No. 19-5011 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

DANNY PHIPPS — PETITIONER
(Your Name)

vs.

PEOPLE OF THE STATE OF NEW YORK — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT
SUPREME COURT OF NEW YORK

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

DANNY PHIPPS DIN# 15-A-4473
(Your Name)
Green Haven C.F. DIN# 15-A-4473
216 Route 594
(Address)

Stormville, New York 12582
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Can Appellate Division develop a rule that shifts the burden from the People to a defendant to prove he or she did not abandon property making it subject to state search and seizure?

2. Whether a person treated in a public place with injuries rendering him or her too incoherent and taken away by police and emergency medical personnel to a hospital via ambulance, without police or medical personnel bringing along bags be deemed to have abandoned property and lose standing to challenge its search?

3. Whether evidence of an affirmative act of divestment of property is required for a showing of abandonment, or whether the People can meet their burden of proof by presenting a lack of evidence a defendant expressed a continued possessory interest in the property?

4. Whether a court may threaten to gag or remove a defendant from the courtroom for making objections or nonmeritorious arguments even though defendant was representing himself pro se and not being disruptive during proceedings?

5. Whether a defendant pro se must risk being gagged or removed from courtroom to preserve claim on appeal even after court directs defendant not to say another word?

6. Can a defendant forfeit right to self-representation for making what court deems nonmeritorious argument?

7. Whether a court may accept a pro se defendant's waiver to a presentence report before sentencing without informing him about the purpose of the interview or failing to determine whether the waiver was knowingly, and intelligently made?

QUESTION(S) PRESENTED

8. Whether a sentencing court may waive the crucial probation interview portion of the report under circumstances not enumerated under CPL 390.20 (4) ?

9. Whether a trial court may regulate the jury selection process in a way that taints prospective jurors from coming forward candidly about making known their difficulty understanding the court on relevant matters?

10. Whether a court may penalize prospective jurors or threaten to do so for lack of English speaking proficiency by withholding their duty pay and mandating language courses?

11. Whether a lower court's substantial departure from jury selection procedure threatening to penalize any prospective jurors asserting a lack of language proficiency and thus affecting honesty and frankness of jurors' responses, thereby affecting essential validity of selection process, constitute mode of proceedings violation?

LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[X] reported at 168 A.D.3d 881, 91 N.Y.S.3d 461; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the New York Court of Appeals court appears at Appendix C to the petition and is

[ ] reported at 2019 WL 1125612; or,
[X] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[x] For cases from **state courts**:

The date on which the highest state court decided my case was 3/27/19. A copy of that decision appears at Appendix C.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In this case, the constitutional provisions, treaties, statutes, ordinances and regulations involved are:

1. United States Constitution Amendments IV, V, VI, XIV; New York State Constitution, Art. 1, Secs. 6, 12 (See pages 22, 23, 28) (RE: expectation of privacy; standing to challenge search and seizure).

2. United States Constitution Amend., V: Liberty Clause; Amends., V and VI: Right to essential fairness; Amends., VI and XIV: Due process, Sixth and Fourteenth Amendment right to self representation correlative of right to counsel; Judiciary Act of 1789, Ch. 20, sec. 35, 1 U.S. Stat. 73, 92; Title 28, sec. 1654; N.Y. Const. Art. 1, sec. 6: Defendant's pro se right to be heard before a court and conduct his own defense, make motions, argue points of law, question witnesses, and to address the court and jury (See pages 21, 22) (RE: Right of self representation may not be forfeited for making objections before the court).

3. Criminal Procedure Law sec. 270.15; Judiciary Law sec. 524 (See pages 28) (RE: Rules governing organization of jurors and pay schedule, and other requirements affecting juror selection procedure).

4. Criminal Procedure Law sec. 390.20 (4) (See pages 26, 27) (RE: Specific grounds for which a presentence report may only be waived by sentencing court).

STATEMENT OF THE CASE

The Suppression Hearing and Decision

During a suppression hearing, Sergeant Steven Bennett and Police Officer Jimmy Wu testified that on March 9, 2014, at around 11:30 p.m., they separately responded to a report of a crime at a hotel on Queens Boulevard in Queens. After questioning occupants for about 45 minutes, another officer told Wu about a man who matched a description of the perpetrator lying down outside of the hotel. The man, who Bennett and Wu identified as Mr. Phipps, was laying between two parked cars and on the sidewalk, with two plastic bags "next to him". Emergency medical technicians and officers surrounded Mr. Phipps, who had two leg injuries and twisted ankles, and was yelling and moaning in pain and speaking incoherently.

Wu saw two plastic shopping bags "right next to" Mr. Phipps and the officer believed the bags belonged to Mr. Phipps. Wu was with Mr. Phipps and paramedics for about 15 minutes, during which time Mr. Phipps was treated by EMTs and police officers did not bring Mr. Phipps's bags with him into the ambulance.

The People presented no evidence at the hearing that Mr. Phipps disclaimed ownership or otherwise took any affirmative acts to distance himself from the bags. After EMTs and officers placed Mr. Phipps into the ambulance and escorted him to a hospital with EMTs, Wu opened the bags and "found" items that connected Mr. Phipps to the crime under investigation.

The hearing court denied Mr. Phipps's suppression motion holding, inter alia, that defendant lacked standing to contest officers' seizure and subsequent search of the bags and their contents that had been "abandoned".

At trial, the People contended that the bags contained the complainant's money and items that Mr. Phipps used during an attempted robbery, after which he jumped from a third-story window with the bags, leading to his leg injuries. He then crawled away with the bags to between two cars, where police and EMTs found him and was treated.

The Appellate Arguments and Appellate Division Decision

The Supreme Court, Appellate Division, Second Department, held that defendant lacked standing to contest officers' seizure and subsequent search of the bags, affirming the lower court's decision.

On appeal, Mr. Phipps argued, inter alia, that the People failed to meet their burden to prove that he voluntarily and intentionally divested ownership or took affirmative actions to dispose of the bags next to him when no evidence was adduced that he purposefully divested himself of possession (Appellant's Brief, Point I).

The People countered that, even though Mr. Phipps was incoherent while being treated for leg injuries, he was nonetheless required to take the bags with him to the hospital or tell EMTs and police officers to take the bags for him to retain an expectation of privacy in them (Respondent's Brief, Point One)— which is not indicative or affirmative action of an intent to purposefully divest himself of bags, nor disclaimed ownership of the bags officer Wu attributed to him.

The Appellate Division found that "the evidence at the suppression hearing established that the bags had been abandoned by the defendant" (Decision at 1, citing

People v. Ramirez-Portoreal, 88 N.Y.2d 99, 108 [1996];
People v. White, 153 A.D.3d 1369 [2d Dep't 2017];
People v. Brown, 52 A.D.3d 943, 945-46 [3d Dep't 2008];
People v. Oliver, 39 A.D.3d 880, 880-81 [2d Dep't 2007]).

See, People v. Phipps, 168 A.D.3d at 468.

Court Threatens to Gag Defendant for Making Objections At Trial

Mr. Phipps waived his right to an attorney and represented himself Pro se at trial,was not disruptive during trial and apologized to the court often when objections were sustained to his questioning of witnesses.

During Mr. Phipps's cross-examination of Sgt. Wu, the court sustained objections to his questions whether it was police procedure to receive calls for backup assistance by cell phone as opposed through a police dispatcher, what he had heard about the reported incident, and about details of the police search following the incident.

Mr. Phipps then argued that the prosecutor's objections were improper because his questions were relevant to his defense and to impeach Wu with his hearing testimony.

When Mr. Phipps requested to question Wu about his testimony concerning his receiving a request for "backup" officer needs assistance from Wu's supervisor Sgt. Bennett through a cell phone and not dispatch, the court responded that it had told the defendant "from the beginning" that he was better off having an attorney represent him and that he

would not allow defendant to discuss the propriety of whether or not it was police procedure since it was not a proper legal argument. When defendant attempted to object and explain his argument to the court, the court interrupted him:

> THE DEFENDANT: Your Honor, but the only issue I was raising --
>
> THE COURT: I'm not going to let you say anything about that.
>
> THE DEFENDANT: I'm not being allowed to ask the questions.
>
> THE COURT: If you keep talking, I'm going to have you either removed from the courtroom or gagged. Your choice.

The Pro se defendant did not respond after the court's threat to forfeit defendant's right to self-representation by either gagging or removing Mr. Phipps for making objections or what the court deemed nonmeritorious argument.

During the continued cross-examination of Wu, Mr. Phipps never made any further arguments when objections were sustained regarding his questions.

The Appellate Arguments and Appellate Division Decision

On appeal, Mr. Phipps argued that he was deprived of his right to self-representation when the court threatened to gag him or remove him from the courtroom for making objections even though he was representing himself pro se and was not

being disruptive to the proceedings (Appellant's Brief, Point II).

The People argued that the Pro se defendant was required to object to the trial court's threat to gag or remove him if he said another word to preserve for appeal the issue that the court's threat was error, and that the threat was nonetheless proper because the pro se defendant asked irrelevant or repetitive questions to a witness (Respondent's Brief, Point Two).

The Appellate Division found that the trial court's threat to gag or remove defendant from courtroom was unpreserved and that the court's threat made outside presence of jury had been in furtherance of maintaining order and decorum in the courtroom and did not prejudice the defendant's ability to represent himself (Decision at 2).

Court Accepts Pro Se Defendant's Waiver to Be Interviewed By the Probation Department Without Informing Him About the Purpose of the Presentence Report

After Mr. Phipps was convicted at trial and before sentencing, probation officials failed to interview him for the presentence report because the video conference room at Rikers Island could not accommodate his wheelchair. At sentencing, the court offered to either adjourn sentencing for a probation interview or have Mr. Phipps waive the interview and instead tell the court during sentencing anything he would have told probation. Mr. Phipps, who still represented himself pro se at sentencing, agreed to waive his right to

talk to probation. The court did not tell him about the information typically elicited from a probation interview, including possible mitigating factors for sentencing.

Mr. Phipps did not provide any information about his personal background, family, education, physical and mental health, or other possible mitigating circumstances, and the court did not inquire about any such information. The pro se defendant only made legal arguments that he was deprived of a fair trial because he was not permitted to call defense witnesses and not provided timely discovery. The court stated that Mr. Phipps's statements confirmed he would have been "much better off" with attorney representation and found his arguments deficient.

The court sentenced Mr. Phipps to, inter alia, the maximum sentence of 15 years in prison and 5 years of postrelease supervision on the top count of attempted first-degree robbery conviction.

The Appellate Arguments and Appellate Division Decision

On appeal, Mr. Phipps argued that the case should be remanded for resentencing because the probation department failed to interview him prior to sentencing and he did not validly waive his right to the interview (Appellant's Brief, Point V). The People summarily claimed that the defendant validly waived his right to be interviewed by the probation department (Respondent's Brief, Point Five).

Regarding the probation interview, the Appellate Division found that "[t]he defendant expressly waived any objection to not being interviewed by the Department of Probation prior to being sentenced, and therefore, his

contention that the matter should be remitted for resentencing after a Department of Probation interview is beyond the scope of appellate review" (Decision at 2, citing People v. Lopez, 6 N.Y.3d 248, 255 [2006]; People v. Chavis, 91 N.Y.2d 500, 506 [1998]).

Mode of Proceedings Error that Deprived Defendant Due Process By Threatening to Penalize Prospective Jurors for Lack of English Speaking Proficiency

At the beginning of jury selection, the court announced before entire jury venire that any prospective juror who would assert a lack of language proficiency as a ground to be excused from jury service would "not get paid today" and "may have to take a course on English again. You are all American citizens and should know how to speak English" (15).

The Appellate Arguments and Appellate Division Decision

On appeal, Mr. Phipps argued that there is no provision in the Criminal Procedure Law, Judiciary Law, or any other applicable statute that affects the organization of jurors that allows a court to penalize prospective jurors who are excused for lack of English proficiency by withholding their duty pay or ordering them to take language courses. Nor could the court have reasonably thought it had such authority. See Judiciary Law sec. 524 (setting forth pay schedule for jurors without including any English proficiency requirement) (Appellant's Brief, Point IV).

The People argued that the court's announcement during jury selection to the entire panel of prospective jurors did not deny defendant a fair trial and to preserve a challenge to the court's conduct during jury selection defendant must object to the court's alleged error (Respondent's Brief, Point Four).

The Appellate Division found that the defendant failed to preserve for appellate review his contention that he was deprived of a fair trial by the lower court's improper comment to prospective jurors during voir dire and that such did not constitute a mode of proceedings error exempt from the rules of preservation (Decision at 2).

REASONS FOR GRANTING THE PETITION

Suppression

Certiorari should be granted and it is important for the Court to exercise its discretionary jurisdiction to decide the questions involved because: a) the decision of the lower courts is in conflict with the decisions of other appellate courts; and, b) this case presents significant privacy concerns for anyone who requires emergency medical treatment within a public place, where the lower court held, that a person who is being treated on a street for severe leg injuries, is incoherent, and is taken to a hospital by ambulance without their property loses his right against state search and seizure, or otherwise lacks standing to challenge search of his property left on the street.

Granting a writ of certiorari in this case will allow this court to address the minimum threshold of evidence required for a citizen to retain an expectation of privacy in them.

Whether or not a person who is being treated on a street by EMTs, is incoherent, and is taken to a hospital by ambulance— though officers present on scene believe bags containing property belong to person treated— loses his or her right against search and seizure of property left on the street and does such person(s) lack standing to challenge object searched is not only of importance to petitioner's case, but to others similarly situated.

The hearing evidence showed that police and medical personnel found Mr. Phipps on the street next to the bags, yelling and moaning incoherently in pain with two severely injured legs and twisted ankles. There was absolutely no evidence presented that Mr. Phipps disclaimed ownership of

the bags, neither tried to discard them, nor that he affirmatively tried to distance himself from them and thus possessed standing to challenge the police search and seizure of bags which police whom escorted him inside ambulance along with EMTs failed to bring with Mr. Phipps.

The evidence showed that the police and EMTs placed Mr. Phipps into 1) an ambulance without the bags; and, 2) without notifying him that they would not bring the bags, as a patient treated for a medical emergency would expect police and EMTs to do.

On appeal, the People did not argue that defendant had taken affirmative action in purposeful divestment of possession of the bags. Instead, the People argued that petitioner who is being treated on a street for severe leg injuries, is incoherent, and is taken to a hospital by police and EMTs is required to take actions to maintain his expectation of privacy in the bags by either physically taking the bags with him into the ambulance when EMTs and officers place him there and escort him to a hospital or by telling officers and EMTs to bring the bags (People's Brief at 27, 30).

In the instant case, the Appellate Division's decision here thus appears to be the first time that a court has found that the People can meet their burden to prove abandonment based on a defendant's omission, rather than by presenting affirmative evidence of a purposeful divestment of property. In other words, the Appellate Division has developed a rule that essentially shifts the burden to a defendant to prove that he or she did not relinquish his or her property. The ruling raises serious privacy concerns in similar common situations when a person is taken away from his or her property by a third person. For instance, anyone who is

taken by emergency medical personnel from a public place to a hospital via ambulance without explicitly telling the medical personnel to bring his or her property, would now be deemed under the decision to have abandoned any property left at the public place—— even if the medical emergency for which the person is being treated renders him or her too incoherent to make such a request.

Police officers could also use the ruling as a shield against Fourth Amendment scrutiny. Officers who arrest a suspect holding a bag in a public place could bring the suspect to the police precinct without the bag, it would be considered abandoned and the officers therefore could search and seize the bag without any Fourth Amendment scrutiny. These privacy concerns thus provide another important reason for this Court to grant certiorari.

Decision of The Court Conflicts with Other Appellate Decisions

The decision of the Appellate Division which decided the the appeal is in conflict with the decisions of other appellate decisions. "It becomes the People's burden to demonstrate that defendant's action in discarding the property searched, if that is the fact, was a voluntary and intentional act constituting a waiver of the legitimate expectation of privacy." Ramirez-Portoreal, 88 N.Y.2d at 108 (citing People v. Howard, 50 N.Y.2d 583, 593 [1980]). "Property is deemed abandoned when the expectation of privacy in the object or place searched has been given up by voluntarily and knowingly discarding the property." Ramirez-Portoreal, 88 N.Y.2d at 110. A defendant's intention to relinquish an expectation of privacy in an item "will be found if the circumstances reveal a purposeful divestment of possession of the item searched." Id. A defendant is presumed not to waive

constitutional rights and the People therefore bear the burden to establish a defendant's waiver of his privacy rights. Id.; Howard, 50 N.Y.2d at 593.

Accordingly, to find that a defendant has abandoned property, courts have required the People to present evidence that he or she took affirmative actions demonstrating a purposeful divestment of possession of the property. See People v. Vega, 256 A.D.2d 730, 731 (3d Dep't 1998) (Defendant could not be found to have abandoned bag when "defendant took no affirmative action indicative of an intent to purposefully divest himself of the bag").

For instance, courts have found property abandoned when a defendant has disclaimed ownership of the property. See e.g., People v. Nobles, 63 A.D.3d 528 (1st Dep't 2009); People v. Ross, 106 A.D.3d 1194 (3d Dep't 2013); People v. Anderson, 268 A.D.2d 228 (1st Dep't 2000); People v. Gabriel, 264 A.D.2d 641, 642 (1st Dep't 1999); People v. Morales, 243 A.D.2d 391 (1st Dep't 1997).

Courts have also found property abandoned when a defendant's actions indicate his or her intent to discard or dispose of the item, such as by throwing or placing an item into a public area. The Appellate court's decision in petitioner's case is thus in conflict with same issue in other cases. See e.g., People v. Swain, 168 A.D.3d 1130 (3d Dep't 2019); People v. Febo, 167 A.D.3d 451, 452 (1st Dep't 2018); People v. Gregory, 163 A.D.3d 847, 848 (2d Dep't 2018); People v. Baldwin, 156 A.D.3d 1356, 1357 (4th Dep't 2017); People v. Robinson, 151 A.D.3d 1851, 1852 (4th Dep't 2017);

People v. Hill, 151 A.D.3d 479, 481 (1st Dep't 2017);
People v. Brown, 148 A.D.3d 1562, 1563 (4th Dep't 2017);
People v. Jiminez, 147 A.D.3d 496, 497 (1st Dep't 2017);
People v. Rozier, 143 A.D.3d 1258, 1259 (1st Dep't 2016);
People v. Brown, 142 A.D.3d 1373, 1374-75 (4th Dep't 2016);
People v. Corona, 142 A.D.3d 889 (1st Dep't 2016);
People v. Feliciano, 140 A.D.3d 1776, 1777 (4th Dep't 2016);
People v. Coleman, 125 A.D.3d 879 (2d Dep't 2015);
People v. McNally, 89 A.D.2d 971, (2d Dep't 1982).

Arguably, courts have found evidence of abandonment when a defendant has taken affirmative actions to distance himself or herself from the property. See People v. Kelly, 132 A.D.3d 437, 438 (1st Dep't 2015) (placed bag on store countertop and walked away toward store exit); People v. Delosanto, 276 A.D.2d 366 (1st Dep't 2000) (placed backpack on ground under station wagon parked in shopping center and walked two blocks away); People v. Green, 258 A.D.2d 531, 532 (2d Dep't 1999) (placed bag on ground and walked away from it when police approached); People v. Ferreras, 231 A.D.2d 471 (1st Dep't 1996) (stuffed bag behind video game in pool hall and walked away).

In the instant case (and in conflict with the foregoing decisions on same issue in other cases), the People presented no evidence that Mr. Phipps took any affirmative action to abandon or purposefully divest himself of the bags that were next to him. The People's theory that he jumped out of a window with the bags and crawled away with the bags between two cars where he was found by police and treated indicate that the intent to maintain possession is clear and not a divestment.

The People's contention that they could meet their burden of proving Mr. Phipps's lack of standing to challenge search and seizure of bags or otherwise abandonment by arguing that the burden to maintain that expectation of privacy was on the injured and incoherent defendant is at odds with well-established case law—and Appellate Division's affirmation is in conflict with other decisions on same issue—that requires the People to present some evidence of a defendant's affirmative act demonstrating a voluntary, knowing, and purposeful divestment of the property.

Each proposition on appeal, found evidence of abandonment based on a defendant's affirmative act indicating a divestment of possession. (People's Brief at 26-28, citing People v. Campbell, 155 A.D.3d 412 (1st Dep't 2017) (knowingly and voluntarily dropped coat while running from officer): People v. Milan, 145 A.D.3d 588 (1st Dep't 2016) (left bags on ground in public place and walked away in obvious effort to distance himself from bags); Brown, 52 A.D.3d at 943 (intentionally dropped items onto public sidewalk); Oliver, 39 A.D.3d at 881 (to avoid search by police, left knapsack on floor of crowded takeout restaurant and went outside to talk to police); People v. Perez, 301 A.D.2d 434 (1st Dep't 2003) (threw package while running from officer); People v. Butler, 293 A.D.2d 686 (2d Dep't 2002) (dropped key box when approached by officer); People v. Cummings, 291 A.D.2d 454 (2d Dep't 2002) (threw gun over fence and into bushes); People v. Silas, 220 A.D.2d 467 (2d Dep't 1995) (when police vehicle passed, placed object behind garbage dumpster on public sidewalk and walked away); People v. Marrero, 173 A.D.2d 244 (1st Dep't 1991) (threw bag down staircase).

And, each of the cases cited by the Appellate Division in its decision dated January 16, 2019 also involved affirmative acts of divestment of possession by the respective

defendants. See White, 153 A.D.3d at 1369 (threw bag to ground and jogged away); Brown, 52 A.D.3d at 945-46 (intentionally dropped items onto public sidewalk); Oliver, 39 A.D.3d at 880-881 (to avoid search by police, left knapsack on floor of crowded takeout restaurant and went outside to talk to police).

Court's Threat to Gag or Remove Defendant

A defendant's right to self-representation encompasses specific rights to have his voice heard. McKaskle v. Wiggins, 465 U.S. 168, 174 (1984). "The Pro se defendant must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial." Id.

Certiorari should also be granted in this case to allow this Court to inform lower courts about how to properly treat Pro se defendant's at trial, including whether threats of gagging or removal are ever appropriate when the Pro se defendant merely makes supposedly nonmeritorious arguments, and whether a court can forfeit defendant's right to self-representation without properly according a defendant opportunity to explain those arguments that affect due process right to be heard.

This case also raises important questions of national importance because the trial court's threat to gag or remove was merely because the court disagreed with defendant's legal arguments and not because Mr. Phipps who proceeded Pro se had been disruptive whatsoever during trial, but rather for making objections.

Moreover, the conduct of the lower court and the ruling of the Appellate Division in this case is in conflict with the decision of the New York Court of Appeals where it held that a pro se defendant may only forfeit the right of self-representation by "engaging in disruptive or obstreporous conduct" which is "calculated to undermine, upset or unreasonably delay the progress of the trial." See People v. McIntyre, 36 N.Y.2d 10, 18 (1974).

In the instant case, the record shows that defendant had not conducted inquiry or objected before the court in a manner that would justify forfeiture or a threat of forfeiture of his right to self-representation. On direct examination, Wu testified he was on patrol, in uniform, inside a marked patrol car, and received a call from Bennett "officer needs assistance," and immediately went to the location, met with Bennett and other officers on the third floor.

On cross-examination, Wu admitted that the call he responded to was received over a cell phone and was not from a transmission over a police radio. Whether a court feels that a "legal argument" is outside the "scope" or latitude in controversy, the proper procedure for a court is to conduct a dispassionate inquiry into the pertinent facts and hear arguments from both sides prior to its issuing a ruling.

Here, the court threatened to gag or remove defendant without according defendant latitude to be heard without eliciting the information which might have warranted the foundation necessary to introduce Bennett as a defense witness (Tr. August 31, 2015 at 562-73).

The Appellate Division ruled that Mr. Phipps's failure to object to the court's threat that he would be gagged or removed if he said another word was unpreserved. The Appellate court therefore found that the Pro se defendant was required to risk being gagged or removed from the courtroom, thereby losing his right to present a defense, by objecting to preserve the issue on appeal.

The Appellate Division's ruling appears contrary to the New York State Court of Appeals rulings that do not mandate such an extreme result under the preservation requirement. See People v. Resek, 3 N.Y.3d 385, 388 n.1 (2004) ("we will not impose a preservation rule so extreme that defendant, to succeed, would have to antagonize the court or test its patience even further. Such a rule would do nothing to advance the objectives of our preservation doctrine"); People v. Mezon, 80 N.Y.2d 155, 160-61 (1992) ("the law does not require litigants to make repeated pointless protests after the court has made its position clear").

Thus, it is important for this Court to exercise its discretionary jurisdiction to decide whether a pro se defendant who is threatened with being gagged or removed from a courtroom if he says another word must nevertheless make an objection, and risk being gagged or removed, to preserve that claim on appeal.

The Appellate Division alternatively ruled that the trial court's threat to gag or remove the defendant was proper to "maintain [] order and decorum in the courtroom and did not prejudice the defendant's ability to represent himself" (Decision at 2). But Mr. Phipps was not disruptive

at trial and indeed requested to discuss his arguments outside the presence of the jury to avoid any disruption. And as the trial transcript shows, and the People did not argue on appeal, the defendant was not disruptive at trial or in presenting his arguments. Instead, the transcript indicates that the court threatened the defendant with removal or gagging merely because it did not agree with his arguments and was frustrated that he proceeded to trial pro se:

> THE COURT: No. No. This is not a legal argument. This is an argument where, from the beginning, I told you that you were better off having an attorney represent you than yourself.

(Tr. September 1, 2015 at 646).

Although the typical defendant pro se may lack certain legal skills, mere ignorance of the law cannot vitiate a "forfeiture" of constitutional right of self-representation as long as a defendant is not abusive before the court in any way. Consequently, where there is a pro se defense, for a court to threaten to gag or remove a defendant from proceedings merely because of a "legal argument" is so unfair as to deny him due process and does not serve the image of justice,

The threshold issue presented for certiorari is the nature and extreme to what extent a lower court may threaten a defendant in a manner inconsistent with Fedeereal and State constitutional safeguards. The right to pro se was codified in the Judiciary Act of 1789 (Ch. 20, s 35, 1 U.S. Stat. 73, 92) and contained in the United States Code (tit. 28, s 1654). The New York Constitution and criminal procedure statute

clearly recognize this right (N.Y. Const. Art. 1, sec. 6; and the United States Supreme Court as has the New York State Court of Appeals repeatedly acknowledged a defendant's right to conduct his own defense (See, People v. Bodie, 16 N.Y.2d 275; People v. Koch, 299 N.Y. 378; People v. McLaughlin, 291 N.Y. 480; People v. Price, 262 N.Y. 410).

The United States Supreme Court has never ruled that a defendant in a criminal case may forfeit the right to defend pro se by making objections before the trial court. Moreover, the NYS Court of Appeals has never ruled that a defendant can be removed or gagged merely for making supposedly nonmeritorious arguments. Inasmuch, the New York Court of Appeals, instead, has required a much higher threshold for removal. See People v. Johnson, 37 N.Y.2d 778 (1975) (defendant waived right to be present at trial by turning over table, lying on floor during witness testimony and repeatedly requesting to leave courtroom); People v. Byrnes, 33 N.Y.2d 343, 349-50 (1974) (defendant's exclusion from courtroom warranted by profane and abusive outbursts, including leaping onto table and lunging at witness in an assaultive manner).

This case thus presents another critical question of national importance: whether a trial court may threaten to gag or remove from the courtroom a Pro se defendant merely for making what the court considers misguided arguments, but who has not been disruptive or disorderly.

In the instant case, the Appellate Division's decision appears to be the first time that a court has found that a lower court who disagrees with a pro se defendant's "legal argument" may remove defendant acting as own counsel or threaten to do so inasmuch as such constitutes grounds under "maintaining order and decorum in the courtroom..."

Under such a ruling, lower courts who now find pro se litigants arguments deficient, misguided, or simply lacking certain legal skills may deem it appropriate to forfeit or threaten to forfeit the right to self-representation without concern of a defendant's Sixth and Fourteenth Amendment right under a banner of "maintaining order and decorum in the courtroom."

The Appellate Division's affirmation implicates a right of constitutional dimension that goes to the heart of the criminal justice process. The United States Supreme Court has previously ruled that a right to pro se is correlative of the Sixth Amendment right to counsel. Adams v. United States ex rel. McCann, 317 U.S. 269; See, e.g., United States v. Plattner, 2 Cir., 330 F.2d 271 (right to pro se implicit in Sixth Amendment rights and protected under the liberty clause of the Fifth Amendment due process); United States ex rel. Maldonado v. Denno, 2 Cir., 348 F.2d 12 (Sixth Amendment and Fifth Amendment due process right to essential fairness).

In petitioner's case, the instant the lower court threatened to gag or remove him from courtroom implicated liberty clause of Fifth Amendment due process and trammeled defendant's right of self-representation creating a condition whereby "forfeiture" of defendant's constitutional right to appear before the court pro se throughout remainder of proceedings hinged upon not objecting to, arguing before the court, nor arousing the trial Judge's displeasure.

As argued above, the pro se defendant should not be required to have risked gagging or removal from the courtroom to preserve his argument that the trial court violated his right to self- representation through those threats.

The trial transcript of the Pro se defendant's cross-examination of Sgt. Wu and the court's subsequent threat to gag or remove him from the court are located at 613-47 September 1, 2015 Tr.

Court Accepts Pro Se Defendant's Waiver to Be Interviewed By the Probation Department Without Informing Him About the Purpose of the Presentence Report

This Court should also grant certiorari in this case to determine the question of whether a defendant, representing himself pro se, can validly waive his right to be interviewed by the Probation Department before sentencing if the court fails to inform the defendant of the purposes of the interview, including that mitigating factors could be adduced that could lead to a lower sentence.

The New York Court of Appeals has consistently held that when a defendant waives a right, a court must ensure that he or she does so knowingly, voluntarily, and intelligently. See People v. Bradshaw, 18 N.Y.3d 257, 264-65 (2011) (waiver of right to appeal is effective only if the record demonstrates that it was made knowingly, intelligently, and voluntarily, i.e., the defendant has a full appreciation of the consequences of the waiver); People v. Smith, 6 N.Y.3d 827 (2006) (for waiver of jury trial to be valid, court must conduct inquiry establishing that defendant understood ramifications of waiver); Lopez, 6 N.Y.3d at 256 (waiver of right to appeal effective only if the record demonstrates that it was made knowingly, intelligently, and voluntarily); People v. Arroyo, 98 N.Y.2d 101, 103-04 (2002) (for waiver of right to be represented by attorney to be valid, court must undertake searching inquiry informing defendant of

dangers and disadvantages of self-representation and delve into defendant's background to determine whether waiver is competent, intelligent, and voluntary).

Here, the sentencing court failed to either inform the pro se defendant about the purpose of the probation report or determine whether Mr. Phipps was aware of the ramifications of waiving his right to a probation interview. Instead, the court merely told Mr. Phipps that he could waive his right to the interview by telling the court at sentencing what he would have told probation. But the court never told Mr. Phipps that the purpose of the report is "to provide the court with the best available information upon which to render an individualized sentence," People v. Perry, 36 N.Y.2d 114, 120 (1975), and that the information adduced from a probation interview about his background, such as his social history, family situation, economic status, education, personal habits, and physical and mental health, could be the basis for issuing a lesser sentence.

During sentencing, Mr. Phipps demonstrated that he did not know the purpose of the probation report or of the proper arguments to make at sentencing when he raised only legal arguments. The court observed the pro se defendant's error and could have informed him about the purpose of the probation report, asked him questions about his background that would have been done during a probation interview, or informed him about proper arguments to make at sentencing. But instead, the court told him that his arguments were deficient, criticized him for proceeding to trial pro se, and sentenced him to the maximum sentence on the top count.

This Court should thus grant certiorari because it is important to show not only in this case but others similarly situated whether a court may accept a pro se defendant's waiver of a probation interview before sentencing without explaining those rights to a defendant, or determining whether the waiver is made knowingly, intelligently, and voluntarily.

The statute regarding presentence reports specifically enumerates the situations in which a presentence report may be waived. See CPL 390.20 (4) (presentence report may only be waived for sentence of time served, probation, or conditional discharge, when a report had been prepared in the preceding twelve months, or a sentence of probation is revoked, but shall not be waived if and indeterminate or determinate sentence of imprisonment is imposed). None of those circumstances were present here for Mr. Phipps's waiver of the probation interview, which is a crucial part of the report.

This Court should also grant certiorari to determine whether a defendant may waive the crucial probation interview portion of the report under circumstances not enumerated under CPL 390.20 (4).

The petitioner's claim that he did not knowingly, intelligently, and voluntarily waive his right to a probation interview was not subject to preservation requirements since the sentencing court never informed him of the purpose of the interview before accepting the waiver, and the defendant therefore had no practical ability to object to the court's error of which he was not aware. See

People v. Turner, 24 N.Y.3d 254, 258 (2014) ("A defendant cannot be expected to object to a constitutional deprivation of which she is unaware"); People v. Peque, 22 N.Y.3d 168, 182 (2013) ("Where a defendant has no practical ability to object to an error in a plea allocution which is clear from the face of the record preservation is not required").

The Appellate Division found that the issue is beyond the scope of appellate review, and therefore, the importance of the question(s) raised should be decided by this Court as this case would allow this Court to inform lower courts whether the lower court can have a pro se defendant waive rights that could affect his sentence without properly explaining those rights, and under circumstances not enumerated under CPL 390.20 (4).

Mode of Proceedings Error that Deprived Defendant Due Process By Threatening to Penalize Prospective Jurors for Lack of English Speaking Proficiency

Certiorari should be granted by this Court as this case also raises important issues regarding a trial court's prerogative in mandating rules affecting juror organization not expressly enacted by judiciary law to the extent that such may regulate jury selection process in a way that taints prospective jurors from coming forward candidly about relevant matters and thus threatens constitutional right to a fair and impartial jury.

This question presents an ideal scenario for the United States Supreme Court to provide guidance on the minimum threshold a lower court may be required to use in order to induce prospective juror participation.

In petitioner's case, by discouraging prospective jurors from coming forward about their lack of English proficiency, the court prejudiced defendant's right to a fair trial by a fair and impartial jury by limiting prospective jurors who sought to be excused from jury service on grounds of language difficulty whether asserted as mere pretext for lack of desire to serve or due to limited language comprehension from candidly notifying the court, in effect would limit the ability to assess jurors' bias as well as qualifications.

The court's announcement threatening to penalize prospective jurors seeking to be excused from jury duty on grounds of lack of English proficiency was a substantial departure from jury selection procedure, affecting honesty and frankness of jurors' responses thereby affecting the essential validity of selection process.

The court's announcement deviated from the mode of proceedings prescribed by CPL 270.15 in a manner that fundamentally undermined the purpose of voir dire, and violated due process by creating a situation in which appellant might have been tried by a jury that included persons who were unqualified to serve. See U.S. Const., Amends. VI, XIV; N.Y. Const., Art. 1, Secs. 2, 6; CPL sec. 270.15.

The question before the U.S. Supreme Court thus becomes whether a lower court may penalize prospective jurors for a lack of English proficiency by threatening to withhold their duty pay and ordering them to take language courses, of which enrollment was not optional, creating a conflict and additional burden of expense(s) and time management for any one claiming difficulty with language comprehension.

Comments such as those made by a court to entire jury venire establishes in the minds of potential jurors the full force and effect of established law.

In People v. Mason, 132 A.D.3d 777, 779 (2d Dep't 2015), leave was pending before the Court of Appeals regarding review of a decision by Appellate Division which found that comments such as those made by a trial court to potential jurors are not mode of proceedings errors exempt from rules of preservation. In Mason, the Court of Appeals of New York granted defendant leave to appeal, however, it was subsequently dismissed as a result of appellant's death. See Mason, 26 N.Y.3d 1147 (2016); see also, Mason, 29 N.Y.3d 972 (2017).

Since Mason was not decided by the higher court, and in light of the aforestated, petitioner's question here presents the possibility of prejudice relevant to the degree of jury selection of which its determination by a higher court should be granted certiorari in light of the severe prejudice that such comments may have on the entire venire's honesty and the court's ability to assess jurors' qualifications. Because "part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors," See Morgan v. Illinois, 504 U.S. 719, 729 (1992).

The court's actions in its exercise of discretion regulated the jury selection process in a way that tainted honesty and frankness in juror responses. The Court of Appeals has previously held that a trial court may not exercise its discretion to regulate the jury selection process in a way that strips the parties of a "fair opportunity to question prospective jurors about relevant matters." People v. Jean, 75 N.Y.2d 744, 745 (1989). Rather, the court "should encourage honesty and frankness in a juror's responses without seeming to place a value or reward on a 'correct' or 'appropriate' answer." People v. Harris, 98 N.Y.2d 452, 481 (2002).

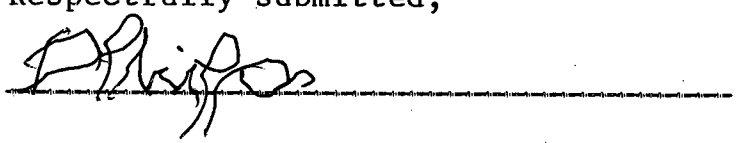
Contrary to these principles, the court's misstatements of law in the instant case here strongly encouraged jurors to lie about their bias and about their ability or comprehension level to the court. Whether a juror sought to hide any bias by using language proficiency as an excuse from jury duty or in fact had limited English comprehension levels, either would remain unknown under circumstances created by the court's announcement, affecting the essential validity of the selection procedure, substantially departing from the jury selection procedure mandated by law, and was so fundamental that the entire trial was irreparably tainted. People v. Silva, 24 N.Y.3d 294, 299 (2014); People v. Mehmedi, 69 N.Y.2d 759, 760 (1987) (when a defendant is deprived of a properly conducted trial in a matter as significant as the proper composition of the jury, there is a question of law that the court should review). See, People v. Patterson, 39 N.Y.2d 288, 296 (1976), aff'd Patterson v. New York, 432 U.S. 197 (1977).

Moreover, the court's error is not subject to harmless error analysis because it deprived defendant of his constitutional right to a trial by a particular jury chosen according to law. See People v. Buford, 69 N.Y.2d 290, 297-98 (1987); People v. Anderson, 70 N.Y.2d 729, 730-31 (1987).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: May 15, 2019