THEODORE T. JONES, THE DEFENDANT'S CHAMPION: REVIEWING A SAMPLE OF JUDGE JONES'S CRIMINAL JURISPRUDENCE

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I. INTRODUCTION

Theodore T. Jones is the most recently appointed Associate Judge of the New York State Court of Appeals. He was nominated for the post by Governor Elliot Spitzer and was unanimously confirmed by the New York State Senate Judiciary Committee and Senate in February 2007.¹ Jones replaced Judge Albert M. Rosenblatt on the Court upon Rosenblatt’s retirement.²

Jones was born in Brooklyn, New York to a school teacher and a railroad station master.³ Armed with political science and history degrees from Hampton University, Judge Jones served in the United States Army in active duty in Vietnam before attending St. John’s University School of Law, where he received his degree in 1972.⁴ This accomplishment marked the beginning of a storied legal career.⁵

Before joining New York’s highest court, Jones served as a law secretary in the New York State Court of Claims.⁶ More significantly, however, Jones served as justice of the state’s supreme

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⁵ Id.
⁶ Id.; Chan, supra note 3, at B1.
court for seventeen years—from 1990 until his Court of Appeals nomination. Jones served as a state supreme court justice in the juvenile offender part and the court’s civil term, before ultimately becoming the civil term’s administrative judge. Prior to entering public judicial service, Jones worked both in private practice and at the Legal Aid Society, where he focused on criminal defense work.

In his tenure of over three years on the Court, Judge Jones has authored numerous majority and dissenting opinions. As of this writing, Jones has authored approximately forty majority opinions. Approximately ten of those majority opinions have been in criminal cases and thirty have been in civil cases. Additionally, Judge Jones has authored thirteen dissenting opinions—nine in criminal cases and four in civil cases.

While some of the majority and dissenting opinions penned by Jones in both criminal and civil cases have been unopposed by another member of the Court, many have not. This article will specifically analyze and discuss those cases. Part II.A of this article outlines Judge Jones’s majority opinions in criminal cases where dissenting opinions were written by another member of the Court. Similarly, Part II.B discusses recent Court of Appeals criminal cases where Judge Jones dissented. Part III analyzes the points of difference between those majority and dissenting views and, in so doing, attempts to identify trends and conclusions regarding Judge Jones’s criminal jurisprudence. Part IV provides a few closing thoughts.

7 Id.
8 Judge Jones, supra note 4.
9 Id.
10 This article will consider and discuss cases decided prior to April 2010.
13 This article does not address concurring opinions written by Judge Jones or majority opinions written by Jones where no concurrence or dissents were written by another member of the Court.
II. JUDGE JONES’S MAJORITY AND DISSENTING CRIMINAL OPINIONS

A. Majority Opinions in Which Another Member of the Court Dissented

Thus far, during his time on the Court of Appeals, Judge Jones has written several majority opinions in criminal cases, and only three of them were not supported by a unanimous Court. In People v. Bailey, Judge Pigott dissented from Jones’s majority opinion on evidentiary issues, and in People v. Bauman, Judge Smith dissented from Jones’s majority opinion on an issue relating to the sufficiency of pleadings.

In People v. Bailey, the defendant was arrested by plain-clothed police officers who were looking out for pickpockets. At the time of his arrest, the defendant was carrying counterfeit bills and allegedly told the officer that “[y]ou got me for the counterfeit money, but I didn’t have my hand near [the woman’s purse that the officers believed the defendant pick pocketed].” Before trial, the defendant moved to suppress his statement, but that motion was denied. Subsequently, the defendant was convicted of fourth degree attempted grand larceny and first degree possession of a forged instrument. Upon his conviction, the defendant moved to set aside the forgery verdict, “arguing that the evidence was insufficient to prove that he had . . . [the requisite] knowledge that [the instrument was] forged and with intent to defraud, deceive or injure another.”

Judge Jones’s majority opinion ultimately dismissed the forged instrument possession count because the evidence “was legally insufficient as to intent.” Jones’s opinion began by outlining the legal sufficiency standard, stating that “[a] verdict is legally

14 The third case, Rawlins, 10 N.Y.3d 136, 884 N.E.2d 1019, 855 N.Y.S.2d 20, is not analyzed in this article. That opinion addressed “whether DNA and latent fingerprinting comparison reports prepared by nontestifying experts are ‘testimonial’ statements” under Crawford v. Washington, 541 U.S. 36 (2004). Rawlins, 10 N.Y.3d at 141, 884 N.E.2d at 1022, 855 N.Y.S.2d 23. Judge Jones, writing for the majority, and Judge Read, writing a concurring opinion which no other judge joined, disagreed only on the issue of whether the specific reports in the exact case before the Court were testimonial. Id. at 160, 884 N.E.2d at 1035, 855 N.Y.S.2d 37.
16 Id.
17 Id.
18 Id.
19 Id. (quoting N.Y. PENAL LAW § 170.15 (McKinney 2010)).
20 Id. at *2.
sufficient when, viewing the facts in a light most favorable to the People, there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt.”

Judge Jones agreed that there was “no dispute that defendant’s inculpatory statement proved that he knew the bills were counterfeit,” but emphasized that “knowledge alone [was] not sufficient” for a possession of forged instrument conviction, and that “[k]nowledge and intent [were] two separate elements that must each be proven beyond a reasonable doubt.” Jones rejected the argument that the defendant’s intent could be inferred from his “presence in a shopping district [at the time of his arrest,] his possession of counterfeit bills, and his larcenous intent” and emphasized that “the intent to commit a crime must be specific to the crime charged.”

Jones’s refusal to infer the defendant’s intent was further supported by his argument that the legislature specifically provided for the “presumption or inference of intent by mere possession” in other criminal statutes, including those relating to credit and debit card forgery, welfare fraud, promotion of obscene articles, but did not do so in the statute on possession of a forged instrument. Each of those other statutes, as pointed out by Judge Jones, specifically provided that the defendant is “presumed to possess the [item] with knowledge that they are forged and with the intent to defraud, deceive or injure another.” The legislature’s failure to include such language in the forged instrument statute indicated to Jones that no such inference or presumption was appropriate in the case at hand.

Jones’s refusal to infer the defendant’s intent to possess a forged instrument was directly at odds with Pigott’s dissenting position that “the specific intent required for possession of a forged instrument . . . [could have been] inferred from defendant’s actions and the surrounding circumstances” in this case and that “a general intent to defraud suffice[d].” The fact that the defendant was “in a busy shopping district[,] . . . was carrying counterfeit bills in his

21 Id. (quoting People v. Danielson, 9 N.Y.3d 342, 349, 880 N.E.2d 1, 849 N.Y.S.2d 480 (2007)).

22 Id. at *3.

23 Id. (citations omitted).

24 Id. (citing N.Y. PENAL LAW § 170.27 (forged credit and debit cards); § 158.00(2)(a) (welfare fraud); § 235.10(a) (McKinney 2008) (possession of obscene articles)).

25 Id. (quoting N.Y. PENAL LAW § 170.27 (McKinney 2010) (forged credit and debit cards)).

26 Id.

27 Id. at *4 (Pigott, J., dissenting) (citations omitted).
pants pocket . . . and was engaging in larcenous behavior” was the “relevant evidence,” along with the defendant’s statement, to prove that the defendant had the requisite intent. Therefore, the dissent concluded that “the evidence was legally sufficient to permit the [possession] charge to be submitted to the jury.”

The defendants in *People v. Bauman*, in addition to being charged with intentional assault, were charged with depraved indifference assault for allegedly hitting the victim with an object, burning the victim, and providing poor nutrition, living conditions, and medical treatment for the victim. The issue presented to the Court was “whether an indictment charging depraved indifference assault . . . which allege[d] eleven acts over an eight-month period under one count violate[d New York’s criminal procedure laws].” A defendant is guilty of first degree depraved indifference assault when, “[u]nder circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes serious physical injury to another person.” In addition, “[e]ach count of an indictment may charge one offense only.”

Judge Jones’s majority opinion began by emphasizing that Court of Appeals’s case law has interpreted this statute to require that “acts which separately and individually make out distinct crimes must be charged in separate and distinct counts” and that statutory compliance is imperative because failure to comply may neither provide the requisite notice to the defendant, protect adequately against double jeopardy risks, nor “ensure[] the reliability of the unanimous verdict.”

Judge Jones ultimately affirmed the lower court’s dismissal of the indictment and found that the depraved indifference assault count was substantially similar to the assault count, “ma[king] it virtually impossible to determine the particular act of [assault] . . . as to which [a] jury [could] reach[] a unanimous verdict.” Jones rejected
the dissent’s argument that the specific language in the indictment resolved all concerns about the unanimity of the jury verdict. That language charged that the defendants allegedly did certain acts “and/or” other acts because the “jury could . . . easily find that defendants committed only one of the alleged acts,” each individually which would “not be sufficient to establish a course of conduct” for depraved indifference assault, and it would be unknown which act caused the defendants conviction.36

Judge Pigott’s dissent, joined by Judge Smith, argued that the indictment did not pose a problem as to the reliability of the verdict “because it is defendants’ course of conduct . . . upon which the jury must unanimously agree before defendants may be convicted of depraved indifference assault.”37 Therefore, “some or all of the acts” in the indictment count at issue “could lead a jury to conclude that defendants’ conduct created a grave risk of death, resulting in serious physical injury to the victim,” as required under the Penal Law for a conviction.38

B. Criminal Dissents

Judge Jones has penned nine dissents in criminal cases. These dissents have addressed a myriad of different issues including, among others, the sufficiency of evidence, statutory interpretation, plea sufficiency, judge trial waivers, Brady violations, constitutional confrontation rights, and improper evidence.

1. People v. Ford

In People v. Ford, a majority of the Court voted to reinstate the defendant’s first degree robbery conviction and remit the matter to the appellate division to consider the facts.39 There, the defendant was convicted of two counts of robbery40 after his motion to sever the trials was denied.41 The motion was grounded on the argument that the identification proof in one trial was weaker than the proof in the other, and that it in light of this difference, it would prejudice him to have both counts presented to the jury simultaneously.42 At

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36 Id.
37 Id. at 156, 905 N.E.2d at 1167–66, 878 N.Y.S.2d at 237–38 (Pigott, J., dissenting).
38 Id.
40 Id.
41 Id. at 876–77, 903 N.E.2d at 257, 874 N.Y.S.2d at 860.
42 Id.
trial, the court instructed the jury that to convict the defendant on the first degree robbery charge, they would have to find that the defendant “forcibly stole property[,] ... used or threatened the immediate use of a knife; [and] ... that ... the knife was a dangerous instrument.” On appeal, the defendant argued that “there was insufficient evidence that he had actually possessed a [dangerous instrument] during one of the robberies,” as required by Penal Law section 160.15(3). The defendant also challenged the denial of his severance motion.

While both the majority opinion and Jones’s dissenting opinions affirmed the trial court’s denial of defendant’s severance motion, they disagreed on the sufficiency of the evidence issue. The majority stated that “it is not enough for [a jury] instruction merely to imply the elements of the crime,” and that because the charge “did not use the term ‘actual possession,’” the jury was not aware of that requirement. The defendant did not object to the charge given by the trial court, however, and the legal sufficiency of the evidence issue was viewed by the majority “in light of the court’s charge as given without exception.” The majority found the defendant’s statement that he had a knife and “simultaneously mov[ed] his hand toward his pants pocket” during one of the incidents legally sufficient to convict the defendant of first degree robbery because the jury could have reasonably found that the “defendant ‘used or threatened the immediate use’ of a knife.”

Judge Jones’s dissent argued that the evidence was legally insufficient for a first degree robbery conviction under section 160.15(3) of the Penal Law. He also found the majority’s approach to the defendant’s failure to object to the jury charge “bizarre.” Jones interpreted the majority’s opinion as having found the evidence to be legally sufficient “because the jury charge was erroneous and defendant failed to make an objection,” but “[i]f the

43 Id. at 877–78, 903 N.E.2d at 257, 874 N.Y.S.2d at 860.
44 Id. at 877, 903 N.E.2d at 257, 874 N.Y.S.2d at 860 (citing N.Y. PENAL LAW § 160.15(e) (McKinney 2010) which states that “[a] person is guilty of robbery in the first degree when he forcibly steals property and when, in the course of the commission of the crime or of immediate flight therefrom, he ... [u]ses or threatens the immediate use of a dangerous instrument”).
45 Id.
46 Id. at 878, 903 N.E.2d at 258, 874 N.Y.S.2d at 861.
48 Id.
49 Id. at 879–80, 903 N.E.2d at 259, 874 N.Y.S.2d at 862 (Jones, J., dissenting).
50 Id. at 880, 903 N.E.2d at 259, 874 N.Y.S.2d at 862.
court had given the clearer charge, defendant would be allowed to argue sufficiency... under the correct view of the law.”\textsuperscript{51} Jones stated that it made no sense that the majority held that “the case must be decided as though the incorrect view of the law, left open by the charge, was correct.”\textsuperscript{52}

In support of his position that the defendant in \textit{Ford} need not have made a separate objection to the jury charge in order for the sufficiency argument to be properly considered, Jones cited \textit{People v. Jean-Baptiste}, a recent Court of Appeals decision which held that after making “a specific motion to dismiss for legal insufficiency at trial,” the defendant “did not additionally have to take an exception to the court’s [jury] charge.”\textsuperscript{53} The majority found \textit{Jean-Baptiste} to be distinguishable.\textsuperscript{54}

Finally, because the defendant must “use or threaten the use of a dangerous instrument” \textit{and} “actually possess a dangerous instrument” to be convicted of first degree robbery, and the evidence on the actual possession was scant, Jones found the evidence to be insufficient and, accordingly, would have held that the defendant was guilty of only third degree robbery.\textsuperscript{55} The evidence in this case consisted of the defendant’s statement that he had a knife and made a gesture toward his pocket.\textsuperscript{56} Additionally, the victim testified that he never saw a knife, a knife was never found, and the victim’s injuries resulted from punches, not from a knife.\textsuperscript{57} Jones held that there was no proof of an actual possession, and “[a] verbal threat by a defendant that he possesses a dangerous instrument, standing alone, is clearly insufficient to establish the ‘dangerous instrument’ element of robbery in the first degree.”\textsuperscript{58}

\textbf{2. People v. Naradzay}

In \textit{People v. Naradzay}, the defendant was convicted of attempted murder, attempted burglary, and criminal possession of a weapon.\textsuperscript{59} On appeal, the defendant challenged the “legal sufficiency of the

\textsuperscript{51} Id.
\textsuperscript{52} Id.
\textsuperscript{53} Id. at 880–81, 903 N.E.2d at 260, 874 N.Y.S.2d at 863 (quoting People v. Jean-Baptiste, 11 N.Y.3d 539, 541, 901 N.E.2d 192, 872 N.Y.S.2d 701 (2008)).
\textsuperscript{54} Id. at 878–79, 903 N.E.2d at 258, 874 N.Y.S.2d at 861.
\textsuperscript{55} Id. at 881–82, 903 N.E.2d at 260–61, 874 N.Y.S.2d at 863–64 (citing People v. Pena, 50 N.Y.2d 400, 407, 406 N.E.2d 1347, 429 N.Y.S.2d 410 (1980)).
\textsuperscript{56} Id. at 881, 903 N.E.2d at 260, 874 N.Y.S.2d at 863.
\textsuperscript{57} Id.
\textsuperscript{58} Id. (citations omitted).
proof supporting [the defendant’s] attempted burglary and murder convictions.” The defendant argued that “his intent was equivocal and that his actions . . . did not come ‘dangerously near’ commission of burglary and murder,” as required by statute. The majority, however, disagreed.

Under New York Penal Law section 110.00, “[a] defendant is guilty of attempt ‘when, with intent to commit a crime, he [or she] engages in conduct which tends to effect the commission of such crime.’” While the “final step necessary to complete the offense is not required,” a defendant’s “mere intent or mere preparation to commit a crime” are insufficient alone, and “the defendant must have ‘engaged in conduct that came dangerously near commission of the completed crime.’”

In this case, the majority found that a “jury could reasonably infer . . . that defendant intended to commit burglary and murder from his ‘conduct and the surrounding circumstances.’” The defendant in Naradzay had a “to-do” list that he followed on the night he was arrested, and brought a loaded gun with pockets full of ammunition “within [twenty] feet of the victim’s home.” These are facts upon which, according to the majority, “a rational jury could conclude that defendant crossed ‘the boundary where preparation ripens into punishable conduct.’” The majority stated that the murder was not carried out only because a bystander and law enforcement officers intervened. Therefore, the Court upheld convictions for attempted murder and burglary.

The dissenters—Judges Jones and Ciparick—found that the defendant’s conduct did not constitute an attempt according to the same statute. While the “defendant’s meticulous planning, post-arrest statements, and ‘to-do’ list showed his intent to commit the crime of murder,” the intent alone was insufficient to support a conviction for attempt. According to Judge Jones, the “defendant

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60 Id. at 466, 872 N.Y.S.2d at 376.
61 Id. at 466, 872 N.Y.S.2d at 376.
62 Id.
63 Id. at 466, 872 N.Y.S.2d at 376–77 (citing N.Y. PENAL LAW § 110.00 (McKinney 2009)) (first alteration added).
64 Id. at 466–67, 872 N.Y.S.2d at 377 (citation omitted).
65 Id. at 467, 872 N.Y.S.2d at 377.
66 Id.
67 Id. at 467–68, 872 N.Y.S.2d at 377–78.
68 Id. at 468, 872 N.Y.S.2d at 378.
69 Id. (Jones, J., dissenting) (citation omitted).
70 Id.
merely carried out the initial steps in his ‘to-do’ list and was never ‘dangerously near’ completion of the crime” because “he was [twenty five to thirty] feet from the border of the victim’s property and his weapon was [five to ten] feet away from him”; he “never approached the house,” which may have even been the incorrect house; and he “never saw or came close to his intended victim,” who “was not even in the area at that time.”72 Additionally, between the time that the police were called and arrived, the defendant had enough time to complete his plan, but never did so and, instead, disarmed himself and surrendered.73 Therefore, Jones would have held that the “dangerous proximity” standard required to support an attempt conviction was not satisfied in this case by the defendant’s “equivocal” conduct.74

3. People v. Sanchez

In People v. Sanchez, the Court analyzed the statutory language and history of New York’s “gang assault” statutes.75 These statutes “apply when a person, who intends to cause ‘physical injury’ to another, causes that person or a third person ‘serious physical injury’ and is ‘aided by two or more other persons actually present.’”76 The specific issue before the Court in Sanchez was whether “aiders” must have the same criminal intent that is required of the defendant.77 The Court held that the answer was no.78

Since these statutes were modeled after the second degree robbery statute, the majority began its opinion by analyzing the language of that statute.79 The robbery statute “requires the defendant to be ‘aided by another person actually present.’”80 New York courts, as noted by the majority, have previously interpreted this language “as showing a clear intention by the Legislature to establish that for the crime of robbery, the aider need not share the specific intent and mental culpability required for accomplice liability,” and that, instead, “a defendant can be found guilty

72 Id. at 469, 872 N.Y.S.2d at 378–79.
73 Id. at 468, 872 N.Y.S.2d at 379.
74 Id. at 468, 872 N.Y.S.2d at 379.
76 Id. (quoting N.Y. PENAL LAW § 120.06–.07 (McKinney 2009)).
77 Id.
78 Id.
79 Id. at 564, 893 N.Y.S.2d at 808 (citing N.Y. PENAL LAW § 160.10(1)).
80 Id. (citing N.Y. PENAL LAW § 160.10(1)).
of . . . robbery . . . even when his codefendant is acquitted.”\textsuperscript{81} Mere “constructive presence,” however, is insufficient, and “the other person must actually be present, at least in the immediate vicinity of the crime, and be capable of rendering immediate assistance to an individual committing the crime.”\textsuperscript{82} The majority found this interpretation “equally applicable to the similarly worded gang assault statutes” at issue in \textit{Sanchez}.

After analyzing the language of the robbery statute, the Court reviewed the language of the gang assault statutes themselves, which require “[n]o particular mental state . . . of those who comprise the gang.”\textsuperscript{84} The statute, the Court held, contemplates that aiders must assist in the commission of the crime but does not require aiders to share a criminal intent with the defendant.\textsuperscript{85} This reading was also supported, in the eyes of the majority, by the purpose of the statute, which was “to enhance public safety” by protecting the public from “threatening, intimidating, and dangerous situation[s]” related to gang violence.\textsuperscript{86} This escalated situation caused by the “often spontaneous and frenzied” nature of gang violence is present regardless of whether the aider shares the defendant’s criminal intent.\textsuperscript{87}

Therefore, the majority held that a defendant can be convicted of gang assault “even if one or more of the persons who aid do not share his or her intent to cause physical harm.”\textsuperscript{88} The majority did not hold, however, “that no mens rea is required of an aider”—just that the aider is not required to share the defendant’s mental state.\textsuperscript{89}

Jones, penning a passionate dissent with which Chief Judge Lippman and Judge Ciparick both joined, emphasized that the gang assault statutes “require that all members involved in the assault have the specific intent to cause physical injury.”\textsuperscript{90} While the

\textsuperscript{81} Id. (citation omitted).
\textsuperscript{82} Id. at 564, 921 N.E.2d at 575–76, 893 N.Y.S.2d at 808–09 (citation omitted).
\textsuperscript{83} Id. at 564–65, 921 N.E.2d at 575–76, 893 N.Y.S.2d at 808–09.
\textsuperscript{84} Id. at 565, 921 N.E.2d at 576, 893 N.Y.S.2d at 809.
\textsuperscript{85} Id.
\textsuperscript{86} Id. (citations omitted).
\textsuperscript{87} Id. at 565–66, 921 N.E.2d at 576–77, 893 N.Y.S.2d at 809–10.
\textsuperscript{88} Id. at 566, 921 N.E.2d at 577, 893 N.Y.S.2d at 810.
\textsuperscript{89} Id. Judge Smith wrote a separate concurring opinion to specifically address the question of “whether any mens rea is required of an ‘aider’ in a gang assault,” and found that there is. \textit{Id.} at 567, 921 N.E.2d at 578, 893 N.Y.S.2d at 811 (Smith, J., concurring). Judge Smith stated that he “would not uphold a conviction for gang assault where the alleged aiders did not have at least” the mental culpability of “believing it probable that he is rendering aid . . . to a person who intends to commit a crime.” \textit{Id.} (citations omitted).
\textsuperscript{90} Id. at 568, 921 N.E.2d at 578, 893 N.Y.S.2d at 811 (Jones, J., dissenting) (citation
dissenters agreed with the majority that “an enhanced punishment is warranted because of the greater potential for harm and fear engendered by a group assault,” they would have required the aiders to have a criminal intent more closely aligned to the defendant’s.91 Jones wrote that “the culpable mental states provided under Penal Law cannot be presumed to have been written out of the gang assault statutes . . . [as the] majority seems to conclude.”92 According to Jones, doing so would allow “a defendant [to] be convicted of gang assault merely because there were uninvolved bystanders in the area or unwitting aiders.”93 He harshly criticized the majority’s ultimate position because it neither “provide[d] guidance to the trial courts and bar as to the precise mental culpability of aiders in a gang assault case,” nor “addressed the . . . deficiencies in the [jury] instructions” given in these two cases at hand.94

The dissent emphasized that Penal Law section 15.05, which defines “the basic principles of culpability,” makes it “axiomatic that culpable mental states must be proven together with an ‘actus reus’ in order to constitute a crime.”95 Furthermore, “to negate the requirement of mental culpability the Legislature would have to specifically include language in the statute and so declare.”96 In the gang assault statutes, no such declaration was made.

In support of its “position that a person can be found guilty of gang assault when aided by another actually present even though that person lacked any mental culpability,” the majority cited the appellate division case of People v. Green.97 The dissenters distinguished Green, however, noting that the court there “did not eliminate the requirement of a culpable mental state.”98 Additionally, the dissenters found support in People v. Coleman, a case in which the appellate division “held that where a person is charged with robbery in the second degree, the person ‘aiding’ must have ‘intent to aid . . . [in] stealing.’ That is, there needs to be a

91 Id. at 568, 921 N.E.2d at 578, 893 N.Y.S.2d at 811 (finding support, like the majority, in the statutory legislative history) (citation omitted).
92 Id. at 568–69, 921 N.E.2d at 578, 893 N.Y.S.2d at 811.
93 Id. at 569, 921 N.E.2d at 578, 893 N.Y.S.2d at 811.
94 Id. at 572, 921 N.E.2d at 581, 893 N.Y.S.2d at 814.
95 Id. at 569, 921 N.E.2d at 578, 893 N.Y.S.2d at 811 (citations omitted).
96 Id. (citations omitted)
97 Id. at 569, 921 N.E.2d at 579, 893 N.Y.S.2d at 812 (citing People v. Green, 126 A.D.2d 105, 512 N.Y.S.2d 714 (App. Div. 2d Dep’t 1987).
98 Id. at 569–70, 921 N.E.2d at 579, 893 N.Y.S.2d at 812.
‘shared intent’ by two persons when one is charged with second
degree robbery.”99 Similarly, Judge Jones and the other two
dissenters would have held that “where a defendant is charged with
gang assault, he/she must have a shared intent with the aiders.”100
Under the facts, both jury “instructions were improper because
under them, the jury could convict defendant of gang assault based
solely on another defendant’s presence.”101

4. People v. Baret

In People v. Baret, the defendants were offered a plea bargain
after being charged with sale of cocaine and possession of cocaine
with intent to sell.102 The deal was a “no-split” plea, meaning that
“it was not available to either defendant unless both agreed” to
accept the plea.103 Both defendants accepted the deal but, before
sentencing, one defendant (“D-2”) moved to withdraw his plea.104
The affidavit in support of D-2’s motion stated that after initially
rejecting the deal, the other defendant (“D-1”) “began to put
pressure on [D-2] to plead guilty,” told D-2 that he “better do the
right thing and plead guilty,” and made D-2 “fe[el] in danger of
physical reprisal if [he] did not plead guilty.”105 The supreme court,
however, denied the defendant’s motion to withdraw the guilty plea
without a hearing.106
On appeal, the majority affirmed the supreme court’s denial of the
D-2’s motion without a hearing.107 Judge Smith emphasized that
“[w]hen a defendant moves to withdraw a guilty plea, the ‘fact-
finding procedures’ to be followed ‘rest largely in the discretion of
the Judge to whom the motion is made,’” and that “[o]nly in the rare
instance will a defendant be entitled to an evidentiary hearing.”108
Smith found “ample support in the record” for the lower court
judge’s exercise of discretion, because the affidavit “[d]id not
unequivocally say . . . that [the defendant] pleaded guilty only

99 Id. at 570, 921 N.E.2d at 580, 893 N.Y.S.2d at 813 (quoting People v. Coleman, 5 A.D.3d
956, 959, 773 N.Y.S.2d 747, 750 (App. Div. 3d Dep’t 2004)).
100 Id. at 571, 921 N.E.2d at 580, 893 N.Y.S.2d at 813.
101 Id. at 570, 921 N.E.2d at 580, 893 N.Y.S.2d at 813.
103 Id.
104 Id. at 33, 892 N.E.2d at 839, 862 N.Y.S.2d at 446.
105 Id. at 33, 892 N.E.2d at 839–40, 862 N.Y.S.2d at 446–47.
106 Id. at 33, 892 N.E.2d at 840, 862 N.Y.S.2d at 447.
107 Id.
108 Id. (quoting People v. Tinsley, 35 N.Y.2d 926, 927, 324 N.E.2d 544, 365 N.Y.S.2d 161
(1974)).
because he was afraid [the other defendant] would have killed or injured him if he did not.”

The affidavit failed to state why D-2 believed that the threats could be carried out, to specify the contexts under which the threats were made, and to describe how the threats were communicated and how he responded. Therefore, according to the majority, the affidavit’s “vague expressions” were “no basis” for disturbing the trial court judge’s exercise of discretion, and the appellate division’s decision affirming that decision.

Judge Jones wrote a spirited dissent that would have ordered a hearing on the ground that “connected pleas have an inherent tendency to coerce [defendants] and, thus, deserve heightened scrutiny.” While pleas are “a vital instrument of judicial administration,” connected pleas may cause “a defendant [to feel] irrevocably ensnared by a previously entered guilty plea which . . . may have been at best ill-advised or, at worst, silenced at allocution by . . . a coercive agent.”

Therefore, Judge Jones did not find it necessary that D-2 have “an intimate understanding of his or her codefendant’s wherewithal to make good on a promised threat,” as the majority seemingly required, in order for the plea to be involuntary, unknowing, or unintelligent.

Judge Jones agreed that a plea must “be entered voluntarily, knowingly and intelligently,” and that in the event that a plea does not meet these criterion, “an affirmative showing on the record [must be made] that the defendant waived his or her constitutional protections.” Judge Jones also agreed that the Court should not follow a “formalistic approach,” but instead afford discretion to the trial court’s decision regarding the “satisfactoriness” of the plea. Upon the making of a withdrawal motion, however, a “reasonable opportunity” should be given to the defendant to address the court so that the court can “make an informed determination,” especially when a connected plea is at issue.

In the case at hand, Jones believed that D-2’s “allegations of coercion . . . sufficiently raised doubts about the voluntariness of his guilty plea such that, at a minimum, an uncumbrous evidentiary

109 Id. at 33–34, 892 N.E.2d at 840, 862 N.Y.S.2d at 447.
110 Id. at 34, 892 N.E.2d at 840, 862 N.Y.S.2d at 447.
111 Id.
112 Id.
113 Id. at 34–37, 892 N.E.2d at 840–42, 862 N.Y.S.2d at 447–49 (Jones, J., dissenting).
114 Id. at 35, 892 N.E.2d at 842, 862 N.Y.S.2d at 449.
115 Id. at 36–37, 892 N.E.2d at 842, 862 N.Y.S.2d at 449.
116 Id. at 34, 892 N.E.2d at 840–41, 862 N.Y.S.2d at 447–48 (citations omitted).
117 Id. at 34, 892 N.E.2d at 841, 862 N.Y.S.2d at 448 (citation omitted).
hearing was warranted.” 118 In fact, as noted by the dissenting
judge below, D-2’s “allegations, if true, portray a picture of a
defendant whose free will was beclouded by the coercive force of his
codfendant’s threats.” 119 Jones found that D-2’s affidavit, alleging
that D-2 changed his plea from not guilty to guilty because D-1 “put
pressure on [him to] do the right thing and plead guilty” and told
him “that his life was ‘on the line’ if he did not, was ‘not facially
incredible.’” 120

Additionally, to Jones, the plea allocution alone, without an
evidentiary hearing, “presumes too much about what has previously
taken place (or not) off the record” and does not adequately “ensure
that a guilty plea is not induced by fraud or coercion.” 121 Unless the
defendant is able to provide the specific information demanded by
the majority, Jones argued that he “would never be heard to
complain” about the entrance of his plea, and that courts should be
“discourage[d] . . . from rendering summary determinations that
risk depriving defendants of the opportunity . . . to make an
uncomplicated case of coercion.” 122

5. “The First” People v. Davis 123

In People v. Davis, the Court held that “Criminal Procedure Law §
350.20, which permits [certain] misdemeanors to be tried and
determined by judicial hearing officers (JHOs) ‘upon agreement of
the parties,’ [wa]s constitutional and that the parties’ agreement to
engage in JHO adjudication . . . was valid.” 124 The Court noted that
the purpose of the statute is to increase judicial efficiency by using
retired judges “to alleviate the backlog and delay that had begun to
’seriously cripple[’] our State’s court system and had ‘undermine[d]
public confidence in the fairness of justice in our state.’” 125

The defendant in Davis consented to the use of a JHO by signing
a consent form, and was ultimately convicted by a JHO for violating

118 Id.
119 Id. at 36, 892 N.E.2d at 842, 862 N.Y.S.2d at 449 (citation omitted).
120 Id. at 35, 892 N.E.2d at 841, 862 N.Y.S.2d at 448.
121 Id.
122 Id. at 35–36, 892 N.E.2d at 841–42, 862 N.Y.S.2d at 448–49 (citation omitted).
123 The title of this section refers to the fact that the Judge Jones has dissented in two
different cases named People v. Davis in 2009. The People v. Davis discussed in this section
was decided in November 2009. The People v. Davis discussed infra Part II.B.6 was decided
in June 2009.
125 Id. at 22–23, 912 N.E.2d at 1047, 884 N.Y.S.2d at 668.
a state parks department rule. The only portion of the detailed opinion upon which the majority and dissent disagreed was whether the defendant’s consent to the use of the JHO adjudication was effective. The defendant argued that his consent was ineffective because he was “not engage[d] . . . in an oral colloquy regarding whether he understood the effect of the signed JHO consent form” with the court. 

Under the facts of this case, the defendant was represented by counsel. The Court noted that “[i]t is well established that a defendant, ‘having accepted the assistance of counsel, retains authority only over certain fundamental decisions regarding the case’ such as ‘whether to plead guilty, waive a jury trial, testify . . . or take an appeal.’” The majority found that the decision to have a JHO adjudicate a matter is a “‘tactical decision’ best left to the determination of counsel.” The defendant’s counsel “participated fully” in the JHO trial “without objection” and the defendant signed the JHO consent form, which was in the court’s file. Therefore, the majority upheld the JHO adjudication.

Judges Jones and Smith, however, dissented and voted to reverse the defendant’s conviction on the ground that the defendant unknowingly waived his right to a trial by judge. While there is no “particular catechism” required for a waiver to be acceptable, “there must be record evidence of a knowing, voluntary, and intelligent waiver of the right to a trial by a judge.”

Judges Jones and Smith did not find the consent form on which majority relied to be sufficient because it was not dated, witnessed, or mentioned on the record. Significantly, there was also no showing that the defendant knew the effect of what he was signing, or even what he was signing. Furthermore, written waivers were not signed by any of the defendant’s attorneys, and there was nothing to show that the defendant made an oral waiver. Lastly,

126 Id. at 22, 912 N.E.2d at 1046, 884 N.Y.S.2d at 667.
127 Id. at 30, 912 N.E.2d at 1052, 884 N.Y.S.2d at 673.
128 Id.
129 Id. (citation omitted).
130 Id. (citation omitted).
131 Id. at 30, 912 N.E.2d at 1053, 884 N.Y.S.2d at 674.
132 Id. at 30–31, 912 N.E.2d at 1053, 884 N.Y.S.2d at 674.
133 Id. at 32, 912 N.E.2d at 1054, 884 N.Y.S.2d at 675 (Jones, J., dissenting).
134 Id. at 33–34, 912 N.E.2d at 1055, 884 N.Y.S.2d at 676.
135 Id. at 32, 912 N.E.2d at 1054, 884 N.Y.S.2d at 675.
136 Id. at 32–33, 912 N.E.2d at 1054, 884 N.Y.S.2d at 675.
137 Id. at 33, 912 N.E.2d at 1054, 884 N.Y.S.2d at 675.
while a defendant can “waive his right [to a bench trial] through counsel,” the “waiver must at least be mentioned on the record in defendant’s presence, to provide some assurance that defendant knew he was giving up the right to be tried by a judge”—something that was not done here.\footnote{Id.} Finally, the dissenters rejected the majority’s assertion that the waiver decision is a tactical one to be made by counsel because there was “no authority to support” such an assertion.\footnote{Id.}

6. “The Second” \textit{People v. Davis}

In the “second” \textit{People v. Davis},\footnote{For an explanation of why this section is entitled “The Second” \textit{People v. Davis}, see \textit{supra} note 122.} the Court was faced with the issue of whether it was reversible error for the trial court to refuse to charge the jury on a lesser included offense of seventh degree criminal possession of a controlled substance (in addition to third degree criminal sale of a controlled substance), in light of the defendant’s assertion of an agency defense.\footnote{People v. Davis, No. 172, 2009 WL 4030872, at *1 (N.Y. Nov. 24, 2009).} The defendant had been indicted for third degree criminal sale of a controlled substance under Penal Law section 220.39 after being arrested by an undercover police officer.\footnote{Id.} At trial, the jury was charged that “a person is not guilty of selling a controlled substance if he was acting as an agent of the buyer,” and the People did not object to this charge.\footnote{Id.} The trial court refused, however, to charge the jury on the lesser included offense of criminal possession of a controlled substance. The defendant was convicted of third degree criminal sale and appealed. On appeal, the appellate division held that it was not error to refuse to charge the jury with the lesser included offense instruction. As discussed in further detail below, a defendant can request a jury charge for a lesser offense if it is \textit{impossible} to have committed the charged offense without also committing the lesser offense.\footnote{Id.} The appellate division’s decision reasoned that “criminal possession is not a lesser included offense of the sale charge because ‘it is not necessary to possess a controlled substance in order to offer or agree to sell it.’”\footnote{Id.} Under that logic,
there is no impossibility and thus no right for a defendant to request a jury charge on the lesser offense. As to the agency defense, however, the appellate division left the issue to the Court of Appeals.\textsuperscript{146}

Writing for the majority, Judge Ciparick noted that “criminal possession is not a lesser included offense of criminal sale,”\textsuperscript{147} and refused to “adopt a different rule for cases where the agency defense is charged” to the jury.\textsuperscript{148} The majority started its analysis by noting that the two-pronged Glover test must be satisfied for the defendant to be entitled to charge the jury on the lesser included offense.\textsuperscript{149}

Under Glover, “the proposed lesser offense must be ‘an offense of lesser grade or degree’ and it must be ‘in all circumstances . . . impossible to commit the greater crime without concomitantly, by the same conduct, committing the lesser offense.’”\textsuperscript{150} The possibility of committing the greater, and not the lesser, offense—the second prong—“must be determined by ‘a comparative examination of the statutes defining the two crimes, in the abstract.’”\textsuperscript{151} It must also be shown that there is “a reasonable view of the evidence in the particular case that would support a finding that [the defendant] committed the lesser offense but not the greater.”\textsuperscript{152}

Applying the facts to the Glover analysis, the majority found it possible to commit the crime of third degree criminal sale of a controlled substance without committing the seventh degree criminal possession offense because sale does not require possession.\textsuperscript{153} Examining the language in the statutes, the Court found that the sale offense requires a defendant to “knowingly and unlawfully” sell a substance: “[a sale] is defined broadly as ‘to sell, exchange, give or dispose of to another, or to offer or agree to do the same.’”\textsuperscript{154} The defendant “need not have dominion or control over a drug in order to . . . sell it to someone else.”\textsuperscript{155}

The majority further held that “[b]ecause the agency defense is a

\begin{footnotes}
\footnotetext[146]{Id.}
\footnotetext[147]{Id.}
\footnotetext[148]{Id.}
\footnotetext[149]{Id. at *2.}
\footnotetext[150]{Id. (citation omitted).}
\footnotetext[151]{Id. (citation omitted).}
\footnotetext[152]{Id. (citation omitted).}
\footnotetext[153]{Id. (citations omitted).}
\footnotetext[154]{Id. (quoting N.Y. PENAL LAW §§ 220.39(1), 220.00(1) (McKinney 2008)).}
\footnotetext[155]{Id.}
\end{footnotes}
defense, [and] not a separate crime under the sale statute, it did not alter [the *Glover* analysis].” Furthermore, the “defense is a well-established ‘interpretation of the statutory definition of the term ‘sell’” and the Court has previously held that “[o]ne who acts solely as the agent of the buyer cannot be convicted of the crime of [sale].” In fact, a finding that “possession is a lesser included offense of a drug sale count in agency defense cases would require an exception to the *Glover* test,” which the majority was unwilling to make. Therefore, the majority upheld the trial court’s charge to the jury.

Judge Jones, joined by Judge Pigott, vehemently disagreed with the majority’s decision on the grounds that the “failure or refusal to charge . . . simple possession as a lesser included offense in a drug case where the agency defense is properly submitted to the jury may lead to incongruous and deleterious results.” As such, Jones urged that an exception to *Glover* be made.

Judge Jones noted that *Glover’s* first requirement, that it be “theoretically impossible to commit the greater crime without at the same time committing the lesser,” is unrealistic in a prosecution of a drug sale where the defendant asserts the agency defense, because there is only a “remote” possibility that one can sell drugs without possessing them. Jones rejected the majority’s “blind[] fitting [of] the *Glover* standard to this type of case” as nonsensical and “fundamentally [unfair],” and argued that *Glover* should not be strictly applied in agency defense situations.

A defendant asserting the agency defense must of course admit that he possessed drugs as the buyer’s agent, and therefore must “usually take the stand, bringing his[] credibility into question.” Jones’s concern was that if the jury found that the defendant was not acting as an agent, but did possess drugs, the failure to charge the jury on the lesser included offense of possession likely will lead to a conviction on the sale count. In essence, the lack of a possession charge may have a coercive effect on the jury, making them choose between acquitting a defendant who admitted to drug

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156 *Id.* at *3.
157 *Id.* (citations omitted).
158 *Id.*
159 *Id.*
160 *Id.* (Jones, J., dissenting).
161 *Id.*
162 *Id.* at *4.
163 *Id.* (citation omitted).
164 *Id.*
possession and convicting the defendant for sale.\textsuperscript{165}

Because such a holding would be consistent with prior case law, would not be reversible error, and would not prevent the prosecution from putting on its case, Jones urged for a \textit{Glover} exception to be recognized in cases like the “second” \textit{Davis}. According to Judge Jones, where it is reasonable for the jury to convict the defendant (who has asserted an agency defense) of simple possession, rather than sale, an exception to \textit{Glover} should be recognized.\textsuperscript{166}

7. \textit{People v. Fuentes}

In \textit{People v. Fuentes}, the Court was presented with whether the prosecution’s failure to disclose an alleged rape victim’s hospital records containing information about the victim’s emotional state and drug use was a constitutional violation under \textit{Brady v. Maryland}.\textsuperscript{167}

In \textit{Fuentes}, the victim was allegedly sodomized and raped, but testified that she did not immediately call the police or seek medical attention.\textsuperscript{168} She did seek medical attention a few hours later.\textsuperscript{169} Almost two years after the rape, a report was issued by the medical examiner that concluded that the defendant’s DNA was taken from the victim during the examination after the alleged rape.\textsuperscript{170} The defendant was arrested, indicted, and tried.\textsuperscript{171} The medical records of the victim were disclosed under an “open file discovery agreement and were admitted into evidence.”\textsuperscript{172} At trial, however, one medical record was admitted into evidence that was not made available to defense counsel before trial.\textsuperscript{173} The record was a one-page document memorializing a psychiatrist’s interview of the victim.\textsuperscript{174} Because the defense was unaware of the record, it did not cross-examine prosecution witnesses on the document at trial.\textsuperscript{175} The document was not discovered by defense counsel until closing arguments, at

\textsuperscript{165} \textit{Id.}
\textsuperscript{166} \textit{Id.} (citation omitted).
\textsuperscript{168} \textit{Id.} at 261, 907 N.E.2d at 287, 879 N.Y.S.2d at 374.
\textsuperscript{169} \textit{Id.} at 261, 907 N.E.2d at 288, 879 N.Y.S.2d at 375.
\textsuperscript{170} \textit{Id.}
\textsuperscript{171} \textit{Id.}
\textsuperscript{172} \textit{Id.}
\textsuperscript{173} \textit{Id.} at 262, 907 N.E.2d at 288, 879 N.Y.S.2d at 375.
\textsuperscript{174} \textit{Id.}
\textsuperscript{175} \textit{Id.}
which time the defendant moved for a mistrial. The court, leery of granting a mistrial, ordered the parties to remove the document from the medical records given to the jury for deliberations, and to refrain from mentioning the document during closing arguments.176 The jury, unaware of the document’s existence or of this dispute, found the defendant guilty; the defendant moved to set aside the verdict, but the court denied the motion.177 The appellate division affirmed the denial, finding “no Brady violation because defendant was given a meaningful opportunity to use the document during the trial.”178

The majority of the Court of Appeals affirmed the finding of no Brady violation, but on different grounds than the appellate division.179 Judge Ciparick’s majority decision held that the failure to disclose the record did not amount to a violation under Brady because the documents at issue were immaterial.180 The majority began its opinion by outlining the due process clauses under both the New York State and Federal Constitutions. Under both clauses, “a criminal defendant [is guaranteed] the right to discover favorable evidence in the People’s possession material to guilt or punishment.”181 In order for a Brady violation to be established “a defendant must show that (1) the evidence is favorable to the defendant because it is either exculpatory or impeaching in nature; (2) the evidence was suppressed by the prosecution; and (3) prejudice arose because the suppressed evidence was material.”182 Under the New York standard,

[if] a defendant makes a specific request for a document, the materiality element is established provided there exists a ‘reasonable possibility’ that it would have changed the result of the proceedings. Absent a specific request by a defendant for the document, materiality can only be demonstrated by a showing that there is a ‘reasonable probability’ that it would have changed the outcome of the proceedings.183 The majority held “that disclosure of th[e] one-page document would not have altered the outcome of the case,” in light of the

176 Id. at 262, 907 N.E.2d at 289, 879 N.Y.S.2d at 376.
177 Id. at 262–63, 907 N.E.2d at 289, 879 N.Y.S.2d at 376.
178 Id. at 263, 907 N.E.2d at 289, 879 N.Y.S.2d at 376.
179 Id.
180 Id. at 260, 907 N.E.2d at 287, 879 N.Y.S.2d at 374.
181 Id. at 263, 907 N.E.2d at 289, 879 N.Y.S.2d at 376 (citing Brady v. Maryland, 373 U.S. 83 (1963); People v. Bryce, 88 N.Y.2d 124, 128, 666 N.E.2d 221, 643 N.Y.S.2d 516 (1996)).
182 Id. at 263, 907 N.E.2d at 289, 879 N.Y.S.2d at 376 (citation omitted).
183 Id. (citations omitted).
entirety of the evidence.\textsuperscript{184} The fact that the document noted that “the victim was upset because she placed herself in danger” on the night in question “would have undoubtedly strengthened the People’s case by corroborating the victim’s testimony that she walked home alone” when she was attacked by the defendant.\textsuperscript{185} But the information relating to the victim’s depression and suicidal thoughts was “unclear” and did not state that “these thoughts were the result of having been raped.”\textsuperscript{186} Additionally, no previous psychiatric history was contained on the record.\textsuperscript{187}

Furthermore, while the report stated that the victim used marijuana within the last year, she had only used it twice, and there was no evidence that she used any other illegal substances.\textsuperscript{188} Even if this information were used to impeach the credibility of the victim as a witness, however, the majority found that the “value [of this] impeachment evidence would have been, at best, minimal.”\textsuperscript{189} Lastly, the “defendant’s version of the events was contradicted in several key respects” by another witness’s testimony and the victim’s testimony.\textsuperscript{190}

To summarize, the majority’s opinion held that because of the “document’s extremely limited utility as impeachment evidence and the strength of the People’s case, in conjunction with the implausibility of defendant’s version of events, the undisclosed document [did] not meet the materiality standard—the third prong required to establish a \textit{Brady} violation—and the failure to disclose thus did not require reversal” of the defendant’s conviction.\textsuperscript{191}

Judge Jones’s dissent, joined by Judge Read, would have remanded the case for a new trial because the undisclosed record contained material information, which meant that failing to disclose the record constituted a \textit{Brady} violation.\textsuperscript{192} Notably, the standard of materiality articulated by the dissent was whether there is “a reasonable possibility’ that [the document’s] disclosure would have affected the outcome of the trial.”\textsuperscript{193}

\textsuperscript{184} \textit{Id.} at 263–64, 907 N.E.2d at 289, 879 N.Y.S.2d at 376.
\textsuperscript{185} \textit{Id.} at 263–64, 907 N.E.2d at 289–90, 879 N.Y.S.2d at 376–77.
\textsuperscript{186} \textit{Id.} at 264, 907 N.E.2d at 290, 879 N.Y.S.2d at 377.
\textsuperscript{187} \textit{Id.}
\textsuperscript{188} \textit{Id.}
\textsuperscript{189} \textit{Id.}
\textsuperscript{190} \textit{Id.} at 264–65, 907 N.E.2d at 290, 879 N.Y.S.2d at 377.
\textsuperscript{191} \textit{Id.} at 265, 907 N.E.2d at 290, 879 N.Y.S.2d at 377.
\textsuperscript{192} \textit{Id.} at 265, 267, 907 N.E.2d at 290–91, 292, 879 N.Y.S.2d at 377–78, 379 (Jones, J., dissenting).
\textsuperscript{193} \textit{Id.} at 264, 907 N.E.2d at 290, 879 N.Y.S.2d at 377 (citation omitted).
The undisclosed record indicated that the “victim expressed feelings of depression, suicide, family problems, mistreatment by her mother, withdrawal and substance abuse.”\textsuperscript{194} According to the dissent, “[n]ondisclosure of psychiatric problems has been held to be a material violation of \textit{Brady} and has resulted in reversal.”\textsuperscript{195}

Additionally, Judge Jones criticized the majority’s characterization of the record as immaterial. Jones wrote that the majority, instead of viewing the materiality of the document in the context of the case, “engage[d] in a selective marshaling of the trial testimony.”\textsuperscript{196} There was substantial evidence in the case supporting each side’s position; therefore, “the issue of [witness] credibility was central to the jury’s consideration of the case.”\textsuperscript{197} Following, Jones wrote that “[i]n light of the contradictory evidence in this case, it was reasonably possible that the disclosure of the record, “unilaterally remov[ed]” by the prosecution, could have changed the result of the trial.\textsuperscript{198}

Jones’s dissent also criticized the majority’s dismissal of the impeachment value of the record. He noted that the majority’s opinion “fail[ed] to account for the probability that disclosure of the record . . . would have likely resulted in a more intense investigation of the victim’s psychological background and history,” which may have resulted in additional impeachment evidence.\textsuperscript{199}

Finally, Judge Jones discussed the issue of open file discovery which, at its “heart[, requires] a good faith reliance on the fact that nothing has been removed, altered or redacted.”\textsuperscript{200} Jones found that by allowing prosecution’s “unilateral removal of th[e] document [the majority’s opinion] undermine[d] the letter and spirit of open file discovery.”\textsuperscript{201}

8. \textit{People v. Wrotten}

In \textit{People v. Wrotten}, the Court was asked to determine if the trial court “erred in permitting an adult complainant living in another state to testify via real-time, two-way video after finding that because of age and poor health he was unable to travel to New York

\begin{itemize}
\item \textsuperscript{194} \textit{Id.} at 265–66, 907 N.E.2d at 291, 879 N.Y.S.2d at 378.
\item \textsuperscript{195} \textit{Id.} at 266, 907 N.E.2d at 291, 879 N.Y.S.2d at 378 (citations omitted).
\item \textsuperscript{196} \textit{Id.}
\item \textsuperscript{197} \textit{Id.}
\item \textsuperscript{198} \textit{Id.} at 266–67, 907 N.E.2d at 291–92, 879 N.Y.S.2d at 378–79.
\item \textsuperscript{199} \textit{Id.} at 267, 907 N.E.2d at 292, 879 N.Y.S.2d at 379.
\item \textsuperscript{200} \textit{Id.}
\item \textsuperscript{201} \textit{Id.}
\end{itemize}
At the time of the trial, the witness was “[eighty-five] years old, frail, [and] unsteady on his feet.” The live video through which the witness gave his testimony allowed him to see the judge, defendant, jury, and counsel in the courtroom and also allowed those individuals to see the witness “very clearly,” including ‘any expressions on his face.’ The defendant was convicted of second degree assault, but the conviction was overturned by the appellate division, which held that “in the absence of any express legislative authorization, [the] Supreme Court lacked authority to permit the admission of televised testimony.”

The People appealed the appellate division’s ruling. The Court of Appeals’s majority opinion, written by Judge Ciparick, held that the trial court acted properly in allowing the virtual testimony because section 2-b of the Judiciary Law, as well as the state constitution, gives the courts discretion in determining trial procedure. While the “primary authority to regulate court procedure” lies with the legislature, “the Constitution permits the courts latitude to adopt procedures consistent with general practice as provided by statute[s],” such as section 2-b of the Judiciary Law. Under section 2-b, state courts are “explicitly authorized [to] use... innovative procedures where ‘necessary to carry into effect the powers and jurisdiction possessed by [the court],’” so long as the procedures are “consistent with constitutional, statutory, and decisional law.”

The majority did not cite any statute addressing the use of two-way televised testimony, and there is “no specific statutory authority evincing legislative policy proscribing televised testimony,” either. The majority noted that the Criminal Procedure Law requires live video testimony of child witnesses in certain sex crime cases, but in no other circumstance is video testimony mentioned. Because the Criminal Procedure Law does not prescribe televised testimony in any other situation, the majority held that its use “is presumably left to the trial court’s

203 Id.
204 Id.
205 Id. (citation omitted).
206 Id.
207 Id. at *2 (citation omitted).
208 Id. (quoting N.Y. JUD. CT. ACTS LAW § 2-b(3) (McKinney 2001)).
209 Id. (citation omitted).
210 Id.
discretion.”

Additionally, the majority found no statute that “implicitly preclude[d] the admission of live video testimony.” The majority cited various provisions of the Criminal Procedure Law that address the use of videotaped testimony and examinations taken outside of the state, but those statutes do “not speak to the permissibility of real-time video testimony subject to cross-examination in front of a jury.”

Also, the majority held that the defendant’s federal and state constitutional rights to confrontation were not offended by this practice. A prior New York case held that the use of “two-way closed-circuit testimony in a criminal trial passe[d] constitutional muster,” and the “United States Supreme Court held that live testimony via one-way closed-circuit television [was] permissible . . . provided there is an individualized determination that denial of ‘physical, face-to-face confrontation’ is ‘necessary to further an important public policy’ and the ‘reliability of the testimony is otherwise assured.’”

The majority noted that the video testimony would satisfy the federal constitutional standard as long as the use of the video was both necessary and reliable. The majority found that the testimony given in this case was sufficiently reliable and necessary, given the technology being used and the frailty of the defendant. The use of the video was reliable evidence because it was subject “to rigorous testing in the context of an adversary proceeding.” Additionally, other “indicia of reliability” necessary to satisfy the right to confrontation, as articulated by the United States Supreme Court, were present in this case—“testimony under oath, the opportunity for contemporaneous cross-examination, and the opportunity for the judge, jury, and defendant to view the witness’s demeanor as he or she testifies.” The majority thus found that the video testimony was sufficiently reliable.

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211 Id.
212 Id.
213 Id. (citing N.Y. CRIM. PROC. LAW §§ 660.10, 660.20, 680.10, 680.20 (McKinney 2009).
214 Id. at *1.
215 Id. at *2 (citing People v. Cintron, 75 N.Y.2d 249, 253, 551 N.E.2d 561, 552 N.Y.S.2d 68 (1990)).
216 Id. (quoting Maryland v. Craig, 497 U.S. 836, 850 (1990)).
217 Id.
218 Id. at *3.
219 Id. (citation omitted).
220 Id. (citation omitted).
As to the necessity requirement, the majority noted that there is no constitutional requirement that televised testimony be used only by child witnesses in sex crime cases, or that some other express statutory “basis for finding necessity” must be present. The majority cited many federal appellate cases, similar to the one at hand, where live televised testimony was permitted. In addition, the majority noted that “[o]ther states have likewise allowed the admissibility of two-way video testimony.”

Noting the trend in federal and state courts across the United States, the majority held that as long as the court’s necessity “findings were supported by clear and convincing evidence, Craig’s public policy requirement [was] satisfied.” The majority did not determine whether such “clear and convincing evidence” was present in this case, but rather remitted the case to the appellate division for that determination.

The majority concluded by emphasizing that “live televised testimony is certainly not” preferred over live testimony and, thus, should only be used in “exceptional circumstances”; furthermore, the majority noted that the necessity must be determined on a case-by-case basis. The majority did not hold that the trial court’s findings of necessity were in fact based “on clear and convincing evidence,” as required, but instead merely held that the court “had authority to utilize a procedure ‘necessary to carry into effect the powers and jurisdiction possessed by it.’” And, until there is express direction from the legislature that such a procedure is not permissible, the courts have “discretion . . . to determine what steps, if any, could be taken to permit this prosecution to proceed.”

Ultimately, the majority reversed and remanded the case to the appellate division.

Judge Jones, in a dissenting opinion joined by Judge Smith, argued that, without “any express legislative authorization, the trial court here lacked the authority to permit the [witness] to

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221 Id. (citing various federal appellate cases where witnesses were “too ill to appear in court” and where, instead, their live video testimony was admissible).
222 Id. (citing cases from Wyoming, Minnesota, and Florida).
223 Id.
224 Id. (citations omitted).
225 Id.
226 Id. (quoting N.Y. JUD. CT. ACTS LAW § 2-b(3) (McKinney 2001)).
227 Id.
228 Id. (citations omitted).
229 Judge Smith also penned a separate dissenting opinion which added that the majority’s opinion was unsound on constitutional and statutory grounds because the “defendant was denied her right of confrontation [without] an adequate excuse for the denial.” Id. at 6.
testify...via live two-way television.” Judge Jones supported this position by emphasizing the fact that the legislature has expressly “provided for the taking of testimony by live two-way television” in other areas, evincing its intent to allow such testimony only in those limited situations. According to Jones’s interpretation of the legislative history, Article 65 of the Criminal Procedure Law, which allows televised testimony of children in sex abuse cases, is a “comprehensive scheme designed to further the aim of insulating child witnesses...from having to testify in the presence of the defendant while, at the same time, fully preserving the defendant’s constitutional rights” to confrontation.

To Jones and Smith, because of “the exhaustive nature of the Legislature’s grant of authority permitting courts to receive televised testimony under those specific limited circumstances...there is a strong inference that the legislature intended to exclude grants of authority under other circumstances,” such as in the case at hand. Thus, a court’s discretion in this area is limited and, in permitting the televised testimony in this case, the trial court exceeded its authority.

Additionally, section 2-b(3) of the Judiciary Law—relied upon heavily by the majority—was not a proper “basis for granting trial courts the authority to receive” televised testimony, according to the dissenters. While the statute allows courts to create procedures “necessary to carry into effect the powers and jurisdiction [they] possess[,]” it does not give courts the authority to create procedures that are “inconsistent with existing law” or that “disregard critical [legislative] policy decisions”—as was done by the majority when it gave those decisions no weight.

Additionally, Jones was unwilling to allow the testimony in this case based on the inherent powers of the court or by allowing it to make a “finding of necessity.” Doing so, he argued, would create a dangerous “broad source of authority that would permit trial courts to use...televised testimony in ways not contemplated under article 65,” thus eliminating the need for the legislature to have enacted the statutory scheme at all. The fact that this grant of

230 Id. at *4 (Jones, J., dissenting).
231 Id. (citations omitted).
232 Id. (citations omitted).
233 Id. at *5.
234 Id.
235 Id.
236 Id.
237 Id. at *6.
authority is potentially limitless, has no discernable guiding standard, and “effectively circumscribes the Legislature’s role by allowing trial courts to (a) determine issues with public policy implications on a case by case basis and (b) create procedural rules for the sole purpose of allowing prosecutions to proceed” led the dissenters to reject such practice by the trial court and, therefore, exclude such live televised testimony.\(^\text{238}\)

9. *People v. Ochoa*

*People v. Ochoa* involved two defendants who were convicted of various counts of robbery and criminal possession of a weapon.\(^\text{239}\) The case was a joint trial, and the prosecution proceeded under the theory that the two defendants acted in concert in carrying out the robberies. Two witnesses testified for the prosecution at the joint trial and, after “vigorous cross-examination,” gave testimony inconsistent to their prior statements.\(^\text{240}\) The method of reexamination of these witnesses by the prosecution was one issue addressed by the Court of Appeals; the prosecution had used prior consistent statements in an attempt to rehabilitate the two witnesses, and the defense objected.\(^\text{241}\) The second issue on appeal was whether a note given to the trial judge by the jury foreperson, one hour after the verdict was reached, was properly handled.\(^\text{242}\) A total of five notes were sent from the jury to the trial judge—three that arrived before the day of the verdict and another that simply stated a verdict had been reached.\(^\text{243}\) The note at issue in the case, sent by the foreperson, stated, “Your Honor, I do not feel comfortable reading this verdict.”\(^\text{244}\) The trial judge spoke with the foreperson without first notifying defense counsel; satisfied that the foreperson was merely confused about how the verdict would be read, the trial judge subsequently showed the note to counsel—neither of whom objected—and proceeded to verdict.\(^\text{245}\) Rejecting both of the defendants’ arguments, the appellate division held that the reexamination of the witnesses was proper, that the trial judge’s actions regarding the note from the juror were “ministerial,” and

\(^{238}\) Id.


\(^{240}\) Id.

\(^{241}\) Id.

\(^{242}\) Id.

\(^{243}\) Id.

\(^{244}\) Id.

\(^{245}\) Id.
that defense counsel failed to object to the handling of the note.\textsuperscript{246} 

As to the first issue, Judge Pigott’s majority decision held that the “prosecutor’s redirect examination [of the witnesses] did not constitute impermissible bolstering.”\textsuperscript{247} The court conceded that the “testimony of the two [witnesses] w[as] not a model of consistency” because the witnesses did not want the fact that they were doing drugs on the night in question to be revealed.\textsuperscript{248} Nevertheless, the redirect questioning of the first witness only “addressed . . . matters raised by defense counsel on cross-examination, and ‘did no more than to explain, clarify and fully elicit a question only partially examined by the defense.’”\textsuperscript{249} The first witness tried to explain the inconsistencies between his testimony at trial and before the grand jury by saying that he was confused, and that the prosecutor questioned him about his confusion.\textsuperscript{250} The defense counsel objected to the redirect on the basis that rehabilitation based on a prior consistent statement was impermissible, but the objection was overruled by the trial court, and this ruling was affirmed by the Court of Appeals.\textsuperscript{251}

The majority held that the prosecution’s questioning of the second witness was also proper because after defense counsel elicited that the witness lied in her prior written statement, the prosecution tried to clarify exactly what was correct in the statements on redirect.\textsuperscript{252} The majority held that this “did not constitute impermissible bolstering, as [the prosecutor] was merely filling in gaps that defense counsel left during cross examination, after defense counsel implied that [the witness’s] entire statement to police was a lie” because “where only a part of a statement is drawn out on cross-examination, the other parts may be introduced on redirect examination for the purpose of explaining . . . that statement.”\textsuperscript{253}

As to the second issue on appeal regarding the handling of the juror’s note, the majority held that the judge did not err in failing to notify defense counsel of the note or give counsel a chance to respond to it.\textsuperscript{254} Under New York’s Criminal Procedure Law, “[a]
defendant must be personally present during the trial of an indictment,” with some exceptions. Under Criminal Procedure Law section 310.30:

At any time during its deliberation, the jury may request the court for further instruction or information with respect to the law...content or substance of any trial evidence, or...any other matter pertinent to the jury’s consideration of the case. Upon such a request, the court must direct that the jury be returned to the courtroom and, after notice to both the people and counsel for the defendant, and in the presence of the defendant, must give such requested information or instruction as the court deems proper.

There are two purposes to this “notice” requirement under section 310.30: (1) to “ensure[] counsel’s presence when the court responds to the jury’s request for instructions or other information and, [2] to ‘ensure[] that counsel has the opportunity to be heard before the response is given.”

In this case, the majority found that the foreperson’s note was “ambiguous” but still “could have been substantive.” Ultimately, however, the Court found that the “note related only to the foreperson’s concern about the manner in which th[e] verdict was to be delivered, and thus was nothing more than an inquiry of a ministerial nature.” While “it may have been more prudent for the judge to follow the procedures” outlined in the Criminal Procedure Law, the judge did not abuse his discretion by asking the foreperson to clarify the note before giving notice to defense counsel.

Judge Jones’s dissenting opinion, joined by Chief Judge Lippman and Judge Ciparick, disagreed with the majority’s holdings on both the improper bolstering and jury note issues.

With respect to the improper bolstering issue, Jones criticized the majority’s characterization of the witnesses’ testimony as “not a model of inconsistency” as an understatement because the impeachment of both witnesses “cast[ed] doubt on whether a robbery actually occurred.” The fact that the prosecutor was able

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255 Id. (quoting N.Y. CRIM. PROC. LAW § 260.20 (McKinney 2010)).
256 N.Y. CRIM. PROC. LAW § 310.30 (McKinney 2010).
257 Id. (citation omitted).
258 Id.
259 Id. (citations omitted).
260 Id. (citation omitted).
261 Id.
262 Id. (Jones, J., dissenting).
to introduce prior consistent statements of the witnesses was “egregious,” but not as egregious as the fact that “the prosecutor was permitted to go through [one witness’] prior written statement given to the police ‘to clarify what’s incorrect and what is correct.’”\textsuperscript{263} Jones emphasized that it is “well settled that a witness who has been impeached cannot be rehabilitated by use of a prior consistent statement, unless the opposing party suggests that the witness’s account is a recent fabrication,” which was not the case in \textit{Ochoa}.\textsuperscript{264}

Additionally, contrary to the majority’s assertion that this was “a case of clarifying or explaining a statement only partially explained by opposing counsel,” the dissenters found that this in fact “was an attempt to recast the entire testimony of two witnesses who had given many versions of the crime and surrounding events” which “severely prejudiced the defendants.” This could not be viewed as harmless error, according to Jones, because of the fact that the evidence favoring conviction “was not overwhelming and depended on the credibility of the two [drug using] witnesses” whose redirect testimony was at issue. Based on this improper bolstering, the dissent found a basis for reversal of the convictions.

As to the issues regarding the juror note, the dissenters found that the “ex parte conference with a deliberating juror, in response to the juror note, without providing prior notice to . . . counsel” was erroneous.\textsuperscript{265} Judge Jones also discussed Criminal Procedure Law section 310.30 procedures to be followed “when a note is received from a deliberating jury,” and found the instructions to be “very clear [and] very simple for the court to have followed.”\textsuperscript{266} The cases relied upon by the majority to excuse the failure to comply because the note was merely “ministerial” were distinguishable. In those cases, notes were exchanged to inquire about whether a juror could attend church\textsuperscript{267} and whether the jury could clarify a question to the court.\textsuperscript{268} These cases were distinguishable from \textit{Ochoa}, according to the dissent, because in the first case, the church inquiry was “clearly a ministerial inquiry,” and in the second, both the defendant and his attorney had “an opportunity to participate before any instruction was given to the jury.”\textsuperscript{269}

\textsuperscript{263} Id.
\textsuperscript{264} Id. (citations omitted).
\textsuperscript{265} Id.
\textsuperscript{266} Id.
\textsuperscript{267} Id. (citing People v. Hameed, 88 N.Y.2d 232 (1996)).
\textsuperscript{268} Id. (citing People v. Lykes, 81 N.Y.2d 767 (1993)).
\textsuperscript{269} Id. (citations omitted).
Additionally, the question of “[w]hether a jury note is a ministerial or substantive inquiry can vary depending on the circumstances.”270 Here, the note was delivered one hour after the jury reached a verdict, announced after days of deliberation and two other notes that the jury was deadlocked.271 Therefore, the “court had every reason to believe that the verdict was a problem to at least one juror” and the trial court’s failure to follow the statutory procedures “cannot be justified by facts which c[a]me to light” subsequently.272 Instead, the court must respond based on “inferences which can be reasonably drawn before the inquiry is conducted.”273 Because the note contained “a potentially ‘serious substantive inquiry,’” the trial court erred in failing to comply with the proper procedures.274

C. Trends and Observations About Judge Jones’s Criminal Jurisprudence

While the issues addressed in the previous opinions vary, one clear trend emerges: Judge Jones’s criminal opinions tend to favor the rights of the defendant.

For example, in Bailey,275 Jones strictly interpreted the statute at issue and refused to infer the existence of the defendant’s intent regarding the drug possession count without express legislative authority. Alternatively, the dissenters were willing and to infer such intent from the facts and circumstances of the case, without express statutory authority. Similarly, in Naradzay,276 Read’s majority opinion inferred the defendant’s intent for the attempted murder and burglary charges at issue from the facts of the case, while Jones found the evidence insufficient to do so. Likewise, in Wrotten,277 Judge Jones in his dissent refused to allow the admission of live televised testimony of an ailing witness without express statutory authority when the legislature specifically allowed such testimony in contexts other than the one at issue in that case. Jones also refused to allow such testimony under the inherent powers of the court. Ciparick’s majority, however,
inferentially found statutory support for the televised testimony under the Judiciary Law, as well as under the court’s inherent power to control procedure, within certain bounds.

In *Bauman*, Jones applied a strict reading to the depraved indifferent assault statute at issue in finding that the count in the challenged pleading was duplicitous and jeopardized the unanimity of the jury verdict. In so doing, Jones protected the defendant from that additional criminal charge, where the dissenters would have allowed the charge as made, finding no such verdict reliability problem, or other problems, and would have allowed the defendant to be convicted on that additional crime.

In *Sanchez*, however, Jones seemed to read the gang assault statutes at issue slightly more liberally than he did in *Bauman*. In *Sanchez*, the majority found that the aiding gang members did not have to share the defendant’s mens rea in order for the defendant to be convicted of gang assault. Jones, however, found that, even though such was not expressly required by the statutory language, the aiding parties must share the defendant’s specific intent in order for a conviction to be had.

Judge Jones also advanced a pro-defendant stance in *Ford*. There, while the majority found the evidence in that case legally sufficient to convict the defendant under the given jury instruction because the defendant failed to specifically object to the charge, Jones did not. Not only did he find that the evidence was legally insufficient for a conviction, but he criticized the majority for erroneously applying the wrong standard, merely because a separate objection was not made to the jury charge—an objection that, according to Jones’s view of the law, was unnecessary anyway.

In the “second” *Davis* case, another case involving a jury instruction, Jones dissented to urge the Court to adopt an exception to the *Glover* rule in certain situations where the incomplete “agency defense” was invoked by the defendant, in order to protect and allow the defendant to request a jury charge on a lesser included offense. The majority, however, gave no special weight to the agency defense and refused to charge the jury on the lesser included offense—a holding that Jones found coerced the jury to either acquit a defendant who was guilty of the lesser crime or convict him of the more serious crime upon which the jury may not

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278 See supra Part II.A.
279 See supra Part II.B.3.
280 See supra Part II.B.1.
281 See supra Part II.B.6.
have found evidence to convict.
Jones also advanced the defendants’ position in the two waiver-related cases analyzed above—Baret and the “first” Davis. In Baret,282 Jones found the connected plea at issue inherently coercive and, therefore, not “knowing, voluntary, or intelligent,” as constitutionally required. Most important, to Jones, was the need for the defendant to have some opportunity to be heard on a waiver withdrawal motion when one was made, especially in the context of these coercive connected pleas. These positions are undeniably supportive of defendants in criminal cases. The majority’s position, however, found the connected plea constitutionally sufficient and that a hearing was only required in rare instances that did not arise in Baret. In the “first” Davis,283 the defendant’s waiver of a judge trial in favor of JHO adjudication was found to be sufficient by the majority because the defendant was represented by counsel at the time. Jones, however, found that not enough protection was given to the defendant to ensure that his waiver was actually knowing, intelligent, and voluntary. Nothing was stated on the record reflecting that fact, and a variety of other elements were missing that Jones found necessary to adequately protect the defendant’s rights.
In Fuentes,284 where a Brady violation issue was presented to the court, Jones was the defendant’s champion again when he found that a Brady violation did in fact occur upon the nondisclosure of the medical record, even though the record itself seemingly was not groundbreaking, because it could have led to additional impeachment evidence and had other material qualities because of the evenhanded evidence on both sides of the case.
Lastly, in Ochoa,285 Jones sided with the defendant on both the improper evidence bolstering and juror note issues. This was evident when he found that the prosecution’s redirect questioning of the two witnesses unfairly prejudiced the defendants and also when he found that the judge’s “ex parte conference” with the jury foreperson without giving proper notice to defense counsel was erroneous.
Additionally, this trend may ring true beyond the specific opinions analyzed in this article. Even though this analysis did not discuss Jones’s criminal concurring opinions, there is support for

282 See supra Part II.B.4.
283 See supra Part II.B.5.
284 See supra Part II.B.7.
this “pro-defendant sentiment” conclusion in such opinions. For instance, in *People v. Nieves-Andino*, a case involving a constitutional confrontation clause issue, Jones’s found that “the defendant’s [constitutional confrontation] rights were violated by the admission of the[] statements as evidence against him at trial . . . .”

III. CONCLUSIONS

It should come as little surprise that the nominee of a Democratic governor and a former criminal defense attorney has proven to be such a “defendant’s champion” from his seat on the bench of the Court of Appeals.

A review of these eleven opinions is enough for any reader to see that Judge Jones has had, and will continue to have, a distinct impact on the New York Court of Appeals, and especially on its criminal jurisprudence. Beyond the writing of opinions, Judge Jones will continue to have an effect on the evolution of these issues, as he has been appointed by Chief Judge Lippman to be the head of a permanent task force on wrongful convictions, whose aim it is to “recommend ways to minimize” the wrongful convictions of defendants in New York.

Perhaps the fact that he enjoyed a long and successful career as a criminal defense attorney before becoming a judge is the reason why Jones has taken such an interest in writing frequently on such significant and complex criminal issues, with an eye toward protecting the defendant and ensuring the preservation of his or her rights.

