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Due Process

presumption is easily rebutted if the trial judge documents a justifiable reason for the increased sentence. Fourth, the presumption will not interfere with the state's interest in providing the trial judge full discretion and flexibility in sentencing the defendant. Lastly, the court, following the rationale in *Pearce*, believed that the threat of a harsher sentence upon reconviction might deter the defendant in exercising his or her right to appeal.[261]

People v. Harris[262]
(decided July 5, 1990)

Defendant claimed that his right to be present at a material stage of his trial was violated when the trial judge communicated with the jury outside his presence,[263] thus violating his state[264] and federal[265] right to due process of law. The court of appeals held that the defendant's presence was not constitutionally mandated when the trial judge, accompanied by the prosecutor and the defense attorney, asked the jury to clarify its request for testimony readback, characterizing the communication as ministerial in nature.[266] Therefore, the defendant's procedural due process rights were not violated.[267]

At defendant's trial, on charges of sodomy and other offenses, the jury sent a note to the judge requesting a readback of certain trial testimony. Accompanied by the prosecutor and defendant's attorney, the judge proceeded to the jury room for a clarification of the readback request. Specifically, the judge asked whether the jurors wanted to hear testimony about the victim, or by the

261. *Id.* at 162-63, 556 N.E.2d at 426-27, 556 N.Y.S.2d at 987-88.

262. 76 N.Y.2d 810, 559 N.E.2d 660, 559 N.Y.S.2d 966 (1990).

263. *Id.* at 811-12, 559 N.E.2d at 661, 559 N.Y.S.2d at 967.

264. N.Y. CONST. art. I, § 6.

265. U.S. CONST. amend. XIV, § 1.

266. *Harris*, 76 N.Y.2d at 812, 559 N.E.2d at 662, 559 N.Y.S.2d at 968. No mention is made in the majority opinion of whether the defendant brought his case under the United States or New York Constitution or both. The dissent refers to defendant's rights under both constitutions. *Id.* at 813, 559 N.E.2d at 662, 559 N.Y.S.2d at 968.

267. *Id.* at 812, 559 N.E.2d at 662, 559 N.Y.S.2d at 968.

victim. This colloquy was held off the record. The judge then had the defendant and the jury return to the courtroom for the readback of the requested testimony. Defendant was subsequently convicted.[268]

On appeal, defendant asserted that the judge's brief communication with the jury in his absence "denied him his constitutional right to be present at a material stage of his trial."[269] The court of appeals held that defendant's presence was not mandated because the communication in question "was wholly unrelated to the substantive legal or factual issues of the trial."[270] The court stated that as a matter of due process a criminal defendant has "an absolute right to be present, with counsel, 'whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge.'"[271]

The court noted that "[t]his includes the right to be present during instructions to the jury 'where the court is required to state the fundamental legal principles applicable to criminal cases generally, as well as the material legal principles applicable to a particular case and the application of the law to the facts.'"[272] In addition, a defendant has the right to be present for "the court's instructions in response to the jury's questions about the evidence."[273] Furthermore, Criminal Procedure Law (CPL) section 310.30 serves to implement a defendant's constitutional rights by providing that when a jury requests further instructions during deliberations, the court "must direct that the jury be returned to the courtroom and, after notice to both the people and counsel for the defendant, and in the presence of the defendant, must give such requested information or instruction as the court

268. *Id.* at 811, 559 N.E.2d 661, 559 N.Y.S.2d at 967.

269. *Id.* at 812, 559 N.E.2d at 661, 559 N.Y.S.2d at 967.

270. *Id.* at 812, 559 N.E.2d at 662, 559 N.Y.S.2d at 968. The court described the communication as "ministerial."

271. *Id.* at 812, 559 N.E.2d at 661, 559 N.Y.S.2d at 967 (quoting Snyder v. Massachusetts, 29 U.S. 97, 105-06 (1934)).

272. *Id.* at 812, 559 N.E.2d at 661, 559 N.Y.S.2d at 967 (quoting People v. Ciaccio, 47 N.Y.2d 431, 436, 391 N.E.2d 1347, 1350, 418 N.Y.S.2d 371, 373 (1979)).

273. *Id.* at 812, 559 N.E.2d at 662, 559 N.Y.S. at 968 (citing People v. Mehmedi, 69 N.Y.2d 759, 505 N.E.2d 610, 513 N.Y.S.2d 100 (1987)).

deems proper."[274]

The court reasoned that the colloquy between the trial judge and the jury did not include instructions or information within the meaning of CPL section 310.30. Further, the communication was "wholly unrelated to the substantive legal or factual issues of the trial."[275] Therefore, the court concluded that in light of the fact that defendant's presence during the judge's colloquy with the jury would not have aided in the defendant's opportunity to defend against the charges, his presence was not constitutionally required.[276]

Federal law in this area is governed by *Snyder v. Massachusetts*.[277] The *Snyder* decision stands for the proposition that due process requires the presence of a defendant if "[i]t bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend."[278] New York follows the *Snyder* proposition,[279] and CPL section 310.30 articulates the rights of a defendant regarding this situation.

In his dissenting opinion, Judge Titone argued that the court improperly found the trial judge's colloquy to be merely ministerial. Judge Titone asserted that the *Snyder* rule, demanding the presence of a defendant, was implicated when the judge communicated with the jury. Further, the dissent noted that in *People v. Torres*[280] the court "recently held that even the simple act of conveying the trial judge's one-sentence directive to the jury to continue deliberating cannot be dismissed as a mere 'ministerial act.'"[281]

In *Torres*, the trial judge was informed by telephone that the

274. *Id.* (quoting N.Y. CRIM. PROC. LAW § 310.30 (McKinney 1982)).

275. *Id.*

276. *Id.* (citing Snyder v. Massachusetts, 291 U.S. 97, 105-06 (1934)).

277. 291 U.S. 97 (1934).

278. *Id.* at 106.

279. *See, e.g.*, People v. Ciaccio, 47 N.Y.2d 431, 436, 391 N.E.2d 1347, 1349, 418 N.Y.S.2d 371, 373 (1979) (stating that a defendant has an absolute right to be present with counsel in every criminal proceeding when his presence is related to the fulness of his defense).

280. 72 N.Y.2d 1007, 531 N.E.2d 635, 534 N.Y.S.2d 914 (1988).

281. *Harris*, 76 N.Y.2d at 813, 559 N.E.2d at 662-63, 559 N.Y.S.2d at 968-69 (Titone, J., dissenting).

jury had reached an impasse. The judge directed a court officer to tell the jury to continue deliberations; neither of the attorneys nor the defendant was present. The court of appeals held that the trial judge had "improperly delegated a judicial duty to a nonjudicial staff member at a critical stage of the proceedings and thus permitted trial proceedings to be conducted in his absence."[282] The *Torres* court held that such an instruction to the jury was not a mere ministerial act.

In his dissent in *Harris*, Judge Titone asserted that following the logic of *Torres*, the colloquy at issue should not have been considered merely ministerial. The dissent concluded by arguing that a proper construction of CPL section 310.30 demanded the presence of the defendant during the colloquy. Judge Kaye joined Judge Titone in his dissent.

In *United States v. Gagnon*,[283] the United States Supreme Court held that the defendants' fifth amendment due process rights were not violated by an *in camera* discussion with a juror that occurred in the absence of the defendants.[284] The juror had expressed his concern that during the trial, one of the defendants, Gagnon, had been sketching the jurors. At the *in camera* meeting, with Gagnon's counsel present, the judge questioned whether the juror would be willing to continue as an impartial juror. Gagnon's counsel briefly questioned the juror, and the discussion ended with all parties satisfied that they could proceed. The defendants were subsequently convicted, and on appeal, claimed a violation of their rights on various constitutional and statutory grounds. The United States Court of Appeals for the Ninth Circuit reversed the convictions, holding that the *in camera* discussion violated the defendants' rights under the due process clause of the fifth amendment. Additionally, the Ninth Circuit held that the *in camera* discussion violated the Federal Rules of Criminal Procedure 43, which requires the presence of a defendant at all stages of trial. The Supreme Court reversed,

282. *Torres*, 72 N.Y.2d at 1008-09, 531 N.E.2d at 636, 534 N.Y.S.2d at 915.

283. 470 U.S. 522 (1985).

284. *Id.* at 526

holding that the defendants' due process rights were not violated by the *in camera* consultation.[285] Citing *Snyder v. Massachusetts*,[286] the Court stated that the absence of the defendants at the *in camera* discussion was "not required to ensure fundamental fairness or a 'reasonably substantial . . . opportunity to defend against the charge.'"[287] The Court reasoned that the defendants' presence at the *in camera* discussion would not have aided them in their defense, and possibly might have been counterproductive in light of the juror's concerns about the defendant's sketching of the jurors. Thus, when a defendant raises a due process claim under either the federal or state constitutions as a result of being absent when the judge communicates with the jury, it appears that courts will rely upon *Snyder* in analyzing the claim.

People v. Scalza[288]
(decided October 18, 1990)

See discussion of this case under JURISDICTION OF THE COUNTY COURT.[289] The New York Court of Appeals held that the statute, authorizing the use of a judicial hearing officer to hear pre-trial suppression arguments and prepare findings for the suppression judge, did not violate the New York State due process clause because defendant's "right to be heard" was adequately protected.[290]

People v. Ohrenstein[291]
(decided November 27, 1990)

See discussion of this case under SPEECH OR DEBATE CLAUSE.[292] The New York Court of Appeals affirmed the

285. *Id.*
286. 291 U.S. 97 (1934).
287. *Gagnon*, 470 U.S. at 527 (quoting *Snyder*, 291 U.S. at 105-06.).
288. 76 N.Y.2d 604, 563 N.E.2d 705, 562 N.Y.S.2d 14 (1990).
289. *See infra* notes 798-830 and accompanying text.
290. *Scalza*, 76 N.Y.2d at 610, 563 N.E.2d at 708, 562 N.Y.S.2d at 17.
291. 77 N.Y.2d 38, 565 N.E.2d 493, 563 N.Y.S.2d 744 (1990).
292. *See infra* notes 1177-266 and accompanying text.