

## **NYS Court of Appeals Criminal Decisions for February 9, 2023**

### **People v. Myers**

This is a unanimous decision reversing the Fourth Department, authored by Judge Garcia. A call from a county jail inmate in Syracuse is intercepted during a wiretap investigation being conducted by the NYS Attorney General's Office ("NYAG"). The defendant (Mr. Myers), not the target of the NYAG investigation, joined the call and made incriminating statements regarding a 2015 fatal hit-and-run being separately investigated by the Syracuse Police. The jail call was introduced into evidence at trial against Mr. Myers for the hit-and-run. Notice and discovery of the eavesdropping warrant (with its application) pursuant to CPL 700.70 was not provided to the defendant within 15 days of his arraignment. Only late and informal notice was given to the defendant, who unsuccessfully moved to preclude. The lower court deemed the jail recording as not qualifying as an "intercepted communication" pursuant to CPL 700.05.

CPL article 700 must be scrupulously complied with; this is a rigorous standard, as electronic surveillance threatens the right to be free from unjustifiable governmental intrusion into one's individual privacy. See, N.Y. Const. art. I, § 12 (second paragraph explicitly protecting against unreasonable interception of telephone communications).

While Mr. Myer's jail conversation was not itself an "intercepted communication," the recording moved into evidence was "derived" from the original wiretapped call (which met the statutory definition). Indeed, they both originated from the same conversation. It was not clear that, absent the wiretap, law enforcement would have otherwise discovered the incriminating jail call regarding the hit-and-run. A new trial was ordered.

### **People v. Sanders**

This is a unanimous decision reversing the First Department, authored by Judge Rivera. The defendant was in shackles as the jury was polled and rendered its verdict pursuant to CPL 310.80. This violated the defendant's due process rights, as recognized by *Deck v. Missouri*, 544 US 622, 624 (2005) (holding, in a capital trial context, "the Constitution forbids the use of visible shackles during the penalty phase, as it forbids their use during the guilt phase, *unless* that use is "justified by an essential state interest" -- such as the interest in courtroom security -- specific to the defendant on trial" (internal citation omitted)). This issue was properly preserved pursuant to CPL 470.05(2).

A defendant maintains the presumption of innocence until the jury's verdict has been recorded in open court and accepted by the judge. Only then is the verdict deemed to have been rendered. There is indeed no official finding of guilt until the verdict is publicly

announced. The reading of the verdict in court is thus an integral part of the guilt determination phase of the trial. For instance, while being polled, jurors could be pressured into not revealing a vote to acquit upon seeing the defendant in shackles (in open court). This was not a harmless error. The court below was required to conduct an individualized inquiry to determine whether there was a special need (*i.e., whether there was a state interest specific to this particular trial*) for having the defendant in shackles under the circumstances. These parameters are subject to “close judicial scrutiny.” A new trial was ordered.

## **NYS Court of Appeals Criminal Decisions for February 14, 2023**

### **People v. Rivera**

The entire decision: “On review of submissions pursuant to section 500.11 of the Rules, order affirmed. On this record, defendant has not met his burden of showing that trial counsel’s performance was constitutionally deficient and his claims regarding counsel’s tactical decisions are based on matters dehors the record (*see People v Hymes*, 34 NY3d 1178, 1179 [2020]). Defendant’s other arguments pertaining to County Court’s inquiry of juror No. 6 are unpreserved (*see People v Bailey*, 32 NY3d 70, 77-79 [2018]). Defendant’s remaining contentions do not require reversal.”