

**People v Fernandez**

2019 NY Slip Op 33912(U)

October 9, 2019

County Court, Westchester County

Docket Number: 17-1004-03

Judge: Anne E. Minihan

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FILED

OCT - 9 2019

TIMOTHY C. IDONI  
COUNTY CLERK  
COUNTY OF WESTCHESTER

FILED  
AND  
ENTERED  
ON Oct. 9 2019  
WESTCHESTER  
COUNTY CLERK

COUNTY COURT: STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
THE PEOPLE OF THE STATE OF NEW YORK

- against -

DECISION and ORDER  
Indictment Number: 17-1004-03

MICHAEL FERNANDEZ,  
ROBERT TORRES, and  
ANGEL RIVERA,

FILED 

Defendants.

OCT - 9 2019

-----X  
Minihan, J.,

TIMOTHY C. IDONI  
COUNTY CLERK  
COUNTY OF WESTCHESTER

An indictment has been filed against the defendant charging him with burglary in the 2<sup>nd</sup> degree (Penal Law § 140.25[2]) (two counts), grand larceny in the 3<sup>rd</sup> degree (Penal Law § 155.35[1], and petit larceny (Penal Law § 155.25). The People allege that on June 22, 2017 that the defendant, Angel Rivera, while aiding, abetting, and acting in concert with Michael Fernandez and Robert Torres, did burglarize the residential apartment located at 55A Locust Avenue in the City of New Rochelle and, while there, did steal property from that dwelling valued in excess of three thousand dollars. They further allege that on July 14, 2017 that the defendant, while aiding, abetting, and acting in concert with these same men, did burglarize a residential apartment located at 666 North Terrace in the City of Mount Vernon and, while there, did steal property from that dwelling.

Defendant Rivera, claiming to be aggrieved by the improper or unlawful acquisition of evidence, has moved to suppress a number of noticed identifications made of him by Tawanda Ballinger (the occupant of one the burglarized Mount Vernon apartment) (double blinded photographic array procedure), by co-defendant Michael Fernandez (single photograph), by New Rochelle Police Sergeant Kevin Perri (single photograph and Facebook photograph), and by Christina Martinez (the common-law wife of co-defendant Robert Torres) (single photograph). The defendant additionally seeks a *Sandoval* ruling by the court.

The People oppose so much of the defendant's motion as seeks suppression of the above-referenced noticed identifications however they have consented to a *Wade/Rodriguez* hearing. As to the noticed identifications which pertained to viewings by grand jury witnesses, they properly assert, and the defendant does not dispute, that these are not subject to suppression as police arranged identification procedures. The People additionally consented to a *Sandoval* hearing.

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By Decision and Order dated August 1, 2018, this court granted so much of the defendant's motion to suppress the noticed identifications pertaining to single photographs to the extent that a hearing was ordered to be held prior to trial to determine whether certain of the noticed identifications were, as the People allege, confirmatory (*People v Rodriguez*, 79 NY2d 445 [1992]) or, alternatively were unduly suggestive so as to taint an in-court identification of the defendant at the trial of this matter (*United States v Wade*, 388 US 218 [1967]). As to the noticed identification pertaining to the double blinded photographic array, the court directed that it be the subject of a *Wade* hearing. In the event that a noticed identification were held to be impermissibly suggestive, the hearing court would, in that instance, consider whether the People have proven by clear and convincing evidence that an independent source exists for the witness's proposed in-court identification (*see People v Pacquette*, 17 NY3d 87 [2011]).

On October 7, 2019, *Wade/Rodriguez* and *Sandoval* hearings were conducted before this court. At the hearings, the People called five witnesses: New Rochelle Police Detective Sergeant Kevin Perri, Detective Michael McKinness, and Detective Kevin Geertgens, Mount Vernon Police Detective Christopher DiMase and Officer Michael Hutchins. Received into evidence at the hearing, without objection by the defendant, were the following exhibits: two single photographs of the defendant, a photographic array packet and a Facebook screen shot photograph. The defense called no witnesses and offered no evidence.

The court finds the testimony offered by the People's witnesses to be plausible, candid, and fully credible and makes the following findings of fact and conclusions of law.

**FINDINGS of FACT**

On June 22, 2017, Detective Michael McKinness, a 30 year veteran with the New Rochelle Police Department, then assigned to the property theft unit, was summoned to the scene of a daytime residential burglary at an apartment located at 55A Locust Avenue in the City of New Rochelle. In furtherance of the investigation, Detective McKinness and his colleagues examined the scene for evidence and obtained and reviewed both security camera footage as well as city camera video footage. In viewing the video recordings, he observed three individuals carrying items taken from the burglarized apartment and placing them into a tan or gold colored Honda Odyssey.

Five days later another residential burglary occurred at 230 Pelham Road in New Rochelle. While Detective McKinness did not respond to the scene of the Pelham Road burglary, he learned that the victim of that burglary had reported that among the items stolen was a child's watch, called a Gizmo, which was equipped with a tracking device, ostensibly to permit the monitoring of a child's whereabouts. After obtaining the permission of the owner of this item, New Rochelle Police tracked the location of the watch to the area in front of 2168 Crotona Avenue in the Bronx. When police responded to the area on Crotona Avenue where the watch had "pinged" they observed a gold Honda Odyssey van matching the one that had been observed

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on the video footage from the burglary of 55A Locust Avenue. Detective Sergeant Kevin Perri, a 26 year veteran of the New Rochelle Police Department, testified that police were able to observe some characteristics about the van that led to the determination that the vehicle used in that burglary was also the one that had been used in the burglary of 55A Locust Avenue. By the end of June, 2017, the New Rochelle Police Department applied for and obtained a warrant authorizing a GPS tracking device to be placed on the van. For several weeks, the movement and location of the van were monitored principally by use of software that permitted a "geo-fence" to be set up to alert police when the van entered Westchester County.

On the morning of July 14, 2017, Sergeant Kevin Perri, who had for weeks been closely monitoring the GPS tracker on his work computer and his work-issued cell phone as part of his supervisory and investigative duties, received an alert that the van was heading from the Bronx into the City of Mount Vernon. He directed his own detectives to the 600 block of North Terrace Avenue in Mount Vernon and he notified the District Attorney's Office and investigators of the status of the van. New Rochelle police and other law enforcement descended upon the location in Mount Vernon where the GPS had pinged. From radio transmissions, Sergeant Perri learned that there were three people in the van that was parked in front of 666 North Terrace Avenue and later, that two of these individuals had been seen being chased by a woman who was later identified as the homeowner, Tawanda Ballinger.

Detective McKinness observed the gold van and noticed that there was a person in the driver's seat. Through the partially open window, he saw the individual later identified as Michael Fernandez, wearing a white t-shirt and a baseball cap that matched the one he had observed on the video footage of the Locust Avenue incident. He also saw a man wearing a distinct red sweater with a black design run past his police vehicle directly in front and around to the passenger side of the van. He thought that the man was carrying something inside the sweater. The individual entered the van and the van immediately pulled into the traffic lane and drove away. He and other police personnel pursued the van while its location was being continually monitored via the GPS tracking device. Detective McKinness recalled that the van pulled around other vehicles waiting at a stop sign, drove into the oncoming lane where it was head to head with a bus, a garbage truck and other vehicles and that it drove through red lights and stop signs. Because of the unsafe manner in which the van was being operated and the difficulty that caused in keeping up with the pursuit, police ultimately elected to discontinue the chase. They instead followed the van using the GPS tracking device.

Sergeant Perri was among those who gave chase to the gold Honda Odyssey that had sped off and it was he who was monitoring the GPS location of the van as it sped down the Henry Hudson Parkway. Ultimately, Sergeant Perri and Detective Ciafardini approached the van when it stopped. The driver, later identified as Michael Fernandez, was directed to turn the van off, put it in park, put the keys on the floor, and get out of the vehicle and down on the ground. When he complied, the sergeant turned his attention to the passenger whom he also instructed to exit the vehicle. When the door opened, he made contact with the person he later learned was the defendant, Angel Rivera. The defendant was partially wearing a red sweatshirt, which covered his arms but not his torso. Looking into the defendant's eyes from about two feet away, the

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sergeant recalled that the fact that the defendant tensed up and looked around made him believe that he intended to flee. As the sergeant raised his hands to place them on the defendant to bring him to the ground, the defendant pushed away and started swinging. The sergeant struggled with him for a while before deciding that since neither he nor Detective Ciafardini had handcuffs with them and because Mr. Fernandez was lying on the ground, that the wiser course of action was to let the defendant go so that they would not lose both suspects. Later that same afternoon, Sergeant Perri looked at a photograph of the defendant and recognized him as the person he had scuffled with and attempted to apprehend earlier in the day (People's exhibit 2b [an enlarged copy of the 2x3 inch photograph that Sergeant Perri viewed]). He testified that he was one hundred percent certain that the person he scuffled with had been the defendant and he recalled that the entire encounter with the defendant, between first looking at him through the window and when the defendant ran off, was two or two and a half minutes in duration.

After his arrest, Michael Fernandez was brought to New Rochelle Police headquarters where he spoke with Detective McKinness about the Locust Avenue and North Terrace Avenue burglaries. Mr. Fernandez was shown video recordings from the 55A Locust Avenue burglary and he pointed out himself as the individual carrying a television set. He also identified the other two individuals depicted in the same video as Robert Torres and "Jose" and he told police that he, Mr. Torres and "Jose" had committed these offenses. He told the detective that he had met Jose through Mr. Torres and that while Jose was closer to Mr. Torres than to him, Jose was nonetheless a "friend" whom he had known for a few months. Although he did not know his address, Mr. Fernandez told the detective that Jose hung out in the same area of the Bronx and that they socialized in the same circles as he. He also said that Jose had been the passenger who had gotten into the van at 666 North Terrace Avenue and had fled from police after the scuffle. Mr. Fernandez was shown a photograph of the defendant and said that it was "Jose" (People's exhibit 2b). When asked to sign the photograph by Detective McKinness, Mr. Fernandez declined.

On July 15, 2017, Sergeant Perri and others executed a search warrant at 2168 Crotona Avenue in the Bronx, the home of Robert Torres and his common-law wife Christina Martinez. At that time, he spoke with Ms. Martinez and showed her a photograph of the defendant, asking if she knew him (People's exhibit 2b). She responded that she did, that it was Angel Rivera, a friend of Mr. Torres. She told the sergeant that the defendant had come to her apartment the previous day and had asked her where Mr. Torres was. In his testimony, he recalled that Ms. Martinez knew both the defendant's first and last names.

Detective Kevin Geertgens, a 24 year veteran of the New Rochelle Police Department, testified that on July 17, 2017, he was called to assist in the investigation of the 55A Locust Avenue burglary and was tasked with driving Mr. Fernandez around the south end of New Rochelle so that Mr. Fernandez could point out places that he had burglarized. Mr. Fernandez, who had agreed to drive around with detectives for this purpose, told him that Robert Torres and a person he knew as "Jose" had committed two burglaries with him in the area and he pointed those areas out. He also told Detective Geertgens that he had picked the locks of the homes and that he had been driving Mr. Torres's wife's gold colored Honda.

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Robert Torres, who had also been arrested by this time, had given police the name "Angel Rivera" as the suspect who had scuffled with and fled from Sergeant Perri and so a decision was made to again show Mr. Fernandez the defendant's photograph (People's exhibit 2a). The detective gave Mr. Fernandez the photograph and asked him if he recognized the person. Mr. Fernandez agreeably viewed the photograph of the defendant and then told Detective Geertgens that it was "Jose." He then complied with the detective's request that he sign the photograph with his name and place the name "Jose" at the top. The detective was unaware that Mr. Fernandez had viewed the photograph earlier and had refused to sign it.

In early August of 2017, Sergeant Perri was sent a screen shot photograph of the defendant by Investigator Bock with the District Attorney's Office who told him that he had found the photograph on Facebook (People's exhibit 3a). He was again shown the photograph in April of 2018 when he testified before the grand jury.

Detective Christopher DiMase, a 20 year veteran of the Mount Vernon Police Department, was assigned to investigate the burglary at 666 North Terrace Avenue in the City of Mount Vernon. As part of that investigation, he met with and interviewed the home owner of the burglarized apartment, Tawanda Ballinger. Upon learning that Ms. Ballinger had chased the burglars out of her home, and having been told by the District Attorney's Office that the defendant was possibly a suspect, he prepared a photographic array with the defendant's photograph along with the photographs of five other individuals that he obtained from the DCJS database.

In selecting images of men who looked like the defendant, he chose photographs that he thought matched the defendant's general appearance, hair style, facial hair and other physical features. He did not know the defendant's weight and he did not consider the lighting of the photographs, acknowledging in his testimony that some of the backgrounds of the photographs were lighter than others. In the array, the defendant's photograph is in the second position (People's exhibits 1a and 1b). The filler photographs are all of men approximately the same age, appearance, and ethnicity as the defendant. Each have similar complexion, hair style and facial hair. The backgrounds of the first three photographs are generally darker than the second three, with the last photograph having the lightest background of all. After compiling the array, he retained a copy of the array in which the subjects' names were listed along with a sheet that lists each of the subjects by name, NYSID number, and position in the array (People's exhibit 1b). He retained these two pages and, at the conclusion of the identification procedure, Detective DiMase obtained the signature of Officer Michael Hutchins who administered the array procedure. In his testimony, Detective DiMase stated that he chose Officer Hutchins because he had no involvement of any sort in this investigation. There were no names on any of the pages of the array packet that he gave to Officer Hutchins and he did not tell him either the defendant's name, that the defendant was a suspect in the burglary, or where in the array the suspect's photograph had been placed.

Police Officer Michael Hutchins, a 10 year veteran of the Mount Vernon Police Department, testified that in August of 2017 he was assigned to the warrant squad, that he was uninvolved in any of the burglary investigations in which the defendant was a suspect, and that

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he was unfamiliar with the defendant in any way. As he had never conducted this kind of identification procedure, Detective DiMase instructed him in how to properly conduct a photographic array procedure. Officer Hutchins was alone with Ms. Ballinger, in a room behind closed doors, when he administered the array. Detective DiMase was at least 50 feet away during while the procedure was being conducted. In his testimony, Officer Hutchins stated that he did not suspect which of the photographs depicted the suspect nor did he surmise that the photograph in the second position was of the defendant.

Initially, Officer Hutchins read the pre-printed instructions that had been included in his packet, telling Ms. Ballinger, in substance, that the array consists of six photographs each of which had a number underneath it, that she should take as much time as she wanted to view the array, that the suspect's photograph might or might not be among the photographs she was being asked to view, that she should not assume that he knew who the suspect was, that she should not look to him for guidance during the procedure, that the photographs might not depict the true complexion of the people depicted and that she should bear in mind that other features such as facial hair and hairstyles are subject to change, that she should not pay attention to any markings on the photographs or any other difference in the type or style of the photographs and that after she had been given the opportunity to view the array, he would ask her if she recognized anyone and that if she indicated that she did, he would ask her the number of the photograph and ask her from where she recognized him (People's exhibit 1a). Ms. Ballinger initialed the instruction form, acknowledging that the instructions had been read to her.

Ms. Ballinger viewed the array and, when asked by Officer Hutchins if she recognized anyone, she selected the defendant's photograph in the second position. She told the officer that she recognized this person as the one she had chased out of her house. Officer Hutchins noted her responses to his questions and he had her circle the number 2 below the defendant's photograph and place her initials there as well. After the procedure was complete, Officer Hutchins returned the array packet to Detective DiMase (People's exhibit 1a) and then signed the array forms that the detective had retained (People's exhibit 1b).

### CONCLUSIONS of LAW

#### *WadelRodriguez*

When a defendant challenges an identification procedure as unduly suggestive, the People have the initial burden of going forward to establish the reasonableness of police conduct and the lack of undue suggestiveness (*see People v Coleman*, 73 AD3d 1200, 1203 [2d Dept 2010]). At a *Rodriguez* hearing, the People bear the burden to demonstrate that the police-arranged identification procedure was merely confirmatory as a result of the defendant been known to the witness to such a degree so as to be impervious to police suggestion (*People v Rodriguez*, 79 NY2d 445, 452 [1992]). The confirmatory identification exception requires a case-by-case

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analysis which “rests on the length and quality of prior contacts between [the] witness and [the] defendant, but always requires a relationship which is more than ‘fleeting or distant’” (*People v Waring*, 183 AD2d 271, 274 [2d Dept 1992], quoting *People v Collins*, 60 NY2d 214, 219 [1983]).

Although no single factor is determinative, under the totality of the circumstances, the court finds that the People sustained their burden to establish that the defendant was so well known to both Michael Fernandez and Christina Martinez as to have made them impervious to police suggestion. The credible record evidence demonstrates that although Mr. Fernandez knew the defendant as “Jose” and not Angel Rivera, he had been with the defendant in the gold Honda Odyssey during the time police pursued it on the day of his arrest and he also told police that he and the defendant had committed a number of burglaries with him as well. Ms. Martinez knew the defendant’s first and last names, she knew him to be a friend of her husband (co-defendant Robert Torres) and she told police that she had spoken with the defendant the day before the North Terrace burglary when he had come to her apartment asking for Mr. Torres. Such is sufficient evidence that the length and quality of the defendant’s prior interactions with Mr. Fernandez and Ms. Martinez were of such duration and quality that the defendant was known to them to a degree that the subsequent viewings of the defendant’s photograph were not subject to police suggestion.

The double blinded identification procedure in which Tawanda Ballinger identified the defendant was conducted properly in all respects. The People satisfactorily demonstrated that the identification procedure itself was not unduly suggestive nor was the manner in which the array was shown to Ms. Ballinger by a Mount Vernon police officer who was unfamiliar with the defendant, who did not know what position the suspect’s photograph had been placed into the array and who was otherwise entirely uninvolved in the investigation. Officer Hutchins properly read the pre-printed directions to the witness properly at the beginning, instructing Ms. Ballinger that she could take whatever time necessary in viewing the array, that she was not to assume that she knew who the perpetrator was, that she was not to look for guidance from him during the procedure, that a photograph may not depict an individual exactly as he appeared on the day of the incident because certain features were subject to change and that she should not pay attention to any markings on the photographs. He told her the questions that he intended to ask when she had the opportunity to view the array and he followed, in all respects, the pre-printed instructions to the administrator showing the array. Officer Hutchins properly recorded Ms. Ballinger’s responses and he later signed the photograph array form as the administrator of the procedure.

On this record, the People also established that the array itself was not unduly suggestive. The photograph of the defendant and all five of the filler photographs depicted individuals reasonably similar in appearance. There was no substantial likelihood that the defendant would be singled out for identification based on the choice of filler photographs as there is no significant or obvious discrepancy in age, race, gender, facial features, weight, hair style or complexion. There is no requirement that all participants in a photographic array be identical in appearance, rather all that is necessary is that the photographed individuals resemble each other sufficiently so as not to create a substantial likelihood that the defendant will be singled out for identification (*see People v Velez*, 222 AD2d 625 [2d Dept ]).

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With respect to the single photograph identifications by Detective Sergeant Kevin Perri, the court concludes that they were both confirmatory and an ordinary part of the burglary investigation in which he was taking an active, professional part. While single photograph identifications are generally frowned upon, courts have consistently held that such viewings, by a trained police officer, are more reliable than that of ordinary civilian witnesses and are unlikely to be the result of undue suggestiveness or misidentification. That is the case here. Sergeant Perri has had 26 years of experience with the New Rochelle Police Department, 15 of which he has served in his current rank assigned to supervise detectives. He viewed the defendant's photograph not long after he had seen the defendant in broad daylight, at close distance, and without obstructions and had looked the defendant in the eye. Also noticed was the viewing of the defendant from a Facebook screen shot at the grand jury proceeding in April of 2018. This single photo identification is neither police arranged nor of a kind ordinarily burdened or compromised by suggestiveness.

Accordingly, that branch of the defendant's motion which is to suppress this noticed identification is denied.

*Sandoval*

Like every other witness in a civil or criminal matter, a defendant who chooses to testify on his own behalf at a criminal trial may be cross-examined regarding those of his prior crimes and bad acts which bear upon his credibility, veracity or honesty (*see People v Hayes*, 97 NY2d 203, 207 [2002]; *People v Bennett*, 79 NY2d 464, 468 [1992]; *People v Sandoval*, 34 NY2d 371 [1974]; *People v Marable*, 33 AD3d 723, 726 [2d Dept 2006]). Although the questioning about prior crimes and past conduct is not automatically precluded simply because the crime or conduct inquired about is similar to the crime charged (*see People v Hayes*, 97 NY2d at 208; *People v Walker*, 83 NY2d 455, 459 [1994]; *People v Pavao*, 59 NY2d 282, 292 [1983]), "cross-examination with respect to crimes or conduct similar to that of which the defendant is presently charged may be highly prejudicial, in view of the risk, despite the most clear and forceful limiting instructions to the contrary, that the evidence will be taken as some proof of the commission of the crime charged rather than be reserved solely to the issue of credibility" (*People v Sandoval*, 34 NY2d at 377; *see People v Brothers*, 95 AD3d 1227, 1228-1229 [2d Dept 2012]). Thus, "a balance must be struck between, on the one hand, the probative worth of evidence of prior specific criminal, vicious or immoral acts on the issue of the defendant's credibility, and, on the other, the risk of unfair prejudice to the defendant, measured both by the impact of such evidence if it is admitted after his testimony and by the effect its probable introduction may have in discouraging him from taking the stand on his own behalf" (*People v Sandoval*, 34 NY2d at 375). By so doing, the defendant may make an informed decision as to whether or not to testify at his trial (*People v Sandoval*, 34 NY2d at 375).

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The People, proposing a *Sandoval* compromise, ask that they be permitted to inquire as to the defendant's prior criminal convictions to the extent that, should he choose to testify, they be permitted to cross-examine him as to his 2018 conviction for resisting arrest (and underlying facts), his 2011 arrest for, inter alia, burglary in the 2<sup>nd</sup> degree (and underlying facts), his 2010 conviction for aggravated unlicensed operation of a motor vehicle in the 2<sup>nd</sup> degree (and underlying facts), his 2013 conviction for driving while intoxicated (as a misdemeanor)(and underlying facts), his 2013 conviction for attempted burglary in the 2<sup>nd</sup> degree (and underlying facts), his 2007 conviction for criminal possession of a weapon in the 3<sup>rd</sup> degree (and underlying facts and two parole violations), his 2005 conviction for criminal possession of a controlled substance in the 7<sup>th</sup> degree, his 2001 conviction for burglary in the 3<sup>rd</sup> degree, and his 2001 conviction for attempted burglary in the 2<sup>nd</sup> degree (and underlying facts).

They seek leave to inquire as to these prior interactions with the criminal justice system. They maintain that each of these bear upon defendant's testimonial credibility and that they are demonstrative of his apparent willingness to place his own interests above those of society and that they would represent a fair compromise in light of the defendant's overall criminal history and prior interactions with the criminal justice system.

Defendant opposes the People's application in its entirety and argues that a number of these prior convictions or arrests are remote and that they are either offenses which have no bearing on the defendant's testimonial credibility or are so similar to the charges he faces in the instant matter so as to invite prejudice should the jury learn that he has been previously convicted of burglary and drug offenses.

In order to properly balance the probative value of the defendant's prior convictions against any potential for undue prejudice, and to permit the defendant the opportunity to make an informed and meaningful decision as to whether he should testify at the trial, the court directs the following *Sandoval* compromise. Pursuant to this compromise, the People will be permitted to inquire at all as to the nature of any of the defendant's prior larcenous or drug convictions, either by naming the offense or by inquiring as to its factual predicate. As to the driving-related offenses and resisting arrest conviction, the People may not inquire as to these at all as they do not bear sufficiently upon the defendant's credibility, honesty or veracity so as to permit inquiry at the risk of unduly deterring the defendant from testifying on his own behalf and subjecting him to prejudice in the eyes of the jurors should he choose to testify.

While each of the defendant's convictions which the People seek leave to use certainly demonstrate the defendant's willingness to place his own interests above those of society, the relative probative value, particularly as to the drug and larcenous offenses, is outweighed by the real and significant danger of these events being perceived by the jury as propensity towards committing burglaries, despite whatever curative instruction it was given. However, since each of these convictions is demonstrative of defendant's demonstrated willingness to place his own interests above those of the community and in that way are germane to his testimonial veracity and integrity, the People may inquire, should the defendant testify, as to whether he has been previously been convicted of crimes, the number of crimes of which he has been convicted (as

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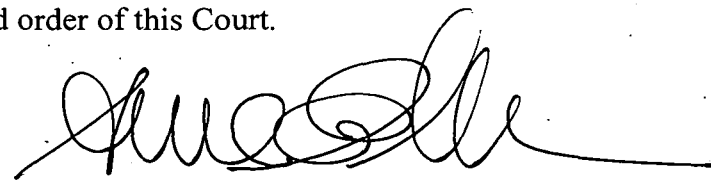
limited by the People in their *Sandoval* application), and whether those prior crimes were felonies or misdemeanors as well as the dates of conviction. By limiting impeachment questioning in this way, any undue prejudice which could result from the fact that these offenses, like those charged here, involved violence, is ameliorated.

Defendant may not use the *Sandoval* ruling as both a sword and a shield (*see People v Marable*, 33 AD3d 723, 725 [2d Dept 2006]). If he chooses to testify and then deny or equivocate as to having been convicted, or should he claim to have never acted in violence, or should he contend that in that prior cases that he pleaded guilty because he was in fact guilty, and that he did not plead guilty here because he is not guilty, he will have opened the door to cross-examination exploring his true motivation for the prior guilty pleas and the People will, upon their application to the court, be permitted to impeach his credibility with questions about all of the underlying facts of his prior criminal convictions (*People v Fardan*, 82 NY2d 638, 646 [1993]; *People v Thomas*, 47 AD3d 850 [2d Dept 2008]; *People v Mirable*, 33 AD2d at 725). If defendant testifies and opens the door, the People may make their application, outside the presence of the jury, and the court will make a determination at that time.

Defendant is thus cautioned not to misuse the protection afforded him under this ruling. If the People believe that the defense has opened the door, and seek either a curative instruction or for leave to use his prior convictions that were limited by this decision and order they shall raise the issue outside the presence of the jury and the matter will be addressed at that time.

This constitutes the opinion, decision and order of this Court.

Dated: White Plains, New York  
 October 9, 2019



Hon. Anne E. Minihan, A.J.S.C.

TO:

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