JUVENILE DELINQUENCY AND PINS CASELAW/LEGISLATIVE UPDATE

Prepared by: Gary Solomon
The Legal Aid Society Juvenile Rights Practice
Current through January 11, 2021

I. NEW LEGISLATION AND ADMINISTRATIVE DIRECTIVES

Capacity To Proceed In Juvenile Delinquency Proceedings

Chapter 602 of the Laws of 2019, which took effect on **March 5, 2020**, amends FCA § 322.1(1) to provide that when the court orders an examination to determine whether the respondent is an incapacitated person, and the respondent is in custody, the court may direct that the examination be conducted on an outpatient basis, and the examination may be conducted at the place where the respondent is being held in custody so long as no reasonable alternative outpatient setting is available.

Section 322.1(1) is also amended to require a determination as to whether the respondent may be diagnosed as a person with mental illness or an intellectual or developmental disability rather than as to whether the respondent is mentally ill, mentally retarded or developmentally disabled.

Chapter 602 amends FCA § 322.2(4) to provide that when the court orders commitment upon finding that there is probable cause to believe that the respondent committed a misdemeanor, the Commissioner may, unless the court specifies that the commitment shall be in a residential facility, arrange for treatment in an appropriate facility or program, including an outpatient program, in accordance with Mental Hygiene Law § 7.09(e) or § 13.09(c-1). The statute now states that the dismissal of the petition that occurs upon issuance of the order of commitment shall constitute a bar to further prosecution of the charge or charges contained in the petition.

FCA § 322.2(5)(a) is amended in a like manner to provide the Commissioner with discretion to arrange for treatment outside a residential facility when commitment has been ordered in a felony case.

FCA § 322.2(7), which provides for court hearings, requested by the Commissioner, regarding the respondent's custodial status, is amended to acknowledge the Commissioner's discretion to arrange for outpatient treatment in misdemeanor and felony cases.

FCA § 322.2(5)(c) is amended to provide that in designated felony act cases, the court may order that treatment be provided in an outpatient facility if the Commissioner petitions the court pursuant to FCA § 322.2(7) and the court approves.

Under § 322.2(7), the respondent now may make an application for a hearing. And the court, having determined that treatment in a non-residential facility or on an outpatient basis would be more appropriate, shall direct, rather than merely authorize, the Commissioner to take such action.

Freedom of Information Law/Civil Right Law § 50-a: Access To Law Enforcement Disciplinary Records

Chapter 96 of the Laws of 2020 repeals Civil Rights Law § 50-a and amends the Freedom of Information Law (Public Officers Law § 84 et seq.).

FOIL Definitions

Chapter 96 amends Public Officers Law (POL) § 86 by adding new subdivisions 6, 7, 8 and 9, which read as follows:

6. "Law enforcement disciplinary records" means any record created in furtherance of a law enforcement disciplinary proceeding, including, but not limited to: (a) the complaints, allegations, and charges against an employee; (b) the name of the employee complained of or charged; (c) the transcript of any disciplinary trial or hearing, including any exhibits introduced at such trial or hearing; (d) the disposition of any disciplinary proceeding; and (e) the final written opinion or memorandum supporting the disposition and discipline imposed including the agency's complete factual findings and its analysis of the conduct and appropriate discipline of the covered employee.

7. "Law enforcement disciplinary proceeding" means the commencement of any investigation and any subsequent hearing or disciplinary action conducted by a law enforcement agency.

8. "Law enforcement agency" means a police agency or department of the state or any political subdivision thereof, including authorities or agencies maintaining police forces of individuals defined as police officers in Criminal Procedure Law § 1.20, a sheriff's department, the department of corrections and community supervision, a local department of correction, a local probation department, a fire department, or force of individuals employed as firefighters or firefighter/paramedics.

9. "Technical infraction" means a minor rule violation by a person employed by a law enforcement agency as defined in this section as a police officer, peace officer, or firefighter or firefighter/paramedic, solely related to the enforcement of administrative departmental rules that (a) do not involve interactions with members of the public, (b) are not of public concern, and (c) are not otherwise connected to such person's investigative, enforcement, training, supervision, or reporting responsibilities.

Redactions in Response To FOIL Request For Law Enforcement Disciplinary Records

Chapter 96 amends POL § 87 by adding two new subdivisions 4-a and 4-b, which read as follows:

4-a. A law enforcement agency responding to a request for law enforcement disciplinary records as defined in POL § 86 shall redact any portion of such record containing the information specified in POL § 89(2-b) prior to disclosing such record under this article.

4-b. A law enforcement agency responding to a request for law enforcement disciplinary records, as defined in POL § 86, may redact any portion of such record containing the information specified in POL § 89(2-c) prior to disclosing such record under this article.

Chapter 96 amends POL § 89 by adding two new subdivisions 2-b and 2-c, which read as follows:

2-b. For records that constitute law enforcement disciplinary records as defined in POL § 86(6), a law enforcement agency shall redact the following information from such records prior to disclosing such records under this article:

(a) items involving the medical history of a person employed by a law enforcement agency as defined in POL § 86 as a police officer, peace officer, or firefighter or firefighter/paramedic, not including records obtained during the course of an agency's investigation of such person's misconduct that are relevant to the disposition of such investigation;

(b) the home addresses, personal telephone numbers, personal cell phone numbers, personal e-

mail addresses of a person employed by a law enforcement agency as defined in POL § 86 as a police officer, peace officer, or firefighter or firefighter/paramedic, or a family member of such a person, a complainant or any other person named in a law enforcement disciplinary record, except where required pursuant Civil Service Law (CSL) Article Fourteen, or in accordance with CSL § 208(4), or as otherwise required by law. This paragraph shall not prohibit other provisions of law regarding work-related, publicly available information such as title, salary, and dates of employment;

(c) any social security numbers; or

(d) disclosure of the use of an employee assistance program, mental health service, or substance abuse assistance service by a person employed by a law enforcement agency as defined in POL § 86 as a police officer, peace officer, or firefighter or firefighter/paramedic, unless such use is mandated by a law enforcement disciplinary proceeding that may otherwise be disclosed pursuant to this article.

2-c. For records that constitute "law enforcement disciplinary records" as defined in POL § 86(6), a law enforcement agency may redact records pertaining to technical infractions as defined in POL § 86(9) prior to disclosing such records under this article.

Legislative Memo

Section 50-a of the New York State Civil Rights Law creates a special right of privacy for the "personnel records used to evaluate performance toward continued employment or promotion" of police officers, correction officers, and firefighters/paramedics employed by the State or political subdivisions, as well as those of peace officers working for the Department of Corrections and Community Supervision or local probation departments.

This exemption was adopted in 1976 by the Legislature in order to prevent criminal defense attorneys from using these records in cross-examinations of police witnesses during criminal prosecutions. However, current law, as narrowly interpreted by the Court of Appeals, prevents access to both the records of the disciplinary proceedings themselves and the recommendations or outcomes of those proceedings.

According to the 2014 annual report by the State Committee on Open Government to the Governor and the State Legislature, "this narrow exemption has been expanded in the courts to allow police departments to withhold from the public virtually any record that contains any information that could conceivably be used to evaluate the performance of a police officer."

Due to the interpretation of § 50-a, records of complaints or findings of law enforcement misconduct that have not resulted in criminal charges against an officer are almost entirely inaccessible to the public or to victims of police brutality, excessive use of force, or other misconduct. The State Committee on Open Government has stated that § 50-a "creates a legal shield that prohibits disclosure, even when it is known that misconduct has occurred." FOIL's public policy goals, which are to make government agencies and their employees accountable to the public, are thus undermined. Police-involved killings by law enforcement officials who have had histories of misconduct complaints, and in some cases recommendations of departmental charges, have increased the need to make these records more accessible.

FOIL already provides that agencies may redact or withhold information whose disclosure would constitute an unwarranted invasion of privacy. Recent changes to the Civil Service Law have created additional, non-discretionary protections against the release of certain sensitive

information such as contact information. Furthermore, this bill adds additional safeguards in the FOIL statute. Finally, courts have the ability to protect against improper cross-examination and determine if police records are admissible in a trial, without the denial of public access to information regarding police activity created by § 50-a. The broad prohibition on disclosure created by § 50-a is therefore unnecessary, and can be repealed as contrary to public policy.
Repeal of § 50-a will help the public regain trust that law enforcement officers and agencies may be held accountable for misconduct.

Penal Law: Aggravated Strangulation ("Eric Garner anti-chokehold act")

Chapter 94 of the Laws of 2020 adds a new Penal Law § 121.13-a (Aggravated strangulation) which states:
A person is guilty of aggravated strangulation when, being a police officer as defined in Criminal Procedure Law § 1.20(34) or a peace officer as defined in CPL § 2.10, he or she commits the crime of criminal obstruction of breathing or blood circulation, as defined in Penal Law § 121.11, or uses a chokehold or similar restraint, as described in Executive Law § 837-t(1)(b), and thereby causes serious physical injury or death to another person.
Aggravated strangulation is a class C felony.
PL § 121.13-a is added to Penal Law § 121.14, which contains an affirmative defense applicable when the defendant performed such conduct for a valid medical or dental purpose.
Chapter 94 took effect on June 12, 2020.

Legislative Memo

It is clear the NYPD's administrative ban on the use of chokeholds is not sufficient to prevent police officers from using this method to restrain individuals they are trying to arrest. Between 2014 and 2020, the New York City Civilian Complaint Review Board reported 996 allegations from people who said they had been subjected to a chokehold; 276 in 2014, 172 in 2015, 139 in 2016, 132 in 2017, 129 in 2018, 116 in 2019, and 32 thus far in 2020(NYC Civilian Complaint Review Board, Data Transparency Initiative, June 7, 2020). Not only has department ban not been enforced, but there is evidence that the penalties for using a chokehold have sometimes been little more than a loss of vacation time.
The NYPD is either unable or unwilling to enforce its own patrol guide. The use of chokeholds has resulted in deaths, and its use continues unabated. Criminal sanctions must be established for those who continue to engage in this banned procedure.
It is noted that defenses and affirmative defenses in the Penal Law would potentially be available here as with any crime, when applicable; among those of relevance might be those in Article 35 of the Penal Law.

Penal Law: Loitering While Being Masked Etc.

Chapter 98 of the Laws of 2020 repeals Penal Law § 240.35(4) (loitering etc. while being masked or in any manner disguised by unusual or unnatural attire or facial alteration).
Chapter 98 took effect on June 13, 2020.

Legislative Memo

The law, which dates back to the 1845 rent riots, has been used to criminalize protest, as well as

to arrest New Yorkers "masquerading" as a different gender. In a time when masks and other face coverings are recommended for health reasons and the Governor has mandated the use of face coverings in certain situations, it is necessary to repeal the statute that prohibits the use of masks in public to avoid confusion and ensure that New Yorkers know that they cannot be prosecuted for following the Governor's guidance.

Orders of Protection: Smart Devices

Chapter 261 of the Laws of 2020, which took effect on November 11, 2020, amends Family Court Act §§ 352(1), 446, 551, 656, 759, 842, and 1056, Criminal Procedure Law §§ 530.12 and 530.13, and Domestic Relations Law §§ 240 and 252, to provide that an order of protection may be issued that requires that the respondent refrain from controlling any connected devices affecting the home, vehicle or property of the person protected by the order.

"Connected device" shall mean any device, or other physical object that is capable of connecting to the internet, directly or indirectly, and that is assigned an internet protocol address or bluetooth address.

The legislative memo notes that "[t]hese devices include security systems that can lock or unlock doors and windows, cameras, thermostats, sprinklers, voice-activated assistants and speakers, lights and more." "These devices can often be used by domestic abusers as tools for surveillance, harassment, and stalking. Protective orders currently do not protect against those who control accounts for smart devices, providing a unique way of harassing victims through smartphone apps connected to the internet-enabled devices."

Criminal Procedure: Preliminary Hearing Upon Felony Complaint

Chapter 126, Part D, and Chapter 123 of the Laws of 2020, which take effect on July 17, 2020 and shall expire and be deemed repealed on April 30, 2021, add a new Criminal Procedure Law § 180.65 ("Hearing upon felony complaint; emergency provision during disaster emergency") that provides that during the period of the COVID-19 state disaster emergency, as declared and extended in executive orders, the following additional provisions shall apply to the conduct of a hearing on a felony complaint:

The appearance of any party and any witness at such hearing may be by electronic appearance through an independent audio-visual system, where the court finds upon its own motion after hearing from the parties and any such witness, either in person or by electronic appearance, that due to the person's circumstances and such disaster emergency a personal appearance by such party or witness would be an unreasonable hardship to such person or witness or create an unreasonable health risk to the public, court staff or anyone else involved in the proceeding.

At any such hearing on the felony complaint, the judge must be able to hear and see the image of each witness clearly through the independent audio-visual system and such sound and visual image shall be similar to the sound and image the judge would hear and see if the witness were present together with the judge testifying in the courtroom.

Documents, photographs and the like offered at the hearing may be exchanged among the parties by electronic means. A stenographic transcription or appropriate audio recording of the proceedings shall be maintained, and the live testimony received by electronic appearance, and

other electronic appearances where practicable, shall be video recorded by the court, and a copy provided to the people and the defense.
The authority for an electronic appearance pursuant to this section shall be considered sufficient means to enable the court to conduct a hearing on a felony complaint within the meaning of CPL § 180.80 (which is amended in a complementary manner).

Police Or Peace Officer Misconduct Causing Death: Investigation And Prosecution By State AG Office of Special Investigation

Chapter 95 of the Laws of 2020 amends the Executive Law by adding a new § 70-b that mandates that an office of special investigation be established within the state Attorney General's Office. This office shall investigate and, if warranted, prosecute any alleged criminal offense or offenses committed by a person, whether or not formally on duty, who is a police officer, as defined in Criminal Procedure Law § 1.20(34), or a peace officer as defined in CPL § 2.10, provided that such peace officer is employed or contracted by an education, public health, social service, parks, housing or corrections agency, or is a peace officer as defined in CPL § 2.10(25), concerning any incident in which the death of a person, whether in custody or not, is caused by an act or omission of such police officer or peace officer or in which the attorney general determines there is a question as to whether the death was in fact caused by an act or omission of such police officer or peace officer.
Chapter 95 takes effect on April 1, 2021.

Legislative Memo

For the criminal justice system to function, everyone involved in it, from the police and prosecutors to defendants and average citizens, must trust that it is fair, impartial, and free of bias. Importantly, it must not only be free of bias, it must be perceived to be free of bias.
This bill would promote public confidence by removing a potential conflict of interest in an investigation where a New Yorker has died following an encounter with a law enforcement officer. District attorneys work regularly and closely with police and peace officers in the investigation of alleged criminal acts. When an investigation involves the death of a person following an encounter with a law enforcement officer, it is reasonable to consider whether a district attorney can be impartial in investigating the facts and determining whether grand jury consideration is appropriate. This bill would establish an Office of Special Investigation within the Office of the Attorney General. The Office would investigate and, where appropriate, prosecute this limited class of cases.
Importantly, this legislation requires the new Office of Special Investigation to produce a report explaining the reasons for its decision regardless of whether it chooses to pursue charges. This allows the public to see a clear statement of necessary reforms, helping to hold the police and policymakers responsible.

Law Enforcement Misconduct Investigative Office

Chapters 104 and 106 of the Laws of 2020, inter alia, add a new Executive Law § 75 (Law enforcement misconduct investigative office) that, subject to the limitations contained in the statute, confers upon the law enforcement misconduct investigative office jurisdiction over all

covered agencies.

From Legislative Memo For Chapter 104

The bill establishes the Law Enforcement Misconduct Investigative Office within the Department of Law to review, study, audit and make recommendations relating to the operations, policies, programs and practices, including ongoing partnerships with other law enforcement agencies, of police agencies of political subdivisions of the State with the goal of enhancing the effectiveness of law enforcement, increasing public safety, protecting civil liberties and civil rights, ensuring compliance with constitutional protections and local, state and federal laws, and

increasing the public's confidence in law enforcement.

The recent history of police disciplinary secrecy, discriminatory practices in policing, and the current widespread pattern of police violence have justifiably convinced a large segment of the public that significant improvements to police disciplinary transparency and police oversight are needed. A strong, independent office with the power to monitor and investigate misconduct within law enforcement agencies is an important element to restore confidence in law enforcement and verify that that confidence is warranted. The Law Enforcement Misconduct Investigative Office improves the existing systems by providing broad jurisdiction, independence, and extra scrutiny where existing systems may be failing.

Police agencies in New York State each have different internal affairs and civilian oversight bodies. These bodies' authority to act on different types of complaints vary as well. This can make it hard for civilians to know who to complain to, whether their complaint will be heard, or whether the agency they are complaining to is independent and can be trusted. The Office created in this bill can handle complaints statewide about any agency because it exists independent of these agencies and the government units they answer to.

Discriminatory Reports To Law Enforcement

Chapter 93 of the Laws of 2020 amends Civil Rights Law § 79-a(2) to establish civil liability for discriminatory conduct in summoning a police officer or peace officer without reason to suspect a violation of the Penal Law, any other criminal conduct, or an imminent threat to a person or property.

A person lacks reason to suspect a violation of the penal law, any other criminal conduct, or an imminent threat to a person or property where a reasonable person would not suspect such violation, conduct, or threat.

Chapter 93 took effect on June 12, 2020.

Legislative Memo

Recent years have shown a number of distressing, frivolous calls to 911 for selling water, cutting grass, or using the swimming pool. These callers' personal comfort with other people has been the basis for the majority of those calls, and not for any particular threat. Calling 911 for non-emergencies poses a bigger threat to society in the era of Trump. Oftentimes, officers reporting to a scene are deposited into a situation with limited information and if that information sounds critical enough to law enforcement, they may respond with tactical force. It takes less than seven seconds for a situation with few details to escalate.

Furthermore, emergency services should be readily available for citizens in imminent danger.

Having 911 call centers continuously dispatching Police, Fire or EMT services for non-emergencies leaves their resources short if an actual emergency is reported at the same time. This bill is not to discourage the intended use of 911, but to inhibit its blatant misuse.

Civil Liability For Law Enforcement Failure To Attend To Arrestee's Need For Medical/Mental Health Treatment

Chapter 103 of the Laws of 2020 adds a new Civil Right Law § 28, which states:

Medical attention for persons under arrest. When a person is under arrest or otherwise in the custody of a police officer, peace officer or other law enforcement representative or entity, such officer, representative or entity shall have a duty to provide attention to the medical and mental health needs of such person, and obtain assistance and treatment of such needs for such person, which are reasonable and provided in good faith under the circumstances. Any person who has not received such reasonable and good faith attention, assistance or treatment and who, as a result, suffers serious physical injury or significant exacerbation of an injury or condition shall have a cause of action against such officer, representative, and/or entity. In any such civil action, the court, in addition to awarding actual damages and costs, may award reasonable attorneys' fees to a successful plaintiff.

The provisions of this section are in addition to, but shall not supersede, any other rights or remedies available in law or equity.

Chapter 103 took effect on June 15, 2020.

Right To Record Law Enforcement Activity

Chapter 100 of the Laws of 2020 adds a new Civil Rights Law § 79-p ("New Yorker's right to monitor act"), which states, inter alia, that a person not under arrest or in the custody of a law enforcement official has the right to record law enforcement activity and to maintain custody and control of that recording and of any property or instruments used by that person to record law enforcement activities; that a person subject to unlawful interference with recording a law enforcement activity may bring an action for, inter alia, damages, including punitive damages, or declaratory and injunctive relief; that

Chapter 100 took effect on July 14, 2020.

Legislative Memo

Several Federal Circuit Courts, the First, Seventh, Ninth, and Eleventh Circuits, have issued clear and consistent opinions finding that the First Amendment of the United States Constitution openly confers and protects the right of ordinary civilians to record police activity. The right of people to document the public activities of law enforcement helps to ensure that the police and others engaged in law enforcement activities are accountable to the public.

Weapon Discharge By Law Enforcement Officer

Chapter 101 of the Laws of 2020 adds a new Executive Law § 837-v which states:

Report of discharge of weapon.

1. Any law enforcement officer or peace officer who discharges his or her weapon while on duty or off duty under circumstances wherein a person could be struck by a bullet from the weapon, including situations wherein such officer discharges his or her weapon in the direction of a

person, shall verbally report the incident to his or her superiors within six hours of the occurrence of the incident and shall prepare and file a written report of the incident within forty-eight hours of the occurrence of the incident. Nothing contained in this section shall prevent any officer from invoking his or her constitutional right to avoid self-incrimination.
2. As used in this section "law enforcement officer" means a state or local police officer and "peace officer" means any person designated as a peace officer pursuant to Criminal Procedure Law § 2.10.
Chapter 101 took effect on September 13, 2020.

Criminal Justice Statistics and Reporting/Arrest-Related Deaths

Chapter 102 of the Laws of 2020 amends the Criminal Procedure Law and the Judiciary Law to authorize the chief administrator of the courts to compile data on misdemeanor offenses and violations, broken down by county. The data must include:
Aggregate number of misdemeanors/violations charged;
The offense/violation charged;
Race, ethnicity, age and sex of individual charged;
Whether the individual was issued a summons or appearance ticket, was subject to custodial arrest, or whether an arraignment was 'held as a result of the misdemeanor/violation;
Zip code or location where the alleged misdemeanor/violation occurred;
Disposition of case including, if the case is dismissed, why it was dismissed, or the sentence imposed, including fines, fees, and surcharges.
The chief administrator shall include this information in the annual report submitted to the legislature. The data collected must be made available online and updated monthly.

Chapter 102 also requires the chief of every police department, county sheriff, and superintendent of state police to promptly report to DCJS any arrest-related death, broken down by county. An arrest-related death is defined as a death that occurs during law enforcement custody or an attempt to establish custody, including, but not limited to, deaths caused by any use of force.
DCJS must make information relating to arrest-related deaths available in an annual and on its website. Such data shall include: the number of arrest-relate deaths; race, ethnicity, age; and sex of individual; zip code or location where death occurred; and brief description of circumstances surrounding the death.
Chapter 102 takes effect on December 12, 2020.

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 takes 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.

Judicial Recusal
Chapter 376 of the Laws of 2020, which took effect on December 23, 2020, adds a new Judiciary Law § 9 (Recusal; reason) which states: “Any judge who recuses himself or herself from sitting in or taking any part in the decision of an action, claim, matter, motion or proceeding shall provide the reason for such recusal in writing or on the record; provided, however, that no judge shall be required to provide a reason for such recusal when the reason may result in

embarrassment, or is of a personal nature, affecting the judge or a person related to the judge within the sixth degree by consanguinity or affinity."
The legislative memo states: "Judicial recusal is an important mechanism to safeguard the perception of judicial integrity. A judge must currently disqualify themselves from presiding over a matter when they doubt their ability to preside. impartially. Currently, judges also have total discretion to recuse themselves without giving a reason. Yet without written order specifically justifying the recusal, it is difficult to tell whether the disqualification was really necessary."

Courthouse Civil Arrests

Chapter 322 of the Laws of 2020, which took effect on December 15, 2020, adds a new Civil Rights Law § 28 that protects certain persons from civil arrest when going to, remaining at, or returning from a court appearance or proceeding unless a specific judicial warrant or judicial order authorizing such arrest has been issued. A civil court action may be brought by the individual or the Attorney General to address an alleged violation of this provision.
Chapter 322 adds a new Judiciary Law § 4-A that allows courts to issue orders designed to protect the prohibition on such civil arrests.
Judiciary Law § 212 is amended to provide that non-local law enforcement officials seeking to enter a courthouse with respect to an alleged violation or violations of federal immigration law are required to identify themselves and such purpose. Counsel for the Unified Court System is required to review any judicial warrant or judicial order presented to assure its authenticity before allowing entry of the officer intending to effect such an immigration-related arrest.
From legislative memo:
JUSTIFICATION:
Article Three of the Civil Rights Law, "Privilege From Arrest," dates back to the early part of the last century. Most of these provisions of the Civil Rights Law were enacted in 1909 (e.g., § 22 ("Privileges of officers and prisoners from arrest while passing through another county"); § 23 ("No person to be arrested in civil proceedings without a statutory provision); § 25 ("Witness exempt from arrest")). While such provisions have been effective to protect the integrity and needs of the court system in certain circumstances, certain modern practices make an updated, supplementary statute necessary. Changes by federal agencies regarding the enforcement of federal immigration law have instilled significant fear in immigrant communities across New York State. In particular, the use of court calendars and courthouses as a means of locating allegedly undocumented individuals has soared, leaving many immigrants, documented and undocumented, afraid to access the justice system or respond to court summonses for fear of potentially life-changing immigration-related repercussions. This trend has a potentially damaging impact on all New Yorkers, not just immigrant communities, as the operation of our judicial system and public safety are undermined.
Domestic violence victims - whether documented individuals or not – need access to our civil justice system, for orders of protection and similar relief. An entire family may be gravely impacted if a tenant is afraid to enter the courthouse and respond to a landlord's court petition. Justice to other persons is denied when an immigrant - documented or not - refuses to come to court to testify as a victim or witness. It serves neither justice nor public safety when fear of a

civil arrest deters a defendant charged with a traffic infraction, or a more serious crime, from attending a scheduled court appearance in the case.

According to the Immigrant Defense Project, from 2016 to 2017, arrests by federal Immigration and Customs Enforcement ("ICE") agents at courthouses in New York State increased by 1200%. Fear of being targeted, either due to a lack of legal immigration status or concern about the uncertain status of a family member, have dissuaded many individuals from contacting law enforcement or following through with court proceedings. District attorneys and legal representatives, in New York and elsewhere, have expressed frustration and concern regarding their ability to prosecute cases, as victims and witnesses are sometimes too afraid to attend the proceedings. This inability of law enforcement and the legal community to work effectively with immigrant communities and individuals has potentially severe consequences for public safety, as the justice system is handicapped by the unwillingness of victims, witnesses, tenants and others to come forward and enter the courthouse.

As fewer individuals feel safe interacting with the justice system, fearing potential implications for themselves, friends or family, it becomes all the more challenging to promote public safety. It is imperative that we ensure that all members of our community feel safe accessing New York's court system.

This bill would make a modest change to clarify and update New York's century-old prohibition on certain courthouse arrests (Civil Rights Law Art. 3). The bill would allow arrest for an immigration offense based on a judicial arrest warrant or judicial order, signed by a judge of another jurisdiction who is authorized to order such arrest. However, an immigration- related courthouse arrest based on an administrative warrant, or without a warrant, would not be permitted.

II. JUVENILE DELINQUENCY CASELAW

Adolescent/Juvenile Offenders

ADOLESCENT OFFENDERS - Removal
STATUTE OF LIMITATIONS

In this adolescent offender prosecution in which defendant is charged with, inter alia, attempted murder in the second degree, the Court denies the People's motion to prevent removal.

The Court first concludes that and there is no legal impediment to removal based on defendant's current age. Although defendant is now eighteen years old, FCA § 302.2 allows for the commencement of a juvenile delinquency proceeding up until his twentieth birthday since he is charged with a designated felony.

The allegations contained within the People's moving papers are rife with hearsay and wholly unsupported by any affidavits from individuals with personal knowledge of the facts and circumstances leading up to defendant's arrest. The People have made out a case only as to the charges of criminal possession of a weapon in the second degree and criminal possession of a firearm.

People v. M.R.
(Sup. Ct., Kings Co., 7/15/20)
http://nycourts.gov/reporter/3dseries/2020/2020_20177.htm

* * *

ADOLESCENT OFFENDERS - Removal

The Court denies defendant's motion to reargue, and also concludes that it lacks discretion to grant defendant's motion to renew, in connection with the Court's ruling denying removal of this adolescent offender proceeding.

Defendant relies on the COVID-19 pandemic to justify his failure to include the new facts in his earlier motion opposition papers, but, even assuming the COVID-19 pandemic "made it nearly impossible to secure" school and medical records, defendant offers no explanation as to why he could not have, for example, presented the facts via an attorney's affirmation or a supporting affidavit from defendant, his parents, or an educational or mental health provider.

People v. K.F.
(County Ct., Nassau Co., 7/17/20)
http://nycourts.gov/reporter/3dseries/2020/2020_50969.htm

* * *

ADOLESCENT OFFENDERS - Removal

In this adolescent offender prosecution, the Court grants the People's motion to prevent removal, noting, inter alia, that the victim suffered serious, painful and debilitating injuries and has required extensive medical intervention to regain normal functioning; that legislators may have intended that cases involving serious and violent felony charges such as first degree robbery and assault usually remain in the Youth Part rather than be removed; that defendant played a role in setting up the drug sale and was apparently in a position of power and authority throughout the incident; and that the only mitigating factor is defendant's lack of prior involvement with the criminal justice system.

People v. K.F.
(County Ct., Nassau Co., 4/8/20)
http://nycourts.gov/reporter/3dseries/2020/2020_50562.htm

* * *

JUVENILE OFFENDERS - Removal

In this juvenile offender assault/gang assault prosecution, the Court, finding a hearing unnecessary, denies defendant's motion for removal pursuant to CPL § 722.22, citing the seriousness of the offenses charged and the extent of harm caused by the offense, and the allegations that defendant violently kicked the complaining witness in the head during the alleged incident.

The Court also notes, inter alia, that while defense counsel argues that defendant's role was minor when compared to that of his co-defendants, the People have evidence indicating that defendant actively participated in violently attacking the victim; that the alleged conduct is serious and concerning even if it is "lesser" in nature compared to stabbing the complainant or hitting him in the head with a bat; and that, in any event, the defendant's alleged level of participation relative to that of co-defendants is not included in the list of enumerated factors to be considered by the Court when making an "interests of justice" determination, and thus the Court is constrained to consider the overall offense rather than focus on the defendant's specific actions.

People v. E.S.B.
(County Ct., Nassau Co., 4/13/20)
http://nycourts.gov/reporter/3dseries/2020/2020_20112.htm

* * *

ADOLESCENT OFFENDERS - Removal

Upon sixth-day appearance under CPL § 722.23(2), the Court finds that the People have not

proved by a preponderance of the evidence that defendant "caused significant physical injury to a person other than a participant in the offense."

Defendant did not directly cause the victim's stab wounds or intercranial bleeding. The rejects the People's argument that the Court must consider "accomplice liability." The Court finds no basis in the statute for inclusion of individuals who did not directly cause significant injury. Even if the language in the statute were arguably ambiguous, legislative history supports the Court's conclusion.

There could be cases in which the People prove that several accomplices all assumed such a clear and active role in causing the complainant's injuries that it would be impossible to pinpoint exactly which actor was directly responsible. This is not such a case.

People v. J.H.
(County Ct., Nassau Co., 1/28/20)
http://nycourts.gov/reporter/3dseries/2020/2020_20021.htm

* * *

ADOLESCENT OFFENDERS - Removal

The Court grants the People's motion to prevent removal of this adolescent offender proceeding, concluding that the People have proven extraordinary circumstances.

The factors that should be considered are whether defendant committed crimes over a series of days, whether he acted in an especially cruel and/or heinous manner, and whether he was a leader of the criminal activity who had threatened or coerced other reluctant youth into committing the crimes, and there also should be strong proof that defendant is not amenable to or would not benefit in any way from the heightened services in the family court.

After the complainant ended a relationship with defendant, he continued to contact the complainant against her wishes and go to her house, and engaged in a pattern of threats and violence that went far beyond what is usual or could be considered teenage obsession or unrequited love. Finally, defendant acted upon his threats when he went to the complainant's home armed with a knife and a hammer, entered by breaking a window, jabbed the knife at the complainant and her mother, and grabbed the complainant and held the knife to her neck. Defendant, who has a juvenile delinquency history, is not amenable to services.

People v. S.E.
(Fam. Ct., Erie Co., 2/24/20)
http://nycourts.gov/reporter/3dseries/2020/2020_50262.htm

* * *

ADOLESCENT OFFENDERS - Removal

The Court holds that the law is intended to prevent removal when the adolescent offender directly "caused significant injury" to a non-participant in the offense, and does not cover additional defendants based on accomplice liability principles.

Even assuming that accomplice liability principles are applicable, the People failed to establish that defendant knew or should have known that his co-defendant possessed a knife, much less that he shared an intent to use such knife to inflict a significant physical injury.

The People may file a motion seeking to prevent removal based on "extraordinary circumstances."

People v. K.F.
(County Ct., Nassau Co., 3/11/20)
http://nycourts.gov/reporter/3dseries/2020/2020_20078.htm

* * *

ADOLESCENT OFFENDERS - Removal

The Court concludes that the People have met their burden of establishing, by a preponderance of the evidence, that defendant caused "significant physical injury" to the victim, and the case is disqualified from automatic removal to the Family Court.

It is alleged that defendant stabbed the victim with a knife in his lower abdomen, and there is photographic evidence depicting the victim's injury and showing blood-soaked sheets under the victim's bandaged midsection. The victim was hospitalized for multiple days in part due to the stab wound, and the wound continued to require bandaging at least two weeks after the incident. Defense counsel did not provide any evidence or arguments in opposition to the People's presentation.

People v. J.A.
(County Ct., Nassau Co., 2/13/20)
http://nycourts.gov/reporter/3dseries/2020/2020_50286.htm

* * *

ADOLESCENT OFFENDERS - Removal

The Court concludes that the People have established extraordinary circumstances justifying denial of removal, noting that defendant is charged with an armed robbery of a cab driver on December 23, 2019 during which the co-defendant pointed a rifle at the complainant; that this allegedly occurred while defendant was released under probation supervision in connection with

a matter that had been removed and was subject to a ninety-day adjustment period; and that defendant was later charged with acting alone in the commission of an armed robbery of another cab less than two weeks later while released under probation supervision, and those charges are not being removed.

It has been consistently held in this State that when a youth is charged as an adolescent offender with the commission of multiple and escalating violent felonies within a period of a few weeks, while under probation supervision, removal to family court should be denied.

People v. K.J.
(Fam. Ct., Erie Co., 3/4/20)
http://nycourts.gov/reporter/3dseries/2020/2020_50319.htm

* * *

ADOLESCENT OFFENDERS - Removal

Upon the "sixth-day appearance" pursuant to CPL § 722.23(2), the Court declines to order removal, concluding that the People have proved by a preponderance of the evidence that defendant caused significant physical injury to a person other than a participant in the offense.

It is alleged that defendant fired one shot at the complainant at point-blank range, striking him in the left side of his upper chest and causing him to sustain lung and spinal cord damage requiring numerous surgeries. The complainant was still hospitalized for his injuries at the time of the sixth-day appearance, which was conducted more than two weeks after the alleged shooting.

People v. D.R.
(County Ct., Nassau Co., 1/23/20)
http://nycourts.gov/reporter/3dseries/2020/2020_50085.htm

* * *

ADOLESCENT OFFENDERS - Removal

The Court denies the People's motion to prevent removal, finding no "extraordinary circumstances."

The "extraordinary circumstances" standard contemplates a highly unusual set of facts. The Legislature intended that "the overwhelming bulk" of cases would be "promptly transferred from the adult court to the family court" and that denials of transfer to the family court "should be extremely rare" and occur "only when highly unusual and heinous facts are proven and there is a strong proof that the young person is not amenable or would not benefit in any way from the heightened services in the family court."

The Court is troubled by the extensive charges pending against defendant in this Court and in other courts, which arose after defendant had been placed on probation. Defendant allegedly participated in a violent robbery of a random stranger.

However, there is no indication that the complainant sustained any serious injuries, and no proof that defendant threatened or coerced reluctant youths into participating in criminal acts or acted in an "especially cruel and heinous manner."

Defendant has faced and continues to face a host of personal challenges which have significantly affected his insight and judgment, including recurring periods of homelessness and housing instability, the absence of strong familial support, and substance abuse issues. Defendant is likely in greater need than others of the heightened services available in the Family Court.

People v. J.S.
(County Ct., Nassau Co., 1/17/20)
http://nycourts.gov/reporter/3dseries/2020/2020_50084.htm

Statute Of Limitations

STATUTE OF LIMITATIONS

In this juvenile delinquency prosecution that began as an adolescent offender prosecution charging, inter alia, attempted murder, the Court rejects respondent's contention that the Court lacks jurisdiction because respondent had already turned 18 years of age when the petition was filed (see FCA § 302.2).

The Court concludes that the tolling provision in Governor Cuomo's Executive Order 202.8 applies, and rejects respondent's contention that EO 202.8 cannot be applied to toll a period tied to biological age. While EO 202.8 cannot toll respondent's aging, FCA § 302.2 imposes a limitation on the amount of time the Presentment Agency has to file a juvenile delinquency petition.

Although a suspension order issued pursuant to Executive Law § 29-a must "specify the statute, local law, ordinance, order, rule or regulation or part thereof to be suspended and the terms and conditions of the suspension," EO 202.8 does that not by listing the name of every statute being suspended, but, instead, by specifying New York's "procedural laws" that prescribe "specific time limit[s] for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding."

Matter of M.R.
(Fam. Ct., Kings Co., 8/10/20)
http://nycourts.gov/reporter/3dseries/2020/2020_20196.htm

* * *

STATUTES - COVID-19-Related Suspension Of Statutes
ADJOURNMENT IN CONTEMPLATION OF DISMISSAL

On October 22, 2019, the Court granted the joint application of the People and the defense to adjourn the matter in contemplation of dismissal. By letter dated July 24, 2020, the People moved to restore the case to the calendar. Defendant opposed the application, arguing that it was not timely. The Court solicited arguments from counsel regarding whether the ACOD was affected by the various executive orders issued by the Governor since March of 2020.

The Court, citing Executive Law § 29-a, concludes that although the executive orders, starting with EO 202.8, were reasonable at the onset of the pandemic when there was little time for combing through law books to identify individual statutes that needed to be suspended in order to cope with the pandemic, that changed by July 6, 2020, the date of EO 202.48. Since then, courts in this district have become more operational. If normal court operations can occur, albeit adjusted to the reality of COVID-19, there is no reason why a statute limiting the time within which the People must move to restore an ACOD to the Court's calendar should remain suspended. Therefore, the Court holds that the Governor's executive orders since July 6, 2020 do not pertain to ACODs.

Still, the People's July 24, 2020 application was timely. The matter will be scheduled for arguments of counsel as to whether the case should be restored to the calendar.

People v. Kenneh Zeolli
(City Ct. of Cohoes, Albany Co., 10/8/20)
http://nycourts.gov/reporter/3dseries/2020/2020_20253.htm

Sealing, Expungement And Confidentiality

ADOLESCENT OFFENDERS - Removal
CONFIDENTIALITY - Juvenile Delinquency Records

In this adolescent offender prosecution, the Court concludes that the People have demonstrated "extraordinary circumstances" which warrant denying removal of the case to Family Court.

The Court notes, inter alia, that when defendant pleaded guilty to a serious violent felony on January 13, 2020, the court in that case specifically advised him that a more lenient sentence was contingent on him not getting arrested again before sentencing, and yet he got arrested again on the instant charges which involve allegations of possession of a deadly weapon; that the prior offense was allegedly gang-related, and defendant was arrested this time in an area that is known for gang activity and allegedly attempted to evade law enforcement by placing the gun behind a parked car; and that defendant has an extensive history of school suspensions for behavioral problems on school grounds, and probation has opined that his father does not appear capable of properly supervising him.

The Court does note that it was prohibited from considering defendant's Family Court records and history as per FCA § 381.2.

People v. M.M.H.
(County Ct., Nassau Co., 4/28/20)
http://nycourts.gov/reporter/3dseries/2020/2020_50563.htm

* * *

SEALING - Use Of Illegally Unsealed Records At Sentencing
SENTENCE

Defendant pleaded guilty to fourth-degree criminal possession of a controlled substance in exchange for a four-year sentence of imprisonment followed by three years of post-release supervision. The court adjourned sentencing and imposed as a condition to the promised sentence that defendant "stay out of trouble." Before sentencing, defendant was prosecuted for a crime allegedly committed after entering his plea. The sentencing court agreed to adjourn sentencing pending resolution of the new matter. The jury acquitted defendant and the official record, including the trial transcript, was sealed. The prosecutor in this case moved to unseal, arguing that "justice requires" unsealing because defendant's trial testimony was relevant to his request to be sentenced under the terms of his plea. The court granted the motion, and the prosecutor submitted defendant's unsealed trial testimony. Defense counsel objected to the unsealing and to the court's consideration of the trial testimony. The court found, based on defendant's trial testimony in the sealed proceeding, that defendant violated the condition of his plea that he "stay out of trouble," and imposed an eight-year term of incarceration.

In a 4-3 decision, the Court of Appeals reverses and remits for resentencing without reference to or consideration of the contents of the sealed record, holding that a court is without authority to consider for sentencing purposes erroneously unsealed official records, and that where violation of the sealing mandate of CPL § 160.50 impacts the sentence, the error warrants appropriate correction.

The People cannot rely on the law enforcement agency exception in CPL § 160.50(1)(d)(ii). The People also cannot rely on the court's constitutional and statutory mandates to impose a sentence based on reliable and accurate information. A sealed record is simply not available for consideration at sentencing. It is a nullity. Citing *Matter of New York State Commission on Judicial Conduct v. Rubenstein* (23 N.Y.3d 570), the Court also notes that there is neither a specific grant of power nor a mandate that cannot be fulfilled without the sealed records. The Court also rejects the People's contention that defendant's testimony does not fall within the scope of CPL § 160.50.

"Adopting any of the People's or the dissent's arguments would permit unsealing in every case where the People challenge a defendant's compliance with the terms of a plea, rendering CPL 160.50 ineffective and turning the sealing of records into the exception rather than the rule."

The Appellate Division wrongly concluded that defendant was not entitled to a remedy. The remedy here is intended to ensure that the sentencing court has access only to information permitted under the legislature's carefully drafted sealing framework.

People v. Anonymous
(Ct. App., 2/18/20)

* * *

DISCOVERY - DNA Samples/Protective Orders
SEARCH AND SEIZURE
EXPUNGEMENT

The police gave respondent a can of soda at the precinct and his genetic material was surreptitiously taken from the can. Respondent later successfully completed a supervised adjournment in contemplation of dismissal.

The Court holds that pursuant to Executive Law § 995-c(9)(b)(iii), as interpreted by *Matter of Samy F. v Fabrizio* (176 A.D.3d 44), it has discretion to expunge a delinquency respondent's DNA profile which has been uploaded into the Office of the Chief Medical Examiner's database.

Samy F. found § 995-c(9)(b)(iii) applicable to a youthful offender whose conviction is deemed vacated. This analysis also applies here because the findings that respondent committed acts constituting two misdemeanors were, of necessity, vacated. Like a youthful offender adjudication, a juvenile delinquency adjudication is not a criminal conviction.

The family court has authority over the retention, sealing, and destruction of identifying information obtained from a youth by the police during the arrest process. The family court also may authorize the taking of DNA samples, and, pursuant to FCA § 331.5(1), may issue an order "limiting, conditioning, delaying or regulating discovery for good cause." The Court rejects the presentment agency's argument that the result should be different because the DNA sample taken from the soda can is a "pseudo exemplar," rather than a "true exemplar." This is not a critical distinction. If the family court may not order expungement, the Court knows of no other way this data may be expunged.

In deciding to exercise its discretion, the Court notes that this is respondent's only brush with the law; that respondent pled guilty to misdemeanors, not felonies; that respondent has behaved well during the fourteen-month period he has been before the Court, has accepted full responsibility for his actions, and has faithfully attended and successfully completed a program which provides counseling for young people charged with sexual offenses; and that the testing and uploading into the OCME database was done after the Court directed that respondent's DNA not be tested and that any existing results not be uploaded into a database because the presentment agency failed to convey the order to the OCME.

The Court directs that the OCME expunge respondent's DNA profile from its database and delete respondent's name as the suspect on the report regarding the DNA mixture on the stain on complainant's shirt. Any remaining DNA material belonging to respondent shall be destroyed. Within thirty days from the date of this order, the presentment agency is to submit a certification from the OCME that respondent's DNA profile is no longer in its database and that his name is no longer associated with any reports in its records or database. The presentment agency is also to provide a certification from the OCME and the NYPD that all of respondent's DNA material in their possession have been destroyed.

Matter of John R.
(Fam. Ct., N.Y. Co., 8/26/20)
http://nycourts.gov/reporter/3dseries/2020/2020_20212.htm

* * *

DISCOVERY - Video Recordings/Protective Orders

A Second Department Justice modifies a protective order directing that certain recordings shall only be exhibited to defendant, attorneys employed by Brooklyn Defender Services, and any person approved by the court as necessary and for the exclusive purpose of preparing a defense in the case.

The court should have permitted defense counsel to disclose the recordings to those employed by counsel or appointed to assist in the defense without prior approval from the court.

People v. Andre Clarke
(2d Dept., 9/30/20)

* * *

DISCOVERY - Audio/Video Recordings
- Witness Identifying Information
- Protective Order

A Second Department Justice modifies a protective order by granting the People's request that disclosure of the audio and video recordings of the narcotics sales shall be made forthwith to defense counsel only, to be viewed at the prosecutor's office, and that disclosure of the names, addresses and contact information of the confidential informant and undercover personnel shall be delayed until the commencement of the trial.

People v. Armando Zayas
(2d Dept., 9/30/20)

* * *

DISCOVERY - Notice Of Alibi

The Third Department addresses defendant's unpreserved claim and finds reversible constitutional error in the trial court's preclusion of alibi testimony.

A little more than three weeks prior to the scheduled trial date, defendant provided untimely notice. Defendant was not provided the opportunity to oppose the People's informal letter request for preclusion or to set forth good cause for the delay. Defendant moved for reconsideration, arguing that the People were not prejudiced as they already knew that his father was a potential witness given that they gave defendant the father's unsigned statement taken by a police officer, but the court denied the motion on procedural grounds and also held that, if it were to reach the merits, it would reach the same conclusion, as defendant failed to show good cause.

The court, without hearing from defendant, implemented the most drastic sanction without considering any lesser sanctions that may have protected the People from potential prejudice. Alibi testimony would have been important to the defense given that the People relied on accomplice testimony, and the People would not have been prejudiced as they were already aware of the father's statement.

People v. Matthew Lukosavich
(3d Dept., 12/24/20)

* * *

DISCOVERY - DNA Samples/Protective Orders
SEARCH AND SEIZURE
EXPUNGEMENT

While respondent was detained at the stationhouse on weapon possession charges, an officer offered him a bottle of water, from which he drank. The officer took the bottle and retrieved from it a DNA sample for testing to compare to DNA possibly left on the firearm. Subsequently, respondent made an admission and was adjudicated a juvenile delinquent.

Respondent's attorney moved for an order directing the New York City Office of the Chief Medical Examiner to destroy and expunge any DNA sample or profile, or, alternatively, a protective order prohibiting OCME from uploading the DNA sample into the New York City DNA databank and barring any comparisons apart from this case.

The Court denies the motion, concluding that the Family Court Act does not authorize the requested orders.

Even if FCA § 354.1, which provides for destruction of fingerprints, palmprints and photographs, could be read to include DNA material, respondent made an admission to a class C

felony, and thus § 354.1 is unavailable. Although FCA § 331.5 authorizes a protective order "denying, limiting, conditioning, delaying or regulating discovery," the DNA sample was not obtained by court order, and the statute does not provide for a protective order against an agency such as OCME.

Although FCA § 255 permits the Court to "order any state, county, municipal and school district officer and employee to render such assistance and cooperation as shall be within his legal authority," there is currently no statutory authority for the requested expungement. The Court disagrees with *Matter of Jahsim R.* (66 Misc.3d 426), which relied on *Matter of Samy F. v. Fabrizio* (176 A.D.3d 44), a case involving a criminal and not a juvenile delinquency proceeding.

Matter of Logan C.
2020 NY Slip Op 32681(U)
(Fam. Ct., Kings Co., 8/19/20)
http://nycourts.gov/reporter/pdfs/2020/2020_32681.pdf

* * *

SEALING

A 911 call and some related paperwork relevant to this case were inadvertently sealed by operation of law after the case against an individual who had been arrested in error was dismissed.

The Court grants the People's application to unseal the records and orders the People to disclose the materials to defendant as prescribed in CPL § 245.20. The Court also orders the immediate resealing of the arrest paperwork and court file.

There exists both a legal discovery mandate and an extraordinary circumstance warranting the unsealing of the records. Only the paperwork relating to the person who was incorrectly arrested should have been sealed. "Simply put, the Court is undoing a clerical error."

People v. Kevin Alexander
(Sup. Ct., Queens Co., 3/4/20)
http://nycourts.gov/reporter/3dseries/2020/2020_20070.htm

* * *

SEALING
BRADY MATERIAL - Bad Acts/Officer's Prior Incredible Testimony

Noting that a prior negative judicial determination about the officers' credibility in a different, and now sealed, criminal case is evidence favorable to the defense that must be disclosed, the

Court concludes that the People are not required under CPL Article 245 to ask for an unsealing order, and in any event are without a legal means to obtain the records, but, in order to safeguard defendant's right to cross examine the witnesses about their prior incredible testimony, the Court orders unsealing in the interest of justice and will conduct an in camera inspection of the evidence in the sealed case.

The Court notes, inter alia, that policy interests underlying a statutory privilege must yield where a defendant's constitutional rights of confrontation and due process outweigh the need for confidentiality; that an inspection could aid in truth-seeking and help boost the public's confidence in our judicial system; and that the potential harm to the individual whose case may temporarily be unsealed is minimal, and the case will be re-sealed upon completion of the in camera inspection except to the extent that the Court deems it appropriate to release information to the parties.

People v. David Davis
(Crim. Ct., Bronx Co., 2/20/20)
http://nycourts.gov/reporter/3dseries/2020/2020_20045.htm

Petitions

PETITIONS - Translations/Language Issues
JURISDICTION - Proof Of Respondent's Age

The Second Department finds the juvenile delinquency petition facially sufficient where the supporting deposition, which had been translated for the complainant by a Spanish-speaking police officer, contained no indication on its face that the complainant had not read and understood it or was incapable of doing so.

The Court rejects respondent's contention that the family court lacked subject matter jurisdiction because the presentment agency failed to present evidence that he was less than 16 years of age when he committed the acts alleged.

Matter of Nelson D.-C.
(2d Dept., 5/13/20)

* * *

ACCUSATORY INSTRUMENTS - Amendment/Date Of Offense

On the third day of defendant's trial on a charge of sexual assault on a child, and after the prosecution had presented the majority of its case, the prosecution moved to amend the date range of the charged offenses to expand the date range by approximately six weeks. The trial court granted the motion over defense counsel's objection.

The Colorado Supreme Court finds reversible error. The amendment prejudiced defendant's substantial right to fully prepare and present his alibi defense.

Fisher v. State
2020 WL 5507864 (Colo., 9/14/20)

* * *

ACCUSATORY INSTRUMENTS - Use Of Hearsay
HEARSAY - Excited Utterance

The Court holds that the statement, "He hit me," contained in the misdemeanor complaint cannot be considered for facial sufficiency purposes where, although a motor vehicle accident would likely be an unexpected and startling event, the complaint fails to indicate how much time elapsed between the alleged accident and the statement.

Although the officer alleges that the declarant was on the ground next to a motorcycle, there are no allegations that the declarant was injured or that he was yelling, crying or upset.

People v. Ramirez
(Crim. Ct., Bronx Co., 1/9/20)
http://nycourts.gov/reporter/3dseries/2020/2020_20006.htm

Initial Appearance and Detention

DETENTION/PRELIMINARY HEARINGS

The Second Department concludes that the People demonstrated good cause for the delay in conducting a preliminary hearing or obtaining an indictment, and notes that grand juries are scheduled to begin reconvening in Kings County on August 10, 2020, and that disposition of this felony complaint or a preliminary hearing should occur no later than August 17, 2020.

People ex rel. Rolls v. Brann
(2d Dept., 7/15/20)

* * *

DETENTION - Time Deadlines

The Court holds that the CPL § 180.80 time period for conducting a preliminary hearing or otherwise disposing of a felony complaint has been suspended by Executive Order 202.8, issued by the Governor on March 20, 2020 as part of New York's response to the COVID-19 emergency. CPL § 180.80 falls squarely within the Executive Order's plain language; it sets a specific time limit (120 or 144 hours) for the commencement of a proceeding (the 180.80

hearing).

Defendant argues that Executive Order 202.8 cannot suspend the CPL § 180.80 preliminary hearing time limit because the Governor lacks the authority to suspend a constitutional right. A defendant arrested without a warrant is entitled to a prompt judicial probable cause determination. In New York, that judicial determination comes at the arraignment on a felony complaint. Here, that determination was made less than 12 hours after defendant's arrest. However, a CPL § 180.80 preliminary hearing is not constitutionally mandated.

Even if Executive Order 202.8 did not temporarily suspend defendant's right to a preliminary hearing, the Court may decline to issue a release order upon a good cause showing of compelling facts or circumstances that preclude disposition of the felony complaint within the prescribed time period, or render such action against the interest of justice. "There is no question that the steps that have been taken to temporarily limit court operations are extraordinary measures. But these are extraordinary times. And if ever there was a moment that called for extraordinary measures, this is that moment."

The 120/144-hour time period is tolled until either the restriction banning courts from hearing non-essential criminal matters has been lifted, or the Chief Administrative Judge's list of essential criminal matters has been revised to expressly include preliminary hearings.

People v. Jason Hood
(City Ct. of Poughkeepsie, 4/4/20)
http://www.nycourts.gov/reporter/3dseries/2020/2020_50384.htm

* * *

DETENTION - Preliminary Hearings/COVID-19 Delays

On March 13, 2020, as the COVID-19 pandemic took hold in California, respondent Superior Court of Contra Costa County announced it would be closed to the public between March 16 and April 1 and ceased conducting most, but not all, proceedings. Petitioner contends that his custodial preliminary hearing should have occurred during the March closure period under the applicable statute.

A California appeals court holds that good cause to delay the hearing was not established. The Superior Court's finding that "the unprecedented [COVID-19] pandemic conditions that California was facing directly impacted the court[ ] operations" is insufficient. There had to be a showing of a nexus between the conditions created by the pandemic and the purported need to delay the hearing, such as a showing based on a balancing of the due process interests protected by timely preliminary hearings, and the specific risks posed generally by such hearings or by any specific hearing. There is also no showing that the Superior Court was unable to provide courtrooms during the March closure period, as it did for other urgent matters, such as "as in-custody arraignments" and "any felony or misdemeanor cases in which sentencing must occur

during the period of closure." A decision not to allocate available resources is not good cause.

The Superior Court started conducting preliminary hearings again on March 30, just five days after the March 25 deadline for petitioner's hearing. There is no indication in the record of what, if anything, changed between March 25 and March 30 that made safe preliminary examinations feasible.

Bullock v. The Superior Court of Contra Costa County
2020 WL 3446274 (Cal. Ct. App., 1st Dist., 6/24/20)

* * *

PRISONERS RIGHTS
HABEAS CORPUS

In this habeas proceeding, petitioner, on behalf of a group of inmates incarcerated in the Otisville Correctional Facility, alleged that the inmates were being unlawfully imprisoned in violation of the Eighth Amendment, in light of certain physical conditions and attributes specific to them as well as unalterable conditions of incarceration at Otisville; that there were no measures that could be taken to protect them from the grave risk of death or serious illness posed by the COVID-19 virus while they were incarcerated in that facility; and that the only remedy that can cure the illegality of detention would be immediate release.

The Second Department holds that these allegations are properly cognizable in habeas corpus, and that the supreme court should not have refused to issue an order to show cause why the inmates should not be released.

People v. Delta Barometre
(2d Dept., 11/4/20)

* * *

DETENTION/PRISONERS RIGHTS - Health Care/COVID-19
- Habeas Corpus

These two "mass" habeas corpus proceedings are brought by defendants incarcerated on Rikers Island. Some are awaiting trial, and others have been convicted and are alleged to have violated their conditions of parole. Petitioners claim federal and state constitutional violations stemming from their continued detention despite the ongoing COVID-19 pandemic. Petitioners were denied habeas relief.

The First Department affirms, noting, inter alia, that with respect to the federal constitutional claim, respondents have demonstrated great care to ensure the safety of everyone who enters the facility, and, by any objective measure, have been anything but indifferent to the risk that COVID-19 poses to the jail population; and that with respect to the additional factors relevant to

the State constitutional claim, the State articulated compelling reasons why petitioners should be held, such as their commission of serious offenses and violations of parole, and has agreed to release a significant number of detainees to help control the spread of the virus, which demonstrates that it has given a great deal of consideration to who should and should not be released.

It would be the better practice for habeas courts reviewing future cases while the pandemic persists to perform individualized assessments of those who petition the court for release. With appropriate data, courts hearing similar petitions will be in a good position to balance the competing interests at issue, and make decisions that recognize the potentially serious implications of confinement on detainees with underlying health conditions, but at the same time ensure the State's ability to enforce the law against those who might not return to face justice once released.

People ex rel. Stoughton v. Brann, People ex rel. Low v. Brann
(1st Dept., 7/23/20)

* * *

DETENTION - Revocation Of Release

The Court finds that the judge abused her discretion in revoking defendant's securing order and setting bail where the People submitted a felony complaint that has been filed in Criminal Court. The Court vacates the securing order and issues a new temporary securing order, and commits defendant to the custody of the sheriff pending a new revocation hearing.

CPL § 530.60(2)(a) authorizes revocation of a securing order after a hearing when there is reasonable cause to believe a felony defendant at liberty has committed a class A felony or a violent felony, or intimidated a victim or witness in violation of Penal Law § 215.15, 215.16, or 215.17. A court must first hold a hearing at which it receives "relevant, admissible evidence," and allows the defendant to cross-examine witnesses and present "relevant, admissible evidence." The court may receive a transcript of Grand Jury testimony and do so in lieu of a witness's appearance. Upon a finding of reasonable cause, a court may revoke a defendant's securing order and issue a new order fixing bail or remanding the defendant for a period of up to 90 days.

Here, the People failed to satisfy their burden of proof. The legislature's use of the phrase "relevant, admissible evidence" demonstrates its intent that the ordinary rules of evidence apply to CPL § 530.60(2)(c) revocation hearings. Where the legislature intended that a court receive hearsay during a proceeding, it has clearly so stated. Moreover, the statute expressly provides for the admission of one form of hearsay - a transcript of the presentation of the new charge to a Grand Jury - and the Court must infer that the omission of other types of hearsay was intentional. Also, the People are permitted to introduce Grand Jury testimony "in lieu of [a] witness' appearance." This implies that the legislature expected the hearing to involve witness testimony.

Finally, principles of justice and due process require that the hearing be more than cursory.

People ex rel. Chiszar v. Brann
(Sup. Ct., N.Y. Co., 6/12/20)
http://nycourts.gov/reporter/3dseries/2020/2020_20132.htm

* * *

DETENTION - Time Deadlines/Due Process

The Court concludes that the Governor's Executive Order 202.8 suspends CPL § 180.80 and other procedural deadlines in the Criminal Procedure Law, and that petitioner's due process rights have not been violated by the criminal court's refusal to calendar this case for a CPL § 180.80 release application. Such an application also is not part of the "emergency" situations covered in the Chief Judge's operational order. The Court also notes that there was a judicial finding of probable cause at the time of defendant's arraignment on the felony complaint.

People ex re. Hamilton v. Brann
(Sup. Ct., Bronx Co., 4/2/20)
http://nycourts.gov/reporter/3dseries/2020/2020_50392.htm

Discovery/Preservation Of Evidence

DISCOVERY - Protective Orders/Witness Identifying Information

A Second Department Justice grants the People's application for a protective order, and directs that disclosure of the address and contact information of the complainant, and the name, address, and contact information of the complainant's mother and the individuals identified as the first and second 911 callers, is delayed until 15 days before trial and shall only be made to defense counsel and counsel's investigator; and disclosure of the last name, address, and contact information of the individual identified as the third 911 caller shall be made within 15 days of this decision and order and shall only be made to defense counsel and counsel's investigator. Defense counsel and counsel's investigator shall not disclose the above-referenced material to defendant or anyone else, aside from each other.

The Supreme Court improvidently exercised its discretion in directing immediate disclosure of these materials to defense counsel, counsel's investigator, and defendant.

People v. Nysair Harper
(2d Dept., Iannacci, J., 4/2/20)

* * *

BRADY MATERIAL

The district attorney learned through immunized grand jury testimony that two officers knowingly made false statements in police reports that concealed the unlawful use of force by a fellow officer against an arrestee, and supported a bogus criminal charge of resisting arrest. The district attorney prepared a discovery letter describing this misconduct and asked a judge to authorize disclosure to defense counsel as potentially exculpatory information in unrelated criminal cases where the officers might be witnesses. The judge authorized the disclosure.

The officers appealed, claiming that disclosure is not constitutionally required and would reveal information obtained from immunized testimony before a grand jury. The Massachusetts Supreme Court affirms.

The Court rejects the officers' contention that a prosecutor should not disclose exculpatory information unless the prosecutor has a constitutional duty to disclose. Prosecutors have a broad duty under state criminal procedure rules that includes all information that would "tend to" indicate that the defendant might not be guilty or "tend to" show that a lesser conviction or sentence would be appropriate. Moreover, a prosecutor should not attempt to determine how much exculpatory information can be withheld without violating a defendant's right to a fair trial. "Rather, once the information is determined to be exculpatory, it should be disclosed -- period. And where a prosecutor is uncertain whether information is exculpatory, the prosecutor should err on the side of caution and disclose it."

The Court rejects the officers' contention that prosecutors have no obligation to disclose their false statements because their prior misconduct would not be admissible in evidence at trial in any unrelated criminal case. In Massachusetts a judge has the discretion to decide whether the credibility of a police officer is a critical issue at trial and whether the officer's prior false statements in a separate matter might have a significant impact on the result of the trial, such that the prior misconduct should be admitted in the interest of justice.

Nothing in an order of immunity protects a witness from other adverse consequences that may arise from the content of the witness's testimony, nor does grand jury confidentiality preclude disclosure without a court order since disclosure to defense counsel of exculpatory information is part of a prosecutor's official duty.

Generally, where a prosecutor determines that a police officer lied to conceal the unlawful use of excessive force, by him- or herself or another officer, or lied about a defendant's conduct and thereby allowed a false or inflated criminal charge to be prosecuted, the prosecutor must disclose the information to defense counsel in any criminal case where the officer is a potential witness or prepared a report in the investigation. The Court recommends adoption in Massachusetts of the United States Department of Justice's "Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information

Concerning Law Enforcement Agency Witnesses," which requires, inter alia, that prosecutors "have a candid conversation with each potential investigative agency witness and/or affiant with whom they work regarding any on-duty or off-duty potential impeachment information, including information that may be known to the public but that should not in fact be the basis for impeachment in a federal criminal court proceeding, so that prosecuting attorneys can take appropriate action, be it producing the material or taking steps to preclude its improper introduction into evidence." Each United States Attorney's office designates a "requesting official" who may ask an investigative agency's official to provide potential impeachment information regarding an agency employee associated with the case or matter being prosecuted.

In re Grand Jury Investigation
2020 WL 5360068 (Mass., 9/8/20)

* * *

DISCOVERY - Protective Orders/Witness Identifying Information

A Second Department Justice upholds a sealed protective order that was issued upon an ex parte application by the People, after defense counsel had a reasonable opportunity to be heard. The Court notes, inter alia, that the Supreme Court, in taking into account that the charges against defendant are gang-related, properly considered and weighed defendant's rights when it allowed disclosure of certain witnesses' names and contact information and other identifying material to defense counsel only, so as to enable defense counsel to begin her investigation.

This does not mean that defendant will never have access to the subject disclosure so as to permit him to fully aid his counsel. Defendant will still be entitled to receive *Rosario*, *Brady*, and *Giglio* material.

People v. Ishmel Griggs
(Austin, J., 2/18/20)

* * *

DISCOVERY - Witness Identifying Information/Protective Orders

A Second Department Justice concludes that the trial court improvidently exercised its discretion in denying the People's request for a protective order in its entirety.

The court should have directed that disclosure of the names, addresses, and contact information of four witnesses, and of the floor plans of the subject jail, be made only to defense counsel, and directed defense counsel not to disclose the materials or information to defendant or to anyone other than those employed by counsel or appointed to assist in

the defense.

People v. Christopher Taggart
(2d Dept., Wooten, J. 9/18/20)

* * *

DISCOVERY - Protective Orders/Witness Statements

A Second Department Justice concludes that defendant waived his objections to the terms of the protective order. The People represented that the parties had agreed that defendant's counsel would be able to view at the District Attorney's office an unredacted version of the surveillance videotape at issue. Defendant's counsel did not object, and then proffered a "reasonable compromise" as to outstanding issues, which the court included in the protective order.

The Court does note that to the extent that the court relied on the People's contention that defendant's counsel might inadvertently disclose identifying information about the witnesses to defendant, that concern, without more, did not constitute good cause for not providing to defendant's counsel unredacted information, including witness statements, with instructions not to reveal identifying information to defendant.

People v. Anthony Brown
(2d Dept., 3/25/20)

* * *

DISCOVERY - Witness Names/Contact Information

The Court concludes that the People satisfy their statutory obligation to disclose to defense counsel "adequate contact information" (CPL § 245.20[1][c]) by utilizing a portal administered by Verizon, which allows counsel to contact witnesses by telephone without requiring disclosure of the witnesses' personal phone numbers.

The Court notes that the portal provides defense counsel with a straightforward, user-friendly way to contact witnesses by phone; that if the witness answers the call, he or she will hear an audio message recorded by defense counsel and can then decide whether or not to speak with counsel, and, if the witness does not pick up the call, the audio note will be recorded on the witness's voicemail; that the attorney can make follow-up calls to the witness, who will have been encouraged by the prosecutor to communicate with defense counsel; that once the witness's phone number is registered with the portal, the unique numeric code assigned to the witness is, for all intents and purposes, part of that person's contact information; that even if defendant had a witness's phone number, counsel's attempts to contact the witness could be ignored; that the portal is likely to increase

witnesses' communication with defense counsel, since they can do so in a way that shields their private contact information; and that defense counsel can later ask the judge to order the People to disclose the witness's physical address, which may, in turn, result in the People compromising by providing the witness's actual phone number or email address.

The Court declines to follow the decision in People v. Feng (NYLJ, Feb. 28, 2020, at 21, col 1, 2020 NYLJ LEXIS 501, at *5), in which the court found that the WitCom system does not provide adequate contact information. The Feng decision effectively rewrites the statute by substituting the phrase "active and verified cell phone number or email address" for "adequate contact information."

The Court concludes that the People have a duty under CPL § 245.20(2), which requires the prosecutor to "make a diligent, good faith effort to ascertain the existence of [discoverable] material or information … where it exists but is not within the prosecutor's possession, custody or control," to attempt to ascertain the names of anonymous 911 callers. The names of witnesses constitute discoverable information.

People v. Shameeka Todd
(Sup. Ct., Queens Co., 3/12/20)
http://nycourts.gov/reporter/3dseries/2020/2020_20075.htm

* * *

EVIDENCE/DISCOVERY - Sanction For Destruction

The Court concludes that defendant, charged with a series of traffic infractions, is entitled to a preclusion sanction, barring the People from introducing testimony regarding defendant's physical condition, due to the destruction of dashcam footage that was in the People's control.

Defendant made multiple demands that the People preserve the footage. While the Court expects that the arresting officer would testify truthfully as to his observations and knowledge, the dashcam footage could have provided defendant an opportunity for a more expansive and meaningful cross-examination. An adverse inference would be an insufficient consequence.

People v. Wright
(Town Justice Ct., Rockland Co., 8/18/20)
https://www.law.com/newyorklawjournal/almID/1598528299NYnone/

* * *

DISCOVERY - Witness Contact Information

The People indicated that their witness could be contacted at a proxy phone number via the WitCom software application. Defense counsel objected and refused to use the program, and argued that WitCom is not sufficient under the discovery statute. The Court ruled that the People sufficiently complied with CPL § 245.20(1)(c). Defendant moves to re-argue.

The Court denies the motion. Defendant has not established a basis under which re-argument would be permissible. Moreover, if the Court were to grant defendant leave to reargue, it would adhere to its previous decision.

The statute requires the People to disclose the names and adequate contact information of witnesses, but does not require the People to disclose the personal phone numbers and addresses of the witnesses. The Court does not believe the Legislature would disapprove of technology which allows the defense an effective means to contact witnesses, and also resolves potentially serious issues, including safety, that come with disclosing personal contact information of witnesses. Moreover, witnesses may, on their own, set up a proxy phone number or a separate e-mail address, solely for the purpose of allowing attorneys to contact them about the case.

WitCom does not deny a defendant access to effective assistance of counsel. Even if a defendant has a witness's personal phone number, counsel's attempts to contact the witness could be ignored and the defendant would have no way of knowing whether there was a communication glitch or the witness was simply disinclined to speak about the case. The issues the defense raises about ascertaining the identity of the person on the call would exist even if the People disclose the personal phone number of the witness.

People v. Daron O Jean Baptiste
(Crim. Ct., N.Y. Co., 12/10/20)
http://nycourts.gov/reporter/3dseries/2020/2020_20331.htm

* * *

DISCOVERY - Witness Contact Information

WitCom is an app available for smartphones that is being utilized by the New York County and Kings County District Attorney's Office. Once a prosecutor registers a witness in the WitCom system, a link is sent to the witness' cell phone with a virtual phone number for defense counsel which the witness can add to the phone's contacts. Defense counsel is required to download the WitCom app, which provides a portal that allows counsel to view the names of witnesses that pertain to a case without revealing the witness contact information. Defense counsel may then text or call the witnesses through the WitCom app. Upon doing so, defense counsel's virtual WitCom number is displayed to the witness, who may accept or decline the phone call or ignore or reply to the text message.

Pursuant to CPL § 245.20(1)(c), the People must provide "[t]he 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." In this

attempted murder prosecution, the People offered, instead of phone numbers, use of the WitCom system as to two of their witnesses. Defense counsel objected, claiming that WitCom does not provide adequate contact information. The Court issued a Preliminary Order requiring defense counsel to make attempts to use WitCom, and then file a report detailing attempts to use the system and highlighting any perceived deficiencies. The Court gave the People an opportunity to comment on defense counsel's findings.

Having received defense counsel's report, the People's response, and defense counsel's reply, the Court concludes that the People's use of the WitCom system did not provide adequate contact information, and directs the People to disclose an active and verified email address and cell phone number for their witnesses to defense counsel.

In some situations, a third-party app or service may encourage communication because the witness may feel more comfortable. In other situations the use of WitCom short circuits the adversarial process by inserting the prosecutor (or the app) as an intermediary between defense counsel and a witness, and defense counsel is forced to rely on the witness' willingness to interact with counsel through a virtual number on their personal smart device, or on the prosecutor to prompt said witness.

Use of the WitCom app is contrary to the plain statutory requirement that the People provide adequate contact information, which, in this day and age, is an active and verified cell phone number or email address. "Public defenders, by necessity and their nature, are distrustful of the government. This court, an agent of the government, does not believe that forcing a public defender or other defense attorney to accept an app, paid for by the District Attorney's Office, another arm of the government, meets the intent of the criminal justice reforms that went into effect this year…." In People v. He (34 N.Y.2d 956), the Court of Appeals held that it would not be adequate for the prosecutor to contact exculpatory witnesses and simply give the defense attorney's contact information to them.

Although the Court believes that the WitCom app could result in more communication, using it is a decision to be made by defense counsel.

People v. Feng
(Sup. Ct., Kings Co., 2/20/20)
https://www.law.com/newyorklawjournal/almID/1582671363NY807118/

* * *

DISCOVERY - Protective Orders/Witness Contact Information

The Court granted the People's ex parte application for a protective order permitting them to delay disclosure, until commencement of trial, of identifying information relating to two witnesses. The Court directed sealing of the application, supporting affirmation, protective order, and minutes of the ex parte proceeding.

The Court denies defendant's motion to unseal and vacate the protective order. The Court had the authority to entertain the People's application ex parte, and to conduct a hearing on the application in the absence of defense counsel. In any event, the Court directed counsel to submit papers and heard argument on defendant's motion, and the People's opposition papers apprised defense counsel of most of the information and arguments set forth in the original application for a protective order.

The Court finds good cause for the issuance of the protective order, noting, inter alia, that defendant is charged with murder in the second degree for allegedly stabbing a man to death; that defendant has prior convictions for burglary and criminal possession of a firearm, and during the burglary defendant and an accomplice, both armed with weapons, forced a couple with a four-month-old baby into their home, bound them with duct tape before stealing valuables and the keys to their vehicle, and cut the wires to the landline telephone and took their cellphones in an apparent attempt to impede their ability to report the crime to the police; that defendant's brother and uncle, who assisted defendant in fleeing the jurisdiction, also have criminal records; that defendant's statement directing an associate to tell someone that "he next" is a clear threat of harm, and defendant's sister's statement to members of the victim's family that "if my brother gets locked up, it's gonna go down" indicates that witnesses may be at risk; that the prosecutor alleged that the witnesses were reluctant to come forward, and revealing their identity to defendant many months in advance of trial may make the witnesses reluctant to testify; and that while defense counsel is willing to abide by a directive that he not share identifying information with defendant, counsel's assurance that he would not "intentionally" disclose the information does not foreclose the possibility of inadvertent disclosure, and, if counsel and/or his investigator went into the community to attempt to speak to the witnesses and obtain impeachment evidence, members of the community, including defendant and defendant's friends and family, could learn of the identity of the witnesses.

To the extent that discovery materials, including grand jury testimony, can be sufficiently redacted to shield the identity of the witnesses, the prosecutor should provide those materials to defense counsel forthwith.

People v. Cole
(Sup. Ct., Queens Co., 2/25/20)
https://www.law.com/newyorklawjournal/almID/1582873637NY184219/

* * *

DISCOVERY - Grand Jury Transcripts

The Court holds that a district attorney or public prosecutor is not required by CPL § 190.25(4)(a) to obtain a court order authorizing release of grand jury transcripts before complying with the automatic discovery obligations in CPL § 245.20(1)(a).

Such disclosure falls within the "lawful discharge of his [her] duties" exception to the grand jury

secrecy requirements. The Court denies the People's motion for an authorizing order as unnecessary.

People v. David Schoetz
(County Ct., Essex Co., 3/12/20)
http://nycourts.gov/reporter/3dseries/2020/2020_20073.htm

* * *

DISCOVERY - Access To Crime Scene

The Court denies the defense motion for an order permitting access into two private residences in which defendant allegedly committed burglaries.

The Court notes, inter alia, that the law does not permit defendant to be allowed into the premises along with his attorney; that photographs taken at the time of the burglary depict the points of entry and the rooms that were burglarized; that new photos provided to the defense depict changes to one of the two premises, and entry into that residence would serve no purpose given those material changes; and that there is no indication why measurements or additional photos would be beneficial to the defense. The hardship placed upon the homeowners should the defense be allowed to enter the residences outweighs the limited benefit the defense would obtain.

"The court ponders whether this statutorily created right for defense to enter into a person's home can supercede the homeowner's rights granted by the 4th Amendment."

People v. Augustus
(County Ct., Nassau Co., 2/26/20)
https://www.law.com/newyorklawjournal/almID/1583408923NY894N17/

* * *

DISCOVERY - Court-Ordered Access To Private Premises

A witness, visiting the resident of an apartment, looked out the window and observed defendant stab a man to death on the sidewalk. Defendant moves pursuant to CPL § 245.30(2) for an order granting access and entry into the apartment, contending that he needs to assess the witness's viewpoint, and that the apartment must remain in an unchanged condition.

The Court denies the motion. Although defendant has a fundamental right to investigate and present a defense, the Court will not order the veritable invasion of an uninvolved citizen's home, especially when the defendant has not established that he would otherwise be deprived of evidence. Defendant has been provided with a copy of a remarkably clear cell phone video that the witness recorded from the window of the apartment. The video demonstrates the witness's perspective and ability to observe the public sidewalk. Also, defendant has been provided with

extensive discovery - video surveillance recordings of the stabbing, body camera footage, and crime scene photographs.

Also, while the long-reaching and long-lasting effects of COVID-19 are still uncertain, this is a precarious and dangerous time in our history, and permitting entry would unreasonably place the apartment dweller in harm's way.

People v. Eric Cruz
(Sup. Ct., Kings Co., 12/11/20)
http://nycourts.gov/reporter/3dseries/2020/2020_51581.htm

* * *

DISCOVERY - Witness Identifying Information/Protective Orders

In this first degree murder prosecution, the People made an ex parte application on May 22, 2019 for a protective order, and submitted an affirmation from an Assistant District Attorney. In a November 1, 2019 order, the court granted the application and sealed the application and its supporting papers. The protective order authorized the People to withhold disclosure of the names, addresses, and any identifying information of witnesses in the indictment, as well as all paperwork, statements, and reports that may relate to or reveal the identity of such witnesses, subject to disclosure at the appropriate time prior to trial in compliance with *People v. Rosario* (9 N.Y.2d 286) and *Brady v. Maryland* (373 U.S. 83). Also on November 1, 2019, defendant unsuccessfully sought to get the order vacated.

On January 7, 2020, after CPL Article 245 took effect, defendant renewed his challenge to the protective order. Defense counsel argued that defendant was being deprived of the right to confront witnesses and present a defense, including a defense at a pretrial Rodriguez hearing. Counsel sought full disclosure of the identities and statements of the two witnesses and, as a "fallback" position, requested disclosure of the information that had been redacted as to other witnesses. As a further "fallback" position, defense counsel offered to share information only with his co-counsel and the defense investigator, and not disclose to defendant. The court determined that the protective order was still in place. Defendant now seeks expedited review of the ruling pursuant to CPL § 245.70(6).

Justice Scheinkman vacates the ruling dated January 7, 2020 and the protective order, without prejudice to submission by the People of a further application under the new statute. Justice Scheinkman, while respecting the sealing order, notes, inter alia, that where a pure question of law is concerned, the reviewing justice decides the question de novo, but where the issue involves balancing the defendant's interest in obtaining information against concerns for witness safety and protection, the question is whether the determination made by the trial court was a provident exercise of discretion; that, in this case, the People's affirmation was unaccompanied by an affidavit from anyone with personal or direct knowledge of the relevant circumstances; that the People, while alleging that a witness had been approached in person and by use of social media by "associates" of defendant, did not set forth the name of any such associate, the

relationship between defendant and any associate, the date or approximate date of the alleged improper approach, or a general description of the incident; that while the use of social media is alleged, no screen shot or other depiction of the communication was provided; that the affirmation does not contain the identity of the witnesses subject to the contact that caused concern; and that, in short, the sealed affirmation is vague, speculative, and conclusory.

Under the new statute, the People and defense counsel should provide a sufficiently detailed factual predicate to enable the courts to evaluate the applicability of the statutory factors, assess the weight to be given to each factor, and draw an appropriate balance. Also, upon its de novo review in January 2020, the court should have examined whether the information previously redacted could be appropriately disclosed only to defense counsel and the defense investigator; the failure to consider this statutorily authorized option at all, when specifically asked to do so by defense counsel, was an error of law.

People v. Linden Beaton
(2d Dept., 1/17/20)

* * *

DISCOVERY - Protective Orders

Upon a prior application pursuant to CPL § 245.70(6), Justice Scheinkman vacated the protective order and remitted the matter to afford defendant an opportunity to make arguments with respect to the People's application. A hearing was conducted, but the court declined to direct the People to disclose the general nature of the information sought to be protected or to disclose the reasons why they were seeking a protective order. Defense counsel inquired as to whether the People were asserting that defendant was connected to a gang, and requested that the information at least be disclosed to counsel for their eyes only. This request was also denied, and the court directed that defense counsel and defendant be excluded from the courtroom, conducted further proceedings ex parte, and issued a new protective order that was substantively identical to the first one.

Justice Scheinkman agrees with defendant that the People should have been required to disclose to defense counsel the general nature of the information the People sought to protect, and, without revealing that information, disclose the reasons for the application.

The People now assert that defendant is a member of the Bloods gang. To the extent that the People's argument for a protective order is predicated upon an allegation of gang membership made by an identified law enforcement officer, the information could have been disclosed to defense counsel without any danger to any cooperating or confidential witnesses, and counsel would have had an opportunity to challenge the allegation.

Defense counsel should be excluded from participation in the protective order review process only to the extent necessary to preserve the confidentiality of sensitive information pending the

court's determination. The matter is remitted, and, prior to a new hearing, the People should disclose to defense counsel the aspects of their application that would not reveal the existence of the information sought to be protected.

People v. Latrell Belfon
(2d Dept., Scheinkman, J., 3/11/20)

* * *

DISCOVERY/BRADY MATERIAL - Police Officer Disciplinary Records

The Court concludes that under CPL § 245.20(1)(k), which requires the People to provide, inter alia, all evidence and information, including what 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, does not include Internal Affairs Bureau files involving allegations that have been determined to be "exonerated" or "unfounded."

For any witness they intend to call at a hearing and/or trial, the People must provide to defendant available IAB files involving substantiated or unsubstantiated allegations. Personal information, such as social security numbers and tax numbers may be redacted.

The People may seek an in limine ruling with respect to the scope of the defense's good faith basis for cross-examination that is relevant to the credibility of the witness.

A defendant also may seek information under the Freedom of Information Law.

People v. Jordan Randolph
(Sup. Ct., Suffolk Co., 9/15/20)
http://www.nycourts.gov/reporter/3dseries/2020/2020_20231.htm

* * *

DISCOVERY - Police Officer Disciplinary Records

The People disclosed by letter to defense counsel that two officers had substantiated allegations of misconduct in their files, with a one-sentence summary of each allegation. The underlying disciplinary records did not accompany this disclosure. Defendant argues that failure to provide the underlying records is a violation of CPL § 245.20(1)(k)(iv). The People maintain that disclosure by letter of the substantiated acts met their burden of disclosing information relevant to the credibility of these witnesses.

The Court, noting the plain language of the statute and the legislative intent related to CPL Article 245, and the repeal of Civil Rights Law § 50-a, holds that the disciplinary records of the substantiated allegations must be disclosed to the defense in their entirety.

The People argue that possession should not be imputed to the prosecution, since the disciplinary records were created for administrative purposes and not to prosecute the instant charges, but the People do not maintain that as a practical matter the records are difficult to obtain. Whether or not the defense can pursue other avenues of disclosure does not relieve the People of their obligation to provide these records. The repeal of Civil Rights Law §50-a eliminates barriers and obstacles that may have inhibited access to such records in the past.

The People may seek an in limine ruling to preclude any 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 or there is no good faith basis for the inquiry.

People v. Porter
(Crim. Ct., Bronx Co., 11/4/20)
https://www.law.com/newyorklawjournal/almID/1607021895NY2020BX0012/

* * *

DISCOVERY - Police Officer Disciplinary Records

The People have indicated that certain officers have disciplinary records with their police agencies, but the records have not been produced. Defendant asserts that the records of police officers involved in the arrest or investigation are discoverable, especially since Civil Rights Law § 50-a was repealed. The People assert that the police "maintains personnel records and will make copies available upon a request made to that agency in writing ... or by phone … [and these] disclosures will be made in accordance with Public Officers Law §§ 86, 87." Defense counsel responds that the obligation to disclose police disciplinary records rests with the People, and that defendant should not have to seek copies of these records by FOIL request or otherwise from police agencies.

The Court concludes that CPL Article 245 does not require that the People obtain officers' disciplinary files and produce those files for defense counsel. The People's discovery obligation is satisfied when they disclose the existence of the officer's disciplinary records and either produce copies of the records or cause the material or information to be made available to defense counsel.

Here, the People had the police department make copies available to defense counsel upon a request, either in writing or by phone. The repeal of Civil Rights Law § 50-a has made certain officer personnel records equally accessible to the prosecution and defense counsel, subject only to redaction in accordance with Public Officers Law §§ 86, 87 and 89.

People v. Jason Suprenant
(City Ct. of Glens Falls, Warren Co., 9/10/20)
http://nycourts.gov/reporter/3dseries/2020/2020_20227.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

* * *

PROSECUTORIAL MISCONDUCT - Abuse Of Process
SUBPOENAS

Plaintiffs allege that for years, prosecutors at the Orleans Parish District Attorney's Office, under the direction of the District Attorney, used fake "subpoenas" to pressure crime victims and witnesses to meet with them. These documents were labeled "SUBPOENA" and were marked with the Office's official seal. They directed recipients "to appear before the District Attorney for the Parish of Orleans" and warned that "A FINE AND IMPRISONMENT MAY BE IMPOSED FOR FAILURE TO OBEY THIS NOTICE." The Office's use of the fake subpoenas violated Louisiana law, which requires prosecutors to channel proposed subpoenas through a court.

The Fifth Circuit upholds the denial of summary judgment for defendants on absolute immunity grounds, concluding that a jury could conclude that the fake subpoenas were not created and sent in defendants' official capacity.

The attorneys may have used the subpoenas for an investigatory function that has historically been the work of police, not prosecutors, while intentionally avoiding the judicial process that Louisiana law requires for obtaining subpoenas and the checks and safeguards inherent in the judicial process. Denying defendants absolute immunity will not deter prosecutors' future decisions to charge specific defendants.

Singleton v. Cannizarro
2020 WL 1922377 (5th Cir., 4/21/20)

* * *

DISCOVERY/SUBPOENAS

This case involves a criminal defense subpoena served on Facebook, seeking restricted posts and private messages of one of its users who is also a victim and critical witness in the underlying attempted murder prosecution.

The California Supreme Court provides direction to the trial court and parties, both for the benefit of this litigation and other similar cases. The Court highlights seven factors that a trial court should explicitly consider and balance in ruling on a motion to quash a subpoena duces tecum directed to a third party, and reiterates its caution to trial courts against readily allowing a defendant seeking to enforce such a subpoena to proceed, as was done here, ex parte and under seal.

The seven factors that should be considered are:
(1) Has the defendant carried his burden of showing a plausible justification for acquiring documents from a third party?
(2) Is the sought material adequately described and not overly broad?
(3) Is the material reasonably available to the entity from which it is sought (and not readily available to the defendant from other sources)?
(4) Would production of the requested materials violate a third party's confidentiality or privacy rights or intrude upon any protected governmental interest?
(5) Is defendant's request timely?
(6) Would the time required to produce the requested information necessitate an unreasonable delay of defendant's trial?
(7) Would production of the records containing the requested information place an unreasonable burden on the third party?

With respect to the ex parte procedure, the district attorney asserts that the victim's constitutional rights were violated when the trial court ordered Facebook to preserve the information, and then issued the subpoena, without giving the victim or the People adequate notice and an opportunity to be heard. A trial court should balance the People's right to due process and a meaningful opportunity to effectively challenge the discovery request against the defendant's constitutional rights and the need to protect defense counsel's work product. A trial court has discretion to balance these competing interests in determining how open proceedings concerning the subpoena should be. When a trial court does conclude, after carefully balancing the respective considerations, that it is necessary and appropriate to proceed ex parte and/or under seal, and hence to forego the benefit of normal adversarial testing, the court assumes a heightened obligation to undertake critical and objective inquiry, keeping in mind the interests of others not privy to the sealed materials.

Facebook, Inc. v. Superior Court of San Diego County
2020 WL 4691493 (Cal., 8/13/20)

* * *

DISCOVERY - Defendant's Video-Recorded Statements

Criminal Procedure Law § 245.10(1)(c) states that "[t]he prosecution shall disclose statements of the defendant as described in [CPL § 245.20(1)(a)] to any defendant who has been arraigned in a local criminal court upon a currently undisposed of felony complaint charging an offense which is a subject of a prospective or pending grand jury proceeding no later than forty-eight hours before the time scheduled for the defendant to testify at a grand jury proceeding ...." CPL § 245.20(1)(a) states that "[t]he prosecution shall disclose to the defendant and permit the defendant to discover, inspect, copy, photograph and test all items and information that relate to the subject matter of the case and are in possession, custody or control of the prosecution or persons under the prosecution's direction or control, including but not limited to ... all written or recorded statements, and the substance of all oral statements, made by the defendant or (a) co-defendant to a public servant engaged in law enforcement activity or to a person then acting under his or her direction or in cooperation with him or her."

The Court concludes that CPL § 245.10(1)(c) requires that the People provide to defense counsel video recordings of a defendant's statements. Logic dictates that if the legislature had intended to limit discovery of written or recorded statements to their "substance," it would have placed such limiting language before the words "written or recorded" statements.

A defendant's right to testify in the grand jury is significant and must be scrupulously protected. The defendant's testimony could result in dismissal of some or all of the charges, or have the opposite effect and contribute to the issuance of an indictment. The testimony could be a determinative factor in deciding whether or not a defendant should testify at trial. Before defense counsel advises the defendant whether to testify in the grand jury, counsel should have the opportunity to view the actual video recording of a defendant's statements in its entirety.

People v. Divine Carswell
(Crim. Ct., Bronx Co., 2/25/20)
http://nycourts.gov/reporter/3dseries/2020/2020_20051.htm

* * *

DISCOVERY - Grand Jury Minutes/Witness Names And Contact Information
- Protective Orders

The People filed a motion seeking a limited protective order pursuant to CPL § 245.70 directing defense counsel not to copy the grand jury minutes and give a copy to defendant or to any third party, and ordering defense counsel not to disclose the complainant's name and contact

information to defendant or to any third party.

Upon a hearing, the Court finds good cause for a protective order regarding the complainant's grand jury testimony and name and contact information, noting, inter alia, that defendant is charged with a violent attempted robbery; that defendant, who is now 20 years old, has a substantial criminal history; that the complainant has alleged that sometime earlier on the day of the charged crime, defendant and the un-apprehended accomplice approached her in a completely different neighborhood and stood directly behind her, while she was wearing the gold chain that was grabbed during the attempted robbery, and she became nervous and fled; and that statutory language requiring that discovery be provided to the defendant does not require disclosure to defendant personally.

Defense counsel is not prevented from discussing the substance of any grand jury testimony with defendant. And, the People have not demonstrated good cause for any type of protective order for grand jury testimony of any police or law enforcement witness.

The Court rejects the People's contention that grand jury secrecy rules generally prevent disclosure, noting that the legislature "seems to have enacted a law that has rendered irrelevant centuries of grand jury secrecy jurisprudence, and the public policy behind those rulings, in favor of a legal and public policy decision that requires transcribed grand jury testimony be given to an indicted defendant as part of 'automatic discovery,' and perhaps even without any limitation placed on the defendant's dissemination of the transcript, absent a showing of case-specific good cause."

People v. Carlos Phillips
(Sup. Ct., Bronx Co., 2/5/20)
http://nycourts.gov/reporter/3dseries/2020/2020_20033.htm

* * *

DISCOVERY - Witness Contact Information
- Electronic Recordings Of Defendant's Prison Phone Calls
- Witness Statements

The Court concludes that the People provided "adequate contact information" for the witnesses they intend to call at trial where the People disclosed the names and personal email addresses of the witnesses. It cannot reasonably be inferred that the legislature intended to require that the People provide home, cellular or work telephone numbers for all civilian witnesses.

The People have established good cause for a delay in disclosure of approximately 200 electronic recordings of calls made by defendant while he was incarcerated.

The Court orders the People to turn over, as part of automatic discovery, a copy of the envelope used to store evidence recovered in this case, which purportedly contains markings or notes from

the officer who vouchered the evidence. The People state that they have provided a copy of an inventory sheet which details the markings, but, without seeing the actual envelope or a copy thereof, there is no way for defendant to know what exactly is written on the envelope.

People v. Jaquan Adams
(Sup. Ct., Queens Co., 2/7/20)
http://nycourts.gov/reporter/3dseries/2020/2020_20041.htm

* * *

DISCOVERY - Protective Orders/Grand Jury Testimony And Medical Records

Upon defendant's application pursuant to CPL § 245.70(6) for expedited review of a protective order, a First Department justice orders that defense counsel is permitted to give defendant a copy of the grand jury testimony and the victim's medical records.

The People failed to establish good cause. The People's policy arguments about the general importance of grand jury secrecy and medical record confidentiality cannot be reconciled with the statutory mandate that these materials be disclosed to defendant. There is insufficient record support for the People's claim that permitting defendant to have a copy of these materials will endanger the safety of a witness, or pose a risk of witness intimidation, harassment or embarrassment. Under the protective order issued by the court, defendant is permitted to review the materials, and the People have failed to show that any greater risk would exist if he has a copy of them.

People v. Swift
(1st Dept., 1/30/20)

* * *

DISCOVERY - Protective Orders/CPL Article 245

In this attempted murder prosecution, the People made an ex parte application for a protective order regarding certain information otherwise subject to automatic disclosure pursuant to CPL § 245.70(1). After conducting an ex parte proceeding, the supreme court issued a protective order which delayed the time by which the People are to provide information regarding a certain witness until the completion of jury selection. Defense counsel contacted the court to request an opportunity to be heard, but the court refused, advising counsel to seek review of the protective order in the Appellate Division pursuant to CPL § 245.70(6).

Presiding Justice Scheinkman agrees with defendant that the court should have granted counsel's request to be heard. The statute cannot reasonably be construed to permit a protective order to be sought entirely ex parte in every case. It necessarily follows that proceedings should be entirely ex parte only where the applicant has demonstrated the clear necessity for the entirety of the

application, and the submissions in support of it, to be shielded from the opposing party. It may be that, even where some aspects of the application should be considered by the court ex parte, other portions of the application may be disclosed.

Here, the court provided no explanation as to why the hearing needed to be entirely ex parte, and no reason is apparent on the face of the record. The court could have reviewed all, or some portion, of the papers and/or received testimony in camera before making a determination as to whether any information should be shared with defense counsel. Even without access to particular evidence, defense counsel could have made arguments with respect to some of the factors the court may consider pursuant to CPL § 245.70(4) in determining whether good cause exists to issue a protective order. The statute permits an interactive process whereby a protective order may be modified from time to time, as circumstances require, upon a showing of good cause made by either party.

Article 245 recognizes the importance of parties and the court taking available measures to attempt to resolve discovery disputes and reach reasonable accommodation. The limited experience under the new statutory procedures to date suggests that, at least in some instances, defense counsel may have more information than the prosecution may perceive, and that candid, good-faith discussion between counsel, superintended by the trial court, may lead to an appropriate accommodation of the parties' competing concerns.

People v. Ramon Bonifacio
(2d Dept., 1/23/20)

* * *

DISCOVERY - Protective Orders

In this expedited review of a protective order pursuant to CPL § 245.70(6), Justice Scheinkman, in connection with the statutory language stating that the court "may impose as a condition on discovery to a defendant that the material or information to be discovered be available only to counsel for the defendant," rejects defendant's contention that the court must allow defense counsel to have access in every case. This is a determination to be made in the exercise of provident discretion.

Here, where defense counsel had notice of the ex parte proceeding and the opportunity to be heard, and the court sua sponte considered the possibility of allowing only defense counsel to have access, without sharing the information with defendant, Justice Scheinkman denies the application for expedited review.

However, Justice Scheinkman opines that it would have been better to allow defense counsel to see the portions of the People's written application that contained legal argument or other matter that would not reveal the information sought to be covered by the protective order, pending the court's determination. Further, even assuming that portions of the People's written and oral

presentations should be sealed, it is better to permit defense counsel to participate in portions of the proceeding where the substance of the sealed information is not discussed. Defense counsel should be excluded from participation in the review process only to the extent necessary to preserve the confidentiality of sensitive information.

People v. Lester Nash
(2d Dept., 1/27/20)

* * *

DISCOVERY - Confidential Informant/Video Recordings
- Protective Orders

Following a hearing, at which defense counsel was present and opposed the People's application, the court issued a protective order directing that the People provide defense counsel with a redacted copy of the confidential informant's statement to police and make the digital video recordings of the narcotics transactions available to defense counsel for review; and that defense counsel refrain from disclosing any information to defendant that may enable him to ascertain the identity of the CI.

Upon expedited review pursuant to CPL § 245.70(6), Justice Garry of the Third Department upholds the protective order, finding that the People have established good cause. The order issued was properly tailored to provide defense counsel with evidence necessary to prepare for trial, while also protecting the CI from the risk of harm or intimidation and safeguarding the needs of law enforcement.

People v. Artis
2020 WL 500331 (3d Dept., 1/31/20)

* * *

DISCOVERY - Grand Jury Transcripts/Protective Order

Upon expedited review pursuant to CPL § 245.70(6), a First Department Justice grants defendant's application to the extent that defense counsel is permitted to give defendant and defendant may possess one copy of the grand jury testimony. On consent, defendant will not duplicate or disseminate, in whole or in part, the copy he is provided, which shall be watermarked.

The People's policy arguments about the general importance of grand jury secrecy cannot be reconciled in this case with the statutory mandate that these materials be disclosed to defendant. There is insufficient record support for the People's claim that permitting defendant to have a copy of these materials will increase any risk to a witness, because the witness information in the grand jury minutes is already fully known to defendant.

People v. Jean Mena
(Gische, J., 1st Dept.,1/31/20)
http://www.courts.state.ny.us/courts/AD1/calendar/appsmots/2020/February/2020_02_04_mot.pdf, at p. 37

* * *

DISCOVERY - Grand Jury Transcripts/Protective Order

Noting that defense counsel has agreed that contact information for the People's witnesses will be provided solely to counsel and not be shared with defendant, the Court grants the People's application for a protective order pursuant to CPL § 245.70 providing that the Grand Jury minutes may be reviewed with defendant but that defendant will not be permitted to obtain his own copy.

The Court notes, inter alia, that defendant has an extensive record, including two violent felony offenses; that it is charged in this case that defendant committed sadistic and life-threatening violence against the then-pregnant victim by strangling her, suffocating her, binding her with an extension cord, and beating her with both his hands and a broomstick, all in violation of a prior order of protection; that, after being charged in this case, defendant entered into an extensive course of witness tampering; and that limiting discovery in this way is consistent with the Court's duty to preserve the secrecy of Grand Jury proceedings.

People v. Randy Harvey
(Sup. Ct., Bronx Co., 1/30/20)
http://nycourts.gov/reporter/3dseries/2020/2020_20022.htm

* * *

DISCOVERY - Police Reports/Electronically Created Information

Defendant, by notice of motion, moved to compel discovery of several attachments to the police report in this case. Having not moved for a protective order under new CPL § 245.70, the People argue that the material has already been turned over, does not exist, or is not related to the subject matter of the case.

The Court grants the motion, except as to items that have already been disclosed. The materials in question are covered by CPL § 245.20(1)(e), which requires disclosure of "[a]ll statements, written or recorded or summarized…of persons who have evidence or information relevant to [the case or a potential defense] including all police reports, notes of police and other investigators, and law enforcement agency reports," and CPL § 245.20(i)(u)(i)(B), which requires disclosure of "[a] copy of all electronically created…information…obtained by or on behalf of law enforcement from…a source other than the defendant which relates to the subject matter of the case."

There is no statutory exception when the defendant already has the "sum and substance" of evidence or information. The Court draws the reasonable inference that if the records did not relate to the subject matter of the case, they would not have been attached to the police report.

"In pursuit of the goal of reducing gamesmanship, delays, and uninformed defense decisions in criminal trials, the new statute provides for prompt, automatic disclosure, by both sides, of evidence and information relating to the case…. The People's obligation under the current statute is so broad as to make 'open file' discovery the recommended course of action to assure compliance." Notably absent from the new statute is any requirement that the material to be disclosed must be relevant or material to the People's or the defendant's case; the material need only relate to the subject matter of the case.

People v. Skinner
(Crim. Ct., Bronx Co., 1/10/20)
https://www.law.com/newyorklawjournal/almID/1579076834NY2019BX0067/

* * *

DISCOVERY - Trial Exhibits

The Colorado Supreme Court holds that the trial court had no authority to order the parties to exchange exhibits thirty days prior to trial.

Under Colorado law, trial courts have no freestanding authority to grant criminal discovery beyond what is authorized by the Constitution, by the rules, or by statute. Trial exhibits are conspicuously omitted from the discovery Rule. Although the prosecution argues that the Rule does not apply because "trial exhibits" will be presented to the jury and are not "pretrial discovery," this is a distinction without a difference. Information provided in pretrial discovery is often presented to the jury. Indeed, a paramount reason for pretrial discovery is to avoid surprises at trial.

The trial court also potentially infringed on defendant's right to due process because his compliance with the disclosure order may help the prosecution meet its burden of proof. The order compels defendant to reveal exculpatory evidence, tip his hand vis-à-vis his investigation and the theory of his defense, and share with the prosecution his trial strategy.

In re Colorado v. Kilgore
2020 WL 130440 (Colo., 1/13/20)

* * *

DISCOVERY/STATUTES - Retroactivity

The Court holds that the new CPL Article 245 discovery requirements that took effect on

January 1, 2020, are applicable retroactively in this case, rejecting the People's contention that the new requirements are not applicable when the People stated their readiness for trial prior to January 1, 2020.

Procedural statutes will generally be construed to operate retroactively. Although legislative intent remains the "lodestar," "[t]he legislative history to Article 245 pounds a steady beat: that broad pretrial discovery is essential to a fair and just criminal justice system; that the discovery afforded by the former Article 240 was unduly restrictive; and that the comprehensive discovery provided by Article 245 will promote better and more efficient outcomes…. Recognizing the goals that this legislation seeks to achieve, there is no plausible basis to interpret the broad discovery provisions of Article 245 as being beyond the reach of pending indictments that were the subject of an earlier statement of readiness for trial."

The Court also rejects the People's contention that an unsealing order is required before Grand Jury transcripts can be disclosed to defendant. Disclosure is expressly compelled by CPL § 245.20(1)(b). However, the automatic disclosure obligation is limited to transcripts of witness testimony. It does not extend to legal instructions the People provided to the Grand Jury.

People v. Christopher
(County Ct., Dutchess Co., 1/7/20)
http://nycourts.gov/reporter/3dseries/2020/2020_20003.htm

Ethics and Judicial/Attorney Misconduct And Fair Trial

ETHICS - Conflict Of Interest/Concurrent Representation

Client One has been charged with a crime in which Client Two is the alleged victim. Client One and Client Two are in a relationship; Client Two denies Client One committed any wrongdoing, opposed Client One's arrest, and wishes to testify in favor of Client One. According to each Client, Client Two was intoxicated during the events at issue, and, following Client One's arrest, Client Two was arrested for driving while intoxicated.

The inquirer's firm proposes to represent each Client. The prosecution objects to the firm representing Client Two, suggesting that the firm has co-opted the prosecution's main witness against Client One. The inquirer asserts that no conflict exists because the prosecutions are separate, and that Client Two may testify in defense of Client One while invoking the Fifth Amendment on any questions probing intoxication.

The New York State Bar Association Committee on Professional Ethics first rejects the arguments of each side. No party has a possessory interest in a witness. However, the fact of separate prosecutions as unpersuasive, because the two charges arise out of the same common nucleus of circumstances.

The Committee, finding that the Clients have differing interests, concludes that the firm

has a conflict of interest. For instance, a reasonable lawyer for Client One would have every incentive to establish that Client Two was intoxicated, and to advise Client One to testify against Client Two in the DWI case to justify the actions giving rise to Client One's arrest. A reasonable lawyer for Client Two might well advise Client Two not to testify in Client One's defense.

The Committee is reluctant to conclude that a conflict may never be waived on the facts as presented, but is very skeptical that informed consent is possible, noting: "(1) Client Two's state of intoxication could be raised in both proceedings; (2) the possibility that inquirer's firm might cross-examine Client Two in Client One's proceeding (and vice versa); (3) the possibility that Client Two might have a change of mind about the content of testimony; (4) the judgment involved for both clients on questions such as which proceeding to push forward first, and whether to negotiate a plea; (5) the risk that the inquirer's firm might be tempted to withhold complete explanations of the considerations and risks to either client out of concern for harming the other's proceeding; (6) the ever-present possibility of negotiable plea options, which could adversely affect the legal interests of one client or the other; and (7) the inadvisability of Client One's counsel advising Client Two of Fifth Amendment issues."

Opinion 1185
(New York State Bar Association Committee on Professional Ethics, 4/22/20)

*** * ***

JUDGES - Improper Interference At Trial

Reaching the unpreserved claim in the interest of justice, the Second Department finds reversible error where, after the two robbery complainants, in response to questions by the prosecutor, were unable to positively identify defendant, the court assumed the appearance or the function of an advocate by questioning the complainants until it elicited a positive in-court identification of defendant from each of them.

People v. Brian Mitchell
(2d Dept., 6/24/20)

*** * ***

JUDGES - Bias/Interference In Proceeding

The Advisory Committee on Judicial Ethics concludes that when misdemeanor-level Vehicle and Traffic Law charges are before a judge on a simplified traffic information, the judge may not ask the prosecuting agency to file a long form information so the judge can sua sponte issue a criminal summons or an arrest warrant for a defendant who failed to appear.

Sua sponte requesting a long form information to permit a broader exercise of the court's enforcement prerogatives would create an appearance of partiality and suggest that the judge is predisposed toward the defendant's guilt. Likewise, if a judge issues a criminal summons or warrant for arrest after sua sponte requesting a long form information, the court creates the impression that it is assisting the prosecution in its enforcement efforts. These activities do not comport with the high standards for integrity and impartiality New York's rules require of its judges.

Judicial Ethics Opinion 20-69
(Advisory Committee on Judicial Ethics, 6/18/20)
https://nycourts.gov/legacyhtm/ip/judicialethics/opinions/20-69.htm

***Practice Note*: Arguably, the reasoning in this ethics opinion would apply when a judge attempts to instigate the filing of a violation of probation petition in a juvenile delinquency proceeding.**

* * *

JUDGES - Bias/Interference At Trial

The Second Department, while ordering a new trial due to errors in the court's charge on justification, directs that a different judge hear the case where the trial judge engaged in extensive questioning of witnesses, usurped the roles of the attorneys, elicited and assisted in developing facts damaging to the defense on direct examination of the People's witnesses, bolstered those witnesses' credibility, and generally created the impression that the judge was an advocate for the People.

People v. Nichole Savillo
(2d Dept., 7/15/20)

* * *

JUDGES - Bias

The Supreme Court of Tennessee holds that a state judicial conduct rule obligated the post-conviction judge to recuse himself even though defendant did not file a motion for recusal.

The judge referred to his longstanding professional acquaintance and familiarity with defendant's trial attorneys, opined that they are "[t]wo of the most preeminent lawyers" in the country and in the world, recited their affiliations with legal professional organizations, and described defendant's claims of ineffective assistance of counsel as "almost absolutely laughable." The judge characterized post-conviction counsel as "sitting back as a Monday morning quarterback and evaluating their performance hindsight," and declared it "painful when lawyers start attacking other lawyers."

The judge described post-conviction claims as unique to Tennessee and as a "game" "that goes on in Tennessee, goes on in Shelby County, Tennessee," reiterated the word "game" to emphasize his distaste for post-conviction proceedings, said the process "bothers" him, and compared post-conviction petitioners and their attorneys to generals in a war who observe a battle from a hill "[and] don't do anything" but later tell those who fought "how they should have fought that battle differently." The judge expressed a preference for the law of Texas, where he had practiced for eight years, explaining that he had worked in twenty-three felony courts but had dealt with only three or four post-conviction petitions during that time.

To a reasonable person of ordinary prudence, these comments would indicate that the judge's decision denying relief was based as much on the judge's disdain for Tennessee law, and dissatisfaction with post-conviction petitioners and their lawyers, as on the evidence presented at the hearing. These comments cast a different light on a number of the judge's actions and rulings during the hearing.

Cook v. State
2020 WL 5014929 (Tenn., 8/25/20)

*** * ***

JUDGES - Bias

After defendant alleged that the trial prosecutor had failed to disclose certain exculpatory evidence before trial, and moved to dismiss the indictments or for a new trial, the motion judge raised the question whether she could be impartial because the prosecutor had since been appointed as a judge and was now her judicial colleague. The judge initially decided to recuse herself, but later reconsidered and changed her mind, deciding that, subjectively, she could be fair and impartial. The Commonwealth appealed.

Adhering to the prior determination by a single Justice of the Court, the Supreme Judicial Court of Massachusetts concludes that recusal from the Brady matter is required. Although the judge indicated that she had initially favored recusal on the basis of a mistaken belief that there was a per se conflict, her statements to the effect that she might be influenced by the fact that the prosecutor is now a judicial colleague cannot be overlooked. An objective appearance of partiality cannot now be avoided.

Commonwealth v. Cousin
2020 WL 2479351 (Mass., 5/14/20)

*** * ***

JUDGES - Participation In Plea Bargaining

The Second Department finds reversible error where the court entered into a plea

agreement with the testifying co-defendant in conjunction with a cooperation agreement reached between the co-defendant and the People.

The co-defendant had been charged with, inter alia, murder in the second degree. The People had promised to recommend a determinate sentence of imprisonment between two and seven years in exchange for the co-defendant's guilty plea to the reduced charge of attempted robbery in the second degree. However, the court promised the co-defendant a sentence of probation in exchange for her testimony against defendant. The court abandoned the role of a neutral arbiter and assumed the function of an interested party, thereby creating a specter of bias.

People v. Daniel Greenspan
(2d Dept., 8/5/20)

* * *

JUDGES - Participation In Plea Bargaining

The First Department concludes that although the court initiated the plea agreement, and imposed the condition of an appeal waiver sua sponte, the court did not thereby abandon the role of a neutral arbiter and assume the function of an interested party.

This Court has not adopted the Second Department's requirement that the court articulate a reason for requiring a plea waiver in a court-initiated plea proceeding. Even if the Court were to do so, in this case the court included the appeal waiver in the plea offer prior to accepting the plea, and explained that the sentence offered benefitted defendant because it was "the minimum, it's after hearing, and it's lower than what's ever been offered."

People v. Jamal Dilworth
(1st Dept., 12/22/20)

* * *

DISCOVERY - Mental Health Records
EVIDENCE - Text Messages/Rule Of Completeness
WITNESSES - Bolstering
RIGHT TO FAIR TRIAL - References To "Victim"

The Third Department rejects defendant's contention that testimony that the victim took measures to improve the security of her home after the attack constituted bolstering.

The trial court properly refused to order an in camera review of records of the victim's mental health counseling and her purported history of substance abuse. Defense counsel's "speculative" assertion that the victim had a drinking problem in light of a single alcohol-related driving infraction, and vague witness testimony about occasions when the victim

was allegedly intoxicated, did not make it reasonably likely that the records contained material relevant to the victim's credibility, nor did the victim's testimony that she had seen a free counselor at an advocacy center a few times after the incident and had "sought out a specialist, therapist for" what she described as "post-traumatic syndrome."

The Court also finds no error in the denial of defense counsel's motion in limine to preclude references to the "victim" on the ground that they would dilute the presumption of innocence and deprive defendant of a fair trial. The trial court agreed that counsel's concern was "well-grounded" and warned all counsel to use caution, stating that "[i]t might call the attorneys over" if a witness repeatedly used terms like "victim" or "assailant," and that police witnesses should not use such terms in such a way as to have an emotional impact on the jury. This Court also agrees that references to the complaining witness as the "victim" at trial should be avoided when his or her credibility is in issue.

The Court also concludes that the rule of completeness did not mandate the admission of text messages offered by defendant, which were not part of any admitted text exchanges, were made outside the time frame of the admitted messages, and were not explanatory or exculpatory with respect to anything in the admitted communications.

People v. Jeffrey Horton
(3d Dept., 3/5/20)

*** * ***

WITNESSES/PROSECUTORIAL MISCONDUCT - Mid-Testimony Contacts With Counsel
PETITIONS - Duplicitous Counts

The First Department finds no error where the victim's direct testimony was interrupted by a six-week continuance, and the court directed the victim not to discuss her testimony with presentment agency counsel or anyone else during the recess, but permitted her to read a transcript of her initial testimony before direct examination resumed. There is no evidence of any communication between counsel and the victim about her testimony.

The sexual abuse counts were not duplicitous because the abuse occurred during a single uninterrupted course of conduct. Respondent followed the victim throughout the school, and the fact that the assaults did not occur in precisely the same location at exactly the same time did not create separate incidents that should have been charged separately.

In re Issiah C.
(1st Dept., 10/1/20)

Confessions/Admissions/Self Incrimination

CONFESSIONS - Interrogation/Custody

After the officer arrived at the scene and discovered defendant in the driveway, he entered the residence and found the victim being treated by defendant's mother. The victim was convulsing and making gurgling sounds, and had bruises and dried blood on her face. The officer radioed emergency services to respond immediately, exited the residence and informed defendant that he was being detained for questioning. The officer did not immediately ask defendant what happened, but, after defendant was handcuffed and placed in the backseat of the patrol car, asked defendant, "What happened?" In response, defendant made incriminating statements.

The Third Department finds reversible error in the denial of suppression. Once defendant was handcuffed and placed in the back of the officer's vehicle, he was in custody. The purpose of the questioning was not to clarify the nature of the volatile situation rather than to elicit evidence of a crime. The incident had been completed, the parties had been identified and medical assistance requested, and defendant had been cooperative and responsive.

People v. Chauncey McCabe
(3d Dept., 3/16/20)

* * *

CONFESSIONS - Notice Of Intent To Offer/Nonverbal Conduct

The Second Department holds that CPL § 710.30 notice was required where, during execution of a search warrant, defendant typed in the combination to a safe in direct response to a detective's request that the safe "needed to be opened." Defendant's act was no less communicative than a verbal communication. Since defendant's knowledge of the safe's combination was the only evidence establishing her dominion and control over its contents, the act of unlocking the safe was undoubtedly incriminating. Moreover, the fact that defendant was still in handcuffs and had not yet been advised of her *Miranda* rights raises questions as to whether her act of unlocking the safe was voluntary. This is not a situation where the requirement of notice was obviated because there was no question regarding the voluntariness of the statement.

However, upon remittal, the People may seek leave to give late notice upon a showing of good cause, and, in the event such relief is granted, defendant must be afforded an opportunity to make an appropriate suppression motion.

People v. Denise Porter
(2d Dept., 12/30/20)

* * *

CONFESSIONS - Interrogation

The Second Department, finds harmless error in the denial of suppression, concluding that the officer's pre-Miranda question and statements - "what happened?" and "I need to hear both sides of the story. Tell me what happened" - were interrogative rather than investigatory for clarification purposes where the police arrived to find two men on the ground in the hallway outside the complainant's bedroom, with defendant on top of the complainant with his fist raised and "blood everywhere on the ground."

People v. Tyrone Sylvester
(2d Dept., 10/7/20)

* * *

CONFESSIONS - Miranda Warnings
- Voluntariness
- Parent Or Guardian/Language Issues

The Court denies suppression of defendant's statements, concluding that the police complied with the relevant statutes. The Court notes, *inter alia*, that defendant's father was seated next to her during the administration of *Miranda* warnings and throughout each interview; that the warnings given at the first interview were administered from a form drafted specifically for juveniles, and each warning was followed by a simple, plain language explanation designed to be comprehensible to a juvenile; and that the two-hour interview, and ninety-minute interview, were for a reasonable period of time.

The Court also notes, with respect to defendant's father, that a Spanish language interpreter was made available, and, as a result, his understanding of English, regardless of its level, did not prevent him from fulfilling his role as parent since he was available to defendant for support and advice for the entirety of the interview; that his failure to request translation of all but one of the warnings was his choice and did not prevent defendant from seeking his advice or support; and that his understanding of English is largely irrelevant and cannot form a basis for rejection of defendant's waiver.

The father's claim that he would not have allowed defendant to be interviewed if he had known that her statements could be "used against her in court," as opposed to "used in court" as explained by the detective, is disingenuous given his long personal history as a civilian and military policeman in Honduras and his knowledge of *Miranda* rights. Moreover, FCA § 305.2(7) does not include the words "against you."

People v. Destiny Garcia
(Sup. Ct., Kings Co., 1/22/20)
http://nycourts.gov/reporter/3dseries/2020/2020_50101.htm

* * *

CONFESSIONS - Motion Papers

The First Department finds no error in the denial of defendant's request for a Huntley hearing where defendant sought suppression of statements made to an employee of a private company, but made only a general allegation that the statement was made to an agent of law enforcement and did not dispute the People's specific allegations to the contrary.

People v. Wilmer Cueva
(1st Dept., 2/11/20)

***Practice Note*: A defendant can obtain a *Huntley* hearing when he/she alleges that statements made to a private individual were "involuntarily made" within the meaning of CPL § 60.45(2)(a) (use or threatened use of physical force, undue pressure, etc.). *See also* FCA § 344.2(2)(a).**

Search And Seizure

SEARCH AND SEIZURE - Auto Stop/Reasonable Suspicion

The Supreme Court holds that a police officer does not violate the Fourth Amendment by initiating an investigative traffic stop where an officer runs a vehicle's license plate and learns that the registered owner has a revoked driver's license, and the officer lacks information negating an inference that the owner is the driver of the vehicle.

The fact that the registered owner of a vehicle is not always the driver does not negate the reasonableness of the inference. Empirical studies demonstrate, and common experience readily reveals, that drivers with revoked licenses frequently continue to drive and therefore to pose safety risks to other motorists and pedestrians.

This is a narrow holding. The presence of additional facts might dispel reasonable suspicion. For example, if an officer knows that the registered owner is in his mid-sixties but observes that the driver is in her mid-twenties, the totality of the circumstances would not raise reasonable suspicion.

Concurring, Justices Kagan and Ginsburg note that given that revocations in Kansas nearly always stem from serious or repeated driving violations, they agree with the Court about the reasonableness of the officer's inference that the owner was driving while his license was revoked.

Kansas v. Glover
2020 WL 1668283 (U.S. Sup. Ct., 4/6/20)

* * *

SEARCH AND SEIZURE - Auto Stop/Traffic Violations
- Mistake Of Law

In one concurring opinion, three Court of Appeals judges conclude that the officer's belief that defendant violated the Vehicle and Traffic Law by operating a vehicle with a non-functioning center stop light was objectively reasonable. The statute could reasonably be read to require that all lamps and signaling devices be in good working condition, and that all equipment and lighting be non-defective, regardless of whether a vehicle is actually required to be equipped with those lamps, signaling devices, equipment, or lights. Even assuming the officer was mistaken on the law, it was objectively reasonable to conclude that the non-functioning center brake light violated the Vehicle and Traffic Law. Because any error of law by the officer was reasonable, there was probable cause justifying the stop. Two judges concur separately and assert that the Vehicle and Traffic Law required the center stop lamp to be functioning, and thus the officer made no mistake of law in stopping defendant's vehicle.

Judge Wilson and Judge Rivera dissent in separate opinions. Judge Wilson asserts that by refusing to say what the VTL permits, the plurality has validated police conduct as a potential "mistake" of law without saying whether the conduct was in fact a mistake of law. This "licenses future police conduct that may, for all the plurality knows, constitute an unlawful abridgement of the Fourth Amendment rights of motorists." The correct result here is to hold that the stop was not supported by probable cause because the legislature has not authorized the stop of a vehicle with two working brake lights, one on each side, and that the officer's error was not objectively reasonable. Judge Rivera asserts that if the Court is going to adopt a per se rule, it should choose one that minimizes illegal stops by requiring suppression in every case where the officer acts without authority under the law. "That would further public safety by incentivizing officers to know the laws that they are obligated to enforce and ensure that motorists who comply with the rules of the road do not have to fear being pulled over for no good reason."

People v. Robin Pena
(Ct. App., 11/19/20)

* * *

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

A police officer stopped a vehicle because his patrol car's mobile data terminal notified him that there was a "similarity hit," indicating that something was similar about the registered owner of the vehicle and a person with an outstanding warrant. After observing a chrome handgun on the floor of the front passenger seat where defendant was sitting, the officer

arrested defendant, who was neither the registered owner of the vehicle nor the person with the warrant.

The Court of Appeals concludes that defendant's suppression motion should have been granted because the People failed to meet their burden to come forward with evidence sufficient to establish that the stop was lawful.

While information generated by running a license-plate number through a government database may provide police with reasonable suspicion to stop a vehicle, the sufficiency of the information is not presumed. When the defendant challenges its sufficiency, the People must present evidence of the content of the information. Here, the People presented no evidence about the content of the "similarity hit" - neither what information matched in this case, nor what kinds of data matches, in general, result in "similarity hits."

People v. Everett Balkman
(Ct. App., 11/19/20)

*** * ***

SEARCH AND SEIZURE - Auto Stop/Traffic Violations

The Court of Appeals, with one judge dissenting, clarifies the law as it is presently understood by all four Appellate Division departments, and holds that a traffic stop must be based on probable cause to believe that a driver has committed a traffic violation.

Here, the result of the license plate check provided neither probable cause nor any basis for an objectively reasonable belief that criminal behavior had occurred or was afoot. Although the People and the dissent argue that the trooper understood the "generic" impound notification to require further investigation as to its cause, the trooper's speculation that the car could have been impounded for "registration … problems," that the "plates could have been suspended," that "insurance could have been suspended," or that the vehicle could have been stolen, was just that - pure speculation. A car may be impounded for a variety of reasons independent of a violation of the Vehicle and Traffic Law or Penal Law.

Significantly, the Court also notes: In contrast to the Fourth Amendment, which permits brief investigative stops when a law enforcement officer has a particularized and objective basis for suspecting the particular person stopped of criminal activity, this Court has adopted greater protections than *Terry* and its federal progeny for pedestrian stops by the police. The Court's *De Bour* test is more protective of the rights of individuals to be free from aggressive governmental interference. The continued vitality of *De Bour* is not contingent upon the interpretation that the Supreme Court gives the Fourth Amendment, because De Bour is largely based upon considerations of reasonableness and sound State policy.

People v. Robert Hinshaw
(Ct. App., 9/1/20)

* * *

SEARCH AND SEIZURE - Statutory Authority Of Officer

Using the emergency lights on his unmarked vehicle, a federal marine interdiction agent with the United States Customs and Border Protection stopped the driver of a vehicle in which defendant was a passenger for driving dangerously on a public highway. After pulling the driver over, the agent waited in his truck for members of the Buffalo Police Department who, upon arriving at the scene, searched the vehicle and arrested defendant for criminal possession of a weapon.

The hearing court granted suppression, relying on People v Williams (4 N.Y.3d 535), in which the Court of Appeals rejected the People's contention that a seizure that occurred outside the geographical jurisdiction of the Buffalo Municipal Housing Authority peace officers was the lawful equivalent of a citizen's arrest under CPL § 140.30. The Court in Williams stated that the CPL clearly distinguishes between the warrantless arrest powers of peace officers and private citizens.

The Appellate Division affirmed. The Court of Appeals reverses. Unlike the uniformed housing guards of the Buffalo municipal housing authority from Williams, federal agents are not expressly included in CPL § 2.10's exclusive list of "persons designated as peace officers." Although, under CPL § 2.15, certain "federal law enforcement officers" are accorded limited peace officer powers, § 2.15 does not contemplate that marine interdiction agents are "federal law enforcement officers."

Because the agent who stopped defendant is not considered a federal law enforcement officer with peace officer powers, he could not have improperly circumvented the jurisdictional limitations on the powers reserved for those members of law enforcement under CPL § 140.25, as the peace officers in Williams did.

Judge Fahey, joined by Judge Rivera, dissents.

People v. Limmia Page
(Ct. App., 6/11/20)

* * *

SEARCH AND SEIZURE - Credibility Of Police Testimony

The Second Department orders suppression, concluding that the People failed to carry their burden of going forward and demonstrating the legality of the police conduct in the first instance.

Although the hearing court credited both of the People's witnesses, their versions of the incident conflicted with each other and could not both be simultaneously true. For instance, one officer testified that he started following the car because he observed the driver fail to come to a complete stop, while another officer testified that he did not observe any such infraction. One officer's testimony that he could read the numbers on the credit card on the center console, and see a stack of cards inside an envelope inside defendant's pocket, all while standing outside of the vehicle, was so improbable as to be unworthy of belief. Important aspects of the police testimony were unsupported by contemporaneous police records. Although the People's witnesses repeatedly claimed certain training and experience in detecting credit card forgeries, their answers to questions about their qualifications were vague or non-responsive and not credible.

Where credibility is in issue, the fact-finder should refuse to select a credible version based upon guesswork.

People v. Shymeek Harris
(2d Dept., 12/30/20)

*** * ***

SEARCH AND SEIZURE - Auto Stop/Discriminatory Police Conduct

The Supreme Judicial Court of Massachusetts, in order to ensure that drivers have a viable means by which to raise equal protection claims under the state Declaration of Rights, establishes a revised test.

A defendant can raise a reasonable inference that an officer's decision to initiate a stop was motivated by race or another protected status by pointing to specific facts from the totality of the circumstances surrounding the stop; the inference need not be based in statistical analysis. If this inference is established, the defendant is entitled to a hearing at which the Commonwealth would have the burden of rebutting the inference. Absent a successful rebuttal, any evidence derived from the stop would be suppressed.

Commonwealth v. Long
2020 WL 5553608 (Mass., 9/17/20)

*** * ***

SEARCH AND SEIZURE - Consent/Buccal Swab

An Oregon Court of Appeals majority holds that the Oregon Constitution does not permit law enforcement officers investigating a crime to obtain a DNA sample from a juvenile suspect without a warrant if the child's parents consent to the search but the child does not.

What little case law there is under the Fourth Amendment suggests that parental consent is necessary in addition to, not in lieu of, the child's independent consent. The state's proposed rule would result in children receiving less protection than adults, and would allow a warrantless search that places children's DNA in the hands of the state, which has consequences that likely go far beyond any that have yet transpired, and any that the Court has yet imagined.

A parent, by virtue of the parent-child relationship, has no power to act on a child's behalf to invoke or waive a child's constitutional rights when a child is the suspect in a criminal investigation. Even if the state has standing to assert parents' fundamental liberty interest in parenting their children, that constitutional right to exclude the state from the parent-child relationship is fundamentally different from a positive parental right to engage the state in that relationship by unilaterally waiving a child's constitutional rights.

The concurring/dissenting judges assert that the Court should employ an analysis similar to the one employed in cases applying the "common authority" rule to searches of minor children's bedrooms and effects. The assessment of whether a parent has authority to consent to a search of their minor child for DNA evidence should focus on the nature of the particular relationship between the parent and the child, including whether (and to what extent) the parent exercised control over the child. The case should be remanded for the juvenile court to determine whether the youth's mother had authority to consent to a search of the youth's mouth, and to make the necessary factual findings related to that issue.

In re H. K. D. S.
2020 WL 3566819 (Oregon Ct. App., 7/1/20)

*** * ***

SEARCH AND SEIZURE - Common-Law Right To Inquire
- Reasonable Suspicion/Flight Of Suspect
- Fruits

While conducting a street narcotics enforcement unit operation, an officer observed defendant standing near a vehicle that was parked near a deli. There was "something heavy on one of the sides" of defendant's sweatshirt pocket, which caused the pocket to "sag[ ]," and the officer believed it was a gun. The officer radioed this information to a second officer who was stationed in an unmarked vehicle parked near the deli. Defendant entered a vehicle and drove away, followed by the second officer in the unmarked vehicle. When defendant stopped his vehicle, the second officer stopped behind defendant's vehicle. Defendant and the officer exited their vehicles at the same time, and faced each other. Defendant had his hands "[a]t his side," and the officer saw a heavy, L-shaped object in defendant's front sweatshirt pocket, which he believed to be a gun. The officer approached defendant and said something like "what's this or what is

that," and "reached" for the item, but before the officer made contact with the pocket, defendant fled the scene, and discarded a gun in the course of his flight.

The Second Department orders suppression. The officer was justified in conducting a common-law inquiry, but was not justified in attempting to touch defendant's sweatshirt pocket as a minimally intrusive self-protective measure, since defendant did not engage in any conduct justifying such an intrusion. Defendant's flight and discarding of the gun was not an independent act involving a calculated risk attenuated from the underlying illegal police conduct.

People v. Wagner Soler
(2d Dept., 12/9/20)

*** * ***

SEARCH AND SEIZURE - Auto Search/Probable Cause

After a deputy initiated a traffic stop, and defendant exited, the deputy directed defendant to get back inside the vehicle and approached. He directed defendant to lower the window, but defendant told him that he could not do so because the window was broken. The deputy directed defendant to unlock the driver's door, and defendant again said he could not do so. The deputy observed defendant "blading" his body away from the deputy and making "furtive movements" toward the center console. Defendant offered to move to the passenger side, and the deputy directed defendant to stay where he was. Defendant, however, moved to the passenger side, opened the passenger door, and fled. The deputy eventually caught up to defendant and arrested him for obstructing governmental administration and resisting arrest. The deputy returned to defendant's vehicle, opened the front passenger door and smelled the odor of marihuana. The deputy also observed empty baggies in the center console, which he recognized as the type of baggies commonly used for drugs. Under the armrest in the vehicle, the deputy observed baggies containing a substance that appeared to be crack cocaine. The deputy stopped searching and obtained a search warrant, and later seized a handgun from the glove compartment.

The Fourth Department suppresses all the evidence, finding no probable cause for the initial search.

People v. Patrick Johnson
(4th Dept., 5/1/20)

*** * ***

SEARCH AND SEIZURE - GPS Monitoring Of Pretrial Releasee

In Commonwealth v. Johnson (481 Mass. 710), the Supreme Judicial Court of Massachusetts held that imposition of GPS monitoring on a probationer was a search but

that, given the diminished privacy expectations of a probationer, the intrusiveness of such monitoring was outweighed by the legitimate governmental interests served by the use of GPS monitoring to further the goals of probation.

The Court now holds that the initial imposition of the GPS device as a condition of pretrial release violated Article 14 of the Massachusetts Declaration of Rights.

The reasonable expectation of privacy of a defendant pretrial is greater than that of a probationer. Although defendant signed a consent form, if he had not the consequence presumably would have been pretrial detention.

The imposition of GPS monitoring in this case was not based on valid government interests and thus was unreasonable and unconstitutional. The only permissible goals of pretrial conditions of release were ensuring defendant's return to court and his presence at trial, and safeguarding the integrity of the judicial process by protecting witnesses from intimidation and other forms of influence. Although the general specter of government tracking could provide an additional incentive to appear in court on specified dates, the causal link is too attenuated and speculative.

This involved a substantial intrusion. If a GPS monitoring device loses connection with either the cellular network or the satellite network, or if the device's battery runs low, "alerts" are issued. The individual may have to leave his or her location in search of a signal, or may be required to travel to a location where the device can be charged. These frequent interruptions can endanger an individual's livelihood. In addition, despite an individual's best efforts to comply with the strictures of GPS monitoring, connectivity issues can lead to the issuance of arrest warrants, thereby subjecting the individual to the indignity and dangers of an arrest.

Commonwealth v. Norman
2020 WL 1270991 (Mass., 3/17/20)

*** * ***

SEARCH AND SEIZURE - Stop/Interfering With Defendant's Movement

The First Department concludes that without reasonable suspicion, the police engaged in unlawful pursuit where were following defendant slowly in their car without turning on their lights or sirens, but then turned on their lights and sirens to cross the street against traffic and pull up ahead of defendant.

Even if their intent was to get a better view and alert oncoming traffic, not to cut off, block, or alarm defendant, the objective impact of this maneuver was intimidating and communicated an attempt to capture or to intrude upon defendant's freedom of movement.

People v. Daquan Collins
(1st Dept., 7/9/20)

* * *

SEARCH AND SEIZURE - Request For Information/Approach Of Vehicle

An officer and his partner were surveilling the parking lot of a private club in an area that was a "hot spot" for crimes. At approximately 3:00 a.m., they saw a white Honda park in the lot, and the driver got out and entered the club. The officers left the area and returned approximately 40 minutes later. The officer could not remember whether the club was still open, but it ordinarily closed at 4:00 a.m. or a little earlier. A few cars were in the lot, including the white Honda, parked in the same location as before, and occupied only by defendant, whom the officers believed was the driver they had seen earlier. Defendant was engaged in a loud, "heated argument" on his cell phone. The officers approached, asked defendant "what he was doing in the car [and] if everything was okay," and requested identification. Defendant responded that everything was fine and that "he was having an argument with his girlfriend," and provided a facially valid driver's license. Upon running the license, the officers learned that it had been suspended for an insurance lapse. The officers arrested defendant, conducted an inventory search and discovered a gun in the trunk.

The Third Department orders suppression, finding insufficient grounds for a request for information. The officers had seen defendant enter the club earlier and had no reason to believe he was anything but a customer with a legitimate reason to be there. Nothing about arguing on a cell phone, without more, raises safety concerns or a need for assistance. Moreover, the officers had no objective, credible reason to extend the initial conversation by running defendant's driver's license after he responded to their initial inquiry and provided the information they requested.

People v. Gregory Stover
(3d Dept., 3/12/20)

* * *

SEARCH AND SEIZURE - Stop/Seizure - Retention Of Suspect's Identification Card

The Supreme Court of Pennsylvania holds that, coupled with other relevant factors, the officer's or his partner's retention of defendant's identification card to conduct a warrant check, as defendant was asked if there was anything in his backpack that the officer needed to know about, constituted a seizure. There is no evidence that the officer ever explained what he intended to do with the identification card.

This case does not call for the Court to consider the adoption of a bright-line rule. But the

Court agrees with defendant that the retention by police of an identification card to conduct a warrant check will generally be a material and substantial escalating factor within the totality assessment.

Commonwealth v. Cost
2020 WL 354975 (Pa., 1/22/20)

***Practice Note*: In *People v. Hill*, 150 A.D.3d 627 (1st Dept. 2017), the First Department held that the defendant was not seized when the police retained his identification and used it in their building trespass investigation, where the defendant provided the identification voluntarily and did not object when the police brought it to an apartment, volunteered to be escorted by the officers to the apartment, and was not in handcuffs or threatened, and the officers did not draw their weapons. The majority noted that although the dissent denied any intent to create a rule that a seizure occurs when identification is retained, that was the fair import of the dissent's analysis, and the dissent provided no support for such a broad proposition.**
The Court of Appeals reversed in *People v. Hill*, 33 N.Y.3d 990 (2019), but did not directly address the retention of identification issue.

*** * ***

SEARCH AND SEIZURE - Stop And Frisk/Reasonable Suspicion
IDENTIFICATION - Independent Source
PHYSICAL INJURY

The Second reduces the degrees of defendant's burglary and robbery convictions, finding legally insufficient evidence of physical injury where the complainant suffered a laceration on her neck from defendant pulling off her necklace and scratches on her wrist from defendant pulling off her bracelets; she did not go to the hospital, and, although her neck was sore and her wrist felt a little sore and afterwards she had pain in her neck and wrist, she did not specify when the pain began or its duration; and the officer who responded to the scene testified that the complainant had a scratch on her neck.

The Court upholds the denial of suppression where the complainant initially identified the perpetrator from a public benefits card shown to her by the police, but she testified that she saw defendant face-to-face during daylight hours for about 15 minutes while defendant burglarized her home and stole her property; and the eyewitness brought to the showup location testified to seeing defendant outside of the complainant's home and leaving the complainant's home carrying something and getting into his vehicle. These witnesses' observations of defendant gave them an independent source for identifying defendant.

Defendant was unlawfully frisked. There was no evidence presented that the officer had reasonable suspicion that defendant was armed or posed a threat to the officer's safety. While the police had received a report of a nearby burglary and defendant matched the

description of the perpetrator, there was no evidence that the alleged crime involved a weapon and the perpetrator was armed, and defendant cooperated when asked to step out of his vehicle. Even assuming that the frisk was justified, the search of defendant's pocket was not since the officer did not testify that he suspected that the little bulge or hard object he felt in the pocket was a weapon. However, the erroneous admission of the seized jewelry and cash was harmless beyond a reasonable doubt.

People v. Jerome Smith
(2d Dept., 10/14/20)

*** * ***

SEARCH AND SEIZURE - Auto Stop/Frisk Of Passenger
- Reasonable Suspicion

The Second Circuit concludes that the police, who stopped a vehicle in which defendant was a passenger for a traffic violation, did not have an objectively reasonable belief that defendant was armed and presently dangerous to the officers or to others.

The Court first notes that while asking a passenger to exit a vehicle might be a de minimis intrusion, the officer effectively initiated a search when he instructed defendant to place his hands on the trunk of the vehicle with legs spread apart. A search, like a seizure, may begin before there is any physical contact if a reasonable person would have believed that a search was being initiated. Although the dissent asserts that an officer's subjective intentions are irrelevant, the Court may look at intent in determining when the action was initiated. And, the Court does not agree with the dissent's formalistic view that a frisk begins only when an officer lays hands on an individual.

Regarding reasonable suspicion, the Government's strongest fact is defendant's movements in the passenger seat "with both hands kind of pushing down on his pelvic area and squirming kinda in the seat left and right, shifting his hips." Nothing suggests that defendant was pushing down a weapon. Defendant's actions were equally consistent with the act of secreting drugs or other nonhazardous contraband. The officer also testified that defendant made a "subtle tug of his waistband," but since defendant's pants were lower than waist level, that conduct is no more suggestive of a firearm than it is of defendant wanting to raise his pants because they slipped lower than he preferred. Although this was a high-crime area, the events occurred during daylight, and, although defendant stared at the unmarked police vehicle as it drove by for "a few seconds," there is nothing objectively unusual about staring at an unmarked car with tinted windows driving by slowly, and citizens are well within their rights to stare at others in public, including police officers.

Officers are not required to rule out every innocent explanation, but that does not mean, as the dissent suggests, that any conduct consistent with, or possibly suggestive of, weapon possession satisfies the reasonable suspicion standard.

United States v. Weaver
2020 WL 5523210 (2d Cir., 9/15/20)

*** * ***

SEARCH AND SEIZURE - Reasonable Suspicion
- Fellow Officer Rule
- Arrest/Use Of Handcuffs

The Fourth Department agrees with defendant that the police lacked reasonable suspicion to detain him where an officer conducting surveillance of a shopping plaza parking lot known for narcotics transactions observed defendant approach a vehicle that was parked in a remote location of the lot in the middle of the afternoon; and, although defendant had his back toward the officer, who testified that he could not see "what, if anything, was passed back and forth," the officer surmised that a drug transaction occurred. A mere hunch or gut reaction is insufficient to create reasonable suspicion.

The Court declines to infer that there was communication between the officers who stopped the buyer and the officers who stopped defendant that would provide the officers detaining defendant with reasonable suspicion. The stops of the buyer and defendant occurred simultaneously and defendant was forcibly detained almost immediately upon his exit from a vehicle, and there is no basis for any inference that there was additional communication between the two teams of officers before defendant's detention.

The Court also concludes that defendant's detention constituted a de facto arrest. Although the use of handcuffs does not automatically transform detention into a de facto arrest, such use must be justified by some additional circumstances, such as a threat of evasive conduct, a need to transport the defendant for a showup procedure, a fear that the suspect may interfere with the execution of a search warrant, or a concern for officer safety. There was no evidence of such circumstances.

The Court suppresses defendant's statements at the scene and the cocaine seized from his person.

People v. Jose Hernandez
(4th Dept., 10/2/20)

*** * ***

SEARCH AND SEIZURE - Incident To Arrest

The Second Department orders suppression where, after arresting defendant for criminal trespass, the officer handcuffed him, and removed a backpack from defendant and searched it. Even a bag within the immediate control or grabbable area of a suspect at the

time of arrest may not be subjected to a warrantless search incident to the arrest unless the circumstances support a reasonable belief that the suspect may gain possession of a weapon or be able to destroy evidence located in the bag.

People v. Rodolfo Chy
(2d Dept., 6/10/20)

*** * ***

SEARCH AND SEIZURE - Reasonable Suspicion
- Incident To Arrest

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.

People v. Nathaniel Mabry
(2d Dept., 6/24/20)

*** * ***

SEARCH AND SEIZURE - Motion Papers

The First Department concludes that defendant is entitled to a hearing on the factual issue of whether or not the store security guards involved in his detention were licensed to exercise police powers, or acting as agents of the police. At the time of his initial motion, defendant did not have access to any information that could have aided him in further

investigation of the security guards' licensing status.

People v. Michael Flanders
(1st Dept., 10/8/20)

Identification

IDENTIFICATION - Confirmatory Photo ID By Witness
APPEAL - Record On Appeal

When defendant requested a Wade hearing regarding single-photograph identifications made by the complainant soon after the shooting, the People responded that the complainant and defendant were well known to each other, and defendant requested a Rodriguez hearing. The court denied the request, relying on the People's assurances that the complainant was familiar with defendant, but the court stated that, if it became clear at trial that defendant was not well known to the complainant, an "appropriate remedy" would be fashioned.

The Second Department concludes that the court erred in relying on the People's mere assurances of familiarity in denying defendant's pretrial request for a Rodriguez hearing. However, a hearing was ultimately unnecessary since the complainant's trial testimony and other evidence demonstrated that the complainant knew defendant by his street name and had had numerous contacts with him, and thus the identification was confirmatory.

A dissenting judge asserts that, in relying solely upon the complainant's trial testimony as the basis for its refusal to order a post-trial Rodriguez hearing, the majority contravenes clear and binding precedent from the Court of Appeals.

People v. Vincent Carmona
(2d Dept., 7/1/20)

* * *

IDENTIFICATION - Sufficiency Of Evidence
EVIDENCE - Fingerprints
ROBBERY - Circumstantial Evidence

The Third Circuit grants habeas relief, concluding that petitioner's robbery conviction was not supported by evidence sufficient to justify a finding of guilt beyond a reasonable doubt by a rational trier of the facts.

The Court notes, inter alia, that petitioner's fingerprints were found on a Manila folder and a paper inside the folder carried into the store by the robber, but there was no evidence of petitioner's prints anywhere else at the crime scene, no evidence that the folder and paper were unavailable to him prior to the robbery, no evidence as to the age of the prints, and no evidence as to how long the prints could remain on the folder and paper after their impression; that

petitioner was actually three to four inches taller than the offender described by the witness; and that the robber had knowledge about the store unknown to the general public, but there was no evidence that petitioner was privy to any of this information.

Travillion v. Superintendent Rockview SCI
2020 WL 7349235 (3d Cir., 12/15/20)

* * *

IDENTIFICATION - Sufficiency Of Evidence
- Lineups/Suggestiveness

The Second Department concludes that the verdict was against the weight of the evidence where the complainant described the perpetrator to the police as balding with no facial hair, and, although the lineup participants wore hats to conceal their hairlines, defendant's significant facial hair was visible; the perpetrator had worn a yellow shirt, defendant was the only lineup participant wearing a yellow shirt, and, although the other participants' shirts were covered with a cloth, defendant's shoulders remained visible; and, after viewing the lineup, the complainant told the officer that the yellow shirt was the most significant visible similarity between the perpetrator and defendant.

People v. Matthew Mann
(2d Dept., 6/10/20)

* * *

IDENTIFICATION - Surveillance Video

The Second Department finds no error where detectives were permitted to identify defendant as the assailant depicted in a surveillance video, without evidence that defendant had altered his appearance. There was some basis for concluding that the detectives, who knew defendant from their patrols of the neighborhood where the incident took place, were more likely than the jury to correctly determine whether he was depicted in the video.

People v. Michael Franzese
(2d Dept., 12/9/20)

* * *

IDENTIFICATION - Sufficiency Of Evidence
SEARCH AND SEIZURE - Stop And Frisk

The Fourth Department, citing problems with the identification evidence, concludes that the jury verdict finding defendant guilty of robbery in the first degree is against the weight of the evidence.

The Court notes that showup identifications are inherently suggestive; that the reliability of an identification is affected where, as here, a gun is displayed, there is a high level of stress, the incident is brief, and the lighting is dim; that defendant was found in a driveway half a mile from the crime scene only seven minutes after the robbery occurred, wearing clothing different from the clothing worn by the gunman; that defendant was not in possession of the fruits of the crime or of a firearm; that there was no testimony that he was out of breath or displayed other signs of having recently run a distance, and his boots were not even laced; that the police investigation established that another person possessed the fruits of the robbery, including the complainant's phone, and that person's flight from the police when the phone alarm sounded was indicative of consciousness of guilt; and that the fleeing gunman never turned toward the area where defendant was found and instead ran in a different direction.

The Court also finds error in the ruling denying suppression of the showup identification, concluding that the stop and frisk of defendant was not justified. Although the general description of defendant for the most part matched the description provided by the 911 dispatcher - i.e., he was a young black man of average height in a hooded sweatshirt - the location where the officer stopped defendant was different from the location where, according to the dispatcher, the suspect had been observed running. The officer explored only "one of" several side streets in a residential neighborhood and seized the first young black man in a hooded sweatshirt he found. "[T]he law does not allow the police to stop and frisk any young black man within a half-mile radius of an armed robbery based solely upon a general description."

People v. Anthony Miller
(4th Dept., 11/13/20)

* * *

IDENTIFICATION - Lineups/Suggestiveness
- Bolstering

The First Department upholds the denial of suppression where, even if defendant was the only lineup participant who appeared to be completely bald, his baldness was not mentioned in the description given by the victim, who described his assailant as wearing a hat, making it less likely that he noticed any baldness.

It was error, albeit harmless, to permit a detective to testify that the victim stated that he would be able to identify the older of the two assailants (later identified as defendant).

People v. Richard Ifill
(1st Dept., 5/28/20)

* * *

IDENTIFICATION - Lineups/Suggestiveness

The Second Department finds reversible error in the admission of lineup identification evidence where defendant was the only person in the lineup with dreadlocks, and dreadlocks featured prominently in the description the complainant gave to the police. The dreadlocks were distinctive and visible despite the fact that defendant and the fillers all wore hats.

People v. Terrence Colsen
(2d Dept., 3/4/20)

Pleas

PLEAS - Voluntariness

The First Department vacates defendant's plea where the evidence showed defendant to be suffering from significant intellectual disability, and thus the court was under an obligation to engage in a more probing colloquy to ensure that defendant understood the ramifications of entering a guilty plea and waiving his right to appeal.

The Court describes the traits of individuals suffering from an intellectual disability, and notes that these traits render them uniquely vulnerable to injustice within criminal proceedings. They are more likely to give false confessions and less able to meaningfully assist their counsel.

Here, Department of Education records showed that defendant had been diagnosed as mentally retarded and suffered from "severe academic delays," and, with an IQ of only 56, had "extremely low" "general cognitive ability," with "overall thinking and reasoning abilities" in the bottom 0.2%. His verbal comprehension, perceptual reasoning, working memory, and processing speed were "extremely low," in the bottom 0.2 to 2%. Doctors at Bellevue observed that defendant suffered from an intellectual disability with "extremely low" intellectual functioning, that his IQ placed him in the bottom one percentile as compared to his peers, and that his limited cognitive abilities placed him at increased risk of impulsive behavior without regard to the consequences of his actions.

The court below commented on defendant's refusals to appear in court and "difficult" behavior, and believed this to be indicative of defendant's sociopathy. But defendant's refusal to participate was likely reflective of his diminished mental capacity. The court should have known that the standard plea allocution would be near incomprehensible to defendant, but made no effort to translate the standard litany into simple language. The allocution was not salvaged by defendant's mechanistic recitation of "yes" in response to the court's questions. People with intellectual disabilities are, by virtue of their disability, easily confused, suggestible, and susceptible to manipulation.

People v. Darrell Patillo

(1st Dept., 7/2/20)

* * *

PLEAS - Waiver Of Appellate Review
SPEEDY TRIAL

The First Department holds that a recent amendment to Criminal Procedure Law § 30.30 which grants a defendant who has pleaded guilty the right to raise a statutory speedy trial claim on appeal does not also preclude a waiver of the right to appeal.

The phrase "shall be reviewable" in § 30.30(6) unequivocally directs that appellate review of a § 30.30 claim shall no longer be forfeited by a guilty plea, but neither that phrase, nor any other language in the statute, precludes a voluntary waiver.

People v. Thomas Person
(1st Dept., 6/11/20)

* * *

PLEAS - Alford Plea

The Third Department declines to invalidate defendant's Alford plea where the "better practice" would have been for the prosecutor to place upon the record the evidence of defendant's guilt, but the court, having conducted the probable cause hearing, was well aware of the evidence against defendant, and there was strong, competent evidence of defendant's guilt.

Defendant stated clearly that he wanted to enter a guilty plea to avoid the possibility of a more severe sentence after trial, and his statements demonstrate that his decision to enter a guilty plea despite his purported innocence was the product of a voluntary and rational choice.

People v. George Crandall
(3d Dept., 3/16/20)

* * *

PLEAS - Allocution

The Court grants respondent's motion for leave to withdraw his admissions where the Court, rather than enumerate all the dispositional alternatives, stated only that respondent would "probably get Probation for a year." Although the respondent was warned that he could receive placement as a consequence of violating probation, no further details were discussed with him and his mother regarding the nature or length of such a placement or an initial placement.

Moreover, the Court failed to engage in a sufficient colloquy with respondent's mother as to her understanding of the rights her son would be waiving.

Matter of M.R.
(Fam. Ct., Schuyler Co., 2/19/20)
http://nycourts.gov/reporter/3dseries/2020/2020_20074.htm

Severance

SEVERANCE - Antagonistic Defenses

The trial court denied defendants' motion for a severance, and implemented a "dual jury" procedure in which there were separate openings; both juries heard the People's evidence common to the charges against both defendants, but one jury was excused when the People presented evidence that was admissible only before the other jury; and there were separate defense cases, summations and jury charges.

Defendant Feliciano was found guilty of second degree murder and first degree robbery, but defendant Roberts was acquitted.

The First Department reverses, noting that Roberts' cross examinations, mostly presented to both juries, undermined Feliciano's defense that he was merely present with Roberts and did not share Roberts' intent to commit robbery or murder; that Feliciano's defense was antagonistic to, and irreconcilable with, Roberts' defense that he was not there at all; and that Roberts' counsel effectively became a second prosecutor and was able to impeach witnesses to Feliciano's detriment in a manner that the People were unable to.

People v. Jose Feliciano
(1st Dept., 12/1/20)

* * *

SEVERANCE

Defendant moved to sever counts in the indictment pertaining to one robbery from counts pertaining to another robbery on the ground that he had important testimony to give in the former case concerning a duress defense which was set forth in a written statement given to police, and that he had a genuine need to refrain from testifying in the other case. The court agreed with defendant, but denied the motion, ruling that, since the People were going to introduce the written statement, defendant did not need to testify as to the contents of the statement.

The Second Department finds reversible error. The People's introduction into evidence of its version of the defense theory did not eliminate defendant's genuine need to testify. The court

incorrectly presumed that defendant's testimony would have mirrored his statement to the police, but the written statement was not, in itself, adequate to support the affirmative defense of duress, and defendant had important testimony to give. The written statement did not explain why defendant did not abandon the robbery once he was given a gun and, according to the People, could have left the scene.

Defendant also showed that he had a genuine need to refrain from testifying as to the other robbery because he would expose himself to the risk of serious impeachment with the underlying facts of two robberies bearing similarities to the charged robbery.

People v. Shawn Moore
(2d Dept., 3/11/20)

Speedy Trial/Adjournments/Prompt Verdict

SPEEDY TRIAL - Constitutional

The Second Department concludes that, under the circumstances, including adjournments to which defense counsel consented, the approximate eight-month delay between the filing of the petition and the commencement of the fact-finding hearing did not violate respondent's statutory speedy trial rights or deprive respondent of his due process right to prompt prosecution.

Matter of Khamari P.
(2d Dept., 1/8/20)

* * *

ADJOURNMENTS

The First Department finds reversible error where the court denied the defense an adjournment to the next business day for the purpose of calling an absent witness, whose testimony would undisputedly have been material.

People v. Prince Bryan
(1st Dept., 1/14/20)

* * *

SPEEDY TRIAL - Public Emergency/COVID-19 Delays

While upholding the exclusion, from statutory speedy trial computations, of COVID-19-related delays pursuant to a series of emergency order issued by the Court, the Massachusetts Supreme Judicial Court notes that while it is usually a trial judge who determines whether a delay will be excluded and makes the required findings, this Court needed to take immediate and uniform

action across the entire court system to prevent the spread of the coronavirus and to avoid the inefficiencies and inconsistencies that would have resulted if trial judges had to make a separate decision and findings in each case as to whether a trial should be continued due to the COVID-19 pandemic.

Although the Court has recognized that when pretrial detention is indefinitely prolonged, due process may require a hearing to determine whether detention has become unreasonable, that point has not yet been reached here.

Commonwealth v. Lougee
2020 WL 3407706 (Mass., 6/22/20)

* * *

SPEEDY TRIAL - Good Cause/COVID-19

In response to the COVID-19 global pandemic, the Governor of California and the Chief Justice of the California Supreme Court issued a series of orders that permit the extension of the time within which state criminal trials must commence. In this writ proceeding, defendant argues that these orders are not authorized by statute and offend separation of powers principles.

A California appeals court, while noting that it doubts that the orders are unlawful, determines that in any event the severity of the COVID-19 pandemic and the impact it has had within this state independently support the trial court's finding of good cause to delay defendant's trial under the statute.

Stanley v. The Superior Court of Contra Costa County
2020 WL 3056181 (Cal. Ct. App., 1st Dist., 6/9/20)

* * *

SPEEDY TRIAL - Failure To Provide Discovery

Criminal Procedure Law § 245.50(3) states that "absent an individualized finding of exceptional circumstances by the court before which the charge is pending, the prosecution shall not be deemed ready for trial for purposes of [CPL § 30.30] until it has filed a proper certificate [of compliance]," and CPL § 30.30(5) states that "any statement of trial readiness must be accompanied or preceded by a certification of good faith compliance with the disclosure requirements of [CPL § 245.20]." These provisions took effect on January 1, 2020.

The Court grants defendant's motion to dismiss, noting that there is outstanding discovery and no exceptional circumstances. The Court rejects the People's contention that their statement of readiness filed on July 8, 2019 remains effective past January 1, 2020. The People were obligated to file an appropriate certificate of compliance as of January 1, 2020, and their failure

to do so rendered them "not ready" as of January 1, 2020.

Defendant's request for an adjournment on December 12, 2019 to after January 1, 2020 did not effectively toll the People's obligation to meet the requirements of the new discovery and speedy trial statutes.

People v. Tyshawn Lobato
(Crim. Ct., Kings Co., 1/30/20)
http://nycourts.gov/reporter/3dseries/2020/2020_50322.htm

Right To Counsel

RIGHT TO COUNSEL - Effective Assistance/Decision-Making Authority

Defendant contends, inter alia, he was deprived of his Sixth Amendment rights to autonomy and effective assistance of counsel because his lawyer conceded in summation, over defendant's objection, an element of the charged crime - that he had hired individuals to shoot the victim - while arguing that the government had failed to prove intent to kill the victim.

The Second Circuit finds no Sixth Amendment violation. One strategic choice a lawyer may make is to concede an element of the charged crime. Such a decision can be sound trial strategy when the attorney does not concede the client's guilt. Similarly, lawyers are permitted to admit the client committed certain acts while challenging whether those acts fit within the charged crime. The Supreme Court's award of decision-making authority to a defendant in *McCoy v. Louisiana* (138 S.Ct. 1500) was explicitly limited to a concession of guilt of the charged crime.

United States v. Rosemond et al.
2020 WL 2092595 (2d Cir., 5/1/20)

* * *

PLEAS - Voluntariness
RIGHT TO COUNSEL

The Second Department grants defendant's motion to withdraw his plea where the court made efforts to protect defendant's right to consult with his attorney, but the court's orders were either refused or ignored by the Department of Corrections.

Defendant testified that he accepted the plea offer of 18 years in prison because he did not have enough time to "consult with [his] lawyer" and because his lawyer "wasn't ready for trial and they [were] forcing [him] to trial anyway," and that the "[s]tress, duress [and] physical hurt" that resulted from the methods and timing of his daily transportation

schedule also played a role in his decision to plead guilty. The court never asked defendant if he had been given enough time to consult with his attorney - a fairly standard inquiry at any plea colloquy - despite the fact that access to counsel was an ongoing issue at every previous court appearance.

Defendant specifically rejected an offer of 18 years' imprisonment at a time when the court still held out the prospect of transferring defendant to a closer facility so that he could consult with his attorney, and it was only after the court informed defendant and counsel that the trial would soon begin regardless of the circumstances of confinement that defendant agreed to accept the same sentence he had explicitly rejected one week earlier.

Defendant made the application to withdraw his plea at the next court appearance about two weeks after he pleaded guilty and before sentence was imposed, and the prompt timing of defendant's application weighs heavily in his favor.

People v. Tyron Hollmond
(2d Dept., 12/2/20)

*** * ***

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)

*** * ***

RIGHT TO COUNSEL - Effective Assistance

In a 3-2 decision, the Fourth Department grants defendant's motion to vacate his conviction where defense counsel spoke, prior to trial, with a witness who represented that she would testify that her former boyfriend had admitted to her that he killed the victim; counsel informed the court that he had subpoenaed the witness and would pursue the testimony only if the witness appeared as directed; and, when the witness did not appear, counsel inexplicably failed to pursue available means for securing her attendance.

Although the dissent focuses on the determination of the court below that the witness was not credible, an assessment of credibility after a lengthy passage of time does not alter the fact that counsel, at the time of trial, believed the witness was credible enough to testify.

The dissenting judges also note that there was other available evidence that supported the defense theory.

People v. Gregory Borcyk
(4th Dept., 6/12/20)

* * *

RIGHT TO COUNSEL - Decision-Making Authority Of Counsel

In a case in which defendant's trial counsel stipulated that both Wells Fargo branches were federally insured, which provided a jurisdictional hook for a federal bank robbery charge, the Third Circuit U.S. Court of Appeals holds that the Sixth Amendment does not categorically forbid stipulating to a crime's jurisdictional element without the defendant's consent or over the defendant's objection.

Whether to contest or concede a jurisdictional element is a tactical decision reserved for counsel, not defendants. By conceding jurisdiction, counsel has not entirely failed to subject the prosecution's case to meaningful adversarial testing. Of course, counsel always retains the ethical responsibility to consult with the defendant about how to achieve the defendant's goals. But a failure to consult with the defendant on a stipulation or to heed his instruction to contest a jurisdictional element, while perhaps ethically worrisome, is not structural error. The Court expresses no view about whether counsel's decision here met the test for effective assistance of counsel.

United States v. Wilson
2020 WL 2603219 (3d Cir., 5/22/20)

Expert Testimony

EXPERT TESTIMONY - DNA Analysis

The Court of Appeals holds that the trial court should have held a *Frye* hearing with respect to

the admissibility of low copy number (LCN) DNA evidence and the results of a statistical analysis conducted using the proprietary forensic statistical tool (FST) developed and controlled by the New York City Office of Chief Medical Examiner (OCME).

With respect to LCN evidence, the Court notes that there were approximately ten trial court decisions in New York that purportedly supported the determination in this case, but those decisions relied upon one lower court ruling that was based on an analysis that did not adequately assess whether OCME's LCN testing was generally accepted within the relevant scientific community, and, in fact, there was marked conflict within the relevant scientific community; and that the use of LCN evidence in foreign courts should have been of no consequence since there was no indication that those bodies use the same exacting standards tas the courts of this state.

With respect to the FST, the Court notes that it is a proprietary program exclusively developed and controlled by OCME, and that is not an appropriate substitute for the thoughtful exchange of ideas envisioned by *Frye* and is an invitation to bias; that approval by the DNA Subcommittee of the New York State Forensic Science Committee may be some evidence of general acceptance, but that insular endorsement is no substitute for the scrutiny of the relevant scientific community; and that OCME's secretive approach to the FST was inconsistent with quality assurance standards within the relevant scientific community.

"There is no absolute rule as to when a *Frye* hearing should or should not be granted, and courts should be guided by the current state of scientific knowledge and opinion in making such determinations. Indeed, admissibility even after a finding of general acceptance through a *Frye* hearing is not always automatic. Recent questioning of previously accepted techniques related to hair comparisons, fire origin, comparative bullet lead analysis, bite mark matching, and bloodstain-pattern analysis illustrates that point; all of those analyses have long been accepted within their relevant scientific communities but recently have come into varying degrees of question (citations omitted)."

This decision should not be read to suggest that a trial court can never rely on a single prior judicial ruling in concluding that expert testimony based on scientific procedures or principles has gained general acceptance in its specified field, or that multiple judicial determinations to that effect are required for admission in the absence of a Frye hearing.

Three judges, in a concurring opinion, agree that a *Frye* hearing should have been held, but "cannot join the majority's pejorative view of [OCME's LCN] DNA typing technique and its use of a [FST], a probabilistic genotyping software program, to determine likelihood ratios for the interpretation of DNA typing in multiple source samples." These judges also "emphasize the paramount importance of the Commission on Forensic Science … and its highly credentialed DNA subcommittee and the significance of their joint approval of the OCME's validated techniques for generating and interpreting LCN DNA typing."

People v. Cadman Williams

(Ct. App., 3/31/20)

* * *

EXPERT TESTIMONY - DNA Analysis

The Second Circuit rejects defendant's contention that the district court erred in admitting DNA evidence and expert testimony based on the Forensic Statistical Tool method of DNA analysis used by New York City's Office of the Chief Medical Examiner.

The district court properly applied the principles established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (509 U.S. 579). The five-day Daubert hearing exhaustively dissected FST's development, methodology, and implementation. While the hearing testimony indicated that FST does not have what experts would describe as a "known error rate," the court had leeway to find it appropriate to substitute consideration of the rate at which FST would produce false positive results. The court clearly explained its finding that FST is sufficiently accepted to warrant admission, given its admission in scores of New York State cases and the fact that the FST has been approved for use in casework by members of the relevant scientific community and subjected to peer review.

United States v. Jones
2020 WL 3956257 (2d Cir., 7/13/20)

* * *

EXPERT TESTIMONY - Child Sexual Abuse

The Third Department finds no error in the admission of expert testimony from a nurse practitioner who stated that an unremarkable sexual abuse examination was common in cases of child sexual abuse, and expert testimony from a licensed clinical social worker who explained why, in general, victims of child abuse delay reporting and why they might not report the full story with all the details from the outset.

People v. Nicholas May
(3d Dept., 11/5/20)

* * *

CONFESSIONS - Waiver Of Rights/Knowing And Voluntary
EXPERT TESTIMONY - Child Sexual Accommodation Syndrome

The Second Department concludes that the People met their burden of establishing that defendant knowingly and voluntarily waived his *Miranda* rights where the detective gave defendant written *Miranda* warnings, and defendant read them, wrote "yes" and signed his name

next to each of the warnings, and indicated that he understood his rights and was willing to speak with the detective.

The trial court did not err in admitting testimony by the People's expert on child sexual abuse accommodation syndrome to explain the issue of delayed disclosure, counter the defense claim that the complainant fabricated the sexual abuse allegations, and explain why the complainant might not recall with specificity when certain of the alleged incidents occurred. However, the expert's testimony exceeded permissible bounds when the prosecutor tailored two hypothetical questions to include facts concerning the abuse that occurred in this particular case. The error was harmless.

People v. Clifford Shane
(2d Dept., 10/28/20)

Right of Confrontation/Hearsay Evidence/Fair Trial

RIGHT OF CONFRONTATION - Hearsay/Expert DNA Evidence

In *People v John* (27 N.Y.3d 294), the Court of Appeals held that a defendant is entitled to cross-examine a DNA analyst "who witnessed, performed or supervised the generation of defendant's DNA profile, or who used his or her independent analysis on the raw data." In *People v Austin* (30 N.Y.3d 98), the Court reiterated that a testifying analyst who did not participate in the generation of a testimonial DNA profile satisfies the Confrontation Clause only if the analyst "used his or her independent analysis on the raw data to arrive at his or her own conclusions."

Here, the records do not establish that the testifying analyst had such a role. Because the analyst's hearsay testimony as to the DNA profiles developed from post-arrest buccal swabs satisfies the primary purpose test for determining whether evidence is testimonial, her testimony and the admission of the DNA profiles into evidence violated defendants' confrontation rights.

Judge Rivera, joined by Judge Wilson, concurs, noting that given the analyst's limited participation in the testing, it was necessary for her to clarify which stages of testing she actually performed and her overall role in the process; and that although the People argue that the listing of the analyst's name as a "reviewer" or "analyst" on some reports and the appearance of the analyst's initials on each page of the Forensic Biology files shows the analyst's critical role, the analyst's name does not appear as a "reviewer" or "analyst" on several documents related to the final stages of DNA typing, and the listing of the analyst's name or initials is meaningless without testimony about what such a designation means.

People v. George Tsintzelis, People v. Jose Velez
(Ct. App., 3/24/20)

* * *

RIGHT OF CONFRONTATION - Video Testimony

The Michigan Supreme Court, relying on the rule established in *Crawford v. Washington* (541 U.S. 36), holds that the federal and state constitutional Confrontation Clauses were violated when a forensic analyst gave two-way, interactive video testimony.

Before *Crawford*, the Supreme Court held in *Maryland v. Craig* (497 U.S. 836) that a child victim may testify against the accused by means of one-way video (or a similar *Craig*-type process) when the trial court finds, consistently with statutory authorization and through a case-specific showing of necessity, that the child needs special protection. When *Crawford* overruled *Ohio v. Roberts* (448 U.S. 56) and did away with reliability balancing, it put into doubt the reliability-focused rule of *Craig*. *Crawford* did not specifically overrule *Craig*, "but it took out its legs." The Court will apply *Craig* only to the specific facts it decided.

People v. Jemison
2020 WL 3421925 (Mich., 6/22/20)

* * *

RIGHT OF CONFRONTATION - Testimonial Screen/Video Testimony

The Idaho Supreme Court holds that the use of a child witness shielding screen at trial deprived defendant of his Fourteenth Amendment due process right to a fair trial. The use of the shielding screen may have been reasonably perceived by jurors as an attempt to protect the children from a guilty or dangerous defendant, and thus was inherently prejudicial.

The screen did not serve an essential state interest. Given the technological advancements in video conferencing available in 2017, when this case went to trial, it is difficult to understand why arrangements were not made for the remote testimony of the child witnesses, via closed-circuit television or an alternate form of video conferencing technology, well before trial. Here, the CCTV procedure was reasonably available, even if the delay in scheduling a courtroom made it inconvenient.

The Court also decides to adopt a bright-line rule. Moving forward, upon a showing of a compelling state interest, the only permissible alternative method of testimony for child-witnesses will be one in which the child-witness testifies from a separate location and appears live, on screen in the courtroom, via two-way CCTV or through other reliable video conferencing means. The COVID-19 pandemic has necessitated that a variety of court proceedings take place via Zoom. This experience has sufficiently demonstrated that effective presentation of live testimony from a separate location is now well within the technological reach of any court in Idaho. Properly conducted, live, on-screen testimony via CCTV, Zoom, or other secure and reliable video conferencing technology does not treat

defendants differently from any other person in the courtroom in regard to the child witness.

Of course, live, in-person witness testimony before the jury, which provides the defendant an opportunity for direct confrontation with the State's witnesses, should continue to be the norm in criminal trials. This ruling only applies to the very narrow category of cases involving vulnerable child witnesses under the age of 13, when the court finds by clear and convincing evidence that the conditions set forth in the statute have been met.

State v. Farrell-Quigle
2020 WL 7062881 (Idaho, 12/3/20)

*** * ***

RIGHT OF CONFRONTATION - Video Testimony

A divided Texas Court of Criminal Appeals holds that the Confrontation Clause was violated when the trial judge allowed a Sexual Assault Nurse Examiner to testify against defendant from Montana using a two-way video system.

The court heard no evidence and made no case-specific finding. Further, the State had sufficient time and ability to subpoena the witness, and the witness was available to appear and testify. Traveling to appear in court and testify can be frustrating and difficult for various reasons: finances, hectic schedules, health issues, sheer distance, etc. But the right to physical, face-to-face confrontation lies at the core of the Confrontation Clause, and it cannot be so readily dispensed with based on the mere inconvenience to a witness. The State cites numerous cases that it argues justify allowing the witness to testify remotely, but those cases deal with child victims and child witnesses, witnesses who are too sick to travel and appear in court, witnesses who are overseas on active duty, or witnesses who are outside the subpoena power of the State.

Haggard v. Texas
2020 WL 7233672 (Tex. Ct. Crim. App., 12/9/20)

*** * ***

RIGHT TO PUBLIC/FAIR TRIAL
RIGHT TO PRESENT DEFENSE
RIGHT TO JURY TRIAL

Defendant has asked the Court to delay his October 13, 2020 trial indefinitely until the unknown time when the trial "can be conducted in a manner that is as close to normal as possible." Defendant argues that criminal jury trials must not proceed for the foreseeable future unless a defendant agrees to go to trial.

The Court denies the motion. A criminal defendant has no ironclad veto right under the Constitution and federal law. During the COVID-19 crisis, other parties, including alleged victims, the government, the public, and the Court, have weighty interests in preventing the wheels of justice from grinding to an indefinite halt.

Recognizing that defendant's 79-year-old father has various medical issues, the Court will offer him a reserved, isolated seat in the courtroom or, if he prefers, an isolated seat in a separate area of the courthouse from which he can watch a live video of the proceedings. Any partial closure that results from the Eastern District's entrance requirements do not violate defendant's Sixth Amendment right to a public trial.

Proceeding to trial would not violate defendant's right to a jury made up of a fair cross section of the community. Even if this case had been tried before the onset of the pandemic, older people and those with pre-existing health conditions may have been excluded.

There is no constitutional right to see a juror's facial expressions or communicate non-verbally with a juror. Despite jurors' masks, defendant's attorneys can evaluate other aspects of jurors' body language, and assess the credibility of potential jurors through other means, such as questionnaires. Defendant also cites no authority or constitutional basis for the notion that his entire face must be fully visible to the jury.

Although defendant argues that some witnesses may be reluctant to meet with his attorneys or investigator, such meetings could take place while the participants are engaged in social distancing, and his attorneys and investigator could speak to witnesses by phone or video chat. Moreover, defendant does not have a constitutional right to interview witnesses in advance of trial, and witnesses have a right to decline to be interviewed.

Defendant also has no constitutional right to present evidence through live, in-person testimony only.

Finally, the Court notes that there now exists a window of opportunity for holding a public trial, before there is a "second wave." The Court should not squander the opportunity, while utilizing all the health and safety precautions at its disposal. Waiting longer increases the likelihood that witnesses will become unavailable or suffer memory lapses.

United States v. Trimarco
2020 WL 5211051 (EDNY, 9/1/20)

*** * ***

RIGHT OF CONFRONTATION - Experts/Basis Of Opinion
EXPERTS - DNA Analysis

The Court finds that defendant's right of confrontation will be properly preserved where

the DNA analyst will not be serving as a mere conduit for others' conclusions, and will be testifying as one who performed the analyses at issue.

STRmix was used as a tool to assist the analyst in her interpretation of the data. She determined whether the program considered the sample to be a two-person or three-person mixture, and STRmix then performed an analysis, using known mathematical and biological models, to give an estimate about the quantity of DNA from each individual and possible genotypes, and assigned probabilities to each of the possible genotypes. The analyst compared those results with her expectations to see if the data made sense based on her training and experience. If the data did not conform to her expectations, she would re-examine the inputs to make sure there were no errors. If there were any, she would correct them and re-run the data. The STRmix performs these analyses much faster than an analyst could. If the analyst was given an unlimited amount of time, she could produce the same output. In essence, the software is acting as a highly sophisticated calculator. In contrast to TrueAllele, STRmix is not an "expert system" that relies on artificial intelligence.

Under these circumstances, the analyst who utilized STRmix can be meaningfully cross-examined.

People v. H.K.
(Crim. Ct., Bronx Co., 5/15/20)
http://nycourts.gov/reporter/3dseries/2020/2020_50709.htm

* * *

RIGHT OF CONFRONTATION - Expert Testimony/Basis Of Opinion

The Third Department rejects defendant's claim that the admission of DNA reports and related testimony violated his right to confront witnesses where the testifying expert prepared buccal swabs taken from the victim and defendant, as well as nearly 90 items of evidence, for preliminary testing, all of which was performed by senior laboratory technicians; after this testing, she received the data files from the genetic analyzer and imported them into the software program; and, although she did not conduct the laboratory testing, she ultimately formulated comparisons and wrote her reports based on her interpretation of the DNA profiles generated from the samples she prepared.

She used her independent analysis on the raw data. The People were not required to produce the analysts who witnessed, performed or supervised the extraction, quantitation, and amplification of the genetic material.

People v. Joseph Vandenburg
(3d Dept., 12/10/20)

* * *

HEARSAY - Excited Utterance/Present Sense Impression

The Second Department finds reversible error in the admission into evidence of a recording of an anonymous call made to 911 under the excited utterance and present sense impression exceptions to the hearsay rule.

The anonymous caller stated, at least five minutes after the shooting, that "[s]omebody just got shot on East 19th and Albemarle" and that it "was a guy with crutches. He started to shoot." Nothing in these brief, conclusory statements suggested that the caller was reporting something that he saw, as opposed to something he was told. Moreover, although the call was made from a payphone located in the vicinity of the shooting, the People did not demonstrate that the payphone was situated outdoors or in a place where the actual site of the shooting would be visible.

People v. Belende Thelismond
(2d Dept., 2/26/20)

* * *

HEARSAY - Prompt Outcry

The Second Department finds no error in the admission of prompt outcry testimony from the child victim's mother regarding the victim's statement that defendant had raped her.

People v. Jard Hobbs
(2d Dept., 7/8/20)

* * *

HEARSAY - Statement For Purposes Of Diagnosis Or Treatment

The Third Department concludes that a sexual assault nurse examiner's testimony as to what the victim had described wearing at the time of the incident was admissible. The SANE's question had the dual purpose of assisting in the investigation of the crime and the care and treatment of the victim's injuries.

People v. Shannon Dickinson
(3d Dept., 4/16/20)

* * *

EVIDENCE - Text Messages

In a 3-2 decision, the Second Department reverses defendant's convictions for attempted use of a child in a sexual performance, disseminating indecent material to a minor in the first degree, and endangering the welfare of a child, where the court improperly admitted into evidence five screenshots, taken by the complainant's former boyfriend, that purported to depict selected portions of a text message conversation between defendant and the complainant.

The text messages themselves did not establish defendant's identity as their author. The complainant's testimony, standing alone, was not sufficient, particularly since part of the conversation allegedly took place while the complainant's unlocked phone was in the possession of her former boyfriend, who had locked himself in a separate room and was texting defendant using the complainant's phone, at times threatening defendant and asking him for money.

The complainant testified that she deleted all of the messages and reset her phone immediately after recovering it from the former boyfriend, but also stated that her messages were stored in her iCloud account and that she provided the police with her iCloud password. Yet the People offered no evidence that the police ever checked either defendant's phone or the complainant's iCloud account to determine the identity of the participants in the conversation.

People v. Luis Rodriguez
(2d Dept., 10/21/20)

*** * ***

EVIDENCE - Text Messages

In a 3-2 decision, the Second Department reverses defendant's convictions for attempted use of a child in a sexual performance, disseminating indecent material to a minor in the first degree, and endangering the welfare of a child, where the court improperly admitted into evidence five screenshots, taken by the complainant's former boyfriend, that purported to depict selected portions of a text message conversation between defendant and the complainant.

The text messages themselves did not establish defendant's identity as their author. The complainant's testimony, standing alone, was not sufficient, particularly since part of the conversation allegedly took place while the complainant's unlocked phone was in the possession of her former boyfriend, who had locked himself in a separate room and was texting defendant using the complainant's phone, at times threatening defendant and asking him for money.

The complainant testified that she deleted all of the messages and reset her phone immediately after recovering it from the former boyfriend, but also stated that her

messages were stored in her iCloud account and that she provided the police with her iCloud password. Yet the People offered no evidence that the police ever checked either defendant's phone or the complainant's iCloud account to determine the identity of the participants in the conversation.

People v. Luis Rodriguez
(2d Dept., 10/21/20)

* * *

EVIDENCE - Text Messages

The First Department concludes that text messages exchanged between a person purporting to be defendant's mother and the victim two days after the crime were properly authenticated as defendant's texts where the texts reached the victim at a disguised phone number she had shared with defendant shortly after the crime and had not shared with anyone else; the texts revealed a detailed knowledge of the incident and the relationship between defendant and the victim, and explicitly discussed the sexual encounter; the sender admitted having the victim's car, bag and phone, which were taken during the incident, and defendant was apprehended a day later driving the victim's car; and the sender's phone number was registered to a former female friend of defendant.

People v. Kenneth Washington
(1st Dept., 1/21/20)

Uncharged Crimes Evidence

UNCHARGED CRIMES EVIDENCE - Violation Of Pretrial Ruling At Trial

The Third Department, reaching the unpreserved claim in the interest of justice, finds reversible error where the trial court admitted testimony by the complainant's niece that was beyond the scope of the court's Molineux ruling.

The court's ruling permitted the People to offer proof about instances of verbal and emotional abuse by defendant toward the complainant. However, the niece testified that the complainant told her that defendant once grabbed her arm in a store because he did not like who she was talking to, that bruises on her legs were caused by defendant, and that she observed defendant kick the complainant in the stomach. Incidents involving physical abuse by defendant were not part of the Molineux application.

People v. Casey Callahan
(3d Dept., 8/20/20)

* * *

UNCHARGED CRIMES EVIDENCE - Consciousness Of Guilt

The Second Department orders a new trial, concluding that evidence that defendant resisted arrest six months after the incident in question, after violating an order of protection held by one of the complainants in this case, was not relevant. Resisting arrest here was too far removed from the underlying incident to be deemed admissible as evidence of consciousness of guilt, and there was potential prejudice from an inference that defendant may have violent tendencies, as indicated by him flailing and thrashing his arms against a police officer.

People v. Malachi Ramirez
(2d Dept., 2/13/20)

Impeachment

IMPEACHMENT - Prior Inconsistent Statement
EVIDENCE - Defendant's Nickname

The Second Department finds reversible error where the trial court precluded defendant from proving a witness's prior inconsistent statement. Defense counsel had failed to lay a proper foundation with the witness because he was not aware of the proffered evidence while the witness testified, and the prosecutor initially volunteered to recall the witness to enable the defense to lay the foundation.

The proffered testimony showing that the witness had stated that he did not see the perpetrators' faces substantially contradicted the witness's testimony that he was able to recognize defendant even though he had a scarf covering his face because at some point during the incident defendant's face became uncovered. There is no evidence that allowing the testimony would have prejudiced the People because the impeaching witness was present in the courtroom during the other witness's testimony.

The Court also concludes that the prosecutor's improper reference to defendant's nickname, "Maniac," was not so egregious as to deprive defendant of a fair trial.

People v. Jermaine Butts
(2d Dept., 6/10/20)

* * *

IMPEACHMENT - Bad Acts/Police Misconduct

The Second Department finds no error in the court's ruling in limine prohibiting the defense from cross-examining a police detective with respect to his prior bad acts. Defendant failed to demonstrate that specific allegations of excessive force in a federal action pending against the detective, and a finding in 2010 by the Civilian Complaint Review Board that the detective used

excessive force, were relevant to the detective's credibility.

People v. Tyrell Brown
(2d Dept., 3/11/20)

* * *

UNCHARGED CRIMES EVIDENCE - Opening The Door
IMPEACHMENT - Own Witness

In this attempted murder prosecution, the Fourth Department finds reversible error where the court permitted the prosecutor to present evidence of a prior uncharged shooting under the theory that defense counsel opened the door.

Even assuming, arguendo, that defense counsel opened the door, this theory does not provide an independent basis for introducing new evidence on redirect, nor does it afford a party the opportunity to offer evidence that should have been brought out on direct examination. This theory merely allows a party to explain or clarify on redirect matters that have been put in issue for the first time on cross-examination.

Here, the court permitted the People to introduce the testimony of four witnesses regarding the prior shooting, which far exceeded what was necessary to confirm that certain projectile holes predated the charged shooting. Moreover, there was no pretrial notice of the People's intent to offer evidence of an uncharged crime, or a Ventimiglia ruling on the admissibility of such evidence.

The Court also concludes that the prosecutor deprived defendant of a fair trial by improperly impeaching the People's own witnesses. The prosecutor was on notice that one witness would identify someone other than defendant as the shooter appearing on video surveillance, and that the other witness would give no more than a qualified answer that the shooter on the video could be defendant. At the time of the relevant questioning, the court had not granted the prosecutor permission to treat either witness as hostile.

People v. Joachim Sylvester
(4th Dept., 11/20/20)

* * *

IMPEACHMENT - Immigration Status

The Maryland Court of Appeals holds that, absent additional circumstances - such as allegations of quid pro quo or leniency giving rise to a motive to testify falsely or bias - a State witness's status as an undocumented immigrant, or the existence of a deportation order to which the witness may be subject, does not show the character of the witness for untruthfulness or that the witness has a motive to testify falsely, and thus the information need not be disclosed by a

prosecutor during discovery and is not a proper subject of cross-examination. It is purely speculative to assert that a deportation order resulted from falsehoods or misrepresentations that were associated with illegal entry or overstaying.

Kazadi v. State
2020 WL 398840 (Md., 1/24/20)

Missing Witness Inference

MISSING WITNESS INFERENCE

The Second Department finds reversible error in the denial of defendant's application for a missing witness charge with respect to the complainant's date.

According to the complainant, her date was present during the incident and was a victim. He appeared in court pursuant to the People's so-ordered subpoena, and his counsel stated that although he did not wish to be a witness, he was outside the courtroom and was prepared to testify. The People did not establish that he was not under their "control" such that he would not be expected to testify in their favor.

People v. Pierre Sanchez
(2d Dept., 8/12/20)

Photographs And Recordings

EVIDENCE - Video Recording
BEST EVIDENCE RULE

In this grand larceny prosecution arising from the theft of wireless speakers from a Target store, the court admitted testimony regarding the contents of a unpreserved surveillance footage under the relevant exception to the best evidence rule.

The Fourth Department finds no error. The testimony does fall under the best evidence rule. However, the absence of the unpreserved footage was sufficiently explained. The store's customary practice was to delete video surveillance footage after 30 days, or less time for certain cameras, and only a portion of the footage was preserved. The witness who had observed the footage was able to recount the contents with reasonable accuracy. He was a security professional whose duties included watching the store's surveillance footage on a regular basis. He testified as to the type of surveillance system utilized by the store and the different types of cameras within that system. He also testified as to his familiarity with the store and, in particular, the store's inventory of speakers. He described the events shown on the unpreserved footage with specificity and detail, and was able to recognize defendant from viewing the footage.

People v. Tamiya Jackson
(4th Dept., 12/23/20)

* * *

BEST EVIDENCE RULE - Video Recordings
POSSESSION OF A CONTROLLED SUBSTANCE - Identity Of Substance

The Second Department concludes that the court properly admitted into evidence a police officer's cell phone video recording of footage from a surveillance camera where the People explained the unavailability of the original recording and established that the recording was a reliable and accurate portrayal of the original.

However, the Court reverses defendant's convictions for criminal possession of a controlled substance in the fifth degree where the opinion testimony by the People's experts was inadmissible. They tested the purity of a sample of the substance recovered from defendant by using a test which relied upon a comparison to a known standard, but the People failed to establish that they performed other tests that did not involve comparison to a known standard.

People v. Jason Campbell
(2d Dept., 7/8/20)

* * *

SEARCH AND SEIZURE - Buccal Swab
EVIDENCE - YouTube Video

In *Matter of Abe A.* (56 N.Y.2d 288), the Court of Appeals, using a Fourth Amendment reasonableness analysis, allowed the use of a search warrant pursuant to CPL Article 690 for the seizure of corporeal evidence from an uncharged suspect. The Court set forth a three-prong standard, requiring the People to demonstrate probable cause to believe the individual committed the crime; a clear indication that material and relevant evidence will be found; and that the means of obtaining the evidence is safe and reliable.

A divided Court of Appeals now holds that *Abe A.* should not be interpreted as creating a mandatory discovery procedure affording a defendant access to the supporting affidavit demonstrating the requisite probable cause, or an adversarial hearing, as a matter of constitutional law. A court may use its discretion to grant discovery after balancing the seriousness of the crime, the importance of the evidence to the investigation, and the unavailability of less intrusive means of obtaining it, on the one hand, against concern for the suspect's constitutional right to be free from bodily intrusion on the other. But access to discovery must depend on the magnitude of the bodily intrusion sought by the warrant.

Here, defense counsel received notice of the hearing and was given an opportunity to be heard on the warrant application. Counsel addressed the issue of probable cause, but failed to direct any argument to the nature of the intrusion, the value of comparative DNA analysis evidence, or

the sufficiency of the safeguards preventing unwarranted disclosure of the results of the DNA testing. The buccal swab is undeniably safe, consists of a minimal intrusion, and involves no discomfort. There is no need for an adversarial hearing to determine whether the collection of a DNA sample amounts to an unreasonable invasion of privacy in a particular case.

The Court also concludes that a YouTube video was sufficiently authenticated where defendant did not dispute that he appeared in the video; the video depicts defendant and two other individuals involved in the shooting in attire similar to what they were wearing on the night of the homicide, and, given the background in the video, it was evidently filmed in defendant's neighborhood; there was evidence pertinent to the time the video was made, including defendant's admission of future intent to make the video the next morning; and the video was uploaded to YouTube close in time to the homicide.

People v. Reginald Goldman
(Ct. App., 10/22/20)

* * *

EVIDENCE - Video Recordings/Photos

The Second Department concludes that the surveillance video and stills and a photo taken from Facebook were properly authenticated where a detective testified that he copied the video from the surveillance system onto two discs and verified that the video cameras and recording equipment were in working order; he confirmed that the date and time stamp were accurate, except for a one-hour difference due to daylight savings time; he testified as to chain of custody and that he obtained the stills from the surveillance footage; and a Facebook certification indicated that the account from which the photo came belonged to defendant.

People v. John Robinson
(2d Dept., 10/28/20)

* * *

BEST EVIDENCE RULE
EVIDENCE - Audio Recordings

The Tenth Circuit U.S. Court of Appeals holds that allowing admission of a transcript of a drug buy with translations of the Spanish portion of the conversations into English, without also admitting the recording from which it was made, violated the best evidence rule. The original recording must be used and the transcript can only supplement it.

United States v. Chavez
2020 WL 5807864 (10th Cir., 9/30/20)

* * *

EVIDENCE - Best Evidence Rule/Video Recordings

The Third Department holds that, under the best evidence rule, the cell phone video recording of a surveillance video depicting the exterior of a bar, the observations of the detective who viewed and recorded the cell phone video, and the detective's observations of a surveillance video showing the bar's interior, should have been precluded. Also, the People did not call the bar manager or a person who installed the video equipment to authenticate the video.

However, the court's error was harmless.

People v. Kashawn Watson
(3d Dept., 5/28/20)

Identification Defense

RIGHT TO COUNSEL - Effective Assistance
IDENTIFICATION

The Second Circuit vacates defendant's conviction where many of the typical causes of mistaken eyewitness identifications were apparent, but his lawyers did almost nothing to challenge the eyewitness identification testimony that formed the core of the Government's case, even though the identifications bore glaring indicia of unreliability, and did not seek to exclude or object to the admission of a highly prejudicial and dubiously relevant photo of defendant posing with what appears to be a handgun.

The robbers were partially disguised. They carried guns, on which the eyes of the victims were likely focused. Initially, the victims were unable to give investigators a detailed description of the robbers beyond noting that they were light-skinned or Hispanic. The victims did not identify defendant (who is white) as one of the intruders until they saw his photo in a photo array presented to them more than a month after the crime. Even then, at least one of the victims did not firmly identify defendant until law enforcement allowed that victim to view photos of defendant on Facebook. That victim discussed with two other victims her identification of defendant and showed the other two victims his Facebook photo before these victims were asked to identify defendant from a photo array.

Defense counsel failed to call or even consult an expert witness who could have informed the judge and jury about the multiple, well established ways in which these identifications were unreliable.

United States v. Nolan
2020 WL 1870140 (2d Cir., 4/15/20)

Temporary And Lawful Possession Defense

DEFENSES - Temporary And Lawful Possession

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

Defendant argues that he was entitled to the charge because he took possession of the weapon with the intent to use it only in self-defense and because his eventual firing of the gun was justified. However, the defense of justification - which may render the use of a firearm lawful - is not a defense to the unlawful possession of the weapon.

Defendant's possession did not result temporarily and incidentally from the performance of some lawful act, such as disarming a wrongful possessor or unexpected discovery. The only reasonable conclusion to be drawn from the evidence is that defendant armed himself in anticipation of a potential confrontation.

Judge Rivera and Judge Wilson, using different analyses, concur in separate opinions.

People v. Lance Williams
(Ct. App., 12/17/20)

Homicide/Assault

MURDER - Attempts

Defendant moved to set aside the verdict with respect to the attempted murder convictions on the ground that the evidence showed no "affirmative action beyond the planning," but the trial court denied the motion. On appeal, the Appellate Division vacated the convictions for attempted murder, holding that the evidence at trial was legally insufficient to establish that defendant engaged in conduct that came "dangerously near commission of the completed crime." Noting that "several contingencies stood between the agreement in the [jail] and the contemplated [crimes]," the Appellate Division determined that the "evidence establishes only that defendant planned the crimes, discussed them with the inmate in the next cell and with that inmate's girlfriend, and exchanged notes about them."

In a 4-3 decision, the Court of Appeals affirms. Defendant's acts were limited to the planning stages, specifying the who, what, where, when, and how of defendant's murder plans. Notably absent are any acts that brought the crimes dangerously close to completion. Defendant's initial promise to give MS (the other inmate) a house was a simple promise. It did not advance the scheme's chance of success. Defendant neither made a cash payment nor provided MS with any means to purchase drugs for the murders. Defendant did not provide a murder weapon. And although defendant provided an address, nothing in the record establishes that the victims (defendant's wife and mother-in-law) lived or could be found there, nor does the proof establish that defendant provided any other information that MS could have used to track down the

intended victims. The other acts listed by the People - such as producing a hand-drawn map, a "detailed plan," and a fake suicide note - consisted of instructions on how to carry out and cover up the murders, but were not actual steps that brought defendant or MS dangerously near or in close proximity to committing the murders.

The acts required to establish attempt culpability are qualitatively different from the overt acts needed for a conspiracy to commit a murder.

People v. Benito Lendof-Gonzalez
(Ct. App., 11/24/20)

* * *

MURDER - Circumstantial Evidence

In this murder prosecution, the Second Department, with one judge dissenting, concludes that the verdict of guilt was against the weight of the evidence where the 23-year-old victim, who had a history of drug use, was found dead in a wooded area; the victim's injuries and physical condition indicated that she had been sexually assaulted and killed by strangulation within 12-24 hours before her body was found; more than two years after her death, defendant was charged after his DNA profile was matched to a single source partial profile generated from various swab samples taken as part of a sexual assault kit; and the People presented no evidence placing 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, and no evidence that sexual contact occurred at or near the time of the murder.

People v. Fernando Romualdo
(2d Dept., 11/12/20)

* * *

RECKLESS ENDANGERMENT - Depraved Indifference
ASSAULT

The Second Department, with one judge dissenting, reduces defendant's first degree assault and first degree reckless endangerment convictions, finding that the verdict was against the weight of the evidence because the People failed to prove the depraved indifference element beyond a reasonable doubt.

The People's theory was that defendant not only failed to obtain proper medical care for her foster child after he was burned, but also caused the burns by holding the child down under scalding hot water. A physician specializing in burn care testified that the burn pattern showed that the child was lying on his side in the tub and was not "splashing or thrashing about," but admitted that "in order to say exactly what occurred," he would have to know the water level, size, and shape of the tub and the approximate temperature of the water, and did not know any of

those things. There were inconsistencies between the physician's trial testimony and his grand jury testimony which went to the People's theory that defendant caused the burns.

Defendant took measures, "albeit woefully inadequate" ones, to care for the child, by inquiring about proper burn care at a pharmacy, purchasing ointments and bandages, and keeping the burns covered. Contrary to the dissent's claim, the evidence does not demonstrate that these measures were taken only to conceal the crime and did not display caring. Although it appears that the date of injury was 4 to 8 days before the burns were discovered by the child's biological father, the urgency of the child's medical condition was not sufficient to establish depraved indifference.

People v. Shirley Verneus
(2d Dept., 6/10/20)

* * *

ASSAULT - Physical Injury

The Second Department reverses defendant's assault conviction, concluding that the evidence of physical injury was legally insufficient where the complainant testified that defendant pushed him to the ground and slapped him several times in the face, and that he cried because he "was in a lot of pain."

People v. Ryan Jhagroo
(2d Dept., 8/19/20)

* * *

RIGHT OF CONFRONTATION - Hearsay/Forfeiture Of Right
HEARSAY - Unavailability Of Witness Due To Defendant's Misconduct
ASSAULT - Physical Injury

The Second Department finds legally insufficient evidence of "physical injury" where witnesses saw "a redness" on the child complainant's cheek, or a slight swelling under his eye and cheek, or a bruise to the right cheek, which was treated with a cold pack; and the child experienced only tenderness for one to two hours after the incident.

The Court finds no error in the admission of the grand jury testimony of the absent adult complainant, and her recorded statement to an ADA, during the People's case. At a Sirois hearing, the People established that the complainant was fully cooperative with the prosecution from the day of the incident in June 2013 until the end of September 2013; gave a recorded statement to an ADA on June 17, 2013; testified for the People before the grand jury in June and July 2013; and always returned the ADA's phone calls prior to the end of September 2013.

The People further established, by clear and convincing evidence, that defendant began calling

the complainant from Rikers Island at the beginning of September 2013 in violation of a full order of protection. A total of 67 calls were made to the complainant between September 10, 2013, and October 14, 2013; defendant frequently called the adult complainant from 3 to 11 times a day. In 5 of the recorded calls, defendant told the complainant not to cooperate with the prosecutor. Defendant frequently used emotional manipulation by repeatedly telling the complainant how much he loved, missed, and needed her, and further played on her guilt by telling her how much pain he was in, that he did not deserve the punishment he was receiving, and that it was now time for her to give him all of her love. By October 21, 2013, the complainant would not cooperate with the People, and made changed statements that required the prosecution to file two Brady disclosures.

People v. Jose Bernazard
(2d Dept., 11/25/20)

* * *

ASSAULT - Dangerous Instrument

The Fourth Department concludes that the evidence is not legally sufficient to support the conviction of reckless assault in the second degree.

Although a sidewalk or concrete surface can be "used" as a dangerous instrument, the blows defendant delivered using a cross-wise motion were not executed in such a way as to establish that defendant consciously disregarded a substantial and unjustifiable risk that the victim's head would have contact with the concrete.

People v. Loirmus Desius
(4th Dept., 11/13/20)

* * *

ASSAULT - Serious Physical Injury

The Third Department concludes that defendant's conviction for first degree assault is not supported by the weight of the evidence. The victim's two facial scars did not constitute a serious physical injury. The conviction is reduced to one for attempted assault in the first degree.

The victim sustained a laceration to his right cheek that was approximately four centimeters long, and a similarly sized laceration transversing the tip of his nose to his right nostril. Both lacerations were sutured by a plastic surgeon. But the record is imprecise as to the extent and appearance of any resulting facial scars. There was no photograph of the scars admitted into evidence, and, although the physician who treated the victim testified that the victim was expected to have facial scars and the victim did in fact display facial scars to the jury, the People failed to make a contemporaneous record of what the jury observed. Despite their prominent

locations, there is no indication that the relatively small facial lacerations produced jagged, uneven or unusually disturbing scars.

People v. Coreen Harris
(3d Dept., 8/6/20)

* * *

ASSAULT - Serious Physical Injury

In a 3-2 decision, the Fourth Department reverses an order that reduced counts from assault in the first degree to attempted assault in the first degree on the ground that there was insufficient evidence that the eight-year-old victim suffered serious disfigurement.

The majority notes that the evidence before the grand jury established that the victim sustained "two significant lacerations to her anterior neck," which were 3-4 and 5-6 centimeters long, with soft tissue defects and exposure of underlying subcutaneous fat; that the lacerations required at least 10 sutures to close; and that the grand jury could reasonably infer that the sutured wounds resulted in permanent scars that would make the victim's appearance distressing or objectionable to a reasonable person observing her.

People v. Sadie Harwood
(4th Dept., 5/1/20)

* * *

ASSAULT/ROBBERY - Physical Injury

The Second Department reduces defendant's second degree robbery conviction to one for third degree robbery, concluding that the evidence was legally insufficient to establish physical injury where defendant pushed the victim down onto a bed, bound her wrists with a coaxial cable, placed the cable around her neck, and placed her in a choke hold with his arm across her throat; after the incident, the victim had an indentation on her wrist where the cord had been tied, her wrist was sore and had redness, and she had a red mark on her neck; she was "pretty numb" at the time and was not experiencing pain and declined to go to the hospital; a few days later, she had difficulty swallowing and her throat was "kind of sore" for "[j]ust a couple of days"; and, when she testified before the grand jury approximately one week after the incident, she was asked if she had any pain or discomfort, and she answered, "just the muscle in my arm."

People v. John Tactikos
(2d Dept., 10/7/20)

* * *

ASSAULT - Physical Injury/Substantial Pain

The Appellate Term finds facially sufficient a charge of third-degree assault where the information alleged that defendant hit the victim with a closed fist "about the face" and "on the back of [her] head," "ear" and "body," causing the victim "pain" and "discolored" eyes.

These allegations were sufficient for pleading purposes to establish that defendant caused "substantial pain."

People v. Sevdina Camara
(App. Term, 1st Dept., 1/21/20)

Falsely Reporting An Incident

FALSELY REPORTING AN INCIDENT - First Amendment

The indictment alleged that defendant, knowing the information to be false, reported, via an emergency 911 call, that "she was 'jumped" on a bus by a group of males, that it was a racial crime, and that she was struck by boys and called a "nigger." The indictment also alleged that defendant, knowing the information to be false, circulated - via social media and through an appearance at an event on the SUNY Albany campus - an allegation that she was the victim of a racially-motivated assault on a bus. Defendant was convicted of two counts of falsely reporting an incident in the third degree.

The Third Department concludes that the verdict based on Penal Law § 240.50(3)(c) is supported by legally sufficient evidence and is not against the weight of the evidence.

However, the Court agrees with defendant's contention that Penal Law § 240.50(1), as applied here, violates the First Amendment. Although it was not unlikely that defendant's false tweets about a racial assault at a state university would cause public alarm, what level of public alarm rises to the level of criminal liability? Criminalizing false speech requires either proof of specific harm to identifiable victims or a great likelihood of harm. General concern by those reading defendant's tweets does not rise to that level, and the proof adduced at trial established that defendant's tweets were "retweeted" a significant number of times and led to nothing more than a charged online discussion about whether a racially motivated assault did in fact occur.

By the very nature of social media, falsehoods can quickly and effectively be countered by truth, making the criminalizing of false speech on social media not actually necessary to prevent alarm and inconvenience. Indeed, here defendant's false tweets were largely debunked through counter speech.

People v. Asha Burwell
(3d Dept., 4/9/20)

Obstructing Governmental Administration

OBSTRUCTING GOVERNMENTAL ADMINISTRATION

The Court of Appeals finds facially insufficient an information charging obstructing governmental administration in the second degree where the information lacked any reference to the search warrant pursuant to which the police effected a vehicle stop, and thus provided defendant with insufficient notice of the official function with which he was charged with interfering.

People v. Damon Wheeler
(Ct. App., 2/13/20)

Possession Of Drugs And Weapons And Stolen Property

POSSESSION OF A WEAPON - Voluntariness

The Court of Appeals, in a 4-3 decision, finds reversible error where the trial court denied defendant's request for a jury instruction on voluntary possession of a Military Armament Corporation Model 11 submachine gun.

A reasonable juror could have found that defendant, then a 17-year-old, was shot in the neck while in someone else's home, and, in the frantic moments afterwards, while searching for a towel to stanch the bleeding, came close enough to a drawer to both see an object that he thought looked like a gun inside it, and to transfer his DNA to the weapon by bleeding on it (even though he may never have touched it). This evidence supports a finding that defendant had constructive possession of the MAC 11 - by virtue of his access to and control over the room where it was found - and that this possession was knowing once he became aware of the presence of the gun, but also that his possession was not voluntary, given that it lasted for only the brief period between when he ran into the bedroom and saw the gun in the dresser, and when he left the bedroom. The charge failed to explain that the jury could consider whether defendant had sufficient time to dispose of the gun once he became aware of its presence in the area that he purportedly controlled.

A defendant's concession of knowing constructive possession is not a prerequisite for a jury instruction regarding involuntary possession. Inconsistency in claimed defenses or even between a defendant's testimony and a defense should not deprive the defendant of the requested charge if the charge would otherwise be warranted by the evidence.

People v. J.L.
(Ct. App., 12/17/20)

* * *

POSSESSION OF DRUGS - Identity Of Substance

The Appellate Term dismisses as facially defective a charge of criminal possession of a controlled substance in the seventh degree where it was alleged in the information that a police officer "recovered synthetic marijuana … from the defendant's right jacket pocket"; and that the officer "examined the recovered substance and has determined that it does in fact contain synthetic marijuana based on his professional training as a police officer in the identification of synthetic marijuana, his prior experience as a police officer making arrests involving synthetic marijuana, and his observation of the packaging which is characteristic of synthetic marijuana."

An information sufficiently demonstrates that the officer knew the substance was a controlled substance when the instrument: (1) alleges that the officer had drug-identification training and experience, and (2) contains non-conclusory allegations establishing the presence of at least one other indicia of criminality - e.g. a physical description of the substance, a description of the substance's packaging, the presence of a drug-related odor, the recovery of drug paraphernalia, or an admission by the defendant.

Here, the allegations do not establish the basis for the officer's belief that the substance was a controlled substance. While the information alleges that the officer had training and experience in identifying synthetic marijuana, it contains no non-conclusory factual allegations suggesting the presence of at least one other indicia of criminality. There is no description - only a conclusory allegation - regarding the nature of the packaging.

People v. Jerome Parsons
(App. Term, 1st Dept., 10/16/20)

* * *

POSSESSION OF DRUGS - Identity Of Substance/Sufficiency Of Allegations

The Appellate Term, under the reasonable cause standard, finds facially insufficient a charge of criminal possession of a controlled substance in the seventh degree where the detective identified the drug and stated his familiarity with and training regarding the identification of that drug, but there was no additional information as to why he concluded that the substance was crack-cocaine residue. There was no description of the appearance of the crack-cocaine residue, of its placement in a glass pipe or some other commonly used apparatus for consuming crack-cocaine, or of packaging commonly used for crack-cocaine, such as a plastic twist or ziplock bag.

People v. Gail Sprull
(App. Term, 2d Dept., 2d, 11th & 13th Jud. Dist., 10/30/20)

* * *

POSSESSION OF A WEAPON - Constructive Possession

The Fourth Department finds that the jury's gun possession verdict is against the weight of the evidence where the driver owned both the vehicle and the duffle bag that was in the locked trunk and contained the gun; the People, who did not rely on the automobile presumption, relied on evidence that defendant's DNA profile matched that of the major contributor to DNA found on the handgun and that the driver was excluded as a contributor, but, although an inference could be made that defendant had physically possessed the gun at some point, that evidence alone does not establish that he possessed the gun at the time alleged in the indictment; and that even if defendant's statement to the police constituted an admission that he knew about the gun's presence in the duffle bag, mere knowledge would not establish constructive possession.

People v. Gerald Hunt
(4th Dept., 7/24/20)

* * *

POSSESSION OF A WEAPON - Constructive Possession

The Second Department concludes that defendant's convictions for criminal possession of a firearm, and possession or disposition of an unpermitted rifle or shotgun, were against the weight of the evidence where defendant resided in the third bedroom of the searched premises and his brother had resided in the first bedroom up until his death; after the brother passed away, the door to the first bedroom was locked and remained locked, and there was no evidence that defendant frequented, had a key to, or kept his belongings in that room; although police witnesses could not recall any damage to the door to the first bedroom, the defense introduced a photograph depicting damage to the door and frame after the search; although the officers recovered a magazine containing seven 9 millimeter cartridges from defendant's bedroom, it was not the correct magazine for the pistol recovered from the first bedroom and had to be manipulated in order to function properly with the pistol; and, apart from the magazine, there was no evidence connecting defendant to the first bedroom or the weapons found therein.

People v. Steven Branch
(2d Dept., 9/30/20)

Sex Crimes

SEXUAL ABUSE - Sexual Gratification Element
IDENTIFICATION - Sufficiency Of Evidence
APPEAL - Weight Of The Evidence Review

Defendant's conviction for sexual abuse in the first degree was related to the forcible grabbing of the complainant's buttocks while she was near her home, and his conviction for criminal obstruction of breathing or blood circulation was related to the impediment of the complainant's breathing during commission of sexual abuse in the first degree. Defendant's conviction for sexual abuse in the third degree was related to the alleged sexual touching of the complainant's

buttocks in a laundromat without her consent.

The Second Department finds legally insufficient evidence of sexual abuse in the third degree where the Court's viewing of the video recording taken inside a laundromat did not establish that the contact between defendant and the complainant as he was exiting the laundromat was of a sexual nature. The complainant's testimony did not demonstrate that the touch was not merely a consequence of defendant passing her on the way out of the laundromat. Although the People argue that defendant deliberately stroked the complainant's buttocks from bottom to top as he passed her, the People failed to demonstrate that the touching was for the purpose of gratifying defendant's or the complainant's sexual desire.

The verdict of guilt on the remaining counts was against the weight of the evidence. The descriptions of the assailant given by the complainant and the detectives varied greatly and were contrary to defendant's actual appearance and physique. The complainant was never asked to make an in-court identification, nor did she identify defendant as her assailant while she was in the laundromat speaking to a detective shortly after the incident even though defendant was known to her.

People v. Richard Kassebaum
(2d Dept., 10/7/20)

* * *

RAPE - Attempts
CRIMINAL SEXUAL ACT
ENDANGERING THE WELFARE OF A CHILD

The Third Department finds legally insufficient evidence of attempted rape in the second degree, attempted criminal sexual act in the second degree, and attempted endangering the welfare of a child where, during an undercover operation, an investigator posted an advertisement on Craigslist stating that a 41-year-old man and his female "friend" were a "loving couple" looking for a male to join them for "some alternative/taboo fun"; defendant, who was in his thirties, responded and thereafter engaged in a series of emails and text messages with undercover investigators, during which the investigators revealed that the "couple" was a stepfather and his 14-year-old stepdaughter; the email and text conversations, as well as a phone call between defendant and one of the undercover investigators, ultimately led to defendant arriving at a "campsite" where he met and conversed with an investigator posing as the stepfather; during that conversation, the investigator indicated the type of sexual conduct defendant could engage in with the fictitious stepdaughter, including giving and receiving oral sex; the investigator asked defendant if he brought a condom and, upon learning that defendant had not, stated that defendant could not ejaculate in the stepdaughter; defendant was not "definitive about what he wanted to do" and gave only passive responses to the investigator's statements; and, even though defendant expressed enthusiasm when asked if he wanted to meet the stepdaughter, when the investigator pretended to summon her, just prior to defendant's arrest, defendant got up from his seat and walked away.

Defendant's conduct did not pass the stage of mere preparation and bring him dangerously close to committing the crimes. Moreover, intent cannot be inferred from the evidence, particularly given defendant's passive and noncommittal statements when discussing potential contact with the 14-year-old stepdaughter, and the fact that defendant did not bring a condom or any other sexual item to the campsite.

People v. Adam Hiedeman
(3d Dept., 12/24/20)

* * *

SEX OFFENDER REGISTRATION ACT

The Second Department concludes that defendant has failed to demonstrate that, as applied to juvenile offenders who were prosecuted and convicted as adults, SORA's mandatory lifetime registration is punitive, let alone that it constitutes cruel and unusual punishment or that it is not rationally related to a legitimate governmental purpose and therefore deprives him of substantive due process.

People v. David Putland
(2d Dept., 10/21/20)

Disposition/Dismissal In Furtherance Of Justice

ADJOURNMENT IN CONTEMPLATION OF DISMISSAL
DISPOSITION - Least Restrictive Alternative

Respondent, ten years old at the time of the incident, was charged with touching the vagina of the then four-year-old complainant over the complainant's clothing with his hand, while he was sitting next to her at a playground. Respondent made an admission to sexual abuse in the second degree. At a dispositional hearing, respondent asked for an adjournment in contemplation of dismissal. The court denied the application and issued an order of disposition which adjudicated respondent a juvenile delinquent and placed him on probation for a period of 12 months.

The Second Department reverses, and remits the matter to the family court for the entry of an order granting an adjournment in contemplation of dismissal nunc pro tunc to the date of disposition. The Court notes that this was respondent's first contact with the court system; he took responsibility for his actions and expressed remorse; he voluntarily participated in counseling and maintained a strong academic and school attendance record.

Matter of Maximo M.
(2d Dept., 6/17/20)

* * *

SENTENCE - Juveniles

Defendant pled guilty to attempted murder in the second degree and robbery in the first degree and was sentenced to 14 years in prison followed by 5 years of post-release supervision.

The First Department reduces defendant's prison sentence to 10 years to match the sentences received by two co-defendants, noting, inter alia, that defendant has suffered intellectual and mental deficiencies since childhood; that prior to the incident, defendant had no felony or misdemeanor convictions and only one youthful offender adjudication stemming from a school fight, and for the first 19 years of his life, defendant exhibited no inclination towards committing crime, let alone violent crime; that it appears that a co-defendant was an outsize influence on defendant and his role in the attacks, and, since defendant was 19 at the time of the incident and had cognitive deficiencies, was even more susceptible to negative influences; that the Court "ha[s] long held that a defendant's young age may render the individual less culpable"; and that according to research cited by defendant, people with serious psychiatric disorders are more likely to be violently victimized and housed in segregation while incarcerated, and an extended term of incarceration would have an extremely harsh impact on defendant.

People v. Kevon Watt
(1st Dept., 12/22/20)

* * *

YOUTHFUL OFFENDERS

The Fourth Department, finding sufficient mitigating circumstances, agrees with defendant that she should be afforded youthful offender status in connection with her plea of guilty to the armed felony of assault in the second degree.

Faced with the threat of a violent attack in her school, defendant had few options - none of them good - and, although her decision to carry a knife in order to protect herself was the wrong choice, it cannot be said that her use of the knife was the act of a hardened criminal rather than a hasty or thoughtless act

Defendant took full advantage of the available educational opportunities while she was incarcerated, obtaining her diploma, participating in vocational programs, earning the certificates related to those programs, making frequent use of the jail's library, and earning acceptance into a college that she wished to attend upon her release.

Defendant had no prior criminal convictions. Although she had been charged with felonies related to shoplifting incidents, those charges were dismissed as satisfied by the guilty plea. There is only one alleged prior act of violence documented in the record. Defendant fought a store clerk who tried to stop her from shoplifting. Although that act was characterized, likely by the prosecution, as defendant having "punched" the store clerk and "slammed" her head into the

ground, that characterization is called into question by the fact that the clerk was uninjured and defendant was not charged with assault. In any event, such an act, according to the evaluation by the forensic psychologist, is out of character for defendant, and there was evidence of defendant's reputation for avoiding violence.

Defendant pleaded guilty and took responsibility for her actions and had already been performing community service to atone for the pending charges. The record supports the court's finding that defendant "now" displays respect for the law. The general consensus is that defendant was successfully rehabilitated by the day of her sentencing.

In the future, courts should consider whether a defendant may be facing discrimination based on protected characteristics such as race or gender, and consider the combined effect of the defendant's specific characteristics and any bias that may arise therefrom. For example, prosecutors are far less likely to exercise their discretion to dismiss in cases against black girls, such as defendant, than they are in cases against white girls.

People v. Z.H.
(4th Dept., 12/23/20)

* * *

ADJOURNMENT IN CONTEMPLATION OF DISMISSAL

Respondent, 14 years old at the time of arrest, was charged with, inter alia, sexual abuse in the first degree. The fact-finding hearing commenced on January 31, 2020. On July 29, 2020, respondent's attorney filed a motion seeking dismissal of the petition in the interest of justice under FCA § 315.2, or an adjournment in contemplation of dismissal under FCA § 315.3.

The Court denies the motion to dismiss, but grants a supervised ACD conditioned on regular school attendance, compliance with a final order of protection on behalf of the complainant, no further arrests, and participation in an appropriate counseling or therapeutic program.

The Court cites respondent's stable home life and family support; his school attendance; his compliance with a temporary order of protection; his age at the time of the alleged incident; the lack of any history of drug or alcohol use or gang affiliation; and the lack of any prior history with the police and juvenile justice system and the fact that he has stayed out of trouble for the past 19 months.

Matter of Keyon C.
(Fam. Ct., Bronx Co., 9/2/20)
http://nycourts.gov/reporter/3dseries/2020/2020_51249.htm

* * *

ADJOURNMENT IN CONTEMPLATION OF DISMISSAL

DISPOSITION - Least Restrictive Alternative

The Second Department reverses an order of fact-finding and disposition, made upon respondent's admission to criminal mischief in the fourth degree (damaging parked vehicles), that adjudicated him a juvenile delinquent, placed him on probation for a period of 12 months, and directed restitution. The Court remits the matter for entry of an order adjourning the matter in contemplation of dismissal on condition that respondent pay restitution in the sum of $750 within six months of the date of the ACD order.

This was respondent's first contact with the court system. He took responsibility for his actions, and the record demonstrates that he had learned from his mistakes.

Matter of Brian M.
(2d Dept., 7/8/20)

* * *

SENTENCE - Violations/Hearsay Evidence

In this release revocation proceeding, the Eighth Circuit U.S. Court of Appeals finds a due process violation where defendant was denied an opportunity to confront the key witness against him, his former partner, whose body camera-recorded statement to the police was admitted.

The Government must provide a reasonably satisfactory explanation for not producing a witness in a revocation proceeding. Here, a single failed attempt to subpoena the witness does not constitute a reasonably satisfactory explanation. Even if the Court credits the Government's claim that the witness may have feared defendant, it did not stop her from making a statement to the police.

The Government has also failed to show that the statement was inherently reliable. The district court found it reliable because it was preceded by a 911 call, it was made to the police, and there was no evidence of a motive to lie. However, the only arguably corroborating evidence is the 911 hang up call and the witness's injuries, but neither points to defendant as the assailant. The evidence shows that the witness had an adversarial relationship with defendant and wanted to have him sent to jail, and she has a prior conviction for lying to the police.

United States v. Timmons
2020 WL 873422 (8th Cir., 2/24/20)

* * *

DISPOSITION - Probation/Violations

The First Department reverses an order that, at the conclusion of a violation of probation

proceeding, adjudicated respondent a juvenile delinquent and placed her on probation for three months, but also continued the original order of disposition which adjudicated respondent a juvenile delinquent and placed her on probation for a period of 12 months.

Under FCA § 360.3(6), the court shall dismiss the violation petition if it continues the order of probation. Thus, the new adjudication of delinquency and period of probation was not authorized by law.

In re Jaquiya F.
(1st Dept., 1/21/20)

* * *

PRISONERS RIGHTS - Health Care
SENTENCE - Eighth Amendment

Petitioner commenced this habeas proceeding on behalf of Jalil Muntaqim, a 68-year-old black inmate at Sullivan Correctional Facility who is serving concurrent prison sentences of 25 years to life following his 1975 conviction of murder (two counts). Petitioner alleges that Muntaqim's age, race and underlying medical conditions left him in significant danger of serious illness and death if infected with SARS-CoV-2. Petitioner argued that, because the risk of infection was high in the close quarters of SCF, and Department of Corrections and Community Services officials were failing to protect Muntaqim from that risk, his continued detention there amounted to cruel and unusual and excessive punishment. Respondents moved to dismiss the petition for failure to state a cause of action and failure to exhaust administrative remedies. The Supreme Court ruled that, although DOCCS had "done nothing wrong," DOCCS was not in a position to address the health risks, and directed Muntaqim's "immediate emergency release" to a private residence, where he would "continue to serve his sentence" and do so "under the jurisdiction of [DOCCS]."

The Third Department first notes that although Muntaqim has become infected and is currently hospitalized with COVID-19, there is a lack of clarity as to what DOCCS plans for him if he recovers, and thus the appeal is not moot. In any event, the exception to the mootness doctrine applies.

Regarding the merits, the Court declines to decide habeas corpus lies to challenge the conditions of confinement for individuals in Muntaqim's position, finding that petitioner failed to meet her burden to show that detention at SCF is illegal. Petitioner arguably established that Muntaqim was incarcerated under conditions posing a substantial risk of serious harm, but has not shown deliberate indifference on the part of prison officials. Respondents have detailed the steps taken to prevent the introduction of the novel coronavirus into the facility and reduce the risks of potential transmission.

To the extent that the Court may consider subsequent developments, they do not compel a

different result. The spread of the novel coronavirus at SCF, and Muntaqim's infection and hospitalization, prove a substantial risk of serious harm to inmates. But prison officials took a variety of steps to address the deteriorating situation at SCF. Deliberate indifference means more than being caught flat footed, or even negligent. A failure to properly alleviate a significant risk that DOCCS officials should have perceived but did not, while no cause for commendation, is not the infliction of unconstitutional punishment.

The Court, noting that it is doubtful that a lawful sentence can become grossly disproportionate as a result of changed prison or inmate medical conditions, rejects in any event petitioner's contention that Muntaqim's sentence became grossly excessive due to the risks created by the ongoing pandemic.

People ex rel. Carroll v. Keyser
(3d Dept., 6/4/20)

* * *

SENTENCE - COVID-19-Related Relief

The Supreme Judicial Court of Massachusetts holds that the denial by a single justice of the Appeals Court of a motion to stay execution of a sentence pending appeal before the Governor declared a state of emergency arising from the COVID-19 pandemic did not require a Superior Court judge to deny a subsequent motion to stay brought after the declaration.

The health risks to a person in custody caused by the pandemic constitute changed circumstances that require de novo review of the motion to stay. In conducting that de novo review, a judge must give careful consideration not only to the risks posed by releasing the defendant - flight, danger to others or to the community, and likelihood of further criminal acts - but also, during this pandemic, to the risk that the defendant might die or become seriously ill if kept in custody. It is also important that the judge give careful consideration to the circumstances under which defendant would quarantine if he were to be released.

Christie v. Commonwealth
2020 WL 1545877 (Mass., 4/1/20)

* * *

DETENTION - COVID-19-Related Relief
PRISONERS RIGHTS

Petitioners, 32 inmates at the Rikers Island prison, have demanded release. Each petitioner faces one or more charges in New York County. Many are incarcerated pending hearings on alleged parole violations. Petitioners contend that they are particularly vulnerable to serious injury and death should they contract the COVID-19 disease. And they assert that prisoners at Rikers are

dangerously likely to contract it, to the point that continued confinement there violates their due process rights under the federal and state constitutions.

The Court grants release to 18 petitioners. COVID-19 is at large at Rikers Island, and its presence equates to an unsafe, life-threatening condition endangering reasonable safety. Respondents have not satisfied the constitutional mandate by taking reasonable care to mitigate the risk of the disease. Due process does not excuse prison officials who mean well, but have no effective way to protect inmates from potentially fatal epidemics. Experts agree that certain pre-existing conditions are aggravators, and 18 petitioners are afflicted with conditions such as heart disease, serious respiratory conditions, cancer, diabetes, and uncontrolled HIV. For others, the petition has been denied. Some of the inmates are between 50 and 60 years old, and have nothing beyond that to suggest that they are in more danger than the average inmate.

The claims of these petitioners, and hundreds of other inmates who believe they are in immediate danger, deserve to be treated as emergency questions for courts and other officials who can grant release. The Court does not believe that release can be denied even to those charged with violent crimes if they are at substantial risk of death or other serious physical injury. Such inmates have the same due process rights as others.

Release is temporary, and the Court has imposed restrictions on release suggested by the government. For some petitioners, home confinement except for visits to mental health services has been directed.

People ex rel. Stoughton v. Jeffrey et al.
(Sup. Ct., N.Y. Co., 4/6/20)
http://nycourts.gov/reporter/3dseries/2020/2020_20081.htm

* * *

SENTENCE - Modification/Court's Legal Error

The Court pronounced consecutive and concurrent prison terms that aggregated to 35 years, expecting that sentence to be reduced by the Penal Law's sentence cap provisions to 30 years. It now appears that the Court has imposed an effective sentence of 25 years. The People ask the Court to resentence defendant in a manner that would result in an effective prison term closer to what the Court intended. Defendant argues that the current sentence is a legal one, and that a resentencing at this point is impermissible under CPL § 430.10, which provides that "[e]xcept as otherwise specifically authorized by law, when the court has imposed a sentence of imprisonment and such sentence is in accordance with law, such sentence may not be changed, suspended or interrupted once the term or the period of the sentence has commenced."

The Court denies the People's request. As noted in *People v. Richardson* (100 N.Y.2d 847), trial courts have inherent authority to correct "clerical" mistakes and otherwise to "conform the record to the truth," and may correct an erroneous departure from the agreed-upon and expected

sentence after a guilty plea. But a failure to state that a prison term imposed after trial will be consecutive, resulting by law in its being concurrent, may not be corrected.

Here, the Court's mistake is not a clerical error, or an inadvertent misstatement. If, under Richardson, a failure to pronounce whether terms are consecutive or concurrent cannot be remedied after the fact, an express statement along those lines should not be subject to reversal.

People v. Abdul Davis
(Sup. Ct., N.Y. Co., 11/23/20)
http://nycourts.gov/reporter/3dseries/2020/2020_20308.htm

* * *

DETENTION - COVID-19-Related Relief
PRISONERS RIGHTS

Petitioners bring the Supreme Judicial Court of Massachusetts's focus to the situation with respect to COVID-19 confronting individuals who are detained in jails and houses of correction pending trial, and individuals who have been convicted and are serving a sentence of incarceration in the Commonwealth. To allow the physical separation of individuals recommended by the CDC, petitioners seek the release to the community of as many individuals as possible as expeditiously as possible.

The Court concludes that to decrease exposure to COVID-19 within correctional institutions, any individual who is not being held without bail, and who has not been charged with an excluded offense (i.e., a violent or serious offense enumerated in Appendix A to the Court's opinion) is entitled to a rebuttable presumption of release. The individual shall be ordered released pending trial on his or her own recognizance, without surety, unless an unreasonable danger to the community would result, or the individual presents a very high risk of flight. The special master previously appointed by this court in conjunction with this case will work at the county level with each relevant court to facilitate these hearings.

However, with respect to those individuals who are currently serving sentences of incarceration, absent a finding of a constitutional violation the Court's superintendence power is limited. Where there is no constitutional violation, the Massachusetts Declaration of Rights precludes the judiciary from using its authority to revise and revoke sentences in a manner that would usurp the authority of the executive branch.

But "[t]o afford relief to as many incarcerated individuals as possible, the DOC and the parole board are urged to work with the special master to expedite parole hearings, to expedite the issuance of parole permits to those who have been granted parole, to determine which individuals nearing completion of their sentences could be released on time served, and to identify other classes of inmates who might be able to be released by agreement of the parties, as well as expediting petitions for compassionate release."

"As the petitioners have argued, and the respondents agree, if the virus becomes widespread within correctional facilities in the Commonwealth, there could be questions of violations of the Eighth and Fourteenth Amendments to the United States Constitution and art. 26 of the Massachusetts Declaration of Rights; nonetheless, at this time, the petitioners themselves clarified in their reply brief and at oral argument that they are not raising such claims."

Committee for Public Counsel Services v. Chief Justice of the Trial Court
2020 WL 1659939 (Mass., 4/3/20)

Appeals

APPEAL - Scope Of Review/Appellate Division

Defendant moved to suppress evidence found inside a suitcase that he was carrying at the time of his arrest, relying on People v Gokey (60 N.Y.2d 309) and arguing that exigent circumstances were needed to justify the warrantless search. The hearing court determined that Gokey did not apply and thus made no findings regarding exigent circumstances. The Appellate Division affirmed, determining that Gokey did apply and that exigent circumstances - the protection of evidence or the safety of the police or the public - justified the search.

The Court of Appeals reverses and remits to the hearing court. The Appellate Division did not err in determining that Gokey was applicable, which was the only reviewable issue before it. Because the suppression court did not rule on exigent circumstances, that issue was not decided adversely to defendant and could not be invoked by the Appellate Division.

People v. Willie Harris
(Ct. App., 6/9/20)

* * *

APPEAL - Scope Of Review/Suppression Rulings

Criminal Procedure Law § 710.70(2) grants a defendant the right to review of a suppression order "upon an appeal from an ensuing judgment of conviction notwithstanding the fact that such judgment is entered upon a plea of guilty." The Court of Appeals holds that this provision grants a defendant the right to review of a suppression decision when the order related exclusively to a count that was satisfied by a guilty plea, but not a count to which the defendant pleaded guilty.

In using the word "ensuing," the legislature chose the broadest of relational terms to convey the connection between the suppression order and the judgment of conviction. If the legislature had intended to limit appellate review to suppression orders specifically pertaining to the evidence underlying the count to which the defendant pleaded guilty, it easily could have said so. A contrary conclusion would insulate erroneous decisions from review and could lead to a

proliferation of unreviewable legal errors at the trial level.

The People, as part of a plea offer, could obtain a concession from the defendant that the denial of the suppression motion did not influence the defendant's decision to plead guilty, or may negotiate a waiver of the defendant's right to appeal with regard to the denial of the motion to suppress.

People v. David Holz
(Ct. App., 5/7/20)

* * *

APPEAL - Waiver Of Right

The Second Department concludes that defendant's purported waiver of the right to appeal is unenforceable because it was the court itself, as opposed to the People, that insisted upon the waiver, without setting forth any reason for doing so, and because defendant received no discernible benefit in exchange.

The Court notes, inter alia, that this case involves a resolution predicated upon defendant's plea to an unreduced charge and defendant's understanding as to the court's anticipated sentence; that trial courts' effectiveness in safeguarding the integrity of the appeal waiver process may be compromised when the court itself has initiated the process; and that there may be circumstances where the trial court has a legitimate interest in conditioning its acceptance of a plea and determination of a sentence upon an appeal waiver the prosecution has not requested, but the court should articulate on the record its reasons for doing so in order to dispel any concern that the court's demand is solely a means of avoiding appellate review.

People v. Darrius Sutton
(2d Dept., 6/17/20)

* * *

APPEAL - Waiver Of Right

The Second Department finds no valid waiver of defendant's right to appeal where the court, after describing the function of an appellate court, stated that "[w]hat all this means, though, is that this plea and the sentence I am going to impose are final and that higher court will not have a chance to review it"; the court did not include clarifying language indicating that appellate review remained available for certain issues or that the right to take an appeal was retained; and, although defendant had prior experience with the criminal justice system, he was only 19 years old at the time of the plea and sentence, and had not completed high school.

People v. Christopher B.

(2d Dept., 6/10/20)

* * *

APPEAL - Preservation

Upon appeal from defendant's conviction and the denial of his CPL § 440.10 motion, the First Department concludes that defendant did not preserve any claim relating to cell site location information obtained without a warrant, and was properly barred from raising the issue by way of a post-conviction motion.

Although the Supreme Court had not yet decided *Carpenter v. United States* (138 S.Ct. 2206) until after defendant's direct appeal was pending, defendant had an opportunity to advocate for a change in the law at the trial level. The Court of Appeals has rejected the argument that an appellant should not be penalized for his failure to anticipate "the shape of things to come."

People v. Michael Crum
(1st Dept., 6/11/20)

* * *

APPEAL - Harmless Error

The Third Department concludes that even assuming, without deciding, that the search warrant application directed to defendant's cell phone provider was not supported by probable cause, any error in admitting cell phone location data was harmless.

Two concurring judges, who do not find overwhelming evidence of guilt, assert that "this unusual case calls out for either a clarification of the governing law or an expansion of our current test for harmless error that, in appropriate circumstances, might allow a multifactorial analysis, such that the clear harmlessness of an error might be weighed in conjunction with the quantum of the other proof of a defendant's guilt, rather than entirely disregarded solely because the proof was not otherwise overwhelming." The Court of Appeals' exemption for errors of "sheerest technicality" applies here even though the error, considered in the abstract, is admittedly difficult to categorize as a technical error.

A dissenting judge asserts that because the evidence provided a scientific basis upon which the jury could decide that the People's witnesses were worthy of belief and defendant's alibi witnesses were not, the error was not harmless.

People v. Alex Perez
(3d Dept., 5/7/20)

PINS

PINS - Right To Counsel/Effective Assistance

In this PINS proceeding, the Third Department rejects respondent's claim of ineffective assistance of counsel.

Given the evidence of respondent's absences, tardiness and school disciplinary referrals, it was a reasonable strategy to have respondent admit the allegations of the petition, which demonstrated some acceptance of responsibility. At the dispositional hearing, counsel argued that, although respondent should be placed outside of his mother's home, he should be placed with his grandparents. Although counsel called no witnesses at the dispositional hearing, petitioner had not called any witnesses and counsel may have made a reasoned choice not to expose the grandparents to cross-examination.

Matter of Skylar DD.
(3d Dept., 5/7/20)