

JUDGE JENNY RIVERA: THE LONE DISSENTER FOR THE  
ACCUSED

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*We cannot simply hope or expect that . . . biases, prejudices, or deep-rooted stereotypes will disappear because of legislative fiat. Indeed, adverse and hostile responses are most common when individuals and institutions are pushed the hardest to relinquish power and to reject the most pernicious of traditions . . . judges, law enforcement personnel, and . . . lawyers, must be educated to recognize and work to eliminate the pervasive bias in our courts and criminal justice system.<sup>1</sup>*

I. BEFORE THE BENCH

Judge Jenny Rivera had an untraditional start to her career on the bench. She was not a judge first, she did not work in the judiciary, she was not a practicing attorney, she did not work in a law firm, she was not a government lawyer, she did not work in the district attorney's office, legislature, or executive branch, and she was not in any other line of work traditional for a New York Court of Appeals Judge.<sup>2</sup> After she graduated from New York University School of Law in 1985, Judge Rivera clerked for the Second Circuit Court of Appeals Pro Se Law Clerk's office, as well as for then Southern District of New York Court Judge Sonia Sotomayor.<sup>3</sup> She was an attorney for the Legal Aid Society and an associate counsel for the Puerto Rican Legal Defense and Education Fund.<sup>4</sup> She served as an

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<sup>1</sup> Jenny Rivera, *The Politics of Invisibility*, 3 GEO. J. ON FIGHTING POVERTY 61, 63 (1995).

<sup>2</sup> Vincent Bonventre, *Jenny Rivera: Cuomo's High Court Pick*, N.Y. CT. WATCHER (Jan. 19, 2013), <http://newyorkcourtwatcher.com/2013/01/jenny-rivera-cuomos-high-court-pick.html>.

<sup>3</sup> John Caher, *Q&A: Judge Jenny Rivera*, N.Y. L.J. (Jan. 3, 2014), <https://www.law.com/newyorklawjournal/almID/12002635849546/QA-Judge-Jenny-Rivera/>; *Honorable Jenny Rivera*, N.Y. CT. OF APPEALS, <https://www.nycourts.gov/ctapps/jrivera.htm> (last visited May 12, 2018); *Judge Jenny Rivera '85 Discusses the Role of State Courts at LAA Luncheon*, N.Y.U. L. NEWS, <http://www.law.nyu.edu/news/2017-laa-luncheon-judge-jenny-rivera-new-york-court-of-appeals> (last visited May 12, 2018).

<sup>4</sup> *Faculty Directory, Hon. Jenny Rivera*, CUNY SCH. LAW, <http://www.law.cuny.edu/>

administrative law judge for the New York State Division for Human Rights and was on the New York City Commission on Human Rights.<sup>5</sup> In addition to her work in the outside legal field, she worked in legal academia as an Assistant Professor of Law at Suffolk University Law School and as a Professor at City University of New York Law School (CUNY Law).<sup>6</sup> While at CUNY Law, Judge Rivera founded the CUNY School of Law's Center on Latino and Latina Rights and Equality (CLORE), and she taught classes on Latina/os and the Law and Paradigmatic Challenges to Race-Based Discrimination Theory and Practice.<sup>7</sup> Rivera also published several legal articles including *Translating Equality: Language, Law and Poetry*; *An Equal Protection Standard for National Origin Subclassifications*; and *The Politics of Invisibility*, among many others.<sup>8</sup> In short, prior to her confirmation as a judge on the Court of Appeals, Jenny Rivera dedicated her career to social justice, civil rights issues and equal protection for women and Latina/os.

As a lawyer and an academic, her fight for social equality and justice was lauded, but there was concern in the legal community that those qualities, and her lack of judicial experience, would interfere with her work as a judge.<sup>9</sup> Those who opposed her nomination, namely the Judiciary Committee, feared that she would be a judicial activist, using her role as a judge to promote the social welfare of Latinos/as and women.<sup>10</sup> Others who opposed her nomination thought Rivera's legal experience was too narrow, her writing confusing and unclear, and her lack of judicial experience impractical for the high court.<sup>11</sup> On the other hand, many applauded her nomination and felt that her work in public service and knowledge of the problems facing immigrants, working families, victims of discrimination, etc. would be a much needed addition to the court.<sup>12</sup> Despite the skepticism and lack of support from the Judiciary Committee, Jenny Rivera's nomination was confirmed by

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faculty/directory/emeriti/rivera.html (last visited May 12, 2018).

<sup>5</sup> See Caher, *supra* note 3.

<sup>6</sup> See Rivera, *supra* note 1, at 61; Caher, *supra* note 3.

<sup>7</sup> See Bonventre, *supra* note 2; *Celebrating Judge Jenny Rivera*, CUNY SCH. LAW PUB. SQUARE (Apr. 17, 2013), <http://www1.cuny.edu/mu/law/2013/04/17/celebrating-judge-jenny-rivera/>.

<sup>8</sup> See *id.*

<sup>9</sup> See John Caher, *Rivera Confirmed for Court of Appeals Seat*, N.Y. L.J. (Feb. 13, 2013), <https://www.law.com/newyorklawjournal/almID/1202587811231/>.

<sup>10</sup> See *id.*

<sup>11</sup> See *id.*

<sup>12</sup> See *id.*

an overwhelming voice vote on February 11, 2013.<sup>13</sup>

## II. THE PRO-ACCUSED JUDGE

After her confirmation, the question still loomed – what type of judge would Jenny Rivera be? Would she be an “activist willing to bend the law to accomplish her goals, a restrained judge reluctant to meddle in the affairs of the other branches of government, a judge prone to dissents, or some combination of the various traits, habits and approaches that make up a judicial philosophy”?<sup>14</sup> After five years on the bench, Judge Rivera is not known as a judicial activist, a judge for women, or the judge for Latina/os. She has become the judge for the accused. The record she has compiled is

[n]early 3 times as pro-accused as that of the Court as a whole. . .it might be argued that Judge Rivera’s record is extreme, that her tendencies lean so far in favor of the rights of the accused, that her votes skew the data. . .[h]owever, her pro-accused record is more than counterbalanced by that of two of her colleagues, Judge Michael Garcia and Eugene Pigott, at the other end of the court’s spectrum.<sup>15</sup>

In fact, her first written opinion with the Court of Appeals was a pro-accused majority in *People v. Griffin*.<sup>16</sup>

In *Griffin*, the Court of Appeals affirmed an order from the Appellate Division stating that the trial court improperly discharged the defendant’s counsel.<sup>17</sup> The Defendant’s attorney requested a change in date for the trial so that Legal Aid’s new attorney had time to prepare for the trial.<sup>18</sup> The trial court denied this request even though the court had given the People more time when requested.<sup>19</sup> Legal Aid then requested for an adjournment, which was rejected, and the court relieved Legal Aid of representing the Defendant.<sup>20</sup> The court appointed an 18-B counsel for the Defendant, and the Defendant was eventually found guilty and sentenced to two

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<sup>13</sup> *See id.*

<sup>14</sup> John Caher, *Rivera’s Record Runs Deep But Is Limited to Social Justice Issues*, N.Y. L.J. (Jan. 24, 2013), <https://www.law.com/newyorklawjournal/almID/1202585475344/>.

<sup>15</sup> Vincent Bonventre, *Part 8 – Observations: Generally Conservative (Early DiFiore Court Patterns)*, N.Y. CT. WATCHER (Oct. 31, 2016), <http://www.newyorkcourtwatcher.com/2016/10/part-8-observations-generally.html>.

<sup>16</sup> *People v. Griffin*, 987 N.E.2d 282 (N.Y. 2013).

<sup>17</sup> *See id.* at 283.

<sup>18</sup> *See id.*

<sup>19</sup> *See id.*

<sup>20</sup> *See id.* at 283–84.

concurrent terms of twenty years to life.<sup>21</sup> The Appellate Division reversed the Supreme Court's decision stating, "discharge of defendant's counsel without consulting defendant was an abuse of discretion and interfered with defendant's right to counsel."<sup>22</sup> In her first written majority, Judge Rivera stated,

the right to counsel is so deeply intertwined with the integrity of the process in Supreme Court that defendant's guilty plea is no bar to appellate review. A claim that removal of counsel was part of the court's disparate, unjustifiable treatment of defense counsel goes to the fundamental fairness of our system of justice. While the right to counsel of choice is qualified, and may cede, under certain circumstances, to concerns of the efficient administration of the criminal justice system, we have made clear that courts cannot arbitrarily interfere with the attorney-client relationship, and interference with that relationship for purpose of case management is not without limits, and is subject to scrutiny.<sup>23</sup>

Rivera's first swing on the court has become her favorite swing as a Judge. She continuously and tirelessly writes opinions, often dissents, to ensure that they accused have their day in court and the full weight of the criminal justice system.

### III. THE LONE DISSENTER

While her first written majority opinion was pro-accused, Judge Rivera is often the lone dissenter in pro-accused cases.<sup>24</sup> As the voice of the pro-accused, her goal in each case is to ensure that the Court is treating the accused justly. She often finds that the actions of the lower court did not give the defendant a fair trial, such as the court not properly explaining procedures to the defendant,<sup>25</sup> violating the right to appeal,<sup>26</sup> and more often than not, violating the defendants' constitutional rights.<sup>27</sup> Judge Rivera has seemingly made it her goal to ensure that the accused are given the same rights in court as every

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<sup>21</sup> See *id.* at 284.

<sup>22</sup> *Id.* (quoting *People v. Griffin*, 934 N.Y.S.2d 393, 395 (App. Div. 2011)).

<sup>23</sup> *Griffin*, 987 N.E.2d at 284.

<sup>24</sup> See *Bonventre*, *supra* note 15.

<sup>25</sup> See, e.g., *People v. Monk*, 989 N.E.2d 1, 5–6 (N.Y. 2013) (Rivera, J., dissenting).

<sup>26</sup> See, e.g., *People v. Perez*, 12 N.E.3d 416, 423 (2014) (Rivera, J., dissenting); *Griffin*, 987 N.E.2d at 284 (Rivera, J., dissenting).

<sup>27</sup> See *Monk*, 989 N.E.2d at 6 (Rivera, J., dissenting).

other person who enters the courtroom.<sup>28</sup>

Her first written dissent on the court was as a lone dissenter in *People v. Monk*, where she determined that the accused had a constitutional right to understand his plea deal.<sup>29</sup> In *Monk*, the defendant agreed to a 10-year sentence with a mandatory five-year post release supervision (PRS) period.<sup>30</sup> When the Defendant agreed to this plea, he was not aware that the PRS could result in an additional five years of incarceration.<sup>31</sup> The majority held that the trial court did not have the obligation to explain to the Defendant his plea acceptance, stating the court “has no obligation to explain to defendants who plead guilty the possibility that collateral consequences may attach to their criminal convictions.”<sup>32</sup> In her dissent, Judge Rivera explained that a trial court has the constitutional duty to ensure that a defendant understands his or her plea bargain and in “today’s criminal justice system . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.”<sup>33</sup> A defendant’s need to understand what his or her plea means is crucial not only because it is a due process right, but because it is the crux of ensuring rights to the accused in the criminal justice system.<sup>34</sup>

She was the lone dissenter for the pro-accused again in her first year with her dissent in *People v. Smith*.<sup>35</sup> Here, the majority determined that a police officer could give testimony in court to the description the victim gave out of court as long as it did not mislead the jury.<sup>36</sup> This was based on a decision in *People v. Huertas*,<sup>37</sup> where the Court held “that a crime victim could testify her own description of her attacker, given to the police shortly after the crime” during trial.<sup>38</sup> Judge Rivera, on the other hand, found “no basis upon which to conclude such evidence constitutes anything other than bolstering of the victim’s testimony.”<sup>39</sup> The Court allows prior consistent statements only for a purpose other than the truth of the matter, and

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<sup>28</sup> See Bonventre, *supra* note 15.

<sup>29</sup> *Monk*, 989 N.E.2d at 5–6 (Rivera, J., dissenting).

<sup>30</sup> See *id.* at 2 (majority opinion).

<sup>31</sup> See *id.*

<sup>32</sup> *Id.* at 3 (quoting *People v. Catu*, 825 N.E.2d 1081, 1082 (N.Y. 2005)).

<sup>33</sup> *Monk*, 989 N.E.2d at 5 (quoting *Missouri v. Frye*, 566 U.S. 136, 144 (2012)).

<sup>34</sup> See *Monk*, 989 N.E.2d at 4 (citations omitted).

<sup>35</sup> *People v. Smith*, 5 N.E.3d 972, 975 (N.Y. 2013).

<sup>36</sup> See *id.* at 974.

<sup>37</sup> *People v. Huertas*, 553 N.E.2d 992 (N.Y. 1990).

<sup>38</sup> See *Smith*, 5 N.E.3d at 972 (citing *Huertas*, 553 N.E.2d 992).

<sup>39</sup> *Smith*, 5 N.E.3d at 975.

here, allowing the officer to testify to the victim's prior statement did nothing but give the jury more reason to believe the victim over the accused.<sup>40</sup>

Judge Rivera continued her trend as the lone dissenter for the pro-accused in her next four years on the bench. In her second year, she wrote dissents in cases such as *People v. Flinn*<sup>41</sup> and *People v. Perez*.<sup>42</sup> In *Flinn*, Rivera disagreed with the majority when they determined that the defendant validly waived his right to be present during the bench conference when prospective jurors were being questioned during voir dire.<sup>43</sup> During trial, the judge told the defendant that he was "welcome to attend" any bench conferences, and when one occurred, he chose not to attend and told his attorney he waived that right.<sup>44</sup> The majority found that the defendant implicitly waived his right when he heard the judge say "welcome to attend," and he explicitly waived his right when his lawyer told the court that he had done so.<sup>45</sup> Conversely, Judge Rivera found that the trial court did not "properly inform the defendant of his fundamental right to attend certain conferences, and to confirm and make a public record of defendant's alleged waiver communicated to the court by counsel . . . [which] constitutes a violation of defendant's rights."<sup>46</sup>

In *Perez*, there were four separate criminal cases at issue, all of which had not been pursued for more than a decade after a notice of appeal had been filed.<sup>47</sup> In each case, the defendants obtained new attorneys, got leave to appeal, and then each case was dismissed on the People's motion.<sup>48</sup> The questions in these cases were whether the defendants' constitutional rights were violated and whether the court used proper discretion when dismissing the cases.<sup>49</sup> The majority stated that the defendants have the right to a fair appellate proceeding "with the minimal safeguards necessary to make an adequate and effective appeal," and in three of the four cases they found that the defendants were given a fair proceeding and their rights were not violated.<sup>50</sup> Judge Rivera agreed with the majority on

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<sup>40</sup> See *id.* 975, 976.

<sup>41</sup> *People v. Flinn*, 7 N.E.3d 496 (N.Y. 2014).

<sup>42</sup> *People v. Perez*, 12 N.E.3d 416 (N.Y. 2014).

<sup>43</sup> See *Flinn*, 7 N.E.3d at 496, 497.

<sup>44</sup> See *id.* at 496.

<sup>45</sup> See *id.* at 497.

<sup>46</sup> *Id.* at 497.

<sup>47</sup> See *Perez*, 12 N.E.3d at 417.

<sup>48</sup> See *id.*

<sup>49</sup> See *id.* at 417–18.

<sup>50</sup> See *id.* at 420.

only two of the cases.<sup>51</sup> In the two where she disagreed, she asserted that because the defendant's counsel in one of the cases violated his professional duties and obligations owed to his client, and in the other case failed to take into consideration that he was a juvenile during his conviction, "violat[ed] the defendants' fundamental rights to appeal their appellate convictions and, as a consequence, the Court's decisions in these cases undermine public confidence in the legal profession and our system of justice."<sup>52</sup> Her dissent in this case shows how strongly she feels that the goal of the justice system is for *both* the accused and the accuser, not *just* the accuser.

In her third year on the Court, she soloed in her dissents in cases such as *People v. Guthrie*<sup>53</sup> and *People v. Sanders*.<sup>54</sup> In *Guthrie*, the defendant was given a breathalyzer after a cop stopped her for running a stop sign and notice a strong smell of alcohol.<sup>55</sup> Her blood alcohol was over the legal limit and she failed the field sobriety tests.<sup>56</sup> The cop arrested her and charged her with a DWI in addition to a stop sign violation.<sup>57</sup> The defendant moved to suppress the evidence stating that there was a lack of probable cause for her initial stop.<sup>58</sup> The majority held that under the Fourth Amendment, a seizure is permissible by the police so long as it is reasonable and the officer has probable cause to believe that a violation was committed.<sup>59</sup> Here, although the stop sign was not a registered sign, because it conformed to sign regulations and it was placed in a position that conforms to traffic laws, it was a valid stop sign, and the officer had the right to pull the defendant over when she ran the stop sign.<sup>60</sup> Thus, the evidence to convict her of the DWI should not have been suppressed.<sup>61</sup>

Judge Rivera, however, stated that the Court has consistently held that an officer's mistake of law does not give him the prerequisite to search and seizure and any evidence contained in this manner must

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<sup>51</sup> See *id.* at 422 (first citing *People v. Lopez*, 60 N.Y.S.3d 808, 808 (App. Div. 2017); then citing *People v. Calaff*, 815 N.Y.S.2d 824, 825 (App. Div. 2006)).

<sup>52</sup> See *Perez*, 12 N.E.3d at 423.

<sup>53</sup> *People v. Guthrie*, 30 N.E.3d 880 (N.Y. 2015).

<sup>54</sup> *People v. Sanders*, 34 N.E.3d 344 (N.Y. 2015).

<sup>55</sup> See *Guthrie*, 30 N.E.3d at 882.

<sup>56</sup> *Id.*

<sup>57</sup> See *id.*

<sup>58</sup> See *id.*

<sup>59</sup> See *id.* at 883 (first citing *People v. Robinson*, 767 N.E.2d 638, 641–42 (2001); then citing *Whren v. United States*, 517 U.S. 806, 809–10 (1996)).

<sup>60</sup> See *Guthrie*, 30 N.E.3d at 888.

<sup>61</sup> See *id.*

be suppressed.<sup>62</sup> Society, she averred

relies on police officers to enforce laws based on what the laws say, not on an officer's mistaken belief. Excusing an officer's mistake of law removes an incentive to learning the law. While the realities of police work rightly justify tolerance of an officer's mistake of fact, there is no similar basis to accept or excuse an officer's error regarding what the law permits and forbids.<sup>63</sup>

Here, the officer did not have probable cause to stop her vehicle because his mistake of law, not knowing the stop sign was registered, is not justifiable, and therefore the evidence obtained after the stop should have been suppressed.<sup>64</sup>

In *Sanders*, the issue was whether the defendant knowingly, voluntarily, and intelligently waived his right to appeal.<sup>65</sup> The defendant was arrested for assaulting and stabbing a sixteen year-old during a gang assault, and on the eve of his trial he pled guilty to the charges.<sup>66</sup> During the "plea colloquy" the defendant's plea and rights were discussed, he was asked if he understood, and said he did.<sup>67</sup> After he was convicted, he filed a notice of appeal pro se.<sup>68</sup> The majority determined that even though the defendant waived his right to appeal during the plea colloquy, because he did so knowingly and intelligently, his waiver of appeal is upheld.<sup>69</sup>

In her dissent, Judge Rivera determined that the waiver was invalid because the nature of the appeal was not defined fully during the plea colloquy.<sup>70</sup> The majority used the defendant's prior background in court to determine that his knowledge was sufficient, but Judge Rivera, quoting the Second Department, concluded that "whatever information the defendant was, or was not, provided with regard to his right to appeal in those prior criminal proceedings is not in this record, [and] [a]s a result, this Court is forced to speculate that the defendant gained an understanding of the nature of his right to appeal from his prior contacts with the criminal justice system."<sup>71</sup>

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<sup>62</sup> See *id.* (Rivera, J., dissenting).

<sup>63</sup> See *id.* at 890.

<sup>64</sup> See *id.* at 882, 884–85, 894.

<sup>65</sup> See *People v. Sanders*, 34 N.E.3d 344, 345, 347 (2015).

<sup>66</sup> See *id.* at 345.

<sup>67</sup> See *id.* at 345–46.

<sup>68</sup> See *id.* at 346.

<sup>69</sup> See *id.* at 347.

<sup>70</sup> See *id.* at 348.

<sup>71</sup> *Id.* at 349 (citing *People v. Sanders*, 976 N.Y.S.2d 205, 210 (2d Dep't 2013)).



The defendant was not intelligently and sufficiently informed of his waiver of appeal, and therefore his appeal on the merits of the suppression claim should have been heard.<sup>72</sup>

Her fourth and fifth years on the bench had her as the lonely dissenter in cases including *People v. Harrison*,<sup>73</sup> *People v. Davis*,<sup>74</sup> *People v. Arjune*,<sup>75</sup> *People v. Ocasio*,<sup>76</sup> and *People v. Sivertson*.<sup>77</sup> As seen in many of her dissents, in *Davis*, Judge Rivera disagreed with the majority about whether there was legally sufficient evidence to show that the defendant's assault on a victim was an actual contributory cause of the victim's death and that the death was a foreseeable result of the defendant's conduct.<sup>78</sup> Here, the defendant entered the victim's house looking for drugs, and was seen exiting the house several minutes later with a white bag.<sup>79</sup> The victim was found dead two days later.<sup>80</sup> The victim's autopsy revealed that the cause of death was Hypertensive Cardiovascular Disease aggravated by obesity and the enlargement of the heart.<sup>81</sup> The Medical Examiner testified that stress can accelerate a person's death by cardiovascular disease and although the victim's physical injuries did not cause the death, the stress the assault caused led to his death.<sup>82</sup> The defendant was charged and convicted of second-degree murder.<sup>83</sup> The Appellate Division reversed the charges and the majority in this Court determined that both the crime scene evidence and the Medical Examiner's testimony established a sufficient connection between the defendant's actions, and the victim's death and the violent nature of the attack made the victim's death foreseeable.<sup>84</sup>

Judge Rivera adamantly disagreed with the majority finding that the evidence did not show a sufficient connection or was reasonably foreseeable.<sup>85</sup> She concluded that between the defendant's obesity and Hypertensive Cardiovascular disease and the Medical

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<sup>72</sup> *See id.* at 348–49.

<sup>73</sup> *People v. Harrison*, 52 N.E.3d 223, 228 (N.Y. 2016) (Rivera, J., dissenting).

<sup>74</sup> *People v. Davis*, 66 N.E.3d 1076, 1083 (N.Y. 2016) (Rivera, J., dissenting).

<sup>75</sup> *People v. Arjune*, 89 N.E.3d 1207, 1217 (N.Y. 2017) (Rivera, J., dissenting).

<sup>76</sup> *People v. Ocasio*, 65 N.E.3d 1263, 1268 (N.Y. 2016) (Rivera, J., dissenting).

<sup>77</sup> *People v. Sivertson*, 77 N.E.3d 349, 350 (N.Y. 2017) (Rivera, J., dissenting).

<sup>78</sup> *See Davis*, 66 N.E.3d at 1078, 1083.

<sup>79</sup> *Id.* at 1079.

<sup>80</sup> *See id.*

<sup>81</sup> *See id.*

<sup>82</sup> *See id.*

<sup>83</sup> *See id.*

<sup>84</sup> *See id.* at 1081.

<sup>85</sup> *See id.* at 1083.

Examiner's Report stating the cause of death was not from the injuries, that the People did not "prove beyond a reasonable doubt that in the course of committing a robbery and burglary defendant caused the victim's death. Causation for criminal liability requires both that the 'culpable act [was] a "sufficiently direct cause" of the death' and that the 'fatal result was reasonably foreseeable.'"<sup>86</sup>

In *Sivertson*, Rivera wrote a lengthy dissent to the Court's extremely short majority. The majority held that Appellate Division's decision was beyond the Court's further review because the record supported the Appellate Division's conclusion, which was that a warrantless entry into a defendant's home "was justified by exigent circumstances is a mixed question of law and fact."<sup>87</sup> Judge Rivera found that there was no evidence to support the ruling that exigent circumstances justified the warrantless entry.<sup>88</sup> Exigent circumstances are "those circumstances that would cause a reasonable person to believe that entry was necessary to prevent physical harm to the officer or other persons, the destruction of relevant evidence, the suspect's escape, or some other consequence improperly frustrating legitimate law enforcement efforts."<sup>89</sup> Here, the defendant was lying in bed watching television, completely unaware that the police were surrounding his home and banging on his doors and windows.<sup>90</sup> When he became aware of the cops appearance, he rolled over in bed and ignored them.<sup>91</sup> These facts led the lower courts to determine exigent circumstances, but Judge Rivera stated that the facts do not support a finding that the defendant was dangerous or that the defendant would escape if the police did not quickly apprehend him, thus the warrantless entry was not justified.<sup>92</sup>

#### IV. CASES AGAINST THE ACCUSED

Although Judge Rivera is known as the pro-accused judge and often makes that happen with her lone dissents, there have been cases throughout her career where she has written the majority for

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<sup>86</sup> *Id.* (internal citations omitted).

<sup>87</sup> *People v. Sivertson*, 77 N.E.3d 349, 350 (N.Y. 2017).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 353 (citations omitted).

<sup>90</sup> *Id.* at 354–55.

<sup>91</sup> *Id.*

<sup>92</sup> *See id.* at 355.

cases against the accused.<sup>93</sup> During her second year on the court, she wrote the majority for *People v. Gordon*,<sup>94</sup> where the defendant was charged with robbery and assault after the jury saw a surveillance camera that showed defendant's suspicious activity in a department store and threatening a police officer.<sup>95</sup> At trial, the People submitted the video footage to corroborate the live testimony and the jury found the defendant guilty of robbery and assault.<sup>96</sup> The defendant appealed the convictions on a lack of legally sufficient evidence because the stolen items were not recovered.<sup>97</sup> A "verdict is legally sufficient if there is any valid line of reasoning and permissible inferences that could lead a rational person to conclude that every element of the charged crime has been proven beyond a reasonable doubt."<sup>98</sup> Judge Rivera, writing for the Court, determined that stolen items did not need to be recovered in order to establish sufficient evidence for the jury to find the defendant guilty because the rest of the evidence led a rational person to conclude that the crime had been committed.<sup>99</sup>

Further, in *People v. Marshall*,<sup>100</sup> the issue was whether the trial court improperly denied the defendant's request for a *Wade* hearing.<sup>101</sup> The defendant was arrested and charged with several offenses arising from an assault on a New York City bus.<sup>102</sup> The day before her scheduled court appearance, the prosecutor met with the complainant to show her a picture of the defendant from the day of the arrest.<sup>103</sup> This meeting prompted the defendant to ask for a *Wade* hearing to determine whether the "display was unduly suggestive."<sup>104</sup> The Court granted the hearing but denied the request to call Counsel, who displayed the picture, as a witness.<sup>105</sup> After the hearing, the court, relying heavily on eyewitness testimony from the complainant and the bus driver, found the defendant guilty.<sup>106</sup> The defendant

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<sup>93</sup> See *infra* notes 93, 99, 110.

<sup>94</sup> *People v. Gordon*, 16 N.E.3d 1178 (N.Y. 2014).

<sup>95</sup> *Id.* at 1180–81.

<sup>96</sup> *Id.* at 1182.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* (quoting *People v. Delamota*, 960 N.E.2d 383, 387 (N.Y. 2011)).

<sup>99</sup> *Gordon*, 16 N.E.3d at 1185.

<sup>100</sup> *People v. Marshall*, 45 N.E.3d 954 (N.Y. 2015).

<sup>101</sup> *Id.* at 956.

<sup>102</sup> *Id.* at 957.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> See *id.*

<sup>106</sup> See *id.* at 958.

appealed stating that the ADA should have been called at the hearing.<sup>107</sup> Citing the Supreme Court, the majority stated “[a]part from the uncertainty of human memory, suggestive identification procedures ‘increase the dangers inhering in eyewitness identification,’” and pretrial identification procedures that unduly suggest a defendant’s guilt based on misidentification is improper.<sup>108</sup> Here, the majority, with Judge Rivera at the helm, determined that the showing a photograph of the defendant carries the risk of undue suggestiveness and the defendant was entitled to a proper *Wade* hearing, however, the error was harmless because the complainant found an independent source to corroborate the defendant to the crime.<sup>109</sup>

Finally, in *People v. Hatton*,<sup>110</sup> the defendant was accused of forcible touching, sexual abuse, and harassment.<sup>111</sup> In two of the complaints, the women accused the defendant of smacking them on the buttocks.<sup>112</sup> The defendant pled guilty to one count of forcible touching and was sentenced to one-year in jail.<sup>113</sup> The defendant completed his year but appealed the conviction stating that the accusatory instruments were factually insufficient.<sup>114</sup> The Court looked at whether the factual part of the instrument was able to establish a reasonable cause to believe that the defendant had committed the crimes he was accused of.<sup>115</sup> The defendant attempted to argue that “a person may smack another on the buttocks for a legitimate purpose, such as in self-defense or in defense of another,” but the Court found that argument “jurisdictionally deficient.”<sup>116</sup> Judge Rivera further explained that intent is difficult to discern, but the factual portions of the instruments provided a reasonable cause to infer that the defendant did commit the crime, and “those factual allegations are of the kind that ‘give an accused notice sufficient to prepare a defense and are adequately detailed to prevent a defendant

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<sup>107</sup> *See id.* at 959 (citing *People v. Marshall*, 990 N.Y.S.2d 439, 439 (2d Dep’t 2014)).

<sup>108</sup> *Marshall*, 45 N.E.3d at 959 (quoting *Wade*, 388 U.S. at 229).

<sup>109</sup> *See Marshall*, 990 N.Y.S.2d at 963 (first citing *Wade*, 388 U.S. at 241; then citing *People v. Chipp*, 552 N.E.2d 608, 613 (N.Y. 1990); and then citing *People v. Adams*, 423 N.E.2d 379, 382 (N.Y. 1981)).

<sup>110</sup> *People v. Hatton*, 44 N.E.3d 188 (N.Y. 2015).

<sup>111</sup> *See id.* at 190.

<sup>112</sup> *See id.*

<sup>113</sup> *See id.*

<sup>114</sup> *See id.*

<sup>115</sup> *See id.* at 191–92 (quoting *People v. Dumay*, 16 N.E.3d 1150, 1152 (N.Y. 2014)).

<sup>116</sup> *Hatton*, 44 N.E.3d at 193.

from being tried twice for the same offense.”<sup>117</sup>

## V. CONCLUSION

From nomination to confirmation, to the longest sitting judge on the Court of Appeals, Judge Jenny Rivera has proven herself a formidable jurist. Rivera overcame a rocky start, amid skepticism that her background as an academic would be unsuitable for a seat on the highest court in New York, she has proven herself time and time again that she will fight for the equal weight of the criminal justice system for both the accused and the accuser. Her pro-accused solo dissents substantiate her effort to guarantee that all people get their day in court, especially the accused. Rivera focuses on the nuances of rules of law and past decisions when she is deciding a case to give the accused every opportunity for equal justice. Whether it is an evidentiary issue, an issue of court explanation, or a due process issue, Judge Rivera will work until she is sure the accused has had their day in court. There are times when she has strayed from this path, but just as every great jurist has strayed before. By ensuring the pro-accused are heard, and “addressing the spectrum of oppression and, thus recognizing as visible who and what are otherwise treated as invisible,” will create the equal justice system that Judge Rivera has strived to create.<sup>118</sup>

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<sup>117</sup> *Id.* at 194 (quoting *People v. Casey*, 740 N.E.2d 233, 236 (N.Y. 2000)).

<sup>118</sup> Rivera, *supra* note 1, at 63.