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People v. Branch: Testing the Limits of Judicial Discretion in Allowing Midtestimony Conferences

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Note

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I. Introduction

A criminal trial does not unfold like a play with actors following a script; there is no scenario and can be none. The trial judge must meet situations as they arise and to do this must have broad power to cope with the complexities and contingencies inherent in the adversary process.¹

*People v. Branch*² exemplifies the truth inherent in Chief Justice Burger's statement in *Geders v. United States*,³ which permitted a midtestimony conference between counsel for a defendant and a testifying defendant.⁴ Eighteen years later, the *Geder's* ruling became the basis for upholding a far different result; a midtestimony conference between a non-defendant witness and a prosecutor.⁵

In *People v. Branch*,⁶ the New York Court of Appeals set parameters which ultimately determined when a judge may allow a prosecutor to hold a "brief private conference"⁷ with a witness during direct examination.⁸ The court held, in this case of first impression in New York, that the decision to permit this type of conference is within the broad discretion of the trial judge.⁹

In *Branch*, Lushon Josephs was shot and killed inside his apartment.¹⁰ Thomas Edwards, a key witness for the prosecution, stated to police and testified before the Grand Jury that he saw the defendant enter and leave Josephs' apartment, armed.¹¹ On direct examination, however, the witness testified inconsistently with his prior testimony.¹² After a bench conference, the trial judge allowed the prosecutor to briefly confer with the witness.¹³ The issue presented in *Branch* was whether

1. *Geders v. United States*, 425 U.S. 80, 86 (1976).

2. 83 N.Y.2d 663, 634 N.E.2d 966, 612 N.Y.S.2d 365 (1994).

3. 425 U.S. at 80.

4. 425 U.S. at 91.

5. *See Branch*, 83 N.Y.2d at 663, 634 N.E.2d at 966, 612 N.Y.S.2d at 365.

6. 83 N.Y.2d 663, 634 N.E.2d 966, 612 N.Y.S.2d 365 (1994).

7. *Id.* at 665, 634 N.E.2d at 967, 612 N.Y.S.2d at 367.

8. *Id.* at 666-67, 634 N.E.2d at 967-68, 612 N.Y.S.2d at 366-67.

9. *Branch*, 83 N.Y.2d at 663, 634 N.E.2d at 966, 612 N.Y.S.2d at 365.

10. *Id.* at 665, 634 N.E.2d at 967, 612 N.Y.S.2d at 366.

11. *Id.* at 665-66, 634 N.E.2d at 967, 612 N.Y.S.2d at 366.

12. *Id.* at 665, 634 N.E.2d at 967, 612 N.Y.S.2d at 366.

13. *Id.* at 665-66, 634 N.E.2d at 967, 612 N.Y.S.2d at 366.

the trial court abused its discretion when it allowed a private meeting between the prosecutor and the witness.¹⁴ The New York Court of Appeals held that where a witness allegedly committed perjury on the stand, the trial court did not abuse its discretion if the alleged perjury impaired the truth-seeking function of the trial.¹⁵

Part II of this casenote examines the basic purpose of a trial and the judge's role in effectuating that purpose. The limitations on a trial judge's discretion are explored along with an appellate court's power to review such discretionary decisions. Additionally, Part II explores various alternatives to midtestimony conferences which continue to uphold the truth-seeking functions of the trial. Finally, Part II provides several instances where the court has allowed a private meeting between a witness and attorney.

Part III discusses the factual background of *People v. Branch*, the procedural history prior to the New York Court of Appeals opinion, and the majority and dissenting opinions. Part IV analyzes the propriety of the court's decision and rationale. This Note concludes that although the court's reasoning was improper, it reached the correct result.

II. Background

A. *Purpose of a trial and the role of the judge in effectuating that purpose.*

The right to a fair trial is recognized as a cornerstone of our system of jurisprudence.¹⁶ In general, a trial resolves both factual and legal disputes.¹⁷ In the realm of factual disputes, the

14. *Id.* at 665, 634 N.E.2d at 967, 612 N.Y.S.2d at 366.

15. *Id.* at 667-68, 634 N.E.2d at 968, 612 N.Y.S.2d at 367.

16. The basis of our system of jurisprudence is the United States Constitution. The Sixth Amendment to the Constitution, guaranteeing a fair trial, states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

U.S. CONST. amend. VI.

17. A trial is defined as: "A judicial examination, in accordance with law of the land, of a cause, either civil or criminal, of the issues between the parties, whether law or fact, before a court that has proper jurisdiction." BLACK'S LAW DICTIONARY

purpose of a trial is truth-seeking.¹⁸ This is especially true in criminal trials where a conviction may justly deprive a person of his or her liberty or property.¹⁹

The ability of the trial process to elicit the truth is not self-executing; there are many devices and processes within the trial which facilitate this function.²⁰ To be most effective, someone must manage these devices and processes. The trial judge is charged with this responsibility.²¹ In fulfilling this responsibility, the goal of ascertaining the truth must always be of paramount concern.²²

Certain matters require the judge, as manager of the trial, to make discretionary decisions. Complicating these discretionary decisions is the absence of an applicable governing statute or law.²³ A judge, therefore, must base these decisions on reason, always realizing the ultimate goal; justice.²⁴ It is difficult to ascertain a precise definition of "judicial discretion" due to the term's abstract nature.²⁵ The Washington Court of Appeals,

1504 (6th ed. 1990). See also AMERICAN HERITAGE DICTIONARY 1292 (2d ed. 1982). "The examination of evidence and applicable law by a competent tribunal to determine the issue of specified charges or claims." *Id.*

18. See *Estes v. Texas*, 381 U.S. 532, 540 (1965). The United States Supreme Court held that "[c]ourt proceedings are held for the solemn purpose of endeavoring to ascertaining the truth which is the *sine qua non* of a fair trial." *Id.* at 540.

19. WAYNE R. LAFAYE & JERALD ISRAEL, CRIMINAL PROCEDURE, at 34 (2d ed. 1992). "The discovery of truth is an essential goal of any criminal justice process that is to serve the ends of the substantive criminal law through the effective enforcement of the law." *Id.* at 33.

20. Some of these devices and processes include, but are not limited to, calling witnesses, presenting evidence to a jury, and implementing rules of procedure.

21. The judge is defined as an officer "appointed to preside and administer the law in a court of justice; the chief member of a court." BLACK'S LAW DICTIONARY, 841 (6th ed. 1990). See also RENZO D. BOWERS, JUDICIAL DISCRETION OF TRIAL COURTS 14 (1931) ("A judge is not placed in that high situation merely as an instrument of the parties. He has a duty of his own, independent of them, and that duty is to investigate the truth.").

22. *Estes v. Texas*, 381 U.S. 532, 540 (1965).

23. BOWERS, *supra* note 21, at 14. The absence of a law or statute is a commonly recognized when a judge is required to make discretionary decisions. See BLACK'S LAW DICTIONARY 467 (6th ed. 1990) (defining discretionary act as "[t]hose acts wherein there is no hard and fast rule as to course of conduct that one must or must not take and, if there is [a] clearly defined rule, such would eliminate discretion.") (citing *Elder v. Anderson*, 205 Cal. App. 2d 326 (5th Dist. 1962)).

24. BOWERS, *supra* note 21, at 14.

25. See, e.g., *Kasper v. Helfrich*, 421 S.W.2d 66, 69 (Mo. Ct. App. 1967) (defining judicial discretion as "the option a trial judge has in doing or not doing a thing that cannot be demanded by a litigant as an absolute right.").

in *State v. Grant*,²⁶ labeled judicial discretion "a sound judgment that is not exercised arbitrarily, but with regard to what is right and equitable under the circumstances and law, and which is directed by the reasoning conscience of the trial judge to a just result."²⁷

The truth-seeking goal of the trial is "best served" when a witness' testimony proceeds free from interruptions.²⁸ However, a prosecutor or defense attorney, in certain limited circumstances, may request that the judge allow an interruption of a witness' testimony for "reasons that present themselves during the progress of the case."²⁹ The judge, as manager of the trial proceedings, has "broad powers in determining the propriety of permitting . . . temporary adjournments."³⁰ Prior to granting a request for an interruption, the attorney must suggest a reason. The judge is then charged with determining whether the stated reason is satisfactory.³¹ The judge's authority to make this decision "is the discretion upon which the course to be chosen depends."³²

As noted above, a court's truth-seeking purpose is best furthered through uninterrupted witness testimony.³³ The court, however, may permit such an interruption at its discretion. An interruption may be coupled with an attorney request to speak with the witness. In *People v. Narayan*,³⁴ the New York Court of Appeals held that a trial judge's refusal to allow the defense counsel to speak with his client while he was on the witness stand, although arguably improper, did not constitute an abuse of discretion.³⁵ In that case, the trial court interrupted the cross-examination of the defendant to research the admissibility of a prosecution question.³⁶ The judge ruled the question admissible, but before the cross-examination continued, the defense attorney requested an opportunity to speak with the

26. 519 P.2d 261, 265 (Wash. Ct. App. 1974).

27. *Grant*, 519 P.2d at 262.

28. *Perry*, 488 U.S. at 282.

29. BOWERS, *supra* note 21, at 309.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Perry*, 488 U.S. at 282.

34. 58 N.Y.2d 904, 447 N.E.2d 51, 460 N.Y.S.2d 503 (1983).

35. *Id.* at 906, 447 N.E.2d at 52, 460 N.Y.S.2d at 504.

36. *Narayan*, 58 N.Y.2d at 905, 447 N.E.2d at 52, 460 N.Y.S.2d at 504.

witness.³⁷ The trial judge denied the attorney's request.³⁸ In affirming the ruling, the New York Court of Appeals found "[t]he proper resolution [as to the determination of the propriety of allowing the conference] lies within the sound discretion of the trial court."³⁹

Narayan aside, a judge may allow a conference between an attorney and a witness, where a compelling reason exists. One such reason involves a testifying defendant.⁴⁰ The United States Supreme Court has continually held that in such a situation, a defendant's Sixth Amendment right to counsel⁴¹ would be violated if the defendant was prohibited from conferring with his or her attorney.⁴²

For example, in *Geders v. United States*,⁴³ the Supreme Court held that a sequestration order,⁴⁴ prohibiting the defendant from consulting with counsel during his criminal trial, violated his right to assistance of counsel.⁴⁵ In *Geders*, the defendant testified in his own defense about his alleged involvement in a conspiracy to fly 1000 pounds of marijuana into the United States.⁴⁶ Throughout the trial, whenever a recess inter-

37. *Id.*

38. *Id.*

39. *Id.*

40. See U.S. CONST. amend. V. This amendment states that a person shall not "be compelled in any criminal case to be a witness against himself." *Id.* Where there is a possibility that this may occur, courts may allow such conferences. This restriction only applies in a criminal trial where the defendant has chosen to testify in his own defense.

41. The amendment states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel in his defense.

U.S. CONST. amend. VI (emphasis added).

42. See generally *Geders v. United States*, 425 U.S. 80, 89 (1976); *Perry v. Leeke*, 488 U.S. 272, 284 (1989).

43. 425 U.S. 80 (1976).

44. A sequestration order "is intended to assure that a witness will testify concerning his own knowledge of the case without being influenced by testimony of prior witnesses and to strengthen role of cross-examination in developing facts." BLACK'S LAW DICTIONARY 1366 (6th ed. 1979).

45. *Geders*, 425 U.S. at 80.

46. *Geders*, 425 U.S. at 81-82.

rupted a witness' testimony, the judge ordered the witness "not to discuss the case overnight with anyone."⁴⁷

At one point during the trial, the defendant took the stand and defense counsel concluded his direct examination at 4:55 p.m.⁴⁸ Thereafter, the judge announced an overnight recess.⁴⁹ The prosecutor asked the judge to give the defendant the same instruction that all other witnesses had received.⁵⁰ Over the objection of the defense, the judge issued the sequestration order.⁵¹ Subsequently, the defendant was convicted and the Court of Appeals for the Fifth Circuit affirmed.⁵²

47. *Geders*, 425 U.S. at 82.

48. *Id.* at 82.

49. *Id.*

50. *Id.*

51. *Id.* The exchange between Mr. Rinehart, the defense attorney, and the court, regarding the propriety of the prosecution's request not to allow anyone, including counsel, to speak with the witness follows:

"THE COURT: My question is: While a witness is subject to cross-examination, even though he is a defendant, does his attorney have the right to confer with him before he is cross-examined?"

"MR. RINEHART [defense counsel]: I feel that I do have the right to confer with him but not to coach him as to what he may say on cross-examination or how to answer questions.

"THE COURT: Then what else would you need to talk to him about?"

"MR. RINEHART: I don't know. Such as whom should I call as the next witness.

"THE COURT: All right.

"MR. RINEHART: There are numerous strategic things that an attorney must confer with his client about.

"THE COURT: Well I don't have any questions, Mr. Rinehart, about what you — I think you are a disciplined man. I think you are trained in the law. And I think if you should tell me, for instance, that you would not discuss this direct testimony with your client I would accept that statement without any qualification.

"MR. RINEHART: Your Honor, I can assure you of that.

"THE COURT: I understand that. But your client, as far as I know, has not had any legal training; and I don't know anything about him other than what I have heard here today. And I don't know that he is subject to that same instruction — that he would understand it. "I think he would understand it if I told him just not to talk to you; and I *just think it is better that he not talk to you about anything*

"And I have held that I find that I don't think you would do anything wrong; but I think it would be better, under the circumstances of this case. And that is my ruling.

Geders, 425 U.S. at 84-85 n.1.

52. *United States v. Fink*, 502 F.2d 1 (5th Cir. 1974). On the point at issue, the appellate court upheld the conviction because the defendant did not claim that any prejudice resulted from being denied the opportunity to meet with counsel

Chief Justice Burger, writing for the majority, recognized the judge's discretionary power to sequester witnesses.⁵³ However, he ruled that where the defendant is the witness, consultation during an overnight recess may be necessary to devise additional strategy, elicit additional information from the day's testimony, and pursue other areas of information not previously explored.⁵⁴ For this reason, the Court reversed the trial court ruling, stating "an order preventing petitioner from consulting his counsel 'about anything' during a 17 hour overnight recess between his direct and cross-examination impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment."⁵⁵

After *Geders*, federal and state courts were divided as to the applicability of the Supreme Court ruling to shorter recesses.⁵⁶ The Supreme Court revisited the *Geders* question in *Perry v. Leeke*.⁵⁷ There, the Court held that the *Geders* rule, permitting a conference between an attorney and non-defendant witness during the trial, was not applicable to a fifteen minute recess occurring between direct examination and cross-examination.⁵⁸ In *Perry*, the defendant was charged with participating in a murder, kidnapping, and assault.⁵⁹ The defendant testified in his own defense.⁶⁰ At the conclusion of his direct

during the recess. *Geders*, 425 U.S. at 86. However, the Supreme Court granted certiorari to answer the question of whether "the order forbidding consultation with [the defendant's attorney] overnight denied him the assistance of counsel in violation of the Sixth Amendment." *Id.*

53. *Geders*, 425 U.S. at 87. "The judge's power to control the progress and, within limits of the adversary system, the shape of the trial includes broad power to sequester witnesses before, during, and after their testimony." *Id.*

54. *Id.* at 88.

55. *Geders*, 425 U.S. at 91.

56. See, e.g., *Bova v. Dugger*, 858 F.2d 1539 (11th Cir. 1988) (stating that an attorney-defendant consultation during a fifteen minute recess in cross-examination was proper); *Bova v. State*, 410 So. 2d 1343 (Fla. 1982) (not allowing consultation during fifteen minute break in cross-examination of defendant violated 6th amendment rights, however, error was harmless); *People v. Stroner*, 432 N.E.2d 348 (Ill. App. Ct. 1982) (stating right to counsel was not violated when discussion of testimony was barred but other consultation was allowed during thirty minute recess); *Wooten-Bey v. State*, 547 A.2d 1086 (Md. Ct. Spec. App. 1988) (stating that consultation with attorney during lunch recess was proper).

57. 488 U.S. 272 (1989).

58. *Id.* at 284.

59. *Id.* at 274.

60. *Id.*

examination, the judge called a fifteen minute recess and ordered the defendant not to speak with anyone, including his attorney.⁶¹ When the trial resumed, the defense moved for a mistrial, which the judge denied.⁶²

The Supreme Court distinguished *Geders*, reasoning that the defendant was ordered not to speak with his attorney during an overnight recess, a time a defendant would normally confer with counsel.⁶³ In *Perry*, however, the Court emphasized that a witness is not normally allowed to confer with counsel during testimony.⁶⁴ The Court was careful to emphasize that its ruling did not preclude consultation in all instances.⁶⁵ Instead, the Court found that a judge's decision to allow a consultation was discretionary and was to be based upon the facts of the case before the court, rather than upon a constitutional right available to all defendants who choose to take the stand.⁶⁶

Courts have established a standard for what may be said to be a reasonable basis for the judge to permit a mid-testimony conference.⁶⁷ In *People v. Enrique*,⁶⁸ the judge called a lunch recess during the prosecution's cross-examination of the defendant.⁶⁹ After the jury left the courtroom, defense counsel asked if he could speak with the witness.⁷⁰ Regarding this request, the judge responded that it was within his discretion to prohibit such a conference.⁷¹ However, the judge stated that he "might entertain" the request if counsel wished to "tell [the court] what [he] would like to say or how long [he] would like to say it."⁷²

61. *Id.*

62. *Perry v. Leeke*, 488 U.S. 272, 274 (1989).

63. *Id.* at 284.

64. *Id.* at 281. "The distinction rests . . . on the fact that when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying." *Id.* at 281.

65. *Id.* at 284.

66. *Id.* "[T]he Federal Constitution does not compel every trial judge to allow the defendant to consult with his lawyer while his testimony is in progress if the judge decides that there is a good reason to interrupt the trial for a few minutes." *Id.* at 284-85.

67. See *infra* notes 68-78 and accompanying text.

68. 165 A.D.2d 13, 566 N.Y.S.2d 201 (1st Dep't 1991).

69. *Enrique*, 165 A.D.2d at 14, 566 N.Y.S.2d at 202.

70. *Id.* at 15, 566 N.Y.S.2d at 202.

71. *Id.*

72. *Id.* at 15-16, 566 N.Y.S.2d at 202.

After counsel replied that he would "rather not reveal that information,"⁷³ the request was denied.⁷⁴

The Appellate Division, First Department, found it "significant" that the trial court denied the request for the conference only after inquiring about its substance.⁷⁵ The Appellate Division emphasized that prior to denying the request, the trial court judge stated that any conference concerning the day's testimony would be "inappropriate."⁷⁶ Thus, in affirming the trial court's ruling, the First Department reasoned that if the defense counsel would have "identified a topic other than defendant's testimony, the ban would have been, to that extent, modified."⁷⁷ The appellate court would have found such a compromise permissible under *Perry*.⁷⁸

B. *Alternatives to a Private Meeting Between Attorney and Witness*

1. *Meeting where judge is present*

One alternative to a private meeting is to include the judge in the conference to assure that no improprieties occur. One such impropriety is witness coaching. In *United States v. Adams*,⁷⁹ a witness refused to testify because he feared for his life.⁸⁰ The trial judge held the witness in contempt, and ordered the witness jailed.⁸¹ Four days later, in a meeting with the judge, the prosecutor, and counsel for the defendant, the witness again refused to testify.⁸² He stated that "he would rather stay in jail than testify and be killed."⁸³ The trial judge asked the defense counsel to leave, and held a meeting with the witness, the prosecutor, and the court reporter to discuss the possi-

73. *Id.* at 16, 566 N.Y.S.2d at 202.

74. *People v. Enrique*, 165 A.D.2d 13, 16, 566 N.Y.S.2d 201, 202 (1st Dep't 1991).

75. *Id.* at 19, 566 N.Y.S.2d at 205.

76. *Id.*

77. *Id.*

78. *Id.* See *Perry*, 488 U.S. at 284 n.8 (suggesting that it may have been permissible for the lower court judge to allow a consultation during a recess if the substance did not involve the ongoing testimony).

79. 785 F.2d 917 (11th Cir. 1986).

80. *Id.* at 919.

81. *Id.*

82. *Id.*

83. *Id.*

bility of enrolling the witness in the Witness Protection Program.⁸⁴ As a result of this meeting, the witness testified.⁸⁵ Subsequently, based upon the witness' testimony, the defendant was convicted.⁸⁶

On appeal, the Eleventh Circuit held that "in . . . the court's residual power to ensure a just trial, and to protect . . . witnesses, a judge may in very rare circumstances feel it essential to confer with a . . . witness on the record but outside the presence of others."⁸⁷ As with allowing a private meeting, a judge's option to include himself is a discretionary decision.⁸⁸ Many judges, however, hesitate to exercise this option.⁸⁹

2. *Impeachment of witness by the party who called him*

New York Criminal Procedure Law (CPL) § 60.35(1) allows a party, whose witness has given testimony which "disproves" the party's position, to introduce evidence of a prior written or oral statement made under oath.⁹⁰ The Commission Staff Notes comment on the reasoning for this law: "A party on the verge of destruction at the hands of his own witness should at least be

84. *United States v. Adams*, 785 F.2d 917, 919 (11th Cir. 1986).

85. *Id.*

86. *Id.* at 918.

87. *Id.* at 920.

88. *See South Omaha v. Fennell*, 94 N.W. 632 (Neb. 1903). "The trial judge is in a better position than the reviewing court to know when the circumstances warrant or require interrogation of witnesses from the bench." *Id.*

89. *See State v. Prater*, 468 N.E.2d 356 (Ohio 1983). A potential problem with utilizing this alternative in a criminal trial is the denial of the defendant's right to confront the witness testifying against him. This is a right guaranteed by the sixth amendment of the United States Constitution. U.S. CONST. amend. VI. If the judge does participate in meeting with the prosecutor and the witness, he can provide a safeguard against this type of deprivation by assuring the defense counsel the right to cross-examine the witness without being unduly limited in subject matter or scope.

90. N.Y. CRIM. PROC. LAW § 60.35(1) (McKinney 1993). This section states, in relevant part:

When, upon examination by the party who called him, a witness in a criminal proceeding gives testimony upon a material issue of the case which tends to disprove the position of such party, such party may introduce evidence that such witness has previously made either a written statement signed by him or an oral statement under oath contradictory to such testimony.

Id.

allowed to show why he called him and to attempt to restore the status quo."⁹¹

The right to impeach one's own witness, however, is not absolute. In *People v. Saez*,⁹² the New York Court of Appeals limited an attorney's right to impeach his own witness to instances where his client's case was damaged.⁹³ In *Saez*, a prosecution witness in an armed robbery case testified on direct examination that she did not see whether the defendant was actually carrying a gun.⁹⁴ This testimony directly conflicted with her prior grand jury testimony, where she had testified that the defendant was carrying a gun.⁹⁵ The Supreme Court, Bronx County, however, refused to allow the prosecutor to impeach the witness at trial with her grand jury testimony.⁹⁶ The Appellate Division of the Supreme Court and the New York Court of Appeals affirmed the trial judge's ruling. The Court of Appeals reasoned that the charged offense of armed robbery does not require that anyone actually see a weapon, therefore, the witnesses' testimony did not affirmatively damage the case.⁹⁷

The use of § 60.35(1) is further limited to clear contradictions in testimony, not merely memory lapses.⁹⁸ In *People v. Fitzpatrick*,⁹⁹ the defendant, a union official, was charged with perjury stemming from his alleged cashing of another's paycheck.¹⁰⁰ A witness testified before the Grand Jury that he cashed the check and gave the proceeds to the defendant.¹⁰¹ At

91. N.Y. CRIM. PROC. LAW § 60.35 (Consol. 1994).

92. 69 N.Y.2d 802, 505 N.E.2d 945, 513 N.Y.S.2d 380 (1987).

93. *Id.* at 804, 505 N.E.2d at 946, 513 N.Y.S.2d at 381.

94. *Id.* at 803, 505 N.E.2d at 946, 513 N.Y.S.2d at 381.

95. *People v. Saez*, 69 N.Y.2d 802, 803, 505 N.E.2d 945, 946, 513 N.Y.S.2d 380, 381 (1987).

96. *Id.* at 804, 505 N.E.2d at 946, 513 N.Y.S.2d at 381.

97. *Id.* at 804, 505 N.E.2d at 946, 513 N.Y.S.2d at 381. *See also* N.Y. CRIM. PROC. LAW § 60.35(3) (McKinney 1993)

When a witness has made a prior signed or sworn statement contradictory to his testimony in a criminal proceeding upon a material issue of the case, but his testimony does not tend to disprove the position of the party who called him and elicited such testimony, evidence that the witness made such prior statement is not admissible

Id.

98. *See infra* notes 99-105 and accompanying text.

99. 40 N.Y.2d 44, 351 N.E.2d 675, 386 N.Y.S.2d 28 (1976).

100. *Id.* at 46, 351 N.E.2d at 676, 386 N.Y.S.2d at 29.

101. *Id.* at 47, 351 N.E.2d at 676, 386 N.Y.S.2d at 29.

trial, however, the witness testified that he did not remember the events. As a result, the court granted the prosecutor permission to treat the witness as a hostile witness under CPL § 60.35¹⁰² and the jury found the defendant guilty.¹⁰³

After the Appellate Division affirmed, the New York Court of Appeals reversed the lower court, holding that when a witness fails to "recall the events in question [it] does not tend to disprove the prosecution's case, but is neutral and merely fails to corroborate or bolster the case without contradicting any factual evidence."¹⁰⁴ The Court of Appeals noted that not allowing the impeachment may psychologically damage the party's case, but classified this as a "risk" assumed when calling a witness.¹⁰⁵

3. *Refreshing the memory of a witness*

When a witness gives adverse testimony, questions calculated to refresh a witness' memory are another alternative to a private meeting between an attorney and a testifying witness. Questions posed in this manner may be used to bring out the reason behind the change in testimony. In *Bullard v. Pear-sall*,¹⁰⁶ the court stated that "[q]uestions asked under the mask of refreshing the recollection of the witness may be asked of the witness for . . . recalling to his mind the statements he previously made, and drawing out an explanation of his apparent inconsistency."¹⁰⁷

C. *Fearful Witnesses*

The truthful testimony of a witness at trial is of paramount importance.¹⁰⁸ This is especially true when the witness is called upon to identify an assailant. Witness identification is "frequently an essential piece of evidence . . . [because] more scientific forms of identification evidence, such as fingerprint and handwriting analyses, are not always available."¹⁰⁹ Therefore,

102. *Id.* at 48-49, 351 N.E.2d at 676-77, 386 N.Y.S.2d at 29.

103. *Id.* at 48, 351 N.E.2d at 677, 386 N.Y.S.2d at 30.

104. *People v. Fitzpatrick*, 40 N.Y.2d 44, 45, 351 N.E.2d 675, 386 N.Y.S.2d 28 (1976).

105. *Id.* at 52, 351 N.E.2d at 680, 386 N.Y.S.2d at 33.

106. 53 N.Y. 230 (1873).

107. *Id.* at 231.

108. *See supra* note 18.

109. *LaFAVE*, *supra* note 19, at 352.

extreme fear in a witness, where "[t]he quality of testimony . . . [may] be impaired,"¹¹⁰ is another compelling reason to allow a midtestimony conference.

In certain circumstances, the constitutional rights of a defendant may be, to some degree, limited to insure that the fearful witness testifies truthfully.¹¹¹ This may be true particularly when the defendant is responsible for creating the witness' fear. The Court of Appeals in *People v. Hagan*¹¹² held that the right to a public trial, secured by the Sixth Amendment of the United States Constitution, was not violated when the judge, due to the fear of a witness, closed the courtroom to the public and press.¹¹³ There, the witness "represented to the court that [he] believed that his life was in danger if he testified publicly."¹¹⁴ For this reason, he refused to testify while the individuals, whom the witness thought were the source of the threats, were present in the courtroom.¹¹⁵ The judge had noticed that when the witness was sworn in, certain individuals present in the court "grinned" and the defendant "turned white as a sheet."¹¹⁶ As a result, the judge "closed the courtroom during this testimony."¹¹⁷ The New York Court of Appeals held that "if, for a good reason related directly to the management of the trial, the Judge closes the courtroom as to the testimony of a witness . . . a defendant is not necessarily deprived of a 'public' trial."¹¹⁸

110. *Estes v. Texas*, 381 U.S. 532, 547 (1965).

111. See *infra* notes 112-118 and accompanying text.

112. 24 N.Y.2d 395, 248 N.E.2d 588, 300 N.Y.S.2d 835 (1969).

113. *Id.* at 399, 248 N.E.2d at 590, 300 N.Y.S.2d at 838.

114. *Id.*

115. *Id.* at 399, 248 N.E.2d at 591, 300 N.Y.S.2d at 838.

116. *Id.* at 398, 248 N.E.2d 590, 300 N.Y.S.2d 836 (quoting *United States v. Harold*, 408 F.2d 125, 127 (2d Cir. 1969)).

117. 24 N.Y.2d at 398, 248 N.E.2d at 591, 300 N.Y.S.2d at 836.

118. *Id.* at 397-98, 248 N.E.2d at 590, 300 N.Y.S.2d at 837. See also *People v. Guzman*, 176 A.D.2d 561, 563, 575 N.Y.S.2d 26, 29 (1st Dep't 1991) (holding that "there was no abuse of discretion by the trial court in ordering closure of the courtroom . . . on the ground that the People had presented a sufficiently overriding interest to the defendant's right to a public trial, i.e., the interest of the witness 'to testify without interference, without fear.'").

D. *Appropriate Role of Appellate Courts*

Generally, appellate courts are reluctant to overturn discretionary rulings of lower courts absent legal error.¹¹⁹ One reason for this reluctance is judicial economy.¹²⁰ An additional reason for this reluctance is that the trial judge enjoys a unique opportunity to view the evidence and the witnesses first hand;¹²¹ an advantage the appellate court does not have.

Not all courts view the role of the appellate court in the same way. For example, the Missouri Supreme Court, in *Feurt v. Caster*,¹²² held that appellate courts are "duty bound to approve or reject all rulings of lower courts, even when made in the exercise of a judicial discretion."¹²³ Other courts, however, reject that notion.¹²⁴ Judge Camden, referred to by one commentator as one of the "greatest and purest"¹²⁵ of all judges, said that judicial discretion represents "the law of tyrants."¹²⁶ He discouraged the use of discretionary decisions and pointed out their many negative aspects.¹²⁷ Judge Camden expounded, "in the best [of circumstances a discretionary decision] is often-

119. 1 CHAMBERLAYN, THE MODERN LAW OF EVIDENCE § 177 (1911). "In matters properly of administration or discretion reversal should properly occur only where error in law has been committed. Such an error may be, and most frequently is, caused by a failure of the trial judge to exercise reason as the law requires." *Id.*

120. *Id.* "It may be fairly observed that the action of many appellate courts in this respect is such as not only to add enormously to their own labors, but also to create a serious congestion of judicial business through repeated new trials and a consequent practical denial of justice." *Id.*

121. See generally *Day v. Day*, 112 A.D.2d 972, 492 N.Y.2d 783 (2d Dep't 1985).

122. 73 S.W. 576 (Mo. 1903).

123. *Feurt*, 73 S.W. at 578. In so holding, however, the court recognized the importance of discretionary rulings and the trial court judge's role in making these decisions. "And whilst this court is always loath to interfere with discretionary rulings of trial courts, nevertheless, such rulings are not conclusive upon this court, and where they are interfered with it is . . . because the ultimate responsibility for every judgement rests upon the court of final resort to which the case is taken" *Id.*

124. See, e.g., *In Re Droege*, 197 N.Y. 44, 45, 90 N.E. 340, 343 (1909).

125. BOWERS, *supra* note 21, at 30.

126. *Id.*

127. *Id.* Camden continued: Judicial discretion is "always unknown; it is different in different men; it is causal, and depends upon constitution, temper, and passion." *Id.*

times caprice; in the worst, it is every vice, folly and passion to which human nature can be liable."¹²⁸

In New York, however, appellate courts may not overturn discretionary decisions of a trial court unless legal error is present.¹²⁹ In *In re Droege*,¹³⁰ the New York Court of Appeals held that it could not review the lawful exercise of a discretionary decision by a lower court.¹³¹ The court found that assuming jurisdiction over this type of decision would necessarily involve "substituting [its] judgment and discretion" for that of the lower court.¹³²

Other courts have considered prejudicial effect when determining whether appellate review of discretionary decisions is proper. Professor Chamberlayn, in his treatise on evidence,¹³³ emphasized that an appellate court should only *review*, and therefore, may only reverse a trial court on a discretionary matter if legal error is present.¹³⁴ Moreover, Chamberlayn believes that the appellate court's power of review should be further restricted to instances where, in addition to this legal error, "the complaining party has, without his own fault, been substantially prejudiced."¹³⁵ Although all courts do not accept Chamberlayn's proposition, some have incorporated prejudicial effect into decisions of whether to review a trial court ruling.¹³⁶

128. *Id.*

129. See *infra* notes 130-132 and accompanying text.

130. 197 N.Y. 44, 90 N.E. 340 (1909).

131. *Droege*, 197 N.Y. at 45, 90 N.E. at 343. *Droege*, the city Magistrate of New York, was charged with misconduct for illegally discharging a prisoner from imprisonment. *Id.* at 45, 90 N.E. at 341. The Association of the Bar of the City of New York petitioned the Appellate Division to remove *Droege* "for cause." *Id.* The Appellate Division found that *Droege* had been involved in misconduct and ordered him removed "for cause." *Id.* at 48, 90 N.E. at 342. Since neither the Constitution nor any statutes define "cause" in the context of "removal for cause," this was a discretionary decision. *Id.* at 51, 90 N.E. at 43. If the Court of Appeals attempted to judge the sufficiency of the "cause," it would be improperly assuming the power of a lower court. *Id.*

132. *Droege*, 197 N.Y. at 50, 90 N.E. at 343. See also *Cox v. Lykes Brothers*, 237 N.Y. 376, 143 N.E. 226 (1924) (holding that "an appellate court may not overrule a . . . [lower court's decision] unless the record shows no basis for the exercise of discretion.").

133. See CHAMBERLAYN, *supra* note 119.

134. *Id.*

135. *Id.*

136. See, e.g., *United States v. Loyd*, 743 F.2d 1555 (11th Cir. 1984) (holding whether to . . . allow prosecutor to interview a witness during a trial recess so that

E. Approaches of other jurisdictions

Prior to *Branch*, no New York case specifically addressed whether a midtestimony private conference between an attorney and witness was permissible. Similarly, there is no applicable New York statute or rule to guide a judge's decision. Other states and various federal circuit courts of appeal, however, have addressed the question.

Some appellate courts have upheld these conferences, basing their propriety upon the discretionary decision of the judge. In *State v. Delarosa-Flores*,¹³⁷ the Court of Appeals of Washington upheld a trial court decision allowing a conference during a short recess. There, the defendant was charged with several counts of rape¹³⁸ stemming from the victim's pretrial statement that the defendant forced her to engage in oral sex.¹³⁹ When asked at trial whether she had any intercourse other than vaginal and anal, the victim replied: "No."¹⁴⁰ This testimony conflicted with her prior statement.¹⁴¹ Immediately following this testimony, the state requested a short recess to speak with the victim.¹⁴² The request was granted and upon the victim's return to the stand, "the defense objected to any further testimony regarding other sexual acts."¹⁴³ The court overruled the objection, and the victim testified that the defendant forced her to perform oral sex.¹⁴⁴

The Washington Court of Appeals found no abuse of discretion.¹⁴⁵ The court based this ruling on three findings: First, no evidence suggested or proved that the prosecutor "did anything

prosecutors questions to the witness can be more precise is within the discretion of the trial court and will not be reviewed absent abuse of that discretion, and showing of prejudice is necessary to find an abuse." *Id.* at 1564; *United States v. Burke*, 495 F.2d 1226, 1233 (5th Cir. 1974) (stating that trial court did not abuse its discretion by allowing a prosecutor to meet with a witness during a recess in cross-examination because defense made no showing of prejudice).

137. 799 P.2d 736 (Wash. Ct. App. 1990).

138. *Id.*

139. *Id.* at 738.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *State v. Delarosa-Flores*, 799 P.2d 736 (Wash. Ct. App. 1990).

145. *Id.*

more than refresh the victim's recollection."¹⁴⁶ Second, no evidence showed that the prosecutor had urged the victim to create testimony.¹⁴⁷ Finally, the post-recess testimony was "consistent with her initial report to the police."¹⁴⁸ The court, in relying upon *Geders*, recognized that there was an "important ethical distinction between a prosecutor discussing testimony and improperly seeking to influence it."¹⁴⁹

Additionally, the court noted that cross-examination was a sufficient safeguard under these circumstances.¹⁵⁰ Nothing impeded the defense from fully cross-examining the witness regarding the conference during the recess.¹⁵¹ The court found that cross-examination could have been used skillfully to "develop a record [to be used] in closing argument . . . raising questions as to the defendant's credibility"¹⁵²

In *United States v. De Jongh*,¹⁵³ the judge allowed the prosecutor to confer with a witness between that witnesses' direct and cross-examination.¹⁵⁴ During the morning session, when the defense learned of the conversation, it "engendered no particular controversy."¹⁵⁵ However, later that afternoon, the defense called the meeting "prejudicial and improper."¹⁵⁶ The Court of Appeals for the First Circuit found no error in allowing the conference, stating that "the District Court possesses considerable discretion . . . to curb possible trial abuses."¹⁵⁷

146. *Id.*

147. *Id.*

148. *Id.*

149. *State v. Delarosa-Flores*, 799 P.2d 736 (Wash. Ct. App. 1990) (citing *Geders*, 425 U.S. 80, 90 n.3 (1976)).

150. *Id.*

151. *Id.*

152. *Id.*

153. 937 F.2d 1 (1st Cir. 1991).

154. *Id.* at 2. The fact that the prosecutor and the witness met came out on cross-examination. *Id.* It was the prosecutor's idea to have the meeting, although the witness testified that she did remember "some more things" over the weekend. *Id.*

155. *Id.* at 2.

156. *Id.*

157. *Id.* at 3. One applicable area in which the court of appeals suggests that the district court has considerable discretion is in its "broad power to sequester witnesses before, during, and after their testimony." *Id.* (quoting *Geders*, 425 U.S. at 80).

The court of appeals further stated that it was "aware of no rule or ethical principal suggesting . . . that a prosecutor should refrain from conferring with a government witness before the start of cross-examination."¹⁵⁸ The court compared a conference immediately following direct examination to the routine preparation of the witness before he takes the stand and found that neither presented a high "risk of taint" to the testimony.¹⁵⁹

The issue of whether a conference between an attorney and witness "taints" the witness' testimony was also addressed in *Frierson v. State*.¹⁶⁰ There, a private meeting occurred during the direct examination of the witness.¹⁶¹ While testifying, the victim became very emotional and the prosecution requested a recess.¹⁶² The court granted the State's request.¹⁶³

The defendant, relying on *Perry v. Leeke*,¹⁶⁴ contended that the trial court erred in denying his motion to preclude the conference.¹⁶⁵ The court found this argument unpersuasive and distinguished the situation in *Frierson* from that in *Perry*.¹⁶⁶ First, unlike in *Perry*, the court in *Frierson* was not worried about the attorney coaching the witness. Rather, the conference was allowed because the witness became emotional and needed to "regain her poise."¹⁶⁷ It was clear that this conference was not held for strategic purposes. Second, the conferences occurred at different times during the respective trials. In *Perry*, the conference occurred between the defendant's direct examination and cross-examination, whereas in *Frierson*, the conference was during direct examination. The court found that a conference occurring during direct examination was "much less

158. *Id.*

159. *Id.*

160. 543 N.E.2d 669 (Ind. Ct. App. 1989).

161. *Id.* at 670.

162. *Id.*

163. *Id.*

164. 488 U.S. 272 (1989).

165. 543 N.E.2d at 671. The term "abuse of discretion" is often misunderstood. It is often thought of as connoting a bad or improper motive. This is not correct. It is defined as an "erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn from such facts and circumstances." BOWERS, *supra* note 21, § 12 at 20, (citing *Richardson v. Augustine*, 49 P. 930 (1897); *Starr v. State*, 115 P. 356 (Okla. Crim. 1911)).

166. 543 N.E.2d at 672.

167. *Id.*

likely undertaken for strategy purposes.”¹⁶⁸ Finally, in *Frier-son*, the defendant was not the witness with whom the conference occurred and therefore, no Sixth Amendment issue was presented, as in *Perry*.¹⁶⁹

Still, other courts have been highly critical of midtestimony conferences. Although some appellate courts have upheld the trial court’s decision to permit these conferences, they have done so only because the resulting error was not prejudicial. In *United States v. Malik*,¹⁷⁰ the prosecutor had several private conferences with a witness during direct examination.¹⁷¹ One conference resulted in a correction to the witness’ prior testimony regarding a minor detail.¹⁷² The defense moved to strike the corrected testimony and further to restrict government counsel from conferring with the witness before his direct examination was completed.¹⁷³ In denying the motion, the court reasoned that although a court rule precluded conversations between a government witness and government counsel during cross-examination, such conversations were permitted during direct examination.¹⁷⁴

The appellate court, nonetheless, reprimanded the prosecutor because the meeting was “unnecessary.”¹⁷⁵ In doing so, the court suggested that there were many well-known ways, on the record, in which the prosecutor could have corrected the witnesses’ direct examination testimony.¹⁷⁶ Ultimately, the appellate court found that it was within the trial judge’s discretion to determine the propriety of such a conference.¹⁷⁷ Because only one correction was made to a minor detail, the court found no prejudicial error and affirmed the trial court ruling denying a mistrial.¹⁷⁸

168. *Id.* at 673.

169. *Id.* See *supra* note 57 and accompanying text.

170. 800 F.2d 143 (7th Cir. 1986).

171. *Id.* at 148.

172. *Id.*

173. *Id.* at 148

174. *Id.*

175. *Id.* at 149.

176. *Id.*

177. *Id.*

178. *Id.*

Similarly, in *Duke v. United States*,¹⁷⁹ private counsel and a testifying witness conferred during direct examination. As a result of this conference, the witness corrected a former statement made to prosecutors and testified that in exchange for his testimony, charges against him in another case were dropped.¹⁸⁰ The Court of Appeals for the Ninth Circuit stated that while it "disapproved of the practice of any witness . . . receiving secret advice from anyone while he is on the stand,"¹⁸¹ in this particular case, it did not prejudice the defendant.¹⁸²

III. People v. Branch

A. The Facts

The defendant, Lamont Branch, was charged with murder in the second degree, burglary in the first degree, and criminal possession of a weapon in the second degree.¹⁸³ These charges resulted from the shooting of Lushon Josephs, which occurred inside Josephs' Brooklyn apartment.¹⁸⁴

Thomas Edwards was a key witness for the prosecution.¹⁸⁵ He stated to police and testified before the Grand Jury that the defendant carried a gun when he entered the victim's apartment.¹⁸⁶ Edwards also stated that he heard a shot from within the apartment and viewed the defendant exit, along with two

179. 255 F.2d 721 (9th Cir. 1958).

180. *Id.* at 728. Ironically, in this particular instance, the admissions made by the witness after the conference actually helped the defendant. *Id.* Since the witness was testifying in exchange for the dropping of a pending charge, this showed a bias and actually supported the defendant's theory of the case. *Id.* The judge stated that "[t]his admission supported the theory of Duke and redounded to his benefit. He thus elicited, upon cross-examination, an interest or motive which might indicate bias after the witness had flatly denied such a fact on direct." *Id.*

181. *Id.*

182. *Id.* The defendant's correction in testimony actually helped the defendant because it brought out a motive and bias behind the witnesses testimony.

183. *People v. Branch*, 191 A.D.2d 576, 595 N.Y.S.2d 88, 89 (2d Dep't 1993).

184. 83 N.Y.2d at 665, 634 N.E.2d at 967, 612 N.Y.S.2d at 366. The defendant and two other individuals entered Josephs' building and went to the second floor where Josephs' apartment was located. Josephs did not open the door and one of the defendant's companions forced the door open. All three entered the apartment. Brief for Respondent at 5-6, *People v. Branch*, 83 N.Y.2d 663, 634 N.E.2d 966, 612 N.Y.S.2d 365 (1994) (No. 89-11099).

185. *Id.* at 665, 634 N.E.2d at 967, 612 N.Y.S.2d at 366 (1994).

186. *Id.*

others.¹⁸⁷ Edwards claimed that Branch was still armed when he left.¹⁸⁸

The defendant was tried in the Supreme Court, Kings County.¹⁸⁹ At trial, the judge instructed the court officers to bring Edwards into the courtroom through a private entrance on the day he was to testify.¹⁹⁰ Notwithstanding these instructions, Edwards was brought in through a public entrance.¹⁹¹ At trial, the prosecutor, during direct examination, asked Edwards who was carrying the gun.¹⁹² Edwards replied that one of the defendants' companions was holding the weapon and that the defendant was unarmed.¹⁹³ Because this contradicted his earlier statements, the prosecutor immediately asked for a bench conference and expressed concern that the witness's trial testimony differed from his pre-trial statements.¹⁹⁴ The prosecutor stated that the witness had been intimidated by the defendant's family.¹⁹⁵ Since the court officer mistakingly brought the witness in through the public area, the prosecutor requested that she be allowed to speak with the witness.¹⁹⁶

Overruling a defense objection, the judge allowed the conference and then granted a short recess for the consultation.¹⁹⁷ The judge instructed both attorneys that the witness could be cross-examined without limitation.¹⁹⁸ He also told the witness that he was not required to speak to the prosecutor.¹⁹⁹ In addition, the judge informed the jury that the recess was for the

187. *Id.*

188. *Id.*

189. *Branch*, 191 A.D.2d at 576, 595 N.Y.S.2d at 88.

190. *Branch*, 83 N.Y.2d at 665, 634 N.E.2d at 967, 612 N.Y.S.2d at 366. The court had ordered that Edwards be sequestered so he could not come in contact with defendant's family or friends. Edwards was not brought to the back of the courtroom where he was supposed to wait to testify. As a result of this, people were able to approach him while he awaited his time to testify. Brief for Respondent at 8-9, *People v. Branch*, 83 N.Y.2d 663, 634 N.E.2d 966, 612 N.Y.S.2d 365 (1994) (No. 89-11099).

191. 83 N.Y.2d at 665, 634 N.E.2d at 967, 612 N.Y.S.2d at 366.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *People v. Branch*, 83 N.Y.2d 663, 634 N.E.2d 966, 612 N.Y.S.2d 365 (1994).

197. *Id.* at 666, 634 N.E.2d at 967, 612 N.Y.S.2d at 366.

198. *Id.*

199. *Id.*

prosecutor and the witness to meet, but the jury was not told of the reason for the meeting.²⁰⁰

After the conference, the witness returned to the stand and testified that the defendant carried the gun.²⁰¹ Although provided with the opportunity, the defense did not cross-examine the witness regarding the conference. However, in summation, the defense suggested that the witness changed his testimony as a result of improper coaching.²⁰² Ultimately, the defendant was convicted of murder in the second degree, burglary in the first degree, and criminal possession of a weapon in the second degree.²⁰³

B. *Procedural History*

The defendant appealed to the Supreme Court, Appellate Division,²⁰⁴ contending that the trial court erred by allowing the conference between the prosecutor and the witness.²⁰⁵ The Appellate Division affirmed, holding that the trial court did not abuse its discretion.²⁰⁶ The court reasoned that a meeting between the prosecutor and the witness did not constitute "an improper impeachment of the witness."²⁰⁷ Finally, the appellate division held that the defendant was not deprived of his right to

200. *Id.*

201. *People v. Branch*, 83 N.Y.2d 663, 666, 634 N.E.2d 966, 967, 612 N.Y.S.2d 365, 366 (1994). The prosecutor was prohibited from bringing out the reasons behind the change in testimony. Edwards was restricted to saying that he was scared and could not give a reason for this fear. *Id.*

202. *Id.* The relevant portion of the defense's summation is as follows:

[Y]ou saw him when he got up on the stand and he said Bigum had the gun, and then the District Attorney stopped dead in her tracks and didn't ask him any more questions. Recess. Goes out and talks to him; comes back and changes answer. "I was scared." Did that person look scared to you?

Brief for Respondent at 10, *People v. Branch*, 83 N.Y.2d 663, 634 N.E.2d 966, 612 N.Y.S.2d 365 (1994) (No. 89-11099).

203. 83 N.Y.2d at 666, 634 N.E.2d at 967, 612 N.Y.S.2d at 366.

204. *Branch*, 191 A.D.2d at 576, 595 N.Y.S.2d at 88-89. Two issues went before the appellate division. The first involved the propriety of admitting evidence of the witnesses prior dealings with the defendant regarding drug activities. *Id.* The court held that it was not improper for these previous activities to be the basis for an in court identification. The court also found that the court gave proper limiting instructions. *Id.*

205. *Branch*, 191 A.D.2d at 576, 595 N.Y.S.2d at 89.

206. *Id.*

207. *Id.* By "improper," the court was referring to the method of impeachment outlined in CPL § 60.35.

confrontation, because the trial court allowed the defense to cross-examine the witness about the substance of the conference.²⁰⁸ The Court of Appeals granted leave to appeal.²⁰⁹

C. *Majority Opinion*

For the majority, Judge Simons²¹⁰ acknowledged the general proposition that witnesses should testify during both direct examination and cross-examination without interruption, to best assure that the truth-seeking function of the trial prevails.²¹¹ However, the court rejected the notion that a trial court must absolutely allow or absolutely prohibit midtestimony conferences.²¹² In rejecting such a firm rule, the court of appeals noted "that trial courts may allow such conferences as a matter of discretion."²¹³ Referring to the *Perry* line of cases,²¹⁴ the court then stated that the rules applicable to attorney conferences with testifying defendant witnesses should "apply generally to other witnesses, including the prosecution witness here."²¹⁵

The court repeated its earlier statement that the decision whether to allow a midtestimony conference is one of judicial discretion.²¹⁶ The court then held that since the court of appeals, "as a court of law, may reverse such decisions only for legal error,"²¹⁷ it lacks the power to substitute its judgment

208. *Id.*

209. 81 N.Y.2d 1011, 616 N.E.2d 856, 600 N.Y.S.2d 199 (1993).

210. Judge Simons wrote the majority opinion. Judges Bellacosa, Smith, and Levine concurred.

211. *Branch*, 83 N.Y.2d at 666, 634 N.E.2d at 967, 612 N.Y.S.2d at 366 (citing *Perry v. Leeke*, 488 U.S. 272, 282 (1989); *People v. Enrique*, 80 N.Y.2d 869, 600 N.E.2d 229, 587 N.Y.S.2d 598 (1992); *People v. Narayan*, 58 N.Y.2d 904, 447 N.Y.2d 51, 460 N.Y.S.2d 503 (1983)).

212. *Id.*

213. *Branch*, 83 N.Y.2d at 666, 634 N.E.2d at 968, 612 N.Y.S.2d at 367.

214. This line of cases, beginning with *Geders*, 425 U.S. 80 (1976), and continuing through *Leeke*, 488 U.S. 272 (1989), involved midtestimony conferences between a defense attorney and his client. See *supra* notes 43-66 and accompanying text.

215. 83 N.Y.2d at 667, 634 N.E.2d at 968, 612 N.Y.S.2d at 367.

216. *Branch*, 83 N.Y.2d at 666, 634 N.E.2d at 968, 612 N.Y.S.2d at 367. See *supra* note 213 and accompanying text.

217. 83 N.Y.2d at 667, 634 N.E.2d at 968, 612 N.Y.S.2d at 367. The court described legal error as where "the case presented shows no room for exercise of . . . reasonable discretion." *Id.* (quoting *Matter of Coombs v. Edwards*, 280 N.Y. 361, 364, 21 N.E.2d 353, 354 (1939)).

when facts and inferences, although they may conflict, are reasonable to support a result.²¹⁸ The court found it "inconsequential" that other methods were available to address this problem.²¹⁹ Although the situation might have been handled differently by other judges, the court of appeals ruled that the availability of alternative methods is not the proper standard of review.²²⁰

The court analyzed the trial judge's decision regarding the conference, and found that the trial judge was faced with a dilemma. On the one hand, there was a witness who was lying because he was intimidated by the defendant's family members; on the other, there was a request for a private conference where improper coaching could occur. Ultimately, the trial judge was required to make a decision that would not undermine the truth-seeking function of the trial. The court of appeals found that the trial judge's decision represented a "sound middle path" between unconditionally allowing the testimony and absolutely prohibiting it.²²¹ By allowing the conference to occur with appropriate safeguards, the trial judge "allowed the People a chance to rehabilitate their case to some extent, yet fully protected both the defendants right to cross-examination and the jury's authority to make informed determinations as to facts and credibility."²²²

Balancing the need to assure the truth-seeking function of the trial, while concomitantly preserving the rights of the defendant, the Court of Appeals held that the trial court acted properly.²²³ The court acknowledged the following safeguards: 1) the court told the witness that he was not required to speak to the prosecutor; 2) the jury was only told that the witness was removed so the prosecutor could talk to him; 3) the prosecutor was barred from introducing details about the change in testi-

218. *Id.* (citing *Cox v. Lykes Bros.*, 237 N.Y. 376, 382, 143 N.E. 226, 228 (1924); *In Re Droegge*, 197 N.Y. 44, 53, 90 N.E. 340, 343 (1909)).

219. 83 N.Y.2d at 668, 634 N.E.2d at 968, 612 N.Y.S.2d at 367. The court acknowledged that the dissent was correct in suggesting that an *in camera* conference or a CPL § 60.35 impeachment would have also resolved the problem at hand. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* at 667, 634 N.E.2d at 968, 612 N.Y.S.2d at 367.

223. *Id.*

mony; 4) Edward's contradictory statements remained on the record to be considered by the jury; 5) the defense was permitted to cross-examine the witness regarding the substance of the conference; and 6) defense counsel was allowed to raise the possibility of witness coaching in summation.²²⁴ After examining the trial court's action in light of the then existing situation, the court of appeals held that as a matter of law, the trial court did not abuse its discretion.²²⁵

Finally, the court of appeals reviewed the law of other jurisdictions which have dealt with this situation.²²⁶ The court found that its holding followed these courts' rulings. The court held that "to unduly limit a trial court's discretionary power in matters concerning trial management increases the likelihood that rigid rules will replace common sense and that the truth-seeking function of a trial will be impaired not advanced."²²⁷

D. *Dissenting Opinion*

Judge Titone, dissenting,²²⁸ believed that the trial court's ruling "fell well outside the permissible range of trial court discretion,"²²⁹ and presented a situation which would likely interfere with the truth-seeking function of the trial.²³⁰ In this instance, the dissent found no "sound reasons" to justify straying from "accepted courtroom practice."²³¹

The dissent rejected the majority's proposition that midtestimony conferences were permissible based upon *Perry* and *Enrique*.²³² The dissenters reasoned that the cases should have been factually distinguished, rather than used as a basis of support because each involved conferences between a testifying de-

224. *People v. Branch*, 83 N.Y.2d 663, 667-68, 634 N.E.2d 966, 968, 612 N.Y.S.2d 365, 366 (1984).

225. *Id.* at 669, 634 N.E.2d at 969, 612 N.Y.S.2d at 368.

226. *Id.* at 668, 634 N.E.2d at 968-69, 612 N.Y.S.2d at 367-68.

227. *Id.* at 669, 634 N.E.2d at 969, 612 N.Y.S.2d at 368.

228. *Id.* at 669, 634 N.E.2d at 969, 612 N.Y.S.2d at 368 (Titone, J., dissenting). Chief Judge Kaye and Judge Ciparick concurred in the dissent.

229. *People v. Branch*, 83 N.Y.2d 663, 669, 634 N.E.2d 966, 969, 612 N.Y.S.2d 365, 368 (1994).

230. *Id.*

231. *Id.*

232. *Id.* at 670-71, 634 N.E.2d at 969, 612 N.Y.S.2d at 368 (Titone, J., dissenting).

fendant and their counsel.²³³ The difference between a testifying defendant and a prosecution witness was "significant,"²³⁴ since those rulings rested upon a defendant's right to assistance of counsel.²³⁵ The defendant in the instant case never asserted that the midtestimony conference violated his right to counsel.

The dissent also found no New York precedent which addressed the issue of midtestimony conferences involving non-defendant witnesses.²³⁶ Since no case law controlled, the defense found no "precedentially supported reason to treat the question as one that falls within the broad, virtually unguided discretion of the trial court"²³⁷ Instead, the dissent advocated that the court fashion a firm rule, ensuring that the truth-seeking functions of the trial remain unhindered.²³⁸

The dissenters further asserted that classifying the decision to allow midtestimony conferences as discretionary would not "advance the truth-seeking process,"²³⁹ regardless of the full opportunity for cross-examination.²⁴⁰ The dissent emphasized that allowing these conferences runs counter to the common law's mistrust of private conferences.²⁴¹ The dissent cited *People v. Enrique* to stress the importance of this proposition.²⁴² In that case, the court did not allow a private consultation during a lunch recess based upon this mistrust.

The dissent believed that trial courts should have some discretion to permit the "suspect practice" of midtestimony conferences.²⁴³ It qualified this belief, however, by stating that this

233. *Id.* at 670, 634 N.E.2d at 969-70, 612 N.Y.S.2d at 368-69.

234. *People v. Branch*, 83 N.Y.2d 663, 670, 634 N.E.2d 966, 970, 612 N.Y.S.2d 365, 369 (Titone, J., dissenting) (1994).

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *People v. Branch*, 83 N.Y.2d 663, 670, 634 N.E.2d 966, 970, 612 N.Y.S.2d 365, 369 (1994).

240. *Id.*

241. *Id.* (citing *Perry v. Leeke*, 488 U.S. 272, 281 (1989) "[I]t is a common practice for a judge to instruct a witness not to discuss his or her testimony with third parties," since mid-testimony consultations by witnesses can impede 'the truth seeking function of the trial' in several ways including 'unethical "coaching."') *Id.*

242. *Id.* at 671, 643 N.E.2d at 970, 612 N.Y.S.2d at 369.

243. *Id.*

discretion should be "narrowly circumscribed and . . . subject to review under one or more specific criteria."²⁴⁴ The dissent suggested "necessity" as one such criteria.²⁴⁵

The dissent found "necessity" to be an appropriate threshold standard because "less perilous methods for remedying apparent reversals in a prosecution witness's story" exist.²⁴⁶ One such method is CPL § 60.35, which allows the prosecutor to impeach the witness by asking leading questions regarding a prior inconsistent statement.²⁴⁷ Although, as the dissent admitted, this technique is difficult to implement because "case law has established a relatively stringent standard as a predicate for invoking [it],"²⁴⁸ they also believed that this apparent difficulty should not automatically justify a midtestimony conference.²⁴⁹

The dissent further suggested the use of *in camera* conferences, where the witness, opposing counsel, and stenographer are present, as an alternative to a private midtestimony conference.²⁵⁰ The dissent found this alternative more appropriate because no privacy problem surfaces.²⁵¹ Since it is the privacy that "creates the opportunity for coaching and tampering,"²⁵² and no attorney-client relationship or privilege existed, an "unsupervised and unmonitored" conference was not necessary.²⁵³

The dissent rejected the majority's proposition that any prejudice to the defendant could be remedied through cross-examination.²⁵⁴ The dissent pointed out two disadvantages of cross-examination: first, that any question asked carries the

244. *People v. Branch*, 83 N.Y.2d 663, 671, 634 N.E.2d 966, 970, 612 N.Y.S.2d 365, 369 (1994)(quoting *People v. Pendleton*, 394 N.E.2d 496, 507 (Ill. 1979)) "[M]id-testimony discussions between prosecutors and their witness 'pose a tantalizing potential for misconduct' and thus 'they are to be strictly scrutinized.'" *Id.*

245. *Id.* at 671, 634 N.E.2d at 971, 612 N.Y.S.2d at 370.

246. *Id.*

247. See N.Y. CRIM. PROC. LAW § 60.35 (McKinney 1993).

248. 82 N.Y.2d at 671-72, 634 N.E.2d at 971, 612 N.Y.S.2d at 370 (Titone, J., dissenting).

249. *Id.* at 672, 634 N.E.2d at 971, 612 N.Y.S.2d at 370 (Titone, J., dissenting).

250. *Id.* See also *United States v. Adams*, 785 F.2d 917 (11th Cir. 1986); *Kingery v. State*, 523 So. 2d 1199 (Fla. Dist. Ct. App. 1988).

251. *Branch*, 83 N.Y.2d at 672, 634 N.E.2d at 971, 612 N.Y.S.2d at 370 (Titone, J., dissenting).

252. *Id.*

253. *Id.*

254. *Id.* at 673, 634 N.E.2d at 971, 612 N.Y.S.2d at 370.

risk that the resulting answer may be harmful; and second, that a well-coached witness will be able to give an undetected untruthful answer.²⁵⁵ Additionally, the dissent believed that requiring the defense to cross-examine the witness to dispel any prejudice "places an unfair and unnecessary burden on the defense."²⁵⁶

Finally, the dissent stated that discretionary rulings may be challenged in a court of law, even where legal error is not present.²⁵⁷ The dissent found that trial courts have "tremendous latitude"²⁵⁸ in managing and directing trials, although, this discretion has limits.²⁵⁹ The appropriate limit here, was that the discretion be "exercised within a framework of legal rules, criteria and general principals . . ."²⁶⁰ The court's power of review is based upon this framework.

IV. Analysis

A. *Majority Opinion and Its Rationale*

People v. Branch is the first case in which New York courts determined whether a midtestimony conference between a non-defendant witness and a prosecutor was proper. Although a case of first impression in New York, other jurisdictions have ruled on this question.²⁶¹ In jurisdictions which confronted the issue, the results varied.²⁶² The United States Supreme Court addressed a similar, but not identical question in *Geders v. United States*,²⁶³ holding a conference between a defendant witness and counsel during an overnight recess permissible.²⁶⁴ The Court then addressed a similar issue involving a shorter recess after direct examination in *Perry v. Leeke*.²⁶⁵ There, the

255. *Id.* at 673, 634 N.E.2d at 972, 612 N.Y.S.2d at 371.

256. *Id.* at 673, 634 N.E.2d at 971, 612 N.Y.S.2d at 371.

257. *Id.* at 674, 634 N.E.2d at 972, 612 N.Y.S.2d at 371.

258. *Id.*

259. *Id.*

260. *Id.*

261. *See supra* part II.E.

262. *Id.*

263. 425 U.S. 80. *See supra* notes 43-55 and accompanying text.

264. *Geders*, 425 U.S. at 91.

265. 488 U.S. 272. *See supra* notes 57-66 and accompanying text.

Court ruled that the trial judge improperly permitted the conference.²⁶⁶

New York courts confronted a related issue in *People v. Enrique*,²⁶⁷ where the judge denied the defense counsel's request to meet with his client during a lunch recess.²⁶⁸ Although courts confronted with this issue split on the permissibility of these conferences, virtually all have continually held the following: 1) the judge must make a discretionary decision on a case-by-case basis to determine the propriety of allowing the conference; and 2) the decision must further the truth-seeking objective of the court.²⁶⁹

In *Branch*, the New York Court of Appeals recognized the important role that uninterrupted testimony plays in the truth-seeking function of a trial.²⁷⁰ However, the court refused to set forth a *per se* rule prohibiting these conferences. Instead, the court found that a trial court may permit such conferences in its "broad discretion."²⁷¹

While the New York Court of Appeals correctly decided *Branch*, it erroneously relied on the *Perry* line of cases to support its ruling. There are several differences which deem those cases inapplicable. The first distinction, and perhaps the most important, is that the holdings in the *Perry* line of cases were based upon midtestimony conferences where the defendant was the testifying witness.²⁷² In *Branch*, however, the witness was a non-party prosecution witness. The crucial difference between a defendant-witness and a non-party witness is that the defendant witness possesses a Sixth Amendment right to counsel.²⁷³ The courts in the *Perry* line of cases based their rulings upon this basic constitutional right. A non-party witness does not possess a Sixth Amendment right to counsel, and thus, the analysis differs.

266. *Perry*, 488 U.S. at 284-85.

267. 165 A.D.2d 13, 566 N.Y.S.2d 201 (1st Dep't 1991). See *supra* notes 68-78 and accompanying text.

268. 165 A.D.2d at 16, 566 N.Y.S.2d at 202.

269. See *supra* notes 34-78, 137-182 and accompanying text.

270. *Branch*, 83 N.Y.2d at 666, 634 N.E.2d at 967, 612 N.Y.S.2d at 366.

271. *Id.* at 666-67, 634 N.E.2d at 968, 612 N.Y.S.2d at 367.

272. See *supra* notes 43-66 and accompanying text.

273. See *supra* note 55 and accompanying text.

Additionally, treating non-party witnesses and defendant witnesses alike, assumes that the same evidentiary rules apply to both. This assumption, however, is incorrect. Some differences in the treatment of these two types of witnesses include: the circumstances in which self-incrimination rights may be invoked;²⁷⁴ circumstances in which character evidence may be used;²⁷⁵ testimony upon preliminary matters;²⁷⁶ and impeachment by evidence of conviction of a crime.²⁷⁷ These differences support the maintenance of separate rules for testifying defendants and non-party witnesses.

A second distinction between *Perry* and *Branch* is the phase of the trial during which the conference took place. Unlike *Perry*, the conference in *Branch* occurred during direct examination.²⁷⁸ Regarding this distinction, the *Perry* court stated:

[I]t is entirely appropriate for a trial judge to decide, after listening to the direct examination of any witness, whether defendant or non-defendant, that cross-examination is more likely to elicit truthful responses if it goes forward without allowing the witness the opportunity to consult with . . . his or her lawyer.²⁷⁹

The court in *Perry* failed to differentiate between types of witnesses, however, it confined its reasoning to conferences occurring between direct examination and cross-examination.

Cross-examination is one of the most effective tools available for finding the truth.²⁸⁰ A conference occurring directly

274. E. CLEARY, MCCORMICK ON EVIDENCE, § 130 (2d ed. 1972) [hereinafter CLEARY]. The privilege confers a significantly different right upon one who is the accused in a criminal proceeding as compared to one who is simply a witness in a criminal or other proceeding. Basically, the right of an accused is the right not only to avoid giving incriminating responses to inquiries put to him but also to be free from the inquiries themselves. *Id.*

275. See generally CLEARY, *supra* note 274, §§ 186-195. See also FED. R. EVID. 404. Rule 404 outlines the permissible ways in which character evidence may be used in a trial. Section (a) relates to "Character Evidence Generally." Within this section, character evidence of the accused and character evidence of a witness are separated, each with its own applicable rules. *Id.*

276. See FED. R. EVID. 104(d). "The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as other witnesses do." *Id.*

277. See FED. R. EVID. 609(a)(1).

278. *Branch*, 83 N.Y.2d at 665, 634 N.E.2d at 967, 612 N.Y.S.2d at 366.

279. *Perry v. Leeke*, 488 U.S. 272, 282 (1989).

280. See, e.g., *Perry v. Leeke*, 488 U.S. 272, 282 (1989); *Geders v. United States*, 425 U.S. 80, 89 (1976); *United States v. De Jongh*, 937 F.2d 1, 3 (1st Cir.

prior to or during a cross-examination has the greatest potential to impair the truth-seeking function of the trial. It is during cross-examination that coaching will more likely occur.

Attorneys generally prepare their witnesses for direct examination; this often includes reviewing with the witness the questions that will be asked, and formulating answers to these questions. Because attorneys ask their own witness planned questions with rehearsed answers during direct examination, the attorney has already controlled the witnesses' testimony. Midtestimony strategy meetings are not necessary during direct examination. Cross-examination, however, "depends for its effectiveness on the ability of counsel to punch holes in a witness's testimony at just the right time, in just the right way."²⁸¹ Thus, it is during cross-examination that an attorney would presumably need to meet with his witness for strategy purposes.

Because *Branch* was a case of first impression, the court of appeals should have considered cases which were more factually similar. One such case, *Frierson v. State*,²⁸² involved a prosecutor's request for a conference during the direct examination of a non-party witness.²⁸³ The *Branch* court faced the identical situation. In *Frierson*, the court found *Perry* "inapplicable" because of factual differences.²⁸⁴ The court emphasized that *Frierson* involved a non-defendant witness and a conference during direct examination, whereas *Perry*, alternatively, involved a conference with a defendant witness between direct examination and cross-examination.²⁸⁵ After distinguishing *Perry*, the *Frierson* court held that the trial judge did not abuse his discretion in allowing the conference when a witness testified falsely due to emotional distress.²⁸⁶ Because of the factual similarities, the *Branch* court should have relied more strongly upon *Frierson*, rather than *Perry*, for its ruling.

1991); *Frierson v. State*, 543 N.E.2d 669, 673 (Ind. Ct. App. 1989); *People v. Enrique*, 165 A.D.2d 13, 17, 566 N.Y.S.2d 201, 204 (1st Dep't 1991); *Holtzman v. Tobin*, 78 Misc. 2d 8, 358 N.Y.S.2d 94, 95 (1st Dep't 1974).

281. *Perry*, 488 U.S. at 282.

282. 543 N.E.2d 669 (Ind. Ct. App. 1989).

283. *Id.* at 670.

284. *Id.* at 673.

285. *Id.*

286. *Id.*

B. *Appropriate Standard of Review*

1. *Permissible Scope of Review Suggested by the Dissent*

The dissent in *Branch* attacked the majority for applying an improper standard of review.²⁸⁷ The majority stated that “[t]his court, as a court of law, may reverse [discretionary] decisions only for legal error”²⁸⁸ The dissent stated that judicial discretion is limited and must be exercised in a legal “framework of rules, criteria, and general principals.”²⁸⁹ The dissent found this “framework” reviewable.²⁹⁰ Applying the dissent’s suggested framework, every occurrence at the trial would be reviewable because each falls within a legal framework, by virtue of its mere occurrence during the trial. Thus, according to the dissent’s theory, an appellate court should review all discretionary decisions and would possess the authority to address questions not even appealed. In our judicial system, this is not the assigned role of appellate courts.²⁹¹

The dissent further suggested that the court of appeals should draw lines and establish criteria to guide all rulings within this legal framework.²⁹² However, applying this suggestion, the court of appeals would be responsible for the impossible task of establishing parameters into which every judicial decision must fall. This suggestion offends the trial judge’s role as manager of the trial and relinquishes his discretionary decisionmaking power, both essential to the trial’s truth seeking function.²⁹³

2. *The “Necessity” Standard*

The dissent, alternatively, suggested a less extreme position regarding the standard of review. Under the dissent’s suggested alternative, trial courts would be given some discretion to allow midtestimony conferences, however, their discretion

287. *Branch*, 83 N.Y.2d at 674, 634 N.E.2d at 972, 612 N.Y.S.2d at 371 (Titone, J., dissenting).

288. *Branch*, 83 N.Y.2d at 667, 634 N.E.2d at 968, 612 N.Y.S.2d at 367.

289. *Branch*, 83 N.Y.2d at 674, 634 N.E.2d at 972, 612 N.Y.S.2d at 371 (Titone, J., dissenting).

290. *Id.*

291. See *supra* notes 119-136 and accompanying text.

292. *Branch*, 83 N.Y.2d at 674, 634 N.E.2d at 972, 612 N.Y.S.2d at 371.

293. See *supra* part II.A.

would be subject to review based upon "necessity."²⁹⁴ The dissent justified this standard with the proposition that "less perilous" alternatives to a private conference exist.²⁹⁵ The alternatives the dissent suggested were impeachment of the witness through CPL § 60.35 or an *in camera* conference.²⁹⁶

There are two inherent problems with the dissent's suggested approaches. First, the alternatives to the private conference would prove ineffective in many situations. CPL § 60.35 allows an attorney to impeach his own witness if a prior inconsistent statement, made under oath, damages that party's case.²⁹⁷ However, this alternative would not have elicited truthful testimony from the witness in *Branch*. This witness feared for his life. Questioning the witness while still in the presence of the jury and the spectators, the prosecutor does not provide any additional incentive for the witness to testify truthfully. This witnesses' fear originated from threats made by people within the courtroom. Although the prosecutor may ask different questions, the witness is still required to answer out loud in front of the jury and the public. Speaking within the public earshot was the basis of the witnesses' fear, and CPL § 60.35 would not sufficiently alleviate that fear.

The second suggested alternative, an *in camera* conference, has its own problems.²⁹⁸ A witness who is reluctant to testify truthfully because of threats or a fear for his life, may be just as reluctant to talk about the problem in a private conference where the judge is present. Additionally, the witness may be more reluctant to state the truth or the reasons for having testified untruthfully, knowing the entire conversation is being transcribed for the record. Again, this alternative would likely not have elicited truthful testimony in *Branch*.

Additionally, using "necessity" as the appropriate standard of review would not assist in the court's truth-seeking function, the overall objective of the trial.²⁹⁹ Instead, it would more likely

294. *Branch*, 83 N.Y.2d at 671, 634 N.E.2d at 971, 612 N.Y.S.2d at 370 (Titone, J., dissenting).

295. *Id.*

296. *Id.* at 671-2, 634 N.E.2d at 971, 612 N.Y.S.2d at 370 (Titone, J., dissenting).

297. See *supra* part II.B.

298. See *supra* part II.B.1.

299. See *supra* notes 16-19 and accompanying text.

impede this function. If the applicable standard became "necessity," judges would waste precious court time ensuring that an attorney has attempted to utilize all possible alternatives to the private conference, before allowing it. In some cases, midtestimony private conferences will be the only vehicle for ascertaining the truth. With a necessity standard, a judge is essentially required to try all other unsuccessful options before allowing the conference. Again, this is time consuming and ultimately may still fail to ascertain the truth.

C. *The Standard of Review Which Emerged*

The dissent was correct, however, in suggesting that the court should establish criteria to guide future judges who may be faced with a similar situation.³⁰⁰ The "necessity" standard, described above, as a threshold is too high. A more appropriate standard would be to allow a private midtestimony conference *where a compelling reason exists and the general objectives of the trial and the interests of justice will be best served*. Without enunciating this as a standard, as such, the *Branch* court applied the facts to this standard to determine whether the conference was appropriate.

The majority found that a *compelling reason* existed for the trial judge to allow such a conference. The judge previously ordered court officials to bring the witness into court through a private entrance. Notwithstanding this order, the witness was "forced to enter through the public area."³⁰¹ As a result, the witness came in contact with the defendant's family, who allegedly threatened his life.³⁰² This threat, and the resulting fear for his life, caused the witness to testify falsely. The court highlighted the *compelling* nature of this situation, stating: "Significantly, it was alleged that the witness was lying, not because of anything the prosecutor had done or failed to do, but because of a hallway confrontation that would not have occurred had court security personnel followed instructions."³⁰³ This situation presented the *compelling reason* for allowing a private conference.

300. See *supra* note 238 and accompanying text.

301. *Branch*, 83 N.Y.2d at 665, 634 N.E.2d at 967, 612 N.Y.S.2d at 366.

302. *Id.*

303. *Id.* at 667, 634 N.E.2d at 968, 612 N.Y.S.2d at 367.

Next, the *Branch* court assured that it preserved the *general objectives of the trial*. The court stated that it was “[f]aced with the need to make sure the court’s truth-seeking function was not impaired.”³⁰⁴ The judge, realizing that the witnesses’ fear for his life impeded the search for truth, calculated his ruling to overcome this impediment. Although the trial court had “at its disposal other means of dealing with this problem,”³⁰⁵ the path it chose was calculated to achieve its articulated end, that of attaining the truth.

The final portion of this standard required the judge to assure that the *interests of justice are best served* when making this discretionary decision. Again, the court did not enunciate this exacting standard in its opinion; however, it did uphold the lower court’s decision because the interests of justice were best served. The trial judge granted the prosecution’s request for a private conference to protect three prevailing interests of justice: 1) providing an opportunity for the prosecution to “rehabilitate” its case after a court officer’s error potentially destroyed it;³⁰⁶ 2) preserving the defendant’s right to confront the witness testifying against him and his right to a fair trial;³⁰⁷ and 3) preserving the jury’s “authority to make informed determinations as to fact and [witness] credibility.”³⁰⁸

The safeguards employed by the trial judge in *Branch* sufficiently ensured that the above interests were best served. The judge informed the jury that the witness was removed so he could speak with the prosecutor, intentionally omitting the contention that the defendant’s family threatened the witness.³⁰⁹ By limiting the jury’s knowledge, the court assured that the defendant was not prejudiced by the meeting. Similarly, the judge cautioned the prosecutor against questioning the witness about the change in testimony and instructed the witness not to testify about the change.³¹⁰

The judge also required that the contradictory statements remain on the record, allowing the jury to consider both state-

304. *Id.*

305. *Id.* at 668, 634 N.E.2d at 968, 612 N.Y.S.2d at 367.

306. *Id.* at 667, 634 N.E.2d at 968, 612 N.Y.S.2d at 367.

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

ments when assessing the witness's credibility.³¹¹ Additionally, by ensuring that both statements remained on the record, the defense could utilize the contradiction to support its summation argument—that the prosecutor improperly coached the witness.

Finally, the defense was allowed to cross-examine the witness regarding the substance of the meeting.³¹² This protected the rights of the defendant in two ways. First, this provided the defense with the opportunity to bring any improprieties that occurred during the meeting to the jury's attention. These improprieties, once exposed, could be grounds for the judge to declare a mistrial or could destroy the credibility of an important prosecution eye-witness. Second, the defense could use the cross-examination to formulate a detailed record for appeal. The court allowed the defense to elicit any information it desired from the witness. This unlimited cross-examination would be extremely effective for developing a complete and detailed record.

V. Conclusion

After *Branch*, New York courts may be more inclined to allow midtestimony conferences between a non-defendant witness and a prosecutor. The New York Court of Appeals has provided new guidance in the area through the broad criteria upon which it based its ruling. The court, however, refused to set down a firm rule governing either the particular situation presented in *Branch*, or any other specific circumstance. This refusal will allow trial judges, on a case-by-case basis, to properly use their discretion to determine whether these midtestimony conferences should be allowed.

Although the court could have used authority more directly on point, the New York Court of Appeals correctly decided the case before it. Allowing a midtestimony conference between the prosecutor and a nonparty witness is a discretionary decision to be made by the trial judge. The court did not establish a specific

311. *People v. Branch*, 83 N.Y.2d 663, 634 N.E.2d 966, 612 N.Y.S.2d 365 (1994).

312. *Id.*

test for future courts to apply, but instead, framed broad criteria which future courts should consider.

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