NYS Court of Appeals Criminal Decisions for November 20, 2023

People v. Jordan

This is a unanimous reversal, authored by Judge Garcia, granting a new trial. The testimony of the Office of the Chief Medical Examiner ("OCME") criminologist relative to the DNA profile (connecting the defendant to a cell phone found at the crime scene) violated the Confrontation Clause of the Sixth Amendment. The error was not harmless and Second Department is reversed.

At issue is the long debated post-*Crawford* determination of "when the mechanical processing of data becomes testimony." The identification of the robber here was the primary issue at trial. Defense counsel's objection to the admission of the OCME office file, the DNA profile and chart, as well as the testimony of a witness who hadn't conducted the DNA testing himself, should have been sustained.

These were out-of-court testimonial statements made by a presumably available non-testifying witness who was not previously subject to cross-examination. *Bullcoming v. New Mexico*, 564 US 647, 657 (2011). That there was no suspect developed at the time the DNA profile from the cell phone was secured is immaterial. Only an analyst who was directly involved in the critical final stage of DNA testing, i.e., one who either witnessed, performed or supervised the process, or who used "independent analysis" on the raw data *(as opposed to being a conduit for others' conclusions)*, may testify. *See*, *People v. John*, 27 NY3d 294, 315 (2016); *People v. Austin*, 30 NY3d 98 (2017); *People v. Tsintzelis*, 35 NY3d 925 (2020).

General testimony about the lab doesn't cut it. The witness at bar did not prepare the reports, nor was he present when they were made. He didn't run the raw data. The record is insufficient to determine what exactly the witness's roll was in the generation of this DNA profile. The witness did not recount any involvement in the stages of testing that would require the exercise of judgment and the opportunity to identify error. The People need to make a clear record in this regard. Indeed, appellate courts "must be able to confirm that the testifying analyst participated in the critical portion of the testing process or reviewed the data in a meaningful way that enabled independent verification of the accuracy of the DNA profile." Nice decision.

People v. Ortega

This is a unanimous affirmance of the AD, with Judge Singas authoring the Court's opinion. The admission of two autopsy reports into evidence at this double homicide trial

violated the Confrontation Clause but constituted harmless error. The First Department is affirmed.

The defendant was a nanny caring for three children in Manhattan. She stabbed two of them to death and pleaded not guilty by reason of insanity under PL § 40.15. The OCME doctor who testified for the People did not perform the autopsies. Still, she testified regarding the number, size, location, type and pattern of wounds to the young victims. These included wounds to the victims' necks and hands. There was no prior opportunity to cross examine the doctor who actually prepared these reports. There was no evidence of the unavailability of the reports' author. Autopsy files include reports, diagrams, videos, photos, slides and crime scene evidence. Here, the jury viewed the reports as well as seven diagrams of the decedents' bodies. The witness at trial did not witness, perform or supervise the analysis in the reports. Nor did the witness use her independent analysis on the primary data.

The admission of these autopsy reports, which were out-of-court testimonial statements admitted for their truth, violated the Confrontation Clause of the Sixth Amendment. *See*, *Crawford v. Washington*, 541 U.S. 36, 61, 68 (2004); *People v. John*, 27 NY3d 294, 315 (2016) (addressing DNA testing); *People v. Freycinet*, 11 NY3d 38, 42 (2008). However, the Court here elected to *abandon* the *Freycinet* factors for evaluating purported "indicia of testimonality": (1) the extent to which the entity conducting the procedure is an arm of law enforcement; (2) whether the contents of the report are a contemporaneous record of objective facts; (3) whether a pro-law-enforcement bias is likely to influence the report; and (4) whether the report's contents are directly accusatory, in that they explicitly link the defendant to the crime.

Freycinet was followed by *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 308-311 (2009), which addressed "certificates of analysis" regarding cocaine that were reasonably believed to be available for use at a later trial. *See also*, *Davis v. Washington*, 547 U.S. 813, 830 (2006). In *Melendez-Diaz*, the surrogate testimony did not meet the constitutional requirement, but rather the analyst was used as a "mere scrivener" of results. Then came *Bullcoming v. New Mexico*, 564 U.S. 647, 652, 661-664 (2011), which recognized that forensic evidence was not immune from the possibility of incompetence, as there was wide variability of techniques, methodologies, reliability, types and numbers of potential errors, research, general acceptability and published material. In sum, *Freycinet*'s framework did not survive *Melendez-Diaz* and *Bullcoming*.

The autopsy reports at bar were created under circumstances which would lead an objective witness reasonably to believe the statements would be available for use at a later trial. The reports, which the OCME were legally required to create, actually accuse the defendant herself (as 'the live-in nanny") of committing the homicides. It was unclear whether the testifying witness based her conclusions on independent analysis or whether she was just providing surrogate testimony and parroting the conclusions of the reports. The Sixth Amendment was violated. But, despite the testimony regarding the six-year-

old's self-defense potentially impacting the defendant's insanity defense, the error was harmless in light of the remaining proof of identification.

NYS Court of Appeals Criminal Decisions for November 21, 2023

November 21st was easily the Court's most voluminous release of substantive criminal decisions on a single date in years.

People v. Medina

This memorandum is a unanimous affirmance of the Third Department.

The legality of the defendant's consent for law enforcement to search his vehicle following a traffic stop (which triggered subsequent *De Bour* issues) was a mixed question of law and fact. There was record support for County Court's conclusion that the officer's testimony was credible and legally sufficient to demonstrate a founded suspicion prior to seeking consent.

People v. Telfair

This is a 4 to 3 decision, authored by Judge Halligan. Judge Rivera wrote a concurrence. Judge Cannataro wrote for the dissent, joined by Judges Garcia and Singas. The AD is reversed and a new trial is ordered based on a *Molineux* violation. The defendant's 2nd Amendment facial constitutional challenge under *Bruen* (142 S.Ct. 2111) is unpreserved (*see People v. Cabrera* below, also decided on 11/21/23).

The defendant was pulled over after making a U-turn in Brooklyn without his headlights on. Four guns were recovered following an inventory search. He was ultimately charged with criminal possession of a weapon ("CPW"). The defendant had picked up his truck from a long-term packing facility the day before the arrest. His defense at trial was that someone else planted the guns, of which he had no knowledge. There was no DNA or fingerprint evidence.

The trial court erroneously admitted evidence of two prior incidents involving the defendant illegally possessing guns: a 2006 uncharged matter and a 2007 misdemeanor conviction. Limiting instructions were given, directing the jury to only consider this evidence regarding the defendant's state of mind and absence of mistake. The strange 2006 incident involved a flight attendant finding a gun in a pillow (or pillowcase) imprinted with a photo of the defendant's baby. The gun was owned by defendant's girlfriend and he purportedly didn't know it was there. No charges were filed. *(Of course the defendant was a professional basketball player at the time: wait a minute, you don't think that may have impacted the decision not to charge him, do you?)* The 2007 incident resulted in

charges in Westchester County. There the defendant was stopped for speeding and a handgun was recovered from under the passenger seat. He pleaded to 4th degree CPW.

People v. Molineux, 164 NY 264, 293 (1901) lives on. Evidence of uncharged crimes or prior bad acts is generally inadmissible, as it risks allowing the jury to infer propensity to commit more crimes. The exceptions: where the evidence is admitted to address motive, intent, absence of mistake or accident, common plan or scheme, or identity. *People v. Alvino*, 71 NY2d 233, 241 (1987). The uncharged or prior acts may not be introduced to establish propensity to commit further crimes. Moreover, the probative value of the proposed evidence must outweigh its potential for prejudice. *People v. Ventimiglia*, 52 NY2d 350, 359 (1981). The 2006 and 2007 incidents, both about a decade old at the time of trial, involved completely different circumstances and did not increase the probability that the defendant intended to commit the present crime or that he knew the guns were in the car at the time of the present (2017) arrest. These priors were not evidence of recent, repeated or highly similar acts. Rather, they involved different circumstances, involved different excuses and different guns -- occurring many years before. These prior incidents only went towards propensity and were therefore inadmissible. Ten years, however, is not a bright line rule; the remoteness of the priors must be evaluated on a case-by-case basis. Because the evidence of guilt was not overwhelming, this error was not harmless.

Judge Rivera opined in her **concurrence** that the *Breun* issue was preserved. In **dissent**, Judge Cannataro concluded the *Molineux* issue had to be evaluated in light of New York's gun problem. The majority's opinion destabilizes the *Molineux* jurisprudence. Moreover, the relevance of evidence is founded on the law of probabilities, often from successive repetitions of an act. Propensity, on the other hand, is focused solely on one's bad character. (Good luck distinguishing these principles for a jury scared of illegal guns.)

People v. Garcia

This is a 6 to 1 affirmance of the AD, with Judge Halligan writing for the majority. Judge Rivera was the lone dissenter. The defendant presented arguments involving *voir dire* restrictions, Eighth Amendment / COVID-19 issues and Second Amendment / *Bruen* issues. All were rejected.

The defendant was charged with 2nd degree CPW, following an incident in a nightclub parking lot where the defendant brandished a gun in anticipation of a threat towards his girlfriend. There had just been an altercation inside the club. The defendant possessed a gun license from the state of Utah.

While trial courts have broad discretion in restricting the scope of *voir dire* examination, it is essential that both sides have a "fair opportunity" to question prospective jurors as to "any unexplored matter affecting their qualifications." *See*, CPL 270.15(1)(c); *People v. Miller*, 28 NY3d 355, 358-359 (2016). During the fifth round of the *voir dire* examination at bar, the trial court denied the defendant permission to question the perspective jurors

about the defendant's likely self-defense claim and regarding gun ownership. Only general questions about impartiality and following the law were permitted. The court itself asked the panel generically about gun licensing and the jurors' ability to follow the law (notwithstanding their personal views). Issues regarding guns and self-defense had been permitted in the preceding *voir dire* rounds. After four rounds of questioning, the original pool of potential jurors was said to be exhausted and were purportedly getting confused, leading to speculation on issues. There was thus no abuse of discretion in the trial court imposing these restrictions on defense counsel.

Regarding the COVID issues, the defendant was 67 years old and suffering from serious health issues at the time he sought release from prison in 2020 (via CPL 440.20) pursuant to the Eighth Amendment because of the pandemic. There weren't a significant number of COVID cases in his facility at the time. The constitutional challenge was rebuffed. Further, the defendant was serving the minimum statutory sentence, so the AD could not have reduced the sentence under CPL 470.20(6). Finally, for the reasons set out in *People v. Cabrera* (see below, also decided on 11/21/23), the defendant's facial constitutional challenge under *Bruen* was unpreserved.

In **dissent**, Judge Rivera concluded that both the *voir dire* and *Bruen* issues had merit. The judge does a nice overview of the *Bruen* "historical tradition" test here, which invalidated New York's "proper cause" requirement. The defendant's out-of-state gun license would have been sufficient except for the NYS "proper cause" licensing scheme. The defendant's statutory presumption argument (under PL § 265.03(1)(b)) required reversal. Mere possession should not trigger a presumption to use the weapon unlawfully. The defendant further did not need to seek a license in NYS in order to obtain standing to litigate this issue. As there was an intervening sea change, i.e., the Supreme Court decision in *Bruen*, the Second Amendment issue is preserved. In other words, a litigant can't raise an issue he or she was unaware of at the time. The Court had the option of remitting for the creation of a better record to be made. Finally, the trial court improperly curtailed *voir dire* in violation of CPL 270.20(1)(c). *See also*, *Miller*, 28 NY3d at 358; *People v. Steward*, 17 NY3d 104, 110 (2011). Direct admissions of bias are not frequently made by prospective jurors. Thus, the question, "Can you be fair?" is often meaningless. Gun ownership and self-defense were the core of this trial. Targeted questioning of prospective jurors was essential to ensure the defendant's right to a fair trial.

People v. David

This is a 6 to 1 affirmance of the AD, with Judge Halligan writing for the majority. Judge Rivera was the lone dissenter. The defendant unsuccessfully challenged law enforcement's inventory search of his vehicle in Rochester, as well as the constitutionality of New York's post-*Bruen* gun regulation. The *Bruen* issue was unpreserved.

An inventory search may be conducted of an impounded vehicle without a warrant, so long as the search is conducted in compliance with reasonable regulations and procedures conducted in good faith. *Colorado v. Bertine*, 479 US 367, 374 (1987).

"Reasonable" means in part to clearly limit the officers' conduct (and discretion) in order to assure consistency. Here, the defendant's vehicle was pulled over after he drove without headlights. The defendant possessed only a learner's permit. After being pulled over, the vehicle illegally parked (partially) in a bike lane. The officer elected to tow the car. Two handguns and a large amount of cash were ultimately recovered. Rochester Police Department Regulations General Order 511 (E) indicates that when deciding whether to tow a vehicle for safekeeping, the police will consider the crime rate in the area, the proximity of the operator's residence, what valuables are in the vehicle and whether another person is readily available to operate the car. Though the police did not know the registered owner resided just three blocks away from the scene, the inventory policy was not violated. The defendant, who did not possess a valid driver's license, could not legally drive the car away and no other licensed driver was present. The defense pointed out, however, that this was just a minor driving infraction, the car was not stolen, the defendant's license had not been revoked and the defendant was not under the influence of alcohol. Indeed, he was only illegally parked because he had been pulled over. But because the defendant could not legally drive away, concluded the Court, the decision to tow his vehicle was reasonable.

In addition to a facial challenge, the defendant argued that New York's gun regulation violated due process by treating presumptively innocent conduct as unlawful, thus unconstitutionally shifting the burden of *production* to the defendant. His claims, however, do not constitute mode of proceedings errors, *see e.g.*, *People v. Patterson*, 39 NY2d 288, 295-296 (1976), and are thus unpreserved.

In **dissent**, Judge Rivera believed that, in addition to *Bruen*, the jury was erroneously instructed, as *not* being licensed to possess a weapon (under PL § 265.20(a)(3)) was an essential element to be proven for CPW. This particular issue is not dependent on *Bruen*. For reasons Judge Rivera provided in *People v. Garcia* (also decided on 11/21/23), the facial *Bruen* challenge is preserved. It is, however, without merit as NYS does not criminalize the mere (licensed) possession of handguns in public. Moreover, the majority erroneously characterizes the presumption argument as merely shifting the burden of production; rather it is the fundamental burden to prove one's innocence that has been shifted.

People v. Debellis

This is a 4 to 3 reversal of the First Department, authored by the Chief. Judge Cannataro wrote for the dissent, joined by Judges Singas and Garcia. A new trial is ordered. The defendant was afforded ineffective assistance of counsel by his attorney failing to seek a jury instruction on the only reasonable defense available to him. Here, counsel sought a temporary lawful possession ("TLP") instruction, *see*, *People v. Williams*, 36 NY3d 156, 160-161 (2020), instead of a voluntary surrender instruction under PL § 265.20(a)(1)(f).

This case arises from a purported NYPD gun buyback program in the Bronx. The defendant was found in possession of a gun located under the front seat during a car stop. Before the weapon was recovered, the defendant lied to the police about having weapons in the car. He testified at trial he was concerned he would not be compensated (as part of the buyback program) if the gun was seized from his vehicle. Charged with CPW, his defense was that he had been arguing with his wife about finances and was on his way to deliver the weapon to law enforcement as part of a gun buyback program in the Bronx. The trial court correctly denied the TLP jury instruction request, as the defendant's weapon possession was not temporary. Even a few hours may disqualify a defendant from being afforded a TLP instruction. *See*, *e.g.*, *People v. Banks*, 76 NY2d 799, 801 (1990). The voluntary surrender defense, on the other hand, is meant to encourage persons with illegal firearms to turn them in, no matter how long the delay in doing so. This impacts public safety by reducing the number of illegal handguns in circulation. At bar, the weapon was possessed for over *a year* before the defendant sought to surrender it.

The defendant was deprived of meaningful and effective assistance of counsel under the circumstances. There were no reasonable, strategic or legitimate explanations for counsel's strategy and conduct. *See generally*, *People v. Benevento*, 91 NY2d 708, 712 (1998); *People v. Caban*, 5 NY3d 143, 156 (2005). In determining whether a reasonable view of the evidence supports a requested jury instruction, it must be viewed in a light most favorable to the defense. Credibility questions regarding the defendant's trial testimony are fact-questions for the jury and would not have precluded the court from giving the voluntary surrender instruction. Because the instruction was not given, the jury was deprived of the opportunity to consider the defendant's only legitimate defense. After the trial court rejected defendant's meritless jury instruction request, counsel unsuccessfully argued for jury nullification in summation. In sum, the defendant was deprived of a fair trial.

The **dissent** believed there was no reasonable view of the evidence to support a voluntary surrender instruction, as the defendant's loaded gun was in his possession for over a year and was hidden under a car seat. Further, the defendant denied having it when asked by the police. Ammunition and a holster were also found in the car. On the date in question, the gun was transported approximately 50 miles -- from Putnam County, where the defendant then lived, to the Bronx, where he formally resided. In fact, the precinct the defendant was driving towards had no payback program in effect at the time. In sum, the majority's view supports a dangerous public policy regarding guns. Finally, the dissent lists all of the things it believed counsel *did not* perform ineffectively in defending his client (i.e., cross-examination of witnesses and summation). Indeed, the defendant was "uncooperative" by taking the stand in his own defense.

More commentary: Just need to file this one away: The dissent seems to hint that defense counsel pursued a *reasonable* strategy by pursuing a jury nullification defense in summation. This is understandably a very touchy issue for appellate courts to grapple with.

People v. Cuencas

This is a 4 to 3 reversal of the Second Department, authored by the Chief. Judge Cannataro wrote for the dissent, joined by Judges Singas and Garcia. The purported consent to enter the homicide defendant's Queens residence, following an exchange with a third party, was invalid.

The police asked the person who answered the door (at 5:30 a.m.): "How ya doing, sir? Mind if we come in and talk to you?" The person at the door stood aside to allow the police to enter. However, no response was given by the third party (who was previously unknown to the police) and law enforcement did not identify who they were speaking to, nor where he resided. There was a small vestibule at the entrance of this multi-family apartment, leading to two separate apartments -- with one of them (leading upstairs) belonging to the defendant. The door to the defendant's apartment was open. The defendant was arrested in his living room and transported to the station where he confessed. A search warrant was executed the next day, wherein incriminating evidence was secured.

Entering a residence without a warrant is presumptively unreasonable. *People v. Knapp*, 52 NY2d 689, 694 (1981); *Payton v. New York*, 445 US 573, 587-590 (1980). The consent here did not comply with either the state or federal constitutions. *See*, NY Const., art. I, § 12; US Const., amend. IV. The purported apparent authority of the third party to grant the police consent to enter (which is dependent on an objective view of the circumstances known to the police) only applied to the vestibule, not the defendant's apartment. *See*, *Coolidge v. New Hampshire*, 403 US 443 (1971). Common authority of a third party to grant consent requires some communication or conduct to support such a claim and may not be implied by one's mere interest in the property in question. *See*, *e.g.*, *People v. Adams*, 53 NY2d 1, 6, 9-10 (1981) (where the third-party granting consent possessed a key to the premises).

The **dissent** observes the issue of consent to enter was a mixed question of law and fact. As there was record support for the lower court's conclusions, the Court was without authority to review this issue.

More commentary: This is one of five cases (*Cuencas*, *Telfair*, *Rodriguez*, *Brown* and *Debellis*) decided on November 21, 2023 where Judge Troutman sided with the defense in a 4 to 3 criminal decision win. Before this date, the odds of her Honor siding with the defense in a split criminal decision was only about *a third* of the time. Something to keep an eye on.

People v. Rodriguez

This is a 4 to 3 decision, with Judge Troutman authoring the majority opinion. Judge Singas wrote for the dissent, joined by Judges Garcia and Cannataro. The question is whether a cyclist has the same Fourth Amendment rights as the operator of a motor vehicle in terms of being pulled over and seized by the police. The answer is yes. Suppression of the loaded firearm seized (which led to a 2nd degree CPW plea) is granted and the indictment is dismissed. The Second Department is reversed.

The defendant was stopped by the police on a December evening in Queens as he was riding his bicycle on a two-way road, wearing sweatpants, a puffy "snorkel" jacket and a hat. The road did not have a marked center-lane divider or a bike lane. Cars could legally park on either side of the road. Though no VTL violations were charged, the officers described the defendant as riding in a "somewhat reckless fashion" in the middle of the road. His right hand was on the handlebars while his left one was holding something, as his hand covered his pants. The defendant was "favoring his waistband." Therein was a "bulky object." The police ordered the defendant to stop twice before he complied. The defendant acknowledged having a gun in his waistband.

Diversion by law enforcement of a vehicle is a seizure. *People v. Spencer*, 84 NY2d 749, 752 (1995). Bicycle stops implicate the right to be left alone, analogous to a motor vehicle stop. Thus for both cars and bicycles, the police need either reasonable suspicion of a crime or probable cause of a VTL violation in order to conduct a stop. *People v. Hinshaw*, 35 NY3d 427, 430 (2020). In contrast to how pedestrians are treated, this is consistent with the VTL subjecting bicycles to the same rules of the road as automobiles. They effectively have the same rights and duties. *See*, VTL § 1231; *see also*, VTL § 375(1)(a) (car horn requirement); § 1236(6) (bicycle bell); § 1229-c (car seatbelt); § 1238(5) (bicycle helmet for those under 14 years of age). Though the dissent observes that a more robust display of authority, and thus a greater intrusion, is required to stop a car, as opposed to a bicycle, all police commands are unsettling, frightening and destabilizing. Moreover, a bicyclist is more physically vulnerable and subject to physical injury than a car passenger. A bicyclist will likely not feel free to simply ride away upon being approached by a police officer.

In every relevant, legally significant way, bicycles are like cars for constitutional purposes during a police encounter. Here, there was insufficient evidence of reasonable suspicion of a crime or probable cause of a VTL violation.

The **dissent** concludes that the case-by-case *De Bour* standard for approaching individuals should control. The majority's decision could lead to *per se* rules for joggers and other pedestrians. Moreover, more force is needed to stop a motor vehicle than for a bicycle, because of its size and potential speed. Following the expansion of Second Amendment rights in *Bruen*, the majority's opinion is simply bad policy.

More commentary: In several cases decided on November 21st, including *Cuencas*, Judge Cannataro articulates his "criminal procedure" position in part by noting the purportedly bad post-*Bruen* gun policy the Court is effectively pursuing.

People v. Pastrana

This is a 4 to 3 decision, affirming the AD. Judge Troutman authored the majority decision. Both Judges Rivera and Halligan (joined by the Chief) authored dissents. The defendant's vehicle was searched following a roadblock stop. The officer smelled (and observed in plain view) marijuana and obtained the defendant's consent to search. A large quantity of marijuana and a loaded firearm were discovered inside the glove compartment, from where a strong odor of marijuana was emanating.

The vehicle checkpoint in question was set up for the purpose of public safety. Every third driver was stopped. Each driver was asked to produce their license, and proof of insurance and registration. Inspections, equipment and seatbelts were also checked. If evidence of a crime, i.e., a DWI, arose, the officer would take appropriate action. The roadblock was maintained in accordance with a uniform procedure, leaving the police little discretion. Fair warning was afforded to motorists and the checkpoint stops were conducted with precautions to assure their safety. The purpose of the checkpoint was highway safety, not general crime control. *Indianapolis v. Edmond*, 531 US 32, 44 (2000); *People v. Jackson*, 99 NY2d2d 125, 131-132 (2002).

According to the majority, the defendant's claim that the checkpoint being conducted on the day of the National Puerto Rican Day Parade was discriminatory was unsupported by the record and went towards law enforcement's credibility, a matter for the lower court to evaluate. It was just as reasonable to infer that the police chose the particular date and location because of the large volume of traffic expected. While there was no written documentation authorizing the roadblock and the supervising officer did not testify, the record was still sufficient.

Moreover, the Marihuana Regulation and Taxation Act ("MRTA"), which became effective March 31, 2021, is *not* to be applied retroactively. The law took effect some six years after this vehicle stop. The law, codified in PL § 222.05(3), prohibits the police from utilizing the purported odor of cannabis as a basis for a "finding or determination of reasonable cause to believe a crime has been committed." In other words, for events occurring on or after March 31, 2021, the odor of marijuana in legally authorized amounts may no longer form the basis of a police search. *See also*, CPL 440.46-a (addressing prior marijuana-related convictions). But the legislature did not intend this law to be applied retroactively. Further, an appeal to the Appellate Division (an "intermediate appellate court") does not constitute a "criminal proceeding" under PL § 222.05(3). *See also*, CPL 1.20(18), (19) and (22).

And finally, the defendant's Second Amendment *Bruen* issue (142 S. Ct. 2111) was unpreserved. *See*, *People v. Cabrera* (also decided on 11/21/23). The First Department is affirmed.

In **dissent**, Judge Rivera concluded the *Bruen* issue was both meritless and unpreserved. The matter should have been remanded to develop the record on the defendant's as-applied constitutional challenge. In Judge Halligan's separate **dissent**, both she and the Chief believed the record was insufficient to confirm the validity of the roadblock stop. While the goal of the checkpoint was vehicular safety, a permissible primary programmatic purpose, the record does not establish that the selection of the particular date and location would be effective in serving public safety. A balancing test to determine the reasonableness of a suspicionless stop was in order. A checkpoint plan must assure the officers in the field are not afforded unfettered discretion in order to reduce the risk of arbitrary intrusions. There was no testimony as to how the checkpoint was authorized. This was not, as the majority opines, a simple issue of credibility. The officers in the field did not choose the location for the stop. A written administrative directive and the testimony regarding the approval of a supervisor (i.e., the brains of the operation) would have addressed these concerns.

People v. Brown

This is a 4 to 3 decision, authored by Judge Rivera. Judge Cannataro wrote for the dissent. The AD is reversed, as the requirement that the defendant register (as a level 2 offender) under SORA violated due process.

This case addresses the propriety of applying SORA to a defendant who stole money at gunpoint from an adult whose 10-year-old child was present. The defendant challenges the premise of *People v. Knox*, 12 NY2d 60 (2009), and its companion cases, where the Court permitted the SORA registration for defendants convicted of non-sex crimes. The court reasoned that the legislature had a rational basis for concluding that children under those circumstances are still vulnerable to being attacked sexually, notwithstanding the non-sexual motives of the perpetrator. Mr. Knox, for instance, was a homeless drug abuser with psychiatric problems. Hurting children is a potential way of leveraging the true target of the crime to comply. Indeed, unlawful imprisonment of a child (under 17 years) by a non-parent is a SORA-eligible crime. Corr. Law § 168-a(1) & (2)(a)(i).

But defendants have a substantive due process right not to be erroneously labeled a sex offender. Indeed, a sex offender is impeded in securing employment, housing and relationships. He or she is often subjected to humiliation, ostracism and vigilante-motivated physical violence. Here, the legislative purpose of SORA was not furthered. The robbery in question included no sexual conduct or sexual motivation. The Court accepted the defendant's as-applied constitutional challenge, claiming that requiring SORA registration for his non-sex crime was not rationally related to protecting the public from *actual* sex offenders. His crime only included detaining the child for a short period of

time. No sex crime occurred, nor was there a risk of a sexual crime taking place. There was no motive for such a crime, nor was the child ever the target of the crime. Moreover, the defendant had not committed any sex offenses in the past.

In addition to the life-changing stigma thrust upon the defendant in question, the public is misled where an individual is wrongly listed as a sex offender. Only two members of the Court, Judge Rivera and the Chief, would officially overrule *Knox* as the error in question also facially violates the constitution. Indeed, SORA has expanded in scope (in part, because of technology) and severity since *Knox* was decided. Filling the SORA registry with individuals who don't actually pose of danger of committing sex crimes undermines the usefulness of having a registry at all.

The **dissent** is tolerant of a small percentage of the SORA population being mislabeled (those who are technically "unmerited" for SORA). Defendant's is a rare "outlier" case. A "marginally overinclusive" application of the law is acceptable. Because of the "hard and fast rule" in *Knox*, *stare decisis* precludes the majority's conclusion. The issue is also unpreserved. Statutes are presumed to be constitutional. The defense has not met its heavy burden in establishing that the legislature acted irrationally. Though SORA courts are required to make individual assessments, it is often *too burdensome* to accurately distinguish non-sex offenders from true sex offenders. The prerogative of the legislature, where it has a rational basis for its decision, controls here. Judicial restraint compels this deference. Finally, the majority and the dissent disagree about the state of the SORA-related jurisprudence in sister state courts and the federal bench.

People v. Rivera

This is a unanimous memorandum in its judgment, with just Judge Rivera filing a concurrence. It was not an abuse of discretion for the sentencing court to deny the 17-year-old weapon possession defendant's YO application under CPL 720.10(1) and (2). The AD is affirmed. The Second Amendment / *Bruen* issue is unpreserved, consistent with the Court's *Cabrera* decision (also decided on 11/21/23). While the sentencing court could have been more artful in its statements, the defendant's contention that the lower court failed to determine whether mitigation circumstances existed under CPL 720.10(3) during his resentencing was rejected.

In **concurrence**, Judge Rivera concluded the *Bruen* issue was preserved. However, since the defendant was under 18 years old, he did not possess Second Amendment rights, as minors (who are immature and may be physically vulnerable) have limited constitutional rights. It's thus not surprising they are prohibited from voting, serving on a jury and holding certain types of employment. Because children lack the maturity, experience and capacity for judgment to make difficult decisions, both state and federal law require adult consent or a court order for minors to engage in certain adult activity. In

sum, the 17-year-old defendant had no legal right to possess the unlicensed guns in question.

People v. Cabrera

This is a 5 to 2 opinion, with Judge Halligan writing for the majority. Judge Rivera authors the dissent, joined by the Chief. The AD is reversed and a new trial is ordered based on a *Miranda* violation. The defendant's *Bruen* (142 S.Ct. 2111) issue, that New York's PL § 265 "proper cause" standard for the issuance of a gun carry license violates the 2nd and 14th Amendments, is unpreserved.

The defendant was pulled over in South Carolina for speeding. He possessed guns he was licensed to carry in Florida and informed law enforcement he was headed to a specific address in the Bronx. The defendant was warned it was illegal to possess the guns in NYS. The NYPD was informed of the defendant's plans. The defendant was subsequently met by law enforcement in the Bronx. There he was handcuffed and questioned about whether he had guns in his car. He affirmed that he did but did not have a NYS firearm license. He was then transported to the station, where he was Mirandized and interrogated. The defendant signed a consent to search form regarding his car. Asked orally if the car could be searched, the defendant nodded affirmatively. He then immediately invoked his right to counsel. The questioning ceased. Three handguns, a rifle and ammunition were recovered from his trunk. The defendant pleaded guilty to 2nd degree CPW.

The facial challenge to PL § 265.03(3) under *Bruen* is unpreserved. Errors need to be corrected at the earliest opportunity after being fully litigated in the court of first instance. CPL 470.05(2). This is especially true for constitutional challenges where appellate courts are asked to take the drastic step of invalidating legislation. Mode of proceedings errors, which address the essential validity of the proceedings and the organization of the court, are an exception. A mere change in the law ushered in by the Supreme Court is not enough to trigger the mode of proceedings exception to the preservation rule. To the extent that a futility exception exists where the law has changed since the proceedings ended below, *i.e.*, *People v. Patterson*, 39 NY2d 288, 295-296 (1976) (addressing *Mullaney* and the burden of persuasion regarding an EED defense); *People v. Baker*, 23 NY2d 307 (1968) (addressing *Bruton* and the Confrontation Clause), that exception does not apply here. In short, citing to past examples of when the Court failed to accept a futility argument (even after *Mapp v. Ohio* was decided!), the Court significantly walks back the intervening Supreme Court case law exception to the preservation rule. Though *Bruen* affected a dramatic change in Second Amendment and gun regulation law, there is a "high bar" for excusing preservation based on an intervening high court decision. After some hair-splitting about the Supreme Court's 2008 *Heller* and 2010 *McDonald* decisions, the Court arrived at this not being a sufficient case for applying the exception. In sum, the

Court will await a future case with a fully developed record (with likely *amici* briefs) before addressing *Bruen* on the merits.

The handcuffing of the defendant outside his mother's Bronx residence constituted custody for *Miranda* purposes. His incriminating statements regarding the guns in the car and his not having a NYS gun license are therefore suppressed. A defendant is in custody for *Miranda* purposes where a person innocent of any wrongdoing would believe he or she was not free to leave and where there has been a forcible seizure curtailing one's freedom of action to the degree associated with a formal arrest. *Miranda v. Arizona*, 384 US 436, 444, 457 (1966); *People v. Paulman*, 5 NY3d 122, 129 (2005); *People v. Morales*, 65 NY2d 997, 998 (1998). Here, the defendant was cuffed prior to interrogation with no limits placed on the duration of the defendant's detainment. His movements were restricted to a degree associated with a formal arrest. No reasonable innocent person would have felt free to leave. No public safety exception was raised by the People.

This is a fact-sensitive issue and the Court declined to adopt a *per se* handcuff rule for *Miranda* custody issues. However, observed the Court, "[t]here may be very few circumstances where a handcuffed person is not in custody for purposes of *Miranda* given the obvious physical constraint and association with formal arrest." But while '[h]andcuffs are generally recognized as a hallmark of a formal arrest," their impact must be assessed based on the circumstances. *See also*, *United States v. Newton*, 369 F3d 659, 675, 677 (2d Cir. 2004). At bar, the plea must be vacated.

The majority found the oral and written consent to search the vehicle to be voluntary. Here, despite the police describing the consent form as a "formalit[y]" that needed to be addressed before defendant's mother could have her car returned: (1) the handcuffs had been removed when the defendant was read *Miranda*, (2) the defendant was calm and cooperative, and (3) he sought counsel right after consenting. Moreover, the *Miranda* violation did not taint the voluntariness of the consent, as this was not a single continuous chain of events. Rather, there was a sufficiently, definite pronounced break in the interrogation to dissipate the *Miranda* violation taint. *People v. Chapple*, 38 NY2d 112, 115 (1975); *Paulman*, 5 NY3d at 130-131. At bar, there was a 90-minute delay between the *Miranda* violation outside the residence and the consent at the station, which were obviously different locations. The removal of the cuffs was also an important factor.

In **dissent**, Judge Rivera believed there should be a *per se* handcuff custody rule for *Miranda* purposes. The dissent describes the history of handcuffing individuals going back at least to the time of slavery. "Handcuffs are restraints, full stop." They are commonly used to physically restrain a person during an arrest. Their singular purpose is to restrain and the individual wearing them knows this. There is no situation where a handcuffed person is not restrained. A case-by case approach is wrong. A *per se* rule is easy to comply with for law enforcement.

Also, the defendant's consent, which was obtained through misstatements, was involuntary under the circumstances. In addition to the factors addressed above, Judge

Rivera also observes there were multiple armed officers present, it was late at night and the defendant had been driving for hours. Further, the defendant could not have known his previous incriminating statements would be suppressed. Thus, there was insufficient evidence remaining to convict and the indictment should be dismissed based on both the *Miranda* and consent violations -- as opposed to merely ordering a new trial.

People v. Espinosa

This is a 6 to 1 memorandum, with Judge Rivera dissenting. The burglary defendant's argument that he was deprived of the effective assistance of counsel because of his attorney's failure to object to the admission into evidence of a DNA report is rejected. At issue was DNA recovered on a screwdriver found in the outdoor patio of the victim's residence. Even if this Confrontation Clause / *Crawford* issue had merit, this singular error was not so clear cut and dispositive that no reasonable counsel would have failed to assert this argument. *People v. Rodriguez*, 31 NY3d 1067, 1068 (2018), quoting *People v. McGee*, 20 NY3d 513, 518 (2013). The AD is affirmed.

In **dissent**, Judge Rivera observed that the DNA report was indeed testimonial. *Melendez-Diaz v. Massachusetts*, 557 US 305, 309-317 (2009); *Bullcoming v. New Mexico*, 564 US 647, 655-663 (2011). Accordingly, the testifying DNA report witness must have performed, witnessed or supervised the testing, or independently analyzed the raw data. *People v. John*, 27 NY3d 294, 303-315 (2016) (though decided after defendant Espinosa was convicted). The People's case relied entirely on the defendant's DNA being found on the screwdriver. As defense counsel cross-examined the forensic witness on his lack of involvement in the testing process, a point counsel revisited in summation, there could be no reasonable, plausible or legitimate explanation for counsel not objecting to the admission of the report. *See generally*, *People v. Benevento*, 91 NY2d 708, 712 (1998); *People v. Caban*, 5 NY3d 143, 156 (2005); *McGee*, 20 NY3d at 518; *People v. Sposito*, 30 NY3d 1110, 1111 (2018). Though it *was* the case here, to qualify as ineffective assistance, the law need not be "definitively settled" regarding the omitted claim. There need only be "clear appellate authority." *People v. Saenger*, 39 NY3d 433, 442 (2023). Here there was. Finally, *People v. Brown*, 13 NY3d 332, 340 (2009), relied upon by the prosecution, which held that a DNA report was not testimonial because the profile was developed *before* the defendant became a suspect, was superseded by the *Bullcoming* decision two years later.