ARTICLES

THE STATE OF PHYSICAL INJURY AND SERIOUS PHYSICAL INJURY IN NEW YORK CRIMINAL LAW

Colleen D. Duffy and Ivy Ozer***

The terms "physical injury" and "serious physical injury" are key elements of proof in assault cases in New York; the applicability of each element depends on the degree, or severity, of the crime. Jurisprudence in this area continues to evolve, as it is often very fact-specific, and the interpretation of what constitutes a physical injury or serious physical injury varies by the court considering individual cases. This article reviews recent New York cases in this area, and highlights, where applicable, the differences in outcome among the judicial departments in their treatment of physical injury and serious physical injury as elements of assault in New York criminal law.

The Penal Law defines "physical injury" as the "impairment of physical condition or substantial pain."[1] The issue of "[w]hether the substantial [sic] pain' necessary to establish an assault charge has been proved is generally a question for the trier of fact."[2] Notwithstanding the foregoing, there is an objective threshold that must be met in order to constitute substantial pain and failure to meet that threshold requires dismissal of the charge as a matter of law.[3] Impairment of physical condition does not require a victim's incapacitation.[4]

As noted by the Court of Appeals in the seminal case of *People v. Chiddick*,[5] where the court discussed the factors to be considered in

* Associate Justice, Appellate Division, 2d Department, New York State Supreme Court

** Principal Law Clerk to the Honorable Susan Capeci, Acting Supreme Court Justice, New York State Supreme Court 9th Judicial District

1 N.Y. PENAL LAW § 10.00(9) (McKinney 2018).

2 People v. Stanback, 51 N.Y.S.3d 201, 202 (App. Div. 2017) (first quoting People v. Rojas, 460 N.E.2d 1100, 1101 (N.Y. 1984); then citing *In re* Philip A., 400 N.E.2d 358, 359 (N.Y. 1980); and then citing People v. Monserrate, 934 N.Y.S.2d 485, 488 (App. Div. 2011)).

3 People v. Young, 951 N.Y.S.2d 735, 736 (App. Div. 2012) (quoting *Philip A.*, 400 N.E.2d at 359); *see* People v. McDowell, 270 N.E.2d 716, 717 (N.Y. 1971).

4 *See* People v. Tejeda, 578 N.E.2d 431, 432 (N.Y. 1991).

5 People v. Chiddick, 866 N.E.2d 1039 (N.Y. 2007).

finding the element of "substantial pain," although it "cannot be defined precisely, . . . it is more than slight or trivial pain."[6] The "[p]ain need not, however, be severe or intense to be substantial."[7] In *Chiddick*, the defendant, during the course of a burglary in a building where the victim was working, bit the victim on the left ring finger which caused the victim's fingernail to crack and his finger to bleed.[8] The injury occurred when the victim attempted to hold on to the defendant, who then bit him in an effort to escape.[9] The victim then got into his car and pursued the defendant, and thereafter turned him over to the police.[10] The victim then sought treatment at a hospital, where he received a tetanus shot and a bandage.[11]

At the trial, the victim testified that the level of pain he suffered was "in between '[a] little' and 'a lot.'"[12] The defendant was found guilty of assault in the second degree and thereafter appealed.[13] The First Department upheld his conviction, finding that the victim's bite wound was sufficient to have "caused him an impairment of physical condition and substantial pain over a period of nearly a week."[14]

The Court of Appeals agreed, finding that the victim suffered more than trivial pain, and considered a number of factors in concluding that he had sustained a physical injury pursuant to Penal Law § 10.00(9).[15] These factors included the injury inflicted, viewed objectively, the victim's subjective description of what he felt, the fact that the victim sought medical treatment, and the defendant's motive in seeking to inflict injury to make the victim release him.[16]

In *In re Philip A.*, the Court of Appeals held that "petty slaps, shoves, kicks and the like delivered out of hostility, meanness and similar motives" constitute only harassment and not assault, because they do not inflict physical injury.[17]

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[6] *Id.* at 1040.

[7] *Id.*

[8] *See id.* at 1039.

[9] *See id.*

[10] *See id.*

[11] *See id.*

[12] *Id.* at 1040.

[13] *See* People v. Chiddick, 813 N.Y.S.2d 903, 903 (App. Div. 2006), *aff'd*, 866 N.E.2d 1039 (N.Y. 2007).

[14] *Chiddick*, 813 N.Y.S.2d at 903 (citing People v. Guidice, 634 N.E.2d 951, 953–54 (N.Y. 1994)).

[15] *See Chiddick*, 866 N.E.2d at 1040.

[16] *See id.* (first citing People v. Rojas, 460 N.E.2d 1100, 1101 (N.Y. 1984); then citing *In re* Philip A., 400 N.E.2d 358, 359 (N.Y. 1980)).

[17] *Philip A.*, 400 N.E.2d at 359 (quoting N.Y. STATE COMM'N ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, PROPOSED NEW YORK PENAL LAW 330 (1964) (detailing the revisers' notes

The case law continues to utilize the following primary factors in evaluating whether a physical injury has occurred. These include: "the injury viewed objectively, the victim's subjective description of the injury and his or her pain, . . . whether the victim sought medical treatment," and the defendant's motive.[18] The relevance of the defendant's motive hinges on the fact that "an offender more interested in displaying hostility than in inflicting pain will often not inflict much of it."[19]

It is possible that an objective account of the injury, unaccompanied by testimony about the degree of pain the victim experienced, will suffice to meet the threshold for physical injury. For example, in *People v. Rojas*, the Court of Appeals found that the People had proven that the defendant had committed a physical injury even though the victim gave no testimony as to pain, but the objective evidence showed that a bullet caused a laceration in the victim's back 1.5 inches in length, the result of which was still visible at the time of trial.[20] In addition, "the victim returned to the hospital the day after the assault [to have] the wound . . . redressed because it was oozing, and the doctor testified that the injury could have caused pain."[21]

As a clear example of a case in which a physical injury was not established, at one extreme, is *In re Philip A.*, a juvenile delinquency proceeding in Family Court, in which the respondent was accused of having struck the victim twice in the face, causing the victim to cry, causing red marks on his face, and causing him pain, the level of which was not "spelled out."[22] The victim testified that he felt like "bumps were coming on [his face] though none did."[23] The Bronx County Family Court found that the respondent committed an act which, if committed by an adult, would constitute the crime of assault in the third degree, and adjudicated him a juvenile delinquent.[24] The

to the Penal Law sections defining assault)).

[18] People v. Johnson, 53 N.Y.S.3d 412, 417 (App. Div. 2017) (quoting People v. Hicks, 9 N.Y.S.3d 474, 476 (App. Div. 2015)); *see Chiddick*, 866 N.E.2d at 1040; People v. Jaen, 983 N.Y.S.2d 837, 837 (App. Div. 2014) (first citing *Chiddick*, 866 N.E.2d at 1040; then citing People v. Nelson, 893 N.Y.S.2d 189, 190 (App. Div. 2010); then citing People v. Williams, 892 N.Y.S.2d 478, 479–80 (App. Div. 2010); and then citing People v. Stapleton, 823 N.Y.S.2d 32, 32–33 (App. Div. 2006)).

[19] *Chiddick*, 866 N.E.2d at 1040.

[20] *Rojas*, 460 N.E.2d at 1101.

[21] *Id.*

[22] *Philip A.*, 400 N.E.2d at 359.

[23] *Id.*

[24] *See id.* (Cooke, J., dissenting).

First Department affirmed, with two Justices dissenting.[25] The Court of Appeals reversed, finding the respondent's conduct akin to "petty slaps," and thus finding it insufficient to establish the element of physical injury.[26] Similarly, in *People v. Rios*,[27] the First Department found no physical injury, and modified the defendant's conviction, where the photographs in evidence depicted only slight redness on the victim's neck and hands, the victim did not seek medical treatment and did not testify.[28]

In *People v. Stokes*,[29] the Second Department, in modifying the defendant's conviction from second degree robbery to third degree robbery, found that the evidence was also insufficient to establish the element of physical injury where the victim, a doctor on her way to work, was shoved and pushed to the ground by the defendant and another man who took her purse.[30] After the incident, she resumed walking to the hospital.[31] The complainant sustained a laceration and a welt on the back of her head, scratches and bruises on her elbow, and other bruises, which left her "sore for several days."[32] At the hospital, she was given painkillers, ice, and bandages.[33] She was able to return the work the following day.[34]

Other recent cases in which courts have found insufficient evidence of physical injury include *People v. Boney*,[35] where the victim "was attacked from behind and fell to the ground."[36] He sustained a bruised finger which required a splint.[37] Although he sought medical treatment, an X-ray showed no broken bones and he did not testify to any lingering pain.[38] On that basis, the Second Department modified, and reduced his conviction from second degree robbery to third degree robbery.[39] Similarly, in *People v. Fews*,[40] the Second

[25] *See id.* at 359 (majority opinion) (citing *In re* Philip A., 405 N.Y.S.2d 1019, 1019 (App. Div. 1978)).
[26] *Philip A.*, 400 N.E.2d at 359.
[27] People v. Rios, 33 N.Y.S.3d 262 (App. Div. 2016).
[28] *See id.* at 263.
[29] People v. Stokes, 32 N.Y.S.3d 314 (App. Div. 2016).
[30] *See id.* at 315–16.
[31] *See id.* at 316.
[32] *Id.*
[33] *See id.*
[34] *See id.*
[35] People v. Boney, 989 N.Y.S.2d 137 (App. Div. 2014).
[36] *Id.* at 138.
[37] *See id.*
[38] *See id.*
[39] *See id.* at 139.
[40] People v. Fews, 50 N.Y.S.3d 523 (App. Div. 2017).

Department recently vacated the defendant's conviction of assault in the third degree, in the interest of justice, finding insufficient evidence of physical injury where the complainant sustained a one-half inch laceration on one of her toes, which stopped bleeding before an emergency medical technician arrived at the scene.[41] There was no evidence to show she sustained more than trivial pain and her testimony that she was unable to wear shoes for an unspecified period time did not result in a finding of substantial pain.[42]

In *People v. Taylor*,[43] the court, reducing the defendant's conviction from second degree robbery to third degree robbery, again found that the element of physical injury was not met where the victim sustained a scratch and some reddening on her neck, and, although she went to the hospital, she did not receive any pain medication or a diagnosis to indicate a physical injury.[44] In *People v. Perry*,[45] the victim, a police officer, did not testify at trial.[46] The officer's "medical records . . . indicated that he suffered a laceration to a finger on his right hand, with abrasions, pain, and swelling."[47] The court found no evidence that the injuries sustained by the victim caused him more than trivial pain, or that the victim's ability to use his finger was impaired by these injuries, and vacated the defendant's conviction of assault in the second degree.[48]

The court reached a similar result in *People v. Baksh*,[49] a case in which neither of the two victims were found to have sustained a physical injury.[50] One victim's "upper back was bruised," and the other "suffered a small cut on his head that did not require suturing."[51] While "neither of the men sought medical attention," and, although one victim "testified that he had a 'little' pain for a '[c]ouple of days'" and the other "testified that he had 'slight' pain for 'a day or two,'" such testimony, even with the bruises and small cut, was insufficient to meet the threshold of physical injury.[52] The court

[41] *See id.* at 524–25 (citations omitted).
[42] *See id.* at 525.
[43] People v. Taylor, 921 N.Y.S.2d 553 (App. Div. 2011).
[44] *See id.* at 553–54.
[45] People v. Perry, 996 N.Y.S.2d 195 (App. Div. 2014).
[46] *See id.* at 197.
[47] *Id.*
[48] *Id.* (citations omitted).
[49] People v. Baksh, 845 N.Y.S.2d 343 (App. Div. 2007).
[50] *See id.* at 344.
[51] *Id.* at 344–45.
[52] *Id.* at 345 (citations omitted).

vacated the defendant's conviction of second degree assault.[53] Similarly, in *People v. Zalevsky*,[54] the victim, a peace officer, "testified that the defendant kicked him in the leg."[55] As a result, "[t]he peace officer was 'bruised up a little bit' at the [area on his leg] where the defendant kicked him, but he did not seek any medical treatment or miss any work."[56] At trial, "he testified to experiencing 'minor pain' in his leg."[57] The court again vacated the defendant's conviction of second degree assault.[58]

Another factor that is often noted in the case law as aiding in the determination of whether a physical injury has occurred is not only the severity, but the duration of the victim's pain.[59] A case from the Third Department, *People v. Williams*,[60] is instructive. The duration of the pain from the victim's injury appears to be one factor of significance in *Williams* in determining whether there was a physical injury to two of the three victims.[61]

In *Williams*, the defendant, an inmate, was charged with having assaulted three corrections officers.[62] The injuries of the first officer were deemed too slight to establish a "physical injury," while the injuries of the second two officers' injuries met the threshold.[63] The first officer was "struck . . . in his left cheek [by the defendant's] elbow, causing [the officer] to fall to the floor."[64] He "experience[ed] a severe sharp pain in his cheek area and some swelling, [and] left work that day, but returned on the following day."[65] It was noted that "[t]he pain lasted for about two days and the swelling subsided after a couple of days."[66] The court reduced the defendant's conviction with respect to the first officer from second degree assault to attempted second degree assault.[67]

By contrast, the second officer was found to have sustained a

[53] *See id.*
[54] People v. Zalevsky, 918 N.Y.S.2d 790 (App. Div. 2011).
[55] *Id.* at 792.
[56] *Id.*
[57] *Id.*
[58] *See id.*
[59] *See, e.g.*, People v. Johnson, 53 N.Y.S.3d 412, 416 (App. Div. 2017); People v. Hicks, 9 N.Y.S.3d 474, 476 (App. Div. 2015).
[60] People v. Williams, 847 N.Y.S.2d 717 (App. Div. 2007).
[61] *See id.* at 719–20.
[62] *See id.* 718.
[63] *See id.* at 720.
[64] *Id.* at 719.
[65] *Id.*
[66] *Id.*
[67] *See id.* at 720.

physical injury, where he was punched in the head, causing him immediate pain which "became steady and throbbing, growing worse over time."[68] His left knee was also injured and the tendons in his right arm were torn, requiring him to attend physical therapy for approximately one and a half months.[69] He "was prescribed medication, had problems sleeping and continued to experience a limited range of motion in his neck."[70] The third officer was also found to have sustained a physical injury, where he had a near loss of consciousness and a severe headache upon being punched in the head, and "suffered from a slight contusion that was tender for about 10 days."[71] The defendant's conviction of second degree assault was affirmed with respect to these two victims.[72]

A case from the Fourth Department, where the injury was found insufficient to meet the threshold for physical injury is *People v. Haynes*,[73] in which the victim, an unfortunate bystander when the defendant began swinging a baseball bat at another individual as a means of attacking him, was struck in the arm, head and neck with the bat, but did not sustain any significant bruising.[74] Despite "[t]he victim testif[ying] that he sustained a bruise on his arm, which did '[n]ot [last] at all,'" a bruise on his neck, and a lump on his head, these injuries were not apparent in the photographs taken shortly after the incident.[75] Subsequently "the victim went to the hospital with his brother and a friend who were also attacked. According to the victim, medical personnel 'looked at [him], but it wasn't serious.'"[76] The victim had "testified that his injuries hurt only '[a] little bit,' and that the pain lasted 'a couple of days, no longer than a week.'"[77] The defendant's lack of motive to injure the victim was also a factor in finding a lack of physical injury.[78] As a result, the court reduced the defendant's conviction from second degree assault to attempted second degree assault.[79]

The above noted cases where courts have found injuries insufficient

[68] *Id.* at 719.
[69] *See id.*
[70] *Id.*
[71] *Id.*
[72] *See id.* at 720.
[73] People v. Haynes, 960 N.Y.S.2d 572 (App. Div. 2013).
[74] *See id.* at 573–74.
[75] *Id.* at 573 (alteration in original).
[76] *Id.* (alteration in original).
[77] *Id.*
[78] *See id.* at 573–74.
[79] *See id.* at 574.

to establish that the victim had sustained a "physical injury" within the meaning of Penal Law § 10.00(9),[80] are contrasted with those cases on the other extreme, where there is no real dispute, based on the evidence, that a physical injury has occurred. For example, in *People v. Brown*,[81] "[t]he testimony at trial established that the defendant stabbed the complainant with a knife in the left side" of the victim's torso "under his rib cage during an altercation, leaving a penetrative wound of approximately one inch."[82] The victim went to the hospital where he "underwent laparoscopic surgery under anesthesia to explore the extent of any damage, and his pain level was recorded by hospital staff as reaching as high as a '7' on a scale of 1 to 10."[83] Following the victim's discharge from the hospital, "[he] was prescribed pain medication."[84] The defendant's conviction of second degree assault was affirmed.[85]

Similarly, in *People v. Carson*,[86] the court, affirming the defendant's conviction, found the victim sustained a physical injury where she was struck in the head with a gun by the defendant, fell to the ground, "experienced a sharp, throbbing pain[,] . . . dizziness, and loss of hearing," and "was unable to move for several minutes."[87] She was transported to the hospital "where she underwent a CT scan and was prescribed prescription pain" medication.[88] Her head pain and dizziness lasted for over a week.[89] Likewise, in *People v. Hodge*,[90] the element of physical injury was met where the

> [D]efendant punched the victim in the face five times, causing her to fall to the ground. As a result of the beating, the victim sustained swelling and bruising to the right side of her face and bloodied lips, as well as headaches, blurred vision, and pain in the jaw, making chewing difficult, for approximately two to three weeks after the incident.[91]

The court affirmed the defendant's conviction of second degree

[80] *See* N.Y. PENAL LAW § 10.00(9) (McKinney 2018).
[81] People v. Brown, 945 N.Y.S.2d 334 (App. Div. 2012).
[82] *Id.* at 336.
[83] *Id.*
[84] *Id.*
[85] *See id.* at 335.
[86] People v. Carson, 6 N.Y.S.3d 269 (App. Div. 2015).
[87] *Id.* at 270.
[88] *Id.*
[89] *See id.*
[90] People v. Hodge, 921 N.Y.S.2d 71 (App. Div. 2011).
[91] *Id.* at 72–73 (first citing People v. Chiddick, 86 N.E.2d 1039, 1040 (N.Y. 2007); then citing People v. Guidice, 634 N.E.2d 951, 954 (N.Y. 1994)).

robbery.[92]

The element of physical injury was also found in *People v. Lumpkin*,[93] where

> [T]he defendant caused the complainant to fall to his knees on a concrete floor. As a result, the complainant experienced such "excruciating" pain that he was transported to the hospital by ambulance[, where he] reported [a] pain level [of] 9 on a scale of 1 to 10, and he was given nonprescription pain medication and a bandage. He had bruising and swelling on his knee. [He] missed almost four weeks of work because he "could barely walk." During that time he attended physical therapy sessions three times per week and was unable to play basketball or "walk straight."[94]

Each of the above cases, where courts have found that the defendant's conviction of assault was legally sufficient vis a vis physical injury, involved injuries which would, objectively viewed, appear to cause substantial pain. In addition, each of the victims reported significant pain which lasted for some duration of time.

There are several reported cases demonstrating that courts routinely find that the element of physical injury has been met where the victim has been punched and/or kicked repeatedly. Of course, this result may very well be because such victims typically sustain injuries that are more intense and last for a longer duration. For example, in *People v. Hodge*, the victim had been punched in the face five times.[95] Similarly, in *People v. Rose*,[96] the court, affirming defendant's conviction, found a physical injury where

> the defendant punched [the victim] in the face numerous times while someone else grabbed his shoulder from behind and tried to reach into his pocket for his wallet. The [victim] sustained swelling and bleeding to his face, nose, and mouth, . . . was examined by an emergency medical technician and treated with ice, and for the next two weeks took antibiotics and painkillers.[97]

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[92] *Hodge*, 921 N.Y.S.2d at 72.

[93] People v. Lumpkin, 63 N.Y.S.3d 461 (App. Div. 2017).

[94] *Id.* at 462 (citing *Chiddick*, 86 N.E.2d at 1040).

[95] *Hodge*, 921 N.Y.S.2d at 72.

[96] People v. Rose, 990 N.Y.S.2d 832 (App. Div. 2014).

[97] *Id.* at 833 (first citing *Chiddick*, 86 N.E.2d at 1040; then citing People v. Stapleton, 823 N.Y.S.2d 32, 32–33 (App. Div. 2006)).

In *People v. Martinez*,[98] the victim testified that the defendant "punched and kicked him in the face numerous times and for several minutes," after following him and demanding his property.[99] The victim "fell to the ground, lost his glasses, sustained swelling and bleeding to his face, nose, and mouth, and later that night went to the hospital in pain."[100] The court, considering motive, found that it was inferable from the circumstances of the case that "the defendant intended to inflict as much pain as possible in order to cause the [victim] to release his hold on his property," and thus affirmed his conviction.[101]

Another case involving repeated punches or kicks is *People v. Kenner*,[102] in which the Second Department affirmed the defendant's conviction, where

> the complainant testified that the defendant and the defendant's brother repeatedly kicked and punched him while he was in his car. The complainant was taken by ambulance to a hospital, where he complained of pain in the face and jaw and underwent a CT scan of the head and X-rays, and oxygen was administered to him. [He] was . . . prescribed pain medication at the hospital[, which he took for several weeks; the victim] testified that one or two days [after the incident], areas on his chest and arm became swollen and "turned black and blue" and "hurt a lot."[103]

While repeated punches or kicks have been found to be sufficient to establish the element of physical injury under § 10.00(9) of the Penal Law,[104] there are also cases which involve less prolonged conduct, or even a single punch, in which a physical injury has been found. For example, in *People v. Krotoszynski*,[105] the court found that the element of physical injury was met where the victim was struck

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[98] People v. Martinez, 983 N.Y.S.2d 839 (App. Div. 2014).

[99] *Id.* at 840 (first citing *Chiddick*, 86 N.E.2d at 1040; then citing People v. Nelson, 893 N.Y.S.2d 189, 190 (App. Div. 2010); then citing People v. Williams, 892 N.Y.S.2d 478, 479 (App. Div. 2010); and then citing *Stapleton*, 823 N.Y.S.2d at 32–33).

[100] *Martinez*, 983 N.Y.S.2d at 840 (first citing *Chiddick*, 86 N.E.2d at 1040; then citing *Nelson*, 893 N.Y.S.2d at 190; then citing *Williams*, 892 N.Y.S.2d at 479; and then citing *Stapleton*, 823 N.Y.S.2d at 32–33).

[101] *Martinez*, 983 N.Y.S.2d at 840 (first citing *Chiddick*, 86 N.E.2d at 1039; then citing *Williams*, 892 N.Y.S.2d at 479).

[102] People v. Kenner, 909 N.Y.S.2d 545 (App. Div. 2010).

[103] *Id.* at 545.

[104] *See* N.Y. PENAL LAW § 10.00(9) (McKinney 2018); *supra* notes 95–103 and accompanying text.

[105] People v. Krotoszynski, 840 N.Y.S.2d 627 (App. Div. 2007).

in the head by the defendant with the television remote control and "sustained a cut to her ear which caused bleeding and bruising on her face."[106] The victim "experienced pain for two weeks," and detectives who investigated the crime three days after the incident, later testified that they had observed that she "had a cut on her ear and 'very bad bruising.'"[107] In *Krotoszynski*, there was no evidence that the victim had sought medical treatment.[108] The court upheld the defendant's conviction of assault in the second degree based upon his conduct.[109]

People v. Johnson, is another case involving a finding of physical injury following a single punch to the head.[110] In *Johnson*, the defendant, while being detained during a traffic stop for illegal lane changes, got up, with a "'crazed, dazed look in his eye,' ran toward the [NYS] trooper and punched him in the side of the head, sending the trooper into the guide rail."[111] The trooper "saw a brief flash of light when he was struck, but did not lose consciousness."[112] He went to the emergency room in a hospital because of headache, pain and "tenderness" in his head, and was diagnosed with a concussion.[113] A considerable amount of time had passed in which "he had what he described as a 'substantial headache,' which made it difficult to sleep and to lie down."[114] The trooper "testified that he took Tylenol and Advil for pain, and that he also lost his appetite for several days."[115] The defendant's conviction for second degree assault of the trooper was upheld.[116]

In *People v. Williams*,[117] the court also found that a punch to the left side of the victim's head which caused an injury to his jaw and

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[106] *Id.* at 630.

[107] *Id.*

[108] *See id.*

[109] *Id.* (citing People v. Chiddick, 866 N.E.2d 1039, 1040 (N.Y. 2007); then citing People v. Vasquez, 745 N.Y.S.2d 920, 920 (App. Div. 2002); then citing People v. Brown, 662 N.Y.S.2d 934, 935 (App. Div. 1997); then citing People v. Brooks, 548 N.Y.S.2d 58, 60 (App. Div. 1989); and then citing People v. Coward, 473 N.Y.S.2d 591, 593 (App. Div. 1984)).

[110] *See* People v. Johnson, 53 N.Y.S.3d 412, 415, 417 (App. Div. 2017) (first citing People v. Newman, 897 N.Y.S.2d 350, 351 (App. Div. 201010; then citing People v. Williams, 847 N.Y.S.2d 717, 719–20 (App. Div. 2007); then citing People v. James, 769 N.Y.S.2d 38, 38 (App. Div. 2003); and then citing People v. Porter, 761 N.Y.S.2d 691, 692 (App. Div. 2003)).

[111] *Johnson*, 53 N.Y.S.3d at 416.

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *See id.* at 419.

[117] People v. Williams, 48 N.Y.S.3d 405 (App. Div. 2017).

caused him to experience difficulty chewing and yawning, established the element of physical injury.[118] Although the court reduced the defendant's conviction from second degree assault to third degree assault, it did so based on the fact that the above injuries were caused by the defendant's fists and not by the baseball bat also used in the crime.[119]

In these cases involving a single punch to the head, to a large extent, the courts have considered the level and duration of the victim's pain in determining that the element of physical injury has been met based on substantial pain.[120]

There are many types of injuries in which New York State courts have determined that the element of physical injury within the meaning of the Penal Law has been met. In *People v. Rahman*,[121] the defendant strangled the victim with both hands.[122] The victim "was unable to breathe for about a minute, and a struggle ensued during which" she lost both shoes, her jeans were ripped and she suffered a "large bruise" on her hip.[123] Particularly, "[t]he bruise on [the victim's] hip took about a month to heal."[124] Following the incident, and in particular, "[a]bout eight hours after the attack, the [victim] first started experiencing 'intensive pain' in her neck which lasted for about a week and one-half."[125] Regrettably "[d]uring [that] time[,] she was unable to sleep, drive, play with her son, or work as a sculptor."[126] She sought medical treatment from a homeopath and an acupuncturist to manage the pain.[127] The court upheld the defendant's conviction of attempted robbery in the second degree, rejecting his argument that the evidence was legally insufficient to establish the element of physical injury.[128]

In *People v. Dollison*,[129] the court, in affirming the defendant's conviction of second degree assault, found physical injury existed as to each of the two complainants, both police officers, when "one officer

[118] *See id.* at 409–10.
[119] *See id.* at 410.
[120] *See, e.g.*, *Johnson*, 53 N.Y.S.3d at 416; *Williams*, 48 N.Y.S.3d at 410; People v. Krotoszynski, 840 N.Y.S.2d 627, 630 (App. Div. 2007).
[121] People v. Rahman, 923 N.Y.S.2d 186 (App. Div. 2011).
[122] *See id.* at 188.
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *See id.*
[128] *See id.* at 187–88.
[129] People v. Dollison, 24 N.Y.S.3d 672 (App. Div. 2016).

suffered a sprained ankle and the other suffered a lumbar sprain."[130] Objectively speaking, while injuries such as sprains might initially appear to be considered minor, in this case the court found them sufficient to establish that a physical injury occurred, in part due to the lengthy duration of each victim's pain, and the concomitant loss of mobility and ability to work that resulted from the injuries.[131]

In *Dollison*,

> [o]ne officer was treated at the hospital for an ankle sprain, his ankle was placed in an aircast, and he was on crutches for one month and then had to use a cane. During that initial one-month period, his mobility was limited, [he remained out of work,] he could not perform normal activities around the house, and he underwent physical therapy. . . . [He] then returned to work on light duty for approximately three months. Moreover, the officer testified that just before returning to work he was still in pain, which he described as a "7" out of "10." When he returned to full duty after four months, he still had pain in his ankle when he performed certain activities.
>
> The other officer testified that he was treated at the hospital for a lumbar sprain[,] . . . and was out of work for five to six months. During that time, he was unable to perform normal activities around the house and could not work out or lift weights.[132]

Afterwards, "[h]e underwent physical therapy, [and] was prescribed muscle relaxers and pain medication."[133]

In *People v. Jones*,[134] a case involving a scuffle in an elevator between the defendant and the victim, the court noted, as a factor in finding that the element of physical injury had been established, that the victim "was bleeding" after having been scratched on the "face from her nose to her mouth."[135] The defendant had pushed the victim in the face and scratched her, leaving her "bleeding and crying," and "under a lot of pain."[136] The victim also "sustained black and blue marks."[137]

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130 *Id.* at 672–73.
131 *See id.* at 673.
132 *Id.*
133 *Id.*
134 People v. Jones, 15 N.Y.S.3d 874 (App. Term 2015).
135 *Id.* at 876, 879.
136 *Id.* at 878.
137 *Id.*

There,

> [t]he victim further testified that her older son cried hysterically during the incident, and that her younger son, a seven-month-old infant, was in a carrier on her back. After the incident, the victim brought her older son to school, and, after reporting the incident to the police, brought her infant son to his babysitter. Immediately thereafter, she traveled to her job at a Manhattan hospital, where she was treated for her injuries . . . . with a tetanus shot and antibiotic ointment."[138]

The court found that "[t]he delay in receiving treatment in this case [did] not negate a finding that the victim suffered a physical injury."[139] Citing the Court of Appeals' decision in *People v. Chiddick*, the Appellate Term in *Jones* "noted that an injury that causes bleeding is 'an experience that would normally be expected to bring with it more than a little pain,' and that seeking medical treatment is 'an indication that [the victim's] pain was significant.'"[140] The court in *Jones* upheld the defendant's conviction of third degree assault.[141]

Ultimately, a court's determination as to whether the People have established that a victim sustained physical injury, within the meaning of Penal Law § 10.00(9), will involve an analysis of the applicable factors outlined above, as applied to the specific facts and circumstances.[142] While each case will turn on its specific facts, this review of the recent noted case law demonstrates that the courts' application and weighing of the relevant factors will yield either a finding of or rejection of a finding of physical injury.

I. THE ELEMENT OF "SERIOUS PHYSICAL INJURY"

The definition of "serious physical injury" set forth in Penal Law § 10.00(10) incorporates the definition of physical injury.[143] The statute provides that a "'serious physical injury' means physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function

[138] *Id.* at 878, 879.

[139] *Id.* at 878.

[140] *Id.* at 879 (alterations in original) (quoting People v. Chiddick, 866 N.E.2d 1039, 1040 (N.Y. 2007)).

[141] *See Jones*, 15 N.Y.S.3d at 880.

[142] *See supra* notes 5–6, 15–16 and accompanying text.

[143] N.Y. PENAL LAW § 10.00(10) (McKinney 2018).

of any bodily organ."[144] It is said that "[t]he statutory definition is disjunctive. If the defendant's conduct caused 'physical injury which creates a substantial risk of death, or' protracted disfigurement '*or*' protracted impairment of the functioning a bodily organ, it has caused 'serious physical injury' within the meaning of that section."[145]

Turning first to the issue of whether a victim has sustained a "protracted disfigurement" to result in a finding of serious physical injury under the statute, a person is seriously disfigured within the meaning of the statute "when a reasonable observer would find her altered appearance distressing or objectionable."[146] The standard of whether a reasonable observer would find the victim's appearance distressing is an objective one, but the injury must be viewed in context, including the location of the victim's injury.[147]

In *McKinnon*, the evidence showed "that the victim had two scars of moderate size on her inner forearm" which she had sustained after the defendant bit her twice during his assault upon her.[148] The Court of Appeals found that while this was "certainly a disfigurement, [there was] no basis . . . for finding it a serious one," noting that "[t]he mere existence of such scars, considering their location, would not make the victim's appearance distressing or objectionable to a reasonable person observing her."[149] The court, finding that no serious disfigurement occurred, reversed the defendant's conviction of first degree assault that had been upheld by the First Department.[150]

Thus, as delineated by the Court of Appeals in *McKinnon*, and under the relevant case law, scars alone will not form the basis for a conclusion that a victim has sustained a serious physical injury.[151] For example, in *People v. Stewart*,[152] the victim sustained four stab wounds, which resulted in permanent scars.[153] Although the Fourth Department upheld the defendant's conviction of first degree assault, the Court of Appeals modified, reducing the conviction to second

[144] *Id.*

[145] Santone v. Fischer, 689 F.3d 138, 150 (2d Cir. 2012) (quoting PENAL LAW § 10.00(10)); *see* People v. Armstrong, 3 N.Y.S.3d 861, 862 (App. Div. 2015) (quoting PENAL LAW § 10.00(10)).

[146] People v. McKinnon, 937 N.E.2d 524, 526 (N.Y. 2010).

[147] *See id.*

[148] *Id.*

[149] *Id.* at 526–27.

[150] *See id.* at 527.

[151] *See id.*

[152] People v. Stewart, 962 N.E.2d 764 (N.Y. 2011).

[153] *See id.* at 765.

degree assault.[154] The court did so based upon its finding that "[t]hese injuries were not shown to be objectively 'distressing or objectionable' so as to justify the conclusion that they constituted 'serious . . . disfigurement' qualifying as a serious physical injury predicate for first degree assault."[155]

In modifying the conviction in *Stewart*, the Court of Appeals observed that "[t]hree of the victim's four wounds required only gauze dressing" and "while the remaining six-to-seven centimeter wound on the victim's inner forearm was sutured, the victim spent just one day in the hospital without follow-up medical care, apart from the removal of his stitches."[156]

Similarly, in *People v. Armstrong*, the Fourth Department, modifying the defendant's conviction from gang assault in the first degree to attempted gang assault in the first degree, in the interest of justice, found the evidence insufficient to establish the victim's injuries constituted a "serious and protracted disfigurement" within the meaning of Penal Law § 10.00 (10).[157] In *Armstrong*, the "evidence established that, as a result of [a] fight" with the defendant and others, "the victim sustained a two-to-three-inch laceration on the back of his head" which was closed with staples, "associated swelling and a hematoma, and other superficial injuries."[158] The court found that, "[w]hen 'viewed in context, considering its location on the body and any relevant aspects of the victim's overall physical appearance,' . . . the scar on the victim's head would [not] cause a reasonable observer to 'find [his] altered appearance distressing or objectionable.'"[159]

The Second Department reached a similar conclusion in *People v. Vasquez*, where the victim had sustained "a cut on the right arm and a cut on the chest, . . . both of which resulted in . . . scar[s]."[160] In affirming the dismissal of the defendant's conviction of assault in the first degree, upon an appeal by the People, the court found these scars did not constitute a "serious disfigurement" within the meaning of the Penal Law.[161]

Courts have recognized that the "prominent location" of an injury

[154] *See id.* at 764.
[155] *Id.* at 765 (quoting *McKinnon*, 937 N.E.2d at 527).
[156] *Stewart*, 962 N.E.2d at 765.
[157] People v. Armstrong, 3 N.Y.S.3d 861, 862–63 (App. Div. 2015).
[158] *Id.* at 863.
[159] *Id.* (alteration in original) (quoting *McKinnon*, 937 N.E.2d at 526).
[160] People v. Vasquez, 19 N.Y.S.3d 771, 772 (App. Div. 2015).
[161] *Id.* at 771–72.

on a victim's face can be considered in applying a *McKinnon* analysis to determine whether a victim's injury is deemed "distressing or objectionable."[162] In *People v. Coote*, in a bar fight, the "defendant struck the victim in the head with a 'pint glass,' causing numerous lacerations to the victim's neck, ear and scalp."[163] At trial—six months after the attack—the victim testified that "he had scars on the left side of his face, on the front and back of his neck, and on his skull behind his ear."[164] Moreover, the victim "testified that he had grown a beard to 'blend [the scar on his neck] in so it won't be that noticeable.'"[165] Furthermore, the physician who treated the victim "testified that, on the day of the trial, he observed that the scar on the victim's neck 'appeared to be hypertrophic,' which, he explained, means 'a bulky scar that's red and almost looks piled up with scar tissue.'"[166]

The court, in affirming the defendant's conviction, found that "[t]he element of serious physical injury was satisfied by evidence supporting the conclusion that the wounds inflicted by defendant caused serious disfigurement to the victim."[167] The court noted that "the prominent location of the wound on the face, support[ed] the inference that at the time of trial the scars remained seriously disfiguring under the *McKinnon* standard."[168]

The court in *People v. Reitz* came to a similar conclusion, where the victim sustained a scar to the face.[169] At trial, the evidence "established that the victim sustained a four-inch-long wound to her cheek that left a permanent scar."[170] In affirming the defendant's conviction, the court specifically noted that it had "consider[ed] the prominent location of the wound on the [victim's] face" in finding that the wound inflicted by the defendant caused a serious disfigurement.[171]

Another recent case in which the court found facial scarring to be a significant factor in finding that a serious disfigurement has

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[162] *See* People v. Reitz, 3 N.Y.S.3d 228, 230 (App. Div. 2015); People v. Coote, 972 N.Y.S.2d 263, 264 (App. Div. 2013).

[163] *Coote*, 972 N.Y.S.2d at 264.

[164] *Id.*

[165] *Id.* (alteration in original).

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] *See* People v. Reitz, 3 N.Y.S.3d 228, 230 (App. Div. 2015).

[170] *Id.*

[171] *Id.*

occurred is *People v. Jimenez*.[172] In *Jimenez*, the defendant had "slashed the victim across the face with a box cutter caus[ing] . . . a laceration to the right side of [the victim's] face that ran from his forehead to his jaw, and . . . resulted in a permanent scar, which the jury observed."[173] The court found that the evidence "[v]iewed as a whole, and especially considering the prominent location of the wound on the face, . . . support[ed] the inference that at the time of trial the scar[] remained seriously disfiguring under the *McKinnon* standard," affirming the defendant's conviction of first degree assault.[174]

In addition to facial scarring, courts have also considered the permanent loss of teeth to constitute a serious disfigurement in support of a finding of the element of serious physical injury.[175] In *People v. Everett*, the court found "the victim's loss of four front teeth [to] constitute[] a 'serious and protracted disfigurement,' since 'a reasonable observer would find her altered appearance distressing or objectionable.'"[176] The court further found that "[t]he fact that the victim received a removable prosthetic device did not ameliorate the seriousness of her injuries, since whenever she removes the device, the disfigurement will be readily apparent."[177] The defendant's conviction of second degree assault was thus upheld.[178]

Another case involving loss of teeth where the court found the evidence legally sufficient to establish that the victim suffered "'serious and protracted disfigurement'" is *People v. Snyder*.[179] In *Snyder*,

> as a result of the assault, five of the victim's teeth were significantly damaged. The victim's dentist testified that one of the victim's teeth was broken off at the gum line, another tooth was broken in half, and three other teeth were badly fractured. According to the dentist, three of the victim's teeth were damaged so extensively that they could not be restored

[172] People v. Jimenez, 64 N.Y.S.3d 512, 513 (App. Div. 2017) (citing People v. McKinnon, 937 N.E.2d 524, 526 (N.Y. 2010)).

[173] *Jimenez*, 64 N.Y.S.3d at 513.

[174] *Id.* at 512–13 (quoting People v. Coote, 972 N.Y.S.2d 263, 264 (App. Div. 2013)).

[175] *See* People v. Everett, 973 N.Y.S.2d 207, 207 (App. Div. 2013) (first citing People v. Lanier, 843 N.Y.S.2d 629, 629 (App. Div. 2007); then citing People v. Howard, 435 N.Y.S.2d 399, 401 (App. Div. 1981)).

[176] *Everett*, 973 N.Y.S.2d at 208 (quoting *McKinnon*, 937 N.E.2d at 526).

[177] *Everett*, 973 N.Y.S.2d at 208.

[178] *Id.* at 207.

[179] *See* People v. Snyder, 953 N.Y.S.2d 430, 432 (App. Div. 2012) (quoting N.Y. PENAL LAW § 10.00(10) (McKinney 2018)).

> and had to be extracted. The remaining damaged teeth were fractured so badly that they required crowns. In addition, the People introduced in[to] evidence photographs of the victim's teeth and copies of his dental X rays that showed the extent of the damage to his teeth.[180]

The court upheld the defendant's conviction of first degree assault.[181]

However, it is important to note that not all injuries involving loss of teeth will result in a finding of a serious disfigurement to support the element of serious physical injury. In *People v. Rosado*,[182] the First Department, in modifying the defendant's conviction from gang assault in the second degree to assault in the third degree, found the evidence "legally insufficient to establish that either the broken nose or the three chipped teeth sustained by the victim constituted serious physical injury."[183] In reaching this conclusion, the court noted that the fact that the victim's three chipped teeth required plastic material used to replace the chipped enamel to be replaced approximately every ten years and that "possible" darkening of the affected teeth and improper healing of the nerves could occur, did "not constitute serious disfigurement, or an impairment to the victim's health or the functioning of his teeth."[184] The victim also had successful reconstructive surgery of his nose.[185]

Turning to the issue of whether a victim has sustained a "protracted impairment" of the functioning of a bodily organ or of health, as a basis to find the element of serious physical injury, a protracted impairment of health has been routinely found where the injuries last a year or more after the attack. In *People v. Kern*,[186] the court upheld a finding that the victim suffered a "protracted impairment of [his] health" where he had been beaten by a group of teenagers with baseball bats and tree limbs, and "suffered severe injuries to his back and right eye which affected him for nearly a year after the incident."[187] In *People v. Heyliger*,[188] the court, upholding the defendant's conviction for first degree assault, found the evidence

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[180] *Snyder*, 953 N.Y.S.2d at 432.
[181] *See id.* at 434.
[182] People v. Rosado, 930 N.Y.S.2d 10 (App. Div. 2011).
[183] *Id.* at 10.
[184] *Id.* at 11.
[185] *See id.*
[186] People v. Kern, 554 N.E.2d 1235 (N.Y. 1990).
[187] *Id.* at 1238, 1246 (citation omitted).
[188] People v. Heyliger, 5 N.Y.S.3d 566 (App. Div. 2015).

"established a protracted impairment of the victim's health pursuant to Penal Law § 10.00(10)," where the victim had been shot in the leg, "caus[ing] a fracture and other injuries to the victim's leg and knee that could cause permanent disability and disfigurement."[189] Furthermore, "[t]he victim confirmed that he could not bend his leg for nearly a year after the shooting and, at trial, he still did not have full range of motion."[190]

In *People v. Garland*,[191] the court found the element of serious physical injury "was established by evidence showing that four years after the complainant was struck by a bullet, he still felt pain and the bullet fragments in his leg and could not engage in sports at the same level as before the incident."[192] The court noted that "[t]his proof sufficiently showed a protracted impairment of health or protracted impairment of the function of a bodily organ to support a finding of serious physical injury," and upheld the defendant's conviction of first degree assault.[193]

Again, in *People v. Messam*, the evidence established that the defendant violently assaulted the victim during his rampage in a hospital by punching the victim in her "face several times, breaking her nose, damaging her teeth and causing pain in her jaw that persisted until the trial.[194] She described the pain as a '10 out of 10' shortly after the assault and she was fearful of opening her jaw as wide as possible when she yawned, lest it lock."[195] The court found that her injuries constituted a "protracted . . . impairment of the function of [a] bodily organ and protracted impairment of health" because she still experienced pain in her jaw while eating, two years after the assault.[196] The court upheld the defendant's conviction of second degree assault.[197]

Similarly, in *People v. Lanier*, the court, upholding the defendant's conviction of second degree assault, found "[t]he element of serious physical injury was established by evidence that the victim's dental injuries caused a protracted impairment of his health, or of the

[189] *Id.* at 569 (citing People v. Khuong Dinh Pham, 818 N.Y.S.2d 674, 678 (App. Div. 2006)).
[190] *Heyliger*, 5 N.Y.S.3d at 569.
[191] People v. Garland, 65 N.Y.S.3d 167 (App. Div. 2017).
[192] *Id.* at 169.
[193] *Id.* (first citing People v. Rosa, 977 N.Y.S.2d 250, 250 (App. Div. 2013); then citing People v. Messam, 954 N.Y.S.2d 532, 533 (App. Div. 2012); and then citing People v. Corbin, 934 N.Y.S.2d 389, 390 (App. Div. 2011)).
[194] *Messam*, 954 N.Y.S.2d at 533.
[195] *Id.*
[196] *Id.* (alteration in original) (citation omitted).
[197] *See id.*

function of a bodily organ."[198] In *Lanier*, "[t]he injury caused pain, and difficulty in eating, for an extended period of time, and this impairment was still present at the time of the trial, over a year after the crime."[199]

An injury may also be considered "protracted" when its serious effects are present for shorter lengths of time. For example, in *People v. Mead*,[200] the Second Department found that the victim sustained a "serious physical injury" where her "jaw was fractured in two places and her orbital bone was fractured."[201] The victim underwent a lengthy and painful recovery period where "[h]er jaw was wired shut for six weeks, she could not eat solid food for that time, and she lost 20 pounds as a result."[202] The Court upheld the defendant's conviction for gang assault in the second degree.[203]

The Fourth Department reached a similar result in *People v. Johnson*,[204] finding that the victim sustained a serious physical injury, where she had suffered "a fractured jaw that was wired shut for four to five weeks."[205] The Court upheld the defendant's conviction of first degree assault.[206] It is notable that in both of these cases, the injuries occurred to the victim's face, which courts have also found to be a significant factor in assessing whether disfigurement has occurred.[207]

By contrast, the cases where the element of serious physical injury with respect to protracted impairment of health or function of a bodily organ has not been found, are often lacking in evidence as to the length of time and/or the extent of the continuing impairment. For example, in *People v. Mazariego*,[208] the Court found that the victim, who had been stabbed in the right flank, did not suffer any protracted impairment of health, and modified the defendant's

198 People v. Lanier, 843 N.Y.S.2d 629, 629 (App. Div. 2007) (citation omitted).

199 *Id.* (citing People v. Hall, 453 N.Y.S.2d 960, 961 (App. Div. 1982)).

200 People v. Mead, 22 N.Y.S.3d 492, 493 (App. Div. 2015).

201 *Id.* at 493 (first citing People v. Johnson, 856 N.Y.S.2d 781, 782 (App. Div. 2008); then citing *In re* Tirell R., 822 N.Y.S.2d 615, 616 (App. Div. 2006); and then citing People v. Davis, 595 N.Y.S.2d 792, 793 (App. Div. 1993)).

202 *Id.*

203 *See id.*

204 *Johnson*, 856 N.Y.S.2d at 781.

205 *Id.* at 782 (first citing *Tirell*, 822 N.Y.S.2d at 616; then citing *Davis*, 595 N.Y.S.2d at 793).

206 *Johnson*, 856 N.Y.S.2d at 781, 782.

207 *See, e.g.*, 1 MELISSA L. BREGER, DESERIEE A. KENNEDY, JILL M. ZUCCARDY & LEE H. ELKINS, NEW YORK LAW OF DOMESTIC VIOLENCE § 2:104, Westlaw (database updated Nov. 2017) (explaining the classification and standard of disfigurement in relation to the location of a serious physical injury).

208 People v. Mazariego, 986 N.Y.S.2d 235 (App. Div. 2014).

conviction, in the interest of justice, from gang assault in the first degree to attempted gang assault.[209] In *Mazariego*, the victim's "wounds required no stitches, and there was no evidence that he suffered any permanent damage to his kidney, which suffered a small laceration."[210] "[T]he only evidence of protracted disfigurement or impairment of health was that he had a scar," and the record did not describe "the scar or what, if any, limitations [the victim] suffered as a result of his injury."[211] The Court found no "legally sufficient evidence that [the victim] suffered a 'serious physical injury' within the meaning of Penal Law § 10.00 (10)."[212]

In *People v. Santos*,[213] the Court reduced the defendant's conviction of first degree assault to second degree assault, finding that while the victim sustained a gunshot wound to his leg during the incident, his "testimony that he 'feel[s] pain in [his] leg' in cold weather [did] not constitute evidence of persistent pain so severe as to cause 'protracted impairment of health.'"[214]

With respect to the issue of a finding of serious physical injury through evidence of a physical injury which creates "a substantial risk of death," courts have upheld the defendants' convictions in cases where the testimony supports a finding that, if left untreated, the victim's injuries would likely have resulted in death.[215] In *People v. Jeanty*, the victim "sustained seven deep head or facial lacerations which were 1 to 3 inches in length and penetrated either the skull membrane or bone, requiring two layers of 50 sutures and resulted in permanent scarring."[216] The Court upheld the defendant's conviction on the counts of robbery in the first degree and assault in

[209] *Id.* at 236, 237 (first citing People v. Nimmons, 945 N.Y.S.2d 358, 359 (App. Div. 2012); then citing People v. Adames, 859 N.Y.S.2d 725, 726 (App. Div. 2008)); *Mazariego*, 986 N.Y.S.2d at 237 (first citing People v. Serrano, 904 N.Y.S.2d 711, 713 (App. Div. 2010); then citing People v. Ham, 889 N.Y.S.2d 110, 112, 113 (App. Div. 2009)).

[210] *Id.* at 237.

[211] *Id.*

[212] *Id.* (first citing *Nimmons*, 945 N.Y.S.2d at 359; then citing *Adames*, 859 N.Y.S.2d at 726).

[213] People v. Santos, 57 N.Y.S.3d 262 (App. Div. 2017).

[214] *Id.* at 264 (citing People v. Stewart, 962 N.E.2d 764, 765 (N.Y. 2011)); *see also* People v. Romero, 47 N.Y.S.3d 599, 600 (App. Div. 2017) (noting that co-defendant's conviction was similarly reduced from first degree assault to second degree assault).

[215] *See* People v. Montimaire, 936 N.Y.S.2d 50, 51 (App. Div. 2012) (first citing People v. Jones, 832 N.Y.S.2d 180, 181 (App. Div. 2007); then citing People v. Almonte, 776 N.Y.S.2d 554, 555, 556 (App. Div. 2004); and then citing People v. Gordon, 685 N.Y.S.2d 28, 28 (App. Div. 1999)); *Jones*, 832 N.Y.S.2d at 181 (first citing People v. Irwin, 774 N.Y.S.2d 237, 238 (App. Div. 2004); then citing People v. Mingo, 767 N.Y.S.2d 597, 597 (App. Div. 2003)); People v. Jeanty, 702 N.Y.S.2d 194, 199 (App. Div. 2000).

[216] *Jeanty*, 702 N.Y.S.2d at 199.

the first degree on the basis that the victim suffered a serious physical injury, pointing out that the trial testimony supported a finding that "[i]f [the victim's] injuries had been left untreated he could have bled to death."[217]

Similarly, in *People v. Jones*,[218] "the victim suffered a stab wound to the back of the neck, causing him substantial blood loss which resulted in the victim being admitted to the intensive care unit of the hospital."[219] Thereafter, "[h]e testified that, as a result of his wounds, he was confined to the hospital for a week, was later readmitted to the hospital because of complications associated with the wound, and was in excruciating pain for a substantial period of time after the assault."[220] The First Department found the victim had sustained a serious physical injury and upheld the defendant's conviction of first degree assault, finding that the evidence amply supported the jury's determination "that the stab wound, if not immediately treated, was so severe as to create a substantial risk of death due to blood loss."[221]

In *People v. Montimaire*, the "defendant inflicted a stab wound [to the victim] that caused profuse bleeding."[222] In turn, "[t]his caused the victim's blood pressure to fall to a dangerous level, so that he urgently required a massive blood transfusion and saline irrigation to stabilize his blood pressure and heart rate."[223] Additionally, "[t]he doctor testified that she acted extraordinarily quickly because she was concerned that the victim might lose so much blood as to endanger his life."[224] The Court upheld the defendant's conviction for second degree assault based upon its finding that "the evidence warranted the conclusion that the [victim's] injury created a substantial risk of death."[225]

Cases where courts have determined that there is insufficient proof of a "substantial risk of death" to result in a finding of serious physical injury to the victim, are often lacking in evidence to directly support that conclusion, for example, no testimony that the victim could have bled to death. For example, in *People v. Nimmons*, a case

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[217] *Id.*

[218] *Jones*, 832 N.Y.S.2d at 181.

[219] *Id.* at 353.

[220] *Id.*

[221] *Id.* (first citing *Irwin*, 774 N.Y.S.2d at 238; then citing *Mingo*, 767 N.Y.S.2d at 597).

[222] People v. Montimaire, 936 N.Y.S.2d 50, 50 (App. Div. 2012).

[223] *Id.*

[224] *Id.*

[225] *Id.* (first citing *Jones*, 832 N.Y.S.2d at 182; then citing People v. Almonte, 776 N.Y.S.2d 554, 556 (App. Div. 2004); and then citing People v. Gordon, 685 N.Y.S.2d 28, 28, 29 (App. Div. 1999)).

in which the defendant was accused of shooting the victim, although the emergency medical technician testified at trial about the potential consequences of gunshot wounds to the chest, he did not testify as to whether the gunshot wound inflicted upon this particular victim in fact created a substantial risk of death.[226] Upon considering the EMT's testimony and the victim's medical records, which were not further explained by a medical provider, the Court found there was insufficient evidence to establish a "substantial risk of death" to the victim to result in a finding of serious physical injury.[227]

Similarly, in *People v. Madera*,[228] the trial evidence, consisting of the victim's testimony and medical records, established that "the bullet entered and exited the victim's body around his right nipple; it was not near any vital organs; and it grazed the victim's right arm either as it entered or exited his body."[229] Although the evidence further showed that "a tiny fragment of the bullet remained in the victim's chest, the People presented no medical testimony to explain what, if any, risk that fragment posed to the victim."[230] Equally important was that "[n]o sutures were needed and the victim's self-reported pain level was low."[231] Moreover, "[t]he victim was kept in the hospital overnight for pain management and observation, but he remained in the hospital for another day due to his expressed intent to retaliate against defendant."[232] Under these facts, the Court reduced the defendant's conviction of first degree assault to attempted first degree assault, in the interest of justice, on the basis that the evidence did not support a finding that the victim's injuries resulted in a "substantial risk of death."[233]

As in the analysis of the element of "physical injury," a court's determination as to whether the People have established that a victim sustained a "serious physical injury" will involve an analysis of the applicable considerations outlined above, as applied to the specific facts and circumstances. The above review of the case law pertaining to the relevant factors in a court's finding of "serious

[226] People v. Nimmons, 945 N.Y.S.2d 358, 359 (App. Div. 2012).
[227] *Id.*
[228] People v. Madera, 959 N.Y.S.2d 337 (App. Div. 2013).
[229] *Id.* at 339.
[230] *Id.*
[231] *Id.*
[232] *Id.*
[233] *Id.* (first citing People v. Nimmons, 945 N.Y.S.2d 359 (App. Div. 2012); then citing People v. Tucker, 936 N.Y.S.2d 386, 388 (App. Div. 2012); then citing People v. Ham, 889 N.Y.S.2d 110, 112 (App. Div. 2009); and then citing People v. Gray, 816 N.Y.S.2d 609, 611 (App. Div. 2006)).

physical injury" provides a framework for assessing whether a given case will result in a finding of a "serious physical injury."

CONCLUSION

These recent New York cases demonstrate that New York courts, in evaluating whether the elements of "physical injury" or "serious physical injury" in assault cases have been established, take a very fact-specific approach in making such determinations. Notwithstanding, the guidelines identified in the above review of recent relevant case law are benchmarks that can be used in assessing whether the facts of a particular case pertaining to an assault are consistent with what courts have found in assault cases to constitute a physical injury or serious physical injury.