NYSBA Criminal Justice Section
Spring 2019 Meeting
Court of Appeals 2018-2019 Term

CLE MATERIALS

I. JURISDICTION

People v Baisley, 32 NY3d 1020 (2018)

Memorandum
The Court upheld the order of the Appellate Term because defendant's challenge to the authority of Justice Court over criminal charges arising from his noncompliance with a child support order was not properly before the Court. The parties were mistaken, and the underlying support order was not issued by Family Court, but by Supreme Court in the context of defendant's contested matrimonial proceeding. Thus, the Court did not opine on defendant's claim that Family Court has exclusive and continuing jurisdiction over any criminal charges based on violations of its own support order.

II. STATUTORY INTERPRETATION

People v Watts, 32 NY3d 358 (2018)

Fahey, J.
At issue was whether defendant's convictions for criminal forgery and possession of counterfeit event tickets were defective under Penal Law § 170.10 [1] on the ground that an event ticket: 1) does not "affect a legal right, interest, obligation or status"; and 2) is not of the same character as a "deed, will, codicil, contract, assignment, commercial instrument, [or] credit card." The Court held that the possession of an event ticket affects an individual's legal rights and status and other obligations because in certain circumstances, a ticket holder can recover the price of the ticket, in an action for a breach of contract. Moreover, event tickets fall within the category of "other instruments" defined by the statute as those that "evidence, create, transfer, terminate, or otherwise affect a legal right, interest, obligation, or status." Penal Law § 170.10 [1].

Matter of Gonzalez v. Annucci, 32 NY3d 461 (2018)

DiFiore, C.J.
Addressing the primary issue, the Court held that there is nothing set forth in the statutory language of Correction Law § 201 (5) that imposes a heightened duty upon Department of Corrections and Community Supervision's (DOCCS) to provide "substantial assistance" to sex offenders to identify appropriate housing that complies with the Sexual Assault Reform Act (SARA). Section 201 requires DOCCS to assist inmates to secure housing prior to release and under supervision and this obligation is satisfied when it actively investigates and

approves residences that have been identified by inmates and when it provides inmates with adequate resources to allow them to propose residences for investigation and approval. In sum, Section 201 deals with a general duty of providing "assistance" and it is unreasonable and impractical to narrowly interpret it to include DOCCS' greater responsibility to assist sex offenders residing in Residential Treatment Facilities (RTFs). Here, "the record reflects that DOCCS provided more than passive assistance."

The Court also held that the Appellate Division properly invoked the exception to mootness to reach the novel and substantial issues that are likely to be repeated and will typically evade review. See Matter of Hearst Corp. v Clyne, 50 NY2d 707, 714 (1980). This issue is likely to recur due to the lack of SARA-compliant housing in New York City, and the resulting need for placement of sex offenders in RTFs for a period of no more than six months pursuant to Penal Law § 70.45. Moreover, the issues presented are likely to evade review because of the transitory duration of placement at the RTFs. These novel and substantial issues also raise the extent of DOCCS' statutory obligation to aid in obtaining SARA-compliant housing.

With respect to the issue of the loss of petitioner's good time credit, the claim became moot when petitioner completed his post release supervision (PRS) term. Further, the claim does not fall within the exception to mootness because it is unlikely to evade review, given that other sex offenders subject to the same SARA residency requirement can raise the challenge to the loss of good time credit while they remain on PRS.

Wilson, J., dissenting (Rivera, J., joining in part)
Judge Wilson states that it is not "unreasonable" nor "impractical" to conclude that DOCCS must make an individualized determination as to whether an inmate nearing release needs certain types of assistance to be able to secure housing and then to take adequate steps to provide that assistance. The Appellate Division properly found that DOCCS failed to "assist" petitioner, as the officials disapproved every potential residence that defendant suggested and did not provide defendant with any manner of aid until his name eventually came up on the waiting list for placement in the SARA-compliant homeless shelter, to which he was ultimately transferred.

Rivera, J., concurring in part and dissenting in part
Judge Rivera agreed fully with Judge Wilson's analysis and discussion of the proper interpretation of DOCCS' duty to assist petitioner pursuant to Corrections Law § 201 (5), and the need for a hearing on petitioner's challenge to his placement at the Woodbourne Correctional Facility based on his claim that it failed to meet the requirements of a residential treatment facility. However, Judge Rivera agreed with the majority that the exception to the mootness doctrine does not apply to petitioner's good time credit claim.

Matter of N.Y. Civil Liberties Union v N.Y.C. Police Dep't, 32 NY3d 556 (2018)

Garcia, J.
The New York Civil Liberties Union (NYCLU) sought disclosure of protected personnel records from the NYPD pursuant to the Freedom of Information Law (FOIL), on the basis that the prohibition on disclosing personnel records under Civil Rights Law § 50-a did not

apply when an officer's identifying information is adequately redacted. The Court disagreed, reasoning that such a reading of the FOIL would enable the NYPD to circumvent Civil Rights Law § 50-a by simply applying redactions that the agency, in its sole discretion, deems adequate. That scheme would transform Civil Rights Law § 50-a into an optional mechanism applicable only when (and if) the agency chooses to invoke it. Moreover, FOIL contains no statutory authorization for redactions of personnel records, and instead bars agencies from disclosing records that are exempt from FOIL.

Stein, J., concurring
Judge Stein concurs because the issue was readily answered by reference to the plain language of the FOIL and Civil Rights Law § 50-a, and therefore, it was unnecessary for the judges to rely on Matter of Short (57 NY2d at 405), or to reach the continuing viability of this Court's reasoning in the case regarding the extent to which an agency may be required under FOIL to release redacted records. Likewise, there was no need to analyze the interplay between Matter of Short and those cases raised by the dissent.

Rivera, J., dissenting
Judge Rivera dissented based on stare decisis. She notes that the Court has always viewed Civil Rights law § 50-a in relation to its purpose: "to protect officers from harassment based on records specific to them." However, this concern is not implicated where the subject of the records is not known and all identifying information has been redacted. The majority's conclusion is erroneous because it concealed all employment records of police officers from public review, except in the limited circumstances where the specific records are material to pending litigation.

Wilson, J., dissenting
Judge Wilson argued that there was no basis to withhold the information sought by NYCLU from disclosure under the FOIL, since some of it was already publicly disclosed in Trial Room hearings. Furthermore, Trial Room confidentiality provisions give the subject officer notice and opportunity to seek confidential treatment, whether the underlying protection was afforded by Civil Rights Law § 50-a or otherwise. Lastly, he agreed with Judge Rivera that FOIL contemplates the redaction of confidential information and further agreed that nonconfidential information subject to FOIL cannot be withheld, even if the redactions might cause a reader to be misled.

People v Frederick Diaz, 32 NY3d 538 (2018)

Feinman, J.
At issue was whether defendant's murder of his half-sister, a non-sexual offense for which registration is required in Virginia under Va Code Ann § 9.1-902, rendered him a "sex offender" for purposes of New York's Sex Offender Registry Act (SORA), which provides that a registerable sex offense includes "a [felony] conviction…for which the offender is required to register as a sex offender in the jurisdiction in which [it] occurred." (Correction Law § 168-a (2) (d) (ii)). The Court held that defendant is not required to register as a sex offender under SORA because the Virginia General Assembly intended to classify defendant as a perpetrator of a violent, nonsexual crime against a minor. Furthermore, this holding does

not diminish a defendant's obligation to keep the state in which he committed the felony notified of his whereabouts. The Court did not reach defendant's argument that requiring him to register under SORA violated due process because it concluded that he was not required to register in the first instance.

Fahey, J., dissenting (DiFiore, C.J., and Stein, J., joining)
Judge Fahey dissented because the majority does not resolve defendant's principal contention, that SORA violates his constitutional rights and their interpretation has defeated the purpose of SORA. A person is a "sex offender" required to register under SORA, if covered by its detailed definitional provisions, regardless of whether the person was convicted of a sexual crime or instead, a registerable offense against a minor that has no sexual component or aspect. In referring to an offender who "is required to register as a sex offender in the jurisdiction in which the conviction occurred," Correction Law § 168-a (2) (d) (ii) describes an offender who is required to be on a registry set up by the other jurisdiction pursuant to the dictates of the federal Crimes Against Children and Sexually Violent Offender Registration Act.

People v Meyers – Decided May 9, 2019

Memorandum
The Court affirmed the Appellate Division's order since the purpose of the reconstruction hearing that was conducted in this case was not to determine whether the court complied with the counsel notice requirements of CPL 310.30 and People v O'Rama (78 NY2d 270, 276 [1991]), but rather, to determine whether in the first instance, the paper marked an exhibit reflected a jury request such that those obligations were triggered. The findings of the courts below, following the hearing, that the paper was a draft note that the jury discarded was supported by the record.

Garcia, J., concurring in result
Judge Garcia wrote separately, describing how he "remain[s] convinced that the O'Rama rule – exacerbated by [People v Parker, 32 NY3d 49 (2018)] – is unfair and unworkable, generating contorted holdings aimed at avoiding absurd results."

III. JUSTIFICATION

People v Vega – Decided May 7, 2019

Memorandum
Defendant was charged with assault, including one count of assault in the second degree, which required the People to prove that, with intent to cause physical injury to the victim, defendant caused such injury by means of a dangerous instrument (see PL § 120.05[2]). Defendant raised a justification defense at trial, arguing that he was defending a third person (see PL § 35.15). On the lesser degree of assault, which does not have a dangerous instrument element, the trial court instructed the jury on the justified use of non-deadly force. The People requested, and the trial court agreed, to instruct the jury that, if it found beyond a reasonable doubt that defendant used a dangerous instrument, then defendant could only be justified in the use of deadly physical force. The Court did not rule out the possibility that a

defendant may be entitled to a jury instruction on the justified use of non-deadly (or "ordinary") physical force, even though charged with a crime containing a dangerous instrument element. There is no per se rule based solely on the fact that a defendant has been charged with second-degree assault with a dangerous instrument. In this particular case, the Court concluded the jury instruction did not require reversal because there was no reasonable view of the evidence that defendant merely "attempted" or "threatened" to use the instrument in a manner readily capable of causing death or serious physical injury but that he did not "use" it in that manner.

Garcia, J., concurring
Judge Garcia agreed that the jury instruction did not require reversal in this case but wrote separately since he does not "endorse the majority's suggestion that a jury may convict a defendant of second-degree assault by means of a dangerous instrument while simultaneously concluding that the defendant used less than deadly physical force." Judge Garcia believed it would be a "rare case" and would "not foreclose the possibility that, in reality" such case may never arise.

People v Rkein – Decided May 7, 2019

Memorandum
Citing to its decision in People v Vega, the Court held that, on the record before it, the trial court appropriately determined that, if the jury convicted defendant of second-degree assault by means of a dangerous instrument, it necessarily determined that defendant employed deadly, rather than ordinary, physical force when he struck the complainant on the head with a pint glass. Additionally, no reasonable view of the evidence supported a deadly force justification charge.

People v Darryl Brown – Decided May 7, 2019

Wilson, J.
Defendant shot and killed the victim in the lobby of defendant's building after an argument. The Court concluded that there was no reasonable view of the evidence that warranted a justification charge. The victim was unarmed and swiped at defendant's gun only after defendant pulled out the gun. The Court held that the trial court's refusal to charge justification was not error because defendant was the initial aggressor as a matter of law.

IV. GRAND JURY & INDICTMENTS

People v Manragh, 32 NY3d 1101 (2018)

Memorandum
Defendant argued that his guilty plea was invalid because the prosecution failed to notify the grand jury of his request to call a particular witness on his behalf. Reviewing the record as a whole, the Court agreed that defendant entered his guilty plea "understandingly and voluntarily" and that the County Court did not abuse its discretion in refusing to allow defendant to withdraw his plea. Furthermore, defendant's guilty plea forfeited any claim

relating to the exclusion of inculpatory and inadmissible witness testimony at the grand jury, because the claimed error did not give rise to a "constitutional defect implicating the integrity of the [grand jury] process."

Rivera, J., concurring (Fahey, J., joining)
While Judge Rivera agreed that defendant's grounds for reversal were without merit, she noted that the majority improperly merged the forfeiture and merits analysis of defendant's claim regarding the integrity of the grand jury process. She opines that the question of whether a defendant's guilty plea forfeits a claim is a threshold issue that must be resolved by following "distinct analytical steps", and not a merits-based determination or a ruling on the proper remedy for a proven error. A court must determine if the defect is of a jurisdictional nature or of a kind that impairs the process, and if it is, the court may reach the merits and decide whether the defect warrants a remedy. While the majority ignored this two-step process and added an improper prejudice requirement, the defect here did not warrant reversal because the testimony was largely inadmissible and would have inculpated defendant by establishing that he had a relationship with the complainant and he was in violation of an order of protection.

People v Allen, 32 NY3d 611 (2018)

Fahey, J.
Criminal Procedure Law 190.75(3) directs the People to obtain court authorization before resubmitting a charge to a grand jury. Here, the People violated that provision when they failed to obtain the authorization to resubmit a murder count to a new grand jury after the first grand jury was deadlocked. Defendant was subsequently acquitted of the murder charge, but convicted of manslaughter. At issue was whether the tainted murder count warranted reversal. The majority held it did not because there was no reasonable possibility that the presence of the murder count influenced the jury's decision to convict defendant on manslaughter.

Rivera, J., concurring
Judge Rivera departed from the majority's analysis only to the extent it applied a prejudice analysis to the erroneously obtained murder count indictment. Instead, the People's failure to obtain the court's permission for re-submission of the murder charge to the grand jury rendered the indictment on that charge jurisdictionally defective and subject to dismissal under CPL § 210.35 and § 210.20 [1].

V. SENTENCING

People v Hakes, 32 NY3d 624 (2018)

Feinman, J.
The Court held that sentencing courts can require a defendant to pay for a Secure Continuous Remote Alcohol Monitoring bracelet that measures alcohol intake as a condition of probation. The Court reasoned that Penal Law § 65.10 authorizes a variety of conditions of probation that may require defendants to pay certain implicit costs or recurring fees

necessary to satisfy the condition itself. To the extent the costs associated with electronic monitoring could be considered to have a punitive or deterrent effect, that effect is dwarfed by the goals to protect the public from alcohol-related offenses, while assisting a defendant's rehabilitation during the probationary term. Importantly, the sentencing courts are able to determine if the defendant has demonstrated an inability to pay the costs associated with a particular condition, or if the defendant willfully refuses to pay and can take reasonable alternative actions in response.

Rivera, J., dissenting
Judge Rivera argued that Penal Law § 65.10 does not authorize judicial imposition of costs for an electronic monitoring device. The history of the relevant provisions does not demonstrate a legislative intent to empower courts to condition a defendant's probation on payment for an electronic monitoring device, without guidance on how to exercise such discretion. Whether such authorization is a good idea requires balancing various social and economic policies and concerns—a task solely for the Legislature. A review of the Legislature's detailed statutory scheme for imposing costs, fees, and fines demonstrates that it explicitly imposes a financial burden on a defendant when it intends to.

People v Thomas, 2019 NY Slip Op 01167 - Decided February 19, 2019

Stein, J.
At issue was whether a resentence on a prior conviction—imposed after the original sentence is vacated as illegal—resets the date of sentencing for purposes of determining a defendant's predicate felony status.

In 1993, defendant was sentenced as a second felony offender, based on two prior felony convictions for which he was sentenced in 1989. The 1989 sentences were later vacated, and defendant was resentenced for those offenses in 2009 and 2012. A second felony offender is one who is convicted of a felony "after having previously been subjected to one or more predicate felony convictions" (Penal Law § 70.06[1][a]). To qualify as a "predicate felony conviction," the sentence for the prior conviction "must have been imposed before commission of the present felony," but "not more than ten years before commission of the [present] felony" (Penal Law § 70.06[1][b][ii], [iv]). Defendant argued that the 1989 convictions could not form the basis of the 1993 sentencing designation because the sentences for those convictions were vacated and defendant was resentenced after the conduct underlying the 1993 conviction occurred.

The Court rejected defendant's interpretation because the statutory text referenced a defendant's prior "sentence," not "resentence." Accordingly, the Court held that the date on which sentence was first imposed upon a prior conviction—not the date of any subsequent re-sentencings on that same conviction—is the relevant date for purposes of determining when "[s]entence upon such prior conviction [was] imposed" under Penal Law § 70.06 [1] [b] [ii]. Therefore, because the original sentences on defendant's 1989 convictions were imposed before the commission of the 1993 felony, the sequentiality requirement of the predicate felony statute was satisfied, and defendant was properly sentenced as a second felony offender.

Fahey, J., dissenting (Rivera, J., and Wilson, J., joining)
In allowing the dates of the original, vacated sentences to control, Judge Fahey argued that the majority gave operative, legal effect to illegal sentences. According to the dissent, the Court must look to the first legal sentence, as opposed to the original sentence because "legality should prevail over chronology." When the sentences on defendant's 1989 convictions were vacated in their entirety, they ceased to exist or have legal effect. Accordingly, the legal sentences imposed in 2009 and 2012 are the only sentences on defendant's 1989 convictions and cannot be prior predicate convictions for purposes of defendant's 1993 felony under Penal Law § 70.06 [1] [b] [ii].

People v Alexis Rodriguez, 2019 NY Slip Op 12444 – Decided April 2, 2019

Memorandum
The Court affirmed defendant's conviction and sentence that was imposed after County Court found that defendant violated a written cooperation agreement and thus sentenced him to consecutive, rather than concurrent, terms. The Court concluded that the agreement was "objectively susceptible to but one interpretation" and therefore County Court did not abuse its discretion by denying defendant's motion to withdraw his guilty plea.

Rivera, J., dissenting (Wilson, J., joining)
Judge Rivera dissented on the basis that the appeal presented "an open question that th[e] Court has never addressed: what interpretive standards apply to the terms of a cooperation agreement when…a defendant claims to have neither intended nor understood the agreement to include the People's demand for assistance with an unspecified criminal investigation or prosecution." Judge Rivera concluded that the cooperation agreement was limited in scope to the crimes for which defendant pleaded guilty and therefore, he did not violate the agreement when he refused to testify against an individual who was charged with a different, prior crime against defendant and his family.

VI. ASSISTANCE OF COUNSEL

People v Grimes, 32 NY3d 302 (2018)

Fiore, C.J.
The Court concluded that counsel's failure to file a criminal leave application does not constitute ineffective assistance of counsel under the New York State constitution, addressing the question left unanswered in Andrews. (23 N.Y.3d 605 [2014]). Accordingly, defendant was not entitled to a writ of error *coram nobis* to extend the time limit under CPL 460.30 for the filing of a leave application. The court relied on the fact that there is no state constitutional right to legal representation on a CLA to the Court of Appeals, nor a federal right to appellate review.

Wilson, J., dissenting (Rivera, J., joining)
Judge Wilson contended that the majority misstated the issue because the case was not about whether criminal defendants have a right to counsel to seek Court of Appeals review – they

do, and defendant did here. Rather, the Court has repeatedly stated that the right to counsel under the New York Constitution is broader than under the United States Constitution. Although the review is discretionary, defendants have a right to seek such review and counsel's failure to seek review and thus forfeit the chance, constituted ineffective assistance under the state constitution.

People v Alvarez, 2019 NY Slip Op 02383 – Decided March 28, 2019

Stein, J.
The Court affirmed the Appellate Division's denial of defendant's petition for a writ of error coram nobis, alleging ineffective assistance of appellate counsel. Defendant's allegation that this counsel failed to communicate with him during the pendency of his appeal was unsupported. Although the brief counsel filed was "somewhat terse, could have been better drafted, and is not a model to be emulated," the Court concluded that it demonstrated counsel's grasp of the facts and the law and raised four reviewable issues. Further, counsel's failure to file a criminal leave application does not, on its own, constitute ineffective assistance of counsel (see People v Grimes, 32 NY3d 302 [2018]; People v Andrews, 23 NY3d 605 [2014]).

Rivera, J., dissenting (Wilson, J., joining)
Judge Rivera would have granted defendant's petition since he did not receive "meaningful representation" as required under the state constitution. Judge Rivera restated that failure to file a criminal leave application to the Court of Appeals constitutes ineffective assistance of counsel, notwithstanding the Court's prior decision to the contrary. With respect to the other bases asserted by defendant, Judge Rivera concluded that the record supported defendant's claim that his counsel failed to communicate with him for three years following his appointment to represent defendant, until the Appellate Division threatened to dismiss the appeal. Further, the brief that counsel eventually filed has substantial failings and does not meet basic criteria fundamental to meaningful appellate advocacy: the brief is only 20 pages long, there is no citation in the two-page facts section to the record on appeal, two of the four points raised do not have a single citation to legal authority, and the brief is riddled with grammatical and typographical errors. In short, "appellate counsel's brief fails to cite cases in support of the argument, lacks appropriate discussion of the facts, fails to comply with the filing rules of the Appellate Division, and violates basic rules of syntax and grammar." This was also the only advocacy presented by counsel to the Appellate Division since counsel chose not to argue the appeal in person. Judge Rivera included a link to the brief in her dissent: http://www.nycourts.gov/ctapps/reference/Alvarez%20Brief.pdf. Judge Rivera also noted that on the facts of this case, counsel should have requested a reduction of the sentence. Based on all these failures, under the totality of the circumstances, counsel did not provide effective representation under our state constitution. Finally, Judge Rivera stressed that the majority's conclusion ignores that, under the state standard, prejudice to defendant is not an indispensable element of an effective assistance of counsel claim.

Wilson, J., dissenting
Judge Wilson joined Judge Rivera's dissent but wrote separately as he would have held that appellate counsel's failure to seek a reduction on appeal of defendant's sentence of 66 ⅔

years to life, for crimes he committed when he was nineteen years old, was, standing alone. ineffective assistance of counsel.

People v Boris Brown, 2019 NY Slip Op 03404 – Decided May 2, 2019

Memorandum
Supreme Court abused its discretion in summarily denying defendant's CPL 440.10 motion without a hearing to resolve whether defendant's attorney was actually conflicted. Defendant was charged with murder based on a shooting that occurred in a crowded courtyard. Defendant's attorney also represented another person who was present at the shooting, Ahmed Salaam, in an unrelated case while defendant's case was pending. During the court's Gomberg inquiry (see People v Gomberg, 38 NY2d 307 [1975]), defendant explained that he understood and waived the conflict based on concurrent representation and that his family had hired his attorney. Following his conviction, defendant moved to vacate per CPL 440.10, arguing that his counsel operated under an unwaivable conflict because Salaam paid the attorney to represent defendant and thus his counsel was unable to "point the finger" at Salaam. Supreme Court summarily denied the motion. Although a court may deny a CPL 440.10 motion without a hearing, (CPL 440.30 [4]), Supreme Court abused its discretion in doing so here. Defendant's CPL 440.10 motion raised issues of fact—e.g., whether and for how long Salaam paid for defendant's representation—that could suggest an actual conflict of interest and should have been addressed in a hearing.

Stein, J., dissenting
Judge Stein dissented, concluding there were no material issues of fact and Supreme Court did not abuse its discretion in denying defendant's motion with a hearing. When deciding whether a hearing is necessary to determine a CPL 440.10 motion, a court must presume the conviction is valid and must only grant a hearing if the defendant presents allegations sufficient to create an issue of fact. Here, the only issue of fact not present in the record was that Salaam allegedly paid defendant's attorney. However, this issue was resolved as defendant stated his family had hired his attorney.

VII. THE RIGHT TO SELF-REPRESENTATION

People v Crespo, 32 NY3d 176 (2018)

DiFiore, CJ. (Stein, J., Garcia, J., and (vouched-in) Scheinkman, J., concurring)
The Court considered whether defendant's request to proceed pro se after 11 jurors were selected and sworn in—but before opening statements—was untimely as a matter of law because it was made after trial had begun. In People v McIntyre (36 NY2d [1974]), the Court used the Code of Criminal Procedure—the precursor to the Criminal Procedure Law—to establish that a trial begins with opening statements. In this case, the Court applied the CPL and found that the commencement of a jury trial was advanced by the legislature to the start of jury selection. Accordingly, it held that a request to proceed pro se in a criminal trial is considered timely where the request is made before the beginning of the jury selection process.

Rivera, J., dissenting (Fahey, J., and Wilson, J., joining)
Judge Rivera maintained that the Appellate Division properly reversed the trial court's decision to reject defendant's request to proceed ~~as~~ pro se as untimely because the request was interposed before the beginning of the prosecutor's opening statement. To decide otherwise would completely disregard the demands of stare decisis and the well-established rule in McIntyre, where this Court defined a timely pro se request under the first prong as "prior to the prosecution's opening statement." See McIntyre, 36 NY2d at 18.

The Court in McIntyre chose the prosecutor's opening statement as the proper place to draw the line because it best gives effect to legislative intent. The Code of Criminal Procedure § 388 described the order of trial as follows: "[t]he jury having been impaneled and sworn the trial must proceed" with "[t]he district attorney or other counsel for the people" opening the case. Although the Criminal Procedure Law § 1.20 [11] states that "a jury trial commences with the selection of the jury"—the Court relied on that very definition in People v Ayala, to explain that a trial "beg[ins] only after the jury [i]s sworn" which remains "prior to the prosecution's opening statement" (75 NY2d 422 [1990]), as held in McIntyre.

VIII. EVIDENCE

A. PAST RECOLLECTION RECORDED AND GRAND JURY TESTIMONY

People v Carlos Tapia, 2019 NY Slip Op 02442 – Decided April 2, 2019

DiFiore, C.J.
The Court held that the testifying police officer's previous grand jury testimony was properly admitted as a past recollection recorded, when the officer could remember neither the incident nor his grand jury testimony. The trial court did not abuse its discretion in finding that the foundational requirements were met where the witness testified that he could not remember his testimony before the grand jury, but that he testified truthfully. Further, the Court held that the admission of the grand jury testimony did not violate CPL 670.10 nor did it violate defendant's right to confrontation. The Court concluded that CPL 670.10 did not apply to bar the testimony because the officer was not unable to attend trial and that, although the witness had memory failure, his presence at trial and ability to be subjected to cross-examination satisfied the confrontation clause.

Wilson, J., dissenting (Rivera, J. and Fahey, J., joining)
Judge Wilson dissented on the basis that the introduction of the grand jury testimony violated CPL 670.10 and the Court's prior decision in People v Green, 78 NY2d 1029 (1991). In Green, the Court held that the admission of the grand jury testimony from a witness who experienced memory failure violated CPL 670.10 since the statute's three enumerated exceptions for when prior testimony may be admitted are exclusive. The witness in Green was present at trial, examined by the People, and cross-examined by defendant's counsel in the judge's chambers, with the testimony then read into the record. The dissent found no meaningful distinction between Green and the present case. Under CPL 670.10, the unavailability of the witness to testify at trial is a prerequisite to using the witness's prior

testimony as a substitute for live testimony. The erroneous admission of the testimony was not harmless in this case.

B. AUTHENTICATION

People v Pendell, 2019 NY Slip Op 02152- Decided March 21, 2019

Memorandum
The Court held that the County Court did not abuse its discretion in admitting contested photographs because they were sufficiently authenticated through the testimony of the complainant and the law enforcement agents who extracted the photographs from the defendant's cell phone and computers. Since the ultimate object of the authentication requirement is to ensure the accuracy of the photograph sought to be admitted into evidence, any person having the requisite knowledge of the facts may verify. See People v Byrnes, 33 NY2d 343, 347 (1974).

C. LEGALLY SUFFICIENT EVIDENCE

People v Drelich, 32 NY3d 1032 (2018)

Memorandum
The Court held that the use of the clinical phrase "manual stimulation" for alleged sexual activity in an accusatory instrument did not render the instrument jurisdictionally defective. The factual allegations that defendant requested "manual stimulation" from a woman on a street corner, for a specific sum of money, at 2:25 a.m., supplied "defendant with sufficient notice of the charged crime to satisfy the demands of due process and double jeopardy" (Dreyden, 15 NY3d at 103). Any assertion that defendant was referring to a nonsexual activity "was a matter to be raised as an evidentiary defense not by insistence that this information was jurisdictionally defective" (see Casey, 95 NY2d at 360). The complaint alleged enough information to demonstrate "reasonable cause" to believe that defendant was guilty of patronizing a prostitute in the third degree (see CPL 100.40[4][b]; Penal Law § 130.00[10]).

People v Garland, 32 NY3d 1094 (2018)

Memorandum
The Court reviewed defendant's claim that the evidence against him in his first-degree assault conviction was not legally sufficient to establish the element of "serious physical injury" under Penal Law § 120.10 [1], [3]. Viewing the evidence in the light most favorable to the People, as the legal sufficiency standard requires, the Court held that the jury acted rationally in finding that the 15-year-old victim's gunshot wound in the leg constituted a "serious physical injury" based upon evidence that removing the bullet would cause further injury and the victim has to continue to endure the effects of the bullet's presence in his leg.

Wilson, J., dissenting (Rivera, J., joining)
Judge Wilson dissents because whether defendant's conviction for first-degree assault can be upheld depends upon a determination of whether the victim suffered a "serious physical injury" for first-degree purposes (Penal Law § 120.10 [1], [3]) or a "physical injury" for second-degree purposes (Penal Law § 120.05[2]). He opines that the objective evidence is legally insufficient to show that the victim suffered a "serious physical injury" because "[t]he victim is not at substantial risk of dying; he has no serious disfigurement; he has no protracted health impairment and has not lost the function of any bodily organ." Finding otherwise departs from the statutory scheme adopted by the legislature.

People v Jones, 32 NY3d 1146 (2018)

Memorandum
Defendant appealed from his conviction of enterprise corruption. Under Penal Law § 460.20, a defendant is guilty of enterprise corruption when, having knowledge of a criminal enterprise, he participates in its pattern acts of criminal activity. The Court held that evidence of defendant's participation in the requisite criminal acts did not demonstrate defendant's knowledge of the existence of the criminal enterprise and his intention to participate in its affairs. There was also critical testimony by the People's cooperating witness which demonstrated that defendant acted independently with the purpose of serving his own interests.

Rivera, J., concurring
Judge Rivera agreed that there was no evidence of the requisite mens rea for enterprise corruption, not because the evidence of the intent itself is insufficient, but because defendant could not have knowledge of a criminal enterprise that appears to be non-existent. People v Besser (96 NY2d 136 [2001]), People v Western Express, 19 NY3d 652 [2012]), People v Kancharla (23 NY3d 294 [2014]), and People v Keschner (25 NY3d 704 [2015]), makes clear that a criminal enterprise cannot exist without "evidence of a hierarchy or some distinct system of authority with an ascending command leadership, insulated from prosecution, that directs enterprise participants and which survives the individual criminal transactions" (quoting Jones, 32 NY3d at 1164).

Here, there was insufficient evidence to demonstrate that: 1) defendant acted in tandem with an association with a separate purpose of criminal enterprise; 2) defendant had any role in such a structure; or 3) the structure even exists for purposes of New York State's Organized Crime Control Act. Accordingly, the People could not establish the requisite mens rea of enterprise corruption because the evidence merely showed that defendant acted in pursuit of his individual interest as a motorcycle thief.

People v Yelich, 32 NY3d 1144 (2018)

Memorandum
Defendant appealed the Department of Corrections and Community Supervision's (DOCCS) calculation of his post-release supervision time. While on parole release, defendant was convicted of an offense in New Jersey and sentenced by the New Jersey court to a term of

imprisonment "to run concurrent with the sentence imposed on the New York State parole violation." Based on the record before the Court, there was no reason to disturb the determination of the Appellate Division that petitioner was not entitled to the relief sought (see Penal Law §§ 70.45 [5] [d]; 70.40 [3] [c]). As petitioner conceded, DOCCS was not bound by the New Jersey sentencing court's recommendation because "a determination as to concurrence of sentence made by one sovereign does not bind the other" (see Jake v Herschberger, 173 F3d 1059, 1065 (7th Cir 1999); Breeden v New Jersey Dep't of Corrections, 132 N.J. 457, 465, (1993)).

IX. ADDITIONAL CONSTITUTIONAL ISSUES

A. FOURTH AMENDMENT

People v Xochimitl, 32 NY3d 1026 (2018)

Memorandum
At issue was whether the police received voluntary consent to enter the apartment from defendant's elderly mother when she did not say a single word but "stepped away from the door." The officers did not confirm that she understood English and understood their request. The Court held that the determination as to whether the police received voluntary consent to enter the apartment was a mixed question of law and fact, unreviewable by the Court. Furthermore, the finding of the trial court was supported by the record and the Court was precluded from disturbing it. The Court pointed out that defendant did not contend at any point that his arrest was unlawful because the police went to his apartment with the intent of making a warrantless arrest.

Rivera, J., concurring (Wilson, J., joining)
Judge Rivera concurred because there was "just barely enough record support" on the mixed question of law and fact for the lower courts to find that the police officer received consent to enter the defendant's home. Judge Rivera reiterated her position, previously explained in People v Garvin, 30 NY3d 174, 205-210 [2017, Rivera, J, dissenting], that home visits by law enforcement for the sole purpose of making a warrantless arrest, resulting in a defendant's involuntary consent to the arrest and absent any exception to the warrant requirement, violates a defendant's constitutionally protected right to counsel. This type of police interaction is intended to avoid the warrant requirement and it undermines the Court's constitutional obligations. Judge Rivera noted that the issue was not preserved because defendant did not challenge his arrest on those grounds.

Wilson, J., concurring (Rivera, J., joining)
Judge Wilson concurred for the same reason as Judge Rivera but wrote separately to explain that the facts here demonstrated why, absent exigent circumstances, the police should be required to obtain a warrant when they intend to arrest someone at home for the reasons set forth in his dissenting opinion in Garvin.

People v. Emmanuel Diaz, 2019 NY Slip Op 01260 - Decided February 21, 2019

Feinman, J.
The Court rejected defendant's argument that while the Department of Correction's interception of his telephone calls may have been lawful, the release of the recordings to the prosecution without notice was an additional search that violates the Fourth Amendment. The Court held that detainees lose all reasonable expectation of privacy in the content of calls made where they receive notice that their phone calls are being monitored and recorded. In agreement with the 8th Circuit, the Court held that "there is no legitimate reason to think that the recordings, like any other evidence lawfully discovered, would not be admissible." (United States v. Eggleston, 165 F3d 624, 626 [8th Cir 1999]).

Wilson, J., dissenting
Since the Fourth Amendment requires law enforcement to obtain a warrant to monitor a defendant's calls when they are out on bail, Judge Wilson argued that defendants who cannot make bail are entitled to the same level of constitutional protection. Judge Wilson rejects the view that defendant impliedly consented to a search, because it disregards the limits of DOC's institutional authority, which if left unchecked undermines the Fourth Amendment's protection against unwarranted government intrusions. Furthermore, he made the broader point that the fact that information is known to someone other than its owner does not divest the owner of all privacy interests in that information, especially in the digital age.

People v Cisse, 2019 NY Slip Op 01258 - Decided February 21, 2019

Memorandum
Defendant was convicted of robbery after the People introduced recorded phone calls he had made while detained on Rikers Island. At issue was whether the conditions of defendant's confinement rendered his statements involuntary and thus recorded in violation of state and federal wiretapping statutes. Based on federal precedent, the Court affirmed the Appellate Division's decision that defendant impliedly consented to the monitoring and recording of his telephone calls. As a result, the recording of those phone calls did not violate the wiretapping statutes, and the calls were admissible. Further, the recording of defendant's nonprivileged phone calls did not violate his right to counsel under the New York State Constitution to the extent it guards against violations of privileged attorney-client communications as opposed to telephone conversations with others involving non-privileged matters, such as discussion of the case (see Johnson, 27 NY3d at 207).

People v Hill, 2019 NY Slip Op 03405 – Decided May 2, 2019

Memorandum
The trial court erred in denying suppression on the grounds that police engaged in a De Bour level-one intrusion. Police encountered defendant outside of an apartment complex and asked him for identification. Defendant provided the identification and explained that he was visiting a friend in the building. One police officer then told defendant to stay, while another took defendant's identification into the building to verify his explanation. When the officer did not find defendant's friend in the building, defendant was arrested for trespassing and a

subsequent search uncovered narcotics. On this record, the police encounter was more intrusive than a level-one request for information, and the narcotics should have been suppressed.

B. FIFTH AMENDMENT

People v Martin, 2019 NY Slip Op 02386 - Decided March 28, 2019

Memorandum

The issue in this case was whether defendant's statements to police made at the time of his arrest were properly introduced under the pedigree exception to Miranda v Arizona (384 US 436 [1966]). While executing a search warrant of defendant's apartment, police found defendant alone in a bedroom with drugs and drug paraphernalia in plain view. Assuming, without deciding, that the Supreme Court erroneously permitted testimony of defendant's response to custodial interrogation by police, the Court concluded that such error was harmless. In reaching this decision, the Court noted that the evidence of defendant's guilt was overwhelming and there was no reasonable possibility that, but for the error, the jury might have acquitted defendant of possession for the drugs in the bedroom where he was initially found by police.

Matter of Luis P., 32 NY3d 1165 (2018)

Memorandum
The Court affirmed the Appellate Division Order, holding that Luis P.'s challenge to the admission of his statements presented a mixed question of law and facts and that any hearsay error in the admission of medical records were harmless.

Rivera, J., dissenting (Wilson, J., joining)
Judge Rivera dissented and would have reversed and remitted for a new fact-finding hearing for the reasons set out in the Appellate Division dissent below. Although the thirteen-year-old respondent said he understood his Miranda rights and waived them with his mother present, he then gave a written statement after his mother had left the room when the detective asked respondent, who himself had been a victim of sexual abuse, if he wanted to write an "apology note" to the complainant. Under the totality of the circumstances, the written confession was not voluntary since it was obtained through deception. Additionally, Judge Rivera wrote separately to question whether Matter of Jimmy D., 15 NY3d 417 (2010) is sufficient to adequately protect the rights of juveniles since respondent's legal guardian (his grandmother) was present at the precinct but never consulted. Respondent had been removed from his mother's care due to her failure to protect him from sexual abuse – facts impacting the voluntariness of the statements. Further, recent guidance from the United States Supreme Court on how juveniles are constitutionally distinct from adults suggest Jimmy D. should be revisited.

C. SIXTH AMENDMENT

People v Flores, 32 NY3d 1087 (2018)

Memorandum
The Court affirmed the Appellate Division Order which stated that the County Court deprived defendants of their right to a fair trial in violation of CPL 270.15 when it anonymized jurors without any factual basis for the extraordinary procedure and failed to mitigate the error by taking steps to offset the potential prejudice to defendants. Furthermore, reversal of the judgments of conviction and a new trial were required as the error could not be deemed harmless.

People v Suazo, 32 NY3d 491 (2018)

Stein, J.
As a matter of first impression, the Court held that a noncitizen defendant who demonstrates that a charged crime carries a maximum possible sentence of three months in jail and also the potential penalty of deportation—i.e. removal from the country—is entitled to a jury trial under the Sixth Amendment. Although crimes carrying a maximum possible term of imprisonment of less than six months are presumptively considered "petty offenses," the penalty of deportation is sufficiently severe to rebut the presumption and make the offense "serious."

Note: After the Court's ruling on this issue, State Senator Brad Hoylman sponsored legislation which would close the gap in New York's criminal procedure law that prohibits jury trials for low-level charges in New York City, but not the rest of the state. That right is already guaranteed to defendants regardless of immigration status outside New York City. As of this writing, the proposed bill recently passed the Codes Committee in the New York State Senate.

Garcia, J., dissenting
Judge Garcia's dissent argues that the potential consequence of deportation for certain convictions does not transform a "petty" offense into a "serious" one for purposes of the right to a jury trial under the Sixth Amendment. Federal immigration law should not override the New York State Legislature's view of the seriousness of the charged offense, as expressed by the maximum penalty authorized. The United States Supreme Court has the ultimate authority to settle the question.

Wilson, J., dissenting
Judge Wilson wrote separately and argued that the majority's decision ignores that the "penalty" for violation of immigration laws is deportation, but deportation proceedings have never entitled a noncitizen to a jury trial. Furthermore, this problem could be resolved if the State Legislature extends the right to a jury trial to all New York City residents who are charged with a B misdemeanor.

D. FOURTEENTH AMENDMENT

People v Towns – Decided May 7, 2019

Stein, J.
The Court held that defendant was denied the right to a fair trial when the trial judge negotiated and entered into a cooperation agreement with the codefendant requiring him to testify against defendant in exchange for a more favorable sentence. The trial judge made clear that he would assess the "truthfulness" of codefendant's testimony against his previously recorded statement to police. The Court concluded that the trial court abandoned the role of neutral arbiter and assumed the function of an interested party, creating a specter of bias. The Court reversed the order of the Appellate Division and remitted the case for trial before a different judge.

Rivera, J., concurring
Judge Rivera wrote separately to stress that the trial judge assumed the role of the prosecutor by securing identification testimony against defendant and then the judge subsequently ruled on the presentation of that testimony in his role as judge. While the law is well settled that even an appearance of bias offends the constitution, Judge Rivera departed "from the majority analysis to the extent it concludes the conduct here is something short of bias."