PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction upon a verdict after jury trial before the Honorable Lewis Bart Stone, Justice of the Supreme Court, New York County, of the crimes of Criminal Possession of a Controlled Substance in the Third Degree, Penal Law § 220.16(1), and Criminal Possession of a Controlled Substance in the Fifth Degree, Penal Law § 220.06(5), and sentences thereon to determinate and concurrent sentences thereon as a Prior Violent Felony Offender of 8 years imprisonment plus 3 years of Post-Release Supervision, and 2 ½ years imprisonment plus 2years of Post-Release Supervision, respectively, entered on August 15, 2008; an appeal from the denial

This is an appeal as of right from the judgment. Defendant-Appellant is appealing on the original record and is represented by Patrick Michael Megaro.

QUESTIONS PRESENTED

1. Was the Trial Court's Interested Witness Charge Infirm on State and Federal Constitutional Grounds on its Face and Improper as Applied Where the Only Witnesses to Testify Were the Police Officers and the Defendant-Appellant?

2. Whether the Trial Court Conducted the Proper Inquiry Before allowing the Defendant-Appellant to Represent Himself Pro-se and Whether the Trial Court Properly Advised the Defendant-Appellant of His Right to Have Counsel at Every Critical Stage of the Proceedings?

3. Whether the Court's Comments During the Defendant-Appellant's Cross Examination of the People's Witness and Arguments Resulted in Burden Shifting Thereby Denying the Defendant-Appellant of his Due Process Rights Under the 14th Amendment of the United States Constitution and Article 1, Section 6 of the New York State Constitution and his Fifth Amendment Right to Remain Silent?

STATEMENT OF FACTS

Introduction

Defendant-Appellant was arrested on October 21, 2007, and charged by a felony complaint filed in the New York County Criminal Court on October 22, 2007. Thereafter, the instant indictment was filed in the New York County Supreme Court, and Defendant-Appellant was arraigned on the indictment on November 28, 2007. After two substitutions of counsel, the case was scheduled for pre-trial hearings and trial on May 20, 2008.

The Suppression Hearing and Waiver of Counsel

On May 20, 2008, a hearing was held upon the Defendant-Appellant's motion to suppress identification evidence and physical evidence before the Honorable Rena Uviller. Prior to the commencement of the hearing, the Defendant-Appellant informed the court that he had not discussed the case with his assigned counsel, who had been appointed on May 1, 2008. (H-7, H-8). This was confirmed by assigned counsel, who informed the hearing court that he had not had the opportunity to meet privately with the Defendant-Appellant. (H-7, H-8). After some discussions, the hearing court second-called the case for the afternoon session and directed counsel to speak with the Defendant-Appellant privately in the interim. (H-11).

Upon recalling the case in the afternoon, the hearing court first inquired whether the Defendant-Appellant would accept the plea offer

extended by the People, to which the Defendant-Appellant replied he would not. (H-12). Immediately thereafter, the following colloquy ensued:

THE DEFENDANT: I suggested to my attorney I wanted to proceed pro-se.
THE COURT: Let me say this to you, Mr. Collins, have you been to trial before?
THE DEFENDANT: Yes, I have, Your Honor
THE COURT: Have you represented yourself?
THE DEFENDANT: That I have not, Your Honor.
THE COURT: How far did you go in school?
THE DEFENDANT: I have some para-legal experience and I have a G.E.D., Your Honor
THE COURT: You understand that you're facing a possible life sentence if you are convicted in this case; do you understand?
THE DEFENDANT: Yes, I do.
THE COURT: Do you also understand it is an extremely bad idea for you to go pro-se because no judge is going to give you any extra advantage or benefit because you are go pro-se. You will get no special privileges from the Court. Do you understand?
THE DEFENDANT: Yes, I do, Your Honor.
THE COURT: You'll be required to follow all of the evidentiary rules, and there will be no special license given to you, but you may very well not know what the rules are. You know the old expression, a person who represents himself has a fool for a client?
THE DEFENDANT: I do.
THE COURT: This is an extremely bad idea.
THE DEFENDANT: Yes, I know.
THE COURT: When you went to trial before you had an attorney, correct?
THE DEFENDANT: Yes, I did.
THE COURT: And do you understand that you are facing a life sentence if you are convicted; do you understand that?
THE DEFENDANT: Fifteen years is life?
THE COURT: You could get twenty-five years to life in prison as a discretionary persistent felon. That is what you can get.
THE DEFENDANT: Wow!
THE COURT: That is a big wow. You are absolutely right. That's what is going to happen if you lose at the trial. That's what you are going

to be possibly facing. Now, if you want to go pro-se, Mr. Katz will be available for you to consult with, and if we find that you are using your pro-se status just to disrupt the trial, you will not be allowed to go pro-se. If it's just going to be a means for you to avoid behaving and following the rules, he'll continue to represent you; do you understand that?

THE DEFENDANT: Yes.

THE COURT: Knowing that you have a possible twenty-five life possible sentence, is that what you wish to do?

THE DEFENDANT: At this time I feel I can do no worse than the attorneys I had.

THE COURT: Are you waiving your right to a lawyer?

THE DEFENDANT: I am.

THE COURT: Let's find a part for it and let me speak to the expediter.

THE DEFENDANT: Thank you, Your Honor.

THE COURT: You have to sign a waiver. You have a waiver available?

MR. KATZ: The clerks have the waivers. My situation tomorrow morning - -

THE COURT: I could actually do the hearing pro-se. I could do the hearing pro-se. Excuse me, I'll do the hearing pro-se, but if it goes to trial, it's going to be tried by someone else. Let's leave it the way it is. Don't send it out at this point, but I need you to give me a waiver.

(At which time there was a pause in the proceedings)

THE COURT: All right, Mr. Collins, do you understand you are waiving your right to an attorney and Mr. Katz is here to confer with you, and if I find that you are disrupting the proceedings by going pro-se, you will not be permitted to go pro-se.

THE DEFENDANT: I fully understand it, judge.

THE COURT: Please give me the waiver.

THE CLERK: I am looking for one, judge.

MR. KATZ: I would ask to instruct Mr. Collins that since I am hear (sic) as his legal advisor, I can only advise him on legal issues and not how to examine and cross-examine witnesses, since he is taking over the role. That function, that I'm only to advise him if there is any questions about the law.

THE COURT: You are here to advise him on all matters.

MR. KATZ: That's fine. I wanted it to be on the record.

THE COURT: We have to get the attorney waiver form, but I have another matter I have to deal with. So we will have to second call this.

THE DEFENDANT: Can I leave my stuff on the table.

COURT OFFICER: Yes

(Third call)

THE CLERK: Recall of the People against Collins

THE COURT: The defendant has a waiver now and is about to sign that waiver.

THE CLERK: I am finishing up now, judge.

THE COURT: Okay, Mr. Collins, the officer is providing you with the waiver of counsel form. Would you please sign that if that is what you wish to do?

(At which time the defendant signs the papers)

THE COURT: By the colloquy we had earlier, I'm satisfied that Mr. Collins understands he has a right to an attorney. He is waiving his right to an attorney; is that correct, Mr. Collins?

THE DEFENDANT: Yes, it (sic), Your Honor

THE COURT: I'm accepting the waiver. Call your witness, by the People. (H-12 through H-17)

Thereafter, the court proceeded to conduct the suppression hearing with the Defendant-Appellant representing himself with assigned counsel standing by as his legal advisor. (H-16). The People called two witnesses at the suppression hearing, Detective JohnPaul Slater and Police Officer JohnFrank Tullo, both of the of the Narcotics Borough Manhattan North command. The defense called no witnesses, and at the conclusion of the hearing, the hearing court denied the motion to suppress.

The Trial

The Defense Opening Statement

Defendant-Appellant delivered his opening statement on May 29, 2008. After the trial court instructed him to limit his arguments to what he believed the evidence presented at the trial would show, the following ensued in the presence of the jury:

THE DEFENDANT: Okay, well you will hear testimony of government witnesses that may seem not so credible to you and you can evaluate that when you make your deliberations. You may have heard the phrase if the foundation is weak then the house can't stand, that's exactly what this case is, the People are trying hard to protect their case, specifying at the same time to provide justice. You will perhaps hear testimony that the defendant is a single parent who had custody of his son.

MR. PERRY: Objection

THE COURT: Sustained. There will be no such testimony.

THE DEFENDANT: Okay. You will perhaps hear that the defendant has a past criminal history and up until 2005 has been working to establish himself back in society as a productive and responsible citizen by going to school.

MR. PERRY: Objection

THE DEFENDANT: To further his education to make him more marketable for a better paying job.

MR. PERRY: Objection

THE COURT: Sustained.

THE DEFENDANT: You will perhaps hear witnesses' testimony as to the defendant's reputation in the community as being honest responsible father and not a drug dealer.

THE COURT: The only –

MR. PERRY: Objection.

THE COURT: The only thing about reputation testimony is permitted for in this courtroom is that you have a reputation for truth telling or honesty if you take the stand. If you do not take the stand you do not get character witnesses.

THE DEFENDANT: Well, I have to object to that, Your Honor.

THE COURT: Overruled.

THE DEFENDANT: How can I not have witnesses?

THE COURT: Overruled, if you testify then your testimony may be supported by character witnesses. If you do not testify there are no character witnesses in a trial in New York County. (T-16 – T-18)

The People's Case

POLICE OFFICER ANTHONY RICEVUTO assigned to the Narcotics Borough Manhattan North command, was the first witness called by the People. Officer Ricevuto testified that on October 21, 2007, he was working as an undercover police officer in an operation conducted by the New York Police Department. (T-31). At approximately 5:30 p.m., he was operating in the vicinity of 2612 Broadway in Manhattan. (T-32). He testified that he met with a man wearing a black bandana and asked him if he could get two dimes, to which the man replied that he could because he was selling out there on that day. (T-35-37). Officer Ricevuto identified Defendant-Appellant in the courtroom as the male with the black bandana. (T-35). He testified that he followed the Defendant-Appellant to a doorway at 2612 Broadway, where the Defendant-Appellant reached into the front of his pants, withdrew a plastic bag, took out two twists containing what he believed was crack cocaine, and handed him $20 in pre-recorded buy money. (T-43, T-44). He then left the location and radioed to other police officers a description of the seller and indicated a positive buy. (T-44). Officer Ricevuto saw Defendant-Appellant in police custody in front of 2612 Broadway and confirmed his identity. (T-46, T-59). The two twists of crack

cocaine were taken back to the command, where they were field-tested positive for cocaine. (T-47). He then vouchered the two twists of cocaine as evidence and sent them for laboratory analysis. (T-48).

DETECTIVE JOHNPAUL SLATER assigned to the Narcotics Borough Manhattan North command, testified for the People. On October 21, 2007, he was assigned as the arresting officer on the buy and bust operation with Detective Ricevuto. (T-82). He testified that he arrested Defendant-Appellant that day after receiving a radio transmission Undercover # 29755, another undercover officer who was operating with Detective Ricevuto. (T-83, T-84). Upon arresting Defendant-Appellant, he testified that he recovered $31 in United States currency from him, including $20 of pre-recorded buy money, and two cellular telephones. (T-86). He also testified that he felt an object in the Defendant-Appellant's groin area, but did not search him further upon determining that the object was not a weapon. (T-88). After vouchering those items, he received a plastic bag from Police Officer JohnFrank Tullo that contained 13 twists of crack cocaine, which he then field-tested positive for cocaine, which were also vouchered. (T-92 – T-94). The crack cocaine was sent to the laboratory for testing. (T-97).

Over objection, the witness was permitted to testify that, in his experience, drug users would only have one or two bags of narcotics on their

person, while drug dealers would tend to have more. (T-99). He was further permitted to testify over objection that the manner in which Defendant-Appellant had the narcotics packaged indicated that he was a drug dealer as opposed to a user. (T-100).

On cross-examination, Defendant-Appellant then attempted to challenge Officer's Slater's testimony that he was the arresting officer, and that he took part in his apprehension and arrest in front of 2612 Broadway. After sustaining several objections to the Defendant-Appellant's questions, the following ensued in the presence of the jury:

THE COURT: Sustained. Let me ask you a question, did those two arrests have anything to do with this case?
THE WITNESS: No.
THE COURT: Okay.
THE DEFENDANT: Your Honor, I'm asking for the simple fact because the officer that claims he's Officer Slater, I remember that night clearly that day, that it's not the same person.
THE COURT: Well, when you put it in you may put that in but that's his testimony.
THE DEFENDANT: Your Honor, I would ask that this witness be identified of who he is, Your Honor. He's not the same person.
THE COURT: Well, he says he is.
THE DEFENDANT: Okay, I'm saying he's not.
THE COURT: That may be.
THE DEFENDANT: I'm talking about prosecutorial misconduct, Your Honor.
THE COURT: When you take the stand you may give your version of what happened or you may not; this is his testimony.
THE DEFENDANT: Your Honor, I'm asking—
THE COURT: This is his testimony.
THE DEFENDANT: I'm asking—saying he's not properly identified; he is not the arresting officer from that night. I'm talking about

prosecutorial misconduct. I would ask that an immediate investigation be done.

THE COURT: Okay.

THE DEFENDANT: I was there.

THE COURT: Overruled. Let's go on.

THE DEFENDANT: Wow, how can I get a fair trial, Your Honor?

THE COURT: Overruled.

THE DEFENDANT: You—

THE COURT: When I say overruled, that's the end of it. You may put that in your testimony in evidence if you wish.

THE DEFENDANT: That was the basis.

THE COURT: But you are not to argue with me.

THE DEFENDANT: I'm not arguing with you, Your Honor. How can I effectively establish the events of that night if—

THE COURT: This is his testimony, you can put in other testimony and other witnesses if you wish. At this point we're moving ahead if you elect not to, I will—

(T-108-110) (emphasis added)

After some additional colloquy, the jury and the witness were excused from the courtroom. When the jury was brought back into the courtroom, the trial court instructed them as follows:

THE COURT: Ladies and gentlemen, you heard some outbursts. Please ignore it – those outbursts. They are neither evidence, nor testimony; nor anything else. **Should there be evidence which contradicts what this officer is being – is testifying to, you are to evaluate such evidence the same way you would evaluated the testimony of this officer; make up your own minds as to what's going on at this point**. We will continue with the cross-examination. I have admonished the defendant; I have warned the defendant that if we have any further outbursts of this nature, that I will exclude him from the courtroom. It's very serious for him because he is conducting his own defense. At this point, and we will continue the case as if there is an empty chair. I believe he understands the significance and the importance; and I understand that he's under pressure because he's on trial, **so if you will please excuse him, but I will not tolerate anything further. I've warned him**. So, let us continue. Do you have

any further questions for this witness? (T- 121) (emphasis added) Cross-examination then resumed and the testimony of the witness was completed on Monday, June 2, 2008.

POLICE OFFICER JOHNFRANK TULLO, a 14-year veteran of the NYPD, testified that he was assigned to the prisoner transport van on October 21, 2007. After Defendant-Appellant was apprehended by Detective Slater, he transported him to the 24th Precinct, where he searched the Defendant-Appellant inside a bathroom and recovered 13 twists of crack-cocaine from the area of Defendant-Appellant's testicles. (T-184). This was recovered pursuant to a strip-search, where the Defendant-Appellant was made to strip naked in the bathroom. (T-198). After recovering the crack cocaine, Police Officer Tullo gave the evidence to Detective Slater, who processed it. (T-185).

MARIEM MAGALLA, was qualified as an expert for the prosecution. She testified that as a chemist for the NYPD laboratory, she performed several tests on the crack cocaine that was received in evidence as People's Exhibit 4 on October 24, 2007. (T-209-212). These tests indicated the presence of cocaine. (T-213).

After this witness concluded her testimony, the People rested.

The Defense Case

After the People rested during the morning session of June 2, 2008, Defendant-Appellant's legal advisor went into the hallway of the courtroom and spoke with CHARISSE FISHER, the proposed defense witness. (T-223). The legal advisor informed the trial court that Defendant-Appellant still intended to call CHARISSE FISHER as a witness, and that she was waiting in the hallway. (T-223). Thereafter, the court took a luncheon recess until 2:15 p.m. (T-227).

After the lunch break, the Defendant-Appellant attempted to call CHARISSE FISHER to the witness stand. (T-228). The trial court directed the legal advisor to get Ms. Fisher, and told Defendant-Appellant that he would testify first. (T-228).

DJUAN COLLINS then took the stand in his own defense and testified in the narrative on direct examination. A father of a 17-month old son, he testified that on October 21, 2007, he left his home in Rosedale, Queens County, and went to Manhattan to socialize with some friends. (T-230, T-231). Upon leaving his home, he saw a black bandana on the side of the house that he believed belonged to his son's mother, which he picked up and placed in his pocket. (T-231). When he arrived in Manhattan, he went to a building where a friend resided, to find that the friend was not at home. (T-232). He waited outside the building for some time, when a white male approached him and asked him several questions, including whether

"Dre" was inside, "are they working in there," and whether Defendant-Appellant knew where he could "get something around here?" (T-232). To each question, Defendant-Appellant merely shrugged his shoulders, finally responding "Leave me the fuck alone, man. What do you want?" (T-232). He then left the location and purchased a bottle of beer at a nearby store, then returned to wait for his friend. (T-233).

After waiting in front of the building for a short time, police officers approached him and ordered him to put his hands up against the wall, where they began asking him who was working, and placed a $20 bill in his pocket. (T-233). A van pulled up, and Defendant-Appellant was searched, his money was taken from his pocket, along with his cigar and two cell phones. (T-234). He was placed in the van, where Officer Tullo asked him whether he wanted a job, which he understood that the police wanted him to become an informant. (T-234). After initially agreeing to become an informant, Defendant-Appellant was driven around in the van, which picked up other arrestees. (T-235). After several objections were sustained, the following occurred in the presence of the jury:

THE DEFENDANT: On what grounds do you object to that, Your Honor?
THE COURT: It's not relevant to this.
THE DEFENDANT: But, I'm giving you –
THE COURT: It's relevant to they (sic) arrested somebody else and put him in the car, right?
THE DEFENDANT: Well, I'm giving you a step-by-step –

THE COURT: You're giving your colorful view of it, but that's not relevant to your case here. (T-236). (emphasis added)

Defendant-Appellant continued that after arriving at the precinct, he was taken to a bathroom, strip-searched, and made to get dressed. (T-237). He was taken to an interview room and asked questions about drug, whereupon Defendant-Appellant supplied the police with several names. (T-238, T-239). He was then permitted to make a phone call. (T-244). The trial court sustained numerous objections as to the occurrences at the precinct and Defendant-Appellant's interactions with police officers. The following occurred in the presence of the jury on direct testimony:

THE COURT: I'll sustain that, what you gave up thereafter is not relevant.
THE DEFENDANT: All right.
THE COURT: The question before this jury is what you've been indicted for as to whether you sold narcotics to an undercover.
THE DEFENDANT: I didn't sell no drugs.
THE COURT: Well, that's what you've testified to. Whether you possessed it with the intent to sell, whether you possessed a certain weight, once you've been arrested and the drugs have been found on you, then there is nothing further for you to testify to at this point.
THE DEFENDANT: You know, Your Honor, you keep saying what was found on me, don't you suppose to say allegedly found on me. You trying to prejudice this jury by saying what was found on me, man, you know, that's how it's supposed to be said, say allegedly.
THE COURT: Okay, continue, please but at this point once that narrative is finished, what happens afterwards is not relevant for this jury.
…
THE COURT: Now, is this the point at which before or after they allegedly recovered the bag from you; because once there has been a recovery of the bag, if it occurred, then there is nothing further after that that is relevant.

THE DEFENDANT: They never recovered nothing from me.

The trial court repeatedly instructed Defendant-Appellant not to testify to anything past the point of the alleged recovery of narcotics at the precinct, and cross-examination then began by the District Attorney.

On cross-examination, Defendant-Appellant testified that he was unsure whether the white male who approached him on the date in question, but related that the white male did resemble him. (T-250). He was also cross-examined about his prior convictions by the Assistant District Attorney, concerning a felony conviction in New York in 1995, and two felony convictions in Illinois in 1989 and 1990. (T-258). His testimony on cross-examination as to the occurrences of October 21, 2007 was consistent with his testimony on direct examination; he consistently denied selling or possessing any drugs. After initially stepping down from the witness stand, Defendant-Appellant took the stand again and testified that he was wearing a white sweat suit made of nylon with black stripes and white sneakers, which was inconsistent with the description of his clothing given by the People's witnesses. (T-261).

At the conclusion of Defendant-Appellant's testimony, the following occurred:

THE COURT: Okay, do you have another witness who is here and ready to go?

THE DEFENDANT: Well, I would like to have called some character witnesses, Your Honor.

THE COURT: Well, they're not here. The character witnesses are within your control and they are not here, so, at this point I think it's time –

…

THE COURT: Sustained. Members of the jury the next step to this trial will be the summations.

THE DEFENDANT: Well, I would like to object to that, man.

(T-265, T-266, T-267).

The Defense Summation

Defendant-Appellant delivered his summation on June 2, 2008. During his summation, the Defendant-Appellant was interrupted by the trial court no less than twenty times, during which the trial court offered commentary, including the following in response to Defendant-Appellant's argument that the police officers planted evidence on him:

THE COURT: There is no evidence in this case of any corrupt cops that I can recall in this case.

THE DEFENDANT: I testified that he tried to put twenty dollars in my pocket.

THE COURT: Well, then there would be, I take that back to the extent that a policeman lied or planted, that would be corruption.

(T-269)

The Interested Witness Instruction

The trial court charged the jury on June 3, 2008, and included the following instruction:

Although not required to do so, the defendant testified on his own behalf, his testimony should be considered by you as you consider the testimony of any other witnesses; however, **I charge you that as a matter of law the defendant is an interested witness. Interested in the**

outcome of the trial. You may as a juror wish to keep such interest in mind in determining weight and credibility to give his testimony. Of course, you should not reject the testimony of a defendant merely because of his interests. It's your duty as the case with all witnesses to accept such testimony of the defendant you believe to be the truth and to reject such of the defendant's testimony you believe to be false.

You will recall when he testified he admitted that he had previously been convicted of three felonies. I now charge and I emphasis that under no circumstances may you consider the fact that he has previously been convicted of these crimes as proof that he committed the crimes for which he is charged in this case. You may, however, consider his previous convictions to help you evaluate his credibility, that is his believability as a witness. **In other words, to aid you in making your determination of what weight you will give his testimony in this case, the People have presented the testimony of police officers and police employees**.

(T-320, T-321)

The Verdict and Sentencing.

On June 3, 3008, the jury returned a partial verdict, finding Defendant-Appellant guilty on the second count, Criminal Possession of a Controlled Substance in the Third Degree, and guilty on the third count, Criminal Possession of a Controlled Substance in the Fifth Degree. The jury was deadlocked on the first count, Criminal Sale of a Controlled Substance in the Third Degree, which was dismissed upon the People's motion. (T-378 – T-380).

Thereafter, on August 15, 2008, Defendant-Appellant appeared for sentencing with newly-retained counsel. The court then sentenced Defendant-Appellant to concurrent sentences as a Prior Violent Felony

Offender of 8 years imprisonment plus 3 years of Post-Release Supervision on the charge of Criminal Possession of a Controlled Substance in the Third Degree, and 2 ½ years imprisonment plus 2 years of Post-Release Supervision on the charge of Criminal Possession of a Controlled Substance in the Fifth Degree.

ARGUMENT

POINT I - THE TRIAL COURT'S INTERESTED WITNESS CHARGE WAS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED WHERE THE CHARGE SINGLED OUT THE DEFENDANT-APPELLANT AS AN INTERESTED WITNESS WHERE THE ONLY WITNESSES AT THE TRIAL WERE THE DEFENDANT-APPELLANT AND POLICE OFFICERS

A. The Criminal Jury Charge is Unconstitutional on its Face

In United States. v. Gains, 457 F.3d 238 (2d. Circ. 2006), the Second Circuit was faced with a similar question as raised in the instant appeal. The Gains court was faced with similar facts, where conflicting police officer testimony and the defendant's testimony "hinged directly on the jury's credibility determinations." Id. at 244. There, the Second Circuit held as follows:

> The 'presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.' Coffin v. United States, 156 U.S. 432, 453, 15 S.Ct. 394, 39 L.Ed. 481 (1895). 'To implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process. In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established ... beyond a reasonable doubt." Estelle v. Williams, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976). Accordingly, this Court has placed out of bounds practices that threaten to dilute the presumption of innocence…This principle leads us to denounce any instruction, including the one at issue here, that tells a jury that a testifying defendant's interest in the outcome of the case creates a motive to testify falsely. We do so not because the instruction is necessarily inaccurate, either generally or as applied to Gaines. To the contrary, we think it clear that defendants frequently have a motive to lie. Indeed, in a perfect world, where prosecutors charged only the guilty,

defendants would always have a motive to testify falsely. But an instruction that the defendant has a motive to testify falsely undermines the presumption of innocence. In this regard, there is an important distinction between a "motive to lie" instruction and an instruction that a defendant has a deep personal interest in the case. Id. at 245-246.

The Gains court went on to condemn the trial court's use of the specific term "deep personal interest." Significantly, the court opined that "[a] defendant's credibility is better addressed 'by reference in the court's general instructions as to all witnesses." Id. citing Taylor v. U.S., 390 F.2d 278 (8th Cir. 1968); see also, Modern Federal Jury Instructions, Inst. 7-4. "Simply stated, an instruction that the defendant's interest in the outcome of the case creates a motive to testify falsely impermissibly undermines the presumption of innocence because it presupposes the defendant's guilt." United States v. Brutus, 505 F.3d 80, 87 (2d Cir. 2007)(internal citation omitted). This statement is unqualified by the specific words used to create such an inference. Rather, Brutus states a Federal constitutional principle that charging the defendant as an interested witness impermissibly undermines the presumption of innocence. When a trial court gives an instruction regarding the interest of the defendant, "[a] jury might well think that the court had a purpose in stating the obvious . . ., a purpose unfavorable to the defendant." Gains, supra at 248.

The 'balancing' concept used in New York State courts is an inappropriate measure to correct this error as "an instruction that assumes

the defendant's guilt is not cured by a further charge that a defendant can still be truthful." Brutus, supra at 87 (internal citation omitted); see also United States v. Spencer, 267 Fed. Appx. 35 (2d Circ 2008). "The critical error in a jury charge that says a defendant has a motive to lie is its assumption that the defendant is guilty." Gains, supra at 247. The Second Circuit has found that "it is error to instruct the jury that a defendant's interest in the outcome of the case creates a motive to testify falsely; it follows that the charge at issue here was error, the prejudice from which was exacerbated by the district court's reference to the defendant's "deep personal interest." Brutus, supra at 87 (internal citation omitted)(emphasis added). In other words, it was not the 'magic language' of the district court, but the charge itself that was in error. The trial court's subsequent reference only served to increase the prejudice. Nothing in the Brutus decision limits its finding to the 'magic language' used in that case. Rather, it is the very assertion that a defendant is an interested witness that renders the charge constitutionally infirm. Brutus, supra at 87-88.

An appropriate jury instruction addresses the evaluation of the defendant's credibility in the same way the jury is to evaluate the testimony of other witnesses. Gains, supra at 249. To charge a jury otherwise is an error of constitutional proportions that undermines the "basic component of a fair trial under our system of criminal justice." Brutus, supra at 88

(internal citations omitted). A Constitutional error such as this requires reversal unless the prosecution can establish that it was harmless beyond a reasonable doubt. Id. at 88. This requires a showing that the error could not have contributed to the conviction. Id. When the evidence is a close test of credibility of the witnesses, the error is not harmless beyond a reasonable doubt. Spencer, supra; Gains, supra.

The New York criminal jury instruction regarding the interested witness highlights the testifying defendant as an interested witness and specifically instructs the jury to consider the interest held by the defendant in determining whether the testimony is truthful or not.[1] This is the specific harm sought to be prevented by the Gains/Brutus rulings. This charge both undermines the presumption of innocence, as it infers that the defendant, who is interested whether he testifies or not (see Gains, supra), may have a motive to lie by virtue of being the defendant. This language impermissibly transgresses against the presumption of innocence and shifts the burden of proof away from the People. In essence, it creates a "who has a better story"

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[1] You may consider whether a witness has any interest in the outcome of the case, or instead, whether the witness has no such interest. A defendant who testifies is a person who has an interest in the outcome of the case. You are not required to reject the testimony of an interested witness, or to accept the testimony of a witness who has no interest in the outcome of the case. You may, however, consider whether an interest in the outcome, or lack of such interest, affected the truthfulness of the witness's testimony (C.J.I. 2d [2008]).

analysis for the jury to consider, rather than the required prosecution proof beyond a reasonable doubt.

New York has dealt with the Gains/Brutus principles in two reported cases. In the first, People v. Blake, 39 A.D.3d 402, 403 (1st Dept. 2007) this Court held that since the jury charge only referred to the defendant as "an example of an interested witness" and did not contain the 'magic language' of "motive to lie and deep personal interest in the case" as such, there was no undermining of the presumption of innocence or shifting of the burden of proof. In the second, People v. Brokenbough, the Second Department ruled that in the absence of the "motive to lie and deep personal interest in the case" language, it was not error to identify the defendant as an "example of an interested witness." 859 N.Y.S.2d 678 (2d. Dept. 2008).

Both New York decisions ignore the principles of the Gains/Brutus rulings that it is constitutionally infirm to refer to a defendant as an interested witness as it creates the appearance that the Court is identifying the defendant as an interested witness for a specific reason, thereby impermissibly creating an inference that the defendant has a motive to lie. Gains, supra at 457 F.3d at 248, see also Brutus, supra. Once the defendant is highlighted as an interested witness, this error cannot be cured by a further charge that the defendant may still be truthful. Brutus, supra at 87; Spencer, supra. Moreover, neither decision addresses the constitutionality of the

New York Sate Criminal Jury Instruction in light of the Gains/Brutus holdings; the issue being whether the charge itself impermissibly undermines the presumption of innocence by highlighting the defendant as an interested witness rather than including the evaluation of the defendant's testimony along with the evaluation of the other witnesses. Respectfully, both Blake and Brokenbough are in error and do not specifically address the issues raised in the instant appeal.

The language of the New York State Criminal Jury Instruction highlights the testifying defendant as a person who has an interest in the outcome of the case and then asks the jury to consider if the interest in the outcome of the case affected the truthfulness of the defendant's testimony. This is in stark contrast to the New York State Criminal Jury Instruction given to the jury if the defendant does not testify where they jury must draw no inference against the defendant.[2] It is exactly the substantive Constitutional violation that the Gains/Brutus holdings seek to prevent and as this constitutes a constitutional violation, the charge itself must be held to be unconstitutional under both State and Federal Constitutions. See People v. Smith, 32 A.D.3d 1318 (4th Dept. 2006).

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[2] "The fact that the defendant did not testify is not a factor from which any inference unfavorable to the defendant may be drawn." C.J.I.2d (2008).

Although no objection was made at the time of reading of the charge, this Court should review the charge in the interests of justice and because it is plain error.

At the outset, giving the charge that a defendant as an interested witness is in contradiction with the Gains/Brutus holdings. Moreover, the language used here specifically asks to consider the truthfulness of an interested witness based upon their interest in the outcome of the case. This charge is given in the singular. The trial court then goes on to highlight the testifying defendant as the interested witness. The specific language used by the trial court signifies that the testifying defendant has an interest in the outcome of the trial and therefore a motive to lie. By highlighting the defendant in this manner the presumption of innocence is dramatically undermined and the burden of proof shifted to the defendant. This error requires reversal.

B. The Criminal Jury Instruction Is Unconstitutional as Applied

The only witnesses to testify at the trial other than the Defendant-Appellant were police witnesses.

There is no rational argument that the finder of fact would have considered any of the police witnesses to have an interest in the outcome of the case based upon the testimony at trial. To read an interested witness charge that singles out the testifying defendant under these circumstances

clearly creates the impression that the court gave that instruction for a specific reason; specifically, that the defendant has a motive to lie. Gains, supra at 248. Thus, having instructed the jury that the defendant has a motive to lie based upon his interest in the case, any subsequent charge that the defendant may still be telling the truth is wholly inadequate as a curative measure. Brutus, 505 F.3d at 87; see also, United States v. Spencer, 267 Fed. Appx. 35 (2d. Cir. 2008). As such, under the circumstances of this case, highlighting the defendant as an interested witness undermined the presumption of innocence and impermissibly shifted the burden of proof creating an error of constitutional proportions that requires reversal. United States v. Spencer, 267 Fed. Appx. 35, 37 (2d. Circ. 2008); United States v. Brutus, 505 F.3d 80, 87 (2d. Cir. 2007); United States v. Gains, 457 F.3d 238 (2d. Circ. 2006).

C. The Trial Court's Failure to Properly Balance the Interested Witness Charge Requires Reversal

Even if the court were to find that the trial court did not commit a Gains/Brutus error, the instruction given by the trial court failed to balance the charge evenly so as not to single out the defendant as the only possible interested witness.

New York has long held that an error that prevents proper consideration by the jury, or which may have misled them and influenced in

their verdict is an error affecting a defendant's substantial right, even though the evidence may otherwise have been sufficient. People v. Ochs, 3 N.Y.2d 54 (1957). In Ochs, the trial court erred by stating that the defendant was less likely to tell the truth as a result of his criminal record. Ochs has often been cited for the proposition that it is lawful to instruct a jury that the defendant has an obvious interest in the outcome of the case and of the defendant's prior criminal history. Id., at 56. While this may be true, it is an error of grave importance where the jury is faced with the main issue of deciding between the credibility and conflicting testimony of the prosecution witnesses against that of the defendant.[3]

The New York State Criminal Jury Instruction on an interested witness is proper only when the charge is properly balanced by instructing the jury that they may consider whether any witness had an interest in the outcome of the case. People v. Agosto, 73 N.Y.2d 963, 967 (1989); People v. Madrid, 52 A.D.3d 532 (2d. Dept. 2008); People v. Dees, 45 A.D.3d (2d. Dept. 2007); People v Francisco, 44 A.D.3d 870 (2d. Dept. 2007).

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[3] The outcome of the case thus depended directly upon the decisions which the jury made with respect to the credibility of the defendant as opposed to that of the witnesses for the prosecution.

It is with regard to this vital issue defendant's credibility that error was committed.

. . .

The error prevented proper consideration by the jury of a most important issue, and could have influenced them in reaching their verdict. It is consequently an error affecting a substantial right. Ochs, at 57.

The trial court's charge in the instant case did not inform the jury that they may consider whether any witness is an interested witness. Rather, the first part of this charge not only highlighted Defendant-Appellant, but referred to the interested witness in the singular. Moreover, the charge failed to inform the jury that they could even consider other witnesses as interested.

In addition, by inviting the jury to compare the Defendant-Appellant's testimony to the testimony of the People's witnesses, the trial court drew added attention to the Defendant-Appellant's criminal history (and by implication the lack of any criminal history for the police), and assigned to Defendant-Appellant a burden of proof.

The trial court then singled out Defendant-Appellant in evaluating his testimony. The trial court specifically told the jury to keep in mind his interest in the case in determining how they weigh his credibility without any such reference to other witnesses. These charges imply that Defendant-Appellant, as the only interested witness, has a motive to lie. These constituted substantial errors that diluted the presumption of innocence and shifted the burden of proof. Ochs, 3 N.Y.2d 54; Agosto, 73 N.Y.2d 963; Madrid, 52 A.D.3d 532; Dees, 45 A.D.3d; Francisco, 44 AD3d 870.

POINT II - THE HEARING COURT FAILED TO CONDUCT THE PROPER INQUIRY BEFORE ALLOWING THE DEFENDANT-APPELLANT TO REPRESENT HIMSELF PRO- SE

AND THE TRIAL COURT FAILED TO ADVISE THE DEFENDANT-APPELLANT OF HIS RIGHT TO COUNSEL AT EVERY CRITICAL STAGE OF THE PROCEEDINGS

In Faretta v. California, 422 U.S. 806 (1975), the United States Supreme Court held that when a criminal defendant demands self-representation, the trial court should first establish that the defendant has the present mental capacity to make an intelligent waiver. This type of inquiry is analogous to the types of questions asked of a defendant at the time he wishes to enter a plea to the court. A trial court is charged with making a full inquiry of a defendant who wishes to represent himself, including but not limited to; the defendant's age, education, ability to read and write, influence of drugs or alcohol, prior legal experience, knowledge of the evidence code, and whether the defendant has ever been adjudicated incompetent or is currently suffering from any mental disability.

New York has adopted the holding in Faretta. A criminal defendant's "choice" to proceed pro se "must be honored" as long as the Court is satisfied, following a "searching inquiry" that defendant is competent to represent himself, is aware of the dangers and disadvantages of self-representation and is apprised "of the singular importance of the lawyer in the adversarial system of adjudication." People v. Slaughter, 78 N.Y.2d 485, 491 (1991), see also People v. McIntyre, 36 N.Y.2d 10, 17 (1974). The trial court must be satisfied, in short, that defendant's waiver of the right to

counsel is knowing, intelligent and voluntary. People v. Sawyer, 57 N.Y.2d 12, 21 (1982).

In People v. Slaughter, the Court of Appeals dealt with the issue of what type of inquiry should be made by a trial court faced with a criminal defendant who wishes to represent himself. There the Court held that the inquiry the trial court had conducted was insufficient to allow the defendant to represent himself, holding that:

> The hearing court's failure to warn defendant of the risks inherent in proceeding pro se requires a new suppression hearing, however. By representing himself, a defendant is necessarily foregoing the benefits associated with the right to counsel. For such a waiver to be effective, the court must be satisfied that it was unequivocal, voluntary and intelligent. To ascertain that it is, the court should undertake a sufficiently 'searching inquiry' of the defendant to be reasonably certain that the 'dangers and disadvantages' of giving up the fundamental right to counsel have been impressed on the defendant. Id. at 491 (internal citations omitted)/

Here, neither the hearing court nor the trial court made a "searching inquiry." Both courts failed to advise Defendant-Appellant about the specific dangers about self representation, instead making a statement that it

was "an extremely bad idea," a fact that Defendant-Appellant acknowledged. Defendant-Appellant was asked a few questions about his educational background, which was extremely limited at best, and his prior legal experience, but no inquiry was made about any possible mental illness or defect that the Defendant-Appellant may have suffered from. (H-12 through H-17). The hearing court focused mainly on the possible sentence Defendant-Appellant could receive if he were convicted, warned him that if his self-representation became a distraction he would not be permitted to proceed pro se, and merely informed Defendant-Appellant that he would get "no assistance from the [c]ourt."

In addition, neither the hearing court nor the trial court took any steps to ensure that Defendant-Appellant's choice to represent himself was a voluntary choice. On the day Defendant-Appellant was expected start the suppression hearings, and then immediately proceed to trial thereafter, he informed the hearing court that he had never met with or discussed the case with his assigned counsel, a fact that counsel acknowledged on the record in open court. After taking a lunch recess, giving Defendant-Appellant only a few hours to discuss his case with his attorney, a case which could have resulted in a possible sentence of 25 years to life, the hearing court again pressed Defendant-Appellant to go forward the with hearing and the trial.

Given only a few hours to discuss the case with a lawyer, formulate a defense, review the facts and the law, it cannot be said that his Sixth Amendment and Due Process rights were being scrupulously honored by the court. Rather, the hearing court continuously pressed Defendant-Appellant to decide whether he would accept the plea bargain being offered, and if not, to get ready for the first witness to be called. Given the option to accept a four and one-half year plea bargain, or proceed to trial with a lawyer who was admittedly unprepared to try the case because he had failed to interview his client, the most basic requirement of representation, Defendant-Appellant's feeling that he could do no worse representing himself was understandable.

Therefore, because the court below failed to conduct the proper inquiry as to the Defendant-Appellant's qualifications to represent himself pro se, the waiver of the right to counsel was insufficient and the convictions should be reversed.

POINT III - THE TRIAL COURT'S COMMENTS DURING THE DEFENDANT-APPELLANT'S CROSS EXAMINATION OF THE PEOPLE'S WITNESS AND ARGUMENTS RESULTED IN BURDEN SHIFTING THEREBY DENYING THE DEFENDANT-APPELLANT DUE PROCESS OF LAW AND IN VIOLATION OF DEFENDANT-APPELLANT'S FIFTH AMENDMENT RIGHT TO REMAIN SILENT

It is axiomatic that the burden of proof in a criminal prosecution rests with the District Attorney and never shifts to the defendant. The Fourteenth Amendment to the United States Constitution prohibits any State from depriving a person of liberty without Due Process of law and thus prohibits a State from shifting to the defendant the burden of disproving an element of the crime charged. Mullaney v. Wilbur, 421 U.S. 684 (1975). Where a trial court's ruling or instruction shifts the burden of proof from the prosecution to a defendant, a denial of Due Process occurs. Sandstrom v. Montana, 442 U.S. 510 (1979). Similarly, the Fifth Amendment of the United States Constitution and the New York Constitution guarantee a criminal defendant the right to remain silent, and to have no adverse inference drawn from his silence before a trial jury.

New York courts have dealt with the issue of burden shifting errors committed by trial courts in numerous cases. In People v. Rodriquez, 211 A.D.2d 443 (1st Dept. 1995), this Court dealt with a situation where the trial court asked what the defense intended to prove by during opening statements. In that case, this Court found that the trial court's comments constituted error because it could "give the jury a message that there were indeed things that the defense had to prove." This Court also addressed the issue in People v. Robinson, 202 A.D.2d 225 (1st Dept. 1994), reversing a conviction where the trial court curtailed a defense opening statement by

asking him what he intended to prove, and when no answer was forthcoming, prohibiting counsel from arguing further.

New York appellate courts have also found reversible error in other situations where trial courts have shifted the burden to the defendant through rulings or instructions. see People v. Cotterell, 7 A.D.3d 807 (2d. Dept. 2004) (failure to instruct jury that burden of proof lies with the People and never shifts deemed fundamental error); People v. Odenthal, 216 A.D.2d 70 (1st. Dept. 1995) (instruction that jury choose "which testimony you like better" between prosecution witnesses and alibi witnesses impermissibly shifted the burden to defendant); People v. Pegeise, 195 A.D.2d 337 (1st. Dept. 1993) (instruction requiring jurors to supply concrete reasons for their inclination to acquit impermissibly shifts the burden to the defendant); People v. Pettaway, 153 A.D.2d 647 (2d. Dept. 1989) (trial court's instruction that defendant was required to present evidence to rebut statutory automobile presumption was reversible error).

In the instant case, the trial court and Defendant-Appellant had this exchange during his cross-examination of the People's witness:

THE DEFENDANT: Your Honor, I'm asking for the simple fact because the officer that claims he's Officer Slater, I remember that night clearly that day, that it's not the same person.

THE COURT: Well, when you put it in you may put that in but that's his testimony.

THE DEFENDANT: Your Honor, I would ask that this witness be identified of who he is, Your Honor. He's not the same person.

THE COURT: Well, he says he is.

THE DEFENDANT: Okay, I'm saying he's not.

THE COURT: That may be.

THE DEFENDANT: I'm talking about prosecutorial misconduct, Your Honor.

THE COURT: When you take the stand you may give your version of what happened or you may not; this is his testimony.

(T-108-110)

The trial court clearly was making comments to the jury that the Defendant-Appellant was going to be testifying, or that he should testify, that his testimony was going to or should include certain statements or evidence that supported his line of questioning during cross examination. However, in doing so, the trial court created an inference that if the Defendant-Appellant did not testify and offer such statements, that his line of questioning was not to be considered by the jury, and thus that he had a burden to substantiate the subject matter of his questions. These comments effectively shifted the burden of proof from the People to the Defendant-Appellant, signaling to the jury that he had to prove his innocence. At the same time, the trial court signaled to the jury that Defendant-Appellant had an obligation to take the witness stand and give his version of events if he persisted in advancing his theory of defense.

This constituted fundamental error. By imposing upon Defendant-Appellant the burden of proving himself innocent, particularly by his own

testimony, the trial court violated the Defendant-Appellant's rights to Due Process of law and against self-incrimination, and placed a burden upon him to disprove the testimony of the police officers who testified for the prosecution. As a result, this Court should reverse Defendant-Appellant's convictions.

CONCLUSION

For the reasons set forth herein, this Court should reverse the Defendant-Appellant's convictions and dismiss the indictment, or in the alternative, order a new trial.

Respectfully submitted,

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