JUVENILE DELINQUENCY AND PINS CASELAW/LEGISLATIVE UPDATE

Prepared by: Gary Solomon
The Legal Aid Society Juvenile Rights Practice
Current through March 3, 2020

I. NEW LEGISLATION AND ADMINISTRATIVE DIRECTIVES

Capacity To Proceed In Juvenile Delinquency Proceedings

Chapter 602 of the Laws of 2019, which takes 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.

Probation Adjustment in Delinquency Proceedings

Chapter 310 of the Laws of 2019 amends Family Court Act § 308.1(8) to remove the admonition that probation may not prevent any person who wishes to request that a petition be filed from having access to the presentment agency for that purpose, and to state instead that probation shall

consider the views of the complainant and the impact of the alleged act or acts of juvenile delinquency upon the complainant and upon the community in determining whether adjustment would be suitable.
Chapter 310 amends FCA § 308.1(9) to allow efforts at adjustment to extend for a period of up to three months (rather than two) without leave of court.
Chapter 310 amends FCA § 320.6(2) to provide that the court may refer a case to the probation service for adjustment services not only at the initial appearance, but also at any other subsequent appearance; that the consent of the victim or complainant is no longer required; and that the probation service shall consider the views of the complainant and the impact of the alleged act or acts of juvenile delinquency upon the complainant and upon the community in determining whether adjustment would be suitable.
Chapter 310 takes effect on December 12, 2019.

PERSONS IN NEED OF SUPERVISION: PLACEMENT/DETENTION
Chapter 56 of the Laws of 2019, Part K, contains significant amendments to FCA Article Seven. Part K took effect January 1, 2020, and applies to the pre-dispositional placement of youth pursuant to PINS petitions filed on or after that date.
Pre-Dispositional Placement
Part K amends FCA § 712 (Definitions) by deleting Detention," "Secure detention facility," and "Non secure detention facility," and adding "Pre-dispositional placement" (temporary care and maintenance away from home pursuant to FCA § 720).
FCA § 720 (re-titled from "Detention" to "Pre-dispositional placement") now precludes detention in a non-secure facility, FCA § 720(2), and permits pre-dispositional placement in a foster care program certified by the OCFS or in a certified or approved family boarding home, and now authorizes such placement in a short-term safe house in accordance with FCA § 739. FCA § 720(3).
FCA § 720(4)(a) now states that before directing pre-dispositional placement, the court must determine and state in its written order that pre-dispositional placement is in the best interest of the respondent and that it would be contrary to the welfare of the respondent to continue in his/her own home; and states that pre-dispositional placement may not be ordered when the sole basis for the petition is an allegation pursuant to § 712(a)(i) (unlawful failure to attend school).
Various other provisions in FCA Article Seven are amended to include a reference to pre-dispositional placement or placement rather than detention. This includes § 712(g) (definition of diversion services); § 728 (Discharge, release or pre-dispositional placement by judge after hearing and before filing of petition in custody cases); § 735 (Preliminary procedure: diversion services); § 739 (Release, pre-dispositional placement or referral after filing of petition and prior to order of disposition); § 747 (Time of fact-finding hearing); § 748 (Adjournment of fact-finding hearing); § 749 (Adjournment after fact-finding hearing or during dispositional hearing); and § 754 (Disposition on adjudication of person in need of supervision). FCA § 727 (Rules of court authorizing release before filing of petition) and § 729 (Duration of detention before filing of petition or hearing) are repealed.
FCA § 735 (Preliminary procedure: diversion services) now requires that the designated lead agency assess whether a youth is a sexually exploited child as defined in SSL § 447-a and, if so,

whether such youth should be referred to a safe house in accordance with FCA § 739.

Dispositional Placement

FCA 756(b) now states that where the child is placed with the commissioner of the local social services district, the child may be placed by the district into a foster boarding home, or, if the court finds that the respondent is a sexually exploited child as defined in SSL § 447-a, an available long-term safe house; the court still may direct the commissioner to place the child with an authorized agency or class of authorized agencies.

Under FCA § 756(c), placement shall not be ordered with the commissioner where the only finding is that the respondent meets the definition of a person in need of supervision as per FCA § 712(a)(i) (unlawful failure to attend school); or unless the court finds and states in its written order that the placement of the respondent is in the best interest of the respondent, and that it would be contrary to the welfare of the respondent to continue in his/her own home.

Under FCA § 756(e), initial placements with the commissioner may be for an initial period of no greater than sixty days. There is no credit for time spent in pre-dispositional placement.

Extensions of Placement/Permanency Hearing

FCA § 756-a(a) now states that a petition to extend placement with the commissioner shall be filed at least fifteen days prior to the expiration of the initial placement and at least thirty days prior to the expiration of the period of any additional placement (as before, except for good cause shown and in no event after the original expiration date).

Under § 756-a(d)(i), one extension may be ordered at the conclusion of the first permanency hearing for not more than six months (rather than one year). Under § 756-a(d)(ii), at the conclusion of the second permanency hearing, the court may, in its discretion, order one extension of placement for not more than four months, unless: the attorney for the child, at the request of the child, seeks an additional length of stay for the child in such program, in which case the court shall determine whether to grant such request based on the best interest of the child; or the court finds that extenuating circumstances exists that necessitate the child be placed out of the home. Under § 756-a(f), temporary orders extending placement no longer have time limits.

Restitution Orders

Under FCA § 758-a(1), restitution may be recommended as a condition of placement, or ordered as a condition of probation or a suspended judgment, in cases involving acts committed by a child over 12 and less than 18 years of age (rather than over 10 and less than 16); in placement cases (rather than just in probation and suspended judgment cases), the court may specify the amount and manner of payment.

Family Support Services Programs

Part K adds new Title 12 to the Social Services Law - §§ 458-m (Family support services programs) and 458-n (Funding for family support services programs).

A "family support services program" is "a program established pursuant to this title to provide community-based supportive services to children and families with the goal of preventing a child from being adjudicated a person in need of supervision and help prevent the out of home placements of such youth or preventing a petition from being filed under article seven of the family court act." "Family support services programs shall provide comprehensive services to such children and their families, either directly or through referrals with partner agencies, including, but not limited to:

(a) rapid family assessments and screenings;
(b) crisis intervention;
(c) family mediation and skills building;
(d) mental and behavioral health services including cognitive interventions;
(e) case management;
(f) respite services;
(g) education advocacy; and
(h) other family support services.
The services shall be trauma responsive, family focused, gender-responsive, and evidence based or informed and strengths based and shall be tailored to the individualized needs of the child and family based on the assessments and screenings conducted by such family support services program. Family support services programs shall have the capacity to serve families outside of regular business hours including evenings and weekends.

Adolescent And Juvenile Offenders: Removal To Family Court

Chapter 240 of the Laws of 2019 amends Criminal Procedure Law §§ 722.20(1) (juvenile offenders) and 722.21(1) (adolescent offenders) to provide that accessible magistrates are authorized to remove a case to the family court immediately at the initial appearance with the consent of the district attorney.
Chapter 240 has taken effect.

Criminal Discovery: New CPL Article 245, and Subpoena Practice

Chapter 59 of the Laws of 2019, Part LLL creates a new Criminal Procedure Law Article 245, which took effect January 1, 2020. It is certainly possible that there will be legislation enacted that provides at least equivalent protections in juvenile delinquency proceedings, with modifications taking account of procedural differences in JD proceedings. In the event that there is no legislation that takes effect by January 1, 2020, defense counsel in JD proceedings should be prepared to argue that constitutional equal protection principles require Family Court judges to apply, as appropriate, the requirements in CPL Article 245. *See Matter of Albert B.*, 79 A.D.2d 251 (2d Dept. 1981); *Matter of Steven B.*, 30 A.D.2d 442 (1st Dept. 1968); *cf. Matter of James H.*, 34 N.Y.2d 814 (1974).
Also effective January 1, 2020, Part LLL of Chapter 59 amends Criminal Procedure Law § 610.20(3) to provide that a subpoena duces tecum of the court issued by defense counsel and directed to a department, bureau or agency of the state or of a political subdivision thereof, or to any officer or representative thereof, is not subject to the notice of motion requirement in CPLR § 2307 if the subpoena is indorsed by the court and provides at least three days for the production of the requested materials. In the case of an emergency, the court may by order dispense with the three-day production period. Under new CPL § 610.20(4), the showing required is that the testimony or evidence sought is reasonably likely to be relevant and material to the proceedings, and the subpoena is not overbroad or unreasonably burdensome.

Marihuana Offenses, Motions To Vacate, Sealing And Expungement

Chapters 131 and 132 (Chapter amendment) of the Laws of 2019, effective August 28, 2019, amend the Penal Law, the Criminal Procedure Law and the Public Health Law.

Penal Law Marihuana Offenses

Penal Law § 221.05 is amended to change the violation-level offense from Unlawful possession of marihuana to Unlawful possession of marihuana in the second degree; to reduce the potential fine from $100 to $50; and to eliminate the possibility of a higher fine based on previous convictions.

Penal Law § 221.10 is amended to change the class B misdemeanor offense of Criminal possession of marihuana in the fifth degree to the violation-level offense of Unlawful possession of marihuana in the first degree, punishable only by a fine of not more than $200. The subdivision referring to possession in a public place has been eliminated, and the aggregate weight requirement has been raised from more than twenty five grams to one ounce.

The definition of "smoking" in Public Health Law § 1399-n(8), which is part of PHL Article 13–E (Regulation of Smoking and Vaping in Certain Public Areas), is amended to include marihuana.

Motion To Vacate Judgment of Conviction

New CPL § 440.10(1)(k) allows the court to vacate a judgment of conviction when the judgment occurred prior to the effective date of this paragraph and is a conviction for a marihuana offense defined in CPL § 160.50(3)(k), in which case the court shall presume that a conviction by plea for the aforementioned offenses was not knowing, voluntary and intelligent if it has severe or ongoing consequences, including but not limited to potential or actual immigration consequences, and shall presume that a conviction by verdict for the aforementioned offenses constitutes cruel and unusual punishment under § 5 of Article 1 of the State Constitution, based on those consequences. The people may rebut these presumptions.

Sealing And Expungement

Criminal Procedure Law § 160.50(3)(k) is amended to, inter alia, include, within the scope of proceedings considered terminated in favor of accused, cases in which a conviction is for a violation of PL § 221.05 or § 221.10, or for a violation of the pre-amendment version of PL § 221.05 or § 221.10, and to eliminate the requirement that at least three years have passed since the offense occurred. In addition, no defendant shall be required or permitted to waive eligibility for sealing or expungement as part of a plea of guilty, sentence or any agreement related to a conviction for a violation of PL § 221.05 or § 221.10, and any such waiver shall be deemed void and wholly unenforceable.

New CPL § 160.50(5) (Expungement of certain marihuana-related records) states that a conviction for an offense described in § 160.50(3)(k) shall, on or after effective date of this paragraph, be vacated and dismissed. All records of and related to such conviction or convictions shall be expunged, and the matter shall be considered terminated in favor of the accused and deemed a nullity, having been rendered legally invalid. All such records where the conviction was entered on or before the effective date of the amendment shall be expunged promptly and, in any event, no later than one year after such effective date.

Under new Criminal Procedure Law § 1.20(45), "Expunge" means that where an arrest and any enforcement activity connected with that arrest, including prosecution and any disposition in any New York state court, is deemed a nullity and the accused is restored, in contemplation of the

law, to the status such individual occupied before the arrest, prosecution and/or disposition, records of such arrest, prosecution and/or disposition shall be marked as expunged or shall be destroyed as set forth in CPL § 160.50. Neither the arrest nor prosecution and/or disposition, if any, of a matter deemed a nullity shall operate as a disqualification of the accused to pursue or engage in any lawful activity, occupation, profession or calling. Except where specifically required or permitted by statute or upon specific authorization of a superior court, no such person shall be required to divulge information pertaining to the arrest, prosecution and/or disposition of such a matter.

CPL § 160.50(5) also governs notification of appropriate agencies by the chief administrator of the courts when records must be expunged, and compliance with the statute. Records shall be marked as expunged by conspicuously indicating on the face of the record and on each page, or at the beginning of the digitized file of the record, that the record has been designated as expunged. Upon the written request of the defendant or his/her designated agent, the records shall be destroyed, and records and papers shall not be made available to any person except the defendant or his/her designated agent. Where a record has not been updated in accordance with the statute, all references to a conviction for an offense described in CPL § 160.50(3)(k) shall be excluded from the report prepared by the Division of Criminal Justice Services. Vacatur, dismissal and expungement is without prejudice to the defendant or his/her attorney seeking further relief pursuant to CPL Article 440 or any other law. OCA, in conjunction with DCJS, is required to develop an affirmative information campaign and widely disseminate to the public information concerning the expungement, vacatur and resentencing of marihuana convictions, including, but not limited to, automatic expungement of certain past convictions, the means by which an individual may file a motion for vacatur, dismissal and expungement, and the impact of such changes on such person's criminal history records.

Sex Crimes: Statute of Limitations

Chapter 315 of the Laws of 2019 amends Criminal Procedure Law § 30.10(2)(a) to provide that a prosecution for incest in the first degree (Penal Law § 255.27) may be commenced at any time.

Chapter 315 adds a new paragraph (a-1) to CPL § 30.10(2) stating that a prosecution for rape in the second degree as defined in PL § 130.30(2), or criminal sexual act in the second degree as defined in PL § 130.45(2), or incest in the second degree (PL § 255.26) where the crime committed is rape in the second degree as defined PL § 130.30(2) or criminal sexual act in the second degree as defined in PL § 130.45(2), must be commenced within twenty years after the commission thereof or within ten years from when the offense is first reported to law enforcement, whichever occurs earlier.

Chapter 315 adds a new paragraph (a-2) to CPL § 30.10(2) stating that a prosecution for rape in the third degree as defined in PL § 130.25(1) or (3), or criminal sexual act in the third degree as defined in PL § 130.40(1) or (3), must be commenced within ten years after the commission thereof.

Chapter 315 amends CPLR § 213-c to increase from 5 to 20 years the time period in which the victim can bring a civil action for a specified sex offense, and state that such an action may be brought against any party whose intentional or negligent acts or omissions are alleged to have resulted in the commission of the conduct.

Chapter 315 took effect on September 18, 2019 and shall apply to acts or omissions occurring on or after that date, and to acts or omissions occurring prior to that date where the applicable statute of limitations in effect on the date of the act or omission has not yet expired.

Penal Law: Unlawful Dissemination or Publication of an Intimate Image

Chapter 109 of the Laws of 2019 creates the crime of unlawful dissemination or publication of an intimate image (new Penal Law § 245.15).

A person is guilty of unlawful dissemination or publication of an intimate image when:

(a) with intent to cause harm to the emotional, financial or physical welfare of another person, he or she intentionally disseminates or publishes a still or video image of such other person, who is identifiable from the still or video image itself or from information displayed in connection with the still or video image, without such other person's consent, which depicts:

(i) an unclothed or exposed intimate part of such other person; or

(ii) such other person engaging in sexual conduct as defined in Penal Law § 130.00(10) with another person; and

(b) such still or video image was taken under circumstances when the person depicted had a reasonable expectation of privacy and the defendant knew or reasonably should have known the person depicted intended for the still or video image to remain private, regardless of whether the defendant was present when the still or video image was taken.

"Intimate part" means the naked genitals, pubic area, anus or female nipple of the person.

"Disseminate" and "publish" shall have the meaning defined in Penal Law § 250.40.

This section shall not apply to the following: (a) the reporting of unlawful conduct; (b) dissemination or publication of an intimate image made during lawful and common practices of law enforcement, legal proceedings or medical treatment; (c) images involving voluntary exposure in a public or commercial setting; (d) dissemination or publication of an intimate image made for a legitimate public purpose; (e) providers of an interactive computer service for images provided by another person. "Interactive computer service" shall mean: any information service, system or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the internet and such systems operated or services offered by libraries or educational institutions.

Unlawful dissemination or publication of an intimate image is a class A misdemeanor.

Chapter 109 amends Criminal Procedure Law § 530.11, and Family Court Act § 812, to add to the list of offenses over which the family court and the criminal courts shall have concurrent jurisdiction.

Chapter 109 adds a new Civil Rights Law § 52-b that provides for a private right of action for unlawful dissemination or publication of an intimate image.

Chapter 109 took effect on September 21, 2019.

Penal Law: "Undetectable Knife"

Chapter 146 of the Laws of 2019 amends Penal Law § 265.01, and § 265.10(1) and (2), to include an "undetectable knife" within the scope of the statute.

New Penal Law § 265.00(5-d) defines "Undetectable knife" as any knife or other instrument, which does not utilize materials that are detectable by a metal detector or magnetometer when set at a standard calibration, that is capable of ready use as a stabbing or cutting weapon and was commercially manufactured to be used as a weapon.
Chapter 146 took effect on November 1, 2019.

Penal Law: Gravity Knife

Chapter 34 of the Laws of 2019 amends Penal Law §§ 10.00(12) (definition of "Deadly weapon"), 265.01(1) (fourth degree criminal possession of weapon), 265.00(5-c) (definition of "Automatic knife"), 265.10(1), (2) (manufacture, transport, etc.), 265.15(3) (presumptions), 265.20(2), (6) (exemptions) by removing any reference to a "gravity knife."
From the Legislative memo:
Beyond the inequities that are clearly replicated in prosecutions of gravity knife possession cases, there is a larger question of whether these knives pose a threat to public safety. A widely reported increase in slashings in 2016 in New York City, proved to be statistically insignificant natural variation, not the beginning of an uptick in violent crime. What's more, the only difference between an illegal gravity knife and a legal fixed-blade knife is a gravity knife's folding mechanism. The idea that a folding knife is somehow more dangerous than a knife that doesn't fold is patently absurd. It is clear from the data that stopping thousands of law-abiding New Yorkers for carrying common pocket knives cannot contribute to public safety. Rather, these stops distract officers from doing the work of keeping New York safe while unfairly pushing New Yorkers with no unlawful intentions into the criminal justice system.
This bill solves this problem by clarifying that the Legislature's intent is not to ban pocket knives. The Legislature intended to ban switchblades and gravity knives, two very specific kinds of weapons with very specific characteristic mechanisms. The Legislature did not intend to ban common folding knives that are widely available for purchase throughout New York State. Since the 1958 ban US manufacturers have ceased to produce the original gravity knife and they cannot be found at retailers in the state, or even anywhere in the US. Many states have repealed knife bans, including New Hampshire, Missouri, Alaska, Indiana, Tennessee and Maine with no accompanying increase in crime. It's time for New York to join them.
Chapter 34 took effect on May 30, 2019.

Penal Law - Defense To Murder: Extreme Emotional Disturbance

Chapter 45 of the Laws of 2019 amends Penal Law §§ 125.25(1)(a), 125.26(3)(a), and 125.27(2)(a) to provide, with respect to the defense of extreme emotional disturbance for which there was a reasonable explanation or excuse, that it shall not be a "reasonable explanation or excuse" when the defendant's conduct resulted from the discovery, knowledge or disclosure of the victim's sexual orientation, sex, gender, gender identity, gender expression or sex assigned at birth.
Chapter 45 took effect on June 30, 2019.

CPLR: Judicial Notice Of Internet Materials

Chapter 223 of the Laws of 2019 is a chapter amendment to Chapter 516 of the Laws of 2018. Chapter 223 repeals CPLR Rule 4511(c), which provides for judicial notice of information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool, and moves the text to a new CPLR § 4532-b, which states:

An image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool, is admissible in evidence if such image, map, location, distance, calculation, or other information indicates the date such material was created and subject to a challenge that the image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool does not fairly and accurately portray that which it is being offered to prove.

A party intending to offer such image or information in evidence at a trial or hearing shall, at least thirty days before the trial or hearing, give notice of such intent, providing a copy or specifying the internet address at which such image or information may be inspected.

No later than ten days before the trial or hearing, or later for good cause shown, a party upon whom such notice is served may object to the request to admit into evidence such image or information, stating the grounds for the objection.

Unless objection is made pursuant to this subdivision, the court shall take judicial notice and admit into evidence such image, map, location, distance, calculation or other information.

The legislative memo states that concerns were raised that the original bill required technical amendments and its provisions should be in a different section of law.

Chapter 223 has taken effect.

Commission on Prosecutorial Conduct - Chapter 23 of the Laws of 2019 amends Article 15-A of the Judiciary Law, and Chapter 202 of the Laws of 2018, which established a Commission on Prosecutorial Conduct.

Section 1 of the chapter amendment clarifies the manner by which commissioners are appointed, amends the bases upon which a claim of misconduct can be investigated, and clarifies the procedure for making public and appealing determinations made by the commission.

The legislative memo states: Concerns were raised regarding the authority of the Chief Justice of the Court of Appeals to oversee prosecutorial conduct. Accordingly, changes were made to the original bill to allow the Governor to appoint more commissioners, and to delegate more authority to the Presiding Justices of the Appellate Divisions. Further, clarifications were made regarding the balance of the commission and regarding the degree of experience commissioners must have.

Chapter 23 took effect on the same date and in the same manner as stated in Chapter 202 - that is, January 1, 2020.

Governor Cuomo’s Approval Memo:

Last year, I was pleased to sign into law the Nation's first Commission on Prosecutorial Conduct (the "Commission"), an independent body entrusted and empowered to review and investigate alleged prosecutorial misconduct. As we steadfastly pursue reforms to all aspects of our criminal justice system, the significance of establishing a body with the potential to reinvigorate the

public's trust cannot be denied. That is why the Executive worked diligently to address the numerous flaws identified in last year's bill in the limited time provided by law. This bill would implement the negotiated changes agreed upon by the Legislature last year.

The creation of this Commission rightfully drew praise by most, but swift scorn and a legal challenge by those who would be subject to its oversight. Previously identified infirmities - including constitutional separation of powers concerns with both the executive and judiciary - that leave this law vulnerable to legal attack have come into sharp focus with the passage of time and attention to the ongoing legal challenge. Still, the Legislature remains unconvinced that changes recommended by the Executive are necessary and determined it best to deliver the bill unchanged.

Despite my desire for a bill strong-suited for the legal challenges that it will surely confront, my commitment to the creation of this Commission and the promise that it brings for a more transparent and just criminal justice system remains unshaken.

DCJS and OCA Criminal History Records/Reports: Undisposed Cases

Chapter 55 of the Laws of 2019, Part II, Subpart L, adds a new Executive Law § 845-c (Criminal history record searches; undisposed cases), which stated that when, pursuant to statute or DCJS regulations, DCJS conducts a search of its criminal history records and returns a report thereon, all references to undisposed cases contained in such criminal history record shall be excluded from such report.

"Undisposed case" means a criminal action or proceeding for which there is no record of an unexecuted warrant of arrest, superior court warrant of arrest, or bench warrant, and for which no record of conviction or imposition of sentence or other final disposition, other than the issuance of an apparently unexecuted warrant, has been recorded and with respect to which no entry has been made in the criminal history records for a period of at least five years preceding the issuance of such report.

When a criminal action in the criminal history record repository becomes an undisposed case, and the action involves class A charges, charges under Penal Law Article 125, or felony charges under Penal Law Article 130, DCJS shall notify the district attorney in the county which has jurisdiction. If the district attorney notifies DCJS that such case is pending and should not meet the definition of an undisposed case, the case shall not be excluded from such report. If DCJS does not receive a response from the district attorney within six months of providing notice, the case shall be excluded from such report.

The exclusion requirement shall not apply to criminal history record information: (a) provided by DCJS to qualified agencies pursuant to Executive Law § 837(6), or to federal or state law enforcement agencies, for criminal justice purposes; (b) prepared solely for a bona fide research purpose; or (c) prepared for DCJS's internal record keeping or case management purposes.

Judiciary Law § 212(2) is amended with the addition of a new paragraph (x) which requires the Chief Administrator of the Courts to take such actions and adopt such measures as may be necessary to ensure that no written or electronic report of a criminal history record search conducted by the Office of Court Administration, other than a search conducted solely for the internal recordkeeping or case management purposes of the judiciary or for a bona fide research purpose, contains information relating to an undisposed case. Nothing contained in this

paragraph shall be deemed to permit or require the release, disclosure or other dissemination by the OCA of criminal history record information that has been sealed in accordance with law.
The law took effect April 11, 2020, and shall apply to searches of criminal history records conducted on or after that date. Prior to that date, DCJS, in consultation with the state administrator of the Unified Court System as well as any other public or private agency, shall undertake such measures as may be necessary and appropriate to update its criminal history records with respect to criminal cases and arrest incidents for which no final disposition has been reported.

Sealing: Old Record "Cleanup"

Chapter 55 of the Laws of 2019, Part II, Subpart M, states that the DCJS commissioner shall direct that records maintained by DCJS of any action or proceeding terminated in favor of the accused under CPL § 160.50 before November 1, 1991 be sealed in the manner provided for by § 160.50.
The DCJS commissioner also shall direct that records of any action or proceeding terminated by a conviction for a traffic infraction or a violation, other than a violation of loitering as described in CPL § 160.10(1)(d) or the violation of operating a motor vehicle while ability impaired as described in Vehicle and Traffic Law § 1192(1), before November 1, 1991 maintained by DCJS be sealed in the manner provided for by CPL § 160.55.
Judiciary Law § 212(2) is amended with the addition of a new paragraph (y) which requires the Chief Administrator of the Courts to take such actions and adopt such measures as may be necessary to ensure that no written or electronic report of a criminal history record search conducted by the Office of Court Administration, other than a search conducted solely for the internal recordkeeping or case management purposes of the judiciary or for a bona fide research purpose, contains information about any action or proceeding terminated prior to November 1, 1991 in favor of the accused, as defined by CPL § 160.50, or sealed in the manner provided by CPL § 160.55.
The law took effect October 9, 2019; provided, however, that the directions to the DCJS commissioner and the Chief Administrator of the Courts are deemed to have been in full force and effect on the effective dates of CPL § 160.50 (enacted in 1976) and CPL § 160.55 (enacted in 1980).

DCJS and OCA Criminal Record Searches For Civil Purposes: Convictions and Pending Cases

Chapter 55 of the Laws of 2019, Part II, Subpart N, adds a new Executive Law § 845-d (Criminal record searches: reports for civil purposes), which states that when, pursuant to statute or its regulations, DCJS conducts a search of its criminal history records for civil purposes, and returns a report therein, it shall only report any criminal convictions, and any criminal arrests and accompanying criminal actions which are pending.
The statute shall not apply to criminal history records: (a) provided by DCJS to qualified agencies as defined in Executive Law § 835(9); (b) provided to federal or state law enforcement

agencies; (c) prepared solely for a bona fide research purpose; or (d) prepared for the internal record keeping or case management purposes of DCJS.
Nothing in the statute shall authorize DCJS to provide criminal history information that is not otherwise authorized by law or that is sealed pursuant to CPL §§ 160.50, 160.55, 160.58 or 160.59.
Judiciary Law § 212(2) is amended with the addition of a new paragraph (z) which requires the Chief Administrator of the Courts to take such actions and adopt such measures as may be necessary to ensure that a certificate of disposition or a written or electronic report of a criminal history search conducted for the public by the Office of Court Administration contains only records of convictions, if any, and information about pending cases. This limitation shall not apply to searches conducted for the internal recordkeeping or case management purposes of the judiciary, or produced to the court, the People, and defense counsel in a criminal proceeding, or for a bona fide research purpose, or, where appropriate, to the defendant or defendant's designated agent.
The law took effect April 11, 2020.

Discrimination/Inquiries Based on Criminal Arrests/Charges: ACD
Chapter 55 of the Laws of 2019, Part II, Subpart O, amends Executive Law § 296(16) to add to the identified unlawful discriminatory practices certain inquiries about an arrest or criminal accusation not then pending which resulted in an order adjourning the criminal action in contemplation of dismissal. The law also now includes inquiries in connection with housing, or volunteer employment positions.
Cases resulting in ACD orders also are now included in the prohibition against requiring an individual to divulge information pertaining to any arrest or criminal accusation of such individual. An individual required or requested to provide information in violation of the statute *may respond as if the arrest, criminal accusation, or disposition of such arrest or criminal accusation did not occur.*
For purposes of the statute, an action which has been adjourned in contemplation of dismissal shall not be considered a pending action, unless the order is revoked and the case is restored to the calendar for further prosecution.
The law took effect July 11, 2019.

Privacy Law: Disclosure of "Mugshots"
Chapter 55 of the Laws of 2019, Part II, Subpart K, and Chapter 59 of the Laws of 2019, Part GGG, amend Public Officers Law § 89(2)(b) to include, as an unwarranted invasion of privacy, disclosure of law enforcement arrest or booking photographs of an individual, unless public release of such photographs will serve a specific law enforcement purpose and disclosure is not precluded by any state or federal laws.
The Legislative findings state: The legislature finds that law enforcement photographs, otherwise known as "mugshots," are published on the internet and other public platforms with impunity. An individual's mugshot is displayed publicly even if the arrest does not lead to a conviction, or the conviction is later expunged, sealed, or pardoned. This practice presents an unacceptable

invasion of the individual's personal privacy. While there is a well-established Constitutional right for the press and the public to publish government records which are in the public domain or that have been lawfully accessed, arrest and booking information have not been found by courts to have the same public right of access as criminal court proceedings or court filings. Therefore, each state can set access to this information through its Freedom of Information laws. The federal government has already limited access to booking photographs through privacy formulations in its Freedom of Information Act, and the legislature hereby declares that New York will follow the same principle to protect its residents from this unwarranted invasion of personal privacy, absent a specific law enforcement purpose, such as disclosure of a photograph to alert victims or witnesses to come forward to aid in a criminal investigation.
The law has taken effect.

Right To Counsel: Criminal Appeals/Collateral Proceedings
Chapter 446 of the Laws of 2019 amends County Law § 722 to state that assignment of counsel upon an appeal in a criminal action includes authorization for representation by appellate counsel, or an attorney selected at the request of appellate counsel by the administrator of the plan in operation in the county (or city in which a county is wholly contained) where the conviction was entered, with respect to the preparation and proceeding upon a motion, pursuant to Criminal Procedure Law Article 440, to vacate a judgment or to set aside a sentence or on a motion for a writ of error coram nobis. Compensation and reimbursement for such representation and expenses shall be governed by County Law §§ 722-b and 722-c.
The law took effect on November 8, 2019.
From the legislative memo:
The bill would bring needed efficiencies to the appellate process. Under current law, counsel is appointed for the appeal, but frequently there are meritorious issues that do not appear on the record of the proceedings before the trial court. Often, these issues require consideration of additional facts. But appellate courts are not equipped to hear witnesses or receive off-the-record evidence. The result is sometimes long delays and a two-step process: first "direct" appellate review, handled by appointed counsel and -- usually later -- a "collateral" review process, which itself may be subject to appellate consideration.
The bill provides that representation provided by an attorney assigned to an appeal includes representation with respect to any post-conviction motion associated with the case. In this manner, legal issues appropriate for review can be presented and considered earlier -- and comprehensively. The piece-meal approach that often results under current law would be largely avoided.
The bill would also address an unjust and nonsensical dichotomy that arises under current law. Institutional providers (such as larger Legal Aid societies and public defender offices) are funded by annual appropriations. Their staffs are generally salaried employees. Attorneys in these offices are more likely to consider post-conviction motions part of their appellate representation and file such motions when needed. Assigned counsel, on the other hand, are paid by the hour. County Law § 722 does not expressly provide for hourly compensation for these motions. The result is that under current law, whether necessary post-conviction motions are made or not often

depends on the employment status of the appointed lawyer (institutional vs. private/ assigned), rather than the merits of the motion.

The bill language is limited in scope. It applies only in instances where there is a direct appeal pending and the post-conviction motion concerns the judgment on appeal.

Finally, in some instances, a post-conviction motion addresses the adequacy of the representation provided by a particular attorney or law office in the trial court. When appellate counsel was the trial lawyer, or works for the same law office, a conflict of interest may arise. In such instances, under the bill language, the administrator of the assigned counsel plan for the jurisdiction would appoint another attorney to represent the defendant.

II. JUVENILE DELINQUENCY CASELAW

Adolescent Offenders

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 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

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

* * *

ADOLESCENT OFFENDERS - Removal

In this armed robbery prosecution, the Court, after finding insufficient evidence that defendant displayed a firearm, denies the People's motion to prevent removal, finding no extraordinary circumstances.

The Court notes, *inter alia*, that defendant is serving a sentence of 1-3 years in a juvenile offender matter; that in the Youth Part defendant would not be eligible for Youthful Offender treatment and would be exposed to a significant period of adult incarceration; and that defendant is from a broken home, his father has a history of incarceration, and he witnessed his father being shot at close range, but he has made efforts to overcome those obstacles through recent utilization of educational and employment opportunities, and several adults appeared and presented positive reports of defendant's behavior before and after his detention in this matter.

People v. S.B.
(City Ct. of Syracuse, Onondaga Co., 12/18/19)
http://nycourts.gov/reporter/3dseries/2019/2019_52076.htm

* * *

ADOLESCENT OFFENDERS - Removal

In this prosecution charging gun possession and possession of stolen property, the Court denies the People's motion to prevent removal to Family Court, finding no extraordinary circumstances. The Court has considered the following factors: (1) whether defendant committed a series of crimes over a series of days; (2) whether defendant acted in an especially cruel and/or heinous manner; and (3) whether defendant was a leader of the criminal activity who had threatened or coerced other reluctant youth into committing the crimes.

The Court notes, *inter alia*, that although defendant is charged with two separate instances of criminal possession of a weapon, neither of the incidents had a victim; that were the Court to prevent removal, it would mean that many if not all cases with mere weapon possession charges would remain in the Youth Part rather than be removed, which is not the intent of Raise the Age; and that although defendant has been charged with a new crime while released under probation supervision, probation did not fully connect defendant with services before the second charge, and has since done so, and defendant has been compliant and appears to be amenable to services.

People v. J.C.
(Fam. Ct., Erie Co., 10/17/19)
http://nycourts.gov/reporter/3dseries/2019/2019_51904.htm

* * *

ADOLESCENT OFFENDERS - Removal

In this prosecution on charges of making a terroristic threat, computer trespass and aggravated harassment, the Court finds no extraordinary circumstances and denies the People's motion to prevent removal.

The Court notes, inter alia, that defendant and her mother spoke about defendant's desire to leave school prior to the alleged crimes; that defendant hacked into email accounts and made threats to do harm from those accounts; that even when confronted by school administration, defendant continued her course of conduct; that defendant participated in the mandatory lockdown and witnessed the impact on others; and that defendant's behavior was not indicative of a child who was being "very stupid" as defendant indicated in her statement, and was more akin to the behavior of a person who is calculating and lacks concern for the negative and harmful impact the behavior would have on innocent people.

However, the Court, looking to the relevant factors, notes that defendant is not charged with multiple felony offenses committed within weeks of one another; that there are no allegations which would support a conclusion that the crimes charged were particularly cruel or heinous; that while it is alleged that defendant was the sole actor, there is no claim that she threatened or coerced reluctant youth into committing the crimes; that although it is alleged that there were nearly one thousand five hundred students at the school, an extraordinary circumstances finding should not be based upon the sheer number of individuals affected, and the actual impact on the individuals involved cannot be determined solely upon review of the papers before the Court; and that since her arraignment, defendant has been amenable to services, has regularly attended school, and has timely appeared in court for all proceedings.

People v. K.A.
(Fam. Ct., Erie Co., 12/2/19)
http://nycourts.gov/reporter/3dseries/2019/2019_51920.htm

* * *

ADOLESCENT OFFENDERS - Removal

In this robbery prosecution, the Court finds "extraordinary circumstances" and grants the People's motion to prevent removal to family court, noting, inter alia, that defendant has been charged with two robberies that occurred within nine days; that the other robbery charge involves an alleged assault with a gun and a further beating, and was not removed because the People established a significant physical injury; that during the felony hearing in this case, a video recording that was played showed that defendant initiated the robbery, and the complainant testified that his 4½ year old son was sitting in a car seat while he fought with defendant; and that the allegations in the two cases include cruel and heinous conduct.

People v. D.B.
(Fam. Ct., Erie Co., 12/16/19)
http://nycourts.gov/reporter/3dseries/2019/2019_29394.htm

* * *

ADOLESCENT OFFENDERS - Waiver Of Removal Determination

Criminal Procedure Law § 722.23(4) states: "A defendant may waive review of the accusatory instrument by the court and the opportunity for removal in accordance with this section, provided that such waiver is made by the defendant knowingly, voluntarily and in open court, in the presence of and with the approval of his or her counsel and the court…."

The Court denied defendant's motion for approval of his waiver of a determination of extraordinary circumstances. Defendant's insistence that adult probation would serve him better than Family Court probation has convinced the Court that he lacks knowledge of the implications

of a waiver. Although there is a plea bargain offer, prior to a determination of extraordinary circumstances there is no legal benefit arising from a waiver.

People v. A.L.
(City Ct. of Syracuse, Onondaga Co., 10/4/19)
http://nycourts.gov/reporter/3dseries/2019/2019_29312.htm

* * *

ADOLESCENT OFFENDERS - Removal

In this adolescent offender proceeding, the Court concludes that the case is subject to removal - and the People must move to prevent it - because the People have failed to prove by a preponderance of the evidence that defendant displayed a firearm in furtherance of a violent offense.

The People have established that defendant displayed an operable firearm, but not that the display was in furtherance of an underlying crime. With respect to the alleged attempted murder, the People showed that defendant met with a co-conspirator before the shooting and received the firearm after the co-conspirator had fired the weapon at the victim, and, even if defendant was tasked with removing the incriminating firearm from the scene of the shooting, that work was accomplished by the time he allegedly pointed the firearm at someone later on. The Court also rejects the People's apparent contention that whenever an adolescent displays a firearm, he or she is "furthering" the commission of the crime of criminal possession or attempted criminal possession of a weapon.

People v. N.C.
(Sup. Ct., Bronx Co., 10/4/19)
http://nycourts.gov/reporter/3dseries/2019/2019_29315.htm

* * *

ADOLESCENT OFFENDERS - Removal

After noting that there is no statutory basis for defense motions to remove in violent felony adolescent offender cases, the Court deems the motion to remove to be a motion to reargue and grants reargument, but adheres to its previous determination. The People proved by a preponderance of the evidence that defendant displayed a firearm in furtherance of the offense where the complaint alleged that defendant was observed by the officer in possession of a shiny silver object he tried to conceal in his jacket as he ran from the officer, and that, upon arrest, a loaded silver .25 caliber semi-automatic pistol was recovered inside defendant's jacket.

People v. W.H.
(Sup. Ct., Queens Co., 8/12/19)

https://www.law.com/newyorklawjournal/almID/1565818553NYredacted/

* * *

ADOLESCENT OFFENDERS - Removal

In this robbery/assault prosecution, the Court, after defendant waived the Court's sixth-day-after-arraignment review to determine whether statutory factors preclude removal to family court, denies the People's motion to prevent removal, finding no extraordinary circumstances under the applicable "high standard." The facts do not rise to the level of "highly unusual and heinous facts," and are not so extremely rare and exceptional that this case should remain in the Youth Part while others are removed.

The Court notes, *inter alia*, that the People have failed to set forth detailed information about defendant's conduct, and it could be surmised from the People's motion papers that defendant was threatened or otherwise coerced into participating; that it would be inconsistent with the apparent statutory presumption favoring removal to deny removal solely because of defendant's pending juvenile offender charge of attempted murder; and that although the People argue that "removal of this case would undermine confidence in the criminal justice system as it would be perceived as one more instance of a violent gang member escaping just punishment due to his age," the other pending matter will remain in the adult criminal court.

People v. J.R.
(County Ct., Nassau Co., 10/22/19)
http://nycourts.gov/reporter/3dseries/2019/2019_51825.htm

* * *

ADOLESCENT OFFENDERS - Removal

In this robbery/assault adolescent offender prosecution, the Court denies the People's motion to prevent removal to Family Court, finding that the People have not demonstrated extraordinary circumstances.

The Court notes that it is not alleged that defendant was the person who initiated the assault and robbery; that while it is alleged that defendant displayed what appeared to be a firearm or deadly weapon, there are no facts indicating that defendant displayed what was in fact a firearm or deadly weapon; that the facts do not show that defendant was the sole cause of the complainant's injuries or that the complainant sustained a significant physical injury; and that, in sum, the allegations establish only that defendant was an accessorial or secondary actor.

People v. L.L.
2019 NY Slip Op 32330(u)
(Sup. Ct., Queens Co., 7/19/19)

http://nycourts.gov/reporter/pdfs/2019/2019_32330.pdf

* * *

SEVERANCE/JOINDER
ADOLESCENT OFFENDERS

In this adolescent offender prosecution, the People successfully moved to prevent removal of one charge involving a February 9th incident, but the People's motion to prevent removal was denied with respect to a February 23rd incident. When the clerk advised the court that the February 23rd charges could not be sent directly to Family Court because they had been combined in one indictment with the February 9th charges, defense counsel moved to sever, the People opposed, and the court eventually granted the motion.

In this Article 78 proceeding in which the People seek a writ of prohibition, arguing that the court exceeded its authority and acted in excess of its powers in ordering severance of charges properly joined in a single indictment, the First Department denies relief. There is no question that the court had the authority to make the determination as to whether the charges were properly joinable, and, finding that they were not, had the authority to sever those charges.

In re Vance v. Roberts
(1st Dept., 10/10/19)

* * *

ADOLESCENT OFFENDERS - Removal

It is alleged that defendants, along with other individuals not charged as adolescent offenders, assaulted a homeless man who suffers from mental health issues by punching and kicking him, causing him to suffer a broken nose, significant swelling to his head, and extreme pain requiring hospitalization.

The Court declines to order removal, finding that the People have proved by a preponderance of the evidence that defendants caused significant physical injury to the victim. It is not necessary that a particular defendant be the sole actor who causes the significant injury.

People v. Y.L. and J.S.
(County Ct., Monroe Co., 5/17/19)
http://nycourts.gov/reporter/3dseries/2019/2019_29181.htm

* * *

ADOLESCENT OFFENDERS - Removal

The Court grants defendant's motion for removal of this adolescent offender charge to Family Court, subject to a motion to prevent removal filed by the People, concluding that the People, who have charged defendant with robbery while displaying what appeared to be a firearm, have failed to meet their burden to prove, by a preponderance of the evidence, that defendant displayed what was, in fact, a firearm.

Although the People allege that the complainant saw defendant take out and point at her what she perceived to be a black firearm, this statement, standing alone, is insufficient to satisfy the People's burden. The time of the alleged incident was 8:30 p.m., and there was no testimony as to the weather or lighting conditions, or the length of time the complainant saw the alleged firearm. Other than the allegation that the firearm was black, no further description has been set forth.

People v. D.G.
(Sup. Ct., Kings Co., 4/4/19)
http://nycourts.gov/reporter/3dseries/2019/2019_50947.htm

* * *

ADOLESCENT OFFENDERS - Removal

Upon a hearing held pursuant to CPL § 722.23, the Court, noting that a "significant physical injury" is more than a "physical injury" and less than a "serious physical injury," declines to order removal to family court.

Relying on photographic evidence and hearsay, the Court finds that the People have met their burden to prove, by a preponderance of the evidence, a "significant physical injury" where the complainant was stabbed five times - four in the back and once in the thigh - and suffered bleeding in the chest cavity which caused him to be hospitalized for three days.

People v. J.W.
(Sup. Ct., Kings Co., 4/2/19)
http://nycourts.gov/reporter/3dseries/2019/2019_50458.htm

* * *

ADOLESCENT OFFENDERS - Removal

In this adolescent offender prosecution charging aggravated cruelty to animals, the Court denies the People's motion to prevent removal to family court, finding no "extraordinary circumstances."

The Court notes that the People have agreed that a facility offering intensive inpatient treatment and a secure environment, not incarceration, would be appropriate; that despite the emotional

and violent nature of this crime and the significant impact it has undoubtedly had, the Court is constrained by the statute and the philosophy behind it; and that family court is well-equipped to meet defendant's therapeutic and supervisory needs.

People v. R.M.
(County Ct., West. Co., 12/14/19)
http://nycourts.gov/reporter/3dseries/2018/2018_28429.htm

Double Jeopardy/Collateral Estoppel

DOUBLE JEOPARDY - Dual Sovereignty Doctrine
STARE DECISUS

In a 7-2 decision, the Supreme Court declines to overrule the "dual-sovereignty" doctrine under which a State may, without violating the Double Jeopardy Clause, prosecute a defendant under state law even if the Federal Government has prosecuted him for the same conduct under a federal statute.

With respect to stare decisis, the majority notes that the doctrine promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. Even in constitutional cases, a departure from precedent demands special justification. This means that something more than ambiguous historical evidence is required before the Court will flatly overrule a number of its major decisions. And the strength of the case for adhering to such decisions grows in proportion to their "antiquity." Here, the historical arguments must overcome numerous major decisions of the Court spanning 170 years.

Concurring, Justice Thomas addresses at length the issue of stare decisus, noting, inter alia, that the Court's typical formulation elevates demonstrably erroneous decisions that are outside the realm of permissible interpretation over the text of the Constitution and federal statutes, and gives the venire of respectability to the continued application of demonstrably incorrect precedents; that if the Court encounters a decision that is demonstrably erroneous, the Court should correct the error, regardless of whether other factors support overruling the precedent; and that this view of stare decisis follows directly from the Constitution's supremacy over other sources of law, including the Court's own precedents.

Justice Ginsburg and Justice Gorsuch dissent in separate opinions, with Justice Gorsuch asserting that "[a] free society does not allow its government to try the same individual for the same crime until it's happy with the result."

Gamble v. United States
2019 WL 2493923 (U.S. Sup. Ct., 6/17/19)

* * *

COLLATERAL ESTOPPEL

In this prosecution for criminal mischief, criminal contempt and criminal trespass, the Court denies the People's application for a ruling that defendant is collaterally stopped, by adverse court decisions in civil matters, from presenting evidence and argument on the issue of whether he has a property right over the complainants' property.

The People may not utilize the doctrine of collateral estoppel offensively against a defendant to bar him from raising a defense at trial that was asserted, and rejected, in prior civil or criminal proceedings. Moreover, defendant was not represented by counsel in the prior civil proceedings and thus the Court questions the extent to which defendant's property right claims were fully and fairly litigated.

People v. Robert Hudson
(County Ct., Dutchess Co., 10/2/19)
http://nycourts.gov/reporter/3dseries/2019/2019_29303.htm

Sealing, Expungement And Confidentiality

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)

* * *

EXPUNGEMENT - OCME DNA Evidence

Respondent, arrested and charged with sex crimes, was offered a water bottle, and, while still handcuffed, put the bottle down and fell asleep. The bottle was then taken by police, vouchered and given to the OCME, which did not test the sample. After filing a petition, the Presentment Agency moved to compel respondent to provide a buccal swab for testing and comparison with DNA evidence recovered from the complainant's swabs. However, respondent made an admission to sexual abuse in the first degree and was later adjudicated a juvenile delinquent and placed on probation for 12 months, and a 12-month order of protection was issued on behalf of the complainant.

The attorney for the child has moved for an order directing the OCME to expunge respondent's DNA profile from its local database, or, alternatively, a protective order prohibiting any further use of the DNA profile by the OCME or any other law enforcement agency. The Presentment Agency contends that the Court does not have jurisdiction to order expungement.

Upon consideration of the circumstances, including the manner in which the DNA sample was obtained, respondent's age, and the charges, the Court grants the motion for expungement. The First Department recently ruled that, under Executive Law § 995-c(9)(b), a trial court had authority and discretion to expunge DNA profiles and related records after a youthful offender disposition. A juvenile delinquent is not and should not be afforded fewer protections than a YO or an adult in equivalent circumstances.

The Court also notes that legislation has been introduced that would provide authority for expungement applications in the supreme court.

Matter of Jahsim R.
(Fam. Ct., Bronx Co., 12/17/19)
http://nycourts.gov/reporter/3dseries/2019/2019_29387.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

* * *

ADOLESCENT OFFENDERS - Removal
CONFIDENTIALITY - Records Of Juvenile Delinquency Proceeding

In these four robbery prosecutions - three of which charge first degree robbery - the Court denies the People's motion to prevent removal, concluding that the People have failed to prove "extraordinary circumstances."

With respect to defendant's juvenile delinquency history, the Court notes that the People gained access to records from the Nassau County Attorney's Office, their prosecutorial counterpart in the Family Court. It is unclear whether the People were instead required to seek court approval to

review confidential Family Court records pursuant to FCA § 166, which does not address the inspection and review of a file maintained by the Nassau County Attorney's Office. However, in any event, FCA § 381.2 prohibits the use of defendant's juvenile delinquency history, including his past adjudications, past admissions and statements to the court, against him or his interests in any other court.

In this case, there are no allegations that defendant caused any physical injuries, committed any criminal sexual act, or displayed an actual "firearm" or "deadly weapon." His alleged conduct does not rise to the level of "cruel and heinous," and does not prove that he would not be amenable to or would not benefit in any way from the heightened services offered by the Family Court. He acted alone, and thus was not a "ringleader" who threatened and coerced reluctant youths to participate in the crimes.

People v. M.M.
(County Ct., Nassau Co., 4/30/19)
http://nycourts.gov/reporter/3dseries/2019/2019_29124.htm

* * *

SEALING/EXPUNGEMENT OF RECORDS

On June 6, 2000, in New York County Family Court, respondent admitted to committing acts constituting menacing in the third degree, a class B misdemeanor. The complainant was her nineteen-year-old sister. On August 17, 2000, respondent was given an eighteen-month term of probation, with a condition that she attend counseling. On October 25, 2000, in Bronx County Family Court, respondent admitted to committing acts constituting assault in the third degree, a class A misdemeanor. The case involved a fight with a peer. Respondent was given a concurrent twelve-month term of probation. Respondent successfully completed her probationary terms and has had no further dealings with the juvenile justice or the criminal justice system. On January 17, 2019, respondent filed a motion in Bronx County Family Court to vacate her delinquency adjudication, dismiss the petition, and seal her records. On January 24, 2019, Bronx County Family Court issued a sealing order, but denied the other requested relief.

Now, in New York County Family Court, "[i]n a case which underscores the tremendous potential for the rehabilitation of juveniles in delinquency matters, respondent Emily P.—now a thirty-four-year-old accomplished forensic scientist, who is about to commence a position with the United States Attorney's Office—asks that her delinquency adjudication, entered when she was fifteen years old, be 'sealed, expunged, and otherwise deleted.' Recognizing that the overriding intent of delinquency proceedings is not to punish, but 'to intervene and positively impact the lives of troubled young people' (citation omitted), the court vacates the dispositional order entered nineteen years ago, dismisses the delinquency petition, and seals and expunges the record (citations omitted). This relief will permit respondent to advance in her career in public service unencumbered by the delinquency adjudication."

Respondent's main concern is being questioned by current and prospective employers about her delinquent past. She is currently undergoing a mid-level security clearance as part of her upcoming employment at the Office of the United States Attorney, and information regarding her delinquency adjudications had to be revealed. Because she is committed to a career in government service, it is almost certain that additional clearances, which will include inquiries into her past, will follow. After the Court vacates the dispositional order pursuant to FCA § 355.1(1)(b), dismisses the petition pursuant to FCA § 352.1(2), orders sealing pursuant to FCA § 375.1, and expunges the court record pursuant to FCA § 375.3, respondent will no longer have to report delinquency findings to current and future employers. An order of expungement is not sufficient without a sealing order because the expungement order only affects the court record, and not records maintained by the police, probation, and the presentment agency.

The Court also notes that there is nothing in the statute or case law which precludes the Court from vacating a dispositional order after its expiration; and that although the Court of Appeals stated in Matter of *Dorothy D.* in dictum (49 N.Y.2d 212, 216) that expungement would not be appropriate in the absence of the respondent's "complete innocence," this dictum has not been consistently followed.

Matter of Emily P.
(Fam. Ct., N.Y. Co., 3/18/19)
http://nycourts.gov/reporter/3dseries/2019/2019_29069.htm

* * *

SEALING - Violation Of Statute By Police

Plaintiffs commenced this putative class action alleging that the NYPD's policy and practice of maintaining, using, and disclosing sealed arrest records for purposes of, inter alia, investigation, violates CPL §§ 160.50 and 160.55 and plaintiffs' due process rights under the State Constitution.

Defendants move to dismiss the due process cause of action, and all causes of action premised upon allegations concerning the NYPD's internal use of the sealed information, but does not challenge the legal sufficiency of claims premised on the NYPD's alleged disclosure of sealed information to the media and to other agencies.

The Court dismisses the due process cause of action, but otherwise denies defendants' motion. The sealing statutes were designed to preclude access by those, especially in the government and bureaucracy, who might otherwise prejudicially use protected information. Accordingly, there are limited and specific exceptions setting forth to whom and why access should be provided. The NYPD is bound by this statutory scheme

R.C. v. City of New York
(Sup. Ct., N.Y. Co., 4/29/19)

http://www.nycourts.gov/reporter/3dseries/2019/2019_29134.htm

* * *

SEALING - Motion For Post-Adjudication Sealing

In this case involving findings of sexual abuse arising from two separate incidents, the Court grants respondent's motion for post-adjudication sealing pursuant to FCA § 375.2.

The Court notes, inter alia, that the acts were committed nearly five years ago, before respondent had turned fourteen, and it is reasonable to assume that respondent has matured since then; that respondent has not had any further involvement in the juvenile or criminal justice system and successfully completed his term of probation with services; that respondent, who is dealing with several physical and mental health difficulties, has undertaken the steps necessary to improve his physical and mental health; that after a "downturn in his mental health" culminating in a hospitalization in June 2018, there was a "turn around" after he agreed to accept medication management, and he has progressed from presenting with oppositional behaviors, aggressive outbursts and sexual behavior problems to improving every aspect of his life; that the presentment agency's opposition is largely premised on the seriousness and concerning nature of the delinquent acts, but § 375.2 permits any respondent to apply for sealing except when there is a designated felony finding; and that the Presentment Agency's unsubstantiated assertion that respondent's conduct "left the complainant traumatized even years after the incidents" is insufficient to warrant a denial of the application.

Matter of M.D.
(Fam. Ct., Nassau Co., 10/10/19)
http://nycourts.gov/reporter/3dseries/2019/2019_29344.htm

Petitions

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

* * *

ACCUSATORY INSTRUMENTS - Use Of Hearsay/911 Recording
HEARSAY

The Court rejects defendant's contention that the accusatory instrument is facially insufficient where defendant alleges that the complainant's statements in the 911 recordings were made four minutes and forty-six seconds after she initially stated that she had broken her nose and thus do not qualify as excited utterances.

The statements were made shortly after a physical attack, while the complaining witness was in continued pain from an inflicted injury, and she cried and pleaded for help. Also, the 911 recording is admissible as a business record.

People v. Angel
(Crim. Ct., Kings Co., 6/27/19)

* * *

ACCUSATORY INSTRUMENTS - Language/Translation Issues

The Appellate Term upholds an order dismissing the accusatory instrument where there was no indication that the Spanish-speaking complainant had reviewed the English statement for its truth and accuracy. The complainant's assertion that the police officer-translator had read the statement to her in Spanish and that what she heard was the truth did not cure the defect, as it cannot be inferred that the English version accurately represented what she had told the officer in Spanish, or that what the officer recited to her in Spanish competently communicated the content of the written English version. Thus, a certificate of translation was required to cure the hearsay defect.

Although the People annexed an "affidavit of translation" to their papers as an exhibit, they did not move for leave to amend the accusatory instrument to add that document, and the court did not deem the "affidavit of translation" to have been filed.

People v. Charo Allen
(App. Term, 2d Dept., 9th & 10th Jud. Dist., 5/30/19)

* * *

ACCUSATORY INSTRUMENTS - Verification/Translation Issues
LAW OF THE CASE DOCTRINE

The Court dismisses the information pursuant to CPL § 30.30, noting that it is clear from the

affidavit of the Assistant District Attorney that a language translator was used to aid the complainant, and that the complainant's supporting deposition did not comport with the requirements of CPLR 2101.

Noting that another judge overruled this Court and accepted the supporting deposition, the Court adheres to its determination, noting that the other judge failed to acknowledge that this Court's prior determination constituted the law of the case.

People v. Jose Ramos
(Crim. Ct., Queens Co., 9/9/19)
http://nycourts.gov/reporter/3dseries/2019/2019_51464.htm

* * *

ACCUSATORY INSTRUMENTS - Verification/Language And Translation Issues
MOTION PRACTICE - Time Deadlines

The Court first finds good cause and concludes that defendant's motion to dismiss on statutory speedy trial grounds should not be barred as untimely where defendant asserts that defense counsel became aware that the complainants did not speak, read, or understand English only upon receipt and review of discovery materials disclosed by the People. While counsel does not address what, if any, information was provided to her by defendant prior to her review of the discovery materials, she does specify the items upon which she relies. And, it is not clear that just because the parties were well known to each other, defendant would have knowledge of the complainants' English language skills sufficient to support this motion. The eighteen-day period between counsel's receipt of discovery and communication of her position to the People was a reasonable length of time for counsel to review and analyze the discovery materials.

The Court finds the accusatory instrument defective and grants defendant's motion. In *Matter of Edward B.* (80 N.Y.2d 458), the Court of Appeals found a latent defect where the complainant revealed at the fact-finding stage that she had not actually read or been read the contents of the accusatory instrument before signing it, but held that the need for the accusatory instrument to comply with sufficiency requirements was no longer compelling, as the witnesses were present and available to testify in person and under oath. Pre-trial, however, such latent defects may be addressed by a trial court in its discretion. If sufficient indicia call into doubt a deponent's English-language abilities, a court may order the filing of a certificate of translation. When the People file a certificate absent a court order, such filing is a concession as to a complainant's inability to speak or read English.

Here, the People filed two affidavits of translation - a necessary prerequisite to full conversion - but they indicate that the contents in the complaint and supporting deposition were translated to the complainants on a date other than the date of original signing.

People v. Walter Rodriguez-Alas

(Crim. Ct., Bronx Co., 10/2/19)
http://nycourts.gov/reporter/3dseries/2019/2019_29302.htm

* * *

ACCUSATORY INSTRUMENTS - Language/Translation Issues

The Appellate Term upholds the dismissal of the accusatory instrument based on the People's failure to timely convert it to an information where the statement of the translator did not comply with CPLR 2101(b). The statement was not in affidavit form, and neither stated the qualifications of the translator nor that the translation was accurate.

When the People filed a statement of a translator simultaneously with the supporting deposition, they provided sufficient indicia of the witness's inability to speak or read English.

People v. Kieth Brooks
(App. Term, 1st Dept., 6/3/19)

* * *

ACCUSATORY INSTRUMENTS - Reliance On Video Recording

The Court finds facially sufficient a charge of petit larceny where it is alleged that a detective "observed, via video surveillance, a Hispanic female, whom [he] later learned to be the defendant, enter the lobby of the building at [address specified], take a package, and then leave the lobby area of the building without returning;" and that defendant stated to the detective that she was "sorry for what [she] did" and the package's owner alleges that defendant did not have permission to take the package.

The surveillance video content described by the detective does not constitute hearsay. While a surveillance video may contain hearsay statements, the video, in itself, is not a "statement" that is true or false.

People v. Juliette Ogando
(Crim. Ct., N.Y. Co., 5/15/19)
http://nycourts.gov/reporter/3dseries/2019/2019_29161.htm

Initial Appearance

INITIAL APPEARANCE - Notice To Parent
APPEAL - Aggrieved Party

The Fourth Department reverses an order that dismissed the juvenile delinquency petition, concluding that there is no requirement that a petitioner provide notification of a juvenile delinquency proceeding to more than one parent or guardian, or make diligent efforts to do so.

The Court also notes that petitioner is an aggrieved party even though the petition was dismissed without prejudice.

Matter of Hayden B.S.
(4th Dept., 4/26/19)

Discovery/Preservation Of Evidence

BRADY MATERIAL

The Court of Appeals finds reversible Brady error, concluding that the People failed to fulfill their "broad obligation" by failing to provide defendant with meaningful access to favorable witnesses. The People's theory was that defendant was the sole perpetrator. However, the owner of the nightclub where the crime occurred told the police that he saw two people approach one of the victims and strike him with a beer bottle, and identified someone other than defendant as one of the assailants. According to a sprint report of a 911 call, another witness claimed that two men "stated that they were going to come back with a gun when leaving location."

The People objected to defendant's pre-trial request for direct disclosure of the witnesses' contact information, and instead offered to provide the witnesses with defense counsel's information. This approach would not have provided adequate means for defense counsel to investigate the witnesses' statements. This was tantamount to suppression of the requested information. The People did not present any evidence that defendant presented a risk to the witnesses.

The suppressed information was material. Access to the nightclub owner could have allowed defendant to develop additional facts, which in turn could have aided him in establishing additional or alternative theories to support his defense.

People v. Rong He
(Ct. App., 10/17/19)

* * *

BRADY MATERIAL

The Court of Appeals, applying the reasonable probability of a different result standard since defendant did not specifically request the undisclosed Brady material, reverses defendant's conviction where the People failed to disclose a surveillance video that captured the scene at the

time of the shooting, including images of body of the victim as he fell to the ground and a key prosecution witness.

The Court notes that the tape clearly contradicted one witness's statement that he was alone with the victim shortly before and after the shooting; that the impeachment value of the video is not cumulative to what was already available to defense counsel, since "[i]mpeachment with contradictory testimony of other witnesses is hardly the same as being confronted with a videotape of the scene"; that the video shows people entering and exiting the building, including other potential eyewitnesses, and, at a minimum, the presence of unidentified witnesses, at least one of whom was only a few feet away when the shots were fired, could have been used by the defense to argue that the police failed to conduct a thorough investigation; that the video captures something none of the eyewitnesses reported - an additional person at the scene interacting with the victim as he lay on the ground, which defense counsel could have used in combination with the medical examiner's report to argue that another shooter was potentially responsible for the victim's death after he fell to the ground; and that during summation, the prosecutor denied the existence of a video and characterized defense counsel's summation as a desperate attempt to distract the jury from the proof by reference to phantom evidence.

People v. Derrick Ulett
(Ct. App., 6/25/19)

* * *

BRADY MATERIAL - Witness's Motive To Fabricate/Existence Of Tacit Cooperation Agreement - Materiality Of Undisclosed Information

The Appellate Division granted defendant's motion to vacate the judgment of conviction, holding that the People had a duty to disclose the circumstances of the witness's initial contact with the police relating to defendant's case and information regarding the witness that defendant's trial prosecutor provided to the drug treatment court, and that the prosecutor was required to correct the witness's trial testimony about his "good" progress in drug treatment and the extent of his contact with the prosecutor and the police detectives. Although the Appellate Division found no evidence of an express promise of a benefit to the witness, it concluded that, had the evidence been disclosed, the jury could have found that there was a tacit understanding between the witness and the prosecution that he would receive or hoped to receive a benefit for his testimony.

The Court of Appeals reverses. There was no agreement with the witness - tacit or otherwise. The People do have a broader responsibility to disclose favorable information tending to show that a witness had an incentive to testify falsely in order to curry favor with the prosecution on an open criminal case. Here, it could be argued that the witness may have perceived that his upcoming testimony at defendant's trial would help him remain in the drug treatment program given that he was repeatedly released, without the People's objection, on his own recognizance despite his drug treatment violations.

But even assuming the People had an obligation to disclose the information, there is no reasonable possibility that it would have resulted in a different verdict. The disclosed evidence allowed defense counsel to argue to the jury that the witness was biased in favor of the People, as he hoped to receive a benefit in exchange for his testimony, and that the People's failure to request bail in the witness's open burglary case despite his drug program violations was the benefit conferred.

People v. John Giuca
(Ct. App., 6/11/19)

* * *

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 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 - 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 - Impeachment Evidence/Police Witnesses (CRL § 50-a)

In this adolescent offender prosecution, the People, unable to comply with CPL § 245.20(1)(k)(iv) (requires disclosure of "[a]ll evidence and information, including that which is known to police or other law enforcement agencies acting on the government's behalf in the case, that tends to . . . impeach the credibility of a testifying prosecution witness"), requested an order directing potential law enforcement witnesses to answer a series of six questions designed to obtain certain information the officers had refused to provide. The People also sought to subpoena relevant police personnel records for an in camera inspection by the court in accordance with Civil Rights Law § 50-a(1).

The Court signed orders requiring officers to answer six questions: "(1) Has the witness been convicted of a crime? (2) Is the witness aware of any pending criminal charge? (3) Is the witness aware of a finding/ruling by a Court about the truthfulness of the testimony of the witness? (4) Is the witness aware of any civil lawsuit filed concerning the conduct of the witness in this case? (5) Is the witness aware of any civil lawsuit about the conduct of the witness in a past case? (6) Is the witness aware of any other administrative, personnel or civilian complaints implicating the witness's honesty and integrity?" The Court also signed the requested subpoenas. Several police Benevolent Associations oppose disclosure via the questionnaire and subpoenas, relying principally on CRL § 50-a.

The Court concludes that under CPL § 245.20(1)(k)(iv) and the case law, the questions contained in the People's questionnaire are relevant and appropriate. CRL § 50-a does not shield the police from having to answer the questions. Section 50-a protects records, not information. Additionally, the legislature must have intended that the police participate in the CPL Article 245 exchange of information. If a police witness answers a question in the questionnaire in the affirmative, and the information sought by the People is contained in the officer's personnel records, the People would be able to show facts sufficient to warrant an in camera inspection of those records pursuant to CRL § 50-a(3).

The motions to quash are granted since the subpoenas were not issued in accordance with CRL § 50-a(2) ("Prior to issuing such court order the judge must review all such requests and give interested parties the opportunity to be heard. No such order shall issue without a clear showing of facts sufficient to warrant the judge to request records for review"). The People argue that since identifying discoverable information is a part of a prosecutor's official functions, CRL § 50-a(4) (exception for prosecutors acting in furtherance of official functions) provides access to the personnel records. However, when the subpoenas were issued, this was not the People's position.

Matter of the Application of Certain Police Officers to Quash a So-Ordered Subpoena Duces Tecum
(County Ct., West. Co., 2/21/20)
http://nycourts.gov/reporter/3dseries/2020/2020_20052.htm

* * *

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 - Mental Health Report By Defense Expert
ATTORNEY WORK PRODUCT

In this habeas proceeding, the Ninth Circuit U.S. Court of Appeals finds no basis for relief where the State's penalty-phase mental health expert made reference during his testimony to test results the State's expert had obtained from a defense expert, and the Nevada Supreme Court concluded on direct appeal that the report was not privileged work product.

Petitioner's work-product privilege claim might be more accurately framed as a complaint about a poor strategic choice on defense counsel's part not to withdraw the expert before turning over the report, which could in turn be grounds for an ineffective assistance of counsel claim that is not before the Court.

Floyd v. Filson
2019 WL 5090756 (9th Cir., 10/11/19)

* * *

DISCOVERY - Notice Of Alibi

The First Department finds error, albeit harmless, where the court precluded defendant's alibi evidence. The notice of alibi was untimely, and defective in that it only stated the location of the alibi without naming any witnesses, but the record does not support a finding of willfulness.

People v. Joel Almonte
(1st Dept., 4/4/19)

* * *

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

* * *

DISCOVERY - Medical Records
PHYSICIAN-PATIENT PRIVILEGE
HIPAA

In this juvenile offender proceeding, the People subpoenaed defendant's medical records, including x-rays, photographs and any scans, pertaining to an injury he sustained in connection with a shooting. The hospital produced the records in response to the subpoena, and the records are in the Court's possession. Defendant moves for an order quashing the subpoena.

The Court denies the motion and releases the records to the People, and orders that the parties are prohibited from using or disclosing the records and the confidential information contained in those records for any purpose other than this litigation.

The Court notes that HIPAA permits disclosure of protected information for "law enforcement purposes" and for "judicial proceedings"; and that although there is no mention in the records of treatment for the firearm-related wounds enumerated in Penal Law § 265.25, the all-inclusive "any other injury arising from or caused by" language in § 265.25 makes this medical information subject to the statute's reporting requirement and excepted from the statutory physician-patient privilege in CPLR § 4504.

People v. J.R.
(County Ct., Nassau Co., 9/17/19)
http://nycourts.gov/reporter/3dseries/2019/2019_29284.htm

* * *

DISCOVERY - Notice Of Psychiatric Evidence

In this burglary prosecution, the Second Department finds reversible error where the trial court refused to grant defendant permission in the interest of justice to submit a late notice of his intent to introduce psychiatric evidence. The trial court failed to exercise any discretion.

Evidence that defendant previously had suffered auditory hallucinations would have corroborated defendant's testimony that he entered the home intending to aid a woman who was yelling, rather than damage the house. Preclusion of testimony regarding portions of defendant's conversation with the officer which involved his past auditory hallucinations, and his resultant hospitalization, deprived the jury of the full context.

Any prejudice to the People was substantially outweighed by defendant's extremely strong interest in presenting the evidence.

People v. Len Morris
(2d Dept., 6/26/19)

* * *

DISCOVERY - Video Recording From Police Dash-Cam/Sanctions

At a suppression hearing, the trooper confirmed that he was running a dash-cam at the time defendant drove by him. Although the video had been requested by defendant, it had not been provided. The trooper was quickly able to obtain a copy of the video, and the court heard a consistent description of the brief video from the parties. Defendant asked the court to grant his motion to suppress as a sanction for the State's discovery violation. Rather than suggesting a continuance or other remedy, the State repeatedly insisted that there was no harm to defendant because the video had no "evidentiary value" and defendant had raised no claim of prejudice. The court ordered suppression as a sanction.

The Maine Supreme Court affirms. The dash-cam video was evidence that showed defendant at the time of the charged crime. Despite a clear discovery request, the State failed to turn over the video. The State's continued insistence that the video was not material or relevant defies common sense and provides full support for the court's determination that a serious sanction was warranted. The suppression of the evidence, while almost certainly fatal to the State's prosecution, fell well within the discretion of the court.

State v. Reed-Hansen
2019 WL 1606146 (Maine, 4/16/19)

Ethics and Judicial/Attorney Misconduct

JUDGES - Interference In Proceeding

The Court of Appeals holds that defendant was denied the right to a fair trial when the trial court negotiated and entered into a cooperation agreement with a co-defendant requiring the co-defendant to testify against defendant in exchange for a more favorable sentence. In doing so, the court abandoned the role of a neutral arbiter and assumed the function of an interested party, thereby creating a specter of bias that requires reversal.

By tying its assessment of the truthfulness of the co-defendant's testimony to his prior statements to police, the court essentially directed the co-defendant on how he must testify in order to receive the benefit of the bargain.

Concurring, Judge Rivera agrees with the majority that reversal and a new trial are required without reference to the trial judge's subjective intentions, but, noting that the trial judge assumed the role of prosecutor, departs from the majority analysis to the extent it concludes the conduct here is something short of bias.

People v. Agape Towns
(Ct. App., 5/7/19)

* * *

JUDGES - Bias/Involvement In Plea Agreement

The Fourth Department finds reversible error where the court negotiated and entered into a plea agreement that required a co-defendant to testify against defendant in exchange for a more favorable sentence, which denied defendant his due process right to a fair trial in a fair tribunal.

People v. Terrance Lawhorn
(4th Dept., 12/20/19)

Confessions/Admissions/Self Incrimination

WITNESSES - Unsworn Testimony
SELF INCRIMINATION - Invocation By Prosecution Witness
CONFESSIONS - Notice Of Intent To Offer

The Second Department finds no CPL § 710.30 notice violation where the People failed to timely serve notice of defendant's statement to a confidential informant. Defendant was friendly with the informant and his admissions were made in a non-coercive, non-custodial setting. Notice of intent need not be served where, as here, there is no question of voluntariness.

However, the trial court erred in admitting the testimony of a witness who refused to take the oath, and was not deemed to be ineligible to take the oath. Although the witness provided only background information about herself, and, when asked about the incident, invoked the Fifth Amendment privilege, defendant was prejudiced by the prosecutor's leading questions informing

the jury that the witness had previously identified defendant as the shooter; by inferences the prosecutor sought to draw from the witness's refusal to testify; and by instructions permitting the jury to draw an inference of defendant's guilt from the witness's refusal to testify. The court also told the jury that the witness did not have the right to refuse to answer questions that might incriminate her because she had been granted immunity from prosecution, but the witness was not given immunity until after she had asserted the Fifth Amendment privilege 12 times.

People v. Tiequan Ward
(2d Dept., 8/28/19)

* * *

RIGHT TO COUNSEL - Invocation By Defendant
CONFESSIONS - Invocation Of Right To Remain Silent

About 40 minutes into the interview, defendant became increasingly quiet and less eager to talk. The detective spoke for roughly 3½ minutes, with little to no contribution from defendant, and attempted to appeal to defendant "as a father." Defendant asked if he would be at the police station all weekend, and the detective said "no." The detective then asked defendant to tell him what had happened, but was met with silence, prompting him to ask again. In response, defendant stated, "maybe I should get a lawyer. I completely understand what you're saying and I agree with you, but I don't want to f**k myself."

The Third Department holds that defendant unequivocally invoked his right to counsel and exercised his right to remain silent.

People v. Michael Harris
(3d Dept., 11/27/19)

* * *

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 - Notice Of Intent To Offer/Waiver Of Preclusion
- Motion Papers

The Court holds that defendant did not waive his right to challenge the sufficiency of CPL § 710.30 notice by moving for preclusion and in the alternative for suppression. Such a motion does not waive preclusion unless the suppression claim is litigated to a final determination.

People v. Morgan
2017 NY Slip Op 33022(U)
(County Ct., West Co., 4/17/17, posted online 4/19/19)

* * *

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).

* * *

CONFESSIONS - Questioning By Child Protective Worker
RIGHT TO COUNSEL

A California appellate court rejects defendant's contention that the admission into evidence of statements he made while in custody to a social worker performing an investigation in a dependency proceeding was error because he was forced to choose between protection of his parental interests in the dependency proceeding and his right not to incriminate himself in the criminal case.

The Court is "troubled" by the admission of the statements, but there is no statutory or constitutional bar. Unless the Legislature decides as a matter of policy that protection is warranted, it is up to a defendant, with the advice of his or her attorney in either the criminal case or dependency proceeding, to decide whether to discuss the facts of the alleged crime with the social worker, or wait until the dependency hearing to testify, at which time a statutory privilege would make his testimony inadmissible as evidence in any other action or proceeding.

Despite the social worker's status as a mandatory reporter, she was not an agent of law enforcement for purposes of Miranda or the Sixth Amendment right to counsel where there is no indication that she acted under the direction or control of law enforcement. She did not discuss the facts of the case with the police or prosecutor prior to interviewing defendant. She only called the prosecutor to find out the charge brought against defendant and the status of the criminal case, and did not inform the police or prosecutor that she intended to interview defendant.

People v. Keo
2019 WL 4593617 (Cal. Ct. App., 2d Dist., 9/23/19)
http://www.courts.ca.gov/opinions/documents/B286844.PDF

Practice Note: New York courts have found that a child protective worker did in fact act as a law enforcement agent when questioning a criminal defendant. *See People v. Rodas*, 145 A.D.3d 1452 (4th Dept. 2016) (there was sufficient degree of cooperation where caseworker and police investigator communicated at least four times and kept each other apprised of investigatory findings; before first interview of defendant, caseworker called investigator again and asked him to accompany her to jail, but he informed caseworker that he could not do so because defendant was represented by counsel on unrelated charge and would not speak in absence of counsel; although investigator did not give caseworker instructions or directions before she interviewed defendant, he asked her not to "focus on" certain letters defendant might have at jail to avoid destruction of letters before investigator could obtain warrant; and, during interviews,

caseworker told defendant she was "working together" with "law enforcement" and would be "sharing" with police the information she obtained from him); *People v. Wilhelm*, 34 A.D.3d 40 (3d Dept. 2006) (statements suppressed where caseworkers were members of county-wide, multidisciplinary team comprised of members of District Attorney's office and police and social service agencies; team met regularly to enhance prosecutorial process, and caseworkers cooperated with DA's office by providing information when requested; before interviewing defendant, caseworkers worked with members of team, including Assistant District Attorney and police investigators, and supervising caseworker was told by ADA that she would be called to testify at grand jury proceedings; and, after interviewing defendant, caseworkers met with ADA to discuss "results of the interview" and progress of investigation); *People v. Greene*, 306 A.D.2d 639 (3d Dept. 2003), *lv denied* 100 N.Y.2d 594 (caseworker had agency relationship with law enforcement given common purpose and cooperative working arrangement in Family Violence Response Team, and understanding that incriminating statements obtained by caseworker would be communicated to police); *see also Jackson v. Conway*, 763 F.3d 115 (2d Cir. 2014), *cert denied* 135 S.Ct. 1560 (caseworker was aware of possibility that investigation could support criminal prosecution, and should have known that questions were reasonably likely to evoke incriminating response); *but see People v. Rodriguez*, 135 A.D.3d 1181 (3d Dept. 2016), *lv denied* 28 N.Y.3d 936 (caseworker not agent of police where he was on task force that included members of law enforcement, but testified that he did not consult with law enforcement regarding plans to interview defendant and law enforcement was not present at interview).

Parent-Child Privilege

PARENT-CHILD PRIVILEGE

The Third Department, noting that a parent-child privilege may arise when a minor, under arrest for a serious crime, seeks the guidance and advice of a parent in the unfriendly environs of a police precinct, concludes that the privilege could not be applied in this case because defendant was 19 years old at the time of the conversation.

People v. Raekwon Stover
(3d Dept., 12/5/19)

Search And Seizure

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

Defendant was approached by officers after they observed him exiting and reentering a building in a New York City Housing Authority development several times. Upon the officers' request, defendant explained that he was visiting a friend who lived in the building. The officers asked defendant for his identification, which he provided. An officer then took defendant's identification to the eleventh floor of the building to verify whether the occupant of the

apartment defendant identified knew him. Another officer instructed defendant to "stand right there" under the watch of two officers. When the first officer returned, having determined that the occupant of the apartment did not know defendant, defendant was arrested for trespassing. At the precinct, officers searched defendant incident to his arrest and recovered 42 bags of crack cocaine from his groin area.

The Court of Appeals orders suppression. Although the request for information was lawful, the encounter thereafter rose beyond level one. The People failed to justify a further intrusion, arguing only that the encounter was a lawful level one inquiry, and thus have failed to preserve any argument that the encounter was justified under levels two or three of De Bour.

People v. Nicholas Hill
(Ct. App., 5/2/19)

* * *

CONFESSIONS - Interrogation/Pedigree Questioning
- Fruits/Subsequent Statements

The Court suppresses defendant's pre-Miranda statements made in response to a detective's questions concerning defendant's employment, the length of his tenure at his current job, his job responsibilities, the length of time he had lived at his current address, and other places where he and his family had lived. The detective was aware that an accomplice claimed to know defendant from previously working with him at a bar, and, when questioning resumed after administration of Miranda warnings, it concerned defendant's work history at bars at or around the time of the incident. The People are not claiming that the pedigree exception is applicable, and, in any event, the detective admitted at the suppression hearing that, at the time of the interview, he had already recorded defendant's pedigree information and that such information does not include an individual's employment.

The post-Miranda statements also must be suppressed since there was no break in time, no change of location, no change in the nature of the interrogation, and no change of police personnel.

People v. Wesnel Dorvil
(2d Dept., 8/28/19)

* * *

SEARCH AND SEIZURE - Saliva Sample/Search Warrant
EVIDENCE - Video Recording

In this homicide prosecution, the First Department finds reversible error where the hearing court precluded defense counsel from reviewing the People's application for a search warrant to obtain

a sample of defendant's saliva in connection with the homicide investigation, and from participating in the substantive portion of the hearing on the application. Counsel had received notice of the People's application because he represented defendant in an unrelated case in which he was in custody.

The hearing court erred in concluding that the notice requirement discussed in Matter of Abe A. (56 N.Y.2d 288) applied only to the seizure of the person, and not to notice and opportunity to be heard on the question of whether there was probable cause.

The Court also concludes that the People failed to adequately authenticate a YouTube video where there was testimony that the video in court was the same as the one posted on YouTube and another website, and that defendant appears in the video.

People v. Reginald Goldman
(1st Dept., 4/23/19)

* * *

SEARCH AND SEIZURE - Cell Phones/Expectation Of Privacy
- Exigent Circumstances

The Supreme Judicial Court of Massachusetts holds that police action causing an individual's cell phone to "ping" and reveal its real-time location constitutes a search requiring a warrant under the State Constitution.

Although our society may have reasonably come to expect that the voluntary use of cell phones discloses cell phones' location information to service providers, and that records of such calls may be maintained, our society would certainly not expect that the police could, or would, transform a cell phone into a real-time tracking device without judicial oversight. The power of such unauthorized surveillance is far too permeating and too susceptible to being exercised arbitrarily by law enforcement. It would require a cell phone user to turn off the cell phone just to assure privacy from governmental intrusion.

However, in the circumstances of this case, the warrantless search was supported by probable cause and was reasonable under the exigent circumstances exception to the search warrant requirement. The police had reasonable grounds to believe that obtaining a warrant would be impracticable because taking the time to do so would have posed a significant risk that the suspect may flee, evidence may be destroyed, or the safety of the police or others may be endangered.

Commonwealth v. Almonor
2019 WL 1769556 (Mass., 4/23/19)

* * *

SEARCH AND SEIZURE - Request For Information/Mere Greeting

At approximately 11:40 p.m., the officers, wearing plainclothes and traveling in an unmarked vehicle, observed defendant and two other males walking on the sidewalk along a chain-link fence. As the officers drove alongside the group, one officer asked, from a rolled down passenger window, "fellas, how you doing tonight." Defendant then motioned and threw an unknown object over the fence. The officers stopped and exited their vehicle, identified themselves as police officers, and approached defendant. While one officer asked defendant what he had thrown, his partner hopped over the fence and retrieved the object - a switchblade knife.

The Second Department upholds the denial of suppression. The comment, "fellas, how you doing tonight," was a greeting and not a level one inquiry.

People v. Kyle Birch
(2d Dept., 4/10/19)

* * *

SEARCH AND SEIZURE - Consent
- Plain View Doctrine
- Emergency Doctrine

The officer received a dispatch reporting that a psychiatrist had called 911 after meeting with defendant and stated that defendant had purchased a shotgun, and had a history of possessing firearms, making threats to police, and paranoia. The police responded to defendant's residence, where he resided with his mother, and the officer also learned that the residence was "flagged" due to an "officer safety alert" and that officers should proceed with caution because defendant previously had made threats to shoot a police officer and had a shotgun confiscated. Defendant's mother invited the police inside after the officer asked to speak with defendant, and the officer asked defendant to step outside to talk. Defendant initially agreed but then darted to the back of the house to the living room. As the officer yelled for defendant to stop, defendant reached into his waistband, removed an object, and tossed it underneath a chair in the living room as he ducked behind a wall. Defendant then complied with the officers' requests to come out with his hands up, and they took him into custody, searched him, and took him outside of the residence. The officer reentered the residence, went to the living room, and moved or lifted the chair under which defendant had thrown the object and discovered a handgun.

The Second Department suppresses the physical evidence recovered from the residence, and defendant's subsequent statements. The mother's consent did not encompass the officer's search of the living room. The plain view exception is inapplicable since the officer did not know what the object was until he moved a chair. The People do not invoke the emergency exception on appeal, and, in any event, any exigency abated once defendant was detained.

People v. Timothy Hickey
(2d Dept., 5/1/19)

* * *

SEARCH AND SEIZURE - Probable Cause/Criminal Trespass

The First Department holds that the officer's knowledge that defendant was on a list of persons barred from entering the Housing Authority complex created probable cause to arrest him for criminal trespass in violation of a no trespass notice. The officer was part of a team of officers that had arrested defendant two months earlier in the complex, when the officer learned that defendant was in the "trespass program."

The Court notes, "however, that trespass notices (such as the one in the instant case) often have exceptions that allow recipients to visit family members who live in Housing Authority complexes. In those situations, since the person is legally authorized to be on site despite the trespass notice, he/she should be allowed to visit, with police intrusion aimed primarily at ascertaining that the person is headed to the right apartment." There must be a basis for an inference by the arresting officer, at the time of arrest, that the suspect knowingly entered or remained unlawfully on the premises in violation of a personally communicated request to leave the premises from a housing police officer or other person in charge.

People v. James Eury
(1st Dept., 5/2/19)

* * *

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 - Strip Search

The Third Department suppresses the bag of cocaine recovered from defendant's clothing during a strip search where the People concede that the search warrant did not authorize a search of defendant, but argue that the police had probable cause to arrest defendant and strip-search him incident to that lawful arrest.

The Court notes, inter alia, that a strip search must be founded on a reasonable suspicion that the arrestee is concealing evidence underneath clothing; and that the proof of defendant's participation in a drug trafficking conspiracy, and an itinerary suggestive of wrongdoing, did not establish reasonable suspicion.

People v. Jeffrey Turner
(3d Dept., 10/17/19)

* * *

SEARCH AND SEIZURE - Stop And Frisk/Reasonable Suspicion

The police received an anonymous tip that a black man in a bodega wearing a black coat with a fur hood had a gun and drugs in his pocket. When the police arrived on the scene, approximately one minute later, they observed defendant, who fit the description, inside the bodega. They observed one other black man, as well as two men of Middle Eastern descent behind the counter. The bodega employees responded "yes" when asked whether everything was okay. One of the officers asked defendant if everything was okay, and he replied in the affirmative. Defendant then attempted to pass by the officers and exit the store. One of the officers "sidestepped to [his] right," in order to "prevent [defendant] from leaving the store." The officers "decided to frisk [defendant] for [their] safety, since it came over as male with a firearm and he fit the description." They walked defendant to the counter, which was 5-10 feet away. Defendant put his hands on the counter, and the officers frisked him. Defendant placed his hand inside his jacket pocket, and an officer used force to pull defendant's wrist from the pocket, and a silver firearm fell to the ground.

The First Department orders suppression. The police may not stop and frisk a person based solely on an anonymous source's report that the person is carrying a gun. Defendant's attempt to leave the store did not raise the level of legitimate suspicion, and he was illegally seized when the officers, having no more than a level two right to inquire, blocked his exit from the bodega, walked him to the counter, and directed him to put his hands on the counter. Thus, defendant's reaching into his pocket could not validate the intrusion.

People v. Paris Brown
(1st Dept., 4/30/19)

* * *

SEARCH AND SEIZURE - Schools
- Reasonableness Of Seizure

In this § 1983 action, K.W.P., a seven-year-old boy in the second grade, alleged that a school-employed officer unreasonably seized him and used excessive force by handcuffing him; that the principal failed to instruct the officer to remove the handcuffs even though K.W.P. posed no imminent threat and complied with instructions; and that school authorities failed to train and supervise the officer on the use of handcuffs on elementary school-age children.

The Eighth Circuit U.S. Court of Appeals finds no violation of K.W.P.'s constitutional rights. The Court need not decide whether to apply the standard governing police officers or the T.L.O. standard governing school officials, since K.W.P.'s claim fails under either standard. K.W.P. resisted the officer's directive to accompany him to the office and attempted to flee upon his removal from the classroom for being disruptive, which posed a safety risk to himself. A reasonable officer could conclude that keeping K.W.P. in handcuffs for 15 minutes until a parent arrived was a reasonable course of action. The principal's failure to intervene was reasonable in light of her previous experience with K.W.P., who, just two months earlier, tried to leave the playground after getting mad at the principal for instructing him not to hit others, and, when the principal grabbed K.W.P.'s wrist to take him to the office, actively resisted by trying to pull away from the principal.

In any event, K.W.P. failed to show that it was clearly established at the time that defendants' conduct constituted a violation of his constitutional rights.

K.W.P. v. Kansas City Public Schools
2019 WL 3489104 (8th Cir., 8/1/19)

* * *

SEARCH AND SEIZURE - Auto Search - Probable Cause/Fear Of Weapon

The complainant told an officer that defendant threatened to shoot him and that he believed the threat was serious because defendant had been in possession of a black handgun prior to the incident. Defendant, who was seated in his truck in front of the complainant's home with two passengers, acknowledged saying he would shoot the complainant if the complainant entered defendant's property. Defendant also admitted that he owned a rifle, which was at his home, and had a Virginia pistol permit but no New York pistol permit. The officers searched defendant's person but recovered no weapons, and then searched the area near the driver's seat of the truck, and recovered a loaded handgun.

The Fourth Department upholds a suppression order, concluding that there was no probable cause, and no basis for a limited safety search.

People v. Kenneth Pastore
(4th Dept., 9/27/19)

* * *

SEARCH AND SEIZURE - Auto Search/Probable Cause

The Second Department agrees with the suppression court that the recovery of a small quantity of what appeared to be cocaine, along with a cut straw, in plain view on defendant's person, was insufficient to provide probable cause to believe that additional contraband would be found in the trunk of defendant's vehicle, particularly after a search of the passenger compartment revealed nothing.

People v. Julio Garcia
(2d Dept., 9/11/19)

* * *

SEARCH AND SEIZURE - Standing/Rental Cars
- Auto Search/Impoundment
RIGHT OF CONFRONTATION - Hearsay/Bruton
APPEAL - Preservation

The Second Circuit concludes that defendant Lyle had no reasonable expectation of privacy in a rental car where he was an unlicensed, and thus unlawful and unauthorized, driver. A rental company with knowledge of the relevant facts certainly would not have given him permission to drive its car nor allowed a renter to let him do so.

Even assuming Lyle had a legitimate privacy interest in the rental car, his challenge to the inventory search fails on the merits as the impoundment of the rental car did not violate the Fourth Amendment. At the time of his arrest for driving with a suspended license and for possessing an illegal knife, Lyle was the rental car's driver and sole occupant, and there was no

third party immediately available to entrust with the vehicle's safekeeping. Although Lyle asked for the opportunity to arrange for his girlfriend, the authorized driver under the rental agreement, to remove the rental car, the police were not required to grant the request.

The Court also finds no error in the admission of Lyle's redacted proffer and post-arrest statements. First, Van Praagh's *Bruton* argument was not preserved by his counsel's objection to the admission of Lyle's unredacted statements, which is a different and independent issue.

The admission of the proffer and statements was not plain error. This was an ongoing criminal enterprise and the government introduced evidence of methamphetamine dealing by several people. Thus, the substituted language alone did not necessarily identify Van Praagh, and the redacted statements also sounded sufficiently natural. Van Praagh's constitutional rights also were not violated when Lyle's counsel elicited testimony that the statements had been redacted for presentation at trial and that Lyle had provided actual names. Lyle's attorney elicited several of the names Lyle mentioned, but not Van Praagh's name, which made it less, not more, obvious to the jury that Lyle had also mentioned Van Praagh.

United States v. Lyle and Van Praagh
2019 WL 1433719 (2d Cir., 4/1/19)

* * *

SEARCH AND SEIZURE - Incident To Arrest

After the police saw defendant and another man engage in shoplifting behavior in several stores and place items in a large rolling suitcase, they approached the two men. Defendant immediately let go of the suitcase and resisted arrest. Both men were handcuffed. A knife was recovered from each man. An officer "quickly opened up" the suitcase and "saw a lot of clothing inside," and immediately closed the suitcase. At the precinct, the suitcase was searched.

In a 3-2 decision, the First Department upholds the denial of suppression. The majority notes that defendant's arrest and the search were contemporaneous, and this was a brief inspection and not a full-blown search; that the police properly inspected the suitcase for their own safety - the suitcase was large enough to conceal a weapon - and to prevent any destruction of evidence; that the suitcase was in defendant's grabbable area and not in the exclusive control of the police; that, contrary to the dissent's claim, there was no testimony that defendant was surrounded by more than eight officers when the suitcase was searched, and although defendant was handcuffed, there was a realistic possibility that he could have used other means, such as kicking or shoving the officer, to disrupt the arrest process in order to grab a weapon or destroy evidence; and that, contrary to the suggestion by the dissent, an officer need not affirmatively testify to the exigency - rather, the exigent circumstances need only be inferred from the circumstances of the arrest.

The dissenting judges assert that the majority obviates the exigency requirement by effectively finding that the mere possibility that an exigency might exist is sufficient.

People v. Willie Harris
(1st Dept., 6/25/19)

* * *

SEARCH AND SEIZURE - Incident To Arrest

The Court finds error, albeit harmless, in the denial of defendant's motion to suppress a knife recovered by the police during a warrantless search of defendant's bag. Although at the time of the search the bag was on the floor within the "grabbable area" next to defendant, he was standing with his arms handcuffed behind his back, and the circumstances do not support a reasonable belief that defendant could have either gained possession of a weapon or destroyed evidence located in the bag.

People v. Rovell Washington
(1st Dept., 4/4/19)

* * *

SEARCH AND SEIZURE - Motion Papers

The Second Department holds that the court erred in denying defendant's motion to controvert the search warrant without holding a hearing where defense counsel did not have access to even a redacted copy of the search warrant applications at the time the motion was made, and thus was not required to make precise factual averments.

People v. Darnell Lambey
(2d Dept., 10/30/19)

Identification

IDENTIFICATION - Police-Arranged Cell Phone Video Identification
APPEAL - Harmless Error

The complainant's landlord gave a detective a cell phone the landlord found in front of the building. After the detective conducted two photo identification procedures using the photo manager computer system, with defendant's photograph included in one of the procedures, but the complainant did not identify anyone, the detective showed the complainant the cell phone, told him that it was recovered from the scene of the robbery, and asked if it was his. The complainant responded that the cell phone was not his. The detective had him view videos that were on the cell phone, one of which portrayed a male tasing an individual who was sleeping on a staircase. The complainant identified the male as one of the individuals who robbed him. The detective submitted a still photograph of the male to a facial recognition software program

containing photographs of criminal offenders, and defendant was a match. The complainant identified defendant from a photo array, and, approximately a week later, identified defendant in a lineup. The court suppressed the lineup identification, but found an independent source for an in-court identification. The court denied suppression of evidence that the complainant identified defendant as the male in the cell phone video, finding that there was no police-arranged procedure.

The Second Department suppresses the cell phone video identification, which was police-arranged, and unduly suggestive. By showing the complainant the cell phone and telling him that it was recovered from the scene of the robbery, the detective suggested that the phone may belong to one of the perpetrators, and the video was similar to the complainant's description of the robbery.

The error was not harmless.

People v. Richard Jones
(2d Dept., 6/19/19)

* * *

IDENTIFICATION - Showups/Suggestiveness
- Independent Source
- Wade Hearing/Right To Waive Appearance

The Second Department finds no undue suggestiveness where there was evidence at the Wade hearing that defendant was wearing sunglasses at the time of the crime, and an eyewitness testified that he overheard that the individuals being detained had been found wearing sunglasses, but the testimony established that defendant was not wearing sunglasses at the time of the showup.

The Court also upholds findings of independent source where the eyewitnesses' descriptions did not mention defendant's facial scar. Defendant describes his scar as being situated approximately one inch under the far corner of his left eye and approximately an inch in length from his eye toward the back of his head. However, the eyewitnesses' descriptions were sufficiently detailed and accurate as to defendant's race, gender, height, build, and age, and they testified at the pretrial hearing that defendant was wearing sunglasses.

While defendant had an absolute right to waive his presence at the independent source phase of the Wade hearing, the hearing court's refusal to allow defendant to absent himself was harmless error.

People v. David Hosannah
(2d Dept., 12/24/19)

* * *

IDENTIFICATION - Showup/Courtroom ID

The Second Department holds that defendant's due process rights were not violated when the court permitted a witness to make a first-time, in-court identification during trial. In these circumstances, defense counsel is able to explore weaknesses and suggestiveness in the identification in front of the jury.

People v. Manuel Morales
(2d Dept., 10/30/19)

Practice Note: It is in these circumstances that defense counsel should consider whether it would be appropriate to request a pretrial lineup or an in-court identification procedure that includes other physically similar individuals.

It behooves defense counsel to persuade the judge that a court-ordered identification procedure is necessary in order to avoid undue suggestiveness, since New York appellate courts have not, thus far, been inclined to find reversible error when a defense motion has been denied. In *People v. Brown*, 28 N.Y.3d 392 (2016), *aff'g* 126 A.D.3d 516 (1st Dept. 2015), the trial court denied the defendant's request for an in-court lineup where one victim had identified the defendant in a suggestive pretrial lineup but would identify the defendant in court after a finding of independent source, and another victim had never participated in a pretrial identification procedure. The First Department alluded to the victims' consistent accounts of the robbery, which showed that they had a good opportunity to view the robber's face at close range, and observed that because one victim never participated in a pretrial identification procedure, his in-court identification could only have been based on his recollection from the night of the crime. In making the latter observation, was the First Department discounting the possibility that the in-court showup played a part in the identification? The Court of Appeals affirmed, concluding that the defendant had no constitutional right to an in-court lineup, and that the trial court did not abuse its discretion by denying his request for one. The Court of Appeals also noted that defendant had "failed to sufficiently cast doubt on the reliability of the witnesses' identification testimony or otherwise demonstrate impermissible suggestiveness by the traditional in-court identification procedure…." Was the Court of Appeals effectively saying that a defendant has no cognizable interest in avoiding an unduly suggestive courtroom showup merely because it appears that an identification that has never taken place will be reliable?

In *People v. Brooks*, 39 A.D.3d 428 (1st Dept. 2007), *lv denied*, 9 N.Y.3d 873, the First Department found no error where the trial court refused to conduct an in-court lineup for the victims' grandmother, who had not participated in any pretrial identification procedures, but at least in that case the grandmother had spontaneously recognized the defendant when she inadvertently saw him in custody in a courthouse hallway, which, according to the court, established her ability to make a reliable identification. *See also People v. Lombardo*, 151 A.D.3d 887 (2d Dept. 2017), *lv denied*, 30 N.Y.3d 951 (no error in admission of 13-year-old

eyewitness's in-court identification where witness did not participate in pretrial identification procedure but there was no colorable claim of suggestiveness); *People v. McCullin*, 248 A.D.2d 277 (1st Dept. 1998), *lv denied*, 92 N.Y.2d 928 (citing strong evidence of guilt, court found no error in denial of motion for out-of-court identification procedure, or in-court procedure including individuals who resembled defendant).

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

The Supreme Judicial Court of Massachusetts is out ahead of New York courts on this issue, holding in *Commonwealth v. Crayton*, 21 N.E.3d 157 (2014) that where an eyewitness has not participated before trial in an identification procedure, courts must treat the in-court identification as an in-court showup, and admit it in evidence only where there is "good reason" for its admission.

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

* * *

IDENTIFICATION - Notice Of Intent To Offer/Multiple IDs
- Remedy For Violation Of Notice Requirement

The Court precludes "[a]ny and all identification testimony" where the timely served VDF notice included three separate procedures, but, on the day of the scheduled Wade hearing, the presentment agency belatedly disclosed a discrepancy between the complainant's account of

photo identifications and the assistant principal's account, and then filed amended VDFs containing notice of two additional identifications - supposedly inadvertent sightings of respondents by the complainant at the school and at the police station.

The belatedly disclosed information "added to the confusion and completely deprived Respondents' counsel of any meaningful opportunity to challenge the identification procedures."

Matter of Mackenzie B.
2019 NY Slip Op 32362(U)
(Fam. Ct., Kings Co., 8/7/19)

* * *

IDENTIFICATION - Photos/Suggestiveness

The Court finds unduly suggestive a photo array in which a black line beneath defendant's photo draws the viewer's immediate attention to that photo as if the police had selected it.

Moreover, the perpetrator was described by the complainant as a light-skinned African-American female with blonde hair, and the photo immediately to the right of defendant's depicts a female with dark brown hair and a different ethnic background. And two other filler photos depict visible chest tattoos.

People v. Brace
2017 NY Slip Op 33093(U)
(Sup. Ct., Albany Co., 12/13/17, posted online 7/10/19)
http://nycourts.gov/reporter/pdfs/2017/2017_33093.pdf

* * *

IDENTIFICATION - Showups/Suggestiveness

In *Commonwealth v. Silva-Santiago* (906 N.E.2d 299), the Supreme Judicial Court of Massachusetts established a protocol to be employed before a photographic array is provided to an eyewitness. To reduce the risks of unnecessary suggestiveness and misidentification, the officer conducting the identification procedure should inform the witness, at a minimum, that he will be asked to view a set of photographs; the alleged wrongdoer may or may not be in the photographs depicted in the array; it is just as important to clear a person from suspicion as to identify a person as the wrongdoer; individuals depicted in the photographs may not appear exactly as they did on the date of the incident because features such as weight and head and facial hair are subject to change; regardless of whether an identification is made, the investigation will continue; and the procedure requires the administrator to ask the witness to state, in his or her own words, how certain he or she is of any identification.

The Court now concludes that prior to a showup identification, the officer conducting the procedure will be required to instruct the witness as follows: "You are going to be asked to view a person; the alleged wrongdoer may or may not be the person you are about to view; it is just as important to clear an innocent person from suspicion as it is to identify the wrongdoer; regardless of whether you identify someone, we will continue to investigate; if you identify someone, I will ask you to state, in your own words, how certain you are." The failure to instruct a witness prior to a showup identification will carry the same consequences as a failure to follow the *Silva-Santiago* protocols; it affects a judge's evaluation of the admissibility of the identification, and, where the identification is found admissible, it affects the judge's instructions to the jury regarding their evaluation of the accuracy of the identification.

Commonwealth v. German
2019 WL 5959570 (Mass., 11/13/19)

Pleas

PLEAS - Voluntariness

The Third Department finds involuntary defendant's plea to a probation violation, noting, inter alia, that the court abdicated its responsibility to consider the facts and fashion an appropriate sentence when it stated that it could not "override" the People's sentencing recommendation unless defendant declined the offer and proceeded to a hearing, and that "the proceedings were also marred by the People's admittedly inappropriate threat to seek a harsher sentence if defendant rejected the offer and was found guilty after a hearing…."

People v. James Roberts
(3d Dept., 10/18/19)

* * *

PLEAS - Allocution/Notice To Parent
TRIAL IN ABSENTIA - Telephonic Appearance

After noting that the Orange County family court had no authority to vacate respondent's admission in the Ulster County family court, and that the Ulster County family court had no authority to "set aside" the Orange County order, the Second Department finds that respondent's admission was legally defective where the record does not show that a "reasonable and substantial effort" was made to notify respondent's mother or guardian about the proceeding; respondent appeared telephonically even though there is no provision in FCA Article Three authorizing such an appearance; respondent's admission to breaking a window failed to establish the elements of reckless criminal mischief in the fourth degree, including monetary damage exceeding $250; and, even if the petition is construed to have charged intentional conduct, respondent's admission to breaking the window failed to show that she intentionally broke it.

Matter of Cheryl P.
(2d Dept., 9/11/19)

* * *

PLEAS - Allocution/Immigration Consequences

The Second Department rejects defendant's contention that his plea was involuntary because the court did not advise him of the possibility that he would be deported as a consequence of his plea. There is no evidence in the record that contradicts defendant's statement under oath at the plea proceeding that he was a U.S. citizen or information in the Presentence Investigation Report indicating that defendant was a naturalized U.S. citizen.

However, the Court "take[s] the opportunity to express our view that a trial court should not ask a defendant whether he or she is a United States citizen and decide whether to advise the defendant of the plea's deportation consequence based on the defendant's answer. Instead, a trial court should advise all defendants pleading guilty to felonies that, if they are not United States citizens, their felony guilty plea may expose them to deportation…. Whether a defendant receives the Peque warning should not depend on the defendant having to acknowledge, on the record in open court, that he or she is not a United States citizen, particularly since eliciting noncitizen status may raise, in some cases, concerns of compelled self-incrimination…."

People v. Deno Williams
(2d Dept., 12/24/19)

* * *

PLEAS - Allocution/Collateral Consequences

The Third Department, noting that an order of protection is not punitive and is instead an ameliorative measure intended to safeguard the rights of the victims and witnesses, concludes that the order and its terms are not a direct consequence of a guilty plea of which a defendant must be advised.

People v. Joshua Sanford
(3d Dept., 4/25/19)

Practice Note: In juvenile delinquency proceedings, FCA § 321.3(1) precludes the court from accepting a juvenile's admission unless he/she is aware of "the possible specific dispositional orders." An order of protection issued pursuant to FCA § 352.3 is not one of the dispositional orders listed in FCA § 352.2(1).

* * *

PLEAS - Knowing, Intelligent, Voluntary
MOTION TO VACATE JUDGMENT OF CONVICTION

The Third Department concludes that the court below should have conducted a hearing to determine whether defendant was entitled to vacatur of the judgment of conviction.

Defendant submitted evidence that, at the time of the crime and when he pleaded guilty, he was suffering from mental health issues and had been prescribed various antidepressants and antipsychotic medications, and produced two expert affidavits to establish that he has a genetic deficiency that negatively affects his ability to metabolize antidepressants and antipsychotic medications and has been scientifically linked to increased rates of drug-induced psychiatric symptoms.

Defendant also established that although defense counsel was well aware of defendant's mental health issues, counsel stated to defendant on multiple occasions that he had "absolutely no defense" to the charged crimes, and thus there is a question as to whether defendant knowingly, voluntarily and intelligently waived any potential defenses, including an involuntary intoxication defense or the defense of not responsible by reason of mental disease or defect.

In addition, there is a question as to whether defendant's guilty plea was voluntary and not coerced since counsel told defendant, among other things, that if he refused to plead guilty, counsel would no longer agree to represent him, and, in attempting to dissuade defendant from proceeding to trial, invoked the potential disgrace to his family.

People v. Joseph Adamo
(3d Dept., 7/25/19)

* * *

PLEAS - Vacated By Court Without Defendant's Consent

The First Department concludes that, under the "unusual procedural circumstances," the court did not exceed its authority in vacating defendant's first guilty plea without his consent where defendant's continued litigation of the validity of the charges before the plea court was incompatible with the plea.

People v. Theophilus Burroughs
(1st Dept., 4/4/19)

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 - Motion Practice

In a 3-2 decision, the First Department holds that the court improvidently exercised its broad discretion over calendar matters when it refused to accept the People's untimely opposition papers - filed on the decision date, some 15 days after the due date - and to reconsider its decision to grant defendant's statutory speedy trial motion as unopposed.

The majority notes that this appears to be an isolated lapse, and there is nothing in the record suggesting any history of dilatory conduct or blatant disregard of court directives on the part of the People; that although there was frustration occasioned by the failure of the People to adhere to the motion schedule, defendant was indicted on numerous weapons possession charges, and dismissal of those charges without a full and complete determination of the motion to dismiss on its merits was unduly harsh; that less drastic remedies, including charging the People for the 15-day delay, were available; and that delay would not have resulted in any prejudice to defendant, as he was not incarcerated on the weapons indictment.

The dissenting judges assert that "in order for trial parts to function effectively, parties are obligated to honor court-imposed deadlines;" and that the court, in the proper exercise of its discretion, advised the parties that it would not entertain a request for an extension of time made on the date designated for decision on the motion.

People v Anthony Lora
(1st Dept., 11/21/19)

* * *

SPEEDY TRIAL - Witness's Vacation

The Fourth Department dismisses the charges on statutory speedy trial grounds, concluding that the People should be charged with a period of post-readiness delay caused when "one of [their] critical witnesses" was scheduled to be "on a pre-paid vacation."

Where a witness is unavailable because of medical reasons or military deployment, courts generally have held that the delay is not chargeable to the People. Where the witness is unavailable because he or she has taken a vacation, however, many courts have charged the time to the People. Here, the People did not establish that they exercised due diligence in attempting to secure the witness's presence.

People v. Sid Harrison
(4th Dept., 4/26/19)

Right To Counsel

RIGHT TO COUNSEL - Effective Assistance

Defendant was charged with unlawfully entering an apartment building on two occasions and stealing the contents of packages from the mailbox area in the lobby. Defendant's identity as the thief was captured with clarity on the building's surveillance video, and he admitted to the police that he was the thief. Defense counsel declared in his opening statement that there was "no great mystery" to the case and that this was a "rock-solid" case because the crimes were captured on video, but also stated that the burglary charges did not fit the facts because the evidence would show that defendant took only mail packages of pairs of pants and "doggy pee pads," and that defendant did not break any locks, did not enter anyone's apartment, and did not possess burglar's tools during the incident. Counsel also told the jury that he had been "fighting for" defendant for over a year and implored the jurors to "join that fight when [they] listen to the evidence," a comment that provoked an objection by the People that was sustained. On summation, defense counsel argued along the same lines and pressed the case for leniency.

The Court of Appeals rejects defendant's claim that defense counsel was ineffective because he "deliberately conceded … guilt on all counts" and exclusively pursued a jury nullification defense. "Given the truly overwhelming evidence against his client on all the charges, and constrained by the limited legitimate defense strategies available, counsel raised what he reasonably perceived could be factual issues in the case, such as the method of defendant's entry into the building." The trial court did not curb counsel's jury nullification summation arguments.

People v. David Mendoza
(Ct. App., 6/13/19)

* * *

RIGHT TO COUNSEL - Decision-Making

The First Department rejects defendant's claim that defense counsel improperly conceded his guilt without his consent where counsel focused on persuading the jury to accept the non-frivolous proposition that there was reasonable doubt as to whether the robbery occurred in a dwelling, and did not concede that defendant was the perpetrator.

Even though counsel did not probe deeply into the question of the robber's identity and asked only perfunctory questions along those lines, the right to counsel is not violated when a defense lawyer advocates for the defendant's claim of complete innocence with what the defendant might consider insufficient zeal.

People v. Terrence Maynard
(1st Dept., 10/17/19)

*** * ***

RIGHT TO COUNSEL - Effective Assistance - Pleas/Immigration Consequences

The First Department vacates the judgment of conviction, concluding that defendant was denied effective assistance of counsel in connection with his third degree robbery plea where defense counsel mistakenly believed that defendant's already-existing youthful offender adjudication, which is not considered a criminal convictions for purposes of immigration law, already rendered him deportable, and did not know that defendant's negotiated sentence of one to three years rendered the conviction an aggravated felony under immigration law.

As a result, counsel focused primarily on ensuring that defendant did not serve extra time on the violation of probation in the YO case rather than on obtaining a sentence of less than one year in connection with the plea, which would have prevented the conviction from being an aggravated felony and subjecting defendant, who is in removal proceedings, to mandatory deportation. When the court advised defendant that his guilty plea would subject him to deportation, defendant did not know there was a way in which a disposition involving the same offenses and aggregate term could be structured to avoid deportation. There was a reasonable probability that the People would have agreed to a different, immigration-favorable disposition resulting in the same aggregate prison time.

People v. Onandi Richards
(1st Dept., 11/14/19)

* * *

RIGHT TO COUNSEL/ETHICS - Decision-Making Authority

Defendant entered a guilty plea with an understanding as to the sentence to be imposed. On the sentencing date, defendant did not appear and later was re-arrested on two misdemeanor charges. On the new sentencing date, defendant discharged his prior attorney and advised the court that he wished to withdraw his plea. The inquiring attorney was appointed and the case was adjourned to allow the inquirer to bring a motion to withdraw. The inquirer has obtained a transcript of the plea proceedings and interviewed prior counsel and finds nothing which would support a contention that the plea was not knowingly and voluntarily made. The inquirer is convinced that there would be a guilty verdict at a trial and that if defendant withdraws his plea he will not be afforded a drug treatment program that was in the previous plea agreement.

The New York State Bar Association's Committee on Professional Ethics concludes that once a lawyer has explained the material risks and chances of success, the lawyer must follow the client's decision to withdraw a plea. Rule 1.2(a) states that, "in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to," among other things, "the plea to be entered." There is no difference in Rule 1.2(a) between a decision to enter a particular plea and a decision later to seek to withdraw it.

A lawyer also is bound by Rule 3.1(a), which says that a "lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous."

N.Y.S. Bar Ass'n Comm. on Prof'l Ethics, Op. 1175
(10/28/2019)
http://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=97631

* * *

RIGHT TO COUNSEL - Invocation By Defendant

The Fourth Department concludes that defendant unequivocally invoked his right to counsel by stating "I think I will take the lawyer" or "I think I need a lawyer."

People v. Jose Hernandez
(4th Dept., 7/31/19)

* * *

RIGHT TO COUNSEL - Invocation By Defendant

The Fourth Department suppresses defendant's statements, concluding that he unequivocally asserted his right to counsel by asking, "May I have an attorney please, a lawyer?"

People v. Delshawn Jackson
(4th Dept., 4/26/19)

* * *

RIGHT TO COUNSEL - Effective Assistance/Conflict Of Interest
ETHICS

The Second Circuit finds a violation of defendant's right to the effective assistance of counsel where defense counsel previously represented the co-defendant, and suggested a severance in response to the co-defendant's disqualification motion while offering to have defendant tried first.

The Court first concludes that the two conflicts that arose were waivable. Counsel had represented the co-defendant with respect to one of the overt acts in the indictment, and was therefore barred from using the fruits of that representation to benefit defendant and from fully cross-examining witnesses about related events. This type of conflict usually is waivable, and the conflict was potential, not actual since it was not clear that the co-defendant would testify or what he would say if he did.

The second, more serious conflict arose from the co-defendant's refusal to waive the conflict, counsel's insistence on severance, and counsel's offer to have defendant tried first, which would deny defendant the strategic advantage of learning the Government's evidence with respect to the co-defendant in advance of or during defendant's trial. Counsel's and defendant's interests diverged, and the conflict was actual, not potential, but it was still waivable. Defendant had no right to proceed to trial with or after the co-defendant. The conflict primarily implicated counsel's ethical obligation to the co-defendant. Counsel's financial interest did not make the conflict non-waivable, not did the tactical advantages in being tried second since a reasonable defendant may decide to retain a trusted attorney after being informed of the risks and benefits of severance.

But defendant's waiver was neither knowing nor intelligent since the court failed to advise him at all about the main strategic disadvantages arising from the conflict. And, since the conflict was actual, it sufficed for defendant to show that an alternative strategic approach (not severing, or pressing to be tried after the co-defendant) was not undertaken due to counsel's other loyalties and interests. Once such a showing is made, a fairly rigid presumption of prejudice applies.

United States v. Roderick Arrington
2019 WL 5276747 (2d Cir., 10/18/19)

* * *

RIGHT TO COUNSEL - Probation Presentence Interview

In this prosecution for aggravated cruelty to animals, the Third Department rejects defendant's contention that the court should have disregarded the presentence report in its entirety and ordered a new one because the Probation Department did not abide by counsel's request to be present for the presentence interview. In light of the non-adversarial nature of a routine presentence interview by a probation officer, such an interview does not constitute a critical stage of the proceedings.

People v. Aaron Brinkley
(3d Dept., 7/18/19)

* * *

RIGHT TO COUNSEL - Consultation With Counsel

In this litigation challenging a Sheriff's policy under which officers are present during courthouse attorney-client meetings, the Court certifies a class consisting of all "adolescent and juvenile offenders, as the terms are defined under New York State Law, who are now, or will be, in the custody of law enforcement and appear before the designated Onondaga County Youth Part," and grants a motion for a preliminary injunction and directs, inter alia, that "Onondaga County and County Executive Ryan McMahon shall make a room available for class members to meet privately with their attorneys in the Syracuse Criminal Courthouse before appearances in the Youth Part," and that "law enforcement officials … are enjoined from being present in the room when class members are discussing their cases with their attorneys before or after court appearances[.]"

The Court notes, inter alia, that a defendant's right to a lawyer includes the right to confer with the lawyer in private; that the violation is most troubling at the time of arraignment, a critical stage of the proceeding at which facts must be developed for purposes of the arraignment and hearings that will soon follow; that, understandably, young people are unwilling to reveal sensitive information in front of law enforcement officers, and, on the other hand, their attorneys must instruct them not to disclose certain facts with an officer present; that the Sheriff has not established that the policy is necessary to ensure security.

J.B. et al. v. Onondaga County et al.
2019 WL 3776377 (N.D.N.Y., 8/12/19)

* * *

SEARCH AND SEIZURE - Auto Search/Probable Cause
EVIDENCE - Consciousness Of Guilt
RIGHT TO COUNSEL

The robbery complainant told the officers that the perpetrators were three black men, one of whom was heavyset, that one of the men had a gun, and that the men had fled in a green minivan traveling eastbound on Kosciusko Street. Other officers to whom these facts were transmitted saw a green minivan traveling eastbound on Kosciusko Street. The officers followed the minivan, which eventually stopped. The front seat passenger, a heavyset black man, exited the vehicle, and an officer approached with his gun drawn and handcuffed the man. Officers then removed the two remaining occupants, including defendant, from the minivan. About a minute later, the complainant arrived and identified the three men as the perpetrators. An officer approached the minivan and observed a firearm between the front seats.

The Second Department upholds the denial of suppression, concluding that there was probable cause to search the minivan for a gun pursuant to the automobile exception.

The trial court erred in admitting defendant's statement to his mother during a recorded telephone call that, with the assistance of an attorney, he could "get around" the fact that he had touched the gun earlier in the day. Evidence which has the jury infer guilt from the fact that a defendant exercised his or her right to counsel should not be admitted. However, the error was harmless beyond a reasonable doubt.

People v. Quindell James
(2d Dept., 6/26/19)

Order Of Proof

ORDER OF PROOF - Re-Opening Suppression Hearing

At the suppression hearing, the People called a police sergeant who testified as to the victim's account, and description of the assailant; the sergeant's observations of defendant upon his arrival at the subway station where defendant was being detained (defendant appeared out of breath and was sweating); and the steps taken to obtain the initial police-arranged show-up identification. Defendant presented no evidence. During oral argument, defense counsel asserted that there was no showing of reasonable suspicion. The court appeared to agree that the testimony concerning defendant's physical state after being detained was of limited relevance. The People responded that they had other witnesses, but the court stated that this was impermissible because the People had rested. The next morning, after reviewing appellate case law provided by the People, the court determined that it did have discretion to reopen the hearing, and refused to continue with oral argument if the People were going to make a motion to reopen, as "tipping [its] hand" or "telling [the People] what [its] feeling [wa]s … would be inappropriate." The People then moved to reopen the hearing, and the court granted the request. The People called one of the officers who had first spotted defendant on the subway platform. That officer testified that approximately five people were on the platform; that defendant was the only one matching the description; and that defendant appeared to be hiding. The Court denied defendant's suppression motion.

The Court of Appeals, in a 5-2 decision, finds no error, holding that the court had discretion to reopen the hearing, and did not abuse its discretion.

In *People v Havelka* (45 N.Y.2d 636), the Court held that where no contention is made that the People did not have a full opportunity to present evidence at a hearing, an appellate court cannot hold an appeal in abeyance and remit a case for a second hearing after finding the evidence offered at the initial hearing insufficient to justify the challenged police action. The Court asserted in *Havelka* that "there is no justification to afford the People a second chance to succeed where once they had tried and failed," and that a remand could lead to impermissible "tailoring" of testimony to overcome defects in the People's proof identified in the Appellate Division decision. In *Matter of Kevin W.* (22 N.Y.3d 287), the Court extended the "one full opportunity" rule to a hearing court's decision to reopen a hearing after a formal decision on the merits.

The Court declines to apply this rule at this earlier point in the process. The risk of improperly tailored testimony is significantly lower where the People do not have a formal decision from either an appellate court or the hearing court. If the suppression court "tips its hand" about perceived weaknesses in the People's proof after the People have rested, that insight might create a risk of tailored testimony at the reopened hearing, and that would inform an appellate court's review of the decision under the abuse of discretion standard. But hearing courts usually will be able to minimize the risk (e.g., by allowing full cross-examination), and detect manufactured testimony. The court's evaluation might include the degree to which evidence at the reopened hearings addresses specific weaknesses the court identified,

The common law power to alter the order of trial proof remains despite statutory provisions governing the order of proceedings during a trial. The statutory framework governing suppression hearing procedures is significantly less comprehensive, and other rules governing suppression hearings are relaxed compared to restrictions that apply in the trial context; this counsels for substantial discretion in altering the order of proof at suppression hearings. The majority rejects the dissent's suggestion that courts may exercise their common-law power only in circumstances identical to those in *People v. Whipple* (97 N.Y.3d 1), where the matter to be addressed after reopening is simple to prove and not seriously contested.

There was no abuse of discretion in this case. The hearing and rehearing occurred over the course of two days. The court denied defendant's suppression motion less than a week after the hearing and rehearing. The additional witness should not have come as a surprise as it was one of the officers who initially spotted defendant at a subway station. The hearing court's "inconclusive comments" had focused on the original witness's observation that defendant was sweating and out of breath, but, at the reopened hearing the People relied on unrelated proof and any risk of tailoring was minimal.

Concerns about finality and improper tailoring of testimony must be balanced against the strong public policy interest in holding culpable individuals responsible and protecting legitimate police conduct. If the People possess evidence showing that no official misconduct occurred, the interests of justice militate strongly in favor of considering this evidence even if it is belatedly

brought to the suppression court's attention.

The dissenting judges (Stein and Rivera) note that *Whipple* can be applied since the question is not whether the ultimate issue - i.e., illegality of police conduct or guilt versus innocence - is uncontested and easy to prove, but whether the missing testimony is a mere technical omission; that the majority's vague rule looking only to whether there was a risk of tailored police testimony increases the potential for abuse and injustice; that it is not only the explicit or established requirements of the courts that may enable the People to provide tailored testimony at a reopened hearing, but also the court's implicit direction; that in this case, after the People stated that, "at this time we are moving to reopen the hearing," the court did tip its hand by stating that "the DA perhaps has concluded that maybe the fellow officer rule is not going to meet his burden of going forward and maybe he needs to bring in the officer who actually detained the person"; and that "defendant was placed in the untenable position of having to choose between vigorous argument regarding the deficiencies in the People's proof and avoiding a clear articulation of those deficiencies so that the People would not be given the opportunity to present tailored testimony upon a reopening of the hearing."

People v. Tyrell Cook
(Ct. App., 12/19/19)
http://www.nycourts.gov/reporter/3dseries/2019/2019_09059.htm

* * *

ORDER OF PROOF - Re-Opening Suppression Hearing
CONFESSIONS - Custody

At the conclusion of the second day of the suppression hearing, after the People had rested, the prosecutor, upon learning from defendant's objection that another prosecutor, who had conducted the first phase of the hearing, had not developed the People's proof that Miranda rights had been given and waived, asked to reopen the proof to admit the relevant testimony. The court granted the request, noting that it had denied the People's request for an adjournment and, instead, had insisted that the hearing resume on the second day without the original prosecutor, who was engaged in a separate trial.

The Appellate Term finds no error, noting that the second prosecutor appears to have erred as to what portion of the proof had been adduced during the first day of the hearing and was unaware that the necessary testimony was available only through a witness present on the second day. The time at issue - from when the People rested until they made a request to reopen - was brief, and the court had not articulated any "direction" as to the absent proof. While it may have been defendant's objection that alerted the People, one of the purposes of requiring timely and specific motions and objections is to provide the opportunity for cure.

The Court also upholds the denial of suppression of defendant's un-Mirandized statement, noting that although the officer communicated to defendant that she was not free to depart in her

automobile, that level of restraint was consistent with a level three De Bour inquiry, which was justified. In the context of noncustodial roadside investigations, Miranda warnings are not required.

People v. Nadia Bedard
(App. Term, 2d Dept., 9th & 10th Jud. Dist., 8/8/19)

* * *

ORDER OF PROOF - Re-Opening Suppression Hearing

The Second Department concludes that the hearing court should have granted defendant's motion to reopen the suppression hearing where the prosecutor disclosed prior to the second trial that the description of the livery car stopped by police may have come from an anonymous bystander who interjected while translating between the complainant and the sergeant at the scene.

The sergeant did not previously testify and could not have been discovered with due diligence by defendant. This information would have affected the suppression determination by placing before the court questions regarding the identity and reliability of the person who described the livery car.

People v. Jermaine Dunbar
(2d Dept., 12/18/19)

Right of Confrontation/Hearsay Evidence

HEARSAY - Past Recollection Recorded/Prior Grand Jury Testimony
RIGHT OF CONFRONTATION

The Court of Appeals, in a 4-3 decision, holds that a portion of a testifying witness's grand jury testimony was properly admitted as a past recollection recorded to supplement his trial testimony, and that defendant's Sixth Amendment right of confrontation was not violated.

There was a proper foundation for the evidence. The witness stated that he had testified truthfully and accurately before the grand jury when the event was still fresh in his mind, and that reading the official transcript did not refresh his present recollection. The transcript was certified by the court reporter as a true and accurate record of the testimony. The discrepancy identified by defendant was a trivial typographical error that defendant fully explored on cross-examination.

With respect to defendant's right of confrontation/CPL § 670.10 claim, the majority notes that the People did not seek to introduce the testimony under § 670.10, and that although § 670.10 does not allow the People to use the grand jury testimony of an unavailable witness because there

was no cross-examination in the prior proceeding (see *People v Green*, 78 N.Y.2d 1029), § 670.10 is not a categorical bar to the use of the grand jury testimony of a testifying witness.

The majority also rejects defendant's argument that the witness's memory failure rendered him unavailable for the purpose of cross-examination. The Confrontation Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.

Writing for the dissenters, Judge Wilson notes, inter alia, that the majority's claim that when a witness is available, any sort of prior testimony fitting within a hearsay exception may be offered into evidence is incompatible with § 670.10 and with the common-law prohibition against trial by out-of-court testimony; that it makes no sense to permit more hearsay when a witness is available; and that this decision will facilitate the wholesale introduction of prior testimony that has not been tested by cross-examination.

People v. Carlos Tapia
(Ct. App., 4/2/19)

* * *

HEARSAY - Constitutional Right To Present Reliable Evidence

The First Department finds reversible error where the trial court denied defendant's application, expressly made under *Chambers v. Mississippi* (410 U.S. 284), to present testimony that one of the robbery victims, who was unavailable to testify at trial, failed to identify defendant at a lineup.

Although there were reasons to suspect that this victim may have falsely claimed to be unable to identify anyone in the lineup, the non-identification plainly bore sufficient indicia of reliability under the applicable standard, which hinges upon reliability rather than credibility. Where the proponent is able to establish this possibility of trustworthiness, it is the function of the jury alone to determine whether the declaration is sufficient to create reasonable doubt.

People v. Justin Cook
(1st Dept., 6/27/19)

* * *

EXPERT TESTIMONY - DNA Analysis
RIGHT OF CONFRONTATION - Hearsay

Law enforcement collected a buccal swab to compare defendant's DNA to that found at the murder scene. The data was sent to Cybergenetics, a private company that used a software program called TrueAllele, which subjects a DNA mixture to statistical modeling techniques to infer what DNA profiles contributed to the mixture and calculate the probability that DNA from

a known individual contributed to it. The DNA analysis revealed, to a high degree of probability, that defendant's DNA was found at the scene. At a pretrial *Frye* hearing, the court concluded that TrueAllele was generally accepted within the relevant scientific community.

The Third Department affirms defendant's first degree murder and first degree robbery convictions. With respect to the *Frye* ruling, the Court notes, *inter alia*, that at the time of the *Frye* hearing, TrueAllele had undergone approximately 25 validation studies, some of which appeared in peer-reviewed publications; that one peer-reviewed publication noted that, when a victim reference was available, "the computer was [4½] orders of magnitude more efficacious than human review on the same data," and that, when a victim reference was unavailable, "the average efficacy of the computer increased to six orders of magnitude;" and that the New York State Forensic Science Commission has approved TrueAllele for forensic casework by the State Police.

The Court rejects defendant's contention that his right to confront witnesses was violated because he did not have access to TrueAllele's source code, which is the program's computer code in the original programming language as written by the software developers. Although Cybergenetics is independent from law enforcement, it was assisting the police and prosecutors in developing evidence for use at trial, and the TrueAllele report implicates defendant in the murder. Thus, the report is biased in favor of law enforcement and is testimonial in nature.

However, the source code is not a declarant. The testifying expert - the creator of TrueAllele and the individual who wrote the underlying source code - testified as to genetic science, the TrueAllele program, and the formulation of the TrueAllele report. This witness was the declarant, rather than the sophisticated and highly automated tool powered by electronics and source code that he created.

People v. John Wakefield
(3d Dept., 8/15/19)

* * *

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

The First Department upholds a determination after a Sirois hearing that there was clear and convincing evidence that the witness was unwilling to testify due to defendant's own conduct or the actions of others with defendant's knowing acquiescence.

The Court notes, inter alia, that in recorded calls defendant placed from Rikers Island, his family members referred to the witness by name, and defendant told his mother and sister to make sure the witness "don't show" before the grand jury by the detention deadline under CPL § 180.80; that many of the threats referred to defendant by name, and he and his mother had the witness's contact information; that while incarcerated, defendant posted on Instagram a video with several

inmates in which he stated that he wanted to kill "rats;" and that at a court appearance when the prosecutor declared her readiness for trial, defendant stated that "[t]he witness ain't coming."

People v. Norman McKenny
(1st Dept., 11/26/19)

* * *

HEARSAY - Prior Consistent Statement

The Third Department finds error (albeit harmless) in the admission of evidence of a prior consistent statement made by one of the identification witnesses, noting that defendant has asserted that he did not challenge the witness's testimony as a recent fabrication, and instead utilized a prior statement to show the inconsistency in her explanations as to how the shooter fled the scene.

Mere impeachment by proof of inconsistent statements does not constitute a charge that the witness's testimony is a fabrication. Even if there was an implicit suggestion of recent fabrication, the consistent grand jury testimony did not predate the witness's motive to testify against defendant.

People v. Jamel Johnson
(3d Dept., 10/24/19)

* * *

RIGHT OF CONFRONTATION - Witness's Invocation Of Fifth Amendment
DISCOVERY - Notice Of Alibi

The Appellate Term finds reversible error where a complainant improperly used the Fifth Amendment as a shield to avoid answering crucial questions about his strong motivation to fabricate testimony, and the court imposed additional limitations on cross-examination. When a witness's refusal to answer affects a defendant's ability to confront and cross-examine the witness on a matter directly relating to bias or a motive to lie, the defendant's Sixth Amendment right to confrontation is implicated and the appropriate remedy is to strike the witness's testimony. These issues were not fully explored through other means.

A dissenting judge asserts that the court erred in precluding testimony from defendant's alibi witness where defense counsel provided good cause for late notice by explaining that he was not the original attorney and had spent the bulk of his time trying to negotiate a plea, and that defendant had provided him with a list of possible alibi witnesses only the week before trial. The record contains no indication that the delay was willful or intended to gain a strategic advantage, and the prosecution could have obtained a 3-day statutory adjournment.

People v. Daniel Osei
(App. Term, 2d Dept., 2d, 11th & 13th Jud. Dist., 5/31/19)

* * *

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 - Excited Utterance

The First Department finds no error in the admission of the victim's 911 call as an excited utterance where the victim made two brief intervening phone calls, but the violent and shocking nature of the incident, the short amount of time that passed between the incident and the 911 call, the fact that the victim was still in the vicinity and still feared her attacker when she made the call, and the court's observation regarding her agitated state during the call, established that the statements were not made under the impetus of studied reflection.

People v. Elliot Carter
(1st Dept., 10/22/19)

* * *

HEARSAY - Prompt Outcry

The Second Department finds no error in the admission of "prompt" outcry testimony where the complainant was four years old when the abuse began and made the outcry when she was eight years old and the abuse was ongoing. Testimony that the complainant reported that defendant had raped her did not exceed the allowable level of detail.

People v. Marcus Gross
(2d Dept., 5/1/19)

* * *

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)

* * *

EVIDENCE - Text Messages

The Second Department finds no error in the admission of a document created by the complainant that reflected a series of text messages between the complainant and defendant where the complainant authenticated the document by testifying that the text messages were accurately and fairly reproduced.

People v. Nancy Enoksen
(2d Dept., 8/21/19)

Uncharged Crimes Evidence

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)

Character Evidence

EVIDENCE - Character

In this child sex abuse prosecution, the Second Department finds no error where the court granted the People's motion to strike the testimony of defendant's character witness.

Although the court erred in ruling that evidence that a character witness never heard anyone say anything negative about the defendant is inadmissible, defendant's reputation in the workplace for lack of sexual impropriety was in no way relevant to whether he sexually abused a child in secret and outside of the workplace.

People v. Anthony Durrant
(2d Dept., 6/12/19)

Impeachment

IMPEACHMENT - Bad Acts/Law Enforcement Misconduct
MURDER - Intent

The Court of Appeals finds legally sufficient evidence of attempted murder in the second degree (and by extension criminal use of a firearm in the first degree) where defendant chased a group of fleeing teenagers on foot before he stopped, steadied his gun at eye level, and fired in their direction. A rational person could reach the conclusion that defendant intended not to warn or to merely scare in shooting the gun, but instead to kill one of the teenagers.

However, the Court finds reversible error where the trial court refused to allow defendant to conduct cross-examination regarding misstatements that one officer made to a federal prosecutor in a different matter, and prior judicial determinations in which each officer was found to have given unreliable testimony.

If they have a good faith basis for the inquiry, defendants should be permitted to explore specific allegations of wrongdoing relevant to the credibility of a law enforcement witness, subject to the discretion of the trial court. Law enforcement witnesses should be treated in the same manner as any other witness for purposes of cross-examination.

Here, although the trial court accurately noted the potential difficulty in determining whether the officer affirmatively lied to the federal prosecutor absent knowledge of the questions the prosecutor asked, defense counsel had a good faith basis inasmuch as the officer's suppression hearing testimony acknowledged that he had not been immediately forthright with the federal prosecutor, and that basis was buttressed by two federal suppression determinations.

Federal rulings finding the officers' testimony incredible in a manner which suggested that the officers may have falsely testified in order to obtain a desired result were probative of the officers' credibility in this prosecution, where defendant's entire defense was aimed at convincing the jury that the officers were incorrectly identifying him in order to avoid backlash for allegedly assaulting defendant upon arrest or capturing an innocent bystander. The court's concern that the jury may view the prior judicial determinations as binding could be mitigated by providing clarifying or limiting instructions.

People v. Clarence Rouse
(Ct. App., 11/25/19)

* * *

IMPEACHMENT - Bad Acts/Police Officer Misconduct

The First Department orders a new suppression hearing and trial where the hearing and trial courts erred in denying defendant's request to cross-examine a police officer regarding allegations of misconduct in a civil lawsuit in which it was claimed, among other things, that this particular officer arrested the plaintiff without suspicion of criminality and lodged false charges against him.

The civil complaint contained specific allegations of falsification by this officer that bore on his credibility at both the hearing and trial. At each proceeding, this officer was the only witness for the People.

People v. Jason Burgess
(1st Dept., 12/26/19)

* * *

IMPEACHMENT - Bad Acts/Dismissed Case

The First Department finds error, albeit non-prejudicial and harmless under the circumstances, where the People were permitted to cross-examine defendant about the underlying facts of two prior arrests that resulted in dismissals, and the prosecutor had not ascertained whether the charges had been dismissed on the merits, which would have negated any good faith basis for inquiry.

People v. Robert Moco
(1st Dept., 10/31/19)

* * *

IMPEACHMENT - Reputation Testimony

The Third Department finds reversible error where the court excluded testimony by a witness who was prepared to testify that she had known the complainant since birth; that they were members of the same large extended family and many members of the family knew the complainant; and that she was aware of the complainant's bad reputation for truthfulness among the extended family.

People v. Joseph Youngs
(3d Dept., 9/12/19)

* * *

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)

* * *

IMPEACHMENT - Immigration Status/Bad Acts

After the People revealed that one of their witnesses did not enter this country legally and that the People believed he was still not in this country lawfully, defense counsel indicated an intent to cross-examine the witness about his illegal residence and to alert Immigration and Customs Enforcement authorities to the witness's presence, and expressed a hope that "ICE will be waiting for him on Friday, once he comes off the witness stand." The parties agreed it would be prudent to appoint an attorney to represent the witness.

The Court first notes that while it cannot prevent defense counsel from reporting to ICE, counsel's public announcement of his intent to do so could be viewed as an effort to discourage a witness from coming forward, and the Court shares the prosecution's concern about it. Defense counsel is reminded that the official policy of the New York State Office of Court Administration is that ICE cannot take custody of a person within the courthouse absent a judicial warrant.

The Court then concludes that sound public policies justify barring this as an avenue of cross examination. If defendants knew they could be subject to questions about their immigration status, it might keep them from exercising their constitutional right to testify on their own behalf, and other witnesses might be discouraged from reporting crime to law enforcement.

However, if there is evidence that the witness has knowingly made false statements to obtain government benefits, assumed a false identity while in the country or committed any other transgression that goes directly to credibility (and if the People are aware of such facts, they must disclose them to the defense), the defense will be permitted to ask the witness about such matters. Counsel for the witness can then advise the witness of the ramifications of a response.

People v. Ashley Williams
(Sup. Ct., N.Y. Co., 10/10/19)
http://nycourts.gov/reporter/3dseries/2019/2019_29342.htm

* * *

IMPEACHMENT - Bad Acts/Civil Lawsuit Against Officer
SEARCH AND SEIZURE - Body Cavity

The First Department finds no error where the court precluded cross-examination of two detectives regarding allegations of misconduct against them in civil lawsuits in which they were named as defendants. These complaints failed to sufficiently specify how the detective at issue was involved in the alleged misconduct of other officers, or, where the detective's own conduct was described, set forth conduct that was relevant to credibility.

However, it was error, albeit harmless, for the court to refuse to permit the defense to cross-examine one of the detectives about a lawsuit in which it was alleged that he fabricated evidence.

The Court also upholds the denial of suppression, concluding that there was reasonable suspicion that defendant-arrestee secreted evidence inside a body cavity where, among other things, the police saw defendant reach into the private area of his body for drugs that he sold to an apprehended buyer and there was a reasonable inference that defendant was continuing to sell drugs.

People v. Robert Smith
(1st Dept., 4/11/19)

* * *

IMPEACHMENT - Bad Acts/Police Witnesses

The Second Department finds no error where the trial court prohibited defendant from cross-examining a police witness with respect to allegations of false arrest and/or police brutality in four federal lawsuits filed against that witness. The complaints contain only allegations of unlawful police conduct by large groups of officers, and do not allege specific acts committed by the police witness individually.

People v. Jonathan Crupi
(2d Dept., 5/8/19)

Missing Witness Inference

MISSING WITNESS INFERENCE

In *People v Gonzalez* (68 N.Y.2d 424), the Court of Appeals held that the party requesting a missing witness instruction initially must demonstrate: (1) "that there is an uncalled witness believed to be knowledgeable about a material issue pending in the case," (2) "that such witness can be expected to testify favorably to the opposing party," and (3) "that such party has failed to call" the witness to testify. The party opposing the charge can rebut the initial showing by accounting for the witness's absence, or demonstrating that the charge would not be appropriate because, inter alia, the testimony would be cumulative to other evidence. If the party opposing the charge rebuts the prima facie showing, the proponent retains the ultimate burden to show that the charge would be appropriate.

While alluding to Appellate Division decisions that have misapplied established law, the Court of Appeals now asserts that it has never required the proponent to negate cumulativeness to meet the prima facie burden. The proponent typically does not know what the witness would have said, and the party opposing the charge is in a superior position to demonstrate that the witness's testimony would be cumulative.

Here, defendant met his initial burden where the People's evidence established that the uncalled witness was the only eyewitness other than the victim; and the witness initially was on the People's witness list, which indicated that he cooperated to some extent in the prosecution of the man who allegedly shot his then-girlfriend and seemed intent on harming the witness himself. The People asserted, without explanation, that the witness's testimony would be cumulative because "there is absolutely no indication that [the witness] would be able to provide anything that wasn't provided by [the victim]." This conclusory argument was insufficient to satisfy the People's burden. Moreover, due to inconsistencies in the victim's descriptions of the incident and what the shooter was wearing, the issue of identification was in sharp dispute, and the witness apparently had a better basis for an identification.

People v. Samuel Smith
(Ct. App., 6/6/19)

* * *

MISSING WITNESS INFERENCE - Cumulative Testimony

The Third Department finds no error in the denial of defendant's request for a missing witness charge with respect to the People's failure to call the confidential informant to testify where the CI was the only eyewitness to the controlled buys.

The testimony would have been cumulative, as the officers' collective testimonies were corroborated by multiple video and audio recordings detailing the controlled buys.

People v. John Valentin
(3d Dept., 6/20/19)

Competency To Be Sworn

WITNESSES - Competency To Be Sworn

The Appellate Term finds no error in the admission of the seven-year-old sex crime complainant's testimony under oath.

Although the trial court failed to ask the complainant about an oath or whether she could keep a promise to tell the truth, the complainant stated that she believed in God, went to church, and knew the difference between telling the truth and telling a lie; stated that the truth is something "[t]hat happened," whereas a "lie is bad, wrong" and "did not happen"; responded "No" when asked if it was "okay to tell a lie"; stated that her mother would scold her when she lied and that she understood that she was not allowed to tell a lie in court; and replied "yes" when the court asked her to "promise me to tell me the truth when you answer questions here in court."

While the court was trying to determine whether the child understood the concept of punishment, the law does not require that children define abstract concepts with the sophistication of an adult.

People v. David Duarte
(App. Term, 2d Dept., 2d, 11th & 13th Jud. Dist., 5/17/19)

Photographs And Recordings

BURGLARY/CRIMINAL TRESPASS - License Or Privilege/Apartment Building
EVIDENCE - Video Recordings

The First Department upholds defendant's burglary conviction where, at a building with a no-trespassing sign and a gated courtyard and lobby that were both secured by locks and buzzer systems, defendant passed through both entrances by following a resident who entered by means of a key, and attempted to use an elevator that had been out of service for more than a year. The jury reasonably could have found that a witness's courteous act of stopping the lobby door from

slamming on defendant gave defendant no reason to believe the witness had conferred a license to enter that did not otherwise exist.

The Court finds no error in the admission of a brief portion of a surveillance videotape that, unlike the rest of the videotapes in evidence, could not be authenticated. The evidence, including the relationship of the videotapes at issue to the admitted videotapes, supported the inference that the videotapes at issue depicted the relevant events, and any uncertainty went to weight and not admissibility.

People v. Christian Mercedes
(1st Dept., 5/28/19)

Temporary And Lawful Possession Defense

DEFENSES - Temporary And Lawful Possession

The Third Department finds reversible error in the trial court's refusal to charge the jury on the defense of temporary and lawful possession where, according to defendant, he chased his assailant after being robbed but, during an ensuing altercation, he was struck in the face and fell to the ground; as the assailant ran away, defendant saw him discard his sweatshirt; and defendant ran over and retrieved the sweatshirt to see if it contained the items that had just been stolen but, before he could search the sweatshirt's pocket, the police pulled up and stopped him at gunpoint and he dropped the sweatshirt, which contained a loaded pistol.

People v. Willie Mack
(3d Dept., 11/27/19)

Justification Defense

DEFENSES - Justification

Defendant was charged with several crimes for beating the victim with a belt with a metal buckle. Defendant raised a justification defense based on his alleged defense of a third person. The trial court instructed the jury on the justified use of non-deadly physical force in connection with a charge of assault in the third degree. At the People's request, the court also instructed the jury that if it found beyond a reasonable doubt that defendant used a dangerous instrument, it should apply the legal rules pertaining to the justified use of deadly physical force. Defendant argues that the statutory definitions, while similar, are not identical and that a jury may convict a defendant of a crime containing a dangerous instrument element without necessarily concluding that the defendant used deadly physical force.

The Court of Appeals finds no error. Although it would be a rare case - particularly where, as here, the charge is assault in the second degree - the Court does not rule out the possibility that a defendant may be entitled to a jury instruction on the justified use of non-deadly physical force

with respect to a crime containing a dangerous instrument element. There is no per se rule regarding which justification instructions are appropriate when the defendant has been charged with second-degree assault with a dangerous instrument.

Here, viewing the record in the light most favorable to defendant, there is no reasonable view of the evidence that defendant merely "attempted" or "threatened" to use the belt in a manner readily capable of causing death or serious physical injury, but did not "use" it in that manner.

People v. Fidel Vega
(Ct. App., 5/7/19)

* * *

DEFENSES - Justification

In this prosecution of defendant for shooting and killing the victim in the lobby of defendant's apartment building after an argument, the Court of Appeals, reversing the Appellate Division, finds no error in the denial of defendant's request for a jury instruction on justification.

Defendant was the initial aggressor as a matter of law; his drawing of a gun could only be understood as an imminent threat of deadly physical force. There had been a verbal altercation, the victim was unarmed, defendant pursued the victim into the lobby, and defendant's daughter (saying "No, daddy, no!") and the victim himself (saying "you going to pull a gun out, you better use it") expressed their subjective belief that defendant had threatened the imminent use of deadly force.

The victim was not the initial deadly force aggressor because of his "swipe" at the gun.

People v. Darryl Brown
(Ct. App., 5/7/19)

* * *

DEFENSES - Justification

The Court of Appeals concludes that the trial court appropriately determined that, if the jury convicted defendant of second-degree assault by means of a dangerous instrument, it necessarily determined that defendant employed deadly, rather than ordinary, physical force by striking the complainant on the head with a pint glass.

The court also properly determined that no reasonable view of the evidence supported a deadly force justification charge where the complainant had merely pushed defendant, albeit with "pretty strong force," and then rested his hands at his sides while a female attempted to separate the two men. Defendant could not have reasonably believed that the complainant was using or

about to use deadly physical force.

People v. Hassan Rkein
(Ct. App., 5/7/19)

Homicide/Assault

ASSAULT - Serious Physical Injury

The Second Department reduces first and second degree assault convictions to a third degree assault conviction, concluding that the verdict was against the weight of the evidence regarding serious physical injury.

The victim sustained a cut on her lip and experienced extreme pain in her left eye. She was treated by an eye surgeon who, among other things, numbed her eye with drops and picked out shards of glass using tweezers. Her pain was treated with Motrin. Upon her release from the hospital, she was directed to wear an eye patch for a week, and, during that week, she had consistent blurry vision in her left eye; after a week, her vision "got better" but was still intermittently blurry. She returned to the hospital every other day for two weeks for continued treatment. At the time of trial, "[m]aybe like twice a week," she still experienced blurry vision, felt "mild discomfort" in her left eye and would treat her eye with drops. Her overall vision worsened since the incident, and she has a permanent scar on her cornea.

But she acknowledged that before the incident, she wore eyeglasses, and medical records indicated that she had been diagnosed and treated for an eye condition, blepharitis. Medical records further indicated that, in a follow-up visit, the victim reported no pain or change in vision. The People did not proffer any medical testimony interpreting and explaining the medical records, or addressing the nature, severity, and prognosis of the injury or whether any preexisting eye condition or conditions were affected by the incident or was a cause of any of the complainant's current complaints.

People v. Jacob Palant
(2d Dept., 10/9/19)

* * *

MURDER - Acting In Concert

The Fourth Department overturns defendant's second degree murder conviction, concluding that the People failed to present legally sufficient evidence establishing that defendant shared the co-defendant's intent, and, in any event, the verdict was against the weight of the evidence, where defendant was inside a bar shortly after 1:30 a.m. on the night of the shooting staring at the victim and his girlfriend; defendant owned a silver Infiniti sedan, and a silver Infiniti was observed near the bar prior to and after the shooting; the co-defendant shot the victim at

approximately 2:10 a.m.; defendant and the co-defendant exchanged phone calls shortly after the shooting, and the co-defendant was picked up in a silver Infiniti and driven to his home; defendant lied to the police regarding her and the co-defendant's whereabouts on the evening of the shooting; and, within days after the shooting, defendant obtained a new cell phone and got rid of the Infiniti.

The Court notes that the People offered no motive; that there was no proof that defendant was inside the Infiniti prior to the shooting, and, although defendant was the recognized owner, two witnesses associated the Infiniti with the co-defendant and not defendant; and that the co-defendant also made two other phone calls, the recipients of which are unknown.

People v. Sherry McDonald
(4th Dept., 5/3/19)

* * *

MURDER - Circumstantial Evidence

The Second Department reverses defendant's second degree murder conviction on the ground that the jury's verdict was against the weight of the evidence.

Defendant and the victim had a contentious relationship and defendant was stressed about and complained of his child support obligations, but it is unclear why the $63 weekly child support obligation would drive defendant to murder when his other, greater, child support obligations - a $600 monthly obligation and a $238 biweekly obligation - did not. Defendant was near the crime scene (the gym where the victim worked) on the morning of the murder, but was near the gym every morning since he lived nearby, parked nearby, and had his breakfast every morning at a deli which faced the gym. Defendant's exchange with a parking lot attendant was described as typical, and defendant did not appear agitated; although defendant arrived at the parking lot a little earlier than usual, he had arrived earlier on the days immediately prior as well. The deli owner thought defendant appeared distracted and extremely pale that morning, and observed an abrasion on defendant's temple. However, defendant's demeanor could be attributable to any number of reasons, there is no evidence that the victim engaged in any struggle with her killer, and the Chief Medical Examiner testified that none of the bullets were fired in close proximity to the victim. Although the victim was killed by a .22 caliber firearm, and a witness (a convicted felon) testified that defendant told him he had "beef to sweat, a problem" and had financial problems, including child support, and also told the witness he had acquired a .38 revolver and a .22 caliber firearm, the witness did not testify that he actually saw the guns.

People v. Christopher Clavell
(2d Dept., 10/9/19)

* * *

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)

* * *

ASSAULT - Intent

In this family offense proceeding, the First Department finds insufficient evidence of intent to cause physical injury where respondent, while on top of petitioner in bed, caused some bruising to her legs, which she treated at home with an ice pack.

Even assuming that the bruising would support a finding of physical injury, petitioner testified that respondent said he was "play fighting" and that she accepted this explanation without giving it another thought.

In re Vanessa R. v. Christopher A.E.
(1st Dept., 6/4/19)

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)

* * *

OBSTRUCTING GOVERNMENTAL ADMINISTRATION

Defendant reported to his probation office with his infant daughter. The probation officer directed him to return the following day as she did not "normally … see probationers who [came] in with their children." Defendant remarked that he had seen female probationers report with their children, and, as he walked away and towards the exit, "threatened to blow [the probation officer] the fuck up."

The Second Department overturns the court's finding that defendant violated a condition of his probation by obstructing governmental administration. Although the probation officer was at work, there was no evidence showing that defendant attempted to prevent her from performing a specific function.

People v. Daniel Brooks
(2d Dept., 4/3/19)

Sale Of Drugs

SALE OF DRUGS - Intent
DEFENSES - Agency
VERDICT - Repugnancy

The Second Department reverses a conviction for criminal sale of a controlled substance in the third degree, concluding that the guilty verdict is against the weight of the evidence where defendant procured drugs at the request of the officer and with the officer's funds; the two were known to each other from a prior interaction of the same nature; defendant was not promised a reward in advance and was not engaged in acts suggesting he had sold drugs to anyone else, and defendant testified that he was panhandling; there was no evidence that defendant received consideration other than a small portion of crack cocaine from the bag he bought for the officer; the supplier was different from the supplier for the previous transaction; there was no evidence that defendant had pre-marked buy money or other drugs on his person; and defendant's salesman-like "touting" of the quality of the drugs after they had been purchased failed to establish, beyond a reasonable doubt, that he was not acting solely as an agent of the buyer.

The Court also concludes that the jury's finding of guilt on a count charging criminal possession of a controlled substance in the seventh degree is irreconcilable with its acquittal of defendant on the count charging him with criminal possession of a controlled substance in the third degree (possession with intent to sell). While, in other circumstances, a jury could find that defendant possessed the drugs but did not intend to sell them, that possibility is foreclosed in this case by the jury's finding of guilt on the third-degree sale count.

People v. Daniel Cruz
(2d Dept., 10/9/19)

* * *

SALE OF DRUGS - Circumstantial Evidence

In a high drug trafficking area, defendant approached a man and talked to him. The man gave defendant money and there was an "exchange," but the officers did not see what was exchanged. Shortly thereafter, a woman approached defendant, spoke to him and then touched his hand, but the officer did not see any money or drugs exchanged. Defendant and the woman separated, and the officer approached the woman, who was chewing on something. The officer asked the woman to spit out the object, which was a small bag containing $10 worth of crack cocaine. The police arrested the woman and defendant. Defendant did not have any drugs on him, but had $10 and other denominations of cash.

The First Department reverses defendant's conviction, concluding that People did not prove a drug sale beyond a reasonable doubt. The People's theory that the woman put the bag in her mouth after purchasing it from defendant was contradicted by the officer's testimony that she never saw the woman bring her hand to her mouth. The People's theory that defendant sold two $10 bags, one to the man and the other to the woman, was inconsistent with the cash found on defendant.

People v. Joel Correa
(1st Dept., 10/1/19)

Possession Of Drugs And Weapons And Stolen Property

APPEAL - Dismissal In The Interest Of Justice
POSSESSION OF A WEAPON - Gravity Knife

With respect to defendant's weapon conviction involving a gravity knife, the First Department endorses the People's decision, "in the exercise of their broad prosecutorial discretion," to agree that the indictment should be dismissed under the particular circumstances of this case, and in light of recent legislation that effectively decriminalizes simple possession of gravity knives even though the law does not apply retroactively.

People v. Michael Caviness
(1st Dept., 10/17/19)

* * *

POSSESSION OF DRUGS - Identity Of Substance

An Appellate Term majority finds facially sufficient the drug possession charge to which defendant pleaded guilty where defendant asserts that the accusatory instrument contained a conclusory assertion that the controlled substance he allegedly possessed was crack-cocaine residue and failed to create an inference that he knowingly possessed it. The presence of crack-

cocaine residue, drug paraphernalia and packaging in defendant's bedroom and living room permit the inference, for pleading purposes, that defendant knew what he possessed.

A dissenting judge asserts that the officer's reference to crack-cocaine "residue" is not sufficient to establish reasonable cause. Although the officer alleged that he believed the residue to be crack-cocaine based on his experience and training, he did not reference his experience in identifying crack-cocaine "residue," what crack-cocaine "residue" looks like, or where the residue was recovered in relation to the paraphernalia present at the scene. Had the officer alleged that the "residue" was recovered from packaging or a container commonly associated with crack-cocaine, the complaint would have been sufficient.

People v. David Crawford
(App. Term, 2d Dept., 2d, 11th & 13th Jud. Dist., 12/20/19)

* * *

POSSESSION OF DRUGS - Identity Of Substance

The Appellate Term dismisses drug possession charges for facial insufficiency where the cocaine identification by an officer who claimed to have training and experience in the identification and packaging of cocaine made no reference to any packaging associated with the cocaine residue purportedly observed, and no facts were stated as to the physical characteristics.

People v. Quran Neischer
(App. Term, 2d Dept., 2d, 11th & 13th Jud. Dist., 8/23/19)

* * *

POSSESSION OF A WEAPON - Stun Gun/Operability

The Court dismisses as facially insufficient a charge of criminal possession of a weapon in the fourth degree where the information fails to allege facts establishing that the electronic stun gun is operable and can emit a high voltage current with the capability to stun, cause mental disorientation, knock out or paralyze a person.

People v. Austin Johnson
(County Ct., Oneida Co., 12/23/19)
http://nycourts.gov/reporter/3dseries/2019/2019_29398.htm

* * *

POSSESSION OF A WEAPON - Razor/Intent To Use Unlawfully

The Second Department reverses a conviction for criminal possession of a weapon in the third degree, concluding that the jury verdict was against the weight of the evidence. The People failed to establish beyond a reasonable doubt that defendant possessed a weapon, instrument, appliance or substance designed, made or adapted for use primarily as a weapon, which is presumptive evidence of intent to use the same unlawfully against another.

There was no testimony by the detectives indicating that they knew based on their experience that the primary use of the razor possessed by defendant, by virtue of being wrapped in black tape, was as a weapon, or that they attempted to ascertain from defendant the manner in which he utilized the blade. There was no evidence from which it could be inferred that defendant considered the instrument to be a weapon. Defendant, who was socializing in front of a building with two men, was not brandishing the instrument in a threatening manner, and made no attempt to flee the scene or discard the blade when approached by the detectives.

People v. Prince Rodgers
(2d Dept., 7/31/19)

* * *

POSSESSION OF A WEAPON - Constructive Possession

The Fourth Department finds legally insufficient evidence of possession of a rifle where, prior to the arrival of the police, defendant was sitting in the living room in which the rifle was on a table, and one of the other perpetrators in the kidnapping put on a mask, grabbed the rifle, went to the room where the victims were being held, came back to the living room and put the rifle back on the table.

Defendant's mere presence in the house was insufficient to establish constructive possession and there was no evidence establishing that defendant exercised dominion or control over the weapon.

People v. Inalia Rolldan
(4th Dept., 9/27/19)

Robbery

ROBBERY - Acting In Concert

Although the complainant testified that respondent was one of the youths who punched him, he also testified that respondent was not one of the persons who took his belt and watch. The complainant did not testify as to when the robbery occurred in relation to when he had been punched, kicked, and hit, except to say that it occurred sometime "after" the attack when he was on the ground. There was no evidence showing that respondent was present when the belt and

watch were taken. The family court found respondent guilty of robbery in the second degree, and assault in the second degree premised on the robbery.

The Second Department reverses, concluding that the presentment agency failed to proffer evidence legally sufficient to establish beyond a reasonable doubt that respondent committed robbery in the second degree.

Matter of Raees T.B.
(2d Dept., 5/1/19)

Right To Summation

RIGHT TO COUNSEL
RIGHT TO SUMMATION

The Court of Appeals holds that a trial court's error in failing to charge the jury in accordance with a pre-summation ruling on a defendants' charging requests is subject to harmless error analysis, and that the errors in these cases were harmless. Two judges dissent.

In *Herring v New York* (422 U.S. 853), the Supreme Court held that the right to be heard in summation is implicit in the right to the assistance of counsel, and that the complete denial of an opportunity to make a summation is a violation of the Sixth Amendment. However, a trial judge is given great latitude in controlling the duration and limiting the scope of closing summations, and Herring does not compel a conclusion that such a restriction amounts to structural error. Under harmless error analysis, an appellate court, after determining that the evidence is overwhelming, reaches the question of prejudice. That determination in this context turns on whether the summation was materially affected because defense counsel structured it in reliance on an anticipated charge that was not conveyed to the jury as promised.

The majority does not reach the question of whether the constitutional or non-constitutional standard applies in evaluating prejudice. A concurring judge opines that the constitutional standard should apply.

The dissenting judges note that the majority does not really employ traditional harmless error analysis and focuses on the impact on the summations; that even when there is little hope of acquittal, summation matters because of the power of an advocate to change minds; and that when, after summation, the judge fails to give the promised instruction or gives a previously denied instruction as requested by defense counsel, the judge should offer to reopen summations so that counsel may address the jury in light of the charge as actually given.

People v. David Mairena, People v. Mauricio Altamirano
(Ct. App., 12/17/19)

Disposition/Dismissal In Furtherance Of Justice

SENTENCE - Violation Of Cooperation Agreement
PLEAS

As part of a plea agreement and in exchange for a favorable sentence, defendant entered into a written cooperation agreement promising to "cooperate completely and truthfully with law enforcement authorities, including the police and the District Attorney's Office, on all matters in which his cooperation is requested, including but not limited to the prosecution of [defendant's accomplices] on charges related to the murder of Jose Sanchez and the assault of [Sanchez's brother]." Defendant had previously confessed to his involvement in the Sanchez murder and assault, explaining that the crimes were retaliation for a prior invasion of defendant's home by Sanchez and his associates, including Jose Marin, and had testified to Marin's involvement in the home invasion before the grand jury in the Sanchez matter and assisted the police with their investigation of the home invasion by identifying Marin in a photo array. Defendant pleaded guilty to murder and assault, and was sentenced on the murder count. Sentencing on the assault count was postponed until defendant had fulfilled his obligations under the cooperation agreement. Before imposition of that sentence, the District Attorney's Office requested that defendant testify against Marin in connection with the prosecution of the home invasion. Defendant refused.

The Court of Appeals finds no error where the court determined that defendant's refusal to testify against Marin violated the express terms of his cooperation agreement. Dissenting, Judge Rivera, joined by Judge Wilson, asserts that cooperation agreements are subject to traditional rules of contract interpretation, and that defendant's cooperation agreement is limited in scope to the crimes for which he pleaded guilty.

People v. Alexis Rodriguez
(Ct. App., 4/2/19)

* * *

DISPOSITION - Least Restrictive Alternative
ADJOURNMENT IN CONTEMPLATION OF DISMISSAL

The Second Department upholds an order of disposition that, after respondent admitted to unauthorized use of a vehicle, placed him on probation for a period of 12 months.

The family court properly denied respondent's request for an adjournment in contemplation of dismissal in light of, among other things, the nature of the offense; the probation officer's recommendation; respondent's poor attendance, performance, and behavior at school; and respondent's minimization of his role in the offense.

Matter of MoQuease J.M.
(2d Dept., 6/19/19)

* * *

SENTENCE - Consideration Of Charge Post-Acquittal

The Michigan Supreme Court holds that after a jury acquits a defendant of a given crime, it violates due process for the judge to take the same alleged crime into consideration when sentencing the defendant for another crime of which the defendant was convicted.

Michigan v. Beck
2019 WL 3422585 (Mich., 7/29/19)

Practice Note: New York lawyers *see, e.g.*, *People v. Brown*, 113 A.D.3d 785 (2d Dept. 2014), *lv denied*, 23 N.Y.3d 1018 (re-sentencing ordered where remarks made by court demonstrated that it improperly considered crime of which defendant was acquitted); *People v. Sheppard*, 107 A.D.3d 1237 (3d Dept. 2013), *lv denied*, 22 N.Y.3d 1203 (judge erred in allowing deceased's mother to give statement describing defendant as "killer" who "got away with murder" where defendant was convicted only on possession of weapon charge supported by evidence not related to homicide charges); *People v. Black*, 33 A.D.3d 338 (1st Dept. 2006) (judge erred in relying on counts of which defendant was acquitted; court rejects People's argument that judge properly considered conduct proved by preponderance of evidence since jury found conduct was justified).

* * *

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)

* * *

SENTENCE - Community Service

The Second Circuit concludes that the pertinent policy statement issued by the Sentencing Commission must be read to advise that courts should generally refrain from imposing more than a total of 400 hours of community service as a condition of supervised release.

Moreover, defendant's condition of supervised release requiring 300 hours a year (a total of 695 hours) is not reasonably related to any of the relevant sentencing factors and involves a greater deprivation of liberty than is reasonably needed to achieve the purposes of sentencing.

While community service can provide educational or vocational training, defendant's service consists primarily, if not entirely, of distributing uncooked meals in a food pantry. In any event, the district court did not find that defendant was in need of any of the training that community service might provide. Although the government argues that the community service will keep defendant occupied in productive activities and thus prevent him from returning to the "negative influences" that "led him astray," this argument lacks a limiting principle that would allow an evaluation of how much community service is needed. Defendant's job driving for Uber seems at least equally suited to keeping him occupied and allows him to provide for his young daughter, and this productive occupation is disrupted by community service.

United States v. Parkins
2019 WL 3884241 (2d Cir., 8/19/19)

* * *

DISMISSAL IN THE INTEREST OF JUSTICE

The Court dismisses, in the interest of justice, charges of assault in the third degree, criminal possession of a weapon in the fourth degree, aggravated harassment in the second degree, endangering the welfare of a child, and harassment in the second degree.

It is alleged that staff at defendant's son's school noticed marks on his face; that he disclosed that he had been struck in the face with a clothes hanger by defendant; that school staff reported the incident to the State Central Registry and the child was taken to the Child Advocacy Center for an interview; and that defendant was arrested the same day and stated to the arresting officers, "He start playing stubborn. I started to discipline him and I hit him with whatever I hit him with." Defendant was released on her own recognizance with a full stay-away temporary order of protection, subject to Family Court modification. An Article Ten case with identical allegations was filed, and the Family Court issued an order adjourning the case in contemplation of dismissal.

The Court notes, *inter alia*, that although defendant has previously used corporal punishment, Child Protective Services observed no additional marks on the child's body or face, nor were there any marks on defendant's other child; that the family is participating in services coordinated by a case planner, including family counseling, anger management, and "skill building," and the conditions and supervision imposed by the ACD order will serve to rehabilitate defendant and prevent further acts of excessive corporal punishment; that this is defendant's first contact with the criminal justice system, and she is employed full time as a home health aide and has generally maintained a healthy and stable home environment; that imposing a sentence of incarceration would stall defendant's progress and traumatize her children further; and that dismissal is a signal that the criminal justice system is flexible enough to recognize the needs of a family and an individual's capacity for learning and change.

People v. S.P.
(Crim. Ct., Bronx Co., 9/4/19)
http://nycourts.gov/reporter/3dseries/2019/2019_29273.htm

*** * ***

PRISONERS RIGHTS - Solitary Confinement Of Juvenile/Eighth Amendment

Plaintiff brought this § 1983 action on behalf of her son, E.L., a minor who is in the custody of the New York Department of Corrections and Community Supervision and who allegedly suffers from severe mental illness. The complaint alleges that E.L.'s confinement in a segregated unit at Hudson Correctional Facility constitutes cruel and unusual punishment in violation of the Eighth Amendment. Plaintiff seeks declaratory and injunctive relief, as well as punitive damages.

Upon a hearing, the Court grants plaintiff's motion for preliminary injunctive relief and orders that defendants are immediately enjoined and restrained from confining E.L. in Hudson's Adolescent Offender Separation Unit.

In the AOSU, E.L. has spent a minimum of 18 hours per day on weekdays and (except for visits) 22 hours on weekends alone in his cell. He is escorted within the facility in handcuffs, is restrained and tied to a chair during programming, and, until recently, has spent his recreation time alone in a cage. He has regularly skipped programming and recreation time, and has at times been deprived of recreation time. His mental health in the AOSU has deteriorated, and he has also been self-harming.

Plaintiff has shown that DOCCS's prolonged confinement of E.L. in the AOSU exposes him to psychological damage. Mentally ill juveniles are particularly vulnerable to the effects of solitary confinement. Defendants were aware of the serious risks that solitary confinement pose to mentally ill juveniles, and knew the serious psychological harms suffered by E.L. in the AOSU.

Paykina o/b/o E.L. v. Lewin
2019 WL 2329688 (N.D.N.Y., 5/31/19)

* * *

DISPOSITION - Least Restrictive Alternative
ADJOURNMENT IN CONTEMPLATION OF DISMISSAL

In a 3-2 decision, the First Department finds no error where the family court adjudicated respondent a juvenile delinquent upon a finding of third degree assault and placed her on probation for a period of 12 months.

The majority notes that although this was respondent's first arrest, she participated in an unprovoked violent attack on two strangers that was instigated by her father; respondent repeatedly struck the female complainant with a mini or souvenir baseball bat, while the father's girlfriend continuously punched the complainant; respondent joined her father and his girlfriend in chasing the two complainants, who sought refuge in a restaurant where they called 911; the complainants were transported by ambulance to the hospital to be treated, and the female complainant suffered from anxiety that continued to the time of trial and intended to relocate to another borough as a result of the attack; the dissent focuses on the injuries inflicted by respondent, but as part of a group assault she is responsible for the consequences of the attack; and the evidence showed that respondent would benefit from mental health services and monitoring of school attendance and academic performance, and that she was in need of a period of supervision longer than six months.

The dissenting judges note, inter alia, that prior to this incident, ACS had already commenced a neglect proceeding against respondent's father and his girlfriend, and, two days after the

incident, ACS placed respondent with her paternal grandmother; respondent has vastly improved her school attendance and performance since being with her grandmother; the supervising foster care agency was attempting to put mental health services in place, and respondent was to receive counseling in school; the family court found that it was respondent's "tumultuous history when she was with the father . . . that led to this incident," and that "she learned from [the incident] and is doing better with the grandmother;" the seriousness of the acts is extremely important but not the only factor, and the disposition is supposed to provide effective intervention and not punish a child as an adult; and respondent immediately acknowledged and expressed remorse for her part in the attack.

In re A.V.
(1st Dept., 6/20/19)

* * *

DOUBLE JEOPARDY/SENTENCE
RIGHT TO COUNSEL - Effective Assistance

The Third Department vacates defendant's guilty plea, concluding that defense counsel was ineffective where, after defendant's conviction was overturned on appeal, counsel failed to recognize that defendant had already served the maximum prison sentence that could be imposed upon him in this case and, consequently, that double jeopardy rules prohibited the imposition of any sentence that included additional prison time. Any punishment already exacted upon a defendant who succeeded in overturning his or her conviction, and was subsequently convicted for the same offense, must be fully credited toward the sentence imposed upon the new conviction. It is significant that the facts were readily available in defendant's motion to reargue this Court's decision in his prior appeal, in which defendant demonstrated that he "served his full sentence."

People v. Andrew Jones
(3d Dept., 4/4/19)

* * *

SENTENCE - Probation/Early Termination

On June 13, 2016, defendant plead guilty to driving while intoxicated and aggravated unlicensed operation of a motor vehicle in the first degree, and was sentenced on September 21, 2016 to 5 years' probation, as well as time served, fines, and surcharges. By order to show cause dated July 22, 2019, defendant applies for early termination of probation.

The Court grants the application, noting that defendant has fulfilled the terms and conditions of probation, has shown himself to be self-motivated in his treatment and recovery success and is no longer in need of the guidance provided by probation supervision; that defendant's early

release from probation would pose no danger to society and have no adverse effect upon the public at large; and that defendant's early release "as a result of his stellar recovery efforts can only serve to enhance the public's faith in the justice system which has at its root the primary goal of rehabilitation back into society."

People v. Jason Pondi
(County Ct., Sullivan Co., 9/25/19)
http://nycourts.gov/reporter/3dseries/2019/2019_51522.htm

* * *

SENTENCE - Probation/Violations

Where a violation of probation is alleged, a written statement must be filed with the court and provided to the defendant "setting forth the condition or conditions of the sentence violated and a reasonable description of the time, place and manner in which the violation occurred."

The Third Department finds improper the court's findings with respect to violations that were referenced in a section of the uniform court report summarizing defendant's probation supervision, where the details of the alleged violations did not include those violations.

The Court also holds that the probation officer's testimony that defendant had been arrested on two occasions, without additional proof as to the underlying acts, did not establish a violation of a condition that, inter alia, required defendant to obey all federal, state and local laws.

People v. Pamela Johnson
(3d Dept., 6/20/19)

* * *

SENTENCE - Probation/Violations
- Discovery

The Third Department finds no error where the court failed to order the People to produce the probation officer's interview notes as *Rosario* material at the probation violation hearing.

Prior statements of the hearing witnesses regarding the subject of their testimony should be provided to a defendant to the extent that they are necessary to afford him or her the opportunity to conduct meaningful cross-examination. Here, the probation officer's testimony regarding his interview of the victim was limited to the fact that the information she disclosed caused him to commence his investigation of potential probation violations. The officer did not testify directly to the substance of the information the victim disclosed during the interview.

People v. Michael Vedder

(3d Dept., 5/9/19)

* * *

SENTENCE - Youthful Offenders/Juveniles

Defendant asks the Court to adjudicate him a youthful offender in connection with his plea of guilty to manslaughter in the first degree. The original sentence was twenty-five years, but that sentence was reduced to twenty years by the First Department on the ground that the original sentence was too severe.

The Court adjudicates defendant a youthful offender, with a sentence of 1 1/3 - 4 years, which is in effect time served. The Court notes, inter alia, that, at the time of the crime, defendant was 16 years old and had never been convicted of a crime; that, at sentencing, defendant apologized to the victim's family and his own family; that defendant was born to a crack-addicted mother, and was likely affected neurologically by the substances his mother used during pregnancy, and it is not unusual for such children to develop neuro-behavioral disorders; that defendant's home situation interrupted the delicate and complex process of maturation and disrupted his progression through age-appropriate milestones; that research tells us that the levels of grey matter in the brain initially increase during early childhood and then decrease during adolescence; that the areas of the brain which are in control of our emotions, impulses, high-level reasoning and decision-making are the areas most often associated with criminal behavior; that teenagers do not necessarily think of the consequences of their actions and can act more impulsively, and partake in risky behavior as a result; and that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.

People v. Hector Morales
(Sup. Ct., Bronx Co., 4/2/19)
http://nycourts.gov/reporter/3dseries/2019/2019_50519.htm

Motion To Vacate Adjudication

MOTION TO VACATE JUDGMENT OF CONVICTION - Sex Trafficking Victims

Defendant moves to vacate the judgments of conviction in eight cases and dismiss the accusatory instruments, arguing that she was compelled and coerced to engage in the charged crimes because she was a victim of sex trafficking under PL § 230.34.

Upon a hearing, the Court grants relief in seven cases, but denies relief in one case because defendant was not arrested on prostitution-related charges. The Court opines that "[a]t the very least, a change in the law eliminating the requirement that the arrest charge be for prostitution or loitering would free courts from the constraints of this limiting statutory language which deprives identified victims of sex trafficking of the relief they are presently denied."

People v. P.V.
(Crim. Ct., Queens Co., 4/30/19)
http://nycourts.gov/reporter/3dseries/2019/2019_29126.htm