

CASES OF INTEREST
November 2010

People v. Winnie Nixon
Appellate Division, Fourth Department
908 NYS2d 293
October 1, 2010

There are not many times when one can successfully argue that **severance** of the co-defendants' cases is required, but this case was one.

Both co-defendants were charged with possession of a gun in a car, and each declared that the other was the one in sole possession. This put the jury in a position such that if they believed the core of one defense, they must necessarily disbelieve the core of the other. This is the essence of irreconcilable defenses under *Mahboubian* (74 NY2d 174).

In addition, the Court found that there was a significant danger that the conflict alone would lead the jury to infer defendant's guilt. They found, therefore, that it was error to deny severance and ordered a new trial.

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The following two cases are from outside our local jurisdiction but have interesting arguments that might come in handy on occasion:

The first is People v. Keith R., a NYLJ case decided 10-20-2010 by Judge Colleen Duffy of Criminal Court in the Bronx and published on 10-27-2010. On the date scheduled for trial the People reduced the top count from an A misdemeanor to a B misdemeanor. At that point the defendant had 5 months in and could have entered a plea of guilty to the top count and received a sentence of time served.

However, instead, the defense attorney (hoping, I assume, to save her client from a conviction) made a CPL §170.40 motion for a **dismissal in the interests of justice**. The judge granted the motion, reasoning that: "The public can have no confidence in a criminal justice system that would regularly incarcerate defendants awaiting trial for periods longer than the potential sentences those defendants would face after a conviction."

The second case deals with whether *Padilla* should be applied **retroactively**. Most times we will continue to deal with our obligation to advise clients regarding their immigration status on pending cases. However, occasionally we will find clients who did not receive appropriate advice on an earlier matter and are now in jail, on probation or parole, or in DHS proceedings because of that. At that point your client may be in a position where it would help to do a pro se 440 motion (there is no automatic right to counsel), wherein one would argue that *Padilla* must be applied to that earlier case.

In People v. Jermaine Bennett, 28 Misc 3d 575 (Criminal Court, Bronx County, 2010) the Court nicely lays out the argument that *Padilla* did not announce a new constitutional rule, but merely applied the well-settled rule in *Strickland* to a particular set of facts. Given that, the Court found that the *Padilla* holding had to be applied retroactively, and granted a hearing to determine whether the client's Sixth Amendment right to counsel had been violated when his attorney failed to advise him of the risk of deportation.

This is not the only case discussing the issue of the retroactivity of *Padilla*, but the language of this case would be useful whenever one has to make that argument.