NYS Court of Appeals Criminal Decisions for June 7, 2018

People v. Sanabria

This unanimous memorandum affirmed the AD. Defendant's argument that his right to present a defense by the trial court limiting his expert's testimony regarding the procedural history of his prior conviction was unpreserved; further, the trial court did not abuse its discretion.

People v. Berrezueta

This is a 6 to 1 memorandum, affirming the Appellate Term, with Judge Rivera dissenting. The accusatory instrument charging criminal possession of a weapon in the fourth degree (PL §265.01 [1]) was not jurisdictionally defective. The instrument, addressing the possession of a switchblade knife in a NYC subway, was supported by non-hearsay allegations which provided the defendant with sufficient notice to prepare a defense and avoid double jeopardy in the future. There was further sufficient evidence presented at this bench trial, including a demonstration of the operability of the knife.

In dissent, Judge Rivera opined that the allegations and proof did not meet the statutory definition under PL §265.00 (4), which requires that the knife open automatically by hand pressure applied to a button, spring or other device in the *handle* of the knife. The handle element has been in some version of the statute since 1909, withstanding several amendments to the law. Here, the portion of the knife containing the spring, which causes the knife to open, was in the *blade*, as opposed to the handle. Since this is a strict liability crime, the statute must be interpreted narrowly. As it turns out, the defendant had no prior criminal convictions and used the knife for opening packages in his mailroom job.

NYS Court of Appeals Criminal Decisions for June 12, 2018

People v. Silvagnoli

This unanimous memorandum is a successful People's appeal, reversing the AD and reinstating the judgment of Supreme Court. The improper questioning of defendant on a represented matter was brief, flippant and minimal; it was discrete and separable from the interrogation of defendant on the unrepresented matter.

People v. Henry

This successful People's appeal resulted in a unanimous opinion authored by Judge Wilson. There were three prosecutions of this defendant at issue, a drug charge, a robbery and a murder. The trial court suppressed statements taken as a result of non-custodial interrogation regarding the robbery charge, as defendant was not represented on that matter. The AD decided to also reverse the statements related to the murder charge as well, as the robbery facts were purportedly related to the murder allegations. The Court of Appeals reversed the AD, which misapplied People v. Cohen, 90 NY2d 632, 638-640 (1997).

Under Cohen, in order to protect the right to counsel on a represented charge, a defendant who is represented on crime A, and is not in custody, may be interrogated regarding an uncharged crime B in which he or she is unrepresented - - unless the two matters are so closely related that there is a serious risk that admissions on one would constitute an admission on the other. (If *in custody* and represented on crime A, the police are prohibited from interrogating defendant on crime B, regardless of whether the two crimes are related. *See* People v. Burdo, 91 NY2d 146, 149-151 [1997].)

At bar, an armed robbery occurred involving two masked perpetrators robbing occupants of a tattoo polar. Two days later, a 19-year old was killed by a single masked gunman while the victim was sitting in a parked car outside a gas station convenience store. The same vehicle was reported to have been used by the perpetrators in both incidents. Five days after the murder, defendant was pulled over for running some stop signs. He was driving what appeared to have been the same vehicle, and was charged with marijuana possession. Defendant was assigned counsel and released on bail. A Blackberry cellphone was recovered during an inventory of the vehicle; defendant denied ownership of it. The phone was subsequently determined to have been stolen in the armed robbery, which occurred the previous week.

Three days later, the defendant is driving a different car and is pulled over for speeding. He is arrested for possession of stolen property regarding the Blackberry cellphone and Mirandized. During questioning, he admits to being the driver on the robbery and the murder cases. He is indicted for both crimes. Again, the trial court suppressed the robbery statements because of its relationship to the charged marijuana case, in which defendant had counsel. Defendant was acquitted by a jury of the robbery and convicted for the murder.

The AD erroneously suppressed the murder-related statements, as the appellate court improperly compared the murder and robbery charges, instead of comparing the murder to the *marijuana* charge (whose only unifying factual connection was the car used in both incidents). In other words, questioning about the murder would not have implicated defendant on the marijuana charge. The AD misapplied CPL 470.15 (which

permits appellate courts to consider only adverse rulings) to mean that it had to suppress the murder charge because the lower court found it factually related to the robbery charge. The AD was wrong, as the lower court's determination regarding the murder charge *was* adverse to the defendant.

NYS Court of Appeals Criminal Decisions for June 14, 2018

People v. Thibodeau

This is a 4 to 3 memorandum, with Judge Rivera authoring the dissent, which was joined in by Judges Wilson and Feinman. The Court of Appeals affirmed the AD, which affirmed the denial of a CPL 440 motion, following a fact-finding hearing involving a homicide mystery.

The 18-year-old victim here went missing on Easter morning in 1994, disappearing from her job as a convenience store clerk. Defendant was convicted of kidnapping; his brother was also a suspect. Defendant was alleged to have made admissions while in prison. The victim's body has never been found.

In his CPL 440 motion, the defendant raised issues of newly discovered evidence, prosecutorial misconduct and Brady. This included the admissions of three individuals, all of whom denied culpability at the hearing. Newly discovered evidence under CPL 440.10 (1)(g) must be admissible. Here, however, the potential third party culpability statements did not qualify under the declaration against penal interest hearsay exception. Under People v. Settles, 46 NY2d 154, 167 (1978), the declarant must be unavailable, aware that the statement was against his or her penal interest and have competent knowledge of the facts. Most importantly, there must be independent circumstances to attest to the statement's trustworthiness and reliability. Though declarations that are exculpatory are subject to a more lenient standard, it is this last component requiring independent corroboration that was purportedly lacking at bar, as there was no independent evidence that these three individuals were near the crime scene at the relevant time. According to the majority, the link between these individuals and the crime was speculative. The admissions were conflicting. They did not qualify under a reverse-Molineux theory either. See People v. DiPippo, 27 NY3d 127, 138-139 (2016) (addressing third party culpability admissibility).

In dissent, Judge Rivera points out that there was not overwhelming evidence of defendant's guilt; indeed, there was no physical or forensic evidence connecting defendant to the crime. There was no ID evidence placing defendant at the scene. The defendant did not confess. His brother bought cigarettes at the victim's store around the time of the crime, and was initially charged with this crime (and eventually acquitted). The van otherwise thought to have been used to transport the victim

contained no forensic evidence connecting the victim. The van's tire marks did not match the ones found outside of the store.

Defendant, who had an alibi defense, simply wants an opportunity to present the new evidence (regarding the three who made admissions) to a new jury. The sheer volume of independent third party confessions provide additional corroboration of each one. Chambers v. Mississippi, 410 US 284, 300-301 (1973) (see also FN 7 of this dissent). The three that confessed indicated that the victim was killed because she was a snitch. They described beating her and disposing of her body in Canada. The admissions were made to several witnesses; not surprisingly, all three denied their guilt at the hearing. Evidence linked the three declarants to each other and to the abduction, and supports the reliability of the info indicating that the body was taken to Canada. Conflicting evidence does not render it inadmissible; accordingly, direct evidence is not required for third party culpability evidence to be admitted. DiPippo, 27 NY3d at 136. Judge Rivera believed that the third party culpability evidence at bar was sufficiently corroborated, and was therefore admissible.

Finally, Judge Rivera challenges the unavailability component of the declaration against penal interest doctrine, making this the second hearsay exception questioned recently by the judge. *See also* People v. Cummings, 31 NY3d 204, 213-216 (May 8, 2018) (Rivera, J, concurring) (challenging the validity of the excited utterance hearsay exception in general).

People v. Tiger

This successful People's appeal, reversing the AD, is not a good decision for defendants in general. This is a 5 to 2 opinion authored by the Chief, with Judge Wilson authoring the dissent, joined in by Judge Rivera. Judge Garcia joined in with the majority and authored a separate concurrence. The AD had reversed a summary CPL 440 denial and ordered a hearing on both of defendant's legal theories: actual innocence and ineffective assistance of counsel ("IAC"). Both were brought under CPL 440.10 (1)(h), which addresses constitutional violations in general. The People only appealed the actual innocence claim, meaning that the hearing would go on regarding the IAC issue, regardless of the high court's decision.

The defendant was the caregiver for a severely disabled 10 year old girl, who required others to bath her. She was unable to speak and was not mobile. After bathing the child, the defendant noticed red and peeling marks on the child's legs; she reported it right away. Medical personnel at first believed that it was a reaction to medication that the child had been taking. But then the burn unit got involved and opined that these marks were from scalding water. Defendant made incriminating statements to the effect that the water may have been too hot. Defendant ended up pleading guilty to a reckless *mens rea* crime (endangering the welfare of a physically disabled person; PL 260.25),

as her attorney advised that hiring an expert regarding the medical reaction issue would be expensive; further, she would be facing an extensive prison sentence if convicted after trial. Defendant was sentenced to probation.

The complainant's family sued defendant for damages in civil court. The jury found that defendant's conduct was not a substantial factor in the child's injuries being caused. Defendant argued in her post-conviction motion that counsel was ineffective for failure to investigate and that she was actually innocent.

In a narrow reading of CPL 440.10, the court, while recognizing that the system must protect the innocent, held that a post-plea actual innocence claim may only be brought under the legislature's specific directive under CPL 440.10 (g-1), which requires that newly discovered DNA evidence in a post-plea scenario establish a "significant probability" of "actual innocence." (The case at bar was not a newly discovered evidence scenario, as the complainant's biopsy report was known to the defense from the beginning; further, defendant told her attorney that she did not actually believe that the bath water was hot.)

No free standing "actual innocence claim may be brought under CPL 440.10 (1)(h), which addresses post-plea *and* post-trial constitutional violations in general. As noted in FN 9, this decision did not address post-*trial* actual innocence claims, a legal theory that is now accepted in all four judicial departments. *See* People v. Hamilton, 115 AD3d 12, 20-27 (2d Dep't 2014). In support of its narrow reading of Article 440, the majority described at great lengths the importance of finality of judgments in criminal cases in light of the "solemn" act of pleading guilty in court and the importance of preserving judicial resources. A valid, constitutional and voluntary guilty plea is inconsistent with an actual innocence claim. The case at bar was an IAC case, not a newly discovered evidence / actual innocence case.

(There is also some language from the majority here about the "exceptional nature of DNA evidence as a scientific tool to conclusively determine the identity of an assailant." *See also* People v. Wright, 25 N.Y.3d 769, 783 [2015] [observing that "[w]hen DNA evidence is introduced against an accused at trial, the prosecutor's case can take on an aura of invincibility"].)

Judge Garcia's concurrence requires some extra commentary. He floats the idea that a *coram nobis* motion, a long time safety net for litigants, would also be an inappropriate vehicle for a defendant making an actual innocence claim, as the Court of Appeals in recent years has only applied the *coram nobis* principle to scenarios where defense counsel missed both the CPL 460.10 notice of appeal and CPL 460.30 extension motion deadlines. *See* People v. Syville, 15 NY3d 391, 397 (2010); People v. Andrews, 23 NY3d 605, 610-611 (2014). While a *coram nobis* motion is only appropriate under rare and extraordinary circumstances, as Judge Wilson correctly observes in his dissent, the majority does not adopt Judge Garcia's view. To be clear, it is **not** the law of our state at this time that a *coram nobis* motion is inapplicable for a post-plea free-

standing actual innocence claim. Judge Garcia also repeats the statement we see in other cases regarding the right to appeal from a criminal conviction being purely statutory (under CPL Article 450). This position is contravened by our state constitution, *as noted below* in the Juarez decision summary, decided on 6/27/18.

In dissent, Judge Wilson pointed out that defendant Tiger "is neither the first nor the last innocent person to plead guilty." Guilty pleas occur in the vast majority of criminal cases. People plead guilty for a multitude of reasons, not the least of which is to avoid a harsher prison sentence. Like confessions, there are various reasons for people falsely stating that they committed a crime, including coercion, youth and mental illness. *See also* People v. Thibodeau, 2018 N.Y. LEXIS 1504, at *7 (also decided 6/14/18), FN 2 (noting that some 200 persons falsely confessed to the 1932 kidnapping of the Lindberg baby). Some 45% of exonerations noted by the National Registry of Exonerations were guilty plea cases. Indeed, "[t]he most hallowed principle of our criminal justice system [is] protecting the innocent." United States v. Watson, 792 F3d 1174, 1183 (9th Cir. 2015). Most exonerations don't even involve DNA issues. It was the dissent's position that the majority decided these issues prematurely, as a fact-finding hearing that will cover the same issues, in essence, was yet to be conducted. "The majority's attempt to close the door prematurely, with little information as to what lies on the other side, is particularly disturbing."

People v. Bailey

This is a 5 to 2 decision, authored by Judge Rivera, with a dissent authored by Judge Wilson (joined in by Judge Fahey). Two issues in this case, involving Buford and Molineux arguments. The AD affirmed, as did the Court of Appeals.

Defendant and two co-defendants were prosecuted for assaulting another prison inmate. Racial comments had escalated into a fight. The "n" word was used a number of times during defense counsel's cross-examination of the complainant. A juror stood up during this exchange, and asked that this word not be repeated or she was going to leave. Defense counsel moved for a mistrial, as the juror plainly expressed animosity towards the attorney, and had become grossly unqualified to serve on the jury. The motion was denied; curative jury instructions were given instead. One of the co-defendants' attorneys specifically requested that the juror be examined. Defendant's attorney did not join in on this request, and thus does not get the benefit of having this issue preserved for appeal. Indeed, appellate courts cannot assume that counsel for co-defendants at trial all have the same tactical and strategic interests in their objections.

The defendant's argument that the trial court improperly failed to inquire as to a jury's fairness and impartiality pursuant to People v. Buford, 69 NY2d 290 (1987) (and People v. Kuzdzal, 2018 N.Y. LEXIS 1125, at *6-9 [decided May 8, 2018]) was unpreserved.

Despite using language from CPL 270.35(1), counsel for defendant made a statement to the trial court that purportedly sought only a mistrial (CPL 280.10) because of the problem juror potentially tainting the rest of the jury, not an examination of the juror under Buford. Preservation in general under CPL 470.05(2) was discussed, in terms of timely having the court below fix problems, so as to preserve resources.

The admission of expert testimony regarding the customs of gang activity, including the motive to participate in violence in order to move up in the hierarchy of the organization, was admissible under People v. Molineux, 168 NY 16, 19 (1901). Limiting jury instructions regarding motive and intent were also provided in this regard. Uncharged bad acts may not be admitted if their sole relevance is propensity; rather, motive, intent, lack of mistake or accident, identity or common scheme or plan may be proper purposes for admission - - once the court has balanced the probative value against the prejudicial effect of the evidence. The gang information passed muster here.

In dissent, Judge Wilson, referencing a recent dissent he authored, opines that defense counsel asked for *both* a mistrial and that the juror in question be examined under CPL 270.35(1). *See again* People v. Silburn, 31 N.Y.3d 144, 162-165 (decided April 3, 2018) (Wilson, J., dissenting) (making analogous argument regarding defendant's request to proceed *pro se* and to have stand-by counsel). This issue was thus preserved, as the majority omitted important portions of counsel's oral argument.

People v. Wilson

This decision was authored by Judge Garcia, with Judges Rivera and Wilson each writing separate concurrences. The AD is affirmed. There was legally sufficient evidence to support defendant's conviction for depraved indifference assault ("DIA") in the first degree under PL §120.10(3). The victim (defendant's girlfriend) was assaulted over a two-month time period, having received multiple broken bones, a brain injury and life-long cognitive impairments. The *mens rea* element here required that the People show: (1) recklessness (*see* PL §15.05[3]) creating a grave risk of death, and (2) a depraved indifference to human life, meaning wanton cruelty, brutality or callousness, combined with an utter indifference to whether the victim lives or dies. DIA can be a continuing crime. The evidence here sufficed, as this was a brutal attack that included the defendant having no regret; instead, he isolated the victim and obstructed those who sought to check on her. A rational juror could conclude that defendant was indifferent as to whether the victim lived or died, and engaged in reckless conduct creating a grave risk of death – notwithstanding the fact that he may also have intended to inflict harm on any given occasion. There was no inconsistency with defendant acting with different mental states regarding two different potential or intended results. A DIA charge is not subject to the same restrictions as depraved indifference *murder* prosecutions are with regard to one-on-one intentional crimes (*see e.g.,* People v. Feingold, 7 NY3d 288, 294 [2006]), as a manifest intent to kill necessarily negates a

reckless indifference to the victim's life. The first-degree assault intent to cause serious physical injury does not.

In concurrence, though concluding that the evidence at bar was legally sufficient, Judge Rivera opined that, contrary to the majority's opinion, DIA's are rare and are analogous to depraved indifference murder prosecutions. The concerns in a DIA prosecution are every bit as concerning, if not more so, including having the jury confused and misperceive a DIA charge as a lesser one compared with intentional assault. In his concurrence, Judge Wilson notes that the defendant acted with separate mental states regarding different occasions, not different outcomes. He also agreed with Judge Rivera that DIA prosecutions are likely to be rare.

NYS Court of Appeals Criminal Decisions for June 26, 2018

People v. Harris

This is a brief unanimous memorandum reversing the Appellate Term and the judgment of conviction. The trial court (in city court) failed to afford the defendant an opportunity to present a summation at the close of this bench trial. This violated the defendant's Sixth Amendment right to counsel. Herring v. New York, 422 US 853, 865 (1975); *see also* CPL 320.20(3)(c) (requiring the opportunity for summations in superior court); *but see* CPL 350.10(3)(c) (permitting trial courts discretion in this regard in local courts; in FN 1 of instant Harris decision, the court notes that the constitutionality of this provision was not properly before it - - if it had been, the provision surely would have been struck down).

NYS Court of Appeals Criminal-Related Decisions for June 27, 2018

Matter of the People v. Juarez; Robles *(nonparty respondent)*

This memorandum addresses a successful People's appeal from the AD's reversal of a denial of a motion to quash a news reporter's subpoena. This was a 4 to 3 decision, with Judges Rivera and Fahey writing separate dissenting opinions, and Judge Wilson joining in both dissents. There's a number of big picture issues that are addressed here.

At bar, a New York Times reporter in 2013 interviewed a homicide defendant who recanted his recent confession to the police regarding the gruesome sexual assault and murder of a four-year-old girl. The DA's Office wanted the reporter's notes. The reporter attempted to use New York's 1970 Shield Law under Civil Rights Law §79-h [c],

which protects reporters from being held in contempt for refusing to comply with subpoenas for their notes and unpublished materials obtained in the course of newsgathering.

First, the holding of the court: a non-party litigant who loses a motion to quash a subpoena does not have a right to appeal if the order denying the motion is issued *after* an accusatory instrument is filed in the related criminal case. There are no interlocutory criminal appeals under CPL Article 450. *See also* Matter of 381 Search Warrants Directed to Facebook, Inc., 29 NY3d 231, 242 (2017). The non-party litigant would have to be held in contempt for non-compliance and appeal *that* order under the CPLR. The CPL addresses criminal actions and proceedings (CPL 1.10 [1][a]). A criminal action commences with the filing of an accusatory instrument (CPL 1.20 [16]). A criminal proceeding is part of a criminal action or is related to a criminal action or involves a criminal investigation (CPL 1.20 [18]).

At bar, the motion to quash was denied *after* the accusatory instrument was filed; therefore it is criminal in nature and no right to an appeal exists. The nonparty here has a compelling policy argument, but that is for the legislature to address, not the courts.

Judge Rivera in dissent reminds that our state has a special place in its heart (i.e., the constitution) in protecting the freedom of the press under Article I, § 8, which was enacted before the federal constitution's First Amendment was incorporated into the states. Our state protections in this regard have historically been interpreted as granting broader protections that its federal counterpart. Here, the news reporter will have no other recourse for appellate review. The People's supposed need for the reporter's notes was not critical or necessary, as they already possessed a video-taped confession. Our state has historically protected the sensitive role of gathering and disseminating news of public events, as well as the right to appeal motions to quash subpoenas in criminal investigations as final civil orders. The dividing line of determining whether a proceeding is civil or criminal in nature should not be the filing of an accusatory instrument, as the CPL also applies to investigations conducted *prior* to the official commencement of a criminal action. *See again* CPL 1.10 (1)(a); CPL 1.20 (18) (addressing criminal "proceedings").

Judge Fahey's dissent trumpets the importance of the freedom of the press under our state constitution, which was violated at bar. The CPL cannot impede what Article I, § 8, of the constitution has required since 1821. (Before you get too excited, Judge Fahey's FN 1 prevents criminal defendants from using the language in his opinion, as those litigants already have a statutory right to appeal.) Moreover, New York's Shield Law has been amended several times since its enactment to broaden the protections of news reporters.

For the appellate practitioners: While the court again states that the right to a criminal appeal is a statutory creation (under CPL Article 450), it also (again) recognizes (in FN 1) that indeed the right to appeal is fundamentally based on Article VI, § 4(k) of the NY

Constitution. Therein the right to appeal to the appellate divisions from a judgment or final order may not be limited or conditioned by law. That part of the state constitution also recognizes all of the appellate divisions' authority that existed in 1962 when that provision went into effect. *See also generally* People v. Pollenz, 67 NY2d 264, 270 (1986); *see also* discussion in Judge Rivera's dissent at bar (section II [C] therein).

People v. Myers

This is a 5 to 2 decision, with Judge Wilson authoring the majority and Judge Rivera writing for the dissent, in which Judge Feinman joined. The AD is affirmed. The lower court properly followed the procedures under CPL Article 195 and NY Constitution, Article I, § 6, in accepting the defendant's waiver of his right to waive an indictment and be prosecuted by superior court information ("SCI"). Defendant complains, among other things, that there was no colloquy on the record regarding the significance of the right being waived, a jurisdictional issue that may be considered at the appellate level for the first time. *See* People v. Boston, 75 NY2d 585, 589, n (1990). While it is the "better practice" for courts to elicit a defendant's understanding of the significance of the right being waived, it is not required. Rather, as mandated by the state constitution, the waiver must instead merely be in writing, in open court and executed in the presence of counsel. Those things were done at bar. Unlike a jury trial waiver (under NY Const., Art. I, § 2), the indictment waiver requires under the constitution the "approval of a judge." The SCI process naturally facilitates a judge's observations of the procedure in court, as well as the opportunity for the defendant to consult with his or her attorney, who is required to be present during the exchange. Complying with the constitutional requirements establishes a prima facie validity to the proceedings that, absent record evidence to the contrary, are conclusive to the waiver's legality.

In dissent, Judge Rivera correctly points out that the constitutional and statutory requirements here did not place a *ceiling* on the court's requirements for assuring a knowing, intelligent and voluntary waiver of such a fundamental right. The written document involved in this procedure was intended only to constitute one aspect of ensuring that these indictment waivers are knowing and intelligent. *See* Governor's Memorandum, introducing the constitutional amendment, 1973 NY Leg. Ann., at 6. Asking defendants on the record whether they acted with such an understanding is the traditional method of confirming a waiver's validity. It is not merely a "better practice." It is a critical component of the court's obligations in accepting a waiver of this importance. Otherwise, the burden is placed on the defendant to come forward with evidence of involuntariness, etc. In the context of accepting guilty pleas, for example, the record must affirmatively demonstrate that the defendant understood the consequences of his or her decision. The common sense way of doing this is to ask the defendant on the record about the topic. The drafters of our state constitution had no reason to spell out any further details of the courts' responsibilities because of the

existing case law in place at the time of the 1974 amendment's enactment that required that defendants be informed by courts on the record of the important consequences of their decisions. *See, e.g.,* People v. Beasley, 25 NY2d 483, 488 (1969); Boykin v. Alabama, 395 US 238, 243-244 (1969). Indeed, it has long been the case that courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights." Johnson v. Zerbst, 304 US 458, 464-465 (1938). Article I, § 6 of the NY Constitution did not supersede these principles. On this point, while the 1938 jury trial waiver provision (Art. I, § 2) did not explicitly require a colloquy on the record, such has been since mandated through case law. At bar, the allocution with defendant was insufficient to ascertain whether the indictment waiver was knowing, intelligent and voluntary.

NYS Court of Appeals Criminal Decisions for June 28, 2018

People v. Morrison

This is a 4 to 3 memorandum, with the Chief and Judge Garcia filing separate dissents. Judge Feinman joins in with the dissenters. This is an unsuccessful People's appeal; the AD's reversal (following the grant of a *coram nobis* motion) is affirmed. This is another chapter in the continuing saga of People v. O'Rama (78 NY2d 270, 277 [1991]) and jury notes (*see also* Parker decision below, also decided on 6/28/18).

The trial court's failure to provide counsel with meaningful notice of a substantive jury note (i.e., being provided the actual specific content of the note) is a mode of proceedings error, requiring reversal. *See* People v. Mack, 27 NY3d 534, 538 (2016). The defense just knowing of the existence of the note, as well of the general parameters of its inquiry, is not enough. No objection to this error is necessary. A new trial must be ordered; a reconstruction hearing is not a sufficient form of relief. In the absence of record proof that that the trial court complied with its affirmative obligations under CPL 310.30, the appellate court will not assume that the error was remedied off the record. People v. Walston, 23 NY3d 986, 990 (2014); People v. Silva, 24 NY3d 294, 300 (2014). Here, the jury's note indicated that they had reached verdicts on two counts, but was struggling with another count. They sought instruction on whether to continue deliberating or return the next morning.

In dissent, the Chief opines that where there is sufficient ambiguity, there should not be a *per se* reversal. A reconstruction hearing is warranted instead. In his dissent, Judge Garcia starts off by noting that this "[d]efendant confessed to forcibly raping a 90-year-old Alzheimer's patient, and his confession was corroborated by DNA evidence." The record here indicated that defense counsel was aware of the note and of the fact that the trial court did not intend to read it into the record. Yet no objection was lodged. Instead, counsel remained silent, knowing that the client had nothing to lose: wait to

hear the verdict and hope for an acquittal; if it's a conviction, it is an automatic reversal. This enables, according to the dissent, gamesmanship and discourages preservation. Litigants are encouraged here to manipulate the system by remaining silent while error is committed, only to complain of it later. *See* Walston, 23 NY3d at 992 (Smith, J., concurring). Judge Garcia thus advocates in no uncertain terms for the Court to revisit its mode of proceedings rule, which is not followed in most jurisdictions (*see* FN 5), where counsel knows of the existence of the jury note and has an opportunity to object. The judge characterizes mode of proceedings relief as "a blunt tool that carries drastic and harsh consequences" (*see* FN 3). A reconstruction hearing, precluded nw by the majority in the O'Rama context, would be the proper remedy in such a scenario. The policy behind enforcing the preservation rule here was also discussed, including avoiding the "unmanageable morass of collateral proceedings." The mode of proceedings doctrine should only be applied to a very narrow class of cases.

More commentary: Judge Garcia makes reference to the fact that neither O'Rama nor CPL 310.30 specifically requires a verbatim account of the note and reversal as a remedy for failing to provide *significant notice*, which, along with the right to respond, makes up the two core O'Rama prongs. As a reconstruction hearing does not specifically violate the exact terms of the principal interest being protected, Judge Garcia's suggestion, consistent with the Chief's opinion, does not actually chip away at the underlying right itself, only with the *protection* of that right. Be careful here. This is analogous to the weakening of Miranda in the 1980's under the public safety doctrine. *See* Quarles v. New York, 467 US 649, 655, FN5 and 657-658 (1984). The court in Quarles wasn't chipping away at the Fifth Amendment itself, only at the protections surrounding the constitutional right. But it's those *protections* that we need to protect. Once those are gone, the enemy may be too close to fight off.

People v. Parker
People v. Nonni

These two defendants were tried together. This was another 4 to 3 decision, reversing the AD and ordering a new trial. Judge Rivera authored the majority opinion, with the Chief and Judge Garcia writing separate dissents, joined in by Judge Feinman. This decision should be read in conjunction with the Morrison decision, also decided on 6/28/18, which also affirmed the O'Rama principle that a trial court failing to read into the record the verbatim contents of a significant jury note is a mode of proceedings error, requiring reversal. Meaningful notice of the note requires strict compliance.

The trial court here was faced with three jury notes. The court intended to address the last two notes after a lunch break, but then a verdict was announced. The verdict was ultimately accepted by the court without complying with the O'Rama notice requirement on the last two notes - - with the consent of both parties. Crucially, as in Morrison (above), the majority explicitly rejects in FN 4 the dissent's offer of affording, like in a

Sandoval scenario, just a remittal and reconstruction hearing in place of a full reversal and new trial as a remedy.

In dissent, the Chief believes that a reconstruction hearing would have been more appropriate instead of a new trial, particularly since the record supported the notion that the parties actually saw the content of these notes, with no prejudice to defendants. The Chief here makes an analogous argument to Judge Garcia's dissent in Morrison (above), in that O'Rama itself did not require such a drastic *per se* reversal remedy for non-compliance *(again, see commentary above)*. Instead, O'Rama referred to a harmless error analysis, consistent with federal case law addressing jury notes (*see* FN 1 of present Parker decision).

The court also rejected a DeBour argument, as a mixed question of law and fact; as there was record support for the suppression court's denial, it was beyond the high court's review. The O'Rama issue was actually not addressed by the AD, which affirmed by a 3 to 2 vote, with the court just focusing on the DeBour issue. The police had reasonable suspicion to pursue, forcibly stop and detain the two defendants, who were seen exiting *(one actively fleeing and the other briskly walking from)* the location of a reported burglary in progress.