

**NYS Court of Appeals Update:
Spotting and Addressing Trending Issues
in Criminal Appeals**

NYSDA CLE / Training

Appellate Division – Third Judicial Department

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NYSDA CLE, Appellate Division – Third Dept., May 17, 2018

February 9, 2017

People v. Guerin

28 NY3d 1152

Not much to see here. This appeal is a 6 to 0 memorandum, with Judge Wilson not participating. The *pro se* appellant failed to preserve his claim that there were insufficient warning signs to support his trespass conviction of ECL §11-2113(1). See *also* ECL §11-2111(2) (requiring that property be posted with warning signs bearing name and address of property owner).

People v. Flanagan

28 NY3d 644

This appeal is another 6 to 0 decision, authored by the Chief Judge, with Judge Wilson not participating. The AD is affirmed. There was legally sufficient evidence for both conspiracy (PL §105.00) and official misconduct (PL §195.00). The case dealt with eleven thousand dollars of stolen electronic equipment from a high school, in Nassau County. The father of the young defendant was apparently connected with the higher ups of the county police department. The charges ultimately went away after both malfeasance and nonfeasance by the police, thus constituting official misconduct. Among other things, leads were not followed, surveillance video was not sought, witness statements were not taken and evidentiary protocols were not followed. This was a text book case of flagrant and intentional abuse of authority by those empowered to enforce the law (i.e., the county police department).

The preservation of evidence under PL §450.10, among other things, was not complied with as well. This statute was enacted to maintain the integrity of evidence for the prosecution, as well as afford defendants the opportunity to review evidence before it is returned to the complainant.

Finally, an interesting hearsay exception issue of first impression arose. Relying in large part on federal case law, the court held that where a conspirator joins an ongoing conspiracy, prior statements by a co-conspirator in furtherance of the conspiracy are admissible against the conspirator. Moreover, statements made after a conspirator's active involvement in the continuing conspiracy ceases are also admissible unless the conspirator has unequivocally communicated his withdrawal from the conspiracy to the co-conspirators.

People v. Then**28 NY3d 1170**

This appeal is another 6 to 0 memorandum, with Judge Wilson not participating. Defendant was wheelchair bound and in orange jail pants for half a day of jury selection. The jury could not see the clothing under the defense table and defendant was not denied a fair trial. Defendant wore a suit for the remainder of the trial. The AD is affirmed. But the court does remind us here again that requiring a defendant to appear in a convict's attire, a continuing visual communication to the jury, is to deny the defendant the right to appear "with the dignity and self-respect of a free and innocent" person. See People v. Roman, 35 NY2d 978, 979 (1975); Estelle v. Williams, 425 US 501, 502 (1976).

February 14, 2017**People v. Pena****28 NY3d 727**

This appeal is a 6 to 0 decision, with Judge Wilson not participating. Judge Abdus-Salaam authored the decision for the court, which affirmed the AD. Here, an off-duty police officer was convicted of rape. Defendant failed to preserve his challenge to the sentencing being cruel and unusual punishment under the Eighth Amendment, which was raised for the first time before the AD. His challenge under the NY Constitution version of this clause (in Art. I, §5) was raised for the first time before the Court of Appeals. Unlike an attack on the fundamental statutory authority of a sentencing court (see People v. Fuller, 57 NY2d 152, 156 [1982]; People v. Morse, 62 NY2d 205, 214, fn 2 [1984]), the narrow exception to the preservation rule where the illegality of the sentence is readily discernible from the record is inapplicable.

People v. Fisher**28 NY3d 717**

This appeal is a 6 to 0 decision, authored by Judge Rivera, with Judge Wilson not participating. The AD is affirmed. Defendant's motion to withdraw his guilty plea (under CPL 220.60[3]) to hindering prosecution in the second degree (PL §205.60) was properly denied, despite his co-defendant having been subsequently acquitted at trial of all felony counts. Defendant admitted during his plea allocution to assisting the co-defendant in a fatal shooting. Interestingly, there was Rosario (not Brady) material disclosed to the co-defendant during trial, and not previously known to defendant, that apparently helped lead to the co-defendant's acquittal. This information, however, did

not refer to defendant's actions and had no material impact on his decision to enter a guilty plea, which forfeited his innocence claim. Analogous to conspiracy, criminal facilitation and accomplice liability, defendant's criminal culpability here was not dependent on the assisted person's legal status (i.e., his arrest or conviction). Moreover, the co-defendant's acquittal does not necessarily equate to his innocence.

People v. Vining

28 NY3d 686

This appeal is a 4 to 2 decision, authored by Judge Abdus-Salaam, with Judge Rivera and the Chief Judge dissenting. Judge Wilson did not participate. This a follow up to the People v. Johnson, 27 NY3d 199, 206 (2016), dealing with recorded inmate calls at Rikers Island. The Department of Correction in Johnson was found not have been acting as an agent of law enforcement for Sixth Amendment purposes.

Here, the defendant was in custody on DV charges for assaultive behavior against his ex-girlfriend. The complainant accused defendant of crimes during a call made by defendant. In response, the defendant was evasive / equivocal and did not make any admissions. This response was deemed an "adoptive admission," as he acknowledged and assented to something already uttered. Under the circumstances, a reasonable person who fully heard and understood these accusations would have lodged a prompt protest if they had not been true. See generally People v. Campney, 94 NY2d 307, 311 (1999); People v. Conyers, 52 NY2d 454, 458-459 (1981). While recognizing that a party's silence or evasiveness may have minimal probative significance, this hearsay exception applied. The majority noted that defendant was calling the victim in violation of an order of protection, attempting to manipulate the complainant. No one induced the defendant to make the call. His evasive answers had to be seen in that context. Further, the jury was provided limiting instructions submitted by the defense, as well as the full evidentiary picture regarding the complainant's highly questionable credibility. The trial court was also properly within its discretion in denying the defense request to redact reference during the phone call to the potential sentence at bar, as it was intertwined with the purpose for the call being made. The trial court as "gatekeeper" language from Johnson (supra at 208) was noted here.

In a thoughtful dissent authored by Judge Rivera, who authored Johnson, she notes that not only was defendant warned by defense counsel, jail wall signs and the jail handbook that phone calls were being recorded, but he had also been Mirandized by that point. In other words, the prosecution was using pre-trial "silence" (according to the dissent) from a defendant who had been repeatedly warned not to speak. See also generally People v. Williams, 25 NY3d 185, 191 (2015) (noting the limited probative value of a defendant's silence). How could this custodial expression be fairly treated as a so-called adoptive admission? According to the defense, under the circumstances,

defendant's silence was not a verbalized response acknowledging the accusations or suggesting an adoption of the alleged wrongdoing.

February 16, 2017

People v. Lin

28 NY3d 701

This People's appeal is a 6 to 0 decision, authored by Judge Stein, with Judge Wilson not participating. The Appellate Term is reversed and the charges reinstated. The defendant was not deprived of his constitutional right to confront the witnesses against him by the admission into evidence of testimony regarding information involving the simulator solution regarding defendant's .25 blood alcohol reading on the Intoxilizer 5000 machine. (The related 13-step checklist was not moved into evidence.) The officer who testified at trial did not administer the breath test in question; that officer had retired and moved out of state. However, similar to People v. Brown, 13 NY3d 332, 337 (2009) (dealing with DNA documents), the witness in Lin, who testified, had personally witnessed the test and had expertise in the administration of the test in general. This is in contrast to the scenario from People v. John, 27 NY3d 294, 308, 313 (2016), where the People's witness who testified regarding DNA-related documents did not personally observe the testing procedure in question, thus violating the Confrontation Clause, as well as Crawford and its progeny. See also Bullcoming v. New Mexico, 564 US 647, 655, 661 (2011) (DWI documents inadmissible, where the witness "neither observed nor reviewed" the analysis of defendant's blood). The Confrontation Clause is concerned with testimonial statements made by declarants who are unavailable for cross-examination. The primary analyst of the documented test does not have to be in court. Following John (supra at 313), rather, the court noted that "at least one analyst with the requisite personal knowledge must testify."

People v. Maldonado

28 NY3d 1173

This is a bit strange. This 6 to 0 memorandum (with Judge Wilson again not participating) reverses, *without any substantive explanation*, a white collar judgment of conviction on ineffective assistance of counsel grounds based on "counsel's overall performance" - - citing to the Baldi and Berroa decisions. A reading of the AD decision below (at 119 AD3d 610 [2d Dep't 2014]) does not provide any further information on this issue. The briefs filed in this matter reveal, however, that defense counsel failed to raise (either with the jury or in his motion for a trial order of dismissal) the lack of reliance by the property owner on defendant's false representations regarding the grand larceny charge.

People v. Staton

28 NY3d 1160

This is a unanimous memorandum. There is support in the record for the AD's finding that the photo array was not unduly suggestive. There was further no demonstration that that the defense attorney did not have a strategic or legitimate explanation for being silent at sentencing. See *generally* People v. Wright, 25 NY3d 769, 779 (2015).

March 23, 2017

People v. Castillo

29 NY3d 935

People v. Degraffenreid

This is a brief and unanimous memorandum, affirming the AD for both co-defendants. Defense counsel's failure to object to the causation jury instruction did not constitute ineffective assistance of counsel. There was no mode of proceedings error either. See *generally* People v. Patterson, 39 NY2d 288, 295 (1976). The instructions, viewed in their totality, did not improperly shift the burden of proof to the defense.

People v. Slocum

29 NY3d 954

This People's appeal is a unanimous memorandum, affirming the AD, which reversed defendant's conviction. Judge Wilson took no part. The issue of whether the request for counsel was unequivocal is a mixed question of law and fact. See People v. Porter, 9 NY3d 966, 967 (2007). The appeal is dismissed, as reversal of the AD was not "on the law alone or upon the law and such facts which, but for the determination of law, would not have led to reversal" under CPL 450.90 (2)(a). Accordingly, the Court of Appeals had no jurisdiction to address the People's argument that the AD conflated the issues of whether the request for counsel was unequivocal with whether a letter from counsel constituted entry into the proceeding.

People v. Peguero-Sanchez

29 NY3d 965

This is a unanimous memorandum, affirming the AD. The court rejected defendant's unpreserved Molineux argument regarding uncharged drug sales referenced in the People's summation. The trial court also properly admitted defendant's text messages, which the People used to rebut defendant's version of the events surrounding his arrest.

People v. Freeman

29 NY3d 926

This is a unanimous memorandum, reversing AD. Law enforcement's entry into defendant's residence was not based on a voluntary consent by defendant. See People v. Gonzalez, 39 NY2d 122, 127 (1976). The court relied on the reasoning of the dissent in the AD (141 AD3d 1164, 1166-1170 [4th Dep't 2016] [Whalen, P.J. and Troutman, J, dissenting]), which observed that the police coerced defendant into permitting their entrance into his residence only after handcuffing him and placing him in the back of a locked patrol vehicle. Recalling that courts are required to indulge every reasonable presumption against a waiver of defendant's constitutional rights, and considering the Gonzalez factors (id. at 128-130), i.e., whether defendant was: (1) in custody or under arrest, (2) handcuffed, (3) evasive or cooperative, (4) advised of his right to refuse consent, and (5) experienced in dealing with the police, the dissenters of the AD concluded that the People failed to sustain their burden of establishing that the purported consent was knowing, intelligent and voluntary. Interesting to note that the purported written consent was signed by defendant while he was still handcuffed behind his back. The drugs were not viewed from a lawful vantage point; thus, the plain view exception was inapplicable.

March 28, 2017

People v. Whitehead

29 NY3d 956

This is a unanimous memorandum, affirming the AD. There was legally sufficient evidence of possessing a controlled substance, despite the drugs not being admitted into evidence at trial. Direct evidence in the form of contraband or other physical evidence is not the only adequate proof. See People v. Samuels, 99 NY2d 20, 24 (2002). Here, the People presented intercepted drug-related phone conversations, corroborative witnesses and evidence of visual surveillance. Moreover, the prosecution's comments during its opening statement did not misstate the law regarding the definition of "sell" under PL §220.00 (1).

People v. Smith

29 NY3d 91

"Stick em' up. I have a gun" (or do I). This is an attempted first-degree robbery case, authored by Judge Fahey, considering what is meant by the term, "displays what appears to be a ... firearm" under PL §160.15(4). This provision includes the affirmative defense that the firearm was not a loaded weapon; this would reduce defendant's

culpability to second-degree robbery. Under the statute's rebuttable presumption, which was enacted in 1969, it is the defendant's burden to show that the object in question was not what it appeared to be (i.e., a firearm). Prior to its enactment, a defendant's gun was required to have been openly displayed during the robbery.

The pointing-finger under the shirt scenario is at issue here. Defendant at bar walked into a check cashing store in Queens, demanded money and threatened to shoot the teller (who was behind bulletproof glass) with what appeared to be a gun under the defendant's sweatshirt. Defendant made no movements of his concealed hand. People v. Lopez, 73 NY2d 214 (1989) controls the result. Threatening words alone are insufficient, but a *hand* secreted in clothing could be used to display what appears to be a firearm. In other words, the precise nature of the object displayed is not dispositive. See also People v. Baskerville, 60 NY2d 374, 381 (1983) (*arm wrapped in towel*, arm raised and pointed at victim, with threats to victim's life made; deemed legally sufficient); People v. Lockwood, 52 NY2d 790, 792 (1980) (*toothbrush* displayed in manner appearing to be a pistol, deemed legally sufficient). As the court observed in Lopez, robbery in the first degree may be proven where a defendant consciously displays something that could reasonably be perceived as a firearm, with the intent of forcibly taking property. The object in question may be hidden or obscured and need not closely resemble a firearm or bear a distinctive shape. The jury at bar could reasonably infer that the object under defendant's sweatshirt was a gun; defendant had said he had a gun. The AD is affirmed.

Judge Abdus-Salaam provides a very quick concurrence, noting that the defense has not asked the court to overrule Lopez.

There is a thoughtful dissent authored here by the newest member of the court, Judge Wilson. Unlike the majority, Judge Wilson strongly disagreed that the timing of when defendant's hand was placed under his sweatshirt. If it was done in front of the complainant, for instance, it could not have the same impact as if the hand had been secreted during the entire exchange. Here, no object was actually *displayed*; rather, defendant's hand was concealed. Further, the majority's analysis of the legislative intent including the victim's fear as a factor is fictional.

People v. Jackson 29 NY3d 18

This decision was authored by Judge Rivera, with Judge Fahey writing a concurrence, joined by Judge Abdus-Salaam. The AD is affirmed. Defendant was convicted of several sex crimes carried out against two female acquaintances. The Sandoval (34 NY2d 371 [1974]) issue was unpreserved. The Court addresses what is required to preserve this issue under CPL 470.05(2). Here, defendant did not object on the basis he argues on appeal, either before or after the Sandoval compromise regarding his prior juvenile delinquent adjudication. Thus, the trial court had no opportunity to confront and

resolve the issue in question; to potentially avoid the need for an appeal. If a defendant specifically and timely objects to a point raised in a Sandoval proffer, and that argument is ruled upon in the People's favor, it is preserved. The issue would also be preserved if in response to a party's protest, the trial court expressly decides an issue based on grounds cited by the People; therein, it unnecessary to object after the court's ruling. See People v. Finch, 23 NY2d 408, 416 (2014). There was also no violation of defendant's right to be present for sidebar conferences during jury selection under People v. Antommarchi (80 NY2d 247, 250 [1992]); the right was waived. In his concurrence, Judge Fahey opines that the Sandoval issue was preserved, as the general protest resulted in an express decision by the court. The court's error was, according to the concurrence, harmless.

People v. Leonard (2 cases) **29 NY3d 1**

It's nice to see a favorable Molineux decision once in a while. This is a unanimous decision, reversing defendant's judgment of conviction. Judge Abdus-Salaam authored the opinion, which granted a new trial on defendant's direct appeal and affirmed (as academic) his CPL 440 motion regarding ineffective assistance of counsel issues. The defendant was alleged to have sexually assaulted the under aged victim, who was asleep on a couch and intoxicated at the time. A very similar 2005 incident regarding the complainant and defendant was improperly admitted into evidence regarding the present (2007) allegations. The complainant did not recall the 2007 rape, but recalled the 2005 incident. The Court does an overview of the Molineux / Ventimiglia doctrine, which requires a balancing of probative versus prejudice before the non-exhaustive list of five exceptions (intent, motive, knowledge, common plan / scheme or identity) is considered. The highly prejudicial nature of the uncharged acts at bar "far outweighed" any probative value; this was propensity evidence. There was no need to provide this evidence as background information or to flesh out the narrative of the events either. Finally, no limiting jury instructions were provided. A new trial was ordered.

March 30, 2017

People v. Brahney **29 NY3d 10**

This unanimous decision was authored by Judge Stein. The AD is affirmed. Consecutive sentences under PL §70.25(2) was authorized for defendant's murder and burglary convictions. Defendant's fatal stabbing of his ex-girlfriend (by 38 stab or slash wounds) after dragging her down the stairs of the victim's apartment, which defendant burglarized, was not all part of a singular act. Though a single transaction that constitutes one of the offenses and a material element (a necessary component) of the

other offense cannot generally result in consecutive sentencing, the sentencing court had before it “separate and distinct acts.” See People v. Laureano, 87 NY2d 640, 643 (1996); People v. Salcedo, 92 NY2d 1019, 1022 (1998). Because the *actus reus* element for the murder and first-degree burglary charges here overlap (i.e., because of the aggravating burglary factor of causing physical injury), the identification of separate and distinct acts was required to justify consecutive sentencing. The People met their burden in establishing the legality of the sentencing.

People v. Valentin 29 NY3d 57

This successful People’s appeal reversed the AD. This is a 4 to 3 decision, authored by Judge Abdus-Salaam. Judge Stein authored the dissent, with Judges Rivera and Wilson joining in. There was no reversible erroring the trial court instructing the jury with the initial aggressor exception (in use of deadly physical force) within its justification charge. The purpose of the instruction is to aid the jury in understanding justifiable use of force; i.e., that a party is not required to wait until he or she is struck or wounded if it is reasonable to believe that deadly physical force is about to be used against the person. This shooting case resulted in a first degree manslaughter conviction. The victim had a mop handle and the defendant had a gun. Guess who won? The exchange between the two parties of mop handle-swinging and shooting took mere seconds. The instructions, viewed as a whole, did not likely confuse the jury regarding the correct rules to be applied in arriving at a decision. There was a reasonable view of the evidence that either the defendant *or* the victim was the initial aggressor. The dissent believed that no reasonable view of the evidence supported this instruction or the proposition that defendant was the initial aggressor in the conflict in question (wherein the parties exchanged attacks simultaneously).

People v. Sparks 29 NY3d 932

Another unanimous memorandum, affirming the AD. No justification defense charge was required in this assault prosecution. Viewing the evidence in a light most favorable to the defense, there was no reasonable view of the evidence that a reasonable person in the 19 year old defendant’s position would believe that the 50 year old victim threatened defendant with unlawful physical force, which would have justified defendant’s conduct. P.L. §35.15(1) and People v. Wesley, 76 NY2d 555, 559 (1990) (addressing subjective and objective elements of justification defense), are considered. See *also generally* People v. Cox, 92 NY2d 1002, 1004 (1998). A verbal exchange between the parties here led to the defendant punching the victim and subsequently making comments indicating that he wanted to further hurt the victim. Instead of walking away as he was free to do, defendant then hit the victim in the face with a milk

crate, causing a broken nose and cheekbone. He was convicted of second degree assault.

People v. Cook (Appeal #30) **29 NY3d 114**

Judge Garcia authored this unanimous decision, affirming the AD. This People's appeal is rejected. Only one county is permitted to render a SORA risk level determination based on a single set of current offenses. Here defendant had sex offense convictions, involving four young children, in the Counties of both Richmond and Queens. The Sex Offender Board assessed defendant for all of the offenses in question with 125 points (level 3) in a single risk assessment instrument ("RAI"). The DA's Office litigated the SORA issue in Richmond County. When the Queens County DA attempted to do the same, the defendant unsuccessfully moved to dismiss, as it was duplicative. The Second Department reversed. The second of the SORA adjudications (in Queens) violated *res judicata* principles. While each sentencing court is required under Correction Law §168 to address SORA when it is applicable, the purposes of SORA in protecting against recidivism are accomplished in a single proceeding. The AD is thus affirmed, and DA's Offices are told by the court to coordinate their SORA efforts in the future.

People v. Cook (Appeal #31) **29 NY3d 121**

This is the companion appeal to Appeal #30, described above. Judge Stein authored this 5 to 2 decision, with Judge Garcia writing the dissent (joined by Judge Fahey). The AD affirmed, but the Court of Appeals reversed, reducing defendant's presumptive risk level from 3 to 2. Factor #7 on the RAI is at issue regarding whether the defendant directed the crime at a stranger or promoted or established his relationship with any of his four young victims for the primary purpose of victimization. Factor # 7 also applies where the relationship arose in the context of a professional or avocational relationship (like a scout leader or bus driver) and the criminal actions were an abuse of that relationship. At bar, the children ranged from ages five through twelve. The SORA court found 20 points to be appropriate under factor #7, in that the defendant "groomed" his victims and changed his relationship with them to enable sexual abuse. Without these points, defendant would fall into the presumptive level 2 category.

The Court provides an overview of the SORA statutory scheme under Correction Law §168, including its purpose in protecting the public from recidivism, with the hearing court not bound by the sex offender board's risk level recommendation. The majority held that a pre-existing private relationship cannot qualify under Factor #7. The People did not establish their burden by clear and convincing evidence. Here, defendant knew his victims through long term relationships he had with childhood friends. There was a

significant lapse of time before the abusive conduct began, including the defendant doing activities with the victims' families. The Court concluded that the People's arguments conflated the "grooming" of victims and "promoting" of relationships. Grooming, in and of itself, is insufficient for this factor; it is the nature of the relationship in which the grooming takes place that is essential. Also, merely abusing trust in a *non*-professional relationship is not enough. Without these restrictions, the vast majority of sex offenders, who usually demonstrate some form of abuse of trust, would be covered by this "blanket assessment" without concern for the risk level *accurately* reflecting the offender's danger to the community.

In dissent, Judge Garcia opined that factor #7 covers a broad range of conduct, establishing pre-existing relationships as well. Child molesters are a significant concern under SORA because of the substantial harm caused if they reoffend. Here, according to Judge Garcia, defendant's confession establishes that he promoted the relationships in question in order to victimize these children.

April 4, 2017

People v. Williams

29 NY3d 84

The Chief authored this unanimous decision, affirming the AD in this burglary and assault prosecution. The trial court did not abuse its discretion in permitting the People to utilize in summation annotated images of trial exhibits (moved into evidence) in a PowerPoint display. Defense counsel objected, as the annotations implied that the victim's brother identified either the defendant or his vehicle. The jury, which was instructed before summation that the comments by attorneys are not evidence, was not misled. Following the summation, defense counsel unsuccessfully moved for a mistrial. Attorneys must only make arguments in summation that are fairly inferable from the four corners of the evidence. Irrelevant and inflammatory comments that tend to prejudice the jury are prohibited. People v. Ashwal, 39 NY2d 105, 109-110 (1976). There is nothing inherently problematic with utilizing a PowerPoint presentation as a visual aid in summation, as long as the presentation must accurately reflect the evidence admitted at trial. Jury instructions remedied any misrepresented evidence here. Further, the jurors were free to examine the pristine original exhibits if they chose to. Defendant was thus not deprived of a fair trial.

People v. Anderson

29 NY3d 69

Judge Abdus-Salaam authored this 5 to 2 decision, which affirmed the AD. Judge Rivera wrote the dissent, joined by Judge Fahey. This Brooklyn homicide prosecution involved another PowerPoint summation presentation approved of by the court. There was no ineffective assistance of counsel by the failure to object to more than one of the PowerPoint slides. Again citing Ashwal, the court finds the prosecution's presentation to be a relevant and fair commentary on the evidence. The majority judged the PowerPoint as it would an oral argument, requiring there to be a clear distinction between argument and evidence. Trial exhibits need not be presented in an unaltered, pristine form; captions and markings are permitted for purposes of presentation and the making of fair inferences from the evidence. The superimposed text here (i.e., "Two Gun Shot Wounds to back" and superimposed circles around items) was clearly not part of the trial (photo) exhibits and could not confuse the jury. The added markings did not misrepresent the evidence. The jury was instructed that summations were not evidence, and the PowerPoint slides were not supplied to the jury during deliberations. The slides and the accompanying oral argument constituted fair comment by the prosecution.

Judge Rivera, in dissent, reminds us of the significant emotional impact that visual presentations have on juries, making the analogy to mere oral argument comments inapplicable. Some useful secondary sources are cited here in support. As the People have the last opportunity to present to the jury, it is a huge advantage. One of the exhibits used by the ADA was defendant's arrest photo surrounded by boxes containing facts, providing the image of defendant's head appearing to be in a target. The image was bolstering and prejudicial, creating the risk of unreasonable inferences. Medical records were also misrepresented in the People's summation regarding the number of gunshots. Limiting instructions were insufficient at bar. Counsel, according to the dissent, was ineffective for not objecting. See People v. Fisher, 18 NY3d 964, 967 (2012); People v. Wright, 25 NY3d 769, 780 (2015).

The Matter of 381 Search Warrants Directed to Facebook, Inc. v. New York County District Attorney's Office

29 NY3d 231

Judge Stein wrote for the majority here in one of the more interesting jurisdictional decisions in recent memory. Judge Rivera wrote a concurrence and Judge Wilson, in one of his first opinions as a judge, authored a 43 page dissent analyzing, among other things, our state's version of the Fourth Amendment (article I, §6) in historical terms. The AD is affirmed. The majority concluded that it did not have jurisdiction to address

the Fourth Amendment issues in question, as appellant's unsuccessful motion to quash the warrant at bar was not "appealable" as an interlocutory appeal. Appellant's standing is not addressed by the majority.

The Manhattan DA's Office was investigating social security disability fraud and sought records from Facebook ("FB"). Supreme Court issued 381 search warrants directed at FB. Based upon a finding of probable cause, the warrants sought subscriber information and content from user accounts, including profile information, contact and financial account info, photos, videos, historical login info and public and private messages. FB was prohibited from informing its subscribers about the warrants. FB unsuccessfully moved to quash the warrants, as they were overbroad and lacked particularity. The nondisclosure requirement was also challenged without success. Supreme Court found FB to lack standing. FB appealed to the AD and sought a stay. When the stay was denied, FB complied with the warrants. A number of the targeted FB users were indicted, and ultimately pleaded guilty. The AD dismissed the appeal, as there is no statutory authority for an interlocutory appeal in a criminal proceeding. FB unsuccessfully sought to have the AD treat the warrants like civil subpoenas.

In general, a civil subpoena is subject to a motion to quash; this is an appealable final order. However, a criminal search warrant is subject to the criminal rules of procedure created by statute, i.e., under C.P.L. articles 450, 470 and 690. The right to appeal is born of specific statutory authority and no interlocutory criminal appeals are authorized. Under the separation of powers doctrine, this must be respected by the judiciary. So if you don't like the search warrant utilized in your prosecution, you have to wait until you are sentenced before complaining to the AD. Moreover, no civil appeal is authorized from an order entered in a criminal proceeding, which is what occurred here. However, civil subpoena motions to quash *are* appealable as final orders in a special proceeding, even if related to a previously commenced criminal investigation. The federal statute in question permits a motion to quash a warrant regarding an already existing proceeding, not the commencement of a new and separate one.

At issue here was Title II of the Stored Communications Act ("SCA"), 18 USC §2701 *et seq.*, which was enacted with a balancing of privacy interests involving computer based content with legitimate law enforcement needs for information and the collection of evidence. Businesses are compelled to retrieve voluminous information and potentially suffer negative consequences to its reputation, as well as financially. Customers and third parties' information are subject to being utilized by law enforcement in ways they had not expected. Under the statute, law enforcement may obtain information by a warrant, an administrative subpoena or a court order. The particular method sought is likely dependent on the type of service provider involved, the age of the communications at issue and whether content is being sought. If the information is 180 days old or less, then it has to be a warrant. Any of the three methods may be utilized if no content is being sought. A motion to quash an SCA warrant may be filed where the

records sought are unusually voluminous in nature or compliance would cause an undue burden on the company.

FB argued that the “warrants” in question were more analogous to subpoenas than traditional warrants where law enforcement enters, searches and seizes evidence - - rather than relying, as they did here, on the company to compile and turn over digital data under its control. The majority reasons that the service provider is simply better equipped to access records (which may be in multiple locations) and carry out such a search, which was conducted here so as to protect Fourth Amendment interests efficiently while minimizing intrusion into the business in question. The SCA warrants at bar provided protection for priority stored communications, and were not “civil by nature.” Federal courts have recognized that while warrants for electronic data are often served like subpoenas, they were intended by Congress to be treated like warrants because of the potentially significant Fourth Amendment implications involved.

In sum, neither the Court of Appeals nor the AD had jurisdiction to entertain FB’s appeal. Accordingly, the court affirmed the AD’s dismissal of the appeal, which addressed both the motion to quash the warrant and FB’s motion to compel the disclosure of the affidavit submitted in support of the warrant.

In her concurrence, Judge Rivera agreed with the majority that the matter is not appealable, but only because FB did not assert its grounds under the proper subsection (18 USC §2703[d]). Substantively, Judge Rivera generally agreed with Judge Wilson’s dissent in general regarding FB’s authority under the SCA to appeal its motion to quash denial. The privacy intrusions in question are even broader than our founders imagined when enacting the Fourth Amendment.

In his dissent, Judge Wilson provides a well thought out analysis of our state version of the Fourth Amendment, which “reflects the American consensus that the general warrants... popular among British officials in colonial government... had no place in a nascent republic that so deeply abhorred arbitrary power.” Judge Wilson considered the 1938 state constitutional convention (*this is topical, as it was on the ballot last November*) when NY Const., Article I, §12 was adopted and approved. In it, there are explicit protections (in its second paragraph) against “unreasonable interception of telephone and telegraph communications.” So in our state constitution, we have the identical language of the Fourth Amendment plus explicit language addressing electronic communications. The delegates to the 1938 convention envisioned analogous concerns in telephone interceptions and what were known as party lines, as we are now facing on social media - - that a *third parties’* communications and information (incidental to the targeted parties) will be subject to law enforcement’s examination. Judge Wilson noted, among other things, Justice Brandeis’ dissent from Olmstead v. United States, 277 US 438, 475-576 (1928), wherein it was observed that “[t]he evil incident to invasion of the privacy of the telephone is far greater than that involved in tempering with the mails” because of the non-targeted third party who is also on the line. The dissent observed how broad the instant warrants were; they would

include high school student users, photos, videos, user histories, private messages, doctor and attorney communications, previous e-mail addresses, deleted names and hidden posted messages.

In sum, the dissent concluded that the motion to quash was indeed appealable, and that FB obtained standing through the SCA. The determination of appealability of warrants and subpoenas should not be done merely by reading the title of the document; rather, the circumstances under which they are issued should control. Here, the SCA warrants operate more like subpoenas than traditional search warrants, in that the data was produced for law enforcement from a neutral depository and was preserved so that a motion to quash could be filed. The denial of a motion to quash was a final decision in a separate proceeding, not an interlocutory criminal appeal, as the majority opines. Further, to hold otherwise is to allow state law to frustrate a federal right to appeal. Thought the majority sees them as viable alternatives, FOIL applications, Article 78 petitions and §1983 civil rights litigation would not address FB's concerns.

May 2, 2017

People v. Smalling 29 NY3d 981

This is a unanimous 6-0 memorandum, reversing the AD and ordering a new trial. The trial court, after agreeing during the charge conference not to charge the jury with constructive possession, charged it any way. This prejudiced the defendant. Under these unique circumstances, the error was not harmless.

People v. Valentin 29 NY3d 150

This is a unanimous 6-0 decision, authored by the Chief Judge, affirming the AD. The underlying crime stemmed from a buy and bust heroin operation in Manhattan in 2010. The defendant, accused of a drug sale, presented an agency defense through cross-examination of the People's witnesses without presenting defense witnesses. In general, a drug "sale" under Penal Law article 220 is not just the mere passing of drugs from one person to another. The agency defense addresses the principal that a person may be just an extension of the buyer; and not a "player" in the drug trade who is out to make a profit from the sale. Mere delivery of drugs does not involve the same culpability as an actual sale. Apparently, defendant was not found in possession of pre-recorded money, and was seen walking and talking with the other main individual in the criminal transaction for 40 minutes, which was consistent with the two being just friends. An agency defense jury instruction was given. The People in response were permitted

to present defendant's 1997 drug sale conviction pursuant to the intent exception under the Molineux doctrine; limiting instructions were provided regarding this evidence. The prior conviction was relevant and the trial court, in performing the proper weighing process, did not abuse its discretion in admitting this evidence.

People v. McMillan **29 NY3d 145**

This unanimous 6-0 decision was authored by Judge Stein. The court here affirms the parolee search standard set out in People v. Huntley, 43 NY2d 175, 180-182 (1977). Though a parolee retains Fourth Amendment protections, he or she has a reduced expectation of privacy. A parole officer's warrantless search must be rationally and reasonably related to the performance of his or her duties. Whether the search is conducted by a parole or police officer, the fact that defendant is a parolee is always relevant. The suppression motion here was properly denied. The detective here received a parole warrant for defendant's arrest and provided defendant's girlfriend with contact information in the event she saw him. The defendant's girlfriend called the police to report that defendant was traveling in his vehicle with his son and a firearm. Defendant was arrested inside an apartment at a location where his vehicle was located. Inside the vehicle was a firearm. The information received by law enforcement created an individualized suspicion from a tip made by a known individual. The vehicle search was lawful and reasonable.

May 4, 2017

People v. Stone **29 NY3d 166**

This is a unanimous 6-0 decision, authored by Judge Rivera. The AD is affirmed. Defendant was convicted of stabbing his wife's lover as the two of them attempted to hail a taxi. Defendant's estranged wife identified defendant at first to the police, but then recanted to the DA's Office and refused to show up for trial. A detective testified that he talked to the wife, and then conducted a computer check on the person indicated as the suspect (the defendant). Defense counsel objected and sought a mistrial, as the jury was not informed that the wife had recanted. The testimony was ordered by the court as struck from the jury's consideration. The mistrial motion was denied, but the jury was further instructed that the wife was unavailable to testify. As it is assumed that the jury followed the trial court's instructions (People v. Baker, 14 NY3d 266, 274 [2010]), any prejudice to defendant by the testimony in question was eliminated by the curative instructions.

The Court of Appeals, though affirming again the state and federal constitutional rights to confront one's accusers (NY Const., Art. I, §6; US Const., Amend. VI), found any constitutionally infirm inference from the detective's testimony to be harmless, as the jury also knew that the detective had spoken to the victim as well, who did, in fact, identify defendant as the assailant. The court further rejected defendant's arguments that: (1) the detective's testimony transformed the case from a one to a *two ID witness* case; and (2) the wife's testimony was analogous to a Bruton issue where a non-testifying co-defendant's incriminating statement could not be cross-examined. Unlike the Bruton scenario, the wife here had not been implicated in the crime and had not been in allegiance with defendant.

People v. Bushey **29 NY3d 158**

Not a good Fourth Amendment decision for defendants. This is 6-0 unanimous decision, authored by the Chief Judge. Here the Court of Appeals affirms County Court's reversal of Buffalo City Court's suppression order. The defendant was pulled over in the early morning hours on the date in question without driving erratically or committing a moving VTL violation. Instead, an observing officer in a parked vehicle, decided, without cause, to run a DMV check on defendant's vehicle. The defendant's license and registration had been suspended because of unpaid parking tickets. The officer pulled the defendant's vehicle over, developed probable cause based on personal observations and arrested defendant for DWI. Following the lead of lower court, federal appellate and other states' jurisprudence, the court concluded that law enforcement's computer record search here was not a "search" for Fourth Amendment purposes. The Katz reasonable expectation of privacy standard was discussed. There is no such expectation in a publically displayed license plate on a vehicle, nor in the DMV database associated with a license plate number. Identifying the owner of a vehicle is an important public safety objective of DMV's registration process. Law enforcement is authorized to conduct DMV database searches.

The court also notes, though it seems unnecessary, that information provided to the DMV that ends up in its database is provided by drivers voluntarily. This is of no moment, as a lot of information that is voluntarily provided to both public and private entities may end up in privately kept business records (like in medical records for instance). It is the retention of potentially sensitive information not immediately accessible to the public, gathered in one location, that makes particular records private - not whether the information was voluntarily turned over to the record keeper.

Factually, in contrast to People v. Ingle, 36 NY2d 413, 414 (1975), the police here had probable cause to pull over the defendant's vehicle after the database was searched, and *before* the stop occurred. The stop was not arbitrary. The mere potential threat of official misconduct in conducting a DMV search is not enough to characterize it as a search.

May 9, 2017

**Matters of Acevedo, Carney and Matsen v.
NYS Department of Motor Vehicles, et al.**

(3 cases decided together)

29 NY3d 202

All three of these civil appeals (out of the Third Department) were affirmed 5 to 0 in a decision authored by Judge Garcia. Petitioners were recidivist drunk drivers subject to license revocation under the 2012 DMV regulations (15 NYCRR §136.5[b]). It's worse than the tax code.

VTL §1193(2) requires permanent license revocation for certain recidivist offenders; i.e., those with 3 alcohol-related convictions in 4 years or 4 such convictions in 8 years. Permanent revocation renders an offender ineligible for relicensing, absent a waiver. But such revocation “shall be waived” after either 5 or 8 years, subject to certain conditions being met, on a case by case discretionary review by the DMV commissioner - - based on the public safety and welfare. The regulations in question provide the DMV discretion to permanently revoke a driver’s license where a driver has 5 or more alcohol-related convictions in his or her life (15 NYCRR §136.5[b][1]) or 3 or 4 such convictions in the last 25 years with one so called “serious” driving offense (including, but not limited to, a fatal accident) (§136.5 [b][2]). If the offender has 3 or 4 such convictions in the last 25 years with no so called “serious” driving offenses, the DMV shall deny the application for at least 5 years (§136.5 [b][3]).

The petitioners’ re-licensing applications were denied, so they appealed. Four main issues were skillfully presented here, though not successful: (1) statutory conflict with the regulations, (2) separation of powers, (3) arbitrary and capricious nature of regulations, and (4) the improper retroactivity and *ex post facto* nature of the regulations.

With regards to the separation of powers argument, an agency like the DMV is a creature of the legislature with powers expressly conferred by statute, as well as those required by necessary implication. Regulations must be consistent with the authorizing statute. Further, the duly elected legislature may not cede its fundamental policy making responsibility to the agency. Here, the DMV has properly been given broad authority in determining whether to grant or deny relicensing applications. Consideration of the factors set out in Boreali v. Axelrod (71 NY2d 1 [1987]), including the DMV’s expertise and technical competence in highway safety and license administration, led the court to conclude that the separation of powers doctrine had not been violated. Moreover, there was a rational basis for these regulations and *ex post facto* principals do not apply to these *civil* regulations.

June 1, 2017

People v. Sivertson

29 NY3d 1006

This is 4 to 2 memorandum affirming the AD, with Judge Rivera authoring a fifteen page dissent, joined in by Judge Stein. The facts are only described in the dissenting opinion. The case involved a nighttime robbery of a convenience store, with one of the two present employees observing the masked perpetrator display a knife. The perpetrator runs from the store between two buildings across the street. About 40 minutes after the crime, the police storm an apartment across the street from the store without a warrant under the auspices of exigent circumstances. 15 to 20 officers surrounded defendant's tiny apartment, wherein he was viewed through a window watching television. He ignored the officers' calls to open the door, but no one was in danger, no evidence was being destroyed and defendant did not attempt to escape. The majority refused to address the substantive Fourth Amendment issue, as this constituted a mixed question of law and fact; there was purportedly record support for the suppression court's decision. The AD is thus affirmed.

The dissent passionately opined that there was no record support for what is supposed to be a narrowly drawn exception to the warrant rule. Good general language on the Fourth Amendment is provided by the dissent, including the home being one's castle, the burden being on the People to establish an exception to the warrant rule and that warrantless entries into the home are presumptively unreasonable. See *generally* People v. McBride, 14 NY3d 440, 445 (2014) (requiring an "urgent need" for the officers' warrantless actions); People v. Levan, 62 NY2d 139, 146 (1984) (noting that the police may not create by their own conduct "an appearance of exigency"); Brigham City v. Stuart, 547 US 398, 404 (2006) (requiring that warrantless entries by the police be objectively justified).

June 6, 2017

People v. Viruet

29 NY3d 527

This is 4 to 2 decision, authored by Judge Garcia, with Judge Wilson authoring a dissent, joined in by Judge Stein. The AD is affirmed. The trial court committed harmless error in not providing an adverse inference instruction to the jury regarding lost surveillance footage from the front of the Queens nightclub where the fatal shooting in question occurred. The police had received this evidence just hours after the crime, but then lost it. A bouncer, who had observed the video, testified that it captured the actual

shooting. Defendant had timely requested that this evidence be turned over. An adverse inference charge was then sought since the evidence was lost. The trial court denied the request, as the video apparently did not identify the shooter. People v. Handey, 20 NY3d 663, 665 (2013), is on point. Where a defendant, acting with due diligence, demands evidence that is “reasonably likely to be of material importance,” and the evidence is destroyed by the state, she is entitled to an adverse inference charge. This is not discretionary on the part of the trial court. The court held that law enforcement must preserve the evidence whether or not the People intended to use the evidence at trial, or whether or not it was created by a third party. Once the police come into possession of the evidence, they have an obligation to preserve it. See People v. Kelly, 62 NY2d 516, 520 (1984); CPL 240.20 (1).

At bar, however, this non-constitutional error was harmless, as the evidence of defendant’s guilt was overwhelming and there was no “significant probability” that that appellant would have been acquitted had it not been for the error. See People v. Byer, 21 NY3d 887, 889 (2013), quoting People v. Crimmins, 36 NY2d 230, 242 (1975). Here, there were eyewitnesses to the shooting, defendant confessed and had made threats twenty minutes before the crime. The dissent disagreed that the evidence was overwhelming, noting, among other things, that the two eyewitnesses only viewed the shooter quickly and offered inconsistent accounts with the events leading up to the crime. Judge Wilson’s thoughtful conclusion was that “[g]iven the standard of proof beyond a reasonable doubt, the totality of the evidence in this case would support a verdict of either guilt or innocence.”

June 8, 2017

People v. Honghirun 29 NY3d 284

This is a unanimous 6-0 decision, authored by Judge Stein. This was a child sex abuse case, where the complainant waited until she was 17 years of age to allege that defendant abused her when she was 5 and 10 years old. The AD is affirmed; defendant’s claim of ineffective assistance of counsel is rejected. There was no lack of strategy or legitimate explanation for counsel’s failure to object to the admission of the complainant’s prior complaints to her school counselor and a detective about the allegations, as the statements were admissible in completing the narrative and they allowed the jury to learn of inconsistent statements made by the complainant. The court provides another comparison of the state and federal ineffective assistance of counsel standards, reminding again that the state standard is meant to provide defendants with greater protection than its federal counterpart. See People v. Gross, 26 NY3d 689, 693 (2016); People v. Benevento, 91 NY2d 708, 712 (1998); Strickland v. Washington, 466 US 668, 689 (1984). Under both standards, there is a presumption that counsel acted

pursuant to a sound trial strategy. At bar, counsel pursued a defense that the complainant was a troubled teenager that simply fabricated the allegations. The jury was instructed that the complainant making a prompt disclosure, or failing to do so, could be considered in evaluating the complainant's credibility.

People v. Frumusa 29 NY3d 364

This is a unanimous 6-0 decision, authored by Judge Fahey. The 3 to 2 AD decision is affirmed. The trial court did not abuse its discretion in this white collar prosecution, despite permitting the admission of a civil contempt order, which effectively provided the jury a judicial confirmation of defendant's theft (i.e., that defendant's business "willfully and deliberately failed to obey" the terms of an earlier order by "convert[ing]" almost \$250,000 and then refusing to pay back the money). For some reason, no limiting jury instructions were requested. The theft in question involved proceeds of a hotel business, which were said to be illegally transferred in secret to defendant's account. In a related civil proceeding, defendant's business was ordered to turn over funds; the trial testimony confirmed, however, that this did not happen.

Molineux evidence is presumptively inadmissible unless it is relevant to a material issue and the court determines that the probative value outweighs the risk of undue prejudice. But this was not a Molineux issue, as the contempt order was not related to a *separate* bad act; rather it involved the indicted accusations at issue. It did not show defendant's propensity to commit the present accusations; rather, it was factually relevant to the very act in question. The trial court did the appropriate weighing of the prejudicial versus probative worth of the evidence, which was relevant to defendant's larcenous intent to deprive others of the funds (see PL §155.05 [1] [defining "deprive" in terms of the property in question]).

People v. Bethune 29 NY3d 539

This is a unanimous 6-0 decision, authored by Judge Wilson, with dueling concurring opinions authored by Judges Fahey and Garcia. The Chief Judge joined in Judge Garcia's concurrence. The AD is affirmed. The trial court did not abuse its discretion in correcting the record, without conducting a reconstruction hearing, in response to the People's motion to resettle the trial transcript. The trial court is the final arbiter of the record. The parties, however, are entitled to a record showing the facts as they actually happened; they should not be prejudiced by a stenographer's error. The court may conduct a hearing, but may also, as the court did here, rely on the court reporter's certification of an amended transcript and the parties' affidavits. The dispute here involved supplemental jury instructions in a homicide prosecution, wherein, according to

the initial transcript, the jury was told that murder was an “*unintentional*” crime. According to an affirmation, the steno told the People that this was a typographical error. In concurrence, Judge Fahey opined that in many cases where the parties are not in agreement as to the facts, a reconstruction hearing would be the best practice. This would avoid any appearance of impropriety for the court. Judge Garcia countered that a reconstruction hearing may expend unnecessary resources and would be unnecessary if conducted for every dispute involving the record.

June 22, 2017

People v. Lofton 29 NY3d 1097

This is a unanimous memorandum reversing the AD, with newly confirmed Judge Feinman not participating. The judgment is reversed and the matter is remitted for re-sentencing pursuant to People v. Middlebrooks, 25 NY3d 516, 525 (2016), as the sentencing court failed to make an on-the-record determination as to whether defendant was eligible for a YO adjudication, considering the CPL 720.10(3) factors.

People v. Spencer 29 NY3d 302

This is a unanimous decision with Judge Feinman not participating. A new trial is ordered. On the fourth day of jury deliberations in this homicide case, wherein the victim was stabbed 38 times, a juror alerted the court that she was unable to continue and could not render an impartial verdict. The court and the juror had an extensive exchange, with the trial court unsuccessfully attempting to persuade the juror to hang in there and do her best. Over and over the juror unequivocally confirms to the court that she was unable to separate her emotions from this case and could not render an impartial verdict anymore. (The Court of Appeals reminds us here that jurors are not expected to be devoid of emotions, but they must have both the capacity and the will to decide each case solely upon the evidence and the law as instructed by the court.) The juror here remained on the panel. Defense counsel unsuccessfully moved for a mistrial, as the alternate jurors had already been dismissed. Defendant was convicted of manslaughter.

The constitutional right to an impartial jury is safeguarded, in part, under CPL Article 270. The Court of Appeals distinguishes here between the CPL 270.20 (1)(b) “likely to preclude” her from rendering an impartial verdict standard for prospective jurors and the CPL 270.35(1) “grossly disqualified” standard for sitting jurors, as set out in People v. Buford, 69 NY2d 290, 298 (1987). The scenario involving a prospective juror requires an unequivocal statement of fairness and impartiality. The latter situation, involving a sitting juror, is a more difficult standard to meet, requiring that it become “obvious” that a

particular juror possesses a state of mind that would prevent her from rendering an impartial verdict. Under Buford, a “probing and tactful” inquiry is required. Buford, 69 NY2d at 299. The court is careful to warn, however, that the jury’s deliberations and thought processes regarding the case must not be invaded.

At bar, the juror made it plain a number of times that she could not continue on, consistent with her oath, as a fair and impartial member of the panel. In other words, she could not decide the case solely on the evidence. The trial court thus erred in letting the juror remain. A new trial is now in order.

People v. Minemier 29 NY3d 414

This is a 5 to 0 decision, with Judges Fahey and Feinman not participating. Judge Stein authored the decision, remitting the matter to County Court. The YO eligible defendant pleaded guilty here to attempted murder relating to a stabbing. Defendant sought the victim’s and victim’s family’s statement submitted with the probation report. The sentencing court denied the request. There was no requirement that the sentencing court make a record of its reasons for denying YO status under CPL 720.20 (*unlike CPL 720.10 [3] [addressing presumptive ineligibility; a record is made for DCJS purposes]*). It is within the court’s discretion as to how it makes a record of its YO denial. The matter is remitted (for the second time), however, for re-sentencing, as CPL 390.50 (2)(a) and due process required the sentencing court to reveal the nature of certain confidential information submitted by the probation department that the court was depending on and the court’s reason for its non-disclosure to the defense. Once again, the court is recognizing that sentencing is a critical stage in the proceedings, requiring that due process be satisfied, in terms of accurate and reliable information being utilized and an opportunity for the defense to respond. See generally People v. Outley, 80 NY2d 702, 712 (1993).

June 27, 2017

People v. Price 29 NY3d 472

This is a 4-0-2 decision, with Judge Stein authoring the majority, and Judge Rivera authoring a concurrence (surprisingly joined by Judge Garcia). A new trial is ordered and the AD is reversed. This armed robbery appeal presents the interesting issue of the admissibility of a photograph purported to be defendant holding a handgun and money, printed out from a website (“BlackPlanet.com”). The People failed to properly authenticate the photo. There was no testimony connecting defendant to the website, other than the site having a user name containing his last name. There was no

testimony indicating that defendant was known to use the profile page account or that the account was traced to electronic devices owned by defendant. There was no testimony that defendant's pedigree info matched the website profile page info. There was no testimony indicating whether others could access the site or whether it was password protected. There was further no testimony as to who took the photo, where it was taken or under what circumstances. There was no testimony as to whether the photo had been altered or was a genuine depiction. Still, the victim testified that the gun in the photo looked similar to the gun used in the crime, yet the witness had no prior familiarity with firearms.

Authenticity (or accuracy) in general is fact-specific to the nature of the proposed evidence and is a condition precedent to the admission of evidence; it is established by proof that the offered evidence is genuine and has not been tampered with. Mere ID by one familiar with the item may suffice when the evidence is unique or distinct. Sometimes chain of custody testimony may demonstrate authenticity in certain circumstances. The majority rejects the two-part test followed in other jurisdictions (and championed by the concurrence), which would essentially require that the photo accurately depicts the website and that the photo is attributable to, and controlled by, the defendant. Traditionally, a photo must be shown to fairly and accurately represent the subject matter depicted. This was not done at bar. The trial court's error was not harmless.

The concurrence criticizes the majority's decision (noted in footnote 3) not to take this opportunity to officially adopt a website / social media photograph authenticity standard, as social media postings are becoming an important source of evidence (while still being uniquely susceptible to alteration).

June 29, 2017

People v. Ramsaran 29 NY3d 1070

This is a 6 to 0 memorandum, with Judge Feinman not participating. The People successfully appealed here, reversing the AD. There was no People v. Wright (25 NY3d 769 [2015]) error at bar; defendant was not deprived of effective assistance of counsel by his attorney not objecting to the prosecutor's comments in summation regarding DNA evidence detected on defendant's sweatshirt.

People v. Smart

29 NY3d 1098

This is a 6 to 0 memorandum, with Judge Feinman not participating. There was record support for the suppression court's finding that the pre-trial lineup identification procedure was not unduly suggestive. The issue was therefore beyond the Court's review.

People v. Prindle

29 NY3d 463

This is a 5 to 0 decision, authored by Judge Wilson, with Judges Fahey and Feinman not participating. The AD is affirmed. New York's persistent felony offender ("PFO") statute (Penal Law §70.10) is found again here to be in compliance with due process and the Sixth Amendment right to a jury trial - - even in light of Alleyne v. US, 133 SCt 2151 (2013), which remanded in an application of the Apprendi rule to an increased *mandatory minimum* term. In other words, both ends of the sentence are protected. The PFO statute, however, does not impact the mandatory minimum sentence. Under Apprendi, every element of a crime must be proven beyond a reasonable doubt, including any fact increasing a sentence, except for an admitted one or the fact of being convicted of a prior felony. The Supreme Court and the Court of Appeals have both recognized the Apprendi rule for a number of years. See, e.g., People v. Rosen, 96 NY2d 329 (2001); People v. Rivera, 5 NY3d 61 (2005). Stare Decisis is thus a factor in the Court's decision here.

There are two steps in determining whether a defendant qualifies for PFO status: first, whether the defendant has two prior felony convictions, and second, whether such a designation is warranted, considering the history and character of the defendant and the nature and circumstances of the conduct. The defendant unsuccessfully attempts to analytically divide the second step into two parts, but it is essentially just a requirement for a sentencing court to exercise its discretion in performing its traditional function (with the People shouldering the burden to show that the defendant deserves a higher sentence). The AD's role in reviewing sentences for proportionality is another layer of protection. Finally, Judge Wilson directs sentencing courts to the PFO statutory construction set out in Portalatin v. Graham, 624 F3d 69 (2d Cir. 2010).

September 5, 2017

People v. Every

29 NY3d 1103

Not much here. This is a unanimous memorandum affirming the AD. The defense failed to demonstrate the absence of strategic or legitimate explanations for counsel's alleged failures in support of its ineffective assistance claim.

September 12, 2017

People v. Lee

29 NY3d 1119

This is a unanimous memorandum affirming the AD. The inventory search here was in accordance with procedure and resulted in a meaningful inventory list. The primary objectives of the search were to preserve property located in the vehicle and to protect the police from a claim of lost property. While the procedures here were not a "model," they were sufficient to meet the "constitutional minimum." The determinations of the lower court regarding the credibility of the officers and whether an inventory search was a ruse to look for contraband was a mixed question of law and fact. There was record support for the lower court's conclusions, making the issues beyond further review by the Court of Appeals.

October 12, 2017

People v. Wright

30 NY3d 933

This is a unanimous memorandum reversing the AD and ordering a new trial. The trial court erred in denying a defense challenge for cause. CPL 270.20(1)(b) is addressed, noting that a prospective juror may be challenged for cause where the juror evinces a state of mind that is likely to preclude him or her from rendering an impartial verdict based upon the evidence adduced at trial. The prospective juror's statements raised serious doubts regarding her ability to be unbiased. No further inquiry to obtain unequivocal assurances that she could be fair and impartial was made.

People v. Campbell **30 NY3d 941**

This is a unanimous memorandum, affirming the AD. Defendant has failed to demonstrate the absence of strategic or other legitimate explanations for counsel's alleged failure. The present ineffective assistance of counsel claims need to be "bottomed on an evidentiary exploration" by collateral or post-conviction proceeding under CPL 440.10.

October 17, 2017

People v. Simmons **30 NY3d 957**

This is a unanimous memorandum, affirming the AD. The determination of whether there was reasonable suspicion of criminality, justifying the officer's demand that defendant show his hands, was a mixed question of law and fact. The determinations below included the experience of the officers, the high crime area, reports of gunshots nearby and the defendant clutching his waistband. There was record support for these DeBour-related findings, making them beyond the Court of Appeals' review.

October 19, 2017

People v. Bautista **30 NY3d 935**

This is another brief unanimous memorandum, affirming the AD. Defendant's claim of being denied a fair trial by prosecutorial misconduct in summation was rejected. Further, there was no Brady violation regarding non-exculpatory notes taken during interviews with unindicted coconspirators.

People v. Austin **30 NY3d 98**

This decision, authored by the Chief Judge, a follow up to the Chief Judge's 2016 John (27 NY3d 294) decision, wherein the Court granted a new trial where the People introduced DNA evidence through lab personnel who did not have personal knowledge of the testing procedures being testified to. The admissibility of DNA results under Crawford v. Washington, 541 US 36, 53-54 (2004), Melendez-Diaz v. Massachusetts,

557 US 305 (2009), and the Confrontation Clause is at issue again. The Court of Appeals here reverses the judgment and orders a new trial.

The case involved the investigation of three 2009 commercial burglaries and several related offenses. DNA from several crime scenes was placed into the Combined DNA Index System (“CODIS”); the defendant’s DNA profile came up as a match. The People elected, however, not to introduce the cold hit from the CODIS system. Instead, to make things easier for them (i.e., to avoid having to bring in a witness from out of town), they secured in 2012 an order to secure a DNA result from defendant via buccal swab. Yet the People *still* failed to utilize a witness that had personal knowledge of the testing procedures; the witness “neither performed, nor was present for, any of the testing” on the 2009 DNA samples.

The post-indictment compilation of this DNA-related testimony was created for the primary purpose of identifying defendant as the perpetrator. Testimony regarding this evidence was inadmissible; it was “nothing more than a parroting of hearsay statements.” The defendant was thus entitled to cross-examine the analyst who either performed, witnessed or supervised the generation of the numerical DNA profile. This is in contrast to People v. Brown, 13 NY3d 332, 340 (2009), where a cold hit of the defendant’s DNA profile was secured *prior* to the defendant becoming a suspect.

Finally, Judge Garcia wrote a concurring opinion, criticizing the John majority’s reliance on Williams v. Illinois, 567 US 50 (2012). As John is on point, however, Judge Garcia was forced to agree with the instant result.

People v. Carr

30 NY3d 945

This is another brief unanimous memorandum, affirming the AD. The People were not required under the circumstances to seek court permission under CPL 190.75(3) before presenting additional charges to a second grand jury.

October 24, 2017

People v. Novak

30 NY3d 222

This is a unanimous decision authored by new associate Judge Feinman. Imagine being convicted of DWAI after a bench trial in city court. You appeal to County Court; you look up at the appellate judge and he ***looks exactly like the trial judge***. Apparently here the city court judge got a new job since the trial.

The Court of Appeals reversed the judgment here, as the appellate judge (also the trial judge on this matter) should have recused himself. This was a due process violation to have the same judge preside over both the bench trial and act as the sole judge on appeal. The Court distinguished the present matter with the scenarios of a judge presiding over both a suppression hearing and a bench trial, and presiding over a sentencing and a CPL 440 motion. In the two latter situations, there is at least a potential for *independent* appellate review. Here, there was no opportunity for “independent scrutiny by a new decision-maker.”

Terrific language here on the “fundamental right” to appeal. People v. Harrison, 27 NY3d 281, 286 (2016). The Court also speaks of our state’s “constitutional and statutory design intended to afford each [defendant] at least one appellate review of the facts.” Maintaining the integrity of the appellate review process is of “fundamental, constitutional importance.” This “constitutional right to a fair appellate procedure” (People v. Perez, 23 NY3d 89, 99 [2014]) must ensure due process of law, as recognized by both the NY and federal constitutions. People v. Andrews, 23 NY3d 605, 610 (2014); Evitts v. Lucey, 469 US 387, 393 (1985).

There is a due process right to have an impartial jurist. Not only must judges be actually neutral, but they must *appear* so as well. See 22 NYCRR 100.2. The public’s confidence in the justice system is undermined otherwise. At bar, there was an unconstitutional potential for bias and a “clear abrogation” the state guarantee of “one level of independent factual review as of right.” This “appearance of impropriety” conflicted with the notion of “fundamental fairness.”

People v. Garvin

30 NY3d 174

This is a 4 to 3 decision (5 to 2 on the 4th Amendment issue), affirming the AD, and authored by Judge Stein. Judge Fahey dissented regarding the legality of the persistent felony offender (‘PFO’) statute, and Judges Rivera and Wilson dissented on a wide array of 4th Amendment issues. Once again, the dissent is a more interesting read than the majority.

The majority ruled that there was no 4th Amendment (Payton) violation where the police approached this robbery defendant's home without a warrant, but with the intention of arresting him - - and did in fact arrest him in the "threshold" or doorway of his home (a two-family residence) after he voluntarily answered his door on the second floor. Another person had let the police into the building. Under the circumstances, defendant surrendered the enhanced constitutional protection of his home. The police did not enter appellant's apartment, and had defendant's fingerprint on a demand note used in one of the robberies under investigation. Defendant was transported to the station where he was Mirandized. He then confessed.

The majority pays some lip service to the basic principle of warrantless entries into the home to make a felony arrest being presumptively unreasonable. Without exigent circumstances, the threshold into the home may not be crossed. One of the carefully delineated exceptions to the warrant rule is of course consent. But a defendant may not be threatened with a 4th Amendment violation in order to get him to exit his residence. Still, the Supreme Court has recognized that a police officer, like an ordinary citizen, may knock on the door of the residence. Florida v. Jardines, 569 US 1, 8 (2013). An officer's subjective intent is irrelevant. (The dissent points out, however, that an ordinary citizen cannot approach a residence intending to carry out an arrest.) When a defendant voluntarily exits his residence, even when lured outside by a ruse, an arrest may be executed. The majority rejects the dissent's proposed rule to apply Payton's protections to the threshold of the residence and to consider law enforcement's subjective intent in approaching a residence in order to carry out an arrest.

The issue at bar was a mixed question of law and fact; the majority concluded that there was record support for the AD's finding that defendant was arrested in his doorway after voluntarily emerging from his residence. Because there was no Payton violation, the subsequent statements made by defendant were not suppressible under People v. Harris, 77 NY2d 434, 437 (1991), which the majority declined to overrule or expand.

Judge Fahey's extensive dissent on the PFO statute in light of Apprendi (530 US 466 [2000]) and Blakely (542 US 296 [2004]) is curious in light of the Court of Appeals' very recent decision in Prindle (29 NY3d 463 [2017]), wherein Judge Fahey did not participate, affirmed again the statute's constitutionality. In Judge Fahey's view, the second condition under CPL 400.20 (1)(b) requires the making of a finding of facts (CPL 400.20 [9]), not the mere traditional exercise of judicial discretion, that has the effect of increasing the prescribed range of penalties to which defendant is exposed. This requires proof before a jury beyond a reasonable doubt (Apprendi, *supra* at 489-490), not before a judge by a preponderance of the evidence (CPL 400.20 [5]). Judge Fahey further challenges the validity of the Rosen (96 NY2d 329 [2001]) and Rivera (5 NY3d 61 [2005]) decisions in this regard. In sum, the two prior felonies under PL 70.10 (1) is a condition, but not the *sole* condition for a PFO adjudication.

Back to the 4th Amendment: Judge Rivera authors a very interesting dissent, analyzing both the impact of a two-family home in this scenario, as well as the officer's approach

of the home without a warrant. The officer's visit to defendant's home for the sole purpose of carrying out a warrantless arrest undermined defendant's indelible right to counsel. The defendant's apartment was on the second floor of a two-family home. The officer had to pass through a common area of the building, included a vestibule and stairway, which defendant had privacy interests in. "The concept of the house as a home would be meaningless if it could be so easily compartmentalized into publically unprotected spheres." People that live in a two-family house do not effectively forfeit their privacy to all areas except for the space which is not commonly shared by the residents. Rather, the purpose of the front door to a home is to ensure the privacy and security of those living behind it. The common area between the front door and defendant's living area was a necessary and inherent consequence of these particular living arrangements. There was no evidence that the vestibule and staircase were generally open to the public. A two-family resident should have the same constitutional guarantees as one living in a one-family residence. One's socio-economic status should not dictate the scope of his or her 4th Amendment rights.

Judge Rivera also agrees in her dissent with Judge Wilson regarding the legality of the officer approaching a residence where the sole reason is to carry out a warrantless arrest. The intersection between the indelible state right to counsel and a warrantless arrest is addressed here. As with judge Wilson's dissent, we find the familiar language from Harris, 77 NY2d at 439, People v. Bing, 76 NY2d 331, 339 (1990) and People v. PJ Video, 68 NY2d 296, 304 [1986], touting the more expansive constitutional protections found in our state constitution (based in part on due process and self-incrimination concerns) than its federal counterpart. As the police may not create an exigency justifying a warrantless entry into a home (King v. Kentucky, 563 US 452, 470 [2011]; see also People v. Levan, 62 NY2d 139, 146 [1984]), robust judicial oversight is needed here. The Supreme Court in King opined that an officer could do at least as much as a private citizen in knocking on a door. 563 US at 469-470. But if the officer's sole purpose to be there is to implement a warrantless arrest, like at bar, that changes things.

Judge's Wilson's dissent further breaks down the intertwining of the indelible right to counsel and warrantless arrests, and challenges the meaning of a home's "threshold" under Payton. (Does it mean "only the narrow space between the doorjamb's"?) Judge Wilson is further critical of pre-planned warrantless arrests in the doorway of a residence - - effectively (*according to the majority*) taking a step into the dangerous waters of what an officer's *subjective* intent might be. This case showed, according to Judge Wilson, how many unanswered questions remain from Payton, which was supposed to provide law enforcement with a bright line rule for its behavior. The federal circuits being split on their interpretation of Payton under these circumstances is used as cause for Judge Wilson to remind us of the Court's lack of hesitation historically in interpreting our state constitution (Article I, Section 12 [*like Section 6*]) broader than its federal counterpart in the 4th Amendment. (*The majority's criticism of the dissent's partial reliance on federal jurisprudence as not being binding on them appears to miss*

the point of NY's constitution being broader in its protection of constitutional rights than its federal counterpart.) The bright line rule proposed by Judge Wilson: first obtain a warrant if you intend on going to a residence to carry out an arrest. Ruses perpetrated by law enforcement to motivate one's exit from his or her home simply undermine the public's trust in law enforcement.

People v. Andujar

30 NY3d 160

This is 6 to 1 decision, affirming the Appellate Term, which reversed the local court's granting of defendant's motion to dismiss the accusatory instrument. Judge Rivera authored the majority and Judge Stein authored the dissent. At issue here is VTL §397, which prohibits a non-police officer from equipping a motor vehicle with a police scanner. The center of the attention here is the word, "equips," and whether the scanner must be physically attached to the vehicle or whether it may be a freestanding device.

The law was meant to target the tow truck driver who receives inside law enforcement info and learns of a car accident (and benefits financially by getting to the scene before his competitors), as well as the lookout or the get-away driver after a robbery, who hears of the soon-to-arrive police being in route. The defendant at bar fit under the first scenario. The scanner was found in his left jacket pocket, unattached to the vehicle.

"[E]quips" is not defined under the statute, so the Court analyzed the statutory text, legislative history, dictionary definitions at the time of the law's enactment (in 1933) and other parts of the VTL. The dictionary speaks of equipping as to furnish for service or to make ready; to provide something with a particular feature or ability. Being physically attached is not mentioned. Other VTL references to equipping vehicles with devices often use a secondary term - - like requiring that the equipping with a mirror be "affixed" or a bus being equipped with a fire extinguisher being "mounted." Other VTL items that vehicles are required to be equipped with that are not described with a secondary term do not need to be physically attached to the vehicle in order to be capable of being used: i.e., wipers, snow tires and trunks. In other words, being physically attached is just one way of being "equipped."

In her thoughtful dissent, Judge Stein focused in on the *vehicle* being the object of the verb, "equips." The legislature decided to not merely prohibit the "possession" of a police scanner. In other words, vehicles are generally *equipped* with items, while people *possess* them.

November 16, 2017

People v. Hardee

30 NY3d 991

This is a 4 to 3 memorandum, affirming the AD, with Judge Stein authoring the dissent, joined in by Judges Rivera and Wilson. The issue of whether the likelihood of a weapon in a vehicle was substantial, and whether the danger to the officers who stopped the vehicle was actual and specific (People v. Carey, 89 NY2d 707, 711 [1997]; People v. Torres, 74 NY2d 224, 231 [1989]), was a mixed question of law and fact. Here, there was record support for the determination that circumstances existed justifying the limited search of the interior of the vehicle. People v. Mundo, 99 NY2d 55, 57-59 (2002).

The dissent, which was much longer and comprehensive than the majority's memorandum, set out the facts and the law in some detail. Defendant was pulled over after speeding and changing lanes without signaling. His fiancé was a front seat passenger. Once pulled over, defendant appeared nervous and admitted to officers to having consumed alcohol. He appeared "hyper." Defendant initially refused to exit the vehicle, but then did so peacefully. Once outside of the vehicle, defendant appeared nervous, but was cooperative during the frisk, which uncovered no weapons. While he was standing outside, defendant looked over his shoulder a couple of times toward the vehicle, against the officers' directions. When handcuffed, he appeared to tense up and resisted. The fiancé was directed to exit the vehicle as well. The officers entered the vehicle with a flashlight and observed a shopping bag on the floor, which defendant was said to have been looking at before. Inside the bag was a smaller black bag containing a firearm. The AD bought the DA's argument that this constituted a legal protective search.

Absent probable cause, it is unlawful for the police to invade the interior of a stopped vehicle once the suspects have been removed and patted down without incident, as any immediate threat to the officers' safety has been eliminated. An exception exists allowing for a limited protective search of the vehicle for weapons where a proper inquiry or other circumstances lead to the conclusion that a weapon located within the vehicle presents an actual and specific danger to the officers' safety, which means a substantial likelihood of there being a weapon in the car. See Mundo, 99 NY2d at 57, 59 (where defendant absconded three times from police; search deemed legal); Torres, 74 NY2d at 230, 231, n 4 (where suspect was isolated from suspected location of weapon inside vehicle; search deemed illegal); Carey, 89 NY2d at 708, 711-712 (where bullet proof vest was found and defendant made furtive acts; search deemed legal); People v. Omowale, 18 NY3d 825, 825 (2011) (where driver failed to immediately stop

vehicle and passenger was seen secreting something in the center console; search deemed legal).

Analyzing the “narrow” Torres exception, the dissenters found the officers’ conduct to be illegal. Mere reasonable suspicion of there being a weapon inside the vehicle is insufficient to validate a protective search therein. Through objective supporting facts, there must be an actual and specific threat to the officers. This would mean the driver or the passenger having access to a weapon. The facts at bar were indistinguishable from Torres. The defendant did not evade the police vehicle, nor was his nervousness sufficient to justify the search. His subsequent resistance to being handcuffed may not be used as justification, as this conduct was not known by the officers when the search began (and as we know, searches must be reasonable at their *inception* and at every step along the way).

People v. Flores

30 NY3d 229

This is a unanimous decision, authored by the Chief Judge, remitting for the lower court to specifically address a CPL 460.30 motion. The People v. Smith, 27 NY3d 643, 647 (2016) holding that recognized affidavits of errors as a jurisdictional requirement for taking a local criminal appeal is reaffirmed. At bar, there was a local court jury trial without a stenographer. Defense counsel made diligent efforts to secure a transcript of the electronically recorded proceedings. He asked County Court to deem the electronic recordings as a sufficient substitute for the affidavit of errors, or alternatively, grant more time to file an affidavit of errors. The court denied the first request but failed to address the second one. Though the County Court lacked jurisdiction to entertain this appeal, as no affidavit of errors was filed, it is remitted for the court to address the extension motion.

Further commentary: As noted by the court in foot note 2, CPL 460.10(3)(a) has been amended to permit a local court defendant that chooses to file a notice of appeal within 30 days of sentencing (as opposed to an affidavit of errors within that time) 60 days from when a transcript of the electronically recorded proceedings are received by the defendant to file an affidavit of errors. CPL 460.30 appears to be still viable for motions for an extension of time. Also note that the Court of Appeals is again recognizing that appellate courts that are deprived of the requisite filings to take an appeal lack jurisdiction to hear the case. This is in contrast to the US Supreme Court’s recent decision in Manrique v. United States 581 U.S. ___, 137 S.Ct. 1266, 1271-1272 (April 19, 2017), where the court all but held that the filing of a federal notice of appeal is not jurisdictional; instead requiring an objection by the government in order to address the defect on appeal.

People v. Estremera**30 NY3d 268**

This is a unanimous decision authored by Judge Wilson, reversing the AD. Unless voluntarily waived (People v. Rossborough, 27 NY3d 485, 488 [2016]), a defendant must be personally present under CPL 380.40 for a PL §70.85 re-sentencing following a PL §70.45 / Catu (4 NY3d 242, 245 [2005]) error, where a defendant was not orally informed by the court of post-release supervision at sentencing. PL §70.85, enacted in 2008, applies to sentences imposed between 9/1/98 and 6/30/08, and permits a defendant to have his or her original sentence with the DA's consent or the withdrawal of the plea. The fact that a defendant may not have been adversely affected by not being present (i.e., where the re-sentence was a foregone conclusion) is of no moment. This is so because the right to be present for sentencing, which brings with it the opportunity to hear it and address the court, is "fundamental" and codified in C.P.L. 380.40. See *a/so* CPL 380.20 (requiring that sentence be "pronounced"); People v. Sparber, 10 NY3d 457, 469-470 (2008). Corr. Law §601-d (4)(a) also contemplates a defendant's presence, as it requires the appointment of counsel.

November 20, 2017**People v. Arjune****2017 NY Slip Op 08159**

From the standpoint of assigned criminal appellate practice, this is one of the most disappointing decisions in years. This was authored by Judge Stein, with Judge Rivera authoring the primary dissent, joined by Judge Wilson. The new rule: the failure of trial counsel to file a motion for poor person status with the AD, or to respond to a motion to dismiss an appeal as abandoned four years after the notice of appeal was filed, does not constitute ineffective assistance of counsel. The coram nobis denial by the Second Department is affirmed.

A notice of appeal was filed by counsel. Five years later, immigration proceedings were instituted against defendant. Appellant unsuccessfully moved to reinstate the appeal. A year later, he moved for a writ of error coram nobis. In support, defendant swore that his attorney did not speak with him regarding an appeal. He did not know that a notice of appeal was filed, and would have pursued his appeal if he had realized his immigration consequences.

The court declined to expand People v. Syville, 15 NY3d 391, 394 (2010) here, which itself was a narrow expansion of CPL 460.30 for seeking permission to file a late notice

of appeal. See People v. Andrew, 23 NY3d 605, 399-400 (2014). Crucially, this relief does not require the showing of a meritorious appellate issue (Syville, 15 NY3d at 398). Under Arjune, a defendant is not constitutionally entitled to the appointment of counsel to assist in the preparation of a poor person application; it is not a critical stage of the proceedings. Ignoring the limitations of many unsophisticated inmates, the court recalled its previous observation that filing a poor person motion requires only “minimal initiative” on the part of the defendant. (Of course, this also means that it would not require too great an effort by *defense counsel* either.) A written notice of the defendant’s rights is apparently enough. Somehow the court concluded that counsel not filing the motion for poor person relief, which is *required* under AD rules, was not inconsistent with the actions of a reasonably competent attorney. The court observed that the Supreme Court in Roe v. Flores-Ortega, 528 US 470, 478 (2000), did not require that a notice of appeal be filed unless clearly instructed otherwise. The majority further distinguished between failing to file the motion for poor person status and failing to file a notice of appeal, the latter of which, if not filed, forfeits the proceeding. This purported distinction again shows no recognition of the realities of how crucial the motion for poor person status really is. Moreover, the court looks squarely to the federal standard here, apparently not concerned with our state constitution’s often greater protections for New York litigants (see also fn 7, where the majority fends off dissenting Judge Rivera’s criticisms). All that a trial attorney has to do is provide a written warning regarding the poor person status issue. The Arjune court even implies that the court clerk’s warnings may satisfy the “consult” requirement under Roe, apparently adopted by the majority here, regarding whether to take an appeal. This, of course, would contravene the local rules of all four judicial departments.

The majority was also overly critical of the supporting affidavits (and affirmations) submitted by the defendant and both his trial-level and immigration attorneys here as part of the coram nobis motion. The court found that they failed to contain non-hearsay proof regarding whether defendant was made aware of his right to appeal or whether his attorneys discussed the taking of an appeal with him prior to filing the notice of appeal. The defendant did not deny understanding the written form handed to him regarding taking an appeal (*which was missing from the record on appeal*). The trial-level attorney’s affirmation was described as “carefully worded,” as he only indicated that he did not have contact with the client *after* the notice of appeal was filed. The immigration attorney’s affirmation simply parroted defendant’s affidavit. Defendant even had affidavits from his parents indicating that defendant had limited mental abilities. According to the majority, defendant failed to establish that he was unaware of his appellate rights, or how to seek poor person relief, or that counsel failed to comply with relevant court rules. According to the majority, instead of acting with due diligence to discover the alleged omission, defendant only became interested in his appeal when his immigration issues started.

Some cherry picking is necessary here. In footnote 7, the majority does acknowledge that “[n]othing in this decision should be read to minimize the importance of... state rules, ... or to contradict our prior decision that a writ of error coram nobis may lie when

the violation of court rules results in a complete deprivation of counsel on a People's appeal." These bread crumbs are small consolation for the rest of the opinion.

With regards to counsel not replying to the dismissal motion four years after the notice of appeal was filed, the majority feared burdening a trial attorney with a constitutional obligation for an infinite period of time.

In dissent, Judge Rivera correctly blasts counsel below for failing to comply with the AD's own rules, as well as the standards proffered by the ABA, the NYS Bar and the National Legal Aid and Defender Association. Professional standards are essential under Strickland's analysis for determining ineffective assistance of counsel. See 466 US 668, 688 (1984); see also Padilla v. Kentucky, 55 US 356, 366 (2010). As observed by the court in People v. Montgomery, 24 NY2d 130, 132 (1969), "there is no justification for making the defendant suffer for his attorney's failing." Moreover, the defendant had a fifth grade education with low, if any, literacy, as demonstrated by the psychological evaluation that was also submitted with the motion. The right to intermediate appellate review, as the court has many times recognized, is fundamental. It is the state's responsibility to "make that appeal more than a meaningless ritual." Evitts v. Lucey, 469 US 387, 394 (1985). Judge Rivera further observed the greater protections that our state right to counsel offers, as opposed to its federal counterpart (see dissent, fn 4). There is a "representation gap" between the notice of appeal being filed and the appeal being perfected; something that the Second Circuit's Rule 4.1(a), which makes the attorney that files the notice of appeal responsible until relieved by the court, would alleviate. Attorneys are constitutionally required to make objectively reasonable choices. Counsel failed to do so here. This statement says it all: "Apart from the injustice suffered by defendant, the holding here risks disincentivizing compliance with the rules. Instead, we should be conveying their centrality to criminal legal practice."

Judge Wilson's brief dissent clarified the Roe requirement of "consult" regarding the right to appeal. This must be done by speaking to the client. A form is not enough.

Further commentary: Since 1964, all four judicial departments have had local rules regarding the warning of defendants of the right to appeal. As of the Fall of 2016, both the Second and Fourth Departments now require that trial counsel file a motion for poor person status when appropriate. CPL 380.55 was enacted in 2016, which permits assigned counsel to seek an order from the sentencing court designating defendant as still qualified for assigned counsel on appeal. This enactment was meant to streamline the assignment of appellate counsel. But now in Arjune, the Court of Appeals has taken a monumental step backwards for assuring that indigent litigants have timely access to intermediate appellate review. The coram nobis motion at bar frankly sounded more detailed and substantive than most that are filed. A very disappointing decision indeed.

People v. Helms**30 NY3d 259**

This People's appeal is a reversal authored by Judge Fahey, with Judge Rivera concurring (and Judge Feinman joining in). Here, defendant's prior (1999) Georgia burglary conviction satisfied the "strict equivalency test" for determining whether a prior conviction in another jurisdiction may serve as a predicate (violent) felony conviction under PL §70.04(1)(b)(i) (requiring that all of the essential elements of the prior felony be authorized in New York). The test requires a comparison of the statutory elements of the crimes from the New York and the foreign jurisdiction. See *generally* People v. Muniz, 74 NY2d 464, 467-468 (1989). The underlying facts alleged in the foreign jurisdiction accusatory instrument are normally not considered; the exception being where the foreign statute renders criminal several different acts, some of which could constitute misdemeanors under New York law. Case law in the foreign jurisdiction is relevant to this determination.

At bar, the "without authority" clause of the Georgia statute was at issue: "*without authority* and with intent to commit a felony or a theft therein, he enters or remains within the dwelling house of another" (emphasis added). See Ga. Code Ann former §16-7-1 (a). Georgia case law established that the culpable mental state was at least commensurate with New York's burglary statute and its "unlawfully" phrase. Judge Rivera, in her concurrence, in an apparent attempt to restrict the majority's holding for future cases, opined that there was no need to compare New York's law with Georgia's lesser included offense case law.

November 21, 2017**People v. Smith****2017 NY Slip Op 08165**

This is a unanimous memorandum reversing the AD and ordering a new trial. The trial court failed to adequately inquire into his "seemingly serious request" to substitute counsel. The request was supported by specific factual allegations of serious complaints about counsel. A minimal inquiry into the nature of the disagreement or its potential for resolution was warranted. People v. Sides, 75 NY2d 822, 824-825 (1990).

People v. Dodson**2017 NY Slip Op 08171**

This is a unanimous memorandum reversing the AD and remitting to County Court to afford defendant the opportunity to move to withdraw his guilty plea. The trial court had a duty to inquire into defendant's specific request for new counsel before proceeding to sentence. People v. Sides, 75 NY2d 822 (1990); People v. Porto, 16 NY3d 93 (2010).

People v. Kislowski**2017 NY Slip Op 08169**

This is a unanimous memorandum reversing the AD and dismissing the violation of probation petition. The petition lacked sufficient allegations under CPL 410.70 regarding the time, place and manner of the purported VOP. The defendant's in-court questions posed to the court did not cure the deficiencies.

December 14, 2017**People v. Boone****2017 NY Slip Op 08713**

This is a welcomed decision. Judge Fahey wrote for the court, with Judge Garcia concurring. Judge Wilson did not participate. The AD is reversed, and a new trial is ordered. At issue are two Brooklyn robberies committed by a black male (or males) two days apart. Both victims were white. The first robbery had the perpetrator threatening with a knife; during the second incident, the victim was actually stabbed. Trial counsel unsuccessfully requested a jury instruction regarding the perils of cross-race identification. The trial court believed that there had to have been expert testimony at trial on the topic as a prerequisite. Also, the court observed that there was no cross-examination regarding the cross-race issue. Moreover, an extensive ID instruction was given to the jury.

In 2011, the NYS Justice Task Force endorsed a new Pattern Jury Instruction regarding cross-race identifications, instructing juries that witnesses may have greater difficulty in accurately making such an ID. The Court of Appeals held here that where identification is at issue, where the identifying witness and the defendant are of different races and a cross-racial ID charge is requested, the instruction must be given to the jury. Neither expert testimony nor cross-examination on the issue is required. A witness that erroneously identifies a suspect will not necessarily display bias. Honesty and accuracy are different categories that the jury may use in evaluating testimony. The Whalen (59

NY2d 273 [1983]) and Knight (87 NY2d 873 [1995]) decisions, which affirmed trial courts' discretionary authority in determining whether to grant a request for an expansive ID instruction, according to the majority, were not disturbed by the present holding. The better practice continues to be for trial courts to grant expansive ID instructions when requested.

The court acknowledged the empirical data supporting the fact that mistaken identity is common when made by a single eye-witness in a cross-race scenario. Indeed, there is acceptance in the scientific community for the principle known as the cross race effect. Only about a third of jurors, however, are thought to have accepted this concept. Three other states (New Jersey, Hawaii and Massachusetts) require this jury instruction. For cross-race ID cases, a new approach from the deferential Whalen and Knight holdings is necessary.

Judge Garcia, in concurrence, was not buying the majority's claim that trial court's still had discretion in whether the cross-race instruction was to be given; the holding here effectively made it mandatory. The concurrence agreed that it was reversible error at bar, but that the majority went too far. There were already systematic protections in place to guard against wrongful ID's (i.e., pre-trial hearings, trial courts' weighing of probative versus prejudicial value of evidence before its admission, cross-examination, expert ID testimony and *discretionary* jury instructions). Trial courts, according to Judge Garcia, are the proper gatekeepers in shielding the jury from misleading, unwarranted or irrelevant ID instructions and should have genuine discretion in deciding on whether to give such a charge.

December 19, 2017

People v. Smith

2017 NY Slip Op 08798

This is a 4 to 3 decision authored by Judge Rivera; a People's appeal. The DA appealed from the AD's reversal, vacating a guilty plea for manslaughter. The defendant had a state and federal constitutional right to the presence of counsel during the People's motion to compel the taking of a buccal swab for DNA. This evidence was to be used for comparison with DNA recovered at the crime scene. The AD, however, improperly dismissed the indictment without prejudice; it should be remitted pursuant to CPL 470.20 as a necessary and appropriate corrective action. As modified, the matter is affirmed.

A defendant has the right to the effective assistance of counsel at every "critical" stage of the proceedings, which means a proceeding that holds significant consequences for the accused. Here, counsel was relieved from the case after consenting to the DNA motion on the record; the motion for the buccal swab then went ahead in his absence.

This was despite defendant indicating that he had not consulted with counsel regarding the motion, was not consenting to the procedure and was also seeking an attorney for assistance at that point. The court, unfortunately, acted as a *de facto* attorney, advising on the record that there was no reason for defendant to contest the People's motion. The motion was then granted.

Judge Garcia wrote for the three-judge dissent, which included Judges Stein and Fahey. The court below had already signed the order for the buccal swab at the time of the exchange in court with defendant (after counsel had been relieved). The subsequent attorney on the case after the exchange in court did not contest the People's DNA motion. Though an adjournment would have been the better practice, this was not a critical stage of the proceedings.

Bio

Mr. Murphy is the Chief Attorney for the Appeals and Post-Conviction Unit of the Legal Aid Bureau of Buffalo, Inc., which represents half of the counties in the Eighth Judicial District. He was previously a member of the criminal department at Lipsitz Green Scime Cambria LLP, in Buffalo, where he represented criminal and civil clients in state and federal courts across the country. Mr. Murphy is a former prosecutor with the Niagara County District Attorney's Office, and a former Town Justice in the Town of Pendleton, where he served for eight years.

Mr. Murphy is Chair of the Appellate Practice Committee for the Bar Association of Erie County, is a Director of the New York State Association of Criminal Defense Lawyers (and a member of its amicus curiae committee) and is Co-Chair of the New York State Bar Association Committee on Courts of Appellate Jurisdiction. He is also a member of the Tri-County Bars Judicial Screening Committee, which interviews judicial candidates for the New York State Court of Appeals. Mr. Murphy is licensed to practice before the U.S. Supreme Court, as well as the Second, Fourth, Sixth and Eleventh Circuit Courts of Appeals.