JUVENILE DELINQUENCY AND PINS CASELAW/LEGISLATIVE UPDATE

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I. NEW LEGISLATION AND ADMINISTRATIVE DIRECTIVES

Raise the Lower Age of Juvenile Delinquency

Raising The Lower Age To Twelve

Chapter 810 of the Laws of 2021, which takes effect on December 29, 2022, amends the definition of juvenile delinquent to include, with specified exceptions, only children at least twelve years old, and not children seven to eleven years of age.

FCA § 301.2(1)(i) now states that "Juvenile delinquent" means a person at least twelve and less than eighteen years of age.

The Exceptions

FCA § 301.2(1)(ii) states: Provided, however, if a person over the age of seven and less than twelve years of age committed one of the following acts that would constitute a crime if committed by an adult, such person shall still be considered a juvenile delinquent:
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

The definition of "Designated felony act" in 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.

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 the exceptions in FCA § 301.2(1)(ii).

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 amendments have been made to EL §§ 502(4) and 507-a(2)(a).

Juvenile Delinquency Cases Involving Only Penal Law Violation-Level Charge or Fact-Finding

Chapter 813 of the Laws of 2021, which took effect on December 29, 2021, provides for adjustment in adolescent offender removal proceedings, and, in a variety of ways, for less restrictive treatment of youth charged with or found guilty of only a violation-level offense defined in Penal Law § 10.00(3).

Jurisdiction

FCA §§ 301.2(1) and 302.1(3) are amended to make it clear that a youth cannot be charged with a violation-level offense for acts committed before the youth turned 16 years of age.

Detention
FCA § 304.1(3) is amended to preclude the detention of a child adjudicated solely for a violation.
FCA § 350.1(1) is amended to state that where a fact-finding is solely for a violation, the respondent shall not be detained pending disposition.
Criminal Procedure Law § 510.15(1) is amended to state that a youth under the age of 18 charged solely with a violation is not subject to detention.

Pre-Filing Adjustment
FCA § 308.1(13) is amended to state that although FCA adjustment provisions do not apply where the petition is an order of removal in a juvenile offender proceeding, adjustment provisions do apply where an adolescent offender proceeding has been removed.

Post-Filing Adjustment, ACD, and Dismissal At Disposition
FCA § 308.1(14) is amended to state that the probation service may adjust any proceeding where a fact-finding under FCA § 345.1(1) is solely for a violation.
FCA § 315.3 is amended with a new subdivision (4) which states that where a fact-finding is solely for a violation, there shall be a rebuttable presumption that the court shall adjourn the case in contemplation of dismissal pursuant to FCA § 315.3, refer the case to probation for adjustment services, or dismiss the case at disposition pursuant to FCA § 352.1(2).
FCA § 320.6(2) is amended to state that where a fact-finding is solely for a violation, there shall be a rebuttable presumption that the court shall refer the case to the probation service for adjustment services, dismiss the case at disposition, or adjourn the case in contemplation of dismissal.
FCA § 345.1 is amended with a new subdivision (3) which parrots the amendment to FCA § 320.6(2).
FCA § 352.2(4) is amended to state that where the presumption in new FCA § 345.1(3) regarding a violation has been rebutted, the court shall not order detention, probation or placement.
FCA § 360.3(6) is amended to state that where the court revokes an order of conditional discharge and the fact-finding was solely for a violation, the court may modify the conditions of the conditional discharge but may not order any other disposition.
FCA § 375.2 is amended with a new subdivision (7) which states that where the fact-finding was solely for a violation, the records shall be sealed automatically at the expiration of a successful period of an adjustment, adjournment in contemplation of dismissal or conditional discharge.

Adolescent Offenders: Pleas and Family Court Adjustment
Chapter 809 of the Laws of 2021, which took effect on December 30, 2021, amends Penal Law § 30.00(3)(d)(ii) to clarify that an adolescent offender is criminally responsible upon a plea to a reduced charge unless the matter is removed to Family Court; and amends Criminal Procedure Law § 220.10(5) by adding a new paragraph (g-1) which states that a plea by an adolescent offender to a charge constituting a misdemeanor must be replaced by an order of fact-finding of juvenile delinquency and must be removed to the Family Court for disposition. (Of course, where the plea is to a felony, the court may remove the action under CPL §§ 722.23 and 725.05.)

To clear up the apparent contradiction between the eligibility of adolescent offenders whose cases have been removed to Family Court for consideration for adjustment, and the mandates in CPL §§ 725.05 and 725.10 for such youth to appear before the Family Court within ten days and for a juvenile delinquency proceeding to be commenced, the legislation makes clarifying amendments to §§ 725.05 and 725.10.

CPL § 725.05(7) now states that unless the youth is in detention or is in the custody of the sheriff or unless the order of removal specifies an offense for which the youth is not eligible for consideration for adjustment under Family Court Act § 308.1(13), the order of removal shall direct the youth to appear at the family court intake office of the county department of probation for adjustment consideration. However, the fact that the youth is in detention or is in the custody of the sheriff shall not preclude the probation service from adjusting the case if the youth is otherwise eligible for adjustment. Similarly, the requirement in CPL § 725.10(1) that a juvenile delinquency proceeding be commenced upon removal now applies unless the youth is an adolescent offender who has been directed to appear at the family court intake office of the county department of probation for adjustment consideration in accordance with CPL § 725.05(7).

The legislative memo notes: Other than in a detention or temporary order of protection case, therefore, this measure will obviate the need for an appearance by the juvenile in Family Court unless and until it is necessary on the ground that the juvenile's case has not been adjusted successfully and the presentment agency has elected to go forward with a juvenile delinquency proceeding.

USE OF RESTRAINTS ON CHILDREN IN COURTROOMS

Chapter 474 of the Laws of 2021, which took effect on October 8, 2021, adds a new FCA § 162-a (Use of restraints on children in courtrooms), which states as follows:

(a) Use of restraints. Except as otherwise provided in subdivision (b), restraints on children under the age of twenty-one, including, but not limited to, handcuffs, chains, shackles, irons or straitjackets, are prohibited in the courtroom.

(b) Exception. Permissible physical restraint consisting of handcuffs or footcuffs that shall not be joined to each other may be used in the courtroom during a proceeding before the court only if the court determines on the record, after providing the child with an opportunity to be heard, why such restraint is the least restrictive alternative necessary to prevent:

(1) physical injury to the child or another person by the child;

(2) physically disruptive courtroom behavior by the child, as evidenced by a recent history of behavior that presented a substantial risk of physical harm to the child or another person, where such behavior indicates a substantial likelihood of current physically disruptive courtroom behavior by the child; or

(3) flight from the courtroom by the child, as evidenced by a recent history of absconding from the court.

The legislative memo notes that “The measure solely addresses courtroom appearances. A similar presumption currently applies to use of restraints during transportation of juveniles from New York State Office of Children and Family Services facilities pursuant to an injunction issued in the class

action case of **MATTER OF JOHN F. V. CARRION**, -Misc.3d-, N.Y.L.J., Jan. 27, 2010 (S.Ct., N.Y.Co., 2010)."

WARRANTS: POST-EXECUTION COURT APPEARANCE

Chapter 456 of the Laws of 2021, which took effect on December 7, 2021, adds a new FCA § 312.2(3) which states:

A juvenile who is arrested pursuant to a warrant issued under this section must forthwith and with all reasonable speed be taken directly to the family court located in the county in which the warrant had been issued, or, when the family court is not in session, to the most accessible magistrate, if any, designated by the appellate division in the applicable department.

If a juvenile is brought before an accessible magistrate, the magistrate shall set a date for the juvenile to appear in the family court in the county in which the warrant had been issued, which shall be no later than the next day the court is in session if the magistrate orders the juvenile to be detained and within ten court days if the magistrate orders the juvenile to be released.

In determining whether the juvenile should be released, with or without conditions, or detained, the magistrate shall apply the criterion and issue the findings required by FCA § 320.5. The magistrate shall transmit its order to the family court forthwith.

The legislative memo note that a "[f]ailure to include a provision in the current statute directing juvenile delinquents returned on warrants to be brought before accessible magistrates when Family Courts are not in session violates the fundamental value of fairness permeating the RTA implementation efforts, i.e., that outcomes for the 16-year olds and 17-year olds who are prosecuted in Family Court should not be worse off after the effective date of the RTA statute than prior to its enactment. This measure is essential to remedy that failure. This measure, which would have no fiscal impact, would take effect 60 days after it becomes a law."

CONFESSIONS: VIDEO RECORDING OF JUVENILE INTERROGATIONS

Chapter 299 of the Laws of 2020 adds a new Family Court Act § 305.2(5-a) which states:

Where a child is subject to interrogation at a facility designated by the chief administrator of the courts as a suitable place for the questioning of juveniles pursuant to FCA § 305.2(4), the entire interrogation, including the giving of any required notice to the child as to his or her rights and the child's waiver of any rights, shall be video recorded in a manner consistent with standards established by rule of the Division of Criminal Justice Services pursuant to Criminal Procedure Law § 60.45(3)(e).

The interrogation shall be recorded in a manner such that the persons in the recording are identifiable and the speech is intelligible. A copy of the recording shall be subject to discovery pursuant to FCA § 331.2.

Family Court Act § 344.2(3) is amended to echo the language in new § 305.2(5-a).

Chapter 299 amends FCA § 305.2(8) to provide that where the child has been interrogated at a facility designated by the chief administrator of the courts as a suitable place for the questioning of juveniles, the court shall consider at a suppression hearing whether the interrogation was in

compliance with the video-recording and disclosure requirements of FCA § 305.2(5-a).
Chapter 299 took effect on November 1, 2021 and shall apply only to confessions, admissions or other statements made on or after that date.

PENAL LAW: COERCION/LARCENY BY EXTORTION/THREAT TO INSTITUTE DEPORTATION PROCEEDINGS

Chapter 447 of the Laws of 2021, which took effect on November 7, 2021, amends Penal Law §§ 135.60 and 155.05 to place efforts to blackmail an individual by threatening to cause deportation proceedings to be instituted on an equal footing with similar efforts involving criminal charges.

MARIHUANA REGULATION AND TAXATION ACT

Chapter 92 of the Laws of 2021 was signed by Governor Cuomo on March 31, 2021. Generally the Act took effect immediately.

Legislative summary:

Enacts the "marihuana regulation and taxation act"; establishes the cannabis law; defines terms; establishes the New York state cannabis control board and the office of cannabis management; outlines powers and duties thereof; authorizes the lawful use of medical cannabis; authorizes research programs related thereto; establishes a cannabis research license to permit a licensee to produce, process, purchase and/or possess cannabis for certain limited research purposes; relates to adult-use cannabis; authorizes a person to apply for a license to cultivate, process, distribute, deliver or dispense cannabis for sale in this state; relates to the description of cannabis, and the growing of and use of cannabis by persons twenty-one years of age or older; makes technical changes regarding the definition of cannabis; relates to removing certain references to marijuana relating to forfeiture actions; relates to the qualification of certain offenses involving cannabis; exempts certain persons from prosecution for the use, consumption, display, production or distribution of cannabis; relates to the definition of smoking; provides for the licensure of persons authorized to produce, process and sell marihuana; relates to the criminal sale of cannabis; relates to drug paraphernalia; adds a new article on cannabis to the penal law; authorizes a motion for resentence for persons convicted of certain marihuana offenses; levies an excise tax on certain sales of cannabis; creates the New York state cannabis revenue fund, the New York state drug treatment and public education fund and the New York state community grants reinvestment fund.

The Act is comprehensive and, over time, any implications for family court practice will become more apparent. Outlined below are some provisions of the Act that immediately present as noteworthy for family court practitioners.

PINS Cause of Action Based on Marihuana Possession:

Amended Family Court Act § 712(a) omits from the definition of "Person in need of supervision" a person who violates Penal Law § 221.05.

Neglect Cause of Action/Central Register Reports Based on Drug Misuse:

Amended FCA § 1046(a)(iii) (prima facie evidence of neglect based on drug/alcohol misuse) states:
Provided however, the sole fact that an individual consumes cannabis, without a separate finding that the child's physical mental or emotional condition was impaired or is in imminent danger of becoming impaired established by a fair preponderance of the evidence shall not be sufficient to establish prima facie evidence of neglect;

Amended SSL § 422(6) states that any report indicated for maltreatment based solely on the purchase, possession or consumption of cannabis, without a showing by a fair preponderance of the evidence that the child's physical, mental or emotional condition was impaired or was in imminent danger of becoming impaired in accordance with the definition of child maltreatment as provided for in SSL § 412, shall immediately be sealed upon a request pursuant to SSL § 422(8) or SSL § 424-a.

Certification and Approval of Foster/Adoptive Parents:

Amended Social Services Law § 378-a(2)(e)(1) states, with respect to certification or approval of a prospective foster parent or adoptive parent who has a felony conviction within the past five years for a felony drug-related offense, that the application shall be denied unless such offense is eligible for expungement pursuant to CPL § 160.50.

Penal Law Cannabis Offenses:

Amended Penal Law Article 220 (controlled substance offenses) excludes cannabis. Penal Law Article 221 (offenses involving marihuana) is repealed.

The Penal Law has been amended with a new Article 222.

ARTICLE 222
CANNABIS

§ 222.00 Cannabis; definitions.

1. "Cannabis" means all parts of the plant of the genus Cannabis, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin. It does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of the plant which is incapable of germination. It does not include hemp, cannabinoid hemp or hemp extract as

defined in section three of the cannabis law or drug products approved by the Federal Food and Drug Administration.

2. "Concentrated cannabis" means:

(a) the separated resin, whether crude or purified, obtained from a plant of the genus Cannabis; or

(b) a material, preparation, mixture, compound or other substance which contains more than three percent by weight of delta-9 tetrahydrocannabinol, or its isomer, delta-8 dibenzopyran numbering system, or delta-1 tetrahydrocannabinol or its isomer, delta 1 (6) monoterpene numbering system.

3. For the purposes of this article, "sell" shall mean to sell, exchange or dispose of for compensation. "Sell" shall not include the transfer of cannabis or concentrated cannabis between persons twenty-one years of age or older without compensation in the quantities authorized in PL § 222.05(1)(b).

4. For the purposes of this article, "smoking" shall have the same meaning as that term is defined in § 3 of the Cannabis Law.

§ 222.05 Personal use of cannabis.

Notwithstanding any other provision of law to the contrary:

1. The following acts are lawful for persons twenty-one years of age or older:

(a) possessing, displaying, purchasing, obtaining, or transporting up to three ounces of cannabis and up to twenty-four grams of concentrated cannabis;

(b) transferring, without compensation, to a person twenty-one years of age or older, up to three ounces of cannabis and up to twenty-four grams of concentrated cannabis;

(c) using, smoking, ingesting, or consuming cannabis or concentrated cannabis unless otherwise prohibited by state law;

(d) possessing, using, displaying, purchasing, obtaining, manufacturing, transporting or giving to any person twenty-one years of age or older cannabis paraphernalia or concentrated cannabis paraphernalia;

(e) planting, cultivating, harvesting, drying, processing or possessing cultivated cannabis in accordance with PL § 222.15; and

(f) assisting another person who is twenty-one years of age or older, or allowing property to be used, in any of the acts described in paragraphs (a) through (e) of this subdivision.

2. Cannabis, concentrated cannabis, cannabis paraphernalia or concentrated cannabis paraphernalia involved in any way with conduct deemed lawful by this section are not contraband nor subject to seizure or forfeiture of assets under PL Article 480, CPLR 1311, or other applicable law, and no conduct deemed lawful by this section shall constitute the basis for approach, search, seizure, arrest or detention.

3. Except as provided in subdivision four of this section, in any criminal proceeding including proceedings pursuant to CPL § 710.20, no finding or determination of reasonable cause to believe a crime has been committed shall be based solely on evidence of the following facts and circumstances, either individually or in combination with each other:

(a) the odor of cannabis;

(b) the odor of burnt cannabis;

(c) the possession of or the suspicion of possession of cannabis or concentrated cannabis in the amounts authorized in this article;

(d) the possession of multiple containers of cannabis without evidence of concentrated cannabis in the amounts authorized in this article;

(e) the presence of cash or currency in proximity to cannabis or concentrated cannabis; or

(f) the planting, cultivating, harvesting, drying, processing or possessing cultivated cannabis in accordance with PL § 222.15.

4. Paragraph (b) of subdivision three of this section shall not apply when a law enforcement officer is investigating whether a person is operating a motor vehicle, vessel or snowmobile while impaired by drugs or the combined influence of drugs or of alcohol and any drug or drugs in violation of Vehicle and Traffic Law § 1192(4) or (4-a), or Navigation Law § 49-a(2)(e), or Parks, Recreation and Historic Preservation Law § 25.24(1)(d). During such investigations, the odor of burnt cannabis shall not provide probable cause to search any area of a vehicle that is not readily accessible to the driver and reasonably likely to contain evidence relevant to the driver's condition.

§ 222.10 Restrictions on cannabis use.

Unless otherwise authorized by law or regulation, no person shall:

1. smoke or vape cannabis in a location where smoking or vaping cannabis is prohibited pursuant to Public Health Law Article Thirteen-E; or

2. smoke, vape or ingest cannabis or concentrated cannabis in or upon the grounds of a school, as defined in Education Law § 1125(10) in or on a school bus, as defined in VHL § 142; provided, however, provisions of this subdivision shall not apply to acts that are in compliance with Article Three of the Cannabis Law.

Notwithstanding any other section of law, violations of restrictions on cannabis use are subject to a civil penalty not exceeding twenty-five dollars or an amount of community service not exceeding twenty hours.

§ 222.15 Personal cultivation and home possession of cannabis.

1. Except as provided for in § 41 of the Cannabis Law, and unless otherwise authorized by law or regulation, no person may:

(a) plant, cultivate, harvest, dry, process or possess more than three mature cannabis plants and three immature cannabis plants at any one time; or

(b) plant, cultivate, harvest, dry, process or possess, within his or her private residence, or on the grounds of his or her private residence, more than three mature cannabis plants and three immature cannabis plants at any one time; or

(c) being under the age of twenty-one, plant, cultivate, harvest, dry, process or possess cannabis plants.

2. No more than six mature and six immature cannabis plants may be cultivated, harvested, dried, or possessed within any private residence, or on the grounds of a person's private residence.

3. The personal cultivation of cannabis shall only be permitted within, or on the grounds of, a person's private residence.

4. Any mature or immature cannabis plant described in paragraph (a) or (b) of subdivision one of this section, and any cannabis produced by any such cannabis plant or plants cultivated, harvested, dried, processed or possessed pursuant to paragraph (a) or (b) of subdivision one of this

section shall, unless otherwise authorized by law or regulation, be stored within such person's private residence or on the grounds of such person's private residence. Such person shall take reasonable steps designed to ensure that such cultivated cannabis is in a secured place and not accessible to any person under the age of twenty-one.

5. Notwithstanding any law to the contrary, a person may lawfully possess up to five pounds of cannabis in their private residence or on the grounds of such person's private residence. Such person shall take reasonable steps designed to ensure that such cannabis is in a secured place not accessible to any person under the age of twenty-one.

6. A county, town, city or village may enact and enforce regulations to reasonably regulate the actions and conduct set forth in subdivision one of this section; provided that:

(a) a violation of any such a regulation, as approved by such county, town, city or village enacting the regulation, may constitute no more than an infraction and may be punishable by no more than a discretionary civil penalty of two hundred dollars or less; and

(b) no county, town, city or village may enact or enforce any such regulation or regulations that may completely or essentially prohibit a person from engaging in the action or conduct authorized by subdivision one of this section.

A violation of this section, other than paragraph (a) of subdivision six of this section, may be subject to a civil penalty of up to one hundred twenty-five dollars per violation.

7. The office of cannabis management shall issue regulations for the home cultivation of cannabis. The office of cannabis management shall enact, and may enforce, regulations to regulate the actions and conduct set forth in this section including requirements for, or restrictions and prohibitions on, the use of any compressed flammable gas solvents such as propane, butane, or other hexane gases for cannabis processing; or other forms of home cultivation, manufacturing, or cannabinoid production and processing, which the office determines poses a danger to public safety; and to ensure the home cultivation of cannabis is for personal use by an adult over the age of twenty-one in possession of cannabis plants, and not utilized for unlicensed commercial or illicit activity, provided any regulations issued by the office shall not completely or essentially prohibit a person from engaging in the action or conduct authorized by this section.

8. The office of cannabis management may issue guidance or advisories for the education and promotion of safe practices for activities and conduct authorized in subdivision one of this section.

9. Subdivisions one through five of this section shall not take effect until such a time as the office of cannabis management has issued regulations governing the home cultivation of cannabis. The office shall issue rules and regulations governing the home cultivation of cannabis by certified patients as defined in section three of the cannabis law, no later than six months after the effective date of this article and shall issue rules and regulations governing the home cultivation of cannabis for cannabis consumers as defined by section three of the cannabis law no later than eighteen months following the first authorized retail sale of adult-use cannabis products to a cannabis consumer.

§ 222.20 Licensing of cannabis production and distribution; defense.

In any prosecution for an offense involving cannabis under this article or an authorized local law, it is a defense that the defendant was engaged in such activity in compliance with the cannabis law.

§ 222.25 Unlawful possession of cannabis.

A person is guilty of unlawful possession of cannabis when he or she knowingly and unlawfully possesses cannabis and such cannabis weighs more than three ounces or concentrated cannabis and such concentrated cannabis weighs more than twenty-four grams.

Unlawful possession of cannabis is a violation punishable by a fine of not more than one hundred twenty-five dollars.

§ 222.30 Criminal possession of cannabis in the third degree.

A person is guilty of criminal possession of cannabis in the third degree when he or she knowingly and unlawfully possesses:

1. cannabis and such cannabis weighs more than sixteen ounces; or

2. concentrated cannabis and such concentrated cannabis weighs more than five ounces.

Criminal possession of cannabis in the third degree is a class A misdemeanor.

§ 222.35 Criminal possession of cannabis in the second degree.

A person is guilty of criminal possession of cannabis in the second degree when he or she knowingly and unlawfully possesses:

1. cannabis and such cannabis weighs more than five pounds; or

2. concentrated cannabis and such concentrated cannabis weighs more than two pounds.

Criminal possession of cannabis in the second degree is a class E felony.

§ 222.40 Criminal possession of cannabis in the first degree.

A person is guilty of criminal possession of cannabis in the first degree when he or she knowingly and unlawfully possesses:

1. cannabis and such cannabis weighs more than ten pounds; or

2. concentrated cannabis and such concentrated cannabis weighs more than four pounds.

Criminal possession of cannabis in the first degree is a class D felony.

§ 222.45 Unlawful sale of cannabis.

A person is guilty of unlawful sale of cannabis when he or she knowingly and unlawfully sells cannabis or concentrated cannabis.

Unlawful sale of cannabis is a violation punishable by a fine of not more than two hundred fifty dollars.

§ 222.50 Criminal sale of cannabis in the third degree.

A person is guilty of criminal sale of cannabis in the third degree when:

1. he or she knowingly and unlawfully sells more than three ounces of cannabis or more than twenty-four grams of concentrated cannabis; or

2. being twenty-one years of age or older, he or she knowingly and unlawfully sells or gives, or causes to be given or sold, cannabis or concentrated cannabis to a person less than twenty-one years of age; except that in any prosecution under this subdivision, it is a defense that the defendant was less than three years older than the person under the age of twenty-one at the time of the offense. This subdivision shall not apply to designated caregivers, practitioners, employees of a

registered organization or employees of a designated caregiver facility acting in compliance with article three of the cannabis law.

Criminal sale of cannabis in the third degree is a class A misdemeanor.

§ 222.55 Criminal sale of cannabis in the second degree.

A person is guilty of criminal sale of cannabis in the second degree when:

1. he or she knowingly and unlawfully sells more than sixteen ounces of cannabis or more than five ounces of concentrated cannabis; or

2. being twenty-one years of age or older, he or she knowingly and unlawfully sells or gives, or causes to be given or sold, more than three ounces of cannabis or more than twenty-four grams of concentrated cannabis to a person less than eighteen years of age. This subdivision shall not apply to designated caregivers, practitioners, employees of a registered organization or employees of a designated caregiver facility acting in compliance with article three of the cannabis law.

Criminal sale of cannabis in the second degree is a class E felony.

§ 222.60 Criminal sale of cannabis in the first degree.

A person is guilty of criminal sale of cannabis in the first degree when he or she knowingly and unlawfully sells more than five pounds of cannabis or more than two pounds of concentrated cannabis.

Criminal sale of cannabis in the first degree is a class D felony.

§ 222.65 Aggravated criminal sale of cannabis.

A person is guilty of aggravated criminal sale of cannabis when he or she knowingly and unlawfully sells cannabis or concentrated cannabis weighing one hundred pounds or more.

Aggravated criminal sale of cannabis is a class C felony.

Non-Criminal Possession of Marihuana By Persons Under Age of Twenty-One

Cannabis Law § 132(4) states:

Any person under the age of twenty-one found to be in possession of cannabis or cannabis products who is not a certified patient pursuant to article three of this chapter shall be in violation of this chapter and shall be subject to the following penalty:

(a) (i) The person shall be subject to a civil penalty of not more than fifty dollars. The civil penalty shall be payable to the office of cannabis management.

(ii) Any identifying information provided by the enforcement agency for the purpose of facilitating payment of the civil penalty shall not be shared or disclosed under any circumstances with any other agency or law enforcement division.

(b) The person shall, upon payment of the required civil penalty, be provided with information related to the dangers of underage use of cannabis and information related to cannabis use disorder by the office.

(c) The issuance and subsequent payment of such civil penalty shall in no way qualify as a criminal accusation, admission of guilt, or a criminal conviction and shall in no way operate as a disqualification of any such person from holding public office, attaining public employment, or as a forfeiture of any right or privilege.

Relief From Convictions and Juvenile Adjudications Under Former Marihuana Law

New Criminal Procedure Law § 440.46-a provides for vacatur of convictions and expungement, automatically or via petition by the defendant, when the conduct covered by the conviction is no longer a crime.
CPL § 440.46-a(4)(f) states:
The provisions of this section shall be available, used and applied in parallel fashion by the family court and the criminal courts to juvenile delinquency adjudications, adolescent offender adjudications and youthful offender adjudications.

Sex Trafficking Victims: Compelled DNA Samples
Chapter 715 of the Laws of 2021, which took effect on December 22, 2021, is designed to exempt victims of sex trafficking from the requirement to provide a DNA sample for inclusion in the state DNA identification index.
The law amends Executive Law § 995(7) to provide that the definition of designated offender shall not include a person convicted of prostitution under Penal Law § 230.00, or a person whose participation in the offense is determined by a court to have been a result of having been a victim of sex trafficking under PL § 230.34, sex trafficking of a child under PL § 230.34-a, or trafficking in persons under the Trafficking Victims Protection Act (United States Code, title 22, chapter 78).
The legislative memo states:
Pursuant to Executive Law § 995-c(3)(a), a designated offender convicted and sentenced for a crime is required to provide a sample appropriate for DNA testing to determine identification characteristics specific to such person and to be included in the state's DNA identification index. This legislation will exclude from the definition of a designated offender a person convicted of prostitution or a person whose participation in the offense the court determines was a result of having been a sex trafficking victim under federal or New York state trafficking law. We have been steadfast in our commitment to the principle that a person who is commercially sexually exploited is a victim, and must not be treated as a criminal. These victims have entered our criminal justice system by virtue of their enslavement at the hands of their traffickers. The basic human rights of sex trafficking victims have already been violated by their traffickers; we should not compound the further violation of their rights by requiring a DNA sample.

PINS/ABUSE AND NEGLECT: "INCORRIGIBILITY"

Chapter 97 of the Laws of 2021, which took effect on April 6, 2021, removes from Family Court Act Article Seven (§§ 712, 732, and 773), and Article Ten (§ 1012), references to youth being "incorrigible" and to "incorrigibility."

The Legislative memo states:

The use of the word “incorrigible” in the context of family or children’s courts dates back to the first juvenile court in Chicago in the late 1800s. It was adopted in New York when the first children's courts were established in the early 20th century and has carried over in each iteration of our juvenile or family court system since that time. Primarily applied to girls, and disproportionately to girls of color, this term - in practice - tends to single out girls of color for behaviors that do not match stereotypical feminine behavior.

“Incorrigible” is defined as a person who is “incapable of being corrected, not reformable” (Merriam-Webster) and, thus this term is completely out of line with the current understanding of the goals of our Family Court system.

The approach now in our Family Court system and more generally is to look for what is needed in order to help young people and to provide for the needs of children, a goal that is at odds with defining a young person as “incapable of being corrected.” Eliminating the use of this term would be a step forward for all young people, particularly for girls and girls of color who have disproportionately been the subject of this archaic and harmful label.

Racial justice and gender justice impact: This bill would have a positive impact on racial and gender justice in New York. The use of “incorrigibility” as a basis for Family Court intervention disparately impacts and harms girls and young women of color. Eliminating this term from the Family Court Act will send a positive message and will assist in the efforts to achieve full equality and empowerment for girls, young women, and people of color.

REVOCATION OF COMMUNITY SUPERVISION

Chapter 427 of the Laws of 2021, which generally takes effect 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.

PRISONER RIGHTS: THE "HUMANE ALTERNATIVES TO LONG-TERM SOLITARY CONFINEMENT" ACT

Chapter 93 of the Laws of 2021 limits the time an inmate can spend in segregated confinement, end the segregated confinement of vulnerable people, restrict the criteria that can result in such confinement, improve conditions of confinement, and create more humane and effective alternatives to such confinement.

From legislative memo:

SUMMARY OF PROVISIONS:

Section 1: Clarifies that the bill's provisions apply to all types and locations of segregated confinement.

Section 2: Defines "special populations" and "residential rehabilitation units".

Section 3: Prohibits the use of special diets as punishment.

Section 4: Provides for mental health screening and a heightened level of care for prisoners placed into segregated confinement or residential rehabilitation units.

Section 5: Prohibits placement of individuals who are in one of the special populations in SHU and limits their keep-lock placement to 48 hours; prohibits placement of any inmate in segregated confinement for more than 15 consecutive days or 20 out of 60 days unless specific acts are committed while in such confinement; specifies certain conditions of confinement and programs within residential rehabilitation units; creates a safety exception for people committing serious disciplinary infractions in SHU and residential rehabilitation units; prohibits the use of restraints in the residential rehabilitation units unless necessary for safety and security; prohibits placement of individuals in protective custody in segregated confinement; provides for periodic review of a person's placement in residential rehabilitation units; reinstates lost good time for successful completion of the residential rehabilitation unit program goals; provides for training of staff; and provides for public reporting.

Section 6: Creates a preference for non-disciplinary interventions by the department.

Section 7: Provides that services in residential mental health treatment units shall be at least comparable to services in residential rehabilitation units.

Section 8: Provides that inmates in residential mental health treatment units may be moved to residential rehabilitation units under certain circumstances.

Section 9: Limits the removal of inmates with mental illness from residential mental health units to residential rehabilitation units unless they commit specified acts of misconduct.

Section 10: Provides for staff training.

Section 11: Provides for Justice Center oversight of segregated confinement and residential rehabilitation units.

Section 12: Provides for Commission of Correction oversight of segregated confinement in jails.

Section 13: Provides for sections of the law to apply to jails.

Section 14: Sets forth the effective date.

JUSTIFICATION:

This bill aims to make New York's prison and jail practices more humane. The bill limits the length of time anyone can spend in segregated confinement, restricts the criteria that can result in such confinement, provides additional procedural protections prior to such confinement, and exempts certain vulnerable groups. The bill also provides an alternative mechanism for working with people who engage in serious violence or other problematic behavior.

Studies have consistently found that subjecting people to segregated confinement for twenty-two to twenty-four hours a day without meaningful human contact, programming, or therapy can cause deep and permanent psychological, physical, developmental, and social harm. People often have more difficulty complying with prison rules after being placed in segregated confinement. Segregated confinement can be particularly devastating for certain vulnerable people, such as young or elderly people, pregnant women, and people with disabilities or trauma histories. Other states have dramatically reduced the number of people in segregated confinement and seen positive benefits in terms of safety and decreased violence.

Despite the tremendous harm caused by massive isolation of thousands of incarcerated persons, New York prisons and jails currently impose segregated confinement routinely for too long a period of time. On any given day, there are nearly 3,000 people, disproportionately people of color, in state prisons in Special Housing Units (SHU) and thousands more in other forms of isolation. There are also hundreds of people in segregated confinement in jails in New York City alone. Despite claims that segregated confinement is used in response to the most violent behavior, five out of six disciplinary infractions that result in SHU time in New York prisons are for non-violent conduct. Moreover, people routinely suffer in segregated confinement for months, years, and even decades in New York.

A growing chorus of individuals, organizations, and policymakers has called for a dramatic transformation and curtailment of the use of segregated confinement. The United Nations Special Report on Torture concluded that solitary confinement can amount to torture and recommended abolishing its use beyond 15 days and prohibiting any use of solitary for vulnerable groups or purposes of punishment. The New York Civil Liberties Union and others have issued reports documenting the arbitrary and unjustified use of segregated confinement in New York and the negative impact its use has on incarcerated persons, staff, and safety in our prisons and communities. The New York State Bar Association has called upon the state and city corrections departments to profoundly restrict the use of segregated confinement, end segregated confinement beyond 15 days, adopt stringent criteria for any separation and ensure any separation is for the briefest period and in the least restrictive conditions practicable. This bill takes up the growing call to limit segregated confinement and provide more humane and effective alternatives.

PENAL LAW: LOITERING FOR THE PURPOSE OF ENGAGING IN A PROSTITUTION OFFENSE

Chapter 23 of the Laws of 2021, effective February 2, 2021, repeals Penal Law § 240.37.
Excerpts from legislative memo:
"As many feared and predicted, Section 240.37's vagueness has led to arbitrary and discriminatory enforcement. Enforcement of Penal Law Section 240.37 targets marginalized women in the commercial sex industry, a group at high risk for trafficking and other exploitation and abuse. It is also duplicative and unnecessary when considered against other statutes that criminalize the behavior at issue."
"Arrests under Section 240.37 disproportionately impact women, particularly cisgender and transgender women of color and women who have previously been arrested for prostitution offenses. Eighty-five percent of the individuals arrested under Section 240.37 between 2012-2015 were Black or Latina. In particular, women of color have often been unlawfully targeted by officers under this statute during "sweeps" or "operations" where officers arrest large numbers of women in a given area at the same time."
"Section 240.37 represents a vestige of an approach that has been universally disavowed. Arrests under the law foster distrust of law enforcement, which hurts victims of trafficking and impedes broader efforts to investigate and punish more serious criminal activity. Exposure to repeated arrests, and resulting criminal records, make it difficult for women to leave the commercial sex industry and seek assistance when victimized."

PENAL LAW: COERCION
Chapter 484 of the Laws of 2021 amends Penal Law § 135.60 (coercion in the third degree) to include coercing a person to produce, disseminate, or otherwise display an image or images depicting nudity of such person or depicting such person engaged in sexual conduct.
The law took effect on December 19, 2021.

POST-CONVICTION MOTIONS TO VACATE JUDGMENT OF CONVICTION: RIGHT TO COUNSEL CLAIMS

Chapter 501 of the Laws of 2021, which took effect on October 25, 2021, amends Criminal Procedure Law § 440.10(2)(b) and (2)(c), which are designed to prevent a defendant from using section § 440.10 as a substitute for direct appeal, to remove the existing bars to collateral review where the claim is the ineffective assistance of counsel.

NEW YORK STATE POLICE BODY-WORN CAMERAS PROGRAM

Chapter 105 of the Laws of 2020 (the "New York state police body-worn cameras program"), adds a new Executive Law § 234 that "create[s] within the division of state police a New York state police body-worn cameras program. The purpose of the program is to increase accountability and evidence for law enforcement and the residents of the state by providing body-worn cameras to all state police officers while on patrol.

Chapter 105 took effect on April 1, 2021.

The division of state police shall provide body-worn cameras, to be worn by officers at all times, while on patrol. Such cameras shall record:

(a) immediately before an officer exits a patrol vehicle to interact with a person or situation, even if there is a dash camera inside such vehicle which might also be recording the interaction;

(b) all uses of force, including any physical aggression and use of a non-lethal or lethal weapon;

(c) all arrests and summonses;

(d) all interactions with people suspected of criminal activity;

(e) all searches of persons and property;

(f) any call to a crime in progress;

(g) investigative actions where there are interactions with members of the public;

(h) any interaction with an emotionally disturbed person; and

(i) any instances where officers feel any imminent danger or the need to document their time on duty.

The attorney general may investigate any instance where body cameras fail to record an event pursuant to this section.

At the discretion of the officer, body-worn cameras may not record:

(a) sensitive encounters, including but not limited to speaking with a confidential informant, or conducting a strip search; or

(b) when a member of the public asks such officer to turn off the camera; provided, however, such officer may continue recording if he or she thinks a record of that interaction should be generated.

The division of state police shall preserve recordings of such body-worn cameras and perform all upkeep on equipment used in such body-worn cameras. Such duties shall include:

(a) creating a secure record of all instances where there is recorded video or audio footage;

(b) ensuring officers have sufficient storage capacity on their cameras to allow for the recording of interactions required by this section; and

(c) ensuring officers have access to body-worn cameras for the recording of instances required by this section.

Legislative Memo

As one of the largest state police agencies in the country, the New York State police should also be one of the first state police departments in the country, which promote accountability with this measure. There are many studies, which have been conducted, that show a direct co-relation between the usage of body-worn cameras and a drop in use of force incidents, and citizen's complaints against police officers. Most recently, the police department in Rialto, California, conducted a study which showed that in the test period in which they enacted a policy for patrol officers to wear body-worn cameras, use of force incidents, and citizen complaints dropped by 50 and 90 percent respectively.

Freedom of Information And Civil Rights Law § 50-b: Exemptions From Disclosure

Chapter 808 of the Laws of 2021, which took effect on December 30, 2021, amends the Freedom of Information Law.

POL § 87(2) is amended to state that a denial of access shall not be based solely on the record's category or type and shall be valid only when there is a particularized and specific justification for such denial.

New Public Officers Law § 89(10) states that nothing in FOIL shall be construed to limit a party to any civil or criminal action or proceeding from gaining access to records pursuant to FOIL relating to such action or proceeding; provided, however, that access may be denied based on particularized and specific justification under FOIL.

POL § 89(6) is amended to state that a denial of access to records or to portions thereof shall not limit or abridge any party's right of access to the records pursuant to the CPLR, the CPL, or any other law.

New Public Officers Law § 87(6) states that when a request is made for agency records and the agency is considering denying access on the grounds that disclosure would interfere with a judicial proceeding, the agency shall promptly notify, in writing, the judge before whom the proceeding is pending and the person making the request. The judge shall offer the person requesting access a reasonable opportunity to be heard, and, after due deliberation, the judge shall determine whether access should be denied and shall submit such determination in writing to the agency and the person requesting the record. The agency shall then proceed in accordance with the court's determination.

Civil Rights Law § 50-b is amended to clarify that only the portions of a report that would identify a victim of a sexual offense are exempt from disclosure.

Hearsay: Admissibility Of Party Admissions

Chapter 833 of the Laws of 2021, which took effect on December 31, 2021 and applies to all actions pending on or after that date, adds a new CPLR 4549 which provides:

A statement offered against an opposing party shall not be excluded from evidence as hearsay if made by a person whom the opposing party authorized to make a statement on the subject or by the opposing party's agent or employee on a matter within the scope of that relationship and during the existence of that relationship.

Excerpts from legislative memo:

The measure is intended to change the extent of authority that a proponent must show in order to make the hearsay statement of an opposing party's agent or employee admissible. While under current law it appears clear that a hearsay statement will be admissible if there was actual authority to speak on behalf of the party, such authority often may be shown only by implication in light of the circumstances of the employment or agency relationship. In practice, this tends to limit "speaking authority" to only the high levels of management.

We believe a strict requirement to demonstrate such authority to speak may exclude reliable proof of an event, even though the employer as a party might not be treated unfairly by admissibility, either because the statement is true and made by a person with relevant knowledge, or because the employer is able to introduce other proof in opposition to the implications of the hearsay statement. As noted above, the current strict requirement to show speaking authority is contrary to Federal Rule of Evidence. See Barker and Alexander, Evidence in New York State and Federal Courts (2d ed.) 8:26, p. 148.

We believe that the Federal approach is an improvement over the current state of New York decisional law, and that trial judges will exercise appropriate discretion to exclude such hearsay evidence when there is inadequate foundation or indicia of reliability.

II. JUVENILE DELINQUENCY CASELAW

Statute Of Limitations

ADOLESCENT OFFENDERS - Removal
STATUTE OF LIMITATIONS - Respondents Over 18 Years Of Age

The Court denies the People's motion to prevent removal of this rape prosecution to family court, rejecting the People's contention that cases involving defendants who commit crimes when they are 17 years old are "extraordinary in and of themselves" because, if the case is not retained in the Youth Part, the defendant cannot be held responsible if a family court petition is not filed before the defendant turns 18. There appears to be an omission or oversight in the relevant Family Court Act provisions, and the Court is concerned about the ramifications of removing the case. However, the Court cannot assume the legislature's role and rewrite the statute.

People v. M.R.
(County Ct., Nassau Co., 6/15/21)
http://nycourts.gov/reporter/3dseries/2021/2021_21168.htm

Sealing, Expungement And Confidentiality

ADOLESCENT OFFENDERS - Removal
CONFIDENTIALITY - Juvenile Family Court Records

In this grand larceny auto prosecution which also involved a crash into a police vehicle that caused an officer to sustain injuries, the Court denies the People's motion to prevent removal to family court, finding insufficient proof of extraordinary circumstances.

The Court notes that the People cite extensively to defendant's history and past contacts with the New Jersey Family Court, but FCA § 381.2(1) prohibits admission of this history as evidence against defendant or his interests; that evidence of defendant's and his co-defendants' premeditation and planning in the commission of this offense is an aggravating factor, but there are mitigating factors including the fact that defendant resides with a foster mother due to his mother's alleged substance abuse issues and currently has no contact with his biological father; and that the People have not alleged that this defendant is responsible for causing anyone to sustain a physical injury.

People v. T.P.
(County Ct., Nassau Co., 9/20/21)
https://www.law.com/newyorklawjournal/almID/1637351776NYredacted/

* * *

ADOLESCENT OFFENDERS - Removal

CONFIDENTIALITY

It is alleged that defendant, his co-defendant, and an uncharged third individual were walking through the streets while defendant and the co-defendant were carrying loaded pistols; and that when they saw police surveilling and moving towards them, they approached a nearby dumpster and left the loaded firearms abandoned in the dumpster as they attempted to flee.

The Court denies the People's motion to prevent removal to Family Court, concluding that the People have failed to meet their burden of establishing "extraordinary circumstances." The People have failed to present evidence outside of the felony complaint, which consists of vague, hearsay-based allegations.

Family Court Act § 381.2 precludes consideration of defendant's juvenile delinquency history and records. The Court has considered defendant's previous arrest on serious weapon possession charges that were removed to Family Court, and the mitigating factors articulated by defense counsel, such as defendant's ADHD diagnosis and his substance abuse problems.

People v. J.A.D.
(County Ct., Nassau Co., 3/1/21)
http://nycourts.gov/reporter/3dseries/2021/2021_50189.htm

* * *

SEALING - Removal Cases

The People seek an order pursuant to Judiciary Law § 2-b(3) and CPL § 725.15 unsealing the records of the juvenile's criminal proceeding, which the People state they are compelled to disclose to satisfy their disclosure obligations in the prosecution of the juvenile's adult co-defendant. CPL § 725.15 states that "[e]xcept where specifically required or permitted by statute or upon specific authorization of the court that directed removal of an action to the family court all official records and papers of the action up to and including the order of removal, whether on file with the court, a police agency or the division of criminal justice services, are confidential and must not be made available to any person or public or private agency, provided however that availability of copies of any such records and papers on file with the family court shall be governed by provisions that apply to family court records."

The Court denies the People's motion. The People have not cited to any legal authority for unsealing. In fact, in Herald Co., Inc. v. Mariani (67 N.Y.2d 668), the Court of Appeals held that an application for release of sealed records brought pursuant to CPL § 725.15 must be made to the family court, to be determined in accordance with standards applicable to juvenile delinquency proceedings in that court. In addition, CPL § 725.10(2) provides, in pertinent part, that the filing of an order of removal in the criminal court terminates the criminal court action upon which the order is based and all further proceedings including motions shall be in accordance with family court laws.

People v. G.V.
(County Ct., Nassau Co., 9/10/21)
https://nycourts.gov/reporter/3dseries/2021/2021_21321.htm

* * *

DISCOVERY - Medical Records
HIPAA
PHYSICIAN-PATIENT PRIVILEGE

After defendant's arraignment in Criminal Court, the People submitted a so-ordered subpoena for defendant's Harlem Hospital records to the Grand Jury judge. The Assistant District Attorney's supporting affirmation referred to defense counsel's arraignment argument that defendant sustained "defensive wounds."

After defendant was indicted, he eventually received, through discovery, the medical records obtained by the People. Defense counsel challenged the propriety of the so-ordered subpoena before a second supreme court justice, to whom this case was previously assigned. After counsel argued that the subpoena violated HIPAA and should not have been procured ex parte, the justice found no impropriety, but agreed to consider the matter further if defense counsel submitted her argument in writing. Defendant now asks this Court to, inter alia, direct the People to return the records to the court to be maintained under seal, and to bar the ADA who obtained the records from further involvement in the case.

The Court declines to direct the return of the records, and disqualification of the ADA, but does direct the People not to disclose or disseminate the records further.

For purposes of HIPAA, a so-ordered subpoena is akin to a court order, and is not the equivalent of an ordinary attorney's subpoena. And, this case concerns a grand jury subpoena, regarding which notice is impractical and potentially ill-advised. In addition, the Court will not overrule the two justices who considered the subpoena proper.

The People may have been able to clarify through counsel whether defendant intended to testify and assert a justification defense in the grand jury before resorting to an ex parte records request. However, even if the subpoena violated HIPAA, the records are not subject to outright suppression. Similarly, the physician-patient privilege is a statutory right only, without constitutional underpinning. Violation of a statute does not, without more, justify suppressing evidence.

People v. Johnny Marrero
(Sup. Ct., N.Y. Co., 4/13/21)
http://nycourts.gov/reporter/3dseries/2021/2021_21093.htm

Petitions

ACCUSATORY INSTRUMENTS - Language/Translation Issues

In these three appeals, defendants challenge the facial sufficiency of the accusatory instruments, arguing that participation of a translator in the process of documenting the information from first-party witnesses with limited-English proficiency created a hearsay defect requiring dismissal.

In Slade and Brooks, the Court holds that no facial defect was evident within the four corners of the accusatory instrument. And in People v. Allen, where the participation of a translator was documented within the witness's supporting affidavit, the Court also concludes that no additional layer of hearsay was created by the use of a translator, and therefore that accusatory instrument too was facially sufficient.

Defects that do not appear on the face of the accusatory instrument are latent deficiencies that do not require dismissal. In Slade and Brooks, certificates of translation were created, but were not incorporated into the accusatory instrument.

In Allen, the complainant stated in her supporting deposition that she had the one-page English-language statement read to her in Spanish by a police officer. However, no hearsay defect exists where the four corners of the instrument indicate only that an accurate, verbatim translation occurred, and the witness or complainant adopted the statement as their own by signing the instrument after the translation.

Nothing precludes a defendant who discovers a specific translation-related latent hearsay defect in the accusatory instrument before trial from using other options available under the Criminal Procedure Law to ensure that the supporting deposition meets statutory requirements.

Judge Rivera and Judge Wilson dissent. Judge Rivera asserts that "[t]he accusatory instrument is a legal nullity without proof that the deponent understood and adopted the allegations ascribed to them. This fundamental flaw is not subject to our prior 'latent defects' analysis because the instrument is void ab initio." "A defendant is unlikely to 'discover' the inadequacy of the translation or the translator's skills when, according to the majority, the prosecutor is under no obligation to provide a certificate of translation or any statement of accuracy."

Judge Wilson notes: "The witness's signature is sufficient to establish the truth, even if the witness has no idea what the document says, so long as a reader cannot tell that from the document itself. Even if other evidence available to the court or parties conclusively shows that the witness does not understand English, or that the translator was inept or unable, it is of no moment. Indeed, the prosecution is not required to show that the translator interpreted for the witness the affirmations regarding perjury and false statements that are critical to the sufficiency of an information or complaint…." "The majority deprives defendants of the CPL's core procedural protections. It eviscerates the efforts of our trial courts to require some minimal assurance that statements verified in a language unintelligible to the affiant are true, knowing that those statements will, in almost

every case, never be tested for veracity. And it does so based upon a skewed vision of victim's rights in which inadequate or unknown translation is preferred to the truth."

People v. Kenneth Slade, People v. Kieth Brooks, People v. Charo Allen
(Ct. App., 5/6/21)

* * *

ACCUSATORY INSTRUMENTS - Constructive Amendment/Change In Theory At Trial
RIGHT OF CONFRONTATION - Limitation Of Cross-Examination

The Second Department vacates defendant's burglary convictions for burglary in the second degree where the bill of particulars incorporated the allegations of the criminal complaint regarding intent to commit property damage and/or theft, but the trial court permitted the prosecutor to argue during summation, and permitted the jury to consider, the uncharged theory that defendant intended to assault the complainant.

The Court also finds error, albeit harmless beyond a reasonable doubt, where the trial limited defendant's cross examination of a witness who was responsible for maintenance and for letting rooms in the rooming house, with regard to the illegality of the rooming house and the damaged condition of doors in the home other than those alleged to have been damaged by defendant.

People v. Gary Petersen
(2d Dept., 1/13/21)

* * *

COLLATERAL ESTOPPEL
PETITIONS - Use Of Hearsay/Video Recordings
ASSAULT - Serious Physical Injury
ADOLESCENT OFFENDERS - Removal

After the adolescent offender matter was removed from the youth part, a designated felony petition was filed in family court. Respondent contends that the non-hearsay allegations in the petition are insufficient, and that the counts which require proof of serious physical injury should be dismissed based upon collateral estoppel because, at the retention hearing held in the youth part, the prosecution failed to prove that respondent caused "significant physical injury" to the victim.

The Court denies the motion to dismiss. With respect to the sufficiency of the non-hearsay allegations, the Court notes that the officer's statement that the person he observed in a surveillance video slashing the victim's face was respondent is legally sufficient to establish respondent's identity; that the officer's allegations that the camera focused on the East Side of Third Avenue, where the incident occurred, and that the time and date stamp on the video were accurate, demonstrate that the video surveillance camera was in proper working order; that a large,

prominent, puffy, dark, three-inch scar visible on the victim's face almost five months after the assault constitutes serious and protracted disfigurement; and that possession of a deadly weapon or dangerous instrument may be inferred circumstantially from respondent's slashing motion on the victim's upper face, which appears in the video, and the resulting profuse bleeding and three-inch scar on the victim's face where he was slashed.

The Court does agree with respondent that it cannot consider the authenticated hospital records because they are unsworn, and that in order to be treated as a sworn allegation, an unsworn but admissible hearsay statement must be annexed to a supporting deposition which attests to the foundational basis of its admissibility.

With respect to collateral estoppel, the Court concludes that two of the prerequisites for application of the doctrine - a final and valid prior judgment, and a full and fair opportunity to litigate the issue - were not established, and that policy considerations strongly militate against giving preclusive effect to a determination made at a retention hearing. The matter concluded in the youth part with an order removing the case, not dismissal. The retention hearing was an abbreviated proceeding held just six days after arraignment. The accusatory instrument was reviewed, and the prosecution presented documentary evidence. No witnesses were called. The serious and protracted disfigurement issue could not be fully litigated at a proceeding that took place just six days after respondent's arrest, when it could not yet be determined if the victim suffered permanent scarring or protracted disfigurement. Moreover, the prosecutor's incentive to litigate the issue of serious physical injury is stronger at a fact-finding hearing than at a retention hearing.

Matter of Isaiah D.
(Fam. Ct., N.Y. Co., 7/27/21)
https://www.nycourts.gov/reporter/3dseries/2021/2021_21200.htm

* * *

ACCUSATORY INSTRUMENTS - Duplicitous Count

The Third Department rejects defendant's contention that a count of the indictment is duplicitous where it alleges that defendant struck the victim with both a rock and a golf club, resulting in two distinct injuries.

Defendant's actions - striking the victim in the face with a rock and then striking the victim's back and sides with a golf club shaft as she attempted to flee - constituted an uninterrupted course of conduct directed at a single person.

People v. Saifur Abussalam
(3d Dept., 7/29/21)

* * *

PETITIONS - Time Of Offense
WITNESSES - Competency To Be Sworn

In February 2019, a juvenile delinquency was filed against respondent alleging three incidents (the victim). It was alleged that respondent engaged in oral and anal sexual conduct with the victim, who was then seven years old. Following a fact-finding hearing, at which the victim provided sworn testimony, the family court determined that respondent had committed acts which, if committed by an adult, would have constituted the crimes of criminal sexual act in the first degree and sexual abuse in the first degree.

In this sex crime prosecution involving a victim (respondent's stepbrother) who was seven years old at the time of the three incidents that allegedly occurred "in or about the [s]ummer of 2018," the Third Department rejects respondent's contention that the petition is facially insufficient because it fails to set forth a time frame sufficient to allow respondent to prepare a defense. The victim recalled in his statement that the incidents had occurred after school, in the daylight when it was still warm outside. The victim's mother recounted an incident that occurred in July or August 2018 when another one of her children had made a similar allegation with respect to respondent, and further recalled approximately six occasions during the summer of 2018 when respondent and the victim had been alone in the victim's bedroom.

The family court did not err in allowing the then eight-year-old victim to give sworn testimony at the fact-finding hearing. Although preliminary questioning indicated that he did not know what an oath is, that fact is not determinative, particularly where, as here, he understood the difference between the truth and a lie and that he was required to testify truthfully at the fact-finding hearing, and promised that he would so testify; and evinced an understanding that, if he were to tell a lie, he could "get in trouble" and be punished by the court.

Matter of Alexander CC.
(3d Dept., 2/18/21)

* * *

ACCUSATORY INSTRUMENTS - Identification Of Defendant

The Court dismisses for facial insufficiency a charge of petit larceny where the allegations that it was defendant who got into the deponent's car and stole property are conclusory. There is no reason to doubt that the complainant observed a male individual engage in the alleged conduct, but there is no basis alleged for the identification of defendant, whom the complainant had never met before.

People v. Kyle Drexler
(Justice Ct. of Town of Webster, Monroe Co., 12/9/21)
https://nycourts.gov/reporter/3dseries/2021/2021_51150.htm

* * *

ACCUSATORY INSTRUMENTS - Identity Of Defendant

The Appellate Term finds facially insufficient a charge of sexual abuse in the second degree brought against defendant Edwin Solito-Leon, concluding that there is no reasonable cause to believe that it was this defendant who committed the crime charged where annexed to the misdemeanor complaint was a signed statement by defendant in which he admitted knowing a girl who was identified only by her first name, and stated that she kissed him but he did not kiss her back; a supporting deposition was filed in which the female child complainant alleged that an "Edwin Gonzalez" committed specified acts of sexual abuse in the second degree against her; a prosecutor's information was subsequently filed, which charged defendant with sexual abuse in the second degree, and contained an allegation that "defendant [] touch[ed] the vagina of H. M., a 13-year-old[,] while attempting to engage in further sexual contact"; and annexed to the information is a copy of the original misdemeanor complaint and the supporting deposition of the complainant.

People v. Edwin Solito-Leon
(App. Term, 2d Dept., 9th & 10th Jud. Dist., 12/3/21)
https://nycourts.gov/reporter/3dseries/2021/2021_51174.htm

* * *

ACCUSATORY INSTRUMENTS - Amendment/Name Of Complainant

The Appellate Term rejects defendant's contention that the complaint was not duly converted to an information because the complaint referred to Catifah Morgan, but the supporting deposition was signed by Latifah Morgan. The court below erred in denying the People's request that the complaint be amended to reflect that the first name of the informant-victim was Latifah, not Catifah.

In the complaint, the deponent police officer refers to only one informant-victim: Catifah Morgan. In the supporting deposition, Latifah Morgan clarified that the correct first letter of her first name is "L," not "C," by crossing out the type-written "C" in "Catifah" and replacing it with a handwritten "L" and initialing the change.

A concurring judge notes that it is not entirely clear whether correction of the complainant's name was permitted in the absence of a superseding accusatory instrument.

People v. Kimone Johnson-McLean
(App. Term, 1st Dept., 3/24/21)

Initial Appearance and Detention

PRISONERS RIGHTS - Child Visitation
VISITATION - Incarcerated Parents

Between October 2017 and August 2018, Manning was a pretrial detainee at the Muscatine (Iowa) County Jail ("MCJ"). At the time, Manning had two children between the ages of 11 and 13. In August 2018, Manning filed a pro se complaint against the Muscatine County Sheriff and various MCJ officials and staff claiming that defendants violated his constitutional rights by denying visitation with his children pursuant to a blanket policy at MCJ prohibiting pretrial detainees from being visited by minor children.

Manning sought injunctive relief, punitive damages, and an order directing MCJ to change its policy. The district court granted defendants' motion for summary judgment, noting that Manning offered no cases to demonstrate that a reasonable official would have been aware that defendants' conduct under the MCJ policy was unconstitutional.

The Eighth Circuit affirms, upholding the qualified immunity ruling. "The time is ripe, however, to clearly establish that such behavior may amount to a constitutional violation in the future." The Court joins the Seventh Circuit in holding that prison officials who permanently or arbitrarily deny an inmate visits with family members in disregard of the factors described in *Turner v. Safley* (482 U.S. 78) and *Overton v. Bazzetta* (539 U.S. 126) have acted in violation of the Constitution.

Manning v. Ryan
2021 WL 4256160 (8th Cir., 9/20/21)

Orders Of Protection

ORDERS OF PROTECTION - Right To Hearing

After first concluding that this proceeding falls within the exception to the mootness doctrine because it implicates substantial issues that will likely recur elsewhere and that typically evade review, the First Department holds that when the defendant presents the criminal court with information showing that there may be an immediate and significant deprivation of a substantial personal or property interest upon issuance of a temporary order of protection, the court should conduct a prompt evidentiary hearing on notice to all parties and in a manner that enables the judge to ascertain the facts necessary to decide whether or not the TOP should be issued. This Court need not articulate the precise form of the evidentiary hearing required.

Matter of Crawford v. Ally
(1st Dept., 6/24/21)

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 Disciplinary Records

The People are required to disclose "[a]ll 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: impeach the credibility of a testifying prosecution witness." CPL § 245.20(1)(k)(iv).

The Court rejects the People's contention that this obligation is merely a codification of their Brady and Giglio obligations. The statute does not include Brady's "materiality" requirement, and "tends to impeach" has appropriately been defined as that which tends to demonstrate an untruthful bent or significantly reveals a willingness to place the advancement of the person's individual self-interest ahead of principle or of the interest of society, or proof that the person is guilty of prior immoral, vicious or criminal conduct bearing on credibility.

Thus, impeachment evidence and information is not limited to that which is related to the subject matter of the underlying case. A contrary holding would mean that, in a new discovery article that in all other respects expanded the People's disclosure obligations, the Legislature narrowed disclosure requirements with respect to impeachment material, and would allow a police witness to escape scrutiny for prior immoral, vicious or criminal acts he or she may have committed which may affect his or her character and show lack of credibility. Particularly in light of the repeal of Civil Rights Law § 50-a, and the expanded scope of disclosure under the Freedom of Information Law, the People's discovery obligation includes any record created in furtherance of a law enforcement disciplinary proceeding, not just "information." 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.

It is not for the People to decide if a particular item from a disciplinary record might be admissible or might impeach a witness. To hold otherwise conflates discovery with admissibility at hearing or trial.

People v. Gerald Pennant
(Dist. Ct., Nassau Co., 1st Dist., 10/15/21)
https://www.nycourts.gov/reporter/3dseries/2021/2021_21277.htm

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DISCOVERY - Police Misconduct Allegations

The Court concludes that the People's certificate of compliance was invalid where the People failed to comply with CPL § 245.20(1)(k)(iv) by providing defendant with information and evidence regarding substantiated and unsubstantiated allegations of police misconduct. "Unsubstantiated" allegations of misconduct have not been disproven; they are termed "unsubstantiated" because the absence of evidence precludes resolution of the allegation one way or the other.

The Court rejects the People's contention that summaries of misconduct allegations are sufficient. Here, for instance, the officer was alleged to have acted improperly during a chase of a vehicle after the driver committed a traffic infraction. Nothing in the summary of the incident suggests that the officer did anything that would impact negatively on his credibility and provides a basis for using the misconduct as a basis for inquiry. Whoever prepared the summary "certainly was not looking at the evidence through the eyes of a defense attorney."

People v. Johnny Edwards
(Crim. Ct., N.Y. Co., 10/8/21)
https://www.nycourts.gov/reporter/3dseries/2021/2021_50944.htm

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DISCOVERY - Witness Contact Information

The Court concludes that the prosecution's disclosure of information that permits defense counsel to contact a witness through a third-party, proxy telephone service (WitCom or Verizon Witness Bridge) that conceals the witness's actual telephone number satisfies the requirement in CPL § 245.20(1)(e) that requires the prosecutor to provide the defendant with adequate contact information for potential civilian witnesses. The Court notes that "[d]efendant plainly is not entitled to the address of a potential witness," nor does the statute require disclosure of a telephone number or an email address.

People v. Manuel Escamilla
(Sup. Ct., Kings Co., 2/8/21)
http://nycourts.gov/reporter/3dseries/2021/2021_50101.htm

* * *

DISCOVERY - Statements By Defendant

The Court holds that the People's obligation under CPL § 245.10(1)(c) to disclose to defendant any statements he made to law enforcement at least 48 hours before he testifies in the grand jury was not satisfied by disclosure of the "sum and substance" of the videotaped statement rather than the recording itself. Whether to testify in the grand jury is a strategic decision of critical importance. Only by viewing the actual recording can counsel fully understand the circumstances in which the statements were made, including any questions to which the statements responded, and thus be able to provide meaningful and informed advice.

The Court also holds that where, as here, the People's unjustifiable failure to disclose a defendant's statements results in the defendant's testimony before the grand jury being delayed beyond the time set by CPL § 180.80, the defendant must be released in accord with § 180.80. The defendant cannot be forced to choose one right over the other.

People v. Rockeem McMillian
(Crim. Ct., Bronx Co., 1/28/21)
http://nycourts.gov/reporter/3dseries/2021/2021_21016.htm

* * *

FREEDOM OF INFORMATION LAW - Disciplinary Records

Shortly after the repeal of § 50-a of the New York Civil Rights Law, New York City announced its intention to proactively publish certain types of disciplinary records and provide other records upon request consistent with its obligations under New York's Freedom of Information Law. Several unions representing uniformed members of the New York City Police Department, the New York City Fire Department, and the New York City Department of Correction filed this action and moved to preliminarily enjoin any disclosure of allegations of misconduct against their members that are unsubstantiated, unfounded, or non-final, or that resulted in an exoneration or a finding of not guilty.

The District Court denied a preliminary injunction premised on a collective bargaining agreement provision which states that upon an officer's "written request to the Chief of Personnel," NYPD "will ... remove from the Personnel Folder investigative reports which, upon completion of the investigation are classified 'exonerated' and/or 'unfounded.'" The District Court granted a preliminary injunction premised on a CBA provision stating that when a police officer who has "been charged with a 'Schedule A' violation as listed in [the] Patrol Guide" proceeds to a disciplinary trial on such charge and is not determined guilty, the officer may then "petition the Police Commissioner for a review for the purpose of expunging the record of the case."

The Second Circuit agrees with the District Court's CBA-related rulings. Removal of investigative reports from a personnel file does not mean eliminating them from all of the City's records. Moreover, the NYPD cannot bargain away its FOIL disclosure obligations. The Court also notes that "Schedule A" lists "technical violations" such as "[i]mproper uniform or equipment" and "[r]eporting late for duty."

In affirming, the Court also notes that the Unions have pointed to no evidence that the availability of records resulted in harm to employment opportunities; that the Unions have not demonstrated that dangers and risks to officers are likely to increase because of the planned disclosures; and that because the public has a stronger legitimate interest in the disciplinary records of law enforcement officers than in those of other public employees, the District Court correctly determined that there was a rational, nondiscriminatory basis for treating the two sets of records differently.

Uniformed Fire Officers Association et al. v. de Blasio et al.
2021 WL 561505 (2d Cir., 2/16/21)

* * *

BRADY MATERIAL - Impeachment/Police Misconduct Evidence
DISCOVERY

Plaintiff in this § 1983 action first sought post-conviction relief in New York state court after learning that the Manhattan District Attorney's Office had failed to disclose that members of the narcotics team had been sued no fewer than thirty-five times in federal court for allegedly falsifying evidence, making false statements, and making unlawful arrests. Three officers who testified - defendants in this action - had been sued no fewer than twenty-nine times. The state court granted plaintiff's motion to vacate his conviction, holding that the civil lawsuits were material exculpatory evidence, and that the DA had violated Brady by failing to disclose them.

Plaintiff now brings this § 1983 suit against the three officers, and also sues the City of New York based on the policies of the NYPD and the DA's Office. Defendants have moved for judgment on the pleadings on the Brady-dependent claims.

The Court denies the motion. The officers have a clear, independent duty to share with the prosecution any potentially exculpatory or impeaching evidence they possess. The Court is not persuaded by any distinction (see *People v. Garrett*, 23 N.Y.3d 878) in the § 1983 context between allegations of misconduct which has some bearing on the case against the defendant, and allegations that apparently have no relationship to the defendant. It makes no difference whether material directly implicates physical evidence in the case, or, instead, impeaches a key witness who happens to be a testifying officer.

Plaintiff also has stated a claim for relief based on the policies of the NYPD, and the City can be liable for policies of the DA. Plaintiff has alleged that the DA had an "unlawful policy ... for prosecutors to refrain from asking police officer-witnesses about civil suits or allegations of

misconduct against them unrelated to the prosecution at hand," and that the purpose of the policy "was to avoid obtaining actual knowledge of information that such prosecutors would be obligated under Brady to disclose" and to signal "that the Office was indifferent to disclosure of such information generally and encouraged a lax attitude about disclosing such information even when prosecutors knew about it." When the primary evidence against the defendant is the testimony of police officers, prosecutors have a duty to inquire about potential impeachment material that reflects on the credibility of those officers. The Constitution does not endorse a "don't ask don't tell" policy with respect to Brady material.

Fraser v. City of New York
2021 WL 1338795 (S.D.N.Y., 4/9/21)

* * *

DISCOVERY - Police Disciplinary Records
FREEDOM OF INFORMATION LAW

The Court denies a motion to quash a defense subpoena that requires, "in accordance with Public Officers Law §§ 86, 87 and 89," the production by the Nassau County Police Department of "all disciplinary records, civilian complaints, investigations and Internal Affairs Bureau records pertaining to any investigation[s] of Det. Galgano [and Det. Concannon.]."

There is nothing vague or unreasonably expansive about the subpoena. It directs production of nothing more than that to which defendant would be entitled pursuant to a FOIL request. In repealing Civil Rights Law § 50-a, the legislature intended to make law enforcement disciplinary records fully available. The definition of "law enforcement disciplinary records" does not distinguish between "unfounded," "exonerated," "substantiated" or "unsubstantiated." The definition references "any record created in furtherance of a law enforcement disciplinary proceeding."

The Court will not, at this stage, conduct an in camera review to determine what defendant may and may not see. Appropriate use of the information and its admissibility can be addressed upon a motion in limine. Also, there is no reason why the Court should direct defendant and his attorney not to publicly share the information they receive. Privacy concerns should be allayed by limitations on disclosure set forth in FOIL.

People v. Carlos Herrera
(Dist. Ct., Nassau Co., 1st Dist., 4/5/21)
http://nycourts.gov/reporter/3dseries/2021/2021_50280.htm

* * *

DISCOVERY - Police Disciplinary Records
- Body Worn Cameras

- Service Of Documents

The Court rejects defendant's contention that the People's Certificate of Compliance is invalid because it was served on his attorney's work e-mail address instead of the e-mail address designated by Brooklyn Defender Services for service from the Kings County District Attorney's Office. Although defendant and the People have cited a "letter" outlining the terms of electronic service, the "letter" has never been presented to or approved by the Court, and defendant has cited no stature requiring that the Court adhere to the parties' private agreement with respect to service.

The People satisfied their disclosure obligation when they provided letters listing all pending and substantiated complaints against each of the officers involved in this case who may be called by the People to testify at a hearing or trial.

The Court also holds that although Body Worn Camera footage is discoverable pursuant to CPL § 245.20(1)(g) (tapes and electronic recordings), BWC audit trail data - which describes the history, tracking and management of the camera itself, is created by a third-party vendor and not stored by the NYPD, and offers no additional information regarding the subject matter of the criminal case - is not discoverable absent a particularized showing that the audit trail is likely to contain relevant information about the charges which cannot be ascertained from the footage itself. Disclosure also is not required pursuant to CPL § 245.20(1)(u)(i)(B) as that statute relates to information "seized or obtained" by or on behalf of law enforcement, not information electronically generated by law enforcement personnel.

People v. Malik Williams
(Sup. Ct., Kings Co., 11/15/21)
https://nycourts.gov/reporter/3dseries/2021/2021_21310.htm

* * *

DISCOVERY - Police Disciplinary Records
- Witness Contact Information

The Court concludes that under CPL § 245.20(1)(k), the People are not required to obtain and disclose all personnel records in the possession of the New York City Police Department. CPL § 245.20(2) limits the items deemed to be in the People's custody and control to those "related to the prosecution of a charge in the possession of any New York state or local police or law enforcement agency." Police personnel records do not relate to the prosecution of the charge. This limitation also applies to CPL § 245.55(1), which requires the People to establish a flow of information with law enforcement necessary to obtain "all material and information pertinent to the defendant and the offense or offenses charged."

These materials may "relate to the subject matter of the case" under CPL § 245.20(1), and thus are discoverable if the People have substantiated IAB or CCRB materials in their actual possession and they "tend to … impeach" a witness's credibility. However, the People are not required to

disclose unsubstantiated complaints since they involve a determination that the allegation was not established by a preponderance of the evidence and thus do not provide a good faith basis for an attempt to impeach.

The repeal of Civil Rights Law § 50-a undermines defendant's position. The prosecutor shall not be required to obtain by subpoena duces tecum material or information which the defendant may thereby obtain. CPL § 245.20(2). As a result of the § 50-a repeal, police personnel materials may be obtained by subpoena.

The Court also concludes that the People have disclosed adequate contact information, as required by CPL § 245.20(1)(c), by providing the defense with a means of contacting civilian witnesses through the Verizon Witness Portal, rather than the witnesses' personal phone numbers and addresses.

People v. Ashley Perez
(Sup. Ct., Queens Co., 6/14/21)
http://nycourts.gov/reporter/3dseries/2021/2021_21165.htm

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DISCOVERY - Impeachment Material/Police Disciplinary Records
- Witness Convictions

The Court finds discovery inadequate under CPL § 245.20(1)(p) (disclosure of "complete record of judgments of conviction for all persons designated as witnesses") where the People provided only a statement that the complaining witness was convicted under Florida Statute 817.034 on October 20, 2003. The People are ordered to provide the docket number, the particular section of the statute that was the basis for the conviction, the court in which the conviction occurred, the sentence imposed, and any other materials concerning the conviction in the People's possession, custody or control.

The Court finds overbroad defendant's request for disclosure of "all underlying reports pertaining to substantiated and unsubstantiated allegations of misconduct for the officer." The statute does not require disclosure of the officer's entire personnel file. However, the People must disclose all allegations and underlying materials on which substantiated disciplinary findings are based. Records of substantiated charges of failure to follow procedures, dishonesty, or other improper conduct are tangible evidence and information that bear directly on an officer's credibility as a witness in any case, regardless of what might be the particular crime charged. Impeachment evidence and information is not limited to that which is related to the subject matter of the underlying case. Without question, evidence and information underlying a substantiated disciplinary complaint would "tend to impeach" a witness's credibility, and it is not for the People to determine whether a particular item might be admissible or might serve as impeachment material.

Since the CCRB is not a law enforcement agency acting on the government's behalf in this case, the People are directed to disclose only those underlying CCRB records concerning the allegation against the officer that are in the People's possession.

People v. Eliezer Soto
(Crim. Ct., N.Y. Co., 7/30/21)
https://nycourts.gov/reporter/3dseries/2021/2021_21204.htm

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DISCOVERY - Impeachment Material/Police Misconduct Allegations

The Court concludes that allegations with a good faith basis which tend to impeach, and were investigated by the police department, must be disclosed. As to such materials, the People must disclose to the defendant any available IAB files, in any form, involving any witness they intend to call at a hearing and/or trial regardless of the police department's view of the allegation as substantiated," "unsubstantiated," "unfounded," or "exonerated." The statute requires disclosure of "all evidence and information," and therefore the entire underlying file must be turned over, not only shortened summary investigative reports. Personal information, such as social security numbers and tax numbers, may be redacted. Only after compliance with the statute can the parties be properly prepared to make arguments in limine regarding permissible areas of cross-examination.

Here, the Court cannot find that the People have complied with the statute where they have considered for potential disclosure only those investigations the police department determined were "substantiated" and "unsubstantiated"; they cannot state based upon personal knowledge that they have provided all information and material in their possession which "tends to impeach" their police witnesses; they have not examined the underlying files to determine what Brady material exists therein; and they have turned over only summary investigative reports prepared by the police department.

People v. Fidel Portillo
(Sup. Ct., Suffolk Co., 7/23/21)
https://nycourts.gov/reporter/3dseries/2021/2021_21207.htm

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DISCOVERY - Impeachment Material/Police Misconduct Allegations

The Court holds that the People's discovery obligation under CPL § 245.20(1)(k) includes any record created in furtherance of a law enforcement disciplinary proceeding. It is not for the People to decide, in the first instance, if a particular item from a disciplinary record might be admissible or might impeach a witness. These items must be disclosed regardless of whether the prosecutor finds the information to be material or credible. If, after reviewing a disciplinary record, the People

believe certain items are not subject to disclosure, they may seek a protective order. To hold otherwise conflates discovery with admissibility at hearing or trial.

The withholding of disciplinary records by law enforcement agencies is no excuse for the People's failure to disclose, and the People's failure to state that they have actually examined the officer's disciplinary file means that they cannot be found to have exercised due diligence in determining the existence of discoverable impeachment material that might be in a disciplinary or personnel file.

People v. Kyle Salters
(Dist. Ct., Nassau Co., 8/20/21)
https://nycourts.gov/reporter/3dseries/2021/2021_50800.htm

* * *

DISCOVERY - Impeachment Material/Police Disciplinary Records

Addressing the People's obligation to make a diligent, good faith effort to discover impeachment materials pursuant to CPL § 245.20(1)(k)(iv), the Court notes that the assistant district attorney assigned to the case relied on information provided to him by the Discovery Compliance Unit within his office. The DCU was set up to act as the principal liaison between the Bronx County District Attorney's Office and various law enforcement agencies and the Civilian Complaint Review Board, for the purpose of obtaining and maintaining officers' disciplinary records.

In this case, the Court concludes that the People established due diligence, good faith, and the reasonableness of their actions under the circumstances. The Court rejects defense counsel's contention that the People have an affirmative obligation to produce the underlying records related to disciplinary proceedings. Because the underlying records do not relate to the prosecution of the charge, they are not deemed to be in the People's control. Also, the People's continuing duty to disclose does not entail obtaining the testifying officers' personnel records on a weekly basis. Civil Rights Law § 50-a has been repealed, and defense counsel is in possession of all the information needed to seek a subpoena or make Freedom of Information Law requests for the misconduct complaints at issue.

The Court also notes that the IAB and CCRB complaints against the officer are not related to this incident. The two substantiated IAB complaints related to marijuana found in a police vehicle after the officer failed to perform a proper search, and the five unsubstantiated complaints, involve violations of police department rules and regulations. Even the unsubstantiated "use of force" allegation is not relevant since defense counsel does not allege that the officer threatened, coerced, or assaulted defendant at any point.

However, in order to discharge their continuing statutory and constitutional duty to make diligent, good faith efforts to ascertain the existence of and obtain materials that tend to impeach their

witnesses' credibility, the People would be well-advised to obtain and review underlying documents.

However, in order to discharge their continuing statutory and constitutional duty to make diligent, good faith efforts to ascertain the existence of and obtain materials that tend to impeach their witnesses' credibility, the People would be well-advised to obtain and review underlying documents.

People v. Robert Ferrer
(Crim. Ct., Bronx Co., 7/28/21)
https://nycourts.gov/reporter/3dseries/2021/2021_50706.htm

* * *

DISCOVERY - Police Disciplinary Records

The Court concludes that discovery under CPL § 245.20(1)(k)(iv) of evidence and information that tends to impeach the credibility of a testifying prosecution witness includes all of a testifying officer's disciplinary records regardless of subject matter or the People's assessment of its credibility or usefulness.

The legislative intent in repealing Civil Rights Law § 50-a was to make law enforcement disciplinary records fully available. The definition of law enforcement disciplinary records in FOIL does not distinguish between labels such as unfounded, exonerated, substantiated or unsubstantiated. Any impeachment material relative to a prosecution witness must be disclosed.

Since possession of police records is imputed to the People, the People must obtain them and make them available to the defense. Requiring the defense to make a formal demand by way of a FOIL request, a subpoena or a court order would shift the People's discovery burden to the defense. Moreover, the Court is aware that FOIL requests in this County have largely gone unanswered.

People v. Cooper
(County Ct., Erie Co., 2/23/21)
http://nycourts.gov/reporter/3dseries/2021/2021_21039.htm

* * *

DISCOVERY - Police Disciplinary Records

The Court holds that CPL § 245.20(1)(k) does not require disclosure of a police officer's full personnel or disciplinary records, but the People are required to examine the officer's personnel and disciplinary files to ascertain whether they contain discoverable material.

People v. Mat Altug

(Crim. Ct., N.Y. Co., 2/9/21)
http://nycourts.gov/reporter/3dseries/2021/2021_50145.htm

* * *

DISCOVERY - Bad Acts/Police Misconduct

The Court concludes that the People have complied with the discovery requirement in CPL § 245.20(1)(k)(iv) where they have provided the defense with documents that contain descriptions of misconduct for each testifying prosecution witness for whom such records exist.

The information is culled from Internal Affairs Bureau files, Civilian Complaint Review Board files, Police Department personnel files, and civil lawsuits. For each witness, the People provided a name and tax identification number, the date of the allegation, the source of the information, and a narrative of the allegation, including the precise nature of the misconduct and a general description of the individual who made the allegation. The People also provided the investigative steps taken by the Bureau, Board, or Department. Details regarding the result of any investigation or departmental trial, including punishment meted out, are also included. And, where a civil lawsuit is still pending, the People so indicate.

The Court rejects defendant's contention that because of the repeal of Civil Rights Law § 50-a, the People must provide police personnel records. The repeal of § 50-a does not automatically entitle the defendant to the entirety of an officer's personnel file. Rather, it makes personnel files subject to inspection pursuant to Freedom of Information and Public Officers Laws.

The People also submitted for the Court's in camera inspection a series of unsubstantiated allegations of police misconduct, and the Court directs the People to provide to defendant all such allegations against officers the People intend to call as witnesses at trial.

People v. Mohammed Akhlaq
(Sup. Ct., Kings Co., 3/15/21)
http://nycourts.gov/reporter/3dseries/2021/2021_21060.htm

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DISCOVERY - Police Disciplinary Records

The Court rejects defendants' argument that internal personnel records maintained by police agencies are automatically discoverable under CPL § 245.20(1)(k) and that knowledge of their existence and their contents are imputed to the People.

CPL §240.20(1) restricts the universe of discoverable information to that which relates to the subject matter of the case. There must be a flow of information between prosecutors and law

enforcement agencies, and prosecutors have the burden of sifting through material in search of evidence that "tends" to impeach witnesses or otherwise benefit the defendant.

In contrast, the Legislature imputes to prosecutors knowledge and possession only of items and information possessed by law enforcement agencies that are related to the "prosecution of a charge." Although defendants argue that all internal disciplinary files of law enforcement officers are related to the prosecution of the charge, defendants fail to explain how evidence of an officer's misconduct in an unrelated investigation could prove or disprove the specific elements of the charges.

While the recent repeal of Civil Rights Law § 50-a will make it easier for defendants and their attorneys to obtain that information, it does not alter the prosecution's discovery obligations under CPL Article 245.

People v. Martin & Hill
(County Ct., Erie Co., 4/7/21)
http://nycourts.gov/reporter/3dseries/2021/2021_50348.htm

* * *

DISCOVERY - Police Personnel Records

The Court concludes that after the repeal of Civil Rights Law § 50-a, New York requires that police officers' personnel records be made available to the public, and thus they are available to a federal civil rights plaintiff if the records are relevant to the litigation. The right of a criminal defendant, who faces the loss of personal liberty, to such information is undoubtedly consistent with a civil rights plaintiffs' entitlement to it.

The Court directs the People to provide to defendant all substantiated and unsubstantiated law enforcement personnel records.

People v. Juan Perez
(Crim. Ct., Bronx Co., 4/8/21)
http://nycourts.gov/reporter/3dseries/2021/2021_50374.htm

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DISCOVERY - Police Disciplinary Records And Information

The Court denies the NYPD's motions to quash the People's subpoenas for records related to police misconduct charges. The Court holds that "unsubstantiated" findings must be provided to the defense under CPL § 245.20(1)(k)(iv). Unlike the facts underlying "exonerated" and "unfounded" complaints, the facts underlying substantiated and unsubstantiated findings may provide a good faith basis for cross examination.

The Court also concludes that a summary that gives only a general description of misconduct is not sufficient. The statute explicitly states that "all" information and evidence that tends to impeach credibility must be disclosed, and thus underlying records for substantiated and unsubstantiated misconduct complaints must be provided by the People. Defendants are entitled to detailed information so they can understand the specific nature and degree of the misconduct, determine its relevance to a particular defense, and prepare arguments as to its use on cross-examination. If any citizen can now file a FOIL request for these records, it makes no sense to conclude that, in a criminal proceeding, the People's obligations do not extend to the underlying records.

The Court rejects the NYPD's contention that the underlying records are not related to the "subject matter of the case" (see CPL § 245.20[1]), and are not deemed to be in the possession of the People under CPL § 245.20 (refers to "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"). If the NYPD's interpretation is accepted, the People would have no obligation to provide even substantiated misconduct complaints that are unrelated to the police officer's conduct in the particular case.

Whether defendants may use any of these records at a hearing or at trial is a decision left to the sound discretion of the trial court. That court must balance the nature of the misconduct allegation, the police officer's role in the case, and the possibility of prejudice or confusion.

People v. Castellanos & Swift
(Sup. Ct., Bronx Co., 4/30/21)
http://nycourts.gov/reporter/3dseries/2021/2021_21126.htm

* * *

DISCOVERY - Witness Impeachment Evidence/Police Disciplinary Records

The Court deems the People's Certificate of Compliance invalid and grants defendant's motion to dismiss the information, noting, inter alia, that the prior complaint accusing the complaining witness of harassing defendant's daughter is impeachment evidence discoverable under CPL § 245.20(1)(k)(iv); with respect to police disciplinary matters, that disclosure of the underlying records for substantiated and unsubstantiated complaints - not just summaries of misconduct - is required; and that while the CCRB is an independent agency that is not under the People's control, the People are obligated to turn over to defendant any relevant CCRB records they have in their actual possession if those records are not available on CCRB's web site.

People v. Shakin McKinney
(Crim. Ct., Kings Co., 5/19/21)
http://nycourts.gov/reporter/3dseries/2021/2021_50456.htm

* * *

DISCOVERY - Police Misconduct/Bad Acts

The Court holds that internal police personnel and disciplinary files are deemed to be in the People's possession, and that the People must provide all underlying materials, or make them available to defendant, for substantiated, and unsubstantiated (when allegation cannot be resolved because sufficient evidence is not available) cases against their police witnesses. The People may seek an in limine ruling precluding cross-examination where the nature of the conduct or the circumstances in which it occurred does not bear logically and reasonably on the witness's credibility.

The People are not obligated to provide materials related to "exonerated" (where the act was legal, proper and necessary), or unfounded allegations, since, in those instances, there is no good faith basis for cross-examination by defense counsel and the evidence or information does not tend to or have an inclination to impeach a police witness.

The civil lawsuits involving one of the officers were dismissed with prejudice, and thus the police files for those matters do not have to be provided. Despite this, the People have provided defendant with materials related to the lawsuits. The People have no affirmative duty to search the dockets in every federal and state court in New York for complaints against their police witnesses.

People v. Devin Kelly
(Crim. Ct., N.Y. Co., 3/19/21)
http://nycourts.gov/reporter/3dseries/2021/2021_50264.htm

* * *

DISCOVERY - Police Misconduct Evidence

The Court, after finding the People's certificate of compliance and concomitant statement of readiness invalid and not filed in good faith and reasonable under the circumstances, the Court directs that the People "file an additional certificate of compliance containing sufficient facts from which a due diligence determination can be made, stating that the prosecutor 'and/or an appropriate named agent' has made reasonable inquiries of all police officers and other persons who have participated in investigating or evaluating the case about the existence of any favorable evidence or information within [CPL § 245.20(1)(k)], including such evidence or information that was not reduced to writing or otherwise.

The People, who relied on prospective law enforcement witnesses self-reporting impeachable acts on questionnaires, concede that this discovery compliance plan was built upon a legally incorrect understanding of § 245.20(1)(k)(iv).

People v. Christopher Johnson
(County Ct., Albany Co., 1/5/21)
http://nycourts.gov/reporter/3dseries/2021/2021_50004.htm

Ethics and Judicial/Attorney Misconduct And Fair Trial

JUDGES - Bias
SENTENCE - Racial Discrimination

At the persistent felony offender hearing, defendant asked defense counsel to desist and indicated that he wished to speak for himself. When the court advised defendant that it would disregard his request, the situation rapidly deteriorated and defendant, who is black, charged the court with being motivated by race. The court directed court personnel, three times, to bind defendant's mouth with masking tape, although that "dire" directive was not implemented and defense counsel completed his comments. The court offered defendant an opportunity to speak and defendant proceeded to challenge the proceedings as racially biased.

Then, the court stated, "I feel sorry for you" because "I know that if we were to look in your mind we would find that your brain, your frontal lobes, your decision making processes are probably retarded in growth." The court "inexplicably and shockingly" reiterated, "Because we have learned through medicine, through science, that physical mental abuse especially at a young age will stunt the growth of the frontal lobes which prevents people from making decisions," and stated that the sentence "is in a way to make you safe from hurting yourself or others, because I appreciate the fact that your brain is not developed, through no fault of your own."

The Third Department vacates defendant's persistent felony offender sentence, and sentences defendant as a second felony offender. "It is shocking that any court, in 2018, would refer to this black defendant's brain, frontal lobes and retardation of growth in concluding that defendant's brain was not developed. Defendant is not a child or an adolescent, but was a 41-year-old grown black man at the time of sentencing. County Court's statements are textbook language that has been used since the late 19th century and even today to justify racist ideologies and beliefs that black people are an inferior race. We find the court's commentary dehumanizing and offensive. To invoke such reasoning today is utterly racist and has no place in our system of justice."

It is difficult to correlate the court's final recommendation that defendant "be housed in a maximum security prison … [and] not be paroled at all," with the court's final comment to defendant, "[h]ave a nice day."

People v. Angelo Johnson
(3d Dept., 7/1/21)

* * *

ETHICS - Conflict Of Interest

In this Kings County murder prosecution, the Court disqualifies The Legal Aid Society from representing defendant where The Legal Aid Society's Brooklyn office has represented the

decedent in multiple criminal cases since 2004, including several open matters pending at the time of the decedent's death.

The defense concedes that there is the likelihood a justification defense will be raised. This will require an intimate understanding of the decedent and the decedent's prior conduct, which creates the potential for the appearance of impropriety. The Court notes that the case is in its infancy and neither party has filed a certificate of discovery compliance.

People v. Dion Edwards
(Sup. Ct., Kings Co., 11/9/21)
https://nycourts.gov/reporter/3dseries/2021/2021_51047.htm

* * *

JUDGES - Excessive Interference In Trial
POSSESSION OF A WEAPON - Constructive Possession

The Second Department finds legally sufficient evidence that defendant constructively possessed a firearm where the evidence showed, inter alia, that defendant resided in the premises for six years; that defendant was aware of the presence of the firearm in the kitchen cabinet above the refrigerator; that defendant received mail at the premises; and that defendant's DNA was found on the firearm.

A 3-judge majority rejects defendant's contention that the trial court unduly interfered in the proceedings by engaging in excessive questioning of witnesses, noting that the court questioned a detectives involved in the search warrant execution to clarify why another occupant of the residence was listed as the owner of certain items seized and vouchered, and that the court intervened to facilitate the orderly and expeditious progress of the trial and to assist in posing questions of witnesses. The fact that more than 200 questions were asked by the court during trial is not dispositive. The conduct of the court did not prevent the jury from arriving at an impartial judgment on the merits.

The dissenting judges assert that the trial judge engaged in extensive questioning of witnesses, usurped the role of the prosecutor, elicited significant testimony from the People's witnesses, made statements summarizing and characterizing the testimony of witnesses, undermined the defense's cross-examination, and generally created the impression that he was an advocate for the People. The court elicited testimony which had been stricken, afforded an explanation to what otherwise would have been a hole in the People's theory that the gun belonged to defendant, and undermined the defense's theory that the firearm belonged to another individual and had no connection to defendant.

People v. Bruce Parker
(2d Dept., 8/25/21)

* * *

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

The Second Department finds reversible error in the judge's denial of defendant's request for recusal of the judge from presiding over the sentencing proceeding where, after the verdict was rendered but prior to sentencing, the judge hired as his law clerk a former Queens County Assistant District Attorney who had been involved in the investigation and the early stages of defendant's prosecution.

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. Although due process principles did not require recusal, as there was no indication that the judge had a direct personal, substantial, or pecuniary interest in the case, the law clerk was not screened from working on the case and, according to the judge, actually discussed sentencing with the judge. Under the circumstances, the judge should have recused himself in a special effort to maintain the appearance of impartiality.

People v. John Hymes
(2d Dept., 4/21/21)

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JUDGES - Participation In Plea Bargaining
SEARCH AND SEIZURE - Stop And Frisk

The Fourth Department concludes that the police had reasonable suspicion supporting a stop and frisk where the officer testified that he received a radio dispatch reporting a robbery, providing a description of two suspects who were armed with handguns, and providing the global position system tracking location of a cellular phone taken from a victim during the robbery; and, within seconds of the radio dispatch, the officer arrived at that location and stopped defendant, who matched the general description.

However, the court committed reversible error when it negotiated and entered into a plea agreement requiring the co-defendant to testify against defendant in exchange for a more favorable sentence.

People v. Rondell Johnson
(4th Dept., 10/1/21)

Confessions/Admissions/Self Incrimination

CONFESSIONS - Miranda/Pedigree Exception
EXPERT TESTIMONY - DNA Analysis

Pursuant to police department policy, defendant was handcuffed when officers executed a search warrant. A detective asked defendant his name, date of birth, address, height, and weight. Defendant stated that his children's mother let him stay at the apartment, motioning toward a bed in the living room. No Miranda warnings were given to defendant before those questions were asked, and no contraband had yet been found. After defendant's departure from the apartment, the officers recovered weapons, drugs, and drug paraphernalia from a back bedroom.

The suppression court ruled that defendant's statement that he lived in the apartment was admissible because it fell within the scope of the pedigree exception to the Miranda requirement. Before trial, defendant moved to preclude expert testimony regarding the probability that he was a contributor to a multiple-source DNA sample - a statistic derived from the use of the Forensic Statistical Tool - or, in the alternative, for a Frye hearing. The court denied defendant's motion without a Frye hearing.

With respect to the pedigree exception, the Court of Appeals notes that if the biographical questions are reasonably related to police administrative concerns, and thus meet the threshold requirement for the exception to apply, the fact that the response may ultimately turn out to be

incriminating at trial does not alter the analysis. However, the exception will not apply where, under the circumstances, a reasonable person would conclude based on an objective analysis that the pedigree question was a disguised attempt at investigatory interrogation: the suppression court may consider the subjective intent of the officer, but the inquiry itself must be objective.

Here, the pedigree exception applied. There was an administrative purpose: at a location where a search warrant is to be executed, the police must know whom they have in custody. Although there may be some circumstances in which asking a suspect for core identifying information such as name, date of birth, and address will not qualify for the exception, those circumstances will be rare. This was not a disguised attempt at investigatory interrogation. The police asked defendant the questions immediately after their entry, before the apartment had been searched and before any contraband had been found. The detective testified that it is standard practice for all adults found at a location where a search warrant is executed to be handcuffed and asked these pedigree questions, regardless of whether contraband is found during the search.

However, reversal is warranted because the court abused its discretion when it denied defendant's motion for a Frye hearing with respect to the admissibility of evidence derived from the FST on a multiple-source DNA sample. The Court remits for a Frye hearing. If the court determines that the DNA evidence derived from the use of the FST is not admissible, defendant is entitled to a new trial. If the court determines that the evidence is admissible, defendant may challenge that determination on direct appeal.

Dissenting, Judge Rivera asserts that the majority has departed from the holding in People v Rodney (85 N.Y.2d 289) that limits the pedigree exception to questions that are intended solely for administrative purposes and not reasonably likely to elicit an incriminating statement under the circumstances. Judge Wilson agrees, and also asserts that the remedy for the Frye violation should be vacatur of the conviction since the trial court’s error in admitting the DNA evidence without a Frye hearing deprived defendant of his right to a fair trial.

People v. Tyrone Wortham
(Ct. App., 11/23/21)

* * *

CONFESSIONS - Voluntariness/Knowing And Intelligent Waiver Of Rights

In a 3-2 decision, the First Department upholds the denial of suppression of 15-year-old respondent’s videotaped statements to law enforcement officials.

The majority notes that *Miranda* warnings for juveniles were read and written copies of the warnings were given to respondent and his grandfather, and, while the written form was not signed, respondent and his grandfather waived the *Miranda* rights; that, contrary to the characterization of the dissenting judges, the *Miranda* warnings were not “pro forma” and were read in a manner that was clear and deliberate; that respondent’s expert in juvenile forensic psychology noted in his

report that respondent tested as having an IQ of 74 and was in the "borderline range" of certain verbal comprehension, perceptual reasoning, reading comprehension, and expressive vocabulary tests, but also stated that respondent had a basic comprehension and understanding of *Miranda* rights at the time of his testing that was consistent with other 15-year-old adolescents of comparable abilities; that the expert's conclusion that respondent could not have made an intelligent, knowing, and voluntary waiver was undermined by evidence of respondent's completion of a test that required answers to 189 written questions in 20 minutes; and that the expert acknowledged that a 2015 individualized education plan rated respondent as a "strong reader" and indicated that he could "retell a story and is able to answer questions based on his reading."

The dissenting judges note respondent's young age, low IQ scores, and limited intellectual functioning; that the expert's conclusions were confirmed by educational records showing that respondent had been selected for an individualized education plan and had consistently been evaluated as having intellectual disabilities, including a low IQ with reading, listening, and comprehension difficulties; that "it is unclear how the fact that [respondent] gave unidentified responses to a specific number of unidentified questions within a certain period of time during the forensic examination bears any relevance to the issue of whether [respondent] had the ability to comprehend the *Miranda* warnings under the circumstances"; that the IEP records indicated that respondent, who was in ninth grade, was reading at a fourth-grade level, and the fact that he was in an IEP program suggests that he had educational disabilities consistent with the analysis and conclusions of the expert; that the grandfather had a conflict of interest since he was also the guardian of the alleged victim, respondent's sister, and he provided no advice or assistance, and made a comment that was intended to assist the officers' attempts to deceive respondent into making a self- incriminating statement; and that respondent was arrested at school instead of his home, placed in handcuffs during intervals prior to the interrogation, separated from a guardian for hours between his arrest and the interrogation, and unable to privately consult with his grandfather before the interrogation, and was seated in the corner of a very small interrogation room next to his grandfather and directly across from two police interrogators.

Matter of Tyler L.
(2d Dept., 8/18/21)

* * *

PRISONERS RIGHTS - Recording And Admission Of Phone Calls
CONFESSIONS

The First Department concludes that the admission of a recorded telephone call defendant made while incarcerated at Rikers Island before trial did not violate his constitutional right to equal protection because he was treated differently than he would have been had he been at liberty.

While defendant concedes that substantial interests in prison safety and security justify conditioning the use of facility telephones on inmates' consent to having the calls monitored, he

claims that equal protection forbids giving prosecutors access to the content of such calls in the absence of a warrant. However, once an inmate implicitly consents to the recording of his calls, the inmate retains no reasonable expectation of privacy that would prevent the correctional facility from disclosing the recording.

While defendant was treated disparately in that he was required to either consent to recording or go without telephone use, this differential treatment did not run afoul of the equal protection clause. Because defendant cannot establish that the governmental action at issue disadvantages a suspect class or burdens a fundamental right, it is not subject to strict scrutiny review and it need only be shown that it is rationally related to a legitimate governmental purpose. The interest in safety and security in the prisons constitutes such a purpose. Indeed, even if strict scrutiny applied, the requirement of a compelling justification is met.

People v. Demel Jennings
(1st Dept., 5/20/21)

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CONFESSIONS - Hearing/Burdens

An investigator testified that he spoke with defendant after defendant was read his rights. When asked who read defendant his Miranda rights, the investigator testified that the first trooper did so. The prosecutor then asked, "Did you speak with him?" and the investigator responded, "Yes."

The Third Department suppresses defendant's statements, concluding that although hearsay is admissible at a suppression hearing, any inference that the trooper told the investigator that he read defendant his rights does not establish beyond a reasonable doubt that defendant was advised of his Miranda rights before being questioned.

People v. Marcel Teixeira-Ingram
(3d Dept., 11/24/21)

* * *

CONFESSIONS - Miranda Warnings
- Invocation Of Right To Remain Silent

The Fourth Department finds no error where the officer suggested that one Miranda right was more important than the others. However, suppression is required because the officer's statement - "now [was] the time" for defendant to provide an explanation for the shooting and such an explanation would benefit defendant - undid the heart of the warning that anything defendant said could and would be used against him.

Moreover, defendant unequivocally invoked his right to remain silent when, about 20 minutes into the interrogation, defendant stated that he did not "want to talk about more of this" (i.e., the shooting). "That's it."

People v. Adalberto Marrero
(4th Dept., 11/19/21)

* * *

CONFESSIONS - Pedigree Information

During the execution of a search warrant, defendant made statements identifying the room in which he resided. The Second Department holds that the hearing court erred in denying suppression of defendant's statements. The People failed to establish that the information contained in defendant's statements constituted pedigree information in these circumstances.

People v. Jesus Rottela
(2d Dept., 5/26/21)

* * *

CONFESSIONS - Voluntariness/Coercion

Thirteen-year-old Tobias confessed to a murder he did not commit after an interrogation in which Los Angeles Police Department detectives, inter alia, ignored his request for an attorney, told him that he would look like a "cold-blooded killer" if he did not confess, and suggested that if he were to exercise his right to remain silent he would receive harsher treatment by the court. A California appeals court reversed the conviction, concluding that the confession should have been suppressed because the detectives failed to respect his unambiguous request for an attorney.

In this § 1983 action against the three LAPD detectives who conducted the interrogation, Tobias asserted violations of his Fifth and Fourteenth Amendment rights. The detectives appeal the district court's denial of their motion for summary judgment based on qualified immunity.

The Ninth Circuit affirms the denial of qualified immunity on the Fifth Amendment claims that the officers continued to question Tobias after he invoked his right to silence and that they engaged in unconstitutional coercive questioning tactics. The Court reverses the denial of qualified immunity on Tobias's Fourteenth Amendment substantive due process claim because it was not clearly established that the abusive interrogation techniques rose to the level of "abuse of power that shocks the conscience."

With respect to the Fifth Amendment claims, the Court notes that Tobias asked for his mother and was assured that she would be right in, but was then confronted with another round of increasingly aggressive interrogation instead; that for over an hour, Tobias was cursed at, called a liar,

"emotionally worn down," "hammered" with questions, and "pressured" to confess; that the detectives falsely insisted that they had strong evidence of guilt and promised leniency if Tobias confessed; that one detective repeatedly invoked Tobias's family to emotionally manipulate him, saying that he was disgusted that Tobias was going to drag his mother into the proceedings by refusing to provide a confession; that the interrogation left Tobias infused with a sense of helplessness and fear; and that when he spoke to his mother directly after the interview, she described him as "panicking," "crying," and "scared to shit."

With respect to the Fourteenth Amendment claim, the Court notes that this extended, overbearing interrogation of a minor, who was isolated from family and his requested attorney, comes close to the level of "psychological torture" the Court has held is not tolerated by the Fourteenth Amendment. However, the interrogation lasted under two hours, while prior cases in which the Court found "psychological torture" involved hours of questioning. The detectives' behavior was similar to - but not obviously worse than - the officers' behavior in other cases.

Tobias v. Arteaga
2021 WL 1621323 (9th Cir., 4/27/21)

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ORDER OF PROOF - Re-Opening Hearing
UNCHARGED CRIMES EVIDENCE

The People's Voluntary Disclosure Form notified defendant of the People's intent to offer a statement overheard by a special agent while defendant and the co-defendant were in a holding cell, and a second statement overheard by a detective while defendant and the co-defendant were being driven to Central Booking.

At the initial Huntley hearing, the People called the special agent as a witness, but not the detective. The court ruled only that the statement overheard by the special agent was admissible. At a pretrial conference 16 months later, the prosecutor, explaining that the special agent was unavailable to testify because he had been transferred to an assignment outside the United States, asked the court to reopen the suppression hearing to allow the detective to testify to the statement he allegedly overheard. The court granted the application over defense objection, and, after the detective's testimony, ruled that the statement was admissible. The special agent did not testify at trial, and only the statement overheard by the detective was received in evidence.

The First Department finds reversible error in the court's decision to re-open the hearing. This is not a case in which the omission of evidence at the initial hearing resulted from a flaw in the proceeding.

In addition, while some evidence regarding the large-scale drug trafficking crimes with which defendant's girlfriend and her relatives were charged was relevant to provide background information regarding the search of the apartment where a pistol was found and defendant was

arrested, and to prove that defendant's possession of the pistol was knowing, the very extensive evidence admitted in this regard was unnecessarily prejudicial.

People v. Maximilian Nunez
(1st Dept., 1/19/21)

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CONFESSIONS - Statements To Private Individuals/Eavesdropping By Police

The Court suppresses statements defendant made to his girlfriend - a suspected accessory - and another individual during surreptitiously recorded cellphone calls from a precinct interrogation room. The calls were recorded with the same audio-visual equipment used to record lawful interrogations that had just concluded.

Because there was neither notice to defendant nor evidence in the record that the recording equipment was clearly visible and the monitoring of defendant apparent, it was reasonable for defendant to expect privacy during calls he made with the encouragement of the police and apparent privacy given that the police left him alone in the interrogation room and closed the door.

People v. Kyle Williams
(Sup. Ct., Kings Co., 12/23/21)
https://www.nycourts.gov/reporter/3dseries/2021/2021_21352.htm

Search And Seizure

SEARCH AND SEIZURE - Payton/Exigent Circumstances

In an opinion by Justice Kagan, joined by Justices Breyer, Sotomayor, Gorsuch, Kavanaugh and Barrett, the Supreme Court holds that the pursuit of a fleeing misdemeanor suspect does not always qualify as an exigent circumstance that justified a warrantless entry into a home. On many occasions, the officer will have good reason to enter - to prevent imminent harms of violence, destruction of evidence, or escape from the home. But when the officer has time to get a warrant, he must do so even though the misdemeanant fled.

The Court has held that when a minor offense alone is involved, police officers do not usually face the kind of emergency that can justify a warrantless home entry. A suspect's flight changes the calculus, but not enough to justify a categorical rule. A categorical rule would treat a dangerous offender and a scared teenager the same. The only cases in which the Court and the concurrence reach a different result are cases involving flight alone, without exigencies like the destruction of evidence, violence to others, or escape from the home, and it is telling that the concurrence hardly talks about those "flight alone" cases.

In a concurring opinion, Chief Justice Roberts, joined by Justice Alito, asserts that the Constitution does not demand this "absurd and dangerous" result. Hot pursuit is not merely a setting in which other exigent circumstances justifying warrantless entry might emerge - it is itself an exigent circumstance.

Justice Kavanaugh, in a concurring opinion, asserts that the difference between the Chief Justice's approach and the Court's approach will be academic in most instances because cases of fleeing misdemeanants will almost always also involve a recognized exigent circumstance - such as a risk of escape, destruction of evidence, or harm to others.

Lange v. California
2021 WL 2557068 (U.S. Sup. Ct., 6/23/21)

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SEARCH AND SEIZURE - Stop/Seizure

Neither Torres, the plaintiff in this § 1983 action, nor her companion was the target of the officers' arrest warrant. As the officers approached the vehicle where Torres was standing, the companion departed, and Torres got into the driver's seat. The officers attempted to speak with her, but she did not notice their presence until one of them tried to open the door of her car. Although the officers wore tactical vests marked with police identification, Torres saw only that they had guns, and thought they were carjackers. She hit the gas to escape. The officers fired 13 shots at Torres, striking her twice in the back and temporarily paralyzing her left arm. Steering with her right arm, Torres accelerated through the fusillade of bullets, and exited the apartment complex. She was not arrested until the next day, at a hospital where she was being treated. She pleaded no contest to aggravated fleeing from a law enforcement officer, assault on a peace officer, and unlawfully taking a motor vehicle, but later sought damages in this § 1983 action.

In a 5-3 decision (Roberts, joined by Breyer, Sotomayor, Kagan and Kavanaugh, with Gorsuch, Alito and Thomas dissenting), the Supreme Court holds that there was a Fourth Amendment seizure. The Court does not address the reasonableness of the seizure, or qualified immunity.

A seizure occurs when an officer shoots someone who temporarily eludes capture after being shot. The application of physical force to the body of a person with intent to restrain is a seizure, even if the force does not succeed in subduing the person.

A seizure by force - absent submission - lasts only as long as the application of force. The fleeting nature of some seizures by force undoubtedly may inform what damages a civil plaintiff may recover, and what evidence a criminal defendant may exclude from trial. But brief seizures are seizures all the same. Here, the officers seized Torres for the instant that the bullets struck her.

While a mere touch can be enough for a seizure, the amount of force remains pertinent in assessing the objective intent to restrain. A tap on the shoulder to get one's attention will rarely exhibit such an intent.

The test suggested by the officers for all seizures - intentional acquisition of control - is inconsistent with the history of the Fourth Amendment and the Court's cases. This approach improperly erases the distinction between seizures by control and seizures by force. Unlike a seizure by force, a seizure by acquisition of control involves either voluntary submission to a show of authority or the termination of freedom of movement. But that requirement of control or submission never extended to seizures by force.

Torres v. Madrid
2021 WL 1132514 (U.S. Sup. Ct., 3/25/21)

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SEARCH AND SEIZURE - Community Caretaking Doctrine

In *Cady v. Dombrowski* (413 U.S. 433), the Supreme Court held that a warrantless search of an impounded vehicle for an unsecured firearm did not violate the Fourth Amendment. The Court observed that police officers who patrol the "public highways" are often called to discharge noncriminal "community caretaking functions," such as responding to disabled vehicles or investigating accidents.

The Court now holds that *Cady's* acknowledgment of these "caretaking" duties does not create a standalone doctrine that justifies warrantless searches and seizures in the home. Like this case, *Cady* involved a warrantless search for a firearm. But the location of that search was an impounded vehicle and not a home, which was a constitutional difference the opinion repeatedly stressed. What is reasonable for vehicles is different from what is reasonable for homes.

Concurring, Chief Justice Roberts, joined by Justice Breyer, asserts that nothing in this opinion runs counter to the Court's previous recognition that a warrant to enter a home is not required when there is a need to assist persons who are seriously injured or threatened with such injury.

Justice Alito, concurring, asserts that searches and seizures conducted for other non-law-enforcement purposes may arise and present their own Fourth Amendment issues, and that today's decision does not settle those questions.

Justice Kavanaugh also concurs, noting that other cases, such as cases involving unattended young children inside a home, illustrate the kinds of warrantless entries that are constitutional under the exigent circumstances doctrine.

Caniglia v. Strom
2021 WL 1951784 (U.S. Sup. Ct., 5/17/21)

* * *

SEARCH AND SEIZURE - Excessive Force Claim

This excessive force action was commenced by the parents of a man who died after being restrained by police officers in a prone, face-down position on the floor. The district court granted summary judgment in favor of the officers, concluding that they were entitled to qualified immunity because they did not violate a constitutional right that was clearly established at the time of the incident. The Eighth Circuit affirmed, holding that the officers did not apply unconstitutionally excessive force.

The Supreme Court vacates and remands the case to give the Eighth Circuit to consider all the relevant facts and circumstances.

The Eighth Circuit described as "insignificant" facts that appear potentially important, including the fact that the decedent was already handcuffed and leg shackled when officers moved him to the prone position and that officers kept him in that position for 15 minutes. Officers placed pressure on his back even though St. Louis instructs officers that pressing down on the back of a prone subject can cause suffocation, and the record includes well-known police guidance recommending that officers get a subject off his stomach as soon as he is handcuffed because of that risk, and guidance indicating that the struggles of a prone suspect may be due to oxygen deficiency, rather than a desire to disobey officers' commands.

Having either failed to analyze this evidence or characterized it as insignificant, the Eighth Circuit may have thought the use of a prone restraint - no matter the kind, intensity, duration, or surrounding circumstances - is per se constitutional so long as an individual appears to resist officers' efforts to subdue him. Such a per se rule would contravene the careful, context-specific analysis required by this Court's excessive force precedent.

Justices Alito, Thomas and Gorsuch dissent.

Lombardo v. City of St. Louis
2021 WL 2637856 (U.S. Sup. Ct., 6/28/21)

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SEARCH AND SEIZURE - Auto Stop/Continued Detention And Canine Search

After a lawful traffic stop, defendant consented to a search of the backseat of his vehicle. Instead of conducting that search, the officer walked his canine around the exterior of the vehicle and, in mere seconds, the canine alerted to the trunk.

In a 4-3 decision, the Court of Appeals concludes that the evidence presented at the suppression hearing provides record support for the determination that a founded suspicion of criminal activity was afoot and justified the canine search.

The dissenting judges assert that unless the Court is prepared to say that the police may detain anyone who hugs or shakes hands outside of a store known to the police to have been the site of drug transactions, those facts cannot be a basis for stopping defendant. Although defendant's "slow roll" and "furtive movements" around the floorboards made the Trooper suspicious, by the time the Trooper decided to continue the stop and fetch his drug-sniffing dog defendant already had consented to a search of the passenger section of his car and the Trooper had found no contraband. Despite the majority's conclusion to the contrary, defendant did preserve his contention that the Trooper was not permitted to prolong the stop and conduct the canine search under the federal constitutional standard requiring reasonable suspicion, and that this Court's application of the state level two standard is therefore unconstitutional. Defendant, by arguing that the canine search violated both New York and federal constitutional standards, necessarily raised the question of whether our state standard is preempted by the federal constitution and is therefore unconstitutional.

People v. Reginald Blandford
(Ct. App., 10/14/21)

* * *

SEARCH AND SEIZURE - Motion Papers
- Standing/Expectation Of Privacy - House Guests

A Court of Appeals majority upholds the summary denial of defendant's suppression motion where the court below found that defendant failed to sufficiently allege standing to challenge the search of the subject premises pursuant to a search warrant. "Defendant's remaining arguments addressed by the dissent, including the assertion that dinner guests have an expectation of privacy in the home of their hosts, are academic."

Dissenting, Judge Wilson and Judge Rivera assert that the Court may not affirm a conviction on a ground not reached below, and, here, the courts denied suppression on the ground that defendant, as a social guest, had no expectation of privacy. Moreover, the circumstances under which a social guest in a private home will have an expectation of privacy are highly unsettled, and defendant should be granted the opportunity to obtain a judicial determination, based on a full record, of the scope of his privacy expectation in the apartment. If the Court were to fail to recognize the privacy interests of social guests, police would possess unfettered discretion to invade the homes of police suspects' friends and family members who invite the suspects inside.

People v. Eric Ibarguen
(Ct. App., 10/14/21)

* * *

SEARCH AND SEIZURE - Eavesdropping Warrants

In a 4-2 decision, the Court of Appeals holds that eavesdropping warrants are executed in the geographical jurisdiction where the communications are intentionally intercepted by authorized law enforcement officers within the meaning of CPL Article 700.

Once the jurisdictional predicate for prosecution of a crime in a particular county is established, as it was here, "a justice may issue an eavesdropping warrant … upon ex parte application of an applicant who is authorized by law to investigate, prosecute or participate in the prosecution of the particular designated offense which is the subject of the application" (CPL § 700.10[1]). Here, the authorized prosecutor - the Kings County District Attorney - was the proper warrant applicant (see CPL § 700.05[5]). Under CPL § 700.35(1), "[a]n eavesdropping … warrant … must be executed according to its terms by a law enforcement officer who is a member of the law enforcement agency authorized in the warrant to intercept the communications …." The law enforcement officers here were competent to execute the warrants because they were authorized to investigate and arrest defendant in the jurisdiction where the interception occurred (see CPL 700.05[6]).

Defendant challenges the jurisdiction of a Supreme Court Justice presiding in Kings County to issue the eavesdropping warrants on the theory that the warrants were not "executed" in Kings County as required by CPL § 700.05(4) because his cell phones were not physically located in New York and his communications occurred outside of New York. However, the statutory scheme supports the Court's holding that the Kings County Supreme Court Justice presiding in the jurisdiction where defendant's communications were overheard and accessed, and therefore intercepted by authorized law enforcement agents, had the authority to issue the warrants. No language in the statutory scheme equates the place of interception with the variable points where cell phones or call participants are located.

The dissenting judges (Wilson and Rivera) assert that neither the text nor the legislative history of CPL Article 700 suggests that the legislature authorized our courts to issue warrants commanding the diversion of purely out-of-state telephone calls between nonresidents so that they could be listened to by New York law enforcement agents.

People v. Joseph Schneider
(Ct. App., 6/3/21)

* * *

SEARCH AND SEIZURE - Auto Stop/Reasonable Suspicion
- Hearing/Burdens

The Court of Appeals orders suppression where the officer's only justification for the auto stop was the dispatcher's report that a 911 caller had asserted that one of the vehicle's occupants possessed a "long gun."

Whether the suppression hearing record is evaluated in light of the totality of the circumstances, or under the *Aguilar-Spinelli* framework, the reliability of the tip was not established. The People failed to introduce the 911 recording, failed to introduce any evidence indicating whether the 911 caller was an identified citizen informant or an anonymous tipster, and failed to offer any explanation of the basis of the caller's knowledge. In sum, the People put forward no relevant information concerning the circumstances surrounding the call at the hearing, and an appellate court cannot consider evidence admitted at trial to justify affirmance of an order denying suppression.

The Court rejects defendant's contention that the stop was invalid because possession of a "long gun" is lawful in New York.

People v. John Walls
(Ct. App., 9/2/21)

* * *

SEARCH AND SEIZURE - Excessive Force

In this § 1983 action, the Second Circuit concludes that the district court did not properly view the evidence in the light most favorable to plaintiff at the summary judgment phase of the litigation, and thus the judgment for defendants must be reversed.

Qualified immunity would not protect the deliberate infliction of injury suggested by plaintiff's testimony. The established law of this Circuit makes clear that the excessive tightening of handcuffs after an explicit verbal complaint of pain is made violates the Fourth Amendment, and that it is impermissible to use significant force against a restrained arrestee who is not actively resisting. There is presumably no proper law enforcement justification for deliberately pushing a restrained individual's head into a car's hard, metal doorframe.

The case law allows only the force necessary to make an arrest. Although defendants point to plaintiff's statements that he continued to scream for help throughout the encounter as an important factor, they offer no case law suggesting that force of any quantum is reasonable in response to purely verbal protestations.

While the absence of serious injury in this case is certainly a matter that the jury can consider in assessing both the reasonableness of the force and potential damages from any misconduct, a district court should not grant summary judgment on this basis alone.

Ketcham v. City of Mount Vernon

2021 WL 1165401 (2d Cir., 3/29/21)

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SEARCH AND SEIZURE - Search Warrants
- Auto Search

Over several days, police officers observed defendant selling heroin from his home. In addition, undercover officers engaged in drug transactions with defendant and conducted a controlled buy using an informant. Based on that information, the court issued a search warrant authorizing a search of defendant's "person" and the "entire premises." The hearing court held that the police had probable cause to search defendant and his residence, suppressed evidence seized from two vehicles located outside the residence, concluding that the warrant did not encompass the search of the vehicles and the police lacked probable cause for that search. The Appellate Division affirmed.

In a 4-3 decision, the Court of Appeals affirms. The observed pattern, as described in the search warrant affidavit, was for defendant to proceed from the residence to the street and back, without detouring to any vehicles parked at the residence.

Criminal Procedure Law § 690.15(1) states: "1. A search warrant must direct a search of one or more of the following: (a) A designated or described place or premises; (b) A designated or described vehicle, as that term is defined in section 10.00 of the penal law; (c) A designated or described person." The People's contention that a search warrant authorizing the search of a premises includes an implicit grant of authority to search all vehicles located on the property undermines the legislature's delineation of three distinct categories as appropriate subjects of a search. If, as the dissent says, trafficking in drugs provides probable cause to search vehicles, the officers can set forth the results of their investigation, describe the vehicles they have observed, and make their case to the magistrate.

Adopting the People's position would deviate from the rule to which the Court has adhered under both the Fourth Amendment and the State Constitution, requiring warrants to provide particularization between vehicles and real property, even when a vehicle is located on real property. Although some Federal Courts of Appeals have interpreted the Fourth Amendment in a manner that might permit this search, the majority declines to follow suit and exercises its independent authority to follow existing state constitutional jurisprudence, even if federal constitutional jurisprudence has changed.

People v. Tyrone Gordon
(Ct. App., 2/18/21)

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SEARCH AND SEIZURE - Search Warrants/Description Of Premises

The Fourth Department orders suppression where the warrant authorized a search of "865 woodlawn upper apt. buffalo, n.y. 2 ½ story wood frame house white with white trim. attached garage and common areas," and drugs and drug packaging materials were found by the police behind a doorway on stairs leading to the attic. The People failed to meet their initial burden of establishing the legality of the police conduct.

The doorway to the attic was in a hallway outside of the upper apartment and, as a result, the attic cannot be considered a part of the upper apartment itself. Defendant testified that the door to the attic was closed and locked, and that, during the execution of the warrant, the door was broken down by the police. If the door was indeed locked, it cannot be said that the attic was accessible to all tenants and their invitees.

People v. David Moore
(4th Dept., 6/17/21)

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SEARCH AND SEIZURE - Auto Search

The First Department refuses to adopt a per se rule that the search of the entire vehicle, including the trunk, is permissible in every circumstance where police have probable cause to believe that the occupant of the car has committed a crime, agreeing with defendant that the automobile exception requires a fact-specific probable cause analysis and a factual nexus between the criminal activity suspected and the area searched.

Here, the odor of marijuana, together with a de minimis amount of unburnt marijuana found in the center console of the vehicle, did not furnish the requisite probable cause to search the trunk of defendant's vehicle. The only reasonable conclusion supported by the evidence was that the marijuana was for personal use, not for distribution or trafficking.

People v. Danny Ponder
(1st Dept., 5/6/21)

* * *

SEARCH AND SEIZURE - Incident To Arrest

After defendant was arrested for trespassing, and was subdued on the ground and handcuffed with a drawstring backpack still on his back, an officer patted down defendant and the backpack. The officer felt something hard in the backpack, which prompted him to look inside, where he saw a box with the words "9mm" written on it. The officer removed the box from the backpack, opened it, and saw what he thought was an illegal silencer.

The First Department concludes that the search of the backpack was not a lawful search incident to arrest. The People failed to meet their burden of showing exigency. The record does not contain evidence or testimony supporting a determination that the officer had objective reasonable grounds to believe that the backpack contained contents that would place his safety at risk or that he was concerned that the bag contained evidence that defendant could destroy.

People v. Arthur Collins
(1st Dept., 11/23/21)

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SEARCH AND SEIZURE - Incident To Arrest

The Court of Appeals reverses the denial of suppression, concluding that the People failed to establish that the warrantless search of defendant's backpack was a valid search incident to arrest. The record does not support a determination that the backpack was in defendant's immediate control or grabbable area, or even indicate where the bag was in relation to defendant immediately prior to the search.

People v. Nathaniel Mabry
(Ct. App., 5/27/21)

Newsletter summary of Second Department decision:
The Second Department concludes that the police had reasonable suspicion to pursue and stop defendant based on the description of the perpetrator - a black male wearing a black hat and carrying a backpack - which matched defendant's appearance, the close proximity to the crime scene, and the short passage of time between the commission of the crime and the observation of defendant. The police had probable cause to arrest defendant based on the complainant's spontaneous identification near the crime scene.
The Court, with one judge dissenting, also finds that the police were justified in searching defendant's backpack incident to his arrest. When the complainant arrived, defendant was standing up and had not yet been handcuffed. Immediately after the complainant's identification, defendant was placed under arrest. Approximately two minutes after the arrest, the police searched the backpack which was "on the street, at the location of the arrest." Thus, the arrest and search were for all practical purposes conducted at the same time and in the same place, and the backpack could have been accessed by defendant and had not yet been reduced to the exclusive control of the police.
The facts support a reasonable belief that the search was necessary to ensure the safety of the arresting officers and the public. The police responded to and arrested defendant for a burglary, a violent crime, and he was arrested after a police chase, following his flight on a bicycle.

* * *

SEARCH AND SEIZURE - Incident To Arrest

POSSESSION OF FORGERY DEVICES

After defendant was arrested in connection with a parole violation, a trooper, upon opening defendant's fanny pack, noticed a stack of credit cards and gift cards in defendant's name and in other individuals' names. He also found two skimmers; he later testified that each credit card's magnetic strip stores digital information, and a person with a skimmer and an attached computer could read the data stored there, save it and then write it to a different card.

The Third Department rejects defendant's contention that in order to prove criminal possession of forgery devices, the People had to prove that the skimmer was operable. Penal Law § 170.40(2) states only that a person must make or possess a device capable of or adaptable for purposes of forgery.

However, the Court orders suppression, concluding that there was an illegal warrantless search. The trooper removed defendant's fanny pack and backpack from the apartment when he left and then placed defendant, who was in handcuffs, in the patrol vehicle. Thereafter, the trooper made a cursory search of the fanny pack and backpack on the hood of the vehicle. At the time of the search, the fanny pack and backpack were in the exclusive control of the trooper and defendant could not possibly gain possession of them or destroy any evidence in them.

A concurring judge finds no fault with the trooper's initial, safety-related search of defendant's bags at the scene of his arrest, which did not result in the seizure of any evidence. The problem here is the second, more extensive search at the barracks.

People v. Eduardo Crosse
(3d Dept. 8/5/21)

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SEARCH AND SEIZURE - Incident To Arrest

The First Department orders suppression where the arresting officer removed a small manila envelope from defendant's pocket in a search incident to arrest, and opened it enough to "peek" inside. This constituted a search of a closed container. To the extent the envelope could be viewed as partly open, its contents were not in plain view, and were not visible until the officer opened the envelope. There were no exigent circumstances.

People v. Michael Lewis
(1st Dept., 6/1/21)

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SEARCH AND SEIZURE - Motion Papers
- Search Warrants

The Court of Appeals upholds the summary denial of defendant's suppression motion where the warrant's description of the target premises - "a private residence," located at a unique, specified street address - clearly commanded a search of "a" single residence, not a multi-unit building, and thus satisfied the constitutional requirement that the warrant particularly describe the place to be searched.

The motion court did not rely on unincorporated warrant application materials to cure a facial deficiency in the warrant. When defendant challenged the warrant on the ground that the building identified actually comprised multiple residences, the court properly reviewed the supporting documents to determine whether they established that the building was a single residence, as described in the warrant. Defendant failed to proffer evidence suggesting that the building's outward appearance indicated that it was not a single-family residence. It had one street address, one front door, and one side door.

Although defendant lacked access to the materials that were before the warrant court, he had ready access to information about the actual conditions of the premises. Defendant tendered city records that purport to show that it would have been lawful to use the house as a three-family residence, and an affidavit from his mother, the owner of the house, saying that on the date of the search, "[defendant] was living at" the specified address, "Third Floor, Bronx NY." But none of the proffered materials show that the house was, in fact, divided into three separate residential units or that defendant did not reside in, or lacked access to, other portions of the house.

People v. Drury Duval
(Ct. App., 2/11/21)

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SEARCH AND SEIZURE - Motion Papers/Private Actors

The First Department concludes that defendant is entitled to a hearing on the factual issue of whether or not the store security guard involved in his detention was licensed to exercise police powers, or acting as an agent of the police. Under People v Mendoza (82 N.Y.2d 415), defendant is entitled to a hearing on that factual issue.

The felony complaint provided no information regarding defendant's arrest, and the voluntary disclosure form simply indicated that the arrest took place on "May 27, 2027," at "9:04 PM," "Inside Bergdorf Goodman at 754 Fifth Avenue." The individual who allegedly recovered the stolen material from defendant's handbag was neither identified by name nor as an employee of Bergdorf. This information could not have helped defendant further investigate whether the security guard was a private or state actor status.

People v. Jamir Sneed
(1st Dept., 9/28/21)

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SEARCH AND SEIZURE - Hearing/Burdens

The First Department rejects defendant's contention that the People failed to meet their burden of coming forward with evidence demonstrating probable cause with respect to the theft of services arrest because they did not present any testimony from the Transit Bureau officers who had firsthand knowledge of the farebeating offense.

Although the People will fail to meet their burden at a suppression hearing where they rely exclusively on hearsay evidence and the defense challenges the sufficiency of the evidence, whether by cross-examining the People's witness or putting on a defense case, defendant did not present any evidence, identify anything in the People's case, or elicit any statements on cross-examination that undercut the veracity of the transit officers' account of a farebeating, as relayed by the testifying officer.

The unsupported assertion in defendant's moving papers that he was seized without reason was not sufficient to necessitate calling the transit officers as witnesses.

People v. Andre Gerard
(1st Dept., 9/28/21)

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SEARCH AND SEIZURE/MOTION PRACTICE

The First Department finds no error where the trial court exercised its discretion in denying, as untimely, defendant's midtrial motion to suppress the results of an Intoxilyzer breath test on the ground of lack of valid consent to take the test.

Defendant was aware of the facts of the Intoxilyzer breath test, chose not to file a motion to suppress on that ground, and expressly declined to raise this claim at a pretrial suppression hearing when the trial court asked defense counsel whether defendant was raising any claims regarding events surrounding the Intoxilyzer breath. Defendant provided no basis for finding that he could not, with due diligence, have been previously aware of a suppression claim, or finding that he had good cause for not raising it earlier. At the suppression hearing, no evidence was presented regarding the administration of the Intoxilyzer breath test.

The Court rejects defendant's contention that his untimeliness was excusable because *People v. Odum* (31 N.Y.3d 344), which he characterizes as "essentially new authority," was decided just 47 days before the suppression hearing. This does not explain counsel's failure to seek expansion of the scope of the suppression hearing, and the reasoning in a pre-*Odum* decision by this Court was in essence the same as that in *Odum*.

Moreover, the validity of defendant's consent to the test was an issue to be determined before trial, not an issue defendant was entitled to litigate during trial without previously making a suppression motion.

A dissenting judge notes, inter alia, that a defendant who fails to act in a timely fashion in serving or filing a pretrial motion should be entitled to relief where, as here, the consequences of such defendant's tardiness would affect the fairness of the truth-finding process of the trial; and that once defense counsel became aware of the applicable two-hour rule and learned of *People v Odum*, he sought to rectify his mistake by moving to suppress.

People v. Derly Marte
(1st Dept., 8/5/21)

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SEARCH AND SEIZURE - Auto Search/Probable Cause
- Plain View Doctrine

The hearing court denied defendant's motion to suppress physical evidence and statements he made to law enforcement officials, concluding that the officer's testimony that he smelled an odor of marihuana coming from the vehicle, and observed a small bag of marihuana on the floor between the driver's seat and the door, provided probable cause to believe the vehicle contained more contraband.

The Second Department concludes that the officer had probable cause to search the center console of the vehicle, and the small zippered wallet contained within it, for the presence of marihuana. However, the People failed to demonstrate that the three credit cards found during the search of the zippered wallet were lawfully seized under the plain view doctrine. The officer did not testify that the names and signature pads on the cards were inadvertently exposed during his search for marihuana, or that he determined the cards were illicit before he removed them from the zippered wallet or otherwise manipulated them in order to expose them to his view.

People v. Jahvon Mosquito
(2d Dept., 8/4/21)

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SEARCH AND SEIZURE - Auto Search/Probable Cause
- Credibility Of Police Testimony

The Fourth Department holds that "[t]he olfactory detection of street-level PCP by a trained and experienced police officer constituted probable cause to search defendant's car." The officer

learned about PCP in the academy, in regular training updates, and in "hundreds" of encounters during his career in law enforcement.

The officer did not merely smell a lawful substance he associated with the production of an illegal drug. He smelled the "pretty distinct" odor of street-level PCP itself. Moreover, no court has ever required a particularized, uniform description of a smell as a precondition to upholding a search predicated on a trained officer's detection of that scent. Indeed, describing a smell with reliable, uniform, and reproducible words is basically beyond human capacity. No two people will use the same words to describe a smell, even one as omnipresent in society as coffee.

However, the police will not now be able to search a vehicle when they smell something vaguely chemical even though that smell could just as easily come from any number of legal substances. Judges will be willing to suppress in such cases.

The Court rejects defendant's suggestion that the officer's testimony is a wholesale fabrication given that the other officer's written report and subsequent testimony were not literally identical. The officers were on different sides of the car, they perceived the events from different vantage points, and they emphasized slightly different things in their accounts. Had the other officer corroborated every minute detail, defendant might now be insisting that human experience makes it impossible to corroborate another person's account so completely, and that the officers must have colluded to tailor their testimony.

People v. Anthony Fudge
(4th Dept., 8/26/21)

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SEARCH AND SEIZURE - Credibility Of Police Testimony

The Second Department orders suppression, noting that the officers' versions of the incident conflicted with each other on key points and could not be simultaneously true. Under these circumstances, "'multiple choice questions are neither desirable nor acceptable," and the fact-finder should refuse to "select a credible version based upon guesswork."

Moreover, although one officer testified that defendant dropped the gun before he fled, which in turn could justify the other officer's pursuit, the officer also testified that the other officer was "trying to take her shield out as she [was] approaching [defendant] to try to grab him" before defendant dropped the gun or started to run, and before she had reasonable suspicion. The evidence established at most that one officer grabbed at defendant, pursued defendant, or both, before defendant dropped a gun, and without the requisite reasonable suspicion.

People v. Jayshawn Rhames
(2d Dept., 7/7/21)

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SEARCH AND SEIZURE - Auto Stop/Frisk Of Defendant

The Fourth Department orders suppression, concluding that, after a lawful traffic stop, defendant's "non-compliant and erratic behavior" - his flat affect and partial disrobement was odd - did not give rise to reasonable suspicion that he was armed or posed a threat to the officer's safety. "If anything, the officer's ability to peer unobstructed into defendant's open pants should have assuaged, rather than heightened, any concerns that defendant was concealing a weapon."

People v. Robert Santy
(4th Dept., 10/8/21)

* * *

SEARCH AND SEIZURE - Request For Information
- Probable Cause/Criminal Trespass

The First Department concludes that the officers, who concededly possessed an objective, credible reason for approaching defendant, were entitled to escort defendant off the elevator and into the hallway so they could talk to him. The police had probable cause after defendant evidently falsely identified a woman in the elevator as his aunt, and as the reason for his presence in the building.

People v. Kevion Hill
(1st Dept., 5/13/21)

* * *

SEARCH AND SEIZURE - Request For Information/Approach Of Vehicle

The Fourth Department orders suppression, concluding that the police approach of a parked vehicle was not supported by an articulable, credible reason where the officer testified that he and his partner approached because the apartment complex at which it was parked was in a high crime area and because the vehicle was not running and had three occupants.

People v. Keith King
(4th Dept., 11/19/21)

* * *

SEARCH AND SEIZURE - Request For Information/Common Law Right To Inquire

In a 3-2 decision, the Second Department suppresses physical evidence and defendant's statements, finding no objective, credible reason for an approach to request information where the

testifying officer stated only that defendant appeared nervous and the officer wanted to "see why he went into the store."

Moreover, the police had no basis for engaging in a pointed, level two inquiry regarding the ownership and contents of a bag that was inside the store. The People adduced no evidence that defendant was observed in possession of the bag, and the testifying officer never asked anyone else in the store if the bag belonged to them. He singled out defendant "[b]ecause from the movements that I told you earlier he made, when he tensed up, his eyes widened when he seen us when I looked at him."

The dissent asserts that defendant's startled reaction upon seeing the plainclothes officers, his entry into the bodega immediately thereafter, and his conspicuous conduct in pacing back and forth while inside the store, provided an objective, credible reason to approach and request information. Defendant's conduct in approaching the officers' vehicle, speaking to them, and lifting his jacket before the officers could address him, coupled with the officer's observation of an unattended bag sitting on a freezer in the area where he had just observed defendant pacing back and forth, justified the inquiry regarding the ownership and contents of the bag. The officer did not become aware of the presence of other individuals until after defendant had already acknowledged ownership of the bag.

People v. Willie Brown
(2d Dept., 10/13/21)

* * *

SEARCH AND SEIZURE - Canine Sniff Of Person/Auto Search
- Fruits/Property

The Third Department concludes that there was a founded suspicion justifying an exterior canine search of defendant's vehicle after a lawful traffic stop where defendant stated that he did not have a driver's license and gave what the officer considered an inconsistent explanation as to where he was going and coming from; after defendant complied with the officer's request that he step out of the vehicle, he appeared nervous; after the officer observed a bulge in defendant's pocket, the officer asked defendant how much cash he had and defendant responded $1,000; and the officer asked defendant for consent to search the vehicle, but defendant declined.

The canine started to pull towards defendant, indicating that the canine was "in odor." The officer redirected the canine, who jumped into the driver's seat area and began sniffing the seat, indicating that the canine was once again "in odor." The officer, wanting to "see if there's any odor on [defendant]," allowed the canine to walk behind defendant, where the canine "started to become in odor," and then "put his nose in the groin/buttock region of [defendant], and then he sat." The officer stated that the canine "has got something," and defendant fled. Defendant discarded heroin before he was apprehended.

Addressing an issue of first impression, a Third Department majority concludes that the reasonable suspicion standard, not the probable cause standard, applies to the canine search of defendant. A canine sniff is a minimal intrusion compared to a full-blown search of a person, and is intended only to detect the possession of narcotics. There was contact between the canine and defendant's person, but it appears that the contact was brief and the canine quickly alerted. After the canine twice was "in odor," and given the necessity for prompt action, there was reasonable suspicion. Moreover, defendant abandoned any right to challenge recovery of the heroin.

A concurring judge, noting that the hearing court did not rule on whether the canine search of defendant's person was unreasonable or on what standard is applicable, asserts that this Court has no authority to affirm the judgment on a ground not ruled upon by the hearing court.

A dissenting judge asserts that the probable cause standard should apply, and that there was no probable cause. While other canine sniff searches have been subject to lower levels of justification due to their minimally intrusive nature, a canine sniff of an individual's groin area is not minimally intrusive.

People v. Devon Butler
(3d Dept., 5/20/21)

* * *

SEARCH AND SEIZURE - Reasonable Suspicion

Officers stopped the vehicle in which defendant was a passenger after observing that the driver was not wearing a seatbelt. Defendant, a backseat passenger, appeared nervous and turned his body toward his waistband, blocking the officers' view of his hands. When asked to remove his hands from the waistband area of his pants, defendant complied, stating that he was looking for a bottle cap upon which to chew. Once it was discovered that none of the occupants had a valid driver's license, the officers asked the occupants to exit the vehicle. At that point, defendant "bladed away" from the officers while "reach[ing] for his waistband." As one of the officers prepared to conduct a pat frisk, defendant "pulled away and ran." Officers pursued and took defendant into custody. Ultimately, a weapon was found in a yard in which defendant had fallen during the pursuit.

In a 3-2 decision, the Fourth Department orders suppression of the weapon and defendant's statements. Defendant's pattern of behavior was suspicious, but the officers had no reasonable suspicion justify pursuit.

People v. Joshua Williams
(4th Dept., 2/11/21)

* * *

SEARCH AND SEIZURE - Stop/Seizure - Consideration Of Race

The Eleventh Circuit U.S. Court of Appeals upholds the denial of suppression, concluding that, unlike age, the race of a suspect is never a factor in seizure analysis.

The Court notes that even if empirical research can provide evidence of how individuals of different demographics have interacted with or perceive the police, this research also reinforces that perceptions vary within groups, and there is no uniform life experience for persons of color; that even if the Court could derive uniform or at least predominant attitudes from a characteristic like race, the Court has no workable method to translate general attitudes towards the police into rigorous analysis of how a reasonable person would understand his freedom of action in a particular situation; that short of assuming that all interactions between police officers and black individuals are seizures, the Court would be left to pure speculation; and that even if the Court could devise an objective way to consider race, the Court could not apply a race-conscious reasonable-person test without running afoul of the Equal Protection Clause.

United States v. Knights
2021 WL 908278 (11th Cir., 3/10/21)

* * *

SEARCH AND SEIZURE - School Seizures

After police officers interrogated L.G. at her high school, she sued them in a § 1983 action, claiming, among other things, that they had unconstitutionally seized her. Defendant School Resource Officer, who brought L.G. to the interrogating officers, moved to dismiss the complaint on the ground of qualified immunity. The district court denied her motion.

The Eighth Circuit U.S. Court of Appeals reverses, noting that the SRO merely escorted L.G. to a room and closed a door, and her nominal role in the incident could well affect whether a reasonable officer in her position would think that she, as opposed to the other officers, had seized L.G.; that even though students have some Fourth Amendment protection, an officer in the SRO's situation would not know, without more guidance, whether escorting L.G. to a room with other officers and closing a door constitutes a seizure; and that it was not clearly established that the school setting makes no difference for Fourth Amendment purposes when the seizure occurs at the behest of police.

L.G. v. Columbia Public Schools
2021 WL 1030977 (8th Cir., 3/18/21)

* * *

SEARCH AND SEIZURE - Expectation Of Privacy/Video Surveillance

Because the police suspected defendant of drug trafficking, they mounted a camera on a utility pole across the street from his house without first securing a warrant. The pole camera continuously recorded footage of defendant's property - including his backyard, which was otherwise hidden by a six-foot-high privacy fence - for more than three months. The camera could pan left and right, tilt up and down, and zoom in and out - features that the police could control while viewing the footage live. Police indefinitely stored the footage for later review. Based on activity they observed from the footage, police obtained a warrant to search the property.

The Supreme Court of Colorado holds that the evidence recovered pursuant to the warrant must be suppressed. Police use of the pole camera to continuously video surveil the fenced-in curtilage for three months, with the footage stored indefinitely for later review, constituted a warrantless search in violation of the Fourth Amendment.

Defendant demonstrated a subjective expectation of privacy in the curtilage surveilled. The area was significantly set back from the street, so a person standing on the street could not see into the backyard. Defendant maintained a six-foot-high privacy fence around the backyard, and used the fence's wooden gate to further prevent the public from being able to see into his backyard.

Defendant's expectation of privacy is one that society is prepared to recognize as reasonable. Society would not expect law enforcement to undertake this kind of pervasive tracking of activities occurring in one's curtilage. The pole camera surveillance at issue shares many of the troubling attributes of GPS tracking. Moreover, the information was stored, allowing the government to efficiently mine the record for information years into the future. Also, the surveillance was surreptitious compared to traditional surveillance.

Although public exposure of an area may diminish one's reasonable expectation of privacy, a person does not surrender all Fourth Amendment protection by venturing into the public sphere. Here, defendant did seek to preserve as private the area surveilled so that the area would be visible only while someone walked up the apartment stairway or perhaps for as long as his neighbor could peer through the gaps in the fence.

People v. Tafoya
2021 WL 4144014 (Colo., 9/13/21)

* * *

SEARCH AND SEIZURE - Expectation Of Privacy/Video Surveillance

Suspecting defendant's involvement in drug trafficking, the government surveilled him for eighteen months without a warrant after installing three cameras on public property that captured the outside of defendant's home.

Noting that most federal courts of appeals that have weighed in on the issue have concluded that pole camera surveillance does not constitute a Fourth Amendment search, the Seventh Circuit

holds that the extensive pole camera surveillance in this case did not constitute a search under the current understanding of the Fourth Amendment. The government's use of a technology that is in public use, in a place where the Government was lawfully entitled to be, to observe plainly visible happenings did not run afoul of the Fourth Amendment.

The Court sounds a note of caution. "Current Fourth Amendment jurisprudence admits of a precarious circularity: Cutting-edge technologies will eventually and inevitably permeate society. In turn, society's expectations of privacy will change as citizens increasingly rely on and expect these new technologies. Once a technology is widespread, the Constitution may no longer serve as a backstop preventing the government from using that technology to access massive troves of previously inaccessible private information because doing so will no longer breach society's newly minted expectations." As this case illustrates, round-the-clock surveillance for eighteen months is now unextraordinary. This could be an apt area for federal legislation.

United States v. Tuggle
2021 WL 2946100 (7th Cir., 7/14/21)

* * *

SEARCH AND SEIZURE - Incident To Arrest

In Arizona v. Gant, the Supreme Court held that incident to an arrest, a vehicle may be searched without a warrant if it was reasonable for the police to believe that the arrestee could have accessed his car at the time of the search.

The Fourth Circuit, joining several sister circuits, concludes that the holding in Gant applies beyond the automobile context to the search of a backpack, and that, in this case, the search of defendant's backpack was unlawful.

Defendant was face down on the ground and handcuffed with his hands behind his back. He had just been ordered out of a swamp at gunpoint. The only other individuals within eyesight were officers, who outnumbered him three to one. And while this all took place in a residential area, it appears there was no one else around to distract the officers. Thus, defendant was secured.

He dropped the bag next to him before lying down. By the time of the search, however, he was handcuffed, which severely curtailed the distance he could reach. The Court "need not recount the various acrobatic maneuvers [defendant] would have needed to perform to place the backpack within his reaching distance at the time of the search." Under Gant, an item is not within a person's immediate control if it is unreasonable to believe that they can access it.

United States v. Davis
2021 WL 1826255 (4th Cir., 5/7/21)

* * *

SEARCH AND SEIZURE - DNA Testing/Probable Cause
DISCOVERY

Defendants are charged with, inter alia, possession of a gun that was found inside a bookbag in the trunk when police searched a car in which defendants were sitting. The People now move pursuant to CPL § 245.40(1)(e) for an order compelling each defendant to submit to the harvesting of a biological sample from his body for the purpose of DNA analysis and comparison to DNA found on the gun.

As to defendant Colon, the motion is denied. The People have not established probable cause to believe that Colon possessed the gun, or a clear indication that his DNA would be found on the gun. He was merely a backseat passenger in the car. Even if he had knowledge that one of his companions had a gun in the trunk, that would not establish that Colon exercised dominion and control over the weapon. Defendant Iglesias stated to the police that the gun was his, and defendant Heyward also stated that the gun belongs to Iglesias. Colon disclaimed any knowledge of the gun's existence. The People may not rely on the "automobile presumption," which would be unconstitutional if applied in the absence of a reasonable basis for concluding that the defendant had control over the weapon.

With respect to Heyward, the driver, the question of probable cause is a closer call, but the People have failed to establish a clear indication that his DNA will be found on the gun. Although Heyward seems to have known the gun existed, it is not clear that he knew it was in the car at the time, or that he exercised dominion and control. Iglesias's statement - "We went to the shooting range yesterday and I forgot it was in the trunk" - does not establish that "we" includes Heyward. With respect to Iglesias, the People have established probable cause and a clear indication that hiss DNA will be found on the gun. He admitted to ownership, and to handling the weapon recently. However, the motion is denied with leave to renew after a suppression hearing has fully scrutinized the basis for the police intrusions. Police officers, happening upon a group of young men in a parked car smoking marijuana on a summer night, engaged in not just the arguably reasonable search of the car's interior for the marijuana that they smelled, but also went on to open the car's trunk and search it, and then went even further and opened a bookbag they found inside the trunk. Going still further, they opened a closed case found within the bag. At this time, "this court is loath to order the forcible removal from a person's body of his most basic, biological essence while no justification for these escalating intrusions have occurred."

People v. Nathaniel Heyward, Brandon Colon, and Justice Iglesias
(Crim. Ct., Bronx Co., 1/28/21)
http://nycourts.gov/reporter/3dseries/2021/2021_21017.htm

Identification

IDENTIFICATION DEFENSE - Sufficiency Of Evidence/Witness Certainty

The trial court issued a jury instruction listing 15 factors to consider when evaluating eyewitness identification evidence. One of those factors was: "How certain was the witness when he or she made an identification?" Defendant argues that the certainty instruction violated his federal and state due process rights to a fair trial because empirical research has shown that a witness's confidence in an identification is generally not a reliable indicator of accuracy.

The California Supreme Court rejects defendant's due process claim. However, the Court agrees with amici curiae that a reevaluation of the certainty instruction is warranted.

As written, the instruction implies that each of the factors have a direct, linear bearing on accuracy. Hearing the certainty instruction in this context increases the risk that the jury will infer that certainty operates the same way. Contrary to widespread lay belief, there is now near unanimity in the empirical research that eyewitness confidence is generally an unreliable indicator of accuracy. As currently worded, the instruction does nothing to disabuse jurors of that common misconception, but rather tends to reinforce it by implying that an identification is more likely to be reliable when the witness has expressed certainty. This is especially problematic because many studies have also shown eyewitness confidence is the single most influential factor in juror determinations regarding the accuracy of an identification.

The Court refers the matter to the Judicial Council and its Advisory Committee on Criminal Jury Instructions to evaluate whether or how the instruction might be modified to avoid juror confusion regarding the correlation between certainty and accuracy. Until the Judicial Council has completed its evaluation, trial courts should omit the certainty factor unless the defendant requests otherwise.

People v. Lemcke
2021 WL 2150610 (Cal., 5/27/21)

* * *

IDENTIFICATION - Sufficiency Of Evidence

The Second Department reverses, as against the weight of the evidence, defendant's drug possession conviction where two women stopped for a smoke break at the side of a building; a young black man came running by, startling them, and then apologized and continued running; both women saw the man holding what appeared to be a white shopping bag with red circles on it, which he threw over a chain-link fence nearby; and the two women led the police to the bag, inside of which the officers found heroin in glassine envelopes.

Neither of the police witnesses observed defendant carrying a bag, neither of the bystander witnesses was able to identify defendant as the man carrying the bag, and no forensic evidence linked defendant to the bag. Although the vague description provided by the bystander witnesses was not inconsistent with defendant's general appearance, such evidence, coupled with nothing more than defendant's proximity to the crime scene, is insufficient to establish, beyond a reasonable doubt, defendant's identity as the perpetrator.

People v. Davonte Hawkins
(2d Dept., 7/7/21)

* * *

IDENTIFICATION - Motion Papers/Confirmatory ID

The First Department holds that the court properly denied defendant's motion to suppress identification testimony without conducting a hearing pursuant to *People v Rodriguez* (79 N.Y.2d 445) where defendant did not set forth any facts to dispute the People's assertion that he and the identifying witness had a prior relationship familiarity that rendered the photo identification confirmatory. The court's review of the grand jury minutes confirmed the People's assertions, and, in his grand jury testimony, defendant admitted that he knew and frequently conversed with the witness.

People v. Dwight Thomas
(1st Dept., 1/21/21)

* * *

IDENTIFICATION - Photos/Confirmatory

The First Department finds error, albeit harmless, where a detective's identification of defendant based on a single photo shown to him a few days after his very brief viewing of defendant should have been suppressed as unduly suggestive. The detective's very limited observation of defendant, who was not otherwise known to this detective, was not so clear that the identification could not be mistaken and the delayed photo identification was confirmatory.

People v. Trumaine Francis
(1st Dept., 1/19/21)

* * *

IDENTIFICATION DEFENSE - Sufficiency Of Identification Evidence
ASSAULT - Physical Injury
POSSESSION OF STOLEN PROPERTY - Constructive Possession

The Third Department concludes that defendant's convictions for, inter alia, robbery in the second degree and assault in the second degree are not supported by legally sufficient identification evidence and are against the weight of the evidence.

The Court notes, inter alia, that the victim could not provide descriptions of his assailants, aside from stating that he had been robbed and assaulted by three black men; that the victim provided a

description of skin tone for the first time at trial and his testimony revealed that the perpetrators' faces were partially covered, that it was dark outside and that he looked at his assailants for only "[a] few seconds"; that it is well-known that there is a higher likelihood of inaccuracy where, as here, cross-race identification is involved; that there were three perpetrators, all three of defendant's co-defendants pleaded guilty to robbing the victim, and defendant was found in a vehicle with those three co-defendants; and that the vehicle's whereabouts were unknown for at least eleven minutes following the robbery and assault, during which defendant could have entered the vehicle.

Also, there was insufficient evidence of physical injury. The victim testified that he had been struck in the head and had "a small cut … up near the top of [his] head," which "was bleeding a lot," but the evidence did not reveal the size and depth of the cut.

The Court also finds legally insufficient evidence that defendant constructively possessed the credit cards and a debit card in the stolen wallet found in the back seat of the vehicle, where defendant and a co-defendant were seated. The testimony demonstrated only that the wallet was found somewhere in the back seat, and there was no other evidence connecting defendant to the stolen property or demonstrating his awareness of its presence inside the vehicle.

People v. Messiah Green
(3d Dept., 5/6/21)

* * *

IDENTIFICATION DEFENSE - Sufficiency Of Evidence
APPEAL - Weight Of The Evidence Review

The Second Department reverses, as against the weight of the evidence, defendant's conviction for, inter alia, first degree robbery, noting that while defendant was found in possession of a distinctive-looking bandana in close spatial and temporal proximity to the scene of the robbery, none of the police witnesses testified that the complainant had mentioned the existence of such a bandana prior to defendant's arrest; the evidence does not explain why the police would have expected to find one of the suspects in the park when the complainant himself testified that the four suspects left together after the robbery; and the complainant testified that he had seen the man with the bandana on two occasions prior to the night of the robbery, yet he also testified that he had never seen defendant before the night of the robbery, and identified one of the co-defendants in court as the man with the bandana.

There is no evidence linking defendant to the crime other than the complainant's identification and defendant's spatial and temporal proximity to the crime scene.

People v. Corona Garcia
(2d Dept., 5/19/21)

* * *

IDENTIFICATION - Lineup/Suggestiveness
ORDER OF PROOF - Re-Opening Suppression Hearing

The First Department finds that the lineups were not unduly suggestive where the generic grey hooded sweatshirt defendant wore, which matched part of the description given by one of the robbery victims, was not so distinctive as to be capable of influencing the identification. The sweatshirt was a common article of clothing, and most of the lineup fillers wore sweatshirts, in various colors. The more significant part of the clothing description was a distinctive colorful jacket, which both victims had described, and which defendant did not wear in the lineups. Any facial scarring of defendant is not readily noticeable in the lineup photos, and no such scarring was included in either victim's description of the robber.

The Court also concludes that the trial court did not err in denying defendant's motion to reopen the suppression hearing where, at trial, the victim of the first robbery could not recall whether he had seen the participants walk in, thereby permitting him to see height differences, before they sat down, but, at the hearing, the detective definitively recalled that the participants were already seated when the victim viewed the lineup. The trial testimony would not have materially affected the suppression ruling, and defendant could have discovered this information with reasonable diligence before the suppression hearing because a representative from defense counsel's office was in the viewing room during the lineup. As for the victim of the second robbery, any discrepancy between his trial testimony that the detective had told him "they might have the person, according to … the description I had given them," and the detective's hearing testimony that she simply asked the victim to view a lineup, could not have materially affected the suppression ruling.

People v. Tarrell Webster
(1st Dept., 5/20/21)

* * *

IDENTIFICATION - Surveillance Video
LAY OPINION TESTIMONY

The First Department finds reversible error in the admission of the arresting detective's lay opinion testimony that defendant was the person depicted in two surveillance videos.

The alleged difference in appearance - the addition of eyeglasses - was de minimis, and the jury had access to photos of defendant without eyeglasses. The detective was a 20-year veteran of the force and had 14 years of experience investigating robberies and burglaries on the Lower East Side, where the incident occurred. He had made nearly 600 arrests and assisted in approximately 200 others. Stating twice that the perpetrator in this case was defendant carried significant weight in the eyes of the jury.

People v. Levi Challenger
(1st Dept., 12/9/21)

* * *

IDENTIFICATION - Surveillance Video
- Lineups
HEARSAY - Excited Utterance

The First Department concludes that the hearing court should have suppressed, as unduly suggestive, an eyewitness's identification of defendant from a surveillance tape where a detective directed the eyewitness to watch for someone wearing "all brown" in the video, which singled out defendant. The "all brown" description was supplied by 911 callers, not the eyewitness.

A lineup held over six weeks after the video identification was not unduly suggestive where the detective told the eyewitness to select anyone she recognized from the shooting, or from a photo array held 21 hours after the video identification. Moreover, the eyewitness told the detective she recognized defendant in the lineup as the one who shot the victim, not as the one in the photo array.

The trial court erred in admitting, as an excited utterance, a detective's testimony that he overheard the eyewitness exclaim, when she saw defendant in the video, "that's him. That's him. He shot the boy in the Polo Ground."

People v. Darrin McGhee
(1st Dept., 5/11/21)

Pleas

PLEAS - Voluntariness
RIGHT TO COUNSEL - Effective Assistance/Conflict Of Interest

In this case involving charges that defendant's son was driving while under the influence of alcohol, and that defendant assaulted an officer when defendant arrived at the scene, the Second Department vacates defendant's plea where defense counsel urged him to plead guilty despite his protestations of innocence because it was "very likely" that defendant's son would otherwise face jail time; the favorable terms of the son's plea offer were conditioned upon defendant entering a plea of guilty as part of the "package deal"; and defendant demonstrated a significant possibility of a conflict of interest arising from defense counsel's joint representation of defendant and his son.

The record suggests that the plea of guilty was induced by considerations other than defendant's desire to obtain more favorable sentencing for himself, and that defendant was deprived of representation that was single-mindedly devoted to his best interests.

People v. Walter Wentland
(2d Dept., 2/3/21)

* * *

PLEAS - Voluntariness/Coercion

The Second Department remits the case for further proceedings, including a hearing, on defendant's motion to withdraw his plea of guilty.

The court's response to defense counsel's questions regarding bail, which included a statement by the court that this was defendant's "last chance" to accept the offer, raises a legitimate question as to whether defendant understood that the court's purportedly forthcoming bail decision was contingent on acceptance of the offer. Notably, after defendant accepted the plea, the court never brought up the issue of changing defendant's bail status, effectively continuing his release on cash bail without any changes.

When a defendant asks about bail during plea negotiations, the court should remind the defendant that the parties are engaged in plea bargaining, not "bail bargaining," and that the question of bail will be addressed only after plea negotiations are completed.

People v. Quentin Swain
(2d Dept., 3/10/21)

Speedy Trial/Adjournments/Prompt Verdict

SPEEDY TRIAL - Waiver

The Third Department finds a speedy trial violation where respondent's waiver of her right to a speedy fact-finding hearing was expressly limited to the time necessary to complete a diagnostic evaluation; the family court subsequently directed that respondent be transferred to a secure facility and eliminated the possibility that the diagnostic evaluation would be continued and completed, which caused the waiver to effectively expire; and the court did not commence a fact-finding hearing within the statutory three-day deadline or, alternatively, bring the parties before it and either obtain a further waiver or set forth on the record its reasons for adjourning the fact-finding hearing beyond the three-day period.

The court did not commence the fact-finding hearing until some fifty days after expiration of the waiver.

Matter of Erika UU.
(3d Dept., 3/18/21)

* * *

STATUTES - Tolling/Suspension
APPEAL - Notice Of Appeal

A copy of the order appealed from was served upon appellant, with written notice of its entry, on October 2, 2020. CPLR 5513(a) provides that an appeal must be taken within 30 days of service of a copy of the order or judgment appealed from and written notice of its entry. Appellant served and filed a notice of appeal on November 10, 2020. According to respondents, the notice of appeal was untimely served and filed, because, in their view, Governor Cuomo suspended filing deadlines in civil litigation in the New York courts until November 3, 2020. Appellant argues that Governor Cuomo tolled such filing deadlines, meaning that the appellant had 30 days from November 3, 2020, to serve and file the notice of appeal.

The Second Department holds that Governor Cuomo's executive orders tolled, rather than suspended, the referenced statutory time limits. The March 20, 2020 executive order, No. 202.8, expressly provided that the subject time limits were "hereby tolled."

The Court rejects respondents' contention that Governor Cuomo did not have the requisite statutory authority. Executive Law § 29-a(2)(d) provides that an order issued pursuant thereto "may provide for the alteration or modification of the requirements of such statute, local law, ordinance, order, rule or regulation suspended, and may include other terms and conditions." The tolling of a time limitation contained in a statute constitutes a modification of the requirements of such statute within the meaning of § 29-a(2)(d).

Although the seven executive orders issued after No. 202.8 did not use the word "toll," those orders all either stated that the Governor "hereby continue[s] the suspensions, and modifications of law, and any directives, not superseded by a subsequent directive," or contained nearly identical language to that effect.

Brash v. Richards
(2d Dept., 6/2/21)

* * *

SPEEDY HEARINGS - COVID-19 Delays

The child filed a motion to quash or dismiss the State's notice of intent to seek adult sanctions because a probable cause determination had not been made within the mandated thirty-day deadline after the State filed the notice. The district court denied the motion, finding that the COVID-19 pandemic constituted an exceptional circumstance justifying extending the time limit.

A New Mexico appeals court affirms. The COVID-19 pandemic constitutes an "exceptional circumstance" under the applicable Rule.

State v. Alejandro M.
2021 WL 63058 (N.M. Ct. App., 1/7/21)

* * *

SPEEDY TRIAL - Exceptional Circumstances/Witness's Physical Injuries
- Unavailability Of Counsel/Consent To Delay

The First Department concludes that the trial court erred in finding that the exclusion in CPL § 30.30(4)(g) for exceptional circumstances applied because the prosecution was "[u]nable to present the case" to the grand jury without the complainant and had sufficiently established her unavailability. The charges against defendant were for leaving the scene of an accident without reporting it. The complainant remembered nothing of the accident, let alone defendant's actions in its aftermath. The prosecution knew it would have to rely on an eyewitness and the officers to prove defendant's actions.

As for the complainant's alleged unavailability, the prosecutor did not create a contemporaneous record of the complainant's injuries, much less offer medical substantiation, showing that the complainant was unavailable for the entire period.

The court also erred in excluding post-readiness delay based on the prosecutor's improper declaration that the People's readiness was "moot" because lead defense counsel was on trial. Because a colleague of defense counsel stood up on the case, defendant was not without representation. Moreover, the right to a speedy trial is not dependent in any way on whether the defendant has expressed his readiness for trial, and the mere failure by defense counsel to object to an adjournment does not constitute consent within the meaning of CPL § 30.30(4)(b).

People v. Bianca Alvarez
(1st Dept., 5/25/21)

Right To Counsel

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 - Pre-Trial Psychiatric Examination
APPEAL - Harmless Error

After defendant provided timely notice that he intended to present psychiatric evidence at trial, he was twice interviewed by the People's clinical psychologist. Although defense counsel was present at the first examination, the expert denied counsel admittance to the second examination. Defense counsel argued that defendant's right to counsel had been violated, but the expert's testimony was admitted at trial. The Appellate Division affirmed, holding that defendant's constitutional right to counsel had been violated but that the error was harmless.

The Court of Appeals reverses, concluding that the constitutional error was not harmless. In *Matter of Lee v. County Ct. of Erie County* (27 N.Y.2d 432), the Court held that defendants' Sixth Amendment right to counsel applies at pre-trial psychiatric examinations to make more effective a defendant's right of cross-examination. In *Lee*, the Court cited to *United States v. Wade*'s (388 U.S. 218) definition of a critical stage of the prosecution as any stage, formal or informal, in court or out, where the presence of counsel is necessary to preserve the defendant's right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself.

The People have failed to show that there was no reasonable possibility that the trial court's admission" of that part of the expert's testimony based on the uncounseled examination affected the jury's verdict.

People v. Jose Guevara
(Ct. App., 9/9/21)

* * *

RIGHT TO COUNSEL - Effective Assistance
ADJOURNMENTS
RIGHT TO PREPARE/PRESENT DEFENSE

The Court of Appeals concludes that the Appellate Division did not err in holding that the trial court acted within its discretion in denying defense counsel's last-minute request for an adjournment to interview a defense witness before the witness testified.

People v. Luis Vasquez
(Ct. App., 3/25/21)

*** * ***

RIGHT TO COUNSEL - Lineup

The Second Department finds a violation of defendant's right to counsel where, prior to the lineup, the attorney representing defendant in connection with another matter spoke to the arresting officer and identified herself as defendant's attorney; the only reasonable inference from the detective's testimony was that he was aware that defendant was represented by the attorney with respect to the robbery case under investigation; and the detective testified that both he and an assistant district attorney called the number provided by defendant, but the phone just rang, and they did not make any further efforts to confirm the attorney's telephone number or contact the attorney some other way.

People v. Seth Marion
(2d Dept., 4/7/21)

* * *

RIGHT TO COUNSEL - Effective Assistance

The Seventh Circuit U.S. Court of Appeals reverses an order grating habeas relief, finding no violation of petitioner's right to the effective assistance of counsel.

The district court focused on counsel's alleged failures to investigate and present evidence that could have corroborated petitioner's testimony, further undermined the sex crime complainant's credibility, and provided a motive for the complainant to lie at the time of her first disclosure. The district court found counsel's explanations for why he made certain decisions "not plausible" and concluded that many of counsel's decisions not to impeach the complainant with prior inconsistent statements were based on inadvertence or neglect rather than strategy.

The Seventh Circuit agrees with a post-conviction state court's observation that counsel's explanation was worthy of being "required reading in every law school trial practice class." Fully aware that a young accuser in a sexual abuse case can be perceived sympathetically by the jury, counsel sought to demonstrate not that she was a liar, but rather that she was not a reliable witness. According to counsel, his "general approach is not to treat a young witness who claims to have been assaulted ... with attack mode but rather with, we need to feel sorry for her but we can't rely on her. That's where I really wanted to be. And sometimes ... I'll even say she believes it happened but that doesn't mean it did, which is to give her emotional credibility but not factual credibility."

Gilbreath v. Winkleski
2021 WL 6143552 (7th Cir., 12/30/21)

*** * ***

RIGHT TO COUNSEL - Consultation With Counsel/Overnight Recess

The Fifth Circuit U.S. Court of Appeals concludes that defendant was deprived of his Sixth Amendment right to the assistance of counsel under the Geders rule (425 U.S. 80) when he was barred from all communication with his attorney during an overnight recess at trial.

Although the Government argues that plain error analysis applies because defense counsel did not expressly object to the sequestration order, the Court need not decide whether the objection was preserved since the error actually affected defendant's substantial rights. Here, Torres was barred from all communication with his attorney during an overnight recess. It was the last night before the end of trial, and the last opportunity to discuss important case-related matters, such as conducting further examination of witnesses, closing arguments, a general recapitulation of how trial was going so far, and even the possibility of negotiating a plea bargain.

The problem could have been avoided. Rather than declaring an overnight recess, the trial court instead directed defendant to take the stand late at night and declared a recess approximately fifty minutes later.

United States v. Torres
2021 WL 1991215 (5th Cir., 5/19/21)

* * *

RIGHT TO COUNSEL - Effective Assistance

In this rape prosecution in which it was alleged that the victim was physically helpless and thus unable to consent, the Third Department, with one judge dissenting, upholds the denial of defendant's motion to vacate the judgment of conviction, concluding that defendant was not deprived of effective assistance.

Defense counsel waived a Huntley hearing and allowed defendant's recorded statements into evidence at trial. But counsel explained that defendant had maintained throughout the interview that the victim was an active and willing participant in the sexual encounter, and that, if the statements were suppressed, the jury would hear only about the changes defendant had made to his story when he testified at trial. In contrast, the defense would benefit from having the jury repeatedly hear defendant's exculpatory version of events. Counsel believed that any damage caused by the jury seeing defendant walk back aspects of his story could be ameliorated, since jurors could be persuaded to sympathize with a "desperate" and "confused" defendant who wavered on a few points after prolonged, increasingly hostile questioning, but remained "adamant that everything that had just happened was consensual and [that the victim] was awake for it." Counsel ably pursued this strategy.

Although defendant complains that counsel failed to consult with experts or present their testimony to rebut proof related to the victim's sexual assault examination, her degree of intoxication, and the presence of defendant's genetic material in her anus, counsel pursued a different strategy. A finding that the victim was alert and willing would have resulted in an acquittal on all charges. Counsel focused on that issue to the exclusion of "murkier battles" over whether any anal sexual conduct had occurred, or whether some of the conclusions drawn by the People's experts were open to question. Counsel cited emotionally charged testimony from the victim, the sexual assault nurse examiner and others, all of whom posed a real danger of inflaming the sympathies of the jury against defendant.

People v. Joseph Sposito
(3d Dept., 4/22/21)

* * *

RIGHT TO COUNSEL - Eligibility For Assigned Counsel

The Appellate Term finds reversible error in the court's failure to assign counsel to defendant, who represented himself, where Legal Aid determined that defendant did not qualify financially, but defendant stated to the court that he wanted a lawyer and had not hired a lawyer because he did not have the money.

Although the court asked defendant where, and with whom, he lived, whether his parents owned a house, whether defendant owned a vehicle, and whether defendant worked, the inquiry was insufficient since no specific financial information was asked for, or provided. The fact that a defendant owns a car or lives with his parents in a house his parents own, does not, in and of itself, mean that defendant can afford to hire an attorney. It appears that the court based its determination predominantly on Legal Aid's determination.

People v. Tobin Zahangirs
(App. Term, 2d Dept., 9th & 10th Jud. Dist., 11/18/21)

* * *

RIGHT TO COUNSEL - Choice Of Counsel/Conflict Of Interest
ETHICS

After jury selection but before the presentation of evidence, the People learned for the first time that the complainant had been represented by two other Queens County Legal Aid attorneys in 1995 and 2005 on matters unrelated to this case. Defense counsel denied having known that the complainant had a history of arrests, having investigated the complainant using the LAS's internal database, or having discussed the complainant's prior cases with the other LAS attorneys, both of whom continued to work at the Queens County office. The court granted, without prejudice,

defendant's motion for a mistrial, and ordered that the complainant's cases be unsealed as potentially exculpatory Brady material.

Subsequently, the court, upon the People's motion, disqualified defense counsel and assigned a new attorney pursuant to article 18-B of the County Law. Defendant later pleaded guilty to disorderly conduct and was sentenced to time served.

A divided Appellate Term panel rejects defendant's contention that the court erred in disqualifying defense counsel, with the majority noting that there is no indication in the record that the complainant waived any conflict; and that where the potential conflict is discovered before trial, a court may act to protect the rights of the defendant, the previously represented witness, and the integrity of the proceedings.

The dissenting judge notes that defense counsel was in the best position to assess the potential conflict; that counsel adamantly disclaimed knowledge of the complainant's prior cases; that the LAS's prior representation of the complainant by two different attorneys more than 10 years earlier on completely unrelated cases was too remote in time and substance to create even an appearance of potential conflict; that there was no danger that the complainant's confidences would have been compromised at trial; and that the presumption favoring counsel of one's choosing was not overcome.

People v. Timothy Curtis
(App. Term, 2d Dept., 2d, 11th & 13th Jud. Dist., 12/3/21)

* * *

RIGHT TO COUNSEL - Pre-Sentence Mental Health Evaluation

Noting that the State concedes that the Sixth Amendment right to counsel requires that defense counsel be given prior notice of the nature and scope of a state-sponsored psychiatric examination, the North Dakota Supreme Court vacates orders allowing representation by counsel during a presentence investigation-related psycho-sexual evaluation. Although there is a Sixth Amendment right to counsel in formulating an approach to the examination, this right is satisfied when defense counsel is given notice and an opportunity to consult with the defendant prior to the evaluation.

State v. Schmidt
2021 WL 3083487 (N.D., 7/22/21)

* * *

SENTENCE - Domestic Violence Survivors
ETHICS - Conflict Of Interest
RIGHT TO COUNSEL - Effective Assistance/Choice Of Counsel

The DV Survivor's Act (Penal Law § 60.12) permits courts to impose reduced alternative sentences in certain cases involving defendants who are victims of domestic violence. In this murder prosecution, the Second Department holds that the sentencing court did not properly apply the law when sentencing defendant, noting, inter alia, that the evidence established that the deceased repeatedly abused defendant physically and sexually, and that the abuse was a significant contributing factor; and that the court evidenced "an arcane belief/suggestion that the defendant could have avoided the murder by withdrawing from her apartment, which are antiquated impressions of how domestic violence survivors should behave."

The trial court did not err in granting the People's motion to disqualify the Public Defender where an attorney from the office of the Public Defender previously represented a potential witness and apparently advised that witness that he was not obligated to speak to the prosecution's investigator regarding defendant's case, and the potential witness was someone whom defendant alleged also had abused her and could have been called by the People to refute the defense of battered women's syndrome. A defendant's willingness to waive the conflict at an early stage does not end the inquiry, and it is within the court's authority to decline to accept such a waiver. Doubts as to the existence of a conflict of interest are resolved in favor of disqualification in order to avoid even the appearance of impropriety.

People v. Nicole Addimando
(2d Dept., 7/14/21)

* * *

COMPETENCY TO PROCEED
RIGHT TO COUNSEL - Decision-Making

The Second Department concludes that where defendant had been found incompetent on four previous occasions, and an expert had concluded that defendant would likely decompensate if he stopped taking his medication, the court, when confronted with evidence that defendant was not taking his required medication and was not able to communicate rationally with his attorney, should have granted the joint applications of the People and the defense to have defendant examined pursuant to CPL § 730.30(1) to determine his fitness to proceed. When both the defense and the People agree that a competency examination is warranted, the court should hesitate before disagreeing.

The Court also notes that a defendant found competent to stand trial has the ultimate authority, even over counsel's objection, to reject the use of a psychiatric defense. Thus, once the court below determined defendant to be competent, it should not have ordered defense counsel, over defendant's objection, to present an insanity defense.

People v. Eric Bellucci
(2d Dept., 12/2/20)

* * *

ETHICS - Conflict Of Interest
RIGHT TO COUNSEL

Before trial, defense counsel learned that the Public Defender's Office (his employer) was representing another individual who was charged with murder and that defendant had information relevant to that crime. Defendant wanted to use that information to secure an advantageous plea bargain. As a result of the conflict of interest, the PD's Office sought to be relieved of representing that other individual as well as defendant. The court presiding over the murder case granted that request, but the court in this case denied it, stating that "there was going to be no plea bargaining or any disposition short of a trial. This case was given to me for trial, and I'm going to try the case."

The Fourth Department concludes that even assuming, arguendo, that there was an actual conflict of interest, it was resolved when the court presiding over the murder case relieved the PD's Office from its representation of the other individual.

People v. Sylvester Britt
(4th Dept., 10/1/21)

Expert And Lay Opinion Testimony

EXPERT TESTIMONY - False Confessions
- Eyewitness Identification

In *People v. Bedessie* (19 N.Y.3d 147), the Court of Appeals recognized that the phenomenon of false confessions during custodial interrogation is common knowledge, and opined that expert psychological testimony relevant to the defendant and the custodial interrogation at issue could be admissible "to educate a jury about those factors of personality and situation that the relevant scientific community considers to be associated with false confessions." The admissibility and limits of the expert's testimony lie primarily in the sound discretion of the trial judge, and the expert may not render an opinion as to the truthfulness or falsity of the confession.

A Court of Appeals majority, in a 4-3 decision, concludes that the trial court did not err in precluding the testimony of defendant's expert witness on false confessions at trial after holding Frye and Huntley hearings.

The majority notes, inter alia, that awareness of the phenomenon of false confessions has evolved to the point of common knowledge, if not conventional wisdom, but this does not mean that expert testimony on the theories behind the reasons for false confessions is rendered unnecessary, and certain aspects of the scientific study of the phenomenon might well be outside the ken of the typical juror; that the proffered psychological expert testimony here is not addressed to a particular scientific technology or procedure that, when properly performed, will generate results generally

accepted as reliable in the scientific community, and is not admitted into evidence to demonstrate an evidentiary fact; that this testimony is meant to be used as an informational tool to educate the jury on the causal connection between relevant factors and false confessions outside their ken, and to do so without opining on the particular facts of the case; that, here, defendant denied making the second, more detailed, confession, so the expert testimony had no relevance; that defendant maintained that the first statement was the product of outright coercion rather than psychological coercion, and there is a difference between the classically, inherently coercive interrogation that produces an involuntary confession, which the jury is well-equipped to understand, and the interplay of situational and dispositional factors that produce a false confession the jury may find counterintuitive; that the thrust of the testimony was that the presence of dispositional factors may be causally linked to false confessions because they may make a vulnerable individual more susceptible to a wide variety of situational factors in the inherently coercive setting of the interrogation, but the speculative nature of the testimony and the lack of relevance to the particular circumstances of defendant's interrogation presented the risk that the jury would be confused or misled, rather than aided, by the testimony; and that "there is no abuse of discretion when the trial court disallows expert psychological testimony as to false confessions when it is not relevant to the circumstances of the custodial interrogation in the case at hand."

The majority also concludes that it was not an abuse of discretion for the trial court to deny defendant's motion to admit expert testimony to explain factors affecting the reliability of eyewitness identification. Although the robberies involved single-witness identifications, made after a brief encounter with an armed stranger of a different race, the identification of defendant in the case in which the expert testimony was precluded was corroborated by defendant's statements as well as surveillance footage, and thus the evidence did not turn solely on the accuracy of the identification.

The dissenting judges assert, inter alia, that after defendant established that the science of false confessions was generally accepted in the relevant scientific community, the lower courts, and the majority, should have ended the analysis there, rather than focusing on questions of foundation, the fit between the proffered testimony and the facts of the case, and the methodologies used by social sciences researchers, which are not relevant at a Frye hearing; and that given the Court's recognition that false confessions occur and that expert testimony on this phenomenon would aid a jury in assessing the voluntariness of a defendant's incriminating statements, the majority unjustifiably delays our inevitable determination that there is general acceptance within the scientific community that there are situational and dispositional factors that lead to false confessions.

People v. Howard Powell
(Ct. App., 11/18/21)

* * *

EXPERT TESTIMONY - Defendant's Mental State/Adolescent Brain Development
DEFENSES - Justification

The murder defendant, 14 years old at the time, allegedly fired a revolver in the direction of rival gang members on a public bus and killed a bystander; and then pursued the rivals on the street, continuing to shoot at them. His defense at trial was justification. Defendant sought to introduce testimony by an expert concerning the science of adolescent brain development and behavior, to assist the jury in determining whether the People had met their burden of disproving justification. The court denied defendant's request without conducting a Frye hearing.

The Court of Appeals finds no error.

People v. Kathon Anderson
(Ct. App., 5/4/21)

* * *

EVIDENCE - Lay Opinion Testimony

The Colorado Supreme Court finds no error where the trial court admitted as lay opinion a police officer's testimony regarding his interpretation of a witness's body language when the witness, e.g., looked down and away after the officer asked the witness whether he had gotten drugs from defendant.

The non-verbal response at issue here is the type of body language that ordinary people have likely experienced. Also, a witness can testify in this manner because it would be difficult, if not impossible, to accurately and vividly describe a person's bodily movements to the jury in a completely factual manner. If the officer merely stated that the witness looked down and away, without explaining how he interpreted that movement in the context of the entire interview, the jury would not understand why the officer then asked, "Did she just give it to you or did she sell it to you?"

The officer's opinion testimony was rationally based on his observations and perception, was helpful to the jury, and was not drawn from his specialized knowledge.

People v. Murphy
2021 WL 1345489 (Colo., 4/12/21)

* * *

EVIDENCE/EXPERTS - Shotspotter Technology

Defendant was convicted for assault with a semi-automatic firearm. The strongest evidence that the firearm he fired was a semi-automatic was an audio recording that had been sent to the Oakland Police Department by a third-party service called "Shotspotter."

A California appeals court concludes that the trial court erred in admitting the Shotspotter evidence without first conducting an evidentiary hearing to assess its scientific reliability pursuant to *People v. Kelly* (549 P.2d 1240), which in turn relied on *Frye v. United States* (293 F. 1013).

Borrowing from a Nebraska court opinion, the Court notes that ShotSpotter is an acoustic gunfire detection and location system of GPS-enabled microphones placed in various locations of a municipal area. Shotspotter's technology remains sufficiently novel to merit California courts' review of it under *Kelly/Frye* to determine its scientific validity and reliability before admitting the evidence to prove the facts of a particular shooting.

The conviction is subject to reinstatement by the trial court upon remand if, after conducting a *Kelly/Frye* hearing, the court concludes the Shotspotter evidence was admissible at trial.

People v. Hardy
2021 WL 2349465 (Cal. Ct. App., 1st Dist., 6/9/21)

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

IDENTIFICATION - Surveillance Video
- Courtroom Showup
HEARSAY - Reliability Exception
RIGHT TO PRESENT EVIDENCE

The Second Department finds no error in the admission of testimony by a detective, who was not a witness to the crime in question, that he believed an individual depicted in certain surveillance videos was defendant. The detective knew defendant from his patrols of defendant's neighborhood over the course of many years, and thus his opinion testimony aided the jury in making an independent assessment of whether the person depicted in the videos was defendant.

Defendant's rights were not violated when the court permitted a witness to make a first-time, in-court identification during trial.

However, the court committed reversible error when it denied defendant's request to introduce the grand jury testimony of a witness who had since become unavailable to testify. The proffered testimony was material and exculpatory since it consisted of eyewitness testimony that positively identified the co-defendant as one of the shooters but provided a description of the second shooter that was inconsistent with a description of defendant. The prosecutor had a full and fair opportunity to examine the witness, and thus the testimony has indicia of reliability.

People v. Oba Johnson
(2d Dept., 8/25/21)

Practice Note: There is nothing preventing a witness from making an in-court identification even though the witness never observed the accused before the crime charged, and has not seen the

accused since. In many cases an arrest is properly made, and the accused is brought to court and arraigned, without any out-of-court identification by a particular witness. However, there is inherent suggestiveness in an in-court showup procedure, possibly occurring long after the crime and certainly involving the most suggestive circumstances imaginable, at which a witness identifies the accused for the first time.

New York law is not, at present, particularly friendly. In *People v. Brown*, 28 N.Y.3d 392 (2016), *aff'g* 126 A.D.3d 516 (1st Dept. 2015), the trial court denied the defendant's request for an in-court lineup where one victim had identified the defendant in a suggestive pretrial lineup but would identify the defendant in court after a finding of independent source, and another victim had never participated in a pretrial identification procedure. The First Department alluded to the victims' consistent accounts of the robbery, which showed that they had a good opportunity to view the robber's face at close range, and observed that because one victim never participated in a pretrial identification procedure, his in-court identification could only have been based on his recollection from the night of the crime. In making the latter observation, was the First Department really blind to the possibility that the in-court showup played a part in the identification? The Court of Appeals affirmed, concluding that the defendant had no constitutional right to an in-court lineup, and that the trial court did not abuse its discretion by denying his request for one. The Court of Appeals also noted that defendant had "failed to sufficiently cast doubt on the reliability of the witnesses' identification testimony or otherwise demonstrate impermissible suggestiveness by the traditional in-court identification procedure…." Was the Court of Appeals effectively saying that a defendant has no cognizable interest in avoiding an unduly suggestive courtroom showup when it appears that an identification that has never taken place will be reliable? Really? *See also People v. Lombardo*, 151 A.D.3d 887 (2d Dept. 2017), *lv denied*, 30 N.Y.3d 951 (no error in admission of 13-year-old eyewitness's in-court identification where witness did not participate in pretrial identification procedure and there was no colorable claim of suggestiveness); *People v. McCullin*, 248 A.D.2d 277 (1st Dept. 1998), *lv denied*, 92 N.Y.2d 928 (citing strong evidence of guilt, court found no error in denial of motion for out-of-court identification procedure, or in-court procedure including individuals who resembled defendant).

In *People v. Brooks*, 39 A.D.3d 428 (1st Dept. 2007), *lv denied*, 9 N.Y.3d 873, the First Department found no error where the trial court refused to conduct an in-court lineup for the victims' grandmother, who had not participated in any pretrial identification procedures, but at least in that case the grandmother had spontaneously recognized the defendant when she inadvertently saw him in custody in a courthouse hallway, which, according to the court, established her ability to make a reliable identification.

None of these decisions suggest that there are no cases in which a lineup is the only means of ensuring that a witness's in-court identification will be reliable, or that the trial court lacks discretion to order a lineup in the interests of justice. There is authority defense counsel can cite when asking for a lineup.

The Supreme Judicial Court of Massachusetts is out ahead of New York courts on this issue, holding in *Commonwealth v. Crayton*, 21 N.E.3d 157 (2014) that where an eyewitness has not

participated before trial in an identification procedure, courts must treat the in-court identification as an in-court showup, and admit it in evidence only where there is "good reason" for its admission.

In *United States v. Archibald*, 734 F.2d 938 (2d Cir. 1984), *modified and rehearing denied*, 756 F.2d 223, the defendant requested that he "be seated with five or six other black men who looked reasonably like him, to ensure that he would not be obviously singled out by an educated witness." The trial court denied the request. The Second Circuit found error, reiterating its concerns about suggestive in-court identification procedures, and noting the risk that an in-court identification will be affected when the defendant is at the counsel table. Although there was no obligation to stage a lineup, there was "an obligation to ensure that the in-court procedure ... did not simply amount to a show-up." "A fairly short delay of proceedings was all that would have been required to rearrange the seating in the courtroom and to secure the presence of some people of the defendant's approximate age and skin color." When it modified its decision, the court stated: "We wish to make it clear in respect to that portion of our opinion relating to in-court procedures for identification that special procedures are necessary only where (1) identification is a contested issue; (2) the defendant has moved in a timely manner prior to trial for a lineup; and (3) despite that defense request, the witness has not had an opportunity to view a fair out-of-court lineup prior to his trial testimony or ruling on the fairness of the out-of-court lineup has been reserved." *See also United States v. Brown*, 699 F.2d 585 (2d Cir. 1983); but see *Matter of Johnson v Torres*, 259 A.D.2d 370 (1st Dept. 1999) (judge had no authority to compel District Attorney to provide "fillers" for lineup during trial).

Finally, defense counsel should not ignore the strategic component. The obvious risk is that a witness will in fact make an identification during a lineup, and rob defense counsel of the ability to challenge an in-court identification on the ground that the witness merely identified the only individual in the courtroom who could possibly be the perpetrator. *See People v. Medina*, 208 A.D.2d 771 (2d Dept. 1994), *lv denied*, 84 N.Y.2d 1035 (when in-court identification is first one, defense can explore weaknesses and suggestiveness of identification).

* * *

RIGHT OF CONFRONTATION - Virtual Suppression Hearing
RIGHT TO BE PRESENT
RIGHT TO PUBLIC TRIAL
RIGHT TO COUNSEL - Effective Assistance

The Supreme Judicial Court of Massachusetts holds that a virtual suppression hearing is not a per se violation of defendant's constitutional rights in the midst of the COVID-19 pandemic. However, since defendant waived his right to a speedy trial and there are no civilian victims or witnesses, the judge abused her discretion in denying defendant's motion to continue his suppression hearing until it may be held in person. The harm to the government's case caused by further delay is minimal. The Commonwealth has presented no evidence that the officers or the evidence in their custody will be unavailable if the hearing is continued.

The Court also addresses several constitutional issues. With respect to the right to be present in court, the Court notes that a virtual hearing, with today's video conferencing technology, can approximate a live physical hearing in ways it could not previously; and that if the technology does not function as designed, it is crucial that the court suspend the hearing.

With respect to the right of confrontation, the Court joins a minority of States that have held that there is a right to confrontation at a hearing on a motion to suppress. However, under the Sixth Amendment, the Supreme Court allows for a case-specific finding of necessity that may justify dispensing with face-to-face confrontation, if there is an assurance that the testimony is reliable. Protecting the public health during this pandemic constitutes an important public policy that may be the basis of a finding of necessity. The use of two-way video conferencing technology, where all parties are virtually present, is sufficient to provide an assurance of reliability.

With respect to the right to a public trial, the Court notes that the right is not absolute; that the presumption of openness may be overcome, and the public may be required to attend a hearing virtually or telephonically, where the judge sets forth on the record reasons that justify imposing such a condition and where the condition is no broader than necessary to accomplish its purpose; and that such a hearing does not amount to a constitutional closure.

With respect to the right to the effective assistance of counsel, the Court notes that a defendant's inability to immediately communicate with counsel regarding tactical or strategic decisions does not interfere with the effective assistance of counsel, nor does the defendant's inability to pass notes to counsel or use nonverbal cues to communicate. However, attorney-client communication over Zoom are not immune from constitutional scrutiny. Both the attorney and the judge must take care that the technology is functioning properly and that the defendant has the opportunity to use the private breakout room with counsel if the defendant wishes. Inquiries should be made regularly of all parties - especially the defendant - to ensure that there is clear audio and video transmission and that the defendant has the opportunity to consult with counsel. It also may be incumbent on counsel to inquire periodically of the defendant whether he or she wishes to communicate with counsel. The Court also observes that because of social distancing protocols, it is likely more difficult for a defendant to communicate privately with counsel at an in-person hearing than a virtual hearing.

Diaz v. Commonwealth
2021 WL 1773873 (Mass., 5/5/21)

* * *

RIGHT OF CONFRONTATION - Video Testimony

A Montana Supreme Court majority finds a right of confrontation violation, albeit harmless, where the trial court allowed a State witness to appear by two-way video.

The court found that the State established that it was impractical to transport the witness 481 miles

in each direction "to talk about whether or not this is a legitimate check written on their account or not." However, the Confrontation Clause applies despite the court's characterization of the testimony as "more or less" foundational. The court made no case-specific finding establishing an important public policy reason for the video testimony apart from judicial economy.

State v. Martell
2021 WL 6055900 (Montana, 12/21/21)

* * *

RIGHT OF CONFRONTATION - Video Testimony

The Nebraska Supreme Court finds no violation of defendant's right of confrontation where the trial court allowed a witness, who had tested positive for COVID-19 and was experiencing symptoms, to testify via two-way interactive video. The requirements of the Confrontation Clause may be satisfied absent a physical, face-to-face confrontation where: (1) the denial of confrontation is necessary to further an important public policy, and (2) the reliability of the testimony is otherwise assured.

The important public policy was the need to respond to the ongoing COVID-19 pandemic and to prevent the spread of the coronavirus. When the trial took place in July 2020, the coronavirus was very new and knowledge regarding its transmission and ways to limit its spread was limited.

In light of the nature of the testimony - a translation of portions of a phone call in which defendant spoke in Spanish - reliability was otherwise assured. The assessment of credibility was not as vital or as nuanced as it would be for testimony by the crime victim or by an eyewitness. Defendant was allowed to cross-examine the witness, and, because it was two-way interactive video, defendant and his counsel could see the witness and vice versa. A recording of the calls was received into evidence and the jury was able to listen to the calls and determine whether the witness's translations appeared reliable.

State v. Comacho
309 Neb. 494 (Neb., 6/18/21)

* * *

RIGHT OF CONFRONTATION - Remote Testimony

A Florida appeals court finds no error where the trial court conducted a remote juvenile delinquency trial via Zoom during the COVID-19 pandemic.

Defense counsel's main concern was that the minor witnesses would not treat remote proceedings as seriously and it was harder to control what went on with them. Counsel also was concerned about parental interference with testimony and the court's ability to see a witness's demeanor. The

court responded that it had learned "techniques" to address those concerns and pledged to "address every concern you've raised at the time it becomes an issue." The court took great care to read four of the six instructions requested by the defense and advised the witnesses of the seriousness of their testimony. The court insured the witnesses were on "gallery" view. The juvenile was able to be in the same room as his counsel, the prosecutor, and the judge. The court recognized that no one knew how long the restrictions would last and people did not want to delay proceedings "unless absolutely necessary."

The juvenile did not cite to any issue related to the witness' testimony and the remote proceedings during trial. Rather, the concerns raised on appeal relate to potential problems in a remote proceeding, not to any problems that occurred here.

A dissenting judge would reverse and remand for the trial court to conduct the required *Maryland v. Craig* (497 U.S. 836) analysis before permitting the witnesses to testify remotely, and asserts, inter alia, that "there is simply no precedent for substituting the United States Supreme Court mandate of a case-specific finding of necessity with 'techniques' developed by the trial court."

E.A.C. v. State
2021 WL 2818155 (Fla. Dist. Ct. App., 6/30/21

* * *

RIGHT OF CONFRONTATION - Remote Testimony

A Missouri appeals court holds that the trial court violated the juvenile's right to confrontation under the United States and Missouri Constitutions when it allowed witnesses to testify remotely, without making a finding that this was necessary or justified by exceptional circumstances.

In determining whether witnesses may testify by two-way videoconferencing despite a defendant's assertion of his Confrontation Clause rights, courts have applied two legal standards, one involving, inter alia, a finding that the denial of confrontation is necessary to further an important public policy, and the other standard requiring a finding of "exceptional circumstances" and witness unavailability.

Applying the *Maryland v. Craig* standard, courts have held that generalized concerns about the spread of COVID-19 did not justify denying a criminal defendant's Confrontation Clause rights without some specific showing that an individual witness was particularly susceptible to the disease, and that other precautionary measures would not adequately protect the witness. Here, the court made no finding that anything about the health or circumstances of the witnesses required that they be permitted to testify from a remote location.

In the context of an outbreak of an infectious disease affecting the entire community, legal standards might be satisfied by generally applicable circumstances beyond the particulars of an individual case. But the record contains no evidence, or findings, concerning the prevalence or

risks of COVID-19 in the relevant geographical area. Moreover, the judge, the judge's staff, the juvenile, and defense counsel, were all physically present in the courtroom as the witnesses testified. Presumably, the court found the safety measures in place in the courtroom to be sufficiently protective.

The Court transfers the case to the Missouri Supreme Court so that the Supreme Court may address the Confrontation Clause arguments.

In re C.A.R.A.
2021 WL 2793539 (Missouri Ct. App., 7/6/21)

In re J.A.T.
2021 WL 3040942 (Missouri Ct. App., 7/20/21)
In another case, a Missouri appeals court found reversible error where, due to the risk of disease transmission associated with the COVID-19 pandemic, the trial court refused to transport the juvenile from the detention facility where he was in custody to the court for his adjudication hearing, and he participated in the hearing by videoconference (although all other trial participants were physically present in the courtroom). The trial court made no specific finding that his exclusion from the hearing was necessary or justified by exceptional circumstances.
The trial court may have had a special obligation to keep the juvenile, and other residents of the detention facility, healthy and safe. Nevertheless, besides the lack of sufficient findings, there is no evidence in the record concerning the particular circumstances of the detention facility, of the juvenile, or of the prosecution's witnesses, which required that the juvenile and the witnesses be kept physically separated from one another.
The purported "necessity" of excluding the juvenile from the courtroom is also undermined by the fact that the court permitted all other trial participants to be physically present in the courtroom during the adjudication hearing. The purported necessity of isolating the detention facility's residents from court-hearing-related exposures is belied by the fact that defense counsel was permitted to enter the facility and interact with the juvenile after experiencing just the sort of exposures which the facility was purportedly seeking to eliminate.
The Court transfers the case to the Missouri Supreme Court so that the Supreme Court may address the Confrontation Clause arguments.

* * *

RIGHT TO BE PRESENT - Virtual Proceedings

The Court holds that after termination of the Governor's executive order, the parties may mutually consent to conducting a criminal proceeding virtually - in this case, an agreed-upon felony probation sentence after a plea - even though the virtual proceeding is not authorized by Criminal Procedure Law Article 182.

There is no reason to believe the Legislature intended to foreclose mutually-agreed upon virtual proceedings using the technologies and confronting the health risks we face today. Article 182 is

an archaic statute enacted in 1993. Some of statute's provisions are obviously outdated. The statute exists for the protection of the defendant, and if a defendant knowingly, voluntarily and intelligently states that he wants to waive his fundamental right to be present, he is entitled to do so.

The benefits of virtual appearances are obvious. People do not have to travel to and wait in courthouses. Defendants who must travel to court, often for routine appearances like calendar calls at which nothing substantive may occur, may miss work or face health or child care challenges. The failure to physically appear in a courtroom may result in incarceration. Virtual proceedings reduce health risks. They save court resources which can be used for cases which require personal appearances, like jury trials.

People v. Andrew Reyes
(Sup. Ct., N.Y. Co., 7/30/21)
https://www.nycourts.gov/reporter/3dseries/2021/2021_21201.htm

* * *

HEARSAY - Excited Utterances

The Second Department finds no error in the admission of certain out-of-court statements as excited utterances where the declarant was present when her boyfriend was killed, inside her own apartment, while her children slept in the next room; there was an interval of time between the incident and the statements to a detective, but the statements were made while the parties were still within an apartment that was bustling with emergency personnel responding to the scene, where the victim's body remained; and the detective testified that when he first saw the declarant, she was "yelling out" and "pacing back and forth," her "hands were shaking," and she was "visibly nervous, upset."

There was an added assurance of reliability since the declarant was a trial witness subject to cross-examination.

People v. Mark Ortiz
(2d Dept., 10/20/21)

* * *

RIGHT OF CONFRONTATION - Autopsy Report/Experts

In this habeas proceeding, the Second Circuit concludes that the New York State appellate court's rejection of petitioner's right of confrontation claim involved an unreasonable application of clearly established Federal law where, at trial, an autopsy report prepared at the request of law enforcement during an active homicide investigation was admitted into evidence through a witness who had not participated in the autopsy or in the preparation of the autopsy report.

The autopsy was performed in aid of an active police investigation, and preparations for the autopsy commenced at a detective's request. The autopsy was performed in the presence of another medical examiner and two detectives. After completing the autopsy, the doctor promptly notified law enforcement of her findings, and the police consequently dropped charges against another individual and pursued a murder charge against petitioner. The circumstances under which the autopsy report was created would lead any objective witness to believe that the report would be available for use at a later trial.

Indications of the report's solemnity include its formal title, "Report of Autopsy," the OCME seal, the certification that the doctor performed the autopsy at the indicated date and time, and the initialed and dated "draft" and "final" dates indicating when the draft report was prepared and when it was finalized.

The Supreme Court has rejected the argument that forensic reports that do not directly accuse the defendant of wrongdoing, or include only observations of an independent scientist made according to a non-adversarial public duty, are not testimonial. There is no category of witnesses who are helpful to the prosecution but somehow immune from confrontation.

Garlick v. Lee
2021 WL 2385394 (2d Cir., 6/11/21)

* * *

RIGHT OF CONFRONTATION - Video Testimony

The Court agrees to admit trial testimony from a witness in California by two-way video technology where the witness's age and preexisting conditions place him at increased risk of serious illness or death if he were to contract COVID-19.

Federal Rule of Criminal Procedure 15 permits the taking of a witness's deposition in exceptional circumstances and courts permit deposition testimony to be used at trial if the witness is unavailable. This Court has held that a witness who could have been deposed under Rule 15 may be examined by two-way videoconference.

The Court rejects defendants' contention that the law has been changed by the Supreme Court's opinion in *Crawford v. Washington* (541 U.S. 36). Crawford only addressed whether confrontation is required for certain out-of-court statements, not whether a defendant's Confrontation Clause right can be vindicated in exceptional circumstances by video testimony.

The witness will testify from his attorneys' offices in the San Francisco area, and counsel for defendants have been invited to send representatives, who can be present in the same room as the witness throughout the entirety of his testimony. This approach will preserve almost all the intangible elements of courtroom testimony.

United States v. Akhavan
2021 WL 797806 (S.D.N.Y., 3/1/21)

* * *

TRIAL IN ABSENTIA - Right To Be Present At Material Stage Of Trial
IMPEACHMENT - Witness's Mental Health History

At trial, after the rape complainant testified during cross-examination that she had suffered from and been treated for depression and bipolar disorder, the court interviewed the complainant in camera, without defendant present, to determine if her psychiatric history was material to the jury's assessment of her credibility. The court determined that the complainant's testimony with respect to her psychiatric history was irrelevant, struck her testimony on the subject, and instructed the jury to disregard that testimony. The court denied defense counsel's motion for a mistrial.

The Second Department finds reversible error. Where a primary prosecution witness is shown to suffer from a psychiatric condition, the defense is entitled to show that the witness's capacity to perceive and recall events was impaired by that condition. Defendant's absence during the court's in camera interview with the complainant had a substantial effect on his ability to defend the charges against him, and thus the interview constituted a material stage of the trial for which defendant should have been present.

Moreover, court erred in striking the complainant's testimony with respect to her psychiatric history.

People v. John King
(2d Dept., 3/31/21)

* * *

RIGHT OF CONFRONTATION - Hearsay/Statement By Accomplice

The Second Department finds reversible error where a law enforcement officer testified to a statement made to him by a non-testifying accomplice directly implicating defendant in the charged crimes. The officer had confronted defendant with the statement during an interrogation.

Although the People contend that there is no proof that the accomplice actually made any statement and suggest that the detective made it up as a ruse to get defendant to confess, the prosecution never denied that the accomplice had made the statement and emphasized its sum and substance in their opening statement as well as in summation.

And, although the People contend that the statement was introduced not for its truth, but only to illustrate defendant's reaction to it, the jury was never informed that they could not consider the statement for its truth.

People v. Troy Lockley
(2d Dept., 11/10/21)

* * *

RIGHT OF CONFRONTATION - Hearsay/Forfeiture Of Right
HEARSAY- Unavailability Of Witness Due To Misconduct By Defendant

The Second Department concludes that the People established at a Sirois hearing by clear and convincing evidence that defendant procured a certain witness's unavailability despite the fact that the witness testified that she was not afraid of defendant. The evidence established that defendant was one source of threats that the witness and her family received in 2016 relating to her statement to the police in this case and that the witness was refusing to testify at defendant's trial because she was afraid that doing so would bring more threats to her and her family.

Accordingly, the court properly admitted the witness's written statement and text messages into evidence.

People v. Joshua Taylor
(2d Dept., 3/31/21)

* * *

HEARSAY - Unavailability Of Witness Due To Defendant's Misconduct/Sirois Hearing
RIGHT OF CONFRONTATION - Hearsay/Forfeiture Of Right
SEVERANCE

The Third Department agrees with defendant that the trial court erred when it permitted the People to read the complainant's grand jury testimony into evidence. The evidence at the Sirois hearing showed, inter alia, that defendant told an individual to contact the complainant's boyfriend and ask if he was "going to do the right thing." When the individual made the call, defendant stated, "yo bro, do the right thing." However, defendant's comments did not reference either the complainant or the underlying incident, and defendant's tone and demeanor can best be described as frustrated or exasperated, as he repeatedly stated that he could not hear the complainant's boyfriend and asked the caller if the boyfriend could hear him. Finally, the complainant cannot be heard on the phone call at all, much less engaging in conversation with defendant.

Although the trial court deemed defendant's comments to the complainant's boyfriend to be "a direct threat" against the complainant, there was no clear and convincing evidence to support the

finding that defendant, or others acting on his behalf, were a significant cause of the complainant's decision not to testify.

The Court splits 3-2 on the question of whether charges of menacing in the second degree and assault in the third degree were joinable with the charge of criminal possession of a weapon in the second degree, with the majority concluding that the court committed reversible error when it denied defendant's motion to sever, and that even assuming, without deciding, that proof of the assault and menacing incident falls within the ambit of Molineux in that it provides necessary background information and/or completes the narrative, the probative value of such evidence as anything other than propensity evidence is de minimus.

People v. Christopher Bryant
(3d Dept., 12/30/21)

* * *

HEARSAY - Present Sense Impression

The First Department concludes that the trial court erred in admitting into evidence the complainant's 911 call under the present sense impression exception to the hearsay rule where the complainant walked almost one full block before he thought about the incident and decided to return to the scene and call 911; and he estimated that it was three to five minutes after the incident, but additional evidence suggested it was closer to six minutes after the incident.

People v. William Merritt
(1st Dept., 4/29/21)

* * *

HEARSAY - Prompt Outcry

Where defendant was charged with subjecting the complainant, his stepdaughter, to a course of sexual abuse beginning in 2009, when the complainant was 10 years old, the Second Department concludes that the complainant's outcry to her close friend when the complainant was 12 years old was prompt since she made the outcry while the abuse was ongoing.

People v. John Lides
(2d Dept., 12/22/21)

* * *

HEARSAY - Prompt Outcry
- Statements Relevant To Treatment And Diagnosis
UNCHARGED CRIMES EVIDENCE

The episodes of sexual abuse described by the victim occurred on three different dates between February 2015 and April 2015, and the last episode occurred four days prior to the disclosure by the victim reflected in the testimony of the victim and her mother.

The Third Department holds that considering the victim's age, that defendant was an authority figure in her life, and her testimony that she was scared of defendant, the trial court did not err in concluding that the disclosure was admissible as a prompt outcry.

The court also did not err in admitting testimony that the victim had observed defendant hitting her mother after the first two incidents and prior to the final incident. This evidence provided necessary background showing why the victim feared defendant and delayed disclosing the abuse.

The Court also finds no error in the admission of the victim's statements to medical professionals alleging that defendant had sexually abused her. Given the significant role defendant had in the victim's life and his regular access to her home, his identity was germane to the victim's medical care since it was important to the creation of a proper discharge plan.

People v. Joenathan Maisonette
(3d Dept., 3/18/21)

* * *

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)

Exclusion Of Witness

WITNESSES - Exclusion From Courtroom
RIGHT TO PRESENCE OF PARENT

In Indiana, children as young as twelve can be tried as adults, exposing them to harsher sentences, such as lengthy incarceration.

The Indiana Supreme Court holds that such a child has the right to have a parent present during criminal proceedings, even when the parent is a witness subject to a witness-separation order, if the child can establish under a state evidence rule that a parent is "essential" to the presentation of the defense. Parents may possess "intimate knowledge" of critical aspects of the child's case, or may be the only ones able to help the defendant deal with any anxiety and fully participate in the trial. In those cases, the juvenile defendant could show a parent possesses the "unique ability" to assist the defense, rendering them "essential" under the evidence rule. Defendant did not make such a showing here.

Defendant also argues that the right to have his mother present at a juvenile delinquency trial (see NY Family Court Act provision cited in Practice Note) should carry over to adult court because that right is rooted in due process and overrides a separation order. However, defendant waived the due process issue by failing to adequately argue it.

Harris v. State
2021 WL 1114963 (Ind., 3/24/21)

Practice Note: In New York, FCA § 341.2(3) states that "[t]he respondent's parent or other person responsible for his or her care shall be present at any hearing under this article and at the initial appearance. However, the court shall not be prevented from proceeding by the absence of such parent or person if reasonable and substantial effort has been made to notify such parent or other person and if the respondent and his or her counsel are present."

Uncharged Crimes Evidence

UNCHARGED CRIMES EVIDENCE - Advance Notice And Hearing
IMPEACHMENT - Rape Shield Law

The People sought to preclude defendant's statements to a detective mentioning allegations regarding prior incidents involving sex with the victim's cousin and inappropriate touching by another man. The trial court granted the People's application, concluding that defendant failed to demonstrate that the evidence was admissible under an exception to the Rape Shield Law, and that any connection between the evidence and the victim's motive to fabricate or her knowledge of sexual activity and the male anatomy is "speculative and so tenuous as to be irrelevant." The trial court also precluded cross-examination of the victim regarding alleged disclosures to her therapist because defendant did not establish a connection between those alleged prior sexual incidents and a motive to fabricate the current allegations.

The Third Department finds no error. The Court rejects defendant's contention that the evidence might have discredited the victim and thus fell within the interests of justice exception.

The Court agrees with defendant that the trial court erred in admitting, without defendant having been put on notice and afforded a Ventimiglia hearing to determine admissibility, testimony by

the victim that every time she had sex with defendant they would use a condom because defendant did not want her to get pregnant; that defendant had indicated to her that if she got pregnant, she "needed to find someone else to blame"; and that when the victim and defendant thought she might have been pregnant because her period was one week late, defendant appeared to be nervous about it and punched her in the stomach because "if there was a baby, [defendant] would kill it." However, the error was harmless.

People v. Ryan Gaylord
(3d Dept., 5/12/21)

* * *

UNCHARGED CRIMES EVIDENCE - Probative Of Intent

In this burglary prosecution in which defendant asserted that he was at the location only to smoke marijuana, the People were permitted to introduce evidence of two prior residential burglaries defendant had committed to prove his intent and rebut his explanation.

The First Department reverses, concluding that although the evidence was relevant to intent, the court allowed the People to introduce an excessive quantum of evidence: testimony by three witnesses, the tenant of an apartment that had been burglarized, the investigating officer, and the building's owner; still photographs of the burglarized apartment and building; and a surveillance video from one burglary (accompanied by the building owner's testimony) that depicts a male standing outside of the locked front door of the building, kicking the door several times until the door breaks open, and entering the building, ascending the stairway toward the roof, and, after apparently finding the door locked, coming back downstairs and leaving the building.

The jury could well have imputed propensity as opposed to defendant's intent.

People v. Christopher Rodriguez
(1st Dept., 4/20/21)

Impeachment

IMPEACHMENT - Racial Bias

In this aggravated murder case, the trial court ruled that defendant, a Black man, could not pursue a line of questioning on cross-examination that was intended to show that the witness was racially biased against Black people. Defendant sought to ask about the witness's relationship with the victim, who was the witness's fiancé at the time and with whom the witness had a child and shared a home. Specifically, defendant wanted to ask questions that touched on the victim's racial prejudices and refusal to allow Black people in the home that the couple shared. The trial court ruled that information about the victim's racial bias was not probative of the witness's own bias and, to the extent it had any relevance, it was unfairly prejudicial.

The Oregon Court of Appeals reversed defendant's conviction, concluding that defendant's proffered evidence of bias was relevant and not unfairly prejudicial.

The Oregon Supreme Court affirms. The danger of unfair prejudice was low under the circumstances, and did not outweigh the probative value of the evidence. If defendant had been allowed to demonstrate that the witness was biased against him based on his race, that could have led the jury to question the reliability of the witness's testimony - in particular, the aspects of her testimony that emphasized defendant's aggression in contrast to that of his white accomplice.

State v. Naudain
2021 WL 2010337 (Oregon, 5/20/21)

* * *

IMPEACHMENT - Bad Acts/Police Misconduct

The Appellate Term finds no error where the court limited defendant's cross-examination of a police witness about a prior civil lawsuit against him alleging excessive force, noting, inter alia, that defendant failed to demonstrate how the prior allegations of excessive force were relevant to the officer's credibility.

People v. Kirk Watson
(App. Term, 1st Dept., 7/1/21)

* * *

IMPEACHMENT - Notice Of Alibi

Noting that the state Rules of Criminal Procedure authorize cross-examination of the defendant concerning an alibi notice when the defendant chooses to testify, the Pennsylvania Supreme Court, without definitively resolving the matter, asserts that one can read the rule, by implication, to preclude the prosecution's use of an alibi notice to cross-examine another alibi witness when the defendant elects not to testify, which is the prevailing approach in many other jurisdictions.

Commonwealth v. Shaw
2021 WL 1133205 (Pa., 3/25/21)

Practice Note: In *People v. Burgos-Santos*, 98 N.Y.2d 226 (2002), the Court of Appeals held that statements in the defendant's notice of alibi could not be used to impeach the testifying defendant where the notice had been withdrawn before trial.

Consciousness Of Guilt Evidence

EVIDENCE - Consciousness Of Guilt

The Washington Supreme Court holds that missing one court hearing does not rise to the level of flight evidence from which one can infer consciousness of guilt as to the underlying crime.

Inferring consciousness of guilt fails to consider a crucial factor - why people miss court. The reasons may include lack of reliable transportation; competing responsibilities, such as child care or work; disorganization; and forgetting court dates. The inference disproportionately impacts indigent people and people of color, and negatively interprets homelessness.

State v. Slater
2021 WL 2006319 (Wash., 5/20/21)

Missing Witness Inference

MISSING WITNESS INFERENCE

An Appellate Term majority finds reversible error in the denial of defendant's request for a missing witness charge where the prosecutor merely asserted that she had been informed by the former assigned prosecutor that the assault complainant moved back to France and that this case would be prosecuted without the complainant. The trial prosecutor made no effort to confirm this information herself.

People v. Ilir Ahmeti
(App. Term, 2d, 11th & 13th Jud. Dist., 5/21/21)

Duress Defense

EXPERT TESTIMONY - Battering And Its Effects
DEFENSES - Duress

Defendant, charged with robbery and brandishing a firearm during a crime of violence, admits the robberies but claims she committed them under duress, in fear of brutal violence at the hands of her abusive boyfriend, Defendant filed a motion in limine seeking a ruling on evidence to support her duress defense, including expert evidence on battering and its effects. The duress defense has two elements: reasonable fear of imminent death or serious injury, and the absence of reasonable, legal alternatives to committing the crime. The district court denied the motion, finding that defendant's evidence could not meet either requirement. Defendant subsequently pleaded guilty.

The Seventh Circuit U.S. Court of Appeals reverses. Defendant faces challenges in demonstrating both imminence and no reasonable alternatives: her boyfriend was not physically present for any of the robberies, defendant actually held a gun, and there is a dispute about whether the boyfriend threatened harm if she did not commit these offenses.

However, immediate physical presence of the threat is not always essential to a duress defense. A reasonable man is not likely to fear death or great bodily injury when a person advances towards him during a verbal altercation. However, a woman who has been repeatedly beaten and once choked into unconsciousness by her husband is likely to fear death or great bodily injury when he advances towards her during a quarrel. Expert testimony may inform a jury about the objective reasonableness of a person's response, especially to unusual circumstances beyond the scope of a typical juror's experience. The same is true of the objective reasonableness of defendant's responses to the circumstances she faced here.

United States v. Dingwall
2021 WL 3238848 (7th Cir., 7/30/21)

Temporary And Lawful Possession Defense

DEFENSES - Temporary Lawful Possession
TAMPERING WITH PHYSICAL EVIDENCE

In the outdoor courtyard of an apartment building, defendant shot the decedent in the chest, killing him. Defendant testified that upon exiting the building and walking into the courtyard, he saw that the decedent was arguing with defendant's brother. After seeing that the decedent was in possession of a firearm, defendant struggled with the decedent, who knocked defendant's eyeglasses off his face. Defendant tried to wrestle the gun away from the decedent, the gun fell to the ground, and both men dove to retrieve it. Defendant recovered the gun, the decedent charged at defendant, and defendant shot him. Defendant then ran inside the building with the gun to look for his brother, but could not find him, returned to the courtyard, and, seeing no one there, returned to the building with the gun. Defendant unloaded the gun, wrapped it and the ammunition in his bloodied shirt, and discarded those items in the trash in a double trash bag. The items were never recovered.

Defendant was acquitted of murder in the second degree, and of criminal possession of a weapon in the second degree under the theory that he intended to use the firearm unlawfully against another. The jury convicted the defendant of criminal possession of a weapon in the second degree under the theory that he possessed the firearm outside his home or place of business, and convicted him of tampering with physical evidence.

The Second Department, with one judge dissenting, reverses the weapon possession conviction, concluding that defendant's temporary possession of the gun did not establish guilt. The fact that he disposed of the gun without turning it into the authorities did not convert his temporary and lawful possession into illegal possession.

However, by consciously disposing of the gun, along with his shirt, to rid himself of what he thought would be incriminating evidence, defendant tampered with physical evidence believing it would be produced in an official proceeding or prospective official proceeding.

People v. Khalfani Rose
(2d Dept., 2/3/21)

* * *

DEFENSES - Temporary And Lawful Possession
POSSESSION OF A WEAPON

The Fourth Department reverses defendant's conviction for criminal possession of a weapon in the second degree, concluding that the trial court erred in denying defendant's request for a jury instruction on the defense of temporary and lawful possession of a firearm.

Defendant testified that she thought that her estranged husband, who had previously attacked her in her home, was the person attempting to forcibly enter, and that she discovered the firearm in the kitchen while trying to find an object with which to defend herself and did not know beforehand that the firearm was there. When the person at the door continued trying to enter, defendant shot through the door to scare him away. When she saw that she had shot her boyfriend, she dropped the firearm, and started to provide first aid.

When the evidence is viewed in the light most favorable to defendant, there is a reasonable view that defendant came into possession of the firearm in a legally excusable manner that was not utterly at odds with any claim of innocent possession, and that the shooting did not involve a "dangerous use" of the firearm that barred the court from giving a temporary lawful possession charge.

The dissenting judge asserts that the majority conflates a "dangerous" use of a weapon with a "justified" use of a weapon, that justification is not a defense to the unlawful possession of the weapon, and that defendant used the weapon in a dangerous manner.

People v. Rebecca Ruiz
(4th Dept., 8/26/21)

Justification Defense

DEFENSES - Justification

An altercation occurred when the complainant confronted the co-defendant over an incident earlier in the day in which she had reported the complainant's girlfriend to the police, resulting in the girlfriend's arrest. Defendant, 5 foot 5 inches tall and 134 pounds, came to the co-defendant's aid. At that point, the complainant, 5 foot 10 inches tall and 200 pounds, whose blood alcohol level was more than 2½ times the legal limit, punched defendant.

According to the complainant, during the ensuing altercation the co-defendant hit the complainant in the back of the head with a hammer. He then got off defendant and went toward the co-defendant

to "take the hammer or to attack her." He tried to grab the hammer and it dropped to the ground. Defendant then picked up the hammer and hit the complainant in the back of the head with it (the arresting officer testified that the complainant never told him defendant had hit him with the hammer, and only the co-defendant was charged with possessing the hammer). The complainant then "attacked" defendant and the hammer again dropped to the ground. The co-defendant tried to pick up the hammer, but when the complainant moved toward her, she left the apartment. The complainant then turned back toward defendant, who struck him in the forehead with a meat cleaver, which lodged in his head. The complainant punched defendant, knocking him unconscious, pulled the meat cleaver out of his head, and left the apartment.

The Second Department finds reversible error in the trial court's refusal to issue a charge on deadly force justification. The evidence raised questions regarding the credibility of the complainant's version of events. The Court notes the differences in size and strength between the complainant and defendant; the complainant's own testimony that he held defendant down and punched him in the face; the significant injuries suffered by defendant, including a fractured ankle; a 911 caller's statement that "they're killing each other;" and the significant factual questions presented regarding what weapons were used and by whom.

Although the dissent asserts that the complainant's ability to knock defendant unconscious with one punch was immaterial because the punch occurred after defendant's alleged use of deadly physical force, such force is justified to defend against the imminent threat of deadly physical force. One reasonable view of the evidence was that the defendant was attacked by a much larger, stronger, and very drunk man, who, at a minimum, held him down and punched him in the face.

People v. Rameshwar Singh
(2d Dept., 9/29/21)

Making A Terroristic Threat

MAKING A TERRORISTIC THREAT

The Second Department finds legally insufficient evidence of the crime of making a terroristic threat where a student testified that one morning during class some of the students were joking and talking when respondent and another student got into "a little argument," and respondent told that student that he "[was] going to be 14 years old, chopped up in somebody's backyard, and he's going to get a white person to shoot up the school."

The presentment agency presented no evidence of intent to intimidate a civilian population.

Matter of Jaydin R.
(2d Dept., 1/13/21)

* * *

MAKING A TERRORISTIC THREAT

The First Department reverses defendant's conviction for making a terroristic threat where the evidence of defendant's "intent to intimidate or coerce a civilian population" was legally insufficient.

At the end of an altercation, defendant, a Muslim, threatened to shoot "you guys," referring to several Bangladeshi worshippers at defendant's mosque. Although there was evidence presented at trial that defendant bore animus toward Bangladeshi people, the threat mentioned no group or population and instead appears to have been based on a personal dispute defendant had with one or more of his fellow worshippers over money or a missing phone.

To find otherwise would trivialize the definition of terrorism by applying it loosely in situations that do not match our collective understanding of what constitutes a terrorist act.

People v. Philip DeBlasio
(1st Dept., 1/21/21)

Theft Offenses

GRAND LARCENY - Credit Cards

A Court of Appeals majority holds that the definition of credit card for purposes of Penal Law § 155.00(7) includes the credit card account number, and thus the People need not prove that a defendant physically possessed the tangible credit card in order to support a conviction of grand larceny based upon credit card theft. Under § 155.00(7), the definition of credit card in General Business Law § 511(1), as supplemented by General Business Law § 511-a, is the controlling definition.

Although ambiguity in a criminal statute should be construed in the defendant's favor, underpinning this rule of lenity is the concern that an individual should have "fair warning" of conduct that is deemed criminal and that activity that will result in criminal punishment be clearly defined by the legislature, rather than the courts. Lenity is warranted where the courts have the task of discerning the undeclared will of the legislature in an ambiguous statute. There is no such ambiguity here. Defendant offers no reasonable argument why the theft of a credit card bearing the account number to enable a purchase would constitute larceny, while theft of the credit card account number itself used to enable the purchase would not.

People v. Frederic Badji
(Ct. App., 2/11/21)

Escape

ESCAPE

The Fourth Department finds that the evidence of escape in the first degree is legally insufficient where a police officer informed defendant that he was under arrest and attempted to pull him from the driver's seat of a vehicle, at which time defendant drove off, dragging officers across a parking lot. Defendant was not in custody at the time of the alleged escape.

People v. Brian Bagley
(4th Dept., 5/7/21)

Homicide/Assault

ASSAULT - Acting In Concert

The victim testified that defendant - the victim's daughter - and several other members of the victim's family repeatedly kicked him from "both sides" after he fell to the ground. Although the victim could not specifically identify who delivered each blow, he did identify the assailants at trial.

The Court of Appeals, with one judge dissenting, concludes that this evidence, and the circumstantial proof, was sufficient to permit a reasonable factfinder to infer that defendant shared a community of purpose with the other assailants, and was sufficient to support a verdict finding defendant guilty of assault in the second degree under a theory of accessorial liability.

People v. Grace Pietrocarlo
(Ct. App., 12/14/21)

* * *

MANSLAUGHTER - Sale Of Drugs/Victim's Overdose
CRIMINALLY NEGLIGENT HOMICIDE

The Court of Appeals concludes that the evidence presented to the grand jury failed to establish a prima facie case that defendant acted either with the recklessness required to sustain the charge of second-degree manslaughter, or the criminal negligence required to sustain the lesser included offense of criminally negligent homicide.

Defendant knew the heroin he sold the decedent was strong and required caution, but it was common knowledge among heroin users that different samples or preparations of heroin had different potencies and that the strength of heroin could vary a great deal among samples. The decedent, his ex-girlfriend, and another individual previously used the sample purchased from defendant and survived those encounters.

The People presented no evidence that defendant had been told that other people had overdosed or died after using the heroin he had sold them. Although one of the bags of heroin recovered from defendant's vehicle tested positive for heroin and fentanyl, there was no evidence that the heroin

defendant sold to the decedent also contained fentanyl, or, if it did, that defendant had cut or packaged the drugs himself or was otherwise aware that it may have contained fentanyl.

People v. Richard Gaworecki
(Ct. App., 10/7/21)

* * *

ASSAULT - Acting In Concert

The First Department finds legally insufficient evidence of attempted assault in the first degree and assault in the second degree, charged under an acting in concert theory, where, during a robbery attempt, the co-defendant stabbed the victim from behind several times with a small knife, but there was no evidence that defendant, who was standing in front of the victim and restraining him, knew the co-defendant had a knife or was planning to use it. The use of the knife was not open and obvious, and defendant released the victim within seconds of the stabbing.

People v. Michael Grosso
(1st Dept., 10/14/21)

* * *

ASSAULT - Physical Injury

The Second Department finds legally insufficient evidence of physical injury where, at the time of the incident, the 73-year-old complainant did not seek medical attention and proceeded on his way; he continued to have pain in his back and neck for approximately three weeks, was unable to use a pillow to sleep, and had pain when he lifted "something" when working in construction, but he did not specify what "something" was; and he never sought medical treatment after the incident, claiming that he did not need it, and used only a topical pain relief cream to relieve pain.

People v. Christopher Bowen
(2d Dept., 7/7/21)

* * *

ASSAULT/ROBBERY - Physical Injury
- Circumstantial Evidence
IDENTIFICATION - Sufficiency Of Evidence

Defendant was charged with crimes relating to four separate robberies, two committed on February 28, 2016, and two committed on February 29, 2016. After a trial, the jury found the defendant guilty of all crimes charged in the indictment.

The Second Department vacates two convictions for robbery in the second degree, concluding that the People failed to establish that the complainants suffered a physical injury. The complainants were hit from behind on the head, and neither complainant sought medical attention. One complainant testified that he had pain that lasted two days, and did not testify that he took any medication to treat his pain. The other complainant testified that his pain lasted for about one week and that he treated it with ice and Advil.

As to the robberies on February 28, the Court concludes that the convictions are against the weight of the evidence. Neither of the complainants was able to identify defendant, and their descriptions of their assailants as young Hispanic/Latino men about five foot six inches tall wearing dark clothing was not sufficiently distinctive to support an inference that defendant committed the crimes. The modus operandi of the two crimes committed on one date and the two crimes committed the next day was not sufficiently distinctive to support an inference that, because the evidence supported an inference that defendant committed the February 29, 2016 crimes, he also committed the February 28, 2016 crimes.

People v. Samuel Rodriguez
(2d Dept., 11/3/21)

* * *

ASSAULT - Serious Physical Injury

In each case, the Second Department reduces defendant's convictions for gang assault in the first degree, assault in the first degree, robbery in the first degree, and assault in the second degree, to the attempt crimes, concluding that the People failed to establish serious physical injury.

The complainant sustained multiple lacerations and wounds to his neck, head, chest, and abdomen, which were treated with sutures, and none of which affected his internal organs. The complainant suffered a diminished grip strength in his left hand on the day of the incident, and numbness in his left arm that persisted "for a while" after the attack. 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. Michael Aragundi
(2d Dept., 5/5/21)

* * *

ASSAULT - Serious Physical Injury
CONFESSIONS - Voluntariness
RIGHT TO COUNSEL - Invocation By Defendant

The Third Department, after noting that defendant's legal sufficiency claim is unpreserved but that, as part of weight of the evidence review, the Court must necessarily determine whether the elements of the charged crimes were proven at trial beyond a reasonable doubt, finds that the evidence does not support a finding that the victim sustained a serious physical injury.

There was no evidence that the victim lost consciousness after being shot or that a vital organ was damaged. The victim described the blood as "trickling" from the wound. At the hospital, he was treated for two days before being discharged on crutches, and he was on crutches for several months and then used a cane for several months more. He occasionally still has pain in his leg, for which he takes medication, and has two circular scars that are "[a]bout the size of a penny." His doctors indicated that "it would take six months to a year for [his] leg to get fully healed." No documentation was submitted as proof of the link between the impairment and the initial injury. To prove that the scars were a serious disfigurement, the People needed to make a record of it, via either a photograph or a detailed description.

The Court upholds the denial of defendant's motion to suppress his statements to a detective, noting, inter alia, that defendant did request medical assistance for a gash on his chin, but the detective promised him medical attention after their interview, the gash was small and bleeding "a little bit," and defendant did not state that he was in pain or that he was unable to focus due to the injury; and that defendant's comment that he was "sitting here with no attorney present" did not constitute an unequivocal request for counsel.

People v. Karim Smith
(3d Dept., 4/29/21)

Possession Of Drugs And Weapons And Stolen Property

POSSESSION OF DRUGS - Constructive Possession
CRIMINALLY USING DRUG PARAPHERNALIA

The Fourth Department concludes that the verdict finding defendant guilty of possession of drugs and drug paraphernalia was against the weight of the evidence where defendant was present in the apartment at the time the police executed the search warrant, and admitted that he had been at the apartment on one other occasion, but no evidence was presented to establish that defendant was an occupant of the apartment or regularly frequented it.

People v. Keith Ponder
(4th Dept., 2/11/21)

* * *

POSSESSION OF DRUGS – Constructive Possession

The Third Department concludes that the jury's determination that defendant constructively possessed crack cocaine was against the weight of the evidence where the crack cocaine was not discovered in the same room as defendant or near him; the crack cocaine was found in his sister's bedroom, and there was no proof indicating that any of defendant's personal belongings were in that bedroom; the crack cocaine was not seen in open view and was instead underneath a pile of female clothes; and, even accepting that defendant was a daily visitor to his sister's apartment, the proof does not establish that he resided there or that he exercised any dominion or control over any part of it.

A scale that was in open view was located in the sister's bedroom, and the remaining scales were found in another person's backpack. Even with the discovery of plastic bags in the living room and both bedrooms, and the amount of cash found on defendant, and the discovery of an identification card bearing defendant's name in another bedroom, the evidence does not establish guilt beyond a reasonable doubt. The People failed to preserve their drug factory presumption claim.

People v. Tyler Cota
(3d Dept., 11/24/21)

Sex Offenses

RAPE/CRIMINAL SEXUAL ACT - Forcible Compulsion

The Second Department reverses defendant's conviction for rape in the first degree and criminal sexual act in the first degree, concluding that the evidence of forcible compulsion by way of an implied threat was not legally sufficient.

Even assuming that the complainant's testimony regarding her relationship with a co-defendant, coupled with the co-defendant's verbal pressuring of the complainant to have sex with defendant and another co-defendant, permitted the jury to reasonably conclude that the co-defendant who pressured the complainant possessed the requisite intent, there was no evidence presented establishing that defendant was even aware of what was happening between that co-defendant and the complainant; that since the complainant had never spoken with defendant prior to the alleged sexual assault, there was no reason, even from her subjective point of view, to fear that he would physically harm her if she did not do what other defendants were pressuring her to do; that the complainant testified repeatedly that she was uncomfortable throughout the incident and "fe[lt] like [she] had no control" over what was happening, and that there was "nothing [she] could do" to stop it, but she never connected those feelings to a fear of being physically injured, or some other similarly serious consequence; that the complainant acknowledged that at least some of her discomfort was attributable to the "whole situation," including the fact that several people were present; and that the complainant's testimony that, at some point during the incident, she said she did not want to have sex, was not insufficient, by itself, to establish forcible compulsion.

People v. Cally Graham

(2d Dept., 12/1/21)

Disposition/Dismissal In Furtherance Of Justice/Motion To Vacate

MOTION TO VACATE JUDGMENT OF CONVICTION - Newly Discovered Evidence

The Third Department upholds the denial of defendant's motion to vacate the judgment of conviction, noting, inter alia, that although defendant contends that certain text messages and photographs constitute newly discovered evidence because technological advances have made it possible to recover the text messages and photographs, defendant still knew about the existence and content of the material from the time he received them. The "new' technology allowed retrieval of the text messages and photographs defendant himself deleted to avoid detection.

"To hold otherwise would create the rule that a defendant can destroy evidence he or she deemed inculpatory and then subsequently benefit from advances in technology to resurrect that evidence if it later appears beneficial."

People v. Mark Hartle
(3d Dept., 3/4/21)

* * *

SENTENCE - Right To Be Sentenced Based On Truthful Information/Due Process

On appeal, defendant's conviction for assault in the first degree was reduced to attempted assault in the first degree. The Third Department, in a 3-2 decision, concluded that although the victim was shot in the leg with a bullet, was in "miraculous pain," underwent two pin placement surgeries for a shattered tibia, and was in a cast for over a month, the weight of the evidence did not support a finding that the victim sustained a serious physical injury. The convictions and sentences under weapon possession counts remained undisturbed. On the conviction for attempted assault in the first degree, defendant was resentenced to seven years determinate with five years of post-release supervision.

Defendant now moves pursuant to CPL § 440.20(1) to set aside the criminal possession of a weapon sentences, arguing that the Court considered the conviction for assault in the first degree as a factor when it imposed the 13-year determinate sentences under the weapon possession counts.

The Court grants the motion. The Court, at the original sentencing, was influenced by the finding that defendant had caused a serious physical injury to the victim. The erroneous as a matter of law serious physical injury finding was inextricably intertwined with the sentences this Court imposed under the weapon possession counts. In order to establish a due process sentencing violation, it is sufficient for a defendant to show that the court took into account material misinformation in making its determination. The defendant need not demonstrate that his original sentence was probably influenced by incorrect information.

People v. James Marshall
(County Ct., Tompkins Co., 1/5/21)
http://nycourts.gov/reporter/3dseries/2021/2021_50389.htm

* * *

MOTION TO VACATE JUDGMENT OF CONVICTION - Newly Discovered Evidence

The Second Department affirms an order that, after a hearing, granted defendant's motion pursuant to CPL § 440.10 to vacate a judgment convicting him of murder in the second degree where there was newly discovered evidence that former detectives Louis Scarcella and Steven Chmil, both of whom played a significant role in the arrest and attendant police investigation in this case, had subsequently been found to have engaged in corrupt police practices and misconduct during the same period of time, which had, inter alia, resulted in the vacatur of other convictions in other cases.

The Court heard the detectives testify at length at the hearing, and found that evidence of their misconduct created a probability that, had such evidence been received at trial, the verdict would have been more favorable to defendant.

People v. Eliseo DeLeon
(2d Dept., 1/13/21)

* * *

SENTENCE - Violation Of Plea Bargain

The sentencing court, noting that defendant's statement to the Probation Department - that "he did not remember the burglary" - conflicted with his sworn plea allocution, enhanced defendant's sentence based upon defendant's failure to cooperate with the Probation Department.

The Third Department vacates the sentence and remits the matter for the court to impose the agreed-upon sentence or afford defendant the opportunity to withdraw his plea.

The court admonished defendant to "cooperate with the Probation Department" or else risk enhancement of his sentence, but did not expressly advise defendant that he must provide truthful answers to the Probation Department, refrain from making statements that were inconsistent with his sworn statements during the plea colloquy, and/or avoid any attempt to minimize his conduct in the underlying burglary.

People v. Justin Ackley
(3d Dept., 3/4/21)

* * *

SENTENCE - Probation/Conditions

A California appeals court strikes a probation condition forbidding defendant from associating with any persons known to him to have a "criminal record." The term "criminal record" is impermissibly vague because it has no settled meaning and may include a record of an arrest resulting in no charge or conviction. By broadly encompassing a prohibition on association with persons having mere arrest histories without charge or conviction, the condition is not carefully tailored to the government's interests in rehabilitating defendant and protecting the public. The Court's decision is informed by the Legislature's efforts over the years to mitigate the prejudicial use and effect of arrest records. A mere record of arrest generally is not probative on the law-abiding character of the arrestee.

People v. Gonsalves
2021 WL 2677777 (Cal. Ct. App., 1st Dist., 6/30/21)

* * *

CONTEMPT - Juveniles

The sixteen-year-old juvenile was before the Juvenile Court judge for a hearing on alleged violations of conditions of her release. After the judge set bail, the juvenile called the judge, among other things, a "dumb, white bitch." The judge found the juvenile in criminal contempt. At a sentencing hearing on the charge of contempt, the judge sentenced the juvenile to a ninety-day maximum sentence.

The Massachusetts Supreme Judicial Court reverses, concluding that the judge abused her discretion by not taking the juvenile's status as a child into account. She had run away from her group home and had cut off her GPS monitor. She stated that she wanted "[one] more chance to go back to the program." When told that she would not get another chance and would be placed in custody with one dollar bail imposed, the juvenile made what she describes on appeal as "disrespectful comments to the judge." Given her characteristics, and apology to the judge, the ninety-day sentence was outside reasonable alternatives.

Commonwealth v. Ulani U.
2021 WL 1343078 (Mass., 4/12/21)

*** * ***

SENTENCE - Eighth Amendment

Petitioner, who is serving a sentence of imprisonment at Sullivan Correctional Facility upon his 1991 conviction for murder in the second degree and other crimes and is eligible for parole in

2038, filed an application for a writ of habeas corpus seeking immediate release, asserting that his underlying health conditions and age placed him at increased risk if infected with the novel coronavirus responsible for causing COVID-19. Petitioner alleged that, as a result of the COVID-19 pandemic, the conditions in prison and the risks presented by his confinement constituted cruel and unusual punishment and deprived him of due process. The Supreme Court denied the application.

The Third Department affirms. Even assuming arguendo that petitioner established that he was incarcerated under conditions posing a substantial risk of serious harm, he failed to demonstrate that prison officials failed to protect him and thereby exhibited "deliberate indifference" to the risk, which is a showing similar to criminal recklessness.

Respondent detailed the extensive protocols and preparedness measures in place to stop the introduction of the novel coronavirus into SCF and its transmission within the facility. Although petitioner contended that social distancing and other protective and hygiene protocols were difficult if not impossible to maintain, and that adequate protective equipment was not consistently supplied or used, these allegations failed to demonstrate that prison officials disregarded the risks posed by COVID-19 or exhibited deliberate indifference.

To the extent that petitioner is arguing that his lawful sentence became grossly excessive due to the risks posed by the pandemic, he has not made the requisite showing that his punishment is so grossly proportionate to his offense as to amount to an unconstitutionally cruel and unusual punishment.

As petitioner's Eighth Amendment claim has been found to be without merit, his substantive due process claim fails as well.

People ex rel. Figueroa v. Keyser
(3d Dept., 4/1/21)

* * *

SENTENCE - Eighth Amendment/Juveniles
ADOLESCENT OFFENDERS - Retroactivity Of RTA

The Court declines to apply the Raise the Age legislation retroactively and set aside defendant's 30 years to life sentence in connection with a 1993 murder committed when he was 16 years old. The Raise the Age legislation does not purport to affect sentences that were already final when the law became effective, and, in any event, the charges would not have been subject to removal to Family Court.

The Court also rejects defendant's Eighth Amendment claim, concluding that defendant is not entitled to a hearing so that his youth may be taken into consideration. Defendant did not receive a sentence of life without the possibility of parole, and his sentence provides him with a meaningful

opportunity to obtain release when he appears before the parole board in the near future. Moreover, a review of the record discloses that the sentencing court considered defendant's youth and its attendant circumstances.

People v. Jermaine Wright
(Sup. Ct., Kings Co., 4/6/21)
http://nycourts.gov/reporter/3dseries/2021/2021_21081.htm

* * *

SENTENCE - Conditional Discharge/Covid Vaccine Condition

The Court concludes that it has authority to require defendant to get vaccinated for Covid as a condition of a conditional discharge.

The Court notes, inter alia, that there is nothing punitive about the condition, since the vaccine has been demonstrated to be safe and effective; that "[e]ncouraging a defendant … to become part of this human covenant is fundamentally rehabilitative"; that there is no requirement that rehabilitative conditions be directly related to the substance of the crime, and, in any event, defendant was accused of punching an EMS worker, and, by agreeing to a vaccine condition, is demonstrating his appreciation for healthcare workers and first responders; and that P.L. § 65.10(2)(d) specifically allows a court to require "available medical or psychiatric treatment" as a condition of a conditional discharge.

People v. D.R.
(Crim. Ct., Bronx Co., 10/6/21)
https://nycourts.gov/reporter/3dseries/2021/2021_21266.htm

* * *

SENTENCE - Eighth Amendment/Juveniles

Under *Miller v. Alabama* (567 U.S. 460), an individual who commits a homicide when under the age of 18 may be sentenced to life without parole, but only if the sentence is not mandatory and the sentencer therefore has discretion to impose a lesser punishment. In this case, the judge acknowledged his sentencing discretion under Miller and sentenced Jones to life without parole for a murder he committed when he was under 18.

In a 6-3 decision, the Supreme Court rejects Jones' argument that a sentencer who imposes a life-without-parole sentence also must make a separate factual finding that the defendant is permanently incorrigible.

In *Miller*, the Court mandated only that a sentencer consider an offender's youth and attendant characteristics before imposing a life-without-parole sentence. In *Montgomery v. Louisiana* (577

U.S. 190), the Court stated that "Miller did not impose a formal factfinding requirement," and that "a finding of fact regarding a child's incorrigibility ... is not required."

The majority also rejects Jones' alternative argument that, even if a separate factual finding of permanent incorrigibility is not required, a sentencer must at least provide an on-the-record sentencing explanation with an "implicit finding" of permanent incorrigibility. The Court's precedents do not support this argument, nor does any historical or contemporary sentencing practice in the States. Moreover, if the sentencer has discretion to consider the defendant's youth, the sentencer necessarily will do so. Faced with a convicted murderer who was under 18 at the time of the offense and with defense arguments focused on the defendant's youth, it would be all but impossible for a sentencer to avoid considering that mitigating factor.

The majority rejects the dissent's claim that it is implicitly overruling the Court's prior decisions. The majority simply has a good-faith disagreement with the dissent over how to interpret *Miller and Montgomery*. Concurring, Justice Thomas indicates that he would overrule *Miller and Montgomery*.

Justice Sotomayor, with whom Justice Breyer and Justice Kagan join, dissents.

Jones v. Mississippi
2021 WL 1566605 (U.S. Sup. Ct., 4/22/21)

Appeals

APPEAL - Legal Sufficiency/Weight Of The Evidence Review

The Appellate Division reversed defendant's conviction, describing its holding as "on the law and on the facts," and dismissed the indictment on both legal sufficiency and weight of the evidence grounds. These determinations were based upon the Appellate Division's conclusion that "the People presented no evidence placing the defendant at or near the scene of the crime, or linking him in any way to the victim, during the critical time frame in which the murder was believed to have occurred."

The Court of Appeals reverses. The Appellate Division failed to consider the "reasonable inferences" from the evidence and view them "in the People's favor."

A rational jury could have inferred from the medical evidence presented at trial that the victim was sexually assaulted immediately prior to her death. Since defendant's semen was found on the victim's genitalia, the semen had not transferred to the victim's clothing, which was still in a state of disarray when her body was found, defendant lived in close proximity to the crime scene, and defendant falsely denied knowing or having sex with the victim, a rational jury could conclude that defendant was present at the time of the victim's death and killed the victim during the course of, or immediately after, sexually assaulting her. Therefore, the evidence was legally sufficient to support defendant's conviction.

This Court has the authority to review a weight of the evidence determination when the intermediate appellate court manifestly failed to consider the issue or did so using an incorrect legal principle. The Appellate Division's statement that it was reversing on weight of the evidence grounds for the "same reasons" that it was reversing on legal sufficiency grounds constituted an error of law.

People v. Fernando Romualdo
(Ct. App., 11/18/21)

* * *

APPEAL - Waiver Of Right

The Court of Appeals, in a 5-2 decision, holds that defendant's contention that his CPL § 380.50(1) right to an opportunity to make a personal statement at sentencing was violated is not reviewable because such a claim did not survive defendant's valid appeal waiver.

Although the statutory right is "deeply rooted" and "substantial," defendant's claim does not fall among the narrow class of nonwaivable defects that undermine the integrity of our criminal justice system or implicate a public policy consideration that transcends the individual desire of a particular defendant to obtain appellate review.

The Court also notes that a valid unrestricted waiver of appeal elicited during a plea proceeding can preclude appellate review of claims that have not yet reached full maturation, including those arising during sentencing. This challenge to presentence procedures also is not reviewable under the illegal sentence exception.

People v. George Brown
(Ct. App., 5/6/21)

* * *

APPEAL - Record On Appeal

The record on appeal in this case is missing, inter alia, three days of jury selection, opening statements, summations, final jury instructions, the trial court's handling of a jury note, and the verdict. In addition, the transcription of the testimony of some of the witnesses includes irregularities such as notations stating "omitted," "untranscribable," and "blah, blah," and unintelligible strings of characters that appear to be in code.

However, the Fourth Department rejects defendant's contention that summary reversal and a new trial is the appropriate remedy. The loss of reporter's minutes is rarely sufficient reason in itself for reversing a conviction. It is only when a defendant shows that a reconstruction is not possible that a defendant is entitled to summary reversal and a new trial.

Here, there is no indication that defendant's former attorneys could not participate in a reconstruction hearing, despite the fact that one of them is now employed by the District Attorney's Office. There is also no indication that the now-retired trial judge could not participate.

People v. Joseph Meyers
(4th Dept., 2/11/21)