JUVENILE DELINQUENCY AND PINS CASELAW/LEGISLATIVE UPDATE

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Current through April 23, 2019

I. NEW LEGISLATION AND ADMINISTRATIVE DIRECTIVES

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 takes 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.

PINS/Educational Neglect: Truancy And School Misbehavior Allegations

Chapter 362 of the Laws of 2018 amends FCA § 735(d)(iii) to require that the designated lead agency review the steps taken by the school district or local educational agency and attempt to engage the district or agency in further diversion attempts if it appears that such attempts will be beneficial not only where the entity seeking to file a petition is a school district or local educational agency, but also where the parent or other potential petitioner indicates that the proposed petition will include truancy and/or conduct in school as an allegation. Where the school district or local educational agency is not the potential petitioner, the designated lead agency shall contact such district or agency to resolve the truancy or school behavioral problems of the youth in order to obviate the need to file a petition or, at minimum, to remediate the education-related allegations of the proposed petition.
Chapter 362 also amends FCA § 735(g)(ii) to provide that the clerk of the court may not accept a petition for filing, where the proposed petition contains allegations of truancy and/or school misbehavior, unless there is a notice from the designated lead agency regarding the diversion efforts undertaken and/or services provided by the designated lead agency and/or by the school district or local educational agency to the youth and the grounds for concluding that the education-related allegations could not be resolved absent the filing of a petition.
Chapter 362 also adds a new FCA § 736(4), which states that where the petition contains allegations of truancy and/or school misbehavior and where the school district or local educational agency is not the petitioner and where, at any stage of the proceeding, the court determines that assistance by the school district or local educational agency may aid in the resolution of the education-related allegations in the petition, the school district or local educational agency may be notified by the court and given an opportunity to be heard.
Chapter 362 also amends FCA § 742(b) to clarify that the court may <u>at any time</u> order that additional diversion attempts be undertaken by the designated lead agency.

Chapter 362 amends FCA § 1012(f)(i)(A) to provide that educational neglect is a failure to provide education to the child "notwithstanding the efforts of the school district or local educational agency and child protective agency to ameliorate such alleged failure prior to the filing of the petition."
Chapter 362 adds a new FCA § 1031(g), which states that where a petition alleges educational neglect, regardless of whether that is the sole allegation, the petition shall recite the efforts undertaken by the petitioner and the school district or local educational agency to remediate such alleged failure prior to the filing of the petition and the grounds for concluding that the education-related allegations could not be resolved absent the filing of a petition.
Chapter 362 adds a new FCA § 1035(g), which provides that where the petition contains an allegation of educational neglect, and where at any stage of the proceeding, the court determines that assistance by the school district or local educational agency would aid in the resolution of the education-related allegation, the school district or local educational agency may be notified by the court and given an opportunity to be heard.

Chapter 362 takes effect on March 7, 2019.

Discrimination/Crimes Based On Gender Identity Or Expression
Chapter 8 of the Laws of 2019 amends the Executive Law, the Civil Rights Law, and the Education Law to prohibit discrimination based on gender identity or expression, defining "gender identity or expression" as "a person's actual or perceived gender-related identity, appearance, behavior, expression, or other gender-related characteristic regardless of the sex assigned to that person at birth, including, but not limited to, the status of being transgender."
Chapter 8 also amends Penal Law §§ 485.00 and 485.05 (hate crimes), and §§ 240.00 (offenses against public order; definition of terms, including "gender identity or expression"), 240.30 (aggravated harassment in the second degree), and 240.31 (aggravated harassment in the first degree), and Criminal Procedure Law § 200.50 (form of "hate crime" charge in indictment), to include acts motivated by the victim's gender identity or expression.
The Penal Law and Criminal Procedure Law amendments take effect on November 1, 2019, and the other amendments take effect on February 24, 2019.

Criminal Procedure: Rape Shield Law
Chapter 55 of the Laws of 2019, Part R, amends Criminal Procedure Law § 60.42 to extend application of the "Rape Shield Law" to cases in which a defendant is charged with Sex trafficking under Penal Law § 230.34.
The law took effect on April 12, 2019.

Penal Law: Hazing
Chapter 188 of the Laws of 2018 amends Penal Law §§ 120.16 (first degree hazing) and 120.17 (second degree hazing) to specify that the prohibited conduct includes, but is not limited to, "making physical contact with or requiring physical activity of such other person."
Chapter 188 took effect on August 13, 2018.

Penal Law/Sex Trafficking of a Child

Chapter 189 of the Laws of 2018 adds a new § 230.34-a to the Penal Law that defines the new crime of Sex trafficking of a child.

A person is guilty of sex trafficking of a child when he or she, being twenty-one years old or more, intentionally advances or profits from prostitution of another person and such person is a child less than eighteen years old. Knowledge by the defendant of the age of such child is not an element of this offense and it is not a defense to a prosecution therefor that the defendant did not know the age of the child or believed such age to be eighteen or over. A person "advances prostitution" when, acting other than as a person in prostitution or as a patron thereof, and with intent to cause prostitution, he or she directly engages in conduct that facilitates an act or enterprise of prostitution. A person "profits from prostitution" when, acting other than as a person in prostitution receiving compensation for personally rendered prostitution services, and with intent to facilitate prostitution, he or she accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he or she participates in the proceeds of prostitution activity.

Sex trafficking of a child is a class B felony.

Chapter 189 amends other Penal Law sections, and other statutes, including the Social Services Law and Family Court Act § 1012(e)(iii)(B), to reflect the addition of this new crime.

Chapter 189 also amends Penal Law § 230.01 to expand the number of cases in which a defendant-victim may raise the affirmative defense to a prostitution charge.

Chapter 189 takes effect on November 13, 2018.

CPLR: Subpoena Practice

Chapter 218 of the Laws of 2018 adds a new subdivision (d) to CPLR § 2305 which states as follows:

"Subpoena duces tecum for a trial; service of subpoena and delivery for records. Where a trial subpoena directs service of the subpoenaed documents to the attorney or self-represented party at the return address set forth in the subpoena, a copy of the subpoena shall be served upon all parties simultaneously and the party receiving such subpoenaed records, in any format, shall deliver a complete copy of such records in the same format to all opposing counsel and self-represented parties where applicable, forthwith."

Chapter 218 took effect on August 24, 2018 and applies to all actions pending on or after that date.

The legislative memo states, inter alia:

"Our Advisory Committee has studied the procedures by which records intended for use at trial are produced pursuant to a subpoena duces tecum; and is of the view that counsel should have the option of having trial material delivered to the attorney or self-represented party at the return address set forth in the subpoena, rather than to the clerk of the court. This is especially true where the materials are in digital format and can be delivered on a disk or through other electronic means."

Practice Note: Presumably, when a subpoena duces tecum must be authorized by the court - e.g., under CPLR § 2307 (government records), or CPLR § 2302(a) (clinical records maintained pursuant to Mental Hygiene Law § 33.13) - the court will decide where the records should be

produced. And, needless to say, when the court needs to conduct an in camera review of confidential records, the parties will not get them until the court rules on the scope of disclosure. In addition, FCA § 1038(a) continues to require that subpoenaed agency records be sent to the court.

Judicial Notice Of Internet Materials

Chapter 516 of the Laws of 2018 adds a new subdivision (c) to CPLR Rule 4511 which states that every court shall take judicial notice of 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, when requested by a party to the action, subject to a rebuttable presumption that such image, map, location, distance, calculation, or other information fairly and accurately depicts the evidence presented.

The presumption shall be rebutted by credible and reliable evidence that the image, map, location, distance, calculation, or other information does not fairly and accurately portray that which it is being offered to prove.

A party intending to offer such image or information 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, a party upon whom such notice is served may object to the request for judicial notice of such image or information, stating the grounds for the objection.

Unless objection is made pursuant to this subdivision, or is made at trial based upon evidence which could not have been discovered by the exercise of due diligence prior to the time for the otherwise required objection, the court shall take judicial notice of such image or information.

The legislative Memorandum in Support states:

Google Maps is a tool that can be used by the courts to fairly resolve cases in a timely manner. Allowing a judge to take judicial notice of a satellite image, location, distance, or other information using Google Maps would relieve the parties from having to otherwise prove the information evidenced in the image or map. Such rebuttable presumption of judicial notice will save time in proving points of fact, while preserving the ability of an opposing party to offer credible and reliable evidence otherwise.

Chapter 516 took effect on December 28, 2018.

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 takes 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.

II. JUVENILE DELINQUENCY CASELAW

Adolescent Offenders

ADOLESCENT OFFENDERS - Removal

In this first degree robbery prosecution, the Court finds extraordinary circumstances and grants the People's motion to prevent removal to family court.

The Court notes, inter alia, that it is alleged that defendant and the co-defendants placed a screwdriver at the back of a cab driver's head as if it was a gun and took approximately $80.00; that the alleged criminal behavior is not in itself extraordinary circumstances; that the People do argue that defendant was the mastermind of the charged offense, and this argument is supported by the complainant's allegation that defendant was the individual who first engaged him and as being the one who "egged on" the co-defendants; that two other felony charges have been brought against defendant, including a charge that he robbed a different cab driver using a BB gun, and the People claim that he was the primary actor in those crimes; and that defendant has already violated conditions of release by failing to report to the probation department and failing to appear in court.

People v. A.T.
(Fam. Ct., Erie Co., 3/25/19)
http://nycourts.gov/reporter/3dseries/2019/2019_29107.htm

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ADOLESCENT OFFENDERS - Removal

In the prosecution of a co-defendant in the cab robbery charged in People v. A.T. (summarized above), the Court denies the People's motion to prevent removal.

The Court notes that defendant is not charged with multiple felonies committed within the space of weeks; that the crime as alleged was not particularly cruel or heinous; that the People have argued that co-defendant A.T. was the "mastermind"; and that defendant has timely appeared in court, has had no other charges, and has attended school as directed.

People v. J.W.
(Fam. Ct., Erie Co., 3/28/19)
http://nycourts.gov/reporter/3dseries/2019/2019_50539.htm

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ADOLESCENT OFFENDERS - Removal

The Court orders that three complaints charging first degree robbery shall proceed towards automatic removal to the Family Court, with the People having the option of timely filing a motion to prevent removal, concluding that the People have failed to meet their burden of proving by a preponderance of the evidence that defendant "displayed a firearm or deadly weapon" in furtherance of any of the offenses.

In one complaint the People alleged only that defendant reached into his waistband while making a threat about shooting, and in another complaint alleged only that defendant placed his hand in his pocket "as if he had" a handgun.

The third complaint involves a closer call because it alleges that defendant "displayed a black handgun" and threatened to shoot the complainant. However, at the sixth-day court appearance, the People cited the allegation in the complainant's supporting deposition that "what appeared to be a black handgun" was displayed, and also referenced defendant's videotaped statement admitting that he acted as if he had a gun but denying actually having a gun.

People v. M.M.
(County Ct., Nassau Co., 3/21/19) http://nycourts.gov/reporter/3dseries/2019/2019_29071.htm

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ADOLESCENT OFFENDERS - Removal

In this adolescent offender prosecution charging, inter alia, attempted murder, the Court declines to order removal, finding that the People proved by a preponderance of the evidence that, as set forth in the accusatory instrument, defendant displayed a firearm or deadly weapon in furtherance of the offense. Defendant allegedly fired five shots from a loaded pistol, and one bullet is lodged in the complainant's abdomen

While the statute does not specify the nature and scope of the parties' opportunity to be heard at the sixth-day appearance, the Court agrees with a previous decision analogizing it to the opportunity to be heard in connection with issuance of a temporary order of protection. Although defendant complains that there is no operability report for the firearm and has been no evaluation of the Grand Jury minutes, the purpose of the sixth-day appearance is to review the accusatory instrument and any other relevant facts; nothing in CPL § 722.23(b) requires that the appearance include testimonial evidence or even allegations of sworn fact based upon personal knowledge of the affiant.

People v. L.M.
(County Ct., Nassau Co., 3/12/19) http://nycourts.gov/reporter/3dseries/2019/2019_50305.htm

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ADOLESCENT OFFENDERS - Removal

In this weapon possession prosecution, the Court denies the People's motion for an order preventing removal to the juvenile delinquency part, concluding that defendant's past violations of probation and failure to comply with the terms of parole supervision, and the current charge, add up to extraordinary circumstances.

"Reform is about changing the dynamics. The intent of the RTA is to give adolescent and juvenile offenders an opportunity to rehabilitate. The goal is avoidance of criminal records and incarceration when possible and in appropriate circumstances." Removal would not amount to allowing defendant's criminal behavior to go without consequences. When defendant violated probation, he was placed at Brookwood Secure and later released with parole supervision, and, at this time, a parole revocation hearing is available. Moreover, in family court, there is potential placement upon adjudication.

People v. D.P.
(Fam. Ct., Erie Co., 2/22/19)
http://nycourts.gov/reporter/3dseries/2019/2019_50261.htm

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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

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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

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ADOLESCENT OFFENDERS - Removal

In this adolescent offender prosecution charging criminal possession of a weapon in the second degree (a loaded firearm), the Court denies the People's motion to prevent removal to family court, finding no "extraordinary circumstances."

The Court notes that many, if not all, of the People's factual allegations are based upon conversations with and observations made by other members of law enforcement, and not, as required, upon the personal knowledge of the affiant.

People v. J.B.
(County Ct., West. Co., 2/27/19)
http://nycourts.gov/reporter/3dseries/2019/2019_29051.htm

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ADOLESCENT OFFENDERS - Removal

In this adolescent offender prosecution charging defendants with violent felonies, the Court, upon a review of the accusatory instrument and other facts at the "sixth-day appearance" under Criminal Procedure Law § 722.23(2), declines to remove the cases to family court.

The accusatory instrument and other facts sufficiently established by a preponderance of the evidence that a victim suffered a "significant physical injury." The Court rejects defense

counsel's contention that medical records are required. The People also specifically identified each defendant by name as having "stomped" and "kicked" the victim in the face, and thus established that each defendant was personally responsible.

People v. E.B.M., People v. J.M.B.
(County Ct., Nassau Co., 2/28/19) http://nycourts.gov/reporter/3dseries/2019/2019_29055.htm

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ADOLESCENT OFFENDERS - Removal

In this prosecution for assault and attempted robbery, the Court denies the People's motion to prevent removal, finding no extraordinary circumstances despite defendant's history of juvenile delinquency and juvenile offender/youthful offender robbery adjudications.

First, to supplement the "extraordinary circumstances" standard, the Court references other definitions of "extraordinary," including "exceptional to a very marked extent," and "most unusual: far from common: very outstanding: very remarkable."

The Court notes, inter alia, that the prior robberies were committed when defendant was 15 years of age, over a relatively brief period of time; that, in this case, defendant was not the more culpable of the two perpetrators, and was described by the complainant in his grand jury testimony as "just standing there watching" at one point in the sequence of events; and that neglect by defendant's mother has been a substantial contributing factor, and is a mitigating circumstance.

People v. J.P.
(Sup. Ct., Bronx Co., 2/11/19) http://nycourts.gov/reporter/3dseries/2019/2019_29059.htm

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ADOLESCENT OFFENDERS - Removal

In this adolescent offender prosecution for murder, the Court declines to order removal, finding that the People have established a "significant physical injury," and finding, in light of the medical examiner's conclusion that death resulted from a gunshot wound and the presence of gunshot primer residue on clothing recovered from defendant's home, that a firearm was displayed in furtherance of the offense.

People v. G.C.
(County Ct., West. Co., 2/7/19) http://nycourts.gov/reporter/3dseries/2019/2019_29050.htm

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ADOLESCENT OFFENDERS - Removal

In this adolescent offender prosecution in which defendant, who allegedly delivered a note containing a fake bomb threat to school administrators, is charged with falsely reporting an incident in the second degree, the Court, finding no extraordinary circumstances, denies the People's motion to prevent removal to family court for a juvenile delinquency prosecution.

The Court notes, inter alia, that the two other children with whom defendant allegedly conspired have been charged in family court, and conspiring with these other children is hardly extraordinary; that a finding of extraordinary circumstances cannot be based solely on an allegation that there were nearly one thousand students at the school, and, although the number of students allegedly placed in fear and at risk of emotional harm is a factor to be considered and might be considered extraordinary circumstances, the actual effect cannot be determined solely upon review of the papers before the Court; and that defendant's failure to accept responsibility or "throw himself at the mercy of the investigating officers with an expansive and total mea culpa" is hardly irregular or unforeseeable, and, to the contrary, it is very common that a sixteen-year-old child would fabricate a story or distance himself from involvement in a matter such as this.

People v. T.R.
(Fam. Ct., Erie Co., 12/21/18) http://nycourts.gov/reporter/3dseries/2018/2018_51976.htm

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ADOLESCENT OFFENDERS - Removal

In this first degree robbery prosecution, the Court grants the People's motion to prevent removal, finding that the People have sufficiently pled facts that would cause a reasonable person to believe that defendant caused significant physical injury to the complainant where there is evidence that defendant and another individual displayed, and struck the complainant in the head four times with, a black pistol; that they broke the complainant's left wrist; and that the complainant received staples in his head due to lacerations.

It appears, from a review of the Raise the Age legislative history, that significant physical injury is greater than physical injury as defined in Penal Law § 10.00(9), but less than serious physical injury as defined in PL § 10.00(10). Lacerations to the complainant's head which required staples to close and stop the bleeding, and a broken wrist, fall within the meaning of significant physical injury.

People v. A.S.
(Fam. Ct., Erie Co., 1/15/19) http://nycourts.gov/reporter/3dseries/2019/2019_50187.htm

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ADOLESCENT OFFENDERS - Removal

The Court grants the People's motion to prevent removal where it is alleged that defendant displayed "a black & silver BB gun," which he placed to the complainant's head, and demanded all his money; that the complainant handed over one hundred dollars in cash to defendant; and that the police recovered a black & silver BB gun in a driveway where defendant threw it and one hundred dollars in cash from defendant's pocket.

As required by CPL § 722.23(2)(c)(ii), the People have shown by a preponderance of the evidence that defendant displayed a firearm, shotgun, rifle or deadly weapon in furtherance of the offense charged.

People v. A.T.
(Fam. Ct., Erie Co., 1/24/19)
http://nycourts.gov/reporter/3dseries/2019/2019_29039.htm

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ADOLESCENT OFFENDERS - Removal To Family Court

The Court denies the People's motion to prevent removal of an adolescent offender charge of attempted arson in the second degree, and orders statutory sealing, finding no extraordinary circumstances.

Attached to the youth felony complaint is a deposition from the complainant, who stated that she was seated in her home when the doorbell rang and that defendant asked to see her son, stating that "he was not going to play her for 2 days and then go back to his baby momma." Defendant then told the complainant that she was going to burn her house down. The complainant closed the door and called 911. She then saw flames outside her window and called for people to get out. A deposition from a passerby stated that he saw someone set a piece of furniture on the porch on fire and called 911. There is no indication of any damage to the house or that any person was injured. Defendant's conduct in plain view is consistent with the defense position that the fire was set impulsively as an angry act by a sixteen-year-old toward a former intimate partner.

Attached to the District Attorney's motion is the deposition of an investigator who stated that he interviewed defendant in the presence of her mother. Defendant told him she was mad at her former boyfriend for giving her a sexually transmitted disease and mad because neither he nor his mother believed that this had occurred. She boasted that she was a "real gangster" and said she wanted to save $3,000 so she could have a baby when she turned eighteen. The investigator stated that "she acted very immature when talking about how her actions could affect other people and even herself" and that he "had concerns regarding the mental health of [defendant] and would like her to talk to some type of mental health and life counselors as part of the outcome of this incident."

The Court finds no highly unusual or heinous facts, nor is there any indication that defendant will be unable to benefit from the services available in Family Court, presents a public safety concern, or requires a sentence of incarceration. Defendant had only just turned sixteen, and, if the incident had occurred just three weeks earlier, she would have been treated as a juvenile delinquent. Defendant's behavior is precisely the type of impulsive act, done without thought of consequences, which is typical of young people. Had she truly intended to burn the house and harm the inhabitants, she could have set a fire at night or without anyone being aware of her actions.

People v. D.L.
90 N.Y.S.3d 866 (Fam. Ct., Monroe Co., 12/27/18)
http://nycourts.gov/reporter/3dseries/2018/2018_28419.htm

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ADOLESCENT OFFENDERS - Removal To Family Court

In this adolescent offender proceeding, defendant, an alleged MS-13 gang member, is charged along with adult co-defendants with, inter alia, attempted gang assault and possession of a weapon.

The Court, after reviewing the facts and giving the parties an opportunity to be heard, determines that the People have failed to prove, by a preponderance of the evidence, that the case should be retained in the Youth Part. The People failed to establish that defendant caused someone a significant physical injury, displayed a deadly weapon, or engaged in certain illegal sexual conduct (CPL § 722.23). The case will be removed to family court unless the People make a motion to prevent removal within 30 days of the date of arraignment.

The Court notes, inter alia, that the initial opportunity to be heard on the question of removal is similar to a temporary order of protection hearing in that accusatory instruments and supporting depositions may be considered, and hearsay evidence may be admitted; that the State Assembly, in the debate prior to passage of the RTA legislation, noted that a "significant physical injury" would be "more serious than a bruise," and would likely involve "bone fractures, injuries requiring surgery and injuries resulting in disfigurement," i.e., injuries that were sustained through the use of a weapon; and that acting in concert with others, while a basis for criminal liability, is not a basis for retaining an adolescent offender's case in the Youth Part where the defendant did not personally cause the significant physical injury.

People v. B.H.
89 N.Y.S.3d 855 (County Ct., Nassau Co., 12/11/18)
http://nycourts.gov/reporter/3dseries/2018/2018_28403.htm

* * *

ADOLESCENT OFFENDERS - Removal

The Court denies the People's motion to prevent removal of this adolescent offender matter in which defendant is charged along with adult co-defendants with, inter alia, attempted murder, where the People allege that defendant and other MS-13 gang members surrounded the three victims and assaulted them with two knives, a bat, a large stick, and a machete; that one victim was stabbed in the back six times and hit over the head with the baseball bat, another victim was hit in the arm with a baseball bat, and the third victim had the machete swung at him; and that on another occasion, defendant and the others approached a car in which the victims were sitting, carrying a long stick, a metal golf club and a dark colored hammer, and picked up large rocks and stones and threw them at the vehicle as it drove away.

The Court notes that the State Assembly envisioned that the courts, in assessing aggravating and mitigating factors would fashion a standard with a "very high bar" for retention of cases in the Youth Part; that there is no evidence that defendant committed numerous crimes over several days, was the one who actually stabbed the most seriously injured victim in the back, was a leader of the assault, or was one of the individuals responsible for the attempt to coerce and intimate a victim's younger brother into joining the group; that while the People state that defendant's school records show evidence of tardiness, truancy, disorderly behavior, use of racial slurs, possession of drugs, and acts of intimidation, harassment and bullying, these are some of the mitigating factors enumerated by the Legislature; and that there is no evidence in the record showing that defendant is not amenable to services.

People v. B.H.
2019 WL 321860 (Sup. Ct., Nassau Co., 1/23/19)
http://nycourts.gov/reporter/3dseries/2019/2019_29024.htm

* * *

ADOLESCENT OFFENDERS - Removal

The Court grants the People's motion to prevent removal to Family Court of two robbery matters, noting that the offenses were allegedly committed while 16-year-old defendant was on Family Court probation, and that defendant has 5 additional pending criminal matters. Removal could result in different and/or duplicative judicial processes and outcomes.

People v. A.G.
62 Misc.3d 1210 (Sup. Ct., Queens Co., 12/20/18)
http://nycourts.gov/reporter/3dseries/2018/2018_51963.htm

Jurisdiction

JURISDICTION - Geographical
CONTEMPT

The Appellate Term reverses an order dismissing a criminal contempt charge for lack of geographical jurisdiction where defendant was charged in New York County for committing acts in Kings County that allegedly violated a New York County order of protection.

Criminal Procedure Law § 20.40(2)(c) confers jurisdiction in a county where the offending conduct "had, or was likely to have, a particular effect upon such county." Here, defendant's conduct had a "particular effect" on the New York County court because courts rely upon orders of protection to protect not only the named complainant, but also the well-being of the community as a whole.

People v. Robert Brooks
(App. Term, 1st Dept., 1/30/19)

Sealing And Confidentiality

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

* * *

CONFIDENTIALITY - Records/Sealing

The Second Department finds no error in the admission into evidence of an audio recording of a telephone conversation defendant had with the victim, and a transcript of that conversation, which were subject to a sealing order. Evidence obtained as the result of a statutory violation lacking constitutional implications is admissible as evidence of guilt.

People v. Brian Stewart
(2d Dept., 5/23/18)

* * *

SEALING - Unsealing Order

In an unrelated robbery case, defendant testified on his own behalf at trial and denied the robbery but admitted to a drug crime. Defendant was acquitted and the record was sealed. In this case, the People sought an order to unseal defendant's testimony at the robbery trial to show that defendant violated a condition of the plea. The court unsealed the record.

The First Department, citing *Matter of Katherine B. v. Cataldo* (5 N.Y.3d 196), concludes that the People were not entitled to an order unsealing the record for the purpose of making a sentencing recommendation. The "law enforcement agency" exception in CPL § 160.50(1)(d)(ii) does not authorize unsealing in these circumstances. It does not matter that the unsealed testimony about a drug crime was given while defendant was awaiting sentencing and did not involve conduct that predated the commencement of this case, and did not relate to "acquitted conduct." "The core purpose of the sealing statute is to protect against the disclosure of information directly relating to a charge that terminates in a defendant's favor."

However, violations of the sealing statute do not require invocation of the exclusionary rule in independent and unrelated criminal proceedings, and thus defendant is not entitled to a new sentencing proceeding or a reduced sentence.

Two concurring judges would not formally decide whether or not the People were entitled to an order unsealing the record, but "cannot state whether the Court of Appeals would find that the sentencing court's legal mandate to determine whether a defendant complied with plea conditions would permit the court to access sealed criminal records for that purpose."

People v. Anonymous
(1st Dept., 5/1/18)

Petitions

ACCUSATORY INSTRUMENTS - Duplicitous Count

The First Department holds that a criminal contempt count was duplicitous because defendant's acts of violating an order of protection by regularly but briefly showing up at the victim's apartment, over the course of about a month and 20 days, constituted distinct crimes that were required to be alleged in separate counts.

People v. Mario Villalon
(1st Dept., 5/10/18)

* * *

ACCUSATORY INSTRUMENTS - Amendment/Change In Theory Of Prosecution

Defendant was charged in the indictment with, inter alia, possessing a loaded revolver "on or about the 20th day of October, 2015." According to the voluntary disclosure form, the crime occurred on October 20, 2015, at 7:36 a.m., at a former girlfriend's address in Hempstead. The VDF does not refer to defendant's residence. Just as jury voir dire was about to commence, the People moved to change the date of the incident to "on or about October 20, 2015, to October 22, 2015." The court granted the application.

The Second Department finds reversible error, concluding that the amendment changed the theory of prosecution and prejudiced defendant. The weapon was actually recovered during a search of defendant's residence on October 22, 2015. The People changed the theory from defendant's actual possession, as witnessed by the former girlfriend, to constructive possession at his own residence. Defense counsel, in opposing the amendment, asserted that he had relied upon the indictment and the VDF, and had made efforts to prove, through time cards and testimony, that it was impossible for defendant to have been at his former girlfriend's apartment at the time of the alleged incident. Thus, defense counsel was forced to forgo an alibi-type defense.

People v. Malcolm McLean
(2d Dept., 3/27/19)

* * *

ACCUSATORY INSTRUMENTS - Use Of Sealed Records

The Court finds facially sufficient a charge of criminal contempt where the People used documents from a now-sealed case involving the same charges that was dismissed for facial insufficiency, but did so within the 30-day window within which the People could appeal and the case was not yet sealed.

People v. Tara Bundy
(Justice Ct. of Town of Penfield, Monroe Co., 5/23/18)
http://nycourts.gov/reporter/3dseries/2018/2018_28158.htm

* * *

ACCUSATORY INSTRUMENTS - Language Issues/Translation

The Appellate Term upholds an order dismissing the accusatory instrument on statutory speedy trial grounds where the statement of the translator did not comply with CPLR 2101(b) because it was not in affidavit form and neither stated the qualifications of the translator nor that the translation was accurate.

The Court rejects the People's contention that a certificate of translation was not required to convert the accusatory instrument into an information since the People filed the translator's statement simultaneously with the complainant's supporting deposition and provided indicia of the complainant's inability to speak or read English.

People v. John Edwards
(App. Term, 1st Dept., 5/30/18)

* * *

ACCUSATORY INSTRUMENTS - Location Of Offense

The Court finds facially insufficient a superseding misdemeanor information charging defendant with public lewdness, endangering the welfare of a child and harassment in the second degree where the original and superseding informations, and the bill of particulars, all contain a location the People acknowledge is incorrect, and the People, on the eve of trial nearly two years after defendant's arraignment, informed defendant for the first time of two new locations.

The Court refuses to allow an amendment. In order to properly prepare for trial, the defense must be given the correct location. The new locations span a distance of ten blocks. Defendant's ability to conduct a timely and thorough investigation was compromised. Defendant was, for example, unable to seek video footage that may have existed or canvass for possible witnesses.

People v. Tridesh Ramcharran
(Crim. Ct., Queens Co., 7/19/18)
http://nycourts.gov/reporter/3dseries/2018/2018_28240.htm

Double Jeopardy/Collateral Estoppel

COLLATERAL ESTOPPEL

In a prior appeal, the Fourth Department reversed defendant's conviction for criminal possession of a forged instrument in the second degree and granted a new trial. Defendant appeals from his conviction, following a new trial, on that count, which involves an allegedly forged bank check identified as check number 61517.

Defendant was acquitted in the first trial of two counts of criminal possession of a forged instrument in the second degree related to allegedly forged bank checks identified as check numbers 61512 and 61519. At the new trial, the People were permitted to use evidence regarding check numbers 61512 and 61519 as evidence of, inter alia, defendant's criminal intent and motive with respect to check number 61517.

The Fourth Department reverses and orders a new trial, concluding that the People were collaterally estopped from using check numbers 61512 and 61519 as evidence. Absent any reference to check numbers 61512 or 61519, the People's witnesses can testify to defendant's involvement, if any, with check number 61517 without materially altering testimony concerning that instrument or providing the jury with a misleading or untruthful account.

People v. Isiah Williams
(4th Dept., 7/6/18)

Discovery/Preservation Of Evidence

RIGHT TO COUNSEL - Waiver/Pro Se Representation
DISCOVERY - Notice Of Intent To Offer Psychiatric Evidence

The Court of Appeals finds no error in the trial court's denial of defendant's request to proceed pro se with "standby counsel." A defendant has no constitutional right to the assistance of standby counsel while conducting a pro se defense. A defendant has only two choices; proceed with counsel or waive the protection of the Sixth Amendment and proceed pro se. Here, the record supports the trial court's conclusion that defendant, who requested permission to ask questions in addition to those asked by his attorney, was seeking dual representation and was not seeking to waive his constitutional right to counsel.

When a defendant asks to proceed "pro se with standby counsel," and the court explains the scope of the right to proceed pro se and denies the request for hybrid representation, the better practice would be to again ask the defendant if he or she wants to proceed without counsel. Nevertheless, courts are not required to engage in any particular catechism before denying an equivocal request to proceed pro se.

The Court also finds no error in the trial court's determination precluding psychiatric testimony for failure to serve notice pursuant to CPL § 250.10. The Court rejects defendant's contention that a challenge to the voluntariness of a confession pursuant to CPL § 710.70 is not a "defense" and is thus outside the ambit of CPL § 250.10(1)(c). If a confession is the primary evidence of guilt, and the defendant successfully raises the issue of voluntariness at trial, it would be a complete defense.

Moreover, allowing a defendant to use unnoticed psychiatric evidence without good cause shown would be contrary to the legislative intent to eliminate surprise and promote fairness at trial by allowing the People the opportunity before trial to obtain otherwise privileged psychiatric evidence to rebut the defendant's affirmative use of the evidence at trial. The legislature also intended to avoid the delay that would result from the surprise presentation of such evidence at trial, which would necessitate an adjournment so that the People could have the defendant examined by their own mental health expert and obtain relevant medical records.

Although, in connection with the issue of prejudice, defendant argues that the People were aware early on that he had a mental illness, that did not put the prosecutor on notice that defendant intended to introduce psychiatric evidence at trial. Defendant never raised the voluntariness argument at his Huntley hearing. Also, until a defendant raises his mental condition and thereby waives Fifth Amendment and confidentiality protections, the People cannot have a mental health expert of their choosing examine a defendant or obtain his or her medical records.

Finally, there was no good cause for defendant's untimeliness. The record contradicts defendant's assertion that he did not plan to challenge the voluntariness of his statements to the

police until hearing the officer's trial testimony. Judge Wilson and Judge Rivera dissent in connection with the right to counsel issue, and would find harmless error with respect to the CPL § 250.10 issue.

People v. Spence Silburn
(Ct. App., 4/3/18)

* * *

DISCOVERY - Social Media Service Provider Records/Subpoenas

Each defendant served a subpoena duces tecum on social media service providers Facebook, Instagram, and Twitter seeking public and private communications, including any deleted posts or messages, from the social media accounts of the homicide victim and a prosecution witness.

The providers moved to quash the subpoenas, citing the federal Stored Communications Act, which states that as a general matter covered service providers may not disclose stored electronic communications except under specified circumstances (including with the consent of the user who posted the communication) or as compelled by law enforcement entities employing procedures such as search warrants or prosecutorial subpoenas. Defendants asserted that they need the communications in order to properly prepare for trial and defend against the pending murder charges, and argued that the SCA violates their Fifth and Sixth Amendment rights to the extent it precludes compliance with the subpoenas. The trial court denied the motions to quash, and ordered production of the requested communications for in camera review. The California Court of Appeal stayed the production order, and eventually directed the trial court to quash the subpoenas.

The California Supreme Court first concludes that the subpoenas are unenforceable with respect to communications addressed to specific persons, and other communications that were and have remained configured by the registered user to be restricted. However, the SCA's lawful consent exception requires disclosure of communications that were configured by the user to be public, and that remained so configured at the time the subpoenas were issued.

Facebook, Inc. v. Superior Court of City of S.F. ex rel. Hunter
2018 WL 2347162 (Cal., 5/24/18)

* * *

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 - Notice Of Alibi

The Third Department finds reversible error where the court denied defendant's mid-trial request to present an alibi witness. Although defendant did not serve an alibi notice in response to the People's demand for notice, defendant did not intend to call an alibi witness until the People, knowing that defendant had testified to having an alibi during the grand jury but had not presented that defense at trial, opened the door by eliciting testimony from a witness about what defendant was doing on the night of the shooting.

There is no evidence that defense counsel's failure to provide earlier notice was willful or intended to gain a tactical advantage.

People v. Curtis Perkins
(3d Dept., 11/21/18)

* * *

BRADY MATERIAL - Police Witness's Misconduct

The Second Department concludes that documents created in connection with investigations conducted by the Internal Affairs Bureau and federal civil lawsuits regarding two police officers who were primarily involved in the investigation and arrest of defendant and testified at trial was impeachment material covered by Brady disclosure requirements. However, defense counsel had knowledge of most of the documents and a meaningful opportunity to use that information to cross-examine the officers.

People v. Jerome Wade
(2d Dept., 11/21/18)

* * *

PROSECUTORIAL MISCONDUCT - Presentation Of False Testimony
BRADY MATERIAL

In this habeas proceeding, petitioner challenges his state court conviction for murdering a member of a rival gang, arguing that prosecutors failed to promptly disclose Brady evidence that the lead investigator had been caught selling cocaine to an undercover police officer before he joined the New York Police Department, and that prosecutors knowingly offered perjured testimony of two eyewitnesses who recanted years after the trial and claimed that the officer had pressured them into accusing petitioner. The district court denied relief. The Second Circuit reverses.

The supreme court's determination that no Brady obligation arose until the day the People ordered the arrest of the officer was an unreasonable application of clearly established federal law. While the prosecutor may have reasonably sought a high degree of certainty before ordering the arrest of a NYPD officer, and assumed that law enforcement officials would have followed up on the information sooner if it were reliable, it was not reasonable to delay disclosure to the defense of credible evidence from an undercover officer. It was the prerogative of the defense, not the prosecution, to exercise judgment in determining whether to use the information. However, the state court's determination that any Brady violation was harmless was a reasonable application of clearly established law. The state courts also reasonably applied clearly established federal law in denying relief based on the recantation by one eyewitness.

However, the state court's rejection of the other eyewitness's recantation - in part premised on the finding that the witness was "trying too hard to be convincing" - was an unreasonable determination of the facts in light of the evidence presented.

Fernandez v. Capra
2019 WL 847285 (2d Cir., 2/22/19)

* * *

BRADY MATERIAL - Knowledge Of Law Enforcement

In this CPL Article 440 proceeding, the Third Department finds no Brady violation, concluding that the State police, the lead agency investigating this prison homicide, is not chargeable with knowledge of any evidence possessed by the Department of Correctional Services Office of the Inspector General indicating that a cooperating inmate may have been threatened or coerced by prison officials.

It appears that the State Police and IG were conducting parallel investigations - one criminal and one administrative - with some overlap but addressing different aspects of the situation. The report from the lead IG investigator reveals that he interviewed inmates with the State Police, gathered information for two months after the incident, conferred with State Police and met with the District Attorney. But the report indicates that the IG closed its case six months before

defendant's criminal trial, based on a finding that there was no evidence of staff misconduct; this indicated the administrative focus of the IG's investigation.

The record contains some evidence that would support a conclusion that the IG investigators were agents of the police, but other evidence that would support a contrary conclusion. Defendant did not meet his burden of proving, by a preponderance of the evidence, that the IG investigators were working as an arm of law enforcement on the night of the incident.

People v. Quentin Lewis
(3d Dept., 11/21/18)

* * *

FREEDOM OF INFORMATION LAW

Petitioner requested, under the Freedom of Information Law, that the Civilian Complaint Review Board disclose certain records of misconduct investigations, if any, regarding a named NYPD police officer. The CCRB denied the request on the ground that the records were exempt under Public Officers Law § 87(2)(a) and Civil Rights Law § 50-a(1). After petitioner's administrative appeal was rejected, petitioner commenced this CPLR Article 78 proceeding. The supreme court granted the petition, and the CCRB appeals.

The Second Department agrees with the First Department that records of the CCRB relating to complaints and proceedings against police officers are exempt from disclosure under Civil Rights Law § 50-a(1). These are "personnel records used to evaluate performance toward continued employment or promotion," and are deemed to be "under the control of" the NYPD. The CCRB also met its burden of establishing a substantial and realistic potential for the abusive use of the material against the officer.

Matter of Luongo v. Records Access Officer, Civilian Complaint Review Board
(2d Dept., 5/23/18)

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CONFESSIONS - Miranda Warnings
- Invocation Of Right To Remain Silent
DISCOVERY - Witness Interviews

After waiving her *Miranda* rights, defendant freely and voluntarily made a videotaped statement at the police station beginning at approximately 9:00 p.m. The interview ended after approximately 30 minutes to allow defendant to compose herself. The idea for ending the interview and stopping the videotape was that of the Assistant District Attorney conducting the interview. Questioning resumed the following morning at approximately 10:00 a.m., at which

time defendant was reminded of the rights she had been read the previous day and agreed to continue answering questions.

The Second Department concludes that defendant's morning statement was properly admitted at trial. Since defendant had not unequivocally and unqualifiedly invoked her right to remain silent, and remained in continuous custody, police and prosecutors were free to resume questioning within a reasonable time without repeating the *Miranda* warnings. The suppression hearing testimony of a detective who, in response to questions by defense counsel stating that defendant did not want to talk anymore during the evening's interview, answered "Right," and in another instance said "Correct," does not change the fact that there was no unequivocal invocation of defendant's right to remain silent at that time.

The Court finds error, albeit harmless, in the trial court's ruling conditioning defendant's ability to interview a prosecution witness upon the interview occurring in the presence of the prosecutor or a detective.

People v. Atara Wisdom
(2d Dept., 8/29/18)

* * *

CONFIDENTIALITY OF RECORDS - Police Personnel Records/Body-Worn Camera Footage

In this "hybrid" Article 78 proceeding challenging the City's public release of police department body-worn-camera footage without a court order or the relevant officers' consent, the supreme court dismissed the petition and complaint, holding that there is no private right of action under Civil Rights Law § 50-a.

The First Department disagrees, concluding that the absence of a statutory private right of action does not preclude review because the statute creates protected rights for police officers and does not explicitly prohibit a private right of action or otherwise manifest a clear legislative intent to negate review.

However, the Court affirms, concluding that body-worn-camera footage is not a personnel record covered by Civil Rights Law § 50-a. While petitioner has valid concerns about invasion of privacy and threats to the safety of police officers, and the body-worn-camera program was designed, in part, for performance evaluation purposes, the primary purpose of the footage is to serve other key objectives of the program, such as transparency, accountability, and public trust-building.

In re Patrolmen's Benevolent Association of the City of New York, Inc. v. De Blasio, etc., et al.
(1st Dept., 2/19/19)

* * *

DISCOVERY/SUBPOENAS - Reciprocal Discovery/Video Recording

The defense moves to quash trial subpoenas issued by the Office of the Special Narcotics Prosecutor for the City of New York calling for production of a DVD containing video footage allegedly depicting the incident underlying the criminal action, and for the appearance of a defense employee to testify to the authenticity of the recording and its chain of custody. A defense investigator obtained the DVD from a business located near the scene of the alleged crime. The People believe the footage will show an attempted sale of crack cocaine between an unapprehended woman and defendant, as well as an ensuing struggle between defendant and police officers.

The Court grants the motion to quash. The People may not use a subpoena to circumvent statutory limitations on the right to reciprocal discovery. The statute exempts video evidence if the defense does not intend to introduce that evidence at trial. The People made no effort to canvass the arrest location for surveillance evidence until eight months after defendant's arrest, despite the likelihood that businesses located near the crime scene would have recorded the interaction. It should hardly have come as a surprise to the People that the surveillance video had been deleted by the time they sought it out. It is well known that most video recordings are routinely destroyed or over-written after a short retention period.

To grant the People access to the fruits of this defense investigation would impinge upon defendant's right to the effective assistance of counsel. Defense counsel was duty-bound to obtain the surveillance video and ascertain its value.

People v. Melvin Butler
(Sup. Ct., N.Y. Co., 10/22/18)
http://nycourts.gov/reporter/3dseries/2018/2018_28330.htm

* * *

DISCOVERY - DNA Testing Report/Protective Order

Defendant, charged with, *inter alia*, criminal possession of a weapon in the second degree, requests issuance of a so-ordered subpoena for a non-confirmatory OCME report. It is alleged that the police took sample swabs from the 9mm firearm, and the swabs were submitted to the OCME for DNA testing. An abandoned cigarette butt sample was also collected from defendant and submitted to the OCME for comparison DNA testing. One OCME report disclosed that one of the sample swabs from the firearm was contaminated, as the profile of a laboratory member matched one of the individual contributor mixtures found on the swab. Another OCME report indicated that it could not be determined whether defendant was included or excluded as a contributor to one of the sample swabs from the firearm. OCME also informed defendant that a non-confirmatory report had been generated as to the contamination of at least one of the sample

swabs from the firearm, and that any corrective action as to the contamination would be contained in the non-confirmatory report.

OCME does not oppose disclosure to defendant of the non-confirmatory report, but moves for a protective order directing defendant not to disseminate the report to any other party, including other counsel within The Legal Aid Society. The OCME argues that the limited disclosure of the non-confirmatory report is warranted because the use of the report in an unrelated case could cause staff to be less willing to fully report any perceived non-conformities.

The Court denies the motion for a protective order. The OCME has not cited any support for the contention that disclosure of the non-confirmatory report beyond this matter would adversely affect its ability to maintain quality assurance and control efforts. The possibility of employees ignoring the OCME's internal policy regarding the reporting of non-conformities does not constitute good cause.

People v. Abdoulaye Sissoko
(Sup. Ct., Kings Co., 12/5/18)
http://nycourts.gov/reporter/3dseries/2018/2018_28401.htm

* * *

DISCOVERY/SUBPOENAS - Police Personnel Records (Civil Rights Law § 50-a)
DISMISSAL IN THE INTEREST OF JUSTICE - Misconduct By Prosecutor

In this DWI prosecution brought against a New York State trooper, the Court adheres to an earlier oral ruling that the People, who cited the exception for prosecutors in Civil Rights Law § 50-a(4), abused their subpoena power by obtaining defendant's personnel records without alerting the Court.

Although the People claim that § 50-a and CPL § 610.20 demonstrate the legislature's intent to confer a broad subpoena power to prosecutors, subpoenaed materials must be returnable to court. The People do not indicate that their subpoena duces tecum was narrowly tailored to seek only records of defendant's arrest and his employer's investigation. Defendant was vulnerable to the People's probe solely because of his employment status as a police officer.

People v. D.N.
(Crim. Ct., Bronx Co., 12/4/18)
http://nycourts.gov/reporter/3dseries/2018/2018_28378.htm

* * *

DISCOVERY - Police Personnel/Disciplinary Records

Defendant, charged with possession of marijuana, moves for an order directing the Civilian Complaint Review Board and Legal Bureau of the New York City Police Department to produce disciplinary records for the officer who recovered the drugs for in camera inspection.

The Court grants the motion. The Bronx District Attorney's Office, the Civilian Complaint Review Board, the Legal Bureau of the New York City Police Department, and the officer are interested parties that have been served and given the opportunity to be heard. Defendant has, inter alia, alleged that the officer "and other members of the 48th Precinct unlawfully arrested and searched (him) under the fabricated pretenses of a drug sale"; and provided exhibits regarding three pending civil lawsuits involving the officer, wherein he is being sued for "excessive force, (making) false arrests, false imprisonment, fabricating statements, (making) false sworn statements in support of a false arrest, unlawful searches, unlawful stops and unlawful seizures."

People v. Pena
(Crim. Ct., Bronx Co., 4/12/18)
https://www.law.com/newyorklawjournal/almID/1526597617NY2017BX0195/

Ethics and Judicial/Attorney Misconduct

JUDGES - Bias

The Second Department holds that the judge at the nonjury trial properly declined to recuse himself after he had decided a pretrial Sandoval motion.

People v. Alvin Smith
(2d Dept., 7/25/18)

* * *

ATTORNEY-CLIENT PRIVILEGE - Crime-Fraud Exception/Presence Of Third Persons
ETHICS - Conflicts

When defendant, who was in the company of relations and friends, asked his lawyer prior to arraignment whether the court would commit him pending trial, the lawyer said he couldn't guarantee otherwise, but the proper course would be to appear as scheduled. When the arraignment proceeding began, defendant was absent. When the court asked if anyone knew where defendant was, the lawyer described his recent conversation with defendant in the company of the relations and friends, including defendant's question about commitment and the lawyer's response. After defendant was arrested, the parties filed a stipulation, signed by defendant, stating the substance of what the lawyer had told the court at the uncompleted

arraignment hearing, with the exception of defendant's question about commitment and the lawyer's answer; this omission was meant to remove any risk that the lawyer might be called as a Government witness, since defendant wished to continue with the lawyer as principal counsel.

The First Circuit U.S. Court of Appeals finds no inadequate representation. New Hampshire Rule of Professional Conduct 3.3 obligates counsel "who knows that a person . . . has engaged in criminal or fraudulent conduct related to the proceeding[,] [to] take reasonable remedial measures, including, if necessary, disclosure to the tribunal," even when information disclosed would "otherwise [be] protected by Rule 1.6." Since defendant's absence from the arraignment he had been ordered to attend was a criminal violation, the lawyer's response to the court was obligatory. Moreover, when speaking with others present, defendant could not assume that his words were privileged statements to his lawyer. He also signed the stipulation despite the court's assurance that new counsel could be appointed to eliminate any conflict.

United States v, Tirado
2018 WL 2126931 (1st Cir., 5/9/18)

* * *

PROSECUTORIAL MISCONDUCT/ETHICS - Disclosure Of Evidence Favorable To Defense

The New York City Bar Association Committee on Professional Ethics addresses post-conviction obligations created by Rule 3.8(c), which states a minimum standard of conduct "when a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted." The rule may be triggered when the defendant pled guilty as well as when the defendant was convicted following a trial, since a guilty plea does not foreclose the possibility that the defendant was in fact innocent.

"New" evidence may include evidence of an alibi, an account of an eyewitness or accomplice, or physical or forensic evidence such as DNA evidence. Rule 3.8(c) may also be triggered by new evidence that tends to discredit the proof at trial, such as a recantation, information impeaching a key witness, or new forensic research that casts doubt on the reliability of earlier forensic evidence. "New" evidence may include previously unknown evidence that might have been available to the defense at the time of trial if only defense counsel had exercised due diligence.

"Credible" has its ordinary meaning. To be "credible," evidence must simply be trustworthy or worthy of belief. The term "material" does not incorporate the standard of materiality for review under Brady v. Maryland (373 U.S. 83) and its progeny. In Rule 3.8(c), "material" means that the new evidence contributes significantly to creating a reasonable likelihood of the convicted defendant's innocence. The reference to "evidence" is not limited to proof that may be admissible under rules of evidence applicable to judicial proceedings.

A lawyer "knows" a fact when the lawyer has "actual knowledge of the fact in question [which may be] inferred from the circumstances." Rule 1.0(k). Conscious avoidance of the fact in question may also constitute knowledge under the Rules. And, a prosecutor who does not know of new exculpatory evidence because of a failure to exercise reasonable diligence may have acted incompetently under Rule 1.1.

Opinion 2018-2
(N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, 4/13/18)

* * *

JUDGES - Excessive Interference At Trial

The Second Department concludes that defendant was deprived of his right to a fair trial where the trial court interjected itself into the questioning of witnesses more than 50 times, asking more than 400 questions; elicited step-by-step details from several officers regarding their observations and actions when they apprehended defendant; elicited and assisted in developing facts damaging to the defense on direct examination of the People's witnesses; and interrupted cross-examination and generally created the impression that it was an advocate on behalf of the People.

People v. Christopher Hinds
(2d Dept., 4/25/18)

Confessions/Admissions/Self Incrimination

CONFESSIONS - Parent Or Guardian/Absence During Questioning

In a 4-2 decision, the Court of Appeals, confronting a mixed question of law and fact, finds record support for the lower courts' determination that respondent's statements were voluntary. This case involved police interrogation of respondent without an adult being present.

The dissenting judges assert that although respondent's mother was present during the Miranda warnings, she is not his legal guardian as he was previously removed from her care due to her failure to protect him from sexual abuse; that respondent's legal guardian, his grandmother, was never consulted, and was not in the room when respondent waived his rights and was questioned, despite being present at the precinct throughout the interrogation; and that in light of United States Supreme Court jurisprudence and scientific studies regarding the capacity of juveniles, this Court should revisit *Matter of Jimmy D.* (15 N.Y.3d 417), where the Court held that the parent of a child has the right to attend the child's interrogation by a police officer but that a confession obtained in the absence of a parent is not necessarily involuntary.

The dissenting judges also would find that respondent's challenge to the admission of his written confession is preserved, and that a question of law is presented with respect to whether a

thirteen-year-old's written confession is voluntary when a detective asks him if he would like to write an "apology note" without an adult or guardian present in the room.

Summary of First Department decision in this case:
The First Department, citing *Matter of Jimmy D.* (15 N.Y.3d 417), denies suppression of respondent's oral and written statements, concluding that the presentment agency proved beyond a reasonable doubt that respondent voluntarily waived his Miranda rights. Two dissenting judges would suppress respondent's written statement.
Although the detective elicited the statements while respondent's mother was outside of the interrogation room, respondent and his mother had an opportunity to talk while at the precinct; they were both present during the Miranda warnings and agreed to respondent being questioned without his mother present; and at no point during any of the questioning did respondent ask for his mother.
The detective did not engage in deceptive or coercive practices. After respondent orally confessed, the detective asked one time if respondent would like to write an apology letter. Respondent was free to refuse this offer. Only when respondent answered that he would like to write the letter did the detective give him a pen and paper and leave the room while he wrote the letter. Despite the dissent's suggestion, there is no case law supporting the proposition that respondent's mother had to be made aware of the fact that the detective was going to ask respondent to write an apology letter in order for the letter to be voluntary. The record does not support the dissent's contention that respondent did not understand, because of his young age and inexperience with the judicial system, that the apology letter would be given to the court.
Respondent's claim that the fifth Miranda warning given by the detective was deficient, and nullified the effects of the other warnings, is unpreserved.

Matter of Luis P.
(Ct. App., 12/11/18)

* * *

CONFESSIONS - Voluntariness
RIGHT TO PRESENT DEFENSE - Funds For Expert Assistance

The Third Department finds no error in the denial of defendant's application, made on the eve of trial, for funds to hire a psychological expert to examine him and testify relative to his duress defense, and, specifically, to explain why he "would succumb to the pressure of an older, more dominant male in his peer group." Although such testimony may have been helpful, defendant failed to demonstrate a distinct necessity for the assistance of an expert to aid the jury in resolving that issue.

The Court also concludes that then 16-year-old defendant's statements were not involuntary. Although defendant was detained for approximately 16½ hours, the questioning was intermittent, with several lengthy breaks that afforded defendant the opportunity to sleep in solitude, and defendant was provided with food and water and permitted to use the restroom. As defendant

was legally an adult, there was no requirement that his family be present. The tactics used by the detectives in encouraging defendant to "be a man" and to "do the right thing" cannot be deemed improper where, as here, there is no evidence that defendant was of subnormal intelligence or susceptible to suggestion.

Certain assurances of confidentiality were made after defendant had already inculpated himself, and related only to his disclosure of the identity of the other shooter and his expressed fear that his revelation would be disseminated in the community and he would be labeled a "rat" and a "snitch." Even if the detective's statements could be viewed as a promise not to divulge defendant's subsequent statements, there was no substantial risk that defendant might falsely incriminate himself. If anything, the assurances of confidentiality would have induced defendant to provide truthful statements.

People v. Jaushi'ir Weaver
(3d Dept., 12/20/18)

* * *

CONFESSIONS - Voluntariness

The Second Department finds harmless error in the admission of defendant's statements where detectives made repeated threats to defendant that they would tell the co-defendant that defendant had incriminated him. The People failed to show that the statement was not the product of psychological coercion.

People v. Paul Giddens
(2d Dept., 5/30/18)

* * *

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)

* * *

CONFESSIONS - Notice Of Intent To Offer - Superseding Accusatory Instrument

The Appellate Term finds no CPL § 710.30 notice violation where, even if the People provided late notice of defendant's statements in connection with the first misdemeanor complaint, which was dismissed as facially insufficient, timely notice was provided after the People filed another misdemeanor information that cured the prior defect, and the new filing was not a pretext designed to circumvent CPL § 710.30.

People v. Claudette Lacast
(App. Term, 2d Dept., 9th & 10th Jud. Dist., 4/5/18)

* * *

CONFESSIONS - Notice Of Intent To Offer
SEARCH AND SEIZURE - Probable Cause/Sending Officer Rule
- Arrest/Use Of Handcuffs

At the suppression hearing, the Court orders preclusion due to a CPL § 710.30 notice violation, noting that while defendant was not in custody and volunteered the statement, that is relevant to suppression, not notice. When a statement was made to a law enforcement official, a defendant has the right to have a court review the circumstances, including whether the statement was truly spontaneous or was instead the product of the functional equivalent of interrogation.

The Court denies preclusion as to other statements, finding that the statements adduced at the hearing are substantially similar to the noticed statements and occurred at the same time, date and location provided on the notice. The statement "I did hit him" is similar to "I know I did this." Likewise, the statement, "I deserve to do what I already did" is similar to "I should be punished." Moreover, defendant waived preclusion by failing to object to the testimony regarding the statements and by cross examining the officer about the statements.

The Court suppresses identification evidence and other evidence obtained post-arrest, concluding that the police did not have probable cause. Although the officers had responded within minutes of receiving a radio run regarding an altercation or crime in progress and observed a man on the ground who was uncommunicative, and, after a woman told them that her husband had run upstairs "in a frenzy" and they followed her into an apartment, defendant stated, "yes, I was involved with the altercation outside," the officers had not spoken to a witness, and did not know what occurred or if the man on the street was injured. The People have offered no explanation supporting their claim that defendant was placed in handcuffs for purposes of detention rather than arrest. Even if a fellow officer had probable cause, he never communicated the information to the officers who handcuffed defendant and placed him in the backseat of the patrol car.

People v. Jose Gonzalez
(Crim. Ct., Queens Co., 2/27/19) http://nycourts.gov/reporter/3dseries/2019/2019_50242.htm

* * *

CONFESSIONS - Notice Of Intent To Offer/Waiver Of Preclusion
IDENTIFICATION - Photos/Suggestiveness

The Court denies suppression where the witness, after failing to identify defendant in a photo array, inadvertently glimpsed a partially obscured photo of defendant in the officer's case folder, and, without prompting, immediately identified defendant and asked to see the photo array for a second time and identified defendant again.

The Court orders preclusion of a video recorded statement regarding which the People failed to serve CPL § 710.30 notice. Defendant, who had received timely notice of a different statement, and moved to suppress any and all statements, did not waive the lack of notice since he was unaware of the video statement until it was played during the suppression hearing. The lack of notice should not be excused simply because defendant was, fortuitously, granted a Huntley hearing in connection with the noticed statement. "To so hold would render the notice requirement useless and vitiate the statute in its entirety."

People v. Nibbs
(Sup. Ct., Kings Co., 2/27/19)
https://www.law.com/newyorklawjournal/almID/1553665613NY325317/

* * *

CONFESSIONS - Interrogation
RIGHT TO COUNSEL - Attachment Of Right In Related Matter
- Effective Assistance

In this prosecution of defendant for bribery and falsely reporting an incident, the Second Department orders suppression, concluding that defendant's pre-Miranda inculpatory statement concerning the manner in which she might have hit her husband was not genuinely spontaneous. The officer should have known that by telling defendant that she needed to come to the precinct in connection with his investigation into her husband's allegations - she had already been told she would be arrested - and then placing her in an interview room and confronting her with the allegations and the evidence against her, including an order of protection, he was reasonably likely to elicit an incriminating response.

The Court also finds error in the initial admission of an audio recording of defendant's statements to two Internal Affairs officers in connection with defendant's sexual misconduct allegations against the officer who had questioned her about her husband's allegations. (A portion of the recording was played to the jury before the court stopped the playback because the officers' questioning shifted the burden of proof, struck the recording and issued a curative instruction.) The officer who questioned defendant about her husband's allegations had alleged that, as he was about to leave the interview room, defendant offered him sex and money to "make the charges disappear." Thereafter, defendant was arraigned on a bribery charge and

charges relating to the alleged assault of her husband. Defendant was represented by an attorney at arraignment and released from custody. A few days later, defendant called the precinct and made the sexual misconduct allegations. Defendant's alleged bribery and false reporting were so inextricably interwoven that any interrogation about the allegedly false report would inevitably elicit incriminating responses regarding the pending bribery charge.

Defendant also was deprived of the effective assistance of counsel. There was no reasonable strategy supporting defense counsel's stipulation to all of defendant's statements in the vehicle, including numerous statements of which the People failed to provide CPL § 710.30 notice.

People v. Luander Stephans
(2d Dept., 1/23/19)

* * *

CONFESSIONS - Interrogation

The Third Department suppresses statements made by defendant during an interview with an investigator conducted while defendant was jailed and awaiting trial in this case. The interview resulted from defendant's repeated requests to speak to an investigator regarding his report of having been the victim of a burglary. The investigator did not raise the issue of the charged shooting during the interview; defendant made the damaging admission in response to the investigator asking if he had any suspects in mind regarding the burglary.

The investigator had supervised the investigation into the shooting and knew, at the time of the interview, that it was drug-related, and thus should have known his question was reasonably likely to evoke an incriminating response.

People v. Donnell Harrison
(3d Dept., 6/14/18)

* * *

CONFESSIONS - Waiver
MOTION TO REARGUE

Under CPLR 2221(d)(3), a motion to reargue must be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. The Court holds that because, in criminal proceedings, parties are immediately placed on notice of a decision when it is distribute orally and/or in writing, and the formality of service with notice of entry appears largely superfluous. The thirty-day time limitation should commence from the date the court renders a final decision. In this case, the People's motion to reargue is untimely.

Nevertheless, the Court reaches the merits of the People's motion, and, having previously ruled that the police are required to orally read the Miranda warnings to suspects in custody, now agrees with the People that Miranda v. Arizona contains no such requirement. But the Court rejects the People's contention that defendant implicitly waived his rights. The officer never explained to defendant that if he did not understand what he was reading in the Miranda waiver form, he could indicate it by recording a "no" after any statement he did not understand. Defendant was merely told to read the Miranda waiver form and to sign and initial the document. There was no meaningful exchange about whether defendant understood the rights delineated in the waiver form.

People v. Calvin Buchanan
(City Ct. of Mount Vernon, Westchester Co., 7/23/18)
http://nycourts.gov/reporter/3dseries/2018/2018_28231.htm

Search And Seizure

SEARCH AND SEIZURE - Expectation Of Privacy - Cell Phone Location Information

In a case in which the Government obtained defendant's cell site location information (CSLI) covering a period of 127 days, and was able to ascertain when he was at the site of the robberies, a 5-Justice Supreme Court majority, in an opinion by Chief Justice Roberts, holds that an individual maintains a legitimate expectation of privacy in the record of his movements as captured through CSLI, and thus the Government's acquisition of CSLI is a Fourth Amendment search. Given the unique nature of CSLI, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection. The Government must generally obtain a warrant supported by probable cause before acquiring such records.

As with GPS information, the time-stamped data provides an intimate window into a person's life, revealing not only his movements, but through them his familial, political, professional, religious, and sexual associations. Like GPS monitoring, cell phone tracking is remarkably easy, cheap, and efficient compared to traditional investigative tools. In fact, historical cell-site records present even greater privacy concerns than the GPS monitoring of a vehicle. While individuals regularly leave their vehicles, they compulsively carry cell phones with them all the time. The Government's access to CSLI information is subject only to the retention polices of the wireless carriers, which currently maintain records for up to five years. Only the few without cell phones could escape this tireless and absolute surveillance.

The rule the Court adopts also must take account of more sophisticated systems that are already in use or in development. The accuracy of CSLI is rapidly approaching GPS-level precision. As the number of cell sites has proliferated, the geographic area covered by each cell sector has shrunk, particularly in urban areas. In addition, with new technology measuring the time and angle of signals hitting their towers, wireless carriers already have the capability to pinpoint a phone's location within 50 meters.

Under the third-party doctrine, an individual has a reduced expectation of privacy in information knowingly shared with another. But this does not mean that the Fourth Amendment falls out of the picture entirely. And cell phone location information is not truly "shared" as one normally understands the term. Cell phones and the services they provide are such a pervasive and insistent part of daily life that carrying one is indispensable to participation in modern society. Also, a cell phone logs a cell-site record by dint of its operation, without any affirmative act on the part of the user beyond powering up. Virtually any activity on the phone generates CSLI, and, apart disconnecting the phone from the network, there is no way to avoid leaving behind a trail of location data. In no meaningful sense does the user voluntarily assume the risk of turning over a comprehensive dossier of his physical movements.

The Government acquired the cell-site records pursuant to a court order issued under the Stored Communications Act, which required the Government to show "reasonable grounds" for believing that the records were "relevant and material to an ongoing investigation." That showing falls well short of the probable cause required for a warrant.

The Government will be able to obtain records via subpoena in the overwhelming majority of investigations. The Court holds only that a warrant is required in the rare case where the suspect has a legitimate privacy interest in records held by a third party. Also, case-specific exigencies may support a warrantless search, such as a need to pursue a fleeing suspect, protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence.

Carpenter v. United States
2018 WL 3073916 (U.S. Sup. Ct., 6/22/18)

* * *

SEARCH AND SEIZURE - Auto Search/Home Curtilage

The Supreme Court holds that the automobile exception to the Fourth Amendment does not permit a police officer, uninvited and without a warrant, to enter the curtilage of a home in order to search a vehicle parked therein.

The part of the driveway where defendant's motorcycle was parked is curtilage. The driveway runs alongside the front lawn and up a few yards past the front perimeter of the house. The top portion of the driveway that sits behind the front perimeter is enclosed on two sides by a brick wall about the height of a car and on a third side by the house. A side door provides direct access from this partially enclosed section of the driveway to the house. A visitor trying to reach the front door would walk partway up the driveway, but turn off before entering the enclosure and proceed up a set of steps leading to the front porch. When the officer searched the motorcycle, it was parked inside this partially enclosed top portion of the driveway that abuts the house.

The scope of the automobile exception extends no further than the automobile itself. Including home curtilage would both undervalue the protection afforded to the home and its curtilage and untether the automobile exception from the justifications underlying it.

The Court rejects the State's proposed bright line barring use of the automobile exception to permit warrantless entry into the physical threshold of a house or a similar fixed, enclosed structure inside the curtilage like a garage. Creating a carve out to the general curtilage rule seems far more likely to create confusion than does uniform application of the rule. The State's proposed rule also would grant constitutional rights to persons with the financial means to afford residences with garages in which to store their vehicles, but deprive persons without such resources of individualized consideration as to whether the areas in which they store their vehicles qualify as curtilage.

Collins v. Virginia
2018 WL 2402551 (U.S. Sup. Ct., 5/29/18)

* * *

SEARCH AND SEIZURE - Expectation Of Privacy - Rental Car

The Supreme Court holds that, as a general rule, someone in otherwise lawful possession and control of a rental car has a reasonable expectation of privacy in it even if the rental agreement does not list him or her as an authorized driver. There may be countless innocuous reasons why an unauthorized driver would get behind the wheel of a rental car and drive it - perhaps the renter is drowsy or inebriated and the two think it safer for the friend to drive. This constitutes a breach of the rental agreement, but, standing alone, has no bearing on expectations of privacy in the car.

The Court remands for consideration of the Government's new argument that defendant should have no greater expectation of privacy than a car thief because, knowing that he would not have been able to rent the car on his own because of his criminal record, he used the authorized driver, who had no intention of using the car for her own purposes, to procure the car for him to transport heroin.

Byrd v. United States
2018 WL 2186175 (U.S. Sup. Ct., 5/14/18)

* * *

SEARCH AND SEIZURE - Expectation Of Privacy/Recorded Prison Phone Calls

The Court of Appeals, in a 5-2 decision, holds that a correctional facility's release to prosecutors or law enforcement agencies of recordings of non-privileged telephone calls made by pretrial detainees, who are notified that their calls will be monitored and recorded, does not violate the Fourth Amendment. Such detainees have no objectively reasonable constitutional expectation of privacy in the content of the calls. A correctional facility may record and monitor detainees' calls and share the recordings with law enforcement officials and prosecutors without violating the Fourth Amendment.

The majority rejects the contention by defendant and the dissent that DOC's release of recordings to the prosecutor's office without notice was an additional search that violated the Fourth Amendment. Where detainees are aware that their phone calls are being monitored and recorded, all reasonable expectation of privacy in the content of those phone calls is lost. Moreover, the signs posted near the telephones used by inmates state that calls are monitored in "accordance with DOC policy," which, according to the DOC Operations Order, provides that while recordings are confidential and not available to the public, the District Attorney's Office may request a copy of an inmate's recorded calls, which will be provided upon approval by DOC. Although the inmate handbook provided at Rikers Island states that inmate telephone calls may be monitored "for purposes of security," that statement simply explains one of the reasons for DOC's monitoring practice; it says nothing about the potential uses or dissemination of the recordings. In addition, the recorded notice heard when first making a telephone call does not restrict the use of the recording.

People v. Emmanuel Diaz
(Ct. App., 2/21/19)

* * *

SEARCH AND SEIZURE - Payton/Consent
APPEAL - Scope Of Review

The Court of Appeals concludes that although the voluntariness of the consent given to police to enter the apartment is open to dispute, the determination as to whether police received voluntary consent is a mixed question of law and fact, and that because the finding of the trial court is supported by the record, the Court is precluded from upsetting it.

Judge Wilson, concurring because the issue is unpreserved, asserts that the rule he offered in *People v. Garvin* (30 N.Y.3d 174) - absent exigent circumstances, officers planning to arrest a suspect at home must obtain a warrant - would better protect our constitutional rights. "By importing the outside-the-home consent rules to non-exigent, warrantless home arrests, we are needlessly and painfully asking too much of everyone involved — the police, defendants, witnesses and the courts, with the result that we are making a loosely substantiated guess about whether the Fourth Amendment has been violated." "Here, for example, not only did the lower

courts have to choose between two conflicting accounts of what happened when the police arrived, but even after choosing the police account, neither they nor we know whether the elderly woman gestured, what that gesture was or what she meant by it, how many step(s) back she took; whether she understood English; or whether she understood that she could refuse admission to the police."

Judge Rivera, also concurring, restates the view she previously expressed in *Garvin* and asserts that a home visit by law enforcement for the sole purpose of making a warrantless arrest, which leads to the defendant's involuntary consent to the arrest and is not justified by another exception to the warrant requirement, violates a defendant's constitutionally protected indelible right to counsel.

People v. Omar Xochimitl
(Ct. App., 9/13/18)

* * *

SEARCH AND SEIZURE - Auto Stop/De Bour
- Common Law Right To Inquire

(Facts as set forth in dissenting opinion) A Trooper, who was alone, stopped defendant's vehicle after 10:00 p.m. for speeding. The rear of defendant's vehicle was "sagging excessively," indicating that a "heavy object" was in the back of the car or the trunk. There were three individuals in the vehicle: a male driver (defendant), a male passenger in the front seat, and a male passenger in the back seat. The Trooper observed a number of large nylon bags on the back seat and floor of the car. The bags had "sharp edges protruding from the inner walls" as if "some type of hard objects" were inside. All of the occupants were "overly nervous," and the passengers were "making a point not to make any eye contact." The Trooper asked defendant where he was going, and defendant responded that he had been visiting family in Ohio for a few days. The Trooper then asked a question which concerned the contents of the nylon bags. The Appellate Division majority concluded that this inquiry was an unlawful, level two common-law inquiry. The two dissenting judges believed it was an appropriate level one question.

The Court of Appeals first finds no error in the Appellate Division's rejection of the People's argument that defendant could not challenge on appeal a suppression ruling that was not reduced to writing.

The Court then concludes that record evidence supports the Appellate Division's suppression determination. To the extent the dissent questions the continued utility of the *De Bour* paradigm generally, and specifically in the context of auto stops, those questions are not presented here where the parties litigated this case within the framework of existing precedent.

Dissenting, Judge Garcia asserts that the "hyperstringent" rule of *De Bour* serves as a barrier to legitimate, effective, and minimally-intrusive law enforcement practices designed to detect and

ward off threats at their earliest stages. And, because, in this context, the occupants of a vehicle have already been stopped, the lesser intrusion of police questioning amounts to, at most, a mere inconvenience, and roadside police encounters are more dangerous than their on-foot counterparts.

People v. Ricky Gates
(Ct. App., 5/1/18)

* * *

SEARCH AND SEIZURE - Common Law Right To Inquire
- Reasonable Suspicion
APPEAL - Preservation

The Court of Appeals concludes that the police lawfully conducted a common-law inquiry where they received a radio transmission of a burglary in progress and their encounter with defendants at the reported address occurred a mere five minutes later; and the officers first saw defendants exiting the private property and observed no other persons or cars in the secluded, residential area, and it was early in the morning on a federal holiday. These circumstances justified asking defendants what they were doing and where they were going, and inquiring further when defendants did not respond after the officers identified themselves.

Defendant Nonni's active flight supports the court's determination that there was reasonable suspicion justifying the pursuit, stop and detention of Nonni. The record also supports the court's conclusion that the officers had reasonable suspicion justifying the pursuit, stop and detention of defendant Parker. After Parker saw Nonni run and some officers give chase, Parker increased his pace, acted in an evasive manner, and crossed the street onto the front lawn of another property. The officer twice characterized Parker's movements as "running," albeit at a slow pace.

Nonni's claim that the searches of his internal coat pocket and the envelopes found inside were unconstitutional is unpreserved. He only generally asserted that he should never have been stopped.

People v. Lawrence Parker, People v. Mark Nonni
(Ct. App., 6/28/18)

* * *

SEARCH AND SEIZURE - Reasonable Suspicion/Flight Of Suspect
- Abandonment

At approximately 9:20 p.m., four officers in plainclothes in an unmarked car received a radio report of shots fired, indicating that the incident had just happened, and a second report indicating that a man had been shot. The perpetrator was described as a black man wearing a black jacket. The officers proceeded to an area a few blocks from the location given, and went to the Dunbar Houses, where it was possible for a perpetrator to cut through to get to the subway to escape. Several minutes later, the officers saw two black men walking out of an entrance to the Dunbar Houses; one was wearing a black bubble jacket, and the other, defendant, who was taller than the man in the black jacket, wore a gray jacket. One officer exited and said, "Hey, Buddy, ... come here." The man in the black jacket stopped, but defendant began running. An officer pursued in the car. Defendant ran in front of the car at one point, and then underneath scaffolding at a construction site, where he threw something black over a fence. After defendant finally stopped and was apprehended, the officer went to the construction site and saw a gun lying on the ground. The hearing court denied suppression, concluding that the pursuit was lawful, and that in any event the gun had been abandoned by defendant.

In a 3-2 decision, the First Department orders suppression. Defendant's flight alone, in conjunction with equivocal circumstances that might permit a request for information, was insufficient to justify pursuit. The police had only a vague description of the shooter, which defendant did not even match. "That defendant and another black man were walking several city blocks from the crime scene, in the Harlem section of Manhattan, should have been unremarkable."

Defendant did not abandon the gun. The chase was fast-paced and continuous and lasted minutes. It can be fairly inferred that defendant's actions in the heat of the chase were precipitated by an instinctive drive to escape rather than a reflective formulation of strategies.

People v. Rashid Bilal
(1st Dept., 3/7/19)

* * *

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 - Darden Hearing

The Fourth Department concludes that the People failed at the Darden hearing to establish the existence of the informant by extrinsic evidence.

The evidence establishes only that a deposition was executed in the name of the alleged confidential informant, that the police obtained a search warrant using the deposition, and that a death certificate was later issued for a person having the same name as the confidential informant. There is no evidence that the alleged informant actually made the statements attributed to her. There is nothing to refute the possibility that the police fabricated the statements in the informant's purported deposition in order to conceal the fact that information critical to the probable cause inquiry was instead obtained through illegal police action.

People v. Al Givans
(4th Dept., 3/22/19)

* * *

SEARCH AND SEIZURE - Credibility Of Police Testimony

The officer testified that he was parked in his unmarked police vehicle, approximately 1½ car lengths in front of defendant's vehicle, which was parked on the street in front of a car wash. Defendant was in the driver's seat and a woman was in the front passenger seat. Looking through his rearview mirror and defendant's front windshield, the officer could see defendant and the woman from the "middle of the stomach up." He saw defendant pass the woman an object that was white and rectangular with a "blue strip." The package was eight inches long by two inches wide, and, that based on the packaging, the officer believed the object was the prescription drug Suboxone. Defendant held the object high "[e]nough for public view." The officer radioed to two detectives, who approached defendant's car, asked the occupants to exit, and arrested them. One of the detectives testified, in contrast to the officer's testimony, that the Suboxone recovered was two inches long and one inch wide. The hearing court denied suppression.

The Second Department orders suppression. The observing officer's testimony was incredible and patently tailored to meet constitutional objections. His claim that he observed the alleged transaction through his rearview mirror with sufficient clarity to see that the object passed between the occupants of the car was Suboxone strains credulity and defies common sense.

Common experience dictates that the dashboard of defendant's vehicle would have obscured the officer's view of a hand-to-hand transaction. Moreover, the difference in size between the eight-inch by two-inch object the officer claimed to have seen, and the two-inch by one-inch object recovered by the detective, casts significant doubt on the officer's testimony that he recognized the object as Suboxone.

People v. Zabi Maiwandi
(2d Dept., 3/6/19)

* * *

SEARCH AND SEIZURE - Consent/Buccal Swab

In a case involving a 17-year-old defendant, the Court holds that a pre-arraignment consent for a buccal saliva swab for DNA profiling, signed by a juvenile defendant absent a parent, legal guardian, guardian ad litem, or attorney, is involuntary by virtue of the defendant's age, and thus a swab violates the Fourth Amendment. In support of its holding, the Court cites United States Supreme Court juvenile death penalty decisions, and the special protections to juvenile offenders provided by New York's Raise the Age legislation.

"Adults, let alone terrified minors, are barely able to comprehend the grave consequences of surrendering their DNA to law enforcement," and a minor in police custody is much more susceptible to police coercion.

Moreover, the uniqueness of DNA evidence requires a more precisely articulated standard of consent than in other search and seizure contexts. There is growing concern over law enforcement's reliance on consent to circumvent the need for a warrant.

Had the Court not ruled that defendant's DNA was unlawfully obtained, it would have granted a protective order limiting the use of defendant's DNA profile to this case.

People v. K.N.
(Crim. Ct., N.Y. Co., 11/14/18)
http://nycourts.gov/reporter/3dseries/2018/2018_28363.htm

* * *

SEARCH AND SEIZURE - Arrest For Immigration Violation

Following the conclusion of the prisoner's state criminal proceeding, at which he was sentenced to time served, he was handcuffed and taken to a courthouse holding cell by members of the Sheriff's Office and then returned to jail, where his paperwork was "re-written" from being an "adult male misdemeanor" case to be being an "adult male warrant" case based on an ICE warrant. He was regarded by the Sheriff as being in the custody of ICE, and placed in a jail cell

rented by ICE. Subsequently, this habeas corpus proceeding was commenced.

The Second Department holds that New York state and local law enforcement officers are not authorized by New York law to effectuate arrests for civil law immigration violations.

New York statutes do not authorize these arrests. Immigration violations are civil matters, not crimes governed by CPL provisions regarding warrantless arrests. These arrests also may not be supported by resort to common law pertaining to the police power, nor, under the "fellow officer" rule, may State and local law enforcement assume the authority of an ICE officer.

Assuming, without deciding, that the Congress may constitutionally convey authority to state and local officials to effectuate arrests which state law does not authorize, the Congress has not done so with regard to the circumstances presented by this case.

People ex rel. Wells v. DeMarco
(2d Dept., 11/14/18)

* * *

SEARCH AND SEIZURE - School Searches

After a student, E.D.J., was accused of making fun of another student, M, for not making the volleyball team, a school official investigating the allegation decided to search E.D.J.'s cellphone to see if she had sent texts about M. After he searched the phone, he returned it and concluded that E.D.J. had not violated any school rule. In response to the search, E.D.J.'s father confronted several school officials by phone and in person. As a result, a Superintendent decided that the father was a threat to the safety of the school's employees and students and prohibited him from appearing on school premises except to bring E.D.J. to and from school and to attend E.D.J.'s volleyball games. After the father mentioned the possibility of litigation, the Superintendent also allegedly told the father he was not permitted to attend a public meeting of the local school board to discuss his grievances. When the father attempted to attend one of E.D.J.'s volleyball games, he was removed from the premises by school officials.

The father and his wife filed a § 1983 action asserting that the school official violated E.D.J.'s Fourth Amendment rights when he searched her cellphone; that the Superintendent violated the father's First Amendment rights by restricting his communication with school personnel and access to school property and by prohibiting him from addressing the school board; and that school officials violated the father's Fourth Amendment rights when they removed him from school premises. The district court granted summary judgment in favor of defendants on qualified immunity grounds. The Eleventh Circuit U.S. Court of Appeals affirms, concluding that the conduct alleged did not violate clearly established federal law.

Addressing the school search, the Court notes, inter alia, that M's accusation that text messages were sent to other students was corroborated by two other students; that policies outlined in the

school handbook prohibit both bullying and rude or disrespectful behavior towards other students; that it is at least arguable that this evidence supplied reasonable grounds for suspecting that the search would turn up evidence that E.D.J. violated the rules of the school; that nothing in *New Jersey v. T.L.O.* establishes that this search of a high-school senior's text messages for evidence of bullying would be excessively intrusive; and that although the official allegedly expanded the search and reviewed messages between E.D.J. and persons other than A and B, including E.D.J.'s ex-boyfriend and family members, E.D.J. labeled many of the contacts in her phone using emojis and nicknames, and the official could reasonably assume that E.D.J. could disguise her contacts and any messages from them.

Jackson v. McCurry
2019 WL 1122999 (11th Cir., 3/12/19)

* * *

SEARCH AND SEIZURE - Arrest By Private Person

The Fourth Department, while assuming, arguendo, that the marine interdiction agent who was with the U.S. Customs and Border Protection Air and Marine Operations, and a deputized task force officer with the Niagara County Sheriff's Office, was not acting as a peace officer, concludes that the agent was not acting lawfully as a citizen when he activated emergency lights that were affixed to his truck by virtue of his position in law enforcement, or when he approached the seized vehicle as backup in cooperation with the officer for safety purposes.

The Court rejects the People's contention that suppression is not required because the citizen's arrest statute does not implicate a constitutional right. The statute implicates the constitutional right to be free from unreasonable searches and seizures, and suppression is warranted where, as here, the purported private person is cloaked with official authority and acts with the participation and knowledge of the police in furtherance of a law enforcement objective.

People v. Limmia Page
(4th Dept., 11/9/18)

* * *

SEARCH AND SEIZURE - Standing/Expectation Of Privacy
- Auto Search

The officer approached defendant, who was sitting in the front passenger seat of a minivan and talking with a man standing on the sidewalk, because the officer believed that the two men were smoking marijuana. The officer removed defendant from the minivan and frisked him, but no weapon was recovered. Although, at that time, the officer realized that the two men were smoking cigars, not marijuana, the officer went to the driver's side and opened the sliding door, and observed a firearm sticking out of a bag behind the driver's seat.

The Second Department orders suppression, rejecting the hearing court's sua sponte determination that defendant lacked standing. Defendant told the police that the minivan was his work van, and, although he had been sitting in the front passenger seat, no evidence was presented to contradict his statement. The police lacked probable cause to conduct a warrantless search by opening the sliding door of the minivan.

People v. Delesley Dessasau
(2d Dept., 1/23/19)

* * *

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 - Auto Stop/Reasonable Suspicion
- Fruits

When the police responded to a gas station after receiving a report about "a man with a gun" in a white BMW, with a description of the man as "a male black wearing a gray hoodie, approximately six feet, two inches [tall]," and the license plate number of the BMW, they observed a white BMW pulling out of the gas station. They pulled over the vehicle and approached with guns drawn. After ordering the occupants to get out, an officer observed defendant "reaching under the seat" and told him to put his hands out the window. Defendant eventually complied, and, upon the officer's instruction, opened the passenger door and walked to the back of the vehicle, where the other officer frisked him and found a firearm in defendant's boot. After defendant was handcuffed, the individual who had reported a man with a gun approached to identify himself as "the caller," and identified defendant as "the guy who pulled the gun on me." After defendant was placed in the backseat of the police vehicle, he stated that he "wasn't going to fight it" and that he had "messed up."

The Second Department suppresses the firearm, and, as tainted fruit, the identification and defendant's statement. The police lacked reasonable suspicion to stop the vehicle based only on an anonymous tip of "a man with a gun." The stop was rendered illegal before the officer observed defendant "reaching under the seat."

People v. Sean Bailey
(2d Dept., 8/22/18)

* * *

SEARCH AND SEIZURE - School Disciplinary Arrest

A middle school's assistant principal had asked the Sheriff's deputy, a school resource officer, to counsel a group of girls who had been involved in ongoing incidents of bullying and fighting. After concluding that the girls were unresponsive and disrespectful, the deputy arrested the seven girls "to prove a point" and "make [them] mature a lot faster."

In an action brought by three of the girls who alleged that the Sheriff's deputy arrested them in violation of their Fourth Amendment rights and state law, the Ninth Circuit U.S. Court of Appeals, applying the two-part reasonableness test set forth in *New Jersey v. T.L.O.* (469 U.S. 325), affirms an order granting summary judgment for plaintiffs.

The arrests were not justified at their inception, and summary arrest, handcuffing, and police transport to the station of the girls was a disproportionate response to the school's need, which was dissipation of what the school officials characterized as an "ongoing feud" and "continuous argument" between the students.

The officers are not entitled to qualified immunity because no reasonable officer could have reasonably believed that the law authorizes the arrest of a group of middle schoolers in order to teach them a lesson or to prove a point.

Scott v. County of San Bernardino
2018 WL 4288899 (9th Cir., 9/10/18)

* * *

SEARCH AND SEIZURE - Common Law Right To Inquire
- Reasonable Suspicion

The Second Department orders suppression, concluding that the encounter began as a level two intrusion when, after the officer observed defendant leaning over while holding a slight bulge in his right jacket pocket, the officer stated "police" and asked defendant to stop, exited his vehicle, walked onto the sidewalk, and again stated "police" and asked defendant to stop; that the officer's pursuit of defendant, by getting "closer to the defendant picking up with his pace," constituted a level three intrusion requiring reasonable suspicion (as the officer got closer, he observed defendant holding the end of a firearm sticking out from his jacket pocket); and that the nondescript bulge in defendant's pocket, and the fact that defendant was leaning to the right side and walked away without complying with the officer's requests to stop, did not establish reasonable suspicion.

A concurring judge asserts that "the officer's testimony that he was able to observe a 'slight bulge' in the right pocket of the defendant's jacket at 1:50 a.m., while seated in a vehicle and from a distance of 25 feet away from the defendant's back, was incredible as a matter of law…."

People v. Lindy Jones
(2d Dept., 9/19/18)

* * *

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 - Incident To Arrest

After pulling over a vehicle driven by defendant for various traffic infractions, one of the police officers, while looking into the open passenger side window, observed on the floor of the vehicle near defendant's feet a clear plastic bag containing what appeared to be marihuana. Defendant was asked to step out of the vehicle. After frisking him for weapons and contraband, the officer placed defendant in handcuffs. He took defendant's wallet out of his pocket to search for pedigree information, and found three credit cards inside the wallet, which he concluded were forged.

The Second Department suppresses the credit cards. The search of defendant's pockets was justified as a search incident to a lawful arrest, but a container within the immediate control or "grabbable area" of a suspect may not be subjected to a warrantless search incident to arrest the officer has a reasonable belief that the suspect may gain possession of a weapon or be able to destroy evidence located in the container.

People v. Jaleel Geddes-Kelly
(2d Dept., 7/11/18)

* * *

SEARCH AND SEIZURE - Reasonable Suspicion

Police officers responded to a 1:15 a.m. 911 dispatch indicating that a taxicab driver had been robbed and possibly pistol whipped. Two to three minutes later, an updated dispatch described the suspects as three black males wearing "all black clothing" and stated that one of the suspects was carrying a book bag. Within two to three minutes of that updated dispatch, an officer spotted three black men wearing dark clothing, with one carrying a book bag, nearly half a mile from the reported location. Upon seeing the officer, two of the men fled and ran through a nearby park before being apprehended. Defendant made no attempt to flee or to avoid interaction with the officer. After defendant was taken into custody, he was positively identified by the victim during a showup procedure. A cell phone was recovered near the intersection where defendant was stopped. The court denied suppression, concluding that there was reasonable suspicion.

The Fourth Department denies suppression of the cell phone since there was no evidence that it was discarded as a result of unlawful police activity. However, the Court suppresses the identification, concluding that there was no reasonable suspicion even assuming, arguendo, that the as-yet unidentified 911 caller was reliable and had a sufficient basis of knowledge.

While the men matched the general description, the dispatcher had stated that the suspects had been observed running from the crime scene, and there was no testimony that defendant or the other two men had been running or appeared out of breath even though they were located nearly half a mile from the reported location within a short period of time after the dispatch. Although

there were no other persons present in the general vicinity of the stop, no search had occurred where the suspects had originally been observed. The other men's flight is not indicative of the collective guilt of the group. It is just as readily demonstrative of the innocence of defendant, who remained at the scene.

People v. Jonathan Spinks
(4th Dept., 7/6/18)

* * *

SEARCH AND SEIZURE - Expectation Of Privacy - Restroom

The First Department holds that the police entrance into a single-use restroom in an adult film and novelty store was a search for purposes of the Fourth Amendment. Once he closed the door, defendant had a reasonable expectation of privacy because he was entitled to assume that while inside he would not be viewed by others. This expectation of privacy was not negated by the facts that the restroom was located in a commercial establishment and was unlocked.

People v. Thomas Vinson
(1st Dept., 5/10/18)

* * *

SEARCH AND SEIZURE - Arrest/Use Of Handcuffs

The First Department holds that defendant was arrested without probable cause where, because there was no reason for the officers to have concluded that defendant, a suspect in a street drug sale, was armed or dangerous, or likely to resist arrest or flee, handcuffing him was inconsistent with an investigatory detention and elevated the intrusion to an arrest.

People v. Jesus Perez
(1st Dept., 3/14/19)

* * *

SEARCH AND SEIZURE - Probable Cause - Drug Possession

The First Department finds probable cause to arrest where, during a lawful traffic stop, the police saw defendant place in his waistband a clear sandwich bag containing four smaller plastic bags of a white substance; and, based on his training and experience, an officer reasonably believed that the smaller bags contained cocaine. Bags of white powder have long been recognized as indicative of the presence of drugs, and the fact that some white powdery substances are legal does not undermine probable cause.

People v. Gabriel Santiago
(1st Dept., 10/2/18)

* * *

SEARCH AND SEIZURE - Reasonable Suspicion/Probable Cause - Drug Transactions

The First Department finds that the police had reasonable suspicion based on the detective's report that he saw a possible drug transaction in which a Hispanic man wearing a black leather jacket handed a bag containing two small white objects to another man before walking away, in close temporal and spatial proximity to defendant's apprehension.

However, there was no probable cause to arrest and search defendant. The detective did not testify that he observed anything that appeared to be money being exchanged or handled by either man, that there was anything furtive about their behavior aside from the brevity of their encounter, or that the area was particularly drug prone.

When the detective recovered a bag containing drugs after the apparent buyer discarded it, there was probable cause, but the non-testifying officers had detained defendant based only on the information known at the time of the initial radioed report.

People v. Juan Ayarde
(1st Dept., 5/24/18)

* * *

SEARCH AND SEIZURE - Fellow/Sending Officer Rule
- Hearing - Burdens

The Fourth Department orders suppression where defendant explicitly challenged the reliability of the information supporting his arrest, but the People did not produce the arrest warrant itself prior to the conclusion of the hearing and instead relied upon the officer's testimony concerning his communications with an unidentified person or persons at the 911 Center and his assumptions about how the 911 Center confirmed the existence of an active and valid warrant.

Without producing the arrest warrant itself or reliable evidence that the warrant was active and valid, the People did not meet their burden of establishing that the arrest was based on probable cause.

People v. Bruce Searight
(4th Dept., 6/15/18)

* * *

SEARCH AND SEIZURE - Fruits/Consent To Search

The Fourth Department agrees with the hearing court that any consent did not attenuate an illegal entry into a private home for the purpose of recovering a gun the officer presumed was hidden inside.

The officer engaged in flagrant misconduct. Without having witnessed any illegality, the officer entered without permission, after midnight, while a woman was trying to feed her newborn child, and coerced her into consenting to a search of her home.

The Court also notes the temporal proximity of the consent; that the woman was not advised that she could refuse to consent; and that the intervening circumstances upon which the People rely - i.e., a conversation during which the officer informed the woman that an unidentified "individual" had come into the home and may have deposited an object that could hurt her children - was designed to deceive the woman into giving her consent and weighs in favor of suppression.

People v. Michael Sweat
(4th Dept., 3/22/19)

* * *

SEARCH AND SEIZURE - Consent To Search

Plaintiff, then seventeen years old, was a passenger in her family's minivan when it was pulled over by police officers for a traffic violation. After the police began to suspect drug activity, but a drug dog did not detect the presence of drugs, defendant, a female officer, was summoned to escort plaintiff to a nearby restroom and, while doing so, searched plaintiff in allegedly inappropriate and unlawful ways. Plaintiff claims that, as part of a pat down, the officer placed her hands under plaintiff's brassiere and pinched her breasts, causing bruising.

In this § 1983 action, plaintiff claims that the search violated the Fourth Amendment. The district court granted summary judgment to defendant.

The Sixth Circuit U.S. Court of Appeals reverses. Because a reasonable jury could credit plaintiff's deposition testimony that she was not escorted to the restroom until after the drug dog had investigated the minivan, the jury could conclude that the officers did not reasonably suspect drug activity at the time of the search and that plaintiff was unlawfully detained, rendering her consent to the search invalid.

Moreover, the record would support a jury in finding that plaintiff did not verbally consent to be searched and that her consent, such as it was, consisted solely of walking towards defendant, as instructed, and her lack of resistance to the actual search. "When a minor, untutored in her Fourth Amendment rights, seized for over an hour and in the presence of numerous armed police

officers, with her arms secured behind her back and facing the choice of consenting to a search or being kept from the restroom, fails to resist that officer's search of her person, a reasonable jury could find that this non-verbal consent was not voluntarily given."

Harris v. Klare
2018 WL 4211858 (6th Cir., 9/5/18)

* * *

SEARCH AND SEIZURE - Consent

The Seventh Circuit U.S. Court of Appeals holds that it was not reasonable for officers to assume that a woman who answered the door in a bathrobe had authority to consent to a search of defendant's apartment. "The officers could reasonably assume that the woman had spent the night at the apartment, but that's about as far as a bathrobe could take them."

The officers knew only that defendant left the woman alone in the apartment for about forty-five minutes, and that she was wearing a bathrobe, appeared sleepy, and consented to the search without hesitation. They did not know who she was, what her relationship to defendant was, why she was in the apartment, how long she had been there, or whether she lived there. At that point, they did not know that the woman was the mother of defendant's child, and so it was wrong for the district court to rely on that fact in evaluating the woman's apparent authority. The existence of so many plausible possibilities should have prompted the agents to inquire further.

United States v. Terry
2019 WL 625152 (7th Cir., 2/14/19)

* * *

SEARCH AND SEIZURE - Body Cavity Search/Pretrial Detainees

During a strip search, defendant, a pretrial detainee, was directed to stand against a wall in his cell and squat. After observing "a white wrapped item like something that was a container" protruding from between defendant's buttocks, a correction officer asked defendant to spread his buttocks. When defendant failed to comply, he was forcibly placed face down on his bunk and handcuffed. The officer then touched the protruding, dime-sized white item, "and it moved so [he] took it" when "[i]t came loose." The officer denied that he touched defendant, but testified that he "dislodged [the item] from [defendant's buttocks]." The officer's supervisor testified that the item, was "laying between defendant's buttocks" and that he directed the officers to "flick it out." Defendant testified that the officer stuck his finger into defendant's rectum and pulled the object out. The hearing court denied defendant's motion to suppress.

The Third Department, in a 3-2 decision, reverses and grants suppression. Two judges conclude that the officers had probable cause to believe defendant had concealed contraband, but there is no showing or claim of an emergency that would justify a manual body cavity search. Since defendant was lying face down, naked and handcuffed, the officers could keep him under full surveillance without any concern that the wrapped drugs would be absorbed into his body while efforts were made to procure a warrant. Also, because no attempt was made to seek the assistance of medical personnel to secure the contraband in a safe, hygienic manner - the record is unclear as to whether the officer was wearing gloves - the manner in which the search was conducted was not reasonable.

The third judge in the majority asserts that although the Court of Appeals has held that either a warrant or exigent circumstances are required before a suspicious object may be removed from an arrestee's body cavity, that requirement should not be extended to pretrial detainees in a correctional facility. Instead, the federal reasonableness test set forth in *Bell v Wolfish* (441 U.S. 520) should apply. Under that test, the legitimate security interests of the facility are balanced against an inmate's privacy interests by considering the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

People v. Eddie Holton
(3d Dept., 4/26/18)

* * *

SEARCH AND SEIZURE - Search Warrants/Orders - Cell Phone Records/Cell Site Location Information
- Exclusionary Rule

The Court denies defendant's motion to suppress cell phone records, noting that defendant has no standing to challenge the NYPD's Administrative Subpoena calling for the records of defendant's incoming and outgoing calls for a two-month time frame (but not for the content of any calls), which revealed the times at which incoming and outgoing calls were placed and the numbers to which calls were placed and from which calls were received, and tend to substantiate the allegation that defendant lured a food delivery man to defendant's building in order to rob him.

The Court also concludes that a judge's order directing T-Mobile to produce cell site location information for a two-day period, issued pursuant to § 2703(d) of the Stored Communications Act and based on a statutory finding that there were "reasonable grounds" to believe the information was relevant and material to an ongoing criminal investigation, was not a Fourth Amendment "search" and did not require a warrant. In *Carpenter v. United States* (138 S.Ct. 2206), the Supreme Court declined to say whether a "search" takes place where the government obtains CSLI data for a limited period of seven days or less. This case involves short-term CSLI data relevant to whether defendant was present at the scene of a crime committed in a public

place. Long-term data can be likened to filming a person's entire life for weeks, or months, or even years.

There is other support for the Court's decision. Since there was probable cause, the order should be treated as the equivalent of a properly issued search warrant. Also, the clear emerging trend in New York and federal courts, based on the holding in *Illinois v. Krull* (480 U.S. 340) that exclusion is not an appropriate remedy where a warrantless search has been conducted in good faith reliance on a statute later found to be unconstitutional, is to find that data obtained pursuant to a CSLI order issued prior to Carpenter is not subject to the exclusionary rule. Although defendant asserts that the Court of Appeals' rejection of the "good faith exception" in *People v. Bigelow* (66 N.Y.2d 417) mandates exclusion, *Bigelow* does not speak to the holding in *Krull*, or overrule prior New York law holding that it is always incumbent upon a court to balance the cost of the exclusionary remedy against its probable deterrent effect.

People v. Sasha Edwards
(Sup. Ct., Bronx Co., 3/14/19) http://nycourts.gov/reporter/3dseries/2019/2019_29086.htm

* * *

SEARCH AND SEIZURE - Emergency Exception

After an officer entered defendant's apartment without a search warrant and found Thomas Collins to be present, a court found that defendant had willfully violated the terms and conditions of her probation by voluntarily allowing Collins to be present in her apartment despite an order of protection. Defendant was sentenced to a 365-day jail term. Defendant also pleaded guilty to two counts of criminal contempt in the second degree and received concurrent sentences of 180 days in jail. Defendant had unsuccessfully moved to suppress all evidence derived from the search of her apartment.

The Third Department reverses, concluding that the warrantless entry was not justified by the emergency exception.

The low, muffled sound the officer heard and the faint light seen through the window were consistent with an occupant watching television. The police had been advised that Collins had been seen in the vicinity of defendant's apartment that evening, and may have been motivated by the possibility of arresting him on an outstanding warrant. After the officer handcuffed defendant, he reported by radio to other officers that he had detained the "female subject," and, when he located Collins, stated that he had detained "that other subject."

Even had the initial entry been lawful, the subsequent search of the apartment was not. Defendant, known by the officer to be the tenant, told him that she was watching television, denied that anyone else was present and made no request for assistance.

People v. Emily Sears
(3d Dept., 10/25/18)

* * *

SEARCH AND SEIZURE - Motion Papers/Search By Private Actor

The First Department upholds the denial, with a hearing, of defendant's motion to suppress items recovered by a department store security guard where defendant failed to allege facts supporting a finding that the store employee was a state actor.

The People alleged that he was a private security guard, and, in the felony complaint and voluntary disclosure form, disclosed information, including the guard's specific job title ("loss prevention associate"), the name and location of the store, and the date and hour at which the guard encountered defendant, to enable defendant to subpoena records and ascertain the guard's status. Defendant did not even attempt to ascertain whether the store employed anyone with any kind of official police status.

People v. Michael Robertson
(1st Dept., 12/6/18)

Identification

IDENTIFICATION - Notice Of Intent/Police-Arranged Procedure
BURGLARY - Circumstantial Evidence
EVIDENCE - Inference From Recent And Exclusive Possession Of Stolen Property

At trial, one complainant testified that approximately 10 days after the burglary, she went to the police station and identified various objects that had been taken from her residence. She asked a police officer about the identity of the individual who had broken into her residence, and the officer provided defendant's name. She asked the officer if she could see a picture of the individual, and the officer responded that it "was online on the Albany Police Department's [Facebook page]." The complainant returned home and accessed the Facebook page. Over defendant's objection, the court permitted the complainant to testify that when she accessed the Facebook page, she saw a number of mugshots and immediately identified defendant as the person who had knocked on her door approximately one week prior to the burglary.

The Third Department concludes that the identification should have been precluded due to the lack of CPL § 710.30 notice. Putting aside the question of whether maintenance by a police department of a Facebook page or website with mugshot photos of arrested individuals, or referral of witnesses to such a website, are, without more, police-initiated identification procedures, in this case the officer also provided the complainant with defendant's name, which could have influenced the identification. This was sufficient police involvement to invoke the notice requirement. However, the error was harmless.

The Court also rejects defendant's contention that the trial court erred when it gave the jury a recent, exclusive possession charge since defendant was not found in possession of the stolen

items until several weeks after the burglaries occurred. Items stolen from each of the four locations, and a hammer which could have been used to facilitate the forced entries, were found together upon a search of defendant's residence, and defendant sold items stolen during three of the burglaries to pawnshops. The burglaries occurred in close proximity to each other, and to defendant's residence, within less than one month, and were conducted in a similar fashion.

People v. Terrance Cole
(3d Dept., 6/14/18)

* * *

IDENTIFICATION - Showups

The Fourth Department suppresses a showup identification made by a witness in the hospital parking lot approximately ninety minutes after the crime and about five miles from the crime scene, while defendant was handcuffed and flanked by police, shortly after the victim's showup identification in his hospital room.

Given the identification made by the victim, the non-victim witness's identification is not rendered tolerable in the interest of prompt identification. The People have proffered no reason that a lineup identification procedure would have been unduly burdensome.

People v. Jamil Knox
(4th Dept., 3/22/19)

* * *

IDENTIFICATION - Wade Hearing/Burden Of Going Forward
- Showups

Within a few minutes of the robbery, the police conducted a canvass of the area, during which the witnesses pointed out defendant and the co-defendant. The two men fled, and the testifying officer got out of the car and, after a chase, apprehended the two men who undoubtedly were the men the witnesses had just identified. A police car arrived with the witnesses, and the testifying officer received a radio message that the witnesses had again identified the two men.

The First Department upholds the denial of suppression. The People met their initial burden of going forward despite the absence of testimony from any officer who was with the witnesses at the moment of the showup. Regardless of whether this "atypical" showup could be described as "confirmatory," it was an immediate repetition of the first, unchallenged identification. Any possibility that something occurred in the car that made this an unduly suggestive procedure is remote and speculative.

People v. Miguel Nunez
(1st Dept., 3/26/19)

* * *

IDENTIFICATION - Independent Source

The Court finds no independent source for, and precludes, any in-court identification of defendant by a witness who identified defendant from one photo shown to the witness by the police.

The witness saw the perpetrator on two different occasions in the months before the murder of her co-worker. On neither occasion did she see the man up close. The first time she saw him was when she glanced at a television screen displaying a live feed from video surveillance cameras. She looked at the man on the screen for approximately ten seconds, staring at him for only about two or three seconds. The next time she looked at him through a window for approximately twenty seconds, but did not look at him from head to toe. There was no evidence that she had a reason to focus on and remember the man. She did not recall the man she had previously observed having as much facial hair as the person in the photo.

People v. Rolanso Lexune
(Sup. Ct., Kings Co., 5/2/18)
http://nycourts.gov/reporter/3dseries/2018/2018_50683.htm

* * *

IDENTIFICATION - Surveillance Recordings
EVIDENCE - Lay Opinion

The First Department finds no error in the admission of lay opinion testimony that defendant was the person depicted in photos from surveillance videotapes where defendant's appearance had changed since the crime in several significant respects; the witnesses, who were sufficiently familiar with defendant, were able to recognize defendant's mannerisms and peculiar way of walking; and the record establishes the poor quality of the photographic evidence.

People v. Clemente Rivera
(1st Dept., 3/26/19)

* * *

IDENTIFICATION - Surveillance Tapes

The First Department finds no error in the admission of testimony by an officer identifying defendants as persons depicted in videotapes.

Although defendants had not changed their appearance after having been videotaped, the testimony aided the jury in making an independent assessment regarding whether the men in the video were the defendants. The circumstances suggested that the jury would be less able than the officer to make an identification given the poor quality of the surveillance tapes, which showed groups of young men, mostly from a distance.

People v. Davon Pinkston, People v. Alejandro Rivera
(1st Dept., 2/19/19)

* * *

IDENTIFICATION - Surveillance Video/Notice Of Intent To Offer
- Description Testimony

The Second Department concludes that no independent source hearing was required because there was nothing inherently suggestive in showing the victim the surveillance video depicting defendant and other individuals shortly before the shooting. Defendant was not singled out, portrayed unfavorably, or in any other manner prejudiced by police conduct or comment, or by the setting in which defendant was taped. The victim's viewing of the video also was not an identification procedure within the meaning of CPL § 710.30 (see People v Gee, 99 N.Y.2d 158).

Police testimony regarding witnesses' descriptions of the shooter was admissible not for the truth of the descriptions, but as evidence of the witnesses' ability to observe and remember the perpetrator and make accurate identifications. The brief recitation by the officers of the descriptions given in the immediate aftermath of the shooting was not likely to give the jury the false impression that there was an impressive amount of testimony corroborating the witnesses' accounts.

People v. Dequan Hall
(2d Dept., 1/9/19)

* * *

IDENTIFICATION - Surveillance Video

The Second Department finds error, albeit harmless, where a police detective testified that, in his opinion, defendant was the person depicted in surveillance video footage.

The detective had arrested defendant, and briefly interviewed him, more than two weeks after the crime. There was no evidence that defendant had changed his appearance prior to trial, and the record is devoid of other circumstances suggesting that the jury would be any less able than the detective to determine whether defendant was the individual depicted in the video.

People v. Corey Reddick
(2d Dept., 8/1/18)

* * *

IDENTIFICATION - Surveillance Video

The Second Department finds no error in the admission of a lay witness's testimony that, in his opinion, defendant was the person depicted in a surveillance video. Defendant's appearance had changed between the commission of the crime and the time of trial, and the testimony aided the jury in making an independent evaluation of the videotape evidence.

People v. Shawn Jones
(2d Dept., 5/23/18)

Pleas

PLEAS - Allocution
APPEAL - Preservation

The Second Department vacates the fact-finding of grand larceny in the fourth degree where, during a plea allocution, respondent admitted that he took $5 from another boy at school, but also stated that the boy had given respondent's friend a $10 bill and that the friend gave respondent $5; and respondent's foster care case planner was present at the allocution but was not questioned.

Respondent did not move to withdraw his admission on the grounds raised on appeal, but preservation is not required because respondent's recitation of the facts underlying the crime casts significant doubt upon his guilt, and the statutory requirement that the court allocute the foster care case planner could not be waived.

Matter of Richard S.
(2d Dept., 1/9/19)

* * *

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)

* * *

PLEAS - Knowing And Voluntary

The Second Department concludes that defendant established at a hearing that his plea of guilty was not knowing and voluntary.

When defendant pleaded guilty, he had already been adjudicated a level three predicate sex offender pursuant to the Sex Offender Registration Act based on a prior conviction. Defendant testified at the hearing that he would not have taken the plea bargain had he known of SOMTA. Defendant showed that the prospect of SOMTA confinement was realistic enough that it reasonably could have caused him, and in fact would have caused him, to reject an otherwise acceptable plea bargain.

People v. Alfred Balcerak
(2d Dept., 5/2/18)

* * *

JUDGES - Bias
PLEAS - Plea-Bargains/Rejection Due To No-Plea Policy Of Judge

Defendant appeals from a Town Court judgment convicting him of use of a mobile telephone in violation of Vehicle and Traffic Law § 1225(c)(2). Prior to the commencement of trial, defendant was offered a reduction to a violation of VTL § 1110(a), but the court did not allow the reduction because it had a blanket policy precluding a reduction in this type of case - a personal policy that "we have between both judges. We don't reduce cell phone tickets."

The Court reverses the judgment of conviction and remits for a new trial in a different court, concluding that a policy of rejecting pleas in a cell phone usage case is an improper exercise of judicial discretion; runs contrary to the purposes of plea bargaining; renders prosecutorial discretion with regard to the type of plea involved meaningless; forces the prosecutor to revise his procedures to conform to the court's wishes; and gives an impartial observer the impression that the judge may be favoring conviction.

People v. Mark Steger
(County Ct., Wayne Co., 3/8/19) http://nycourts.gov/reporter/3dseries/2019/2019_29091.htm

Speedy Trial/Adjournments/Prompt Verdict

SPEEDY TRIAL - Constitutional

The Second Department upholds an order dismissing the petition on the ground that respondent was deprived of his constitutional right to due process where respondent was arrested on November 7, 2017, and the petition was filed March 9, 2018.

While the charges were serious (they included attempted first degree robbery and criminal possession of a weapon in the fourth degree), and respondent did not demonstrate any actual prejudice to his defense attributable to the delay, the presentment agency failed to establish a legitimate reason for the delay. The ultimate goal of promptly treating and rehabilitating respondent would not be furthered by permitting a fact-finding hearing following the unjustified delay.

Matter of Isaiah L.
(2d Dept., 2/20/19)

Practice Note: The message from the Second Department appears to be that even when the delay in filing is far less profound than the almost 13 month delay in *Matter of Benjamin L.* (92 N.Y.2d 660), and the respondent cannot show prejudice to his/her defense, dismissal may be warranted when the presentment agency proffers no colorable reason for the delay. *See also Matter of Richard JJ.*, 66 A.D.3d 1152 (3rd Dept. 2009) (dismissal ordered where presentment agency delayed approximately 6 months, alleging that delay was attributable to need to obtain additional documents from police and consult with District Attorney's office); *In re Jamie D.*, 293 A.D.2d 278 (1st Dept. 2002) (petition dismissed where presentment agency was given opportunity to but failed to explain delay - almost 6 months, according to JRD brief on appeal).

* * *

SPEEDY TRIAL - Constitutional Due Process

The presentment agency filed the delinquency petition 7 months after the respondent was arrested and 15 months after the police first interviewed the complainant. Respondent moves to dismiss the petition, asserting that prosecution of this case would violate his constitutional due process right to a speedy trial.

The Court, after discussing the relevant factors, concludes that although it may be inclined to dismiss the petition without additional information from the presentment agency, it will hold a hearing regarding the reason for the delay, and the possibility of prejudice to respondent's defense. The Court notes that the initial delay before respondent's arrest is relevant.

Regarding the seriousness of the charges - criminal sexual act in the first degree, a B felony, and sexual abuse in the first degree, a D felony - the Court notes that they arise from an incident in which respondent, then 13 years old, allegedly inserted his penis into the mouth and buttocks of his cousin, who was then 7 years old. If these charges are proven to be true, it is likely that respondent has mental and/or emotional needs requiring rehabilitation and additional services.

Regarding the reason for the delay, the Court notes that respondent has identified potential discrepancies and contradictions in the presentment agency's explanation. The Court requires more information with respect to the presentment agency's blanket statement that the police attempted to apprehend respondent multiple times before his arrest, and the presentment agency's alleged fourteen attempts to obtain cooperation from the complainant's parents to have her videotaped statement reduced to writing.

The Court is not persuaded by respondent's argument that the delay warrants dismissal without a showing of prejudice to the respondent's defense. Regarding the prejudice issue, the Court notes that the petition and the complainant's written statement are sufficiently specific with respect to time (between June 1 and June 11, 2017), place (respondent's residence in Long Beach), and sequence of events (the complainant was in respondent's bedroom when respondent inserted his penis into her mouth and into her buttocks); and that respondent, by all accounts, cooperated with the investigation and has been represented by counsel since before his arrest. However, in *Benjamin L.* (92 N.Y.2d 660), the Court of Appeals stated that determining whether a juvenile's defense has been impaired due to delay "may be even more arduous" than in adult criminal cases. Moreover, respondent has raised troublesome allegations about the complainant changing the details of the incident over the course of the 15-month delay, and concerns that the complainant's memory will only worsen and prevent respondent from "properly defending himself."

Matter of K.C.T.
(Fam. Ct., Nassau Co., 3/12/19)
http://nycourts.gov/reporter/3dseries/2019/2019_50447.htm

* * *

APPEAL - Preservation
SPEEDY TRIAL

The Second Department holds that respondent failed to preserve his statutory speedy trial claim because he did not move to dismiss the petition in the family court.

Matter of Brandon S.
(2d Dept., 2/27/19)

Practice Note: In finding a lack of preservation, the Second Department cited *Matter of Yarras F.*, 5 A.D.3d 481 (2d Dept. 2004), *Matter of Kovan Clearance D.*, 288 A.D.2d 219 (2d Dept. 2001), and *Matter of Naiquan T.*, 265 A.D.3d 331 (2d Dept. 1999). There is no indication in those cases as to why, when the family court is about to adjourn a case beyond a speedy trial deadline, it does not suffice for defense counsel to say, "your Honor, we object to any adjournment beyond the speedy trial deadline on the grounds that there has been no showing of good cause [or, when appropriate, special circumstances]." Such an objection surely satisfies the main purpose of the preservation requirement, which is to ensure that the court is apprised of the issue being raised at a time when the court can address it. In fact, unlike *Kovan Clearance D.*, which cited *Naiquan T.*, and unlike *Yarras F.*, which cited *Kovan Clearance D.* and *Naiquan T.*, *Naiquan T.* itself does not contain a holding that a motion to dismiss is required, only a statement that "appellant's claim, raised for the first time on appeal, that the speedy trial provisions of the Family Court Act were violated is untimely."
In any event, with the case law accumulating - in *In re Traekwon I.*, 152 A.D.3d 431 (1st Dept. 2017), the First Department also cited the absence of a motion to dismiss - defense counsel is well advised not only to object to an adjournment and argue the good cause or special circumstances issue, but also to state, "and I move to dismiss the petition on that ground."
While a lack of preservation effectively works as a concession that the requisite grounds for an adjournment exist, it does not constitute consent or a waiver of speedy trial rights. Both the First and the Second Department have clearly distinguished between a lack of preservation and consent/waiver. *See In re Traekwon I.*; *Matter of Yarras F.* Thus, the speedy trial clock does not stop running. So, if, for example, defense counsel fails to object to an adjournment that runs from day 55 to day 85, the defense cannot complain on appeal that there was no good cause. However, on day 85, if the presentment agency is not ready, the defense can argue that special circumstances are required.

* * *

SPEEDY TRIAL - Police Witness Unavailable Due To Training Program

The Third Department, finding no due diligence on the part of the People, dismisses the indictment on statutory speedy trial grounds where the detective who allegedly was unavailable due to a mandatory training program testified that he did not know how often the training was offered and did not try to resolve the scheduling conflict, aside from telling the prosecutor about it; the detective also testified that he could miss up to 12 hours of the program and would have

tried to make arrangements if he had been directed to testify on a certain date; and the People knew that the training was locally offered twice a year and did not set forth any effort on their part to learn whether the witness could switch to another training offering or work around the scheduled training prior to seeking the adjournment.

Defense counsel's offer of condolences to the prosecutor for a recent loss in her family, and his suggestion that the prosecutor should ask him if her family situation required accommodation, did not clearly express counsel's consent to an adjournment sought without his knowledge for an unrelated reason.

People v. Jahrell Friday
(3d Dept., 4/5/18)

* * *

SPEEDY TRIAL - Plea Bargaining-Related Delay Caused By Co-Defendant

The Court orders dismissal on statutory speedy trial grounds where there was an unreasonable delay caused by the co-defendant's effort to obtain a favorable plea offer and her consent to adjournments, while defendant repeatedly proclaimed his desire for an expeditious trial.

Criminal Procedure Law §30.30(4)(d) provides that in the context of a joint trial, a reasonable period of delay caused by one defendant binds co-defendants. This rule reflects a strong public policy favoring joinder. However, the People should not be able to create unreasonable delay for a co-defendant who is demanding a speedy trial, even where, as here, defendant did not file a severance motion.

The Court also notes that the People are charged with the delay caused by their late response to the co-defendant's motion for severance.

People v. Malcolm Nowell
(Sup. Ct., N.Y. Co., 2/20/19) http://nycourts.gov/reporter/3dseries/2018/2018_51978.htm

Right To Counsel

RIGHT TO COUNSEL - Effective Assistance On Appeal

In *Roe v. Flores-Ortega* (528 U.S. 470), the Supreme Court held that when an attorney's deficient performance costs a defendant an appeal that the defendant would have otherwise pursued, prejudice should be presumed with no further showing from the defendant of the merits of his underlying claims, and the defendant gets a new opportunity to appeal.

In a 6-3 decision, the Court now holds that the same presumption of prejudice applies when the defendant has, in the course of pleading guilty, signed an "appeal waiver." Even the broadest

appeal waiver does not deprive a defendant of all appellate claims, and thus the defendant has a right to a proceeding that has been lost due to counsel's deficient performance.

The Court rejects the Government's suggestion that a defendant should be required to show either that he in fact requested, or at least expressed interest in, an appeal on a non-waived issue, or that there were nonfrivolous grounds for appeal despite the waiver. While it is the defendant's prerogative whether to appeal, it is not the defendant's role to decide what arguments to press. It is especially improper to impose that role upon the defendant where his opportunity to appeal was relinquished by deficient counsel. There is no right to counsel in post-conviction proceedings, and most applicants proceed pro se. And, it would be difficult and time consuming for a post-conviction court to determine what appellate claims a defendant was contemplating at the time of conviction, and what claims have in fact been waived.

Garza v. Idaho
2019 WL 938523 (U.S. Sup. Ct., 2/27/19)

*** * ***

RIGHT TO COUNSEL - Effective Assistance
IDENTIFICATION

The Supreme Court overturns an award of habeas relief that was based on defense counsel's failure to file a motion to suppress identification evidence.

The witness gave a vague initial description of the shooter, and there was a 17-month delay between the shooting and the identification. But the witness talked to petitioner immediately after the shooting, was paying attention during the crime and even remembered petitioner's distinctive walk. He chose petitioner's picture in both photo lineups, and was "sure" about his identification once he saw petitioner in person.

Instead of considering arguments or theories that could have supported the state court's decision, the Ninth Circuit considered arguments against the decision that petitioner never even made. The Ninth Circuit also failed to assess petitioner's claim with the appropriate amount of deference, essentially evaluating the merits de novo and tacking on a perfunctory statement at the end of its analysis asserting that the state court's decision was unreasonable. Deference to the state court should have been near its apex in this case, which involves a Strickland claim regarding a motion to suppress that turns on general, fact-driven standards such as suggestiveness and reliability.

Sexton v. Beaudreaux
2018 WL 3148261 (U.S. Sup. Ct., 6/28/18)

* * *

RIGHT TO COUNSEL - Decision-Making Authority
APPEAL - Harmless Error

In *Florida v. Nixon* (543 U.S. 175), the Supreme Court, considering whether the Constitution bars defense counsel from conceding a capital defendant's guilt at trial when the defendant, informed by counsel, neither consents nor objects, held that no blanket rule demands the defendant's explicit consent to implementation of that strategy.

In a 6-3 decision, the Court now holds that a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty. With individual liberty - and, in capital cases, life - at stake, it is the defendant's prerogative, not counsel's, to decide on the objective of his defense.

Trial management is the lawyer's province. Counsel provides his or her assistance by making decisions such as what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence. Some decisions, however, are reserved for the client - notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal. Autonomy to decide that the objective of the defense is to assert innocence belongs in this latter category.

Although the Louisiana Supreme Court concluded that defense counsel's refusal to maintain defendant's innocence was necessitated by a state ethics rule which provides that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent," defense counsel simply disbelieved defendant's account in view of the prosecution's evidence, and his express motivation for conceding guilt was not to avoid suborning perjury, but to try to build credibility with the jury, and thus obtain a sentence lesser than death.

Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind the Court's decisions have called "structural"; when present, such an error is not subject to harmless-error review.

McCoy v. Louisiana
2018 WL 2186174 (U.S. Sup. Ct., 5/4/18)

* * *

RIGHT TO COUNSEL - Effective Assistance/Appellate Counsel

In a 5-2 decision, the Court of Appeals upholds the Appellate Division's denial of the murder defendant's petition for a writ of error coram nobis based upon his ineffective assistance of appellate counsel claim.

Apart from his own otherwise unsupported allegation, defendant has provided no proof that counsel failed to adequately communicate with him. Counsel's brief was somewhat terse, could have been better drafted, and is not a model to be emulated, but it demonstrated a grasp of the relevant facts and law. "Brevity—which, indeed, can be a virtue in an appellate brief—a small number of citations to case law, or even the poor style of a brief that otherwise permits meaningful appellate review does not render appellate representation ineffective under our 'undemanding' standard (citations omitted)." Defendant can identify only a single issue that was even potentially meritorious - an excessive sentence claim - that he asserts should have been included in the brief, but, given the heinous nature of defendant's violent crimes, and defendant's lamentable behavior and lack of remorse at sentencing, it cannot be said that counsel lacked a sound, strategic reason to forgo pursuing a discretionary reduction of defendant's sentence.

Although Judge Rivera's dissent criticizes counsel's failure to distinguish between legal sufficiency and weight of the evidence, the Appellate Division has authority to review both issues and thus the discussion of both issues does not demonstrate counsel's ineffectiveness.

Finally, defendant does not identify any claim that should have been raised in a criminal leave application to this Court, and his unduly harsh and severe sentence claim would be unreviewable by this Court.

People v. Omar Alvarez
(Ct. App., 3/28/19)

*** * ***

RIGHT TO COUNSEL - Decision-Making
DEFENSES - Insanity

The Ninth Circuit U.S. Court of Appeals holds that under McCoy v. Louisiana (138 S.Ct. 1500), defendant had a Sixth Amendment right to demand that counsel not present an insanity defense. McCoy's emphasis on a defendant's autonomy strongly suggests that counsel cannot impose an insanity defense on a non-consenting defendant.

An insanity defense is tantamount to a concession of guilt, and, like a concession of guilt, carries grave personal consequences that go beyond the sphere of trial tactics. A defendant may have a firmly held feeling that he was not mentally ill at the time of the crime, and wish to avoid the

stigma of insanity. A defendant may also prefer a remote chance of exoneration to the prospect of indefinite commitment to a state institution.

United States v. Read
2019 WL 1196654 (9th Cir., 3/14/19)

* * *

RIGHT TO COUNSEL - Attachment Of Right In Related Matter
APPEAL - Scope Of Appellate Division Review

Two masked men robbed the occupants of a tattoo parlor at gunpoint, taking a BlackBerry cellphone from one victim. Surveillance footage showed a black Hyundai Sonata with tinted windows in the parking lot behind the parlor. Two days later, a masked gunman shot and killed a 19-year-old man. An eyewitness reported that the shooter arrived in a black Hyundai Sonata with tinted windows. Five days after the shooting, defendant, driving a black Hyundai Sonata with tinted windows, sped away from the police before being pulled over. After marijuana was recovered from the car, defendant was arrested and charged with criminal possession of marijuana, and an attorney was assigned to represent him. He was arraigned and released on bail. Following an inventory search and investigation, the police determined that a BlackBerry found in defendant's car was the one stolen from the tattoo parlor owner. Three days after his arrest, defendant, driving a different car, was pulled over for speeding. Upon learning that defendant was wanted for possession of the stolen BlackBerry, the police arrested him. During questioning about the robbery and the murder, defendant admitted that he was the driver and identified the passengers, but denied any additional involvement.

After defendant was indicted in connection with the robbery, the murder, and possession of marijuana, he moved to suppress his statements, arguing that his right to counsel had attached as to the marijuana charge. The court suppressed only his statements regarding the robbery, reasoning that the robbery and marijuana charges were related because the BlackBerry was obtained as a result of the marijuana arrest, while the murder and marijuana charges were unrelated. The Appellate Division suppressed the statements regarding the murder, reasoning that because CPL § 470.15 prevented consideration of an issue that did not adversely affect defendant-appellant, it was bound by the court's determination as to questioning on the robbery charges.

The Court of Appeals reverses, holding that CPL § 470.15 did not bind the Appellate Division since the hearing court ruled against defendant as to suppression on the murder charge. The Appellate Division should have considered whether the murder charge was sufficiently related to the marijuana charge. No evidence in the record supports that claim; questioning about the murder would not have implicated the marijuana charge, and the police asked defendant nothing about the marijuana charge.

People v. Bryan Henry
(Ct. App., 6/12/18)

* * *

RIGHT TO COUNSEL - Attachment Of Right In Related Matter

The Court of Appeals concludes that the impermissible questioning of defendant without the attorney who was representing him in the matter "was so brief, flippant, and minimal" that it was discrete and fairly separable as a matter of law from the interrogation of defendant regarding a matter in which he was unrepresented.

People v. Roque Silvagnoli
(Ct. App., 6/12/18)

*** * ***

RIGHT TO COUNSEL - Effective Assistance

The First Department vacates defendant's plea where defendant pleaded guilty to a felony drug sale charge in return for a promised sentence of five years' probation with a certificate of relief from civil disabilities; and, although defense counsel did advise defendant of the likelihood of deportation upon conviction for that type of crime, counsel erroneously told defendant that the certificate of relief would protect him from deportation.

People v. Juan Paulino Rosario
(1st Dept., 6/7/18)

* * *

RIGHT TO COUNSEL - Effective Assistance

The First Department finds no error where the new attorney appointed for purposes of defendant's pro se plea withdrawal motion declined to adopt, and stated there were no legal grounds for, the motion. This did not reach the level of taking a position adverse to defendant's.

People v. Devon Taylor
(1st Dept., 1/10/19)

Practice Note: Putting aside the question of whether another attorney should have been appointed, it is difficult to understand why counsel needed to comment at all on defendant's pro se motion rather than simply decline to adopt it, without comment.

* * *

RIGHT TO COUNSEL - Effective Assistance - Plea Bargaining

Before defendant entered a plea, defense counsel, without placing details on the record, apologized for his inappropriate conduct with the prosecutor and stated that he "let some personal issues override [his] better judgment," that he "should never have said most of the things that [he] said, if not all of the things," and that, "as a result of part of that problem, [he] misconstrued what [defendant] was willing to do relative to the plea offer that was on the table at that time." Defense counsel expressed a belief that, because of his conduct, a more favorable plea offer that was allegedly available was no longer available.

The Third Department, noting that defense counsel fulfilled his professional obligation, declines to find that defense counsel's vague statements constituted ineffective assistance of counsel.

However, the trial court committed reversible error when it failed to recognize that defense counsel's statements disqualified him from continuing to represent defendant - particularly if counsel were required to provide testimony regarding the events - and failed to immediately explain the situation to defendant and adjourn the matter to allow for the substitution of counsel, and a hearing to determine whether defendant received the ineffective assistance of counsel and was entitled to an order directing the People to renew the allegedly more favorable plea offer.

A court may direct the People to reoffer a prior, more favorable plea offer on ineffective assistance of counsel grounds if a defendant demonstrates: (1) the existence of a prior, more favorable plea offer; (2) a reasonable probability that, but for defense counsel's conduct, he or she would have accepted the prior plea offer; (3) a reasonable probability that the agreement would have been presented to and accepted by the court; and (4) that the conviction and/or sentence under the terms of the plea offer would have been less severe than the conviction and sentence ultimately imposed.

People v. Russell McGee
(3d Dept., 11/29/18)

* * *

PLEAS - Voluntariness
RIGHT TO COUNSEL - Consultation With Counsel

Defendant was housed, pretrial, at a correctional facility approximately 132 miles north of the Kings County Supreme Court. When the case was referred to a trial part, defendant was moved to a facility approximately 100 miles north of Brooklyn. Defense counsel sought to have defendant moved to Rikers Island, or another downstate facility, and argued that defendant was being denied his right to counsel by virtue of being housed in a remote location with limited telecommunication capabilities. The court ordered that defendant be moved to Rikers Island or another closer facility, and issued numerous orders over the following two weeks directing that defendant be moved, none of which was complied with. Although each appearance required

defendant to travel at least five hours each way, and the court noted that it would be nearly impossible to try the case under these conditions, the court nevertheless stated that the trial would commence regardless of where defendant was housed. The next court date, defendant agreed to plead guilty. His subsequent application to withdraw the plea was denied without a any inquiry by the court.

The Second Department orders a hearing, and the appointment of new counsel. The record substantiates defendant's claim that his plea was effectively coerced by the ongoing violation of his Sixth Amendment right to counsel.

People v. Tyron Hollmond
(2d Dept., 3/27/19)

*** * ***

RIGHT TO COUNSEL - Entry By Counsel

The First Department finds no right to counsel violation where, at the time of arrest, defendant was represented in an unrelated case by an attorney from Neighborhood Defender Service, who attempted to enter the new case on defendant's behalf at defendant's mother's request by contacting the police, and the attorney's supervisor subsequently attempted to enter the case as well, but, after being apprised by the detectives of these attempts, defendant unequivocally declined to be represented by the attorneys.

In these circumstances, no attorney-client relationship existed.

People v. Jamal Armstead
(1st Dept., 7/1/18)

* * *

RIGHT TO COUNSEL - Decision-Making

The First Department rejects defendant's claim that defense counsel rendered ineffective assistance when he declined to assert the affirmative defense of mental disease or defect in the face of defendant's opposition. The decision was for defendant, not counsel, to make.

People v. Camor Harding
(1st Dept., 5/24/18)

Right of Confrontation/Hearsay Evidence

RIGHT OF CONFRONTATION - Hearsay

The Supreme Court denies a petition for a writ of certiorari in this Confrontation Clause case involving alleged testimonial hearsay.

Justices Gorsuch and Sotomayor dissent, noting that the Court's various opinions in Williams v. Illinois (567 U.S. 50) yielded no majority and have sown confusion in courts across the country. To prove that defendant was driving under the influence, the State introduced in evidence the results of a blood-alcohol test, but refused to bring to the stand the analyst who performed and called a different analyst. "The engine of cross-examination was left unengaged, and the Sixth Amendment was violated." The State says that because it did not offer the report for the truth of what it said about defendant's blood-alcohol level, only to provide the testifying expert's basis for estimating defendant's blood-alcohol level when she was driving. However, in Williams at least five Justices rejected this logic, and for good reason. Why would the prosecutor bother to offer the non-testifying analyst's report except to prove the truth of its assertions about the level of alcohol in defendant's blood at the time of the test? Moreover, the report is testimonial. The four-Justice Williams plurality opined that a forensic report is testimonial only when it is prepared for the primary purpose of accusing a targeted individual who is in custody or under suspicion. Four dissenting Justices took the broader view that even a report devised purely for investigatory purposes without a target in mind can be testimonial when it is made under circumstances which would lead an objective witness reasonably to believe that it would be available for use at a later trial. Here, there's no question that defendant was in custody when the government conducted its forensic test and that the report was prepared for the primary purpose of securing her conviction.

Stuart v. Alabama
2018 WL 6028872 (U.S. Sup. Ct., 11/19/18)

* * *

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)

* * *

MOTION TO VACATE JUDGMENT OF CONVICTION - Newly Discovered Evidence
HEARSAY - Declaration Against Penal Interest

In this prosecution in which defendant was convicted in 1995 of first degree kidnapping in connection with the abduction of an 18-year-old convenience store clerk who disappeared from her job and has not been seen or heard from since, the Court of Appeals, in a 4-3 decision, upholds the denial of defendant's motion to vacate the judgment of conviction. The courts below properly held that the hearsay evidence of third-party culpability provided by witnesses the hearing court found credible was inadmissible under the exception for declarations against penal interest.

There was no independent credible evidence that any of the declarants were at or near the scene of the kidnapping at the relevant time, or that in some other way connects them to the kidnapping. The evidence failed to demonstrate that two of the declarants even knew the third declarant at the time of the offense. The declarants' criminal histories also do not provide the requisite corroboration; evidence of one declarant's prior convictions was properly excluded because the similarities of his prior crimes and the kidnapping were not sufficiently unique to establish a modus operandi or identify one person. There is also record support for the finding that certain witnesses were not credible.

The dissenting judges assert that although the majority assumes without deciding that the requirement that a declarant be unavailable presents no barrier to admissibility when the declarant takes the stand and denies having made the statement, that position should be adopted as a matter of law. When the other three criteria are met, admission of the statement protects a defendant's constitutional rights, furthers our legal system's truth-seeking function, and comports with the underlying reasons for the hearsay exception. The dissenting judges also assert that the hearing court improperly considered its own conclusion that the statements were false. The court was tasked solely with deciding whether defendant established a reasonable possibility of the statements' truth.

People v. Gary Thibodeau
(Ct. App., 6/14/18)

* * *

HEARSAY - Excited Utterance
LAW OF THE CASE DOCTRINE

At about 2:28 p.m., three men - Relaford, Phillips and Allen - were on a corner when a minivan drove past and double parked. The passenger exited, walked past the group, then turned around and shot Relaford in the hand and leg, shot Phillips in the leg, and shot Allen in the buttocks. The gunman reentered the minivan, which sped off. Somewhere between 2:29 p.m. and 2:32 p.m., Phillips called 911. About 20 seconds into the call, someone in the background can be faintly heard saying, "Yo, it was Twanek, man! It was Twanek, man!"

During defendant's first trial, the court refused to admit the unidentified person's statement on the 911 call as an excited utterance. The jury deadlocked, and the court declared a mistrial. Before the second trial, a different judge also refused to admit the statement, but after she took ill and was replaced by another judge, the People renewed their application and the judge agreed to admit the statement as an excited utterance. Defendant was convicted.

The Court of Appeals reverses. The Court first holds that the law-of-the-case doctrine did not bar admission of the statement, which was an evidentiary decision that could be reconsidered on retrial. There is no reason to apply a different rule to a successor judge within the same trial. And where, as here, an evidentiary ruling was reversed before the jury was empaneled, with no prejudice resulting from, for example, a mid-trial reversal of an evidentiary ruling that impedes the defense strategy, there was no abuse of discretion.

However, the Court, noting that it is a mixed question of law and fact, concludes that there is no record support for the admissibility ruling. The declarant's statement contained no basis from which personal knowledge can reasonably be inferred. Video evidence shows that many people ran toward the site of the shooting and arrived before the statement on the call.

Judge Rivera, concurring, asserts that "[l]egal scholars and jurists have questioned the continued vitality of [the excited utterance] exception, in light of advances in psychology and neuroscience that demonstrate an individual's inability to accurately recall facts when experiencing trauma, and, in turn, to create falsehoods immediately." "Science, fact, and common sense suggest that we should cabin, if not outright abandon, the exception."

People v. Twanek Cummings
(Ct. App., 5/8/18)

* * *

RIGHT OF CONFRONTATION - Hearsay

The First Department concludes that the victim's statements to a nurse were not testimonial under the Confrontation Clause because the nurse elicited the statements primarily to treat the victim, and her role in gathering evidence for the police by way of a rape kit was secondary.

People v. Donelle Murphy
(1st Dept., 1/31/19)

* * *

RIGHT OF CONFRONTATION - Hearsay/Basis Of Expert Opinion
EXPERT TESTIMONY - Gangs

In a case in which defendant and four other alleged members of the S.N.O.W. Gang were tried together upon an indictment charging them with, inter alia, conspiracy to murder two members of a rival gang, the Second Department finds reversible error where information derived by the police from the debriefing of arrested S.N.O.W. Gang members, which constitutes testimonial evidence, was conveyed to the jury in the course of expert police testimony regarding the gang.

There is no indication that the officers merely relied on hearsay for the purpose of forming an independent opinion based on their own expertise. Instead, they were impermissibly allowed to convey the substance of the hearsay to the jury for its truth.

In addition, one officer usurped the jury's function by interpreting, summarizing, and marshaling the evidence.

People v. Jahmarley Jones
(2d Dept., 11/14/18)

* * *

UNCHARGED CRIMES EVIDENCE
IMPEACHMENT - Bad Acts
HEARSAY - Prior Consistent Statements
APPEAL - Preservation

In a case in which a loaded firearm was recovered from defendant after a lawful stop of a livery cab, the Second Department finds error, albeit harmless, in the admission of two photographs discovered on defendant's cell phone that displayed a .45 caliber handgun for which he possessed a permit, the 9 millimeter handgun he possessed at the time of his arrest - defendant did not object to the use of those images - and images of other firearms. The trial court reasoned that the photographs would complete the officer's narrative regarding the image he observed on defendant's cell phone, and counter defendant's assertion that, despite being an avid gun enthusiast, he had intended to surrender part of his collection through a gun buy-back program. However, any relevance was outweighed by the potential for prejudice.

The trial court did not err in precluding cross-examination of an officer regarding the underlying facts of two of three settled federal civil rights lawsuits. The two complaints contained only broad conclusory allegations of unlawful police action by large groups of officers, and did not allege specific acts committed by the officer in question. However, the court committed error, albeit harmless, in precluding cross-examination as to the underlying facts of the third lawsuit, in which it was alleged that this officer and two fellow officers pulled the plaintiffs' vehicle over, ordered the plaintiffs out of their car, and conducted a search of the vehicle without probable cause, and that, upon recovering a small folding knife from the glove compartment, the officers falsely claimed that the object was a gravity knife and placed the plaintiffs under arrest for its possession.

The trial court also did not err in precluding, after asking for an offer of proof prior to any objection or motion in limine by the prosecution, testimony by a defense witness regarding defendant's statement of intent to hand in the gun at the precinct. The court was not required to passively await an attempt to elicit the inadmissible testimony, and the inevitable prosecution objection, before ruling. The use of a prior consistent statement to rehabilitate a witness has no application here because defendant did not testify. Moreover, the prosecutor never accused defendant of recent fabrication of his explanation for his possession of the gun, and maintained instead that defendant's explanation had been false from its inception. Although the dissent primarily argues that defendant's explanation was admissible as evidence of his state of mind rather than for its truth, defendant has never advanced this argument.

Defendant's current contention, raised for the first time on appeal, that the trial court should have admitted evidence of discussions between the witness and defendant regarding the buyback program under the state of mind exception is unpreserved. Defense counsel made only a conclusory assertion that the evidence was admissible nonhearsay.

People v. Kevin Watson
(2d Dept., 7/18/18)

* * *

RIGHT OF CONFRONTATION - Hearsay
HEARSAY - Excited Utterance

The Court finds admissible, as excited utterances, statements made by the complainant in a 911 call, and some of her statements in police body camera footage.

The statements in the 911 recording related to an ongoing emergency. The questions posed by the 911 operator, as well as those from emergency medical services, were designed to elicit information that would furnish police officers and medical technicians with knowledge of the situation they would be confronting. Those statements are non-testimonial for Confrontation Clause purposes.

Some of the statements in the body camera footage also are non-testimonial. The officers encountered an injured and distressed woman within minutes of receiving a 911 call, standing out in the rain with no shoes. They immediately accompanied her back to the scene of the traumatic event, without lingering to delve for more information. Their questions at this stage were designed to facilitate police assistance to meet an ongoing emergency.

However, subsequent questions primarily related to the nature and history of the complainant's relationship with defendant. The complainant's responses are testimonial, and, given that the complainant is unavailable for trial, must be barred under the Confrontation Clause.

People v. Alvarez
(Sup. Ct., N.Y. Co., 2/13/19)
https://www.law.com/newyorklawjournal/almID/1551261814NY019052018/

* * *

EXPERT TESTIMONY - Domestic Violence/Coercive Control Theory
HEARSAY - Business Records/Statements Relevant To Treatment And Diagnosis

In this child abuse prosecution, the Third Department finds no error where the trial court, without holding a *Frye* hearing, denied defendant mother's application to retain an expert witness to testify about the theory of coercive control and explain why the mother would falsely confess to beating her own child and/or why she would protect her boyfriend. Defendant failed to present evidence demonstrating that the theory of coercive control has gained general acceptance in the scientific community, and evidence that being subjected to coercive control would cause an individual to falsely confess to a crime he or she did not commit.

The Court finds no error in the admission of the child's statements to medical professionals implicating defendant. An emergency department nurse asked the child what had happened to his

neck, to which he replied, "mommy [choked] me, mommy tied me and pulled me." The child's attending physician later asked him who had hurt him, to which he responded, "mommy hurt me." These statements fall within the business records exception since each inquiry was made for the purpose of determining the mechanism of injury and was germane to diagnosis, prognosis and treatment. Moreover, the hospital, aware that the incident involved child abuse, needed to create a discharge plan that would, among other things, ensure the child's safety and provide for any psychological and counseling services he might require.

People v. Saundra Hansson
(3d Dept., 6/14/18)

* * *

HEARSAY - Prompt Outcry/Statements Relevant To Diagnosis And Treatment

The Third Department concludes that the victim's mother and former boyfriend were properly permitted to give prompt outcry testimony that the victim told them defendant raped her. A sexual assault nurse's testimony detailing the victim's description of what happened was admissible because it was germane to diagnosis and treatment.

People v. Kyle Hackett
(3d Dept., 12/6/18)

* * *

HEARSAY - Prompt Outcry

The Appellate Term concludes that testimony by the complainant's mother regarding the complainant's complaint that defendant had placed his hand or hands on her breasts did not exceed the detail permitted under the prompt outcry exception since the testimony was limited to the nature of the touching with no improper reference to the details of the incident.

People v. Jose Demoura
(App. Term, 2d Dept., 9th & 10th Jud. Dist., 6/28/18)

* * *

HEARSAY - Prompt Outcry

The Fourth Department finds reversible error where the trial court permitted the People to present prompt outcry testimony that exceeded the proper scope of such testimony.

Evidence that a sexual assault victim promptly complained about the incident is admissible to corroborate the allegation that an assault took place, but such evidence is limited to the fact of a complaint, not its accompanying details, including the identity of the assailant. Here, the court

erred in permitting two of the three prompt outcry witnesses to testify concerning the identity of the alleged assailant.

People v. Dung Vo
(4th Dept., 11/16/18)

* * *

HEARSAY - Admission By Agent/Attorney

Prior to trial, the People moved in limine to introduce on their direct case portions of the minutes of defendant's arraignment, arguing that certain statements by defendant's former (now retired) attorney are properly attributable to defendant. The Court reserved decision pending defendant's opening and testimony by the People's witnesses. Now, following the parties' openings and the prosecution's case-in-chief, the Court denies the People's motion.

Several factors militate against allowing the introduction of arraignment minutes. A defendant at arraignment does not generally proffer a defense. Defense counsel has near complete control over what is disseminated at a brief arraignment hearing. Attorneys may make brief statements for the purposes of bail setting before a defense is fashioned for trial with the benefit of a proper investigation and discovery. Pre-arraignment meetings with counsel are notoriously brief. Here, the arraignment minutes reveal that defense counsel had spoken at some length to another individual, "the witness." There is no telling how much information came from this witness, and defendant may have merely acquiesced to the witness's version for purposes of the arraignment. Also, the attorney who appeared at the arraignment was someone in an "of counsel" arrangement and not the attorney hired by defendant, and may not have the same degree of understanding as defendant's chosen counsel.

"Arraignment comments of defense counsel should be permitted rarely and on occasions when the defendant testifies or otherwise opens the door through an obvious and targeted defense. Those are not the circumstances presented here."

People v. L.D.
(Sup. Ct., Bronx Co., 6/11/18)
http://nycourts.gov/reporter/3dseries/2018/2018_28179.htm

* * *

EVIDENCE - Hearsay/State Of Mind
- Text Messages/Facebook Posts

The First Department finds no error in the admission of certain Facebook posts and text messages made by a separately tried co-defendant, which were relevant to the co-defendant's state of mind and were in turn relevant to defendant's guilt given the circumstances, including evidence of a shared motive.

However, it was error, albeit harmless, to admit the co-defendant's text message announcing that the murder at issue was about to be committed, and his Facebook post boasting that it had succeeded. This exceeded the proper bounds of state-of-mind evidence.

The court did not err in admitting a series of text messages between defendant and his girlfriend, while redacting portions in which defendant denied that he committed the murder. There was no violation of the rule of completeness since the messages that were introduced did not contain material that needed to be explained by way of the redacted self-exculpatory messages.

People v. Robert Cartagena
(1st Dept., 3/7/19)

* * *

CONFESSIONS - Challenge Raised At Trial
RIGHT TO PRESENT A DEFENSE
HEARSAY - State Of Mind

The Third Department finds reversible error where, during the People's direct examination of a detective, a redacted version of defendant's recorded statements, containing only the post-*Miranda* portion of the interview, was admitted into evidence and played for the jury, and defense counsel's subsequent attempt to cross-examine the detective about the portion of the interview that preceded the administration of *Miranda* warnings was met with objections by the People, which were sustained by the court.

The pre-*Miranda* portion of the interview does not constitute inadmissible hearsay. It consists of statements by the detective to defendant concerning her son's gang membership, extensive criminal behavior and suspected involvement in the shooting that took place the night before, and defendant sought to put this evidence before the jury to establish her state of mind upon hearing the statements. The circumstances surrounding the making of a confession, including the manner in which it was extracted, are relevant to the question of its voluntariness.

Moreover, defendant's entire defense was that the drugs recovered from a bedroom did not belong to her and that, for a variety of reasons, her confession to the contrary should not be

believed. To support that defense, defendant sought to portray herself as a concerned mother who was induced to make a false confession in order to protect and save her son from a drug possession charge.

People v. Octavia Hall
(3d Dept., 4/5/18)

Impeachment

APPEAL - Weight Of The Evidence Review
IMPEACHMENT - Ability To Observe

The Appellate Term reverses defendant's conviction for criminal trespass in the third degree where, at the time of the alleged incident, an officer was inside a subway restroom, washing her hands and attempting to look through vents in the restroom door, when she purportedly observed defendant enter the station without paying the required fare. Defendant, a Parks Department employee, testified that he was on his way home from work when he swiped his MetroCard before entering the turnstile, that he observed two other individuals jump the turnstile, and that the officers were unable to apprehend those individuals before confronting defendant.

"On this record, since the testifying officer's observations were made through vents in a door and there was no other evidence to establish defendant's guilt, it cannot be said that defendant's conviction was supported by the weight of the credible evidence."

People v. Darrell Stephens
(App. Term, 1st Dept., 10/11/18)

* * *

IMPEACHMENT - Prior Misconduct Of Officer

In this drug possession prosecution, the Second Department finds harmless error in the court's ruling precluding defense counsel from cross-examining the arresting officer at trial with respect to allegations made against him in four federal civil rights lawsuits claiming that he was involved in false arrests.

People v. Patrick Moore
(2d Dept., 1/30/19)

* * *

SEARCH AND SEIZURE - Standing/Police Allegation Of Possession
IMPEACHMENT - Bad Acts/Police Misconduct

The First Department notes that the parties correctly agree that the hearing court erred when it denied defendant's motion to suppress based on a lack of standing where the pistol was recovered from the ground but two officers testified at the hearing to the effect that the pistol was recovered immediately after it fell from defendant's person.

Defendant is also entitled to a new trial because the court improperly precluded his counsel from cross-examining the only police officer who allegedly saw the pistol falling about allegations in a federal civil action against the officer, which had settled. Counsel had a good faith basis for seeking to impeach the officer's credibility by asking him about allegations that he and other officers approached and assaulted the plaintiff in that case without any basis for suspecting him of posing a danger and filed baseless criminal charges against him.

People v. Stanley Holmes
(1st Dept., 3/19/19)

* * *

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 - Conviction/Bad Acts - Probative Value

In a case in which defendant is charged with aggravated harassment of an employee by an inmate for allegedly throwing urine out of his cell onto the faces, backs, and/or shoulders of two correctional officers, the Court, upon a Sandoval hearing, refuses to allow the People to use defendant's prior conviction for attempted promoting prison contraband in the first degree to impeach defendant's credibility should he choose to testify.

The Court agrees with defendant that given the nature of the charge in this case, the jury will already be aware that he has a criminal history, and thus the probative value of any impeachment will not outweigh the unfair prejudicial effect.

People v. Numani Lambert
(County Ct., Sullivan Co., 4/11/18) http://nycourts.gov/reporter/3dseries/2018/2018_50528.htm

Physician-Patient Privilege

PHYSICIAN-PATIENT PRIVILEGE - Blood Sample

The Minnesota Supreme Court holds that a blood sample drawn by a medical professional during the course of emergency medical treatment is not "information" within the scope of Minnesota's statutory physician-patient privilege.

State v. Atwood
2019 WL 1142420 (Minn., 3/13/19)

Practice Note: The same conclusion was reached under New York's statutory privilege in *People v. Elysee*, 49 A.D.3d 33 (2d Dept. 2007), *aff'd on other grounds* 12 N.Y.3d 100, and *People v. Drayton*, 56 A.D.3d 1278 (4th Dept. 2008).

Competency To Be Sworn

WITNESSES - Competency To Be Sworn

In this sex crime prosecution, the Second Department finds no error in the family court's determination allowing the six-year-old complainant to testify as a sworn witness.

The complainant had "some conception" of the obligations of an oath and the consequences of giving false testimony. Her testimony, as a whole, demonstrated that she understood that she had a moral duty to tell the truth, knew the difference between the truth and a lie, knew that a

promise to tell the truth must be adhered to, and knew that she would be punished if she did not tell the truth. She stated that she would tell the truth in court.

Matter of Lamark H.
(2d Dept., 3/6/19)

Experts

RIGHT TO COUNSEL - Effective Assistance
EXPERT TESTIMONY - Child Sex Abuse

The Third Department upholds the denial of defendant's motion to vacate his conviction, rejecting defendant's contention that defense counsel was ineffective because he retained an expert less qualified than the expert - John Yuille - he could have retained had he anticipated that the People were going to call an expert forensic psychologist to testify with regard to delayed disclosure of sexual abuse.

It is speculative to claim that Yuille would have been available to testify if counsel had contacted him earlier, and the failure to call a particular witness will not necessarily establish a claim of ineffective assistance of counsel. While defendant and counsel may not have been wholly satisfied with the defense expert's performance, that expert was, like the prosecution's expert, a forensic psychologist who was able to offer testimony with regard to typical and atypical behavior among sexually abused children.

The validity of Child Sexual Abuse Accommodation Syndrome was not at issue. Although the prosecution expert did testify during cross-examination that some aspects of CSAAS remained valid, he, like Yuille, confirmed that it was not universally accepted in the scientific community, and stated that he had not testified with regard to it in more than ten years. Thus, Yuille's testimony would not have contradicted or added to the trial evidence.

People v. Chad Olson
(3d Dept., 6/14/18)

* * *

EXPERT TESTIMONY - Identification
IDENTIFICATION - Lineups/Suggestiveness

At a Frye hearing, the Court rules on the admissibility of expert testimony at the Wade hearing in support of defendant's contention that he was incorrectly picked out of a lineup.

The Court finds that "attitudes and expectations" - involving witnesses' expectation that the perpetrator is in the lineup and their desire to make a choice, and police officers' expectation that a witness will choose the suspect and their unwitting communication of that expectation to the

witness through behavioral and nonverbal and verbal cues - is generally accepted by the relevant scientific community.

"Partial disguise" - involving a reduction in the accuracy of witness identifications when the hair or hairline is masked - is not generally accepted by the relevant scientific community.

The "diagnosticity of non-identification" - the idea that non-identifications is exculpatory in nature - is not generally accepted by the relevant scientific community.

Suggestibility among children resulting from statements and other non-verbal cues from police and parents is generally accepted by the relevant scientific community.

"Cross-contamination" - occurring when witnesses share accounts of a single event and alter their respective memories of the event - is generally accepted by the relevant scientific community.

"Clothing bias" - the idea that if a suspect in a lineup is the only person wearing clothes similar to those worn by the perpetrator, that increases the likelihood of false identification - is generally accepted by the relevant scientific community, but defendant's expert was unable to articulate any acceptable explanation of clothing bias that would be beyond the ken of an average juror.

"Filler quality/dud effect" - occurring when a lineup consists of dissimilar fillers, which increases the confidence of the witness without increasing the accuracy - is generally accepted by the relevant scientific community.

The Court notes that even if the lineup is admitted, defendant may argue at trial that it was conducted in a suggestive manner.

People v. Pacheco
(Sup. Ct., Kings Co., 3/11/19)
https://www.law.com/newyorklawjournal/almID/1554876919NY44522016/

* * *

EXPERT TESTIMONY - Sex Trafficking Victims

In each of two separate sex trafficking prosecutions, the People notified defense counsel of their intent to call an expert witness regarding trauma bonding between sex traffickers and their victims, and the coercive control techniques utilized by traffickers, in order to explain certain paradoxical conduct of the victims. Each defendant moved to preclude the expert's testimony. Because the Court believed that the theory of trauma bonding to explain the behaviors of prostitutes and pimps may involve a novel scientific theory whose general acceptance has not yet been ruled upon, the Court ordered a *Frye* hearing.

Upon the hearing, the Court denies defendants' motions to preclude, concluding that the proffered expert testimony will be allowed. The theories of trauma bonding and coercive control are well established in both the psychological and legal communities. The People have demonstrated that all three of the elements inherent in the forging of traumatic bonds - power imbalance, use of control tactics, and meting of intermittent rewards and punishment - that are present in cases of intimate partner violence and child sex abuse, and in kidnapper/hostage situations, are present in cases in which sex trafficking is alleged.

Like rape victims and child sex abuse victims, victims of sex trafficking often engage in counterintuitive conduct such as staying with and not leaving their pimp, not reporting or even lying on behalf of their pimp, and professing their love for their pimp. Trauma bonding and coercive control provide the most logical and persuasive explanation, and expert testimony would aid the average juror in understanding this conduct.

People v. Lemuel Skipper
(Sup. Ct., Bronx Co., 5/29/18) http://nycourts.gov/reporter/3dseries/2018/2018_28161.htm

Missing Witness Inference

MISSING WITNESS INFERENCE

The Maryland Court of Appeals, while not ruling out the possibility that there may be the rare criminal case in which a missing witness instruction adverse to a defendant may be appropriate - although it is difficult to foresee what those circumstances might be - holds that such an instruction should rarely, if ever, be given.

The inference may be in conflict with constitutional principles that forbid comment on the failure of a defendant to testify and require that the prosecution prove each element of a charged offense beyond a reasonable doubt. Also, it has been noted that an inference about the content of testimony from a witness who does not actually testify may implicate a defendant's right of confrontation.

Moreover, modern rules of evidence make clear that a party no longer vouches for, and may attack the credibility of, his or her own witness. Under modern criminal discovery rules, each party has more information in advance of trial as to the universe of potential witnesses and their likely testimony. Most experienced litigators prefer to try a "lean" case, and seldom call every witness who may have favorable testimony.

Even in the limited circumstances in which a prosecutor may legitimately urge the jury to draw an adverse inference, there is no need for the court to endorse that element of the prosecutor's argument.

Harris v. State
2018 WL 1748232 (Md., 4/12/18)

Photographs

EVIDENCE - Photographs

The Court of Appeals concludes that certain photographs were sufficiently authenticated through the testimony of the complainant and the law enforcement agents who extracted the photographs from defendant's cell phone and computers.

People v. Perry Pendell
(Ct. App., 3/21/19)

The pertinent facts are set forth in the Third Department's decision (164 A.D.3d 1063):
"Although the foundational questioning here was brief, the controlling point is that the victim identified herself in all of the photographs. She confirmed that she took several of the photographs of herself in her room at home and sent those photographs to defendant. She also explained that defendant took some of the photographs of her at the motel, where he admitted he took her on multiple occasions. All of the photographs of the victim were obtained from either defendant's cell phone or his home computer. We thus have the victim authenticating, as both photographer and subject, the pictures that she took of herself and that she provided to defendant. As for photographs taken by defendant at the hotel, the victim, as subject, confirmed that she was depicted in the photographs, without qualification. We also know from her testimony that these photographs were taken between October 2012 and March 2013. There was also explicit testimony from Constance Leege, a special agent with the United States Secret Service, explaining the process that she utilized to extract seven of the photographs from defendant's cell phone, and testimony from her colleague, Robert Lupe, who performed a forensic analysis of defendant's computer to extract the remaining photographic image."

Alibi Defense

EVIDENCE - Habit
DEFENSES - Alibi

The Second Department finds no error where the trial court precluded a witness from testifying that defendant generally put out his garbage in front of his home in Brooklyn at 8:30 a.m. as alibi evidence regarding the murder, which occurred at about 8:00 a.m. in Queens.

This was not admissible as habit evidence because it did not establish a repetitive pattern sufficient to be predictive of defendant's conduct.

People v. Hemant Megnath
(2d Dept., 8/22/18)

Justification Defense

DEFENSES - Justification
APPEAL - Weight Of The Evidence Review

The Third Department overturns, as against the weight of the evidence, a nonjury trial verdict finding defendant guilty of assault in the first degree and criminal possession of a weapon in the fourth degree, concluding that the People failed to prove beyond a reasonable doubt that defendant could have retreated with complete personal safety before he used deadly physical force, or that he knew he could do so.

The complainant's testimony that defendant began the fight and was the first to use a knife would have supported the conclusion that defendant could have retreated before he did so, but, at sentencing the court stated that defendant had not brought the knife to the scene of the fight and had somehow gotten possession of the knife from the complainant during the struggle.

Defendant told police that he tried to back up after the complainant pulled out the knife, but that the complainant kept swinging at him, and that the complainant continued to come at him and punch him even after defendant got possession of the knife, forcing him to keep "swing[ing] for his life." Defendant and the complainant agreed that the fight went on continuously after the knife emerged, with the complainant describing an unbroken struggle in which he managed to continue to throw punches at defendant even after he was stabbed. Although the complainant said he was trying to defend himself against defendant's continued attack, he did not testify that there was any break in the action when defendant could have known that he might safely escape. Forensic evidence of bloody prints on the exterior doors and windows of defendant's car, including some that resemble fingerprints, provides objective support for defendant's assertion that the complainant tried to pull the car door open as defendant tried to close it, pounding on the car even as defendant drove away.

Although the court stated that it rejected defendant's justification defense because it found that defense to be inconsistent with the multiple wounds on the complainant's face, neck and body, those injuries are not inconsistent with defendant's assertion that he had to swing the knife repeatedly to defend himself as the complainant continued to attack and punch him, and do not provide the missing proof that defendant could have retreated with complete safety.

People v. Norberto Hernandez
(3d Dept., 10/25/18)

Homicide/Assault

ASSAULT - Serious Physical Injury

The Court of Appeals finds legally sufficient evidence of the "serious physical injury" element of first degree assault where defendant fired five shots into a crowd and struck a 15-year-old bystander in the leg.

Medical evidence established, *inter alia*, that the bullet was "lodged in the soft tissues of the [victim's] leg," "on the side towards the front of the thigh," and the possibility of multiple other, smaller fragments;" that the injury was close to the victim's femoral artery - a "big blood vessel" - and "where a bullet enters an extremity, we don't take the bullet out in the trauma situations" because "going after a bullet like this can cause further injury," and where a bullet is "lodged near a blood vessel …, actually taking it out can cause injury to that blood vessel and near around it," resulting in "bleeding," "neurological deficit," "numbness," "tingling," and "weakness;" that, had "the femoral artery … been struck with a bullet," possible medical complications could include "exsanguinating, bleeding, excessive bleeding" and "possibly loss of limb;" and that "[m]uscle damage can cause long-term injuries to the kidneys from leakage of chemicals from the muscle, toxic to the kidneys, can cause pain and weakness, difficulty walking."

The victim's testimony established, *inter alia*, that the injury hurt and he was bleeding a lot and "had crutches for about two months," and, "after that, there was a lot of limping, crutches in the shower;" and that, four years after the shooting, he can still "feel [the bullet] poking out," the injury still "disturbs" him at times, that "something is wrong with [his] leg," and that he can no longer participate in competitive sports, as the injury would present a "very, very, very, very big risk."

Judge Wilson and Judge Rivera dissent.

People v. Tamarkqua Garland
(Ct. App., 11/20/18)

* * *

ASSAULT - Depraved Indifference

The Court of Appeals finds legally sufficient evidence of depraved indifference assault where defendant assaulted his girlfriend on multiple occasions over a period of two months, causing numerous broken bones, a brain injury, and life-long cognitive impairments, and failed to seek medical attention for the gravely-injured victim.

Defendant's sustained violence in the face of the victim's worsening condition demonstrates that he consciously disregarded a grave risk that she would die. Her injuries demonstrate uncommon

brutality and inhuman cruelty. Defendant burned the victim with a cigarette and caused her permanent brain damage. He attempted to hide the severity of the injuries and suggested that they were self-inflicted. He isolated the victim, obstructed those who sought to check on her. When the victim was near death and a clergymen suggested calling an ambulance, defendant's only concern was that he would be "blamed."

Proof of an intent to inflict serious physical injury does not necessarily preclude a finding of depraved indifference. Although, in depraved indifference murder cases, the Court has delineated two exceptional circumstances, involving vulnerable victims, in which a one-on-one confrontation might establish depraved indifference rather than intent to kill, a one-on-one assault, particularly where no deadly weapon is involved, can involve depraved indifference in more than those rare circumstances because there is no inconsistency in finding an intent to cause serious physical injury and a reckless indifference as to whether the victim lives or dies. Moreover, the categories of first-degree assault do not create any risk of a misperception that depraved indifference assault is a less serious crime than intentional assault.

In any event, in this case the jury could reasonably conclude that the repeated trauma rendered the victim particularly vulnerable. The Court also rejects defendant's contention that the "particularly vulnerable victim" classification is limited to young children.

Judge Rivera, concurring, disagrees with the majority's suggestion that cases of depraved indifference assault are neither rare nor limited to a narrow subset of assaults.

People v. Theodore Wilson
(Ct. App., 6/14/18)

* * *

CRIMINALLY NEGLIGENT HOMICIDE

The Third Department finds legally insufficient evidence of criminally negligent homicide where defendant, who shot a fellow deer hunter, had no reason to believe that any of his three companions would be in the area where he was shooting.

The group had agreed to hunt from separate, stationary tree stands that had been positioned prior to the hunt so that no one would be shooting in the direction of another hunter. After the deceased had taken a dangerous path back to the camp during the morning hunt, defendant and the property owner had specifically advised the deceased that, should he decide to again leave his designated stand before the hunt was over, he should take a specific route, along a nearby stream, that was outside the hunters' respective lines of fire. While defendant made the tragic and deadly error of mistaking the camouflage-dressed hunter for a buck, his actions did not rise to the level of criminal negligence.

People v. Robert Gerbino
(3d Dept., 5/3/18)

* * *

RECKLESS ENDANGERMENT
ASSAULT - Recklessness

The Second Department, with one judge dissenting, concludes that the jury verdict finding defendant guilty of reckless endangerment in the second degree and (reckless) assault in the third degree is against the weight of the evidence.

The gun was brought to defendant's home by the victim. The gun discharged as defendant handled it out of curiosity. There was no evidence that defendant was familiar with weapons, or the particular gun. There was no evidence from which it could be inferred that defendant knew the gun was loaded with live ammunition, or knew how the gun operated. There was no evidence that the defendant was aware of and consciously disregarded the risk that the gun might misfire. The victim testified that defendant appeared "scared" when the gun discharged and immediately stated that he was "sorry." Defendant attempted to dispose of the gun and helped the victim get medical care.

People v. Maximo Marin
(2d Dept., 8/29/18)

* * *

ASSAULT - Serious Physical Injury

The First Department concludes that the medical testimony and other evidence supports the conclusion that the victim's injury, a shattered kneecap, met the definition of serious physical injury. Among other things, there was evidence that at the time of the trial the victim was still unable to run without pain.

People v. Christopher Wong
(1st Dept., 10/11/18)

* * *

ASSAULT - Serious Physical Injury

In a 3-2 ruling, the Third Department concludes that the weight of the evidence does not support a finding that the victim sustained a serious physical injury.

The victim testified that, following the shooting, he was in "miraculous pain," he underwent two surgeries, and his tibia bone was "shattered" and pins were inserted to hold the bones in place. The pins, however, were removed four months later, at which point the pain subsided. The victim then wore a cast on his leg for 1½ months. These did not constitute injuries that create a substantial risk of death.

The record evidence also does not support a finding that the victim suffered from a protracted impairment of health or protracted loss or impairment of the function of a bodily organ. At trial, less than six months after the shooting, the victim stated that he had "a little limp," but was nonetheless able to walk. The victim was undergoing "rehab" but did not state for how long. When asked whether he could continue to play arena football, he responded, "Not at this time" and did not state that his injury to his leg prohibited him from playing in the future.

People v. James Marshall
(3d Dept., 6/7/18)

Obstructing Governmental Administration

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)

MetroCard And Other Forgery Crimes

POSSESSION OF A FORGED INSTRUMENT – Knowledge

The First Department finds insufficient evidence of the knowledge element of criminal possession of a forged instrument where the two MetroCards were bent in a manner known to permit unpaid rides, but the evidence did not establish beyond a reasonable doubt that defendant knew the cards were bent in that manner. The evidence was consistent with innocent explanations, such as that defendant picked up discarded MetroCards in the hope that they might have fares remaining on them.

People v. Michael Ross
(1st Dept., 7/5/18)

* * *

POSSESSION OF A FORGED INSTRUMENT

The Court of Appeals holds that an event ticket, such as a concert or sports event ticket, affects a legal right, interest, obligation, or status within the meaning of Penal Law § 170.10(1), and thus a defendant may be prosecuted under Penal Law § 170.25 for possession of counterfeit event tickets.

People v. Rodney Watts
(Ct. App., 11/20/18)

Possession Of Drugs And Weapons And Stolen Property

POSSESSION OF A WEAPON - Switchblade Knife

The Court of Appeals concludes that a weapon possession count charging possession of a switchblade knife was not jurisdictionally deficient, and that the evidence at trial, which included the police officer's testimony and his demonstration of the operability of the knife, was legally sufficient.

A dissenting judge first notes that defendant was arrested for possession of a United States Army-themed knife, which he testified he bought online for use in the mailroom where he worked. Knives are tools found in the home and workplace, and individuals may confuse a criminally-proscribed knife with a legally-acceptable one. While ignorance is no excuse under the law, the Court must not broaden the category of per se knives beyond the legislatively-adopted definition. Here, in the accusatory instrument, the officer described the knife as having "a spring-loaded portion of the blade of the knife protruding from the handle of the knife," and, at trial, the officer testified that the spring mechanism was "in the blade." Neither description satisfies the Penal Law requirement that the blade open automatically "by hand pressure applied to a button, spring or other device in the handle of the knife." "A knife's blade and handle are two different entities, and no amount of legal finessing can change that simple fact."

People v. Steven Berrezueta
(Ct. App., 6/7/18)

* * *

POSSESSION OF A WEAPON - "Place Of Business" Exception

The Court of Appeals holds that the "place of business" exception in Penal Law § 265.03(3) does not apply to defendant, who possessed an unlicensed firearm while working as a "swing manager" - a newer manager who has not been trained as an assistant manager - at a McDonald's restaurant.

The Court rejects defendant's argument that the exception encompasses any place where a person earns their livelihood. The exception applies to those individuals who would qualify for a license to possess a firearm at their "place of business" under Penal Law § 400.00, which contains a "merchant or storekeeper" qualifier for the "place of business" phrase. The Court, noting the ordinary dictionary definitions of merchant and storekeeper as "the operator of a retail business" or "one that operates a retail store," concludes that under § 265.03(3), the exception encompasses a person's "place of business," when such person is a merchant, storekeeper, or principal operator of a like establishment.

Such persons have a greater interest in protection of their premises, principal control over said premises, and a strong tie to the continued safety and security of their establishment and the goods and services they offer. Extending the exception to every employee who chooses to carry a weapon to and from work, engaging in felonious behavior and endangering the public on their daily commute, would swallow the rule and be in contravention of New York's legislative scheme of strict gun control.

Judge Stein, concurring, asserts that the exception ordinarily will cover the person or persons who have the greatest proprietary or possessory interest in the business. It is unlikely that employees or managers of retail establishments, without more, would ever fall within the exemption.

People v. Akeem Wallace
(Ct. App., 5/8/18)\

* * *

POSSESSION OF A WEAPON - Gravity Knife/Constitutionality Of Statute

The Second Circuit rejects plaintiffs' Due Process challenge to New York's ban on gravity knives that can be opened to a locked position with a one-handed flick of the wrist [Penal Law §§ 265.01(1), 265.00(5)].

Because plaintiffs' claim would, if successful, effectively preclude all enforcement of the statute, and because plaintiffs sought to prove their claim chiefly with hypothetical examples of unfair prosecutions that are divorced from their individual facts and circumstances, the Court deems this a facial challenge requiring plaintiffs to show that the statute is invalid in all applications because it does not give adequate notice to the public and does not provide sufficient guidance to

those charged with enforcing it. Plaintiffs' claim must fail if the gravity knife law was constitutionally applied to any one of the challengers.

One plaintiff, a seller of knives, did not make the necessary showing. This plaintiff was responsible for ensuring that its merchandise was legal, but prior to receiving a gravity knife subpoena in 2010, made no meaningful effort to verify that its knives did not respond to the wrist-flick test. That limits this plaintiff's ability to show that the statute provided insufficient notice that it sold banned knives. The Court notes that a gravity knife conviction might be constitutionally infirm if the knife could be flicked open to a locked position only with great difficulty or by a person with highly unusual abilities. A knife that responds inconsistently to the wrist-flick test might also provide grounds to challenge the law on an as-applied basis.

The gravity knife law also satisfies the requirement that a legislature establish minimal guidelines to govern law enforcement. The Court is troubled by signs that defendants selectively enforce the gravity knife law. However, what makes a statute unconstitutionally vague is that the statute, as drafted by the legislature and interpreted by the courts, invites arbitrary enforcement. The gravity knife law has an objective "incriminating fact": either the knife flicks open to a locked position or it does not. In the ordinary case, a law enforcement officer is not called upon to make a subjective judgment.

The Court also rejects the contention made by amici curiae that the law is unconstitutional because it imposes strict liability on possession of an everyday item and because possession can, in some circumstances, be charged as a felony. The absence of a scienter element, without more, does not make a law unconstitutionally vague. At most, the Supreme Court has suggested in dicta that a legislature might be unable to create a strict liability ban on indisputably harmless and everyday items. But a knife "is not a paper clip."

Finally, the Court observes that while plaintiffs did not show that the statute invites arbitrary enforcement as that term is used in the vagueness doctrine, the sheer number of people who carry folding knives that might or might not respond to the wrist-flick test raises concern about selective enforcement. The legislative and executive branches may wish to give further attention to the gravity knife law.

Copeland et al. v. Vance
2018 WL 3076907 (2d Cir., 6/22/18)

* * *

POSSESSION OF A WEAPON - Gravity Knife/Constitutionality Of Statute As-Applied

Plaintiff Cracco was arrested for possession of a gravity knife, and pleaded guilty to disorderly conduct and paid a fine. He claims that it took the arresting officer four or five tries of the wrist flick test to get the knife to lock into place. Cracco wants to continue carrying the same type of knife, but fears he will be prosecuted again. He seeks a declaratory judgment against defendant District Attorney Vance that: (1) the gravity knife statute as-applied is void for vagueness, and (2) a knife that does not open in response to the wrist flick test on the first or second attempt cannot form the basis for a criminal prosecution under the statute. The parties have cross moved for summary judgment.

The Court grants Cracco's motion and denies Vance's motion.

The Court first concludes that this is an as-applied and not a facial challenge. Cracco's claim is based on the conduct for which he was already prosecuted and does not reach beyond his own circumstances. He seeks relief that would eliminate the vague application of the gravity knife statute to folding knives that do not open and lock in response to the wrist flick test on the first or second try. It appears that no court has faced a true prospective, as-applied vagueness challenge to the statute, and the Second Circuit has indicated that such a case might succeed. *See Copeland v. Vance* (893 F.3d 101).

To succeed on an as-applied vagueness challenge to a criminal statute, a plaintiff must show that that the statute either: (1) failed to provide sufficient notice that his or her behavior was prohibited, or (2) authorized or even encouraged arbitrary and discriminatory enforcement.

With respect to notice, Cracco has no reliable way of knowing whether the common folding knife he wishes to possess will be viewed as legal or illegal given the text of the gravity knife statute and the procedures used by the District Attorney to enforce the statute. Notably, the case law in New York is not clear on what can be considered a gravity knife. Moreover, the types of knives that are prosecuted as gravity knives are sold openly in stores in New York, and the type of ordinary folding knife Cracco possessed is commonly used by cooks, craftsmen, and laborers to perform their job functions; the statute was intended to criminalize knives used by criminals in New York City.

With respect to enforcement, the statute does not provide explicit standards for those who apply it, to eliminate the risk of arbitrary enforcement. The District Attorney presented evidence that prosecution would be unlikely if it were undisputed that it took an officer four or five tries to effectively apply the wrist flick test, but also claims that there would be authority to prosecute such cases.

Cracco v. Vance
2019 WL 1382102 (S.D.N.Y., 3/27/19)

* * *

UNAUTHORIZED USE OF A VEHICLE
POSSESSION OF STOLEN PROPERTY - Knowledge

The Appellate Term finds facially insufficient a charge of unauthorized use of a vehicle in the third degree where it was alleged that "items in said vehicle were rummaged through, that an imitation pistol and condoms not belonging to [the owner] were left on the driver's seat," and that "defendant's fingerprints were found on a condom wrapper." These allegations did not establish reasonable cause to believe that defendant exercised control over or otherwise used the vehicle. Entry alone is not enough.

The Court also finds facially insufficient a charge of criminal possession of stolen property in the fifth degree where it was alleged that the bicycle found in defendant's possession belonged to another and that the owner had not given anyone permission to possess it, but the allegations do not establish defendant's knowledge that the bicycle was stolen. Absent an allegation as to when the bicycle was stolen, or of facts circumstantially establishing a time frame, the inference based on recent exclusive possession is inapplicable.

However, the Court finds facially sufficient a charge of criminal possession of stolen property in the fifth degree where it was alleged that defendant possessed a camera which, according to the victim, had been stolen from her a few days earlier.

People v. Wesley Brissett
(App. Term, 2d Dept., 2d, 11th & 13th Jud. Dist., 3/8/19)

* * *

POSSESSION OF A WEAPON - Dangerous Knife

The Appellate Term finds a weapon possession charge facially defective, under the standards which govern the sufficiency of an information, where it was alleged that police recovered a "pocket knife" from defendant's "right front pocket," but there were no allegations which, if true, would have established that the knife was a "dangerous knife."

People v. McCain, 30 N.Y.3d 1121, which applied the lower reasonable cause standard, is distinguishable.

People v. Jonelle Magnaye
(App. Term, 1st Dept., 5/17/18)

* * *

POSSESSION OF A WEAPON - Dangerous Knife

The Appellate Term finds facially sufficient a charge of criminal possession of a weapon in the fourth degree where the arresting officer alleged that defendant was in front of a specified address with three separately charged defendants "exchanging money and rolling a set of dice ... in a game of chance"; that police recovered "a pocket knife from the defendant's right pants pocket": and that defendant stated, in substance, "I use the knife for protection."

The trier of fact could infer that the knife qualifies as a "dangerous knife," i.e., an instrument of offensive or defensive combat and not an innocent utilitarian utensil.

People v. Jason Alexander
(App. Term, 1st Dept., 10/19/18)

* * *

POSSESSION OF A WEAPON - Dangerous Knife

The Appellate Term finds facially sufficient a charge of criminal possession of a weapon in the fourth degree where it was alleged that police recovered "a black kitchen knife from the defendant's pants pocket" after he was observed riding a bicycle on the sidewalk; that the knife blade was longer than four inches; that defendant stated, in substance, "I got jumped yesterday, I carry it for protection"; and that defendant resisted arrest by "refus[ing] to place his hands behind his back and placed his hands under his body on the ground, making it difficult to handcuff him."

The allegations provide reasonable cause to believe that defendant possessed a dangerous knife. In these circumstances use of the knife for a lawful purpose was highly unlikely. Defendant's attempt to resist arrest and his statement that he carried the knife "for protection" permit an inference that defendant considered the knife to be a weapon of significance to the police and not an innocent utilitarian utensil.

People v. Ervin Ortiz
(App. Term, 1st Dept., 10/19/18)

* * *

POSSESSION OF DRUGS - Constructive Possession

The Appellate Term dismisses as facially insufficient a drug possession charge where it was alleged that, at a location "underneath the overpass of the Bruckner Boulevard Expressway," the officer observed defendant "to have in his custody and control, on a concrete ledge where defendant was seated, one zip lock bag containing a white powdery residue" that the officer determined to be crack cocaine. These facts were insufficient to demonstrate reasonable cause to believe that defendant constructively possessed the crack cocaine.

People v. Joseph Wiltshire
(App. Term, 1st Dept., 2/25/19)

* * *

POSSESSION OF DRUGS - Constructive Possession

The Third Department reverses defendant's conviction for criminal possession of a controlled substance in the second degree where defendant's mere presence in the garage where methamphetamine was found is not enough, standing alone, to establish dominion or control. Defendant did not reside there, and there was no evidence that she had keys, kept belongings there or frequently spent time there. Although the couch where defendant said she was napping was near the shelf where the one-pot containing methamphetamine was found in plain view, and the police noticed smoke and a chemical odor and the presence of various substances and tools used to produce methamphetamine, knowledge of the presence of an illegal substance does not, without more, demonstrate that a defendant had the ability and intent to exercise dominion or control over the contraband.

Defendant's statement to police that she had purchased pseudoephedrine a couple of days before her arrest did not establish her dominion or control over the methamphetamine found in the garage. Pseudoephedrine itself is not illegal to purchase, and the People presented no evidence that the pseudoephedrine defendant purchased was actually present in the garage, had been used to produce the methamphetamine or was otherwise linked to that substance.

Although an inference of dominion or control over a controlled substance could possibly be supported by evidence of a defendant's prior use of the drug, no such inference can be drawn from defendant's admitted prior use of methamphetamine in the circumstances presented here, where testimony established that the substance in the one-pot was not necessarily recognizable as methamphetamine to a prior user of the drug, as it was not yet in usable form.

People v. Kristina Yerian
(3d Dept., 7/5/18)

* * *

POSSESSION OF DRUGS - Constructive Possession

The Court dismisses as facially insufficient misdemeanor charges of drug possession where it is alleged that upon entering an apartment, the officer observed defendant and two co-defendants in a bedroom where there was "one (1) plastic vile [sic] containing a dried, green leafy substance with a distinctive odor, and also in that vile [sic], there was (1) small ziplock bag containing a white, powdery substance, which was inside of a purse on top of a dresser."

The accusatory instrument does not describe the distance between defendant and the alleged contraband and indicates that the drugs were "inside" a purse but not that the purse was open. There are no allegations that defendant had any connection to the apartment except his mere

presence on the date in question. The drug factory presumption applies only to crimes requiring intent to sell or crimes involving amounts of drugs greater than what is required for misdemeanor possession, and, in any event, the accusatory instrument does not allege that any drug paraphernalia or packaging equipment was recovered.

People v. Andre Souchet
(Crim. Ct., Bronx Co., 7/27/18) http://nycourts.gov/reporter/3dseries/2018/2018_51164.htm

* * *

POSSESSION OF DRUGS - Constructive Possession/Drug Factory Presumption
SEARCH AND SEIZURE - Protective Sweep

The First Department finds lawful a protective sweep conducted by officers, who had come to an apartment to arrest someone for a parole violation, after a struggle with the parolee at the doorway. The officers reasonably believed there might be a weapon inside since a firearm had been recovered from that apartment a week earlier, and there was evidence that other people were present in the apartment.

However, the trial court committed reversible error when it instructed the jury on the drug factory presumption in Penal Law § 220.25(2). The officers recovered approximately one gram of crack cocaine, divided between 26 "twists" that were in a larger bag. Although a detective testified as an expert in "street level narcotics and narcotics investigations" and stated that 26 twists would be more "consistent with sale" than with possession for personal use, he conceded that given the absence of packaging or processing materials in the apartment, the bag, by itself, was not conclusive evidence that the drugs were packaged in the apartment. An untested, white residue on a kitchen counter was equally consistent with the residue left by household cooking and cleaning products.

People v. Shavaler Johnson, People v. Vijay Jain
(1st Dept., 4/26/18)

Criminal Mischief

CRIMINAL MISCHIEF - Intent

The Appellate Term finds facially sufficient, under the standard governing misdemeanor complaints, a charge of criminal mischief in the fourth degree where it was alleged that as a result of defendant slapping the complainant in the face, causing her annoyance and alarm and to fear for her physical safety, her cell phone dropped to the floor and its screen shattered. It is clear that defendant's intent was to injure the complainant, not to damage her phone.

People v. Emilio Toro
(App. Term, 2d Dept., 2d, 11th & 13th Jud. Dist., 6/29/18)

Sex Crimes

SEX CRIMES - Sex Offender Registration

The First Department affirms an order which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act, rejecting the constitutional claim by defendant and amici curiae that a person who commits a sex crime between the ages of 16 and 17 should be spared lifetime public registration, and thus should not be adjudicated a sex offender at a level higher than level one, at least without an individual clinical evaluation.

People v. Jean Carlos Delacruz
(1st Dept., 5/15/18)

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 reverses an order of disposition that, after respondent's admission to criminal possession of a weapon in connection with an incident in which he brought a firearm to school, adjudicated respondent a juvenile delinquent and placed him on probation for a period of nine months. The Court remits the matter for the entry of an order granting an adjournment in contemplation of dismissal nunc pro tunc to the date of disposition.

This proceeding constituted respondent's first contact with the court system. He took responsibility for his actions and learned from his mistakes, readily complied with the supervision imposed by the family court and by his father in the home, garnered praise from the Probation Department and school officials, had a commendable academic and school attendance record and mentored fellow students, and poses a minimal risk to the community.

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

* * *

SENTENCE - Release Conditions

The Eighth Circuit U.S. Court of Appeals finds unconstitutionally vague a release condition that states that defendant "must not knowingly associate with any member, prospect, or associate member of any gang without the prior approval of the United States Probation Office," and that if "defendant is found to be in the company of such individuals while wearing the clothing, colors, or insignia of a gang, the Court will presume that this association was for the purpose of participating in gang activities."

The prohibition fails to define "gang" or "associate member" of a gang, and could apply to "incidental contacts" with gang members.

United States v. Washington
2018 WL 3134611 (8th Cir., 6/27/18)

* * *

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/Violations

The Third Department concludes that the People failed to establish by a preponderance of the evidence that defendant violated the terms and conditions of his probation by willfully refusing to pay or failing to make sufficient good faith efforts to pay the cost of the SCRAM monitoring where the hearing testimony establishes that defendant made sufficient bona fide efforts to acquire the fiscal resources to pay the costs associated with SCRAM monitoring but could not do so as a result of his indigence, which resulted, at least in part, from serious injuries he sustained.

The court was therefore required to consider alternate measures of punishment other than imprisonment, and erred in failing to do so.

People v. Brian Hakes
(3d Dept., 1/17/19)

* * *

DISMISSAL IN FURTHERANCE OF JUSTICE

In 2003, defendant moved from New York City to North Carolina to shield her son from the negative influences of the city. While there, she legally purchased a handgun. She worked as a licensed practical nurse and raised her son in North Carolina until he graduated from college. In 2012 they moved back to New York City and defendant brought the gun with her. Her son found

employment and moved to the Bronx. Defendant decided to continue her studies to become a registered nurse. In 2016 she met the complainant and began a romantic relationship. At some point defendant terminated this relationship as a result of the complainant's verbal and physical abuse. On December 29, 2017 the complainant loudly and unexpectedly knocked on the door of defendant's home, demanding entrance. When she refused and called the police, he broke her storm door. He left before the police arrived to avoid arrest, only to return the following night and again demand entrance, threatening defendant loudly and banging hard on the front door. Terrified, defendant blocked the front door with her couch, took her gun from the closet and called 911. While she was on the phone, the complainant broke in her door. She fired twice, hitting him once.

The Court dismisses in furtherance of justice the charge of criminal possession of a firearm, noting, inter alia, that the gun was used in a desperate act of self-defense by a 5' 1" woman as her 6' 2" ex-boyfriend broke down her door; that intimate partner violence is the leading cause of injury to women in this country and domestic violence homicides account for 17.5% of homicides in New York City; that although the complainant was paralyzed as a result of the shooting, defendant was not indicted for assault; that defendant told the truth to the police and gave herself up; that defendant is law-abiding while the complainant has a criminal record, is a registered sex offender and the subject of the earlier domestic incident report, and lied to the police about his actions; and that the District Attorney's office has asked the Court to accept a plea to a misdemeanor with a sentence of probation, which reflects a recognition that defendant should not be incarcerated, but even a misdemeanor plea could have negative collateral consequences related to her employment as a nurse and future ability to support herself.

People v. Tonya Wooten
(Sup. Ct., Kings Co., 1/11/19)
http://nycourts.gov/reporter/3dseries/2019/2019_50015.htm

* * *

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

* * *

SENTENCE - Conditions Of Probation

The Court of Appeals holds that, as a condition of probation, sentencing courts can require a defendant to wear and pay for a Secure Continuous Remote Alcohol Monitoring bracelet that measures alcohol intake.

The Court rejects defendant's contention that payment is a punitive measure that serves no public safety or deterrent goal, and that the legislature only meant to authorize electronic monitoring if the costs were borne by the State. Payment is part and parcel of the requirement. Any punitive or deterrent effect is dwarfed by the explicit goals of the statute - to protect the public from alcohol-related offenses while assisting a defendant's rehabilitation. Were the Court to hold that any monetary component of a condition that must be borne by a defendant per se invalidates the condition, sentencing courts would be unable to impose a myriad of probationary requirements, and would, in many instances, no longer view release into the community as a viable alternative to incarceration.

However, courts cannot impose costs a defendant cannot feasibly meet, or incarcerate a defendant who has initially agreed to make payment but later becomes unable to do so. When a defendant asserts an inability to pay, the sentencing court must hold a hearing and give the defendant the opportunity to be heard in person, present witnesses, and offer documentary evidence establishing sufficient bona fide efforts to pay. If the court determines that the defendant has demonstrated an inability to pay despite bona fide efforts to do so, the court must attempt to fashion a reasonable alternative to incarceration. If the court determines, by a preponderance of the evidence, that a probationer has willfully refused to pay despite being able, the court may revoke probation and order imprisonment.

People v. Brian Hakes
(Ct. App., 12/13/18)

* * *

DISPOSITION - Restitution

The California Supreme Court rejects respondent's contention that the juvenile court, in determining his ability to pay restitution, violated federal law by considering the SSI benefits he received.

However, with respect to respondent's contention regarding cases where, as here, an individual's only source of "income" is Social Security benefits, the Court notes that the People conceded during oral argument that the ability to pay determination in this case would be "improper" if the juvenile court "was contemplating the social security money as the source of the restitution payments," i.e., that respondent could pay "from [his] social security money." The Court remands for a new ability to pay hearing that includes consideration of respondent's future earning capacity, his current financial circumstances, and the total amount of restitution to be ordered.

In re J.G.
2019 WL 908780 (Cal., 2/25/19)

* * *

SENTENCE - Presentence Report
APPEAL - Waiver Of Right

The Fourth Department directs that the arresting officer's reference to defendant as a "sociopath" be redacted from all copies of the presentence report. This reference was inappropriate and inflammatory. The term is a professional one and such a diagnosis should be left to qualified professionals. A failure to redact erroneous information from the PSR creates an unjustifiable risk of future adverse effects in other contexts, including appearances before the Board of Parole or other agencies.

Defendant's contention survives his valid waiver of the right to appeal.

People v. Demario Washington
(4th Dept., 3/15/19)

* * *

PRISONERS RIGHTS - Solitary Confinement Of Juveniles

In this action in which plaintiffs seek declaratory and injunctive relief on behalf of themselves and a proposed class of fellow 16– and 17–year–olds who have been or will be held in some form of solitary confinement at the Broome County Correctional Facility, the Court, inter alia: grants plaintiffs' motion for class certification; issues a preliminary injunction barring imposition

of 23–hour disciplinary isolation; directs that juveniles may be locked in their cells for disciplinary purposes only if the juvenile poses an immediate threat to the safety or security of the facility and only after less restrictive measures have been employed and found inadequate to address the particular threat at issue; directs that under no circumstances shall a juvenile be locked in a cell for greater than four hours for disciplinary purposes; directs that if a juvenile remains an immediate threat to the safety and security of the facility after four hours, a psychiatrist shall be consulted and a plan put in place to ensure the juvenile's safe return to the general juvenile population; directs that juveniles be given access to at least three hours of educational instruction each day as well as any IDEA-mandated special education and related services; and directs that if a juvenile with a mental health or intellectual disability will potentially lose access to the benefits, services, and programs offered at the facility as a result of the disciplinary process, defendants shall ensure that mental health staff will perform an individualized assessment of the juvenile as soon as possible.

There is a broad and growing consensus in the scientific and professional community that juveniles are psychologically more vulnerable than adults. Plaintiffs assert a constitutionally protected property interest in receiving a certain amount of minimum education under New York's Education Law, and, with respect to their IDEA claim, assert that defendants routinely fail to adhere to the procedural requirements mandated by federal law, such as a "manifestation hearing," before changing a qualifying juvenile's "current placement." Plaintiffs also contend that defendants violate the ADA and § 504 of the Rehabilitation Act of 1973 by routinely placing juveniles with disabilities in solitary confinement without ever conducting the type of "individualized assessment" of their disability that these laws require.

A.T. v. Harder
2018 WL 1635921 (N.D.N.Y., 4/4/18)

Motion To Vacate Adjudication

MOTION TO VACATE JUDGMENT OF CONVICTION - Claim Of Actual Innocence

The Court of Appeals holds that CPL § 440.10(1)(h), which allows a defendant to move to vacate a judgment of conviction obtained in violation of the defendant's state or federal constitutional rights, does not permit a defendant to raise a claim of actual innocence when the conviction followed a guilty plea that was constitutionally obtained.

Judge Wilson, joined by Judge Rivera, dissents, asserting that some completely innocent people plead guilty; that innocent defendants may be motivated to plead guilty for a variety of reasons, including the threat of a more serious charge and a far longer sentence, the chance to obtain a release from pre-trial detention, and concerns about the defendant's lawyer or the availability of evidence that would conclusively demonstrate innocence; that innocent suspects falsely confess;

and that it is not beyond the ability of our courts to identify the exceptional circumstances in which someone who has pleaded guilty should be entitled to have her conviction vacated.

People v. Natascha Tiger
(Ct. App., 6/14/18)

* * *

MOTION TO VACATE JUDGMENT OF CONVICTION - Newly Discovered Evidence

The Second Department affirms an order granting defendant's motion to vacate a judgment convicting him of murder and first degree assault on the ground of newly discovered evidence where the supreme court determined that evidence of prior police misconduct, if known to the court and the jury, would have created a probability of a more favorable verdict.

The supreme court noted, inter alia, that the judgments of conviction in five other cases had been vacated because a detective in this case (Scarcella) had procured false identification testimony; that defendant's conviction was based solely on the identification made by a witness prepared by Scarcella; that Scarcella was "in part responsible for the outcome" of the identification procedures, and his testimony at the CPL Article 440 hearing was "false, misleading, and non-cooperative"; and that given Scarcella's false and misleading testimony at the hearing "and the circumstances surrounding the conviction, with missing biological evidence, inconsistent testimony, and bare evidence," the newly discovered evidence makes it probable that the result would have been different if a new trial were held.

The Second Department notes, inter alia, that in assessing the probable impact of new evidence, a court should consider whether and to what extent the evidence is: (1) material to the pertinent issues in the case, (2) cumulative to evidence that was already presented to the jury, and (3) merely impeaches or contradicts evidence presented at trial; that impeachment evidence may properly form the basis for a new trial, and to impose a requirement that new evidence do more than "merely" impeach or contradict other evidence would subvert the overall purpose of the statute and render its remedial purpose illusory; that defendant would not have been required to demonstrate that Scarcella engaged in improprieties in this case, and, if the judge at the suppression hearing did not find the police testimony credible, suppression would have been warranted; that even if the suppression judge credited the police testimony, the jury, taking into account Scarcella's history of facilitating false identification testimony, and the questionable police procedures used in this case, could have found a reasonable doubt as to the veracity and accuracy of the identification; and that the People's case was exceptionally weak.

People v. Rosean Hargrove
(2d Dept., 4/18/18)

Appeals

APPEAL - Weight Of The Evidence Review

The Court of Appeals concludes that although the Appellate Division cited to prior decisions containing language that is inconsistent with this Court's more recent guidance regarding weight of the evidence review, the Appellate Division stated the correct standard when it stated that, "viewing the evidence presented at trial in a neutral light . . . , and weighing the relative probative force of the conflicting testimony and evidence, as well as the relative strength of the conflicting inferences to be drawn therefrom, and according deference to the jury's opportunity to view the witnesses, hear their testimony and observe their demeanor, the jury was justified in finding that the People sustained their burden of disproving defendant's justification defense beyond a reasonable doubt."

Judge Wilson, joined by Judge Rivera, dissents, asserting that "[a] majority of our Court concludes, without directly saying so, that none of the three Justices in the majority below would vote differently if the incorrect statements were excised from the opinion. I do not know that, and do not know how we can know that. But I do know who does know that, and I know where to find them. I would therefore remit to the Appellate Division to apply the unambiguously correct legal standard." The Appellate Division incorrectly stated that "reversal of a judgment of conviction on weight of the evidence review is not warranted in the absence of record evidence indicating that the jury's findings of credibility and fact were manifestly erroneous and so plainly unjustified by the evidence that rejection is required in the interest of justice."

People v. Alexis Sanchez
(Ct. App., 9/1/18)

* * *

APPEAL - Preservation
EVIDENCE - Gangs
UNCHARGED CRIMES

In this prosecution charging defendant and two other inmates with assaulting another inmate, the Court of Appeals finds no error in the admission of extensive testimony by an investigator about the Bloods gang. The testimony was probative of defendant's motive and intent to join the assault, and provided necessary background information on the nature of the relationship between the defendants. The testimony was intended to explain why defendant and one of the co-defendants were quick to join in the fight, as well as the gang-related meaning of the words the co-defendant allegedly used. The testimony described how members are identified and briefly discussed how carrying out an act of violence on behalf of a member might allow another

member to rise in the gang's hierarchy. Very little testimony focused on sensational details about the Bloods. The court's instructions addressed any possible prejudice to defendant.

The Court also holds that defendant failed to preserve, by way of his co-defendant's objection, his claim that a juror should have been discharged after an outburst. The Court notes that co-defendants may not share the same position in a case or on a specific ruling. The reference in CPL § 470.05(2) to "a party" must be understood to mean the party who raised the issue. The statute cannot be read to mean that a co-defendant implicitly lodges the same protest on the same grounds every time a co-defendant objects.

Judge Wilson, joined by Judge Fahey, dissents, asserting that defendant's counsel did in fact ask for removal of the juror, and the trial court understood him to be so asking.

People v. Princesam Bailey
(Ct. App., 6/14/18)

* * *

APPEAL - Waiver Of Right To Appeal

The Second Department finds valid defendant's waiver of the right to appeal where there was a sufficient oral colloquy and a detailed written waiver. The question was a close one given, inter alia, that the on-the-record explanation of the nature of the right to appeal and the consequences of waiving it was terse and included no reference to a higher court or the Appellate Division; defendant had a limited education, having stopped attending school in the eighth grade; and defendant had minimal prior experience with the criminal justice system, having only been adjudicated a youthful offender.

The Court "take[s] the opportunity to respectfully urge our trial courts to give greater attention to the colloquy used in taking a waiver of the right to appeal." It is advisable for courts to engage in a comprehensive colloquy, which clearly places on the record the defendant's understanding of the nature of the right to appeal and the consequences of waiving it.

The Criminal Jury Instructions & Model Colloquies include a model colloquy for the waiver of the right to appeal that provides, inter alia:
"Next, a defendant ordinarily retains the right to appeal even after pleading guilty. In this case, however, as a condition of the plea agreement, you are asked to waive your right to appeal.
First, what is an appeal? An appeal is a proceeding before a higher court, an appellate court. If a defendant cannot afford the costs of an appeal or of a lawyer, the state will bear those costs. On an appeal, a defendant may, normally through his/her lawyer, argue that an error took place in this court which requires a modification or reversal of the conviction. A reversal would require either new proceedings in this court or a dismissal. Do you understand?
By waiving your right to appeal, you do not give up your right to take an appeal by filing a notice of appeal with this court and the District Attorney within 30 days of the sentence. But, if

you take an appeal, you are by this waiver giving up the right to have the appellate court consider most claims of error, and whether the sentence I impose, whatever it may be, is excessive and should be modified. As a result, the conviction by this plea and sentence will normally be final. Do you understand?"

"Far too often, trial courts instead conduct a perfunctory appeal waiver colloquy that serves only as a pathway to future litigation. Far too often, this Court is compelled to hold invalid a bargained-for waiver of the right to appeal. Our research has shown that this Court has held an appeal waiver invalid in well over 200 appeals over the past five years. This problem is not confined to a certain trial judge or county …."

A concurring judge asserts that "[r]esort to a model form of colloquy would substantially reduce the difficulties encountered by this Court, which is working diligently to address a substantial case backlog, provided, of course, that the criminal part judges retain, and use, the flexibility to undertake individualized inquiries as appropriate and take the time involved to truly assure that each defendant coming before them who has executed an appeal limitation has done so knowingly and voluntarily. The benefit to be derived from a thorough colloquy concerning the waiver of the right to appeal far outweighs any burden imposed on the trial courts by a minor increase in the duration of plea proceedings. Moreover, if obtaining a valid appeal limitation is truly part of the bargained-for consideration received by the People in a plea bargain, then prosecutors, as a matter of self-interest, should play a proactive role in ensuring that a proper allocution is conducted in every instance in which a defendant agrees to waive or limit the right to appeal in connection with a negotiated sentence."

People v. Anardo Batista
(2d Dept., 11/7/18)

* * *

APPEAL - Anders Briefs

In *Giovanni S.* (89 A.D.3d 252), the Second Department, addressing its role in reviewing an *Anders* brief, identified two separate and distinct steps. Step 1 is an evaluation of the brief, which must, to be adequate, discuss "relevant evidence, with specific references to the record; identify and assess the efficacy of any significant objections, applications, or motions; and identify possible issues for appeal, with reference to the facts of the case and relevant legal authority." Step 1 is not satisfied by a brief that "merely recite[s] the underlying facts" and "state[s] a bare conclusion," after a review of the record and discussion of the case with the defendant, that there are no nonfrivolous issues for appeal. If the brief is deficient under Step 1, new counsel must be assigned to perform a new review. If the brief satisfies Step 1, the Court reaches Step 2, which involves an "independent review of the record" to determine whether "counsel's assessment that there are no nonfrivolous issues for appeal is correct." If the Court concludes under Step 2 that there are nonfrivolous issues that could be raised, it will assign new counsel. The Court has often applied the two-step analysis in such a manner that failure by assigned counsel to identify and

discuss even a single issue apparent on the face of the record resulted in the assignment of new counsel. The Court's jurisprudence has, in effect, imposed a standard of near perfection on assigned counsel in the context of *Anders* briefs.

In this case, counsel's *Anders* brief factually and legally analyzes two potential appellate issues – whether defendant's plea was voluntary and whether the sentence was excessive - but fails to identify or analyze the fact that defendant waived his right to appeal. However, the brief is not deficient. The validity of an appeal waiver is relevant only if there is a nonfrivolous issue that the defendant could be precluded from raising. Here, there are no such nonfrivolous issues and thus the validity of the waiver can make no practical difference.

The Court's "narrow" holding in this case is that an *Anders* brief will not be deemed deficient under Step 1 of the Giovanni S. analysis if it is demonstrable from the face of the brief that the missing issue would be inconsequential.

People v. Raymond Murray
(2d Dept., 2/13/19)

* * *

APPEAL - Record On Appeal

The Third Department holds that defendant cannot obtain meaningful appellate review where the People have failed to provide him with certain video and photographic exhibits that were introduced into evidence at trial, in a format that he could readily view.

The People are directed to provide defendant's counsel copies of the exhibits in a format readily accessible by modern personal computer equipment, and provide counsel with the necessary instructions and program requirements.

People v. Nyjew Haggray
(3d Dept., 6/7/18)

Interstate Compact On Juveniles

INTERSTATE COMPACT ON JUVENILES

In this proceeding brought pursuant to the Interstate Compact on Juveniles (Executive Law § 501-e), the Court, after examining the requisition and the amended requisition, finds that they are not in order and are substantially defective, and also concludes that the cited basis for return - that the youth breached his probation - has not been demonstrated. Therefore, the request for return is denied and the youth is discharged.

While the level of due process in Compact proceedings is generally minimal, at the very least a juvenile is entitled to notice in the requisition of the reasons the demanding state wants his return, as well as notice of which legally appropriate official is demanding return. A probation officer is identified in the requisition and amended requisition as the requisitioner, but she was not a person who has authority to execute a requisition. It appears that someone other than the probation officer signed the requisition, but the identity of that individual is not apparent since the signature is illegible and there is no name under the signature. The verification signed by a Deputy Compact Administrator, which accompanies the amended requisition, does not cure the defects concerning the identity and signature of the requisitioner since she did not sign the requisition herself.

Although Delaware alleges that the youth breached his probation by being charged with a new crime, the conditions of pre-adjudication probation submitted to the Court do not include any requirement that the youth refrain from criminal behavior.

Matter of Aubree C.
(Fam. Ct., Monroe Co., 5/9/18)
http://nycourts.gov/reporter/3dseries/2018/2018_28225.htm