

New York State Court of Appeals Update

Hon. Jenny Rivera

New York State Court of Appeals, Albany

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**NYSBA Criminal Justice Section
Spring 2018 Meeting
Court of Appeals Decisions**

CLE MATERIALS

I. Jurisdiction of the Courts

A. Preservation & Mode of Proceedings Errors

People v. Spencer, 29 N.Y.3d 302 (2017) - Decided June 22, 2017

DiFiore, C.J.

The issue presented was whether the trial court erred, after its inquiry pursuant to Buford, in failing to discharge a sworn juror who, on the fourth day of deliberations, repeatedly stated that she could not “separate [her] emotions from the case” and “[did not] have it in [her]” to decide the case on the facts and the law. The Court held that where the juror repeatedly and unambiguously responded that she was unable to render an impartial verdict based solely on the evidence and the law—that the trial court erred in failing to discharge the juror as “grossly unqualified to serve” pursuant to CPL 270.35(1). Accordingly, the order was reversed and defendant entitled to a new trial.

People v. Lofton, 29 N.Y.3d 1097 (2017) - Decided June 22, 2017

Memorandum

The issue presented was whether the court erred in failing to make an on-the-record determination as to defendant’s eligibility for a youthful offender adjudication. The Court held that such determinations are required, and thus the court erred. The case was reversed and remitted to Supreme Court for consideration of defendant’s eligibility for a youthful offender adjudication.

B. Grounds for Dismissal

People v. Mary Anne Grady Flores, 30 N.Y.3d 229 (2017) - Decided November 16, 2017

DiFiore, C.J.

The issue was whether failure to file an affidavit of errors renders the intermediate appellate court without jurisdiction to hear the appeal. CPL 460.10 (3) makes the filing of an affidavit of errors a “jurisdictional requirement” for taking an appeal from a local criminal court in which the proceedings were not recorded by a court stenographer. Defendant here did not take an appeal as dictated by statute, thus barring review by the intermediate appellate court. However, defendant did file a timely notice of appeal and moved for leave to file a late affidavit of errors within the statutory one-year limit. Considering the unusual circumstances of this case, in which the defendant inquired about the proper procedure and acted accordingly, the Court remitted to County Court to allow that court to exercise its discretion in connection with defendant’s motion to file a

late affidavit of errors. The order was reversed, and the case was remitted to County Court for further proceedings in accordance with the Court's opinion.

II. Grand Jury & Indictments

People v. Carr, 2017 NY Slip Op 07299 (2017) - Decided October 19, 2017

Memorandum

Following a conviction for murder and burglary, defendant moved to vacate the judgment. The Supreme Court denied his motion. The Court held that denial of defendant's motion to vacate judgment convicting him of murder and burglary was not erroneous. Under the circumstances, the People were not required to seek the court's permission before presenting additional charges to a second grand jury.

People v. Boyd, 2018 N.Y. Slip op. 02120 - Decided March 27, 2018

Memorandum

Defendant was charged with criminal possession of a pistol and BB gun. On the People's motion, prior to submitting the case to the jury, the trial court dismissed the charges related to the BB gun. The Court held that the dismissal did not impair the defendant's right to present a defense, even though the defendant's sole defense was that he possessed the BB gun, but not the pistol.

Rivera, J. dissenting (Wilson, J. concurring)

The dissent argued that the trial court's dismissal of the count related to the BB gun was an abuse of discretion since, under the circumstances, it allowed the jury to consider highly prejudicial testimony that was irrelevant to the actually submitted counts. Consequently, the trial court encouraged reverse nullification, confused jury deliberations, and deprived defendant of "a fair opportunity to defend against the state's accusations" (Chambers v. Mississippi, 410 U.S. 284, 294 [1973]).

III. Speedy Trial

People v. Wiggins, 2018 NY Slip Op 01111 (2018) - Decided February 15, 2018

Fahey, J.

At issue in this case is whether a lengthy delay between defendant's arrest and his eventual guilty plea violated his constitutional right to a speedy trial. Here, the time between defendant's arrest for murder in the second degree, among other charges, and his guilty plea spanned over six years, starting when defendant was 16 years old. Much of the delay was attributable to the People's desire to try defendant's co-defendant first to elicit his cooperation, and co-defendant's prosecution was delayed on several occasions on request of the prosecutor, the defense attorney, and due to other contingencies, with two trials resulting in mistrial and another in a deadlocked jury. During this time, defendant was involved in a jailhouse fight resulting in a sentence for assault. The trial court acknowledged that the defendant's delay was lengthy, but reasoned that a good part of the extraordinary delay was caused by the People's good faith effort to get the co-

defendant to cooperate. The trial court further concluded that the defense did not appear to be impaired by the delay.

The Court analyzed the constitutional speedy trial claim using the five factors set forth in People v. Taranovich (37 N.Y.2d 442 [1975]): (1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether there has been an extended period of pretrial incarceration; and (5) whether there is any indication that the defense has been impaired by the delay. After determining that all factors except factor three weighed in favor of the defendant, the Court held that defendant's constitutional right to a speedy trial was violated because the People's strategy to pursue codefendant's cooperation, which was continually unsuccessful over five years, cannot justify that extraordinary delay. Although the serious nature of the crime favored the People, the lengthy period of pretrial incarceration, as well as the presumptive prejudice that resulted from the lengthy delay favored defendant. Accordingly, the order of the Appellate Division was reversed and the indictment dismissed.

DiFiore, C.J., dissenting (Garcia, J., and Feinman, J., concurring)

The dissent agreed with the majority's opinion that the delay for a trial was extraordinary, but disagreed that the defendant's constitutional right was violated. In making such determination, the dissent also analyzed the Taranovich factors, concluding that the People were making diligent efforts within their "broad discretion" when determining the order in which to prosecute codefendants, that defendant was not prejudiced by the delay, and that the record indicated defendant acquiesced to the bulk of the delay. As such, the dissent would have affirmed the Appellate Division order and upheld the denial of defendant's motion to dismiss the indictment.

IV. Suppression Motions

People v. Sivertson, 2017 NY Slip Op 04320 (2017) - Decided June 1st, 2017

Memorandum

At issue here is whether a warrantless entry by the police into defendant's home was justified by exigent circumstances. The Court held that no further review was needed since the record supported the Appellate Court's conclusion that the issue was a mixed question of law and fact. Seeing that defendant's remaining contention was without merit, the order of the lower court was affirmed.

Rivera, J., dissenting (Stein, J., concurring)

The dissent argued that there were no exigent circumstances to invoke the probable cause exception relied on by the People to justify a warrantless entry into defendant's home. People v. McBride (14 N.Y.3d 440 [2010]), identified several factors used by courts to determine whether such pressing circumstances exist, none of which were found in the record here. Therefore, the Appellate Division should have been reversed and a new trial ordered, in order to protect defendant's Fourth Amendment rights.

People v. Stanley Hardee, 29 N.Y.3d 994 (2017) - Decided November 16, 2017

Memorandum

At issue here is whether the substantial likelihood of finding a weapon inside a car, which presented a threat to the officer's safety, justified a limited search of that vehicle. The Court determined that the record supported the determination that such circumstances existed, thus justifying the search of the inside of the car. The order of the Appellate Division was affirmed.

Stein, J., dissenting (Rivera, J., and Wilson, J., concurring)

The dissenting opinion reasoned that the rule in People v. Torres (74 N.Y.2d 224 [1989]), requiring an "actual and specific threat" to officer safety from a weapon located in the vehicle, cannot be justified by the officers' mere suspicion that a weapon exists. Therefore, the firearm should have been suppressed.

People v. Johnson, 2018 NY Slip Op 01955 (2018) - Decided March 22, 2018

Memorandum:

The Court was asked to consider whether the Appellate Division correctly determined that defendant's statements to the police were involuntary, considering pre-arraignment delay and circumstances surrounding the interrogation. The Court determined that on the facts of the case, assuming without deciding that the trial court erroneously denied defendant's motion to suppress, any such error was harmless. As such, the order of the Appellate Division was affirmed.

People v. Perez, 2018 NY Slip Op 02218 (2018) - Decided March 27, 2018

Memorandum:

The issue before the Court was whether the police conduct conformed to People v. De Bour (40 N.Y.2d 210 [1976]), which provides the framework for evaluating police-initiated encounters with private citizens. Here, in a New York City Housing Authority building, defendant pushed the elevator button after seeing police officers in the lobby, despite their request to hold the doors. The police followed defendant up two flights, and asked whether he lived in the building. Defendant did not respond to an officer's questions, and the officer noticed a bulge in defendant's arm. The officer grabbed defendant's arm and found a machete. The Court reasoned that there is support in the record for the determination that the circumstances, as testified to by the arresting officer, provided the requisite level of support to satisfy De Bour. The Court concluded that to the extent the lower court may have erred in admitting the statement defendant made at the precinct prior to being given any Miranda warnings, any error was harmless. The order of the Appellate Division was affirmed.

Rivera, J., dissenting (Wilson, J., concurring)

The dissent argued the majority's conclusion that the record supported defendant's forcible detention and frisk was inconsistent with established law. Absent reasonable suspicion that a person has committed, is committing, or is about to commit a crime, the police may not stop and detain them. Moreover, reasonable suspicion cannot be based on a person's failure to answer police questions absent other indicia of criminal activity. Nor may forcible police action be based on a person's efforts to avoid

confrontation, which defendant clearly sought to do here. Where, as here, police have no advance information about any criminality ascribed to an individual, and that person stands motionless and silent when approached, the police may not stop and detain, nor grab and place the person under arrest, even if his shirtsleeve has a nondescript bulge. In other words, none of the circumstances, in isolation or cumulatively, established reasonable suspicion that defendant had committed or was about to commit a crime. The dissent emphasized that police encounters must be scrutinized carefully for constitutional compliance, in order to avoid the criminalization of indeterminate behavior based on the nature of the surroundings or someone's attempts to avoid contact with law enforcement.

V. Voir Dire

People v. Phillip Wright, 30 N.Y.3d 933 (2017) - Decided October 12, 2017

Memorandum

The Court was asked to consider whether the trial court made an error in denying defendant's for-cause challenge to a prospective juror. Pursuant to CPL 270.20 (1)(b), a prospective juror may be challenged for cause if the juror evinces "a state of mind that is likely to preclude [the juror] from rendering an impartial verdict based upon the evidence adduced at the trial." Here, the prospective juror's statements raised serious doubt regarding her ability to be unbiased, and the trial court did not inquire further to obtain unequivocal assurance that she could be fair and impartial. The Court held that it was error to deny defendant's for-cause challenge. Defendant's conviction was reversed and a new trial ordered.

VI. Statutory Interpretation

People v. Minemeir, 29 N.Y.3d 414 (2017) - Decided June 22, 2017

Stein, J.

The issues before the Court were whether sentencing courts are required to state, on the record, their reasons for denying YO treatment and whether the sentencing court violated CPL 390.50, which governs confidentiality of pre-sentence investigation (PSI) reports and memoranda, and defendant's due process rights by failing to adequately set forth on the record the basis for its refusal to disclose to the defense certain statements that were reviewed and considered by the court for sentencing purposes.

The Court held that the sentencing court was not required to state, on the record, its reasons for denying defendant youthful offender status. However, by failing to adequately set forth on the record the basis for its refusal to disclose to the defense certain statements that were reviewed and considered by the court for sentencing purposes, the court violated CPL 390.50 and defendant's due process rights. The case was reversed and remitted to County Court.

Myers v. Schneiderman, 2017 NY Slip Op 06412 (2017) - Decided September 7, 2017

Per Curiam

The Court was asked to determine if there was a constitutional right to “aid-in-dying,” which the plaintiffs define as the right of a mentally competent and terminally ill person to obtain a prescription for a lethal dosage of drugs from a physician, to be taken at some point to cause death. The plaintiffs sought a declaratory judgment determining that physicians who provide aid-in-dying in this manner are not criminally liable under the State’s assisted suicide statutes. The Court rejected plaintiffs’ assertion that the State’s prohibition on assisted suicide is not rationally related to legitimate state interests.

Upon reviewing the statute, the Court determined that the trial and lower court’s reading of the statute was consistent with the tenants of statutory construction. The Court had previously addressed the scope of the statutory ban on assisted suicide determining that it is prohibited even if it is motivated by a sympathetic concern to relieve the terminally ill person from suffering and pain (People v. Duffy, 79 N.Y.2d 611, 615 [1992]).

The Court also reviewed the plaintiffs’ constitutional claims of equal protection and due process. The equal protection claim was denied on state and federal grounds because the statute treated all persons equally; allowing anyone to refuse life-saving treatment and prohibiting everyone from assisting in a suicide. In rejecting the state due process claim, the court highlighted the precedential difference between the fundamental right to refuse life-saving treatment and assisted suicide. Since the right to assisted suicide is not fundamental, the State’s rationale for the statute need only be rationally related to a legitimate governmental interest. The State has a legitimate purpose in guarding against mistake and abuse, therefore, the statute does not violate due process.

Rivera, J., concurring

Judge Rivera’s concurring opinion agreed that the broad right of a mentally competent, terminally ill person to have unrestricted access to a medical prescription to hasten death was not constitutional. However, there may be instances, as a terminally-ill person approaches death, when the State’s legitimate interest in protecting and promoting life is outweighed by the terminally-ill person’s right to bodily integrity.

Fahey, J., concurring

Judge Fahey wrote separately to argue that while there is nothing stopping the legislature from legalizing aid-in-dying (a point conceded by all parties and the per curiam), the risks are too great and therefore the legislature should think twice before legalizing the practice.

Garcia, J., concurring

Judge Garcia wrote separately to argue that even if the Court were to go farther and consider the claims of the narrower set of patients discussed by Judge Rivera, the claims should still be rejected as the State has a rational basis for rejecting aid-in-dying even for these patients.

People v. Andujar, 30 N.Y.3d 160 (2017) - Decided October 24, 2017

Rivera, J.

The issue presented was whether Vehicle and Traffic Law § 397, which prohibits equipping a motor vehicle with a police radio scanner or using a vehicle so equipped, applies in the case of a freestanding device found on a defendant-driver's person. The trial court granted defendant's motion to dismiss the accusatory instrument on the ground that the superseding information lacked allegations that the motor vehicle was equipped with the scanner or that the scanner was prepared for use with a vehicle. The Court held that the statute does not require that the prohibited device be physically attached to the motor vehicle for the conduct to fall under its purview. Because the scanner was in the defendant's pocket, where it could be quickly accessed and operated in the vehicle, the accusatory instrument was sufficient for pleading purposes to satisfy the "equips a motor vehicle" element of the VTL § 397 charge.

Stein, J., dissenting

The dissenting opinion would hold that based on the allegations, the accusatory instrument was not facially sufficient to charge defendant with violating VTL § 397. Interpreting the plain language of the statute, the language compels a conclusion that some relationship between the vehicle and the device is required, even if that relationship is something less than physical attachment.

People v. Roberto Estrema, 30 N.Y.3d 268 (2017) - Decided November 16, 2017

Wilson, J.

The Court was asked to consider whether section 380.40, requiring that defendant be personally present when sentence is pronounced, applies to the re-imposition of a defendant's original prison sentence under Penal Law § 70.85. The Court stated that defendants have a fundamental right to be present at sentencing to hear the court's pronouncement and address the court, even if a certain sentence is a foregone conclusion. Here, there was no waiver of this right, and therefore, the Court held, defendant's absence at re-sentencing was a violation of his right under CPL 380.40.

People v. Helms, 30 N.Y.3d 259 (2017) - Decided November 20, 2017

Fahey, J.

The issue presented is whether defendant's Georgia conviction qualifies as a predicate felony conviction under New York's sentencing statute. To make such a determination, reviewing courts should apply the "strict equivalency test," which examines the elements of the foreign conviction by looking at relevant case law and statutes to determine whether a crime corresponds to a New York felony. Here, the Court concluded that the culpable mental state element of the Georgia burglary statute is commensurate with its New York counterpart. Consequently, defendant's foreign crime qualifies as a predicate felony. The order for appeal was reversed and defendant's sentence as a second violent felony offender was reinstated.

Rivera, J., concurring (joined by J. Feinman)

The concurring opinion agreed with the majority on reversing the Appellate Division's order, but noted that no statutory comparisons were needed to resolve the

question of whether the “knowledge” element is required under Georgia law, because Price v. State (289 Ga 459 [2011]), *sub silentio* construed that element as a requirement of the burglary statute.

People v. Francis, 2018 NY Slip Op 01017 (2018) - Decided February 13, 2018

Rivera, J.

The issue on appeal is whether the State Board of Examiners of Sex Offenders (Board) acted *ultra vires* in issuing guidelines for determining sex offender risk of re-offense that include a Youthful Offender (YO) adjudication as part of an offender’s criminal history factors, notwithstanding that a YO adjudication is not a conviction and the purpose of the YO statute is to spare youths the stigma of a criminal conviction. To resolve this question, the Court analyzed the language of the Sex Offender Registration Act’s mandate to the Board as well as the YO statute to ascertain the Legislature’s intent. The Court determined that the statutes do not prohibit the Board’s consideration of YO adjudications for the limited purpose of accurately assessing an offender’s risk level.

People v. Teri W., 2018 NY Slip Op 02210 (2018) - Decided March 29, 2018

Wilson, J.

The Court was asked to consider whether the maximum probationary term authorized by statute for a youthful offender convicted of a felony is five or ten years. The 17-year-old defendant in this case pled guilty to one count of sexual abuse in first degree, a class D felony sex offense. The trial court sentenced defendant to a ten-year probation pursuant to CPL § 60.02 (2), which provides that the sentence for a youthful offender adjudication, replacing a felony conviction, must be a sentence “authorized to be imposed upon a person convicted of a class E felony.” Defendant argued that a class E felony, here referred to an undesignated E felony, and that her probation term must therefore be no more than five years. The Court determined that the language requiring a 10-year probation period in Penal Law § 65.00 (3) (a) (iii) does not conflict facially with any other statutory provision, including Penal Law § 60.02(2), and affirmed the ten-year sentence.

VII. Evidence

A. Witness Testimony

People v. Brooks, 2018 NY Slip Op 01956 (2018) - Decided March 22, 2018

Memorandum:

The first question the Court addressed was whether the trial court erred in granting the People’s motion for a Frye hearing. A Frye hearing is meant to assess if a testifying expert’s techniques are acceptable when properly performed because they generate results accepted as reliable within the scientific community. The Court determined that to the extent that the trial court improperly employed the Frye procedure to rule on the foundation of the defense expert’s testimony, any such error was harmless. The Court then rejected defendant’s challenges to the trial court’s evidentiary rulings. However, the Court reasoned that the trial court did err in admitting a specific witness’s

testimony, because it constituted double hearsay and was not properly admitted pursuant to any exceptions to the hearsay rule. Considering the overwhelming evidence against defendant, such error was harmless. The order of the Appellate Division was affirmed.

B. Hearsay & Confrontation Clause

People v. Austin, 30 N.Y.3d 98 (2017) - Decided October 19, 2017

DiFiore, C.J.

The issue presented was whether defendant's Sixth Amendment right to confrontation was violated by the introduction of DNA evidence through the testimony of a witness who had not performed, witnessed, or supervised the generation of the DNA profiles. The Court held that this introduction of hearsay evidence through surrogate testimony violated defendant's right to confront the witnesses against him.

Garcia, J., concurring

The concurring opinion agreed that defendant's conviction must be reversed and a new trial granted under the Court's holding in People v. John (27 N.Y.3d 294 [2016]), but noted that the Supreme Court has declined to take the same approach with respect to DNA evidence under the Confrontation Clause, citing Williams v. Illinois 567 U.S. 50 [2012]).

C. Authentication

People v. Price, 29 N.Y.3d 472 (2017) – Decided June 27, 2017

Stein, J.

The court was asked to determine whether the People proffered a sufficient foundation at trial to authenticate a photograph that was obtained from an Internet profile page allegedly belonging to defendant. Since the object of the authentication requirement is to insure the accuracy of a photograph sought to be admitted into evidence, the standard for authentication is that any person having requisite knowledge of the facts may verify, or an expert may testify that the photograph has not been altered.

The Court held that, under the special circumstances of this case, the People's proof fell short of establishing the requisite authentication to render the photograph admissible in evidence. The People's authentication proffer was lacking because the victim could not identify the firearm in the image and because no other witness testified that the photograph was a fair and accurate representation of the scene depicted. The order was reversed and a new trial ordered.

Rivera, J., concurring (joined by J. Garcia)

The concurring opinion agreed with the majority that the People failed to authenticate the computer printout and that its admission was reversible error entitling defendant to a new trial. However, the case presented a novel question as to how a party may authenticate a printout of a digital image found on a social media website, and the majority did not adopt a test to apply in determining that the foundational proof is

insufficient. The concurrence would hold that the People had to establish that: (1) the printout was an accurate representation of the webpage; and (2) the page was defendant's, meaning he had dominion and control over the page, allowing him to post on it. What the People crucially failed to establish here, by direct or circumstantial evidence, was that the page in question belonged to defendant.

D. Molineux

People v. Frumusa, 29 N.Y.3d 364 (2017) - Decided June 8, 2017

Fahey, J.

The issue on appeal was whether the trial court abused its discretion by admitting a civil contempt order. The contempt order was issued in a civil case related to the defendant's criminal charges. The order held three of defendant's other businesses in contempt for failing to obey a July 2009 order of the court directing defendant's businesses to turn over all related funds deposited into defendant's accounts. The funds at issue in the civil case were the same funds related to the defendant's charges of grand larceny in the second degree.

The Court determined that the order did not constitute propensity evidence and did not fall under People v. Molineux (168 N.Y. 264 [1901]), therefore the court did not abuse its discretion. The common thread in all Molineux cases is that the evidence sought to be admitted concerns a separate crime or bad act committed by the defendant. The contempt order was directly related to the criminal charges and went to prove the defendant's larcenous intent which was a specific material issue in the criminal case. Accordingly, there was no danger that the jury would have drawn an improper inference of propensity.

Then, the Court reasoned that the evidence was relevant to defendant's intent in committing grand larceny in the second degree and did not violate any exclusionary rule because it was not Molineux evidence. Finally, the Court found that the trial court did not abuse its discretion when weighing the probative value of the evidence against the potential prejudice that it could cause.

E. Legally Sufficient Evidence

People v. McCain; People v. Edward, 2018 NY Slip Op 01018 (2018) - Decided February 13, 2018

Memorandum

The Court was asked to decide whether the factual allegations of a misdemeanor complaint were sufficient to support a charge of criminal possession of a weapon in the fourth degree. Factual allegations must establish reasonable cause to believe that a defendant committed the charged offense. Here, the Court held the factual allegations in each misdemeanor complaint established reasonable cause to believe that each defendant possessed a dangerous knife, triggering the statutory presumption of unlawful intent arising from such possession. Accordingly, each accusatory instrument was sufficient to support a charge of criminal possession of a weapon in the fourth degree. The order of the Appellate Term was affirmed.

Stein, J., concurring

The concurring opinion agreed with the majority's opinion on constraint of the Court's prior precedent.

Wilson, J., concurring for People v. McCain, dissenting for People v. Edward

The concurring opinion agreed with the majority in People v McCain because the officer's sworn statement attached to the complaint specified that the "knife was activated by deponent to an open and locked position through the force of gravity," which meets the statutory definition of "gravity knife" in Penal Law § 265.00 (5), and therefore *a fortiori* is a "dangerous knife" under Penal Law § 265.01, when subsections (1) and (2) thereof are read together.

The dissent for People v Edward relied on the reasons set out in Judge Simons' dissent in Matter of Jamie D (59 N.Y.2d 589 [1983]).

People v. Casimiro Reyes, 2018 NY Slip Op 01113 (2018) - Decided February 15, 2018

Memorandum

The issue presented is whether the evidence was sufficient to support conviction of defendant for conspiracy to commit arson where defendant was present when the alleged co-conspirators discussed and planned the crime. Conspiracy requires proof of intent that a specific crime be performed, as well as an agreement with another person to engage in or cause that crime to be committed. The Court held that the law does not contain a presumption of agreement based on sheer presence at a meeting at which a conspiracy is discussed. In other words, knowing the existence and goals of a conspiracy does not itself make defendant a co-conspirator. However, the Court declined to define or limit the circumstances giving rise to an agreement, but agreed with the Appellate Division that under the facts of this case, there is no valid line of reasoning and permissible inferences from which a rational jury could find the element of agreement beyond a reasonable doubt. The order of the Appellate Division was affirmed.

Garcia, J., dissenting (Feinman, J., concurring)

The dissent argues that the facts here, viewed in a light most favorable to the People, are legally sufficient to find the elements of the crime proven beyond reasonable doubt. Particularly in this case, defendant was a gang member charged with a conspiracy directly related to enforcing the rules governing gang membership and obligations, thus granting a permissible inference to find there was an agreement to conspire to commit a crime. Still, the dissent agreed with the majority that an individual's knowledge of the goals of a conspiracy does not automatically make one a co-conspirator.

VIII. Jury Instructions & Notes

People v. Viruet, 29 N.Y.3d 527 (2017) - Decided June 6, 2017

Garcia, J.

The court was asked to determine if the Appellant was entitled to an adverse inference jury instruction after the arresting officer could not locate the surveillance video collected from the crime scene. The Court, applying the rule in People v. Handy (20 N.Y.3d 663, 665 [2013]), agreed that the Appellant was entitled to the adverse inference

jury instruction because he had requested “evidence that [was] reasonably likely to be of material importance,” and that evidence had been made unavailable by the State.

However, the Court also determine that the error by the trial court was harmless therefore, the order of the Appellate Division was affirmed. The prosecution presented eye witness evidence and testimony that the defendant confessed to the shooting. The Court reasoned that the evidence presented at trial against the Appellant was overwhelming and there was no significant probability that the jury would have acquitted the defendant had it not been for the error.

Wilson, J., dissenting

The dissenting opinion agreed with the majority’s finding that there had been an error by the trial court in refusing the adverse inference jury instruction. However, the dissent found that the error was not harmless. The dissent contends that the evidence presented at trial could have supported either a finding of guilt or innocence. The eyewitnesses stated that they had only briefly seen the shooter and there was evidence that the defendant and his brother shared a significant resemblance. Therefore, since there was not overwhelming proof of guilt the error could not be considered harmless.

People v. Boone, 30 N.Y.3d 521 (2017) - Decided December 14, 2017

Fahey, J.

At issue was whether the trial court erred in denying defendant’s request for a jury instruction on cross-racial identification. The Court cited extensive scientific and psychological research, as well as recent judicial trends, to determine that when identification is an issue in a criminal case, and the identifying witness and defendant appear to be of different races, upon request, a party is entitled to a charge on cross-racial identification. Such instructions shall state (1) that the jury should consider whether there is a difference in race between the defendant and the witness who identified the defendant, and (2) that, if so, the jury should consider (a) that some people have greater difficulty in accurately identifying members of a different race than in accurately identifying members of their own race and (b) whether the difference in race affected the accuracy of the witness’s identification.

While the Court reiterated that the decision to grant expert testimony on the subject of cross-racial identification remains within the trial court’s discretion, the absence of expert testimony on cross-racial identification does not preclude the charge. Similarly, the charge is not dependent on whether defense counsel cross-examined the People’s witnesses about their identifications.

Garcia, J., concurring (joined by Stein, J.)

The concurring opinion agreed that the trial court abused its discretion in denying defendant’s request for a cross-racial identification charge in this case. It disagreed with the majority’s new rule, however, which it argued deprived trial courts of their discretion. As a result, the concurrence worried that the charge was over-inclusive, possibly harmful to jurors, and improperly suggested a lack of confidence in trial judges.

IX. Sentencing

People v Prindle, 29 N.Y.3d 463 (2017) – Decided June 29, 2017

Wilson, J.

This case presented an Apprendi challenge to New York’s discretionary persistent felony offender sentencing scheme. The issue before the Court was whether, in light of Alleyne v. United States (570 U.S. 99 [2013]), the sentencing scheme violated Apprendi v. New Jersey (530 U.S. 466 [2000]) and the defendant’s due process and Sixth Amendment rights.

The Court upheld the constitutionality of the discretionary persistent felony offender sentencing scheme and further held that defendant’s constitutional rights were not violated. When faced with an Apprendi challenge to New York’s persistent felony offender statute in the past, the Court has resolutely held that the statute falls within the exception provided by Almendarez-Torres v. United States (523 U.S. 224 [1998]), and is thus outside the scope of Apprendi, because it exposes defendants to an enhanced sentencing range based only upon the existence of two prior felony convictions.

X. Assistance of Counsel

People v. Leroy Savage Smith, 2017 NY Slip Op 08165 (2017) - Decided November 21, 2017

Memorandum

Where a defendant raises specific, serious, factual complaints about counsel, the court is obligated, under People v Sides (75 N.Y.2d 822 [1990]), to conduct a minimal inquiry into the nature of the disagreement. Here, the Court found, the trial court abused its discretion when it failed to conduct any inquiry, despite sufficient complaints from the defendant. The trial court order was therefore reversed and a new trial ordered.

People v. Honghirun, 29 N.Y.3d 284 (2017) - Decided June 8, 2017

Stein, J.

The issue before the court was appellant’s ineffective assistance of counsel claim. Defendant contended that there was no strategic reason for defense counsel’s failure to object to a witness’ testimony regarding the disclosure that she had been sexually abused by the defendant under the “prompt outcry” exception to the rule prohibiting prior consistent statements. The Court found the record sufficiently demonstrated defense counsel’s strategy to use the witness’ testimony to show that she was a “troubled teen” and that it would have likely been admitted anyway to rebut a charge of recent fabrication or for the non-hearsay purpose of completing the narrative. Since the standard for effectiveness is “reasonable competence, not perfect representation” (People v. Pavone, 26 N.Y.3d 629, 647 [2015]), defendant failed to demonstrate an absence of strategic purpose to defense counsel’s course of action and thus that his counsel was ineffective.

People v. Campbell, 2017 NY Slip Op 07158 (2017) - Decided October 12, 2017

Memorandum

The Court was asked to decide whether defense counsel was ineffective in failing to challenge a prospective juror. Under both federal and state constitutional standards,

defendant bears the burden of establishing a claim that his counsel's performance is constitutionally deficient. To do so, defendant must demonstrate the absence of strategic or other legitimate explanations for counsel's alleged failure. Here, the Court held, defendant did not meet that burden, and therefore the order of the Appellate Division was affirmed.

People v. Mario Arjune, 2017 NY Slip Op 08159 (2017) - Decided November 20, 2017

Stein, J.

The Court in People v. Syville (15 N.Y.3d 391 [2010]), held that a defendant may seek *coram nobis* relief to assert a claim that his right to appeal was deprived due to the ineffective assistance of counsel. In this case, the Court was asked to decide whether Syville may apply when trial counsel files a notice of appeal, but fails to inform the client about his right to appeal and how to seek indigent appellate counsel, resulting in the appeal being dismissed as abandoned.

The Court reasoned that trial counsel is not constitutionally responsible for responding to a dismissal motion of an appeal years after the appeal was filed. Moreover, the Court found that counsel was under no constitutional obligation to assist defendant in procuring indigent counsel assistance, since defendant was given written notice by the court on how to do so. Considering that defendant was unable to prove his right to an appeal was extinguished due to ineffective counsel, the order of the Appellate Division was affirmed.

Rivera, J., dissenting

The dissenting opinion reiterated well-established statutory and case law, professional standards, and appellate division department rules to argue that trial lawyers must consult with their clients about appeals and make reasonable efforts to discover their clients' wishes. The burden to ensure that a defendant thoroughly understands the right to an appeal and how to pursue that appeal lies with counsel. Here, the People relied on a form provided by the court clerk at the end of sentencing as a substitute for the trial attorney's consultation. That form neither informed defendant of how to establish proof of financial inability nor how to seek poor person relief. Because this fails to comply with professional and statutory rules, defendant's *coram nobis* petition should have been granted and his appeal reinstated.

Wilson, J., dissenting

This dissenting opinion emphasized that the majority contradicted the holding of Roe v. Flores-Ortega (528 U.S. 470 [2000]), which states that counsels have a duty to consult with their clients about their right to an appeal. Here, the court provided a standard form that did not substitute for counsel's duty to consult with defendant, and thus violated defendant's constitutionally protected rights.

People v. Dwight Smith, 30 N.Y.3d 626 (2017) - Decided December 19, 2017

Rivera, J.

The first question the Court addressed was whether the trial court's denial of defendant's request for a lawyer during pretrial proceedings concerning a DNA test violated defendant's right to counsel. The trial court had relieved defendant's lawyer

from the case in defendant's absence, but ordered defendant give a DNA sample based on that counsel's inaction. Defendant denied consent to the test and requested assistance of counsel on that motion, a request the trial court denied. The Court here determined that such denial was error, and a court may not inform an unrepresented defendant that, in the court's opinion, there is no legal recourse. As such, the Court held that defendant was denied his right to counsel in violation of the Sixth Amendment and Article 1, Section 6 of the New York State Constitution.

The Court also examined whether the Appellate Division's dismissal of the indictment was the proper remedy for defendant's deprivation of counsel. Under CPL 470.20, the Appellate Division may take necessary and appropriate corrective actions both to rectify any injustice to the appellant resulting from the error or defect which is the subject of the reversal or modification, and to protect the rights of the respondent. The violation of defendant's right to counsel occurred post-indictment and did not retroactively infect the grand jury proceedings, even though it resulted in defendant being denied the opportunity to confer with counsel regarding a potential challenge to inculpatory DNA evidence. The Court here determined that dismissal of the indictment was not "necessary and appropriate" to rectify the injustice to the defendant. Accordingly, the order of the Appellate Division was modified by reinstating the indictment and remitting the case to Supreme Court for further proceedings.

Garcia, J., dissenting (Stein, J., and Fahey, J., concurring)

The dissenting opinion argued that because defendant was never unrepresented during a critical stage of the proceedings, defendant's only reviewable claim of a constitutional right-to-counsel should be rejected. The dissent reasoned that United States v. Wade (338 U.S. 218 [1967]), defined "critical stage" to include any stage of the prosecution where counsel's absence might derogate from the accused's right to a fair trial, which does not cover "mere preparatory steps," such as DNA testing. Therefore, a claim of inadequate representation during DNA testing should be beyond the scope of the Court's review.

People v. Sposito, 2018 NY Slip Op 00860 (2018) - Decided February 8, 2018

Memorandum

The issues presented were whether trial counsel's performance was deficient, and whether the trial court properly denied defendant's motion for DNA testing.

Defendant bears the burden of establishing a claim that counsel's performance is constitutionally deficient by demonstrating the absence of strategic or other legitimate explanations for counsel's alleged failures. Here, defendant failed to meet that burden on the basis of the record alone, and counsel's alleged out-of-court statements were beyond review by the Court on direct appeal.

The Court also determined that defendant's post-verdict motion for DNA testing was properly denied because defendant failed to show that there was a reasonable probability that the verdict would have been more favorable had the requested testing been carried out and the results admitted at trial.

People v. O'Kane, 2018 NY Slip Op 00859 (2018) - Decided February 8, 2018

Wilson, J.

The issue presented was whether County Court erred in holding that defendant's trial counsel was ineffective for consenting to verdict sheet annotations beyond those automatically permitted by CPL 310.20, which explicitly allows trial courts to annotate verdict sheets with specific information by which certain counts may be distinguished. Here, defense counsel consented to parenthetical annotations that went beyond those specifically listed in the statute. Such consent did not deprive defendant of meaningful representation, however, since the annotations were not themselves prejudicial, and the record established that counsel had a sound strategic reason for consenting to them.

People v. Silburn, 2018 N.Y. slip op. 02286 (2018) – Decided April 3, 2018

DiFiore, C.J.

This case presented two issues, the first about *pro se* representation, the second about the use of psychiatric evidence. On the first issue, the record reflected that, at trial, the defendant had requested to proceed *pro se* with the assistance of standby counsel. The Court held that such a request was not an unequivocal request to proceed *pro se*. The trial court therefore had no obligation to “conduct [the] ‘searching inquiry’” otherwise required by People v. McIntyre, 36 N.Y.2d 10 (1974), to ensure a knowing, intelligent, and voluntary waiver of the right to counsel, although the better practice would have been to ask anyway. As to the second issue, CPL 250.10 requires that defendants give notice before introducing psychiatric defenses at trial. The Court held that the trial court did not err when it relied on this provision to preclude the defendant from adducing deficiently-noticed psychiatric testimony to challenge the voluntariness of defendant's statements to police, holding it was generally the intent of the Legislature to allow the prosecution a fair opportunity to rebut psychiatric evidence in this context as well.

Wilson, J. dissenting (Rivera, J., concurring)

The dissent argued that defendant was both timely and unequivocal in asserting his right to self-representation, triggering the trial court's duty to conduct a McIntyre inquiry. The trial court should also have considered defendant's request for standby counsel – a request ordinarily granted by trial courts and supported by prior case law, ABA recommendations and a colorable reading of the Sixth Amendment. On the second issue, although harmless in this case, the preclusion of the admission of psychiatric testimony for notice failure was error, since psychiatric evidence offered to persuade the jury to discount the defendant's statements was not subject to the notice requirements of CPL § 250.10.

Rivera, J. dissenting

The dissent agreed with Judge Wilson's analysis on both issues, but further argued that there had been a shift in prevailing legal norms and that courts now recognized the importance of standby counsel for vindicating the rights of *pro se* defendants.

XI. Other Constitutional Issues

People v. Bautista, 2017 NY Slip Op 07297 (2017) - Decided October 19, 2017

Memorandum

The Court held that defendant was not deprived of a fair trial by the prosecutor's remarks in summation, as they reflected arguments that were fairly inferable from the evidence adduced at trial. The Court also agreed with the courts below that the notes taken during the interviews of an unindicted alleged co-conspirator were not subject to disclosure under Brady v Maryland (373 U.S. 83 [1963]), because the notes were not exculpatory as to defendant's convictions for criminal tax fraud in the first degree and offering a false instrument for filing in the first degree.

People v. Garvin, 30 N.Y.3d 174 (2017) - Decided October 24, 2017

Stein, J.

The Court was asked to overrule prior decisions holding that a warrantless arrest of a suspect in the threshold of a residence is permissible under the Fourth Amendment, provided that the suspect has voluntarily answered the door and the police have not crossed the threshold. Stemming from his arrest without a warrant inside the doorway of his home, defendant argued that by entering his home without his consent or a search warrant, the police violated Payton v. New York (445 U.S. 573 [1980]). Defendant also argued that he should not have been adjudicated a persistent felony offender.

The Appellate Division affirmed, with one Justice dissenting, concluding that defendant's warrantless arrest did not violate Payton because the facts established that the arresting officer effectuated the arrest in the doorway of the home and did not go inside or reach to pull the defendant out. Critically, the Appellate Division found that "defendant was arrested at the threshold of his apartment after he voluntarily emerged." Thus, the Appellate Division found that defendant had voluntarily "surrendered the enhanced constitutional protection of the home." In addition, the Appellate Division upheld the persistent felony adjudication. This Court affirmed.

Fahey, J., dissenting in part

The dissenting opinion agreed with the Court's analysis of the Payton issue, but wrote to disagree with the Court's affirmation of the persistent felony adjudication, noting that New York's persistent felony offender scheme is unconstitutional under Apprendi v. New Jersey (530 U.S. 466 [2000]).

Rivera, J., dissenting (Wilson, J., concurring)

The dissenting opinion argues that a warrantless entry by police to effectuate a home arrest is "presumptively unreasonable" under Payton. The burden of overcoming that presumption is on the People, and thus a defendant is not required to show that he has an "expectation of privacy" in his apartment. Here, The People failed to rebut that presumption when they failed to establish, as a constitutional matter, that defendant lacked any reasonable expectation of privacy in the location of the house where he was arrested (the threshold between his apartment and the inner hallway of a two-family house), and that the arrest came within one of the "carefully delineated" narrow exceptions to the warrant requirement.

Wilson, J., dissenting

The dissenting opinion reiterates that absent exigent circumstances, officers planning to arrest a suspect at home must obtain a warrant. Judge Wilson contends that the majority's analysis failed to satisfy the Federal and State Constitutions, and does not serve the interests of New York citizens and law enforcement officers. Because the police planned to arrest defendant, did not obtain a warrant, and no exigent circumstances existed, defendant's threshold arrest was unlawful and his case should be remanded to the Appellate Division.

People v. Novak, 2017 NY Slip Op 07384 (2017) - Decided October 24, 2017

Feinman, J.

In this case, the sole Judge deciding a criminal defendant's appeal as of right also presided over defendant's pretrial motions and bench trial. The Court held this was a due process violation, even though New York law did not explicitly mandate recusal in this instance. The Judge should have been recused.

People v. Lee, 2017 NY Slip Op 06415 (2017) - Decided September 12, 2017

Memorandum

The issue presented was whether an inventory search of a vehicle by police was in accordance with procedure and resulted in a viable inventory list. The primary purpose of the vehicle search was to preserve property in the vehicle and shield the police from any claims of lost property. The entire search is not invalidated even if the police knew that the search might result in contraband. The court did not address the lower court's finding that the police testimony was credible because it presented a mixed question of law and fact.

People v. Bethune, 29 N.Y.3d 539 (2017) - Decided June 8, 2017

Wilson, J.

Appellant challenged the Supreme Court's granting of the People's motion to resettle his trial transcript without holding a reconstruction hearing. Not every dispute about the trial record requires a reconstruction hearing and the Supreme Court's reliance on the stenographer's official certification of accuracy of the amended transcript, the affidavit of counsel recounting a conversation with that reporter as to the reason for the discrepancy in the two transcripts, and the context of the purported error was not outside its discretion. Additionally, even when a judge's recollection of the disputed or missing portion of a transcript is unclear, other information may suffice to allow him or her to resettle the record without a reconstruction hearing. The Court determined that Supreme Court did not abuse its discretion and affirmed the Appellate Division's order upholding the trial judge's ruling.

Fahey, J., concurring

The concurrence joined the opinion fully, but separately addressed the better practices that could have been utilized by the Superior Court. A reconstruction hearing will, in many cases, constitute the best means of resolving apparent errors in a record, however, when a criminal appellant believes that the party's adversary is relying on an

inaccurate transcription of the trial, the party should notify the trial judge rather than the reporter.

2018 JUDICIAL SEMINAR COURT OF APPEALS CRIMINAL CASE SUMMARIES

	2013	2014	2015	2016	2017
Total Applications Assigned	2044	2100	2338	2211	2275
Total Applications Decided	1923	2090	2201	2497	2244
Granted	74	81	91	33	25
Denied	1692	1843	1868	2230	2042
Dismissed	145	154	231	221	172
Withdrawn	12	12	11	13	5
Total People's Applications	63	47	51	66	65
Granted	14	11	7	10	7
Denied	39	29	25	48	52
Dismissed	3	2	2	2	5
Withdrawn	7	5	7	6	1
Average Number of Applications Assigned to Each Judge	324	325	391	358	374
Average Number of Grants for Each Judge	11	12	13	5	4

Speedy Trial

People v. Wiggins, 2018 NY Slip Op 01111 (2018) - Decided February 15, 2018

(Fahey, J.) At issue is whether a lengthy delay between defendant's arrest and his eventual guilty plea violated his constitutional right to a speedy trial. The Court analyzed the constitutional speedy trial claim using five factors set forth in People v Taranovich: (1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay. The Court held that defendant's constitutional right to a speedy trial was violated because the People's strategy to pursue codefendant's cooperation that continued to be unsuccessful after five years cannot justify that extraordinary delay. Although the serious nature of the charges favors the People, the lengthy period of pretrial incarceration, as well as the presumptive prejudice to defendant that resulted from the lengthy delay and pretrial incarceration, favor defendant. Accordingly, the order of the

Speedy Trial

People v. Wiggins, 2018 NY Slip Op 01111 (2018) - Decided February 15, 2018

DiFiore, C.J., dissenting (Garcia, J., and Feinman, J., concurring)
The dissent agreed with the majority's opinion that the delay for a trial was extraordinary, but disagreed that the defendant's constitutional right was violated. In making such determination, the dissent also analyzed the Taranovich factors, concluding that the People were making diligent efforts within their "broad discretion" when determining the order in which to prosecute codefendants, that defendant was not prejudiced by the delay, and that the record indicated defendant acquiesced to the bulk of the delay. As such, the dissent would have affirmed the Appellate Division order and upheld the denial of defendant's motion to dismiss the indictment.

Suppression Motions

People v. Stanley Hardee, 29 N.Y.3d 994 (2017) – Decided November 16, 2017

(Memorandum) At issue here is whether the substantial likelihood of finding a weapon inside a car, which presented a threat to the officer's safety, justified a limited search of that vehicle. The Court determined that the record supported the determination that such circumstances existed, thus justifying the search of the inside of the car. The order of the Appellate Division was affirmed.

Suppression Motions

People v. Stanley Hardee, 29 N.Y.3d 994 (2017) – Decided November 16, 2017

Stein, J., dissenting (Rivera, J., and Wilson, J., concurring)
The dissenting opinion reasoned that the rule in People v. Torres (74 N.Y.2d 224 [1989]), requiring an "actual and specific threat" to officer safety from a weapon located in the vehicle, cannot be justified by the officers' mere suspicion that a weapon exists. Therefore, the firearm should have been suppressed.

Suppression Motions

**People v. Sivertson, 2017 NY Slip Op 04320 (2017) –
Decided June 1st, 2017**

(Memorandum) At issue here is whether a warrantless entry by the police into defendant's home was justified by exigent circumstances. The Court held that no further review was needed since the record supported the Appellate Court's conclusion that the issue was a mixed question of law and fact. Seeing that defendant's remaining contention was without merit, the order of the lower court was affirmed.

Suppression Motions

**People v. Sivertson, 2017 NY Slip Op 04320 (2017) –
Decided June 1st, 2017**

Rivera, J., dissenting (Stein, J., concurring)

The dissent argued that there were no exigent circumstances to invoke the probable cause exception relied on by the People to justify a warrantless entry into defendant's home. People v. McBride (14 N.Y.3d 440 [2010]), identified several factors used by courts to determine whether such pressing circumstances exist, none of which were found in the record here. Therefore, the Appellate Division should have been reversed and a new trial ordered, in order to protect defendant's Fourth Amendment rights.

Suppression Motions

People v. Perez, 2018 NY Slip Op 02218 (2018) - Decided March 27, 2018

(Memorandum) The issue before the Court was whether the police conduct conformed to People v De Bour (40 N.Y.2d 210 [1976]), which provides the framework for evaluating police-initiated encounters with private citizens. Here, in a New York City Housing Authority building, defendant pushed the elevator button after seeing police officers in the lobby, despite their request to hold the doors. The police followed defendant up two flights, and asked whether he lived in the building. Defendant did not respond to an officer's questions, and the officer noticed a bulge in defendant's arm. The officer grabbed defendant's arm and found a machete. The Court reasoned that there is support in the record for the determination that the circumstances, as testified to by the arresting officer, provided the requisite level of support to satisfy De Bour. The Court concluded that to the extent the lower court may have erred in admitting the statement defendant made at the precinct prior to being given any Miranda warnings, any error was harmless. The order of the Appellate Division was affirmed.

Suppression Motions

People v. Perez, 2018 NY Slip Op 02218 (2018) - Decided March 27, 2018

Rivera, J., dissenting (Wilson, J., concurring)

The dissent argued the majority's conclusion that the record supported defendant's forcible detention and frisk was inconsistent with established law. Absent reasonable suspicion that a person has committed, is committing, or is about to commit a crime, the police may not stop and detain them. Moreover, reasonable suspicion cannot be based on a person's failure to answer police questions absent other indicia of criminal activity. Nor may forcible police action be based on a person's efforts to avoid confrontation, which defendant clearly sought to do here. Where, as here, police have no advance information about any criminality ascribed to an individual, and that person stands motionless and silent when approached, the police may not stop and detain, nor grab and place the person under arrest, even if his shirtsleeve has a nondescript bulge. In other words, none of the circumstances, in isolation or cumulatively, established reasonable suspicion that defendant had committed or was about to commit a crime. The dissent emphasized that police encounters must be scrutinized carefully for constitutional compliance, in order to avoid the criminalization of indeterminate behavior based on the nature of the surroundings or someone's attempts to avoid contact with law enforcement.

Hearsay & Confrontation Clause

People v. Austin, 30 N.Y.3d 98 (2017) - Decided October 19, 2017

(DiFiore, C.J.) The issue presented was whether defendant's Sixth Amendment right to confrontation was violated by the introduction of DNA evidence through the testimony of a witness who had not performed, witnessed, or supervised the generation of the DNA profiles. The Court held that this introduction of hearsay evidence through surrogate testimony violated defendant's right to confront the witnesses against him.

Authentication

People v. Price, 29 N.Y.3d 472 (2017) – Decided June 27, 2017

(Stein, J.) The court was asked to determine whether the People proffered a sufficient foundation at trial to authenticate a photograph that was obtained from an Internet profile page allegedly belonging to defendant. Since the object of the authentication requirement is to insure the accuracy of a photograph sought to be admitted into evidence, the standard for authentication is that any person having requisite knowledge of the facts may verify, or an expert may testify that the photograph has not been altered.

The Court held that, under the special circumstances of this case, the People's proof fell short of establishing the requisite authentication to render the photograph admissible in evidence. The People's authentication proffer was lacking because the victim could not identify the firearm in the image and because no other witness testified that the photograph was a fair and accurate representation of the scene depicted. The order was reversed and

Authentication

People v. Price, 29 N.Y.3d 472 (2017) – Decided June 27, 2017

Rivera, J., concurring (joined by J. Garcia)

The concurring opinion agreed with the majority that the People failed to authenticate the computer printout and that its admission was reversible error entitling defendant to a new trial. However, the case presented a novel question as to how a party may authenticate a printout of a digital image found on a social media website, and the majority did not adopt a test to apply in determining that the foundational proof is insufficient. The concurrence would hold that the People had to establish that: (1) the printout was an accurate representation of the webpage; and (2) the page was defendant's, meaning he had dominion and control over the page, allowing him to post on it. What the People crucially failed to establish here, by direct or circumstantial evidence, was that the page in question belonged to defendant.

Legal Sufficient Evidence

People v. Reyes, 2018 NY Slip Op 01113 (2018) - Decided February 15, 2018

(Memorandum) The issue presented is whether the evidence was sufficient to support conviction of defendant for conspiracy to commit arson where defendant was present when the alleged co-conspirators discussed and planned the crime. Conspiracy requires proof of intent that a specific crime be performed, as well as an agreement with another person to engage in or cause that crime to be committed. The Court held that the law does not contain a presumption of agreement based on sheer presence at a meeting at which a conspiracy is discussed. In other words, knowing the existence and goals of a conspiracy does not itself make defendant a co-conspirator. However, the Court declined to define or limit the circumstances giving rise to an agreement, but agreed with the Appellate Division that under the facts of this case, there is no valid line of reasoning and permissible inferences from which a rational jury could find the element of agreement beyond a reasonable doubt. The order of the Appellate Division was affirmed.

Legal Sufficient Evidence

**People v. Reyes, 2018 NY Slip Op 01113 (2018) –
Decided February 15, 2018**

Garcia, J., dissenting (Feinman, J., concurring)

The dissent argues that the facts here, viewed in a light most favorable to the People, are legally sufficient to find the elements of the crime proven beyond reasonable doubt. Particularly in this case, defendant was a gang member charged with a conspiracy directly related to enforcing the rules governing gang membership and obligations, thus granting a permissible inference to find there was an agreement to conspire to commit a crime. Still, the dissent agreed with the majority that an individual's knowledge of the goals of a conspiracy does not automatically make one a co-

Jury Instructions & Notes

People v. Viruet, 29 N.Y.3d 527 (2017) - Decided June 6, 2017

(Garcia, J.) The court was asked to determine if the Appellant was entitled to an adverse inference jury instruction after the arresting officer could not locate the surveillance video collected from the crime scene. The Court, applying the rule in People v. Handy (20 N.Y.3d 663, 665 [2013]), agreed that the Appellant was entitled to the adverse inference jury instruction because he had requested “evidence that [was] reasonably likely to be of material importance,” and that evidence had been made unavailable by the State.

However, the Court also determine that the error by the trial court was harmless therefore, the order of the Appellate Division was affirmed. The prosecution presented eye witness evidence and testimony that the defendant confessed to the shooting. The Court reasoned that the evidence presented at trial against the Appellant was overwhelming and there was no significant probability that the jury would have acquitted the defendant had it

Jury Instructions & Notes

People v. Viruet, 29 N.Y.3d 527 (2017) - Decided June 6, 2017

Wilson, J., dissenting

The dissenting opinion agreed with the majority's finding that there had been an error by the trial court in refusing the adverse inference jury instruction. However, the dissent found that the error was not harmless. The dissent contends that the evidence presented at trial could have supported either a finding of guilt or innocence. The eyewitnesses stated that they had only briefly seen the shooter and there was evidence that the defendant and his brother shared a significant resemblance. Therefore, since there was not overwhelming proof of guilt the error could not be considered harmless.

Jury Instructions & Notes

People v. Boone, 30 N.Y.3d 521 (2017) - Decided December 14, 2017

(Fahey, J.) At issue was whether the trial court erred in denying defendant's request for a jury instruction on cross-racial identification. The Court cited extensive scientific and psychological research, as well as recent judicial trends, to determine that when identification is an issue in a criminal case, and the identifying witness and defendant appear to be of different races, upon request, a party is entitled to a charge on cross-racial identification. Such instructions shall state (1) that the jury should consider whether there is a difference in race between the defendant and the witness who identified the defendant, and (2) that, if so, the jury should consider (a) that some people have greater difficulty in accurately identifying members of a different race than in accurately identifying members of their own race and (b) whether the difference in race affected the accuracy of the witness's identification.

While the Court reiterated that the decision to grant expert testimony on the subject of cross-racial identification remains within the trial court's discretion, the absence of expert testimony on cross-racial identification does not preclude the charge. Similarly, the charge is not dependent on whether defense counsel cross-examined the People's witnesses about their identifications.

Jury Instructions & Notes

**People v. Boone, 30 N.Y.3d 521 (2017) –
Decided December 14, 2017**

Garcia, J., concurring (joined by Stein, J.)

The concurring opinion agreed that the trial court abused its discretion in denying defendant's request for a cross-racial identification charge in this case. It disagreed with the majority's new rule, however, which it argued deprived trial courts of their discretion. As a result, the concurrence worried that the charge was over-inclusive, possibly harmful to jurors, and improperly suggested a lack of confidence in trial judges.

Assistance of Counsel

People v. Smith, 30 N.Y.3d 626 (2017) - Decided December 19, 2017

(Rivera, J.) The first question the Court addressed was whether the trial court's denial of defendant's request for a lawyer during pretrial proceedings concerning a DNA test violated defendant's right to counsel. The trial court had relieved defendant's lawyer from the case in defendant's absence, but ordered defendant give a DNA sample based on that counsel's inaction. Defendant denied consent to the test and requested assistance of counsel on that motion, a request the trial court denied. The Court here determined that such denial was error, and a court may not inform an unrepresented defendant that, in the court's opinion, there is no legal recourse. As such, the Court held that defendant was denied his right to counsel in violation of the Sixth Amendment and Article 1, Section 6 of the New York State Constitution.

The Court also examined whether the Appellate Division's dismissal of the indictment was the proper remedy for defendant's deprivation of counsel. Under CPL 470.20, the Appellate Division may take necessary and appropriate corrective actions both to rectify any injustice to the appellant resulting from the error or defect which is the subject of the reversal or modification, and to protect the rights of the respondent. The violation of defendant's right to counsel occurred post-indictment and did not retroactively infect the grand jury proceedings, even though it resulted in defendant being denied the opportunity to confer with counsel regarding a potential challenge to inculpatory DNA evidence. The Court here determined that dismissal of the indictment was not "necessary and appropriate" to rectify the injustice to the defendant.

~~Accordingly, the order of the Appellate Division was modified by reinstating the indictment and~~

Assistance of Counsel

People v. Smith, 30 N.Y.3d 626 (2017) - Decided December 19, 2017

Garcia, J., dissenting (Stein, J., and Fahey, J., concurring)

The dissenting opinion argued that because defendant was never unrepresented during a critical stage of the proceedings, defendant's only reviewable claim of a constitutional right-to-counsel should be rejected. The dissent reasoned that United States v. Wade (338 U.S. 218 [1967]), defined "critical stage" to include any stage of the prosecution where counsel's absence might derogate from the accused's right to a fair trial, which does not cover "mere preparatory steps," such as DNA testing. Therefore, a claim of inadequate representation during DNA testing should be beyond the scope of the Court's review.

Other Constitutional Issues

People v. Garvin, 2017 NY Slip Op 07382 (2017) - Decided October 24, 2017

(Stein, J.) The Court was asked to overrule prior decisions holding that a warrantless arrest of a suspect in the threshold of a residence is permissible under the Fourth Amendment, provided that the suspect has voluntarily answered the door and the police have not crossed the threshold. Stemming from his arrest without a warrant inside the doorway of his home, defendant argued that by entering his home without his consent or a search warrant, the police violated Payton v. New York (445 U.S. 573 [1980]). Defendant also argued that he should not have been adjudicated a persistent felony offender.

The Appellate Division affirmed, with one Justice dissenting, concluding that defendant's warrantless arrest did not violate Payton because the facts established that the arresting officer effectuated the arrest in the doorway of the home and did not go inside or reach to pull the defendant out. Critically, the Appellate Division found that "defendant was arrested at the threshold of his apartment after he voluntarily emerged." Thus, the Appellate Division found that defendant had voluntarily "surrendered the enhanced constitutional protection of the home." In addition, the Appellate Division upheld the persistent felony adjudication. This Court

Other Constitutional Issues

People v. Garvin, 2017 NY Slip Op 07382 (2017) - Decided October 24, 2017

Fahey, J., dissenting in part

The dissenting opinion agreed with the Court's analysis of the Payton issue, but wrote to disagree with the Court's affirmation of the persistent felony adjudication, noting that New York's persistent felony offender scheme is unconstitutional under Apprendi v. New Jersey (530 U.S. 466 [2000]).

Rivera, J., dissenting (Wilson, J., concurring)

The dissenting opinion argues that a warrantless entry by police to effectuate a home arrest is "presumptively unreasonable" under Payton. The burden of overcoming that presumption is on the People, and thus a defendant is not required to show that he has an "expectation of privacy" in his apartment. Here, The People failed to rebut that presumption when they failed to establish, as a constitutional matter, that defendant lacked any reasonable expectation of privacy in the location of the house where he was arrested (the threshold between his apartment and the inner hallway of a two-family house), and that the arrest came within one of the "carefully delineated" narrow exceptions to the warrant requirement.

Other Constitutional Issues

People v. Garvin, 2017 NY Slip Op 07382 (2017) - Decided October 24, 2017

Wilson, J., dissenting

The dissenting opinion reiterates that absent exigent circumstances, officers planning to arrest a suspect at home must obtain a warrant. Judge Wilson contends that the majority's analysis failed to satisfy the Federal and State Constitutions, and does not serve the interests of New York citizens and law enforcement officers. Because the police planned to arrest defendant, did not obtain a warrant, and no exigent circumstances existed, defendant's threshold arrest was unlawful and his case should be remanded to the Appellate Division.