JUVENILE DELINQUENCY AND PINS CASELAW/LEGISLATIVE UPDATE

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I. NEW LEGISLATION AND ADMINISTRATIVE DIRECTIVES

Juvenile Delinquency Jurisdiction: Raising The Lower Age Of Juvenile Delinquency

Definition Of Juvenile Delinquent
Chapter 810 of the Laws of 2021, and Chapter 38 of the Laws of 2022, which took effect on December 29, 2022, amend FCA § 301.2(1) to states that "Juvenile delinquent" means:
(a)(i) a person at least twelve and less than eighteen years of age [§ 301.2(1)(a)(i)];
(a)(ii) a person over sixteen and less than eighteen years of age who has committed an act that would constitute a violation as defined by Penal Law § 10.00(3) where such violation is alleged to have occurred in the same transaction or occurrence of the alleged criminal act; or
(a)(iii) a person over the age of seven and less than twelve years of age who has committed an act that would constitute one of the following crimes:
aggravated criminally negligent homicide as defined in PL § 125.11;
vehicular manslaughter in the second degree as defined in PL § 125.12;
vehicular manslaughter in the first degree as defined in PL § 125.13;
aggravated vehicular homicide as defined in PL § 125.14;
manslaughter in the second degree as defined in PL § 125.15;
manslaughter in the first degree as defined in PL § 125.20;
aggravated manslaughter in the second degree as defined in PL § 125.21;
aggravated manslaughter in the first degree as defined in PL § 125.22;
murder in the second degree as defined in PL § 125.25;
aggravated murder as defined in PL § 125.26; and
murder in the first degree as defined in PL § 125.27.

Designated Felonies
FCA § 301.2(8)(vi) is amended to reflect the fact that when a DF charge is based on two prior felony findings, the respondent must commit the third felony after turning twelve years of age.
The definition of "Designated felony act" is amended to fill in a gap and include acts specified in FCA § 301.2(8)(iv) that are committed by a person sixteen or seventeen years of age.

Detention
FCA § 304.1(3) is amended to change the usual minimum age for secure detention purposes from ten to thirteen, unless the child is at least ten years old and is considered a juvenile delinquent pursuant to FCA § 301.2(1)(a)(iii).

Fingerprints And Related Records
Provisions governing fingerprinting, and the retention and destruction of fingerprint and related records [i.e., FCA §§ 306.1(a), 308.1(12), 354.1(1), (2), (6), (7)] are amended to reflect the raising the lower age law.

Restitution/Public Services
Provisions governing restitution/public services orders at disposition [i.e., FCA §§ 353.2(2)(f), 353.6(1)] are amended to reflect the raising the lower age law.

Services For Children Under Twelve
Preventive Services
Social Services Law § 409-a(1)(a) is amended to require preventive services for children under the age of twelve whose behavior, but for their age, would bring them within the jurisdiction of the family court under FCA Article Three, where the local social services official determines that the child is at risk of being placed in foster care.
Differential Response Programs
SSL Article Six is amended with a new Title 12-A (Differential Response Programs for Children Under Twelve) which require local social services districts to establish differential response programs for children under twelve whose behavior, but for their age, would bring them within the jurisdiction of the family court under FCA Article Three. The legislative memo notes that "[s]uch programs would be required to be approved by the Office of Children and Family Services (OCBS) and utilize appropriate assessments and determine what, if any, services should be provided to such youth to help reduce future interaction with the juvenile justice and child welfare systems"; and that the law restricts access to the records created as part of such programs.
Family Support Services Programs
SSL § 458-m(1) is amended to provide for participation of such youth in "family support services programs."

Miscellaneous
Executive Law § 840(1)(j) is amended to provide for the training of police officers with respect to the youth under 12 years of age.
Conforming/technical amendments have been made to FCA § 117(b), EL §§ 502(4) and 507-a(2)(a).

Jurisdiction/Statute of Limitations

Chapter 56 of the Laws of 2022, Part UU, Subpart E adds a new FCA § 302.1(4) which states:
Where a proceeding had been commenced in the youth part of a superior court for an act alleged to have been committed prior to the youth's eighteenth birthday and then had been removed to family court, the family court shall exercise jurisdiction under this article, notwithstanding the fact that the respondent may be over the age of eighteen prior to the proceeding having commenced in the family court.

FCA § 302.2 (Statute of limitations) is amended to lift any requirement that a proceeding be commenced before the respondent's eighteenth birthday (if that date occurs before the CPL § 30.10 deadline) when the act was allegedly committed when the respondent was aged sixteen years or older (no change to general rule governing acts committed before age 16).
When the alleged act constitutes a designated felony (see FCA § 301.2[8]) or is an act allegedly committed when the respondent was aged sixteen years or older, the proceeding must be commenced as required by CPL § 30.10 or before the respondent's twentieth birthday, whichever occurs earlier.

These amendments took effect on April 9, 2022.

Community Based Treatment Referrals

Chapter 56 of the Laws of 2022, Part UU, Subpart E also adds a new FCA § 309.1 which states:
A youth who is released prior to the filing of a petition shall be made aware of and referred to community based organizations offering counseling, treatment, employment, educational, or vocational services in which they may voluntarily enroll or participate. Such services shall be separate from and in addition to any adjustment services provided under FCA § 308.1, where applicable.
The youth shall be advised that the service referrals are being made as a resource and participation in them is voluntary and that refusal to participate will not negatively impact any aspect of their pending case. Provided, however, nothing shall preclude the youth from voluntarily providing information, after consulting with their attorney, demonstrating successful enrollment, participation, and completion, where applicable, of any such services. The court shall consider any information provided by the youth regarding such participation in the case proceedings including but not limited to dispositional or placement determinations. The court may require supporting documentation for any such consideration that the youth requests, provided however, that such information shall be maintained as confidential in accordance with any applicable state or federal law.
No statements made to probation when discussing any service referrals under this section shall be admissible in a fact-finding hearing.
New § 309.1 shall apply to offenses committed on or after April 9, 2022 and to offenses for which the statute of limitations that was in effect prior to that date has not elapsed as of that date.

Penal Law: Sexual Conduct Against A Child
Chapter 647 of the Laws of 2022, which took effect on December 23, 2022, amends Penal Law § 130.66(1) to state that the insertion of a finger into the vagina, urethra, penis, rectum or anus of another person under the circumstances described in the statute may be prosecuted in the same manner as when a foreign object is inserted; and to include acts committed when the victim is less than thirteen years old and the actor is eighteen years old or older.

REVOCATION OF COMMUNITY SUPERVISION

Chapter 427 of the Laws of 2021, which generally took effect on March 1, 2022, amends the Executive Law (§§ 259, 259-i) and the Penal Law (§§ 70.40, 70.45) in relation to revocation of community supervision for the purpose of ensuring the Department of Corrections and Community Supervision focuses resources on helping people successfully complete community supervision and avoid any future return to DOCCS custody or supervision.
There is no reason juveniles in Family Court cannot attempt to use this legislation and the rationale justifying it in arguing against revocation of pretrial/pre-dispositional release or of probation/conditional discharge orders based on what is minor misbehavior. Those arguments should be made prior to March 1, 2022.

Summary:
This bill facilitates the positive reintegration into society of people who are subject to community supervision (parole, presumptive release, conditional release, and post-release supervision) and to reduce the number of people held in jail and prison in New York, by
(1) allowing people subject to community supervision to receive "earned time credits" to encourage positive behavior and accelerate discharge from supervision;
(2) raising the standard for parole officers to issue a notice of violation or arrest warrant for someone accused of 4 Parole violations;
(3) ensuring that people who are alleged to have violated the terms of their community supervision receive a hearing in a local criminal court to determine whether they should be detained in jail pending adjudication of the alleged violation:
(4) limiting the circumstances. under which people subject to community supervision may be re-incarcerated for violations of the terms of community supervision and capping the length of any such re-incarceration; and
(5) shortening the timeframe for adjudicatory hearings.

Justification:
New York reincarcerates more people on parole for technical parole violations like missing an appointment with a parole officer, being late for curfew, or testing positive for alcohol than any state in the country except Illinois. Of people on parole whom New York sent back to prison in 2916, Over 6,398 or 65% were reincarcerated for technical parole violations. That's five times the national average. Only 1,318 or 14% of parolees who were reincarcerated were returned to prison because they were convicted of a new crime. The racial disparity is stark: black people are incarcerated in New York City jails for technical parole violations at more than 12 times the rate of whites.
There are approximately 35,008 people under active parole supervision in New York State who at almost any time can see their efforts to successfully rejoin the workforce and reintegrate into their families and their communities disrupted by re-incarceration for a technical violation. This not only harms individual lives and families without commensurate public safety gains, but also drives up the population in the state prisons and local jails, wasting taxpayer money. Other states, such as Arkansas, Arizona, Georgia, Idaho, Kentucky, Louisiana, Mississippi, South Carolina and Utah, have already implemented reforms similar to those proposed here, reducing community

supervision populations and curbing violations. According to research on the federal Bureau of Justice Assistance Justice Reinvestment Initiative ("3RX") published by the Pew Charitable Trusts, in eighteen 3RI states (AK, AR, AZ, DE, GA, ID, KS, KY, LA, MD, MO, MS, MT, NH, OR, SC, SD, UT) releasees can shorten their supervision periods by up to 30 days for 30 days of compliance.

Further, sixteen Justice Reinvestment states have put caps or guidelines on how long individuals can serve for a technical violation of supervision conditions (AK, AL, AR, GA, HI, ID, K5, L A, MD, MO, MS, MT, NC, OK, PA, UT). These reforms have worked. After South Carolina adopted graduated sanctions, compliance revocations decreased 46 percent, and recidivism rates for people under supervision dropped by a third. Meanwhile, crime rates dropped by over 29 percent. Similarly, after Louisiana implemented caps on jail or prison terms for first-time technical violations, length of incarceration declined by 281 days and 22X fewer people under community supervision were sent back to prison for new crimes. After Missouri adopted earned time credits for people on probation and parole, supervision terms dropped by 14 months, the supervised population fell 18 percent, average caseloads decreased 16 percent, and recidivism rates did not change.

Permitting people to earn accelerated discharge off community supervision will responsibly shrink the number of people subject to such supervision, and allow us to concentrate our finite resources on those who are most in need and who pose the greatest risks. New York can reduce jail and prison populations, support people in the reentry process, end promote safety and justice for families and communities.

II. JUVENILE DELINQUENCY CASELAW

Adolescent Offenders

ADOLESCENT OFFENDERS - Removal
WRIT OF PROHIBITION

In connection with an adolescent offender prosecution, the Bronx County District Attorney seeks a writ of prohibition as to orders which would result in BG being tried in Supreme Court rather than Family Court. Petitioner argues that the initial decision declining to retain the case in the Youth Part - to the extent it found that BG did not cause one victim's fractured arm or another victim's death - exceeded the court's authority and disregarded settled legal principles, and also argues, with respect to the order denying the People's motion to preclude removal, that the court erred in concluding that the circumstances were not "extraordinary."

The First Department denies relief, noting, inter alia, that petitioner cites a routine disagreement with the way in which the two courts applied and interpreted the relevant law and the facts before them; and that although the People have no right to take a direct appeal from the underlying orders, it must be presumed that the legislature purposefully declined to provide for such an appeal. The Court also declines to issue a declaratory judgment, which would amount to an advisory opinion since it would not have an immediate practical effect on the conduct of the parties.

The Court does note that one could question the basis for concluding that BG did not "cause" the surviving victim's fractured arm or the other victim's death. Causation in criminal matters is ordinarily dependent upon whether a person set in motion the events that led to harm, or materially contributed to those events; there is no requirement that the person be the sole cause. BG was far from a bystander and appears to have been at the center of the assault against the surviving victim. It could be argued that one who deliberately throws a person on subway tracks should foresee that a good samaritan will place themselves in harm's way to go to their aid. And, "one could question what set of facts would need to be presented to constitute 'extraordinary circumstances,' if the present scenario, involving a brutal gang assault and deliberate placement of a person on the subway tracks, does not qualify."

Matter of Clark v. Boyle
(1st Dept., 11/10/22)

Sealing, Expungement And Confidentiality

EXPUNGEMENT - OCME DNA Records
SEARCH AND SEIZURE - Abandonment
- DNA Database

The presentment agency filed a petition alleging that, on October 29, 2019, respondent, while aided by another, forcibly stole property consisting of a credit card or debit card. The arrest took place

on October 29, 2019. On October 31, after he had been in pre-arraignment detention and inside a police interrogation room for two days, the NYPD interrogated him without an adult present. During the interrogation, a police officer offered him water in a disposable cup. After he drank from the cup, the officer retrieved it, vouchered it as abandoned, and sent it for DNA analysis to the OCME. The officer knew there was no DNA evidence collected in connection with the charged acts, and nothing to compare with any DNA sample obtained from the cup.

Respondent filed a motion for an order directing the NYPD and OCME to expunge all records and samples relating to the DNA testing. After respondent had made an admission to criminal possession of stolen property and received a conditional discharge, the family court denied respondent's motion.

The First Department, with one judge dissenting, reverses, concluding that the family court had jurisdiction under Executive Law § 995-c to order expungement and erred in denying expungement of respondent's DNA sample and all related information; and that the DNA sample was obtained without respondent's knowledge or consent and in violation of his constitutional and due process rights.

This Court held in *Matter of Samy F. v Fabrizio* (176 A.D.3d 44) that, even though Executive Law § 995-c does not refer to youthful offender adjudications, the supreme court has discretionary authority to order the expungement of a youthful offender's DNA records within the state or OCME database. The holding in *Samy F.* applies to an adjudicated juvenile delinquent, who, like a youthful offender, is not a "designated offender" under the Executive Law and does not have a conviction, but should not be afforded fewer protections than an adult in the equivalent circumstances.

It can be inferred that 16-year-old respondent, who was offered a drink of water in a disposable cup for the sole purpose of collecting and preserving his DNA sample, was unaware that the cup could be used against him at a later date and retained by OCME in perpetuity. It is the presentment agency's burden to show that respondent abandoned the cup and waived his constitutional protections. The record is silent as to the circumstances of any abandonment, and this Court cannot assume that the cup was in fact abandoned. DNA evidence obtained after an arrest should be material and relevant and be linked to the arrest charges. Here, there is no such link; absent consent or, as alleged, abandonment, the police officer would not have been able to obtain a court order to collect a DNA sample.

The statutory purpose of juvenile delinquency proceedings is to focus on rehabilitation over punishment. The family court must consider youths' needs and best interests, and afford adjudicated youths a fresh start. Here, maintaining respondent's DNA profile in OCME's database in perpetuity is completely incompatible with the statutory goal and result in substantial injustice.

Matter of Francis O.
(1st Dept., 6/16/22)

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SEALING - Domestic Incident Report

At a hearing, the People proffered an NYPD Domestic Incident Report as evidence in support of their application for a full order of protection. This DIR described an alleged domestic incident from last year that resulted in defendant's arrest, but the ensuing criminal case was later dismissed and sealed.

The Court orally ruled that it would not consider this DIR, which, the Court now explains, is an official record that is on file with the prosecutor's office, and thus must be sealed. The statute prohibits the Bronx District Attorney's Office from maintaining sealed DIRs in such a way that prosecutors can view them; or copying those DIRs and disseminating them within their office; or sharing those DIRs with third parties outside of the office.

People v. Anonymous
(Crim. Ct., Bronx Co., 9/20/22)
https://nycourts.gov/reporter/3dseries/2022/2022_22291.htm

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DISCOVERY - Police Misconduct Information/Sealed Records
SEALING - Motion To Unseal

The Court holds that under CPL § 245.20(1)(k), the People are required to provide all materials regarding misconduct allegedly committed by their testifying witnesses, whether administrative findings are labeled as "substantiated," "unsubstantiated," or "exonerated." The People are mandated to disclose discoverable items in their actual and constructive possession, which includes everything held by law enforcement agencies, but the statute also imposes a secondary obligation to make a diligent, good faith effort to verify the existence of and make available all discoverable material outside of the People's possession, custody or control, including records of the CCRB and the Unified Court System.

The Court also holds that the People must seek the unsealing of criminal cases in which a testifying witness was found incredible. Even if the People may not move to unseal under CPL § 160.50, unsealing may be authorized because the People's legal mandate to disclose discoverable material cannot be fulfilled without unsealing the criminal record.

People v. Walmer Taveras
(Crim. Ct., Bronx Co., 2/3/23)
https://nycourts.gov/reporter/3dseries/2023/2023_50074.htm

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ADOLESCENT OFFENDERS - Removal
CONFIDENTIALITY - Juvenile Delinquency History

The Court, finding no extraordinary circumstances, denies the People's motion to prevent removal of this adolescent offender prosecution in which defendant is charged with four counts of arson in the second degree and it is alleged that defendant deliberately set a fire in a residence and subjected other residents and staff to a risk of serious physical injury.

The People's burden of proof must be something more than a mere preponderance - closer to or resembling "clear and convincing evidence." Rather than rely only on allegations involving highly unusual and heinous behavior, the People must also establish that the defendant would not benefit in any way from the heightened services in the family court. The People's motion must contain allegations of sworn fact based upon the personal knowledge of the affiant, and the People may not use the defendant's juvenile delinquency history [see FCA § 381.2(1)]. A court must view the evidence in its totality and balance any aggravating factors against any mitigating factors.

Here, defendant has been in over thirteen placements; has threatened former foster parents and their children and exhibited "explosive aggression" towards other foster parents and even his own family members; has absconded from foster care homes on multiple occasions; has, at times, refused to engage in treatment or take prescribed medications; has refused to attend school programs and has destroyed computer equipment to avoid having to attend classes virtually; has been hospitalized numerous times, for suicidal ideation or activity and also for injuries he sustained while destroying the property of others out of frustration or during physical altercations; and has continually engaged in low-level criminal conduct, such as vandalism and larceny.

The Court also is mindful of defendant's troubling upbringing. His parents abandoned him at an early age. Before abandoning him, his mother subjected him and his brother to physical violence and he was removed after his mother whipped his brother with a jump rope.

The Court cannot characterize the charged crimes as "highly unusual" or "heinous." Defendant's actions do not evince any measure of calculation or malice. There is no indication that anyone was hurt or that defendant intended to cause another person harm. There is no proof that the building was damaged to any degree. Defendant's statement that he would "burn this bitch down" is linked directly by witnesses to his frustration over the conditions at the residence. A conviction would subject defendant to a mandatory minimum state prison sentence of 5 years and a maximum sentence of up to 25 years.

People v. J.J.
(County Ct., Ulster Co., 3/15/22)
https://www.nycourts.gov/reporter/3dseries/2022/2022_50211.htm

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MOTION TO VACATE SEALING

The First Department concludes that respondent failed to establish a substantial change of circumstances sufficient to warrant vacatur of his juvenile delinquency adjudication pursuant to FCA § 355.1(1)(b). Respondent's compliance with the terms of his conditional discharge alone was insufficient, particularly because both the offense and completion of the requirements of supervision were relatively recent. The Court also notes the seriousness of the underlying sexual offense and the need for protection of the community.

As for respondent's sealing request, the Court notes that respondent's interests are adequately protected by the automatic confidentiality of Family Court records and the fact that juvenile delinquency adjudications do not entail civil disabilities. Sealing could potentially impede the use of records by law enforcement agencies for legitimate purposes in the event respondent engaged in further criminal activity. Respondent has not substantiated his claim that this adjudication might have adverse consequences for him in the future.

Matter of Dazaeth S.-M.
(1st Dept., 4/21/22)

Detention/Orders Of Protection

ORDERS OF PROTECTION - Due Process Hearing

At arraignment in this case in which defendant is charged with assaulting his wife, a full, temporary order of protection was issued which prohibited defendant from having any contact with the complainant. Pursuant to Crawford v Ally (197 A.D.3d 27), defendant moved for an evidentiary hearing and to modify the full temporary order of protection, asserting that because defendant owns the home from which he was excluded, issuance of the full order of protection presented an immediate and significant deprivation of a substantial personal or property interest.

Upon a hearing, the Court denies relief, noting, inter alia, that an informal evidentiary hearing can achieve due process; that reliable hearsay, including Domestic Incident Reports, is admissible without authentication at a Crawford hearing; and that the Court was entitled to consider defendant's abusive behavior against the complainant in incidents that had not been reported to the police. The People can meet their burden without witness testimony. The informal hearing enabled the Court to ascertain the facts necessary and provide due process.

People v. Vernon Simmons
(Crim. Ct., Bronx Co., 2/8/23)
https://nycourts.gov/reporter/3dseries/2023/2023_23037.htm

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ORDERS OF PROTECTION - Hearing Requirement

Upon a hearing held pursuant to *Crawford v. Ally* (197 A.D.3d 27), the Court modified a full stay-away temporary order of protection to a limited TOP.

Although the People allege that defendant has arranged for an alternative place to stay and that it is, therefore, not a burden for him to be excluded, the People were unable to articulate any basis for this assertion, and defense counsel maintained that defendant has been living in his car and has nowhere else to live at the present time.

The People argued that the TOP was necessary to ensure the safety of the complaining witness, but relied on the unconverted complaint and assumptions, and referenced, but did not offer, the Domestic Incident Report that gave rise to this case and a DIR from 2014 involving a different intimate partner. The information presented at the hearing should have some minimal indicia of reliability to ensure basic due process standards are met. While the evidence need not be competent, it should, at the very least, be material, relevant and legally introduced. The severity of the allegations may, in certain circumstances, suffice to sustain the People's burden, but in this particular case it does not. The People also acknowledged that the complaining witness is not cooperative, does not wish to have a full order of protection, and does not wish to proceed with this case.

People v. Jason Riley
(Crim. Ct., Bronx Co., 1/17/23)
https://www.nycourts.gov/reporter/3dseries/2023/2023_23012.htm

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RIGHT TO A FAIR TRIAL - Shackling Of Defendant
APPEAL - Preservation

Noting the "long forbidden routine use of visible shackles during the guilt phase of a trial" in the absence "of a special need," the Court of Appeals holds that this rule applies during the jury's reading of its verdict and the court's polling of the jurors. Here, the trial judge violated this constitutional due process prohibition and committed by ordering defendant to be handcuffed when the jury returned to announce its verdict without providing an on-the-record, individualized explanation for the restraints. This error was not harmless beyond a reasonable doubt.

Defendant preserved his claim when defense counsel noted his opposition to the handcuffing on the record based on a fear that the jurors would draw negative inferences about defendant by observing him physically restrained.

People v. Oscar Sanders
(Ct. App., 2/9/23)

Petitions

ACCUSATORY INSTRUMENTS - Verification/Child Deponent
- Identity Of Defendant

The Appellate Term rejects defendant's contention that the accusatory instrument is defective because, since a 14-year-old child cannot be held criminally liable, the statement the child complainant signed, to the effect that he could be subject to punishment for a class A misdemeanor in the event his statement is false, is inconsequential.

The form notice citing Penal Law § 210.45 is used so that the deponent knows that he or she must tell the truth and can be punished if he or she does not. Even though minors may not be held criminally responsible for violating Penal Law § 210.45, they can be adjudicated a juvenile delinquent. Thus, the efficacy of the statement regarding the Penal Law § 210.45 sanction remains.

The Court also concludes that defendant was adequately identified in the accusatory instrument where she was referred to as the complainant's mother. The allegations show that defendant and the complainant share the same last name, and the address the complainant provides for his mother is the same as defendant's address. These facts permit an inference that defendant is the individual referred to as "my mom."

People v. Rhonda Parker
(App. Term, 2d Dept., 9th & 10th Jud. Dist., 3/17/22)

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ACCUSATORY INSTRUMENT - Duplicitous Count

Having previously remitted the case for a ruling on defendant's motion seeking dismissal of the indictment on the ground that the indictment, as amplified by the bill of particulars, was facially duplicitous, the Fourth Department concludes that the court below erred in denying the motion.

The bill of particulars alleged that defendant engaged in two separate and distinct acts of nonconsensual sexual intercourse with the victim, which allegedly occurred more than three hours apart. Thus, while the indictment charged only one criminal act, the jury heard evidence at trial of two criminal acts, with no specification from the court or the prosecutor of the act they were to consider when rendering a verdict.

Even if the trial evidence had narrowed the scope of defendant's allegedly illegal conduct, that would be irrelevant. Defendant was entitled to pretrial notice of the charges so that he would be able to adequately prepare a defense.

People v. Richard Baek
(4th Dept., 7/1/22)

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ACCUSATORY INSTRUMENTS - Identity Of Perpetrator

The Court dismisses for facial insufficiency charges of criminal mischief in the fourth degree where the complainant alleges that he observed "the defendant" via video surveillance, but there are no allegations providing reasonable cause to believe that this defendant is the person depicted in the video.

The complainant was not present when the events transpired, it is not alleged that the complainant knew defendant or that he had ever seen him before, and there are no allegations explaining how he was able to identify the person on the video as this defendant.

People v. Derrick Swann Jackson
(Crim. Ct., Bronx Co., 3/10/22)
https://www.nycourts.gov/reporter/3dseries/2022/2022_22082.htm

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ACCUSATORY INSTRUMENTS - Identification Of Defendant
IDENTIFICATION - Notice Of Intent To Offer/Confirmatory Identification

The Appellate Term finds the information facially sufficient where the officer stated that he "viewed" the surveillance "video depicting the … occurrence … and observed a male whom he recognizes to be defendant Jamill Jones … strike" the victim. A statement that the deponent recognized the defendant is not conclusory, and the source of the deponent's knowledge is a matter to be raised at trial.

The Court upholds the denial of preclusion where there was late disclosure of an identifying police witness, rejecting defendant's claim that the witness was not sufficiently familiar with defendant to make a confirmatory identification. The witness and defendant were to be future family members and had met on three occasions - once when the witness attended defendant's engagement party where defendant gave a speech, once when defendant was a guest in the witness's home, and on one other occasion. On each occasion they spoke to and were in close proximity to one another. Also, defendant testified that he spoke to the witness the morning after the incident, when defendant saw a police vehicle and yellow crime scene tape at the location of the incident and sought the witness's advice. Moreover, the People could not have complied with the 15-day CPL § 710.30(2) notice requirement. When, during trial, the People learned that the witness had identified defendant, they immediately provided notice.

A dissenting judge asserts that the identification of defendant in the accusatory instrument was too conclusory to establish a prima facie case because it required a basis of knowledge beyond the mere viewing of the video.

People v. Jamill Jones
(App. Term, 2d Dept., 2d, 11th & 13th Jud. Dist., 9/2/22)

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ACCUSATORY INSTRUMENTS - Amendment
ENDANGERING THE WELFARE OF A CHILD

The Third Department agrees with defendant's contention, which survives his appeal waiver and is not subject to preservation rules, that the charge of endangering the welfare of a child in the superior court information was jurisdictionally defective where the alleged date of birth for the victim at the time of the offense was 17.

Although the original indictment was amended to change the age, that amendment was not authorized by CPL § 200.70 regardless of any consistency with the People's theory before the grand jury or the lack of prejudice to defendant.

People v. Yermia Solomon
(3d Dept., 3/31/22)

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ACCUSATORY INSTRUMENTS - Amendment During Trial/Change Of Theory

The First Department finds prejudice to defendant, and thus reversible error, where the trial court amended the indictment at the conclusion of the trial by replacing the offenses of second degree assault and attempted assault as a hate crime with the lesser included offenses of third degree assault and attempted assault as a hate crime in order to conform the indictment to the factual allegations set forth therein.

Although evidence of a deadly weapon or a dangerous instrument was presented to the grand jury - a bike rental sign - and the grand jury was properly charged on the second degree hate crimes, the indictment failed to allege a material element of the second degree hate crime offenses, i.e., that the injury was caused by the use of a deadly weapon or a dangerous instrument. The court should have dismissed those counts as jurisdictionally defective.

The People presented their case as one involving a dangerous instrument, and defendant was on notice of that theory and defended against that claim. Assuming, arguendo, that defendant was on notice during trial that the court would charge the jury with the lesser included offenses of third degree hate crimes and third degree assault, he was never on notice during trial that, at the conclusion of trial, the greater offenses would be deleted and would be replaced with the lesser included offenses, which do not require proof of the existence of a deadly weapon or a dangerous

instrument. The amendment was not a mere correction of a "misnomer" of the offense in the accusatory clauses of the indictment.

People v. Bryan Winston
(1st Dept., 3/24/22)

Discovery/Preservation Of Evidence

DISCOVERY - Impeachment Evidence/Equal Protection In JD Proceedings

After the presentment agency disclosed via a Voluntary Disclosure Form that nine of fourteen officers were involved in at least one pending lawsuit, and listed the title and index number of each proceeding, respondent sought discovery under Family Court Act § 331.2(1), and, citing the Equal Protection Clause of the federal and state constitutions, discovery under CPL § 245.20(1)(a)-(u). In particular, he sought impeachment information under § 245.20(1)(k)(iv). The presentment agency emailed defense counsel "disclosure letters" about twelve of the officers, which summarized their disciplinary history, but "refused as not properly discoverable upon a Demand to Produce" any items sought under § 245.20(1)(a)-(u). Respondent then moved for an order directing the presentment agency to provide the discovery sought, including impeachment evidence pursuant to § 245.20(1)(k)(iv), and argued that it was unconstitutional to deny him those materials solely because he is an alleged juvenile delinquent. The family court concluded that "the provisions of the CPL … are expressly inapplicable and preempted in juvenile delinquency cases pursuant to Family Ct Act 303.1(1)."

The First Department holds that while not all provisions of the Criminal Procedure Law are applicable to proceedings under the Family Court Act, under these circumstances the denial of discovery of records available under CPL § 245.20(1)(k)(iv), which broadly requires disclosure of all impeachment evidence, deprived respondent of equal protection of the laws under the federal and state Constitutions. A respondent in a juvenile delinquency proceeding has the same right to cross-examine witnesses as a criminal defendant, and there is no reason to allow less access to impeachment materials in a juvenile suppression or fact-finding hearing than in a criminal suppression hearing or trial. The need for impeachment evidence is equally crucial in all these proceedings. The Court also notes that the legislature is considering legislation that would amend the Family Court Act to include the same disclosure now required under CPL § 245.20(1)(k).

Finally, the Court noted: "Because appellant asks only that the information be provided under Family Court Act article 3 timelines, we need not address whether any different time frame contained in the Criminal Procedure Law must apply under equal protection principles."

Matter of Jayson C.
(1st Dept., 12/7/21)

Practice Note:

In addition to being controlling law in all family courts in the First Department, under the rules of stare decisis Jayson C. is controlling law in all other New York State family courts unless an appellate court outside the First Department rules to the contrary. Mountain View Coach Lines, Inc. v. Storm, 102 A.D.2d 663, 664 (2d Dept. 1984).

Regarding the nature and scope of disclosure, note first that the First Department's decision has to do with what the presentment agency must disclose to the respondent in the course of demand to produce discovery under FCA § 331.2. In contrast, under CPL Article 245, the prosecution must disclose information without service of a demand.

The First Department noted that "CPL 245.10(1)(k)(iv) … broadly requires disclosure of all impeachment evidence," but it is important to recognize the full scope of discovery, which includes "[a]l evidence and information, including that which is known to police or other law enforcement agencies acting on the government's behalf in the case, that tends to: … (iv) impeach the credibility of a testifying prosecution witness." The statute does not limit disclosure to information that is factually related to the charges.

Moreover, under CPL § 245.20(1)(k), information "shall be disclosed whether or not such information is recorded in tangible form and irrespective of whether the prosecutor credits the information. The prosecutor shall disclose the information expeditiously upon its receipt and shall not delay disclosure if it is obtained earlier than the time period for disclosure…." "For purposes of [CPL § 245.20(1)], all items and information related to the prosecution of a charge in the possession of any New York state or local police or law enforcement agency shall be deemed to be in the possession of the prosecution." CPL § 245.20(2). There shall be a presumption in favor of disclosure when interpreting these discovery provisions. CPL § 245.20(7).

Regarding the timing of disclosure, the First Department apparently contemplates that disclosure will be made "under Family Court Act article 3 timelines," and noted that it "need not address whether any different time frame contained in the Criminal Procedure Law must apply under equal protection principles."

Fortunately for juvenile delinquency respondents, it appears that equal protection arguments need not be made with respect to the timing of disclosure. Indeed, because hearings in juvenile delinquency proceedings must take place within an accelerated time frame, especially when the respondent is in detention, the Family Court Act already contains time frames more restrictive than those in the Criminal Procedure Law.

While CPL § 245.10(1)(a)(i) requires disclosure under § 245.20(1) within twenty calendar days after the defendant's arraignment when the defendant is in custody, FCA § 331.7(1) requires disclosure within seven days after service of a demand to produce (which can be made anytime within seven days after the initial appearance). And, while CPL § 245.10(1)(a)(ii) requires disclosure under § 245.20(1) within thirty-five calendar days after the defendant's arraignment

when the defendant is not in custody, FCA § 331.7(2) requires disclosure within fifteen days after service of a demand to produce (which can be made anytime within fifteen days after the initial appearance).

And, while the First Department's decision does not address supplementary discovery of uncharged misconduct and criminal acts under CPL § 245.20(3), those materials must be disclosed as soon as practicable but not later than fifteen calendar days before the first scheduled trial date. CPL § 245.10(1)(b).

Obviously the attorney for the child needs to consider making an equal protection argument whenever the respondent is denied discovery to which a criminal defendant would be entitled, and it behooves the AFC to identify those areas of CPL discovery that seem to give rise to the strongest equal protection arguments.

The First Department's reminder that juvenile delinquency respondents and criminal defendants have the same constitutional cross-examination and witness impeachment right means that broader CPL discovery that potentially implicates the respondent's ability to effectively cross-examine prosecution witnesses will be fertile ground for equal protection claims. But a respondent also has a constitutional right to present a defense and raise suppression arguments, and broader CPL discovery that relates to those rights also must be scrutinized. These are some of the most obvious areas of discovery for the AFC to think about:

Exculpatory/Favorable Evidence
CPL § 245.20(1)(k)
All evidence and information, including that which is known to police or other law enforcement agencies acting on the government's behalf in the case, that tends to:
(i) negate the defendant's guilt as to a charged offense;
(ii) reduce the degree of or mitigate the defendant's culpability as to a charged offense;
(iii) support a potential defense to a charged offense;
(iv) impeach the credibility of a testifying prosecution witness;
(v) undermine evidence of the defendant's identity as a perpetrator of a charged offense;
(vi) provide a basis for a motion to suppress evidence; or
(vii) mitigate punishment. Information under this subdivision shall be disclosed whether or not such information is recorded in tangible form and irrespective of whether the prosecutor credits the information. The prosecutor shall disclose the information expeditiously upon its receipt and shall not delay disclosure if it is obtained earlier than the time period for disclosure in subdivision one of section 245.10 of this article.

Witness Cooperation Agreements
CPL § 245.20(1)(l)
A summary of all promises, rewards and inducements made to, or in favor of, persons who may be called as witnesses, as well as requests for consideration by persons who may be called as witnesses and copies of all documents relevant to a promise, reward or inducement.

Witness Record Of Convictions and Pending Actions
CPL § 245.20(1)(p)
A complete record of judgments of conviction for all defendants and all persons designated as potential prosecution witnesses pursuant to paragraph (c) of this subdivision, other than those witnesses who are experts.
CPL § 245.20(1)(q)
When it is known to the prosecution, the existence of any pending criminal action against all persons designated as potential prosecution witnesses pursuant to paragraph (c) of this subdivision.
(Note: the FCA requires disclosure of this information AT, but not before, hearings.)

Statements By Witnesses and Other Persons
CPL § 245.20(1)(e)
All statements, written or recorded or summarized in any writing or recording, made by persons who have evidence or information relevant to any offense charged or to any potential defense thereto, including all police reports, notes of police and other investigators, and law enforcement agency reports. This provision also includes statements, written or recorded or summarized in any writing or recording, by persons to be called as witnesses at pre-trial hearings.
(Note: the FCA requires disclosure of witness statements AT, but not before, hearings.)

Grand Jury Testimony
CPL § 245.20(1)(b)
All transcripts of the testimony of a person who has testified before a grand jury, including but not limited to the defendant or a co-defendant.

Search Warrant Information
CPL § 245.20(1)(n)
Whether a search warrant has been executed and all documents relating thereto, including but not limited to the warrant, the warrant application, supporting affidavits, a police inventory of all property seized under the warrant, and a transcript of all testimony or other oral communications offered in support of the warrant application.

Witness Names and Contact Information
CPL § 245.20(1)(c)
The names and adequate contact information for all persons other than law enforcement personnel whom the prosecutor knows to have evidence or information relevant to any offense charged or to any potential defense thereto, including a designation by the prosecutor as to which of those persons may be called as witnesses.

Names of Law Enforcement Personnel
CPL § 245.20(1)(d)
The name and work affiliation of all law enforcement personnel whom the prosecutor knows to have evidence or information relevant to any offense charged or to any potential defense thereto, including a designation by the prosecutor as to which of those persons may be called as witnesses.

Expert Opinion Evidence
CPL § 245.20(1)(f)
Expert opinion evidence, including the name, business address, current curriculum vitae, a list of publications, and a list of proficiency tests and results administered or taken within the past ten years of each expert witness whom the prosecutor intends to call as a witness at trial or a pre-trial hearing, and all reports prepared by the expert that pertain to the case, or if no report is prepared, a written statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

Tapes Or Electronic Recordings
CPL § 245.20(1)(g)
All tapes or other electronic recordings, including all electronic recordings of 911 telephone calls made or received in connection with the alleged criminal incident, and a designation by the prosecutor as to which of the recordings under this paragraph the prosecution intends to introduce at trial or a pre-trial hearing.

Uncharged Misconduct and Criminal Acts: Supplemental Discovery
CPL § 245.20(3)
The prosecution shall disclose to the defendant a list of all misconduct and criminal acts of the defendant not charged in the indictment, superior court information, prosecutor's information, information, or simplified information, which the prosecution intends to use at trial for purposes of
(a) impeaching the credibility of the defendant, or
(b) as substantive proof of any material issue in the case.
In addition the prosecution shall designate whether it intends to use each listed act for impeachment and/or as substantive proof.

* * *

DISCOVERY - Police Misconduct Records

The Appellate Term agrees with the lower court that the People's Certificate of Compliance was not valid and therefore did not stop the speedy trial clock where the People relevant records to defendant, including underlying impeachment materials pursuant to CPL § 245.20(1)(k) (see, e.g., *Matter of Jayson C.*, 200 A.D.3d 447).

People v. Javier Rodriguez
(App. Term, 1st Dept., 12/29/22)
https://nycourts.gov/reporter/3dseries/2022/2022_22393.htm

* * *

DISCOVERY - Police Misconduct Information

The Court holds that "[t]ere is no longer ambiguity over whether the People may only disclose mere summaries of their testifying police witnesses' prior misconduct records. The Appellate Division held in *Matter of Jayson C.* (200 A.D.3d 447) that such summaries are insufficient to satisfy CPL § 245.20(1)(k)(iv). The People must disclose all underlying impeachment evidence and information regarding a testifying police witness's prior bad acts in their possession or the possession of police. "All means all."

Moreover, the People wrongly presume that that an unsubstantiated complaint does not provide a good faith basis to inquire on cross-examination. There is no prohibition against cross-examining a witness about bad acts that have never been formally proved in another forum.

People v. Toussaint
(Crim. Ct., Queens Co., 1/31/23)
https://nycourts.gov/reporter/3dseries/2023/2023_23025.htm

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DISCOVERY - Police Misconduct Information

The Court, noting that CPL § 245.20(1)(k) does not mention summaries, concludes that the legislature clearly intended that underlying impeachment evidence and information must be provided. The Court cites Matter of Jayson C., 200 A.D.3d 447 (1st Dept. 2022) and People v. Rodriguez, 2022 NY Slip Op 22393 (App. Term, 1st Dept., 2022).

Moreover, it does not matter whether a disciplinary record is substantiated, unsubstantiated, or exonerated. The results of the NYPD or CCRB investigations are not the final determination as to whether the underlying records tend to impeach a witness. Single-minded counsel for the accused must review the material and prepare whatever impeachment argument is available, which is then decided by a trial court.

People v. Ismael Rugerio-Rivera
(Crim. Ct., Queens Co., 1/24/23)
https://nycourts.gov/reporter/3dseries/2023/2023_50069.htm

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DISCOVERY Police Misconduct Allegations

The Court holds that underlying documents relating to substantiated police misconduct allegations are discoverable under CPL § 245.20(1)(k). The First Department held in *Matter of Jayson C.* (200 A.D.3d 447) that the statute "broadly requires disclosure of all impeachment evidence" and that mere summaries of such records are insufficient. Although *Jayson C.* addressed a juvenile

delinquency matter, the First Department opined that "a similarly situated defendant in a criminal proceeding would be entitled to access to impeachment materials requested by the appellant."

People v. Taron Critten
(Crim. Ct., N.Y. Co., 12/20/22)
https://nycourts.gov/reporter/3dseries/2022/2022_51315.htm

* * *

DISCOVERY - Police Misconduct Allegations

The Court holds that since CCRB records are available to the public via an open database, the People are not obligated to disclose testifying officers' records unless they are already in possession of the CCRB documents; that unsubstantiated misconduct allegations investigated by the NYPD Internal Affairs Bureau must be shared, but "exonerated" or unfounded allegations need not be disclosed; and that defendants are entitled to detailed information about allegations of misconduct so they can understand the specific nature and degree of the misconduct alleged, determine its relevance to a particular defense, and prepare arguments as to its use on cross-examination, but, although a simple list summarizing an officer's disciplinary history without details is insufficient, the Court is not prepared to hold that detailed summaries are never sufficient and does not find the holding in *Matter of Jayson C.* (200 A.D.3d 447) to be inconsistent with this determination.

People v. Amissah Godfred
(Crim. Ct., Bronx Co., 12/19/22)
https://nycourts.gov/reporter/3dseries/2022/2022_22390.htm

* * *

DISCOVERY - Police Disciplinary/Other Records

Citing *Matter of Jayson C.* (200 A.D.3d 447), the Court holds that the People may not satisfy their discovery obligation by disclosing mere summaries of their testifying police witnesses' prior misconduct records, without the underlying documentation. The People must disclose all evidence and information regarding a testifying police witness's prior bad acts in their possession or the possession of police.

With respect to certain NYPD information the People failed to disclose before filing their certificate of compliance, the Court rejects the People's contention that the information need not be disclosed because, in their view, it relates to individuals whose involvement in the case was "limited." The standard for whether information should be disclosed is whether it "relate[s]" to the

case. The People accuse defendant of driving while intoxicated, and crashing into parked cars. Information relating to the individuals who own these cars relates to the case.

People v. Trotman
(Crim. Ct., Queens Co., 12/5/22)
https://nycourts.gov/reporter/3dseries/2022/2022_51181.htm

* * *

DISCOVERY - Police Disciplinary Records

Noting that CPL § 245.20(1)(k) goes beyond the constitutional minimum set forth in Brady v. Maryland, Giglio v United States, and their progeny, and beyond Rule 3.8(b) of the New York State Rules of Professional Conduct and the New York State Unified Court System's Administrative Order of Disclosure, the Court asserts that the People are required to provide all underlying materials for, at minimum, substantiated, unsubstantiated, and pending allegations of misconduct by their testifying witnesses. Case summaries prepared by the People are insufficient. For the proposition that underlying documents are discoverable, the Court cites Matter of Jayson C. (200 A.D.3d 447).

Here, the People improperly redacted material from copies of IAB logs and CCRB records underlying disciplinary complaints without seeking a protective order under CPL § 245.70.

People v. Tyrek Goggins
(Crim. Ct., Bronx Co., 9/6/22)
https://nycourts.gov/reporter/3dseries/2022/2022_22279.htm

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DISCOVERY - Disciplinary And Other Police Records

The Court dismisses the accusatory instrument pursuant to CPL § 30.30, concluding that the People's statements of readiness were not preceded by a proper certificate of discovery compliance, and thus were illusory.

The Court notes that there is no categorical "administrative records" exception since a NYPD document can "relate" to a case even if it is not created for the prosecution and does not contain statements of a witness or other impeachment material, and, in any event, any exception would not apply in this case to a NYPD "prisoner movement slip" and mugshot; that the People were not entitled to withhold memo books as "duplicative" of body-worn camera footage, or withhold DD5s from a related companion case; that the memo books of the "domestic violence officers" are discoverable since follow-up visits by such officers are not unrelated to the case simply because those officers do not "respond" to the incident; that nothing in the discovery statute exempts an officer's paperwork simply because the People choose not to call the officer to testify; that the

People's assertion that the "scratch" Domestic Incident Report is "merely duplicative" of the typed DIR is not sufficient; and that prior misconduct records for officers involved in a case are automatically discoverable regardless of whether the People call those officers to testify, since prior misconduct could negate the defendant's guilt or support a potential defense, could lead to a defense investigation into police interactions with a complainant or witnesses, or could undermine the integrity of the investigation.

People v. Cartagena
(Crim. Ct., Bronx Co., 9/28/22)
https://nycourts.gov/reporter/3dseries/2022/2022_50943.htm

* * *

DISCOVERY - Police Disciplinary Files

Nassau County prosecutors seek an order pursuant to CPLR article 78 prohibiting a judge from imposing a duty to produce the entirety of confidential police disciplinary files regarding all testifying police witnesses whether or not the documents are related to the subject matter of the criminal proceeding, and when the misconduct allegations were determined to be "exonerated," "unfounded," and "undetermined," and allegedly lack impeachment value; and prohibiting the judge from striking Certificates of Compliance and Certificates of Readiness on the ground that disciplinary files were not disclosed to the defense. Petitioners also seek a temporary restraining order and preliminary injunction preventing the judge from striking COCs and CORs, and a declaratory judgment that petitioners do not have a duty under CPL § 245.20 to produce the entirety of confidential police disciplinary files.

The Court denies relief, noting that there are no submitted appellate decisions addressing this issue; that there is a "presumption of openness" in the statute; and that if a privilege is claimed, the statute provides for a protective order in CPL § 245.70, which has not been sought.

Ryder v. Engel
(Sup. Ct., Nassau Co., 3/16/22)
https://www.law.com/newyorklawjournal/almID/1648452820NY61498321/

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DISCOVERY - Witness Convictions

Under CPL § 245.20(1)(p), the People must disclose "[a] complete record of judgments of conviction for … all persons designated as potential prosecution witnesses."

The Court holds that the People satisfied the statue by disclosing to defendant a list of the complainant's prior criminal convictions, including the date of conviction, penal law section violated, county in which the conviction was obtained, and the docket or indictment number. The

Court rejects defendant's contention that a "complete record" includes the evidence and paperwork generated in preparation for the criminal case that resulted in a conviction. To construe the adjective 'complete' to include the 'underlying documents,' … would inevitably lead to unfruitful arguments over what paperwork must be disclosed by the People."

However, the change in language from the old discovery statute was intended to emphasize that the prosecutor now has an obligation to obtain and disclose a complete list of the witness's judgments of conviction as opposed to a selective list containing only the convictions known to the prosecutor. The prosecutor may no longer turn a blind eye to their witnesses' criminal convictions, and, instead, must affirmatively ascertain their existence and provide such information to the defense.

People v. Marcel Simmons
(Sup. Ct., Bronx Co., 1/19/23)
https://nycourts.gov/reporter/3dseries/2023/2023_23016.htm

* * *

DISCOVERY - DNA Databank/Protective Orders

The Court grants the People's motion pursuant to CPL § 245.40(1)(e) and orders defendant to provide a buccal swab for DNA analysis, and then denies defendant's motion for a protective order preventing the DNA profile developed from the buccal swab from being uploaded into the local DNA databank (LDIS) maintained by the Erie County Central Police Services lab.

Executive Law § 995 does not prohibit lawfully obtained samples from being uploaded to the Erie County CPS Lab LDIS. And, once evidence is lawfully obtained, law enforcement is permitted to perform additional scientific testing and use the evidence seeking further investigative leads. "Once lawfully obtained, DNA is no different than fingerprints or mugshots, and if anything, is a more reliable method of identification which not only links suspects to crimes, but serves to exonerate the innocent."

There are methods already proscribed by statute allowing for the removal of a DNA profile from the LDIS of an individual who is acquitted or not charged with a crime.

People v. Unique Rogers
(Sup. Ct., Erie Co., 8/12/22)
https://nycourts.gov/reporter/3dseries/2022/2022_22265.htm

* * *

DISCOVERY - Time Deadlines

The Court finds timely filed the People's Certificate of Compliance and Statement of Readiness where the People filed on Friday, the 89th day, at 5:13 p.m. via email after the court clerk's office closed at 5:00 p.m., and the documents were stamped filed by the clerk's office Saturday, on the 90-day deadline, at 8:55 a.m. The court was in session on that day, and thus the CPL § 30.30 clock was stopped.

The Court also notes that General Construction Law § 19 provides that "a calendar day includes the time from midnight to midnight."

People v. De-Vantae Murray
(City Ct. of Mount Vernon, 11/9/22)
https://nycourts.gov/reporter/3dseries/2022/2022_51146.htm

* * *

DISCOVERY - Police Disciplinary Records
IMPEACHMENT - Bad Acts

The Court orders dismissal pursuant to CPL § 30.30, concluding that the People's Certificate of Compliance with CPL Article 245 was not valid where they failed to disclose the disciplinary records underlying substantiated or unsubstantiated police misconduct allegations.

In Matter of Jayson C. (200 A.D.3d 447), the First Department held, on Equal Protection grounds, that respondents in juvenile proceedings are entitled to the same impeachment material as defendants in criminal cases, and that a mere summary of substantiated allegations is insufficient to satisfy CPL § 245.20(1)(k)(iv), "which broadly requires disclosure of all impeachment evidence." There can be a good faith basis to cross-examine police witnesses about substantiated allegations that are clearly supported by facts, and even as to unsubstantiated allegations when sufficient evidence is available. The Court rejects the People's contention that information and materials underlying substantiated and unsubstantiated allegations of misconduct need not be disclosed unless the officer's misconduct is directly related to the particular prosecution.

Here, there are summaries of serious misconduct bearing on the officers' credibility. One substantiated complaint involved the officer sending text messages of a personal nature to the girlfriend of a suspect he arrested, and, on another occasion, the same officer was found unfit for duty due to intoxication that resulted in a physical altercation with other officers. There are unsubstantiated charges against that officer concerning property missing from search warrant premises. Another officer has substantiated findings based on his arrest and misdemeanor conviction for driving while intoxicated.

People v. Ezequiel Martinez
(Crim. Ct., N.Y. Co., 6/8/22)
https://www.nycourts.gov/reporter/3dseries/2022/2022_50476.htm

* * *

DISCOVERY - Police Misconduct/FDNY Reports

In this DWI prosecution in which the People allege that after the police arrested defendant, the FDNY was "called to the scene," the Court concludes that the People had an obligation to, and have failed to, articulate efforts to ascertain the existence of FDNY reports and make them available for discovery.

The Court also concludes that, consistent with Brady principles, the People are required to disclose evidence about prior misconduct by police witnesses whom the People will not call to testify. While prior misconduct could tend to impeach the credibility of a testifying police witness (see CPL § 245.20[1][k][iv]), it could also tend to negate the defendant's guilt or support a potential defense (see CPL § 245.20[1][k][i], [iii]). Moreover, at suppression hearings, the People often elicit hearsay statements by non-testifying officers. Where an officer is involved in a case, that officer's credibility relates to the case. The Court orders the People to produce all evidence and information, including any underlying documents, in the possession of or known to the People or the police that impeaches the credibility of any witness.

People v. Figueroa
(Crim. Ct., Bronx Co., 9/7/22)
https://www.nycourts.gov/reporter/3dseries/2022/2022_22278.htm

* * *

DISCOVERY - Police Disciplinary Records
- Police DD5s
- Body Camera Video

The Court concludes that the People improperly failed to disclose police "DD5s" related to this case. The statute "leaves no room for the People to pick and choose which documents in their case file, or the police's case file, to disclose." The People may not decide that materials in a police investigative file are not related to the subject matter of the case simply because, in the People's estimation, they appear to be of minimal value.
Moreover, the People cannot "simply hope that they 'automatically' receive notifications through their 'system' every time the police conduct further investigation into a case." They must determine whether new documents have been added.

The Court also rejects the People's contention that prior misconduct by officers involved in this case is not discoverable when the People will not be calling those officers to testify. An officer's prior misconduct could be favorable because it impeaches the credibility of a testifying witness,

but it also could negate the defendant's guilt or support a potential defense. Here, the People have refused to do anything regarding files about non-testifying officers' prior misconduct.

The Court also concludes that it was not sufficient for the People to share body-camera video with the defense without giving the defense the ability to download the video. The People must grant the defense sufficient control over material to "copy, photograph and test" it.

People v. Amir
(Crim. Ct., Bronx Co., 9/13/22)
https://www.nycourts.gov/reporter/3dseries/2022/2022_50856.htm

* * *

DISCOVERY - Police Disciplinary Records

The Court holds that the "unilateral, self-serving, and incomplete" Queens County District Attorney's Office practice of withholding and redacting disciplinary records of police witnesses without leave of court or a protective order, and filing and serving Law Enforcement Officer Witness letters containing mere summaries without underlying documentation, does not satisfy CPL § 245.20(1)(k)(iv). The requirement that the People provide "all evidence and information" includes all underlying documentation whether the allegations in the disciplinary action were substantiated or unsubstantiated by the investigating agencies.

This obligation is not just a codification of Brady; the statute jettisons the "materiality" requirement, and does not just include impeachment evidence and information which is related to the subject matter of the underlying case. Published criminal court decisions have shown an inclination to require the disclosure of all underlying documents, not mere summaries; the First Department reached this conclusion in Matter of Jayson C. (200 A.D.3d 447). It is for defense counsel, not the prosecutor, to determine whether something is potential impeachment material. The prudent prosecutor will resolve doubts in favor of disclosure. The underlying records may contain material the defense needs in order to properly prepare cross-examination and impeachment of the People's witness.

People v. James Best
(Crim. Ct., Queens Co., 9/13/22)
https://nycourts.gov/reporter/3dseries/2022/2022_50859.htm

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DISCOVERY - Police Misconduct/Civil Lawsuits
- Witness Identifying Information

The Court concludes that where the Law Department represents the People's police witnesses in civil lawsuits alleging the witness' misconduct, the People must disclose the underlying lawsuit

documents. A civil lawsuit that names an individual officer and alleges the commission of bad acts is impeachment material. It is of no moment that civil lawsuit documents are in the actual possession of the Law Department and not the prosecutor's office. The People's statutory discovery obligation extends to information that is known to police. Where the Law Department represents an officer in a civil lawsuit, it receives service of lawsuit documents on behalf of the officer.

The Court also concludes that the People, who allege that defendant drove while intoxicated and crashed into a parked car, and that the person who owned the parked car is an "eye witness," improperly redacted what they describe as "the individual, who's [sic] car was rear-ended by defendant's vehicle, vehicle policy number, date of birth, … and license customer identification number" from records provided to the defense. Although the People contend that the defense can still "investigate" any possible defense, that the withheld information would not tend to "absolve[]" defendant of guilt, and that they identified the eyewitness by disclosing his phone number, the redacted information in the People's possession relates to the subject matter of the case.

People v. Payne
(Crim. Ct., Bronx Co., 7/22/22)
https://nycourts.gov/reporter/3dseries/2022/2022_50656.htm

* * *

DISCOVERY - Police Misconduct

The Court holds that the Law Enforcement Officer Witness letters the People turned over during discovery satisfied their obligation under CPL § 245.20(1)(k). The People are not required to turn over underlying documentation.

Because they do not relate to the prosecution of a charge, police personnel records are not deemed by the statute to be in the People's control. The repeal of Civil Rights Law § 50-a cannot define the scope of the People's discovery obligations under CPL Article 245. Defendant's argument that the letters do not include "any substance or details" about the misconduct in general is conclusory and he does not show how the letters are insufficient.

People v. James Williams
(Sup. Ct., Queens Co., 8/1/22)
https://nycourts.gov/reporter/3dseries/2022/2022_22249.htm

* * *

DISCOVERY - Police Disciplinary Records

The Court concludes that under CPL § 245.20(1)(k)(iv), the People are not required to disclose the underlying disciplinary records regarding unsubstantiated, exonerated, or unfounded claims, which would not support a good faith basis for cross-examination of the officer and thus are not evidence or information that tends to impeach a witness.

A judge must decide whether disciplinary records from the files of substantiated or founded complaints may be used for impeachment by determining whether the substance of the allegation bears on the credibility of the witness. Some substantiated allegations involve conduct which seemingly has no bearing on credibility, "to wit: lost parking plaques, incomplete paperwork, missed court appearances, discourtesy to a member of the public, and lost equipment."

People v. Santos Leonardo
(Crim. Ct., Queens Co., 8/9/22)
https://nycourts.gov/reporter/3dseries/2022/2022_50755.htm

* * *

DISCOVERY - Video Footage
- Police Disciplinary Records

The Court grants defendant's motion for a determination that the People's statements of readiness are invalid where the People listed a "Disclosure Letter" and "Lawsuit Information" regarding misconduct by one of the police witnesses, but inadvertently failed to place those items in the "OneDrive" they sent to the defense, and failed to produce underlying documents regarding an unsubstantiated allegation. The People are directed to provide "[a]ll evidence and information, including any underlying documents, known to the People or the police, that tends to impeach the credibility of any witness, including the underlying documents for the officer's IAB matter.

The Court also notes that audit trails establish that the People produced certain discoverable videos to Bronx Defenders email addresses, and gave Bronx Defenders "permissions to View" the files, before filing a Certificate of Compliance, the People did not give Bronx Defenders timely "permissions to View and Download" them. Neither party has raised this issue, but it may be that only allowing the defense to "view," but not "view and download," a discoverable file does not meet the statutory command that the defense be allowed to "copy, photograph and test" disclosed items.

People v. Alvia
(Crim. Ct., Bronx Co., 8/1/22)
https://www.nycourts.gov/reporter/3dseries/2022/2022_22233.htm

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DISCOVERY - Crime Scene Visit
- Complainant's Text Messages

Defendant, charged with first-degree burglary, third-degree assault, and fourth-degree criminal mischief, allegedly entered the complainant's dwelling, caused damage to a wooden front door and/or a wooden bathroom door, and injured the complainant by assaulting her. Defendant asserts he has been living for two years in the apartment building where the incident occurred; that the location where the incident took place "may be" a common area which is used by tenants of the building to access the laundry room and/or for entering and leaving the building; and that the complainant "may have" arrogated to herself the area she now claims to be her apartment and excludes other tenants without any legal right to do so.

Defendant moves for an order, pursuant to CPL § 245.30(2), granting defense counsel and defendant access to the alleged crime scene to inspect, photograph and/or measure the crime scene and directing that the condition of the crime scene remain unchanged in the interim.

The Court concludes that defendant, who alleges that the incident occurred in a common area, not in the complainant's home, has failed to establish that his need for access to the scene outweighs the complainant's privacy rights.

However, defendant should not be limited to the photographs and videotaped evidence provided to him by the People. Counsel for defendant and his investigator shall be granted reasonable access to the premises, including any and all common areas up to and including the threshold of the complainant's apartment; a member of the police department or an investigator from the District Attorney's Office shall be present.

The Court, pursuant to CPL § 245.30(3), also grants defendant's request for text messages between the complainant and her boyfriend at the time of the incident, regarding the subject matter of the incident. Defendant does not appear to have any other means of obtaining this potentially relevant evidence. The complainant shall provide the People access to her cell phone for the purpose of making copies of text message exchanges, which shall be provided to the Court for in camera inspection.

People v. James Mongan
(County Ct., Orange Co., 7/5/22)
https://nycourts.gov/reporter/3dseries/2022/2022_22212.htm

* * *

DISCOVERY - Police Disciplinary Records/Witness' Prior Bad Acts

The Court grants defendant's motion to dismiss pursuant to CPL § 30.30 where the People failed to timely disclose NYPD records regarding substantiated and unsubstantiated disciplinary findings for the two testifying officers. The Court rejects the People's contentions that the records they

concern a "collateral issue"; that they are not related to the subject matter of the case; and that disclosure "would impose an insurmountable burden on police departments, prosecutors, and the criminal justice system." The ability to test an adverse witness' credibility through impeachment is a fundamental right. There can be a good faith basis for cross-examination of police witnesses about substantiated allegations that are clearly supported by facts, and even about unsubstantiated allegations when sufficient evidence is available.

Noting that the officers' body-worn camera recordings reveal a history between the officers and the complaining witness, and reveal that at least two officers "express[ed] incredulousness that the complainant is not being charged as the aggressor in the instant case," the Court also concludes that it does not appear that the People made any good faith or diligent effort to ascertain or disclose evidence and information concerning the complaining witness' prior bad acts.

People v. Danks Darren
(Crim. Ct., N.Y. Co., 5/19/22)
https://nycourts.gov/reporter/3dseries/2022/2022_50415.htm

* * *

DISCOVERY - Police Disciplinary Files

Criminal Procedure Law § 245.20(1) states in part that the prosecution must disclose to defense "all items and information that relate to the subject matter of the case," including but not limited to enumerated items within the statute. The Court concludes that a plain reading of § 245.20(1) requires that the items subject to "automatic discovery" be related to the subject matter of the case.

Thus, impeachment material covered by CPL § 245.20(1)(k)(iv) could include items such as: "a witness identified someone else as a participant in the crime; a witness failed to pick out the defendant in a line-up; a witness recanted his/her statement; information developed that someone else committed the crime; a videotape that does not support the People's theory of the case; or an officer was reprimanded for how they handled a certain aspect of the current case."

The statute could not have been intended to include the release of police personnel files because, at the time the legislation was enacted, Civil Rights Law § 50(a), which protected such files, was still in full force and effect. Any documents which do not relate to the subject matter of the case, but have general impeachment value, must be disclosed when required by the State and/or Federal Constitution.

The CPL Article 245 qualifiers - "relates to the subject matter of the case" and "related to the prosecution of a charge" - also limit what is deemed to be in the People's constructive possession. As a practical matter, the People will not know whether information contained in police personnel files relates to the subject matter of the case or the prosecution of the charge until they review them. Thus, they run the risk and will suffer the consequences of late disclosure should it be

determined by a court that records related to the subject matter of the case were not timely disclosed to the defense.

People v. Benjamin Florez
(Sup. Ct., Nassau Co., 3/10/22)
https://nycourts.gov/reporter/3dseries/2022/2022_50202.htm

* * *

DISCOVERY - Police Disciplinary Records

In this murder prosecution, the People have agreed to provide the defense with police disciplinary records concerning "substantiated," "pending" and "unsubstantiated" allegations. Defendant moves to compel the People to produce New York City Civilian Complaint Review Board and the New York City Police Department records which have been classified by these agencies as "unfounded," or "exonerated."

Although the Court presumes that at least some of the records concern alleged conduct which would be relevant to officer credibility, rather than only minor administrative infractions which would not be proper subjects for cross-examination, defendant's motion is denied.

The argument that unfounded or exonerated findings are not subject to discovery because they do not provide a good faith basis for impeachment questions is unpersuasive. A defense attorney might have a reasonable basis for believing the truth of an allegation, and thus have a good faith basis for an inquiry, even if a police department investigating the officer asserted the officer had done nothing wrong.

However, the question is whether such records actually tend to impeach, and the Court believes that they do not. A defense attorney might appropriately determine that asking a question with a good faith basis and receiving a denial is helpful, since it might raise a question about an officer's credibility, but such a question and answer do not result in impeachment evidence. And, it can be predicted that in the vast majority of cases, an officer whose conduct had already been investigated and found to be proper will not newly acknowledge wrongdoing when questioned in an unrelated case.

The repeal of Civil Rights Law § 50-a did not modify the discovery statute. The question here is not whether unfounded or exonerated records are confidential. The question is whether the People are required to produce them.

Although impeachment material must be turned over by the People under the statute "regardless of whether the prosecutor credits the information," that prohibition on prosecutors making

credibility determinations does not evidence legislative intent to override formal administrative decisions.

People v. Brighton Montgomery
(Sup. Ct., N.Y. Co., 1/12/22)
https://www.nycourts.gov/reporter/3dseries/2022/2022_22009.htm

* * *

DISCOVERY/BRADY MATERIAL - Complainant's Mental Health Records
RIGHT OF CONFRONTATION

On direct appeal in New York, habeas petitioner challenged the decision to provide him with only a sample of the rape victim's mental health records, arguing that doing so violated his right to due process under Brady and his Sixth Amendment right of confrontation. The New York Court of Appeals affirmed, finding that the sample was sufficiently representative of the records as a whole. The district court denied habeas relief.

The Second Circuit affirms. The New York Court of Appeals' application of Brady and its progeny was reasonable, and there is no binding Supreme Court precedent providing that a defendant's right to confrontation extends to pretrial discovery in a criminal case.

Much of the victim's file was duplicative of those portions of the file that were produced, and many of the documents in the file were otherwise irrelevant to the victim's credibility as a witness. Between the sample provided and the victim's testimony in open court, petitioner had ample material with which to impeach the victim's credibility at trial and more than sufficient information to prompt defense counsel to pursue the victim's mental health as a potential avenue for impeachment. The dissent is incorrect to say that the withheld documents would have corroborated the weaker aspects of petitioner's defense in ways the disclosed documents did not.

McCray v. Capra
2022 WL 3383104 (2d Cir., 8/17/22)

* * *

DISCOVERY - Police Disciplinary Records/Impeachment Material
- Brady Material
STATUTES - Retroactivity

After noting that the People are in constructive possession of the Rochester Police Department's officer disciplinary records, the Court concludes that disciplinary records involving allegations determined to be "exonerated" or "unfounded" are not covered by the automatic discovery requirement in CPL § 245.20(1)(k)(iv). Since there is no good faith basis for cross examination by defense counsel in such cases, the information does not tend to impeach a police witness. However,

the People are required to turn over disciplinary records regarding pending disciplinary complaints or pending civil litigation.

The People may refer the defense to public filings in federal civil lawsuits in which police officer witnesses are named as defendants, but, if the Rochester Police Department possesses documents relating to such lawsuits, they must be provided to the defense. The Court also concludes that CPL § 245.20(1)(k)(iv) does not require that previous determinations that an officer's testimony was false or incredible be maintained in a database or portal.

The Court also concludes that the prosecution's practice of sending e-mails to the officers involved in a matter, and asking each officer to review his/her files for exculpatory matters, does not violate Brady or Giglio.

The repeal of Civil Rights Law § 50-a should not be applied retroactively, since protected persons relied upon the sealed nature of personnel records in resolving disciplinary matters; to now reach back and lay bare matters an officer believed would not be subject to public view at the time disciplinary action was meted out would be patently unfair.

People v. Kaliek Francis and Roy Siplin
(Sup. Ct., Monroe Co., 1/4/22)
https://www.nycourts.gov/reporter/3dseries/2022/2022_22041.htm

* * *

ASSAULT - Acting In Concert
BRADY MATERIAL
IMPEACHMENT - Prior Inconsistent Statement

Defendant was involved in a street brawl during which complainant one was stabbed in the face and hit in the head with a hatchet or "slag hammer," and complainant two was punched in the head and hit with a stun gun. At trial, complainant one identified defendant as the person who had hit him in the head with the slag hammer, and complainant two testified that he had been hit with a stun gun by an unknown individual. Defendant was convicted of gang assault in the first degree and assault in the first degree for the injuries suffered by complainant one as a result of being hit in the head with the slag hammer, and assault in the second degree under an acting-in-concert theory for the injuries suffered by complainant two as a result of being hit with a stun gun.

The Second Department concludes that the evidence of second-degree assault was legally insufficient. The evidence failed to establish that defendant shared a community of purpose with the unknown individual.

The Court reverses the convictions for gang assault in the first degree and assault in the first degree. A 911 caller who witnessed the brawl told a detective during an interview on the night of the incident that defendant, whom the caller identified by name, had walked toward the sidewalk

where the incident took place before the "violent fight started," and that "the person who had the hatchet was … wearing a Black tee shirt ad [sic] blue jeans." This description did not match defendant. Although the People disclosed the caller's statement, they failed to provide the defendant with meaningful access to the caller because they redacted the caller's identity and contact information and thereafter denied defendant's request for the caller's identity. "While the contents of the 911 call may have provided some clues as to the identity of the caller, the defendant should not be forced to guess as to the identity of this caller."

Also, the trial court deprived defendant of a fair trial by precluding defense counsel from questioning a police witness regarding an omission in a police report reflecting the witness's interview with complainant one in the hospital after the incident. Complainant one testified at trial that he told the police witness that the defendant "[s]plit my head open" with "a big cutting device," but the report contained no such identification, and stated instead that complainant one "believes he would be able to identify the persons responsible for attacking him."

People v. Michelle Ramunni
(2d Dept., 3/23/22)

* * *

DISCOVERY - Notice Of Alibi
IDENTIFICATION - Sufficiency Of Evidence

The Fourth Department finds that the verdict finding defendant guilty on one robbery count was against the weight of the evidence where the victim could not identify defendant; and, although defendant's fingerprint was found on the handle of the door to the victim's apartment building, there was no testimony that the perpetrator had ever touched that door handle, much less that he touched that door handle during the robbery.

The trial court erred in denying defendant's motion seeking to file a late notice of alibi, which was filed on the day prior to jury selection, where defense counsel alleged that, just days after defendant's arraignment on the indictment, defendant informed him of the existence of a potential alibi witness, and counsel's investigator confirmed the alibi with the witness a week later; that, despite his awareness of the witness, counsel failed to notify the court and the prosecutor of the witness through his own negligence; and that counsel had no objection to a brief adjournment for the People to investigate the alibi. Under these circumstances, defendant's constitutional right to offer the testimony of the alibi witness outweighed any prejudice to the People or their interest in having the trial begin as scheduled.

People v. Adam Thomas
(4th Dept., 9/30/22)

* * *

EVIDENCE - Failure To Activate Body Camera
DISCOVERY - Sanctions

Defendant moves to preclude the testimony of certain police witnesses at a suppression hearing, asserting that the officers who stopped his vehicle for an alleged traffic infraction failed to activate their body-worn cameras at the outset of the encounter, in violation of New York City Police Department protocols in NY City Police Dept Patrol Guide procedure no. 212-123(4)(g) (mandating activation of body-worn camera "prior to engaging in, or assisting another uniformed member of the service with" vehicle stops).

The Court denies the motion. Since the People cannot, and therefore need not, provide discovery that never existed, their failure to do so does not warrant a discovery sanction. Rather, the failure of an officer to activate his body-worn camera in violation of police procedures may subject the witness to impeachment for prior misconduct, although such a bad act is collateral and may not be proved by extrinsic evidence.

People v. Warren Foster
(Sup. Ct., N.Y. Co., 3/28/22)
https://nycourts.gov/reporter/3dseries/2022/2022_50223.htm

Ethics and Judicial/Attorney Misconduct And Fair Trial

JUDGES - Excessive Participation In Trial

The Second Department finds no error in the admission of evidence of prior bad acts during the cross-examination of defendant's expert and during the testimony of the prosecution's expert. This evidence was properly admitted to explain the experts' opinions with respect to defendant's extreme emotional disturbance defense. The court balanced the jury's need to be informed of the basis for the experts' opinions against the prejudice to defendant.

The majority concludes that the trial court's questioning of witnesses did not deprive defendant of a fair trial. The court's most objectionable interventions occurred during the testimony of defendant's expert. However, ultimately the defense was undermined not by the court's excessive questioning, but because the defense relied on inherently weak expert evidence that was belied by defendant's own testimony at the first trial.

Two dissenting judges note that the court's extensive questioning of defendant's expert improperly disrupted defense counsel's examination, usurped the role of the prosecutor, elicited significant testimony in the form of cross-examination during defendant's direct examination of the witness, appeared to display an inordinate amount of skepticism in the witness' testimony. The court treated

the two experts differently, made efforts to point out inconsistencies in the testimony of defendant's wife, and assisted in eliciting testimony from the People's witnesses.

People v. Asim Martinez
(2d Dept., 1/5/22)

* * *

JUDGES - Bias/Court Attorney's Prior Term As DA

The Third Department addresses the unpreserved error and orders a hearing upon defendant's motion to vacate the judgment of conviction where the judge's law clerk was the former District Attorney responsible for defendant's indictment, prosecution and conviction.

Although the law clerk does not appear to have been directly involved in defendant's case during her term as District Attorney, and the allegations in defendant's motion do not implicate the law clerk's conduct as District Attorney, a law clerk is probably the one participant in the judicial process whose duties and responsibilities are most intimately connected with the judge's own exercise of the judicial function, and judges not only must actually be neutral, they must appear so as well.

People v. Richard Thornton
(3d Dept., 2/2/23)

* * *

CONTEMPT - Attorney's Failure To Appear

The Court finds respondent attorney guilty of criminal contempt of court for disobeying the Court's order to appear for a continued suppression hearing. The Court rejects respondent's contentions that the order was unlawful; and that his failure to appear was not willful because the date for the hearing conflicted with a sentencing hearing and a suppression hearing scheduled to start that day for two incarcerated clients, and the Uniform Rules for the Engagement of Counsel (22 NYCRR § 125.1) required him to prioritize those cases over a continued hearing for a defendant at liberty.

The Court notes, inter alia, that even if the order conflicted with § 125.1, a conflict between two facially valid mandates does not mean that one or the other is unlawful or void on its face; that § 125.1(d), which requires an attorney with a scheduling conflict in criminal cases to give preference to the case of an incarcerated defendant, is subject to § 125.1(f), which states that when "a trial already has commenced, and an attorney for one of the parties has an engagement elsewhere, there shall be no adjournment of the ongoing trial except in the sole discretion of the judge presiding thereat," and applies to suppression hearings; that even if respondent was unprepared because of his preparations for other cases that day, he was required to appear and seek an adjournment; and

that as a result of respondent's contemptuous behavior, the suppression hearing had to be severed from another suppression hearing and be conducted de novo.

Matter of Rankin
(Sup. Ct., Kings Co., 1/3/23)
https://nycourts.gov/reporter/3dseries/2023/2023_23002.htm

Pleas

PLEAS - Absence Of Parent/Guardian Ad Litem

The First Department rejects respondent's challenge to his guilty plea, noting, inter alia, that where respondent and his mother had an adversarial relationship and she was the complainant, and neither respondent nor his counsel requested the mother's presence, the court did not err in proceeding in the absence of the mother; and that because respondent had reached the age of 18, the court did not err in accepting counsel's waiver of the assignment of a guardian ad litem.

Matter of Tyrin M.
(1st Dept., 5/19/22)

* * *

PLEAS - Forfeiture Of Claim/Brady Violation

In this CPL Article 440 proceeding, the Second Department, departing from prior decisions, holds that defendant did not forfeit his right to seek review of an alleged Brady violation by pleading guilty.

People v. Lorenzo Kelly
(2d Dept., 9/21/22)

Confessions/Admissions/Self Incrimination

CIVIL RIGHTS ACTIONS
CONFESSIONS - Miranda Warnings

A Supreme Court majority holds that a plaintiff may not bring a § 1983 action against a police officer based on the allegedly improper admission of an "un-Mirandized" statement in a criminal prosecution.

Section 1983 provides a cause of action against any person acting under color of state law who "subjects" a person or "causes [a person] to be subjected ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." *Miranda* imposed prophylactic rules which are constitutionally based, but at no point did the *Miranda* Court state that a violation

of its new rules constituted a violation of the Fifth Amendment right against compelled self-incrimination. Instead, it claimed only that those rules were needed to safeguard that right during custodial interrogation. The Court's post-*Miranda* cases have acknowledged the prophylactic nature of the *Miranda* rules and engaged in cost-benefit analysis to define the scope of these prophylactic rules.

Although it may be argued that the *Miranda* rules constitute federal "law" and that an abridgment of those rules can therefore provide the ground for a § 1983 claim, allowing the victim of a *Miranda* violation to sue a police officer for damages under § 1983 would have little additional deterrent value, and would cause many problems.

Vega v. Tekoh
2022 WL 2251304 (U.S. Sup. Ct., 6/23/22)

* * *

CONFESSIONS - Notice Of Intent To Offer

The People served CPL § 710.30 notice stating that the substance of defendant's statements was: "I DIDN'T DO IT, IT WASN'T ME."

The Court orders preclusion of any statements that are not, in sum and substance, "I DIDN'T DO IT, IT WASN'T ME." Where a notice refers only to exculpatory statements, the People may not elicit alleged statements at trial that could be considered incriminating.

People v. Kennedy
(Crim. Ct., Bronx Co., 7/20/22)
https://nycourts.gov/reporter/3dseries/2022/2022_50654.htm

* * *

CONFESSIONS - Custody
- Fruits/Search Warrant

The Third Department suppresses un-Mirandized statements made by defendant at the crime scene - a sporting goods store - because defendant was questioned while in custody. Throughout most of the interaction, four police officers were present at the store, with at least one officer positioned between defendant and the exit. Shortly after the police arrived, defendant had been told to empty his pockets and place all of his personal property on the counter. Defendant did so. While being detained by the police, defendant asked the police multiple times if he could retrieve his possessions. They denied each of these requests. Additionally, the questions posed by the police to defendant exceeded what was necessary for investigation. Many of their inquiries were not limited to the alleged petit larceny, but instead focused on firearms that defendant may have possessed and their location and caliber, and defendant's intent as to his usage of the firearms.

Since the application for a search warrant was based upon these statements, the warrant is invalid and the firearms and slungshots recovered from the storage unit should be suppressed.

People v. Ramadan Abdullah
(3d Dept., 6/23/22)

* * *

SELF INCRIMINATION

The First Department holds that a defendant who has invoked his Fifth Amendment right against self-incrimination and has a direct appeal pending should not be assessed points under the Sex Offender Registration Act under risk factor 12.

Defendant who had denied guilt while participating in a Sex Offender Counseling and Treatment Program, was presented with a Hobson's choice: the assessment of 10 points for invoking the Fifth Amendment, or incriminating himself by accepting responsibility for something he wished to deny and risking the use of his admissions in any subsequent retrial and perjury charges for contradicting his trial testimony. The assessment of a higher risk level constituted an adverse consequence of such severity that defendant was, in effect, compelled to provide incriminating testimony in violation of his Fifth Amendment rights.

Although the People attempt to mitigate the seriousness of this risk by asserting that DOCCS has granted immunity from prosecution for statements made during the program, the People have not presented any authority for this proposition, and it is unclear whether this purported immunity would be binding on the District Attorney's Office.

People v. Vadimir Krull
(1st Dept., 8/2/22)

Search And Seizure

SEARCH AND SEIZURE - Eavesdropping

While monitoring a wiretap in an investigation unrelated to this case, law enforcement officials intercepted a call that originated from a county jail. Defendant joined the call and made statements suggesting his involvement in a fatal hit-and-run accident. Local police were alerted and obtained a recording of the call from the jail. Defendant was charged in connection with the hit-and-run. The People introduced the jail recording as evidence without providing notice within fifteen days of arraignment pursuant to CPL § 700.70.

The Court of Appeals finds reversible error. A communication intercepted via wiretap is not exempted from statutory notice procedures merely because the same communication was incidentally captured on a separate, consensual recording.

The existence of the wiretap does not convert the jail recording into an "intercepted communication," but the consensual recording was "derived" from an "intercepted communication." The Court notes that it is not certain that police investigating the hit-and-run would otherwise have discovered the call - indeed, the inmate who placed the call had no apparent connection to the hit-and-run incident. the fact that the inmate consented to recording by the detention facility has no bearing on the status of the communication overheard on the wiretap.

People v. Michael Myers
(Ct. App., 2/9/23)

* * *

SEARCH AND SEIZURE - Auto Search/Probable Cause
- Hearing

The officer who initiated a traffic stop after observing defendant commit a traffic violation also recognized the make, model, and license plate of the vehicle, and the physical appearance of the driver, from a "wanted" flyer for a burglary committed two days prior. The first officer called a second officer to the scene, who testified that he recognized defendant's face from an "I-card" which stated that defendant was wanted for burglary. The first officer took defendant into custody, and the second officer stayed with the vehicle. The second officer retrieved a knapsack from the back seat and, upon opening it, found a clear plastic bag full of jewelry. The knapsack was later identified by a complainant as having been taken during the burglary of her home. Some of the jewelry recovered from the knapsack was identified by complainants as property taken during burglaries of their homes.

At the conclusion of the suppression hearing, the court determined that the evidence was properly recovered pursuant to the automobile exception to the warrant requirement - a legal theory not expressly argued by the People.

The Second Department first rejects defendant's contention that the court erred in relying upon the theory not argued by the People. The general rule is that the suppression court is entitled to consider legal justifications that were supported by the evidence, even if they were not raised explicitly by the People. Defendant's due process rights were not violated. The interests underlying a suppression hearing do not coincide with the objective of determining guilt or innocence, and the interests at stake are of a lesser magnitude than those at trial.

However, the Court orders suppression, concluding that there was no probable cause. The Court notes, inter alia, that given the passage of a full day's time since the most recent burglaries described in the I-card, and two full days since first set of burglaries described in the wanted poster,

there was ample opportunity for defendant to have stored stolen items somewhere other than in the vehicle he used to flee the burglaries.

People v. Benjamin Marcial
(2d Dept., 11/2/22)

* * *

SEARCH AND SEIZURE - Reasonable Suspicion/Flight
- Request For Information

The First Department upholds an order of suppression, concluding that an officer's testimony that he saw defendant walking along the street toward a marked police van, with what appeared to be a heavy object in his pocket, while clinching that pocket and appearing nervous, failed to establish a basis for anything more than a level one inquiry. Defendant's flight did not create reasonable suspicion because there was no founded suspicion of criminality before the flight.

People v. Thierno Diallo
(1st Dept., 2/9/23)

* * *

SEARCH AND SEIZURE - Probable Cause/Reasonable Suspicion

Numerous eyewitnesses provided details of a shooting and descriptions of the two subjects involved in the shooting. The descriptions were relayed to police via radio transmission. Shortly thereafter, an officer saw defendant, who fit the description of one of the suspects - blue jeans and a white tank top - running approximately two to three blocks from the shooting. Defendant did not immediately stop when directed.

The Third Department agrees with the hearing court that the officer had a founded suspicion that criminal activity was afoot and was entitled to interfere with defendant by drawing a weapon and handcuffing him, to assure the officers' safety and to gain explanatory information.

After defendant stated that he was involved in the shooting, there was probable cause to place defendant under arrest.

People v. Tarell Calafell
(3d Dept., 12/1/22)

Practice Note: Oddly, the Third Department referred to the "founded suspicion" standard, which governs common law inquiries. It seems unlikely that detention accompanied by a drawn weapon and handcuffing could ever be a mere common law inquiry rather than a stop requiring reasonable suspicion or an arrest requiring probable cause.

* * *

SEARCH AND SEIZURE - Reasonable Suspicion
- Arrest/Use Of Handcuffs

At about 2:35 a.m., immediately after hearing a report of shots fired and a "group" of fleeing youths, a plainclothes officer, who was with two other officers in plainclothes, saw defendant and another male teenager running together in a place consistent with the report. The teenagers were looking over their shoulders, and there was no other group of youths, or anyone else running, in the area. The youths looked at the unmarked police car and slowed to a walk, causing the officer to reasonably suspect that they had recognized them as plainclothes officers and were slowing down to avert suspicion. The officer's partner told him that defendant was holding his waistband.

The First Department concludes that, at that point, the officer had reasonable suspicion that the reason for the youths' flight was their involvement in the shooting. Although the report involved a "group," while defendant was accompanied by only one other person, the officer testified that a fleeing group may break up to avoid detection.

The level of suspicion increased because defendant falsely stated that he had not been running, but, although defendant and the other youth were handcuffed and placed sitting on the ground, these were reasonable precautionary measures to prevent defendant from fleeing before the reporting officer could arrive to make an identification, and these measures did not elevate the detention to an arrest.

People v. Jeremy Sanchez
(1st Dept., 11/29/22)

* * *

SEARCH AND SEIZURE - Auto Stop/Reasonable Suspicion

The Fourth Department orders suppression, concluding that the police lacked reasonable suspicion when they effectively seized defendant's vehicle by pulling into a gas station parking lot and stopping their vehicle directly behind defendant's parked vehicle in such a manner as to prevent it from driving away.

The officers were responding to the sound of multiple gunshots originating at or near the gas station in a high crime area. However, they did not observe the source of the gunshots. Their attention was drawn to defendant's vehicle because it collided with another vehicle as it tried to leave the area, and there were a number of vehicles and pedestrians trying to leave the gas station due to the ongoing gunfire.

People v. Daquan Singletary
(4th Dept., 12/23/22)

* * *

SEARCH AND SEIZURE - Auto Stop/Reasonable Suspicion

Police officers were dispatched based on an anonymous tip that defendant was in a specific vehicle at a specific location. When the police arrived, neither defendant nor the vehicle was present. Over 3½ hours later, officers observed the vehicle and two individuals inside. The testifying officer could not determine whether defendant was in the vehicle., and the vehicle was not registered to defendant.

The Fourth Department concludes that the police did not have reasonable suspicion justifying a stop of the vehicle.

People v. Jose Ponce
(4th Dept., 3/11/22)

* * *

SEARCH AND SEIZURE - Stop/Reasonable Suspicion

The First Department, with one judge dissenting, orders suppression, concluding that the officers did not have reasonable suspicion when they stopped defendant by ordering him to put his hands against a wall, grabbing his arms, and forcing him to the ground.

Defendant matched the suspect's description only in that he was a black male. The radio run did not describe the suspect's clothing, but even if the Court credits the officers' testimony that they relied on a dispatch description of a suspect wearing "dark clothing," such a description is still too general to justify a forcible stop. Moreover, defendant had distinctive features that were not part of the description, including a goatee and tattoos, and he was wearing a backpack. Although defendant was walking at a fast pace and hiding his face from the officers, such equivocal behavior was just as susceptible to an innocent interpretation. Walking at a quick pace is not considered flight, and defendant was under no obligation to walk more slowly or to show his face to the officers. "Defendant's desire not to make eye contact with the officers was equally consistent with an innocent desire as a black male to avoid interactions with the police." The police admitted that they did not see the outline of a gun until after they wrestled defendant to the ground.

People v. Floyd Thorne
(1st Dept., 6/7/22)

* * *

RIGHT TO COUNSEL - Effective Assistance
SEARCH AND SEIZURE - Reasonable Suspicion
PLEAS - Waiver Of Claim

One of the victims of a home invasion described the suspects as two black men in their twenties, one of whom was wearing a hoodie "with some kind of emblem on the front." About a half-hour later, the officer heard a broadcast of a tip from an unidentified retired police officer. The tip reported "two [black] males [in their twenties] inside [a] corner store that possibly looked suspicious" with one that "might" have had "a handgun on his side" and another that was wearing a "teddy bear type hoodie," which was later described as a hoodie with a teddy bear on the front. The officers responded to the corner store, entered with weapons drawn, and immediately ordered the two men, one of whom was defendant, to raise their hands. While handcuffing defendant, the officer observed a handgun in defendant's waistband, saw blood on defendant's hoodie, and obtained statements from defendant. Defendant was then taken for show-up identifications, during which the victims of the home invasion identified him.

The Fourth Department reverses defendant's conviction, concluding that defense counsel was ineffective for failing to move to suppress on the ground that the police unlawfully seized defendant without reasonable suspicion.

This was not part of a legitimate pretrial defense strategy. The court held a Huntley/Wade hearing, and there is no discernable reason why the scope of that hearing could not have been expanded. Defense counsel did not opt to pursue a more favorable plea deal in lieu of pretrial motions and hearings.

Defendant's claim survives his guilty plea because the error infected the plea bargaining process. Suppression would have resulted in dismissal of at least some of the charges.

People v. Willie Roots
(4th Dept., 11/18/22)

* * *

SEARCH AND SEIZURE - Auto Search/Probable Cause

During a canvas conducted to locate a vehicle that had been reported stolen, the officers located the vehicle, which was parked on a street corner and unoccupied. After observing the vehicle for approximately 45 minutes, one of the officers noticed the vehicle's headlights turn on, as if someone had unlocked the vehicle with a key fob. The lights remained illuminated for approximately two to three minutes, and then turned off. No one entered the vehicle. Approximately 10 to 15 minutes later, the officer again observed the headlights flash on, and, within seconds, respondent ran to the vehicle and got into the driver's seat, carrying a fanny pack. The officers approached and arrested respondent. An officer patted respondent's pockets, but was unable to locate keys or a key fob. Upon inspection of the ignition and the center console, again

the officer was unable to locate keys or a key fob. The officer then observed respondent's fanny pack in the front passenger seat area. The officer opened the fanny pack and discovered a loaded .32 caliber revolver.

The Second Department upholds the denial of suppression. Respondent had no legitimate expectation of privacy in the vehicle, which was owned by and had been stolen from another individual. In any event, the officer had probable cause to believe that the vehicle, including the fanny pack, contained evidence of a crime - i.e., the keys or key fob.

Matter of Shermel M.
(2d Dept., 7/6/22)

* * *

SEARCH AND SEIZURE - Auto Search/Probable Cause - Drug Possession
APPEAL - Retroactivity Of New Statute

After observing defendant pull away from a curb without signaling, the officers followed defendant's car for approximately one block and then signaled defendant to pull over. He did not pull over right away, but made a left turn into a gas station. An officer approached the vehicle, but defendant did not roll down the window. The officer shook the car and, "[a] moment later," defendant opened the window, at which point the officer detected a "strong odor of raw [m]ari[h]uana." The officer asked the defendant whether there was marihuana in the car. Defendant told him there was, opened the center console, and pointed at the open console. The officer recovered two bags of marihuana from the console, as well as more than $1,000 cash from defendant's person. After the officer removed the marihuana from the car, the smell of marihuana persisted. The officer searched the interior of the car as well as the trunk, and recovered a loaded firearm from the trunk.

The Second Department upholds the denial of suppression, concluding that the officer had probable cause to believe that the vehicle, including the trunk, contained contraband.

The Marihuana Regulation and Tax Act, which became effective during the pendency of this appeal, states that "no finding or determination of reasonable cause to believe a crime has been committed" can be based "solely on evidence" of "the odor of cannabis" or, with limited exception, "the odor of burnt cannabis"; the possession of cannabis in an authorized amount; or "the presence of cash or currency in proximity to cannabis." However, since nothing in the law or its legislative history evinces a clear intent that this provision be applied retroactively, the presumption of prospective application has not been overcome.

People v. Artur Babadzhanov
(2d Dept., 4/6/22)

* * *

STATUTES - Retroactivity

The First Department upholds the denial of suppression where the odor of marijuana was sufficient to support a finding of probable cause under the law in effect at the time, and concludes that the Marijuana Regulation and Taxation Act, which became effective almost three years after defendant's conviction, is inapplicable. Nothing in the statute indicates that the legislature clearly intended the statute to have retroactive effect.

The Court rejects defendant's contention that this direct appeal falls within the definition of "criminal proceeding" [see CPL § 1.20(16), (18)] for purposes of the MRTA. Such an interpretation would be contrary to those cases holding that, once final judgment has been pronounced, a change in the law does not arrest or interfere with execution of the sentence.

People v. Bernard Fabien
(1st Dept., 6/7/22)

* * *

SEARCH AND SEIZURE - Schools

In this § 1983 action challenging alleged school seizures, the Eighth Circuit concludes that secluding A.A. in a little room and B.B. in a calm-down corner constituted seizures. Defendant Weisenburger and her aides picked up and carried A.A. into the little room, held the door shut, and forbade her from leaving until she completed tasks unrelated to any disciplinary violation. Staff also shuttered B.B. in the calm-down corner with physical barriers and prevented him from leaving. Grabbing B.B. to push him into a swimming pool and pinning C.C. down to strip his clothes off also rose to the level of seizures.

Other allegations do not involve seizures. Keeping C.C. atop a horse and carrying B.B. to gym class are not radically different than what a typical student might experience. Claims that Weisenburger grabbed the students' chins and arms reflect only the momentary use of physical force by a teacher in reaction to a disruptive or unruly student.

Noting that the record lacks documentation of any disciplinary infractions by these students - much less the kind of violations that would call for restraint and seclusion responses - the Court concludes that Weisenberger is not entitled to qualified immunity with respect to four violations of clearly established Fourth Amendment rights: (1) secluding A.A. in the little room; secluding B.B. in the calm-down corner using dividers; (3) grabbing B.B.'s arms to push him into the swimming pool; and (4) pinning C.C. down to strip his clothes off.

Doe v. Aberdeen School District
2022 WL 3024301 (8th Cir., 8/1/22)

* * *

SEARCH AND SEIZURE - School Searches/Strip Searches

After a teacher smelled marijuana burning in the classroom and alerted school officials, officials searched the belongings of every student in the class. They did not find any marijuana, but found marijuana stems and seeds, rolling paper, two lighters, and an assortment of pills in T.R.'s backpack. Two students from T.R.'s class told the Principal that they saw T.R. light a marijuana cigarette in class. T.R. admitted to school officials that she had a drug problem and regularly smoked marijuana, but denied smoking marijuana in the classroom that day and denied having additional drugs on her person. School officials decided to strip search T.R., according to whom they strip searched her twice. Nothing was found, but T.R.'s teacher found the remains of the marijuana cigarette under T.R.'s desk the next day.

With respect to T.R.'s § 1983 claim, the district court found that defendants were entitled to qualified immunity, and granted defendants' summary judgment motion. The district court also found that defendants were immune from T.R.'s invasion of privacy claim; and that T.R.'s claim for outrage failed because defendants' conduct was not extreme and outrageous.

The Eleventh Circuit reverses, and reinstates T.R.'s claims. With respect to the Fourth Amendment claim, the Court concluded that defendants' actions violated a clearly established constitutional right. At the time of the strip search, there had been two materially similar cases involving strip searches by school officials, that resulted in a finding that the strip searches were unreasonable under New Jersey v. T.L.O. The Court also notes, inter alia, that while other students indicated that they had seen T.R. smoking a marijuana cigarette, the students did not indicate that she hid them in her underwear, and there is no evidence that any other students at the school had previously hidden contraband under their clothing; and that T.R. alleged that the first search was visible through an office door that led to a public hallway.

T.R. v. Lamar County Board of Education
2022 WL 336343 (11th Cir., 2/4/22)

* * *

SEARCH AND SEIZURE - Private Search/Motion Papers

The First Department concludes that defendant's motion to suppress evidence recovered by a store security guard was properly denied without a hearing, where defendant failed to allege facts supporting a finding that the guard was a state actor.

The felony complaint and voluntary disclosure form disclosed sufficient information about the guard, including his name, the name and location of the store, and the date and hour of the encounter, to enable defendant to subpoena records and ascertain the guard's status.

People v. Jeffrey Boateng
(1st Dept., 10/6/22)

* * *

SEARCH AND SEIZURE - Auto Stop/Discrimination
- Motion Papers

A police officer who has probable cause to believe that a driver has committed a traffic infraction may stop a vehicle without violating the Federal or State Constitution even if the officer's primary motivation is to conduct another investigation [People v. Robinson (97 N.Y.2d 341)]. In 2016, the First Department interpreted Robinson to mean that "a police stop that is motivated by discrimination or pretext may still be upheld if it is otherwise supported" by either reasonable suspicion or, in the case of a traffic violation, by probable cause [Patrolmen's Benevolent Assn. of the City of N.Y., Inc. v. City of New York (42 A.D.3d 53)].

The Third Department disagrees when it comes to discrimination. Robinson does not preclude a challenge to a traffic stop predicated on racial profiling, at least under the State constitution. Although the First Department reached a contrary conclusion in People v. Fredericks (37 A.D.3d 183), the remedy for such an unconstitutional stop would be suppression of the evidence seized.

Here, defendant made sufficient allegations in his motion papers. Defendant, who is black, supported his claim with sworn affidavits from himself and the vehicle's driver. The driver - a white woman - averred that, during the police encounter, the investigator who initiated the stop chided her, saying "you stupid little white b****, you think this black guy cares about you, but he's just using you to run drugs."

People v. Bruce Jones
(3d Dept., 10/20/22)

* * *

SEARCH AND SEIZURE - Motion Papers

The First Department holds that defendant is entitled to a hearing on his suppression motion in this buy and bust case where defendant did not contradict the People's allegations regarding the drug transaction itself, but did challenge the constitutional adequacy of "any transmitted description on which the seizing officers relied in detaining and arresting the defendant."

Defendant's access to information was limited because the People did not disclose the description radioed by the purchasing officer to the arresting officer, and did not even specifically aver that such a communication occurred. A defendant cannot be expected to allege facts about which he had no knowledge.

It was incumbent on defendant to supply the motion court with any facts he did possess that were relevant to the probable cause issue, and he did. Defendant stated that he was a 44-year-old black man, and that there was nothing "particularly distinctive about his appearance" that would tend to "preclude the possibility of misidentification." This allowed for a comparison between defendant's self-description and the transmitted description, once that description was disclosed. Defendant's allegation that he was not the only black man in the area at the time he was arrested was relevant to his claim that the description communicated to the arresting officer was too general to establish probable cause for the arrest.

People v. Gregory Fleming
(1st Dept., 1/20/22)

* * *

SEARCH AND SEIZURE - Motion Papers

The First Department, noting that the circumstances surrounding the drug sale and arrest of defendant were first expounded at trial and were not available to defendant at the time the motion to suppress was made, finds reversible error in the denial of the motion without a hearing.

The People had a pattern of omitting key pieces of information concerning the pre-warrant police entry into defendant's apartment. Neither the application for a search warrant, the criminal complaint, nor the People's opposition to defendant's motion mentioned that the search warrant was requested only after officers had already been inside defendant's apartment and had conducted a protective sweep.

Although the People note that defendant was present when the police entered, and would have known whether the officers were conducting a search upon arrival rather than waiting for a warrant, defendant is 67 years old, is nearly blind, does not speak English, spent the first half of her life outside of the country, and has never been convicted of a crime.

Accordingly, defendant's allegations that she "did not give verbal or written consent to law enforcement to enter and/or search her … residence" and that "[s]uch a search and seizure as described above are in violation of the defendant's constitutional rights" were sufficient.

Although trial testimony usually cannot be considered by the Court when evaluating a suppression ruling, here the trial testimony is being used solely to determine the context of defendant's motion, the extent of her lack of access to information, and the extent of information withheld from the motion court.

People v. Maria Esperanza
(1st Dept., 1/25/22)

* * *

SEARCH AND SEIZURE - Credibility Of Police Testimony

The Second Department orders suppression where the officers' versions of events sharply conflicted with each other as to where defendant was sitting in the minivan, and what he was doing, when the officers arrived at the minivan's front windows. The accounts could not both have been true, since both officers acknowledged that they approached the minivan simultaneously and reached the front seats at the same time.

A belatedly disclosed search warrant affidavit indicated that one officer had seen defendant "pushing an unknown object," rather than a gun, under the front passenger seat of the minivan. If the officer had seen a gun, it is unlikely he would have waited several hours, until he drove the minivan back to the station house, to confirm his observation. The complaint report suggests that the minivan had been searched not because the officer had seen a gun, but, rather, incident to an arrest for a forged license plate.

Given the inconsistences, it is impossible to determine exactly what happened, and what the officers saw when they approached the minivan.

People v. Laurence Austin
(2d Dept., 3/2/22)

* * *

SEARCH AND SEIZURE - Arrest/Jaywalking

Respondent and a companion were stopped by the police for jaywalking after they crossed the street against the light. When the officer asked respondent for ID, he responded that he was sixteen years old and did not have ID. He was cooperative and readily gave the officer his name and address and his father's name, and repeatedly asked the officer to "look up" his name and "check out" the information he provided. Without making any attempt to verify the information, the officer placed respondent in handcuffs and searched him for weapons and contraband. A firearm was recovered from respondent's jacket pocket.

The Court orders suppression, finding a violation of Criminal Procedure Law § 150.20.

A traffic infraction, although not criminal, is an offense. Pursuant to Criminal Procedure Law § 140.10(1)(a), an officer may arrest an individual for an offense that occurs in his presence. Pursuant to PL § 30(3)(b), youth who are sixteen and seventeen years old are criminally responsible for committing traffic infractions. However, CPL § 150.20 requires a police officer to issue an appearance ticket (also called a summons) in lieu of arrest for offenses and low-level crimes if "the person has been given a reasonable opportunity to make their verifiable identity and a method of contact known, and has been unable or unwilling to do so." For the purpose of determining identity, an officer may rely on "various factors, … including but not limited to personal knowledge of such person, such person's self-identification, or photographic identification." "There is no requirement

that a person present photographic identification in order to be issued an appearance ticket in in lieu of arrest where the person's identity is otherwise verifiable." Government-issued identification of various kinds "shall be accepted as evidence of identity, which the officer must accept."

The Court rejects the prosecution's contention that if the accused cannot produce a government ID, nothing more is required of the police before they may make an arrest. Rather, the officer must first make reasonable attempts to verify the identity of the accused based upon the information provided. The prosecution's contention that a photo ID must be presented is in direct conflict with the statute.

Here, respondent could do no more than he did. There were ways the officer could have verified the information while still at the scene, including the ways in which respondent's identity was later verified at the precinct. The reasons the officer gave for not verifying respondent's identity at the scene were contrived.

Finally, "[i]t is hard to escape the conclusion that the officers' goal was to frisk the two young men, rather than issuing them summonses for jaywalking." Although the fact that a stop is pretextual does not render the ensuing search and arrest unlawful, "the court does not approve of the police bypassing the stop and frisk law by using a jaywalking violation as an excuse to perform a frisk…. Jaywalking is ubiquitous, particularly in Manhattan. If, as respondent strongly suggests, the jaywalking ordinance is being selectively enforced in a discriminatory manner, such that certain racial and ethnic groups are disproportionately stopped by the police for jaywalking, it is cause for great concern…. The court hopes that the New York City Police Department will closely examine its policies regarding when and under what circumstances the jaywalking ordinance is to be enforced in order to avoid its discriminatory use."

Matter of Alfred B.
(Fam. Ct., N.Y. Co., 9/14/22)
https://nycourts.gov/reporter/3dseries/2022/2022_22342.htm

Identification

IDENTIFICATION - Photos/Suggestiveness

The First Department orders suppression where defendant was the only person in a photo array shown wearing distinctive clothing which fit the description of the suspect, and the distinctive clothing was an outstanding feature of the identifying witness's description of the robber.

The victim told the police that he "fixated" on the "unusual shirt" the r0bber was wearing during the incident - a white shirt with a distinctive black design. The fillers all wore shirts that, to the extent visible in the photos, were solid-colored shirts without any markings or designs.

People v. Jassey Sulayman
(1st Dept., 6/28/22)

* * *

IDENTIFICATION - Photos/Suggestiveness

An Appellate Term majority finds unduly suggestive the complainant's identification of defendant from a photo array where defendant has long, curly hair and, although other individuals with long hair were in the array, the other individuals have straight long hair; and, prior to the complainant viewing the array, the detective sent text messages to the complainant notifying her that there was a "big break" in the case and that the detective was "picking up the perpetrator."

People v. Anthony Salgado
(App. Term, 2d Dept., 2d, 11th & 13th Jud. Dist., 9/23/22)

* * *

IDENTIFICATION - Lineups
EVIDENCE - Third-Party Culpability
JUDGES - Interference In Proceeding
RIGHT TO SUMMATION

The Second Department, noting that a defendant may attempt to establish at trial that a pretrial identification procedure was so suggestive as to create a reasonable doubt regarding the accuracy of the identification and of any subsequent in-court identification, holds that the trial court improperly impeded defendant's defense of third-party culpability by limiting cross-examination of the police witness regarding the lineup procedures; curtailing defense counsel's summation; and informing the jury that counsel could not argue that the lineup was unfair or suggestive and that the court had already determined that the pretrial identification procedure was fair, not suggestive, and "constitutional," which wrongly intimated that those facts were not within the jury's province to determine.

The court also erred in denying defendant's application for admission of photographs of defendant and the third party to allow the jury to compare their likenesses.

The court also substantially impaired defendant's right to make an effective closing argument by engaging in sua sponte "objection sustained" interruptions without any actual objection by the People. The court's comments about defense counsel's argument regarding a prior inconsistent statement made by an eyewitness to a prosecutor were unsupported by the record. The court took on the appearance of an advocate for the People.

People v. Bryan Aponte
(2d Dept., 4/27/22)

* * *

IDENTIFICATION - Surveillance Video/Photos

The People served CPL § 710.30 notice of two identifications, both of which involved police officers. The officers, who had previously arrested defendant but were not involved in this investigation, viewed still frame images of the perpetrator taken from video surveillance. One officer stated in the grand jury that he interacted for approximately one to two hours during the prior arrests, which were in 2018 and 2020. He received the still frame "wanted" photo from the investigating detective, but did not state whether there was any information accompanying the request. The other officer who viewed video stills did not testify in the grand jury and the circumstances are unclear.

The Court grants defendant's motion for a Wade hearing. There can be suggestive direction to a witness, and, unless the Court holds a hearing, there is little chance that the circumstances can be explored. While the People maintain that the detective who caused the officers to view the video stills was unaware of the suspect's identity, there is nothing in the record to support that conclusion. It is unclear how the officers' prior interactions with defendant came to the detective's attention, and whether he singled these officers out or circulated the wanted flyer to the entire precinct.

"Wrongful convictions based on mistaken identifications continue to trouble the criminal justice system, 55 years after Wade…. The court must err on the side of conducting a pre-trial hearing to determine whether the prosecutor or the police conducted an out-of-court identification procedure that exposed any witness to the defendant's identity in an unduly suggestive manner."

People v. Henry Flowers
(Sup. Ct., N.Y. Co., 10/13/22)
https://nycourts.gov/reporter/3dseries/2022/2022_22322.htm

* * *

IDENTIFICATION - Surveillance Video/Photos
LAY OPINION TESTIMONY

When the Connecticut Code of Evidence was adopted in 1999, § 7-3(a) codified the common-law evidentiary rule prohibiting lay opinion testimony that embraced an ultimate issue to be decided by the trier of fact. In accordance with that rule, the Connecticut Supreme Court held that lay opinion testimony identifying a defendant in video surveillance footage is prohibited when that identification embraces an ultimate issue.

The Court, revisiting the issue, amends § 7-3(a) to incorporate an exception for lay opinion testimony that relates to the identification of persons depicted in surveillance video or photographs, and adopts a totality of the circumstances test for admissibility.

In order for a witness' general familiarity with the defendant's appearance to weigh in favor of admitting such testimony, the proponent must demonstrate that the witness possesses more than a minimal degree of familiarity with the defendant. Some illustrative examples of persons who may satisfy this standard are friends, longtime acquaintances, neighbors, co-workers, family members, and former classmates.

The remaining three factors are: the witness' familiarity with the defendant's appearance at the time of the surveillance footage; any change in the defendant's appearance since the surveillance or any disguise worn by the subject at the time of the surveillance; and the quality of the video or photographs.

State v. Gore
2022 WL 366522 (Conn., 2/7/22)

Speedy Trial/Adjournments/Prompt Verdict

SPEEDY TRIAL - Constitutional Due Process

The Court of Appeals concludes that, in upholding the denial of dismissal, the Appellate Division erred when it weighed the factors to be considered in determining whether pretrial delays rise to the level of a constitutional speedy trial deprivation.

The Appellate Division "assume[d], arguendo, that the People failed to establish 'good cause' for the 'protracted' preindictment delay" of almost 8 years. However, some examination of the reason for the delay is required.

The crime - the sexual assault of a minor found unresponsive on a city street - is quite serious, is directly related to the issues of complexity, and may, therefore, account for some of the delay. The victim's severe intoxication and lack of memory of the assault rendered her unable to identify her attacker. The Appellate Division's conclusion that this factor favored defendant was rendered with no analysis of the relevant concerns, and is not supportable.

The Appellate Division held that because defendant pled guilty only to rape in the second degree, which depends solely on the age difference between the defendant and the victim, "the preindictment delay could not have 'impaired' defendant's ability to defend himself on the charge of which he was convicted." This was error. If delay impacts the defendant's ability to defend on one of multiple counts, it may weaken that defendant's position in plea bargaining, potentially adversely impacting the resulting plea. Thus, the appellate court must consider prejudice measured against all counts pending when the dismissal motion is made, not merely against the crime of conviction.

People v. Ronald Johnson
(Ct. App., 11/17/22)

* * *

SPEEDY TRIAL - Constitutional

The Minnesota Supreme Court holds that trial delays caused by the judicial orders issued in response to the COVID-19 global pandemic do not weigh against the State in evaluating whether a defendant's constitutional right to a speedy trial has been violated. The orders were responding to a deadly and virulent illness over which the court had no control.

State v. Paige
2022 WL 2826253 (Minn., 7/20/22)

* * *

DEFENSES - Intoxication
ADJOURNMENTS/DISCOVERY

Approximately an hour prior to the altercation, defendant walked into the bar holding a large bottle of Heineken beer, which the bartender said could not be brought into the bar. The bartender testified that defendant was not intoxicated, but had cut him off after serving him only two drinks. Another witness testified that, prior to serving defendant, the bartender inquired as to whether he had a designated driver. Multiple witnesses described defendant as being loud, obnoxious and argumentative; he argued with the bartender over details on a poster advertising a benefit, just prior to suggesting to the victim that they "step outside." Video evidence depicts a man, who appears to be defendant, at the bar earlier in the day, drinking beer and playing pool for approximately two hours. The man appears to be quite calm and getting along with other patrons, but later in the night, upon his return, he has an unsteady gait and is gesturing wildly and becoming irate just prior to exiting the bar and engaging in the altercation. The People's expert witness testified that consumption of alcohol in excess can alter one's personality.

The Third Department finds reversible error in the trial court's denial of defendant's request for a jury charge on intoxication.

The trial court also committed reversible error by denying defendant's request for an adjournment when defendant was informed, after the commencement of jury selection, that the People had just learned of additional video footage from the bar that had not been provided to defendant. The video evidence depicts approximately 28 hours of footage and additional camera angles. "Without an adjournment, defense counsel, after the trial had already commenced, was being asked to somehow review 28 hours of footage in one evening"; it was unreasonable to task defense counsel with that review.

People v. Raymond Adrian
(3d Dept., 10/20/22)

* * *

STATUTES - Retroactivity
APPEALS

The Court of Appeals holds that CPL § 30.30(1)(e), which requires application of the statute and its maximum times for prosecutorial readiness to accusatory instruments charging traffic infractions jointly with a felony, misdemeanor, or violation, did not apply to this case where it was added to the statute and made effective while defendant's direct appeal was pending before the Appellate Term. The legislature has not mandated retroactive application.

However, although the People argue that the amendment should be treated as a legal nullity because the legislature did not specify a time limit applicable to traffic infractions, it is obvious that by expressly including traffic infractions within the definition of "offenses," the legislature intended that the speedy trial deadline in a criminal action that includes a traffic offense would be determined by the most serious offense charged.

People v. Carlos Galindo
(Ct. App., 6/16/22)

* * *

SPEEDY TRIAL - Motion Practice/Deadlines

The Court grants defendant's March 2, 2022 motion to dismiss pursuant to CPL § 30.30, concluding that the 29-day period of delay from the deadline for the People's response set by the Court - March 23, 2022 - to the date an extension was requested - April 21, 2022 - should be charged to the People

"This case reveals a not-so-well-kept secret of Bronx Criminal Court: lawyers routinely ignore judicially set motion deadlines. To slightly re-order the words of Daniel Patrick Moynihan, deviancy can be defined downward only so far before there are consequences. In this case, that point has been reached: the People's decision to blow off the Court's motion schedule must result in the blowing up of their 30.30 clock."

The People allege that the ADA was "swamped." The Court routinely grants timely requests for extensions, but will not do so retroactively.

People v. Erion Beshiri
(Crim. Ct., Bronx Co., 5/16/22)
https://nycourts.gov/reporter/3dseries/2022/2022_50400.htm

* * *

RIGHT TO PRESENT DEFENSE
MISSING WITNESS INFERENCE
ADJOURNMENTS

The Second Department finds reversible error where the trial court denied a one-day continuance for defendant's daughter to travel to New York from out of state to provide alibi testimony, and also granted the prosecution's request for a missing witness inference as to the daughter. It is unfair and illogical to allow a jury to draw an adverse inference from the failure of a party to call a witness when the party is unable to do so.

People v. Randy Reeves
(2d Dept., 8/17/22)

Double Jeopardy

DOUBLE JEOPARDY - Prosecution After Mistrial/Manifest Necessity

The Fourth Department grants a writ of prohibition, concluding that a new trial would violate the Double Jeopardy Clause because there was no manifest necessity justifying the judge's decision to declare a mistrial. At the time of the mistrial declaration, the judge knew he was scheduled to have a COVID-19 test that afternoon. If the result was negative, he could have returned to the courtroom as soon as he was provided with the result. If it was positive, he may have been out for a longer time, but could have reassessed the situation after receiving the test results. The judge also did not consider alternatives such as a continuance or substitution of another judge.

Matter of McNair v. McNamara
(4th Dept., 6/10/22)

Right To Counsel

RIGHT TO COUNSEL - Effective Assistance/Assigned Counsel Payment Rates

Plaintiffs seek an immediate preliminary injunction requiring defendants to compensate assigned counsel at the rate of $158.00 per hour. Plaintiffs argue that increasing the rate would prevent the ongoing violation of the constitutional rights of children and indigent adults in Family and Criminal Court proceedings at the trial and appellate levels in New York City. Plaintiffs also argue that defendants' failure to increase the rates since 2004 has caused the number of assigned counsel willing to take on cases to decrease, which has led to an increased workload for counsel who remain in the program. Plaintiffs argue that the increased workload has directly caused counsel to spend less time on tasks that are critical to effective representation, and that a number of children and indigent adults are not receiving adequate legal representation.

The Court grants plaintiffs' application, and directs defendants to pay assigned counsel the interim rate of $158.00 per hour, retroactive to February 2, 2022, the date plaintiffs' Order to Show Cause

was filed. Plaintiffs have established a likelihood of success on the merits, and that severe and irreparable harm to children and indigent adult litigants would occur without an injunction. Plaintiffs have demonstrated that the quality of legal representation for children and indigent adults, as well as protection of their due process rights, would continue to decline without a preliminary injunction, and that a balance of the equities weighs in favor of granting injunctive relief because, in the absence of injunctive relief, the constitutional rights of child litigants and indigent adults would be violated.

New York County Lawyers Association et al. v. New York State, et al.
(Sup. Ct., N.Y. Co., 7/25/22)
https://nycourts.gov/reporter/pdfs/2022/2022_32476.pdf

* * *

RIGHT TO COUNSEL - Suspension From Practice
- Choice Of Counsel
- Effective Assistance

The Court of Appeals rejects defendant's contention that his retained attorney's suspension from practice by the Second Circuit United States Court of Appeals rendered the attorney constructively unlicensed to practice in New York while reciprocal New York disciplinary proceedings were pending. The imposition of reciprocal discipline is not a foregone conclusion, nor is the nature or length of any reciprocal discipline imposed certain. Defendant's proposed rule would deprive attorneys of the due process to which they are entitled in pending reciprocal disciplinary proceedings.

The Court also rejects defendant's contention that his attorney's failure to inform him of the suspension and pending reciprocal disciplinary proceedings deprived him of his constitutional right to choice of counsel. The Court declines to create a bright-line rule invariably requiring attorneys to affirmatively disclose the imposition of foreign discipline or pending reciprocal discipline proceedings to their clients in every case, where no court order or ethical rule requires such disclosure. Instead, an attorney's failure to disclose the imposition of foreign discipline and pending reciprocal disciplinary proceedings can adequately be assessed in the context of an ineffective assistance of counsel claim. Here, defendant has not sustained his burden of demonstrating that the attorney's performance, including his failure to disclose the suspension, deprived defendant of meaningful representation.

People v. Angelo Burgos
(Ct. App., 3/17/22)

* * *

RIGHT TO COUNSEL - Invocation Of Right

In a 5-2 decision, the Court of Appeals finds support in the record for the lower courts' determination that defendant - whose inquiries and demeanor suggested a conditional interest in speaking with an attorney only if it would not otherwise delay his clearly-expressed wish to speak to the police - did not unequivocally invoke his right to counsel while in custody.

The dissenting judges note, inter alia, that after being read his Miranda rights and asked if he understood those rights, defendant said that he had a lawyer and asked if it would be possible to call that person, whose number was located in his (confiscated) personal phone; that the interrogating detective twice stated that he understood defendant to be invoking his right to counsel and told him he was suspending the interrogation to retrieve defendant's phone to enable a call to counsel; that defendant's interest in knowing what was going on - particularly why he had been detained, and for how long he would be kept at the police station just hours before he was expected at work - does not in any way diminish the clarity of his request for counsel; and that defendant's phrasing of his reiterated request - "is it possible for you to like call him or something" - does not indicate any lack of desire to call his lawyer, but rather a lack of certainty about whether he could contact the lawyer directly or perhaps the police would have to make the initial contact for him. "Today's holding is like several others in which our Court has imposed a high and unrealistic linguistic burden on criminal defendants — where the intent is clear, but some better choice of words can be imagined, often finding ambiguity in deferential language." "It is tragic to develop such a beautifully justified constellation of rights — one meant to offset the fear an individual subject to the coercive power of the state must inevitably feel — only to dim them because fear affected a person's speech." "Penalizing criminal defendants for fearful or deferential speech that otherwise clearly articulates their desires is detrimental for those individuals, but also damages the integrity of the justice system as a whole." "The People argue that if our Court were to recognize [defendant's] request that police call his lawyer as what it was — a request for his lawyer — the rule would mark the end of police interrogation. If so, that would transpire only because any competent lawyer would have told [defendant] to remain silent, as is his constitutional right."

People v. Malik Dawson
(Ct. App., 4/26/22)

* * *

RIGHT TO COUNSEL - Waiver/Pro Se Representation

The Court of Appeals concludes that the trial court failed to undertake a sufficient, searching inquiry to ensure that defendant's waiver of the right to counsel was knowing, voluntary, and intelligent before allowing the defendant to proceed pro se.

Initially, the court did not warn defendant of the risks of proceeding pro se or apprise him of the importance of a lawyer in the adversarial system. Although the court later told defendant that it was "not a great idea" to represent himself, that he was putting himself "in a very bad position,"

and that a lawyer would have knowledge of criminal procedure that defendant did not have, those brief, generalized warnings were not sufficient. A colloquy before a different judge after defendant had been representing himself for nearly a year and a half did not establish a waiver. That judge failed to inform defendant of the dangers and disadvantages of self-representation or the singular importance of a lawyer in the adversarial system of adjudication.

The Court also notes that when the court permits standby counsel, it should explain to the defendant the court's rules regarding the role of a legal advisor or standby counsel and how that role differs from representation by an attorney. No such explanation was given here.

Defendant is entitled to remittal for an opportunity to make whatever pretrial motions were or could have been made, as he or his counsel deem appropriate.

People v. Donnell Baines
(Ct. App., 10/20/22)

* * *

RIGHT TO COUNSEL - Waiver/Pro Se Representation

During a colloquy with the court, defendant renewed the unsuccessful application to relieve assigned counsel made at his prior appearance, claiming that counsel was "ineffective." The court denied the application, and defendant immediately responded, "I would love to go pro se." A Court of Appeals majority agrees with the Appellate Term that defendant did not clearly and unequivocally request to proceed pro se. In a footnote, the majority observes that the court did not clearly deny the purported request, and that neither defendant nor defense counsel sought any decision on that. "Both factors suggest that the request was not considered genuine in the first instance by those present in the courtroom who heard the statement."

Judge Rivera, joined by Judge Wilson, dissents, asserting that "[t]he import of these seven words" - "I would love to go pro se" - "is obvious: defendant wanted to represent himself." The fact that this request was made in the context of expressing defendant's dissatisfaction with counsel did not make the request any less clear or suggest equivocation on defendant's part.

People v. Vladimir Duarte
(Ct. App., 2/15/22)

* * *

RIGHT TO COUNSEL - Effective Assistance

The Court of Appeals concludes that defendant failed to demonstrate that counsel's representation was ineffective. The decision to waive the suppression hearing and allow defendant's statements into evidence was in accord with a reasonable defense strategy of showing that defendant had

consistently maintained that the acts in question were consensual. This strategy also attempted to take the sting out of defendant's statements and avoided the use of them as impeachment material.

Counsel was not required to consult with or call expert witnesses. Counsel was well-equipped to execute the defense strategy, and obtained key concessions from the People's experts on cross-examination.

People v. Joseph Sposito
(Ct. App., 1/6/22)

* * *

RIGHT TO COUNSEL - Lineup

The First Department orders suppression of a post-indictment lineup identification, finding a violation of defendant's right to have counsel present where counsel was notified of the lineup and did not attend, but a paralegal employed by counsel attempted to attend the lineup and was turned away by the police.

The attorney did not waive defendant's right to counsel by failing to appear. The police should have briefly paused the lineup in order to advise the attorney he needed to attend personally, or to have the paralegal so advise counsel.

People v. Michael Bennett
(1st Dept., 12/8/22)

* * *

RIGHT TO COUNSEL - Effective Assistance/Conflict Of Interest

The First Department finds no error in the denial, upon an evidentiary hearing, of defendant's motion claiming that the attorney who represented him at his trial had a conflict of interest because this attorney and the attorney representing the co-defendant were members of the same de facto law firm.

The court credited the testimony of both counsel that they were separately incorporated, had separate offices in the same complex, did not share client confidences, carefully kept their finances separate, and in virtually all respects operated independently of each other. Although the attorneys were father and son, and the father paid for some mutual office expenses, the evidence does not establish that they effectively operated as a single firm.

People v. Kevin Jagnandan
(1st Dept., 4/28/22)

Character Evidence

CHARACTER EVIDENCE

The Third Department finds no error where the trial court prevented defendant from calling a coworker as a witness to testify generally as to his reputation for good character in the workplace.

Defendant's offer of proof lacked any indication that the evidence concerned a particular character trait that was related to the charges, and evidence of defendant's reputation for good character in the workplace was not relevant to the accusations of sexually abusing minors in secret, outside the workplace.

People v. Oscar Catalan
(3d Dept., 4/21/22)

Expert And Lay Opinion Testimony

EXPERT TESTIMONY - DNA Analysis
DISCOVERY - DNA Testing Materials
RIGHT OF CONFRONTATION

A Court of Appeals majority upholds the admission, following a Frye hearing, of DNA mixture interpretation evidence generated by the TrueAllele Casework System.

In reviewing the Frye hearing evidence, the majority notes, inter alia, that two independent validation studies were conducted by the New York State Police Lab using complex mixtures of up to four contributors and varying amounts of DNA; that the system was able to separate the known donor samples from the unrelated profiles provided by staff members, which demonstrated that it provides both inculpatory and exculpatory results; and that the validation studies found the results generated by TrueAllele were reliable as they were sensitive (identifying the correct person), specific (excluding noncontributors), accurate and reproducible.

TrueAllele's use of the continuous probabilistic genotyping approach to generate a statistical likelihood ratio of a DNA genotype is generally accepted in the relevant scientific community. Although the continuous probabilistic approach was not used in the majority of forensic crime laboratories at the time of the hearing, there is empirical evidence of its validity, as demonstrated by multiple validation studies, including collaborative studies, peer-reviewed publications in scientific journals and its use in other jurisdictions.

There was no error in the denial of defendant's request for discovery of the TrueAllele software source code in connection with the Frye hearing. Disclosure of the TrueAllele source code was not needed in order to establish acceptance of the methodology by the relevant scientific community. Defendant's arguments as to why the source code had to be disclosed are directed more toward the foundational concern of whether the source code performed accurately and as intended.

The denial of disclosure did not deprive defendant of his Sixth Amendment right to confront the witness against him. Like the Lab reports on the generated DNA profiles, the report created by TrueAllele providing the likelihood ratio that defendant was a contributor to the DNA mixture profile found on the items of evidence is testimonial. The report was prepared by Cybergenetics at the request of the People for purposes of prosecuting defendant in a pending criminal proceeding. However, the source code is not the declarant. Even if the TrueAllele system is programmed to have some measure of "artificial intelligence," the source code is not an entity that can be cross-examined. And both the analyst who performed the electrophoresis on the DNA samples, and an expert who fully understood the parameters and methodology of the TrueAllele software in its DNA interpretation processes, testified at trial and were subject to cross-examination.

Three judges, noting that the court admitted DNA results developed using the TrueAllele methodology even though at the time its source code and underlying algorithms were kept from independent evaluators and the defense as trade secrets, conclude that the court erred because it relied on validation studies by interested parties and evaluations founded on incomplete information about TrueAllele's computer-based methodology. However, the error was harmless. It remains an open question in this Court whether a defendant should be granted access to a proprietary source code under a protective order. This familiar method of ensuring a defendant's right to present a defense would safeguard commercial interests.

People v. John Wakefield
(Ct. App., 4/26/22)

* * *

BURGLARY - Circumstantial Evidence
EXPERT TESTIMONY - Fingerprints

The Fourth Department reverses defendant's burglary conviction where the evidence established, at best, a subjective and unverified expert opinion that defendant's fingerprint shared a small number of characteristics with a partial print found at the scene.

The expert testified that every individual fingerprint has approximately 80 to 120 classifiable characteristics, and that every characteristic between two prints must be identical for them to be considered a match. Here, because of the limited nature of the partial print, she was only able to match 18 characteristics, meaning that it matched 15% to 22.5% of the characteristics of defendant's inked print.

People v. Ali Jones
(4th Dept., 6/3/22)

* * *

EXPERT TESTIMONY - Defendant's Ability To Form Intent
- Court-Ordered Funding

The Fourth Department concludes that the court erred in denying his pretrial application pursuant to County Law § 722-c for $1,800 for an expert psychologist who would render an opinion whether, inter alia, defendant was able to form the requisite intent to commit the crimes charged given his mental illness. The court improperly denied the application on the sole ground that defendant had a retained attorney.

People v. Mustaf Osman
(4th Dept., 2/3/23)

Right of Confrontation And To Be Present/Hearsay Evidence/Fair Trial

RIGHT OF CONFRONTATION - Hearsay/Opening The Door

The State charged Nicholas Morris with murder, but after trial commenced, he agreed to a plea deal. Years later, the State prosecuted petitioner Darrell Hemphill for the same murder. At his trial, Hemphill blamed Morris, and he elicited undisputed testimony from a prosecution witness that police had recovered 9-millimeter ammunition from Morris' nightstand. Morris was outside the United States and not available to testify. The trial court allowed the State to introduce parts of the transcript of Morris' plea allocution as evidence to rebut Hemphill's theory that Morris committed the murder. The court reasoned that Hemphill's arguments and evidence had "open[ed] the door" to the introduction of these testimonial out-of-court statements because they were reasonably necessary to correct the misleading impression Hemphill had created.

The Supreme Court holds that the admission of the plea allocution violated Hemphill's Sixth Amendment right to confront the witnesses against him. Hemphill did not forfeit his confrontation right merely by making the plea allocution arguably relevant to his theory of defense.

For Confrontation Clause purposes, it was not for the judge to determine whether Hemphill's theory that Morris was the shooter was unreliable, incredible, or otherwise misleading in light of the unconfronted plea evidence, nor was it the judge's role to decide that this evidence was reasonably necessary to correct that misleading impression. The Confrontation Clause requires that the reliability and veracity of the evidence against a criminal defendant be tested by cross-examination, not determined by a trial court. Courts may not overlook the Sixth Amendment's command, no matter how noble the motive.

The Court rejects the State's contention that the "opening the door" rule is a mere "procedural rule" that "treats the misleading door-opening actions of counsel as the equivalent of failing to object to the confrontation violation," and that the rule limits only the manner of asserting the confrontation right, not its substantive scope. States do have flexibility to adopt reasonable procedural rules governing the exercise of a defendant's right to confrontation. However, the door-opening principle is not a procedural rule; rather, it is a substantive principle of evidence that

dictates what material is relevant and admissible in a case.

Moreover, if a court admits evidence before its misleading or unfairly prejudicial nature becomes apparent, it generally retains the authority to strike it, or issue a limiting instruction as appropriate.

In a concurring opinion, Justices Alito and Cavanaugh note that the traditional rule of completeness (i.e., if a party introduces all or part of a declarant's statement, the opposing party is entitled to introduce the remainder of that statement or another related statement by the same declarant, regardless of whether the statement is testimonial or there was a prior opportunity to confront the declarant), which has not been applied in this case, fits comfortably within the concept of implied waiver. By introducing part or all of a statement made by an unavailable declarant, a defendant has made a knowing and voluntary decision to permit that declarant to appear as an unconfronted witness.

Hemphill v. New York
2022 WL 174223 (U.S. Sup. Ct., 1/20/22)

* * *

RIGHT OF CONFRONTATION - Hearsay

The Second Department finds reversible Confrontation Clause error where the court admitted into evidence a Criminal Justice Agency form through a CJA employee who did not create the form; it was not shown that the creator of the form was unavailable; and the form listed defendant's address as the basement of the home where the police recovered a gun.

The testimony and the form were admitted in order to establish an essential element of criminal possession of a weapon.

People v. Cid Franklin
(2d Dept., 7/6/22)

* * *

HEARSAY - Excited Utterances
APPEAL - Harmless Error
PETITIONS - Removal Case

In this juvenile delinquency prosecution that followed removal of an adolescent offender proceeding, the Second Department rejects respondent's contention that the family court lost jurisdiction when the presentment agency filed a superseding petition adding a charge of attempted criminal possession of a weapon in the second degree over which the family court had no original jurisdiction. The appropriate remedy would be dismissal of the improperly added count, and no guilty finding was made with respect to that count.

The Court finds error in the admission, as excited utterances, of statements made while respondent's mother was being interviewed by police officers. Those statements, made after respondent had been handcuffed and removed from the scene, were not spontaneous and were made in narrative form and in response to prompting, after sufficient time had passed to render the mother capable of engaging in reasoned reflection. Although she raised her voice and became agitated as she recalled the incident, her tone did not evidence an inability to reflect upon the events.

While the mother's statements that respondent threatened to "boom" her and her boyfriend had no apparent effect on findings upon counts charging criminal possession of a firearm, endangering the welfare of a child, and obstructing governmental administration, those statements supplied proof of respondent's intent to use a gun unlawfully against another, and thus the error was not harmless with respect to the charge of criminal possession of a weapon in the second degree.

Matter of Omar G.
(2d Dept., 1/11/23)

* * *

RIGHT OF CONFRONTATION - Hearsay
HEARSAY - Excited Utterance
APPEAL - Harmless Error

In this attempted murder prosecution in which it was alleged that defendant stabbed his wife in the chest with a knife at their residence in the presence of their adult daughter, the Second Department finds reversible Confrontation Clause error, concluding that the daughter's out-of-court statements regarding the circumstances under which defendant had stabbed the victim were testimonial in nature.

At the time the statements were made, there was no ongoing emergency. The victim had been removed from the scene and taken to a hospital. Defendant had been taken into custody and transported to a police station. Although the daughter was still deeply upset, she was not in need of police assistance, and it is clear that the officer's questions were not asked for the purpose of facilitating such assistance. Rather, the primary purpose of the questioning was to investigate a possible crime. The officer went beyond simply asking what happened and requested that the daughter describe and illustrate exactly how it happened using simple words and gestures. The daughter's detailed account, complete with a physical re-enactment of the crime, did precisely what a witness does on direct examination, and thus was inherently testimonial.

The Court also notes that it was error to admit into evidence, as an excited utterance, the statement of defendant's son asking "Why, why, why? Why did you stab my mom?" There is no indication in the record that the son had personally observed the stabbing.

A dissenting judge opines that the error was harmless. The majority counters that even if the properly admitted evidence can be considered overwhelming in establishing defendant's intent, there is a reasonable possibility that the testimony recounting the daughter's statement and re-enactment "contributed" to the jury's finding of guilt

People v. Nolberto Contreras Vargas
(2d Dept., 12/28/22)

* * *

RIGHT TO BE PRESENT - Remote Appearance

The Missouri Supreme Court concludes that the trial court erred in requiring J.A.T. to participate in the juvenile adjudication hearing via two-way video. The court denied J.A.T. the crucial right to be physically present, which affected the fairness of these proceedings.

The court's general reference to the detention facility's COVID-19 pandemic policy to not transport juveniles to and from court "to limit the exposure to germs of that particular juvenile as well as juveniles in detention" does not in and of itself justify the denial of J.A.T.'s right to be present. This explanation is undercut by the fact that defense counsel was permitted to go to the facility and complete the hearing with J.A.T. after counsel had been present in the courtroom with the judge, the judge's staff, J.A.T.'s parents, two juvenile officers, a victim services representative, and all the witnesses.

In re J.A.T.
2022 WL 108456 (Mo., 1/11/22)

* * *

TRIAL IN ABSENTIA - Right To Be Present At Material Stages/Waiver Of Right

The First Department finds reversible error where defendant was denied his statutory right to be present during a sidebar conference regarding justification.

The subject of the conference was whether defendant would be permitted to testify as to a heart condition with regard to his justification defense. The court repeatedly implored defense counsel to explain how defendant's medical condition impacted his assessment of his physical safety. Defendant, if present, might have apprised the court, defense counsel and prosecutor of the exact details of his heart condition. Defendant was absent for the vast majority of the discussion, which included facts which had not previously been discussed in defendant's presence.

Defendant did not waive the right to be present. In the absence of any record discussion by the court with defense counsel and the prosecutor regarding defendant's right to be present, counsel's

failure to object to defendant's absence did not confirm that defendant himself was waiving his right to be present.

People v. Janac Girard
(1st Dept., 11/22/22)

* * *

RIGHT OF CONFRONTATION - Face Masks

In this assault prosecution, a Texas appeals court concludes that the trial court denied defendant his Sixth Amendment right to confrontation, and committed reversible error, by allowing defendant's ex-girlfriend to testify at trial while wearing a mask without making any findings related to the witness's particular need to wear a mask. Neither a generalized pronouncement by the trial court that courts were to protect against COVID-19 exposure nor the existence of a governing, county-level COVID-19 operating plan met this case-specific burden.

The Court rejects the State's contention that particularized findings are not required in the COVID-19 context given the important public-policy need for courts to protect their participants from the disease.

Finley v. State
2022 WL 4373606 (Tex. Ct. App., 9/22/22)

* * *

RIGHT OF CONFRONTATION - Witness Face Masks

A California appeals court rejects defendant's contention that the trial court's requirement that witnesses wear masks covering their noses and mouths violated his constitutional right to confrontation.

Defendant alleges that masks were not necessary in light of other precautions in use, including plexiglass partitions and social distancing. However, the trial court observed there was a "very real danger of COVID 19 and its transmission here in the court," as Sonoma County was "at the wors[t] possible level or tier of California Governor's rating system relating to transmissions of the disease." The court noted there had been recent outbreaks in the jails despite the imposition of safety measures including personal protective equipment, and that some of the jurors and others in the courtroom would be highly vulnerable to the virus. The court described the limitations of the plexiglass shield that partially surrounded the witness stand, and noted that masks had been identified as the best tool for slowing transmission.

The court noted that the jurors would be able to hear a witness's voice and assess "her tone and inflections and pattern of speech," and that the witness's eyes would be fully visible and her body

language would be easily observed "were she to become emotional, were she to scowl or become angry, were she to cho[o]se to not make any contact with her alleged offender."

People v. Wandrey
2022 WL 2527288 (Cal. Ct. App., 1st Dist., 7/7/22)

* * *

RIGHT OF CONFRONTATION - Face Mask Requirement

A California appeals court holds that defendant's constitutional right to confront witnesses was not violated by the trial court's requirement that all persons in the courtroom, including witnesses, wear face masks due to the COVID-19 global pandemic.

The mask requirement furthered the public policy of protecting against the substantial health risks presented by the COVID-19 virus, particularly in an indoor setting like a courtroom. The mask order protected the safety of the trial participants, and also public health more broadly by seeking to limit the spread of the virus.

The mask requirement did not meaningfully diminish the face-to-face nature of the witness testimony. The witnesses testified in court, under oath and were subject to unfettered cross-examination. The jurors could see the witnesses' eyes, hear the tone of their voices, and assess their overall body language, and numerous other factors relevant to the jury's assessment of witness credibility were not impacted or diminished, such as: (1) how well the witness could see, hear, or otherwise perceive the things about which the witness testified, (2) how well the witness was able to remember and describe what happened, (3) whether the witness answered questions directly, (4) whether the witness's testimony may have been influenced by bias or prejudice in the form of a personal relationship with someone involved in the case, or a personal interest in how the case was decided, (5) any past consistent or inconsistent statements by the witness, (6) the existence of other evidence that proved or disproved any fact about which the witness testified, and (7) whether the witness admitted to being untruthful about any aspect of his or her testimony.

People v. Lopez
2022 WL 456304 (Cal. Ct. App., 2d Dist., 2/15/22)

Another California appeals court reached the same conclusion, noting that face shields and plexiglass screens are not an adequate substitute and standing alone do not provide reasonable protection for the trial participants; that although face masks covered the witnesses' mouths and the lower part of their noses, significant aspects of their appearance, including the eyes, tops of the cheeks, and the body, were readily observable, as was posture, tone of voice, cadence and numerous other aspects of demeanor; that jurors can observe the witnesses from head to toe, see how the witnesses move when they answer a question, how the witnesses hesitate and how fast the witnesses speak, and see the witnesses blink or roll their eyes, make furtive glances, and tilt their

heads; and that the Confrontation Clause does not guarantee the right to see the witness's lips move or nose sniff.
"There may well be occasions, due to the fluid nature of the pandemic and evolving health and safety measures, as well as the type of face covering that may be at issue, when the balance tips differently, and does not fit as neatly, within the public policy exception identified in Craig. That is not the case on the record before us."
People v. Alvarez
2022 WL 441534 (Cal. Ct. App., 2d Dist., 2/14/22)

* * *

RIGHT OF CONFRONTATION - Video Testimony

The Missouri Supreme Court holds that the trial court erred in permitting witness testimony via two-way live video because it violated C.A.R.A.'s right to confrontation under the United States Constitution and the Missouri Constitution.

It is unclear whether the COVID-19 pandemic generally could satisfy the "important public policy" standard under *Maryland v. Craig* (497 U.S. 836). Even if it could, the court was also required to make witness-specific findings establishing that it was necessary for each witness to testify via two-way video due to an enhanced risk associated with COVID-19.

None of the court's general statements concerning COVID-19 satisfy the requisite standard. The court did not find that anything about the health or circumstances of these witnesses required that they be permitted to testify remotely. In fact, the court's staff, C.A.R.A., and C.A.R.A.'s attorney were all physically present at the courtroom when the witnesses testified. Presumably the court found the courtroom safety measures to be sufficiently protective.

Moreover, the possibility of postponing the hearing, or reducing the number of people in the courtroom, further cuts against any finding that it was necessary to proceed via video.

This Court recognizes the devastating toll the COVID-19 pandemic has taken in this country and this state, and the substantial impact the pandemic has had on all aspects of society. Nevertheless, generalized concerns about the virus may not override an individual's constitutional right to confront adverse witnesses in a juvenile adjudication proceeding.

In re C.A.R.A.
2022 WL 106134 (Mo., 1/11/22)

* * *

RIGHT OF CONFRONTATION - Telephonic Testimony

In this DUI prosecution, the Idaho Supreme Court finds a violation of defendant's right of confrontation where the trial court allowed a nurse who conducted a blood draw from defendant to testify telephonically to his qualifications in order to lay the foundation for admission of the results of the blood draw.

The reliability of the telephonic testimony is less assured than closed-circuit television testimony since the witness was at no point visible to the judge, counsel, or defendant. Although this was foundation testimony, nowhere in the text of the Confrontation Clause is there language limiting the type of testimonial evidence to which the right to physical confrontation applies;

State v. Clapp
2022 WL 332711 (Idaho, 2/4/22)

* * *

RIGHT OF CONFRONTATION - Hearsay/Background Evidence

The Fifth Circuit U.S. Court of Appeals reverses defendant's conviction where one officer relied on information acquired from another, non-testifying officer and a confidential source when he testified in detail regarding a controlled purchase of drugs despite admitting to the jury that he had not witnessed the sale personally, and linked defendant to a meth-dealing conspiracy.

Although officers can sometimes provide background information to explain their actions, the government must advance a specific reason why it needs to provide inculpatory "context" for its investigation. It may not introduce highly inculpatory out-of-court statements as a non-hearsay context where the statements' value for that purpose pales in comparison to the risk that the jury will consider them for the truth of the matters asserted.

Here, defendant has never contended that the investigation was inadequate. The government could have begun its case-in-chief by explaining that officers arrived at the motel to execute a search warrant and found defendant and his co-conspirator (who did testify) together in the parking lot holding distributable amounts of meth.

United States v. Hamann
2022 WL 1498873 (5th Cir., 5/12/22)

* * *

HEARSAY - Unavailability Of Witness Due To Defendant's Misconduct
RIGHT OF CONFRONTATION

A divided Appellate Term panel finds reversible error in the admission of the complainant's hearsay statements where the People failed to prove by clear and convincing evidence at the Sirois hearing that defendant, by violence, threats or chicanery, caused a witness's unavailability.

The dissenting judge notes, inter alia, that defendant made approximately 96 recorded phone calls from Rikers Island to the complainant and told her that her testimony was the only evidence against him, that the case would be dropped if she did not appear in court, that the prosecution was lying to her and trying to manipulate her into testifying, that she did not have to comply with a subpoena, and that she should talk to his lawyer and the detective involved with the case; that defendant sought to take advantage of the complainant's pregnancy, expressing his hope that he would be present for their child's baby shower and birth and his belief that his "number one concern" was providing for his family; and that, in recorded phone calls made by defendant to his mother, he stated that the complainant "knows what she's supposed to do," that he had explained the "whole situation to her," and that he was only in custody because of a false accusation.

People v. Michael Washington
(App. Term, 2d Dept., 2d, 11th & 13th Jud. Dist., 6/3/22)

* * *

HEARSAY - Prompt Outcry
JUDGES - Presumption That Judge Considers Only Competent Evidence

The First Department finds reversible error where the trial court admitted four statements made by the alleged victim both as excited utterances and prompt outcries.

The statements did not qualify as excited utterances. Although two of the statements were correctly admitted as prompt outcries, under that exception only the fact of a complaint, not its accompanying details, is admissible. Since the trial court considered all four statements for their substance, there can be no presumption that the court, as the finder of fact, considered only competent evidence.

People v. Godsent Gideon
(1st Dept., 3/15/22)

* * *

HEARSAY - Statements Relevant to Diagnosis Or Treatment

The First Department concludes that most of one victim's statement to an emergency medical technician during a 911 call, regarding how he came to be stabbed in the head through the bedroom door, was admissible under the hearsay exception for statements made for the purpose of medical diagnosis or treatment.

But it was error, albeit harmless, to admit the portion of the statement indicating that defendant was the stabber and that the victim was pressing his body against the bedroom door to keep defendant out of the bedroom. These facts were not germane to diagnosis or treatment.

People v. Tyrone Nelson
(1st Dept., 1/4/22)

Text Messages

EVIDENCE - Text Messages/Screenshots

In this prosecution of defendant, a high school volleyball coach, on charges of attempted use of a child in a sexual performance, disseminating indecent material to minors in the first degree, and endangering the welfare of a child arising from acts allegedly committed against a player on the volleyball team, defendant moved prior to trial to preclude printouts of six text message screenshots taken by the complainant's boyfriend, arguing that they violated the best evidence rule and were not properly authenticated. The court denied the motion. At trial, the complainant identified the screenshots, confirming that they depicted some of the messages sent to and from defendant's phone, and stated that the screenshots were a fair and accurate representation of the messages. The court overruled defendant's objection.

The Appellate Division reversed, holding that a new trial was required based on the admission of the screenshots.

The Court of Appeals reverses, finding no error. The complainant testified that the screenshots fairly and accurately represented text messages sent to and from defendant's phone. The boyfriend also identified the screenshots as the same ones he took from the victim's phone. Telephone records of call detail information for defendant's number showed that defendant sent the complainant numerous text messages during the relevant time period. Even if the Court were to apply the best evidence rule, there was no error.

People v. Luis Rodriguez
(Ct. App., 5/19/22)

Uncharged Crimes Evidence

UNCHARGED CRIMES EVIDENCE - Pretrial Ruling/Cross-Examination Of Defendant

The Court of Appeals concludes that, under the unique circumstances presented, the court did not abuse its discretion in reserving decision on the People's pre-trial Molineux request to cross-examine defendant in order to elicit evidence regarding the underlying facts of his prior gun-related convictions, when the court could determine whether, and to what extent, defendant opened the door to such inquiry.

Judge Wilson dissents for reasons stated in the dissenting opinion in the Appellate Division (which asserted that the Molineux ruling improperly deterred defendant from exercising his constitutional right to testify, and prevented the jury from hearing and considering defendant's contention that the shooting was an accident).

People v. Edmond Huertas
(Ct. App., 6/14/22)

* * *

EVIDENCE - Res Gestae Rule
UNCHARGED CRIMES EVIDENCE

The Colorado Supreme Court notes that "[r]es gestae may be broadly defined as matter incidental to a main fact and explanatory of it, including acts and words which are so closely connected therewith as to constitute a part of it, and without a knowledge of which the main fact might not be properly understood."

Noting that in criminal cases, the Court has treated res gestae evidence as not subject to the rules limiting the admissibility of extrinsic, uncharged misconduct evidence, and that res gestae is so ill-defined that uncharged misconduct evidence too often dodges the rules and slips into cases without the requisite scrutiny, a Court majority concludes that it is time to "bury" res gestae.

The Court's adoption of the Colorado Rules of Evidence more than four decades ago should have rendered the res gestae doctrine obsolete. Under the governing Rule, only uncharged misconduct evidence that meets certain requirements can be admitted. When res gestae is applied in connection with the "completing the story" rationale, it risks being the exception that swallows the Rule.

Rojas v. People
2022 WL 521921 (Colo., 2/21/22)

Impeachment

IMPEACHMENT - Ability To Observe And Recall
HEARSAY - Present Sense Impression

In this murder prosecution, the Court of Appeals finds reversible error in the preclusion of certain evidence offered by defendant in support of his justification defense.

R.M., the sole eyewitness to testify, stated that, after he met his girlfriend and they walked around together, he told his girlfriend he had to go home, and they parted just before the shooting. Defendant attempted to call R.J. to contradict R.M.'s testimony. According to defendant, R.J. would have testified that she was not with R.M. at any point on the night of the shooting, and that she lived a mile away from the scene. The court precluded this testimony on the ground that it would serve only to impeach R.M. on a collateral issue.

This was error. R.J.'s proffered testimony was probative of R.M.'s ability to observe and recall details of the shooting. R.M. testified in detail about his relationship with R.J. and their activities that night. This testimony made R.J. an integral part of R.M.'s account of why he was in a position to witness the shooting, and, since the People's theory of the case placed R.J. on the scene the instant before the shooting, her testimony cannot be characterized as collateral.

The court also erred in excluding three 911 calls, which were admissible as present sense impressions. During B.M.'s call, gunshots were still being fired, as acknowledged by the 911 operator. Caller 7 stated that "somebody just got shot," and was "trying to save someone's life" by making the call, demonstrating the caller's belief that there was a need for urgent medical attention. Caller 21 spoke in hushed tones because the person the caller perceived as the gunman had just left the scene on foot, and urged the officers to be careful, evincing a belief that the danger had not passed. The calls were adequately corroborated by other evidence. B.M.'s availability at trial did not preclude the admissibility of the call under the present sense impression hearsay exception.

People v. Dashawn Deverow
(Ct. App., 5/24/22)

* * *

IMPEACHMENT - Prior False Allegations By Complainant

In this sexual abuse prosecution, the Fourth Department finds reversible error where the trial court precluded defendant from calling a witness who would testify that the complainant offered to make a false allegation of abuse against the witness's boyfriend around the same time as the first incident alleged against defendant and just months before the second incident.

The nature and circumstances of the allegations against defendant and the allegation against the witness's boyfriend were sufficiently similar to suggest a pattern casting substantial doubt on the validity of the charges.

People v. Marquis Andrews
(4th Dept., 11/10/22)

* * *

BRADY MATERIAL - Prejudice/Timeliness Of Disclosure
IMPEACHMENT - Prior False Allegations

In this child sex crime prosecution, the Third Department upholds the denial of defendant's motion to set aside the verdict, finding no deprivation of defendant's right to a fair trial where, four days prior to trial, defendant, via a subpoena, learned that a physical examination of the victim, performed three months after the incident, was "normal" and did not reveal any corporeal injury; and that the victim, during an interview related to the physical examination, made allegations of prior sexual abuse by two different individuals which, defendant asserts, were fabricated.

Defendant had a meaningful opportunity to review the Brady materials and use, or at least attempt to use subject to a ruling on admissibility, the information in his defense. Defendant's contention that he could have done further investigation and possibly produced other witnesses had he obtained the records sooner is speculative.

The trial court did not err in preventing defendant from cross-examining the victim regarding her allegations of prior sexual abuse. Defendant asserted that, "as best [as he] determined," one of the allegations was false because it was reported to the police but there was no indictment or conviction. He asserted that the other allegation - that the victim's brother committed abuse more than ten years prior to the trial - was false because the victim had since gone to live with her brother and saw him as "a trusted figure." Defendant pointed to nothing else to demonstrate the falsity of these allegations.

A dissenting judge asserts that defendant was denied the opportunity to investigate and interview potential defense witnesses well in advance of trial, or develop a more detailed argument regarding application of the Rape Shield Law.

People v. Jason Sherwood
(3d Dept., 4/14/22)

* * *

BURGLARY - Armed With Deadly Weapon
ACCUSATORY INSTRUMENTS
IMPEACHMENT - Sandoval/Prior Conduct Similar To Crime Charged

The Second Department finds jurisdictionally defective a count of the indictment charging defendant with first degree burglary under Penal Law § 140.30(1) the count alleged that "in the course of effecting entry into said dwelling," defendant "was armed with a dangerous weapon, to wit: a knife," but the statute requires that the defendant be armed with a "deadly weapon," a term which includes only certain specified knives. The People's motion to amend the count was not authorized under CPL § 200.70 since it would have cured the failure to charge defendant under § 140.30(1).

The trial court also erred in determining, after a Sandoval hearing, that if defendant chose to testify, the prosecutor could cross-examine him regarding the facts underlying his 2004 conviction for assault in the second degree, and his 2012 conviction for robbery in the third degree. The Court notes that cross-examination with respect to crimes or conduct similar to the crime charged may be highly prejudicial, in view of the risk, despite the most clear and forceful limiting instructions to the contrary, that the evidence will be taken as some proof of the commission of the crime charged.

People v. Steven Bloome
(2d Dept., 5/25/22)

* * *

IMPEACHMENT - Police Misconduct/Bad Acts

In this drug sale prosecution, the First Department finds error, albeit harmless, where the court did not allow defendant to cross-examine the undercover officer about the underlying facts of a pending lawsuit alleging that the officer and other officers falsely claimed that the plaintiff had sold drugs.

People v. Rasheem Meredith
(1st Dept., 3/29/22)

* * *

I*MPEACHMENT - Reputation For Truthfulness And Veracity*

Defendant sought to introduce testimony regarding the reputation for truthfulness and veracity of the eight-year-old complainant's mother. In order to lay a foundation, a staff sergeant in the United States Army described a community of seven or eight friends and acquaintances, predominantly of Haitian nationality, and predominantly living within certain neighborhoods in Brooklyn. The witness testified that she had known the mother since 1999, that almost everyone she knew also

knew the mother, and that every time she saw her acquaintances among this group, the mother's reputation for truthfulness and veracity was discussed. The court excluded the testimony.

The Second Department finds reversible error. Neither the specific number of individuals in the purported community, nor the duration of their respective relationships with the mother, was dispositive.

People v. Alpha Lisene
(2d Dept., 1/12/22)

Consciousness Of Guilt Evidence

EVIDENCE - Consciousness Of Guilt
SEARCH AND SEIZURE - Search Warrants/Description Of Premises

The Third Department holds that the warrant application and supporting documentation were sufficiently detailed to permit law enforcement to search the correct premises where the warrant authorized the search of 1013 Pleasant Street, which was the first-floor residence of a multifamily house, and the handgun was found in the second-floor residence which had an address of 1015 Pleasant Street, but the warrant application and the warrant, noted that the residence to be searched was located on the second floor.

However, the Court agrees with defendant that he was deprived of a fair trial. The trial court erred in admitting a jail phone call in which defendant stated that he might as well "cop out to … the five years or whatever." Even if relevant, evidence of consciousness of guilt is generally considered weak, and, here, defendant's statement had little probative value but had a prejudicial effect since it is widely assumed that only the guilty would consider entering a guilty plea. Moreover, the prosecutor commented on summation about defendant's statement during the phone call expressing a need for counsel.

People v. Vandyke Roberts
(3d Dept., 3/31/22)

Temporary And Lawful Possession Defense

DEFENSES – Temporary And Lawful Possession

On the night in question, the victim, defendant's boyfriend, warned her not to open the door for anyone before leaving her at home with her children, who ranged in age from four to thirteen. Shortly thereafter, defendant was startled awake by someone pounding on her front door, identifying himself as her husband and yelling for her to open the door. Defendant testified that while searching for something to use to defend herself, she found a gun in a kitchen drawer that the victim had left behind. She told the person at the door to leave or she would shoot. When the person nevertheless continued trying to get inside the house, defendant fired a single shot at the

door. The victim's friend then yelled, from outside, that defendant shot the victim. She ran out of the house, dropped the gun on the ground, and called 911 as she tried to help the victim. Passersby and police officers heard defendant state that she did not mean to shoot the victim and thought he was her husband.

The Court of Appeals finds no error in the denial of defendant's request for a jury charge on temporary and lawful possession.

A defendant is entitled to such a charge when there is evidence presented at trial showing a legal excuse for possession as well as facts tending to establish that, once possession has been obtained, the weapon had not been used in a dangerous manner.

Here, defendant used the weapon in a dangerous manner, firing the gun blindly through a closed, windowless door, endangering anyone who might have been on the other side, striking and killing the victim, and creating a risk that the bullet would ricochet off the metal door and injure her children.

People v. Rebecca Ruiz
(Ct. App., 12/15/22)

Justification Defense

DEFENSES - Justification

While being processed for an arrest, after being frisked, defendant was directed to remove his footwear, a command given to all those in custody at the jail so that footwear could be searched for weapons and contraband. Defendant refused to remove his footwear despite multiple orders to do so. After the sergeant called for backup, he specifically warned defendant that he would pepper spray defendant if defendant did not remove his footwear. Defendant continued to refuse, and the sergeant sprayed him in the face. Five seconds after he was sprayed, defendant charged at the sergeant and punched him in the head, after which defendant was subdued by other officers.

On appeal, the Appellate Division reversed, holding that the trial court erred in refusing to grant defendant's request for a justification charge.

The Court of Appeals reverses. There is no reasonable view of the evidence that the sergeant's use of pepper spray was excessive or otherwise unlawful.

People v. Michael Heiserman
(Ct. App., 12/13/22)

Homicide/Assault

MURDER - Acting In Concert

Mack, defendant and another individual met in the parking lot and entered an establishment together. Mack immediately engaged in a fist fight with the victim. During the altercation, defendant and the other individual pointed guns at the various onlookers. At some point, Mack brandished a knife and slashed at the victim, landing several blows including one to the victim's chest that ultimately proved to be fatal. All three individuals eventually fled the scene

The Third Department reverses defendant's murder conviction, finding that the evidence was not legally sufficient to prove that defendant acted in concert with Mack by aiding him in the commission of the murder.

The altercation began as a fist fight and evolved into a fatal encounter only after Mack was knocked to the ground and resorted to the use of a knife. Defendant's conduct in support of Mack at the commencement of the altercation did not establish that he shared a community of purpose with Mack with respect to his later-formed homicidal intent, or rationally exclude the possibility that defendant was without knowledge of Mack's intent, and that defendant's intent was merely to prevent intervention in a fist fight between Mack and the victim.

People v. Willie Jenkins
(3d Dept., 11/23/22)

* * *

MURDER - Depraved Indifference

In this vehicular homicide prosecution, the Third Department, with one judge dissenting, reduces defendant's conviction for depraved indifference murder to manslaughter in the second degree.

Defendant was extremely intoxicated, but his driving prior to police pursuit demonstrated that he was aware of his surroundings, obeyed multiple traffic signals and responded to the alerts of other drivers. He was traveling at an exceptionally high rate of speed during the pursuit, but did so on a roadway designed to accommodate greater rates of speed than residential roads, at an hour when lighter traffic conditions predominated. There is no evidence that he failed to abide by any traffic signals while he fled or that any vehicles were forced to pull over or move out of his way. He did partially enter the lane of oncoming traffic for brief periods of time, but such episodic conduct stands in stark contrast to cases where the defendant traveled in an oncoming lane as part of a deadly game. Defendant largely chose to evade police not by weaving in and out of the oncoming lane, but instead by driving on a wide, paved shoulder, and, even if his attempted escape was carried out in a reckless manner, he may simultaneously intend to flee police and avoid striking other cars. The limited evidence of his proximity to other vehicles prior to the collision falls short

of establishing the sort of disregard of narrow misses that could be some evidence of depraved indifference.

The circumstantial evidence permits only the inference that defendant, while reckless, consciously avoided risk, which is the antithesis of a complete disregard for the safety of others.

People v. Ryan Williams
(3d Dept., 6/16/22)

* * *

IDENTIFICATION - Photo Showup
ASSAULT - Physical Injury

During the investigation of the burglary, the complainant informed police that a Facebook photograph depicted the perpetrator, and that photograph led police to defendant's photograph from a prior arrest. On two occasions, the complainant was asked whether she could identify the individual the arrest photograph, and she replied that he was the perpetrator.

The Second Department finds reversible error, concluding that although the identification of the Facebook photograph was not the product of a police-arranged identification procedure, the complainant's identifications of defendant from a single arrest photograph were the result of unduly suggestive identification procedures, and those identifications should have been suppressed.

The Court, with one judge dissenting, also concludes that the conviction of assault in the second degree is not supported by legally sufficient evidence that the detective sustained a "physical injury" where the detective testified that defendant hit him in the mouth with his fist, that his lip bled, and that he felt severe pain at the time; there was no evidence corroborating the detective's subjective description of the degree of pain; hospital records indicate that there was a "[l]ip abrasion" and a "superficial laceration to right lower lip," and that the detective "currently denies bleeding, denies head trauma"; and the detective did not receive stitches and went back to work that same day. The dissenting judge asserts that defendant's "hard punch" to the detective's mouth - delivered with enough force to cause bleeding, severe pain and a hospital trip - inflicted substantial pain.

People v. Elsun Wheeler
(2d Dept., 1/26/22)

* * *

ASSAULT - Physical Injury

The Fourth Department concludes that the evidence is legally insufficient to establish the physical injury element of assault in the second degree where the officer testified that he experienced "quite a bit of pain" to his "left upper thigh/groin area" after struggling with defendant when he resisted arrest, and that his pain was a 6 or 7 out of 10 on the pain scale, there was only a vague description of the injury, no medical records were introduced into evidence, there was no testimony that the officer took any pain medication for the injury, and the officer did not miss any work or testify that he was unable to perform any activities because of the pain.

People v. Ronnie Bunton
(4th Dept., 6/10/22)

* * *

ASSAULT - Serious Physical Injury/Intent

The First Department reduces defendant's convictions to attempted assault in the first degree, finding legally insufficient evidence of serious physical injury where the People relied solely on two photos of the victim depicting a scar on his cheek, which was briefly described by the doctor who treated the victim on the day of the slashing. Despite the scar's prominent location, neither the photos nor the doctor's testimony warrant an inference that the scar rendered the victim's appearance distressing or objectionable to a reasonable observer.

The verdict was not against the weight of the evidence with respect to defendant's intent to cause serious injury. Defendant slashed the victim in the face with a sharp object, which is the sort of attack that is likely to result in serious physical injury and permanent disfigurement.

People v. David McBride
(1st Dept., 12/13/22)

* * *

ASSAULT - Serious Physical Injury

The Second Department reduces defendant's gang assault, assault and robbery convictions, concluding that the evidence was not legally sufficient to establish serious physical injury. Although the complainant was stabbed multiple times, there was no evidence of serious and protracted disfigurement, protracted impairment of health, or protracted loss or impairment of the function of any bodily organ.

People v. Luis Mayancela
(2d Dept., 7/27/22)

Fraudulent Accosting

FRAUDULENT ACCOSTING

A Court of Appeals majority concludes that the complaint charging fraudulent accosting under Penal Law § 165.30 ("accosts a person in a public space with intent to defraud him of money or other property by means of a trick, swindle or confidence game") met the reasonable cause standard where it alleged that defendant was standing on a street corner next to two milk crates set up as a table; that, on the table, was a black box with a slot for money and fliers describing how to donate to homeless shelters; that defendant positioned the table in a way that "blocked" the sidewalk, causing at least 75 pedestrians to have to "walk around" him in order "to continue walking on the sidewalk"; that, as pedestrians did so, defendant asked them to "help the homeless"; that, in response to a question by a police officer, defendant said that "donations go to a Church on 116 Street," but he "was unable to state the name of the church or the name of the person that receives the money"; and that, although defendant told the officer that he was "the president of the NYC Homeless Outreach" and gave the officer "a laminated card which stated he was affiliated with" that organization, he later admitted that "most of the proceeds" went to him.

The majority rejects defendant's contention that "accost" as used in the statute requires "a physical approach and an element of aggressiveness or persistence." Although "stationing" is insufficient, it is sufficient if the defendant initiate contact with a potential victim through an affirmative act.

The majority also rejects defendant's contention that because the statute requires that the offender accost "a person in a public place," the approach must be directed toward a specific individual, rather than the public at large. It is a settled rule of statutory interpretation that words in the singular number include the plural unless a different meaning or application was intended. Here, the statute was aimed at preventing members of the public, going about their business in public places, from being lured into fraudulent schemes.

People v. Marc Mitchell
(Ct. App., 5/24/22)

Possession Of Drugs And Weapons And Stolen Property

POSSESSION OF A WEAPON - Second Amendment

In New York (see Penal Law § 400.00), a license applicant who wants to possess a firearm at home (or in his place of business) must convince a "licensing officer" - usually a judge or law enforcement officer - that, among other things, he is of good moral character and has no history of crime or mental illness, and that "no good cause exists for the denial of the license." If the applicant wants to carry a firearm outside his home or place of business for self-defense, he must obtain an unrestricted license to "have and carry" a concealed "pistol or revolver." To secure that license, the applicant must prove that "proper cause" exists" to issue it. If an applicant cannot make that showing, he can receive only a "restricted" license for public carry, which allows him to carry a

firearm for a limited purpose, such as hunting, target shooting, or employment. No New York statute defines "proper cause," but courts have held that an applicant shows proper cause only if he can "demonstrate a special need for self-protection distinguishable from that of the general community." Living or working in an area noted for criminal activity does not suffice. Rather, New York courts generally require evidence of particular threats, attacks or other extraordinary danger to personal safety.

When a licensing officer denies an application, judicial review is limited. New York courts defer to an officer's application of the proper cause standard unless it is arbitrary and capricious. In other words, the decision must be upheld if the record shows a rational basis for it.

Petitioners Koch and Nash are adult citizens whose license applications were denied. Petitioner New York State Rifle & Pistol Association, Inc., is a public-interest group organized to defend New Yorkers' Second Amendment rights.

A Supreme Court majority holds that New York's denial of petitioners' license applications violated the Second Amendment.

When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, it is only when the government demonstrates that the regulation is consistent with this Nation's historical tradition of firearm regulation that a court may conclude that the individual's conduct falls outside the Second Amendment's unqualified command.

This test requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding. Whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are central considerations when engaging in an analogical inquiry. Even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster. For example, although the historical record yields relatively few 18th- and 19th-century "sensitive places" where weapons were altogether prohibited - e.g., legislative assemblies, polling places, and courthouses - the Court is aware of no disputes regarding the lawfulness of such prohibitions, and therefore can assume it settled that these locations were "sensitive places" where arms carrying could be prohibited consistent with the Second Amendment.

Here, there is no historical basis for New York to effectively declare the island of Manhattan a "sensitive place" simply because it is crowded and protected generally by the New York City Police Department. The plain text of the Second Amendment protects Koch's and Nash's proposed course of conduct - carrying handguns publicly for self-defense.

Respondents have not met their burden to identify an American tradition justifying the State's proper-cause requirement. The historical evidence does demonstrate that the manner of public

carry was subject to reasonable regulation. Under the common law, individuals could not carry deadly weapons in a manner likely to terrorize others. Similarly, although surety statutes did not directly restrict public carry, they did provide financial incentives for responsible arms carrying. Finally, States could lawfully eliminate one kind of public carry - concealed carry - so long as they left open the option to carry openly. None of these historical limitations on the right to bear arms approach New York's proper-cause requirement because none operated to prevent law-abiding citizens with ordinary self-defense needs from carrying arms in public for that purpose.

New York State Rifle & Pistol Association, Inc., et al. v. Bruen
2022 WL 2251305 (U.S. Sup. Ct., 6/23/22)

* * *

POSSESSION OF A WEAPON - Second Amendment

The Fifth Circuit U.S. Court of Appeals finds unconstitutional, under the Second Amendment, a statute that prohibits the possession of firearms by someone subject to a domestic violence restraining order. The Government has failed to demonstrate that this restriction fits within our Nation's historical tradition of firearm regulation.

United States v. Rahimi
2023 WL 1459240 (5th Cir., 2/2/23)

* * *

POSSESSION OF A WEAPON – Second Amendment

Defendant moves to dismiss a charge of criminal possession of a weapon in the second degree, contending that New York's licensing scheme is unconstitutional after *New York State Rifle & Pistol Association, Inc. v. Bruen* (142 S.Ct 2111), and that Penal Law §265.03 itself is unconstitutional because "it embeds an unconstitutional licensing law."

The Court denies defendant's motion, concluding that defendant lacks standing because he did not apply for a license and he has not made a substantial showing that submitting an application would have been futile; and that the right to bear arms, as *Bruen* recognized, is subject to certain reasonable, well-defined restrictions, including properly administered, evenhanded licensing requirements, and Bruen merely invalidated New York's "proper cause" licensing standard.

People v. Caleb Brundige
(Sup. Ct., Erie Co., 2/2/23)
https://nycourts.gov/reporter/3dseries/2023/2023_23028.htm

* * *

POSSESSION OF A WEAPON - Second Amendment
SEARCH AND SEIZURE - Probable Cause/Gun Possession
- Hearing/Burdens

On March 4, 2021, defendant was arrested for possessing a loaded semi-automatic firearm with an extended magazine. Defendant was a front seat passenger in a car that was stopped because of its erratic movements. The People charged the car presumption in the Grand Jury. On April 18, 2022, this Court issued a written decision denying suppression. On June 22, 2022, the United States Supreme Court issued its opinion in N.Y. State Rifle & Pistol Ass'n v. Bruen (142 S.Ct. 2111).

Defendant subsequently moved to dismiss the indictment, arguing that Bruen renders this prosecution unconstitutional. Defendant alleges that he is a resident of Vermont, where no license is required and he is able to legally purchase and maintain firearms, and argues that but for New York's unconstitutional licensing law, he would have been able to lawfully possess the firearm.

The Court orders that the suppression hearing be re-opened so defendant can provide additional evidence relevant to probable cause to arrest.

The Court does not find that Penal Law § 400.00 is unlawful in its entirety. The defense has not shown that § 400.00(1) restrictions such as denying licenses to convicted felons are unconstitutional. Bruen did not render all prosecutions under PL § 265.03 unconstitutional.

However, defendant also raises an "as applied" challenge, alleging that he could have legally possessed a gun but was thwarted by the unconstitutional licensing requirement. Defendant does not lack standing merely because he did not apply for a license. Under Bruen, an application by any person without a special need for concealed carry would have been futile.

This "as applied" challenge raises the question of whether there was probable cause to arrest, and is implicitly an application to reopen the suppression hearing. The People met their burden of going forward at the suppression hearing by demonstrating that defendant was not licensed, and was concealing the firearm on his person. It will be defendant's burden at the reopened hearing to show that he was an ordinary, law-abiding, adult citizen like the plaintiffs in Bruen, and would have been able to obtain a license for his weapon but for the unconstitutional aspect of the licensing statute.

People v. Javante Sovey
(Sup. Ct., N.Y. Co., 11/1/22)
https://nycourts.gov/reporter/3dseries/2022/2022_22340.htm

* * *

POSSESSION OF A WEAPON - Second Amendment

Plaintiffs in this civil rights action have moved for a preliminary injunction restricting enforcement of provisions in New York State's Concealed Carry Improvement Act, which, in response to the Supreme Court's decision in *New York State Rifle & Pistol Association, Inc. v. Bruen* (142 S.Ct. 2111), generally replaced the "proper cause" concealed carry license standard with: (1) a definition of the "good moral character" that is required to complete the license application or renewal process; (2) the requirement that the applicant provide a list of current and past social-media accounts, the names and contact information of family members, cohabitants, and at least four character references, and "such other information required by the licensing officer"; (3) a requirement that the applicant attend an in-person interview; (4) the requirement of 18 hours of in-person and "live-fire" firearm training in order to complete the license application or renewal process; and (5) a list of "sensitive locations" and "restricted locations" where carrying arms is prohibited.

The Court grants a preliminary injunction enjoining enforcement of the following provisions of the CCIA:
The provision requiring "good moral character";
The provision requiring the "names and contact information for the applicant's current spouse, or domestic partner, any other adults residing in the applicant's home, including any adult children of the applicant, and whether or not there are minors residing, full time or part time, in the applicant's home";
The provision requiring "a list of former and current social media accounts of the applicant from the past three years";
The provision contained in Section 1 of the CCIA requiring "such other information required by review of the licensing application that is reasonably necessary and related to the review of the licensing application";
The following "sensitive locations" provisions: "any location providing ... behavioral health, or chemical dependance care or services" (except to places to which the public or a substantial group of persons have not been granted access); "any place of worship or religious observation"; "public parks, and zoos"; "airports" to the extent the license holder is complying with federal regulations, and "buses"; "any establishment issued a license for on-premise consumption pursuant to article four, four-A, five, or six of the alcoholic beverage control law where alcohol is consumed"; "theaters," "conference centers," and "banquet halls"; and "any gathering of individuals to collectively express their constitutional rights to protest or assemble" as contained in Paragraph "2(s)"; and
The "restricted locations" provision.

The Court notes, inter alia, that the Supreme Court's one-step, burden-shifting approach, which consists of first determining whether the Second Amendment's plain text covers the conduct at issue, and then determining whether the government has met its burden of demonstrating that the regulation is consistent with this nation's historical tradition of firearm regulation, is applicable; that the Court has found historical support for a modern law providing that a license shall be issued or renewed except for applicants who have been found, based on their past conduct, to be likely to

use the weapon in a manner that would injure themselves or others (other than in self-defense), but that is not this law; that the imposition of a state-wide restriction on all private property that is open for business to the public creates a First Amendment problem because it coerces busy store owners, who are not available to give express consent to individuals, into conspicuously posting a warning if they want to welcome onto their property license-holding visitors.

Antonyuk v. Hochul
2022 WL 16744700 (NDNY, 11/7/22)

* * *

POSSESSION OF A WEAPON - Second Amendment Issues

The Court denies defendant's motion to dismiss weapons charges on Second Amendment grounds.

In *New York State Rifle and Pistol Ass'n v. Bruen* (142 S.Ct. 2111), the Supreme Court only found that one part of New York's licensing statute violated the Second Amendment. Citizens must be afforded an opportunity to obtain a license to carry a concealed weapon in non-sensitive public places for purposes of ordinary self-defense. But the requirement that an individual have a license to legally possess a gun in a public place in remains the law, and thus possession of an unlicensed firearm remains a crime.

Moreover, defendant lacks standing since he denies possessing the gun; he does not allege facts supporting an argument that he would have been able to satisfy licensing provisions requiring that he demonstrate he is a "law-abiding, responsible citizen"; and the facts alleged do not support any finding that defendant chose to arm himself for "ordinary self-defense" reasons.

People v. Dave Brown
2022 NY Slip Op 32290(U) (Sup. Ct., Bronx Co., 7/15/22)
https://nycourts.gov/reporter/pdfs/2022/2022_32290.pdf

* * *

POSSESSION OF A WEAPON - Second Amendment
PLEAS - Motion To Vacate/Knowing And Intelligent

Defendant moves to withdraw his guilty plea and for dismissal of firearm possession charges on the grounds that the Supreme Court's decision in *New York State Rifle & Pistol Association, Inc v Bruen* (142 S.Ct. 2111) renders the indictment defective under the Second Amendment.

The Court denies the motion. The issuance of the *Bruen* decision has no effect on the validity and enforceability of a voluntary plea.

In any event, *Bruen* invalidated New York's requirement that an applicant for a firearm license show "proper cause" - i.e., a special need for self-protection distinguishable from that of the general community - but left intact a state's ability to impose a licensing scheme, and to criminalize the possession of an unlicensed firearm. Defendant has failed to show that he ever applied for a license for the subject firearm, let alone an unrestricted license. The Court also notes that because of defendant's prior felony record, New York would have constitutionally denied defendant an unrestricted license to carry.

People v. Anton Caldwell
(Sup. Ct., Queens Co., 9/14/22)
https://nycourts.gov/reporter/3dseries/2022/2022_22281.htm

* * *

POSSESSION OF A WEAPON - Second Amendment Issues

Defendant, citing *New York State Rifle & Pistol Assn., Inc. v Bruen* (142 S.Ct. 2111), moves to dismiss two counts of criminal possession of a weapon in the second degree, alleging an unconstitutional infringement on his right to bear arms.

The Court denies the motion. The court in *Bruen* held that New York impermissibly burdened the right of law-abiding citizens to carry concealed firearms outside of their homes or places of business for purposes of "ordinary self-defense." The court did not hold that the Constitution forbids a state from requiring citizens to obtain a license in order to engage in such activity when the ability to obtain the license is not thwarted by an obligation to demonstrate a unique need beyond the general desire to protect oneself.

Defendant does not claim to have a license, or to have sought a license. Thus, he lacks standing to bring any challenge to the licensing regime. In any event, defendant does not ultimately seek to challenge New York's former licensing regime. Defendant's quarrel lies with the statutes criminalizing unlicensed possession.

"Defendant's reading of the Second Amendment, unsupported by *Bruen*, would turn New York into the Wild West, placing its citizens at the mercy of criminals wielding unlicensed firearms, concealed from public view, in heavily populated areas…. The Constitution is not a suicide pact."

The Court also notes that *Bruen*'s rejection of New York's licensing scheme in no way undermines New York's permissive, rebuttable presumption that a person who possesses an unlicensed handgun intends to use it in an unlawful manner.

People v. Jonathan Rodriguez
(Sup. Ct., N.Y. Co., 7/15/22)
https://nycourts.gov/reporter/3dseries/2022/2022_22217.htm

* * *

POSSESSION OF A WEAPON - Second Amendment Issues

The Court rejects defendant's contention that the United States Supreme Court's decision in New York State Rifle & Pistol Assn., Inc. v Bruen, (142 S.Ct. 2111) rendered unconstitutional New York's licensing scheme and New York Penal Law sections criminalizing possession of a firearm without a license, and defendant's alternative argument that the Penal Law sections are unconstitutional under Bruen's "historical tradition test" because the government cannot demonstrate that there was no blanket prohibition on carrying firearms outside the home at the time the Constitution was ratified.

Only that part of New York's licensing statute that requires a finding of "proper cause" was struck down, and a constitutionally permissible licensing provision remains, and the Penal Law sections criminalizing the possession of firearms without a license remains constitutional and thus the Court need not engage in the "historical tradition" test.

Moreover, defendant lacks standing because he did not apply for a license and he has not made a substantial showing that submitting an application would have been futile.

People v. Devaughntae Williams
(Sup. Ct., Kings Co., 8/5/22)
https://nycourts.gov/reporter/3dseries/2022/2022_22252.htm

* * *

POSSESSION OF DRUGS - Synthetic Cannabinoid

The Court of Appeals finds facially deficient a count charging defendant with criminal possession of a controlled substance in the seventh degree for allegedly possessing an illegal synthetic cannabinoid.

To meet the jurisdictional standard for facial sufficiency, a misdemeanor complaint must set forth facts that establish reasonable cause to believe that the defendant committed the charged offense. Standing alone, a conclusory statement that a substance was a particular type of controlled substance does not meet the reasonable cause requirement.

Here, an officer alleged that he saw defendant possess one "clear ziplock bag containing a shredded dried plant-like material with a chemical odor"; and "based upon [his] training and experience, which includes training in the recognition of controlled substances, and their packaging," the officer also alleged that the "substance is alleged and believed to be synthetic cannabinoid/synthetic marijuana (K2)."

The Public Health Law criminalizes possession of some, but not all, synthetic cannabinoids. The complaint made no reference to Public Health Law § 3306(g), or its schedule which lists ten proscribed synthetic cannabinoid substances by specific chemical designation, and gave no basis for concluding that the substance defendant possessed was an illegal synthetic cannabinoid listed in § 3306(g).

People v. Ron Hill
(Ct. App., 6/16/22)

* * *

POSSESSION OF A WEAPON - Constructive Possession/Automobile Presumption

The Third Department holds that the automobile presumption applied where defendant asserts that no one witnessed him inside the vehicle or exit the vehicle, that he was outside the vehicle when the handgun was found, and that the other subjects had an opportunity to place the handgun in the vehicle while he was outside of it, but the deputy sheriff observed three silhouettes inside the vehicle and, shortly after the vehicle parked, observed defendant and two other subjects walking away from the vehicle. The deputy sheriff further observed defendant throw an empty magazine - which fit the handgun found in the vehicle - under a nearby vehicle, and the police recovered a handgun, a loaded magazine, and a glove that matched a glove that was in physical possession of one of the subjects, from the vehicle immediately after defendant and the other suspects began walking away from the vehicle.

People v. Patrick Colter
(3d Dept., 6/23/22)

* * *

POSSESSION OF A WEAPON - Constructive Possession

The Fourth Department, with one judge dissenting, finds legally insufficient evidence that defendant constructively possessed a loaded handgun in the drop ceiling of a living room in which defendant was present as a guest.

Defendant's text messages did not evince consciousness of guilt and, in any event, mere knowledge of the presence of the handgun would not establish constructive possession. Although there was evidence that defendant's DNA profile matched that of the major contributor to DNA found on the handgun, and that other individuals in the apartment were excluded as contributors, which supported an inference that defendant physically possessed the gun at some point in time, this evidence was not sufficient to support an inference that defendant had constructive possession of the weapon at the time it was discovered.

People v. Alvin King
(4th Dept., 6/3/22)

Harassment

HARASSMENT - Phone Threats

The Court of Appeals reverses the Appellate Term's determination that the evidence was legally insufficient to establish harassment in the second degree beyond a reasonable doubt where defendant, during a phone call with the victim, accused her and her husband of extorting him, and stated to the victim that her children were going to get a bullet in their heads and that he was going to firebomb her home and kill her and her family. Defendant unequivocally threatened the victim with physical contact of a serious nature, with the intent to harass, annoy or alarm her.

The angry tone of the call, defendant's use of profanities to refer to the victim and her children, and the fact that defendant threatened to use deadly violence all support a finding that the statements were not said in jest. Indeed, the morning after this call, defendant, a police officer, admitted to his captain that he said something he should not have, to the effect that he was going to shoot the victim's children in the head. Defendant also communicated a motive for his threats: his alleged belief that the victim had extorted him and that she had cheated on him.

Although the Appellate Term found that defendant's statements did not communicate an immediate threat of physical harm, the statute does not include a temporal requirement. The timing of the threatened action may go to whether it is a real and unequivocal threat, but does not foreclose a factual finding that the threat is genuine in nature.

People v. Anthony Lagano
(Ct. App., 12/13/22)

Disposition/Dismissal In Furtherance Of Justice/Motion To Vacate

SENTENCE - Probation/Violation Hearing

The Massachusetts Supreme Judicial Court concludes that the absence of the complainant, defendant's former fiancée, at a probation violation hearing, did not violate defendant's due process right to confront adverse witnesses, but the inability to question her violated defendant's due process right to present a defense.

There is no requirement that hearsay satisfy all indicia of reliability in order to be admissible. Here, the complainant's allegations were based on her personal knowledge, and were made relatively close in time to the alleged incidents. With a few exceptions, her statements generally were internally consistent, and certain incidents were described with a high degree of factual detail. Thus, there was no violation of the probationer's due process rights in the introduction of the complainant's prior recorded statements at the probation violation hearing.

However, a probationer has a presumptive due process right to call witnesses in his or her defense. At least three factors must be considered: (1) whether the proposed testimony might be significant

in determining whether it is more likely than not that the probationer violated the conditions of probation; (2) whether the witness would provide evidence that adds to or differs from previously admitted evidence rather than be cumulative of that evidence; and (3) whether, based on an individualized assessment of the witness, there is an unacceptable risk that the witness's physical, psychological, or emotional health would be significantly jeopardized if the witness were required to testify in court. Given the centrality of the complainant's credibility in this case, the minimal corroboration of her allegations, and defendant's proffered reasons to doubt her credibility, countervailing interests do not overcome the presumption, and so the hearing judge erred in denying defendant's request to call the complainant as a witness.

Commonwealth v. Costa
2022 WL 2383313 (Mass., 7/1/22)

* * *

SENTENCE - Consideration Of Acquittal Charges

The Seventh Circuit U.S. Court of Appeals finds no error where the sentencing court considered a conspiracy charge on which defendant had been acquitted. The Supreme Court has held that a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.

United States v. Gan
2022 WL 17170973 (7th Cir., 11/23/22)

* * *

DISPOSITION - Secure Placement/Least Restrictive Alternative

In this juvenile delinquency prosecution not involving a designated felony finding, the Third Department upholds a dispositional order placing respondent in a secure OCFS facility.

During the pendency of the proceedings, respondent repeatedly failed to appear in court, causing the court to issue a warrant for his appearance and temporarily place him in a nonsecure facility. The court received evidence that respondent physically attacked other residents and staff at the nonsecure facility and destroyed property there.

Matter of Braden U.
(3d Dept., 10/20/22)

* * *

DISMISSAL IN FURTHERANCE OF JUSTICE

Petitioner filed a juvenile delinquency petition charging respondent, who was 17 years old, with assault in the third degree. An initial appearance was scheduled, but, before it was held, the family court sua sponte dismissed the petition in the furtherance of justice.

The Third Department reverses. The court had authority to dismiss the petition pursuant to FCA § 315.2 "at any time," including prior to the initial appearance, and a motion to dismiss in the furtherance of justice is excluded from the list of pretrial motions that are to be made after the initial appearance (see FCA §§ 332.1; 332.2 [1]). Petitioner was given an opportunity to be heard prior to the dismissal, since the court set a deadline for the parties to file written submissions but it appears that petitioner did not take advantage of this opportunity.

However, dismissal was not justified. On the date in question, the complainant, the mother of respondent's child, asked him to feed the child, who was crying. Respondent allegedly threw a full, eight-ounce baby bottle at the complainant which hit her in the face. She alleged that, although she was bleeding heavily, respondent and his father discouraged her from seeking medical attention. When she eventually did go to the hospital the next day, a cut on her face was glued shut by a doctor and she was told to return for X rays after the swelling had abated. Although the court placed emphasis on the fact that respondent was charged only with a misdemeanor, this was nevertheless a violent act, and the complainant's allegations referenced an escalation in respondent's propensity towards violence.

Matter of James JJ.
(3d Dept., 6/2/22)

* * *

SENTENCE - Due Process/Court's Reliance On Materially False Information
- Juveniles

Defendant, a juvenile offender who received a total effective sentence of sixty years of incarceration, claims that the sentencing court relied on materially false information.

The Connecticut Supreme Court agrees with defendant and finds a due process violation. The sentencing court held the view that defendant was a "charter member" of a mythical group of teenage "superpredators." A review of the superpredator theory and its history demonstrates that the theory constituted materially false and unreliable information. The theory's dire predictions centered disproportionately on the demonization of Black male teens. Extensive research data and empirical analysis quickly demonstrated that the superpredator theory was baseless.

The superpredator myth employed a particular tool of dehumanization - portraying Black people as animals. The superpredator metaphor invoked images of packs of teens prowling the streets. The superpredator myth triggered and amplified the fears inspired by these dehumanizing racial

stereotypes, thus perpetuating the systemic racial inequities that historically have pervaded our criminal justice system. The response came in the form of a public panic and media frenzy, prompting nearly every state in the country to step up the sentencing and punishment of juveniles. This shift in the law subjected "juvenile offenders to sentencing regimes that were originally conceived for adults.

By labeling a juvenile as a superpredator, the very characteristics of youth that should serve as mitigating factors in sentencing - impulsivity, submission to peer pressure, deficient judgment - are treated instead as aggravating factors justifying harsher punishment.

State v. Belcher
2022 WL 200040 (Conn., 1/21/22)

* * *

SENTENCE - Eighth Amendment/Late-Adolescence Offenders

Defendant was 18 years old when he aided and abetted a first-degree premeditated murder. Defendant asserts that his sentence of mandatory life without parole is cruel and/or unusual punishment under both the federal and state Constitutions.

A Michigan Supreme Court majority rejects defendant's federal claim but holds that the sentence violates the Michigan Constitution's ban on "cruel or unusual" punishment. The sentence lacks proportionality because it fails to take into account the mitigating characteristics of youth - specifically, late-adolescent brain development.

The submissions from defense counsel, and from the neuropsychologist, psychologist, and criminal justice scholar amici, establish a clear consensus that late adolescence - which includes the age of 18 - is a key stage of development characterized by significant brain, behavioral, and psychological change. The research indicates that late adolescents are hampered in their ability to make decisions, exercise self-control, appreciate risks or consequences, feel fear, and plan ahead. This period of development explains why a young adult is more susceptible to negative outside influences, including peer pressure. This susceptibility to peer pressure exacerbates late adolescents' predisposition to risk taking and deficiencies in decision making. A late adolescent often behaves more like a 14- or 15-year-old than like an older adult when in the presence of their peers. Eighteen-year-olds are acutely sensitive to the potential of social rejection, which increases conformity with their peers. These hallmarks of the developing brain render late adolescents less fixed in their characteristics and more susceptible to change as they age. Overall, late-adolescent brains are far more similar to juvenile brains than to the brains of fully matured adults.

People v. Parks
2022 WL 3008548 (Mich., 7/28/22)

Appeals

APPEAL - Preservation
VERDICT - Inconsistent

In this first-degree robbery prosecution involving an allegation that defendant used or threatened to use a hypodermic needle, the Second Department, in a 3-2 decision, concludes that defense counsel's objection during the prosecutor's summation to "all of this" - which was interposed only after the prosecutor likened a hypodermic needle to a dangerous instrument - did not preserve the issue because it was vague and ambiguous, untimely, and general and nonspecific.

The prosecutor had been speaking at some length - 28 uninterrupted sentences - before defense counsel interposed the objection. The trial court and the Appellate Division cannot be expected to speculate about what portion of the prosecutor's summation an objection is intended to encompass. The objection was general, as it did not identify any particular argument or remark by the prosecutor or any specific basis.

With respect to timing, the majority notes that the prosecutor completed two sentences about the dangers of needle sticks, without objection, followed by the complained-of sentence about a prospective juror's voir dire, without objection, followed by yet another sentence about needles, also without objection, and it was only after the prosecutor made five further statements ending with a reference to a needle being a dangerous instrument that an objection was finally interposed. Defense counsel's objection made after the jury was already deliberating also was untimely.

The Court "use[s] this occasion to remind the bar that objections, in order to be preserved for appellate review, must be clear, timely, and specific to the issue complained of … and presented in a manner that enables the court to promptly rule upon them and cure any potential prejudice that might otherwise arise …."

Defendant's first-degree robbery conviction is not inconsistent with his acquittal on the count of criminal possession of a weapon in the fourth degree. The jury could have concluded that defendant, without intending to do so, used or threatened to use the needle in a manner capable of causing death or other serious physical injury, while at the same time concluding that the People failed to prove defendant's intent to actually use the needle unlawfully. The majority rejects the dissent's contention that "it is highly likely that the jurors were influenced by the prosecutor's … remarks" about the dangerousness of the needle stick.

The dissenting judges also assert that, regardless of whether defendant's objection was sufficiently explicit, the trial court expressly decided the question raised on appeal since, following summations, the court invited defense counsel to elaborate on her objections to the prosecutor's summation remarks.

People v. Angelo Adorno
(2d Dept., 10/19/22)

* * *

APPEAL - Waiver Of Right

The Second Department concludes that defendant knowingly, voluntarily, and intelligently waived his right to appeal where the court followed the Model Colloquy for the waiver of the right to appeal drafted by the Unified Court System's Criminal Jury Instructions and Model Colloquy Committee - a practice specifically endorsed by this Court and by the Court of Appeals - and ensured that defendant understood, inter alia, that the waiver of his right to appeal was distinct from the trial rights that would be automatically forfeited as a consequence of his plea of guilty, and that the waiver of the right to appeal is not an "absolute bar" to taking an appeal.

It was not necessary for the court to specifically delineate the issues that survive a valid appeal waiver. In some circumstances, a court might feel that it is appropriate to advise the defendant of a particular issue, or issues, but here most of those issues were of no relevance.

People v. Rasha Stevens
(2d Dept., 3/16/22)