Legal Update
Court Attorneys
October 2019
New York Law School

Grand Jury

Pleas

Batson

Challenges

Buford

Right to be Present

Sirois

Pro Se/Right to Counsel

Jury Issues, Notes and *O'Rama*

Miscellaneous

Grand Jury

Impairment - *People v. Baptiste*, 160 A.D.3d 976 (2d Dept. 2018)

D testifies before the GJ and asserts a self defense claim. He asks the prosecutor to call his girlfriend, his sister and a third witness, as he said they saw some or all of the incident. The DA proffers the three witnesses and the GJ opts to hear only one, not the sister.

In his omnibus motion D moves to dismiss the indictment pursuant to CPL § 210.20 based on the failure of the GJ to hear from the sister.

Pursuant to CPL § 190.50(6) - a defendant may request the GJ call a witness. The grand jury has "great discretion in determining what evidence to hear" and has "the absolute right to reject" a D's request. *People v. Johnson*, 282 A.D.2d 309, 310 (1st Dept. 2001).

So what do you tell your Judge?

Deny that portion of the D's omnibus motion relative to the dismissal of the indictment for failure to call the sister.

Easy?

Maybe not.

At trial, the sister testifies. It is revealed that she saw the entire incident – the only witness to so see.

So, at the close of the evidence, Dse/c moves to dismiss the indictment arguing that the prosecutor's failure to inform the GJ that the sister was the sole EW to entire event (and, therefore, failure to call her at the GJ) was error especially as sister said at trial that the V was the initial aggressor.

What do you tell your judge now? Same thing?

Impaired?

Baptiste

- Yes, same thing
- Not impaired.
- The grand jury was informed of the relevance of the sister's testimony and chose not to call her as a W. (And the GJ was charged properly on justification.)

- See *People v. Manragh*, 32 N.Y.3d 1101 (2018) – same holding

Impairment – *People v. Morales*, 160 A.D.3d 1414 (4th Dept. 2018)

- In this DV case, the prosecutor seeks to indict D for, *inter alia,* rape 1, rape 3 and agg family offense.
- To establish agg family offense, the prosecutor introduces a certificate of conviction involving a prior sexual misconduct charge against the D.
- The prosecutor instructs the GJ that that testimony was to be considered ONLY as to the extent that it is required to establish an element of aggravated family offense and NOT as to propensity.
- So what's the problem?

Problem is that the D **had NO prior s**exual misconduct conviction.

- D moves to dismiss the entire indictment, not just the agg family offense, as, he argues, the mere mention of sexual misconduct tainted the whole proceedings.
- What does County Court do?

- County court dismisses the agg family offense charge, but not the balance of the charges.

- App div agree or should the entire indictment have been dismissed?

Impairment – *People v. Morales*

4th Dept. agrees and affirms, entire indictment should not have been dismissed. The prosecutor did not engage in fraudulent conduct or conduct so egregious so as to impair the integrity of the proceedings…there is no dispute that the E before the GJ was sufficient to support the balance of the charges, P gave an appropriate limiting instruction that jurors are presumed to have followed.

(Case modified on other grounds)

Impairment – *People v. Williams*, 163 A.D.3d 1422 (4th Dept. 2018)

Similar to Morales and also in the 4th Dept…

Where it is later revealed that a witness provided false testimony to the GJ, hence leading to dismissal of that relevant count, was the entire proceeding impaired, ie what about the rest of the counts based on the testimony of other, presumably truthful, witnesses, must those counts be dismissed too?

No, dismissal not required so long as P did not knowingly or deliberately present false testimony before the grand jury…

Impairment *People v. McKinney*, 171 A.D.3d 555 (1st Dept. 2019)

A police W in the GJ testifies that the person in two videotape presented to the GJ, regarding two separate alleged crimes was, in fact, the D whom he knew from the neighborhood. The Police officer did not witness either of the offenses.

What did the judge do?

McKinney

Trial court dismisses both indictments.

McKinney

P request re-argument, get it, same result, dismissal.

P appeal.

What should the 1st dept do?

- Reverse and reinstate the indictment.

- The “testimony was not impermissible and it did not render the grand jury proceedings defective. The detective testified from personal knowledge…unlike trial jurors who can normally observe a defendant in court, grand jurors do not have the means of making a comparison btwn the videotape and Ds appearance….
- They expressed no opinion however on the admissibility of a similar id at trial.

People v. Calderon, 171 A.D.3d 422 (1st Dept. 2019)

- At trial and while viewing a video tape of the crime, the arresting officer, without prompting, identified the D as one of the people depicted in the video.
- The officer was not previously familiar with the D.
- Dse/c objection to that testimony was overruled, so it was preserved.
- Appropriate lay opinion?
- Error?

Calderon

- Error
- Harmless?

Calderon

Harmless …this isolated instance of apparent lay opinion was plainly harmless as the officer said he could not make out the face of the person, but was simply testifying about similarities btwn appearance and clothing on the video and at the time or arrest.

SO IS A GJ EVER IMPAIRED?

Impairment – *People v. Huston*, 88 N.Y.2d 400 (1996)

D alleged to have knifed to death his wife and her mother, but DA was having proof issues. Some time after the murder the DA decides to put the case in the GJ and calls a woman who testifies that the D's father's girlfriend told her that D arrived at their home just after the murder covered in blood and carrying a knife and said to his father, I told you I was going to do it and I did it.

Holy hearsay batman!

Hearsay inadmissible in the GJ.

But the DA gives the GJ an instruction…

Here's the instruction…

I'm asking you now to perform the task of excluding that from your mind with respect to your ultimate deliberation regarding the D. What we're going to be doing is calling in the D's girlfriend (who is alleged to have said these things to this witness), I'll have the subpoena served upon her. She'll be in probably two weeks from today. At that time we'll try and get the truth from her. If she's cooperative and is willing to tell us the truth, then there's no problem, you'll just drop out and forget about the testimony entirely that you've heard from (this hearsay witness). If we have problems and if she, whether from fear or obstinacy, whatever, is not going to cooperate with us and disclose the truth to us, then I will be bringing up the other witness from Georgia who has similar testimony – I also will seek a perjury indictment against (dad's girlfriend). Okay? That's the purpose of it. And that's the admonition that I want the record to reflect.

- The witness (D's dad's girlfriend) does testify and it is inculpatory, but it differs greatly from what the hearsay witness had said.

- At this point the grand jurors ask to hear from the Dad.
- What does DA do?

Impairment – *People v. Huston*

- DA, reluctantly, tells grand jurors, well…maybe he's an accomplice.

- Dad does eventually testify and says his girlfriend is wrong (when she inculpated his son, the D) that never happened and the girlfriend is an alcoholic who suffers from hallucinations so don't believe her.

Here's the cross examination of DAD (who denies that his son, the D, ever appeared at their house on the evening of the murder.)

DA - so when the D came over to your apt that night…

DA - that night, when the D said that he thought that he had killed both of them, what did you tell him to do with the knife?

DA - stop running your mouth (as he sought to answer the questions)

Then when a juror opined aloud that if it happened the way the hearsay witness said, there'd be more blood…the DA responded, no that's not accurate, not necessarily the case, there may have been blood on the floor…not accurate to assume the blood would spatter and cover him…

Of course, this was a master class in impairment of GJ proceedings.

COA in reversing said the DA "disregarded his role as public officer and his duty of fair dealing." The minutes were "rife with instances of [the DA] imparting his personal opinion," his questions were "impermissible and inflammatory" and conveyed "his belief in the D's guilt."

BUT……*Fuller*

Notice – *People v. Fuller*, 145 A.D.3d 1086 (2d Dept. 2016)

Must a court point out a particular GJ defect to the DA before dismissing, and allow the P to address any alleged defects prior to dismissal?

People v. Fuller, 145 A.D.3d 1086 (2d Dept. 2016)

Yes.

PLEAS

People v. Barr, 170 A.D.3d 1189 (2d Dept. 2019)

- Prior to imposition of sentence, D moves to withdraw his plea.
- Counsel takes an adverse position to the D at the proceeding and, therefore, moves to be relieved.
- That application is denied, Supreme Court sentences the D.

Can your judge do this?

- No you can’t do this and the Second Dept. holds that the D’s right to counsel was adversely affected by his atty’s adverse position.

- BUT they *didn’t reverse*.

Pleas - *Barr*

- Rather, the Court remitted the matter to the Sup Ct for a hearing on the D's motion to withdraw his plea.
- Sup Ct was to submit a report to the App Div regarding its decision on the motion.

(The appeal was held in abeyance for that information.)

So…. What happens?

Barr

- Upon remittal, the *P consent to the withdrawal of the plea*.
- And so, the Sup Ct vacates the "plea judgment and sentence" and adjourns the case for trial.
- D eventually repleads (he ends up with a harsher sentence than originally bargained for).

ALL GOOD?

Barr

- Not good.
- Why not?

- Not bc of the enhanced sentence (necessarily).
- Was no good as the App Div had directed the Sup Ct to conduct a hearing, make a new determination and a file report with APP DIV as they had held the appeal in abeyance…
- So the vacatur of the judgment of conviction *exceeded the scope of the remittal*, the court had no jurisdiction to vacate.
- So the second plea and sentence, vacated.
- But what about the first plea and sentence???

Barr

The original plea and sentence was not vacated per App Div, and stood.

People v. Hollmond, 170 A.D.3d 1193 (2d Dept. 2019)

- D, charged with murder, was housed, pretrial, in Coxsackie Correctional some 130 miles north of Kings Cty where the D's case was pending.
- Dse/c argued that being housed so remotely, denied his client's basic constitutional right to counsel.
- Sup Ct agreed (sorta) and signed orders directing that the D be moved within a reasonable distance of Brooklyn, but added that the trial would commence wherever he was housed.
- On the next adjournment, D plead guilty.

Hollmond

At sentencing D moves to withdraw his plea contending that the plea was involuntary, given his lack of access to his counsel, based on the housing situation.

Sup Ct denies the application, noting that D got a favorable plea.

Does the App Div agree with the judge?

Hollmond

No but they don’t reverse…

Hollmond

App Div remits the case for a hearing, noting that the trial court could not have made an informed decision re: voluntariness of the plea without a full inquiry.

App Div directs the trial judge to submit a report to the App Div re: whether D established that his plea should be withdrawn (they expressed no opinion on the merits of the D's application).

Appeal held in abeyance pending the trial court's report, which has yet to be filed.

People v. Sarner, 167 A.D.3d 663 (2d Dept. 2018)

D pleads guilty to criminal contempt 1 and 2.

At sentencing D seeks to withdraw his plea as he is innocent and was coerced.

In response, Dse counsel says “I fought long and hard to get this. I thought we had this?”

D starts to speak, the court tells him to stop talking as he could be charged with perjury.

D’s motion is denied and he is sentenced.

Hmmm.

Plea - *Sarner*

First, yes his attorney did take an adverse position, new counsel should have been assigned.

Also, that the court had D stop talking, deprived D of the right to present his reasons for withdrawal of his plea.

And so…

What does the App Div do?

Sarner

They remit the case to Sup Ct for further proceedings on the D's motion, new counsel to be appointed and thereafter "a report to this Court limited to its findings with respect to the motion and whether the defendant established his entitlement to the withdrawal of his plea of guilty."

Appeal held in abeyance pending receipt of trial court's report.

Pleas/Counsel - *People v. Caputo*, 163 A.D.3d 983 (2d Dept. 2018)

D pleads guilty.

At sentencing he wants to withdraw his plea.

The court asks defense counsel whether "other than he just changed his mind is there any legal basis for him to take his plea back?"

Atty says no.

Judge asks whether the D wishes to say anything before she imposes sentence, the D starts to speak, she cuts him off and sentences the D.

AFFIRMED OR REVERSED?

Counsel - *Caputo*

ANSWER

REVERSED

1. D was not afforded a reasonable opportunity to be heard, AND,

2. Counsel deprived the D of meaningful representation by taking an adverse position to his client. (When defense counsel answered “no” when court asked “other than he just changed his mind is there any legal basis for him to take his plea back?”)

Plea – *People v. Bellinger*, 169 A.D.3d 553 (1st Dept. 2019)

D PG to 3 counts of attempted Rob 1, involving 3 incidents, in exchange for 3 concurrent 15-year terms. At sentence, D seeks to withdraw one of the three pleas on a ground specific to that plea.

What does the sentencing court do?

Bellinger

The sentencing court grants the motion, and proceeds to sentence the D on the remaining two guilty pleas to two 15-years term, concurrent.

Well…

Bellinger

On appeal the D says, as one plea was vacated, and they were all part of the same plea bargain, he is entitled to withdraw the remaining two.

Is D right?

Bellinger

No he's not right.

His claim was "baseless and contradicted by the plea allocution…".

Plea - *People v. Walker*, 169 A.D.3d 723 (2d Dept. 2019)

D, a mandatory persistent violent felon, is charged with CPW 2.

The court explains that if convicted of top count…16 – 25 to life.

D pleads guilty to attempt CPW2 in exchange 12- life on the DVFO.

Walker

D moves to withdraw his plea of guilty, arguing that it was neither knowing nor voluntary as the court failed to inform him that if he went to trial he possibly could have been convicted of a non-violent offense (with a determinate non-life sentence.)

What result?

Walker

- It was affirmed…this seems so easy, yet…

- The court said "[t]here is no evidence that the defendant failed to appreciate that, if he went to trial, he could have been convicted of a lesser charge with a lesser sentence than the charge to which he pleaded guilty."

Batson and other challenges

Batson – People v. Watson, 169 A.D.3d 81 (1st Dept. 2019)

On a prior appeal, the appellate division holds that the trial court failed to follow *Batson's* protocol, thereby preventing the app div from determining whether the exclusion of Af Am males from the panel was discriminatory.

So, the case was "remanded for a new hearing to properly apply *Batson*…and clarify certain portions of the *voir dire* record."

(The issue NOT preserved, fyi).

Batson - Watson

4 years after the original jury selection, at the reconstruction hearing, an ADA other than the one who conducted the *voir dire* in question, appeared on behalf of the People.

The new ADA had no notes of the prior ADA, and she wasn't even clear as to which struck jurors they were talking about.

But the judge who presided over the original jury selection said that as he was on loan to the Bronx and only tried 3 cases while visiting, he recalled the case precisely.

Watson

Although the trial judge did not conduct an analysis of stage three, despite the appellate division's explicit instruction, relying on the substituted ADA's representations and its own recollections, determined that no *Batson* violation had taken place.

Good enough?

Watson

No. Not good enough. Reversed.

"…the reconstruction hearing failed to satisfy the requirements of *Batson*."

So was the case sent back for retrial??

Watson

No.

The indictment was DIMISSED!

2 wicked dissents

Batson – People v. Alexander, 168 A.D.3d 755 (2d Dept. 2019)

D alleges that the prosecutor exercised a preempt based on race.

Prima facia case is found.

ADA's explanation - juror too young and inexperienced to serve on a murder case.

After further questioning, the court says juror seemed to have difficulty understanding the Qs posed to him, he had a "glazed-eye look" and his "ability to communicate is somewhat impaired."

As a result the court deems the peremptory challenge "to be not in any way based on any discrimination."

All ok?

Batson - Alexander

Well…

Judge didn't say anything about the ADA's contention that juror was too young and inexperienced to serve.

Does that matter (since it appears the judge was articulating cause)?

Batson - Alexander

It does matter.

“Under these circumstance, the Supreme Court failed in its duty to determine whether the prosecutor’s race-neutral explanations were credible…the trial court should consider only the reasons initially given to support the challenged strike, not additional reasons offered after the fact.”

Judgment vacated, new trial ordered.

Cause Challenge (Implicit Bias) – *People v. Martinez*, 168 A.D.3d 412 (1st Dept. 2019)

- D challenges a prospective juror as the juror was "married to a supervisor in the Bronx DA's office, notwithstanding that the juror gave assurances the could be fair despite his wife's employment.
- The prosecutor states that he didn't even know who the panelist's wife.
- D argues implied bias requiring ***automatic exclusion***
- What does the judge do?

Martinez

- Judge denies the for cause challenge
- Affirmed or reversed

- Affirmed.
- “the connection between the panelist and the prosecution was too attenuated to support a finding of implied bias.”

Cause Challenge (Implicit Bias) – *People v. Ellis*, 166 A.D.3d 993 (2d Dept. 2018)

A prospective juror is a retired school security officer for the NYPD. Coincidentally, the prospective juror's son had previously been excused in the very same case as the son was an NYPD Sgt who knew two of the witnesses in the case.

Altho the retired school security prospective juror said he knew nothing of the case, would not discuss the matter with his son if chosen, and could be fair and impartial, Dse challenged him for cause, arguing implicit bias.

Cause challenged granted or denied based on implicit bias?

Ellis

Cause challenge denied.

Affirmed or reversed?

Ellis

Affirmed. "[T]he mere fact that the retired school security officer was related to a prospective juror who was excused for cause does not establish implicit bias."

Peremptory Challenge - *People v. Robinson*, 161 A.D.3d 608 (1st Dept. 2018)

Ct denies a P's cause challenge to Juror C.

P fail to peremptorily challenge her.

After the Dse begins his/her peremptories the P say, oops, I meant to challenge Juror C.

The court permits the belated challenge and offers defense counsel the oppty to "go through the whole list [of prospective jurors] starting from the beginning…and change any of their prior perempts."

Counsel declines the offer and Juror C is seated.

D mistrial request is denied.

Reversed or affirmed?

Perempt Challenge - *Robinson*

REVERSED

"[In] no event may the People exercise a peremptory challenge after the defendant has exercised his or her peremptory challenges."

Perempt Challenge – *People v. Viera*, 164 A.D.3d 1277 (2d Dept. 2018)

Two defendant murder case.

Attorney #1 handles perempts for both Ds after consultation with attorney #2. After a round of perempts, the clerk names the selected jurors and atty #2 says, wait "we missed one" and seeks to challenge one more.

Supreme court says, you already told me "what the perempts are and who the selected jurors are…" and denies the request as untimely.

ERROR?

Perempt Challenge – *Viera*

ERROR

New trial ordered

Buford

Buford – *People v. Kuzdzal*, 31 N.Y.3d 478 (2018)

At the close of the E in the D's murder 2 trial, a spectator reports to defense counsel that she overheard two jurors calling the D a scumbag and making faces during testimony.

Court places the spectator/witness under oath. She testifies she heard this during the 15 minute morning recess the prior day.

Buford – Kuzdzal

When confronted by the fact that there was no 15 minute recess the prior day, the witness instead said oh it was at noon…there was no noon break either.

Kuzdzal

Turns out spectator/witness was….D's girlfriend.

Notwithstanding, Dse/c still asks court to *Buford* the 2 jurors.

The P urge the court instead to make a credibility finding.

The court does neither, rules that *Buford* is unnecessary.

QUESTION

What does the App Div do?

Buford – Kuzdzal

ANSWER

4TH Dept. REVERSES as the trial court made no findings, express or implied as to the credibility of the spectator witness, noting that the court should have held *Buford* hearings to determine whether either of the two jurors was now biased.

And the COA?

Buford – Kuzdzal

COA reverses the App Div and REINSTATES the conviction.

(Although the case was remitted on other grounds)

Rt to be Present/*Buford* – *People v. Robinson*, 163 A.D.3d 1002 (2d Dept. 2018)

QUESTION

Does a D have a right to be present at a conference (where the DA and Dse/c are present) to determine whether a sworn juror should be excluded (within the meaning of *Buford*?)

Buford/Rt to be Present – *Robinson*

ANSWER

No

Proceeding ancillary

A defendant's presence is required only if it could have had a substantial impact on his/her ability to defend against the charges, or where defendant has something valuable to contribute. *People v. Morales*, 80 N.Y.2d 450 (1992); *People v. Sloan*, 79 N.Y.2d 386 (1992).

Right to be Present – People v. Joseph, 168 A.D.3d 877 (2d Dept. 2019)

A court officer informs the court, privately, about an incident during which the officer briefly spoke to one of the jurors in the court house lobby.

The court conveys that to the parties and presumably the substance of the conversation.

The court gives defense the oppty to question the juror and then discharges the juror at the D's request.

Was D deprived of his right to be present (and his right to counsel) as the court officer informed the court, privately about the incident?

Joseph

No, not deprived, no error.

Not a material stage of the proceedings (right to be present) nor a critical stage (right to counsel).

Sirois

Sirois – People v. Walton, 168 A.D.3d 1103 (2d Dept. 2019)

While we know that a D's violence, threats or chicanery (trickery, deceit, sophistry), if clear and convincing, could result in otherwise inadmissible prior sworn statements being introduced into E on Ps direct case…

What about this?

Walton

A W is not cooperating at trial, notwithstanding prior sworn statements inculpating the D in this homicide. D and W are cousins. At *Sirois*, the P play W's jail calls to his family (he was an inmate in an unrelated matter) and the D's jail calls to (the same) family. In the W's calls to family, they try to convince W not to testify – there are no threats or violence or chicanery.

But, the P also have another inmate, unrelated, who would testify at a *Sirois* that the D said he "put the wolves out" on the cousin/W and therefore was confident he'll beat the case. That inmate, however, refused to testify a the *Sirois* as he was threatened by the D – of this the judge was clearly convinced.

What does the trial judge do?

Walton

The trial judge allows the cousin witnesses' prior sworn statements to be admitted.

What does the App Div do?

Walton

The appellate division affirms.

No dissent

Pro Se/Right to Counsel

Pro Se – People v. Costan, 169 A.D.3d 820 (2d Dept. 2019)

Pro se D is convinced to have his legal advisor take over for the suppression hearing. The atty says fine, happy to, but I need an adjournment. Judge says no and proceeds to conduct the hearing.

Error?

Costan

Error.

On what grounds?

Costan

Judge abused his/her discretion and thus denies D the effective assistance of counsel.

By “improvidently exercis[ing] its discretion” to deny defendant’s request for an adjournment, in a matter with significant discovery, coupled with the importance of the statements to the People’s case, D was denied the effective assistance of counsel.

Pro Se – People v. Findley, 160 A.D.3d 492 (1st Dept. 2018)

Just prior to trial, D, whose *pro se* status was appropriately granted, says he doesn't want the atty, his third, as stand by counsel and instead requests either a 4th atty or no atty at all.

What does the court do?

Findley

The court refuses to assign new counsel and requires stand by counsel to remain as part of the case over defendant's objection.

AFFIRMED OR REVERSED?

Pro Se – Findley

Affirmed.

To proceed with no stand by counsel at all…would have risked a mistrial in the event termination of defendant's *pro se* status became necessary…

Right to Counsel - *People v. Harris*, 31 N.Y.3d 1183 (2018)

At the conclusion of this bench trial in a B misdemeanor case, the court says it is exercising its prerogative not to hear summations.

The court immediately then renders a guilty verdict.

What does App Term do?

Right to Counsel - *Harris*

App Term affirms

Does the Court of Appeals agree?

Right to Counsel - *Harris*

ANSWER

COA disagrees and reverses

Denying defense counsel the oppty to present a summation violated D's 6th amendment right to counsel.

Jury Issues, Notes and *O'Rama*

Jury Issues - *People v. Davis*, 161 A.D.3d 1003 (2d Dept. 2018)

An alternate juror briefly participates in the deliberations with 11 sworn members while the 12th was absent from the jury room.

Dse requests a mistrial, instead, the court questions each juror and gains assurances that each could disregard the prior deliberations and start anew. The court then addresses the 12 and says the discussions with alternate were a nullity, must be disregarded…you must start "fresh, anew, *ab initio*, from the beginning."

Reversed or Affirmed?

Jury Issues - *Davis*

REVERSED

ERROR NOT CURED BY THE INSTRUCTIONS

O'Rama – *People v. Morrison*, 32 N.Y.3d 951 (2018)

QUESTION

Where defense counsel is made aware of the existence of a note and its ***"gist" …*** is that good enough?

O'Rama – Morrison

NOT GOOD ENOUGH

PRESERVATION NOT REQUIRED

REVERSED

(The dissents are far longer than the memorandum opinion.)

O'Rama – *People v. Parker*, 32 N.Y.3d 49 (2018) (decided same day as *Morrison* above)

Three substantive notes – atty is informed of the existence of all three and the contents of the one for sure, unclear as to the contents of the two others.

DID DEFENSE HAVE A SUFFICIENT OPPORTUNITY TO OBJECT, as he/she was aware of 3 notes, OR WAS THIS AN *O'RAMA* VIOLATION?

O'Rama – *Parker*

O'RAMA VIOLATION

"…an insufficient record cannot be overcome with speculation about what might have occurred…the presumption of regularity cannot salvage an *O'Rama* error…".

O'Rama – People v. Ott, 165 A.D.3d 1601 (4th Dept. 2018)

Court gets two notes from the jury.

Note 1 - we would like a written copy of the court's legal instructions.

Note 2 - we would like a rereading of the court's legal instructions.

Attys are informed that two notes exist.

The court indicates on the record that the "jury requested a rereading of the instructions."

Hmmm.

O'Rama – Ott

So this isn't a classic *O'Rama* issue to the extent that the defendant is clearly on notice of more than one note. OR is it? Is it like *Morrison* the "gist" case?

Is it a mode of proceedings error requiring preservation where the Dse atty was aware of that other note, and could have asked what it said …and in fact it did say essentially the same thing?

Affirmed or Reversed?

O'Rama - Ott

Reversed.

It's a gist case

Mode of proceedings error

Preservation not required

The first note was not read, no meaningful notice

No dissent

O'Rama – *People v. Lopez*, 161 A.D.3d 698 (1st Dept. 2018)

During a readback of testimony that had been given through an interpreter a juror asks, from the box, "[T]he Spanish was not put in the transcript, correct?"

The court immediately responds with "correct."

O'Rama violation?

MODE OF PROCEEDINGS ERROR?

O'Rama – Lopez

NO AND NO

Here, the juror's unambiguous question about whether the W's words in Spanish had been transcribed was plainly ministerial and non-substantive. *People v. Mays*, 20 N.Y.3d 969 (2012).

Miscellaneous

People v. Ellis, 166 A.D.3d 993 (2d Dept. 2018)

Is a D entitled to wear civilian clothes when on trial?

Ellis

Yes…but…

Is a D entitled to wear civilian clothes when on trial *everyday*?

Ellis

Definitely Maybe

Ellis

On appeal D complains that during his 18 day trial he was forced to wear prison garb (green jumpsuit) on 5 days of witness testimony and 3 days of jury selection.

Ok or not ok?

Before you answer…

Ellis

The court had given the D several adjournments to obtain civilian clothes and he did not (of course he was incarcerated – his atty eventually got him a suit).

On the days when he was in prison garb the D did not complain about his attire.

And the clothing bore no marking indicative of prison clothing.

Affirmed or reversed?

Ellis

Affirmed.

D did not object to continuing in the prison clothes and "while the State cannot ***consistently***…compel an accused to stand trial before a jury while dressed in identifiable prison clothes" (*emphasis added*) here, the D was given multiple adjournments to obtain civilian clothes and failed to do so, there was no explanation as to why such clothing could not have been provided earlier in the proceedings, and there were no prison markings on the items he did wear, no error.

There was a dissent

Reasonable Reliance – *People v. Kyser*, 158 A.D.3d 544 (1st Dept. 2018)

The People indicate that they are unable to locate the CW, the sole eyewitness in the case, and leave her name off the witness list. After jury selection, but before openings, the P find her and she testifies, over defense objection, whose *voir dire* was geared to a trial without the CW.

QUESTION

Did the court err in allowing the testimony?

Reasonable Reliance – *Kyser*

YES

Error

Sandoval – People v. Wahaab, 160 A.D.3d 654 (2d Dept. 2018)

QUESTION

May a defendant be cross examined under *Sandoval* about a prior robbery conviction which, at the time of trial, was the subject of a pending appeal?

Sandoval – Wahaab

NO

Reversed

Sentence/440 - *People v. Francis*, 164 A.D.3d 1108 (1st Dept. 2018)

D files a CPL 440.20 to set aside his sentence for his 1988 conviction for CPW 3 where he was sentenced as a first felony offender and received a 6 month split when in fact he was not a first felony offender, he was a predicate and should have been sentenced to a minimum of 2-4.

Why would D do this?

Francis

The 1988 conviction was one of the bases for his 1997 persistent violent felony offender adjudication…

Trial court denies the 440.20 even thought that sentence was illegal.

Affirmed or Reversed?

Sentence/440 - *Francis*

Affirmed

D was not adversely affected by the court's error in 1988 and indeed "benefitted from the imposition of a lesser sentence."

Sentence – *People v. Shapiro*, 164 A.D.3d 1133 (1st Dept. 2018)

Resentencing proceeding based on a violation of a CD.

The assigned atty was not available so another atty, who represented D in an earlier case, agreed to stand up for the resentencing, "as a courtesy to the court."

OK?

Sentence – *Shapiro*

NOT OK

Case was reversed and remitted for a new sentencing procedure – "…defendant did not have proper legal representation."