TABLE OF CONTENTS

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

----------x

THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent, :

against, :

ALSHAWN HOLIDAY, :

Defendant-Appellant. :

----------x

STATEMENT PURSUANT TO RULE 5531

1. The indictment number in the court below was 3672/10.
2. The full names of the original parties were People of the State of New York against Alshawn Holiday.
3. This action was commenced in Supreme Court, Kings County.
4. This action was originally commenced by the filing of an indictment.
5. This is an appeal from a judgment of conviction entered on August 10, 2011.
6. This is an appeal from a judgment convicting appellant, after a jury trial, of murder in the second degree [P.L. § 125.25], and criminal possession of a weapon in the second degree [P.L. § 265.03(1)].
7. Appellant has been granted permission to appeal as a poor person on the original record. The appendix method is not being used.

PRELIMINARY STATEMENT

Appellant Alshawn Holiday appeals from a judgment of the Supreme Court, Kings County, dated August 10, 2011, convicting him of murder in the second degree and criminal possession of a weapon in the second degree and sentencing him to concurrent prison terms of 25 years to life, and 16 years to life, respectively (Guzman, J., at trial and sentence).

Timely notice of appeal was filed and on December 7, 2012, this Court granted appellant permission to appeal as a poor person and assigned Lynn W. L. Fahey as appellate counsel.

Appellant is incarcerated pursuant to the judgment. No stay has been sought. Appellant had no co-defendants in the court below.

QUESTIONS PRESENTED

1. Whether appellant was deprived of due process and a fair trial when the court permitted family members to wear T-shirts bearing the photograph of the deceased.

2. Whether the prosecutor's elicitation of the irrelevant and extremely prejudicial emotional testimony of the grieving mother of the deceased about going to the crime scene to find that her son, whose wife was expecting his baby, had been shot to death, and about her visit to the morgue to identify his body, violated appellant's due process right to a fair trial.

3. Whether, during summation, when the prosecutor repeatedly professed to know that appellant was guilty while vouching for the credibility of the people's witnesses, she violated appellant's right to a fair trial.

STATEMENT OF FACTS

Introduction

Appellant Alshawn Holiday was arrested in connection with the shooting death of Orlando Colon. During the trial, members of Mr. Colon's family wore T-shirts the fronts of which "prominently" displayed his photograph. Defense counsel made an application to have the shirts removed or turned inside-out. The trial court however, citing the family members' First Amendment right to "make a statement" denied the application. Later in the trial, the court officer was told that the jurors expressed concern about the fact that Mr. Colon's family was present.

Although Mr. Colon's identity was not in question, the prosecutor called his mother to the stand not just to formally identify him, but to describe being told that her son was dead and going to the scene and seeing his body, and to state that he was an expectant father. She took the opportunity to tell Mr. Colon's mother, "I'm sorry for your loss."

During summation, the prosecutor solicited the jury's sympathy for Mr. Colon and repeatedly offered her own unsworn opinion that the People's witnesses were telling the truth, that it was Mr. Holiday who was depicted on a surveillance video that did not show identifying details, and that appellant was guilty.

The Trial

The People's Case

The Shooting

LOUIS JAMES, whose street name was Half, called his friend Orlando "O" Colon on April 13, 2010, because he was expecting to fight a "kid name[d] Rowlin" and he wanted Mr. Colon's help ensuring it was a fair fight (110-114-15). Mr. Colon, together with DARKEL "KELS" WARD, met up with Half on Chauncey Street near Bainbridge and Malcolm X in Brooklyn between 10:30 p.m. (James 117) and midnight (Ward 277). The three men, accompanied by a group of others that included appellant Alshawn "Crook" Holiday and Linwood "Uncle Junior" Williams, "Haze," and a number of women, walked toward the park where the fight was to take place (James 118; Ward 278). Rowlin wanted to fight Half because he thought Half had slept with his girlfriend (James 115), but the fight never took place; words were exchanged between the two women who were involved, but there was no fight (James 118; Ward 280). Kels thought a man who was talking to Mr. Holiday had a gun (Ward 279).

The group left the park in two waves; Mr. Holiday, Uncle Junior, Haze, and some others left first while Mr. Colon, Kels and Half were with others following behind (James 118). Kels could not walk fast because he had a heart condition (Ward 281). They were all walking along Chauncey from the park past Malcolm X Blvd. toward Bainbridge (James 118-19), when Half and Kels then saw Mr. Holiday arguing with Haze (James 119; Ward 282). Seeing this, Mr. Colon ran up

and punched Mr. Holiday, knocking him to the ground (James 119; Ward 282). As Half ran up to grab Mr. Colon, Uncle Junior shot Half in the arm with a silver .357 pistol (James 120). Half testified that Mr. Holiday got up and took the gun away from Uncle Junior (James 122-23). He recognized the gun as belonging to Mr. Holiday because he had seen it before; Mr. Holiday called it "Betsy" (James 124, 176-77). He said that Mr. Holiday, whom he socialized with on a daily basis and identified in court, was wearing a blue sweater and blue jeans that night (James 125). Both Half and Kels, who also identified Mr. Holiday in court (275), testified that they saw Mr. Colon running toward Kels, with Mr. Holiday in pursuit, firing shots (James 135-36; Ward 283). Kels was within 15 feet of Mr. Holiday at one point and he described the street lighting as "bright" (Ward 285-86). When the two men turned the corner out of his view, he walked to the next block to see if Mr. Colon had gotten away but saw him lying in the street (Ward 286).[1]

At around midnight on April 13, 2010, THERESA CALLISTE-ALEXANDER, a N.Y.P.D. bus and towtruck driver, was in her truck parked on Chauncey Street facing Malcolm X Blvd. — its lights and flashers were on — when she heard gunshots (226-27). She lifted her head and saw a man running toward her, followed by another man and two others further behind (227). When the first man fell down, face first, the second man ran up to him, took out a gun,

---

[1] Detective ALFRED SPEARMAN obtained surveillance video, which was not date or time stamped, showing the street outside 120 Chauncey Street (328). Detective Spearman was told that the footage was from the night of the shooting. The video, and still taken from it, were published to the jury (328, 338-42, 346-51). There was no testimony indicating who the figures visible on the dark and grainy video were or that it disclosed the shooting itself.

and shot him in the back (227). The gunman returned to the other two men and the three of them ran away (227). The man on the ground was stocky, wearing a white shirt, and the man who shot him was slender but she wasn't sure whether he was wearing a red shirt as she may have said at the time (229, 232, 234). She then "got on the radio" and "told them what happened" (227).

Detective SUSAN WEKAR processed two crime scenes: one in the street near 120 Chauncey Street, where Mr. Colon was shot, and the other outside a deli at Bainbridge and Malcolm X Blvd., where Half was shot (62-63). Crime scene officers recovered bullet fragments found on the ground and in a car parked on Chauncey Street (80; People's Exhibit #1).

Doctor AGLAE CHARLOT, of the Office of the Chief Medical Examiner testified about the autopsy of Orlando Colon (360). Mr. Colon had suffered two fatal gunshot wounds; one to the back of the head, and the other to the back (362). A fragmented bullet was recovered from the head and a bullet was recovered from the body (362, 367; People's Exhibit #2). There was no stippling associated with the head wound, but there was stippling associated with the back wound, meaning that the shot to the head was fired from more than 12 to 16 inches away while the wound to the back was fired within 16 inches of Mr. Colon's body (363, 364, 368).

Police Officer ARTHUR SADOWSKI vouchered a .38 caliber class lead bullet and two pieces of copper jacketing recovered by crime scene officers (36;

People's Exhibit #1) and the ballistics evidence he received from the Office of the Chief Medical Examiner (37; People's Exhibit #2).

After receiving the ballistics evidence recovered from Chauncey Street and the medical examiner, Detective JOHN HEANEY examined it and determined that all the bullets and fragments were .38 caliber class bullets (252). While those bullets could have been fired from a .357 magnum revolver, it was also possible that they could have been fired from a 9 mm. semiautomatic pistol (264).

Upon being assigned to investigate the shooting, Detectives MARK MATHES and CHRISTOPHER SCANDOLE interviewed Half in the hospital on April 13, 2010, and Kels on April 21, 2010, and developed Mr. Holiday as a suspect in the shooting of Mr. Colon (Mathes 395; Scandole 433). They also developed Uncle Junior as a suspect in the shooting of Half (Mathes 396; Scandole 433). Mr. Holiday was arrested on April 27, 2010 (Mathes 397; Scandole 434). After reading Miranda warnings to Mr. Holiday, the detectives interviewed him (Mathes 398; Scandole 434). Mr. Holiday agreed to speak with the detectives, telling them that he had heard about the shootings, but that since he was on parole and had a curfew, he was at home with his girlfriend (Mathes 402; Scandole 436). He knew that Half had been shot in the arm and that Mr. Colon had been killed, but he wasn't there when it happened (Mathes 402-03; Scandole 436).

After Mr. Holiday had made this statement, the detectives showed Kels a lineup that included Mr. Holiday (Mathes 410; Scandole 437). The detectives then spoke with Mr. Holiday again, telling him he had been picked out of a lineup

(Mathes 410; Scandole 438). This time, Mr. Holiday admitted that he had been in the park with Mr. Colon, Half, Uncle Junior and others and that there was supposed to be a big fight over a girl (Mathes 408-09; Scandole 439). The fight never happened, but as everyone was walking towards Bainbridge, Haze started laughing at him (Mathes 409; Scandole 349). When the two started arguing, Mr. Colon came over and punched Mr. Holiday in the back of the head, knocking him down (Mathes 409; Scandole 439). Mr. Colon told him, "that's my homie" (Mathes 409). Mr. Holiday then heard two gunshots and, together with everyone else, ran (Mathes 409; Scandole 439-440). As he was running, Mr. Holiday heard three more shots. He ran to the home of a girl named Reese, then went back to his girlfriend's house (Mathes 409; Scandole 440). After this second statement, Detective Mathes conducted another lineup, which was viewed by KASON BROWN (Mathes 412; Brown 206-07).

Brown testified that he "bumped into" Mr. Holiday on Chauncey Street on April 14, 2010 (203-04). He had known Mr. Holiday for a couple of years and because he looked upset Brown asked him what was wrong (204). Mr. Holiday told him "I just blew that Nigger O face off down the block" (204). Brown told him, "Shit, you hot," and then walked away (205). Brown told the police about that conversation a few days later, on April 18, 2010, when he was arrested for criminal possession of a weapon (211). He denied that he received any benefit in exchange for his testimony in this case even though he was sentenced to a total of

only 3 years in prison on two violent felony convictions, second-degree robbery and second-degree possession of a weapon, on June 21, 2010 (215).

Orlando Colon's Mother's Testimony

The prosecutor called Orlando Colon's mother, ROSITA CARASCO to the witness stand to testify about the death of her son (59). She learned he had been shot when someone came to her house and woke her up (58). She got dressed and went to 120 Chauncey Street where she "saw [her] son laying on the floor" (58). "He was covered with a white sheet and there was blood all over his body" (59). The prosecutor then elicited that Orlando was 23 years old and that his wife was pregnant with his baby (59). Ms. Carasco also testified that she viewed a photograph of her son, identifying him for the Medical Examiner (59). At the close of her examination, the prosecutor thanked her and said, "I'm sorry for your loss" (59). The court instructed the jury that "[t]he prosecutor's comment is not evidence" (60).

The Colon Family Memorial Shirts

On the second day of a five-day trial, defense counsel brought to the court's attention, outside the presence of the jury, that family members present in court were wearing memorial T-shirts:

> It appears that quite a few members of the deceased's family are present in the court, they are all wearing T-shirts with his photograph on it, displayed in a fairly prominent position on the front of their T-shirts. I think this is an impermissible attempt to influence the jury by inducing sympathy for the deceased and I would ask that the either remove the T-shirts or turn them inside out, whatever they want to

> do. I ask they not be allowed to do that in the courtroom. This impacts my client's right to have a fair trial (198).

The court asked the family members to stand, and confirmed that they were wearing the T-shirts counsel had described but saw no impediment to a fair trial (199). Indeed, the court ruled that there was

> no basis in case law for the Court to limit the audience's right to wear, to make a statement, and the Court would not preclude them from coming in. They have a First Amendment right of expression. That First Amendment right, as the Court sees it, does not come into conflict with the defendant's right to a fair trial (199).

The court stated that the only definitive rulings it had found in state and federal case law were in cases in which "a person, lawyer or the party themselves, wears something that could influence the jury" (199). Finding that the family had done nothing to disrupt the proceedings, the court denied counsel's application (199). The prosecutor agreed that "they are entitled to wear the shirts" (200).

Later during the trial, the court informed the parties that a juror spoke with a court officer, expressing "some concern that there were comments by the jury in regard to family members" and that the jurors "are aware the[re a]re family in the court" (344). When the court inquired whether it should instruct the jury to consider only evidence that comes from the witness stand, counsel asked the court to add "[a]nd they are not to consider anything else that's not evidence" (344). Before dismissing the jury for the day, the court instructed it as follows:

> I just want to remind the jurors that the only thing that they can consider [a]s evidence is that which comes

> from the stand, and when you do have evidence as you do now, you are not to discuss it amongst yourselves or with anyone else or attempt to visit any of the locations (383).

The Summations

Defense counsel discounted the video because it was not time-stamped and because it did not reveal floodlights crime scene would have employed afterward (467). He told the jurors that there was no proof that the same gun was used in both shootings and asked, rhetorically, why, if the .357 belonged to Mr. Holiday, Uncle Junior would have had it (468, 473). He also told them that the case was not about a mistaken identification; it was about whether the People's eyewitnesses were telling the truth (471). He pointed out inconsistencies in the People's case, including that Mr. Holiday's friends said he was wearing a dark shirt while the tow truck driver said the shooter wore a white shirt (473-75).

Counsel argued that Brown made up the statement he attributed to Mr. Holiday in order to get a good plea deal on his own felony cases (479), and questioned why Kels did not go to the police to identify Mr. Holiday even though it was his best friend who was shot and killed (477). Finally, counsel argued that Mr. Holiday's first statement denying his presence at the park was made to avoid a parole violation for staying out past curfew (481).

The prosecutor began her summation by focusing on Mr. Colon and his family: Orlando Colon "never thought that he's not going to come back that night, that he is never going to see his family again, that he is never going to be able to see his girlfriend again" (486). She called it "truly a tragedy because a 24-year-old

life was taken away by this man here (indicating), Alshawn Holiday" (486). Turning to the evidence, she discussed Kels first, saying that he was "one hundred percent credible (492). After relating the narrative Kels gave, including Mr. Colon knocking Mr. Holiday down, the prosecutor claimed that Mr. Holiday, who was too small to overpower Mr. Colon, was embarrassed and had "a motive to make sure that everybody in the neighborhood [knew] that nobody messes with Crook" (497). Mr. Holiday "need[ed] an equalizer" so that "all those guys knew that [Mr. Colon was] never getting back up again" (497).

Claiming that Kels had the best vantage point for viewing the shooting, the prosecutor told the jury that "he told you what he saw" and that even though he had 8 days to do so, "he doesn't embellish anything" and "he doesn't make anything up" (503). The court sustained its own objections to both comments, but the prosecutor reiterated "you can rely on the testimony because he testified to what he saw and it was consistent with everything else he told the police" (504). She then added: "The bottom line is that this defendant . . . took that gun and he went after Orlando and he finished him off. That is what the bottom line is" (504-05).

With respect to Kels's failure to talk to the police, the prosecutor urged the jurors to "decide what it is that the defendant is capable of doing," "you decide why it is that the other people didn't come forward right away and testify or bring the evidence forward. Because they know what this defendant's capable of doing" (505-06, emphasis supplied).

When discussing Mr. Holiday's statements to the police, the prosecutor told the jurors that he first denied being present "because he wanted to remove himself completely from that scene" (507). It was "not because of a curfew"; "He wasn't worried about getting busted for the parole. He doesn't want to take responsibility. He wanted to come up with an alibi" (507).

Next, the prosecutor examined Half's story, which he told the jurors was plausible (511). The court instructed the jurors, "You judge the credibility of Half" (511). When recounting that Half said that Mr. Holiday called his gun Betsy, the prosecutor remarked, "How could you make something like that up" (514). She then told the jurors,

> This was Alshawn's gun. It's true, Junior had it that night. They're friends, they're together, but this is Alshawn's gun and Half had seen it before. You cannot make something like that up, ladies and gentlemen. You cannot. That is why you know it's reliable (516).

She added, "There's only one gun here, one gun, one shooter. He's the one who's firing it" (517).

The prosecutor then said that there was nothing so special about Mr. Holiday "that the whole world decided to conspire against him," that the witnesses had no motive for blaming Mr. Holiday and letting the real shooter go free, and that the witnesses testified to what they saw (517-18). She then declared, "This man is responsible for killing Orlando Colon" (518).

When playing the surveillance video for the jury, the prosecutor repeatedly pointed to the figure she alleged fired the fatal shots and identified him as being

Mr. Holiday. After identifying Mr. Colon on the video as the figure with a white shirt, she said, "Right there, I submit to you, ladies and gentlemen, that's Alshawn, that's Crook, the second person" (528). Noting the dark clothing, she added "that's him" (529). She also said, "the first person who was wearing white, who collapsed, that is Orlando Colon, and the second person, Alshawn Holiday" (530).

As the prosecutor was explaining to the jurors who was who in the stills taken from the video, the court interjected, "when the D.A. says who that is, you may make inferences . . . but the D.A. was not a witness. . . . It's for you to determine who that is" (533). Disregarding that warning, the prosecutor declared, "Here's the defendant coming back around joining the group" (534). The court sustained a defense objection and struck the comment (534). Finally, when describing locations of events, the prosecutor stated, "One shooter, Alshawn Holiday. He's the one who's firing the shots in the corner" (539). In the face of the court's warning that since the pictures did not show faces it was up to the jury to analyze the evidence, the prosecutor added "I submit to you that is who it is, I submit to you this is Alshawn" (539).

The Verdict

The jury convicted Mr. Holiday of murder in the second degree and criminal possession of a weapon in the second degree (576-78).

ARGUMENT

POINT I

APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL WHEN THE COURT PERMITTED FAMILY MEMBERS TO WEAR T-SHIRTS BEARING THE PHOTOGRAPH OF THE DECEASED

In the middle of trial defense counsel noticed that several family members of the deceased, Orlando Colon, were wearing T-shirts on which was "prominently displayed" his photograph. Defense counsel asked that the family remove the shirts or turn them inside-out, but the court refused, ruling that the family members had a First Amendment right to "make a statement," and that this right was not in conflict with Mr. Holiday's right to a fair trial. Because the court was wrong and the display, which a juror appears to have commented on, deprived appellant of his due process right to a fair trial, this Court must reverse his conviction and order a new trial. U.S. Const. Amends., V, XIV; N.Y. Const. Art. 1, §6; Estelle v. Williams, 425 U.S. 501, 505 (1976); Norris v. Risley, 918 F.2d 828, 834 (9th Cir. 1990); State v. Franklin, 327 S.E.2d 449, 454-55 (W. Va. 1985).

"Due process requires that the accused receive a trial by an impartial jury free from outside influences." Sheppard v. Maxwell, 384 U.S. 333, 362 (1966). To implement the presumption of innocence, an integral part of the right to a fair trial, "courts must be alert to factors that may undermine the fairness of the fact-finding process" and "carefully guard against dilution of the principle that guilt is to be established by probative evidence beyond a reasonable doubt." Williams,

425 U.S. at 503 (internal citations omitted). Thus, when a courtroom practice creates "an unacceptable risk" of "impermissible factors coming into play," that practice causes inherent prejudice to the defendant's right to a fair trial. Williams, 425 U.S. at 505.

Whether a courtroom practice is inherently prejudicial often turns on the message it sends to the jurors. Thus, in Williams, the United States Supreme Court held that the State cannot compel an accused to stand trial in prison clothes because such attire would improperly influence the jury as a constant reminder of the defendant's status of an accused needing to be held in custody. But in Holbrook v. Flynn, 475 U.S. 560, 568 (1986), the Court held that the presence of uniformed officers seated behind defendant and his co-defendants was not so inherently prejudicial because it "need not be interpreted as a sign that [defendant] is particularly dangerous or culpable."

In Carey v. Musladin, 549 U.S. 70, 76 (2006), several members of the decedent's family attended the trial wearing buttons displaying a photograph of the victim. After exhausting his state appeals, defendant filed for habeas relief, arguing the buttons violated his fair trial rights. The Ninth Circuit agreed, and reversed the district court's denial of his habeas petition. The United States Supreme Court held that the Circuit Court's decision was incorrect under AEDPA because the Supreme Court's previous decisions in Williams and Flynn concerned only the effect of state-sponsored courtroom practices on a defendant's fair trial rights. Thus, as "the effect on a defendant's fair-trial rights of the spectator conduct to

which [defendant] objects is still an open question of our jurisprudence," habeas relief was unwarranted, the Court ruled. Musladin, 549 U.S. at 76.

Nevertheless, as Justice Souter said in his concurring opinion in Musladin, because "the focus" of Flynn and Williams is "on appearances within the courtroom open to the jurors' observations," it should not matter "whether the State or an individual may be to blame for some objectionable sight; either way, the trial judge has an affirmative obligation to control the courtroom and keep it free from improper influence." Id. at 82. As Justice Souter aptly explained:

> [O]ne could not seriously deny that allowing spectators at a criminal trial to wear visible buttons with the victim's photo can raise a risk of improper considerations. The display is no part of evidence going to guilt or innocence, and the buttons are at once an appeal for sympathy for the victim (and perhaps for those who wear the buttons) and a call for some response from those who see them. On the jurors' part, that expected response could well seem to be a verdict of guilty, and a sympathetic urge to assuage the grief or rage of survivors with a conviction would be the paradigm of improper consideration.

Id. at 82-83.

For this reason, numerous courts have concluded that spectator displays are inherently prejudicial and have condemned such practices. See Norris 918 F.2d at 831-32, 834 ("Women Against Rape" buttons worn by spectators during trial inherently prejudicial and "erod[ed] the presumption of innocence" as they constituted a continuing reminder that various spectators believed defendant's guilt and encouraged the jury to find appellant guilty); United States v. Yahweh, 779 F.Supp. 1342, 1343-44 (S.D.Fla. 1992) (members of defendant's organization

could not wear their uniforms during trial due to the possibility that jury would be influenced or intimidated); State v. Franklin, 327 S.E.2d at 454-55 (the wearing of Mothers Against Drunk Driving buttons by spectators was reversible error; jury should be "insulated, at least to the best of the court's ability, from every source of pressure or prejudice").

Even courts that have ultimately affirmed convictions, often for procedural reasons, have uniformly expressed their concern about the ability of a defendant to receive a fair trial when spectators inject memorial displays. See, e.g., State v. Speed, 961 P.2d 13, 29-30 (Kan. 1998) (spectators wearing buttons or T-shirts depicting the victim "is not a good idea because of the possibility of prejudice which might result"); U.S. v. Sheffey, 57 F.3d 1419, 1431-34 (6th Cir. 1995) (anti-drunk driving buttons worn by spectators raised "troubling issues"); Cagle v. State, 6 S.W.3d 801, 803 (Ark. Ct. App. 1999) (court "not unsympathetic" to argument that trial court erred in refusing to prohibit spectators from wearing buttons bearing a photograph of the victim); Pachl v. Zenon, 929 P.2d 1088, 1093 n.1 (Or. Ct. App. 1996) (court was not "indicating that the wearing of buttons by spectators in a trial could never deprive a defendant of a fair trial").

Accordingly, when alerted to the issue of conspicuous spectator conduct, a court is required to do something to preserve the integrity of the courtroom. For example, in People v. Levandowski, 8 A.D.3d 898 (3rd Dept. 2004), the victim, her friends, and members of the prosecutor's staff sat together in the courtroom wearing ribbons. Upon defense counsel's objection, the court ordered them

removed. Nevertheless, when the Third Department reversed appellant's conviction on other grounds, it acknowledged that the ribbons were "meant to convey support for the victim, belief in her version of events, and, by implication, disbelief in defendant's," and thus, may have improperly influenced the jury. Id. at 901. And in People v. Pennisi, 149 Misc.2d 36, 37, 40-41 (Sup. Ct., Queens Cty 1990), the court prohibited the wearing of red and black ribbon corsages by family members and friends in the courtroom, as it constituted "conduct disruptive of a courtroom environment," which "must be scrupulously dedicated to the appearance as well as the reality of fairness and equal treatment." See also Matter of Montgomery v. Miller, 176 A.D.2d 29, 31-32 (3rd Dept. 1992) (defendant's right to a fair trial outweighed prosecutor's right to wear American flag lapel pin, which might have caused the jury to "ascribe greater measure of veracity and personal commitment to the correctness of the State's cause").

These cases are in line with court decisions in other states that have recognized that trial judges should take an active role once the issue of spectator displays has been raised, as a "court's cardinal failure" is "to take no action." Franklin, 327 S.E.2d at 455. See State v. Iromuanya, 806 N.W.2d 404, 432-33 (Neb. 2011) ("we admonish trial courts to act promptly" and "immediately determine" who is displaying the memorial and what message it conveys; the court should "immediately prohibit such conduct" and "inquire of jurors whether the displays would affect their ability to be impartial and admonish them to disregard any displays to which they might have been exposed"); Allen v. Commonwealth,

286 S.W.3d 221, 229, 230 (Ky. 2009) ("the best course in these situations is for the trial court to determine if the spectators' display caused the defendant to suffer any tangible prejudice"); State v. Speed, 961 P.2d 13, 29-30 (Kan. 1998) ("it would have been better for the district court to have ordered the buttons removed or the t-shirts covered up" "because of the possibility of prejudice that might result"); State v. Rose, 548 A.2d 1058, 1104-05 (N.J. 1998) (instructing trial judges to ensure an impartial trial by prohibiting buttons or emblems from courtrooms); State v. Lord, 114 P.3d 1241 (Wash. Ct. App. 2005) ("the better practice would have been to have prohibited the buttons in the courthouse at first sight"); People v. Houston, 130 Cal. App. 4th 279, 320 (Cal. Ct. App. 2005) ("The better practice of any trial court is to order such buttons and placards removed from display in the courtroom promptly upon becoming aware of them in order to avoid further disruption").

This Court has recently decided a case raising a nearly identical claim, but on facts far less compelling than those of Mr. Holiday's case. In People v. Nelson, 125 A.D.3d 58, 60 (2014), the family of the defendant appeared in court during the trial wearing T-shirts bearing a photograph of the deceased with the words "Remembering Leo Walton." Citing Musladin, Flynn and Holbrook with approval, the Court echoed the principles discussed above, and agreed that an atmosphere of coercion by spectators is incompatible with due process. Id. at 62. The Court declined, however, to announce a per se rule requiring reversal in any case involving spectator memorial clothing. Id. at 63. Rather, the Court

announced that there must be a "sui generis determination of its potential effect on the jury in light of the particular circumstances of the case." Id. In that case, the Court found that the family's T-shirts, bearing writing the court could not make out, did not pose a threat to the impartiality of the jurors because the T-shirts were not inflamatory, the jurors did not draw attention to them, they wore outer clothing over the T-shirts, minimizing their visibility, and defense counsel did not notice them for several days. These facts supported the trial court's conclusion that the T-shirts "were not prominently displayed." Id. at 64.

Here, defense counsel specifically described the shirts as "prominently displaying" Mr. Colon's photograph on the front and, after the court had the family stand up so the shirts could be examined, neither the prosecutor nor the court disputed it. Counsel's unrefuted description did not indicate that there was outer clothing obscuring the shirts and the court made no finding that the shirts were not prejudicial. Rather, the court seemed to acknowledge that the family was exercising its First Amendment rights to "make a statement."

That the family succeeded in making its statement in this case cannot be seriously disputed because the only fair inference from the record is that the jurors saw the shirts. One of them expressed to a court officer his or her concern "that there were comments by the jury in regard to family members" and that the jurors were aware family members were in court (344). It is not a stretch to infer that the jury was aware that family members were present because of the memorial shirts they were wearing, or that the shirts would naturally be a topic for discussion. Cf.,

People v. Grady, 40 A.D.3d 1368 (3rd Dept. 2007) (although uniformed officers seated in courtroom who stood in unison when the victim entered to testify "was not appropriate because such conduct may have the secondary effect of influencing the jury," defendant not deprived of a fair trial when court had observed most jurors had not looked in their direction).[2]

The court ruled that the family members were exercising what it ruled was their right to "make a statement," and the prosecutor never denied that they were sending a message, saying "they are entitled to wear the shirts" (200). The court ultimately declined to find that the shirts "were not themselves inflammatory" as did the court in Nelson, but, essentially, that the family members had a First Amendment right to prejudice Mr. Holiday in that way. As defense counsel correctly argued, wearing T-shirts with a photographic image of Mr. Colon was "an impermissible attempt to influence the jury by inducing sympathy for the deceased" (198). See Levandowski, 8 A.D.3d 898. It was meant to remind the jurors of the suffering the family had endured, and call on them to vindicate Mr. Colon's death, whether or not they concluded beyond a reasonable doubt that appellant was guilty of killing him. Even if the message was of personal sorrow, there is a very real danger that despite the intentions of Mr. Colon's family members, the jury interpreted the symbols as signs of appellant's guilt "before it

---

[2] That Mr. Colon's family members made no outbursts does not mean that their conduct in wearing the memorial shirts was not disruptive. See Levandowski, 8 A.D.3d at 901 (ribbons worn by prosecutor's staff and others); Pennisi, 149 Misc.2d at 36. Numerous cases have held these symbolic displays – even without oral protests – are prohibited. See, e.g., Norris 918 F.2d at 828 (buttons); Yahweh, 779 F.Supp at 1342 (uniforms); Franklin, 327 S.E.2d at 449 (buttons).

was proven, eroding the presumption of innocence," or emotional pleas for a guilty verdict. Norris 918 F.2d at 831. Because jurors "will not necessarily be fully conscious of the effect [a prejudicial practice] will have on their attitude toward the accused," Holbrook, 475 U.S. at 570, it was incumbent upon the court to minimize the jury from being exposed to such improper influences.

The trial court's deference to the First Amendment rights of the family was misplaced because the right to communicate does not extend to the right to influence the jury in a criminal case. In re Oliver, 333 U.S. 257, 270 n. 25 (1948); see Norris 918 F.2d at 832 (finding that First Amendment rights of spectators "must bow to the constitutional right to a fair trial"); see also Gannet v. DePasquale, 443 U.S. 368, 393 (1979) (affirming the trial court's conclusion that the public's constitutional right of access to the court was outweighed by the defendant's right to a fair trial). More recently, and locally, the court in Pennisi, 149 Misc.2d at 40-41 (Sup. Ct., Queens Cty 1990), specifically rejected the notion that "people who want to communicate protests, views or feelings of any kind or nature, for or against any person, issue or cause, have a constitutional right to do so within the confines of a public courtroom").

The display of Mr. Colon's photograph to the jury served as a constant reminder that he was a real person, their family member, and friend. This is exactly the type of emotional factor that sociological studies confirm can influence a jury's decision. See Lyon, Elizabeth, "A Picture is Worth a Thousand Words": The Effect of Spectators' Display of Victim Photographs During A Criminal Jury

Trial On A Criminal Defendant's Fair Trial Rights, Hastings Constitutional Law Quarterly, Vol. 36:3, Spring 2009, at 534-537; Lind, Meghan E., Hearts on Their Sleeves: Symbolic Display of Emotion By Spectators in Criminal Trials; Journal of Criminal Law & Criminology, Vol 98, No. 3, 2008, at 1152-55. Indeed, more than 20 years ago, in People v. Stevens, 76 N.Y.2d 833, 835 (1990), the Court of Appeals ruled that photographs of the victim taken while he or she was alive should not be admitted at trial precisely because they "are likely to arouse the passions and resentment of the jury."

Because the court refused to take action, this case is fundamentally different from those in which a judge's active intervention protected the defendant from prejudice. See, e.g., U.S. v. Farmer, 583 F.3d 131, 149-51 (2d Cir. 2009) (in finding memorial T-shirts worn by relatives were not inherently prejudicial, court noted that trial judge had "urge[d]" the prosecutors to encourage the relatives not to wear the T-shirts in the courtroom; this "intervention fulfilled the obligation of trial judges to 'take careful measures to preserve the decorum of courtrooms,'" and constituted "ameliorative action" distinguishing the case from others "in which the trial courts did nothing to remove the displays from their courtrooms") (internal citations omitted); Iromuanya, 806 N.W.2d at 432 (memorial buttons were not inherently prejudicial when "the court ordered spectators not to wear" them); Lord, 114 P.3d at 1241 (court ordered buttons removed to "avoid possibility of future contamination of the jury and prejudice" to defendant); Houston, 130 Cal. App. 4th at 316 (court's two admonishments to jury to disregard displays upon

being notified of them "cured an inherent prejudice that may have been caused by them"); Mitchell v. State, 884 P.2d 1186, 119 (Okla. Crim. App. 1994) rev'd on other grounds, Mitchell v. Gibson, 262 F.3d 1036 (10th Cir. 2001) (no prejudice when court took action and "sternly admonished" victim's family members and ordered them to stop wearing buttons and holding victim's photograph).

Contrary to the court's indifferent approach, there is no conceivable version of a just and fair trial when outside influences are permitted into the trial process. The only justification is the improper one of permitting family members to "make a statement" expressing their feelings of grief, mourning, or blame. Mr. Colon's family members were to get their opportunity to publicly express their emotions in the criminal justice process at sentencing, after the facts had been found and appellant's guilt had been determined, in the form of victims' impact statements.

Neither this Court, nor others that have considered the question, apply a harmless error analysis that involves the strength of the People's case. See Nelson, 125 A.D.3d at 64 (whether right to an impartial jury has been violated depends on circumstances of the case including the nature of the crime and evidence, the nature of the spectator conduct, and the degree to which the jury was exposed to it). As this Court said, "[i]t is not necessary for an actual prejudicial effect on the jury be established." Id. (citing Holbrook, 475 U.S. at 570). Rather, "'the question is whether the [spectator conduct] presents an unacceptable risk . . . of impermissible factors coming into play in the jury's consideration of the case.'" Id.

(quoting Carey, 549 U.S. at 82 (Souter, J., concurring)). The Ninth Circuit has construed the question as being whether "the risk that the conduct had an impact on the jurors is unacceptably high." Norris, 918, F.2d at 834). Here, the court found that the jurors were "making a statement," a juror expressed "concern" about the jurors having seen the family members, whose shirts "prominently displayed" Orlando Colon's photograph. Unlike in Nelson, where the T-shirts were partially obscured, defense counsel did not even see them until the end of trial, and there was no indication the jurors were aware of them, the circumstances in this case demonstrate that the risk of impact on the jury was unacceptably high.

For these reasons, the trial court's denial of defense counsel's request to have the spectators remove their memorial shirts deprived appellant of due process. Accordingly, appellant's conviction should be reversed on the law. See Levandowski, 8 A.D.3d at 901 (ribbon display "impaired defendant's right to a fair trial"); Norris, 918 F.2d at 828; Franklin, 327 S.E.2d at 449.

POINT II

THE PROSECUTOR'S ELICITATION OF THE IRRELEVANT AND EXTREMELY PREJUDICIAL EMOTIONAL TESTIMONY OF THE GRIEVING MOTHER OF THE DECEASED ABOUT GOING TO THE CRIME SCENE TO FIND THAT HER SON, WHOSE WIFE WAS EXPECTING HIS BABY, HAD BEEN SHOT TO DEATH, AND ABOUT HER VISIT TO THE MORGUE TO IDENTIFY HIS BODY, VIOLATED APPELLANT'S DUE PROCESS RIGHT TO A FAIR TRIAL.

The prosecutor impermissibly attempted to arouse the jurors' sympathy for the deceased Mr. Colon and create animosity toward Mr. Holiday by eliciting and highlighting that his mother was called to the crime seen where she found her son dead with blood all over him, that she had to identify his dead body to the medical examiner, and that Mr. Colon died an expectant father. The prosecutor went on to offer Mr. Colon's mother condolences during her testimony, telling her she was "sorry for your loss." As this Court has recognized repeatedly, playing upon the emotions of jurors in order to align them with a crime victim or against a defendant is improper. People v. Moss, 215 A.D.2d 594, 595 (2d Dept. 1995); People v. DeJesus, 137 A.D.2d 761, 762 (2d Dept. 1988); People v. Calderon, 88 A.D.2d 604 (2d Dept. 1982); People v. Fogarty, 86 A.D.2d 617 (2d Dept. 1982); See People v. Ashwal, 39 N.Y.2d 105, 110 (1976); ABA Standards for Criminal Justice § 3-5.8(c) ("The prosecutor should not make arguments calculated to appeal to the prejudices of the jury") (3d ed. 1993). It is especially important that

appeals to sympathy be "scrupulously" avoided in an "emotionally charged" case such as this one. People v. Fogarty, 86 A.D.2d at 617.

There was no place in Mr. Holiday's trial for Ms. Carasco's anguish at finding her son dead on the street and for eliciting the wholly irrelevant fact that his wife had been expecting a baby when he was killed. People v. Walters, 251 A.D.2d 433, 434 (2d Dept. 1998)(impermissibly invited jury to imagine what a shock crime was to the victim's wife, who was eight months' pregnant); People v. Green, 183 A.D.2d 617, 618 (2d Dept. 1992)(strongly disapproving calculated appeal to the jury's emotions, in particular, wrath toward the defendant and sympathy for the victim). The prosecutor's addition of her own personal condolence, "sorry for your loss" left no question about the purpose of Ms. Carasco's testimony. Those facts proved no material issue in the case; their only purpose was to improperly align the jurors in sympathy with the deceased and his family and inflame their passions against Mr. Holiday. People v. Ortiz, 116 A.D.2d 531, 532 (1st Dept. 1986)(improper for prosecutor to use inflammatory language which appeals to the sympathies and fears of the jury); People v. Fogarty, 86 A.D.2d 617 (2d Dept. 1982) (error for prosecutor to "play[] heavily on the emotions of the jurors in an obvious attempt to align them with the complainant").

The prosecutor's use of the deceased's mother to invite the jurors' sympathy for them was sufficiently egregious as to have denied appellant his right to due process and a fair trial, requiring reversal regardless of the strength of the

People's case. See U.S. Const., Amend. XIV; N.Y. Const., Art. 1, § 6; People v. Nevedo, 202 A.D.2d 183 (1st Dept. 1994). To the extent the testimony was not objected to, this Court should consider it in the interest of justice. See People v. Pagan, 2 A.D.3d 879, 880 (2d Dept. 2003)(cumulative effect of prejudicial comments required reversal in the interest of justice); People v. Ortiz, 125 A.D.2d 502 (2d Dept. 1986) (same).[3]

The judgment of conviction should, therefore, be reversed and a new trial ordered.

POINT III

DURING SUMMATION, THE PROSECUTOR VIOLATED APPELLANT'S DUE PROCESS RIGHT TO A FAIR TRIAL BY REPEATEDLY PROFESSING TO KNOW THAT HE WAS GUILTY WHILE VOUCHING FOR THE CREDIBILITY OF THE PEOPLE'S WITNESSES

The prosecutor began summation by invoking the jury's sympathy for the decedent who could not have expected the "tragedy" of never seeing his family again because of Mr. Holiday. The balance of her summation was spent asserting that facts elicited were true, that the People's witnesses were credible, and that Mr. Holiday was guilty. Although the court sustained a few of counsel's, and its own, objections, the pervasiveness of the prosecutor's misconduct deprived appellant

[3] In the alternative, should the Court choose not to exercise its interest of justice jurisdiction, it should nonetheless reverse based on counsel's ineffectiveness for failing to object to improperly introduced testimony and any of these patently improper remarks. See People v. Lauderdale, 295 A.D.2d 539, 540 (2d Dept. 2002)(attorney's failure to object to improper summation comments, among other things, deprived defendant of effective assistance of counsel); People v. Lindo, 167 A.D.2d 558, 559 (2d Dept. 1990)(failure to object to prosecutor's inflammatory comments).

of his due process right to a fair trial. U.S. Const., Amend. XIV; N.Y. Const., Art. 1, § 6.

(A)

"Evenhanded justice and respect for the fundamentals of a fair trial mandate the presentation of legal evidence unimpaired by intemperate conduct aimed at sidetracking the jury from its ultimate responsibility –- determining facts relevant to guilt or innocence." People v. Calabria, 94 N.Y.2d 519, 523 (2000). Unfortunately, the prosecutor in this case had very little regard for this principle. Her first priority on summation was to instill in the jury as much sympathy for Mr. Colon as possible. She urged them to focus on how Mr. Colon would not have thought he would never come home, never see his family again, and never see his girlfriend again. She called his death, in dramatic fashion, "truly a tragedy because a 24-year-old life was taken by this man here . . . Alshawn Holiday" (486).

As the Court of Appeals long ago made clear, a prosecutor must not lead the jury away from the legitimate issues in the case by causing them to draw irrelevant and inflammatory conclusions that have a decided tendency to prejudice the jury against the defendant. People v. Ashwal, 39 N.Y.2d 105, 110 (1976). Obviously, nothing about what Mr. Colon expected or about how tragic his death might have been was relevant to the question whether Mr. Holiday shot him. Rather, this line of argument was a calculated appeal to the jurors' sympathies, which had no place in his trial. People v. Robinson, 123 A.D.2d 796, 797 (2d Dept. 1986) (improper to ask "jurors to consider how they would feel if their

homes had been burglarized"); see People v. Moss, 215 A.D.2d 594, 595 (2d Dept. 1995) (improper to invite jurors to place themselves in position of the victims being threatened by the defendant); People v. Fogarty, 86 A.D.2d 617, 617 (2d Dept. 1982) (improper to "play[] heavily upon the emotions of the jurors in an obvious attempt to align them with the complainant and to thus bolster his testimony"); see also People v. Walters, 251 A.D.2d 433, 434 (2d Dept. 1998)(invited jury to imagine what a shock it was to the victim's wife, who was eight months' pregnant).

(B)

Throughout her summation, the prosecutor made declarations about what was true or not true, acting as an unsworn witness with inside knowledge of the validity of the evidence and of Mr. Holiday's guilt. She also purported to know that Mr. Holiday had, in his first statement to the police, denied being present at the park because he wanted to establish an alibi, not because he was afraid of being violated for breaking his parole curfew (507). She also claimed to know that Mr. Holiday "needed an equalizer" to overpower Mr. Colon, who was too much bigger to fight, and that so as to assuage his embarrassment and make sure that everyone knew that "nobody messes with Crook" he had to make certain that Mr. Colon would never get up again (497). She repeatedly, directly, declared that Mr. Holiday "took that gun and he went after Orlando and he finished him off," that "[t]his man is responsible for killing Orlando Colon," and that "[t]here's only one gun here" and "he's the one who's firing it" (504-05, 517, 518).

Finally, when discussing the video, which was too grainy and dark to make out any identifying features in the figures caught on camera, the prosecutor pointed out that it was Mr. Holiday who was the figure at various points at which the figure who supposedly fired the fatal shots appeared. "One shooter, Alshawn Holiday. He's the one who's firing the shots in the corner" (539).

These personal assurances of the falsity of Mr. Holiday's statement to the police, and the fact of his guilt, violated the prosecutor's most basic duty to not misrepresent the evidence, go beyond the "four corners" of the proof, or call upon the jurors to draw inferences not fairly drawn from the evidence. Ashwal, 39 N.Y.2d at 109; People v. Simms, 130 A.D.2d 525 (2d Dept. 1987) . See People v. Collins, 12 A.D.3d 33 (1st Dept. 2004) (in drug sale case, arguing without evidentiary basis that defendant was part of an organized narcotics enterprise); People v. Smith, 288 A.D.2d 496, 497 (2d Dept. 2001) (prosecutor improperly stated that witness who did not testify would have corroborated the complainant's testimony); People v. Bonaparte, 98 A.D.2d 778, 778 (2d Dept. 1983) (prosecutor became unsworn witness by testifying to facts dehors the record and presenting her opinion as to why other potential witness did not testify).

In particular, the remarks directly declaring Mr. Holiday's guilt "amount[ed] to a subtle form of testimony against the defendant, as to which the defendant may have no effective means of cross-examination." People v. Paperno, 54 N.Y.2d 294, 300-01 (1981). The prosecutor should not have "expressed her personal belief on matters which may influence the jury" thus becoming an "unsworn

witness." Id.; see People v. Lovello, 1 N.Y.2d 436, 439 (1956); People v. Forbes, 111 A.D.3d 1154, 1158 (1st Dept. 2013) ("[C]ounsel may not become a witness in the case or vouch for the credibility of the witnesses who testified."); People v. Smith, 288 A.D.2d 496 (2d Dept. 2001) (unqualified pronouncements of defendant's guilt, including, "of course he did it. This isn't an issue of who did it").

(C)

Finally, the prosecutor repeatedly, and improperly, vouched for her witnesses' credibility. As to Kels, she claimed that he was "one hundred percent credible" (492), that he "told you what he saw," and "did not embellish anything" (503). As for why Kels did not talk to the police, the prosecutor alleged, with no evidence in the record, that it was because Mr. Holiday was a dangerous man: "You decide what it is that the defendant is capable of doing," and speculated that the reason other witnesses did not come forward was "because they know what this defendant is capable of doing" (505-06). She also said that there was no reason to believe "that the whole world decided to conspire against" Mr. Holiday, or that the witnesses would falsely blame Mr. Holiday and let the real shooter go free (517).

It is improper for the prosecutor to express her personal belief in the veracity of the People's witnesses by arguing they have no motive to lie. Pagan, 2 A.D.3d at 880 (improper vouching to argue, inter alia, that complainant had no motive to lie); People v. Clark, 120 A.D.2d 542, 544 (2d Dept. 1986) (improper to equate acquittal with perjury by arguing "why would [the officers] get on the stand

and commit perjury"). Arguing that a police witness would not risk their job or pension in order to frame a defendant has been similarly condemned. People v. Beckford, 138 A.D.2d 613, 614 (2d Dept. 1988) (improper to argue that police "would not put their jobs on the line" to frame defendant); People v. Bonaparte, 98 A.D.2d 778, 778 (2d Dept. 1983) (improper to ask "why police officers would risk their pensions" to frame defendant).

The prosecutor's repeated vouching for the truthfulness of the People's witnesses and unsworn testimony about Mr. Holiday's guilt went beyond all proper response. See People v. Ortiz, 116 A.D.2d 531 (1st Dept. 1986) (although defense strategy was to attack complainant's credibility, prosecutor's right to respond did not encompass right to use inflammatory language, attempts to burden-shift, mischaracterize defense, or impugn counsel's integrity); see also People v. Goldstein, 196 Misc.2d 741, 744 (App. Term, 2d Dept. 2003) ("While a prosecutor is clearly entitled to respond by arguing that the witness had, in fact, been credible and certain of the prosecutor's remarks served that proper purpose, others went beyond any permissible and fair argument that the complainant had testified truthfully.") (internal quotations and citations omitted); People v. Conners, 149 A.D.2d 722, 723 (2d Dept. 1989) ("While some of the prosecutor's comments may have been justified by defense counsel's summation . . . we conclude that the pervasive improprieties in this case exceeded the realm of reasonable response . . . .").

* * *

The prosecutor used many improper rhetorical flourishes deemed especially prejudicial by New York courts over and over again, often without regard for the trial judge's attempts to restrain him. Those attempts did nothing to cure the harm to appellant, see People v. Carborano, 301 N.Y. 39, 42 (1950), and the prosecutor's persistence in the face of them made his misconduct "particularly egregious." People v. Fogel, 97 A.D.2d 445, 445 (2d Dept. 1983) (prosecutorial misconduct "particularly egregious" when it "persisted throughout the summation even after the court sustained numerous objections"); see People v. Lowery, 214 A.D.2d 684 (2d Dept. 1995) (error when "prosecutor continued with this line of [improper] inquiry notwithstanding that the court sustained the defense counsel's objections thereto"); People v. Browne, 106 A.D.2d 455, 457 (2d Dept. 1984) (same). In light of the extent of the misconduct and the sheer number of improper remarks -- some of which required judicial intervention -- the cumulative effect of the prosecutor's misconduct denied appellant his right to a fair trial. Berger v. United States, 295 U.S. 78, 88-89 (1935); People v. Calabria, 94 N.Y.2d 519, 522 (2000); People v. Crimmins, 36 N.Y.2d 230, 237-38 (1975). "The right to a fair trial is self-standing and proof of guilt, however overwhelming, can never be permitted to negate this right." People v. Hicks, 100 A.D.3d 1379, 1380 (4th Dept. 2012) (quoting Crimmins, 36 N.Y.2d at 238). As the First Department has held in a case in which the People's summation was similarly replete with improprieties, where "the cumulative effect of the errors . . . was to deny the defendant [a] fair trial," the court is "constrained to reverse and remand for a new

trial without regard to any evaluation as to whether the errors contributed to the defendant's conviction." People v. Nevedo, 202 A.D.2d 183, 186 (1st Dept. 1994) (internal citation and quotation marks omitted).

To the extent defense counsel made only general objections or did not object to certain of the prosecutor's improprieties during summation, this Court should consider them in the interest of justice given how pervasive and egregious they were. See People v. Spann, 82 A.D.3d 1013, 1015 (2d Dept. 2011); People v. Anderson, 35 A.D.3d 871, 872 (2d Dept. 2006). Alternatively, this Court should find counsel ineffective for failing to object to certain of the comments. See Strickland v. Washington, 466 U.S. 668, 688, 694 (1984); People v. Fisher, 18 N.Y.3d 964, 967 (2012); People v. Baldi, 54 N.Y.2d 137, 146-47 (1981); People v. Mehmood, 112 A.D.3d 850, 855 (2d Dept. 2013).

In sum, the prosecutor's conduct, with a summation devoted to tactics at the expense of legitimate argument, deprived appellant of his due process right to a fair trial, and this Court should reverse his conviction and order a new trial.

CONCLUSION

FOR THE REASONS STATED ABOVE, APPELLANT'S CONVICTION SHOULD BE REVERSED AND A NEW TRIAL ORDERED

Respectfully submitted,

LYNN W. L. FAHEY
Attorney for Defendant-Appellant

PAUL SKIP LAISURE
Of Counsel
April 14, 2015