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Court of Appeals Jurisdiction: Motion to Dismiss for Insufficient Evidence Will Not Preserve Reviewable Question of Law on Lack of Corroboration

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DEVELOPMENTS IN NEW YORK LAW

Court of Appeals jurisdiction: Motion to dismiss for insufficient evidence will not preserve reviewable question of law on lack of corroboration

The jurisdiction of the Court of Appeals in noncapital criminal cases is limited by the state constitution to review of questions of law.[210] To preserve a challenge for Court of Appeals review, therefore, the CPL requires in most cases that a litigant register an effective protest to a disputed ruling or instruction in the court of original jurisdiction.[211] The statute further provides that any meaningful complaint sufficient to apprise the trial court of a party's position with respect to the ruling or instruction will constitute an effective protest even if it is imprecisely or inartistically phrased.[212] Recently, however, in *People v. Cona*,[213] the Court of

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[210] *See* N.Y. CONST. art. 4, § 3(a); People v. Michael, 48 N.Y.2d 1, 5, 394 N.E.2d 1134, 1135, 420 N.Y.S.2d 371, 372 (1979); People v. Mackell, 40 N.Y.2d 59, 67, 351 N.E.2d 684, 689, 386 N.Y.S.2d 37, 41-42 (1976) (Jasen, J., dissenting). In contrast to the limited appellate jurisdiction of the Court of Appeals, the appellate divisions have the plenary power to consider and determine questions of law or to reverse or modify on the facts or in the exercise of discretion. CPL § 470.15(3) (1971); *see* People v. Coppa, 45 N.Y.2d 244, 380 N.E.2d 195, 408 N.Y.S.2d 365 (1978); People v. Monroe, 40 N.Y.2d 1096, 360 N.E.2d 1076, 392 N.Y.S.2d 393 (1977); 6 J. ZETT, NEW YORK CRIMINAL PRACTICE ¶ 53.5[3][a] (1977 & Supp. 1979).

[211] *See* People v. Cona, 49 N.Y.2d 26, 33, 399 N.E.2d 1167, 1168-69, 424 N.Y.S.2d 146, 148-49 (1979); CPL § 470.05 (1971). The preservation requirements of § 470.05 may be entirely dispensed with in certain narrowly circumscribed instances. Thus, a fundamental right, a constitutional right, or a trial error touching the elemental jurisdiction of the criminal courts may be raised for the first time on appeal. *See, e.g.*, People v. Michael, 48 N.Y.2d 1, 394 N.E.2d 1134, 420 N.Y.S.2d 371 (1979) (double jeopardy); People v. Patterson, 39 N.Y.2d 288, 347 N.E.2d 898, 383 N.Y.S.2d 573 (1976), *aff'd*, 432 U.S. 197 (1977) (certain jurisdictional defects); People v. Bennett, 29 N.Y.2d 462, 280 N.E.2d 637, 329 N.Y.S.2d 801 (1972) (right to counsel).

For a discussion of the distinctions among the concepts of reviewability, appealability, waiver, and "law of the case," see People v. Michael, 48 N.Y.2d 1, 5 n.1, 394 N.E.2d 1134, 1135 n.1, 420 N.Y.S.2d 371, 372 n.1 (1979) (per curiam); People v. Iannone, 45 N.Y.2d 589, 600, 384 N.E.2d 656, 663-64, 412 N.Y.S.2d 110, 117 (1978); People v. Watson, 57 App. Div. 2d 143, 146, 393 N.Y.S.2d 735, 738 (2d Dep't), *rev'd on other grounds*, 45 N.Y.2d 865, 382 N.E.2d 1352, 410 N.Y.S.2d 577 (1977); Karger, *The New York Court of Appeals: Some Aspects of the Limitations on Its Jurisdiction*, 27 REC. OF N.Y.C.B.A. 370, 377-79 (1972).

[212] CPL § 470.05 (1971). Any protest of error, regardless of its phraseology, is sufficient to preserve a challenge for appellate consideration. *See id.*; 6 J. ZETT, NEW YORK CRIMINAL PRACTICE § 53.5[1] (1977 & Supp. 1979); STAFF COMMENTS TO THE PROPOSED CPL § 240.10 (1967). Nevertheless, the statute requires a certain degree of specificity in objections in order to eliminate the need for a new trial where a proper and timely objection would have alerted the court to the disputed issue at the first trial. People v. Vidal, 26 N.Y.2d 249, 254, 257 N.E.2d 886, 889-90, 309 N.Y.S.2d 336, 340 (1970). Thus, an objection is sufficient to

Appeals held that a timely motion to dismiss for insufficient evidence did not satisfy the statutory requirement so as to allow the Court to reach the merits of the defendants' claim that they had been convicted on the basis of uncorroborated accomplice testimony.[214]

In *Cona*, 24 defendants, all of whom had been members of the New York City Police Department, were indicted on charges of conspiring to solicit and collect payoffs from gamblers in exchange for "protection" from police interference in their gambling activities.[215] At trial, 11 of the defendants were implicated in the scheme solely by the testimony of two former co-conspirators, Officers Buchalski and O'Brien.[216] On the stand, the officers related events

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preserve a question for appellate review only if the attention of the court and the adversary is "fairly and distinctly called to the precise error complained of." Henze v. People, 82 N.Y. 611, 613 (1880); *see* People v. Smith, 172 App. Div. 826, 833, 159 N.Y.S. 1073, 1078 (1916); *cf.* Wainwright v. Sykes, 433 U.S. 72, 86-91 (1977) (contemporaneous-objection rule discourages "sandbagging" by defense attorneys and elicits defendants' constitutional claims when recollections of witnesses are freshest); Pobliner v. Fogg, 438 F. Supp. 890, 893 (S.D.N.Y. 1977) (failure of habeas corpus petitioner to object contemporaneously to admission of allegedly tainted evidence deprived prosecution of opportunity to prove independent untainted sources for the information). Notably, even under the former Code of Criminal Procedure, which imposed a stricter standard for the sufficiency of objections, a general objection would suffice to preserve an issue for appeal if raised in such a context that, had it been specific, it would have been dispositive of the argument. People v. Vidal, 26 N.Y.2d 249, 254, 257 N.E.2d 886, 889-90, 309 N.Y.S.2d 336, 340 (1970); People v. Morrison, 194 N.Y. 175, 86 N.E. 1120 (1909); Tooley v. Bacon, 70 N.Y. 34, 8 Hun. 176 (1877); People v. Smith, 172 App. Div. 826, 159 N.Y.S. 1073 (1916).

[213] 49 N.Y.2d 26, 399 N.E.2d 1167, 424 N.Y.S.2d 146 (1979) *aff'g in part, rev'g in part*, 60 App. Div. 2d 318, 401 N.Y.S.2d 239 (2d Dep't 1978).

[214] *Id.* at 33 n.2, 399 N.E.2d at 1169 n.2, 424 N.Y.S.2d at 148 n.2. Section 60.22 of the CPL precludes a conviction based on the testimony of an accomplice unless that testimony is corroborated by nonaccomplice evidence tending to connect the defendant with the commission of the crime charged. CPL § 60.22(1) (1971). The accomplice doctrine reflects a legislative determination that the complicity of a witness in the alleged offense renders his testimony inherently suspect. People v. Duncan, 46 N.Y.2d 74, 385 N.E.2d 572, 412 N.Y.S.2d 833 (1978). The corroboration of accomplice testimony was not required at common law, however, *see In re* Hardenbrook, 135 App. Div. 634, 121 N.Y.S. 250, *aff'd*, 199 N.Y. 539, 92 N.E. 1086 (1909), nor is it currently required in the federal courts, *see* United States v. Wright, 573 F.2d 681, 685 (1st Cir.), *cert. denied*, 436 U.S. 949 (1978), where the status of a witness as an accomplice is merely deemed to be one factor bearing upon the credibility of his testimony, United States v. Sigal, 572 F.2d 1320, 1325 (1st Cir. 1978).

[215] 49 N.Y.2d at 32, 399 N.E.2d at 1168, 424 N.Y.S.2d at 148. Specifically, each defendant was indicted on one count of bribe receiving, one count of receiving an award for official misconduct, two counts of conspiracy, and one count of official misconduct. *Id.* They allegedly operated a highly organized network for receiving bribes from gamblers within the geographical confines of the 13th Plainclothes Division. *Id.* at 38, 399 N.E.2d at 1172, 424 N.Y.S.2d at 152 (Jasen, J., dissenting).

[216] 49 N.Y.2d at 32-34, 399 N.E.2d at 1168-70, 424 N.Y.S.2d at 148-49. Buchalski had

and observations occurring both during the time of their actual participation in the bribery scheme and during a period in which they were acting as undercover operatives.[217] At the close of the People's case, defense counsel made a motion on behalf of all the defendants to dismiss the indictment on the ground of insufficient evidence.[218] Additionally, two defendants moved to dismiss the charges due to lack of corroboration of the accomplice testimony.[219] At the end of the trial, the defendants inculpated by O'Brien's testimony requested a jury charge that the officer was an accomplice as a matter of law and that, therefore, his entire testimony was subject to the corroboration requirement.[220] These protests were unsuccessful, and all 11 defendants were subsequently convicted.[221] The Appellate Division, Second Department, reversed the convictions and dismissed the indictment, however, concluding that Buchalski and O'Brien were "accomplices" when acting as informants, as well as when they were actual co-conspirators, and that their testimony as to the events transpiring while they were undercover agents could not provide the necessary corroboration for their conspiratorial testimony.[222]

On appeal, a divided Court of Appeals agreed with the appel-

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agreed to operate as an undercover agent for the authorities in their investigation of the operation in return for immunity from prosecution for his prior criminal involvement. *Id.* at 32, 399 N.E.2d at 1168, 424 N.Y.S.2d at 148. O'Brien, on the other hand, initially infiltrated the conspiracy in an undercover capacity, but subsequently became an active and actual participant in the scheme. *Id.* at 34, 399 N.E.2d at 1169, 424 N.Y.S.2d at 149.

[217] *Id.* at 32, 399 N.E.2d at 1168, 424 N.Y.S.2d at 147. In addition to oral testimony, tape recordings of conversations elicited from 10 defendants were admitted into evidence. Two defendants identified the voices on the tapes as theirs, but disputed the incriminatory interpretation given by the prosecution. 60 App. Div. 2d at 325. As to the other defendants, however, the only authentication of the recordings was given by Officer Buchalski himself. *Id.* at 323, 401 N.Y.S.2d at 242.

[218] 49 N.Y.2d at 33 n.2, 399 N.E.2d at 1169 n.2, 424 N.Y.S.2d at 148 n.2.

[219] *Id.* at 37 n.3, 399 N.E.2d at 1171 n.3, 424 N.Y.S.2d at 151 n.3.

[220] *Id.* at 34, 399 N.E.2d at 1170, 424 N.Y.S.2d at 149. The trial court charged the jury that the officers were accomplices as a matter of law during the time they were actual participants in the conspiracy. *Id.* As to the periods during which they were operating as undercover agents, the court instructed that it was a question of fact for the jury to determine whether they were accomplices. 60 App. Div. 2d at 327, 401 N.Y.S.2d at 244; *id.* at 333, 401 N.Y.S.2d at 249 (Rabin, J., dissenting).

[221] 60 App. Div. 2d at 320, 401 N.Y.S.2d at 241.

[222] *Id.* at 323-25, 401 N.Y.S.2d at 242-44 (2d Dep't 1978). On appeal to the appellate division, eight of the original defendants were not parties, and one of the defendant-appellants died after the institution of the appeal. *Id.* at 320, 401 N.Y.S.2d at 241. The convictions of four of the appellants were affirmed on the ground that there existed sufficient nonaccomplice testimony to corroborate the testimony of the officers. *Id.* at 325-26, 401 N.Y.S.2d at 244.

late division's resolution on the merits, finding "no justification for distinguishing between testimony pertaining to different periods of time as a basis for application of the accomplice corroboration rule."[223] Writing for the majority,[224] Judge Gabrielli concluded that by timely requesting a charge that O'Brien was an accomplice as a matter of law, two of the defendants had created a question of law amenable to Court of Appeals review.[225] Moreover, the majority stated, the interposition by two other defendants of a motion to dismiss specifically alleging lack of corroboration rendered their claims reviewable as well. Accordingly, the appellate division order reversing the convictions of all of these defendants was affirmed.[226] The Court reinstated the convictions of the seven remaining defendants, however, ruling that by failing to object to that portion of the trial court's charge dealing with the accomplice corroboration requirement, they had failed to preserve the question for Court of

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[223] 49 N.Y.2d at 35, 399 N.E.2d at 1170, 424 N.Y.S.2d at 150. The majority relied upon "the plain language of the law" in finding that Officer O'Brien was an accomplice during all the events and transactions he related at trial. *Id.* Since the accomplice corroboration statute includes within its ambit witnesses who have participated in "[a]n offense based upon the same or some of the same facts or conduct which constitute the offense charged," CPL § 60.22(2)(b) (1971), Judge Gabrielli concluded that O'Brien's entire testimony, including that portion relating to events occurring before his involvement in the scheme, was subject to the corroboration requirement. 49 N.Y.2d at 35, 399 N.E.2d at 1170, 424 N.Y.S.2d at 150.

The *Cona* Court's resolution of the corroboration issue seems unexceptional in light of the letter and spirit of the corroboration statute. The enactment of the CPL in 1971 relaxed the degree of complicity necessary to invoke the corroboration rule. *See* CPL § 60.22, commentary at 194-95 (1971). Under § 399 of the former Code of Criminal Procedure, "accomplice" included only those persons who could have been convicted at trial as a principal or accessory before the fact. *Id.* Professor Denzer notes, however, that the statute as presently drawn is sufficiently broad to cover persons "who are *in some way* criminally implicated in, and possibly subject to prosecution for, the general conduct or factual transaction on trial." *Id.* (emphasis in original). Thus, a witness will be deemed an accomplice for purposes of the statutory corroboration requirement even if his involvement in the alleged offense is merely reciprocal or correlative. *See* People v. Jackson, 69 Misc. 2d 793, 797, 331 N.Y.S.2d 216, 221 (N.Y.C. Crim. Ct. N.Y. County 1972); CPL § 60.22, commentary at 194-95 (1971). The Court's decision in *Cona,* therefore, appears to comport with the intent of the legislature to apply liberally the requirement of independent corroborative evidence.

[224] Judges Jones, Fuchsberg, and Meyer joined Judge Gabrielli in the majority. Judge Jasen dissented in part and voted to modify in a separate opinion. Filing a separate memorandum in which Chief Judge Cooke concurred, Judge Wachtler dissented in part and voted to modify the appellate division order.

[225] 49 N.Y.2d at 34, 399 N.E.2d at 1170, 424 N.Y.S.2d at 149.

[226] *Id.* at 37 & n.3, 399 N.E.2d at 1171 & n.3, 424 N.Y.S.2d at 151 & n.3. The specific ground cited by the Court for affirming the portion of the order relating to these defendants was "insufficient evidence in the record to corroborate the accomplice testimony implicating [them]." *Id.* at 37, 399 N.E.2d at 1171, 424 N.Y.S.2d at 151.

Appeals review.[227] Although acknowledging that a timely motion to dismiss had been made on behalf of all the defendants, the Court stated that there was no indication in the record that the motion was predicated on a claim that corroboration was lacking.[228] Hence, Judge Gabrielli concluded, the remaining defendants were precluded from relying on the motion to "creat[e] a question of law on this point."[229] Instead, the majority remitted the case in order to allow the lower court the opportunity to exercise its discretionary power to review alleged errors to which no timely objection had been made at trial.[230]

In a vigorous dissent, Judge Jasen disputed the majority's resolution of the reviewability issue.[231] Judge Jasen argued that all

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[227] *Id.* at 33-34, 399 N.E.2d at 1169, 424 N.Y.S.2d at 148-49; *see* note 210 *supra.*

[228] *Id.* at 33 n.2, 399 N.E.2d at 1169 n.2, 424 N.Y.S.2d at 148 n.2.

[229] *Id.*

[230] *Id.; see* notes 210-11 and accompanying text *supra.* To guard against the possibility that the Court of Appeals might review an appellate division order reversing in the exercise of discretion or on the weight of the evidence, the Court has developed the practice of requiring the order to recite the precise basis of the lower court's decision. People v. Mackell, 40 N.Y.2d 59, 67, 351 N.E.2d 684, 689, 386 N.Y.S.2d 37, 41-42 (1976) (Jasen, J., dissenting). In deciding whether its jurisdictional requisites have been met, however, the Court is empowered to look beyond a recital in the order that the appellate division's reversal was "on the law." Thus, if it determines that a facially appealable order was partially "on the facts" or "in the interests of justice," the Court may divest itself of jurisdiction to review the question. People v. Sullivan, 29 N.Y.2d 937, 938, 280 N.E.2d 98, 99, 329 N.Y.S.2d 325, 326 (1972); People v. Woodruff, 27 N.Y.2d 801, 802, 264 N.E.2d 353, 353, 315 N.Y.S.2d 861, 861 (1970). A contrary rule applied, however, if the order was facially unreviewable. If the order recited that the appellate division's decison was "on the facts" or "in the interest of justice," it was conclusively unreviewable; the Court could not look beyond the recital in the order, and the appeal had to be dismissed. *See, e.g.,* People v. Sullivan, 29 N.Y.2d 937, 938, 280 N.E.2d 98, 99, 329 N.Y.S.2d 325, 326 (1972); People v. Cooper, 25 N.Y.2d 928, 928-29, 252 N.E.2d 626, 626, 305 N.Y.S.2d 145, 146 (1969); People v. Campbell, 25 N.Y.2d 784, 784-85, 250 N.E.2d 586, 586, 303 N.Y.S.2d 530, 530 (1969). Prompted by the patent inequity worked by this rule in People v. Mackell, 40 N.Y.2d 59, 351 N.E.2d 684, 386 N.Y.S.2d 37 (1976), the legislature responded with a 1980 amendment to CPL § 450.90 (1971 & Supp. 1979-1980). *See* CPL § 450.90, commentary at 100-01 (Supp. 1979-1980). Pursuant to the statute as amended, the Court of Appeals may review an order if it "determines that the intermediate appellate court's determination was . . . upon the law and such facts which, but for the determination of law, would not have led to reversal or modification." CPL § 450.90(2)(b) (Supp. 1979-1980).

[231] 49 N.Y.2d at 45-46, 399 N.E.2d at 1176-77, 424 N.Y.S.2d at 156 (Jasen, J., dissenting). In addition to criticizing the Court's resolution of the reviewability issue, the dissent also characterized the majority's disposition on the merits as a "restrictive, if not oppressive, construction of the statutory corroboration rule" that would "effectively and permanently deprive law enforcement of . . . the use of the turncoat conspirator." *Id.* at 37-38, 399 N.E.2d at 1171-72, 424 N.Y.S.2d at 151 (Jasen J., dissenting). Although he acknowledged that the term "accomplice" for purposes of the corroboration requirement had been expanded by the enactment of the CPL, *id.* at 41, 399 N.E.2d at 1173-74, 424 N.Y.S.2d at 153

the defendants had preserved "the *pure question of law*"[232] of sufficiency of the corroborative evidence by moving to dismiss at the close of the People's case.[233] Although the stated ground for the motion was the prosecution's failure to establish a prima facie case against the defendants,[234] the dissent urged that the supporting arguments of counsel and the trial judge's ruling demonstrated that the major issue raised by the motion was that of corroboration.[235] Moreover, since the appellate division had "specifically" predicated its reversal on a finding of legally insufficient evidence, Judge Jasen asserted, the issue was amenable to Court of Appeals review.[236] Finally, the dissent postulated that the Court's disposition of the case by remittitur gave rise to the "foregone conclusion" that the appellate division would conform its order to the legal conclusions reached by the majority.[237]

It is submitted that the determination by the *Cona* court that it lacked jurisdiction to review the defendants' corroboration claim was inconsistent both with judicial precedent and statutory rules of appellate procedure.[238] Indeed, although the defendants' protest

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(Jasen, J., dissenting), Judge Jasen urged that § 60.22 had never dispensed with the requirement that the witness be criminally implicated in the transactions related at trial. *Id.* (Jasen, J., dissenting). Reasoning that criminal liability depended on the presence of the requisite criminal intent, the dissent concluded that an undercover officer, whose participation is merely feigned, could not be "criminally implicated" in the conduct involved. *Id.* (Jasen, J., dissenting). Moreover, Judge Jasen suggested that the testimony proffered by such a witness need not suffer from the unreliability normally attributed to accomplice testimony; he has been offered immunity from prosecution and so has no motive to exculpate himself at the expense of the conspirators on trial. *Id.* at 42, 399 N.E.2d at 1174, 424 N.Y.S.2d at 154 (Jasen, J., dissenting).

[232] *Id.* at 45, 399 N.E.2d at 1176, 424 N.Y.S.2d at 156 (Jasen, J., dissenting) (emphasis in original).

[233] *Id.* (Jasen, J., dissenting).

[234] *Id.* (Jasen, J., dissenting).

[235] *Id.* (Jasen, J., dissenting).

[236] *Id.* at 46, 399 N.E.2d at 1176-77, 424 N.Y.S.2d at 156 (Jasen, J., dissenting).

In his separate opinion in which Chief Judge Cooke concurred, Judge Wachtler agreed with the majority on the reviewability issue, but concurred with Judge Jasen on the merits of the appellants' claim. *Id.* at 46, 399 N.E.2d at 1177, 424 N.Y.S.2d at 157 (Wachtler, J., dissenting in part and concurring in part).

[237] *Id.* at 46, 399 N.E.2d at 1177, 424 N.Y.S.2d at 156-57 (Jasen, J., dissenting).

[238] The *Cona* court refused to distinguish between an exception directed at the trial court's charge and a protest based on legally insufficient evidence. The Court of Appeals has distinguished, however, between alleged charge errors and claims of evidentiary insufficiency in the past. *See, e.g.*, People v. Speigel, 48 N.Y.2d 647, 648, 396 N.E.2d 472, 472, 421 N.Y.S.2d 190, 190 (1979); People v. Daniels, 37 N.Y.2d 624, 631 n.4, 339 N.E.2d 139, 143 n.4, 376 N.Y.S.2d 436, 442 n.4 (1975). In *Spiegel*, which was cited with approval in *Cona*, the defendant had asserted on appeal to the appellate division the failure of the trial court to

may have been ineffective to preserve the charge point for appellate review,[239] the majority's conclusion that their timely motion to dismiss for insufficient evidence was inadequate to raise a question of law on *that* point seems at odds with the relaxed preservation requirement of the CPL.[240] According to the statute, "a party who without success has expressly or impliedly sought or requested a particular ruling . . . is thereby deemed to have protested the court's ultimate disposition of the matter . . . sufficiently to raise a question of law . . . ."[241] If, as Judge Jasen has suggested, the colloquy between the court and defense counsel had crystallized corroboration as the dispositive issue,[242] the motion to dismiss would appear to have sufficiently preserved that question for Court of Appeals review.

Moreover, that the appellate division order was based on an erroneous determination of the reviewability of the charge point[243] does not preclude the Court of Appeals from reaching the merits of the distinct legal contention of insufficient evidence. The CPL provides that, upon receiving an order from an intermediate appellate court, the Court of Appeals may consider any other properly preserved question of law, although that issue did not constitute a basis for the appellate division's reversal.[244] Furthermore, "even though rejecting the intermediate appellate court's reasons for its order of reversal," the Court "may affirm or modify such order

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charge the accomplice rule. Because he had failed to register an effective protest at trial, however, the appellate division held that reversal was not warranted as a matter of law. *Id.* On appeal to the Court of Appeals, the defendant alternatively contended that "the proof at trial [was] legally insufficient to sustain the conviction." *Id.* The failure of the defendant to except to the charge did not preclude the Court from reviewing this distinct legal defect, and the Court subsequently reached the merits of his claim. *Id.* at 648-49, 396 N.E.2d at 472, 421 N.Y.S.2d at 190; *cf.* People v. Robinson, 36 N.Y.2d 224, 229, 326 N.E.2d 784, 786-87, 367 N.Y.S.2d 208, 212 (1975) (Wachtler, J., dissenting) (even in absence of exception to charge, principle that prosecution must prove guilt beyond reasonable doubt is sufficiently fundamental to create reviewable question of law).

[239] *See* People v. Daniels, 37 N.Y.2d 624, 631 n.4, 339 N.E.2d 139, 143 n.4, 376 N.Y.S.2d 436, 442 n.4 (1975).

[240] *See id.;* People v. Thomas, 36 N.Y.2d 514, 516, 330 N.E.2d 609, 610-11, 369 N.Y.S.2d 645, 647-48 (1975). One commentator has suggested that even a motion to dismiss made at the close of all the proof, rather than at the close of the People's case, should be adequate to preserve for review the issue of the legal sufficiency of evidence. *See* R. PITLER, NEW YORK CRIMINAL PRACTICE UNDER THE CPL § 14.40 (Supp. 1979).

[241] CPL § 470.05(2) (1971).

[242] *See* text accompanying note 235 *supra.*

[243] *See* note 227 and accompanying text *supra.*

[244] CPL § 470.35(2)(b) (1971).

upon the basis of such other questions . . . ."[245] In this manner, the *Cona* Court could have expeditiously determined the merit of the defendants' contentions without the necessity for remittitur to the appellate division.[246]

The *Cona* decision seems to portend a stricter preservation requirement in New York appellate practice. It appears that an imprecisely phrased objection or motion, once overruled or denied, will no longer suffice to preserve a question of law unless the protest is reregistered by a more specific objection or by an exception to the jury charge. As a result of *Cona*, therefore, defendants may be unduly penalized for what is, at most, imprecise trial advocacy

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[245] Section 470.35(2)(b), in its entirety, permits the Court of Appeals to consider and determine:

> Any other question of law involving alleged or possible error or defect in the criminal court proceedings resulting in the original judgment, sentence or order which may have adversely affected the party who was appellant in the intermediate appellate court and who is respondent in the court of appeals. The court of appeals is not precluded from considering or determining such a question by the circumstance that it was not considered or determined by the intermediate appellate court, or that it did not constitute a basis for such court's reversal or modification, or that the party who may have been adversely affected thereby is the respondent rather than the appellant in the court of appeals; and the court of appeals, even though rejecting the intermediate appellate court's reasons for its order of reversal or modification, may affirm or modify such order upon the basis of such other questions . . . .

CPL § 470.35(2)(b) (1971). Professor Denzer's commentary is particularly illustrative of the sort of situation contemplated by § 470.35(2)(b):

> Upon an appeal to the Appellate Division from a judgment of conviction, the defendant-appellant raises legal contentions A, B and C, all addressed to alleged trial errors. Sustaining his position upon contention A, the Appellate Division reverses the judgment, declaring that under the circumstances it is unnecessary to consider contentions B and C.
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> Upon an appeal by the People to the Court of Appeals (based, of course, upon the claim that the Appellate Division was wrong with respect to contention A), the defendant, who is now the respondent, in addition to urging the correctness of the Appellate Division's decision, seeks to argue that, even were the Court of Appeals to disagree with it, the alleged errors presented in contentions B and C (not determined by the Appellate Division) justify a reversal of the judgment.

CPL § 470.35, commentary at 635 (1971).

[246] Again, Professor Denzer indicates that subdivision 2(b) may indeed be adaptable to the *Cona* situation:

> The rule [of § 470.35(2)(b)] is patently an equitable one. It would hardly be fair to deprive the defendant of all appellate consideration of contentions B and C because of the Appellate Division's error in handling the case. The only just alternative would be remission of the case to the Appellate Division for determination of contentions B and C — a cumbersome and seemingly pointless procedure in view of the fact that the Court of Appeals has in effect already decided those issues.

CPL § 470.35(2)(b), commentary at 635-36 (1971).

by making the appellate divisions their courts of last resort.

Elaine T. Ryan

Third party consent to warrantless police search of jointly occupied premises valid notwithstanding contemporaneous objection of co-occupant.

The fourth amendment[247] prohibition against unreasonable searches and seizures generally requires that government officials obtain a valid warrant prior to conducting a search.[248] The need for a warrant is obviated, however, if valid consent[249] to the search is

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[247] The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV; *see* N.Y. CONST. art. 1, § 12.

[248] *See* Warden v. Hayden, 387 U.S. 294, 301-02 (1967); Mapp v. Ohio, 367 U.S. 643, 643-60 (1961); Weeks v. United States, 232 U.S. 383, 393-94 (1914); 1 W. LAFAVE, SEARCH AND SEIZURE § 3.1, at 438-39 (1978); Comment, 30 RUTGERS L. REV. 1056, 1057 (1977).

Warrantless searches are deemed unreasonable per se, Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971) (citing Katz v. United States, 389 U.S. 347, 357 (1967)), unless they are predicated on one of the established exceptions to the warrant requirement. *See, e.g.*, Michigan v. Tyler, 436 U.S. 499, 509-10 (1978) (exigency); United States v. Ramsey, 431 U.S. 606, 619 (1977) (border searches); South Dakota v. Opperman, 428 U.S. 364, 372-76 (1976) (inventory search of automobile); United States v. Matlock, 415 U.S. 164, 165-66 (1974) (consent); United States v. Robinson, 414 U.S. 218, 234-35 (1973) (search incident to traffic arrest); Cady v. Dombrowski, 413 U.S. 433, 447-48 (1973) (dangerous weapon); Coolidge v. New Hampshire, 403 U.S. 443, 465-71 (1971) (open view); Chambers v. Maroney, 399 U.S. 42, 48-52 (1970) (automobile); Chimel v. California, 395 U.S. 752, 762-63 (1969) (search incident to lawful arrest); People v. Howard, 50 N.Y.2d 583, 592-93, 408 N.E.2d 908, 914, 430 N.Y.S.2d 578, 585 (1980) (abandonment); People v. Kuhn, 33 N.Y.2d 203, 209-10, 306 N.E.2d 777, 780, 351 N.Y.S.2d 649, 653-54 (1973) (airport searches); *cf.* Mincey v. Arizona, 437 U.S. 385, 395 (1978) (no scene-of-crime exception). Evidence seized as a result of an illegal search will be suppressed pursuant to the exclusionary rule. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

[249] In order to be valid, consent to a warrantless search must be made voluntarily. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973). Whether consent is voluntary "is a question of fact to be determined from the totality of all the circumstances." *Id.* at 227. Some of the factors to be considered in determining the voluntary nature of a defendant's consent include:

> the youth of the accused, his lack of education, or his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep.

Id. at 226 (citations omitted).

Consent has been rendered involuntary by the presence of a disproportionate number of police in relation to the number of defendants, People v. Gonzalez, 39 N.Y.2d 122, 124,