To be argued by
EVAN M. GOLDMAN

New York Supreme Court

Appellate Division – First Department

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

FELIX CEPEDA,

Defendant-Appellant.

BRIEF FOR RESPONDENT

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PRELIMINARY STATEMENT

This is an appeal from a judgment of the Criminal Court, Bronx County, rendered December 1, 2006, convicting appellant, after a bench trial, of driving with ability impaired and sentencing him to a Conditional Discharge and a Three Hundred Dollar Fine. (Marvin J. at trial and sentence).

Notice of appeal was timely filed on December 6, 2006, granted appellant leave to appeal as a poor person on the original record and typewritten briefs and assigned Steven Banks as counsel on appeal.

QUESTIONS PRESENTED

I. WHETHER APPELLANT'S CONVICTION WAS BOTH LEGALLY SUFFICIENT AND SUPPORTED BY THE WEIGHT OF THE EVIDENCE WHERE APPELLANT WAS OBSERVED DRIVING ERRATICALLY, SMELLED OF ALCOHOL, HAD IMPAIRED MOTOR SKILLS, AND HAD A BLOOD ALCOHOL CONTENT OF .06 PERCENT APPROXIMATELY ONE AND A HALF HOURS AFTER BEING PULLED OVER BY THE POLICE

II. WHETHER THE TRIAL COURT WAS WITHIN ITS DISCRETION BY LIMITING CROSS-EXAMINIATION, WHICH HAD NO BEARING ON WITNESS CREDIBILITY OR ON APPELLANT'S GUILT OR INNOCENCE AND ACTED PROPERLY IN NOT GRANTING THE APPELLANT AN ADJOURNMENT TO PRESENT A WITNESS WHO WAS NOT PRESENT DURING THE INCIDENT AND WHOSE TESTIMONY WAS MERELY SPECULATIVE

STATEMENT OF FACTS

I. Introduction

Felix Cepeda ("Appellant") was charged with Driving While Ability Impaired, stemming from a 3:00 a.m. traffic stop on August 12, 2006. Appellant was pulled over after making an illegal u-turn in front of an NYPD vehicle. Appellant's breath smelled of alcohol, he had bloodshot and watery eyes, and he admitted to the arresting officers that he had been drinking. Officer Delguidice asked Appellant to step out of his vehicle, which appellant attempted to, although he stumbled back onto his car. At approximately 4:40 a.m., more than one and a half hours after being pulled over, appellant's blood alcohol content was .06 percent. Appellant was charged by a misdemeanor information dated August 12, 2006. On September 29, 2006, Judge Oliver directed a *Huntley/Mapp/Dunaway* hearing be conducted, which was held on December 1, 2006. At the hearing, the defense's motions to suppress were denied, followed by a non-jury bench trial.[1]

The People called Police Officer Laura Delguidice, the arresting officer, who testified to appellant's illegal u-turn and the behavior that led to her conclusion that appellant was driving while ability impaired. The court found Officer Delguidice's testimony to be both relevant and credible. Police Officer Joseph Liotta, who administered a Breathalyzer test to appellant, then testified that appellant seemed visibly intoxicated and his blood alcohol content was .06 percent more than an hour and a half after the traffic stop. The defense chose not to present a case. Based on the testimony of both police officers, as well as the results of the breathalyzer test, appellant was convicted of driving while ability impaired.

[1] The court combined the suppression hearing and bench trial, with the consent of all parties, in the interest of convenience. Therefore, all testimony is considered trial testimony.

II. People's Case

In the early morning of August 12, 2006, New York City Police Officers Laura D. Delguidice, John Tescano, and Edmund Kearney were on a tour of duty for the 49th Precinct Conditions Unit (Tr. Rec. at 7).[2] They were assigned to spot quality of life crimes, such as open containers of alcohol, graffiti, public exposure, and drunk drivers (Tr. Rec. 7-8, 10). At the time of the trial, Officer Delguidice had been a police officer for approximately four and a half years (Tr. Rec. 8). During her time on the force, she made over one hundred traffic stops, issued approximately seventy-five summonses for open container, and made approximately four DWI-related arrests (Tr. Rec. 9, 19).

At approximately 3:00 a.m., Office Delguidice observed a northbound 1996 Mercury mini-van near the intersection of Antin Place and Bronxdale Avenue in the Bronx (Tr. Rec. 12-13). Sitting in the front passenger seat of a marked NYPD vehicle (Tr. Rec. 10), a uniformed Officer Delguidice watched the mini-van make an illegal u-turn, causing her partner to brake suddenly (Tr. Rec. 12).[3]

Office Delguidice put the sirens on and the mini-van pulled over (Tr. Rec. 13). The three officers exited their vehicle, approached the mini-van, and Officer Delguidice asked appellant for his driver's license and registration (exiting vehicle: Tr. Rec. 13-14; 40). At the time, appellant's keys were in the ignition, the mini-van was running, and Officer Delguidice noticed that appellant's speech was slurred and a strong odor of alcohol was emanating from appellant's breath (Tr. Rec. 14). Officer Delguidice shined her flashlight in appellant's face, (Tr. Rec. 15), and realized that appellant's eyes were "bloodshot" and "watery" (Tr. Rec. 28, 50). Trying to get a clearer picture, Officer Delguidice asked appellant if he had any drinks, to which appellant

[2] Numbers following "Tr. Rec." refer to the pages of the hearing and trial transcript.
[3] Officer Delguidice testified that the mini-van was approximately 30 feet in front of the NYPD vehicle when her partner slammed on the brakes.

responded that he had "like four beers" (Tr. Rec. 15). Both parties spoke English and Officer Delguidice felt comfortable that appellant understood their conversation; appellant did not request any questions be repeated (Tr. Rec. 16, 42). Officer Delguidice asked appellant to step out of his mini-van, and although he anxiously complied, he stumbled back onto his vehicle (Tr. Rec. 16). Appellant was placed under arrest (*Id*.), and taken to the 45th Precinct where Police Officer Joseph Liotta administered a breathalyzer in Officer Delguidice's presence (Tr. Rec. 16-17). At trial, Officer Delguidice explained that appellant's refusal to answer further questions was caused by a language barrier (Tr. Rec. 33-34).

At the time of trial, Officer Liotta had been with the New York Police Department for fourteen and a half years (Tr. Rec. 66). He had been part of Highway Unit Number One for eighteen months, was a trained breath analysis operator for seventeen months, administered over five hundred tests, had been present for "well over one thousand" tests, and participated in a "few hundred" arrests for persons suspected of driving while intoxicated (Tr. Rec. 66-67, 69, 92).

At approximately 4:40 a.m., Officer Liotta, after receiving appellant's consent, began a breath analysis (Tr. Rec. 76).[4] At the conclusion of the analysis, Officer Liotta determined that appellant's blood alcohol content was .06 percent (Tr. Rec. 18). Using this information, in addition to "the strong odor of alcoholic beverage on [appellant's] breath" and his "bloodshot watery eyes," Officer Liotta was led to the conclusion that appellant was intoxicated (Tr. Rec. 92). Officer Liotta testified that the breathalyzer device, an Intoxilizer 5000, had been properly calibrated, and that an August 10, 2006 field report stated that the device was functioning within

[4] Officer Liotta's warnings were spoken in English and then repeated through an audiotape in Spanish.

the manufacturer's specifications (Tr. Rec. 81-83).[5] The device was tested again on the date of the incident and came back with a result within the margin of error.[6] The process was videotaped, however, the camera did not get an up-close shot of appellant's face (Tr. Rec. 93).

At the conclusion of the breath analysis, Officer Delguidice filled out the appropriate paperwork relating appellant's arrest (Tr. Rec. 32). Although the completed form did not indicate that appellant admitted to having "four beers," Officer Delguidice did note that appellant had been drinking, and that he refused to answer questions (Tr. Rec. 33-34).

III. Defense's Case

The defense chose not to put on a case. Rather, defense counsel attempted to question Officer Delguidice on other traffic stops the night of the incident. Judge Marvin informed counsel that the court was only interested in the incident in question. Counsel then alerted the court that he had one witness who was willing to testify that appellant had not been drinking heavily and explain "kind of a reason for [appellant's] u-turn" (Tr. Rec. 105).[7] However, the witness was not present at the time of the incident and not available during the trial (Tr. Rec. 105). Judge Marvin held that the testimony would be speculative and unhelpful (Tr. Rec. 105-106). The defense chose to rest (Tr. Rec. 106).

IV. Verdict and Sentence

After defense counsel rested, Judge Marvin found appellant guilty of VTL §1192(1) and sentenced him to a conditional discharge (Tr. Rec. 114). Judge Marvin imposed a $300 fine, court costs, a license suspension, and placed the defendant in a Williams Program (*Id.*).[8]

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[5] Although the keyboard's space bar was sticking, it had no effect on the accuracy or effectiveness of the analysis (Tr. Rec. 84, 98).

[6] The device registered a .093 reading while using a controlled sample of .10 of alcohol (Tr. Rec. 103). A misreading of .007, however, is within the device's margin of error (*Id.*).

[7] Although defense counsel had already rested, he again stated his desire to rest.

[8] The court gave the defendant the option of 15 days in jail in lieu of the Williams Program.

ARGUMENT

New York Vehicle and Traffic Law Section 1192(1) states, "No person shall operate a motor vehicle while the person's ability to operate such motor vehicle is impaired by the consumption of alcohol." VTL §1192(1). In this case, the weight of the evidence supports a conviction. Additionally, the trial court properly exercised its discretion in limiting an irrelevant line of cross-examination and not issuing a continuance to secure an immaterial witness.

POINT I

APPELLANT'S CONVICTION WAS BOTH LEGALLY SUFFICIENT AND SUPPORTED BY THE WEIGHT OF THE EVIDENCE WHERE APPELLANT WAS OBSERVED DRIVING ERRATICALLY, SMELLED OF ALCOHOL, HAD IMPAIRED MOTOR SKILLS, AND HAD A BLOOD ALCOHOL CONTENT OF .06 PERCENT APPROXIMATELY ONE AND A HALF HOURS AFTER BEING PULLED OVER BY THE POLICE

The trial court (Marvin, J) properly weighed the evidence and convicted appellant of driving while ability impaired. In conducting a weight of the evidence review, the Appellate Division must go through a two-step process. *People v. Danielson*, 9 N.Y.3d 342, 348 (2007). First, the court must determine whether an acquittal would not have been unreasonable. *Id*.; *see also People v. Romero*, 7 N.Y.3d 633, 636 (2006). If so, the "court must weigh conflicting testimony, review any rational inferences that may be drawn from the evidence, and evaluate the strength of such conclusions." *Id*.; see also CPL §470.15(5). This requires a careful examination of the evidence to ensure that each element of the crime is properly supported. *Id*.; *see also Danielson*, 9 N.Y.3d at 348-349 (holding that the appellate court sits as a thirteenth juror and "decides which facts were proven at trial"); *see also Tibbs v. Florida*, 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982).

The main element in VTL §1192(1) is whether the defendant is impaired, because the court makes clear that no precise blood alcohol content constitutes impairment. *People v. Cruz*, 48 N.Y.2d 419, 423 (1979). A person's consumption of alcohol must render them incapable of operating a motor vehicle in order to be convicted. *Id*. at 428; *see also People v. Lawrence*, 53 A.D.2d 705 (3rd Dep't 1976) (holding that "the result of a breathalyzer showing less than .05 of 1 percent by weight of alcohol in the blood do not establish conclusively that the defendant was innocent of the charge of driving while intoxicated").

Under New York law, blood alcohol content can be considered relevant evidence and even support a prima facie showing of impairment if it's over .07 percent. VTL §1192(2)(b); *see also People v. Scallero*, 122 A.D.2d 350, 352 (3rd Dep't 1986) (an alcohol content between .05 and .07 percent is considered relevant evidence of impairment); *see also People v. Blair*, 98 N.Y.2d 722, 723 (2002) ("Vehicle and Traffic Law § 1195 (2) (c) provides that [e]vidence that there was more than .07 of one per centum but less than .10 of one per centum by weight of alcohol in such person's blood shall be prima facie evidence that such person was not in an intoxicated condition"). Objecting to the results of the operation and administration of the breath analysis, those arguments go to the weight afforded to the results and not its admissibility. *People v. Terrance*, 120 A.D.2d 805, 806 (3rd Dep't 1986). Regardless, courts in New York have long held that testimony by officers as to the physical characteristics of a driver are enough to uphold a conviction. *See People v. Cavana*, 16 Misc.3d 1120(A), *3 (N.Y.Co.Ct. 2007); *see also People v. McConnell*, 11 Misc.3d 57, 60-61 (N.Y.Sup.App.Term 2006); *cf. People v. Michael C.*, 10 Misc. 3d 135(A) (N.Y.Sup.App.Term 2005).

In *Scallero*, the court held that a conviction was legally sufficient when the defendant was pulled over for driving erratically, smelled of alcohol, had a blood alcohol content of .06

percent approximately one hour after the accident, and appeared intoxicated to a police officer. 122 A.D.2d at 352. All of these elements, according to the court, set forth a legally sufficient verdict of guilty beyond a reasonable doubt. *Id*.

The case before this Court is factually similar to *Scallero*. Here, Judge Marvin's decision was both supported by the weight of the evidence and legally sufficient. The court correctly weighed the testimony of Officers Liotta and Delguidice, along with the result of the breath analysis in determining that appellant was impaired. The Intoxilizer 5000, which was working properly, measured appellant's blood alcohol content at .06 percent more than an hour and a half after the initial traffic stop. The finding was consistent with the officers' testimony and should be considered relevant evidence of impairment. See VTL §1192(2)(b). It is not unreasonable that a driver with a blood alcohol content of .06 percent made an illegal u-turn in front of a police vehicle, and had bloodshot eyes, slurred speech and impaired motor skills. It is completely reasonable that a court find the officers' testimony credible and consistent with the breathalyzer results. The evidence, in its totality, supports a finding that appellant was driving with impaired ability. Thus, as in *Scallero*, the finder of fact held that the testimony of the officers was credible and that the breathalyzer reading was accurate. In conclusion, the verdict was supported by the weight of the evidence and we ask that the court affirm appellant's decision.

POINT II

THE TRIAL COURT WAS WITHIN ITS DISCRETION BY LIMITING CROSS-EXAMINIATION, WHICH HAD NO BEARING ON WITNESS CREDIBILITY OR ON APPELLANT'S GUILT OR INNOCENCE AND ACTED PROPERLY IN NOT GRANTING THE APPELLANT AN ADJOURNMENT TO PRESENT A WITNESS WHO WAS NOT PRESENT DURING THE INCIDENT AND WHOSE TESTIMONY WAS MERELY SPECULATIVE

A. The Trial Court Acted Properly In Limiting Cross-Examination

The trial court properly limited defense counsel's cross-examination to a relevant line of questioning. Cross-examination is "the principal means by which the believability of a witness and the truth of his testimony are tested." *People v. Chin*, 67 N.Y.2d 22, 27-28 (1986). This Court, in *People v. Norco*, held that "although the Confrontation Clause of the Sixth Amendment does not prevent trial judges from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness, the wide latitude they retain to impose reasonable limits on such cross-examination must be based upon legitimate concerns." 15 A.D.3d 14, 22 (1st Dep't 2004). The court continued to explain that those concerns include "prejudice, confusion of the issues … or interrogation that is … only marginally relevant." *Id*.; *see also People v. Schwartzman*, 24 N.Y.2d 241, 244 (1969), *cert denied* 396 U.S. 846 (holding that "the nature and extent of cross-examination is subject to the sound discretion of the trial judge"); *see also People v. Dixon*, 228 A.D.2d 175 (1st Dep't 1996) (holding that "the scope of cross-examination lies within the sound discretion of the Trial Judge"). On appeal, this discretion "should not be second guessed in absence of 'plain abuse and injustice.'" *People v. Usage*, 186 A.D.2d 22, 23 (1st Dep't 1992) (*quoting People v. Surge*, 301 N.Y. 198, 202 (1950)).

The Court of Appeals, in *People v. Gissendanner*, set the standard for proper cross-examination of police records and other conduct. Appellant in this case cannot meet this heightened standard. 48 N.Y.2d 543, 549 (1979). The Court held that a defendant must make a preliminary showing that the cross-examination would bear on guilt or innocence, and not be used for "general credibility impeachment." *Id*. Simply "grasp[ing] at a straw" will not suffice. *Id*. Conversely, this court in *Norco*, held that a trial judge committed reversible error when it limited cross-examination of the People's main witness who was motivated to lie based on her

desire to implicate the defendant. 15 A.D.3d at 19-20. That court explained that the direct-examination testimony was "pregnant with the jeopardy in which [the witness] found herself as result of this sordid crime." *Id*. at 20.

In the present case, Judge Marvin's limitation on cross-examination was appropriate. Trial counsel was given multiple opportunities to impeach Officers Delguidice and Liotta. He could have questioned Officer Delguidice on why she said "she" slammed on the breaks but was in the passenger seat, or the accuracy of her notes. However, unlike *Gissendanner*, appellant here cannot meet the standard for cross-examination on police records and conduct. 48 N.Y.2d at 550. Counsel failed to make a preliminary showing that cross-examination would clarify any facts relating to the Police Officers' credibility, or go to appellant's guilt or innocence. *Id*. Defense counsel received Officer Delguidice's notes as part of discovery, and failed to make a showing that such evidence went beyond "that of general credibility impeachment." *Gissendanner*, 48 N.Y.2d at 550. Furthermore, Officer Delguidice was not involved in the commission of a crime, nor would she have gained anything by implicating appellant. *See Norco*, 15 A.D.3d at 20. Officer Delguidice had no motivation to lie—appellant's arrest was not part of an elaborate investigation, nor did the Officers know appellant; instead, this was a random traffic stop as a result of appellant's illegal u-turn. *See Id*. Therefore, the court did not err.

Moreover, this issue has not been preserved for appellate review. New York Criminal Procedure Law requires an objection to a ruling of law be timely and in a sufficient manner. CPL §470.05(2); *see also People v. Dillon*, 61 A.D.3d 1221 (3rd Dep't 2009). Although it is unnecessary to note a formal objection, counsel must "make his position known." *Id*. In the case before this court, defense counsel failed to make the court aware of his position, and merely proceeded with his line of questioning when the Assistant District Attorney, Mr. Paris, inquired

if the court would permit "any car stops of that night" (Tr. Rec. 41). Defense Counsel made no objection, took no exception, and made no petition to the court for clarification or specificity. Therefore, this issue is not preserved for appellate review.

Lastly, this court should not hear this case in the "interest of justice." Criminal Procedure Law allows a reversal or modification of a judgment, sentence or order "as a matter of discretion in the interest of justice" where an error or errors occurred which, although not preserved as a matter of law, nevertheless resulted in an unfair trial. CPL §470.15(3)(c); *see also People v. Garcia*, 125 A.D.2d 186, 187 (1st Dep't 1986) ("vague or conclusory reasons, unsupported by a record which gives them enough substance to 'clearly demonstrate' the actual existence of at least 'some compelling factor, consideration or circumstance', will not make for the intended meaningful appellate review"). The case before this court is not ambiguous or based on weak facts; rather, Judge Marvin, in his role as the finder of fact, determined that the information relating to other traffic stops on the night of the incident was insignificant in deciding whether appellant was impaired. Clearly, Judge Marvin's decision was a proper exercise of his discretion and his determination should not overturned.

B. Judge Marvin Acted Properly in Not Granting Appellant An Adjournment to Secure a Witness

The trial court's decision not to grant an adjournment was proper. It is well settled in New York that a judge must grant an adjournment only if: "(1) … the witness is really material and appears to the court to be so; (2) … the party who applies has been guilty of no neglect; (3) … the witness can be had at the time to which the trial is deferred." *People v. Foy*, 32 N.Y.2d 473, 476 (1973). Adjournments are left to the discretion of the judge at trial. *People v. Spears*, 64 N.Y.2d 698, 699 (1984). If a witness's testimony would be immaterial, and as in the instant case,

defense counsel could not demonstrate good faith in securing the witness for trial, a trial court is well within its discretion in not granting an adjournment. *Id*.

On appeal, it is for the person who requested the adjournment to make a significant showing that the trial judge abused his discretion and that a fundamental right was threatened. *Id*. This is an extremely high standard. *See People v. Husband*, 135 A.D.2d 406 (1987). The New York Court of Appeals has set clear boundaries for respecting the discretion of trial courts, while still holding that courts should be liberal in their discretion when an adjournment could affect a fundamental right. *Foy*, 32 N.Y.2d at 475-76. There are two elements to the Court of Appeals' standard: the efforts of defense counsel to secure the witness' appearance and the materiality of the witness' testimony. *Id*.

Appellant's trial counsel failed to prove that the witness could be "produced within the time requested." *See People v. Verdel*, 22 A.D.3d 324, 325 (2005). New York courts have repeatedly refused to excuse unprepared attorneys on appeal. *Spears*, 64 N.Y.2d at 699; *see also People v. Darkel C.*, 68 A.D.3d 1129 (2nd Dep't 2009). While the Court of Appeals in *Spears* held that the trial judge's refusal to grant and adjournment was "arbitrary and an abuse of discretion as a matter of law," that case is drastically different than the one before this court. *Id*. In that case, a witness' failure to appear led appellant's co-defendant to rest earlier than expected. *Id.* at 699-700. Then, at 4:55 p.m., the trial judge refused to adjourn the proceedings for the day and instead ordered defense counsel to proceed. *Id*.

This case is completely different. Unlike cases where the denials seemed arbitrary, here, defense counsel made no indication that he had an unavailable witness, failed to explain why the witness was unavailable, and did not explain when the witness would be available. Appellant's trial counsel simply failed to have the witness ready for trial and was without reason.

The second element, materiality, stems from a defendant's right to present a defense, as provided in the New York State Constitution. *Foy*, 32 N.Y.2d 475-76; see N.Y. Const. art. I, §6. Only if a witness's testimony will contribute to the defense will an adjournment be granted. *Id*. The focus is on whether testimony would be useful to the fact-finder in weighing the evidence or make credibility determinations. *Spear*, 64 N.Y.2d at 699; *see also Husband*, 135 A.D.2d at 409. Witnesses who testify to relevant facts, such as an alibi, are considered material. *Foy*, 32 N.Y.2d at 475-76. However, testimony that is inconsistent or not exculpatory with a testifying officer is "merely cumulative" and immaterial. *Verdel*, 22 A.D.3d at 325-26.

Unlike *Husband*, the witness in this case was not being offered as an alibi witness or to rebut the testimony of the People's witness. She would have only offered speculative testimony on appellant's drinking and why appellant made an illegal u-turn—although she wasn't present at the time of the incident. Appellant's witness would not have exculpated appellant or rebutted any claims made by Officers Delguidice or Liotta. The officers were called to testify to appellant's appearance and action, and whether those actions supported probable cause for his arrest. Additionally, the breath analysis confirmed that appellant had been drinking heavily that night. Moreover, appellant's reason for his u-turn is not the issue; the fact that an illegal u-turn was made was a sufficient reason for the police officers to stop appellant. As Judge Marvin stated, appellant's witness's testimony was merely "speculative" would have been unhelpful in his weighing the evidence or making credibility determinations (Tr. Rec. 105-06). Therefore, the court did not err in denying appellant's request for an adjournment.

Regardless, denial of the adjournment has not been preserved for appellate review. Defense counsel failed to ask for an adjournment to secure the witness. As stated above, counsel must make a specific and timely objection in order for an issue to be preserved. CPL §470.05(2);

see also Dillon, 61 A.D.3d at 1221. His failure to express objection constitutes a waiver of the right to object now. *Moore v. Alexander*, 53 A.D.3d 747, 750 (3rd Dep't 2008).

Furthermore, in the case before this court, the facts are simple: defense counsel indicated that he had an unavailable witness, and Judge Marvin explained that he believed the witness would be unhelpful. Defense counsel decided to rest at that stage (Tr. Rec. 106). The record is devoid of any specific request by defense counsel as to what action he wanted the court to take in response to his unavailable witness. Defense counsel merely acquiesced and rested his case. Clearly, counsel failed to object and this issue has not been preserved.

Lastly, this issue should not be heard in the interest of justice. As stated above, the appellate court's power to reverse or modify does not "convey an untrammeled right to act on purely subjective considerations." *People v. Muriel*, 187 A.D.2d 341, 343 (1st Dep't 1992). Judge Marvin properly explained that he believed the defense's witness would be unhelpful and immaterial, and therefore, Judge Marvin properly exercised his discretion. His decisions were properly based in the law and should not be disturbed on appeal.

C. Any Error The Trial Court Committed Was Harmless

The trial court did not err in limiting defense counsel's cross-examination or in not granting an adjournment to secure a witness. The evidence against appellant was overwhelming. However, if this court believes that the trial court did err, the errors were harmless. An error of law may be found harmless where "the proof of the defendant's guilt, without reference to the error, is overwhelming" and where there is no "significant probability ... that the jury would have acquitted the defendant had it not been for the error." *People v. Arafet*, 13 N.Y.3d 460, 467 (2009). In *People v. Crimmins*, the Court of Appeals recognized that errors are bound to be found in trials, but that does not automatically entitle the defendant to a new trial. 36 N.Y.2d

230, 241 (1975). Discretionary errors, such as limiting cross-examination or not adjourning, are not of the "constitutional dimension." *Id*. At 238.

In the present case, the weight of the evidence was overwhelming, Even if Judge Marvin had reversed his now-appealed decisions, the verdict would have been the same. Judge Marvin's denial of the continuance to secure an immaterial and unhelpful witness was not prejudicial. The speculative nature of the witness's testimony would have had no bearing on the verdict. The explanation for the u-turn does not change the fact that the u-turn was made, that it was illegal, and that Officer Delguidice was justified in pulling appellant over for making it. After the traffic stop, Officer Delguidice observed appellant being visibly intoxicated. Additionally, although appellant's witness believed that appellant hadn't been drinking heavily, a properly working Intoxilizer 5000 registered appellant's blood alcohol content at .06 percent more than an hour and a half after Officer Delguidice pulled him over. The witness could not have rebutted either of these facts. It is clear that the witness's testimony would have been immaterial and unhelpful, and therefore could not have reasonably affected the verdict.

Furthermore, defense counsel's attempt to cross-examine Officer Delguidice on her other traffic stops that evening had no bearing on her credibility or whether appellant was impaired. Judge Marvin did not realize any attempt by Officer Delguidice to implicate the defendant or fabricate a story. Additionally, the court allowed defense counsel to cross-examine Officer Delguidice on her memory of appellant's stop and arrest, the only relevant event of the night (Tr. Rec. 10-15). Lastly, even if Judge Marvin disregarded all of Officer Delguidice's testimony, the fact remains that Officer Liotta had his own independent observations and reports of appellant, and the breath analysis measured appellant's blood alcohol content at .06 percent. The combination of this, with the other facts elicited at trial, makes it clear that the court had

sufficient information to find appellant guilty beyond a reasonable doubt. Clearly, there is not a "significant probability" that Judge Marvin would have acquitted. *Arafet*, 13 N.Y.3d at 467.

CONCLUSION

FOR THE AFOREMENTIONED REASONS, JUDGMENT SHOULD BE AFFIRMED.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISON: FIRST DEPARTMENT
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THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

- against-

FELIX CEPEDA

Defendant – Appellant.
----------X

STATEMENT PURSUANT TO RULE 5531

1. The case number in the court is 42542C-2006 and docket number is 2006BX042542.
2. The full names of the original parties were The People of the State of New York against Felix Cepeda. There was been no change of parties on this appeal.
3. The action was commenced in Criminal Court, Bronx County.
4. The action was commenced by the filing of a misdemeanor information on August 12, 2006.
5. This is an opposition brief for appeal of a judgment convicting appellant, after a non-jury bench trial, of driving while ability impaired.
6. This is an appeal from a judgment of conviction rendered December 1, 2006.
7. Appellant has been granted permission to appeal as a poor person on the original record. The appendix method is not being used.