## NYS Court of Appeals Criminal Decisions for January 9, 2020

### People v. Muhammad

This is a unanimous memorandum affirming the AD. Defense counsel at bar "impliedly consented" to the submission of written copies of the court's entire final instructions to the jury. Any error is this regard was thus unpreserved for appellate review.

## NYS Court of Appeals Criminal Decisions for February 13, 2020

### People v. Ramlall

This is a unanimous memorandum affirming the appellate term. After balancing the factors set out in People v. Taranovich, 37 NY2d 442, 445 (1975); CPL 30.20, the defendant's claims do not rise to a level of a constitutional speedy trial violation regarding a lengthy delay of his prosecution for the traffic infraction of driving while ability impaired.

### People v. Wheeler

This is a unanimous memorandum reversing the appellate term. The lower court accusatory instrument charging obstructing governmental administration (PL § 195.05) is dismissed, as the instrument was facially insufficient. Defendant was not put on notice of the "official function" that he purportedly interfered with. Such notice implicates the defendant's constitutional rights to due process, to prepare a defense and to be protected from double jeopardy. Defendant was accused of not cooperating with law enforcement which was attempting to execute a search warrant on his vehicle as he was backing out of his driveway. There were insufficient *nonhearsay* allegations which, if true, would establish every element of the offense charged and the defendant's commission thereof. *See generally*, People v. Kalin, 12 NY3d 225, 228-229 (2009); CPL 100.40(1)(c).

## People v. Francis

This is a unanimous opinion authored by Judge Garcia, affirming the First Department. This is interesting. The defendant here had four prior felony convictions, in 1982, 1988, 1991 and 1997, often using different aliases along the way. The unique question posed to the state's highest court was whether the defendant was "adversely affected" pursuant to CPL 470.15(1) by the CPL 440 denial of his argument that his 1988 sentence was illegally *lenient*.

The defendant had a cogent plan. If he could knock out his 1988 adjudication, which was illegal *(in that he received 60 days for felony drug possession!)*, then like dominos his subsequent recidivist felony offender judgments would theoretically follow. (In footnote 2, the court quickly mentions the defendant's previous strategy to make a *sequentiality* argument, which was effectively rejected last year in People v. Thomas, 33 NY3d 1 [2019].)

The court held that the jurisdictional restrictions of CPL 470.15(1) apply to appeals from CPL 440 litigation. Being aggrieved under the statute requires that the defendant must have already been adversely *affected*, which is in the past tense. It can't be a speculative future harm contingent on how future litigation is navigated; the provision in question does not encompass errors that *may* adversely *affect* the defendant. A court can only address a purported error or defect presently before it. Along these lines, the defendant actually received a windfall through his unusually low 1988 sentence. In and of itself, he was not adversely affected by the ruling; it merely kept in place his illegally lenient sentence. If just being denied a motion were enough to satisfy the statute, it would incentivize the delaying of post-conviction proceedings.

# NYS Court of Appeals Criminal Decisions for February 18, 2020

## People v. Anonymous

This is a 4 to 3 opinion, authored by Judge Rivera. The Chief Judge authored the dissent, joined by Judges Feinman and Garcia. The defendant was arrested for committing a crime after he entered a guilty plea. He asked that his sentence be adjourned until after the new matter was resolved. The jury acquitted defendant of the new charge and the records were sealed pursuant to CPL 160.50. In order to obtain evidence of the defendant violating a pre-sentence condition, the People secured an order staying the CPL 160.50 (1) sealing of these records. This order was erroneous. The information should never have been used to increase the defendant's sentence for his A-II drug felony *(from the promised minimum term of 4 years up to 8 years)*. The AD correctly found that the CPL 160.50 order was erroneous, but wrongly concluded that there was no remedy to be

afforded. The matter was thus remitted for resentencing, as defendant should have been restored to his status before arrest with regards to the acquitted matter.

CPL 160.50 (1) permits the unsealing of records and papers relating to an arrest or prosecution where the People, with at least five days' notice, make a motion demonstrating that the interests of justice require the record to be unsealed. The purpose of CPL 160.50 is to protect the presumption of innocence and to keep individuals from suffering adverse consequences as a result of unfounded public accusations. CPL 160.60, which deems an unsuccessful arrest and prosecution a nullity, should be read in conjunction with CPL 160.50. (*But contrast*, People v. Britton, 31 NY3d 1019, 1020 [2018] [allowing underlying facts from acquitted charge to be considered in SORA risk assessment hearing].)

People v. Patterson, 78 NY2d 711, 713-716 (1991) was considered by the court. There, in-court identification testimony was improperly supported by the pre-trial use of an unsealed photograph of the defendant in a photo array. The court found that CPL 160.50 does not confer constitutionally derived substantive rights; accordingly, application of the Fourth Amendment's exclusionary rule for a technical violation of 160.50 was inapplicable. Here, however, the defendant testified at trial in his own defense that he in fact used drugs prior to sentencing in violation of the sentencing court's admonishment not to get in any more trouble. Defendant was ultimately acquitted of robbery allegations after trial.

None of the six specifically delineated exceptions to sealing records under CPL 160.50 (1)(d), as outlined in footnote 1, were present. The sentencing court's obligation to sentence defendants with accurate and reliable info (CPL 400.10 [4]) does not outweigh this fact. The sentencing court may consider a defendant's non-compliance with pre-sentence conditions in an Outley (80 NY2d 702, 712-713 [1993]) hearing, just not with sealed records. These did not constitute extraordinary circumstances warranting an exception under this carefully designed statutory framework.

In dissent, the Chief Judge observed that the defendant was told to just stay out of trouble while awaiting sentencing. The relevant info for the sentencing court here was the defendant's sworn trial testimony given in open court regarding his dealing drugs after his guilty plea was entered - - not the robbery charge for which he was ultimately acquitted. The exceptions under CPL 160.50 (1)(d) reveal the legislature's balancing of the interests of the defendant with those of law enforcement. At bar, there would have been no stigma suffered by the defendant (i.e., impacting employment, education, professional licensing, etc.), as the acquitted charge would not have been considered. Rather, consistent with Patterson in terms of remedy, the sentencing court would have been considering reliable and accurate info in imposing its sentence and fulfilling its obligation to execute the terms of the plea agreement.

## People v. Diaz

This is a 5 to 2 memorandum, with Judge Rivera authoring the dissent, joined by Judge Wilson. The AD, which affirmed the SORA risk level assessment finding defendant to be a level two offender, is affirmed. Here the presentence investigation report ("PSI") authored by the probation department, which addresses the circumstances surrounding the offense and the defendant's background (CPL 390.30[1]), indicated without any basis that the defendant "on one or more occasions … used physical force to coerce the victim into cooperation." The Case Summary falsely stated that the PSI indicated that "on more than one occasion force was used." These documents were used to justify an additional 10 points under the forcible compulsion factor of the risk assessment instrument, taking the score from the low risk level one to the moderate level two risk. People v. Mingo, 12 NY3d 563, 571-573 (2009) recognized that Corr. Law § 168-n(3) permits the admission of "reliable" hearsay in a SORA hearing. The accuracy of the PSI at bar was not challenged by counsel below.

Terrific dissent here by Judge Rivera, addressing the SORA statutory regime under Corr. Law article 168 (*see*, footnotes 1 and 2), as well as the critical hearsay problem here. Using hearsay to establish truth in any legal context is notoriously suspect as it does not subject the declarant to cross-examination regarding his or her potentially faulty narration, memory and perception. *See also*, People v. Cummings, 31 NY3d 204, 213-216 (2018) (Rivera, J, concurring) (providing more of Judge Rivera's scholarship on hearsay jurisprudence; calling for the end of the excited utterance exception). The statements here were vague, conclusory, uncorroborated, boilerplate, unpersuasive and self-contradictory. The majority wrongly extends the Mingo holding to mean that uncorroborated hearsay from a PSI and Case Summary, standing alone, may constitute clear and convincing evidence supporting a risk level designation without considering whether the statement should actually be credited.