CHIEF ASSISTANT DISTRICT ATTORNEY
Chana Krauss

FIRST ASSISTANT DISTRICT ATTORNEY
Larry Glasser

ASSISTANT DISTRICT ATTORNEYS
Joseph Charbonneau
Mackenzie Ferguson
Nicholas LaStella
Melissa Lynch
David Rosenberg
Jessica Segal
Breanne Smith

ROBERT V. TENDY
District Attorney

November 4, 2020

Attn: Clerk of the Court
Appellate Division: Second Judicial Department
45 Monroe Place
Brooklyn, NY 11201

Re: People v. Nicole Addimando
App. Div. Case No. 2020-02485

Dear Ms. Agostino:

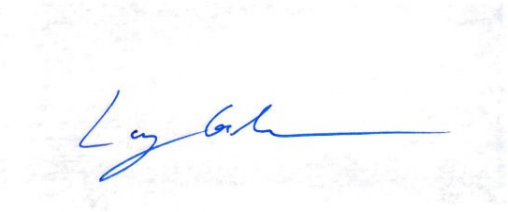
The People respectfully request permission to file an oversized brief, consisting of 19,119 words, in the above-captioned matter. This appeal concerns Appellant's convictions of Murder in the Second Degree and Criminal Possession of a Weapon in the Second Degree following an approximately month-long trial. She then moved for sentencing under the Domestic Violence Survivors Justice Act (DVSJA), which led to a multi-day hearing in the court below. As Appellant has noted, the record is over 3,000 pages.

Appellant, who received permission to file an oversized brief of over 17,000 words, raises five distinct points on appeal, including the disqualification of counsel, the grand jury presentation, jury selection, an evidentiary ruling by the court, and a claim regarding the DVSJA. Each of these issues requires a recount of the record below and thorough analysis. Additionally, the DVSJA was recently enacted and this is one of the first cases, if not the first, to be considered by the Court. Each side has addressed it accordingly.

If the brief is not acceptable, the People respectfully request an extension of time of 2 weeks, to November 18, 2020, or to any other date deemed reasonable by the Court, in order to submit a brief in compliance with the Court's word-count limit.

Thank you for your consideration in this matter. Please do not hesitate to contact me with any questions or concerns.

Respectfully,



First Assistant District Attorney
Putnam County District Attorney's Office

CC: Mr.Garrard R. Beeney
Sullivan & Cromwell, LLP
125 Broad Street
New York, NY 10004

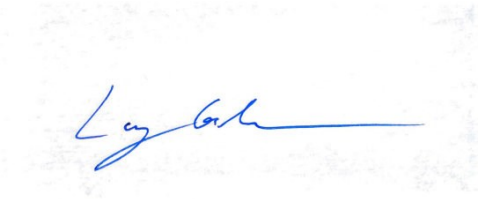
People v. Addimando
App. Div. No. 2020-02485

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss:
COUNTY OF PUTNAM)

Larry Glasser, being duly sworn, deposes and says:

That today, November 4, 2020, deponent served the within Respondent's Brief on Appellant's counsel, Garrard Beeney, by causing a true copy of same enclosed in a post-paid, properly addressed wrapper, in a post office official depository, addressed to Sullivan & Cromwell, LLP, 125 Broad Street, New York, NY 1004, and by e-mail.



Larry Glasser
First Assistant District Attorney

To be argued by:
Larry Glasser
15 Minutes Requested

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

- against -

NICOLE ADDIMANDO,
Defendant – Appellant.

BRIEF FOR RESPONDENT

Appellate Division Docket Number: 2020-02485
Duchess County Court Indictment Number: 74/2018

ROBERT V. TENDY
District Attorney
Putnam County*
40 Gleneida Avenue
Carmel, New York 10512
(845) 808-1050

LARRY GLASSER
FIRST ASSISTANT DISTRICT ATTORNEY
Of Counsel

---

* The Putnam County District Attorney's Office was named Special Prosecutor in this case after the Dutchess County District Attorney recused his office from the prosecution.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

INTRODUCTION

In the early morning hours of September 28, 2017, Nicole Addimando shot and killed Christopher Grover, the father of her two children, as Mr. Grover laid on his back on the couch in their living room. She then fled the apartment with her two children, but not before picking up the spent shell casing and taking it with her.

Appellant admitted to the police that she killed Grover, but claimed it was the culmination of years of physical and sexual abuse and a visit by Child Protective Services the day before. However, as shown at a lengthy jury trial, Appellant had recently texted a friend that she was only still with Grover because she hadn't yet "figured out to kill him without getting caught." She had verbally and emotionally abused Mr. Grover in the days and weeks leading up to the murder, such as by calling him an "asshole man child" who had "some sort of a mental disorder" in a series of text messages three days before the murder. Appellant was demonstrated to have given contradictory accounts of the alleged abuse, and inconsistently accused multiple different men in her past of abuse, to different people. She admittedly tampered with evidence at the crime scene and it was forensically proven that one photograph that she claimed depicted injuries inflicted by Grover could not have been taken in the manner in which she testified.

Appellant was found guilty of Murder in the Second Degree, P.L. § 125.25(1), and Criminal Possession of a Weapon in the Second Degree, P.L. § 265.03(1)(b). She

then moved for a reduced sentence under the Domestic Violence Survivors Justice Act ("DVSJA" or "the Act"), P.L. § 60.12. The court held a hearing on Appellant's application after which it issued a decision finding that Appellant did not demonstrate she qualified for sentencing under the Act. She was subsequently sentenced to concurrent terms of 19 years to life imprisonment on the first count and 15 years imprisonment (with 5 years post-release supervision) on the second count.

On the instant appeal, Appellant challenges neither the weight nor the sufficiency of the evidence supporting her conviction. She raises five claims, none of which have any merit. *First,* the Court correctly disqualified the Dutchess County Public Defender ("DCPD") from representing Appellant early in the proceedings due to a significant conflict of interest. The court's decision was proper for three reasons. The first was that DCPD had previously represented an individual who Appellant accused of repeatedly sexually assaulting her in the past, which she argued contributed to her state of mind and her asserted defenses of justification and Battered Women's Syndrome.[1] The court correctly found that this individual would be a "necessary" witness if the People chose to refute Appellant's allegations at trial, and DCPD would be in the untenable position of accusing a former client of heinous, despicable crimes. The second reason disqualification was required was because after that witness was contacted by an investigator for

[1] Although "Battered Women's Syndrome" is a considered to be an outdated term, it was used throughout the proceedings and is therefore used herein to be consistent with the record.

the prosecution, he reached out to DCPD who then contacted the prosecution on his behalf, asserting his rights to counsel and to remain silent. This may have served the witness's interests, but it did not serve Appellant's, who wanted the prosecution to fully investigate her claims of prior abuse. The third reason is that in response to the People's disqualification motion, DCPD shockingly offered to excise any mention of this witness from their defense of Appellant. The court correctly noted that because Appellant's expert witness had placed "significant weight" on this witness's purported abuse of Appellant and he was "intricately interwoven" into her defense, this suggestion demonstrated a gross dereliction of DCPD's obligation to zealously, single-mindedly represent Appellant.

Second, the integrity of the grand jury proceeding was not impaired. Appellant complains of four questions asked to one of the five witnesses who testified in the proceeding in which he stated that he was told that the gun Appellant used appeared to have been wiped clean of fingerprints. Contrary to Appellant's instant claim, the prosecutor did not leave this testimony uncorrected and twice provided the grand jury with instructions that hearsay must be disregarded and could not be considered. There is also no evidence that the claim was untrue or elicited in bad faith.

Third, Appellant's right to exercise peremptory challenges was not violated during jury selection. After both parties exercised challenges on a set of

prospective of jurors (and five jurors were selected from that group), the process continued to not one, but two more sets of prospective jurors. Both parties used additional peremptory challenges and an additional juror was selected. At that time, Appellant sought to exercise a peremptory challenge to one of the first five jurors. This belated challenge was rightfully not permitted.

Fourth, the court correctly denied Appellant's attempt to introduce a "profile" that she alleged was Grover's from an adult website. Appellant was not able to authenticate the profile as being Grover's, and her asserted foundation – that the username contained the name "Grover" and the listed biographical information generally matched that of Grover – has previously been found by this Court to be insufficient in similar cases.

Fifth, the Court carefully and diligently applied the DVSJA to this case. The Court presided over a three-day hearing, after which it issued a comprehensive, 48-page decision finding that Appellant did not meet her burden of showing that she qualified to be sentenced under the Act. This was an eminently reasonable decision on the facts of this case and should not be disturbed by this Court.

In sum, nothing that occurred during the pendency of this case, at trial, or during the sentencing proceedings violated Appellant's constitutional or statutory rights or otherwise requires disturbing the conviction and sentence duly imposed.

STATEMENT OF FACTS

A. Defense Counsel's Conflict

Following Appellant's arrest, she was represented by Kara Gerry of the Dutchess County Public Defender's Office ("DCPD"). Prior to the case being presented to the grand jury, Ms. Gerry met with the assigned prosecutor and asserted that Appellant was a victim of severe physical and sexual abuse by Grover. She also contended that Appellant had also been sexually assaulted by a number of men in her past, including, most recently before Grover, someone named Cesar Betancourt. Ms. Gerry provided the People with a significant amount of information regarding this alleged history of abuse, including the names of witnesses that she urged the prosecution to interview before any potential grand jury presentation. (Aff. of Chief ADA Chana Krauss in Support of Motion to Recuse, May 8, 2018, [hereinafter "Krauss Aff."], p. 5). The People investigated these claims and learned that Appellant had alleged to multiple people that many of the ways Grover supposedly assaulted her were ways that she had also claimed Betancourt assaulted her, and that she claimed that Grover "role-played" as Betancourt while raping her. (Id., pp. 7-8).

DCPD had also served notice of an intent to pursue a defense of justification based on Battered Women's Syndrome [hereinafter "BWS"] and Appellant's

expert witness in this area had stated in a report that that any prior abuse that an individual experienced is a significant factor in evaluating BWS. (Id., pp. 6, 8-9.)

As a result of Ms. Gerry's efforts, an investigator from the DA's Office located Betancourt and attempted to interview him about his relationship with Appellant. (Id., pp. 9-10). Betancourt learned the investigator was looking to speak with him and contacted DCPD, who had previously represented him on a criminal charge in 2011. (Id., p. 10). Betancourt's attorney on that case immediately sent a letter to both the People and police department stating that Betancourt had contacted DCPD requesting an attorney and that he "hereby invokes his right to counsel and his right to remain silent." (Letter from Senior Assistant Public Defender Nancy Garo, April 24, 2018).

The prosecution then brought a motion to disqualify DCPD from representing Appellant. The Court thoroughly reviewed both the applicable law and the procedural posture of the case to date and found that Appellant's allegations against Betancourt were "integral" to her defense. (Decision and Order (McLaughlin, J.), May 25, 2018 [hereinafter "Disqualification Dec."], p. 5). The court further found that in addition to Betancourt being an important witness on his own, the "inescapable truth" was that Appellant's own expert witness placed "significant weight" on Betancourt's purported abuse of Appellant and he was "intricately interwoven" into Appellant's BWS claim. (Id., p. 6-7). Therefore, if the

People sought to rebut Appellant's claims, Betancourt would be a "necessary" rebuttal witness. (Id., p. 5).

The court also noted that it was significantly concerned by the fact that, in response to the motion to disqualify, DCPD offered to eliminate any conflict by omitting Betancourt as a "contributor" to the Appellant's BWS when presenting their defense. (Id., pp. 5-6). Put differently, DCPD *affirmatively stated* that they would be willing to alter their prospective trial strategy due to their former representation of Betancourt. The Court plainly observed that to permit this to occur would provide Appellant with a clear ineffective assistance of counsel claim if she were to be convicted. (Id., p.6). The court disqualified DCPD and appointed the conflict defender to represent Appellant. (Id., p. 8).[2]

Shortly thereafter, Appellant retained private counsel, which she had intended to do since before the disqualification issue arose. (DT 9, TT 1367-1370).

B. Evidence of the Firearm Being Wiped Clean and the Grand Jury Presentation

In December, 2017, Town of Poughkeepsie Police Detective Jason Guy brought the firearm Appellant used to the to the New York State Police Laboratory

[2] DCPD's website specifically notes that it is a "conflict of interest" when DCPD represents a defendant "who happens to be a witness against another client in a separate case" and in such cases, the conflict defender will represent the defendant. See https://www.dutchessny.gov/Departments/Public-Defender/Public-Defender-Frequently-Asked-Questions.htm, (visited on November 2, 2020).

for fingerprint analysis. (TT 372). He was informed that it appeared to have been wiped clean of fingerprints, which he relayed to the prosecutor. (TT 1757-1758). The ADA had previously been informed that a container of baby wipes had been found next to the firearm at the scene of the murder, so she contacted the Police Laboratory and asked if they could determine whether the gun had been wiped down. (GJ 97, TT 1425). She was informed that an examination for baby wipe residue could be conducted. (TT 1425; Defendant's CPL § 330.30 Mot. to Set Aside Verdict, Ex. C (lab technician's notes).)

Approximately one month later, the ADA interviewed Sarah Caprioli, Appellant's friend and former therapist. (TT 1425). Caprioli, who was one of the individuals whose name and contact information was provided by Ms. Gerry, stated that someone had told her that the gun may have been wiped clean, but she could not remember if she had heard that from Appellant, Gerry, or someone else on Appellant's "team." (TT 1425-1426).

On June 20, 2018, the case was presented to a grand jury and Detective Guy was one of five witnesses. (GJ 78-98). He testified about his qualifications in the area of firearms, that he test-fired the gun involved in this case, and how the type of firearm used in this case is loaded and discharged. (GJ 79-84).

After the prosecutor finished her questioning of the detective, a number of Grand Jurors asked questions. (GJ 85-98). In response to their inquiries, the ADA

asked Det. Guy about the forensic tests that had been conducted on the firearm, including whether any fingerprints wee found. (GJ 90-91). He answered by stating that "Prints were not recovered. They told us that the gun was wiped down." (GJ 91).

Recognizing that this completely non-responsive answer was impermissible hearsay, but having a good-faith basis to believe the gun had in fact been "wiped down," the ADA attempted to clarify this information in a legally permissible manner by asking the detective about his own first-hand observations:

> **Question:** It appeared to be wiped down?
> **Answer:** Yes.

(GJ 91). Later, in response to another question, Det. Guy testified that "[t]hey told us there appeared to be residue left over from it being wiped off, consistent with a cleaning solvent." (GJ 94). Finally, the prosecutor's last question to the detective was whether any cleaning fluids were found near the gun and whether he was able to "definitively determine" what was used to wipe the gun down. (Id. 94). The detective answered, nonresponsively but entirely truthfully, that an open container of baby wipes had been recovered next to the gun. (Id.)

During the presentation, the ADA twice addressed the issue of hearsay. First, during Det. Guy's testimony, she unequivocally told the Grand Jury that "I'm going to give you an instruction. What one witness is told by somebody else is hearsay. We're not offering it for the truth of the matter." (GJ 93). Later, at the

end of the evidentiary portion of the presentation, the ADA instructed the Grand Jury that the legal standard of "reasonable cause" was satisfied when evidence "which appears reliable" convinces the Grand Jury that it is reasonably likely the crime was committed and the defendant was the person who committed the crime. (GJ 130). However, the Grand Jury was explicitly cautioned that "such apparently reliable evidence may include or consist of hearsay," which, as noted above, the Grand Jury had been told was testimony that they could not consider for the truth of the matter asserted. (GJ 130-131).

C. Jury Selection

After the first 20 prospective jurors were questioned, the Court proceeded to hear challenges from the parties. (JS 541-544). The Court first addressed prospective jurors 1 through 12. (JS 541). One potential juror was struck for cause and the People exercised four peremptory challenges. (JS 542). Appellant then exercised two peremptory challenges. (Id.). Appellant's counsel then confirmed he did not wish to challenge any other potential jurors and five jurors – including prospective juror 10 – were selected. (JS 543).

The Court then addressed jurors 13 through 19. (Id.) The People exercised four more peremptory challenges, Appellant exercised two additional challenges, and the remaining juror was selected as juror 6. (Id.) Finally, the court addressed potential juror 20, who Appellant challenged. (JS 544).

Appellant's counsel then stated that Appellant had indicated that she did not want prospective juror 10 to be selected, so he wished to exercise a peremptory challenge on that juror. (JS 545). The Court noted that it was "past the point" of challenges to that juror and denied the challenge. (JS 544-545). Appellant's counsel apologized for the belated request. (JS 545).

D. The Trial

At trial, the People's theory of the case was that Appellant shot Grover as he slept and had manipulated the crime scene – including by, for example, performing internet searches on his phone, removing the spent shell casing from the crime scene, and submerging a laptop computer in the bathtub. Her motivation for doing so was that she had falsely been accusing Grover of abuse to certain close friends for years, and an impending Child Protective Services ("CPS") investigation was about to reveal her deceit and lies.

Appellant contended that Grover had physically and sexually abused her for years and had taken violent, pornographic pictures of her and uploaded them to an adult website. She asserted that the CPS investigation was about to uncover all of this and it pushed Grover over the edge. She alleged that after he brandished a gun and threatened to kill both of them, she was somehow able to wrestle the gun away from Grover and shot him in self-defense. She argued her fear was reasonable in light of the circumstances and her suffering from BWS.

1. The Prosecution's Case

a. Appellant's Relationship with Grover Prior to the Crime

In the days and weeks before Appellant killed Grover, she berated and insulted him, cursed him out, and complained to friends about their relationship. On August 8, 2018, she sent a text message to a friend saying that she needed to obtain some birth control, because she did not want "another thing tying me to him." (TT 49-51; People's Exhibit 4). On August 16, approximately 5 weeks before the crime, she sent another friend a message stating "I haven't figured out how to kill him without being caught, so. [sic] I'm still here." (TT 51-52; People's Exhibit 5).

Three days before the murder, Appellant had a heated discussion with Grover via text messages. Over the course of *four minutes*, Appellant:

i) rhetorically asked Grover "Are you this stupid?!" after he suggested taking their daughter to his parents' house;

ii) asked him "is something wrong with your brain";

iii) belittled him by writing "I have full complex thoughts like a human being. And you can't understand them.";

iv) asked "WTF is wrong with you? I think you might have some sort of mental disorder?"; and

v) culminated her tirade by calling him an "asshole man child."

(TT 93-99; People's Exhibit 7).[3]

b. The CPS Interview

Appellant been contacted by CPS because she had been seen with bruises (People's Exhibit 10). She set up a meeting with them for September 27, 2017 at 10:00 a.m.. (TT 154-155). Grover was shocked to find out that they thought he might be hitting her. (TT 155). After the meeting, Grover went to work at the gym where he coached gymnastics. (TT, 155; People's Exhibit 10). His demeanor was not unusual in any way. (TT 155-156). His boss, Marisa Hart, inquired about the meeting and Grover said that he was shocked to hear they thought he hit Appellant. (TT 155). He told CPS he had nothing to hide. (TT 155-156).

Appellant, on the other hand, was very disturbed by the CPS interview. Despite being told not to contact potential witnesses in the CPS investigation, she reached out to Hart, who used to employ Appellant as well. (TT 158-159). She wanted to make sure that Hart would say that Appellant bruised easily, which Hart knew to be true from the time Appellant worked at the gym. (TT 158).[4]

[3] Approximately 30 minutes before this exchange, Grover had complained to Appellant that she was "so negative." (TT 88-90, People's Exhibit 6). She responded by texting "I'm not negative. At all. Only with you." (Id.) Grover then offered "so maybe you'll [be] happier if I go if I make you so unhappy" (Id.). Appellant continued to complain to him and stated that things seem to "swirl around your head but don't actually go in your ears." (Id.).

[4] Appellant's sister also knew that Appellant bruised easily. (TT 986).

c. The Murder

Shortly after 2:00 a.m. on September 28, 2017, Town of Poughkeepsie Police Officer Richard Sisilli was on Taft Avenue in Poughkeepsie when he stopped at a red light behind another vehicle. (TT 175). The vehicle, which contained Appellant and her two children, did not move when the light turned green, so he sounded his air horn. (TT 176, 179-190). Appellant then got out of the vehicle and began walking towards Officer Sisilli. (TT 176). She was crying and shaking. (TT 206). She said she had been "in a fight with her husband involving a gun." (TT 177). After learning where the incident occurred, Officer Sisilli radioed that information so other officers could be dispatched to Appellant's residence. (TT 177-178).

Police Officer Joseph Murray was the first to enter her apartment. (TT 299-300). He observed Grover, deceased, lying on his back on the couch with his hands laying across his torso and his legs stretched out, as if he had been sleeping. (TT 304-305; People's Exhibit 13). Grover had a visible gunshot wound to the head which appeared to have entered Grover's left temple, passed through his head, and exited out his right temple. (TT 466, 469; People's Exhibit 18). There was a pistol on the floor next to the couch. (TT 304-305; People's Exhibit 13). The projectile was later found in a pillow that had been next to Grover's right ear. (TT 341-342, 351-352, 373; People's Exhibits 16, 26). Officer Murray found a camera on the

floor of another room with the memory card door open (TT 305). He also saw that in one bathroom the shower curtain was closed, the water was running, and the tub was filling up with water. (TT 305-306). He found a laptop computer, broken in half at the hinges, submerged in the water, and he turned the water off. (TT 306-307, 317-318, People's Exhibit 24).

Detective Thomas Keith, a Crime Scene Technician, also arrived at the apartment to document the scene and gather evidence. (TT 330, 332-333). He did not find a shell casing at the scene, even though one would have been ejected from the gun Appellant used. (TT 338). A used baby wipe was found in the trash can. (TT 264).

Meanwhile, Officer Sisilli continued to speak to Appellant on the side of the road. He was having difficulty because Appellant was not giving direct answers to his questions and answered most of his questions with questions of her own. (TT 208). Appellant stated that Grover had a gun and, at various times, provided inconsistent explanations of how she got the gun from him, alternately stating that she kneed him in the groin, smacked it out of his hand, and elbowed him. (TT 215-216). She told the officer that after she got control of the gun, Grover threatened her and "the gun had just gone off." (TT 178). She said that he was "lying on the

couch, just lying there" when she shot him. (TT 214). Officer Sisilli asked if she needed medical attention, but she declined. (TT 206-207).[5]

Appellant was then brought to the police station where Detective Darrell Honkala interviewed her in a video-recorded interview. (TT 251-252; People's Exhibit 10). She waived her Miranda rights and claimed that when Grover came home from work, she asked about his CPS interview. (People's Exhibit 10). Grover told her it was fine and thought that he had nothing to worry about. (Id.). She stated that she asked him to let her leave with their children and said she would not tell anyone what happened. (Id.). She said that at some point Grover threw his camera, which she alleged he used to take pictures of "things that he would do to me," across the room. (Id.).

She asserted that she and Grover both went into their bedroom, where he took out his gun. (Id.). Appellant claimed that Grover then showed her how to load it and gave her bullets to load it herself, but she wasn't able to do it. (Id.). She then begged him to let her leave. (Id.).

Appellant alleged that she then took a shower and Grover got into the shower with her. (Id.). She claimed that when she got out Grover was on the living room couch and "made" her have sex with him on the couch. (Id.). She said he

[5] Appellant had what appeared to be a bruise on her cheek, but she later stated it was old. (TT 260, 270; People's Exhibit 10). She had no other bruises anywhere on her body. (TT 270). She later stated that she was bleeding "a little bit" as the result of "sex stuff." (People's Exhibit 10).

wore a condom, which he had never done before. (Id.). Afterwards, she stated he threw it away, although a used condom was not found in the apartment. (TT 346; People's Exhibit 10). She said that they both got dressed and Grover fell asleep on the couch with his arms around her. (People's Exhibit 10).

She told the detective that she attempted to get up, but Grover woke up, pulled her back down, and asked where she was going. (Id.). She stated that she told him that she was going to check on the children. (Id.). She alleged that Grover then pulled the gun out of the couch cushion, and Appellant kneed him in his groin, causing him to drop it. (Id.). Appellant stated that she then got off the couch, picked up the gun, and "held it to him." (Id.). She claimed that Grover turned his head to her and said "you wouldn't do it, you don't have it in you." (Id.). Appellant told the detective that Grover then told her to him the gun and he would kill both of them, leaving their children without parents. (Id.). She said after he mentioned the children, "[h]e faced me, and then he looked up for a second, and I shot him." (Id.). According to Appellant, Grover was "still laying on his back" on the couch with his hands on his chest and he "didn't even get up" when she pulled the trigger. (Id.).

She stated that she picked up the gun and put it back down, but inexplicably took a bullet with her. (Id.). She said she then checked Grover's pulse and heard the shower running, so she went to go turn the water off. (Id.). She claimed to have

seen his laptop computer submerged in the bathtub, but she left it there and did not turn the water off because she didn't know what to do. (Id.). She said that she then got her children and carried them to her car. (Id.).

Appellant stated that she started driving away and called Sarah Caprioli, who did not answer her phone, and then another friend, Elizabeth Clifton. (Id.). She said that she decided to go back to her apartment, but when she returned, she turned around in the apartment complex and left again. (Id.). She told the detective that she was stopped at the red light, deciding whether to go to the police or to Elizabeth's house, when she noticed Officer Sisilli behind her. (Id.).[6]

Towards the end of the interview, Appellant asked whether a SAFE (sexual assault forensics examination) would be necessary, and when she was told the choice was hers, she declined. (TT 274-276; People's Exhibit 10).

d. Forensic Evidence

A forensic examination of Grover's phone showed that the website history had been deleted sometime that night. (TT 102). Investigators were able to restore it, however, and it showed that from 11:19 to 11:34 p.m., the phone searched for, among other phrases, "will they know ahe [sic] was asleep when shot" "What will happen if someone was asleep and then someone shot them in the head? Will they

[6] Appellant did not live far from the Town of Poughkeepsie Police Department, but she drove past both of the routes she would take to get from her apartment to the police station. (TT 204).

wake up and die or they die instantly?" and "how they determine id [sic] shot person was asleep when shot." (TT 102-115; People's Exhibit 8).

The final web page that the phone visited was a news story titled "Police: Steve McNair Shot Dead in Sleep by Girlfriend." (TT 115-116; People's Exhibit 8). That page was, as it sounds, a news story about former professional football player who was fatally shot in the head by his girlfriend as he slept. (TT 116).

Even though the laptop computer had been submerged, its contents were recovered and analyzed. (TT 383-384). It was Grover's computer and there was no history of visiting pornographic websites on the computer, no pornographic photos or videos, and no photos or videos of Appellant being injured or assaulted. (TT 385-388). There were "a lot" of family-related images of Appellant, Grover, and their children. (TT 387).[7]

The memory card of the digital camera was also searched, and it was also found to contain numerous family photos and videos, but no images of Appellant being physically or sexually abused. (TT 347-348).

Grover's autopsy showed a "muzzle imprint" of the firearm in his left temple, which occurred because the barrel of the gun had been pressed directly against his skin when he was shot. (TT 471-473; People's Exhibit 29).

[7] A defense witness subsequently testified that Grover's phone likewise did not contain any pornography, pictures or videos of Appellant being physically or sexually assaulted, or bookmarks to pornographic websites. (TT 624-625).

2. The Defense Case

a. Appellant's Testimony

Appellant testified that she met Grover in 2008 and they moved in together in 2012. (TT 639). She stated that Grover started to force her to have sex with him after their son was born in 2013, and that the sex and violence increased over time. (TT 640, 646). The majority of her testimony, other than discussing the night of the crime, consisted of Appellant describing many instances in which she stated Grover raped and/or assaulted her throughout their relationship. (TT 647-716). She testified that the abuse started when she disclosed to him that Cesar Betancourt, a maintenance worker at an apartment complex her mother managed, had been raping her. (TT 804-806, 824-825). She claimed Chris started to "role play" and mimic Cesar's conduct. (TT 817). She also claimed that sometime in 2015 Grover had taken pornographic pictures of her and uploaded them to Pornhub, an adult website, without her consent. (TT 688-693, 696).

She testified that twice in September 2014 she went to the SAFE unit of Vassar Brothers Hospital for examinations. (TT 648-649, 657). She also stated that in the summer of 2017 she sought treatment from Susan Rannestad, her midwife, for injuries that Grover caused. (TT 702-703).

Appellant described how she was contacted by CPS and set up an appointment with them for the morning of September 27, 2017. (TT 720). She was

upset by this, but Grover was not. (TT 947). She called Sarah Caprioli to ask if CPS would be able to obtain any materials that she didn't want them to have (TT 967). CPS offered to tell Grover about the report if she was afraid to tell him, but she said she was not afraid. (TT 971).

CPS came to her house where she and Grover were separately interviewed. (TT 721). She denied any abuse and also denied that there were any weapons in the apartment, despite knowing about Grover's lawfully-registered gun. (TT 721-722). While she was being interviewed by CPS, Grover was so unconcerned that he took the children to a playground. (TT 975, 978). In contrast, while Grover was being interviewed, Appellant was so concerned that she remained in the apartment and tried to overhear what he was saying. (TT 979). She testified that when CPS left, Grover made her call the people who she identified as witnesses to CPS to make sure they would say everything was okay. (TT 723).

Regarding the events of that evening, she stated that when Grover came home from work she asked about his interview. (TT 729). She then told him she thought they should separate. (Id.). Grover interrupted and demanded that she bring him his camera, and after she did, he threw it on the floor. (TT 729-730). She testified they then went into the bedroom where Grover took out the gun and told her he could kill her in her sleep. (TT 730-731). He showed her how to load it. (Id.). He then, according to Appellant, showed her diagrams of the brain on his

phone and described what would happen if he shot her in different places. (TT 731-732).

Appellant testified that she "was pretty sure he was going to kill me" but inexplicably decided to take a shower. (TT 732). Grover got in the shower with her and threatened to shoot her. (TT 733). Grover left the shower first, and Appellant got out shortly after. (Id.). She then got dressed. (TT 734). She testified that Grover then stopped her, pushed her to her knees, and forced himself into her mouth. (Id.). He pulled her up to her feet and apologized, but then pulled her onto the couch on top of him. (TT 734). He put on a condom and had sex with her. (TT 734-735). When he finished, she put her pants on and he used a baby wipe to clean the couch. (TT 735). She went into the children's bedroom and stayed for awhile. (TT 736-739). Grover was on the couch and motioned for her to join him. (Id.). She walked over and laid on top of him. (Id.).

When she thought he was asleep, she tried to get up, but Grover lifted up his arm and had the gun in his hand. (TT 741). She kneed him in the groin and the gun fell to the floor. (TT 742). Appellant said she got off the couch, picked it up, and pointed it at him. (TT 743). She said Grover remained on the couch and did not try to get the gun. (TT 1099). She testified that she two steps to her right, towards the door to the apartment, and Grover said, "you won't do it." (TT 743). She claimed that he told her that she would give him the gun and he would kill her and himself,

leaving the children with no one. (Id.). She was about one step away from him. (TT 744). At that point, Appellant "took one last step towards him, [] lunged, and [] pulled the trigger." (Id.). She then dropped the gun but picked up a bullet, or possibly a shell casing, that she saw on the floor. (TT 748-749, 755). She then heard running water and went to the bathroom where she saw the laptop in the bathtub. (TT 749). She claimed that she could not turn the water off and left the laptop there. (Id.). She picked up the children and carried them to the car. (TT 750). She called Sarah, who did not answer, and then called Elizabeth Clifton, who told Appellant to come to her house. (TT 750-751).

Appellant felt that she should go back to the apartment for the computer, because she thought that the pictures Grover took of her would be on it. (TT 751). She drove back to the apartment and went inside, but then left again, empty-handed. (TT 753).[8]

Appellant also testified that she sent the text message stating "I haven't figured out how to kill him without being caught…" to a friend in "jest." (TT 717).

On cross-examination, Appellant stated that early in her relationship with Grover, she disclosed she was sexually abused as a child. (TT 761). She told him

[8] She testified that she previously told Sarah that the laptop would have pictures proving Grover's abuse, and Sarah counselled her in "many" conversations that if she ever left Grover, it was "most important" to take the laptop and camera memory cards. (TT 929, 992, 1134).

that because of that, he would have to be patient with her sexually, (TT 762). Grover agreed to wait as long as she needed to feel comfortable being intimate with him. (TT 762). He was "kind" and "caring." (TT 763). He enjoyed playing video games and was "like a big kid," which was endearing to Appellant at first, but over time became aggravating. (TT 766-767).

While Appellant was pregnant, Grover made video tribute to her that he called "Becoming a Mom" and gave to her as a Mother's Day present. (TT 778, 781). When Appellant was pregnant, she gave Grover a handwritten card with a list of "25 Reasons You're Going to Make a Great Dad!" which included "family is your biggest priority," "you love me!," "you are gentle but strong," "you've done everything you can to make a stable home for our family," and "you get up at any time to make sure I have food that I'll eat." (TT 867-868; People's Exhibit 60). Appellant also gave Grover a handwritten birthday card approximately three months after her son was born – during the time, she previously testified, that he was violently abusing her – from her and their son in which she wrote Grover was "a loving father, a selfless provider, and the man whose footsteps I am proud to follow." (TT 1154-1157; People's Exhibit 78).[9]

[9] The People's forensic psychologist testified in rebuttal that it "doesn't make sense" that Appellant would want her son follow his father's footsteps if he was a violent rapist who had horribly abused her for a long period of time. (TT 1960).

b. Other Evidence

Appellant presented a "cyber forensics" expert who attempted to blunt the impact of Appellant's text message stating "I haven't figured out how to kill him without being caught…" by testifying that a few seconds after Appellant sent that message she texted an emoji known as a "grimacing face." (TT 529-530, 537-539). He also testified that the web history from Grover's cell phone showed it had searched sexually explicit terminology. (TT 566-568). These searches were from various days in July, two and a half months before the crime. (TT 568-570; Defense Exhibit AA-1).

Appellant also presented several friends and acquaintances who testified that over the course of her relationship with Grover, they observed her with bruises and/or wearing unseasonably long-sleeved clothes. (See, e.g., TT 1241-1276, 1360-1366, 1536-1543. None of them ever saw Grover assault or abuse Appellant.

Susan Rannestad, Appellant's midwife, testified that she examined Addimando three times in 2017 and observed injuries to her vagina, vulva, rectum, and, on one occasion, elsewhere on her body. (TT 1284, 1287-1300).[10] She admitted that Appellant had told her the purpose of these visits was for documentation purposes so she could obtain custody of the children. (TT 1336-1337). Rannestad also admitted sharing Appellant's medical records with Caprioli,

[10] Rannestad merely recommended that Appellant take Tylenol and warm salt baths for these injuries. (TT 1334).

and at one point told Appellant that she didn't send her the records because "I have to look up a few hints about making a chart that is evidence." (TT 1342).

Rannestad acknowledged previously telling the prosecutor that she belied Appellant "was controlling of [Grover] even though she claims he was her abuser," and testified that "I do think there is room here for… to wonder about this case. I think they were both sick and probably abusive to each other." (TT 1345-1346). Rannestad, Caprioli, and Appellant had discussed that Appellant's injuries could appear to be self-inflicted. (TT 1347-1349). She also conceded that she did not observe any injuries to Appellant when she conducted numerous pelvic examinations on her throughout her second pregnancy in 2014 and 2015, despite Appellant's claims of being violently assaulted throughout that period. (TT 1304, 1313-1324).

Lastly, Appellant called Dr. Dawn Hughes, an expert in the area of "interpersonal violence and traumatic stress." (TT 1587). Dr. Hughes testified that based on Appellants history, self-reported relationship with Grover, and other factors, Appellant had a heightened perception of fear and danger at the time she killed Grover. (TT 1648; see generally, TT 1595-1651).

3. The Prosecution's Rebuttal Case

In rebuttal, the People presented forensic evidence proving that one of the photographs Appellant introduced into evidence which she claimed depicted severe vaginal injuries, (see TT 958-960, 965-966; People's Exhibits 64, 65), could not have been taken by Appellant's cell phone, as she claimed, or in the manner she testified. (TT 1769-1770, 1773-1778).

The People also recalled Marisa Hart, who testified that she taught gymnastics classes to Appellant and Grover's children "for a long time" starting in 2014. (TT 1803, 1806). She observed that they were "having fun" together during the classes, just like "a normal mom and dad taking kids to gymnastics and enjoying their time while they were there." (TT 1804, 1807). Appellant never had any visible bruises or injuries. (TT 1805, 1807).

The People then called Jenn Ventura, another employee of the gym who was friends with both Appellant and Grover and frequently observed them interact with each other. She said they had a "normal relationship" and she "never" observed Grover act aggressively towards Appellant. (TT 1836). She also went on vacation with Appellant and Grover over Memorial Day weekend in 2011 and 2012. (TT 1837-1838, 1847). Appellant had no visible injuries on these occasions, and they acted "normal." (TT 1848).

Finally, the People called Dr. Stuart Kirschner, an expert in "forensic psychology." (TT 1868-2041). Dr. Kirshner testified that Grover did not exhibit the "character pathology" of an abuser and there was "absolutely no indication" that he was possessive or controlling of Appellant. (TT 1901-1905). In fact, some of Appellant's actions and the extent of her independence from Grover were the "total opposite" of the extreme psychological and physical control that is typically seen in cases where someone abuses a partner as horrifically as Appellant alleged. (TT 1914-1915). Other aspects of their relationship were "so contrary to anything we know about how batterers treat their victims." (TT 1915). He concluded that Grover's treatment of Appellant "doesn't match what a batterer would do." (TT 1917).

Dr. Kirshner also said that the idea that Grover, who was not otherwise violent, would turn into an abuser by mimicking the prior abuse that Appellant disclosed to him was something that was not consistent with any research in the field and he had never heard of such a scenario. (TT 1937).

Referring to People's Exhibits 4-7, the text messages between Appellant and Grover, Dr. Kirschner noted: "the person who's really being abusive here is [Appellant]. She's the one who's being condescending. She's the one who's telling him that he's, you know, an idiot basically." (TT 1941).

Finally, he testified that it very significantly "speaks to [Appellant's] reliability" that she did not mention to either Officer Sisilli or Detective Honkala that Grover showed her pictures of the brain and made comments about shooting her, because Appellant had since stated that was the trigger that caused her to feel differently about that night and that her life was in danger. (TT 1962-1965). In his experience, an individual in such a situation would not forget to mention or omit such a significant detail. (TT 1964-1965).

4. The Pornhub Pictures

During Appellant's testimony, she identified a number of photographs as the pictures of her that were on Pornhub. (TT 688-693, 696; Defense Exhibits GGG – MMM.)

Detective Jason Ruscillo of the Hyde Park Police Department testified that in 2015 he was investigating these photographs and observed them on PornHub. (TT 1518-1519). He identified Defense Exhibits GGG through MMM as the pictures he saw online. (TT 1520-1522).

Dr. Hughes testified that she had viewed the pictures and asserted that what they depicted, and the act of uploading them without consent, was a form of "sexual violence" inflicted upon Appellant by Mr. Grover. (TT 1626-1627, 1631, 1640-41).

Appellant also attempted to admit two other exhibits into evidence, which were marked as Defense Exhibits UUU and VVV for identification. Defense Exhibit UUU was a screenshot of the profile for the Pornhub account that contained the photographs admitted as Defense Exhibits GGG – MMM. See Def. Ex. UUU. The profile contained the account name "groverrespect" and included biographical information, such as the user's purported age, interests, and geographic location. Id. Defense Exhibit VVV was a collection of screenshots showing the "activity log" of that username. See Def. Ex. VVV. The log showed that this account uploaded the photographs at issue and also posted obscene and vile comments about these, and other, pictures. Id.

Appellant's counsel showed these exhibits to Det. Ruscillo, who testified that he had seen them on Pornhub, but agreed with Appellant's counsel's statement that there was "no way of knowing who" provided the information or posted the comments. (TT 1520, 1522).

At the end of the day's proceedings, long after Det. Ruscillo finished testifying, Appellant sought to make a record about this issue. (TT 1554-1560). She argued that the defense should have been permitted to elicit from Det. Ruscillo that the username was "groverrespect" and that the biographical information that it contained, such as the listed interests and approximate age, matched Christopher Grover. (TT 1555). The Court noted that the issue had previously been discussed

off-the-record and that because the profile and comments could not be authenticated or connected to Grover, they were not admissible. (TT 1555-56). The Court explicitly stated that its ruling was limited to the "information around the pictures" not being sufficiently authenticated, and noted that Appellant had been able to fully introduce the photographs themselves into evidence and establish that they had been uploaded to a web site without her consent. (TT 1559-1560).

During cross-examination of Dr. Kirschner, Appellant attempted to solicit information about the username and profile of the account where the pictures had been uploaded, but the People's objection was sustained. (TT 2008-09). The court ruled that counsel could not ask the witness to describe the content of the web page but could ask what effect that information had on his conclusions and opinions. (TT 2009). Appellant proceeded to do just that, showing the witness Trial Exhibits UUU and VVV for identification and asking several questions about them. (TT 2010). Dr. Kirschner testified that the information "corroborates that there were images of her on the internet, but it doesn't corroborate necessarily who put them there, how they got there." (Id.).

Appellant later argued that this answer from Dr. Kirschner was misleading and opened the door to the admissibility of the two exhibits. (TT 2110-2111). Counsel forthrightly conceded that "there is no evidence as to who posted [the

pictures]" but argued that the jury should nonetheless be given the opportunity to "connect" the Pornhub profile to Grover. (TT 2110-2111).

The Court noted that that on a website "anyone can name their screen name or their profile anything they want." (TT 2112). The court then asked Appellant's counsel his favorite baseball team and stated he could make a profile, without counsel's permission, using his name and saying he was a fan of that team. (Id.). Counsel agreed that could be done. (Id.). The Court concluded that it was improper to take something that was "not authenticated" and "not even hearsay" and "invite[] the jury to assume that that's the person who uploaded it." (TT 2113).

E. Sentencing

Following her conviction, Appellant moved to be sentenced under the DVSJA. The Court granted Appellant an evidentiary hearing and discussed with the parties the statutory elements, the burden of proof, and the applicable rules of evidence. (ST 7-11 (making a record about the parties' pre-hearing submissions on these issues)).

The trial transcript was admitted into evidence at the hearing. (ST 6). Appellant also called a number of witnesses. One witness described an incident in 2014 in which she observed Appellant with injuries to her face and neck and another incident in 2017 in which she observed bruises on her chin and mouth. (ST

16, 19). Appellant later told the witness that Grover caused the 2014 injury. (ST 47).

Sarah Caprioli, Appellant's therapist, was another witness. She met Appellant in 2014. (ST 55). Caprioli testified to seeing Addimando with red marks and injuries on a number of occasions, which Appellant generally stated had been caused by Grover. (TT 60-64, 83-85, 87-95, 115-117).

Caprioli described one time when Appellant brought her two memory cards that supposedly contained video recordings of Appellant and Grover having sex that Grover made without her consent, but Appellant would not consent to Caprioli giving them to the police, looking at them, or copying them to her computer. (TT 86). Another time Appellant brought her two more memory cards, but they did not contain any sexual pictures or videos. (TT 88).

Appellant also called an expert in the field of "domestic abuse." (ST 304).

Following the hearing and post-argument written submissions, the Court issued a 48-page written decision. (Decision and Order (McLaughlin, J.), February 6, 2020 [hereinafter "DVSJA Dec."]). The Court concluded that there were "significant, unresolved questions" about Appellant's allegations and "weighty questions" regarding her account of her relationship with Grover and whether he

was the perpetrator of such abuse. (Id., pp. 40-41).[11] As a result, Appellant failed to meet her burden of proof. (Id., pp. 44-45, 47).[12] This conclusion was eminently reasonable in light of the glaring inconsistencies in Appellant's account of the crime, the contradictions among the evidence she presented, and other factors. For example, the court specifically noted:

- Appellant had told some friends, and led others to believe, that "D.T" had repeatedly sexually abused her, stalked her, and injured her. However, when asked at trial if D.T. ever forced himself on her, Appellant said "no." (Id., pp. 13-14).[13]

- Although both Dr. Hughes and Dr. Kirschner testified that severe abusers exert complete control over their victims, it was uncontroverted that Appellant ran her own business, had private bank accounts, and was not socially isolated or restricted from traveling, working, or seeing friends. (Id., pp. 17-18). Grover was aware she was seeing a therapist and did not attempt to stop her from doing so, nor did he object to her living with "D.T." while he was allegedly assaulting her. (Id.). Grover did not monitor her calls, follow her to work, or otherwise seek to control her. (Id., p. 32).

- The "revealing" text messages between Appellant and Grover in the days and weeks before the murder. (Id., p. 18). Dr. Hughes testified that the barrage of insults and curses showed Appellant "emotionally degrading" Grover, and Dr. Kirschner described them as "berating and condescending"

---

[11] The court noted that in addition to Grover, Appellant had alleged she had previously been abused by "Butch," "Cesar," another man named "Chris," a police officer with the initials "D.T.," someone named "Race," and someone nicknamed "A-Rod." (DVSJA Dec., pp. 12-14). The Court noted that, every single relationship Appellant had with a male partner or acquaintance had, according to her, "included either physical or sexual abuse, or both." (Id., p. 14).

[12] The parties agreed before the hearing that Appellant, as the movant, had the burden to prove she was entitled to relief by a preponderance of the evidence. (DVSJA Dec., p. 8).

[13] Appellant testified at trial that when she was arrested, she called her mother and then "immediately" called D.T. (TT 1163-1164).

messages that would serve no purpose other than to provoke Grover if Appellant's claims were true. (Id., pp. 18-20). Appellant's midwife, who had been seeing Appellant since 2014, thought she and Grover were "sick and abusive" to each other. (Id., p. 19).

- Appellant testified that Grover physically and sexually abused her throughout her second pregnancy, but her midwife testified that she performed full examinations on Appellant and did not document any injuries of evidence of abuse. (Id., p. 20).

- Although Appellant claimed that she thought the camera Grover threw across the room contained documentation of her abuse, the memory card of the camera had no such pictures on it. (Id., p. 21).

- Similarly, the laptop computer – which Appellant told police would likely have evidence of her abuse, and which she argued Grover submerged in the bathtub to destroy this evidence – was resurrected and did not contain any pornography or proof of abuse. (Id.).

- Additionally, Caprioli had repeatedly told Appellant to take the laptop if she ever left Grover, but after the murder she inexplicably did not either turn off the water or take it. (Id.).

- At a "physical" approximately two weeks before the murder, Appellant neither disclosed the abuse nor had any injuries that were observed by the doctor. (Id., p. 30).

In evaluating the evidence of *who* perpetrated any abuse inflicted on Appellant, the court highlighted that:

- Dr. Hughes testified that Appellant told her that some of the alleged incidents perpetrated by different people "sort of blend together" and she concluded that at one time Appellant was conflating two separate instances of abuse and appeared to be "confused" about those events. (Id., pp. 21-22).

- As discussed above, although Appellant stated to some friends that "D.T." was forcing her to have sex with him, when asked under oath, she stated that he did not do so. (Id., p. 23).

- Dr. Kirschner found it illogical that Appellant would tell D.T., a retired police officer, about Betancourt's abuse but not Grover's, and that she would leave the safety of living with D.T.'s family and moved in with Grover if he had been horrifically abusing her. (Id., p. 24). After all, D.T. was like Appellant's "personal bodyguard." (Id.)

- Appellant had provided other, different accounts of abuse to different people, and one time claimed to have been attacked by an "ex-boyfriend who was a police officer" at a time before her relationship with D.T. began and when Grover was out of town. (Id., p. 24).

- Appellant's mother had informed the police in another incident that she "makes things up for attention." (DVSJA Dec., p. 24).

The Court also recognized other, general issues with Appellant's claims, including:

- Despite Appellant's disclosures to some friends about Grover's purported abuse, she consistently resisted all attempts to forensically gather evidence or provide official reports to law enforcement. (Id., p. 25).

- At Appellant's first forensic examination she was asked whether she had been attacked with weapons, bitten, choked, or burned. (Id., p. 25, 30). She stated she had not, but when she returned for her second examination a few days later, she stated all of those things had occurred in the most recent assault. (Id.).

- Despite her claims of being assaulted and stalked by D.T., she wanted him to visit her in jail while she was held on bail in this case. (Id.).

- There would be no reason for Grover to want to destroy the camera or laptop, as neither contained any proof of alleged abuse. (Id., pp. 25-26).

- Her bizarre claims that an abuser would hand his victim a gun, teach her to load it, and make sure she knew how to operate it. (Id., p. 26).

The Court next considered whether Grover appeared to be abusive, and found the following evidence to be significant:

- Appellant herself described Grover as a "big kid." (Id., p. 31).
- She acknowledged Grover was willing to wait for "a year" to be intimate with her after she disclosed some alleged prior abuse to him. (Id.).
- A few days before the murder, Grover texted Appellant that he would leave if he made her unhappy. (Id.).
- Dr. Kirschner testified that it would be highly unusual for abuse to begin by someone being informed of abuse by another man that he then imitated. (Id., p. 32).
- Not one of the voluminous text messages introduced into evidence showed Grover being verbally abusive to Appellant in any way. (Id.).
- Grover was "calm" regarding the CPS investigation. (Id., p. 33).

Lastly, the Court considered the crime itself. In doing so, the Court specifically noted that its analysis was based on Appellant's version of events, as the People's contention was that Appellant "executed Christopher Grover as he slept." (Id., p. 45). The details of note to the Court included:

- The gun was pressed against Grover's temple as he laid on his back on the couch with his hands resting on his torso. (Id., p. 35).
- Appellant acknowledged Grover never attempted to get off of the couch after she gained possession of the gun. (Id., p. 37).

- Even though she had the gun, and Grover was a black belt in Taekwondo, Appellant lunged towards him before pulling the trigger. (Id.).

- Appellant testified that she pressed the gun to Grover's temple, but had told Caprioli that she did not think the gun touched his head. (Id., p. 38).

- She alternately testified that she did not remove the laptop from the water and that she did remove the laptop, but then put it back underwater. (Id.).

- She told Dr. Kirschner she did not take the laptop because she did not want to "tamper with evidence," but she admittedly took the shell casing. (Id.)

- Appellant told Officer Sisilli at different times that Grover dropped the gun because she kneed him, elbowed him, or knocked his arm. (Id., p. 39).

- Appellant never told Officer Sisilli or Det. Honkala that Grover showed her pictures of where he could shoot her in the head, although she testified that he did. (Id., p. 40).

Additionally, the Court found that Appellant had numerous resources available to assist her, including eight friends who offered help and services, numerous members of law enforcement, and many people trained in assisting domestic-abuse victims. (Id. pp. 26-27). The Court further described how Appellant admitted receiving advice on how to safely leave Grover, including that she should leave while he was at work and should take the laptop with her. (Id., p. 27). Multiple people had offered to let Appellant could live with them if she left Grover, and Caprioli even offered to help her pack. (Id., pp. 27-28).[14] The Court

[14] Caprioli testified at the hearing that a lack of support services was not a barrier to Appellant leaving Grover. (Id., p. 28).

also noted that although Appellant claimed that the CPS inquiry heightened her sense of fear for her safety, when she told Caprioli about the CPS investigation, Caprioli specifically told her that "CPS is the safe way out." (Id., p. 28).

After reviewing all of this evidence, the Court concluded that:

> There are significant, unresolved questions regarding the defendant's version of what occurred in her past and on the night of the homicide, as well as weighty questions regarding the nature of her relationship with Christopher Grover and the profile of Christopher Grover as an abuser, in action or by reputation.

(Id., p. 42). The Court found that because (i) Appellant had made many "inconsistent statements" regarding her alleged abuse by Grover and her account of the crime; (ii) Grover did not fit the profile of an abuser (even according to Dr. Hughes, Appellant's witness); (iii) Appellant had significant resources available to her; and (iv) Appellant's own description of the murder, in which Grover was laying supine on the couch when Appellant lunched forward to shoot him "point blank in his temple," Appellant failed to meet her burden to show she was entitled to relief under the Act. (Id., pp. 42-47).

The court subsequently sentenced Appellant to concurrent terms of 19 years to life imprisonment on the first count and 15 years imprisonment (with 5 years post-release supervision) on the second count.

ARGUMENT

POINT I

The Trial Court Properly Disqualified Defense Counsel (Responding to Appellant's Point I)

A. The Trial Court Did Not Improperly Deny Appellant the Right to Counsel of Her Choice or Force Her to Retain Counsel

The Federal and State Constitutions guarantee criminal defendants the right to counsel. U.S. Const. 6th Amend.; N.Y. Const. Art. I, § 6. However, "[a]n indigent defendant's constitutional right to the assistance of counsel 'is not to be equated with a right to choice of assigned counsel.'" (People v. Espinal, 10 A.D.3d 326, 329 (2nd Dept. 2004) quoting People v. Sawyer, 57 N.Y.2d 12, 18-19 (1982)). A court can replace assigned counsel upon making "threshold findings that [counsel's] participation would have … created any conflict of interest or resulted in prejudice to the prosecution or the defense." (Espinal, at 329). In such a situation, a "defendant's preference for a particular assigned attorney is not controlling." (People v. Guistino, 59 Misc.3d 801, 804 (Glens Falls City Ct. 2018)).

As a preliminary matter, Appellant claims that she was denied the "constitutional right to counsel of her choice" and that she was "forced to retain" new counsel as a result of the Court's decision to disqualify DCPD. (App. Br., pp.

15-16, 18 n 6, 29). These are wholly inaccurate and misleading descriptions of what occurred. *First,* DCPD was assigned to represent Appellant. (App. Br., p. 14). Therefore, Appellant plainly did not have a constitutional right to assigned counsel of her choice. (Sawyer, at 18-19; Espinal, at 329).[15] *Second*, the result of the court's decision disqualifying DCPD from this case neither left her without counsel nor "forced" her to retain counsel: the court plainly did nothing more than disqualify one public defender's office and appoint another public defender's office in its place. (Disqualification Dec., p. 8). While Appellant eventually retained private attorneys to be trial counsel, she intended to do so long before this conflict arose, and her decision was wholly independent of the court's ruling. (TT 1367-1370).[16]

B. The Court Correctly Determined that DCPD had an Unwaivable, Irreconcilable Conflict

It is axiomatic that a defendant is entitled to conflict-free, zealous representation. (People v. Ennis, 11 N.Y.3d 403, 409-410 (2008)). It is so

[15] Indeed, nothing prevents DCPD or any other public defender from reassigning cases among staff attorneys for internal reasons, such as to manage caseloads. A defendant cannot complain that such an action constitutes a constitutional violation simply because he wanted to continue to be represented by the originally-assigned attorney.

[16] The prosecutor placed on the record at the conflict inquiry that from "early on" in the case Appellant had intended to only use the public defender's office through the grand jury presentation and then planned to retain private counsel. (DT 9). She stated she wanted to place this on the record because if the court disqualified DCPD, it could erroneously appear that any private counsel that was subsequently retained was only brought in because of the disqualification motion. (DT 10).

fundamental that counsel's "paramount responsibility is to [the] defendant alone" that an actual conflict of interest need not be present to warrant reversal of a conviction and a new trial; the "significant possibility" of a conflict is sufficient. (People v. Macerola, 47 N.Y.2d 257, 264 (1979)).

A conflict of interest is present when counsel represents someone whose interests "are actually in conflict with those of the defendant," (People v. McDonald, 68 N.Y.2d 1, 8 (1986)), and when a potential conflict has "operated on" the defense. (Ennis, at 410). The core concept of a conflict of interest is that it places a lawyer in "the very awkward position" of being subjected to conflicting ethical demands. (People v. Solomon, 20 N.Y.3d 91, 97 (2012)).

A trial court has the "independent obligation to ensure that defendant's right to effective representation [is] not impaired." (People v. Carncross, 14 N.Y.3d 319, 328 (2010)). Therefore:

> A determination to substitute or disqualify counsel falls within the trial court's discretion. That discretion is especially broad when the defendant's actions with respect to counsel place the court in the dilemma of having to choose between undesirable alternatives, either one of which would theoretically provide the defendant with a basis for appellate review. Criminal courts faced with counsel who allegedly suffer from a conflict of interest must balance two conflicting constitutional rights: the defendant's right to effective assistance of counsel; and the defendant's right to be represented by counsel of his or her own choosing. Thus, a court confronted with an attorney or firm that represents or has represented multiple clients with potentially conflicting interests faces the prospect of having its

> decision challenged no matter how it rules—if the court permits the attorney to continue and counsel's advocacy is impaired, the defendant may claim ineffective assistance due to counsel's conflict; whereas, if the court relieves counsel, the defendant may claim that he or she was deprived of counsel of his or her own choosing.

(People v. Watson, 26 N.Y.3d 620, 624 (2016) (quotations and citations omitted)).

A defendant's willingness to waive a conflict does not end the court's inquiry, and the court has "substantial latitude" in refusing a waiver in instances of both actual conflicts and "the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses." (Watson, at 627 (2016) (quotations omitted)). As the Court of Appeals has recognized, these decisions must be made:

> not with the wisdom of hindsight after the trial has taken place, but in the murkier pre-trial context when relationships between parties are seen through a glass, darkly. The likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict.

(Carncross, at 327-328 (quotations omitted)). This determination will not be second-guessed simply because a readily foreseeable potential conflict did not actually come to pass as the proceeding continued. (Watson, at 627).

Based on these principles, it is clear that the trial court correctly found a conflict existed and disqualified DCPD for three reasons. *First,* DCPD had an actual conflict due to their competing ethical duties to both Cesar Betancourt and Appellant. *Second*, DCPD had affirmatively taken steps on Betancourt's behalf

that were contrary to Appellant's interests. *Third*, DCPD was willing to alter their defense of Appellant to avoid a conflict, which definitively shows that this conflict would have "operated on" the defense had DCPD not been disqualified.

1. DCPD Had Represented, And Currently Represented, An Individual Whose Interests Were at Odds with Appellant's Interests and Who Was a Potential Witness Against Appellant

An attorney's duty of loyalty to his or her clients survives the termination of the attorney-client relationship. (People v. Ortiz, 76 N.Y.2d 652, 656 (1990). This duty extends to all members of a public defender's office, not just the individual attorney who represented the client. (Watson, at 625 (public defender has an "institutional duty of loyalty to its former client")).

It is therefore a conflict of interest when an attorney's former client may be a witness against a current client, because

> [t]he attorney's decision whether and how best to impeach the credibility of a witness to whom he – or his law partner – owe[s] a duty of loyalty necessarily place[s] the attorney in a very awkward position, where *prejudice to defendant need not be precisely delineated but must be presumed.*

(McDonald, at 11 (emphasis added)). Therefore, a court faced with the realistic possibility of this situation occurring should err in favor of disqualification. (Gjoni v. Swan Club Inc., 134 A.D.3d 896, 897 (2nd Dept. 2015) ("any doubts as to the existence of a conflict of interest must be resolved in favor of disqualification …");

Severino v. DiIorio, 186 A.D.2d 178, 179 (2nd Dept. 1992) ("any doubts about the existence of a conflict should be resolved in favor of disqualification so as to avoid the appearance of impropriety")).

In light of this standard, it is clear that the court below made the correct decision. Betancourt was neither a disinterested third-party in this case nor "collateral" to the issues in this case, as Appellant contends. (App. Br., p. 38). Throughout the pendency of this case – and at trial – Appellant claimed that Betancourt, a prior client of DCPD, committed multiple heinous, violent crimes against her and that his conduct contributed to her committing the instant crime while suffering from Battered Women's Syndrome. He was, as the court found, "central to the defense" and "intricately interwoven" into Appellant's assertion of BWS. (Disqualification Dec., pp. 5, 7). The court noted that it was Appellant who made Betancourt relevant to the instant case and that Appellant's own expert placed "significant weight" on Betancourt's alleged abuse in formulating her opinions and conclusions regarding Appellant's state of mind at the time she killed Grover. (Id., p. 6; Mem. of Law in Opp. to People's Motion to Recuse, May 14, 2018, p. 1.).

The court also correctly noted that Betancourt would be a "necessary" rebuttal witness if the prosecution sought to refute Appellant's claims – and therefore, was someone that DCPD would seek to discredit – was an untenable

situation. (Id., p. 5). The result of Betancourt's criminal case, and his underlying conduct, would have been proper (and potentially valuable) impeachment material, but DCPD would not have ethically been permitted to cross-examine him about it, because

> The duty of loyalty to a former client is broader than the attorney-client privilege and an attorney is not free to attack a former client with respect to the subject matter of the earlier representation even if the information used in the attack comes from sources other than the former client.

(People v. Liuzzo, 167 A.D.2d 963, 963 (4th Dept. 1990).)[17]

The propriety of the court's ruling is even clearer when considered in light of the fact that Betancourt was not solely a prior client of DCPD, he was *a current client.* After the People's investigator contacted Betancourt, he reached out to DCPD, presumably because of his prior relationship with them. DCPD acknowledged that he was "seeking advice" and "wanted an attorney." (Letter from Criminal Department Bureau Chief Kara M. Gerry, May 1, 2018 [hereinafter "Gerry Letter"]; Aff. of Kara M. Gerry, Esq., in Opp. to People's Motion to Recuse, May 14, 2018 [hereinafter [Gerry Aff."], p. 3). DCPD then engaged in a number of acts, each of which, if not individually then certainly collectively, established an attorney-client relationship with Betancourt. In particular, DCPD:

[17] Additionally, DCPD's representation of Betancourt was in 2011, the same time as he was allegedly repeatedly raping Appellant, which further complicated any potential cross examination.

(i) Gave Betancourt legal advice (that he did not have to speak to the People's investigator and had the right to an attorney), (Disqualification Dec., p. 2; Gerry Aff., pp. 2-3);

(ii) Informed him that they would contact the court "on his behalf," (Gerry Letter, May 1, 2018, p. 3); and

(iii) Immediately contacted both the investigating police department and prosecutor "invoking Betancourt's right to remain silent." (Id.).

The right to counsel and the right to remain silent are personal to the individual invoking them and a third party cannot invoke these rights on behalf of another. (People v. Mitchell, 2 N.Y.3d 272, 275 (2004)). Therefore, when DCPD invoked these rights on Betancourt's "behalf," they necessarily did so as his counsel. That office was therefore in the position of simultaneously representing both a defendant in a criminal case and a likely witness whom the defendant had accused of heinous, unspeakable crimes.

The fact that the People ultimately elected not to call Betancourt, due to how the trial ultimately unfolded, does not affect the propriety of the court's conclusions. (Watson, at 627 (2016); Carncross, at 327-328).[18] It was clearly impossible for DCPD to zealously and single-mindedly advocate for Appellant while also upholding their duty of loyalty to Betancourt.

[18] Although Betancourt did not testify, his purported conduct played a prominent role in the trial. A search of the transcript shows that he was referenced, either by name or as "the maintenance worker," (as he was known), 113 times throughout the trial, excluding opening statements and closing arguments. Appellant also testified that her son could have been a product of a rape by Betancourt. (TT 779).

2. DCPD Had, in Fact, Taken Steps Adverse to Appellant

A criminal defendant is entitled to "both the fact and appearance of unswerving and exclusive loyalty" from counsel. (Sawyer, at 20). An attorney is "strictly forbidden from placing themselves in a position where they must advance, or even appear to advance, conflicting interests." (Matter of Lichtenstein, 171 Misc.2d 29, 34 (Sup Ct. Bronx Cty. 1996)).

Here, DCPD engaged in an extensive pre-indictment effort to convince the prosecution not to present this case to a grand jury. DCPD specifically asserted that a significant contributing factor to Appellant's BWS was Appellant's history of prior sexual abuse by several perpetrators, including Betancourt. DCPD also provided the People with the names of many witnesses whom Appellant wanted the prosecution to interview who would supposedly corroborate Appellant's claims.

Thus, it is clear that DCPD served Betancourt's interests, but decidedly not Appellant's, by writing the letter to the police and prosecution invoking his right to remain silent. It unquestionably would have been in Appellant's interest for the People to interview Betancourt, ideally (for Appellant) without counsel, in order to fully investigate her claims of abuse and her proffered defense. Had Betancourt admitted her accusations were true, or even issued an unconvincing denial, it

would have undoubtedly inured to Appellant's benefit. DCPD's letter on Betancourt's "behalf" foreclosed any possibility of this occurring.

This presented an actual conflict of interest and demonstrated that DCPD failed to provide Appellant with single-minded, zealous representation due to their relationship with Betancourt. Because it was "difficult to repose confidence in counsel's single-minded protection of defendant's interests in these circumstances," the Court was correct in disqualifying DCPD. (Carncross, at 329).

3. DCPD Offered to Modify Appellant's Defense to Avoid the Conflict

A court acts "well within the bounds of its discretion" to disqualify counsel upon "concluding that allowing counsel to continue would severely undermine defendant's ability to present a cogent defense." (Carncross at 329).

In response to the People's motion, DCPD shockingly offered to omit any reference to Betancourt as a "contributor" to Appellant's BWS, which, counsel claimed, would obviate any conflict. (Disqualification Dec., pp. 5-6). The court noted that this would unquestionably "compromise[] the representation" of Appellant because "the experts who have already interviewed the defendant have clearly integrated Cesar Betancourt's prior actions in forming the basis of their opinion." (Id., pp. 5-6). Thus, if DCPD remained as Appellant's counsel and she were to be convicted at trial, the court recognized that this decision would provide Appellant with a clear ineffective assistance of counsel claim. (Id., p. 6).

The court's reasoning was eminently correct. Betancourt allegedly assaulted Appellant in the time period immediately before she was dating Grover, and she had alleged that Grover "role-played" as Betancourt while raping her. (Krauss Aff., pp. 7-8).[19] Appellant's expert witness relied on her claims of repeated sexual abuse by Betancourt in reaching her conclusions. (Disqualification Dec., pp. 5-6). Even without Betancourt being called as a witness, he was referenced well over 100 times during the trial – entirely during Appellant's case and the People's rebuttal case. See fn 18, *supra*. Plainly, the proposal to entirely omit him from the defense case would have crippled Appellant's effort to present a "cogent defense."

The astounding proposal by DCPD to entirely excise Betancourt from Appellant's defense represented a gross dereliction of their duty to vigorously represent Appellant. Indeed, DCPD's proposed "solution" to this conflict issue is, in fact, irrefutable proof that the conflict was unavoidable and that DCPD was willing to make tactical and strategic decisions based on factors *other* than their single-minded zealous representation of Appellant. (Watson, at 620 (affirming disqualification of defense counsel because the possible solution of not cross-examining a witness due to a conflict between counsel and the witness was "a tactic based on loyalty" to the other client); People v. Cristin, 30 Misc.3d 383, 393 (Bx. Cty. Sup. Ct. 2010) (proposal for a different attorney to cross-examine a

[19] At trial, Appellant testified that Betancourt was continuing to rape her *while* she was dating Grover. (TT 804).

witness that counsel previously represented was not a solution, it was proof of counsel's "complete disloyalty" to his client)).

C. Appellant's Remaining Arguments Are Meritless

Despite the multiple, readily apparent grounds for the court to have appropriately concluded that DCPD could not provide Appellant with conflict-free representation, Appellant offers several arguments in support of her position that the court's decision was erroneous. Each of these arguments is meritless.

Appellant first claims that there is only a conflict between former and current clients when the two representations are "substantially related." (App. Br., pp. 31-33). In support of this position, she two cases, neither of which are applicable.[20] Solow v. W.R. Grace & Co., 83 N.Y.2d 303 (1994) is a civil case decided before Watson, Solomon, Carncross, and many of the other authorities cited above, and, although the Court of Appeals used the "substantially related" test in that case, the Court did not state that this was the only basis for finding a conflict of interest or that other scenarios could not also present a disqualifying conflict. (Solow, at 308). In People v. Prescott, 21 N.Y.3d 925, 928 (2013), the Court specifically found a conflict existed due to "mutually incompatible legal

[20] Appellant also cites to the Rules of Professional Conduct. (App. Br., pp. 31-32). However, a defendant's reliance on the rules is "unavailing" because the Rules, while important, serve a different purpose and do not have the force of law. (People v. Herr, 86 N.Y.2d 638, 642 (1995)). This issue on an appeal "is not [whether any ethical rules were violated], but with whether defendant received the effective assistance of counsel guaranteed him by the State and Federal Constitutions." (Ortiz, at 656).

strategies" and held that "[t]he conflict is no less significant…because [ ] counsel's representation [of one party] ended prior to the completion of defendant's representation." (Prescott, at 926, 928). As shown above, DCPD employed such "mutually incompatible legal strategies" here: they wanted the prosecution to investigate and credit Appellant's claims that Betancourt repeatedly raped her, but simultaneously asserted Betancourt's right to counsel and right to remain silent, which hindered the prosecution's ability to do so.

Appellant also claims that People v. Burks, 192 A.D.2d 542 (2nd Dept. 1993) "controls here." (App. Br., p. 32). That case is readily distinguishable because in Burks the defense attorney was unaware of any conflict until after his cross-examination of the witness. (Burks, at 543). Therefore, counsel clearly "perceived no… loyalty owing to the witness" that could have affected his performance. (Id.)

Appellant next contends that because another attorney at DCPD represented Betancourt, that should not have been imputed to Appellant's counsel and that fact, standing alone, was insufficient to create a conflict. (App. Br., pp. 33-36). While it is true that knowledge of one attorney of a public defender's office will not be *automatically* imputed to other staff attorneys in the same way it would for attorneys at a private law office, (People v. Wilkins, 28 NY.2d 53, 56 (1971)), the rule does not apply when a defendant's attorney and the public defender's office were *actually aware* of the prior representation and therefore had to balance the

competing interests of multiple clients. (Watson, at 626). The fact that individual or the public defender's office take steps to protect the former client's confidences, such as preventing counsel from reviewing the file or speaking to the other attorney does not ameliorate any conflict, as Appellant now suggests – it exacerbates it, because such restrictions would not be placed on an unconflicted attorney. (Watson, at 620).

Next, Appellant contends that she validly waived any conflict. (App. Br., pp. 36-39). For a waiver to be valid, the court's inquiry must be "sufficiently searching to assure that [defendant's] waiver was knowing and voluntary." (People v. Caban, 70 N.Y.2d 695, 696-97 (1987)). A valid waiver demonstrates that the defendant "has an awareness of the potential risks involved in that course and has knowingly chosen it." (Macerola, at 263). Even then, a defendant's waiver is not dispositive. (Watson, at 627; Carncross, at 327-328).

During the court's conflict inquiry, conflict counsel identified the concern that he discussed with Appellant as "issues of cross-examination with regard to that potential witness and some of the limitations that Ms. Gerry might have with regard to that matter." (DT 7). This record is plainly insufficient to conclude that Appellant's waiver was knowing and voluntary. It provides no factual support for Appellant's current claim that she had any true understanding of these issues, and there is no indication that Appellant was aware – much less discussed with conflict

counsel – that DCPD had asserted Betancourt's constitutional rights on his behalf or had proposed curtailing Appellant's BWS claim by eliminating any mention of Betancourt.

Next, Appellant complains that the court failed to consider less drastic alternatives to disqualification. (App. Br., pp. 39-41). Appellant did not raise any other alternatives with the court below, so this claim is unpreserved. (CPL § 470.05). It is also meritless, and the proposals Appellant now suggests are in fact impermissible. Her suggestion that a conflict could have been avoided by limiting DCPD's potential cross-examination of Betancourt to publicly-available information, (App. Br., p. 40), is contrary to law. (Liuzzo, at 963 (counsel can not cross former client "even if the information used in the attack comes from sources other than the former client.")). Her proposal that another attorney could have been appointed to question Betancourt, (App. Br., p. 40), has also been previously rejected. (Cristin, at 393). Lastly, her suggestion that the Court could have ordered counsel not to obtain any information about Betancourt's DWI case, (App. Br., p. 40), is likewise unavailing. (Watson, at 626 (prohibiting attorney from investigating potential witness/former public defender client "directly impinged on [counsel's] representation of defendant.")).

Finally, Appellant provides precedent which, she argues, entitles her to dismissal of the indictment. (App Br., pp. 40-41). Appellant's reliance on these

cases is misplaced, as neither case involves a conflict of interest. See People v. Young, 137 Misc. 2d 400, 401 (Sup. Ct. Nassau Cty. 1987) (indictment dismissed because it was procured in violation of defendant's right to have counsel when he testified in the grand jury); People v. Estrada, 293 A.D.2d 626, 627 (2nd Dept. 2002) (same).

POINT II

The Integrity of the Grand Jury Proceeding Was Not Impaired by Isolated Instances of Hearsay (Responding to Appellant's Point II)

A. The Introduction of Hearsay Does Not Impair the Integrity of the Proceedings

Dismissal of an indictment is authorized when the underlying grand jury proceeding "fails to conform to the requirements of [CPL Article 190] to such a degree that the integrity thereof is impaired and prejudice to the defendant may result." (CPL §§ 210.20 (1)(c), 210.35 (5)). The Court of Appeals has explained:

> The 'exceptional remedy of dismissal' is available in 'rare cases' of prosecutorial misconduct upon a showing that, in the absence of the complained-of misconduct, the grand jury might have decided not to indict the defendant. In general, this demanding test is met only where the prosecutor engages in an 'over-all pattern of bias and misconduct' that is 'pervasive' and typically willful.

(People v. Thompson, 22 N.Y.3d 687, 699 (2014) (citations omitted)).

This standard is "very precise and very high" and is not met by "mere flaw [or] error." (People v. Darby, 75 N.Y.2d 449, 455 (1990)). "Certainly, not every improper comment, elicitation of inadmissible testimony, impermissible question or mere mistake renders an indictment defective." (People v. Huston, 88 N.Y.2d 400, 409 (1996)). The standard "should be stringent, because the dismissal of indictments for relatively minor errors can seriously interfere with the enforcement of the criminal laws." (People v. Hill, 5 N.Y.3d 772, 777 (2005) (Smith, J., dissenting)).

In contrast, when hearsay is elicited before a grand jury, dismissal of an indictment is warranted only when the properly-admitted evidence is not legally sufficient to support the charges. (CPL § 210.20 (1)(c)). This is an evidentiary issue that the Court of Appeals has noted is "obviously" different than an "impaired the integrity of the proceeding" claim and must be evaluated under a different standard:

> Obviously, on a motion to dismiss the indictment, the fact that inadmissible evidence, inadvertently adduced, has been introduced into criminal proceedings does not necessarily alter the validity of the proceedings; rather, such a defect renders the indictment dismissible when the remaining evidence is insufficient to sustain the indictment.

(People v. Hansen, 95 N.Y.2d 227, 233 (2000)). Put differently, "the submission of some inadmissible evidence during the course of [a grand jury presentation] is held to be fatal only when the remaining legal evidence is insufficient to support the

indictment." (People v. Avant, 33 N.Y.2d 265, 271-272 (1973); see also People v. Kappen, 142 A.D.3d 1106 (2nd Dept. 2016); People v. Simon, 101 A.D.3d 908 (2nd Dept. 2012)).

Appellant does not now claim that the admissible evidence was not legally sufficient to support the charges. Nor could she. A key role of the grand jury is to prevent "unfounded prosecutions," (Huston, at 405), and the propriety a prosecution is established by a conviction at trial. (People v. Pelchat, 62 N.Y.2d 97, 109 (1984) (After a defendant is convicted at trial, "the sufficiency of the evidence to convict…is manifest from the record."); People v. DeFreece, 183 A.D.2d 842, 843 (2nd Dept. 1992) (Defendant did not establish that he was prejudiced as a result of alleged perjury, and dismissal of the indictment was not warranted, when the trial jury convicted defendant without hearing any of the challenged evidence)).

The sum total of Appellant's objections are four questions and answers relating to one witness contained within the five-witness, 134-page grand jury presentation. Detective Guy himself was asked 72 questions, and he was called as a witness primarily because he his test-fired the gun Appellant used to commit the murder. (GJ 79-84). Only after asking grand jurors if they had questions for the witness did the issue of fingerprints or the gun having been wiped down arise. The

first time Det. Guy testified to hearsay was in response to a wholly different question posed by a grand juror:

> **Question:** And prior to you test-firing it – this is a question from a Grand Juror – there was an attempt to recover fingerprints?
> **Answer:** Yes.
> **Question:** Were there any prints recovered from the weapon?
> **Answer:** Prints were not recovered. They told us that the gun was wiped down.

(GJ 91). This answer was both non-responsive and impermissible hearsay, so the ADA, who, as discussed below, had a good-faith basis to believe the gun had been wiped down, rephrased the question to ask for the detective's first-hand observation:

> **Question:** It appeared to be wiped down?
> **Answer:** Yes.

(GJ 91). Shortly thereafter the ADA interrupted the proceeding to instruct the grand jury on hearsay. She unequivocally instructed them that "What one witness is told by somebody else is hearsay. We're not offering it for the truth of the matter." (GJ 93).[21] At the end of the presentation she further instructed the grand jury that they cannot consider any hearsay evidence in determining whether the evidence presented satisfies the "reasonable cause" standard. (GJ 130-131). These

[21] Concededly, the prosecutor later impermissibly asked the witness what he was told by someone else. (GJ 94). However, as discussed herein, this is garden-variety hearsay which did not impair the integrity of the proceeding and which was directly addressed by the limiting instruction that the prosecutor had previously given.

instructions were appropriate to give and legally correct, and the grand jurors are presumed to have followed them. (People v. Berg, 59 N.Y.2d 294, 299-300 (1983).

B. There is No Basis to Conclude the Hearsay Was False

Appellant attempts to bootstrap what is plainly a hearsay objection into an "integrity of the proceeding" claim by contending that Det. Guy committed perjury and, egregiously, that the prosecutor knowingly elicited this false testimony. (App. Br. 5, 18, 41-44). These baseless and inflammatory allegations are factually and legally meritless.

Detective Guy was a sixteen-year veteran law enforcement officer, (GJ 78-79). He undoubtedly appreciates the integrity of the grand jury proceeding and the significance of the oath he took as a witness. Appellant points to no evidence whatsoever suggesting he testified falsely or that the prosecutor knowingly suborned perjurious testimony. In fact, numerous other facts support the conclusion that his testimony, while hearsay, was truthful and that the prosecutor had a good-faith basis to believe that the detective had been told the gun had been wiped down. These other facts include that Sarah Caprioli told the ADA that someone from Appellant's "team," perhaps Appellant herself or her attorney, had stated that the gun may have been wiped down (TT 1424-1425); that a container of baby wipes had been found near the firearm (GJ 97); that a used baby wipe had been found in a trash can in Appellant's apartment (TT 264); and that the ADA had

requested forensic testing of the gun for the presence of solvents but had not yet received any test results. (TT 1425). There is plainly no basis to conclude that Det. Guy's testimony was false or that the prosecutor acted in bad faith.

Appellant's claim is fatally flawed in any event because, even if Det. Guy's testimony had been intentionally false, such testimony would nonetheless not rise to the level of impairing the integrity of the entire proceeding. (People v. Charles-Pierre, 31 A.D.3d 659, 659 (2nd Dept. 2006); People v. Avilla, 212 A.D.2d 800, 801 (2nd Dept. 1995)).

C. Appellant's Claims of Prejudice Are Belied by the Record

Appellant claims she was prejudiced because the prosecutor failed to give a curative instruction to the grand jury regarding the hearsay and this improper testimony therefore provided "consciousness of guilt" evidence. (App. Br. pp. 43-45). However, the prosecutor did give appropriate curative instructions to the grand jury not once, but twice. (TT 93, 130).

Lastly, Appellant relies on People v. Jones, 27 Misc.3d 1208(A) (Sup. Ct. Kings Co. 2010) which she claims is "directly on point." (App. Br., p. 45). To the contrary, it is wholly inapplicable to the instant case. In Jones, a police officer testified in the grand jury that he arrested the defendant, but later admitted to the prosecutor that he was not present and that other officers effected the arrest under unknown circumstances. (Id.) The trial court noted that "[t]here is ample authority

for this court to conclude that the fact that false testimony was adduced before the Grand Jury does not in itself warrant dismissal of the indictment" but found that the officer's testimony, which was entirely fabricated out of whole cloth, "conflicted with key components of defendant's testimony" before the grand jury and the court therefore could not conclude that the defendant had not been prejudiced. (Id., at *3, 4).

This case is also distinguishable because that court had to make its determination during the pendency of the case, while in the instant case, Appellant has been convicted at a trial, at which the prosecution's burden of proof is higher and no evidence of the gun having been wiped was presented. This demonstrably shows that she was not prejudiced by the admission of this evidence before the grand jury. DeFreece, at 843.

POINT III

The Court Properly Denied Appellant's Request to Exercise a Peremptory Challenges Made After Several Additional Rounds of Strikes Had Occurred. (Responding to Appellant's Point III)

A. The Court Properly Exercised Its Discretion in Denying Appellant's Belated Request to Exercise a Peremptory Challenge

Criminal Procedure Law § 270.15 requires that the prosecution exercise peremptory challenges before the defense. (CPL § 270.15(2)). As long as the challenges are exercised in this order, a defendant has received "all the tactical

advantages and procedural protection the Legislature intends to confer upon him." (People v. Alston, 88 N.Y.2d 519, 530 (1996)). Thus, it is well-settled that once both parties accept a juror and proceed to consider subsequent prospective jurors, a court may properly deny a defendant's belated request to peremptorily challenge a previously-selected juror. (People v. Monroe, 118 A.D.3d 916 (2nd Dept. 2014) (citing cases); People v. Smith, 278 A.D.2d 75, 76 (1st Dept. 2000) ("There is nothing in CPL 270.15 that would require a court to grant a defendant's request to exercise a peremptory challenge to a juror who had already been accepted by both sides earlier in jury selection, but who had not yet been sworn.")).

Here, after the People exercised four peremptory challenges on prospective jurors 1 through 12, Appellant exercised two. (JS 542). The Court then asked Appellant's counsel "Is that it?" (JS 543). Counsel replied, "That's it." (Id.) Five jurors – including prospective juror 10 – were therefore selected as trial jurors. (Id.)

The Court then heard challenges to potential jurors 13 through 19. (JS 543). The People exercised four peremptory challenges, Appellant exercised two, and the remaining prospective juror was selected as the sixth trial juror. (JS 543).

Next, the Court entertained challenges to potential juror 20, who Appellant peremptorily challenged. (JS 544). Appellant's counsel then made the belated request to exercise a peremptory challenge against prospective juror number 10.

The trial court properly exercised its discretion in denying the late challenge. By the time of this challenge, the Court and parties had considered not one, but two additional sets of prospective jurors. The People had exercised four additional peremptory challenges, Appellant had exercised three more challenges, and an additional juror had been selected. As the court itself noted, each party had their own strategy for jury selection, and the number of peremptory challenges available and used by each side would "effect [sic] the process." (JS 545).

Appellant contends it was an abuse of discretion for the Court not to permit this late and out-of-order challenge. (App. Br. pp. 47-50). However, the cases cited by Appellant in support of her argument are readily distinguishable and unavailing, unlike Monroe and Smith, which involved the exact situation that occurred here. For example, in People v. Price, this Court held it was error to deny a defendant's request to exercise a belated peremptory challenge which was only "a couple of seconds" late and caused "no discernable interference" with the jury selection process, because "voir dire of the next subgroup of jurors was still to be conducted." (175 A.D.3d 1436, 1437 (2nd Dept. 2019)). Likewise, in People v. Parrales, it was error for the trial court to deny a challenge that a defendant sought to exercise "moments after" he accepted a juror and before any other prospective jurors were considered. (105 A.D.3d 871, 872 (2nd Dept. 2013)). The remaining cases cited by Appellant are equally inapposite. (People v. Scerbo 147 A.D.3d

1497 (4th Dept. 2017) (defense counsel "momentarily lost count" of the number of jurors selected and "immediately" asked the court to exercise a challenge upon realizing the mistake), People v. McGrew, 103 A.D.3d 1170, 1173 (4th Dept, 2013) (counsel sought to exercise a challenge "approximately one minute" after counsel failed to strike a juror, after complaining that court had proceeded too quickly for him to register a timely challenge); People v. Jabot, 93 A.D.3d 1079, 1081 (3rd Dept. 2012) (counsel changed his mind "seconds later" and before any other prospective jurors were considered)).[22]

In sum, Appellant does not cite a single case in which it has been held an abuse of discretion to deny a challenge made after multiple additional groups of prospective jurors were considered, both parties exercised additional peremptory challenges, and an additional juror had been selected. The Court properly denied Appellant's belated request, and her argument on this point must be rejected.

B. Appellant's Alternate Remedy Was Not Raised Below and is Therefore Unpreserved

Appellant's final argument on this issue is that any potential prejudice that could have resulted from allowing the belated challenge could have been

[22] In fact, in Jabot the Third Department noted with approval that "the First and Second Departments have upheld a trial court's discretion not to allow belated challenges to as-yet unsworn prospective jurors where the challenge would interfere with or delay the process of jury selection." (Jabot, at 1081). The Court found that interference or delay with the jury selection process had occurred when the "court had already moved on to next subgroup of jurors when challenge [was] made." (Id.).

adequately addressed by reopening challenges to the subsequently-sat juror. (App. Br., p. 50). However, after the trial court denied Appellant's untimely challenge, counsel merely noted his objection and apologized. (JS 545). This contention is unpreserved for appellate review because Appellant did not request this relief from the court below. (CPL § 470.05).

POINT IV

The Court Properly Precluded the Unauthenticated Pornhub Exhibits (Responding to Appellant's Point IV)

A. Appellant Did Not Authenticate the Profile or Activity Log

A defendant's right to present a defense, while guaranteed by the Constitution, is not unlimited. It does not, for example, "give criminal defendants carte blanche to circumvent the rules of evidence." (People v. Hayes, 17 N.Y.3d 46, 53 (2011) (citations omitted)). In particular, "there is no unfettered right to [the] introduction of hearsay testimony bearing no assurance of reliability." (Id.)

Evidence is only relevant, and therefore admissible, when it is shown to actually be what it is purported to be. As the Court of Appeals has explained:

> In order for a piece of evidence to be of probative value, there must be proof that it is what its proponent says it is. The requirement of authentication is thus a condition precedent to admitting evidence. Accuracy or authenticity is established by proof that the offered evidence is genuine and that there has been no tampering with it.

(People v. Price, 29 N.Y.3d 472, 476 (2017)).

In Price, a case very similar to the instant case, the issue was the admissibility of a photograph from a website that allegedly showed the defendant holding a firearm. (Price, at 474). The profile page where the photograph was found indicated that the page owner had the same last name as the defendant and the page contained other photographs of him. (Id.) Additionally, the profile page contained demographic information such as the user's age and hometown. (Id., at 475). The Court nonetheless found that the information contained in the profile was insufficient to authenticate the profile and the photographs on the page. (Id. at 478).

Applying Price, this Court has found that the appearance of information on the internet does not authenticate the information; rather, there must be a showing "that the statements found on… the accounts were made by the [purported declarant]." (People v. Upson, 186 A.D.3d 1270, 1271 (2nd Dept. 2020); see also People v. Wells, 161 A.D.3d 1200, 1200 (2nd Dept. 2018) (photographs from Instagram and Facebook were improperly admitted when they were not shown to be "accurate and authentic"); People v. Johnson, 51 Misc. 3d 450, 453 (Sullivan County Ct. 2015) (social media postings purportedly made by the victim precluded because there was no evidence the victim herself used that account or personally made the posts); U.S. v. Vayner, 769 F.3d 125 (2nd Cir. 2014) (although profile page from social networking site contained defendant's name, photograph, and

some accurate biographical information, the profile was not properly authenticated because there was no evidence that defendant personally created the page or was responsible for its contents)).

Applying these standards, it is clear that Appellant did not come close to properly authenticating Defense Exhibits UUU and VVV. There was absolutely no evidence offered that the username or account was the victim's; that any of the comments made by the user were actually made by Christopher Grover; or when, where, or how those comments were made. The fact that the username included the victim's last name and the word "respect," (which Appellant suggested was important to Grover), as well as some pedigree information that generally matched his interests and background, was insufficient to authenticate the information, just as similar information was insufficient in Price, Wells, Upson, Johnson, and Vaynor.

The question for the court was not whether the proposed exhibits were fair and accurate reproductions of what appeared on the internet – rather, Appellant had the obligation to show the *underlying information* contained in the exhibits was genuine, has not been altered or tampered with, and is properly attributable to the person to whom it is being assigned. (Price, at 477 n. 2).

Both of the witnesses that Appellant questioned about these exhibits stated that they could not ascertain, from looking at either the actual website or the

printouts, who posted the photographs of Appellant to Pornhub. See TT 1522 (Det. Ruscillo agreeing with Appellant's counsel's statement that he had "no way of knowing" who created the profile or posted the comments); TT 2010 (Dr. Kirschner stating that seeing this information corroborated that the photographs were on the internet, but not "who put them there, how they got there"). In fact, this same issue had arisen in other contexts within the trial. See TT 391-392 (a New York State Police computer forensic analyst testified that although she recovered a backup of an iPhone on Grover's computer, she could not ascertain who performed the backup); TT 400 (the web history of a cell phone shows what web pages the phone connected to, not who was using the phone at the time); TT 608-611 (Joshua Horowitz, Appellant's "cyber forensics" expert, testified that he could not determine who used Grover's cell phone to conduct particular online activity, even though the phone had a password, because the phone could have been unlocked or anyone with the password could have used the phone).

The trial court correctly rejected Appellant's application to admit the exhibits after Det. Ruscillo's testimony, noting that the witness was merely "reading off a screen" when he observed the profile online and could not "tell us the origin or authentication of the user name" or "authenticate anything else on the screen." (TT 1556, 1560). When Appellant's trial counsel raised the issue again following Dr. Kirshner's testimony, counsel conceded that "there was no evidence

as to who posted [the pictures], admittedly so." (TT 2111). The following colloquy then occurred:

> **The Court:** Can I just interrupt, Mr. Ostrer?
> **Counsel**: Sure, Judge.
> **The Court**: Is this the victim's website?
> **Counsel**: We don't know, Your Honor, but –

(Id.). The court then posed a hypothetical question to counsel:

> **The Court:** I could, and I might do this, pretend to be Ben Ostrer on -- what's your favorite baseball team? Tell me you have one.
> …
>
> **Counsel**: I'm a Met fan.
> **The Court:** So I can become Ben Ostrer Met fan 2019 and make an entire profile without your permission right now.
> **Counsel**: Yes, Your Honor.

(TT 2112). This scenario is *exactly* the issue here, and it was not even a close call for the court to determine that the profile had not been sufficiently authenticated.[23]

B. Dr. Kirschner's Testimony Was Not "Misleading" and Did Not Open the Door to These Exhibits

Defendant next argues that Dr. Kirschner's testimony on this issue was "misleading" and therefore Appellant was improperly prohibited from using it to cross-examine him. (App. Br., pp. 56–59). This argument is baseless.

[23] No other evidence in the case supported Appellant's allegation that Grover took these photographs or uploaded them to the internet. Various police and forensic expert witnesses established that the photographs were not found on the memory card of Grover's camera or on his computer, (TT 347-348, 386-388), and no evidence was found on his phone indicating it had been used to upload pornography to the internet. (TT 611).

Dr. Kirschner's testimony was entirely in accord with the court's reasoning that the profile could not be authenticated as being Christopher Grover's. Compare TT 2010 (Dr. Kirschner testifying that the contents of the exhibits do not corroborate "who put [the pictures] there, how they got there") with TT 1556 (the court stating that seeing the profile information online does not "tell us the origin or authentication of the user name"), TT 2112-2113 (the court noting that "anyone can name their screen name or their profile anything they want"). Detective Ruscillo, Appellant's own witness, similarly testified that he had "no way of knowing" who created the profile or posted the comments. (TT 1552). And, of course, the accuracy of Dr. Kirschner's testimony was repeatedly acknowledged by Appellant's trial counsel, who conceded "there was no evidence as to who posted [the pictures]" and "we don't know" whose website it was. (TT 2111-2112).

When the Court, one of Appellant's witnesses, and Appellant's counsel all acknowledged that it was unknown who owned the Pornhub page, posted the pictures to that page, or made the comments on that page, there is nothing erroneous or misleading about a prosecution witness testifying similarly. To argue otherwise is meritless, and borders on disingenuous.

C. Even if The Court's Ruling Was Error, it was Harmless

Reversal is not warranted when an error is shown to be harmless beyond a reasonable doubt. (People v. Crimmins, 36 N.Y.2d 230, 243 (1975)). Such is the

case here: even if, *arguendo*, the court's ruling precluding these exhibits was error, it caused no prejudice to Appellant.

From the first time Appellant raised this issue, the court explicitly stated it "want[s] to be clear" that its ruling was limited to the profile and activity log and that the court had allowed, and would continue to allow, Appellant to present any evidence and make any argument she wanted about the photographs themselves and that they were posted to the internet without her consent. (TT 1559-1560). The court further noted that its ruling was limited to "the information around the pictures." (Id.)

In accordance with this ruling, Appellant herself authenticated Defense Exhibits GGG-MMM as pictures of her (which were admitted into evidence without objection) and testified (1) that Grover had taken them, (2) that they depicted her being assaulted and restrained by him, and (3) that she observed them on Pornhub. (TT 688-693, 696). Detective Ruscillo testified that he saw these photographs on that website, (TT 1518-1522), and Dr. Hughes testified that the taking of the pictures, the acts depicted in the pictures, and the uploading of the pictures without defendant's consent were all forms of "sexual violence." (TT 1626, 1631, 1640-41). These photographs also comprised a significant part of defense counsel's summation, in which he graphically described them, stated that

they had been uploaded to Pornhub, and argued that they "sum up the case." (TT 2153-54).

In sum, Appellant was able to fully and completely present her defense, as the court recognized. (TT 1559-1560). However, she could not properly authenticate the profile page where the photographs were found and the exhibits were properly precluded.

POINT V

The Trial Court Carefully Considered and Applied the DVSJA to the Facts of This Case (Responding to Appellant's Point V)

The DVSJA allows a court to impose a reduced sentence for certain offenses when the court finds that:

> (a) at the time of the instant offense, the defendant was a victim of domestic violence subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family or household …;
>
> (b) such abuse was a significant contributing factor to the defendant's criminal behavior; [and]
>
> (c) having regard for the nature and circumstances of the crime and the history, character and condition of the defendant, that [an otherwise lawful sentence] would be unduly harsh …

(P.L. § 60.12(1)). Sentencing determinations are committed to the court's discretion and should be "afforded high respect" on appeal because an appellate

court lacks the first-hand knowledge of the case that the sentencing court possesses. (People v. Suitte, 90 A.D.2d 80, 83 (2nd Dept. 1982)). This rule is doubly applicable here, where the sentencing followed a very lengthy trial, substantial sentencing hearing, and a detailed, thorough consideration of the evidence by the trial court.

The Court's lengthy written decision makes it abundantly clear that the Court carefully evaluated all of the evidence Appellant presented, both at trial and at the sentencing hearing. The court systematically recounted Appellant's evidence as to the alleged abuse and the identity of her abuser(s) (DVSJA Dec., pp. 10-15, 20-25); the extensive resources and support available to her, (id., pp. 26-30); Grover's conduct as it relates to the "profile" of an abuser established at trial and at the hearing, (id., pp. 31-34); and the events of the night of the murder. (Id. pp. 34-40). In every one of those sections, the court found the evidence – much of it offered by Appellant, Dr. Hughes, or her fact witnesses – to be contradictory and inconsistent with having been a victim of substantial domestic violence or a finding that such abuse was a significant contributing factor to Appellant's behavior.

In light of these myriad examples of Appellant's contradictions, inconsistencies, illogical decisions, and unsupported claims, the Court came to the obvious conclusion that there were "significant, unresolved questions" about

Appellant's history as a purported victim of abuse, her relationship with Grover, their relationship, and the events of the murder. (Id., p. 42). The Court then explained that there were four separate and independent grounds for its determination. *First*, the court found Appellant's alleged history of abuse to be "undetermined and inconsistent" regarding both the extent of the abuse and the identity of her abuser(s). (Id.). *Second*, her specific claim of being in an abusive relationship with Grover was not demonstrated based on Grover's actions and demeanor in the days and weeks before his death. (Id.). The Court found the text messages between Appellant and Grover to be "notable" in this regard. (Id.). *Third*, Appellant acknowledged that she had a "tremendous amount" of resources and opportunities to leave Grover within her family and in the healthcare, law enforcement, and domestic-violence advocacy communities. (Id.). The Court found her failure to avail herself of these opportunities significantly weakened her argument as to the "nature and circumstances" of the crime, one of the statutory prongs. (Id.). *Fourth,* and "most importantly," the specific facts of the crime, *as asserted by Appellant*, were that Grover was supine on the couch with his eyes closed, whereas Appellant was armed with a gun and had a clear path both to her children and to leave the apartment. (Id.). Nonetheless, she chose to "lunge forward" and shoot Grover with the barrel of the gun pressed into his temple. (Id.).

Applying these conclusions to the elements, the Court found that Appellant failed to prove that she "was subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family" as required by CPL § 60.12(1)(a) because "it is not clear whether the alleged abuse was carried out by Christopher Grover in part or in whole, and to what degree." (Id., p. 44). She also failed to show that her alleged abuse was a "significant contributing factor" to her criminal conduct, pursuant to CPL § 60.12(1)(b), because of her "undetermined abuse history" and Grover's personality profile. (Id.).[24] Finally, in consideration of "the nature and circumstances of the crime and the history, character and condition of the defendant," (CPL § 60.12(1)(b)), the Court found that the events leading up to the murder, and Appellant's text messages to him, made her motive "unknown." (Id., pp. 44-45). Even acknowledging that her history and character were not negative factors, the Court found that the "nature and circumstances" of the crime did not warrant a finding that an otherwise-lawful sentence would be unduly harsh based on the facts of this case. (Id., p. 45). Therefore, the Court properly denied her motion for DVSJA sentencing.

Despite this overwhelmingly thorough and well-reasoned decision, Appellant attacks it on two grounds. She first contends that the Court's statements

[24] The Court noted that under the circumstances in which she killed Grover, any abuse inflicted upon Appellant by other individuals would not, by itself, have been a significant contributing factor to her decision to kill Grover and that, in any event, it was not shown that all of her alleged abusers were "household or family members" as required by the statute. (Id.).

that the extent of her abuse and identity of her abuser were "not clear" or "undetermined" demonstrated that the Court shirked its responsibility to make the statutorily-required findings. (App. Br., p. 62-63). This semantic claim is meritless.

Appellant bore the burden to prove she qualified for relief under the DVSJA by a preponderance of the evidence. (DVSJA Dec., p. 8). Thus, to the extent that the Court found that the extent of Appellant's alleged abuse and the identity of her purported abuser(s) was "unclear," it was because Appellant did not present sufficient credible evidence for the Court to draw any definitive conclusion.[25] A Court plainly cannot make such findings when it is not given sufficient credible evidence to make a determination. One of the Court's statements, viewed in context, demonstrates this point: "the Court finds the abuse history *presented by the defendant* is undetermined and inconsistent regarding the extent of the abuse, as well as the identity of her abuser(s)." (Id., p. 42 (emphasis added)).

Appellant's related claim that the Court did not decide whether Appellant was abused by a member of the "same family or household" fails for the same reason. She claimed to have been abused by *seven* different men throughout her life, at least one of which when she was a child. See fn 11, *supra*. Some of those

[25] For example, if a Court were to preside over a suppression hearing and then state it was "not clear" whether the defendant waived his Miranda rights, the Court would unquestionably be ruling that the People did not meet their burden of proving the defendant waived his rights. It would be absurd to argue that the court failed to decide the issue.

men meet this definition, some do not, and for some, Appellant presented no information from which the Court could make a determination.

Appellant's second argument is that by noting in its decision that Appellant could have retreated without using deadly force, the Court "required that sentencing relief be conditioned on the crime never having occurred" and conflated the law of justification with DVSJA relief. (App. Br., pp. 63-65). The Court clearly imposed no such requirement in this case and recognized the difference between these principles.

In fact, the cited legal precedent for the proposition that a Court's CPL § 60.12 sentencing determination is independent of the jury's determination regarding justification. (DVSJA Dec., pp. 6-7, citing People v. Sheehan, 106 A.D.3d 1112 (2nd Dept. 2013)). The Court also explicitly recognized that "although the jury verdict [that Appellant was not justified,] is consistent with this Court's determination under § 60.12 the verdict is not determinative." (DVSJA Dec., p. 41).

Nonetheless, because the statute requires the Court to consider the "nature and circumstances" of the crime, there is no reason in law or logic that a court could not decide to credit the same facts that a jury credited in rejecting a justification defense. In any event, the Court did not deny relief solely because Appellant could have retreated or state that was a determinative factor. The court

denied relief, in pertinent part, because Appellant could have safely retreated from a situation where, *by her own account*, she was armed and beyond the reach of her victim, who was laying on his back on a couch, unarmed, facing the ceiling, with his eyes closed. (Id., p. 43). Instead of doing so, she lunged at him, pressed the barrel of the gun into his head, and pulled the trigger. (Id.). Her motive could not be determined. (Id., pp. 44-45).

Lastly, Appellant requests this Court resentence her under the DVSJA or remand the case to a different judge for resentencing. (App. Br., pp. 65-71). There is no reason for this Court to take either of these actions. If this Court were to agree with Appellant's claim that the lower court misapplied the DVSJA, the case should be remanded to the sentencing court for resentencing in accordance with whatever instructions or guidance this Court issues.

This case is distinguishable from cases cited by Appellant in which this Court has modified sentences. In those cases the Court merely modifies a sentence to another lawful sentence within the appropriate sentencing range. This case, in contrast, involves the initial determination of the applicability of the DVSJA to the facts of the case. It is respectfully submitted that County Court, having presided

over the trial, is in the best position to make this factual determination in the first instance. (Suitte, at 83).[26]

CONCLUSION

For all the reasons stated herein, Appellant's appeal should be denied in its entirety.

DATED: Carmel, New York
November 4, 2020

Respectfully submitted,

_____
Larry Glasser
First Assistant District Attorney
(845) 808-1057

[26] Appellant's request to remand the case to a different judge for resentencing is wholly unwarranted. Even if the Court were to find the court below misapplied the DVSHA – which there is no reason to conclude – that is a far cry from showing bias or partiality.

PRINTING SPECIFICATIONS CERTIFICATION

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman
Point Size: 14
Line Spacing: Double

The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service, this printing specifications statement, and any authorized addendum containing statutes, rules, regulations, etc. is **19,119**.

To be argued by:
Larry Glasser
15 Minutes Requested

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

- against -

NICOLE ADDIMANDO,
Defendant – Appellant.

BRIEF FOR RESPONDENT

Appellate Division Docket Number: 2020-02485
Duchess County Court Indictment Number: 74/2018

ROBERT V. TENDY
District Attorney
Putnam County*
40 Gleneida Avenue
Carmel, New York 10512
(845) 808-1050

LARRY GLASSER
FIRST ASSISTANT DISTRICT ATTORNEY
Of Counsel

---

* The Putnam County District Attorney's Office was named Special Prosecutor in this case after the Dutchess County District Attorney recused his office from the prosecution.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

INTRODUCTION

In the early morning hours of September 28, 2017, Nicole Addimando shot and killed Christopher Grover, the father of her two children, as Mr. Grover laid on his back on the couch in their living room. She then fled the apartment with her two children, but not before picking up the spent shell casing and taking it with her.

Appellant admitted to the police that she killed Grover, but claimed it was the culmination of years of physical and sexual abuse and a visit by Child Protective Services the day before. However, as shown at a lengthy jury trial, Appellant had recently texted a friend that she was only still with Grover because she hadn't yet "figured out to kill him without getting caught." She had verbally and emotionally abused Mr. Grover in the days and weeks leading up to the murder, such as by calling him an "asshole man child" who had "some sort of a mental disorder" in a series of text messages three days before the murder. Appellant was demonstrated to have given contradictory accounts of the alleged abuse, and inconsistently accused multiple different men in her past of abuse, to different people. She admittedly tampered with evidence at the crime scene and it was forensically proven that one photograph that she claimed depicted injuries inflicted by Grover could not have been taken in the manner in which she testified.

Appellant was found guilty of Murder in the Second Degree, P.L. § 125.25(1), and Criminal Possession of a Weapon in the Second Degree, P.L. § 265.03(1)(b). She

then moved for a reduced sentence under the Domestic Violence Survivors Justice Act ("DVSJA" or "the Act"), P.L. § 60.12. The court held a hearing on Appellant's application after which it issued a decision finding that Appellant did not demonstrate she qualified for sentencing under the Act. She was subsequently sentenced to concurrent terms of 19 years to life imprisonment on the first count and 15 years imprisonment (with 5 years post-release supervision) on the second count.

On the instant appeal, Appellant challenges neither the weight nor the sufficiency of the evidence supporting her conviction. She raises five claims, none of which have any merit. *First,* the Court correctly disqualified the Dutchess County Public Defender ("DCPD") from representing Appellant early in the proceedings due to a significant conflict of interest. The court's decision was proper for three reasons. The first was that DCPD had previously represented an individual who Appellant accused of repeatedly sexually assaulting her in the past, which she argued contributed to her state of mind and her asserted defenses of justification and Battered Women's Syndrome.[1] The court correctly found that this individual would be a "necessary" witness if the People chose to refute Appellant's allegations at trial, and DCPD would be in the untenable position of accusing a former client of heinous, despicable crimes. The second reason disqualification was required was because after that witness was contacted by an investigator for

[1] Although "Battered Women's Syndrome" is a considered to be an outdated term, it was used throughout the proceedings and is therefore used herein to be consistent with the record.

the prosecution, he reached out to DCPD who then contacted the prosecution on his behalf, asserting his rights to counsel and to remain silent. This may have served the witness's interests, but it did not serve Appellant's, who wanted the prosecution to fully investigate her claims of prior abuse. The third reason is that in response to the People's disqualification motion, DCPD shockingly offered to excise any mention of this witness from their defense of Appellant. The court correctly noted that because Appellant's expert witness had placed "significant weight" on this witness's purported abuse of Appellant and he was "intricately interwoven" into her defense, this suggestion demonstrated a gross dereliction of DCPD's obligation to zealously, single-mindedly represent Appellant.

Second, the integrity of the grand jury proceeding was not impaired. Appellant complains of four questions asked to one of the five witnesses who testified in the proceeding in which he stated that he was told that the gun Appellant used appeared to have been wiped clean of fingerprints. Contrary to Appellant's instant claim, the prosecutor did not leave this testimony uncorrected and twice provided the grand jury with instructions that hearsay must be disregarded and could not be considered. There is also no evidence that the claim was untrue or elicited in bad faith.

Third, Appellant's right to exercise peremptory challenges was not violated during jury selection. After both parties exercised challenges on a set of

prospective of jurors (and five jurors were selected from that group), the process continued to not one, but two more sets of prospective jurors. Both parties used additional peremptory challenges and an additional juror was selected. At that time, Appellant sought to exercise a peremptory challenge to one of the first five jurors. This belated challenge was rightfully not permitted.

Fourth, the court correctly denied Appellant's attempt to introduce a "profile" that she alleged was Grover's from an adult website. Appellant was not able to authenticate the profile as being Grover's, and her asserted foundation – that the username contained the name "Grover" and the listed biographical information generally matched that of Grover – has previously been found by this Court to be insufficient in similar cases.

Fifth, the Court carefully and diligently applied the DVSJA to this case. The Court presided over a three-day hearing, after which it issued a comprehensive, 48-page decision finding that Appellant did not meet her burden of showing that she qualified to be sentenced under the Act. This was an eminently reasonable decision on the facts of this case and should not be disturbed by this Court.

In sum, nothing that occurred during the pendency of this case, at trial, or during the sentencing proceedings violated Appellant's constitutional or statutory rights or otherwise requires disturbing the conviction and sentence duly imposed.

STATEMENT OF FACTS

A. Defense Counsel's Conflict

Following Appellant's arrest, she was represented by Kara Gerry of the Dutchess County Public Defender's Office ("DCPD"). Prior to the case being presented to the grand jury, Ms. Gerry met with the assigned prosecutor and asserted that Appellant was a victim of severe physical and sexual abuse by Grover. She also contended that Appellant had also been sexually assaulted by a number of men in her past, including, most recently before Grover, someone named Cesar Betancourt. Ms. Gerry provided the People with a significant amount of information regarding this alleged history of abuse, including the names of witnesses that she urged the prosecution to interview before any potential grand jury presentation. (Aff. of Chief ADA Chana Krauss in Support of Motion to Recuse, May 8, 2018, [hereinafter "Krauss Aff."], p. 5). The People investigated these claims and learned that Appellant had alleged to multiple people that many of the ways Grover supposedly assaulted her were ways that she had also claimed Betancourt assaulted her, and that she claimed that Grover "role-played" as Betancourt while raping her. (Id., pp. 7-8).

DCPD had also served notice of an intent to pursue a defense of justification based on Battered Women's Syndrome [hereinafter "BWS"] and Appellant's

expert witness in this area had stated in a report that that any prior abuse that an individual experienced is a significant factor in evaluating BWS. (Id., pp. 6, 8-9.)

As a result of Ms. Gerry's efforts, an investigator from the DA's Office located Betancourt and attempted to interview him about his relationship with Appellant. (Id., pp. 9-10). Betancourt learned the investigator was looking to speak with him and contacted DCPD, who had previously represented him on a criminal charge in 2011. (Id., p. 10). Betancourt's attorney on that case immediately sent a letter to both the People and police department stating that Betancourt had contacted DCPD requesting an attorney and that he "hereby invokes his right to counsel and his right to remain silent." (Letter from Senior Assistant Public Defender Nancy Garo, April 24, 2018).

The prosecution then brought a motion to disqualify DCPD from representing Appellant. The Court thoroughly reviewed both the applicable law and the procedural posture of the case to date and found that Appellant's allegations against Betancourt were "integral" to her defense. (Decision and Order (McLaughlin, J.), May 25, 2018 [hereinafter "Disqualification Dec."], p. 5). The court further found that in addition to Betancourt being an important witness on his own, the "inescapable truth" was that Appellant's own expert witness placed "significant weight" on Betancourt's purported abuse of Appellant and he was "intricately interwoven" into Appellant's BWS claim. (Id., p. 6-7). Therefore, if the

People sought to rebut Appellant's claims, Betancourt would be a "necessary" rebuttal witness. (Id., p. 5).

The court also noted that it was significantly concerned by the fact that, in response to the motion to disqualify, DCPD offered to eliminate any conflict by omitting Betancourt as a "contributor" to the Appellant's BWS when presenting their defense. (Id., pp. 5-6). Put differently, DCPD *affirmatively stated* that they would be willing to alter their prospective trial strategy due to their former representation of Betancourt. The Court plainly observed that to permit this to occur would provide Appellant with a clear ineffective assistance of counsel claim if she were to be convicted. (Id., p.6). The court disqualified DCPD and appointed the conflict defender to represent Appellant. (Id., p. 8).[2]

Shortly thereafter, Appellant retained private counsel, which she had intended to do since before the disqualification issue arose. (DT 9, TT 1367-1370).

B. Evidence of the Firearm Being Wiped Clean and the Grand Jury Presentation

In December, 2017, Town of Poughkeepsie Police Detective Jason Guy brought the firearm Appellant used to the to the New York State Police Laboratory

[2] DCPD's website specifically notes that it is a "conflict of interest" when DCPD represents a defendant "who happens to be a witness against another client in a separate case" and in such cases, the conflict defender will represent the defendant. See https://www.dutchessny.gov/Departments/Public-Defender/Public-Defender-Frequently-Asked-Questions.htm, (visited on November 2, 2020).

for fingerprint analysis. (TT 372). He was informed that it appeared to have been wiped clean of fingerprints, which he relayed to the prosecutor. (TT 1757-1758). The ADA had previously been informed that a container of baby wipes had been found next to the firearm at the scene of the murder, so she contacted the Police Laboratory and asked if they could determine whether the gun had been wiped down. (GJ 97, TT 1425). She was informed that an examination for baby wipe residue could be conducted. (TT 1425; Defendant's CPL § 330.30 Mot. to Set Aside Verdict, Ex. C (lab technician's notes).)

Approximately one month later, the ADA interviewed Sarah Caprioli, Appellant's friend and former therapist. (TT 1425). Caprioli, who was one of the individuals whose name and contact information was provided by Ms. Gerry, stated that someone had told her that the gun may have been wiped clean, but she could not remember if she had heard that from Appellant, Gerry, or someone else on Appellant's "team." (TT 1425-1426).

On June 20, 2018, the case was presented to a grand jury and Detective Guy was one of five witnesses. (GJ 78-98). He testified about his qualifications in the area of firearms, that he test-fired the gun involved in this case, and how the type of firearm used in this case is loaded and discharged. (GJ 79-84).

After the prosecutor finished her questioning of the detective, a number of Grand Jurors asked questions. (GJ 85-98). In response to their inquiries, the ADA

asked Det. Guy about the forensic tests that had been conducted on the firearm, including whether any fingerprints wee found. (GJ 90-91). He answered by stating that "Prints were not recovered. They told us that the gun was wiped down." (GJ 91).

Recognizing that this completely non-responsive answer was impermissible hearsay, but having a good-faith basis to believe the gun had in fact been "wiped down," the ADA attempted to clarify this information in a legally permissible manner by asking the detective about his own first-hand observations:

> **Question:** It appeared to be wiped down?
> **Answer:** Yes.

(GJ 91). Later, in response to another question, Det. Guy testified that "[t]hey told us there appeared to be residue left over from it being wiped off, consistent with a cleaning solvent." (GJ 94). Finally, the prosecutor's last question to the detective was whether any cleaning fluids were found near the gun and whether he was able to "definitively determine" what was used to wipe the gun down. (Id. 94). The detective answered, nonresponsively but entirely truthfully, that an open container of baby wipes had been recovered next to the gun. (Id.)

During the presentation, the ADA twice addressed the issue of hearsay. First, during Det. Guy's testimony, she unequivocally told the Grand Jury that "I'm going to give you an instruction. What one witness is told by somebody else is hearsay. We're not offering it for the truth of the matter." (GJ 93). Later, at the

end of the evidentiary portion of the presentation, the ADA instructed the Grand Jury that the legal standard of "reasonable cause" was satisfied when evidence "which appears reliable" convinces the Grand Jury that it is reasonably likely the crime was committed and the defendant was the person who committed the crime. (GJ 130). However, the Grand Jury was explicitly cautioned that "such apparently reliable evidence may include or consist of hearsay," which, as noted above, the Grand Jury had been told was testimony that they could not consider for the truth of the matter asserted. (GJ 130-131).

C. Jury Selection

After the first 20 prospective jurors were questioned, the Court proceeded to hear challenges from the parties. (JS 541-544). The Court first addressed prospective jurors 1 through 12. (JS 541). One potential juror was struck for cause and the People exercised four peremptory challenges. (JS 542). Appellant then exercised two peremptory challenges. (Id.). Appellant's counsel then confirmed he did not wish to challenge any other potential jurors and five jurors – including prospective juror 10 – were selected. (JS 543).

The Court then addressed jurors 13 through 19. (Id.) The People exercised four more peremptory challenges, Appellant exercised two additional challenges, and the remaining juror was selected as juror 6. (Id.) Finally, the court addressed potential juror 20, who Appellant challenged. (JS 544).

Appellant's counsel then stated that Appellant had indicated that she did not want prospective juror 10 to be selected, so he wished to exercise a peremptory challenge on that juror. (JS 545). The Court noted that it was "past the point" of challenges to that juror and denied the challenge. (JS 544-545). Appellant's counsel apologized for the belated request. (JS 545).

D. The Trial

At trial, the People's theory of the case was that Appellant shot Grover as he slept and had manipulated the crime scene – including by, for example, performing internet searches on his phone, removing the spent shell casing from the crime scene, and submerging a laptop computer in the bathtub. Her motivation for doing so was that she had falsely been accusing Grover of abuse to certain close friends for years, and an impending Child Protective Services ("CPS") investigation was about to reveal her deceit and lies.

Appellant contended that Grover had physically and sexually abused her for years and had taken violent, pornographic pictures of her and uploaded them to an adult website. She asserted that the CPS investigation was about to uncover all of this and it pushed Grover over the edge. She alleged that after he brandished a gun and threatened to kill both of them, she was somehow able to wrestle the gun away from Grover and shot him in self-defense. She argued her fear was reasonable in light of the circumstances and her suffering from BWS.

1. The Prosecution's Case

a. Appellant's Relationship with Grover Prior to the Crime

In the days and weeks before Appellant killed Grover, she berated and insulted him, cursed him out, and complained to friends about their relationship. On August 8, 2018, she sent a text message to a friend saying that she needed to obtain some birth control, because she did not want "another thing tying me to him." (TT 49-51; People's Exhibit 4). On August 16, approximately 5 weeks before the crime, she sent another friend a message stating "I haven't figured out how to kill him without being caught, so. [sic] I'm still here." (TT 51-52; People's Exhibit 5).

Three days before the murder, Appellant had a heated discussion with Grover via text messages. Over the course of *four minutes*, Appellant:

i) rhetorically asked Grover "Are you this stupid?!" after he suggested taking their daughter to his parents' house;

ii) asked him "is something wrong with your brain";

iii) belittled him by writing "I have full complex thoughts like a human being. And you can't understand them.";

iv) asked "WTF is wrong with you? I think you might have some sort of mental disorder?"; and

v) culminated her tirade by calling him an "asshole man child."

(TT 93-99; People's Exhibit 7).[3]

b. The CPS Interview

Appellant been contacted by CPS because she had been seen with bruises (People's Exhibit 10). She set up a meeting with them for September 27, 2017 at 10:00 a.m.. (TT 154-155). Grover was shocked to find out that they thought he might be hitting her. (TT 155). After the meeting, Grover went to work at the gym where he coached gymnastics. (TT, 155; People's Exhibit 10). His demeanor was not unusual in any way. (TT 155-156). His boss, Marisa Hart, inquired about the meeting and Grover said that he was shocked to hear they thought he hit Appellant. (TT 155). He told CPS he had nothing to hide. (TT 155-156).

Appellant, on the other hand, was very disturbed by the CPS interview. Despite being told not to contact potential witnesses in the CPS investigation, she reached out to Hart, who used to employ Appellant as well. (TT 158-159). She wanted to make sure that Hart would say that Appellant bruised easily, which Hart knew to be true from the time Appellant worked at the gym. (TT 158).[4]

[3] Approximately 30 minutes before this exchange, Grover had complained to Appellant that she was "so negative." (TT 88-90, People's Exhibit 6). She responded by texting "I'm not negative. At all. Only with you." (Id.) Grover then offered "so maybe you'll [be] happier if I go if I make you so unhappy" (Id.). Appellant continued to complain to him and stated that things seem to "swirl around your head but don't actually go in your ears." (Id.).

[4] Appellant's sister also knew that Appellant bruised easily. (TT 986).

c. The Murder

Shortly after 2:00 a.m. on September 28, 2017, Town of Poughkeepsie Police Officer Richard Sisilli was on Taft Avenue in Poughkeepsie when he stopped at a red light behind another vehicle. (TT 175). The vehicle, which contained Appellant and her two children, did not move when the light turned green, so he sounded his air horn. (TT 176, 179-190). Appellant then got out of the vehicle and began walking towards Officer Sisilli. (TT 176). She was crying and shaking. (TT 206). She said she had been "in a fight with her husband involving a gun." (TT 177). After learning where the incident occurred, Officer Sisilli radioed that information so other officers could be dispatched to Appellant's residence. (TT 177-178).

Police Officer Joseph Murray was the first to enter her apartment. (TT 299-300). He observed Grover, deceased, lying on his back on the couch with his hands laying across his torso and his legs stretched out, as if he had been sleeping. (TT 304-305; People's Exhibit 13). Grover had a visible gunshot wound to the head which appeared to have entered Grover's left temple, passed through his head, and exited out his right temple. (TT 466, 469; People's Exhibit 18). There was a pistol on the floor next to the couch. (TT 304-305; People's Exhibit 13). The projectile was later found in a pillow that had been next to Grover's right ear. (TT 341-342, 351-352, 373; People's Exhibits 16, 26). Officer Murray found a camera on the

floor of another room with the memory card door open (TT 305). He also saw that in one bathroom the shower curtain was closed, the water was running, and the tub was filling up with water. (TT 305-306). He found a laptop computer, broken in half at the hinges, submerged in the water, and he turned the water off. (TT 306-307, 317-318, People's Exhibit 24).

Detective Thomas Keith, a Crime Scene Technician, also arrived at the apartment to document the scene and gather evidence. (TT 330, 332-333). He did not find a shell casing at the scene, even though one would have been ejected from the gun Appellant used. (TT 338). A used baby wipe was found in the trash can. (TT 264).

Meanwhile, Officer Sisilli continued to speak to Appellant on the side of the road. He was having difficulty because Appellant was not giving direct answers to his questions and answered most of his questions with questions of her own. (TT 208). Appellant stated that Grover had a gun and, at various times, provided inconsistent explanations of how she got the gun from him, alternately stating that she kneed him in the groin, smacked it out of his hand, and elbowed him. (TT 215-216). She told the officer that after she got control of the gun, Grover threatened her and "the gun had just gone off." (TT 178). She said that he was "lying on the

couch, just lying there" when she shot him. (TT 214). Officer Sisilli asked if she needed medical attention, but she declined. (TT 206-207).[5]

Appellant was then brought to the police station where Detective Darrell Honkala interviewed her in a video-recorded interview. (TT 251-252; People's Exhibit 10). She waived her Miranda rights and claimed that when Grover came home from work, she asked about his CPS interview. (People's Exhibit 10). Grover told her it was fine and thought that he had nothing to worry about. (Id.). She stated that she asked him to let her leave with their children and said she would not tell anyone what happened. (Id.). She said that at some point Grover threw his camera, which she alleged he used to take pictures of "things that he would do to me," across the room. (Id.).

She asserted that she and Grover both went into their bedroom, where he took out his gun. (Id.). Appellant claimed that Grover then showed her how to load it and gave her bullets to load it herself, but she wasn't able to do it. (Id.). She then begged him to let her leave. (Id.).

Appellant alleged that she then took a shower and Grover got into the shower with her. (Id.). She claimed that when she got out Grover was on the living room couch and "made" her have sex with him on the couch. (Id.). She said he

[5] Appellant had what appeared to be a bruise on her cheek, but she later stated it was old. (TT 260, 270; People's Exhibit 10). She had no other bruises anywhere on her body. (TT 270). She later stated that she was bleeding "a little bit" as the result of "sex stuff." (People's Exhibit 10).

wore a condom, which he had never done before. (Id.). Afterwards, she stated he threw it away, although a used condom was not found in the apartment. (TT 346; People's Exhibit 10). She said that they both got dressed and Grover fell asleep on the couch with his arms around her. (People's Exhibit 10).

She told the detective that she attempted to get up, but Grover woke up, pulled her back down, and asked where she was going. (Id.). She stated that she told him that she was going to check on the children. (Id.). She alleged that Grover then pulled the gun out of the couch cushion, and Appellant kneed him in his groin, causing him to drop it. (Id.). Appellant stated that she then got off the couch, picked up the gun, and "held it to him." (Id.). She claimed that Grover turned his head to her and said "you wouldn't do it, you don't have it in you." (Id.). Appellant told the detective that Grover then told her to him the gun and he would kill both of them, leaving their children without parents. (Id.). She said after he mentioned the children, "[h]e faced me, and then he looked up for a second, and I shot him." (Id.). According to Appellant, Grover was "still laying on his back" on the couch with his hands on his chest and he "didn't even get up" when she pulled the trigger. (Id.).

She stated that she picked up the gun and put it back down, but inexplicably took a bullet with her. (Id.). She said she then checked Grover's pulse and heard the shower running, so she went to go turn the water off. (Id.). She claimed to have

seen his laptop computer submerged in the bathtub, but she left it there and did not turn the water off because she didn't know what to do. (Id.). She said that she then got her children and carried them to her car. (Id.).

Appellant stated that she started driving away and called Sarah Caprioli, who did not answer her phone, and then another friend, Elizabeth Clifton. (Id.). She said that she decided to go back to her apartment, but when she returned, she turned around in the apartment complex and left again. (Id.). She told the detective that she was stopped at the red light, deciding whether to go to the police or to Elizabeth's house, when she noticed Officer Sisilli behind her. (Id.).[6]

Towards the end of the interview, Appellant asked whether a SAFE (sexual assault forensics examination) would be necessary, and when she was told the choice was hers, she declined. (TT 274-276; People's Exhibit 10).

d. Forensic Evidence

A forensic examination of Grover's phone showed that the website history had been deleted sometime that night. (TT 102). Investigators were able to restore it, however, and it showed that from 11:19 to 11:34 p.m., the phone searched for, among other phrases, "will they know ahe [sic] was asleep when shot" "What will happen if someone was asleep and then someone shot them in the head? Will they

[6] Appellant did not live far from the Town of Poughkeepsie Police Department, but she drove past both of the routes she would take to get from her apartment to the police station. (TT 204).

wake up and die or they die instantly?" and "how they determine id [sic] shot person was asleep when shot." (TT 102-115; People's Exhibit 8).

The final web page that the phone visited was a news story titled "Police: Steve McNair Shot Dead in Sleep by Girlfriend." (TT 115-116; People's Exhibit 8). That page was, as it sounds, a news story about former professional football player who was fatally shot in the head by his girlfriend as he slept. (TT 116).

Even though the laptop computer had been submerged, its contents were recovered and analyzed. (TT 383-384). It was Grover's computer and there was no history of visiting pornographic websites on the computer, no pornographic photos or videos, and no photos or videos of Appellant being injured or assaulted. (TT 385-388). There were "a lot" of family-related images of Appellant, Grover, and their children. (TT 387).[7]

The memory card of the digital camera was also searched, and it was also found to contain numerous family photos and videos, but no images of Appellant being physically or sexually abused. (TT 347-348).

Grover's autopsy showed a "muzzle imprint" of the firearm in his left temple, which occurred because the barrel of the gun had been pressed directly against his skin when he was shot. (TT 471-473; People's Exhibit 29).

[7] A defense witness subsequently testified that Grover's phone likewise did not contain any pornography, pictures or videos of Appellant being physically or sexually assaulted, or bookmarks to pornographic websites. (TT 624-625).

2. The Defense Case

a. Appellant's Testimony

Appellant testified that she met Grover in 2008 and they moved in together in 2012. (TT 639). She stated that Grover started to force her to have sex with him after their son was born in 2013, and that the sex and violence increased over time. (TT 640, 646). The majority of her testimony, other than discussing the night of the crime, consisted of Appellant describing many instances in which she stated Grover raped and/or assaulted her throughout their relationship. (TT 647-716). She testified that the abuse started when she disclosed to him that Cesar Betancourt, a maintenance worker at an apartment complex her mother managed, had been raping her. (TT 804-806, 824-825). She claimed Chris started to "role play" and mimic Cesar's conduct. (TT 817). She also claimed that sometime in 2015 Grover had taken pornographic pictures of her and uploaded them to Pornhub, an adult website, without her consent. (TT 688-693, 696).

She testified that twice in September 2014 she went to the SAFE unit of Vassar Brothers Hospital for examinations. (TT 648-649, 657). She also stated that in the summer of 2017 she sought treatment from Susan Rannestad, her midwife, for injuries that Grover caused. (TT 702-703).

Appellant described how she was contacted by CPS and set up an appointment with them for the morning of September 27, 2017. (TT 720). She was

upset by this, but Grover was not. (TT 947). She called Sarah Caprioli to ask if CPS would be able to obtain any materials that she didn't want them to have (TT 967). CPS offered to tell Grover about the report if she was afraid to tell him, but she said she was not afraid. (TT 971).

CPS came to her house where she and Grover were separately interviewed. (TT 721). She denied any abuse and also denied that there were any weapons in the apartment, despite knowing about Grover's lawfully-registered gun. (TT 721-722). While she was being interviewed by CPS, Grover was so unconcerned that he took the children to a playground. (TT 975, 978). In contrast, while Grover was being interviewed, Appellant was so concerned that she remained in the apartment and tried to overhear what he was saying. (TT 979). She testified that when CPS left, Grover made her call the people who she identified as witnesses to CPS to make sure they would say everything was okay. (TT 723).

Regarding the events of that evening, she stated that when Grover came home from work she asked about his interview. (TT 729). She then told him she thought they should separate. (Id.). Grover interrupted and demanded that she bring him his camera, and after she did, he threw it on the floor. (TT 729-730). She testified they then went into the bedroom where Grover took out the gun and told her he could kill her in her sleep. (TT 730-731). He showed her how to load it. (Id.). He then, according to Appellant, showed her diagrams of the brain on his

phone and described what would happen if he shot her in different places. (TT 731-732).

Appellant testified that she "was pretty sure he was going to kill me" but inexplicably decided to take a shower. (TT 732). Grover got in the shower with her and threatened to shoot her. (TT 733). Grover left the shower first, and Appellant got out shortly after. (Id.). She then got dressed. (TT 734). She testified that Grover then stopped her, pushed her to her knees, and forced himself into her mouth. (Id.). He pulled her up to her feet and apologized, but then pulled her onto the couch on top of him. (TT 734). He put on a condom and had sex with her. (TT 734-735). When he finished, she put her pants on and he used a baby wipe to clean the couch. (TT 735). She went into the children's bedroom and stayed for awhile. (TT 736-739). Grover was on the couch and motioned for her to join him. (Id.). She walked over and laid on top of him. (Id.).

When she thought he was asleep, she tried to get up, but Grover lifted up his arm and had the gun in his hand. (TT 741). She kneed him in the groin and the gun fell to the floor. (TT 742). Appellant said she got off the couch, picked it up, and pointed it at him. (TT 743). She said Grover remained on the couch and did not try to get the gun. (TT 1099). She testified that she two steps to her right, towards the door to the apartment, and Grover said, "you won't do it." (TT 743). She claimed that he told her that she would give him the gun and he would kill her and himself,

leaving the children with no one. (Id.). She was about one step away from him. (TT 744). At that point, Appellant "took one last step towards him, [] lunged, and [] pulled the trigger." (Id.). She then dropped the gun but picked up a bullet, or possibly a shell casing, that she saw on the floor. (TT 748-749, 755). She then heard running water and went to the bathroom where she saw the laptop in the bathtub. (TT 749). She claimed that she could not turn the water off and left the laptop there. (Id.). She picked up the children and carried them to the car. (TT 750). She called Sarah, who did not answer, and then called Elizabeth Clifton, who told Appellant to come to her house. (TT 750-751).

Appellant felt that she should go back to the apartment for the computer, because she thought that the pictures Grover took of her would be on it. (TT 751). She drove back to the apartment and went inside, but then left again, empty-handed. (TT 753).[8]

Appellant also testified that she sent the text message stating "I haven't figured out how to kill him without being caught…" to a friend in "jest." (TT 717).

On cross-examination, Appellant stated that early in her relationship with Grover, she disclosed she was sexually abused as a child. (TT 761). She told him

[8] She testified that she previously told Sarah that the laptop would have pictures proving Grover's abuse, and Sarah counselled her in "many" conversations that if she ever left Grover, it was "most important" to take the laptop and camera memory cards. (TT 929, 992, 1134).

that because of that, he would have to be patient with her sexually, (TT 762). Grover agreed to wait as long as she needed to feel comfortable being intimate with him. (TT 762). He was "kind" and "caring." (TT 763). He enjoyed playing video games and was "like a big kid," which was endearing to Appellant at first, but over time became aggravating. (TT 766-767).

While Appellant was pregnant, Grover made video tribute to her that he called "Becoming a Mom" and gave to her as a Mother's Day present. (TT 778, 781). When Appellant was pregnant, she gave Grover a handwritten card with a list of "25 Reasons You're Going to Make a Great Dad!" which included "family is your biggest priority," "you love me!," "you are gentle but strong," "you've done everything you can to make a stable home for our family," and "you get up at any time to make sure I have food that I'll eat." (TT 867-868; People's Exhibit 60). Appellant also gave Grover a handwritten birthday card approximately three months after her son was born – during the time, she previously testified, that he was violently abusing her – from her and their son in which she wrote Grover was "a loving father, a selfless provider, and the man whose footsteps I am proud to follow." (TT 1154-1157; People's Exhibit 78).[9]

[9] The People's forensic psychologist testified in rebuttal that it "doesn't make sense" that Appellant would want her son follow his father's footsteps if he was a violent rapist who had horribly abused her for a long period of time. (TT 1960).

b. Other Evidence

Appellant presented a "cyber forensics" expert who attempted to blunt the impact of Appellant's text message stating "I haven't figured out how to kill him without being caught…" by testifying that a few seconds after Appellant sent that message she texted an emoji known as a "grimacing face." (TT 529-530, 537-539). He also testified that the web history from Grover's cell phone showed it had searched sexually explicit terminology. (TT 566-568). These searches were from various days in July, two and a half months before the crime. (TT 568-570; Defense Exhibit AA-1).

Appellant also presented several friends and acquaintances who testified that over the course of her relationship with Grover, they observed her with bruises and/or wearing unseasonably long-sleeved clothes. (See, e.g., TT 1241-1276, 1360-1366, 1536-1543. None of them ever saw Grover assault or abuse Appellant.

Susan Rannestad, Appellant's midwife, testified that she examined Addimando three times in 2017 and observed injuries to her vagina, vulva, rectum, and, on one occasion, elsewhere on her body. (TT 1284, 1287-1300).[10] She admitted that Appellant had told her the purpose of these visits was for documentation purposes so she could obtain custody of the children. (TT 1336-1337). Rannestad also admitted sharing Appellant's medical records with Caprioli,

[10] Rannestad merely recommended that Appellant take Tylenol and warm salt baths for these injuries. (TT 1334).

and at one point told Appellant that she didn't send her the records because "I have to look up a few hints about making a chart that is evidence." (TT 1342).

Rannestad acknowledged previously telling the prosecutor that she belied Appellant "was controlling of [Grover] even though she claims he was her abuser," and testified that "I do think there is room here for… to wonder about this case. I think they were both sick and probably abusive to each other." (TT 1345-1346). Rannestad, Caprioli, and Appellant had discussed that Appellant's injuries could appear to be self-inflicted. (TT 1347-1349). She also conceded that she did not observe any injuries to Appellant when she conducted numerous pelvic examinations on her throughout her second pregnancy in 2014 and 2015, despite Appellant's claims of being violently assaulted throughout that period. (TT 1304, 1313-1324).

Lastly, Appellant called Dr. Dawn Hughes, an expert in the area of "interpersonal violence and traumatic stress." (TT 1587). Dr. Hughes testified that based on Appellants history, self-reported relationship with Grover, and other factors, Appellant had a heightened perception of fear and danger at the time she killed Grover. (TT 1648; see generally, TT 1595-1651).

3. The Prosecution's Rebuttal Case

In rebuttal, the People presented forensic evidence proving that one of the photographs Appellant introduced into evidence which she claimed depicted severe vaginal injuries, (see TT 958-960, 965-966; People's Exhibits 64, 65), could not have been taken by Appellant's cell phone, as she claimed, or in the manner she testified. (TT 1769-1770, 1773-1778).

The People also recalled Marisa Hart, who testified that she taught gymnastics classes to Appellant and Grover's children "for a long time" starting in 2014. (TT 1803, 1806). She observed that they were "having fun" together during the classes, just like "a normal mom and dad taking kids to gymnastics and enjoying their time while they were there." (TT 1804, 1807). Appellant never had any visible bruises or injuries. (TT 1805, 1807).

The People then called Jenn Ventura, another employee of the gym who was friends with both Appellant and Grover and frequently observed them interact with each other. She said they had a "normal relationship" and she "never" observed Grover act aggressively towards Appellant. (TT 1836). She also went on vacation with Appellant and Grover over Memorial Day weekend in 2011 and 2012. (TT 1837-1838, 1847). Appellant had no visible injuries on these occasions, and they acted "normal." (TT 1848).

Finally, the People called Dr. Stuart Kirschner, an expert in "forensic psychology." (TT 1868-2041). Dr. Kirshner testified that Grover did not exhibit the "character pathology" of an abuser and there was "absolutely no indication" that he was possessive or controlling of Appellant. (TT 1901-1905). In fact, some of Appellant's actions and the extent of her independence from Grover were the "total opposite" of the extreme psychological and physical control that is typically seen in cases where someone abuses a partner as horrifically as Appellant alleged. (TT 1914-1915). Other aspects of their relationship were "so contrary to anything we know about how batterers treat their victims." (TT 1915). He concluded that Grover's treatment of Appellant "doesn't match what a batterer would do." (TT 1917).

Dr. Kirshner also said that the idea that Grover, who was not otherwise violent, would turn into an abuser by mimicking the prior abuse that Appellant disclosed to him was something that was not consistent with any research in the field and he had never heard of such a scenario. (TT 1937).

Referring to People's Exhibits 4-7, the text messages between Appellant and Grover, Dr. Kirschner noted: "the person who's really being abusive here is [Appellant]. She's the one who's being condescending. She's the one who's telling him that he's, you know, an idiot basically." (TT 1941).

Finally, he testified that it very significantly "speaks to [Appellant's] reliability" that she did not mention to either Officer Sisilli or Detective Honkala that Grover showed her pictures of the brain and made comments about shooting her, because Appellant had since stated that was the trigger that caused her to feel differently about that night and that her life was in danger. (TT 1962-1965). In his experience, an individual in such a situation would not forget to mention or omit such a significant detail. (TT 1964-1965).

4. The Pornhub Pictures

During Appellant's testimony, she identified a number of photographs as the pictures of her that were on Pornhub. (TT 688-693, 696; Defense Exhibits GGG – MMM.)

Detective Jason Ruscillo of the Hyde Park Police Department testified that in 2015 he was investigating these photographs and observed them on PornHub. (TT 1518-1519). He identified Defense Exhibits GGG through MMM as the pictures he saw online. (TT 1520-1522).

Dr. Hughes testified that she had viewed the pictures and asserted that what they depicted, and the act of uploading them without consent, was a form of "sexual violence" inflicted upon Appellant by Mr. Grover. (TT 1626-1627, 1631, 1640-41).

Appellant also attempted to admit two other exhibits into evidence, which were marked as Defense Exhibits UUU and VVV for identification. Defense Exhibit UUU was a screenshot of the profile for the Pornhub account that contained the photographs admitted as Defense Exhibits GGG – MMM. See Def. Ex. UUU. The profile contained the account name "groverrespect" and included biographical information, such as the user's purported age, interests, and geographic location. Id. Defense Exhibit VVV was a collection of screenshots showing the "activity log" of that username. See Def. Ex. VVV. The log showed that this account uploaded the photographs at issue and also posted obscene and vile comments about these, and other, pictures. Id.

Appellant's counsel showed these exhibits to Det. Ruscillo, who testified that he had seen them on Pornhub, but agreed with Appellant's counsel's statement that there was "no way of knowing who" provided the information or posted the comments. (TT 1520, 1522).

At the end of the day's proceedings, long after Det. Ruscillo finished testifying, Appellant sought to make a record about this issue. (TT 1554-1560). She argued that the defense should have been permitted to elicit from Det. Ruscillo that the username was "groverrespect" and that the biographical information that it contained, such as the listed interests and approximate age, matched Christopher Grover. (TT 1555). The Court noted that the issue had previously been discussed

off-the-record and that because the profile and comments could not be authenticated or connected to Grover, they were not admissible. (TT 1555-56). The Court explicitly stated that its ruling was limited to the "information around the pictures" not being sufficiently authenticated, and noted that Appellant had been able to fully introduce the photographs themselves into evidence and establish that they had been uploaded to a web site without her consent. (TT 1559-1560).

During cross-examination of Dr. Kirschner, Appellant attempted to solicit information about the username and profile of the account where the pictures had been uploaded, but the People's objection was sustained. (TT 2008-09). The court ruled that counsel could not ask the witness to describe the content of the web page but could ask what effect that information had on his conclusions and opinions. (TT 2009). Appellant proceeded to do just that, showing the witness Trial Exhibits UUU and VVV for identification and asking several questions about them. (TT 2010). Dr. Kirschner testified that the information "corroborates that there were images of her on the internet, but it doesn't corroborate necessarily who put them there, how they got there." (Id.).

Appellant later argued that this answer from Dr. Kirschner was misleading and opened the door to the admissibility of the two exhibits. (TT 2110-2111). Counsel forthrightly conceded that "there is no evidence as to who posted [the

pictures]" but argued that the jury should nonetheless be given the opportunity to "connect" the Pornhub profile to Grover. (TT 2110-2111).

The Court noted that that on a website "anyone can name their screen name or their profile anything they want." (TT 2112). The court then asked Appellant's counsel his favorite baseball team and stated he could make a profile, without counsel's permission, using his name and saying he was a fan of that team. (Id.). Counsel agreed that could be done. (Id.). The Court concluded that it was improper to take something that was "not authenticated" and "not even hearsay" and "invite[] the jury to assume that that's the person who uploaded it." (TT 2113).

E. Sentencing

Following her conviction, Appellant moved to be sentenced under the DVSJA. The Court granted Appellant an evidentiary hearing and discussed with the parties the statutory elements, the burden of proof, and the applicable rules of evidence. (ST 7-11 (making a record about the parties' pre-hearing submissions on these issues)).

The trial transcript was admitted into evidence at the hearing. (ST 6). Appellant also called a number of witnesses. One witness described an incident in 2014 in which she observed Appellant with injuries to her face and neck and another incident in 2017 in which she observed bruises on her chin and mouth. (ST

16, 19). Appellant later told the witness that Grover caused the 2014 injury. (ST 47).

Sarah Caprioli, Appellant's therapist, was another witness. She met Appellant in 2014. (ST 55). Caprioli testified to seeing Addimando with red marks and injuries on a number of occasions, which Appellant generally stated had been caused by Grover. (TT 60-64, 83-85, 87-95, 115-117).

Caprioli described one time when Appellant brought her two memory cards that supposedly contained video recordings of Appellant and Grover having sex that Grover made without her consent, but Appellant would not consent to Caprioli giving them to the police, looking at them, or copying them to her computer. (TT 86). Another time Appellant brought her two more memory cards, but they did not contain any sexual pictures or videos. (TT 88).

Appellant also called an expert in the field of "domestic abuse." (ST 304).

Following the hearing and post-argument written submissions, the Court issued a 48-page written decision. (Decision and Order (McLaughlin, J.), February 6, 2020 [hereinafter "DVSJA Dec."]). The Court concluded that there were "significant, unresolved questions" about Appellant's allegations and "weighty questions" regarding her account of her relationship with Grover and whether he

was the perpetrator of such abuse. (Id., pp. 40-41).[11] As a result, Appellant failed to meet her burden of proof. (Id., pp. 44-45, 47).[12] This conclusion was eminently reasonable in light of the glaring inconsistencies in Appellant's account of the crime, the contradictions among the evidence she presented, and other factors. For example, the court specifically noted:

- Appellant had told some friends, and led others to believe, that "D.T" had repeatedly sexually abused her, stalked her, and injured her. However, when asked at trial if D.T. ever forced himself on her, Appellant said "no." (Id., pp. 13-14).[13]

- Although both Dr. Hughes and Dr. Kirschner testified that severe abusers exert complete control over their victims, it was uncontroverted that Appellant ran her own business, had private bank accounts, and was not socially isolated or restricted from traveling, working, or seeing friends. (Id., pp. 17-18). Grover was aware she was seeing a therapist and did not attempt to stop her from doing so, nor did he object to her living with "D.T." while he was allegedly assaulting her. (Id.). Grover did not monitor her calls, follow her to work, or otherwise seek to control her. (Id., p. 32).

- The "revealing" text messages between Appellant and Grover in the days and weeks before the murder. (Id., p. 18). Dr. Hughes testified that the barrage of insults and curses showed Appellant "emotionally degrading" Grover, and Dr. Kirschner described them as "berating and condescending"

---

[11] The court noted that in addition to Grover, Appellant had alleged she had previously been abused by "Butch," "Cesar," another man named "Chris," a police officer with the initials "D.T.," someone named "Race," and someone nicknamed "A-Rod." (DVSJA Dec., pp. 12-14). The Court noted that, every single relationship Appellant had with a male partner or acquaintance had, according to her, "included either physical or sexual abuse, or both." (Id., p. 14).

[12] The parties agreed before the hearing that Appellant, as the movant, had the burden to prove she was entitled to relief by a preponderance of the evidence. (DVSJA Dec., p. 8).

[13] Appellant testified at trial that when she was arrested, she called her mother and then "immediately" called D.T. (TT 1163-1164).

messages that would serve no purpose other than to provoke Grover if Appellant's claims were true. (Id., pp. 18-20). Appellant's midwife, who had been seeing Appellant since 2014, thought she and Grover were "sick and abusive" to each other. (Id., p. 19).

- Appellant testified that Grover physically and sexually abused her throughout her second pregnancy, but her midwife testified that she performed full examinations on Appellant and did not document any injuries of evidence of abuse. (Id., p. 20).

- Although Appellant claimed that she thought the camera Grover threw across the room contained documentation of her abuse, the memory card of the camera had no such pictures on it. (Id., p. 21).

- Similarly, the laptop computer – which Appellant told police would likely have evidence of her abuse, and which she argued Grover submerged in the bathtub to destroy this evidence – was resurrected and did not contain any pornography or proof of abuse. (Id.).

- Additionally, Caprioli had repeatedly told Appellant to take the laptop if she ever left Grover, but after the murder she inexplicably did not either turn off the water or take it. (Id.).

- At a "physical" approximately two weeks before the murder, Appellant neither disclosed the abuse nor had any injuries that were observed by the doctor. (Id., p. 30).

In evaluating the evidence of *who* perpetrated any abuse inflicted on Appellant, the court highlighted that:

- Dr. Hughes testified that Appellant told her that some of the alleged incidents perpetrated by different people "sort of blend together" and she concluded that at one time Appellant was conflating two separate instances of abuse and appeared to be "confused" about those events. (Id., pp. 21-22).

- As discussed above, although Appellant stated to some friends that "D.T." was forcing her to have sex with him, when asked under oath, she stated that he did not do so. (Id., p. 23).

- Dr. Kirschner found it illogical that Appellant would tell D.T., a retired police officer, about Betancourt's abuse but not Grover's, and that she would leave the safety of living with D.T.'s family and moved in with Grover if he had been horrifically abusing her. (Id., p. 24). After all, D.T. was like Appellant's "personal bodyguard." (Id.)

- Appellant had provided other, different accounts of abuse to different people, and one time claimed to have been attacked by an "ex-boyfriend who was a police officer" at a time before her relationship with D.T. began and when Grover was out of town. (Id., p. 24).

- Appellant's mother had informed the police in another incident that she "makes things up for attention." (DVSJA Dec., p. 24).

The Court also recognized other, general issues with Appellant's claims, including:

- Despite Appellant's disclosures to some friends about Grover's purported abuse, she consistently resisted all attempts to forensically gather evidence or provide official reports to law enforcement. (Id., p. 25).

- At Appellant's first forensic examination she was asked whether she had been attacked with weapons, bitten, choked, or burned. (Id., p. 25, 30). She stated she had not, but when she returned for her second examination a few days later, she stated all of those things had occurred in the most recent assault. (Id.).

- Despite her claims of being assaulted and stalked by D.T., she wanted him to visit her in jail while she was held on bail in this case. (Id.).

- There would be no reason for Grover to want to destroy the camera or laptop, as neither contained any proof of alleged abuse. (Id., pp. 25-26).

- Her bizarre claims that an abuser would hand his victim a gun, teach her to load it, and make sure she knew how to operate it. (Id., p. 26).

The Court next considered whether Grover appeared to be abusive, and found the following evidence to be significant:

- Appellant herself described Grover as a "big kid." (Id., p. 31).
- She acknowledged Grover was willing to wait for "a year" to be intimate with her after she disclosed some alleged prior abuse to him. (Id.).
- A few days before the murder, Grover texted Appellant that he would leave if he made her unhappy. (Id.).
- Dr. Kirschner testified that it would be highly unusual for abuse to begin by someone being informed of abuse by another man that he then imitated. (Id., p. 32).
- Not one of the voluminous text messages introduced into evidence showed Grover being verbally abusive to Appellant in any way. (Id.).
- Grover was "calm" regarding the CPS investigation. (Id., p. 33).

Lastly, the Court considered the crime itself. In doing so, the Court specifically noted that its analysis was based on Appellant's version of events, as the People's contention was that Appellant "executed Christopher Grover as he slept." (Id., p. 45). The details of note to the Court included:

- The gun was pressed against Grover's temple as he laid on his back on the couch with his hands resting on his torso. (Id., p. 35).
- Appellant acknowledged Grover never attempted to get off of the couch after she gained possession of the gun. (Id., p. 37).

- Even though she had the gun, and Grover was a black belt in Taekwondo, Appellant lunged towards him before pulling the trigger. (Id.).

- Appellant testified that she pressed the gun to Grover's temple, but had told Caprioli that she did not think the gun touched his head. (Id., p. 38).

- She alternately testified that she did not remove the laptop from the water and that she did remove the laptop, but then put it back underwater. (Id.).

- She told Dr. Kirschner she did not take the laptop because she did not want to "tamper with evidence," but she admittedly took the shell casing. (Id.)

- Appellant told Officer Sisilli at different times that Grover dropped the gun because she kneed him, elbowed him, or knocked his arm. (Id., p. 39).

- Appellant never told Officer Sisilli or Det. Honkala that Grover showed her pictures of where he could shoot her in the head, although she testified that he did. (Id., p. 40).

Additionally, the Court found that Appellant had numerous resources available to assist her, including eight friends who offered help and services, numerous members of law enforcement, and many people trained in assisting domestic-abuse victims. (Id. pp. 26-27). The Court further described how Appellant admitted receiving advice on how to safely leave Grover, including that she should leave while he was at work and should take the laptop with her. (Id., p. 27). Multiple people had offered to let Appellant could live with them if she left Grover, and Caprioli even offered to help her pack. (Id., pp. 27-28).[14] The Court

[14] Caprioli testified at the hearing that a lack of support services was not a barrier to Appellant leaving Grover. (Id., p. 28).

also noted that although Appellant claimed that the CPS inquiry heightened her sense of fear for her safety, when she told Caprioli about the CPS investigation, Caprioli specifically told her that "CPS is the safe way out." (Id., p. 28).

After reviewing all of this evidence, the Court concluded that:

> There are significant, unresolved questions regarding the defendant's version of what occurred in her past and on the night of the homicide, as well as weighty questions regarding the nature of her relationship with Christopher Grover and the profile of Christopher Grover as an abuser, in action or by reputation.

(Id., p. 42). The Court found that because (i) Appellant had made many "inconsistent statements" regarding her alleged abuse by Grover and her account of the crime; (ii) Grover did not fit the profile of an abuser (even according to Dr. Hughes, Appellant's witness); (iii) Appellant had significant resources available to her; and (iv) Appellant's own description of the murder, in which Grover was laying supine on the couch when Appellant lunched forward to shoot him "point blank in his temple," Appellant failed to meet her burden to show she was entitled to relief under the Act. (Id., pp. 42-47).

The court subsequently sentenced Appellant to concurrent terms of 19 years to life imprisonment on the first count and 15 years imprisonment (with 5 years post-release supervision) on the second count.

ARGUMENT

POINT I

The Trial Court Properly Disqualified Defense Counsel (Responding to Appellant's Point I)

A. The Trial Court Did Not Improperly Deny Appellant the Right to Counsel of Her Choice or Force Her to Retain Counsel

The Federal and State Constitutions guarantee criminal defendants the right to counsel. U.S. Const. 6th Amend.; N.Y. Const. Art. I, § 6. However, "[a]n indigent defendant's constitutional right to the assistance of counsel 'is not to be equated with a right to choice of assigned counsel.'" (People v. Espinal, 10 A.D.3d 326, 329 (2nd Dept. 2004) quoting People v. Sawyer, 57 N.Y.2d 12, 18-19 (1982)). A court can replace assigned counsel upon making "threshold findings that [counsel's] participation would have … created any conflict of interest or resulted in prejudice to the prosecution or the defense." (Espinal, at 329). In such a situation, a "defendant's preference for a particular assigned attorney is not controlling." (People v. Guistino, 59 Misc.3d 801, 804 (Glens Falls City Ct. 2018)).

As a preliminary matter, Appellant claims that she was denied the "constitutional right to counsel of her choice" and that she was "forced to retain" new counsel as a result of the Court's decision to disqualify DCPD. (App. Br., pp.

15-16, 18 n 6, 29). These are wholly inaccurate and misleading descriptions of what occurred. *First,* DCPD was assigned to represent Appellant. (App. Br., p. 14). Therefore, Appellant plainly did not have a constitutional right to assigned counsel of her choice. (Sawyer, at 18-19; Espinal, at 329).[15] *Second*, the result of the court's decision disqualifying DCPD from this case neither left her without counsel nor "forced" her to retain counsel: the court plainly did nothing more than disqualify one public defender's office and appoint another public defender's office in its place. (Disqualification Dec., p. 8). While Appellant eventually retained private attorneys to be trial counsel, she intended to do so long before this conflict arose, and her decision was wholly independent of the court's ruling. (TT 1367-1370).[16]

B. The Court Correctly Determined that DCPD had an Unwaivable, Irreconcilable Conflict

It is axiomatic that a defendant is entitled to conflict-free, zealous representation. (People v. Ennis, 11 N.Y.3d 403, 409-410 (2008)). It is so

[15] Indeed, nothing prevents DCPD or any other public defender from reassigning cases among staff attorneys for internal reasons, such as to manage caseloads. A defendant cannot complain that such an action constitutes a constitutional violation simply because he wanted to continue to be represented by the originally-assigned attorney.

[16] The prosecutor placed on the record at the conflict inquiry that from "early on" in the case Appellant had intended to only use the public defender's office through the grand jury presentation and then planned to retain private counsel. (DT 9). She stated she wanted to place this on the record because if the court disqualified DCPD, it could erroneously appear that any private counsel that was subsequently retained was only brought in because of the disqualification motion. (DT 10).

fundamental that counsel's "paramount responsibility is to [the] defendant alone" that an actual conflict of interest need not be present to warrant reversal of a conviction and a new trial; the "significant possibility" of a conflict is sufficient. (People v. Macerola, 47 N.Y.2d 257, 264 (1979)).

A conflict of interest is present when counsel represents someone whose interests "are actually in conflict with those of the defendant," (People v. McDonald, 68 N.Y.2d 1, 8 (1986)), and when a potential conflict has "operated on" the defense. (Ennis, at 410). The core concept of a conflict of interest is that it places a lawyer in "the very awkward position" of being subjected to conflicting ethical demands. (People v. Solomon, 20 N.Y.3d 91, 97 (2012)).

A trial court has the "independent obligation to ensure that defendant's right to effective representation [is] not impaired." (People v. Carncross, 14 N.Y.3d 319, 328 (2010)). Therefore:

> A determination to substitute or disqualify counsel falls within the trial court's discretion. That discretion is especially broad when the defendant's actions with respect to counsel place the court in the dilemma of having to choose between undesirable alternatives, either one of which would theoretically provide the defendant with a basis for appellate review. Criminal courts faced with counsel who allegedly suffer from a conflict of interest must balance two conflicting constitutional rights: the defendant's right to effective assistance of counsel; and the defendant's right to be represented by counsel of his or her own choosing. Thus, a court confronted with an attorney or firm that represents or has represented multiple clients with potentially conflicting interests faces the prospect of having its

> decision challenged no matter how it rules—if the court permits the attorney to continue and counsel's advocacy is impaired, the defendant may claim ineffective assistance due to counsel's conflict; whereas, if the court relieves counsel, the defendant may claim that he or she was deprived of counsel of his or her own choosing.

(People v. Watson, 26 N.Y.3d 620, 624 (2016) (quotations and citations omitted)).

A defendant's willingness to waive a conflict does not end the court's inquiry, and the court has "substantial latitude" in refusing a waiver in instances of both actual conflicts and "the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses." (Watson, at 627 (2016) (quotations omitted)). As the Court of Appeals has recognized, these decisions must be made:

> not with the wisdom of hindsight after the trial has taken place, but in the murkier pre-trial context when relationships between parties are seen through a glass, darkly. The likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict.

(Carncross, at 327-328 (quotations omitted)). This determination will not be second-guessed simply because a readily foreseeable potential conflict did not actually come to pass as the proceeding continued. (Watson, at 627).

Based on these principles, it is clear that the trial court correctly found a conflict existed and disqualified DCPD for three reasons. *First,* DCPD had an actual conflict due to their competing ethical duties to both Cesar Betancourt and Appellant. *Second*, DCPD had affirmatively taken steps on Betancourt's behalf

that were contrary to Appellant's interests. *Third*, DCPD was willing to alter their defense of Appellant to avoid a conflict, which definitively shows that this conflict would have "operated on" the defense had DCPD not been disqualified.

1. DCPD Had Represented, And Currently Represented, An Individual Whose Interests Were at Odds with Appellant's Interests and Who Was a Potential Witness Against Appellant

An attorney's duty of loyalty to his or her clients survives the termination of the attorney-client relationship. (People v. Ortiz, 76 N.Y.2d 652, 656 (1990). This duty extends to all members of a public defender's office, not just the individual attorney who represented the client. (Watson, at 625 (public defender has an "institutional duty of loyalty to its former client")).

It is therefore a conflict of interest when an attorney's former client may be a witness against a current client, because

> [t]he attorney's decision whether and how best to impeach the credibility of a witness to whom he – or his law partner – owe[s] a duty of loyalty necessarily place[s] the attorney in a very awkward position, where *prejudice to defendant need not be precisely delineated but must be presumed.*

(McDonald, at 11 (emphasis added)). Therefore, a court faced with the realistic possibility of this situation occurring should err in favor of disqualification. (Gjoni v. Swan Club Inc., 134 A.D.3d 896, 897 (2nd Dept. 2015) ("any doubts as to the existence of a conflict of interest must be resolved in favor of disqualification …");

Severino v. DiIorio, 186 A.D.2d 178, 179 (2nd Dept. 1992) ("any doubts about the existence of a conflict should be resolved in favor of disqualification so as to avoid the appearance of impropriety")).

In light of this standard, it is clear that the court below made the correct decision. Betancourt was neither a disinterested third-party in this case nor "collateral" to the issues in this case, as Appellant contends. (App. Br., p. 38). Throughout the pendency of this case – and at trial – Appellant claimed that Betancourt, a prior client of DCPD, committed multiple heinous, violent crimes against her and that his conduct contributed to her committing the instant crime while suffering from Battered Women's Syndrome. He was, as the court found, "central to the defense" and "intricately interwoven" into Appellant's assertion of BWS. (Disqualification Dec., pp. 5, 7). The court noted that it was Appellant who made Betancourt relevant to the instant case and that Appellant's own expert placed "significant weight" on Betancourt's alleged abuse in formulating her opinions and conclusions regarding Appellant's state of mind at the time she killed Grover. (Id., p. 6; Mem. of Law in Opp. to People's Motion to Recuse, May 14, 2018, p. 1.).

The court also correctly noted that Betancourt would be a "necessary" rebuttal witness if the prosecution sought to refute Appellant's claims – and therefore, was someone that DCPD would seek to discredit – was an untenable

situation. (Id., p. 5). The result of Betancourt's criminal case, and his underlying conduct, would have been proper (and potentially valuable) impeachment material, but DCPD would not have ethically been permitted to cross-examine him about it, because

> The duty of loyalty to a former client is broader than the attorney-client privilege and an attorney is not free to attack a former client with respect to the subject matter of the earlier representation even if the information used in the attack comes from sources other than the former client.

(People v. Liuzzo, 167 A.D.2d 963, 963 (4th Dept. 1990).)[17]

The propriety of the court's ruling is even clearer when considered in light of the fact that Betancourt was not solely a prior client of DCPD, he was *a current client.* After the People's investigator contacted Betancourt, he reached out to DCPD, presumably because of his prior relationship with them. DCPD acknowledged that he was "seeking advice" and "wanted an attorney." (Letter from Criminal Department Bureau Chief Kara M. Gerry, May 1, 2018 [hereinafter "Gerry Letter"]; Aff. of Kara M. Gerry, Esq., in Opp. to People's Motion to Recuse, May 14, 2018 [hereinafter [Gerry Aff."], p. 3). DCPD then engaged in a number of acts, each of which, if not individually then certainly collectively, established an attorney-client relationship with Betancourt. In particular, DCPD:

[17] Additionally, DCPD's representation of Betancourt was in 2011, the same time as he was allegedly repeatedly raping Appellant, which further complicated any potential cross examination.

(i) Gave Betancourt legal advice (that he did not have to speak to the People's investigator and had the right to an attorney), (Disqualification Dec., p. 2; Gerry Aff., pp. 2-3);

(ii) Informed him that they would contact the court "on his behalf," (Gerry Letter, May 1, 2018, p. 3); and

(iii) Immediately contacted both the investigating police department and prosecutor "invoking Betancourt's right to remain silent." (Id.).

The right to counsel and the right to remain silent are personal to the individual invoking them and a third party cannot invoke these rights on behalf of another. (People v. Mitchell, 2 N.Y.3d 272, 275 (2004)). Therefore, when DCPD invoked these rights on Betancourt's "behalf," they necessarily did so as his counsel. That office was therefore in the position of simultaneously representing both a defendant in a criminal case and a likely witness whom the defendant had accused of heinous, unspeakable crimes.

The fact that the People ultimately elected not to call Betancourt, due to how the trial ultimately unfolded, does not affect the propriety of the court's conclusions. (Watson, at 627 (2016); Carncross, at 327-328).[18] It was clearly impossible for DCPD to zealously and single-mindedly advocate for Appellant while also upholding their duty of loyalty to Betancourt.

[18] Although Betancourt did not testify, his purported conduct played a prominent role in the trial. A search of the transcript shows that he was referenced, either by name or as "the maintenance worker," (as he was known), 113 times throughout the trial, excluding opening statements and closing arguments. Appellant also testified that her son could have been a product of a rape by Betancourt. (TT 779).

2. DCPD Had, in Fact, Taken Steps Adverse to Appellant

A criminal defendant is entitled to "both the fact and appearance of unswerving and exclusive loyalty" from counsel. (Sawyer, at 20). An attorney is "strictly forbidden from placing themselves in a position where they must advance, or even appear to advance, conflicting interests." (Matter of Lichtenstein, 171 Misc.2d 29, 34 (Sup Ct. Bronx Cty. 1996)).

Here, DCPD engaged in an extensive pre-indictment effort to convince the prosecution not to present this case to a grand jury. DCPD specifically asserted that a significant contributing factor to Appellant's BWS was Appellant's history of prior sexual abuse by several perpetrators, including Betancourt. DCPD also provided the People with the names of many witnesses whom Appellant wanted the prosecution to interview who would supposedly corroborate Appellant's claims.

Thus, it is clear that DCPD served Betancourt's interests, but decidedly not Appellant's, by writing the letter to the police and prosecution invoking his right to remain silent. It unquestionably would have been in Appellant's interest for the People to interview Betancourt, ideally (for Appellant) without counsel, in order to fully investigate her claims of abuse and her proffered defense. Had Betancourt admitted her accusations were true, or even issued an unconvincing denial, it

would have undoubtedly inured to Appellant's benefit. DCPD's letter on Betancourt's "behalf" foreclosed any possibility of this occurring.

This presented an actual conflict of interest and demonstrated that DCPD failed to provide Appellant with single-minded, zealous representation due to their relationship with Betancourt. Because it was "difficult to repose confidence in counsel's single-minded protection of defendant's interests in these circumstances," the Court was correct in disqualifying DCPD. (Carncross, at 329).

3. DCPD Offered to Modify Appellant's Defense to Avoid the Conflict

A court acts "well within the bounds of its discretion" to disqualify counsel upon "concluding that allowing counsel to continue would severely undermine defendant's ability to present a cogent defense." (Carncross at 329).

In response to the People's motion, DCPD shockingly offered to omit any reference to Betancourt as a "contributor" to Appellant's BWS, which, counsel claimed, would obviate any conflict. (Disqualification Dec., pp. 5-6). The court noted that this would unquestionably "compromise[] the representation" of Appellant because "the experts who have already interviewed the defendant have clearly integrated Cesar Betancourt's prior actions in forming the basis of their opinion." (Id., pp. 5-6). Thus, if DCPD remained as Appellant's counsel and she were to be convicted at trial, the court recognized that this decision would provide Appellant with a clear ineffective assistance of counsel claim. (Id., p. 6).

The court's reasoning was eminently correct. Betancourt allegedly assaulted Appellant in the time period immediately before she was dating Grover, and she had alleged that Grover "role-played" as Betancourt while raping her. (Krauss Aff., pp. 7-8).[19] Appellant's expert witness relied on her claims of repeated sexual abuse by Betancourt in reaching her conclusions. (Disqualification Dec., pp. 5-6). Even without Betancourt being called as a witness, he was referenced well over 100 times during the trial – entirely during Appellant's case and the People's rebuttal case. See fn 18, *supra*. Plainly, the proposal to entirely omit him from the defense case would have crippled Appellant's effort to present a "cogent defense."

The astounding proposal by DCPD to entirely excise Betancourt from Appellant's defense represented a gross dereliction of their duty to vigorously represent Appellant. Indeed, DCPD's proposed "solution" to this conflict issue is, in fact, irrefutable proof that the conflict was unavoidable and that DCPD was willing to make tactical and strategic decisions based on factors *other* than their single-minded zealous representation of Appellant. (Watson, at 620 (affirming disqualification of defense counsel because the possible solution of not cross-examining a witness due to a conflict between counsel and the witness was "a tactic based on loyalty" to the other client); People v. Cristin, 30 Misc.3d 383, 393 (Bx. Cty. Sup. Ct. 2010) (proposal for a different attorney to cross-examine a

[19] At trial, Appellant testified that Betancourt was continuing to rape her *while* she was dating Grover. (TT 804).

witness that counsel previously represented was not a solution, it was proof of counsel's "complete disloyalty" to his client)).

C. Appellant's Remaining Arguments Are Meritless

Despite the multiple, readily apparent grounds for the court to have appropriately concluded that DCPD could not provide Appellant with conflict-free representation, Appellant offers several arguments in support of her position that the court's decision was erroneous. Each of these arguments is meritless.

Appellant first claims that there is only a conflict between former and current clients when the two representations are "substantially related." (App. Br., pp. 31-33). In support of this position, she two cases, neither of which are applicable.[20] Solow v. W.R. Grace & Co., 83 N.Y.2d 303 (1994) is a civil case decided before Watson, Solomon, Carncross, and many of the other authorities cited above, and, although the Court of Appeals used the "substantially related" test in that case, the Court did not state that this was the only basis for finding a conflict of interest or that other scenarios could not also present a disqualifying conflict. (Solow, at 308). In People v. Prescott, 21 N.Y.3d 925, 928 (2013), the Court specifically found a conflict existed due to "mutually incompatible legal

[20] Appellant also cites to the Rules of Professional Conduct. (App. Br., pp. 31-32). However, a defendant's reliance on the rules is "unavailing" because the Rules, while important, serve a different purpose and do not have the force of law. (People v. Herr, 86 N.Y.2d 638, 642 (1995)). This issue on an appeal "is not [whether any ethical rules were violated], but with whether defendant received the effective assistance of counsel guaranteed him by the State and Federal Constitutions." (Ortiz, at 656).

strategies" and held that "[t]he conflict is no less significant…because [ ] counsel's representation [of one party] ended prior to the completion of defendant's representation." (Prescott, at 926, 928). As shown above, DCPD employed such "mutually incompatible legal strategies" here: they wanted the prosecution to investigate and credit Appellant's claims that Betancourt repeatedly raped her, but simultaneously asserted Betancourt's right to counsel and right to remain silent, which hindered the prosecution's ability to do so.

Appellant also claims that People v. Burks, 192 A.D.2d 542 (2nd Dept. 1993) "controls here." (App. Br., p. 32). That case is readily distinguishable because in Burks the defense attorney was unaware of any conflict until after his cross-examination of the witness. (Burks, at 543). Therefore, counsel clearly "perceived no… loyalty owing to the witness" that could have affected his performance. (Id.)

Appellant next contends that because another attorney at DCPD represented Betancourt, that should not have been imputed to Appellant's counsel and that fact, standing alone, was insufficient to create a conflict. (App. Br., pp. 33-36). While it is true that knowledge of one attorney of a public defender's office will not be *automatically* imputed to other staff attorneys in the same way it would for attorneys at a private law office, (People v. Wilkins, 28 NY.2d 53, 56 (1971)), the rule does not apply when a defendant's attorney and the public defender's office were *actually aware* of the prior representation and therefore had to balance the

competing interests of multiple clients. (Watson, at 626). The fact that individual or the public defender's office take steps to protect the former client's confidences, such as preventing counsel from reviewing the file or speaking to the other attorney does not ameliorate any conflict, as Appellant now suggests – it exacerbates it, because such restrictions would not be placed on an unconflicted attorney. (Watson, at 620).

Next, Appellant contends that she validly waived any conflict. (App. Br., pp. 36-39). For a waiver to be valid, the court's inquiry must be "sufficiently searching to assure that [defendant's] waiver was knowing and voluntary." (People v. Caban, 70 N.Y.2d 695, 696-97 (1987)). A valid waiver demonstrates that the defendant "has an awareness of the potential risks involved in that course and has knowingly chosen it." (Macerola, at 263). Even then, a defendant's waiver is not dispositive. (Watson, at 627; Carncross, at 327-328).

During the court's conflict inquiry, conflict counsel identified the concern that he discussed with Appellant as "issues of cross-examination with regard to that potential witness and some of the limitations that Ms. Gerry might have with regard to that matter." (DT 7). This record is plainly insufficient to conclude that Appellant's waiver was knowing and voluntary. It provides no factual support for Appellant's current claim that she had any true understanding of these issues, and there is no indication that Appellant was aware – much less discussed with conflict

counsel – that DCPD had asserted Betancourt's constitutional rights on his behalf or had proposed curtailing Appellant's BWS claim by eliminating any mention of Betancourt.

Next, Appellant complains that the court failed to consider less drastic alternatives to disqualification. (App. Br., pp. 39-41). Appellant did not raise any other alternatives with the court below, so this claim is unpreserved. (CPL § 470.05). It is also meritless, and the proposals Appellant now suggests are in fact impermissible. Her suggestion that a conflict could have been avoided by limiting DCPD's potential cross-examination of Betancourt to publicly-available information, (App. Br., p. 40), is contrary to law. (Liuzzo, at 963 (counsel can not cross former client "even if the information used in the attack comes from sources other than the former client.")). Her proposal that another attorney could have been appointed to question Betancourt, (App. Br., p. 40), has also been previously rejected. (Cristin, at 393). Lastly, her suggestion that the Court could have ordered counsel not to obtain any information about Betancourt's DWI case, (App. Br., p. 40), is likewise unavailing. (Watson, at 626 (prohibiting attorney from investigating potential witness/former public defender client "directly impinged on [counsel's] representation of defendant.")).

Finally, Appellant provides precedent which, she argues, entitles her to dismissal of the indictment. (App Br., pp. 40-41). Appellant's reliance on these

cases is misplaced, as neither case involves a conflict of interest. See People v. Young, 137 Misc. 2d 400, 401 (Sup. Ct. Nassau Cty. 1987) (indictment dismissed because it was procured in violation of defendant's right to have counsel when he testified in the grand jury); People v. Estrada, 293 A.D.2d 626, 627 (2nd Dept. 2002) (same).

POINT II

The Integrity of the Grand Jury Proceeding Was Not Impaired by Isolated Instances of Hearsay (Responding to Appellant's Point II)

A. The Introduction of Hearsay Does Not Impair the Integrity of the Proceedings

Dismissal of an indictment is authorized when the underlying grand jury proceeding "fails to conform to the requirements of [CPL Article 190] to such a degree that the integrity thereof is impaired and prejudice to the defendant may result." (CPL §§ 210.20 (1)(c), 210.35 (5)). The Court of Appeals has explained:

> The 'exceptional remedy of dismissal' is available in 'rare cases' of prosecutorial misconduct upon a showing that, in the absence of the complained-of misconduct, the grand jury might have decided not to indict the defendant. In general, this demanding test is met only where the prosecutor engages in an 'over-all pattern of bias and misconduct' that is 'pervasive' and typically willful.

(People v. Thompson, 22 N.Y.3d 687, 699 (2014) (citations omitted)).

This standard is "very precise and very high" and is not met by "mere flaw [or] error." (People v. Darby, 75 N.Y.2d 449, 455 (1990)). "Certainly, not every improper comment, elicitation of inadmissible testimony, impermissible question or mere mistake renders an indictment defective." (People v. Huston, 88 N.Y.2d 400, 409 (1996)). The standard "should be stringent, because the dismissal of indictments for relatively minor errors can seriously interfere with the enforcement of the criminal laws." (People v. Hill, 5 N.Y.3d 772, 777 (2005) (Smith, J., dissenting)).

In contrast, when hearsay is elicited before a grand jury, dismissal of an indictment is warranted only when the properly-admitted evidence is not legally sufficient to support the charges. (CPL § 210.20 (1)(c)). This is an evidentiary issue that the Court of Appeals has noted is "obviously" different than an "impaired the integrity of the proceeding" claim and must be evaluated under a different standard:

> Obviously, on a motion to dismiss the indictment, the fact that inadmissible evidence, inadvertently adduced, has been introduced into criminal proceedings does not necessarily alter the validity of the proceedings; rather, such a defect renders the indictment dismissible when the remaining evidence is insufficient to sustain the indictment.

(People v. Hansen, 95 N.Y.2d 227, 233 (2000)). Put differently, "the submission of some inadmissible evidence during the course of [a grand jury presentation] is held to be fatal only when the remaining legal evidence is insufficient to support the

indictment." (People v. Avant, 33 N.Y.2d 265, 271-272 (1973); see also People v. Kappen, 142 A.D.3d 1106 (2nd Dept. 2016); People v. Simon, 101 A.D.3d 908 (2nd Dept. 2012)).

Appellant does not now claim that the admissible evidence was not legally sufficient to support the charges. Nor could she. A key role of the grand jury is to prevent "unfounded prosecutions," (Huston, at 405), and the propriety a prosecution is established by a conviction at trial. (People v. Pelchat, 62 N.Y.2d 97, 109 (1984) (After a defendant is convicted at trial, "the sufficiency of the evidence to convict…is manifest from the record."); People v. DeFreece, 183 A.D.2d 842, 843 (2nd Dept. 1992) (Defendant did not establish that he was prejudiced as a result of alleged perjury, and dismissal of the indictment was not warranted, when the trial jury convicted defendant without hearing any of the challenged evidence)).

The sum total of Appellant's objections are four questions and answers relating to one witness contained within the five-witness, 134-page grand jury presentation. Detective Guy himself was asked 72 questions, and he was called as a witness primarily because he his test-fired the gun Appellant used to commit the murder. (GJ 79-84). Only after asking grand jurors if they had questions for the witness did the issue of fingerprints or the gun having been wiped down arise. The

first time Det. Guy testified to hearsay was in response to a wholly different question posed by a grand juror:

> **Question:** And prior to you test-firing it – this is a question from a Grand Juror – there was an attempt to recover fingerprints?
> **Answer:** Yes.
> **Question:** Were there any prints recovered from the weapon?
> **Answer:** Prints were not recovered. They told us that the gun was wiped down.

(GJ 91). This answer was both non-responsive and impermissible hearsay, so the ADA, who, as discussed below, had a good-faith basis to believe the gun had been wiped down, rephrased the question to ask for the detective's first-hand observation:

> **Question:** It appeared to be wiped down?
> **Answer:** Yes.

(GJ 91). Shortly thereafter the ADA interrupted the proceeding to instruct the grand jury on hearsay. She unequivocally instructed them that "What one witness is told by somebody else is hearsay. We're not offering it for the truth of the matter." (GJ 93).[21] At the end of the presentation she further instructed the grand jury that they cannot consider any hearsay evidence in determining whether the evidence presented satisfies the "reasonable cause" standard. (GJ 130-131). These

[21] Concededly, the prosecutor later impermissibly asked the witness what he was told by someone else. (GJ 94). However, as discussed herein, this is garden-variety hearsay which did not impair the integrity of the proceeding and which was directly addressed by the limiting instruction that the prosecutor had previously given.

instructions were appropriate to give and legally correct, and the grand jurors are presumed to have followed them. (People v. Berg, 59 N.Y.2d 294, 299-300 (1983).

B. There is No Basis to Conclude the Hearsay Was False

Appellant attempts to bootstrap what is plainly a hearsay objection into an "integrity of the proceeding" claim by contending that Det. Guy committed perjury and, egregiously, that the prosecutor knowingly elicited this false testimony. (App. Br. 5, 18, 41-44). These baseless and inflammatory allegations are factually and legally meritless.

Detective Guy was a sixteen-year veteran law enforcement officer, (GJ 78-79). He undoubtedly appreciates the integrity of the grand jury proceeding and the significance of the oath he took as a witness. Appellant points to no evidence whatsoever suggesting he testified falsely or that the prosecutor knowingly suborned perjurious testimony. In fact, numerous other facts support the conclusion that his testimony, while hearsay, was truthful and that the prosecutor had a good-faith basis to believe that the detective had been told the gun had been wiped down. These other facts include that Sarah Caprioli told the ADA that someone from Appellant's "team," perhaps Appellant herself or her attorney, had stated that the gun may have been wiped down (TT 1424-1425); that a container of baby wipes had been found near the firearm (GJ 97); that a used baby wipe had been found in a trash can in Appellant's apartment (TT 264); and that the ADA had

requested forensic testing of the gun for the presence of solvents but had not yet received any test results. (TT 1425). There is plainly no basis to conclude that Det. Guy's testimony was false or that the prosecutor acted in bad faith.

Appellant's claim is fatally flawed in any event because, even if Det. Guy's testimony had been intentionally false, such testimony would nonetheless not rise to the level of impairing the integrity of the entire proceeding. (People v. Charles-Pierre, 31 A.D.3d 659, 659 (2nd Dept. 2006); People v. Avilla, 212 A.D.2d 800, 801 (2nd Dept. 1995)).

C. Appellant's Claims of Prejudice Are Belied by the Record

Appellant claims she was prejudiced because the prosecutor failed to give a curative instruction to the grand jury regarding the hearsay and this improper testimony therefore provided "consciousness of guilt" evidence. (App. Br. pp. 43-45). However, the prosecutor did give appropriate curative instructions to the grand jury not once, but twice. (TT 93, 130).

Lastly, Appellant relies on People v. Jones, 27 Misc.3d 1208(A) (Sup. Ct. Kings Co. 2010) which she claims is "directly on point." (App. Br., p. 45). To the contrary, it is wholly inapplicable to the instant case. In Jones, a police officer testified in the grand jury that he arrested the defendant, but later admitted to the prosecutor that he was not present and that other officers effected the arrest under unknown circumstances. (Id.) The trial court noted that "[t]here is ample authority

for this court to conclude that the fact that false testimony was adduced before the Grand Jury does not in itself warrant dismissal of the indictment" but found that the officer's testimony, which was entirely fabricated out of whole cloth, "conflicted with key components of defendant's testimony" before the grand jury and the court therefore could not conclude that the defendant had not been prejudiced. (Id., at *3, 4).

This case is also distinguishable because that court had to make its determination during the pendency of the case, while in the instant case, Appellant has been convicted at a trial, at which the prosecution's burden of proof is higher and no evidence of the gun having been wiped was presented. This demonstrably shows that she was not prejudiced by the admission of this evidence before the grand jury. DeFreece, at 843.

POINT III

The Court Properly Denied Appellant's Request to Exercise a Peremptory Challenges Made After Several Additional Rounds of Strikes Had Occurred. (Responding to Appellant's Point III)

A. The Court Properly Exercised Its Discretion in Denying Appellant's Belated Request to Exercise a Peremptory Challenge

Criminal Procedure Law § 270.15 requires that the prosecution exercise peremptory challenges before the defense. (CPL § 270.15(2)). As long as the challenges are exercised in this order, a defendant has received "all the tactical

advantages and procedural protection the Legislature intends to confer upon him." (People v. Alston, 88 N.Y.2d 519, 530 (1996)). Thus, it is well-settled that once both parties accept a juror and proceed to consider subsequent prospective jurors, a court may properly deny a defendant's belated request to peremptorily challenge a previously-selected juror. (People v. Monroe, 118 A.D.3d 916 (2nd Dept. 2014) (citing cases); People v. Smith, 278 A.D.2d 75, 76 (1st Dept. 2000) ("There is nothing in CPL 270.15 that would require a court to grant a defendant's request to exercise a peremptory challenge to a juror who had already been accepted by both sides earlier in jury selection, but who had not yet been sworn.")).

Here, after the People exercised four peremptory challenges on prospective jurors 1 through 12, Appellant exercised two. (JS 542). The Court then asked Appellant's counsel "Is that it?" (JS 543). Counsel replied, "That's it." (Id.) Five jurors – including prospective juror 10 – were therefore selected as trial jurors. (Id.)

The Court then heard challenges to potential jurors 13 through 19. (JS 543). The People exercised four peremptory challenges, Appellant exercised two, and the remaining prospective juror was selected as the sixth trial juror. (JS 543).

Next, the Court entertained challenges to potential juror 20, who Appellant peremptorily challenged. (JS 544). Appellant's counsel then made the belated request to exercise a peremptory challenge against prospective juror number 10.

The trial court properly exercised its discretion in denying the late challenge. By the time of this challenge, the Court and parties had considered not one, but two additional sets of prospective jurors. The People had exercised four additional peremptory challenges, Appellant had exercised three more challenges, and an additional juror had been selected. As the court itself noted, each party had their own strategy for jury selection, and the number of peremptory challenges available and used by each side would "effect [sic] the process." (JS 545).

Appellant contends it was an abuse of discretion for the Court not to permit this late and out-of-order challenge. (App. Br. pp. 47-50). However, the cases cited by Appellant in support of her argument are readily distinguishable and unavailing, unlike Monroe and Smith, which involved the exact situation that occurred here. For example, in People v. Price, this Court held it was error to deny a defendant's request to exercise a belated peremptory challenge which was only "a couple of seconds" late and caused "no discernable interference" with the jury selection process, because "voir dire of the next subgroup of jurors was still to be conducted." (175 A.D.3d 1436, 1437 (2nd Dept. 2019)). Likewise, in People v. Parrales, it was error for the trial court to deny a challenge that a defendant sought to exercise "moments after" he accepted a juror and before any other prospective jurors were considered. (105 A.D.3d 871, 872 (2nd Dept. 2013)). The remaining cases cited by Appellant are equally inapposite. (People v. Scerbo 147 A.D.3d

1497 (4th Dept. 2017) (defense counsel "momentarily lost count" of the number of jurors selected and "immediately" asked the court to exercise a challenge upon realizing the mistake), People v. McGrew, 103 A.D.3d 1170, 1173 (4th Dept, 2013) (counsel sought to exercise a challenge "approximately one minute" after counsel failed to strike a juror, after complaining that court had proceeded too quickly for him to register a timely challenge); People v. Jabot, 93 A.D.3d 1079, 1081 (3rd Dept. 2012) (counsel changed his mind "seconds later" and before any other prospective jurors were considered)).[22]

In sum, Appellant does not cite a single case in which it has been held an abuse of discretion to deny a challenge made after multiple additional groups of prospective jurors were considered, both parties exercised additional peremptory challenges, and an additional juror had been selected. The Court properly denied Appellant's belated request, and her argument on this point must be rejected.

B. Appellant's Alternate Remedy Was Not Raised Below and is Therefore Unpreserved

Appellant's final argument on this issue is that any potential prejudice that could have resulted from allowing the belated challenge could have been

[22] In fact, in Jabot the Third Department noted with approval that "the First and Second Departments have upheld a trial court's discretion not to allow belated challenges to as-yet unsworn prospective jurors where the challenge would interfere with or delay the process of jury selection." (Jabot, at 1081). The Court found that interference or delay with the jury selection process had occurred when the "court had already moved on to next subgroup of jurors when challenge [was] made." (Id.).

adequately addressed by reopening challenges to the subsequently-sat juror. (App. Br., p. 50). However, after the trial court denied Appellant's untimely challenge, counsel merely noted his objection and apologized. (JS 545). This contention is unpreserved for appellate review because Appellant did not request this relief from the court below. (CPL § 470.05).

POINT IV

The Court Properly Precluded the Unauthenticated Pornhub Exhibits (Responding to Appellant's Point IV)

A. Appellant Did Not Authenticate the Profile or Activity Log

A defendant's right to present a defense, while guaranteed by the Constitution, is not unlimited. It does not, for example, "give criminal defendants carte blanche to circumvent the rules of evidence." (People v. Hayes, 17 N.Y.3d 46, 53 (2011) (citations omitted)). In particular, "there is no unfettered right to [the] introduction of hearsay testimony bearing no assurance of reliability." (Id.)

Evidence is only relevant, and therefore admissible, when it is shown to actually be what it is purported to be. As the Court of Appeals has explained:

> In order for a piece of evidence to be of probative value, there must be proof that it is what its proponent says it is. The requirement of authentication is thus a condition precedent to admitting evidence. Accuracy or authenticity is established by proof that the offered evidence is genuine and that there has been no tampering with it.

(People v. Price, 29 N.Y.3d 472, 476 (2017)).

In Price, a case very similar to the instant case, the issue was the admissibility of a photograph from a website that allegedly showed the defendant holding a firearm. (Price, at 474). The profile page where the photograph was found indicated that the page owner had the same last name as the defendant and the page contained other photographs of him. (Id.) Additionally, the profile page contained demographic information such as the user's age and hometown. (Id., at 475). The Court nonetheless found that the information contained in the profile was insufficient to authenticate the profile and the photographs on the page. (Id. at 478).

Applying Price, this Court has found that the appearance of information on the internet does not authenticate the information; rather, there must be a showing "that the statements found on… the accounts were made by the [purported declarant]." (People v. Upson, 186 A.D.3d 1270, 1271 (2nd Dept. 2020); see also People v. Wells, 161 A.D.3d 1200, 1200 (2nd Dept. 2018) (photographs from Instagram and Facebook were improperly admitted when they were not shown to be "accurate and authentic"); People v. Johnson, 51 Misc. 3d 450, 453 (Sullivan County Ct. 2015) (social media postings purportedly made by the victim precluded because there was no evidence the victim herself used that account or personally made the posts); U.S. v. Vayner, 769 F.3d 125 (2nd Cir. 2014) (although profile page from social networking site contained defendant's name, photograph, and

some accurate biographical information, the profile was not properly authenticated because there was no evidence that defendant personally created the page or was responsible for its contents)).

Applying these standards, it is clear that Appellant did not come close to properly authenticating Defense Exhibits UUU and VVV. There was absolutely no evidence offered that the username or account was the victim's; that any of the comments made by the user were actually made by Christopher Grover; or when, where, or how those comments were made. The fact that the username included the victim's last name and the word "respect," (which Appellant suggested was important to Grover), as well as some pedigree information that generally matched his interests and background, was insufficient to authenticate the information, just as similar information was insufficient in Price, Wells, Upson, Johnson, and Vaynor.

The question for the court was not whether the proposed exhibits were fair and accurate reproductions of what appeared on the internet – rather, Appellant had the obligation to show the *underlying information* contained in the exhibits was genuine, has not been altered or tampered with, and is properly attributable to the person to whom it is being assigned. (Price, at 477 n. 2).

Both of the witnesses that Appellant questioned about these exhibits stated that they could not ascertain, from looking at either the actual website or the

printouts, who posted the photographs of Appellant to Pornhub. See TT 1522 (Det. Ruscillo agreeing with Appellant's counsel's statement that he had "no way of knowing" who created the profile or posted the comments); TT 2010 (Dr. Kirschner stating that seeing this information corroborated that the photographs were on the internet, but not "who put them there, how they got there"). In fact, this same issue had arisen in other contexts within the trial. See TT 391-392 (a New York State Police computer forensic analyst testified that although she recovered a backup of an iPhone on Grover's computer, she could not ascertain who performed the backup); TT 400 (the web history of a cell phone shows what web pages the phone connected to, not who was using the phone at the time); TT 608-611 (Joshua Horowitz, Appellant's "cyber forensics" expert, testified that he could not determine who used Grover's cell phone to conduct particular online activity, even though the phone had a password, because the phone could have been unlocked or anyone with the password could have used the phone).

The trial court correctly rejected Appellant's application to admit the exhibits after Det. Ruscillo's testimony, noting that the witness was merely "reading off a screen" when he observed the profile online and could not "tell us the origin or authentication of the user name" or "authenticate anything else on the screen." (TT 1556, 1560). When Appellant's trial counsel raised the issue again following Dr. Kirshner's testimony, counsel conceded that "there was no evidence

as to who posted [the pictures], admittedly so." (TT 2111). The following colloquy then occurred:

> **The Court:** Can I just interrupt, Mr. Ostrer?
> **Counsel**: Sure, Judge.
> **The Court**: Is this the victim's website?
> **Counsel**: We don't know, Your Honor, but –

(Id.). The court then posed a hypothetical question to counsel:

> **The Court:** I could, and I might do this, pretend to be Ben Ostrer on -- what's your favorite baseball team? Tell me you have one.
> …
>
> **Counsel**: I'm a Met fan.
> **The Court:** So I can become Ben Ostrer Met fan 2019 and make an entire profile without your permission right now.
> **Counsel**: Yes, Your Honor.

(TT 2112). This scenario is *exactly* the issue here, and it was not even a close call for the court to determine that the profile had not been sufficiently authenticated.[23]

B. Dr. Kirschner's Testimony Was Not "Misleading" and Did Not Open the Door to These Exhibits

Defendant next argues that Dr. Kirschner's testimony on this issue was "misleading" and therefore Appellant was improperly prohibited from using it to cross-examine him. (App. Br., pp. 56–59). This argument is baseless.

[23] No other evidence in the case supported Appellant's allegation that Grover took these photographs or uploaded them to the internet. Various police and forensic expert witnesses established that the photographs were not found on the memory card of Grover's camera or on his computer, (TT 347-348, 386-388), and no evidence was found on his phone indicating it had been used to upload pornography to the internet. (TT 611).

Dr. Kirschner's testimony was entirely in accord with the court's reasoning that the profile could not be authenticated as being Christopher Grover's. Compare TT 2010 (Dr. Kirschner testifying that the contents of the exhibits do not corroborate "who put [the pictures] there, how they got there") with TT 1556 (the court stating that seeing the profile information online does not "tell us the origin or authentication of the user name"), TT 2112-2113 (the court noting that "anyone can name their screen name or their profile anything they want"). Detective Ruscillo, Appellant's own witness, similarly testified that he had "no way of knowing" who created the profile or posted the comments. (TT 1552). And, of course, the accuracy of Dr. Kirschner's testimony was repeatedly acknowledged by Appellant's trial counsel, who conceded "there was no evidence as to who posted [the pictures]" and "we don't know" whose website it was. (TT 2111-2112).

When the Court, one of Appellant's witnesses, and Appellant's counsel all acknowledged that it was unknown who owned the Pornhub page, posted the pictures to that page, or made the comments on that page, there is nothing erroneous or misleading about a prosecution witness testifying similarly. To argue otherwise is meritless, and borders on disingenuous.

C. Even if The Court's Ruling Was Error, it was Harmless

Reversal is not warranted when an error is shown to be harmless beyond a reasonable doubt. (People v. Crimmins, 36 N.Y.2d 230, 243 (1975)). Such is the

case here: even if, *arguendo*, the court's ruling precluding these exhibits was error, it caused no prejudice to Appellant.

From the first time Appellant raised this issue, the court explicitly stated it "want[s] to be clear" that its ruling was limited to the profile and activity log and that the court had allowed, and would continue to allow, Appellant to present any evidence and make any argument she wanted about the photographs themselves and that they were posted to the internet without her consent. (TT 1559-1560). The court further noted that its ruling was limited to "the information around the pictures." (Id.)

In accordance with this ruling, Appellant herself authenticated Defense Exhibits GGG-MMM as pictures of her (which were admitted into evidence without objection) and testified (1) that Grover had taken them, (2) that they depicted her being assaulted and restrained by him, and (3) that she observed them on Pornhub. (TT 688-693, 696). Detective Ruscillo testified that he saw these photographs on that website, (TT 1518-1522), and Dr. Hughes testified that the taking of the pictures, the acts depicted in the pictures, and the uploading of the pictures without defendant's consent were all forms of "sexual violence." (TT 1626, 1631, 1640-41). These photographs also comprised a significant part of defense counsel's summation, in which he graphically described them, stated that

they had been uploaded to Pornhub, and argued that they "sum up the case." (TT 2153-54).

In sum, Appellant was able to fully and completely present her defense, as the court recognized. (TT 1559-1560). However, she could not properly authenticate the profile page where the photographs were found and the exhibits were properly precluded.

POINT V

The Trial Court Carefully Considered and Applied the DVSJA to the Facts of This Case (Responding to Appellant's Point V)

The DVSJA allows a court to impose a reduced sentence for certain offenses when the court finds that:

> (a) at the time of the instant offense, the defendant was a victim of domestic violence subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family or household …;
>
> (b) such abuse was a significant contributing factor to the defendant's criminal behavior; [and]
>
> (c) having regard for the nature and circumstances of the crime and the history, character and condition of the defendant, that [an otherwise lawful sentence] would be unduly harsh …

(P.L. § 60.12(1)). Sentencing determinations are committed to the court's discretion and should be "afforded high respect" on appeal because an appellate

court lacks the first-hand knowledge of the case that the sentencing court possesses. (People v. Suitte, 90 A.D.2d 80, 83 (2nd Dept. 1982)). This rule is doubly applicable here, where the sentencing followed a very lengthy trial, substantial sentencing hearing, and a detailed, thorough consideration of the evidence by the trial court.

The Court's lengthy written decision makes it abundantly clear that the Court carefully evaluated all of the evidence Appellant presented, both at trial and at the sentencing hearing. The court systematically recounted Appellant's evidence as to the alleged abuse and the identity of her abuser(s) (DVSJA Dec., pp. 10-15, 20-25); the extensive resources and support available to her, (id., pp. 26-30); Grover's conduct as it relates to the "profile" of an abuser established at trial and at the hearing, (id., pp. 31-34); and the events of the night of the murder. (Id. pp. 34-40). In every one of those sections, the court found the evidence – much of it offered by Appellant, Dr. Hughes, or her fact witnesses – to be contradictory and inconsistent with having been a victim of substantial domestic violence or a finding that such abuse was a significant contributing factor to Appellant's behavior.

In light of these myriad examples of Appellant's contradictions, inconsistencies, illogical decisions, and unsupported claims, the Court came to the obvious conclusion that there were "significant, unresolved questions" about

Appellant's history as a purported victim of abuse, her relationship with Grover, their relationship, and the events of the murder. (Id., p. 42). The Court then explained that there were four separate and independent grounds for its determination. *First*, the court found Appellant's alleged history of abuse to be "undetermined and inconsistent" regarding both the extent of the abuse and the identity of her abuser(s). (Id.). *Second*, her specific claim of being in an abusive relationship with Grover was not demonstrated based on Grover's actions and demeanor in the days and weeks before his death. (Id.). The Court found the text messages between Appellant and Grover to be "notable" in this regard. (Id.). *Third*, Appellant acknowledged that she had a "tremendous amount" of resources and opportunities to leave Grover within her family and in the healthcare, law enforcement, and domestic-violence advocacy communities. (Id.). The Court found her failure to avail herself of these opportunities significantly weakened her argument as to the "nature and circumstances" of the crime, one of the statutory prongs. (Id.). *Fourth,* and "most importantly," the specific facts of the crime, *as asserted by Appellant*, were that Grover was supine on the couch with his eyes closed, whereas Appellant was armed with a gun and had a clear path both to her children and to leave the apartment. (Id.). Nonetheless, she chose to "lunge forward" and shoot Grover with the barrel of the gun pressed into his temple. (Id.).

Applying these conclusions to the elements, the Court found that Appellant failed to prove that she "was subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family" as required by CPL § 60.12(1)(a) because "it is not clear whether the alleged abuse was carried out by Christopher Grover in part or in whole, and to what degree." (Id., p. 44). She also failed to show that her alleged abuse was a "significant contributing factor" to her criminal conduct, pursuant to CPL § 60.12(1)(b), because of her "undetermined abuse history" and Grover's personality profile. (Id.).[24] Finally, in consideration of "the nature and circumstances of the crime and the history, character and condition of the defendant," (CPL § 60.12(1)(b)), the Court found that the events leading up to the murder, and Appellant's text messages to him, made her motive "unknown." (Id., pp. 44-45). Even acknowledging that her history and character were not negative factors, the Court found that the "nature and circumstances" of the crime did not warrant a finding that an otherwise-lawful sentence would be unduly harsh based on the facts of this case. (Id., p. 45). Therefore, the Court properly denied her motion for DVSJA sentencing.

Despite this overwhelmingly thorough and well-reasoned decision, Appellant attacks it on two grounds. She first contends that the Court's statements

[24] The Court noted that under the circumstances in which she killed Grover, any abuse inflicted upon Appellant by other individuals would not, by itself, have been a significant contributing factor to her decision to kill Grover and that, in any event, it was not shown that all of her alleged abusers were "household or family members" as required by the statute. (Id.).

that the extent of her abuse and identity of her abuser were "not clear" or "undetermined" demonstrated that the Court shirked its responsibility to make the statutorily-required findings. (App. Br., p. 62-63). This semantic claim is meritless.

Appellant bore the burden to prove she qualified for relief under the DVSJA by a preponderance of the evidence. (DVSJA Dec., p. 8). Thus, to the extent that the Court found that the extent of Appellant's alleged abuse and the identity of her purported abuser(s) was "unclear," it was because Appellant did not present sufficient credible evidence for the Court to draw any definitive conclusion.[25] A Court plainly cannot make such findings when it is not given sufficient credible evidence to make a determination. One of the Court's statements, viewed in context, demonstrates this point: "the Court finds the abuse history *presented by the defendant* is undetermined and inconsistent regarding the extent of the abuse, as well as the identity of her abuser(s)." (Id., p. 42 (emphasis added)).

Appellant's related claim that the Court did not decide whether Appellant was abused by a member of the "same family or household" fails for the same reason. She claimed to have been abused by *seven* different men throughout her life, at least one of which when she was a child. See fn 11, *supra*. Some of those

[25] For example, if a Court were to preside over a suppression hearing and then state it was "not clear" whether the defendant waived his Miranda rights, the Court would unquestionably be ruling that the People did not meet their burden of proving the defendant waived his rights. It would be absurd to argue that the court failed to decide the issue.

men meet this definition, some do not, and for some, Appellant presented no information from which the Court could make a determination.

Appellant's second argument is that by noting in its decision that Appellant could have retreated without using deadly force, the Court "required that sentencing relief be conditioned on the crime never having occurred" and conflated the law of justification with DVSJA relief. (App. Br., pp. 63-65). The Court clearly imposed no such requirement in this case and recognized the difference between these principles.

In fact, the cited legal precedent for the proposition that a Court's CPL § 60.12 sentencing determination is independent of the jury's determination regarding justification. (DVSJA Dec., pp. 6-7, citing People v. Sheehan, 106 A.D.3d 1112 (2nd Dept. 2013)). The Court also explicitly recognized that "although the jury verdict [that Appellant was not justified,] is consistent with this Court's determination under § 60.12 the verdict is not determinative." (DVSJA Dec., p. 41).

Nonetheless, because the statute requires the Court to consider the "nature and circumstances" of the crime, there is no reason in law or logic that a court could not decide to credit the same facts that a jury credited in rejecting a justification defense. In any event, the Court did not deny relief solely because Appellant could have retreated or state that was a determinative factor. The court

denied relief, in pertinent part, because Appellant could have safely retreated from a situation where, *by her own account*, she was armed and beyond the reach of her victim, who was laying on his back on a couch, unarmed, facing the ceiling, with his eyes closed. (Id., p. 43). Instead of doing so, she lunged at him, pressed the barrel of the gun into his head, and pulled the trigger. (Id.). Her motive could not be determined. (Id., pp. 44-45).

Lastly, Appellant requests this Court resentence her under the DVSJA or remand the case to a different judge for resentencing. (App. Br., pp. 65-71). There is no reason for this Court to take either of these actions. If this Court were to agree with Appellant's claim that the lower court misapplied the DVSJA, the case should be remanded to the sentencing court for resentencing in accordance with whatever instructions or guidance this Court issues.

This case is distinguishable from cases cited by Appellant in which this Court has modified sentences. In those cases the Court merely modifies a sentence to another lawful sentence within the appropriate sentencing range. This case, in contrast, involves the initial determination of the applicability of the DVSJA to the facts of the case. It is respectfully submitted that County Court, having presided

over the trial, is in the best position to make this factual determination in the first instance. (Suitte, at 83).[26]

CONCLUSION

For all the reasons stated herein, Appellant's appeal should be denied in its entirety.

DATED: Carmel, New York
November 4, 2020

Respectfully submitted,

_____
Larry Glasser
First Assistant District Attorney
(845) 808-1057

[26] Appellant's request to remand the case to a different judge for resentencing is wholly unwarranted. Even if the Court were to find the court below misapplied the DVSHA – which there is no reason to conclude – that is a far cry from showing bias or partiality.

PRINTING SPECIFICATIONS CERTIFICATION

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman
Point Size: 14
Line Spacing: Double

The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service, this printing specifications statement, and any authorized addendum containing statutes, rules, regulations, etc. is **19,119**.

New York Official Reports

134 A.D.3d 896, 21 N.Y.S.3d 341, 2015 N.Y. Slip Op. 09252

**1 Miradin Gjoni, Respondent

v

The Swan Club, Inc., et al., Appellants.

Supreme Court, Appellate Division, Second Department, New York
2015-02645, 5652/14
December 16, 2015

CITE TITLE AS: Gjoni v Swan Club, Inc.

HEADNOTE

Attorney and Client
Disqualification

Franklin, Gringer & Cohen, P.C., Garden City, NY (Joshua Marcus of counsel), for appellants.
Law Office of Vincent R. Fontana, P.C., Garden City, NY, for respondent.

In an action, inter alia, to recover damages for employment discrimination on the basis of sex in violation of Executive Law § 296, the defendants appeal from an order of the Supreme Court, Nassau County (J. Murphy, J.), entered November 14, 2014, which denied their motion to disqualify Vincent R. Fontana from the continued representation of the plaintiff in this action.

Ordered that the order is reversed, on the facts and in the exercise of discretion, with costs, and the defendants' motion to disqualify Vincent R. Fontana from the continued representation of the plaintiff in this action is granted.

The plaintiff was employed by the defendant The Swan Club, Inc. (hereinafter the club), from April 2001 until he was terminated in March 2014. In 2004, a female coworker of the plaintiff filed a complaint against the club with the New York State Division of Human Rights. She alleged, inter alia, that the plaintiff made offensive remarks to her regarding her sex and race, that she reported his behavior to her superiors and that, in retaliation, her work hours were reduced. Vincent R. Fontana, who was then "of counsel" to a Nassau County law firm, represented the club in its defense against the complaint. In July 2014, the plaintiff, now represented by Fontana, the principal of The Law Office of Vincent R. Fontana, P.C., commenced this action against the club and its principals—Gregory Trunz, Robert Trunz, and Warren Trunz (hereinafter collectively the defendants). The plaintiff alleged, inter alia, that he was subjected to a hostile work environment in violation of Executive Law § 296 based on sex and gender and was wrongfully terminated. After joinder of issue, the defendants moved pursuant to the Rules of Professional Conduct (22 NYCRR 1200.0) to disqualify Fontana from representing the plaintiff in this action based upon Fontana's prior representation of the ***897** club. The Supreme Court denied the motion and the defendants appeal.

"The disqualification of an attorney is a matter that rests within the sound discretion of the court" (*Albert Jacobs, LLP v Parker*, 94 AD3d 919, 919 [2012]). "A party seeking disqualification of its adversary's counsel based on counsel's purported prior representation of that party must establish '(1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse' " (****2** *Matter of Town of Oyster Bay v 55 Motor Ave. Co., LLC*, 109 AD3d 549, 550 [2013], quoting *Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 131 [1996]). " 'A party's entitlement to be represented in ongoing litigation by counsel of [his or her] own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted' " (*Matter of Town of Oyster Bay v 55 Motor Ave. Co., LLC*, 109 AD3d at 550, quoting *Matter of Dream Weaver Realty, Inc. [Poritzky—DeName]*, 70 AD3d 941, 943 [2010]). However, the right to be represented by counsel of one's own choosing "will not supersede a clear showing that disqualification is warranted" (*Matter of Marvin Q.*, 45 AD3d 852, 853 [2007]; *see Scopin v Goolsby*, 88 AD3d 782, 784 [2011]). Any doubts as to the existence of a conflict of interest must be resolved in favor of disqualification so as to avoid even the appearance of impropriety (*see Cohen v Cohen*, 125 AD3d 589, 590 [2015]; *Halberstam v Halberstam*, 122 AD3d 679 [2014]). "Due to the 'significant competing interests inherent in attorney disqualification cases,' however, the Court of Appeals has advised against 'mechanical application of blanket rules,' in favor of a 'careful appraisal of the interests involved' " (*Gabel v Gabel*, 101 AD3d 676, 676-677 [2012], quoting *Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d at 131).

Here, the defendants established that Fontana, while "of counsel" to another firm several years earlier, had a prior attorney-client relationship with the club, that the issues involved in Fontana's prior representation of the club were substantially related to the issues involved in Fontana's current representation of the plaintiff, and that the interests of the plaintiff and the defendants were materially adverse (*see* Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.9; *Matter of Town of Oyster Bay v 55 Motor Ave. Co., LLC*, 109 AD3d at 550-551). Further, although Fontana contends that he has no independent recollection of the facts of the prior repres ***898** entation and, in effect, that whatever information he obtained during the prior representation would not be relevant to the issues in this matter, the defendants are " 'entitled to freedom from apprehension and to certainty that [their] interests will not be prejudiced' " due to Fontana's current representation of the plaintiff (*Matter of Town of Oyster Bay v 55 Motor Ave. Co., LLC*, 109 AD3d at 551, quoting *Cardinale v Golinello*, 43 NY2d 288, 296 [1977]).

The plaintiff's remaining contentions either are without merit or have been rendered academic by our determination.

Accordingly, the Supreme Court improvidently exercised its discretion in denying the defendants' motion to disqualify Vincent R. Fontana from the continued representation of the plaintiff in this action. Dillon, J.P., Chambers, Cohen and Hinds-Radix, JJ., concur.

New York Official Reports

171 Misc.2d 29, 652 N.Y.S.2d 682

In the Matter of Hanna Lichtenstein, Petitioner, for the Appointment of a Guardian for the Person and/or Property of Edda Wogelt, an Alleged Incapacitated Person.

Supreme Court, Bronx County,
90412/95, 96-583
October 15, 1996

CITE TITLE AS: Matter of Wogelt

HEADNOTES

Attorney and Client
Conflicts of Interest
Representation of Guardian in Mental Hygiene Law Article 81 Proceeding for Former Client

(1) In a Mental Hygiene Law article 81 proceeding, the attorney for petitioner proposed guardian is disqualified where he had previously drafted the alleged incompetent person's (AIP) last will and testament, assisted in the selection of and placement of the AIP in a nursing home, and acted in a fiduciary manner by handling her future expenses, since an attorney may not both appear for and oppose a client on substantially related matters when the clients' interests are adverse. Attorneys have an ethical obligation to avoid placing themselves in a position where they must advance, or even appear to advance, conflicting interests. Doubts as to the existence of a conflict must be resolved in favor of disqualification and this presumption of disqualification is irrebuttable. In preparing the article 81 petition, the attorney used information as to the AIP's financial and health status which was obtained during the period the attorney represented the AIP as her attorney and fiduciary. In addition, the AIP apparently believed that the attorney represented her after the initial petition was filed. Furthermore, the attorney's objection to testimony of a psychiatrist who did not believe the AIP suffered from dementia indicates that the attorney was acting in an adverse manner to the interests of the AIP, his former client. Finally, the issues involved in this article 81 proceeding are directly related to the attorney's admitted prior representation of the AIP.

Attorney and Client
Compensation

(2) In a Mental Hygiene Law article 81 proceeding, the attorney for the proposed guardian who was disqualified on the basis of conflict of interest is only entitled to attorney's fees for legal services he rendered up to mid-July when the alleged incompetent person, his former client, wrote him rejecting the petitioner as the proposed guardian, since he should have realized at this time that there was a conflict of interest in his representation of the petitioner.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Attorneys at Law, §§ 184, 189, 261.

Carmody-Wait 2d, Officers of Court §§ 3:272, 3:273.

CLS, Mental Hygiene Law art 81.

NY Jur 2d, Attorneys at Law, §§ 55, 55.5, 70, 71.

ANNOTATION REFERENCES

See ALR Index under Attorney or Assistance of Attorney; Attorneys' Fees. ***30**

APPEARANCES OF COUNSEL

Margaret Ann Bomba, New York City, movant *pro se. Jonathan D. Bachrach,* New York City, for petitioner. *Steven Cottler,* Baldwin, for Edda Wogelt.

OPINION OF THE COURT

Gerald V. Esposito, J.

Margaret Ann Bomba, Esq., the court evaluator appointed by this court by order dated September 12, 1996, in the above-entitled proceeding, has moved by order to show cause, for an order to: disqualify Jonathan Bachrach, Esq., attorney for the petitioner, Hanna Lichtenstein, on the grounds that he (Bachrach), by reason of his former representation of the alleged incapacitated person (AIP) (Edda Wogelt), his fiduciary representation of her, and his present representation of the petitioner, is rendered in conflict of interest with the

AIP, Edda Wogelt; direct Jonathan Bachrach, Esq., to deliver to the court evaluator herein the personalty, and papers of the AIP then in his possession; and for a preference of this matter.

This application to disqualify Jonathan Bachrach, Esq., is supported by Steven Bruce Cottler, Esq., who was appointed counsel to the AIP by order of this court, dated September 12, 1996.

By notice of cross motion, dated September 24, 1996, Jonathan Bachrach, Esq., has cross-moved for an order: "Granting Petitioner's attorney the amount of $9,895 for services rendered, plus $885.72 in disbursements, for a total of $10,760.72, pursuant to Petitioner's attorney's Affidavit of Services, dated December 5, 1995; Granting Petitioner's Attorney the amount of $17,800.00 for services rendered, plus $3,456.41 in disbursements, for a total of $21,256.41, pursuant to Petitioner's attorney's Reply Brief to the Appellate Division; Granting Petitioner's Attorney's application herewith for legal fees in the amount of $4,193.00 for services rendered, plus $193.15 in disbursements, for a total of $4,386.15, pursuant to Petitioner's Attorney's" and awarding co-counsel Susan Feldman-Gordon, Esq., compensation for services rendered in the amount of $1,250. This presentation of his requested fees is difficult to decipher.

By amended notice of cross motion, dated October 1, 1996, Jonathan Bachrach, Esq., has cross-moved again for compensation, as requested in his original cross motion; sanctions against the court evaluator, Margaret Ann Bomba, Esq., for frivolous ***31** conduct in bringing her order to show cause to disqualify Attorney Bachrach, and for a hearing on the factual issues raised herein. Mr. Bachrach, in his amended cross motion, alleges that said court evaluator lacks standing to seek to disqualify him.

A full and complete hearing was conducted by this court on October 2, 1996.

The procedural history of this proceeding is as follows:

Edda Wogelt, a 93-year-old widow, resided alone in an apartment located at 57 West 86th Street, New York, New York, apartment 2C, until the spring of 1995, when she was admitted to Mt. Sinai Hospital, complaining of dizziness.

Jonathan Bachrach, Esq., the attorney who had drafted Ms. Wogelt's last will and testament, which was executed on December 30, 1994, assisted in the selection, transfer to and placement of the AIP in the Moshulu Parkway Nursing Home, on April 28, 1995. Attorney Bachrach also accepted personal property and seven checks from the AIP. These checks were undated but signed by the AIP herein for payment of her future expenses.

Jonathan Bachrach, Esq., prepared the original order to show cause and petition for the appointment of Hanna Lichtenstein as guardian of Edda Wogelt, together with the supporting affirmations of the petitioner and Mr. Bachrach, said affirmations dated June 23, 1995. Said order to show cause was signed by Justice Wilkins on July 11, 1995. Said supporting affirmations contain information concerning the financial status, health status, and family history of the AIP; Hanna Lichtenstein, in her affirmation, stated that the AIP and the proposed guardian "have always had a friendly familiar relationship and get along well to this day". Mr. Bachrach, in his affirmation, under penalties of perjury, stated that "Edda Wogelt has mentioned the Lichtensteins' *[sic]* to me from time to time in a positive manner, indicating a good and friendly relationship on her part to them". Said original petition was supported by an affirmation by Dr. Benjamin Rudner, a psychiatrist, who had stated that at that time the AIP, Edda Wogelt, suffered from dementia and needed assistance to manage her financial affairs.

The information as to the AIP's financial and health status which Mr. Bachrach enumerated in his affirmation in support of this petition was information he had obtained during the period he represented the AIP as her attorney and fiduciary. ***32**

That petition, which was dated June 23, 1995, was prepared less than two months after Mr. Bachrach had assisted in the selection and placement of the AIP in the nursing home (Apr. 28, 1995) and less than six months after the execution of the last will and testament of the AIP, which he drafted and was executed under his supervision on December 30, 1994. The file contents reflect that Mr. Bachrach had assembled the family members of the AIP in April 1995, and had discussed the underlying action herein with them.

Due to a defect in service, the original petition was refiled on October 6, 1995. This refiled petition contained affirmations in support executed by Mr. Bachrach and Hanna Lichtenstein, which were dated September 20, 1995.

Mr. Bachrach, on or about July 19, 1995, received a letter from the AIP, Edda Wogelt, dated July 17, 1995, and notarized

on July 19, 1995, which stated: "I Edda Wogelt hereby state that I do not want Hanna Lichtenstein and Abraham Lichtenstein to be appointed as my guardian, for reasons known to me. I hereby state that I want Jonathan Bachrach to be appointed my guardian". After receipt of this letter Mr. Bachrach persisted in the preparation and refiling of the petition and the supporting affirmation dated September 20, 1995.

At a hearing held before the Honorable Justice Wilkins, on December 1, 1996, the court evaluator, Lee Mager, Esq., first expressed concerns that Mr. Bachrach might be acting under a conflict of interest as the petitioner's attorney due to his prior representation of Ms. Wogelt. Said court evaluator, in his affirmation dated November 23, 1995, expressed his conclusions that Ms. Wogelt disliked and distrusted the petitioner herein. At said hearing Mr. Bachrach did not call Dr. Rudner to testify in support of the petition. However, Justice Wilkins insisted upon his testimony. Mr. Bachrach objected to the testimony of Dr. Rudner and asserted that no medical testimony was necessary since Dr. Rudner's affirmation in support of the original petition was sufficient. A review of the record of the proceedings before Justice Wilkins, of December 1, 1995, reveals that Dr. Rudner had changed his opinion due to the fact that when he conducted his prior evaluation of the AIP he did not know that the AIP was "stone deaf" and could not respond to his questions. Dr. Rudner had informed Mr. Bachrach, prior to the hearing of December 1, 1995, that he had changed his opinion. At the hearing of December 1, 1995, Dr. Rudner testified that:

"At the outset I'd like simply to state I feel in a very uncomfortable position because, ordinarily, when I'm to testify, ***33** the petitioning lawyer seems to behave in a more cooperative manner with me.

"The fact is, I spoke to Mr. Bachrach some weeks ago. And he objected to my findings. He disagreed with the fact that I found Mrs. Wogelt mentally competent and indicated to me that he was going to find another psychiatrist to examine her. So I just assumed that his behavior must reflect his feeling about the conclusion I've drawn on the case".

This is a further indication that Mr. Bachrach was acting in an adverse manner to the interests of his former client, Edda Wogelt, the AIP herein, and to her clear detriment. This action is unconscionable.

Throughout this proceeding before Justice Wilkins, Mr. Bachrach maintained that he had no fiduciary relationship with Ms. Wogelt.

In a judgment and order entered on or about January 9, 1996, Justice Wilkins declined to appoint the guardian of the person, and appointed an independent third party, Marion Stone, as guardian of Ms. Wogelt's property. Justice Wilkins further awarded $1,000 in legal fees and $885.72 in disbursements to Mr. Bachrach; $500 to his co-counsel; and $500 in fees to the court evaluator.

The petitioner appealed and the Appellate Division, by decision entered July 25, 1996, reversed the judgment and order of Justice Wilkins and remanded the matter for a new hearing *(Matter of Wogelt,* 223 AD2d 309 [1st Dept 1996]).

Although the issue of the conflict of interest was not presented to the Appellate Division, said Court noted: "While we ascribe only the most honorable of intentions to Attorney Bachrach, the record plainly reflects continuing and conflicting interests arising from his representation of the petitioner and his actions on behalf of the AIP" *(Matter of Wogelt,* 223 AD2d, *supra,* at 315 [1st Dept 1996]).

Upon remand, this proceeding was assigned to this court. Upon reassignment this court requested that a copy of the last will and testament of the AIP, Edda Wogelt, be produced for an "in camera inspection".

Mr. Bachrach complied with the court's direction and submitted a copy of this last will and testament, which the court examined "in camera". Such examination reveals that the nominated executor and the nominated substitute executor are both attorneys who are closely associated with Mr. Bachrach. It was developed by the court at the hearing on the order ***34** to show cause and cross motions herein, that the nominated executor is a New York court-employed attorney who had referred other matters, including this particular matter involving Ms. Wogelt, to Mr. Bachrach. This was in fact acknowledged by Mr. Bachrach. Mr. Bachrach further acknowledges that the nominated substitute executor is an attorney associated with Mr. Bachrach's law firm and had no previous relationship with the AIP.

A full and complete hearing on this order to show cause and cross motion and amended cross motion was duly held by this court on October 2, 1996, and all parties were given

a full opportunity to present their various claims and their respective positions involved herein.

(1) On the issue of the disqualification of Jonathan Bachrach, Esq., as an attorney for the petitioner, Hanna Lichtenstein, given Mr. Bachrach's involvement in the affairs of the AIP prior to the commencement of these proceedings and the findings of the Appellate Division where it stated that the AIP was of the belief that Mr. Bachrach represented her after the initial petition was filed, it is apparent and well settled that he may not both appear for and oppose a client on substantially related matters when the clients' interests are adverse *(see, Greene v Greene,* 47 NY2d 447, 451 [1979]). The rule fully implements an attorney's fiduciary duties of loyalty and confidentiality to the client and his ethical obligation to avoid the appearance of impropriety *(Solow v Grace & Co.,* 83 NY2d 303, 306 [1994]; *Adams v Lehrer McGovern Bovis,* 208 AD2d 377 [1st Dept 1994]). Mr. Bachrach, by commencing the guardianship proceeding and representing the petitioner in the same matter is clearly in an adverse position to the AIP.

Historically, attorneys have been strictly forbidden from placing themselves in a position where they must advance, or even appear to advance, conflicting interests *(see, e.g., Greene v Greene, supra,* at 451; *Cardinale v Golinello,* 43 NY2d 288, 296; *Eisemann v Hazard,* 218 NY 155, 159). "The standards of the profession exist for the protection and assurance of the clients and are demanding; an attorney must avoid not only the fact, but even the appearance, of representing conflicting interests" *(Cardinale v Golinello, supra,* at 296). Here Mr. Bachrach's representation of the petitioner clearly advances conflicting interests to the detriment of the AIP.

This principle of avoiding even the appearance of impropriety is related to an attorney's duty of loyalty to a former client. The proscription against taking a case adverse to a former client ***35** is predicated first and foremost on the broad duty of loyalty and then secondarily on the possibility of the use in the second representation of information confidentially obtained from the former client in the first representation *(Cardinale v Golinello, supra,* at 295). In other words, even if the attorney did not, in fact, obtain, or use adversely, any confidential information in connection with the first employment, the former client is entitled to freedom from apprehension and to the certainty that her interests will not be prejudiced in the present suit by the representation of the opposing litigant by the client's former attorney *(Cardinale v Golinello, supra,* at 296; *see also, People v Shinkle,* 51 NY2d 417, 421).

"A party seeking to disqualify an attorney or a law firm, must establish (1) the existence of a prior attorney-client relationship and (2) that the former and current representations are both adverse and substantially related" *(Solow v Grace & Co.,* 83 NY2d, *supra,* at 308).

"In order to meet the 'substantial relationship' test, the issues in the present litigation must be ' "identical to" ' or ' "essentially the same" as' those in the prior case before disqualification will be granted" *(Lightning Park v Wise Lerman & Katz,* 197 AD2d 52, 55 [1st Dept 1994]; *District Council 37 v Kiok,* 71 AD2d 587 [1st Dept 1979]). The issues involved in the present controversy are directly related to Mr. Bachrach's admitted prior representation of the AIP who became infirm and unable to manage her affairs while he was representing her. The issues concerning the nature of the AIP's assets, the petitioner's current retention of Mr. Bachrach, and Ms. Wogelt's current status as an impaired person, all overlap.

While any fair rule of disqualification should consider the circumstances of the prior representation, if an attorney has represented a client in an earlier matter and then attempts to represent another in a substantially related matter which is adverse to the interests of the former client, the presumption of disqualification is irrebuttable.

Additionally, it should be noted that "doubts as to the existence of a conflict of interest must be resolved in factor of disqualification". *(Ocko Found. v Liebovitz,* 155 AD2d 426.) Similarly, even if there is currently insufficient evidence at this juncture to justify disqualification, a hearing should be held to make such a determination *(see, Lightning Park v Wise Lerman & Katz, supra).*

The Court of Appeals in *Solow (supra)* noted that first among these concerns is the protection of client confidences. "An attorney ***36** may not disclose or use adversely information confided by former or current clients (Code of Professional Responsibility DR 4-101 [B] [22 NYCRR 1200.19 (b)]; *and see,* Code of Professional Responsibility DR 5-108 [A] [2] [22 NYCRR 1200.27 (a) (2)]). When an attorney represents a party against a former client the current client's interest in vigorous representation potentially threatens the former client's expectation of confidentiality. The rule is designed to free the former client from any apprehension that matters disclosed to an attorney will subsequently be used against it in related litigation" *(see, Solow v Grace & Co.,* 83 NY2d, *supra,* at 309; *Cardinale v Golinello,* 43 NY2d, *supra,* at 295; Code of Professional Responsibility DR 4-101 [22 NYCRR

1200.19]). "Thus, the Code imposes a continuing obligation on the attorney to respect the client's confidences, even after a matter has concluded. The use of an irrebuttable presumption of disqualification insures that this obligation is enforced and that client confidences and secrets will never be misused in substantially related and adverse litigation" *(Solow v Grace & Co.,* 83 NY2d, *supra,* at 309).

Second, the Court noted that "the rule avoids the 'appearance of impropriety' on the part of the attorney or the law firm. Whether a conflict actually exists could be determined by a hearing but the rule requires disqualification even when there may not, in fact, be any conflict of interest so that any suggestion of impropriety is avoided *(see, Cardinale,* 43 NY2d, at 296; Code of Professional Responsibility Canon 9; *Conflicts of Interest, op. cit.,* at 1358-1359; Note, *Attorney Disqualification: The Case for an Irrebuttable Presumption Rebutted,* 44 Alb L Rev 645, 649-650)" *(Solow v Grace & Co.,* 83 NY2d, *supra,* at 309).

"An irrebuttable presumption of disqualification is favored over a hearing because it avoids the danger that an inquiry may destroy the very confidences sought to be protected *(see, NCK Org. v Bregman,* 542 F2d 128, 134-135; *Conflicts of Interest, op. cit.,* at 1329)" *(Solow v Grace & Co.,* 83 NY2d, *supra,* at 309).

Finally, the Court stated "the rule provides a test which, because of the ease of its application, becomes a strong aid in self enforcement among members of the legal profession" *(Solow v Grace & Co.,* 83 NY2d, *supra,* at 309).

Despite the per se rule, it is well established that if there exists even the possibility of a conflict of interest, it must be resolved in favor of disqualification *(see, e.g., Matter of Fleet v Pulsar Constr. Corp.,* 143 AD2d 187, 189 [2d Dept 1988]; *Sirianni v Tomlinson,* 133 AD2d 391, 392 [2d Dept 1987]). ***37**

Accordingly, this court grants that branch of the motion to disqualify Mr. Bachrach to avoid any real or any perceived inferences of impropriety.

As to the cross motion of the petitioner's attorney, Jonathan Bachrach, which seeks legal fees herein, this court, in reviewing the entire proceeding, and after the full hearing conducted, finds that Mr. Bachrach, even viewing his intention in the most favorable light, did not appreciate his conflict of interest when he first conferred with the petitioner herein, in April and May of 1995, at which time he disclosed confidential information he had obtained, both financial and personal, from the AIP, Edda Wogelt, during his representation of the AIP.

However, as of July 19, 1995, upon receipt of the AIP's notarized letter, in which the AIP in clear and unequivocal terms informed Mr. Bachrach that she was opposed to the appointment for Hanna Lichtenstein as her guardian, and wished Mr. Bachrach to be so appointed, it should have been abundantly clear to Mr. Bachrach that he had a clear conflict of interest.

Ms. Bomba, the court evaluator, has taken the position that Mr. Bachrach, due to his conflict of interest, is not entitled to any fees for the services he performed. Mr. Cottler, the court-appointed attorney, has taken the position that Mr. Bachrach should be entitled to reasonable fees for the services he rendered.

In *Matter of Merrick* (107 Misc 2d 988), a guardian ad litem who had resigned his position due to an apparent conflict of interest sought compensation for the legal services he had rendered prior to his resignation. That court ruled that "[i]t would now be improvident for the court to saddle this estate with additional guardian ad litem counsel fees" and denied the application *(supra,* at 991; *see also, Schwartz v Jones,* 58 Misc 2d 998, 999 ["(w)here the attorney is discharged for cause or withdraws without reason, he forfeits his fee"]).

(2) This court, in its discretion, will permit a fee to be paid to Jonathan Bachrach, Esq., for the legal services he rendered up to mid-July 1995, when he should have realized that there was a conflict of interest in his representation of the petitioner herein. Based upon the affirmation of services, dated December 5, 1995, Mr. Bachrach stated that up to and including July 1995, he performed 10.7 hours of service. Accordingly, this court awards Mr. Bachrach a fee of $1,605, which represents 10.7 hours of service; and disbursements in the amount of $245 which represents the purchase of an RJI and index number, ***38** plus $150 which represents the approximate cost for a process server for the service of the first order to show cause, for a total of $395.

The fee awarded is based upon the factors enumerated in *Matter of Karp* (145 AD2d 208). The Court, in *Karp (supra,* at 215), listed these factors as: " '[T]he time spent, the difficulties involved in the matters in which the services were rendered, the nature of the services, the amount involved, the

professional standing of the counsel, and the results obtained' ".

Mr. Bachrach's expertise in this field, in light of the fact that he felt compelled to retain co-counsel (Ruth Feldman-Gordon, Esq.) to assist him in the hearing conducted before Justice Wilkins, is not of such quality to warrant a larger fee. (Justice Wilkins had awarded a fee of $500 to Ms. Feldman-Gordon, Esq.)

Notwithstanding the issue of Mr. Bachrach's conflict of interest, the initial proceeding was an ordinary, noncomplex Mental Hygiene Law article 81 proceeding. It appears to the court that Mr. Bachrach, who should have known of his conflict of interest since July 19, 1995, has persisted to date in his representation of the petitioner herein and himself, in his quest for legal fees, and continues to refuse to either recognize this clear conflict of interest or withdraw as attorney for petitioner.

Accordingly, the cross motion for legal fees is granted to the extent as indicated above.

Furthermore, since the application to disqualify Jonathan Bachrach, Esq., as attorney for the petitioner herein has been granted, the court hereby appoints Erwin Greenwald, Esq., 369 East 149th Street, Bronx, New York 10455, as temporary guardian, until a guardian is appointed, and further grants the petitioner, Hanna Lichtenstein, 60 days from entry of this decision and order to obtain new counsel if petitioner so desires.

The court, at the appropriate time, upon submission of affirmations of services rendered, will award legal fees to the court evaluators, Lee Mager, Esq., and Margaret Ann Bomba, Esq., the court-appointed attorney Steven Bruce Cottler, Esq., and any other parties who have rendered services herein pursuant to and consistent with *Matter of Karp (supra)*.

The branch of the motion which seeks a preference is granted and the branch of the motion which seeks the delivery of the personalty and papers of the AIP by Mr. Bachrach has been complied with.

The branch of the cross motion which seeks a hearing on these issues is denied as moot, said hearing having been held ***39** on October 2, 1996. The branch of the cross motion which seeks sanctions against the court evaluator, Ms. Bomba, is denied, said court evaluator having standing to bring the order to show cause for the disqualification of Mr. Bachrach. The branch of the cross motion which seeks a legal fee in the amount of $1,250 for Mr. Bachrach's co-counsel, Ruth Feldman-Gordon, Esq., is disposed of by awarding her a fee for legal services in the amount of $500. ***40**

New York Official Reports

88 N.Y.2d 519, 670 N.E.2d 426, 647 N.Y.S.2d 142

The People of the State of New York, Respondent,
v.
Guy Alston, Appellant.
The People of the State of New York, Respondent,
v.
Rodney Morris, Appellant.

Court of Appeals of New York
159, 160
Argued June 4, 1996;

Decided June 28, 1996

CITE TITLE AS: People v Alston

SUMMARY

Appeal, in the first above-entitled action, by permission of the Chief Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered December 19, 1995, which affirmed a judgment of the Supreme Court (Joan C. Sudolnik, J.), rendered in New York County upon a verdict convicting defendant of robbery in the first degree and criminal possession of a weapon in the third degree.

Appeal, in the second above-entitled action, by permission of the Chief Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered July 31, 1995, which modified, on the law, and, as modified, affirmed a judgment of the Supreme Court (Herbert A. Posner, J.), rendered in Queens County upon a verdict convicting defendant of attempted robbery in the second degree and menacing, and sentencing defendant to an indeterminate term of imprisonment of six years to life on his conviction of attempted robbery in the second degree and a definite term of imprisonment of one year on his conviction of menacing. The modification consisted of reducing the term of imprisonment for menacing from one year to three months.

People v Alston, 222 AD2d 294, affirmed.

People v Morris, 217 AD2d 710, affirmed.

HEADNOTES

Crimes
Jurors
Selection of Jury--Permissible Methods for Exercising Peremptory Challenges

(1) CPL 270.15, governing jury selection, does not mandate that the People make all their peremptory challenges to a particular array before the defendant is required to make any; rather, it permits the court to require both parties to exercise peremptory challenges to a subset of jurors or sequentially to individual jurors in a particular array. As long as the prosecution exercises its peremptory challenges before the defendant, and in no case challenges a ***520** prospective juror "remaining in the jury box" after both parties have had a chance to peremptorily challenge that juror, the requirements of CPL 270.15 are satisfied. This construction dovetails with the flexibility built into CPL 270.15 (1) (c) which allows individual or collective questioning of jurors by the parties, and CPL 270.15 (3), which gives Trial Judges the discretion to fill the jury box with any number of jurors after the first round of jury selection. It also avoids arbitrarily vesting criminal defendants whose Trial Judges use the efficient procedure of removing sworn jurors from the box and questioning more than are needed to complete the jury in later rounds of jury selection with a tactical advantage unavailable to defendants whose Trial Judges use a more cumbersome method of selecting a jury. At the same time, this construction respects both the language and history of subdivision (2).

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Criminal Law, § 684; Jury, §§ 227, 234, 240.

Carmody-Wait 2d, Criminal Procedure §§ 172:2268-172:2272.

CPL 270.15.

NY Jur 2d, Criminal Law, §§ 2274, 2288-2290.

ANNOTATION REFERENCES

See ALR Index under Jury and Jury Trial; Peremptory Challenges.

POINTS OF COUNSEL

Frank J. Loss, New York City, and *Daniel L. Greenberg* for appellant in the first above-entitled action.

I. The trial court violated the CPL 270.15 (2) requirement that the prosecution exercise "peremptory challenges first," and not against any jurors "in the jury box" after the exercise of defense challenges, depriving appellant of a substantial right, by engaging in a statutorily unauthorized jury selection procedure, over defense objection, that allowed the prosecutor to exercise challenges first, but not against the full box, and then after defense challenges were exercised. (*People v White,* 73 NY2d 468; *People v Miles,* 143 NY 383; *People v Mancuso,* 26 AD2d 292, 22 NY2d 679; *People v Fromen,* 284 App Div 576, 308 NY 324; *People v McGonegal,* 136 NY 62; *People v Williams,* 20 AD2d 622, 14 NY2d 948; *Matter of Knight-Ridder Broadcasting v Greenberg,* 70 NY2d 151; *People v Bolden,* 81 NY2d 146; *People v Williams,* 26 NY2d 62.) II. Appellant was denied his due process right to a fair appeal and his right to effective assistance of counsel on appeal when the trial court *sua sponte* excused a prospective juror for cause from the venire based upon an ***521** unrecorded sidebar conference and refused to requestion the juror on the record when defense counsel and the court disagreed about whether the juror had, during that off-the-record conference, satisfactorily pledged to put aside her personal opposition to incarcerating people convicted of a crime in rendering a verdict. (*Evitts v Lucey,* 469 US 387; *Griffin v Illinois,* 351 US 12; *Hardy v United States,* 375 US 277; *People v Montgomery,* 24 NY2d 130; *People v Rivera,* 39 NY2d 519; *People v Pride,* 3 NY2d 545; *People v Emmett,* 25 NY2d 354; *People v Gonzalez,* 47 NY2d 606; *People v Harrison,* 85 NY2d 794; *Matter of Mertens,* 56 AD2d 456.)

Robert M. Morgenthau, District Attorney of New York County, New York City (*Ilisa T. Fleischer* and *Norman Barclay* of counsel), for respondent in the first above-entitled action.

I. Peremptory challenges were exercised in accordance with CPL 270.15 (2). (*People v Jean,* 75 NY2d 744; *People v Pepper,* 59 NY2d 353; *People v Boulware,* 29 NY2d 135, 405 US 995; *People v Corbett,* 52 NY2d 714; *People v Stanard,* 42 NY2d 74, 434 US 986; *People v Fromen,* 284 App Div 576, 308 NY 324; *People v Blackmond,* 212 AD2d 402; *People v Levy,* 194 AD2d 319.) II. The court made a record sufficient to support its decision to dismiss an unsworn juror for cause. (*People v Pride,* 3 NY2d 545; *People v Harrison,* 85 NY2d 794; *Williams v Norman,* 34 NY2d 626; *People v Glass,* 43 NY2d 283; *People v Rivera,* 39 NY2d 519; *People v Fearon,* 13 NY2d 59; *Devine v Keller,* 32 AD2d 34; *People v West,* 62 NY2d 708; *People v Boulware,* 29 NY2d 135, 405 US 995.)

Jeffrey I. Richman, New York City, and *Daniel L. Greenberg* for appellant in the second above-entitled action.

The jury selection procedure, in which the court, over objection, had each party, starting with the prosecutor, exercise their peremptory challenge to one juror at a time, and before the People had completed the exercise of "their peremptory challenges first" to all of the prospective jurors in the jury box, was contrary to law, denying appellant a substantial right. (*People v White,* 73 NY2d 468; *People v McQuade,* 110 NY 284; *People v Miles,* 143 NY 383; *People v Mancuso,* 26 AD2d 292; *People v Fromen,* 284 App Div 576; *People v Carpenter,* 102 NY 238; *People v McGonegal,* 136 NY 62; *People v Williams,* 20 AD2d 622; *People v De Conto,* 172 AD2d 684, 80 NY2d 943; *People v Williams,* 26 NY2d 62.)

Richard A. Brown, District Attorney of Queens County, Kew ***522** Gardens (*John J. Orlando* and *Steven J. Chananie* of counsel), for respondent in the second above-entitled action.

The trial court properly exercised its discretion under the CPL during jury selection. (*Moynahan v City of New York,* 205 NY 181; *People v McQuade,* 110 NY 284; *People v Levy,* 194 AD2d 319; *People v Boylan,* 190 AD2d 1043; *Pajak v Pajak,* 56 NY2d 394; *People v Williams,* 26 NY2d 62; *People v Grieco,* 266 NY 48; *People v McGonegal,* 136 NY 62; *People v Seligman,* 35 AD2d 591; *People v Hamlin,* 9 AD2d 173.)

Charles J. Hynes, District Attorney of Kings County, Brooklyn (*Roseann B. MacKechnie, Amy Applebaum* and *Alyson J. Gill* of counsel), for New York State District Attorneys' Association, *amicus curiae,* in the second above-entitled action.

CPL 270.15 (2) does not require use of the full box method for the exercise of peremptory challenges. (*People v McQuade,* 110 NY 284; *People v Levy,* 194 AD2d 319; *People v Mancuso,* 22 NY2d 679.)

OPINION OF THE COURT

Levine, J.

Defendants in these cases raise a common issue regarding the proper construction of CPL 270.15, the statutory provision governing jury selection: whether that section mandates that the People make all their peremptory challenges to a particular array before the defendant is required to make any, or if it permits the court to require both parties to exercise

peremptory challenges to a subset of jurors or sequentially to individual jurors in a particular array.

In *People v Alston,* the court and the parties questioned the group of prospective jurors seated in the jury box at the beginning of each round of jury selection. Thereafter, challenges for cause were made, first by the People, then the defense. The parties then executed their peremptory challenges. In the first two rounds, the prosecution exercised peremptory challenges with respect to the entire group of prospective jurors seated in the jury box. The defense followed, also exercising all its peremptory challenges to the entire panel sitting in the box. After two rounds, seven jurors had been accepted by both sides, sworn as trial jurors, and removed from the box. Fourteen prospective jurors were then seated in the jury box, questioned, and subjected to challenges for cause. The court then asked the parties--first the People and then the defense--to exercise peremptory challenges to the first five prospective jurors in the ***523** box (five jurors were needed to complete the jury). Defendant objected, arguing that the People must challenge the entire panel seated in the box, not part of the panel. The objection was noted, but the voir dire proceeded as directed by the Trial Judge, with the number of jurors the parties were permitted to peremptorily challenge being determined by the number of jurors needed to complete a full 12-person jury. In that fashion a jury was ultimately formed, and that jury convicted defendant after a trial of robbery and weapons possession.

A different method of jury selection was used in *People v Morris.* In defendant Morris' case, a group of prospective jurors was seated in the jury box and questioned by the court and the parties. The court then entertained challenges for cause by both sides. Next, the court instructed the attorneys that they were to use their peremptory challenges as to each juror "one at a time," the People first, then the defendant. Defense counsel objected, urging that CPL 270.15 (2) required that the prosecution exercise all peremptory challenges as to the jurors in the jury box before the defense was required to exercise any peremptory challenges. The court disagreed with defendant, and voir dire proceeded with the prosecution, then the defense, making peremptory challenges sequentially as to each individual juror. At the end of each round, those jurors who had not been excused were sworn as trial jurors. The sworn trial jurors were then removed from the box, and 14 more were brought in. Two more rounds were conducted in the same manner until a jury of 12 had been selected and sworn. At the conclusion of the trial, defendant was convicted of attempted robbery and menacing.

On appeal both defendants argue that CPL 270.15 requires the People to exercise all peremptory challenges to a particular array of jurors before the defendant may be required to exercise any peremptory challenges to that array. Under their construction, the section confers on defendants a substantial right--a tactical advantage in conserving the limited number of peremptory challenges to select the most favorable prospective jurors, because the defense will know which jurors of the entire panel will be struck by the prosecution before having to exercise any of its challenges. Defendants contend that the refusals of the trial courts to adopt their interpretation of the statute deprived them of that substantial right and thus, they are entitled to a new trial. The Appellate Division rejected defendants' arguments, as do we.

The process by which juries are seated, examined, excused for cause and by peremptory challenge, and sworn as trial ***524** jurors is prescribed by CPL 270.15. First, the jurors are called into the jury box in groups of "not less than twelve" (CPL 270.15 [1] [a]), and together sworn to answer questions truthfully. The court then "initiate[s] the examination of prospective jurors" as to preliminary matters "affecting their qualifications to serve as jurors in the action" (CPL 270.15 [1] [b]). Thereafter, the court must permit both parties to question the jurors "individually or collectively regarding their qualifications to serve as jurors" (CPL 270.15 [1] [c]). After questioning is completed, each party

"commencing with the people, may challenge a prospective juror for cause .... After both parties have had an opportunity to challenge for cause, *the court must permit them to peremptorily challenge any remaining prospective juror ...* and such juror must be excluded from service. *The people must exercise their peremptory challenges first and may not, after the defendant has exercised his peremptory challenges, make such a challenge to any remaining prospective juror who is then in the jury box. ...* The prospective jurors who are not excluded from service must retain their place in the jury box and *must be immediately sworn as trial jurors.*" (CPL 270.15 [2] [emphasis supplied].)

Having sworn any jurors selected in the first round, the court may then either "direct that the persons excluded be replaced in the jury box by an equal number from the panel or, in its discretion, direct that all sworn jurors be removed from the jury box and that *the jury box be occupied by such additional number of persons from the panel as the court shall direct"* (CPL 270.15[3] [emphasis supplied]).

To resolve the question presented in *People v Alston,* whether the trial court may require the prosecution and then the defense to exercise peremptory challenges to only the number of jurors needed to make a group of 12 even if more are sitting in the box, we turn first to subdivision (3) of CPL 270.15, which defines how jury selection takes place after the first round. This subdivision expressly permits the trial court in its discretion: (1) to keep sworn jurors in the box at the end of a round and to fill the remaining seats with the number of prospective jurors excused in the previous round; or (2) to remove sworn jurors and fill the box with any number of jurors that it chooses. When a court opts for the first method, the number of ***525** prospective jurors placed in the jury box but not sworn, i.e., the number of jurors in the box who are subject to peremptory challenges (*People v Harris,* 57 NY2d 335, 349 [once a juror is sworn, that juror cannot be challenged peremptorily]), may equal the number of jurors needed to complete the jury. Likewise, under the second method, a trial court has the discretion to seat any number of prospective jurors in the box, and thus can limit the number of jurors against whom the prosecution is required to make its peremptory challenges in a given round to the exact number needed to complete the jury. Thus, whether or not sworn jurors are removed from the box, a trial court can use statutorily permissible means under CPL 270.15 (3) to limit the number of jurors challenged at one time to the number of jurors needed to complete a jury.

Defendant Alston argues, however, that once a court seats more than the number of jurors necessary to fill out a trial jury, it must require the prosecution to exercise all its peremptory challenges to the entire group seated in the box because CPL 270.15 (2) controls the order in which peremptory challenges are to be made in all rounds, and in his view, the language of subdivision (2) strictly prohibits the prosecution from making peremptory challenges as to any juror seated in the box after the defendant has exercised any peremptory challenge. Specifically, he points as controlling here to the use of the plural "challenges" in the clause "[t]he people must exercise their peremptory challenges first," together with the limitation that after the defense has made its "peremptory challenges" the People may not challenge "any remaining prospective juror who is then in the jury box." Thus, he argues, in his case-- in which the trial court filled the box with more than the number of jurors necessary to complete a jury of 12--it was error to allow the prosecution to make peremptory challenges to groups of potential jurors in the box rather than requiring that challenges be made to all those potential jurors in the box at one time, because the procedure used allowed the prosecution to challenge jurors who were in the box but not a part of the first group challenged after the defense exercised its challenges.

Defendant Alston's argument finds no support in the history to subdivision (3). At its inception, subdivision (3) allowed the court to remove sworn jurors from the box only with the consent of the parties. It was amended in 1985 to allow the court in its discretion to empty the jury box of sworn jurors and fill it with more than the number of prospective jurors ***526** needed without the consent of the parties (L 1985, ch 516, § 1). The singular purpose of the legislation was to speed up the jury selection process by eliminating repetitious preliminary questions (*see,* Bill Jacket, 1985, ch 516, Mem of Senator Stafford [Sponsor's Mem]; Mem of J. Marc Hannibal, Div of Parole; Mem of Linda J. Valenti, Div of Probation & Correctional Alternatives; Mem of Jay Cohen, Div of Criminal Justice Servs; Mem of William Pelgrin, State Commn of Correction; Mem of Donald E. Urell, Div for Youth). There is no indication in the statutory history that this amendment would confer upon a criminal defendant the tactical advantage that would arise from knowing all of the prosecution's peremptory strikes to the whole array of prospective jurors in the box before the defendant was required to make any.

Similarly, the express language of CPL 270.15 (2) is ambiguous and thus does not have the dispositive effect that defendant Alston and the dissent attribute to it. CPL 270.15 (2) says that "[t]he people must exercise their peremptory challenges first and may not, after the defendant has exercised his peremptory challenges, make such a challenge to any remaining prospective juror who is then in the jury box" (CPL 270.15 [2]). The word "challenges," from which defendant infers a legislative intent to require collective--not individual--challenges, does not sustain the meaning given it by defendant. The sentence in the statute preceding the one using the plural "challenges" refers to an individual challenge of a single juror, i.e., "[t]he court must then permit [the parties] to peremptorily challenge *any remaining prospective juror*" (*id.* [emphasis supplied]), and a statutory rule of construction requires that "[w]ords in the singular number include the plural, and in the plural number include the singular" (General Construction Law § 35). Thus, "challenges" as used here in the phrase "the people must exercise their peremptory challenges first" can easily be read to mean that each of the multiple peremptory "challenges" of

the prosecution must come before each of the challenges of the defense.

Moreover, the phrase "the people ... may not, after the defendant has exercised his peremptory challenges, make such a challenge to any remaining prospective juror who is then in the jury box" may be read--as defendant urges--to require the People to make all their peremptory challenges to all the jurors in the box before the defendant makes any in all rounds. It can, however, also be read--as the People urge--to preclude the prosecution from challenging any juror *remaining* in the ***527** jury box after both sides have had an opportunity to strike the juror and failed to do so.

Defendant's interpretation of the statute would arbitrarily vest defendants at whose trials the Judges take advantage of what was intended merely as a time saving device--removing sworn jurors and seating more than are needed to complete a trial jury--with a strategic advantage unavailable to other defendants when the court declines to remove sworn jurors or removes them but decides not to fill the entire box. Statutes should be construed to avoid creating such arbitrary application (McKinney's Cons Laws of NY, Book 1, Statutes § 147).

Moreover, the history of CPL 270.15 weighs against defendant's construction. CPL 270.15 "was included in the CPL in 1970 without any substantive change from the old Code of Criminal Procedure, which basically codified traditional common law practice" (Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 270.15, at 414 [1993]; *see,* Denzer, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 270.15, at 497 [1971]). It was a restructuring and simplification of what had been "a number of prolix provisions in the existing Code" (Commn Staff Notes, reprinted in Proposed NY Criminal Procedure Law § 140.15, at 209 [Thompson Co. 1967]) aimed at "establish[ing] a uniform procedure for the selection of trial jurors" (*id.*).

At common law, and under the former Code of Criminal Procedure, varying methods of jury selection were employed. In one, each individual juror was put on the stand, questioned, and subject to both prosecution and defense challenges for cause and then peremptory challenges. If the juror was acceptable to both parties, the juror was immediately sworn, and no longer subject to peremptory challenge by either party (*see, e.g., People v Miles,* 143 NY 383; *People v Carpenter,* 102 NY 238, 243). Another method, sometimes called the full box method, also involved individual questioning of jurors. The individual jurors could be excused for cause after questioning, or, if they survived challenges for cause, be seated in the jury box, but not sworn. Once 12 jurors were thus seated in the box, the parties--first the People, then the defense--exercised peremptory challenges (*see, e.g, People v McQuade,* 110 NY 284). The defendant retained the right to " 'challenge a person who appears as a juror at any time *before he is sworn' "* (*People v Fromen,* 284 App Div 576, 578, quoting *People v Carpenter,* 36 Hun 315, 317), and "no juror [was] to be sworn until the jury [was] complete" (*id.,* at 579; *but see,* ***528** *People v Mancuso,* 26 AD2d 292, *mod* 22 NY2d 679). An apparent third method of jury selection involved collective examination and challenges to an entire array of jurors (*see, e.g., People v Grieco,* 266 NY 48, 54).

When these methods were challenged by criminal defendants, they were upheld as fair and valid under the former Code of Criminal Procedure (*see, People v Williams,* 26 NY2d 62; *People v Grieco,* 266 NY 48, *supra; People v Miles,* 143 NY 383, *supra; People v McQuade,* 110 NY 284, *supra*); except in two circumstances: (1) when the prosecution was allowed to exercise a peremptory challenge to a juror whom it had already accepted (*see, People v Williams, supra; People v McQuade, supra);* or (2) when the method announced at the beginning of jury selection was deviated from so as to block use of peremptory challenges that would have been available had the initial method been adhered to (*see, People v Carpenter, supra,* at 247; *People v Mancuso,* 26 AD2d 292, *mod* 22 NY2d 679, *supra; People v Fromen, supra*).

In *People v McQuade* (*supra*), the Court, tracing the history of peremptory challenges, observed that although many of the advantages of the peremptory challenge had historically been the defendant's, "the requirement ... that the People shall challenge first, is the only substantial advantage remaining to a defendant" (*id.,* at 294). This advantage confers a benefit on the defendant; it "relieves the defendant from using his challenges in cases where the juror challenged by the prosecution was also unacceptable to the defendant, and thereby preserves his challenges to be used in other cases" (*id.*). It also protects the defendant by prohibiting the prosecution from "acquir[ing] information as to what jurors are satisfactory to the defendant, and exclud [ing] them from the panel for that reason" (*id.,* at 295). We have consistently held that the advantage retained by defendants in jury selection, and its resulting benefit and protection to defendants, is satisfied by the juror-by-juror method of exercising peremptory challenges because "in no case and

in no manner [is a defendant engaging in juror-by-juror peremptory challenges] compelled to challenge until after the prosecution had fully exhausted its right" (*see, People v Miles,* 143 NY 383, 386, *supra; see also, People v Carpenter,* 102 NY 238, 248, *supra*).

The procedure adopted in CPL 270.15 made several technical changes to the process of jury selection. Most importantly, it eliminated the individual under oath questioning of prospective jurors, requiring instead that prospective jurors be placed in the box and sworn to tell the truth together and collectively ***529** questioned by the court. Thus, the new code introduced a uniform procedure of *examining* jurors "with a view toward speeding up the often prolonged, time-consuming task" (Preiser, Practice Commentaries, *op. cit.).*

The new code also manifestly retained the one persistently protected and enunciated rule of jury selection--that the People make peremptory challenges first, and that they never be permitted to go back and challenge a juror accepted by the defense. Thus, the statute says that "[t]he people must exercise their peremptory challenges first and may not, after the defendant has exercised his peremptory challenges, make such a challenge to any remaining prospective juror who is then in the jury box" (CPL 270.15 [2]). This historical rule was not violated when the parties were required to make peremptory challenges juror by juror (*see, People v Miles,* 143 NY 383, 386, *supra; see also, People v Carpenter,* 102 NY 238, 248, *supra*), and there is absolutely no evidence in the legislative history of CPL 270.15 of an intent to overrule those cases. Nor is there evidence of an intent to expand "the only substantial advantage remaining to a defendant" (*People v McQuade,* 110 NY 284, 294, *supra*) by requiring in all cases that the prosecutor exercise all its challenges to an entire array before the defendant exercises any.

Based on the foregoing, we hold that as long as the prosecution exercises its peremptory challenges before the defendant, and in no case challenges a prospective juror "remaining in the jury box" after both parties have had a chance to peremptorily challenge that juror, the requirements of CPL 270.15 are satisfied. This construction dovetails with the flexibility built into CPL 270.15 (1) (c) which allows individual *or* collective questioning of jurors by the parties, and CPL 270.15 (3), which gives Trial Judges the discretion to fill the jury box with any number of jurors after the first round. It also avoids arbitrarily vesting criminal defendants whose Trial Judges use the efficient procedure of removing sworn jurors from the box and questioning more than are needed to complete the jury in later rounds of jury selection with a tactical advantage unavailable to defendants whose Trial Judges use a more cumbersome method of selecting a jury. At the same time, this construction respects both the language and history of subdivision (2).

It is thus apparent that the method of jury selection employed in *People v Alston* was permissible. The People exercised their peremptory challenges before the defendant, and in no case challenged a juror they had already accepted. Defendant's other contention is without merit. ***530**

Likewise, the juror-by-juror method of exercising peremptory challenges employed in *People v Morris* was also permissible. The legislative history to CPL 270.15 (2) manifests no intent to give criminal defendants a tactical advantage in the first round that could be eliminated by the trial court in later rounds at its discretion. Here, the prosecution made all its peremptory challenges to each prospective juror before the defense, and in no case went back and exercised a peremptory challenge to any prospective juror who remained in the box after being accepted by both sides. Defendant Morris thus received all the tactical advantages and procedural protection the Legislature intended to confer upon him. Therefore, although the one-by-one exercise of peremptory challenges directed by the trial court in *People v Morris* is apparently anomalous and quite clearly counterproductive to the legislative goal of swift and efficient jury selection, we cannot say it is barred by the statute.

Accordingly, the orders of the Appellate Division in *People v Morris* and *People v Alston* should be affirmed.

Titone, J.

(Dissenting). I dissent.

Far from being "ambiguous" (*see,* majority opn, at 526), the statutory directive regarding the order in which the parties' peremptory challenges must be exercised could not be plainer. After the jury box has been filled, the prospective jurors questioned and the challenges for cause made, CPL 270.15 (2) requires that

"[t]he people must exercise their peremptory challenges first and may not, after the defendant has exercised his peremptory challenges, make such a challenge to any remaining prospective juror who is then in the jury box."

The natural and most logical reading of this provision is the one that defendants Morris and Alston advance. CPL 270.15 (2) requires that the People must exercise all of their peremptory challenges to the panel "*first,*" before the defense begins exercising its peremptories. Any doubt as to whether the prosecution must finish exercising its peremptories with respect to the entire box before the defense begins is dispelled by the statute's clear statement that after the defense peremptories have been made the People "may not" challenge "any remaining prospective juror *who is then in the jury box.*" (Emphasis supplied.) ***531**

The foregoing language makes it impossible to construe the statute, as the majority does, to permit a procedure in which the prosecution and defense alternate their challenges. As the italicized language unambiguously states, once the defense exercises its challenge or challenges, the statute precludes the People from challenging *any* juror then in the box, not just those jurors in the box whom "both sides have had an opportunity" to challenge (majority opn, at 527).*

The persuasiveness of the majority's contrary analysis is not enhanced by its reliance on the General Construction Law § 35 principle that "[w]ords in the singular number include the plural, and in the plural number include the singular." As applied within the context a natural reading of CPL 270.15 (2), General Construction Law § 35 means no more than that the phrase "peremptory challenge*s*" may be read in the singular to account for the possibility that, in any given round, the People and/or the defendant may choose to exercise only one of their peremptories. Manifestly, a canon of construction such as General Construction Law § 35 should not be invoked in such a way as to create an ambiguity in a statute where none would otherwise exist.

Even assuming that under General Construction Law § 35, the phrase "[t]he people must exercise their peremptory challenges first" may be reasonably read to mean that "*each* of the [prosecution's] multiple peremptor[ies] ... must come before *each* of the [defense's] challenges" (majority opn, at 526 [emphasis supplied]), that reading would not explain how the alternating method that the majority envisions can be reconciled with the clear statutory directive that the prosecution cannot peremptorily excuse "*any juror who is then in the jury box*" after the defense has exercised one or more of its peremptories.

Equally unhelpful is the majority's extended discussion of CPL 270.15 (3), whose meaning and effect are not at issue here. Indeed, it is not surprising that "[d]efendant Alston's argument finds no support in the history" of that subdivision (majority opn, at 525), since CPL 270.15 (3) has nothing to do withthe ***532** order in which peremptories must be exercised and is not in fact the basis for either of these defendants' appellate claims. Further, the purpose of the 1985 amendment to that subdivision, which the majority cites, was to accelerate the jury selection process through the specific device of "eliminat[ing] the parties' right to determine whether sworn jurors may be removed from the jury box while the *voir dire* continues" (Bill Jacket, L 1985, ch 516, Mem in Support by Senator Stafford; *see,* Mem of J. M. Hannibal, Div of Parole, July 2, 1985; Mem of J. Cohen, Div of Criminal Justice Servs, July 10, 1985; Mem of W. Pelgrin, State Commn of Correction, July 12, 1985; Mem of D. E. Urell, Div for Youth, July 1, 1985). Manifestly, that legislation has no bearing on the issue presented here concerning the order in which peremptories are to be used.

Ironically, the majority's holding runs counter to the thrust of the legislative history on which it relies. The consistent modern trend has been to streamline the jury selection process to make it less confusing, cumbersome and time-consuming wherever possible (*see,* Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 270.15, at 414 [1993]; Denzer, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 270.15, at 497 [1971]). Toward this end, CPL 270.15 eliminates the former procedure under which prospective jurors were questioned one at a time (*see,* majority opn, at 529). Instead, CPL 270.15 (1) mandates that in the first round a group of 12 prospective jurors must be placed in the jury box, given an oath and questioned together, either collectively or individually. Thus, as the majority itself acknowledges, subdivision (1) evinces the drafters' intent to adopt the group or "full box" method as the exclusive procedure for examining prospective jurors "'with a view toward speeding up the often prolonged, time-consuming task'" (majority opn, at 529, quoting Preiser, *op. cit.*). Although CPL 270.15 (3) gives the court the discretion to unilaterally adjust the *size* of the group in the box, it does not alter the basic premise implicit in CPL 270.15 (1) that the "full box" method is to be used, at least for purposes of juror examination.

Given their goal of "speeding up" the process and their chosen method of implementing it, it would have made little sense for the CPL's drafters to abandon the "full box" method in favor of the slower and more cumbersome juror-by-juror approach for purposes of the challenge part of the jury selection

process. Certainly, it makes little sense for this Court, which is unanimous in its commitment to eradicating unnecessary inefficiencies ***533** in jury selection, to stretch the language of CPL 270.15 (2) in order to authorize a less efficient method for challenging jurors than its plain language and its sibling subdivision suggest.

In any event, even without regard to the underlying policy considerations, the controlling factor here--the language of the statute--leaves room for no other conclusion than that the trial courts in these two cases erred when they permitted the People to exercise peremptories with respect to prospective jurors remaining in the box after the defense had taken its turn. Because of this error, which adversely affected these defendants, I conclude that the orders of the courts below should be reversed.

Chief Judge Kaye and Judges Simons, Bellacosa and Smith concur with Judge Levine; Judge Titone dissents and votes to reverse in a separate opinion in which Judge Ciparick concurs. In each case: Order affirmed. ***534**

Footnotes

* Significantly, this view of CPL 270.15 (2) is one that has been utilized by the panel that was recently commissioned to review jury practices in the State (The Jury Project, *Report to the Chief Judge of State of New York,* at 46 [1994]), as well as by the Committee on the Publications of the Association of Justices of the Supreme Court of the State of New York (Bench Book for Trial Judges--New York [1993] § 73-22; *accord,* Pitler, New York Criminal Practice Under the CPL, at 630 [1972]).

New York
Official Reports

33 N.Y.2d 265, 307 N.E.2d 230, 352 N.Y.S.2d 161

The People of the State of
New York, Respondent,
v.
Frederick Avant and
Margaret Avant, Appellants.

Court of Appeals of New York
Argued April 26, 1973;

decided December 28, 1973.

CITE TITLE AS: People v Avant

HEADNOTES

Constitutional law
immunity from prosecution
defendants, who had contracted with city whose purchasing practices were being investigated, executed waivers of immunity and Grand Jury returned indictments against them--General Municipal Law (§§ 103-a, 103-b) which requires such waiver of immunity, unconstitutional--rule applicable to public employees not different from that applicable to public contractors--since "target" of investigation testified, indictment must be dismissed--reindictment possible if sufficient independent evidence is adduced to support it. ***266**

(1) Defendants, under subpoena, appeared before a Grand Jury investigating the purchasing practices of a city with which they had entered into a contract, executed a limited waiver of immunity and surrendered the subpoenaed records. Subsequently the Grand Jury returned two indictments against them. Section 103-b of the General Municipal Law provides that any person who, when called before a Grand Jury to testify in an investigation concerning any transaction or contract had with the State or any political subdivision thereof, refuses to sign a waiver of immunity or to answer any relevant question should be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any municipal corporation, for a stated period. A statement obtained pursuant to this statute is coerced within the meaning of the Fifth Amendment and may not be used at a subsequent criminal prosecution. The fact that the defendants are public contractors and not public employees (cf. *Garrity v. New Jersey*, 385 U. S. 493; *Gardner v. Broderick*, 392 U. S. 273) or license holders (cf. *Spevack v. Klein*, 385 U. S. 511) does not render a different rule applicable.

(2) The general rule that the submission of some inadmissible evidence during the course of the proceeding is fatal only when the remaining legal evidence is insufficient to sustain the indictment is inapplicable when the Grand Jury has considered testimony from a witness who is a "target" of the investigaton and, in this case, defendants fall into this category. The violation of the constitutional privilege carries with it a dismissal of the indictment.

(3) Reindictment is possible, however, if sufficient evidence, independent of the evidence, links, or leads furnished by the prospective defendant, is adduced to support it.

(4) The law in effect at the time defendants appeared before the Grand Jury required an affirmative claim of the privilege against self incrimination and an invalid waiver, as was present in this case, would not confer full transactional immunity.

(5) Sections 103-a and 103-b of the General Municipal Law as presently enacted are unconstitutional.

People v. Avant, 39 A D 2d 389, reversed.

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered July 28, 1972, which (1) reversed, on the law, an order of the Albany County Court (John J. McCall, J.; opn. 69 Misc 2d 445), granting a motion by defendants to dismiss indictments charging them with offering false instruments for filing in the first degree (Penal Law, §175.35) and grand larceny in the second degree (Penal Law, §155.35), and (2) ordered that the indictments be reinstated.

POINTS OF COUNSEL

Paul E. Cheeseman for appellants.

I. Appellants are immune from this prosecution because the waivers which they executed ***267** are invalid as a matter of law as: the products of coercion; the products of a constitutionally impermissible statutory condition, or, they are invalid, factually, because respondent failed to sustain its burden of proof. (*People v. Steuding*, 6 NY2d 214; *People v. Laino*, 10 NY2d 161; *Malloy v. Hogan*, 378 U. S. 1; *Garrity v. New Jersey*, 385 U. S. 493; *Gardner v. Broderick*, 392 U. S. 273; *People v. Goldman*, 21 NY2d 152; *People v. Straehle*, 30 A D 2d 452; *People v. Michael A C.*, 27 NY2d 79.) II. With regard to their respective constitutional rights, there is no valid distinction between public contractors and public employees. (*People v. Schwab*, 62 Misc 2d 786; *Gardner v. Broderick*, 392 U. S. 273; *Garrity v. New Jersey*, 385 U. S. 493; *Grabinger v. Conlisk*, 320 F. Supp. 1213.) III. Section 103-b of the General Municipal Law is unconstitutional as applied to these appellants. (*Garrity v. New Jersey*, 385 U. S. 493; *Boyd v. United States*, 116 U. S. 616; *Canteline v. McClellan*, 282 N. Y. 166; *Cohen v. Hurley*, 366 U. S. 117; *United States ex rel. Laino v. Warden of Wallkill Prison*, 246 F. Supp. 72, 355 F. 2d 208; *Matter of Gardner v. Murphy*, 46 Misc 2d 728; *Turley v. Lefkowitz*, 342 F. Supp. 544; *Sanitation Men v. Sanitation Comr.*, 392 U. S. 280; *Matter of McGrath v. Kirwan*, 32 A D 2d 700, 25 NY2d 734.) IV. Appellants were denied due process of law in the procurement of these indictments. (*Matter of Proskin v. County Ct. of Albany County*, 30 NY2d 15; *People v. Prior*, 294 N. Y. 405; *People v. Amos*, 21 A D 2d 80; *People v. De Lucia*, 20 NY2d 275.)

Arnold W. Proskin, District Attorney (*John A. Williamson, Jr.* of counsel), for respondent.

I. Appellants voluntarily executed valid waivers of immunity which were not unconstitutionally coerced either as a matter of law or fact. (*People v. Yonkers Contr. Co.*, 17 NY2d 322; *People v. Guidarelli*, 22 A D 2d 336; *People v. Ryan*, 7 A D 2d 198, 6 NY2d 975; *People v. Freistadt*, 6 A D 2d 1053; *People v. Dudish*, 5 Misc 2d 856; *People v. Werkes*, 46 Misc 2d 1020; *People v. Laino*, 10 NY2d 161; *People v. Steuding*, 6 NY2d 214; *United States ex rel. Laino v. Warden of Wallkill Prison*, 246 F. Supp. 72, 355 F. 2d 208; *People v. Schwab*, 62 Misc 2d 786.) II. Section 103-b of the General Municipal Law is constitutional, since the situation of public contractors is distinguishable from that of ***268** public employees. (*United States ex rel. Laino v. Warden of Wallkill Prison*, 246 F. Supp. 72, 355 F. 2d 208; *Atkin v. Kansas*, 191 U. S. 207; *Campbell Painting Corp. v. Reid*, 392 U. S. 286; *Slochower v. Board of Educ.*, 350 U. S. 551; *Stevens v. Marks*, 383 U. S. 234; *Garrity v. New Jersey*, 385 U. S. 493; *Spevack v. Klein*, 385 U. S. 511; *People v. Goldman*, 21 NY2d 152, 392 U. S. 643, 393 U. S. 899; *Matter of Gardner v. Broderick*, 20 NY2d 227, 392 U. S. 273; *People v. Straehle*, 30 A D 2d 452.) III. Appellants were not denied due process of law in the procurement of the indictments. (*Matter of Proskin v. County Ct. of Albany County*, 30 NY2d 15; *People v. Amos*, 21 A D 2d 80; *People v. De Lucia*, 20 NY2d 275; *People v. Prior*, 294 N. Y. 405; *Matter of Corning v. Donohue*, 29 NY2d 209.)

Louis J. Lefkowitz, Attorney-General (*William J. Kogan* and *Ruth Kessler Toch* of counsel), in his statutory capacity under section 71 of the Executive Law.

Section 103-b of the General Municipal Law is a valid exercise of the police power of the State of New York. (*Nettleton Co. v. Diamond*, 27 NY2d 182; *Fenster v. Leary*, 20 NY2d 309; *Matter of Van Berkel v Power*, 16 NY2d 37; *Matter of Roosevelt Raceway v. Monaghan*, 9 NY2d 293; *Matter of Orans*, 15 NY2d 339; *People v. Mancuso*, 255 N. Y. 463; *People v. Bunis*, 9 NY2d 1; *Matter of Jacobs*, 98 N. Y. 98; *People v. Samuel*, 29 NY2d 252; *Albany Supply & Equip. Co. v. City of Cohoes*, 25 A D 2d 700, 18 N Y 2d 968.)

OPINION OF THE COURT

Wachtler, J.

The defendants are public contractors. In 1969 they entered into a contract with the City of Albany to perform snow removal services during the winter of 1969-1970. In March of 1971, they were subpoenaed to appear and produce certain business records before the Albany County Grand Jury investigating the purchasing practices of the City of Albany. They appeared, executed a limited waiver of immunity -- extending only to their performance of the snow removal contract -- and surrendered the subpoenaed records. On May 26, 1971 the Grand Jury returned two indictments charging them with grand larceny (Penal Law, § 155.35) and knowingly offering a false instrument for filing (Penal Law, § 175.35).

Prior to trial they moved to dismiss the indictments claiming that they had been compelled by ***269** section 103-b of the General Municipal Law to testify and furnish incriminating evidence to the Grand Jury in violation of their constitutional rights.

Section 103-b of the General Municipal Law states in part: "Any person who, when called before a grand jury *** to testify in an investigation concerning any transaction or contract had with the state [or] any political subdivision thereof *** refuses to sign a waiver of immunity against

subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract *** shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any municipal corporation *** for a period of five years after such refusal or until a disqualification shall be removed". Section 103-a provides that all contracts awarded by a municipal corporation shall contain a clause to this effect and another clause permitting the municipality to terminate all existing contracts without incurring penalty.

At the time the subpoenas were issued the defendants apparently had no existing public contracts but they nevertheless maintain that they felt compelled by the General Municipal Law to execute the limited waiver rather than lose the right to compete for future contracts. This, it is argued, constitutes a form of coercion prohibited by the Supreme Court in *Garrity v. New Jersey* (385 U. S. 493).

In *Garrity* the court held that a statement obtained from a police officer by threat of loss of public employment is coerced within the meaning of the Fifth Amendment and may not be used at a subsequent criminal prosecution. The corollary of this principle was announced in *Spevack v. Klein* (385 U. S. 511). There an attorney who refused to testify at a disciplinary proceeding on the ground that his testimony would tend to incriminate him, was disbarred. The Supreme Court reversed holding that the petitioner had been penalized for exercising his Fifth Amendment privilege which violated the basic "'right of a person to remain silent *** and to suffer no penalty *** for such silence'" (385 U.S., at pp. 514-515, n. 2).

In these decisions the Supreme Court considered and recognized the right of the State to call upon public servants and persons having a special duty to the State to account for their ***270** activities. The limits of this power however were finally clarified in *Gardner v. Broderick* (392 U.S. 273). In *Gardner* a New York City police officer was summoned to appear before a Grand Jury investigating gambling activities in the city. He was advised of his rights but was also informed that if he refused to execute a waiver of immunity he could lose his job. When he refused to execute the waiver, he was discharged and once again the Supreme Court reversed, observing that:

"If the appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, *Garrity v. New Jersey* [385 U.S. 493], supra.;, the privilege against self-incrimination would not have been a bar to his dismissal.

"The facts of this case, however, do not present this issue. Here petitioner was summoned to testify before a grand jury in an investigation of alleged criminal conduct. He was discharged from office, not for failure to answer relevant questions about his official duties, but for refusal to waive a constitutional right *** [T]he mandate of the great privilege against self-incrimination does not tolerate the attempt, regardless of its ultimate effectiveness to coerce a waiver of the immunity it confers on penalty of the loss of employment." (392 U. S., at pp. 278, 279.)

What distinguishes this case and divided the courts below is the fact that the defendants here are public contractors and not public employees or license holders. The trial court found that this was a distinction without legal significance (69 Misc 2d 445) but the Appellate Division disagreed and reversed the order dismissing the indictments (39 A D 2d 389). There it was successfully argued that the public contractor possesses nothing more than the right to bid for public employment and having other sources of income outside the public sphere may assert his constitutional rights without fear of losing his sole means of livelihood, as does the public employee or license holder.

While this appeal was pending before our court, the Supreme Court resolved the issue by rejecting the argument that a different ***271** rule is applicable to public contractors. (*Lefkowitz v. Turley*, 414 U. S. 70.) In affirming a Federal court decision declaring sections 103-a and 103-b of the General Municipal Law unconstitutional (*Turley v. Lefkowitz*, 342 F. Supp. 544) the court stated at pages 83, 84 "We fail to see a difference of constitutional magnitude between the threat of job loss to an employee of the State, and a threat of loss of contracts to a contractor. *** A significant infringement of constitutional rights cannot be justified by the speculative ability of those affected to cover the damage."

In sum, the State may compel any person enjoying a public trust to account for his activities and may terminate his services if he refuses to answer relevant questions, or furnishes information indicating that he is no longer entitled to public confidence (*Gardner v. Broderick*, 392 U.S. 273, supra.;). But testimony compelled in this manner, under threat of loss of public employment, may not be used as a basis

for subsequent prosecution (*Garrity v. New Jersey*, 385 U. S. 493, supra.;). "Rather, the State must recognize *** that answers elicited upon the threat of the loss of employment are compelled and inadmissible in evidence." (*Lefkowitz v. Turley*, supra.;, at p. 85.)

Obviously, then, the Grand Jury considered evidence that had been obtained at the expense of a constitutional right. As a general rule this does not require a dismissal of the indictment. Ordinarily the mere fact that some inadmissible evidence has intruded into the criminal proceedings does not necessarily affect the validity of those proceedings. To this extent the rule which applies to trials applies with equal force to Grand Jury proceedings. But although a trial error of this nature must be found to have been harmless beyond a reasonable doubt (*People v. Cefaro*, 23 NY2d 283; *People v. McKinney*, 24 NY2d 180) the rule is quite different when the inadmissible evidence has been submitted to a Grand Jury.

Since the Grand Jury performs the limited function of determining whether the People have in their possession sufficient evidence to present a prima facie case, the submission of some inadmissible evidence during the course of this proceeding is held to be fatal only when the remaining legal evidence is insufficient to sustain the indictment. (*People v. Eckert*, 2 N Y 2d 126; *People v. Leary*, 305 N. Y. 793; ***272** *People v. Rabinowitz*, 277 App. Div. 793, affd. 301 N. Y. 763; see, also, *People v. Oakley*, 28 NY2d 309.)

This general rule however is inapplicable when the Grand Jury has considered testimony from a witness who is a "target" of the investigation -- and it is undisputed that in the case now before us, the defendants fall into this category. Under these circumstances, the rule established in *People v. Steuding* (6 NY2d 214) governs. In that case we said: "By virtue of the Constitution of this State (art. I, § 6) -- and it is solely the Constitution of New York with which we are now concerned -- a prospective defendant or one who is a target of an investigation may not be called and examined before a Grand Jury and, if he is, his constitutionally-conferred privilege against self incrimination is deemed violated even though he does not claim or assert the privilege. *** *A violation of the constitutional privilege carries with it a dismissal of the indictment returned by the Grand Jury* before which the defendant testified." (*People v. Steuding*, supra.;, at pp. 216-217; emphasis added.) We also indicated that this requirement of mandatory dismissal is accompanied by an exclusionary rule protecting the defendant "not only from indictment based on any incriminating testimony which he may have given, but also from use of such evidence" (*Steuding*, supra.;, at p. 217).

But this does not mean that the defendants have received automatic immunity for all time for any transaction revealed by them during the Grand Jury proceeding, and our subsequent decision in *People v. Laino* (10 NY2d 161, 173) made it quite clear that "reindictment is possible if sufficient evidence, independent of the evidence, links, or leads furnished by the prospective defendant, is adduced to support it". This is so because "Complete immunity from prosecution may be obtained by a prospective defendant, or any witness, only by strict compliance with the procedural requirements of our immunity statutes" (*People v. Laino*, supra.;, at p. 173). The law in effect at the time the appellants appeared before the Grand Jury (Code Crim. Pro., § 619-c) required an affirmative claim of the privilege against self incrimination. Under that statute an invalid waiver, as in the case now before the court, would not confer full transactional immunity. (But compare CPL 190.40, subd. 2.) ***273**

Thus although sections 103-a and 103-b of the General Municipal Law as presently enacted are unconstitutional, the appellants are not immune from future prosecution, nor has the municipality lost the right to call upon them to account for their public trust, provided only that in all subsequent proceedings their constitutional rights must be fully recognized. Accordingly, the order of the Appellate Division should be reversed and the order of the County Court reinstated.

Breitel, J.

(Concurring).

I concur in result on constraint of *Lefkowitz v. Turley* (414 U. S. 70). I feel impelled, however, to add the following comments.

Most constitutional rights may be waived and, in particular, the privilege against self incrimination under both the Federal and State Constitutions may be waived (e.g., *Lee v. County Ct. of Erie County*, 27 NY2d 432, 441; *People v. Cassidy*, 213 N. Y. 388, 393-395; *Gardner v. Broderick*, 392 U. S. 273, 276; see 8 Wigmore, Evidence [McNaughton Rev.], § 2275). This is undisputed. While there was once a different view, it is now equally undisputed that one may not be "coerced" into waiving his constitutional privilege by the withholding of a substantial right to engage in one's occupation or of any

other substantial or fundamental exercise of life, liberty, and the pursuit of happiness (*Gardner v. Broderick*, 392 U. S. 273, 279, supra.; *Garrity v. New Jersey*, 385 U. S. 493, 497).

Given these premises, it is or should be equally obvious that there will never, or at best rarely, be a waiver of the privilege against self incrimination unless there is some positive consideration or negative withholding to induce or motivate the waiver. Indeed, if this were not so the privilege would become nonwaivable in fact; for no one is likely to yield a privilege or right unless, in exchange, some profit, avail or gain is offered or contemplated.

The next logical step is apparent. To distinguish between an acceptable waiver and a coerced waiver of the privilege the losses and gains must be measured. Only those surrenders or withholding of rights or privileges which affect profoundly the individual suggest coercion. Thus, to compel one to waive his privilege on penalty of losing his right to engage in his livelihood, often one for which he has been especially trained, ***274** acquired seniority, or which represents his only skill, has been held to be coercive (*Garrity v. New Jersey*, 385 U. S. 493, 497, supra.; *Spevack v. Klein*, 385 U. S. 511, 515, 520).

The rule, it is suggested, should not be extended to the withholding of lesser privileges, such as that of a prospective contractor who would bid for municipal or other public contracts. In most instances, and one judges the desirability of rules by their general impact, the loss may involve no more than an alternative or greater profit opportunity for an entrepreneur, quite capable of taking care of himself in our economy. The situation becomes all the more serious when it is recognized that the letting of public contracts is subject to corrupting influence and bargaining. To extend the rule applicable to public employees and officers to public contractors is hardly a sound rational process. It is not good law, good policy, or realistic jurisprudence.

The facts in this very case are illustrative of the undesirable policy extension. The case arises in an ongoing investigation of municipal corruption in a city that has been much troubled for years and is now the subject of various local and State investigations. If the statute and State Constitution were enforced as they read, defendants would not have lost their privilege against self incrimination, had they chosen to forego in the future for a period of five years the very type of contract about which they were being asked to make disclosures. By any test that is hardly unreasonable and does not attain that degree of undue pressure which makes its exaction "coercive". This court has in the past sustained the constitutional and statutory waiver of privileges, even for public officers, until curtailed by rulings of the United States Supreme Court affecting public officers, many of rather low rank (e.g., *Canteline v. McClellan*, 282 N. Y. 166, 171). (The lowness in rank of the officer involved is not unimportant. One is entitled to doubt that the Supreme Court would find it coercive to require a Judge, a ranking executive officer, or a member of the Legislature to surrender his privilege against self incrimination in order to qualify for or retain his office.)

Finally, and this is somewhat repetitious, there is something grossly offensive in requiring a municipality to accept as a bidder for public contracts one who refuses to speak freely ***275** under oath, and under waiver of immunity, about his conduct on a prior contract with the municipality. It is less offensive to safeguard public officers and employees of low rank and perhaps of long service from the "coercion" of waivers of the privilege.

It is also of interest that statutory and constitutional provisions for waivers of privilege were enacted following the widespread corruption scandals in public affairs in the 1930's (Record, 1938 Constitutional Convention, pp. 2577, 2590, 2593-2594; see *State of New York v. Perla*, 21 NY2d 608, 612). At that time, there was shock and revulsion at the spectacle of public officers retaining their offices although they refused to testify concerning their prior official conduct without the shield of immunity from criminal prosecution. Evidently, the lesson will have to be relearned. And it is no answer that there will still be power to question, but only at the public price of giving the suspected culprit testimonial immunity, and under present statutes, transactional immunity.

Chief Judge Fuld and Judges Burke and Jones concur with Judge Wachtler; Judge Breitel concurs in a separate opinion in which Judges Jasen and Gabrielli concur.
Order reversed, etc.

New York
Official Reports

212 A.D.2d 800, 623 N.Y.S.2d 280

The People of the State of
New York, Respondent,
v.
Louis Avilla, Appellant.

Supreme Court, Appellate Division,
Second Department, New York
92-04554
(February 27, 1995)

CITE TITLE AS: People v Avilla

HEADNOTE

CRIMES
ASSAULT
Sufficiency of Evidence

(1) Judgment convicting defendant of assault affirmed --- Evidence adduced at trial established that defendant assaulted complainant with dangerous weapon thereby causing him serious physical injury; although complainant's memory was imperfect due to his injuries from assault, his testimony that it was defendant who assaulted him was unequivocal and he had ample opportunity to observe defendant during course of assault and made unequivocal in-court identification of defendant as one of his assailants --- Moreover,despite defendant's claim that Grand Jury proceedings were tainted by allegedly perjured testimony of complainant's companion, there is nothing in record to indicate that there had been knowing use of perjured testimony by prosecutor --- Furthermore, since Grand Jury testimony of complainant alone was sufficient to establish reasonable cause to believe that defendant was one of assailants, even if companion's testimony before Grand Jury was false, this situation does not constitute ‘impairment of integrity‘ of Grand Jury process and qualify for dismissal.

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Gerges, J.), rendered June 11, 1992, convicting him of assault in the first degree, upon a jury verdict, and imposing sentence.

Ordered that the judgment is affirmed.

The defendant contends that the complainant's testimony was incredible as a matter of law. Viewing the evidence in the light most favorable to the prosecution *(see, People v Contes,* 60 NY2d 620), we find that it was legally sufficient to establish the defendant's guilt beyond a reasonable doubt. The evidence adduced at trial established that the defendant, on April 19, 1991, assaulted the complainant with a dangerous weapon, i.e., a metal pipe, thereby causing him serious physical injury. Resolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury, which saw and heard the witnesses *(see, People v Gaimari,* 176 NY 84, 94). Its determination should be afforded great weight on appeal and should not be disturbed unless clearly unsupported by the record *(see, People v Garafolo,* 44 AD2d 86, 88). Although the complainant's memory was imperfect due to his injuries from the assault, his testimony that it was the defendant who assaulted him was unequivocal and he had ample opportunity to observe the defendant during the course of the assault and made an unequivocal in-court identification of the defendant as one of his assailants *(see, People v Huber,* 201 AD2d 583, 584; *People v McNeil,* 183 AD2d 790; *People v Delfino,* 150 AD2d 718; *see also, People v Cook,* 203 AD2d 476; *People v Colombo,* 202 AD2d 685, 686; *People v Bennett,* 161 AD2d 773). Upon the exercise of our factual review power, we are satisfied that the verdict was not against the weight of the evidence *(see,* CPL 470.15 [5]).

We disagree with the defendant's claim that the Grand Jury proceedings were tainted by the allegedly perjured testimony of the complainant's companion. There is nothing in the ***801** record to indicate that there had been a knowing use of perjured testimony by the prosecutor *(see, People v DeFreece,* 183 AD2d 842, 843; *People v Hutson,* 157 AD2d 574). Since the Grand Jury testimony of the complainant alone was sufficient to establish reasonable cause to believe that the defendant was one of the assailants, even if the companion's testimony before the Grand Jury was false, this situation does not constitute an “impairment of integrity” of the Grand Jury process pursuant to CPL 210.35 (5) and qualify for the exceptional remedy of dismissal of the indictment *(see, People v Darby,* 75 NY2d 449; *People v DeFreece, supra,* at 843; *People v Skye,* 167 AD2d 892).

We have considered the defendant's remaining contention and find it to be unpreserved for appellate review *(see, People v Udzinski,* 146 AD2d 245) and, in any event, without merit *(see, People v Andino,* 113 AD2d 944, 946).

Balletta, J. P., Thompson, Joy and Florio, JJ., concur.

New York Official Reports

59 N.Y.2d 294, 451 N.E.2d 450, 464 N.Y.S.2d 703

The People of the State of New York, Appellant, v. Alfred Berg and Camillo Lovacco, Respondents.

Court of Appeals of New York
Argued April 27, 1983;

decided June 9, 1983

CITE TITLE AS: People v Berg

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered June 1, 1982, which (1) reversed, on the law, judgments of the Supreme Court (Vincent Pizzuto, J.), rendered in Kings County upon verdicts convicting each defendant of assault in the second degree and criminal possession of a weapon in the fourth degree, and (2) ordered a new trial.

Defendants' convictions were reversed by the Appellate Division, which concluded that the trial court erred in permitting the People to call the assault victim as a witness after he had made it clear that he would not testify. The Appellate Division found that this refusal gave rise to the natural inference that the witness feared reprisal if he testified against defendants.

The Court of Appeals reversed the Appellate Division order and reinstated the Supreme Court judgments, holding, in an opinion by Judge Wachtler, that it cannot be said that the trial court abused its discretion in allowing the People to call the witness, given the State's strong interest in attempting to induce his testimony and to avoid the unfavorable inference arising from a failure to produce the victim of the assault, coupled with the curative instruction concerning the witness's refusal to testify.

People v Berg, 88 AD2d 919, reversed.

People v Lovacco, 88 AD2d 919, reversed.

HEADNOTES

Crimes
Witnesses
Victim's Refusal to Testify

(1) At defendants' trial on assault charges, the trial court did not abuse its discretion in allowing the People to call the assault victim as a witness after he had indicated that he would refuse to testify, since the sole motive of the prosecutor in calling the witness was a good-faith effort to elicit his testimony, the prosecutor never commented on or attempted to exploit the witness's refusal to testify, his refusal to testify did not supply the key or even provide corroboration as to factual issues or defenses raised and the court gave curative instructions to the effect that the jurors must refrain from speculation about the reason for the witness's refusal to testify and the reason for the exclusion of items of evidence which had been admitted subject to the witness's testimony ***295**

POINTS OF COUNSEL

Elizabeth Holtzman, District Attorney (*Jason L. Shaw* and *Barbara D. Underwood* of counsel), for appellant.
The prosecutor questioned the complaining witness with the approval of the trial court and solely in a good-faith effort to elicit testimony. The finding of the court below of prosecutorial misconduct creates an unwarranted per se rule that limits a trial court's discretion and ignores the realities of trial practice. (Rado v State of Connecticut, 607 F2d 572; United States v Mayes, 512 F2d 637, 422 US 1008, cert den *sub nom.* Cook v United States, 423 US 840; United States v Brickey, 426 F2d 680; Branzburg v Hayes, 408 US 665; United States v Bryan, 339 US 323; United States v Vandetti, 623 F2d 1144; United States v Quinn, 543 F2d 640; People v Thomas, 51 NY2d 466; Namet v United States, 373 US 179; United States v Maloney, 262 F2d 535.)
Harvey L. Greenberg and *Joseph J. McCarthy, Jr.,* for Alfred Berg, respondent.
The trial court was in error when it permitted a fearful complaining witness to refuse to testify before the jury after the court and prosecutor had been notified of his intentions. (Namet v United States, 373 US 179; People v Pollock,

21 NY2d 206; People v Thomas, 51 NY2d 446; People v Wheatman, 31 NY2d 12, cert den *sub nom.* Marcus v New York, 409 US 1027.)

Gino Josh Singer and *Ronald M. Kleinberg* for Camillo Lovacco, respondent.

I. The circumstantial evidence adduced at trial was insufficient to prove respondent's guilt beyond a reasonable doubt. (People v Jackson, 55 AD2d 961; People v Gwynn, 53 AD2d 565; People v Eastman, 50 AD2d 1065; People v Taddio, 292 NY 488; People v Cleague, 22 NY2d 363; People v Weiss, 290 NY 160; People v Argon, 10 NY2d 130; People v Washington, 18 NY2d 366; People v Beaudet, 31 AD2d 705.) II. Respondent was denied his constitutional right to a fair trial when the trial court erroneously permitted the victim to refuse to answer questions properly put to him in the presence of the jury. (United States v Beechum, 582 F2d 898; United States v Maloney, 262 F2d 535; People v Schneider, 36 NY2d 708; People v De Tore, 34 NY2d 199; People v Pollock, 21 NY2d 206; People v Sifford, 76 AD2d 937; ***296** People v Razezicz,, 206 NY 249; People v Paulino, 60 Ad2d 769; Namet v United States, 373 US 179; Douglas v Alabama, 380 US 415.)

OPINION OF THE COURT

Wachtler, J.

Defendants were convicted, following a jury trial, of assault in the second degree and criminal possession of a weapon in the fourth degree. Their convictions were reversed and a new trial was ordered, the Appellate Division having concluded that the trial court erred in permitting the People to put a witness before the jury who had already indicated that he would refuse to testify. We now reverse and hold that, although the better practice would have been to avoid exposing the witness's reticence to the jury, nevertheless under the circumstances of this case the trial court did not abuse its discretion in permitting the witness to be called.

The primary evidence against defendants came from the testimony of a police officer who happened upon the scene. He testified that, while on motor patrol, he observed three men striking another person who was lying on the ground. As the officer approached, the assailants fled in a car parked nearby. Following a brief chase, the assailants' car stopped, and the driver and another ran off on foot. Defendant Lovacco was apprehended as he attempted to flee from the rear seat. A few minutes later, defendant Berg was arrested nearby by other officers and taken to the station house where he was positively identified as one of the assailants by the officer who had witnessed the incident. The assault victim, Ronald Iovino, was found not far from the scene of the assault, with his mouth taped and his hands bound behind him with handcuffs.

Although Iovino had been in court for much of the trial, he unexpectedly failed to appear on the day he was scheduled to testify. He was thereafter brought to court under a material witness order. At defense counsel's request, the court interviewed Iovino *in camera,* to determine the reason for his apparent reluctance to testify. The court ascertained that Iovino had not been threatened or intimidated, but, nevertheless, appointed counsel to represent him. It is noteworthy that, during this interview, Iovino never indicated ***297** that he would refuse to testify; he merely expressed an inability to remember very much about the incident. Thereafter, during proceedings to determine whether Iovino should be held as a material witness, he gave the court every reason to believe that he intended to appear and testify the next day.

Prior to Iovino's being called to the witness stand, defense counsel requested that the court first ascertain whether the witness intended to testify, expressing concern for the possibility of prejudice to defendants should the refusal to testify occur in front of the jury. An *in camera* meeting attended by the Trial Judge, the prosecutor and Iovino's assigned counsel was then held. After being assured that Iovino was not suspected of any criminal activity in connection with the incident and that immunity would be granted if he invoked his Fifth Amendment privilege against self incrimination, Iovino's attorney informed the court that his client would not testify. No reason was offered for this refusal.

Thereafter, defense counsel were informed that Iovino had indicated that he would not answer any questions, but that the court would nevertheless allow the People to call him as a witness. When Iovino took the witness stand, he refused to answer the question put to him by the prosecutor concerning his whereabouts at the time of the assault. Despite several directions by the court and admonitions regarding the consequences of his refusal, the witness steadfastly refused to answer. The jury was then excused, and having continued his refusal to respond, Iovino was held in contempt. Certain items of evidence, which had been admitted subject to this witness's testimony, were then excluded. When the jury returned, the court admonished the jurors not to speculate as to the reasons for the exclusion of that evidence or the failure of Iovino to

testify, or to consider those events in any way during their deliberations.

Defendants' convictions were reversed by the Appellate Division, which concluded that the trial court erred in permitting the People to call Iovino as a witness once he had made clear that he would not testify. This refusal, it was believed, gave rise to the natural inference that Iovino ***298** feared reprisal if he testified against defendants. There should be a reversal.

The decision to permit the People to call a witness who has already indicated that he or she will refuse to testify is one resting within the sound discretion of the trial court (United States v Vandetti, 623 F2d 1144, 1149; United States v Quinn, 543 F2d 640, 650; see People v Thomas, 51 NY2d 466, 472). Once a witness has communicated that intent, the trial court must determine whether any interest of the State in calling the witness outweighs the possible prejudice to defendant resulting from the unwarranted inferences that may be drawn by the jury from the witness's refusal to testify. The trial court's exercise of discretion is subject to review by this court only on the basis of whether that discretion was abused. Two bases for ascertaining whether reversible error has occurred have been advanced in the somewhat analogous context of a witness's invocation of the Fifth Amendment privilege against self incrimination. The first focuses upon the prosecutor's motive in calling the reticent witness, in an effort to determine whether the witness's refusal to testify was deliberately demonstrated to the jury for the purpose of having it draw unwarranted inferences against the defendant. The second basis for finding error exists when it appears that the inferences from such a refusal to testify added critical weight to the prosecution's case in a form not subject to cross-examination (Namet v United States, 373 US 179, 186- 187; United States v Maloney, 262 F2d 535, 537).

We conclude that neither theory of reversible error has been demonstrated in the present case. An examination of the proceedings relative to the witness Iovino makes clear that the sole motive of the prosecutor in calling this witness was a good-faith effort to elicit his testimony; particularly where, as noted, the prosecutor offered to grant immunity to Iovino. The prosecutor was faced with a complaining witness who had been fully cooperative right up until the day he was to testify, and who even then merely expressed reservations about his ability to recall the incident but nevertheless assured the court that he would appear on the rescheduled date. Indeed, until just prior to the time Iovino was actually called as a witness, he ***299** had never indicated that he would refuse to answer questions put to him. Under the circumstances, it was not unreasonable for the prosecutor to attempt to induce the witness to again change his mind about testifying by putting him before the jury and having him admonished regarding the court's contempt power. Although the prosecutor was no doubt concerned over the unfavorable inference to be drawn against the People if he failed to produce the victim of the assault, it nevertheless does not appear that he intended, by putting Iovino before the jury to take advantage of the inference to be drawn by his refusal to testify. The case against defendants had been fully established by the testimony of other witnesses, one of whom had witnessed the assault. The prosecutor never commented upon nor in any way attempted to exploit the fact that Iovino had refused to testify (Rado v State of Connecticut, 607 F2d 572, 581). Clearly, the actions of the prosecutor do not support the conclusion that he was guilty of misconduct.

Moreover, any unfavorable inferences that the jury may have drawn from Iovino's refusal to testify would have had little bearing upon the jury's resolution of any direct issue raised on the trial. As noted, the People's case was strong, and no factual issues or defenses were raised as to which the witness's refusal to testify supplied the key or even provided corroboration (cf. People v Pollock, 21 NY2d 206; see Rado v State of Connecticut, supra, at p 582). It is urged that the only possible inference to be drawn from Iovino's refusal to testify is that he did so out of fear or because he had been threatened, an inference that would, no doubt, result in unfair prejudice to defendants. We believe, however, that the court's careful curative instruction to the effect that the jurors must refrain from speculation about Iovino's reasons for refusing to testify and must not allow his conduct to enter into their deliberations, given to the jury immediately upon its return to the courtroom after the incident, was sufficient to dispel the formulation of such an unwarranted inference (United States v Maloney, supra, at p 538). The importance, as well as the effect, of curative instructions in such a case cannot be underestimated, as we depend, for the integrity of the jury system itself, upon ***300** the willingness of jurors to follow the court's instructions in such matters.

Thus, given the State's strong interest both in attempting to induce this witness to testify and to avoid the unfavorable inference arising from a failure to produce the victim of the assault, coupled with the curative instruction concerning Iovino's refusal to testify, it cannot be said that the trial court abused its discretion in allowing the People to call

him as a witness. We have examined defendants' contentions concerning the sufficiency of the evidence and find them to be without merit.

Accordingly, the order of the Appellate Division should be reversed and the judgments of Supreme Court, Kings County, reinstated.

Meyer, J.

(Dissenting).

I could, perhaps, accept the majority's rationale had the witness not clearly stated before being called to testify that he would refuse to do so and had the witness not been the victim. Because he was the victim and because the Trial Judge knew when he permitted Iovino to be called that he would refuse notwithstanding the court's direction and admonition, I would hold it an abuse of discretion as a matter of law to permit him to be called, for the jury can have derived no other impression from the performance they witnessed than that the refusal resulted from intimidation of the victim- witness by defendants.

The question turns not alone on whether the prosecutor was guilty of misconduct; important also is whether defendant has been fairly tried. That the People had been misled by the victim's prior professed willingness to testify into introducing evidence for which he was a necessary connection warranted an instruction to the jury, after his recalcitrance became apparent to the court, that the evidence was being stricken because the connecting witness was not available and that they should disregard the evidence and should not speculate upon the reason for his unavailability as a witness. By such an instruction the interests of the People could have been protected without giving rise to improper speculation unfair to defendants. Nothing but ***301** unfair speculation could result, however, from the charade of putting Iovino on the stand only to have him adamantly defy the court.

Nor, under the circumstances of this case, can I share the majority's faith in the curative instruction given. Learned Hand in United States v Maloney (262 F2d 535, 538), upon whose decision the majority relies, expressed doubt "whether such admonitions are not as likely to prejudice the interest of the accused as to help them, imposing, as they do, upon the jury a task beyond their powers * * * which it is for practical purposes absurd to expect of them." He accepted the curative instruction given in *Maloney* only on constraint of earlier Supreme Court rulings and expressly rested his decision "upon the fact that the *accredited ritual* was not followed" (emphasis supplied). Justice Robert Jackson, a trial lawyer of note, concurring in Krulewitch v United States (336 US 440, 453), made indelibly clear his view: "The naive assumption that prejudicial effects can be overcome by instructions to the jury [citation omitted], all practicing lawyers know to be unmitigated fiction."

The implication that defendants frightened Iovino into refusing to testify, like the suggestion in People v Levan (295 NY 26, 36) that Levan was an army deserter, was a "virus * * * implanted in the minds of the jury" which, in my view, a curative instruction could not extract (see, also, People v Carborano, 301 NY 39, 42). I would, therefore, affirm.

Chief Judge Cooke and Judges Jasen, Jones and Simons concur with Judge Wachtler; Judge Meyer dissents and votes to affirm in a separate opinion.
Order reversed, etc. ***302**

New York
Official Reports

192 A.D.2d 542, 596 N.Y.S.2d 118

The People of the State of
New York, Respondent,
v.
Daniel Burks, Appellant.

Supreme Court, Appellate Division,
Second Department, New York
92-01464
(April 5, 1993)

CITE TITLE AS: People v Burks

HEADNOTES

CRIMES
DISCLOSURE
Failure to Produce Rosario Material

(1) Delay in furnishing defense counsel with copy of handwritten notes of undercover officer who purchased cocaine from defendant did not prejudice defendant; defense counsel was provided with copy of handwritten notes at issue in time for effective use of notes; defense counsel cross-examined undercover officer extensively on disparity between his prior description of seller as contained in handwritten notes and defendant's actual physical appearance; thus, no substantial right of defendant was prejudiced by delay in producing Rosario material.

CRIMES
RIGHT TO COUNSEL
Effective Representation

(2) In narcotics prosecution, defendant was not denied effective assistance of counsel because his counsel had on prior occasion represented one of prosecution witnesses in unrelated criminal proceeding; defendant has failed to show that 'conflict of interest or even a significant possibility thereof' existed; defense counsel did not realize he had previously represented witness in unrelated criminal proceeding until long after conclusion of his testimony; defense counsel effectively cross-examined witness on circumstances surrounding alleged sale, his alleged introduction of undercover officer to defendant, his use of various aliases, and fact he was paid $50 for what he did; since defense counsel did not realize he had on prior occasion represented witness in unrelated proceeding, he 'perceived no conflict and no loyalty owing to the witness'; trial court did not err in failing to conduct Gomberg inquiry.

Appeal by the defendant from a judgment of the County Court, Orange County (Byrne, J.), rendered January 23, 1992, convicting him of criminal sale of a controlled substance in the third degree (two counts) and criminal possession of controlled substance in the third degree (two counts), after a nonjury trial, and imposing sentence.

Ordered that the judgment is affirmed.

The delay in furnishing defense counsel with a copy of the handwritten notes of the undercover officer who purchased the cocaine from the defendant did not prejudice the defendant. Where there has been a delay in furnishing the defendant with *Rosario* material, reversal is required only if the defense is substantially prejudiced by the delay *(see, People v Martinez,* 71 NY2d 937; *People v Ranghelle,* 69 NY2d 56).

Here, defense counsel was provided with a copy of the handwritten notes at issue in time for effective use of the notes. The defense counsel cross-examined the undercover officer extensively on the disparity between his prior description of the seller as contained in the handwritten notes and the defendant's actual physical appearance. Thus, no substantial right of the defendant was prejudiced by the delay in producing the *Rosario* material.

Further, the defendant was not denied the effective assistance ***543** of counsel because his counsel had on a prior occasion represented one of the prosecution witnesses in an unrelated criminal proceeding. The defendant has failed to show that a "conflict of interest or even a significant possibility thereof" existed *(People v Perez,* 70 NY2d 773, 774, citing *People v Lombardo,* 61 NY2d 97, 103).

The record shows that the defense counsel did not realize that he had previously represented the witness in an unrelated criminal proceeding until long after the conclusion of his

testimony. Indeed, the defense counsel effectively cross-examined the witness on the circumstances surrounding the alleged sale, his alleged introduction of the undercover officer to the defendant, his use of various aliases, and the fact that he was paid $50 for what he did. Since the defense counsel did not realize that he had on a prior occasion represented the witness in an unrelated proceeding, he "perceived no conflict and no loyalty owing to the witness" *(People v Perez,* 70 NY2d 773, 774, *supra).* Under the circumstances, the trial court did not err in failing to conduct a *Gomberg* inquiry *(see, People v Gomberg,* 38 NY2d 307), and the defendant was not denied the effective assistance of counsel.

We have considered the defendant's remaining contentions and find them to be meritless.

Mangano, P. J., Bracken, Lawrence and O'Brien, JJ., concur.

End of Document

New York Official Reports

70 N.Y.2d 695, 512 N.E.2d 536, 518 N.Y.S.2d 953

The People of the State of New York, Respondent,
v.
Richard Caban, Appellant.

Court of Appeals of New York
144
Argued April 24, 1987;

decided June 2, 1987

CITE TITLE AS: People v Caban

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered September 15, 1986, which affirmed a judgment of the Supreme Court (Julius Vinik, J.), rendered in Kings County upon a verdict convicting defendant of manslaughter in the first degree and criminally negligent homicide.

Defendant was charged with various crimes arising out of a street fight involving himself, two of his brothers, his cousin Joaquin Lopez, and two men named James Jones and Sidney Fair. Fair and Jones died as a result of injuries received in the fight. Defendant and one of his brothers were indicted, while Lopez was not indicted, but did testify before the Grand Jury, at which time he was represented by the attorney who represented defendant at trial.

On appeal from his conviction, defendant argued that he was denied his right to effective assistance of counsel by the conflict of interest in representation.

People v Caban, 123 AD2d 356, affirmed.

HEADNOTES

Crimes
Right to Counsel
Effective Representation

(1) In a criminal prosecution arising out of a street fight involving six individuals, one of whom was a cousin of defendant who testified before the Grand Jury but was not indicted, an order of the Appellate Division, which affirmed a judgment convicting defendant of manslaughter and criminally negligent homicide, should be affirmed. Defendant was not denied his right to effective assistance of counsel by virtue of the fact that his defense counsel at trial also represented the cousin during the Grand Jury inquiry, since the trial court conducted a lengthy discussion with defendant and advised him of the possible conflict and of the fact that defendant might be "better off" with another attorney. By telling the court that he understood these concerns but nevertheless wished to continue with the same attorney, defendant waived his right to conflict-free representation, and the trial court's inquiry was sufficiently searching to assure that his waiver was informed and voluntary. Moreover, there is no per se rule requiring consultation with independent counsel, and while it is true that the advice of the conflict-impaired attorney is not alone sufficient to ensure the truly informed choice that the law requires, a careful inquiry by the court is an adequately reliable and effective safeguard. ***696**

APPEARANCES OF COUNSEL

Richard A. Greenberg for appellant.
Elizabeth Holtzman, District Attorney (Ann Bordley and *Barbara D. Underwood* of counsel), for respondent.

OPINION OF THE COURT

The order of the Appellate Division should be affirmed.

While defendant's trial was in progress, the Presiding Judge reviewed the Grand Jury minutes and discovered for the first time that defense counsel had represented Joaquin Lopez during the Grand Jury inquiry into the incident for which defendant was on trial. Lopez had been a target of the Grand Jury's inquiry, but he was not ultimately indicted. Upon learning of counsel's prior representation of Lopez, the trial court questioned him about the possible conflict of interest,[1] noting that Lopez had been on counsel's list of potential defense witnesses and that the court itself considered Lopez's Grand Jury testimony to be *Brady* material helpful to defendant's case. In response, counsel agreed that a potential conflict of interest existed and that the conflict "would be perhaps one of the reasons" for not calling Lopez as a

defense witness. However, counsel also stated that he had other reasons for not calling Lopez and that, in any event, he had discussed the potential conflict with defendant, who was willing to waive it.

The court then conducted a lengthy discussion with defendant, advising him specifically that Lopez's testimony could be very helpful in establishing an intoxication or justification defense, that his present attorney might be handicapped in eliciting all of the necessary facts because of his prior representation of Lopez, that his attorney might even refrain entirely from calling Lopez because of the possible conflict and that defendant might be "better off" with another attorney who was not similarly restricted. Defendant told the court that he understood these concerns but nonetheless wished to waive any potential conflict and continue with his present attorney.

Defendant waived his right to conflict-free representation and the trial court's inquiry was sufficiently searching to ***697** assure that his waiver was informed and voluntary *(see, People v Lloyd,* 51 NY2d 107).[2] Indeed, on this appeal, defendant does not contest the thoroughness of the court's inquiry, but instead contends that the trial court should have afforded him an opportunity to consult with independent counsel before deciding whether to waive his attorney's potential conflict. However, just as "there is no prescribed * * * catechism that the court must follow" in ascertaining a defendant's understanding of his choices *(People v Lloyd,* 51 NY2d 107, 112, *supra),* there is no per se rule requiring consultation with independent counsel. While it is true that the advice of the conflict-impaired attorney is not alone sufficient to ensure the truly informed choice that the law requires, we have consistently regarded a careful inquiry by the court to be an adequately reliable and effective safeguard. We see no need to add an additional layer of mandatory inquiry or consultation.

We have examined defendant's remaining contentions and deem them to be without merit.

Chief Judge Wachtler and Judges Simons, Kaye, Alexander, Titone, Hancock, Jr., and Bellacosa concur.

Order affirmed in a memorandum.

Footnotes

1 The court specifically drew counsel's attention to the continuing obligation to preserve a client's or former client's confidences and secrets.

2 The sufficiency of the trial court's inquiry to assure an intelligent and voluntary waiver *(see, People v Macerola,* 47 NY2d 257; *People v Gomberg,* 38 NY2d 307) is a question of law, not a "mixed question of law and fact." Consequently, we have the power to review that question independently, and we reject the People's present suggestion that we are bound by the "findings" of the courts below *(see also, People v Mattison,* 67 NY2d 462, 470, n 4).

New York
Official Reports

14 N.Y.3d 319, 927 N.E.2d 532, 901
N.Y.S.2d 112, 2010 N.Y. Slip Op. 02435

**1 The People of the State
of New York, Respondent
v
James J. Carncross, Appellant.

Court of Appeals of New York
38
Argued February 11, 2010

Decided March 25, 2010

CITE TITLE AS: People v Carncross

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered February 11, 2009. The Appellate Division affirmed a judgment of the Onondaga County Court (William D. Walsh, J.), which had convicted defendant, upon a jury verdict, of reckless driving and aggravated criminally negligent homicide.

People v Carncross, 59 AD3d 1112, affirmed.

HEADNOTES

Crimes
Appeal
Preservation of Issue for Review—Legal Sufficiency of Evidence That Defendant Acted with Requisite Mens Rea

(1) In a prosecution for aggravated criminally negligent homicide and related crimes arising from the death of a state trooper in a car accident while pursuing defendant in a high-speed chase, defendant failed to preserve his claim that the evidence at trial was legally insufficient to establish that he acted with the requisite mens rea to support his conviction for aggravated criminally negligent homicide. In moving to dismiss the aggravated criminally negligent homicide count, defendant had argued only that the evidence was insufficient to prove a "causal connection" between the defendant's conduct and the trooper's death, and not that the evidence failed to establish he acted with the requisite mens rea. Where a motion to dismiss for insufficient evidence is made, the preservation requirement compels that the argument be specifically directed at the alleged error.

Crimes
Criminally Negligent Homicide
Causation—Officer Killed while Engaged in Pursuit

(2) In a prosecution for aggravated criminally negligent homicide and related crimes arising from the death of a state trooper in a car accident while pursuing defendant in a high-speed chase, the evidence was legally sufficient to establish a causal connection between defendant's conduct and the trooper's death. There was no requirement that defendant's motorcycle actually make contact with the trooper's vehicle in order for the causation element to be satisfied. Rather, the essential inquiry was whether defendant's conduct was a sufficiently direct cause of the trooper's death. Had defendant not fled when the trooper attempted to pull him over for speeding, the trooper would not have engaged in the high-speed chase that resulted in his death. Where, as here, a defendant's flight naturally induces a police officer to engage in pursuit, and the officer is killed in the course of that pursuit, the causation element of the crime will be satisfied.

Crimes
Right to Counsel
Effective Representation—Potential Conflict of Interest

(3) County Court did not abuse its discretion in granting the prosecution's motion to disqualify the defense counsel who had represented defendant's *320 father and girlfriend at the grand jury. Defendant was charged with aggravated criminally negligent homicide and related crimes arising from the death of a state trooper in a car accident while pursuing defendant in a high-speed chase, and the testimony defendant's father and girlfriend gave before the grand jury would have been damaging to the possible defense theory that defendant was not the person who had been driving the pursued motorcycle. Although defendant's father and girlfriend never actually testified at trial, at the time the disqualification motion was made the parties were operating

under the assumption that defendant's father and girlfriend might well be called as prosecution witnesses. Any identity of interest defendant's father and girlfriend may have had with defendant would have dissolved if they were called as witnesses for the prosecution, or if defense counsel opted for a strategy tailored to avoid having to cross-examine them. The trial court, in granting the disqualification motion despite defendant's waiver of the conflict on the record, carefully balanced defendant's right to counsel of his own choosing against his right to effective assistance of counsel.

Crimes
Right to Counsel
Effective Representation—Counsel's Actions in Encouraging Defendant to Speak with Police

(4) Defendant, who had agreed, after conferring with counsel, to speak with the police and gave a statement implicating himself in a high-speed pursuit that resulted in the death of a state trooper, failed to establish that he received ineffective assistance of counsel. After defendant's attorney arrived at the police barracks the attorney was told by representatives of the District Attorney's Office that the District Attorney would look favorably upon defendant if he voluntarily gave a statement. He was also told that the police had received information that defendant was in fact the person being sought and that the police had the names of other persons who had spoken to defendant. Defendant's attorney made the strategic decision to encourage defendant to cooperate in order to receive favorable treatment once charges were brought. Even assuming that the right to effective assistance of counsel attached prior to defendant's inculpatory statement and that suppression is the appropriate remedy where a statement is given as the result of ineffective assistance of counsel, it could not be said that defendant received less than meaningful representation.

RESEARCH REFERENCES

Am Jur 2d, Appellate Review §§ 575, 627; Am Jur 2d, Attorneys § 195; Am Jur 2d, Criminal Law §§ 1102, 1120, 1135–1139; Am Jur 2d, Homicide §§ 85–87, 114, 432, 441.

Carmody-Wait 2d, Right to Counsel §§ 184:103, 184:104, 184:162–184:167, 184:219; Carmody-Wait 2d, Fundamentals of Criminal Evidence § 193:3; Carmody-Wait 2d, Appeals in Criminal Cases §§ 207:18, 207:19, 207:34, 207:172.

LaFave, et al., Criminal Procedure (3d ed) §§ 11.4, 11.7, 11.10, 27.5.

NY Jur 2d, Criminal Law: Procedure §§ 750, 758, 759, 864–870, 878, 883, 3454–3456, 3472, 3644; NY Jur 2d, Criminal Law: Substantive Principles and Offenses §§ 558, 559, 563.

*321 ANNOTATION REFERENCE

See ALR Index under Appeal and Error; Attorneys; Criminal Procedure Rules; Homicide.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: preserv! /s insufficien! /3 evidence /p caus! /p negligent /2 homicide

POINTS OF COUNSEL

Mitchell Goris & Stokes, LLC, Cazenovia (*Stewart F. Hancock, Jr.,* of counsel), and *Bianco Law Offices,* Syracuse (*Randi Juda Bianco* of counsel), for appellant.
I. The proof presented by the prosecution was legally insufficient to establish the required elements of aggravated criminally negligent homicide. The trial court erred, as a matter of law, in denying defendant's motions to dismiss for legal insufficiency and the Appellate Division erred in failing to reverse the trial court and dismiss that charge. (*People v Cabrera,* 10 NY3d 370; *People v Gray,* 86 NY2d 10; *People v Badke,* 21 Misc 3d 471; *People v Haney,* 30 NY2d 328; *People v Soto,* 44 NY2d 683; *People v Ricardo B.,* 73 NY2d 228; *People v Loughlin,* 76 NY2d 804; *People v Maher,* 79 NY2d 978; *People v Harris,* 81 NY2d 850; *People v Ladd,* 89 NY2d 893.) II. The Appellate Division erred in holding that defendant had failed to preserve the contention that the evidence was legally insufficient to establish that defendant had the requisite mens rea for criminally negligent homicide; in the event that this Court should hold that this issue is being presented for the first time in this Court, this Court can and should hear the issue on the merits. (*People v Fermin,* 36 AD3d 934; *People v Edwards,* 95 NY2d 486; *People v LaPetina,* 34 AD3d 836; *People v Duncan,* 177 AD2d 187; *People v Flores,* 124 Misc 2d 478; *People v Haney,* 30 NY2d 328; *People v Kibbe,* 35 NY2d 407; *People v Le Mieux,* 51 NY2d 981; *People v Gray,* 86 NY2d 10; *People v Bynum,* 70 NY2d 858.) III. The court erred in granting

the People's motion to disqualify defense counsel and that error deprived appellant of his federal and state constitutional right to counsel of his choice. This constitutional deprivation, without more, mandates reversal and a new trial. (*United States v Perez,* 325 F3d 115; *People v Caban,* 123 AD2d 356; *United States v Kliti,* 156 F3d 150; *People v Ortiz,* 76 NY2d 652; *People v Wandell,* 75 NY2d 951; *People v Gomberg,* 38 NY2d 307; *People v Mattison,* 67 NY2d 462; *People v Stewart,* 126 AD2d 943; *People v Arroyave,* 49 NY2d 264; *People v Salcedo,* 68 NY2d 130.) IV. The ***322** trial court erred in failing to dismiss the indictment based on improper expert testimony and misleading grand jury instructions. (*People v Loizides,* 123 Misc 2d 334; *People v Taylor,* 150 Misc 2d 91; *De Long v County of Erie,* 60 NY2d 296; *Kulak v Nationwide Mut. Ins. Co.,* 40 NY2d 140; *People v Santi,* 3 NY3d 234; *Ortiz v City of New York,* 39 AD3d 359; *People v McCart,* 157 AD2d 194; *People v Champion,* 247 AD2d 901; *People v Huston,* 88 NY2d 400; *People v Wilkins,* 68 NY2d 269.) V. The court's evidentiary rulings at trial deprived defendant of his right to a fair trial in violation of article I, § 6 of the New York State Constitution and the Fifth and Fourteenth Amendments of the United States Constitution. (*Selkowitz v County of Nassau,* 45 NY2d 97; *People v Goldstein,* 6 NY3d 119; *People v Peguero-Castillo,* 174 AD2d 1026; *Olden v Kentucky,* 488 US 227; *People v De Jesus,* 42 NY2d 519; *People v Montes,* 141 AD2d 767; *People v Ortiz,* 116 AD2d 531; *People v Rivera,* 116 AD2d 371; *People v Alicea,* 37 NY2d 601; *People v Steinhardt,* 9 NY2d 267.) VI. Defendant's statement should have been suppressed as his right to counsel under the Fifth and Sixth Amendments to the United States Constitution and article I, § 6 of the New York State Constitution had indelibly attached and his rights were violated when the representation afforded him by counsel in dealing with law enforcement authorities was grossly incompetent. (*People v Claudio,* 83 NY2d 76; *People v Iucci,* 61 AD2d 1; *United States v Cronic,* 466 US 648.) VII. The cumulative effect of the errors deprived defendant of the right to a fair trial. (*People v Crimmins,* 36 NY2d 230; *People v Pyne,* 223 AD2d 910; *People v Kitchen,* 55 AD2d 575.)

William J. Fitzpatrick, District Attorney, Syracuse (*James P. Maxwell* and *Victoria M. White* of counsel), for respondent.

I. The evidence was legally sufficient to support defendant's conviction of aggravated criminally negligent homicide. (*People v Contes,* 60 NY2d 620; *Jackson v Virginia,* 443 US 307; *People v Bleakley,* 69 NY2d 490; *People v Boutin,* 75 NY2d 692; *People v Haney,* 30 NY2d 328; *People v Ricardo B.,* 73 NY2d 228; *People v Conway,* 6 NY3d 869; *People v Cabrera,* 10 NY3d 370; *People v Paul V.S.,* 75 NY2d 944; *People v McGrantham,* 12 NY3d 892.) II. The Appellate Division properly held that defendant failed to preserve his contention that the evidence was legally insufficient to establish that defendant possessed the requisite mens rea for criminally negligent homicide. (*People v Gray,* 86 NY2d 10; *People v Hines,* 97 NY2d 56, 678; *People v Bynum,* 70 NY2d 858; *People v Sweeney,* 15 AD3d 917, 4 NY3d 891; *People v Belge,* 41 NY2d 60.) III. The court properly disqualified defense ***323** counsel. (*People v Gomberg,* 38 NY2d 307; *People v Tineo,* 64 NY2d 531; *People v Wandell,* 75 NY2d 951; *People v Harris,* 99 NY2d 202; *People v McDonald,* 68 NY2d 1; *People v Lombardo,* 61 NY2d 97; *People v Stewart,* 126 AD2d 943; *Wheat v United States,* 486 US 153; *United States v Gonzalez-Lopez,* 548 US 140; *People v Hall,* 46 NY2d 873, 444 US 848.) IV. The testimony and instructions presented to the grand jury did not impair the integrity of the grand jury or prejudice defendant. (*People v Huston,* 88 NY2d 400; *People v Wooten,* 283 AD2d 931, 96 NY2d 943; *People v Caracciola,* 78 NY2d 1021; *People v Darby,* 75 NY2d 449; *People v Gray,* 86 NY2d 10; *Mallory v Mallory,* 113 Misc 2d 912; *People v McCart,* 157 AD2d 194, 76 NY2d 861; *People v Sims,* 178 AD2d 993, 79 NY2d 953; *People v DaCosta,* 6 NY3d 181; *People v Calbud, Inc.,* 49 NY2d 389.) V. County Court's evidentiary rulings were legal, proper and did not deprive defendant of his right to a fair trial. (*People v Gray,* 86 NY2d 10; *People v LeGrand,* 8 NY3d 449; *People v Brown,* 97 NY2d 500; *People v Cronin,* 60 NY2d 430; *Selkowitz v County of Nassau,* 45 NY2d 97; *People v Sorge,* 301 NY 198; *People v Snell,* 234 AD2d 986, 89 NY2d 1015; *People v McIntyre,* 36 NY2d 10; *People v Straniero,* 17 AD3d 161, 5 NY3d 795; *People v Gonzalez,* 38 NY2d 208.) VI. County Court did not err in denying suppression of defendant's statements. (*People v Claudio,* 83 NY2d 76; *People v Steward,* 88 NY2d 496; *Kirby v Illinois,* 406 US 682; *People v Stultz,* 2 NY3d 277; *People v Baldi,* 54 NY2d 137; *People v Simmons,* 167 AD2d 924, 77 NY2d 843; *People v Borrell,* 12 NY3d 365; *People v Turner,* 5 NY3d 476; *People v Rivera,* 71 NY2d 705; *People v Droz,* 39 NY2d 457.) VII. Defendant received a fair trial. (*People v Lucie,* 49 AD3d 1253, 10 NY3d 936.)

OPINION OF THE COURT

Chief Judge Lippman.

In protecting a defendant's Sixth Amendment rights, a trial court may on occasion ****2** properly disqualify the attorney of a defendant's choosing due to that attorney's conflicts, actual or potential, even in the face of defendant's waiver of such conflicts. This is such a case.

In the late afternoon on April 23, 2006, defendant drove away from his home in Onondaga County on his motorcycle. On felony probation at the time, defendant could not own or operate a motor vehicle since he did not have his probation officer's permission to do so, and he was not licensed to drive a motorcycle in New York State. As defendant traveled west on Route 173 ***324** toward Jamesville, New York State Trooper Craig Todeschini observed defendant speeding and began to pursue him. Defendant admitted that when he turned left onto Route 91, he saw the trooper's vehicle behind him with its emergency lights on, but, rather than pulling over to the side of the road, "took off" in an attempt to "not get[ ] caught by the trooper."

Various witnesses observed the motorcycle, followed by the trooper's vehicle, traveling at a high rate of speed, estimated between 90 and 120 miles per hour, and weaving in and out of traffic along the two-lane country roads. As Trooper Todeschini entered the Hamlet of Pompey Hill, still in pursuit of defendant, he was unable to negotiate a turn in the road, lost control of his vehicle, and collided head-on into a tree, resulting in his immediate death. Three days after the accident, defendant voluntarily appeared at the New York State Police barracks for an interview and, after consulting with his attorney, gave an inculpatory statement.

Defendant was indicted on one count each of reckless driving, aggravated manslaughter in the second degree, and aggravated criminally negligent homicide. A jury acquitted him of the aggravated manslaughter count, but convicted him on the reckless driving and aggravated criminally negligent homicide counts. Defendant was sentenced as a predicate felon to seven years in prison with five years' postrelease supervision. The Appellate Division affirmed the judgment of conviction (59 AD3d 1112 [2009]). A Judge of this Court granted defendant's application for leave to appeal from that order (12 NY3d 852 [2009]). We now affirm.

I.

(1) Defendant first argues that the evidence was legally insufficient to support his conviction for aggravated criminally negligent homicide. In particular, defendant claims that there was insufficient evidence to establish that he acted with the requisite mens rea. This claim, however, is unpreserved. After the People rested, and again at the close of all the proof, defendant moved to dismiss the aggravated criminally negligent homicide count, arguing only that the evidence was insufficient to prove a "causal connection" between the defendant's conduct and the trooper's death. The court denied both motions. At no point did defendant argue, as he does now, that the evidence failed to establish he acted with the requisite mens rea. As we have previously explained, "where a motion to dismiss for ***325** insufficient evidence [is] made, the preservation requirement compels that the argument be 'specifically directed' at the alleged error" (*People v Gray*, 86 NY2d 10, 19 [1995], quoting *People v Cona*, 49 NY2d 26, 33 n 2 [1979]). ****3** Given defendant's failure to argue with particularity that the evidence was legally insufficient to prove that he acted with the requisite mens rea, we are foreclosed from reviewing that claim here.

(2) Defendant also argues that the evidence is legally insufficient to establish a causal connection between his conduct and the death of the trooper. Although plainly preserved, this argument is without merit.

In *People v DaCosta*, we explained the law regarding causation in this context:

> "To be held criminally responsible for a homicide, a defendant's conduct must actually contribute to the victim's death by setting in motion the events that result in the killing. Liability will attach even if the defendant's conduct is not the sole cause of death if the actions were a sufficiently direct cause of the ensuing death. More than an obscure or merely probable connection between the conduct and result is required. Rather, an act qualifies as a sufficiently direct cause when the ultimate harm should have been reasonably foreseen" (6 NY3d 181, 184 [2006] [internal quotation marks, brackets and citations omitted]).

In that case, we held that the evidence was legally sufficient with respect to causation where a police officer, while chasing the fleeing defendant across a busy expressway, was struck and killed by a vehicle. Similarly, in *People v Matos* (83 NY2d 509 [1994]), evidence of causation was legally sufficient where a police officer fell down an air shaft to his death in the course of pursuing the fleeing defendant up a ladder and across a roof. These cases establish that where a defendant's flight naturally induces a police officer to engage in pursuit, and the officer is killed in the course of that pursuit, the causation element of the crime will be satisfied.

Defendant argues that the trooper was negligent by excessively speeding and losing control of his vehicle and violated State Police pursuit policy and Vehicle and Traffic Law § 1104, and that these acts were intervening and unforeseeable causative circumstances. However, it is plain that had defendant not fled, the trooper would not have

engaged in the ***326** high-speed chase that resulted in his death. Additionally, contrary to defendant's contention, there is no requirement that a defendant's vehicle actually make contact with the trooper's vehicle in order for the causation element to be satisfied. Rather, the essential inquiry is whether defendant's conduct was a sufficiently direct cause of the trooper's death, a question we answer in the affirmative. There can be no doubt that defendant's conduct set in motion the events that led to the trooper's death, and it was reasonably foreseeable that a fatal accident would occur as a result of defendant leading the trooper on a high-speed pursuit. Accordingly, the evidence was legally sufficient to establish a causal connection between defendant's conduct and the trooper's death.

II.

Defendant next argues that County Court erred in granting the People's motion to ****4** disqualify his counsel. When the case was presented to the grand jury, the prosecutor called defendant's father and girlfriend. One of defendant's retained attorneys, Mary Gasparini, represented these witnesses and appeared with them in the grand jury room while they gave their testimony. Defendant's father testified that, on the evening of the accident, defendant returned home after riding his motorcycle and told his father not to let him ride his motorcycle until he was properly licensed because he was nearly pulled over by the police. Defendant also told his father that he had seen flashing lights, yet kept driving. Defendant's girlfriend testified that he called her shortly after the accident and said he was the motorcyclist the police were looking for and that he thought he was going to jail because the trooper had died. The next day, he called her and told her not to say anything about what he had told her the night before.

After the case had been presented to the grand jury, and four months before trial, the People moved to disqualify Gasparini and her partner, James Meggesto, on the ground that a potential conflict of interest existed based on Gasparini's representation at the grand jury of defendant's father and girlfriend who would be prosecution witnesses at trial. Defendant argued that if there was any conflict at all, it was only potential, and the issue could not be determined until after the testimony of the witnesses. Further, the defense argued that any potential conflict was waivable by defendant. Indeed, in open court, defendant indicated he was willing to waive any conflict.

***327** At a subsequent court appearance, the court appointed an independent attorney to advise the defendant with respect to the conflict of interest and its implications. After a discussion with defendant, the independent counsel informed the court that defendant understood the conflict and was willing to waive it, after which defendant waived the conflict on the record. Nevertheless, the court granted the People's motion, concluding that defense counsel "must be disqualified in order to protect the defendant's rights to effective assistance of trial counsel and a fair trial free of any conflict of interest."

(3) Although both defendant's father and girlfriend were mentioned at jury selection as potential witnesses, in the end neither actually testified. On appeal, the Appellate Division concluded that County Court did not abuse its discretion in granting the People's motion to disqualify defense counsel. We agree.

When examining a defense counsel's possible conflict of interest, a court must balance the defendant's constitutional right to the effective assistance of counsel against the defendant's right to be defended by counsel of his own choosing (*see People v Gomberg*, 38 NY2d 307, 312 [1975]). "A lawyer simultaneously representing two clients whose interests actually conflict cannot give either client undivided loyalty" (*People v Ortiz*, 76 NY2d 652, 656 [1990]), and, in such a case, the constitutional right to effective assistance of counsel may be "substantially impaired" (*Gomberg*, 38 NY2d at 312). Where there is a question as to a possible ****5** conflict, although the court "should not arbitrarily interfere with the attorney-client relationship," the court "has a duty to protect the right of an accused to effective assistance of counsel" (*id.* at 313). Thus, when the court is informed of a potential conflict, it must "ascertain, on the record, whether each defendant has an awareness of the potential risks involved in that course and has knowingly chosen it" (*id.* at 313-314).

In *Gomberg*, we explained that it is often difficult to assess these conflicts prospectively, before the court is fully aware of "the evidence to be adduced, the strategies to be followed and all defenses that may be plausibly asserted" (*id.* at 314). Thus, a defendant's willingness to waive the conflict at an early stage does not end the inquiry. As the Supreme Court has explained, even though there is a "presumption in favor of [the defendant's] counsel of choice," that right is not absolute and the court may decline to honor the defendant's waiver of a conflict:

> "Unfortunately for all concerned, a [lower] court ***328** must pass on the issue whether or not to allow a waiver of

> a conflict of interest by a criminal defendant not with the wisdom of hindsight after the trial has taken place, but in the murkier pre-trial context when relationships between parties are seen through a glass, darkly. The likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict . . .
>
> "For these reasons we think the [lower] court must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses" (*Wheat v United States*, 486 US 153, 164, 162-163 [1988]).

Here, the trial court had the independent obligation to ensure that defendant's right to effective representation was not impaired. Although defendant's father and girlfriend never testified at trial, at the point in the proceedings when the disqualification motion was made, the parties were operating under the assumption that these witnesses might well be called. Specifically, the defense had indicated that it was possible they would proceed with the theory that defendant was not the person who had been driving the motorcycle. The trial court reasonably concluded that, if the defense chose this strategy at trial, it was highly likely that the prosecution would call defendant's father and girlfriend, who both possessed damaging evidence indicating that defendant had, indeed, been driving the motorcycle. Further, the court properly found that, if these witnesses were called, defense counsel would have been required to cross-examine them. An "attorney's decision whether and how best to impeach the credibility of a witness to whom he . . . owe[s] a duty of loyalty necessarily place[s] the attorney in a very awkward position, where prejudice to defendant need not be precisely delineated but must be ****6** presumed" (*People v McDonald*, 68 NY2d 1, 11 [1986] [internal quotation marks, citation and brackets omitted]). Moreover, had counsel not been disqualified under these circumstances, counsel's ability to objectively assess the best strategy for defendant to pursue may have been impaired. Defense counsel, obligated to maintain the confidences of the father and the girlfriend, might choose the ***329** strategy least likely to cause the prosecution to call them as witnesses, thereby avoiding the need to cross-examine them. It would be difficult to repose confidence in counsel's single-minded protection of defendant's interests in these circumstances.

Our dissenting colleagues embrace a seemingly unworkable test in characterizing the conflict here as "more theoretical than real" and "not serious, given the common interest shared by defendant, his girlfriend and his father" (dissenting op at 332). Defendant's father and girlfriend may well have shared with defendant the desire to see him exonerated and avoid having the prosecutor call them to testify; indeed, that may be why they retained the same lawyers in the first instance. Their identity of interest with defendant would dissolve, however, upon either being called as a witness for the prosecution or, as noted, could have dissolved even earlier if defense counsel opted for a strategy tailored to avoid having to cross-examine them (*see People v Wandell*, 75 NY2d 951 [1990] [excoriating defense counsel and the prosecutor for failing to advise the trial court of defense counsel's representation of a prosecution witness in a separate civil action]; *see e.g. People v Stewart*, 126 AD2d 943 [4th Dept 1987] [concluding that a conflict was presented by counsel's representation of both a father and a son, and ordering a new trial on ineffective assistance of counsel grounds where, as here, the son made incriminating statements to his father who then provided information against his son to authorities]). More fundamentally, the trial court was tasked with considering this potential conflict without the benefit of hindsight, and the approach taken by the dissent would too narrowly limit the "substantial latitude" (*Wheat*, 486 US at 163) we all agree the trial court possessed in exercising its discretion under these circumstances.

A review of the record here reveals that the court carefully balanced defendant's right to counsel of his own choosing against his right to effective assistance of counsel. The court was quite properly reluctant to disqualify counsel, but acted well within the bounds of its discretion in concluding that allowing counsel to continue would "severely undermine [defendant's] ability to present a cogent defense." Further, there is no indication that the prosecution's disqualification request was manufactured in order to gain a tactical advantage (*see Wheat*, 486 US at 163). We also note that, contrary to defendant's argument, the court was under no obligation to wait until trial to ***330** see if defendant's father and girlfriend would testify. If the court were required to delay resolution of the motion, and these witnesses were called to testify—which was a possibility even when the trial began—a mistrial would likely have been necessary at that late juncture. ****7**

Indeed, the circumstances of this case highlight that trial courts faced with a defendant willing to waive a conflict are often placed in the very difficult position of having their decision challenged regardless of the outcome. As the Supreme Court in *Wheat* explained, if the court honors

the waiver, the defendant can later claim he was denied the effective assistance of counsel (*see id.* at 161). On the other hand, if the trial court refuses to honor the waiver, a defendant may well raise a challenge like the one presented here (*see id.*). Of course, the rights that must be balanced—the right to counsel of a criminal defendant's choosing and the right to effective assistance of counsel free of conflicts—both inure to a defendant's benefit. At times, however, as here, circumstances are such that the attorney a defendant chooses is also conflicted, in which case these rights may not be enforced in perfect harmony. Thus, as we have observed, a trial court's "discretion is especially broad when the defendant's actions with respect to counsel place the court in the dilemma of having to choose between undesirable alternatives, either one of which would theoretically provide the defendant with a basis for appellate review" (*People v Tineo*, 64 NY2d 531, 536 [1985]; *see generally People v Konstantinides*, 14 NY3d 1 [2009]). We trust that the trial courts, relying on their experience and sound judgment, will carefully evaluate the circumstances presented in such cases and strike an appropriate balance of the relevant interests. Under the circumstances presented here, the court did not abuse its broad discretion in granting the motion to disqualify defendant's counsel.

III.

Defendant further argues that his statement to the police should be suppressed because his counsel was ineffective in advising him to give the statement. The record reveals that, when defendant voluntarily arrived at the trooper barracks three days after the accident, he was given *Miranda* warnings. Defendant spoke with troopers for a period of time, but then invoked his right to counsel, at which point the questioning immediately ceased. Defendant's then attorney, David Savlov, faxed a letter to the barracks indicating he represented defendant, ***331** and appeared at the barracks shortly thereafter. After speaking with defendant, Savlov informed the troopers that defendant was willing to speak with them. The troopers again administered *Miranda* warnings to defendant, who subsequently gave a statement implicating himself in the motorcycle chase.

County Court denied defendant's motion to suppress the statement, and the Appellate Division affirmed, holding that "suppression was not required inasmuch as defendant received meaningful representation" (59 AD3d at 1114 [citation omitted]).

(4) Even assuming, without deciding, the right to effective assistance of counsel attached prior to defendant's inculpatory statement and that suppression is the appropriate remedy ****8** where a statement is given as the result of ineffective assistance of counsel (*see People v Claudio*, 83 NY2d 76 [1993]), defendant here has failed to establish that he received ineffective assistance. In determining whether a defendant has been deprived of effective assistance of counsel, we must examine whether "the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of representation, reveal that the attorney provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147 [1981]). "[A]ll of the evidence must be weighed in context and as of the time of representation to assess the alleged deficient representation" (*People v Hobot*, 84 NY2d 1021, 1022 [1995]). Although rare, a single, substantial error by counsel may "so seriously compromise[ ] a defendant's right to a fair trial [that] it will qualify as ineffective representation" (*id.*). Only where the single error is sufficiently "egregious and prejudicial" will counsel be deemed ineffective (*People v Caban*, 5 NY3d 143, 152 [2005]).

The record reveals that, after arriving at the police barracks, Savlov was told by representatives of the District Attorney's Office that the District Attorney would look favorably upon defendant if he voluntarily gave a statement. Further, Savlov "was also told that the police had received information that the defendant was in fact the person being sought [and] . . . the names of other persons who had spoken to the defendant." Thus, this case is distinguishable from *Claudio* (83 NY2d at 78), in which we noted that defendant's counsel was grossly incompetent for advising defendant to give a statement despite that the police had indicated they had insufficient evidence against defendant and the prosecutor had informed the attorney that no plea bargain would be offered. Here, Savlov made the ***332** strategic decision to encourage defendant to cooperate in order to receive favorable treatment once charges were brought. Under all the relevant circumstances, we cannot say that defendant received less than meaningful representation.

IV.

We have considered defendant's other challenges to his conviction and find them to be without merit.

Accordingly, the order of the Appellate Division should be affirmed.

Pigott, J. (dissenting). Because, in my view, County Court committed reversible error in disqualifying defendant's counsel, I respectfully dissent. The court disqualified counsel based upon its finding that a potential conflict of interest—which was more theoretical than real—would, in its opinion, ****9** infringe upon defendant's right to the effective assistance of trial counsel.

It is hornbook law that, the right to counsel being a fundamental one, courts must "carefully scrutinize[ ]" the "judicial restriction or governmental intrusion" upon its exercise (*People v Tineo*, 64 NY2d 531, 536 [1985]). While a trial court should be accorded "substantial latitude" in refusing a defendant's waiver of even a potential conflict (*Wheat v United States*, 486 US 153, 163 [1988]), it is evident from this record that any potential conflict (which never came to fruition) was simply not serious, given the common interest shared by defendant, his girlfriend and his father.

When the court questioned defendant about his waiver, he remained steadfast that he wished to waive any potential conflict. The court then appointed an experienced criminal lawyer as independent counsel to meet with defendant to explain the ramifications of this choice. She met with defendant twice and sent him a letter explaining his rights, including the risks and benefits of waiving the conflict. That attorney reported to the court that it was her view that defendant understood the risks of waiving the conflict and still wished to do so. Notwithstanding these facts, County Court disqualified counsel. What is remarkable here is that no one seems to have had an objection to defendant retaining his counsel other than his adversary and the court.

An element of a defendant's federal and state constitutional right to counsel (US Const 6th Amend; NY Const, art I, § 6) "is the right of [the] defendant who does not require appointed counsel to choose who will represent him" (***333** *United States v Gonzalez-Lopez*, 548 US 140, 144 [2006]; *see People v Arroyave*, 49 NY2d 264, 270 [1980]). When a defendant is wrongly deprived of that right, the deprivation is "complete" at the time the defendant is erroneously prohibited from being represented by the counsel of his choice, and such error is considered a "structural" one not subject to harmless error analysis (*Gonzalez-Lopez* at 148, 150).

In support of its holding here, the majority relies on *People v Ortiz* (76 NY2d 652 [1990]) and *People v Gomberg* (38 NY2d 307 [1975]), both of which are "multiple representation" cases. The former case involved a garden-variety drug trial where defense counsel's loyalties were divided between the defendant he was representing and a testifying witness whose interests diverged from those of the defendant; the latter case involved a situation where the same attorney represented three defendants who were on trial for arson, and the defense asserted by one of the defendants allegedly shifted the blame to the other defendants. Of course, as the United States Supreme Court has recognized, "multiple representation of criminal defendants engenders special dangers of which a court must be aware" (*Wheat*, 486 US at 159). But that is not the situation we are presented with here, where neither defendant's father nor his girlfriend was facing a criminal charge, nor were they targets of the investigation.

The Supreme Court has recognized "a presumption in favor of [a defendant's] ****10** counsel of choice" which may be overcome by either a showing of actual conflict or "a serious potential for conflict" (*Wheat*, 486 US at 164). It is undisputed in this instance that, at most, there was a potential conflict because defendant's interests might have placed defense counsel under inconsistent duties in the future had defendant's father and girlfriend been called as witnesses at trial (*United States v Perez*, 325 F3d 115, 125 [2d Cir 2003], citing *United States v Kliti*, 156 F3d 150, 153 n 3 [2d Cir 1998]). But such a conflict, waivable so long as the court is satisfied that it is knowing and intelligent (*Perez*, 325 F3d at 125), could hardly be considered serious, and clearly not enough to overcome the presumption in favor of affording defendant his constitutional right to counsel of his own choosing.

The majority and the People latch onto the premise that, at the time of the disqualification motion, it was the defense's theory of the case that defendant was not the operator of the motorcycle, and that the "damaging" testimony by defendant's father and girlfriend before the grand jury all but ensured that ***334** they would be called as witnesses. However, the defense advised the court that, without discovery, it had yet to determine its trial strategy. Moreover, a simple reading of the grand jury testimony of defendant's father and girlfriend, who were not called to testify before the second grand jury,* indicates that their testimony was not substantially different from the statement defendant made to the police just three days after the crash. If anything, the testimony of defendant's father and girlfriend was no more damaging than defendant's own statement to the police which, upon a fair reading, rendered it unlikely that defendant would be pursuing a "mistaken identity" defense as the

court surmised in its decision and order disqualifying defense counsel.

In matters where there is an apparent conflict, the trial courts have a duty to protect a defendant's right to the effective assistance of counsel without concomitantly "arbitrarily interfer[ing] with the attorney-client relationship" (*Gomberg*, 38 NY2d at 313). Where, as here, the potential conflict is theoretical at best because the witnesses are united with the defendant and the defendant has been adequately apprised of the risks of waiving any potential conflict and agrees to do so, the defendant should not be deprived of his fundamental right to counsel of his own choosing. Absent any institutional concerns, such as where the attorney's representation would jeopardize the integrity of the judicial proceedings, courts should not "assume too paternalistic an attitude in protecting the defendant from himself" (*Perez*, 325 F3d at 126, quoting *United States v Curcio*, 694 F2d 14, 25 [2d Cir 1982]).

There being no indication that allowing disqualified counsel to represent ****11** defendant in these circumstances would jeopardize the integrity of the proceedings, I would reverse the order of the Appellate Division and grant defendant a new trial with counsel of his choosing.

Judges Ciparick, Graffeo, Read and Jones concur with Chief Judge Lippman; Judge Pigott dissents and votes to reverse in a separate opinion in which Judge Smith concurs.

Order affirmed. ***335**

FOOTNOTES

Footnotes

* The second grand jury proceeding occurred in September 2006 after disqualification of defense counsel, the indictment from the first grand jury proceeding having been dismissed due to the alleged conflict.

New York Official Reports

31 A.D.3d 659, 818 N.Y.S.2d 303, 2006 N.Y. Slip Op. 05807

**1 The People of the State of New York, Respondent

v

Marvell Charles-Pierre, Appellant.

Supreme Court, Appellate Division, Second Department, New York
04-00304, 2005-03421
July 18, 2006

CITE TITLE AS: People v Charles-Pierre

HEADNOTES

Grand Jury
Defective Proceeding

Any omission in complainant's testimony regarding extent of his knowledge of defendant, which People claim was designed to avoid undue prejudice to defendant regarding his alleged commission of uncharged crimes, did not materially affect or influence grand jury's investigation into whether prima facie case existed, and therefore did not warrant reversal.

Crimes
Conduct of Trial Judge

Although trial court posed number of questions to defendant when he testified at trial, its participation in proceedings did not deny defendant fair and impartial trial.

Appeal by the defendant from a judgment of the County Court, Rockland County (Resnik, J.), rendered April 1, 2005, convicting him of unlawful imprisonment in the first degree, upon a jury verdict, and imposing sentence.

Ordered that the judgment is affirmed, and the matter is remitted to the County Court, Rockland County, for further proceedings pursuant to CPL 460.50 (5).

During the course of the trial, the defendant made an oral application to dismiss the indictment on the ground that the evidence at trial revealed that the complainant had lied to the grand jury regarding the extent of his prior knowledge of the defendant. That application was denied. The defendant now argues that the complainant's alleged lie to the grand jury impaired the integrity of the grand jury proceeding and warrants reversal. We disagree. Any omission in the complainant's testimony regarding the extent of his knowledge of the defendant, which the People claim was designed to avoid undue prejudice to the defendant regarding his alleged commission of uncharged crimes, did not materially affect or influence the grand jury's investigation into whether a prima facie case existed, and therefore does not warrant reversal (*see People v Hansen,* 290 AD2d 47, 51 [2002], *affd* 99 NY2d 339 [2003]; *People v Landtiser,* 222 AD2d 525, 526-527 [1995]; *People v Kaba,* 177 AD2d 506, 507 [1991]; *see also People v Wadsworth,* 253 AD2d 899 [1998]; *People v Taylor,* 225 AD2d 640 [1996]).

Although the trial court posed a number of questions to the defendant when he **2 testified at trial, its participation in the proceedings did not deny the defendant a fair and impartial *660 trial (*see People v Bembury,* 14 AD3d 575, 576 [2005]; *People v Sevencan,* 258 AD2d 485 [1999]; *People v Watts,* 159 AD2d 740 [1990]). Moreover, any potential prejudice to the defendant was minimized by the trial court's instructions advising the jury that the court had no opinion concerning the case (*see People v Bembury, supra*; *People v Man Xing Guo,* 271 AD2d 700 [2000]; *People v Cuba,* 154 AD2d 703 [1989]).

The sentence imposed was not excessive (*see People v Suitte,* 90 AD2d 80 [1982]).

The defendant's remaining contention is without merit. Florio, J.P., Crane, Ritter and Fisher, JJ., concur.

End of Document

New York
Official Reports

36 N.Y.2d 230, 326 N.E.2d 787, 367 N.Y.S.2d 213

The People of the State
of New York, Appellant,
v.
Alice Crimmins, Respondent.

Court of Appeals of New York
Argued January 8, 1975;

decided February 25, 1975.

CITE TITLE AS: People v Crimmins

HEADNOTES

Crimes
prejudicial error--nonconstitutional error--constitutional error--appeals on law--nonconstitutional error is harmless under State rule where there is overwhelming proof of guilt and no significant probability that, had it not been for errors, jury would have acquitted defendant-- nonconstitutional errors committed at defendant's trial for manslaughter were harmless under State test--comment of prosecutor upon defendant's failure to testify constituted harmless constitutional error, since there was overwhelming proof of guilt and, under Federal rule, there was no reasonable possibility that error might have contributed to defendant's conviction, and, moreover, there is no predicate for a claim that defendant was deprived of fair trial, which would require reversal notwithstanding proof of guilt, whether or not error contributed to conviction--reversal by Appellate Division as to defendant's conviction for murder of her son was explicitly on "law and facts" and is, accordingly, nonappealable, and corrective action of dismissal was proper--reversal by Appellate Division for prejudicial error as to conviction for manslaughter of daughter is appealable since based upon law alone and, upon reversal in this court, is remitted to Appellate Division for determination of facts.

(1) The doctrine of harmless error as applied to nonconstitutional error is to be determined by the State courts and it involves, first, the quantum and nature of proof of the defendant's guilt if the error were to be excised and, second, the causal effect of the error upon the actual verdict. As in the instance of the Federal rule applicable to constitutional error, an error may be found to be ***231** harmless only where proof of guilt without reference to the error is overwhelming. Under the State rule, the error may then be found harmless only after further inquiry as to the potential of the error to prejudice the defendant by creating a significant probability that the jury would have acquitted the defendant had it not been for the error, whereas the Federal rule requires a finding of no reasonable possibility that the error contributed to conviction.

(2) The nonconstitutional errors which occurred on the defendant's second trial were harmless. After excising the evidence erroneously admitted, there was overwhelming proof, consisting of circumstantial evidence, eyewitness testimony and a confession, that the defendant was guilty of manslaughter in the death of her daughter, and there is no significant probability in the light thereof that, had it not been for the errors which occurred, this jury or a third would have acquitted the defendant.

(3) The comment of the prosecutor upon the defendant's failure to testify on her own behalf constituted constitutional error but was harmless, since there was overwhelming proof of the defendant's guilt and, meeting the Federal harmless error test, there was no reasonable possibility that the error might have contributed to the defendant's conviction. Moreover, there is no predicate for a claim that the defendant was deprived of the further constitutional right to a fair trial, which would require reversal without regard to whether the error contributed to conviction and without regard to proof of guilt, however overwhelming.

(4) The reversal by the Appellate Division as to the defendant's conviction for murder of her son was explicitly recited to be "on the law and the facts" and, accordingly, may not be appealed to the Court of Appeals, but the consequential corrective action of dismissal is appealable. The reversal was based upon a failure to prove that death resulted from a criminal act or, alternatively, that any finding that it did would be contrary to the weight of the evidence, and under the mandate of CPL 470.20, dismissal is proper in such cases.

(5) The reversal by the Appellate Division for prejudicial error as to the defendant's conviction for manslaughter in the homicide of her daughter is subject to appeal, since it was based upon the law alone, and, upon reversal in this court, the case should be remitted to the Appellate Division for a determination of the facts.

People v. Crimmins, 41 A D 2d 933, modified.

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered May 7, 1973, which, with respect to a judgment of the Supreme Court (George J. Balbach, J.), rendered in Queens County upon a verdict convicting defendant of murder in the first degree and manslaughter in the first degree, and an order of said Supreme Court denying defendant's motion for a new trial, (1) reversed said judgment as to the murder count, on the law and the facts, and dismissed ***232** that count, on the law, (2) reversed said judgment as to the manslaughter count, on the law, and granted a new trial on that count, and (3) dismissed the appeal from said order.

POINTS OF COUNSEL

Nicholas Ferraro, District Attorney (*Thomas A. Duffy, Jr.,* and *Barry Alan Schwartz* of counsel), for appellant.

I. Defendant's guilt of the manslaughter of her daughter was established beyond a reasonable doubt. (*People v. Wachowicz,* 22 NY2d 369; *People v. Bretagna,* 298 N. Y. 323.) II. The prosecutor's summation remarks "well, she doesn't have the courage to stand up here and tell the world she killed her daughter" were, under the circumstances of this case, harmless beyond a reasonable doubt. (*Griffin v. California,* 380 U. S. 609; *Chapman v. California,* 386 U. S. 18; *People v. Brosnan,* 32 NY2d 254.) III. Joseph Rorech never gave testimony concerning his taking of a sodium pentothal test and no error was committed during the cross-examination of defense witness Colabella. (*People v. Ashby,* 8 NY2d 238; *People v. Harris,* 25 NY2d 175, 401 U. S. 222.) IV. The evidence established a prima facie case with respect to the murder of defendant's son. The indictment should be reinstated. (*People v. Jaehne,* 103 N. Y. 182; *People v. Jennings,* 40 A D 2d 357; *Ruloff v. People,* 18 N. Y. 179; *People v. Palmer,* 109 N. Y. 110; *People v. Benham,* 160 N. Y. 423; *People v. Beckwith,* 108 N. Y. 67; *People v. Cleague,* 22 NY2d 365.)

William M. Erlbaum, Herbert A. Lyon and *Charles Wender* for respondent.

I. The introduction of organized crime into the retrial of this case was prejudicial. To accomplish its goal, the prosecution had to impeach its own witness, Anthony Grace, and nakedly violate other established rules of evidence. (*People v. Crimmins,* 26 NY2d 319; *People v. Sellinger,* 265 N. Y. 149; *People v. Minsky,* 227 N. Y. 94; *People v. De Martino,* 252 App. Div. 476; *People v. Davey,* 179 N. Y. 345; *People v. Korn,* 40 A D 2d 561; *People v. Neumuller,* 29 A D 2d 886; *Voorhees v. Unger,* 151 App. Div. 35; *People v. Fair,* 35 A D 2d 519; *People v. Chance,* 37 A D 2d 572.) II. It was prejudicial to present along with defendant's alleged confession (and to fail to redact from it), statements that defendant was alleged to have made one- half hour earlier, concerning a notorious organized crime conference unrelated to the case. (*People v. Carborano,* 301 N. Y. 39; *People v. Feldman,* 296 N. Y. 127, 299 N. Y. 153; *People v.* ***233** *Infantino,* 224 App. Div. 193; *People v. Loomis,* 178 N. Y. 400; *People v. Davey,* 179 N. Y. 345; *People v. Posner,* 273 N. Y. 184; *People v. Robinson,* 273 N. Y. 438; *People v. Wolf,* 183 N. Y. 464.) III. Clearly irrelevant and harmful claims concerning Vincent Colabella's activities on the night of the crime were put before the jury during the cross-examination of defense witness, Harold Harrison. (*People v. Chance,* 37 A D 2d 572; *Harris v. People,* 64 N. Y. 148; *United States v. Agone,* 302 F. Supp. 1258; *United States v. Pfizer & Co.,* 426 F. 2d 32, 404 U. S. 548; *Stirone v. United States,* 361 U. S. 212.) IV. It was correctly held that good faith required an explanation of the People's failure to call an Ed Sullivan, its alleged information source, for its claim that Colabella was involved in the crime. Similarly, in the absence of such an explanation, it was bad faith to oppose a defense request to charge concerning Sullivan. It was reversible error for the trial court to deny the request. (*People v. Valerius,* 31 NY2d 51; *People v. Moore,* 17 A D 2d 57; *People v. Fiori,* 123 App. Div. 174.) V. It was correctly held that it was prejudicial to inform the jury that defense witness, Vincent Colabella, had refused to execute a waiver of immunity. Although Colabella had not refused, the prosecutor's questions asserted to the jury that Colabella was hiding knowledge of the crime. (*People v. Ashby,* 8 NY2d 238; *Johnson v. United States,* 318 U. S. 189; *Kinser v. Cooper,* 413 F. 2d 730; *United States v. Atnip,* 374 F. 2d 720; *Bradley v. United States,* 420 F. 2d 181; *People v. Cassidy,* 213 N. Y. 388; *People v. Rutigliano,* 261 N. Y. 103; *United States v. Sing Kee,* 250 F. 2d 236, cert. den. *sub nom. Sing Kee v. United States,* 355 U. S. 954; *People v. Owens,* 22 NY2d 93.)

VI. Anthony Lombardino flagrantly violated defendant's attorney-client privilege. The first trial prosecutor revealed a confidential communication allegedly passed along to him by defendant's first attorney, Harold Harrison, in hallway conversation between the two adversaries during the first trial near the courthouse candy counter. (*People v. Buchanan,*

145 N. Y. 1; *Doheny v. Lacy,* 168 N. Y. 213; *Baumann v. Steingester,* 213 N. Y. 328; *Kaufman v. Rosenshine,* 97 App. Div. 514, 183 N. Y. 562; *Lockwood v. House,* 17 Jones & Sp. 500, 101 N. Y. 647; *People v. Guillont,* 40 A D 2d 658.) VII. Collateral testimony, plainly irrelevant to the issue of the accused's guilt or innocence, was introduced to show Vincent ***234** Colabella's guilt. The jury was given an account of a Federal jail interview with Colabella, containing unvarnished hearsay. (*People v. Sellinger,* 265 N. Y. 149; *People v. Davey,* 179 N. Y. 345.) VIII. Respondent was severely prejudiced by the persistent offer into evidence by the prosecutor, in the presence of the jury, of an irrelevant newspaper article concerning organized crime. (*People v. Nasti,* 37 A D 2d 980; *People v. De Martino,* 252 App. Div. 476; *People v. Posner,* 273 N. Y. 183; *People v. Neumuller,* 29 A D 2d 886; *People v. Carborano,* 301 N. Y. 39.) IX. The prosecution improperly bolstered its most important witness, Joseph Rorech, by persistently bringing out that Rorech had been given a sodium pentothal (truth serum) test. (*People v. Leone,* 25 NY2d 511; *People v. Ford,* 304 N. Y. 679; *People v. Brownsky,* 35 Misc 2d 134; *People v. Dobler,* 29 Misc 2d 481.) X. Although defendant decided not to put her character in issue by testifying, after the court denied her *Luck*- type motion, the prosecutors themselves put her character in issue, by launching repeated and flagrant attacks upon defendant's morals. Her trial was thereby hopelessly poisoned. (*Luck v. United States,* 348 F. 2d 763; *People v. Slover,* 232 N. Y. 264; *People v. Sorge,* 301 N. Y. 198; *People v. Malkin,* 250 N. Y. 185; *United States v. Palumbo,* 401 F. 2d 270; *United States v. Puco,* 453 F. 2d 539; *People v. Duffy,* 44 A D 2d 298; *Matter of Rodolfo "CC" v. Susan "CC",* 37 A D 2d 657; *People v. Richardson,* 222 N. Y. 103; *People v. Carborano,* 301 N. Y. 39.)

XI. It was properly held that the prosecutor's summation statements were grossly improper, constituting both an assertion by the District Attorney that he knew defendant was guilty, and, an attack on her refusal to testify. (*People v. Zvonik,* 40 A D 2d 840; *People v. Rutigliano,* 261 N. Y. 103; *People v. Kennedy,* 164 N. Y. 449; *People v. Abel,* 298 N. Y. 333; *People v. Travato,* 309 N. Y. 382; *People v. Bianculli,* 9 NY2d 468; *People v. Robinson,* 13 NY2d 296; *People v. Conrow,* 200 N. Y. 356; *People v. Morrison,* 195 N. Y. 116; *People v. Cascone,* 185 N. Y. 317.) XII. Massive hostile publicity and community passion resulted in a jury "organized to convict." Every defense appeal for the court's help in meeting the situation was unavailing. (*People v. Agron,* 10 NY2d 130; *Sheppard v. Maxwell,* 384 U. S. 333; *Estes v. Texas,* 381 U. S. 532; *Swain v. Alabama,* 380 U. S. 202; ***235** *Turner v. Louisiana,* 379 U. S. 466; *Rideau v. Louisiana,* 373 U. S. 723.) XIII. The People's proof was thin and insubstantial and does not warrant a retrial of this 10-year old case. The indictment should be dismissed in its entirety. (*People v. Crimmins,* 33 A D 2d 793.) XIV. The court properly dismissed the murder count relating to the boy. (*People v. Jennings,* 40 A D 2d 357; *People v. Jaehne,* 103 N. Y. 182; *People v. La Marca,* 3 NY2d 452; *People v. Cleague,* 22 NY2d 363; *Ruloff v. People,* 18 N. Y. 179; *People v. Bennett,* 49 N. Y. 137; *People v. Cuozzo,* 292 N. Y. 85; *People v. Rooks,* 40 Misc 2d 359; *People v. Crimmins,* 33 A D 2d 793, 26 NY2d 319; *People v. DeLio,* 75 Misc 2d 711.)

OPINION OF THE COURT

Jones, J.

On this appeal we are called on principally to consider the doctrine of harmless error as applied to errors which occurred on defendant's second trial. In this case a mother was charged with criminal responsibility in connection with the deaths of her son and her daughter. On her first trial defendant was charged only with the death of the daughter and was convicted of manslaughter. On appeal this conviction was reversed and a new trial was ordered. (*People v. Crimmins,* 33 A D 2d 793, affd. 26 NY2d 319.) On her second trial the jury convicted defendant of murder of her son and manslaughter of her daughter. The Appellate Division then reversed the conviction of murder of the son and dismissed the charge against defendant with respect to his death. (*People v. Crimmins,* 41 A D 2d 933.) As to the manslaughter conviction, the Appellate Division also reversed defendant's conviction but ordered a new trial with respect to her responsibility for the death of her daughter. The case is now before us on appeal by the People.

The procedural aspects of this appeal and of our dispositions of its several branches call for exposition. The ultimate issues turn on the procedural significance and consequences properly to be attached to errors of law which occurred during the second trial. We conclude that these errors fall into separate categories calling for different legal results.

I. As to defendant's conviction of murder of her infant son:

The Appellate Division's reversal of this conviction (as distinguished from that court's attendant dismissal of this count in the indictment) was explicitly recited to be "on the law and ***236** the facts". An appeal may be taken to our court only where the reversal is expressly stated to be on the law alone; accordingly an appeal from this reversal may not be taken to our court (CPL 450.90, subd. 2, par. [a]).

By contrast, the corrective action directed by the Appellate Division in consequence of its reversal of the murder conviction, i.e., the dismissal of the murder count, is subject to an appeal to and review by our court (CPL 450.90, subd. 2, par. [b]). We find that corrective action to have been what was required by the Criminal Procedure Law. The reversal of the conviction was based on the conclusion of the Appellate Division that, as a matter of law, the People did not prove that the son's death resulted from a criminal act and, in the alternative, that any finding that it did would be contrary to the weight of the evidence (41 A D 2d 933). CPL 470.20 (subd. 2) mandates dismissal of the accusatory instrument in the event of reversal of a judgment after trial for legal insufficiency of trial evidence; subdivision 5 of the same section mandates the same corrective action where the reversal is on the ground that the verdict is against the weight of the trial evidence. Accordingly the Appellate Division's dismissal of the murder count with respect to the death of the son must be affirmed.

II. As to defendant's conviction of manslaughter in the homicide of her infant daughter:

The Appellate Division determined that because of errors committed on the second trial this conviction should be reversed. Because such determination was expressly stated to be on the law alone, that aspect of the present appeal, as well as the associated corrective action directed by the Appellate Division, is properly before us (CPL 450.90, subd. 2, pars. [a], [b]). For reasons discussed below, a majority of our court is of the view that this determination of the Appellate Division should itself be reversed. In that circumstance, since the order of the Appellate Division reversing the manslaughter conviction was based on the law alone, the provisions of CPL 470.40 (subd. 2, par. [b]) dictate that the manslaughter conviction be remitted to the Appellate Division for determination of the facts. Presumably consideration will then be revived, too, as to defendant's separate and distinct appeal from the order of Supreme Court ***237** denying her motion for a new trial on the grounds of newly-discovered evidence and of improper conduct by the prosecutor in withholding from defendant information potentially helpful to her defense. In view of the other determinations made at the Appellate Division in the order from which appeal is now being taken it was not then necessary formally to reach or dispose of defendant's contentions with respect to denial of her motion for a new trial. Defendant now becomes entitled to consideration and disposition of such contentions by that court.

We turn then to a discussion of our reasons for concluding that the reversal of the manslaughter conviction should be overturned.

A. As to the constitutional error:

The People concede that the comment of the prosecutor in summation with respect to defendant's failure to testify on her own behalf was improper and constituted constitutional error under the provisions of both the Federal and our State Constitutions (U. S. Const., 5th Amdt.; N. Y. Const., art. I, § 6). All of the members of the court agree that such error calls for reversal and a new trial unless it was harmless under the test for harmless constitutional error laid down by the Supreme Court of the United States, namely, that there is no reasonable possibility that the error might have contributed to defendant's conviction and that it was thus harmless beyond a reasonable doubt (*Chapman v. California,* 386 U. S. 18; *Fahy v. Connecticut,* 375 U. S. 85).

We of the majority are satisfied that this test is met here in view of the circumstances in which the constitutional error occurred -- *inter alia,* the unsworn outbursts by defendant herself which both preceded and followed the prosecutor's error, the comments of defense counsel and the reactions in the courtroom at the time, and the explicitly clear instructions of the trial court -- coupled with what, as indicated below, we think was the overwhelming proof of defendant's guilt.

Although in our view this case presents no appropriate instance for its application, our discussion of the effect to be given constitutional error should not overlook a parallel, and in some instances an overlapping doctrine, also of constitutional ***238** proportion, namely, the right to a fair trial. Not only the individual defendant but the public at large is entitled to assurance that there shall be full observance and enforcement of the cardinal right of a defendant to a fair trial. The appellate courts have an overriding responsibility, never to be eschewed or lightly to be laid aside, to give that assurance. So, if in any instance, an appellate court concludes that there has been such error of a trial court, such misconduct of a prosecutor, such inadequacy of defense counsel, or such other wrong as to have operated to deny any individual defendant his fundamental right to a fair trial, the reviewing court must reverse the conviction and grant a new trial, quite without regard to any evaluation as to whether the errors contributed to the defendant's conviction. The right to a fair trial is self-standing and proof of guilt, however

overwhelming, can never be permitted to negate this right. There is no predicate here, however, for any claim that this defendant on her second trial was deprived of any such basic right.

B. As to the nonconstitutional errors:

For the purposes of our disposition of this appeal we assume, although each of the Judges in the majority would not necessarily so decide, that the Appellate Division was correct in concluding that in the circumstances of this trial: (1) it was error to permit introduction of testimony with respect to the witness Rorech's having been given a sodium pentothal (truth serum) test (although nothing was said as to any results thereof); (2) it was error to permit the prosecutor to elicit testimony in cross-examination of defendant's witness Colabella that the latter had refused to sign a waiver of immunity when questioned by the prosecutor during the pretrial investigation of the case; and (3) it was error, after the prosecutor had put before the jury an apparently damaging admission by Colabella to one Sullivan but had thereafter failed to call Sullivan or to explain the failure to do so, for the trial court to deny defendant's request for a charge that the jury could draw an unfavorable inference from the People's failure to call Sullivan as a witness. None of these errors, however, was of constitutional dimension. ***239**

We turn then to the question whether any one of such errors, or all taken in combination, calls for a reversal of the jury verdict here.

The definition and elaboration of the doctrine of harmless error as applied to nonconstitutional error involve peculiarly questions of the law of the State of New York to be determined by our State courts. The doctrine has received expression in our court over the last 20 years in various forms, accompanied usually explicitly, always at least implicitly, by a recognition that "[e]rrors are almost inevitable in any trial, improprieties almost unavoidable, [and that] the presence of one or the other furnishes no automatic signal for reversal and retrial" (*People v. Kingston,* 8 NY2d 384, 387).

Examination of the language chosen to describe the doctrine and its application in individual cases, as well as analysis of the authorities selected for citation, discloses that we have not always been either consistent in our classification or uniform in our expression. Forms of our verbalization of the doctrine cannot be nicely harmonized. Often there has been no expilcit recognition that there is a distinction between constitutional and nonconstitutional error; citations and verbiage have frequently been indiscriminately interchanged. On the other hand, we have never expressly held, as the dissent now urges, that there is no difference in the application of the doctrine of harmless error between constitutional and nonconstitutional error. When we have reached the conclusion that the error was harmless we have stated the rule loosely, in terms relatively easily satisfied. On the other hand when we have concluded that the error was not harmless our statement has been of a tight, demanding rule. The ultimate result in the individual case has been more significant than the particular formulation of the rule. (For cases decided in recent years see *People v. Brosnan,* 32 NY2d 254, 262; *People v. Stanard,* 32 NY2d 143, 148; *People v. Steiner,* 30 NY2d 762, 763-764; *People v. Crimmins,* 26 NY2d 319, 324-325; *People v. Baker,* 26 NY2d 169, 174; *People v. McKinney,* 24 NY2d 180, 185; *People v. Pelow,* 24 NY2d 161, 167; *People v. Miles,* 23 NY2d 527, 544; *People v. Mirenda,* 23 NY2d 439, 446-447; *People v. Cefaro,* 23 N Y 2d 283, 290; *People v. Savino,* 22 NY2d 732, 733; *People v. Adams,* 21 NY2d 397, 402; *People v. Fein,* 18 NY2d 162, 175; *People v.* ***240** *Donovan,* 13 NY2d 148, 153-154; *People v. Duncan,* 13 NY2d 37, 42; *People v. Rosenfeld,* 11 NY2d 290, 299-300; *People v. Rosario,* 9 N Y 2d 286, 290-291; *People v. Steinhardt,* 9 NY2d 267, 271-272; *People v. Kingston,* 8 NY2d 384, 387; *People v. Jackson,* 7 NY2d 142, 145; *People v. Dziobecki,* 3 NY2d 997, 999; *People v. Ochs,* 3 NY2d 54, 57; *People v. Savvides,* 1 NY2d 554, 557, 558; *People v. Mleczko,* 298 N. Y. 153, 162- 163.)

The presently applicable legislative statement of our State's rule, like its predecessor, has not been helpful. "An appellate court must determine an appeal without regard to technical errors or defects which do not affect the substantial rights of the parties" (CPL 470.05, subd. 1). The choice of the adjective "technical" in referring to errors may be said to connote those of a formalistic or minor character. On the other hand, to refer to errors which may affect "substantial" rights suggests errors of a somewhat more serious nature. Notably there has never been incorporated in the statutory language any concept of "harmlessness beyond a reasonable doubt". In any event, our decisions have not turned on or even been significantly affected by the legislative diction of present CPL 470.05 (subd. 1) or of section 542 of the former Code of Criminal Procedure.

It is appropriate therefore to recognize and to delineate the difference between the Federal harmless error rule with respect to constitutional error and our State's harmless error rule with respect to nonconstitutional error.

Two discrete considerations are relevant and have combined in varying proportions to produce specific results in particular cases. The first of such factors is the quantum and nature of proof of the defendant's guilt if the error in question were to be wholly excised. The second is the causal effect which it is judged that the particular error may nonetheless have had on the actual verdict.* It appears that it is the latter consideration which is critical in the application of the Supreme Court test as to harmlessness of constitutional error. Thus, however ***241** overwhelming may be the quantum and nature of other proof, the error is not harmless under the Federal test if "there is a reasonable possibility that the *** [error] might have contributed to the conviction" -- perhaps the most demanding test yet formulated (*Fahy v. Connecticut,* 375 U. S. 85, 86, supra.; *Chapman v. California,* 386 U. S. 18, supra.;).

Our State rule to determine harmlessness of nonconstitutional error is not the same as the Federal rule.

The ultimate objective, grounded in sound policy considerations, is the wise balancing, in the context of the individual case, of the competing interests of the defendant and those of the People. "While we are ever intent on safeguarding the rights of a defendant *** we recognize at the same time that the State has its rights too" (*People v. Kingston,* 8 NY2d 384, 387, supra.;). Thus, it does not follow that an otherwise guilty defendant is entitled to a reversal whenever error has crept into his trial. On the other hand, we recognize that a finding that an error has not been harmless does not result in fatal consequences to the People; they are put to a new trial, but the defendant does not go free.

Our State test with respect nonconstitutional error is not so exacting as the Supreme Court test for constitutional error. We observe that in either instance, of course, unless the proof of the defendant's guilt, without reference to the error, is overwhelming, there is no occasion for consideration of any doctrine of harmless error. That is, every error of law (save, perhaps, one of sheerest technicality) is, *ipso facto,* deemed to be prejudicial and to require a reversal, unless that error can be found to have been rendered harmless by the weight and the nature of the other proof. That "overwhelming proof of guilt" cannot be defined with mathematical precision does not, of course, mean that the concept cannot be understood and applied in individual cases, although not always without some difficulty. It surely does not invite merely a numerical comparison of witnesses or of pages of testimony; the nature and the inherent probative worth of the evidence must be appraised. As with the standard, "beyond a reasonable doubt", recourse must ultimately be to a level of convincement. What is meant here, of course, is that the quantum and nature of proof, excising the error, are so logically compelling and ***242** therefore forceful in the particular case as to lead the appellate court to the conclusion that "a jury composed of honest, well-intentioned, and reasonable men and women" on consideration of such evidence would almost certainly have convicted the defendant.

If, however, an appellate court has satisfied itself that there was overwhelming proof of the defendant's guilt, its inquiry does not end there. Under our system of justice a jury is not commanded to return a verdict of guilty even in the face of apparently conclusive proof of the defendant's guilt. Similarly it may and often does exercise a positive sense of moderating mercy. Further inquiry must accordingly be made by the appellate court as to whether, notwithstanding the overwhelming proof of the defendant's guilt, the error infected or tainted the verdict. An evaluation must therefore be made as to the potential of the particular error for prejudice to the defendant. We hold that an error is prejudicial in this context if the appellate court concludes that there is a significant probability, rather than only a rational possibility, in the particular case that the jury would have acquitted the defendant had it not been for the error or errors which occurred.

Turning then to the record now before us, we of the majority conclude that, excising both the evidence erroneously admitted (with respect to Rorech's taking a truth test and as to Colabella's refusal to sign a waiver of immunity) and the prosecutor's interrogation of Colabella (as to the latter's damaging admission to Sullivan), there was overwhelming proof that this defendant was guilty of manslaughter in the death of her daughter. In addition to other compelling circumstantial evidence, there was eyewitness testimony (unavailable to support the conviction on the first trial because it had been infected by the wholly improper visit of jurors to the scene) that on the night before the daughter's body was found, defendant, carrying what was described as a "bundle" and accompanied by an unidentified man, was seen leading her son from the Crimmins home; that as the man threw the "bundle" into a parked car defendant cried out, "Please don't do this to her", to which the man responded, "Does she know the difference now? *** Now you're sorry." Additionally defendant herself later confessed her guilt to her paramour -- "Joseph, ***243** forgive me, I killed her." On the other hand the description which defendant offered of the

events of the evening preceding the children's disappearance was completely discredited and the prosecution conclusively exploded defendant's theory of an outside kidnapper. We read this record as leading only to a single, inexorable conclusion, as two juries have indeed found: defendant was criminally responsible for the death of her daughter.

Proceeding further, then, as we must, we also conclude that in the circumstances of this case there is no significant probability in the light of the overwhelming proof that, had it not been for the errors which occurred, this jury would have acquitted the defendant or that a third jury might do so. Our ultimate conclusion, therefore, is that under our State rule the nonconstitutional errors which occurred on this defendant's second trial were harmless.

The order of the Appellate Division with respect to the manslaughter conviction should accordingly be reversed, and the case remitted to the Appellate Division for determination of the facts in conformity with CPL 470.40 (subd. 2, par. [b]).

Cooke, J.

(Concurring in part and dissenting in part).

I

I agree with the court's disposition of the appeal from that portion of the order of the Appellate Division which reversed defendant's conviction of the murder of her infant son and dismissed that count of the indictment.

II

With respect to the manslaughter count, I would affirm the order of the Appellate Division. There is reason for grave concern because of the rule formulated by the majority for the review of "nonconstitutional" errors and its application to this case.

As to errors of constitutional dimension, the majority recognizes the standard of *Chapman v. California,* (386 U. S. 18, 24), that before a constitutional error can be held harmless the court must be able to declare a belief that it was harmless beyond a reasonable doubt. This standard is followed by the declaration of "a parallel, and in some instances an overlapping ***244** doctrine, also of constitutional proportions, namely, the right to a fair trial," such that "if in any instance, an appellate court concludes that there has been such error of a trial court, such misconduct of a prosecutor, such inadequacy of defense counsel, or such other wrong as to have operated to deny any individual defendant his fundamental right to a fair trial, the reviewing court must reverse the conviction and grant a new trial, *quite without regard to any evaluation as to whether the errors contributed to the defendant's conviction*" (emphasis supplied) (p. 238). As to "nonconstitutional errors", the majority establishes (p. 242) the further precept that, if "an appellate court has satisfied itself that there was overwhelming proof of defendant's guilt," further inquiry must be made by it "as to whether *** the error infected or tainted the verdict" and "an error is prejudicial in this context if the appellate court concludes that there is significant probability, rather than only a rational possibility, in the particular case that the jury would have acquitted the defendant had it not been for the error or errors which occurred."

While the effort to harmonize the Constitutions, the statute and judicial pronouncements and to render a yardstick to guide courts in the conduct of criminal trials and in reviewing alleged errors therein is creditable, it is urged respectfully that the majority's opinion does not accomplish that result. To begin with, what has evolved is indeed a trifurcated standard for appellate scrutiny. There is a fork of error "harmless beyond a reasonable doubt" as to "constitutional" deprivations, another "also of constitutional proportion, namely, the right to a fair trial *** quite without regard to any evaluation as to whether the errors contributed to the defendant's conviction" (pp. 237-238) and a third with a test of "significant probability" applicable to nonconstitutional errors. This three-pronged measure will be difficult to administer and apply and, instead of clarity, confusion comes forth.

Although the decision of the Supreme Court in *Chapman* did not purport to establish a harmless error rule for application to all errors, there are strong reasons for applying the "harmless beyond a reasonable doubt" standard to all errors affecting the substantial rights of a party which arise under the State Constitution or State law, as well as to those which ***245** emanate from the Federal Constitution. Such a rule would not be inconsistent with the mandate of CPL 470.05 (subd. 1), which merely directs an appellate court to determine an appeal without regard to technical errors which do not affect the substantial rights of the parties.

First, if the nature of the error is constitutional, it is going to be difficult, if not impossible, to determine which test

shall be applied. Should it be according to the *Chapman* scale where "the court must be able to declare a belief that it [the constitutional error] was harmless beyond a reasonable doubt"? Or, should there be a weighing to ascertain if there has been a "full observance and enforcement of the cardinal right of a defendant to a fair trial *** quite without regard to any evaluation as to whether the errors contributed to the defendant's conviction"? (p. 238). Although it is obvious that the criteria are not the same, the majority does not supply the answer.

Second, to establish a coexisting rule that where there has been denied to "any individual defendant his fundamental right to a fair trial, the reviewing court must reverse the conviction and grant a new trial, quite without regard to any evaluation as to whether the errors contributed to the defendant's conviction" (p. 238) is incongruous, since generally one of the most significant inquiries to be made in ascertaining whether a fair trial has been accorded a defendant concerns the effect of any error, misconduct, inadequacy or wrong upon the verdict. Such a rule would unnecessarily place in jeopardy a host of convictions.

Third, it is apparent from a reading of *Chapman v. California* (386 U. S. 18, 24, supra.;) that the test of "harmless beyond a reasonable doubt" was adopted as a corollary to the reasonable doubt standard applicable to criminal cases. By adopting a test regarding so-called "nonconstitutional" errors which requires "a significant probability *** that the jury would have acquitted defendant had it not been for the error or errors which occurred" (p. 242), the court is dangerously diluting the time-honored standard of proof beyond a reasonable doubt which has been a cornerstone of Anglo-Saxon criminal jurisprudence. No one would dispute the statement that a defendant in a criminal case has a constitutional right ***246** to be proven guilty beyond a reasonable doubt before he is deprived of his life, liberty or property (U.S. Const., 5th Amdt., 14th Amdt., § 1; N. Y. Const., art. I; *In re Winship,* 397 U. S. 358, 363-364; La Fave & Scott, Criminal Law, Hornbook Series, pp. 45-46; cf. *Matter of Richard S.,* 27 NY2d 802; see CPL 70.20). Unless an appellate court can say that errors committed at trial, which affected defendant's substantial rights, are harmless beyond a reasonable doubt, defendant's right to that standard of proof can be severely prejudiced, the extent of the prejudice depending upon the nature of the error in the context of other proof and the circumstances of the case.

Fourth, while the conceptual distinction between constitutional and nonconstitutional errors is a real one, the differentiation is of dubious validity as applied to the appellate review process. As the history of the "right-privilege" distinction in law indicates, the process of ascribing labels to concepts from which serious consequences flow is one fraught with peril and one uniquely susceptible to semantic gamesmanship. (For a history of the right-privilege distinction see Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439.) Ultimately, the Supreme Court opted for a course of action where the consequences to the particular party, rather than the label attached, determined the scope of due process safeguards (see *Goldberg v. Kelly,* 397 U. S. 254, 262-263).

The pitfalls of utilizing the "constitutional" and "nonconstitutional" dichotomy to determine the standard of review are apparent. According to the rule enunciated by the majority, the "harmless beyond a reasonable doubt" test is applied where a constitutional error, other than one which denied the right to a fair trial, is involved; however, in a nonconstitutional error situation, the test of "significant probability *** that the jury would have acquitted" (p. 242) but for the error comes into play. Given a case, like this one, where there is an accumulation of errors, or even in other situations involving a single error, the effect of which is such as to deprive a defendant of his or her constitutional right to a fair trial (*Irvin v. Dowd,* 366 U. S. 717, 722; *In re Murchison,* 349 U. S. 133, 136), even the most intense student of the law must wonder which standard is to be applied. Of course, if a single standard of harmless ***247** error beyond a reasonable doubt is in force, such difficulties would not arise.

More fundamentally, a defendant's constitutional right to a fair trial can be prejudiced equally by nonconstitutional errors as by constitutional errors. This is why it makes little sense to have a strict standard of review in one area and a looser one in the other. In the instant matter, for example, the constitutional error, which triggers the more exacting standard of review, was not of great significance in the context of the trial and was provoked to some extent by defendant's action, as the majority recognizes. Far more serious, in my opinion, were the errors the majority labels as nonconstitutional. On this record, these and other errors cannot be shown to be harmless beyond a reasonable doubt. In any event, their effect was to deprive defendant of a fair trial and the conviction must be reversed (see *People v. Trybus,* 219 N. Y. 18, 21).

One of the major items of evidence received at the trial was an admission made by defendant to Joseph Rorech in which she admitted killing her daughter. The majority does not deny that it was error to permit introduction of testimony that Rorech, an important prosecution witness, had been given a sodium pentothal (truth serum) test. It is difficult to imagine evidence that could have had as grave an impact upon the jury in their assessment of the credibility of the witness Rorech, to defendant's obvious detriment. Under any view of the case, the error affected defendant's "substantial rights" (CPL 470.05, subd. 1) to have the jury evaluate the believability of the witness without the distraction of totally irrelevant considerations injected by evidence erroneously received.

The prosecution's theory was that Colabella was with defendant on the night her daughter was killed and helped her dispose of the body. The admission into evidence of proof regarding his failure to sign a waiver of immunity, when questioned by the prosecutor during the pretrial investigation of the case, was "most improper" and also affected defendant's "substantial rights" since, as observed by the majority in the Appellate Division, his refusal may well have been considered by the jury as an indication of defendant's guilt (cf. *People v. Ashby,* 8 NY2d 238, 242-243; *United States v. Sing Kee,* 250 F. 2d 236, 240, cert. den. 355 U. S. 954). The existence of this ***248** issue, involving indirectly at least the Fifth Amendment, has "constitutional overtones" (see *Namet v. United States,* 373 U. S. 179, 186-187; *Grunewald v. United States,* 353 U. S. 391, 423-424) and points up again the difficulty in assigning the labels employed by the majority.

Likewise, the seriousness of the error, in putting before the jury Colabella's alleged admission to Sullivan that he had a girl friend, Alice, "who was in a jam," and asking Sullivan to help get rid of a body, is readily apparent. Colabella denied not only knowing Sullivan but making the admission, and Sullivan was not called as a witness nor was an explanation given for the failure to call him. As pointed out in the decision under review, this impropriety was aggravated when "(a) the prosecutor strenuously opposed a subsequent defense request for a charge that the jury could draw an unfavorable inference from the People's failure to call Sullivan as a witness and (b) the court refused to so charge" (41 A D 2d 933).

The trial was infected with further prejudicial error in placing before the jury the subject of defendant's trip to the Bahamas with a married man. The only conceivable relevancy of this item was on the question of motive but testimony bearing on this subject would be incompetent since there was not a logical relation between it and the commission of the crime charged "according to known rules and principles of human conduct" (*People v. Fitzgerald,* 156 N. Y. 253, 258; Richardson, Evidence [Prince -- 10th ed.], § 171). As noted recently in *People v. Sandoval* (34 NY2d 371, 376), "it must be recognized as inevitable *** that evidence of prior criminal, vicious or immoral conduct will always be detrimental to the defendant."

Further difficulty is encountered regarding the introduction of evidence that, on the date of her alleged confession, defendant became extremely distraught upon reading a newspaper account of the arrests of 13 persons at the "Little Appalachian" meeting in Queens and kept repeating a name. It turned out later that Colabella was not named in the news story nor was it his name which defendant repeated. This Mafia "angle", introduced without relevance, was prejudicial and may have played an important part in the trial. One major witness, Sophie Earomirski, who allegedly saw defendant from a distance on the night of the crime carrying a bundle and overheard ***249** an incriminating conversation, justified her failure to come forward promptly with her evidence on the grounds of fear. With the prosecutor's injection of a spurious organized crime aspect to the case, in itself dangerous, her explanation very likely gained a credence it might otherwise have lacked.

The majority (p. 242) resolves the problem by "excising both the evidence erroneously admitted (with respect to Rorech's taking a truth test and as to Colabella's refusal to sign a waiver of immunity) and the prosecutor's interrogation of Colabella (as to the latter's damaging admission to Sullivan)" and by finding overwhelming evidence of guilt. Performing such radical surgery on the evidence fails to recognize sufficiently the danger of improperly influencing or "tainting" the verdict by "harmless errors". Jurors, hearing the events unfolding in an emotion-charged atmosphere may very well impute greater importance to evidence erroneously received than is apparent by speculation of appellate courts, removed from the environment and reading cold print. Their assessment of such evidence may color their entire outlook of defendant's legal position.

More importantly, however, it is not for this court to usurp the function of the jury and speculate whether, without this evidence erroneously admitted, the jury nevertheless would have acquitted (see dissent in *People v. Catalanotte,* 36 NY2d 192). What this court wrote in *People v. Marendi* (213 N.

Y. 600, 619) many years ago is just as true today: "where prejudicial matter is erroneously received in evidence on a disputed question of fact, its harmful character cannot be determined solely by the mere weight of competent evidence unless we are to resolve ourselves into a jury and, ignoring the finding upon incompetent evidence, substitute one upon the evidence which we may deem competent." That two juries have found guilt is beside the point, just as is the fact that the both verdicts, up to this point, have been set aside by different courts. This court, following the first trial said (26 NY2d 319, 324): "Although, as the People argue, the evidence is legally sufficient to sustain the verdict of guilt, it was not so overwhelming that we can say, as a matter of law, that the error [then under review] could not have influenced the verdict (*Harrington v. California,* 395 U. S. 250; *Chapman v. California,* 386 U. S. 18)." Emotions aside, ***250** the failure to accord an accused a fair hearing violates even the minimal standards of due process regardless of the heinousness of the crime charged (see *Irvin v. Dowd,* 366 U. S. 717, 722, supra.;).

The fact is that different items of prejudicial matter were admitted and were before the jury for its consideration. The character of the evidence was such that they may well have affected the jury's evaluation of other items of evidence, to defendant's detriment. Where these several major elements of evidence against defendant were tainted by error, it cannot be said that the case against defendant, although persuasive, was overwhelming and that a jury composed of honest, well-intentioned, and reasonable men and women could not have acquitted her.

I would affirm the order of the Appellate Division.

Chief Judge Breitel and Judges Jasen, Gabrielli and Wachtler concur with Judge Jones; Judge Cooke concurs in part and dissents in part and votes to affirm in a separate opinion in which Judge Fuchsberg concurs.

Order modified and case remitted to Appellate Division, Second Department, for further proceedings in accordance with the opinion herein and, as so modified, affirmed.

Footnotes

* There may be other identifiable considerations in special instances (e.g., *People v. Savvides,* 1 NY2d 554, supra.;) in which our court held the conduct of the prosecutor to be so improper as to call for a new trial quite irrespective either of the quantum of evidence of guilt or of any evaluation of the actual effect of the misconduct, at least in part for therapeutic purposes.

New York Official Reports

30 Misc.3d 383, 911 N.Y.S.2d 784, 2010 N.Y. Slip Op. 20466

**1 The People of the State of New York, Plaintiff
v
Omarys Cristin, Defendant.
The People of the State of New York, Plaintiff
v
Wanda Palmero, Defendant.
The People of the State of New York, Plaintiff
v
Kanton Callistro, Defendant.

Supreme Court, Bronx County
4562/09
November 12, 2010

CITE TITLE AS: People v Cristin

HEADNOTES

Attorney and Client
Disqualification
Dual Representation in Criminal Matter

(1) An attorney who represented two criminal defendants to be tried jointly as codefendants and who later concluded that a conflict of interest prevented him from representing one of the defendants could not continue to represent the remaining defendant where the defendant from whose representation he had withdrawn did not consent to the continuing representation of the other codefendant. Given the lack of waiver by the one codefendant, the Rules of Professional Conduct prevented the continued representation of the other defendant. Although the latter defendant had a strong interest in being represented by counsel of her choice, that interest was overcome by her right to a fair trial free of attorney conflicts: neither severance nor counsel's hiring of an "independent counsel" to cross-examine the nonwaiving defendant could cure the root problem presented by the conflict of interest. If counsel were not removed, he would violate rule 1.9 (a) of the Rules of Professional Conduct (22 NYCRR 1200.0), and such an ethical breach could give rise to an appellate claim of lack of effective assistance of counsel. Accordingly, the court exercised its discretion to disqualify counsel.

Attorney and Client
Disqualification
Dual Representation in Criminal Matter—Assigned Counsel

(2) An assigned counsel group could not continue to represent a criminal defendant where it had unknowingly been assigned to represent a codefendant in the same criminal matter and then withdrew from representing the codefendant once the dual assignment was recognized. The interests of the two defendants were materially adverse and there was no attempt to secure a waiver of the conflict. Attempts by the group, a large institutional defender organization, to erect a "wall" to prevent any dissemination about the codefendant were impractical in theory and a failure in practice, the barrier having been breached on two occasions. Attorneys in public defender offices may not be relieved from the requirements of the Rules of Professional Conduct to provide conflict-free representation in cases where there is a knowing, contemporaneous conflict involving dual representation. Accordingly, the court's obligation to assign an attorney who does not have a conflict to represent defendant would not be satisfied by granting the application of the assigned counsel group to remain as his counsel.

RESEARCH REFERENCES

Am Jur 2d, Attorneys at Law §§ 55, 56, 188–190, 195; ***384** Am Jur 2d, Criminal Law §§ 1102, 1109, 1141, 1142, 1144, 1145, 1147, 1148.

Carmody-Wait 2d, Officers of Court §§ 3:284, 3:397–3:399, 3:412, 3:413; Carmody-Wait 2d, Right to Counsel §§ 184:55, 184:103–184:105, 184:182–184:191, 184:195, 184:199.

LaFave, et al., Criminal Procedure (3d ed) §§ 11.2, 11.4, 11.9.

22 NYCRR 1200.0.

NY Jur 2d, Attorneys at Law §§ 90, 91, 97–99, 105, 424, 426; NY Jur 2d, Criminal Law: Procedure §§ 745, 747, 749, 750, 758, 759.

ANNOTATION REFERENCE

Disqualification of member of law firm as requiring disqualification of entire firm—state cases. 6 ALR5th 242.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: dual simultaneous! /4 represent! /p conflict /3 interest & disqualify /3 attorney

APPEARANCES OF COUNSEL

Ronald Rubenstein for Omarys Cristin, defendant. *Jeffrey Horn* for Wanda Palmero, defendant. *Robert T. Johnson*, *District Attorney* (*Candace Brooks* of counsel), for plaintiff. *The Bronx Defenders* (*Jocelyn Simonson* of counsel), for Kanton Callistro, defendant. *Robert T. Johnson*, *District Attorney* (*John Bieder* of counsel), for plaintiff.

OPINION OF THE COURT

Ralph Fabrizio, J.

In these cases, the court is presented with the question of whether to exercise its discretion and relieve an attorney from representing a client because of an acknowledged conflict arising out of the prior representation of a codefendant in the same matter. In one case, defendant Omarys Cristin is represented by retained counsel, Ronald Rubenstein, who had also been retained to represent codefendant Wanda Palmero on that same case, and did so for nearly 11 months. Ms. Palmero is now represented by counsel from the 18-B panel, Jeffrey Horn, assigned by the court after Mr. Rubenstein asked to be relieved in September 2010 because of the conflict. In the other case, defendant Kanton Callistro, who is indigent, was assigned a public ***385** defender office, The Bronx Defenders, to represent him at the time of his arraignment on a felony complaint. That same office had already been assigned to represent a codefendant, who will hereinafter be called Jane Doe, when that defendant was arraigned before another judge earlier the same day on a separately-docketed felony complaint. After Mr. Callistro and Ms. Doe were indicted and charged as accomplices to certain felony counts in the same indictment, The ****2** Bronx Defenders asked only to be relieved from representing Ms. Doe, who was then assigned counsel from the 18-B panel. Her case was dismissed in September 2010 before a different judge; the reason for that dismissal is unknown to this court. In both cases, after considering the records made and upon the review of applicable law, the court exercises its discretion and relieves counsel.

People v Palmero* and *People v Cristin

On October 21, 2009, defendants Palmero and Cristin were arrested for charges including criminal possession of a controlled substance in the first degree (Penal Law § 220.21 [1]). According to the People, defendants were both present inside a house in Bronx County in which the police recovered more than 40,000 glassines of heroin, purportedly packaged and ready for sale. The police also recovered additional heroin and drug paraphernalia in various locations inside the house. The police allege that, when they entered the house, they found Ms. Palmero covered with white dust, which they believe to be powdered heroin. Ms. Cristin was found hiding in a different area of the house, on a different floor.

Both defendants retained Mr. Rubenstein to represent them, and both were indicted and charged as codefendants. Mr. Rubenstein acknowledged from the outset that there was a conflict. Another judge made an inquiry early on in the case pursuant to *People v Gomberg* (38 NY2d 307 [1975]), and it is this court's understanding that both defendants waived the conflict on the record in open court and indicated at that time that they each wanted Mr. Rubenstein to be their attorney. When defendants first appeared before this court on February 28, 2010, counsel was reminded of his ethical obligation to have both clients waive the conflict in writing, as required by rule 1.7 (b) (4) of the Rules of Professional Conduct (22 NYCRR 1200.0). During a subsequent court appearance, Mr. Rubenstein indicated he did obtain the required "informed consent, confirmed in writing" from each defendant.

***386** The case proceeded through motion practice and discovery. Counsel was actively engaged in plea discussions with the District Attorney's Office for several months on behalf of both clients. The case was set down for hearing and trial on September 13, 2010. On that date, Mr. Rubenstein informed the court that he could no longer continue to represent both Ms. Palmero and Ms. Cristin, because at that point the conflict prevented him from giving each of his clients appropriate legal representation. He asked to be relieved from representation of Ms. Palmero, but stated his intention to remain as Ms. Cristin's attorney. The court relieved Mr. Rubenstein from representing Ms. Palmero, and

said that she would be given time to retain her own separate attorney. Mr. Rubenstein informed the court that Ms. Palmero was indigent, and requested court-assigned counsel for her.[1] The court directed that counsel from the 18-B panel be assigned to represent Ms. Palmero. Since it was an unusual situation, in this court's experience, Mr. Rubenstein and the People were asked to provide the court with legal authority supporting Mr. Rubenstein's application to be relieved of his representation of Ms. Palmero while continuing to represent Ms. Cristin.

On September 27, 2010, Mr. Horn appeared on behalf of Ms. Palmero. The People had ****3** not yet decided to take a position on the conflict issue and asked for an adjournment. Mr. Rubenstein said that he had decided to remain as Ms. Cristin's counsel and that he intended to hire another attorney to cross-examine Ms. Palmero, should she testify at the trial, believing that measure would eliminate any conflict. Mr. Horn wanted to confer with his client about the issue. On October 22, 2010, the People indicated that they would not move to disqualify Mr. Rubenstein. Mr. Horn, who had discussed the conflict with his client, expressed concern about "any potential cross-examination of my client by co-counsel, by Mr. Rubenstein, or . . . any member of his firm as well as the possibility that there could be that type of conflict even if it's potentially in a summation or some other part of the trial." Mr. Horn then made an oral application to sever Ms. Palmero's trial from Ms. Cristin's, saying that would "be appropriate to protect my client's rights." The People opposed the oral severance application. Mr. Rubenstein had ***387** spoken with "independent counsel" and contended this individual could "cross-examine Ms. Palmero without consulting with me as to any information I have gained from my representation of Ms. Palmero, and that would ensure the integrity of the proceedings."

The court referred all parties to rule 1.9 (a) of the Rules of Professional Conduct, which relates to an attorney's representation of a client in a case in which a former client is also a party. The rule requires that unless the former client "gives informed consent, confirmed in writing," to an attorney representing a codefendant in the same case, that attorney "shall not thereafter represent another person in the same or a substantially related matter." (Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.9 [a].) Mr. Horn stated that Ms. Palmero told him on several occasions that she would not consent to Mr. Rubenstein's representation of Ms. Cristin. Despite the ethical directive, Mr. Rubenstein would not withdraw from representing Ms. Cristin, and left it to the court to decide whether he should be relieved.

People v Callistro

On April 18, 2010, defendant Callistro was arraigned on a felony complaint charging him, inter alia, with violating Penal Law § 220.39 (1), criminal possession of a controlled substance in the third degree. The complaint alleged that Mr. Callistro and "an unapprehended individual" sold crack cocaine to an undercover police officer on April 17, 2007, at about 2:25 p.m., inside a building purportedly located at 2824 Morris Avenue. The defendant was arraigned in Part AR 3, which hears cases between 5:00 p.m. and 1:00 a.m., and is the "night arraignment" part in Bronx County. The judge presiding in that part assigned The Bronx Defenders to represent Mr. Callistro. Although Mr. Callistro is the only party named as a defendant in this felony complaint, the "back" of the file is stamped with the words "co-defendant," a notation meant to alert the arraignment judge and the parties that there is a related docketed case.

During the arraignment, as part of the bail hearing, defense counsel stated in substance that if any "pre recorded buy money" was recovered from Mr. Callistro, it might be explained by the fact that he "went to an apartment at 2205 Morris Park Avenue where he had a friend Mr. White who he owed money to at the address," and he received change from Mr. White prior to the arrest. There was an off-the-record bench conference, after ***388** which the judge asked, "Do you recall the date that we put the co-defendant on? They were all adjourned to April 23rd in Part N." Defense counsel stated, "I may have missed something. I don't believe there is actually a co-defendant in this case." The judge replied, "Let me be more specific. What we discussed at sidebar was this case is somehow linked to another case where drugs were being sold outside of ****4** an apartment which on the surface led the officers into that building to make an arrest inside of the apartment." The case was adjourned until April 23, 2010 to join the related "co-defendant" case for grand jury action.

As it turns out, earlier that same day, before a different judge, three other defendants were arraigned on a separately-docketed felony complaint. One of these defendants is the individual named herein as Jane Doe, while another is Rufus White. They were charged, inter alia, with violating Penal Law § 220.16 (1), criminal possession of a controlled substance in the third degree. The complaint alleged that Ms. Doe, Mr. White and a third individual were present inside apartment 2E at 2707 Morris Avenue on April 17, 2010,

and that police officers searched that apartment and found 41 bags of crack cocaine. Mr. White was arraigned on yet another separately-docketed felony complaint charging him with having possessed 27 additional bags of crack cocaine allegedly found in his waistband when he was inside that apartment. The judge assigned The Bronx Defenders to represent Ms. Doe; two different attorneys from the 18-B panel were assigned to represent the other codefendants. The attorney assigned by The Bronx Defenders to represent Ms. Doe is not the same attorney assigned to represent Mr. Callistro. This case was adjourned until April 23, 2010 for grand jury action. The cases against all four defendants named in the three separate dockets were presented to the same grand jury panel. On or about May 7, 2010, a true bill was voted naming Mr. Callistro, Ms. Doe, Mr. White and another codefendant as accomplices to the possession of the narcotics recovered inside apartment 2E at 2707 Morris Avenue. Defendant Callistro alone was charged in that indictment with a single count of criminal sale of a controlled substance in the third degree, presumably based on the charges in his stand-alone felony complaint. By doing so, the People essentially joined all defendants for prosecution in a single indictment.

Ms. Doe was arraigned on the indictment in Supreme Court, Part B, on May 18, 2010; Mr. Callistro was separately arraigned ***389** on the same indictment on June 2, 2010. On June 25, 2010, a pretrial motion and a demand for discovery and bill of particulars were filed on behalf of Mr. Callistro, returnable on July 13, 2010. No motions were filed on Ms. Doe's behalf. On July 13, 2010, the cases were called for the first time before this court. Mr. Callistro and his attorney from The Bronx Defenders appeared. Ms. Doe was not present; however, her attorney from The Bronx Defenders appeared. Both attorneys acknowledged that there was a conflict in The Bronx Defenders continuing to represent codefendants charged as accomplices in the same indictment. Ms. Doe's attorney asked to be relieved immediately, and requested the court to assign counsel from the 18-B panel. Mr. Callistro's attorney stated that "this is the first time this case has been on with any co-defendants. The last court date was the [Supreme Court arraignment date]. And when I received the indictment [it] was the first time I knew there were co-defendants." Counsel indicated that an institutional conference had been held with a supervising attorney, and it was the supervising attorney's "belief that I could remain on the case. Determination my office made. I am asking to stay on the case. We did file motions."[2] Counsel stated that she had not spoken with Ms. Doe's attorney at any time, and that a "wall" had been built because of the conflict to prevent sharing of any information about Ms. Doe or her case.

Even though Ms. Doe's attorney asked to be relieved, that attorney still made arguments on Ms. Doe's behalf, in the presence of Mr. Callistro and his attorney, stating that counsel had ****5** tried to reach Ms. Doe that day and had been unsuccessful, and citing to past records made in another court part about Ms. Doe's medical issues. The court issued the bench warrant, relieved The Bronx Defenders from Ms. Doe's case, and directed, as per the attorney's request, that 18-B counsel be assigned whenever Ms. Doe next appeared. The court reminded the attorneys that they had to obtain written consent from both defendants if it was going to permit The Bronx Defenders to remain as assigned counsel for Mr. Callistro, and also for any legal authority supporting their request.

Ms. Doe was arrested within days on a new case; the arresting officer discovered the active warrant issued by the court. On July 23, 2010, Ms. Doe appeared in court before a different judge, and the warrant was vacated. Another attorney from The ***390** Bronx Defenders appeared on her behalf. That judge set bail. On July 28, 2010, Ms. Doe appeared before this court. Yet another attorney from The Bronx Defenders appeared on the record on Ms. Doe's behalf and began to argue for a change in the bail conditions. This court, recognizing that The Bronx Defenders had been relieved, cut off the colloquy and assigned an attorney from the 18-B panel present in the courtroom to act as Ms. Doe's counsel. That attorney made his own bail application. He also made an application for Ms. Doe to be considered for a drug treatment program through "judicial diversion." That application was referred to Bronx Treatment Court. During this time, codefendant Rufus White also applied for judicial diversion. On September 23, 2010, the judge in Bronx Treatment Court approved Mr. White's application to enter drug treatment, and Mr. White pleaded guilty to criminal possession of a controlled substance in the third degree. On that day, the judge in that part dismissed the indictment against Ms. Doe. Meanwhile, on September 24, 2010, Mr. Callistro was arrested on a new case, charging him with resisting arrest and obstructing governmental administration. He was arraigned on the misdemeanor information on September 26, 2010. The arraignment judge assigned the Legal Aid Society to represent Mr. Callistro on this case.

On September 30, 2010, Mr. Callistro once again appeared before this court. Counsel stated that because Ms. Doe's case

had been dismissed, rule 1.9 of the Rules of Professional Conduct would apply, as Ms. Doe was a "former client." Counsel read into the record only the part of this rule that states, "[a] lawyer . . . in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse." (Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.9 [a].) Counsel acknowledged "that is a possibility in this case." However, counsel argued, based on *People v Wilkins* (28 NY2d 53 [1971]), that "the presumption that there is a materially adverse interest here is rebutted by the fact that I work for an institutional defender." Counsel stated that

> "The Bronx Defenders, an institutional defender, much like The Legal Aid Society, which is the subject of the [*Wilkins*] case, is set up in such a way that I have never seen the file of [Ms. Doe] . . . Any conversations that [Ms. Doe's counsel] had with her were confidential. A wall has been put up."

***391** Counsel did not address the question posed by the court on the previous date about the need for a written waiver of the conflict from both clients, which is a requirement of rule 1.9.

The People agreed that "there is a potential conflict . . . If it went to trial, and [Ms. Doe] may take the stand, she could put herself in jeopardy of being rearrested under new information given," and asked that The Bronx Defenders be relieved. Counsel asked that the Legal Aid Society be relieved from representing Mr. Callistro on the new misdemeanor case, and have the ****6** court assign The Bronx Defenders to represent defendant on this matter as well.[3] The court reserved decision on the applications.

Conclusions of Law

Both the Sixth Amendment to the United States Constitution and article I, § 6 of the New York Constitution guarantee that an accused in a criminal proceeding have the assistance of counsel. "[A]n element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him." (*United States v Gonzalez-Lopez*, 548 US 140, 144 [2006], citing *Wheat v United States*, 486 US 153, 159 [1988].) "Where a constitutional right to counsel exists . . . there is a correlative right to representation that is free from conflicts of interest." (*Wood v Georgia*, 450 US 261, 271 [1981]; *see also Cuyler v Sullivan*, 446 US 335, 355 [1980, Marshall, J., concurring in part, dissenting in part], citing *Holloway v Arkansas*, 435 US 475, 483 n 5 [1978].) When a defendant has retained counsel of his or her own choosing, "judicial restriction[s] . . . upon the exercise of this fundamental right will be carefully scrutinized." (*People v Tineo*, 64 NY2d 531, 536 [1985].) Earlier this year, in *People v Carncross* (14 NY3d 319, 323 [2010]), the Court held that "[i]n protecting a defendant's Sixth Amendment rights, a trial court may on occasion properly disqualify the attorney of a defendant's choosing due to that attorney's conflicts, actual or potential, even in the face of defendant's waiver of such conflicts."

(1) Following their arrest, Ms. Palmero and Ms. Cristin exercised their Sixth Amendment right to retain counsel of their choice, who was Mr. Rubenstein. And, the court permitted ***392** such representation because these defendants each waived the conflict that existed, and affirmed that they wanted Mr. Rubenstein to represent them. Mr. Rubenstein, in turn, satisfied his ethical obligation under rule 1.7 (b) of the Rules of Professional Conduct and obtained the requisite written informed consent from both clients. However, that waiver is no longer relevant in this case, because Mr. Rubenstein, for his own reasons, has concluded that the conflict now prevents him from fulfilling his ethical obligation to continue to zealously represent both defendants. Ms. Palmero will not waive the current conflict and agree to have Mr. Rubenstein continue to represent Ms. Cristin. Although Mr. Rubenstein asked to be relieved from representing Ms. Palmero, and did not dispute the court's characterization of the conflict as one in which Ms. Cristin's "interests are materially adverse to the interests of [his] former client" (Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.9 [a]), Mr. Rubenstein nonetheless insists that he can and should be allowed to remain as Ms. Cristin's lawyer. The court disagrees.

The starting off point in this analysis must focus on Ms. Cristin's choice of Mr. Rubenstein to be her counsel. She retained Mr. Rubenstein, and he has been representing her for more than a year. Both she and Ms. Palmero chose to confide in Mr. Rubenstein, each with the expectation that he would remain as her attorney, despite the presence of any potential or actual conflicts. The presumption, therefore, is that Ms. Cristin be permitted to be represented by her counsel of choice, who is Mr. Rubenstein. (*Wheat*, 486 US at 160.) However, this presumption "may be overcome 'by a showing of a serious potential for conflict.' " (*United States ex rel. Stewart on Behalf of Tineo v Kelly*, 870 F2d 854, 856 [2d Cir 1989], quoting *Wheat*, 486 US at 164.) ****7**

There is no "per se" rule recognizing that simultaneous retained representation of different defendants on the same case violates any of these defendants' Sixth Amendment rights. (*Wheat*, 486 US at 160.) Nonetheless, "a court confronted with and alerted to possible conflicts of interest must take adequate steps to ascertain whether the conflicts warrant separate counsel." (*Id.*) Here, Mr. Rubenstein's request to be relieved of representing one client is nothing less than an acknowledgment that there is a real conflict, and it is a serious one. As far as Ms. Palmero is concerned, granting Mr. Rubenstein's application to relieve him of his retained representation has answered the question of whether the conflict in this case requires that separate ***393** counsel be assigned for Ms. Palmero. Now the question is whether this conflict requires Ms. Cristin to retain new counsel.

Since a court always has the responsibility of "ensuring that [cases before it] are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them," this responsibility should be weighed in determining an application to disqualify an attorney where a conflict exists. (*Wheat*, 486 US at 160.) There is a decided ethical problem in this case involving Mr. Rubenstein's continuing representation of Ms. Cristin. It is, in fact, prohibited by the Rules of Professional Conduct because Ms. Palmero has not waived the current conflict. The per se violation of an ethical rule does not, in and of itself, trump the Sixth Amendment right to retain counsel of choice. (*Cuyler*, 446 US at 346 n 10 [discussing various conflicts and ABA standards].) It is, where relevant, something to consider in determining whether to relieve retained counsel, in a conflict of interest case involving representation of a current client, where the same attorney has represented another client on the same case. (*Id.*; *Wheat*, 486 US at 161.) In this case, if the court does not relieve Mr. Rubenstein, he will violate "ethical standards of the profession" (*Wheat*, 486 US at 160), including, specifically, rule 1.9 (a) of the Rules of Professional Conduct. Such an ethical breach can, in and of itself, give rise to an appellate claim, should Mr. Rubenstein be permitted to remain as Ms. Cristin's counsel and she is convicted, that Ms. Cristin failed to receive effective assistance of counsel. (*See Wheat*, 486 US at 161; *Carncross*, 14 NY3d at 330.)

Mr. Rubenstein has acknowledged that, because of conversations he had with Ms. Palmero about this case when she was his client, he cannot cross-examine Ms. Palmero. Therefore, this is a situation in which " 'prejudice to defendant need not be precisely delineated but must be presumed.' " (*Carncross*, 14 NY3d at 328, quoting *People v McDonald*, 68 NY2d 1, 11 [1986].) He also acknowledges that even if the court would approve his suggestion that he let the "independent counsel" he has already spoken with assist him at the trial for the specific purpose of cross-examining Ms. Palmero, he could not speak with that attorney about any information he received from Ms. Palmero. It is understandable why Ms. Palmero is unwilling to waive the conflict, as this proposal demonstrates a complete "disloyalty" to his former client (*People v McLaughlin*, 174 Misc 2d 181, 182 [Sup Ct, NY County 1997]), in that Mr. Rubenstein believes ***394** that it would be proper for another attorney, working with him in representing Ms. Cristin, to vigorously cross-examine Ms. Palmero. Should Ms. Palmero and/or Ms. Cristin be convicted, following a trial at which Mr. Rubenstein represented Ms. Cristin in this scenario, an untold number of meritorious appellate claims could be raised protesting this decision.

The severance proposed by Mr. Horn might be sufficient to protect Ms. Palmero's rights; however, it would do nothing to ameliorate the root problem confronting Ms. Cristin. Even if a motion for a severance were granted, Mr. Rubenstein's duty to his former client remains exactly the same as it was when he represented her in this action. Thus, he could never take any ****8** position adverse to her interests. Mr. Horn, as a counsel with no conflict, can freely pursue any plea discussions, or appropriate hearing or trial strategy, on Ms. Palmero's behalf. Mr. Rubenstein has to walk a very narrow line in this case, and basically cannot mention anything about Ms. Palmero that would be to her detriment, even if such argument would be to Ms. Cristin's advantage. (*See Holloway*, 435 US at 489-490.) This, of course, would be to Ms. Cristin's detriment. She presumably always understood this when she agreed to waive any potential conflict and agreed to have Mr. Rubenstein jointly represent her and Ms. Palmero. Whether there continues to be a knowing waiver of the new conflict is unknown. However, even if Ms. Cristin's waiver is still valid, a court still has the right to disregard it where there is a real question about whether Mr. Rubenstein is able to afford her meaningful representation. (*Wheat*, 486 US at 160-161.) And Ms. Palmero's prior waiver in this case is a nonstarter, as the circumstances surrounding her agreeing to the waiver have in fact changed, rendering the prior waiver meaningless. (*See Carncross*, 14 NY3d at 327-328.)

At bottom, allowing Mr. Rubenstein to represent Ms. Cristin, a client in "the same or a substantially related matter" without getting "informed consent, obtained in writing" from his

prior client, Ms. Palmero, places him in ethical jeopardy. He has acknowledged that he is unable to directly fulfill his obligation to Ms. Cristin without violating his duty to Ms. Palmero, and has proposed that he can effectively represent this client by hiring independent counsel for some aspects of the case. Employing another attorney to aggressively cross-examine a former client in order to benefit a current client in the same case, if not violative of the letter of the ethics rule, more than violates its spirit. Independent counsel is what is needed in this case, but ***395** for all aspects of the conflict-free representation to which Ms. Cristin is entitled. Given all the issues, and balancing Ms. Cristin's right to a fair trial free of attorney conflicts against her right to be represented by counsel of choice, the court exercises its discretion and disqualifies Mr. Rubenstein from representing Ms. Cristin any further. She will be given ample opportunity to retain new counsel of her choice.

Mr. Callistro's case is quite different in several respects. First of all, the law is very clear that "[t]he right to counsel of choice does not extend to defendants who require counsel to be appointed for them." (*Gonzalez-Lopez*, 548 US at 151; *see Morris v Slappy*, 461 US 1, 13-14 [1983]; *Unites States v Parker*, 469 F3d 57, 61 [2d Cir 2006].) A court should be cautious when considering whether to relieve assigned counsel who has developed a long-term relationship with a client. (*Cf. People v Knowles*, 88 NY2d 763, 766 [1996]; *but see Morris v Slappy*, 461 US at 13-14.) Nonetheless, where assigned counsel is involved, "courts are afforded considerable latitude in their decisions to replace appointed counsel, and may do so where a potential conflict of interest exists." (*United States v Parker*, 469 F3d at 61 [Sotomayor, J.], citing *United States ex rel. Stewart on Behalf of Tineo v Kelly*, 870 F2d 854, 857 [1989].) As discussed, because the right to counsel itself does "include[ ] a right to conflict-free representation" (*Armienti v United States*, 234 F3d 820, 823 [2d Cir 2000]), a court should not assign counsel to represent an indigent defendant when the court is aware that counsel represents a codefendant or any other defendant in a factually related matter, or has represented or does represent a potential witness in the case, or where any other similar conflict exists. (*See generally Cuyler*, 446 US at 345-346.)

Here, had the arraignment judge been made aware of the conflict at the time Mr. Callistro was arraigned in criminal court, it is very clear that The Bronx Defenders would have never been assigned to represent him. At that time, the judge was only aware that there was a related case with other named "co-defendants," but not that The Bronx Defenders had already been assigned ****9** by another judge to represent one of those codefendants. Indeed, it is a well-recognized practice in this county, and this city, for judges not to assign attorneys from the same public defender organization to represent codefendants on the same case, or to assign attorneys to represent an indigent defendant where the same 18-B attorney or the institutional defender organization which employs the attorney has been assigned ***396** to represent a potential witness in the case.[4] Based on the colloquy at Mr. Callistro's arraignment, it is clear that the attorneys knew there was a related case with related defendants who had already been themselves arraigned and their cases adjourned to have their case presented to a grand jury. It is also clear that neither the attorneys from the District Attorney's Office nor The Bronx Defenders looked into whether there was a conflict based upon dual representation prior to the time Mr. Callistro's case was presented to the same grand jury. Moreover, while The Bronx Defenders acknowledge the postindictment conflict, there has been no attempt to secure a written waiver of that conflict, to this court's knowledge, by Mr. Callistro and Ms. Doe. To the extent that a *Gomberg* inquiry, which applies to conflicts involving retained counsel, is at all appropriate to undertake in a case involving assigned counsel (*cf. People v Jordan*, 83 NY2d 785, 786 [1994]), such inquiry was never attempted, nor requested, and at this point does not seem possible. Significantly, the attorneys never mentioned whether they had discussed their decision to ask to be relieved from representing one client, Ms. Doe, and be allowed to continue to represent Mr. Callistro with either one of these individuals, let alone that Ms. Doe or Mr. Callistro understood the ramifications of such a decision. Based on the record, it appears only that there was an institutional decision made, sometime prior to July 13, 2010, that Mr. Callistro alone would continue to be represented by The Bronx Defenders on this case. If there were a right to counsel of choice in this situation, the choice would be the client's, not counsel's. There is an appearance of impropriety when an assigned counsel with a conflict makes a choice about which client to continue to represent after the cases have been presented to a grand jury. In fact, it appears that, because of that institutional decision, motions and discovery demands were filed on behalf of one client, Mr. Callistro, but not the other, and that type of decision can result not only in the appearance that clients are treated differently, but it carries with it the potential ***397** to prejudice the other client. The court is certain this was never the intent of the lawyers involved, as they also sought to protect Ms. Doe's rights by requesting, on her behalf, even in her absence, that she would be assigned a new attorney who would presumably file motions as that attorney deemed fit.

(2) The Bronx Defenders' proposal that they will be able to afford Mr. Callistro conflict-free representation in this case because they have constructed a "wall" to prevent any dissemination of information about Ms. Doe is not only impractical, but has failed. The barrier discussed was breached on two occasions, when two different attorneys from The Bronx Defenders appeared on two different dates to represent Ms. Doe and make arguments on her behalf after ****10** she was rearrested and returned following the issuance of a "bench warrant." If the wall were impenetrable, one would expect that all attorneys from The Bronx Defenders would have been on notice that they could not represent Ms. Doe in any other case, let alone the one in which their application to be relieved and have counsel assigned from the 18-B panel had already been granted. Therefore, the court cannot find that the "wall" referenced by counsel cured any conflict in this case. (*See McLaughlin*, 174 Misc 2d at 186-187.)

Even if there were a more secure barrier, the simple fact remains that a "wall" is completely impractical in this type of situation. The realities of indigent defendant representation practice by institutional defender organizations such as the Legal Aid Society and The Bronx Defenders in this county simply do not support a conclusion that a judge could rely on a "wall" to prevent gathering and sharing of information about the clients by more than one lawyer in these vital organizations. Given the large case loads, the need for attorneys from these organizations to be assigned to arraignment parts seven days and nights a week, and, of course, the times when these attorneys are appearing before only one judge at a hearing or a trial, different attorneys from the two Bronx County public defender organizations routinely stand up in court on calendar appearances for a client of the organization who they themselves have not been designated by the organization to represent. In this very case, at least three different attorneys from The Bronx Defenders appeared in court on Ms. Doe's behalf in less than two weeks.

Put simply, while "the wall" concept is sometimes recognized as an option in cases where a firm has been retained by different ***398** clients who are parties in the same case, it is still incumbent upon the organization to demonstrate that there has been no sharing of information, and that the "wall" is adequate. (*See Kassis v Teacher's Ins. & Annuity Assn.*, 93 NY2d 611, 618-619 [1999].) Here, the record shows that, although there was an attempt to create a wall that would isolate Ms. Doe from the rest of The Bronx Defenders, that attempt did not succeed. Even if the proposed wall were fortified for the future, at the very least, "the appearance of impropriety" would always remain in this case. (*Id.* at 618; *McLaughlin*, 174 Misc 2d at 186-187; *see also Solow v Grace & Co.*, 83 NY2d 303, 313-314 [1994].)

Counsel's sole legal argument, relying on *People v Wilkins* (28 NY2d at 56), is unconvincing. In *Wilkins*, the Legal Aid Society had in the past represented a witness who testified at a criminal trial of a defendant who they now represented. The conflict was not discovered until another attorney from the Legal Aid Society was perfecting the appeal. After the conflict was discovered, the organization prudently withdrew from bringing the appeal and new counsel was assigned. (*Id.* at 55.) When the Court reviewed the claim that the defendant had been denied effective representation of counsel because of the "unknowing dual representation" during the trial (*id*.), it did so via an appeal from a writ of error coram nobis. Thus, the defendant was required to demonstrate the existence of actual prejudice. In that fact-specific case, the Court declined to find, as with a law firm, the rule that "knowledge of one [attorney] will be imputed by inference to all members of that law firm" would presumptively apply to a "large public-defense organization such as the Legal Aid Society" (*id*. at 56), and therefore did not find that the defendant had met his burden to demonstrate actual prejudice.

Here, in contrast, we have knowing dual representation. *Wilkins* cannot be read in a way that would relieve attorneys in public defender offices from the requirements of the Rules of Professional Conduct in cases where there is a knowing, contemporaneous conflict involving dual representation. It matters not whether knowledge will be presumed to be imputed within the ****11** confines of a public defender organization in a Monday-morning-quarterback analysis.[5] In this case, the conflict has been acknowledged, it is unwaived, and the court's obligation ***399** to assign an attorney who does not have a conflict to represent Mr. Callistro will not be satisfied by granting The Bronx Defenders' application to remain as Mr. Callistro's counsel on the indicted case.

Accordingly, considering all the information before the court, and in the exercise of its discretion, The Bronx Defenders' applications to be allowed to continue to represent Mr. Callistro in the indicted matter, as well as to be assigned to represent him on his subsequent misdemeanor arrest, are denied. Instead, the court continues the assignment of the Legal Aid Society to represent Mr. Callistro on the misdemeanor case, docket No. 61123C-2010, and also

assigns that organization to represent Mr. Callistro on the felony case, indictment No. 1696/2010. The Legal Aid Society does not appear to have been assigned to represent any of the defendants on the felony matter. Barring some unknown conflict involving some past representation, the court believes that this assignment will protect Mr. Callistro's constitutional right to conflict-free representation on these cases, as well as allow him to continue being represented by an attorney he already knows and with whom he has begun to develop an attorney-client relationship.

FOOTNOTES

Footnotes

1 Ms. Palmero has been incarcerated on this case since its inception. Bail had been set at $200,000 by the arraignment judge. Ms. Cristin was released on a bail bond in that same amount posted on December 23, 2009, following an examination of surety.

2 The motions have remained undecided pending the determination of counsel's request to be permitted to remain on the case.

3 Pursuant to local practice, if an indigent defendant who is assigned counsel is arrested again while a case is pending, the court will generally assign the same public defender organization or 18-B attorney assigned to the first case to represent the defendant on the new matter.

4 Conflicts arise with increasing frequency, and judges and attorneys have to be vigilant in preventing the assignment of counsel who will have a conflict. For example, an alleged “buyer” in a drug sale case is usually charged with a misdemeanor, and is arraigned separately from the alleged seller, who is usually charged with a felony. The same public defender organization can never represent both of these individuals. In assault cases, including those involving domestic violence, individuals arrested frequently allege that they are also victims of a crime, and they are therefore both criminal defendants and complaining witnesses at the same time in the same incident, and the same attorney cannot represent both parties.

5 In *Wilkins*, the Court supported its conclusion by referring to city-wide statistics relating to the number of attorneys then working for the Legal Aid Society (150), and the number of dispositions reached by those lawyers in state and federal courts (more than 156,000 in the relevant year, 1969). To the extent that the *Wilkins* case might be relevant to a decision by a court to allow a large city-wide public defender organization with a knowing, unwaived conflict to continue representing a criminal defendant, the holding has not been applied to “a Criminal Defense Division office of a single county” (*McLaughlin*, 174 Misc 2d at 187), such as The Bronx Defenders.

New York
Official Reports

75 N.Y.2d 449, 553 N.E.2d 974, 554 N.Y.S.2d 426

The People of the State of
New York, Respondent,
v.
John L. Darby, Appellant.

Court of Appeals of New York
21
Argued January 9, 1990;

decided February 20, 1990

CITE TITLE AS: People v Darby

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered February 3, 1989, which affirmed a judgment of the Supreme Court (Walter T. Gorman, J.), rendered in Onondaga County upon a verdict convicting defendant of burglary in the first degree (two counts), burglary in the second degree, robbery in the first degree, robbery in the second degree (three counts), assault in the second degree (three counts) and criminal possession of a weapon in the fourth degree.

People v Darby, 147 AD2d 914, reversed.

HEADNOTES

Crimes
Jurors
Disqualification of Juror--Presence of Defense Counsel Required at Disqualification Inquiry

(1) An inquiry to determine the existence and extent of prejudice affecting the gross disqualification of a sworn juror is inextricably related to defendant's entitlement to a fair hearing. Therefore, the unique, indispensable presence of at least the single-minded counsel for the accused is minimally necessary to safeguard that fundamental fairness to defendant, who will be judged as to his charged criminal conduct by a jury selected with his approval and participation. Accordingly, in the prosecution of defendant for burglary and related crimes, the trial court committed reversible error requiring a new trial when it did not allow defense counsel to be present for the voir dire hearing--after four witnesses had testified--into possible taint of the impaneled jury.

Grand Jury
Defective Proceedings--Impairment of Integrity of Proceeding--Failure of Prosecutor to Instruct Grand Jury as to Possible Inadmissibility of Inculpatory Statement

(2) The District Attorney's failure to instruct the grand jurors that an inculpatory statement made by defendant may turn out to be inadmissible did not infect the Grand Jury proceeding to the point that its integrity was impaired requiring dismissal of the indictment. Neither the demanding test of CPL 210.35 (5), which requires impairment of the integrity of the Grand Jury proceeding and prejudice to defendant, nor the policies underlying it, nor the facts and evidence of this case warrant the final plenary remedy of dismissal of this criminal proceeding. Here, defendant's statement was ultimately admitted into evidence at trial after it was determined the statement was voluntary and a product of a knowing, voluntary and intelligent waiver of his constitutional rights. To adopt the standard urged by defendant and award him a dismissal of all charges on this argument would be particularly ironic in view of those developments. But more ***450** significantly, the adoption and application of this generalized standard in this case would invert retrospectively the well-established and well-founded instructional requirements for Grand Juries and would supplant the unquestionably high prong of "impairment of integrity" of the Grand Jury process without even addressing the additional prejudice prong. This case does not come anywhere near satisfying the statute's high test and qualifying for its exceptional remedy (CPL 210.35 [5]).

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Grand Jury, § 19; Jury, §§ 190, 196, 198; Indictments and Informations, § 253.

CLS, CPL 210.35 (5).

NY Jur 2d, Criminal Law, §§2236, 2237, 2243, 2297, 2395.

ANNOTATION REFERENCES

See Index to Annotations under Grand Jury; Instructions to Jury; Voir Dire.

POINTS OF COUNSEL

J. Scott Porter, Gerald T. Barth and *James P. Maxwell* for appellant.

I. Appellant's constitutional rights were violated when the trial court refused to allow appellant and defense counsel to be present during the reexamination of trial jurors. *(People v Buford,* 69 NY2d 290; *People v Mullen,* 44 NY2d 1; *People v Wilson,* 106 AD2d 146; *People v O'Keefe,* 281 App Div 409, 306 NY 619, 347 US 989; *People v Townsend,* 67 NY2d 815; *People v Blyden,* 55 NY2d 73; *Snyder v Massachusetts,* 291 US 97; *People v Ciaccio,* 47 NY2d 431; *People v Mordino,* 58 AD2d 197; *Irvin v Dowd,* 366 US 717; *People v McLaughlin,* 150 NY 365.)

II. The indictment should have been dismissed because the District Attorney failed to instruct the Grand Jury properly. *(Rogers v Richmond,* 365 US 534; *People v Washington,* 51 NY2d 214; *Miranda v Arizona,* 384 US 436; *Harris v New York,* 401 US 222; *Mincey v Arizona,* 437 US 385; *People v Maerling,* 64 NY2d 134; *People v Graham,* 55 NY2d 144; *People v Gibson,* 89 AD2d 859; *People v DiFalco,* 44 NY2d 482; *People v Valles,* 62 NY2d 36.)

III. Appellant was denied due process of law and a fair trial by the mishandling of evidence by the prosecution. *(United States v Agurs,* 427 US 97; *Brady v Maryland,* 373 US 83; *United States v Bryant,* 439 F2d 642; *People v Saddy,* 84 AD2d 175; *California v Trombetta,* 467 US 479; *People v Kelly,* 62 NY2d 516.)

IV. The ***451** People failed to present sufficient evidence at trial to corroborate the testimony of the accomplice. *(People v Cona,* 49 NY2d 26; *People v Duncan,* 46 NY2d 74; *People v Moses,* 63 NY2d 299.)

V. The police lacked probable cause to arrest appellant. *(Wong Sun v United States,* 371 US 471; *People v Lane,* 102 AD2d 829, 63 NY2d 865; *People v Carrasquillo,* 54 NY2d 248; *People v De Bour,* 40 NY2d 210; *People v Corrado,* 22 NY2d 308; *People v Torres,* 115 AD2d 93; *People v Howard,* 50 NY2d 583; *People v Battaglia,* 82 AD2d 389, 56 NY2d 558.)

VI. Appellant's case was unduly prejudiced by the trial court's refusal to grant him a separate trial from the two codefendants. *(People v La Belle,* 18 NY2d 405; *People v Fisher,* 249 NY 419; *People v Payne,* 35 NY2d 22; *People v Valdez,* 97 AD2d 778; *People v McGee,* 68 NY2d 328; *People v Carter,* 37 NY2d 234; *Faretta v California,* 422 US 806; *Chambers v Mississippi,* 410 US 284; *People v Gilmore,* 66 NY2d 863.)

VII. Prosecutorial misconduct deprived appellant of a fair trial. *(Estes v Texas,* 381 US 532; *Berger v United States,* 295 US 78; *People v Lovello,* 1 NY2d 436.)

VIII. The cumulative effect of all errors deprived appellant of a fair trial. *(People v Crimmins,* 36 NY2d 230.)

Robert E. Wildridge, District Attorney (Donna M. Cathy of counsel), for respondent.

I. Appellant was given a fair opportunity to examine the jurors. *(People v McLaughlin,* 150 NY 365; *People v Fernandez,* 125 AD2d 932; *People v Boulware,* 29 NY2d 135; *United States v Barton,* 647 F2d 224; *People v Pepper,* 59 NY2d 353; *United States v Barnes,* 604 F2d 121; *People v Mullen,* 44 NY2d 1; *People v Blyden,* 55 NY2d 73; *People v Ciaccio,* 47 NY2d 431.)

II. The Assistant District Attorney sufficiently instructed the Grand Jury on the law, thereby enabling the grand jurors to fulfill their function. *(People v Calbud, Inc.,* 49 NY2d 389; *People v Rallo,* 46 AD2d 518, 39 NY2d 217; *People v Percy,* 45 AD2d 284, 38 NY2d 806.)

III. The accomplice's testimony was sufficiently corroborated. *(People v Moses,* 63 NY2d 299; *People v Lyon,* 134 AD2d 909; *People v Hudson,* 51 NY2d 233; *People v Lamont,* 126 AD2d 967.)

IV. The circumstances escalated into probable cause to arrest appellant. *(People v De Bour,* 40 NY2d 210; *People v Benjamin,* 51 NY2d 267; *People v Carrasquillo,* 54 NY2d 248; *People v Howard,* 50 NY2d 583, 449 US 1023; *People v Bruce,* 78 AD2d 169; *People v Corrado,* 22 NY2d 308; *People v Torres,* 115 AD2d 93; *Terry v Ohio,* 392 US 1; *People v Ridley,* 124 AD2d 610; *People v Belk,* 100 AD2d 908.)

V. The prosecutor's ***452** summation was proper and the police did not mishandle the evidence. *(People v Alicea,* 37 NY2d 601; *People v Steinhardt,* 9 NY2d 267; *People v Williams,* 46 NY2d 1070; *People v Dean,* 56 AD2d 242, 45 NY2d 651; *People v Safian,* 46 NY2d 181, *cert denied sub nom. DeSantis v New York,* 443 US 912; *People v Broady,* 5 NY2d 500; *People v Crimmins,* 36 NY2d 230; *People v Shields,* 58 AD2d 94, 46 NY2d 764.)

VI. A joint trial was not prejudicial to appellant. *(People v Bronholdt,* 33 NY2d 75, *cert denied sub nom. Victory v New York,* 416 US 905; *People v Fisher,* 249 NY 419; *People v Baum,* 64 AD2d 655; *People v Owens,* 22 NY2d 93; *People v Sher,* 69 Misc 2d 847; *Sims v United States,* 405 F2d 1381; *People v Ronson,* 54 AD2d 639; *People v Smith,* 108 AD2d 763; *People v Del Popolo,* 50 AD2d 710; *Chapman v California,* 386 US 18.)

VII. Appellant received a fair trial.

OPINION OF THE COURT

Bellacosa, J.

Defendant, tried with two accomplices, was convicted after a jury trial of multiple counts of burglary and robbery in the first and second degrees, assault in the second degree (two counts), and criminal possession of a weapon. He and four others broke into the home of a woman early one morning and terrorized her by the commission of many crimes against her person and property. They departed with her purse and television set.

Two issues are presented to us: first, whether the trial court committed reversible error requiring a new trial when it did not allow defense counsel to be present for the voir dire hearing--after four witnesses had testified--into possible taint of the impaneled jury; second, whether the District Attorney committed error, requiring dismissal of all charges, in not instructing the Grand Jury with respect to certain controverted evidence.

The voir dire hearing occurred during the course of the trial when a question arose as to whether a potentially prejudicial surmise--an alternate juror expressed concern to the court upon seeing defendant examining papers she thought might contain jurors' home addresses--and conversation was had among the alternate juror and four other woman jurors. The Trial Justice questioned the alternate in Chambers with the prosecutor and defense counsel present. The trial court, however, proceeded to inquire of the other four sitting jurors with ***453** no attorneys or parties present, over defense counsel's objection as to his exclusion. The alternate juror was ultimately excused. The trial court concluded, however, that the other four jurors remained qualified and the trial continued to verdict and conviction.

The Appellate Division, in affirming the judgment of conviction, addressed the voir dire issue and reasoned that because the actual presence of a defendant has been held dispensable in certain circumstances at such a hearing *(People v Mullen,* 44 NY2d 1), so too is the presence of defense counsel excusable where, as that court phrased it, the hearing was "evenhanded and not prejudicial." *(People v Boatman,* 147 AD2d 912, 913 [codefendants].) The court appears to have rejected the Grand Jury instruction claim as being "without merit".

We cannot agree with the Appellate Division's rationale or result on the voir dire issue. The fundamental unfairness to defendant by the exclusion of his counsel from this relevant inquiry is evident from the inherently speculative nature of the impact on those four jurors. For that reason, we reverse and order a new trial.

CPL 260.20 requires that "[a] defendant must be personally present during the trial of an indictment". In *People v Mullen* (44 NY2d 1, *supra),* we held that in camera questioning of a juror was not a "material part" of a trial requiring the personal presence of defendant, reasoning, however, that the presence of defense counsel at the inquiry was "sufficient to afford the defendant a 'fair and just hearing.' " *(Id.,* at 6, quoting *Snyder v Massachusetts,* 291 US 97, 108.)

By holding here that under *Mullen* nothing less than counsel's presence will suffice in these circumstances, we need decide no more in this case. While greater safeguards may be desirable or even eventually held to be required depending on some future particular fact pattern, it is unnecessary, because of the narrowness of the defense objection and its determinative impact on this case, to express any additional views to resolve this case *(see, however, e.g., People v Buford,* 69 NY2d 290, 299 [which, in holding that a juror was not "grossly unqualified" and should not have been discharged over defendant's objection under CPL 270.35, commented that a defendant as well as the attorney should be present at an in camera hearing to determine that question]).

(1) We believe and conclude that an inquiry to determine the existence and extent of prejudice affecting the gross disqualification ***454** of a sworn juror--here, 4 of 12--is inextricably related to defendant's entitlement to a fair hearing *(see, People v Mullen,* 44 NY2d, *supra,* at 6). Therefore, the unique, indispensable presence of at least the "single-minded counsel for the accused" *(People v Rosario,* 9 NY2d 286, 290) is minimally necessary to safeguard that fundamental fairness to defendant, who will be judged as to his charged criminal conduct by a jury selected with his approval and participation.

(2) We agree with the Appellate Division, however, that defendant's second argument addressed to the instructions to the Grand Jury is unavailing. Defendant, in testimony before the Grand Jury and at a later *Huntley* hearing, claimed his inculpatory statement was coerced. The *Huntley* hearing court ultimately ruled it was voluntary and admissible. Defendant nevertheless now contends that the District Attorney's failure to instruct the grand jurors that a statement may turn out

to be inadmissible infected the Grand Jury proceeding to the point that its "integrity [was] impaired" and requires the dismissal of the indictment. CPL 210.35 (5) provides: "A grand jury proceeding is defective within the meaning of paragraph (c) of subdivision one of section 210.20 when * * * [t]he proceeding otherwise fails to conform to the requirements of article one hundred ninety *to such degree that the integrity thereof is impaired and prejudice to the defendant may result."* (Emphasis added.) The dissenting-in-part opinion accepts that proposition as applicable here and would dismiss the indictment entirely. We disagree because neither the demanding test, nor the policies underlying it, nor the facts and evidence of this case warrant the final plenary remedy of dismissal of this criminal proceeding.

"[A] Grand Jury need not be instructed with the same degree of precision that is required when a petit jury is instructed on the law." *(People v Calbud, Inc.,* 49 NY2d 389, 394.) The separate and distinct standards of instruction applicable to the issue are further made clear by CPL 190.30 (7): "Whenever it is provided in article sixty that a court presiding at a jury trial *must* instruct the jury with respect to the significance, legal effect or evaluation of evidence, the district attorney, in an equivalent situation in a grand jury proceeding, *may* so instruct the grand jury." (Emphasis added.)

Here, defendant's statement was ultimately admitted into evidence at trial after it was determined the statement was voluntary and a product of "a knowing, voluntary and intelligent ***455** waiver of his constitutional rights." To adopt the standard urged by defendant and award him a dismissal of all charges on this argument would be particularly ironic in view of those developments. But more significantly, the adoption and application of this generalized standard in this case would invert retrospectively the well-established and well-founded instructional requirements for Grand Juries and would supplant the unquestionably high prong of "impairment of integrity" of the Grand Jury process without even addressing the additional prejudice prong. This case does not come anywhere near satisfying the statute's high test and qualifying for its exceptional remedy (CPL 210.35 [5]).

The dissent-in-part complains that without such a result the Grand Jury proceeding in this case becomes "skewed" for lack of the particular evidentiary instruction. But this misses the point of the statutory test, which does not turn on mere flaw, error or skewing. The statutory test is very precise and very high: "impairment of integrity" of the Grand Jury process. It has not been met here.

We find it difficult to understand, in any event, how a third procedural litigation of the issue of voluntariness of a statement--which would be routinized now at the Grand Jury stage--advances fairness and justice generally or to this defendant. Defendant necessarily, appropriately and ultimately had his *Huntley* hearing to contest the voluntariness issue and he lost. He was also allowed by law to raise the issue a second time at the trial (CPL 60.45). Only if the very high hurdle of impairment of the integrity of the Grand Jury process, plus prejudice, is met, can it then be said that an additional evaluation of that issue should have been presented to the Grand Jury in the first instance. To rule otherwise would make the exceptional routine and without a valid justification.

Finally, the dissent-in-part finds some support for its view on this issue in *People v Batashure* (75 NY2d 306 [decided today]). That case, however, deals with arrogation by a prosecutor of authority reposed in the Grand Jury. It does not turn on or focus on the assertion of a particularized evidentiary instruction. We conclude in this case, in any event, that it was not even error because accomplice evidence does not have to be "ironclad" but rather only minimal. Thus, *People v Batashure (supra)* seems beside the point in this case on the pertinent issue.

Accordingly, because error was committed in excluding ***456** defendant's counsel from the voir dire examination of sitting jurors, the order of the Appellate Division should be reversed and a new trial ordered.

Titone, J.

(Concurring in part and dissenting in part).

Although I agree that the conviction in this case must be reversed, I cannot concur in the majority's rationale, which rests not on the State statutory right to be present during "material parts" of the trial (CPL 260.20; *see, People ex rel. Bartlam v Murphy,* 9 NY2d 550; *Maurer v People,* 43 NY 1) but rather on the more fundamental right of a defendant to be present, but only in circumstances "where his absence would have a substantial effect on his ability to defend." *(People v Mullen,* 44 NY2d 1, 5, citing *Snyder v Massachusetts,* 291 US 97, 105-106.) Since the latter right has heretofore been treated strictly as an aspect of a defendant's due process rights under

the *Federal* Constitution *(see, People v Mullen, supra,* at 5, citing *Snyder v Massachusetts, supra; People ex rel. Bartlam v Murphy, supra),* I cannot subscribe to an analysis that fails to come to grips with *United States v Gagnon* (470 US 522) and *Rushen v Spain* (464 US 114), two recent decisions drastically constricting the scope and effect of the Federal right.* On this record, however, I find no need to set forth in detail my own independent analysis of the problem addressed by the majority's writing. In my view, an entirely separate ground for reversal exists because of the trial court's refusal to dismiss the indictment before trial on the ground that the prosecutor's legal instructions to the Grand Jury were fatally flawed.

Before the applicable legal principles may be considered, a brief review of the facts underlying the issue is required. The charges against defendant stemmed from a five-man robbery and brutal assault against a middle-aged woman. Although there was some evidence other than accomplice testimony connecting defendant to the crime, this evidence was not ironclad and, consequently, defendant's identity as one of the perpetrators was clearly one of the factual issues for the Grand Jury to resolve. In this regard, one of the most significant pieces of evidence that were placed before the Grand Jury was a station house statement by defendant in which he admitted to having been present at the scene of the crime. ***457** The validity of this bit of evidence was directly called into question, however, by defendant's own testimony before the Grand Jury concerning the alleged threats of serious violence by police that were used to elicit the station house statement. Despite this controversy over the statement, the prosecutor failed to instruct the Grand Jury on the inadmissibility of statements that are found to be involuntary. This omission was particularly puzzling because the Grand Jury was given clear and adequate instructions on the need for corroboration of accomplice testimony *(see,* CPL 60.22).

Turning to the applicable legal principles, I begin with *People v Calbud, Inc.* (49 NY2d 389), in which the standard for reviewing the quality of Grand Jury instructions was discussed. In that case, the court said: "We deem it sufficient if the District Attorney provides the Grand Jury with enough information to enable it intelligently to decide whether a crime has been committed and *to determine whether there exists legally sufficient evidence* to establish the material elements of the crime." *(Id.,* at 394-395 [emphasis supplied]; *see also, People v Goetz,* 68 NY2d 96.) After establishing this relatively lenient standard, the court nonetheless went on to caution that the Grand Jury's integrity might well be deemed impaired within the meaning of CPL 210.35 (5) "[w]hen the District Attorney's instructions to the Grand Jury are so incomplete * * * as to substantially undermine [the Grand Jury's] function" *(People v Calbud, Inc.,* 49 NY2d, at 396, *supra).* It seems to me that this language is directly applicable here.

It is now beyond dispute that one of the Grand Jury's fundamental functions is to determine whether there is legally sufficient evidence to support a particular criminal charge (CPL 190.65 [1] [a]; *see, People v Batashure,* 75 NY2d 306 [decided today]; *see also, People v Jennings,* 69 NY2d 103, 115). Indeed, in *People v Calbud, Inc.* (49 NY2d, at 394, *supra* [emphasis supplied]), the court stated that "[t]he primary function of the Grand Jury in our system is to investigate crimes and *determine whether sufficient evidence exists to accuse a citizen of a [particular] crime".* Further, in the first instance, it is the Grand Jury's *exclusive* right to determine whether there is "reasonable cause to believe" that the charged crimes were committed by the accused (CPL 190.65 [1] [b]; *see, People v Deegan,* 69 NY2d 976, 979; *People v Jennings,* 69 NY2d, at 114-115, *supra).* ***458**

Legally sufficient evidence means "competent evidence which, if accepted as true, would establish every element of an offense charged" (CPL 70.10 [1]). It goes without saying that evidence obtained in violation of the defendant's constitutional rights is not "competent" evidence within this definition *(see, People v Huntley,* 15 NY2d 72).

Thus, in order for the Grand Jury to perform its essential function in a case involving a seriously contested confession or admission, that body must be told by its legal advisor, the District Attorney, that the confession or admission cannot be used as part of the People's direct case if found involuntary *(see, People v Valles,* 62 NY2d 36, 38 ["(t)he District Attorney is required to instruct the Grand Jury on the law with respect to the matters before it"]). Such an instruction, which is standard fare for petit juries *(see, People v Huntley, supra),* is necessary to enable the Grand Jury realistically to evaluate the People's proffered evidence and to determine whether the legal sufficiency standard has been, or can be, satisfied.

Without such an instruction, the Grand Jury cannot properly determine the significance, if any, to be assigned to the testifying defendant's claims that his statement was coerced. Moreover, in cases where the Grand Jury elects to credit the defendant's claims of coercion, the absence of a proper instruction deprives the Grand Jury of the all-important knowledge that the sufficiency of the People's case must

now be assessed completely without regard to the statement. The net result is that the Grand Jury's "essential function" is "substantially undermined," and "it may fairly be said that the integrity of that body has been impaired", requiring dismissal under CPL 210.35 (5) *(People v Calbud, Inc., supra,* at 396).

Finally, the fact that the *Huntley* hearing court in this case ultimately rejected defendant's claims and found his station house statement to be voluntary does not cure the defect in the Grand Jury proceedings or otherwise vitiate the need for reversal. The issue here does not concern the sufficiency of the evidence before the Grand Jury or the propriety of admitting defendant's station house statement--questions which may well be rendered moot by the subsequent determinations of an appropriate fact finder *(see, People v Oakley,* 28 NY2d 309; *People v Valinoti,* 26 NY2d 553, 557; *People v Nitzberg,* 289 NY 523, 529-530). Rather, the dispute concerns an impairment of the *process* by which the Grand Jury reached its decision to indict. If, as I believe, this process was improperly skewed by ***459** the omission of critical legal instructions, then defendant's basic constitutional right to the intercession of an informed Grand Jury was abridged (NY Const, art I, §6; *see, People v Iannone,* 45 NY2d 589), and the strength and/or subsequently determined admissibility of the evidence before the Grand Jury is irrelevant.

For that reason, I vote to reverse the order of the Appellate Division and dismiss the indictment.

Chief Judge Wachtler and Judges Simons, Kaye, Alexander and Hancock, Jr., concur with Judge Bellacosa; Judge Titone concurs in part and dissents in part and votes to reverse and dismiss the indictment in a separate opinion.

Order reversed, etc. ***460**

Footnotes

* The *Rushen* case (464 US 114) is particularly important here because it treated an in camera inquiry conducted in the absence of the defendant *and defense counsel* as subject to harmless error analysis.

New York Official Reports

183 A.D.2d 842, 584 N.Y.S.2d 91

The People of the State of New York, Respondent,
v.
Victor DeFreece, Appellant.

Supreme Court, Appellate Division, Second Department, New York
90-04149
(May 18, 1992)

CITE TITLE AS: People v DeFreece

HEADNOTES

CRIMES
VERDICT
Sufficiency of Evidence

(1) Evidence was legally sufficient to establish defendant's guilt of sodomy in first degree and other offenses beyond reasonable doubt; People proved defendant engaged in deviate sexual intercourse consisting of contact between his mouth and vulva of person less that 11 years old; defendant contends testimony offered by victim, being neither logical nor coherent, should not have been believed by jury; however, resolution of issues of credibility, as well as weight to be accorded to evidence presented, are primarily questions to be determined by jury.

GRAND JURY
DEFECTIVE PROCEEDING

(2) Defendant's argument that recantation by witness of his testimony before Grand Jury tainted indictment proceedings and required dismissal of indictment is without merit; there is nothing to indicate there was knowing use of perjured testimony by prosecutor; moreover, since events involving two victims were separate and Grand Jury had to investigate and vote upon facts involving each count on its own merits, case does not satisfy statute's requirement of 'impairment of integrity' of Grand Jury process and qualify for exceptional remedy of dismissal of indictment; since nothing was presented to Grand Jury to indicate witness was witness to sexual abuse of girl, his testimony had no bearing upon evidence regarding those charges involving defendant's abuse of her; in any event, determination of Grand Jury that there was sufficient evidence to indict was confirmed by petit jury, which convicted defendant despite hearing absolutely no evidence of other crimes which were subject of witness's recanted testimony; thus, defendant has not demonstrated possibility of prejudice created by recanted testimony.

Appeal by the defendant from a judgment of the County Court, Orange County (Pano Z. Patsalos, J.), rendered December 21, 1989, convicting him of sodomy in the first degree, sexual abuse in the first degree, and endangering the welfare of a child, upon a jury verdict, and imposing sentence.

Ordered that the judgment is affirmed.

We disagree with the defendant's claim that the Grand Jury proceedings were tainted by the allegedly perjured testimony of one of the complainants. CPL 210.35 (5) provides that

"[a] grand jury proceeding is defective within the meaning of paragraph (c) of subdivision one of section 210.20 when ...

"[t]he proceeding otherwise fails to conform to the requirements of article one hundred ninety *to such degree that the integrity thereof is impaired and prejudice to the defendant may result"* (emphasis supplied).

The defendant's argument that the recantation by Todd C. of his testimony before the Grand Jury tainted the indictment proceedings and required dismissal of the indictment is without merit. There is nothing in the record to indicate that there was a knowing use of perjured testimony by the prosecutor *(see, People v Hutson,* 157 AD2d 574). Moreover, since the events involving the two victims were separate and the Grand Jury had to investigate and vote upon the facts involving each count on its own merits, this case does not satisfy the statute's requirement of "impairment of integrity" of the Grand Jury process and qualify for the exceptional remedy of dismissal of the indictment *(see, People v Darby,* 75 NY2d 449, 455; *People v Skye,* 167 AD2d 892). Furthermore, since nothing was presented to the Grand Jury to indicate that Todd C. was a witness to the sexual abuse of Jessica C., his testimony had ***843** no bearing upon the

evidence regarding those charges involving the defendant's abuse of her. In any event, the determination of the Grand Jury that there was sufficient evidence to indict was confirmed by the petit jury, which convicted the defendant despite hearing absolutely no evidence of the other crimes which were the subject of Todd C.'s recanted testimony. Thus, the defendant has not satisfied the second prong of the test by demonstrating the possibility of prejudice created by the recanted testimony *(see, People v Hutson, supra,* at 574-575; *People v Collins,* 154 AD2d 901, 902).

Viewing the evidence adduced at trial in a light most favorable to the People *(People v Contes,* 60 NY2d 620), we find that it was legally sufficient to establish the defendant's guilt beyond a reasonable doubt. The People proved that the defendant engaged in deviate sexual intercourse consisting, *inter alia,* of contact between his mouth and the vulva of Jessica C., a person less that 11 years old. The defendant contends that the testimony offered by Jessica C., being neither logical nor coherent, should not have been believed by the jury. However, resolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury, which saw and heard the witnesses *(see, People v Gaimari,* 176 NY 84, 94). Its determination should be accorded great weight on appeal and should not be disturbed unless clearly unsupported by the record *(see, People v Garafolo,* 44 AD2d 86, 88). Upon the exercise of our factual review power, we are satisfied that the verdict was not against the weight of the evidence (CPL 470.15 [5]).

The defendant's remaining contentions are either unpreserved for appellate review *(see, People v Balls,* 69 NY2d 641, 642) or without merit *(see, People v Suitte,* 90 AD2d 80, 88-89).

Thompson, J. P., Rosenblatt, Miller and O'Brien, JJ., concur.

End of Document

New York Official Reports

11 N.Y.3d 403, 900 N.E.2d 915, 872 N.Y.S.2d 364, 2008 N.Y. Slip Op. 09007

**1 The People of the State of New York, Respondent

v

Sheldon Ennis, Appellant.

Court of Appeals of New York
Argued October 15, 2008

Decided November 20, 2008

CITE TITLE AS: People v Ennis

SUMMARY

Appeal, by permission of the Chief Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered June 21, 2007. The Appellate Division affirmed (1) a judgment of the Supreme Court, New York County (Leslie Crocker Snyder, J.), which had convicted defendant, upon a jury verdict, of conspiracy in the second degree, assault in the first degree (two counts), assault in the second degree, criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree; and (2) an order of that Supreme Court (Robert M. Stolz, J.; op 2005 NY Slip Op 30328[U]), which had denied defendant's CPL 440.10 motion to vacate the judgment.

People v Ennis, 41 AD3d 271, affirmed.

HEADNOTES

Crimes
Right to Counsel
Conflict of Interest

(1) Defendant's claim that defense counsel failed to make appropriate use of potentially exculpatory information discovered during trial did not warrant reversal on the ground that a conflict of interest arose that significantly impacted the defense. The conflict of interest purportedly arose when defense counsel learned, during trial, of a statement by a codefendant to authorities exculpating defendant and promised codefendant's counsel that he would not reveal information about the statement until the trial ended. The personal dilemma of defense counsel stemming from the assurance of confidentiality was markedly different from the types of conflicts that have been recognized as triggering conflict of interest analysis because it was entirely subjective. The purported conflict of interest did not arise from objective facts or circumstances external to defense counsel. Defendant's argument that defense counsel's failure to raise a *Brady* violation or to otherwise attempt to use the exculpatory information at trial was a result of the purported conflict, was rejected. The actions defendant claimed that his trial counsel should have taken would not have advanced his defense.

Crimes
Right to Counsel
Effective Representation

(2) Defendant's claim that defense counsel's performance fell below constitutionally adequate levels based on his assertion that his lawyer failed to make appropriate use of potentially exculpatory information discovered during trial did not warrant reversal. Defense counsel learned, during trial, of a statement by a codefendant to authorities exculpating defendant and promised codefendant's counsel that he would not reveal information about the statement until the trial ended. Defense counsel performed as an effective ***404** advocate in many significant respects. If defense counsel had sought a severance based on the purported *Brady* violation the codefendant would undoubtedly have asserted his Fifth Amendment privilege against self-incrimination. Because the codefendant could not have been compelled to testify on defendant's behalf and his statements would not have been admissible through a third party, defense counsel could not be deemed ineffective for failing to seek a severance or to otherwise attempt to admit the statements into evidence. Nor could the representation be deemed constitutionally deficient based on defense counsel's failure to raise the *Brady* argument during trial. Had the statement been turned over, there would have been no avenue for defense counsel to admit it into evidence.

RESEARCH REFERENCES

Am Jur 2d, Criminal Law §§ 1135–1139.

Carmody-Wait 2d, Criminal Procedure §§ 172:1832–172:1837, 172:1852, 172:1855–172:1857, 172:1865, 172:1889–172:1891.

LaFave, et al., Criminal Procedure (3d ed) §§ 11.9, 11.10.

NY Jur 2d, Criminal Procedure: Procedure §§ 750, 864–868.

ANNOTATION REFERENCE

Circumstances giving rise to prejudicial conflict of interests between criminal defendant and defense counsel—state cases. 18 ALR4th 360.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: defense /2 counsel /s conflict /3 interest & ineffective /3 assistance /p brady

POINTS OF COUNSEL

Office of the Appellate Defender, New York City (*Richard M. Greenberg* of counsel), for appellant. I. Defense counsel's conflict of interest deprived Sheldon Ennis of his constitutional right to the effective assistance of counsel where, as a result of that conflict, defense counsel failed to act on exculpatory evidence that could have resulted in a new trial, established Mr. Ennis's innocence in the shooting of Billy Moody, and altered Mr. Ennis's defense to the remaining charges in the case. (*People v Berroa,* 99 NY2d 134; *People v Longtin,* 92 NY2d 640; *People v Ortiz,* 76 NY2d 652; *People v McDonald,* 68 NY2d 1; *United States v Kliti,* 156 F3d 150; *United States v Levy,* 25 F3d 146; *Cuyler v Sullivan,* 446 US 335; *People v Alicea,* 61 NY2d 23; ***405** *People v Brensic,* 70 NY2d 9; *People v Settles,* 46 NY2d 154.) II. Where defense counsel failed to timely raise a meritorious motion for a mistrial and severance based on his discovery of *Brady* material that the prosecution had never disclosed, and where defense counsel's failure was not the result of a legitimate strategic decision, Sheldon Ennis was denied the effective assistance of counsel. (*Strickland v Washington,* 466 US 668; *People v Benevento,* 91 NY2d 708; *People v Ortiz,* 76 NY2d 652; *People v Turner,* 5 NY3d 476; *People v Caban,* 5 NY3d 143; *People v Hobot,* 84 NY2d 1021; *People v Mahboubian,* 74 NY2d 174; *People v Bornholdt,* 33 NY2d 75; *People v Owens,* 22 NY2d 93; *People v Rivera,* 71 NY2d 705.) III. Where the prosecution failed to disclose significant *Brady* evidence that went directly to Sheldon Ennis's innocence in the Billy Moody shooting, and where defense counsel did not learn of that evidence until too late in the trial to take advantage of it, Mr. Ennis's convictions must be reversed. (*Brady v Maryland,* 373 US 83; *United States v Bagley,* 473 US 667; *Berger v United States,* 295 US 78; *People v Steadman,* 82 NY2d 1; *Banks v Dretke,* 540 US 668; *United States v Manning,* 56 F3d 1188; *Smith v Secretary of New Mexico Dept. of Corrections,* 50 F3d 801; *Bowen v Maynard,* 799 F2d 593; *People v Vilardi,* 76 NY2d 67; *People v Wright,* 86 NY2d 591.) IV. Where there was no evidence that Sheldon Ennis knew that anyone involved in the Randolph Sherman-Clarence Calwell incident was armed with a knife, no evidence that Mr. Ennis intended anyone to inflict physical injury on Sherman and Calwell by stabbing them, and no evidence that Mr. Ennis aided the actual stabbers in any way, his convictions for the assaults of Sherman and Calwell were obtained without legally sufficient evidence and must be reversed. (*Jackson v Virginia,* 443 US 307; *People v Contes,* 60 NY2d 620; *People v Piazza,* 48 NY2d 151; *People v Gerard,* 50 NY2d 392; *People v La Belle,* 18 NY2d 405; *People v Morales,* 130 AD2d 366; *People v Akptotanor,* 158 AD2d 694, 76 NY2d 1000; *People v Monaco,* 14 NY2d 43; *People v Rivera,* 176 AD2d 510.)

Robert M. Morgenthau, District Attorney, New York City (*Susan Axelrod* and *Patrick J. Hynes* of counsel), for respondent. I. The People did not fail to disclose *Brady* or *Giglio* material. (*People v Wright,* 86 NY2d 591; *Brady v Maryland,* 373 US 83; *People v Vilardi,* 76 NY2d 67; *People v Baxley,* 84 NY2d 208; *Giglio v United States,* 405 US 150; *People v Cwikla,* 46 NY2d 434; *United States v Bagley,* 473 US 667; *People v Bond,* 95 NY2d 840; *People v Sutherland,* 219 AD2d 523, 87 NY2d 908; *People v Clark,* 89 AD2d 820.) II. Defendant received effective ***406** assistance of trial counsel. (*People v Pizarro,* 7 NY3d 840; *People v Bongarzone-Suarrcy,* 6 NY3d 787; *People v Ortiz,* 76 NY2d 652; *People v Tamayo,* 222 AD2d 321; *United States v Moree,* 220 F3d 65; *Cuyler v Sullivan,* 446 US 335; *People v Berroa,* 99 NY2d 134; *People v McDonald,* 68 NY2d 1; *United States v Kliti,* 156 F3d 150; *United States v Levy,* 25 F3d 146.) III. The People's evidence was more than sufficient to sustain defendant's assault convictions for the stabbings of Clarence Calwell and Randolph Sherman. (*People v Danielson,* 9 NY3d 342; *People v Schulz,* 4 NY3d 521; *People v Tejeda,* 73 NY2d 958; *People v Jackson,* 65 NY2d 265; *People v Bleakley,* 69 NY2d 490; *Matter of Erin C.,* 16 AD3d 320; *People v Wilson,* 240 AD2d 774; *People v Mitchell,* 77 NY2d 624; *People v Akptotanor,* 158 AD2d 694, 76 NY2d 1000.)

OPINION OF THE COURT

Graffeo, J.

Defendant, his brother and a coconspirator were jointly tried and convicted of participating in a conspiracy to sell drugs and assaulting rival drug dealers to further the conspiracy. On appeal, defendant argues that his convictions should be reversed because his trial counsel failed to make appropriate use of potentially exculpatory information that he discovered **2 during the trial. We agree with the Appellate Division that reversal is not warranted and we therefore affirm.

Sheldon Ennis, his brother Aaron, and coconspirator Keith Taylor were named in a 23-count indictment as participants in a drug selling conspiracy in which they used violence to keep rival drug dealers from encroaching on their territory. At the joint trial of the three men, the People offered proof that Sheldon and Aaron Ennis ran their operation—known as the "Dog Pound"—out of a hotel on 38th Street in Manhattan. The Ennis brothers allowed other groups to sell drugs in the vicinity but warned them to stay outside of a designated area in front of the hotel. Those who failed to heed the warning were severely punished, as demonstrated by the two violent incidents that led to the convictions Sheldon Ennis challenges in this appeal.

One such incident, which occurred in August 1996, involved Frank "Nitti" Brown who ran a competing drug operation adjacent to the Dog Pound territory. Brown testified at trial that, for many months, he had a peaceful relationship with the Ennis brothers. That changed when Brown antagonized the brothers by his decision not to use them as his supplier. Then, *407 one of Brown's workers crossed into Dog Pound territory and sold drugs near the hotel. The Ennis brothers confronted Brown about the transgression and a verbal altercation ensued. Brown retreated to his base of operations in the Bronx, intending to return with a group of armed associates the next day. Nonetheless, that evening he and Billy Moody drove down 38th Street, accompanied by two female acquaintances. Brown and Moody both testified that they were unarmed and did not intend to provoke a fight.

Brown recounted at trial that, as he proceeded down the street, he spotted Sheldon Ennis leaning against a telephone pole. Once Sheldon saw Brown's car, he raised a gun and began to shoot. Brown swerved and then observed Aaron on the opposite side of the street. Aaron also began firing at Brown's vehicle. A third conspirator—Keith Taylor—pointed a gun at the car, although Brown was not sure whether Taylor pulled the trigger. As they drove off, Moody told Brown that he had been shot. A couple of blocks away, Brown was able to locate a police car to report the shooting. He then sought medical assistance for Moody, who survived but was paralyzed as a result of the incident. The police retrieved numerous discharged shells and casings from the area of the shooting and, at trial, a ballistics expert testified that at least two and probably more guns were involved. In connection with this shooting, the Ennis brothers and Taylor were charged with attempted murder of Moody and several counts of assault and criminal possession of a weapon.

The second violent incident occurred four months after the Moody shooting—in December 1996—when the Ennis brothers were involved in another fracas with Clarence Calwell and Randolph Sherman, rival drug dealers who ran an operation down the street. Similar to the Brown incident, the dispute arose when one of the dealers who worked for Calwell and Sherman conducted a drug sale in Dog Pound territory. Sheldon and Aaron located the rival **3 dealers and initiated a confrontation that resulted in Calwell and Sherman each suffering multiple stab wounds. Both brothers were charged with two counts of attempted murder in the second degree and multiple counts of assault.

The jury returned a verdict convicting defendant Sheldon Ennis of conspiracy in the second degree for his participation in the Dog Pound drug operation. In connection with the Moody shooting, the jury acquitted defendant of the attempted murder count but convicted him of assault in the first degree and criminal *408 possession of a weapon in the second and third degrees. Defendant was also acquitted of the two attempted murder counts arising from the stabbing of Sherman and Calwell but was convicted of one count of assault in the first degree and one count of assault in the second degree for the injuries they sustained.[1]

After the verdict but before sentencing, defendant's trial counsel—David Cooper—submitted a CPL 330.30 motion alleging that Sheldon's conviction for assault in the first degree as to the shooting of Billy Moody should be reversed based on a *Brady* violation. Cooper asserted that, during the trial, he learned that Aaron Ennis had participated in a proffer session with the District Attorney's office in which Aaron stated that he shot Billy Moody and that defendant was not present at the shooting. The People never turned over the statement as *Brady* material. Cooper explained that he was told about the statement in confidence and with the understanding that he would not disclose it until after the trial concluded. He claimed that, if the People had timely provided

the *Brady* information, he would have sought a severance and a separate trial for defendant so that he could have called Aaron as a witness. Having learned of the statement late in the trial, however, Cooper contended there was no way he could get the statement before the jury because Aaron would have invoked his Fifth Amendment privilege against self-incrimination if Cooper had tried to call him as a witness at the joint trial.

The trial court denied the CPL 330.30 motion, reasoning that, although the People should have disclosed Aaron's statement, reversal was not warranted because defense counsel knew of the information during trial, at a time when he could have pursued various remedies (including an ex parte application to the court). The court concluded that defense counsel "tactically chose not to do anything" until after the jury reached its verdict, attempting "to use the Brady doctrine as both a shield and a sword." After the motion was denied, defendant was sentenced as a predicate felon to an aggregate term of 43⅓ to 60 years in prison.

Five years later, defendant made a CPL 440.10 motion to vacate the judgment, ****4** repeating his *Brady* argument and raising ***409** an ineffective assistance of trial counsel claim. The motion was supported by the affidavit of David Cooper, Sheldon's trial attorney, who explained that it was Aaron's attorney who told him that, in an attempt to enter into a cooperation agreement with the People, Aaron stated that he shot Billy Moody and that defendant was not involved in the shooting. Cooper averred that, because he had promised Aaron's attorney that he would not disclose this information until the trial was over, he felt constrained not to alert the trial court. He further claimed that he had no "tactical or strategic reason" for his failure to act on the information during the trial. The motion court denied the application, echoing the reasoning of the trial court (2005 NY Slip Op 30328[U]).

The Appellate Division affirmed defendant's convictions, rejecting the ineffective assistance of counsel and *Brady* violation arguments for reasons similar to those articulated by the trial and motion courts (41 AD3d 271 [2007]). The court noted that there was no reasonable possibility that the People's failure to timely disclose Aaron's statement contributed to the verdict because there would have been no means for defendant to use the statement at trial, even if a severance had been granted, since Aaron would undoubtedly have invoked his Fifth Amendment privilege to avoid testifying on his brother's behalf. The court reasoned that any attempt to introduce the statement as hearsay through a third party present at the proffer session would have been unsuccessful because the statement did not fall within any hearsay exception, including the exception for declarations against penal interest. Finally, the Appellate Division also rejected defendant's claim that his assault convictions arising from the Calwell and Sherman incident were not supported by legally sufficient evidence. A Judge of this Court granted defendant leave to appeal (10 NY3d 810 [2008]).

(1), (2) Defendant raises two ineffective assistance of trial counsel arguments. First, he contends that when Cooper made a promise to Aaron's counsel not to reveal information about Aaron's exculpatory statement until the trial ended, a conflict of interest was created and reversal is necessary because the conflict significantly impacted the defense. Second, he asserts that he did not receive meaningful representation because Cooper failed to appropriately act on the information he received from Aaron's lawyer during the trial. We conclude that both arguments lack merit.

Under the state and federal constitutions, a criminal defendant is entitled to the effective assistance of counsel, defined as ***410** "representation that is reasonably competent, conflict-free and singlemindedly devoted to the client's best interests" (*People v Harris*, 99 NY2d 202, 209 [2002] [citations omitted]). A claim that defense counsel's representation was compromised by a conflict of interest requires two inquiries. First, the court must examine the nature of the relationship or circumstances that are alleged to establish a conflict. Second, if a conflict is identified, the court must determine whether the conflict "operated on the representation" (*People v Ortiz*, 76 NY2d 652, 657 [1990] [internal quotation marks and citations omitted]), i.e., ****5** whether the relationship or circumstances "bore a substantial relation to the conduct of the defense" (*People v Berroa*, 99 NY2d 134, 142 [2002] [internal quotation marks and citations omitted]).

To date, our conflict of interest cases have generally fallen into one of two categories: cases where a potential conflict of interest was identified based on defense counsel's previous or concurrent representation of a client whose interests conflicted with those of defendant (*see e.g. People v Abar*, 99 NY2d 406 [2003]; *People v McDonald*, 68 NY2d 1 [1986]) and cases where defense counsel became a witness against defendant (*see e.g. People v Lewis*, 2 NY3d 224 [2004]; *Berroa*, 99 NY2d 134 [2002]). Regardless of the circumstances, in our prior cases the potential conflicts of interest were discernible based on objective facts that were

not easily subject to manipulation by the conflicted attorney. For example, in *Abar*, the purported conflict arose from defense counsel's former employment as a prosecutor who had been involved in prior prosecutions of defendant. In *Berroa*, defense counsel's out-of-court conversations with defense witnesses created the potential that she would become a witness against her client when those witnesses later gave alibi testimony contradicting what they had previously told her.

(1) In this case, the purported conflict of interest does not arise from objective facts or circumstances external to defense counsel. Rather, it is alleged that defense counsel was torn between keeping a promise to Aaron's counsel not to reveal the exculpatory information and fulfilling his professional obligation to act in defendant's best interests. In the affidavit submitted in connection with the CPL 440.10 motion, Cooper stated that he did not tell the trial court about the alleged *Brady* violation or otherwise attempt to use the exculpatory information at trial because he felt constrained to remain silent, apparently based on his personal (as opposed to professional) ethical values.

The personal dilemma defense counsel describes is markedly different from the types of conflicts that we have previously ***411** recognized as triggering our conflict of interest analysis because it is entirely subjective. Many (perhaps most) attorneys would not have perceived any conflict; having learned information that they deemed useful to their client, they presumably would have pursued one of several available courses of action, including advising the trial court, ex parte and without necessarily divulging their source, that they had reason to believe there had been a proffer session in which exculpatory statements were made. For these lawyers, any personal concern stemming from the assurance of confidentiality would have been outweighed by the professional obligation to pursue the interests of a client who was on trial for serious offenses, including attempted murder. We are therefore hard-pressed to place the internal struggle cited by defense counsel in the same category as the conflicts of interest discussed in our precedents.

Even if we viewed this case as presenting a conflict situation, reversal would not be warranted under the second prong of the inquiry. "Whether a conflict of interest operates on ****6** the defense is a mixed question of law and fact and, as a result, our review is limited. We may disturb an Appellate Division determination on this issue only if it lacks any record support" (*Abar*, 99 NY2d at 409 [citations omitted]). Here, the Appellate Division rejected the argument that defense counsel's failure to raise a *Brady* violation or to otherwise attempt to use the exculpatory information at trial was a result of the purported conflict. Defendant argues that this conclusion is unsupported by the record because defense counsel stated that he had no tactical or strategic reason for acting as he did. But the Appellate Division was not required to accept defendant's allegations at face value. Rather, in determining what motivated defense counsel, all of the circumstances surrounding the situation could be taken into account. In this case, we cannot say that the inference drawn by the Appellate Division (and the other two fact-finding courts) lacked any support in this record, particularly because, as addressed below, the actions defendant contends that his trial counsel should have taken would not have advanced his defense.

Defendant's related claim that defense counsel's performance fell below constitutionally adequate levels is also based on his assertion that his lawyer failed to appropriately use Aaron's statement—which he characterizes as *Brady* material—at trial. Where no conflict of interest is involved, the standard for assessing the effectiveness of trial counsel is whether the attorney provided meaningful representation. New York courts have ***412** adopted a flexible approach that takes into account the fairness of the trial process as a whole and the totality of the representation (*see People v Benevento*, 91 NY2d 708 [1998]). Unlike the federal ineffective assistance standard, which requires a showing that, but for counsel's inadequacy, the outcome of the trial would have been different, New York courts do not conduct a strict prejudice inquiry (*see id*. at 713-714). However, this Court has held that it "would, indeed, be skeptical of an ineffective assistance of counsel claim absent any showing of prejudice" and that such a showing is "a significant but not indispensable element in assessing meaningful representation" (*People v Stultz*, 2 NY3d 277, 283-284 [2004]).

(2) In this case, defense counsel performed as an effective advocate in many significant respects. He vigorously cross-examined the People's witnesses, gave a strong closing argument, and succeeded in obtaining acquittals on the most serious charges facing defendant—the three attempted murder counts (one relating to the Moody shooting and the others stemming from the stabbings of Calwell and Sherman). Defendant contends that counsel operated below the minimally-required level of effectiveness because he failed to preserve an objection to the purported *Brady* violation (or to seek a mistrial or severance based on the

violation) and made no attempt to get Aaron's exculpatory statement before the jury. We disagree.

Defendant's claim that his trial should have been severed from Aaron's so that he could call Aaron as a witness is undermined by the fact that Aaron would undoubtedly have asserted his Fifth Amendment privilege against self-incrimination if this had occurred. Nor could defendant have called a witness who overheard Aaron's statement—such as Aaron's ****7** attorney—to testify as to its content because, in a trial against defendant, the statement would be hearsay not subject to any exception.

Defendant's allegation that the statement would be admissible through a third party under the exception for declarations against penal interest (DAPI) also fails. To qualify under this exception, the declarant must be unavailable, must have competent knowledge of the facts and must have known at the time the statement was made that it was against his or her penal interests (*People v Brensic*, 70 NY2d 9, 15 [1987]; *see People v Settles*, 46 NY2d 154, 167 [1978]). Even if these criteria are met, the statement cannot be received in evidence unless it is also supported by independent proof indicating that it is ***413** trustworthy and reliable (*id*.). Here, only two of the DAPI criteria are present: Aaron would have been unavailable to testify on defendant's behalf because of his Fifth Amendment privilege and, since Aaron acknowledged (and independent evidence indicated) that he participated in the shooting, he would have had competent knowledge of whether defendant was also a participant.

The requirement that the statement be contrary to the declarant's penal interest, however, poses a problem since the part of the statement that defendant would have sought to admit—that defendant was not present at the time of the shooting—is not directly inculpatory of Aaron (*Brensic*, 70 NY2d at 16 [courts "admit only the portion of (the) statement which is opposed to the declarant's interest since the guarantee of reliability contained in declarations against penal interest exists only to the extent the statement is disserving to the declarant" (citations omitted)]). Moreover, given the context in which the statements were elicited, it is questionable whether Aaron would have viewed them as being against his penal interest. Aaron made the statements at the District Attorney's office, in the presence of his attorney, at a time when he was already being prosecuted for the offense and as part of a proffer in which he apparently sought to obtain an advantage, perhaps a plea bargain for himself or leniency for Sheldon, in exchange for his cooperation. As such, Aaron was in control of whether any statement he made could be used against him and, if it was, it would only be because he had reached an agreement with the prosecution that he deemed sufficiently valuable to justify such a result. Finally, an inculpatory declaration is not admissible under the fourth criterion unless there is "sufficient competent evidence independent of the declaration to assure its trustworthiness and reliability" (*id*. at 15 [citation omitted]) and, in this case, no such proof has been identified.

Because Aaron could not have been compelled to testify on his brother's behalf and his statements would not have been admissible through a third party, defense counsel cannot be deemed ineffective for failing to seek a severance or to otherwise attempt to admit the statements into evidence. Nor can the representation be deemed constitutionally deficient based ****8** on defense counsel's failure to raise the *Brady* argument during ***414** the trial.[2] While the People have an ongoing obligation to turn over exculpatory information—and their failure to do so in this case cannot be condoned—noncompliance with this requirement will not rise to the level of a *Brady* violation unless the evidence was material which, in New York, turns on whether the defense made a specific request for the information (*People v Vilardi*, 76 NY2d 67, 77 [1990]). Here, defense counsel sought disclosure of all statements made by participants in the crime that were exculpatory of defendant. As such, the People's failure to turn over Aaron's statement would be material if there is a "reasonable possibility" that the nondisclosure contributed to the verdict (*id*.). That standard is not met because, had the statement been turned over, there would have been no avenue for defense counsel to admit it into evidence, either in the joint trial of the Ennis brothers or in a separate trial of defendant had severance been granted.

As defendant acknowledges in his brief, it was not the content of Aaron's statement that was potentially valuable to the defense; if true, the fact that defendant was not present at the shooting would be a fact already known to defendant. In other words, this is not a case where the information might have opened a line of investigation for the defense that was not otherwise available. Rather, here it was the fact that Aaron made the statement that was significant. Defendant contends that, if the jury had learned that the actual shooter stated that defendant was not involved, this would be compelling evidence supplying reasonable doubt. While the impact of such testimony is debatable since jurors would have had ample reason to question Aaron's credibility given that he had an obvious motive to lie to protect his brother, a case

could be made that, had the statement been admissible, there is at least a reasonable possibility that the outcome of the trial would have been different. But because there is no way that defendant could have presented the statement to the jury, this is a situation where the inadmissibility of the exculpatory information prevented it from being material, meaning its nondisclosure did not rise to the level of a *Brady* violation (*see e.g.* ***415** *People v Scott*, 88 NY2d 888 [1996]). As such, defense counsel's failure to preserve a *Brady* objection during the trial did not amount to ineffective assistance of counsel because an attorney is not deemed ineffective for failing to pursue an argument that had little or no chance of success.

Finally, we have considered defendant's challenge to the sufficiency of the evidence underlying the Calwell and Sherman assault convictions and find it to be without merit. ****9** There was ample evidence from which a rational jury could conclude beyond a reasonable doubt that the two brothers acted in concert and shared the intent to inflict the requisite degree of physical injury.

Accordingly, the order of the Appellate Division should be affirmed.

Chief Judge Kaye and Judges Ciparick, Read, Smith, Pigott and Jones concur.

Order affirmed.

FOOTNOTES

Footnotes

1 Defendant was convicted of six out of the nine counts charged against him in the indictment: conspiracy in the second degree, two counts of assault in the first degree, criminal possession of a weapon in the second and third degrees, and one count of assault in the second degree.

2 Although we discuss the *Brady* issue in connection with defendant's ineffective assistance of counsel claim, defendant's separate argument that reversal is warranted based on the purported *Brady* violation is not properly before this Court for review due to defense counsel's failure to preserve the issue by making a timely objection to the People's nondisclosure when he discovered it during the trial (*see People v Rogelio*, 79 NY2d 843 [1992]).

New York Official Reports

10 A.D.3d 326, 781 N.Y.S.2d 99, 2004 N.Y. Slip Op. 06447

**1 The People of the State of New York, Respondent

v

Adriano Espinal, Appellant.

Supreme Court, Appellate Division, First Department, New York
2543, 2543A
August 26, 2004

CITE TITLE AS: People v Espinal *327

HEADNOTE

Crimes
Right to Counsel

Court failed to make findings sufficient to justify dismissal of assigned counsel with whom defendant had established longstanding relationship; court made no inquiry to determine expected length of trial before another judge that attorney was scheduled to begin week after court relieved him, and apparently did not consult with other judge to verify attorney's assertions or to explore possibility of obtaining agreement that he would try instant case first—doctrine of harmless error was inapplicable to violation of defendant's right to counsel of his own choosing.

Judgment, Supreme Court, New York County (Laura Visitacion-Lewis, J., at trial and sentence), rendered February 14, 2001, convicting defendant, after a jury trial, of two counts of criminal sale of a controlled substance in the first degree, one count of criminal sale of a controlled substance in the second degree, two counts of criminal use of drug paraphernalia in the second degree, and one count of criminal possession of a controlled substance in the third degree, all under Indictment No. 10580/98, and sentencing him to an aggregate term of 15 years to life, unanimously reversed, on the law, and the matter remanded for a new trial. Judgment, same court (Budd G. Goodman, J., at plea and sentence), rendered July 5, 2001, convicting defendant, on his guilty plea, of murder in the second degree, under Indictment No. 10581/98, and sentencing him to a term of 22 years to life, to run concurrently with the sentences imposed by the judgment of conviction rendered under Indictment No. 10580/98, unanimously reversed, on the law, the guilty plea vacated, and the matter remanded for trial.

Shortly after defendant's arrest in December 1998, Lawrence H. Levner, Esq., was assigned to represent him in connection with the two indictments at issue on this appeal (as well as a third indictment not presently before us). In November 1999, Levner represented defendant at an audibility hearing. The trial of Indictment No. 10580/98 (which included charges against a codefendant) was scheduled for November 14, 2000, at which time, apparently in Levner's absence, the matter was adjourned until the next day for hearings only. On November 15, 2000, Levner appeared before the court (Budd G. Goodman, J.) and stated that he was not ready to proceed with hearings, explaining that he had concluded a first-degree murder trial before another judge only six days earlier, and had another first-degree murder trial that was scheduled to open before a third judge (Leslie Crocker Snyder, J.) the following Monday. The following colloquy then took place between Justice Goodman and Levner:

"the court: Then I will relieve you as attorney in this case.

"mr. levner: Thank you. **2

"the court: You will never have a matter in this court ever again. *328

"mr. levner: Great.

"the court: You know that this case had been on. You were directed by this court to be ready. You said you answered ready last time. There was no reason not to be ready today.

"mr. levner: Don't you see—

"the court: I don't want to hear it.

"mr. levner: Call Judge Snyder.

"the court: Step out of the well.

"mr. levner: Fine.

"the court: Thank you. And do not come back in this part again."

Levner served a written motion, dated November 15, 2000, seeking reconsideration of the court's directive relieving him as defendant's counsel. In the supporting affirmation, Levner averred that he had "spent hours at hearings in this matter," had "listened to numerous tapes," and had "spen[t] countless hours in research and investigation of the charges." Levner further stated that, during his two-year representation of defendant, he had "become close to the defendant and his mother, brother and various other family members." "The defendant has asked me," Levner represented, "to approach you . . . to reconsider your directive." The affirmation explained that Levner had been unable to go forward with hearings on November 15, 2000 because he had been "engaged in hearings for approximately five weeks before the Hon. Judge Beeler in a Murder I case which concluded on November 6th of 2000," after which he was "directed to Brief a record of over 2600 pages on or before November 30, 2000." Then, on November 13, 2000, Justice Snyder "directed me to begin a Murder I trial before her on November 20, 2000," on an indictment older than defendant's. Levner concluded that he "would commit to going forward upon a weeks [*sic*] notice after the conclusion of [Justice Snyder's] case so I may [be] properly prepared [in] this matter."

By endorsement of the papers dated November 16, 2000, Justice Goodman denied, without discussion, the motion for reconsideration of the directive relieving Levner as defendant's counsel. Thereafter, defendant was assigned new counsel, and the case was assigned to a new justice for hearings and trial. Pretrial hearings, and the joint trial of defendant and his codefendant on Indictment No. 10580/98, were held in January 2001. The trial resulted in defendant's conviction on several narcotics charges, and he was sentenced as indicated on February 14, 2001. Defendant subsequently pleaded guilty to second-degree murder in satisfaction of the companion indictment (No. 10581/ ***329** 98) and, as promised, he was sentenced on that charge to a term to run concurrently with the sentences on the narcotics charges.

Defendant now appeals from his convictions under both of the aforementioned ****3** indictments. Defendant argues, among other things, that the court improperly dismissed Levner from the case, over defendant's objection, after that attorney had represented defendant in the matter for two years, and had formed a relationship of trust and confidence with defendant. We agree that the court failed to make findings sufficient to justify the dismissal of an assigned counsel with whom defendant had an established and longstanding relationship.

An indigent defendant's constitutional right to the assistance of counsel "is not to be equated with a right to choice of assigned counsel" (*People v Sawyer*, 57 NY2d 12, 18-19 [1982], *cert denied* 459 US 1178 [1983]). As we have noted before, however, "that distinction is significantly narrowed once an attorney-client relationship is established" (*People v Childs*, 247 AD2d 319, 325 [1998], *lv denied* 92 NY2d 849 [1998], citing *People v Knowles*, 88 NY2d 763, 766-767 [1996], and *People v Hall*, 46 NY2d 873, 875 [1979], *cert denied* 444 US 848 [1979]). Once an attorney-client relationship has formed between assigned counsel and an indigent defendant, the defendant enjoys a right to continue to be represented by that attorney as "counsel of his own choosing" (*People v Arroyave*, 49 NY2d 264, 270 [1980]). While the right to be represented by counsel of choice "is qualified in the sense that a defendant may not employ [it] as a means to delay judicial proceedings" (*id.* at 271), a court may not interfere with that right "arbitrarily" (*Knowles*, 88 NY2d at 766). Thus, "judicial interference with an established attorney-client relationship in the name of trial management may be tolerable only where the court first determines that counsel's participation presents a conflict of interest or where defense tactics may compromise the orderly management of the trial or the fair administration of justice" (*id.* at 766-767). Accordingly, a court commits reversible error where it interferes with an established attorney-client relationship without making "threshold findings that [the attorney's] participation would have delayed or disrupted the proceedings, created any conflict of interest, or resulted in prejudice to the prosecution or the defense" (*id.* at 767). Such findings must demonstrate that interference with the attorney-client relationship is "justified by overriding concerns of fairness or efficiency" (*id.* at 769).

In this case, the court failed to make findings sufficient to ***330** support relieving Levner as defendant's counsel. The only explanation the court gave for dismissing Levner was that the attorney had failed to adhere to the court's direction to be ready to go forward on November 15, 2000, although he had "answered ready last time." When Levner attempted to respond to the court's statement, the court abruptly cut him off, saying "I don't want to hear it." The court thereafter summarily denied, without explanation, defendant's written motion for reconsideration, in which Levner averred that he would be ready to go to trial on a week's notice after the conclusion of the trial of an older case

that was scheduled to begin the following week. While the dismissal of defense counsel may be necessitated by his or her prolonged unavailability for trial due to another professional engagement (*see People v Bracy*, 261 AD2d 180 [1999], *lv denied* 93 NY2d 966 [1999]; *People v Nevitt*, 209 AD2d 341 [1994], *lv denied* 85 NY2d 865 [1995]), here the court made no inquiry to determine the expected length of the trial before another judge that Levner was scheduled to begin the week after the court relieved him. We further note that the court apparently did not consult with the other judge to verify Levner's assertions or, alternatively, to explore the possibility of obtaining the other judge's agreement that Levner would try the instant case first.

On appeal, the People—who took no position on Levner's dismissal in Supreme Court—argue that the court's action can be justified retrospectively, based on a close review of the record that reveals, in their view, that Levner had a history of "consistent dilatory tactics and lack of ****4** candor with the court" in this case. We readily agree that dismissal of defense counsel may be justified by findings that the attorney in question has engaged in a longstanding pattern of dilatory conduct, or that such attorney has demonstrated an egregious and persistent lack of candor with the court. In this case, however, the court made no such findings, and we are unable to undertake an independent examination of the record to make such findings of our own, since any justification for the court's action that was neither articulated by the court, nor advanced before the court by the People, is unpreserved for appellate consideration (*see People v More*, 97 NY2d 209, 214 [2002], citing *People v Dodt*, 61 NY2d 408, 416 [1984]; *People v Callendar*, 90 NY2d 831, 832 [1997]; *People v Millan*, 295 AD2d 267, 268 [2002]).

We are also unable to affirm the conviction on the ground that any error the court committed in relieving Levner was harmless. The doctrine of harmless error is inapplicable to a violation of a defendant's right to counsel of his own choosing (*see People v Arroyave*, 49 NY2d 264, 273 [1980]). ***331**

Finally, defendant's plea of guilty to the second-degree murder charge under Indictment No. 10581/98 was induced by the promise of a sentence concurrent with the sentences imposed by the prior judgment of conviction under Indictment No. 10580/98. As the People concede, our reversal of the latter conviction constrains us to reverse the plea conviction as well (*see People v Fuggazzatto*, 62 NY2d 862 [1984]).

In view of the foregoing, we need not address defendant's remaining argument. Concur—Nardelli, J.P., Tom, Andrias and Friedman, JJ.

New York Official Reports

293 A.D.2d 626, 740 N.Y.S.2d 241 (Mem), 2002 N.Y. Slip Op. 02998

The People of the State of New York, Appellant,
v.
Jose Estrada, Respondent.

Supreme Court, Appellate Division, Second Department, New York
(April 15, 2002)

CITE TITLE AS: People v Estrada

Appeal by the ***627** People from an order of the County Court, Nassau County (Boklan, J.), entered July 23, 2001, which granted the defendant's motion to dismiss the indictment pursuant to CPL 190.50 and CPL 210.20.

Ordered that the order is affirmed, and the People's time to resubmit the case to another grand jury is extended until 30 days after the date of this decision and order.

The People contend that the County Court erred in dismissing the indictment charging the defendant with, inter alia, attempted murder in the second degree based upon the People's denial of the defendant's right to testify before the grand jury. We disagree and affirm the order dismissing the indictment.

The defendant's second request to postpone presentment of the case to the grand jury to assure the presence of defense counsel, who was actively engaged in a criminal trial in Federal Court, was made in good faith and was not a dilatory tactic (*see People v Diaz,* 137 Misc 2d 181; *People v Young,* 137 Misc 2d 400; *cf. People v Arroyave,* 49 NY2d 264; *People v Stevens,* 151 AD2d 704). Moreover, the importance of a defendant being represented by counsel of his or her own choosing requires the People to make reasonable accommodations to counsel (*see People v Winslow,* 140 Misc 2d 210, 214; *cf. People v Backman,* 274 AD2d 432; *People v Stevens, supra*).

Accordingly, since the People failed to permit a short postponement of the grand jury presentment to allow the defendant to appear with his counsel, the defendant was not afforded a reasonable time to exercise his right to appear as a witness before the grand jury, and the County Court properly dismissed the indictment (*see* CPL 190.50 [5] [a]).

In the event that the People choose to resubmit this case to another grand jury as authorized herein, prior to any such presentations, the People shall inform the defendant so that he may be afforded the opportunity to testify before the grand jury.

Santucci, J.P., Smith, Goldstein and Friedmann, JJ., concur.

New York Official Reports

59 Misc.3d 801, 73 N.Y.S.3d 407, 2018 N.Y. Slip Op. 28083

**1 The People of the State of New York, Plaintiff,

v

Joseph R. Guistino, Defendant.

City Court of Glens Falls
CR-2450-17
March 20, 2018

CITE TITLE AS: People v Guistino

HEADNOTE

Crimes
Right to Counsel
Withdrawal of Assigned Counsel

In a criminal prosecution, defense counsel's motion to be relieved as assigned counsel on the grounds that the order of assignment was issued without defendant's consent or request and that defendant did not want the Public Defender's Office to represent him, failed to complete the application for assigned counsel and was not in custody was denied. Defendant had indicated at a court appearance that he was very concerned that he could not afford private counsel and requested a second application for assigned counsel, stating that he would "definitely" be submitting the application. Defendant never advised the court that he did not want the Public Defender's Office to represent him, or that he was financially able to afford counsel. In any event, defendant's preference for a particular assigned attorney was not controlling because while indigent defendants are entitled to assigned counsel, this entitlement does not encompass the right to counsel of one's own choosing. Moreover, even though defendant failed to complete the application for assigned counsel in this matter, the fact that defendant was represented by assigned counsel in an adjoining court within the county constituted competent evidence that defendant was actually qualified for assigned counsel here. Finally, a defendant is entitled to counsel at each stage and each proceeding of the case, regardless of whether he or she is incarcerated.

RESEARCH REFERENCES

Am Jur 2d Criminal Law §§ 1078–1079, 1085–1086, 1126.

Carmody-Wait 2d Right to Counsel §§ 184:55, 184:103, 184:107–184:108.

LaFave, et al., Criminal Procedure (3d ed) §§ 1.4, 11.1–11.4.

NY Jur 2d Criminal Law: Procedure §§ 739, 750–751, 757, 761, 764, 766.

ANNOTATION REFERENCE

Indigent accused's right to choose particular counsel appointed to assist him. 66 ALR3d 996.

FIND SIMILAR CASES ON THOMSON REUTERS WESTLAW

Path: Home > Cases > New York State & Federal Cases > New York Official Reports

Query: right! /5 counsel! & cho! & qual! /5 assign!

***802 APPEARANCES OF COUNSEL**

Marcy I. Flores, *Public Defender*, for defendant.
Jason M. Carusone, *District Attorney*, for plaintiff.

OPINION OF THE COURT

Gary C. Hobbs, J.

By letter application dated March 16, 2018, the Warren County Public Defender's Office, Marcy I. Flores, Esq., moved this court for an order relieving that office from its obligation to provide legal representation to the above named defendant as directed by this court's March 16, 2018 order of assignment. In the letter motion, Ms. Flores asserts that: (1) the court's order of assignment was issued when the defendant failed to appear in court and was issued without the defendant's consent or request for indigent legal services; (2) the defendant is not incarcerated and, as a result, there is no need to assign counsel; (3) the defendant has not submitted an application for indigent legal services on this court's matter; and (4) the defendant told Ms. Flores that he does not want the Public Defender's Office to represent him. The Public Defender's motion does not allege any conflict of interest or

any ethical concerns in their representation of the defendant. The People have taken no position on the application.

Findings of Fact

On October 1, 2017, the defendant was charged in this court with the crime of criminal contempt in the second degree (Penal Law § 215.50 [3]). On October 6, 2017, the defendant was arrested and arraigned on the criminal contempt in the second degree charge, with the Public Defender's Office present. On October 6, 2017, the Public Defender's Office was assigned to represent the defendant on the criminal contempt charge. On December 19, 2017, the defendant entered a plea of guilty to the charge of criminal contempt in the second degree (Penal Law § 215.50 [3]). On December 19, 2017, the defendant was sentenced to a one-year conditional discharge, which required the defendant, among other things, to: (a) remain arrest and conviction free, (b) comply with any and all requirements of the Domestic Violence Term of this court and attend all court dates as directed by the court, and (c) to enroll in the Men's Opportunity Program through the ****2** Adirondack Samaritan Counseling Center within two weeks of December 19, 2017, and successfully complete all requirements of the Men's Opportunity ***803** Program. The defendant was represented by the Warren County Public Defender's Office throughout the case, including the plea and sentence. Upon imposition of the sentence, the Warren County Public Defender's Office was relieved as counsel for the defendant.

On January 22, 2018, this court issued a declaration of delinquency of the defendant's conditional discharge, which alleges that the defendant has violated the December 19, 2017 conditional discharge by being arrested on new criminal charges in Saratoga County and by failing to enroll in the Men's Opportunity Program within two weeks of December 19, 2017. A notice to appear was sent to the defendant directing him to appear for an arraignment on the declaration of delinquency on February 16, 2018. On February 16, 2018, the defendant appeared for his arraignment on the declaration of delinquency. On this date, the defendant requested time to obtain private counsel, and the arraignment was then adjourned to March 2, 2018, for the defendant to obtain counsel. The defendant was also provided with an assigned counsel application in the event that he was not able to afford private counsel.

On March 2, 2018, the defendant appeared in court and, on the record, expressed concerns that he could not afford private counsel. The defendant then requested another application for assigned counsel and stated that he would "definitely" submit his application for assigned counsel. The defendant, therefore, made a clear request for assigned counsel. The defendant's arraignment was again adjourned to March 16, 2018, for the defendant to complete the assigned counsel application process.

On March 16, 2018, the defendant failed to appear at court. On this date, Lynn Pucciarelli, Assistant Public Defender, indicated on the record that the defendant was not in court because he was going to a health center. This court had also received a call from the defendant indicating that he was unable to appear at court because he was going to an unidentified health center. This court inquired of Ms. Pucciarelli if the Public Defender's Office was appearing to represent the defendant, and Ms. Pucciarelli indicated that she was not aware if the defendant had completed an assigned counsel application. Ms. Pucciarelli stated that the defendant was presently being represented by the Warren County Public Defender's Office on unrelated charges in the Queensbury Town Court.

Based on the defendant's March 2, 2018 statement, made on the record, that he was unable to afford private counsel and ***804** that he "definitely" wanted to apply for assigned counsel, and further based on Ms. Pucciarelli's March 16, 2018 representation that the Public Defender's Office was presently representing the defendant on pending charges in the Queensbury Town Court, this court issued a March 16, 2018 order of assignment directing the Warren County Public Defender's Office to provide legal representation to the defendant on this court's pending declaration of delinquency. The Public Defender now seeks to vacate that order of assignment.

Conclusions of Law

The right to legal representation in a criminal matter is a basic right guaranteed by the Constitutions of New York and the United States and by state statutes. (*Gideon v Wainwright*, 372 US 335 [1963]; *Hurrell-Harring v State of New York*, 15 NY3d 8 [2010].) In 1965, the ****3** Court of Appeals held that the right to legal counsel in criminal cases included all crimes, including both misdemeanors and felonies, not just major crimes. (*People v Witenski*, 15 NY2d 392 [1965].) In response to the *Gideon* and *Witenski* decisions, New York enacted County Law article 18-B and created a county-based system of delivering mandated legal services to indigent defendants to ensure that they receive meaningful and effective assistance of counsel.

Thus, the state constitutional right to counsel has been held to be a "cherished principle" that is worthy of the "highest degree of [judicial] vigilance." (*People v Ramos*, 99 NY2d 27, 32 [2002], quoting *People v West*, 81 NY2d 370, 373 [1993], citing *People v Harris*, 77 NY2d 434, 439 [1991], *People v Settles*, 46 NY2d 154, 160-161 [1978], and *People v Cunningham*, 49 NY2d 203, 207 [1980].) The defendant's constitutional right to counsel attaches indelibly in two situations. First, it arises where, *as here*, formal criminal proceedings have commenced against the defendant, "*whether or not the defendant has actually retained or requested a lawyer*." (*Ramos* at 32, citing *People v Di Biasi*, 7 NY2d 544 [1960] [emphasis added].) Second, the right to counsel attaches when an uncharged individual "has actually retained a lawyer in the matter at issue or, while in custody, has requested a lawyer in that matter." (*Ramos* at 32-33, citing *People v West*, 81 NY2d 370, 373-374 [1993], *People v Skinner*, 52 NY2d 24 [1980], and *People v Hobson*, 39 NY2d 479, 481 [1976].)

In *Hurrell-Harring v State*, the Court of Appeals held that "[i]t is clear that a criminal defendant, regardless of wherewithal, ***805** is entitled to 'the guiding hand of counsel at every step in the proceedings against him.' " (*Hurrell-Harring v State of New York*, 15 NY3d 8, 20 [2010] [some internal quotation marks omitted], citing *Gideon v Wainwright*, 372 US at 345, and *Powell v Alabama*, 287 US 45, 69 [1932].) The Court of Appeals further held that the right to counsel attaches at the defendant's initial arraignment. (*Id.*, citing *Rothgery v Gillespie County*, 554 US 191 [2008].)

Thus, the defendant has the right to have the "aid of counsel at the arraignment and at every subsequent stage of the action." (CPL 170.10 [3].) Pursuant to CPL 170.10, during the defendant's arraignment, the judge has the obligation to inform the defendant of his/her rights, to provide the defendant with an opportunity to exercise those rights, and the court must take "affirmative action as is necessary" to enforce the defendant's legal rights. (CPL 170.10 [3], [4] [a].)

Based on these legal principles, this court has considered and now addresses the Public Defender's application to vacate the March 16, 2018 order of assignment.

A. Order Issued without the Defendant's Consent or Request

In the present case, the Public Defender asserts that this court's March 16, 2018 order of assignment should be vacated because the order was issued when the defendant was not present in court and that the order was issued without the defendant's request or consent. The Public Defender's assertion that the defendant did not request or consent to the appointment of counsel, however, is directly contradicted by the defendant's March 2, 2018 statements made on the record.

At his March 2, 2018 appearance, the defendant indicated that he was very concerned that he could not afford private counsel. He then requested another application for assigned counsel and stated that he would "definitely" be submitting the application for assigned counsel. ****4** The defendant was then granted a further adjournment to March 16, 2018, to complete the application.

While the defendant may have advised the Public Defender that he does not want that office to represent him, the defendant has never advised this court of that claim. He has never advised this court that he is financially able to afford counsel. No other attorney has filed a notice of appearance for the defendant. The defendant has never made an unequivocal request for self-representation. (***806** *People v Santos*, 243 AD2d 334, 334 [1st Dept 1997], *lv denied* 91 NY2d 880 [1997].) Instead, the defendant made a clear statement, on the record, that he "definitely" wanted an opportunity to apply for assignment of counsel.

Finally, while the defendant may claim that he does not want the Public Defender's Office to represent him, the defendant's preference for a particular assigned attorney is not controlling. While indigent defendants are entitled to assigned counsel, "this entitlement does not encompass the right to counsel of one's own choosing." (*People v Puccini*, 145 AD3d 1107, 1109 [3d Dept 2016], *lv denied* 29 NY3d 1035 [2017], quoting *People v Porto*, 16 NY3d 93, 99 [2010].) To warrant a substitution of assigned counsel, defendant is required "to make specific factual allegations of serious complaints about counsel. If such a showing is made, the court must make at least a minimal inquiry, and discern meritorious complaints from disingenuous applications by inquiring as to the nature of the disagreement or its potential for resolution." (*People v Porto*, 16 NY3d at 100 [internal quotation marks omitted]; *People v Puccini*, 145 AD3d 1107, 1109 [3d Dept 2016].) Here, defendant has never articulated any specific complaints about the Public Defender's representation. His alleged general dissatisfaction with the Public Defender's representation is insufficient to warrant substitution. (*People v Puccini*, 145 AD3d 1107, 1109 [2016], citing *People v Davenport*, 58 AD3d 892, 895 [3d Dept 2009], *lv denied* 12 NY3d 782 [2009].)

B. Defendant's Failure to Complete the Application

The Public Defender further asserts that this court's order of assignment should be vacated, because the defendant has failed to complete the application for assigned counsel in this matter. This argument is also without merit.

In New York State, courts have the ultimate authority for determining eligibility for assigned counsel. (*See* County Law § 722; CPL 170.10 [3] [c]; 180.10 [3] [c]; *People v Rankin*, 46 Misc 3d 791, 802-803 [Monroe County Ct 2014] [holding that, in New York State, "an indigent defendant's eligibility determination rests with the court"].) While the courts may delegate the responsibility of screening the defendant's financial eligibility to other agencies, such as an assigned counsel administrator, the court has the ultimate responsibility to determine whether the defendant is eligible for assigned counsel. (County Law § 722; CPL 170.10 [3] [c]; 180.10 [3] [c].)

In 2016, the Office of Indigent Legal Services (ILS) published its Criteria and Procedures for Determining Assigned Counsel ***807** Eligibility. ILS's Criteria and Procedures became effective in all counties, outside the City of New York, on April 1, 2017. ILS's Criteria ****5** and Procedures provided a proposed application for defendants to complete to assist the court in determining eligibility. (*See* ILS, Criteria and Procedures for Determining Assigned Counsel Eligibility, Appendix D [Apr. 2016].) However, the ILS's Criteria and Procedures sets forth certain presumptions of eligibility that are intended to streamline the eligibility application process. (*See* ILS, Criteria and Procedures for Determining Assigned Counsel Eligibility 20-24 [Apr. 2016].) If a "presumption of eligibility" applies to the defendant, then that presumption "is rebuttable only where there is compelling evidence that the applicant has the financial resources sufficient to pay for a qualified attorney and the other expenses necessary for a competent defense." (*See* ILS, Criteria and Procedures for Determining Assigned Counsel Eligibility 20 [Apr. 2016].)

ILS's Criteria and Procedures further provide, in pertinent part, that a defendant is presumed to be eligible where the defendant has "within the past six months, been deemed eligible for assignment of counsel in another case in that jurisdiction or another jurisdiction." (*See* ILS, Criteria and Procedures for Determining Assigned Counsel Eligibility 12 [Apr. 2016].)

In the present case, the defendant was found to be eligible for assigned counsel by this court in October of 2017. The defendant was still eligible for assigned counsel in December of 2017 when, with the assistance of the Public Defender's Office, he entered his guilty plea to the charge of criminal contempt in the second degree in this court. More importantly, according to the Public Defender's Office, the defendant is presently assigned to be represented by that office on unrelated criminal charges pending in the Queensbury Town Court. The fact that the defendant is presently represented by assigned counsel in an adjoining court within this county constitutes competent evidence that the defendant is actually, not just presumptively, qualified for assigned counsel in this court's pending case. Thus, absent some compelling evidence of a substantial change in the defendant's financial situation, this court finds that the defendant is qualified for assigned counsel. If the County later determines that the defendant was not eligible for indigent legal services, then the County can seek reimbursement of the legal services from the defendant. (County Law § 722-d.)

***808** C. Defendant is not in custody.

The Public Defender asserts that, because the defendant is not in custody, an assignment of counsel is not necessary. This argument coincides with the Public Defender's Office's policy of advising defendants that their office will no longer represent a defendant, when the defendant is released from jail, even though the court has issued an order of assignment. This argument is without merit.

Once an attorney has appeared for a criminal defendant, either by assignment or by being retained, the attorney can not discontinue representation of the defendant, without approval of the court. (*See* Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.16; 22 NYCRR 604.1 [d] [6].) In order to withdraw from a case, the attorney must show that the withdrawal is justified, must give reasonable notice to the client, and must receive the court's permission. Upon court approval of termination of representation, a lawyer must take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for ****6** employment of other counsel, delivering to the client all papers and property to which the client is entitled, promptly refunding any part of a fee paid in advance that has not been earned and complying with applicable laws and rules. (Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.16 [e].)

Thus, contrary to the Public Defender's assertion, a defendant is entitled to counsel at each stage and each proceeding of the case, regardless of whether the defendant is incarcerated. (CPL 170.10 [3]; *Hurrell-Harring v State of New York*, 15 NY3d 8, 20 [2010]; *Gideon v Wainwright*, 372 US at 345; *Powell v Alabama*, 287 US 45, 69 [1932].) While the arraignment of a defendant, who is not incarcerated, may be adjourned to provide the defendant with additional time to either retain counsel or apply for assigned counsel, the adjournment should be relatively brief. Lengthy adjournments are prejudicial to both the defendant and to the People. During the period that the defendant remains unrepresented, potential defenses are not investigated or reviewed. Discovery is not conducted and motions are delayed. Potential witnesses move or otherwise become unavailable over time, and their recollection can fade. Evidence can become stale, lost or destroyed with unnecessary delays.

In the present case, the defendant's arraignment has been adjourned for a period of a month to allow the defendant to either ***809** retain private counsel or to complete the application for assigned counsel. There is no legal or factual reason for further adjournments for counsel. On March 2, 2018, the defendant indicated that he wanted assigned counsel and requested an application. He indicated that he would "definitely" file the application to determine eligibility for that assignment. On March 16, 2018, this court was advised by the Public Defender's Office that the defendant was qualified for assigned counsel, since the Public Defender's Office was assigned to represent the defendant on unrelated criminal charges in another court. Based on these facts, on March 16, 2018, this court was obligated to take "affirmative action as is necessary" to enforce the defendant's legal rights, and the order of assignment was issued. (CPL 170.10 [3], [4] [a].)

Based on the foregoing, the Public Defender's application to vacate this court's March 16, 2018 order of assignment is denied, without prejudice.

New York
Official Reports

95 N.Y.2d 227, 738 N.E.2d 773, 715
N.Y.S.2d 369, 2000 N.Y. Slip Op. 08893

The People of the State of
New York, Respondent,
v.
Scott Hansen, Appellant.

Court of Appeals of New York
115
Argued September 14, 2000;

Decided October 19, 2000

CITE TITLE AS: People v Hansen

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered October 14, 1999, which affirmed a judgment of the Washington County Court (Philip A. Berke, J.), convicting defendant, upon his plea of guilty, of attempted burglary in the first degree.

People v Hansen, 265 AD2d 598, affirmed.

HEADNOTE

Crimes
Plea of Guilty
Forfeiture of Right to Raise Issues on Appeal--Impairment of Grand Jury Fact-Finding Process

Defendant, by pleading guilty, forfeited the right to contend that the fact-finding process of the Grand Jury was impaired by the prosecutor's introduction of inadmissible videotaped hearsay, since defendant's claim does not activate a question of jurisdiction or a constitutional defect implicating the integrity of the process. While defendant's constitutional right to be prosecuted on a jurisdictionally valid indictment survived the guilty plea, his right to challenge this evidence did not. To allow such a right to survive would be fundamentally inconsistent with the plea of guilty, because the claim essentially relates to the quantum of proof required to satisfy the factual elements of the crimes considered by the Grand Jury.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Criminal Law, §§ 686-688, 721, 723.

Carmody-Wait 2d, Criminal Procedure §§ 172:1317-172:1319.

NY Jur 2d, Criminal Law, §§ 1357, 1359.

ANNOTATION REFERENCES

Validity and effect of criminal defendant's express waiver of right to appeal as part of negotiated plea agreement. 89 ALR3d 864.

POINTS OF COUNSEL

J. Anthony Jordan, Greenwich, for appellant.
I. Guilty plea does not waive right of defendant to seek dismissal of indictment ***228** on ground that Grand Jury proceeding was defective. (*People v Huston,* 88 NY2d 400; *People v Pelchat,* 62 NY2d 97; *People v Wilkins,* 68 NY2d 269; *People v Williams,* 73 NY2d 84.) II. Conduct of District Attorney rendered Grand Jury proceeding defective, thereby impairing the integrity of the proceeding. (*People v Swamp,* 84 NY2d 725; *People v Richard,* 148 Misc 2d 573; *People v Allweiss,* 48 NY2d 40; *People v Huston,* 88 NY2d 400; *People v Marquez,* 156 Misc 2d 509; *People v Calate,* 178 Misc 2d 190.) III. Defendant need only show risk that prejudice may result; need not prove actual prejudice. (*People v Darby,* 75 NY2d 449; *People v Huston,* 88 NY2d 400; *People v Calbud, Inc.,* 49 NY2d 389.)
Robert M. Winn, District Attorney of Washington County, Fort Edward, for respondent.
I. Defendant's guilty plea waived his contention that the Grand Jury proceeding was defective. (*People v Seaberg,* 74 NY2d 1; *People v Taylor,* 65 NY2d 1; *People v Gerber,* 182 AD2d 252; *People v Beattie,* 80 NY2d 840; *People v Clarke,* 93 NY2d 904; *People v Patterson,* 39 NY2d 288; *People v Gray,* 86 NY2d 10; *People v Voliton,* 83 NY2d 192; *People v Avant,* 33 NY2d 265; *People v Kazmarick,* 52 NY2d 322.) II. The integrity of the Grand Jury proceeding was not impaired and thus the proceeding was not defective pursuant to CPL 210.35 (5). (*People v Darby,* 75 NY2d 449; *People v Huston,* 88 NY2d 400; *People v Avant,* 33 NY2d 265; *People v Pelchat,*

62 NY2d 97; *People v Seaberg,* 74 NY2d 1; *People v Selikoff,* 35 NY2d 227; *Santobello v New York,* 404 US 257; *Schick v United States,* 195 US 65.)

OPINION OF THE COURT

Chief Judge Kaye.

In this prosecution for burglary and related charges, the issue is whether a defendant who pleaded guilty forfeited the right to contend that the fact-finding process of the Grand Jury, culminating in an indictment against him, was impaired by the prosecutor's introduction of inadmissible hearsay.

During the Grand Jury presentation, the complainant,Harold Stickney, testified that shortly after midnight his wife awoke him after hearing noises outside their home, and called 911; that he saw defendant on their back porch holding a snow shovel; that he watched as defendant unsuccessfully tried to open the sliding glass door to the house, then kicked it in; and that, after pointing an antique gun at defendant, the two struggled and the police arrived. Washington County Deputy ***229** Sheriff Scott Stark testified that, at the scene, he saw Stickney on the ground, and also heard someone running from the house in the snow, whereupon he and his partners chased and apprehended defendant. According to Stark, defendant stated he was on the Stickney property to shovel snow.

Defendant testified on his own behalf before the Grand Jury, admitting a history of alcohol and drug abuse. He claimed that on the night of the incident, he was "all strung out" on prescription medication, felt "extremely paranoid" and wanted to get some fresh air to cool down. Defendant acknowledged going onto the Stickney property, first to the garage and then to the porch, where he picked up a blue shovel that, in the light over the garage, prompted him to hallucinate. Then he saw Harold Stickney holding a gun.

Following this testimony, the prosecutor played a portion of a videotaped television newscast containing first a reporter's lead-in and then an interview with defendant. The reporter's full remarks, about a minute in length, noted that elderly homeowners had thwarted an intruder in an attempted break-in, and that defendant was charged with the crime. The prosecutor played two portions of these remarks--the record does not reveal which portions were actually shown to the grand jurors--before fast-forwarding to defendant's interview. In the interview, defendant claimed to have been on the Stickney property to help them shovel snow.

After playing the videotape, the prosecutor advised the grand jurors that "the only thing we are offering this for, ladies and gentlemen, is the statement made by--that's the basic statement, the statement that he gave." The prosecutor then cross-examined defendant about his conflicting statements. At the conclusion of the proceedings, the prosecutor instructed the grand jurors that "only that portion of the tape where [defendant] is making a statement should be considered by you as evidence. The rest of it should be stricken from your deliberations in this case." Defendant was indicted on charges of first degree burglary, attempted second degree burglary, second degree assault and first degree reckless endangerment.

Defendant sought dismissal of the indictment on the ground that the Grand Jury proceeding was defective because the videotaped remarks amounted to unsworn hearsay that prejudiced him (CPL 210.20, 210.35). The motion court found that the prosecutor had played the reporter's remarks inadvertently, and denied the application, concluding both that the ***230** prosecutor submitted the tape for the purpose of showing defendant's contradictory statement and that the reporter's remarks were, in substance, also testified to under oath by the witnesses in the Grand Jury. Defendant thereafter pleaded guilty to one count of attempted first degree burglary and the Appellate Division affirmed, concluding that defendant's plea amounted to a "waiver" of the contention that the videotape was improperly admitted before the Grand Jury. We now affirm.

Discussion

A plea of guilty, as we have repeatedly observed, generally marks the end of a criminal case, not a gateway to further litigation (*People v Taylor,* 65 NY2d 1, 5). As a rule, a defendant who in open court admits guilt of an offense charged may not later seek review of claims relating to the deprivation of rights that took place before the plea was entered (*see, People v Di Raffaele,* 55 NY2d 234, 240; *see also, Tollett v Henderson,* 411 US 258, 267). This is so because a defendant's "conviction rests directly on the sufficiency of his plea, not on the legal or constitutional sufficiency of any proceedings which might have led to his conviction after trial" (*People v Di Raffaele, supra,* at 240). A guilty plea will thus encompass a waiver of specific rights attached to trial, such as the right to a trial by jury and to confrontation, and it will also effect a forfeiture of the right to revive certain claims made prior to the plea.[1]

A guilty plea does not, however, extinguish every claim on appeal. The limited issues surviving a guilty plea in the main relate either to jurisdictional matters (such as an insufficient accusatory instrument) or to rights of a constitutional dimension that go to the very heart of the process (such as the constitutional speedy trial right, the protection against double jeopardy or a defendant's competency to stand trial) (*see, People ex rel. Battista v Christian,* 249 NY 314, 318; *People v Beattie,* 80 NY2d 840, 842; *see also,* Rosenblatt, Cohen and Brownstein, *Criminal Appellate Practice,* in Ostertag and Benson, General Practice in New York § 38.8, at 32 [***231** 25 West's New York Practice Series, 1998]).[2] The critical distinction is between defects implicating the integrity of the process, which may survive a guilty plea, and less fundamental flaws, such as evidentiary or technical matters, which do not.[3]

Defendant contends that his guilty plea did not "waive" his right to seek dismissal of the indictment on the ground that the prosecutor, by showing portions of the videotaped reporter's remarks, impaired the integrity of the Grand Jury proceeding. Defendant's claim, actually a matter of forfeiture, does not activate a question of jurisdiction. Before a person may be publicly accused of a felony, and required to defend against such charges, the State must persuade a Grand Jury that sufficient legal reasons exist to believe the person guilty (*People v Iannone,* 45 NY2d 589, 594). That occurred here. An indictment is rendered jurisdictionally defective only if it does not charge the defendant with the commission of a particular crime, by, for example, failing to allege every material element of the crime charged, or alleging acts that do not equal a crime at all (*id.,* at 600). In this case, the Grand Jury returned a valid and sufficient accusatory instrument enabling the court to acquire jurisdiction to try defendant, and requiring him to proceed to trial as to a specific criminal transaction (NY Const, art I, § 6; *People ex rel. Battista, supra,* 249 NY, at 319; *People v Ford,* 62 NY2d 275, 281-282).

Additionally, a defendant may not forfeit a claim of a constitutional defect implicating the integrity of the process. Ordinarily, following a defendant's admission of culpability as to the crime charged, a guilty plea does forfeit a claim "that ***232** the criminal proceedings preliminary to trial were infected with impropriety and error" (*People v Di Raffaele, supra,* at 240). As the United States Supreme Court has explained, a guilty plea "renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established" (*Menna v New York,* 423 US 61, 63, n 2, *supra*). Flaws of an evidentiary or technical nature are thus forfeited by a guilty plea.

Defendant in essence seeks a review of the fact-finding process engaged in by the grand jurors with respect to the videotaped remarks. While his constitutional right to be prosecuted on a jurisdictionally valid indictment survived the guilty plea, his right to challenge this evidence did not (*see, People v Sobotker,* 61 NY2d 44, 48 [although a constitutional right may survive a guilty plea, a related statutory right is forfeited if it confers more than the Constitution requires]). To allow such a right to survive here would be fundamentally inconsistent with the plea of guilty, because, at its base, the claim essentially relates to the quantum of proof required to satisfy the factual elements of the crimes considered by the Grand Jury (*see, People v Dunbar,* 53 NY2d 868, 871). Having pleaded guilty, defendant is not now entitled to revisit an evidentiary error in a pretrial proceeding (*see, People v Di Raffaele, supra,* at 240). (We note that defendant, who was present during the showing of the videotape, does not indicate which portions the grand jurors actually saw.)

Defendant's reliance on *People v Pelchat* (62 NY2d 97), is misplaced. In *Pelchat,* the prosecutor knowingly allowed the defendant to enter a guilty plea to a marihuana offense even though there was no evidence before the Grand Jury to support the belief that the defendant had committed a crime. We recognized that the integrity of the criminal justice system would be impaired if a criminal proceeding could continue even after the prosecutor learned that jurisdiction was based on an empty indictment. The prosecutor's knowledge that the only evidence supporting the accusatory instrument was false rendered the instrument void, and placed the defendant's claim in that category of rights surviving a guilty plea. *Pelchat* hinged substantially on the constitutional function of the Grand Jury to indict, as well as on the prosecutor's duty of fair dealing.

By contrast, here, the motion court held that there was sufficient evidence before the Grand Jury to support every element ***233** of the crimes charged. Obviously, on a motion to dismiss the indictment, the fact that inadmissible evidence, inadvertently adduced, has been introduced into criminal proceedings does not necessarily alter the validity of the proceedings; rather, such a defect renders the indictment dismissible when the remaining evidence is insufficient to sustain the indictment (*People v Avant,* 33 NY2d 265,

271). After a guilty plea, however, the sufficiency of the evidence before the Grand Jury cannot be challenged (*People v Kazmarick,* 52 NY2d 322, 326).

Defendant relies additionally on our statement that "defects in Grand Jury proceedings (as opposed to claims of insufficiency of evidence to support the indictment, which are barred by CPL 210.30 [6]) may be raised even after a plea of guilty" (*People v Wilkins,* 68 NY2d 269, 277, n 7). However, our decision in *People v Dunbar* (53 NY2d 868, *supra*), upon which the *Wilkins* footnote relied, was limited to review of a defect alleged to be of a jurisdictional nature: whether a nonresident Special Assistant District Attorney had authority to present a matter to a Grand Jury (*People v Dunbar, supra,* at 871). Jurisdictional matters, of course, do survive the entry of a guilty plea. Thus, *Wilkins* does not expand the limited group of issues that survive a guilty plea.

Accordingly, the order of the Appellate Division should be affirmed.

Judges Smith, Levine, Ciparick, Wesley and Rosenblatt concur.
Order affirmed. ***763**

Footnotes

1 Forfeiture occurs by operation of law as a consequence of the guilty plea, with respect to issues that do not survive the plea. Waiver occurs when a defendant intentionally relinquishes or abandons a known right that would otherwise survive a guilty plea (*see, People v Thomas,* 53 NY2d 338, 342, n 2). A waiver of the claims that survive a guilty plea may also be bargained-for, such as the waiver of the right to appeal (*People v Seaberg,* 74 NY2d 1, 10).

2 A defendant may raise, after a guilty plea, certain constitutional claims such as the voluntariness of a plea (*People v Seaberg, supra,* 74 NY2d, at 10); speedy trial claims (*People v Blakley,* 34 NY2d 311, 314); double jeopardy claims (*Menna v New York,* 423 US 61); competence to stand trial (*People v Armlin,* 37 NY2d 167, 172; *People v Francabandera,* 33 NY2d 429, 434-435); and the constitutionality of a statute under which the defendant was convicted (*People v Lee,* 58 NY2d 491, 494).

3 Claims that are foreclosed by a guilty plea have, for example, included pre-indictment prosecutorial misconduct (*People v Di Raffaele,* 55 NY2d 234, *supra*); selective prosecution (*People v Rodriguez,* 55 NY2d 776); failure to provide CPL 710.30 notice (*People v Taylor,* 65 NY2d 1, *supra*); the statutory right to a speedy trial (*People v Friscia,* 51 NY2d 845; *People v Brothers,* 50 NY2d 413); the denial of an application for leave to file a late motion to suppress (*People v Petgen,* 55 NY2d 529); transactional immunity (*People v Flihan,* 73 NY2d 729); the exercise of alleged discriminatory peremptory challenges (*People v Green,* 75 NY2d 902); an ex post facto challenge to an evidentiary rule change (*People v Latzer,* 71 NY2d 920); and alleged unconstitutional statutory presumptions (*People v Thomas,* 53 NY2d 338, *supra*).

New York
Official Reports

17 N.Y.3d 46, 950 N.E.2d 118, 926
N.Y.S.2d 382, 2011 N.Y. Slip Op. 03887

**1 The People of the State
of New York, Respondent
v
Kenneth Hayes, Appellant.

Court of Appeals of New York
79
Argued March 23, 2011

Decided May 10, 2011

CITE TITLE AS: People v Hayes

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered April 6, 2010. The Appellate Division affirmed a judgment of the Supreme Court, New York County (Ronald A. Zweibel, J.), which had convicted defendant, upon a jury verdict, of assault in the second degree and criminal possession of a weapon in the fourth degree.

People v Hayes, 72 AD3d 441, affirmed.

HEADNOTES

Crimes
Disclosure
Failure to Disclose Exculpatory Material—No Affirmative Duty to Obtain Potentially Exculpatory Evidence for Defendant

(1) In a prosecution for assault and possession of a weapon arising from a stabbing which occurred in a crowded movie theater, the failure of the police to interview or acquire the contact information of two bystanders who made statements indicating that the victim was the initial aggressor and possessed the knife first, which were overheard by a police sergeant safeguarding the crime scene, did not constitute a *Brady* violation (*Brady v Maryland*, 373 US 83 [1963]). While the prosecution's duty to disclose favorable evidence that is material to guilt requires the preservation of exculpatory evidence already within the People's possession, the People have no affirmative duty to obtain potentially exculpatory evidence for the benefit of a criminal defendant. Here, the People met their obligation under *Brady* when they disclosed to defendant, during trial preparation, the content and substance of the two statements at issue. The prosecution was not required to impart identifying information unknown to them and not within their possession, and had no responsibility to acquire the contact information of the makers of the statements.

Crimes
Evidence
Use of Hearsay Evidence to Challenge Police Investigation

(2) In a prosecution for assault and possession of a weapon arising from a stabbing which occurred in a crowded movie theater, the trial court properly exercised its discretion when it precluded defendant, during the cross-examination of the police sergeant who safeguarded the crime scene, from introducing hearsay statements from two anonymous bystanders for the purpose of challenging the thoroughness of the police investigation. While a challenge to the adequacy of a police investigation may constitute a permissible nonhearsay purpose where appropriate, there is no rule requiring the automatic admission of any hearsay statement. The trial court, in exercising its discretion to determine the scope of cross-examination, must weigh the probative value of hearsay evidence against the dangers of speculation, *47 confusion, and prejudice. Here, the trial court concluded that the use of the hearsay statements, which indicated that the victim was the initial aggressor and possessed the knife first, would have created an unacceptable risk that the jury would consider the statements for their truth. Furthermore, the hearsay statements were not so critical that their exclusion deprived defendant of due process. Since it was undisputed that at a certain point during the altercation, defendant came into possession of a knife and the victim was unarmed, the crucial inquiry with respect to defendant's justification defense was whether defendant was justified in the use of deadly physical force against an unarmed victim. Therefore, the relevancy of the hearsay statements was diminished because the question of whether the knife was initially possessed by the victim was not decisive of the issue of

defendant's justified use of deadly physical force at the time of the alleged stabbing (*see* Penal Law § 35.15 [2] [a]).

RESEARCH REFERENCES

Am Jur 2d, Depositions and Discovery §§ 256, 280; Am Jur 2d, Witnesses §§ 782, 816.

Carmody-Wait 2d, Discovery §§ 187:84, 187:86–187:90, 187:95, 187:98; Carmody-Wait 2d, Testimony of Witnesses § 195:104.

LaFave, et al., Criminal Procedure (3d ed) §§ 20.3, 24.3, 24.4.

McKinney's, Penal Law § 35.15 (2) (a).

NY Jur 2d, Criminal Law: Procedure §§ 1692, 1694, 1698, 1701, 2305.

ANNOTATION REFERENCE

See ALR Index under Cross–Examination; Discovery; Exculpatory Evidence; Hearsay.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: police /s fail! /3 interview investigat! /p exculpatory & duty /3 disclos!

POINTS OF COUNSEL

Legal Aid Society, Criminal Appeals Bureau, New York City (*John Schoeffel* and *Steven Banks* of counsel), for appellant.
I. In this justification case which turned on the question of who first produced the knife, a police sergeant who heard two witnesses independently state that it was the wounded man—and not appellant—who had done so had a *Brady* duty to request their contact information, or to take some other reasonable step to preserve the exculpatory information in a form that would make it possible for a defendant to investigate it and to use it at ***48** a trial. (*Brady v Maryland*, 373 US 83; *Youngblood v West Virginia*, 547 US 867; *Strickler v Greene*, 527 US 263; *People v Hunter*, 11 NY3d 1; *People v Vilardi*, 76 NY2d 67; *United States v Bagley*, 473 US 667; *Kyles v Whitley*, 514 US 419; *United States v Agurs*, 427 US 97; *Giglio v United States*, 405 US 150; *People v Wright*, 86 NY2d 591.) II. Under New York and federal law, the trial court was required to permit the defense to use statements on cross-examination of police witnesses for the limited nonhearsay purpose, held proper in *Kyles v Whitley* (514 US 419 [1995]), of challenging the adequacy of their investigation into the main disputed factual issue of whether the complainant had the knife. (*People v Gissendanner*, 48 NY2d 543; *Davis v Alaska*, 415 US 308; *People v Hudy*, 73 NY2d 40; *People v Knight*, 80 NY2d 845; *People v Cade*, 73 NY2d 904; *People v Schwartzman*, 24 NY2d 241; *People v Corby*, 6 NY3d 231; *Olden v Kentucky*, 488 US 227; *Delaware v Van Arsdall*, 475 US 673; *People v McDowell*, 9 NY2d 12.)
Cyrus R. Vance, Jr., District Attorney, New York City (*Gina Mignola* and *AmyJane Rettew* of counsel), for respondent.
The trial judge properly handled the issues raised by comments one officer overheard from the crowd while guarding crime scene blood evidence from contamination. (*Youngblood v West Virginia*, 547 US 867; *People v Hilts*, 13 NY3d 895; *People v Rodriguez*, 100 NY2d 30; *Brady v Maryland*, 373 US 83; *People v Colon*, 13 NY3d 343; *People v Fuentes*, 12 NY3d 259; *People v Hunter*, 11 NY3d 1; *People v Garcia*, 46 AD3d 461; *DiSimone v Phillips*, 461 F3d 181; *United States v Rivas*, 377 F3d 195.)

OPINION OF THE COURT

Jones, J.

This appeal presents two issues for our review. First, whether the failure of the police to interview witnesses after overhearing two potentially exculpatory statements constituted a *Brady* violation. Second, whether defendant was improperly precluded during cross- ****2** examination from challenging the adequacy of the police investigation.

I

It is undisputed that in the early morning of August 8, 2004, Charles Shell and 10 friends attended the 1:00 a.m. showing of a movie in a Times Square theater. In the crowded theater —a two-level auditorium with a capacity for approximately 578 people—Shell and his friends were loudly talking during the ***49** early portions of the movie when someone shouted at them to be quiet. At this point, the versions of the salient facts diverge.

According to the People, when Shell looked away from the movie, he observed his friends out of their seats and facing a group of approximately 10 people standing on the balcony level of the theater. The group, which included defendant Kenneth Hayes, descended from the balcony level. Shell and

his friends left their seats to approach the group and observed defendant pacing back and forth in a "rocking motion," saying "Who want it?" When Shell confronted defendant, defendant grabbed Shell's left wrist, blocked his right arm, punched Shell twice in the stomach, and fled from the theater. Shell realized that he had been, in fact, stabbed when he observed blood on his shirt.

Defendant claims that he went to the lower level of the theater to politely ask Shell and his friends to refrain from talking during the movie. After he made the request, Shell leapt from his seat and confronted defendant, making a gesture with respect to his belt—an indication to defendant that Shell had a weapon. Shell removed a knife from his waistband and swung at defendant with his left arm. Defendant used his left hand to grab Shell's arm and his right hand to wrest the knife away. During the course of the altercation, defendant was pushed onto the stairs leading up to the balcony of the theater. While he was on the ground, leaning on the stairs with possession of the knife, defendant attempted to block a further punch, but the forward momentum of Shell resulted in him being stabbed. Defendant fled the theater to escape an alleged chase by Shell's friends.

Ultimately, defendant was apprehended outside of the movie theater by Sergeant Mack who had observed him fighting within the vestibule of the theater and throwing a metal object into the street—later recovered and identified as a gravity knife. After the arrest, in the midst of a hectic setting, Sergeant Mack then assigned officers to either secure the crime scene, control the crowd, gather evidence, or interview possible witnesses.

Sergeant Fitzpatrick was tasked with safeguarding the crime scene to prevent contamination of blood evidence. While guarding the location, Sergeant Fitzpatrick overheard two separate individuals claim, "That's the guy [referring to Shell], . . . he had the knife first, he got it taken away from him, he got what he deserved" and "That guy [Shell] pulled the knife out first, the other guy took it away from him." Sergeant Fitzpatrick did ***50** not ascertain the identities of the potential witnesses, obtain contact information, or otherwise investigate these two statements.

During trial preparation, Sergeant Fitzpatrick disclosed these two statements to ****3** the prosecution, and the People immediately advised defendant of this newfound information. Defendant argued before the trial court that the lack of police investigation of the two statements and the failure to obtain contact information constituted a *Brady* violation. Defendant also sought to use the statements for the nonhearsay purpose of challenging the completeness of the police investigation. The trial court ruled that no *Brady* violation was committed by the People and precluded defense counsel, during the cross-examination of Sergeant Fitzpatrick, from eliciting testimony regarding the two statements. After a jury trial, defendant was acquitted of first degree assault, but convicted of second degree assault and weapon possession.

In a 3-2 decision, the Appellate Division affirmed the judgment, holding that the People did not violate their disclosure obligations under *Brady* and had no duty to obtain the identities or contact information of the bystanders (72 AD3d 441, 441-442 [1st Dept 2010]). Furthermore, the Appellate Division held that the trial court properly exercised its discretion in limiting defendant's cross-examination for the purpose of challenging the thoroughness of the police investigation (*id.* at 442). A Judge of this Court granted defendant leave to appeal (15 NY3d 751), and we now affirm.

II

In the seminal case *Brady v Maryland* (373 US 83, 87 [1963]), the United States Supreme Court held that a criminal defendant's right to due process is violated when the prosecution suppresses favorable evidence that is material to guilt because every criminal defendant should "be afforded a meaningful opportunity to present a complete defense" (*California v Trombetta*, 467 US 479, 485 [1984]). "To establish a *Brady* violation, a defendant must show that (1) the evidence is favorable to the defendant because it is either exculpatory or impeaching in nature; (2) the evidence was suppressed by the prosecution; and (3) prejudice arose because the suppressed evidence was material" (*People v Fuentes*, 12 NY3d 259, 263 [2009]; *see also Strickler v Greene*, 527 US 263, 281-282 [1999]).

(1) Here, defendant claims that the police and the People committed a *Brady* violation by failing to interview, or at a ***51** minimum, acquire the contact information of the two individuals who made the statements overheard by Sergeant Fitzpatrick. While defendant's argument is couched in *Brady* terms, when distilled, he essentially seeks a rule that would impose an affirmative duty upon the police to obtain potentially exculpatory evidence for the benefit of a criminal defendant. However, this Court has declined to impose such an obligation.

In *People v Alvarez* (70 NY2d 375 [1987]), the defendant, charged with various Vehicle and Traffic Law offenses for intoxicated driving, asked this Court to require the police to obtain and preserve additional breath samples for later testing because the initial samples were destroyed when tested by the police. We concluded that there is no "basis for a rule, sought by defendants in this case, that would require the police to affirmatively gather evidence for the accused" (*Alvarez*, 70 NY2d at 381). And in *People v Reedy* (70 NY2d 826, 827 [1987]), where ****4** the defendant sought a copy of a personal account written by the victim of an attempted rape, we held, among other things, that the People had no obligation to disclose evidence "not in their possession or control." In addition, the Supreme Court has similarly noted that it is "[l]ess clear from our access-to-evidence cases the extent to which the Due Process Clause imposes on the government the additional responsibility of guaranteeing criminal defendants access to exculpatory evidence beyond the government's possession" (*Trombetta*, 467 US at 486).

While this Court has instructed that "[a] necessary corollary of the duty to disclose is the obligation to preserve evidence until a request for disclosure is made" (*People v Kelly*, 62 NY2d 516, 520 [1984]), defendant erroneously equates the word "preserve" with "obtain" or "acquire." There is a difference between preserving evidence already within the possession of the prosecution and the entirely distinct obligation of affirmatively obtaining evidence for the benefit of a criminal defendant. The protection of *Brady* extends to """"discoverable evidence gathered by the prosecution" (*Kelly*, 62 NY2d at 520) and seeks to ensure the disclosure, or prevent the destruction of exculpatory information already within the People's possession (*see e.g. Kelly*, 62 NY2d at 520 [in a larceny and criminal possession of property case, the Court found a *Brady* violation when the police permanently lost property *within their possession*]; *People v Cortijo*, 70 NY2d 868 [1987] [Court held no *Brady* violation occurred where the defendant had an opportunity to ***52** use the allegedly exculpatory information at trial, but the People are only required to disclose exculpatory material information in their control]; *People v Brown*, 67 NY2d 555, 559 [1986] ["(T)he People unquestionably have a duty to disclose exculpatory material in their control"]). Here, the People met their obligation under *Brady* when they disclosed the statements to defendant; the prosecution was not required to impart identifying information unknown to them and not within their possession.

The recent federal case of *United States v Rodriguez* (496 F3d 221 [2d Cir 2007]) is illustrative. There, the defendant sought to compel production of any notes created by the government during their investigation of witnesses. The government claimed that no notes were created memorializing the interviews, and the defendant responded that this constituted a *Brady* violation. The Second Circuit held that while exculpatory information that had been procured must be disclosed, the government investigators had no affirmative obligation to create notes for the benefit of the defendant (*id.* at 224-225). Here, similarly, while the People fulfilled their duty by apprising defendant of the content and substance of the statements, they had no responsibility to acquire the contact information of the makers of the statements.

Accordingly, we adhere to our precedent, decline to impose an affirmative obligation upon the police to obtain exculpatory information for criminal defendants, and hold that the failure of the police and the People to investigate the sources of the two statements was not a *Brady* violation.

III

Defendant additionally argues that he was improperly precluded from utilizing the two statements and challenging the thoroughness of the police investigation pursuant to ****5** *Kyles v Whitley* (514 US 419 [1995]). Defendant's argument is unavailing.

In *Kyles*, the Supreme Court, discussing the materiality under *Brady* of witness statements that were not disclosed, acknowledged that it is a common and accepted tactic for defendants to challenge the adequacy of a police investigation. There, during the investigation of a murder, the police relied upon an informant named "Beanie." Although Beanie should have been considered a suspect, the police failed to question and investigate him, instead relying on him despite his "eager[ness] to cast ***53** suspicion on Kyles" (*id.* at 425), as evidenced by an internally inconsistent, and continuously evolving narrative of the incident. The Supreme Court reasoned that "the defense could have examined the police to good effect on their knowledge of Beanie's statements and so have attacked the reliability of the investigation in failing even to consider Beanie's possible guilt" (*id.* at 446). If this line of inquiry were pursued, "the defense could have laid the foundation for a vigorous argument that the police had been guilty of negligence" (*id.* at 447).

Despite this recognized strategy, a criminal defendant does not have an unfettered right to challenge the adequacy of a police investigation by any means available. It is well settled that "[a]n accused's right to cross-examine witnesses . . . is not absolute" (*People v Williams*, 81 NY2d 303, 313 [1993]). The scope of cross-examination is within the sound discretion of the trial court (*see People v Corby*, 6 NY3d 231, 233 [2005]) and it must "weigh the probative value of such evidence against the possibility that it 'would confuse the main issue and mislead the jury . . . or create substantial danger of undue prejudice to one of the parties' " (*id.* at 234; *see People v Davis*, 43 NY2d 17, 27 [1977]).

Defendant contends that the statements were germane to his justification defense because it established that Shell was the initial aggressor and possessed the knife first. Based on that premise, defendant sought to utilize the statements and argue that the investigation was inadequate because the police: (1) failed to fingerprint the knife, and (2) failed to interview, or obtain the contact information of the two individuals who made the statements.

(2) While a defendant has a constitutional right to present a defense, """"[t]he right to present a defense 'does not give criminal defendants carte blanche to circumvent the rules of evidence' " (*People v Cepeda*, 208 AD2d 364, 364 [1st Dept 1994], quoting *United States v Almonte*, 956 F2d 27, 30 [2d Cir 1992]). Challenging the adequacy of a police investigation may constitute a permissible nonhearsay purpose where appropriate, but there is no rule requiring the automatic admission of any hearsay statement (*see Buie v Phillips*, 298 Fed Appx 63, 66 [2d Cir 2008] [there is no "unfettered right to introduction of hearsay testimony bearing no assurance of reliability"]). Here, the trial court did not abuse its discretion in concluding that the use of the anonymous hearsay in cross-examination would have created an unacceptable risk that the jury would consider the statements for their truth.

***54** Furthermore, the hearsay statements were not so critical that their exclusion ****6** deprived defendant of due process (*cf. Chambers v Mississippi*, 410 US 284 [1973]). Penal Law § 35.15 (2) (a) provides that deadly physical force may not be used unless:

> "(a) The actor reasonably believes that such other person is using or about to use deadly physical force. Even in such case, however, the actor may not use deadly physical force if he or she knows that with complete personal safety, to oneself and others he or she may avoid the necessity of so doing by retreating."

Despite the conflicting accounts of the incident in question, it is undisputed that at a certain point during the altercation, defendant came into possession of a knife and Shell was unarmed. Defendant's justification defense must be viewed at this focal point and the true, crucial inquiry is whether defendant was justified in the use of deadly physical force against an unarmed Shell (*see People v Aska*, 91 NY2d 979, 981 [1998]). Even accounting for the claim that Shell continued to struggle with, and swing at defendant, Shell was no longer capable of using deadly physical force against defendant. Therefore, the relevancy of the statements is diminished because the question of whether the knife was initially possessed by Shell is not decisive of the issue of defendant's justified use of deadly physical force at the time of the alleged stabbing. As such, the two statements that Shell initially possessed the knife did not have the great probative force anticipated by defendant.

For the foregoing reasons, we hold that the trial court did not abuse its discretion in prohibiting the use of the hearsay statements and precluding defendant from challenging the adequacy and thoroughness of the police investigation where the probative force of the proposed evidence was outweighed by the dangers of speculation, confusion, and prejudice (*see generally Davis*, 43 NY2d at 27).

Accordingly, the order of the Appellate Division should be affirmed.

Chief Judge Lippman (dissenting). I agree that the apparent failure of the police to collect contact information respecting the putative witnesses overheard by Sergeant Fitzpatrick was not a due process violation sanctionable under *Brady v Maryland* (373 US 83 [1963]); this was not a case in which information favorable to the accused in the possession or control of the ***55** prosecution was suppressed and, accordingly, *Brady* does not come into play (*see id.* at 87). It does not follow, however, and I do not agree, that defendant was properly precluded from using the statements overheard by Fitzpatrick to question the adequacy of the investigation upon which his prosecution was premised.

In analyzing this second point, the majority first acknowledges that the admission of out-of-court statements for the purpose of showing that the police were aware of, yet failed to pursue, information potentially exculpatory to the accused, is not barred by the hearsay rule—indeed, that the defense tactic of relying upon such statements is

"common and accepted" (majority op at 52, citing *Kyles v Whitley*, 514 US 419, 446-447 [1995]). The majority, however, concludes that the trial court did not abuse its discretion in excluding the statements at issue because their probative value was outweighed by their potential to engender "speculation, confusion, and prejudice" (majority op at 54). This analysis is, in my view, flawed, principally because the record does not disclose that there was any exercise of discretion involved in the trial court's decision to deny defendant use of the bystander statements, but also because the exercise of discretion now described by the majority is not consistent with a defendant's basic right to present a defense.

The trial court excluded the proffered bystander statements simply as hearsay, stating at the time of its ruling, "I decide whether [the statement] comes in under the rules of evidence. And if I rule that you're bringing it out for an impermissible purpose and it's hearsay, it doesn't come out" (Appellant's Appendix at A401). This was nothing more than an erroneous application of the hearsay rule—a legal error—arising from the court's misunderstanding of the rule and the purpose for which the statements were proposed to be introduced. It should be corrected as such; there is absolutely no indication that the court, although recognizing that there was no legal bar to the statements' admission, nevertheless determined that they should not be received because, after performing a discretionary balancing of the sort the majority now retrospectively imputes, it had concluded they would likely mislead the jury.

But, even if some discretionary exercise had been involved, it would have been an abuse of discretion to deny defendant the limited use of the statements sought. The statements were facially indicative of the existence of independent witnesses whose accounts of the altercation agreed with defendant's in crucial respects and were supportive of his claim that his ***56** conduct was justified. While, because of the cited police omission, the reliability of the statements could not be tested, there was, as noted, no hearsay bar to their admission precisely to show that an investigative lapse had occurred leaving room for reasonable doubt as to the adequacy of the evidence offered by the People to meet their burden of disproving the defense of justification (*see* Penal Law § 35.00; *Matter of Y.K.*, 87 NY2d 430, 433 [1996]). The use of the statements for this legally permissible purpose would, of course, have been accompanied by appropriate limiting instructions, and as we have frequently noted, it is presumed that such instructions are heeded (*see e.g. People v Tosca*, 98 NY2d 660 [2002]).[1] Moreover, the People would have been afforded the opportunity to respond with ****7** evidence showing that their investigation was in fact suitably thorough.[2]

The discretionary preclusion of defendant's use of the statements on cross-examination would, under these circumstances, have been insupportable since a trial court has no discretion to cut off a legally permissible, non-collateral, indeed potentially exculpatory, line of inquiry by a criminal defendant. Such discretion would be utterly incompatible with the constitutional right to present a defense (*see People v Carroll*, 95 NY2d 375, 385-386 [2000]; *People v Hudy*, 73 NY2d 40, 57 [1988], *abrogated on other grounds by Carmell v Texas*, 529 US 513 [2000]; *see also Chambers v Mississippi*, 410 US 284, 294 [1973] ["The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations"]). It is no answer to say, as the majority does, that the relevancy of the statements at issue is "diminished" (majority op at 54) because it is undisputed that at the time of the stabbing defendant possessed the knife. If the stabbing occurred under the circumstances described by defendant—as an incident ***57** of defendant's disarming of the initial aggressor at close quarters—it is plain that defendant's possession of the knife at the moment of the stabbing, and the concomitant circumstance that Shell was then unarmed, would not have been preclusive of a finding of justification (*see e.g. People v Huntley*, 59 NY2d 868, 869 [1983], *affg* 87 AD2d 488, 491 [4th Dept 1982]).

Accordingly, while due process was not violated by the State's apparent failure to develop leads seemingly favorable to defendant, it was violated by the court's failure to permit defendant to bring what were evidently highly material inadequacies in the State's investigation to the factfinder's attention. The State in our adversary system of justice has no affirmative duty to seek out evidence favorable to the accused, but when its failure to do so may reasonably be understood to impair the adequacy of the proof of guilt, judicial discretion is not properly deployed to shield the alleged infirmity from the jury's scrutiny.

Judges Ciparick, Graffeo, Read, Smith and Pigott concur with Judge Jones; Chief Judge Lippman dissents in a separate opinion.

Order affirmed.

FOOTNOTES

Footnotes

1 While the majority alludes to some discretionary exercise in which the trial court concluded that there was an unacceptable risk that the bystander statements would be considered for their truth, there is no evidence of any such exercise or conclusion in the record. Nor is it explained how such a conclusion in this case would be reconciled with the presumption, most frequently invoked by the prosecution, that limiting instructions are abided.

2 The People, for example, maintain that although Officer Fitzpatrick did not record the contact information of the declarant bystanders, there were numerous other officers on the scene assigned to interview witnesses and that, if the declarants' contact information was not obtained, it was probably because, after the declarants were interviewed, it was determined that they had no first-hand information.

New York
Official Reports

5 N.Y.3d 772, 835 N.E.2d 654, 801
N.Y.S.2d 794, 2005 N.Y. Slip Op. 05752

The People of the State
of New York, Appellant
v
Garth M. Hill, Respondent

Court of Appeals of New York
123, 4
Argued June 9, 2005

Decided July 6, 2005

CITE TITLE AS: People v Hill

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered June 14, 2004. The Appellate Division affirmed an order of the Onondaga County Court (Anthony F. Aloi, J.), which had granted defendant's motion to dismiss the indictment.

People v Hill, 8 AD3d 1076, affirmed.

HEADNOTE

Grand Jury
Defective Proceeding
Integrity of Grand Jury Impaired by Actions of District Attorney

The integrity of a grand jury proceeding was substantially undermined and defendant was potentially prejudiced (CPL 210.20 [1] [c]) when the prosecutor gave an inaccurate and misleading answer to the grand jury's legitimate inquiry regarding witnesses. The prosecutor knew that a list furnished by defendant included alibi witnesses, but he kept that information from the grand jury. Having been given only names, the grand jury had no indication as to who these witnesses were or whether they could contribute anything to the case. With no basis to determine whether to call the witnesses, the grand jury voted not to hear them and voted a true bill. Upon defendant's motion, County Court correctly dismissed the indictment with leave to re-present.

APPEARANCES OF COUNSEL

William J. Fitzpatrick, *District Attorney*, Syracuse (*James P. Maxwell* and *Victoria M. White* of counsel), for appellant.
Thomas W. Ryan, Syracuse, for respondent.

OPINION OF THE COURT

Memorandum.

The order of the Appellate Division should be affirmed. ****2 *773**

Defendant furnished the prosecutor with a list of alibi witnesses seeking to have them testify before the grand jury. When presenting the case, the prosecutor told the grand jury that he had received a request from the defense asking that the grand jurors "consider and vote whether or not you want to hear from the following witnesses," and gave only their names. The foreperson asked the prosecutor, "Can we ask you anything about the witnesses? I mean were they witnesses of the crime or . . . ?" Although the prosecutor knew that the list referred to alibi witnesses, he kept that information from the grand jury and said, "I can't tell you anything. I don't know." Having been given only the names of the witnesses, the grand jury was left with no indication as to who these witnesses were or whether they could contribute anything to the case. With no basis to determine whether to call the witnesses, the grand jury voted not to hear them and ultimately returned a true bill against defendant. Upon defendant's motion, County Court dismissed the indictment with leave to re-present. This ruling was correct, considering that at the pretrial stage of the proceeding, it would not be possible to predict that the prejudice could or would be cured at trial or by guilty plea.

We agree with the lower courts that, under the circumstances of this case, the prosecutor gave an inaccurate and misleading answer to the grand jury's legitimate inquiry, thus substantially undermining the integrity of the proceeding and potentially prejudicing defendant (CPL 210.20 [1] [c]).

R.S. Smith, J. (dissenting). I agree that the prosecutor erred in not giving the grand jury more information about defendant's proposed witnesses. I do not agree, however,

that the error impaired the integrity of the grand jury proceeding and required dismissal of the indictment.

Facts and Procedural History

The indictment in question charges defendant with murder in the second degree and criminal possession of a weapon in the second degree. A witness told the grand jury that defendant had been involved shortly before 2:00 a.m. in an altercation in a bar named Bo's Place and then, after the bar closed, in a "scuffle" in the parking lot across the street during which some shots were fired and a man was wounded. The police broke up the disturbance and the witness left, but he returned a short time later to get a car out of the parking lot. The witness then ***774** observed parts of an encounter that ended with a fatal shooting by a man who, the witness said, looked like defendant.

Defendant's lawyer, in a letter to the prosecutor, asked "that the Grand Jury hear the testimony of several witnesses who were with the defendant after the initial altercation outside of Bo's Place." The letter listed seven such witnesses and described briefly what defense counsel expected their testimony to be. The first five, counsel said, would describe defendant's ****3** travel from the scene to the home of Lakisha Dixon and her mother, and Dixon and her mother would testify that the defendant was with them "for the rest of the morning." In short, it was clear from the letter that these seven people were offered as alibi witnesses, and Dixon and her mother were apparently the critical ones. Defense counsel's letter also asked the grand jury to call a police officer who, according to defense counsel, was in the area of the shooting but did not see the car that defendant was allegedly riding in.

At the time he received this letter, the prosecutor had a Syracuse Police Department report of an interview with Dixon, described in the report as defendant's girl friend. According to the report, Dixon at first said that she was with defendant "the entire time," but later "she admitted that she lied" and that defendant had told her to do so. According to the report, Dixon did not know when defendant came to her home on the night in question, except that it was "well after" 1:30 a.m.

The prosecutor presented to the grand jury defendant's request that Dixon and seven other witnesses be heard from, but did not give them any of the above information--neither defense counsel's predictions as to their testimony, nor the contradictory information in the police report. He simply told the grand jury that "I have received a request of the defense attorney" asking the grand jury to "consider and vote whether or not you want to hear from the following witnesses" and read the eight names. There was then some discussion, including the following:

> "the foreperson: Can we ask you anything about the witnesses? I mean were they witnesses of the crime or?
> "mr. o'donnell [The Prosecutor]: I can't tell you anything. I don't know.
> "the foreperson: Or the police officer, was he the one that did the arrest in the investigation? ***775**
> "mr. o'donnell: It's improper for me to discuss even what--I'd be giving my opinion on what I'd think they would say. . . .
> "the foreperson: Okay. Personal opinion; maybe you can't ****4** answer: As our legal advisor would it actually hurt the case; I mean is it better to see?
> "mr. o'donnell: As your legal advisor it would be improper for me to--
> "the foreperson: Say anything.
> "mr. o'donnell: That should be decided amongst yourselves."

The grand jury, after deliberating, voted not to call any of the witnesses, and later voted an indictment. Supreme Court dismissed the indictment with leave to re-present, a decision which the Appellate Division and now this Court have affirmed. I would reverse, and reinstate the indictment.

Discussion

Two statutes govern this case. The first is CPL 190.50 (6), which provides:

> "A defendant or person against whom a criminal charge is being or is about to be brought in a grand jury proceeding may request the grand jury, either orally or in writing, to cause a person designated by him to be called as a witness in such proceeding. The grand jury may as a matter of discretion grant such request and cause such witness to be called . . . ."

The second governing statute is CPL 210.35, which lists the errors that render a grand jury proceeding "defective" and therefore require dismissal of an indictment. The denial of the defendant's right to request the calling of witnesses is not among the errors listed, though the denial of the defendant's own right to testify before the grand jury is (CPL 210.35 [4]). Defendant relies on the catch-all subsection, CPL 210.35 (5), which requires dismissal of the indictment where: "The proceeding otherwise fails to conform to the

requirements of article one hundred ninety to such degree that the integrity thereof is impaired and prejudice to the defendant may result." ****5**

Thus, defendant is entitled to have the indictment dismissed here only if he can show both a violation of CPL 190.50 (6) and ***776** a resulting impairment of the proceeding's integrity. In my opinion, defendant clears the first hurdle but not the second.

I agree with the majority that CPL 190.50 (6) was violated, because, like the majority, I think the grand jurors' questions about who these proposed witnesses were should have been answered. In answering them, the prosecutor had several options: He could simply have read to the grand jury the relevant portions of defense counsel's letter; he could have summarized the defense position by saying, in substance, "the defense attorney says that the first seven are alibi witnesses and the eighth a police officer who was nearby at the time of the shooting"; he could, if he chose, have answered on the basis of his own information about the witnesses--including the information from the police report of the Dixon interview--as long as he summarized it fairly. By providing no information, the prosecutor deprived the grand jury of material that would have been valuable to it in exercising its discretion as to whether the witnesses should be called.

I do not believe, however (and I do not read the majority's memorandum as suggesting), that the prosecutor's error was a deliberate attempt to stack the cards against defendant in the grand jury. It seems, rather, that the prosecutor chose an unduly conservative way of handling what he might well have seen as a tricky problem. It is understandable that he was reluctant to say to the grand jury that seven of the people listed were alibi witnesses, without mentioning that one of them had told the police the alibi was false; such a partial disclosure might have been viewed by the prosecutor as misleading, and likely to create unwarranted doubts about the quality of the case against defendant. On the other hand, the prosecutor might have been concerned that, if he told the grand jurors the contents of the police report on the Dixon interview, he would later be accused of prejudicing grand jurors against defendant. I believe the prosecutor could properly have chosen either of these alternatives, and should have chosen one of them, but I conclude that his decision to do neither was nothing worse than a good faith misjudgment.

I also do not believe that, as the majority concludes, the prosecutor gave "an inaccurate and misleading answer" to the grand jurors' questions (majority mem at 773). It would be better, of course, if he had not said "I don't know" when he did have information about what the witnesses would say, but it is clear from the context that he was not really pretending to be ***777** totally ignorant. He twice told the grand jurors that it would be "improper" for him to say more, and he refused to give "my opinion on what I'd think they would say." The grand jurors must have understood that the prosecutor had information he was not sharing with them.

The prosecutor's reticence made it more difficult than it should have been for the ****6** grand jurors to perform their function, but it did not make it impossible. The grand jurors knew that there were eight people defendant wanted them to hear from. If they thought it was important to know what these people would say, they had the power to summon them and find out. Their choice not to do so was an exercise of the discretion committed to them by the statute. While a perfect performance by the prosecutor might have made the exercise of that discretion easier or better informed, I cannot conclude that the integrity of the grand jury proceeding was impaired.

The "integrity . . . is impaired" test of CPL 210.35 (5) is not easy to meet. It "does not turn on mere flaw, error or skewing. The statutory test is very precise and very high." (*People v Darby*, 75 NY2d 449, 455 [1990] [the test was not met where the prosecutor failed to advise the grand jurors that a statement made by defendant, ruled admissible at a *Huntley* hearing, may yet turn out to be inadmissible]; *cf. People v Calbud, Inc.*, 49 NY2d 389, 394-395 [1980].) The test should be stringent, because the dismissal of indictments for relatively minor errors can seriously interfere with the enforcement of the criminal laws. No great harm is done in this case, where the indictment was dismissed before trial, and the case can be re-presented to another grand jury. But if Supreme Court had denied the motion to dismiss the indictment, and defendant had been tried and convicted of murder in the second degree, a holding that the indictment was defective would require nullifying the conviction. We might be more reluctant to dismiss an indictment on grounds like this after a conviction has already been obtained--but it is, to say the least, unclear that the statute permits a dismissal in one case and not the other.

Our previous decisions applying CPL 210.35 (5) do not support the majority's holding. There are only two such cases in which we have found that the integrity of grand jury proceedings was impaired. One of them is *People v Huston* (88 NY2d 400 [1996]), an outrageous case in which the

prosecutor intentionally put inadmissible evidence before the grand jury, told the grand jury that some witnesses were truthful and oth ***778** ers were perjurers, harassed and insulted witnesses, and instructed the grand jury to interpret the physical evidence in the way he preferred. The other is *People v Caracciola* (78 NY2d 1021, 1022 [1991]), in which "the prosecutor's legal instructions were too confusing to have been understood by the Grand Jury."

This case involves neither deliberate prosecutorial misconduct nor incomprehensible instructions, but a good faith error that had only limited impact on the grand jury proceedings. I believe that an error of this kind should not require dismissal of an indictment, and I therefore dissent.

Chief Judge Kaye and Judges G.B. Smith, Ciparick, Rosenblatt and Graffeo concur; Judge R.S. Smith dissents and votes to reverse and reinstate the ****7** indictment in an opinion in which Judge Read concurs.

Order affirmed in a memorandum.

New York Official Reports

88 N.Y.2d 400, 668 N.E.2d 1362, 646 N.Y.S.2d 69

The People of the State of New York, Respondent,
v.
Joshua Samuel Huston, Appellant.

Court of Appeals of New York
98
Argued March 26, 1996;

Decided June 13, 1996

CITE TITLE AS: People v Huston

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered April 28, 1995, which affirmed a judgment of the Niagara County Court (James P. Punch, J.), rendered upon a verdict convicting defendant of two counts of murder in the second degree.

People v Huston, 214 AD2d 982, reversed.

HEADNOTES

Grand Jury
Defective Proceeding
Integrity of Grand Jury Impaired by Actions of District Attorney

(1) Dismissal of indictments under CPL 210.35 (5) is limited to those instances where prosecutorial wrongdoing, fraudulent conduct or errors potentially prejudice the ultimate decision reached by the Grand Jury. The likelihood of prejudice turns on the particular facts of each case, including the weight and nature of the admissible proof adduced to support the indictment and the degree of inappropriate prosecutorial influence or bias. Accordingly, defendant's conviction of two counts of murder in the second degree is reversed and the indictment dismissed with leave to the District Attorney to apply for an order permitting resubmission of the charges to another Grand Jury where the prosecutor who submitted defendant's case to the Grand Jury imparted his personal opinion regarding the proper inferences to draw from the testimony or physical evidence, asked impermissible and inflammatory questions, and conveyed--both directly and indirectly--his belief in defendant's guilt. Because the prosecutor's misconduct was intentional, usurped the function of the Grand Jury and biased the proceedings against the defendant, it impaired the integrity of the Grand Jury proceedings and created a substantial risk of prejudice to the defendant. The indictment, therefore, cannot be permitted to stand even though it is supported by legally sufficient evidence. Nor does defendant's conviction after trial cure the defective Grand Jury proceedings.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Indictments and Informations, §§ 225, 243.

Carmody-Wait 2d, Criminal Procedure §§ 172:885, 172:888, 172:893, 172:1034.

CPL 210.35 (5).

NY Jur 2d, Criminal Law, §§ 1021, 1181, 1420, 1428. ***401**

ANNOTATION REFERENCES

See ALR Index under Grand Jury; Indictments and Informations; Prosecuting Attorneys.

POINTS OF COUNSEL

Howard K. Broder, Rochester, for appellant.
I. The trial court's refusal to allow the defense to place Jule Huston's exculpatory Grand Jury testimony before the trial jury deprived defendant of his fundamental constitutional right to present a defense. *(Chambers v Mississippi,* 410 US 284; *People v Tinh Phan,* 150 Misc 2d 435; *United States v Agurs,* 427 US 97; *Ohio v Roberts,* 448 US 56; *United States ex rel. Bracey v Fairman,* 712 F2d 315; *Washington v Texas,* 388 US 14.)
II. Prosecutorial transgressions impaired the integrity of the Grand Jury proceeding and, without question, prejudice to defendant may have resulted. *(People v Lancaster,* 69 NY2d 20; *People v Pelchat,* 62 NY2d 97; *People v Di Falco,* 44 NY2d 482; *People v Jones,* 157 Misc 2d 45; *People v Wilkins,* 68 NY2d 269; *People v Paperno,* 54 NY2d 294; *People v*

Hollis, 144 Misc 2d 259; *Matter of Grand Jury of County of Suffolk,* 117 Misc 2d 197.)

Matthew J. Murphy, III, District Attorney of Niagara County, Lockport *(Thomas H. Brandt* of counsel), for respondent.

I. The trial court correctly denied appellant's request to admit his father's Grand Jury testimony at trial.

II. The Grand Jury proceedings were not defective. *(People v DeFreece,* 183 AD2d 842.)

OPINION OF THE COURT

Chief Judge Kaye.

In our State justice system, the critical functions of investigating criminal activity and protecting citizens from unfounded accusations are performed by the Grand Jury, whose proceedings are conducted by the prosecutor alone, beyond public scrutiny. When the Grand Jury is subjected to improper influence and bias, its ability to discharge these essential functions fairly and reliably is necessarily undermined and the integrity of this constitutionally and historically independent institution impaired.

In order to protect the liberty of all citizens, the Legislature requires that an indictment be dismissed where the Grand ***402** Jury proceeding is defective (*see,* CPL 210.20 [1] [c]). Moreover, dismissal of the indictment is specifically compelled by statute when the integrity of the Grand Jury proceeding is impaired "and prejudice to the defendant may result" (CPL 210.35 [5]).

The issue in this case is whether prosecutorial improprieties during presentation of defendant's case to the Grand Jury rendered the resultant indictment fatally defective. Because the prosecutor's misconduct was intentional, usurped the function of the Grand Jury and biased the proceedings against the defendant, it impaired the integrity of the Grand Jury proceedings and created a substantial risk of prejudice to the defendant. We therefore reverse the order of the Appellate Division and dismiss the indictment, as mandated by CPL 210.35 (5), with leave to the District Attorney to seek resubmission of the charges to another Grand Jury.

Facts

On the evening of April 14, 1982, defendant's wife, Mary Huston, and her mother, Allison Brown, were murdered in their home. Defendant and Mary Huston had been married, divorced and remarried. At the time of the murders, defendant was living at the home of his brother, Frank Huston.

That evening, defendant accompanied the police to the station for questioning and provided them with a statement regarding his whereabouts. Defendant told the police that he had been served with divorce papers that day and went to his wife's house in the late afternoon to discuss them with her, accompanied by a friend. Later, he made his evening walk past his wife's house. The police searched the home of Frank Huston with defendant's consent and also interviewed various family members. Nevertheless, they were unable to link defendant or anyone else to the crime, and no arrests were made.

One and one-half years later, the police resumed their investigation, and Grand Jury proceedings against defendant commenced in November 1983. The first civilian witness called by the prosecutor to testify before the Grand Jury was Emma Threats. Threats was a friend of Vickie Pickles, who lived with defendant's father, Jule Huston. Threats testified that Pickles came to her apartment at 5:00 A.M. on April 15, 1982, the day after the murders. Threats further testified that Pickles had a drink; Pickles told her that defendant had arrived at their apartment the previous evening, covered with blood and carrying a knife; and that Pickles informed her that defendant had ***403** stated to his father, "I told you I was going to do it and I did it." According to Threats, Pickles also told her that defendant had left the knife at their apartment.

The prosecutor informed the Grand Jury that Threats' testimony constituted hearsay and that "[i]t is not evidence that you can use at all against Joshua Samuel Huston." But he then said:

"I'm asking you now to perform the task of excluding that from your mind with respect to your ultimate deliberation regarding Joshua Samuel Huston. What we're going to be doing is calling in Vickie Pickles. I'll have the subpoena served upon her. She'll be in probably two week[s] from today. At that time we'll try and get the truth from her. If she's cooperative and is willing to tell us the truth, then there's no problem, you'll just drop out and forget about the testimony entirely that you've heard from Emma Threats. If we have problems and if Vickie Pickles, whether it's from fear or obstinacy, whatever, is not going to cooperate with us and disclose the truth to us, then I will be bringing up the other witness who has similar testimony as this from Georgia and seek a perjury indictment against Vickie Pickles from you. Okay. That's the purpose of it. And that's the admonition that I want the record to reflect."

Two weeks later, Pickles was called before the Grand Jury. She testified that defendant had visited his father earlier in the day on April 14, 1982. Defendant showed up again at 8:00 that evening, with a knife hidden in the sleeve of his blue jacket. Although there was blood on the tip of the knife and on defendant's hand, she saw no blood on defendant's clothing. According to Pickles, defendant told his father, "I think I killed them." He did not leave the knife at their apartment but took it with him after Pickles refused to get rid of it.

Pickles contended that her conversation with Threats the next day took place in the afternoon and in Threats' van, not her apartment. She further maintained that, while she never informed the police of this incident, she related it to a friend named Charles Jones as well.

The grand jurors themselves asked that defendant's father be subpoenaed to testify, but the prosecutor expressed reluctance, responding that Jule Huston might be implicated in the ***404** commission or facilitation of the crime. Two weeks after Pickles' testimony, however, Jule Huston testified before the Grand Jury. He maintained that defendant never returned to their apartment after his afternoon visit. According to Jule Huston, Pickles was an alcoholic who suffered from hallucinations.

Notwithstanding Jule Huston's repeated denials that defendant appeared at their apartment the evening of the murders displaying a knife, the prosecutor continued time and again to assume the existence of these repudiated facts during extended questioning of Huston. For instance, the prosecutor prefaced his questions to Huston with statements such as, "when [defendant] came over to your apartment that night" or "on that evening, when [defendant] displayed the knife." Even after Huston had steadfastly maintained that he never saw defendant that evening and that defendant never made any statement to him about the murders, the prosecutor asked questions such as, "that night, Wednesday, April 14th, 1982, when [defendant] said that he thought that he had killed both of them, did you indicate to him to just throw the knife into the field?"

During Huston's testimony, the prosecutor ordered him to stop "running your mouth off without listening." Huston was examined regarding the fact that, in the past, he had admitted himself to a psychiatric institution and pleaded guilty in a robbery case. He was also asked about his son's prior drug addiction. Pickles, by contrast, was never questioned about her alleged drinking problem, even though several witnesses before the Grand Jury concurred that she was an alcoholic.

The prosecutor also asked Huston about a laundry list of personal items belonging to Vickie Pickles that remained in Huston's apartment although Pickles was no longer living there. The prosecutor informed the Grand Jury that he was issuing a subpoena to Huston requiring him to produce all of these items to the District Attorney's office, who would forward them to Pickles. When Huston was subsequently recalled to the stand, the prosecutor berated him for not bringing these personal belongings with him.

Testimony established that Allison Brown had been stabbed 12 times and Mary Huston 9 times, and the Grand Jury was shown photographs of the victims. The Grand Jury was also shown photographs of a pair of sneakers removed from the home of defendant's brother and a green jacket that defendant was wearing when questioned by the police on April 14, 1982. ***405** Both items had human blood on them, in amounts insufficient to allow any grouping or typing.

During the proceedings, several grand jurors noted that, according to Threats, Pickles had told her defendant was covered with blood. One grand juror thus commented that there "[s]hould have been more blood on his chest someplace," and another observed, "[a]s a matter of fact, just looking at the number of wounds, punctures, he'd have to have more blood." The prosecutor dismissed the grand jurors' concerns, saying:

"No, that's not accurate. It's not necessarily the case, even though you see a lot of blood, you also have to keep in mind that they had been lying there for a long time, so for a sufficient period of time, a lot of that blood would have come from bleeding onto the floor, so there's nothing to indicate, we've got no evidence to indicate and it's not accurate to assume that by the stab, the blood would splatter out and cover him, that kind of thing is not necessarily so."

A neighbor of Mary Huston further testified that she saw defendant and his wife arguing on the day of her death. She also observed defendant standing in the driveway outside his wife's home between 7:00 and 7:30 that evening.

The Grand Jury charged defendant with two counts of murder in the second degree. Defendant subsequently moved to dismiss the indictment due to prosecutorial misconduct before the Grand Jury. Although the trial court was "disturbed" by

"the way the prosecutor seemed to testify before the Grand Jury," it orally denied the motion. Defendant proceeded to trial and was convicted of both murder counts. The Appellate Division affirmed the convictions, concluding that defendant had failed to establish any possibility of prejudice resulting from the prosecutor's misconduct. We now reverse.

Analysis

Our State Constitution guarantees that "[n]o person shall be held to answer for a capital or otherwise infamous crime ... unless on indictment of a grand jury" (NY Const, art I, § 6; *see also,* CPL art 190). By acting as a "buffer between the State and its citizens," the Grand Jury shields against prosecutorial excesses and protects individuals from unfounded prosecutions (*People v Calbud, Inc.,* 49 NY2d 389, 394, 396; *see, People v Pelchat,* 62 NY2d 97, 108). Historically, the Grand Jury has ***406** performed the essential function of investigating criminal activity to determine whether sufficient evidence exists to accuse a citizen of a crime (*see, People v Lancaster,* 69 NY2d 20, 26, *cert denied* 480 US 922; *People v Calbud, Inc.,* 49 NY2d at 394)

The Criminal Procedure Law designates both the District Attorney and the court as legal advisors to the Grand Jury (*see,* CPL 190.25 [6]). Because Grand Jury proceedings are conducted by the prosecutor alone, this function confers upon the prosecutor broad powers and duties, as well as wide discretion in presenting the People's case (*see, People v Di Falco,* 44 NY2d 482, 487). In addition to providing legal instruction to the Grand Jury, the District Attorney determines what evidence to present to that body and what evidence should be excluded (*see, id.,* at 486-487).

The prosecutor's discretion during Grand Jury proceedings, however, is not absolute. As legal advisor to the Grand Jury, the prosecutor performs dual functions: that of public officer and that of advocate. The prosecutor is thus "charged with the duty not only to secure indictments but also to see that justice is done" (*People v Lancaster,* 69 NY2d at 26, *supra; see also, People v Pelchat,* 62 NY2d at 105, *supra*). With this potent authority, moreover, comes responsibility, including "the prosecutor's duty of fair dealing" (*People v Pelchat,* 62 NY2d at 104, *supra*). As this Court has explained, "[t]hese duties and powers, bestowed upon the District Attorney by law, vest that official with substantial control over the Grand Jury proceedings, requiring the exercise of completely impartial judgment and discretion" (*People v Di Falco,* 44 NY2d at 487, *supra*).

Where, as here, the charges facing the defendant are of the most serious nature, society's interest in justice is especially great. Nevertheless, the prosecutor who submitted defendant's case to the Grand Jury disregarded his role as public officer and his "duty of fair dealing." The Grand Jury minutes are rife with instances of the prosecutor imparting his personal opinion regarding the proper inferences to draw from the testimony or physical evidence, asking impermissible and inflammatory questions, and conveying--both directly and indirectly--his belief in defendant's guilt.

An example of such misconduct was the prosecutor's use of the concededly inadmissible hearsay testimony of Emma Threats, relating Vickie Pickles' narration to her of defendant's appearance with a bloody knife and his admission to the ***407** murders. Importantly, the prosecutor openly acknowledged that Threats' testimony was not offered for any legitimate purpose. Rather, his articulated purpose for introducing Threats' hearsay testimony before calling Pickles to the stand was to force Pickles to conform her account to the factual rendition already given by Threats and prevent any repudiation or modification.

Such deliberate tactics to influence a witness' Grand Jury testimony jeopardize "the goal of fostering free and truthful testimony" (*People v Sayavong,* 83 NY2d 702, 708). We have, moreover, long condemned any Grand Jury practice that might incline a witness to give an inaccurate account of her knowledge of a crime (*see, e.g., People v Minet,* 296 NY 315 [forbidding the presence of one witness during the Grand Jury testimony of another]).

Even worse, the prosecutor proceeded to use Threats' inadmissible testimony as a platform to convey to the Grand Jury his personal belief in defendant's guilt. He repeatedly informed the Grand Jury that the version of events recounted by Threats was "the truth." He further vouched for the reliability of Threats' hearsay testimony by advising the Grand Jury that there was another witness in Georgia with "similar testimony." The prosecutor thus became an unsworn witness against defendant, creating the danger that the Grand Jury, "impressed by the prestige of the office of the District Attorney, [would] accord great weight to [his] beliefs and opinions" (*People v Paperno,* 54 NY2d 294, 301).

The prosecutor's comments usurped the function of the Grand Jury, which "remains the exclusive judge of the facts with respect to any matter before it" (*People v Pelchat,* 62 NY2d

at 105, *supra; accord,* CPL 190.25 [5]). The CPL provides that a Grand Jury may issue an indictment only where there is legally sufficient evidence *and* "competent and admissible evidence before it provides reasonable cause to believe that [a] person [has] committed [an] offense" (CPL 190.65 [1] [b]). "Reasonable cause" exists

"when evidence or information *which appears reliable* discloses facts or circumstances which are collectively *of such weight and persuasiveness* as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it" (CPL 70.10 [emphasis added]). ***408**

Reasonable cause "dictates the degree of certitude grand jurors must possess to indict" and, unlike legal sufficiency, is exclusively within the province of the Grand Jury (*People v Jennings,* 69 NY2d 103, 115). Consequently, determination as to whether Pickles or Jule Huston was the more reliable witness and the weight to accord each witness' testimony was to be made solely by the Grand Jury, uninfluenced by the opinion of the prosecutor (*cf., People v Batashure,* 75 NY2d 306 [prosecutor may not inform the Grand Jury that, as a matter of law, he or she has determined that legally sufficient evidence has been presented]).

Nor was this an isolated instance. To the contrary, the prosecutor's exploitation of Threats' inadmissible testimony was part of an over-all pattern of bias and misconduct. The prosecutor again acted as an unsworn witness, usurping the fact-finding function of the Grand Jury, when he informed it of the inference it should draw from the fact that only a small amount of human blood was found on defendant's sneaker and jacket--the only physical evidence connecting defendant to the murders. Specifically, he informed questioning grand jurors that it was "not accurate" that, given the number of stab wounds, more blood should have been found on defendant's clothing. He further stated, "we've got no evidence to indicate and it's not accurate to assume that by the stab, the blood would splatter out and cover him." Whether this physical evidence was sufficiently persuasive to warrant belief that defendant committed the crime, however, was a question reserved exclusively for the grand jurors.

Throughout his questioning of Jule Huston, moreover, the prosecutor communicated his disbelief in Huston's testimony to the Grand Jury. Although Jule Huston repeatedly denied that the bloody knife incident ever took place, the prosecutor continued to ask questions that assumed defendant did indeed appear at Huston's apartment with a bloody knife and admit to killing his wife and mother-in-law. While a prosecutor who believes a witness is not being forthright may vigorously question or press that witness, the prosecutor here simply went too far.

Manifestly, the prosecutor's misconduct was pervasive. Under the CPL, however, the Grand Jury proceeding in a criminal action must be defective to warrant dismissal of the indictment (*see,* CPL 210.20 [1] [c]). We must therefore next determine whether the prosecutor's behavior rendered the indictment fatally defective. ***409**

CPL 210.35 (5) provides that a Grand Jury proceeding is defective when "the integrity thereof is impaired and prejudice to the defendant may result." The exceptional remedy of dismissal is thus warranted only where a defect in the indictment created a possibility of prejudice (*see, People v Di Falco,* 44 NY2d at 487, *supra*). Although this statutory test "is very precise and very high" (*People v Darby,* 75 NY2d 449, 455), it does not require actual prejudice (*see, People v Sayavong,* 83 NY2d at 709, 711, *supra; People v Wilkins,* 68 NY2d 269, 276). Indeed, two earlier drafts of CPL 210.35 (5) required a showing of actual prejudice before an indictment could be dismissed as the result of defective Grand Jury proceedings. The Legislature, however, rejected a requirement of actual prejudice in favor of the current provision-- requiring only that "prejudice to the defendant *may* result" (CPL 210.35 [5] [emphasis added]; *see, People v Di Falco,* 44 NY2d 482, 487, *supra;* Preiser, Practice Commentary, McKinney's Cons Laws of NY, Book 11A, CPL 210.35, at 676).

Dismissal of indictments under CPL 210.35 (5) should thus be limited to those instances where prosecutorial wrongdoing, fraudulent conduct or errors potentially prejudice the ultimate decision reached by the Grand Jury. The likelihood of prejudice turns on the particular facts of each case, including the weight and nature of the admissible proof adduced to support the indictment and the degree of inappropriate prosecutorial influence or bias.

Certainly, not every improper comment, elicitation of inadmissible testimony, impermissible question or mere mistake renders an indictment defective. Typically, the submission of some inadmissible evidence will be deemed fatal only when the remaining evidence is insufficient to sustain the indictment (*see, People v Avant,* 33 NY2d 265, 271). Likewise, isolated instances of misconduct will not

necessarily impair the integrity of the Grand Jury proceedings or lead to the possibility of prejudice.

Here, however, the prosecutor did not simply introduce concededly inadmissible hearsay testimony--he did so with the stated goal of influencing upcoming testimony. The prosecutor then further thwarted the ability of the Grand Jury to uncover the facts accurately and conduct a reliable investigation by repeatedly conveying his personal assessment of critical witnesses and the physical evidence. As a result, the integrity of the Grand Jury proceedings was substantially undermined (*see, People v Caracciola,* 78 NY2d 1021 [misleading legalinstructions ***410** to the Grand Jury impaired the integrity of the proceedings and mandated dismissal of the indictment]).

The risk of prejudice to defendant from the prosecutor's impermissible tactics is manifest. The two crucial pieces of inculpatory evidence before the Grand Jury were the testimony of Vickie Pickles and the two items of defendant's clothing containing small amounts of blood. Pickles' version of events, however, was vigorously contested by Jule Huston. By informing the grand jurors that Vickie Pickles' account was the truth, while undermining the credibility and character of Jule Huston, the prosecutor made it substantially more likely that the Grand Jury would believe Pickles.

Likewise, defendant's sneaker and jacket, while circumstantial evidence implicating his guilt, did not irrefutably lead to the conclusion that defendant committed the murders. Indeed, several grand jurors themselves questioned whether the small amount of blood found on these items could be reconciled with the number of stab wounds and amount of blood at the crime scene. The prosecutor's assurances that these concerns were unfounded surely created at least the possibility of prejudice, since "the grand jurors and the prosecutor will not invariably see eye to eye about what the evidence establishes, particularly when more inchoate questions such as ... inferences to be drawn from circumstantial evidence are critical" (*People v Batashure,* 75 NY2d at 311, *supra*).

In rare cases such as this where irregularities in presenting the case to the Grand Jury rise to the level of impairing those proceedings and creating the risk of prejudice, "the indictment [can]not be permitted to stand even though it is supported by legally sufficient evidence" (*People v Calbud, Inc.,* 49 NY2d at 395, *supra*).

An important principle at the root of the statute compels this result: the Grand Jury acts as " 'the shield of innocence ... and as the guard of the liberties of the people against the encroachments of unfounded accusations from any source' " (*People v Minet,* 296 NY at 323, *supra* [citation omitted]). It is thus fundamental that the Grand Jury and those testifying before that body remain insulated from improper influence (*see, People v Di Falco,* 44 NY2d at 488, *supra* ["(s)ecrecy is a vital requisite of Grand Jury proceedings"]; *see also,* CPL 190.25 [4]). Where this tenet is flagrantly violated, society's interest in the integrity of the criminal process itself is jeopardized. ***411**

To countenance such conduct by a District Attorney that was overwhelmingly likely to influence the proceedings whenever legally sufficient evidence was otherwise adduced would overlook that the CPL requires not only legally sufficient evidence as a prerequisite to indictment but also reasonable cause to believe the person committed an offense. Given "the crucial nature of the prosecutor's role ... vis-a-vis the Grand Jury," it would also significantly jeopardize the essential function of the Grand Jury to protect our citizenry (*People v Di Falco,* 44 NY2d at 485, *supra*). The statutory remedy of dismissal thus not only protects the defendant but also safeguards the liberty of all citizens by ensuring that improper prosecutorial influence during secret Grand Jury proceedings will not lead to unfounded prosecutions.

Likewise, conviction after trial does not cure defective Grand Jury proceedings (*see, People v Wilkins,* 68 NY2d at 277, n 7, *supra; see, e.g., People v Sayavong,* 83 NY2d at 702, *supra* [dismissing indictment of defendant convicted after jury trial, where impairment of Grand Jury proceeding potentially prejudiced defendant]). This is supported by the statutory scheme-- while the Legislature has provided that claims of insufficiency of evidence to support the indictment are barred upon conviction after trial (*see,* CPL 210.30 [6]), no similar provision exists for claims of defect based upon impairment of the Grand Jury proceedings.*

In sum, in this unusual case, the cumulative impact of the prosecutor's improper tactics during presentation of defendant's case to the Grand Jury sufficiently impaired the integrity of the proceedings as to warrant dismissal of the indictment. Because the CPL provides for reindictment of defendant, this remedy will allow another Grand Jury to pass upon defendant's case after a presentation not tainted by bias and misconduct (*see,* CPL 210.20 [4]).

In light of this determination, it is unnecessary to reach defendant's remaining claim.

Accordingly, the order of the Appellate Division should be reversed and the indictment dismissed with leave to the ***412** District Attorney to apply for an order permitting resubmission of the charges to another Grand Jury.

Judges Simons, Titone, Bellacosa, Smith, Levine and Ciparick concur.
Order reversed, etc. ***413**

Footnotes

* We thus reject the People's similar argument that defendant's conviction after trial--where Pickles' testimony again constituted the primary evidence against him--demonstrates that no possibility of prejudice arose from the prosecutor's improper admission of Threats' testimony before the Grand Jury, since no such error took place at trial. In any event, unlike the Grand Jury proceedings, Pickles' trial testimony was not challenged by the contrary testimony of Jule Huston, since defendant's father had previously died and his Grand Jury testimony was precluded at trial.

New York
Official Reports

93 A.D.3d 1079, 941 N.Y.S.2d
311, 2012 N.Y. Slip Op. 02348

**1 The People of the State
of New York, Respondent
v
Arvin Jabot, Appellant.

Supreme Court, Appellate Division,
Third Department, New York
March 29, 2012

CITE TITLE AS: People v Jabot

HEADNOTES

Crimes
Bill of Particulars
Time of Offense

Crimes
Jurors
Peremptory Challenge

Mitch Kessler, Cohoes, for appellant.
Kevin C. Kortright, District Attorney, Fort Edward (Katherine G. Henley of counsel), for respondent.

Spain, J. Appeal from a judgment of the County Court of Washington County (McKeighan, J.), rendered October 12, 2010, upon a verdict convicting defendant of the crimes of attempted burglary in the second degree and conspiracy in the fourth degree.

Defendant was convicted of attempted burglary in the second degree and conspiracy in the fourth degree based upon trial testimony establishing that, in late October 2008, with a plan to burglarize the home of two elderly brothers in the Village of Hudson Falls, Washington County, defendant drove his sister, Amy Bullard, and Justin Rawlins to the home; they approached *1080 the house while defendant waited in the car. When they knocked on the door, the son of one of the victims, Duane Waite, who had been working in a shed behind the house and heard the knocking, came around the side of the house. Recognizing Waite as a correction officer who had worked at the jail where Rawlins had previously been incarcerated, the couple pretended to be looking for someone named "Bob" and quickly left the premises. On defendant's appeal, we now reverse.

Initially, we reject defendant's contention that the indictment should have been dismissed as lacking in sufficient specificity regarding the date of the charged offenses because, as supplemented by the bill of particulars, it alleged only that the incident occurred on an afternoon "on or about the last week of October, 2008." "When time is not an essential element **2 of an offense, the indictment, as supplemented by a bill of particulars, may allege the time in approximate terms" (*People v Watt*, 81 NY2d 772, 774 [1993]; *see* CPL 200.50 [6]; *People v Morris*, 61 NY2d 290, 295 [1984]; *People v Oglesby*, 12 AD3d 857, 859 [2004], *lv denied* 5 NY3d 792 [2005]). The People must, in good faith, engage in a reasonably thorough investigation in order to identify the time and circumstances of the offense with sufficient clarity to protect a " 'defendant's constitutional right "to be informed of the nature and cause of the accusation" ' " so that the defendant may adequately defend against the charges (*People v Keindl*, 68 NY2d 410, 417 [1986], quoting *People v Morris*, 61 NY2d at 294; *see People v Sedlock*, 8 NY3d 535, 539 [2007]). Although the People here took steps to more specifically pinpoint the date, their efforts were hampered because neither Waite nor any of the other witnesses could recall the exact date, the date supplied by one of the victims (an octogenarian allegedly suffering from dementia) was contradicted by all the other witnesses and, because the burglary was thwarted, no police record was made until a subsequent armed robbery was committed at the same residence the following month, on November 11, 2008. Under the totality of the circumstances presented, we find the span of time during which the crime was alleged to have occurred is not so unreasonable that defendant was "prevented from preparing a defense, notwithstanding that it would be easier to prepare an alibi defense if the exact date and time of the offense were known and provided"; thus, County Court did not err in denying defendant's motion to dismiss the indictment (*People v Morris*, 61 NY2d at 297; *see People v White*, 283 AD2d 964, 964 [2001]; *see also People v Windley*, 228 AD2d 875, 876 [1996], *lvs denied* 88 NY2d 991, 997 [1996]).

Under the narrow circumstances presented, we find merit, *1081 however, in defendant's assertion that County Court improperly denied defendant's request to exercise

a peremptory challenge to a prospective juror. After questioning of the first group of prospective jurors was completed and the People had exercised their challenges, the court asked defense counsel if he wished to exercise any peremptory challenges, to which counsel responded, "Yes, Judge. No." Seconds later, as the court named the first two prospective jurors in the group to be assigned seats, defense counsel immediately interrupted him, apologizing, and explained that he had intended to exercise a peremptory challenge against one of the remaining prospective jurors in that group, a correction officer, but that he had missed it in his notes. Although that juror was not yet assigned a seat and the request was made just moments after counsel mistakenly accepted all of the remaining prospective jurors in that group, the court denied his request to challenge the juror as untimely.

At common law, a defendant "retained the right to challenge a person who appears as a juror at any time *before he* [*or she*] *is sworn*" (*People v Alston*, 88 NY2d 519, 527 [1996] [internal quotation marks and citations omitted]). Under CPL 270.15, which now governs the procedure for challenging jurors, the decision to entertain a belated peremptory challenge is left to the discretion of the trial court, in recognition that the voir dire process can often be time-consuming and requires practical limitations (*see generally id.* at 529; Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 270.15, at 275-277 [2002]). Indeed, the First and Second Departments have upheld a trial court's decision not to allow belated challenges to as-yet unsworn prospective jurors where the challenge would interfere with or delay the process of jury selection (*compare People v Brown*, 52 AD3d 248, 248 [1st Dept 2008], *lv denied* 11 NY3d 735 [2008] [court had already moved on to next subgroup of jurors when challenge made]; *People v Leakes*, 284 AD2d 484, 484 [2d Dept 2001], *lv denied* 96 NY2d 920 [2001] [same]; *People v Smith*, 278 AD2d 75, 76 [1st Dept 2000], *lv denied* 96 NY2d 763 [2001] [court had moved on to next juror and challenges were being made on a juror by juror ****3** basis]). Here, however, we can detect no discernable interference or undue delay caused by defense counsel's momentary oversight that would justify County Court's hasty refusal to entertain defendant's challenge. Accordingly, we conclude that the court's denial of the challenge was an abuse of discretion (*see generally People v Steward*, 17 NY3d 104 [2011] [trial court's limitation on time given for voir dire held an abuse of discretion]) and, because the right to exercise a peremptory challenge against a specific prospective juror is a "substantial right" (***1082** *People v Hamlin*, 9 AD2d 173, 174 [1959]), reversal is mandated. Accordingly, defendant is entitled to a new trial (*see People v Hecker*, 15 NY3d 625, 661-662 [2010]). Defendant's remaining contentions have been rendered academic.

Lactinex, J.P., Stein, Garry and Egan Jr., JJ., concur. Ordered that the judgment is reversed, on the law, and matter remitted to the County Court of Washington County for a new trial.

New York
Official Reports

51 Misc.3d 450, 28 N.Y.S.3d
783, 2015 N.Y. Slip Op. 25431

**1 The People of the
State of New York, Plaintiff
v
Robert Johnson, Defendant.

County Court, Sullivan County
64-2015
December 31, 2015

CITE TITLE AS: People v Johnson

HEADNOTES

Crimes
Evidence
Electronically Stored Information from Sexual Assault Victim's Facebook Page—Sexually Suggestive Content on Third-Party Website

(1) In defendant's prosecution for allegedly sexually assaulting his stepdaughter beginning when she was 11 years old, defendant was precluded on relevancy grounds from introducing electronically stored information (ESI) evidence consisting of sexually explicit images from a website containing sexually suggestive content and an image of the victim's Facebook page showing that she "liked" that website. The exhibits would only tend to show the sexual penchant the alleged victim may or may not have had. Consent was not an issue under the law and the material elements of predatory sexual assault against a child, since a child under the age of 13 is deemed to be incapable of consenting to sexual conduct by definition of law. The ESI images did not tend to prove the existence or nonexistence of any material fact at issue in the case. The purported sexual content was irrelevant to whether or not defendant engaged in a course of sexual conduct against the victim, as there was no evidence to suggest a nexus between the images and the elements of the crime charged, and any question as to what the victim may have liked on Facebook and pictures associated with any third-party account did not tend to prove or disprove any material fact relating to defendant's guilt.

Crimes
Evidence
Impeachment of Sexual Assault Victim's Credibility Using Sexually Suggestive Facebook Content

(2) In defendant's prosecution for allegedly sexually assaulting his stepdaughter, defendant was precluded from introducing for the purpose of impeaching the victim's credibility electronically stored information (ESI) evidence consisting of sexually explicit images from a website containing sexually suggestive content and an image of the victim's Facebook page showing that she "liked" that website. The material did not go to the witness' credibility, and defendant made no foundation to use the ESI as an inconsistent statement. A party who is cross-examining a witness cannot introduce extrinsic documentary evidence or call other witnesses to contradict a witness' answers concerning collateral matters solely for the purpose of impeaching that witness' credibility. Defendant did not confront the victim with any question as to whether she viewed the images on the third-party site. The only testimony elicited from the witness on the issue of Facebook—that she did not have pornographic images on her Facebook site—was not called into question by the evidence proffered. The materials offered were images on a third-party site neither controlled nor demonstrably accessed or viewed by the victim, who was never questioned with respect to her knowledge of the site. Furthermore, defendant had not demonstrated that the material showed moral turpitude to be relevant on the credibility issue.

Crimes
Evidence
Authentication of Facebook Images

(3) In defendant's prosecution for allegedly sexually assaulting his stepdaughter, defendant was precluded from introducing electronically stored *451 information (ESI) evidence consisting of sexually explicit images from a website containing sexually suggestive content and an image of the victim's Facebook page showing that she "liked" that website, since defendant could not demonstrate the authenticity of the proffered material. Defendant had no personal knowledge with respect to the management, security

or corporate records of Facebook, nor did he have any personal knowledge that the proffered materials were created by the victim. Defendant could not testify with respect to the maintenance or routine creation of Facebook records, and had failed to demonstrate any knowledge of the corporate policy or computer programs comprising Facebook. Moreover, as there had been no factual specificity offered with respect to how the ESI at issue was created, acquired, maintained and preserved without alteration or change, defendant could not authenticate the proffered materials through personal knowledge. Nor could defendant authenticate the materials by circumstantial evidence. The images from the third-party website did not appear on the image of the victim's Facebook page, and defendant failed to establish that the victim ever viewed any of the images on the "liked" site or that she ever visited the third-party site.

Crimes
Evidence
Rape Shield Law—Sexually Suggestive Facebook Material

(4) New York's Rape Shield Law (Criminal Procedure Law § 60.42) barred admission in defendant's prosecution for sexually assaulting his stepdaughter of electronically stored information evidence consisting of sexually explicit images from a website containing sexually suggestive content and an image of the victim's Facebook page showing that she "liked" that website. The Rape Shield Law bars harassment of victims and confusion of issues through raising matters relating to the victims' sexual conduct that have no proper bearing upon the defendant's guilt or innocense. Defendant sought to introduce such evidence for the sole purpose of attacking his victim's purported and unverified "like" of a sexualized Facebook site. If defendant were to argue that the materials proffered demonstrated the victim's willingness to engage in sexual conduct, such testimony or evidence is the kind prohibited from admission to trial by the Rape Shield Law.

RESEARCH REFERENCES

Am Jur 2d, Evidence §§ 509–511; Am Jur 2d, Rape § 64; Am Jur 2d, Witnesses §§ 807, 808, 883–888.

Carmody-Wait 2d, Fundamentals of Criminal Evidence §§ 193:11, 193:38; Carmody-Wait 2d, Particular Types of Evidence § 194:37; Carmody-Wait 2d, Testimony of Witnesses §§ 195:110, 195:111, 195:123–195:125.

LaFave, et al., Criminal Procedure (3d ed) § 24.4.

McKinney's, CPL 60.42.

NY Jur 2d, Criminal Law: Procedure §§ 2040, 2046, 2049, 2308, 2310, 2318.

ANNOTATION REFERENCE

***452** Admissibility of evidence that juvenile prosecuting witness in sex offense case had prior sexual experience for purposes of showing alternative source of child's ability to describe sex acts. 83 ALR4th 685.

FIND SIMILAR CASES ON WESTLAWNEXT

Path: Home > Cases > New York State & Federal Cases > New York State Cases > New York Official Reports Materials

Query: sexual assault child Facebook victim relevancy

APPEARANCES OF COUNSEL

Donna Maria Lasher, Youngsville, for defendant.
James R. Farrell, *District Attorney*, Monticello (*Eamonn P. Neary* of counsel), for plaintiff.

OPINION OF THE COURT

Frank J. LaBuda, J.

The issue of the admissibility of Facebook and other electronically stored information (ESI) evidence is novel in U.S. courts and has little statutory or judicial precedent guidance. The issue before this court at a criminal jury trial is to what extent is ESI evidence admissible at trial, and then to what extent is the proffered ESI evidence in this trial admissible.

The instant matter before the court concerns the admissibility of ESI at the jury trial of Sullivan County indictment No. 64-15, in which defendant was charged with one count of predatory sexual assault against a child, in violation of Penal Law § 130.96. The charges stemmed from allegations by the victim, Cassidy Doe,[1] that for over a period of years, beginning when she was approximately 11 years old and continuing until she was approximately 13 years old, her stepfather, the defendant herein, subjected her to touching of her breasts and vagina over the course of an extended period of time (more than three months), having oral sex over the

course of an extended period of time, and having intercourse on two occasions during the spring of 2014. The child witness indicated the alleged incidents occurred in her bedroom at the family residence in the Town of Mamakating, Sullivan County, New York.[2]

***453 Pretrial Disclosure of Purported Facebook Information**

As a threshold matter, the ESI evidence regarding Facebook items of the sexual abuse child witness in this case was first disclosed by the prosecutor to defendant during the course of pretrial discovery and omnibus motion practice in connection with this case. The ESI items were disclosed as part of discovery because this defendant himself brought the victim's Facebook materials to the New York State Police barracks in Wurtsboro, New York, when first interviewed, in an apparent effort to assail the character of this child victim in the weeks following the girl's initial disclosure of his abuses of her.

The People did not represent, concede, or consent that these items are authentic, nor generated by the child witness, Cassidy Doe, associated with the Facebook materials.[3]

The People argued that these items must be precluded from evidence in this case, as they are irrelevant, have not been authenticated, and constitute inadmissible hearsay.

Facebook as Electronically Stored Information

A brief description of the material now proffered for admission into evidence by defendant is warranted, in connection with the instant analysis of its authentication, relevance and admissibility at trial.

The defendant seeks to admit five separate exhibits. The first exhibit is a photograph which defendant alleges is a picture taken of Cassidy Doe's Facebook page. It is alleged that the photograph is a picture of Facebook pages, created by third parties, which Cassidy has, according to defendant, "Liked." One of those "likes" appears to be a Spanish language page entitled, "Sexo Infinito," and may be considered "mildly" pornographic and sexually suggestive, as are all the proffered exhibits.

Today Facebook is a major communication and identification media. Generally, a person using a Facebook account can "like" ***454** a third-party page by clicking a "Thumbs up" icon located next to content posted by the third party.[4] This then has the page appear on the receiver's Facebook page, and in this case the child/witness'.

The next two exhibits submitted by the defendant purport to be photographs taken not of Cassidy Doe's purported Facebook page, but of images alleged by defendant to have been posted from the aforementioned third-party site "Sexo Infinito" which are observable by any person who views that site. Both of these exhibits appear to depict couples simulating exotic sexual contact.

The remaining two exhibits depict images of enhanced male genitalia. It appears that these images were printed from a "comment" section, meaning that they can only be accessed by clicking the term "comment," which is adjacent to content posted at a third-party site, which in this case was allegedly done again by the child/witness.

The Prosecutor's Argument

1. The prosecutor maintains Cassidy Doe was not the person who caused a "like" associated with "Sexo Infinito" to appear on the first proffered page.

2. Cassidy Doe never viewed the content depicted upon any of the proffered exhibits.

3. Cassidy Doe did not identify the exhibits during direct or cross-examination.

4. The exhibits defendant has offered into evidence are not relevant to the material issues of this case.

(1) The prosecutor's last argument regarding relevancy will be addressed first by this court. The Court of Appeals has stated, "[a]s a general rule, evidence is relevant if it tends to prove the existence or non-existence of a material fact, i.e., a fact directly at issue in the case" (****2** *People v Primo*, 96 NY2d 351, 355 [2001]). Thus, where evidence offered does not tend to prove the existence or nonexistence of a material fact directly at issue in a case, it is not relevant. Assuming arguendo the exhibits are legally admissible, they would only tend to show ***455** the sexual penchant the alleged victim may or may not have. Consent in this case is not an issue under the law and the material elements of a predatory sexual assault against a child (Penal Law § 130.96). In fact, a child under the age of 13 is deemed to be incapable of consenting to sexual conduct by definition of law.

The ESI images sought to be introduced by the defendant do not tend to prove the existence or nonexistence of any material fact at issue in the case. The purported sexual content is irrelevant, both factually and legally, to whether or not this defendant engaged in a course of sexual conduct against Cassidy Doe from the summer of 2011 to in or about May 2014.

Defendant has not offered a scintilla of evidence that would support materiality or relevancy in this case.

Additionally, there has been no evidence that Cassidy Doe ever operated the purported Facebook account or "liked" the third-party site in question, nor is there any evidence that the victim ever viewed any of the pictures contained on that third-party site, including those purportedly added to that site by its administrator or an operator thereof, nor the images appearing in the "comment" section thereof. These exhibits cannot be construed as relevant because there is no evidence to suggest a nexus between the images contained on the "Sexo Infinito" page and the elements of predatory sexual assault against a child. (Penal Law § 130.96.)

Assuming arguendo, that the "like" choice was made on the Facebook page by the witness, any question as to what she may have liked on Facebook and pictures associated with any third-party account do not tend to prove or disprove any material fact that relates to this defendant's guilt. Whether the victim "liked" or did not "like" a third-party site that posts sexualized content is irrelevant to the guilt or non-guilt issues at trial.[5]

Facebook to Impeach the Witness' Credibility

The defendant's argument to use the exhibits to impeach the witness' credibility also fails under the law. Defendant chose not to examine the victim, Cassidy Doe, with respect to the association of her purported Facebook page with the third-party ***456** site, and furthermore, never questioned the victim as to whether she viewed the third-party site ESI images now offered by defendant into evidence. A Facebook page associated with sexualized content, purported to have been accessed well after defendant's access to abuse the victim had been foreclosed by the removal of the victim from defendant's home, does not go to this witness' credibility. Furthermore, no foundation was made by the defendant to use the ESI as an inconsistent statement.

> "A cross-examiner is bound by the answers of a witness to questions concerning collateral matters (*see, People v Pavao,* 59 NY2d 282, 288). Thus, a 'party who is cross-examining a witness cannot introduce extrinsic documentary evidence or call other witnesses to ****3** contradict the witness' testimony concerning collateral matters solely for the purpose of impeaching that witness' credibility' (*People v Pavao, supra,* at 288-289)." (*People v Inniss*, 192 AD2d 553, 554 [2d Dept 1993], *affd* 83 NY2d 653 [1994].)

Thus, the collateral evidence rule, which is binding upon this court, precludes defendant from now offering the material at issue.

> "The general rule of evidence in this State concerning the impeachment of witnesses with respect to collateral matters is that 'the cross-examiner is bound by the answers of the witness to questions concerning collateral matters inquired into solely to affect credibility.' (Richardson, Evidence [Prince, 10th ed], § 491, p 477.) It is well established that the party who is cross-examining a witness cannot introduce extrinsic documentary evidence or call other witnesses to contradict a witness' answers concerning collateral matters solely for the purpose of impeaching that witness' credibility. (*People v Zabrocky*, 26 NY2d 530, 535; *People v Schwartzman*, 24 NY2d 241, 245, *cert den* 396 US 846; *People v Duncan*, 13 NY2d 37, 41; *People v Sorge*, 301 NY 198, 201.)" (*Pavao*, 59 NY2d at 288-289.)

(2) In this context, defendant's proffer of the ESI material is an attempt to assail the credibility of his victim in violation of the collateral evidence rule precluding such extrinsic documentary evidence material from admission into evidence at trial for impeachment purposes and not a prior inconsistent statement.

***457** The defendant has argued that the instant material is relevant with respect to the victim's credibility, yet defendant has failed, in toto, to confront the victim with the existence of the "like" at issue, nor has he confronted the victim with any question as to whether she viewed the seemingly pornographic images on the third-party site. The only testimony elicited from the witness on the issue of Facebook is not called into question by the evidence proffered; that is, the victim testified that she did not have pornographic images on *her* Facebook site, and the proffered material does not suggest otherwise. Instead, the proffered material confuses that issue by offering into evidence images on a third-party site neither controlled nor demonstrably accessed or viewed by the victim, who was never questioned

with respect to her knowledge of the site. Furthermore, defendant has not demonstrated that the material at issue "show[s] moral turpitude to be relevant on the credibility issue" (*Badr v Hogan*, 75 NY2d 629, 634 [1990]). For all of these reasons, defendant is now barred from moving into evidence extrinsic documentary evidence assuming arguendo the defendant's argument that such material bears in some way on the victim's credibility. (*Badr*, 75 NY2d at 635-636 ["It was error to admit this extrinsic proof for the sole purpose of contradicting (a witness') testimony on (a) collateral issue (*see, People v Schwartzman, supra,* at 245; *People v Sorge, supra,* at 201)"]; *accord People v Blanchard*, 279 AD2d 808, 811 [3d Dept 2001], *lv denied* 96 NY2d 826 [2001]; *People v St. Louis*, 20 AD3d 592, 593 [3d Dept 2005].)

Accordingly, the law of this state is clear that the ESI material proffered by defendant must be relevant and material before other pertinent issues of admissibility can be met. Otherwise it is precluded from admission into evidence at trial. Nonetheless, the court will also address the fundamental evidentiary issues of ESI.

Electronically Stored Information

Electronically stored information is a broad term generally used to describe information stored on computers, including email, Internet sites, computer logs, documents, ****4** digital recordings, and various other media; the Federal Rules of Civil Procedure, in 2006, were amended to include provisions for the preservation and civil discovery of such information.

***458 Authentication of Electronically Stored Information**

ESI may, in certain contexts, be properly admitted into evidence. Such information may be authenticated according to the same principles governing authentication of other types of evidence. For example, the creator of such information may testify as to its authenticity (*Thompson v Workmen's Circle Multicare Ctr.*, 2015 WL 4591907, 2015 US Dist LEXIS 74528 [SD NY, June 9, 2015, No. 11 Civ 6885 (DAB) (HBP)]). However, although circumstantial evidence of authenticity may, in some cases, be sufficient to provide an adequate foundation upon which digital evidence may be admitted, circumstantial evidence is an insufficient foundation for admissibility where there is no evidence establishing the security of a website from which purported information has been accessed or that a purported author had exclusive access thereto. (*Commonwealth v Williams*, 456 Mass 857, 869, 926 NE2d 1162, 1172-1173 [2010].) Indeed, "courts have recognized that authentication of ESI may require greater scrutiny than that required for the authentication of 'hard copy' documents" (*Lorraine*, 241 FRD at 542-543), and that decisions as to the admissibility of such items "are to be evaluated on a case-by-case basis as any other document to determine whether or not there has been an adequate foundational showing of their relevance and authenticity" (*Lorraine*, 241 FRD at 543, quoting *In re F.P.*, 878 A2d 91, 96 [Pa Super Ct 2005]). "Indeed, courts increasingly are demanding that proponents of evidence obtained from electronically stored information pay more attention to the foundational requirements than has been customary for introducing evidence not produced from electronic sources." (*Lorraine*, 241 FRD at 543.)

Lorraine v Markel Am. Ins. Co.

This court's reliance upon a 2007 holding of the United States District Court for the District of Maryland in *Lorraine v Markel Am. Ins. Co.* (241 FRD 534 [D Md 2007]) and the Federal Rules of Evidence rule 803 (8) supports a finding, in the case at bar, that defendant has failed to adequately authenticate the items he now proffers as evidence.

In *Lorraine*, the US District Court of Maryland denied summary judgment motions which were purportedly supported by emails which were not authenticated, and failed, therefore, to comply with the requirements of rule 56 (c) of the Federal Rules of Civil Procedure. (*Lorraine*, 241 FRD 534.) Indeed, the ***459** *Lorraine* court found that the documents submitted to it for consideration in that case had not been properly authenticated. In the case at bar the defendant failed to have the witness, or anyone, accept or deny the third-party Facebook page.

The *Lorraine* court engaged in an analysis of the rules governing admissibility of ESI, under the Federal Rules of Evidence, summarized and applied to the instant situation as follows.

Authentication by Personal Knowledge

> "Courts considering the admissibility of electronic evidence frequently have acknowledged that it may be authenticated by a witness with personal knowledge. *United States v. Kassimu*, 2006 WL 1880335 (5th Cir. May 12, 2006) (ruling that copies of a post office's computer records could be authenticated by a custodian or other qualified witness with personal knowledge of the procedure that generated

the records); *St. Luke's [Cataract & Laser Inst., P.A. v Sanderson]*, 2006 WL 1320242 at *3-4 [MD Fla, May 12, 2006] ('To authenticate printouts from a website, the party proffering the evidence must produce "some statement or affidavit from **5 someone with knowledge [of the website] . . . for example [a] web master or someone else with personal knowledge would be sufficient." ' (citation omitted)); *[United States v] Safavian*, 435 F.Supp.2d [36,] 40 n. 2 (D.D.C. 2006) (noting that e-mail may be authenticated by a witness with knowledge that the exhibit is what it is claimed to be); *Wady [v Provident Life & Acc. Ins. Co. of Am.]*, 216 F.Supp.2d 1060 [CD Cal 2002] (sustaining objection to affidavit of plaintiff's witness attempting to authenticate documents taken from the defendant's website because the affiant lacked personal knowledge of who maintained the website or authored the documents). Although [Federal Rules of Evidence] Rule 901(b)(1) certainly is met by the testimony of a witness that actually drafted the exhibit, it is not required that the authenticating witness have personal knowledge of the making of a particular exhibit if he or she has personal knowledge of how that type of exhibit is routinely made. [Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence] § 901.03[2] [Joseph **460 M. McLaughlin ed, Matthew Bender 2d ed 1997]. It is necessary, however, that the authenticating witness provide factual specificity about the process by which the electronically stored information is created, acquired, maintained, and preserved without alteration or change, or the process by which it is produced if the result of a system or process that does so, as opposed to boilerplate, conclusory statements that simply parrot the elements of the business record exception to the hearsay rule, Rule 803(6), or public record exception, Rule 803(8)." (*Lorraine*, 241 FRD at 545-546.)

(3) In the case at bar the defendant has no personal knowledge with respect to the management, security or corporate records of Facebook, nor does he have any personal knowledge that the proffered materials were created by the person to whom he has attributed them: his child victim. Defendant has not and cannot testify with respect to the maintenance of Facebook records, nor has he (or can he) testify with respect to the routine creation of such records, as he has failed to demonstrate any knowledge of the corporate policy or computer programs comprising Facebook. Because there has been no factual specificity offered in this case with respect to how the ESI at issue is created, acquired, maintained and preserved without alteration or change, he cannot authenticate the proffered materials in this manner.

Authentication by Comparison to Known Authentic Samples

The *Lorraine* court also explained that the ESI may be authenticated by comparisons made, by a factfinder or expert witness, to known and authentic ESI (*Lorraine*, 241 FRD at 546).

Defendant has not authenticated the materials now at issue in this way, by calling an expert or other witness with comparisons.

Authentication by Circumstantial Evidence Coupled with Distinctive Characteristics

Nonetheless, the *Lorraine* court further described a method "most frequently used to authenticate e-mail and other electronic records." (*Lorraine*, 241 FRD at 546.)

This method, pursuant to rule 901 (b) (4) of the Federal Rules of Evidence,

> **461 "permits exhibits to be authenticated or identified by '[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.' The commentary to Rule 901(b)(4) observes '[t]he characteristics of the offered item itself, considered in the light of circumstances, afford authentication techniques in great variety,' including authenticating an exhibit by showing that it came from a 'particular person by virtue of its disclosing knowledge of facts known peculiarly to him,' or authenticating 'by content and circumstances indicating it was **6 in reply to a duly authenticated' document. Fed.R.Evid. 901(b)(4) advisory committee's note.[6] Use of this rule often is characterized as authentication solely by 'circumstantial evidence.' Weinstein at § 901.03[8]. Courts have recognized this rule as a means to authenticate ESI, including e-mail, text messages and the content of websites. *See United States v. Siddiqui*, 235 F.3d 1318, 1322-23 (11th Cir. 2000) (allowing the authentication of an e-mail entirely by circumstantial evidence, including the presence of the defendant's work e-mail address, content of which the defendant was familiar with, use of the defendant's nickname, and testimony by witnesses that the

> defendant spoke to them about the subjects contained in the e-mail); *Safavian*, 435 F.Supp.2d at 40 (same result regarding e-mail); *In re F.P.*, 878 A.2d at 94 (noting that authentication could be accomplished by direct evidence, circumstantial evidence, or both, but ultimately holding that transcripts of instant messaging conversation circumstantially were authenticated based on presence of defendant's screen name, use of defendant's first name, and content of threatening message, which other witnesses had corroborated); *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F.Supp.2d 1146, 1153-54 (C.D.Cal. 2002) (admitting website postings as evidence due to circumstantial indicia of authenticity, including dates and presence of identifying web addresses)." (*Lorraine*, 241 FRD at 546.)

The *Lorraine* court explained modes of circumstantial authentication that could support the admissibility of ESI, ***462** including "hash values" (241 FRD at 546-547) and "metadata"[7] (241 FRD at 547-548), neither of which have been offered in support of the instant defendant's proffer of the material at issue in the case at bar.

Here the defendant has failed to authenticate the materials at issue by circumstantial evidence. Indeed, defendant, during his trial testimony, had denied knowledge that his victim had a Facebook account. Defendant's only claim to have associated the instant exhibit purportedly depicting an image of that account based upon the appearance of the victim's name and photograph thereupon. Federal courts have described these kinds of materials as "inherently untrustworthy," and that "hackers can adulterate the content on *any* web-site from *any* location at *any* time. For these reasons, any evidence procured off the Internet is adequate for almost nothing, even under the most liberal interpretation of the hearsay exception rules" (*St. Clair v Johnny's Oyster & Shrimp, Inc.*, 76 F Supp 2d 773, 774-775 [SD Tex 1999]). Taken in conjunction with all of the circumstances attendant to defendant's testimony with respect thereto, defendant's purported authentication of the "likes" section of what he purports to be a previously-unknown-to-him Facebook page of the victim via a name, which may be entered by any person creating an account and is not verified in any way by the operators of Facebook, and a picture (again, entered by any user and not verified in any way by the operators of Facebook), without any verification from any source that the victim was the operator of that specific Facebook account at any time, including at the time defendant purportedly captured an image thereof, weeks after his access to abuse the victim had been cut off, is wholly insufficient to authenticate that image. Furthermore, the remaining exhibits offered by defendant have not ****7** been authenticated by him that can in any way attribute or connect those images to the victim, including because of this inability to authenticate the purported image of the victim's Facebook page, as well as because those images do not appear, anywhere, on the purported image of the victim's Facebook page, and, instead, appear on a third-party site, and defendant has failed to establish that the victim ever viewed any of those images on the "likes" sites. There is no circumstantial evidence demonstrating that the victim ever visited the third-party site.

***463** Thus, defendant has failed to demonstrate any circumstances supporting a conclusion that the Facebook page he attributes to the victim is authentic, having not established any indicia of reliability, such as the existence of disclosed knowledge of any fact particularly known to the victim, or any content or circumstances indicating the victim was replying to any other known, authentic communication or document. Therefore, defendant has not satisfied his burden pursuant to this method of authentication as established by courts in the U.S.

Public Record or Reports as Authentication

The *Lorraine* court recognized that the public filing or recording of ESI may support its admissibility. (*Lorraine*, 241 FRD at 548-549.)

Defendant has not, and cannot, advance this method as a means of authenticating the proffered materials.

Accuracy and Reliability of a Process or System as Authentication

The *Lorraine* court further described authentication via proof that a particular computer process or system produces an accurate and reliable result (for example, computer-generated evidence). (*Lorraine*, 241 FRD at 549.)

Defendant has not advanced this method as a means of authenticating the proffered materials.

Self-Authentication

The *Lorraine* court further described the variety of documents which are self-authenticating, and which include various forms of ESI, none of which have been advanced by this defendant in support of his application. (241 FRD at

549-553.) Examples of self-authenticating records include public records or reports stored in a public office: tax returns, weather bureau records, military records, social security records, INS records, VA records, judicial records, correctional records, law enforcement records, domestic public documents under and not under seal, foreign public documents, certified copies of public records, official publications of public authorities, newspapers and periodicals, trade inscriptions, acknowledged documents (for example, by a notary public), commercial paper and related documents, and certified domestic records of regularly conducted activity.

***464 Internet Postings, Text Message/Chat Room Content**

Important to the law of evidence in New York the *Lorraine* court further engaged in a theoretical analysis of the authentication required to admit Internet postings and text message or chat room content, concluding that "[b]ased on the [relevant] cases, the rules most likely to be used to authenticate chat room and text messages, alone or in combination, appear to be 901(b)(1) (witness with personal knowledge) and 901(b)(4) (circumstantial evidence of distinctive characteristics)." (*Lorraine*, 241 FRD at 556.) Further, "authentication rules most likely to apply, singly or in combination, [to Internet website postings] are 901(b)(1) (witness ****8** with personal knowledge) 901(b)(3) (expert testimony) 901(b)(4) (distinctive characteristics), 901(b)(7) (public records), 901(b)(9) (system or process capable of producing a reliable result), and 902(5) (official publications)." (*Lorraine*, 241 FRD at 556.)

Because the instant defendant has failed to demonstrate the existence of any evidence supporting any of the methods of authentication described by the *Lorraine* court, or the federal rules, he cannot meet any of the authentication burdens contemplated by the court for the admission of the purported Facebook "likes" of the victim, nor for the admission of the far more attenuated third-party sites. Therefore, because defendant cannot demonstrate the authenticity of the proffered material, and because the material is utterly irrelevant with respect to any material fact at issue in this case, his application to admit those materials must be denied; additionally, the court should preclude these items as inadmissible hearsay.[8]

***465 Hearsay Objection to ESI**

Internet postings are out of court declarations and present a hearsay issue.

> "Where postings from internet websites are not statements made by declarants testifying at trial and are offered to prove the truth of the matter asserted, such postings generally constitute hearsay under Fed.R.Evid. 801. *United States v. Jackson*, 208 F.3d 633, 638 (7th Cir. 2000) (declining to admit web postings where defendant was unable to show that the postings were authentic, and holding that even if such documents qualified under a hearsay exception, they are 'inadmissible if the source of information or the method or circumstances of preparation indicate a lack of trustworthiness') (quoting *United States v. Croft*, 750 F.2d 1354, 1367 (7th Cir. 1984)); *see also St. Clair v Johnny's Oyster & Shrimp, Inc.*, 76 F.Supp.2d 773, 775 (S.D. Tex. 1999) ('[A]ny evidence procured off the Internet is adequate for almost nothing, even under the most liberal interpretation of the hearsay exception rules.')." (*Novak v Tucows, Inc.*, 2007 WL 922306, *5, 2007 US Dist LEXIS 21269, *15-16 [ED NY, Mar. 26, 2007, No. 06-CV-1909 (JFB) (ARL)].)

The victim/witness in the case at bar was not confronted with the "likes" now attributed to her, nor was she questioned with respect to whether she has viewed the images purported to exist on a third-party site. Therefore, the "like" now attributed to her, now offered to prove, purportedly, that she did cause that "like" to exist, constitutes impermissible hearsay which falls within no existing exception and, therefore, must be precluded. The proffered material purporting to be the victim's "likes" on Facebook pages is akin to a written statement which may be just as much hearsay as oral testimony (*Boschen v Stockwell*, 224 NY 356 [1918]). Furthermore, there is no evidence suggesting that the victim ever viewed the additional sexually ****9** suggestive images offered by defendant. These images do not exist even upon the purported Facebook page of Cassidy Doe offered by defendant as that of the victim, and, thus, in addition to constituting hearsay, they remain unauthenticated.

***466 Rape Shield Law**

Defendant's offer of these materials further violates section 60.42 of the Criminal Procedure Law, generally known as New York's "Rape Shield" Law.

> "Evidence of a victim's sexual conduct shall not be admissible in a prosecution for an offense or an

attempt to commit an offense defined in article [130] of the penal law unless such evidence:

"1. proves or tends to prove specific instances of the victim's prior sexual conduct with the accused; or

"2. proves or tends to prove that the victim has been convicted of an offense under section 230.00 of the penal law within three years prior to the sex offense which is the subject of the prosecution; or

"3. rebuts evidence introduced by the people of the victim's failure to engage in sexual intercourse, oral sexual conduct, anal sexual conduct or sexual contact during a given period of time; or

"4. rebuts evidence introduced by the people which proves or tends to prove that the accused is the cause of pregnancy or disease of the victim, or the source of semen found in the victim; or

"5. is determined by the court after an offer of proof by the accused outside the hearing of the jury, or such hearing as the court may require, and a statement by the court of its findings of fact essential to its determination, to be relevant and admissible in the interests of justice." (CPL 60.42.)

(4) The Rape Shield

"[L]aw 'bar[s] harassment of victims and confusion of issues through raising matters relating to the victims' sexual conduct that have *no proper bearing* upon the defendant's guilt or innocence' (Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 60.42, at 9 [emphasis added]; *see also*, Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom,* 77 Column L Rev 1, 15-22)." (*People v Jovanovic*, 263 AD2d 182, 192 [1st Dept 1999], *appeal dismissed* 95 NY2d 846 [2000].)

This is exactly the kind of evidence defendant now seeks to introduce, after failing to demonstrate any basis upon which this court could construe it as relevant, authenticated or nonhearsay, for the sole purpose of attacking his victim's purported and unverified "like" of a sexualized Facebook site.

***467** Indeed, even where specific content has caused actual disagreement between a victim and a defendant, even simple cross-examination of the victim on that issue, far short of admission into evidence of purported images of graphic content, is properly limited, even where "it was obvious that the inappropriate . . . postings caused considerable friction between defendant and his daughter and that she resented his parental intrusion" (*People v Halter*, 19 NY3d 1046, 1051 [2012]). Thus, in the case at bar where defendant failed to engage in any cross-examination of his victim on this issue and has himself denied any prior knowledge of his victim's use of Facebook prior to his separation from her and the cessation of his abuses of her, admission of the proffered material is prohibited by the rules of evidence, as set forth above, and furthermore because the defendant has totally failed to demonstrate the existence of the purported "like" prior to the cessation of his abuses, and because the introduction of such evidence violates the Rape Shield Law.

"Evidence that [a] friend touched the victim sexually while at defendant's apartment does ****10** not indicate that the victim was willing to engage in sexual relations with anyone, including the friend, and is irrelevant to the issue of whether her sexual relations with defendant were consensual. . . . It has been routinely held that a victim's willingness to engage in sexual conduct with one person around the time of the incident in question is not indicative of a concomitant desire to consent to such behavior with another (*see People v Wilhelm*, 190 Mich App 574, 585, 476 NW2d 753, 759 [1991], *lv denied* 439 Mich 1013 [1992]; *Ellis v State*, 181 Ga App 630, 632, 353 SE2d 822, 825 [1987]; *State v Bevins*, 140 Vt 415, 419, 439 A2d 271, 273 [1981]; *Commonwealth v Folino*, 293 Pa Super 347, 355-357, 439 A2d 145, 149-150 [1981]; *see also People v McLaurin*, 27 AD3d 1117, 1118 [2006], *lv denied* 7 NY3d 759 [2006]; *People v Grantier*, 295 AD2d 988, 988 [2002], *lv denied* 99 NY2d 535 [2002]). Indeed, the inference that defendant sought to establish by the proffered evidence is precisely that which the Rape Shield Law sought to prevent (*see generally People v Williams,* 81 NY2d [303,] 312 [1993]; Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 60.48)." (*People v Simonetta*, 94 AD3d 1242, 1245-1246 [3d Dept 2012], *lv denied* 19 NY3d 1029 [2012].)

***468** Thus, even if defendant were to argue that, in some way, the materials proffered demonstrate the victim's willingness to engage in sexual conduct, such testimony or evidence is exactly the kind of testimony or evidence prohibited from admission at trial by the Rape Shield Law. Indeed, even where mental health records have included reports of a victim's "hypersexuality," such evidence is properly excluded.

"Defendant did not introduce medical evidence or expert testimony to establish that hypersexuality is a mental illness that would impact the victim's credibility or control her behavior; indeed, all references to the victim's 'hypersexuality' in her medical history are

> to her wholly voluntary inappropriate, promiscuous behavior—conduct intentionally designed to shock and draw attention—which is precisely the kind of evidence the Rape Shield Law prohibits (*see* CPL 60.42; *People v Simonetta*, 94 AD3d 1242, 1246 [2012], *lv denied* 19 NY3d 1029 [2012]).” (*People v McCray*, 102 AD3d 1000, 1007-1008 [3d Dept 2013], *affd* 23 NY3d 193 [2014].)

Defendant's application to admit the proffered materials should, therefore, be also denied as violative of the Rape Shield Law, as well as for all of the reasons set forth above on relevancy and ESI authentication.

Conclusion

Since the proffered ESI materials are irrelevant to the material issues at trial, and are offered solely as an impermissible collateral attack on the victim's credibility without any demonstration that such materials actually impair the credibility of the victim, rather than simply demonstrate defendant's effort to embarrass and shame his child victim/witness; and because the proffered ESI materials have not been sufficiently authenticated pursuant to any permissible mode of authentication; and because the proffered materials are inadmissible as hearsay; and because such evidence violates the Rape Shield Law, the materials of ESI are precluded from evidence at this trial.

FOOTNOTES

Footnotes

1 Cassidy Doe testified at trial at the age of 14 regarding incidents that first happened when she was 11 years old.

2 Sullivan County Family Court had previously awarded defendant custody of the victim and her younger brother after determining their biological parents were incapable of caring for the children. The authorities became aware of the allegations after the victim contacted her biological mother on Facebook. According to the trial testimony, the biological mother, in turn, told the victim's uncle, who reported the allegations to the authorities and the New York State Police investigated the case.

3 Therefore, the general rule in the context of civil cases that items produced by one party to another in the course of discovery are presumed authentic is not implicated by the People's disclosure to counsel for defendant of documents delivered by defendant himself to the police. (*See e.g. Lorraine v Markel Am. Ins. Co.*, 241 FRD 534, 552-553 [2007].)

4 It is important to note that on January 9, 2014, Facebook was sued in the United States District Court for the Northern District of California. The complaint alleged that Facebook falsely attributed sponsorship in the form of “likes” to items that individual users had never liked. The complaint was eventually withdrawn by the plaintiff (*DiTirro v Facebook, Inc.*, US Dist Ct, ND Cal, No. 5:2014cv00132).

5 Even if the victim was an adult, the protection of the Rape Shield Law and its progeny of cases make the victim's sexual proclivity or sexual history “protected” and irrelevant as will be later discussed.

6 In New York there is no legislative authority or rules for ESI.

7 “Hash” value is a word used in a message preceded by the number for a search. “Metdata” is info that is held as a description of stored data, like a Google search of keywords for a website.

8 “As Novak proffers neither testimony nor sworn statements attesting to the authenticity of the contested web page exhibits by an employee of the companies hosting the sites from which plaintiff printed the pages, such exhibits cannot be authenticated as required under the Rules of Evidence. *See, e.g. Costa v. Keppel Singmarine Dockyard PTE, Ltd.*, No. 01-CV-11015 MMM (Ex), 2003 U.S. Dist. LEXIS 16295, at *29 n. 74 (C.D. Cal. Apr. 25, 2003) (declining to consider evidence downloaded from corporation's website in the absence of testimony from the corporation authenticating such documents) (citing *[United States v] Jackson*, 208 F.3d [633,] 638 [2000], and *St. Clair*, 76 F.Supp.2d at 775 (‘Anyone can put anything on the internet. No web-site is monitored for accuracy and nothing contained therein is under oath or even subject to independent verification absent underlying documentation.’)). Therefore, in the absence of any authentication of plaintiff's internet printouts, combined with the lack of any assertion that such printouts fall under a viable exception to the hearsay rule, defendants' motion to strike Exhibits B, J, K, N-R, U and v is granted.” (*Novak v Tucows, Inc.*, 2007 WL 922306, *5, 2007 US Dist LEXIS 21269, *18 [ED NY, Mar. 26, 2007, No. 06-CV-1909 (JFB) (ARL)].)

End of Document

New York Official Reports

Unreported Disposition
27 Misc.3d 1208(A), 910 N.Y.S.2d 407 (Table), 2010 WL 1444529 (N.Y.Sup.), 2010 N.Y. Slip Op. 50621(U)

***1** The People of the State of New York

v.

Akindele Jones, Defendant

4290/2008
Supreme Court, Kings County
Decided on March 29, 2010

CITE TITLE AS: People v Jones

ABSTRACT

Grand Jury
Defective Proceeding
False Testimony

Crimes
Right to Speedy Trial

People v Jones (Akindele), 2010 NY Slip Op 50621(U). Grand Jury—Defective Proceeding—False Testimony. Crimes—Right to Speedy Trial. (Sup Ct, Kings County, Mar. 29, 2010, Riviezzo, J.)

APPEARANCES OF COUNSEL

For defendant:
Gregory Johnston, Esq.
For Seymour James, Esq.
The Legal Aid Society
Criminal Defense Division
111 Livingston Street
Brooklyn, NY 11201
(718) 243-6315
For the People,
Charles J. Hynes, Esq., District Attorney
by Frank Santarpia
350 Jay Street
Brooklyn, NY
718-250-4730

OPINION OF THE COURT

Dineen A. Riviezzo, J.

Defendant moves, inter alia, (1) to dismiss the indictment pursuant to CPL § 210.20 (1) (c), on the ground that the Grand Jury proceeding was defective, and (2) to dismiss the indictment pursuant to CPL § 30.30.

Facts and Procedural History

Defendant was charged in an indictment with assaulting Leonard White on April 26, 2008. The People contend that on the day of the assault, the defendant was present at a "stoop sale" in Kings County, where he encountered a young lady with whom he had a prior relationship. According to Mr. White's grand jury testimony, the defendant was arguing in a heated manner with the young lady. Mr. White, the superintendent of the building where the sale was taking place, requested that defendant leave. As Mr. White followed the defendant away from the building and around the corner, the defendant suddenly turned and plunged a knife into Mr. White's chest. ***2**

Defendant gave a different account of the incident, stating that he was indeed at the sale, and that he was told to leave. He was followed by Mr. White. According to defendant, who testified in the Grand Jury, it was Mr. White who in fact suddenly slashed the defendant's face with a sheet rock knife, and defendant then used his own knife to defend himself, ultimately stabbing the victim in the chest.

The defendant testified that after the incident, he walked by a nearby police station, and officers observed the wound to defendant's face. As they questioned defendant, a radio call was received that a person fitting defendant's description had been involved in a stabbing. Defendant was ultimately arrested.

Prior to defendant's testimony, on May 1, 2008, Police Officer Paul Harloff testified before the Grand Jury that he responded in a marked vehicle to a radio report of a stabbing, and obtained a description of the defendant from the victim. He then canvassed the area, and located the defendant several

blocks away. He arrested the defendant, and recovered a knife from the defendant.

In August 2008, the assigned Assistant District Attorney interviewed Officer Harloff, who described the events in a manner consistent with his earlier testimony. However, in a further interview on October 2, 2009, the People represent that Officer Harloff now indicated for the first time that he "may not" have been the officer who stopped the defendant or recovered the knife. The assigned Assistant District Attorney placed this on the record on October 21, 2009. Subsequent investigation indicated that three or four other officers in fact were involved in the initial encounter with the defendant. The names and memo book entries of these officers were turned over to defendant on November 18, 2009. Although the People represent that Officer Harloff was not in any way involved in the apprehension, arrest and recovery of the knife, none of officers who actually were present has any recollection of the circumstances surrounding the recovery and vouchering of the knife. The People concede that "this deficiency may preclude the People from prevailing at a *Mapp* hearing...."

Defendant now moves to dismiss the indictment based on the introduction of perjured testimony before the Grand Jury. Defendant argues that the perjured testimony by Officer Harloff that the defendant was detained after the area was canvassed conflicts with the defendant's testimony, and falsely suggested that defendant was in flight, undermining the defense of justification. The People argue, to the contrary, that Officer Harloff's perjured testimony was so generalized that it did not prejudice the defendant. They argue that Officer Harloff never indicated that the defendant was running, or resisted arrest. Under these circumstances, they maintain that the admission of perjured testimony, without the knowledge of the District Attorney's office, did not impair the integrity of the Grand Jury.

In addition, defendant argues that the case must be dismissed pursuant to CPL 30.30. Defendant maintains that the action was commenced on April 28, 2008, with the filing of a felony complaint, and that 541 days have elapsed since this action was commenced. Defendant argues that the People's statement of readiness was illusory, as they were not in fact ready to proceed with hearings, or to try the case. The People agree that the action was commenced on April 28, and they thus calculate that they were required to be ready for trial within 183 days. They maintain, however, that only 124 days are chargeable, based on the actual time periods involved and the various time periods excluded from their 30.30 time. The People also argue ***3** that the perjured testimony did not affect their readiness, as they could proceed to trial without introducing the defendant's knife into evidence, and without calling any police officers to testify.

Discussion

Defect in the Proceedings Before the Grand Jury

In People v. Pelchat (62 NY2d 97, 464 NE2d 447, 476 NYS2d 79 [1984]), a police officer, stating that he misunderstood the question propounded to him before the Grand Jury, gave testimony which indicated that the defendant was observed, along with others, to have engaged in off-loading marihuana from a boat. In fact, the defendant was merely present in a building to which the marihuana had been delivered. The Court of Appeals held that the false evidence was the only evidence in the Grand jury linking the defendant to the unlawful possession of marihuana (as defendant's presence at the scene of arrest, standing alone, would not support the indictment), and thus the indictment was fatally defective because the Grand Jury had no evidence before it worthy of belief that defendant had committed a crime.

In Pelchat, the false testimony was the only testimony linking defendant to the commission of a crime. Here, on the contrary, the victim's testimony standing alone was sufficient to support the indictment. It has been held that where there is sufficient evidence before the Grand Jury to support every element of the crimes charged, the mere fact that false or inadmissible evidence was inadvertently adduced before the Grand Jury does not necessarily affect the validity of the proceeding. (People v. Hansen, 95 NY2d 227, 233 [2000] [dismissal not required where portion of videotape of newscast, which was inadmissible hearsay, was inadvertently played during Grand Jury proceeding].) In People v. Johnson, 54 AD3d 636, 2008 NY Slip Op 7074 (1st Dep't 2008), the trial court was held to have properly declined to dismiss an indictment on the ground that a prosecution witness revealed at trial that a portion of his grand jury testimony was untrue, where the indictment was amply supported by other evidence, and there was no suggestion that the prosecutor had reason to believe the testimony was false.

The foregoing cases indicate that if the false testimony is admitted as to a minor point, or if without the false (or even perjured) testimony there is ample and sufficient competent evidence to support the Grand Jury's findings, the indictment need not necessarily be dismissed. (See, also, People v. Davis,

256 AD2d 200, 683 NYS2d 502 [1st Dep't 1998] [where prosecutor advised defendant and the court of his belief that one witness had offered perjured testimony before the Grand Jury, dismissal of indictment was not warranted as the record indicated that there was additional, apparently competent evidence before the Grand Jury to support the indictment]; People v. Bryant, 234 AD2d 605, 605-606 [2d Dep't 1996] [even if the testimony of the recanting witness before the Grand Jury was false, the Grand Jury testimony of the police officer/victim was sufficient to establish reasonable cause to believe that the defendant was the shooter].)

There is ample authority for this court to conclude that the fact that false testimony was adduced before the Grand Jury does not in itself warrant dismissal of the indictment. But this court's inquiry does not end at determining whether there exists sufficient evidence, aside from the false testimony, to support the indictment. The court must also address whether or not the irregularity in the proceeding resulted in potential prejudice to the defendant, so as to impair the integrity of the Grand Jury. As the Court stated in People v. Huston (88 NY2d 400, 409 [1996]): ***4**

"CPL 210.35 (5) provides that a Grand Jury proceeding is defective when " the integrity thereof is impaired and prejudice to the defendant may result. " The exceptional remedy of dismissal is thus warranted only where a defect in the indictment created a possibility of prejudice (see, People v Di Falco, 44 NY2d at 487, supra). Although this statutory test "is very precise and very high" (People v Darby, 75 NY2d 449, 455, 554 NYS2d 426, 553 NE2d 974), it does not require actual prejudice (see, People v Sayavong, 83 NY2d at 709, 711, supra ; People v Wilkins, 68 NY2d 269, 276, 508 NYS2d 893, 501 NE2d 542). Indeed, two earlier drafts of CPL 210.35 (5) required a showing of actual prejudice before an indictment could be dismissed as the result of defective Grand Jury proceedings. The Legislature, however, rejected a requirement of actual prejudice in favor of the current provision--requiring only that "prejudice to the defendant may result" (CPL 210.35 [5] [emphasis added]; see, People v Di Falco, 44 NY2d 482, 487, 406 NYS2d 279, 377 NE2d 732, supra ; Preiser, Practice Commentary, McKinney's Cons Laws of NY, Book 11A, CPL 210.35, at 676)."'Dismissal of indictments under CPL 210.35 (5) should thus be limited to those instances where prosecutorial wrongdoing, fraudulent conduct or errors potentially prejudice the ultimate decision reached by the Grand Jury. The likelihood of prejudice turns on the particular facts of each case, including the weight and nature of the admissible proof adduced to support the indictment and the degree of inappropriate prosecutorial influence or bias."

The likelihood of prejudice in this case is clear and pronounced. As indicated above, and as defendant argues, the false testimony conflicted with key components of defendant's testimony. Defendant relied on a theory of justification, and thus he testified that he was bleeding from his face when he was approached by officers from a nearby precinct. His testimony suggested - consistent with his claims of innocence - that he was neither fleeing, nor hiding his face, nor attempting to avoid the police, when he was approached by a group of officers. Officer Harloff's false testimony that the defendant was apprehended by a single officer after the area was canvassed (1) made defendant's testimony appear to be fabricated; (2) suggested that if defendant lied about key details, he might be lying about his account of the events *in toto*; and (3) negated the inference that defendant was neither fleeing not hiding. Moreover, since Officer Harloff did not apprehend the defendant, he gave no testimony that the defendant was bleeding from the face; testimony which may well have further corroborated defendant's version of the events.

In short, the false testimony may well have caused the Grand Jury to reject the defense of justification entirely. Potential prejudice to the defendant is amply established on this record, and thus the court cannot in good conscience find that the integrity of the Grand Jury was not impaired by the presentation of false evidence.

Dismissal Under CPL 30.30

The defendant has, in addition, moved to dismiss this action on the grounds that he was denied a speedy trial pursuant to CPL 30.30. The instant criminal action was commenced for speedy trial purposes on April 28, 2008, when a felony complaint was filed. The People have six months (183 days) to be ready for trial.

The following time periods are to be considered: ***5**

April 28, 2008 to May 2, 2008: *4 days charged.*

May 2, 2008 to June 16, 2008: The People filed a statement of readiness on May 23, 2008, and served a copy on defense counsel on May 27, 2008. A valid certificate of readiness is effective as of the date it is filed with the court, as long as

defense counsel is promptly notified. See People v. Anderson, 252 AD2d 399, 400 (1st Dept 1998). *21 days charged.*

June 16, 2008 to June 17, 2008: Defendant was arraigned on June 17. The People had already filed a statement of readiness, and answered ready. *0 days charged.*

June 17, 2008 to August 27, 2008: The case was adjourned for open file discovery and submission of the Grand Jury minutes, in accordance with the practice in Kings County of submission of the Grand Jury minutes to the court for review as to sufficiency without the need for a formal written motion. See People v. Dorilas 19 Misc 3d 75 (App. Term, 2d Dept. 2008) (period of time during which parties engaged in discovery by stipulation was excludable). *O days charged*.

August 27, 2008 to August 29, 200: The case was adjourned for a decision on the sufficiency of the Grand Jury minutes, on consent. *0 days charged.*

August 29, 2008 to September 29, 2008: Adjourned on consent. *O days charged*.

September 29, 2008 to October 27, 2008: Adjourned on consent. *O days charged*.

October 27, 2008 to November 20, 2008: Adjourned to complete discovery on consent. The file notation reads, “Medical records and grand jury minutes to be turned over. If not, charge the People.” This was accomplished as instructed (see below). *O days charged*.

November 20, 2008 to January 23, 2008: The minutes of the calendar call of November 20 ordered by the court indicate that the People had served medical records and grand jury minutes on defense counsel's office, and that defense counsel requested time to have an expert review the medical records. As the adjournment was at the request of and for the benefit of the defendant, *O days charged*. (The case was advanced on December 12 to December 17. On December 17, orders of protection were renewed, then adjourned back to the original date).

January 23, 2009 to March 16, 2009: The minutes of the calendar call of January 23 indicate that defendant's trial counsel was not present, but that he was away on paternity leave. The People consented to the holding of a Wade hearing. The case was adjourned to March 16 for hearing and trial. *O days charged*.

March 16, 2009 to April 8, 2009: The People were not ready. *15 days charged*.

April 8, 2009 to May 11, 2009: The People were not ready and requested May 4. The case was adjourned to May 11. *26 days charged*. (The People conceded 33 days, but they were mistaken, as the court records indicate.)

May 11, 2009 to May 25, 2009: The People were not ready, and requested May 25. The case was adjourned by the court to June 12. *14 days charged*.

June 12, 2009 to July 1, 2009: The minutes ordered by the court indicate that the defendant was not ready for trial. *0 days charged.*

July 1, 2009 to September 16, 2009: The People were not ready, and requested July 15. The case was adjourned by the court to September 16. *14 days charged*. ***6**

September 16, 2009 to October 5, 2009: The People were not ready, and requested September 30. The case was adjourned by the court to October 5. *14 days charged*.

October 5, 2009 to October 21, 2009: Defendant was not ready. *0 days charged.*

October 21, 2009 to November 18, 2009: The People announced they were not ready, made a record that Officer Harloff's Grand Jury testimony was false, and requested a two-day adjournment. *2 days charged*.

November 18, 2009 to December 16, 2009:The minutes as ordered by the court indicate that defendant's trial counsel was on trial before another judge. As defendant was not ready, *0 days charged.*

December 16, 2009 to January 20, 2010: The People assert announced they were not ready. The court file indicates that the People were to be charged until December 23. The case was adjourned to January 20. *7 days charged*.

On January 11, the instant motion was served.

The People contend that 124 days of chargeable time elapsed. The Court finds that 117 days elapsed. The People are within their allotted 30.30 time.

The court does not find that the People's statements of readiness were "illusory," as defendant now argues, based on the statements made by the officer which, it was eventually discovered, were untrue. A statement of readiness made at a time when the People are not actually ready is illusory, and is thus insufficient to stop the running of the speedy trial clock. (People v Cole, 73 NY2d 957, 958, 538 NE2d 336, 540 NYS2d 984 [1989]). The governing standard is whether the People are able to present their case, and do so immediately - the People's statement or readiness must be made in good faith and reflect an actual, present state of readiness. (People v. Robinson, 171 AD2d 475, 567 NYS2d 401 [1st Dep't 1991].) The police officer's misrepresentations were relied upon by the People in good faith, and promptly reported to the court. It has been held that where a witness testified falsely in the Grand Jury, requiring the case to be re-presented, the People's statement of readiness based in good faith on the validity of the earlier indictment was not chargeable to the People. (People v. Rosario, 176 AD2d 830, 574 NYS2d 831 [2d Dep't 1991].)

CONCLUSION

The indictment is dismissed pursuant to CPL § 210.35 (5), with leave to re-present.

This is the Order of the Court.

Dated: 3/29/2010/s/

J.S.C.

New York
Official Reports

142 A.D.3d 1106, 38 N.Y.S.3d
215, 2016 N.Y. Slip Op. 06103

**1 The People of the State
of New York, Respondent,

v

David A. Kappen, Appellant.

Supreme Court, Appellate Division,
Second Department, New York
1885/10, 2012-09487
September 21, 2016

CITE TITLE AS: People v Kappen

HEADNOTES

Grand Jury
Defective Proceeding
Integrity of Grand Jury Impaired by Actions of District Attorney—No Prejudice to Defendant

Crimes
Double Jeopardy

Crimes
Instructions
Expanded Knowledge Charge

Crimes
Jurors
Discharge of Juror

Barket Marion Epstein & Kearon, LLP, Garden City, NY (Donna Aldea of counsel), for appellant.
Madeline Singas, District Attorney, Mineola, NY (Daniel Bresnahan and Joseph Mogelnicki of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Nassau County (St. George, J.), rendered October 9, 2012, convicting him of criminal possession of a controlled substance in the first degree and criminal possession of a controlled substance in the third degree, upon a jury verdict, and imposing sentence.

Ordered that the judgment is affirmed.

The defendant participated in a scheme to transport cocaine from California to New York by secreting it inside of a flat screen television and shipping it via UPS to an auto servicing store where an accomplice worked.

Viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620 [1983]), we find that it was legally sufficient to establish the defendant's guilt beyond a reasonable doubt. Moreover, in fulfilling our responsibility to conduct an independent review of the weight of the evidence (*see* CPL 470.15 [5]; *People v Danielson*, 9 NY3d 342 [2007]), we nevertheless accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor (*see People v Mateo*, 2 NY3d 383, 410 [2004]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). Upon reviewing the record here, we are satisfied that the verdict of guilt was not against the weight of the evidence (*see People v Romero*, 7 NY3d 633 [2006]).

Although the prosecutor improperly elicited testimony which constituted inadmissible hearsay, the grand jury proceeding did not fail to conform to the requirements of CPL article 190 to such a degree that the integrity thereof was impaired and, in view of the sufficiency of the independent, admissible proof which supported the indictment, no prejudice to the defendant could have resulted from the improperly elicited testimony (*see People v Simon*, 101 AD3d 908, 909 [2012]; *People v Miles*, 76 AD3d 645 [2010]; *People v Read*, 71 AD3d 1167, 1168 [2010]; *People v Walton*, 70 AD3d 871, 873 [2010]).

The defendant contends that double jeopardy precluded his second trial and required dismissal of the indictment because the evidence against him at his first trial, which ended in a **2 mistrial, was legally insufficient to support a conviction (*see* **1107 *People v Dann*, 100 AD2d 909 [1984]; *People v Tingue*, 91 AD2d 166 [1983]; *Rafferty v Owens*, 82 AD2d 582 [1981]). However, since the defendant himself sought and obtained a mistrial without prejudice, he waived his present claim that the second trial constituted double jeopardy (*see United States v Scott*, 437 US 82, 93 [1978]; *Matter of Gorghan v DeAngelis*, 7 NY3d 470, 473 [2006]; *Matter of Davis v Brown*, 87 NY2d 626, 630 [1996]; *People v Ferguson*, 67 NY2d 383, 388 [1986]; *People v Nicholson*, 35 AD3d

886, 889-890 [2006]; *People v Brown*, 147 AD2d 579, 580 [1989]).

Contrary to the defendant's contention, the Supreme Court properly gave the jury an expanded knowledge charge. That the evidence of the defendant's guilt was circumstantial, and his possession of the cocaine was accessorial and constructive, did not constitute a bar to the charge as given (*see People v Ford*, 66 NY2d 428, 442-443 [1985]; *People v Sierra*, 45 NY2d 56, 60 [1978]; *People v Reisman*, 29 NY2d 278, 285 [1971]; *People v Brown*, 133 AD3d 772, 773 [2015]; *People v Skyles*, 266 AD2d 321, 322 [1999]; *People v Cuesta*, 199 AD2d 101, 101-102 [1993]).

The record supports the Supreme Court's determination that it was not necessary to either disqualify a juror who expressed discomfort at rendering a verdict after it came to her attention that a relative of the defendant might be a student at the school her daughter attended or conduct a more probing inquiry regarding her ability to continue to serve on the jury. The court fully explored the nature of the juror's concerns during an in camera proceeding, at which the court conducted a "probing and tactful inquiry" and made a "careful consideration of the juror's answers and demeanor" (*People v Paige*, 134 AD3d 1048, 1054 [2015] [internal quotation marks omitted]; *see People v Mejias*, 21 NY3d 73, 79 [2013]; *People v Buford*, 69 NY2d 290, 299 [1987]), and providently exercised its discretion in finding that the juror did not possess a state of mind that would have prevented her from rendering an impartial verdict and, therefore, was not grossly unqualified (*see People v Parrilla*, 27 NY3d 400 [2016]). Leventhal, J.P., Roman, Sgroi and LaSalle, JJ., concur.

New York Official Reports

167 A.D.2d 963, 562 N.Y.S.2d 303

*963 The People of the State of New York, Respondent,

v.

Anthony Liuzzo, Joseph Liuzzo, Walter Flynn and Frederick J. Landy, Appellants.

Supreme Court, Appellate Division, Fourth Department, New York
1354
(November 16, 1990)

CITE TITLE AS: People v Liuzzo

HEADNOTE

ATTORNEY AND CLIENT
DISQUALIFICATION

(1) Court did not err in disqualifying attorney and his law firm from representing defendants concerning indictment; before criminal proceeding was commenced, attorney's firm had represented Department of Social Services auditor on allegations of misconduct against him; those allegations arose from audit that led to instant indictment and were made by defendants or their agents --- Duty of loyalty to former client is broader than attorney-client privilege and attorney is not free to attack former client with respect to subject matter of earlier representation even if information used in attack comes from sources other than former client; although defendants purported to waive conflict of interest and agreed attorney would limit cross-examination of auditor, who was expected to be key prosecution witness at trial, auditor did not waive conflict; auditor's right to attorney's loyalty cannot be waived by defendants.

Order unanimously affirmed with costs.

OPINION OF THE COURT

The court did not err in disqualifying attorney Cambria and his law firm from representing defendants Liuzzo concerning Chautauqua County indictment No. 89-242. Before this criminal proceeding was commenced, Cambria's firm had represented a Department of Social Services auditor on allegations of misconduct against him. Those allegations arose from the audit that led to the instant indictment and were made by the Liuzzos or their agents.

The duty of loyalty to a former client is broader than the attorney-client privilege and an attorney is not free to attack a former client with respect to the subject matter of the earlier representation even if the information used in the attack comes from sources other than the former client *(see,* Code of Professional Responsibility EC 4-4; DR 5-105). Although the Liuzzos purported to waive any conflict of interest and agreed that Cambria would limit cross-examination of the auditor, who was expected to be a key prosecution witness at trial, the auditor did not waive the conflict. The auditor's right to Cambria's loyalty cannot be waived by the Liuzzos. The disqualification of Cambria was a reasonable exercise of the trial court's discretion, because an individual's right to counsel of his own choice must yield to an overriding competing public interest. The overriding public interest here is "the courts' duty to protect the integrity of the judicial system and preserve the ethical standards of the legal profession" *(Matter of Abrams,* 62 NY2d 183, 197). (Appeal from order of Chautauqua County Court, Adams, J.--disqualify attorney.)

Present--Doerr, J. P., Denman, Boomer, Pine and Lawton, JJ.

New York Official Reports

47 N.Y.2d 257, 391 N.E.2d 990, 417 N.Y.S.2d 908

The People of the State of New York, Respondent,
v.
Joseph T. Macerola, Jr., Appellant.
The People of the State of New York, Respondent,
v.
Michael Harry Letko, Appellant.

Court of Appeals of New York
Argued April 26, 1979;

decided June 7, 1979

CITE TITLE AS: People v Macerola

SUMMARY

Appeal, in the first above-entitled action, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered December 7, 1977, which affirmed a judgment of the Albany County Court (John J. Clyne, J.), rendered upon a verdict convicting defendant of burglary in the second degree and two counts of assault in the third degree.

Appeal, in the second above-entitled action, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered December 12, 1977, which modified, on the law and the facts, and, as modified, affirmed a judgment of the Albany County Court (John J. Clyne, J.), rendered upon a verdict convicting defendant of burglary in the second degree and two counts of assault in the third degree. The modification consisted of reversing so much of the judgment as convicted defendant of burglary in the second degree and vacating the sentence imposed thereon.

Defendants, who were charged in a three-count indictment with burglary in the second degree and assault in the second degree, were represented by an attorney retained by both, and were jointly tried.

The Court of Appeals reversed the orders of the Appellate Division and ordered a new trial, holding, in an opinion by Judge Jasen, that defendants had been deprived of their constitutionally guaranteed right to counsel by reason of their representation by the same attorney at trial, since the Trial Judge failed to ascertain on the record whether each defendant was cognizant of the potential risks inherent in the simultaneous representation of codefendants at trial and there was consequently no indication whether defendants' decision to proceed with their attorney was knowingly and intelligently made, and due to the conflict which existed between the defenses sought to be established by each defendant in ***258** that by attempting to establish a separate defense for each defendant, defense counsel was, by implication, incriminating the other defendant.

People v Macerola, 60 AD2d 661, reversed.

People v Letko, 60 AD2d 661, reversed.

HEADNOTES

Crimes
Right to Counsel
Joint Representation of Codefendants

(1) The defendants were deprived of their constitutionally guaranteed right to counsel (US Const, 6th Amdt; NY Const, art I, §6) by reason of their representation by the same attorney at trial and a new trial is required, since the Trial Judge failed to ascertain on the record whether each defendant was cognizant of the potential risks inherent in the simultaneous representation of codefendants at trial and there is consequently no indication whether defendants' decision to proceed with their attorney was knowingly and intelligently made, and due to the conflict which existed between the defenses sought to be established by each defendant in that by attempting to establish a separate defense for each defendant, defense counsel was, by implication, incriminating the other defendant; additionally, the fact that defendants were charged with accessorial conduct (Penal Law, art 20) did not ameliorate the inherent dangers when counsel for defendants attempted to represent their conflicting interests.

Crimes
Right to Counsel

(2) One accused of committing a crime is entitled to the effective assistance of counsel; such right is guaranteed by both the Federal and State Constitutions, and by State statute (US Const, 6th Amdt; NY Const, art I, §6; CPL 210.15, subd 2).

Crimes
Right to Counsel
Joint Representation of Codefendants

(3) Although joint representation of multiple defendants is not per se violative of one's constitutional right to the effective assistance of counsel, the trial court is charged with the responsibility of determining whether the defendant's decision to proceed with his attorney is an informed decision; the Judge must ascertain on the record, before formal commencement of the trial, whether each defendant represented by the same attorney has an awareness of the potential risks involved in that course and has knowingly chosen it.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

9 NY Jur, Constitutional Law § 344

Criminal Procedure Law §210.15, subd 2; Penal Law, Article 20

16 Am Jur 2d, Constitutional Law § 573; 21 Am Jur 2d, Criminal Law §§ 222, 314, 315, 318 et seq.

Am Jur Pl & Pr Forms (Rev), Criminal Procedure, Forms 31 et seq.

NY Constitution, Article I, § 6 ***259**

ANNOTATION REFERENCES

Circumstances giving rise to conflict of interest between or among criminal codefendants precluding representation by same counsel. 34 ALR3d 470

POINTS OF COUNSEL

E. Stewart Jones, Jr., for appellant in the first above-entitled action.

I. Appellant Macerola was denied his Sixth Amendment right to assistance of effective, competent counsel at trial because his attorney failed to inform Macerola of the risks involved in the joint representation by that attorney of Macerola and the codefendant Letko who had conflicting interests. *(People v Dell,* 60 AD2d 18; *People v Gomberg,* 38 NY2d 307; *People v Gonzalez,* 30 NY2d 28, 409 US 859; *United States v Alberti,* 470 F2d 878, 411 US 919; *United States v De Berry,* 487 F2d 448; *People v Rivera,* 62 AD2d 767; *Salomon v La Vallee,* 575 F2d 1051.) II. Defendant Macerola was denied his Sixth Amendment right to assistance of effective, competent counsel because the Trial Judge failed to make inquiry on the record to determine if Macerola was aware of the potential risks involved in Macerola and Letko being jointly represented by one attorney. *(People v Gomberg,* 38 NY2d 307; *People v Rivera,* 62 AD2d 767; *People v Kerr,* 61 AD2d 762.) III. Improper conduct by Macerola's counsel, the Assistant District Attorney, and the Trial Judge resulted in Macerola's being deprived of his constitutional rights to effective assistance of counsel and a fair impartial trial. *(People v De Jesus,* 42 NY2d 519; *People v Wright,* 41 NY2d 172; *People v Sandoval,* 34 NY2d 371; *People v Dickman,* 42 NY2d 294; *People v Carmack,* 44 NY2d 706; *People v Watson,* 55 AD2d 873; *People v Alicea,* 37 NY2d 601; *Berger v United States,* 295 US 78.)

Sol Greenberg, District Attorney (George H. Barber and *F. Patrick Jeffers* of counsel), for respondent in the first above-entitled action.

I. Defendant was not denied his right to the effective assistance of counsel. *(People v Brabson,* 9 NY2d 173; *People v Smith,* 31 AD2d 847; *People v La Bree,* 34 NY2d 257; *People v Gonzalez,* 30 NY2d 28; *People v Gomberg,* 38 NY2d 307.) II. The trial court did not err by not asking defendant whether he was aware of the potential risks. *(People v Gomberg,* 38 NY2d 307; *People v Allini,* 60 AD2d 886; *People v* ***260** *Gonzalez,* 30 NY2d 28.) III. Defendant received a fair trial. *(People v Brabson,* 9 NY2d 173; *People v Smith,* 31 AD2d 847; *People v La Bree,* 34 NY2d 257; *People v Robinson,* 36 NY2d 224; *People v Patterson,* 39 NY2d 288; *People v Ruberto,* 10 NY2d 428; *People v Lovello,* 1 NY2d 436; *People v Ashwal,* 39 NY2d 105; *People v McKinney,* 24 NY2d 180.)

Thomas J. Neidl for appellant in the second above-entitled action.

I. The representation of retained counsel for defendant-appellant was so ineffective as to deny him his right to

adequate representation, and the trial court's failure to inquire and ascertain whether each defendant had an awareness of the potential risks of joint representation constituted reversible error. *(Glasser v United States,* 315 US 60; *People v Gonzalez,* 30 NY2d 28, 409 US 859; *People v Gomberg,* 38 NY2d 307; *United States v Truglio,* 493 F2d 574; *United States v Williams,* 429 F2d 158, 400 US 947; *United States v Lovano,* 420 F2d 769, 397 US 1071; *Campbell v United States,* 352 F2d 359; *United States v Wisniewski,* 478 F2d 274; *People v Crimmins,* 36 NY2d 230.) II. The summation given by the Assistant District Attorney was so prejudicial, improper and inflammatory as to deny defendants a fair trial and militates for a reversal of the conviction. *(People v Defense,* 51 AD2d 924; *People v Davis,* 51 AD2d 974; *People v Arce,* 51 AD2d 1043; *People v Cruz,* 52 AD2d 1; *People v Lombard,* 4 AD2d 666.)

Sol Greenberg, District Attorney (George H. Barber and *F. Patrick Jeffers* of counsel), for respondent in the second above-entitled action.

I. The representation of defendant Letko and his codefendant Macerola by the same retained attorney did not deprive defendant of a fair trial and does not constitute reversible error. *(People v Gonzalez,* 30 NY2d 28, 409 US 859; *People v Gomberg,* 38 NY2d 307; *People v Brabson,* 9 NY2d 173; *People v Smith,* 31 AD2d 847; *People v La Bree,* 34 NY 257.) II. The summation given by the Assistant District Attorney was not so prejudicial as to deny defendant a fair trial. In any event, defendant's failure to object precludes review by this court. *(People v Kingston,* 8 NY2d 384; *People v Robinson,* 36 NY2d 224; *People v Ruberto,* 10 NY2d 428; *People v Lovello,* 1 NY2d 436; *People v Ashwal,* 39 NY2d 105; *People v Castillo,* 16 AD2d 235, 12 NY2d 732; *People v Marks,* 6 NY2d 67; *People v Cicchetti,* 44 NY2d 803.) ***261**

OPINION OF THE COURT

Jasen, J.

The issue presented for our determination on these appeals is whether defendants were deprived of the effective assistance of counsel by reason of counsel's joint representation of defendants at trial. While we had thought the applicable legal principles firmly established by prior decisions of this court, the circumstances of this case compel us to elaborate further on the safeguards which must be employed to ensure that a defendant is afforded adequate legal representation.

The pertinent facts are as follows: Defendants Macerola and Letko were charged in a three-count indictment with the crimes of burglary in the second degree (Penal Law, § 140.25, subd 1, par [b]) and assault in the second degree (Penal Law, § 120.05, subd 1) as a result of events occurring during the evening hours of March 31, 1976, at the Governor's Motor Inn in the Town of Guilderland. The indictment alleges, in substance, that defendants knowingly and unlawfully entered the Motor Inn with intent to commit the crime of assault, and that defendants did assault the proprietor and his wife, inflicting serious physical injury.

Defendants, represented by an attorney retained by both, were jointly tried. The jury rendered a verdict finding both defendants guilty of the crimes of burglary in the second degree and two counts of assault in the third degree.[1] On appeal, the Appellate Division, finding no evidence in the record upon which defendant Letko's burglary conviction could be sustained, modified the judgment of conviction by reversing so much thereof as convicted Letko of burglary in the second degree and vacated the sentence imposed thereon, and, as modified, otherwise affirmed the convictions as to both defendants. Defendants were granted leave to appeal to this court from the orders of the Appellate Division.

(1)It is the contention of the defendants that they were deprived of their constitutionally guaranteed right to the effective assistance of counsel by reason of their representation ***262** by the same attorney at trial.[2] Due to the failure of the Trial Judge to ascertain on the record whether each defendant was cognizant of the potential risks inherent in the simultaneous representation of codefendants at trial and due to the conflict which existed between the defenses sought to be established by each defendant, we now reverse the orders of the Appellate Division and order a new trial.

(2)It is indisputable that one accused of committing a crime is entitled to the effective assistance of counsel. Such right is guaranteed by both the Federal and State Constitutions, and by State statute (US Const, 6th Amdt; NY Const, art I, §6; CPL 210.15, subd 2), and courts must remain ever vigilant in their duty to ensure that a defendant receives effective legal representation. As we have recognized, effectuation of this duty may be significantly impaired where one attorney "simultaneously represents the conflicting interests of a number of defendants." *(People v Gomberg,* 38 NY2d 307, 312, citing *Glasser v United States,* 315 US 60, 70.)

(3)While the joint representation of multiple defendants is certainly not per se violative of one's constitutional right to the effective assistance of counsel *(People v Gonzalez,* 30 NY2d 28, 34, cert den 409 US 859; *Holloway v Arkansas,*

435 US 475, 482), we have charged the trial court, in cases where codefendants are represented by a single attorney, with the weighty responsibility of determining whether "the defendant's decision to proceed with his attorney is an informed decision." *(People v Gomberg,* 38 NY2d 307, 313, supra.;*)* The rationale for imposing such duty is obvious. It is all too apparent that the respective interests of each defendant which must be zealously safeguarded are oftentimes at odds, making crucial decisions by defense counsel during the entire criminal proceeding all the more difficult, and, at times, precluding certain defense strategies. For example, an attorney may be less than willing to engage fervently in plea negotiations to obtain a lesser charge for one defendant if to do so would require that defendant to testify against the other defendants, or to call a defendant to testify on his own behalf when his testimony may be detrimental to other defendants whom the attorney represents. (See, generally, ***263** Geer, Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney, 62 Minn L Rev 119, 125-135.)

Defendants, however, often unschooled in the nature of criminal proceedings, may not always sense when a conflict of interest does exist or perceive how such conflict may run counter to the effectiveness of his attorney's representation. Thus, before the formal commencement of trial, it is the responsibility of the Trial Judge, independent of the attorney's obligation to inform his clients of any conflicting interests which may hinder his representation,[3] to "ascertain, on the record, whether each defendant [represented by the same attorney] has an awareness of the potential risks involved in that course and has knowingly chosen it." *(People v Gomberg,* 38 NY2d, at pp 313-314, supra.;*;* see, e.g., *Glasser v United States,* 315 US 60, 71, supra.;*; United States v Wisniewski,* 478 F2d 274, 285; *People v Coleman,* 42 NY2d 500, 508-509; *People v Rivera,* 62 AD2d 767, 770; *People v Kerr,* 61 AD2d 762; *People v Allini,* 60 AD2d 886, 889-890; ABA Standards Relating to the Function of the Trial Judge, § 3.4.)

While a defendant may choose to retain his attorney,[4] such choice may be made only after the defendant is informed of the possible ramifications which joint representation might spawn when conflicting interests arguably exist. Only after sufficient admonition by the trial court of the potential pitfalls of joint representation can it be said that a defendant's right to the effective assistance of counsel is adequately safeguarded. If such admonition does appear on the record, appellate courts are able to determine whether a defendant's decision to retain his attorney is indeed an informed choice.

(1)Here, however, the record is devoid of any indication that the Trial Judge, by proper inquiry,[5] took the necessary ***264** precautions to ensure that the defendants perceived the potential risks inherent in joint representation. Thus, because of this absence of a proper inquiry on the record, we are unable to ascertain whether the defendants' decision to proceed with their attorney was knowingly and intelligently made, or whether they merely acquiesced out of ignorance to their joint representation. Although this omission by the Trial Judge was error, there remains for our consideration whether such failure to inquire mandates that defendants' convictions be vacated and a new trial ordered.

Insofar as joint representation of codefendants is not per se violative of the constitutional guarantee to the effective assistance of counsel (see, e.g., *Holloway v Arkansas,* 435 US 475, 482, supra.;*),* there exists no compelling reason to adopt a rule which would automatically equate the trial court's failure to undertake proper precautionary measures with an error of constitutional magnitude requiring reversal in every instance. There may always exist those cases in which joint representation of multiple defendants is, without doubt, justified, and the court's neglect in admonishing codefendants of the potential risks entailed in joint representation would not deprive, without more, a defendant of his right to the effective assistance of counsel. However, where a Trial Judge has failed to make satisfactory inquiry and a defendant can demonstrate that a conflict of interest, or at least the significant possibility thereof, did exist, a new trial must be ordered for "[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *(Glasser v United States,* 315 US 60, 76, supra.;*;* see *People v Gomberg,* 38 NY2d 307, 312, supra.;*; United States v Lawriw,* 568 F2d 98, 104-105, cert den 435 US 969, reh den 436 US 951; *United States ex rel. Hart v Davenport,* 478 F2d 203, 209-211.)

In this case, the record reveals that there was indeed a conflict of interest which endangered each defendant's right to receive advice and assistance from an attorney whose paramount responsibility is to that defendant alone. Defense counsel found himself in a very awkward position at trial in that by attempting to establish a separate defense for each defendant, he was, by implication, incriminating the other defendant. ***265** Thus, to establish Macerola's defense to the assault charges, it was necessary for counsel to attribute the responsibility for the physical injuries to Letko. Further, to establish Letko's defense to the burglary charge, defense counsel had to stress that only Macerola entered the private

office at the Motor Inn. As admitted by defense counsel in his summation: "There's no testimony in the total record of anyone other than Mr. Macerola--any other defendant, Mr. Letko--at any time was in that office."

Nor does the fact that defendants were charged with accessorial liability (Penal Law, art 20) ameliorate the inherent dangers when counsel for defendants attempted to represent their conflicting interests, as the dissent would surmise. Quite to the contrary, it becomes even more critical where one defendant is charged with the criminal conduct of another that he be represented by an attorney who, without the constant need to balance delicately competing interests, is free to demonstrate, by extensive examination of his own client or by penetrating cross-examination of other defendants, that the defendant whom he represents did not harbor the culpability required to sustain a conviction on the theory of accessorial liability. Simply put, when defendants are charged with accessorial liability, this only enhances the need to be represented by separate counsel.

Defendants having demonstrated an apparent conflict, it becomes unnecessary for us to speculate, as the dissent would now do, as to the exact prejudice resulting from the defendants' joint representation. The right of every person accused of committing a crime to the effective assistance of counsel is too fundamental to tolerate such conjecture by appellate courts, especially where, as here, the prejudice which results when one attorney represents codefendants with conflicting interests may never clearly manifest itself in the record. (Cf. *People v Felder,* 47 NY2d 287.) As observed by the Supreme Court: "Joint representation of conflicting interests is suspect because of what it tends to *prevent* the attorney from doing." *(Holloway v Arkansas,* 435 US 475, 489-490, supra.; [emphasis added].) Since the trial court failed to ascertain on the record whether each defendant had an awareness of the potential risks of joint representation and since defendants have demonstrated the existence of a conflict of interest, a new trial is required. ***266**

Accordingly, the orders of the Appellate Division should be reversed and a new trial ordered.

Gabrielli, J.

(Dissenting).

The orders of the Appellate Division should be affirmed and the defendants' convictions should be sustained in every respect. Therefore, I dissent from the holding by the majority.

It is appropriate to set forth a brief description of what occurred when the defendants entered the motel premises owned by the victims Donald and June Hauffe, with the obvious intention of retaliating for whatever occurred to defendant Macerola's mother, who apparently had become involved in an altercation on the premises a few nights before. Macerola sought out the owner, Donald Hauffe, and began to abuse him. Hauffe, frightened by his demeanor, then left Macerola to call the police. Macerola followed him into the living quarters, picked up Hauffe and threw him into the corner. When the fracas moved into the public area Letko, Macerola's codefendant and coconspirator, began punching Hauffe and knocked him to the floor. Letko then broke Hauffe's nose and began the process of gouging out Hauffe's eyes. When Mrs. Hauffe came to the aid of her husband, Letko, who is six feet four inches tall and weighs 525 pounds, struck at her, causing her to hit her head on an air conditioner and to fall against a table. Both victims sustained serious injuries, resulting from the obviously unprovoked actions of both Macerola and Letko. The jury was properly instructed by the court that the defendants were accused and charged as having acted in concert.

It is upon this factual background that defendants claim they were deprived of effective assistance of counsel because of the now perceived *possible* conflict of interest between the defense which each defendant *might* have offered. In the context of the factual background revealed by the record in this case, it is inconceivable that there could be any conflict of interest between these defendants or, indeed, any inconsistencies in their respective defenses to the charges. In such circumstances, a claim of deprivation of effective assistance of counsel just cannot be sustained, even under the factual claims made by defendants themselves regarding these brutal assaults.

When defendants Macerola and Letko were arrested and accused of burglary and assault they retained Armand Riccio ***267** to represent them both and conduct their defense. An experienced trial lawyer, as conceded by all, Attorney Riccio furnished both defendants with forceful, competent and effective representation throughout the trial. Now the defendants, appealing their criminal convictions, seek to renege on their choice, complaining that they were somehow denied their right to effective assistance of counsel.

This right actually encompasses two conflicting interests of the defendants, making it necessary to carefully balance them. One interest is, of course, the right to be free of any potential conflict of interest that may arise when one lawyer represents two or more defendants; and, secondly, and of equal importance, is the right of every defendant to select counsel of his choice, and this right may well be interfered with if the trial court injects himself too actively into the advisability of joint representation. As we said in *People v Gomberg* (38 NY2d 307, 312-313): "[a]n important concomitant of the right to counsel is the obligation of the courts to respect a selection of counsel made by the defendant and such choice should not be lightly interfered with. (See *United States v Sheiner,* 410 F2d 337, 342, cert den 396 US 825.) Once counsel is selected, the evolving relationship of attorney and client becomes increasingly close and intimate. In order to give proper professional guidance to his client, the attorney should be made fully cognizant of the relevant facts. (ABA Standards Relating to the Defense Function, §§ 3.1, 3.2; see *Whiting v Barney,* 30 NY 330, 332-333.) Trial strategy and tactics must be carefully planned and discussed. In order to insure that the attorney and client have the privacy necessary for effective representation, we have in our State, as a matter of public policy, given confidential attorney-client communications a privileged status. (CPLR 4503; Richardson, Evidence [10th ed], § 411, pp 404-405.) It has even been suggested that the freedom of confidential communication between lawyer and client is as valuable as the privilege against self incrimination. (See *People v Lynch,* 23 NY2d 262, 271.)"

Recognizing the fine balance that must be struck if these two important but conflicting rights are to be respected, we have evolved the necessary rules for joint representation. First, we note that joint representation is not per se violative of constitutional guarantees of effective assistance of counsel. "This principle recognizes that in some cases multiple defendants can appropriately be represented by one attorney; indeed, ***268** in some cases, certain advantages might accrue from joint representation. *** 'Joint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack' *Glasser v United States* [315 US 60, 92] (dissenting opinion)" *(Holloway v Arkansas,* 435 US 475, 482-483; accord *People v Gomberg,* 38 NY2d 307, supra.; *; People v Gonzalez,* 30 NY2d 28).

Any inquiry by the court as to whether counsel has perceived a possible conflict of interest and informed his clients of it should necessarily be limited in scope to avoid interference with the attorney-client relationship *(People v Gomberg, supra,* at pp 313-314). Given the limited nature of the inquiry, I agree with the majority that it is sophomoric to say that the Constitution mandates a reversal without any showing of prejudice whenever the court fails to inquire.

The record in this case does not indicate that either defendant was in any way prejudiced by the joint representation. They merely intimate how their interests *might* have conflicted *if a different theory of defense was used.* This was not a case where a defendant testified and made statements shifting the blame to his codefendant as in *Gomberg.* Nor is it a case where evidence was admissible against only one codefendant but was nevertheless not objected to on behalf of the other, as in *Glasser.* Counsel was not precluded from cross-examining any defense witnesses because he was privy to their secrets as in *Holloway.* It is, pure and simple, a case where the defendants agreed totally on their story, so access to another attorney would not have changed matters.

As in *Gonzales,* "both defendants had the same interest in discrediting the testimony of the People's witnesses" *(People v Gonzalez,* 30 NY2d 28, 33, supra.;). Their defense was essentially that Macerola was legitimately at the Governor's Motor Inn when he was attacked by Donald Hauffe, and that Letko came to his aid, injuring both Mr. and Mrs. Hauffe. Both defendants directed their trial strategy to convincing the jury that this story, and not the People's, was the true version of what happened. Certainly there was no conflict between their interests where the common goal was so closely shared. Even the District Attorney, who candidly noted on oral argument that his policy is to inform the court when he perceives any indication of conflict, saw none. Mere speculation of what might have been is not enough. Actual, not imagined, conflict of interest must be shown before a defendant may successfully ***269** claim that he was denied the right to effective assistance of counsel *(People v Gonzalez,* 30 NY2d 28, 32, supra.;).

The only conflict pointed to in the majority opinion is that defense counsel *might* have reduced Macerola's responsibility for the assaults in the eyes of the jury *if* he had emphasized that Letko caused the injuries. Since the defendants were charged with accessorial liability (Penal Law, art 20) the jury could have convicted Macerola for Letko's acts, and since Macerola was portrayed as the instigator of the crimes it is

inconceivable that emphasizing his alleged inactive role in the actual assault would have benefited him. Likewise, any claim of prejudice, as advanced by the majority, because defense counsel should have emphasized that Letko was not involved in the burglary evaporated when his conviction for that crime was set aside by the Appellate Division; and also because the jury properly received the case on the theory of accessorial conduct.

It is of no small moment that it be noted that the Appellate Division attached no significance whatsoever to the claims of the defendants and, indeed, both opinions in that court treated the issue with obvious disdainful insignificance, presumably for the reasons expressed in this dissent.

In sum, absolutely no conflict of interest, or even a possibility thereof, has been demonstrated. Neither has there been any showing of any prejudice whatsoever, in any manner or form and no legal or logical reason to reverse the convictions has been shown. I, therefore, vote to affirm the orders of the Appellate Division.

Judges Jones, Wachtler and Fuchsberg concur with Judge Jasen; Judge Gabrielli dissents and votes to affirm in a separate opinion in which Chief Judge Cooke concurs.
In each case: Order reversed, etc. ***270**

Footnotes

1 The trial court charged assault in the third degree as a lesser included offense of assault in the second degree with respect to the attack upon the proprietor of the Motor Inn, Donald Hauffe. The trial court only submitted the crime of assault in the third degree in reference to the assault upon the proprietor's wife, June Hauffe.

2 Separate counsel, different from counsel retained by defendants at trial, represented the defendants on their appeals to the Appellate Division and this court.

3 Every attorney is under an ethical obligation to disclose fully to each client the possible implications of joint representation, and a lawyer may not act for the client unless the client has expressly consented to that course of representation. (Code of Professional Responsibility, EC 5-16, DR 5-101, subd [A]; DR 5-105, subds [B], [C]; ABA Standards Relating to the Defense Function, § 3.5, subds [a], [b].) Here, there is no evidence that the defense attorney fulfilled this obligation.

4 As we recognized in *People v Gomberg* (38 NY2d 307, 312, supra.;*)*, "an important concomitant of the right to counsel is the obligation of the courts to respect a selection of counsel made by the defendant". By requiring a Trial Judge to apprise a defendant of the potential risks involved in joint representation, no violence befalls the right of a defendant to select an attorney of his own choosing. Rather, we are merely ensuring that such choice is intelligently and knowingly made.

5 The factors and considerations which a Trial Judge should take into account when inquiring of a defendant whether he has an awareness of the potential risks involved when an attorney represents two or more defendants in a criminal proceeding were set forth in detail in *People v Gomberg* (38 NY2d 307, 312-314, supra.;*)*

New York
Official Reports

68 N.Y.2d 1, 496 N.E.2d 844, 505 N.Y.S.2d 824

The People of the State of
New York, Respondent,
v.
James McDonald, Appellant.

Court of Appeals of New York
210
Argued May 27, 1986;

decided July 3, 1986

CITE TITLE AS: People v McDonald

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered November 15, 1985, which (1) reversed, on the law, an order of the Monroe County Court (Donald J. Wisner, J.), modifying a jury verdict, which found defendant guilty of arson in the third degree by substituting the lesser included offense of attempted arson in the third degree, (2) reinstated the jury verdict, and (3) remitted the matter to the Monroe County Court for resentencing.

People v McDonald, 115 AD2d 223, reversed.

HEADNOTES

Crimes
Right to Counsel
Effective Representation--Concurrent Representation of Defendant and Victim--Conflict of Interest

(1) An attorney's concurrent representation of both a defendant charged with arson and the corporation whose building he is alleged to have damaged and whose corporate officer gives testimony tending to prove his guilt involves a conflict of interest which, absent inquiry by the court and the informed consent of the defendant, deprives the defendant of the effective assistance of counsel. The victim's corporate officer provided evidence of defendant's motive in setting the fire and when the officer disclosed the fact that defense counsel represented his company, the Trial Judge should have perceived the arguable existence of conflicting loyalties on the part of defense counsel and conducted a *Gomberg* inquiry to ascertain ***2** whether defendant was aware of the potential risks and had knowingly consented thereto; the Trial Judge's error in failing to do so, however, mandates reversal only if defendant has demonstrated that a conflict of interest or at least the significant possibility thereof, existed, and that the conflict bears a substantial relation to the conduct of the defense. In the instant case, defense counsel labored under an actual conflict in his representation of both defendant and the company; the corporate officer's testimony concerning defendant's employment relationship with the company was an integral part of the People's case, and under the circumstances, defendant was entitled to be informed by the Trial Judge that his attorney's representation of the company placed counsel in a "very awkward position" in deciding whether and how best to impeach the officer's testimony. It was the prerogative of defendant rather than his counsel to decide whether he would accept the risk that counsel's trial strategy was devised not in his interest, but in the interest of the victim company.

Crimes
Appeal
Jurisdiction of Appellate Division--Order Modifying Verdict--Raising Issue for First Time on Appeal to Court of Appeals

(2) The Appellate Division had jurisdiction under CPL 450.20 (3) of a cross appeal by the People from a County Court order modifying a jury verdict finding defendant guilty of arson in the third degree by substituting the lesser included offense of attempted arson in the third degree, upon a motion by defense counsel to set aside the verdict. CPL 450.20 (3) grants the People the right to appeal to an intermediate appellate court from a criminal court "order setting aside a verdict, entered pursuant to section 330.30" and the reference to CPL 330.30 is to that section as a whole and encompasses the court's authority either to "set aside or modify the verdict or any part thereof"; the Legislature cannot, therefore, be deemed to have intended to exclude from the People's right of appeal those orders entered pursuant to CPL 330.30 that modify rather than completely set aside the jury verdict. Further, because appealability goes to the subject matter jurisdiction of the court, which may be raised for the first time on appeal to the

Court of Appeals, the fact that the defendant failed to move before the Appellate Division to dismiss the People's appeal presents no obstacle to consideration of the question by the Court of Appeals.

Crimes
Arson
Sufficiency of Evidence--Charring Constitutes Damage to Building

(3) At the trial of a defendant charged in connection with setting fire to a shed, the evidence of damage to the shed, which consisted of charring, was legally sufficient to sustain defendant's conviction of arson in the third degree pursuant to Penal Law § 150.10 (1), which requires intentional damage to a building. Slight burning or charring was sufficient under the previous statute, and although the prior law was substantially changed to remove incongruities with respect to the intent required for the various degrees of arson, nothing in the legislative history or in the change from "burning a building" to "damages a building" suggests an intent to vary the quantum of proof required. Rather, the change makes clear that proof of damage short of burning (including proof of "charring") is sufficient to establish this element of the crime.

TOTAL CLIENT SERVICE LIBRARY REFERENCES *3

Am Jur 2d, Arson and Related Offenses, § 3; Appeal and Error, § 159 *et seq.;* § 268.

CLS, CPL 330.30, 450.20 (3); Penal Law § 150.10 (1).

NY Jur 2d, Criminal Law, §§2460, 2461, 2620, 3004, 3040, 3042, 3052,3070-3073, 3075, 3076, 3078, 3079, 3081, 3085, 3090, 3091.

ANNOTATION REFERENCES

Appeal by State or order granting new trial in criminal case. 95 ALR3d 596.

When criminal case becomes moot so as to preclude review of or attack on conviction or sentence. 9 ALR3d 462.

Liability for spread of fire purposely and lawfully kindled. 24 ALR2d 241.

POINTS OF COUNSEL

Edward J. Nowak, Public Defender (Brian Shiffrin of counsel), for appellant.
I. Appellant was deprived of his right to effective assistance of conflict-free counsel when he was represented at trial by the same attorney who was also representing the corporation which was the victim of the alleged arson for which appellant was being prosecuted and where the trial court failed to make any inquiry as to whether appellant was aware of the risks of the conflict of interest inherent in such joint representation. *(Gideon v Wainwright,* 372 US 335; *People v Gomberg,* 38 NY2d 307; *Wood v Georgia,* 450 US 261; *Glasser v United States,* 315 US 60; *People v Lombardo,* 61 NY2d 97; *People v Macerola,* 47 NY2d 257; *People v Baffi,* 49 NY2d 820; *People v Fioretti,* 49 NY2d 976; *People v Alicea,* 61 NY2d 23; *Holloway v Arkansas,* 435 US 475.) II. The court below lacked jurisdiction to consider and grant the People's cross appeal from the decision of the trial court modifying appellant's conviction from one of arson in the third degree to one of attempted arson in the third degree. *(People v Marra,* 13 NY2d 18; *People v Gersewitz,* 294 NY 163; *People v Reed,* 276 NY 5; *People v Zerillo,* 200 NY 443; *Feinstein v Bergner,* 48 NY2d 234; *Patrolmen's Benevolent Assn. v City of New* ***4** *York,* 41 NY2d 205; *Sanders v Winship,* 57 NY2d 391; *Gaden v Gaden,* 29 NY2d 80.) III. The trial court was correct in determining that the People's proof was legally insufficient to establish the element of damage required for a conviction of arson in the third degree. *(People v Simpson,* 85 AD2d 306.)
Howard R. Relin, District Attorney (Joan A. Psaila of counsel), for respondent.
I. The court below properly found that, under the facts of this case, defendant received effective assistance of counsel. *(Gideon v Wainwright,* 372 US 335; *People v Gomberg,* 38 NY2d 307; *People v Macerola,* 47 NY2d 257; *People v Lombardo,* 61 NY2d 97; *United States ex rel. Miller v Myers,* 253 F Supp 55; *People v Adams,* 53 NY2d 241; *People v Ballott,* 20 NY2d 600; *People v James,* 110 AD2d 1037; *People v De Mauro,* 48 NY2d 892.) II. The court below had jurisdiction to consider and grant the People's cross appeal. *(People v Wright,* 92 AD2d 722; *People v Holmes,* 72 AD2d 1; *People v Dorta,* 56 AD2d 607, 44 NY2d 930.) III. The court below properly reinstated the jury verdict finding defendant guilty of arson in the third degree. *(People v Montanez,* 41 NY2d 53; *People v Serra,* 104 AD2d 66; *People v Woods,* 99 AD2d 556; *People v Wright,* 92 AD2d 722.)

OPINION OF THE COURT

Meyer, J.

(1) An attorney's concurrent representation of both a defendant charged with arson and the corporation whose building he is alleged to have damaged and whose corporate officer gives testimony tending to prove his guilt involves a conflict of interest which, absent inquiry by the court and the informed consent of the defendant, deprives the defendant of the effective assistance of counsel. The order of the Appellate Division should, therefore, be reversed and a new trial ordered.

I

Defendant, James McDonald, was indicted on charges of arson in the third degree for setting fire to a shed belonging to the Lyell Exchange Lumber Company (the company) in Rochester, New York. Throughout the pretrial and trial proceedings before the Monroe County Court, defendant was represented by retained counsel, Werner Lomker.

In an omnibus motion under CPL 210.30, Lomker sought to inspect the Grand Jury minutes; to dismiss the indictment as ***5** not supported by sufficient evidence to establish the crime charged (CPL 190.65 [1]); to suppress, because tainted by a showup, the identification of defendant by the sole eyewitness, Police Officer Evelyn Baez; and other relief. In support of dismissal, counsel attached the affidavit of Michael Lazzaro, the vice-president of the company, made some six months after the fire, attesting that he had inspected the shed on the night of the fire, that there was "some damage where the boards were pulled away from the support near the foundation" but that, in his opinion, "there existed no diminution of value or damage [to the shed] as a result of any fire,"[1] and that, therefore, the company had made no insurance claim for property loss resulting from the fire. After review of the Grand Jury minutes the court denied so much of the motion as sought dismissal but ordered a *Wade* hearing as to the identification issue.

At the *Wade* hearing, the People produced evidence that defendant was seen by Officer Baez at about 2:00 a.m. from a distance of about 30 feet; that the area was lit by three street lamps; that Baez saw defendant walk briefly up and down the sidewalk adjacent to the lumberyard and then entered the yard, encircle a building and crouch alongside the corner of a shed from where flames then appeared; that defendant then ran in a northerly direction from the lumberyard; that Baez broadcast a description of him as a white male, with shoulder-length hair wearing dark pants and a white shirt; and that within 15 minutes of her broadcast, he was apprehended and returned in a marked patrol car to the scene of the fire, and there was identified by Baez as the perpetrator. Defense counsel cross-examined the two arresting officers and Baez as well, questioning her about the distance between her and defendant and about the lighting conditions, but never asked whether she knew of defendant's arrest before she identified him at the crime scene.[2] Then, to the surprise of the prosecutor, Lomker conceded that at trial Baez could not only ***6** identify defendant but also could testify to her crime-scene identification of him.

At trial the People presented the same evidence, plus the testimony of fire experts and of Dean Lazzaro, the secretary-treasurer of the company. The experts ruled out possible accidental causes of the fire and stated that the fire--which was quickly extinguished--had caused charring to the building's clapboards at two separate locations. In their opinion, the charring, along with incidental damage caused by the efforts of fire fighters in pulling some boards away from the foundation, plus the company's failure to repair the shed in the eight months since the fire, had diminished the value of the shed. Although Lazzaro acknowledged at the beginning of the prosecutor's questioning that defense counsel "represents [our] company," the Trial Judge made no effort to ascertain whether defendant was aware of that fact or whether he understood the risks involved in counsel's representing both defendant and the company. Lazzaro's testimony concerning the condition of the building after the fire was consistent with Michael Lazzaro's pretrial affidavit, but he testified further that although defendant had been a lifelong family friend and a long-time employee of the company, he had quit his job about seven weeks before the fire, at a time when defendant and the company "were not on good terms because we had had some prior problems inside our establishment." He identified those problems as including "theft and what have you" and stated that had defendant not resigned, he would have been fired.

Defense counsel began his cross-examination by acknowledging that "[i]t is very uncomfortable to call you Mr. Lazzaro", and thereafter referred to the witness as "Dean." His cross-examination focused on the lack of damage to the shed, but made no reference to defendant's relationship with the company. The sole witness for the defense was an investigator, through whom defense counsel sought to impeach Officer Baez's testimony by showing that the distance between her and defendant when she observed him

apparently setting the fire was substantially greater than she had testified it was.

In summation the prosecutor argued that defendant had set the fire as "his way of getting back at the [company]" for his having had to resign "under a cloud for one reason or another." The jury returned a verdict of guilty of arson in the third degree (Penal Law § 150.10 [1]), but on defense counsel's ***7** motion to set aside the verdict, the Trial Judge, reasoning that the People had not proven beyond a reasonable doubt the element of damage to the building, modified the verdict *(see,* CPL 330.30 [1]; 330.50 [1]; 470.15 [2] [a]) by substituting the lesser included offense of attempted arson in the third degree *(see,* Penal Law §§ 110.00, 150.10 [1]). Judgment of conviction was then entered on the verdict as modified and defendant was sentenced as a predicate felon to a minimum of two and a maximum of four years in prison.

On appeal from the judgment of conviction, defendant was represented by the Monroe County Public Defender, who argued that defendant had been denied the effective assistance of trial counsel. The Appellate Division disagreed, holding that neither a conflict of interest nor the significant possibility thereof was demonstrated "merely by showing that defendant's trial counsel also represented the lumber company" (115 AD2d 223, 224), that the fact that the company had made no claim for repair to the shed showed that the company's interests did not conflict with defendant's, and that Dean Lazzaro "evidenced no hostility of any kind toward the defendant" *(id.)*. On the People's cross appeal from the order modifying the jury verdict, the Appellate Division held the People's evidence of damage sufficient to sustain the jury verdict and, therefore, vacated the judgment of conviction, reversed the Trial Judge's order, reinstated the jury verdict and remitted the matter to the Monroe County Court for resentencing.

(1- 3) Defendant appeals by leave of a Judge of this court. He argues that he is entitled to a new trial because counsel's representation of both himself and the company constitutes, per se, a conflict of interest, and that he was, therefore, denied the effective assistance of counsel. He argues also that the Appellate Division erred in reinstating the jury verdict because the People had no authority under CPL 450.20 (3) to cross-appeal to that court from the order modifying the jury verdict and because the evidence was legally insufficient to present a jury question concerning whether defendant had "intentionally damage[d]" the building within the meaning of Penal Law § 150.10 (1). We conclude (1) that the Appellate Division had jurisdiction under CPL 450.20 (3) of the People's cross appeal, (2) that the evidence of damage to the shed was legally sufficient to sustain defendant's conviction of arson in the third degree, but (3) that under the circumstances of this case defense counsel's concurrent representation of defendant ***8** and the company constituted a conflict of interest which, in light of the Trial Judge's failure to inquire into defendant's knowledge of and consent to the potential risks involved, denied the defendant the effective assistance of counsel. We therefore reverse and order a new trial.

II

(1) A defendant is denied the right to effective assistance of counsel guaranteed by the Sixth Amendment when, absent inquiry by the court and the informed consent of defendant, defense counsel represents interests which are actually in conflict with those of defendant *(People v Mattison,* 67 NY2d 462, 469-470; *People v Lombardo,* 61 NY2d 97, 102-103; *People v Macerola,* 47 NY2d 257, 264-265; *People v Gomberg,* 38 NY2d 307, 313-314; *People v Wilkins,* 28 NY2d 53, 55). Initially it is defense counsel's burden to recognize the existence of a potential conflict of interest, to alert both the client and the court to the potential risks involved, and to obtain the client's informed consent to counsel's continued representation despite those risks *(People v Lloyd,* 51 NY2d 107, 111; *People v Gomberg,* 38 NY2d, at pp 313-314, *supra; see,* Code of Professional Responsibility EC 5-16, 5-19; DR 5-105 [C]; ABA Standards for Criminal Justice, Defense Function § 3.5 [a] [1971]). But the prosecutor is also obliged to alert the court when he or she possesses knowledge of facts from which apparent conflict can be inferred *(People v Mattison,* 67 NY2d, at p 469, *supra),* and the Trial Judge owes a duty independent of counsel " 'to protect the right of an accused to effective assistance of counsel' " *(People v Mattison,* 67 NY2d, at p 468, *supra).* And once so informed, or aware of facts from which it appears that conflicting interests arguably exist, the Trial Judge must conduct a record inquiry of each defendant whose representation is potentially conflict-ridden in order to ascertain whether he or she "has an awareness of the potential risks involved in that course and has knowingly chosen it" *(People v Gomberg,* 38 NY2d 307, 313-314, *supra; People v Macerola,* 47 NY2d 257, 263, *supra).* Thus, in *Gomberg,* we held that defense counsel's joint representation of codefendants in a criminal prosecution created such a potential conflict of interest, and more recently, in *People v Lombardo* (61 NY2d 97, 102, *supra)* we recognize the potential for conflict in defense counsel's representation of a defendant accused of a usurious loan scheme when he

had previously represented the ***9** victim of the scheme who served as the prosecution's chief witness.

Here, although the victim's corporate officer, Dean Lazzaro, was not the People's chief witness--a characterization more descriptive of Officer Baez--he nonetheless provided important evidence of defendant's motive in setting fire to the company's shed. Thus, as the People concede, when Lazzaro disclosed the fact that defense counsel represented his company, the Trial Judge should have perceived the arguable existence of conflicting loyalties on the part of defense counsel and conducted a *Gomberg* inquiry.

Though the Trial Judge erred in failing to do so, that error mandates reversal only if defendant has demonstrated that " 'a conflict of interest, or at least the significant possibility thereof, did exist' " *(People v Lombardo,* 61 NY2d, at p 103, *supra; People v Macerola,* 47 NY2d, at p 264, *supra).* The conflict must, however, be one which bears a substantial relation to "the conduct of the defense" *(People v Lombardo,* 61 NY2d, at p 103, *supra).* In *Lombardo,* for example, although a potential for conflict existed because defense counsel owed a continuing duty to protect the confidences of his former client--the victim who testified as the prosecution's chief witness--we held, nonetheless, that counsel, having concluded that the victim's cooperation with the prosecution amounted to a waiver of the attorney-client privilege, had "eliminated any significant possibility that the conduct of the defense would be affected by the attorney's prior representation of [the victim/witness], and scrutiny of the attorney's searching cross-examination of [the victim/witness] on defendant's trial confirms that the attorney conducted the defense on the operational premise that he no longer owed any professional obligation to [the victim/witness]" *(id.,* at p 103; *see also, Olshen v McMann,* 378 F2d 993, 994, *cert denied* 389 US 874, *reh denied* 389 US 964).

We cannot, however, reach that same conclusion on the present record, for it clearly demonstrates that defense counsel Lomker labored under an actual conflict in his representation of both defendant and the company. Initially, we note that the potential for conflict is far greater here, counsel's representation of the accused and the victim being concurrent, than in *Lombardo,* where counsel had terminated his representation of the victim before the trial of the accused *(see, People v Wilkins,* 28 NY2d, at p 56, *supra; but see, United* ***10** *States v Jeffers,* 520 F2d 1256, 1263-1264, and n 13, *cert denied* 423 US 1066 [even though prior representation of witness has ended, the attorney may have a pecuniary interest in possible future business that may cause him to avoid vigorous cross-examination]). The only source of potential conflict in *Lombardo* was the *attorney's* continuing obligation to protect client confidences or secrets even though the attorney-client relationship had terminated (Code of Professional Responsibility EC 4-6; DR 4-101 [B]). The *victim* of a crime, however, may well have an economic interest in the outcome of the criminal prosecution, creating duties on the part of his or her attorney which inherently conflict with the duties owed to the accused *(see, State v Aguilar,* 87 NM 503, 536 P2d 263 [victim sought payment of medical expenses from accused]; *People v Coslet,* 67 Ill 2d 127, 364 NE2d 67 [attorney's representation of both accused in murder prosecution and the administrator of victim's estate]; Code of Professional Responsibility EC 5-14--5-17, 5-19; DR5-105 [B]). The attorney's economic interest in continuing representation of the victim, though not a legally cognizable duty, may also motivate a less than zealous defense of the accused even if the victim is not biased. As was stated in an often quoted passage in *United States ex rel. Miller v Myers* (253 F Supp 55, 57): "It takes no great understanding of human nature to realize that the individuals who had been burglarized might be less than happy and might go so far as to remove the attorney from their good graces if this defendant were acquitted or received a light sentence or were placed on probation. Moreover, if the case had gone to trial it might have meant an investigation involving the [victims] and even cross-examination of them on the stand. The entire situation could be very embarrassing for the lawyer who is naturally interested in having the legal business of the [victims], especially when they are much more able to compensate him for his services than the defendant. The circumstances here are such that an attorney cannot properly serve two masters."[3]

But perhaps the most pervasive source of conflict remains the victim *(see, Castillo v Estelle,* 504 F2d 1243, 1245; *Unites States ex rel. Miller v Myers,* 253 F Supp, at p 57, *supra; People v Stoval,* 40 Ill 2d 109, 112-113, 239 NE2d 441, 443; *see* ***11** *also, Tucker v United States,* 235 F2d 238, 240). The Fifth Circuit put the matter succinctly when it stated that "[t]he victim of a crime is not a detached observer of the trial of the accused, and his 'private attorney' is likely to be restrained in the handling of that client/witness" *(Castillo v Estelle,* 504 F2d, at p 1245, *supra).*[4] And more recently, speaking in the related context of an accomplice's testimony against the defendant, we held in *Mattison* (67 NY2d, at p 470, *supra)* that the attorney's decision whether and how best to impeach the credibility of a witness to whom he--or

his law partner--owed a duty of loyalty "necessarily placed [the attorney] in a very awkward position, where prejudice to [defendant] need not be precisely delineated but must be presumed *(see, People v Gomberg,* 38 NY2d 307, 312, *supra)."*

The People argue, nonetheless, that under the particular circumstances of this case, defendant has demonstrated neither an actual conflict nor the significant possibility of conflict. They point to the fact that the company disclaimed any economic interest in the outcome of the trial, providing both a pretrial affidavit in support of defendant's motion to dismiss the indictment and trial testimony asserting that the shed had not been damaged and that no insurance claims had been filed. Thus, they suggest, Dean Lazzaro having testified favorably to defendant on the damage issue, counsel had no interest in attempting to impeach his credibility.

Although we decline to adopt the per se approach urged upon us by defendant,[5] we also disagree with the People's ***12** contention that under the circumstances of this case there was no conflict and on the present record find *Mattison* controlling. Despite the People's efforts to portray a spirit of cooperation between defense counsel and the company, we cannot ignore the fact that Dean Lazzaro's testimony concerning defendant's employment relationship with the company was an integral part of the People's case against him. Indeed, the prosecutor foreshadowed this evidence of motive in his opening statement and made full use of it in summation. Under these circumstances, defendant was entitled to be informed by the Trial Judge that his attorney's representation of the company placed counsel in a "very awkward position" in deciding whether and how best to impeach Lazzaro's trial testimony. That an attorney whose loyalty is undivided might have chosen not to impeach Lazzaro concerning defendant's employment history because his testimony was otherwise favorable to defendant, or indeed that no basis for impeachment existed, is of no import. It was the prerogative of defendant rather than his counsel to decide whether he would accept the risk that counsel's trial strategy was devised not in his interest, but in the interest of the company. Nor is this a case, such as *Lemley v State* (245 Ga 350, 264 SE2d 881), relied on by the People, where it was held that no conflict existed because both the witness and the accused gave the same testimony *(compare also, United States v Fannon,* 491 F2d 129, *cert denied* 419 US 1012 [no conflict where accused confirmed the testimony of accomplice/witness]; *Circumstances Giving Rise to Conflict of Interest Between or Among Criminal Codefendants Precluding Representation by Same Counsel,* Ann., 34 ALR3d 470, § 6 [d], at 486-490 [collecting similar cases]). We add that here, unlike *Lombardo,* defense counsel made no claim that his client's cooperation with the People constituted a waiver of the attorney-client privilege. Legal ethics aside, he could not practically have done so without imperiling his status as the attorney for the company, from whose good graces he may have fallen because of his failure to protect his client's confidences and secrets (Code of Professional Responsibility EC 4-1, 4-5; DR 4-101 [B]). Nor does it appear that counsel obtained the consent necessary to use a client's confidences and secrets in a manner detrimental to his or her ***13** interest (Code of Professional Responsibility DR 4-101 [C] [2]). The court's failure to conduct a *Gomberg* inquiry was, therefore, reversible error.[6]

III

There remain for consideration defendant's challenge to the legal sufficiency of the evidence to sustain the jury's verdict and to the jurisdiction of the Appellate Division to hear and determine the People's cross appeal from the order of the Trial Judge modifying the jury verdict.[7]

(3) The Appellate Division did not err in holding the evidence sufficient to present a jury question with respect to damage within the meaning of Penal Law § 150.10 (1).[8] Slight burning or charring was sufficient under prior statute *(Levy v People,* 80 NY 327 ["burn somewhat the realty" (at p 332); "It matters not that it did not burn but a part of the edifice" (at p 334)]; *People v Butler,* 16 Johns 203 ["two or three of the kitchen stairs were, in part, consumed"]; 3 Wharton, Criminal Law § 346 [14th ed]; *What Constitutes "Burning" to Justify Charge of Arson,* Ann., 28 ALR4th 482). This was recognized when the present Penal Law was adopted, the Staff Notes of the Temporary State Commission on Revision of the Penal Law and the Criminal Code (Proposed New York Penal Law 1964) with respect to arson stating that the "burning" requirement of the prior statute "does not mean destruction *or even* ***14** *substantial damage,* for *the slightest damage is sufficient" (id.,* at 349). Although the prior law was substantially changed to remove incongruities with respect to the intent required for the various degrees of arson *(id.,* at 350), nothing in the legislative history or in the change from "burning a building" to "damages a building" suggests an intent to vary the quantum of proof required. Rather the change makes clear that proof of damage short of burning (including proof of "charring") is sufficient to establish this element of the crime

(see, Hechtman, Practice Commentaries, McKinney's Cons Laws of NY, Book 39, Penal Law § 150.10, p 89).

(2) We also reject defendant's challenge to the jurisdiction of the Appellate Division.[9] CPL 450.20 (3) grants the People the right to appeal to an intermediate appellate court from a criminal court "order setting aside a verdict, entered pursuant to section 330.30 or 370.10". The reference to CPL 330.30 is to that section as a whole and encompasses the court's authority either to "set aside or modify the verdict or any part thereof". The Legislature cannot, therefore, be deemed to have intended to exclude from the People's right of appeal those orders entered pursuant to CPL 330.30 that modify rather than completely set aside the jury verdict *(People v Wright,* 92 AD2d 722, *further appeal at* 112 AD2d 38, *revd on other grounds* 67 NY2d 749; *People v Holmes.* 72 AD2d 1; *see, People v Dorta,* 56 AD2d 607, *appeal dismissed* 44 NY2d 930). Indeed, so to construe the section would be inconsistent with the Legislature's intent by its enactment to provide defendants with "an omnibus 'motion to set aside verdict' " (Temporary State Commission on Revision of Penal Law and Criminal Code, Proposed CPL 170.30, Staff Comment, at 238 [1967]; Bellacosa, Practice Commentary, McKinney's Cons Laws of NY, Book 11A, CPL 330.30, p 46).

Accordingly, the order of the Appellate Division should be reversed and a new trial ordered.

Chief Judge Wachtler and Judges Simons, Kaye, Alexander, Titone and Hancock, Jr., concur.

Order reversed, etc. ***15**

Footnotes

1 The theory of counsel's accompanying memorandum of law was that because Penal Law § 150.10 (1) required proof that defendant "intentionally damage [d]" the shed, he could not be convicted of arson in the third degree unless there had been a diminution in the value of the shed.

2 Earlier, in response to questioning by the court, Officer Nicholas Bianchi stated that he informed the police dispatcher, by radio, that he had apprehended defendant and was transporting him back to the lumberyard and that Baez, who carried a portable radio, could have heard the broadcast before she identified defendant.

3 *Cf. Wood v Georgia* (450 US 261 [defendant's legal fees paid by his employer]); Judd, *Conflicts of Interest--A Trial Judge's Notes,* 44 Fordham L Rev 1097, 1099-1102; Code of Professional Responsibility EC 5-1, 5-21, 5-22; DR 5-101 (A); 5-107 (A).

4 As is evident from our citation in *People v Wilkins* (28 NY2d 53, 56) of the *Myers* and *Stoval* rulings, we have long recognized the dangers inherent in an attorney's cross-examination of his or her client. That no conflict was found in *Wilkins,* although the Legal Aid Society represented both the defendant and the complaining witness, resulted from the unique organization of the Society's legal staff.

5 Defendant would have us rule that there is always a conflict when the same attorney represents both the accused and the victim. Our rejection of such a per se rule does not mean that defendant must specifically demonstrate prejudice, however, in order to obtain a reversal. It will be sufficient, absent the required inquiry and consent, that a substantial possibility of prejudice existed. We underscore the distinction between conflict and prejudice, however, because there is confusion in this regard in some of the cases on which defendant relies to support a per se rule. Thus, in *People v Coslet* (67 Ill 2d 127, 133, 364 NE2d 67, 70), the Illinois Supreme Court described *People v Stoval* (40 Ill 2d 109, 239 NE2d 441), relied on by defendant as making unnecessary allegation or proof of prejudice when an actual conflict is shown, and made a like ruling in *People v Berland* (74 Ill 2d 286, 385 NE2d 649). Similarly, *Zurita v United States* (410 F2d 477) merely ordered a hearing on petitioner's coram nobis application. On remand, however, the District Court found that no conflict existed and in an unreported opinion (No. 71-1070, 7th Cir, Jan. 20, 1972, cited in *United States v Jeffers,* 520 F2d 1256, 1260, n 3) the Seventh Circuit affirmed.

6 In light of that conclusion, we need not consider the effect of the company's disclaimer of any economic interest in the outcome of the criminal prosecution, nor the inference to be drawn from defense counsel's unanticipated concession, made at the close of the *Wade* hearing, that Officer Baez's right to identify defendant at trial would be unrestricted *(see, Holloway v Arkansas,* 435 US 475, 489-490; and Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interests and the Professional Responsibilities of the Defense Attorney,* 62 Minn L Rev 119, 128, 136 [discussing defenses "lost" by reason of divided loyalties]).

7 We must, of course, reach these issues, for if defendant is correct in asserting that the evidence was legally insufficient to convict him of arson in the third degree, either because the Trial Judge's determination to that effect is not appealable by the People or because, though appealable, the Appellate Division's contrary determination is erroneous, the remedy would be not a new trial but an order dismissing the indictment with leave for the People to institute such proceedings as they deem appropriate respecting the lesser included attempt offense not charged in the indictment *(see, People v Mayo,* 48 NY2d 245, 253).

8 The statute provides that "[a] person is guilty of arson in the third degree when he intentionally damages a building or motor vehicle by starting a fire or causing an explosion."

9 Because appealability goes to the subject matter jurisdiction of the court *(see, e.g., People v Marra,* 13 NY2d 18, 20, and cases there cited), which may be raised for the first time on appeal to this court *(People v Ahmed,* 66 NY2d 307, 310; *People v Harper,* 37 NY2d 96, 99), the fact that the defendant failed to move before the Appellate Division to dismiss the People's appeal presents no obstacle to our consideration of the question.

End of Document

New York Official Reports

103 A.D.3d 1170, 958 N.Y.S.2d 561, 2013 N.Y. Slip Op. 00637

**1 The People of the State of New York, Respondent

v

Michael McGrew, Appellant.

Supreme Court, Appellate Division, Fourth Department, New York
February 1, 2013

CITE TITLE AS: People v McGrew

HEADNOTES

Crimes
Unlawful Search and Seizure
Police Officer Acting Outside His Geographical Area—Discovery of Weapon and Marihuana

Crimes
Jurors
Selection of Jury—Improper Denial of Peremptory Challenge—Confusion during Voir Dire

Crimes
Indictment
Requisite Notice of Charges—Possession of Weapon and Marihuana

Frank H. Hiscock Legal Aid Society, Syracuse (Piotr Banasiak of counsel), for defendant-appellant.
Michael McGrew, defendant-appellant pro se.
William J. Fitzpatrick, District Attorney, Syracuse (James P. Maxwell of counsel), for respondent.

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered June 15, 2009. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree and unlawful possession of marihuana.

It is hereby ordered that the judgment so appealed from is unanimously reversed on the law, that part of the omnibus motion seeking suppression of physical evidence is granted, the indictment is dismissed, and the matter is remitted to Onondaga County Court for further proceedings pursuant to CPL 470.45.

Memorandum: On appeal from a judgment convicting him following a jury trial of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and unlawful possession of marihuana (§ 221.05), defendant contends that reversal is warranted because the police officer who stopped both defendant and his codefendant prior to their arrest lacked the statutory authority to do so. We agree, and conclude that County Court therefore erred in refusing to suppress the physical evidence obtained as a result of that illegal stop.

The subject stop occurred in a college parking lot in the Town of DeWitt at approximately 7:30 p.m. on December 28, 2008. A City of Syracuse police detective assigned to a security detail for an athletic event at the college saw codefendant approach the foyer of its gymnasium. According to the detective, codefendant then turned around and started walking back in the direction from which he came. The detective followed codefendant in his police car, and observed codefendant approach a parked sedan. Codefendant opened the front passenger-side door of the sedan, leaned in, leaned back out, closed the door and proceeded back toward the gymnasium. ***1171**

At that point, the detective exited his police vehicle and asked to speak to codefendant, who, according to the detective, smelled of burnt marihuana. Defendant emerged from the car several seconds later and stopped walking when the detective asked to speak with him. The **2 detective then recognized that defendant had bloodshot eyes and also smelled of burnt marihuana, which defendant and codefendant admitted to having smoked. After his partner arrived on the scene, the detective looked into the car with a flashlight to make sure no one else was in that vehicle. He saw a small baggie containing a leafy substance in the compartment of the driver's side door, which he believed to be marihuana. The detective, who detected an odor of unburned marihuana around the car, then asked codefendant and defendant for consent to search that vehicle. Consent was granted, and the ensuing search revealed a loaded revolver on the floor in front of the passenger seat. The detective then called the DeWitt police to effect a formal arrest of defendant and codefendant, and the gun and the marihuana were subsequently seized from the vehicle.

The parties thereafter stipulated that the events in question occurred more than 100 yards from the boundary line of the City of Syracuse.

Pursuant to CPL 140.50 (1), "a police officer may [under certain circumstances] stop a person in a public place located *within the geographical area of such officer's employment*" (emphasis added), the relevant "geographical area" in this case being the City of Syracuse (CPL 1.20 [34-a] [b]). We thus conclude that, under these circumstances, the detective lacked statutory authorization to stop and question defendant in the Town of DeWitt (*see People v Howard*, 115 AD2d 321, 321 [1985]; *Brewster v City of New York*, 111 AD2d 892, 893 [1985]). Moreover, on these facts, the detective's violation of CPL 140.50 (1) requires suppression of the evidence derived therefrom, i.e., the gun and the marihuana seized from the car (*see People v Greene*, 9 NY3d 277, 280-281 [2007]). We thus grant that part of defendant's omnibus motion seeking suppression of that physical evidence, dismiss the indictment, and remit the matter to County Court for further proceedings pursuant to CPL 470.45.

As an alternative ground for reversal, defendant contends that the court abused its discretion in rejecting defense counsel's peremptory challenge to a prospective juror. This contention is properly before us (*see* CPL 470.05 [2]; *cf. People v Buckley*, 75 NY2d 843, 846 [1990]), and we conclude that it too has merit.

At the outset of jury selection, the court told the attorneys for both defendant and codefendant that they would have a total of 15 peremptory challenges, with seven challenges allocated to de ***1172** fendant and eight to codefendant. Then, consistent with *People v Alston* (88 NY2d 519, 524-529 [1996]), the court determined that the parties could exercise peremptory challenges only to the number of jurors necessary to seat a twelve-person venire. Put differently, the court indicated that the parties would consider prospective jurors in groups of equivalent size to the number of seats to be filled on the jury, and that peremptory challenges would be exercised with respect to each such group.

After the prosecutor exercised his peremptory challenges with respect to the first group of prospective jurors, the court turned to the defenses' peremptory challenges, and told codefendant's counsel that "this is a combination. Both of you have to agree." Codefendant's attorney indicated that he had talked with defendant's attorney "about most of these," and proceeded to exercise four peremptory challenges.

The foregoing peremptory challenges were shared with defendant, and the court did not ask defense counsel about peremptory challenges before proceeding to the next group of seven prospective jurors under consideration. With respect to that group of prospective jurors, the prosecutor had exercised one peremptory challenge and codefendant's attorney had exercised two such challenges before defendant's attorney indicated that "we," i.e., defendant's attorney and codefendant's attorney, "need to talk a second." After an off-the-record discussion, codefendant's attorney indicated that "we're going to exercise one more peremptory challenge," and proceeded to do so. The court then swore the eight jurors that had been selected by that ****3** point, and thereupon recessed for lunch.

Following lunch, the court conducted the voir dire of the next group of prospective jurors. At the end of that questioning, defendant's attorney indicated that he and codefendant's attorney "have to share" the juror questionnaires, and that "[i]f one of us objects to the exercise of peremptory, that person is seated, so we are debating between ourselves which kind of makes it a little bit more complicated." The court eventually entertained challenges to a group of four prospective jurors, at which time the prosecutor exercised one peremptory challenge and codefendant's attorney exercised two. Once again, defendant's attorney did not personally exercise any peremptory challenges.

At that point, there were three jurors left to be selected, and the prosecutor and codefendant's attorney used one and two peremptory challenges, respectively, on the group of three prospective jurors before them. Another group of three prospective jurors was brought before the parties, and codefendant's at ***1173** torney exercised a peremptory challenge with respect to one such prospective juror, and asked, "How many do I have left[?]" The court, apparently speaking to defendant's attorney, stated that "[y]ou're keeping track," and defendant's attorney indicated that there were four remaining defense peremptory challenges, which the court reduced to three in view of the challenge to the subject prospective juror.

Codefendant's attorney then attempted to challenge another prospective juror, who was not part of the group then under consideration. The court refused to accept the challenge, noting that the particular prospective juror at issue was not

part of the subject group. The court thereafter seated the two remaining prospective jurors in that group of three.

With one juror remaining to be seated, the court instructed the attorneys to use any challenges with respect to that new prospective juror. On the prompt of defendant's attorney, codefendant's attorney challenged the sole prospective juror in that group, and defendant's attorney then inquired whether one of the prospective jurors from the previous group of three prospective jurors had been seated. The clerk answered affirmatively, and codefendant's attorney complained that "we did not want [that prospective juror]." The court ignored the further complaint of codefendant's attorney that the court was proceeding "too fast" through jury selection, and denied the request of codefendant's attorney to strike the juror at issue. A 12th juror was subsequently seated, and codefendant's attorney then objected to the presence of the juror at issue on the jury on the ground that proceedings were "just going too fast, I couldn't hear." The court noted the objection before swearing the remaining jurors. The record reflects that approximately one minute passed between the time at which the juror at issue was seated and the time at which the jury was sworn.

Under these circumstances, "we can detect no discernable interference or undue delay caused by [the] momentary oversight [of the attorneys for defendant and codefendant] that would justify [the court's] hasty refusal to entertain [their] challenge. Accordingly, we conclude that the court's denial of the challenge was an abuse of discretion (*see generally People v Steward*, 17 NY3d 104 [2011] [trial court's limitation on time given for voir dire held an abuse of discretion]) and, because the right to exercise a peremptory challenge against a specific prospective juror is a 'substantial right' (*People v Hamlin*, 9 AD2d 173, 174 [1959]), reversal is mandated" (*People v Jabot*, 93 AD3d 1079, 1081-1082 [2012]).

We now turn to defendant's remaining contentions. We reject ***1174** defendant's contentions that the evidence is legally insufficient to support the conviction and that the verdict is against the weight of the evidence. His challenge to the legal sufficiency of the evidence is preserved with respect to the conviction of criminal possession of a weapon in the second degree, but not ****4** with respect to the conviction of unlawful possession of marihuana (*see People v Gray*, 86 NY2d 10, 19 [1995]). In any event, defendant's challenge lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant further contends that reversal is required because he may have been convicted upon a theory not charged in the indictment. "Preservation is not required inasmuch as '[t]he right of an accused to be tried and convicted of only those crimes and upon only those theories charged in the indictment is fundamental and nonwaivable' " (*People v Bradford*, 61 AD3d 1419, 1420-1421 [2009], *affd* 15 NY3d 329 [2010]; *see People v Boykins*, 85 AD3d 1554, 1555 [2011], *lv denied* 17 NY3d 814 [2011]). Nevertheless, we reject that contention. "It is well established that a defendant cannot be convicted of a crime based on evidence of an 'uncharged theory' " (*People v Gunther*, 67 AD3d 1477, 1478 [2009], quoting *People v Grega*, 72 NY2d 489, 496 [1988]), but here, " 'defendant received the requisite fair notice of the accusations against him' " (*People v Abeel*, 67 AD3d 1408, 1410 [2009]), and the indictment did not limit the People to a particular theory of possession at trial.

In view of our determination, we do not address defendant's remaining contentions raised in his main and pro se supplemental briefs. Present—Scudder, P.J., Smith, Fahey and Martoche, JJ.

New York Official Reports

2 N.Y.3d 272, 810 N.E.2d 879, 778 N.Y.S.2d 427, 2004 N.Y. Slip Op. 03507

**1 The People of the State of New York, Respondent

v

Ricky Mitchell, Appellant

Court of Appeals of New York
Argued March 25, 2004

Decided May 4, 2004

CITE TITLE AS: People v Mitchell

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered November 12, 2002. The Appellate Division affirmed a judgment of the Supreme Court, Bronx County (Robert L. Cohen, J.), which had convicted defendant, upon a jury verdict, of robbery in the first degree (two counts).

People v Mitchell, 299 AD2d 187, affirmed.

HEADNOTE

Crimes
Right to Counsel
Right of Parent to Invoke on Child's Behalf

The mother of a 15-year-old defendant arrested for armed robbery did not invoke the right to counsel at a lineup on her son's behalf by informing the police that he had a lawyer and asking whether the police wanted the lawyer's phone number. Although the parent or legal guardian of a juvenile delinquent or juvenile offender may invoke the right to counsel on the child's behalf, the invocation must be unequivocal. The remarks made by defendant's mother were consistent with a variety of interpretations and did not alert the police that the presence of counsel at the lineup was specifically requested.

TOTAL CLIENT-SERVICE LIBRARY REFERENCES

Am Jur 2d, Criminal Law §§ 995, 1186, 1192, 1193, 1210; Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children §§ 76, 78.

Carmody-Wait 2d, Proceedings Involving Abused and Neglected Children, Juvenile Delinquents, and Persons in Need of Supervision §§ 119A:219, 119A:226; Carmody-Wait 2d, Criminal Procedure §§ 172:1700, 172:1705–172:1707.

LaFave, et al., Criminal Procedure (3d ed) § 7.3.

NY Jur 2d, Criminal Law §§ 655, 764, 765; NY Jur 2d, Domestic Relations § 1334.

ANNOTATION REFERENCE

See ALR Index under Attorney or Assistance of Attorney; *273 Juvenile Courts and Delinquent and Dependent Children; Lineups.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: right /4 counsel attorney /s invo! /p line-up & juvenile minor

POINTS OF COUNSEL

Lawrence T. Hausman, New York City, and *Laura R. Johnson* for appellant.
Given that the mother of the 15-year-old appellant communicated to the police her interest in having appellant's lawyer from an unrelated case attend the investigatory lineup, the police violated appellant's right to counsel by conducting the lineup without affording that attorney an opportunity to attend. (*People v Hawkins,* 55 NY2d 474; *People v Blake,* 35 NY2d 331; *People v LaClere,* 76 NY2d 670; *People v Coates,* 74 NY2d 244; *People v Lee,* 155 Misc 2d 337; *United States v Wade,* 388 US 218; *Gilbert v California,* 388 US 263; *People v Oakley,* 28 NY2d 309; *Kirby v Illinois,* 406 US 682; *People v Cunningham,* 49 NY2d 203.)
Robert T. Johnson, District Attorney, Bronx (*Andrew N. Sacher, Joseph N. Ferdenzi* and *Peter D. Coddington* of counsel), for respondent.
I. Defendant's guilt of robbery in the first degree was proved beyond a reasonable doubt. (*People v Kello,* 96 NY2d 740; *People v Johnson,* 57 NY2d 969; *People v Shedrick,* 66 NY2d 1015.) II. Defendant was not entitled to have counsel present

at his preindictment investigatory lineup. (*People v Hawkins,* 55 NY2d 474; *Kirby v Illinois,* 406 US 682; *United States v Wade,* 388 US 218; *Matter of Jamal C.,* 75 NY2d 893; *People v Hernandez,* 70 NY2d 833; *People v Grice,* 100 NY2d 318; *People v Bing,* 76 NY2d 331; *People v Wilson,* 89 NY2d 754; *People v LaClere,* 76 NY2d 670; *People v Coates,* 74 NY2d 244.)

OPINION OF THE COURT

Chief Judge Kaye.

This appeal calls upon us to decide whether the parent of a juvenile offender can invoke the right to counsel on the child's behalf.

Defendant was 15 years old when he was arrested at his high school for armed robbery. Prior to placing defendant in a lineup, the investigating officer called defendant's mother to ask whether she could attend the planned identification procedure. ***274** At a suppression hearing, defendant's mother testified that she told the officer she was unable to attend because she had a young baby, but added that defendant had a lawyer and asked, "Do you want a number?" Although defendant's mother did not remember the officer's response, the record reflects (and Supreme Court found) that the police were already aware that defendant was represented by counsel in a pending, unrelated case. The officer did not, however, attempt to contact defendant's lawyer or otherwise afford counsel an opportunity to attend the lineup, at ****2** which defendant was identified by two eyewitnesses as the perpetrator of the robbery. Defendant's motion to suppress the uncounseled lineup and any in-court identification was denied, and, upon his trial as a juvenile offender, a jury convicted him of two counts of robbery in the first degree. The Appellate Division affirmed, as do we.

Discussion

The constitutional right to counsel generally attaches upon the commencement of a criminal action or other adversary judicial proceedings.[1] There is thus no automatic entitlement to counsel at pre-accusatory, investigatory lineups, including in the context of juvenile delinquency proceedings.[2] As a result, "law enforcement authorities ordinarily are not required to notify counsel of an impending investigatory lineup absent a specific request to do so."[3]

Even before the commencement of formal proceedings, however, the right to counsel at an investigatory lineup will attach in either of two circumstances. The first is when counsel has actually entered the matter under investigation.[4] The second is when a defendant in custody, already represented by counsel on an unrelated case, invokes the right by requesting his or her attorney.[5] Once the right to counsel has been triggered, the police may not proceed with the lineup without at least apprising the defendant's lawyer of the situation and affording the lawyer ***275** a reasonable opportunity to appear. A specific request that the lineup not proceed until counsel is so notified need not be made.

The question presented here is whether defendant's mother could invoke the right to counsel on his behalf. We hold that she could, but did not in this case.

The police are not required to secure counsel for an unrepresented suspect being placed in a pre-accusatory, investigatory lineup, even when the suspect requests that counsel be provided.[6] Rather, a request for counsel at such a lineup will cause the right to attach only when the police are or become aware that the suspect is actually represented by counsel in a pending case. "When an accused, at any stage, . . . to the knowledge of the law enforcement agencies, already has counsel, his right or access to counsel may not be denied."[7] Here, the undisturbed ****3** finding of the suppression court, supported by the record, was that the police were already aware that defendant was represented by counsel on a pending, unrelated case, even before defendant's mother so informed them. In these circumstances, the question becomes simply whether defendant's mother could invoke counsel by requesting it on his behalf.

Although a third party cannot invoke counsel on behalf of an adult defendant,[8] the considerations may be different when a juvenile is involved. Juveniles charged with delinquency can be as young as seven.[9] Children of tender years lack an adult's knowledge of the probable cause of their acts or omissions and are least likely to understand the scope of their rights and how to protect their own interests. They may not appreciate the ramifications of their decisions or realize all the implications of the importance of counsel. Indeed, the need for counsel "has been recognized as all the more vital with respect to the unsophisticated, who are often uneducated in the ways of the criminal justice system and unaware of the role counsel can play in protecting their interests."[10] Consistent with these principles, New York law requires that

parents be notified of certain criminal proceedings involving an accused under 16 years old.[11] ***276**

While the parent or legal guardian of a juvenile delinquent or juvenile offender may invoke the right to counsel on his or her child's behalf,[12] the undisturbed finding that defendant's mother did not do so here has support in the record and is thus beyond our further review. In order for the right to attach, the invocation of counsel by an uncharged defendant--or by a parent standing in the defendant's shoes--must be unequivocal. Whether a particular request is or is not unequivocal "must be determined with reference to the circumstances surrounding the request including the [speaker's] demeanor, manner of expression and the particular words found to have been used."[13] While no magic words are required, an unequivocal invocation-- even when uttered by a layperson understandably upset at the arrest of her child--must alert the police that the presence of counsel at the lineup is specifically requested. A suggestion that counsel might ****4** be desired;[14] a notification that counsel exists;[15] or a query as to whether counsel ought to be obtained[16] will not suffice. Here, defendant's mother merely informed the police that defendant had a lawyer and asked whether the police wanted that lawyer's number. Because her remarks are consistent with a variety of interpretations, we cannot conclude that the suppression court erred as a matter of law in finding that she did not unequivocally invoke her son's right to counsel.

Accordingly, the order of the Appellate Division should be affirmed.

Judges G.B. Smith, Ciparick, Rosenblatt, Graffeo, Read and R.S. Smith concur.

Order affirmed.

FOOTNOTES

Footnotes

1 *See People v Settles,* 46 NY2d 154 (1978); *People v Blake,* 35 NY2d 331 (1974); *People v Coleman*, 43 NY2d 222 (1977); *People v Sugden*, 35 NY2d 453 (1974).

2 *See People v Hawkins,* 55 NY2d 474 (1982); *Blake,* 35 NY2d 331; *Matter of Jamal C.*, 75 NY2d 893 (1990).

3 *People v Coates*, 74 NY2d 244, 249 (1989).

4 *See People v LaClere*, 76 NY2d 670 (1990); *People v Wilson*, 89 NY2d 754 (1997).

5 *See Coates*, 74 NY2d at 249; *People v Thomas*, 76 NY2d 902 (1990).

6 *See Hawkins*, 55 NY2d at 487.

7 *Blake*, 35 NY2d at 338.

8 *See People v Grice*, 100 NY2d 318, 324 n 2 (2003).

9 *See* Family Court Act § 301.2 (1).

10 *Settles*, 46 NY2d at 160.

11 *See* CPL 1.20 (42); 140.20 (6) (police must notify parent of arrest and whereabouts of a juvenile offender); Family Court Act § 305.2 (2), (3), (7) (parent must be given notice, *Miranda* warnings and an opportunity to attend custodial interrogation of children under 16 years old arrested for juvenile delinquency).

12 Of course, as made clear above, in the context of a pre-accusatory, investigatory lineup, the right to counsel may be invoked only when the defendant is already represented in a pending case.

13 *People v Glover*, 87 NY2d 838, 839 (1995).

14 *See People v Fridman*, 71 NY2d 845 (1988).

15 *See People v Roe*, 73 NY2d 1004 (1989).

16 *See People v Hicks*, 69 NY2d 969 (1987).

New York Official Reports

118 A.D.3d 916, 987 N.Y.S.2d 243 (Mem), 2014 N.Y. Slip Op. 04519

*1 The People of the State of New York, Respondent

v

Reginald Monroe, Appellant.

Supreme Court, Appellate Division, Second Department, New York
June 18, 2014

CITE TITLE AS: People v Monroe

Lynn W.L. Fahey, New York, N.Y. (Barry Stendig of counsel), for appellant.
Richard A. Brown, District Attorney, Kew Gardens, N.Y. (John M. Castellano, Ellen C. Abbot, and Daniel Bresnahan of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Lasak, J.), rendered January 4, 2012, convicting him of murder in the second degree and criminal possession of a weapon in the fourth degree, upon a jury verdict, and imposing sentence.

Ordered that the judgment is affirmed.

The Supreme Court providently exercised its discretion in denying the defendant's belated peremptory challenge to an unsworn juror after both sides had accepted the juror and the court had begun to entertain challenges regarding the next group of prospective jurors (*see* CPL 270.15; *People v Hecker*, 15 NY3d 625 [2010]; *People v Alston*, 88 NY2d 519 [1996]; *People v Brown*, 52 AD3d 248, 248 [2008]; *People v Leakes*, 284 AD2d 484, 484 [2001]; *People v Smith*, 278 AD2d 75, 76 [2000]; *cf. People v Rosario-Boria*, 110 AD3d 1486, 1486-1487 [2013]; *People v Parrales*, 105 AD3d 871, 872 [2013]; *People v Jabot*, 93 AD3d 1079, 1080-1081 [2012]). Skelos, J.P., Dillon, Maltese and Barros, JJ., concur.

End of Document

New York Official Reports

76 N.Y.2d 652, 564 N.E.2d 630,
563 N.Y.S.2d 20, 59 USLW 2371

The People of the State of New York, Respondent,
v.
Juan Ortiz, Appellant.

Court of Appeals of New York
223
Argued October 11, 1990;

decided November 20, 1990

CITE TITLE AS: People v Ortiz

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered December 14, 1989, which affirmed (1) a judgment of the Supreme Court (Jerome Hornblass, J.), rendered in Bronx County upon a verdict convicting defendant of two counts of criminal possession of a controlled substance in the third degree, and (2) an order of that court, entered in Bronx County, denying a motion by defendant pursuant to CPL 440.10 to vacate the judgment of conviction.

People v Ortiz, 156 AD2d 222, reversed.

HEADNOTES

Crimes
Right to Counsel
Effective Representation--Potential Conflict of Interest Arising from Defense Counsel's Relationship with Former Client

(1) A defendant urging that a conviction should be overturned for violation of his State and Federal constitutional right to effective assistance of counsel, on the ground of a potential conflict of interest arising from defense counsel's relationship with a former client, must show that the potential conflict affected the conduct of the defense; the defendant is not required to show specific prejudice. Accordingly, counsel did not serve defendant's interests with the single-minded devotion constitutionally required for effective assistance of counsel, where a former client of defense counsel privately admitted to counsel that he committed the offense for which defendant was being prosecuted and, in an effort to accommodate both individuals, counsel then put the former client on the witness stand as part of the defense case and the witness exculpated defendant but also perjuriously exculpated himself. The potential conflict between the interests of the defendant and the former client affected the conduct of the defense, since an attorney not laboring under the conflict would not have made that choice.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Criminal Law, §§984, 985, 987.5.

NY Jur 2d, Attorneys at Law, §71; Criminal Law, §§52, 55.

ANNOTATION REFERENCES

***653** Circumstances giving rise to prejudicial conflict of interests between criminal defendant and defense counsel--State cases. 18 ALR4th 360.

POINTS OF COUNSEL

Lynn W. L. Fahey and *Philip L. Weinstein* for appellant.
Appellant was denied his Sixth Amendment right to the effective assistance of counsel because his attorney felt the need to treat as privileged another client's confession to the crime which wholly exculpated appellant. *(Cuyler v Sullivan,* 446 US 335; *People v McDonald,* 68 NY2d 1; *People v Recupero,* 73 NY2d 877; *People v Mattison,* 67 NY2d 462, 479 US 984; *People v Gomberg,* 38 NY2d 307; *People v Macerola,* 47 NY2d 257; *People v Baffi,* 49 NY2d 820; *People v Caban,* 70 NY2d 695; *People v Perez,* 70 NY2d 773.)
Robert T. Johnson, District Attorney (Jonathan R. Walsh and *Peter D. Coddington* of counsel), for respondent.
I. Appellant's guilt was proven beyond a reasonable doubt by overwhelming evidence. *(Matter of Anthony M.,* 63 NY2d 270; *People v Contes,* 60 NY2d 620.)
II. Appellant received effective assistance of counsel. *(People v Alicea,* 61 NY2d 23; *People v Monroe,* 54 NY2d 35; *People v Owens,* 22 NY2d 93; *People v Recupero,* 73 NY2d 877; *People v Burwell,* 53 NY2d 849; *People v Crump,* 53

NY2d 824; *People v Macerola,* 47 NY2d 257; *People v Baffi,* 49 NY2d 820; *People v McDonald,* 68 NY2d 1; *People v Mattison,* 67 NY2d 462, 479 US 984.)

OPINION OF THE COURT

Kaye, J.

During defendant's trial on drug possession charges, a former client privately confessed to trial counsel that the drugs defendant was charged with having possessed were not defendant's, but that he was the "owner and possessor of those drugs" and defendant "really had nothing to do with that." In an effort to accommodate both individuals, trial counsel then put the former client on the witness stand as part of the defense case, and the witness exculpated defendant but also perjuriously exculpated himself. In these circumstances, we agree with defendant that counsel did not serve defendant's interests with the single-minded devotion constitutionally required for effective assistance of counsel, and that counsel's divided loyalty affected the conduct of the defense. We therefore reverse defendant's conviction and order a new trial. ***654**

I.

Defendant was arrested on August 2, 1984, and charged with two counts of criminal possession of a controlled substance in the third degree. At trial, the main prosecution witnesses were the two arresting officers, who testified that while on patrol in The Bronx in an unmarked car they saw defendant, standing on the front stoop of a building, take a glassine envelope out of a grey pouch and hand it to another man. When the police approached, the man and his companion walked away. The officers looked in the grey pouch, saw drugs, and arrested defendant.

During defendant's trial, a question arose about the configuration of the building stoop, and defense counsel visited the premises to take photographs. Later that same day, John Gonzalez, a former client, came to counsel's office. In the presence of two employees, Gonzalez told counsel that when he saw him at the building taking photographs, he realized that he was a witness. Stating that "I can trust you" because "you're my lawyer,"[1] Gonzalez then admitted to the attorney that he, and not defendant, was the owner and possessor of the drugs. Gonzalez further described how he had cautioned defendant to leave when he saw what he recognized as a police car approaching, but that defendant failed to do so and was arrested. Gonzalez informed counsel that, if called to testify and questioned about his confession, he would invoke his privilege against self-incrimination.

Trial counsel did not reveal Gonzalez's statement to the court, but instead called Gonzalez as a defense witness. Gonzalez testified that, as a passerby at the arrest scene, he saw defendant descending the steps, that he saw several other men closer to the bag that contained the drugs, and that the other men ran or walked away when the arresting officers pulled up in an unmarked car. This testimony corroborated the testimony of another defense witness that defendant had gone to that building to repay a loan and was arrested as he was leaving; defendant himself (through an interpreter) testified to this same effect. Gonzalez further testified--falsely in light of ***655** his confession to counsel--that he was near the arrest scene because he had been playing ball down the street and was on his way to buy soda. After lengthy deliberations, the jury found defendant guilty of two counts of possession.

At sentencing, trial counsel for the first time revealed that another person had confessed to having owned and possessed the drugs, and suggested that as one of several reasons justifying a short sentence. However, it did not become evident until a postconviction hearing two years later that the person counsel had referred to was Gonzalez.

At the CPL 440.10 hearing, trial counsel testified that he regarded Gonzalez (though refusing to name him, on grounds of attorney-client privilege) as a client at the time of defendant's trial, but had not perceived any conflict of interest. Counsel testified that he did not examine Gonzalez about his confession at the trial or take the stand himself to recount the confession because he did not think the jury would have believed such testimony, because he would have violated his obligations to Gonzalez, and because Gonzalez had told him that he would not recount his confession in court. Counsel further testified that he had informed defendant that another client had confessed to owning the drugs (although not that Gonzalez was the person), that he had advised defendant it was not likely that the jury would believe that such a confession had been made, and that the "strategy" of calling Gonzalez as a defense witness had been discussed with defendant.

Both the trial court and the Appellate Division rejected defendant's claims that he was denied effective assistance of counsel, holding that any conflict was not shown to have prejudiced defendant. As expressed by the Appellate Division: "The witness's confession could not have been

brought before the jury because the witness indicated to counsel that he would assert his Fifth Amendment right and counsel would have been precluded from divulging the statement because of the attorney/client privilege. Thus, we reject defendant's claim that he was precluded from obtaining new counsel, the only prejudice alleged as a result of the conflict, when new counsel would have, likewise, been unable to put the witness's confession before the jury.“ (156 AD2d 222.)

We now reverse.

II.

The State and Federal constitutional right to counsel, so ***656** fundamental to our form of justice, is the right to effective assistance of counsel, meaning the reasonably competent services of an attorney devoted to the client's best interests. The right to effective assistance of counsel encompasses the right to conflict-free counsel *(People v McDonald,* 68 NY2d 1; *People v Salcedo,* 68 NY2d 130, 135); in another context we have noted our assumption that counsel's devotion to a client's interests will be ” 'single-minded' “ *(People v Darby,* 75 NY2d 449, 454).

While defendant argues that trial counsel committed several breaches of the Code of Professional Responsibility, particularly in eliciting false testimony, our concern on this appeal is not with any professional impropriety but with whether defendant received the effective assistance of counsel guaranteed him by the State and Federal Constitutions. We conclude that he did not.

A lawyer simultaneously representing two clients whose interests actually conflict cannot give either client undivided loyalty. Thus, the right to effective assistance of counsel has been violated when a lawyer represented both a defendant and the chief prosecution witness *(People v Wandell,* 75 NY2d 951, 953), or a defendant accused of crime and the victim of that crime *(People v McDonald,* 68 NY2d 1, 9, *supra).* The same has been true when law partners represented two codefendants, one of whom pleaded guilty and agreed to testify against the other *(People v Mattison,* 67 NY2d 462, 470).

The possibility that a lawyer may give one client less than undivided loyalty because of obligations to another client can also exist when the conflicting representations are not simultaneous. Even though a representation has ended, a lawyer has continuing professional obligations to a former client, including the duty to maintain that client's confidences and secrets *(People v Alicea,* 61 NY2d 23, 29), which may potentially create a conflict between the former client and a present client. Such a conflict is called potential not because the clients' conceivable interests are less than completely adverse, but because--the former representation having ended--the conflict may never actually arise during the existing attorney-client relationship.

In that a conflict may never in fact arise, a defendant urging that a conviction should be overturned on account of counsel's relationship with a former client must do more than show a substantial possibility that defendant's interests potentially ***657** conflicted with those of the lawyer's former client. In order to prevail on such a claim of ineffective assistance of counsel, defendant must show that ”the conduct of his defense was in fact affected by the operation of the conflict of interest,“ or that the conflict ” operated on“ the representation *(People v Alicea,* 61 NY2d, at 31, *supra).* We have, alternatively, phrased this requirement as one that the potential conflict have borne a substantial relation to the conduct of the defense *(People v Recupero,* 73 NY2d 877, 879). Notably, the requirement that a potential conflict have affected, or operated on, or borne a substantial relation to the conduct of the defense--three formulations of the same principle--is not a requirement that defendant show specific prejudice *(People v Alicea,* 61 NY2d, at 30, n, *supra).*

Here, there was a potential conflict between defendant's interests and those of Gonzalez. Defense counsel clearly felt a continuing duty to preserve Gonzalez's confidences and secrets, and Gonzalez as evidently expected that he would do so. It is equally clear that Gonzalez's interest was adverse to defendant's, since Gonzalez admitted having committed the offense for which defendant was being prosecuted.

The Appellate Division held that defendant failed to show that this potential conflict affected the conduct of his defense, reasoning that Gonzalez's confession could not have been brought before the jury because Gonzalez would have asserted his Fifth Amendment privilege if questioned about it, and trial counsel was precluded from testifying to their conversation by the attorney-client privilege. The court rejected defendant's claim because he could not establish prejudice, in that new counsel would also have been unable to put Gonzalez's confession before the jury.[2]

The Appellate Division erred in focusing its inquiry on the question whether a different attorney could have put

Gonzalez's confession before the jury. Instead, the focus should be on whether the potential conflict affected the conduct of the defense. In that the court failed to apply the proper legal standard, we are not bound by the finding that counsel's conflict did not in fact operate on the conduct of the defense *(see, People v Alicea,* 61 NY2d 23, 31, *supra).* ***658**

Here we conclude that the potential conflict affected the conduct of the defense. Trial counsel's decision to call Gonzalez as a defense witness was a product of the conflict. On one hand, his duty to defendant required him to make what use he could of Gonzalez's testimony to exculpate defendant, but on the other hand, he was obligated to maintain Gonzalez's confidences and secrets. He therefore put Gonzalez on the stand to exculpate defendant but in the process elicited false testimony. An attorney not laboring under the conflict would not have made that choice. If unaware of Gonzalez's involvement, such an attorney obviously would not have called Gonzalez to the stand. If aware of Gonzalez's involvement, the attorney could have made efforts to put the facts before the jury. Indeed, defense counsel himself testified that an attorney who represented only defendant could have subpoenaed Gonzalez and the persons to whom the confession was made in an effort to inform the jury of that confession. Whether or not those efforts would have succeeded, it is clear that the conduct of the defense would have been different in the absence of trial counsel's continuing professional responsibilities to Gonzalez.

We reject the People's suggestion that defendant actually benefited by being represented by the same attorney who represented Gonzalez, since a different attorney in all likelihood would not have obtained Gonzalez's testimony corroborating defendant's own version of events. Gonzalez's testimony was partly false, and a premise of our jury system is that jurors can detect false testimony. We are unwilling to conclude that defendant was benefited by having perjured testimony presented on his behalf.

In sum, defendant has amply demonstrated that the potential conflict between his interests and those of counsel's former client affected the conduct of his defense. Accordingly, the order of the Appellate Division should be reversed and a new trial ordered.

Chief Judge Wachtler and Judges Simons, Alexander, Titone, Hancock, Jr., and Bellacosa concur.

Order reversed, etc. ***659**

Footnotes

1 In his testimony at the CPL 440.10 hearing, counsel was not entirely certain of his relationship with Gonzalez at the time of trial, but did recall that he had no pending or subsequent matters for Gonzalez. The trial court and Appellate Division treated the relationship as one with a *former* client, and we proceed on that basis, noting that in this case the result is the same whether defendant was trial counsel's present or former client.

2 The trial court, as a basis for its decision, referred to the "advised consent of the defendant" in calling Gonzalez. Even if the conflict could have been waived, there is no showing here that full disclosure was made to defendant or informed consent given.

New York Official Reports

105 A.D.3d 871, 962 N.Y.S.2d 663, 2013 N.Y. Slip Op. 02417

**1 The People of the State of New York, Respondent

v

Pedro Parrales, Appellant.

Supreme Court, Appellate Division, Second Department, New York
April 10, 2013

CITE TITLE AS: People v Parrales

HEADNOTE

Crimes
Jurors
Selection of Jury—Peremptory Challenge

Lynn W. L. Fahey, New York, N.Y. (Steven R. Bernhard of counsel), for appellant.
Richard A. Brown, District Attorney, Kew Gardens, N.Y. (John M. Castellano, Sharon Y. Brodt, and Matthew J. Sweet of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Holder, J.), rendered May 31, 2011, convicting him of attempted murder in the second degree, assault in the first degree (two counts), assault in the second degree (three counts), endangering the welfare of a child (two counts), and criminal possession of a weapon in the fourth degree, upon a jury verdict, and imposing sentence. ***872**

Ordered that the judgment is reversed, on the law and in the exercise of discretion, and a new trial is ordered.

During the second round of voir dire, after questioning of the second group of prospective jurors was completed and each side had exercised challenges for cause, the Supreme Court asked defense counsel if he wished to exercise any peremptory challenges, and defense counsel responded, "No." Seconds later, as the court named the first three prospective jurors in the group to be assigned seats, defense counsel interrupted, apologizing, and explained that he had intended to exercise a peremptory challenge against one of the remaining prospective jurors in that group, prospective juror number four. Although that prospective juror was not yet assigned a seat and the request was made just moments after defense counsel mistakenly accepted all of the remaining prospective jurors in that group, the court denied defense counsel's request to challenge that juror as untimely. Under these circumstances, where there was no discernable interference or undue delay caused by defense counsel's momentary oversight, the Supreme Court improvidently exercised its discretion in denying defense counsel's request to challenge the prospective juror (*see People v Jabot*, 93 AD3d 1079, 1081 [2012]; *cf. People v Leakes*, 284 AD2d 484 [2001]; *People v Isaac*, 212 AD2d 635 [1995]). Since a trial court's improper denial of a peremptory challenge mandates automatic reversal (*see People v Hecker*, 15 NY3d 625, 661 [2010]), we must reverse the conviction and order a new trial (*see People v Jabot*, 93 AD3d at 1082).

The defendant's remaining contention has been rendered academic in light of our determination. Balkin, J.P., Lott, Austin and Sgroi, JJ., concur.

New York
Official Reports

62 N.Y.2d 97, 464 N.E.2d 447, 476 N.Y.S.2d 79

The People of the State of
New York, Respondent,
v.
David Pelchat, Appellant.

Court of Appeals of New York
Argued March 23, 1984;

decided May 15, 1984

CITE TITLE AS: People v Pelchat

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered May 31, 1983, which affirmed a judgment of the Supreme Court (Joseph Jaspan, J.), rendered in Suffolk County, convicting defendant, upon his plea of guilty, of criminal possession of marihuana in the first degree.

Before defendant pleaded guilty to the indictment charging him with criminal possession of marihuana in the first degree, the prosecutor in charge of the case was told by the police officer who testified before the Grand Jury that he had not observed defendant engage in any criminal activity and that he had identified defendant as a participant in the crime because he misunderstood the question asked by the prosecutor's associate before the Grand Jury. However, the prosecutor failed to disclose the police officer's admissions or to make any efforts to correct the Grand Jury proceedings, and defendant subsequently pleaded guilty to the indictment. Before defendant was sentenced, the police officer appeared as a witness at the trial of the remaining defendants who were arrested with defendant. After first testifying that he "thought" he had seen defendant carrying a bale of marihuana but was not sure, he then admitted that neither he nor his partner had observed defendant participating in any criminal activity. He testified that he had advised the Assistant District Attorney of this and that he had explained to him that he understood his associate's questions before the Grand Jury as merely a request for a list of the persons arrested that night and not a request for the names of the individuals he actually observed engaging in criminal activity. Upon learning of this testimony, defendant moved prior to sentencing to withdraw his guilty plea and to dismiss the indictment, which motion was denied. The trial court ruled that the evidence before the Grand Jury was sufficient, and that by ***98** pleading guilty defendant had waived his right to challenge the indictment or to challenge the prosecutor's failure to disclose the police officer's statements as *Brady* material. Further, after a hearing, the court concluded that the District Attorney was not aware of the limited nature of the police officer's observation as to this defendant until after the indictment had been handed up. The Appellate Division affirmed, holding that defendant had waived any objections to the indictment and that the information withheld was not *Brady* material.

The Court of Appeals reversed and dismissed the indictment with leave to move for permission to resubmit the case to the Grand Jury, holding, in an opinion by Judge Simons, that because the only information before the Grand Jury connecting defendant with the crime was the testimony of the police officer and the prosecutor knew of the officer's mistake in so testifying before defendant's plea, he was obliged to resubmit the matter and correct the proceedings and his failure to do so mandates that the conviction be reversed and the indictment dismissed.

People v Pelchat, 94 AD2d 805, reversed.

HEADNOTES

Crimes
Indictment
False Evidence--Waiver by Guilty Plea

(1) Defendant's conviction of criminal possession of marihuana in the first degree, upon his plea of guilty, must be reversed and the indictment dismissed as fatally defective, since the only evidence before the Grand Jury connecting defendant with the crime was the testimony of a police officer who subsequently told the prosecutor, prior to defendant's plea, that he had not observed defendant engage in any criminal activity and that he had identified defendant as a participant in the crime because he misunderstood the question asked by the prosecutor's associate before the Grand Jury; the Grand Jury could indict only upon legally sufficient evidence and when the prosecutor learned of the error while the proceedings were still pending, he was obliged to correct the error by obtaining a new accusatory instrument. Further,

defendant did not forfeit his right to challenge the court's jurisdiction by his plea of guilty to an accusatory instrument which is void because of the prosecutor's knowledge that the only evidence supporting it is false.

POINTS OF COUNSEL

Michael Young and *David Breitbart* for appellant.
The District Attorney's failure to advise the court, the defense and the Grand Jury, once he had learned that the indictment as to appellant Pelchat was based entirely on false, misleading and legally insufficient evidence and that the officers who witnessed the commission of the crimes ***99** charged had in fact not seen Mr. Pelchat commit any crime, violated appellant's constitutional and statutory rights and requires that his guilty plea be vacated and the charges against him be dismissed. (United States v Basurto, 497 F2d 781; Stirone v United States, 361 US 212; Berger v United States, 295 US 78; People v Isaacson, 44 NY2d 511; People v Rao, 73 AD2d 88; United States v Modica, 663 F2d 1173; United States v Estepa, 471 F2d 1132; United States v Di Re, 332 US 581; People v Martin, 32 NY2d 123; People v Battaglia, 56 NY2d 558.)
Patrick Henry, District Attorney (*Mark D. Cohen* of counsel), for respondent.
The trial court properly denied appellant Pelchat's motion to withdraw his plea. (People v Di Raffaele, 55 NY2d 234; People v Thomas, 53 NY2d 338; People v Evans, 58 NY2d 14; People v Dunbar, 53 NY2d 868; People v Kazmarick, 52 NY2d 322; People v Mosher, 81 AD2d 684; United States v Basurto, 497 F2d 781; United States v Estepa, 471 F2d 1132; Costello v United States, 350 US 359; Communist Party v Control Bd., 351 US 115.)

OPINION OF THE COURT

Simons, J.

Defendant has been convicted of criminal possession of marihuana in the first degree after pleading guilty to the indictment. He now seeks reversal of the judgment contending that the indictment was fatally defective because the only evidence before the Grand Jury connecting him with the crime was the testimony of a police officer who subsequently told the prosecutor that he was unable to identify defendant as a participant in the crime and that he had misunderstood the question which caused him to do so. Defendant contends that because the prosecutor knew of this mistake before defendant's plea, he should have resubmitted the matter and corrected the proceedings and that his failure to do so mandates that the conviction be reversed and the indictment dismissed. We agree. The Grand Jury could indict only upon legally sufficient evidence and when the prosecutor learned of the error while the proceedings were still pending, before defendant's plea, he was obliged to correct the error by obtaining a new accusatory instrument. ***100**

The charge arose out of an intensive drug investigation which resulted in the arrest and indictment of 33 defendants for criminal possession of marihuana. The crimes were committed during the early morning hours of September 3, 1981, when a vessel known as the *"Miss Marge"* sailed into Gardiner's Bay, Long Island, and dropped anchor off shore from the premises at 51 Milina Drive, Easthampton. Over the next several hours, some 72 bales of marihuana were removed from *"Miss Marge",* transported to shore by smaller boats, and then loaded onto a truck parked on the Milina Drive premises. These activities, both on and off shore, were observed by police officers from 2:00 A.M. until approximately 5:30 A.M. through a night scope. After the unloading was completed, at approximately 6:00 A.M., the officers arrested everyone in the house at 51 Milina Drive. Twenty-one persons were inside, including defendant. Other defendants were arrested subsequently in the boats. It was later to develop that none of the officers were able to identify defendant as having participated in any part of the unloading operation or any other criminal activity that evening. He was arrested because he was in the house with other defendants.

The case was handled by two Assistant District Attorneys. The ADA in charge of the prosecution was on vacation when the case went before the Grand Jury on September 9, 1981, and an associate who had no prior connection with it made the presentment. The only evidence relating to defendant appears during the following testimony by Officer Tuthill:

Q. Did there come a time when a number of individuals were arrested within that house?

A. Yes, there were.

Q. Approximately, how many, do you know?

A. I'd say approximately, twenty-one.

Q. Those twenty-one individuals, were they under your observations with respect to off-loading the Unapplied Times,

off-loading the four Zodiac rafts and transporting the bales of what you suspected to be marijuana into the truck located on the east side of 51 Milina Drive?

A. Yes, they were. ***101**

Q. Do you know the names of those twenty-one individuals you made those observations of?

A. Yes.

Q. Would you please indicate to the Grand Jury the names of those twenty- one individuals?

A. * * * P-E-L-C-H-A-N-T, David R. [*sic*].

In late October or early November, 1981, before defendant's plea, the prosecutor in charge of the case was told by Officer Tuthill that he had not observed defendant engage in any criminal activity and that he had misunderstood the questions asked by the prosecutor's associate before the Grand Jury. The prosecutor testified that from that moment on he knew that "the only testimony I had about Pelchat was that he was carrying a football jersey, dungarees and sneakers; or he was fully dressed with a football jersey on, in the ground floor of the house [when he was arrested]." Nevertheless, the prosecutor failed to disclose Tuthill's admissions or make any effort to correct the Grand Jury proceedings, leaving both the Grand Jury and the court with the false impression that Officer Tuthill had actually observed defendant engage in some criminal activity when in fact he had never made any such observation and had not intended to testify that he had. Defendant subsequently pleaded guilty to the indictment immediately before trial. Before he was sentenced Officer Tuthill appeared as a witness at the trial of the remaining defendants. After first testifying that he "thought" he had seen defendant carrying a bale of marihuana but wasn't sure, he then admitted that neither he nor his partner, Officer Lia, had observed defendant participating in any criminal activity. He testified that he had advised the Assistant District Attorney of this and that he had explained to him that he understood his associate's questions before the Grand Jury as merely a request for a list of the persons arrested that night and not a request for the names of the individuals he had actually observed engaging in criminal activity:

Q. How about a Mr. Pelchat? Did you have a discussion on the front lawn with regard to a Mr. Pelchat?

A. Yes. ***102**

Q. And was that with regard to what you had observed Mr. Pelchat do that night?

A. I thought I saw Mr. Pelchat carrying a bale of marijuana but I wasn't quite sure it was him. And Lia told me he didn't see him doing anything. And I wasn't absolutely positive that it was Pelchat.

Q. You weren't positive?

A. I wasn't absolutely positive it was Pelchat.

Q. And did Lia dissuade you from the fact that Pelchat had done anything?

A. No. But I'm not going to implicate the man if I partially saw him. And Lia didn't see him at all.

Q. You wouldn't do that?

A. No. I wouldn't.

Q. Did you testify under oath in a grand jury, sir?

A. Yes, I did.

Q. Were you asked these questions and did you give these answers, sir? Under oath in the grand jury. Which led to these proceedings.

[reads Grand Jury testimony quoted above]

A. I believe so.

***

Q. You just told this jury that you didn't see Gregorek do anything, did you?

A. I was giving the men [*sic*] a list of the names of the individuals that were arrested from 51 Milina Drive.

Q. You were giving the man a list of names?

A. Yes.

Q. Did you just tell us a couple of moments ago that you understood the question?

A. I do now.

Q. Did you understand the implications of your testimony in the grand jury?

A. I thought the ADA was asking for the subjects that were arrested from 51 Milina Drive. And that's what I gave him. I wasn't trying to mislead anyone.

Q. Did you also indicate, sir, that you observed Pelchat, David R.?

A. I don't know, did I? ***103**

***

Q. And were you asked, sir, by Mr. Castellano where [*sic*] in fact individuals who you were about to name were observed by you off-loading zodiacs, carrying bales and moving marijuana on the morning of September 3rd?

A. The first question that Mr. Castellano asked me was to name the 21 -- to me, I thought he said name the 21 people that are arrested from the house. And that's what I did.

***

Q. At any time did you tell the Assistant District Attorney Pelchat did nothing? Did you tell him that?

A. Yes, I did.

***

Q. Would it be fair to say, sir, that neither you nor Lia which you deduced from talking to him, had seen any of those four men do anything?

A. Like I said, I hadn't seen Pelchat, Gregorek or Segal do anything.

Upon learning of this testimony, prior to sentencing, defendant moved to withdraw his guilty plea and to dismiss the indictment. On the return date, March 16, 1982, the trial court ruled, as it had on defendant's preplea motion to dismiss, that the evidence before the Grand Jury was sufficient. It also ruled that by pleading guilty defendant had waived his right to challenge the indictment or to challenge the prosecutor's failure to disclose the Tuthill statements as *Brady* material (see Brady v Maryland, 373 US 83). The court ordered a hearing, however, to determine whether the prosecutor had known prior to the Grand Jury presentation of Tuthill's inability to connect defendant with the crime.

After the hearing, the trial court concluded that "the District Attorney * * * did not seek to indict the defendant by the knowing use of perjurious or mistaken testimony. He was not aware of the limited notice of the Police Officer's observation as to this defendant until after the indictment had been handed up." The Appellate Division affirmed, holding that defendant had waived any objections to the indictment and that the information was not *Brady* material. ***104**

We accept the finding of the courts below that the record does not support any claim that the prosecutor knew of the deficiency in the evidence before presenting the case. Indeed, it appears that the presenting attorney knew very little about the case. He had not seen defendant's arrest report (which apparently stated only that defendant was arrested in the house) and he had a relatively brief conversation with the police officers to obtain an "overview" of the crime before they testified about these several arrests. He later testified at a posttrial hearing:

Q. [Interposing] Well, in the grand jury, in your mind, Tuthill told you he saw Pelchat doing something inculpatory; is that right?

A. In the grand jury, in my mind, he indicated to me that Mr. Pelchat, along with the other individuals, was participating in some aspect of the off-loading.

Q. What aspect did he indicate to you Pelchat was involved in?

A. He did not indicate that to me. Nor did I inquire, sir.

The court made no findings on the prosecutor's subsequent discovery of Officer Tuthill's mistaken testimony but the evidence on the point is undisputed.

Resolution of the appeal depends upon fundamental considerations governing the operation of two integral parts of the criminal justice system: the Grand Jury's constitutional function to indict and the prosecutor's duty of fair dealing.

The Constitution mandates that no person shall be held to answer for an infamous crime unless upon indictment of the Grand Jury (NY Const, art I, § 6). The section is similar in form and purpose to that contained in the Fifth Amendment to the United States Constitution. The idea underlying both these provisions was to preserve on the English model a fair method for instituting criminal proceedings against persons believed to have committed crimes. The Grand Jury was created as an investigative and accusatory body made up of laymen from the general population and given the function of assessing the sufficiency of the prosecutor's case, thus insulating the innocent from governmental excesses. Unhampered by technical legal rules of procedure and evidence and divorced from the control of the ***105** government, the grand jurors were free to make their presentments and indictments as they deemed satisfactory, "pledged to indict no one because of prejudice and to free no one because of special favor" (Costello v United States, 350 US 359, 362; and see People v Glen, 173 NY 395, 401; United States v Umans, 368 F2d 725, 730). The Grand Jury's role and procedures are now defined by statute (CPL art 190). It remains the exclusive judge of the facts with respect to any matter before it (CPL 190.25, subd 5) and it may indict for an offense only if the evidence spells out a legally sufficient case and reasonable grounds to believe defendant committed the offense charged (CPL 190.65, subd 1). "Legally sufficient evidence" means competent evidence which, if accepted as true, would establish every element of the offense and the defendant's commission of it (CPL 70.10, subd 1; People v Haney, 30 NY2d 328, 335-336). The test is whether the evidence before the Grand Jury if unexplained and uncontradicted would warrant conviction by a trial jury (People v Valles, 62 NY2d 36; People v Dunleavy, 41 AD2d 717, affd 33 NY2d 573). It is this judgment of the Grand Jury, expressed in an indictment, which provides the predicate for the court's jurisdiction (CPL 100.05; Matter of Simonson v Cahn, 27 NY2d 1).

The other subject for consideration is the prosecutor's responsibility under the circumstances presented. It is familiar doctrine that a prosecutor serves a dual role as advocate and public officer. He is charged with the duty not only to seek convictions but also to see that justice is done. In his position as a public officer he owes a duty of fair dealing to the accused and candor to the courts, a duty which he violates when he obtains a conviction based upon evidence he knows to be false. Such misconduct may impair a defendant's due process rights and require a reversal of the conviction (see, e.g., People v Robertson, 12 NY2d 355; People v Savvides, 1 NY2d 554; People v Creasy, 236 NY 205, 221; Napue v Illinois, 360 US 264; Alcorta v Texas, 355 US 28). It goes without saying that this duty also rests upon the prosecutor during pretrial proceedings (see, e.g., People v Geaslen, 54 NY2d 510; People v Cwikla, 46 NY2d 434) and the proceedings relating to indictment both at presentment and afterwards. "It is a serious matter for any ***106** individual to be charged with crime whether the charge be true or false" and it is as important "that he be fairly and justly accused * * * as that he be fairly and impartially tried' " (People v Minet, 296 NY 315, 322-323, quoting Matter of Gardiner, 31 Misc 364, 375). Thus we have held a defendant has a procedural right to challenge an indictment founded upon inadequate or improper evidence which is of constitutional dimension (Matter of Jaffe v Scheinman, 47 NY2d 188, 194; People v Sexton, 187 NY 495, 511-512).

Indictments are presumed to be valid (People v Bergerson, 17 NY2d 398, 402; People v Howell, 3 NY2d 672, 675; People v Sexton, supra), and they are rarely open to attack on grounds of inadequacy after a conviction because such attacks lend themselves to abuses (see Costello v United States, supra.; Holt v United States, 218 US 245; and see CPL 210.30). However, courts have exercised their inherent powers to dismiss an indictment, even then, when there was a total lack of evidence before the Grand Jury (see People v Glen, 173 NY 395, 400, supra), when the quality of the evidence is challenged because the witness's testimony was perjured (United States v Basurto, 497 F2d 781; cf. United States v Flaherty, 668 F2d 566; United States v Kennedy, 564 F2d 1329, cert den *sub nom.* Myers v United States, 435 US 944), or when the indictment is founded on hearsay testimony which the Grand Jury may not have understood as such (United States v Estepa, 471 F2d 1132). Courts have dismissed in these circumstances even though there was sufficient other reliable evidence presented, or the prosecutor acquired the knowledge of the false evidence after the indictment was handed up, or the prosecutor made a full disclosure of the falsity after discovering it (United States v Basurto, supra.; cf. People v Leary, 305 NY 793). Indeed, courts have stated that indictments may be dismissed solely because they were obtained by the prosecutor for improper motives (see, e.g., United States v DeMarco, 401 F Supp 505, affd 550 F2d 1224; People v Tyler, 46 NY2d 251; Matter of Cunningham v Nadjari, 39 NY2d 314, 318).

This conviction must be reversed and the indictment dismissed because the evidence before the Grand Jury failed to meet legal standards and the prosecutor knew ***107** that

when he permitted the court to take defendant's plea to the full indictment. Whatever the presenting prosecutor and the Grand Jury believed Officer Tuthill meant to say when he testified before them, he subsequently made clear to the prosecutor, in private conversations and sworn statements, that he had not observed defendant engage in criminal conduct and that he had not intended to testify that he had. Tuthill's evidence was not only material to the charges against defendant, it was the only evidence linking him to the unlawful possession of marihuana; defendant's presence at the scene of arrest, standing alone, would not support the indictment (People v Martin, 32 NY2d 123; United States v Di Re, 332 US 581). That being so, the indictment was fatally defective because the Grand Jury had no evidence before it worthy of belief that defendant had committed a crime. Possessing the knowledge he did before the entry of the plea, the prosecutor was duty bound to obtain a superseding indictment on proper evidence or to disclose the facts and seek permission from the court to resubmit the case (see CPL 200.80, 210.20, subd 4). Just as he could not sit by and permit a trial jury to decide a criminal action on evidence known to be false, he could not permit a proceeding to continue on an indictment which he knew rested solely upon false evidence (cf. People v Robertson, 12 NY2d 355; supra.; People v Savvides, 1 NY2d 554, supra.; Napue v Illinois, 360 US 264, supra).

To be distinguished is Grand Jury testimony sufficient when given but which through change of circumstances, such as the death of the witness (see People v Jones, 44 NY2d 76, cert den 439 US 846), or the witness's uncertainty at trial may lose its force. Such testimony, when given, is given as intended and the minds of the prosecutor, the witness and the grand jurors understand its import. The evidence may subsequently fail its purpose for many reasons but the integrity of the Grand Jury's fact-finding process has not been undermined because of that. Also to be distinguished are situations in which there may be latent weaknesses in the Grand Jury evidence unknown to the prosecutor and only discovered subsequent to conviction. There exists an infirmity in the Grand Jury's indictment but the prosecutor knew none of it and the conviction ***108** based on defendant's plea may stand. The cardinal purpose of the Grand Jury, however, is to act as a shield against prosecutorial excesses and this protection is destroyed and the integrity of the criminal justice system impaired if a prosecution may proceed even after the District Attorney learns that jurisdiction is based upon an empty indictment.

The People contend and the court below held that defendant waived his right to challenge the proceedings preliminary to conviction when he pleaded guilty (see People v Evans, 58 NY2d 14; People v Di Raffaele, 55 NY2d 234; People v Thomas, 53 NY2d 338; People v Lynn, 28 NY2d 196). We have held that a defendant who accepts a bargained plea to a lesser included offense may not challenge the sufficiency of the Grand Jury evidence supporting the charge in the indictment (People v Kazmarick, 52 NY2d 322, 326; People v Clairborne, 29 NY2d 950) and that is so even if there are technical defects in the proceedings, if the defects do not impair the integrity of the Grand Jury process (see People v Dunbar, 53 NY2d 868). By pleading, defendant has elected a trial strategy. He has determined, for whatever reason, that he will not litigate the question of guilt. Having made that bargain he necessarily surrenders certain rights including the right to challenge the factual basis for the plea (see People v Foster, 19 NY2d 150, 151; People v Griffin, 7 NY2d 511, 515). He does not, however, forfeit all right to challenge the court's jurisdiction (People v Harper, 37 NY2d 96; People v Koffroth, 2 NY2d 807; People v Miles, 289 NY 360) or raise arguments of a constitutional dimension (see People v Lee, 58 NY2d 491 [constitutionality of statute]; People v Blakley, 34 NY2d 311 [speedy trial rulings]; People v Francabandera, 33 NY2d 429 [defendant's competence to stand trial]; People v Lynn, 28 NY2d 196, supra [right to be informed of right to appeal]; see, also, Pitler, NY Crim Prac Under the CPL, § 9.11, pp 453-454; cf. Boykin v Alabama, 395 US 238). Falling into the same category is a challenge based upon a guilty plea to an accusatory instrument which is void because of the prosecutor's knowledge that the only evidence to support it is false (see People v Peetz, 7 NY2d 147; People v Koffroth, supra.; People v Sexton, 187 NY 495, 511, supra). ***109**

The People refer to the limiting provisions of CPL 210.30. That section provides that the validity of an order denying a motion to dismiss an indictment for insufficiency is not reviewable upon an appeal from an ensuing judgment of conviction based upon legally sufficient trial evidence. It was enacted in response to People v Nitzberg (289 NY 523) and similar cases (see Bellacosa, Practice Commentary, McKinney's Cons Laws of NY, Book 11A, CPL 210.30, p 93; see, also, 34 NY Jur 2d, Criminal Law, §2283). In *Nitzberg,* defendant was convicted of murder after a jury trial. The judgment was reversed on appeal because of an error in the charge, not because of the insufficiency of the evidence. After the reversal defendant moved, for the first time, to inspect the Grand Jury minutes and dismiss the indictment for insufficiency because it was based solely on accomplice

testimony. The trial court denied the motion but on appeal to this court, after the second trial, the judgment was reversed and the motion to dismiss granted.

CPL 210.30 changed the *Nitzberg* rule but it did not similarly restrict the authority of the court to review the validity of the evidence supporting an indictment after a plea of guilty. The statutory differentiation between the two situations is logical because the sufficiency of the evidence to convict following a trial is manifest from the record.

In view of our decision it is unnecessary to address defendant's contention that the prosecutor promised to deliver all *Brady* material to him (see Brady v Maryland, 373 US 83, supra) and that he failed to honor that promise, and therefore violated defendant's due process rights, by not revealing Officer Tuthill's conversation.

Accordingly, the order of the Appellate Division should be reversed and the indictment dismissed with leave to the prosecutor to move before Supreme Court for permission to resubmit the case to the Grand Jury.

Chief Judge Cooke and Judges Jasen, Jones, Wachtler, Meyer and Kaye concur.
Order reversed and indictment dismissed with leave to move for permission to resubmit the case to the Grand Jury. ***110**

New York
Official Reports

21 N.Y.3d 925, 990 N.E.2d 125, 967
N.Y.S.2d 887, 2013 N.Y. Slip Op. 03266

The People of the State of
New York, Respondent
v
Tyrone Prescott, Appellant

Court of Appeals of New York
Argued March 21, 2013

Decided May 7, 2013

CITE TITLE AS: People v Prescott

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered September 30, 2011. The Appellate Division denied defendant's application for a writ of error coram nobis to vacate an order of that Court entered October 2, 2009 (66 AD3d 1357 [2009]), which had affirmed a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, J.), convicting defendant, after a nonjury trial, of gang assault in the first degree and assault in the first degree.

People v Prescott, 87 AD3d 1413, reversed.

HEADNOTE

Crimes
Right to Counsel
Effective Representation—Unwaived Actual Conflict of Interest

Defendant's coram nobis application asserting ineffective assistance of appellate counsel was granted where defendant was not apprised, prior to or ***926** during the appeal process, that his counsel was simultaneously representing him and his codefendant at the latter's sentencing hearing and where defendant did not waive the actual conflict of interest. Simultaneous representation of two clients with conflicting interests means the lawyer cannot give either client undivided loyalty, and counsel has the duty to inform the client and the court so that the court may ascertain the nature of the conflict and give the client an opportunity to waive it. Appellate counsel's arguments at the sentencing hearing were in direct conflict with his strategy on defendant's appeal and this conflict was no less significant because counsel's representation of the codefendant ended prior to completion of defendant's representation. The successive representation concerned substantially related matters, but depended on mutually incompatible legal strategies, which undermined appellate counsel's loyalties. Moreover, conflicts arise even in cases of successive representation because even though a representation has ended, a lawyer has continuing professional obligations to a former client, including the duty to maintain that client's confidences and secrets, which may potentially create a conflict between the former client and a present client.

APPEARANCES OF COUNSEL

Gleason, Dunn, Walsh & O'Shea, Albany (*Thomas F. Gleason* of counsel), for appellant.
Frank A. Sedita, III, District Attorney, Buffalo (*Matthew B. Powers* and *Donna A. Milling* of counsel), for respondent.

OPINION OF THE COURT

Memorandum.

The order of the Appellate Division should be reversed, defendant's application for a writ of error coram nobis granted, the Appellate Division's October 2009 order of affirmance vacated, and the case remitted to the Appellate Division for a de novo determination of the appeal to that Court.

Defendant Tyrone Prescott alleges that he was denied effective assistance of counsel due to an unwaived actual conflict of interest occasioned by his appellate counsel's ****2** representation of defendant's codefendant, Calvin Martin, at Martin's sentencing hearing. The People concede the simultaneous representation, but maintain that it is legally inconsequential because it was of a relatively short duration, appellate counsel did not represent Martin by the time defendant's appeal was perfected, and because it did not operate on defendant's direct appeal. We disagree.

Defendant retained counsel to represent him on his appeal from his conviction for gang assault, but without defendant's

knowledge or consent, this same counsel represented codefendant Martin at Martin's sentencing hearing. Martin had served as a prosecution witness, and testified against defendant. At the ***927** sentencing hearing, counsel argued for leniency, in part, because of Martin's cooperation with the prosecution and testimony adverse to defendant.

Counsel thereafter represented defendant on his appeal, wherein he argued that the weight of the evidence did not support the conviction, and specifically sought to discredit codefendant Martin. Counsel argued before the Appellate Division that the Court should reject Martin's testimony as the words of an admitted liar, who sought to gain from his "incredible" testimony against defendant. Counsel never informed defendant, or the court, that he represented Martin. Nor did he provide defendant the transcript of Martin's sentencing hearing, even after defendant contacted counsel and inquired as to whether comments at the hearing revealed that Martin lied on the stand. The Appellate Division affirmed defendant's conviction (66 AD3d 1357 [4th Dept 2009], *lv denied* 13 NY3d 909 [2009]).

Defendant subsequently learned of his appellate counsel's representation of Martin and moved for a writ of error coram nobis. The Appellate Division denied the motion for the writ (87 AD3d 1413 [4th Dept 2011]), and a Judge of this Court granted defendant leave to appeal (19 NY3d 866 [2012]).

It is undisputed that appellate counsel represented defendant and his codefendant simultaneously, that appellate counsel argued at Martin's sentencing hearing for leniency based on Martin's trial testimony adverse to the defendant, and that defendant neither knew nor had the opportunity to waive any conflict arising from appellate counsel's representation of defendant and Martin. Under these circumstances, an actual unwaived conflict existed.

An attorney may not simultaneously represent a criminal defendant and a codefendant or prosecution witness whose interests actually conflict unless the conflict is validly waived (*see People v Solomon*, 20 NY3d 91, 96-97 [2012]; *People v Macerola*, 47 NY2d 257, 264 [1979]). Simultaneous representation of two clients with conflicting interests means the lawyer "cannot give either client undivided loyalty" (*People v Ortiz*, 76 NY2d 652, 656 [1990]). Counsel has the duty to inform the client and the court so that the court may ascertain the nature of the conflict and give the client an opportunity to waive it (*see* ****3** *People v Wandell*, 75 NY2d 951, 952 [1990]; *People v Gomberg*, 38 NY2d 307, 313-314 [1975]), if indeed it is waivable (*People v Carncross*, 14 NY3d 319, 328 [2010]).

Here, counsel represented defendant on appeal, and at the same time represented codefendant Martin at Martin's sentencing ***928** hearing. Appellate counsel's arguments at the sentencing hearing, where counsel argued for leniency based on the codefendant's cooperation with the prosecution and testimony against defendant, were in direct conflict with his strategy on defendant's appeal, which depended on discrediting the testimony of the codefendant. Thus, the interests of defendant and codefendant Martin were conflicting.

The conflict is no less significant, nor defendant's ineffective assistance of counsel claim rendered any less meritorious, because appellate counsel's representation of Martin ended prior to completion of defendant's representation. The successive representation concerned substantially related matters, but depended on mutually incompatible legal strategies, which undermined appellate counsel's loyalties. Moreover, conflicts arise even in cases of successive representation because "[e]ven though a representation has ended, a lawyer has continuing professional obligations to a former client, including the duty to maintain that client's confidences and secrets (*People v Alicea*, 61 NY2d 23, 29 [1983]), which may potentially create a conflict between the former client and a present client" (*Ortiz*, 76 NY2d at 656). Holding otherwise would render an ineffective assistance of counsel claim based on conflict meaningless if the conflicted counsel could merely terminate representation of one party while continuing to represent another.

On these facts, where appellate counsel failed to apprise defendant of this conflict prior to or during the appeal process, in disregard of his duty to his client, and where defendant did not waive the conflict, the writ should be granted.

Chief Judge Lippman and Judges Graffeo, Read, Smith, Pigott and Rivera concur.

Order reversed, defendant's coram nobis application granted, the Appellate Division's October 2009 order of affirmance vacated, and case remitted to the Appellate Division, Fourth Department, for a de novo determination of the appeal to that Court, in a memorandum.

End of Document

New York Official Reports

175 A.D.3d 1436, 107 N.Y.S.3d 134, 2019 N.Y. Slip Op. 06629

**1 The People of the State of New York, Respondent,

v

Tyrone Price, Appellant.

Supreme Court, Appellate Division, Second Department, New York
2010-07352, 2065/03
September 18, 2019

CITE TITLE AS: People v Price

HEADNOTE

Crimes
Jurors
Selection of Jury—Belated Peremptory Challenge

Paul Skip Laisure, New York, NY (De Nice Powell of counsel), for appellant.
John M. Ryan, Acting District Attorney, Kew Gardens, NY (John M. Castellano, Johnnette Traill, and William H. Branigan of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Ronald D. Hollie, J.), rendered July 19, 2010, convicting him of murder in the second degree (two counts), attempted robbery in the first degree (two counts), attempted robbery in the second degree, criminal possession of a weapon in the second degree, and criminal possession of a weapon in the third degree, upon a jury verdict, and imposing sentence.

Ordered that the judgment is reversed, on the law and in the exercise of discretion, and the matter is remitted to the Supreme Court, Queens County, for a new trial.

During voir dire, after the questioning of a group of jurors was completed and each side had the opportunity to exercise challenges for cause with respect to that group, the Supreme Court asked whether the People had any peremptory challenges. The People responded that they did not, and the court asked defense counsel the same question. Defense counsel asked, "We are looking at what numbers?," and the court responded, "We are looking at one and four." The court named prospective juror number one to be assigned a seat and said, "We now have ten, need two. Looking at Chavez —," when defense counsel interrupted, stating that he had made an error and had intended to exercise a peremptory challenge to prospective juror number one. Defense counsel acknowledged that the challenge was "a couple of seconds" late, and requested permission to excuse prospective juror number one. The court summarily denied the request.

The defendant contends that the Supreme Court improvidently exercised its discretion in denying his belated peremptory challenge. We agree. Under CPL 270.15, "the decision to ***1437** entertain a belated peremptory challenge is left to the discretion of the trial court" (*People v Jabot*, 93 AD3d 1079, 1081 [2012]). Where a belated peremptory challenge to as-yet unsworn prospective jurors "would interfere with or delay the process of jury selection," it is a proper exercise of the court's discretion to refuse to permit the challenge (*id.* at 1081). However, where there is "no discernable interference or undue delay caused by defense counsel's momentary oversight that would justify [the court's] hasty refusal to entertain [the] defendant's challenge," it is an improvident exercise of discretion to deny it (*id.*). Here, the delay in challenging prospective juror number one was de minimis (*see People v Viera*, 164 AD3d 1277, 1278-1279 [2018]). There was no discernable interference or undue delay caused by defense counsel's momentary oversight, and the voir dire of the next subgroup of jurors was still to be conducted (*see id.* at 1279; *People v Scerbo*, 147 AD3d 1497, 1498 [2017]; *People v Rosario-Boria*, 110 AD3d 1486, 1487 [2013]; *People v Parrales*, 105 AD3d 871, 872 [2013]; *People v Jabot*, 93 AD3d at 1081; *cf. People v Monroe*, 118 AD3d 916 [2014]; *People v Brown*, 52 AD3d 248, 248 [2008]; *People v Leakes*, 284 AD2d 484, 484 [2001]). Since a trial court's improper denial of a peremptory challenge mandates reversal, we reverse the judgment and order a new trial (*see People v Hecker*, 15 NY3d 625, 661-662 [2010]; *People v Marshall*, 131 AD3d 1074, 1075 [2015]).

In light of our determination, we need not address the defendant's remaining contentions. Mastro, J.P., Balkin, Iannacci and Christopher, JJ., concur.

End of Document

New York
Official Reports

29 N.Y.3d 472, 80 N.E.3d 1005, 58
N.Y.S.3d 259, 2017 N.Y. Slip Op. 05174

**1 The People of the State
of New York, Respondent,
v
Chris Price, Appellant.

Court of Appeals of New York
58
Argued April 26, 2017

Decided June 27, 2017

CITE TITLE AS: People v Price

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered April 15, 2015. The Appellate Division affirmed a judgment of the Supreme Court, Queens County (Ronald D. Hollie, J.), which had convicted defendant, upon a jury verdict, of robbery in the first degree and robbery in the second degree.

People v Price, 127 AD3d 995, reversed.

HEADNOTE

Crimes
Evidence
Sufficient Foundation to Authenticate Photograph

The trial court in defendant's robbery prosecution erred in admitting into evidence a photograph purportedly of defendant holding a firearm and money obtained from an Internet profile page allegedly belonging to defendant, where the People failed to proffer a sufficient foundation to authenticate the photograph as a fair and accurate representation of defendant holding a gun. The victim was unable to identify the weapon in the photograph as that which was used in the robbery, and no other witnesses testified that the photograph was a fair and accurate representation of the scene depicted. There was no evidence regarding whether defendant was known to use an account on the website in question, whether he had ever communicated with anyone through the account or whether the account could be traced to electronic devices owned by him. Nor did the People proffer any evidence indicating whether the account was password protected or accessible by others, whether non-account holders could post pictures to the account or whether the website permitted defendant to remove pictures from his account if he objected to what was depicted therein. The authentication requirement cannot be satisfied solely by proof that defendant's surname and picture appeared on the profile page. Thus, even if the photograph could have been authenticated through proof that the web page on which it was found was attributable to defendant, the People's proffered authentication evidence failed to actually demonstrate that defendant was aware of, let alone exercised dominion or control over, the profile page in question.

RESEARCH REFERENCES

Am Jur 2d Evidence §§ 976, 980, 981.

Carmody-Wait 2d Presentation of the Case §§ 56:85, 56:86; Carmody-Wait 2d Particular Types of Evidence § 194:68.

*473 LaFave, et al., Criminal Procedure (3d ed) § 24.4.

NY Jur 2d Criminal Law: Procedure §§ 2211, 2212.

ANNOTATION REFERENCE

See ALR Index under Evidence Rules; Pictures and Photographs.

FIND SIMILAR CASES ON THOMSON REUTERS WESTLAW

Path: Home > Cases > New York State & Federal Cases > New York Official Reports

Query: authenticat! /s photo! /s internet

POINTS OF COUNSEL

Lynn W.L. Fahey, Appellate Advocates, New York City (*Tammy E. Linn* of counsel), for appellant.
The court erred in admitting at appellant's armed robbery trial, which was based on one witness's identification, an undated social networking photograph of appellant posing with a handgun and currency when the people failed to establish

that the photo was genuine or that the gun was the robbery weapon. (*People v Myers*, 22 NY3d 1010; *People v Patterson*, 93 NY2d 80; *People v Byrnes*, 33 NY2d 343; *People v McGee*, 49 NY2d 48; *People v Ely*, 68 NY2d 520; *United States v Hobbs*, 403 F2d 977; *DiMichel v South Buffalo Ry. Co.*, 80 NY2d 184; *People v Webb*, 60 AD3d 1291; *People v Russell*, 79 NY2d 1024; *People v Lenihan*, 30 Misc 3d 289.)

Richard A. Brown, District Attorney, Kew Gardens (*Anastasia Spanakos, Robert J. Masters, John M. Castellano* and *Joseph N. Ferdenzi* of counsel), for respondent.

The People established the authenticity of the social media evidence, defendant waived his claim that its prejudicial effect outweighed its probative value, and any error was harmless. (*People v Patterson*, 93 NY2d 80; *People v Mirenda*, 23 NY2d 439; *People v Lynes*, 49 NY2d 286; *United States v Vayner*, 769 F3d 125; *People v Julian*, 41 NY2d 340; *United States v Bansal*, 663 F3d 634; *United States v Barnes*, 803 F3d 209; *United States v Tin Yat Chin*, 371 F3d 31; *People v Scarola*, 71 NY2d 769; *People v Alvino*, 71 NY2d 233.)

OPINION OF THE COURT

Stein, J.

On this appeal, we are asked to determine whether the People proffered a sufficient foundation at trial to authenticate ***474** a photograph—purportedly of defendant holding a firearm and money—that was obtained from an Internet profile page allegedly belonging to defendant. We conclude that the People's proof fell short of establishing the requisite ****2** authentication to render the photograph admissible in evidence.

I.

Defendant was convicted by a jury of two counts of robbery (Penal Law §§ 160.15 [4]; 160.10 [1]). At the trial, a witness testified that he was conducting milk deliveries with the victim when he noticed—from his vantage point inside the delivery truck—that someone was holding a gun about a foot away from the chest of the victim, who was standing outside the truck. After exchanging words with the gunman, the victim threw a handful of cash from his pocket to the ground. The gunman's accomplice gathered the money and the two robbers fled. The witness never saw the gunman's face and was unable to identify defendant at trial as either of the perpetrators.

Following this testimony, the People informed the court that they intended to introduce a photograph that was "found on the internet," which purportedly depicted defendant holding a handgun.[1] According to the People, the victim would identify the gun in the photograph as the weapon used during the robbery, and a detective would identify defendant as the individual holding the gun in the picture. Defendant objected to the admission of the photograph in evidence, arguing that the People had not proffered a sufficient foundation establishing the authenticity of the photograph as a fair and accurate representation of defendant holding a gun and that the photograph had not been altered. In response, the People contended that the necessary foundation would be established through proof that the photograph was obtained from a publicly available web page that bore an Internet profile associated with defendant's surname and photographs of him. Over defendant's renewed objection to the sufficiency of the proffered authentication, the court ruled that the photograph would be admissible in connection with the proposed testimony.

Thereafter, the victim testified to the circumstances of the robbery, and he identified defendant as the gunman. The victim ***475** described the firearm used in the robbery as a 9 millimeter automatic with a silver rectangular feature on the top of the barrel, but he admitted that he had no prior familiarity with firearms. When shown the portion of the photograph obtained from the website depicting the gun, the victim testified that the gun looked "similar" to the gun used in the robbery, but he could not identify the gun in the photograph as the one held by the robber. ****3**

A police detective subsequently testified that she found the photograph in question on the website "BlackPlanet.com." The detective had searched defendant's surname "Price" and, after scrolling through several pages of results containing approximately 50 Internet profiles—the usernames of which incorporated the term "Price"—the detective saw a public profile that contained several photographs of defendant and had the user name "Price_ OneofKind." There was no reference to defendant's full name on the profile page and, while the detective testified that the profile page listed the purported user's age and hometown, she did not testify as to whether any of this information matched defendant's pedigree information. Nor were any of the pages containing this pedigree information introduced to connect defendant to the specific user of this website.

The photograph at issue was posted to the Internet profile page several months before the robbery. The detective testified that the individual in the photograph holding the

handgun "look[ed] like" defendant. She explained that she had printed the photograph from the Internet website, and she asserted that the printout was a true and accurate depiction of the photograph she observed on the website. However, the detective admitted that she did not know who took the photograph, when it was taken, where it was taken, or under what circumstances it was taken. Nor did she know whether the photograph had been altered or was a genuine depiction of that which it appeared to depict. Nevertheless, after the photograph was admitted into evidence over defendant's objection, the detective identified defendant as the individual in the picture.

During summations, the People urged the jury to conclude that the photograph was taken from an Internet profile page belonging to defendant, and they emphasized that the victim "recognized" the gun depicted in the photograph as the one held by the gunman. Following deliberations, the jury found defendant guilty of both counts of robbery.

***476** Upon defendant's appeal, the Appellate Division affirmed the judgment of conviction, holding that "the People laid a proper foundation for admission of the photograph, it was relevant to the issue of the defendant's identity as the gunman, and its probative value outweighed any prejudicial effect" (127 AD3d 995, 996 [2d Dept 2015]). A Judge of this Court granted defendant leave to appeal (25 NY3d 1206 [2015]).

II.

Defendant argues that the trial court erred by admitting into evidence the photograph obtained from the Internet because the People failed to sufficiently authenticate it. Defendant contends that the People's authentication proffer was lacking because the victim could not identify the firearm in the image and because the People presented no evidence that the photograph was genuine and had not been altered. The People argue in response that the photograph was sufficiently authenticated by the detective's testimony that the printout was a fair and accurate representation of the image shown on the Internet profile page, combined with the ****4** indicia suggesting that the profile belonged to defendant.

"In order for a piece of evidence to be of probative value, there must be proof that it is what its proponent says it is. The requirement of authentication is thus a condition precedent to admitting evidence" (*United States v Sliker*, 751 F2d 477, 497 [2d Cir 1984]; *see* 1-4 David M. Epstein et al., New York Evidentiary Foundations § A [2016]). "Accuracy or authenticity is established by proof that the offered evidence is genuine and that there has been no tampering with it" (*People v McGee*, 49 NY2d 48, 59 [1979]). We have explained that "[t]he foundation necessary to establish [authenticity] may differ according to the nature of the evidence sought to be admitted" (*id.*). For example, mere identification by one familiar with an item of evidence may suffice where the item is distinct or unique (*see People v Julian*, 41 NY2d 340, 343 [1977]; *see e.g. People v Flanigan*, 174 NY 356, 368 [1903]). Where a party seeks to admit tape recordings, authenticity may often be established by testimony from a participant in the conversation attesting to the fact that the recording is a fair and accurate reproduction of the conversation (*see People v Ely*, 68 NY2d 520, 527 [1986]; *People v Arena*, 48 NY2d 944, 945 [1979]). In addition, testimony establishing a chain of custody may suffice to demonstrate authenticity in other circumstances (*see e.g. Julian*, 41 NY2d at 343; ***477** *Amaro v City of New York*, 40 NY2d 30, 35 [1976]; *People v Connelly*, 35 NY2d 171, 174 [1974]; *see also People v Patterson*, 93 NY2d 80, 84 [1999]; *Ely*, 68 NY2d at 528). Ultimately, "[t]he availability of these recognized means of authentication should ordinarily allow for and promote the general, fair and proper use of new technologies, which can be pertinent truth-yielding forms of evidence" (*Patterson*, 93 NY2d at 84).

With respect to photographs, we have long held that the proper foundation should be established through testimony that the photograph "accurately represent[s] the subject matter depicted" (*People v Byrnes*, 33 NY2d 343, 347 [1974]; *see Patterson*, 93 NY2d at 84; 1-4 David M. Epstein et al., New York Evidentiary Foundations § I [2016]; Prince, Richardson on Evidence § 4-212 [2008]; Fisch on New York Evidence § 142 at 82-83 [2d ed 1977]). "Rarely is it required that the identity and accuracy of a photograph be proved by the photographer. Rather, since the ultimate object of the authentication requirement is to insure the accuracy of the photograph sought to be admitted into evidence, any person having the requisite knowledge of the facts may verify," or an expert may testify that the photograph has not been altered (*Byrnes*, 33 NY2d at 347 [citations omitted]; *see Patterson*, 93 NY2d at 84).

The People failed to authenticate the photograph through any of these methods at trial, as the victim was unable to identify the weapon as that which was used in the robbery,[2] and ****5** no other witnesses testified that the photograph was a fairand ***478** accurate representation of the scene depicted (*see People v Marra*, 21 NY3d 979, 981 [2013], *affg* 96 AD3d

1623, 1625-1626 [4th Dept 2012]; *Byrnes*, 33 NY2d at 347; *Alberti v New York, Lake Erie & W. R.R. Co.*, 118 NY 77, 88 [1889]; *see also Zegarelli v Hughes*, 3 NY3d 64, 69 [2004]) or that it was unaltered. Indeed, the People do not claim, on appeal, to have satisfied the traditional authentication requirements.

Rather, the People argue that authentication of the photograph by a witness with personal knowledge of the scene depicted or through expert testimony is unnecessary in cases such as this, where the photograph at issue is obtained from an Internet profile page that the People claim is controlled by defendant. To that end, the People point out that courts of several other jurisdictions have adopted a two-pronged analysis for authenticating evidence obtained from Internet profiles or social media accounts. This approach allows for admission of the proffered evidence upon proof that the printout of the web page is an accurate depiction thereof, ****6** and that the web page is attributable to and controlled by a certain person, often the defendant (*see e.g. State v Jones*, 318 P3d 1020, *5-6 [Kan Ct App 2014]; *Smoot v State*, 316 Ga App 102, 109-111, 729 SE2d 416, 425-426 [2012]; *United States v Bansal*, 663 F3d 634, 667 [3d Cir 2011]; *Tienda v State*, 358 SW3d 633, 642 [Tex Crim App 2012]). The courts that have adopted this approach have generally held that circumstantial evidence, such as identifying information and pictures, may be used to authenticate a profile page or social media account as belonging to the defendant. Relying on these out-of-state cases, the People contend that the detective's testimony identifying and describing the profile page she found on BlackPlanet.com, combined with her testimony that the printout was an accurate representation of the photograph displayed thereon, provided sufficient authentication evidence to allow admission of the photograph. We disagree.

Assuming without deciding that a photograph may be authenticated through the method proposed by the People, the evidence presented here of defendant's connection to the website or the particular profile was exceedingly sparse.[3] For example, notably absent was any ****7** evidence regarding whether ***479** defendant was known to use an account on the website in question, whether he had ever communicated with anyone through the account, or whether the account could be traced to electronic devices owned by him. Nor did the People proffer any evidence indicating whether the account was password protected or accessible by others, whether non-account holders could post pictures to the account, or whether the website permitted defendant to remove pictures from his account if he objected to what was depicted therein. Without suggesting that all of the foregoing information would be required or sufficient in each case, or that different information might not be relevant in others, we are convinced that the authentication requirement cannot be satisfied solely by proof that defendant's surname and picture appears on the profile page. Thus, even if we were to accept that the photograph could be authenticated through proof that the web page on which it was found was attributable to defendant, the People's proffered authentication evidence failed to actually demonstrate that defendant was aware of—let alone exercised dominion or control over—the profile page in question (*see United States v Vayner*, 769 F3d 125, 132-133 [2d Cir 2014]; *Commonwealth v Williams*, 456 Mass 857, 869, 926 NE2d 1162, 1172-1173 [2010]; ***480** *compare Jones*, 318 P3d at *6; *Moore v State*, 295 Ga 709, 713, 763 SE2d 670, 674 [2014]).

III.

In sum, the People failed to demonstrate that the photograph was a fair and accurate representation of that which it purported to depict. Nor—assuming adoption of the test urged by the People (or some variation thereof)—did the People present sufficient evidence to establish that the web page belonged to, and was controlled by, defendant. Thus, although the decision of whether to admit or preclude evidence generally rests within the discretion of the trial court (*see Patterson*, 93 NY2d at 84), admission of the photograph here lacked a proper foundation and, as such, constituted error as a matter of law. Furthermore, on the facts of this case, we cannot conclude that the error was harmless (*see generally People v Crimmins*, 36 NY2d 230, 242 [1975]). ****8**

Accordingly, the order of the Appellate Division should be reversed and a new trial ordered.

Rivera, J. (concurring). I agree with the majority that the People failed to authenticate the computer printout and its admission was reversible error, entitling defendant to a new trial (majority op at 474). The case presents a novel question as to how a party may authenticate a printout of a digital image found on a social media website.[1] However, the majority does not adopt a test to apply in determining that the foundational proof was insufficient. I write to clarify why the People's authentication proof comes up short.

At defendant's trial on two counts of armed robbery (Penal Law §§ 160.15 [4]; 160.10 [1]), the People sought to admit

a printout of a digital image obtained on a website called "BlackPlanet.com." The People argued that the printout depicted defendant holding the gun used in the robbery. There is no dispute that the printout depicts a person holding a gun and money. The court admitted the evidence, concluding that a proper foundation had been laid after a detective identified defendant's face in the top half of the printout, and the victim ***481** identified the gun in the bottom half as a gun that "looks similar to the gun that took place in the robbery." The Appellate Division affirmed the judgment, specifically rejecting defendant's argument that the People failed to adequately authenticate the printout (*People v Price*, 127 AD3d 995, 996 [2d Dept 2015]).

Before this Court, defendant renews his authentication challenge. Defendant and the People propose different tests for authenticating social media evidence, each claiming their respective test best reflects the requirements of our prior case law and accounts for the risk of tampering associated with social media images. Although I do not adopt defendant's proposed test, he is correct that the People's proof was inadequate in this case.

The decision whether to admit or exclude evidence "may be disturbed by this Court only when no legal foundation has been proffered or when an abuse of discretion as a matter of law is demonstrated" (*People v Patterson*, 93 NY2d 80, 84 [1999]). "In determining whether a proper foundation has been laid for the introduction of real evidence, the accuracy of the object itself is the focus of inquiry" (*People v McGee*, 49 NY2d 48, 59 [1979]). "Accuracy or authenticity is established by proof that the offered evidence is genuine and that there has been ****9** no tampering with it" (*id.*).

We have long recognized that authentication is not subject to a one-size-fits all approach but, rather, the proof necessary to establish the reliability of the proposed evidence "may differ according to the nature of the evidence sought to be admitted" (*id.*). Authentication may be established by direct or circumstantial evidence, and "reasonable inferential linkages can ordinarily supply foundational prerequisites" so long as the "tie-in effort" is not "too tenuous and amorphous" (*Patterson*, 93 NY2d at 85). In other words, the party seeking to admit evidence may rely on a variety of proof, alone or in combination, to meet its burden of establishing the reliability of the evidence (*see People v Ely*, 68 NY2d 520, 527 [1986] ["The necessary foundation may be provided in a number of different ways"]). While certain types of proof by their nature may establish authentication for categories of evidence, previously "noted methods of authentication are not exclusive" (*Patterson*, 93 NY2d at 84). A court's determination as to the sufficiency of proof in any particular case is a fact-specific enterprise, which turns on the purpose of the evidence sought to be admitted (*see* ***482** *e.g. People v Julian*, 41 NY2d 340, 343 [1977] ["Proof of a complete chain of custody is one accepted technique for showing the authenticity of a fungible item of real evidence"]; *People v Kinne*, 71 NY2d 879, 880 [1988] [authentication certificate on a business record may "replace( ) the testimony of a live witness"]; *People v Lynes*, 49 NY2d 286, 293 [1980] ["substance of the conversation" may supply "criteria of reliability"]). Thus, our precedent establishes that the test for authentication is flexible and responds to the factual nuances of each case.

As with other evidentiary matters, when presented with a question of authentication, the trial court's task is to determine whether the party offering the evidence has made a sufficient threshold showing of reliability so that the evidence may be submitted to the jury (*see Lynes*, 49 NY2d at 293 [a judge may leave it to the jury to decide whether the evidence implicates defendant or some other person]; *People v Dunbar Contr. Co.*, 215 NY 416, 422-423 [1915] [trial judge did not err in allowing the jury to determine whether defendant was the speaker in a telephone conversation submitted as evidence]). It is for the jury then to determine the weight of the evidence and whether it implicates the defendant in the crime charged (*Dunbar*, 215 NY at 423 ["The question before the trial judge was whether he would exclude the conversation altogether, or receive it and allow the jury to say whether (defendant) was the speaker"]; *Lynes*, 49 NY2d at 293 ["(I)t cannot be said as a matter of law that the Trial Judge erred in leaving it to the jury—aided as it could be by the instruments of cross-examination, counsels' arguments and other fact-finding tools available at the trial level—to decide whether . . . the speaker was sufficiently identified" (internal quotation marks omitted)]).

Given the general population's mass consumption and use of social media, "[p]redictably, social media postings are becoming an important source of evidence" (Imwinkelried, Evidentiary Foundations § 4.02 [6] [9th ed 2014]; *see also* Hon. Paul W. Grimm, ****10** *Authentication of Social Media Evidence*, 36 Am J Trial Advoc 433 [2013]). Courts have recognized that this evidence presents unique challenges (*see e.g. Lorraine v Markel Am. Ins. Co.*, 241 FRD 534, 537 [D Md 2007]; *Tienda v State*, 358 SW3d 633, 639 [Tex Crim App 2012]; *Parker v State*, 85 A3d 682, 685-686 [Del

2014]). As some commentators have noted, "social media is often stored on remote servers, is accessed through unique interfaces, can be dynamic and collaborative in nature, and is uniquely susceptible to alteration and fabrication" (H. Christopher Boehning & Daniel J. Toal, *Authenticating Social* ***483** *Media Evidence*, NYLJ, Oct. 2, 2012 at 5 [2012]). Arguably, traditional approaches to authentication are inadequate because these new online platforms "can complicate the application of those traditional concepts, and we must be prepared to deal with these complications" (David I. Schoen, *The Authentication of Social Media Postings*, ABA Trial Evidence Committee [May 17, 2011], available at https://apps.americanbar.org/litigation/committees/trialevidence/articles/051711-authentication-social-media.html). On this appeal, we are squarely presented with the question of how our flexible authentication standard applies to social media images. Therefore, we have the opportunity to resolve an evidentiary issue of growing concern given the proliferation and ubiquitousness of social media.[2]

Here, the People sought to establish that the printout was a digital image from defendant's web page. The majority concludes that the People failed to submit testimony that courts have previously found sufficient to authenticate a photograph: testimony from a forensic computer expert, the person who took the picture, or a third party who either was present at the time or who has personal knowledge about the accuracy of the image (majority op at 477-478). The majority does not decide whether the People may only rely on this type of proof, or whether other evidence would suffice. In response to the People's proposed test for the authentication of social media evidence, the majority states that, "[a]ssuming without deciding that a photograph may be authenticated through the method proposed by the People, the evidence presented here . . . was exceedingly sparse," and then concludes that "the authentication requirement cannot be satisfied solely by proof that defendant's surname and picture appears on the profile page" (majority op at 478-479). This approach hints at, but does not confirm, the proof that would satisfy the People's burden. However, we cannot know whether the printout of the digital image was authenticated without knowing how to measure the adequacy of the People's proof (*see Stop the Beach Renourishment,* ***484** *Inc. v Florida Dept. of Environmental Protection*, 560 US 702, 716, 737 [2010] [rejecting the concurrence's insistence that "this case does not require those questions to be addressed" because "(o)ne cannot know whether a takings claim is invalid without knowing what standard it has failed to meet"]).[3]

Turning to the merits, whether the People's evidence was sufficient to authenticate the social media digital image depends on the purpose for which it was offered. The People argued that the printout was an accurate representation of an image from defendant's web page, and that it depicted him with the gun used in the crime. Essentially, the People sought to establish the reliability of the image by connecting defendant to a web page that belonged to him.

The People's proof had to first overcome two levels of authentication. Given the People's purpose for seeking admission of the image, I would hold that the People had to establish that: (1) the printout was an accurate representation of the web page; and (2) the page was defendant's, meaning he had dominion and control over the page, allowing him to post on it. It is undisputed that the People proved, through the detective's testimony, that the printout was an accurate representation of the digital image she viewed on the BlackPlanet.com website. Crucially, however, the People failed to establish that this was defendant's web page, by direct or circumstantial evidence, or with proof establishing "reasonable inferential linkages [that] ordinarily supply foundational prerequisites" (*Patterson*, 93 NY2d at 85). Like in *Patterson*, the "tie-in effort" between the testimony relied on by the People here, and the purpose for which the printout was submitted, was "too tenuous and amorphous" (*id.*). In other words, the People did not submit ***485** proof by which a reasonable jury could conclude that the printout was an accurate ****11** representation of defendant's profile page. Although the majority does not expressly adopt this requirement, I agree with my colleagues' conclusion that "the authentication requirement cannot be satisfied solely by proof that defendant's surname and picture appears on the profile page" (majority op at 479).

The People had knowledge of personal information posted on the web page which might have established the necessary link to defendant, but the People did not present that evidence as part of the proffer. Other evidence arguably addresses the authentication of the web page and the depiction therein, such as proof that the defendant posted or adopted the photograph, or knew of the photograph and allowed it to remain on the profile page without objection. However, given the deficiency of the proof actually submitted, I agree with the majority (majority op at 479 n 3), we need not consider whether proof that the web page belonged to defendant could also establish that the image depicted was genuine (*McGee*, 49 NY2d at 59).[4] ****12** In other words, since the People did not link

defendant to the web page ***486** where the image was found, there is no need to consider on this appeal what must be shown to satisfy *McGee*'s requirement that "there has been no tampering with" the proffered evidence (*id.*). That question is left for a future case.

This approach respects the role of the judge and jury. If the People satisfy their burden then the court may exercise its discretion to admit the evidence, assuming it otherwise meets the rules for admission (i.e., relevance, whether the probativeness of the evidence outweighs any potential unfair prejudice). Once the People have met these threshold requirements, that is, once a printout from a social media web page is authenticated, it is for the jurors to decide whether they find the evidence persuasive on an issue in the case (*see Lynes*, 49 NY2d at 293; *Dunbar Contr. Co.*, 215 NY at 422-423; Evidence in New York State and Federal Courts § 9:7 [2d ed 5A West's NY Prac Series] ["the judge alone determines the specimen's authenticity, subject to the jury's right to reject the judge's finding of genuineness"]; CJI2d[NY] Instructions of General Applicability—Role of Court and Jury).

As is the usual case, the defendant is free to challenge the reliability of the evidence, and suggest other inferences and interpretations of the People's proof. A defendant may submit evidence on rebuttal that the photo is unreliable, for example, with proof from the person who altered the photo, proof that the defendant disavowed the photo on the web page, or a copy of the original, unaltered photo. It is then for the jury to weigh the evidence and ultimately ****13** decide.

Chief Judge DiFiore and Judges Fahey and Wilson concur; Judge Rivera concurs in result in an opinion in which Judge Garcia concurs; Judge Feinman taking no part.

Order reversed and a new trial ordered.

FOOTNOTES

Footnotes

1 The concurrence insists upon referring to the photograph as a "digitized rendition posted on a social media site." Such characterization does not alter the fact that the People proffered the image as a *photograph* purporting to depict a real-life, accurate, and genuine representation of defendant holding a firearm.

2 The concurrence appears to confuse authentication with relevance. To be sure, Appellate Division Departments have found in-court *testimony* from witnesses who claim that they have *observed* a defendant possessing a weapon similar to that which is alleged to have been used in a crime to be *relevant*. In such cases, however, there is no question as to the *authenticity* of a witness's testimony (*see e.g. People v Gonzalez*, 88 AD3d 480, 480 [1st Dept 2011], *lv denied* 18 NY3d 924 [2012]; *People v Rivera*, 281 AD2d 702, 703 [3d Dept 2001], *lv denied* 96 NY2d 805 [2001]; *People v Brown*, 266 AD2d 863, 863 [4th Dept 1999], *lv denied* 94 NY2d 860 [1999]). Contrary to the concurrence's analysis, the People here did not seek merely to "establish that the printout was a digital image from defendant's web page" (concurring op at 483). Rather, the People sought to prove that defendant actually possessed the firearm used in the robbery. In other words, the photograph here was proffered only for the *truth* of its contents and, therefore, was relevant *only* insofar as it is a fair and accurate representation of that which it purports to depict. While fabricated or altered photographs found on a defendant's Internet profile page may, in some other cases, be relevant *regardless* of the photograph's authenticity—for example, if offered to show a defendant's state of mind, familiarity with another person, or knowledge of something relevant to the case—the People proffered no such purpose at trial for the photograph at issue here.

3 We disagree with the assertion of our concurring colleagues that we should not decide this appeal without conclusively adopting a general and comprehensive test for authentication to be applied, not only in this case, but in all cases involving authentication of photographs found on a social network web page. Because we conclude that the proffer was insufficient under any potential standard for authentication—whether it be the traditional method of authenticating a photograph or the standard offered by the People (or some variation thereof)—we need not go any further than deciding the case presently before us (*cf. Matter of Solla v Berlin*, 24 NY3d 1192, 1195 [2015] [even assuming, without deciding, adoption of petitioner's proposed definition, petitioner would not prevail on appeal], *rearg denied* 25 NY3d 1063 [2015]; *People v Basile*, 25 NY3d 1111, 1113 [2015] [holding that the Court need not reach the question presented by defendant on appeal "because, even assuming that defendant is correct, he would not be entitled to relief on this record"]). "We reject the premise that we must now declare that one test would be appropriate for all situations, or that the proffered tests are the only options that should be considered" (*Matter of Brooke S.B. v Elizabeth A.C.C.*, 28 NY3d 1, 27 [2016]). In our view,

it is more prudent to proceed with caution in a new and unsettled area of law such as this. We prefer to allow the law to develop with input from the courts below and with a better understanding of the numerous factual variations that will undoubtedly be presented to the trial courts. Because we necessarily decide each case based on the facts presented therein, it would be premature to decide whether the People's proffer would have been sufficient had the prosecution, hypothetically, established that the web page was controlled by defendant. At this time, it is sufficient and appropriate for us to hold that, based on the proffer actually made, the photograph was not admissible.

1 To avoid confusion with our prior case law on the authentication of photographs, and to more precisely describe that the evidence offered for admission here was a digitized rendition posted on a social media site, I refer to the proffered evidence as a “printout of a digital image” rather than as a “photograph” (majority op at 474).

2 Contrary to the majority's claim, when we decide an open question presented on appeal we do not act in haste (majority op at 479 n 3). Rather, we pronounce the law by which we reason an outcome. Given the pervasive use of social media, there is nothing premature about determining how law enforcement and prosecutors may use evidence obtained online (*see* David I. Schoen, *The Authentication of Social Media Postings*, ABA Trial Evidence Committee [May 17, 2011]).

3 In some contexts we may resolve a matter by “[a]ssuming, without deciding” a legal fact or applicable standard (*see e.g. Matter of East Ramapo Cent. Sch. Dist. v King*, 29 NY3d 938, 939-940 [2017]; *People v Fisher*, 28 NY3d 717, 725 [2017]; *People v Augustine*, 21 NY3d 949, 951 [2013]; *People v Cornelius*, 20 NY3d 1089, 1091 [2013]; *Quilloin v Walcott*, 434 US 246, 256 [1978]; *Smith v Spisak*, 558 US 139, 156 [2010]). That approach is appropriate where the Court assumes a threshold fact necessary to the resolution of the issue on appeal or decides between two or more well-established rules (*see Stop the Beach*, 560 US at 718). It is one thing to hold that, for example, assuming there was error, it was harmless, but it is quite another to assume a test applies, and hold that it has not been satisfied. In the former case, what the Court assumes is, in actuality, immaterial to the outcome, but in the latter case—as illustrated by defendant's appeal—what the court assumes is precisely necessary to resolving the issue presented.

4 Given the lack of adequate evidence connecting defendant to the web page, the Court has no occasion to address the sufficiency of the victim's identification of the gun. Nevertheless, the majority concludes the People failed to authenticate the printout, in part, because the victim “could not identify the gun in the photograph as the one held by the robber” (majority op at 475). Yet, only in unusual circumstances will a victim be able to testify with confidence that the proffered evidence matches exactly the weapon used during the commission of the crime. More likely, a victim will be able to testify only that the evidence looked “like” the weapon used, as the victim did here. Notably, the Appellate Division has decided that this type of testimony is enough to permit admission (*People v Gonzalez*, 88 AD3d 480, 480 [1st Dept 2011] [evidence of defendant's possession of a knife that “resembled the knife used in the robbery” one week after the robbery was “clearly relevant”]; *People v Rivera*, 281 AD2d 702, 703 [3d Dept 2001] [“evidence of defendant's prior and subsequent possession of a firearm resembling the one used in the present crimes was admissible for the purpose of identifying defendant as the perpetrator”]; *People v Brown*, 266 AD2d 863, 863 [4th Dept 1999] [evidence that defendant possessed a handgun similar to the gun used in the crime four days before “was admissible to establish defendant's identity”]; *People v Jackson*, 237 AD2d 620, 620 [2d Dept 1997] [“trial court properly admitted into evidence testimony that five days after the crime, the defendant possessed a weapon resembling the weapon used in the crime” as proof of defendant's identity]). As this Court has stated, “certainty [is] not necessary” to establish admissibility (*People v Dunbar Contr. Co.*, 215 NY 416, 423 [1915]). While the majority observes that in some of these, the courts held that the evidence was “relevant,” and did not refer to “authentication” (majority op at 477 n 2), the testimony would only be relevant if the weapon were the same as the weapon used during the commission of the crime because in those cases the prior possession was admitted to show identity just as in defendant's case. These courts certainly must have determined a weapon to be the same as that used during the crime based on testimony that the weapon was “similar.” In any event, whether the gun was properly identified by the victim in this appeal is rendered academic because the People did not connect defendant to the web page. Prudence requires we leave the issue until properly presented in another case.

New York
Official Reports

57 N.Y.2d 12, 438 N.E.2d 1133, 453 N.Y.S.2d 418

The People of the State
of New York, Appellant,
v.
Robert E. Sawyer, Respondent.

Court of Appeals of New York
Argued June 9, 1982;

decided July 2, 1982

CITE TITLE AS: People v Sawyer

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered November 13, 1981, which (1) reversed, on the law and the facts, a judgment of the Chautauqua County Court (Lee Towne Adams, J.), rendered upon a verdict convicting defendant of murder in the second degree (two counts), and (2) granted a new trial.

Defendant, who upon arraignment on murder charges was advised of his right to counsel and given one week in which to secure one, appeared on the adjourned date with the former Public Defender, whose appearance was solely for the purpose of pursuing the representation matter and for advancing the argument that, in view of the defendant's indigency requiring the assignment of counsel, a conflict of interest might render the Public Defender's office ineligible for such an assignment. This argument was premised on the fact that the successor Public Defender was formerly employed by the office of the District Attorney, creating a vacancy that was in turn filled by a former employee of the Public Defender. The County Judge rejected this contention with the observation that the court earlier made a disassociation order which separated the successor Public Defender from the case. Thereafter, the court appointed the Assistant Public Defender to represent defendant. The defendant protested that he did not want to be represented by the office of the Public Defender and was advised by the court that he was not entitled to counsel of his choice and would have to stay with the Assistant Public Defender or proceed *pro se*. Defendant responded that he was not capable of defending himself, but still refused to be represented by the Public Defender. On at least three subsequent occasions before the trial eventually got under way, the court offered to make the Public Defender's office available, but the defendant still insisted that, while he desired counsel, he would not accept one from the Public ***13** Defender's office. Defendant was convicted following a trial in which he showed no comprehension of the applicable evidentiary or substantive law. The Appellate Division reversed and granted a new trial, holding that although the trial court had properly denied defendant's request since an indigent does not have the right to select his assigned counsel, where the Assistant Public Defender was relieved from responsibility, the trial court improperly deprived defendant of a continuing choice of either relying on counsel or proceeding on his own.

The Court of Appeals affirmed, holding, in an opinion by Judge Fuchsberg, that the duty of the trial court to make a "searching inquiry" to ascertain that the defendant appreciated the risks of self-representation was not satisfied by a dialogue with the court consisting of repeated judicial importunities that the defendant accept the services of the Public Defender and their repeated rejection by the defendant, and the court's declarations that the defendant was "facing a very serious charge" and "that your own best interests are probably served by having a lawyer represent you".

People v Sawyer, 83 AD2d 205, affirmed.

HEADNOTES

Crimes
Right to Counsel
Assigned Counsel

(1) Where defendant, although professing an inability to represent himself, chose to proceed *pro se* rather than be represented by an attorney from the office of the Public Defender who was formerly employed by the District Attorney's office, the duty of the trial court to make a "searching inquiry" to ascertain that the defendant appreciated the risks of self-representation was not satisfied by a dialogue with the court consisting of repeated judicial importunities that the defendant accept the services of the Public Defender and their repeated rejection by the defendant, and the court's declarations that the defendant was "facing

a very serious charge" and "that your own best interests are probably served by having a lawyer represent you".

Crimes
Right to Representation Pro Se

(2) Where a defendant decides on self-representation, a Judge may, even over objections by the accused, appoint a "standby counsel" to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self- representation is necessary.

POINTS OF COUNSEL

John T. Ward, District Attorney for appellant.
The court below erred in holding that defendant had not waived his right to counsel. (Maynard v Meachum, 545 F2d 273; ***14** United States ex rel. Testamark v Vincent, 496 F2d 641; Matter of Legal Aid Soc. of City of N. Y. v Rothwax, 69 AD2d 801; Pizarro v Harris, 507 F Supp 642; Kates v Nelson, 435 F2d 1085; United States ex rel. Davis v McMann, 386 F2d 611; United States v Washington, 341 F2d 277; Carter v Illinois, 329 US 173; Johnson v United States, 318 F2d 855; Adams v United States ex rel. McCann, 317 US 269; Faretta v California, 422 US 806.)
Charles Edward Fagan for respondent.
I. This court does not have jurisdiction to hear this appeal because the order of the court below reversing respondent's conviction and ordering a new trial was based on findings of fact which led to the reversal. (People v Mackell, 40 NY2d 59; People v Albro, 52 NY2d 619.) II. The court below did not err in holding that respondent had not waived his right to counsel. (People v McIntyre, 36 NY2d 10; Matter of Legal Aid Soc. of City of N. Y. v Rothwax, 69 AD2d 801; People v Medina, 44 NY2d 199; Maynard v Meachum, 545 F2d 273; Pizarro v Harris, 507 F Supp 642; United States ex rel. Testamark v Vincent, 496 F2d 641.) III. Even assuming, *arguendo,* that the court below erred in number II above, the reversal of respondent's conviction and order for a new trial should be affirmed since reversible error was rampant throughout the trial court proceeding.

OPINION OF THE COURT

Fuchsberg, J.

Once again we face sensitive questions associated with an indigent defendant's *pro se* representation in a criminal case.

After trial by jury, defendant, Robert Earl Sawyer, was convicted, and thereafter sentenced to an indeterminate term of 25 years to life imprisonment on two counts of murder arising out of the fatal shooting of a grocery clerk in Stow, Chautauqua County. Upon arraignment, the County Court, on March 2, 1978, advised him of his right to counsel and gave him a week in which to secure one.

On the adjourned date, March 9, Charles Fagan, Esq., who until shortly prior thereto had occupied the post of Public Defender, in which he apparently had developed some familiarity with the charges against the defendant, ***15** appeared with him, but only at the instance of the defendant's family and solely, as he explained to the County Judge, for the purpose of pursuing the representation matter. In particular, anticipating that defendant's indigency would require the County Judge to assign counsel, he advanced the argument that a conflict of interest might render the Public Defender's office ineligible for such an assignment. This he premised on the fact that Fagan's successor as Public Defender, Richard V. Slater, Esq., had come to his new office from service as Chief Assistant District Attorney, thus, in turn, creating a vacancy which was filled when an Assistant Public Defender, Ronald J. Gibb, Esq., shifted his employment to the District Attorney's office. The Trial Judge, who, in his position, of course, had to have been aware of these personnel changeovers in the relatively well-knit legal community of nonmetropolitan Chautauqua County, rejected Fagan's contention with the observation that the court earlier made a disassociation order which separated Slater from the case. Without further exploration of the subject, the court then adjourned the case to March 16, so that defendant could determine whether Fagan was to be his lawyer.

When, on this date, Fagan again appeared but only to give the court formal notification that the defendant lacked sufficient funds to retain private counsel, the court announced the appointment of Bruce K. Carpenter, Esq., in his official capacity as Assistant Public Defendant under Slater, to represent him. The defendant promptly protested, "I don't want the Public Defender, Your Honor." Four days later, the court notified the defendant that, after further consideration, it had decided that he was not entitled to counsel of his choice, and therefore would either have to stay with Carpenter or

proceed *pro se*. Defendant responded that he was not capable of defending himself, but still refused to be represented by the Public Defender. In the course of the colloquy, Carpenter informed the court that he had been unable to receive any co-operation from the defendant and suggested the appointment of alternate counsel to follow the case and be present at all proceedings. The court refused to do so or to appoint Fagan in place of Carpenter. ***16**

This as prelude, we move to March 22, when the case again appeared on the calendar, this time for pleading. There ensued the following:

"THE COURT: And do you want a lawyer?

"DEFENDANT: Yes, Your Honor.

"THE COURT: Then, you have the Public Defender, and I am asking you how you plead to this charge?

"DEFENDANT: I cannot plead now, Your Honor, because I cannot accept the Public Defender's office as counsel.

"THE COURT: I hold him in contempt of Court. The Public Defender -- either you are your own lawyer, or the Public Defender is your lawyer. Now, which? Which?

"DEFENDANT: I don't want the Public Defender, Your Honor.

"THE COURT: Then, you are your own lawyer. I enter a plea of not guilty, on your behalf, and I give you 30 days in which to make motions on your behalf.

"MR. CARPENTER: [Public Defender] I take it, an order is entered relieving the Public Defender of representing Mr. Sawyer at this time? Thank you, Your Honor.

"THE COURT: * * * I don't know how you are going to make your own motions. It's up to you. You have chosen to be your own lawyer, since you will not accept the lawyer I have assigned --

"DEFENDANT: I have not chosen --

"THE COURT: You have chosen. I am giving you another chance. You may make your choice. One, represent yourself. Two be represented by the Public Defender. You have no other choice. You are facing a very serious charge. If guilty and convicted, a mandatory sentence is life imprisonment. I strongly suggest you stop playing games with this Court and look out for your own best interests. Your own best interests are probably served by having a lawyer represent you. You will not have me assign anybody, or accept the Public Defender. Now, I know you've been talking with another lawyer. I do not know whether or not he has given you any advice, but if he has given you any ***17** advice that is contrary to what the Courts of this State say, obviously it isn't good advice. Now, if you want the Public Defender, I will re-appoint him; otherwise, you have no lawyer.

"DEFENDANT: I want to put on the record, I am not competent to defend myself, Your Honor.

"THE COURT: In that case, I assign the Public Defender again to represent you, and I will not hear you say anything one way or the other. You have a lawyer, or you don't have."

On March 27, defendant was denied bail. At that time, he again refused the services of the Public Defender, who thereupon was formally relieved of further responsibility to the defendant in this exchange:

"THE COURT: * * * At this time, the Public Defender has pointed out to me that I have not issued a formal order relieving him from the assignment which I made. Is it your desire that you now do so?

"DEFENDANT: Your Honor, it is completely up to you.

"THE COURT: No, I am asking you. Would you please answer me yes, or no.

"DEFENDANT: We have already discussed this at the last hearing.

"THE COURT: Do you want me to relieve the Public Defender?

"DEFENDANT: I do not consent to have him assigned as my counsel.

"THE COURT: And by not consenting, you say as such you would not accept him as your counsel?

"DEFENDANT: That's correct.

"THE COURT: And would not cooperate with him; would not talk to him and accept the services of his department, is that correct?

"(Whereupon there was no response from the Defendant.)

"THE COURT: Is that correct?

"(Whereupon there was no response from the Defendant.)

"THE COURT: You just don't accept him, period? ***18**

"DEFENDANT: I do not consent to have him as assigned counsel, Your Honor.

"THE COURT: Well, I relieve the Public Defender of the assignment which I have made. Please note for the record that Mr. Sawyer is his own counsel as such."

On at least three subsequent occasions before the trial proper eventually got under way, the court offered to make the Public Defender's office available, but the defendant was unswerving in his insistence that, while he desired counsel, he would not accept one from the Public Defender's office.[1] When his counsel-less defense did take place, the defendant proved the truth of his protestation that he was not competent to represent himself; neither disrespectful nor disorderly, he simply showed no comprehension of the applicable evidentiary or substantive law. In effect, the trial was an inquest.

It was essentially on this record that a sharply divided Appellate Division reversed and granted a new trial. In a writing by Justice Schnepp, the majority reasoned that, granted that an indigent did not have the right to select his assigned counsel, the Trial Judge had properly denied defendant's request, but that, when he relieved Carpenter from further responsibility, the Trial Judge improperly deprived the defendant of a continuing choice of either relying on counsel or proceeding on his own. In contrast, the two dissenting Justices opined that the defendant effectively waived the right to counsel (83 AD2d 205). Though on a somewhat different rationale than the one it adopted, we believe the result the majority reached is the one that should be upheld.

Our analysis begins with the observation that it was incumbent upon the defendant to show "good cause" for the desired substitution. For, while it is true that an indigent defendant is guaranteed the right to assistance of counsel by both our Federal and State Constitutions,[2] this is not to ***19** be equated with a right to choice of assigned counsel. Thus, while Trial Judges have a duty to carefully evaluate complaints concerning court-appointed counsel and, when appropriate, effect a change of counsel, "this is far from suggesting that an indigent's request that a court assign new counsel is to be granted casually" (People v Medina, 44 NY2d 199, 207; see People v Brabson, 9 NY2d 173, 180-181).

Therefore, though a defendant's confidence in appointed counsel is most desirable, as it is in any client-attorney relationship, a bald profession that it is lacking is not controlling. Good cause for such an opinion must be demonstrated before a substitution need follow. It goes without saying, for instance, that most compelling would be a showing that counsel is unable to provide the defendant effective assistance, as, for example, by reason of professional incompetence or the existence of a personal impediment which handicaps his or her professional performance. Surely, a genuine conflict of interest would entitle a defendant to relief.

In the case before us now the only objection raised was the one broadly uttered under the conflict of interest rubric but at no time was there anything to even slightly suggest that any of the former members of either the District Attorney's staff or that of the Public Defender who recently had shifted their employments from one of these agencies to the other would not zealously honor the confidences and loyalties assumed in their original positions. Rather, as indicated earlier the County Judge made it known to the defendant that he had been circumspect enough to issue a disassociation order which presumably was tailored to minimize the risk, if not entirely avoid the occasion, for any occurrence of conflict in fact. And, we note that the Appellate Division, alert to our admonitions in People v Shinkle (51 NY2d 417), thought the Trial Judge could draw a distinction between the circumstances created in *Shinkle,* where a defense counsel had joined the prosecutor's office, and the converse here, where one formerly allied with the prosecutor had taken over direction of the Public Defender's domain. Finally, absent any oral or ***20** written definition of the specifics of the disassociation order or any information on Carpenter's prior vocational history, with neither of which the record here favors us, it can be argued that the details of the order in fact may have mandated a foolproof disassociation procedure and that Carpenter's background and intended *modus operandi* would have reinforced it.

But then, of course, less summary treatment of the matter than the record revealed also might have disclosed a less ideal drawing of disassociation lines or, for instance, allowed for exploration of the relationship, if at all, of Gibbs' successive employments to the handling of defendant's case. Beyond all this, however, "even if the actuality * * * of prejudice were absent, what of the appearance of things (see Code of Professional Responsibility, Canon 9)?" (People v Zimmer, 51 NY2d 390, 395.) Or, as *Shinkle,* in its more analogous context, explains, "We recognize that the rule applied in this case may impede the transfer of attorneys between offices of Legal Aid or Public Defender and of District Attorney. This circumstance, however, affords no basis to deny defendants the right to both the fact *and appearance* of unswerving and exclusive loyalty on the part of attorneys who represent them" (emphasis added) (People v Shinkle, supra, p 421).

(1) Obviously then, to say the least, a fine line here had to be tread. But we need not decide whether it was. This is because a new trial is necessary in any event, since, as we read the record, the trial court did not ascertain that the defendant appreciated the risks of self- representation.

For, even if we assume the defendant's request for other counsel was properly denied, in the posture of the two options to which he was confined, his unwillingness to accept Carpenter as counsel left the defendant no way to proceed but *pro se.* This then called upon the court to give the defendant appropriate warnings. Clearly, this requirement was not diminished because the defendant chose to become a *pro se* litigant because of the strictures of the options open to him rather than in the absence of such restraint. Whatever his displeasure at having to make such a choice, when it ultimately was made it was unequivocal. Indeed, it can be said that his decision was no ***21** less, but perhaps more, definite because it was evidenced by conduct rather than the mouthing of a verbal formula.

At the root of the rule calling for special inquiry before a defendant may proceed *pro se* is recognition that implicit in a defendant's exercise of the right to do so is a concomitant right to forego the advantages of counsel (Faretta v California, 422 US 806, 835). To make sure this is well understood, more is required than that the right be "unequivocally and timely asserted". Substantively, it must be "knowing and intelligent" as well. (People v McIntyre, 36 NY2d 10, 17). To ascertain that it is, the court should undertake a sufficiently "searching inquiry" of the defendant to be reasonably certain that the "dangers and disadvantages" of giving up the fundamental right to counsel have been impressed on the defendant (see Faretta v California, 422 US 806, 835, supra.; People v White, 56 NY2d 110, 117). Appropriate "colloquy on the record between the judge and defendant" will not only test the defendant's understanding, but provide an objective basis for review (United States v Bailey, 675 F2d 1292; see United States v Dujanovic, 486 F2d 182; United States v Plattner, 330 F2d 271).

So measured, the precautionary inquiry in this case was woefully inadequate. In the main, the dialogue consisted of repeated judicial importunities that the defendant accept the services of the Public Defender and their repeated rejection by the defendant. The court's declarations that defendant was "facing a very serious charge" and that "your own best interests are probably served by having a lawyer represent you" simply did not satisfy the duty to make a "searching inquiry".

Interestingly, the only accounting of dangers of *pro se* representation that found its way into the record was that contained in an excerpt the defendant read from Gideon v Wainwright (372 US 335) months after Carpenter had been relieved.[3] Though on its face this language could be deemed most informative, there is no way of telling ***22** whether and to what extent the defendant appreciated its significance, or whether he was doing no more than reading uncomprehended language supplied to him by another. Unexplored by a cross current of colloquy, we are left in the dark.

(2) Finally, since there is to be a new trial, for the guidance of the trial court should the situation arise again, we now comment on the matter of "standby counsel". It will be remembered that the trial court rejected Assistant Public Defender Carpenter's suggestion, made after reporting on defendant's mistrust, that alternate counsel be appointed to follow the case and be present at all proceedings. On this point, we agree, particularly in a case as serious as the one here, that, where a defendant decides on self-representation, a Judge "may -- even over objection by the accused -- appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary" (Faretta v California, supra, p 835, n 46). It may be advisable to do so to protect the defendant and to facilitate the trial, not only in serious cases, but "in cases expected to be long or complicated or in which there are multiple defendants" (ABA Standards for Criminal

Justice [2d ed], Special Functions of the Trial Judge, standard 6-3.7).

Accordingly, the order of the Appellate Division should be affirmed.

Jasen, J.

(Dissenting).

I vote to reverse. By repeatedly rejecting, without good cause, the services of the only attorney to which he was constitutionally entitled, defendant waived his right to counsel. On this point, I am in complete agreement with the views expressed in the dissenting ***23** opinion of Justice Richard D. Simons at the Appellate Division. (83 AD2d 205, 210-216.) I find it necessary, however, to comment briefly on the rationale employed by the majority in needlessly sustaining the reversal of defendant's conviction for the brutal murder of a teen-age girl.

At the outset, certain facts should be noted. It is not contended that Bruce Carpenter, the Chief Assistant Public Defender assigned to represent the defendant, is other than an experienced, qualified and highly respected trial attorney. At no time in the course of these proceedings has defendant offered a valid reason for not accepting his services as counsel. Indeed, the record suggests that defendant's refusal to accept Carpenter as his attorney was more the product of appellate counsel's dissatisfaction with the political turnover in the Public Defender's office than any real concern over defendant's constitutional right to full and fair representation at trial.

Be that as it may, defendant at the time of trial was 31 years old and by no means unfamiliar with the criminal justice system. Not only had he served time on prior felony charges, but he was involved in a lengthy extradition proceeding in the State of Maine which ended in his return to this State to face the present murder charges. On both these occasions, defendant was represented by counsel and, as a result, fully exposed to the role played by an attorney in the course of a criminal proceeding.

Although defendant was indigent, there is no indication that he was ignorant or that he lacked a basic understanding of the English language. In fact, the record is directly to the contrary. On each of the several occasions that he was confronted with the choice of either accepting Carpenter or proceeding *pro se,* defendant, while adamantly refusing the Public Defender's assistance, continuously professed an inability to represent himself. Such self-proclaimed incompetence is some indication that he was aware of and appreciated the dangers involved in not being represented by a lawyer at trial. Furthermore, the court specifically advised defendant of the seriousness of the charges he was facing and the term of life imprisonment ***24** that could follow upon conviction. In addition, defendant, in the course of his opening statement, expressly acknowledged that "[t]he law is very complex", that "[a] man has to go through many years of schooling before he can become a lawyer" and asked the court how it expected him "to do this in a few months".

Beyond this, the clearest indication of defendant's subjective appreciation of the risks involved in *pro se* representation came from his own mouth. At one point in the pretrial proceedings, the defendant addressed the court as follows: "I'm not familiar with the proceedings going on here, and I have tried, to the best of my ability, to understand what's happening, and something I have read, a Supreme Court Decision, Gideon vs. Wainwright: 'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.' " (See Gideon v Wainwright, 372 US 335, 344-345.)

Nevertheless, the majority has concluded that a new trial is in order because "the trial court did not ascertain that the defendant appreciated the risks of self-representation." (At p 20.) Yet, I know of no case in which such a clear articulation on the pitfalls of *pro se* representation has come from the lips of the defendant himself. The majority blithely passes over this part of the record with the unfounded suggestion that there is no way of telling whether defendant understood the significance of what he was saying or whether he was merely "reading uncomprehended ***25** language supplied to

him by another." (At p 22.) Such a view is not only highly speculative, but wholly unrealistic. The defendant's recitation concerning the dangers of self-representation provides a far clearer indication of his personal appreciation of the particular risks involved than if the court had uttered the warnings and the defendant merely acknowledged his understanding by a simple "yes".

Nor is there any possibility that further dialogue between the court and the defendant concerning the dangers of self-representation would have altered defendant's unyielding position concerning Carpenter's assistance at trial. On numerous occasions throughout these proceedings, defendant made it clear that he would accept no attorney from the Public Defender's office. Under the circumstances, further questioning by the trial court of the type suggested by the majority would have been futile. On this record, I can only conclude that defendant fully appreciated the danger of proceeding *pro se* and, despite the risks involved, refused the assistance of court- appointed counsel.

No constitutional rights will have been protected by ordering a new trial in this case. Rather, by sanctioning the type of gamesmanship practiced here, this court's decision will only serve to further undermine public confidence in the criminal justice system. No defendant faced with the constitutionally permissible choice of either accepting competent, court-appointed counsel or proceeding *pro se* should be able to straddle both rights and, in so doing, frustrate the course of a criminal trial. As one court has aptly noted: " '[W]e have recognized a right of a defendant to proceed without counsel and to refuse the representation of assigned counsel. * * * [H]e may not use this right to play a "cat and mouse" game with the court * * * or by ruse or stratagem fraudulently seek to have the trial judge placed in a position where, in moving along the business of the court, the judge appears to be arbitrarily depriving the defendant of counsel.'" (Kates v Nelson, 435 F2d 1085, 1088-1089, quoting United States ex rel. Davis v McMann, 386 F2d 611, 618-619 [citations omitted].)

Having clearly and unequivocally rejected the only attorney to which he was constitutionally entitled, the sole ***26** option that remained was for the defendant to represent himself. He should now be bound by that election. Instead, he is given an unwarranted, second opportunity to put the People to the task of establishing his guilt at trial, five years after the crime was committed. Since it is likely that defendant will not have any different or better counsel on the retrial than was available to him at the first trial, I fully agree with Justice Simons that "[n]either justice nor the appearance that justice has been done is satisfied by such a result." (83 AD2d, at p 216.)

Chief Judge Cooke and Judges Jones and Meyer concur with Judge Fuchsberg; Judge Jasen dissents and votes to reverse in a separate opinion in which Judges Gabrielli and Wachtler concur.

Order affirmed. ***27**

Footnotes

1 The defendant even went so far as to bring an article 78 proceeding against the Trial Judge to seek assignment of counsel not associated with the Public Defender. The Fourth Department denied the application (app dsmd 45 NY2d 835).

2 (NY Const, art I, §6; People v Koch, 299 NY 378, 381; US Const, 6th, 14th Amdts; Argersinger v Hamlin, 407 US 25; Gideon v Wainwright, 372 US 335.)

3 The defendant made the following statement during discovery proceedings held on July 19, 1978: "I'm not familiar with the proceedings going on here, and I have tried, to the best of my ability, to understand what's happening, and something I have read, a Supreme Court Decision, Gideon vs. Wainwright: 'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.' " (See Gideon v Wainwright, 372 US 335, 344-345.)

438 N.E.2d 1133, 453 N.Y.S.2d 418

End of Document

New York Official Reports

147 A.D.3d 1497, 47 N.Y.S.3d 607, 2017 N.Y. Slip Op. 01073

**1 The People of the State of New York, Respondent,

v

Mark E. Scerbo, II, Appellant.

Supreme Court, Appellate Division, Fourth Department, New York
113, 13-01883
February 10, 2017

CITE TITLE AS: People v Scerbo

HEADNOTE

Crimes
Jurors
Selection of Jury—Improper Denial of Belated Peremptory Challenge

Timothy P. Donaher, Public Defender, Rochester (Drew R. Dubrin of counsel), for defendant-appellant.
Sandra Doorley, District Attorney, Rochester (Leah R. Mervine of counsel), for respondent.

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered July 15, 2013. The judgment ***1498** convicted defendant, inter alia, upon a jury verdict, of reckless driving (three counts), driving while intoxicated, as a class D felony (two counts), aggravated driving while intoxicated, as a class D felony, and manslaughter in the second degree.

It is hereby ordered that the judgment so appealed from is unanimously reversed on the law, a new trial is granted on counts 4, 6 through 8, 10 and 11 of the indictment, and counts one through three of the indictment are dismissed without prejudice to the People to re-present any appropriate charges under those counts to another grand jury.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, three counts of reckless driving (Vehicle and Traffic Law § 1212), and one count each of manslaughter in the second degree (Penal Law § 125.15 [1]) and aggravated driving while intoxicated (Vehicle and Traffic Law § 1192 [2-a] [a]), defendant contends that County Court erred in refusing to consider his belated peremptory challenge. We agree.

A trial court has broad discretion over the jury selection process (*see People v Wilson*, 106 AD2d 146, 149 [1985], citing *People v Pepper*, 59 NY2d 353 [1983]). Where a defendant seeks to exercise a peremptory challenge after the time in which to do so has passed, the court has discretion whether to allow the challenge (*see People v Jabot*, 93 AD3d 1079, 1081 [2012]). Here, defense counsel momentarily lost count of the number of jurors who had been selected. As a result, defense counsel declined to exercise a peremptory challenge to prospective juror 21. When informed that prospective juror 21 was the 12th juror seated, defense counsel immediately asked the court to allow defendant to exercise his last peremptory challenge to that juror. The jury had not yet been sworn, the panel from which the alternates would be selected had not yet been called, and prospective juror 21 had not yet been informed that he had been selected. Furthermore, the People expressly declined to object to the request. Under the circumstances of this case, we conclude that the court abused its discretion in denying defendant's request. Indeed, " 'we can detect no discernable interference or undue delay caused by [defense counsel's] momentary oversight . . . that would justify [the court's] hasty refusal to entertain [the] challenge' " (*People v McGrew*, 103 AD3d 1170, 1173 [2013]; *see People v Rosario-Boria*, 110 AD3d 1486, 1486-1487 [2013]; *People v Parrales*, 105 AD3d 871, 872 [2013]). Such an error cannot be deemed harmless (*see People v Hecker*, 15 NY3d 625, 661-662 [2010]; *People v Marshall*, 131 AD3d 1074, 1075 [2015], *lv denied* 26 NY3d 1041 [2015]), and ***1499** thus reversal is required. Present —Whalen, P.J., Smith, DeJoseph, Curran and Scudder, JJ.

New York
Official Reports

106 A.D.3d 1112, 965 N.Y.S.2d
633, 2013 N.Y. Slip Op. 03859

**1 The People of the State
of New York, Respondent
v
Barbara Sheehan, Appellant.

Supreme Court, Appellate Division,
Second Department, New York
1124/08, 2011-11719
May 29, 2013

CITE TITLE AS: People v Sheehan

HEADNOTE

Crimes
Sentence

Stillman & Friedman, P.C., New York, N.Y. (Nathaniel Z. Marmur and Nathaniel I. Kolodny of counsel), for appellant. Richard A. Brown, District Attorney, Kew Gardens, N.Y. (Gary S. Fidel and Donna Aldea of counsel), for respondent. Dorchen A. Leidholdt, New York, N.Y., and Nancy K.D. Lemon, Berkeley, California, pro hac vice, for amici curiae Sanctuary for Families, Center for Battered Women's Services, National Clearinghouse for the Defense of Battered Women, Women's Law Project, Domestic Violence Program at Albany Law School Clinic and Justice Center, Pace Women's Justice Center, Connect, Domestic Violence Report, Legal Project, Washington State Coalition Against Domestic Violence, National Network to End Domestic Violence, SUNY Buffalo School of Law Women, Children, and Social Justice Clinic, Minnesota Indian Women's Resource Center, New York Legal Assistance Group, New York State Coalition Against Domestic Violence, and Legal Aid Society.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Kron, J.), rendered November 10, 2011, convicting her of criminal possession of a weapon in the second degree, upon a jury verdict, and imposing sentence.

Ordered that the judgment is affirmed, and the matter is remitted to the Supreme Court, Queens County, for further proceedings pursuant to CPL 460.50 (5).

In fulfilling our responsibility to conduct an independent review of the weight of the evidence (*see* CPL 470.15 [5]; *People v Danielson*, 9 NY3d 342, 348-349 [2007]), we nevertheless accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor (*see People v Mateo*, 2 NY3d 383, 410 [2004], *cert denied* 542 US 946 [2004]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). Upon reviewing the record, we are satisfied that the jury's verdict of guilt was not against the weight of the evidence (*see People v Romero*, 7 NY3d 633 [2006]).

The defendant's contention that the Supreme Court erred by precluding her from presenting expert psychiatric testimony with respect to her mental condition is academic in light of her acquittal of the count of murder in the second degree (*see People v Pons*, 68 NY2d 264, 265 [1986]; *People v Almodovar*, 62 NY2d 126, 130 [1984]; *People v Marquez*, 82 AD3d 1123, 1124 [2011]; *People v Thomas*, 232 AD2d 667 [1996]). **2 *1113

The sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80 [1982]). We acknowledge that the record demonstrates that the defendant, a first-time felony offender, had been the victim of domestic violence, and that such domestic violence was a factor in the defendant's commission of criminal possession of a weapon in the second degree, the crime for which she was convicted. Consequently, we agree with our dissenting colleague that Penal Law § 60.12 is applicable and could have been utilized by the Supreme Court to sentence the defendant to an indeterminate term of imprisonment. However, under the particular circumstances of this case, it was not an improvident exercise of discretion for the court to decline to sentence the defendant pursuant to that statute. Moreover, the sentence imposed, a determinate term of imprisonment of five years, was appropriate and not excessive. While the court accurately noted that the sentence would have limited deterrent and rehabilitative impact on this particular defendant, the court's aim in imposing the sentence was, in large part, to deter others from engaging in similar misconduct. Indeed, the court stated at sentencing that "[s]ociety certainly must be concerned with self-help, violent behavior that is not sanctioned by law." Since the court viewed general deterrence as an overriding sentencing principle, we cannot say that the emphasis was erroneous or that the interest of justice calls for a reduction in the

defendant's sentence (*see People v Rodriguez*, 161 AD2d 737, 738 [1990]).

The defendant's remaining contentions are without merit. Dillon, J.P., Chambers and Hall, JJ., concur.

Balkin, J., concurs in part, and dissents in part, and votes to modify the judgment, as a matter of discretion in the interest of justice, by reducing the sentence imposed to an indeterminate term of imprisonment of 2¼ to 4½ years, and otherwise affirm the judgment, with the following memorandum: I agree that the defendant's conviction should stand, but I would reduce the sentence as a matter of discretion in the interest of justice. Therefore, I respectfully dissent from so much of the order as affirms the sentence.

In "Jenna's Law" (L 1998, ch 1) the Legislature lengthened the authorized prison terms for first-time violent felons by, among other things, requiring the imposition of determinate sentences. In the very first section of the new law, however, the Legislature provided an exception, contained in a new Penal Law § 60.12, which allows a court to sentence a first-time violent felony offender to an indeterminate term of imprisonment if the victim's domestic violence against the offender was a factor in the offender's commission of the crime. ***1114**

The indeterminate sentences permitted under the exception were not only significantly less harsh than the determinate sentences that Jenna's Law created, but were exactly the same sentences as those that could be imposed on first-time violent offenders before Jenna's Law was enacted (*compare* Penal Law § 60.12 *with* Penal Law § 70.02 [former (2)] *and* Irving Schwartz, New York Sentence Charts, McKinney's Cons Laws of NY, Book 39 [1998 ed]). In other words, the exception permits those defendants to be sentenced under the old law.

In this case, the sentencing court recognized the applicability of the exception, but declined to sentence the defendant to an indeterminate term of imprisonment.

No one disputes the fact that, before she committed this crime, the defendant was a productive, law-abiding citizen. And it is most likely that she will be a productive, law-abiding citizen when she finishes serving her sentence. Even the sentencing court thought so; it said: "[t]here is very little in this world to be sure of, but I am certain to the extent possible that this will be [the defendant's] only lifetime contact with the criminal justice system . . . and that the sentence thus has limited deterrent and rehabilitative impact on [her]."

Moreover, the record in this case—both the trial evidence and the additional evidence put before the court at sentencing—overwhelmingly established that the defendant had been the ****3** victim of her husband's constant physical and verbal abuse for almost two decades. At the very least, the record established that, as the sentencing court found and the People themselves do not dispute, the prerequisites of Penal Law § 60.12 were satisfied, so the defendant was eligible to be sentenced to an indeterminate pre-Jenna's Law term of imprisonment.

We need not find that the sentencing court "abused" its discretion in order to invoke our interest of justice jurisdiction to reduce a sentence. Rather, as this Court said in *People v Suitte*, "since the Legislature has empowered us to modify sentences 'as a matter of discretion in the interest of justice' and our general review powers include the right to do whatever the trial court could have done even in matters entrusted to the discretion of that court, we can substitute our own discretion for that of a trial court which has not abused its discretion in the imposition of a sentence" (90 AD2d 80, 85-86 [1982], quoting CPL 470.15 [3] [citations omitted]). Under the circumstances of this case, we should utilize that power because the imposition of a five-year determinate term of imprisonment on this defendant was improvident. The Legislature created a compassionate exception within Jenna's Law for certain victims of domestic violence. If not now, when? ***1115**

New York Official Reports

101 A.D.3d 908, 954 N.Y.S.2d 899 (Mem), 2012 N.Y. Slip Op. 08558

**1 The People of the State of New York, Respondent

v

Carl Simon, Appellant.

Supreme Court, Appellate Division, Second Department, New York
December 12, 2012

CITE TITLE AS: People v Simon

HEADNOTES

Grand Jury
Defective Proceeding
Integrity of Grand Jury Impaired by Actions of District Attorney

Grand Jury
Right to Appear before Grand Jury

Crimes
Instructions

Del Atwell, East Hampton, N.Y., for appellant, and appellant pro se.
Thomas J. Spota, District Attorney, Riverhead, N.Y. (Ronnie Jane Lamm of counsel), for respondent.

Appeal by the defendant from a judgment of the County Court, Suffolk County (Hudson, J.), rendered September 8, 2009, convicting him of attempted assault in the first degree, upon a jury verdict, and imposing sentence.

Ordered that the judgment is affirmed.

Viewing the evidence in the light most favorable to the prose ***909** cution (*see People v Contes*, 60 NY2d 620 [1983]), we find that it was legally sufficient to establish the defendant's guilt beyond a reasonable doubt. Moreover, in fulfilling our responsibility to conduct an independent review of the weight of the evidence (*see* CPL 470.15 [5]; *People v Danielson*, 9 NY3d 342 [2007]), we nevertheless accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor (*see People v Mateo*, 2 NY3d 383, 410 [2004], *cert denied* 542 US 946 [2004]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). Upon reviewing the record here, we are satisfied that the verdict of guilt was not against the weight of the evidence (*see People v Romero*, 7 NY3d 633 [2006]).

Although the prosecutor improperly elicited testimony which constituted inadmissible hearsay, the grand jury proceeding did not fail to conform to the requirements of CPL article 190 to such a degree that the integrity thereof was impaired and, in view of the sufficiency of the independent, admissible proof which supported the indictment, no prejudice to the defendant could have resulted from the improperly elicited testimony (*see People v Miles*, 76 AD3d 645 [2010]; *People v Read*, 71 AD3d 1167, 1168 [2010]; *People v Walton*, 70 AD3d 871, 873 [2010]).

The defendant contends that the indictment should be dismissed because he was denied his right to testify before the grand jury. A motion to dismiss on that ground must be made within five days after arraignment or it is deemed waived (*see* CPL 190.50 [5] [c]). Here, the defendant's motion was made several months after arraignment, well beyond the time limit (*see People v Brown*, 227 AD2d 691 [1996]; *People v McMoore*, 214 AD2d 893 [1995], *cert denied* 516 US 1096 [1996]).

Contrary to the defendant's contention, "[s]ince the case against [him] consisted of both direct and circumstantial evidence," he was not entitled to a circumstantial evidence charge (*People v Garson*, 69 AD3d 650, 651 [2010]; *see People v Washington*, 45 AD3d 880 [2007]).

The defendant's remaining contentions, including those raised in his pro se supplemental brief, are without merit. Rivera, J.P., Florio, Chambers and Cohen, JJ., concur.

End of Document

New York
Official Reports

278 A.D.2d 75, 718 N.Y.S.2d
305, 2000 N.Y. Slip Op. 11027

The People of the State of
New York, Respondent,
v.
Michael Smith, Appellant.

Supreme Court, Appellate Division,
First Department, New York
2651
(December 14, 2000)

CITE TITLE AS: People v Smith

HEADNOTES

CRIMES
JURORS
Selection of Jury

(1) Jury selection was conducted in lawful manner; there is nothing in CPL 270.15 that would require court to grant defendant's request to exercise peremptory challenge to juror who had already been accepted by both sides earlier in jury selection, but who had not yet been sworn.

CRIMES
ROBBERY

(2) Judgment convicting defendant of two counts of robbery in third degree affirmed--defendant threatened use of force in each of two incidents, and defendant's relatively polite behavior does not warrant contrary conclusion; record fails to support defendant's arguments that language barrier caused victim to misinterpret defendant's statements, or that defendant's conduct was consistent with begging or some other innocent explanation; in each incident defendant placed his hand in his pocket, pointed to cash register, asked victim to open it, and took substantial amount of money from both register and victim's wallet; moreover, in first incident, defendant made statement implying that victim would be hurt if she resisted.

Jdgment, Supreme Court, New York County (Felice Shea, J.), rendered April 21, 1997, convicting defendant, after a jury trial, of two counts of robbery in the third degree, and sentencing him, as a second felony offender, to concurrent terms of 3 to 6 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence. The evidence established that defendant threatened the use of force in each of the two incidents, and defendant's relatively polite behavior does not warrant a contrary conclusion. The record fails to support defendant's arguments that a language barrier caused the victim to misinterpret defendant's statements, or that defendant's conduct was consistent with begging or some other innocent explanation. In each incident defendant placed his hand in his pocket, pointed to the cash register, asked the victim to ***76** open it, and took a substantial amount of money from both the register and the victim's wallet. Moreover, in the first incident, defendant made a statement implying that the victim would be hurt if she resisted.

Jury selection was conducted in a lawful manner. After both sides had accepted the 13th prospective juror, the court went on to consider the 14th. Both sides accepted juror 14 and the jury was complete. Defense counsel then said, “But if you would allow me to do this, could we strike [juror 13] or is it too late?” The court denied that request.

There is nothing in CPL 270.15 that would require a court to grant a defendant's request to exercise a peremptory challenge to a juror who had already been accepted by both sides earlier in jury selection, but who had not yet been sworn (*see, People v Alston,* 88 NY2d 519).

Concur--Sullivan, P. J., Rosenberger, Williams, Ellerin and Andrias, JJ.

End of Document

New York Official Reports

20 N.Y.3d 91, 980 N.E.2d 505, 956 N.Y.S.2d 457, 2012 N.Y. Slip Op. 07223

**1 The People of the State of New York, Respondent

v

Michael J. Solomon, Appellant.

Court of Appeals of New York
Argued September 4, 2012

Decided October 30, 2012

CITE TITLE AS: People v Solomon

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered May 7, 2010. The Appellate Division affirmed a judgment of the Niagara County Court (Peter L. Broderick, Sr., J.), which had convicted defendant, upon a jury verdict, of rape in the first degree, course of sexual conduct against a child in the first degree, course of sexual conduct against a child in the second degree, rape in the second degree (nine counts), criminal sexual act in the second degree (seven counts), and use of a child in a sexual performance (four counts).

People v Solomon, 73 AD3d 1440, reversed.

HEADNOTES

Crimes
Right to Counsel
Effective Representation—Conflict of Interest—Invalid Waiver

(1) In a prosecution in which the lawyer who represented defendant at a pretrial hearing and at trial was simultaneously representing, in an unrelated matter, a police officer who testified for the People that defendant had confessed to one of the charged crimes, defendant did not effectively waive the lawyer's conflict of interest. When defense counsel advised the court that she represented the police officer "in an unrelated civil matter," the trial judge merely asked the defendant if, as defense counsel had indicated, he had indeed agreed to waive any conflict, and defendant replied affirmatively. A defendant in a criminal case may waive an attorney's conflict, but only after an inquiry has shown that the defendant has an awareness of the potential risks involved in that course and has knowingly chosen it. The judge's inquiry here, in which not even the nature of defense counsel's simultaneous representation of the police officer was placed on the record, was simply inadequate.

Crimes
Right to Counsel
Effective Representation—Conflict of Interest—Actual Conflict—Substantial Relation to Conduct of Defense

(2) In a prosecution in which defendant did not validly waive the conflict of interest of the lawyer who represented defendant at a pretrial hearing and at trial and who was simultaneously representing, in an unrelated civil matter, a police officer who testified that defendant had confessed to one of the charged crimes, the conflict had such a substantial relation to the conduct of the defense as to require reversal. There was an actual, as opposed to potential, conflict of interest between defendant and the police officer. The officer testified that defendant had confessed to raping his daughter and it was very *92 much in defendant's interest either to discredit that testimony or to show that his confession had been obtained by some unlawful or unfair means while the officer's interest was the opposite. While counsel's cross-examination of the officer may have been competently performed, the simultaneous representation of clients whose interests actually conflict cannot be overlooked and where such an actual conflict exists and is not waived, defendant has been deprived of the effective assistance of counsel. An adverse effect on the conduct of the defense necessarily exists where an actual conflict of interest is established. A defendant has a right to receive advice and assistance from an attorney whose paramount responsibility is to that defendant alone.

RESEARCH REFERENCES

Am Jur 2d, Attorneys at Law § 193; Am Jur 2d, Criminal Law §§ 1135–1139.

Carmody-Wait 2d, Right to Counsel §§ 184:182, 184:185, 184:192.

LaFave, et al., Criminal Procedure (3d ed) § 11.9.

NY Jur 2d, Criminal Law: Procedure §§ 759, 869, 937, 943.

ANNOTATION REFERENCE

Circumstances giving rise to prejudicial conflict of interests between criminal defendant and defense counsel—state cases. 18 ALR4th 360.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: conflict /3 interest & waiver /5 invalid & assistance /4 counsel

POINTS OF COUNSEL

Harrington & Mahoney, Buffalo (*Mark J. Mahoney* of counsel), for appellant.
I. In the absence of a sufficient inquiry by the court, and waiver by the accused, defense counsel's conflict of interest requires a new trial—regardless of prejudice. (*People v Gomberg*, 38 NY2d 307; *People v Macerola*, 47 NY2d 257; *People v Lombardo*, 61 NY2d 97; *People v Alicea*, 61 NY2d 23; *People v Wandell*, 75 NY2d 951; *People v McDonald*, 68 NY2d 1; *People v Stewart*, 126 AD2d 943; *People v Gordon*, 272 AD2d 133; *Wheat v United States*, 486 US 153; *United States v Locascio*, 6 F3d 924.) II. Without an actual waiver of *Miranda* rights, and the interrogation being recorded, the statements made by the accused should have been suppressed. (*Miranda v Arizona*, 384 US 436; *Carnley v Cochran*, 369 US 506; *People v Huntley*, 15 NY2d 72; *Oregon v Elstad*, 470 US 298; ***93** *People v Combest*, 4 NY3d 341; *United States v Plummer*, 118 F Supp 2d 945; *United States v Mansker*, 240 F Supp 2d 902; *People v Oglesby*, 15 AD3d 888; *People v Rosario*, 20 Misc 3d 401; *People v Crews*, 18 Misc 3d 1120.) III. The unqualified admission of the complainant's extrajudicial accusations requires reversal. (*Reed v McCord*, 160 NY 330; *People v De George*, 73 NY2d 614.) IV. Appellant was deprived of effective assistance of counsel. (*People v Baldi*, 54 NY2d 137; *People v Zaborski*, 59 NY2d 863.) V. The court's rulings violated the accused's right to present a defense. (*People v Hudy*, 73 NY2d 40; *People v Shapiro*, 50 NY2d 747; *Chambers v Mississippi*, 410 US 284; *Washington v Texas*, 388 US 14; *People v Mandel*, 61 AD2d 563, 48 NY2d 952; *People v Ruiz*, 71 AD2d 569; *People v Torre*, 42 NY2d 1036; *People v Carter*, 37 NY2d 234.) VI. The cumulative errors deprived appellant of a fair trial. (*People v Crimmins*, 36 NY2d 230; *People v Durrin*, 32 AD3d 665.)
Michael J. Violante, District Attorney, Lockport (*Thomas H. Brandt* of counsel), for respondent.
I. Defendant received effective assistance of counsel under the "conflict of interest" doctrine. (*People v Ortiz*, 76 NY2d 652; *People v Alicea*, 61 NY2d 23; *People v Ennis*, 11 NY3d 403; *People v Abar*, 99 NY2d 406; *People v Macerola*, 47 NY2d 257; *People v Konstantinides*, 14 NY3d 1; *People v Harris*, 99 NY2d 202; *People v Lombardo*, 61 NY2d 97.) II. Defendant's statement was properly admitted. (*People v Berg*, 92 NY2d 701; *People v Mateo*, 2 NY3d 383, 542 US 946; *People v Davis*, 55 NY2d 731; *People v Sirno*, 76 NY2d 967; *People v Falkenstein*, 288 AD2d 922, 97 NY2d 704; *People v Hawkins*, 11 NY3d 484; *People v Rosas*, 30 AD3d 545, 8 NY3d 493; *People v Beckingham*, 57 AD3d 1098, 13 NY3d 742.) III. Defendant's conversation with the complainant was properly admitted. (*People v Chico*, 90 NY2d 585; *People v Jackson*, 148 AD2d 930, 74 NY2d 665; *People v Hawkins*, 11 NY3d 484.) IV. Defendant received effective assistance of counsel. (*People v Flores*, 84 NY2d 184; *People v Turner*, 5 NY3d 476; *People v Baldi*, 54 NY2d 137; *People v Rivera*, 71 NY2d 705; *People v Garcia*, 75 NY2d 973; *People v Satterfield*, 66 NY2d 796.) V. Defendant's right to present a defense was not violated. (*Michigan v Lucas*, 500 US 145; *Rock v Arkansas*, 483 US 44; *United States v Valenzuela-Bernal*, 458 US 858.) VI. Defendant received a fair trial. (*People v Clyde*, 18 NY3d 145.)

OPINION OF THE COURT

Smith, J.

The lawyer who represented defendant at a pretrial hearing and at trial was simultaneously representing, in an unrelated ***94** matter, a police officer who testified for the People that defendant had confessed to one of the charged crimes. We hold that, because there was no valid waiver of the lawyer's conflict of interest, defendant is entitled to a new trial. ****2**

I

Defendant was charged with raping his daughter, and committing other sex offenses against her, over a four-year period beginning when she was 10 years old. The evidence against him included a partial confession, in which defendant

told two police detectives, Karen Smith and Larry Kuebler, that he had had sex with his daughter once.

A *Huntley* hearing was held on the voluntariness of defendant's statements to the detectives. Before the hearing began, defense counsel advised the court that she represented Kuebler "in an unrelated civil matter." She said that she had disclosed this to defendant, and that defendant "respects the nature of my representation of Detective Kuebler . . . and . . . has agreed to waive any conflict in that regard." The judge asked defendant: "Is that correct, Mr. Solomon?" and defendant replied "Yes, sir." The record reflects no other discussion with defendant about the conflict, and discloses nothing further about the nature of counsel's representation of Kuebler.

Kuebler testified at the *Huntley* hearing and at trial, and was cross-examined by the lawyer who was representing him. According to Kuebler's testimony (which was consistent with Smith's), Smith was the detective in charge of the case and had been the first to interview defendant, while Kuebler sat in a nearby room, listening through an audio system and taking notes. He testified that defendant first denied to Smith that he had sex with his daughter, but that as the interview went on "his denials kind of weakened . . . [a]nd at one point Detective Smith asked him if he did have sex with his daughter and he stated that he did." After Smith finished her interview, Kuebler conducted his own, in which, Kuebler testified, defendant told Kuebler "that he got drunk one time and had sex with his daughter just one time."

Defendant's motion to suppress his statements was denied, and he was convicted by a jury. He appealed on the ground, among others, that his lawyer's conflict denied him the effective assistance of counsel. The Appellate Division agreed with defendant that the trial court's inquiry into the conflict was ***95** sufficient, and that defendant's waiver was therefore invalid. It nevertheless affirmed, holding that defendant "failed to establish that any 'conflict affected the conduct of the defense' " (*People v Solomon*, 73 AD3d 1440, 1441 [4th Dept 2010], quoting *People v Ortiz*, 76 NY2d 652, 657 [1990]). A Judge of this Court granted leave to appeal (17 NY3d 801 [2011]), and we now reverse.

II

(1) We agree with the Appellate Division that defendant did not effectively waive any conflict of interest here—indeed, the People do not strongly argue otherwise. Our cases make clear that a defendant in a criminal case may waive an attorney's conflict, but only after an inquiry has shown that the defendant "has an awareness of the potential risks involved in that course and has knowingly chosen it" (*People v Gomberg*, 38 NY2d 307, 313-314 [1975]; *see also People v Macerola*, 47 NY2d 257, 263 [1979]; *People v Wandell*, 75 NY2d 951, 952-953 [1990]). The inquiry here, in which not even the nature of defense counsel's simultaneous ****3** representation of Kuebler was placed on the record, was simply inadequate.

(2) Thus, the case turns on whether the conflict had such a "substantial relation to the conduct of the defense" as to require reversal (*People v McDonald*, 68 NY2d 1, 9 [1986] [internal quotation marks and citation omitted]). We conclude that it did.

Discussions of the effect of a lawyer's conflict of interest on a defendant's right to the effective assistance of counsel distinguish between a potential conflict and an actual conflict (*e.g. Cuyler v Sullivan*, 446 US 335, 337, 349-350 [1980]; *People v Macerola*, 47 NY2d 257, 264-265 [1979]). The distinction can be illustrated by cases in which, as in *Cuyler* and *Macerola*, the same lawyer represents more than one defendant. Such a multiple representation carries the potential for conflict, but the potential will not always be realized. In some cases, the interests of codefendants will be in harmony, as for example when their defense consists of an attempt to show that prosecution witnesses are lying or mistaken. Thus, in *Macerola*, we rejected a per se rule that simultaneous representation of codefendants automatically requires reversal in the absence of a valid waiver: "There may always exist those cases in which joint representation of multiple defendants is, without doubt, justified, and the court's neglect in admonishing codefendants ***96** of the potential risks entailed in joint representation would not deprive, without more, a defendant of his right to the effective assistance of counsel" (47 NY2d at 264). Similarly, in *Cuyler*, the Supreme Court, though observing that "a possible conflict inheres in almost every instance of multiple representation" (446 US at 348), held that the mere "possibility of conflict is insufficient to impugn a criminal conviction" (*id.* at 350).

On the other hand, where the interests of codefendants actually conflict, multiple representation will taint a conviction unless the conflict is waived. The "constitutional predicate" for an ineffective assistance claim is, as the Supreme Court said in *Cuyler*, a showing that the defendant's counsel "actively represented conflicting interests" (*id.*). In *Macerola*, where such an actual conflict was established, we

held that reversal of the conviction was required. Indeed, we said there that reversal is necessary where even a "significant possibility" of an actual conflict exists (*Macerola*, 47 NY2d at 264; *accord People v Recupero*, 73 NY2d 877, 879 [1988]).

In a case like this one, where a defendant's lawyer simultaneously represents not a codefendant but a prosecution witness, the potential for conflict is more obvious. Even in such cases, however, we have not adopted a per se rule (*see McDonald*, 68 NY2d at 11 n 5). Sometimes there will be no actual conflict between the defendant and a prosecution witness—for example, where the witness testifies only about a trivial or uncontroversial issue, or where the ****4** witness, testifying reluctantly for the People, really wants the defendant to be acquitted. More typically, however, a prosecution witness's interest will actually conflict with the defendant's. In such cases, we have held that the same attorney cannot simultaneously represent both, unless the conflict is validly waived (*McDonald*, 68 NY2d at 7-8; *People v Mattison*, 67 NY2d 462, 465 [1986]; *Wandell*, 75 NY2d at 952-953).

There was an actual conflict of interest between defendant and Kuebler here. Kuebler testified that defendant had confessed to raping his daughter. It was very much in defendant's interest either to discredit that testimony or to show that the confession had been obtained by some unlawful or unfair means; Kuebler's interest was the opposite. Our holdings in *McDonald*, *Mattison* and *Wandell* require reversal.

The People argue, and the Appellate Division held, that reversal is not necessary because defendant has not shown that ***97** the conflict "affected the conduct of the defense" (73 AD3d at 1441, quoting *Ortiz*, 76 NY2d at 657). Nothing in the record, the People say, proves that counsel was less effective in cross-examining Kuebler than she would have been had Kuebler not been her client. We assume that this is correct; it seems from the transcript that the cross-examination was competently performed. Defendant now suggests a number of lines of inquiry that counsel might have pursued, but did not. Such after-the-fact suggestions, however, can probably be made about almost every significant cross-examination in almost every case.

But we have never held, and decline now to hold, that the simultaneous representation of clients whose interests actually conflict can be overlooked so long as it seems that the lawyer did a good job. Our cases, and the United States Supreme Court's, make clear that, where such an actual conflict exists and is not waived, the defendant has been deprived of the effective assistance of counsel.

When we have considered simultaneous representations, whether of codefendants, as in *Macerola* and *Recupero*, or of prosecution witnesses, as in *McDonald* and *Wandell*, or of a codefendant who became a prosecution witness, as in *Mattison*, we have not inquired into the quality of counsel's performance, but have stressed the "very awkward position" of a lawyer subject to conflicting demands (*Mattison*, 67 NY2d at 470), and have protected a defendant's "right to receive advice and assistance from an attorney whose paramount responsibility is to that defendant alone" (*Macerola*, 47 NY2d at 264). We have specifically held, and now reaffirm, that "[a] defendant is denied the right to effective assistance of counsel guaranteed by the Sixth Amendment when, absent inquiry by the court and the informed consent of defendant, defense counsel represents interests which are actually in conflict with those of defendant" (*McDonald*, 68 NY2d at 8). It is true that the Supreme Court in *Cuyler* said that a defendant must "establish that an actual conflict of interest adversely effected his lawyer's performance" (446 US at 350). In context, however, it is clear that, in the view of the *Cuyler* Court, an adverse effect necessarily exists where "an actual conflict of interest" is established (*id.* at 349).

The cases in which a conviction has been upheld because the lawyer's performance was not shown to be deficient were ones in which the lawyer was not subject to an *actual* conflict —the simultaneous representation of clients whose interests were opposed. Thus in *People v Abar* (99 NY2d 406 [2003]), the claimed ***98** conflict arose from defense counsel's *prior* representation of the People. Similarly, in *Mickens v Taylor* (535 US 162 [2002]), the lawyer's representations of the victim and the defendant were successive, not concurrent. In each of these cases, it was recognized that the potential for conflict existed, but the defendants failed to show that the potential was realized—i.e. that the conflict operated on the representation. *People v Smart* (96 NY2d 793 [2001]), *People v Ennis* (11 NY3d 403 [2008]) and *People v Konstantinides* (14 NY3d 1 [2009]) did not involve the representation of multiple clients at all, either simultaneously or in succession. In each of those cases there was a circumstance—a personal acquaintance with the victim in *Smart*, a promise made to cocounsel in *Ennis*, an accusation of wrongdoing against the lawyer in *Konstantinides*—that might have led the lawyer to be less than zealous on the client's behalf, but in each case

the client failed to show that the attorney's performance was impaired.

The problem in this case—a lawyer who simultaneously owed a duty of loyalty both to the defendant on trial and to the police officer she cross-examined—is of a different order. In such a case, as we have repeatedly held, if the clients' interests actually conflict, and if the defendant has not waived the conflict, the defendant is deprived of the effective assistance of counsel.

Accordingly, the order of the Appellate Division should be reversed and a new trial ordered, to be preceded by a new suppression hearing.

Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Pigott and Jones concur.

Order reversed, etc.

New York Official Reports

90 A.D.2d 80, 455 N.Y.S.2d 675

The People of the State of New York, Respondent,
v.
James Suitte, Appellant

Supreme Court, Appellate Division, Second Department, New York
134 SE
November 22, 1982

CITE TITLE AS: People v Suitte

SUMMARY

Appeal from a sentence of the Nassau County Court (Raymond Harrington, J.), imposed June 16, 1981 following defendant's conviction, upon his plea of guilty, of criminal possession of a weapon in the fourth degree.

HEADNOTES

Crimes
Sentence

(1) Defendant, a college-educated 46 year old with two children, who had never before been convicted of a crime and who was aware of New York's gun licensing requirement but claimed that a gun was necessary because the tailor shop he operated was in a high crime area, pleaded guilty to criminal possession of a weapon in the fourth degree, and was sentenced to 30 days of imprisonment and three years of probation when the sentencing Judge found the mandatory one-year jail provision too severe (see Penal Law, § 70.15, subd 1); inasmuch as there has been no abuse of discretion and neither a failure to observe sentencing principles nor a need to impose a different view of discretion than that of the sentencing Judge, the sentence is affirmed; although the defendant does not appear to be a danger to society or in apparent need of rehabilitation, the sentencing court viewed general deterrence as the overriding principle; this emphasis was not erroneous and the interests of justice do not call for a reduction.

APPEARANCES OF COUNSEL

Robert W. Farrell (*Barry C. Weiss* of counsel), for appellant. *Denis Dillon, District Attorney* (*Judith R. Sternberg* of counsel; *Susan J. Manne* on the brief), for respondent.

OPINION OF THE COURT

Lazer, J. P.

The defendant has pleaded guilty to criminal possession of a weapon in the fourth degree, a class A misdemeanor. The sentence we review consists of 30 days of imprisonment and three years of probation, the jail time to be a condition of and to run concurrently with the period of probation. Execution of the sentence has been stayed pending this appeal. In the course of a typically eloquent opinion dissenting from our vote to affirm, Justice O'Connor concludes that the custodial portion of the sentence is an abuse of discretion, castigates as futile the vast national emphasis upon incarceration as a means of punishment, ***81** attacks the resultant pressures that a vengeance-ridden society imposes on the judicial system and condemns the crushing effects of those pressures upon those unduly punished as a consequence. In our colleague's view, the sentence “borders on the obscene”. Although we share Justice O'Connor's concern over the state of the Nation's correctional processes, we still cannot agree that the sentence imposed represents excessive punishment or abuse of sentencing discretion.

When arrested in January, 1981, for unauthorized use of a motor vehicle, based on what seems to have been a misunderstanding, James Suitte was found to possess a loaded Sterling .25 calibre automatic pistol. Although Mr. Suitte had registered the gun in North Carolina when he acquired it there in 1973, he carried it unlicensed in this State for the seven and one-half year period preceding his arrest. College educated for three years, Mr. Suitte is 46 years old, has been married for 25 years, and has two children, aged 14 and 21 years. He has never before been convicted of a crime. Although he admits he was aware of New York's gun licensing requirement, he claims that the gun was necessary for protection because the tailor shop he operates is located in a high crime area of The Bronx.

The plea of guilty was a bargained one. Originally charged with the class D felony of criminal possession of a weapon in the third degree, Mr. Suitte was permitted to plead to the

misdemeanor of possession in the fourth degree. In imposing sentence under the new gun statute and its mandatory one-year imprisonment provision (Penal Law, §§ 70.02, 70.15) -- publicized in the State as the "toughest gun law in the country" (L 1980, ch 233, eff Aug. 12, 1980; Governor's Memorandum, NY Legis Ann, 1980, p 107) -- the sentencing Judge found the mandatory one-year jail provision too severe. He noted, however, "the Legislature, the community and indeed this Court [are] concerned with the proliferation of guns and the possession of guns by individuals in the community, regardless of the reasons, and we have such a possession in this case." He then exercised his discretion under the statute and imposed a jail sentence of 30 days plus three years' probation. The jail portion of the sentence is the focus of the appeal. ***82**

The new gun statute has substantially increased the penal sanctions for possession and sale of illegal weapons. The major change from previous law is the mandatory imposition of a prison sentence of at least one year upon conviction of possession of a loaded weapon outside the home or place of business. The legislation contains additional procedures, however, which, *inter alia*, permit imposition of a lesser sentence upon conviction of possession in the fourth degree if "the court having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that such sentence would be unduly harsh" (Penal Law, § 70.15, subd 1). This mitigation inquiry relative to possession in the fourth degree is limited to individuals who have not been convicted of either a felony or a class A misdemeanor within the preceding five years (Penal Law, § 70.15, subd 1). Other provisions of the new law prohibit preindictment plea bargaining, restrict postindictment plea bargaining (CPL 220.10, subd 5, par [d], cl [iii]), and expedite the processing of licensing requests (Penal Law, § 400.00, subd 4-a).

The statute is an obvious expression of the State's reaction to the current avalanche of gun-related crimes. In approving the law, Governor Carey proclaimed: "We must bring an end to the proliferation of illegal handguns in New York and the intolerable assaults on law enforcement officers and law-abiding citizens. We must let it be known that New York has the toughest gun law in the country and that it will be strictly enforced. We are determined to rid our streets of those who would do violence to its citizens" (Governor's Memorandum, NY Legis Ann, 1980, p 107). The Governor viewed the amended gun law as even more stringent than that of Massachusetts, which had been considered the strictest in the country (see "Carey Signs a Bill Controlling Guns; Calls it 'Toughest'", *New York Times*, June 14, 1980, I, p 1, col 6). Mayor Koch termed the legislation "a significant first step in the fight to remove illegal handguns from the streets of our city" (*id*., p 27, col 4).

Early returns on the law -- later ones are not available -- indicate that applications for gun licenses have increased ***83** (see "Record Number Ask Gun Permits in New York City", *New York Times*, March 16, 1981, I, p 1, col 5), fewer gun possession cases have been reduced to misdemeanors, and sentences of incarceration have been imposed in more instances than before the law (see Report of New York State Division of Criminal Justice Services, Feb., 1982, pp 122-123). Slightly more than half of the adults convicted of gun possession received at least the mandatory one-year minimum (*id*., p 111).

Whatever its ultimate success in a Nation bedeviled by handguns, there can be no doubt that the State's 1980 legislation represents a vivid manifestation of public policy intended to make illegal possession of guns a serious criminal offense accompanied by the strong prospect of punishment by penal servitude. While we note our colleague's negative view of the wisdom of the statute, it is not for the court to pass on the wisdom of the Legislature, for that body "has latitude in determining which ills of society require criminal sanctions, and in imposing, as it reasonably views them, punishments, even mandatory ones, appropriate to each" (*People v Broadie*, 37 NY2d 100, 117, cert den 423 U.S. 950). We turn, then, to the role of the judiciary in enforcing this public mandate that the crime of illegal possession of a gun be impressed upon all as a serious offense against society.

It is scarcely worth repetition to observe that a sentencing determination is a matter committed to the exercise of the sentencing court's discretion, for it is that court's primary responsibility (*People v Farrar*, 52 NY2d 302, 305; *People v Notey*, 72 AD2d 279, 282). Sentencing involves consideration of the crimes charged, the particular circumstances of the offender, and the purposes of a penal sanction (*People v Farrar, supra; People v McConnell*, 49 NY2d 340, 346). "It is the sensitive balancing of these ... criteria in the individual case that makes the process of sentencing the most difficult and delicate decision that a Judge is called upon to perform" (*People v Notey, supra*, p 283).

As has been oft-stated, the four principal objectives of punishment are deterrence, rehabilitation, retribution and

isolation (*People v Notey, supra*, p 282; ***84** Perlman & Stebbins, Implementing an Equitable Sentencing System: The Uniform Law Commissioners' Model Sentencing and Corrections Act, 65 Va L Rev 1175, 1176; Pugsley, Retributivism: A Just Basis for Criminal Sentences, 7 Hofstra L Rev 379, 381; Crump, Determinate Sentencing: The Promises and Perils of Sentence Guidelines, 68 Ky L J 1, 28). While deterrence includes individual deterrence directed at preventing the specific offender from repeating the same or other criminal acts, it also includes general deterrence which aims to discourage the general public from recourse to crime (Campbell, Law of Sentencing, § 5; Mueller, Sentencing, Process & Purposes, p 48; Carlson, The Dilemmas of Correction, p 29). Rehabilitation is directed, of course, at reform of the individual, while retribution includes "the reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves", community condemnation, and the community's emotional desire to punish the offender (see Note, Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study, 69 Yale LJ 1453, 1455). Isolation serves simply to segregate the offender from society so as to prevent criminal conduct during the period of incarceration (see Pugsley, Retributivism: A Just Basis for Criminal Sentences, 7 Hofstra L Rev 379, 387). It is clear that the principal aim of the 1980 gun legislation is general deterrence.

The most difficult problem confronting the sentencing Judge is determination of the priority and relationship between the objectives of punishment (see *People v Notey*, 72 AD2d 279, 283, *supra*), a matter of considerable and continuing debate (see, e.g., Crump, Determinate Sentencing: The Promises and Perils of Sentence Guidelines, 68 Ky LJ 1, 27). Inevitably, there are bound to be differences of opinion in the relative values assigned these factors in particular cases (Hopkins, Reviewing Sentencing Discretion: A Method of Swift Appellate Action, 23 UCLA L Rev 491). The theories frequently are in unavoidable and constant conflict (*ibid*.; Reduction of Criminal Sentences on Appeal, 37 Col L Rev 521) and those that prevail in the sentencer's mind obviously decide the degree of punishment. Much of the controversy and criticism swirling about the contemporary sentencing scene relates to inequitable ***85** disparities between sentences for the same or similar crimes (Dawson, Sentencing, The Decision as to Type, Length, and Conditions of Sentence, pp 216-217; Rubin, Criminal Correction [2d ed], ch 4, § 6; Williams, Law of Sentencing and Corrections, p 27; Frankel, Criminal Sentences, p 5; Levin, Toward a More Enlightened Sentencing Procedure [Symposium: The Tasks of Penology], 1976, p 137). The disparities derive primarily from differing philosophies and attitudes of Judges and a lack of consensus concerning the goals of criminal justice (Dawson, *op. cit*.; Rubin, *op cit*.; Frankel, *op. cit*., p 23; Levin, *op. cit*., p 139).

Appellate review of sentences obviously is a useful means of diminishing sentencing disparity (Williams, *op. cit*.; ABA Standards Relating to Appellate Review of Sentences, Approved Draft [1968], § 1.2) and ensuring the imposition of fair sentences. Nevertheless, the limited nature of appellate review of sentences is a recognition that "the sentencing decision is a matter committed to the exercise of the [sentencing] *court's* discretion" (*People v Farrar*, 52 NY2d 302, 305, *supra*). A reviewing court lacks some of the first-hand knowledge of the case that the sentencing Judge is in a position to obtain, and therefore the sentencer's decision should be afforded high respect (*People v Notey*, 72 AD2d 279, 282, *supra*; Labbe, Appellate Review of Sentences: Penology on the Judicial Doorstep, 68 J Crim L & Criminology 122). As a consequence, abuse of discretion is the test most frequently cited as the one to be applied (see, e.g., *People v Frazier*, 86 AD2d 557; *People v Mendez*, 75 AD2d 400, 405; *People v Junco*, 43 AD2d 266, affd 35 NY2d 419, cert den 421 U.S. 951). The abuse of discretion standard is especially befitted to an era in which most convictions derive from plea bargains where the bargaining leverages of the respective parties to the agreement are ofttimes more important in fixing the degree of the crime pleaded to and the other limits of the sentence to be imposed than matters of guilt, fault, character, mitigative circumstances or other factors which might seem more relevant. Nevertheless, since the Legislature has empowered us to modify sentences "as a matter of discretion in the interest of justice" (CPL 470.15, subd 3) and our general review powers include the right to do whatever the trial ***86** court could have done (*Jacques v Sears, Roebuck & Co*., 30 NY2d 466; *Phoenix Mut. Life Ins. Co. v Conway*, 11 NY2d 367; *O'Connor v Papertsian*, 309 NY 465) even in matters entrusted to the discretion of that court (see *Robinson v Interurban St. Ry. Co*., 113 App Div 46; *Serwer v Serwer*, 71 App Div 415), we can substitute our own discretion for that of a trial court which has not abused its discretion in the imposition of a sentence. The power to substitute discretion helps us to meet recommended sentence review standards by making any disposition the sentencing court could have made, except an increased sentence (see ABA Standards Relating to Appellate Review of Sentences, Approved Draft [1968]). Without the substitution power, our ability to rectify sentencing disparities, reach extraordinary situations, and

effectively set sentencing policy through the development of sentencing criteria, would be sorely handicapped (see Note, Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study, 69 Yale LJ 1453, 1477; Labbe, Appellate Review of Sentences: Penology on the Judicial Doorstep, 68 J Crim L & Criminology 122, 128).

Appellate review determines whether the sentence is excessive to the extent that there was a failure to observe the principles of sentencing (ABA Standards Relating to Appellate Review of Sentences, Approved Draft [1968]; Mueller, Penology on Appeal: Appellate Review of Legal but Excessive Sentences, 15 Vand L Rev 671). In such review, the court takes a "second look" at the sentences in light of the societal aims which such sanctions should achieve (*People v Notey, supra*, p 284; Note, Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study, 69 Yale LJ 1453). But in reducing any sentence, the appellate body must be sensitive to the fact that its actions become guidelines for the trial court to follow in the imposition of future sentences under circumstances similar to the case reviewed.

In the current case, there has been no abuse of discretion and we perceive neither a failure to observe sentencing principles nor a need to impose a different view of discretion than that of the sentencing Judge. True, the defendant does not appear to be a danger to society or in apparent ***87** need of rehabilitation. It is plain, however, that the sentencing court viewed general deterrence as the overriding principle, and we cannot say that the emphasis was erroneous or that the interests of justice call for a reduction (see *People v Gittelson*, 25 AD2d 265, affd 18 NY2d 427). Deterrence is the primary and essential postulate of almost all criminal law systems (Zimring and Hawkins: Deterrence, The Legal Threat in Crime Control, p 1). In this era of conflict between the adherents of the rehabilitation model (Orland, Is Determinate Sentencing an Illusory Reform? 62 Judicature 381) and those who advocate determinative sentencing (Fogel, Justice, Not Therapy: A New Mission for Corrections, 62 Judicature 372; van den Haag, Punitive Sentences, 7 Hofstra L Rev 123), it is hardly debatable that prisons do deter even if the degree of deterrence and the types of persons deterred remain in dispute (Carlson, The Dilemmas of Corrections, p 28). Even when imposing an "individualized" sentence, the Judge may look beyond the offender to the presumed effect of the sentence on others (*United States v Foss*, 501 F2d 522, 528). Indeed, the primary purpose behind mandatory sentence laws is to impose swift and certain punishment on the offender (see Senna & Siegel, Introduction to Criminal Justice [2d ed], p 428). A short definite period of confinement under the circumstances has been seen as the most effective method of deterrence (see Newman, Introduction to Criminal Justice, p 245; Hoffman, Purposes and Philosophy of Sentencing, 75 FRD 287, 317; Tao, Crime, Punishment & Law Enforcement, 23 Wayne L Rev 1395). As Marvin Frankel has written, general deterrence may be satisfied through "relatively short but substantially inexorable sentences to prison" (Frankel, Criminal Sentences, p 110). Some commentators have concluded that lesser punishment for firearm crimes, e.g., fines, probation or suspended sentences, is not significant enough to have any real deterrent effect (see Beha, "And *Nobody* Can Get You Out," The Impact of a Mandatory Prison Sentence for the Illegal Carrying of a Firearm on the Use of Firearms and on the Administration of Criminal Justice in Boston, 57 Boston U L Rev 96, 322; Chambliss, The Deterrent Influence of Punishment, 12 Crime & Delinquency 70). ***88**

In emphasizing the mandatory minimum sentence and the purpose of deterrence, the new gun legislation intended to convey to the public a "get tough" message on crime (see Governor's Memorandum, NY Legis Ann, 1980, p 107; see also, 16 Crim L Bull 150, commenting on Massachusetts' mandatory minimum sentence gun law -- Mass Gen Laws Ann, ch 269, § 10, subd [a]). In this regard, the advertisements heralding the new law are significant; thus: "If you get caught carrying an illegal handgun, you'll go to jail for one year. No plea bargaining. No judges feeling sorry for you. Just one year in jail" (see "State's Gun Law: Impact & Intent Uncertain", *New York Times*, April 11, 1982, I, p 1, col 2).

With such a background, we cannot view the new gun law as containing a blanket exception of first offenders from the scope of its penal provisions. The statute's provisions for mitigation are not *carte blanche* for the commission of one offense free of the threat of a sentence of custodial detention. The sense of the new law is to deter all unlicensed handgun possessions, whether the offense is the first or a repeat. The special mitigation inquiry is not intended to provide automatic probation for those without prior criminal records. The penalty to be imposed is a matter for the trial court's broad discretion within the limits imposed by the Legislature. In balancing the public and private interests represented in the criminal justice process (see *People v Farrar*, 52 NY2d 302, 306, *supra*), the sentencing court's decision in this case was neither inconsistent with sound sentencing principles (see Perlman & Stebbins, Implementing an Equitable Sentencing System: The Uniform Law Commissioners' Model Sentencing and Corrections Act,

65 Va L Rev 1175), nor inappropriate. We see nothing obscene about a 30-day jail sentence (which is subject to a 10-day reduction for good behavior) for possession of a gun, particularly when the defendant has a history of carrying the weapon for over seven years with knowledge of the law's requirements.

Reduction of the current sentence by this court would proclaim to those listening that the new gun law presents no threat of jail to first criminal offenders. Such a reduction would also declare to the trial Bench that a Judge who ***89** imposes a 30-day jail sentence on such a first offender has either abused his discretion or that this court disagrees with the sentencer's evaluation of the relevant sentencing factors. Finally, reduction would be this court's expression that violation of the gun law is nothing serious.

Accordingly, the sentence is affirmed.

O'Connor, J.

(Dissenting).

In his usual scholarly and impelling style, my esteemed confrere of the majority, Justice Lazer, reviews the principles and discusses the rationale attendant upon sentencing and its appellate review. And so we go pell mell on our merry, merry way! More crimes are committed, more police make more arrests, more District Attorneys process more cases, more Judges commit more people to jail, and here, the majority would affirm a jail sentence despite the presence of what, by any standard, was an abuse of sentencing discretion that warrants, nay demands, a reduction to probation. I cannot agree.

Recently released Justice Department figures for 1981 indicate that there were 369,000 adults in Federal and State prisons at the end of that year, plus nearly 157,000 in local jails.[1] The National Council on Crime and Delinquency reports that the United States trails only the Soviet Union and South Africa (what a combination!) in its per capita rate of incarceration and, contrary to popular belief, in the severity of the punishments it inflicts![2] And in spite of it all, the crime rate continues to soar.[3]

It must be further noted that recent responsible studies on national and State levels have long since sounded the tocsin. Our badly overcrowded prisons are but a smoldering time bomb awaiting the explosion!

It seems to me that it's about time we begin to find, in matters such as this where no violence or even threat of violence is present, alternatives to jail. I further believe that rather than joining those who bend before the incessant cry of a rightly outraged public for vengeance we, as ***90** appellate Judges, should seek to put some sanity into the sentences we approve under these circumstances.

I agree with the principle, articulated in the majority opinion, that an appellate court ought not disturb a sentence in the absence of an abuse of discretion by the sentencing court or unless the interest of justice so requires. I further agree that a workable test for applying this principle is whether the alleged excessiveness of the challenged sentence in fact demonstrates a failure by the sentencing court to observe the purposes of sentencing: individual and general deterrence, rehabilitation, retribution and isolation. I can even agree to the soundness of visiting upon one individual a punishment greater than would have been his had the sentencing court not decided to make an example of him in order to curb sharply a sudden manifestation in the general public of pernicious conduct previously endemic to certain subclasses, e.g., drug abuse, or to overcome widespread public intransigence to legislated curbs on historically unregulated conduct such as gun possession. But I disagree with the majority's statement that the sentencing Judge, rather than this court, may on an *ad hoc* basis, subject only to personal predilections, establish the coefficients to the four variables of deterrence, rehabilitation, retribution and isolation in this sentencing formula. This court should not abdicate its responsibility for the assignment of appropriate, if somewhat inexact, weights to these factors in the discharge of its obligation to control sentencing discretion within the overarching limits fixed by the Penal Law.

Is it just or proper that we permit one sentencing Judge to count general deterrence as the overriding factor in this gun possession case under the new antigun law, with the implication that another sentencing Judge in a *factually* identical case may switch the emphasis in the formula to another factor, e.g., rehabilitation? Bear in mind that the difference resulting from our toleration of such *ad hoc* legislating by sentencing Judges is *incarceration*, and I most vehemently reject any argument that incarceration is but a gentle escalation of sanctions to the point at which a real deterrent effect can finally be ascertained operating on the populace. After all, 30 days in the county jail will ***91** surely

cripple the spirit of any otherwise law-abiding citizen who honestly believed that the cost of unlawfully possessing a gun (discounted tremendously by the infinitesimally small probability of being caught) outweighed the benefit of protecting his life while conducting his livelihood in an urban war zone. I submit that it is we, as the Appellate Division, that should assign the approximate values to the parameters of the sentencing formula (to the extent possible), and that we should restrict sentencing Judges to their proper role in applying this legal formula, as so weighted, to the facts as they find them in individual cases.

I pose the questions:

(1) Is it a proper exercise of discretion to sentence to jail a first offender who poses no serious threat to the community?

(2) Does the nature of the crime here committed make it a serious threat to the community?

With these thoughts in mind, let us look at the case at bar.

On the morning of January 20, 1981, while driving through Nassau County on his way to his place of business in New York City, the defendant was stopped and arrested on a bench warrant charging him with the unauthorized use of a motor vehicle.

The validity of that warrant, or the merits of the complaint upon which it was issued, are not before the court at this time, but it should be noted that it is defendant's contention that the charge is totally without substance, arising, he alleges, out of a misunderstanding involving the return by him of a rented automobile.

Be that as it may, upon his arrest he was found in possession of a loaded Sterling .25 caliber automatic pistol. He was promptly charged with the crime of criminal possession of a weapon in the third degree, a class D felony, was convicted on his plea of guilty to possession in the fourth degree, a class A misdemeanor, and was sentenced to three years' probation with the special condition that he serve a determinate sentence of 30 days in the Nassau ***92** County Correctional Center. Execution of that sentence has been stayed pending appeal.

Upon appeal to this court as excessive, that sentence has been affirmed by my confreres of the majority. I respectfully disagree and strongly suggest that under the facts and circumstances here extant, it is totally inappropriate and completely counterproductive to impose a jail sentence for however short a period of time.

An objective review of the record establishes that this defendant, a successful businessman, with three years of college education, is married and the father of two children, a daughter, aged 21, and a son, 14 years of age.

Since 1973 the defendant has owned and operated a custom tailor shop which is located in a high crime area of The Bronx. A prior owner of the shop had been stabbed during one of several robberies that took place before defendant became the proprietor. The defendant lawfully purchased the gun in question in North Carolina and properly registered it in that State.

According to the arresting officers, the defendant was “very cooperative” when arrested, and readily admitted that he knew that it was illegal to carry an unregistered pistol in New York City and stated that although he had inquired about obtaining a gun permit, he had never completed the process. The defendant told the police that he thought he needed the gun for self- protection.

The probation report contains this significant appraisal: “The present offense is the defendant's only criminal conviction and his first criminal charge in 21 years. He appears to be a devoted father and husband, as well as a productive member of society. There is no evidence of criminal intent in his possession of this weapon and his desire for protection in his business neighborhood is justified.”

No one can sustain this defendant, or any person, in the illegal possession of a loaded firearm. It is a clear violation of law and calls for an appropriate sanction and penalty. But under the clear and compelling circumstances here present, is it appropriate or fair or just to send this first offender off to jail for 30 days, 10 days or even one day? To ***93** me, such a sentence based upon these facts is cruel and harsh and borders on the obscene.

It is beyond cavil that violent crime is ever on the increase and that it is, in all its terrifying aspects, continuously creating conditions of unspeakable horror on the streets of our cities. Out of these jungle conditions in crescendo fashion, the cry of an aroused and frightened public is heard demanding, with good reason, swift and effective measures to contain and to curtail the monstrous abominations which are daily visited upon them. The fire is fueled by those who should and do

know better but who, seizing upon a popular theme, pick up the cry and, by some total distortion of reason, imply that the fault lies with the judiciary and suggest that tougher and longer prison sentences are the solution. The Legislature responds by passing more and more mandatory sentencing laws and the press and other news media not infrequently give at least tacit approval to such measures. And all the time, Judges sitting in the eye of the storm, know that the catastrophic rise in crime bespeaks a failure not alone of society, but of the family, the church, the schools, the home and of the economic and political structure of the State itself. We know, too, that there are as many reasons for crime as there are people who commit it and we have long since learned that there is no simple solution or ready answer to the problem. I have previously expressed my disapproval of mandatory sentences[4] because of a firmly held opinion that mandatory sentences give to a worried and frightened public the illusion of protection, that they do not deter the criminal and, worst of all, that they incapacitate a major section of the system of criminal justice in denying discretion to the courts. Are we really ready to give up on the theory that the punishment fit the crime?

To the issue before us -- to tack on an additional jail sentence for the possession and/or use of the gun, loaded or unloaded, in or about the commission of a crime, makes much sense and may even be effective. However, to send an otherwise law-abiding citizen to jail on his first offense under the facts of this case makes no sense, accomplishes no good and creates nothing but untoward hardship and ***94** bitterness. I respectfully dissent and would modify the sentence by striking the 30-day period of incarceration.

Thompson and Niehoff, JJ., concur with Lazer, J. P.; O'Connor, J., dissents and votes to modify the sentence by deleting the period of incarceration, with an opinion.

Appeal by defendant, as limited by his motion, from a sentence of the County Court, Nassau County, imposed June 16, 1981.

Sentence affirmed.

This case is remitted to the County Court, Nassau County, for further proceedings pursuant to CPL 460.50 (subd 5). ***95**

Footnotes

1 *New York Times*, Aug. 16, 1982, IV, p 11, col 4.

2 See *People v Yocus*, 79 AD2d 1037, 1038 (O'Connor, J., dissenting).

3 A clear indication of the utter futility of it all! Is it not by now abundantly clear that the answer to crime lies not in sterner and tougher sentences?

4 *People v Yocus*, 79 AD2d 1037, 1038-1040.

New York Official Reports

22 N.Y.3d 687, 8 N.E.3d 803, 985 N.Y.S.2d 428, 2014 N.Y. Slip Op. 01205

**1 The People of the State of New York, Respondent

v

Paul Thompson, Appellant.

Court of Appeals of New York
10
Argued January 7, 2014

Decided February 20, 2014

CITE TITLE AS: People v Thompson

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered February 1, 2011. The Appellate Division affirmed a judgment of the Supreme Court, Richmond County (Stephen J. Rooney, J.), which had convicted defendant, upon a jury verdict, of murder in the second degree, criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

People v Thompson, 81 AD3d 670, affirmed.

HEADNOTES

Grand Jury
Defective Proceeding
Integrity of Grand Jury Impaired by Actions of District Attorney

(1) In a second grand jury proceeding on charges against defendant arising out of a fatal shooting, the prosecutors' conduct in initially suggesting that they did not know the identity of a witness from the first grand jury proceeding that defendant requested them to call and later contending that her testimony would be irrelevant did not impair the integrity of the proceeding under the totality of the circumstances, including defendant's opportunity to submit his request directly to the grand jurors followed by their independent vote to refuse to grant defendant's request. CPL 190.50 grants the grand jury the power to subpoena witnesses and the prosecutor must comply with the grand jury's order. In addition, a prosecutor cannot provide an inaccurate and misleading answer to the grand jury's legitimate inquiry. However, dismissal of an indictment for prosecutorial misconduct is warranted only where the prosecutor engages in an overall pattern of bias and misconduct that is pervasive and typically willful. Here, the prosecutors' comments relating to defendant's witness request neither suppressed his request to call the witness nor stripped the grand jury of its discretion to grant or deny that request. The prosecutor could not be blamed for initially withholding information regarding the witness's identity as there were concerns regarding witness safety and possible breach of the secrecy of the first grand jury. And while the prosecutor contended that the witness's testimony would be irrelevant, she also repeatedly acknowledged that the grand jurors could vote to call the witness based on their own belief regarding the relevance of the testimony. In light of the prosecutor's advisory role she had some leeway to argue her views on the testimony's admissibility. Also, defendant's description of the witness and her potential testimony did not provide an exact identification or clearly convey what she might say. That the grand jurors actively questioned the defense witnesses and the prosecutor regarding the evidence and investigation showed that they fully exercised their independent decision-making authority over the course of the entire proceeding.

*688 Crimes
Indictment
Sufficiency of Evidence before Grand Jury—Failure to Call Witness

(2) The evidence presented by the People to a grand jury in defendant's prosecution arising out of a fatal shooting was legally sufficient to support the indictment and the prosecution of defendant was not completely unfounded so as to warrant dismissal of the indictment notwithstanding defendant's allegations of the prosecution's misconduct during its commentary on a witness requested by defendant. A grand jury has properly carried out its function when it has issued an indictment upon evidence that is legally sufficient to establish that the accused committed a crime. Dismissal is meant to eliminate only prosecutions that are truly unfounded as opposed to those that merely rest on a view of the evidence

that is not comprehensive. Here, the evidence, which included testimony from a prosecution eyewitness who identified defendant as the shooter, was legally sufficient to support the indictment. Given that the petit jury had heard defendant's witness's testimony and concluded that it did not create a reasonable doubt as to defendant's guilt, it was not likely that that witness's testimony would have altered the grand jury's determination, particularly in light of the prosecution eyewitness's unequivocal testimony that defendant shot the victim in broad daylight and another witness's description of the shooter which, while inconsistent with defendant's appearance in some respects, still suggested that defendant was the shooter.

RESEARCH REFERENCES

Am Jur 2d, Indictments and Informations §§ 224, 237, 238.

Carmody-Wait 2d, Pretrial Motions §§ 189:145, 189:160, 189:161.

LaFave, et al., Criminal Procedure (3d ed) §§ 15.6 (a); 15.7 (b).

McKinney's, CPL 190.50.

NY Jur 2d, Criminal Law: Procedure §§ 1112, 1118, 1558, 1561.

ANNOTATION REFERENCE

See ALR Index under Grand Jury; Indictments and Informations; Prosecuting Attorneys.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: conduct /p distr! /2 att! & impair! /s (grand /2 jury) /3 proceed! & witness! /2 test!

POINTS OF COUNSEL

Lynn W.L. Fahey, Appellate Advocates, New York City (*Warren S. Landau* of counsel), for appellant.

I. The prosecutor impaired the grand jury's integrity and denied appellant due process ***689** when she (a) dissuaded the grand jurors from honoring appellant's request that they call an eyewitness who had exculpatory information by, inter alia, repeatedly telling them that they "ha[d] to take [her] advice" that the witness was irrelevant; and (b) accused appellant of orchestrating a stabbing from his hospital bed and persistently conveyed her disbelief of his testimony. (*People v Huston*, 88 NY2d 400; *People v Lancaster*, 69 NY2d 20; *People v Bailey*, 58 NY2d 272; *People v Pelchat*, 62 NY2d 97; *People v Hill*, 5 NY3d 772; *People v Paperno*, 54 NY2d 294; *People v Di Falco*, 44 NY2d 482; *People v Adessa*, 89 NY2d 677; *People v Sandoval*, 34 NY2d 371; *People v Molineux*, 168 NY 264.) II. The court denied appellant his right to a public trial when it excluded his friend and business partner, Shawn Berry, from the courtroom during much of the defense case solely because the People asserted that they might call him as a rebuttal witness, when the court had ruled that their plea agreement with Berry precluded them from doing so. (*Waller v Georgia*, 467 US 39; *People v Tolentino*, 90 NY2d 867; *People v Jones*, 47 NY2d 409; *People v Alvarez*, 20 NY3d 75; *People v Martin*, 16 NY3d 607; *People v Jelke*, 308 NY 56; *People v Hinton*, 31 NY2d 71; *In re Oliver*, 333 US 257; *Matter of Gannett Co. v De Pasquale*, 43 NY2d 370, 443 US 368; *Presley v Georgia*, 558 US 209.) III. The court improperly altered the prescribed order of trial and denied appellant due process and an effective suppression remedy, when, in response to an appropriate defense summation argument, it allowed the People to reopen their case to introduce suppressed evidence. (*Mapp v Ohio*, 367 US 643; *People v Olsen*, 34 NY2d 349; *People v Fardan*, 82 NY2d 638; *People v Melendez*, 55 NY2d 445; *People v Massie*, 2 NY3d 179; *People v Reid*, 19 NY3d 382; *People v Whipple*, 97 NY2d 1; *People v Ventura*, 35 NY2d 654; *People v Fama*, 212 AD2d 542; *People v Carrion*, 54 AD3d 640.) IV. Appellant was denied his due process rights to present a defense and a fair trial by the court's (a) refusal to admit a police surveillance video of the shooting scene, which the People had stipulated into evidence at the first trial, and preclusion of defense argument that an adverse inference should be drawn from the People's failure to offer it; (b) preclusion of evidence and argument as to a key defense witness's credibility; and (c) exclusion of appellant's hospital record, which would have supported his testimony that he could not have done what the People claimed the shooter did. (*People v McGee*, 49 NY2d 48; *People v Hawkins*, 11 NY3d 484; *People v Ely*, 68 NY2d 520; *People v Patterson*, 93 NY2d 80; *Zegarelli v Hughes*, 3 NY3d 64; *People v Williams*, 55 AD3d 1398; ***690** *People v Byrnes*, 33 NY2d 343; *People v Lee*, 80 AD3d 1072; *People v White*, 73 NY2d 468; *People v Walker*, 198 NY 329; *Clason v Baldwin*, 152 NY 204.) V. Appellant was denied the effective assistance of counsel when his attorney failed to (a) request meaningful relief for the People's refusal to disclose contact information

for an exculpatory witness; (b) protect appellant from the People's efforts to portray him as a violent menace and witness intimidator; and (c) otherwise avoid prejudicing the defense. (*Strickland v Washington*, 466 US 668; *People v Baldi*, 54 NY2d 137; *People v Zaborski*, 59 NY2d 863; *People v Droz*, 39 NY2d 457; *Kimmelman v Morrison*, 477 US 365; *People v LaBree*, 34 NY2d 257; *People v Bennett*, 29 NY2d 462; *People v Dean*, 50 AD3d 1052; *Quartararo v Fogg*, 679 F Supp 212, 849 F2d 1467; *Brady v Maryland*, 373 US 83.)

Daniel M. Donovan, Jr., District Attorney, Staten Island (*Anne Grady* and *Morrie I. Kleinbart* of counsel), for respondent.

I. The evidence of defendant's guilt was overwhelming. (*People v Calabria*, 3 NY3d 80; *People v Arroyo*, 54 NY2d 567.) II. The prosecutor's conduct in the grand jury served to protect the integrity of that body's function. (*People v Brewster*, 63 NY2d 419; *People v Lancaster*, 69 NY2d 20; *People v Mitchell*, 82 NY2d 509; *People v Adessa*, 89 NY2d 677; *People v Smith*, 84 NY2d 998; *People v Karp*, 76 NY2d 1006; *People v Di Falco*, 44 NY2d 482; *People v Huston*, 88 NY2d 400; *People v Darby*, 75 NY2d 449; *People v Germosen*, 86 NY2d 822.) III. The exclusion of Shawn Berry from defendant's trial comported with the relevant constitutional standards. (*Waller v Georgia*, 467 US 39; *Perry v Leeke*, 488 US 272; *People v Cooke*, 292 NY 185; *Geders v United States*, 425 US 80; *People v Sayavong*, 83 NY2d 702; *People v Santana*, 80 NY2d 92; *People v Hinton*, 31 NY2d 71; *People v Baker*, 14 NY3d 266; *People v Porter*, 9 NY3d 966; *People v Garcia*, 20 NY3d 317.) IV. The court acted within its discretion by permitting the People to reopen their case to introduce a suppressed glove following defense counsel's misleading summation comments. (*United States v Verdugo-Urquidez*, 494 US 259; *Kansas v Ventris*, 556 US 586; *Withrow v Williams*, 507 US 680; *Stone v Powell*, 428 US 465; *In re Gault*, 387 US 1; *Walder v United States*, 347 US 62; *Harris v New York*, 401 US 222; *Oregon v Hass*, 420 US 714; *James v Illinois*, 493 US 307; *People v Brown*, 98 NY2d 226.) V. Defendant's due process rights to present a defense and to a fair trial were fully vindicated. (*People v Alvarez*, 20 NY3d 75; *People v Angelo*, 88 NY2d 217; *People v Umali*, 10 NY3d 417; *People v Aska*, 91 NY2d 979; *People v Jackson*, 8 NY3d 869; *People v Davidson*, 98 NY2d 738; ***691** *People v Hines*, 97 NY2d 56; *Holmes v South Carolina*, 547 US 319; *Crane v Kentucky*, 476 US 683; *Chambers v Mississippi*, 410 US 284.) VI. Defendant received meaningful representation from trial counsel. (*People v Benevento*, 91 NY2d 708; *People v Flores*, 84 NY2d 184; *People v Baldi*, 54 NY2d 137; *People v Reyes*, 287 AD2d 660; *People v Nowicki*, 49 AD3d 666; *People v Dolan*, 2 AD3d 745; *People v Groonell*, 256 AD2d 356; *People v Turner*, 5 NY3d 476; *Strickland v Washington*, 466 US 668; *People v Hobot*, 84 NY2d 1021.)

OPINION OF THE COURT

Abdus-Salaam, J.

Defendant vigorously urged the second grand jury in this case to have the People call a particular witness to testify. After the two prosecutors presenting the case noted the vagaries of defendant's request and asserted that the witness's testimony would be irrelevant, the ****2** grand jurors voted on defendant's request in accordance with CPL 190.50 (6) and declined to hear from the witness. Subsequently, the grand jury voted for an indictment supported by legally sufficient evidence establishing reasonable cause to believe that defendant had publicly executed a rival drug dealer on a street corner in Staten Island. Defendant was then tried and convicted of second-degree murder by a jury of his peers.

Defendant now seeks reversal of his conviction and dismissal of the indictment on grounds of prosecutorial misconduct, insisting that the prosecutors' commentary on his proffer to the second grand jury effectively compelled the grand jury to surrender all independent discretion in the matter and thus impaired the integrity of the proceedings. Of course, we are highly concerned about prosecutorial overreach in the grand jury context, and the prosecutors here should have shown greater sensitivity to defendant's request and the grand jurors' concerns. However, in light of the totality of the circumstances that arose in the second grand jury proceeding, we conclude that the prosecutors' actions did not impair the integrity of that proceeding or otherwise warrant dismissal of the indictment.

I

After defendant's arrest on suspicion of murdering Rasheem Williams in the Stapleton neighborhood of Staten Island, the People presented weapon possession charges against him to a grand jury. The People planned to call a witness (hereinafter ***692** Jane Doe) to testify in the grand jury proceeding that she had seen defendant shoot Williams. However, prior to the grand jury presentation, Jane Doe received anonymous threats. When she subsequently testified, Jane Doe gave a description of the shooter somewhat consistent with defendant, but she told the grand jurors that she had not seen the shooter's face. As Jane Doe would later inform the People, she was too scared to identify the shooter to the

first grand jury. The People also presented the testimony of an eyewitness (hereinafter John Doe) who knew Williams. Defendant testified on his own behalf. The grand jury declined to indict defendant on the weapon possession charges.

Subsequent to the first grand jury proceeding, another Stapleton resident (hereinafter James Doe) was detained by the police in an unrelated case. James Doe informed the police that he had seen defendant, who was accompanied by someone resembling defendant's friend Shawn Berry, shoot Williams to death. Upon learning this information, the People filed weapon possession and murder charges against defendant and Berry, and with the court's permission, they submitted the new charges to a second grand jury, proceeding on the theory that defendant had killed Williams in retaliation for Williams's alleged prior shooting of defendant.

At the second grand jury presentation, the People, represented by two assistant district attorneys, called James Doe to the stand. James Doe testified that he had seen defendant, as well as a man whose appearance was consistent with Berry's and a third man with light skin, lying in wait for Williams in a car. Defendant and the light-skinned man got out of the car, and ****3** defendant shot Williams in the head and then fled with the light-skinned man.

Williams's friend, John Doe, testified that, on the morning of the murder, he was near the corner where Williams was gunned down, and he heard a scream. John Doe saw a light-skinned black or Hispanic man running in his direction but on the opposite side of the street. The man wore a black hoodie, black "cotton fall gloves," dark pants and dark blue or black short-cut Timberland boots. The man was holding a white shirt with a three-inch gun barrel sticking out of it. John Doe saw part of the man's face, which had "blotchy" light and dark skin indicative of vitiligo. The man ran toward the location where defendant was later arrested. Returning his attention to the corner, John Doe noticed that his friend, who had the same first name as Jane Doe, was there.

***693** Berry testified that he had been moving out of his old residence at the time of the crime, and he requested that the grand jurors call two witnesses to corroborate his alibi. The grand jurors did not immediately respond to his request, and they asked him some follow-up questions.

Defendant testified and maintained his innocence. According to defendant, he had been merely running an errand near the scene of Williams's murder when the police arrested him. The grand jury actively questioned defendant about his relationship with Berry, the details of his errand, his interactions with the police and the description of the shooter that the police had provided to him. The grand jurors also inquired as to whether defendant had blotchy skin at the time of the murder.

After the grand jurors' questioning, defendant was excused, but he soon returned to the grand jury room to make an additional statement. Defendant told the grand jury that there was a missing female eyewitness to the shooting. The lead prosecutor asked defendant how he knew of the witness in light of his denial that he had been at the scene of the crime when it occurred. Defendant started to answer, but the prosecutor cut off his explanation on a hearsay objection. Defendant complained:

> "The District Attorney will not let me talk about a witness. I have her name and, you, the Grand Jury, have the permission to call this girl. They have her name and address. She was brought here to the last Grand Jury. She did not testify—or I don't know if she didn't testify, but this person is a witness to this crime."

The prosecutor asked defendant how he knew that, and defendant said, "She was brought—they told me there was a witness to the crime." When the prosecutor inquired as to the relevance of the witness's testimony, defendant answered, "Because if you, the District Attorney know there's a witness that witnessed this crime and the witness is not—is saying it's not me—." The following discussion ensued:

> "[Prosecutor]: Do you know that she testified to that Mr. Thompson, because I have to instruct ****4** this Grand Jury if you are speculating as to whether or not she testified that somebody else did the crime, that is not relevant for their consideration.
>
> "[Defendant]: She was brought here to testify. Like ***694** I said before, the only charge I was charged with was the guns. She was brought here to testify.
>
> "[Prosecutor]: Do you know what her name is?
>
> "[Defendant: first name resembling Jane Doe's first name and different last name]. They have her address and they know this information pertaining to this crime. I'm asking you, please, you have the power to call this young lady . . . Her name is [first name resembling Jane Doe's first name] or [Jane Doe] or [another last name]. The District Attorney has her address. . . . For some reason, I don't know the reason—it's not clear to me if this person testified in the

first Grand Jury. I am saying she was brought here. I don't know if she came to testify."

The prosecutor asked defendant whether he had spoken to the witness and had learned about her testimony in the grand jury, and defendant said, "You would know—." The prosecutor interjected, "I wouldn't know, because I don't have any idea who you're talking about." In response to further queries about the witness, defendant said that he was not sure whether the witness's last name was Jane Doe's last name or the other last name he had mentioned, but he knew her first name was the same as Jane Doe's first name. Defendant acknowledged that he had never spoken to her and had no idea what she would say. Defendant also claimed that the detectives at the police precinct had told him about the missing witness to the crime, "[Jane Doe] or [Jane Doe's first name with the other last name]." Defendant again told the grand jurors that they had the power to compel the appearance of "Mrs. [Jane Doe's last name] or [the other last name]," and that "[s]he will tell you I'm not the shooter, as I told you." Defendant was then excused for the second and final time.

Noting that John Doe had also mentioned someone with the same first name as Jane Doe, a grand juror asked if the grand jury could hear her testimony. The prosecutor "instruct[ed] [the grand jurors] that it is not relevant at this time based on the evaluation of the evidence and witnesses." When the grand juror professed not to understand this, the prosecutor repeated that the proposed evidence was not relevant, and she stated, "It's in our purview to decide that." The grand juror retorted, "[i]t doesn't make sense."

A grand juror asked, "Can we vote as to having that witness come in?" This exchange then occurred:

***695** "[Lead Prosecutor]: Let me explain it this way, based on our investigation and what's been testified to, and I'm skating a thin line here, I think at this point, it's six-thirty, we have to make a lot of determinations right now. Additionally, based upon on our investigation, ****5** *and it's up to you whether to have that witness*, but I'm telling you that it is not relevant to this proceeding. You have to take our advice, as your legal advisors, that it is not relevant to the situation at hand.

"[Grand Juror]: How?

"[Second Prosecutor]: However, *it would be relevant, if she was going to give testimony in the defendant's favor*. It's our determination, she is not relevant. Any other questions?" (emphasis added).

As the grand jury continued to question her, the lead prosecutor admitted that she knew the nature of the witness's potential testimony "[b]ased upon [the People's] investigation and interviews of her." The prosecutor further stated:

"And, again, I'm sure you were told repeatedly, every time somebody charges you, it is not everybody in society that was on the face of the planet that day coming before the Grand Jury. Just because he offers it—he talked about newspaper articles, what police officers told him. That is not legal evidence to come before you. Hold on one second. *What I am going to do is let you put it to a vote. If twelve or more jurors, who were present and heard all the evidence on the dates we were in session, vote as to whether or not you want to hear from,* I believe the name of the person, we are not even clear on the names here, if it is even the same individual, he says *[Jane Doe's first name] or [a first name resembling Jane Doe's first name and Jane Doe's last name] or [another last name], that is the person he is saying, if that's what you want to do, you need twelve or more people to vote on that*" (emphasis added).

When a grand juror interrupted, the prosecutor again told the grand jurors that "[t]he witness will be subpoenaed if twelve or more of [them] vote[d] on this," but that "[a]t this point [they] need[ed] to first decide if [they] believe[d]—that [they] th[ought] that's relevant to proving as to whether or not this defendant, ***696** who just testified, committed the crimes." The prosecutor continued:

"One more thing you should keep in mind, I am going to refresh your recollection, marshal the evidence in regards to, you have an eyewitness who identified the defendant at the scene as the shooter. Keep that in mind. If this additional person is relevant at this point, and you have no idea, and he didn't offer any evidence to you either if she was there or not there, if she is even able to identify anybody —Keep that in mind. If *you* think that's really relevant, whether or not *you* want to hear from this person—you have an eyewitness, you have additional evidence in the case. Again, it's not a trial" (emphasis added).

****6** The grand jurors voted on defendant's request for the witness's testimony and rejected it. Thereafter, the grand jury indicted defendant on various charges, including second-degree murder, second-degree weapon possession and third-degree weapon possession.

After their vote to indict defendant, the grand jury voted on and approved Shawn Berry's previous request to hear from two witnesses. The witnesses then appeared before the grand jury. The grand jurors indicted Berry as well.

Defendant made two unsuccessful motions to dismiss the indictment. In support of the second one, defendant argued that the prosecutors had committed misconduct in criticizing defendant's entreaties to have the grand jury call Jane Doe to the stand. Among other things, defendant analogized Jane Doe's testimony to *Brady* material, suggesting that just as "fear for [a] witness's safety did not insulate the People from Brady violation [sic]," it could not justify the refusal to allow the witness to appear here. Defendant further sought to inspect the minutes of the first grand jury proceeding.

The People opposed defendant's renewed dismissal motion. In addition to challenging the sufficiency of defendant's offer of proof and relying on their role as legal advisors to the grand jury, the People asserted that whether Jane Doe had testified before the first grand jury was irrelevant to defendant's claim. The People also maintained that defendant's request to inspect the first grand jury minutes to review Jane Doe's testimony was "an effort to circumvent the secrecy of the Grand Jury and find out who testified, not for any legitimate purpose."

***697** After these arguments, Supreme Court denied defendant's renewed motion to dismiss the indictment. Thereafter, the People successfully obtained a protective order for Jane Doe, citing, among other things, the threats that had caused her to testify in the first grand jury proceeding inconsistently with her prior statements to the People.

II

CPL article 190 governs the conduct of the grand jury and the parties which appear before that body, and it requires that all grand jury proceedings remain secret to protect the essential functions of those various actors (*see generally* CPL 190.05, 190.25 [4] [a]). Under this statutory regime, the exclusive "legal advisors of the grand jury are the court and the district attorney" (CPL 190.25 [6]), and their decision to present certain items of evidence and to exclude others is for the most part limited only by the rules of evidence applicable at trial (*see* CPL 190.30 [1]; *People v Mitchell*, 82 NY2d 509, 513 [1993]). In the same vein, the prosecutor enjoys "broad powers and duties, as well as wide discretion in presenting the People's case" to the grand jury (*People v Huston*, 88 NY2d 400, 406 [1996]; *see People v Lancaster*, 69 NY2d 20, 25 [1986]). Indeed, the prosecutor "determines the competency of witnesses to testify," and he or she "must instruct the jury on the legal significance of the evidence" (*People v Di Falco*, 44 NY2d 482, 487 [1978]; *see Huston*, 88 NY2d at 406). ****7**

Notably, though, due process imposes upon the prosecutor a "duty of fair dealing to the accused and candor to the courts," thus requiring the prosecutor "not only to seek convictions but also to see that justice is done" (*People v Pelchat*, 62 NY2d 97, 105 [1984]; *see Huston*, 88 NY2d at 406). This duty extends to the prosecutor's instructions to the grand jury and the submission of evidence (*Lancaster*, 69 NY2d at 26). The prosecutor also cannot provide "an inaccurate and misleading answer to the grand jury's legitimate inquiry" (*People v Hill*, 5 NY3d 772, 773 [2005]), nor can the prosecutor accept an indictment that he or she knows to be based on false, misleading or legally insufficient evidence (*see Pelchat*, 62 NY2d at 107).

Even under those principles, "[a] Grand Jury proceeding is not a mini trial, but a proceeding convened primarily to investigate crimes and determine whether sufficient evidence exists to accuse a citizen of a crime and subject him or her to a criminal prosecution" (*Lancaster*, 69 NY2d at 30 [internal ***698** quotation marks and citations omitted]). That being so, the prosecutor need not tread too lightly in pressing the People's case or rebutting the defendant's assertions. For example, where the defendant chooses to testify, the prosecutor may, within limits, ask probing or even skeptical questions of the defendant about issues raised by his or her testimony (*see People v Germosen*, 86 NY2d 822, 824 [1995]; *People v Karp*, 76 NY2d 1006, 1008 [1990]; *People v Smith*, 84 NY2d 998, 1000-1001 [1994]; *People v Halm*, 180 AD2d 841, 842 [3d Dept 1992], *affd* 81 NY2d 819 [1993]). Similarly, in the role of legal advisor, the prosecutor need not instruct the grand jury on the full extent of its investigatory and deliberative powers (*see People v Harris*, 98 NY2d 452, 475 nn 5, 6 [2002]; *see also Lancaster*, 69 NY2d at 25-26). The prosecutor may decline to instruct the grand jury about a variety of defenses, and he or she need not disclose certain forms of exculpatory evidence or reveal to the grand jury the circumstances surrounding the authorities' investigation of the case (*see People v Robinson*, 89 NY2d 648, 653-654 [1997]; *Mitchell*, 82 NY2d at 513; *Lancaster*, 69 NY2d at 30; *People v Brewster*, 63 NY2d 419, 422-423 [1984]). These examples illustrate that, in occupying a "dual role as advocate and public officer" (*Pelchat*, 62 NY2d at 105), the prosecutor is not obligated to present the evidence or make statements to the grand jurors in the manner most favorable to the defense.

Of course, the grand jurors are empowered to carry out numerous vital functions independently of the prosecutor, for they "ha[ve] long been heralded as 'the shield of innocence . . . and as the guard of the liberties of the people against the

encroachments of unfounded accusations from any source' " (*People v Sayavong*, 83 NY2d 702, 706 [1994], quoting *People v Minet*, 296 NY 315, 323 [1947]). Accordingly, CPL 190.50 grants the grand jury the power to subpoena witnesses, including witnesses not called by the People, and the prosecutor must comply with the grand jury's order for such testimony (CPL 190.50 [3]). If the grand jurors ask to hear from a witness, the prosecutor has no recourse to prevent the witness from appearing, save for a motion for an order vacating or modifying their subpoena on the ground that "such is in the public interest" (*id.*). In addition, the defendant may specifically ask the grand jury to ****8** exercise its power to call a witness of his or her selection, and "[t]he grand jury may as a matter of discretion grant such request and cause such witness to be called" (CPL 190.50 [6]). In the non-adversarial context of grand jury proceedings, ***699** however, the defendant's statutory power to seek the appearance of a witness is one of "limited extent" (*Lancaster*, 69 NY2d at 26; *see Robinson*, 89 NY2d at 653).

The court may enforce these statutory rules by dismissing an indictment that "fails to conform to the requirements of [CPL article 190] to such degree that the integrity thereof is impaired and prejudice to the defendant may result" (CPL 210.35 [5]; *see* CPL 210.20 [1] [c]; *Hill*, 5 NY3d at 773). The "exceptional remedy of dismissal" is available in "rare cases" of prosecutorial misconduct upon a showing that, in the absence of the complained-of misconduct, the grand jury might have decided not to indict the defendant (*Huston*, 88 NY2d at 409, 410). In general, this demanding test is met only where the prosecutor engages in an "over-all pattern of bias and misconduct" that is "pervasive" and typically willful, whereas isolated instances of misconduct, including the erroneous handling of evidentiary matters, do not merit invalidation of the indictment (*id.* at 408, 409-410; *see Pelchat*, 62 NY2d at 106-107). "[T]he statutory test, which does not turn on mere flaw, error or skewing . . . is very precise and very high" (*People v Darby*, 75 NY2d 449, 455 [1990]).

(1) Here, the prosecutors' comments on defendant's proffer relating to Jane Doe (or someone of that approximate description) neither suppressed defendant's request to call the witness nor stripped the grand jury of its discretion to grant or deny that request. The prosecutors allowed defendant to submit his request directly to the grand jurors, and defendant told the grand jurors at considerable length why he thought the witness's testimony to be relevant and worthwhile. Once defendant had completed his exhortation to call the witness, the prosecutors repeatedly acknowledged that the grand jurors could vote to hear from the witness and that the witness would be "subpoenaed if twelve or more of [them] vote[d]" to do so. "[A]s a matter of [their] discretion," the grand jurors then independently refused to "grant such request," thus exercising their prerogative under CPL 190.50 (6).

It is true that the lead prosecutor forcefully contended that the witness's testimony would be irrelevant, analogizing defendant's proffer to a plea for the testimony of random members of the community at large. She also told the grand jurors that they "ha[d] to take [her] advice" on that subject because she was their legal advisor; although she was indeed the grand jurors' ***700** sole legal advisor, to whom they had to defer on most evidentiary issues, her remarks may have suggested an unduly expansive view of her powers. However, there was nothing inherently impermissible about the prosecutor's suggestion that the potential witness had no relevant testimony to offer, and the dissent does not appear to take a contrary position. In light of her advisory role and her duty to uphold the public interest in prosecuting crimes, the prosecutor surely had some leeway to argue her views on the admissibility of the proffered defense evidence (*see Mitchell*, 82 NY2d at 515; *Di Falco*, 44 NY2d at 487; *Lancaster*, 69 NY2d at 30). Furthermore, although the prosecutor probably should not have belabored her relevance argument, she made a valid point, as defendant's description of the witness and the witness's potential testimony did not provide an exact identification of the witness by name or clearly convey what the witness might say other than that she was present at the scene of the crime.

In any case, the lead prosecutor clarified that, despite her objections, the grand jurors had the right to call the witness based on their own belief regarding the relevance of the potential witness's testimony. As the prosecutor put it to the grand jurors, "if *you* believe—that *you* think that's relevant," the witness would be called (emphasis added). Indeed, at several points, the prosecutor generally acknowledged to the grand jurors that the decision to call or exclude the witness rested with them. Given those accurate instructions, the prosecutor's argument that the proposed testimony was irrelevant could not have misled the grand jurors into believing that they had no choice but to agree with her.

The grand jurors' assertive conduct further belies the notion that the prosecutors undermined the grand jurors' independence to such an extent as to impair the integrity of the second grand jury proceeding. Far from being a passive audience, the grand jury actively questioned the

defense witnesses in an effort to gauge their stories against the People's witnesses's testimony. In a later exchange with the lead prosecutor, a grand juror pressed the prosecutor regarding the adequacy of her investigation into, and presentation of evidence regarding, defendant's physical ability to commit the crime.[1] And, when the ***701** lead prosecutor questioned the relevance of the defense witness's proposed testimony, a grand juror repeatedly expressed skepticism, even going so far as to say that the prosecutor's assertions made no sense. Not only did the grand jurors still exercise their right to vote on defendant's request, but afterward, they voted to hear from two of Shawn Berry's proffered witnesses. Because the grand jurors fully exercised their independent decision-making authority over the course of the entire proceeding, there is no reason to believe that the prosecutors' statements about defendant's request cowed the grand jurors into abandoning their independence. Accordingly, the integrity of the grand jury proceeding remained intact, and the trial court properly denied defendant's motion to dismiss the indictment.

III ****9**

The dissent would invalidate the indictment based on a number of perceived misdeeds committed by the prosecutors, but the circumstances cited by the dissent do not justify that exceptional remedy.

The dissent faults the second-seating prosecutor for indicating to the grand jurors that the witness at issue would not testify favorably to the defense (*see* dissenting op at 712). But, taken in context, that is not what the prosecutor said. After the lead prosecutor had asserted that defendant's proposed witness had no relevant testimony to offer, the second-seating prosecutor evidently sought to add some nuance to that contention, observing that, despite the firm view of her colleague that the proposed evidence could not be relevant, the evidence would, in fact, "be relevant, if [the witness] was going to give testimony in the defendant's favor." However, the second-seating prosecutor never claimed that the favorable nature of the testimony was the only way in which it could be relevant, but rather that it was a possible basis on which to reject her colleague's assertions about the relevance of the evidence. And, because the prosecutor did not equate relevance with favorability, her contention that the witness's testimony would not be relevant did not inappropriately signal that the testimony would be adverse to defendant.

Contrary to the dissent's interpretation of the record, the lead prosecutor never instructed the grand jury that the ***702** relevance of the witness's testimony "turn[ed] . . . upon whether James Doe's testimony was, in the prosecutor's estimation, sufficient to support an indictment" (dissenting op at 713). In the disputed remarks, the prosecutor stated:

> "Understanding that everything the defendant asks is not legally—he's not entitled to bring before you—This is not a trial. It's just whether or not there's probable cause, sufficient—legal, sufficient evidence to move forward with an indictment. It's not to have every witness known to mankind relevant to the proceeding . . . Just because he offers it—he talked about newspaper articles, what police officers told him. That is not legal evidence to come before you."

By this inartful declaration, the prosecutor merely made two legally accurate points: (1) a grand jury proceeding is an investigatory and accusatory process for deciding the existence of reasonable cause to bring a defendant to trial rather than an adversarial proceeding to determine guilt beyond a reasonable doubt (*see Lancaster*, 69 NY2d at 30); and (2) the admissibility of evidence turns on its relevance rather than the defendant's desire to see it admitted (*see Di Falco*, 44 NY2d at 487; *see generally People v Scarola*, 71 NY2d 769, 777 [1988]).

In alerting the grand jury to those two principles, the prosecutor never said that those rules were interdependent, such that the sufficiency of the evidence underlying the indictment controlled the relevance of the testimony of the defense witness. In fact, the prosecutor immediately informed the grand jurors that they could vote on whether they wanted to receive the witness's testimony, signaling that the prosecutor's belief in the sufficiency of the evidence did not preclude the grand jury from summoning the witness. Moreover, when the ****10** prosecutor later cited James Doe's testimony that defendant had shot Williams, she properly reiterated that the grand jurors could decide whether to call the witness and whether her testimony would be relevant, apparently without regard to James Doe's testimony.

Additionally, the dissent takes issue with the lead prosecutor's initial assertion that she did not know the identity of the witness mentioned by defendant (*see* dissenting op at 712). But, as the dissent concedes (*see id.*), the prosecutor soon thereafter dispelled any misconception by revealing that she was familiar with the witness to whom defendant had likely referred—Jane ***703** Doe. Nor can the prosecutor be blamed for withholding this information when defendant first

mentioned it, as defendant's conduct put the prosecutor in a difficult bind.

Sometime after the first grand jury proceeding, Jane Doe revealed to the People that she had received anonymous threats prior to her appearance before the first grand jury, and the People became concerned for her safety and privacy, eventually obtaining a protective order for her. Defendant threatened the People's justified concerns for Jane Doe's safety and the secrecy of the prior grand jury proceedings, however, when he told the second grand jury that Jane Doe had testified or appeared before the first grand jury and that the prosecutor knew her identity. No doubt alarmed that defendant had possibly breached the secrecy of the first grand jury, the prosecutor reasonably feigned ignorance of Jane Doe's identity to avoid confirming defendant's suspicion that Jane Doe had been a witness in the first grand jury and/or furthering a breach of grand jury secrecy by intimating to the grand jurors that their predecessors had heard from Jane Doe. Had she done otherwise, the prosecutor might have ended any hope she had of obtaining truthful testimony from Jane Doe in the future (*see Sayavong*, 83 NY2d at 708) and imperiled Jane Doe by revealing that she had cooperated in the prosecution of defendant. Indeed, it is presumably for these reasons that, in their response to defendant's renewed dismissal motion, the People expressed concern that he was trying to circumvent the secrecy of the grand jury, and they avoided revealing whether Jane Doe had testified before the first grand jury by asserting that her potential presence before that body did not matter. Even defendant seemed to recognize the witness safety issue, as he contended that the People could not avoid dismissal of the indictment by relying on their fear that the witness might be harmed as result of her grand jury testimony.[2] ****11**

(2) ***704** Beyond its criticisms of the prosecutors, the dissent dismisses the strength of the evidence the People presented to the grand jury as insufficient to save the indictment, insisting that Jane Doe's testimony could have undermined the grand jury's finding of reasonable cause to believe that defendant had murdered Williams (*see* dissenting op at 714-716). As the dissent observes, the legal sufficiency of the evidence supporting an indictment, standing alone, does not automatically immunize the indictment from dismissal, and a defendant's conviction after trial does not necessarily cure defects in an indictment (*see Huston*, 88 NY2d at 410-411). Still, "[i]n the ordinary case, it may be said that the Grand Jury has properly carried out [its] function when it has issued an indictment upon evidence that is legally sufficient to establish that the accused committed a crime" (*People v Calbud, Inc.*, 49 NY2d 389, 394 [1980]), and dismissal is meant to eliminate only prosecutions that are truly unfounded, as opposed to those that merely rest on a view of the evidence that is not comprehensive (*see People v Valles*, 62 NY2d 36, 38-39 [1984]).

Here, no one disputes that the evidence was legally sufficient to support the indictment and that therefore the prosecution of defendant was not completely unfounded. Furthermore, given that the petit jury heard from Jane Doe and concluded that her testimony did ****12** not create a reasonable doubt as to defendant's guilt, it is hard to imagine that her testimony before the grand jurors would have altered their determination that the evidence met the less exacting standard of reasonable cause. That is particularly so in light of James Doe's unequivocal testimony that defendant shot Williams in broad daylight and John Doe's description of the shooter which, while inconsistent with defendant's appearance in some respects, still suggested that ***705** defendant was the shooter.[3] Therefore, any "mere flaw, error or skewing" by the prosecutors did not satisfy the "very precise and very high" test for dismissal of this indictment, which was supported by reasonable cause to believe that defendant had committed the charged crimes (*Darby*, 75 NY2d at 455).

People v Hill (5 NY3d at 772) does not support the dissent's position in this case. In *Hill*, the defendant's attorney sent the prosecutor a letter requesting that the prosecutor call eight alibi witnesses to testify in front of the grand jury (*see id.* at 773; *see also id.* at 774-778 [R.S. Smith, J., dissenting]). The letter listed each witness by name and a brief description of the events about which the witness would testify (*see id.* at 774). The prosecutor informed the grand jurors that the defendant wanted to call the eight witnesses, but the prosecutor did not provide the grand jurors with any of the detailed information contained in counsel's letter (*see id.* at 773; *see also id.* at 774-775). The grand jurors specifically asked about the nature of the witnesses' testimony, and the prosecutor still claimed not to know what the witnesses would testify about (*see id.* at 773; *see also id.* at 774-775). The grand jurors voted not to call the witnesses (*see id.* at 773; *see also id.* at 775). We affirmed the dismissal of the indictment, holding that, "under the circumstances of this case, the prosecutor gave an inaccurate and misleading answer to the grand jury's legitimate inquiry, thus substantially undermining the integrity of the proceeding and potentially prejudicing defendant" (*id.*). ****13**

In the instant case, unlike *Hill*, the prosecutors did not hide the full extent of defendant's offer of proof, which defendant

himself made to the grand jury. And, here, defendant's identification of the witness as someone who had testified before the first grand jury required the prosecutors to avoid acknowledging that fact to protect the secrecy of the first grand jury, ***706** whereas there was no such issue in *Hill*. Furthermore, while the prosecutor in *Hill* never fully disclosed his knowledge of the witnesses and their proposed testimony, the lead prosecutor here eventually told the grand jurors that her office had spoken with the witness at issue in the course of its investigation. Thus, the prosecutors here did not hide defendant's proffer from the grand jury or engage in any misconduct equivalent to that which led to the dismissal of the indictment in *Hill*.

IV

In this case, the prosecutors did not commit pervasive misconduct, nor does the record indicate that they were motivated by bias or a desire to deceive the grand jury when they responded to defendant's request for Jane Doe's testimony. At most, the prosecutors made isolated missteps that could not have affected the outcome of the grand jury proceeding. We do not endorse the prosecutors' actions as the preferred way to present a case to the grand jury, but we decline to dispose of the well-founded prosecution here as a result of their handling of the matter. Moreover, upon reviewing defendant's claims regarding the trial proceedings, we find that they do not warrant reversal of his conviction. Accordingly, the order of the Appellate Division should be affirmed.

Chief Judge Lippman (dissenting). On the morning of October 10, 2003 Rasheem Williams was fatally shot in the head as he stood at the corner of Gordon and Broad Streets in Staten Island. Defendant was stopped by police officers about one quarter hour later several blocks from the scene of the shooting. At that time, he was reportedly wearing a white tee shirt, dark jeans and black sneakers. Although defendant was not in the near aftermath of the Williams murder identified as its perpetrator, he was arrested on charges of gun possession. Those charges were presented to a grand jury on the theory that defendant could be linked to weapons and clothing found hidden in an abandoned back lot on Hudson Street, a venue situated along a route leading from the place of the Williams shooting to the place defendant was stopped. The evidence supporting the posited linkage included testimony purporting to show that a police dog tracked defendant's scent to the spots where the weapons and clothing had been secreted, and testimony that a person seen running from the shooting scene had been attired in a dark-colored hoodie resembling one of the garments recovered from the Hudson Street back lot. From this proof the ***707** People sought to invite inferences that it was defendant who was observed fleeing north on Broad Street immediately after the shooting and who, shortly before being stopped by the police on Gray Street, deposited the weapons, hoodie and other recovered items, including a silencer and a black ****14** hat, in the nearby back lot. There was, however, evidence before the grand jury not entirely consonant with this scenario. Although the witness we now refer to as “John Doe” lent some support to the People's theory by testifying that he saw a person running up Gordon Street just after the shooting wearing a dark hoodie and jeans, and cradling what appeared to be a gun barrel in his shirt, he also stated that that individual had a “blotchy” complexion, a long shapely beard and wore Timberland boots. Defendant possessed neither distinctive facial characteristic and, as noted, was clad in sneakers when stopped. In addition, a witness we now refer to as “Jane Doe” testified that the individual she saw come up behind Williams as she conversed with him, fire the fatal shots at close range and then run up Gordon Street, wore a brown hoodie bearing a Burberry plaid pattern. The black garment recovered in the Hudson Street lot sported no such pattern. The grand jury declined to vote a true bill as to any of the submitted weapon possession counts.

Thereafter, an individual we refer to as “James Doe” came forward, claiming that he witnessed defendant, with whom he was acquainted, shoot Rasheem Williams. The People obtained permission to re-present charges against defendant stemming from the Williams shooting, and, in November 2003, James Doe testified before a grand jury new to the matter. He stated that on the morning of the shooting he noticed defendant sitting in a car parked on Broad Street holding a gun with a long barrel. He reported that a while later—after encountering Rasheem Williams down the block, chatting with an ex-girlfriend and buying a cup of coffee—he watched as defendant approached Williams and shot him in the back of the head. Defendant, he said, was wearing a hoodie, blue jeans and a black hat.

The second grand jury also heard testimony from John Doe. He stated, as he had before the first grand jury, that shortly after the shooting he saw a man fleeing up Gordon Street holding what appeared to be the barrel of a gun in the folds of his shirt. The man, he said, wore a dark hoodie and Timberland-like boots, and had an unusual “blotchy” complexion which he supposed might have been caused by

a disease. John Doe noted in passing that he encountered a friend—a person having the same moderately distinctive first name as Jane Doe—at the scene of the shooting.

***708** Jane Doe was not called by the People to testify before the second grand jury. In concluding his own testimony, however, defendant announced, "I have additional facts, that on October 10th there was a witness to this crime. It was a young lady. And [she] was brought to the precinct." This precipitated the following contentious exchange:

"[PROSECUTOR]: Hold on a minute. Were you there on October 10th at the time of the murder?

"[DEFENDANT]: Was I there? No.

"[PROSECUTOR]: So how would you know there was a witness to the crime?

"[DEFENDANT]: How? When I was brought to the police station and the police told me—

"[PROSECUTOR]: . . . that is hearsay, and you cannot talk about hearsay . . .

"[DEFENDANT]: The District Attorney will not let me talk about a witness. I have her name and, you, the Grand Jury, have the permission to call this girl. They have her name and address. She was brought here to the last Grand Jury . . . this person is a witness to this crime. . . .

"[PROSECUTOR]: How do you know that?

"[DEFENDANT]: She was brought—they told me there was a witness to the crime.

"[PROSECUTOR]: And what is the relevance? . . .

"[PROSECUTOR]: Do you know that she testified to [witnessing the crime], because . . . if you are speculating as to whether or not she testified that somebody else did the crime, that is not relevant for [the grand jurors'] consideration. . . .

"[DEFENDANT]: . . . I'm asking you, please, you have the power to call this young lady . . . Her name is [listing several appellations, among them Jane Doe]. The District Attorney has her address. She was brought here to testify. . . .

"[PROSECUTOR]: Did you speak to her?

"[DEFENDANT]: I never spoke to her—

***709** "[PROSECUTOR]: And did she tell you what she testified to in Grand Jury or what she was going to say?

"[DEFENDANT]: You would know—

"[PROSECUTOR]: I wouldn't know, because I don't have any idea who you're talking about."

After defendant was excused, a grand juror asked to hear from the witness to whom the juror supposed defendant was referring; the juror understood that witness to be the friend that John Doe mentioned seeing at the scene of the shooting. The prosecutor responded that the witness's testimony "is not relevant to this proceeding." The requesting grand juror protested that she did not understand how a witness to the central events would not have relevant testimony, but was rebuffed, the prosecutor instructing that "[i]t's in [the prosecutors'] purview to decide that." The juror persisted, asking if the grand jury could vote on whether to call Ms. Doe, and this colloquy ensued:

"[FIRST PROSECUTOR]: . . . based on our investigation and what's been testified to, and I'm skating a thin line here, I think at this point, it's six-thirty, we have to make a lot of determinations right now. Additionally, based upon our investigation, and *it's up to you whether to have that witness, but I'm telling you that it is not relevant to this proceeding. You have to take our advice, as your legal advisors, that it is not relevant to the situation at hand.*

"JUROR: How?

"[SECOND PROSECUTOR]: However, it would be relevant, if she was going to give testimony in the defendant's favor. It's our determination, she is not relevant. Any other questions?

"JUROR: So, basically she would be for you guys, if not, why wouldn't you want us to hear?

"[****15** FIRST PROSECUTOR]: The testimony she would have given to you is not relevant.

"JUROR: How do you know that her testimony—

***710** "[FIRST PROSECUTOR]: Based upon our investigation and interviews of her.

"JUROR: So why is he so insistent on having her?

"[FIRST PROSECUTOR]: Understanding that everything the defendant asks is not legally—he's not entitled to bring before you—This is not a trial. It's just whether or not there's probable cause, sufficient—legal, sufficient evidence to move forward with an indictment. *It's not to have every witness known to mankind relevant to this proceeding . . . not everybody in society that was on the face of the planet that day coming before the Grand Jury*" (emphasis added).

The prosecutor then agreed to allow the grand jury to vote on whether to call Jane Doe, but first purported to "marshal the evidence," reminding the jury that they heard testimony "[from] an eyewitness [James Doe] who identified the defendant at the scene as the shooter," and suggesting that, in light of James Doe's identification, whatever Ms. Doe would say would not be "really relevant."

The grand jury, acting in accord with the prosecutors' assertedly binding advice, voted not to call Ms. Doe. Directly

afterward it voted to indict defendant for Rasheem Williams' murder and related weapons possession charges.

Before trial, defendant moved to dismiss the indictment pursuant to CPL 210.35 (5), i.e., upon the ground that the underlying proceeding "fail[ed] to conform to the requirements of [CPL] article one hundred ninety to such degree that the integrity thereof is impaired and prejudice to the defendant may result." Prominent among the grounds for the application was the prosecutors' handling of defendant's request that Ms. Doe be called as a witness.[1] In opposing the application the People urged only that defendant had not adequately identified the witness whose testimony he sought, that his request was "flimsy," and that whether Jane Doe testified before the grand jury was irrelevant. There was no mention of any need to protect Ms. Doe or to shield from disclosure to the second grand jury the fact and substance of her testimony before the first ****16** grand jury. Dismissal was summarily denied and the matter proceeded to trial. The ***711** first trial of the indictment ended in a hung jury. Defendant was finally convicted of second degree murder and second and third degree criminal possession of a weapon after lengthy jury deliberation at the retrial. In affirming the judgment of conviction (81 AD3d 670 [2011]), the Appellate Division, while faulting the prosecutor's suggestion in front of the grand jury that defendant had committed crimes other than those alleged within the presentment proceeding, deemed the exceptional remedy of dismissal pursuant to CPL 210.35 (5) unwarranted in light of the properly admitted proof supporting the indictment (*id.* at 671). The court did not in its decision address the manner in which the prosecutor dealt with defendant's witness request.

The grand jury, we have observed, is a "constitutionally and historically independent institution" (*People v Huston*, 88 NY2d 400, 401 [1996]) intended to function as a buffer between the state and its citizens and as a check upon prosecutorial excess (*People v Calbud, Inc.*, 49 NY2d 389, 396 [1980]). A prosecutor, then, in presenting a matter to a grand jury and simultaneously acting as its statutorily designated legal advisor (*see* CPL 190.25 [6]), although possessing broad discretion as to the evidence to be adduced in support of any formal accusation sought (*People v Lancaster*, 69 NY2d 20, 25-26 [1986]), is at the same time bound to respect the grand jury's essential independence and may not thwart that body's satisfaction of its core investigative purpose. The grand jury, we have said "ought to be well informed concerning the circumstances of the case before it" (*id.* at 25).

While, as a practical matter, the evidence before a grand jury will largely be a function of prosecutorial discretion as to what is relevant and fair in enabling the panel's constitutionally required judgment as to whether there are adequate grounds for prosecution, there are important statutory limits upon the power of a prosecutor unilaterally to determine what evidence will and will not be placed before the grand jury—limits essential to maintaining the institutional integrity of the grand jury and to characterizing its work as the product of independent judgment.

Foremost among these is the grand jury's broad and autonomous power to "call [ ] as a witness any person believed by it to possess relevant information or knowledge" (CPL 190.50 [3]). This power expressly extends to witnesses *not* called by the People; indeed, the People "must comply with [the grand jury's] direction" to serve a subpoena, even when they do not agree that the requested witness should be called (*id.*). Relatedly, the ***712** person who is the subject of the grand jury proceeding must be afforded the opportunity to testify before the investigating panel (CPL 190.50 [5]) and "may request the grand jury, either orally or in writing, to cause a person designated by him to be called as a witness in such proceeding" (CPL 190.50 [6]). Such a request may be made by a defendant in the course of grand jury testimony (*see People v Mitchell*, 82 NY2d 509, 515 [1993] [referring to a defendant's right to bring exculpatory evidence to the grand jury's attention by her own testimony]). The statute is explicit that the ****17** grant or denial of such a request is a matter lying within the discretion of the grand jury, not the prosecutor, and that if the request is granted the designated witness's appearance may be caused pursuant to CPL 190.50 (3), i.e., as the appearance of a person "*believed by [the grand jury]* to possess relevant information or knowledge" (emphasis added).

Here, the presenting prosecutors lost sight of these limitations and, in so doing, impermissibly substituted their discretion for that legally committed to the grand jury. The prosecutor knew that Jane Doe had been identified and interviewed as a witness to the Williams shooting, and indeed that she had at her office's request testified before the first grand jury, before which she had given an account essentially favorable to defendant. Nevertheless, after first (while the defendant was present) professing ignorance of the requested witness's existence, she said to the grand jurors that, while she did know who Ms. Doe was, her testimony would be irrelevant, an assertion which understandably nonplussed at least one grand

juror, since it appeared from John Doe's testimony that Ms. Doe had been present at the scene during or immediately after the shooting. The prosecutor then incorrectly instructed that it was the purview of her office to decide whether the requested testimony was relevant and that the grand jury was obliged to take her office's advice that Ms. Doe's testimony would be irrelevant. This was contrary to CPL 190.50, subdivisions (6) and (3), which, as noted, empower the grand jury to exercise its discretion to call any witnesses "*believed by it* to possess relevant information" (emphasis added). Matters were not improved when the second prosecutor suggested, inaccurately, that what Ms. Doe had to say would not be favorable to defendant.[2] And, although the ***713** grand jury was in the end permitted to vote on whether to call Jane Doe, the vote did not take place before the prosecutor reminded the jurors that it was 6:30 and they had to "make a lot of determinations right now," and then led the jury to understand that, given James Doe's testimony identifying defendant as Mr. Williams' assailant, additional testimony would be irrelevant and a ****18** waste of valuable time. But the relevance of Jane Doe's account did not turn at all upon whether James Doe's testimony was, in the prosecutor's estimation, sufficient to support an indictment and, obviously, was not fairly equated with what "everybody . . . on the face of the planet" the day of the shooting might have to say. It was the grand jury, and not the prosecutor, that was the proper judge of the facts with respect to the matter before it (*People v Pelchat*, 62 NY2d 97, 105 [1984]; CPL 190.25 [5]), both as to their legal sufficiency and the closely enmeshed question of whether they provided reasonable cause to believe defendant had committed the alleged crimes (*People v Batashure*, 75 NY2d 306, 310-311 [1990]). The grand jury was not bound to accept James Doe's account, particularly if it was inconsistent with other eyewitness accounts. The prosecutor's contrary suggestion—that narratives competing with the one offered by James Doe could be dismissed as irrelevant and thus need not be explored at all—impinged upon and abridged the grand jury's basic investigative and fact-finding functions.

The prosecutors' misstatements of fact and law were inconsistent with the People's obligations of candor and fair dealing as officers of the court and advisers to the grand jury (*see Pelchat*, 62 NY2d at 105). They did not merely suggest "an unduly expansive view" (majority op at 700) of the prosecutor's power. Nor did they constitute permissible argument as to the admissibility of the proffered defense evidence (majority op at 700). What the prosecutor said as to the relevance of that evidence and the purportedly plenary power of her office to determine evidentiary relevancy in the context of a defendant's witness request was very misleading. It is not sensible to suppose, as the majority does, that this misadvice from the grand jury's ***714** designated legal advisor did not compromise the grand jury's investigative function or defendant's dependent right to request witnesses. The votes that followed in the wake of those misstatements cannot be viewed as expressions of the indicting body's independent and well-informed judgment. Possibly the People had valid reasons to oppose Ms. Doe's testimony (e.g., concern for the witness's safety), but those should have been interposed, if at all, pursuant to CPL 190.50 (3), in a motion to vacate a grand jury direction for her appearance or to quash a subpoena issued to her,[3] or in opposition to defendant's motion to dismiss the indictment pursuant to ****19** CPL 210.35 (5). The grounds upon which such a motion might have been premised are not appropriately asserted for the first time on appeal as they have been in this litigation. In any event, the elaborate post hoc rationalization of need (majority op at 703-705) for the prosecutors' representations to the grand jury is purely speculative and, oddly, appears to rest upon the uncertain availability of relief pursuant to CPL 190.50 (3). Surely the majority does not suggest that the possibility a court would exercise its discretion to deny a prosecutor's motion to quash a grand jury subpoena could ever justify a prosecutor in misleading a grand jury as to the relevance of a murder witness's testimony. The statute exists precisely to obviate the need for bringing purely prosecutorial interests possibly conflicting with the prosecutor's duty of neutral advisement within the grand jury chamber directly to bear upon the grand jury's exercise of its power to call witnesses "*believed by it* to possess relevant information."

It is true that the standard for dismissal of an indictment pursuant to CPL 210.35 (5) for statutory nonconformities impairing the integrity of the underlying grand jury proceeding is exacting (*People v Darby*, 75 NY2d 449, 455 [1990]). But the recitation of the standard does not decide the particular claim and defendant's claim, I believe, merits relief.

***715** In *People v Hill* (5 NY3d 772 [2005]) we upheld the dismissal of an indictment pursuant to CPL 210.35 (5) where the presenting prosecutor undermined the defendant's witness request by withholding from the grand jury basic information at his disposal bearing upon the relevance of the sought testimony. We reasoned that the prosecutor's failure to furnish the information on the ground that he could not disclose what he did not know, was misleading and left the grand jury with no basis to determine, in accordance with CPL

190.50 (6), whether the witness request should be granted (*id.* at 773). The conduct in this case, involving a far more aggressive assertion of prosecutorial influence to undermine what was on its face a legitimate CPL 190.50 (6) request for the testimony of a potentially pivotal witness, strikes even more profoundly at the integrity of the proceedings.

The further finding required as a condition of relief—that there "may" be consequential prejudice to the defendant (CPL 210.35 [5]; *Huston*, 88 NY2d at 409)—is, on this record, also justified. Ms. Doe testified before the grand jury that declined to return a true bill against defendant. The possibility that her plainly relevant testimony would have been sought by the second grand jury if not for the prosecutors' very serious mishandling of defendant's witness request and would have been instrumental to an outcome similarly favorable to defendant cannot be discounted. ****20**

The People, and now the majority, stress that by the time of the second grand jury presentation the testimony of James Doe had been obtained and that that testimony was legally sufficient to sustain the indictment. But this misses the point. It was up to the grand jury not only to determine whether the evidence was sufficient but whether there was reasonable cause to believe defendant had done the things of which he was accused (CPL 190.65 [1]; *and see Huston*, 88 NY2d at 411 ["the CPL requires not only legally sufficient evidence as a prerequisite to indictment but also reasonable cause to believe the person committed an offense"]), an exercise involving weighing the evidence (CPL 70.10 [2]). James Doe's identification of defendant as Rasheem Williams' shooter was essentially the only evidence before this grand jury linking defendant to the crime. The People did not present, as they had to the previous grand jury, evidence relating to the clothes and weapons found in the Hudson Street lot. But James Doe's identification, in respects not lost upon the grand jurors, was inconsistent with John Doe's description of ***716** the person he saw running from the scene,[4] and might well have been further cast in question by Jane Doe's description of the shooter. The grand jury could have resolved the testimonial conflicts differently had it heard from Ms. Doe, and a substantial possibility of a different outcome is all the statute requires in the way of prejudice where, as here, the integrity-impairing conduct is pronounced (*see Huston*, 88 NY2d at 409 ["The likelihood of prejudice turns on the particular facts of each case, including the weight and nature of the admissible proof adduced to support the indictment *and the degree of inappropriate prosecutorial influence or bias*"] [emphasis added]).

That the grand jury voted upon the witness request cannot be a saving factor here any more than it was in *Hill*. The salient point, which the majority overlooks in attempting to distinguish *Hill*, is that in each case the prosecutor's conduct deprived the grand jury of potentially outcome-determinative information essential to the discharge of its core constitutional obligation. Where that occurs, there can be no supposition that the grand jury would otherwise have voted as it did. Such a supposition only rewards conduct that CPL 210.35 (5) exists to deter.

The majority's minimization of what was a very serious prosecutorial misstep to treat this as an "ordinary case [in which] it may be said that the Grand Jury has properly carried out [its] function when it has issued an indictment upon evidence that is legally sufficient" (majority op at 704, quoting *Calbud, Inc.*, 49 NY2d at 394) significantly neuters CPL 210.35 (5) as a deterrent to improper prosecutorial influence during secret grand jury proceedings. ****21** While the exercise saves a conviction, it also practically eliminates the utility of a powerful, legislatively prescribed disincentive to the sort of prosecutorial overreaching that results in unfounded prosecutions. Accordingly, I dissent.

I would reverse and grant the motion to dismiss the indictment, with leave to re-present (*see People v Morris*, 93 NY2d 908 [1999]; CPL 210.20 [6] [b]).

Judges Graffeo, Read and Pigott concur with Judge Abdus-Salaam; Chief Judge Lippman dissents in an opinion in which Judges Smith and Rivera concur.

Order affirmed.

FOOTNOTES

Footnotes

1 Specifically, the grand juror asked if defendant had been examined by a doctor and would have been able to jump over certain fences to escape the crime scene. The prosecutor replied that she believed defendant had testified to having completed his recovery by the time of the murder, but she cautioned that her recollection did not control the matter.

2 The dissent suggests that the prosecutor was allowed to address these serious safety and secrecy issues only by waiting for the grand jury to order Jane Doe's appearance and then moving to vacate the grand jury's directive pursuant to CPL 190.50 (3) (*see* dissenting op at 714). However, if the prosecutor had simply acquiesced in defendant's request without expressing some ground for opposition, the grand jurors and defendant may very well have thought that the prosecutor was tacitly conceding Jane Doe's role as a witness before the first grand jury. And, if the prosecutor had thereafter applied for a motion to vacate a grand jury order for Jane Doe's testimony, the court could still have exercised its considerable "discretion" to deny the motion as inadequate to meet the less-than-clearly-defined requirement that vacatur be "in the public interest" (CPL 190.50 [3]). Indeed, it was not far-fetched for the prosecutor to fear that, if she did not immediately respond to defendant's statements about Jane Doe's role as a prior grand jury witness, the trial court might later rely on defendant's comments to conclude that there was no longer any reason to quash a subpoena issued by the grand jury; by that time, the prosecutor would have arguably allowed defendant to let the proverbial cat out of the bag without opposition. Tellingly, in his dismissal motions, even defendant did not assert that the prosecutor should have awaited a subpoena and then quashed it rather than rebutting defendant's offer of proof during the grand jury proceeding. In any event, although the prosecutor might have been better advised to pursue a motion to quash, her failure to take that step was not the sort of pervasive misconduct that would impair the integrity of the grand jury proceeding.

3 Indeed, there were only minor differences between: (1) John Doe's description of the shooter, who was reportedly a light-skinned black or Hispanic man with a shapely beard, blotchy complexion, short-cut black Timberland boots, dark pants, and a black hoodie; and (2) defendant, who, according to the officers who testified in the first grand jury, was a light-skinned black man with a goatee, wore black sneakers, and wore dark pants. And, although the parties have not provided us with the police officers' testimony, if any, before the second grand jury, it is notable that, at trial, the officers testified that defendant was arrested near a discarded black hoodie. Ultimately, the grand jurors observed defendant in person in the grand jury room and indicted him despite the alleged differences between his appearance and that of the shooter described by John Doe.

1 Also cited were the presenting prosecutor's insinuations that defendant had committed crimes other than those that were the subject of the proceeding.

2 The majority protests that the second prosecutor's statement, "[h]owever, it would be relevant, if she was going to give testimony in the defendant's favor," merely added nuance to the first prosecutor's categorical pronouncement that Ms. Doe's testimony was not relevant, and did not necessarily mean that Ms. Doe's account was not exculpatory. While this parsing is logically correct, the fact remains that the most accessible meaning was the one the juror actually drew—that Ms. Doe's testimony not only would not be exculpatory but that "basically she would be for [the prosecution]." Even if the second prosecutor's comment was only intended to add nuance, it was demonstrably misleading.

3 The statute provides in relevant part:

> "At any time after such a direction [by the grand jury to call a witness], however, or at any time after the service of a subpoena pursuant to such a direction and before the return date thereof, the people may apply to the court which impaneled the grand jury for an order vacating or modifying such direction or subpoena on the ground that such is in the public interest. Upon such application, the court may in its discretion vacate the direction or subpoena, attach reasonable conditions thereto, or make other appropriate qualification thereof."

4 Obviously attempting to reconcile John Doe's description with James Doe's identification, a juror specifically inquired of defendant whether he had had blotches or rashes on his face at the time of the Williams shooting.

New York Official Reports

186 A.D.3d 1270, 127 N.Y.S.3d 884 (Mem), 2020 N.Y. Slip Op. 04876

**1 The People of the State of New York, Respondent,

v

Shaquille Upson, Appellant.

Supreme Court, Appellate Division, Second Department, New York
2016-05590, 4880/14
September 2, 2020

CITE TITLE AS: People v Upson

HEADNOTES

Crimes
Evidence
Photographs of Crime Scene

Crimes
Evidence
Social Media Content

Paul Skip Laisure, New York, NY (Caitlin Halpern of counsel), for appellant.
Eric Gonzalez, District Attorney, Brooklyn, NY (Leonard Joblove, Camille O'Hara Gillespie, and Denise Pavlides of counsel), for respondent.
Appeal by the defendant from a judgment of the Supreme Court, Kings County (Danny Chun, J.), rendered April 20, 2016, convicting him of murder in the second degree and criminal possession of a weapon in the second degree (two counts), upon a jury verdict, and imposing sentence.

Ordered that the judgment is affirmed.

The defendant's challenges to various remarks made by the prosecutor during the opening and summation are partially unpreserved for appellate review, as the defendant largely failed to object to the challenged remarks (*see* CPL 470.05 [2]; *People v Romero*, 7 NY3d 911, 912 [2006]; ***1271** *People v Thomas*, 143 AD3d 1006 [2016]; *People v Yusuf*, 119 AD3d 619 [2014]; *People v Jeudy*, 115 AD3d 982, 983 [2014]). In any event, the challenged remarks were either fair comment on the evidence and the reasonable inferences to be drawn therefrom, fair response to defense counsel's summation, or otherwise not improper (*see People v Bridges*, 114 AD3d 960 [2014]; *People v Wingfield*, 113 AD3d 798, 799 [2014]; *People v Hawley*, 112 AD3d 968, 969 [2013]).

We agree with the Supreme Court's determination admitting into evidence photographs taken by the police at the scene of the shooting (*see People v Carranza*, 306 AD2d 351, 352 [2003], *affd* 3 NY3d 729 [2004]). The photographs served to illustrate and corroborate witness testimony as to the defendant's proximity to the victim at the time of the shooting, and the number of shots fired. As the manner of death and intent were material issues in the case, the photographs were properly admitted (*see People v Pobliner*, 32 NY2d 356, 369-370 [1973]; *People v Wells*, 161 AD3d 1200 [2018]; *People v Morin*, 146 AD3d 901, 902 [2017]; *People v Stover*, 36 AD3d 837, 838 [2007]).

We disagree, however, with the Supreme Court's determination admitting into evidence certain content from various social media accounts (*see People v Wells*, 161 AD3d at 1200). The People failed to present sufficient evidence that the subject social media accounts belonged to the defendant, that the photographs on the accounts were accurate and authentic, or that the statements found on one of the accounts were made by the defendant (*see People v Price*, 29 NY3d 472, 479-480 [2017]; *cf. People v Franzese*, 154 AD3d 706, 707 [2017]). Nevertheless, the admission of such evidence was harmless as the evidence of the defendant's guilt was overwhelming, and there was no significant probability that the error contributed to the defendant's convictions (*see People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

The defendant's contention that the prosecutor's impeachment of his own witness was improper and in violation of CPL 60.35 is unpreserved for appellate review (*see* CPL 470.05 [2]). In any event, any error was harmless as the evidence of the defendant's guilt was overwhelming, and there was no significant probability that the error contributed to the defendant's convictions (*see People v Crimmins*, 36 NY2d at 241-242).

The sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80 [1982]).

The defendant's remaining contention is without merit.
Rivera, J.P., LaSalle, Barros and Iannacci, JJ., concur.

New York
Official Reports

26 N.Y.3d 620, 46 N.E.3d 1057, 26
N.Y.S.3d 504, 2016 N.Y. Slip Op. 00998

**1 The People of the State
of New York, Appellant
v
Lawrence Watson, Respondent.

Court of Appeals of New York
19
Argued January 14, 2016

Decided February 11, 2016

CITE TITLE AS: People v Watson

SUMMARY

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of that Court, entered December 2, 2014. The Appellate Division (1) reversed, on the law, a judgment of the Supreme Court, New York County (Richard D. Carruthers, J., at substitution of counsel ruling; Juan M. Merchan, J., at trial and sentencing), which had convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree (two counts) and resisting arrest; and (2) remanded the matter for a new trial.

People v Watson, 124 AD3d 95, reversed.

HEADNOTE

Crimes
Right to Counsel
Disqualification—Conflict of Interest—Representation by Public Defense Organization of Defendant and Potential Witness

Where defendant and a possible witness against him were in separate prosecutions arising from a single incident represented by different attorneys from the same public defense organization, the Appellate Division erred in holding that the trial court abused its discretion by relieving defendant's assigned counsel due to the potential conflict of interest. The trial court appropriately balanced defendant's countervailing rights to counsel of his choosing and to effective assistance of counsel, based on the information it had at the time, and reasonably concluded that counsel could not effectively represent defendant due to the organization's representation of the witness and the duty of loyalty counsel's supervisors asserted toward that former client. Prior to defendant's trial, counsel's supervisors determined that there was a potential or actual conflict that prevented counsel from investigating the witness, attempting to locate him, calling him as a witness at trial or cross-examining him if he was called by the People. Even if the institutional representation of the witness did not, in and of itself, present a conflict because knowledge of a large public defense organization's current and former clients is typically not imputed to each attorney employed thereby, the conflict was created by the conditions imposed by counsel's supervisors. Though defendant indicated his willingness to waive the conflict under those conditions, almost immediately thereafter he said that he wanted the witness to be called as a witness at trial. Those competing statements did not clearly demonstrate a knowing waiver, and the trial court could properly decide that it would not accept a waiver under the circumstances.

*621 RESEARCH REFERENCES

Am Jur 2d, Attorneys at Law §§ 188–190, 192, 195; Am Jur 2d, Criminal Law §§ 1101, 1102.

Carmody-Wait 2d, Officers of Court §§ 3:398, 3:399; Carmody-Wait 2d, Right to Counsel §§ 184:105, 184:204.

NY Jur 2d, Attorneys at Law §§ 97–99; NY Jur 2d, Criminal Law: Procedure § 938.

ANNOTATION REFERENCE

See ALR Index under Attorneys; Conflicts of Interest.

FIND SIMILAR CASES ON WESTLAWNEXT

Path: Home > Cases > New York State & Federal Cases > New York State Cases > New York Official Reports Materials

Query: defense counsel conflict interest witness waiver

POINTS OF COUNSEL

Cyrus R. Vance, Jr., District Attorney, New York City (*Dana Poole* and *Susan Gliner* of counsel), for appellant.

The trial judge did not abuse his discretion when, acting upon the report by defendant's attorney and his public defense agency of a conflict of interest created by the agency's dual representation in related cases of defendant and a potential witness at his trial, he relieved counsel and appointed a conflict-free attorney to represent defendant. (*People v Payton*, 22 NY3d 1011; *People v Harris*, 99 NY2d 202; *People v Arroyave*, 49 NY2d 264; *People v Gomberg*, 38 NY2d 307; *People v Carncross*, 59 AD3d 1112, 14 NY3d 319; *People v Gordon*, 272 AD2d 133; *People v Robinson*, 121 AD3d 1179; *People v Lawson*, 65 AD3d 1380; *Wheat v United States*, 486 US 153; *People v Tineo*, 64 NY2d 531.)

Olshan Frome Wolosky LLP, New York City (*Renee M. Zaytsev* of counsel), and *Richard M. Greenberg, Office of the Appellate Defender*, New York City, for respondent.

I. The Court should dismiss this appeal, as appellant has not identified any determinative legal question to be reviewed. (*People v Giles*, 73 NY2d 666; *People v Albro*, 52 NY2d 619; *People v Bay*, 54 NY2d 808; *People v Konstantinides*, 14 NY3d 1; *People v Polhill*, 24 NY3d 995; *People v Holland*, 18 NY3d 840; *People v Omowale*, 18 NY3d 825; *People v Hinton*, 81 NY2d 867; ***622** *People v Amill*, 58 NY2d 967; *Strickland v Washington*, 466 US 668.) II. The Court should affirm the Appellate Division's reversal of Lawrence Watson's conviction because Mr. Watson was denied his Sixth Amendment right to counsel when the lower court disqualified his attorney over a nonexistent conflict of interest. (*People v Arroyave*, 49 NY2d 264; *Matter of Abrams [John Anonymous]*, 62 NY2d 183; *People v Griffin*, 92 AD3d 1, 20 NY3d 626; *People v Chambers*, 133 Misc 2d 868; *United States v Lech*, 895 F Supp 586; *United States v Kliti*, 156 F3d 150; *People v Wilkins*, 28 NY2d 53; *People v Griffin*, 249 AD2d 244; *People v Gomez*, 13 NY3d 6.) III. The Court should affirm the Appellate Division's reversal of Lawrence Watson's conviction even if it finds that there was a potential conflict because any conflict was too remote to warrant disqualification and, in any event, Mr. Watson was willing to waive it. (*Prodell v State of New York*, 125 AD2d 805; *Holloway v Arkansas*, 435 US 475; *Wheat v United States*, 486 US 153; *United States v Camisa*, 969 F2d 1428; *United States v Sullivan*, 381 F Supp 2d 120; *Rowe v De Jesus*, 106 AD2d 284; *People v Glinton*, 72 AD3d 618; *People v Doe*, 98 Misc 2d 805; *People v Salcedo*, 68 NY2d 130; *United States v Perez*, 325 F3d 115.)

OPINION OF THE COURT

Stein, J.

Notwithstanding the general rule that, for the purposes of conflict of interest analysis, knowledge of a large public defense organization's current and former clients is typically not imputed to each attorney employed by the organization, conflicts may nevertheless ****2** arise in certain circumstances involving multiple representations within such organizations. In this case, Supreme Court was placed in the difficult position of having to either relieve defense counsel—thereby depriving defendant of the counsel of his choosing—or permit counsel to continue his representation despite a potential conflict of interest, thereby impinging on defendant's right to the effective assistance of counsel. Under the circumstances presented here, the court did not abuse its discretion by relieving defendant's assigned counsel and appointing conflict-free counsel to represent him. Therefore, we reverse.

I.

Defendant showed a friend a gun in his waistband and threatened to use it against another person. He then went to a park, where he was seen near Toi Stephens. When police arrived, ***623** defendant and Stephens fled separately. Witnesses saw defendant throw a gun during the chase, and a gun was subsequently found in the identified location. Cocaine and marihuana were also found on the ground, and Stephens admitted that the drugs belonged to him. Defendant was charged with criminal possession of a weapon in the second degree (two counts) and resisting arrest. Stephens was charged with drug possession.

Robert Fisher, an attorney employed by New York County Defender Services (NYCDS), was assigned to represent defendant. Eight months later, the People turned over *Rosario* material that revealed that a different attorney from NYCDS had represented Stephens on his criminal charge arising from the same incident. Fisher immediately brought this to the attention of Supreme Court. Fisher stated that he had been looking for Stephens as a possible witness for defendant before becoming aware of the potential conflict of interest. Even though defendant wanted Fisher to continue as his attorney, Fisher was not sure it would be appropriate to do so. The court granted an adjournment to determine whether the situation could be resolved.

At an appearance a few days later, Fisher advised the court that Stephens had entered a guilty plea shortly after his arraignment, and NYCDS no longer represented him. However, because Stephens had not waived confidentiality, Fisher's supervisors at NYCDS prohibited him from

searching for Stephens, calling Stephens as a witness, or conducting any cross-examination if the People called him to testify. Fisher advised defendant that he could not continue to represent defendant unless defendant agreed to waive even the attempt to call Stephens as a witness. Fisher also asked the court to prohibit the People from calling Stephens, because his supervisors had determined that Fisher could represent defendant only under those conditions.

The court stated that it could not prevent the People from calling a relevant witness, and explained to defendant the potential conflict and the difficult position confronting Fisher. Defendant responded that he wanted to keep Fisher as his attorney and waive the conflict, but also that he wanted Stephens to testify. After hearing these statements that were incompatible with an unequivocal waiver, the court relieved Fisher of his assignment and ****3** assigned a new attorney, who represented defendant at trial. The jury convicted defendant of all charges.

***624** The Appellate Division, with one Justice dissenting, reversed the judgment on the ground that the trial court had abused its discretion in relieving Fisher (124 AD3d 95 [1st Dept 2014]). The majority concluded that, because Fisher did not represent Stephens and was not privy to any of his confidential information, the relationship between NYCDS and Stephens did not constitute a conflict (*see id.* at 102-104). The dissent would have held that, at the very least, a potential conflict existed, and the trial court properly acted within its discretion in disqualifying counsel (*see id.* at 107-108 [Tom, J.P., dissenting]). The dissenting Justice granted the People leave to appeal to this Court (2015 NY Slip Op 63184[U] [1st Dept 2015]).

II.

A determination to substitute or disqualify counsel falls within the trial court's discretion (*see People v Carncross*, 14 NY3d 319, 330 [2010]; *People v Tineo*, 64 NY2d 531, 536 [1985]). "That discretion is especially broad when the defendant's actions with respect to counsel place the court in the dilemma of having to choose between undesirable alternatives, either one of which would theoretically provide the defendant with a basis for appellate review" (*Tineo*, 64 NY2d at 536; *see Carncross*, 14 NY3d at 330; *People v Robinson*, 121 AD3d 1179, 1180 [3d Dept 2014]). Criminal courts faced with counsel who allegedly suffer from a conflict of interest must balance two conflicting constitutional rights: the defendant's right to effective assistance of counsel; and the defendant's right to be represented by counsel of his or her own choosing (*see* US Const 6th Amend; *Carncross*, 14 NY3d at 327; *People v Gomberg*, 38 NY2d 307, 312-313 [1975]). Thus, a court confronted with an attorney or firm that represents or has represented multiple clients with potentially conflicting interests faces the prospect of having its decision challenged no matter how it rules—if the court permits the attorney to continue and counsel's advocacy is impaired, the defendant may claim ineffective assistance due to counsel's conflict; whereas, if the court relieves counsel, the defendant may claim that he or she was deprived of counsel of his or her own choosing (*see Wheat v United States*, 486 US 153, 161 [1988]; *Carncross*, 14 NY3d at 330).

Courts "should not arbitrarily interfere with the attorney-client relationship," but must protect the defendant's right to effective assistance of counsel (*Gomberg*, 38 NY2d at 313; *see Carncross*, 14 NY3d at 327; *see also* ***625** *Wheat*, 486 US at 159-160). Thus, the court must satisfy itself that the defendant has made an informed decision to continue with counsel despite the possible conflict, yet avoid pursuing its inquiry too far so as not to intrude into confidential attorney-client communications or discussions of possible defenses (*see Gomberg*, 38 NY2d at 313; *see also Holloway v Arkansas*, 435 US 475, 487 [1978]).

Particularly relevant here, the presumption in favor of a client being represented by counsel of his or her choosing may be overcome by demonstration of an actual conflict or a ****4** serious potential for conflict (*see Wheat*, 486 US at 164). The court may appropriately place great weight upon counsel's representations regarding the presence or absence of a conflict (*see Gomberg*, 38 NY2d at 314), because the attorney is generally in the best position to determine when a conflict of interest exists or is likely to develop during trial (*see Holloway*, 435 US at 485). Depending on when a potential conflict becomes evident, the court may not be aware of the details and ramifications of any conflict, or of the evidence, strategies or defenses that will emerge at trial (*see People v Lloyd*, 51 NY2d 107, 111 [1980]; *Gomberg*, 38 NY2d at 314; *see also Wheat*, 486 US at 162-163 [court must decide whether to allow waiver of conflict "not with the wisdom of hindsight after the trial has taken place, but in the murkier pretrial context" where conflicts are hard to predict]; *Carncross*, 14 NY3d at 328-329 [same]). However, if the court waits until trial—to ascertain what witnesses testify or what strategy or defenses are employed—it runs a serious risk of a mistrial based on the conflict (*see Carncross*, 14 NY3d at 329-330).

Where there have been successive representations of individuals with different goals or strategies, a concern arises that counsel's loyalties may be divided because a lawyer has continuing professional obligations to former clients. Those obligations include a duty to maintain the former client's confidences and secrets (*see* Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.9), " 'which may potentially create a conflict between the former client and a present client' " (*People v Prescott*, 21 NY3d 925, 928 [2013], quoting *People v Ortiz*, 76 NY2d 652, 656 [1990]; *see* Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.7). Here, prior to defendant's trial, Fisher's NYCDS supervisors noted the institutional duty of loyalty to its former client, Stephens. Those supervisors—who presumably were familiar with Stephens's file—determined that there was a potential or actual conflict that prevented ***626** Fisher from investigating Stephens, attempting to locate him, calling him as a witness, or cross-examining him if he was called by the People. Under these circumstances, the trial court did not err in concluding that defendant's statements were insufficient to waive the conflict.

Our decision in *People v Wilkins* (28 NY2d 53 [1971]) does not compel a contrary result. In that case, this Court found that no conflict of interest existed merely because a defendant was represented by the Legal Aid Society and a different staff attorney from that same organization had previously represented—in an unrelated criminal proceeding—the person who was now the complaining witness against Wilkins. There, the purported conflict was not discovered until after Wilkins's trial, and his counsel had no prior knowledge of the separate case involving charges against the complaining witness. Thus, the prior representation could not have affected the representation of Wilkins. We held that, unlike private law firms where knowledge of one member of the firm is imputed to all, large public defense organizations are not subject to such imputation, so there was no inferred or presumed conflict (*see id.* at 56; *compare* Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.10 [addressing imputation of conflict to firm]). ****5**

The current case is distinguishable from *Wilkins*, and we do not disturb the general rule against imputation of knowledge created there. In both cases, counsel worked for a large public defense organization and was initially unaware of another staff attorney's representation of a potential witness in the client's case, because there was apparently no free flow of information among staff attorneys. However, unlike counsel in *Wilkins*, defense counsel here became aware before defendant's trial of NYCDS's prior representation of Stephens, and the organization's representation of Stephens arose from the same incident that led to defendant's arrest. Additionally, Fisher's supervisors expressly prohibited him from attempting to locate Stephens (apparently even by searching in publicly-available sources) or questioning him. This directly impinged on Fisher's representation of defendant. Not only did the supervisors instruct Fisher to refrain from investigating Stephens, they also directed that he could not cross-examine Stephens if he was called by the People. Therefore, even if the institutional representation of Stephens did not, in and of itself, present a conflict, such a conflict was created by the conditions imposed by Fisher's supervisors, which hampered his ability to zealously ***627** and single-mindedly represent defendant. Although the court could have inquired as to why NYCDS took the position of forbidding any investigation into or questioning of Stephens, the court was in a precarious situation because such an inquiry might have intruded into confidential attorney-client information. Thus, the court did not abuse its discretion by relieving counsel once those restrictions were announced.

Defendant's assertion that he was never given the opportunity to waive the conflict is unavailing. Although defendant indicated that he would be willing to waive the conflict, almost immediately thereafter he said that he wanted Stephens to be called as a witness at trial. These competing statements did not clearly demonstrate a knowing waiver, or that defendant would knowingly waive Fisher's conflict. Moreover, had he attempted to do so, it would have been within the court's authority to decline to accept such a waiver (*see Carncross*, 14 NY3d at 327-328). A trial

> "court must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses" (*Wheat*, 486 US at 163).

Further, while defendant might have agreed to allow counsel to refrain from calling Stephens, the People indicated the possibility that they would call him as a witness, depending on the defense that was raised—including the potential assertion that someone other than defendant possessed and dropped the gun—which would not be known until trial. Although a waiver of the conflict by defendant would have permitted counsel to refrain from cross-examining Stephens if he was called, that would be a tactic based on loyalty to Stephens as a former NYCDS client, not a strategy employed in the best

interest of defendant. Additionally, if the court had waited until trial and the People had decided to call Stephens, a mistrial could ****6** have resulted (*see Carncross*, 14 NY3d at 329-330). Thus, the court could properly decide that it would not accept a waiver in these circumstances, instead choosing to protect defendant's right to the effective assistance of counsel in order to ensure a fair trial (*see Carncross*, 14 NY3d at 327-328; *see also Wheat*, 486 US at 162-163).

***628** In sum, the Appellate Division erred in holding that the trial court abused its discretion. Supreme Court appropriately balanced defendant's countervailing rights, based on the information it had at the time, and reasonably concluded that Fisher could not effectively represent defendant due to NYCDS's representation of Stephens and the duty of loyalty Fisher's supervisors were asserting toward that former client. Accordingly, the Appellate Division order should be reversed and the case remitted to that Court for consideration of the facts and issues raised, but not determined, on the appeal to that Court.

Judges Pigott, Rivera, Abdus-Salaam and Fahey concur; Chief Judge DiFiore and Judge Garcia taking no part.

Order reversed and case remitted to the Appellate Division, First Department, for consideration of the facts and issues raised but not determined on the appeal to that Court.

New York Official Reports

161 A.D.3d 1200, 77 N.Y.S.3d 668, 2018 N.Y. Slip Op. 03862

**1 The People of the State of New York, Respondent,

v

Christopher Wells, Appellant.

Supreme Court, Appellate Division, Second Department, New York
2014-11908, 223/13
May 30, 2018

CITE TITLE AS: People v Wells

HEADNOTES

Crimes
Harmless and Prejudicial Error
Admission of Photographs Found on Facebook and Instagram

Crimes
Harmless and Prejudicial Error
Prosecutor's Summation Comments were Fair

Paul Skip Laisure, New York, NY (Michael Arthus of counsel), for appellant.
Michael E. McMahon, District Attorney, Staten Island, NY (Morrie I. Kleinbart and Anne Grady of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Richmond County (Stephen J. Rooney, J.), rendered December 23, 2014, convicting him of murder in the second degree and criminal possession of a weapon in the second degree, upon a jury verdict, and imposing sentence.

Ordered that the judgment is affirmed.

We agree with the Supreme Court's determination admitting certain surveillance video footage from the security system located in a building near the subject shooting, as the People presented sufficient evidence that the video footage accurately represented the events being depicted (*see People v Price*, 29 NY3d 472, 476 [2017]; *People v Patterson*, 93 NY2d 80, 84 [1999]; *People v Lynes*, 49 NY2d 286, 291-292 [1980]).

We disagree with the Supreme Court's determination admitting photographs depicting the defendant found on Facebook and Instagram, inasmuch as the People failed to present sufficient evidence that the photographs were accurate and authentic (*see People v Price*, 29 NY3d at 479-480; *cf. People v Franzese*, 154 AD3d 706, 707 [2017]). However, the admission of the photographs was harmless, as the proof of the defendant's guilt was overwhelming and there is no significant probability that the jury would have acquitted had the photographs not been admitted (*see People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

We agree with the Supreme Court's determination admitting photographs taken by the medical examiner during the victim's autopsy. The photographs served to illustrate and corroborate the medical examiner's testimony as to the nature and location of the victim's wounds and his manner of death, and to show the shooter's intent. As the manner of death and intent were material issues in the case, the photographs were properly admitted (*see People v Pobliner*, 32 NY2d 356, 369-370 [1973]; *People v Morin*, 146 AD3d 901, 902 [2017]).

The defendant's contention that he was deprived of a fair trial by certain comments made by the prosecutors during the People's opening statement and summation is almost entirely ***1201** unpreserved for appellate review since he either failed to object or made only a general one-word **2 objection to nearly all of the remarks he now challenges (*see* CPL 470.05 [2]; *People v Spigner*, 153 AD3d 1289, 1289-1290 [2017]). In any event, the majority of the challenged comments were either fair comment on the evidence and the inferences to be drawn therefrom (*see People v Ashwal*, 39 NY2d 105 [1976]), fair response to the defense summation (*see People v Galloway*, 54 NY2d 396 [1981]), or otherwise not improper. To the extent that some of the comments were improper, they did not deprive the defendant of a fair trial.

The defendant's remaining contentions are unpreserved for appellate review and, in any event, without merit. Austin, J.P., Roman, Sgroi and Connolly, JJ., concur.

End of Document

New York
Official Reports

28 N.Y.2d 53, 268 N.E.2d 756, 320 N.Y.S.2d 8

The People of the State of
New York, Respondent,
v.
Harold A. Wilkins, Appellant.

Court of Appeals of New York
Argued November 23, 1970;

decided February 25, 1971.

CITE TITLE AS: People v Wilkins

HEADNOTES

Crimes
dual representation by counsel

Representation of defendant by Legal Aid Society and its representation of complaining witness against defendant in unrelated criminal proceeding by different staff attorneys who were not aware thereof, did not create conflict of interest and did not deprive defendant of effective representation of counsel. ***54**

(1) The representation of defendant by the Legal Aid Society and its representation of the complaining witnessagainst defendant in an unrelated criminal proceeding, by different staff attorneys who were not aware of the fact, did not create a per se conflict of interest of defendant's trial and did not deprive defendant of the effective representation of counsel. In the case of a large public-defense organization such as the Legal Aid Society, the rule applicable to law firms that knowledge of one member of a law firm will be imputed by inference to all members does not apply. Even if the Legal Aid Society were treated like a law partnership, there is no evidence that information concerning defendants being represented by the society flows freely within the office, or that there was actual knowledge of the dual representation. In view of the nature of the organization and the scope of its activities, it cannot be presumed that complete and full flow of "client" information between staff attorneys exists, in order to impute knowledge to each staff attorney within the office. Moreover, defendant does not allege a single factor which might have deterred his counsel from presenting an effective defense, nor does he claim that his defense was not conducted in a capable and diligent manner. Absent a showing that the particular staff attorney who defended defendant knew of a potential conflict and was inhibited or restrained thereby during trial, prejudice to defendant cannot be inferred.

People v. Wilkins, 34 A D 2d 896, affirmed.

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered May 19, 1970, which affirmed an order of the Supreme Court (Joseph A. Brust, J.), entered in Bronx County, denying, without a hearing, a motion by defendant for a writ of error *coram nobis* to vacate a judgment of said court convicting defendant of the crimes of robbery in the second degree (two counts) and unlawful possession of a weapon as a felony.

POINTS OF COUNSEL

Harry R. Pollak for appellant. The conflicting representation of defendant and the complaining witness by the same attorney of record, an error not apparent on the face of the record, requires that a writ of error *coram nobis* issue herein and that the judgment be vacated and a new trial ordered. (*Glasser v. United States*, 315 U. S. 60; *Porter v. United States*, 298 F. 2d 461; *Case v. State of North Carolina*, 315 F. 2d 743; *Campbell v. United States*, 352 F. 2d 359; *People v. Byrne*, 17 N Y 2d 209; *Craig v. United States*, 217 F. 2d 355; *Whitaker v. Warden, Maryland Penitentiary*, 362 F. 2d 838; *Gideon v. Wainwright*, 372 U. S. 335; *Betts v. Brady*, 316 U. S. 455; *People v. Jenkins*, 32 A D 2d 632.) ***55**
Burton B. Roberts, District Attorney (*Ronald D. Degen* and *Donald B. Liberman* of counsel), for respondent. Defendant's motion was properly denied without a hearing. (*Porter v. United States*, 298 F. 2d 461; *Glasser v. United States*, 315 U. S. 60; *United States v. Paz-Sierra*, 367 F. 2d 930, 386 U. S. 935; *Whitaker v. Warden, Maryland Penitentiary*, 362 F. 2d 838; *United States v. Dardi*, 330 F. 2d 316, 379 U. S. 845; *People v. Byrne*, 17 N Y 2d 209; *People v. Quick*, 30 A D 2d 561, 26 N Y 2d 773; *Olshen v. McMann*, 378 F. 2d 993, 389 U. S. 874; *United States v. Calarco*, 424 F. 2d 657.)

OPINION OF THE COURT

Jasen, J.

On October 30, 1968, defendant was convicted of the crimes of robbery and unlawful possession of a weapon. On May 1, 1969 the Legal Aid Society, which had represented him during the trial, was assigned to perfect the appeal. While preparing the appeal, Legal Aid first discovered that the society had also been assigned to represent, in an unrelated criminal proceeding, the complaining witness at defendant's trial. Subsequently, Legal Aid, on its own motion, was relieved of defendant's assignment and other counsel designated to prosecute the appeal. The Appellate Division affirmed the judgment of conviction. On September 3, 1969, while his direct appeal was pending, defendant instituted this *pro se* motion for a writ of error *coram nobis*, seeking to vacate the judgment of conviction on the ground that he was denied his constitutional right of effective counsel. Specifically, he contends that the assignment of the Legal Aid Society to represent the complaining witness in an unrelated criminal proceeding created a per se conflict of interest at his trial.

We are not persuaded that the unknowing dual representation of both the complaining witness and the defendant does, in and of itself, deprive a defendant of effective representation of counsel. A mere contention that the defendant has been deprived of effective counsel, without some showing of a conflict of interest or prejudice, is insufficient to grant *coram nobis* relief.

That is not to say, however, that a defendant would not be denied his constitutional right of effective counsel, if the *same* lawyer represented conflicting interests without his knowledge and assent. (*Glasser v. United States*, 315 U. S. 60; *United States v. Hayman*, 342 U. S. 205; ***56** *People v. Byrne*, 17 N Y 2d 209; *Porter v. United States*, 298 F. 2d 461; *United States ex rel. Miller v. Myers*, 253 F. Supp. 55; *People v. Stoval*, 40 Ill. 2d 109.) The thrust of defendant's argument, as we view it, is not that there was dual representation of conflicting interests by the same lawyer, but that the mere dual representation by the same *attorney of record*, designated on behalf of the Legal Aid Society, raises a presumption of deprivation of effective representation of counsel.

While it is true that for the purpose of disqualification of counsel, knowledge of one member of a law firm will be imputed by inference to all members of that law firm (*Laskey Bros. of W. Va. v. Warner Bros. Pictures*, 224 F. 2d 824), we do not believe the same rationale should apply to a large public-defense organization such as the Legal Aid Society. The premise upon which disqualification of law partners is based is that there is within the law partnership a free flow of information, so that knowledge of one member of the firm is knowledge to all.

Even if we were to treat the Legal Aid Society to be analogous to a law partnership, there is no evidence that information concerning defendants being represented[1] by the society flows freely within the office, or that there was actual knowledge of the dual representation by the society. The New York City Legal Aid Society, a nonprofit membership organization authorized by law to represent indigent persons[2], consists of four branches[3] and three units[4], and is undoubtedly the largest legal defense organization in the world. In Criminal Court work alone, the society has approximately 150 lawyers engaged in all of the courts in the city exercising criminal jurisdiction.

In view of the nature of the organization and the scope of its activities, we cannot presume that complete and full flow of "client" information between staff attorneys exists, in order to impute knowledge to each staff attorney within the office. ***57**

Moreover, defendant does not allege a single factor which might have deterred his counsel from presenting an effective defense, nor does he claim that his defense was not conducted in a capable and diligent manner.

Absent a showing that the particular staff attorney who defended the defendant knew of a potential conflict and was inhibited or restrained thereby during trial, defendant's prejudice cannot be inferred.

Accordingly, the order of the Appellate Division, denying defendant's application for a writ of error *coram nobis*, should be affirmed.

Chief Judge Fuld and Judges Burke, Scileppi, Bergan, Breitel and Gibson concur.
Order affirmed.

Footnotes

1 Dispositions by the Legal Aid Society Criminal Bureau in 1969:

Criminal Court	143,671
Supreme Court	11,628
Federal Court	1,243

2 Rules, Supreme Court, Appellate Division, First Department, section 606.1. (22 NYCRR 606.1.)

3 Civil, Criminal, Family Court and Appeals Bureau.

4 Immigration, Mental Health and Legislation.

New York Official Reports

137 Misc.2d 400, 520 N.Y.S.2d 924

The People of the State
of New York, Plaintiff,
v.
George Young, Defendant

Supreme Court, Criminal Term, Nassau County
7741
November 4, 1987

CITE TITLE AS: People v Young

HEADNOTES

Grand Jury
Right to Appear before Grand Jury
Right to Counsel

Defendant had properly notified the District Attorney of his desire to testify before the Grand Jury and had requested an adjournment of three weeks when his retained counsel could be present, and although no evidence had as yet been presented to the Grand Jury, the District Attorney refused the request and advised defendant to obtain other counsel. This constituted an abridgment of defendant's constitutional right to counsel and a deprivation of his statutory right to testify before the Grand Jury. Accordingly, the indictment is dismissed.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Criminal Law, §§ 692-695, 732-737, 967-974; Grand Jury, §§ 32-38.

NY Jur 2d, Criminal Law, §§46, 48, 2246.

ANNOTATION REFERENCES

Accused's right to counsel under the Federal Constitution--Supreme Court cases. 18 L Ed 2d 1420.

Power of court to control evidence or witnesses going before Grand Jury. 52 ALR3d 1316.

Privilege against self-incrimination as to testimony before Grand Jury. 38 ALR2d 225.

APPEARANCES OF COUNSEL

George Nager for defendant. *Denis Dillon, District Attorney (J. Kenneth Littman* of counsel), for plaintiff.

OPINION OF THE COURT

Marie G. Santagata, J.

The defendant has moved this court for an order pursuant to CPL 210.20 dismissing the indictment on the ground that the defendant was not accorded the opportunity to testify before the Grand Jury (CPL 190.50) with his attorney (CPL 190.52).

Defendant's motion is granted. ***401**

CPL 190.50 (5) (a) provides that a defendant possesses the statutory right to testify before a Grand Jury in his own behalf provided he satisfies the procedural requirements of notice to the District Attorney. In exercising this right, CPL 190.52 ensures a criminal defendant the additional right to be represented by retained counsel of his choice or by court-appointed counsel if he is indigent. Thus, the right to counsel embodied in CPL 190.52 is part of the defendant's statutory right to testify before the Grand Jury. Denial of a defendant's right to counsel is, inferentially, a denial of the right to testify provided in CPL 190.50 (5) (a). Consequently, an indictment procured in violation of a defendant's right to counsel mandates a dismissal under CPL 190.50 (5) (c).

In this case the defendant complied with the statutory requirements of notifying the District Attorney that he wished to testify before the Grand Jury. He requested an adjournment of three weeks because of the unavailability of his retained attorney, who was going to be out of the country. The Assistant District Attorney refused to schedule the Grand Jury presentation for a date after the attorney's return, suggesting that defendant obtain another attorney.

This was not an unnecessary and/or unreasonable dilatory tactic by the defendant. It was not motivated by "bad faith or manipulation" *(People v Arroyave*, 49 NY2d 264, 270, 271; *People v Diaz*, 137 Misc 2d 181); nor would the requested adjournment cause an indefinite delay in the presentment *(People v Ferrara*, 99 AD2d 257, 261); nor had the defendant made previous requests for adjournments *(supra)*.

The refusal to delay the presentment caused undue prejudice to the defendant whereas the People would not have been prejudiced by rescheduling the presentment. At the time of defendant's request, the Grand Jury had not heard any evidence relating to this matter and the Assistant District Attorney was not under any time constraints to start and/or complete the presentment before the expiration of the Grand Jury panel's term.

The right of a criminal defendant to be represented by counsel of his own choice is a principle which has long been recognized by both the State and Federal courts. *(Chandler v Fretag*, 348 U.S. 3, 9; *Powell v Alabama*, 287 U.S. 45, 53; *People v Price*, 262 NY 410, 412; *People v McLaughlin*, 291 NY 480, 482; *People v Hannigan*, 7 NY2d 317, 318.)

The refusal to adjourn the presentment abridged the defendant's ***402** constitutional right to be represented by counsel of his own choice, thus depriving the defendant of his statutory rights to testify as guaranteed in CPL 190.50 (5).

Accordingly, defendant's motion to dismiss the indictment is granted.

The District Attorney is hereby authorized to submit the charge to the same or another Grand Jury within 45 days of the date of the issuance of this order. (CPL 210.20 [4].) ***403**

New York Official Reports

186 A.D.2d 178, 587 N.Y.S.2d 766

Christine Severino et al., Respondents,
v.
John DiIorio et al., Appellants.

Supreme Court, Appellate Division,
Second Department, New York
90-04280
(September 21, 1992)

CITE TITLE AS: Severino v DiIorio

HEADNOTE

ATTORNEY AND CLIENT
DISQUALIFICATION

(1) In medical malpractice action, order which denied motions to disqualify law firm as counsel for plaintiffs reversed --- When action stemming from medical services provided infant plaintiff at time of her birth was commenced, attorney was member of law firm which had represented defendant hospital in number of medical malpractice actions and which was actually doing so at that time; attorney actively participated in litigation where firm defended defendant against medical malpractice claims, but did not directly participate in defense of instant action; approximately six months after commencement of this action, attorney became associated with law firm that commenced this action on plaintiffs' behalf --- On facts of this case, disqualification is called for; there is reasonable probability attorney acquired confidential or strategically valuable information that may be of use to plaintiffs here; plaintiff's law firm is in position of either compromising its zeal in order to avoid making use of information probably known to one of its present associates, or compromising confidences of that associate's former client; any doubts about existence of conflict should be resolved in favor of disqualification so as to avoid appearance of impropriety.

In an action to recover damages for medical malpractice, etc., the defendant Booth Memorial Medical Center and the defendants DiIorio, Immerman, Reiss, Moise and Lavy separately appeal from an order of the Supreme Court, Queens County (Rosenzweig, J.), dated April 24, 1990, which denied their separate motions to disqualify the law firm of Kramer, Dillof, Tessel, Duffy & Moore as counsel for the plaintiffs.

Ordered that the order is reversed, on the facts and as a matter of discretion, without costs or disbursements, the motions are granted, the law firm of Kramer, Dillof, Tessel, Duffy & Moore is disqualified from representing the plaintiffs in this action, and no further proceedings shall be taken against the plaintiffs, without leave of court, until the expiration of 30 days after service upon them of a copy of this decision and ***179** order, with notice of entry, which shall constitute notice to appoint another attorney under CPLR 321 (c).

This medical malpractice action stems from the medical services provided the infant plaintiff at the time of her birth. In 1988, when this action was commenced, and indeed at the time of the acts giving rise to it, Thomas J. Principe was a member of Ivone, Devine & Jensen, a law firm which had represented the defendant Booth Memorial Hospital (hereinafter Booth) in a number of medical malpractice actions and which was actually doing so at that time. Principe had joined Ivone, Devine & Jensen, a firm consisting of 10 lawyers, as an associate in 1986, becoming a partner in 1987. During the course of his tenure at that firm, Principe actively participated in litigation where the firm defended Booth against medical malpractice claims. In one such case, the alleged malpractice, like the malpractice alleged here, occurred in Booth's delivery room and the injuries allegedly sustained are remarkably similar. In the course of his representation of Booth in that case, Principe communicated directly with Booth, interviewed its employees, interviewed experts, conducted depositions on Booth's behalf, and appeared on Booth's behalf at conferences with the court. Moreover, Principe tried through to a verdict at least one medical malpractice case on Booth's behalf. Although it does not appear that Principe ever directly participated in the defense of the instant action, all members and employees of Ivone, Devine & Jensen had access to all case files.

In April 1989, approximately six months after the commencement of this action, Principe left Ivone, Devine & Jensen and became associated with Kramer, Dillof, Tessel, Duffy & Moore, the law firm that commenced this action on the plaintiffs' behalf. Within one month, Booth, joined by the defendant physicians, made application for removal

of Kramer, Dillof, Tessel, Duffy & Moore as counsel for the plaintiffs on the grounds that Principe's new association with that firm enables it to use secrets and confidences of a former client on behalf of a present client and that it gives rise to the appearance of impropriety *(see,* Code of Professional Responsibility Canons 4, 9; *see also,* Code of Professional Responsibility Canons 5, 7). The plaintiffs opposed disqualification, urging that there is no substantial relationship between this action and the medical malpractice matters where Principe dealt directly with Booth, and that there is no evidence that Principe in fact acquired any specific pertinent confidential information *(see, Juergens v Schanman,* 182 AD2d 740). Accordingly, ***180** the plaintiffs maintain that the Supreme Court properly exercised its discretion *(see, Fischer v Deitsch,* 168 AD2d 599) when it denied the motions for disqualification. However, we conclude that, on the facts of this case, disqualification is called for.

It is apparent from the nature of Principe's actual involvement with Booth *(cf., Lopez v Precision Papers,* 99 AD2d 507) and from the fact that Principe was a partner with the small firm of Ivone, Devine & Jensen, when it began the defense of this action on behalf of Booth, that there is a reasonable probability that Principe acquired confidential or strategically valuable information that may be of use to the plaintiffs here *(see, Matter of Hof,* 102 AD2d 591, 594; *Colonie Hill v Duffy,* 86 AD2d 645; *see also, Matter of Fleet v Pulsar Constr. Corp.,* 143 AD2d 187). The firm of Kramer, Dillof, Tessel, Duffy & Moore is thus in the position of either compromising its zeal in order to avoid making use of information probably known to one of its present associates, or compromising the confidences of that associate's former client *(see, Narel Apparel v American Utex Intl.,* 92 AD2d 913; *see also, Matter of Mann,* 111 AD2d 652). It is such conflicts which the Code of Professional Responsibility was designed to avoid.

We recognize the importance of the right to be represented by counsel of one's choosing *(see, Schmidt v Magnetic Head Corp.,* 97 AD2d 151, 163-164; *see also, S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.,* 69 NY2d 437, 443). However, we are also mindful that any doubts about the existence of a conflict should be resolved in favor of disqualification so as to avoid the appearance of impropriety *(see, Matter of Mann, supra; Schmidt v Magnetic Head Corp., supra,* at 276-277). Under the particular circumstances of this case *(cf., Lopez v Precision Papers, supra),* including the lack of any indication that the defendants' prompt disqualification applications were made in bad faith or to gain an untoward tactical advantage *(see, Lopez v Precision Papers, supra,* at 508; *see also, Poli v Gara,* 117 AD2d 786), we conclude that it would be improper for Kramer, Dillof, Tessel, Duffy & Moore to continue to represent the plaintiffs in this litigation *(see, Cardinale v Golinello,* 43 NY2d 288, 295).

Harwood, J. P., Balletta, Rosenblatt and Ritter, JJ., concur.

New York
Official Reports

83 N.Y.2d 303, 632 N.E.2d 437,
610 N.Y.S.2d 128, 62 USLW 2638

Sheldon H. Solow et al., Appellants,

v.

W. R. Grace & Company, Respondent.

Court of Appeals of New York
26
Argued February 8, 1994;

Decided March 24, 1994

CITE TITLE AS: Solow v Grace & Co.

SUMMARY

Appeal, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of that Court, entered May 13, 1993, which (1) reversed, on the law, an order of the Supreme Court (Harold Baer, Jr., J.), entered in New York County, denying a motion by defendant to disqualify the law firm of Stroock & Stroock & Lavan from representing plaintiffs in this action, and (2) granted the motion. The following question was certified by the Appellate Division: "Was the order of this Court, which reversed the order of the Supreme Court, properly made?"

Solow v Grace & Co., 193 AD2d 459, reversed.

HEADNOTES

Attorney and Client
Disqualification
Law Firm--Representation Adverse to Interests of Former Client-- Disqualification as Matter of Law

(1) If an attorney has left a law firm after representing a client in a matter, and the law firm then seeks to represent another client in a substantially related matter which is adverse to the interests of the former client, the court must presume that the rights of the former client are jeopardized by the firm's subsequent representation of the other client, but the firm should be allowed to rebut that presumption by facts establishing that the firm's remaining attorneys possess no confidences or secrets of the former client. However, for firms whose attorneys are so intimately acquainted with all the work in the office that they can be expected to share client confidences and ideas about how to handle client problems as a matter of course, disqualification will be imposed as a matter of law without a hearing.

Attorney and Client
Disqualification
Law Firm--Representation Adverse to Interests of Former Client--Showing Necessary to Permit Representation

(2) If an attorney has left a law firm after representing a client in a matter, and the law firm then seeks to represent another client in a substantially related matter which is adverse to the interests of the former client, the court must presume that the rights of the former client are jeopardized by the firm's subsequent representation of the other client, but the firm should be allowed to rebut that presumption by facts establishing that the firm's remaining attorneys possess no confidences or secrets of the former client. If the firm can demonstrate prima facie that there is no reasonable possibility that any of its other attorneys acquired confidentialinformation ***304** concerning the client, a hearing should be held after which the court may determine that disqualification may be unnecessary. The evidence must be sufficient, however, to establish that the former client's interests are fully protected and to overcome any suggestion of impropriety.

Attorney and Client
Disqualification
Law Firm--Representation Adverse to Interests of Former Client-- Representation Permitted

(3) Where an attorney left a law firm after representing a client in an action, and the law firm then sought to represent another client in a substantially related action which was adverse to the interests of the former client, a motion by the former client to disqualify the firm from participating in the present action is denied since the record establishes that the only matter handled by the firm for the former client was the preparation of an expert witness in the prior litigation, the people primarily responsible for handling that matter left the firm several years prior to the current representation, and the

attorneys remaining at the firm had, at most, limited contact with the prior matter. Moreover, in a large, departmentalized firm, such as this firm, the attorneys are not usually so intimately acquainted with all the work in the office that they can be expected to share client confidences and ideas about how to handle client problems as a matter of course, and that suggests that representation is permissible.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Attorneys at Law, § 184.

NY Jur 2d, Attorneys at Law, §72.

ANNOTATION REFERENCES

See ALR Index under Attorney or Assistance of Attorney.

POINTS OF COUNSEL

Stroock & Stroock & Lavan, New York City *(Charles G. Moerdler, Joseph L. Forstadt, Joseph J. Giamboi* and *Amanda F. Shechter* of counsel), for appellants.

Barbara Billauer's prior retention as a consultant to prepare Dr. Seaton during her tenure at Stroock does not provide a basis for disqualifying Stroock from representing Solow in this matter. *(Schmidt v Magnetic Head Corp.,* 101 AD2d 268; *Magjuka v Greenberger,* 46 AD2d 867; *Fischer v Deitsch,* 168 AD2d 599; *Hunkins v Lake Placid Vacation Corp.,* 120 AD2d 199; *Saftler v Government Empls. Ins. Co.,* 95 AD2d 54; *Cardinale v Golinello,* 43 NY2d 288; *Amrod v Doran,* 107 AD2d 575; *Greene v Greene,* 47 NY2d 447; *Niesig v Team I,* 76 NY2d 363; *S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.,* 69 NY2d 437.) ***305**

Cahill Gordon & Reindel, New York City *(John R. Vaughan, P. Kevin Castel, Marshall Cox* and *William F. Dahill* of counsel), for respondent.

I. The Court below correctly applied this Court's *Cardinale* ruling. *(Cardinale v Golinello,* 43 NY2d 288; *T. C. Theatre Corp. v Warner Bros. Pictures,* 113 F Supp 265; *Cooke v Laidlaw Adams & Peck,* 126 AD2d 453; *Forest Park Assocs. Ltd. Partnership v Kraus,* 175 AD2d 60; *Matter of Hof,* 102 AD2d 591; *Forbush v Forbush,* 107 AD2d 375; *Flaum v Birnbaum,* 107 AD2d 1087; *Gabri v County of Niagara,* 127 Misc 2d 623; *Nichols v Village Voice,* 99 Misc 2d 822; *Chinatown Apts. v New York City Tr. Auth.,* 100 Misc 2d 495.)

II. The Court should retain its bright line standard for disqualifying lawyers and law firms for conflict. *(Cardinale v Golinello,* 43 NY2d 288; *Saftler v Government Empls. Ins. Co.,* 95 AD2d 54; *Amrod v Doran,* 107 AD2d 575; *Letizia v Letizia,* 117 AD2d 587; *Rotante v Lawrence Hosp.,* 46 AD2d 199; *Flaum v Birnbaum,* 107 AD2d 1087; *Desbiens v Ford Motor Co.,* 81 AD2d 707; *Messina v Messina,* 175 AD2d 866; *Macro Cash & Carry Corp. v Berkman,* 81 AD2d 783.)

III. The courts below were plainly correct in ruling that the *Enterprise* case and this case are substantially related. *(Major v Waverly & Ogden,* 7 NY2d 332.)

IV. Stroock itself owes a duty of loyalty to its former client Grace. *(Cardinale v Golinello,* 43 NY2d 288.)

V. The American Bar Association Model Rules of Professional Conduct have no application to New York law affecting the disqualification of lawyers for conflict. *(Cardinale v Golinello,* 43 NY2d 288.)

OPINION OF THE COURT

Simons, J.

Stroock & Stroock & Lavan represent plaintiffs in this action to recover damages for asbestos contamination resulting from the use of fireproofing materials manufactured by defendant W. R. Grace & Co. Stroock had previously defended Grace in an action entitled *City of Enterprise v Grace & Co.* (Cir Ct, Coffee County, Ala, Civ No. 85- 87), which also involved the contamination of a premises by asbestos. Thus, Grace moved to disqualify the Stroock firm from participating in the present action and the issue is whether it is entitled to that relief.

The courts below disagreed on the question. Supreme Court held that there was a substantial relationship between the issues in the current litigation and those in *City of Enterprise,* ***306** but denied the motion to disqualify, deciding that Stroock had successfully established that the attorneys presently with the firm had not been privy to any confidences or secrets of Grace acquired during the prior representation. The Appellate Division, relying on our decision in *Cardinale v Golinello* (43 NY2d 288), held that there was an irrebuttable presumption that all the firm's attorneys had knowledge of confidential information learned during its prior representation of Grace in the *City of Enterprise* matter. Accordingly, it reversed and certified the following question: "Was the order of this Court, which reversed the order of the Supreme Court, properly made?"

I.

A lawyer may not both appear for and oppose a client on substantially related matters when the client's interests are

adverse *(see, Greene v Greene,* 47 NY2d 447, 451). Thus, a single practitioner who had previously represented defendant in this matter, would be disqualified from representing plaintiff. The rule has been extended to provide that if one attorney in a firm is disqualified from representing a client, then all attorneys in the firm are disqualified *(Cardinale v Golinello, supra)*. This is so because there is an irrebuttable presumption of shared confidences among attorneys employed by the firm which forecloses the firm from representing others in the future in substantially related matters.

The rule fully implements attorneys' fiduciary duties of loyalty and confidentiality to the client and their ethical obligation to avoid the appearance of impropriety. In the case before us, however, the attorney who represented Grace in the prior matter, one of 372 attorneys employed by Stroock, left the firm well before it was retained in this litigation. In these circumstances, Stroock contends that the strict enforcement of the irrebuttable presumption rule gives too much weight to those ethical concerns and unduly impairs related policy objectives involving the right of clients to select counsel of their choice and favoring the mobility of attorneys. It maintains that it should be able to avoid disqualification by demonstrating that the remaining attorneys have no knowledge of the client's prior matter; that the client's confidences and secrets, if any there were, left with the departing partner. For the reasons which follow, we conclude Stroock is correct. We, therefore, reverse the order of the Appellate Division and answer the certified question in the negative. ***307**

II.

Stroock was retained as cocounsel in this case in 1992, some five years after the action was commenced, by plaintiffs' attorney-of-record. Earlier it had represented Grace in work performed principally by attorney Barbara Billauer. She had been a partner at Anderson Russell Kill & Olick from 1982 to 1986 and while there had represented Grace as a defendant in asbestos lawsuits. In 1986 Ms. Billauer left the Anderson office and became a partner at Stroock. She remained there until 1990. During that time, in the six months between September 30, 1986 and March 18, 1987, Stroock performed work on behalf of Grace in the *City of Enterprise* litigation.

The retention of Stroock in *City of Enterprise* was made, on Grace's behalf, by the Boston law firm of Goodwin, Procter & Hoar, counsel defending Grace nationally in asbestos matters. The Goodwin firm hired Stroock for the limited purpose of preparing Dr. Seaton, an independent expert retained by Grace, for deposition and possible testimony. Ms. Billauer, assisted by a first-year associate and several paralegals, was responsible for the matter and reported to Stroock partners Jay Mayesh and Joseph Forstadt. She and the associate and paralegals who assisted her have all left Stroock. While Mr. Forstadt remains and is expected to play a major role in Stroock's current representation of plaintiffs, Supreme Court found that his role in the *City of Enterprise* litigation was negligible. Indeed, billing records show that neither Mr. Mayesh nor Mr. Forstadt billed any time to Grace on the matter. Joseph Giamboi, a Stroock first-year associate at the time of the *Enterprise* litigation, billed 30 minutes to Grace. Mr. Giamboi stated in his affidavit that he had been involved in planning a presentation on asbestos at the time and, for that purpose, he had reviewed copies of published articles concerning the subject which were in the *City of Enterprise* files. He denies having reviewed any confidential information concerning Grace or its expert. However, like Mr. Forstadt, Mr. Giamboi is actively involved in the current litigation and is scheduled to depose several Grace experts.

A Stroock associate who reviewed the files relating to the *City of Enterprise* matter, stated in the moving papers that they contained only published articles about asbestos and contained no confidential or proprietary information concerning Grace. Ms. Billauer also swore that her representation of Grace while at Stroock consisted solely of drafting a hypothetical ***308** direct trial examination of Dr. Seaton and preparing him for trial. This preparation, she stated, was based exclusively on her collection and review of public documents on the subject and Dr. Seaton's medical expertise. Finally, Ms. Billauer stated that the only people with whom she might have discussed her prior representation of Grace while at Anderson Russell were a first-year associate and a paralegal, both of whom have since left Stroock. The statements in these affidavits were corroborated by the evidence contained in Stroock's computerized billing records. Based upon this, Stroock maintains that it has rebutted any claim that its representation of plaintiff will compromise confidences of Grace and that because it has done so it should not be disqualified.

In denying Grace's motion, Supreme Court reasoned that while the presumption of knowledge among attorneys in a firm is irrebuttable so long as the attorney who worked on the prior matter remains at a firm, the presumption that those remaining are aware of client confidences in cases they themselves did not handle is rebuttable after the affected

attorney leaves and that Stroock had sufficiently rebutted it in this case. The Appellate Division, in reversing, believed that the possibility that client confidences had been shared could not be discounted, and that, absent client consent, Stroock should be disqualified.

III.

A party seeking to disqualify an attorney or a law firm, must establish (1) the existence of a prior attorney-client relationship and (2) that the former and current representations are both adverse and substantially related *(Cardinale, supra,* at 295-296; *see also, T. C. Theatre Corp. v Warner Bros. Pictures,* 113 F Supp 265, 268, *rearg denied* 125 F Supp 233; Developments in the Law, *Conflicts of Interest in the Legal Profession,* 94 Harv L Rev 1244, 1318 *["Conflicts of Interest"]).* Assuming that the former client has satisfied that burden, what effect are courts to give the presumption of disqualification under the present circumstances: is the issue concluded or may the client's former law firm rebut the presumption?

Analysis begins with examining the purposes of the rule. The irrebuttable presumption is employed to fully protect client confidences and secrets, to offer a clear test which is easy to administer and to avoid an appearance of impropriety on the part of the attorney or the law firm. ***309**

First among these concerns is the protection of client confidences. An attorney may not disclose or use adversely information confided by former or current clients (Code of Professional Responsibility DR 4-101 [B] [22 NYCRR 1200.19 (b)]; *and see,* Code of Professional Responsibility DR 5-108 [A] [2] [22 NYCRR 1200.27 (a) (2)]). When an attorney represents a party against a former client the current client's interest in vigorous representation potentially threatens the former client's expectation of confidentiality. The rule is designed to free the former client from any apprehension that matters disclosed to an attorney will subsequently be used against it in related litigation *(see, Cardinale,* 43 NY2d, at 295; Code of Professional Responsibility DR 4-101). Thus, the Code imposes a continuing obligation on the attorney to respect the client's confidences, even after a matter has concluded. The use of an irrebuttable presumption of disqualification insures that this obligation is enforced and that client confidences and secrets will never be misused in substantially related and adverse litigation.

Second, the rule avoids the "appearance of impropriety" on the part of the attorney or the law firm. Whether a conflict actually exists could be determined by a hearing but the rule requires disqualification even when there may not, in fact, be any conflict of interest so that any suggestion of impropriety is avoided *(see, Cardinale,* 43 NY2d, at 296; Code of Professional Responsibility Canon 9; *Conflicts of Interest, op. cit.,* at 1358-1359; Note, *Attorney Disqualification: The Case for an Irrebuttable Presumption Rebutted,* 44 Alb L Rev 645, 649- 650). An irrebuttable presumption of disqualification is favored over a hearing because it avoids the danger that an inquiry may destroy the very confidences sought to be protected *(see, NCK Org. v Bregman,* 542 F2d 128, 134-135; *Conflicts of Interest, op. cit.,* at 1329).

Finally, the rule provides a test which, because of the ease of its application, becomes a strong aid in self enforcement among members of the legal profession.

Thus, this per se rule of disqualification protects all of the ethical concerns implicated by successive representations. It does so, however, at a substantial cost to current clients, to the public-at-large and to the legal profession. It is unnecessarily preclusive because it disqualifies all members of a law firm indiscriminately, whether or not they share knowledge of former client's confidences and secrets. As a result the rulemay ***310** cause a current client to face significant hardships when the chosen attorney is disqualified, thus depriving the client of the specialized knowledge of counsel of choice and forcing the client to familiarize a new attorney with the matter.

Moreover, because of the rigor of the rule, motions to disqualify are frequently used as an offensive tactic, inflicting hardship on the current client and delay upon the courts by forcing disqualification even though the client's attorney is ignorant of any confidences of the prior client. Such motions result in a loss of time and money, even if they are eventually denied. This Court and others have expressed concern that such disqualification motions may be used frivolously as a litigation tactic when there is no real concern that a confidence has been abused *(see, S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.,* 69 NY2d 437, 443; *Melamed v ITT Cont. Baking Co.,* 592 F2d 290, 295).

A per se disqualification rule also conflicts with public policies favoring client choice and restricts an attorney's ability to practice *(see, Denburg v Parker Chapin Flattau & Klimpl,* 82 NY2d 375, 380; *Cohen v Lord, Day & Lord,*

75 NY2d 95, 98). While those concerns are not sufficient to override the important ethical considerations which underlie the rule, it is a fact of life that many attorneys in today's society spend a substantial portion of their careers with large firms such as Stroock. To attach to those attorneys an irrebuttable presumption that they have knowledge of all the business the firm handled during their employment, and thus are disqualified from later appearing in matters substantially related to any part of it, seriously disadvantages them and the clients who wish to retain them.

IV.

Our decision in *Cardinale v Golinello* (43 NY2d 288, *supra)* and the Second Circuit's decision in *Silver Chrysler Plymouth v Chrysler Motors Corp.* (518 F2d 751)* present two different settings illustrating these competing interests in disqualification cases. As the decisions suggest, the purposes of the irrebuttable presumption may be satisfied in different ways depending on the nature of the law firm and the character ofits ***311** practice. In smaller, more informal settings the imputation of knowledge as a matter of law is necessary to protect the client and avoid the appearance of impropriety. In other circumstances the risk of conflict is so minimal that the danger of it occurring is outweighed by policy considerations militating against an irrebuttable presumption.

In *Cardinale,* a partner in Halperin, Somers & Goldstick, P. C., had represented defendant Golinello in connection with the purchase of corporate capital stock. After the transaction had been completed, attorney Charles Schiller joined the Halperin firm. The firm continued to represent defendant after Schiller's arrival, but Schiller did not render legal services on Golinello's behalf. Schiller subsequently left the Halperin firm and became associated with the law firm of King & King. Thereafter, plaintiffs retained the King firm in connection with claims against Golinello and members of the Halperin firm arising out of the earlier stock purchase. Upon learning that Schiller had been retained by the King firm to handle the matter, defendant Golinello moved to disqualify both the King firm and Schiller.

We began our analysis by noting that Halperin was “a small firm whose activities were characterized by an understandable informality” in which “there was a 'constant cross-pollination' ” and “ 'cross current of discussion and ideas' ” among the employees *(Cardinale, supra,* at 292). Given that atmosphere, we believed Schiller had likely become aware of confidential information concerning Golinello while with Halperin. Indeed, it was of “no moment” that Schiller had never rendered legal services to Golinello, we said, because, by being an attorney associated with Golinello's attorney, the possibility was simply too great that he had wittingly or unwittingly acquired confidential information concerning Golinello. We also expressed concern over the appearance of impropriety, for if Schiller were allowed to represent plaintiffs in the current action, laypersons might well believe that he was being hired not only because of his legal talent, but also because of confidential information that he possessed.

We concluded, therefore, that Schiller was properly disqualified from the current litigation. No inquiry was required: disqualification arose “simply from the fact that the lawyer, or the firm with which [the lawyer] was then associated, represented the former client in matters related to the subject matter of the second representation” *(***312** Cardinale, supra,* at 295). The King firm was similarly disqualified under the principle that if one attorney in a firm is barred from representing a client, then all attorneys in a firm are likewise precluded from such representation.

Our holding in *Cardinale* reflected the prevailing understanding that the duty of loyalty owed to a former client and the avoidance of even an appearance of impropriety are so important that any harm associated with disqualification was minimal when compared with furthering those goals *(see generally, T. C. Theatre Corp., supra;* Note, *Federal Courts and Attorney Disqualification Motions: A Realistic Approach to Conflicts of Interest,* 62 Wash L Rev 863, 875-876). Our determination did not rest on the size of the firm or the number of lawyers it employed, although those factors were relevant. It was based upon our recognition that in firms such as Halperin attorneys are so intimately acquainted with all the work in the office that they can be expected to share client confidences and ideas about how to handle client problems as a matter of course *(Cardinale,* at 292; *see also, Conflicts of Interest, op. cit.,* at 1355). Thus, we found unpersuasive Federal decisions dealing with law firms of a different type and rejected them without discussion.

One of those Federal decisions was *Silver Chrysler Plymouth v Chrysler Motors Corp. (supra)*. It involved a firm of quite different makeup and practice. In *Silver Chrysler,* attorney Schreiber was associated with the Hammond law firm, which was representing Silver Chrysler in its action against Chrysler. Schreiber had previously been associated with the firm of Kelley, Drye & Warren, which had represented Chrysler

for many years. Upon learning that Schreiber had worked on several Chrysler matters while at Kelley Drye, Chrysler moved to disqualify him and his new firm.

The Second Circuit began its analysis, as this Court had in *Cardinale,* by reviewing the type of firm involved and the nature of its work. At the time Kelley Drye, unlike the Halperin firm in *Cardinale,* was a firm of some 80 lawyers segregated into different departments. The court reasoned from this that it would be "absurd" to assume that upon entry into the firm an attorney, by "osmosis," became aware of every client of the firm and shared in all of the client confidences and secrets which the firm, as a whole, possessed. Because of this the Second Circuit held that the presumption of disqualification should be a rebuttable one; quite simply, it ***313** said, there are valid reasons for differentiating "between lawyers who become heavily involved in the facts of a particular matter and those who enter briefly on the periphery" *(id.,* at 756). The court reasoned that to apply the remedy of disqualification when there is no realistic chance that confidences were disclosed would go far beyond the purposes of a strict disqualification rule *(id.,* at 757).

V.

As these decisions illustrate, any fair rule of disqualification should consider the circumstances of the prior representation. If an attorney has represented a client in an earlier matter and then attempts to represent another in a substantially related matter which is adverse to the interests of the former client, the presumption of disqualification is irrebuttable. Thus, if Ms. Billauer had attempted to represent plaintiffs in their current action against Grace, she would be disqualified from doing so and the imputation of shared confidences with her partners might be so obvious from the facts that her new firm would also be disqualified as a matter of law *(see, Cardinale v Golinello, supra).*

(1, 2) In this matter, however, Stroock seeks to represent plaintiffs and Ms. Billauer, who handled the Grace matter while at Stroock, has moved to another firm. Under these circumstances the ethical considerations which support a per se disqualification rule have considerably less force and may be overridden by competing policy concerns. In this situation the court must presume that the rights of the former client are jeopardized by Stroock's subsequent representation of plaintiffs, but Stroock should be allowed to rebut that presumption by facts establishing that the firm's remaining attorneys possess no confidences or secrets of the former client. That procedure does no violence to our existing rules. In firms characterized by the informality exhibited by the Halperin firm in *Cardinale,* disqualification will be imposed as a matter of law without a hearing. If the firm can demonstrate prima facie that there is no reasonable possibility that any of its other attorneys acquired confidential information concerning the client, a hearing should be held after which the court may determine that disqualification may be unnecessary. The evidence must be sufficient, however, to establish that the former client's interests are fully protected and to overcome any suggestion of impropriety. ***314**

(3) The record in this case establishes that the only matter handled by Stroock for Grace was the preparation of Dr. Seaton as an expert witness in the *City of Enterprise* litigation. The people primarily responsible for handling that matter left the firm several years prior to this current representation, and the attorneys remaining at Stroock had, at most, limited contact with the *City of Enterprise* matter. Moreover, the informality which was the hallmark of the Halperin firm in *Cardinale,* is not usually found in large, departmentalized firms such as Stroock and that suggests that representation is permissible.

Accordingly, the order of the Appellate Division should be reversed, with costs, defendant's motion to disqualify the law firm of Stroock & Stroock & Lavan from representing plaintiffs in this action denied, and the certified question answered in the negative.

Chief Judge Kaye and Judges Bellacosa, Smith, Levine and Ciparick concur; Judge Titone taking no part.
Order reversed, etc. ***315**

Footnotes

* That part of *Silver Chrysler* which held that orders denying disqualification motions are appealable was overruled by *Armstrong v McAlpin* (625 F2d 433, 440), which was vacated on the interlocutory appeals issue in *McAlpin v Armstrong* (449 US 1106).

End of Document

769 F.3d 125
United States Court of Appeals,
Second Circuit.

UNITED STATES of America, Appellee,
v.
Semyon VAYNER, aka Sam Vayner, aka Semen, Defendant, Aliaksandr Zhyltsou, Defendant–Appellant.

No. 13–803–cr.
|
Argued: March 24, 2014.
|
Decided: Oct. 3, 2014.

Synopsis

Background: Defendant was convicted in the United States District Court for the Eastern District of New York, Glasser, J., of unlawful transfer of false identification document. Defendant appealed.

Holdings: The Court of Appeals, Debra Ann Livingston, Circuit Judge, held that:

[1] government did not provide sufficient basis from which jury could conclude that proffered printout was defendant's profile page from Russian social networking Internet website, and thus that document was not properly authenticated, and

[2] district court's abuse of its discretion in admitting printout of defendant's profile page due to lack of proper authentication was not harmless.

Vacated and remanded.

West Headnotes (14)

[1] **Criminal Law** Foundation or Authentication

Criminal Law Evidence dependent on preliminary proofs

A preliminary decision regarding authentication is committed to the district court, and the Court of Appeals reviews that decision for abuse of discretion. Fed.Rules Evid.Rule 901, 28 U.S.C.A.

2 Cases that cite this headnote

[2] **Criminal Law** Discretion of Lower Court

A district court abuses its discretion when it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or renders a decision that cannot be located within the range of permissible decisions.

2 Cases that cite this headnote

[3] **Criminal Law** Foundation or Authentication

The requirement of authentication is a condition precedent to admitting evidence. Fed.Rules Evid.Rule 901, 28 U.S.C.A.

4 Cases that cite this headnote

[4] **Criminal Law** Preliminary or introductory questions of fact

The ultimate determination as to whether the evidence is, in fact, what its proponent claims is thereafter a matter for the jury. Fed.Rules Evid.Rule 901(a), 28 U.S.C.A.

7 Cases that cite this headnote

[5] **Criminal Law** Identification of object

The type and quantum of evidence required for authentication is related to the purpose for which the evidence is offered, and depends upon a context-specific determination whether the proof advanced is sufficient to support a finding that the item in question is what its proponent claims it to be. Fed.Rules Evid.Rule 901, 28 U.S.C.A.

30 Cases that cite this headnote

[6] **Criminal Law** Foundation or Authentication

Criminal Law Identification of object

Even though the proponent of evidence need not rule out all possibilities inconsistent with authenticity, or prove beyond any doubt that the evidence is what it purports to be, there must nonetheless be at least sufficient proof so that a reasonable juror could find in favor of authenticity or identification. Fed.Rules Evid.Rule 901, 28 U.S.C.A.

16 Cases that cite this headnote

[7] **Criminal Law** Foundation or Authentication

The proof of authentication may be direct or circumstantial. Fed.Rules Evid.Rule 901, 28 U.S.C.A.

3 Cases that cite this headnote

[8] **Criminal Law** Foundation or Authentication

After the proponent of the evidence has adduced sufficient evidence to support a finding that the proffered evidence is what it is claimed to be, the opposing party remains free to challenge the reliability of the evidence, to minimize its importance, or to argue alternative interpretations of its meaning, but these and similar other challenges go to the weight of the evidence, not to its admissibility. Fed.Rules Evid.Rule 901, 28 U.S.C.A.

14 Cases that cite this headnote

[9] **Criminal Law** Telecommunications

Government did not provide sufficient basis from which jury could conclude that proffered printout was defendant's profile page from Russian social networking Internet website, and thus that document was not properly authenticated and district court abused its discretion in admitting it in defendant's trial on charge of unlawful transfer of false identification document, since defendant may not have created or controlled that profile page; although defendant's name, photograph, and some details about his life were consistent with testimony about him, there was no evidence that defendant himself had created that page or was responsible for its contents. 18 U.S.C.A. § 1028(a)(2), (b)(1)(A)(ii); Fed.Rules Evid.Rule 901, 28 U.S.C.A.

16 Cases that cite this headnote

[10] **Criminal Law** Rulings as to Evidence in General

An erroneous evidentiary decision that has no constitutional dimension is reviewed for harmless error.

2 Cases that cite this headnote

[11] **Criminal Law** Evidence in general

A district court's erroneous admission of evidence is harmless if the appellate court can conclude with fair assurance that the evidence did not substantially influence the jury.

2 Cases that cite this headnote

[12] **Criminal Law** Rulings as to Evidence in General

In order to uphold a verdict in the face of an evidentiary error, it must be highly probable that the error did not affect the verdict.

[13] **Criminal Law** Evidence in general

Criminal Law Curing Error by Facts Established Otherwise

In conducting the analysis of whether an erroneous evidentiary decision is harmless, a court considers: (1) the overall strength of the prosecution's case; (2) the prosecutor's conduct with respect to the improperly admitted evidence; (3) the importance of the wrongly admitted evidence; and (4) whether such evidence was cumulative of other properly admitted evidence.

2 Cases that cite this headnote

[14] **Criminal Law** Documentary and demonstrative evidence

District court's abuse of its discretion in admitting unauthenticated printout of defendant's profile page from Russian social networking Internet website was not harmless, in prosecution for unlawful transfer of false identification document, since printout was not cumulative, but played important role in government's case. 18 U.S.C.A. § 1028(a)(2), (b)(1)(A)(ii); Fed.Rules Evid.Rule 901, 28 U.S.C.A.

3 Cases that cite this headnote

Attorneys and Law Firms

***126** Tali Farhadian (Jo Ann M. Navickas, on the brief), Assistant United States Attorneys, for Loretta E. Lynch, United States Attorney for the Eastern District of New York, Brooklyn, NY, for Appellee.

Yuanchung Lee, Assistant Federal Public Defender, Federal Defenders of New York, Inc., New York, NY, for Defendant–Appellant.

***127** Before WESLEY, LIVINGSTON, and LOHIER, Circuit Judges.

Opinion

DEBRA ANN LIVINGSTON, Circuit Judge:

In Defendant–Appellant Aliaksandr Zhyltsou's criminal trial on a single charge of transfer of a false identification document, the government offered into evidence a printed copy of a web page, which it claimed was Zhyltsou's profile page from a Russian social networking site akin to Facebook. The district court (Glasser, *J.*) admitted the printout over Zhyltsou's objection that the page had not been properly authenticated under Rule 901 of the Federal Rules of Evidence. We conclude that the district court erred in admitting the web page evidence because the government presented insufficient evidence that the page was what the government claimed it to be—that is, *Zhyltsou's* profile page, as opposed to a profile page on the Internet that Zhyltsou did not create or control. Because the district court abused its discretion in admitting the evidence, and because this error was not harmless, we vacate the conviction and remand for retrial.

BACKGROUND

Aliaksandr Zhyltsou was convicted after trial on a single count of the unlawful transfer of a false identification document, in violation of 18 U.S.C. § 1028(a)(2) and (b)(1)(A)(ii). At trial, the government's principal evidence against Zhyltsou was the testimony of Vladyslav Timku, a Ukrainian citizen residing in Brooklyn who testified pursuant to a cooperation agreement and who had earlier pled guilty to conspiracy to commit wire fraud, aggravated identity theft, and impersonating a diplomat. Timku testified that he was a friend of Zhyltsou's and was familiar with Zhyltsou's work as a forger because he had previously paid Zhyltsou to create false diplomatic identification documents in a scheme to avoid taxes on the purchase and resale of luxury automobiles through a corporation called Martex International. Timku said that in the summer of 2009 he asked Zhyltsou to create a forged birth certificate that would reflect that Timku was the father of an invented infant daughter. Timku sought the birth certificate in an attempt to avoid compulsory military service in his native Ukraine, which permits a deferment of service for the parents of children under three years of age. According to Timku, Zhyltsou agreed to forge the birth certificate without charge, as a "favor," and began creating the fake birth certificate on a computer while the pair chatted in a Brooklyn Internet café. Timku testified that Zhyltsou sent the completed forgery to Timku via e-mail on August 27, 2009 fromazmadeuz@gmail.com (the "Gmail address"), an e-mail address that Timku had often used to correspond with Zhyltsou. After receiving the document, Timku thanked Zhyltsou and then went on to use the fake document to receive the deferment from military service that he sought. The government introduced a copy of the e-mail, with the forged birth certificate as an attachment, which reflected that it was sent to Timku's e-mail address, "timkuvlad@yahoo.com," fromazmadeuz@gmail.com.

The government presented several other witnesses who corroborated certain aspects of Timku's testimony—regarding the falsity of the birth certificate, the Ukrainian military deferment for parents of young children, and the path of the e-mail in question through servers in California. There was expert testimony to the effect that the e-mail originated in New York, but no evidence as to what computer it was sent from, or what IP addresses were linked to it. Thus, near the

conclusion of the prosecution's case, only Timku's testimony ***128** directly connected Zhyltsou with the Gmail address that was used to transmit the fake birth certificate to Timku.[1] Before the prosecution rested, however, the government indicated to the district court that it planned to call an unexpected final witness: Robert Cline, a Special Agent with the State Department's Diplomatic Security Service ("DSS"). The government said that it intended to introduce a printout of a web page that the government claimed to be Zhyltsou's profile on VK.com ("VK"), which Special Agent Cline described as "the Russian equivalent of Facebook." J.A. 36. Zhyltsou objected, contending that the page had not been properly authenticated and was thus inadmissible under Federal Rule of Evidence 901.[2] The district court overruled the defense objection, concluding that the VK page was "[Zhyltsou's] Facebook page. The information on there, I think it's fair to assume, is information which was provided by him." J.A. 32. Moreover, the court ruled, "There's no question about the authenticity of th[e] document so far as it's coming off the Internet now." J.A. 32.

During his testimony, Special Agent Cline identified the printout as being from "the Russian equivalent of Facebook." He noted to the jury that the page purported to be the profile of "Alexander Zhiltsov" (an alternate spelling of Zhyltsou's name), and that it contained a photograph of Zhyltsou. Importantly for the government's case, Special Agent Cline next pointed out that under the heading, "Contact Information," the profile listed "Azmadeuz" as "Zhiltsov's" address on Skype (a service that Special Agent Cline described as a "voiceover IP provider"). The web page also reflected that "Zhiltsov" worked at a company called "Martex International" and at an Internet café called "Cyber Heaven," which corresponded with Timku's earlier testimony that Zhyltsou and Timku had both worked for those entities. On cross-examination, Special Agent Cline admitted that he had only a "cursory familiarity" with VK, had never used the site except to view this single page, and did not ***129** know whether any identity verification was required in order for a user to create an account on the site. In its summation, the government argued that it had proven that Zhyltsou had produced the fake birth certificate and sent it to Timku using the Gmail address. In the final words of her summation, the Assistant United States Attorney ("AUSA") argued that proof of the connection between Zhyltsou and the Gmail address could be found on Zhyltsou's "own Russian Facebook page":

> It has the defendant's profile picture on it. You'll see that it confirms other facts that you've learned about the defendant. That he worked at Martex and at Cyber Heaven, for example. He told [a DSS agent] that he's from Belarus. This page says he's from Minsk, the capital of Belarus. And on that page, you'll see the name he uses on Skype which, like e-mail, is a way to correspond with people over the Internet.
>
> Azmadeuz. That [is] his online identity, ladies and gentlemen, for Skype and for [G]mail. That is [w]hat the defendant calls himself. Timku even told you that the defendant sometimes uses azmadeuz@yahoo.com. That [is] his own name on the Internet. Timku didn't make it up for him. The defendant made it up for himself.
>
> Aliaksandr Zhyltsou made a fake birth certificate and he sent it through e-mail. Those are the facts. The defendant is guilty. Find him so. Thank you.

G.A. 65–66.

After deliberating for approximately a day and a half, the jury found Zhyltsou guilty on the single charge contained in the indictment. Subsequently, the district court sentenced Zhyltsou principally to time served and one year of post-release supervision.[3] Judgment was entered in March 2013, and Zhyltsou brought this timely appeal.

DISCUSSION

[1] **[2]** The preliminary decision regarding authentication is committed to the district court, *United States v. Sliker,* 751 F.2d 477, 499 (2d Cir.1984), and we review that decision for abuse of discretion, *United States v. Dhinsa,* 243 F.3d 635, 658 (2d Cir.2001). "A district court abuses its discretion when it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or renders a decision that cannot be located within the range of permissible decisions." *Porter v. Quarantillo,* 722 F.3d 94, 97 (2d Cir.2013) (brackets and internal quotation marks omitted).

I.

[3] **[4]** "The requirement of authentication is ... a condition precedent to admitting evidence." *Sliker,* 751 F.2d at 497; *see also United States v. Maldonado–Rivera,* 922 F.2d 934, 957 (2d Cir.1990) ("In general, a document may not be admitted into evidence unless it is shown to be genuine."). Rule 901

of the Federal Rules of Evidence governs the authentication of evidence and provides, in pertinent part: "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed.R.Evid. 901(a).[4] "This requirement is satisfied ***130** if sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity or identification." *United States v. Pluta,* 176 F.3d 43,49 (2d Cir.1999) (internal quotation marks omitted). The ultimate determination as to whether the evidence is, in fact, what its proponent claims is thereafter a matter for the jury. *See Sliker,* 751 F.2d at 499.

[5] **[6]** Rule 901 "does not definitively establish the nature or quantum of proof that is required" preliminarily to authenticate an item of evidence. *Id.* at 499. "The type and quantum of evidence" required is "related to the purpose for which the evidence is offered," *id.* at 488, and depends upon a context-specific determination whether the proof advanced is sufficient to support a finding that the item in question is what its proponent claims it to be. We have said that "[t]he bar for authentication of evidence is not particularly high." *United States v. Gagliardi,* 506 F.3d 140, 151(2d Cir.2007). But even though "[t]he proponent need not rule out all possibilities inconsistent with authenticity, or ... prove beyond any doubt that the evidence is what it purports to be," *id.* (internal quotation marks omitted), there must nonetheless be at least "sufficient proof ... so that a reasonable juror could find in favor of authenticity or identification," *Pluta,* 176 F.3d at 49 (internal quotation marks omitted).

[7] The "proof of authentication may be direct or circumstantial." *United States v. Al–Moayad,* 545 F.3d 139, 172 (2d Cir.2008). The simplest (and likely most common) form of authentication is through "the testimony of a 'witness with knowledge' that 'a matter is what it is claimed to be.' " *United States v. Rommy,* 506 F.3d 108, 138 (2d Cir.2007) (quoting Fed.R.Evid. 901(b)(1) (pre–2011 amendments)). This is by no means exclusive, however: Rule 901 provides several examples of proper authentication techniques in different contexts, *see* Fed.R.Evid. 901(b), and the advisory committee's note states that these are "not intended as an exclusive enumeration of allowable methods but are meant to guide and suggest, leaving room for growth and development in this area of the law," Fed.R.Evid. 901 advisory committee's note (Note to Subdivision (b)).

Some examples illustrate the point. For instance, we have said that a document can be authenticated by "distinctive characteristics of the document itself, such as its '[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with the circumstances.' " *Maldonado–Rivera,* 922 F.2d at 957 (alteration in original) (quoting Fed.R.Evid. 901(b)(4) (pre–2011 amendments)); *see also Sliker,* 751 F.2d at 488 (contents of alleged bank records, in conjunction with their seizure at purported bank office, provided sufficient proof of their connection to allegedly sham bank). Or, where the evidence in question is a recorded call, we have said that "[w]hile a mere assertion of identity by a person talking on the telephone is not in itself sufficient to authenticate that person's identity, some additional evidence, which need not fall into any set pattern, may provide the necessary foundation." *Dhinsa,* 243 F.3d at 658–59 (brackets and internal quotation marks omitted); *see also Sliker,* 751 F.2d at 499 (voice on tape recording was sufficiently authenticated as defendant's based on comparison of taped voice with defendant's trial testimony). And in a case where credit card receipts purportedly signed by the defendant would have tended to support his alibi defense, we ruled that the defendant's copies had been sufficiently authenticated, despite some question as to ***131** when these copies had been signed, where the defendant offered testimony from store managers as to how the receipts were produced, testimony from the defendant's wife (a joint holder of the credit card) that she had not made the purchases in question, and testimony from a handwriting expert that the defendant's signature was genuine. *United States v. Tin Yat Chin,* 371 F.3d 31, 35–38 (2d Cir.2004).[5]

[8] As we have said, "[a]uthentication of course merely renders [evidence] admissible, leaving the issue of [its] ultimate reliability to the jury." *United States v. Tropeano,* 252 F.3d 653, 661(2d Cir.2001). Thus, after the proponent of the evidence has adduced sufficient evidence to support a finding that the proffered evidence is what it is claimed to be, the opposing party "remains free to challenge the reliability of the evidence, to minimize its importance, or to argue alternative interpretations of its meaning, but these and similar other challenges go to the *weight* of the evidence—not to its *admissibility." Tin Yat Chin,* 371 F.3d at 38.

II.

[9] Based on these principles, we conclude that the district court abused its discretion in admitting the VK web page, as it did so without proper authentication under Rule 901. The government did not provide a sufficient basis on which to

conclude that the proffered printout was what the government claimed it to be—*Zhyltsou's* profile page—and there was thus insufficient evidence to authenticate the VK page and to permit its consideration by the jury.

In the district court, the government initially advanced the argument that it offered the evidence simply as a web page that existed on the Internet at the time of trial, not as evidence of Zhyltsou's own statements. The prosecution first represented to the district court that it was presenting the VK page only as "what [Special Agent Cline] is observing today on the Internet, just today," J.A. 26, conceded that "the agent does not know who created it," and averred that Special Agent Cline would testify only that "he saw [the VK page] and this is what it says," J.A. 30. Consistent with these representations, Special Agent Cline testified only that the page containing information related to Zhyltsou was presently accessible on the Internet and provided no extrinsic information showing that Zhyltsou was the page's author or otherwise tying the page to Zhyltsou.[6]

At other times, however, the government repeatedly made a contrary argument to both the trial court and the jury, and insisted that the page belonged to and was authored by Zhyltsou.[7] Nor is this ***132** surprising. The VK profile page was helpful to the government's case only if it belonged to Zhyltsou—if it was his profile page, created by him or someone acting on his behalf—and thus tended to establish that Zhyltsou used the moniker "Azmadeuz" on Skype and was likely also to have used it for the Gmail address from which the forged birth certificate was sent, just as Timku claimed. Moreover, the district court overruled Zhyltsou's hearsay objection and admitted a printout of the profile page, which stated that "Zhiltsov's" Skype username was "Azmadeuz," because it found that the page was created by Zhyltsou, and the statement therefore constituted a party admission. *See* J.A. 23 (The Court: "This is a statement made by your client. This is his Facebook record."); J.A. 29–30 (describing the government's plan to establish that the Gmail address was Zhyltsou's "by what [the court] regard[ed] to be perfectly legitimate admissible evidence of what it is, the assumption is quite clear that what appears on the Facebook page is information which was provided by" Zhyltsou); J.A. 32 (The Court: "It's his Facebook page. The information on there, I think it's fair to assume, is information which was provided by him."); *see also* Fed.R.Evid. 801(d)(2)(A) (defining an opposing party's statement as non-hearsay).

As noted above, Rule 901 requires "evidence sufficient to support a finding that the item is what the proponent claims it is." It is uncontroverted that information *about* Zhyltsou appeared on the VK page: his name, photograph, and some details about his life consistent with Timku's testimony about him. But there was no evidence that Zhyltsou himself had created the page or was responsible for its contents. Had the government sought to introduce, for instance, a flyer found on the street that contained Zhyltsou's Skype address and was purportedly written or authorized by him, the district court surely would have required some evidence that the flyer did, in fact, emanate from Zhyltsou. Otherwise, how could the statements in the flyer be attributed to him? *Cf. Dhinsa,* 243 F.3d at 658–59 ("[A] mere assertion of identity by a person talking on the telephone is not in itself sufficient to authenticate that person's identity...."). And contrary to the government's argument, the mere fact that a page with Zhyltsou's name and photograph happened to exist on the Internet at the time of Special Agent Cline's testimony does not permit a reasonable conclusion that this page was created by the defendant or on his behalf.

It is true that the contents or "distinctive characteristics" of a document can sometimes alone provide circumstantial evidence sufficient for authentication. Fed. R. Evid. 901(b)(4). For example, a writing may be authenticated by evidence "that the contents of the writing were not a matter of common knowledge." *Maldonado–Rivera,* 922 F.2d at 957 (brackets and internal quotation marks omitted). Here, however, all the information contained on the VK page allegedly tying the page to Zhyltsou was also known by Timku and likely others, some of whom may have had reasons to create a profile page falsely attributed to the defendant. Other than the page itself, moreover, no evidence in the record suggested that Zhyltsou even had a VK profile page, much less that the page ***133** in question was that page. Nor was there any evidence that identity verification is necessary to create such a page with VK, which might also have helped render more than speculative the conclusion that the page in question belonged to Zhyltsou.

We express no view on what kind of evidence *would* have been sufficient to authenticate the VK page and warrant its consideration by the jury. Evidence may be authenticated in many ways, and as with any piece of evidence whose authenticity is in question, the "type and quantum" of evidence necessary to authenticate a web page will always depend on context. *Sliker,* 751 F.2d at 488. Given the purpose for which the web page in this case was introduced, however

—to corroborate Timku's testimony that it was Zhyltsou who used the moniker "azmadeuz" for the Gmail address from which the forged birth certificate was sent—Rule 901 required that there be *some* basis beyond Timku's own testimony on which a reasonable juror could conclude that the page in question was not just any Internet page, but in fact *Zhyltsou's* profile. No such showing was made and the evidence should therefore have been excluded.

III.

[10] **[11]** **[12]** **[13]** An erroneous evidentiary decision that has no constitutional dimension is reviewed for harmless error. *United States v. Dukagjini,* 326 F.3d 45, 61–62 (2d Cir.2003). "A district court's erroneous admission of evidence is harmless if the appellate court can conclude with fair assurance that the evidence did not substantially influence the jury." *Al–Moayad,* 545 F.3d at 164 (internal quotation marks omitted). "In order to uphold a verdict in the face of an evidentiary error, it must be 'highly probable' that the error did not affect the verdict." *Dukagjini,* 326 F.3d at 61 (quoting *United States v. Forrester,* 60 F.3d 52, 64 (2d Cir.1995)); *see also Kotteakos v. United States,* 328 U.S. 750, 765, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946) (holding that error is not harmless if the court "cannot say, with fair assurance ... that the judgment was not substantially swayed by the error"); *United States v. Kaplan,* 490 F.3d 110, 123 (2d Cir.2007) (stating that an error "is harmless if we can conclude that [the evidence] was unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (internal quotation marks omitted)). In conducting the harmlessness analysis, we consider:

> (1) the overall strength of the prosecution's case; (2) the prosecutor's conduct with respect to the improperly admitted evidence; (3) the importance of the wrongly admitted evidence; and (4) whether such evidence was cumulative of other properly admitted evidence.

United States v. McCallum, 584 F.3d 471, 478 (2d Cir.2009) (brackets and internal quotation marks omitted). "We have frequently stated that the strength of the government's case is the most critical factor in assessing whether error was harmless." *United States v. Ramirez,* 609 F.3d 495, 501 (2d Cir.2010).

[14] It was, of course, vital to the government's case to prove that it was in fact Zhyltsou who used the Gmail address to send the fake birth certificate to Timku. This was the only point truly in contention at trial. Further, the prosecution's case on this point was far from overwhelming: with the limited exception of the circumstantial evidence that the Gmail account was closed shortly after Zhyltsou encountered federal agents, the *only* evidence that connected Zhyltsou to the emailed birth certificate, other than the VK page, ***134** was Timku's testimony.[8]

The jury may well have been reluctant to rely on Timku's testimony alone. Pursuant to his cooperation agreement, Timku pled guilty to three felonies—aggravated identity theft, impersonating a diplomat, and conspiracy to commit wire fraud—each of which involved deceit. Timku's business operation, which he said he carried on with Zhyltsou's help, involved using fake identification papers and shell companies to commit tax fraud in the course of exporting luxury vehicles for sale in Ukraine and Russia. Timku admitted that he had destroyed evidence and fled the country after federal agents questioned him concerning this scheme. He also testified that he paid a United States citizen to enter into a sham marriage with him and opened a joint bank account in their names with the intention of deceiving immigration authorities into thinking that the marriage was genuine. All this likely undermined Timku's credibility, and may even have led the jury to believe that Timku could have used his expertise in fabricating identities and documents to create false evidence to substantiate his testimony against Zhyltsou.

Moreover, as the government recognized, the VK page provided significant corroboration of Timku's testimony that the Gmail address belonged to Zhyltsou. As the AUSA argued in urging that the VK page should be admitted by the district court, the fact that "this particularly unique section of letters that make up his e-mail address [is] found on [Zhyltsou's] Facebook page with his picture go[es] a long way to proving that he is the owner of this address." J.A. 25–26. The district judge agreed that the evidence tended to establish that the Gmail address was Zhyltsou's. J.A. 29–30. Indeed, the AUSA pressed the significance of the VK profile in the final words of her summation, arguing to the jury that the defendant's own web page linked him—through the moniker "Azmadeuz"—to the Gmail account used to send the birth certificate. G.A. 65–66.

In sum, the government's proof on the issue of whether Zhyltsou transferred the fake birth certificate was not unassailable. As a result, the printout of the VK profile was by no means cumulative, but played an important role in the government's case, which the AUSA augmented by

highlighting the evidence in her summation. *See United States v. Grinage,* 390 F.3d 746, 751(2d Cir.2004) ("Where the erroneously admitted evidence goes to the heart of the case against the defendant, and the other evidence against the defendant is weak, we cannot conclude that the evidence was unimportant or was not a substantial factor in the jury's verdict."). Because the wrongly admitted evidence was "the sort of evidence that might well sway a jury" confronted with a case otherwise turning solely on the word of a single witness whose credibility was weak, *Kaplan,* 490 F.3d at 123; *cf. id.* (discussing such proof in the context of a "marginal circumstantial case"), we conclude that the ***135** district court's error was not harmless and requires vacatur.

CONCLUSION

For the foregoing reasons, the judgment of the district court is **VACATED** and the case is **REMANDED** for a new trial.

All Citations

769 F.3d 125, 95 Fed. R. Evid. Serv. 802

Footnotes

1 The government did introduce evidence showing that the azmadeuz @gmail.com account was closed two days after Zhyltsou had an encounter with federal agents. In summation, the government argued that the closure circumstantially supported the theory that Zhyltsou was the owner of the account. However, federal agents were questioning Timku that day regarding other criminal charges. (Zhyltsou happened to be present and was himself questioned only briefly.) The defense intimated in its summation that Timku would also have had reason to delete the account at that time.

2 Zhyltsou also objected to the district court's admission of the VK page on the ground that it was not disclosed to him before trial in violation of Rule 16 of the Federal Rules of Criminal Procedure. Rule 16 provides grounds for reversal if the "government's untimely disclosure of the evidence" caused the defendant "substantial prejudice." *United States v. Salameh,* 152 F.3d 88, 130 (2d Cir.1998) (per curiam) (internal quotation marks omitted). Zhyltsou argued that the page was not provided to him before trial and that he was prejudiced due to his inability to conduct forensic analysis in an attempt to discover the source of the information on the VK page. We incline to agree with Zhyltsou that the late disclosure may have "adversely affected some aspect of his trial strategy," *United States v. Miller,* 116 F.3d 641, 681 (2d Cir.1997) (internal quotation mark omitted), because his counsel argued in his opening statement—based on the evidence provided in discovery by the government at that time—that there was no evidence corroborating Timku's testimony that the Gmail address belonged to Zhyltsou. Because we vacate Zhyltsou's conviction on other grounds, however, we need not reach the issue of whether the timing of the disclosure caused him substantial prejudice. For the same reason, we also need not reach Zhyltsou's additional argument that his conviction must be vacated due to error in the district court's supplemental instruction in response to a jury question.

3 Zhyltsou was denied bail pending trial; all told, he spent approximately one year in detention.

4 We note that Rule 902 provides for several classes of "self-authenticating" evidence—that is, evidence "requir[ing] no extrinsic evidence of authenticity in order to be admitted." Fed.R.Evid. 902. None of the categories enumerated in the rule (which include, *inter alia,* certain public records, periodicals, or business records) applies to the VK page.

5 Some courts have suggested applying "greater scrutiny" or particularized methods for the authentication of evidence derived from the Internet due to a "heightened possibility for manipulation." *Griffin v. State,* 419 Md. 343, 19 A.3d 415, 424 (2011) (citing cases). Although we are skeptical that such scrutiny is required, we need not address the issue as the government's proffered authentication in this case fails under Rule 901's general authentication requirement.

6 Certain statements by the district court could also support this view of the government's theory of the introduction of the VK page—notably, the district court's suggestion that the page was properly authenticated solely by the fact that it was "coming off the Internet now." J.A. 32. As noted below, however, this rationale for authentication is inconsistent with the manner in which the evidence was admitted by the district court and the way it was employed by the government at trial.

7 *See* J.A. 21(AUSA to the district court: "This is the defendant's Russian Facebook page.... [It] contains his Skype address which is the same formulation ["]azmadeuz["] next to his photograph."); G.A. 66 (AUSA in summation to the jury: "Azmadeuz. That [is] his online identity, ladies and gentlemen, for Skype and for [G]mail. That is [w]hat the defendant calls himself. Timku even told you that the defendant sometimes uses azmadeuz@yahoo.com. That [is] his own name on the Internet. Timku didn't make it up for him. The defendant made it up for himself.")

8 While the government presented several witnesses to bolster other parts of Timku's testimony, none presented any evidence that Zhyltsou had sent the birth certificate. Those witnesses testified, respectively, (1) that the invented infant's

birth certificate was in fact a forgery; (2) that Ukraine imposes compulsive military service that permits certain exemptions, including for those with children under three years of age; (3) that the e-mail with the birth certificate attached did in fact travel from azmadeuz@gmail.com to Timku's e-mail address; and (4) that in 2011 Zhyltsou had been briefly stopped and questioned by federal agents, shortly after which (5) the Gmail account that was used to send the birth certificate was closed.

End of Document

McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter11-a. Of the Consolidated Laws (Refs & Annos)
Part Two. The Principal Proceedings
Title I. Preliminary Proceedings in Superior Court
Article 210. Proceedings in Superior Court from Filing of Indictment to Plea (Refs & Annos)

McKinney's CPL § 210.20

§ 210.20 Motion to dismiss or reduce indictment

Effective: November 1, 1999
Currentness

1. After arraignment upon an indictment, the superior court may, upon motion of the defendant, dismiss such indictment or any count thereof upon the ground that:

(a) Such indictment or count is defective, within the meaning of section 210.25; or

(b) The evidence before the grand jury was not legally sufficient to establish the offense charged or any lesser included offense; or

(c) The grand jury proceeding was defective, within the meaning of section 210.35; or

(d) The defendant has immunity with respect to the offense charged, pursuant to section 50.20 or 190.40; or

(e) The prosecution is barred by reason of a previous prosecution, pursuant to section 40.20; or

(f) The prosecution is untimely, pursuant to section 30.10; or

(g) The defendant has been denied the right to a speedy trial; or

(h) There exists some other jurisdictional or legal impediment to conviction of the defendant for the offense charged; or

(i) Dismissal is required in the interest of justice, pursuant to section 210.40.

1-a. After arraignment upon an indictment, if the superior court, upon motion of the defendant pursuant to this subdivision or paragraph b of subdivision one of this section challenging the legal sufficiency of the evidence before the grand jury, finds that the evidence before the grand jury was not legally sufficient to establish the commission by the defendant of the offense charged in any count contained within the indictment, but was legally sufficient to establish the commission of a lesser included offense, it shall order the count or counts of the indictment with respect to which the finding is made reduced to allege the most

serious lesser included offense with respect to which the evidence before the grand jury was sufficient, except that where the most serious lesser included offense thus found is a petty offense, and the court does not find evidence of the commission of any crime in any other count of the indictment, it shall order the indictment dismissed and a prosecutor's information charging the petty offense filed in the appropriate local criminal court. The motion to dismiss or reduce any count of an indictment based on legal insufficiency to establish the offense charged shall be made in accordance with the procedure set forth in subdivisions one through seven of section 210.45, provided however, the court shall state on the record the basis for its determination. Upon entering an order pursuant to this subdivision, the court shall consider the appropriateness of any securing order issued pursuant to article 510 of this chapter.

2. A motion pursuant to this section, except a motion pursuant to paragraph (g) of subdivision one, should be made within the period provided in section 255.20. A motion made pursuant to paragraph (g) of subdivision one must be made prior to the commencement of trial or entry of a plea of guilty.

3. Upon the motion, a defendant who is in a position adequately to raise more than one ground in support thereof should raise every such ground upon which he intends to challenge the indictment. A subsequent motion based upon any such ground not so raised may be summarily denied, although the court, in the interest of justice and for good cause shown, may in its discretion entertain and dispose of such a motion on the merits notwithstanding.

4. Upon dismissing an indictment or a count thereof upon any of the grounds specified in paragraphs (a), (b), (c) and (i) of subdivision one, or, upon dismissing a superior court information or a count thereof upon any of the grounds specified in paragraphs (a) or (i) of subdivision one, the court may, upon application of the people, in its discretion authorize the people to submit the charge or charges to the same or another grand jury. When the dismissal is based upon some other ground, such authorization may not be granted. In the absence of authorization to submit or resubmit, the order of dismissal constitutes a bar to any further prosecution of such charge or charges, by indictment or otherwise, in any criminal court within the county.

5. If the court dismisses one or more counts of an indictment, against a defendant who was under the age of sixteen at the time of the commission of the crime and who did not lack criminal responsibility for such crime by reason of infancy, and one or more other counts of the indictment having been joined in the indictment solely with the dismissed count pursuant to subdivision six of section 200.20 is not dismissed, the court must direct that such count be removed to the family court in accordance with article seven hundred twenty-five of this chapter.

6. The effectiveness of an order reducing a count or counts of an indictment or dismissing an indictment and directing the filing of a prosecutor's information or dismissing a count or counts of an indictment charging murder in the first degree shall be stayed for thirty days following the entry of such order unless such stay is otherwise waived by the people. On or before the conclusion of such thirty-day period, the people shall exercise one of the following options:

(a) Accept the court's order by filing a reduced indictment, by dismissing the indictment and filing a prosecutor's information, or by filing an indictment containing any count or counts remaining after dismissal of the count or counts charging murder in the first degree, as appropriate;

(b) Resubmit the subject count or counts to the same or a different grand jury within thirty days of the entry of the order or such additional time as the court may permit upon a showing of good cause; provided, however, that if in such case an order is again entered with respect to such count or counts pursuant to subdivision one-a of this section, such count or counts may not again be

submitted to a grand jury. Where the people exercise this option, the effectiveness of the order further shall be stayed pending a determination by the grand jury and the filing of a new indictment, if voted, charging the resubmitted count or counts;

(c) Appeal the order pursuant to subdivision one or one-a of section 450.20. Where the people exercise this option, the effectiveness of the order further shall be stayed in accordance with the provisions of subdivision two of section 460.40.

If the people fail to exercise one of the foregoing options, the court's order shall take effect and the people shall comply with paragraph (a) of this subdivision.

Credits

(L.1970, c. 996, § 1. Amended L.1972, c. 184, § 3; L.1974, c. 467, § 15; L.1974, c. 763, § 2; L.1980, c. 136, § 3; L.1990, c. 209, §§ 13, 14; L.1995, c. 1, § 9; L.1999, c. 563, § 1, eff. Nov. 1, 1999.)

McKinney's CPL § 210.20, NY CRIM PRO § 210.20

Current through L.2019, chapter 758 and L.2020, chapters 1 to 249. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter11-a. Of the Consolidated Laws (Refs & Annos)
Part Two. The Principal Proceedings
Title I. Preliminary Proceedings in Superior Court
Article 210. Proceedings in Superior Court from Filing of Indictment to Plea (Refs & Annos)

McKinney's CPL § 210.35

§ 210.35 Motion to dismiss indictment; defective grand jury proceeding

Currentness

A grand jury proceeding is defective within the meaning of paragraph (c) of subdivision one of section 210.20 when:

1. The grand jury was illegally constituted; or

2. The proceeding is conducted before fewer than sixteen grand jurors; or

3. Fewer than twelve grand jurors concur in the finding of the indictment; or

4. The defendant is not accorded an opportunity to appear and testify before the grand jury in accordance with the provisions of section 190.50; or

5. The proceeding otherwise fails to conform to the requirements of article one hundred ninety to such degree that the integrity thereof is impaired and prejudice to the defendant may result.

Credits
(L.1970, c. 996, § 1.)

McKinney's CPL § 210.35, NY CRIM PRO § 210.35
Current through L.2019, chapter 758 and L.2020, chapters 1 to 249. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter11-a. Of the Consolidated Laws (Refs & Annos)
Part Two. The Principal Proceedings
Title J. Prosecution of Indictments in Superior Courts--Plea to Sentence
Article 270. Jury Trial--Formation and Conduct of Jury (Refs & Annos)

McKinney's CPL § 270.15

§ 270.15 Trial jury; examination of prospective jurors; challenges generally

Currentness

1. (a) If no challenge to the panel is made as prescribed by section 270.10, or if such challenge is made and disallowed, the court shall direct that the names of not less than twelve members of the panel be drawn and called as prescribed by the judiciary law. Such persons shall take their places in the jury box and shall be immediately sworn to answer truthfully questions asked them relative to their qualifications to serve as jurors in the action. In its discretion, the court may require prospective jurors to complete a questionnaire concerning their ability to serve as fair and impartial jurors, including but not limited to place of birth, current address, education, occupation, prior jury service, knowledge of, relationship to, or contact with the court, any party, witness or attorney in the action and any other fact relevant to his or her service on the jury. An official form for such questionnaire shall be developed by the chief administrator of the courts in consultation with the administrative board of the courts. A copy of questionnaires completed by the members of the panel shall be given to the court and each attorney prior to examination of prospective jurors.

(b) The court shall initiate the examination of prospective jurors by identifying the parties and their respective counsel and briefly outlining the nature of case to all the prospective jurors. The court shall then put to the members of the panel who have been sworn pursuant to this subdivision and to any prospective jurors subsequently sworn, questions affecting their qualifications to serve as jurors in the action.

(c) The court shall permit both parties, commencing with the people, to examine the prospective jurors, individually or collectively, regarding their qualifications to serve as jurors. Each party shall be afforded a fair opportunity to question the prospective jurors as to any unexplored matter affecting their qualifications, but the court shall not permit questioning that is repetitious or irrelevant, or questions as to a juror's knowledge of rules of law. If necessary to prevent improper questioning as to any matter, the court shall personally examine the prospective jurors as to that matter. The scope of such examination shall be within the discretion of the court. After the parties have concluded their examinations of the prospective jurors, the court may ask such further questions as it deems proper regarding the qualifications of such prospective jurors.

1-a. The court may for good cause shown, upon motion of either party or any affected person or upon its own initiative, issue a protective order for a stated period regulating disclosure of the business or residential address of any prospective or sworn juror to any person or persons, other than to counsel for either party. Such good cause shall exist where the court determines that there is a likelihood of bribery, jury tampering or of physical injury or harassment of the juror.

2. Upon the completion of such examination by both parties, each, commencing with the people, may challenge a prospective juror for cause, as prescribed by section 270.20. If such challenge is allowed, the prospective juror must be excluded from

service. After both parties have had an opportunity to challenge for cause, the court must permit them to peremptorily challenge any remaining prospective juror, as prescribed by section 270.25, and such juror must be excluded from service. The people must exercise their peremptory challenges first and may not, after the defendant has exercised his peremptory challenges, make such a challenge to any remaining prospective juror who is then in the jury box. If either party so requests, challenges for cause must be made and determined, and peremptory challenges must be made, within the courtroom but outside of the hearing of the prospective jurors in such manner as not to disclose which party made the challenge. The prospective jurors who are not excluded from service must retain their place in the jury box and must be immediately sworn as trial jurors. They must be sworn to try the action in a just and impartial manner, to the best of their judgment, and to render a verdict according to the law and the evidence.

3. The court may thereupon direct that the persons excluded be replaced in the jury box by an equal number from the panel or, in its discretion, direct that all sworn jurors be removed from the jury box and that the jury box be occupied by such additional number of persons from the panel as the court shall direct. In the court's discretion, sworn jurors who are removed from the jury box as provided herein may be seated elsewhere in the courtroom separate and apart from the unsworn members of the panel or may be removed to the jury room or be allowed to leave the courthouse. The process of jury selection as prescribed herein shall continue until twelve persons are selected and sworn as trial jurors. The juror whose name was first drawn and called must be designated by the court as the foreperson, and no special oath need be administered to him or her. If before twelve jurors are sworn, a juror already sworn becomes unable to serve by reason of illness or other incapacity, the court must discharge him or her and the selection of the trial jury must be completed in the manner prescribed in this section.

4. A challenge for cause of a prospective juror which is not made before he is sworn as a trial juror shall be deemed to have been waived, except that such a challenge based upon a ground not known to the challenging party at that time may be made at any time before a witness is sworn at the trial. If such challenge is allowed by the court, the juror shall be discharged and the selection of the trial jury shall be completed in the manner prescribed in this section, except that if alternate jurors have been sworn, the alternate juror whose name was first drawn and called shall take the place of the juror so discharged.

Credits

(L.1970, c. 996, § 1. Amended L.1981, c. 301, § 1; L.1981, c. 302, § 1; L.1983, c. 684, § 1; L.1985, c. 173, § 1; L.1985, c. 467, § 1; L.1985, c. 516, § 1; L.1997, c. 634, § 1, eff. Sept. 24, 1997.)

McKinney's CPL § 270.15, NY CRIM PRO § 270.15

Current through L.2019, chapter 758 and L.2020, chapters 1 to 249. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Penal Law (Refs & Annos)
Chapter 40. Of the Consolidated Laws (Refs & Annos)
Part Two. Sentences
Title E. Sentences
Article 60. Authorized Dispositions of Offenders (Refs & Annos)

McKinney's Penal Law § 60.12

§ 60.12 Authorized disposition; alternative sentence; domestic violence cases

Effective: May 14, 2019
Currentness

1. Notwithstanding any other provision of law, where a court is imposing sentence upon a person pursuant to section 70.00, 70.02, 70.06 or subdivision two or three of section 70.71 of this title, other than for an offense defined in section 125.26, 125.27, subdivision five of section 125.25, or article 490 of this chapter, or for an offense which would require such person to register as a sex offender pursuant to article six-C of the correction law, an attempt or conspiracy to commit any such offense, and is authorized or required pursuant to sections 70.00, 70.02, 70.06 or subdivision two or three of section 70.71 of this title to impose a sentence of imprisonment, the court, upon a determination following a hearing that (a) at the time of the instant offense, the defendant was a victim of domestic violence subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family or household as the defendant as such term is defined in subdivision one of section 530.11 of the criminal procedure law; (b) such abuse was a significant contributing factor to the defendant's criminal behavior; (c) having regard for the nature and circumstances of the crime and the history, character and condition of the defendant, that a sentence of imprisonment pursuant to section 70.00, 70.02, 70.06 or subdivision two or three of section 70.71 of this title would be unduly harsh may instead impose a sentence in accordance with this section.

A court may determine that such abuse constitutes a significant contributing factor pursuant to paragraph (b) of this subdivision regardless of whether the defendant raised a defense pursuant to article thirty-five, article forty, or subdivision one of section 125.25 of this chapter.

At the hearing to determine whether the defendant should be sentenced pursuant to this section, the court shall consider oral and written arguments, take testimony from witnesses offered by either party, and consider relevant evidence to assist in making its determination. Reliable hearsay shall be admissible at such hearings.

2. Where a court would otherwise be required to impose a sentence pursuant to section 70.02 of this title, the court may impose a definite sentence of imprisonment of one year or less, or probation in accordance with the provisions of section 65.00 of this title, or may fix a determinate term of imprisonment as follows:

(a) For a class B felony, the term must be at least one year and must not exceed five years;

(b) For a class C felony, the term must be at least one year and must not exceed three and one-half years;

(c) For a class D felony, the term must be at least one year and must not exceed two years; and

(d) For a class E felony, the term must be one year and must not exceed one and one-half years.

3. Where a court would otherwise be required to impose a sentence for a class A felony offense pursuant to section 70.00 of this title, the court may fix a determinate term of imprisonment of at least five years and not to exceed fifteen years.

4. Where a court would otherwise be required to impose a sentence for a class A felony offense pursuant to subparagraph (i) of paragraph (b) of subdivision two of section 70.71 of this title, the court may fix a determinate term of imprisonment of at least five years and not to exceed eight years.

5. Where a court would otherwise be required to impose a sentence for a class A felony offense pursuant to subparagraph (i) of paragraph (b) of subdivision three of section 70.71 of this title, the court may fix a determinate term of imprisonment of at least five years and not to exceed twelve years.

6. Where a court would otherwise be required to impose a sentence for a class A felony offense pursuant to subparagraph (ii) of paragraph (b) of subdivision two of section 70.71 of this title, the court may fix a determinate term of imprisonment of at least one year and not to exceed three years.

7. Where a court would otherwise be required to impose a sentence for a class A felony offense pursuant to subparagraph (ii) of paragraph (b) of subdivision three of section 70.71 of this title, the court may fix a determinate term of imprisonment of at least three years and not to exceed six years.

8. Where a court would otherwise be required to impose a sentence pursuant to subdivision six of section 70.06 of this title, the court may fix a term of imprisonment as follows:

(a) For a class B felony, the term must be at least three years and must not exceed eight years;

(b) For a class C felony, the term must be at least two and one-half years and must not exceed five years;

(c) For a class D felony, the term must be at least two years and must not exceed three years;

(d) For a class E felony, the term must be at least one and one-half years and must not exceed two years.

9. Where a court would otherwise be required to impose a sentence for a class B, C, D or E felony offense pursuant to section 70.00 of this title, the court may impose a sentence in accordance with the provisions of subdivision two of section 70.70 of this title.

10. Except as provided in subdivision seven of this section, where a court would otherwise be required to impose a sentence pursuant to subdivision three of section 70.06 of this title, the court may impose a sentence in accordance with the provisions of subdivision three of section 70.70 of this title.

11. Where a court would otherwise be required to impose a sentence pursuant to subdivision three of section 70.06 of this title, where the prior felony conviction was for a felony offense defined in section 70.02 of this title, the court may impose a sentence in accordance with the provisions of subdivision four of section 70.70 of this title.

Credits

(Added L.1998, c. 1, § 1, eff. Aug. 6, 1998. Amended L. 2019, c. 31, § 1, eff. May 14, 2019; L.2019, c. 55, pt. WW, § 1, eff. May 14, 2019.)

McKinney's Penal Law § 60.12, NY PENAL § 60.12

Current through L.2019, chapter 758 and L.2020, chapters 1 to 249. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Penal Law (Refs & Annos)
Chapter 40. Of the Consolidated Laws (Refs & Annos)
Part Three. Specific Offenses
Title H. Offenses Against the Person Involving Physical Injury, Sexual Conduct, Restraint and Intimidation
Article 125. Homicide and Related Offenses (Refs & Annos)

McKinney's Penal Law § 125.25

§ 125.25 Murder in the second degree

Effective: June 30, 2019
Currentness

A person is guilty of murder in the second degree when:

1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:

(a)(i) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime. (ii) It shall not be a "reasonable explanation or excuse" pursuant to subparagraph (i) of this paragraph when the defendant's conduct resulted from the discovery, knowledge or disclosure of the victim's sexual orientation, sex, gender, gender identity, gender expression or sex assigned at birth; or

(b) The defendant's conduct consisted of causing or aiding, without the use of duress or deception, another person to commit suicide. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the second degree or any other crime; or

2. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person; or

3. Acting either alone or with one or more other persons, he commits or attempts to commit robbery, burglary, kidnapping, arson, rape in the first degree, criminal sexual act in the first degree, sexual abuse in the first degree, aggravated sexual abuse, escape in the first degree, or escape in the second degree, and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants; except that in any prosecution under this subdivision, in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:

(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and

(b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

(c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

(d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury; or

4. Under circumstances evincing a depraved indifference to human life, and being eighteen years old or more the defendant recklessly engages in conduct which creates a grave risk of serious physical injury or death to another person less than eleven years old and thereby causes the death of such person; or

5. Being eighteen years old or more, while in the course of committing rape in the first, second or third degree, criminal sexual act in the first, second or third degree, sexual abuse in the first degree, aggravated sexual abuse in the first, second, third or fourth degree, or incest in the first, second or third degree, against a person less than fourteen years old, he or she intentionally causes the death of such person.

Murder in the second degree is a class A-I felony.

Credits

(L.1965, c. 1030. Amended L.1967, c. 791, § 9; L.1973, c. 276, § 13; L.1974, c. 367, § 4; L.1984, c. 210, § 1; L.1990, c. 477, § 4; L.2003, c. 264, § 10, eff. Nov. 1, 2003; L.2004, c. 459, § 4, eff. Nov. 1, 2004; L.2006, c. 320, § 7, eff. Nov. 1, 2006; L.2019, c. 45, § 1, eff. June 30, 2019.)

McKinney's Penal Law § 125.25, NY PENAL § 125.25

Current through L.2019, chapter 758 and L.2020, chapters 1 to 249. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Penal Law (Refs & Annos)
Chapter 40. Of the Consolidated Laws (Refs & Annos)
Part Three. Specific Offenses
Title P. Offenses Against Public Safety
Article 265. Firearms and Other Dangerous Weapons (Refs & Annos)

McKinney's Penal Law § 265.03

§ 265.03 Criminal possession of a weapon in the second degree

Effective: December 15, 2006
Currentness

A person is guilty of criminal possession of a weapon in the second degree when:

(1) with intent to use the same unlawfully against another, such person:

(a) possesses a machine-gun; or

(b) possesses a loaded firearm; or

(c) possesses a disguised gun; or

(2) such person possesses five or more firearms; or

(3) such person possesses any loaded firearm. Such possession shall not, except as provided in subdivision one or seven of section 265.02 of this article, constitute a violation of this subdivision if such possession takes place in such person's home or place of business.

Criminal possession of a weapon in the second degree is a class C felony.

Credits
(Added L.1974, c. 1041, § 3. Amended L.1998, c. 378, § 4, eff. Nov. 1, 1998; L.2005, c. 764, § 3, eff. Dec. 21, 2005; L.2006, c. 742, § 2, eff. Nov. 1, 2006; L.2006, c. 745, § 1, eff. Dec. 15, 2006.)

McKinney's Penal Law § 265.03, NY PENAL § 265.03
Current through L.2019, chapter 758 and L.2020, chapters 1 to 249. Some statute sections may be more current, see credits for details.

End of Document