APPENDIX

1) ORDER OF U.S. SUPREME COURT GRANTING EXTENSION TO FILE WRIT OF CERTIORARI

2) ORDER OF N.Y. SUPREME COURT DECISION/SECOND CPL 440.10 MOTION

3) ORDER OF U.S. DISTRICT DECISION FOR WRIT OF HABEUS CORPUS

4) ORDER OF N.Y. SUPREME COURT DECISION/FIRST CPL 440.10 MOTION

5) ORDER OF N.Y. SUPREME COURT/APPELLATE DIVISION DENYING LEAVE TO APPEAL

6) ORDER OF N.Y. SUPREME COURT/COURT OF APPEALS DENYING LEAVE TO APPEAL AND RECONSIDERATION

7) ORDER OF N.Y. SUPREME COURT/APPELLATE DIVISION AFFIRMING AND DENYING REARGUMENT

8) MEDICAL RECORDS OF COMPLAINANT DONALD BRADLEY

9) AFFIDAVIT OF MARLY SENAT

10) NEW YORK LAW JOURNAL ARTICLE

11) U.S. CONSTITUTION FOURTEENTH AND SIXTH AMENDMENTS

12) N.Y. CONSTITUTION ARTICLE ONE AND ARTICLE SIX

APPENDIX

13) NEW YORK CONTEMPORANEOUS OBJECTION RULE

14) NEW YORK CPL 470.05

15) NEW YORK CPL 470.15

16) NEW YORK CPL 200.20

17) NEW YORK CPL 210.25

APPENDIX (3)

U.S. DISTRICT COURT DECISION FOR WRIT OF HABEUS CORPUS

U.S. COURT OF APPEALS ORDER DENYING CERTIFICATE FOR APPEALABILITY

E.D.N.Y. – Bklyn
20-cv-9
Chen, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 13th day of March, two thousand twenty-four.

Present:

Robert D. Sack,
William J. Nardini,
Myrna Pérez,
Circuit Judges.

Andrew Fields,

Petitioner-Appellant,

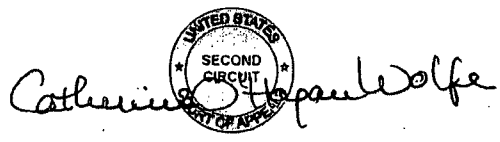
v. 23-7349

N.Y.S.D.O.C.C.S.,

Respondent-Appellee.

Appellant, pro se, moves for a certificate of appealability and in forma pauperis status. Upon due consideration, it is hereby ORDERED that a certificate of appealability is DENIED because Appellant has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c); *see Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). The motion for in forma pauperis status is DENIED as unnecessary. Fed. R. App. P. 24(a)(3).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



Appeal Filed by Fields v. N.Y.S.D.O.C.C.S., 2nd Cir., October 13, 2023
2023 WL 6292479
Only the Westlaw citation is currently available.
United States District Court, E.D. New York.

Andrew FIELDS, Petitioner,

v.

N.Y.S.D.O.C.C.S., Respondent.

20-CV-00009 (PKC)

Signed September 27, **2023**

Attorneys and Law Firms

Andrew Fields, Albion, NY, Pro Se.

Margaret Ann Cieprisz, **NYS** Office of Attorney General, New York, NY, New York State Attorney Generals Office, Queens County District Attorneys Office, for Respondent.

MEMORANDUM & ORDER

PAMELA K CHEN, United States District Judge:

*1 Before the Court is Petitioner **Andrew Fields's** petition, which he brings *pro se*, for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254. For the reasons stated below, the petition is denied.

BACKGROUND [1]

I. Factual Background

A. Petitioner's August 30, 2013 Arrest

On August 30, 2013, Donald Bradley ("Bradley") walked into an apartment building at 106-35 159th Street in Queens County, New York to visit his friend Bobby Garcia ("Garcia"). (Transcript ("Tr."), [2] Dkt. 31-2, at 578:16–579:2.) In the hall of Garcia's apartment building, Petitioner and Marly Senat ("Senat") who had entered the building minutes before Bradley (Tr. 606:5–608:22), approached Bradley from behind, punched Bradley in the face, and put him into a headlock. (Tr. 582–86.) While Petitioner was holding Bradley in a headlock, Senat approached Bradley, told him to "shut up," and hit him in the face. (Tr. 586:5–25.) Senat then showed a gun to Bradley, and Bradley stopped struggling. (Tr. 587:3–4, 22–23.) Shortly thereafter, Petitioner tightened his headlock on Bradley; as Bradley lost consciousness, Petitioner and Senat rummaged through his pockets. (Tr. 587:24–588:6.) When Bradley came to, his cell phone, car keys, wallet and approximately $1,160 in cash were missing from his person. (Tr. 588:20–589:4.)

"[M]aybe a couple of days afterward," Bradley called his uncle, New York City Police Department ("NYPD") Chief Phillip Banks, a high-ranking member of the NYPD, to report the incident. (Tr. 590:21–591:23.) About a week later, Bradley filed an official complaint with the NYPD. (Tr. 592:7–592:19.) On September 17, 2013, NYPD officers attempted to pull Petitioner and Senat over for driving a stolen Toyota Sienna minivan down Guy R. Brewer Boulevard in Queens, New York; Petitioner, who was driving when the officers approached him, sped away and crashed the vehicle. (Tr. 802–809.) Senat was unable to flee because the passenger door was stuck; Petitioner ran from the car, but was soon apprehended. (Tr. 809:14–813.) A loaded revolver was recovered from the vehicle. (Tr. 812:12–20.) Later that day, Bradley identified Petitioner and Senat in two separate police line-ups as the individuals who had robbed him on August 30, 2013. (Tr. 595:18–597:11.)

Petitioner and Senat were arrested on two sets of charges, one relating to the August 30, 2013 armed robbery of Bradley and the other relating to Petitioner's and Senat's September 17, 2013 attempt to flee and avoid being stopped and arrested by the police. (State Court Record ("Record"), [3] at ECF [4] 213–14.) Both sets of charges were later joined in a single indictment, Indictment Number 2916/13, returned against Petitioner and Senat on December 5, 2013. (*Id.* at ECF 212–14.)

B. Petitioner's Severance Motions

*2 Prior to trial, Petitioner moved to sever trial with respect to his two sets of charges based on his August 30, 2013 and September 17, 2013 arrests. (*Id.* at ECF 214.) Petitioner argued, in sum and substance, that the two incidents were entirely separate and distinct "criminal transactions" under C.P.L. § 40.10(2), and that a single trial on both sets of charges "misled the Grand Jury into speculating that" the same gun recovered on September 17 was also used in the robbery on August 30, or that the "Grand Jury [was] improperly [led to] conclude criminal propensity rather than considering the evidence separately for each of the criminal transactions." (*Id.* at ECF 214, 217.) The Honorable Marcia P. Hirsch of the Queens County Supreme Court denied Petitioner's motion,

finding that the charges were properly joined pursuant to C.P.L. § 200.20[2][b]. (*Id.* at ECF 233.)

C. State Court Trial

Petitioner's and Senat's jury trial began on April 28, 2015 and ended May 18, 2015. (Tr. 2.) Donald Bradley testified extensively as to the events of August 30, 2013, including that Senat showed him a "chrome and black" gun during his robbery (Tr. 587:18–19), and about identifying Petitioner and Marly Senat in line-ups. (Tr. 577–99.) The prosecution also presented the testimony of Detective Richard McCarty regarding the investigation of the August 30, 2013 robbery, including the call he received from his former partner on September 17 and the subsequent line-up he conducted with Petitioner and Senat (Tr. 752–61), and video surveillance footage showing two men Bradley identified as Defendants entering and leaving the lobby, with Bradley walking out minutes later (Tr. 606–12). In addition, the prosecution introduced the testimony of NYPD Officers Derek Webber, who testified regarding the moment of Petitioner's arrest on September 17 (Tr. 741–47); Robert DeFerrari, an officer who pursued Defendants on September 17 before apprehending Senat and the loaded revolver from the stolen car (Tr. 800–19); Detective Dominic Cappiello, a firearms examiner in the Forensic Investigation Division, who testified that the recovered revolver was operable (Tr. 831–42); and the stolen car's owner (Tr. 737–41).

During Bradley's testimony and throughout the trial, the Honorable Ronald Hollie, the presiding Queens Supreme Court Justice, asked numerous questions of the witnesses. Justice Hollie asked Bradley to clarify who had asked Bradley for a cigarette before the incident (Tr. 580:13–16), whether Bradley had testified that **Fields** first punched Bradley in the face (Tr. 583:14–584:25), how Petitioner had approached Bradley, and who had held Bradley in a headlock (585:20–586:4). Justice Hollie also asked Bradley about various other details pertaining to the setting of the mugging (Tr. 583:14–584:25), about where Senat was standing when Bradley first saw him, and what Senat had said to Bradley. (Tr. 586:5–23.) In addition, the judge asked Bradley specific questions about what items were taken from him (Tr. 588:24–589:10), the circumstances surrounding Bradley's interactions with friends on the street before going to see Bobby Garcia (Tr. 593:25–595:16; 643:17–644:25), Bradley's knowledge of the video surveillance of the incident (Tr. 600:10–601:21; 609–12), and Bradley's disability and employment status (Tr. 619:5–621:16). The judge also asked questions of other witnesses, including Detective Richard McCarty regarding his conversations with Bradley before the line-ups and what Bradley told the detective about what items allegedly had been taken from him. (Tr. 770:6–773:13.)

Petitioner and Senat again moved at trial to sever the indictments. After Bradley and Detective McCarty testified, Petitioner moved for severance on grounds that "Det. McCarty made it clear that the complainant described the gun that was allegedly used in the alleged robbery as a semi automatic gun in all the paper work within this case," whereas the recovered gun was a revolver. (Tr. 798:7–799:3.) The Court denied the motion without explanation. (Tr. 799:4–5.) At the close of the prosecution's case, Petitioner argued that the Government's evidence regarding the gun used in the alleged robbery and the gun recovered from the stolen car were "descriptions of 2 different guns and 2 different firing mechanisms"—and since the firearm was the link between the incidents "there is no basis to join the case together." (Tr. 848:6–10.)

***3** Near the end of the trial, Petitioner's counsel asked the Court to give a "missing witness" instruction as to several witnesses: (1) Garcia, who "would have been in a position to testify as to [Bradley's] physical appearance and injuries or ... lack thereof" after the alleged robbery; (2) Bradley's mother and stepfather, who had brought Bradley an extra set of keys after the robbery and also would have been in a position to testify as to Bradley's injuries; and (3) Bradley's uncle, NYPD Chief Phillip Banks, who could have verified that Bradley contacted him about the August 30 robbery soon after it had occurred. (Tr. 878:23–879:13.) The Court rejected Petitioner's "missing witness" charge as to all potential witnesses. (Tr. 880:22–881:2.)

Petitioner was found guilty of Robbery in the First Degree (N.Y. Penal Law § 160.15(4)), two counts of Robbery in the Second Degree (N.Y. Penal Law § 160.10(1), (2)(a)), Strangulation in the Second Degree (N.Y. Penal Law § 121.12), two counts of Criminal Possession of a Weapon in the Second Degree (N.Y. Penal Law § 265.03(1)(b), (3)) and Criminal Possession of Stolen Property in the Fourth Degree (N.Y. Penal Law § 165.45(5)). (Tr. 1061–66.) Senat was convicted on the same charges. (Tr. 1061:23–1063:3.) On July 21, 2015, the trial court sentenced Petitioner to an aggregate sentence of 15 years in prison, to be followed by five years of post-release supervision. (Tr. 1086–1103.)

II. Procedural Background

A. Petitioner's Direct Appeal

In March 2017, Petitioner's post-conviction attorney filed a direct appeal with the Appellate Division, Second Department ("Appellate Division"). (Record, at ECF 1–46.) Petitioner raised three claims in his counseled brief: (1) the trial court conducted excessive and prejudicial questioning of trial witnesses, warranting a new trial; (2) the trial court abused its discretion when it denied the severance motions, and (3) the trial court abused its discretion when it failed to grant Petitioner's missing witness charge.[5] (*Id.* at ECF 6.) Petitioner also filed a *pro se* brief raising additional claims: (1) the medical evidence of Bradley's physical injury was insufficient to support conviction; and (2) the police sergeant who recognized Petitioner on surveillance video from the apartment building lobby where the August 30 robbery occurred did not testify at trial, which denied Petitioner his due process right to a fair trial and the right to confront his accuser, and (3) reiterating the severance argument. (Record, at ECF 47–61.)

On November 21, 2018, the Appellate Division affirmed Petitioner's convictions on all counts. *People v. **Fields***, 166 A.D.3d 897 (N.Y. App. Div. 2018). The New York Court of Appeals denied Petitioner's motion for leave to appeal on February 19, 2019, and denied Petitioner's applications for reconsideration on May 28, 2019. *People v. **Fields***, 32 N.Y.3d 1204 (2019), *recons. Denied*, 33 N.Y.3d 1031 (2019). The Appellate Division also denied Petitioner's application for re-argument. (Record, at ECF 283.)

B. Petitioner's State Court Motion to Vacate His Conviction

On August 3, 2021, Petitioner filed a Motion to Vacate his Conviction pursuant to New York Criminal Procedure Law ("CPL") § 440.10(1)(h) ("440 Motion") with the trial court. (*Id.*at ECF 337.) Petitioner raised two claims: (1) the trial court conducted excessive and prejudicial questioning of trial witnesses in violation of Petitioner's Fourteenth Amendment due process right to a fair trial, and (2) Petitioner received ineffective assistance of counsel because his attorney did not object to the trial court's excessive and prejudicial questioning, thereby failing to preserve this issue for appellate review. (*Id.* at ECF 321–37.) The trial court denied Petitioner's motion in its entirety, finding the first argument both procedurally barred and meritless, and the second argument meritless. (*Id.* at ECF 368–78.) The Appellate Division denied leave to appeal. (*Id.* at ECF 395.)

C. Petitioner's Federal *Habeas* Petition

***4** On January 13, 2020, Petitioner timely filed the instant petition for writ of *habeas corpus* pursuant to 28 U.S.C. § 2254. (Dkt. 1, at ECF 1.) On December 16, 2020, Petitioner first requested a stay and abeyance pending exhaustion of state remedies, and filed his 440 Motion in state court. (Dkt. 16.) In response, the Court ordered Petitioner to submit a letter explaining "(1) what claim(s) he seeks to exhaust and through which state remedies, (2) why he failed to exhaust his remedies as to those claims prior to filing the instant petition, and (3) why those claims have merit." (12/21/2020 Docket Order.) After multiple extensions, on August 16, 2021, Petitioner filed his 440 Motion. (Dkts. 17, 18, 21.) Shortly thereafter, this Court stayed the case pending exhaustion of Petitioner's claims in state court. (8/18/2021 Docket Order). On January 12, 2022, while the case was still stayed, the Court issued a docket order administratively closing the case pending either party's motion to reopen it; instructing Petitioner to amend his petition to add all additional claims not listed in the petition so as to avoid any time bar that could apply to those added claims; and advising Petitioner that he could be barred from reopening this case if he unreasonably delayed exhausting his claims in state court or reopening the case in this Court after exhaustion. (1/12/2022 Docket Order.) On February 16, 2022, Respondent mailed the state court record to Petitioner. (Dkt. 24.)

On September 12, 2022, Petitioner moved to reopen the case, and to amend his petition for writ of *habeas corpus*; Respondent consented, and the Court granted the motion to reopen and amend the petition. (Dkts. 25–27; 9/26/2022 Docket Order.) Respondent answered, filed the state court record, and served both on Petitioner on December 12, 2022. (Respondent's Answer ("Answer"), Dkt. 30; State Court Record and Transcript, Dkt. 31; Certificate of Service, Dkt. 32.) On January 20, **2023**, Petitioner filed the Amended Petition to include a claim of ineffective assistance of counsel. (Amended Petition ("Am. Pet."), Dkt. 33.)[6] The Amended Petition was fully briefed on April 25, **2023**. (Petitioner's Reply ("Pet.'s Rep."), Dkt. 40.)

STANDARD OF REVIEW

Under 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), an application for a writ of *habeas corpus* by a person in custody pursuant to a state court judgment may only be brought on the grounds that his or her custody is "in violation of the Constitution or laws or treaties of the United States." 28

U.S.C. § 2254(a). To obtain relief, a petitioner must show that the state court decision, having been "adjudicated on the merits in State court proceedings," is either "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *see also Johnson v. Williams*, 568 U.S. 289, 292 (2013). A claim is "adjudicated on the merits" in the state court if the state court "(1) disposes of the claim on the merits, and (2) reduces its disposition to judgment." *Bell v. Miller*, 500 F.3d 149, 155 (2d Cir. 2007) (quoting *Sellan v. Kuhlman*, 261 F.3d 303, 312 (2d Cir. 2001)).

A state court's decision is "contrary to" Supreme Court precedent "if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases," or "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to" the Supreme Court's result. *Bell v. Cone*, 543 U.S. 447, 452–53 (2005) (internal citation and quotation marks omitted); *see Ennis v. Artus*, No. 09-CV-10157 (DAB) (GWG), 2011 WL 3585954, at *7 (S.D.N.Y. Aug. 12, 2011) (same) (quoting *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000)). A state court's decision "involve[s] an unreasonable application of" Supreme Court precedent if there is "no possibility fairminded jurists could disagree that the state court's decision conflicts with [Supreme Court] precedents." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). In other words, a state court decision must be "more than incorrect or erroneous." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). These standards are " 'difficult to meet,' because the purpose of AEDPA is to ensure that federal *habeas* relief functions as a 'guard against extreme malfunctions in the state criminal justice systems,' and not as a means of error correction." *Greene v. Fisher*, 565 U.S. 34, 38 (2011) (citation and internal quotation marks omitted).

*5 A federal court may not grant *habeas* relief to a prisoner in state custody unless the prisoner has exhausted state-court remedies. *See* 28 U.S.C. § 2254(b)(1); *see also Aparicio v. Artuz*, 269 F.3d 78, 89 (2d Cir. 2001) ("If anything is settled in *habeas corpus* jurisprudence, it is that a federal court may not grant the *habeas* petition of a state prisoner unless it appears that the applicant has exhausted the remedies available in the courts of the State[.]" (internal quotation marks and citation omitted)). This exhaustion requirement includes two parts. First, "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *Galdamez v. Keane*, 394 F.3d 68, 73 (2d Cir. 2005) (emphasis omitted) (quoting *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999)). In New York, this means a *habeas* petitioner must first appeal the relevant conviction to the Appellate Division, and then seek further review by applying to the Court of Appeals for a certificate granting leave to appeal. *Id.* at 74 (citing, *inter alia, Morgan v. Bennett*, 204 F.3d 360, 369 (2d Cir. 2000)). Second, *habeas* petitioners must have " '*fairly presented* [their] claims to the state courts,' such that the state court had a fair opportunity to act." *Id.* at 73 (quoting *O'Sullivan*, 526 U.S. at 848); *see also Aparicio*, 269 F.3d at 89–90 ("To satisfy § 2254's exhaustion requirement, a petitioner must present the substance of the same federal constitutional claim[s] that he now urges upon the federal courts to the highest court in the pertinent state." (internal quotation marks and citations omitted)).

DISCUSSION

Petitioner raises five claims for this Court's review: (1) the trial court's excessive and prejudicial questioning of trial witnesses violated his due process right to a fair trial (Dkt. 1, at ECF 5; Dkt. 33, at 2); (2) his trial counsel's failure to object to the trial court's excessive questioning constituted ineffective assistance (*see generally* Dkt. 33); (3) the trial court's denial of severance violated Petitioner's due process right to a fair trial (Dkt. 1, at ECF 7); (4) the trial court's refusal to give a "missing witness" instruction violated Petitioner's due process right to a fair trial (*id.* at ECF 8); and (5) the failure of the police officer who had identified Petitioner on the August 30 surveillance video to testify at trial violated Petitioner's due process rights to a fair trial and to confront his accuser (*id.* at ECF 10).

For the reasons set forth below, the Court denies Petitioner's *habeas* petition in its entirety.

I. Petitioner's Judicial Interference Claim is Procedurally Barred

In his direct appeal in state court, Petitioner argued that the trial court conducted excessive and prejudicial questioning of trial witnesses, which violated Petitioner's Fourteenth Amendment due process right to a fair trial. (Record, at ECF 10–28.) While acknowledging that his trial counsel "did not object to any of the Court's judicial questioning," Petitioner argued that "[n]o objection was necessary ... to preserve this error for appeal," in light of the Appellate Division's ruling weeks before in a different case "that the identical error, by the same judge, was subject to [that] Court's interest of

justice jurisdiction." (Record, at ECF 25–26 (citing *People v. Davis*, 147 A.D. 3d 1077, 1079 (N.Y. App. Div. 2017)).) The Appellate Division disagreed, holding that Petitioner's claim was unpreserved for appellate review, and declined to consider the claim in the "interest of justice." ***Fields***, 166 A.D. 3d at 898. Petitioner raised the same claim in his 440 Motion. There, the trial court held that Petitioner's claim was procedurally barred under CPL § 440.10(2)(c), as there were sufficient facts on the record to permit appellate review of the claim. (Record, at ECF 372–73).

A federal court "may not review federal claims that were procedurally defaulted in state court—that is, claims that the state court denied based on an adequate and independent state procedural rule." *Davila v. Davis*, 582 U.S. 521, 527 (2017). "To qualify as an adequate procedural ground, capable of barring federal *habeas* review, a state rule must be firmly established and regularly followed." *Johnson v. Lee*, 578 U.S. 605, 608 (2016) (internal quotation marks and citation omitted). A procedural ground is independent when the state court relies solely on that law for its disposition and clearly and expressly states that the judgment rests on that law. *Garner v. Lee*, 908 F.3d 845, 859 (2d Cir. 2018).

***6** Under New York State law, to preserve an issue for appeal, a party must lodge a contemporaneous and specific objection at trial. N.Y. Crim. Proc. Law § 470.05(2). The Second Circuit has long recognized New York's "contemporaneous objection rule" to be "a firmly established and regularly followed New York procedural rule" that "constitutes an independent and adequate state law ground." *Downs v. Lape*, 657 F.3d 97, 104 (2d Cir. 2011); *see also Richardson v. Greene*, 497 F.3d 212, 217–19 (2d Cir. 2007) (same). The rule "require[s], at the very least, that any matter which a party wishes the appellate court to decide have been brought to the attention of the trial court at a time and in a way that gave the latter the opportunity to remedy the problem and thereby avert reversible error." *People v. Luperon*, 623 N.Y.S.2d 735, 738–39 (1995). Thus, a state court decision based on contemporaneous-objection grounds generally precludes federal *habeas* review. *See Downs*, 657 F.3d at 103–04.

However, "when 'a state appellate court refuses to review the merits of a criminal defendant's claim of constitutional error because of his failure to comply with ... a "contemporaneous objection" rule,' a federal court may review the merits of such a claim when the state court 'unevenly' applies [the] rule." *Silverman v. Edwards*, 69 F. App'x 489, 491 (2d Cir. 2003) (quoting *Peterson v. Scully*, 896 F.2d 661, 663 (2d Cir. 1990) and citing *Williams v. Lane*, 826 F.2d 654, 659 (7th Cir. 1987)). But "an allegedly uneven application of state procedural default rules *in general* does not necessarily establish that the application of a procedural default rule in a particular case is not 'adequate.' " *Wedra v. Lefevre*, 988 F.2d 334, 340 (2d Cir. 1993) (quoting ***Andrews*** *v. Deland*, 943 F.2d 1162, 1190 (10th Cir. 1991), *cert. denied*, 502 U.S. 1110 (1992)).

Here, the Appellate Division determined that Petitioner had failed to preserve his judicial intervention claim via contemporaneous objection at trial, and did not review the claim on its merits. ***Fields***, 166 A.D.3d at 898. Therefore, the Appellate Division's decision bars this Court's review of Petitioner's claim, unless the Court finds that the Appellate Division unevenly applied the contemporaneous-objection rule in this case and that its application of the rule therefore is not "adequate" to bar federal *habeas* review. *See Davila*, 582 U.S. at 527 (holding that federal court may not review federal claims "that the state court denied based on an adequate and independent state procedural rule"); *Johnson*, 578 U.S. at 608 ("To qualify as an adequate procedural ground, capable of barring federal *habeas* review, a state rule must be firmly established and regularly followed.").

Petitioner's argument about the inadequacy of the Appellate Division's application of the contemporaneous-objection rule is based on the fact that the Appellate Division granted a number of appeals alleging excessive and prejudicial questioning by Justice Hollie, "in the interest of justice," despite defense counsel having failed to object at trial. (Record, at ECF 10–24.) *See People v. Robinson*, 151 A.D.3d 758, 759 (N.Y. App. Div. 2017); *People v. Hinds*, 160 A.D.3d 983, 984 (N.Y. App. Div. 2018); *People v. Sookdeo*, 164 A.D.3d 1268, 1269 (N.Y. App. Div. 2018); *People v. Ramsey*, 174 A.D.3d 651, 652 (N.Y. App. Div. 2019); *People v. Savillo*, 185 A.D.3d 840, 842 (N.Y. App. Div. 2020); *People v. Martinez*, 199 A.D.3d 834 (N.Y. App. Div. 2021). Even so, the Court does not find that the Appellate Division's decision not to review Petitioner's excessive questioning claim constitutes an "uneven application" of the contemporaneous-objection rule. As the Second Circuit "found in connection with another New York rule that permits exceptions, even if New York law allows 'some discretion to be exercised,' the application of the procedural default rule in a particular case remains appropriate so long as the rule is 'evenhandedly' applied 'to all similar claims.' " *Murden v. Artuz*, 497 F.3d 178, 193 (2d Cir. 2007) (quoting *Wedra*, 988 F.2d at 340). "Similarly, in *Glenn v. Bartlett*, [the Circuit] found a procedural bar, based on the defendant's failure to preserve an objection at

trial, even though the state court acknowledged that it could have reversed the conviction 'in the interest of justice.' " *Id.* (quoting *Glenn v. Bartlett*, 98 F.3d 721, 724–25 (2d Cir. 1996)).

*7 The Appellate Division's exercise of its discretion to apply the contemporaneous-objection rule in Petitioner's case, while not applying it in other cases involving alleged judicial intervention by Justice Hollie, in itself, does not make the Appellate Division's application of the rule here "not adequate." *See Wedra*, 988 F.2d at 340 (" '[A]n allegedly uneven application of state procedural default rules *in general* does not necessarily establish that the application of a procedural default rule in a particular case is not 'adequate.' " (quoting ***Andrews***, 943 F.2d at 1190)). As the Supreme Court made clear in *Beard v. Kindler*:

> We hold that a discretionary state procedural rule can serve as an adequate ground to bar federal *habeas* review. Nothing inherent in such a rule renders it inadequate for purposes of the adequate state ground doctrine. To the contrary, a discretionary rule can be "firmly established" and "regularly followed"—even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others.

558 U.S. 53, 60–61 (2009).

In *Cotto v. Herbert,* the Second Circuit identified three "guideposts" for courts to consider in determining the adequacy of a state court's application of a procedural default rule. 331 F.3d 217, 240 (2d Cir. 2003) (stating that "the adequacy of a state procedural bar is determined with reference to the 'particular application' of the rule") (quoting *Lee v. Kemna*, 534 U.S. 362, 387 (2002)). None of these point to a finding that the Appellate Division's application of the contemporaneous-objection rule in this case was inadequate. The first, "whether the alleged procedural violation was actually relied on in the trial court, and whether perfect compliance with the state rule would have changed the trial court's decision," is inapplicable here. *Clark v. Perez*, 510 F.3d 382, 391 n.4 (2d Cir. 2008) (holding that "the failure altogether to raise an issue cannot be actually relied on because no court has been notified that the issue even exists"). The second guidepost—"whether state caselaw indicated that compliance with the rule was demanded in the specific circumstances presented"—also clearly favors finding that the contemporaneous-objection rule is adequate with respect to Petitioner's judicial interference claim. *See, e.g.*, *Adams v. Keyser*, No. 16-CV-129 (GBD) (AJP), 2016 WL 4429889, at *24 (S.D.N.Y. Aug. 22, 2016) ("The requirement that a defendant preserve a claim of judicial interference by appropriate objection or motion for a mistrial ... is firmly established and regularly followed by New York state courts." (collecting cases)). And third, Petitioner clearly did not "substantially compl[y] with the rule given the realities of trial" when he failed to raise this issue in any way before the trial court. *Cotto*, 331 F.3d at 240.

"Because of comity concerns, a decision that a state procedural rule is inadequate should not be made 'lightly or without clear support in state law.' " *Murden*, 497 F.3d at 192 (quoting *Garcia v. Lewis*, 188 F.3d 71, 77 (2d Cir. 1999) (citation omitted)). Federal courts find applications of the contemporaneous-objection rule inadequate sparingly, for example, where the "defense counsel's request at trial was sufficient to preserve the issue" at trial, but the Appellate Division erroneously found otherwise. *Silverman*, 69 F. App'x at 491. Here, it is undisputed that Petitioner failed to lodge any objection or move for a mistrial on the basis of the judicial interference that he only alleged post-trial. As such, the Appellate Division's decision to apply the contemporaneous-objection rule was a valid application of a discretionary state procedural bar and constitutes "an independent and adequate state ground foreclosing federal *habeas* review." *Wade v. Melecio*, No. 21-CV-9138 (GHW) (JLC), **2023** WL 2152489, at *11 (S.D.N.Y. Feb. 22, **2023**), *report and recommendation adopted,* **2023** WL 2500676 (S.D.N.Y. Mar. 14, **2023**). Therefore, Petitioner may obtain review of his claim only if he demonstrates "cause and prejudice for the procedural default" or that the "constitutional violation has probably resulted in the conviction of one who is actually innocent of the substantive offense." *Dretke v. Haley*, 541 U.S. 386, 393 (2004) (internal quotation marks and citations omitted). Petitioner does not maintain that he is actually innocent. And although Petitioner does not argue "cause and prejudice" in so many words, he does argue that his counsel was ineffective for failing to preserve the judicial interference argument at trial. (*See* Dkt. 5, at ECF 2.) *Terrell v. Kickbush*, No. 17-CV-7027 (JFB), 2019 WL 3859512, at *5 (E.D.N.Y. Aug. 16, 2019) ("A petitioner can demonstrate cause ... [if] the procedural default was the result of ineffective assistance of counsel.") (citing *Bossett v. Walker*, 41 F.3d 825, 829 (2d Cir.

1994)). Because Petitioner's ineffective assistance arguments fail, *see infra* Discussion Section II, he cannot overcome the procedural bar to federal review of his judicial interference claim, and it is denied as procedurally barred. [7]

II. Petitioner's Trial Counsel Was Not Ineffective

***8** Petitioner contends that he received ineffective assistance of counsel because his attorney failed to object to the trial court's frequent questioning of witnesses. (Dkt. 33.) Petitioner also raised this claim in his 440 Motion. In denying that motion, the trial court found that Petitioner's ineffective assistance claim was "not procedurally barred," but that it lacked merit. (Record, at ECF 376 (finding that Petitioner "failed to show that counsel's lack of objecting to the trial court's actions deprived him the effective assistance of counsel.").) Therefore, Petitioner's ineffective assistance claim is subject to federal *habeas* review and entitled to AEDPA deference, which only permits *habeas* relief if the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d).

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court established a two-part test for ineffective assistance of counsel claims: (1) "that [the] attorney's performance 'fell below an objective standard of reasonableness' "; and (2) "that there was prejudice, meaning a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Tavarez v. Larkin*, 814 F.3d 644, 648 (2d Cir. 2016) (quoting *Strickland*, 466 U.S. at 688, 694). Under AEDPA, "it is not enough to convince a federal *habeas* court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly." *Cone*, 535 U.S. at 699. "[A] petitioner must show 'that the [state court] applied *Strickland* to the facts of his case in an objectively unreasonable manner.' " *McPherson v. Keyser*, No. 20-161-PR, 2021 WL 4452078, at *3 (2d Cir. Sept. 29, 2021) (quoting *Cone*, 535 U.S. at 699); *see also Cullen v. Pinholster*, 563 U.S. 170, 190 (2011) (describing review of state-court applications of *Strickland* in the *habeas* context as "doubly deferential" and "highly deferential"); *Rosario v. Ercole*, 601 F.3d 118, 123 (2d Cir. 2010) ("[S]tate courts are granted even more latitude to reasonably determine that a defendant has not satisfied that [*Strickland*] standard." (cleaned up)). Further, "[t]he more general the rule [applied by the state court], the more leeway courts have in reaching outcomes in case by case determinations." *Yarborough v. Alvarado*, 541 U.S. 652, 653 (2004).

Petitioner argues that his attorney's performance was deficient because despite believing that the trial court's questions were excessive and prejudicial, Petitioner's counsel failed to object to the court's questions. (Dkt. 33, at 2, 3.) Further, Petitioner contends that but for counsel's failure to object, there is a reasonable probability that the result of the proceedings would have been different. (Dkt. 33, at 4 ("If counsel would have inform [sic] the court of this [prejudicial questioning] from its onset, than [sic] the court would have had a chance to cure this misconduct, refrained from continuing to question the witnesses in that manner and given Petitioner a chance of justice with a fair trial.").)

The trial court examined Petitioner's ineffective assistance claim under New York's constitutional standard for ineffective assistance, which requires that a defendant receive "meaningful representation," and "is ultimately concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case." (Record, at ECF 376 (quoting *People v. Benevento*, 91 N.Y.2d 708, 712, 714 (1998)).) "The Second Circuit has repeatedly recognized that the New York 'meaningful representation' standard is not contrary to the *Strickland* standard. ... For this reason, '[t]he only avenue of reprieve available to [Petitioner] then is to establish that the state court unreasonably applied *Strickland*.' " *Arena v. Kaplan*, 952 F.Supp.2d 468, 489 (E.D.N.Y. 2013) (internal citations omitted) (quoting *Rosario*, 601 F.3d at 126).

***9** As to the first prong—trial counsel's allegedly substandard performance—Petitioner "must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Cone*, 535 U.S. at 698. The decision of when to object and on what grounds is a matter of trial strategy and tactics, and is "virtually unchallengeable absent exceptional grounds for doing so." *Broxmeyer v. United States*, 661 F. App'x. 744, 748 (2d Cir. 2016) (summary order) (citation omitted). While Petitioner's counsel might have felt that Justice Hollie's frequent questioning was detrimental to Petitioner, she also could have reasonably made the strategic calculation that registering a complaint with the judge carried greater risks than dealing with the results of that questioning through cross-examination and/or argument. Further, although the trial judge did intervene on numerous occasions, many of his interventions were to clarify the witness's testimony and

were not explicitly biased or prejudicial. Neutral questions posed by the court can illicit responses that are injurious to the defense, but that does not make them improper or violative of a defendant's right to a fair trial. *Daye v. Att'y Gen. of State of N.Y.*, 712 F.2d 1566, 1572 (2d Cir. 1983). Therefore, counsel's decision not to object to questions posed by the trial court—especially where those questions merely clarified admissible and relevant testimony—does not fall below an objective standard of reasonable performance.

Further, Petitioner has not established how the outcome of the proceedings would have been different if counsel had objected to the judge's questioning. *Tavarez*, 814 F.3d at 648. Even if the Petitioner's counsel had objected to that questioning, there was "no significant probability" that Petitioner would have been acquitted. *People v. Vasquez*, 76 N.Y.2d 722, 725 (N.Y. 1990). Given the victim, eyewitness, and law enforcement testimony, and video surveillance evidence, presented to the jury, there was overwhelming evidence of Petitioner's guilt, and Petitioner has provided no basis for finding that the verdict would have been different if his counsel had objected to the trial court's questions. Thus, Petitioner was not prejudiced.

Accordingly, the state court did not unreasonably apply *Strickland*, and Petitioner's ineffective assistance of counsel claim is denied as meritless.

III. Petitioner's Severance Claim Fails on the Merits

Petitioner alleges that his Fourteenth Amendment due process right to a fair trial was violated when the trial court denied his motion to sever for trial the charges stemming from the alleged August 30 robbery from those stemming from the events of September 17. (Dkt. 1, at ECF 7 ("The 2 case's [sic] are not from the same incident, they are not a continuous incident, they do not occur on the same day, they are not similar in criminal statu[t]e and nothing of the two have anything in common to combine them.").) Petitioner raised this claim on direct appeal. In affirming the trial court's denials of Petitioner's severance motions, the Appellate Division found that "the nature of the evidence for each of the offenses was material and admissible as evidence upon the trial of the other counts in the indictment." ***Fields***, 166 A.D.3d at 897. The Appellate Division also held that the trial court lacked the authority to sever the counts, since the offenses "were properly joined in one indictment from the outset" pursuant to CPL § 200.20(2)(b). *Id.* Petitioner's appeal application to the New York Court of Appeals reiterated all of the claims from his direct appeal, including the severance claim. (Record, at ECF 284.) He has therefore properly exhausted his state law remedies with respect to this claim, and it is subject to AEDPA deference.

The improper joinder of charges against a defendant is a matter of state law and does not amount, on its own, to a constitutional violation. *McKinnon v. Superintendent, Great Meadow Corr. Facility*, 422 F. App'x 69, 72 (2d Cir. 2011) (citing *United States v. Lane*, 474 U.S. 438, 446 n.8 (1986)); *McCall v. Artus*, No. 06-CV-3365 (SAS) (DF), 2008 WL 4501834, at *8 (S.D.N.Y. Sept. 29, 2008) ("As a preliminary matter, it should be stressed that the issue for this Court is not whether the consolidation of the indictments in this case was proper under state law" because "[f]ederal *habeas* relief 'does not lie for errors of state law.' ") (quoting *Estelle v. McGuire*, 502 U.S. 62, 67 (1991)). "Joinder of offenses rises to the level of a constitutional violation only if it actually render[s] petitioner's state trial fundamentally unfair and hence, violative of due process." *Herring v. Meachum*, 11 F.3d 374, 377 (2d Cir. 1993) (internal quotations marks and citations omitted). In evaluating whether the joinder of claims rises to the level of a constitutional violation, only the consequences of that action—not the joinder itself—can be assessed. *Conroy v. Racette*, No. 14-CV-5832 (JMA), 2017 WL 2881137, at *13 (E.D.N.Y. July 6, 2017) (quoting *Herring*, 11 F.3d at 377). Therefore, to succeed on a federal *habeas* claim of improper joinder, Petitioner must "go beyond the potential for prejudice and prove that *actual* prejudice resulted from the events as they unfolded during the joint trial." *Herring*, 11 F.3d at 377–78.

***10** Here, Petitioner fails to show that he was actually prejudiced as a result of the August 30 and September 17 charges being joined into a single indictment and for trial. On direct appeal, Petitioner argued that he was prejudiced "because proof of the identity of the robbers was not strong," and "the jury may have relied on the flight and apprehension" evidence from Petitioner's September 17 arrest to prove the robbery crime on August 30. (Record, at ECF 35–36.) Even assuming that evidence relating to the two arrests bolstered each other—a perfectly logical assumption—that fact did not "actually render petitioner's state trial fundamentally unfair and hence, violative of due process." *Herring*, 11 F.3d at 377 (noting that the Supreme Court "explicitly accept[s]" that prejudicial effect will inhere when several crimes are tried together, nevertheless, "[j]oinder of offenses rises to the level of a constitutional violation only if it actually render[s] petitioner's state trial fundamentally unfair and hence, violative of due process."). This is because the prosecution was entitled to use the evidence from the September 17

arrest to prove the identities of the perpetrators of the August 30 robbery. CPL § 200.20(2)(b) allows joinder of offenses based on separate criminal acts into one indictment where "proof of the first offense would be material and admissible as evidence in chief upon a trial of the second, or proof of the second would be material and admissible as evidence in chief upon a trial of the first[.]" Here, the charges from the two incidents were necessarily and inextricably related: the gun recovered on September 17 was material and admissible evidence of both Petitioner's role in the August 30 robbery and his relationship with co-defendant Senat. (Record, at ECF 91–93.) Thus, evidence relating to Petitioner's and Senat's September 17 arrest was properly admitted at trial as proof of their involvement in the August 30 robbery. *Dayton v. LaValley*, No. 11-CV-1261 (DG) (CLP), 2021 WL 3848148, at *14 (E.D.N.Y. July 29, 2021) (denying a severance *habeas* claim where "the same evidence would have been presented" at both severed trials and severance "would create an undue burden upon the People to necessarily bring many of the same witnesses forward once again." (citation omitted)). Petitioner's argument that there were fundamental discrepancies between Bradley's description of the gun used in his robbery and the gun recovered on September 17 is also unpersuasive; Bradley described a "chrome and black" handgun that was largely consistent with the gun recovered on September 17. (*Compare* Tr. 686:12–16 (describing "top" of gun as chrome and handle as black) *with* Tr. 106:15–18 ("It's a silver revolver ... a 44 Magnum with a black handle.").) Although Petitioner contends that Bradley initially described the gun brandished during his robbery as an "automatic" gun, on cross-examination Bradley did not seem to be able to describe the difference between an automatic gun and a revolver, and did not recall telling the NYPD that the gun was automatic. (Tr. 685:20–21 ("I don't know what type of gun it was. I don't recall telling him what type of gun it was."); 686:2–9.) Further, the trial court carefully instructed the jury separately on each element of each of the seven charges stemming from the two arrests. (*See generally* Tr. 978–1021, 1028:9–1029:18, 1054:17–1058:8.) *Burke v. Smith*, No. 07-CV-3098 (NG), 2012 WL 2394718 (E.D.N.Y. June 21, 2012) (denying joinder *habeas* claim where "[a]lthough the trial judge did not give specific instructions regarding the independent nature of each of the charges, he did instruct the jury as to each element of each charge separately.").

Second, Petitioner's claims that joinder caused actual prejudice are based on speculation rather than evidence. *Rolling v. Fischer*, 433 F. Supp. 2d 336, 344 (S.D.N.Y. 2006) (denying *habeas* claim premised on "mere speculation" that joinder caused prejudice). Since Petitioner provides no proof that he was actually prejudiced by the denials of his severance motions, his claim is denied. *See e.g.*, *Matthews v. Artuz*, No. 97-CV-3334 (DC), 1999 WL 349694, at *4 (S.D.N.Y. May 27, 1999) ("Here, petitioner's claim fails on the merits because he cannot demonstrate actual prejudice."). Petitioner has not shown—and would be hard-pressed to show, given the surveillance video and witness testimony identifying him at both the robbery and with the stolen car and recovered firearm —that, "but for the joint trial, he would have been acquitted of the charges arising from either of the two incidents." *McCall*, 2008 WL 4501834, at *10.

For the foregoing reasons, Petitioner fails to carry his "onerous burden" of demonstrating actual prejudice as a result of the consolidation of his two sets of charges into a single indictment and for trial. *Herring*, 11 F.3d at 378. Therefore, *habeas* relief is denied on this ground.

IV. Petitioner's Claim Based on the Failure to Give a Missing Witness Charge Is Meritless

Petitioner argues that his right to a fair trial was violated when the trial court denied his motion for a "missing witness charge"—i.e., an instruction that the jury could draw an adverse inference from the state's failure to call a witness in their control—regarding Bobby Garcia. (Dkt. 1, at ECF 8.) Petitioner raised this claim at the end of the presentation of all of the evidence at trial (Tr. 879), and again on direct appeal (Record, at ECF 37–43). The Appellate Division held that the request was untimely, and that Petitioner had failed to show that Garcia was knowledgeable about a material issue in the case and would have provided non-cumulative testimony. ***Fields***, 166 A.D.3d at 897.

While the failure to provide a missing witness charge is a matter of state law and is therefore not cognizable under federal *habeas* review, *Estelle*, 502 U.S. at 67–68, federal courts may consider whether the failure to provide the missing witness charge violated a petitioner's constitutional rights. *Bisnauth v. Morton*, No. 18-CV-4899 (JFB), 2021 WL 3492746, at *14 (E.D.N.Y. Aug. 9, 2021). *Habeas* relief is available only if the trial court's failure to provide a missing witness charge "so infected the entire trial that the resulting conviction violated due process." *Klosin v. Conway*, 501 F. Supp. 2d 429, 444 (W.D.N.Y. 2007) (quoting *Cupp* v. *Naughten*, 414 U.S. 141, 147 (1973)). Further, "[w]here, as here, the alleged error is one of omission, it 'is less likely to be prejudicial than a misstatement of the law,' thereby making the petitioner's 'burden ... especially heavy.' " *Crews v.*

Herbert, 586 F. Supp. 2d 108, 114 (W.D.N.Y. 2008) (quoting *Henderson v. Kibbe*, 431 U.S. 145, 155 (1977)).

*11 Under New York law, the decision to give a missing witness charge to the jury is at the discretion of the trial judge. *Reid v. Senkowski*, 961 F.2d 374, 377 (2d Cir. 1992). To obtain a missing witness charge, the party requesting the charge bears the burden of establishing that (1) "the witness's knowledge [is] material to the trial"; (2) "the witness [is] expected to give noncumulative testimony favorable to the party against whom the charge is sought"; and (3) "the witness [is] available to that party." *Zimmerman v. Conway*, No. 10-CV-1393 (ER) (PED), 2018 WL 6413144, at *6 (S.D.N.Y. Dec. 6, 2018) (quoting *People v. Savinon*, 100 N.Y.2d 192, 197 (2003)).

Here, Petitioner fails to show that the trial court abused its discretion by failing to give a missing witness charge as to Garcia. Petitioner contends that the allegedly "missing witness," Garcia, should have been produced to testify regarding Bradley's physical condition after the robbery —an issue material to one of the second degree robbery charges, which required proof that the complaining witness suffered "physical injury," N.Y. Penal Law § 160.10(2)(a)— and that Garcia's testimony would have been non-cumulative because there was no other witness besides Bradley to testify about his physical condition. Notably, Petitioner does not explain how Garcia would have testified regarding Bradley's injuries or even if Garcia could have testified about that subject. Petitioner therefore cannot demonstrate that Garcia's testimony would have been probative or helpful to the jury, whether it would have been non-cumulative of Bradley's own testimony, or whether it would have been favorable to Petitioner. *Arena*, 952 F. Supp. 2d at 489 ("A missing witness charge is not appropriate when the witness's testimony would merely corroborate the testimony of other witnesses.") (citing *People v. Keen*, 94 N.Y.2d 533, 539 (2000)). Further, there is no indication that Garcia was available to the prosecution; indeed, Bradley repeatedly testified that he had not been in touch with Garcia since the day he was robbed in Garcia's lobby. Thus, Petitioner fails to demonstrate that the Appellate Division erred in finding that the trial court did not abuse its discretion in denying his requests for a missing witness charge.

Even assuming *arguendo* that the trial court erred by not giving the missing witness charge, Petitioner has not demonstrated that this error "so infected the entire trial that the resulting conviction violated due process." *Klosin*, 501 F. Supp. 2d at 444 (quoting *Cupp*, 414 U.S. at 147). Indeed, in the face of overwhelming evidence of Petitioner's guilt—e.g., surveillance video footage, Bradley's line-up identifications of Petitioner and Senat, the recovery of a firearm from Petitioner and Senat similar to Bradley's description—Petitioner offers nothing to show that the absence of the missing witness charge as to Garcia so "infected the entire trial" as to deprive Petitioner of due process. Petitioner's claim—that the absence of Garcia's testimony as to one largely uncontested element of one charge so infected the entire trial that the resulting conviction on seven separate charges violated due process—is pure conjecture. *Toland v. Walsh*, No. 04-CV-0773 (GLS), 2008 WL 65583, at *14–15 (N.D.N.Y. Jan. 4, 2008) (denying *habeas* relief where possibility that missing witness would give favorable testimony was "based upon nothing other than mere conjecture" and stating that "federal *habeas* relief cannot be granted upon claims that are rooted in speculation"). Therefore, *habeas* relief is denied as to Petitioner's missing witness charge claim.

V. Petitioner's Confrontation Clause Claim is Meritless

*12 Lastly, Petitioner argues that his due process right to "confront his accuser" because the NYPD officer who had identified Petitioner on "a video of [the] alleged robbery" never came "to any form of the proceedings."[8] (Dkt. 1, at ECF 10.) The Court assumes that Petitioner's argument is that the NYPD officer, Sgt. Demma, should have testified at trial. Petitioner first raised this claim on direct appeal, in his *pro se* supplemental brief, (Record, at ECF 53–57), and the Appellate Division held that it was unpreserved. ***Fields***, 166 A.D.3d at 898. Petitioner's motion for leave to appeal to the New York Court of Appeals, which was denied, included this claim, and so the claim is exhausted even though he did not raise it in his 440 Motion. *Watson v. New York*, No. 19-CV-0707 (CM), 2019 WL 6117711, at *2 (S.D.N.Y. Nov. 15, 2019) ("[A] petitioner need not give the state court system more than one full opportunity to rule on his claims; if he has presented his claims to the highest state court on direct appeal he need not also seek collateral relief." (quoting *Daye v. Att'y Gen. of the State of N.Y.*, 696 F.2d 186, 191 n.3 (2d Cir. 1982))).

Petitioner's claim is procedurally barred by the Appellate Division's finding that he failed to preserve the issue for appeal. *Davila*, 582 U.S. at 527. As discussed *supra*, New York State's preservation rule is "a firmly established and regularly followed New York procedural rule," and is therefore an independent and adequate state ground foreclosing federal *habeas* review. *Downs*, 657 F.3d at 104.

The Appellate Division relied solely on this procedural ground for its determination. ***Fields***, 166 A.D. 3d at 898. Although the Appellate Division ruling simply stated that "[t]he defendant's remaining contentions, including those raised in his pro se supplemental brief, are unpreserved for appellate review, ... and we decline to consider them in the interest of justice," *id.* (internal citations omitted), and did not specifically reference the contemporaneous-objection rule, the Appellate Division's decision is sufficient to foreclose federal *habeas* review. *See Wade*, **2023** WL 2152489, at *11 (finding a claim procedurally barred for federal *habeas* review where the Appellate Division "declined to review ... based on lack of preservation," but failed to cite the contemporaneous-objection rule statute, C.P.L. § 470.05(2)).

With respect to this claim, Petitioner argued in his *pro se* motion for reconsideration of his application for leave to appeal to the Court of Appeals that "[t]he failure of defendant to object at trial, to the identification by Sgt. Demma is hardly a waiver, since defendant made an appropriate pretrial motion to suppress the identification" and "no purpose would be served by renewing it [at] trial." (Record, at ECF 293.) But Petitioner's pretrial motion to suppress the photo array and line-up identifications clearly did not involve the same issue he raised post-trial or raises now about Sgt. Demma not testifying at trial about his identification of Petitioner. (*See* Record at ECF 166 (Petitioner moving to suppress the photo array as suggestive); Tr. 148–52 (denying Defendants' suppression motions on grounds that they are "reasonably enough non-suggestive").) "New York's highest courts uniformly instruct that to preserve a particular issue for appeal, [a] defendant must specifically focus on the alleged error." *Garvey v. Duncan*, 485 F.3d 709, 714–15 (2d Cir. 2007) (collecting cases). Thus, Petitioner simply did not preserve the argument that he should have been permitted to cross-examine Sgt. Demma at trial.

Finally, Petitioner's claim that Sgt. Demma's "testimony would have had a vital impact on the outcome of this case" (Record, at ECF 56–57) is purely speculative and fails to establish cause for default and actual prejudice, or a miscarriage of justice due to absolute innocence. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Therefore, Petitioner's claim is procedurally barred and denied.

CONCLUSION

***13** For the reasons explained above, the Court denies Petitioner's *habeas* petition in its entirety. Moreover, the Court declines to issue a certificate of appealability because Petitioner has not made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

SO ORDERED.

All Citations

Slip Copy, 2023 WL 6292479

Footnotes

1 Because Petitioner was convicted at trial, the Court presumes the facts set forth herein as established and views them in the light most favorable to the prosecution. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979) ("Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution.").

2 References to "Tr." refer to the numbering created by the Court's electronic filing system, or "ECF," within the transcript of the state court proceedings (Dkt. 31-2)—not to the internal pagination thereof.

3 References to the "Record" refer to the State Court Record filed at Dkt. 31-1.

4 Citations to "ECF" refer to the pagination generated by the Court's CM/ECF docketing system and not the document's internal pagination.

5 Although Petitioner seemed to seek a missing witness charge as to multiple potential witnesses at trial, he only appealed the denial regarding Bobby Garcia. (Record, at ECF 37–43.)

6 Petitioner filed the same Amended Petition a second time on January 23, **2023**. (Dkt. 34.)

7 The Court notes that, although Petitioner's constitutional claim is procedurally barred from federal review, Justice Hollie's conduct in this case is similar in nature—although not necessarily in degree—with his conduct in other cases where the Appellate Division has found defendants' rights to have been violated. In *People v. Robinson*, for example, the Appellate Division found that Justice Hollie "effectively took over the direct examination of a complaining witness while the prosecutor was eliciting details related to ... the physical altercations at issue" and Justice Hollie "posed at least eight fact-specific questions about [the witness's] physical location in relation to that of the attacker." 151 A.D. 3d at 759; *see also Ramsey*, 174 A.D. at 652, (describing Justice Hollie as "engag[ing] in extensive questioning of witnesses, usurp[ing] the

roles of the attorneys, elicit[ing] and assist[ing] in developing facts damaging to the defense on direct examination of the People's witnesses, bolster[ing] the witnesses' credibility, interrupt[ing] cross-examination, and generally create[ing] the impression that it was an advocate on behalf of the People."); *see also People v. Davis*, 147 A.D. 3d at 1079 (reversing conviction and noting, "[i]n last analysis, [the trial judge] should be guided by the principle that his [or her] function is to protect the record, not to make it. The line is crossed when the judge takes on either the function or appearance of an advocate at trial. Indeed, even proper questions from trial judges present significant risks of prejudicial unfairness, particularly when the trial judge indulges in an extended questioning of witnesses." (internal citations and quotations omitted)).

Here, Justice Hollie asked Bradley, the complaining witness, seven consecutive questions about Petitioner's positioning relative to him as the alleged assault unfolded (Tr. 583:14–584:19)—and then, after the Government asked several questions, the Court interjected again to ask seven more questions about the sequence of the attack and the actions of his alleged attackers (Tr. 585:20–596:23). The Court intervened several more times during the complaining witness's direct examination to develop key aspects of the record by asking between five and seven consecutive fact-specific questions. (Tr. 588:24–589:10; 590:5–15; 595:6–17; 600:5–25; 601:1–22; 600:13–22; 611:14–612:17; 619:5–621:16; 590:12–17 ("The Court: So you contacted relatives and they came into Queens. The Witness: Yes. The Court: People. [The Government]: That was my next question your Honor. Where did you go immediately after the robbery?").) Justice Hollie also took over defense counsel's questioning of Detective Robert McCarty regarding the conversations he had with Bradley before the lineups in which he identified Petitioner and his co-defendant, eliciting testimony regarding the items Bradley reported as having been stolen (Tr. 770, 771:3–22, 772:13–773:13), and regarding Bradley's description of the alleged perpetrators of his robbery (Tr. 778:20–779:11; 781:22–782:20). Justice Hollie also asked Detective Robert DeFerrari numerous questions about the pursuit of Petitioner and Senat on September 7, 2013. (Tr. 807:22–808:14; 809:23–812:2; Tr. 813:10–814:5; *see People v. Hinds*, 160 A.D. at 984 ("The court elicited step-by-step details from several officers regarding their observations and actions during their apprehension of the defendant").) The Court did not make similar interventions to develop facts relating to Petitioner's defense, but instead repeatedly admonished defense counsel (Tr. 635:9–15, 601:1–22, 629:2–8), denied defense attempts to impeach the complaining witness (Tr. 636:21–638:11, 720:4–24) and testifying officers (Tr. 770:6–771:22), and elicited facts that defense counsel did not intend to seek (Tr. 644:6–21).

However, in light of the procedural bar on federal habeas review as to this claim, the "substantial burden of showing reversible error," *United States v. Bejasa*, 904 F.2d 137, 141 (2d Cir. 1990), and Justice Hollie's use of a curative instruction (Tr. 960:20–25), the Court does not make a determination as to whether the trial court engaged in excessive and prejudicial questioning that deprived Petitioner of his right to a fair trial.

8 At a pre-trial hearing, NYPD Detective Richard McCarty testified that he and one Sergeant ("Sgt.") Demma reviewed surveillance video from the date of the Bradley robbery, and Sgt. Demma indicated that he knew Petitioner "from a previous incident." (Tr. 10:5–13.)

End of Document

APPENDIX (1)

EXTENSION TO FILE WRIT OF CERTIORARI

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

July 3, 2024

Mr. Andrew Fields
Prisoner ID 04595-033
Gouverneur Correctional Facility
PO Box 480
Gouverneur, NY 13642

Re: Andrew Fields
v. New York Department of Corrections and Community Supervision
Application No. 23A1177

Dear Mr. Fields:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Sotomayor, who on July 3, 2024, extended the time to and including August 12, 2024.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by

Angela Jimenez
Case Analyst

APPENDIX (2)

DECISION/SECOND N.Y. CPL 440.10 MOTION

SUPREME COURT – STATE OF NEW YORK
CRIMINAL TERM, PART K-20, QUEENS COUNTY
125-01 QUEENS BOULEVARD
KEW GARDENS, NEW YORK 11415

P R E S E N T:

HONORABLE CASSANDRA M. MULLEN
JUSTICE OF THE SUPREME COURT

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

ANDREW FIELDS,

Defendant.

DECISION AND ORDER OF THE COURT

Queens County
Ind. No.: 2916/13

Motion to Vacate the Judgment of Conviction

Defendant Andrew Fields stands convicted, after a jury trial, of first-degree robbery and other related crimes, arising from two separate incidents. In the first incident, he and co-defendant Marly Senat robbed Donald Bradley at gunpoint on August 30, 2013. Then, on September 17, 2013, defendant and Senat sped away from police when the police attempted to pull the two over for driving a stolen car with a gun inside. Following his conviction for these crimes, the court sentenced defendant, as a second violent felony offender, to an aggregate prison term of fifteen years, and his

judgment of conviction was affirmed on appeal (*People v. Fields*, 166 AD3d 897 [2d Dept. 2018] *lv. denied* 32 NY3d 1204 [2019]).

Defendant now moves, *pro se*, to vacate his judgment of conviction under section 440.10 of the Criminal Procedure Law. For the reasons that follow, his motion is denied.

BACKGROUND

On August 30, 2013, Donald Bradley was visiting a friend inside an apartment building at 106-35 159th Street, Queens County, when defendant jumped out from behind him and punched Bradley in the face. The two struggled, and defendant put Bradley in a headlock while continuing to punch him. Co-defendant Senat then stepped out in front of Bradley and pointed a firearm at him and told him to be quiet. Still in the headlock, Bradley stopped struggling when he saw the gun but nonetheless lost consciousness. As he passed out, he felt defendant and co-defendant Senat rummaging through his pockets and later discovered that they had taken his money, wallet, cell phone and car keys.

On September 17, 2013, police saw defendant and co-defendant Senat driving a stolen 2006 minivan. The police attempted to pull defendant over, but he sped up and lost control of the car, ultimately crashing into the fence of a residential area. The police then arrested defendant.

Following his arrest, defendant was charged with these two incidents. For these crimes, he was charged with Robbery in the First Degree (Penal Law § 265.15[4]), two

counts of Robbery in the Second Degree (Penal Law § 160.10[1], [2][a]), Strangulation in the Second Degree (Penal Law § 121.12), two counts of Criminal Possession of a Weapon in the Second Degree (Penal Law § 265.03[1][b], [3], and Criminal Possession of Stolen Property in the Fourth Degree (Penal Law § 165.45[5]).

He then proceeded to trial before a justice of this court, and a jury. Upon conclusion of the trial, the jury convicted defendant of all charges. On July 21, 2015, the court sentenced defendant to an aggregate prison term of fifteen years.

Defendant then appealed his judgment of conviction to the Appellate Division, Second Department. In his appeal, he argued, *inter alia*, that the trial court excessively with the examination and cross-examination of the witnesses, thereby depriving him of a fair trial. The People opposed defendant's claim, arguing that this claim was not preserved and, in any event, without merit as the trial court acted within its province to clarify confusing testimony, and otherwise did not usurp the role of the prosecutor.

In a decision and order dated November 21, 2018, the Second Department affirmed defendant's judgment of conviction (*People v. Fields*, 166 AD3d 897 [2d Dept. 2018]) *lv. denied* 32 NY3d 1204 [2019]. In its decision, the Court did not specifically address defendant's claim that the trial court excessively interfered in the trial. Instead, it dismissed that claim along with several others as unpreserved and declined to review those claims in the interest of justice (*id.* at 898).

The Current Motion

In his current motion, defendant, *pro se*, moves to vacate his judgment of conviction under CPL 440.10, claiming that the trial court excessively interfered with the trial by its questioning of the witnesses. In support of this argument, he cites several instances in which the trial court questioned the witnesses. Defendant also claims that he was denied the effective assistance of counsel, owing to counsel's failure to preserve this issue for appellate review.

In a response dated December 7, 2021, the People oppose defendant's motion. First, the People argue that defendant's claim regarding the court's conduct is procedurally barred as one that should have been raised on appeal. With respect to defendant's ineffective assistance claim, the People argue that, viewing counsel's representation in its totality, defendant received the effective assistance of counsel, and counsel was not ineffective for failing to raise an objection to the court's otherwise proper conduct.

In a reply dated January 11, 2022, defendant contends that his claims present a "mixed claim," with matters appearing both on the record and off the record, and so appropriately raised in a post-conviction motion. He also argues that his claims are not procedurally barred as a recent amendment to the CPL 440.10(2)(c) permits review of ineffective assistance claims in a post-conviction motion, notwithstanding that the claim was reviewable on direct appeal.

DISCUSSION

Under section 440.10 of the Criminal Procedure Law, a defendant may, "at any time after entry of judgment," move to vacate the judgment of conviction based on several enumerated grounds. Such motions, however, "must" be denied when "sufficient facts appeared on the record" to have permitted adequate appellate review of the ground or issue raised, but no such review took place "owing to the defendant's . . . unjustifiable failure to raise such ground or issue upon an appeal" (CPL 440.10[2][c]). In other words, "defects that can be raised on direct appeal in that way or not at all" (*People v. Cuadrado*, 9 NY3d 362, 365 [2007]). "The purpose of this provision is to prevent CPL 440.10 from being employed as a substitute for direct appeal when [the] defendant was in a position to raise an issue on appeal" (*People v. Cooks*, 67 NY2d 100, 103 [1986]). Where a motion is not procedurally barred, however, a court may still deny a motion to vacate a judgment of conviction without a hearing where, among other grounds, the papers do not state a legal basis entitling the defendant to relief (CPL 440.30[4][a]).

Here, sufficient facts appeared on the record so as to permit appellate review of defendant's claim that the trial court impermissibly took on an active role in the direct and cross-examination of witnesses. As such, this claim was reviewable on appeal and therefore procedurally barred under CPL 440.10(2)(c). In supporting this claim, defendant points entirely to interactions between the court. For example, he alleges that, "Throughout the trial, the supreme court conducted excessive and prejudicial

questioning of trial witnesses" (Defendant's Motion at 11), and that "the court asked over 350 fact specific questions even though there was rarely any need to clarify their testimony" (Defendant's Motion at 12). He bases this claim entirely on exchanges between the court, the witnesses, and the attorneys that occurred at trial (Defendant's Motion at 12-17), and otherwise presents no issues or facts that appeared "off the record." And in fact, defendant actually *did* raise this claim on appeal, but the Second Department dismissed it as unpreserved. Post-conviction motions under CPL 440 do not exist to circumvent either the appellate process or the preservation requirement (*see Cooks*, 67 NY2d at 103).

Moreover, even if this Court were to entertain the merits of defendant's motion, it would nonetheless be denied without a hearing (*see* CPL 440.30[1]). Under CPL 440.30[4][a], a court may deny a post-conviction motion when "the moving papers do not allege any ground constituting legal basis for the motion."

Defendant claims that the trial court impermissibly interfered with the examination of the witnesses. The Court of Appeals has "recognized the Trial Judge's vital role in clarifying confusing testimony and facilitating the orderly expeditious progress of trial," but has cautioned that such power "is one that should be exercised sparingly" (*People v. Yut Wai Tom*, 53 NY2d 44 [1981]). A trial judge is there expected "to protect the record, not to make it" (*id.* at 58). Further, "even if a trial judge makes intrusive remarks that would better have been left unsaid, or questions witnesses extensively, the defendant is not thereby deprived of a fair trial so long as the jury is not

prevented from arriving at an impartial judgment on the merits" (*People v. Adams*, 117 AD3d 104 [1st Dept. 2014]). "That line is crossed when the judge takes on either the function or appearance of an advocate at trial" (*People v. Arnold*, 98 NY2d 63 [2002]).

Here, defendant cites several instances in which the trial court overstepped its bounds and took on the function of an advocate. But examination of those instances, in context, reveals that the court acted within its authority. For example, defendant points to the following exchange:

> THE COURT: Hold on. Did you ever get into Bobby's apartment?
>
> WITNESS: Yeah. After when you see me talking to the guy with the red hat, me and him are talking, I go back into Bobby's apartment, tell him what's going on.
>
> THE COURT: Okay.
>
> WITNESS: And he comes out with me.
>
> THE COURT: So the only point at which you get into Bobby's apartment is after those two people leave?
>
> WITNESS: Exactly. After the whole situation happened, that's when I get in.
>
> THE COURT: Okay. So counsel, you are asking him how much of the People he knows was in Bobby's apartment at the time he had gotten—

It is clear that this line of questioning was meant to clarify testimony and to encourage the "orderly expeditious progress of trial" (*see Parker*, 197 AD3d at 141). It was not meant to take on the position of an advocate, nor was it so intrusive that it actually did so (*see People v. Mitchell*, 184 AD3d 875 [2d Dept. 2020] [new trial ordered where judge questioned witnesses until they were able to positively identify defendant as the

NY2d at 712). So-called errors in representation will be tolerated so long as the overall representation can be characterized as "meaningful." (*People v. Borrell*, 12 NY3d 365, 368 [2009]). A defense counsel's decisions in "making strategic and tactical decisions" is "objectively evaluated . . . to determine whether it was consistent with strategic decisions of a 'reasonably competent attorney" (*People v. Oathout*, 21 NY3d 127, 132 [2013] [internal citations omitted]). And, a defendant is not denied the effective assistance of counsel "merely because counsel does not make a motion or argument that has little or no chance of success" (*People v. Stultz*, 2 NY3d 277, 287 [2004]).

Although state claims of ineffective assistance eschew the rigid two-prong federal standard in lieu of a flexible approach (*see People v. Henry*, 95 NY2d 563 [2000]), prejudice, or lack thereof, is nonetheless a "significant . . . element in assessing meaningful representation" and courts should rightfully be "skeptical of an ineffective assistance of counsel claim absent any showing of prejudice" (*see People v. Stultz*, 2 NY3d 277, 284 [2004]). Moreover, the prejudice component of ineffective assistance under the state constitution "focuses on the fairness of the process as a whole, rather than any particular impact on the outcome of the case" (*People v. Yagudayev*, 91 AD3d 888 [2d Dept. 2012]).

Here, defendant has failed to show that he was prejudiced by counsel's failure to object to the trial court's questioning of witnesses. He has not shown that the Second Department would have reversed his conviction and ordered a new trial had the issue been properly preserved. As discussed, the trial court's questioning of the witnesses did

not exceed impermissible bounds, but remained within the court's province to clarify confusing testimony and ensure the expeditious progress of the trial. Accordingly, there is no reasonable possibility of a different outcome had defense counsel objected, and so counsel was not ineffective, especially when viewed in the entirety of his representation, for not objecting.

In sum, defendant's claim that the trial court excessively interfered in the questioning of witnesses is procedurally barred and, in any event, without merit. Defendant's claim that he was denied the effective assistance of counsel, while not procedurally barred, is also without merit, as he has failed to show that his conviction would have been reversed on appeal had the issue been properly preserved. Accordingly, defendant's motion to vacate his judgment of conviction is denied in its entirety.

This constitutes the decision and order of the Court.

The Clerk of the Court is directed to distribute copies of this decision and order to counsel for the defendant and to the District Attorney.

March 17, 2022

CASSANDRA M. MULLEN, J.S.C.

APPENDIX (3)

ORDER OF N.Y. SUPREME COURT DECISION/
SECOND C.P.L. 440.10 MOTION

SUPREME COURT – STATE OF NEW YORK
CRIMINAL TERM, K20 – QUEENS COUNTY
125-01 QUEENS BOULEVARD
KEW GARDENS, NY 11415

P R E S E N T:

HONORABLE CASSANDRA M. MULLEN
JUISTICE OF THE SUPREME COURT

THE PEOPLE OF THE STATE OF NEW YORK	DECISION AND ORDER OF THE COURT
- against -	Ind. No.: 2916/2013
ANDREW FIELDS, Defendant.	Decision on Motion to Vacate Judgment

APPEARANCE OF COUNSEL

For the People:	Melinda Katz, District Attorney, Queens County (Lucy E. Pannes, Esq., of Counsel)
For the Defendant:	Defendant, *Pro Se* For the Motion

The following constitutes the opinion, decision, and order of the Court:

By his *pro se* motion dated April 21, 2024, the Defendant seeks an order of the Court to vacate his judgment of conviction and set aside his sentence. In support thereof, the Defendant argues: (1) that he was denied his right to effective assistance of counsel at trial, (2) that his Sixth Amendment right to confront witnesses was violated when the

People failed to call Sergeant Frank Demma to testify at trial, and (3) that he is actually innocent of the charges for which he was convicted after trial. In response, the People have filed an Affirmation in Opposition to Defendant's Motion (hereinafter, the "People's Aff."), dated June 10, 2024. Therein, the People assert that the Defendant's claims are procedurally barred and without merit.

Upon the foregoing papers, and due deliberation had, the Defendant's *pro se* motion to vacate his judgment of conviction and to set aside the sentence thereon, under C.P.L. §440, is denied in all respects for the reasons set forth below.

RELEVANT PROCEDURAL HISTORY

On August 30, 2013, at approximately 3:30 p.m., inside of 106-35 159th Street, Jamaica, Queens County, complainant, Donald Bradley, was robbed at gunpoint by two individuals, acting in concert with one another. On that date, the Defendant punched the victim and placed him in a chokehold, causing him to lose consciousness, while co-Defendant, Marly Senat, pointed a gun at the victim. The victim's car keys, cell phone, and U.S. currency were stolen from him during this encounter. As part of the subsequent police investigation into the incident, two video surveillance videos (each depicting moments immediately before and after the robbery) were recovered. Sgt. Frank Demma, of NYPD's 103rd Precinct, recognized the Defendant as one of the assailants depicted in the surveillance videos. On September 17, 2013, the Defendant was observed by police (with co-Defendant Senat seated in the passenger seat) driving a stolen vehicle. When police attempted to stop the car, the Defendant continued driving away from police until

he crashed the vehicle, causing it to come to a stop. After a brief foot pursuit of the Defendant, he was apprehended by police. His co-Defendant was then removed from the crashed vehicle and apprehended. Officers then recovered a loaded handgun matching the description of the gun utilized in the robbery. Both Defendants were identified by the victim on September 18, 2013.

Thereafter, the Defendant was charged by Indictment with Robbery in the First Degree (P.L. § 160.15[4]), two counts of Robbery in the Second Degree (P.L. § 160.10[1], [2][a]), Strangulation in the Second Degree (P.L. § 121.12), two counts of Criminal Possession of a Weapon in the Second Degree (P.L. § 265.03[1][b], [3]), and Criminal Possession of Stolen Property in the Fourth Degree (P.L. § 165.45[5]). Following pre-trial suppression hearings, the Honorable Steven Paynter denied the Defendant's application to suppress the pre-trial identification procedures. Judge Marcia Hirsch denied the Defendant's separate pre-trial motion to sever the robbery charges from the stolen property and weapon possession charges, holding that same were properly joined pursuant to C.P.L § 200.20.

The Defendant then proceeded to trial before the Honorable Ronald D. Hollie, and a jury. At the conclusion thereof, the Defendant was found guilty of all charges. On July 21, 2015, the Defendant was sentenced to concurrent determinate prison terms of fifteen years for each count of first and second-degree robbery and second-degree criminal possession of a weapon. The Defendant was also sentenced to a determinate prison term of seven years for the second-degree strangulation conviction, and one-year

imprisonment for the criminal possession of stolen property in the fifth-degree conviction. The Defendant's sentences were to run concurrent to one another and followed by post-release supervision.

In March 2017, the Defendant appealed his conviction to the Appellate Division, Second Department. In that appeal, the Defendant made the following three claims: (1) that the Court excessively interfered at trial, thereby denying him his due process right to a fair trial; (2) that the trial court erred in denying his motion to sever the robbery charges from the gun possession charges; and (3) that the trial court erred in denying his request for a missing witness charge. (People's Aff. at ¶ 12). The People, in turn, responded to the Defendant's claims, arguing that they were unpreserved and without merit. In June 2018, the Defendant filed a *pro se* supplemental brief, wherein he alleged two more claims. The Defendant alleged that the People committed a *Brady* violation in failing to provide him with Mr. Bradley's medical report in a timely manner and that the evidence convicting him of Robbery in the First and Second Degrees was legally insufficient. The Defendant also reiterated his claim that the Court erred in not severing the charges outlined above. Thereafter, the People filed a supplemental brief wherein they addressed the claims of a *Brady* violation and legal insufficiency of charges. In short, the People argued that same were procedurally barred and without merit. (People's Aff. at ¶ 16-17). On November 21, 2018, the Appellate Division, Second Department, denied the Defendant's application in all respects and affirmed his conviction. (*People v. Fields*, 166 A.D.3d 897 [2d Dept. 2018]). (People's Aff. at ¶ 19).

On December 2, 2018, the Defendant, through counsel, moved for leave to appeal to the Court of Appeals. Again, the People opposed the application. On March 4, 2019, the Court of Appeals denied the Defendant's application. (*People v. Fields*, 32 N.Y.3d 1204 [2019]). On March 27, 2019, the Defendant again moved, *pro se*, for the Court to reconsider its March 4, 2019 decision. The People again opposed same by letter dated May 7, 2019. The Court of Appeals renewed its previous denial in an order dated May 28, 2019. (People's Aff. at ¶ 22-23).

Following the Court of Appeals' denial, the Defendant filed his first *pro se* motion to vacate judgment on July 19, 2021, pursuant to C.P.L. § 440.10. Therein, the Defendant again alleged that the trial court interfered in questioning witness, thereby denying him the right to a fair trial. He also alleged ineffective assistance of counsel. In their opposition papers dated December 7, 2021, the People argued: (1) that the claim of the trial court's interference was procedurally barred and (2) that the claim of ineffective assistance of counsel was meritless. (People's Aff. at ¶ 25-26). In his Reply dated January 11, 2022, the Defendant relied on the amendment to C.P.L. § 440.10(2)(c), "which permitted such a claim notwithstanding the fact that sufficient facts appeared on the record to permit appellate review," to argue that his ineffective assistance of counsel claim was not procedurally barred. (People's Aff. at ¶ 27). This Court's decision and order, dated March 17, 2022, summarily denied the Defendant's motion. In particular, this Court held that the Defendant's "claim that the trial court excessively interfered in the questioning of witnesses is procedurally barred and, in any event, without merit.

Defendant's claim that he was denied the effective assistance of counsel, while not procedurally barred, is also without merit, as he has failed to show that his conviction would have been reversed on appeal had the issue been properly preserved." (3/17/2022 Decision at 11). In response, the Defendant, by letter dated April 28, 2022, moved, *pro se*, for leave to appeal to the Appellate Division, Second Department for "reconsideration" of this decision. The People opposed same by letter, dated July 18, 2022. The Appellate Division, Second Department, in an order dated August 5, 2022, denied the Defendant's application.

CURRENT MOTION

In motion papers dated March 29, 2024, the Defendant, *pro se*, seeks to vacate the judgment of conviction in this case based on three separate claims. First, the Defendant argues that trial counsel was ineffective for failing to object to the trial court's "excessive and prejudicial questioning of trial witnesses," pursuant to C.P.L. § 440.10(1)(h). (Def. Aff. at 12). Next, the Defendant argues that his Sixth Amendment right to confront witnesses was violated when the People did not call Sgt. Demma (who recognized the Defendant from the recovered surveillance videos) to testify at trial. (Def. Aff. at 13, 15). Lastly, the Defendant argues that he is actually innocent. In support of the third claim, the Defendant alleges "police misconduct" due to Sgt. Demma's failure to testify and relies on the Affidavit of his co-Defendant, Marly Senat, who claimed responsibility for the robbery. (Def. Aff. at 16-19).

The People submitted an Affirmation in Opposition to Defendant's Motion to Vacate Judgement and to Set Aside the Sentence on June 10, 2024. The People oppose the Defendant's "motion in its entirety because his claims were raised on direct appeal, or before this Court in his first motion to vacate, and are otherwise meritless." (People's Aff. at ¶ 34). C.P.L. § 440.10(2)(a), (c).

The Defendant is currently incarcerated pursuant to the judgment of conviction.

DECISION

Pursuant to section 440.10(2)(b) of the Criminal Procedure Law, a court must deny a motion to vacate judgment when the judgment is, at the time of the motion, appealable or pending on appeal, and sufficient facts appear on the record with respect to the ground or issue raised upon the motion to permit adequate review thereof upon such an appeal. Furthermore, pursuant to C.P.L. § 440.10(2)(c), a court must deny a motion to vacate a judgment when although sufficient facts appear on the record on the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred, owing to the Defendant's unjustifiable failure to take or perfect an appeal during the prescribed period, or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him.

Furthermore, C.P.L. § 440.30(4)(b) states that, "Upon considering the merits of the motion, the court may deny it without conducting a hearing if the motion is based upon the existence or occurrence of facts and the moving papers do not contain sworn

allegations substantiating or tending to substantiate all the essential facts, as required by subdivision one." Similarly, if "an allegation of fact essential to support the motion (i) is contradicted by a court record or other official document, or is made solely by the defendant and is unsupported by any other affidavit or evidence, and (ii) under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true," the Court may also deny a motion without conducting a hearing. (N.Y. Criminal Procedure Law § 440.30(4)(d) McKinney 2020).

I. Defendant's Claims of Ineffective Assistance of Counsel.

The United States Supreme Court has codified that for a finding of ineffective assistance of counsel under the Sixth Amendment, the defendant must establish: (1) that his attorney committed errors so egregious that he did not function as counsel within the meaning of the Sixth Amendment and (2) that counsel's deficient performance actually prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668 (1984).

As articulated by the New York Court of Appeals, the constitutional requirement of effective assistance of counsel is met under New York law when "the evidence, the law and the circumstances of a particular case, viewed in totality and as of the time of representation, reveal that the attorney provided meaningful representation." *People v. Benevento*, 91 N.Y.2d 708, 712 (1998). The Court continues, "[w]e have similarly noted that a claim of ineffective assistance of counsel will be sustained only when it is shown that counsel partook "an inexplicably prejudicial course." *Id.*, at 713 (*citing People v Zaborski*, 59 N.Y.2d 863 [1983]). Moreover, there is a strong presumption in favor of

effective assistance. *See People v. Myers*, 220 A.D.2d 461 (2d Dept. 1995); *see also People v. Baldi*, 54 N.Y. 2d 137 (1981).

Here, the Defendant renews the claim that his trial attorney was ineffective because counsel failed to object to what the Defendant deems to be "the ongoing making of the record by trial judge ... [or] to submit a motion to put a stop to the remarks and conduct of the trial judge." (Def. Aff. at 11). Moreover, the Defendant asserts that:

> "the full magnitude of the courts conduct, and reveal the extensive and excessive question the trial judge presented to the trial's witnesses, coupled with defense counsel failing to make the appropriate [o]bjection to protect the Defendant from being violated of his [d]ue [p]rocess and not [a]lertiing the court of its errors constitute a set of circumstances this court should not [i]gnore. The courts remarks and conduct and resulting fallout was extremely prejudicial, necessitating a new trial." (Def. Aff. at 13).

First, the Court finds that the Defendant's claim of ineffective assistance of counsel involves solely on-the-record matters and thus, is procedurally barred from this Court's review, as sufficient facts appear on the record to permit adequate review of these issues on direct appeal. Second, the Court agrees with the People that the Defendant has failed to articulate any new and/or off-the-record allegations to support his current motion to vacate based on this claim. C.P.L. § 440.30(4)(d). Finally, C.P.L. § 440.10(3)(b) clearly states that "the court may deny a motion to vacate a judgment when, the ground or issue raised upon the motion was previously determined on the merits upon a prior motion or proceeding." This Court previously ruled on the merits of this very claim, in its March 17, 2022 decision, wherein this Court held that the

Defendant failed to establish that his attorney was ineffective. In particular, this Court's March 17, 2022, decision held that the Defendant "failed to show that he was prejudiced by counsel's failure to object to the trial court's questioning of witnesses. He has not shown that the Second Department would have reversed his conviction and ordered a new trial had the issue been properly preserved." (3/17/2022 Decision at 10).

Therefore, the Court finds this claim to be procedurally barred and, in any event, with merit.

II. Defendant's Confrontation Claim.

Next, the Defendant claims that the fact that Sgt. Demma did not testify at trial constitutes a violation of his constitutional Sixth Amendment right to confront witnesses against him. (Def. Aff. at 13). In support of this claim, the Defendant further argues that "knowing, that any officer, who comes across or interviews a witness and/or is the [i]nitial [i]dentified in a criminal case [h]as to be subpoenaed." Therefore, the failure to call Sgt. Demma to the witness stand constituted an "extreme violation of [his] right of [d]ue [p]rocess. (Def. Aff. at 15). Pursuant to C.P.L. § 440.10(2)(c) a court "***must*** deny a motion to vacate a judgment of conviction where ... there were sufficient facts on the record which would have permitted appellate review of the issue on direct appeal, but no review occurred owing to the defendant's unjustifiable failure to perfect a direct appeal ... or to his ... unjustifiable failure to raise such ground or issue upon an appeal actually

perfected by him." (Emphasis added). In this instance, the Defendant failed to raise this record-based claim on his direct appeal.

Even assuming, *arguendo,* that this claim was not procedurally barred, the Defendant's assertion that he had a constitutional right to confront Sgt. Demma, is incorrect. The U.S. Supreme Court, in *Crawford v. Washington,* 541 U.S. 36 (2004), held that "testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." In this instance, the People did not call Sgt. Demma as a witness at the Defendant's trial, nor did they rely on his testimony to identify the Defendant. Instead, "the People called the victim, Donald Bradley, who identified [the D]efendant in a line-up and at trial, as the person who robbed and strangled him." (People's Aff. at p. 23-24). The Defendant, through counsel, was then afforded the opportunity to cross-examine Mr. Bradley. Since the People did not admit testimonial statements nor the identification of the Defendant made by Sgt. Demma into evidence, the Defendant's constitutional rights under the Confrontation Clause were not infringed upon in the instant matter. *See People v. Lin,* 28 N.Y.3d 701 (2017).

Therefore, in accordance with C.P.L. § 440.10(2)(c), the Court denies the Defendant's second claim, as it is also procedurally barred.

clear and convincing evidence that the defendant is innocent ... The constitutional violation on a claim of actual innocence is that the defendant is subject to a criminal conviction while he or she is in fact innocent. Mere doubt as to the defendant's guilt, or a preponderance of conflicting evidence as to the defendant's guilt, is insufficient, since a convicted defendant no longer enjoys the presumption of innocence, and in fact is presumed to be guilty. [Furthermore] a prima facie showing of actual innocence is made out when there is 'a sufficient showing of possible merit to warrant a fuller exploration' by the court." Furthermore, innocence claims made pursuant to C.P.L. 440.10(1)(g) require new evidence to have been discovered since the Defendant's conviction before a court *may* vacate a judgment of conviction. This "new evidence" "could not have been produced by the defendant at the trial even with due diligence on his part and ... is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant." C.P.L. 440.10(1)(g).

In this case, the Defendant has failed to substantiate a claim under both C.P.L. 440.10(1)(g) and C.P.L. 440.10(1)(h). Specifically, the co-Defendant's Affidavit does not exculpate the Defendant's role in this incident. Nor does it state that the Defendant was not present during the crime, that Mr. Senat acted alone, or that someone else was responsible for the charged crimes. So too, the Defendant's application to this Court does not allege any new evidence being discovered since his conviction which would

III. Defendant's Claim of Actual Innocence.

Finally, the Defendant argues that this Court should vacate his judgment of conviction because he is actually innocent of the aforementioned charges. In support of this claim, the Defendant included an Affidavit in Support, signed by co-Defendant Marly Senat and dated April 2, 2014, in the current motion. As acknowledged by the Defendant himself, said Affidavit was executed by the co-Defendant and submitted by the Defendant a year prior to the Defendant's trial. In his Affidavit in Support, co-Defendant Senat wrote:

> "I, Marly Senat, takes and accepts full responsibility for the above-mentioned crimes & offenses for which I have been charged. I acknowledge and admit that the weapon was in my sole possession as well as the stolen property. I make this Affidavit under my own free-will, free of any duress, pressure, or coercion. I am also fully aware of what I am doing and of the legal ramifications of such." (Def. Aff. at 21).

In addition, the Defendant, without any supporting documentation and/or evidence, alleges that Sgt. Demma made false out-of-court statements in order to ensure his arrest. Lastly, the Defendant asserts that he is not the individual captured in the surveillance videos obtained by police and introduced into evidence at trial. (Def. Aff. at 18).

Claims of actual innocence must be raised pursuant to C.P.L. § 440.10(1)(h). *People v. Hamilton*, 115 A.D.3d 12 (2014). In *Hamilton*, the Appellate Division, Second Department, held that "with respect to a claim of actual innocence, as distinguished from a specific constitutional violation, a constitutional violation occurs only if there is

substantiate his claims of actual innocence. In any event, this claim is procedurally barred as the Defendant could have raised it previously but failed to do so.

Therefore, the Defendant's motion under a claim of actual innocence is denied pursuant to sections 440.10(1)(g) and (h) of the Criminal Procedure Law.

This constitutes the decision and order of the Court.

The Clerk of the Court is directed to distribute copies of this decision and order to the attorney for the defendant and to the District Attorney.

July 15, 2024

CASSANDRA M. MULLEN, J.S.C.

HON. CASSANDRA MULLEN

APPENDIX (4)

DECISION/FIRST N.Y. CPL 440.10 MOTION

SUPREME COURT – STATE OF NEW YORK
CRIMINAL TERM, PART K-20, QUEENS COUNTY
125-01 QUEENS BOULEVARD
KEW GARDENS, NEW YORK 11415

P R E S E N T:

HONORABLE CASSANDRA M. MULLEN
JUSTICE OF THE SUPREME COURT

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

ANDREW FIELDS,

Defendant.

DECISION AND ORDER OF THE COURT

Queens County
Ind. No.: 2916/13

Motion to Vacate the Judgment of Conviction

Defendant Andrew Fields stands convicted, after a jury trial, of first-degree robbery and other related crimes, arising from two separate incidents. In the first incident, he and co-defendant Marly Senat robbed Donald Bradley at gunpoint on August 30, 2013. Then, on September 17, 2013, defendant and Senat sped away from police when the police attempted to pull the two over for driving a stolen car with a gun inside. Following his conviction for these crimes, the court sentenced defendant, as a second violent felony offender, to an aggregate prison term of fifteen years, and his

judgment of conviction was affirmed on appeal (*People v. Fields*, 166 AD3d 897 [2d Dept. 2018] *lv. denied* 32 NY3d 1204 [2019]).

Defendant now moves, *pro se*, to vacate his judgment of conviction under section 440.10 of the Criminal Procedure Law. For the reasons that follow, his motion is denied.

BACKGROUND

On August 30, 2013, Donald Bradley was visiting a friend inside an apartment building at 106-35 159th Street, Queens County, when defendant jumped out from behind him and punched Bradley in the face. The two struggled, and defendant put Bradley in a headlock while continuing to punch him. Co-defendant Senat then stepped out in front of Bradley and pointed a firearm at him and told him to be quiet. Still in the headlock, Bradley stopped struggling when he saw the gun but nonetheless lost consciousness. As he passed out, he felt defendant and co-defendant Senat rummaging through his pockets and later discovered that they had taken his money, wallet, cell phone and car keys.

On September 17, 2013, police saw defendant and co-defendant Senat driving a stolen 2006 minivan. The police attempted to pull defendant over, but he sped up and lost control of the car, ultimately crashing into the fence of a residential area. The police then arrested defendant.

Following his arrest, defendant was charged with these two incidents. For these crimes, he was charged with Robbery in the First Degree (Penal Law § 265.15[4]), two

counts of Robbery in the Second Degree (Penal Law § 160.10[1], [2][a]), Strangulation in the Second Degree (Penal Law § 121.12), two counts of Criminal Possession of a Weapon in the Second Degree (Penal Law § 265.03[1][b], [3], and Criminal Possession of Stolen Property in the Fourth Degree (Penal Law § 165.45[5]).

He then proceeded to trial before a justice of this court, and a jury. Upon conclusion of the trial, the jury convicted defendant of all charges. On July 21, 2015, the court sentenced defendant to an aggregate prison term of fifteen years.

Defendant then appealed his judgment of conviction to the Appellate Division, Second Department. In his appeal, he argued, *inter alia*, that the trial court excessively with the examination and cross-examination of the witnesses, thereby depriving him of a fair trial. The People opposed defendant's claim, arguing that this claim was not preserved and, in any event, without merit as the trial court acted within its province to clarify confusing testimony, and otherwise did not usurp the role of the prosecutor.

In a decision and order dated November 21, 2018, the Second Department affirmed defendant's judgment of conviction (*People v. Fields*, 166 AD3d 897 [2d Dept. 2018]) *lv. denied* 32 NY3d 1204 [2019]. In its decision, the Court did not specifically address defendant's claim that the trial court excessively interfered in the trial. Instead, it dismissed that claim along with several others as unpreserved and declined to review those claims in the interest of justice (*id.* at 898).

The Current Motion

In his current motion, defendant, *pro se*, moves to vacate his judgment of conviction under CPL 440.10, claiming that the trial court excessively interfered with the trial by its questioning of the witnesses. In support of this argument, he cites several instances in which the trial court questioned the witnesses. Defendant also claims that he was denied the effective assistance of counsel, owing to counsel's failure to preserve this issue for appellate review.

In a response dated December 7, 2021, the People oppose defendant's motion. First, the People argue that defendant's claim regarding the court's conduct is procedurally barred as one that should have been raised on appeal. With respect to defendant's ineffective assistance claim, the People argue that, viewing counsel's representation in its totality, defendant received the effective assistance of counsel, and counsel was not ineffective for failing to raise an objection to the court's otherwise proper conduct.

In a reply dated January 11, 2022, defendant contends that his claims present a "mixed claim," with matters appearing both on the record and off the record, and so appropriately raised in a post-conviction motion. He also argues that his claims are not procedurally barred as a recent amendment to the CPL 440.10(2)(c) permits review of ineffective assistance claims in a post-conviction motion, notwithstanding that the claim was reviewable on direct appeal.

DISCUSSION

Under section 440.10 of the Criminal Procedure Law, a defendant may, "at any time after entry of judgment," move to vacate the judgment of conviction based on several enumerated grounds. Such motions, however, "must" be denied when "sufficient facts appeared on the record" to have permitted adequate appellate review of the ground or issue raised, but no such review took place "owing to the defendant's . . . unjustifiable failure to raise such ground or issue upon an appeal" (CPL 440.10[2][c]). In other words, "defects that can be raised on direct appeal in that way or not at all" (*People v. Cuadrado*, 9 NY3d 362, 365 [2007]). "The purpose of this provision is to prevent CPL 440.10 from being employed as a substitute for direct appeal when [the] defendant was in a position to raise an issue on appeal" (*People v. Cooks*, 67 NY2d 100, 103 [1986]). Where a motion is not procedurally barred, however, a court may still deny a motion to vacate a judgment of conviction without a hearing where, among other grounds, the papers do not state a legal basis entitling the defendant to relief (CPL 440.30[4][a]).

Here, sufficient facts appeared on the record so as to permit appellate review of defendant's claim that the trial court impermissibly took on an active role in the direct and cross-examination of witnesses. As such, this claim was reviewable on appeal and therefore procedurally barred under CPL 440.10(2)(c). In supporting this claim, defendant points entirely to interactions between the court. For example, he alleges that, "Throughout the trial, the supreme court conducted excessive and prejudicial

questioning of trial witnesses" (Defendant's Motion at 11), and that "the court asked over 350 fact specific questions even though there was rarely any need to clarify their testimony" (Defendant's Motion at 12). He bases this claim entirely on exchanges between the court, the witnesses, and the attorneys that occurred at trial (Defendant's Motion at 12-17), and otherwise presents no issues or facts that appeared "off the record." And in fact, defendant actually *did* raise this claim on appeal, but the Second Department dismissed it as unpreserved. Post-conviction motions under CPL 440 do not exist to circumvent either the appellate process or the preservation requirement (*see Cooks*, 67 NY2d at 103).

Moreover, even if this Court were to entertain the merits of defendant's motion, it would nonetheless be denied without a hearing (*see* CPL 440.30[1]). Under CPL 440.30[4][a], a court may deny a post-conviction motion when "the moving papers do not allege any ground constituting legal basis for the motion."

Defendant claims that the trial court impermissibly interfered with the examination of the witnesses. The Court of Appeals has "recognized the Trial Judge's vital role in clarifying confusing testimony and facilitating the orderly expeditious progress of trial," but has cautioned that such power "is one that should be exercised sparingly" (*People v. Yut Wai Tom*, 53 NY2d 44 [1981]). A trial judge is there expected "to protect the record, not to make it" (*id.* at 58). Further, "even if a trial judge makes intrusive remarks that would better have been left unsaid, or questions witnesses extensively, the defendant is not thereby deprived of a fair trial so long as the jury is not

prevented from arriving at an impartial judgment on the merits" (*People v. Adams*, 117 AD3d 104 [1st Dept. 2014]). "That line is crossed when the judge takes on either the function or appearance of an advocate at trial" (*People v. Arnold*, 98 NY2d 63 [2002]).

Here, defendant cites several instances in which the trial court overstepped its bounds and took on the function of an advocate. But examination of those instances, in context, reveals that the court acted within its authority. For example, defendant points to the following exchange:

> THE COURT: Hold on. Did you ever get into Bobby's apartment?
>
> WITNESS: Yeah. After when you see me talking to the guy with the red hat, me and him are talking, I go back into Bobby's apartment, tell him what's going on.
>
> THE COURT: Okay.
>
> WITNESS: And he comes out with me.
>
> THE COURT: So the only point at which you get into Bobby's apartment is after those two people leave?
>
> WITNESS: Exactly. After the whole situation happened, that's when I get in.
>
> THE COURT: Okay. So counsel, you are asking him how much of the People he knows was in Bobby's apartment at the time he had gotten—

It is clear that this line of questioning was meant to clarify testimony and to encourage the "orderly expeditious progress of trial" (*see Parker*, 197 AD3d at 141). It was not meant to take on the position of an advocate, nor was it so intrusive that it actually did so (*see People v. Mitchell*, 184 AD3d 875 [2d Dept. 2020] [new trial ordered where judge questioned witnesses until they were able to positively identify defendant as the

perpetrator). Additionally, although defendant contends that the trial court's excessive interference was palpable from the 350 times it questioned the witnesses, "it is the substance and not the number of questions asked that is the important consideration" (*id.* at 734).

The Court also notes that, as mentioned, defendant raised this claim on direct appeal, but the Second Department did not review the merits of this claim because it was not preserved. As the dissenting justices in *Parker*, *supra*, noted, however, that Court "has consistently reached the issue in the interest of justice despite defense counsel's failure to raise objections to the trial court's interjections" (*id*. at 145), and cited several cases in which that court has done so and ordered a new trial, including one, *People v. Sookdeo*, 164 AD3d 1268 (2d Dept. 2018), that was decided merely two months before that court declined to review defendant's similar claim (*see Fields*, 166 AD3d at 898). That the Second Department disinclined to review defendant's claim in the interest of justice, when it otherwise found fit to do so in meritorious instances raising similar claims, suggests that the court found defendant's claim unavailing under these circumstances.

Accordingly, this claim of defendant's motion is denied as procedurally barred as one that should have been raised on appeal and is otherwise without merit.

Defendant next claims he was denied the effective assistance of counsel, owing to counsel's failure to object, and therefore preserve the issue for appellate review, the trial court's interference with the questioning of witnesses. As defendant correctly

notes, CPL 440.10(2)(c) was recently amended to permit claims of ineffective assistance of counsel to be raised in a post-conviction motion, notwithstanding that sufficient facts may otherwise appear on the record as to permit appellate review. As such, this claim is not procedurally barred by CPL 440.10(2)(c).

Nonetheless, this branch of defendant's motion is denied under CPL 440.30(4)(a), as he has not stated a legal basis entitling him to relief. Reviewing defendant's ineffective assistance claim on the merits, defendant has failed to show that counsel's lack of objecting to the trial court's actions deprived him the effective assistance of counsel.

In order to show he was denied the effective assistance of counsel under the Federal constitution, a defendant must show both that: (1) that counsel's representation fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different (*Strickland v. Washington*, 466 US 668 [1984]). New York law, however, eschews the rigid two-prong test under the federal standard, and instead, "the core of the inquiry is whether defendant received 'meaningful representation'" (*People v. Benevento*, 91 NY2d 708, 712 [1998]). A claim of ineffectiveness "is ultimately concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case" (*id.* at 714).

Further, counsel's performance "should not be guessed with the clarity of hindsight to determine how the defense might have been more effective" (*Benevento*, 91

NY2d at 712). So-called errors in representation will be tolerated so long as the overall representation can be characterized as "meaningful." (*People v. Borrell*, 12 NY3d 365, 368 [2009]). A defense counsel's decisions in "making strategic and tactical decisions" is "objectively evaluated . . . to determine whether it was consistent with strategic decisions of a 'reasonably competent attorney" (*People v. Oathout*, 21 NY3d 127, 132 [2013] [internal citations omitted]). And, a defendant is not denied the effective assistance of counsel "merely because counsel does not make a motion or argument that has little or no chance of success" (*People v. Stultz*, 2 NY3d 277, 287 [2004]).

Although state claims of ineffective assistance eschew the rigid two-prong federal standard in lieu of a flexible approach (*see People v. Henry*, 95 NY2d 563 [2000]), prejudice, or lack thereof, is nonetheless a "significant . . . element in assessing meaningful representation" and courts should rightfully be "skeptical of an ineffective assistance of counsel claim absent any showing of prejudice" (*see People v. Stultz*, 2 NY3d 277, 284 [2004]). Moreover, the prejudice component of ineffective assistance under the state constitution "focuses on the fairness of the process as a whole, rather than any particular impact on the outcome of the case." (*People v. Yagudayev*, 91 AD3d 888 [2d Dept. 2012]).

Here, defendant has failed to show that he was prejudiced by counsel's failure to object to the trial court's questioning of witnesses. He has not shown that the Second Department would have reversed his conviction and ordered a new trial had the issue been properly preserved. As discussed, the trial court's questioning of the witnesses did

not exceed impermissible bounds, but remained within the court's province to clarify confusing testimony and ensure the expeditious progress of the trial. Accordingly, there is no reasonable possibility of a different outcome had defense counsel objected, and so counsel was not ineffective, especially when viewed in the entirety of his representation, for not objecting.

In sum, defendant's claim that the trial court excessively interfered in the questioning of witnesses is procedurally barred and, in any event, without merit. Defendant's claim that he was denied the effective assistance of counsel, while not procedurally barred, is also without merit, as he has failed to show that his conviction would have been reversed on appeal had the issue been properly preserved. Accordingly, defendant's motion to vacate his judgment of conviction is denied in its entirety.

This constitutes the decision and order of the Court.

The Clerk of the Court is directed to distribute copies of this decision and order to counsel for the defendant and to the District Attorney.

March 17, 2022

CASSANDRA M. MULLEN, J.S.C.

APPENDIX (5)

DECISION/APPELLATE DIVISION/DENYING LEAVE TO APPEAL

Rec'd via Email 8-5-22

Def'g Motion

Supreme Court of the State of New York
Appellate Division : Second Judicial Department

M284310
SL/

REINALDO E. RIVERA, J.

2022-03918

DECISION & ORDER ON APPLICATION

The People, etc., plaintiff,
v Andrew Fields, defendant.

(Ind. No. 2916/2013)

Application by the defendant pursuant to CPL 450.15 and 460.15 for a certificate granting leave to appeal to this Court from an order of the Supreme Court, Queens County, dated March 17, 2022, which has been referred to me for determination.

Upon the papers filed in support of the application and the papers filed in opposition thereto, it is

ORDERED that the application is denied.

REINALDO E. RIVERA
Associate Justice

August 5, 2022

PEOPLE v FIELDS, ANDREW

APPENDIX (6)

COURT OF APPEALS DENYING LEAVE TO APPEAL AND RECONSIDERATION

State of New York
Court of Appeals

2019
Talcott

BEFORE: LESLIE E. STEIN, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

ANDREW FIELDS,

Appellant.

ORDER DENYING LEAVE

Appellant having applied for leave to appeal to this Court pursuant to Criminal Procedure Law § 460.20 from an order in the above-captioned case;*

UPON the papers filed and due deliberation, it is

ORDERED that the application is denied.

Dated: February 19, 2019
at Albany, New York

Associate Judge

*Description of Order: Order of the Appellate Division, Second Department, dated November 21, 2018, affirming a judgment of the Supreme Court, Queens County, rendered July 21, 2015.

Zelig/Federici
2916/13

State of New York
Court of Appeals

BEFORE: LESLIE E. STEIN, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

ORDER DENYING RECONSIDERATION

ANDREW FIELDS,

Appellant.

Appellant having moved for reconsideration in the above-captioned case of an application for leave to appeal denied by order dated February 19, 2019;

UPON the papers filed and due deliberation, it is

ORDERED that the motion for reconsideration is denied.

Dated: May 28, 2019
at Albany, New York

Leslie E. Stein
Associate Judge

APPENDIX (7)

DECISION/APPELLATE DIVISION/AFFIRMING AND DENYING REARGUMENT

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D57371
Q/htr

_____AD3d_____ Submitted - October 23, 2018

WILLIAM F. MASTRO, J.P.
SANDRA L. SGROI
COLLEEN D. DUFFY
HECTOR D. LASALLE, JJ.

2015-07353 DECISION & ORDER

The People, etc., respondent,
v Andrew Fields, appellant.

(Ind. No. 2916/13)

Steven A. Feldman, Uniondale, NY, for appellant, and appellant pro se.

Richard A. Brown, District Attorney, Kew Gardens, NY (John M. Castellano, Johnnette Traill, Merri Turk Lasky, Nancy Fitzpatrick Talcott, and Mariana Zelig of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Ronald D. Hollie, J.), rendered July 21, 2015, convicting him of robbery in the first degree, robbery in the second degree (two counts), strangulation in the second degree, criminal possession of a weapon in the second degree (two counts), and criminal possession of stolen property in the fifth degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

The defendant was tried with a codefendant for various crimes arising out of a gunpoint robbery of an individual in a Queens apartment building and possession of a firearm thereafter while occupying a vehicle that had been reported stolen. Following a jury trial, the defendant was convicted of robbery in the first degree, two counts of robbery in the second degree, strangulation in the second degree, two counts of criminal possession of a weapon in the second degree, and criminal possession of stolen property in the fifth degree.

We agree with the Supreme Court's denial of the defendant's motion to sever the robbery and weapons possession counts. These counts in the indictment were properly joined, since

the nature of the evidence for each of the offenses was material and admissible as evidence upon the trial of the other counts in the indictment (*see* CPL 200.20[2][b]; *People v Bongarzone*, 69 NY2d 892, 895). As the offenses were properly joined in one indictment from the outset pursuant to CPL 200.20(2)(b), the court lacked the statutory authority to sever them (*see* CPL 200.20[3]; *People v Bongarzone*, 69 NY2d at 895; *People v Senat*, ___ AD3d ___, 2018 NY Slip Op 06573 [2d Dept 2018]; *People v Bonilla*, 127 AD3d 985, 986).

We also agree with the Supreme Court's denial of the defendant's motion for a missing witness charge as to the robbery victim's friend, who allegedly saw the victim shortly after the robbery. As conceded by the defendant, the request for the missing witness charge was untimely (*see People v Joseph*, 161 AD3d 1105, 1105; *People v Mancusi*, 161 AD3d 775, 776; *People v Sealy*, 35 AD3d 510, 510). Moreover, the defendant failed to show that the witness was knowledgeable about a material issue in the case and would be expected to provide noncumulative testimony favorable to the prosecution (*see People v Edwards*, 14 NY3d 733, 735; *People v Locenitt*, 157 AD3d 905, 907).

The defendant's contentions, raised in his pro se supplemental brief, that the verdict of guilt was not supported by legally sufficient evidence and was against the weight of the evidence, are without merit. Viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621), we find that it was legally sufficient to establish the defendant's guilt beyond a reasonable doubt (*see People v Danielson*, 9 NY3d 342, 349). Moreover, in fulfilling our responsibility to conduct an independent review of the weight of the evidence (*see* CPL 470.15[5]; *People v Danielson*, 9 NY3d at 348-349), we nevertheless accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor (*see People v Mateo*, 2 NY3d 383, 410; *People v Bleakley*, 69 NY2d 490, 495). Upon reviewing the record here, we are satisfied that the verdict of guilt was not against the weight of the evidence (*see People v Romero*, 7 NY3d 633).

The defendant's remaining contentions, including those raised in his pro se supplemental brief, are unpreserved for appellate review (*see* CPL 470.05[2]; *People v Geritano*, 158 AD3d 724, 724; *People v Jimenez*, 148 AD3d 1054, 1054; *People v Gough*, 142 AD3d 673, 675; *People v Whitfield*, 181 AD2d 752, 752), and we decline to consider them in the interest of justice.

MASTRO, J.P., SGROI, DUFFY and LASALLE, JJ., concur.

ENTER:

Aprilanne Agostino
Clerk of the Court

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

M264292
kbp/

WILLIAM F. MASTRO, J.P.
ROBERT J. MILLER
COLLEEN D. DUFFY
HECTOR D. LASALLE, JJ.

2015-07353 DECISION & ORDER ON MOTION

The People, etc., respondent,
v Andrew Fields, appellant.

(Ind. No. 2916/13)

Motion by Andrew Fields for leave to reargue an appeal from a judgment of the Supreme Court, Queens County, rendered July 21, 2015, which was determined by decision and order of this Court dated November 21, 2018.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied.

MASTRO, J.P., MILLER, DUFFY and LASALLE, JJ., concur.

ENTER:

Aprilanne Agostino
Clerk of the Court

July 12, 2019

PEOPLE v FIELDS, ANDREW

APPENDIX (8)

MEDICAL REPORTS OF COMPLAINANT DONALD BRADLEY

North Shore LIJ Huntington Hospital

270 Park Avenue
Huntington, NY 11743-275
Tel (631) 351-2000
www.hunthosp.org

DELEGATION OF AUTHORITY

I, Kevin Lawlor, the President and C.E.O. of Huntington Hospital certify that **Cecile O'Brien, Medical Records Clerk,** whose signature appears below is a responsible employee of this Institution. I hereby authorize her to certify records of this Institution as the full and complete record of the condition, act, transaction, occurrence or event which have been made in the regular course of business of this Institution, and it is in the regular course of business of this Institution to make such records at the time of the condition, act transaction, occurrence or event, or within a reasonable time thereafter.

THIS DELEGATION OF AUTHORITY SHALL BE VALID UNTIL

December 31, 2014

Kevin Lawlor, President & C.E.O.

Cecile O'Brien

Signature of Authorized Employee

:cal
MediRecAuthorizationO'Brien2014

North Shore LIJ Huntington Hospital
North Shore-Long Island Jewish Health System

270 Park Avenue
Huntington, New York 11743-2799
(631) 351-2000
www.hunthosp.org

CERTIFICATION

I, Cecile O'Brien, the Medical Records Correspondence Clerk of Huntington Hospital hereby certify that the record attached is in our custody and is the full and complete record of the condition, act, transaction, occurrence of event of this Institution concerning:

Donald Bradley of
(Name of Patient)

(Address)

I further certify that this record was made in the regular course of business of this institution and it is in the regular course of business of this Institution to make such record at the time of the condition, act, transaction, occurrence of event, or within a reasonable time thereafter.

I have been authorized to certify these records and I am authorized on this date.

2·18·2014
Date

Cecile O'Brien
Correspondence Clerk

:cal
MedRecCertO'Brien2006

In the Name of the People of the State of New York

HUNTINGTON HOSPITAL
270 PARK AVE
HUNTINGTON, NY 11743
Attn: Medical Records Department

GREETING:

YOU ARE COMMANDED to appear before the **SUPREME COURT, PART TAPA** of the County of Queens at the Courthouse located at 125-01 Queens Boulevard, Kew Gardens , Queens County, in the City and State of New York, on **Monday, February 17, 2014**, at 9:30 AM in the forenoon of that day, as a witness in a criminal action prosecuted by the People of the State of New York against **ANDREW FIELDS AND MARLY SENAT, Indictment No: 2916/2013**, and you are required to bring and leave the following:

A certified copy of any and all records, including but not limited to, emergency room records, pathology reports, laboratory test results, photographs, X-rays; dictated, typed operative reports, and any other relevant material related to the care and treatment of:

Patient's Name: **DONALD BRADLEY**

Address: [redacted]

Date of Birth: [redacted]

Date of Examination/Admission: **August 30, 2013**

Reason For Examination/Admission: ASSAULTED

[If any material in the record is confidential pursuant to Public Health Law Art. 27 F, please redact that material and forward the rest of the record as requested.]

****

If this SUBPOENA is Disobeyed
You may be held in Criminal Contempt under the Judiciary Law
and/or prosecuted under the Penal Law.

****

Dated, The City of New York, Borough and County of Queens, ~~January 30, 2014~~ FEB 03 2014

ADA: **RACHEL BUCHTER**
Bureau: **Career Criminal Major Crimes**
Phone No. **(718) 286-7020**
Email: **REBuchter@queensda.org**

Richard A. Brown
District Attorney - Queens County

SO ORDERED

1/31/14

JUSTICE OF THE SUPREME COURT

~~HON. BARRY KRON~~

In lieu of Personal Appearance, if you so choose, you may mail or deliver the requested documents to the QUEENS DISTRICT ATTORNEY, 125-01 Queens Boulevard, Kew Gardens, New York, 11415, Attention: ADA RACHEL BUCHTER

BRADLEY, DONALD ****59

HUNTINGTON HOSPITAL POA: NO LW: NO **EMERGENCY DEPARTMENT**

ACCOUNT NO.	PATIENT LAST NAME	FIRST	AGE	SOC SECURITY	REG. DATE	TIME	MED. REC. NO.
[redacted]	BRADLEY	DONALD	30 Y	XXX-XX-XXXX	08/31/13	17:40	[redacted]

ADDRESS	CITY	STATE	ZIP	BIRTHDATE	HOME PHONE	WORK PHONE
[redacted]	[redacted]					

RACE	SEX	M.S.	REL.	GUAR LAST NAME	GUAR FIRST	GUARANTOR EMPLOYER
B	M	S	NO	BRADLEY	DONALD	

PLAN DESCRIPTION POLICY HOLDER/POLICY# REL SEX DOB GROUP/PAYOR ID

[redacted]

BRADLEY, DONALD [redacted]

EMERGENCY CONTACT: NAME	HOME PHONE	MOA	ACCOMPANIED BY
ANCETTA KING	[redacted]		

PRIOR VISIT	HOSP EMP	SELF PAY	WC	MVA	ACCIDENT DATE	FAMILY PHYSICIAN: NAME	PHONE	REGISTERED BY
[redacted]	N				08/30/13	CHOY, LAWRENCE		[redacted]

CHIEF COMPLAINT/REASON FOR VISIT:
SORE THROAT, VOV

ISOLATION REQUIRED Y N
CIRCLE ONE

PLACE TRIAGE STICKER HERE

Time	BP	P	RR	Temp	SaO2		

Input			Output		
Time	Type	Amt	Time	Type	Amt

Time
Site
Gauge started by
Soln
Rate

PAIN MANAGEMENT

TIME	PAIN LEVEL	PAIN LOCATION	CHARAC-TERISTICS	INTERVEN-TIONS	INITIAL	PAIN LEVEL / OUTCOME	TIME	INITIAL
1830	9/10	neck	AP	Motrin	MA	sleeping	1840	MA

Time	Nursing notes	Sign
1840	pt seen * throat pain c̄ VOV episode last pm, to Pali police, pt med as Rx X-Rays done, pt refused large meal of rice and fried chicken in waiting room c̄ no difficulty, Ø signs of injury noted, pt sleeping in room. D/C home c̄ instructions — M.Aguilar RN	

4-140 (1/28/12)

8/31/13 6:04 PM

ED Triage

Name	Birth Date	Account #	MRN	Sex	Age
BRADLEY, DONALD	[redacted]	[redacted]	[redacted]	M	30 Years

Initial Intake

Initial Intake	Arrival Mode	Charted by	HIV Testing
08/31/2013 17:58	Ambulatory	Manning, Susan	Offered and declined

BP	Pulse	Resp	Temp	O2 SAT	Language	Pain Level	ESI
106/59	67	16	98.7F	97% Room air	English	9 Nrs	3

Height	Weight	Suicide Risk	Suspect Sepsis	Suspect Stroke	Allergic	Primary Reaction
70in	70.9kg actual	Not at risk	No	No	NKA	

Chief Complaint	Comment
Sore Throat	started last pm, was put in a head lock last pm until he was unconscios, did not call police

Nursing Assesment

Past Med History	other -->
Comment	chronic pain to rt leg
Past Surgical HX	
Comment	2 stab wounds in back, ped mva 9/13/11
Last TD	

Adv. Directives	Special Needs	Domestic Violence	Travel Outside US
none	none	No	No

Medical Observations	Comment
	pt was choked until unconscious last pm

Medication	Dose	Freq	Route	Date Taken	Comment
Percocet Oral			Oral		

Nursing Assessment Performed By:
Manning, Susan RN

Dept	Bed ID	Time to TX
ER	4	1810

HUNTINGTON HOSPITAL BRADLEY, DONALD ****59

EMERGENCY DEPARTMENT

L3:1 L4:4 L5:4

Time: 18:30 Source: (PT)/OTHER

CC

HPI

HISTORY

☐ HPI/ROS/PE limited due to urgency of condition and/or mental status

Attending DX

Obtained additional history from: Family PMD EMS NH notes Old Chart

Location: R L Neck pain / Discomfort

Quality: (dull) / sharp / pressure

Severity: (mild) / mod / severe

Duration: 1 min / hrs / (days)

Timing: acute / (constant) / intermittent / (gradual)

Context: c/o being choked in choke hold yesterday

Mod factors: Rest ... pain c swallow

Assoc. sx: N/V / dizzy / SOB / fever

PMH/PSH None | DM CAD HTN CA Asthma / COPD CVA Thyroid ↑ Chol Dementia ... able to tolerate PO solids/liquids

SH Alcohol Tobacco Illicit subs / IUTD daycare sick contact travel

FH DM CAD CA

Med. None Percocet

Allergies ☑ NKA

Review of Systems

Ant Neck pain / ... / Able to tolerate diet / Ant neck tender 15 / ... / No SOB ...

L3:1 L4:2-9 L5:10

☐ Unable to obtain: AMS dementia severe distress non-verbal intubated

GEN Neg Fever Chills Sweats ↑ / ↓ Appetite ↑ / ↓ Wt Fatigue Weakness

EYES Neg ↓ Vision Floaters Scotoma Photophobia Pain Itch D/C Redness Diplopia Glasses Contacts Glaucoma Blind

ENT Neg Ear Pain / D/C ↓ Hearing Tinnitus Nasal D/C Epistaxis Sore Throat Dysphagia Ulcers Caries Dentures

CV Neg Chest pain / pressure / burning / pleuritic Syncope Edema Orthopnea PND Claudication Palpitations

RESP Neg Dyspnea Cough Sputum Hemoptysis Wheezing Stridor

GI Neg Abd. pain Nausea Vomiting Anorexia Constip. Diarrhea Rectal pain Hematem. Melena BRBPR Hernia Jaundice

☐ All other ROS negative except as indicated herein

GU/GYN Neg Dysuria Hematuria Frequency Retention Incont. Penile / Vag. D/C Vag bleeding Amenorrhea Menopausal Test pain Genital ulcer

MS Neg Joint: pain swelling eryth stiffness Myalgia Weakness Atrophy Spasm (Neck) / Back pain Sciatica

SKIN/BR Neg Rash Lesion Laceration Pruritis Breast mass Nipple D/C

NEURO Neg HA ↓Motor Sensory Δ Speech Δ Dizziness Vertigo Unsteady Lightheaded Tremor Seizure Loss of Consciousness

PSYCH Neg Depression Mania Anxiety Insomnia Phobia Suicidal Hallucinations Schizophrenia

ENDO Neg DM Polydipsia Polyuria Heat / Cold Intol. ↑ / ↓ Thyroid

HEME/LYM Neg ABN Bleeding Bruising Petechiae Adenopathy Anemia

ALL/IMM Neg Rhinitis Atopy ↓Immunity HIV Cancer

PHYSICAL EXAMINATION

Vital signs	BP supine	BP sitting	BP standing	Pulse reg - irreg	Resp	Temp PO - PR	BGM	Ht.	Wt (kg)	Pulse Ox
	PULSE	PULSE	PULSE noted —							

L3:2 L4:5 L5:8

General (Alert) Unresponsive WD WN (NAD) playful interactive
Distress: mild / moderate / severe anxious thin obese disheveled poor hygiene acutely / chronically ill

Head (NC) (AT) laceration deformity scar mass tenderness hematoma VP shunt fontanelle flat bulging

Eyes
Visual fields normal field cut
• EOM (Full) Abnormal Nystagmus Acuity R ______ L ______ blind
• Pupils R 3 L 3 (PERRL) unequal irregular unreactive
Fundi: Disc normal pale vessel Δs hemorrhage exudate
retinal detachment Cornea clear cloudy FB abrasion ulcer (contact lens)
Ant. chamber clear cloudy hyphema hypopyon
• Lids normal lesion ptosis exophthalmos
• Conjunctiva pink pale erythematous icteric D/C FB

ENT • Inspection: Auricle normal tender lesion mass
• Otoscopic: canal normal mass swelling erythema FB D/C
• TM normal eryth poorly mobile defect effusion hemoTM
Hearing normal whispered voice finger rub Weber Rinne deaf
Nose mucosa normal eryth epistaxis FB septum normal deviated
hematoma turbinates normal eryth • Sinuses tenderness -/+
• Lips/teeth/gums lips normal pale cyanotic laceration teeth normal malocclusion decay gums normal swollen hyperplastic eryth abscess pigmented
• Oropharynx mucosa normal dry ulcers laceration tongue normal laceration swelling pharynx normal eryth exudate ↑ tonsils petechiae mass thrush salivary glands normal tender ↑ size

• **Neck** Inspection supple mass laceration tender crepitus
Kernig Brudzinski JVD Trachea midline deviated stridor
• Thyroid normal enlarged mass scar tender

Respiratory • Effort normal labored retractions agonal
Percussion normal dull hyperresonant Palpation normal mass tender fremitus
• Auscultation clear equal rales wheeze rhonchi egophony

Chest/Breast Inspection normal lesion asymmetry nipple D/C
mastectomy Palpation normal mass tenderness

Resident /PA/NP Examination

n/at

C-Spine
nontender
Ant aspect
no edema
no tenderness
no stridor.

Attending Examination

A/Ox3

nc
AT

MMM

Airway
Ant neck
No crepitus
trachea intact
...

BRADLEY DONALD
PATIENT LAST NAME FIRST

AGE 30 Y

[redacted] MEDICAL RECORD NO

PATIENT ACCOUNT NO. [redacted]

DATE 08/31/1

MEDICAL RECORDS

EMERGENCY DEPARTMEN

PHYSICAL EXAMINATION (Page 2)

Resident Examination

Attending Examination

- **Cardiovascular** **Palpation** PMI normal PMI displaced heave thrill
  Auscultation Reg irreg/irreg reg/irreg S_3 - S_4 - rub - murmur
  Carotids normal pulse bruit **Aorta** normal enlarged pulsatile bruit
  Femoral R (nl pulse diminished bruit) L (nl pulse diminished bruit)
  Pedal R (nl pulse diminished bruit) L (nl pulse diminished bruit)

Abdomen soft nontender tender rebound guarding mass scar
BS: normal ↑ / ↓ absent flat distended fluid wave
gravid Murphy's sign Rovsing's sign

- **Liver** normal size enlarged tender mass
- **Spleen** normal size enlarged nonpalpable
- **Hernia** none umbilical inguinal femoral incisional

Rectum normal poor tone fissure mass abscess hemorrhoid
Fecal occult blood negative positive ☐ Int. QC ref(neg) melena BRBPR
Back nontender tender C T L CVAT scoliosis kyphosis
Pelvis normal deformity tender ecchymosis

Male GU **Scrotum** normal eryth tenderness **Testis** normal ↑ tender mass
nonpalpable **cremasteric reflex** normal absent hydrocoele cord tenderness
Epididymis normal ↑ tender mass
Penis normal D/C blood at meatus circumcised
Prostate normal ↑ nodule tender boggy high riding

Female GU **Vulva** normal lesion eryth abscess mass
Vagina normal lesion D/C rectocoele urethrocoele cystocoele
Urethra normal mass scar **Bladder** normal full mass tender
Cervix normal lesion CMT D/C closed open
Uterus normal gravid enlarged firm retroverted anteverted tender
Adnexa normal mass tender enlarged nonpalpable

- **Lymphatic** **Neck** normal adenopathy **Axillae** normal adenopathy
  Groin normal adenopathy **Other areas** normal adenopathy

Musculoskeletal **Gait** normal unsteady wide-based ataxic unable
- **Extremities** edema varicosities ulcers mottling cyanosis
  Digits & nails normal clubbing cyanosis eryth petechiae ischemia swelling

RUE normal ☐	LUE normal ☐	RLE normal ☐	LLE normal ☐
Tender Swelling Misalignment Crepitation Mass / Effusion	Tender Swelling Misalignment Crepitation Mass / Effusion	Tender Swelling Misalignment Crepitation Mass / Effusion	Tender Swelling Misalignment Crepitation Mass / Effusion
ROM normal / ↓	ROM normal / ↓	ROM normal / ↓	ROM normal / ↓
Laxity / Dislocation Subluxation	Laxity / Dislocation Subluxation	Laxity / Dislocation Subluxation	Laxity / Dislocation Subluxation
Normal /5 Tone normal / ↑ / ↓	Normal /5 Tone normal / ↑ / ↓	Normal /5 Tone normal / ↑ / ↓	Normal /5 Tone normal / ↑ / ↓

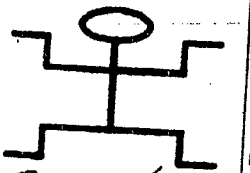
- **Skin inspection** normal rash ulcer urticaria pale erythema cyanosis
  jaundice laceration abrasion abscess cellulitis lymphangitis
  Palpation normal dry moist warm cool cap refill < 2 sec

Neurological **CN II-XII intact** II normal ↓acuity field cut APD blind
III / IV / VI normal pupil deficit ↓EOM
V normal ↓facial sensation ↓corneal reflex
VII normal facial asymmetry ↓facial strength
VIII normal ↓hearing vertigo ataxia
IX normal palate deficit ↓gag reflex XI normal ↓trapezius
XII normal tongue deviated
Reflexes normal ↑ ↓ none Babinski ↑ ↓
Sensation normal ↓touch ↓pin ↓vibration ↓ 2pt disc
Coordination normal limb ataxia trunk ataxia F—N nl/abn ROMBERG - / +

NIHSS _____

- **LOC** Alert Responds to: / verbal / pain Unresponsive

Psychiatric **Insight & judgement** normal impaired
- **Orientation** X3 person place date disoriented
  Memory recent normal impaired remote normal impaired
- **Affect** appropriate depressed anxious agitated cooperative hostile
  Thought normal disordered suicidal homicidal hallucinations delusions



I have seen and evaluated the patient. I reviewed the resident's note and/or middle level provider's note (where applicable) and agree except where my documentation differs. I have also reviewed all information relating to medical decision making and disposition of this patient.

Attending:

Time	Comments / Procedures / Re-assessments	Signature
	☐ Risks, benefits and alternatives explained ☐ Laceration repair ☐ simple ☐ multi-layer	
	☐ Time out prior to procedure ☐ Lidocaine ☐ with epinephrine ☐ irrigation	
	☐ Splint applied R L _____ closed with _____ interrupted _____ sutures	
	☐ Neurovascular intact	

I was present during the key portions of the above procedure and immediately available in the ED during the entire procedure.

Attending Signature: _____

4-181 (10/92)

BRADLEY, DONALD
PATIENT LAST NAME FIRST

30 Y [redacted]
AGE MEDICAL RECORD NO

[redacted] 08/31/1
PATIENT ACCOUNT NO. DATE

MEDICAL RECORDS

BRADLEY, DONALD

****59

HUNTINGTON HOSPITAL

EMERGENCY DEPARTMENT

Time	Orders	Sign	Time Cancel	Sign	Time	Orders	MD Sign	Time Start	Time Stop	RN Sign
	CBC BMP CMP									
	CPK Trop BNP Mg					NS L bolus				
	Amylase Lipase					NS mL/hr x hrs				
	PT APTT D-Dimer									
	ABG VBG Lactate				15[illegible]	Motrin 600mg po				
	T&S T&X ____ units				15[illegible]	soft tissue [illegible]				
	UA UCG UCX									
	BCX 1 @ ______									
	BCX 2 @ ______									
	EKG CXR Monitor ____									
	CT: Brain C-Spine									
	Chest/Abd/Pelvis PO/IV									
	Foley: ______									
	Swallow Screen: ☐ Pass ☐ Fail									
	☐ NPO									

d/w Dr. [illegible]

☐ See additional order sheet

Time	Pt response / Test results / Consultations
	☐ Nursing Note Reviewed
	☐ Critical Care Note
	I have provided > 30 min of critical care services exclusive of separately billable procedures

LABORATORY RESULTS

UA:

ECG ☐ Interp. by me Rate ______ ☐ NSR ☐ nl intervals ☐ nl axis ☐ nl QRS ☐ nl ST/T

unchanged from: ______

Trop
CPK
BNP
D-dimer

RADIOLOGY

CXR

XR - [illegible], no [illegible]

CT [illegible]

☐ Results discussed with radiologist

IMPRESSION

1. neck pain
2.
3.

DISPOSITION / CONDITION

☐ DISCHARGE ☐ AMA ☐ NOTE
☐ IMPROVED ☐ SATISFACTORY ☐ UNCHANGED
☐ ADMIT TO:
DR. ______ ☐ FLOOR ☐ ICU ☐ TELE
SVC ______ ☐ ISOLATION ☐ OR
☐ CATH LAB
☐ TRANSFER TO:
ACCEPTING DR. ______
☐ CONSENT ☐ NOTE ☐ MED. REC COPIED
☐ EXPIRED NOTIFIED ☐ ME ☐ PMD ☐ FAMILY
AUTOPSY: ☐ GRANTED ☐ NOT GRANTED

TIME

PHYSICIAN SIGNATURE

Resident, NP, PA
Attending

DISCHARGE PLAN

☐ MEDICATIONS ☐ SPRAINS/FRACTURES ☐ MD REF FORM GIVEN ☐ CLINIC APPT GIVEN ☐ TENTANUS ☐ WOUND CARE ☐ MED SHEET GIVEN ☐ HEAD INJURY/HEADACHE ☐ INSTRUCTIONS GIVEN ☐ ABD PAIN ☐ CHEST PAIN

1- Rest / soothing liquids
2- follow up PMD in 48 hrs.
3- Motrin 600mg
4-

YOU MUST RETURN IMMEDIATELY FOR ANY PERSISTENT/WORSENING OR NEW SYMPTOMS

I have received and understand instructions given to me by the Emergency Department.

Patient or S/O verbalizes and/or demonstrates understanding instructions and referral.

X ______ SIGNATURE ______ RELATIONSHIP

SIGNATURE R.N./P.A./M.D.

PATIENT LAST NAME: BRADLEY, FIRST: DONALD

AGE: 30 Y

MEDICAL RECORD NO. [redacted]

PATIENT ACCOUNT NO. [redacted]

DATE 08/31/13

MEDICAL RECORDS

4-140 (10/12)

BRADLEY, DONALD
REGISTRATION, EMER
M 30 DOB: [redacted] NO
M/R [redacted]
08/31/13

North Shore LIJ Huntington Hospital

270 Park Avenue
Huntington, New York 11743-2799
(631) 351-2000
www.huntHosp.org

CONSENT FOR PARTICIPATION IN NEW YORK STATE IMMUNIZATION INFORMATION SYSTEM

I give my consent for Huntington Hospital to release my immunization(s) and identifying information to the New York State Immunization Information System (NYSIIS). I understand the purpose of the NYSIIS is to assist in my medical care and to record the immunizations that I have had or will receive in the future. My immunization information may potentially be used by the Department of Health for quality improvement purposes, epidemiologic research, and disease control purposes. Information used for quality improvement or any research purposes will have my personal identifying information removed.

The immunization information in NYSIIS may be released to the following: myself, my health insurance plan, the state and local health departments, the school that I am registered to attend, and authorized medical providers that deliver my medical care.

I understand that there will be no effect on my treatment, payment, or enrollment for benefits if I choose not to enroll in NYSIIS. This consent may be withdrawn at any time by using the form provided. Information about immunizations received by NYSIIS with my consent will remain in NYSIIS if I later choose to withdraw my consent. However, future immunizations will not be recorded in NYSIIS.

PRINT NAME

SIGNATURE

DATE OF BIRTH

8/31/13
DATE

DOH-4439 6/12

BRADLEY, DONALD Opt Out: No
HUNTINGTON HOSPITAL
ED Triage
From: 08/31/2013 17:40 To: 09/01/2013 10:27
Rm-Bed: Admit Dt: 08/31/2013 17:40
Age: 30 yr Gender: M MD: Registration, Emergency Room
DOB: [redacted] Acct: [redacted]
MRN: [redacted]
Requested: 09/01/2013 17:41 (SID) Page 1 of 2

ED Triage Nsg Documentation
08/31/2013 17:58
Initial Intake

Chief complaint (I-Z) = Sore Throat	Manning, Susan 08/31/2013 18:04
Notes: started last pm, was put in a head lock last pm until he was unconscios, did not call police Mode of arrival = Ambulatory	
BP (NIBP) = 106/59	Manning, Susan 08/31/2013 18:04
PULSE #1 = 67	Manning, Susan 08/31/2013 18:04
RESPIRATIONS = 16	Manning, Susan 08/31/2013 18:04
TEMP #1 in F = 98.7F	Manning, Susan 08/31/2013 18:04
O2 SAT % = 97% Room air	Manning, Susan 08/31/2013 18:04
Preferred Language = English	Manning, Susan 08/31/2013 18:04
PAIN LEVEL = 9 NRS	Manning, Susan 08/31/2013 18:04
Suicide risk = Not at risk	Manning, Susan 08/31/2013 18:04
Suspect sepsis = No	Manning, Susan 08/31/2013 18:04
Suspect stroke = No	Manning, Susan 08/31/2013 18:04
HEIGHT/LENGTH in inches = 70in	Manning, Susan 08/31/2013 18:04
WEIGHT in Kg = 70.9kg actual	Manning, Susan 08/31/2013 18:04
BMI = 22.4	Manning, Susan 08/31/2013 18:04
HIV Testing = Offered and declined	Manning, Susan 08/31/2013 18:04
ESI level = 3	Manning, Susan 08/31/2013 18:04

Nursing Assessment

Allergies documented = Yes	Manning, Susan 08/31/2013 18:04
Home medications documented = Yes	Manning, Susan 08/31/2013 18:04
Past medical history = other -->	Manning, Susan 08/31/2013 18:04
Notes: chronic pain to rt leg Past surgical history = 2 stab wounds in back, ped mva 9/13/11	Manning, Susan 08/31/2013 18:04
Advanced directives = none	Manning, Susan 08/31/2013 18:04
Special needs = none	Manning, Susan 08/31/2013 18:04

BRADLEY, DONALD
HUNTINGTON HOSPITAL
ED Triage
From: 08/31/2013 17:40 To: 09/01/2013 10:27
Rm-Bed: Admit Dt: 08/31/2013 17:40
Age: 30 yr Gender: M MD: Registration, Emergency Room
DOB: [redacted] Acct: [redacted]
MRN: [redacted]
Requested: 09/01/2013 17:41 (SID)
Opt Out: No
Page 2 of 2

ED Triage Nsg Documentation
08/31/2013 17:58
Nursing Assessment

Fear for safety at home = No

Travel outside U.S. past 3 months = No

Pertinent medical observations = pt was choked until unconscious last pm

Manning, Susan
08/31/2013 18:04
Manning, Susan
08/31/2013 18:04
Manning, Susan
08/31/2013 18:04

Allergy Detail

Active - Drug	Allergen Reaction	Severity	Sensitivity Type
[NS] *NKA* Onset Date: Reported By: Rel. to Patient: Comments: Entered: 09/14/2011 05:12 Cc System, Id Confirmed: 08/31/2013 18:00 Manning, Susan Verified: 09/14/2011 05:12 Staffid, Js0526			Allergy

Medication Detail

Status - Type	Description	Dose	Route	Freq/ Rate	Form	Strength
Active - Unknown	**Percocet Oral (oxycodone-acetaminophen Oral)** PRN: No AKA: Indication: Type: Info Source: Comments: Entered: 11/13/2012 08:00 Alivio, Leah Confirmed: 08/31/2013 18:00 Manning, Susan Modified: 08/31/2013 18:00 Manning, Susan		Oral			

Patient: BRADLEY,DONALD
MR#: [redacted]
DOB: [redacted]
Acct: [redacted]
Age: 30 Y
Service Date: 08/31/2013
Sex: Male

Tests

Order No	Description	Date and Time	Ordered By	Entered By
1833133	Neck (Soft Tissue) Xry Er	08/31/2013 18:13	Grassi,John	Grassi,John

BRADLEY, DONALD
HUNTINGTON HOSPITAL
FROM: 08/31/13 17:40 TO: 09/01/13 10:27
ROOM: *-* ADM: 08/31/13 17:40
AGE: 30Y SEX: M : REGISTRATION, EMERGENCY ROOM
DOB: [redacted] 4673510 [redacted]
REQUESTED:09/02/13 18:40
OPT OUT: NO

Orders Summary - BRADLEY, DONALD
DEPT: ROOM: *-* MR: 000710059
FROM: 08/31/13 17:40 TO: 09/01/13 10:27

ALLERGY

Charted	Allergy name	Type	Reaction	Severity	Comment
09/14 05:12	NKA	Drug Allergy			

DIAGNOSIS

SORE THROAT

ERXY

Ord#	Status	Order Name	Freq	Priority	Duration	Start	Stop
1	Complete	**NECK (SOFT TISSUE) XRY ER**	ONCE	STAT	1 Occr	08/31 18:13	08/31 18:13

Ordered by: GRASSI, JOHN
Entered by: STAFFID, GRAS - 08/31/13 18:13
Modified by: CC SYSTEM, ID - 09/01/13 10:27
Mode: Written
Room: 14 r/o fx s/p choke hold

No unsigned orders found.

BRADLEY, DONALD Opt Out: No
HUNTINGTON HOSPITAL
Pre-Op Checklist
From: 08/31/2013 17:40 To: 09/01/2013 10:27
Rm-Bed: Admit Dt: 08/31/2013 17:40
Age: 30 yr Gender: M MD: Registration, Emergency Room
DOB: [redacted] Acct: [redacted]
MRN: [redacted]
Requested: 09/02/2013 18:40
Page 1 of 1

Pre- Op Checklist
08/31/2013 07:01 TO 09/01/2013 07:00
08/31/2013 17:58
PreOp Vitals

HEIGHT/LENGTH in Inches = 70in	Manning, Susan 08/31/2013 18:04
WEIGHT in Kg = 70.9kg actual	Manning, Susan 08/31/2013 18:04
BMI = 22.4	Manning, Susan 08/31/2013 18:04
TEMP #1 in F = 98.7F	Manning, Susan 08/31/2013 18:04
PULSE #1 = 67	Manning, Susan 08/31/2013 18:04
RESPIRATIONS = 16	Manning, Susan 08/31/2013 18:04
BP (NIBP) = 106/59	Manning, Susan 08/31/2013 18:04
O2 SAT % = 97% Room air	Manning, Susan 08/31/2013 18:04

North Shore LIJ Huntington Hospital

Huntington Hospital
Department of Radiology
270 Park Ave
Huntington, NY 11743
Ph: (631) 351-2351

RADIOLOGY IMAGING REPORT

Report Status: FINAL

Patient Name:	BRADLEY, DONALD			
MRN:	[redacted]	DOB: [redacted]	Age:30Y	Sex: M
Ordering Physician:	GRASSI, JOHN	Account Number:	[redacted]	
Ordering Location:	ER	Att MD:		
		Ref MD:	GRASSI, JOHN	
		Con MD:		
Accession Number:	000233637			
Order Date / Time:	8/31/13 18:13	Order Number:	00146735101833133	
Study Description:	4420007 - CR ER NECK (SOFT TISSUE)			
Reason:	ROOM: 14 R/O FX S/P CHOKE HOLD			

Radiographs of the cervical spine

CLINICAL INFORMATION: Status post choke hold, pain

TECHNIQUE: Frontal and lateral views of the cervical spine were obtained. Odontoid view was not obtained.

FINDINGS: No previous examinations are available for review.

C1-C7 are visualized. No prevertebral soft tissue swelling is noted. No gross vertebral body fracture seen. The disc spaces appear intact. Straightening of the cervical lordosis is noted.

IMPRESSION: Limited study. Straightening of the cervical lordosis is noted. No gross vertebral body fracture is seen.

Dictated By: MULTZ, MICHELLE
Transcribed By:
CC Physicians:

Radiologist: MULTZ, MICHELLE
Date Signed: 9/1/13 10:28

BRADLEY, DONALD Opt Out: No
HUNTINGTON HOSPITAL
HHS Admit Discharge Rpt
From: 08/31/2013 17:40 To: 09/01/2013 10:27
Rm-Bed: Admit Dt: 08/31/2013 17:40
Age: 30 yr Gender: M MD: Registration, Emergency Room
DOB: [redacted] Acct: [redacted]
MRN: [redacted]
Requested: 09/02/2013 18:40 Page 1 of 2

NO DATA FOUND FOR MODULE: 1. ADX Discharge report

Allergy Detail

Allergen	Reaction	Severity	Sensitivity Type
Active - Drug			
[NS] *NKA* Onset Date: Reported By: Rel. to Patient: Comments: Entered: 09/14/2011 05:12 Cc System, Id Confirmed: 08/31/2013 18:00 Manning, Susan Verified: 09/14/2011 05:12 Staffid, Js0526			Allergy

Medication Detail

Status - Type / Description	Dose	Route	Freq/ Rate	Form	Strength
Active - Unknown					
Percocet Oral (oxycodone-acetaminophen Oral) PRN: No AKA: Indication: Type: Info Source: Comments: Entered: 11/13/2012 08:00 Alvio, Leah Confirmed: 08/31/2013 18:00 Manning, Susan Modified: 08/31/2013 18:00 Manning, Susan		Oral			

Immunization Detail

Description	Dose	Route	Site	Type of Vaccine and Dose #	Adverse Reaction		
					Reaction	Severity	Intervention

BRADLEY, DONALD Opt Out: No
HUNTINGTON HOSPITAL
HHS Admit Discharge Rpt
From: 08/31/2013 17:40 To: 09/01/2013 10:27
Rm-Bed: Admit Dt: 08/31/2013 17:40
Age: 30 yr Gender: M MD: Registration, Emergency Room
DOB: [redacted] Acct: [redacted]
MRN: 000710059
Requested: 09/02/2013 18:40
Page 2 of 2

Immunization Detail (continued)

Description	Dose	Route	Site	Type of Vaccine and Dose #	Adverse Reaction		
					Reaction	Severity	Intervention
influenza virus vaccine, split virus (incl. purified surface antigen) (influenza, split (incl. purified surface antigen)) Manufacture: Lot#: Exp. Date: Status: Refused Consent Dt: 09/14/2011 09:51 Consent By: Relationship: VIS Date: VIS Published Date: Comments: Administered on: Last Modified: Bifulco, Dorothy 09/14/2011 09:51 Adverse Reaction Occurred: N Reported to CDC: N							
pneumococcal polysaccharide vaccine (pneumococcal) Manufacture: Lot#: Exp. Date: Status: Given Consent Dt: Consent By: Relationship: VIS Date: VIS Published Date: Comments: pt does not take Administered on: Last Modified: Bifulco, Dorothy 09/14/2011 09:50 Adverse Reaction Occurred: N Reported to CDC: N				Single dose			

BRADLEY, DONALD
HUNTINGTON HOSPITAL Opt Out: No
Peds Admission
From: 08/31/2013 17:40 To: 09/01/2013 10:27
Rm-Bed: Admit Dt: 08/31/2013 17:40
Age: 30 yr Gender: M MD: Registration, Emergency Room
DOB: [redacted] Acct: [redacted]
MRN: 000710059
Requested: 09/02/2013 18:40 Page 1 of 1

Peds Admission

08/31/2013 07:01 TO 09/01/2013 07:00

08/31/2013 17:58

Peds Physical Assessment

HT & WT INFO - HEIGHT/LENGTH in Inches = 70in	Manning, Susan 08/31/2013 18:04
HT & WT INFO - WEIGHT in Kg = 70.9kg actual	Manning, Susan 08/31/2013 18:04
HT & WT INFO - BMI = 22.4	Manning, Susan 08/31/2013 18:04
VITAL SIGNS - TEMP #1 in F = 98.7F	Manning, Susan 08/31/2013 18:04
VITAL SIGNS - PULSE #1 = 67	Manning, Susan 08/31/2013 18:04
VITAL SIGNS - RESPIRATIONS = 16	Manning, Susan 08/31/2013 18:04
VITAL SIGNS - BP (NIBP) = 106/59	Manning, Susan 08/31/2013 18:04
VITAL SIGNS - O2 SAT % = 97% Room air	Manning, Susan 08/31/2013 18:04

Pain Site Mgmt

PAIN - PAIN LEVEL = 9 NRS	Manning, Susan 08/31/2013 18:04

BRADLEY, DONALD
HUNTINGTON HOSPITAL Opt Out: No
Peds Nsg Documentation
From: 08/31/2013 17:40 To: 09/01/2013 10:27
Rm-Bed: Admit Dt: 08/31/2013 17:40
Age: 30 yr Gender: M MD: Registration, Emergency Room
DOB: [redacted] Acct: [redacted]
MRN: [redacted]
Requested: 09/02/2013 18:40
Page 1 of 1

Peds Nsg Documentation
08/31/2013 07:01 TO 09/01/2013 07:00
08/31/2013 17:58

Peds Respiratory

OXYGEN - O2 SAT % = 97% Room air

Manning, Susan
08/31/2013 18:04

Pain Site Mgmt

PAIN - PAIN LEVEL = 9 NRS

Manning, Susan
08/31/2013 18:04

BRADLEY, DONALD
HUNTINGTON HOSPITAL Opt Out: No
Nsg Documentation
From: 08/31/2013 17:40 To: 09/01/2013 10:27
Rm-Bed: Admit Dt: 08/31/2013 17:40
Age: 30 yr Gender: M MD: Registration, Emergency Room
DOB: [redacted] Acct: [redacted]
MRN: [redacted]
Requested: 09/02/2013 18:40 Page 1 of 1

Nsg Documentation
08/31/2013 07:01 TO 09/01/2013 07:00
08/31/2013 17:58

Respiratory (19166)

OXYGEN - O2 SAT % = 97% Room air	Manning, Susan 08/31/2013 18:04

Pain Site Mgmt

PAIN - PAIN LEVEL = 9 NRS	Manning, Susan 08/31/2013 18:04

L&D Vital Signs

TEMP #1 in F = 98.7F	Manning, Susan 08/31/2013 18:04
PULSE #1 = 67	Manning, Susan 08/31/2013 18:04
RESPIRATIONS = 16	Manning, Susan 08/31/2013 18:04
BP (NIBP) = 106/59	Manning, Susan 08/31/2013 18:04
O2 SAT % = 97% Room air	Manning, Susan 08/31/2013 18:04

Vital Signs/Measurements

TEMP #1 in F = 98.7F	Manning, Susan 08/31/2013 18:04
PULSE #1 = 67	Manning, Susan 08/31/2013 18:04
RESPIRATIONS = 16	Manning, Susan 08/31/2013 18:04
O2 SAT % = 97% Room air	Manning, Susan 08/31/2013 18:04

Vitals/Measurements

VITALS - TEMP #1 in F = 98.7F	Manning, Susan 08/31/2013 18:04
VITALS - PULSE #1 = 67	Manning, Susan 08/31/2013 18:04
VITALS - RESPIRATIONS = 16	Manning, Susan 08/31/2013 18:04
VITALS - O2 SAT % = 97% Room air	Manning, Susan 08/31/2013 18:04

BRADLEY, DONALD
HUNTINGTON HOSPITAL Opt Out: No
Cardiac Services
From: 08/31/2013 17:40 To: 09/01/2013 10:27
Rm-Bed: Admit Dt: 08/31/2013 17:40
Age: 30 yr Gender: M MD: Registration, Emergency Room
DOB: Acct:
MRN:
Requested: 09/02/2013 18:40 Page 1 of 1

Cardiac Services

08/31/2013 07:01 TO 09/01/2013 07:00

08/31/2013 17:58

Cardiac Services Procedure Record

HT & WT INFO - HEIGHT/LENGTH in Inches = 70in

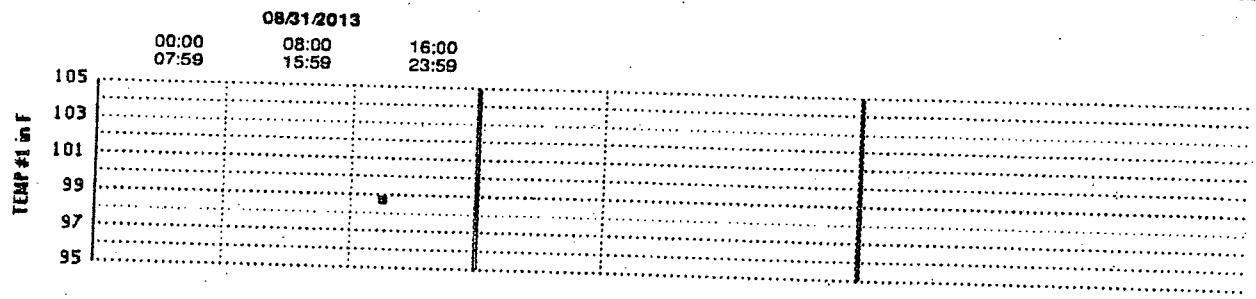
HT & WT INFO - WEIGHT in Kg = 70.9kg actual

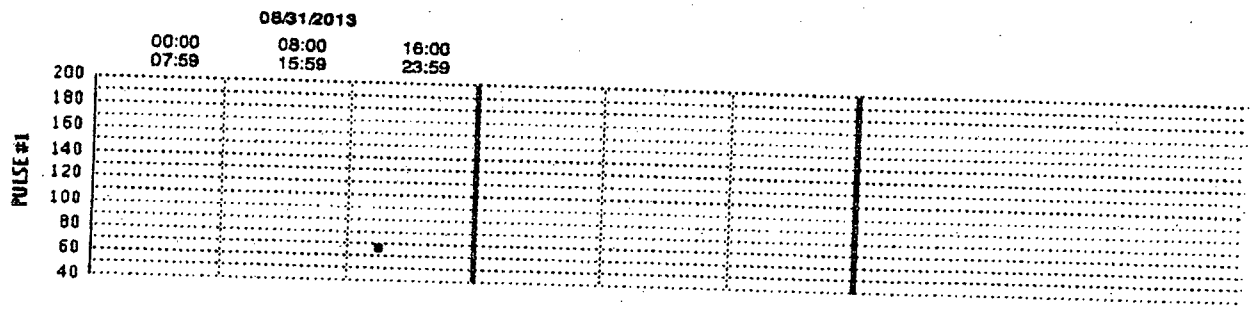
HT & WT INFO - BMI = 22.4

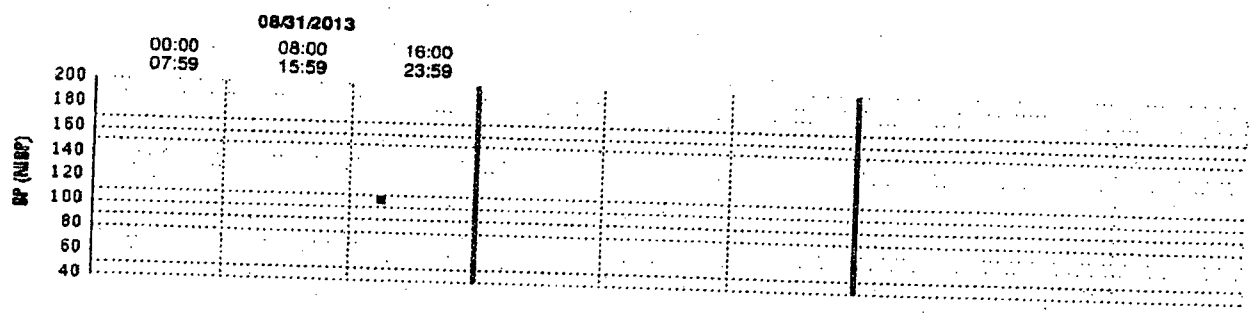
Manning, Susan
08/31/2013 18:04
Manning, Susan
08/31/2013 18:04
Manning, Susan
08/31/2013 18:04

BRADLEY, DONALD Opt Out: No
HUNTINGTON HOSPITAL
Vital Signs I&O Report
From: 08/31/2013 17:40 To: 09/01/2013 10:27
Rm-Bed: Admit Dt: 08/31/2013 17:40
Age: 30 yr Gender: M MD: Registration, Emergency Room
DOB: [redacted] Acct: [redacted]
MRN: [redacted]
Requested: 09/02/2013 18:40 Page 1 of 2

Vital Signs I&O Report







Vital Signs

	08/31/2013		
	00:00 07:59	08:00 15:59	16:00 23:59
HEIGHT/LENGTH			70in *17:58 SMAN*
WEIGHT in Kg			70.9kg Actual *17:58 SMAN*
BMI			22.4 *17:58 SMAN*

BRADLEY, DONALD Opt Out: No
HUNTINGTON HOSPITAL
Vital Signs I&O Report
From: 08/31/2013 17:40 To: 09/01/2013 10:27
Rm-Bed: Admit Dt: 08/31/2013 17:40
Age: 30 yr Gender: M MD: Registration, Emergency Room
DOB: [redacted] Acct: [redacted]
MRN: [redacted]
Requested: 09/02/2013 18:40 Page 2 of 2

Vital Signs I&O Report (continued)

Vital Signs

	08/31/2013		
	00:00 07:59	08:00 15:59	16:00 23:59
TEMP #1 in F			98.7F *17:58 SMAN*
PULSE #1			67 *17:58 SMAN*
RESPIRATIONS			16 *17:58 SMAN*
O2 SAT %			97% Rmair *17:58 SMAN*
BP (NIBP)			106/59 *17:58 SMAN*

Staff Legend	
SMAN	*Manning, Susan*

BRADLEY, DONALD Opt Out: No
HUNTINGTON HOSPITAL
Respiratory Therapy
From: 08/31/2013 17:40 To: 09/01/2013 10:27
Rm-Bed: Admit Dt: 08/31/2013 17:40
Age: 30 yr Gender: M MD: Registration, Emergency Room
DOB: Acct:
MRN:
Requested: 09/02/2013 18:40 Page 1 of 1

Respiratory Therapy
08/31/2013 07:01 TO 09/01/2013 07:00
Legend Charting
08/31/2013 17:58
RT Equipment (80528)
O2 SAT % = 97% Room air

Manning, Susan
08/31/2013 18:04

APPENDIX (9)

AFFIDAVIT OF MARLY SENAT

AFFIDAVIT IN SUPPORT

Marly Senat #8251301278
13-13 Hazen St.
E. Elmhurst, N.Y. 11370

Re: Affidavit In Support, Docket No. 2013QN052004/Ind.No.2916-2013

To Whom It may Concern:

I, Marly Senat, defendant in the above-referenced criminal matter, am writing this Affidavit In Support pertaining to the above-referenced criminal matter. On September 17, 2013 I was arrested for the following offenses: PL 160.15-4 (Robbery in the First Degree), PL 160.10-1 (Robbery in the Second Degree), PL 160.10-2A (Robbery in the Second Degree), PL 121.12 (Strangulation in the Second Degree), PL 265.03-1B (Criminal Possession of a weapon in the Second Degree), PL 265.03-3 (Criminal Possession of a Weapon in the Second Degree), PL 165.45-5 (Criminal Possession of Stolen Property in the Fourth Degree).

I, Marly Senat, takes and accepts full responsibility for the above-mentioned crimes & offenses for which I have been charged. I acknowledge and admit that the weapon was in my sole possession as well as the stolen property. I make this Affidavit under my own free-will, free of any duress, pressure, or coercion. I am also fully aware of what I am doing and of the legal ramifications of such.

ANTONIO MIGUEL FRAZIER
COMMISSIONER OF DEEDS
No. 2-13375
Qualified in Queens County
Commission Expires July 1 2014

Respectfully Submitted

Marly Senat #8251301278

SWORN TO BEFORE ME THIS
2 DAY OF Apr 2014

NOTARY PUBLIC

CC: File/M.S.
District Attorney, Queens County

APPENDIX (10)

NEW YORK LAW JOURNAL ARTICLE

HEADLINE: Second Department Orders New Trial, Rebuking Queens Justice's Behavior

BODY:

In a rare move for an appellate court in New York, a panel of jurists ordered a new trial for a man from Queens this week to be presided over by a different judge, saying that Queens Supreme Court Justice Ronald Hollie inappropriately interfered with proceedings.

The Appellate Division, Second Department said in the decision that Hollie, whose decisions have been reversed by the appellate court on several other occasions, unfairly inserted himself into the trial two years ago.

"There must be a new trial, before a different Justice, because the Supreme Court conducted excessive and prejudicial questioning of trial witnesses," the decision said. "Although defense counsel did not object to the questioning of witnesses by the court, we reach this contention in the exercise of our interest of justice jurisdiction."

Hollie was not immediately available to comment on the decision Thursday afternoon.

The appeal was brought by Darnell Ramsey, who was convicted on robbery charges by a jury before Hollie in 2017. Ramsey was represented on appeal by attorneys with Robert D. DiDio & Associates in Queens.

"Obviously I'm thrilled with the decision of the Appellate Division," DiDio said. "It was extensive interference by the judge during the trial. Asking questions, ruling on his own objections."

Hollie, according to the decision, decided to take an active role in the trial at several different points. He extensively questioned witnesses beyond the line of inquiry levied by attorneys in the case, interrupted cross-examination by the defense and "generally created the impression that [he] was an advocate on behalf of the People," according to the decision.

DiDio claimed that Hollie asked 226 questions of witnesses in 340 transcript pages from the trial. He was accused of bolstering the credibility of witnesses in favor of the prosecution through that questioning, the decision said.

The panel said the jury may have decided against convicting Ramsey, had Hollie not acted as he did during the trial, even though it did not go against the weight of the evidence presented.

"In fulfilling our responsibility to conduct an independent review of the weight of the evidence, we accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor," the decision said. "Upon reviewing the record here, we are satisfied that the verdict of guilt was not against the weight of the evidence."

Hollie was also accused of siding with prosecutors more often when deciding whether to sustain or overrule objections. According to papers filed by DiDio with the Second Department in the case, Hollie

either directly or implicitly sustained objections from prosecutors nearly 70% of the time. But for the defense, Hollie was said to have only sustained objections about 42% of the time.

"It was just extreme," DiDio said. "Obviously the appellate decision agreed."

A request for comment sent to the Queens District Attorney's Office, which prosecuted Ramsey, was not immediately returned.

It's hardly the first time a decision by Hollie has been reversed by the Second Department. As the New York Law Journal reported last year, four of Hollie's decisions have been reversed by the appellate court for similar behavior in the last two years alone.

In each of those cases, the Second Department highlighted Hollie's practice of interjecting himself into trial proceedings and ordered a new trial with a different judge. That doesn't usually happen when a state appellate court comes to such a conclusion; usually the same judge oversees the new trial.

Associate Justices Leonard Austin, John Leventhal, Sheri Roman and Robert Miller were on the appellate panel that reviewed Hollie's decision.

READ MORE:

A Series of Rare Appellate Reversal Orders, All From One Queens Justice's Courtroom

NY Appellate Court Reverses Denial of Attorney Fees to Conservative Commentator

Suspended NY Judge's Lawsuit Against OCA Officials Allowed to Continue by Federal Judge

LOAD-DATE: July 13, 2019

111 DR. MARTIN LUTHER KING JR BLVD
WHITE PLAINS, N.Y. 10601
MIRIAM E. ROCAH

APPENDIX (III)

U.S. CONSTITUTION FOURTEENTH AND SIXTH AMENDMENTS

Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Amendment XV [1870]

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XVI [1913]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Amendment XVII [1913]

[1] The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

[2] When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

[3] This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Amendment XVIII [1919]

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation

Amendment XXII [1951]

Section 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

Amendment XXIII [1961]

Section 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous state; they shall be in addition to those appointed by the states, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a state; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXIV [1964]

Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXV [1967]

Section 1. In the case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability

APPENDIX (12)

N.Y. CONSTITUTION ARTICLE ONE AND ARTICLE SIX

§ 6. [Grand jury; waiver of indictment; right to counsel; informing accused; double jeopardy; self-incrimination; waiver of immunity...
NY CONST Art. 1, § 6 McKinney's Consolidated Laws of New York Annotated Constitution of the State of New York Effective: January 1, 2002 *(Approx. 2 pages)*

McKinney's Consolidated Laws of New York Annotated
Constitution of the State of New York (Refs & Annos)
Article I. Bill of Rights (Refs & Annos)

Effective: January 1, 2002

McKinney's Const. Art. 1, § 6

§ 6. [Grand jury; waiver of indictment; right to counsel; informing accused; double jeopardy; self-incrimination; waiver of immunity by public officers; due process of law][Text & Notes of Decisions subdivisions I to VI]

Currentness

<Notes of Decisions for Const. Art. 1, § 6 are displayed in multiple documents.>

No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land, air and naval forces in time of war, or which this state may keep with the consent of congress in time of peace, and in cases of petit larceny under the regulation of the legislature), unless on indictment of a grand jury, except that a person held for the action of a grand jury upon a charge for such an offense, other than one punishable by death or life imprisonment, with the consent of the district attorney, may waive indictment by a grand jury and consent to be prosecuted on an information filed by the district attorney; such waiver shall be evidenced by written instrument signed by the defendant in open court in the presence of his or her counsel. In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him or her. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he or she be compelled in any criminal case to be a witness against himself or herself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his or her present office or of any public office held by him or her within five years prior to such grand jury call to testify, or the performance of his or her official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his or her present office by the appropriate authority or shall forfeit his or her present office at the suit of the attorney-general.

The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law. No person shall be deprived of life, liberty or property without due process of law.

Credits

(Amended Nov. 8, 1938; Nov. 3, 1959; Nov. 6, 1973, eff. Jan. 1, 1974; Nov. 6, 2001, eff. Jan. 1, 2002.)

Editors' Notes

HISTORICAL NOTES

Derivation

Section is derived from Const.1894, Art. 1, § 6; Const.1846, Art. 1, § 6; Const.1821, Art. 7, § 7.

Notes of Decisions (4203)

McKinney's Const. Art. 1, § 6, NY CONST Art. 1, § 6
Current through L.2024, chapters 1 to 213. Some statute sections may be more current, see credits for details.

End of Document

APPENDIX (13)

NEW YORK CONTEMPORANEOUS OBJECTION RULE

- conviction overturned

  ◆ **Example:** The defendant's conviction was overturned because the prosecution violated its agreement to use the defendant's juvenile record only with reference to sentencing; the prosecutor used it on cross-examination when defendant took the stand. *People v. Rhem*, 52 Misc. 2d 853, 276 N.Y.S.2d 751 (Sup 1966).

- case remanded for sentencing

  ◆ **Example:** The prosecution before trial stated that it would offer no statement of defendant at trial but then, over objection and without prior notice, offered the statement into evidence. Conviction reversed, retrial ordered. *People v. Clergeot*, 20 Misc. 3d 87, 864 N.Y.S.2d 671 (App. Term 2008).

§ 18:180 Absence of evidence

One or both sides at trial may fail or be unable to present certain evidence, for example, identification testimony, a missing witness, or other proof. This may result in either an adverse jury charge or an argument by opposing counsel to the jury. *See* § 9:247, *Nonidentification of defendant at trial*; § 19:208, *Comment by counsel when no missing witness charge given*; § 19:209, *Comment by prosecution*; § 19:217, *Misstatements common.*

II. OBJECTIONS AND PRESERVATION OF ERROR

§ 18:181 Preservation of error, generally

For the most part, errors allegedly committed by a trial judge cannot be raised on appeal as of right unless the issue was preserved, i.e., brought to the attention of the trial judge, on the record. The preservation rule is contained in CPL 470.05(2). *People v. Udzinski*, 146 A.D.2d 245, 541 N.Y.S.2d 9 (2d Dep't 1989).

Thus, part of an attorney's role is to "protect the record" in this manner. *See People v. Paul*, 212 A.D.2d 1020, 623 N.Y.S.2d 50 (4th Dep't 1995); *see also People v. Walters*, 251 A.D.2d 433, 674 N.Y.S.2d 114 (2d Dep't 1998).

The underlying purpose of the preservation rule is to provide the trial court with "timely and adequate opportunity to rule on and explain claims in the context of the trial and trial record." *People v. Walker*, 71 N.Y.2d 1018, 530 N.Y.S.2d 103, 525 N.E.2d 748 (1988). Raising an objection well after the issue arose in court does not preserve the error. *People v. Rogers*, 277 A.D.2d 876, 715 N.Y.S.2d 353 (4th Dep't 2000). But a trivial delay does not require denial of the objection. *People v. Rosario-Boria*, 110 A.D.3d 1486, 972 N.Y.S.2d 798 (4th Dep't 2013). *See* § 20:24, *Insufficient to preserve some error.*

Where a judge has definitively ruled on an issue, counsel need not repeat the issue so as to preserve it. *People v. Finch*, 23 N.Y.3d 408, 991 N.Y.S.2d 552, 15 N.E.3d 307 (2014).

A question of law is preserved if the point was expressly decided in response to a protest, even though the protesting party overlooked that argument in making the protest. *CPL 470.05(2); People v. Ayala*, 142 A.D.2d 147, 534 N.Y.S.2d 1005 (2d Dep't 1988), order aff'd, 75 N.Y.2d 422, 554 N.Y.S.2d 412, 553 N.E.2d 960 (1990).

746 N.E.2d 166 (2001). *See* § 18:201, *The specifi*

Appellate courts have imposed strict preserva
in *People v. Beasley*, 16 N.Y.3d 289, 921 N.Y.S
Robert S. Smith commented, "This affirmance o
age prosecutors in their already well-establishe
imperfection in a defense lawyer's argument
merits." Trial defense counsel must make object
doing so counsel risks alienating the jury by ap

Closely related to the concept of preservati
unpreserved may still be reviewed on appeal, b
no appellate review will occur. *People v. Moore*,
Dep't 1996).

◆ **Practice Tip:** Although a prompt objecti
method, counsel sometimes may be reluctant to
ing to the jury the importance of the objected-t
desire to allow opposing counsel to finish withou

Delayed preservation of error, so long as it is
had an opportunity to change the ruling), may
141 A.D.2d 986, 530 N.Y.S.2d 642 (3d Dep't 1988
as soon as practicable.

The court may not condition admission of evi
other, improper piece of evidence, to be used.
N.Y.S.2d 556 (2d Dep't 1977); *cf. People v. White*
Dep't 1989).

OBJECTI
Incompetent
Irrelevant
Immaterial
Hearsay
Hearsay on hearsay
Right of confrontation
Bolstering
Assumes fact not in evidence
Badgering witness
Argumentative
Asked and answered
Beyond the scope
Privileged
No foundation
Opinion

◆ **Practice Tip:** The prosecut

◇ **Examples:** The prosecution in a homicide case was held to its agreement to recommend dismissal of the charge if the defendant passed a polygraph test. *People v. Prado*, 81 Misc. 2d 710, 365 N.Y.S.2d 943 (Sup 1975).

The prosecution refused to honor its agreement to administer a polygraph test. The indictment was dismissed in the interest of justice. *People v. Davis*, 94 A.D.2d 610, 462 N.Y.S.2d 7 (1st Dep't 1983). *See* Ch 10, *Dismissal in Interests of Justice*.

- conviction overturned

◇ **Example:** The defendant's conviction was overturned because the prosecution violated its agreement to use the defendant's juvenile record only with reference to sentencing; the prosecutor used it on cross-examination when defendant took the stand. *People v. Rhem*, 52 Misc. 2d 853, 276 N.Y.S.2d 751 (Sup 1966).

- case remanded for sentencing

◇ **Example:** The prosecution before trial stated that it would offer no statement of defendant at trial but then, over objection and without prior notice, offered the statement into evidence. Conviction reversed, retrial ordered. *People v. Clergeot*, 20 Misc. 3d 87, 864 N.Y.S.2d 671 (App. Term 2008).

§ 18:180 Absence of evidence

One or both sides at trial may fail or be unable to present certain evidence, for example, identification testimony, a missing witness, or other proof. This may result in either an adverse jury charge or an argument by opposing counsel to the jury. *See* § 9:247, *Nonidentification of defendant at trial*; § 19:208, *Comment by counsel when no missing witness charge given*; § 19:209, *Comment by prosecution*; § 19:217, *Misstatements common*.

II. OBJECTIONS AND PRESERVATION OF ERROR

§ 18:181 Preservation of error, generally

For the most part, errors allegedly committed by a trial judge cannot be raised on appeal as of right unless the issue was preserved, i.e., brought to the attention of the trial judge, on the record. The preservation rule is contained in CPL 470.05(2). *People v. Udzinski*, 146 A.D.2d 245, 541 N.Y.S.2d 9 (2d Dep't 1989).

Thus, part of an attorney's role is to "protect the record" in this manner. *See People v. Paul*, 212 A.D.2d 1020, 623 N.Y.S.2d 50 (4th Dep't 1995); *see also People v. Walters*, 251 A.D.2d 433, 674 N.Y.S.2d 114 (2d Dep't 1998).

The underlying purpose of the preservation rule is to provide the trial court with "timely and adequate opportunity to rule on and explain claims in the context of the trial and trial record." *People v. Walker*, 71 N.Y.2d 1018, 530 N.Y.S.2d 103, 525 N.E.2d 748 (1988). Raising an objection well after the issue arose in court does not preserve the error. *People v. Rogers*, 277 A.D.2d 876, 715 N.Y.S.2d 353 (4th Dep't 2000). But a trivial delay does not require denial of the objection. *People v. Rosario-Boria*, 110 A.D.3d 1486, 972 N.Y.S.2d 798 (4th Dep't 2013). *See* § 20:24, *Insufficient to preserve some error*.

Where a judge has definitively ruled on an issue, counsel need not repeat the issue so as to preserve it. *People v. Finch*, 23 N.Y.3d 408, 991 N.Y.S.2d 552, 15 N.E.3d 307 (2014).

A question of law is preserved if the point was expressly decided in response to a protest, even though the protesting party overlooked that argument in making the protest. *CPL 470.05(2)*; *People v. Ayala*, 142 A.D.2d 147, 534 N.Y.S.2d 1005 (2d Dep't 1988), order aff'd, 75 N.Y.2d 422, 554 N.Y.S.2d 412, 553 N.E.2d 960 (1990).

◇ **Practice Tip:** In making objections, counsel should raise as many grounds as possible. The basis of the objection must be specific to preserve the issue for appellate review. In addition, the constitutional aspect of an error should not be overlooked. For example, in addition to objecting to hearsay, defense counsel may also raise the denial of the right to confront witnesses. *See People v. Kello*, 96 N.Y.2d 740, 723 N.Y.S.2d 111, 746 N.E.2d 166 (2001). *See* § 18:201, *The specific objection.*

Appellate courts have imposed strict preservation rules in criminal cases. Dissenting in *People v. Beasley*, 16 N.Y.3d 289, 921 N.Y.S.2d 178, 946 N.E.2d 166 (2011), Judge Robert S. Smith commented, "This affirmance on preservation grounds will only encourage prosecutors in their already well-established tendency to pounce on every arguable imperfection in a defense lawyer's argument as a barrier to deciding a case on the merits." Trial defense counsel must make objections to raise the issue on appeal, yet in doing so counsel risks alienating the jury by appearing obstructionist.

Closely related to the concept of preservation is that of waiver. An error that is unpreserved may still be reviewed on appeal, but where an affirmative waiver occurs, no appellate review will occur. *People v. Moore*, 233 A.D.2d 670, 650 N.Y.S.2d 332 (3d Dep't 1996).

◇ **Practice Tip:** Although a prompt objection generally is the most appropriate method, counsel sometimes may be reluctant to do so. Reasons include fear of emphasizing to the jury the importance of the objected-to question, or (with a summation) the desire to allow opposing counsel to finish without interruption.

Delayed preservation of error, so long as it is still timely (made when the judge still had an opportunity to change the ruling), may be found sufficient. *People v. Butchino*, 141 A.D.2d 986, 530 N.Y.S.2d 642 (3d Dep't 1988). Counsel should register the objection as soon as practicable.

The court may not condition admission of evidence upon the defendant allowing another, improper piece of evidence, to be used. *People v. Jordan*, 59 A.D.2d 746, 398 N.Y.S.2d 556 (2d Dep't 1977); *cf. People v. White*, 155 A.D.2d 953, 547 N.Y.S.2d 768 (4th Dep't 1989).

OBJECTIONS	
Incompetent	Goes to ultimate fact
Irrelevant	Leading
Immaterial	Form of question
Hearsay	Compound question
Hearsay on hearsay	Best evidence
Right of confrontation	Cumulative
Bolstering	Unresponsive answer
Assumes fact not in evidence	Vouching for witness
Badgering witness	Unsworn witness
Argumentative	Chain of custody
Asked and answered	Collateral
Beyond the scope	Impeaches own witness
Privileged	Speculative
No foundation	Overly broad
Opinion	Narrative answer

◇ **Practice Tip:** The prosecution also needs to protect the record, even when a ruling

is in its favor. If the trial judge's ruling is clearly wrong, it may be important for the prosecutor to not exploit that ruling, thereby avoiding it from becoming an issue on appeal. Or, the prosecutor may need to clarify the record.

§ 18:182 Preservation of error, generally—Exceptions to preservation requirement

There are four categories in which an appellate court can review an unpreserved issue:

- weight of the evidence, which only an intermediate appellate court may review. *See* § 24:94, *Weight vs. legal sufficiency of evidence*.
- an appellate court may review an unpreserved issue in the "interest of justice," which is sparingly exercised. CPL 470.15(6)(a); *People v. Branch*, 54 A.D.2d 90, 387 N.Y.S.2d 581 (1st Dep't 1976). *See* § 24:103, *Preservation of error: "interest of justice" review*.
- variances from fundamental procedure that violate the mode of proceedings prescribed by law, *see* § 24:105, *"Mode of proceedings" error*.
- certain specific exceptions to the preservation rule, *see* § 24:104, *Exceptions to preservation rule*.

Methods of Preserving Error	
general objection	motion to reopen hearing
specific objection	requesting disqualification of juror
continuing objection	requesting adverse inference instruction
exception	objecting to jury instruction
motion to strike	curative and limiting instruction
motion for mistrial	motion to withdraw guilty plea
preclusion of evidence	offer of proof
motion in limine	motion for trial order of dismissal
request for redaction	contempt
motion for reargument	posttrial motion

§ 18:183 Preservation of error, generally—Preservation through request for sanctions

One way in which an issue can be preserved is by requesting a sanction; see examples listed above.

But care must be taken to ask for an appropriate sanction. A request for an inappropriate sanction that is properly denied by the trial judge does not preserve for appeal whether the party received an appropriate sanction. *People v. Spivey*, 81 N.Y.2d 356, 599 N.Y.S.2d 477, 615 N.E.2d 961 (1993); *People v. Pabon*, 213 A.D.2d 289, 624 N.Y.S.2d 149 (1st Dep't 1995); *see also People v. Carrero*, 216 A.D.2d 148, 629 N.Y.S.2d 8 (1st Dep't 1995). Where counsel rejects the court's offer of an appropriate sanction, the alleged error will not be considered on appeal. *People v. Greene*, 252 A.D.2d 746, 677 N.Y.S.2d 804 (3d Dep't 1998). And, where the court grants the sanction that defense counsel requested, no issue may be raised on appeal to the adequacy of that sanction. *People v. Vasquez*, 245 A.D.2d 178, 666 N.Y.S.2d 181 (1st Dep't 1997).

◇ **Practice Tip:** When an improper matter occurs at trial, counsel will typically request the strongest sanction. If this is not granted, it may be appropriate for counsel to request other, lesser sanctions, to preserve the issues for appellate review. Request-

tion proceeding is not rendered moot. *People v. Maraj*, 44 A.D.3d 1090, 845 N.Y.S.2d 134 (3d Dep't 2007).

Where there are collateral consequences to the conviction, e.g., predicate felony status, the appeal is not moot. *People v. De Leo*, 185 A.D.2d 374, 585 N.Y.S.2d 629 (3d Dep't 1992).

V. APPELLATE STANDARDS OF REVIEW

§ 24:81 The preservation rule

To raise an issue on appeal, the appellant must preserve the issue. CPL 470.05(2). The party appealing must have raised a contemporaneous objection. *See* § 18:181, *Preservation of error, generally.*

There are a number of recognized exceptions to the preservation rule.

◆ **Example:** The finding of a violation of probation, without either a hearing or an admission, did not require preservation for the defense to raise it on appeal. *People v. Montenegro*, 153 A.D.3d 553, 60 N.Y.S.3d 95 (2d Dep't 2017).

§ 24:82 Standards for appellate review

An appellate court employs certain standards in reviewing issues. The standard may be de novo review, abuse of discretion, or plain error, among others.

Where a trial court has discretion in its ruling, the abuse of discretion may be reviewable. *People v. Crawford*, 4 A.D.3d 748, 772 N.Y.S.2d 182 (4th Dep't 2004) (uncharged crimes); *People v. Zamorano*, 301 A.D.2d 544, 754 N.Y.S.2d 645 (2d Dep't 2003); *People v. Young*, 249 A.D.2d 576, 670 N.Y.S.2d 940 (3d Dep't 1998); *People v. Jones*, 210 A.D.2d 904, 620 N.Y.S.2d 656 (4th Dep't 1994), order aff'd, 85 N.Y.2d 998, 630 N.Y.S.2d 961, 654 N.E.2d 1209 (1995). Even in the absence of abuse of discretion, an intermediate appellate court in an appropriate case has the power to review facts and substitute its own discretion. *People v. Rickert*, 58 N.Y.2d 122, 459 N.Y.S.2d 734, 446 N.E.2d 419 (1983).

§ 24:83 Standards for appellate review—Standard: jury issues

Batson: Whether the exercise of a peremptory jury challenge was impermissibly based on race or other improper factor rests with the trial court, whose resolution is entitled to great deference. *People v. Green*, 181 A.D.2d 693, 581 N.Y.S.2d 357 (2d Dep't 1992). *See* § 19:108, *Challenging racial exclusion of prospective jurors: Batson v. Kentucky.*

Challenge for cause: Whether a prospective juror can provide reasonable jury service is left largely to the discretion of the trial judge, who can question and observe the person during jury selection. *People v. Pagan*, 191 A.D.2d 651, 595 N.Y.S.2d 486 (2d Dep't 1993).

Harmless-error analysis is inappropriate where a juror is improperly removed or where the court fails to properly conduct a hearing that is required. *People v. Anderson*, 70 N.Y.2d 729, 519 N.Y.S.2d 957, 514 N.E.2d 377 (1987); *People v. Dotson*, 248 A.D.2d 1004, 670 N.Y.S.2d 147 (4th Dep't 1998).

§ 24:84 Standards for appellate review—Standard: grand jury

So long as the evidence is legally sufficient, weighing the evidence is the province of

APPENDIX (14)

NEW YORK C.P.L. 470.05

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter 11-a. Of the Consolidated Laws (Refs & Annos)
Part Two. The Principal Proceedings
Title M. Proceedings After Judgment (Refs & Annos)
Article 470. Appeals--Determination Thereof (Refs & Annos)

McKinney's CPL § 470.05

§ 470.05 Determination of appeals; general criteria

Currentness

1. An appellate court must determine an appeal without regard to technical errors or defects which do not affect the substantial rights of the parties.

2. For purposes of appeal, a question of law with respect to a ruling or instruction of a criminal court during a trial or proceeding is presented when a protest thereto was registered, by the party claiming error, at the time of such ruling or instruction or at any subsequent time when the court had an opportunity of effectively changing the same. Such protest need not be in the form of an "exception" but is sufficient if the party made his position with respect to the ruling or instruction known to the court, or if in reponse [1] to a protest by a party, the court expressly decided the question raised on appeal. In addition, a party who without success has either expressly or impliedly sought or requested a particular ruling or instruction, is deemed to have thereby protested the court's ultimate disposition of the matter or failure to rule or instruct accordingly sufficiently to raise a question of law with respect to such disposition or failure regardless of whether any actual protest thereto was registered.

Credits
(L.1970, c. 996, § 1. Amended L.1986, c. 798, § 1.)

Editors' Notes

HISTORICAL AND STATUTORY NOTES

L.1986, c. 798 legislation

Subd. 2. L.1986, c. 798, § 1, in the second sentence, inserted ", or if in reponse to a protest by a party, the court expressly decided the question raised on appeal".
L.1986, c. 798, § 2, provides:
"This act shall take effect immediately [Aug. 2, 1986] and shall apply to all matters, actions or proceedings pending as of the date it shall have become a law or commenced on or after such date."

Derivation

Subd. 1. Code Crim.Proc.1881, §§ 542, 684, 764. Section 764 amended L.1882, c. 360, § 1; L.1954, c. 806, § 11.
Subd. 2. Code Crim.Proc.1881, §§ 420-a, 455. Section 420-a added L.1946, c. 209. Section 455 derived from R.S., pt. 4, c. 2, tit. 5, § 21.

SUPPLEMENTARY PRACTICE COMMENTARY

APPENDIX (15)

NEW YORK C.P.L. 470.15

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter 11-a. Of the Consolidated Laws (Refs & Annos)
Part Two. The Principal Proceedings
Title M. Proceedings After Judgment (Refs & Annos)
Article 470. Appeals--Determination Thereof (Refs & Annos)

McKinney's CPL § 470.15

§ 470.15 Determination of appeals by intermediate appellate courts; scope of review

Currentness

1. Upon an appeal to an intermediate appellate court from a judgment, sentence or order of a criminal court, such intermediate appellate court may consider and determine any question of law or issue of fact involving error or defect in the criminal court proceedings which may have adversely affected the appellant.

2. Upon such an appeal, the intermediate appellate court must either affirm or reverse or modify the criminal court judgment, sentence or order. The ways in which it may modify a judgment include, but are not limited to, the following:

(a) Upon a determination that the trial evidence adduced in support of a verdict is not legally sufficient to establish the defendant's guilt of an offense of which he was convicted but is legally sufficient to establish his guilt of a lesser included offense, the court may modify the judgment by changing it to one of conviction for the lesser offense: [1]

(b) Upon a determination that the trial evidence is not legally sufficient to establish the defendant's guilt of all the offenses of which he was convicted but is legally sufficient to establish his guilt of one or more of such offenses, the court may modify the judgment by reversing it with respect to the unsupported counts and otherwise affirming it;

(c) Upon a determination that a sentence imposed upon a valid conviction is illegal or unduly harsh or severe, the court may modify the judgment by reversing it with respect to the sentence and by otherwise affirming it.

3. A reversal or a modification of a judgment, sentence or order must be based upon a determination made:

(a) Upon the law; or

(b) Upon the facts; or

(c) As a matter of discretion in the interest of justice; or

(d) Upon any two or all three of the bases specified in paragraphs (a), (b) and (c).

4. The kinds of determinations of reversal or modification deemed to be upon the law include, but are not limited to, the following:

(a) That a ruling or instruction of the court, duly protested by the defendant, as prescribed in subdivision two of section 470.05, at a trial resulting in a judgment, deprived the defendant of a fair trial;

APPENDIX (16)

NEW YORK C.P.L. 200.20

§ 200.20 Indictment; what offenses may be charged; joinder of offenses and consolidation of indictments
NY CRIM PRO § 200.20 McKinney's Consolidated Laws of New York Annotated Criminal Procedure Law Effective: October 1, 2019 *(Approx. 3 pages)*

McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter 11-a. Of the Consolidated Laws (Refs & Annos)
Part Two. The Principal Proceedings
Title I. Preliminary Proceedings in Superior Court
Article 200. Indictment and Related Instruments (Refs & Annos)

Effective: October 1, 2019

McKinney's CPL § 200.20

§ 200.20 Indictment; what offenses may be charged; joinder of offenses and consolidation of indictments

Currentness

1. An indictment must charge at least one crime and may, in addition, charge in separate counts one or more other offenses, including petty offenses, provided that all such offenses are joinable pursuant to the principles prescribed in subdivision two.

2. Two offenses are "joinable" when:

(a) They are based upon the same act or upon the same criminal transaction, as that term is defined in subdivision two of section 40.10; or

(b) Even though based upon different criminal transactions, such offenses, or the criminal transactions underlying them, are of such nature that either proof of the first offense would be material and admissible as evidence in chief upon a trial of the second, or proof of the second would be material and admissible as evidence in chief upon a trial of the first; or

(c) Even though based upon different criminal transactions, and even though not joinable pursuant to paragraph (b), such offenses are defined by the same or similar statutory provisions and consequently are the same or similar in law; or

(d) Though not directly joinable with each other pursuant to paragraph (a), (b) or (c), each is so joinable with a third offense contained in the indictment. In such case, each of the three offenses may properly be joined not only with each of the other two but also with any further offense joinable with either of the other two, and the chain of joinder may be further extended accordingly.

3. In any case where two or more offenses or groups of offenses charged in an indictment are based upon different criminal transactions, and where their joinability rests solely upon the fact that such offenses, or as the case may be at least one offense of each group, are the same or similar in law, as prescribed in paragraph (c) of subdivision two, the court, in the interest of justice and for good cause shown, may, upon application of either a defendant or the people, in its discretion, order that any such offenses be tried separately from the other or others thereof. Good cause shall include but not be limited to situations where there is:

(a) Substantially more proof on one or more such joinable offenses than on others and there is a substantial likelihood that the jury would be unable to consider separately the proof as it relates to each offense.

(b) A convincing showing that a defendant has both important testimony to give concerning one count and a genuine need to refrain from testifying on the other, which satisfies the court that the risk of prejudice is substantial.

(i) Good cause, under this paragraph (b), may be established in writing or upon oral representation of counsel on the record. Any written or oral representation may be based

upon information and belief, provided the sources of such information and the grounds of such belief are set forth.

(ii) Upon the request of counsel, any written or recorded showing concerning the defendant's genuine need to refrain from testifying shall be ex parte and in camera. The in camera showing shall be sealed but a court for good cause may order unsealing. Any statements made by counsel in the course of an application under this paragraph (b) may not be offered against the defendant in any criminal action for impeachment purposes or otherwise.

4. When two or more indictments against the same defendant or defendants charge different offenses of a kind that are joinable in a single indictment pursuant to subdivision two, the court may, upon application of either the people or a defendant, order that such indictments be consolidated and treated as a single indictment for trial purposes. If such indictments, in addition to charging offenses which are so joinable charge other offenses which are not so joinable, they may nevertheless be consolidated for the limited purpose of jointly trying the joinable offenses. In such case, such indictments remain in existence with respect to any nonjoinable offenses and may be prosecuted accordingly. Nothing herein precludes the consolidation of an indictment with a superior court information.

5. A court's determination of an application for consolidation pursuant to subdivision four is discretionary; except that where an application by the defendant seeks consolidation with respect to offenses which are, pursuant to paragraph (a) of subdivision two, of a kind that are joinable in a single indictment by reason of being based upon the same act or criminal transaction, the court must order such consolidation unless good cause to the contrary be shown.

6. Where an indictment charges at least one offense against a defendant who was under the age of seventeen, or commencing October first, two thousand nineteen, eighteen at the time of the commission of the crime and who did not lack criminal responsibility for such crime by reason of infancy, the indictment may, in addition, charge in separate counts one or more other offenses for which such person would not have been criminally responsible by reason of infancy, if:

(a) the offense for which the defendant is criminally responsible and the one or more other offenses for which he or she would not have been criminally responsible by reason of infancy are based upon the same act or upon the same criminal transaction, as that term is defined in subdivision two of section 40.10 of this chapter; or

(b) the offenses are of such nature that either proof of the first offense would be material and admissible as evidence in chief upon a trial of the second, or proof of the second would be material and admissible as evidence in chief upon a trial of the first.

Credits

(L.1970, c. 996, § 1. Amended L.1974, c. 467, § 8; L.1980, c. 136, § 2; L.1984, c. 672, § 1; L.2017, c. 59, pt. WWW, § 29.)

Editors' Notes

HISTORICAL AND STATUTORY NOTES

L.2017, c. 59 legislation

Subd. 6. L.2017, c. 59, pt. WWW, § 29, in the opening paragraph, substituted "seventeen, or commencing October first, two thousand nineteen, eighteen" for "sixteen"; and in par. (a), inserted "or she" following "he".
L.2017, c. 59, pt. WWW, § 106(b), provides:
"b. sections one through thirty, thirty-one-a, thirty-one-b, thirty-two, thirty-five, thirty-six, thirty-eight, forty-a, forty-one, forty-three, forty-four, fifty-six, fifty-six-a, fifty-six-b, fifty-seven, fifty-nine, sixty-one through sixty-three, sixty-five, sixty-seven, sixty-nine, seventy, seventy-two, seventy-five through seventy-eight, seventy-nine, seventy-nine-b, eighty, eighty-one-b, eighty-two-a, ninety-nine, one hundred, one hundred-a and one hundred one of this act shall take effect October 1, 2018; provided however, that when the applicability of such provisions are based on the conviction of a crime or an act committed by a person who was seventeen years of age at the time of such offense such provisions shall take effect October 1, 2019[.]"

L.1984, c. 672 legislation

Subd. 3. L.1984, c. 672, § 1, eff. Nov. 1, 1984, designated existing text as the opening par.; in the opening par. as so designated, in sentence beginning "In any case", substituted "such offenses be tried separately from the other or others thereof" for "one of such offenses or groups of offenses be tried separately from the other or others, or that two or more thereof be tried together but separately from two or more others thereof" and added sentence beginning "Good cause shall"; and added pars. (a) and (b).

Derivation

See, Code Crim.Proc.1881, §§ 278, 279. Section 279 added L.1936, c. 328, § 1, derived from former § 279, amended L.1883, c. 306; repealed L.1936, c. 328, § 1.

SUPPLEMENTARY PRACTICE COMMENTARIES

by William C. Donnino

2017

In 2017, legislation was approved to raise the age of criminal liability--*i.e.*, the age that must be reached before a person may be prosecuted for an offense in a criminal court and may accordingly be convicted of a crime or other offense. L. 2017, c. 59, Part WWW. For commentary on the effective dates and scope of the legislation and the conforming amendments to this section, *see* Practice Commentary to CPL 722.10.

SUPPLEMENTARY PRACTICE COMMENTARIES

by Peter Preiser

2010

In an odd case, where there had been no motion for severance or consolidation to rule upon, the Court of Appeals reversed a judgment of conviction that was imposed pursuant to a plea-bargained waiver of indictment by holding that a defendant who had pled guilty to a superior court information drafted pursuant to his agreement with the People (under CPL article 190) claimed on appeal that the superior court information improperly applied subdivision two (c) of this section by joining the crimes of Criminal Possession of Stolen Property and Grand Larceny derived from different criminal transactions. *People v. Pierce*, 2010, 14 N.Y.3d 564, 904 N.Y.S.2d 255, 930 N.E.2d 176 [see also 2010 Practice Commentary for CPL 195.20].

Considering the two crimes charged in this case-one charging use of a bank card obtained by false pretenses to withdraw money and the other charging an unrelated possession of a car that had previously been stolen-one could conclude as the Court noted that, since "in the broadest sense, both involve misappropriated property", the joinder fell within the loose concept of similarity set forth in the statutory provision. However, without further discrete analysis, the Court opined that they were not really similar because they do not share comparable elements and the essential nature of the criminal conduct that was evident from the underlying allegations was quite distinct (*id.*, at 573-574).

The case is odd because the Court of Appeals has never before ruled upon the validity of a joinder of counts in a superior court information pursuant to an agreement to waive indictment and as the Court indicated it paid particular attention to the attempt of the parties to avoid the strict limitations upon attempts by the parties to avoid specific compliance with the statutory provisions for waiver of an indictment (see *id.*, at 570-571). Thus, while the guidance set forth here may well be of help in resolving future challenges by motion to sever or consolidate, it does not appear that the Court set forth any specific definition of "same or similar in law".

PRACTICE COMMENTARIES

by Peter Preiser

This section provides the guidelines for determining whether separate charges against a defendant may be joined for prosecution in a single trial. It deals only with multiple charges against a single defendant. Guidelines for determining whether two or more defendants can be joined for prosecution in the same trial are set forth in CPL § 200.40.

Subdivision two establishes the basic criteria for joining two or more charges in a single indictment. Subdivision three provides the court with certain authority to direct that one or more charges in a multiple count indictment be prosecuted in a separate trial. This is known as "severance". Subdivisions four and five deal with a situation where charges that were joinable pursuant to subdivision two are for one reason or another alleged in separate indictments. In such case the court may, upon application of either party, order that the indictments, or portions thereof be tried together. This is known as "consolidation". Finally, subdivision six deals with the problem that arises where a juvenile offender is charged with a mixed group of offenses committed when he or she was under the age of sixteen -- *i.e.*, where there is at least one crime for which the offender would be criminally responsible and one crime that would be treated as juvenile delinquency for processing by the Family Court.

Analysis commences with joinder authority provided by subdivision two. Paragraph (a) specifies the most common situation for joinder -- *i.e.*, where the offenses are integrally related to each other, either because they resulted from a single act, were committed during a single continuing incident, or were integral parts of a single criminal venture.

Paragraph (b) involves a somewhat similar concept because of the logical connection between the joined offenses. Here, although the offenses are not integrally related to each other, proof of one would be admissible as relevant on trial of the other. The classic example is where proof of an entirely separate offense, "X" would be admissible at trial of offense "A" to show motive, intent, identity, absence of mistake or accident, or a common scheme or plan to prove the defendant guilty of offense "A" (*see People v. Molineux*, 168 N.Y. 264, 61 N.E. 286 [1901]).

Paragraph (c) of subdivision two introduces an entirely different, and more debatable, concept. Here there is no logical connection between the offenses. Despite the danger of the legally unacceptable proposition that proof of one offense establishes a likelihood the defendant committed other offenses of the same ilk, joinders of this sort, perhaps justifiable on grounds of economy of resources and of saving defendants from the expense of separate trials, are a customarily approved aspect of criminal procedure both here and in federal practice (see Rule 8 [a]), Federal Rules of Criminal Procedure), as evidenced in opinions by courts of last resort. *See e.g., Pointer v. United States*, 151 U.S. 396, 400-404, 14 S.Ct. 410, 38 L.Ed. 208 (1894); *People ex. rel. Pincus v. Adams*, 274 N.Y. 447, 453-454, 9 N.E 2d 246 (1937); *People v. Hetherington*, 27 N.Y.2d 242, 245-246, 317 N.Y.S.2d 1, 265 N.E.2d 530 (1970).

Due to possible prejudice through joinder of unrelated criminal transactions, subdivision three vests the court with authority to order a severance where joinder is premised on that basis. As originally enacted this did not contain any specific criteria or special procedure to guide the court in ruling on a motion for severance. The bare standard was "in the interest of justice and for good cause shown." But in 1984 an amendment specified the two grounds for prejudice spelled out in paragraphs (a) and (b) culled from various prior judicial opinions. Note however that these two circumstances are not exclusive: the statute still expressly provides that the basic standard for severance is the interest of justice and good cause shown. The amendment simply specifies these two circumstances as grounds which, if shown, definitely meet the test.

Research discloses that severance is rarely granted. An example of a justifiable request for severance under paragraph (a) of subdivision three would be where identification is in issue and the People's evidence as to the identity of the culprit is much stronger on one charge than it is on the other (*see e.g., People v. Forest*,

50 A.D.2d 260, 261-262, 377 N.Y.S.2d 492 [1st Dept., 1975]). An example to illustrate paragraph (b) of that subdivision would be a situation where the possibility of devastating impeachment by cross-examination may justify a defense decision to refrain from testifying on one of the charges, but not on the other, or may be outweighed by the need for the defendant's testimony on the other charge. *See People v. Lane*, 56 N.Y.2d 1, 10, 451 N.Y.S.2d 6, 436 N.E.2d 456 (1982). Perhaps the reason for the paucity of successful attempts at severance is that courts require a concrete demonstration of a factual basis for undue prejudice, which cannot be achieved simply by confabulating the circumstances set forth in (a) and (b). Thus for example, in *People v. Lane*, *supra*, the Court held that a desire to refrain from testifying on one of two charges simply to take advantage of a perceived weakness in the People's case on that charge was insufficient, because it did not show defendant would be unduly prejudiced by giving testimony thereon (56 N.Y.2d at 10).

Before turning to the subject of consolidation, observe that paragraph (d) of subdivision two permits a sort of commingling or cross-joinder so that additional offenses may be added if they are joinable under any of the first three rationales -- (a), (b) or (c) -- to any one of the offenses alleged in the indictment, even though they are not joinable to any of the others under those rationales. This provision was not in the old Code or in the original version of the proposed CPL (see § 100.20 of 1967 proposal). It was added without explanation to the 1968 study bill and it does not appear to have been the subject of any published judicial opinion.

Subdivisions four and five deal with consolidation of separate indictments or consolidation of particular charges made in separate indictments to be prosecuted at a single trial. Consolidation can perhaps best be understood by observing three basic differences between it and severance.

First, an application for severance -- though available to either side -- usually is a defense effort to be relieved of a joinder of multiple charges alleged in a single indictment that was drafted by the prosecutor as legal advisor to the Grand Jury. Consolidation, on the other hand, usually involves a situation where separate indictments, based upon different incidents, are returned at varying times prior to trial. The application here most commonly would be by the prosecutor, seeking to combine the various charges for a single trial.

Second, a court only has authority to grant severance in a case where the joinder of charges was made pursuant to paragraph (c) of subdivision two -- *i.e.*, that the offenses are defined by the same or similar statutory provisions. But consolidation may be granted for any charges that could have been joined pursuant to any of the paragraphs of subdivision two. Thus a court's authority to consolidate is broader than its authority to sever.

Third, the Court of Appeals has pointed out that the standard to be applied on an application for severance -- *i.e.* "in the interest of justice and for good cause shown" (see subd. 3) is different from the standard to be applied for consolidation, which is committed simply to the sound discretion of the trial court to be exercised by "weigh[ing] the public interest in avoiding duplicative, lengthy and expensive trials against the defendant's interest in being protected from unfair disadvantage" (*see People v. Lane*, *supra*, 56 N.Y.2d at 7-8).

Finally, on the subject of consolidation, note the circumstance in subdivision five that requires consolidation on application of the defendant, unless good cause to the contrary be shown. The purpose of this is to prevent the prosecutor from splitting up charges that arose out of a single act or criminal transaction into two or more indictments to be tried separately with the aim of subjecting the defendant to multiple trials and thereby increasing the chances for eventual conviction. The provision here gives the defendant an option to move for consolidation; and a separate CPL provision bars subsequent prosecution of the unconsolidated charge if it should ultimately be determined that the application to consolidate was improperly denied (see CPL § 40.40 and Practice Commentaries thereunder).

Subdivision six is designed to deal with a problem that arises where a young person is charged with two or more offenses committed while under the age of

sixteen and is criminally responsible as a juvenile offender for at least one of the offenses (see CPL § 1.20[42] and Penal Law § 30.00), but the other less serious offenses are classified as juvenile delinquency ordinarily dealt with by the Family Court. Here, in order to avoid bifurcation of the charges -- which would raise an issue regarding multiple prosecutions for the same transaction (see CPL § 40.40) -- paragraph (a) specifies that, where a juvenile delinquency charge arises out of the same act or criminal transaction as the juvenile offender criminal charge, it may be joined with the juvenile offender charge for trial. Paragraph (b) deals with situations where evidence of an offense chargeable as juvenile delinquency would be admissible as evidence in chief upon trial of the juvenile offender criminal charge. Guidance as to the appropriate disposition where the defendant is found guilty of both the criminal and the juvenile delinquency offenses, or is found guilty of the latter but not the former, is set forth in CPL § 310.85.

Notes of Decisions (569)

McKinney's CPL § 200.20, NY CRIM PRO § 200.20
Current through L.2024, chapters 1 to 213. Some statute sections may be more current, see credits for details.

End of Document

APPENDIX (17)

NEW YORK C.P.L. 210.25

WESTLAW

§ 210.25 Motion to dismiss indictment; as defective
NY CRIM PRO § 210.25 McKinney's Consolidated Laws of New York Annotated Criminal Procedure Law *(Approx. 2 pages)*

McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter 11-a. Of the Consolidated Laws (Refs & Annos)
Part Two. The Principal Proceedings
Title I. Preliminary Proceedings in Superior Court
Article 210. Proceedings in Superior Court from Filing of Indictment to Plea (Refs & Annos)

McKinney's CPL § 210.25

§ 210.25 Motion to dismiss indictment; as defective

Currentness

An indictment or a count thereof is defective within the meaning of paragraph (a) of subdivision one of section 210.20 when:

1. It does not substantially conform to the requirements stated in article two hundred; provided that an indictment may not be dismissed as defective, but must instead be amended, where the defect or irregularity is of a kind that may be cured by amendment, pursuant to section 200.70, and where the people move to so amend; or

2. The allegations demonstrate that the court does not have jurisdiction of the offense charged; or

3. The statute defining the offense charged is unconstitutional or otherwise invalid.

Credits

(L.1970, c. 996, § 1.)

Editors' Notes

HISTORICAL AND STATUTORY NOTES

Derivation

Section derived from Code Crim.Proc.1881, §§ 281, 284, 313, 323, 402. Section 284 amended L.1941, c. 255, § 12. Section 313 amended L.1897, c. 427, § 1; L.1960, c. 551, § 3. Section 323 amended L.1945, c. 629.

PRACTICE COMMENTARIES

by Peter Preiser

This section delineates one ground for dismissal of an indictment -- *i.e.*, a defect that can be seen by analysis of the allegations as set forth on the face of the instrument.

For an analysis of the requirements of CPL Article 200, see the Practice Commentaries for the various sections of that Article. Possible jurisdictional defects are analyzed in the Practice Commentaries for CPL Articles 10 (dealing with subject matter jurisdiction) and 20 (pertaining to geographical jurisdiction).

Notes of Decisions (86)

McKinney's CPL § 210.25, NY CRIM PRO § 210.25
Current through L.2024, chapters 1 to 213. Some statute sections may be more current, see credits for details.