# CRIMINAL LAW

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CONTENTS



## I. THE STATUTORY RIGHT TO COUNSEL

In *People v. Washington*, the Court of Appeals held that the failure of police to notify the defendant, after she had consented to a chemical breath test but before she had performed it, that an attorney had telephoned the police station on her behalf violated her statutory right to legal consultation.[1] The Court distinguished this case from *People v. Gursey*, where it reasoned that:

> [I]f a defendant arrested for driving while under the influence of alcohol asks to contact an attorney before responding to a request to take a

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1. 23 N.Y.3d 228, 233, 12 N.E.3d 1099, 1103, 989 N.Y.S.2d 670, 674 (2014).

> chemical test, the police "may not, without justification, prevent access between the criminal accused and his lawyer, available in person or by immediate telephone communication."[2]

The majority concluded that *Gursey* was directed at the defendant's request to seek legal consultation prior to giving consent to a chemical test, while in *Washington* the "defendant never asked to speak to an attorney before executing consent . . . to take [a] breathalyzer test."[3] Ultimately, the Court stated that the issue in *Washington* was "whether counsel's intervention just prior to commencement of testing requires suppression of the results under these facts."[4] The majority reasoned that under the facts of *Washington*, "when an attorney contacts the police before a chemical test for alcohol is performed," "the statutory right to legal consultation applies," "and the police must [then] alert the [accused] of the presence of counsel, [regardless of] whether the contact is made in person or [by] telephon[e]."[5] The police may "prevent access between the . . . accused and [an attorney only] if such access [will unduly] interfere . . . with the administration of the alcohol test," thus making access to an attorney unreasonable under the circumstances.[6] In *Washington*, the majority found that the defendant was "entitled to suppression of the [alcohol] test results." Because

> the police officers here made no effort to advise defendant about the lawyer's communication and the People did not demonstrate that a notification of this nature would have been unreasonable under the circumstances,[the Court held that] the chemical test was administered in violation of the statutorily-based *Gursey* right to counsel.[7]

## II. INTERROGATION

In *People v. Doll*, the Court of Appeals held that the emergency doctrine justified police questioning of a defendant without giving him *Miranda* warnings.[8] In *Doll*, the police "received a 911 [call] of a suspicious person walking on a particular roadway."[9] The defendant was found by an officer, walking on the particular roadway, matching the description from the 911 report, with "wet blood stains on [his] knees,

2. *Id.* at 231-32, 12 N.E.3d at 1102, 989 N.Y.S.2d at 673 (quoting People v. Smith, 18 N.Y.3d 544, 549, 965 N.E.2d 928, 931, 942 N.Y.S.2d 426, 429 (2012) (citation omitted)).
3. *Id.* at 232, 12 N.E.3d at 1102, 989 N.Y.S.2d at 673.
4. *Id*.
5. *Id.* at 233, 12 N.E.3d at 1103, 989 N.Y.S.2d at 674.
6. *Washington*, 23 N.Y.3d at 233, 12 N.E.3d at 1103, 989 N.Y.S.2d at 674.
7. *Id.* at 234, 12 N.E.3d at 1103, 989 N.Y.S.2d at 674.
8. 21 N.Y.3d 665, 671, 998 N.E.2d 384, 388, 975 N.Y.S.2d 721, 725 (2013).
9. *Id*. at 668, 988 N.E.2d at 385, 975 N.Y.S.2d at 722.

thighs, hands, and shoes."[10] The defendant was then detained and questioned about the blood on his clothes, and in response, the defendant told the officer "that he was wearing his deer butchering outfit."[11] The officer then drove the defendant to his van, where more bloodstains were found, and it was "[a]round this [point that the] defendant asked to speak to his divorce" attorney.[12] The police continued to "question [the] defendant about whether the blood was from a deer or a human, [and the] defendant declined to" answer, and declined to take officers to the source of the blood.[13] The blood found on the defendant and in his van "was later matched to the victim," who was found dead.[14]

The defendant argued "that his right to counsel and *Miranda* protections were violated because the emergency doctrine should not apply where the police did not know for certain [that] a crime had occurred."[15] The majority explained that the "emergency doctrine" is an exception to *Miranda* and that:

> [T]he exception is comprised of three elements: (1) the police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property and this belief must be grounded in empirical facts; (2) the search must not be primarily motivated by an intent to arrest and seize evidence; and (3) there must be some reasonable basis, approximating probable cause, to associate the emergency with the area of place to be searched.[16]

The Court concluded that in *Doll*, the emergency doctrine did indeed justify the police questioning because:

> [T]he police officers responding to a 911 call found defendant walking along a public road covered in fresh, wet blood and their reasonable inquiries regarding the source of the blood were met with inconsistent responses by defendant, who refused to state whether the blood was from a human or an animal. Under these circumstances, it was reasonable for the police to believe that a person may have been seriously injured and in need of imminent emergency assistance.[17]

The majority rejected the defendant's argument, concluding that: "[T]he fact that police did not know definitively whether a crime had occurred or the identity of the potential victim was not dispositive

10. *Id*.
11. *Id*. at 668, 988 N.E.2d at 386, 975 N.Y.S.2d at 722.
12. *Id.* at 668, 988 N.E.2d at 386, 975 N.Y.S.2d at 723.
13. *Doll*, 21 N.Y.3d at 668, 988 N.E.2d at 386, 975 N.Y.S.2d at 723.
14. *Id*. at 669, 988 N.E.2d at 386, 975 N.Y.S.2d at 723.
15. *Id*. at 670, 988 N.E.2d at 387, 975 N.Y.S.2d at 724.
16. *Id.* at 670-71, 988 N.E.2d at 387, 975 N.Y.S.2d at 724.
17. *Id.* at 671, 988 N.E.2d at 388, 975 N.Y.S.2d at 725.

because the emergency doctrine is premised on reasonableness, not certitude."[18]

In *People v. Thomas*, the defendant's infant son was rushed to the hospital with intracranial injuries while the defendant remained at his own residence.[19] While at the hospital the child died from blunt force trauma, meanwhile the police responded to the defendant's residence to question him; he was unaware the child had died.[20] The police transported the defendant to an interrogation room where they read him his rights and questioned him for nine and a half hours; this period consisted of a two-hour session followed by a seven and a half hour session.[21] The defendant had exhibited suicidal thoughts during the first session and was temporarily involuntarily hospitalized in between the two sessions.[22] "The premise of the [police] interrogation was that an adult [in the defendant's] household must have inflicted [the t]raumatic head injuries [to] the infant."[23]

During the course of the interrogation, the police told the defendant that the doctor had informed them that the infant was "slammed into something very hard. It's like a high speed impact in [a] vehicle. . . . [T]his baby is going to die."[24] The police also "repeatedly reassured [the] defendant that they understood the [infant]'s injuries to have been accidental," and "that once defendant had told them what had happened he could go home."[25] When the defendant persisted in denying he had hurt the infant, the police "falsely represented that [the defendant's] wife had blamed him for [the infant's] injuries" and that, "if [the defendant] did not take responsibility," the police would "bring her in" because either the defendant or his wife had injured the infant.[26] At the end of the initial "two-hour [session, the] defendant [had] agreed to 'take the fall' for his wife," and he agreed to "take responsibility to keep her out of trouble."[27] Finally, the police, knowing the infant was already dead, "told [the] defendant that [the infant] was alive and that his survival could depend on [the] defendant's disclosure of how he had caused the . . .

18. *Doll*, 21 N.Y.3d at 671, 988 N.E.2d at 388, 975 N.Y.S.2d at 725.
19. 22 N.Y.3d 629, 637, 8 N.E.3d 308, 310-11, 985 N.Y.S.2d 193, 195-96 (2014).
20. *See id.*
21. *Id.* at 637, 8 N.E.3d at 311, 985 N.Y.S.2d at 196.
22. *Id.* at 638, 8 N.E.3d at 311, 985 N.Y.S.2d at 196.
23. *Id.*
24. *Thomas*, 22 N.Y.3d at 638, 8 N.E.3d at 311, 985 N.Y.S.2d at 196 (alteration in original).
25. *Id.*
26. *Id.*
27. *Id.*

injuries."[28] An excerpt of the officer's actual statement is as follows:

> The doctors need to know this. Do you want to save your baby's life, all right? Do you want to save your baby's life or do you want your baby to die tonight? . . . You better find that memory right now Adrian, you've got to find that memory. This is important for your son's life man. . . . Maybe if we get this information, okay, maybe he's able to save your son's life.[29]

After this barrage of questioning, the defendant admitted to accidentally dropping the infant, and proceeded to enact the incident for the officers.[30] As the defendant enacted the incident, he was instructed by one of the officers as follows:

> Hold that like you hold that baby, okay and start thinking about them negative things that your wife said to you, all right, start thinking about them kids crying all day and all night in your ear, your mother-in-law nagging you and your wife calling you a loser, all right, and let that aggression build up and show me how you threw Matthew on you [sic] bed, all right. Don't try to sugar coat it and make it like it wasn't that bad. Show me how hard you threw him on that bed.[31]

Following the enactment, which was captured on video, the defendant admitted that under circumstances resembling those referred to by the officer during the enactment, that he (the defendant) had thrown his infant son down on a mattress three separate times preceding the infant's hospitalization.[32]

It is the People's burden to show, beyond a reasonable doubt, "where deception is employed in the service of psychologically oriented interrogation," that the statements "under the totality of the circumstances" are "the product of the maker's own choice."[33] The majority characterized the actions of the officers in *Thomas* as "coercive deceptions" that "were of a kind sufficiently potent to nullify individual judgment in any ordinarily resolute person and were manifestly lethal to self-determination when deployed against [the] defendant."[34] The Court stated that the issue in *Thomas* was "whether [the investigative option] was permissibly marshaled to pressure defendant against his penal interest."[35] The majority held that in *Thomas*, both the defendant's

28. *Id.*
29. *Thomas*, 22 N.Y.3d at 638-39, 8 N.E.3d at 311-12, 985 N.Y.S.2d at 196-97.
30. *Id.* at 639-40, 8 N.E.3d at 312, 985 N.Y.S.2d at 197.
31. *Id.* at 640, 8 N.E.3d at 312-13, 985 N.Y.S.2d at 197-98.
32. *Id*. at 640-41, 8 N.E.3d at 313, 985 N.Y.S.2d at 198.
33. *Id.* at 641-42, 8 N.E.3d at 313, 985 N.Y.S.2d at 198.
34. *Thomas*, 22 N.Y.3d at 642, 8 N.E.3d at 314, 985 N.Y.S.2d at 199.
35. *Id*. at 643, 8 N.E.3d at 314, 985 N.Y.S.2d at 199.

inculpatory statements and incriminating statements were made involuntarily, and as such should have been suppressed.[36]

## III. GRAND JURY

In *People v. Thompson*, the defendant sought "reversal of his conviction and dismissal of the indictment on grounds of prosecutorial misconduct."[37] The defendant argued that the prosecutors' comments in response to the defendant's request that the grand jury call a particular witness effectively "compelled the grand jury to surrender all independent discretion in the matter and thus impaired the integrity of the proceedings."[38] The defendant requested that the grand jury call a witness that the defendant claimed to have witnessed the crime.[39] When a grand juror asked to vote on whether or not to call the witness, one of the prosecutors made the following statements to the grand jury:

> Let me explain it this way, based on our investigation and what's been testified to, and I'm skating a thin line here, I think at this point, it's six-thirty, we have to make a lot of determinations right now. Additionally, based upon our investigation, *and it's up to you* [the grand jurors] *whether to have that witness*, but I'm telling you that it is not relevant to this proceeding. You have to take our advice, as your legal advisors, that it is not relevant to the situation at hand.[40]

At that point after the prosecutor had spoken, a grand juror asked how the witness was not relevant, and the second prosecutor responded that the witness "would be relevant, if she was going to give testimony in the defendant's favor. It's our determination, she is not relevant."[41] As the grand jurors continued to question the prosecutors, one of the prosecutors responded with final instructions to the grand jurors: "[T]he witness will be subpoenaed if twelve or more of [you] vote[] on this, but . . . at this point [you] need [to] first decide if [you] believe[] that . . . [it's] relevant to proving as to whether or not this defendant, who just testified, committed the crimes."[42] The grand jurors subsequently voted and denied the defendant's request to call the witness; later, the grand jury indicted the defendant.[43]

36. *Id.* at 646, 8 N.E.3d at 316, 985 N.Y.S.2d at 201.
37. 22 N.Y.3d 687, 691, 8 N.E.3d 803, 805, 985 N.Y.S.2d 428, 430 (2014).
38. *Id.*
39. *Id.* at 691-94, 8 N.E.3d at 805-07, 985 N.Y.S.2d at 429-31.
40. *Id.* at 694-95, 8 N.E.3d at 807, 985 N.Y.S.2d at 432.
41. *Id*. at 695, 8 N.E.3d at 807, 985 N.Y.S.2d at 432.
42. *Thompson*, 22 N.Y.3d at 695-96, 8 N.E.3d at 808, 985 N.Y.S.2d at 432 (internal quotation marks omitted).
43. *Id.* at 696, 8 N.E.3d at 808, 985 N.Y.S.2d at 433.

The majority declared that "[t]he exceptional remedy of dismissal is available in rare cases of prosecutorial misconduct upon a showing that, in the absence of the complained-of misconduct, the grand jury might have decided to not indict the defendant."[44] The majority further explained that the test of prosecutorial misconduct "is met only where the prosecutor engages in an 'over-all pattern of bias and misconduct' that is 'pervasive,'" as compared with "only isolated instances of misconduct."[45] The Court rejected the defendant's argument and distinguished this case from *People v. Hill*.[46] In *Hill*, the prosecutor received a letter from the defendant's attorney that requested eight alibi witnesses be allowed to testify in front of the grand jury, and "[t]he letter listed each witness by name and a brief description of the events about which the witness would testify."[47] The prosecutor in *Hill* informed the grand jurors that the defendant wanted to call eight witnesses, but did not provide any of the detailed information contained in the attorney's letter.[48] When the grand jurors questioned the prosecutor in *Hill* about the witnesses, the prosecutor claimed to not "know what the witnesses would testify about."[49] The majority in *Thompson* stated that the prosecutors' actions in that case differ from those in *Hill* because unlike in *Hill*, the prosecutors in *Thompson* did not hide the full extent of the defendant's offer of proof, which defendant himself made to the grand jury.[50] The Court also pointed out that the prosecutors instructed the grand jurors that they could ultimately decide, by voting, whether or not to call the defendant's witness.[51] The majority ultimately held that the prosecutors in *Thompson* did not commit pervasive misconduct, and at most they "made isolated missteps that could not have affected the outcome of the . . . proceeding."[52]

44. *Id.* at 699, 8 N.E.3d at 810, 985 N.Y.S.2d at 435 (internal quotation marks omitted).

45. *Id.*

46. *Id.* at 705, 8 N.E.3d at 815, 985 N.Y.S.2d at 440 (citing People v. Hill, 5 N.Y.3d 772, 835 N.E.2d 654, 801 N.Y.S.2d 794 (2005)).

47. *Thompson*, 22 N.Y.3d at 705, 8 N.E.3d at 815, 985 N.Y.S.2d at 439 (citing *Hill*, 5 N.Y.3d at 773-74, 835 N.E.2d at 655, 801 N.Y.S.2d at 795).

48. *Id.* (citing *Hill*, 5 N.Y.3d at 773-75, 835 N.E.2d at 655-56, 801 N.Y.S.2d at 795-96).

49. *Id.* at 705, 8 N.E.3d at 815, 985 N.Y.S.2d at 439-40 (citing *Hill*, 5 N.Y.3d at 773-75, 835 N.E.2d at 655-56, 801 N.Y.S.2d at 795-96).

50. *Id.* at 705-06, 8 N.E.3d at 815, 985 N.Y.S.2d at 440.

51. *Id.* at 699, 8 N.E.3d at 811, 985 N.Y.S.2d at 435.

52. *Thompson*, 22 N.Y.3d at 706, 8 N.E.3d at 815, 985 N.Y.S.2d at 440.

## IV. PLEAS

In *People v. Tyrell*, the majority held that the defendant's guilty pleas at two separate proceedings did not affirmatively demonstrate the defendant's understanding or waiver of his constitutional rights.[53] In *Tyrell*, the "[d]efendant was charged by misdemeanor complaint with criminal sale of marihuana in the fourth degree and criminal possession of marihuana in the fifth degree."[54] These two charges stemmed from events that occurred during February 2009.[55] At his arraignment for the charges mentioned above, the defendant pled guilty to criminal possession of marihuana in the fifth degree through his attorney, and the arraigning judge accepted the plea on the record by simply stating: "Time served. Enter judgment."[56] In October 2009 the defendant was arrested again and charged by "misdemeanor complaint with criminal sale of marihuana in the fourth degree."[57] At his arraignment for the above-mentioned charges, the defendant's attorney "informed the court that [the] defendant would be willing to plead guilty for time served," but "[t]he court rejected the request [and] offered a jail sentence of [ten] days."[58] The defendant stated "he agreed to plead guilty and acknowledged his participation in the drug sale," and "[t]he court accepted [the] defendant's [guilty] plea and immediately imposed the [ten]-day jail sentence."[59] The defendant appealed from the judgment of convictions and sentences for both the October and February guilty pleas, arguing that both pleas were not voluntary, knowing, and intelligent, specifically asserting that in both cases the record did not affirmatively demonstrate the waiver of his *Boykin* rights.[60] In *Boykin v. Alabama*, "the United States Supreme Court held that a defendant who enters a guilty plea must voluntarily and intelligently waive several federal constitutional rights, namely, the right to trial by jury, the right to confront one's accusers and the privilege against self-incrimination."[61]

The Court in *Tyrell* explained that a guilty plea "will not be invalidated 'solely because the Trial Judge failed to specifically enumerate all the rights to which the defendant was entitled and to elicit

53. 22 N.Y.3d 359, 361, 4 N.E.3d 346, 347, 981 N.Y.S.2d 336, 337 (2013).
54. *Id.*
55. *Id.*
56. *Id.* at 362, 4 N.E.3d at 347, 981 N.Y.S.2d at 337.
57. *Id.* at 362, 4 N.E.3d at 348, 981 N.Y.S.2d at 338.
58. *Tyrell*, 22 N.Y.3d at 362, 4 N.E.3d at 348, 981 N.Y.S.2d at 338.
59. *Id.* at 363, 4 N.E.3d at 348, 981 N.Y.S.2d at 338.
60. *Id.*
61. *Id.* at 361, 4 N.E.3d at 347, 981 N.Y.S.2d at 337 (citing Boykin v. Alabama, 395 U.S 238 (1969)).

from him or her a list of detailed waivers before accepting the guilty plea.'"[62] Furthermore, the majority reasoned that a knowing, voluntary and intelligent plea, as required by *Boykin*, must be affirmatively shown on the record, and a silent record "'will not overcome the presumption against a waiver by a defendant.'"[63] Therefore, the Court ruled that due to the "complete absence" of any discussion of "the pertinent constitutional rights" by the court, defense counsel, or the defendant, the defendant's "pleas must be vacated."[64]

## V. PRE-TRIAL MOTIONS

The issue presented to the Court in *People v. Sibblies* was "whether the period of time between an off-calendar declaration of readiness for trial by the People and their statement of unreadiness at the next court appearance may be excluded from the statutory speedy trial under CPL 30.30."[65] The defendant was charged with various offenses, including assault in the third degree, and the People filed the misdemeanor information on February 8, 2007, triggering the ninety-day statutory speedy period during which the People must declare readiness for trial.[66] The People filed an off-calendar certificate of readiness on February 22, 2007, and included a supporting deposition.[67] "On March 28, 2007, the next scheduled control date, the People told the court that they were not ready: 'Your honor, the People are not ready at this time. The People are continuing to investigate and are awaiting medical records.'"[68]

"The People did not file a second certificate of readiness until May 23, 2007, which was 104 days after the speedy trial period began to run."[69] The concurrence explained that "the People must (1) declare in open court that they are ready or file an off-calendar certificate of readiness and serve it on defense counsel, and (2) 'in fact be ready to proceed at the time they declare readiness.'"[70] The defendant bears the

62. *Id.* at 365, 4 N.E.3d at 350, 981 N.Y.S.2d at 340 (quoting People v. Harris, 61 N.Y.2d 9, 16, 459 N.E.2d 170, 173, 471 N.Y.S.2d 61, 64 (1983)).

63. *Tyrell*, 22 N.Y.3d at 365, 4 N.E.3d at 350, 981 N.Y.S.2d at 340 (quoting *Harris*, 61 N.Y.2d at 17, 459 N.E.2d at 173, 471 N.Y.S.2d at 64).

64. *Id.* at 366, 4 N.E.3d at 350, 981 N.Y.S.2d at 340.

65. 22 N.Y.3d 1174, 1175, 8 N.E.3d 852, 852, 985 N.Y.S.2d 474, 475 (2014) (Lippman, C.J., concurring).

66. *Id.* (Lippman, C.J., concurring) (citing N.Y. CRIM. PROC. LAW § 30.30(5)(c) (McKinney 2014)).

67. *Id.* at 1175, 8 N.E.3d at 852-53, 985 N.Y.S.2d at 475 (Lippman, C.J., concurring).

68. *Id.* at 1175-76, 8 N.E.3d at 853, 985 N.Y.S.2d at 475 (Lippman, C.J., concurring).

69. *Id.* at 1176, 8 N.E.3d at 853, 985 N.Y.S.2d at 475 (Lippman, C.J., concurring).

70. *Sibblies*, 22 N.Y.3d at 1177, 8 N.E.3d at 853, 985 N.Y.S.2d at 476 (Lippman, C.J., concurring) (quoting People v. Chavis, 91 N.Y.2d 500, 505, 695 N.E.2d 1110, 1112, 673

initial burden to demonstrate that the People were not really ready within the 90-day period, and the burden then shifts to the People to establish that a period of time should be excluded in computing the time within which they were ready for trial.[71] Time may be excluded for "delays resulting from appeals, delays at the request of the defendant, or where the defendant has absconded."[72] In response to the defendant's motion to dismiss in *Sibblies*, the People argued "that the [thirty-four] days between their February 22 off-calendar declaration of readiness and their March 28 in-court statement of unreadiness should be excluded."[73] The Court, in rejecting the People's contention, distinguished the situation in *Sibblies* from the facts of *People v. Stirrup*.[74] In *Stirrup*, the Court "explained that when the People's lack of readiness necessitates an adjournment, 'a subsequent [off-calendar] statement of readiness can save the People from liability for the remainder of the adjournment period.'"[75]

The Court reasoned that the situation in *Sibblies* is distinguished from the facts of *Stirrup* because in *Stirrup*, the People announced off-calendar readiness and remained ready at the next court appearance, whereas in *Sibblies*, the People announced off-calendar readiness and then declared themselves unready at the next court appearance.[76] The concurrence stated that the People's actions in *Sibblies* prevented the defendant from availing herself of the People's readiness: "[t]his would be readiness in the air, without readiness on the ground. If the defendant cannot ask for a trial, the People's readiness has served effectively to harm the defendant by delaying the running of the statutory period."[77]

Furthermore, the Court says that when the People's readiness is challenged, in order to overcome the challenge, they must demonstrate an exceptional fact or circumstance, defined by CPL 30.30(3)(b) as "the sudden unavailability of evidence material to the People's case, occurring after the initial readiness response, [which] makes it impossible for the

N.Y.S.2d 29, 31 (1998)).

71. *Id.* at 1177, 8 N.E.3d at 854, 985 N.Y.S.2d at 476 (Lippman, C.J., concurring).

72. *Id.* (Lippman, C.J., concurring) (citing N.Y. CRIM. PROC. LAW § 30.30(4) (McKinney 2014)).

73. *Id.* (Lippman, C.J., concurring).

74. *Id.* (Lippman, C.J., concurring) (citing People v. Stirrup, 91 N.Y.2d 434, 694 N.E.2d 434, 671 N.Y.S.2d 433 (1998)).

75. *Sibblies*, 22 N.Y.3d at 1177, 8 N.E.3d at 853-54, 985 N.Y.S.2d at 476 (Lippman, C.J., concurring) (alteration in original) (quoting *Stirrup*, 91 N.Y.2d at 436, 694 N.E.2d at 435, 671 N.Y.S.2d at 434).

76. *Id.* (Lippman, C.J., concurring) (citing *Stirrup*, 91 N.Y.2d 434, 694 N.E.2d 434, 671 N.Y.S.2d 433).

77. *Id.* at 1178, 8 N.E.3d at 854, 985 N.Y.S.2d at 476-77 (Lippman, C.J., concurring).

People to proceed."[78] As the concurrence in *Sibblies* said, under the facts, no such circumstance existed for the People, and as such they granted the defendant's motion to dismiss the misdemeanor information.[79]

The issue before the Court in *People v. Wells* was whether the harmless error rule could be used to uphold a guilty plea after the improper denial of a suppression motion.[80] In *Wells*, the defendant was found drunk in a crashed stolen car, and during an inventory search of the car, the police found a crack pipe and an open bottle of rum.[81] Following the denial of his motion to suppress the evidence found in the car, the defendant pled guilty to driving while ability impaired, and he stated that he "'was not planning on going to trial if [he] got a negative ruling,'" referring to the suppression motion.[82] Later, the appellate division ruled that the trial court had improperly denied the defendant's suppression motion, but that "the erroneous denial of the motion to suppress was harmless due to independent and overwhelming proof of defendant's guilt."[83] The Court rejected the appellate division's decision, ruling instead that under the decision handed down in *People v. Grant*, "convictions premised on invalid guilty pleas . . . are not amenable to harmless error review."[84] However, the majority recognizes an exception to the *Grant* doctrine, where a "guilty plea entered after an improper court ruling may be upheld if there is no 'reasonable possibility that the error contributed to the plea.'"[85] Nonetheless, the Court states that such an exception does not apply in *Wells*, because the defendant had conditioned his guilty plea on receiving a negative ruling on his suppression.[86] Thus, the Court concludes that had the defendant's motion to suppress been granted as it should have been, the defendant may not have pled guilty.[87] Therefore, the majority holds that "the denial of the motion to suppress could not be viewed as harmless [error] and the guilty plea must be

78. *Id.* at 1178, 8 N.E.3d at 854-55, 985 N.Y.S.2d at 477 (Lippman, C.J., concurring) (quoting People v. Anderson, 66 N.Y.2d 529, 534, 488 N.E.2d 1231, 1234, 498 N.Y.S.2d 119, 122 (1985); N.Y. CRIM. PROC. LAW § 30.30(3)(b) (McKinney 2014)).

79. *Id.* at 1179, 8 N.E.3d at 855, 985 N.Y.S.2d at 477 (Lippman, C.J., concurring).

80. 21 N.Y.3d 716, 717-18, 999 N.E.2d 1157, 1158, 977 N.Y.S.2d 712, 713 (2013).

81. *Id.* at 718, 999 N.E.2d at 1158, 977 N.Y.S.2d at 713.

82. *Id*.

83. *Id*. (citing People v. Wells, 95 A.D.3d 696, 697, 944 N.Y.S.2d 560, 561 (1st Dep't 2012)).

84. *Id.* at 718-19, 999 N.E.2d at 1159, 977 N.Y.S.2d at 714 (citing People v. Grant, 45 N.Y.2d 366, 378-79, 380 N.E.2d 257, 408 N.Y.S.2d 429 (1978)).

85. *Wells*, 21 N.Y.3d at 719, 999 N.E.2d at 1159, 977 N.Y.S.2d at 714 (quoting *Grant*, 45 N.Y.2d at 378-79, 380 N.E.2d at 264, 408 N.Y.S.2d at 436).

86. *Id*.

87. *Id.*

vacated."[88]

The issue before the court in *People v. Finch* was whether a sufficiency argument specifically made and rejected before trial must be repeated at trial in order to preserve the issue for appeal.[89] The defendant in *Finch* was arrested on April 28, 2009, May 12, 2009, and May 27, 2009 for allegedly trespassing at his girlfriend's apartment complex, and as a result of the three arrests, he was charged with three counts of criminal trespass and one count of resisting arrest.[90] Following a jury trial in city court which convicted the defendant of two counts of criminal trespass and one count of resisting arrest, the county court reversed the defendant's convictions for criminal trespass, but upheld the conviction for resisting arrest.[91] Prior to the jury trial, at arraignment, the defendant challenged the sufficiency of the accusatory instrument, arguing essentially that he had permission from his girlfriend, a tenant, to be at the apartment complex on the dates he was arrested and therefore, could not be trespassing.[92] The city court judge disagreed with the defendant, rejecting the argument because management personnel of the apartment complex had objected to defendant being present on the grounds.[93] The defendant did not include the specific sufficiency argument mentioned above in his motion to dismiss at trial.[94] In deciding that the defendant had indeed properly preserved the sufficiency argument raised at arraignment, the majority declined to reconsider two cases cited by the dissent, the first was *People v. Gray*,[95] and the second was *People v. Hines*.[96] In addressing *Gray* and *Hines*, the majority in *Finch* reasoned that a specific objection in a trial motion to dismiss is not always necessary "where the lack of a specific motion has caused no prejudice

88. *Id*. at 720, 999 N.E.2d at 1160, 977 N.Y.S.2d at 715.

89. 23 N.Y.3d 408, 410, 15 N.E.3d 307, 308-09, 991 N.Y.S.2d 552, 553-54 (2014).

90. *Id*. at 410-11, 15 N.E.3d at 309, 991 N.Y.S.2d at 554.

91. *Id*. at 411, 15 N.E.3d at 309, 991 N.Y.S.2d at 554.

92. *Id*. at 412, 15 N.E.3d at 310, 991 N.Y.S.2d at 555.

93. *Id*.

94. *Finch*, 23 N.Y.3d at 412, 15 N.E.3d at 310, 991 N.Y.S.2d at 555.

95. *Id*. at 414, 15 N.E.3d at 311, 991 N.Y.S.2d at 556 ("We held in *Gray* that 'where a defendant seeks to argue on appeal . . . that the People have failed to establish the defendant's knowledge of the weight of drugs, preservation of that contention is required by an appropriate objection.' We further held that an 'appropriate objection' meant one that specifically identified the flaw in the People's proof.") (quoting People v. Gray, 86 N.Y.2d 10, 18, 652 N.E.2d 919, 920-21, 629 N.Y.S.2d 173, 174-75 (1995)).

96. *Id*. at 414, 416, 15 N.E.3d at 311, 313, 991 N.Y.S.2d at 556, 558 ("In *Hines*, we said that a defendant who had made a specific motion to dismiss at the close of the People's case, and had thereafter called witnesses and testified in his own behalf, had not preserved the argument that he specifically made because he did not make another motion to dismiss for insufficiency at the close of all the evidence.") (citing People v. Hines, 97 N.Y.2d 56, 762 N.E.2d 329, 736 N.Y.S.2d 643 (2001)).

to the People and no interference with the swift and orderly course of justice."[97] Furthermore, the court ruled: "*Hines* does not establish a general rule that every argument once made and rejected must be repeated at every possible opportunity. Specifically, the argument that [the] defendant here made at arraignment did not need to be repeated in his trial motion to dismiss."[98] Ultimately, the court in *Finch* ruled that the defendant properly preserved his sufficiency argument made at arraignment, because, as the majority put it, "[w]hen a court rules, a litigant is entitled to take the court at its word. . . . [A] defendant is not required to repeat an argument whenever there is a new proceeding or a new judge."[99]

In *People v. Jimenez,* Chief Judge Lippman, writing for the majority, states:

> The protections embodied in *article I, § 12 of the New York State Constitution* serve to shield citizens from warrantless intrusions on their privacy interests, including their personal effects. In the context of warrantless searches of closed containers incident to arrest, the People bear the burden of demonstrating the presence of exigent circumstances in order to invoke this exception to the warrant requirement.[100]

The defendant had moved to suppress the loaded handgun found in her purse subsequent to her and her male companion being arrested for trespassing in an apartment building that the police had been called to for a reported burglary in progress.[101] The defendant and her companion did not meet the description of "two Latino males" reported in the burglary, but the building superintendent made a gesture towards the defendant and her companion that indicated they might have been involved in the reported burglary, and when questioned, the defendant gave contradictory information as to why she was present in the building.[102] The trial court denied the defendant's motion to suppress, holding that the search was justified for officer safety reasons, and the appellate division affirmed, concluding that the search was proper given "'[t]he bag was large enough to contain a weapon and was within defendant's grabbable area at the time of her arrest for criminal trespass in connection with the police investigation of a burglary.'"[103]

97. *Id.* at 414, 15 N.E.3d at 312, 991 N.Y.S.2d at 557.
98. *Id*. at 416, 15 N.E.3d at 313, 991 N.Y.S.2d at 558.
99. *Finch*, 23 N.Y.3d at 413, 15 N.E.3d at 310, 991 N.Y.S.2d at 555.
100. 22 N.Y.3d 717, 719, 8 N.E.3d 831, 833, 985 N.Y.S.2d 456, 457 (2014).
101. *Id*. at 720-21, 8 N.E.3d at 833-34, 985 N.Y.S.2d at 457-58.
102. *Id*. at 720, 8 N.E.3d at 833, 985 N.Y.S.2d at 457-58.
103. *Id*. at 721, 8 N.E.3d at 834, 985 N.Y.S.2d at 458 (quoting People v. Jimenez, 98 A.D.3d 886, 886, 950 N.Y.S.2d 700, 700 (1st Dep't 2012)).

The Court rejected the lower court's findings and stated that there was no evidence that the arresting officers feared for their "safety or for the integrity of any destructible evidence."[104] The Court concluded that "[w]hile an officer need not affirmatively testify as to safety concerns to establish exigency, such apprehension must be objectively reasonable."[105] The Court reasoned that the four arresting officers did not have a reasonable safety concern emanating from the defendant and her companion, nor did they meet the description given for the burglary suspects, nor was there any reasonable suspicion that the two were armed or posed a threat to the officers let alone that they were involved with the burglary.[106] Thus, the Court of Appeals concluded that the "People's proof failed to demonstrate that the circumstances of defendant's arrest gave rise to a reasonable belief that her purse contained either a weapon or destructible evidence."[107] Therefore, "[a]bsent the requisite exigency, the warrantless search of defendant's purse incident to that arrest was improper and the gun discovered should have been suppressed."[108]

## VI. SPECIFIC CRIMES

### *A. Robbery*

The issue before the Court in *People v. Smith* was whether "[t]hreats alone can satisfy the statutory definition of 'force,'" as is required for a robbery conviction.[109] "A larceny becomes robbery if property is forcibly stolen. . . . '[F]orce' refers to the use or threatened use of immediate physical force upon another person during the course of committing a larceny for the purpose of preventing or overcoming resistance to the taking of the property."[110] "Second degree robbery occurs when an individual forcibly steals property while being aided by another individual who was actually present during the crime."[111] In *Smith*, the defendant and his brother impersonated plainclothes police officers using fake badges in order to rob the victim.[112] The defendant and his brother approached the victim, the defendant then announced he was a police

104. *Id*. at 722-23, 8 N.E.3d at 835, 985 N.Y.S.2d at 459.

105. *Jimenez*, 22 N.Y.3d at 723, 8 N.E.3d at 835, 985 N.Y.S.2d at 459.

106. *Id*. at 723-24, 8 N.E.3d at 835-36, 985 N.Y.S.2d at 460.

107. *Id*. at 724, 8 N.E.3d at 836, 985 N.Y.S.2d at 460.

108. *Id.*

109. 22 N.Y.3d 1092, 1093-94, 5 N.E.3d 584, 584-85, 982 N.Y.S.2d 437, 437-38 (2014).

110. *Id.* at 1093, 5 N.E.3d at 584, 982 N.Y.S.2d at 437 (citing N.Y. PENAL LAW § 160.00(1) (McKinney 2014)).

111. *Id.* (citing N.Y. PENAL LAW § 160.10(1) (McKinney 2014)).

112. *Id.*

officer, displayed his fake badge, and subsequently told the victim to place his hands on a wall while the defendant frisked him.[113] The victim complied with the defendant's demands believing the defendant to be a police officer and during the frisk, the defendant removed items from the victim's pocket, including $200 dollars.[114] At trial, the defendant moved to dismiss his second degree robbery charge, and he argued that the People could prove larceny by trick, but did not have sufficient evidence to prove the forcible theft element needed for second degree robbery.[115] The trial court rejected the defendant's argument, and he was convicted by a jury of second-degree robbery.[116]

The Court in *Smith* also rejected the defendant's argument, stating that, "[b]y impersonating police officers, defendant and his brother restrained the victim and conveyed the impression that disobeying their directives could result in imminent physical repercussions, which caused the victim to submit to their false assertion of legal authority."[117] The Court therefore held that the defendant's actions constituted a threat, and that "[t]hreats alone can satisfy the statutory definition of force."[118]

### *B. Aggravated Harassment*

In *People v. Golb*, the Court struck down the statute defining aggravated harassment in the second degree because it was "unconstitutionally vague and overbroad."[119] The defendant in *Golb* had been engaging in an internet campaign in order "to attack the integrity and harm the reputation" of certain academics, scholars, and students with the express goal of promoting the views of his own father.[120] The defendant sent fraudulent emails and posted anonymously on academic blogs in order to perpetrate his own purpose, and eventually he was charged with a number of offenses including three counts of aggravated harassment in the second degree.[121] The defendant argued that the three counts of aggravated harassment in the second degree should be vacated because the statue was unconstitutionally vague and overbroad.[122] Aggravated harassment in the second degree is defined as:

113. *Id.*
114. *Smith*, 22 N.Y.3d at 1093, 5 N.E.3d at 584, 982 N.Y.S.2d at 437.
115. *Id.* at 1093, 5 N.E.3d at 585, 982 N.Y.S.2d at 438.
116. *Id.* at 1093-94, 5 N.E.3d at 585, 982 N.Y.S.2d at 438.
117. *Id.* at 1094, 5 N.E.3d at 585, 982 N.Y.S.2d at 438.
118. *Id.*
119. 23 N.Y.3d 455, 467, 15 N.E.3d 805, 813, 991 N.Y.S.2d 792, 800 (2014).
120. *Id.* at 459, 15 N.E.3d at 808, 991 N.Y.S.2d at 795.
121. *Id.* at 459-60, 15 N.E.3d at 808, 991 N.Y.S.2d at 795.
122. *Id.* at 467, 15 N.E.3d at 813, 991 N.Y.S.2d at 800.

> when, with intent to harass, annoy, threaten or alarm another person, he or she . . . communicates with a person, anonymously or otherwise, by telephone, by telegraph, or by mail, or by transmitting or delivering any other form of written communication, in a manner likely to cause annoyance or alarm.[123]

The majority agreed with the defendant and cited *People v. Dietze*, where the Court struck down a similar statute as the one at issue in *Golb*.[124] The statute in *Dietze*, former Penal Law Section 240.25, "prohibited the use of abusive or obscene language with the intent to harass, annoy or alarm another person."[125] The Court in *Golb* articulated their conclusion in *Dietze* "that the statute was unconstitutional under both the State and Federal Constitutions [because] 'any proscription of pure speech must be sharply limited to words which, by their utterance alone, inflict injury or tend naturally to evoke immediate violence.'"[126] The Court in *Golb* applied the reasoning mentioned above and concluded that Penal Law Section 240.30(1)(a) "criminalizes, in broad strokes, any communication that has the intent to annoy," and thus, found that the statute contains no necessary constitutional limitations as defined in *Dietze*.[127]

### *C. Depraved Indifference Murder*

In *People v. Heidgen*, three defendants challenged their convictions of depraved indifference murder; each defendant argued that the evidence was not legally sufficient to support the convictions.[128] In *Heidgen*, each of the three defendants, on three distinct and separate occasions, "drove in an outrageously reckless manner while intoxicated by alcohol or drugs and caused the death of at least one other person."[129] Heidgen, the first defendant, was driving the wrong way on the highway for over two miles without reacting to other drivers, car horns, or signs telling him he was going the wrong way.[130] A toxicologist testified that the first defendant's blood alcohol level was high, but not high enough to render him incapable of reacting at all.[131] The Court ruled that a jury could have "reasonably

123. *Id.* at 466-67, 15 N.E.3d at 813, 991 N.Y.S.2d at 800 (quoting N.Y. PENAL LAW § 240.30(1)(a) (McKinney 2014)).

124. *Golb*, 23 N.Y.3d at 467, 15 N.E.3d at 813, 991 N.Y.S.2d at 800 (citing People v. Dietze, 75 N.Y.2d 47, 50, 549 N.E.2d 1166, 1167, 550 N.Y.S.2d 595, 596 (1989)).

125. *Id.*

126. *Id.* (citing *Dietze*, 75 N.Y.2d at 52, 549 N.E.2d at 1168, 550 N.Y.S.2d at 597).

127. *Golb*, 23 N.Y.3d. at 467, 15 N.E.3d at 813, 991 N.Y.S.2d at 800.

128. 22 N.Y.3d 259, 267, 3 N.E.3d 657, 659, 980 N.Y.S.2d 320, 322 (2013).

129. *Id.*

130. *Id.* at 268, 3 N.E.3d at 660, 980 N.Y.S.2d at 323.

131. *Id.* at 269, 3 N.E.3d at 661, 980 N.Y.S.2d at 324.

concluded that defendant drove, knowing that he was on the wrong side of the road and with [knowledge] of the grave risks involved[.]"[132] The majority reasoned that, "[o]ne who engages in what amounts to a high speed game of chicken, with complete disregard for the value of the lives that are thereby endangered, is undoubtedly an individual whose culpability is the equivalent of an intentional murderer."[133]

The second defendant, Taylor, had been driving at speeds in excess of eighty miles per hour on the wrong side of a local road, with no lights on.[134] When the police arrived, Taylor attempted to drive away in a police squad car; "[t]he emergency medical personnel generally characterized [the] defendant as alert and coherent."[135] Given those circumstances, the Court held that the jury in Taylor's case could have reasonably concluded that the "defendant recklessly engaged in conduct that created a grave risk of death to others, with an utter disregard for whether any harm came to those she imperiled."[136]

The third defendant, McPherson, drove "at excessive speed" on a parkway for about five or six miles, and did not apply his brakes or try to avoid on-coming traffic and crashed into a jeep head-on, killing its driver.[137] The Court ruled that there was, "under the circumstances, ample evidence supporting the conclusion that defendant was aware that he was driving on the wrong side of the road and continued to do so with complete disregard for the lives of others."[138] In concluding that all three defendants' cases merited a conviction for depraved indifference murder, the Court cited *People v. Feingold*, which established that "depraved indifference is a culpable mental state. That mental state 'is best understood as an utter disregard for the value of human life—a willingness to act not because one intends harm, but because one simply doesn't care whether grievous harm results or not.'"[139] Furthermore, the Court explained that circumstantial evidence can be used to establish the necessary mens rea for a depraved indifference murder, and the majority held that in each defendant's case, the facts, viewed in a light most favorable to the People, established a clear finding of depraved indifference while driving under the influence of drugs or alcohol.[140]

132. *Id.* at 277, 3 N.E.3d at 667, 980 N.Y.S.2d at 330.
133. *Heidgen*, 22 N.Y.3d at 277, 3 N.E.3d at 667, 980 N.Y.S.2d at 330.
134. *Id.* at 271-72, 3 N.E.3d at 663, 980 N.Y.S.2d at 326.
135. *Id.* at 272, 3 N.E.3d at 663, 980 N.Y.S.2d at 326.
136. *Id.* at 278, 3 N.E.3d at 667, 980 N.Y.S.2d at 330.
137. *Id.* at 273, 279, 3 N.E.3d at 664, 668, 980 N.Y.S.2d at 327, 331.
138. *Heidgen*, 22 N.Y.3d at 279, 3 N.E.3d at 668, 980 N.Y.S.2d at 331.
139. *Id.* at 274, 3 N.E.3d at 665, 980 N.Y.S.2d at 328 (quoting People v. Feingold, 7 N.Y.3d 288, 296, 852 N.E.2d 1163, 1168, 819 N.Y.S.2d 691, 697 (2006)).
140. *Id.* at 279, 3 N.E.3d at 668, 980 N.Y.S.2d at 331.

### *D. Forcible Touching*

The issue before the Court in *People v. Guaman* was whether the definition of forcible touching merges with the definition of third-degree sexual abuse.[141] The majority held that the definitions do not merge, and the two offenses are separate and distinct crimes.[142] The defendant in *Guaman* pled guilty to forcible touching in relation to events that occurred on April 8, 2009, where the defendant had rubbed his exposed penis against another man's buttocks.[143] The defendant then challenged his conviction, arguing that his actions did not constitute the level of force required by the forcible touching statute and that there is no distinction between forcible touching and third degree sexual abuse.[144] Forcible touching is defined in Penal Law section 130.52 as:

> [W]hen such person intentionally, and for no legitimate purpose, forcibly touches the sexual or other intimate parts of another person for the purpose of degrading or abusing such person; or for the purpose of gratifying the actor's sexual desire. For the purposes of this section, forcible touching includes squeezing, grabbing or pinching.[145]

The defendant argued that rubbing does not involve compression like squeezing, grabbing, or pinching does, and as such, cannot be forcible because rubbing is less likely to result in pain or physical discomfort.[146] The Court rejects this argument holding that:

> [W]e understand the examples set out in the statute (i.e., "squeezing, grabbing or pinching") as intended by the legislature to signal a low threshold for the forcible component of this crime's actus reus. Accordingly, we hold that, when done with the relevant mens rea, any bodily contact involving the application of some level of pressure to the victim's sexual or intimate parts qualifies as a forcible touch within the meaning of Penal Law § 130.52.[147]

The majority in *Guaman* also rejected the argument that the offense of forcible touching merges with the offense of third-degree sexual abuse.[148] "[T]o be guilty of third-degree sexual abuse, [a person] must 'subject another person to sexual contact without the latter's consent.'"[149]

141. 22 N.Y.3d 678, 682, 8 N.E.3d 324, 326, 985 N.Y.S.2d 209, 211 (2014).
142. *Id.* at 684, 8 N.E.3d at 328, 985 N.Y.S.2d at 213.
143. *Id.* at 679, 680, 8 N.E.3d at 324, 325, 985 N.Y.S.2d at 209, 210.
144. *Id.* at 681, 682, 8 N.E.3d at 325, 326, 985 N.Y.S.2d at 210, 212.
145. *Id.* at 680-81, 8 N.E.3d at 325, 985 N.Y.S.2d at 210 (quoting N.Y. PENAL LAW § 130.52 (McKinney 2014)).
146. *Guaman*, 22 N.Y.3d at 682, 8 N.E.3d at 326, 985 N.Y.S.2d at 211.
147. *Id.* at 684, 8 N.E.3d at 328, 985 N.Y.S.2d at 213.
148. *Id.*
149. *Id.* at 682, 8 N.E.3d at 326-27, 985 N.Y.S.2d at 211-12 (quoting N.Y. PENAL LAW

Furthermore, "sexual contact" is defined as:

> [A]ny touching of the sexual or other intimate parts of a person *for the purpose of gratifying sexual desire of either party*. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing, as well as the emission of ejaculate by the actor upon any part of the victim, clothed or unclothed.[150]

The defendant asserted that "forcibly touches" is the same as "any touching" unless "forcibly touching" is limited expressly to "squeezing, grabbing or pinching."[151] The Court rejected this argument stating that the two statutes are distinct "[b]ecause third degree sexual abuse criminalizes nonconsensual sexual touching for the purposes of *either* party's sexual gratification."[152] Furthermore, the majority points out the fact that third degree sexual abuse is "part of a family of crimes that also includes second and first degree sexual abuse, where punishment is elevated if additional factors are present. In short, third-degree sexual abuse is not 'the lesser crime' as compared to forcible touching."[153] Thus, the Court ruled that the current definition of "forcible touch" does not merge the two separate offenses.[154]

### *E. Recklessness*

The issue before the Court in *People v. Asaro* was whether there was sufficient evidence to find a mens rea of recklessness, which was required for the defendant's convictions of manslaughter in the second degree and assault in the second degree to stand.[155] The defendant in *Asaro* had intentionally been driving over the speed limit at around ninety-four miles per hour on November 22, 2008, when his vehicle crossed the double yellow line into the other lane, struck another vehicle, causing a crash that killed the driver and injured the passenger.[156] Prior to crossing the double yellow line into the other lane, the defendant had ignored pleas from his passengers for him to slow down.[157] There was also evidence that the defendant had smoked marijuana prior to the crash.[158] The defendant

§ 130.55 (McKinney 2014)).

150. *Id.* at 683, 8 N.E.3d at 327, 985 N.Y.S.2d at 212 (quoting N.Y. PENAL LAW § 130.00(3)).

151. *Guaman*, 22 N.Y.3d at 682, 8 N.E.3d at 326, 985 N.Y.S.2d at 211.

152. *Id.* at 683, 8 N.E.3d at 327, 985 N.Y.S.2d at 212.

153. *Id.*

154. *Id.* at 684, 8 N.E.3d at 328, 985 N.Y.S.2d at 213.

155. 21 N.Y.3d 677, 680, 998 N.E.2d 810, 811, 976 N.Y.S.2d 10, 11 (2013).

156. *Id.*

157. *Id.*

158. *Id.* at 682, 998 N.E.2d at 812, 976 N.Y.S.2d at 12.

argued that the evidence was legally insufficient to sustain the second-degree manslaughter and second-degree assault convictions because he maintained that he did not act with recklessness, but instead was at most criminally negligent.[159]

"A person is guilty of manslaughter in the second degree . . . when [they] 'recklessly cause[] the death of another person,'"[160] and "guilty of assault in the second degree when [they] 'recklessly cause[] serious physical injury to another person by means of a deadly weapon or a dangerous instrument.'"[161] Furthermore, "recklessly" is defined as:

> A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.[162]

The majority in *Asaro* reasoned that the key distinction between criminal negligence and recklessness was that recklessness requires the defendant "be 'aware of' and 'consciously disregard' the risk, while criminal negligence is [satisfied] when the defendant negligently fails to perceive the risk."[163]

When evaluating recklessness in the context of automobile accidents, the Court stated that to find recklessness there needs to be "'some additional affirmative act,' aside from 'driving faster than the speed limit.'"[164] The majority ruled that the fact the defendant was traveling more than twice the legal speed limit, essentially using a public road as a drag strip, and was smoking marijuana and drinking, meant that "[the] defendant engaged in conduct exhibiting the 'kind of seriously blameworthy carelessness whose seriousness would be apparent to anyone who shares the community's general sense of right and wrong.'"[165] Thus, the Court rejected the defendant's argument, and held that "the proof was sufficient to support the jury's conclusion that [the]

159. *Id.* at 683, 998 N.E.2d at 813, 976 N.Y.S.2d at 13.

160. *Asaro*, 21 N.Y.3d at 683, 998 N.E.2d at 813, 976 N.Y.S.2d at 13 (quoting N.Y. PENAL LAW § 125.15(1) (McKinney 2014)).

161. *Id.* at 684, 998 N.E.2d at 813, 976 N.Y.S.2d at 13 (quoting N.Y. PENAL LAW § 120.05(4)).

162. *Id.* (quoting N.Y. PENAL LAW § 15.05(3)).

163. *Id.*

164. *Id.* at 684, 998 N.E.2d at 814, 976 N.Y.S.2d at 14 (quoting People v. Cabrera, 10 N.Y.3d 370, 377, 897 N.E.2d 1132, 1136, 858 N.Y.S.2d 74, 78 (2008)).

165. *Asaro*, 21 N.Y.3d at 685, 998 N.E.2d at 814, 976 N.Y.2d at 14 (quoting *Cabrera*, 10 N.Y.3d at 377, 897 N.E.2d at 1136, 858 N.Y.S.2d at 79).

defendant acted recklessly."[166]

### *F. Unlawful Surveillance*

The issue before the Court in *People v. Schreier* was whether there existed sufficient evidence to support the defendant's conviction of unlawful surveillance in the second degree.[167] On December 24, 2008, the defendant in *Schreier* stood outside his neighbor's front door and used his compact video camera to zoom in and film the victim "while she was naked in her second floor bathroom."[168] A person is guilty of unlawful surveillance in the second degree when:

> for his or her own amusement, entertainment, or profit, or for the purpose of degrading or abusing a person, he or she intentionally uses or installs, or permits the utilization or installation of an imaging device to surreptitiously view, broadcast or record a person dressing or undressing or the sexual or other intimate parts of such person at a place and time when such person has a reasonable expectation of privacy, without such person's knowledge or consent.[169]

The defendant argued that there was insufficient evidence to establish that the recording was made "surreptitiously" because he was filming out in the open, and in "full public view."[170] Penal Law Section 250.45(1), the statute which defines unlawful surveillance in the second degree, does not specifically define "surreptitiously," and thus, the Court applied its common meaning, "something done 'by stealth' or 'clandestinely.'"[171] The majority states that "whether [the] defendant's actions can be considered surreptitious is dependent on the particular facts and circumstances presented."[172] The Court rejected the defendant's argument and cited the time he was filming, along with his actions taken to conceal his filming, as reasoning for finding he did indeed act surreptitiously.[173] The Court found the fact that the defendant was filming at 7:30 AM, combined with his use of the zoom feature on his camera, to be convincing evidence of surreptitious behavior as required by the statute.[174]

166. *Id.*
167. 22 N.Y.3d 494, 496, 5 N.E.3d 985, 986, 982 N.Y.S.2d 822, 823 (2014).
168. *Id.* at 496, 5 N.E.3d at 986-87, 982 N.Y.S.2d at 823-24.
169. *Id.* at 497, 5 N.E.3d at 987, 982 N.Y.S.2d at 824 (quoting N.Y. PENAL LAW § 250.45(1) (McKinney 2014)).
170. *Id.* at 498, 5 N.E.3d at 988, 982 N.Y.S.2d at 825.
171. *Id.*
172. *Schreier*, 22 N.Y.3d at 498, 5 N.E.3d at 988, 982 N.Y.S.2d at 825.
173. *Id.* at 498-99, 5 N.E.3d at 988, 982 N.Y.S.2d at 825.
174. *Id.*

## VII. MOLINEUX

The issue before the Court in *People v. Morris* was whether the trial court abused its discretion in admitting evidence of an uncharged robbery, in the form of a 911 recording.[175] In *Morris* the police responded to a 911 call regarding a robbery at gunpoint, soon after the police spotted the defendant, who matched the description provided by the 911 caller.[176] The police acted "aggressively toward[s] the defendant, . . . forcibly pressing him against [a] patrol car," and once the defendant was restrained the police recovered a pistol from the defendant.[177] Ultimately, a struggle ensued between the police and the defendant, which resulted in the defendant being briefly hospitalized and charged with two counts of criminal possession of a weapon and one count of resisting arrest.[178] Over the defendant's objection, the trial court admitted the 911 recording into evidence and provided the jury with four limiting instructions, which emphasized that the 911 recording "was not to be considered proof of the uncharged crime."[179]

The Court states that the traditional non-propensity reasons for which uncharged crimes may be relevant under *People v. Molineux* are not exhaustive, and that in addition to the *Molineux* categories, "evidence of prior, uncharged crimes may also be relevant to complete the narrative of the events charged in the indictment and to provide necessary background information."[180] The majority cites two cases which it builds upon to develop the proper analysis for admission of evidence of an uncharged crime that is needed to complete the narrative of events and provide background information, *People v. Tosca*[181] and *People v. Resek*.[182] The majority states that the analysis for determining the admissibility of evidence of an uncharged crime that is relevant in order

175. 21 N.Y.3d 588, 590, 999 N.E.2d 160, 161, 976 N.Y.S.2d 682, 683 (2013).

176. *Id.* at 590-91, 999 N.E.2d at 162, 976 N.Y.S.2d at 683-84.

177. *Id.* at 591, 999 N.E.2d at 162, 976 N.Y.S.2d at 684.

178. *Id.* at 591, 593, 999 N.E.2d at 162, 164, 976 N.Y.S.2d at 684, 686.

179. *Id.* at 598, 999 N.E.2d at 167, 976 N.Y.S.2d at 689.

180. *Morris*, 21 N.Y.3d at 594, 999 N.E.2d at 164, 976 N.Y.S.2d at 686 (citing People v. Molineux, 168 N.Y. 264, 61 N.E. 286 (1901)).

181. *Id.* at 590, 999 N.E.2d at 161, 976 N.Y.S.2d at 683 (citing People v. Tosca, 98 N.Y.2d 660, 661, 773 N.E.2d 1014, 1014, 746 N.Y.S.2d 276, 276 (2002) (holding that the trial court did not abuse its discretion by admitting evidence of an uncharged incident regarding a gun in order to provide background information as to why the police pursued defendant and gave two express limiting instructions as to the use of such evidence)).

182. *Id.* (citing People v. Resek, 3 N.Y.3d 385, 388, 821 N.E.2d 108, 109, 787 N.Y.S.2d 683, 684 (2004) (holding that the trial court abused its discretion by admitting evidence of uncharged crimes in order to provide background information, but failing to inform the jury in a limiting instruction that a grand jury had declined to indict the defendant for the uncharged crime)).

to complete the narrative of events and provide background information for the charged crime is as follows: "[I]f the evidence's probative value in explaining the police encounter outweighs any undue prejudice to the defendant, the trial court may, in its discretion, admit the evidence with 'proper limiting instructions.'"[183] The Court conducts this analysis and upholds the admission of the 911 recording because: (1) the 911 recording was probative of all the police conduct, before and after the stop; (2) the 911 recording was probative of the officers' credibility, which is an important issue in a case involving resisting arrest; (3) the undue prejudice to the defendant was minimal because the People were prevented from cross-examining the defendant regarding the events in the recording; and (4) the undue prejudice was also minimized by the four express limiting instructions the trial court gave to the jury.[184]

The issue presented to the Court in *People v. Kevin W.* was whether "the People, if afforded a full and fair opportunity to present evidence of the dispositive issues at a suppression hearing," were entitled to another suppression hearing, granted by a trial judge.[185] The defendant in *Kevin W.* was detained by two police officers; officers Gungor and Indiviglio approached the defendant upon officer Indiviglio's suspicion that the defendant matched the description of a robbery suspect.[186] After being forcibly detained the defendant managed to escape, dropping his bag which contained a weapon.[187] Subsequently, the defendant was found and charged with criminal possession of a weapon in the second degree along with resisting arrest, and officers Gungor and Indiviglio recovered the weapon and bag from where defendant had dropped them.[188] At the initial suppression hearing, only officer Gungor testified, and he stated that it was officer Indiviglio who "made eye contact" with the defendant and suspected he was armed, and as a result of his incomplete testimony, the physical evidence was suppressed.[189] Following the initial suppression hearing, the trial court granted the People's motion to reargue the issue of legality of the stop, and the People were granted another suppression hearing in order to call officer Indiviglio.[190] As a result of officer Indiviglio's testimony the physical evidence was allowed back into evidence, and the defendant was subsequently convicted of second degree

183. *Id.* at 596, 999 N.E.2d at 166, 976 N.Y.S.2d at 688.
184. *Id.* at 597, 598, 999 N.E.2d at 166-67, 976 N.Y.S.2d at 688-89.
185. 22 N.Y.3d 287, 289, 3 N.E.3d 1121, 1121, 980 N.Y.S.2d 873, 873 (2013).
186. *Id.* at 289-90, 3 N.E.3d at 1121-22, 980 N.Y.S.2d at 873-74.
187. *Id.* at 290-91, 3 N.E.3d at 1122, 980 N.Y.S.2d at 874.
188. *Id.* at 291, 3 N.E.3d at 1122-23, 980 N.Y.S.2d at 874-75.
189. *Id.* at 291-92, 3 N.E.3d at 1123, 980 N.Y.S.2d at 875.
190. *Kevin W.*, 22 N.Y.3d at 292, 3 N.E.3d at 1124, 980 N.Y.S.2d at 876.

possession of a weapon along with resisting arrest.[191]

The Court held in *Kevin W.* that the People should not have been allowed a second suppression hearing, and in reaching this result, the Court extended the holding from *People v. Havelka*.[192] The Court in *Kevin W.* ruled that *Havelka* applies to the pretrial setting as well, thus preventing the trial judge from granting another suppression hearing unless the People were not afforded a full and fair opportunity to present evidence.[193] The majority in *Kevin W.* believed that the prosecution was afforded a full and fair opportunity to present evidence at the initial suppression hearing.[194] The Court held: "[N]othing about the initial hearing robbed the People of a full and fair opportunity to justify the stop and seizure. . . . The prosecutor certainly knew what his evidentiary burden was and had full access to all the evidence available to establish it."[195]

## VIII. EVIDENCE

In *People v. Smith*, the Court of Appeals held that a police officer may testify to a crime victim's description of his or her attacker given to the police shortly after the crime.[196] The Court noted their previous holding in *People v. Huertas* that a victim of a crime may testify as to the description he or she had given of the attacker to police, and expanded *Huertas* to include testimony by the police officer of this same description as admissible.[197] The Court in making this holding rationalized that:

> The issue here is whether the rule of *Huertas*, like CPL 60.30's hearsay exception for prior eyewitness identifications, is limited to a witness's account of his or her own previous statement. We see nothing to justify such a limitation. A statement that is not hearsay when the declarant testifies to it does not become hearsay when someone else does so.[198]

191. *Id.* at 294, 3 N.E.3d at 1124, 980 N.Y.S.2d at 876.

192. *Id.* at 289, 3 N.E.3d at 1121, 980 N.Y.S.2d at 873 (citing People v. Havelka, 45 N.Y.2d 636, 644, 384 N.E.2d 1269, 1273, 412 N.Y.S.2d 345, 349 (1978) (holding the People, if afforded a full and fair opportunity to present evidence of the dispositive issues at a suppression hearing, are not entitled to a remand after appeal for a reopened suppression hearing)).

193. *Id.*

194. *Id.* at 297, 3 N.E.3d at 1127, 980 N.Y.S.2d at 879.

195. *Kevin W.*, 22 N.Y.3d at 297, 3 N.E.3d at 1127, 980 N.Y.S.2d at 879.

196. 22 N.Y.3d 462, 464, 5 N.E.3d 972, 972-73, 982 N.Y.S.2d 809, 809-10 (2013).

197. *Id.* (citing People v. Huertas, 75 N.Y.2d 487, 488-89, 553 N.E.2d 992, 993, 554 N.Y.S.2d 444, 445 (1990)).

198. *Id.* at 466, 5 N.E.3d at 974, 982 N.Y.S.2d at 811.

The Court however warned that their holding "should not be interpreted as giving carte blanche to the presentation of redundant police testimony that accomplishes no useful purpose."[199] Judge Rivera argues in her dissent that this is exactly what will happen with the majority's decision and that there is "no basis upon which to conclude such evidence constitutes anything other than bolstering of the victim's testimony."[200] Judge Rivera distinguished the Court's decision in *Huertas* by explaining that the Court

> permitted prior descriptive statements by the victim because in that case such statements were offered for the nonhearsay purpose of assessing the victim's observations and the reliability of her memory. The *Huertas* analysis focused on the victim's ability to construct a mental image of the perpetrator and whether that image differed at the time the victim made a "corporeal identification" of the defendant. That evidence aided the jury in assessing the victim's opportunity to observe the perpetrator at the moment of the crime, and, therefore, was admissible as relevant to the question of the victim's memory.[201]

Judge Rivera concluded in her dissent that while the majority warned against reading their decision "as giving carte blanche to the presentation of redundant police testimony that accomplishes no useful purpose," this was exactly what was likely to occur due to the majority's decision.[202]

The Court of Appeals in *People v. Oddone* held that the defendant's counsel should have been permitted to refresh a witness's recollection with a prior statement and that the refusal to do so was a reversible error.[203] The Court stated that "[w]hen a witness, describing an incident more than a year in the past, says that it 'could have' lasted 'a minute or so,' and adds 'I don't know,' the inference that her recollection could benefit from being refreshed is a compelling one."[204] The Court stated that while the witness was "not the central witness in the case, . . . limiting counsel's examination of her was important enough to justify reversal."[205] However, the Court rejected the defendant's argument, based on the *Frye v. United States* rule, that an "expert who is a scientist can express no opinion based on his own experience, but must rely only

199. *Id.* at 467, 5 N.E.3d at 974, 982 N.Y.S.2d at 811.

200. *Id.* at 467, 5 N.E.3d at 975, 982 N.Y.S.2d at 812 (Rivera, J., dissenting).

201. *Smith*, 22 N.Y.3d at 467-68, 5 N.E.3d at 975, 982 N.Y.S.2d at 812 (Rivera, J., dissenting).

202. *Id.* at 469, 5 N.E.3d at 976, 982 N.Y.S.2d at 813 (Rivera, J., dissenting).

203. 22 N.Y.3d 369, 373, 3 N.E.3d 1160, 1162, 980 N.Y.S.2d 912, 914 (2013).

204. *Id.* at 377, 3 N.E.3d at 1164, 980 N.Y.S.2d at 916.

205. *Id.* at 377, 3 N.E.3d at 1165, 980 N.Y.S.2d at 917.

on published studies or texts."[206] The Court held that such evidence is not barred by *Frye* and that:

> An expert may well overvalue his own experience, or even exaggerate or fabricate it. But these flaws can be exposed by cross-examination, and by the opinions of opposing experts . . . . There will ordinarily be no unfairness as long as the jury is not misled into thinking that the expert's opinion reflects a generally accepted principle.[207]

In conclusion, the Court acknowledged "that it may not be possible to draw a neat line between scientific principles and experience-based testimony."[208]

The defendants in *People v. Martinez* argued they were "prejudiced by the unavailability of the scratch 61"[, a contemporaneous handwritten complaint report], and so the trial judge abused his discretion when he declined to issue an adverse inference charge, the mildest sanction available."[209] One of the defendants argued that "'there is a strong presumption that the defendant has been prejudiced to at least some degree' whenever *Rosario* material is lost or destroyed."[210] However, the Court of Appeals rejected this position and found that the defendants did not establish prejudice, as was their burden.[211] The Court stated that the "[d]efendants fault the trial judge for not analyzing prejudice when he denied their request for an adverse inference charge, but they did not even mention the word."[212] Rather, the defense counsel "requested the instruction simply because the scratch 61 could not be produced."[213] The Court of Appeals concluded that the trial judge correctly "ruled that inadvertent loss alone was insufficient to require a sanction."[214]

In his dissent, Chief Judge Lippman wrote:

> [T]he majority's ruling provides absolutely no incentive to retain these types of forms. Given the loss of the material, defendants are left to speculate as to what value that document may have held. It simply is not a satisfactory result to penalize defendant for being unable to establish a concrete injury.[215]

206. *Id.* at 376, 3 N.E.3d at 1163, 980 N.Y.S.2d at 915 (citing Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923)).
207. *Id*. at 376, 3 N.E.3d at 1163-64, 980 N.Y.S.2d at 915-16.
208. *Oddone*, 22 N.Y.3d at 376, 3 N.E.3d at 1164, 980 N.Y.S.2d at 916.
209. 22 N.Y.3d 551, 563, 6 N.E.3d 586, 594, 983 N.Y.S.2d 468, 476 (2014).
210. *Id.* (citations omitted).
211. *Id.* at 567, 6 N.E.3d at 596, 983 N.Y.S.2d at 478.
212. *Id.* at 567, 6 N.E.3d at 596-97, 983 N.Y.S.2d at 478-79.
213. *Id.* at 567, 6 N.E.3d at 597, 983 N.Y.S.2d at 479.
214. *Martinez*, 22 N.Y.3d at 567, 6 N.E.3d at 597, 983 N.Y.S.2d at 479.
215. *Id.* at 569-70, 6 N.E.3d at 598, 983 N.Y.S.2d at 480 (Lippman, C.J., dissenting).

Chief Judge Lippman concluded that he would have found "that the trial court erred in failing to give the requested adverse inference instruction as a minimal sanction for the failure to turn over the 'scratch 61' report" because "[t]he People have an obligation to preserve *Rosario* material and to produce it upon demand."[216]

The defendant in *People v. Reed* argued that there was insufficient evidence of a robbery, in the course of which the victim was killed and, "[i]n order to prove that defendant was guilty of first-degree robbery, the prosecution had to produce sufficient evidence that defendant, or someone whom he intentionally aided, forcibly stole [the victim's] property."[217] The defendant claimed there was insufficient proof that anything was stolen from the victim.[218] The Court of Appeals stated that "the standard of appellate review in determining whether the evidence before the jury was legally sufficient to support a finding of guilt beyond a reasonable doubt is the same for circumstantial and non-circumstantial cases."[219] In the case before it, the Court held:

> [A] rational jury could have inferred beyond a reasonable doubt that the $40,000 was stolen from Thomas by defendant and the men he aided. The jury heard evidence that Thomas was carrying $40,000, in a double-knotted Tops grocery bag, about an hour before he was killed; that defendant arranged for Thomas, whom he knew, to drive to the vicinity of defendant's father's house; that defendant fled the scene of Thomas's shooting, along with the gunman, in his father's car; that one of the men bent over Thomas's body briefly before getting into the car; and that a double-knotted Tops grocery bag was found, with its bottom torn out and contents removed, under the driver's armrest of the same car.[220]

Thus, the Court concluded that there was legally sufficient circumstantial evidence "for the jury to infer beyond a reasonable doubt" that the victim's property of $40,000 cash was forcibly taken from him.[221]

In *People v. Garrett*, the Court of Appeals held that there was no *Brady* violation where the People "failed to disclose that a federal civil action had been brought against one of their police witnesses, a homicide detective who interrogated defendant, alleging that the detective engaged

216. *Id.* at 568-69, 6 N.E.3d at 597-98, 983 N.Y.S.2d at 479-80 (Lippman, C.J., dissenting).

217. 22 N.Y.3d 530, 534, 6 N.E.3d 1108, 1110, 983 N.Y.S.2d 752, 754 (2014).

218. *Id.*

219. *Id.*

220. *Id.* at 535, 6 N.E.3d at 1111, 983 N.Y.S.2d at 755.

221. *Id.*

in police misconduct in an unrelated case."[222] The Court, in making this ruling, stated there was no need to "draw . . . hard and fast lines here about the scope of *Brady* imputation," but the Court was satisfied in the case before it that the "alleged misconduct [was] in an unrelated criminal case, and the allegations were, at most, collateral to defendant's prosecution to the extent they may have provided impeachment material."[223] Accordingly, the Court found that the interrogating detective's knowledge of his own alleged misconduct and the civil action against him "could not be imputed" to the People for *Brady* purposes.[224]

## IX. INEFFECTIVE COUNSEL

The Court of Appeals in *People v. Zeh* held that the affirmation obtained by the People from the defendant's trial counsel stating, "certain alleged deficiencies in his performance were actually part of his trial strategy" was not sufficient for the denial of an evidentiary hearing pursuant to CPL 440.[225] Specifically, the trial counsel claimed in his affirmation that the defendant and trial counsel jointly decided not to pursue a suppression motion, but the Court stated the trial counsel's affirmation failed to:

> address why suppression could not have been sought on the basis of: the 26-hour interrogation at a State Police barracks, which occurred in a room that may have been locked at times; the possible use of handcuffs, shackles and a "jail suit" during such questioning; and a purported refusal by the police to contact the lawyer who was representing defendant in a pending criminal case because defendant's request for legal assistance was deemed "too late."[226]

In conclusion, the Court held that the defendant should not have been denied the opportunity to establish "he was deprived of meaningful legal representation" and therefore, should have been provided with an evidentiary hearing.[227]

The defendants in *People v. Howard* claimed that their defense attorneys were ineffective because they "fail[ed] to assert as an affirmative defense that one of two weapons allegedly displayed during the robbery 'was not a loaded weapon from which a shot, readily capable of producing death or other serious physical injury, could be

222. 23 N.Y.3d 878, 880, 18 N.E.3d 722, 725, 994 N.Y.S.2d 22, 25 (2014).

223. *Id.* at 889, 18 N.E.3d at 731, 994 N.Y.S.2d at 31 (quoting United States v. Robinson, 627 F.3d 941, 952 (4th Cir. 2010)).

224. *Id.* at 890-91, 18 N.E.3d at 732-33, 994 N.Y.S.2d at 32-33.

225. 22 N.Y.3d 1144, 1145, 9 N.E.3d 366, 366-67, 986 N.Y.S.2d 16, 16-17 (2014).

226. *Id.* at 1146, 9 N.E.3d at 367, 986 N.Y.S.2d at 17.

227. *Id.*

discharged.'"[228] The Court of Appeals in examining the defendants' claim stated the "[d]efendants here are not claiming an overall pattern of ineffective assistance; indeed, they could not, as their attorneys put on a vigorous, if ultimately unsuccessful, misidentification defense."[229] The Court concluded that trial counsel were not ineffective for failure to put the affirmative defense before the jury because the choice "could have been a reasonable defense strategy."[230] The Court reasoned that "[d]efendants' attorneys relentlessly pursued a misidentification defense at trial," and that "[p]utting on evidence that [the defendant] had no gun, but rather used his finger, for example, would have undermined the claim that he was simply not there at all."[231]

In concluding that the trial attorneys were not ineffective for the failure to raise such an obvious affirmative defense that would have certainly at least reduced the defendants' sentences, the Court could not say that this was the "'rare case [where] it might be possible from the trial record alone to reject all legitimate explanations'" for strategy chosen by defense counsel, and for all the Court knew, it may have been the defendants whose choice it was to "go for broke."[232] The defendants also challenged the showup identification process that was used by arguing that the "two-hour interval between the crime and a showup is per se unacceptable" and that in the circumstances of their case, it was "unduly suggestive."[233] However, the majority decision rejected both of these arguments, stating the Court "ha[s] never adopted any such bright-line rule" in regards to the time elapsed from the crime to the showup and that the facts of this showup did not render "it more prejudicial than any other."[234] In conclusion, the majority stated that "[w]hile showups must be reasonable under the circumstances and not unduly suggestive, we have repeatedly held this determination presents a mixed question of law and fact," and that so long as there is record support that reasonably supports this determination by the lower court, it shall survive review of a higher court.[235]

228. 22 N.Y.3d 388, 391-92, 4 N.E.3d 320, 321, 981 N.Y.S.2d 310, 311 (2013) (citing N.Y. PENAL LAW § 160.15(4) (McKinney 2014)).

229. *Id.* at 400, 4 N.E.3d at 327, 981 N.Y.S.2d at 317.

230. *Id.* at 401, 4 N.E.3d at 327, 981 N.Y.S.2d at 317.

231. *Id.* at 401, 4 N.E.3d at 327-28, 981 N.Y.S.2d at 317-18.

232. *Id.* at 401, 4 N.E.3d at 328, 981 N.Y.S.2d at 318 (citing People v. Rivera, 71 N.Y.2d 705, 709, 525 N.E.2d 698, 701, 530 N.Y.S.2d 52, 55 (1988)).

233. *Howard*, 22 N.Y.3d at 402, 4 N.E.3d at 328, 981 N.Y.S.2d at 318.

234. *Id.* at 402-03, 4 N.E.3d at 328-29, 981 N.Y.S.2d at 318-19.

235. *Id.* at 403-04, 4 N.E.3d at 329, 981 N.Y.S.2d at 319 (citing People v. Brisco, 99 N.Y.2d 596, 597, 788 N.E.2d 611, 611-12, 758 N.Y.S.2d 262, 262-63 (2003); People v. Harrison, 57 N.Y.2d 470, 477, 443 N.E.2d 447, 451, 457 N.Y.S.2d 199, 203 (1982)).

Chief Judge Lippman wrote in his dissent that he would have found the trial counsel ineffective because "[c]ounsel's failure to raise the defense was in the present legal and factual context a serious and inexplicable departure from prevailing, and indeed legislatively assumed, standards of professional practice," and that if the affirmative defense would have "been raised the outcome of the trial would have been significantly less adverse to [the] defendants."[236] As to the defendants' showup argument, Chief Judge Lippman also dissented by stating there were "exigencies in whose light a lineup would be impracticable and which would render the considerable risks entailed by showups constitutionally tolerable," but that in the facts of this case, there was no such factual exigency that would justify "geographically remote showups hours after the initial confrontation and after the suspect's arrest."[237] Thus, Chief Judge Lippman concluded that "this highly suggestive showup was not a constitutionally permissible surrogate for a fairly constituted lineup identification procedure."[238]

In her dissent, Judge Abdus-Salaam agreed with the majority that the defendants received effective representation and that trial "counsel[] provided defendants with a competent 'go for broke' defense" that, 'viewed in totality and as of the time of representation,' provided defendants with meaningful representation."[239] However, Judge Abdus-Salaam disagreed with the majority as to the showup because, "[a]lthough the showup was certainly convenient and may have been helpful in the broader police investigation, we have never held that such factors can justify a showup absent exigent circumstances or a closer spatial and temporal proximity to the crime."[240] Judge Abdus-Salaam concluded that the majority's insistence on the mixed question doctrine is misplaced because the "showup in this case was 'simply illegal.'"[241]

In *People v. Clermont* the majority decision found that the defendant's case should be remitted to the trial court based on the ineffective representation that the defendant had in relation to suppression issues.[242] The majority stated: "In light of the litany of errors made by defense counsel, including the failure to offer legal argument

236. *Id.* at 410, 4 N.E.3d at 334, 981 N.Y.S.2d at 324 (Lippman, C.J., dissenting).

237. *Id*. at 405, 407, 4 N.E.3d at 330, 331-32, 981 N.Y.S.2d at 320, 321-22 (Lippman, C.J., dissenting).

238. *Howard*, 22 N.Y.3d at 407, 4 N.E.3d at 332, 981 N.Y.S.2d at 322 (Lippman, C.J., dissenting).

239. *Id*. at 410-11, 4 N.E.3d at 334, 981 N.Y.S.2d at 324 (Abdus-Salaam, J., dissenting).

240. *Id*. at 412, 4 N.E.3d at 335, 981 N.Y.S.2d at 325 (Abdus-Salaam, J., dissenting).

241. *Id*. at 411, 4 N.E.3d at 335, 981 N.Y.S.2d at 325 (Abdus-Salaam, J., dissenting).

242. 22 N.Y.3d 931, 934, 999 N.E.2d 1149, 1152, 977 N.Y.S.2d 704, 707 (2013).

concerning suppression or to attempt to correct the significant factual anomaly in the decision, our confidence in the fairness of the proceeding is substantially undermined."[243]

However, Judge Rivera wrote in her dissent that facts in the record in relation to the suppression issues did not constitute a close call under the *De Bour* jurisprudence and that, based on the record before the Court of Appeals, suppression was warranted.[244] Judge Rivera stated the facts in the record clearly establish that the arresting police officer never had the initial reasonable suspicion to pursue the defendant and which lead to the ultimate seizure of the gun that was at the heart of the suppression issue.[245] She wrote: "Nearly two decades ago, in a case on all fours with the present appeal, we held that flight in combination with a defendant grabbing at his waistband, 'does not support a determination that the officers had reasonable suspicion to pursue defendant."[246] Thus, Judge Rivera concluded that she agrees with the majority "that counsel's conduct was constitutionally deficient," but this is where her agreement ends because "there is no legal support for denying the motion to suppress, and therefore the indictment must be dismissed."[247]

The defendant in *People v. Baret* was a non-U.S. citizen who pled guilty in 1995 to a deportable offense under U.S. Immigration Law.[248] The "defendant moved to vacate his conviction pursuant to CPL 440.10 on the ground that [his] defense counsel . . . fail[ed] to advise him of the [automatic deportation] consequence[] of his guilty plea."[249] The appellate division denied the defendant's appeal on the grounds that *Teague v. Lane*, and as adopted by New York through the *People v. Eastman*, dictated that *Padilla v. Kentucky* was not to be applied retroactively.[250] In discussing *Teague*, the Court of Appeals stated it "established as a guiding principle that new rules of federal constitutional criminal procedure do not apply retroactively to cases that had become final on direct review before the new rule was announced."[251] The Court

243. *Id*.

244. *Id*. (Rivera, J., dissenting).

245. *Id*. at 936, 999 N.E.2d at 1153, 977 N.Y.S.2d at 708 (Rivera, J., dissenting).

246. *Id*. at 938, 999 N.E.2d at 1154, 977 N.Y.S.2d at 709 (Rivera, J., dissenting). (quoting People v. Sierra, 83 N.Y.2d 928, 930, 638 N.E.2d 955, 956, 615 N.Y.S.2d 310, 311 (1994)).

247. *Clermont*, 22 N.Y.3d at 940, 999 N.E.2d at 1156, 977 N.Y.S.2d at 711.

248. 23 N.Y.3d 777, 782, 16 N.E.3d 1216, 1218, 992 N.Y.S.2d 738, 740 (2014).

249. *Id*. at 783, 16 N.E.3d at 1219, 992 N.Y.S.2d at 741.

250. *Id.* at 783, 16 N.E.3d at 1219, 992 N.Y.S.2d at 741 (citing Teague v. Lane, 489 U.S. 288 (1989); People v. Eastman, 85 N.Y.2d 265, 275-76, 648 N.E.2d 459, 464-65, 624 N.Y.S.2d 83, 88-89 (1995); Padilla v. Kentucky, 559 U.S. 356 (2010)).

251. *Id*. at 783, 16 N.E.3d at 1219, 992 N.Y.S.2d at 741 (citing Whorton v. Bockting,

of Appeals stated that *Teague* created a test to differentiate between a new rule and existing or old rule: "[A] case announces a new rule if the result was not dictated by precedent existing at the time of the defendant's conviction became final."[252] Accordingly, the Court defined "'dictated by precedent' to mean that the result was 'apparent to all reasonable jurists.'"[253] *Teague* also created two exceptions to this general rule, one of those being the exception "'reserved for watershed rules of criminal procedure.'"[254] *Teague* defines watershed rules as "'those new procedures [of fundamental fairness] without which the likelihood of an accurate conviction is seriously diminished.'"[255]

The defendant argued that the appellate division erred in deciding that *Padilla* had not announced a watershed rule within the meaning of *Teague* and/or *Eastman*.[256] The defendant further argued the Court of Appeals could interpret Teague more broadly in light of *Danforth v. Minnesota* "and hold that *Padilla* was simply an application of *Strickland* [*v. Washington*]."[257] Additionally, the defendant argued the Court could "apply the three-factor test in *People v. Pepper*."[258] The Court of Appeals, in discussing the *Pepper* test, stated the *Pepper* court adopted a three-part test to seek the "balance between 'full retroactive application (permitting a collateral attack on a conviction no longer in normal appellate channels)' and 'limit[ing] relief to prospective police conduct or trials.'"[259] The three-part test requires the court to:

> weigh three factors to determine whether a new precedent operates retroactively: the purpose to be served by the new standard; the extent of the reliance by law enforcement authorities on the old standard; and the effect on the administration of justice of a retroactive application of the new standard. The second and third factors are, however, only given substantial weight "when the answer to the retroactivity question is not

549 U.S. 406, 416 (2007)).

252. *Id*. at 784, 16 N.E.3d at 1220, 992 N.Y.S.2d at 742 (quoting *Teague*, 489 U.S. at 301).

253. *Baret*, 23 N.Y.3d at 784, 16 N.E.3d at 1220, 992 N.Y.S.2d at 742 (quoting Lambrix v. Singletary, 520 U.S. 518, 527-28 (1989)).

254. *Id*. (quoting *Teague*, 489 U.S. at 311).

255. *Id.* at 784, 16 N.E.3d at 1220, 992 N.Y.S.2d at 742 (quoting *Teague*, 489 U.S. at 313).

256. *Id*. at 789, 16 N.E.3d at 1223, 992 N.Y.S.2d at 745.

257. *Id.* at 789, 16 N.E.3d at 1223-24, 992 N.Y.S.2d at 745-46 (citing Strickland v. Washington, 466 U.S. 668 (1984); Danforth v. Minnesota, 718 N.W.2d 451 (Minn. 2006)).

258. *Baret*, 23 N.Y.3d at 789, 16 N.E.3d at 1224, 992 N.Y.S.2d at 746 (citing People v. Pepper, 53 N.Y.2d 213, 220, 423 N.E.2d 366, 369, 440 N.Y.S.2d 889, 892 (1981)).

259. *Id*. at 792, 16 N.E.3d at 1226, 992 N.Y.S.2d at 748 (citing *Pepper*, 53 N.Y.2d at 220, 423 N.E.2d at 369, 440 N.Y.S.2d at 891-92).

to be found in the purpose of the new rule itself."[260]

Turning to the defendants' first argument, that the appellate division erred in not finding *Padilla* to be a watershed rule within the meaning of *Teague* and/or *Eastman*, the Court of Appeals stated that the meaning of the *Teague* exception for watershed rules is, "the rule must be one 'without which the likelihood of an accurate conviction is *seriously* diminished.'"[261] The majority rejected the defendant's argument that without the *Padilla* protections, non-citizen defendants are unknowingly lured into plea bargains without knowledge that they will be deported and that with minimal foresight and creative plea bargaining, these draconian immigration results could be avoided.[262] The majority stated: "[t]hat a plea bargain may turn out tso be far less advantageous than a defendant anticipated, however, does not pose 'an impermissibly large risk of an inaccurate conviction."'[263] The majority went on to state that unlike *Gideon v. Wainwright*, which does "constitute a bedrock principle," (i.e. the right to a free defense counsel), the result in *Padilla* was "relatively modest" (i.e. give accurate advice on deportation consequence where it is truly clear) and "is a far cry from 'the right to free immigration counsel.'"[264]

The majority acknowledged that "*Danforth* frees [the state courts] to interpret *Teague* more broadly than the" federal courts; however, the majority decline[d] to do so, stating that the rule announced in *Padilla* is not '"central to an accurate determination of guilt or innocence,' and safeguards 'the fundamental fairness of [a] trial.'"[265] The majority, in rejecting the defendant's argument, stated that "*Padilla* created a new rule of federal constitutional criminal procedure in New York which, consistent with *Teague* and *Eastman*, does not apply retroactively in CPL 440.10 proceedings."[266]

In turning to the defendant's argument that the Court should apply *Padilla* retroactively pursuant to the *Pepper* test, the Court stated the first part of the *Pepper* test disfavors retroactive application because "*Padilla*

260. *Id.* at 793, 16 N.E.3d at 1226, 992 N.Y.S.2d at 748 (quoting *Pepper*, 53 N.Y.2d at 220, 423 N.E.2d at 369, 440 N.Y.S.2d at 892).

261. *Id.* at 795, 16 N.E.3d at 1228, 992 N.Y.S.2d at 750 (quoting Schriro v. Summerlin, 542 U.S. 348, 352 (2004) (citation omitted))).

262. *Id.* at 796, 16 N.E.3d at 1228-29, 992 N.Y.S.2d at 750-51.

263. *Baret*, 23 N.Y.3d at 796, 16 N.E.3d at 1229, 992 N.Y.S.2d at 751 (quoting Whorton v. Bockting, 549 U.S. 406, 418 (2007)).

264. *Id.* at 796-97, 16 N.E.3d at 1229, 992 N.Y.S.2d at 751; *see* Padilla v. Kentucky, 559 U.S. 356, 369 (2010); Gideon v. Wainwright, 372 U.S. 335 (1963).

265. *Id.* at 798, 16 N.E.3d at 1230, 992 N.Y.S.2d at 752 (quoting People v. Eastman, 85 N.Y.2d 265, 276, 648 N.E.2d 459, 465, 624 N.Y.S.2d 83, 89 (1995)).

266. *Id.* at 799, 16 N.E.3d at 1231, 992 N.Y.S.2d at 753.

has nothing to do with a reliable determination of guilt or innocence; rather, *Padilla* assures that noncitizen defendants appreciate the immigration risks that inhere in guilty pleas to crimes they acknowledge during the plea allocution to having committed."[267] The majority concluded that "the sheer volume of prosecutions disposed of by guilty plea[s]" that would be implicated by "the retroactive application of *Padilla*" "weigh[ed] heavily against" such application, and therefore, defendant's CPL 440.10 motion should be denied.[268]

Chief Judge Lippman wrote in his dissent that:

> Deportation is an unusually serious consequence of pleading guilty, often more serious than the prison sentence imposed. It can banish defendants from the only home they have known and separate them from family and friends. Indeed, it can result in the loss "of all that makes life worth living."[269]

Chief Judge Lippman faulted the majority for not taking the opportunity interpret *Teague* more broadly in light of *Danforth*. He further opined that doing so was especially erroneous in the State of New York—which is home to the "second largest population" of lawful permanent residents whom are at risk under pre-*Padilla* practices.[270] The Chief Judge argued that the majority misunderstood "the first 'watershed' rule requirement, that a new rule 'be necessary to prevent an impermissibly large risk of an inaccurate conviction."'[271] Chief Judge Lippman explained that a guilty plea is "a surrender[ing] of a fundamental constitutional protections" and its surrender must be one that is fully understood and voluntary.[272] The Chief Judge further wrote that "[t]he *Padilla* rule goes to the heart of the legal accuracy of a conviction" because if the defendant is unaware of its most important consequence, then it cannot be accurate in any legal sense.[273] Thus, Chief Judge Lippman concluded that he would have found *Padilla* a watershed rule and applied it retroactively, and states:

267. *Id.* at 800, 16 N.E.3d at 1231, 992 N.Y.S.2d at 753.

268. *Baret*, 23 N.Y.3d at 800, 16 N.E.3d at 1231, 992 N.Y.S.2d at 753.

269. *Id.* at 801, 16 N.E.3d at 1232, 992 N.Y.S.2d at 754 (Lippman, C.J., dissenting) (quoting Ng Fung Ho v. White, 259 U.S. 276, 284 (1922)).

270. *Id.* at 801-02, 16 N.E.3d at 1232-33, 992 N.Y.S.2d at 754-55 (Lippman, C.J., dissenting).

271. *Id.* at 803, 16 N.E.3d at 1233, 992 N.Y.S.2d at 755 (Lippman, C.J., dissenting) (quoting Whorton v. Bockting, 549 U.S. 406, 418 (2007)).

272. *Id.* (Lippman, C. J., dissenting).

273. *Baret*, 23 N.Y.3d at 803, 16 N.E.3d at 1234, 992 N.Y.S.2d at 756 (Lippman, C.J., dissenting).

> [D]efining *Teague*'s watershed exception narrowly, while defining "new rule" broadly, inevitably produces the Kafkaesque result that the more a rule sweeps away prior bad law and implicates fundamental fairness to criminal defendants, the less likely it is that a defendant can seek retroactive relief under the rule.[274]

Judge Rivera in her dissent disagreed with both Chief Judge Lippman and the majority and concluded that *Padilla* neither created "a new rule of federal constitutional criminal procedure," nor was it a *Teague* exception watershed rule.[275] Rather, Judge Rivera concluded that, similar to the reasoning in the dissent in *Chaidez v. United States*, *Padilla* was simply the application of "the well-established standard" in *Strickland*.[276] Judge Rivera stated:

> "[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Padilla* did neither. It merely recognized what members of the defense and immigration bar in New York State had known for years, that the immigration consequences of a guilty plea are so weighty and of such critical importance to the lives of defendants and their families that a defense lawyer who fails to inform a client of these potential consequences falls far short of professional norms.[277]

Thus, Judge Rivera reasoned, it is fiction to say *Padilla* lacked basis in existing precedent and as such it did not announce a new rule, but rather simply brought federal law in compliance with what the New York defense bar had already known for years; namely "that informing clients of the immigration consequences of a guilty plea was integral to the Sixth Amendment right to effective assistance of counsel."[278] Therefore, Judge Rivera concluded that "[t]here is no binding or persuasive legal argument against [the] retroactive application of *Padilla*."[279]

274. *Id.* at 804, 16 N.E.3d at 1234, 992 N.Y.S.2d at 756 (Lippman, C.J., dissenting).

275. *Id.* at 807, 810, 16 N.E.3d at 1236, 1239, 992 N.Y.S.2d at 758, 761 (Rivera, J., dissenting).

276. *Id.* at 806, 16 N.E.3d at 1236, 992 N.Y.S.2d at 758 (Rivera, J., dissenting); *see* Chaidez v. United States, 133 S. Ct 1103, 1114 (2013) (Sotomayor, J., dissenting); Strickland v. Washington, 466 U.S. 668 (1984).

277. *Id.* at 807, 16 N.E.3d at 1236, 992 N.Y.S.2d at 758 (Rivera, J., dissenting) (quoting Teague v. Lane, 489 U.S. 288, 301 (1989)).

278. *Baret*, 23 N.Y.3d at 809, 16 N.E.3d at 1238, 992 N.Y.S.2d at 760 (Rivera, J., dissenting).

279. *Id.* at 811, 16 N.E.3d at 1239, 992 N.Y.S.2d at 761 (Rivera, J., dissenting).

## X. JURY INSTRUCTIONS

The defendant in *People v. Rivera* claimed that "his due process rights to a fair trial" had been violated because the trial judge rejected his request to have a lesser-included charge of second-degree manslaughter submitted to the jury.[280] The defendant argued that the reasonable view of the evidence supported that he killed the victim recklessly, or as his lawyer put it, '"if you're swinging a knife at a crowd[, i]t's like firing a weapon at a crowd. It's reckless,' and therefore not intentional."[281] The Court stated that "the question is whether the trial judge should have charged second-degree manslaughter in addition to first-degree manslaughter."[282] The Court, in distinguishing the two charges, stated that "to obtain a second-degree manslaughter instruction, defendant needed to show that a reasonable view of the evidence supported finding that he recklessly caused [the victim's] death *without* intending to cause serious physical injury."[283] The defendant argued "that '[o]nly in a truly "exceptional case" will the wounds themselves be so numerous or extreme that they [could] be relied on to rule out a reckless homicide.'"[284] The Court stated that a "'reasonable view of the evidence' does not mean . . . that a trial court must charge reckless manslaughter as a lesser included offense of second-degree murder unless the record 'completely excludes the possibility that the defendant acted recklessly.'"[285] Therefore, the Court rejected the defendant's argument that there was "no reasonable basis in the evidence for a finding of guilt of the lesser count and rejection of the greater count."[286] The Court stated:

> Three penetrating stab wounds to the same person, who—according to defendant—picked a fight with him, is strong evidence of intent to cause at least serious physical injury, and inconsistent with defendant's pretrial claims that he aimlessly swung a knife in a crowd of people when caught up in the turmoil and panic of a bar fight, oblivious to the possible consequences of his actions and unaware that he had struck anyone.[287]

Chief Judge Lippman wrote in his dissent that "the testimony regarding the chaotic bar fight, combined with defendant's post-arrest statements and the evidence of his intoxicated state, provided a

280. 23 N.Y.3d 112, 120, 12 N.E.3d 444, 449, 989 N.Y.S.2d 446, 451 (2014).
281. *Id.* at 119, 12 N.E.3d at 449, 989 N.Y.S.2d at 451 (alterations in original).
282. *Id.* at 122, 12 N.E.3d at 451, 989 N.Y.S.2d at 453.
283. *Id.*
284. *Id.*
285. *Rivera*, 23 N.Y.3d at 121, 12 N.E.3d at 450, 989 N.Y.S.2d at 452.
286. *Id.* at 124, 12 N.E.3d at 452-53, 989 N.Y.S.2d at 454-55.
287. *Id.* at 124, 12 N.E.3d. at 452, 989 N.Y.S.2d at 454.

reasonable basis to find defendant guilty of reckless manslaughter and to acquit on the intentional counts."[288] Thus, the Chief Judge would have found a reversible error in the lower court's refusal to include the lesser charge of manslaughter in the second degree to be heard before the jury.[289]

In *People v. Beaty*, "[t]he trial court denied [the] defendant's request for an intoxication charge."[290] The Court of Appeals, in reviewing the defendant's appeal, stated that "[a]lthough intoxication is not a *defense* to a criminal offense, a defendant may offer evidence of intoxication whenever relevant to negate an *element* of the charged crime."[291] However, on the facts before it, the Court found that the defendant was not entitled to an intoxication jury charge because "the evidence was insufficient to allow a reasonable juror to harbor a doubt concerning the element of intent on the basis of intoxication."[292] The Court reasoned that the defendant's "self-serving" statement to police that he consumed alcohol and the victim's statement "that she smelled alcohol on [his] breath" did not meet the "relatively low threshold" of evidence sufficient to entitle the defendant to an intoxication defense.[293] Furthermore, the Court stated that the defendant's conduct was purposeful: "[h]e cut a hole in a screen to gain entry, instructed the victim to be quiet, threw a blanket over her head, and stole her cell phone so she could not call the police," and therefore, the lower court was correct in rejecting his request for an intoxication charge.[294]

In *People v. Sage*, the Court of Appeals held that the trial court's refusal "to charge the jury with an 'accomplice-in-fact' instruction for the [prosecution]'s key witness" was not a harmless error and warranted a reversal of the defendant's conviction.[295] In its analysis, the Court stated that "a witness is an accomplice as a matter of law where, for example, the witness pleads guilty to aiding the defendant in the commission of the [alleged] crime."[296] In contrast, a witness is an accomplice-in-fact "where there are factual disputes as to the witness's participation or intent, such that 'different inferences may reasonably be drawn' from the evidence as to the witness's role as an accomplice."[297] The Court stated that on the

288. *Id.* at 128, 12 N.E.3d. at 455, 989 N.Y.S.2d at 457 (Lippman, C.J., dissenting).
289. *Id.* (Lippman, C.J., dissenting).
290. 22 N.Y.3d 918, 920, 999 N.E.2d 535, 536, 977 N.Y.S.2d 172, 173 (2013).
291. *Id.* at 921, 999 N.E. at 536, 977 N.Y.S.2d at 173.
292. *Id.* at 921, 999 N.E. at 537, 977 N.Y.S.2d at 174.
293. *Id.* at 920, 921, 999 N.E. at 536, 537, 977 N.Y.S.2d at 173, 174.
294. *Id.* at 921, 999 N.E. at 537, 977 N.Y.S.2d at 174.
295. 23 N.Y.3d 16, 18, 11 N.E.3d 177, 179, 988 N.Y.S.2d 104, 106 (2014).
296. *Id.* at 24, 11 N.E.3d at 183, 988 N.Y.S.2d at 110.
297. *Id.* (quoting People v. Barsch, 36 N.Y.2D 154, 157, 325 N.E.2d 156, 158, 365

record before it, there was more than sufficient evidence to meet defendant's burden of demonstrating the witness was an accomplice-in-fact.[298] Here, the witness admitted he was present before, during, and after the fatal attack, that he participated in part of the attack and therefore, the Court stated "there [was] ample record evidence 'from which it can be reasonably inferred' that [the witness] participated in [the victim's] murder, or 'an offense based upon the same or some of the same facts or conduct which constitute' the murder."[299]

The Court of Appeals in *People v. Gonzalez* held that while CPL Section 250.10 requires as defendant to "provide notice of intent to offer evidence in connection with the affirmative defense of extreme emotional disturbance" ("EED"), this requirement is not a bar to the defendant's request of an EED jury charge if the prosecution presents sufficient evidence to support the jury instruction of the EED.[300] The Court stated that the trial court is required to:

> grant the defendant's request for an EED charge if the jury could reasonably conclude from the evidence that, at the time of the homicide, the defendant "was affected by an extreme emotional disturbance, and that [the] disturbance was supported by a reasonable explanation or excuse rooted in the situation as he perceived it."[301]

The Court concluded that the same holds true if the evidence that supports the EED charge is offered by the prosecution and not the defendant.[302] In reaching this conclusion, the Court stated that "CPL 250.10 requires notice whenever a defendant intends to admit evidence establishing a mental infirmity defense; a defendant merely relying on the People's proof simply does not come within the ambit of the statute."[303]

## XI. SENTENCING

In *People ex rel. Ryan v. Cheverko*, the Court upheld and affirmed the lower court's decision that:

> "[w]hen the two-year limit on the aggregate term of consecutive definite sentences provided by Penal Law § 70.30 (2) (b) applies, a person's release date must be calculated *based on* a two-year aggregate term of incarceration," and any jail time or good time credits must therefore "be

N.Y.S.2d 836, 839 (1975)).

298. *Id.* at 25, 11 N.E.3d at 183, 988 N.Y.S.2d at 110.

299. *Id.* at 25, 11 N.E.3d at 184, 988 N.Y.S.2d at 111.

300. 22 N.Y.3d 539, 541, 5 N.E.3d 1269, 1270, 983 N.Y.S.2d 208, 209 (2014).

301. *Id.* at 545, 5 N.E.3d at 1273, 983 N.Y.S.2d at 212 (quoting People v. McKenzie, 19 N.Y.3d 463, 466, 976 N.E.2d 217, 220, 951 N.Y.S.2d 691, 694 (2012)).

302. *Id.*

303. *Id.* at 548, 5 N.E.3d at 1275, 983 N.Y.S.2d at 214.

applied against this two-year aggregate term."[304]

Thus, the Court concluded that the most a defendant may serve pursuant to Penal Law Section 70.30(2)(b), despite multiple consecutive definite sentences, is two years minus discretionary good time credits.[305] For example, for a defendant sentenced to two or more definite sentences (as long as the defendant is already under the sentence of one definite sentence and excluding crimes committed while the defendant is serving his/her sentence), the longest possible amount of time served would be sixteen months, so long as the defendant earns all good time credits.[306]

In *People v. Santiago*, the Court of Appeals held that the defendant's felony conviction for murder in the third degree from the Commonwealth of Pennsylvania, when he was fifteen years old, "was not a predicate felony conviction" supporting his adjudication as a second felony offender "because he could not even have been prosecuted for [the New York felony equivalent of] second-degree manslaughter in New York" at that age.[307] The Court stated that "Penal Law § 30.00(1) specifies that a person must be at least 16 years old to be criminally responsible for his conduct," and that "Penal Law § 30.00(2) lists crimes that are exceptions to this age requirement, but second-degree manslaughter is not among them."[308] Therefore, the Court concluded that because the defendant "could not even have been prosecuted for second-degree manslaughter in New York at age 15," the third-degree murder conviction could not be predicate within the meaning of the statute governing second felony offender sentences.[309]

The question presented in *People v. Brown* was "whether a sentence imposed for 'simple' knowing, unlawful possession of a loaded weapon (i.e., without any intent to use) was properly run consecutively to the sentence for another crime committed with the same weapon."[310] The Court of Appeals concluded that the defendants had "completed the crime of possession independently of their commission of the later crimes, and therefore consecutive sentencing was permissible."[311] The Court reached this conclusion by reasoning that the "[l]egislature intended, when it

304. 22 N.Y.3d 132, 135-36, 2 N.E.3d 233, 235, 979 N.Y.S.2d 269, 271 (2013) (quoting People ex rel Ryan v. Cheverko, 102 A.D.3d 990, 991, 958 N.Y.S.2d 505, 506 (2d Dep't 2013)).

305. *Id.* at 137, 2 N.E.3d at 236, 979 N.Y.S.2d at 272.

306. *Id.*

307. 22 N.Y.3d 900, 904, 999 N.E.2d 507, 509, 977 N.Y.S.2d 144, 146 (2013).

308. *Id.*

309. *Id.*

310. 21 N.Y.3d 739, 744, 999 N.E.2d 1168, 1170, 977 N.Y.S.2d 723, 725 (2013).

311. *Id.*

created the 'simple' weapon possession crime, to toughen punishment for gun crimes."[312] Further, the Court stated the "mens rea for 'simple' possession is knowing unlawful possession of a loaded firearm," and as long as the "defendant knowingly unlawfully possesses a loaded firearm before forming the intent to cause a crime with that weapon, the possessory crime has already been completed, and consecutive sentencing is permissible."[313]

## XII. ARTICLE 10 PROCEEDING

In *In re State v. Enrique D.*, the Court of Appeals held that the "Supreme Court abused its discretion by precluding [the appellant's former-girlfriend] from testifying" in relation to her consensual sexual relationship with the appellant.[314] The Court of Appeals held that "Mental Hygiene Law § 10.08(g) provides that a respondent in an Article 10 proceeding 'may, as a matter of right, testify in his or her own behalf, call and examine other witnesses, and produce other evidence in his or her behalf.'"[315] The Court of Appeals pointed out that this statute in no way limits Enrique D. to calling expert witnesses.[316] The Court stated that "[t]he pertinent question is whether a witness—expert or lay—has material and relevant evidence to offer on the issues to be resolved."[317] The Court held that Enrique D.'s former girlfriend's testimony would have been relevant to the issues presented in his hearing.[318] As the Court stated:

> With respect to the first prong, Naomi N.'s testimony would have called into question whether Enrique D. exhibited a long-standing fixation on non-consenting women; as to the second, her testimony was relevant to show whether he experienced difficulty controlling his sexual behavior.[319]

In conclusion, the Court held that a respondent in an Article 10 proceeding is not limited to simply calling expert witnesses, but rather, may call any witness that has testimony that is relevant to the issue at the core of the proceeding.[320]

312. *Id.* at 752, 999 N.E.2d at 1175, 977 N.Y.S.2d at 730.
313. *Id.* at 751, 999 N.E.2d at 1174-75, 977 N.Y.S.2d at 729-30.
314. 22 N.Y.3d 941, 943-44, 1 N.E.3d 296, 297, 978 N.Y.S.2d 95, 96 (2013).
315. *Id.* at 944, 1 N.E.3d at 297, 978 N.Y.S.2d at 96.
316. *Id.*
317. *Id.*
318. *Id.*
319. *Enrique D.*, 22 N.Y.3d at 944, 1 N.E.3d at 296-97, 978 N.Y.S.2d at 96-97.
320. *Id.* at 944, 1 N.E.3d at 297, 978 N.Y.S.2d at 96.

In *In re State v. Nelson D.*, subsequent to an Article 10 proceeding, the supreme court found the State had not met its statutory burden in establishing Nelson D. was a dangerous sex offender requiring confinement.[321] However, the supreme court did agree to the State's request that Nelson D. be confined to a placement at Valley Ridge in the custody of the Office for People with Developmental Disabilities ("OPWDD").[322] The supreme court concluded that while the State had not met its burden of establishing Nelson D. was a dangerous sex offender requiring confinement, the placement at Valley Ridge in the custody of OPWDD was not confinement because Valley Ridge was not "a facility authorized for confinement under [A]rticle 10."[323] The Court of Appeals, in reviewing the lower courts' decisions, stated: "[A]rticle 10 provides for only two dispositional outcomes, confinement or an outpatient SIST regime."[324] The Court concluded that the two dispositional outcomes are mutually exclusive and that:

> it is undeniable that if Nelson D. is confined as part of a SIST plan and denied procedures available to designated sex offenders confined to a secure facility, such denial would be a violation of statutory requirements intended to protect against unlawful confinement.[325]

Thus, the Court held that when the State failed to meet its burden that Nelson D. was a dangerous sex offender requiring confinement, the dispositional outcome was an outpatient SIST regime and this excluded any mandatory confinement conditions.[326]

In *In re State v. John S.*, the question presented to the Court of Appeals was whether hearsay evidence regarding the respondent's alleged sex offenses, that did not lead to adjudications, satisfied the standard recently set out in *In re State v. Floyd Y.*[327] The Court of Appeals held in *Floyd Y.* "that hearsay basis testimony by an expert witness may be admitted at a Mental Hygiene Law [A]rticle 10 trial if the hearsay is reliable and its probative value in assisting the jury to evaluate the expert's opinion substantially outweighs its prejudicial effect."[328] The Court stated that "[h]earsay basis evidence is admissible [in a]n [A]rticle

321. 22 N.Y.3d 233, 236, 3 N.E.3d 674, 675, 980 N.Y.S.2d 337, 338 (2013).
322. *Id.*
323. *Id*. at 236-37, 3 N.E.3d 675-76, 980 N.Y.S.2d 338-39.
324. *Id.* at 237, 239, 3 N.E.3d at 676, 677-78, 980 N.Y.S.3d at 339, 340-41.
325. *Id.* at 239, 243, 3 N.E.3d at 677, 680, 980 N.Y.S.3d at 340, 343.
326. *Nelson D.*, 22 N.Y.3d at 237, 3 N.E.3d at 676, 980 N.Y.S.3d at 339.
327. In re State v. John S., 23 N.Y.3d 326, 331, 15 N.E.3d 287, 291, 991 N.Y.S.2d 532, 536 (2014); *see* In re State v. Floyd Y., 22 N.Y.3d 95, 2 N.E.3d 204, 979 N.Y.S.2d 240 (2013).
328. *John S.*, 23 N.Y.3d at 331, 15 N.E.3d at 291, 991 N.Y.S.2d at 536 (citing *Floyd Y.*, 22 N.Y.3d at 95, 2 N.E.3d at 204, 979 N.Y.S.2d at 240).

10 [proceeding] 'if it satisfies two criteria. First, the proponent must demonstrate through evidence that the hearsay is reliable. Second, the court must determine that the 'probative value in helping the jury evaluate the expert's opinion substantially outweighs its prejudicial effect.'"[329] However, the Court states that "hearsay indicating that the respondent was acquitted of a sex offense fails both parts of the due process test: it 'cannot provide the basis for reliability' and is generally considered 'more prejudicial than probative on the question of the respondent's mental abnormality.'"[330]

Similarly, the Court stated that in determining whether uncharged crimes should be excluded, the court should look to whether "the underlying allegations are [or are] not supported by an admission from the respondent or extrinsic evidence substantiating those allegations."[331] As to the admissibility of "'criminal charges that resulted in neither an acquittal nor conviction,'" the Court of Appeals stated the trial court must "closely scrutinize the evidence supporting the charges and ensure that the allegations are 'substantially more probative than prejudicial' before allowing the hearsay to be admitted."[332] The Court held that the "basis hearsay related to respondent's indictments for rape and robbery met the minimum due process requirements we outlined in *Floyd Y.* and was properly admitted at trial."[333] However, the "basis hearsay about an uncharged rape was unreliable and should have been excluded, [but] its admission was harmless error."[334]

329. *Id.* at 343, 15 N.E.3d at 299, 991 N.Y.S.2d at 544.

330. *Id.*

331. *Id.*

332. *Id.* at 343, 15 N.E.3d at 299-300, 991 N.Y.S.2d at 544-45 (quoting *Floyd Y.*, 22 N.Y.3d at 110, 2 N.E.3d at 214, 979 N.Y.S.2d at 250).

333. *John S.*, 23 N.Y.3d at 331, 15 N.E.3d at 291, 991 N.Y.S.2d at 536.

334. *Id.*