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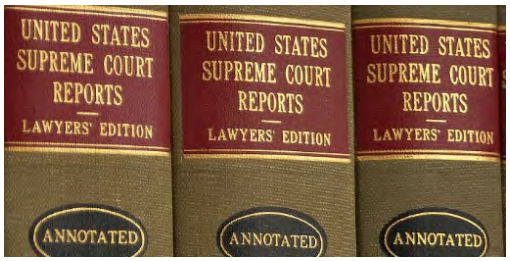

Presented jointly by the
Suffolk Academy of Law and the Nassau Academy of Law

2021 CRIMINAL LAW UPDATE

FACULTY

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New York State Court of Claims, Acting Supreme Court Justice

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October 22, 2021
Suffolk County Bar Association, New York

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Mark D. Cohen served as a Judge of the New York State Court of Claims from 2006 to 2020. During that period, he was an Acting New York State Supreme Court Justice in Suffolk County, New York and from 2015 to 2020, was the Supervising Judge of the Superior Criminal Courts for the Tenth Judicial District (Suffolk).

Judge Cohen has been an adjunct law professor at the Touro Law Center in Central Islip, New York since 1993. In 2021, he was appointed by the law school as a Distinguished Jurist in Residence. In 2004, Touro honored him as its Distinguished Public Interest Attorney in Residence. In 2009, the law school named him as its Adjunct Professor of the Year. In 2013, he received Touro's Annual Award "In Recognition of Devoted Service to the Ideals and Purpose of Legal Education," which in the past, had been reserved only for full-time faculty. During that same year, Touro's Moot Court Honors Board presented him with the Annual Hon. George C. Pratt Award in Appellate Advocacy, in recognition of his work with the law school's competitive moot court teams. In 2014, 2015, 2018 and 2019, Judge Cohen was voted Touro's Best Adjunct Professor by the law school's Student Bar Association.

In 2016, Chief Judge DiFiore named Judge Cohen as a member of the State Judicial Advisory Committee on Evidence and in 2018, she designated him as a member of the State's Continuing Legal Education Board.

Judge Cohen is a graduate of Columbia College, Columbia University, and the Hofstra University School of Law, where he was a member and editor of the Law Review. Upon graduation from law school, he was an appellate law clerk in Boston, Massachusetts.

Judge Cohen was the Deputy Director and Chief Counsel of the New York State Office of Homeland Security from 2001 to 2006. During that time, he also served as Acting Director for the Office and Assistant Director for its Legal Division and held a Top-Secret security clearance.

Judge Cohen was an Assistant District Attorney in the Suffolk County, New York District Attorney's Office from 1976 through 2001 and served as Chief Assistant District Attorney for thirteen years under two elected District Attorneys. He also was Chief of the Office's Appeals Bureau, Deputy Chief of the Special Investigations Unit, and a trial prosecutor in the Felony Trial Bureau.. As a prosecutor, Judge Cohen argued more than 200 cases in the Appellate Division, Second Department, more than 20 cases in the New York Court of Appeals and 10 cases in the United States Court of Appeals for the Second Circuit.

Judge Cohen has spoken extensively to judicial, governmental, bar, professional, and academic organizations across the country and has lectured for or been a member of the faculty of the New York State Judicial Institute, various Judicial Associations, the National College of District Attorneys, the New York Prosecutors Training Institute and the Federal Law Enforcement Training Center. He is a past-President and served on the Board of Directors of the Association of Government Attorneys in Capital Litigation and served as a Legislative Secretary and Treasurer for the New York State District Attorneys' Association. He was honored by the Suffolk County Court Officers' Association as its 2020 Judge of the Year and in 2018, the Suffolk Criminal Bar Association named Judge Cohen as "Judge of the Year" as well.

Judge Cohen has received the New York State District Attorneys Association's highest honor, the Frank S. Hogan Award, and is the only non-elected or non-acting recipient ever given this award.

Kent Moston is the Director of Training at the Legal Aid Society of Suffolk County. He started his career in 1975 as a staff attorney with the Legal Aid Society of Nassau County where he defended misdemeanor and felony cases at the trial level, and also prepared and argued appeals in the Appellate Term, Appellate Division, and the New York State Court of Appeals. In 1986 he became Chief of the Appeals Bureau where he litigated a wide variety of criminal and civil cases in New York and Federal courts. In 2001, he was names Attorney in Chief of Nassau Legal Aid where he served until his retirement in 2016. He joined Suffolk Legal Aid as its Director of Training later that year. Mr. Moston is a former adjunct professor of Political Science at CW Post College/LIU where he taught constitutional law, and a frequent lecturer on criminal law and procedure at the Nassau and Suffolk Academies of Law, the Suffolk County Bar Association, and the New York State Bar Association. He is the recipient of the Outstanding Alumnus Award from Hofstra Law School's Public Justice Foundation, and the George M. Estabrook Distinguished Service Award from Hofstra University.

Annual Criminal Law Update

Selected Recent Cases and New Legislation
SEPTEMBER 2020 -OCTOBER 2021

MARK D. COHEN
DISTINGUISHED JURIST IN RESIDENCE: TOURO LAW CENTER
JUDGE, NEW YORK STATE COURT OF CLAIMS (RET.)
KENT V. MOSTON
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Warrantless Searches & Seizures

People v. John W. Walls. __ N.Y.3d __, 2021 WL 3921427 (9/2/21) [Memorandum 7/0].

Following a 911 dispatcher's radio call of an occupant in a motor vehicle with a "long gun," a police officer located the van using information given to him by the dispatcher, i.e., the license plate and travel direction. The officer did not observe any traffic infractions or any conduct suggestive of criminality prior to the stop. Initially, the Court rejected the defendant's claim that the stop was invalid since long guns are not illegal in New York claim as meritless (see Penal Law 265.00 [22]). Nonetheless, the People failed to introduce the 911 recording, failed to introduce any evidence indicating whether the 911 caller was an identified citizen informant or an anonymous tipster, and failed to offer any explanation of the basis of the caller's knowledge to justify the stop. In sum, as the Court recounted "the People put forward no relevant information concerning the circumstances surrounding the call at the hearing." Therefore, on the record of the suppression hearing, "whether evaluated in light of the totality of the circumstances or under the *Aguilar-Spinelli* framework, the reliability of the tip was held not established" (*People v Argyris, 24 N.Y.3d 1138, 1141 [2014]).* Accordingly, lower court orders that denied suppression were reversed.

People v. Nathaniel Mabry, 37 N.Y.3d 933, 2021 WL 2144079 (5/27/21) [6/0; Memorandum].

The Court of Appeals unanimously held that People failed to establish that the warrantless search of defendant's backpack was a valid search incident to arrest pursuant to *People v Jimenez, 22 N.Y.3d 717, 721-722 (2014)* where the record did not contain evidence supporting a determination that the backpack was in defendant's "immediate control or 'grabbable area'" as

required by *People v Gokey, 60 N.Y.2d 309, 312 (1983);* see also, *People v Wheeler, 2 N.Y.3d 370, 373 (2004),* cited by the Court. Thus, because there was no testimony in the record indicating where the bag was in relation to defendant immediately prior to the search reversal was required. However, because the suppression court denied the defendant's motion without reaching the People's alternative argument raised in opposition, we remitted to that court for consideration of these unresolved claims.

People v. Robin Pena, 36 N.Y.3d 978, 2020 NY Lexis 2550 (11/19/20) [5/2; Memorandum], N.Y.L.J. 11/20/20 @ pp. 1 & 19.

A majority of the Court held by a memorandum concurring opinion and a separate signed concurring opinion [Feinman, J.], that police stop of an Dodge Caravan automobile because of a non-functioning light, while not a violation of New York's vehicle and traffic law [See sec. 375(40)(b)], was nonetheless objectively reasonable under *People v. Guthrie, 25 N.Y.3d 130, 136 (2015)* and *Heine v. North Carolina, 574 U.S. 54 (2014*), and as such, the defendant's subsequent arrest for driving while intoxicated was valid. In ruling that the police interpretation of the statute while purportedly mistaken was open to several interpretations and thus, a contrary determination of the appellate term was reversed and the defendant's conviction reinstated. Judges Wilson and Rivera dissented [Rivera, J., concurring in part], suggested that the concurrence, which authorized stops of vehicles "by mistake," "licenses future police conduct that for all the plurality knows constitute an unlawful abridgement of the Fourth Amendment rights of motorists. Judge Rivera, further suggested in her concurrence that *Guthrie* was sui generis and should not be followed in this case.

People v. Everett D. Balkman, 35 N.Y.3d 556 (11/19/20) [7/0; Feinman, J.].

The notification on a police officer's mobile data terminal that that notified him that there was a "similarity hit, indicating that something was similar about the registered owner of the vehicle and a person with an outstanding warrant did not provide a sufficient basis for the police to stop the defendant's car and thereafter discover a chrome handgun on the floor of the front passenger seat, and as such, the defendant's motion to suppress should have been granted. In so ruling the Court reversed a contrary divided appellate division ruling, on the holding that the People failed in going their burden of going forward with sufficient proof to justify the stop. The court did not reach the issue of whether the decriminalization of possession of gravity knives [L. 2019, Ch. 34] should be applied retroactively, notwithstanding the People's apparently contrary position at a C.P.L. 440.10 motion in which they consented to vacate the conviction, which in turn was rejected by the trial court.

People v. Andre Gerard, __ A.D.3d __, 2021 NY Slip Op 05089 (1st Dept. 9/28/21).

The first department affirmed a lower curt denial of suppression on a holding that a police officer's testimony about what he was told by transit officers provided the basis of knowledge , so long as, under the *Aguilar-Spinelli* test, the People establish that there was "some basis" of knowledge for that information and that it was "reliable" (*People v Bigelow*, 66 N.Y.2d 417, 423 (1985), where, as here, the information is based on personal knowledge (*Bigelow*, 66 NY2d at 423-24), and that "[i]nformation received from another police officer is [thus deemed] presumptively reliable" (*People v Ketcham*, 93 N.Y.2d 416, 420 (1999). In so ruling, the appellate division also noted that where the defendant did not "present any evidence, identify anything in the People's case, or elicit any statements on cross-examination that undercut the veracity of the transit officers' account of a farebeating, as relayed by the testifying officer," the hearing evidence here did not present any "substantial questions concerning the legality of the non-testifying [officers'] conduct," quoting *People v Gonzalez* (80 N.Y.2d 883, 885 (1992).

People v. Willie Alexander, __ A.D.3d __ (4th Dept. 8/26/21) [#KA-160054].

The fourth department affirmed the defendant's weapons possession and larceny conviction arising out the theft of a gun from Walmart over claims raised pro se that the gun was subject to suppression because the defendant discarded it as a direct result of a security guard's purportedly unlawful pursuit. As the court noted, "It is settled that [even] an unauthorized search or seizure by private individuals, including store detectives, does not render the evidence inadmissible at subsequent civil or criminal proceedings," quoting, *People v. Mendoza, 82 N.Y.2d 415, 433 [1993*], also quoting *People v. Jones, 47 N.Y.2d 528, 533 (1979),* and the pursuing security guard in this case was a private individual acting on behalf of his private employer. As such the defendant failed to identify "any recognized indicia of state action [see *People v. Ray, 65 N.Y.2d 282, 286 (1985*)] upon which suppression could have been sought under these circumstances (cf,, *People v. Mendoza, 82 NY2d at 425, 433-434.*

People v. Anthony Fudge, 2021 NY Slip Op 04841. 2021 WL 2782695 (4th Dept. 8/26/21).

In an extensive review of state, federal and national caselaw and in particular relying on People v. Darby,263 A.D.3d 112 (2000) the fourth department held that the distinctive odor of PCP

provided probable cause for the police in Syracuse to search the defendant's car and thereafter seize cocaine. In so ruling, the court also severely "reproved" appellant's attorney for several unethical breaches in terms of his brief submission, including, failing to alert the court to adverse case law and making factual assertions without a basis in the record.

People v. Robert Costan, __ A.D.3d __, 2021 WL 3744850, 2021 NY Slip Op 04760 (2nd Dept. 8/25/21).

The police were not required to obtain a search warrant in order to obtain the defendant's real-time Cell Site Location Information (hereinafter CSLI) in case involving an investigation into more than a dozen gunpoint robberies in Brooklyn. In affirming a denial of suppression, the appellate division held that the 2018 determination of the United States Supreme Court in *Carpenter v United States*, 138 S. Ct. 2206 ( ), requiring law enforcement, in the absence of exigent circumstances, to obtain a warrant supported by probable cause before acquiring a person's historical CSLI, "specifically does not encompass the acquisition of real-time CSLI at issue here." The second department further noted that even if *Carpenter* were to be applied here, the lower court order containing an "express finding of probable cause, which was supported by the People's evidentiary showing" (*People v Grant, 185 A.D.3d 608, 609 (2nd Dept. 2020),* was effectively a warrant for *Carpenter* purposes (see *People v Clark, 171 A.D.3d 942, 943 (2nd Dept. 2019).* Thus, the Supreme Court properly determined that suppression was not warranted on the basis that the CSLI was illegally obtained. See also, *United States v. Caraballo, 831 F.3d 95 (2nd Cir. 2015),* in which the second circuit sustained the warrantless acquisition of CSLI due to reasonable concerns regarding the safety of undercover agents and a government informant, at the hands of the defendant, a major narcotics trafficker.

People v. Eduardo Crosse, __ A.D.3d __, 2021 NY Slip Op 04636 (3rd Dept. 8/5/21).

In September 2016, a state trooper and a City of Plattsburgh police detective went to an apartment in Clinton County to attempt to locate a suspect in an assault. When the defendant answered the door to the apartment, the trooper asked him to provide identification. The defendant produced a state benefit card with the name "Edward Crosse" on it and told the trooper that he was a guest staying at the apartment. The trooper took the card to his vehicle, ran the name on the card through a database in the vehicle's computer, and discovered that defendant was currently on parole in New York City. When the trooper questioned defendant about his parole status, he initially denied it, but eventually admitted to being on parole and stated that he had permission to be in Schuyler Falls. The trooper then contacted the Parole Department and an officer was dispatched to the residence. While waiting for the parole officer to arrive, the trooper asked the defendant if he and the detective could enter the premises to search for the suspect and to determine if anyone else was present and the defendant consented. While inside the residence, the trooper observed a backpack, fanny pack and two air guns. The defendant denied owning the

air guns but admitted to owning the backpack and fanny pack. Shortly after the parole officer arrived, a warrant for the defendant's arrest was issued. After defendant was handcuffed, taken into custody and placed inside the patrol vehicle, the trooper performed a cursory warrantless search — on the hood of the vehicle — of the defendant's bags, finding several credit and gift cards bearing various names and two devices known as skimmers — one larger than the other. The trooper transported the defendant to the State Police barracks, where he conducted a second warrantless search of defendant's backpack and fanny pack and inventoried the contents of the bags. The third department reversed a lower court denial of suppression on the holding that there was an insufficient basis to conduct a warrantless search of the defendant's closed container, his fanny pack, under *People v. Jiminez, 22 N.Y.3d 717 (2014)* as a search incident to arrest because the pack was in the complete control of the trooper and there were no exigent circumstances present.

People v. Jayvon Mosquito, __ A.D.3d __, 2021 NY Slip Op 04620 (2nd Dept. 8/4/21).

An experienced NYPD police Officer testified that at approximately 2:15 a.m. on December 10, 2016, while working in plain clothes with a partner in an unmarked vehicle, he observed a white Honda fail to stop at the stop sign in Queens. The officer activated the emergency lights and siren on his vehicle, pulled over the Honda, exited his vehicle, and approached the car. The officer further testified that when he approached, he smelled an odor of marihuana and when he looked into the driver's side window, he saw a small bag on the floor between the door and the driver's seat. Based upon his visual observation of the contents of the small bag and his training and experience, the officer believed that the bag contained marihuana. The officer then asked the defendant, the driver of the Honda, for his license and registration, which was provided. The officer then asked the defendant to step out of the vehicle and directed him to the back of the vehicle near the trunk. At the back of the vehicle, the officer asked the defendant if there was anything else in the car that he needed to know about, and the defendant said there was more marihuana in the car in a bag in the back seat. Thereafter, while the defendant and the other individual in the vehicle were at the back of the vehicle with the officer's partner, the first officer searched the vehicle, looking for more marihuana. Officer Zaleski recovered several bags of what appeared to be marihuana from the inside of a black backpack that was located in the back seat of the vehicle. The officer also recovered three credit cards from a small zippered wallet that was in the center console of the vehicle. The officer also testified that, based on his training and experience, he believed that the credit cards were forged because the names on the credit cards did not match the names of the individuals in the vehicle and the signature pads on the cards were not "raised." The appellate division reversed a denial of suppression order on the holding that while the officer had probable cause to search the Honda under the automobile exception, he did not had a valid basis to seize the credit cards under the plain view doctrine because he had to unzip the wallet and the illegal nature of the cards was thus not immediately apparent, as required under both the federal and state constitutions.

People v. Patricia Mortel, 197 A.D.3d 196, 2021 NY Slip Op 04498 (2nd Dept. 7/21/21).

A majority of the second department by a 3-2 vote, per Miller J., reversed the defendant's Rockland County first degree possession of controlled substance conviction on a holding that while there was sufficient proof that a series of traffic violation had been committed. Nonetheless, the majority further held that there was an insufficient basis for state troopers to have conducted a search of the vehicle based on the "fellow-officer's rule" based on more than 89,000 wiretap intercepts that purportedly provided information of narcotics trafficking, because there was no proof presented at the suppression hearing of any such investigative information was actually imparted to the troopers involved in the stop. The majority additionally held that the "odor of marijuana" did not provide a basis to search the vehicle, but did not cite to the recent cannabis decriminalization statute [L. 2021 Ch. 93, eff. 3/31/21], and moreover held that the inventory exception to the requirement of a search warrant did not apply where the troopers did not conduct the search pursuant to departmental rules and procedures as is required. The majority declined to reach the issue of a search of two closed containers, a purse and a bag, found in the car pursuant to the inventory search. Justices Connelly and Rivera dissented on their conclusion that the inventory search was indeed conducted properly and would have reached the issue concerning the search of the closed container. See also *People v. Aaron Parker, __ A.D.3d __, 2021 NY Slip Op 04500 (2nd Dept. 7/21/21*), in which the co-defendant's conviction was reversed by the same majority also by a 3-2 vote on the same grounds.

People v. Kirklan Wright, __ A.D.3d __, 2021 NY Slip Op 03675 (4th Dept. 6/11/21).

At approximately 11:55 p.m. a uniformed police officer and two fellow officers were on patrol when the officers spotted two men walking along a street. According to one officer, one of the men "appeared to have an open container, open alcoholic beverage container, taller can inside a paper bag." The testifying officer explained that "people attempt to hide open containers, alcoholic beverage containers, in paper bags, plastic bags, so we can't see the container and I have made it a practice of mine to stop pretty much everyone I see that has a—has similar to that, what I believe to be an open container." All three officers exited the marked patrol car in which they were riding and immediately began "notifying the male with what we believe to be an open container, the open alcoholic beverage, that we're checking to see if the alcoholic beverage is closed." The testifying officer explained that he then approached defendant because, as the officers approached, defendant "separate[d] himself, enter[ed] a driveway, just partially enter[ed] a driveway on the north side of the street and then blade[d] his body to us while kind of grabbing at his right waistband area." The fourth department reversed the defendant's weapons possession and related-crime conviction on the holding that since each police intrusion must be justified at the inception and not retroactively, even assuming, arguendo, that the officers possessed a level one right to approach defendant and his companion, the officers nonetheless immediately

"engaged in a level two intrusion, i.e., 'a more pointed inquiry into [the] activities [of defendant and his companion]' . . . , by improperly asking 'invasive question[s] focusing on the possible criminality of the subject' " where they “did not see defendant or his companion drinking from whatever item was in the paper bag, and there were no other attendant circumstances indicative of criminal behavior that would warrant the more pointed inquiry at the outset . As such suppression was required.

People v. Devon T. Butler, 193 A.D.3d 28, 2021 WL 2005249, 2021 NY Slip Op 03222 (3rd Dept. 5/20/21).

Binghampton police observed a male enter the defendant’s vehicle shortly after it pulled into a parking lot. Although it was dark out, the police observed what they believed to be a “hand to hand exchange.” Seconds later the male exited the vehicle and the defendant’s car exited the lot. The police followed the defendant’s car and observed it make and “evasive u-turn” and run a stop sign. After stopping the car, the police received what they believed was an “inconsistent” explanation of where the defendant was going to and from and learned that the defendant did not have a driver’s license. The defendant was asked to step out of the car and complied. The police then observed a “bulge” at the defendant’s side and asked him how much cash the defendant had on him. The defendant replied, $1,000. The police then asked for the defendant’s consent to search the car but the defendant declined. The police then brought a “passive alert” canine sniffing dog and after walking him around the exterior of the vehicle, the dog was “in odor” or alerted. As the police moved the dog to near where the defendant was standing, about six to eight feet from the vehicle, the dog alerted again. The dog was re-directed into the interior of the car and when it was in the driver’s seat, it alerted a third time. The dog was then brought to where the defendant was standing and after sniffing the defendant’s “groin/buttocks area”, it alerted once more, The defendant then “bolted,” but was later apprehended. A quantity of heroin was recovered thereafter in the street. A majority of the third department per Justice Lunch, with Justice Aarons concurring, by a 4 to 1 vote, sustained a Broome County court denial of suppression on the holding that there was a sufficient basis to stop the car for a traffic violation, that there was founded suspicion to conduct an exterior canine sniff of the car under *People v. Devone, 15 N.Y.2d 106 (2013)* and in a case of apparent first impression in New York and analogizing the encounter to a *Terry* frisk, there was reasonable suspicion to conduct a warrantless canine sniff of the defendant’s person. Thus, the defendant’s abandonment of the narcotics rendered him unable to challenge its recovery as a fruit of an unlawful police act. Justice Pritzker dissented on the conclusion that probable cause was required to conduct a canine sniff of the defendant’s person due to the intrusive nature of the police activity.

People v. Lance Rodriguez, 194 A.D.3d 968, 2021 NY Slip Op 03202 (2nd Dept. 5/19/21).

The police were justified in directing the defendant to stop riding his bicycle when they told him to “hold up, police,” after they observed him riding “recklessly” in the middle of a Queens street holding a “bulky” object at his waist under a *DeBour* level 2 common law right of inquiry. Thereafter from their police car, they asked him if he “had anything on him,” and the defendant stated that he did and that it was a gun. The defendant was thereafter arrested and handcuffed. In affirming the denial of suppression, the second department held that under *People v. Bora, 83 N.Y.2d 531, 533 (1993),* the *DeBour* rubric applicable to pedestrians also applied to bicyclists, and that the stop and seizure were valid.

People v. Hakeem Clark, 194 A.D.3d 948, 2021 WL 1991437, 2021 NY Slip Op 03192 (2nd Dept. 5/19/21).

The People met their burden of establishing that NYPD officers obtained a consent to enter an apartment in Queens from the defendant’s cousin who owned the dwelling and had the apparent authority as a co-occupant and owner to so consent, during a kidnapping investigation. Thus, where in an effort to locate the victim, the police tracked certain cell phone calls to the defendant’s home and after discovering the victim tied up in a garage and freeing her, thereafter obtained consent from the defendant’s cousin, (who happened to be a police officer as well), the seizure by officers in plain view of cell phones used by the defendant was proper. In affirming the defendant’s first-degree kidnapping conviction, the appellate division also held that it “would be beneficial” to the defendant if he cooperated and that the police would inform the district attorney’s office did not constitute a promise of leniency that could have induced the defendant to falsely incriminate himself.

People v. Jeffrey Contreras, __ A.D.3d __, 2021 WL 1899421, 2021 NY Slip Op 03048 (2nd Dept. 5/12/21).

An NYPD officer exited a Queens police precinct with three other officers and saw the defendant sitting in the driver's seat of a parked car. The officer approached the car on the driver's side and asked through the open window, "What do you need?" The defendant responded that he needed a cell phone out of "that vehicle." The officer testified that he believed that the defendant was referring to an allegedly stolen Acura vehicle, and that he suspected that the defendant had something to do with the theft of that vehicle. The first officer and another officer asked the defendant to step out of his vehicle, and the defendant refused. The police opened the driver's side door and again asked the defendant to step out of the vehicle. The defendant once again refused and tried to close the vehicle's door. The police then attempted to physically remove the defendant from the driver's seat of the car, and a physical altercation ensued. The first officer testified that during the altercation, the defendant's vehicle went forward, ran over both his legs, hit a parked vehicle, went in reverse, ran over his ankles, and then fled the scene. The appellate

division held that while the police approach to the parked car was proper as a level one *DeBour* interaction, the direction that the defendant step out of the car was without a proper lawful basis where the police had no real reason to believe the defendant was engaged in any criminality, notwithstanding what amounted to the hunch regarding the Acura, However, the defendant's actions of fleeing the scene by running over the legs of the officer dissipated the taint and thus, by application of the attenuation doctrine, the defendant's statements were held properly admissible.

People v. Danny Ponder, 195 A.D.3d 123, 2021 WL 1806248, 2021 NY Slip Op 02880, 2021 WL 1806428 (1st Dept. 5/6/21).

The first department (Kapnick, J.), held that the odor of marijuana, together with a "de minimis" amount of marijuana, "consistent with personal use," found in the center console of the vehicle, did not furnish the requisite probable cause to search the trunk of the defendant's vehicle stopped by the police for a traffic infraction in Manhattan under the automobile exception under *United States v. Ross, 456 U.S. 798, 800 (1982*) and *People v. Langen, 60 N.Y.2d 170, 181 (1983*), because there was no "factual nexus" between the possession of an amount of marijuana consistent with personal consumption and a search for contraband in the trunk of the vehicle. In so ruling, the court noted in a footnote, that new P.L. 222.05(4) was recently enacted, effective March 31, 2021, which provides that during an investigation into whether an operator of a vehicle is impaired by drugs, "the odor of burnt cannabis shall not provide probable cause to search any area of a vehicle that is not readily accessible to the driver and reasonably likely to contain evidence relevant to the driver's condition." Compare *People v. Nehemiah Henderson, __ A.D.3d __, 2021 WL 3641432, 2021 NY Slip Op 04721 (2nd Dept. 8/18/21*), in which the second department without mention of *Ponder* or the new statute affirmed a warrantless search of an automobile by state troopers with the predicate for the search based on the smell of burning marijuana, and *People v. Donnie McCray, 195 A.D.3d 555 (1st Dept. 6/24/21)* in which *Ponder* was distinguished based on facts present beyond the "mere" smell of marijuana, including furtive movements, the observation of marijuana smoking and marijuana itself inside the car. See also, *People v. Ronnie L. Boswell, Jr., __ A.D.3d __, 150 N.Y.S.3d 640 (4th Dept. 8/26/21) [#KA-17-001058],* in which the fourth department held without citation to *Ponder* or the new cannabis legislation that the odor of marijuana, detected by a trained police officer provided reasonable cause to frisk a defendant who instead fled which resulted in the discovery of a weapon that he discarded.

People v. Sayed Ahmad, __ A.D.3d __, 2021 NY Slip Op 02404 (2nd Dept. 4/21/21).

There was insufficient reasonable suspicion for a police officer to stop the defendant's car following the bare bones report of a "suspicious" car travelling slowly on a road in a sparsely trafficked area of Nassau County by placing his patrol car in front of the defendant's vehicle. As

such, the subsequent seizure of a gravity knife was improper to the extent that the lower court order denying suppression was reversed. In so ruling, the second department held that where there was an insufficient basis in the suppression hearing record to conclude that the defendant's car was the same vehicle in the initial report, and moreover that the road that the defendant's car was stopped was actually a private road, the suppression court should not have concluded that the police officer properly arrested him for trespassing and thereafter discovered the knife.

People v. James Benbow, __ A.D.3d __, 2021 NY Slip Op 02304 (2nd Dept. 4/14/21).

The lower court erred in finding, that NYPD officers had lawfully stopped the defendant before the defendant fled from the police and removed a gun from his waist where the hearing testimony indicated that police officers who were in a police sergeant's vehicle had received a tip that two individuals, one of whom had a gun, were leaving the club, but here was no evidence presented at the hearing as to the identity of the individual who provided the tip, no evidence that the informant explained to the police how he or she knew about the gun, no evidence that the informant supplied any basis to believe that he or she had inside information about the defendant, and no evidence that the informant had "'knowledge of concealed criminal activity,'" quoting *Florida v J.L., 529 U.S. 266, 272 (1990)* such that the police lacked reasonable suspicion to stop the defendant and his companion as he ran from them and as he did so removed a gun from his waist based solely on the tip. In reversing, the second department rejected the People's appellate claims that there was at least a founded suspicion to stop the defendant as a common-law intrusion or that even assuming the police stop was unlawful, the defendant's act of removing the gun was independent thereof where neither of these arguments was raised at the suppression court level.

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People v. Anthony Lawrence, __ A.D.3d __, 2021 NY Slip Op 01921 (4th Dept. 3/26/21).

Two police officers responded to the scene of a one-car collision in Oneida County and observed defendant and a woman standing outside of the vehicle, which had struck a tree. The woman informed the officers that she had been driving the vehicle and that defendant had been a passenger. The woman did not have identification, and the officers allowed her to walk to her nearby residence to retrieve it. During the encounter, defendant informed the officers that the vehicle belonged to a friend and that its registration certificate was inside. Although defendant stated that he would retrieve the registration certificate, one of the officers then indicated that he would retrieve the registration certificate because he was standing closer to the car. The officer then bent down and entered the car so that he could access the glove compartment. As he did so, the officer saw a revolver on the dashboard that, because of the manner in which the airbag had deployed, had not been visible from the outside. At the suppression hearing, the officer testified that defendant did not consent to the search of the vehicle, and the officer agreed that he lacked

probable cause to conduct the search. The fourth department reversed a lower court denial of suppression on the holding that the where the officer lacked probable cause to search the car, there were no particularized “safety concerns” as alleged by the People that required the police, rather than the defendant to enter the vehicle and thereafter observe the weapon.

People v. Sandley Jonathas, 192 A.D.3d 646, 2021 NY Slip Op 01954 (1st Dept. 3/30/21).

The defendant was a passenger in a car, with a Massachusetts license plate, that was stopped for driving through a red light in a "high crime" neighborhood. The driver of the car complied with the demands of one of the officers for his driver's license and that he get out of the car, but was "visibly nervous," breathing heavily, and stammering in his responses to the officer's questions. Moments later, one of the other officers asked whether there were any weapons in the car. This ultimately led to the recovery of a pistol from defendant. The first department reversed a Manhattan court order denying suppression on the holding that the circumstances did not give rise to the founded suspicion of criminality that was required to authorize this level two inquiry under *People v. Garcia, 24 N.Y.3d 317, 324 (2012).* In so ruling, the court held that, neither occurrence of the stop for a traffic violation in a "high crime" area, nor the unproven perception of one of the officers that in general out-of-state license plates are more highly correlated with criminality than New York license plates, elevated the suspicion to the level required to authorize a common-law inquiry.

People v. Qwunta Curry, __ A.D.3d __ (4th Dept. 3/26/21) [#KA-18-01548].

Evidence was adduced at a suppression hearing that police officers in Onondaga County observed that a vehicle driven and occupied solely by defendant had illegally tinted side windows and, instead of immediately pulling over when the officers activated their emergency lights, continued driving for several hundred feet despite the presence of numerous safe locations to stop. During that period, the vehicle veered slightly and the arresting officer observed through the back window that defendant was making a “furtive, lunging movement” to the right toward the passenger seat. The arresting officer’s concerns with defendant’s evasive delay in pulling over and furtive movement within the vehicle included his belief, based on his experience, that defendant was trying to conceal something such as contraband. After defendant stopped and was removed from the vehicle, the arresting officer observed and then confirmed with a field test that there was cocaine on the driver’s seat and floorboard. Despite the fact that a subsequent inventory search of the vehicle revealed the presence of a digital scale with cocaine residue on it and multiple cell phones, the arresting officer had not found anything on defendant’s person upon frisking him. Based on the encounter, the arresting officer conveyed to the booking officer at the police station hat he suspected that defendant had some type of contraband on his person. The fourth department affirmed the denial of suppression on the holding that the testimony of the booking officer established that he did not initiate a strip search based on a blanket policy, but

rather was based on the consideration of both the nature of the crime for which defendant was arrested and the information conveyed by the arresting officer regarding his suspicion that defendant was concealing contraband [see *People v. Mothersell, 14 N.Y.3d 363, 366 (2010)* and (*People v. Hall, 10 N.Y.3d 303, 309 (2008)*], relied on by the court. As the appellate division noted, "[b]ased on that evidence, including defendant's evasive delay in pulling over, his furtive movement in the vehicle before doing so, the discovery of items associated with drug trafficking such as loose cocaine, the scale with cocaine residue on it and multiple cell phones, the lack of any contraband found on defendant's person following the pat frisk, and the inference drawn by the arresting officer based on his experience that defendant was concealing contraband on his person 'the strip search and visual cavity inspection of defendant's body were constitutionally valid because the particular facts, viewed objectively and in their totality, provided the police with reasonable suspicion that defendant had drugs secreted underneath his clothing and possibly in his body,'" quoting *Hall, 10 N.Y.3d at 312.*

People v. Francisco Rivera, 192 A.D.3d 920, 2021 NY Slip Op 08256 (2nd Dept. 3/17/21).

At the suppression hearing, a police officer testified that the defendant's vehicle was "parked on the corner" at the time of the defendant's arrest, there was no testimony that the vehicle was parked illegally or that there were any posted time limits pertaining to the space where the vehicle was parked. The People, however, presented no evidence demonstrating any history of burglary or vandalism in the area where the defendant had parked his vehicle, and the officer testified that the vehicle was driven to the precinct because it was used in the commission of a crime. Thus, the People failed to establish that the impoundment of the defendant's vehicle was in the interests of public safety or part of the police's community caretaking function under *South Dakota v Opperman*, 428 U.S. 364, 368 (1968); *People v Tardi*, 28 N.Y.3d 1077, 1078 (2016). Moreover, although the officer who performed the inventory search of the defendant's vehicle testified that the policy for conducting such searches was located in the Patrol Guide, the People presented no evidence demonstrating the requirements of the policy for impounding and searching a vehicle, or whether the officer complied with that policy when she conducted the inventory search of the defendant's vehicle (*see People v Tardi*, 28 N.Y.3d at 1078; *People v Weeks, 182 AD3d 539, 541 (2nd Dept. 2020).* As such a Queens County order denying suppression was reversed. Compare, *People v. Rakeem Douglas, 193 A.D.3d 622, 2021 NY Slip Op 02501 (1st Dept. 4/27/21)* in which an inventory search of the defendant's car conducted sometime after his arrest for weapons possession was sustained on the holding that any delay was explained by the exigencies of the police investigation.

People v. Joshua Williams, __ A.D.3d __, 2020 NY Slip Op 00983 (4th Dept. 2/11/21) {#KA-16-2227].

Officers on patrol stopped the vehicle in which the defendant was a backseat passenger after observing that the driver was not wearing a seatbelt. As officers were investigating the validity of the occupants' licenses, the defendant appeared nervous and turned his body toward his waistband, blocking the officers' view of his hands. When asked to remove his hands from the waistband area of his pants, defendant complied, stating that he was "looking for a bottle cap upon which to chew." Once it was discovered that none of the occupants had a valid driver's license, the officers asked the occupants to exit the vehicle. At that point, defendant "bladed away" from the officers while "reach[ing] for his waistband." As one of the officers prepared to conduct a pat frisk, the defendant "pulled away and ran." While he was running, defendant had his hands in front of him, "huddled in." Officers thereafter pursued the defendant and took him into custody. Ultimately, a weapon was found in a yard in which the defendant had fallen during the pursuit. Although defendant denied possession of the gun, he informed officers that he knew it was going to be tested and stated that, "if it [came] back with a body on it or it's dirty," then they would "have to sit down and talk again." At the suppression hearing, the officers candidly admitted that they never saw a bulge or any other indication of an object in defendant's waistband and that they never saw defendant actually touch his waistband. A majority of the fourth department reversed a Monroe county court denial of suppression by a 3-2 vote on a holding that the defendant's nervousness, use of a bottle cap, and "blading" do not provide additional specific circumstances indicating that defendant was engaged in criminal activity. As the court noted, "[t]here is no doubt that defendant engaged in furtive and suspicious activity and that his pattern of behavior, viewed as a whole, was suspicious, but there is nothing in this record to establish that the officers had a reasonable suspicion of criminal conduct to justify the pursuit."

People v. Nissar Moore, __ A.D.3d __, 2021 NY Slip Op 00927 (4th Dept. 2/11/21) [#KA-20-00592].

The police properly pursued and recovered a weapon that was properly ruled admissible at the lower court's suppression hearing based on proof that an unidentified person called 911 and said that there was a group of five to seven males at a particular location and that two of the men "had guns out." According to the caller, one of the men with a gun was wearing a tan and black coat while the other was wearing a black coat. One officer responded to the location identified by the caller and observed two groups of men walking in different directions. The officer exited her patrol car, approached a man wearing a tan and brown coat, and asked if he would consent to a pat frisk. The man obliged, and the officer found no weapons. In the meantime, a man wearing a black coat continued walking, and his movements were captured on a street pole police camera that was being monitored by a different officer. The man in the black coat was defendant, who was on probation at the time. The monitoring officer reported defendant's whereabouts over the police radio, stating that he matched the description provided by the anonymous caller. A third officer was in the vicinity in an unmarked vehicle, heard the report, activated the rear emergency lights on his vehicle, and responded to the scene. As the third officer approached the scene, he observed defendant in a black coat walking westbound on the sidewalk. Upon seeing the third

officer in his vehicle, defendant ran down a driveway. The third officer pulled into the driveway of that residence and, while still in the vehicle, observed defendant throw what appeared to be a long-barreled handgun over the fence while he ran. The third officer then exited his vehicle and chased defendant, ultimately apprehending him. A loaded .22-caliber firearm was found on the ground in the backyard adjacent to the driveway. As the appellate division held, there was sufficient reasonable suspicion to warrant the pursuit and recovery of the weapon where the handgun was discarded by the defendant following a lawful pursuit.

People v. Lorenzo Sykes, __ A.D.3d __, 2021 NY Slip Op 00530 (1st Dept. 2/2/21).

The suppression court properly held that exigent circumstances permitted the police to enter the defendant's home, arrest him and thereafter seize and handgun found under a pillow in a bedroom where a prostitution victim's statements to the police, while pointing to defendant's nearby house, provided "probable cause to arrest him" for the "violent crime[s]" of raping her and holding her against her will for days, and thus, gave police "strong reason to believe that defendant was inside his" home and where he was reasonably believed to be armed because the victim told the police that defendant kept a handgun under his pillow (*see e.g. People v. McBride, 14 N.Y.3d 440, 446 (2010) and People v Funches, 89 N.Y.2d 1005, 1007 (1997),* relied on by the court. In so ruling, the court held that under the "particular circumstances" of this case, it was not dispositive whether defendant posed a flight risk. S*ee People v Hallman, 237 A.D.2d 17, 22-23 [1st Dept 1997], aff'd 92 N.Y.2d 840 1998).*

People v. Ahzallam Kabia, 190 A.D.3d 1105, 2021 NY Slip Op 00209 (3rd Dept. 1/14/21).

The suppression court found that a shotgun shell was discovered on defendant's person during a limited protective pat-down search of defendant, which then provided Albany City police with probable cause to search the vehicle. The third department, however, held that this was not supported by the evidence presented at the suppression hearing, which demonstrated that the search of the vehicle actually preceded the search of defendant's person and discovery of the shotgun shell. In so ruling, the court also held that although the People raised other arguments that could potentially justify the search of the vehicle and defendant's person, the appellate division was statutorily restricted from considering issues not ruled upon by the trial court under C.P.L. 470.15 [1] and *People v LaFontaine*, 92 NY2d 470, 473-474 [1998). Interestingly, in reversing, the appeal was held in abeyance and the matter remitted the matter to county court to review the evidence presented at the suppression hearing, consider any alternate bases to suppress the physical evidence and render a new determination on defendant's motion.

People v. Reginald E. Blandford, 190 A.D.3d 1033, 2021 NY Slip Op 00058 (3rd Dept. 1/7/21).

A State Police investigator in Elmira, New York saw defendant drive past him at about 5:00 p.m. without wearing a seatbelt. Based upon past surveillance and general police knowledge, the investigator knew that defendant was involved in the illegal sale of narcotics. As the investigator followed defendant's vehicle, he contacted a state trooper who was a canine handler, advised the trooper of what he had seen and asked the trooper to come to the scene to conduct a traffic stop of defendant's vehicle. The investigator watched the defendant drive into the parking lot of a convenience store that was familiar to the investigator as a "trouble spot" for drug transactions. Th defendant got out of his vehicle and entered the store, where he remained for about five minutes. When the defendant left the store, he made physical contact with at least one of several people outside the store, which the investigator described as "a handshake, type hug thing." The investigator did not see anything in defendant's hands during this contact, but he testified that, in his professional experience, it was common for participants in outdoor drug transactions to "hug somebody, tap them up, and make an exchange" of currency and narcotics. He described the convenience store as "notorious" for such activity. The defendant and a male passenger then got into defendant's car and drove away. After being contacted by the investigator, the trooper drove with his canine partner to the convenience store. As he arrived, he saw defendant leaving the building with no purchases in his hands. The trooper watched defendant conversing with people outside the store and "giving hand-shakes, high fives, [and] hugs," behaviors that, in the trooper's experience, occurred "routinely" during drug transactions. The trooper followed the defendant's vehicle and, at 5:10 p.m., observed that the license plate was inadequately lit. The trooper turned on his emergency lights to initiate a stop and observed a "slow roll response," in which defendant slowed down but did not immediately stop his vehicle. The trooper saw defendant make "furtive movements" inside the car, ducking down in his seat, moving around, reaching over the passenger seat and doing something that the trooper could not see "in the floorboard area and/or the backseat." He stated that, in his professional experience, this behavior was not typical of most drivers, who usually came to an immediate stop and "s[a]t easy within the seat" when pulled over. After the vehicle stopped, the trooper spoke with defendant at the driver side window and obtained identification information for the defendant and the passenger. The trooper permitted the passenger to leave, asked the defendant to step out of the vehicle and spoke with him briefly about such matters as his reason for visiting the store without making a purchase and the movements he had made in the vehicle. In response, the defendant "talked in a circle" and gave inconsistent answers. The trooper then asked the defendant for permission to search the vehicle. Defendant gave limited consent, agreeing only to a search of the backseat and passenger seat area. The trooper retrieved his canine partner from his vehicle and, at 5:19 p.m., conducted a canine sniff search of the outside of defendant's car. The canine alerted to the outside of the trunk and, when the trunk was opened, to a bag that contained multiple bags of marihuana, digital scales and other paraphernalia associated with drug sales. A majority of the third department held 4-1 that the traffic stop of the vehicle was proper and that thereafter the canine search was proper based on a founded suspicion that criminal activity was afoot under *People v. Devone, 15 N.Y.3d 106 (2010).* Justice Clark dissented on the conclusion that while the stop was valid there was insufficient founded suspicion for the canine search.

People v. Shymeek Harris, __ A.D.3d __, 2020 NY Slip Op 08079 (2nd Dept. 12/30/20).

The appellate division, per Miller, J., reversed a lower court determination following a hearing to deny suppression based on a conclusion that based on inherent inconsistencies that made it the testimony of five People's witnesses, either considered separately or together, "implausible and contradictory," and the inherent inconsistencies in their testimony and ultimately their lack of credibility, there was an insufficient basis to the NYPD stop the defendant's car in Queens and thereafter seize what turned out to be forged instruments therein. Thus, the appellate court declined to credit any portion of the People's proof on the conclusion that it was impossible to tell what happened in connection with the police encounter.

People v. Wagner Soler, __ A.D.3d __, 2020 NY Slip Op 07404, 2020 N.Y. App. Div. Lexis 7533 (2nd Dept. 12/29/20).

Police observed the defendant on a street in Brooklyn at about 12:15 a.m. standing near a vehicle and with what appeared to be a heavy object in one of the sides of the defendant's sweatshirt that appeared to "sag." The defendant entered a car and after driving for a short distance, stopped. The police exited their vehicle and when the defendant exited his car, observed what appeared to be a "heavy, t-shaped object" in the defendant's sweatshirt that was believed to be a gun. One of the officers reached towards the sweatshirt and asked, "what's this or what's that," but the defendant turned and fled before the officer could make contact defendant pocket. As the defendant ran, he discarded what turned out to be a gun. The appellate division reversed a lower court order that denied suppression on these facts on the holding that while the officers were permitted to make a common law inquiry regarding what the object in the sweatshirt was, they were not justified in attempting to touch the sweatshirt as claimed by the People, as a "minimally intrusive self-protective measure where the defendant engaged in no conduct to justify the police action. Moreover, the defendant's act of discarding the weapon was held to not be an independent act separate from the illegal police conduct.

People v. Andrew Tates, __ A.D.3d __, 2020 NY Slip Op 7405, 2020 NY App. Div. Lexis 7624 (2nd Dept. 12/9/20).

Three NYPD police officers observed Jamal Foreman engaged in an altercation with a bouncer at a nightclub in Queens. The officers heard Foreman tell the bouncer that he had a "grip," or gun, in his car, and that he would "take [the bouncer] out." The officers followed Foreman to an SUV that was owned by the defendant. After observing Foreman close the door of the defendant's SUV, they confronted Foreman as the defendant and another man arrived at the vehicle. The three men began to "make a scene," resulting in a large, unruly crowd gathering at the location.

The officers then attempted to arrest the men for disorderly conduct. The defendant pushed against an officer, pulled away from his grasp, and fled, but was quickly apprehended nearby. The defendant's SUV was driven back to the precinct, where a gun subsequently was found in the trunk area. The hearing court held that there was an insufficient basis to support an inventory search because the police seizure of the SUV was unlawful, on a theory advanced by the People, but on its own determined that the automobile exception justified the search and seizure of the weapon. The appellate division reversed on its conclusion that where the People's contention that the search was justified under the automobile exception was raised for the first time on appeal (indeed, the prosecutor conceded that there was insufficient probable cause to arrest the defendant or to search his SUV at the hearing on any other basis than as an inventory search), the claim could not be asserted on appeal, and that as such, under *People v. LaFontaine, 92 N.Y.2d 470, 474 (1998)*, the weapon was ordered suppressed and the defendant's conviction thereon was reversed. The court, however, let stand the defendant's conviction for resisting arrest on the determination that there was no prejudicial spillover.

People v. Phillip Boykin, __ A.D.3d __, 2020 NY Slip Op 07085 (2nd Dept. 11/25/20).

NYPD officers observed the defendant seated in the driver's seat of his vehicle that was parked near a fire hydrant in Queens. They then saw a known gang member enter and exit the vehicle. The officers then approached and one observed "two clear cups of brown liquid, alcohol," in the cup holders in the vehicle's front console and smelled the odor of alcohol as well emanating from the car. The officer then asked the defendant and the front passenger to exit and both complied. Since the rear passenger-side door was opened (according to the officer), with the aid of a flashlight, the officer observed a "white top" of a prescription bottle sticking out of the pouch on the back of the front passenger seat. The officer then entered the vehicle, pulled the bottle out, and observed that it was clear, with no prescription label and had white pills inside that the officer identified as Oxycodone. In reversing a lower court denial of suppression, the appellate division held that while there was probable cause to suspect a violation of VTL 1227, which prohibits the possession of open containers containing alcohol in a vehicle and would have justified entry into the car to seize that item, there was no justification for the removal of the bottle and the inspection thereafter. Thus, the court rejected the People's contention that plain view permitted the seizure of the bottle.

People v. Davon McCurbin, __ A.D.3d __, 2020 NY Slip Op 06811 (2nd Dept. 11/18/20).

An NYPD police officer's observation of the defendant grabbing his waist area and then the observation of a gun handle at the defendant's waist on a Brooklyn street outside the doorway of a delicatessen, coupled with the defendant's flight upon making eye contact with the officer,

provided the requisite reasonable suspicion that the defendant was involved in a felony or misdemeanor, to the extent that the police pursuit of the defendant and the subsequent recovery of a weapon was justified as a Level 3 intrusion under *DeBour*. In affirming the lower court denial of suppression, the court rejected the defendant's contention that a video surveillance recording of the episode did not undermine the police officer's testimony that he had an unobstructed view of the defendant grabbing his waist area where he saw the brown handle of the gun and thus determined that the defendant's abandonment of the property was not precipitated by any illegal police conduct.

People v. Cory Lawrence, __ A.D.3d __, 2020 NY Slip Op 06810 (2nd Dept. 11/18/20).

After receiving an anonymous tip that, earlier in the evening, a fight had occurred at a Brooklyn funeral home and an individual allegedly had a gun, NYPD officers drove to the funeral home. Upon arriving, the officers observed a group of five or six males, some or all of whom were drinking alcohol on the sidewalk outside of the funeral home. When the officers stopped their vehicle at the entrance of the parking lot to the funeral home, all but one of the males in the group approached the officers and asked if there was anything wrong and if they could help. The officers responded that there was "no problem," and asked the men to "keep the drinks behind" a fence outside of the funeral home. The defendant, who was initially part of the group, had separated from the group, did not approach the police vehicle, and instead walked away from the officers. The defendant walked to a parked vehicle, and asked another male in the group to open the door to the vehicle. When that male declined to open the door, the defendant continued to walk away from the officers. As a result, the officers slowly drove their vehicle behind the defendant, who was walking on the sidewalk. The officers then stopped their vehicle in the street behind the defendant, and attempted to get the defendant's attention by yelling "yo" and "excuse me, sir" through the open windows of the vehicle. Although the defendant initially did not respond, he eventually looked over his shoulder and responded, "Nah." One officer testified that he opened the door of the police vehicle, and the defendant "immediately started running." The further testified that "by the time [he] was able to . . . exit the vehicle," he saw the defendant reach into his pocket and throw a "silver metallic object that appeared to be a gun." The officer thus stated that he heard a "metal on metal sound," pursued the defendant on foot, and placed the defendant under arrest. Other officers recovered a gun from the area where the arresting saw the defendant throw the object**.** The second department affirmed a denial of suppression of the weapon on a holding that the officers had an objective credible reason to approach the defendant with a request for information when they first observed him walking away from the group of men who approached the officers, that the officers' action in following behind the defendant in their patrol car as he walked on the sidewalk was unobtrusive and did not elevate the encounter beyond a level-one *DeBour* request for information.

People v. Jose Hernandez, 181 A.D.3d 456, 2020 NY Slip Op 05321 (4th Dept. 10/2/20).

Police officers lacked reasonable suspicion to detain the defendant based on proof that while conducting surveillance of a shopping plaza parking lot known for narcotics transactions, they observed the defendant approach a parked car that was located in a remote location of the lot in the middle of the afternoon. Although they could not see "what if anything was being passed back and forth," since the defendant had his back to them, the officer "surmised" that a drug transaction was underway. Although a "mere hunch" or "gun reaction" is insufficient to satisfy this standard, the officers nonetheless directed two teams of police to stop the purported buyer's vehicle as well as the vehicle in which the defendant left the scene as a passenger. One of the officers approached the car in which the defendant was a passenger while it was located at a fast-food restaurant one-half mile away from the scene of the purported transaction. After the defendant exited the vehicle he was immediately handcuffed, taken to a different area of the parking lot and questioned "for a while." After his admission that he was in possession of cocaine he was arrested. A second team of officers stopped and questioned the purported buyer. She admitted purchasing $50 worth of cocaine and, after the officers drove her to the location identified the defendant as the person who sold her the cocaine. The defendant was transported to the police station where officers recovered cocaine and $50 from his person. The court further held that because there was no reasonable suspicion to detain, since the officers could not see any pertinent part of an alleged narcotics transaction the defendant's detention, which ripened into a de facto arrest when he was handcuffed was not authorized as well since there was also insufficient probable cause to support the intrusion at each point in the unfolding episode. As such, the defendant's statements, as well as the cocaine seized from him should have been suppressed and as a result, his conviction was reversed and a new trial ordered. Compare, *United States v. Jesus Torres-Miranda, __ F. Supp. 3d __, 2021 WL 77066 (D. Conn. 1/8/21)* [Following *United States* v *Fiseku, 915 F.3d 853 (2nd Cir. 2018);* Detention of defendant in handcuffs during 30 minute *Terry* stop while police investigated not unreasonable; suppression of handgun denied].

People v. Tony Richards, __ A.D.3d __, 2020 NY Slip Op 05232 (2nd Dept. 9/30/20).

NYPD officers responded to a Queens home on a report that a woman was being held at gunpoint. When they arrived, the observed the victim through the basement window who was holding a small child and appeared to be frantic. The police pried the bars from the window and lifted the child and victim out and through the basement window and moved them to s secure location. While the officers were removing the victim, she was screaming, "He's got a gun. He's got a gun," and said this person's name was "Tony." At the direction of the officers, three people including the defendant exited the house. The officers then entered the house to look for other occupants. When one officer was at the bottom of the basement stairs, he peered into a boiler room and observed a firearm in plain view resting on a piece of furniture. He recovered this weapon and went outside. The victim then identified the defendant as "Tony," and stated that the firearm was not the one he had pointed at her. The next day the police searched the house with a

search warrant and did not recover the weapon used on the victim. The firearm that was recovered was tested for DNA that was found to match the defendant. The court affirmed the defendant's second degree weapons possession conviction based on knowing possession but acquitted of the same crime based on possession with intent to use unlawfully after a denial of suppression. In so ruling the appellate division held that the emergency faced by responding police was continuing and had not abated even after the victim was secured since when the police entered the house they did not know if other person were still present who may have been at risk of injury or danger such that the warrantless search was reasonable.

People v. Keanu Whitfield, 186 A.D.3d 1414, 2020 NY Slip Op 04985 (2nd Dept. 9/16/20).

NYPD police officers observed a vehicle bearing out-of-state license plates accelerate quickly and attain a speed approaching twice the posted speed limit in a residential Queens neighborhood. The officers activated the lights and sirens on their vehicle and attempted to stop the offending vehicle for a traffic violation. The car did not stop and continued by making a left turn without signaling onto another street. The officers followed and, although they briefly lost sight of the vehicle, after they had traveled less than two blocks, they located it parked in front of the defendant's house. The officers observed two individuals exit the vehicle and run toward the back of the defendant's house which was surrounded by a fence that had an open gate. A police officer briefly entered the property through the open gate in an effort to locate the driver of the vehicle. While that officer was standing on the driveway near the back of the defendant's house, he observed the defendant open a side door to his house, look around, and throw a pair of gym shorts over the back fence of the property and onto the adjoining property. The officer heard the defendant utter a profanity and observed a firearm coming out of the gym shorts as it flew through the air. The appellate division affirmed a lower court denial of suppression and affirmed the defendant's weapons possession and related-crimes conviction on the holding that the officer's "brief, peaceful" entry onto the curtilage of the defendant's property was justified because it was in hot pursuit of the defendant and that the defendant's throwing the shorts with the gun inside over the fence was an act of abandonment.

United States v. Joshua James Cooley, __ U.S. __ (6/3/21) [9/0; Breyer, J.].

A unanimous Court held 9-0 per Breyer, J., that a tribal police officer in Montana had authority to stop and detain for driving under the influence and then search a non-tribal person who was on a public road that ran through an Indian reservation on a holding that tribes retain the authority to address conduct that has a direct effect on the health and safety of tribal members. The search of the defendant's vehicle resulted in the discovery of several weapons and the defendant's later transport to non-tribal authorities.

Edward D. Caniglia v. Robert F. Strom, __ U.S. __, 141 S.Ct. 1593 (5/17/21) [9/0; Thomas, J.].

The Court unanimously held that the "community caretaking exception to the requirement fo a search warrant recognized in *Cady v. Dombrowski, 413 U.S. 433 (1973)* did not justify the warrantless seizure of a firearm from a home following a domestic dispute in Rhode Island between a husband and a wife. Thus, where the police were called to a home following a domestic dispute and after the complainant's husband was taken to the hospital, the complainant told the police that her husband had two handguns inside the home, the circuit court sustained the entry and seizure of the weapons. The community caretaking function is related to, but lacks the urgent nature of the "exigent circumstances" and "emergency aid exceptions to the warrant requirement, and was relied on by the district and first circuit court of appeals in the context of a civil lawsuit to sustain the search [931 F.3d 112 (1st Cir. 2020)]. Chief Justice Roberts, joined by Justice Breyer concurred, to emphasize that nothing in the Court's holding in *Caniglia* lessened the breadth of the emergency aid exception recognized in *Brigham City v. Stuart, 547 U.S. 398 (2006) and Michigan v. Fisher, 588 U.S. 45 (2009*). Justice Kavanaugh also separately concurred to express the point in greater detail. Justice Alito, also separately concurred to outline his concern for the continued validity of the "community caretaking" exception on appropriate facts such a presenting suicide and the enforcement of so-called "red-flag laws" as "free-stranding" fourth amendment issue.

Roxanne Torres v. Janice Madrid, __ U.S. __, 141 S.Ct. 989 (3/25/21) [5/2; Roberts, C.J.].

"The application of physical force to the body of a person with intent to restrain is a 'seizure' under the fourth amendment even if the person does not submit and is not subdued." Thus, in the context of a civil rights lawsuit under 42 U.S.C. 1983 that alleged excessive force by New Mexico State Police based on an officer's shooting at the plaintiff 13 times and hitting her twice as the police attempted to execute an arrest warrant, the plaintiff's flight (she maintained she thought she was being carjacked and fled by stealing a car) with her continued driving for 75 miles and thereafter her hospitalization, the majority in an analysis of English common law precedents expanded the notion of a "seizure" beyond mere touching under *California v. Hodari D., 499 U.S. 621 (1991)* to include this scenario and thus, allowed the litigation to continue. Justice Gorsuch, joined by Justice Thomas and Alito, dissented on the conclusion that the majority's holding was mistaken and "novel."

United States v. Calvin Weaver, __ F.3d __, 2020 WL 5523210 (2nd Cir. 9/15/20).

The defendant's felon in possession conviction was reversed and suppression was ordered by a 2-1 vote (Pooler, J) with Calibresi, J., concurring, in a case in which Syracuse police observed the defendant in a "high crime area" stare at the passing police car as the police saw him engage in a "subtle tug" at his waist area. After the defendant entered a car as a passenger the police then stopped the vehicle for a traffic infraction. They then frisked the defendant which resulted in the discovery of a loaded weapon. The plurality held that while there was a sufficient basis for the stop, there was an insufficient basis to first order the defendant out of the car, which was a minimal intrusion, but then frisk him because there was insufficient proof by reasonable suspicion that whatever he was carrying was dangerous. Judge Calibresi concurred on his conclusion that the frisk was invalid and based on the "current protests" about police conduct, suggested consideration of the exclusionary rule and qualified immunity for police. Judge Livingston, would have affirmed on her conclusion that the fair inferences present justified the police fear of danger under the circumstances and second circuit precedent. Interestingly, the Onondaga county court suppressed the same evidence in this case on the prosecution of the defendant in state court on second degree weapons possession.
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Arthur Gergory Lange v. California, __ U.S. __, 141 S.Ct. 2011 (6/23/21) [9/0; Kagan, J.].

The Supreme Court unanimously held that the pursuit of a fleeing misdemeanant does not always or "categorically" permit a hot pursuit entry into a suspect's home. Here a police officer observed the defendant operating a motor vehicle playing music loudly and honking its horn and when he tried to stop it, the defendant proceeding to his nearby driveway, exited the vehicle and entered a home through an open garage door. The pursuing officer managed to get his foot in the garage doorway. The sensor reacted and the door returned to the open position. When the officer entered he saw the defendant in the garage area and arrested him for driving under the influence of alcohol. The Court reversed lower court orders to the contrary. The case is discussed in Kamins, "*The Supreme Court Weighs in on the 'Hot Pursuit' Doctrine*," N.Y.L.J. 10/30/20 @ p. 3, who notes that while the issue is settled in New York when the suspect has committed a felony, it was unsettled in cases involving misdemeanors. See *People v. Watson, 115 A.D.3d 687 (2nd Dept. 2014); People v. Whitfield, 186 A.D.3d 1414 (2nd Dept. 2020);* and *Stark v. New York State Dept. of Motor Vehicles, 104 A.D.3d 194 (3rd Dept. 1984*).
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United States v. Bekem Fiseku, __ F.3d __, 2018 U.S. App. Lexis 35281 (2nd Cir. 10/18/18).

A Bedford, New York police officer observed a man sitting in a parked near a vacant home in a rural area of Westchester about 1:00 a.m. This person told the officer that he had been visiting a friend, that he had transmission trouble and that he was waiting for another friend to arrive with a tow-truck from Brooklyn. The officer left but about five minutes later observed the same car driving on a nearby street. The officer became concerned that the operator was casing the neighborhood for an opportune burglary. The officer followed the car to a nearby park and ride and observed the same man speaking with two other men, one of whom was the defendant in or near a second parked car. The officer radio'ed for back-up. As additional officers responded, the first officer approached the parked car and asked the two other men to exit the car and patted them down. Nothing was found. The defendant was also frisked with similar results. The police then handcuffed all three for "officer safety" but did not draw their guns and explained to the three that they were not under arrest, but that they were being "detained" while the officers investigated their suspicious activity. The men were separated and provided inconsistent stories. The driver of the parked car was then asked if there was "anything in the vehicle that shouldn't be there? The driver indicated that there was not and indicated that the police could "look." A subsequent search of the car resulted in the discovery of false police badges, walkie-talkies, a stun gun, a bb gun reconfigured to replicate a Colt .45 pistol, a blank pistol reconfigured to replicate a .22 pistol, gloves, a screw driver and duct tape. The circuit court affirmed a district court denial of suppression on the holding that the "unusual circumstances" of the defendant's apprehension justified the use of handcuffs and that their implementation did not improperly result in a de facto arrest without probable cause in an investigatory stop. In so ruling, the court also held that the police had sufficient reasonable suspicion to engage in an investigatory stop and that the use of the handcuffs was proper as a safety measure in *Terry* stop during an unfolding situation in a remote location. The case, which represents a continuing split in the circuits, is discussed in M. Flumenbaum & B. Karp, *"Court Shifts on Effect of Using Handcuffs During Police Encounter,"* N.Y.L.J. 1/30/19 @ p. 3. Compare, *United States v. Kenny Pena, 351 F.Supp.3d 723 (S.D.N.Y. 2019),* in which the court, distinguished *Fiseku,* and found that there was a de facto arrest when the police handcuffed the defendant for a 50 minute period and then searched him.

Automobile Stops and Searches

People v. Robert Hinshaw, __ N.Y.3d __, 2020 NY Slip Op 04816 (9/1/20) [6/1;Wilson, J.], N.Y.L.J. 9/2/20 @ p. 18 and 9/3/20 @ p. 1.

A majority of the Court of Appeals reversed a divided fourth department ruling [170A.D.3d 16890 (4th Dept. 2019)] on the conclusion that the police lacked an objectively reasonable suspicion to stop the defendant's car for a traffic infraction based upon a radio inquiry undertaken with no proof of any traffic infraction or criminality merely because the vehicle in which defendant was traveling was indicated as having been in an impound yard. Thus, a trooper in Buffalo "observed no traffic violations and saw that the inspection sticker was valid, both of the occupants were wearing their seatbelts and "everything looked good," but the trooper thereafter ran a check of the car that resulted in a response, "THE FOLLOWING HAS BEEN REPORTED AS AN IMPOUND VEHICLE - IT SHOULD NOT BE TREATED AS A STOLEN VEHICLE HIT - NO FURTHER ACTION SHOULD BE TAKEN BASED SOLELY UPON THIS IMPOUNDED RESPONSE." The trooper then directed the operator to stop in order to "investigate further and find out what the problem was" and as he later testified at the suppression hearing, on his consideration of the notice as "indicating the car may have been stolen." The driver-defendant provided his license and registration and both were in order. When the trooper asked about the impound notification, the defendant stated that the car had been stolen previously. The trooper detected an order of marijuana and observed a "roach" in the center console. The trooper then searched the driver and the passenger of the vehicle and found additional marijuana on the floor of the passenger side and the defendant's waistband. The trooper eventually found a loaded gun under the driver's seat. The majority of the Court held that there was insufficient reasonable suspicion, as required, to stop the car for investigative purposes, while also noting that as been held by all four appellate divisions, probable cause is required to stop a car for a traffic infraction with traffic stops sobriety checks permitted without suspicion. In so ruling the majority noted that notwithstanding all other facts present, the trooper candidly conceded at the suppression hearing he had no reason to stop defendant," quoting *People v. Ingle, 36 N.Y.2d 413, 420 (1975)* and that the trooper's subjective belief that the impound was based on some illegality, even honestly held was insufficient. Judge Stein dissented on her conclusion that the report of impound indicated to the trooper that the vehicle should not be out on the road and that this information required further investigation after a proper stop. Judge Garcia also dissented on his conclusion that the information received in the radio report regarding the impound was sufficient minimal reasonable suspicion to stop the car. See also, *United States v. Jaison R. Feliciana, __F.3d __, 2020 WL 549878 (4th Cir. 9/11/20)* for a similar ruling. The case is discussed in B. Kamins, "*A Return To Independent State Constitutionalism*," N.Y.L.J. 4/5/21.

People v. Limmia Page, 35 N.Y.3d 199, 2020 N.Y. Lexis 1084, 2020 NY Slip Op 03265 (6/11/20) [5/2; Feinman, J.]. N.Y.L.J. 6/12/20 @ p. 18.

A majority of the Court, per Feinman, J., held that the stop of the defendant's vehicle by a marine interdiction agent with the U.S. Customs and Border Protection Air and Marine Operations, who was also a deputized task force officer with the Niagara County Sheriff's Department, in Buffalo, after the agent observed the vehicle engaging in dangerous maneuvers and allegedly committing several traffic violations was without law enforcement or peace officer authority under C.P.L. 2.15 and 140.25 but that it was valid as a citizen's arrest under C.P.L. 140.30. As such lower court orders that suppressed a firearm and ammunition that was thereafter seized by Buffalo City Police Officers from the vehicle who responded to the scene from the vehicle were reversed. In so ruling, majority distinguished *People v. Williams, 4 N.Y.3d 535 (2005),* which held that the warrantless traffic stop by Buffalo Housing Authority officers was not valid and thus reversed the appellate division decision that the Marine interdiction agent's actions of displaying light emergency lights affixed to his truck to effectuate the stop caused the defendant-driver to submit to his position under color of authority as a law enforcement officer and were not the action of a private citizen under C.P.L. 140.30(1)(b). Judge Fahey, joined by Judge Rivera, dissented on the conclusion that the majority expanded the ability of law enforcement officials to effect arrests "that they have no authority to make, under the guise of a citizen's arrest [b]y holding that a law enforcement official who is not a police officer or peace officer may impersonate one," to arrest. The case is discussed in, L.K. Neuner & W.T. Russell, "*Powers of Law Enforcement When Acting Outside Jurisdiction,*" N.Y.L.J. 7/16/20 @ p. 3 and P. Schectman, "*Criminal Practice: Amid Pandemic, Criminal Cases Continued to Steer a Middle Course,*" N.Y.L.J. Court of Appeals and Appellate Practice pp. S2 & S3. Compare, *People v. Jean Janvier, 186 A.D.3d 1247, 2020 NY Slip Op 04861 (2nd Dept. 9/2/20)* in which a New York City Taxi and Limousine Commission Inspector was held to have been authorized to stop an unlicensed vehicle for hire for a traffic infraction; subsequent assault and related-crime conviction after attempt to detain defendant affirmed].

Clyde S. Bovat v. Vermont, 592 U.S. __ (10/19/20) [Statement of Justice Gorsuch, joined by Justices Sotomayor and Kagan, respecting the denial of certiorari].

Justice Gorsuch, joined by Justices Sotomayor and Kagan, issued an unusual statement in connection with the denial of certiorari in a case in which Vermont game wardens entered the defendant's property, which contained a driveway, detached garage and home, and sought consent of the defendant's wife to search the property for evidence of a "deerjacking." Although it was refused, this was not before the wardens peered in inside the garage and observed what appeared to be "deer hair" on the tailgate of a parked truck in plain view. Thereafter, the wardens returned with a search warrant. Although the Vermont Supreme Court affirmed [2019 Vt. 81, 465 A.2d 103 (2019), without citing *Florida v. Jardines 569 U.S. 1 (2013),* which concerns

warrentless entry into the curtilage of a home, the statement noted law enforcement use of what is called, “knock and talk.”

Kansas v. Charles Glover, __ U.S. __, 140 S.Ct. 1183 (4/6/20) [8/1; Thomas, J.].

A Kansas deputy sheriff ran a license plate check on a pickup truck and discovered that the truck belonged to the defendant and that the defendant’s driver’s license had been revoked. The deputy pulled the truck over because he assumed the defendant was driving. The defendant was indeed driving and was charged with driving as a habitual violator. He moved to suppress all evidence from the stop, claiming that the deputy lacked reasonable suspicion. The trial court granted the motion, but the intermediate appellate court reversed. The Kansas Supreme Court in turn reversed, holding that the deputy violated the Fourth Amendment by stopping Glover without reasonable suspicion of criminal activity. A majority of the Court held 8-1 per Justice Thomas, joined by Justices Kagan and Ginsburg, concurring, that when an officer lacks information negating an inference that the owner is driving the vehicle, an investigative traffic stop made after running a vehicle’s license plate and learning that the registered owner’s driver’s license has been revoked is reasonable under the Fourth Amendment. Thus, based on what the Court has previously held to be the State’s “vital interest” in assuring that only properly licensed motorists operate motor vehicles on public roads [see *Delaware v. Prouse, 440 U.S. 648, 658 (1979)*], and weighing the facts and inferences known to the deputy at the time of the stop, in a common-sense fashion, including that the defendant was the registered owned of the truck and thus the likely operator, notwithstanding that others could have been driving the vehicle, there was “more than reasonable suspicion” to initiate the stop. In so ruling, the majority rejected the claims raised by the defendant and the dissent that the inferences of reasonable suspicion had to be based on law enforcement training and experience to conclude based on reasonable suspicion that the registered owned of a vehicle was its operator. Justice Sotomayor dissented on the conclusion that it was not reasonable to conclude based on an individualized reasonable suspicion that the registered owner of the stopped struck would be its operator at the time of the stop where the defendant’s license to drive had been suspended.

<u>Suppression Motion Practice</u>

People v. Derley Marte, __ A..3d __, 2021 NY Slip Op 04648 (1st Dept. 8/4/21).

A majority of the first department held 4-1 that the trial court properly denied the defendant's mid-trial motion to suppress the results of a breathalyzer test based on an alleged lack of consent in his New York County driving while intoxication prosecution on the grounds of untimeliness. Thus, where defense counsel moved and was provided with a suppression hearing to contest the issue of probable cause and expressly declined the raise the issue of consent pre-trial, the trial court's declination to hear the motion at that late stage of the proceedings was within the courts discretion. A dissenter, Justice Renwick would have reversed on the ground that there was good cause for the late application.

People v. Maximillian Nunez, 190 A.D.3d 565, 2021 NY Slip Op 00266 (1st Dept. 1/19/21).

The defendant allegedly made two statements while in custody following his arrest for weapons possession. In each instance, he was overheard urging a codefendant, who was his girlfriend, to tell the authorities that she was the possessor of a pistol recovered at the apartment where they were arrested. The first statement was overheard by a special agent while the defendant and the codefendant were in a holding cell. The second was overheard by a detective while defendant and the codefendant were being driven to Central Booking. At the initial *Huntley* hearing, the People called the special agent as a witness, but not the detective. The court ruled that the statement overheard by the special agent was admissible. No evidence was presented regarding the later statement overheard by the detective. At a pretrial conference 16 months later, the prosecutor, explaining that the special agent was unavailable to testify because he had been transferred to an assignment outside the United States, asked the court to reopen the suppression hearing to allow the detective to testify to the (second) statement he allegedly overheard. The court granted the application over defense objection, and, after the detective's testimony at the reopened hearing, ruled that the statement to which the detective testified was admissible. The special agent did not testify at trial, and only the statement overheard by the detective was received in evidence. The first department reversed on a holding that under *People v. Kevin W., 22 N.Y.3d 287 (2013)* and *People v. Havekla, 45 N.Y.2d 636 (1978)*, the People could have obtained a ruling on the statement allegedly overheard by the detective at the initial hearing but did not. Thus, where the court issued a ruling after the initial Huntley hearing and the claim to re-open did not involve an allegation of a "flawed proceeding," the error was not harmless and reversal was required

Search Warrants

People v. Tyrone D. Gordon, 36 N,Y.3d 420, 2021 NY Slip Op 01091 (2/18/21) [4/3; Wilson, J.].

A majority of the Court held 4-3 that a search warrant that authorized the search of the "entire premises" did permit the police to search two automobiles parked in the driveway which resulted in the seizure of narcotics and drug paraphernalia in one car and a handgun in the other. As such, and basing its decision on Art I, sec. 12 of the New York Constitution and clear state case precedents in a declination to follow federal precedent [see e.g., *United States v. Ross, 456 U.S. 792 (1982)*], lower court orders that granted suppression were affirmed on a holding that the particularity requirement for search warrants in the state constitution was not satisfied by this language. Judge Feinman, joined by Chief Judge DiFiore and Judge Garcia, dissented on the conclusion that New York is the only state whose highest court has determined that "premises" in a search warrant did not include a vehicle parked in the driveway. The case is discussed in B. Kamins, "*A Return To Independent State Constitutionalism*," N.Y.L.J. 4/5/21. See also, *People v. David M. Moore, 2021 WL 2471167 (4 th Dept. 6/18/21)* [Search of closed door staircase to attic during execution of search warrant That authorized search of "common areas" of dwelling and attached garage improper; drug evidence suppressed but weapon held properly seized in common area

People v. Drury Duval, 36 N.Y.3d 384 (2/11/21) [7/0; Wilson, J.].

The lower court did not err in summarily denying the defendant's motion to controvert a search warrant that sought to search a dwelling in the Bronx that was described with sufficient particularity pursuant to C.P.L. 690.45, by specific address such that the warrant the warrant was facially valid, notwithstanding defense claims that the residence was actually three separate living areas, where the defendant, pursuant to *People v. Mendoza, 82 N.Y.2d 415, 421 (1993)* failed to present sufficient factual allegations to support his claim. As such a divided first department ruling that affirmed the defendant's conviction [179 A.D.3d 62 (1st Dept 2019)], was affirmed.

People v. Reginald Goldman, 35 N.Y.3d 582, 2020 NY Lexis 2515 (10/22/20) [5-2; DiFiore, J.].

A majority of the Court held 5-2, per Chief Judge DiFiore, that aside from notice to counsel and an opportunity to be heard, here is no constitutional requirement that discovery and an adversarial hearing be provided in connection with the issuance of an order requiring the production of a buccal swab by the defendant to conduct a DNA analysis. In addition, the majority of the Court held that social media on YouTube was properly authenticated under the requirements for admissibility during the defendant's homicide trial of media downloaded from the Internet under *People v. Price, 29 N.Y.3d 472 (2017)* in that it accurately represented the images it purported to represent and where the defendant did not contest he was the person indicated in the video.

People v. Jamir Sneed, __ A.D.3d __, 2021 NY Slip Op 05095 (1st Dept/ 9/28/21).

The first department per Renwick, J., held that the trial court should not have summarily denied the defendant's suppression motion without a hearing on the factual issue of whether a Bergdorf Goodman store security guard was functioning as a state actor and thus an agent of the police at the time of an encounter with the defendant. Thus, pursuant to *People v. Mendoza, 82 N.Y.2d 415 (1993),* the case was remanded for the lower court to conduct such a hearing.

People v. Darnell Lambey, __ A.D.3d __, 2021 NY Slip Op 04764 (2nd Dept. 8/25/21).

The Dutchess County Court properly denied that branch of the defendant's omnibus motion which was to controvert the search warrant and to suppress physical evidence found upon its execution where the police affidavit submitted in support thereof contained ample factual allegations of criminal conduct at the apartment wherein the defendant was residing to justify the issuance of the warrant and in particular satisfied the requirements of *Aguilar-Spinelli*, in terms of the informant's reliability. Thus, the second department held that the factual allegations in the police affidavit were sufficient to demonstrate that the confidential informant who provided information to the police was reliable, where that information was corroborated by "personal observations by the police and the two controlled purchases of crack cocaine from the defendant made by an undercover officer."

People v. Uriel Bryant, __ A.D.3d __, 2021 NY Slip Op 03603 (2nd Dept. 6/9/21).

In affirming the lower courts' denial of the defendant's motion to controvert a search warrant on the holding that there was probable cause for the issuance of the warrant, the appellate division also note that the lower court properly found that redactions to the search warrant application and hearing minutes were necessary to protect the identity of a confidential informant.

People v. Amin A. Rashid, __ A.D.3d __, 2021 NY Slip Op 04390 (3rd Dept. 7/15/21).

During the execution of a no-knock search warrant in Broome County, police investigators used a battering ram to enter the designated premises. As they did this, they identified themselves as police officers and ordered the occupants to get to the ground. The defendant, however, attempted to run out of the rear of the dwelling but investigators as that location intercept him and again direct him to lay on the ground. As the defendant was getting on his stomach, the

police observed a weapon sticking out of his back pocket. Officers then handcuffed the defendant and removed the weapon. As they did this one officer asked the defendant if the gun was loaded. The defendant responded that he did not know. The weapon was examined and found to have two live rounds. The third department affirmed the lower court denial of suppression on the holding that although the defendant was not named in the warrant, the police could detain persons present at the scene of the execution of the warrant for their safety. Additionally, the appellate division rejected claims that the defendant should have been provided with Miranda warnings prior to the inquiry about whether the weapon was loaded on the holding that the emergency exception under *New York v Quarles*, 467 U.S. 649, 655-657 (1984) warranted the question.

People v. Terrane Boothe, 188 A.D.3d 1202, 2020 NY Slip Op 07084 (2nd Dept. 11/20/20).

Allegations in an affidavit filed in support of a search warrant to search a cell phone recovered from the defendant following his arrest for a gunpoint robbery in Far Rockaway, Queens, that persons involved in robberies and other crimes "utilize mobile telephones to facilitate their illegal activities" and moreover, without further elaboration, or factual support, that the cell phone recovered on the defendant's person "possesses information concerning the communications related to the instant robbery" were insufficient to establish the requisite probable cause to search inside the cell phone such that a lower court order summarily denying the defendant's motion to controvert the warrant and later conviction for first degree robbery was reversed.. In so ruling, the second department noted that although the arresting officer later testified at trial that he had observed photographs of a gun on the call phone at the time of the defendant's arrest, which "arguably could have established probable cause, had it been lawfully obtained," was never included in the affidavit and thus the case was remanded for a new trial. Compare, *People v. Kaitlin A. Conley, __ A.D.3d __ (4th Dept. 3/18/21) [#KA-20-00601 (4th Dept. 3/18/21)* in which the court rejected claims that the allegations in support of a cell-phone search warrant in a murder investigation were insufficiently particularized, holding, without elaboration that "there was sufficient information in the warrant application to support a reasonable belief that evidence of a crime was on defendant's cell phone."

People v. James Barnett, __ Misc.3d __ (Sup. Ct. N.Y. Co. 12/2/20).

The court granted a motion to controvert a search warrant and, in part, suppress certain evidence obtained by two search warrants that authorized the search of five cell phones found in two apartments in Manhattan in connection with undercover drug sales that took place therein on five separate days due to the fact that they lacked any temporal specificity. In so ruling, the court noted that while drug transactions may indeed involve ongoing planning and communication between buyer and seller over days, with no time restriction, they were overbroad. However, the court fashioned a remedy suppressing only evidence derived from therein more than 30 days

prior to the first dale date to the date of seizure of the cellphones based on its conclusions regarding drug transactions noted above.

People v. Cynthia Wallack, __ Misc.3d __, 2020 NYLJ Lexis 1275 (Sup. Ct. N.Y. Co 8/14/20).

Where one of four search warrants directed at electronic social media, that was directed at the defendant's Instagram account and as issued during an investigation involving a burglary and the alleged harassment of one "AB" and her estranged husband, (which resulted in the production of certain pictures of and texts from the defendant), required the production of all information within a period of time contained therein without a specification of the type or data that should be produced, the warrant lacked sufficient particularity by requiring that the information be downloaded first and then searched by law enforcement for communications specifically related to the case, the evidence was ordered suppressed on the defendant's motion to controvert. In so ruling, the court noted that by comparison, this process was properly used in connection with the other three warrants which were directed at Google, Facebook and LinkedIn.

Eavesdropping Warrants

People v. Joseph Schneider, 37 N.Y.3d 187, 2021 2021 WL 2228791 (6/3/21) [4/2; DiFiore, C.J.].

A majority of the Court held that eavesdropping warrants are deemed executed in the geographical jurisdiction where the communications are intentionally intercepted by authorized law enforcement officers within the meaning of CPL article 700. Thus, an eavesdropping warrant that authorized the interception of cell phones in connection with an enterprise corruption and gambling investigation in Kings County, one of which involved the cell phone of the defendant who was a California resident who had never been in New York was properly ordered notwithstanding that the cell phones were not physically in New York State. The basis for the majority's ruling was based on the legislative history of C.P.L. Art. 700 and P.L. Art. 250, there was a jurisdictional predicate in Brooklyn for the warrant and that the warrants were thus executed in Kings County pursuant to C.P.L. 700.05(4) and that this holding was consistent with analogous federal circuit court holdings under 18 U.S.C. 2518. Judge Wilson, joined by Judge Rivera, dissented in a lengthy opinion on the conclusion that the warrant was invalid based on a lack of jurisdiction by the issuing court in New York. See also, *People v. Tajammal Sharief Brown, __ A.D.3d __, 2021 NY Slip Op 04737 (1st Dept. 8/19/21*), in which the first department, relying on *Schneider* held that because an electronic surveillance warrant is deemed executed

where the conversation is intercepted, surveillance warrants issued by an second department appellate division justice and a justice of the New York City special narcotics court that resulted in interceptions in Kinds County were valid.

Confessions

Miranda

People v. Adam Green, 197 A.D.3d 993 (4th Dept. 8/26/21).

The facts of this case arose from a motor vehicle accident in which a van struck another vehicle and then was immediately driven from the scene. As the van was driven away, the front bumper fell off with the license place attached. Witnesses notified the Yates County Sheriff's Office, which broadcast the name of the vehicle's registered owner. The sergeant heard the broadcast, knew the owner, and went to a farm he knew to be associated with her to investigate the incident. Upon arriving, he found the defendant, who stated that the van had been stolen and gave the sergeant permission to look around the grounds for the van. The sergeant found the van in a rear area of the farm, and defendant was arrested after he made several admissions. The fourth department held that evidence at the *Huntley* hearing established that defendant made three sets of statements to the sergeant. As such the appellate division affirmed a hearing court finding that the defendant was not subjected to custodial interrogation by the sergeant during the first set of statements, where the evidence established that when the defendant made the first set of statements without *Miranda* warnings, his freedom of action was not significantly restricted and the questioning was investigatory rather than accusatory." With respect to the second set of statements, the court held that the evidence at the hearing established that the sergeant had placed defendant in handcuffs because defendant provided evasive answers while standing close to several sharp farm implements. At that time, the sergeant informed defendant that he was trying to sort out what had happened during the accident and that the defendant "was not under arrest." Thus, the fourth department rejected the claim of a de facto arrest due to the handcuffs and held that the defendant's second set of statements was made in response to a threshold inquiry by the sergeant that was "intended to ascertain the nature of the situation during initial investigation of a crime, rather than to elicit evidence of a crime, and those statements thus were not subject to suppression," quoting *People v Mitchell, 132 A.D.3d 1413, 1414 [4th Dept 2015)* The court also rejected the defendant's contention that the court erred in determining that defendant voluntarily made the third set of statements after validly waiving his *Miranda* rights.

Matter of Tyler L., __ A.D.3d __, 2021 NY Slip Op 04713 (2nd Dept. 8/25/21).

A divided second department, by a 3-1 vote, affirmed a Kings County Family Court determination that a juvenile voluntarily and knowingly waived his *Miranda* rights during a videotaped interview with his grandfather present, notwithstanding certain mental deficiencies. In so ruling the majority noted that "while the appellant's expert in juvenile forensic psychology noted in his report that the appellant tested as having an IQ of 74 and was in the 'borderline range' of certain verbal comprehension, perceptual reasoning, reading comprehension, and expressive vocabulary tests, the … [juvenile's] expert also stated that the respondent had a basic comprehension and understanding of *Miranda* rights at the time of his testing consistent with other 15-year-old adolescents of comparable abilities." Justice Barrios dissented on the conclusion that the juvenile's mental challenges rendered him incapable of validly giving up his rights and that the Presentment Agency failed to prove voluntariness beyond a reasonable doubt.
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People v. David Perry, __ A.D.3d __, 2021 NY Slip Op 03031 (2nd Dept. 5/12/21).

After initially indicating to the two interviewing detectives that he was not "up for" a conversation in connection with a robbery-murder investigation, the defendant answered some pedigree questions, was advised of his *Miranda* rights, indicated that he understood those rights, and, when asked immediately thereafter if he wished to speak to the police without an attorney present, responded, "I'm willing to listen." The appellate division affirmed the defendant's Duchess County murder conviction on the holding that by that statement the defendant did not unequivocally invoke his right to remain silent so as to preclude further questioning. Moreover, under the circumstances presented, the fact that there was a break of approximately 4½ hours in the questioning after the defendant asked for some time to sleep did not require the police thereafter to readvise the defendant of his *Miranda* rights, since the defendant remained in continuous police custody during that period and was reminded, when the questioning resumed, that he had previously been advised of his rights.

People v. Robert Burbridge, 194 A.D.3d 831, 2021 WL 1899547, 2021 NY Slip Op 03045 (2nd Dept. 5/12/21).

The evidence at the suppression hearing established that the defendant was sitting in his bedroom when a detective came into the room with a gun he found in the house, mentioned to the other detective in the room that he had located a gun, and placed the gun on the bed. The defendant then uttered that he had "forgot[ten] all about that," and that he had gotten the gun for protection.

The court held that under these circumstances where the defendant was handcuffed for safety at the time he made the statement, he was in his home, and he was “not being questioned,” the detective's statement to the other detective that he found the gun and the placement of the gun on the bed could not have reasonably been expected to elicit an inculpatory response from the defendant. As such, the defendant’s Orange County weapons conviction was affirmed.

People v. Micah Alleyne, __ A.D.3d __, 2021 NY Slip Op 02538 (2nd Dept. 4/28/21).

Two NYPD detectives testified at a *Huntley* hearing that the defendant agreed to accompany them to the precinct, the defendant was not handcuffed, and that his statements were spontaneous and not the result of interrogation or its functional equivalent Although at trial, a detective described the defendant's accompanying the detectives to the precinct as "apprehend[ing]" the defendant, the appellate division affirmed the lower court’s denial of suppression on the holding that same term was used at the suppression hearing to mean finding the defendant so the detectives could talk to him, not placing the defendant under arrest. In any event, at the trial, the second department further noted that the defendant did not ask the court to reopen the suppression hearing, and moreover, testimony adduced at trial may not be relied upon as a basis to challenge the finding that the statements the defendant made to the detectives in the patrol car before *Miranda* warnings were given were admissible.

People v. Wafa Abboud, __ A.D.3d __, 2021 NY Slip Op 01267 (2nd Dept. 3/3/21).

The defendant was not required to be provided *Miranda* warnings before she spoke to an investigator for the Justice Center for the Protection of People with Special Needs since the evidence at the suppression hearing established that the defendant’s statement was not obtained by a “public servant engaged in law enforcement activity” under C.P.L. 60.45(2)(b)(ii). As such, her criminal tax fraud and offering a false instrument for filing was affirmed.

People v. Charles Santjer, __ A.D.3d __, 2021 NY Slip Op 00438 (2nd Dept. 1/27/21).

The defendant was not subjected to custodial interrogation such that the police were required to provide *Miranda* warnings where a detective investigating a hit and run incident located the suspected vehicle in the defendant’s driveway and after agreeing to allow the officer to inspect the automobile, admitted to the detective that he had been at a bar earlier in the evening in question and the roads he would have taken to return home thereafter. The police then asked permission to continue the discussion inside the defendant’s home and after then providing

Miranda warnings, the defendant waived his rights. In affirming the defendant's conviction and order denying suppression, the court held the interview did not take place in a coercive environment and that a reasonable, innocent person would have felt free to leave thus obviating the need for warnings.

People v. Tyrone Sylvester, __AD3d__, 2020 Slip Op 05534 (2d Dept. 10/7/20) [MEMO].

The appellate division rejected the hearing court's determination that defendant's non-Mirandized incriminating statements, made in response to custodial police questioning, were admissible on the theory that the police were simply seeking to clarify a confusing situation. Nonetheless, the defendant's second-degree assault and criminal possession of a weapon (machete) convictions were affirmed on harmless error grounds. The police were called to a Brooklyn apartment where they observed the defendant-landlord, with fists raised, on top of the complainant-tenant. Observing blood "everywhere," (the complainant had earlier been cut on the leg with a machete) the police separated the men, handcuffed the defendant, and escorted defendant outside to a sidewalk. Without *Miranda* warnings, a police officer asked defendant "what happened" and "I need to hear both sides of the story. Tell me what happened." The defendant then made incriminating statements. On these facts the appellate division concluded that the police officer's questions and statements were "interrogative rather than investigatory for clarification purposes (*cf. People v. Valentin*, 118 AD3d 823[2d Dept 2014]). Since the defendant was in police custody (handcuffed) and not free to leave, *Miranda* warnings were required.

People v. Jonathan Mansilla, __AD3d__, 2020 Slip Op 05531 (2d Dept. 10/7/20) [MEMO].

Affirming defendant's murder conviction, the appellate division sustained the hearing court's determination that defendant's custodial non-Mirandized statements to police, made in response to an officer's question, "What happened?" were admissible. The hearing evidence established that the defendant, who had earlier consumed beer and oxicodone, got into a street fight with the victim, stabbing him to death with a knife. At the hearing, defendant contended that when the police first apprehended him, and without administering Miranda warnings, an officer asked, "What happened?" He responded that the victim provoked him and that the police should check street surveillance cameras for proof. The appellate division held that ". . . such a question did not constitute an interrogation, but rather was an attempt to clarify the situation, and therefore did not require that the defendant be advised of *Miranda* rights."

Voluntariness

People v. Jermaine B. Johnston, __ A.D.3d __ (4th Dept/ 3/18/21) [#KA-13-02064].

Any alleged police deception in the form of exaggeration of the evidence was held insufficient under the circumstances presented to warrant suppression in the defendant's Monroe County murder trial and "the duration of the interview did not render the resulting statement involuntary" In affirming, the fourth department also concluded further that the"[d]efendant . . . was not subjected to the type of deprivations and psychological pressure . . . [that] 'bespeak such a serious disregard of defendant's rights, and [are] so conducive to unreliable and involuntary statements, that the prosecutor has not demonstrated beyond a reasonable doubt that the defendant's will was not overborne,'" quoting. *People v Jin Cheng Lin, 26 N.Y.3d 701, 725 (2016); cf. People v. Thomas, 22 N.Y.3d, 629, 641 (2014).* The court additionally noted that while the defendant purportedly asserted his right to remain silent on three occasions during his police interrogation, the first was not clearly communicated and thus not effective and statements obtained after the next two occasions should have been suppressed, but any error was harmless beyond a reasonable doubt due to other overwhelming proof of guilt.

Self-Representation

People v. Michael Price, __ A.D.3d __, 2021 NY Slip Op 04981 (2nd Dept. 9/15/21).

The trial court did not deprive the defendant of the right to self-representation, when after several months of self-representation during preliminary phases of the case, it reassessed whether the defendant wished to continue to proceed to trial without the aid of counsel. In affirming the defendant's Nassau county narcotics sale conviction, the appellate division also noted that the record did not support the defendant's contention that the court's pretrial inquiry compelled or forced him to accept representation by counsel. Finally, to the extent the defendant renewed his requests to proceed pro se after the trial commenced, his requests were untimely under *People v Crespo*, 32 N.Y.3d 176, *182 (2018),* and moreover failed to assert compelling circumstances to relieve counsel in favor of a return to self-representation.

People v. Dominick Crispino, __ A.D.3d __, 2021 NY Slip Op 04918 (2nd Dept. 9/1/21).

The defendant's Brooklyn grand larceny conviction was reversed due to the trial court's failure to have conducted the required searching inquiry regarding the defendant's determination to represent himself. Thus, notwithstanding the fact the defendant was a disbarred attorney, the record did not demonstrate that the defendant was aware of the dangers and disadvantages of representing himself or the benefits of having trial counsel pursuant to *People v Crampe, 17 N.Y.3d 469, 481 (2011*). As the second department noted. although the record did reflect that the Supreme Court was aware of the defendant's pedigree information, including his status as a

disbarred attorney, the court failed to ascertain that the defendant was aware of the risks inherent in proceeding without a trial attorney and the benefits of having counsel represent him at trial.

People v. Ronald Jackson, __ A.D.3d __, 2021 NY Slip Op 03288 (1st Dept. 5/25/21).

The first department held that the defendant's waiver of his right to counsel was invalid, because the record did "not sufficiently demonstrate that [the]defendant was aware of his actual sentencing exposure" (quoting, *People v Rodriguez, 158 A.D.3d 143, 152 [1st Dept 2018]).* In reversing the defendant's Manhattan conviction for first-degree auto-stripping and related crimes, the court noted that because "[t]he critical consideration is defendant's knowledge at the point in time when he first waived his right to counsel"; the trial court's subsequent warnings about sentencing "were incapable of retrospectively 'curing' the . . . court's error" (quoting, *People v Crampe*, 17 N.Y.3d 469, 483 (2011). Thus, statements made by the defendant in court more than four months before the waiver, and at defendant's arraignment more than a year before the waiver were held to not adequately apprise defendant of his sentencing exposure, especially in light of the defendant's history of mental illness, as well as his statement, in response to the court's reference to the "tremendous pitfalls of representing yourself," that "[n]one of that has been explained," even after the court had warned him of a number of such risks.

People v. Robert Lemmo, __ A.D.3d __, 2021 NY Slip Op 01997 (2nd Dept. 3.31.21).

The appellate division reversed the defendant's Queens criminal mischief conviction because the trial court failed to conduct the requisite inquiry before allowing the defendant to proceed pro se. A court must determine that the defendant's waiver of the right to counsel is made competently, intelligently, and voluntarily before allowing that defendant to represent himself or herself as required in *People v Crampe*, 17 N.Y.3d 469, 481 (2011). While the lower court's "brief" inquiry obtained certain pedigree information from the defendant, it failed to ascertain that the defendant was aware of the risks inherent in proceeding without an attorney and the benefits of having counsel represent him at trial (*see People v Crampe*, 17 N.Y.3d at 482-483), the court failed to discuss the potential sentence that could be imposed. Thus, the court's inquiry was insufficient to ensure that the defendant understood the dangers and disadvantages of self-representation. Under these circumstances, the defendant's purported waiver of his right to counsel was ineffective. Accordingly, a new trial was ordered.

Right to Counsel

People v. Jose Guevara, __ N.Y.3d __, 2021 WL 4092521, 2021 NY Slip Op 04955 (9/9/21) [7/0; Memorandum].

Because the sixth amendment right to counsel applies to pre-trial psychiatric examinations conducted pursuant to C.P.L. 250.10, [see *Matter of Lee v. County Court of Erie County, 27 N.Y.2d 432 (1971)*], the exclusion of defense counsel at a such a session by a clinical psychologist was error [the psychologist permitted the attorney access at an initial session but declined access at a second) such that this forensic examiner should not have been permitted to testify at the defendant's trial. In so ruling the Court rejected claim that the error was harmless beyond a reasonable doubt since there was a constitutional principle at stake in connection with the ability to cross-examine and provide effective assistance.

Substitution of Counsel

People v. Theodore Robinson, __ A.D.3d __ (4th Dept. 6/17/21) [#KA 18-02085].

During pre-trial proceedings on the defendant's Onondaga County first degree robbery indictment the defendant complained to the trial judge that, "I have asked my attorney over and over again to come by and see me, bring me paperwork and talk about matters. I have nothing. It's been like about nine months . . . He still hasn't responded to me . . . my lawyer is not taking this case very seriously." The court responded that this was "a problem." The defendant then added: "I didn't even know I was indicted on this charge," referring to an unrelated burglary charge that was also pending. The court noted that defendant was in court when he was arraigned on the burglary charge, and stated that defense counsel had "filed every single piece of paper that he needs to file to defend this case." With respect to defendant's allegation that his attorney had ignored his repeated inquiries over the preceding nine months, the court stated: "I understand that every defendant who's in custody would like their attorney to come over once a week or sooner, but it's just not the way it works." The court assured defendant that he would have "all the paperwork" that he needed and that defense counsel would be fully prepared, adding that the case "should be worked out" by plea bargain. Over two months later, the defendant followed up on his prior complaints, stating that he had not seen defense counsel between court appearances and still did not have the paperwork that was previously discussed. The defendant also alleged: "we have a lot of conflict, him and I, in terms of the case itself. He is saying things I didn't say and I am telling him he did say. And we are just going back and forth." The court assured defendant that it was "sure" defense counsel would provide "whatever paperwork" defendant wanted and noted that defendant and his attorney had been present together in court during pretrial appearances. The court, however, explained: "If there is someone you want to hire instead . . . , no problem. You feel free. The law states we have to give you an attorney. I have

given you . . . one of the best defense attorneys in this County . . . maybe he is not the best baby-sitter of all time, but he is one of the best lawyers . . .” The defendant thereafter was acquitted of the first-degree robbery charges but convicted of third degree robbery. A majority of the fourth department reversed 3-2 and held that pursuant to *People v Sides, 75 N.Y.2d 822, 824-825 (1990),* where the defendant advanced a “seemingly serious” series of allegations over 12 months involving his attorney the trial court was obligated to inquire and that the failure to do so violated the defendant’s right to counsel. Judge Whalen, joined by Judge Peradotto dissented on their conclusion that the trial court’s exchange with the defendant was sufficient to allow the defendant to air his concerns which did not rise to the level or warranting a substitution of counsel.

People v. Shakeith Stackhouse, __ A.D.3d __ (4th Dept. 3/26/21) [#KA 16-00757].

The defendant’s request for the substitution of counsel based on a claim that his attorney had only conferred with him twice in the time months following his arrest in an Onondaga County felony-murder case was denied by the trial with the court, in essence urging that the defendant cooperate with his attorney and providing “platitudes” regarding the attorney’s performance. Following the filing of an omnibus motion, a *Huntley* hearing, and the setting of a trial date, the judge granted the defendant’s request 10 days prior to trial to substitute counsel with an attorney who was willing to accept the assignment with no delay of trial. The fourth department reversed the defendant’s conviction on the holding that the trial court’s failure on two separate occasions to safeguard the right to effective assistance of counsel, when in the first instance, the defendant presented a “seemingly serious” request based on specified facts for new counsel that required at least a “minimal inquiry,” by the court under *People v. Sides, 75 N.Y.2d 822 (1990),* which was exacerbated by the defendant’s “internalizing” of the court’s denial, his delay in making his second request which was granted, but with less than two weeks for the new attorney to prepare to trial.

People v. Shaheed D. Fellows, __ A.D.3d __, 2021 NY Slip Op 01269 (2nd Dept. 3/3/21).

The defendant pleaded guilty to assault in the first degree, in Dutchess County but at sentencing, the defendant stated that he wished to withdraw his plea, which he claimed had been coerced by his counsel. The County Court relieved defense counsel, and assigned new counsel to represent the defendant. Subsequently, the defendant's new counsel advised the court that after evaluating the evidence, the defendant's allocution, and after speaking to the defendant and his prior attorney, a motion to withdraw the plea of guilty would be frivolous. The court granted the defendant a number of adjournments to permit him to retain private counsel to pursue his motion to withdraw his plea, but when the defendant failed to do so, the court ultimately sentenced him,

while he was still represented by the second assigned counsel. The appellate division reversed and held that where second assigned took a position adverse to the defendant, he was denied effective assistance of counsel. As such the case was remitted to the lower court, with a direction that new counsel be appointed and the defendant given the opportunity to withdraw his plea.

People v. Karim Thaxton, __ A.D.3d __ (3rd Dept. 2/25/21) [#110513].

Defense counsel's response to an inquiry by the lower court as to whether a motion to withdraw a plea was being made solely by defendant, that he had notarized the affidavit but that he did "not necessarily even agree with the affidavit," with no further elaboration as to the legal basis or merits of the motion, was held to have not affirmatively undermined defendant's assertions or amounted to an adverse position against defendant so as to create an actual conflict. As such, citing, among other cases, *People v. Washington, 25 N.Y.3d 1091 (2015),* the third department rejected claims that the trial court should have appointed new counsel at that point and affirmed the defendant's narcotics sale conviction.

People v. Horatio Forrest, __ A.D.3d __, 2020 NY Slip Op 04963 (2nd Dept. 9/16/20).

The trial court properly denied the application of defendant's counsel's request to be relieved due to a "breakdown in communication." In affirming the defendant's Nassau first degree robbery and weapons possession conviction, the appellate division note that while a breakdown would "normally constitute good cause," the trial judge reasonably found that the application lacked that good cause "given the nature of the defendant's stance with respect to the trial and the prosecution of the case, which would cause an inability to communicate meaningfully with any assigned counsel." The court additionally held that the defendant voluntarily absented himself from the trial thereby waiving or forfeiting his right to be present where the court fulfilled its obligation to inquire as toe whether the defendant's absence was deliberate and recite on the record its reasons for proceeding without the defendant.

Ineffective Assistance

People v. Darren Bernard, __ A.D.3d __, 2021 NY Slip Op 03601 (2nd Dept. 6/9/21).

Where the “very brief” plea proceeding failed to reflect that the defendant, a citizen or Trinidad was provided advice by his attorney regarding the immigration consequence of his plea of guilty to fifth degree narcotics sale, the case was remitted to the lower court to permit the defendant and opportunity the develop in a hearing that he would no0t have pleaded guilty had he been so warned.

People v. Joseph Sposito, __ A.D.3d __ (3rd Dept. 4/22/21) [#111155].

The defendant’s claim that he received ineffective assistance of counsel in connection with his prosecution for first degree rape and criminal sex act in Albany County because his attorney failed to seek a *Huntley* hearing to contest the admissibility of his recorded statements to the police and moreover failed to consult with experts to rebut proof of the victims sexual assault examination, the victim’s degree of intoxication and the presence of genetic material in the victim’s anus, where, following a hearing on the claim, defense counsel established that he had a strategic reason for his actions. Thus, from defense counsel’s considered standpoint, admission of the statements was beneficial, because the defendant had maintained throughout the interview with the police that the victim was an active and willing participant in the sexual encounter and that, if the statements were suppressed, the jury would only hear about the changes that defendant had made to his story when, as expected, he testified at trial and was cross-examined about them. Similarly, where it was indisputable that the defendant and the victim had had sexual relations, and the overarching issue was consent by a complainant who was purportedly physically helpless, a finding that the victim was alert and willing would have “therefore resulted in defendant's acquittal on all charges,” to the extent that counsel made the “tactical decision to focus on that issue to the exclusion of murkier battles over whether the alleged anal sexual conduct had occurred or whether some of the conclusions drawn by the People's experts were open to question. As counsel explained, he chose that course because of “emotionally charged testimony from the victim, the sexual assault nurse examiner and others, all of whom he realized posed a real danger of inflaming the sympathies of the jury against defendant.” As such, counsel viewed it as essential to present a narrowly tailored defense that kept the jury "singl[ed] in on" concrete facts pointing to the victim as an active participant in the sexual encounter,” quoting *People v. Berroa, 99 N.Y.2d 134, 138 (2002*).

People v. James Davis, __ A.D.3d __, 2021 NY Slip Op 02408 (2nd Dept. 4/21/21).

The lower court should have granted the defendant’s motion to vacate his 2006 Brooklyn murder conviction based on a claim of ineffective assistance of counsel where his trial attorney failed to properly investigate and contact several material witnesses. In so ruling the appellate division rejected the People’s claim that this determination was merely a strategic decision by counsel in

connection with witnesses who had criminal records on the holding that without even collecting the requisite information about these witnesses, no informed decision could have been made regarding whether to call them.

People v. Jermaine Jennings, __ A.D.3d __, 2021 NY Slip Op 00944 (4th Dept. 2/5/21).

The failure by defense counsel to raise this issue of a repugnant verdict following the acquittal of the defendant's co-defendant in an Onondaga County joint murder in which the court charged the jury that the People had to prove that the defendant directed the co-defendant to shoot the victim in the head which thereby caused the victim's death constituted ineffective assistance of counsel. Thus, citing *People v. Muhammad, 17 N.Y.3d 532, 539-540 (2011),* where it was legally impossible for the jury to have convicted on one charge but not the other, the defendant's conviction was reversed.

People v. Rasheen Bell, __ A.D.3d __ (4th Dept. 2/5/21) [#KA 15-01725].

The defendant's Monroe County double murder conviction was affirmed over claims that defense counsel did not provide effective assistance because he failed to move for a *Cardona* hearing [see *People v. Cardona, 41 N.Y.2d 733 (1977)],* where the trial record reflected that the informant related the defendant's statements to the district attorney "of his own accord" and without any prior involvement of law enforcement on the conclusion that such a motion would have been futile, In affirming, the court also rejected ineffective assistance claims that defense counsel failed to move to challenge the jury venire on grounds of a failure to call prospective jurors from across-section of the community and that the defense attorney was ineffective because he failed to provide a defense expert with sufficient documents, where the defendant's defense was that he "had nothing to do" with the murder and thus the assertion on appeal was inconsistent therewith.

People v. Kenneth B. Barksdale, 191 A.D.3d 1370 (4th Dept. 2/5/21) [#KA-17-01486].

The defendant was not deprived of effective assistance of counsel because his attorney failed to challenge a prospective juror during jury selection in the defendant's Canandaigua narcotics trial where that determination was a strategic decision left to counsel. Similarly, where counsel did not move to controvert a search warrant, where the there was little likelihood of success, there was no deprivation as well. Finally, the trial court did not err in permitting the defendant to proceed pro se midtrial, notwithstanding its untimeliness, where after the requisite searching inquiry, the defendant voluntarily and knowingly gave up his right to be represented.

People v. Todd Mirabella, __ A.D.3d __, 2020 NY Slip Op 05388 (4th Dept. 10/2/20).

The lower court properly denied the defendant's C.P.L. 440.10 motion to vacate his Monroe County judgment of conviction without a hearing on a claim that his trial attorney was ineffective for failing to retain or consult a Child Sexual Abuse Accommodation Syndrome [CSAAS] expert where defense counsel was effective nonetheless by "carefully" highlighting on the cross examination of the People's CSAAS expert that CSAAS was not a diagnostic tool for proving whether sexual abuse had occurred or whether the victims' accounts were credible. The trial, court, however, should have granted a hearing on whether defense counsel was ineffective with respect to whether counsel fulfilled his duty of advising defendant that his decision to testify was his own, not defense counsel's to make.

Frederick R. Whatley v. Warden, __ U.S. __ (4/19/21) [Dissent from Denial of Certiorari, Sotomayor, J.].

Justice Sotomayor dissented from the denial of certiorari in a vase in which she was of the opinion that defense counsel's unreasonable failure to object to the defendant's shackling with leg irons and manacles during his Georgia capital trial arising out of the robbery and murder of a bait shop owner constituted ineffective assistance of counsel.

<u>Ineffective Assistance of Appellate Counsel</u>

People v. Terraine J. Slide, __ A.D.3d __, 2021 NY Slip Op 04982 (2nd Dept. 9/15/21).

The appellate division granted the defendant's application for reversal based on a writ of error corm nobis due to his former appellate counsel's failure to contend on appeal that the trial court failed to determine whether the defendant should be afforded youthful offender status under *People v Rudolph* (21 NY3d 497 (2013). The second department decision note that it was reversing notwithstanding that the Court of Appeals decided *Rudolph* only shortly before former appellate counsel filed the brief on the appeal, because the holding in *Rudolph* compels vacatur

of the sentence, the standard of meaningful representation required former appellate counsel to argue that, pursuant to *Rudolph*, the sentence must be vacated and the matter remitted for determination of the defendant's youthful offender status.

People v. Brandon Davis, __ A.D.3d __, 2021 NY Slip Op 04740 (2nd Dept. 8/18/21).

The defendant's application for a writ of error coram nobis on grounds of ineffective assistance of appellate counsel was granted and his Suffolk robbery-murder conviction and sentence vacated on the appellate division's holding that appellate counsel was ineffective in failing to raise the that the defendant's second degree murder conviction was an inclusory concurrent count to his conviction of first degree murder. The court however, also held that statements made, during the defendant's transportation to the police station following his arrest, were properly admitted as spontaneous. Thus, the defendant initiated a conversation during his transportation to the police station after his arrest by asking a detective why he was arrested. When the detective responded, "murder," the defendant asked "when this murder supposedly happened." The detective replied, "Christmas day . . . the previous year." The defendant then stated that "he doesn't get involved in murders, that's not his M.O., he just is involved in drugs and getting money." In response, the detective then asked the defendant "if he had a job." The defendant responded "no, I just get money." The statement, "no I just get money," was held in context to have been spontaneous and not the functional equivalent of un-*Mirandized* interrogation.

People v. William Grant, 187 A.D.3d 1043, 2020 NY Slip Op p5922 (2nd Dept. 10/21/20).

The failure by the defendant's former appellate counsel to have raised an argument on the defendant's prior appeal in 1998 [see 255 A.D.3d 334] regarding mode of proceedings error in connection with the failure of the trial court to have meaningfully responded to a substantive note from the jury during deliberations that requested "direction" due to an apparent deadlock in the vote in violation of the *O'Rama* rule warranted reversal as mode of proceedings error. In granting the writ of error coram nobis, the appellate division noted that jury's request was "not ministerial requiring only a ministerial response" and that this was a rare case in which a single failing in an otherwise competent appellate performance required this action.

<u>Huntley Hearings</u>

People v. Quran L. Coffie, 192 A.D.3d 1643 (4th Dept. 3/26/21) [#KA-15-01986].

The fourth department held that the trial court erred in failing to hold a *Huntley* hearing before the start of trial. As the court noted in reversing the defendant's Monroe County robbery conviction, "When [a] motion [to suppress evidence] is made before trial, the trial may not be commenced until determination of the motion" (CPL 710.40 [3]; citing also, *People v Jackson, 221 A.D.2d 964, 964 (4th Dept. 1995*), *People v Blowe, 130 A.D.2d 668, 670 [2d Dept 1987]; see also Matter of Green v DeMarco, 87 A.D.3d 15, 17-18 [4th Dept 2011]).* Thus, although the defendant moved to suppress his statements to the police on the ground that they were involuntarily made (see CPL 710.20 [3]), but the court did not rule on the motion prior to trial and repeatedly refused to conduct a pretrial *Huntley* hearing, even after the People requested a *Huntley* hearing at the outset of the trial and the lower court finally granted the People's request for a *Huntley* hearing over defendant's objection after nine of the ten prosecution witnesses had already testified, the error was held reversible where the proof was not overwhelming.

Bail

People ex rel. Alexis Padilla, __ A.D.3d __, 2021 NY Slip Op 2021 NY Slip Op 02376 (2nd Dept. 4/20/21).

The second department sustained a pro se writ of habeas corpus that challenged bail set in the defendant's Queens prosecution and modified them to require the defendant post either $250,000 cash bail, a $250,000 insurance bail bond or a $250,000 partially secured bail bond at 10%, with additional requirements that the defendant **"**1) wear an electronic monitoring bracelet, with monitoring services to be provided by a qualified entity pursuant to CPL 510.40(4)(c), and any violations of the conditions set forth herein relating to the electronic monitoring shall be reported by the electronic monitoring service provider to the Office of the District Attorney of Queens County; (2) remain confined to his residence, located in Queens County, except for visits to his attorney, his doctors, or court, and must travel directly from his home to his attorney, his doctors, or court, and directly back to his home, when conducting those visits; (3) surrender all passports, if any, he may have to the Office of the District Attorney of Queens County, or, if he does not possess a passport, provide to the Office of the District Attorney of Queens County an affidavit, in a form approved by the Office of the District Attorney of Queens County, in which he attests that he does not possess a passport, and shall not apply for any new or replacement passports; and (4) provide to the Office of the District Attorney of Queens County an affidavit, in a form approved by the Office of the District Attorney of Queens County, in which he attests that if he leaves the jurisdiction he agrees to waive the right to oppose extradition from any foreign jurisdiction."

CPL Article 730

People ex rel. Molinaro v. Warden, 194 AD3d 885 (2d Dept. 6/16/21).

Sustaining a writ of habeas corpus wherein petitioner, charged by misdemeanor complaint in Brooklyn with various non-qualifying offenses, was ordered remanded at arraignments for a CPL article 730 examination, the second department held that "a defendant who has been ordered released, or, as in [petitioner's] case was statutorily entitled to release (see CPL 510.10 [3]; 530.20 [1]), cannot be jailed because the court ordered a CPL article 730 examination."

People v. Bellucci, 189 AD3d 869 (2d Dept. 12/2/20) [MEMO].

Charged with murdering his parents, Bellucci was found incompetent to stand trial on four occasions over five years. In 2015, after being stabilized on medication, he was found competent. Later, during court proceedings, Bellucci stopped taking his medications and decompensated. The prosecutor and defense attorney both requested a new CPL 730.30 examination which was denied by the trial court. The case proceeded to trial, and over Bellucci's repeated and vociferous objections, the trial judge ordered defense counsel to raise an insanity defense. Counsel raised the insanity defense as well as a justification defense. Bellucci was convicted on both counts of murder. The second department reversed. [W]hile it is for the court to decide whether to order a competency examination, when both the defense and the People agree that a competency examination is warranted, the court should hesitate before disagreeing. "Since there may be a new trial, we note that a defendant found competent to stand trial has the ultimate authority, even over counsel's objection, to reject the use of a psychiatric defense . . ."

Prosecutorial Authority

People v. David Mazzeo, __ A.D.3d __ (3rd Dept. 2/25/21) [#111003].

Although "the Attorney-General's prosecutorial authority is strictly limited to the specific statutory grants of such authority" [Matter of *Haggerty v Himelein, 89 NY2d 431, 435 [1997)]*, a district attorney may enlist the help of an assistant attorney general in prosecuting a case by appointing him or her as an assistant district attorney, provided that such appointment is made in accordance with the dictates of County Law § 702 and that the district attorney retains "ultimate prosecutorial authority" over the matter. Where, as here the appointment of an assistant attorney general by the Albany county district attorney as a special assistant district attorney was undertaken in accordance with the law, the defendant's claims that an assistant attorney general had no authority to assume a prosecutorial role was rejected. In affirming, the third department also held that the defendant was held properly adjudicated in violation of his probation on a

showing by a preponderance of evidence that that he committed additional crimes of grand larceny and money laundering and also failed to pay restitution when he was capable of doing so.

Discovery/*Rosario*/*Brady*/Freedom of Information

Rosario

People v. Abdul Shaad Azeez. __ A.D.3d __, 2021 NY Slip Op 02171 (2nd Dept. 4/7/21).

The defendant's application for sanctions following the non-willful loss of a portion of a controlled recording made by the complainant in the defendant's Westchester rape trial was properly denied on the holding that pursuant to People v. Martinez, 22 N.Y.3d 551, 557 (2014), "the non-willful, negligent loss of *Rosario* material does not mandate a sanction unless the defendant establishes prejudice and here the defendant failed to do that.

Brady

People v. Darren McGhee, 36 N.Y.3d 1063, 2021 WL 1132164, 2021 NY Slip Op 01836 (3/25/21) [6/0; Memorandum].

Citing People v. *Giuca*, 33 N.Y.3d 462, 476 (2019), the Court held that there was no reasonable possibility that the People's failure to disclose the witness statement at issue undermined the fairness of defendant's New York County trial or impacted the verdict where the undisclosed witness's description of the shooter and his flight path did not differ in any material respect from that of the eyewitness who identified defendant in court as the perpetrator. In reversing a divided first department order to the contrary [180 A.D.3d 26 (1st Dept. 2019)] , the Court noted further that the jury's verdict was supported by "considerable other evidence," including the testimony of a cooperating witness who planned the crime with defendant, provided a weapon and cellphone for defendant's use, observed defendant approach and leave the site of the shooting at the time it occurred, and described the manner in which the weapon was destroyed after the shooting; testimony by the spouse of the cooperating witness confirming defendant's involvement; the testimony of additional witnesses who described the perpetrator's clothing and his movements following the shooting; telephone records; and surveillance videos showing defendant's proximity, clothing, and behavior immediately after the crime. Thus, the undisclosed witness statement "lacked sufficient impeachment value to cast any doubt on the fairness of defendant's trial" Furthermore, considering the totality of the evidence, there is no reasonable possibility that the statement supported an alternative theory of defense, nor did the defendant demonstrate any likelihood that the statement would have led to additional admissible evidence to the extent that he failed to show that "prejudice arose because the suppressed evidence was material." quoting People v *Garrett*, 23 N.Y.3d 878, 885 (2014). Upon remittal to the first

department [2021 WL 1877559, 2021 NY Slip Op 03002)], that court reached an issue regarding the suggestiveness of a lineup made six weeks after a video identification and while it held that a detective's advising an eyewitness to look at someone "wearing brown" was indeed unduly suggestive, any error in admitting this evidence was harmless due to the overwhelming proof of guilty. Additionally, the first department rejected claims that a detective's conduct in advising another eyewitness that she should select anyone she recognized from a photo-array she was shown also six weeks prior warranted suppression of a subsequent lineup. Finally, the first department held that while the trial court improvidently exercised its discretion in admitting, as an excited utterance, a detective's testimony that he overheard the eyewitness exclaim, "that's him. That's him. He shot the boy in the Polo Grounds," when she saw defendant in the video since this did not qualify as an excited utterance, this error was also harmless.

People v. Kamil Wideman, __ A.D.3d __ (3rd Dept. 3/25/21) [#109274].

Assuming, without deciding that the People's failure to timely disclose that a testifying State Police investigator had been accused of providing incorrect testimony to a grand jury in an unrelated criminal proceeding the third department held that the defendant failed to establish that this evidence was material or that there was reasonable possibility that, had it been timely disclosed, this evidence would have changed the outcome in his Clinton County narcotics trial. See *People v Giuca, 33 N.Y.3d 462, 477-478 (2019),* relied on by the court.

People v. Wildon Rodriguez, 186 A.D.3d 1724, 2020 NY Slip Op 05234 (2nd Dept. 9/30/20).

The trial court did not err in summarily granting the defendant's C.P.L. 440.10 motion to vacate his Brooklyn murder conviction arising out of a 1993 shooting where the People failed to disclose that their sole eyewitness had a relationship with law enforcement agencies as a confidential informant which included her placement in a witness protection program and the payment of her rent for approximately a year by the DA's Office in an unrelated homicide and where this failure directly contradicted her testimony that she did not have any deals with law enforcement and had not been in touch with the DA's office "for a long period of time, as well as the prosecutor's closing argument that this witness, "never took a deal," and "never asked for anything in return." As the court noted in affirming the order on a People's appeal, in the context of this trial, and where the error was material to credibility, no hearing was required.

Matter of Glenn Ross Kurtzrock, __ A.D.3d __, 2020 NY Slip Op 08114 (2nd Dept. 12/30/20).

A former prosecutor was suspended from the practice of law for two years for failing timely disclosure to defense counsel in a murder trial the existence of evidence or information known to him, in his capacity as a prosecutor, that tended to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence, in violation of rule 3.8(b) of the Rules of Professional Conduct (22 NYCRR 1200.0) and requirements under *Brady*. In condemning the attorney's conduct, the court noted in an extensive opinion, that it merited "the strongest possible condemnation because his actions deprived the defendant of a fair trial and also deprived the victim's family of a determination as to whether the defendant was responsible for the homicide and, if so, the imposition of a just sentence." See also, J. Wester,"*A 'New Normal'?: Panel Metes Out Rare Two Year Suspension For Ex-Prosecutor's Brady Violations,"* N.Y.L.J.law.com 1/5/20.

People v. George Bell/Rohan Bolt/Gary Johnson, __ Misc.3dc __, 2021 WL 865420 (Sup. Ct. Queens Co. 3/8/21).

With the People joining, the court granted the defendants' motion to vacate their separate trials Queens murder judgments of conviction arising out of the 1996 shooting of two men, one an off-duty police officer due to the failure to disclose information that other individuals who were members of a gang, "Speedstick" might have been responsible for this crime which arose out of an unrelated armored car robbery, which information was specifically demanded by defense attorneys following media reports relating to these information in the Daily News, along with information that a key prosecution witness had credibility issues relating to auditory hallucinations. In calling the prosecutors actions "perplexing," and perhaps due to "negligence or inadvertence," the court rejected claims of a good faith failure and thus held that where the New York courts have drawn a "hard line" in *Brady* failure cases, pursuant to *People v. Vilardi, 76 N.Y.2d 67 (1990*), and while granting the People 90 days to determine whether to re-try the cases, there was a reasonable possibility the result would have been different if the information had been provided. The case is discussed in B. Gershman, "*'Mindboggling' Misconduct by Queens Prosecutors,"* N.Y.L.J. 3/16/21.

United States v. Ali Sadr Hashemi Nejad, __ F. Supp. 3d __ (S.D.N.Y. 9/16/20). [Nathan, J.]

The prosecution's failure to produce an admittedly exculpatory letter in the defendant's conspiracy to evade international trade sanctions, bank fraud, and money laundering resulted in a prior court order on consent of the Government that granted his motion for a new trial, vacated the defendant's conviction and dismissed the indictment with prejudice. However, due to what the court determined were the ongoing systemic failure on the part of the Untied States Attorney to comply with *Brady* obligations in this case, that was exacerbated by misrepresentations to the

in formal judicial submissions in statements to the court and a letter of explanation that contained falsehoods, the court directed that the Acting U.S. Attorney and certain designated supervising and line attorneys answer a series of interrogatories regarding: when each learned of the undisclosed document, when did you learn of the document's exculpatory value, why did you not immediately disclose the document, what specific communications did you have with other office prosecutors regarding the undisclosed document, what role did you play in the preparation of the letter? The case notes the need to correct the problem of prosecutorial *Brady* failure with systemic corrective actions such a better training and supervision. The court later concluded that there was no "knowing" failure to disclose and closed its factfinding. [2021 WL 6814127 (S.D.N.Y. 2/22/21)].

Discovery

New C.P.L. Article 245

People ex rel. Ferro v. Brann, __ A.D.3d __, 2021 NY Slip Op 04897 (2nd Dept. 8/27/21).

Because the filing of a certificate of discovery compliance pursuant to C.P.L. 30.30(5) could not be deemed complete until all of the material and information identified in the certificate as subject to discovery and electronically shared with the defendant was actually produced to the defendant, pursuant to C.P.L. 245.50(1) and (3) [*see People v Aquino*, 72 Misc 3d 518, 523 (Cr. Ct. Kings Co.5/7/21)], and more than 90 days had elapsed since the filing of the indictment C.P.L 30.30(2)(a) required that the defendant be released on bail which he is capable of meeting, or upon his own recognizance. In granting the habeas corpus writ, the second department also held that the substitution of a different assistant district attorney did not constitute an exceptional circumstance that would render excludable for speedy trial purposes the time period between the date to which the Supreme Court adjourned the matter for the filing of the People's response to the defendant's omnibus motion, and the date upon which the People ultimately filed their response.

People v. Fidel Portillo, __ Misc.3d __ (Sup. Ct. Suffolk Co. 7/23/21), N.Y.L.J. 9/14/21.

Following a hearing the court granted a defense application to strike the People's certificate of discovery compliance on a holding that all investigative matters involving alleged misconduct by a police officer witness, including underlying documentation, in all matters, substantiated,

unsubstantiated, along with exonerated and unfounded, and not merely reports concerning substantiated and unsubstantiated reports [see *People v. Randolph, 69 Misc.3d 772 (Sup. Ct. Suffolk Co, 2020*)], must be provided by the People. The court's conclusion was based on the holding that C.P.L. 245.20((1)(k)(iv) "tends to impeach" required full disclosure of all documentation in all disciplinary cases because the ultimate determination by the police department of investigations on credibility essentially do not address relevancy under *Giglio,* with the statutory burden to search out, identify and produce such material on the prosecution. See People v. Castellanos, 2021 NY Slip Op 21126 (Sup. Ct. Bx. Co. 2021), relied on by the court, aside from several general Court of Appeals *Brady* cases.

People v. Cesar Belliard, __ Misc.3d __ (Sup. Ct. N.Y. Co. 12/26/20), N.Y.L.J. 12/27/20.

A defendant's application for a protective order limiting the comparison of his DNA profile to evidence related to the charged sexual crime of was denied on the holding that notwithstanding the recent enactment of C.P.L. 245.40 no separate probable cause application to compare DNA samples to uncharged crimes is required since, as here, once the evidence is lawfully obtained in the charged-crime case (here, by court order under Matter of Abe A., 56 N.Y.2d 288 (1982)), there was no longer a reasonable expectation of privacy in that evidence against further comparisons. See *People v. King, 232 A.D.2d 111 (2nd Dept. 1997)* relied on by the court, in part. The court additionally rejected claims that the People should not be permitted to upload the results of the DNA comparison into the New York City Office of the Chief Medical Examiner's DNA indexing system [LDIS] on the holding that Exec Law 995, which established the statewide DNA indexing system also applied to the LDIS pursuant to *Matter of Samy F. V. Fabrizio, 176 A.D.3d 144 (1st Dept. 2019).*

People v. Shameeka Todd, 2020 N.Y. Misc. Lexis 1153, 2020 NY Slip Op 20075 (Sup. Ct. Queens Co. 3/12/20).

The People may satisfy their statutory discovery obligations to provide defense counsel "adequate contact information" for persons who may be witnesses with knowledge about the case, involving a charge of first degree assault, under C.P.L. 245.20(1)(c) by using a portal administered by Verizon, that allows defense counsel to contact witnesses by telephone without requiring the disclosure of the potential witnesses' personal telephone numbers. In so ruling, the

court distinguished, *People v. Rong He, 34 N.Y.3d 956 (2019)* which, pre-new C.P.L. Art 245, held that the People's offer to contact witnesses and provide them with defense counsel's contact information was inadequate to provide meaningful access and moreover implicated *Brady* because these witnesses possessed potentially exculpatory information, here the People do not control access

People v. Matt Altug, __ Misc.3d __ (Cr. Ct. N.Y. Co. 2/9/21),

The court denied a defense motion to strike the People's certificate of discovery compliance in connection with claimed required production of police department disciplinary files of a police witness in the defendant's but held that while the district attorney is not required to turn over full personnel files of police witnesses, they must "make reasonable inquires" to ascertain the existence of discoverable material and thereafter "disclose the existence of the officer's disciplinary records and either produce copies of the records or cause the material or information to be made available to defense counsel." See also, *People v. Robert Ferrer, __ Misc.3d __, 2021 NY Slip Op 050706(U) (Cr. Ct. Bx, Co. 7/28/21,* in which the court following a hearing, denied a motion to strike the prosecution's certificate of discovery compliance and statement of readiness on a holding that even assuming without deciding that unrelated disciplinary matters are indeed Giglio material, where the defense had received notice of Prior NYPD and NYC Civilian Complainant Board investigations (two substantiated and five unsubstantiated), in terms of date and nature of the particular alleged incident, and where databases of these materials are now available on-line in New York City with regard to complaints investigated by both agencies, the People were not required to provide "underlying documents," on the conclusion that the defense could obtain it itself and thus, discovery is not a "game of gotcha." The Ferrer court cited several cases in support: *People v. Perez, 2021 NY Slip Op 21165 [Sup. Ct, Queens County 2021]; People v. Akhlaq, 71 Misc 3d 823 [Sup. Ct. Kings County 2021]; People v. Cano, 71 Misc 3d 728, 737-738 [Sup Ct. Queens County 2020]; People v. Knight, 69 Misc 3d 546 [Sup. Ct. Kings County 2020]; People v. Gonzalez, 68 Misc 3d 1213 [A], at *2 [Sup. Ct. Kings County 2020]; People v. Altug, 70 Misc 3d 1218[A], at *2-3 [Crim Ct, N.Y. County 2021]; People v. Martini, 71 Misc 3d 1211[A] [Co. Ct. Erie County 2021])* and noted several in opposition: *People v. Perez, 71 Misc 3d 1214[A], at *5 [Crim Ct, Bronx County 2021]; People v. Cooper, 71 Misc 3d 559 [County Ct, Erie County 2021];f2020]..*

People v. Jason A. Suprenant, __ Misc.3d __, 130 N.Y.S.3d 633, 2020 WL 5424041 (City Ct. Glens Falls Warren County 9/10/20).

The People are not obligated to obtain police disciplinary files maintained by the City of Glens Falls Police department for various police personnel who may be witnesses in the defendant's

criminal mischief and petit larceny case on the conclusion that notwithstanding the recent repeal of Civil Rts. Law 50-a, C.P.L. art. 245 does not mandate the People to "obtain" police officers' disciplinary files directly and that the People's obligation in connection with these records is satisfied when they cause the records to be produced or the "information" about them made available. Compare, *People v. Jordan Randolph, __ Misc.3d __, 2020 NY Slip Op 20231 (Sup. Ct. Suffolk Co. 9/15/20)* [Disclosure of substantiated and unsubstantiated IAB reports required as *Giglio* material but not unfounded or exonerated] with *People v. David Davis, 2020 N.Y. Misc. Lexis 8243 (Cr, Ct. Bx. Co. 10/20/20)* [Only information re: substantiated IAB file required, per *Suprenant*], *People v. Porter, __ Misc.3d __ (Cr. Ct. Bx. Co. 11/4/20), N.Y.L.J. 12/4/20* [all substantiated IAB file documentation required; no claim of undue hardship], and *People v. Muhammed Ahklaq, __ Misc.3d __, 20212 WL 1047074 (Sup. Ct. Kings Co, 3/15/21) [#2049-19]* [Description regarding NYPD Civilian Complaint Review Board disciplinary records sufficient, including unsubstantiated ones; entire file not required]. See also, *People v. Desean Cooper, __ Misc.3d __, 2021 WL 728983 (Sup. Ct. Erie Co. 2/23/21*) [Entire Buffalo Police Department police disciplinary records of prosecution witnesses required to be produced under C.P.L. 245.20(1)(k) notwithstanding public availability]; See generally, *People v. Carlos Herrera, __ Misc.3d __, 2021 WL 1247418 (Dist. Ct. Nassau Co. 4/5/21)* [Nassau County PD motion to quash subpoena for police witness disciplinary files required to be produce by People under C.P.L .245.20(1) denied].

C.P.L. 710.30

People v. Denise Porter, __ A.D.3d __, 2020 NY Slip Op 08122 (2nd Dept. 12/30/20), N.Y.L.J./law.com1/11/20.

The People were required to notify the defendant, within 15 days of her arraignment, of their intention to offer at trial the testimony of a police that the defendant's physical act of unlocking the safe was in response to a request from police that the safe "needed to be opened" pursuant to CPL 710.30(1)(a). Thus, where NYPD officers executed a no-knock search warrant and after gaining entry to a Queens apartment (and shooting a dog who was blocking their path), and securing three occupants, an officer told the defendant, in handcuffs, that a safe found in a bedroom "had to be opened," and the defendant typed the combination in and opened the safe, this had to be timely noticed by the district attorney under the statute. Since it was not, it should have been precluded and the defendant's narcotics conviction was reversed.

Former C.P.L. Art. 240

People v. Timothy McKenny, __ A.D.3d __, 2021 NY Slip Op 00913 (1st Dept/ 2/10/21).

The trial court properly declining to preclude, on the ground of lack of pretrial disclosure, certain statements defendant made to a police officer were the statements "constituted [] res gestae statement[s]" [quoting, *People v McLean*, 128 AD3d 1094, 1097 (2d Dept 2015)], that were "in the course of the criminal transaction" and thus not discoverable under former CPL 240.20(1)(a). In affirming the defendant's Manhattan robbery conviction, the appellate division also noted that n any event, unlike the situation (not present in this case) of an unnoticed statement covered by the notice requirement of CPL 710.30(1)(a), preclusion of evidence for a C.P.L. article 240 discovery violation was discretionary. Thus, even if the statements at issue were discoverable under the old law, the "drastic sanction" of preclusion would not have been warranted because the defendant was not significantly prejudiced under all the circumstances, and there was no indication of prosecutorial bad faith. *See People v Jenkins, 98 N.Y.2d 280, 284 (2002)*, relied on by the court), to the extent that any error in admitting the statements was harmless,

Protective Orders

People v. Armando Zayas, __ A.D.3d __, 2020 NY Slip Op 05236 (2nd Dept. 9/30/20) [Maltese, J.].

The court modified a protective order signed by the Rockland county court that required the disclosure of certain audio recordings and certain contact information of prosecution witnesses to delay such disclosure until the commencement of trial with a requirement also with a pre-trial hearing scheduled to commence on October 2, 2020, defense counsel be required to hear and view the audio and video recordings in the prosecutor's office. See also, *People v. Davina Singh, __ A.D.3d __, 2020 NY Slip Op 05479 (2nd Dept. 10/6/20) (Maltese, J.*) [Relying on *People v. Zayas, supra,* same holding in a Rockland County protective order with further notation by Justice Maltese: " I remind the People that their motion for a protective order 'should provide a sufficiently detailed factual predicate to enable the courts to evaluate the applicability of the statutory factors governing the issuance of protective orders, assess the weight to be given to each factor, and draw an appropriate balance,'" quoting *People v. Beaton, 179 A.D.3d 871, 875 (2nd Dept. 2020),* discussed below and *People v. Marvin Jeanty, __ A.D.3d __ (2nd Dept. 10/7/20) [Maltese, J.]* for a similar ruling involving the name of a confidential informant on a review of the factors enumerated in C.P.L. 245.70(4). See Generally, *People v.*

Anthony F. Loor, __ A.D.3d __ (2nd Dept.11/10/20) [Hinds-Radix, J.], [Protective order re: names, addresses and contact information of People's witnesses, affirmed] (http://www.nycourts.gov/courts/AD2/Handdowns/2020/Motions/M274061.pdf)

People v. Andre Clarke, __ A.D.3d __, 2020 NY Slip Op (2nd Dept. 9/30/20) [Duffy, J.].

The court modified an protective ordered entered by the lower court on a defendant's appeal that permitted that certain recordings could be "exhibited" only to defense counsel but required the defense to seek permission to share them with their investigators or other employees of defense counsel on the holding that such a provision was an abuse of discretion not established by any safety or protection need or otherwise.

People v. Christopher Taggert, __ A.D.3d __, 2020 NY Slip Op 05020 (2nd Dept. 9/18/20) [Wooten, J.].

The court modified a Rockland county court order of protection that required the immediate production of the names of four witnesses and the floor plans of a correctional facility on a People's appeal on a determination that the lower court's determination was an "improvident exercised of discretion" on a consideration of the factors enumerated in C.P.L. 245.70(4), and in particular in consideration of witness safety, to limit their production to defense counsel only. See Also, *People v. Tajohn Harringon, __ A.D.3d __, 2020 NY Slip Op 05612 (10/8/20) [Dillon, J.]* [Kings County Supreme Court order requiring immediate production of names of three complainants delayed until commencement of trial; names of parents of complainants delayed until 15 days before trial on People's appeal on conclusion lower court order was an "improvident excervise of discretion" on review of C.P.L. 245.70(4) factors.]

People v. Francisco Morales-Aguilar, 186 A.D.3d 786, 2020 NY Slip Op 04721 (2nd Dept. 8/24/20) [Iannacci. J.].

On cross-appeals from a Nassau Supreme Court order that granted the People's application for a protective order pursuant to C.P.L. 240.70(6) that certain of the documents in question be provided to defense counsel no later than 15 days prior to the first scheduled date for hearing or trial, and could be shared with the defendant at the commencement of jury selection, and the remaining subject documents be disclosed immediately to defense counsel, and substituting therefor a provision granting the People's application to withhold all of the subject documents from disclosure until the completion of jury selection, Justice Iannacci modified the order to require production of all materials only on the completion of jury selection.

Freedom of Information

Matter of The Jewish Press, Inc. v. N.Y.C.P.D., __ A.D.3d __ 2021 NY Slip Op 00119 (1st Dept. 1/12/21).

The court granted a media application for access to the police records of a certain traffic accident under the Freedom of Information Law, Public Off. Law, Secs. 84-90, in a CPLR Art. 78 review on the holding that the NYPD's blanket assertion that production of the records would interfere with judicial proceedings pending in the New York City Traffic Violations Bureau [TVB] was insufficient to rebut the presumption of public access. Thus, the police department's claim that access could "tip the hand" of TVB prosecuting attorneys was held insufficient where the records would be otherwise available to the motorist who could then share the documents with others.

Identifications

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People v. Andre Jones, __ A.D.3d __ (4th Dept. 3/26/21) [#KA-02100].

The fact that the defendant was the only individual in a photo array with a tattoo and piercing in connection with a Buffalo police investigation of a robbery and assault, did not make the photo array unduly suggestive where the tattoo and piercing were barely visible and thus did not "orient the viewer toward the defendant as the perpetrator," quoting, *People v Spence, 92 A.D.3d 905, 905 [2nd Dept. 2012).*

People v. Lawen Goins, __ A.D.3d __ (4th Dept. 2/5/21) [#KA-02385].

The fourth department affirmed the defendant's manslaughter conviction over claims that a photo-array shown by police to an eyewitness was unduly suggestive on the holding that the array depicted six males of similar age, skin tone, hairstyle, and physical features and "[a]lthough [the] defendant is the only person in the array looking [slightly] to his [right], the viewer's attention is not drawn to [the] defendant's photo in such a way as to indicate that the

police were urging a particular selection" (quoting, *People v Rogers, 245 AD2d 1041, 1041 (4th Dept 1997);* see also *People v Lee, 96 NY2d 157, 163 (2001*), also relied on by the court.

People v. Courtney Burton, __ A.D.3d __ (4th Dept. 2/5/21] [#KA-00281].

Although the trial court should have suppressed the defendant's parole officer's identification of the defendant in a video surveillance recording in his Onondaga County attempted murder and related-crime trial on grounds that it was unduly suggestive because the police discussed the investigation with the parole officer told him that the defendant was the suspected shooter, any error in permitting an in-court identification was held harmless based on extensive other proof of identification. In affirming, the fourth department also rejected claims that the defendant was arrested without probable cause by the police or for a parole violation by his parole officer prior to the issuance of a parole arrest warrant on the holding that in any event, he validly waived his *Miranda* rights prior to any incriminating statements.

People v. Luis Reyes, 69 Misc.3d 963 (Sup. Ct. N.Y. 10/7/20), N.Y.L.J./law.com10/16/20).

The court per Dwyer, J., denied a motion to preclude testimony involving a facial recognition software [FRS] used by an NYPD detective to identify the defendant as the perpetrator of a burglary in a case in which the surveillance video of the crime scene, 507 West 113th Street by creating stills from the video and after comparing them to the FRS, and then developing a "possible match" of the defendant, which was thereafter followed by the detective personally comparing the mugshot to the still. On the defense motion to preclude the identification, the court held that the detective's determination that the defendant matched the still in the video, even if it followed use of the FRS as an investigative tool was not an identification procedure with no reason for judicial intervention other than a suggestion that perhaps legislative efforts should be undertaken to curtail the use of such software. See, V.D. Wesson, "*Why Facial Recognition Technology is Flawed,"* N.Y.S. Bar Journal August 2020 @ p. 15. See also, *People v. Casey Knight, 69 Misc.3d 546 (Sup. Ct. Kings Co. 9/2/20*) in which the court held that 230 images generated by the NYPS's facial recognition were not Brady material where they were never shown to any person and as such, a motion to compel their discovery was denied.

United States v. Robert Diaz, __ F.3d __ (2nd Cir. 1/27/21), N.Y.L.J./law.com, 2/3/21.

The circuit court affirmed a district court determination adjudicating the defendant in violation of his supervised release based on proof by "preponderant" evidence that he had been the perpetrator of a robbery in a Bronx housing development in which the victim was almost killed

over claims that his identification by the victim on two occasions was tainted by unduly suggestive police procedures. Thus, where an NYPD detective showed the complainant a single mug shot selected from a police data base the day after the attack, which resulted in a positive identification, and three months later, the victim again selected the defendant's photo from a six-person array in which the defendant's was the only image with a large neck tattoo, his identifications were held to not violate due process, notwithstanding the Government's concession that both identifications were indeed suggestive, where the identifications were found to be nonetheless highly reliable due to the nature of the close physical attack, detailed description of the perpetrator provided by the victim and degree of focus and opportunity to view during the attack under *Neil v. Biggers, 409 U.S. 188, 199-200 (1970)* and *Stovall v. Denno, 388 U.S. 293, 302 (1967).*

Right to Counsel

People v. Shane E. Desjardins, __ A.D.3d __, 2021 NY Slip Op 04465 (4th Dept. 7/16/21).

A CPS caseworker testified at the defendant's Oswego County *Huntley* hearing that, at the time she interviewed the defendant, she was aware that he was being held on criminal charges and that he was represented by counsel. She further testified that she worked on a multidisciplinary task force composed of social services and law enforcement agencies, through which she received training on interviewing individuals accused of committing sexual offenses. Additionally, in keeping with task force protocol directing her to report to law enforcement any inculpatory statements made during CPS interviews, the CPS caseworker called the investigating officer immediately following the interview with defendant and promptly went to his office to report the defendant's statements. The fourth department reversed the defendant's second degree course of sexual conduct against a child and related-crime conviction on the holding that under the circumstances of this case although the police did not specifically direct the CPS caseworker to conduct the interview on a specific date or time or accompany her to the interview, that the CPS caseworker here had a "cooperative working arrangement" [quoting *People v. Wilhelm, 34 A.D.3d 40, 48 (3rd Dept. 2006*)] with police such that she was acting as an agent of the police when she interviewed defendant and relayed his incriminatory statements. As such, the fourth department conclusion that they were obtained in violation of his right to counsel, with an additional holding that the error in denying suppression was not harmless.

People v. Michael B. Cunningham, __ A.D.3d __, 2021 NY Slip Op 03195 (2nd Dept. 5/19/21).

The police did not violate the defendant's right to counsel when they questioned him about a murder of a victim, one Robinson, notwithstanding the fact that the defendant was represented on pending criminal matters that occurred more than three months before the murder, at different locations involving Robinson and the defendant's wife, with whom Robinson was having an affair. In so ruling, the second department also observed that even assuming that the defendant's right to counsel had attached on two pending criminal matters, the murder was not "so closely related transactionally, or in space or time" to the represented matters "that questioning on the unrepresented matter would all but inevitably elicit incriminating responses regarding the matter in which there had been an entry of counsel," [quoting, *People v Cohen*, 90 N.Y.2d 632, 638 (1997); *see also People v Henry*, 31 N.Y.3d 364, 370 (2018)]. Moreover, as the appellate division noted, the alleged incidents underlying the prior crimes did not make those crimes so related that representation on the prior matters precluded the defendant from effectively waiving his right to counsel regarding the]murder (especially where the police did not ask the defendant about the represented matters, so the interview did not "actually entail an infringement of the defendant's right to counsel" (*see People v Henry*, 31 N.Y.3d at 371; *People v Cohen*, 90 N.Y.2d at 640.

People v. Seth Marion, 193 A.D.3d 762, 2021 NY Slip Op 02177 (2nd Dept. 4/7/21).

Prior to a lineup, the attorney representing the defendant on another matter spoke to the arresting officer and identified herself as the defendant's attorney. The detective who conducted the lineup testified at the suppression hearing that he was aware prior to conducting the lineup that the defendant indeed was represented by an attorney, to the extent that "the only reasonable inference from the detective's testimony was that he was aware that the defendant was represented by the attorney with respect to the robbery case under investigation." Nonetheless, the detective did not successfully notify the attorney of the lineup. The detective testified that both he and an assistant district attorney called the number provided by the defendant, but the phone just rang but did not make any further efforts to confirm the attorney's telephone number or contact the attorney some other way. As such, pursuant to *People v. LaClere, 76 N.Y.3d 670, 672 (1990),* the defendant's Queens robbery conviction was reversed and a new trial ordered.

***Rodriguez* Hearings**

People v. Vincent Carmona, __ N.Y.3d __ (10/7/21) [7/0; Memorandum].

The Court of Appeals remitted the case for a *Rodriguez* hearing [79 N.Y.2d 445 (1992)] on the holding that the suppression court erred in summarily denying the defendant's request for

suppression of his identification where the prosecution only provided “bare assurances” that the eyewitness was familiar with the defendant. In so ruling the Court noted that the appellate division affirmance based on harmless error improperly relied on record information developed during trial.

Grand Jury

People v. Michael Edwards, 36 N.Y.3d 946 (11/24/20) [6-1; Memorandum], N.Y.L.J. 11/25/20 @ p. 25.

A majority of the Court held 6-1 that the evidence before the grand jury, that the defendant, who was legally intoxicated and while attempting to evade the police, fled down a local road with two passengers at a speed of at least 119 miles per hour, then abruptly swerved across lanes of oncoming traffic into a parking lot and crashed into a wall, thereby severely injuring his passengers, was sufficient to support a charge of first degree depraved indifference vehicular assault and related crimes under this mens rea under *People v. Heidgen, 22 N.Y.3d 259 (2013*) and related cases. Judge Wilson dissented on his conclusion that the evidence, while reflective of reckless and dangerous conduct, did not rise to the level of “grave culpability” required.

People v. Darryl Hemphill, 35 N.Y.3d 1035 (6/25/20) [6/1; Memorandum], N.Y.L.J. 6/30/20 @ p. 24.

A divided Court of Appeals held 6-1 that notwithstanding the prosecutor’s failure to alert the grand jury to exculpatory evidence that implicated another, the People were not obligated to present evidence that someone else was initially identified as the shooter in a Bronx murder trial involving eh shooting of a child. See *People v Mitchell, 82 NY2d 509 [1993]; People v Lancaster, 69 NY2d 20, 25-26 [1986]*), relied on by the majority. The majority also held that the trial court did not abuse its discretion by admitting evidence that the allegedly culpable third party pleaded guilty to possessing a firearm other than the murder weapon. Judge Fahey dissented on his conclusion that the refusal by the trial judge to allow the defense to call the grand jury reporter without first recalling another witness was an abuse of discretion since this third party-culpability information was not collateral. The Supreme Court granted certiorari on April 19, 2021 in this case, now *Hemphill v. New York [#20-637*] on the issue regarding the

third party in question – i.e., whether the defendant "opened the door" at his trial for the prosecutors' use of a statement by the third party, whom three eyewitnesses identified as the shooter, when he pleaded guilty to possessing a .357 revolver – a different kind of gun than the one that killed the child. Prosecutors introduced the third party culpability statement after the defendant attempted to shift blame to the third party, eliciting testimony about the recovery of a 9-mm cartridge from the third party's nightstand after the shooting.

People v. James Ball, __ N.Y.3d __ (6/9/20) [7/0; Memorandum], N.Y.L.J. 6/10/20 @ p. 18.

The Court unanimously affirmed a divided appellate division order [see 175 A.D.3d 987 (4th Dept. 2019)] that held that the trial court properly dismissed the defendant's indictment due to the failure by the People to have charged justification following a request by the defendant during the presentation that the grand jury be provided an instruction on the justifiable use of force under both P.L. 35.15 and 35.20, in a case arising out of the defendant's shooting and killing his brother-in-law.

People v. Anthony Moses, __ A.D.3d __ (4th Dept. 8/26/21) [#KA-19-001416].

The fourth department affirmed the defendant's Onondaga County first degree assault and weapons possession conviction over the defendant's contention that the People impaired the integrity of the grand jury proceedings by failing to charge the grand jury with the defense of justification, failing to present exculpatory evidence, and allowing the victim to provide false testimony. With regard to the failure to instruct the grand jury with respect to justification, the court held that that "[t]here is no requirement that the [g]rand [j]ury must be charged with every potential defense suggested in evidence," and the People are required to charge "only those defenses that the evidence will reasonably support," quoting, *People v Angona, 119 A.D.3d 1406, 1407 (4th Dept 2014).* The appellate division also rejected the contention that the People failed to provide the grand jury with certain exculpatory evidence on the holding that "the People maintain broad discretion in presenting their case to the grand jury and need not seek evidence favorable to the defendant or present all of their evidence tending to exculpate the accused," quoting, *People v. Mitchell, 82 NY2d 505, 515 (1993).*

People v. Maurice Owens, __ A.D.3d __, 2021 NY Slip Op 00958 (4th Dept. 2/11/21) [#KA-19-00978].

The failure by the People to have sought and received leave to re-present a case to the grand jury under C.P..L. 210.20(4) following a trial dismissal of a weapons charge on grounds of

legally insufficient evidence rendered the subsequent indictment jurisdictionally defective and thus, a nullity. As such, notwithstanding a motion to dismiss the instant indictment on that ground, the defendant's judgment of conviction was vacated and reversed with the indictment dismissed. In so ruling, the court noted that the People could apply to leave to re-present on proper grounds to the trial court.

People v. Robert Baska, __ A.D.3d __, 2021 NY Slip Op 00947(4th Dept. 2/11/21) {KA# 20-01200].

There was sufficient evidence presented to the grand jury to corroborate the accomplice's testimony under C.P.L. 60.22 to support the defendant's Onondaga County indictment for perjury and related crimes based on the accomplice's testimony that, on a specific date, defendant and the accomplice had a telephone conversation regarding the alleged criminal conduct that was corroborated by defendant's cell phone records, which establish "that cell phone calls were made as the accomplice[] testified," quoting, *People v Pratcher, 134 AD3d 1522, 1524 (4th Dept 2015).* The accomplice's testimony was also corroborated by, among other things, the testimony of non-accomplices and the transcript of the criminal jury trial during which the charged offenses were allegedly committed. As such, a trial court order that dismissed the indictment was reversed on a People's appeal.

People v. Luis Jimenez, __ A.D.3d __, 2020 NY Slip Op 07223 (2nd Dept. 12/2/20).

Where there was no reasonable view of the evidence presented to the grand jury that required a justification charge in a presentation involving criminal mischief involving the defendant's striking the complainant's small dog and charges in Queens under Agriculture and Markets Law 353-a, a majority of the court by a 3-1 vote reversed a lower court order that dismissed the defendant's indictment was reversed, the indictment reinstated and the case remitted to the lower court. Justice Hinds-Radix dissented on the conclusion that where the defendant testified before the grand jury that he hit the dog because it bit his leg following a dispute over money with the complainant, the charge was warranted, notwithstanding the size of the animal.

People v. Luis Morillo/Miles Gibson, 70 Misc.3d 603 (Sup. Ct. Bronx Co. 11/17/20), N.Y.L.J./law.com12/4/20.

Several defendants' murder, manslaughter and weapons indictment was dismissed with leave to re-present on the motion court's rare conclusion that pursuant to C.P.L. 210.20(c), and *People v. Huston, 88 N.Y.2d 400 (1995),* the grand jury presentment was "palpably" impaired and

prejudice may have occurred due to the elicitation of testimony by an investigating detective regarding what he observed on a surveillance video, including identifications of persons on the video and what they were thinking, where the video recording itself was never introduced in evidence before the grand jury and where the detective never indicated any prior contact with the defendants.

Accusatory Instruments

People v. Thomas Timko, __ N.Y.3d __ (10/7/21) [7/0; Memorandum].

On the People's concession, the Court of Appeals held that the factual allegations contained in the accusatory instrument along with the supporting deposition failed to provide probable cause to believe that the defendant had communicated a threat to cause physical harm to or unlawful harm to the complainant or a member of her family as required by P.L. 240..30(1)(a) per *People v. Golb, 23 N.Y.3d 455 (2014).* As such an appellate term order to the contrary was reversed and the accusatory instrument dismissed. *Identification*

People v. Kennth Slade/Keith Brook/Charo N. Allen, 37 N.Y.3d 127 (5/6/21) [4/2; Garcia, J.].

A majority of the Court sustained three misdemeanor informations over challenges they were deficient because a translator participated in the drafting process in cases involving complainants with a limited English proficiency and thus created improper hearsay. As such, in *Slade*, the initial accusatory instrument related facts supporting a third-degree assault charge with a limited-English victim but contained no certificate of translation when the instrument was converted to a misdemeanor information. In *Brooks*, a certificate of translation was attached to the converted information but rejected by the trial court and appellate term as defective. In *Allen*, the limited-English speaking complainant in a second-degree menacing case with a false statements jurat from an officer who translated the victim's statements but the trial court and appellate term rejected the instrument as deficient without a certificate of translation. The majority held that in *Slade* and *Brooks*, reviewing the "four corners" of each instrument along with the supporting depositions, as required, each was sufficient with non-hearsay allegations as a matter of "sound policy and practice" especially where the criminal procedure law does not require a certificate of translation. Moreover, in *Allen*, the majority held the statement of the police officer attesting to the accuracy of the translation did not create a "hearsay defect,"

because the officer was merely a "language conduit." Judge Garcia and Judge Wilson dissented separately in each case on the grounds that the issue here regarding the facial sufficiency of accusatory instruments with translated allegations was systemic in a state with a "linguistically diverse" population.

People v. Daria N. Epatchi, __ N.Y.3d __ , 2021 NY Slip Op 02021 (4/1/21) [5/1; DiFiore, C.J.].

A majority of the Court, per DiFiore, C.J., held that a rule adopted by the appellate term for the ninth and tenth judicial districts which, absent special circumstances, the People cannot re-prosecute a defendant by filing a new simplified traffic information after an original simplified traffic information was dismissed for facial insufficiency under CPL 100.40 (2) for failure to provide a requested supporting deposition in a timely manner has no basis in the Criminal Procedure Law as an "extra-statutory barrier to prosecution" and contravened the Court's holding in *People v Nuccio, 78 N.Y.2d 102 (1991).* As such, lower court orders entered on that basis were reversed. Judge Wilson dissented on his conclusion that the rule as consistent with interest of justice authority and thus, is valid.

People v. Edward Hardy, __ N.Y.3d __ (10/15/20) [6/1; Wilson, J.].

A majority of the Court held 6-1 per Judge Wilson, that the lower courts erred in permitting an amendment of a clearly erroneous fact contained in an information that charged the defendant with harassment and second degree contempt on a conclusion that under the modern criminal procedure law, prosecutors may not cure factual errors and deficiencies in informations and misdemeanor complaints vis amendment and thus a superseding accusatory instrument is required. In so ruling, the majority held that *People v. Easton, 307 N.Y. 336 (1954),* relied on the lower courts and decided under the old Code of Criminal Procedure was "displaced" with the enactment of the CPL in 1971. Thus, "the structure and legislative history of the CPL, as well as a straightforward application of our canons of statutory construction, all demonstrate that the CPL does not permit the kinds of statutory amendments by *Easton*.

People v. Alejandro Zaragoza, 195 A.D.3d 522, 2021 NY Slip Op 03915 (1st Dept. 6/17/21).

A complaint that alleged that the defendant "touched the victim's thighs and genitals by reaching under her skirt," but failed to allege any facts consistent with the application of

pressure was insufficient and thus jurisdictionally defective. As such the defendant's attempted forcible touching conviction entered after a non-jury trial was vacated.

Multiplicitous Indictments

People v. Christopher G. O'Brien, __ A.D.3d __, 2020 NY Slip Op 04971 (2nd Dept. 9/16/20).

While sustaining the defendant's multiple count second degree aggravated vehicular manslaughter and related conviction against challenges to the lower court's adverse ruling on the admissibility of his statements to law enforcement and evidence of the defendants' refusal to submit to a chemical test, the court dismissed three of the four aggravated vehicular manslaughter conviction on the determination that they were pled multiplicitiously. The basis for its conclusion that the defendant had been charged with four counts of second degree vehicular manslaughter pursuant to P.L. 125.12(1) based on his having violated separate provision of VTL 1192: four "distinct" theories based on intoxication, or impairment by a combination of drugs of of alcohol. As such, because the Peopel were only required to prove that the defendant violated one subdivision of VTL 1192 in order to prove the defendant's guilt under P.L.125.25(12)(1), the People's "the People's electiob to proceed on a theory that the defendant had violated more than one such subdivision by presenting his multiple, disinct manners of intoxication was not necessary to his guilt. While dismissal of the extra counts was ordered, the court noted that this would not impact the sentence originally imposed but this ordered "in consideration of the stigma attached to the redundant convictions."

Superior Court Informations

People v. Zaquan Walley, __ N.Y.3d __, 2020 NY Slip Op 07691 (12/22/20) [Memo/7/0].

The Court reversed an appellate division order that held that a superior court information to which the defendant pled guilty was jurisdictionally defective and held that shortly after the appellate division rendered its decision herein, the Court of Appeals decided *People v Lang (34 NY3d 545, 567 (2019),* which held that that any "omission from the indictment waiver form of non-elemental factual information that is not necessary for a jurisdictionally-sound indictment is [] forfeited by a guilty plea" and "must be raised in the trial court" (*Lang* at 569, quoting *People v Milton, 21 NY3d 133, 137 n [2013]).* Thus, the Court ruled that "[t]he time of incident is not an element of second-degree criminal possession of a weapon (Penal Law § 265.03 [2]), and where defendant was on notice of the crime charged, *Lang* was controlling.

People v. Jovan McCall, __ A.D.3d __, 2021 NY Slip Op 03083 (3rd Dept. 5/13/21) [#111213].

The third department, per Aarons, J., held that the defendant's plea of guilty to the crime of attempted second-degree robbery [P.L. 110.00/160.10(1)], pursuant to a filed superior court information was jurisdictionally defective and properly raised on appeal notwithstanding an appeal waiver because the SCI did not contain either an offense charged in the underlying felony complaint which charged first degree robbery under P.L. 160.15(1), or a lesser included offense thereof.

People v. Terry Angel, __ A.D.3d __, 143 N.Y.S.3d 536, 2021 NY Slip Op 03001 (1st Dept. 5/11/21).

Where the initial felony complaint charged the defendant with two counts of criminal contempt in the first degree, and one count each of assault in the third degree and harassment in the second degree, the defendant's agreement to plead guilty to one count of aggravated criminal contempt, an offense greater than that charged in the original felony complaint in an S,C.I. was invalid. In reversing, the first department held that because the only offense contained in the superior court information was not an offense for which defendant was held for grand jury action, or a lesser included offense, the S.C.I. was jurisdictionally defective (*see People v Zanghi*, 79 N.Y.2d 815 (1991); *People v Pierce*, 14 NY3d 564 (2010).

People v. Paul Meeks, __ A.D.3d __, 2021 NY Slip Op 01925 (4th Dept. 3/26/21).

An Onondaga County defendant was charged by felony complaint with two separate acts of rape in the first degree that occurred in September and October 2016, an act of criminal sexual act in the first degree that occurred in November 2016 and separate acts that constituted endangering the welfare of a child. Thereafter, he waived indictment by a superior court information that listed only a single count of count of rape in the first degree that allegedly occurred sometime between July and November 2016. He thereafter pled guilty to that crime. The fourth department reversed and held the accusatory instrument to be jurisdictionally defective because the sole charge in the waiver of indictment and SCI could plausibly refer to either of the acts of rape in the first degree alleged in the felony complaint, and as such, the waiver of indictment failed to put defendant on notice of the precise crime for which he was waiving prosecution by indictment. In reversing, the court distinguished *People v. Thomas, 34 N.Y.3d 454, 570 (2019)* and noted that this is not a case in which the waiver of indictment and SCI contained all of the same offenses alleged in the felony complaint, which, despite any

generic language in the waiver, would have sufficed to place defendant on notice of the offenses for which he was waiving prosecution by indictment.

People v. Melvin Aquino, __ A.D.3d __, 2021 NY Slip Op 01057, [& 2021 NY Slip Op 01058] (2nd Dept. 2/17/21).

The defendant's contention that the written waiver of indictment failed to comply with Criminal Procedure Law § 195.20, in that it does not contain the "approximate time and place" of the offenses to be charged in the SCI, is forfeited by his plea of guilty. See *People v Thomas,* 34 N.Y.3d 545 (2019), relied on by the court.

Jurisdiction

People v. Robert S. Crumb, 194 A.D.3d 739, 143 N.Y.S.3d 565, 2021 NY Slip Op 02816 (2nd Dept. 5/5/21).

The defendant was charged with murdering his wife in Nassau County and for reckless endangerment and other crimes related to has having fled and led the police through several counties on a chase that ended in Brooklyn where he was arrested. The trial court, upon submitting the issue of venue regarding the charge related to the flight and the defendant's arrest to the jury, instructed that "a finding of geographic jurisdiction on one count effectively provided the County with jurisdiction over all the other counts." The second department reversed these counts on a holding that because a defendant is entitled to have a jury by a preponderance of the evidence and not the court, determine factual issues regarding venue, "[i]t is not enough that the record contains evidence" that an element of the offense occurred in the county asserting jurisdiction (*People v Ribowsky*, 77 N.Y.2d 284, 292 (1992); *People v Sosnik*, 77 N.Y.2d 858, 860 (1991). As the court noted "it must appear from the instructions or by necessary implication from the verdicts that *the jury* made a finding of proper venue" (*People v Ribowsky*, 77 N.Y.2d at 292 [emphasis added]; *see People v Sosnik*, 77 NY2d at 860). In this case it could not be said from the nature of the verdict that the jury "necessarily found" that conduct constituting an element of each of the three relevant counts was committed in Nassau County (*People v Sosnik*, 77 NY2d at 860.

Matter of Edward Grant Gentner v. Hall, 191 A.D.3d 1129, 2021 NY Slip Op 02028 (3rd Dept. 4/1/21).

The third department granted a defendant's application for a C.P.L.R. Art. 78 writ of prohibition to prevent his prosecution in Warren County for the alleged theft of $3,900 from an organization, the Lake George Emergency Medical Squad. by illegally accessing bank accounts in Saratoga County on a theory of impact jurisdiction based on "particularized harm" under C.P.L. 20.40(2)c, on a holding that for particular effect jurisdiction to attach the People were required to establish "not only that petitioner's alleged conduct had a materially harmful impact to the well-being of the Warren County community as a whole, but also that petitioner intended his conduct to have such an impact" [citing *People v Fea, 47 N.Y.2d 70, 76-77 [1979*)]. Here, where there was no proof of such intent on the part of petitioner. The prosecution failed to establish that the theft of money, in the amount of $3,900 from Lake George EMS — a nongovernmental entity serving one town within Warren County — caused such a "materially harmful impact upon the governmental processes or community welfare" of that county to justify the extraordinary exercise of particular effect jurisdiction. In so ruling, the appellate division held that an article 78 writ was an appropriate vehicle to test jurisdiction and that this was not the rare case in which "particularized harm" jurisdiction was present.

People v. Saceed Cousar, 191 A.D.3d 694, 2021 NY Slip Op 00573 (2nd Dept. 2/3/21).

The defendant's Putnam County grand larceny conviction was reversed on a holding that where the People did not dispute the defendant's claim that none of the elements of the alleged offense occurred in New York and moreover never sought to establish that the complainant's bank account was located in New York, the crime of larceny was not a "result offense" within the meaning of C.P.L. 20.20(2)(a). In so ruling, the court expressed no opinion regarding territorial jurisdiction under C.P.L. 20.20(2)(b) or 20.10(4).

Speedy Trial

People v. Ushawn Taney, __ A.D.3d __ (3rd Dept. 9/1/21) [#111027].

Notwithstanding a period of 14 months of pre-indictment delay in filing charges against the defendant in connection with his narcotics-related activities in Schenectady County, weighing the "the extent of the delay, the reason for the delay, the nature of the charges against the defendant, whether there has been an extended period of pretrial incarceration and whether the defense has been impaired by reason of the delay" as required by *People v. Taranovich, 37*

N.Y.2d 442. 445 (1975) and its progeny, the defendant's due process right to a speedy prosecution was no violated, especially where the defendant was not incarcerated during this period.

People v. Tina Wagoner, __ A.D.3d __ (4th Dept. 6/17/21) [# KA-16-02366].

The fourth department rejected the defendant's claim that a more than three year period of pre-indictment delay warranted a reversal of her conviction for various sexual assault crimes involving a 12 year old child. Thus, considering "(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay" *People v Taranovich, 37 N.Y.2d 442, 445 (1975);* see *People v Decker, 13 N.Y.3d 12, 15 (2009),* and the fact that a "determination made in good faith to delay prosecution for sufficient reasons will not deprive defendant of due process even though there may be some prejudice to defendant' " (*Decke*r, 13 N.Y.3d at 14), and the lack of any material prejudice, the conviction with a modification of two first degree rape counts due to weight of the evidence insufficiency.

People v. Bianca Alvarez, __ A.D.3d __, 2021 NY Slip Op 03286 (1st Dept. 5/23/21).

The defendant's speedy trial motion should have been granted by the lower court where a 93 day period of post-readiness delay in presenting the case to the grand jury should have been charged to the People. Thus, in a Manhattan leaving the scene of an incident case, where the prosecution knew from the outset that in light of the complainant's injuries and inability to recall much of the incident, it would primarily have to rely on eyewitnesses and police witnesses, delaying the presentation purportedly due to the complainant's unavailability was not an exceptional circumstance under C.P.L. 30.30(g). In so ruling, the first department noted that the exclusion for special circumstances applies "only when the People for practical reasons beyond their control cannot proceed with a legally viable prosecution" quoting, *People v Price, 14 N.Y.3d 61, 64 (2010),* and "it is for the prosecutor to establish a material witness's unavailability, its own due diligence, and its ground for believing in the imminent availability of the witness [citation removed] none of which was established here." Additionally, the prosecutor did "not create a contemporaneous record of the witness' injuries, much less offer medical substantiation, showing that the complainant was unavailable for the entire 93-day period."

People v. Ronald B. Johnson, __ A.D.3d __ (4th Dept. 4/30/21) [#KA 17-00529].

The fourth department affirmed the defendant's second degree rape conviction on a holding that notwithstanding an unspecified and "unjustified" lengthy period of pre-indictment delay in prosecuting the case by the People, the defendant suffered "no conceivable prejudice as a result under *People v. Singer, 44 N.Y.2d 241 (1978).* Thus, on a review of the factors under *People v. Taranovich, 37 N.Y.2d 442 (1975)* of 1) the extent of the delay; 2) the reason for the delay; 3) the nature of the underlaying charge; 4) whether or not there has been an extended period of pre-trial incarceration; and 5) whether or not there is any indication the defense has been impaired by the delay, the court held that while the second factor favored the defendant, the fifth did not in the final analysis. Indeed, as the panel observed, while the law does not require prejudice to succeed on such an application [see *People v. Wiggins, 31 N.Y.3d 1, 13 (2018)],* the "complete absence of prejudice" was determinative.

People v. Roslyn Pilmar, __ A.D.3d __, 2021 NY Slip Op 02116 (1st Dept. 4/6/21).

Although a 21-year delay in bringing murder charges in New York County against the defendant was "significant," it was not due to the bad faith of the People, but the result of prosecutorial efforts to procure sufficient evidence to establish the defendant's guilt beyond a reasonable doubt. As such on a balancing of the factors required in *People v. Taranovich, 37 N.Y.2d 4442 (1975*), the defendant was not deprived of his right to a prompt prosecution under *People v. Singer, 44 N.Y.2d 241 (1978).*

People v. Reuben Garcia, __ A.D.3d __ (4th Dept. 3/18/21) [#KA-16-00875].

The trial court properly denied the defendant's motion to dismiss his rape indictment on constitutional prompt-prosecution grounds pursuant to *People v Singer, 44 NY2d 241, 253-254 (1978), n*otwithstanding an 8-year, 10-month interval between the alleged crime and the commencement of this action (see generally CPL 1.20 [1] [a]; [8]; [17]), In so ruling in the defendant's Monroe County prosecution, the fourth department held that while the delay was "extraordinary" and "weigh[ed] in defendant's favor for purposes of the *Singer* analysis, less than two years of that period was attributable to governmental inaction, namely, the time between April 2011, when defendant's DNA sample was submitted to the CODIS database following an unrelated conviction, and March 2, 2013, when the crime lab finally tested the complainant's rape kit and matched the sample to defendant's DNA. Thus. the People were not faulted for the first six years of delay because the complainant could not identify her alleged attacker and defendant's DNA was not in the database to compare against the rape kit. Additionally, given the further investigation necessitated by the DNA hit in March 2013, the delay between that event and the filing of charges in February 2014 (see *Singer,* 44 N.Y.2d at 254); was excused as well.

People v. Bernhard Laufer, __ A.D.3d __, 2020 NY Slip Op 05920 (2nd Dept. 10/21/20).

Once the People have stated their readiness for trial, they are under no obligation to "continually repeat that declaration upon each subsequent appearance in court." As such, while the People must re-state their readiness if there is a substantial break in the proceedings, here with no break, any delay that was attributable to a finding that the defendant was incompetent to proceed, which ended when, following treatment, he was found fit to proceed, did not require a new statement of readiness. As such, the lower court denial of dismissal on speedy trial grounds correctly made that determination.

People v. Mujahid "Peter" Pervez, __ Misc.3d __ (Sup. Ct. Bx. Co. 1/21/21), N.Y.L.J. 1/23/21 @ p. 21.

The court denied a defendant charged with Medicaid fraud enterprise corruption's motion to dismiss based on claims of a speedy trial denial and in the interest of justice based on the fugitive disentitlement doctrine, where the defendant had fled to Pakistan in 2013 following his indictment and remained therein. In so ruling, the court declined to consider the motion as an equitable remedy for the defendant's affirmative unwillingness to make himself available to the court's jurisdiction. In ruling the defendant's application "audacious,", the court relied on, among other cases, *Roman Polanski v. Superior Court, 180 Cal. App. 4th 507, 533 (2009)* and the second circuit's rationale in *United States v. Persico, 853 F.2d 134, 137 (2d Cir. 1988),* as the basis for denying relief to those who flee from justice: "1) assuring the enforceability of any decision that may be rendered against the fugitive; 2) imposing a penalty for flouting the judicial process; 3) discouraging flights from justice and promoting the efficient operation of the courts; and 4) avoiding prejudice to the prosecution caused by the defendant's escape." Moreover, in reaching the merits in the alternative, the court found that the defendant's speedy trial rights had not been violated.

Guilty Pleas

People v. Colton Price, __ A.D.3d __ (4th Dept. 6/17/21) [# KA 19-00981].

The defendant's claim that his guilty plea to first degree sexual abuse in Seneca County was coerced because it was connected to and entered on condition that his brother also plead guilty was rejected on the holding that consistent with *People v. Fiumefreddo, 82 N.Y.2d 536, 51 (1993),* the inclusion of a third-party benefit did not necessarily render a plea involuntary where, following a hearing on the issue with testimony from his former attorney that the defendant was

properly advised. In affirming the fourth department noted that notwithstanding that advice included information that if convicted after trial he would probably receive more jail time, of the defendant was under some internal pressure because of his brother, this was not an involuntary plea.

People v. Carlos A. Benitez, __ A.D.3d __, 2021 NY Slip Op 03600 (2nd Dept. 6/9/21).

On the People's concession, the failure by the trial court to specify the period of post-release supervision the court was conditionally promising to impose required that the defendant's plea be vacated and the case reversed because it was not entered voluntarily and knowingly. See also *People v. Keith Dillon, __ A.D.3d __, 2021 NY Sip Op 03606 (2nd Dept. 6/9/21)* for a similar ruling issued the same day by the second department.

People v. Timoth Buchanan, __ A.D.3d __, 2021 NY Slip Op 03386 (1st Dept. 5/27/21).

The defendant's guilty pleas was involuntarily entered where he was incorrectly told that he faced the possibility of serving three 15-year sentences, to run consecutively, if he chose to proceed to trial**,** when at most he was facing 20 years because of the statutory cap (*see* Penal Law § 70.30[1][e][i]). Thus, where he was weighing a 9-year plea offer against what he was told was a maximum of 45 years' imprisonment the failure to have advised him about the so-called capping statute, made him unable to have a "full understanding of what the plea connotes and of its consequences" (quoting, *People v Harris*, 61 N.Y.2d 9, 19 (1983). As the first department explained, this 25-year disparity between the true legal sentence and the sentence defendant was told he could receive was so significant alone as to render his plea involuntary where the defendant explained in his affidavit, submitted in support of his CPL 440.10 motion, that the prospect of spending 45 years in prison—and dying there—factored into the 42-year-old's calculation of the relative pros and cons of accepting the plea.

People v. Desivino B. Gause, __ A.D.3d __, 2021 NY Slip Op 02543 (2nd Dept. 4/28/21).

During the defendant's plea allocution to the crime of third-degree criminal sale of a controlled substance, the defendant's factual recitation negated the element of intent. The trial court merely inquired whether the defendant was pleading guilty of his own free will thereafter. The appellate

division reversed notwithstanding no post-plea motion to withdraw was made on the holding that “[t]his is "that rare case . . . where the defendant's recitation of the facts underlying the crime pleaded to clearly casts significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea," quoting, *People v Lopez, 71 N,Y.2d 662, 666 (1988*).

People v. Tung Nguyen, __ A.D.3d __, 2021 NY Slip Op 00724 (4th Dept. 2/5/21) [#KA 14-01895].

The failure by the trial court to have advised the defendant at his plea proceeding that he would be required to pay a fine and after a period of incarceration, be required to undergo a three-year condition discharge that required him to install an maintain an ignition interlock device on any car he owned or maintained rendered the plea involuntary. As such it was vacated and remitted to the lower court.

People v. Tyron Hollmond, __ A.D.3d __, 2020 NY Slip Op 07222 (2nd Dept. 12/2/20).

Notwithstanding extensive efforts by the trial court to enable the defendant sufficient time to consult with his attorney prior to his plea on the eve of a scheduled trial, the record as developed at a hearing following a remittal on a the defendant’s appeal [see 170 A.D.3d 1193 (2nd Dept. 2019)], reflected that these efforts were insufficient to provide the required constitutional full measure of opportunity where the defendant was housed in an upstate DOCS correctional facility (Coxsackie) and where DOCS repeatedly thwarted the court’s efforts. Thus, where the time for consultation prior to the plea was insufficient under the Sixth Amendment, considering the defendant’s substantial mental challenges and his claim on appeal that it was coerced, the defendant’s guilty plea was vacated on the conclusion that it was not knowing, voluntary and intelligent.

People v. Lee, 188 AD3d 1685 (4th Dept. 11/13/20) [MEMO]

The fourth department remitted Lee’s case to the trial court for assignment of new counsel holding that defense counsel became an adverse witness to his own client. Lee had pled guilty to attempted assault in the 1st degree and then moved *pro se* to withdraw the plea. Defense counsel asserted that Lee’s guilty plea was informed, that the court was correct in denying it, and that the motion was “silly.” When the conflict became apparent, the court should have assigned new counsel

People v. Jeffrey Joseph, __ A.D.3d __, 2020 N.Y. App. Div. 7678 (1st Dept. 12/10/20).

The lower court's mis-advice that the defendant faced an aggregate period of 45 years incarceration for a series of Manhattan and Brooklyn burglaries when in fact, if convicted of all charges, any sentence would have been reduced by operation of P.L. 70.30(1)(3)(I) to 20 years required that plea of guilty to Manhattan charges with a 10 year aggregate sentence therein to run concurrently with Brooklyn charges, be vacated on the conclusion that it was not sufficiently voluntary, knowing and intelligently entered. Is so ruling, the court, per Renwick, noted that while erroneous advice as to a potential sentence on a plea does not necessarily render a plea involuntary but is merely a factor in such a determination, and here, the defendant never moved to withdraw his plea, the issue was reached nonetheless.

People v. Tenesaca, __ Misc.3d __ (App. Term 1st Dept. 1/22/21).

The defendant's harassment conviction was affirmed on a holding that where he never moved to vacate or withdraw his guilty plea any issue concerning its voluntariness was not preserved on appeal. Alternatively, the court held that there was nothing in the record of the defendant's plea proceeding to indicate that the presence of two jurisdictionally defective counts in the charging document adversely impacted the voluntary, knowing and intelligent nature of his plea allocution where the defendant was represented by counsel and affirmatively indicated he wished to plead guilty.

People v. Citron, __ Misc.3d __ (App. Term Ist Dept. 11/27/20), N.Y.L.J./law.com, 12/10/20.

The defendant's guilty plea to disorderly conduct as a lesser offense to the charges of assault and harassment was held valid where he confirmed that he was pleading guilty voluntarily, that he had the opportunity to discuss the plea with his attorney, and that he understood he was giving up various rights, including his right to a trial, to call witnesses, to question the People's witnesses, and to testify on his own behalf. In affirming, the court noted also that where the defendant pleaded guilty to an uncharged lesser offense, no factual basis for the plea was necessary, citing, *People v. Johnson, 23 NY3d 973, 975 (2014).*

<u>Immigration Consequences</u>

People v. Jose DeLorb, __ N.Y.3d __ (3/31/20) [7/0; Garcia, J].

The court held that a defendant's failure to object to a trial court's alleged failure to have apprised him of the immigration consequences of a guilty plea under *People v. Peque, 22 N.Y.3d 168, 173 (2013),* he or she must preserve the claim for appellate review in the Court of Appeals as a matter of law. Thus, where a defendant, a national of the Dominican Republic and a permanent resident in this country was served with a "Notice of Immigration Consequences" [Notice] in three languages, including Spanish, at arraignment what warned him of possible deportation, a denial of naturalization or an exclusion from the United States as a result of a conviction, with specific mention and then failed to object at his plea or sentence as a second violent felony offender in a Queens burglary case which occurred prior to *Peque*, the defendant's claim was held not reviewable in the Court of Appeals. In affirming, the Court declined to apply the "rare case" exception to the rule of preservation based on the Notice and the defendant's opportunity to object. Judge Wilson, joined by Judges Rivera and Fahey concurred in the result based on proof that the defendant here knew of the immigration consequences base on the notice and his submission under C.P.L. 440.10, but left open the possibility that another defendant might not be similarly situated in spite of the Notice. Additionally, Judge Wilson suggested that if the court were to inadvertently omit *Peque* warnings, it would "behoove" the parties to remind the trial judge to provide them.

People v. Dwight A. Saunders, __ A.D.3d __, 2021 NY Slip Op 02181 (2nd Dept. 4/7/21).

The lower court properly determined that defense counsel's mis-advice regarding the immigration consequences following the defendant's Nassau County plea of guilty to criminal contempt prejudiced the defendant and thus properly vacated the defendant's conviction on grounds of ineffective assistance. Thus, the second department affirmed this determination on a People's appeal under *Padilla v. Kentucky, 559 U.S. 356, 364 (2009)* and its progeny that the record supported the trial judge's determination that there was a reasonable probability that but for counsel's mis-advice, the defendant would not have pleaded guilty to criminal contempt in the second degree, a deportable offense, even though the defendant did not testify at the hearing where defense counsel and the defendant's former immigration counsel both testified to the defendant's "being focused on the immigration consequences of his plea and his determination to plead guilty only after being incorrectly advised that a conviction of criminal contempt in the second degree would not render him deportable."

People v. Jose Remigo, __ A.D.3d __, 2021 NY Slip Op 01519 (1st Dept. 3/16/21).

The defendant was deprived of effective assistance of counsel when his attorney failed to advise him that his guilty plea to an aggravated felony (attempted first degree robbery) would result in mandatory deportation, but rather indicated that the plea "may very well result" in deportation. The appeal was held in abeyance to afford defendant the opportunity to move to vacate his plea upon a showing that there is a reasonable probability that he would not have pleaded guilty had he been made aware of the deportation consequences of his plea.

People v. Leo Tapia, __ A.D.3d __, 2021 NY Slip Op 01274 (2nd Dept. 3/3/21).

During a joint Queens supreme court plea proceeding the court advised the co-defendant that he could be deported as a result of his guilty plea in the presence of the defendant. After the co-defendant indicated that he understood this, the court addressed the defendant directly and asked him if he understood this as well. The defendant indicated in the affirmative. The appellate division held that the lower court's limited inquiry, coupled with the fact that the defendant required a Spanish interpreter to understand the court's remarks rendered the *Peque* advice insufficient to the extent that the case was remanded with the defendant to be given an opportunity o withdraw his plea.

Jose Santos Sanchez v. Mayorkas, __ U.S. __ (6/7/21) [9/0; Kagan, J.).

A unanimous court held 9-0 that a person who, in 1997, entered the country as a citizen of El Salvador unlawfully and thereafter in 2004 was granted temporary protected status (TPS) was ineligible to be granted lawful permanent resident status (LPS) under 8 U.S.C 1255. Thus, because the applicant's "admission" to the United States was not lawful he was not eligible for consideration for LPS and a third circuit determination which reversed a district court determination to the contrary was affirmed.

Waivers of Appeal

People v. Jose Bisono, et al., __ N.Y.3d __ (12/15/20) [7/0; Memorandum], N.Y.L.J 12/16/20 @ p. 18.

The Court of Appeals reversed ten appellate division orders in the captioned case, along with nine other companion cases on a holding that the defendant's waiver of appeal was invalid and unenforceable under *People v. Thomas, 34 N.Y.3d 545 (2019)* [discussed below]. In so ruling, the Court cited 90 prior appellate division rulings that have invalidated appeal waivers in an appendix. Upon remittal, in one of these cases, in *People v. Trevor Bisono, __ A.D.3d __ (4th Dept. 2/5/21) [#KA-17-1097],* the fourth department held that one defendant's sentence was not unduly harsh, that claims regarding venue were forfeited as a result of the plea and that based on the record presented, he did not received ineffective assistance from his attorney in connection with his plea. See also *People v. Joshua D. Biaselli, __ A.D.3d __ (4th Dept. 2/5/21) [#KA-18-01034]* and *People v. Jeffrey R. MaGee, __ A.D.3d __ (4th Dept. 2/5/21) [#KA-01753],* in which the fourth department in another companion case remittals held that the defendant's sentence was not harsh or excessive and *People v. Joshua L. Miller, __ A.D.3d __ (4th Dept. 2/5/21) [#KA-01302],* in which the court similarly rejected claims that the lower court erroneously denied suppression and that the defendant 's sentence was harsh or excessive on a remittal from *Bisono.*

People v. God Islam Botts, __ A.D.3d __ (3rd Dept. 2/4/21).

Where the trial court made clear that the waiver of the right to appeal was a condition of the plea bargain, adequately distinguished the right to appeal as separate and apart from the trial-related rights forfeited by virtue of the guilty plea, confirmed with defendant that he understood the waiver and its consequences and additionally, defendant executed a written appeal waiver, after having an opportunity to review it with defense counsel, and assured the court that he understood it, the defendant's waiver of the right to appeal was held effective. See also, *People v. Michael Crossley, __ A.D.3d __ (3rd Dept. 2/4/21)* for a similar ruling the same day.

People v. Jamal Dilworth, __ A.D.3d __, 2020 NY Slip Op 07720 (1st Dept. 12/22/20).

The first department enforced the trial court required-defendant's waiver of his right to appeal on a holding that the defendant's plea colloquy with the court sufficiently separated out those rights waived by operation a law as a result of a guilty plea and those rights waived by a specific waiver under *People v. Thomas, 34 N.Y.3d 545 (2019),* discussed above. In affirming the court also declined to adopt the second department's ruling in *People v. Sutton, 184 A.D.3d 236 (2nd Dept. 2020)* [discussed below], in which that court held that where the court conditions a guilty plea on a waiver of a appeal, the specific rationale must be placed on the record and held that in any event, the waiver was valid.

People v. Esposito, __AD3d__, 2020 Slip Op 05524 (2d Dept. 10/7/20)[MEMO].

The appellate division, relying on *People v. Sutton*, 184 AD3d 236 (6/17/20), found an appeal waiver unknowing and involuntary where the plea judge –not the prosecutor– made a sentence offer to the defendant and required the defendant to waive his right to appeal. The plea judge failed to "set forth any reason for demanding an appeal waiver, and none is apparent on the record."

Outley **Enhancements – Violations of Conditions of Plea**

People v. Keith A, Geter, __A.D.3d __, 2021 NY Slip Op 01271 (2nd Dept. 3/3/21).

The county court did not err in declining to conduct a hearing on whether he had violated the conditions of his release under a program where the lower court's determination that the defendant violated the conditions of his release, i.e., that he complete a treatment program or face incarceration of 12 years. Thus, where that finding was consistent with due process requirements and supported by reliable and accurate evidence, namely, the contents of the presentence report which included the defendant's admission to the probation officer who prepared the report that he was involved with drugs while in the program, the sentence of 5 years with post-release supervision was affirmed.

Justin E. Ackley, __ A.D.3d __, 2021 NY Slip 01293 (3rd Dept. 3/4/21) [#112397].

The lower court's *Outley* enhancement of the defendant's sentence following his Warren County guilty plea to attempted burglary in which his a pre-sentence report indicated that the defendant did not remember the burglary was reversed on the holding that where the trial court merely cautioned the defendant that as a condition of its plea promise, the defendant had to cooperate with probation did not, however, expressly advise the defendant (and defendant, in turn, did not agree) that he must provide truthful answers to the probation department, refrain from making statements that were inconsistent with his sworn statements during the plea colloquy and/or avoid any attempt to minimize his conduct in the underlying burglary. As the third department noted, while there is no doubt that a sentence may be enhanced following a guilty plea where the trial court specifics the condition(s) required, here the trial court never conducted an inquiry or permitted the defendant to withdraw his plea.

People v. Terrence L. Stanley, __ A.D.3d __, 2021 NY Slip Op 00924 (4th Dept. 2/11/21) [#KA-18-01735].

Since the trial court was required to advise the defendant at his guilty plea that if he violated any term of his plea agreement which included youthful offender treatment, the court could impose an enhanced sentence with the possibility of a period of post-release supervision, the enhancement of the defendant's sentence to prison with post-release supervision following the defendant's failure to cooperate with probation and his arrest on new charges, under *People v. Outley, 80 N.Y.2d 702 (1993),* rendered his guilty plea involuntary.

Withdrawal of Plea

People v. Donald Hollman, __ A.D.3d __, 2021 NY Slip Op 04617 (2nd Dept. 8/4/21).

A majority of the court held by a 3-1 vote that the lower court properly rejected the defendant's motion to withdraw his guilty plea to unlicensed possession of explosives, reckless endangerment and narcotics sale in a case in which the defendant expressed some misgivings about pleading guilty during his plea allocution but eventually stated that he indeed "wanted the plea." Thus, where the plea allocution "manifests the defendant's understanding of the terms of the plea agreement, including the sentencing promise, which was clearly explained to him, and the limited circumstances under which he would be permitted to withdraw the guilty plea and moreover where the defendant was told that he could ask questions of his counsel at any time, was afforded time to consult with counsel, confirmed that he had sufficient opportunity to do so, and confirmed that he was satisfied with counsel's representation the plea was voluntarily, knowingly and intelligently entered, notwithstanding belated claims that he did not have an adequate opportunity to speak with his attorney or that he was "feeling some pressure" in general regarding whether to plead or not. Justice Wooten would have reversed on his conclusion that the defendant's pela was motived, in part by "coercive concerns," which cast doubt on the voluntary nature of the plea.

People v. Quentin Swain, __ A.D.3d __, 2021 NY Slip Op 01430 (2nd Dept. 3/10/21).

The trial court erred in summarily denying the defendant's motion to withdraw his plea of guilty to vehicular assault and driving while intoxicated where the trial judge indicated that the offer was the defendant's "last chance" to plead guilty and where defense counsel raised the possibility of a change in bail status if the plea was not accepted after the defendant indicated hie was late to

court because he was having babysitting issues for his three-year old son. In remanding the case for hearing on the issue the appellate division held that where, as here, there was a legitimate question raised as to the plea's voluntariness and notwithstanding that it was the defense attorney and not the court who brought up the issue of bail, this action was required.

People v. Walter Wentland, __ A.D.3d __, 2021 NY Slip Op 00578 (2nd Dept. 2/3/21).

The defendant's motion to withdraw his plea of guilty to attempted second degree assault in connection with a dispute that arose when the police were attempting to arrest the defendant's son for driving while intoxicated in a case in which both he defendant and his son were represented by one attorney and where the defendant claimed that the defense attorney coerced him to plead guilty by informing him that if he did not the People would withdraw their beneficial offer involving the son and that it was "very likely" the son would received jail time if convicted. In o ruling, the second department relied on *People v. Hollmond, __ A.D.3d __, 2020 NY Slip Op 07222 (2nd Dept. 12/20/20*), noted that the plea was induced by a "coercive circumstance."

Evidence

Confrontation

People v. Evans Ganthier, __ A.D.3d __, 2021 NY Slip Op 03469 (2nd Dept. 6/2/21).

The defendant's murder conviction was affirmed over claims that the admission of an autopsy report prepared by a deputy Connecticut medical examiner who was unavailable to testify through the testimony of another deputy Connecticut medical examiner, violated his confrontation rights on the conclusion that the non-opinion portion of the autopsy report in question contained no testimonial information under *People v. John, 27 N.Y.3d 294 (2016*) and an unredacted portion that was admitted at the request of the defendant.

Hearsay

People v. Jason R. Montello, __ A.D.3d __, 2021 NY Slip Op 04670 (2nd Dept. 8/11/21).

The defendant's Suffolk County robbery and burglary conviction was affirmed over claims that the testimony of a police detective regarding conversations with a cooperating witness was improper bolstering and inadmissible hearsay where the testimony "was properly admitted for the relevant, non-hearsay purpose of establishing the reasons behind the [detective's] actions, and to complete the narrative of events leading to the defendant's arrest" (quoting, *People v Prince, 128 A.D.3d 987, 987 (2nd Dept. 2015*) [internal quotation marks omitted] and it did not constitute improper bolstering and also where the trial court specifically instructed the jury on the limited purpose of this testimony and that the testimony was not admitted for its truth. In so ruling, the court also noted that the defendant failed to preserve his appellate claim that this testimony violated the confrontation clause and that in any event it was properly admitted for the relevant, non-hearsay purpose of "establishing the reasons behind the [detective's] actions, and to complete the narrative of events leading to the defendant's arrest" (quoting *People v Prince, 128 A.D.3d at 987* [internal quotation marks omitted, and where the defendant had the opportunity to cross-examine the cooperating witness, who testified at trial.

People v. Marcos Germosen, __ A.D.3d __, 2021 NY Slip Op 04237 (2nd Dept. 7/7/21).

The trial court erred in admitting testimony from two police officers during the defendant's Brooklyn third degree assault and menacing trial on the content of certain hearsay statements made to them by the complainant when they encountered her at a deli a few hours after the alleged assault on the holding that the statements did not qualify as excited utterances where they occurred so long after the startling event of the criminal incident. In reversing this count, the second department held that the statements were inadmissible "in light of the amount of time that elapsed between the incident and the statements [citation omitted] and the lack of evidence as to what transpired in the interim [citation omitted], the People did not establish that the complainant's capacity for reflection and deliberation remained stilled by the time she spoke to the police officers at the deli."

People v. Daniel Jones, 192 A.D.3d 1524, 140 N.Y.S. 3d 836 (4th Dept. 3/18/21) [#KA-17-00683].

The Onondaga county trial court properly rejected the defendant's made an offer of proof with respect to the prospective testimony of a police officer that she had been told by another person that someone else—i.e., a person other than defendant—was responsible for killing the victim. In so ruling, the fourth department held that the officer's proposed third-party culpability testimony about another person's statements concerning the statements of yet another person constituted double hearsay. Thus, "[d]ouble hearsay is admissible only if each hearsay statement falls within an exception to the hearsay rule" (quoting *Kamenov v Northern Assur. Co. of Am., 259 A.D.2d 958, 959 (4th Dept. 1999);* see *People v Myhand, 120 A.D.3d 970, 973 (4th Dept. 2014).* As such,

the trial judge correctly determined that the officer's proposed testimony was inadmissible inasmuch as the statement made to her relaying the purported third-party admission constituted hearsay and did not fall within any of the exceptions to the hearsay rule (see generally *People v Brensic, 70 NY2d 9, 14 (1987),* relied on by the court. In light of the court's conclusion that the officer's proposed testimony was inadmissible hearsay, the court did not address whether the trial court properly determined that the initial declarant's purported hearsay admission of culpability did not fall within the declaration against penal interest exception to the hearsay rule. See generally *People v. Thibodeau, 31 NY3d 1155, 1158-1159 (2015).* To the extent the defendant contended that he was deprived of his constitutional right to present a defense by the court's ruling precluding the proposed testimony, that contention was deemed unpreserved and also not addressed in the interest of justice.

Excited Utterances

People v. Yiqiao Yang, 191 A.D.3d 485, 2021 WL 433899, 2021 NY Slip Op 00813 (1st Dept 2/9/21).

Relying on *People v Hernandez, 28 NY3d 1056, 1057 (2016)* and the Guide to NY Evid Rule 8.17, Excited Utterance), the first department affirmed the defendant's Manhattan third degree rape conviction and held that the trial court properly exercised its discretion in admitting the victim's 911 call as an excited utterance where the call was made 20 to 30 minutes after the victim had been raped and assaulted at defendant's apartment, while she was crying, and after she had unsuccessfully tried to find a police station to report the incident. Thus, the call and surrounding circumstances established that the victim made her statements while she was under the stress of excitement and lacked the reflective capacity essential for fabrication. See also *People v. Stacey Jackson, 194 A.D.3d 654, 2021 NY Slip Op 03385 (1st Dept. 5/25/21)* [Victim's 911 call properly admitted under excited utterance and present sense impression exceptions in assault trial]

Present Sense Impression

People v. Lenard Crudup, __ NY Slip Op 04719 (2nd Dept. 8/18/21).

The trial court properly exercised its discretion in precluding from evidence a recording of an anonymous call to the 911 emergency number, which the defendant sought to admit under the

present sense impression exception to the hearsay rule." As the appellate division noted, such declarations are considered reliable "because the contemporaneity of the communication minimizes the opportunity for calculated misstatement as well as the risk of inaccuracy from faulty memory" [quoting *People v Vasquez, 88 N.Y.2d 561, 574 (1996*); *see People v Brown, 80 N.Y.2d 729, 732-733 (1993)]*. Thus the record in this case was that the anonymous caller "described the entire course of events to the operator using the past tense, indicating that he was recalling and describing events that he observed in the recent past, rather than as [they were] occurring," and the defendant "failed to demonstrate that the delay between the conclusion of the event and the beginning of the call was not sufficient to destroy the indicia of reliability upon which the present sense impression exception rests" [quoting *People v Parchment*, 92 A.D.3d 699, 699 (2nd Dept 2012)]. Accordingly, the recording was held not admissible as a present sense impression (see *People v Vasquez, 88 N.Y.2d at 578-580*)

Molineux

People v. Born Poledore, __ NY Slip Op 05092 (1st Dept/ 9/28/21).

The trial court properly exercised its discretion when, during his direct testimony, the defendant offered various exculpatory and inconsistent explanations for his entries into the victims' apartments, it then permitted the People to cross-examine defendant about his prior burglary convictions and a false exculpatory statement he had made to the police in connection with one of the prior burglaries. While the court's prior *Molineux* ruling precluded the use of this evidence either on the People's case or for impeachment in the event the defendant testified, the defendant by his testimony, put his intent in issue, thereby warranting admission of his other crimes under the intent exception of the *Molineux* rule (citing, *People v Ingram, 71 NY2d 474 (1988).* Additionally, the trial court was held to have properly determined that the defendant's testimony regarding specific prior crimes committed by defendant which were admitted under the court's initial *Sandoval* ruling misled the jury about his criminal record, thereby justifying admission of evidence of the additional prior crimes. In affirming the defendant's Bronx burglary and related-crime conviction, the first department further held that the defendant's claim that he was unfairly prejudiced because he testified in reliance on the court's prior rulings without merit where the trial court repeatedly warned him thatits *Molineux* and *Sandoval* rulings were based on what had occurred at trial up to that point, and that those rulings could change depending upon the testimony. Defendant thus was specifically warned that depending upon his testimony, it could open the door to the admission of evidence of his prior crimes.

People v. Christopher Rodriguez, 193 A.D.3d 554, 2021 NY Slip Op 02367 (1st Dept. 4/20/21).

While the trial court properly exercised its discretion in admitting *Molineux* proof of the defendant's commission of two of four prior residential burglaries during the defendant's Manhattan apartment attempted burglary trial (he was found on a fire escape outside the apartment) on the issue of intent, it erred in permitting the People the present too "significant a quantum of evidence" about these crimes. Thus, where the court permitted still photographs, surveillance footage, along with testimony from one investigating police officer, a tenant and owner, the "extensive" proof went "well-beyond" that which was required to demonstrate intent and as such, even with limiting instructions, the defendant's conviction was reversed.

People v. Robert Kattau, __ A.D.3d __, 2021 NY Slip Op 08247 (2nd Dept. 3/17/21).

Testimony regarding the defendant's ownership and use of certain guns was properly admitted as probative of the complainant's state of mind and on the issue of delayed outcry in the defendant's course of sexual conduct and related-crimes prosecution on the holding that its probative value outweighed any possible prejudice to the defendant.

People v. Mark Schinnerer. __ AD.3d __(3rd Dept. 3/25/21) [#112155].

During the defendant's Schoharie County rape trial, the People sought to elicit testimony of defendant "grooming" the victim, which included sexual conduct by the defendant prior to the incidents charged in the indictment. In affirming, the third department held that the county court properly found that this evidence constituted necessary background information and, as it was more probative than prejudicial, was admissible at trial and that moreover, this evidence also "demonstrated the escalating nature of the sexual abuse and revealed the manipulative and abusive setting in which the victim lived with defendant" that was contained in the rape in the first-degree charges. See also *People v. Robert G. Case, __ A.D.3d __ (4th Dept. 8/26/21) [#KA-001836],* in which the fourth department affirmed the defendant's Cattaraugus County first degree rape and unlawful imprisonment, over claims that the trial court erroneously admitted uncharged bad acts preceding the charged crimes.

People v. Jason Vega, __ A.D.3d __, 2021 NY Slip Op 00912 (1st Dept. 2/11/21).

The trial court properly admitted excerpts of recordings of phone calls the defendant made while in custody during his Manhattan burglary trial where the excerpts were admissions of guilt that

were directly relevant to the crimes with which defendant was charged and any references to defendant's criminal past were part of the context of the admissions. As the appellate division observed, the only reference to a specific uncharged crime was a mention of a burglary defendant committed six years earlier, but "this was in the context of comparing his behavior during that burglary with one of the charged crimes" to the extent that each of the challenged excerpts "tended, by way of an admission to prove that defendant was the person who committed one or more of the charged crimes." As such, the probative value of the recordings was held to have outweighed any prejudicial effect.

People v. John Duncan, 188 A.D.3d 1249, 2020 NY Slip Op 07090 (2nd Dept. 11/25/20).

The defendant's Brooklyn attempted rape conviction was reversed as a result of the trial court's erroneous ruling that permitted the People to introduce evidence during their case in chief of the defendant's 1990 robbery and sexual assault conviction as *Molineux* proof in order to establish his identity by clear and convincing proof as the perpetrator where the facts of the prior assault were not sufficiently unique or unusual as a modus operandi. As the court noted, while both incidents involved robberies and sexual assaults of unaccompanied Caucasian women during daytime hours, in the lobbies of residential buildings, there similarities were not so distinctive to give rise that the defendant was the same perpetrator. In sol ruing, however, the court let stand the defendant's conviction for burglary on a conclusion that the error was harmless as to that count.

People v. Joachim Sylvester, __ A.D.3d __, 2020 N.Y. App. Div Lexis 7116 (4th Dept. 11/20/20).

The defendant's attempted murder conviction was reversed due to the trial court's erroneous admission of evidence of a prior shooting by the defendant on a theory that defense counsel's cross-examination of prosecution witnesses regarding the presence of bullet holes in the defendant's car opened the door to this new evidence on a conclusion that even assuming the questioning created a false impression, it was not necessary to present evidence of this prior conduct, which was highly prejudicial. An additional ground for reversal was the improper impeachment by the prosecutor of two of the People's witnesses.

People v. Edmund Huertas, __ A.D.3d __, 2020 NY Slip Op 04577 (2nd Dept. 8/19/20), N.Y.L.J. 8/21/20 @ p. 22.

A divided appellate division affirmed the defendant's Queens murder and related-crime conviction by a 3-2 vote on the holding that the trial court properly permitted two of the victim's friends to testify that the defendant had previously assaulted her on two occasion where the proof

was not admitted for the truth but to explain the witnesses' state of mind and their subsequent actions on the day of the murder and where the court provided a limiting instruction. The majority also rejected claims that the lower court's *Sandoval* ruling which permitted the People to cross-examine the defendant regarding the underlying facts of three prior gun convictions if he were to testify that the shooting was an accident. Justice Chambers, joined by Justice Roman dissented on their conclusion that the trial judge's *Sandoval* ruling deprived the defendant of a fair trial and the trial to present a defense by his decision not to testify and thus argue that the shooting was indeed an accident.

Defendant's Silence

People v. Anthony DeLaCruz, __ A.D.3d __, 2021 NY Slip Op 01785 (2nd Dept. 3/24/21).

The prosecution's presentation of proof regarding the defendant's pre-trial silence at his Brooklyn assault trial during their direct case warranted reversal of his conviction on the conclusion that the evidence was not harmless beyond a reasonable doubt. See *People v. Williams, 25 N.Y.3d 185 (2015*), relied on by the court. In directing a new trial on interest of justice grounds even in the absence of an objection, the appellate division noted that this case was different than the use of silence for impeachment purposes following exculpatory testimony offered by the defendant under *People v. Savage, 50 N.Y.2d 673 (1980).*

Prompt Outcry

People v. Joenathan Maisonette, 192 A.D.3d 1325 (3rd Dept. 3/18/21) [#108798].

Although the episodes of abuse described by the victim occurred on three different dates between February 2015 and April 2015 and the last episode did not result in a conviction, that last episode occurred four days prior to the disclosure reflected in the testimony of the victim and her mother. Considering the victim's age, that defendant was an authority figure in her life and her testimony that she was scared of defendant, the trial court did not err in concluding that such disclosure was admissible as a prompt outcry in the defendant's Schenectady criminal sex act and rape trial. See also, *People v. David Rath, 192 A.D.3d 1600 (4th Dept. 3/19/21*) and *People v. Akil Folborg, 194 A.D.3d 1071 (2nd Dept. 5/26/21)* for similar rulings.

Electronic Evidence-Social Media

Matter of Philadelphia Ins. Indem. Co. v. Kendall, __ A.D.3d __, 2021 NY Slip Op 04284 (1st Dept. 7/8/21).

The first department held that the transmission of an email, and not whether an email "signature" can be shown to have been re-typed is what determines whether an attorney's settlement stipulation has been subscribed for purposes of C.P.L.R 2104. Thus, bowing to the current practice of law, any distinction between a pre-populated or re-typed signature on such an email was a distinction with a "needless formality," Thus a lower court ruling that denied an application by special proceeding to enforce a settlement agreement was reversed and the petition was granted on a showing that the email was sufficiently authenticated. This case, while limited to it's stated holding, may have implications on admissibility issues in connection with emails on a broader basis.

People v. Differson Legrand, __ A.D.3d __, 2021 NY Slip Op 03333 (2nd Dept. 5/26/21).

The trial court properly admitted certain photographs on foundational proof that they were exact duplicates of those found on a social media account controlled by the defendant under *People v. Price, 29 N.Y.3d 272 (2017).* While affirming second degree rape, promoting prosecution counts, the second department however, reversed the defendant's second degree kidnapping conviction on the holding that the People failed to prove that the defendant had the requisite intent to restrain the victim and also that he knew she was less than 16 years old.

People v. Steven Bush, 187 A.D.3d 643 (2nd Dept. 12/22/20).

The appellate division held that a photograph of the defendant holding a small handgun, taken approximately six weeks before the charged shooting, and recovered from defendant's phone pursuant to a search warrant, was properly admitted. It could be inferred from video footage introduced at trial that a small handgun was used in the shooting. As the second department noted, quoting *People v Alexander (169 A.D.3d 571 (1st Dept. 2019),* the photograph was "relevant to show that defendant had access to such a weapon, thus tending to establish his identity as the

perpetrator, and there was no requirement of proof that the [firearm] in the photograph was the actual weapon used in the crime"

People v. Luis A. Rodriguez, 187 A.D.3d 1063 (2nd Dept. 10/21/20).

A majority of a second department panel held 3-2 that "[u]nder the unusual circumstances of this case," the admission into evidence of five screenshots purporting to depict selected portions of a text message conversation between the defendant and the complainant was improper on the holding that the text messages themselves were insufficient to establish the defendant's identity as their author, nor was the complainant's testimony, standing alone, sufficient to establish this disputed fact. According to the majority, which reversed the defendant's Queens attempted use of a child in a sexual performance and related-crimes conviction, this was particularly since, according to the People's own witnesses, part of the conversation depicted by the subject screenshots allegedly took place while the complainant's unlocked phone was in the possession of her former boyfriend, who had locked himself in a separate room and was texting the defendant using the complainant's phone, at times threatening the defendant and asking him for money. Although the complainant herself testified that she deleted all of the messages and reset her phone immediately after recovering it from the former boyfriend, she also testified that her messages were stored in her iCloud account, and that she provided the police with her iCloud password, the People offered no evidence that the police ever checked either the defendant's phone or the complainant's iCloud account to determine the identity of the participants in the conversation. Justice Rivera, joined by Justice Roan, dissented on the conclusion that there was a sufficient foundation laid for the admission of the text messages notwithstanding hat the phone had temporarily been in the possession of the former boyfriend. Justice Rivera granted leave to appeal to the Court of Appeals on December 28, 2020 [36 N.Y.3d 977].

Experts

People v. Kathon Anderson, 36 N.Y.3d 1109, 2021 WL 1739987 (5/4/21) [6/0; Memorandum]

The Court of Appeals affirmed the defendant's murder conviction was affirmed over claim that the trial court improperly denied his request to present expert testimony regard to "adolescent brain development" in a case involving a 14-year-old defendant allegedly fired shots and killed an innocent passenger on a Brooklyn bus because he felt threatened by rival gang members. In so ruling the Court upheld the trial judge's determination not to conduct a Frye hearing or admit this testimony as a proper exercise of discretion. The second department had affirmed on a determination the issue presented was not beyond the ken of an average juror. [180 A.D.3d 923 (2nd Dept. 2020).

People v. Ye Min T. Austen, 197 A.D.3d 761 (4th Dept. 8/26/21).

With a proper foundation, expert testimony concerning child sexual abuse accommodation syndrome [CSAAS] is admissible under *People v. Spicola, 16 N.Y3d 465 (2011),* withstanding that a few out of state jurisdictions have ruled to the contrary. See *State of New Jersey v. J.L.G. 197 A.3d 442 (N.J. 2018).*

People v. John Kinsman, 191 A.D3d 539, 2021 NY Slip Op 01009 (1st Dept. 2/16/21).

The trial court properly exercised its discretion in permitting the People to call an expert witness on extremist groups during the defendant's gang assault trial. In so ruling, the first department held that some background information regarding the ideology and past conduct of the Proud Boys was permissible to explain the preexisting animosity between the Proud Boys and Antifa at the time of the incident at issue, and moreover, that while some of the evidence regarding the Proud Boys' practices, and in particular racist remarks made by the group's founder, were immaterial to the issues at trial, and their potential for prejudice outweighed any probative value, the court issued a limiting instruction that the background information provided by the expert was not proof of the defendants' mental states.

People v. Christina Murray, 191 A.D.3d 1324, 2021 NY Slip Op 00722 (4th Dept. 2/5/21) [#KA-000108].

The defendant's insurance fraud and falsifying business records conviction was reversed on a holding that the trial court erred in permitting an arson investigator to testify that a fire in the defendant's home, that was the subject of a fraudulent insurance claim had been intentionally set on the holding that the testimony was not relevant (as found by the trial court) to complete the narrative of the investigation and in any event, it was unduly prejudicial because it along with the court's jury instructions allowed the jury to speculate that the defendant actually set the fire herself to collect the proceeds of the insurance. See *People v. Rivers, 18 N.Y.3d 533 (2011),* for the leading New York case on this issue.

Right to Present Defense

People v. Kysheen Oliver, __ A.D.3d __, 2021 NY Slip Op 02548 (2nd Dept. 4/28/21).

The defendant was not deprived of his righto present a defense when the trial court in his Brooklyn manslaughter trial arising out of the death of his girlfriend's 17-month-old foster son precluded him from testifying to statements allegedly made to him to his girlfriend that were evidently purportedly inconsistent with his testimony. In affirming the appellate division noted that because the right to present a defense does not give a defendant "carte blanche" to circumvent the rules of evidence, the defendant was required to be confronted with the prior inconsistent statement by time and place of the statement in over to prevent surprise. The court held that the lower court properly admitted, as adoptive admissions, recordings of telephone calls the defendant made to his cousin, while the defendant was incarcerated, when he "clearly assented to his cousin's assertions that the defendant struck the child by accident and had not meant to harm the child."

Trial Practices

Severance

People v. James Santiago, __ A.D.3d __, 2021 NY Slip Op 00130 (1st Dept. 1/12/21).

The trial court should have granted the defendant's motion to sever a Bronx driving while intoxicated charged that was alleged to have occurred on January 14, 2012 from a leaving the scene of an incident charge that occurred several months earlier on September 4, 2011, where none of the facts present in either case would have been admissible in the other, and in so ruling and reversing the defendant's conviction, the court rejected the People's contention that the defendant's identification in the latter incident was relative to the former. Compare, *People v. Shamar Sumpter, __ A.D.3d __ (3rd Dept. 2/25/21) [#110190],* in which the third department rejected claims that the trial court abused its discretion in consolidating two narcotics transactions under C.P.L. 200.20 that were tried together in a single Fulton County trial where the charges were discrete and easily separately considered by the jury.

Prosecutors

People v. Marina Y. Viviani/Justin Hope/Nichole Hodgdon, __ N.Y.3d __ (3/30/21) [5/0; Garcia, J.].

Executive Law 552, which created a Special Prosecutor and justice center to investigate and prosecute cases involving the abuse and criminal neglect of victims with special vulnerabilities in facilities owned or operated by the State, was declared and unconstitutional delegation of authority from constitutionally empowered duly elected county district attorneys. As such trial court orders, which dismissed charges brought by this agency, as affirmed in separate appellate division orders were affirmed by the Court. In so ruling, the Court, by plurality and concurring opinions declined to impose a "savings" construction as urged by the special prosecutor and attorney general to save portions of the law.

Change of Venue

People v. Lovely Warren, __ A.D.3d __ (4th Dept. 1/18/21).

The Fourth Department denied an application by the defendant, the mayor of Rochester, for a change of venue under C.P.L. 230.30 in a campaign fraud prosecution on the conclusion that it was premature and without a sufficient demonstration that the jury pool would be tainted without prejudice to renewal after jury selection is attempted.

Continuances

People v. Luis Vasquez, __ N.Y.3d __ (3/25/21) [6/0; Memorandum].

The Appellate Division did not err in holding that the trial court acted within its discretion in denying defense counsel's last-minute request for an adjournment to interview a defense witness before the witness testified. Thus, "under the circumstances of this case," the denial of the adjournment request did not infringe defendant's rights to a fair trial, to prepare a defense, or to effective assistance of counsel. In affirming, the Court also rejected claims that the trial court should have sua sponte directed a third competency examination under C.P.L. Art. 730 and that

while certain of the prosecutor cross-examination tactics and summation remarks were error, these was harmless.

Prosecutorial Disqualification

People v. Goliath Van Alphen, 195 A.D.3d 1307, 2021 NY Slip Op 04056 (3rd Dept. 6/24/21).

The third department rejected claims that the district attorney who handled the defendant's Columbia County predatory sexual assault trial should have been disqualified and a special prosecutor appointed because the district attorney handled matters in the family court as a judge there before he was the district attorney involving the defendant and his children on the holding that the issues raised in the criminal prosecution were different than those presented in the family court cases and that in any event, Judiciary Law 17 did not compel disqualification of the DA in this circumstance.

Judicial Recusal, Etc.

People v. John Hymes, __ A.D.3d __, 2021 NY Slip Op 02412 (2nd Dept. 4/21/21).

The trial court erred in denying the defense motion that he recuse himself from presiding over the defendant's sentencing where his law secretary had previously worked on the defendant's case while an A.D.A. in the Queens district attorney's office. As such the defendant's sentence was vacated and the case remanded to the lower court for re-sentencing before another justice. In so ruling the second department noted that while the factual circumstances here did not actually require recusal, notwithstanding the close relationship between the judge and law clerk, where there was no indication that the judge had a direct interest in the case, there was no effort here to screen the law clerk from involvement in the matter. See also, *People v. Aasim McPhee, 193 A.D.3d 980 (2nd Dept. 4/21/21) and People v. Asam McPhee, 2021 NY Slip Op 04723 (2nd Dept. 8/18/21) [*Same facts; issue unpreserved but reached in interests of justice with same holding.

Jury Selection

General

Challenges For Cause

People v. Marcus Rios, __ A.D.3d __ (3rd Dept/ 3/18/21) [#112384].

During jury selection in a trial involving arson and animal abuse, a prospective juror indicated that she cares a lot about animals and is involved in animal advocacy organizations. Subsequently, when asked whether the facts of this case would present an issue with any prospective jurors, the juror stated that "[e]motionally it would be very difficult for [her] to hear about anything happening to an animal that got harmed in any way." When asked if this would impact her ability to "be fair and impartial," the juror stated that "[she thought] if [she] heard about an animal being hurt, [she] would cry" and that "[i]t would be very hard for [her]." In contrast, when asked if incidents of stalking in her past would impact her ability to be impartial, the juror stated that it would not be and that she "could be impartial." When subsequently asked, by defendant's trial counsel, if "this particular case would probably not be the type of case that you'd want to sit on if there's allegations of animal cruelty," the prospective juror stated that it "would be extremely difficult for [her] to hear about an animal being hurt." In response, defendant's trial counsel then asked if the juror "would have difficulty in being fair and impartial in this case" and she responded, "I would become emotional if I heard about it." Defendant's trial counsel then asked if that "would probably effect [her]," to which she responded "[y]es." The third department held that on this record, the defense challenge for cause should have been granted\ since the court failed to “pose questions” to rehabilitate the juror.

People Emilio Padilla, __ A.D.3d __, 2021 NY Slip Op 00732 (4th Dept. 2/5/21) [#KA-18-00710].

The fourth department reversed the defendant’s Onondaga County robbery and related crime conviction due the erroneous denial by the trial court of two defense challenges to prospective jurors for cause where each was unable to clearly state that he or she was unable to separately consider each incident charged to determine if the People proved their case in each beyond a reasonable doubt. Thus, where the jurors indicated that they were “not sure,” in response to specific questions placed to them, the failure to obtain a clear expurgatory statement raised doubt as to their ability to be fair.

Peremptory Challenges

People v. Jorge Burgess, __ A.D.3d __, 2021 NY Slip Op 01993 (2nd Dept. 3/31/21).

The trial court committed reversible error when it permitted the People to exercise peremptory challenges to prospective jurors after the defendant and his codefendant exercised peremptory challenges to that same panel of prospective jurors (*see* C.P.L 270.15[2]. In reversing the defendant's Nassau County second degree manslaughter and weapons possession conviction the appellate division held that this procedure violated "the one persistently protected and enunciated rule of jury selection—that the People make peremptory challenges first, and that they never be permitted to go back and challenge a juror accepted by the defense," quoting, *People v Alston, 88 N.Y.2d 519, 529 (1996).* See also *People v. Joshua Taylor, __ A.D.3d __, 2021 NY Slip Op 01998 (2nd Dept. 3/31/21),* in which the court reversed a Nassau murder conviction on the same day for the same error. The court in *Burgess* also held that the trial court erred in granting the People's *Sirois* application to admit the un-cross-examined testimony of an unavailable witness on the conclusion that the People failed to establish by clear and convincing evidence that the defendant was responsible for procuring a certain witness's refusal to testify at trial and specifically, that the People's evidence did not establish that the defendant controlled the individuals who threatened the witness or that the defendant influenced or persuaded any individual to threaten the witness or his family. See *People v. Dubarry, 25 N.Y.3d 161 (2015)* cited by the court.

Batson

People v. Wesley Brissett, __ A.D.3d __, 2021 NY Slip Op 04266 (2nd Dept. 7/14/21).

During the second round of jury selection in the defendant's Staten Island stolen property trial, the prosecutor attempted to exercise a for-cause challenge against the only black prospective juror on the panel, who indicated during questioning that his father and two cousins had been arrested and incarcerated. That prospective juror stated that the prosecution of his father and two cousins would not affect the way he listens to the case, and that he was able to be fair and open minded. Nevertheless, the prosecutor stated that he was challenging that prospective juror because "[h]e was a little vague with his responses as to the family members that he had as far as incarcerated and was kind of vague as far as it will play a role in his decision making here."

Defense counsel responded that although the prospective juror was vague as to the details of what happened with his father (with whom he did not maintain contact even after the father's release from prison) and cousins, "he was very clear . . . that he could be fair." The trial court denied the prosecutor's for-cause challenge, and then the prosecutor exercised a peremptory challenge to that prospective juror. Defense counsel requested that the prosecutor provide a race-neutral reason, and the court found that the defense failed to make a prima facie showing of discrimination. During the third and final round of jury selection, the prosecutor again exercised a peremptory challenge against the only black prospective juror on the panel, who indicated that his brother was a recently retired New York City Police Department Special Victims Division detective, and that he had experienced an attempted burglary in which someone "tried to get [his] window open." When the prosecutor exercised a peremptory challenge to that prospective juror, defense counsel made another *Batson* challenge, to which the trial court stated, "I am getting a little annoyed. . . . This is not the Bronx." Defense counsel asserted that the prosecutor had engaged in a pattern of exercising peremptory challenges to black prospective jurors. The second department held that the trial court's conclusion that the defendant failed to make a prima facie showing of discrimination, since the prosecutor did not challenge three of four black prospective jurors during the first round of jury selection, and the People only challenged 50% of the six black prospective jurors in the entire pool was error because the defendant based on a prima facie showing of discrimination and remanded the case for a hearing and report on the *Batson* claim.

People v. Michael M. Coleman, __ A.D.3d __, 2021 NY Slip Op 03695 (4th Dept. 6/11/21).

The People provided the following explanation for challenging a prospective juror: the "last comments . . . made in response to [defense counsel's] discussion . . . [where defense counsel] asked him about contacts with police or the differences between police in Brooklyn and here in Rochester, and [the prospective juror] made some comments . . . to the effect of, they're not as harsh . . . [and] it was a clear distinction between his views of the police between Brooklyn and Rochester or Monroe County." However, the juror actually stated, "'[i]t's a little easier growing up [in Rochester]," which related to his prior statement that living in Rochester was "a lot different" than Brooklyn because Rochester was "smaller" and "slower [paced]." Thus, as the fourth department found in reversing the defendant's narcotics conviction, the only question asked of the prospective juror that pertained to policing was whether he ever had "any different experiences" regarding "law enforcement stuff," was answered in the negative. As such, the prospective juror's statements "neither reflected a bias with respect to police nor described his view of police or policing. Instead, the prosecutor's proffered race-neutral reason for the peremptory challenge appears to have been based on an erroneous recollection of the prospective juror's statements," where the court accepted the prosecutor's erroneous account, explaining, "I think the reference that [the prosecutor] was referring to . . . was not as harsh. Law enforcement here in Monroe County was easier going than down in Brooklyn."

Courtroom Closure

People v. Tyrell Myers, __ A.D.3d __, 2021 NY Slip Op 02766 (1st Dept. 5/4/21).

The People made a sufficiently particularized showing of an overriding interest justifying the trial courts determination to close the courtroom during the testimony of an undercover officer under *Waller v Georgia*, 467 U.S. 39 (1984) and *People v Echevarria*, 21 NY3d 11, 12-14 (2013), based on the officer's expected return to undercover work in the area of defendant's arrest and her pending cases and "lost subjects" from that area, along with several incidents, one of which occurred in court during a suppression hearing, indicating that defendant and his relatives or associates might be seeking to reveal the officer's identity in order to disrupt her future work.

Right to be Present

People v. John King, __ A.D.3d __, 2021 NY Slip Op 01996 (2nd Dept. 3/31/21).

In 2004, the then-12 year-old complainant in reported that she was the victim of a Queens forcible rape but recanted the allegation the same day, The case remained closed for nine years when it was re-opened in 2013 based on new investigative leads. Following the defendant's arrest for first degree rape, and during his trial, an issue arose regarding the complainant's psychiatric history after she testified that she had suffered from depression and bi-polar disorder. The court then examined the complainant, in camera "outside the presence of the defendant," with regard thereto and determined that this information was not relevant for the jury to assess her credibility. Thereafter the court instructed the jury to disregard her testimony on her psychiatric history. The second department reversed and held that "[w]here a primary prosecution witness is shown to suffer from a psychiatric condition, the defense is entitled to show that the witness's capacity to perceive and recall events was impaired by that condition," quoting, *People v Rensing, 14 N.Y.2d 210 (1964).* Thus, the defendant's absence during the trial judge's in camera interview with the complainant to determine if her psychiatric history was relevant had a substantial effect on his ability to defend the charges against him, and thus, the interview constituted a material stage of the trial for which the defendant should have been present to the extent that harmless error analysis was held not appropriate," and a new trial ordered. In so ruling, the court also noted that while the scope of cross-examination generally rests within the trial court's discretion here, the court "improvidently exercised its discretion in

striking the complainant's testimony adduced during cross-examination with respect to her psychiatric history."

People v. Luther Brown, __ A.D.3d __ (4th Dept. 3/19/21) [#KA 17-00739]

The trial court erred in removing the defendant from the courtroom during jury selection in his Monroe County forgery trial when he began shouting loudly without a warning that he would be so removed if he continued his misbehavior. Thus, on the morning that jury selection was scheduled to begin, but before the prospective jurors had been brought into the courtroom, the defendant began shouting, insisting that the court was calling him by the wrong name and that he could not wear the clothes provided to him. The court immediately had the defendant removed from the courtroom, stating that it deemed defendant to have waived his right to be present based on his "outburst and behavior." After defendant had been removed, the court stated that defendant's "voice was raised to a level of almost deafening proportions, and it was very clear that it was imminent he was going to turn violent." Defendant was then absent for the selection of the first 11 jurors, but returned to the courtroom at the next recess and did not cause any further disruption. In reversing, the fourth department held that a defendant has a fundamental right to be present at all material stages of trial, and that right is "violated by his or her absence during the questioning of prospective jurors during the impaneling of the jury," quoting, *People v Crespo, 32 N.Y.3d 176, 182 (2018).* Because a defendant's right to be present during trial is not absolute," quoting, *People v Joyner, 303 A.D.2d 421, 421 (2nd Dept. 2003),*the court noted that C.P.L. 260.20 provides, in relevant part, "that a defendant who conducts himself in so disorderly and disruptive a manner that his trial cannot be carried on with him in the courtroom may be removed from the courtroom if, after he has been warned by the court that he will be removed if he continues such conduct, he continues to engage in such conduct."

Cross-Examination of Witnesses

People v. Ryan J. Gaylord, 194 A.D.3d 1189, 2021 WL 1914264 (3rd Dept. 5/13/21) [#110534].

After a *Huntley* hearing, the lower court held that a recorded interview of defendant by a Broome County detective was admissible up until the point in the interview at which the defendant requested an attorney. Thereafter, the People filed an in limine application seeking to have certain portions of the video redacted under the rape shield law because defendant mentions to the detective that the victim was allegedly involved in prior incidents where she had sex with her cousin and was inappropriately touched by another man. The lower's court's ruling sustaining the

application was affirmed per Pritzker, J., on the holding that the defendant failed to demonstrate that these portions of the interview should have been be admitted under an exception to the rape shield law, and that any connection between the allegations concerning the prior incidents and the victim's motive to fabricate or her knowledge of sexual activity and the male anatomy was "speculative and so tenuous as to be irrelevant." The county court also was held to have properly precluded cross-examination of the victim regarding her alleged disclosures to her therapist because the defendant presented no evidence to establish a connection between the victim's alleged prior sexual incidents and her apparent motive to fabricate the current allegations.

People v. James L. Jones, 193 A.D.3d 1410, 2021 WL 17115153 (4th Dept. 4/30/21).

The defendant's Monroe County murder conviction was affirmed over claims that the trial court improperly restricted the defendant's access to certain confidential information regarding an eyewitness sought by the defendant by subpoena, after an in-camera review of these records, only permitting the defense to review nine pages of such materials and withholding the rest. As the fourth department noted, "[i]n considering a request to disclose such information, the court, in conducting its in camera review, must determine whether "the records [at issue] contain data relevant and material to the determination of guilt or innocence." Thus, here the court did not abuse its discretion in declining to disclose all of the documents because those documents had little, if any, relevance to defendant's case and were not exculpatory. Indeed, defendant was "simply fishing for 'general credibility' evidence," quoting *People v. Kozlowski, 11 N.Y.3d 233, 242 (2008).*

Instructions

Justification

People v. Karille Herrera, __ A.D.3d __, 2021 NY Slip Op 01148 (1st Dept. 2/23/21).

The failure by the trial court to have instructed the jury as required in *People v. Velez, 131 A.D.3d 139 (1st Dept. 2015),* that where justification is raised by the defense in a first-degree assault trial, if they acquit on the greater counts, they must stop deliberations on any lesser count, second degree assault and thus, required reversal. The first department reached the issue in the interest of justice and distinguished prior cases that had declined to do so. In so ruling, he court cautioned that

the better practice is to utilize the OCA model verdict sheet promulgated in the aftermath of *Velez* to avoid this issue.

Temporary Lawful Possession of Weapon

People v. Lance Williams, 36 N.Y.3d 156, 2020 N.Y. Lexis 2871 (12/17/21) [6/0; Stein, J.].

The Court, per Stein J., with Judges Wilson and Stein concurring in separate opinions, held 6-0 (Chief Judge DiFiore did not participate), that there was no reasonable view of the evidence to support the defendant's request for a temporary lawful possession of a weapon instruction presented at the defendant's attempted murder and related-crime trial arising out of a shooting outside of an apartment building in which there was a defense of justification and where the defendant was acquitted of the more serious charges but convicted of the weapons charge. Thus, where the defendant had been shot by the victim's brother on two prior occasions and where there was continuing bad blood between them and the victim purportedly pulled a gun on the defendant who retreated inside his apartment and was handed a loaded weapon from a third party, Foe, and then left his apartment and after observing the victim in a nearby hallway, just, "blacked out" and started firing the weapon, the trial court's decision to deny the requested charge was proper. In so ruling the Court rejected the defendant's claim that he was entitled to the charge because he ostensibly took possession of the weapon for self-defense. See *People v. Almodovar, 62 N.Y.2d 126, 130 (1984),* relied on by the Court. Judge Rivera concurred on her conclusion that the defendant was not entitled to the charge because he took possession of the weapon and then "used it in a dangerous manner." Judge Wilson also concurred on his determination in an extensive review of New York's justification law that while it was a "close case," the defendant's actions could not be excused on the law to permit him to arm himself for a future confrontation. See *People v. Khalfani Rose, __ A.D.3d __ (2nd Dept. 2/3/21),* in which a divided second department reversed a defendant's weapons possession conviction on an interest of justice determination that his possession of a weapon during a dispute in a Brooklyn courtyard was temporary.

People v. J.L. __ N.Y.3d __, 2020 N.Y. Lexis 2872 (12/17/20) [4/3; Rivera, J.], N.Y.L.J. 12/18/20 @ p. 22.

The defendant's request for a temporary lawful possession of a weapon charge should have been granted in a case in which the police were called to the defendant's basement apartment on a report that the 17-year-old defendant had been shot in the neck by an unknown assailant who fired from an alley way and when they responded ultimately located a military armament corporation 11 (MAC 11) weapon in his bedroom. The evidence presented at trial indicated that the defendant, when shot scrambled to locate a towel to stop the bleeding and was a contributor to DNA found on the

weapon; no fingerprint evidence was introduced at trial. In reversing and ordering a new trial, the majority held that viewing the facts most favorably to the defendant, the instruction should have been given where it was possible that in the "frantic moments after the shooting," the young defendant touched the weapon as he searched for towels to stanch the bleeding. Chief Judge DiFiore dissented on her conclusion that there was no reasonable basis in the record to support the request. See also, *People v. Lance Williams, __ N.Y.3d __ (12/17/20) [6/0; Stein, J.], N.Y.L.J. 12/18/20 @ p. 23*, for a contrary ruling on the same issue in a case, discussed above.

Summations

People v. Rodney Veeney, __ A.D.3d __, 2021 NY Slip Op 04673 (2nd Dept. 8/11/21).

The second department reversed the defendant's Brooklyn assault conviction on grounds of prosecutorial misconduct during summation "made a number of improper comments during her summation by improperly vouching for the credibility of the People's witnesses, interjecting sympathy, improperly advising the jurors on the law, and making herself an unsworn witness." Moreover, the prosecutor referred to testimony that had been struck by the Supreme Court when she told the jury that, during the events on the night at issue, the defendant could have shot one of the witnesses. Finally, the prosecutor also informed the jury that the voice of that same witness could be heard screaming on an audio recording of a call to the 911 emergency number and also twice erroneously advised the jury that its credibility determination should be based on, among other things, "what [the jurors] *felt*" (emphasis added), and, when discussing the credibility of the prosecution's witnesses, instructed the jury that the criminal history of one of the prosecution's witnesses was not relevant to the question of that witness's credibility. Contrary to the People's contention, these errors were not harmless with regard to the conviction of attempted assault in the first degree, because it cannot be said that proof of the defendant's guilt with regard to this count was overwhelming. In so ruling, however, the court let stand the defendant's attempted murder and weapons possession convictions on the holding that with respect to these counts the errors were harmless. See also *People v. Nasheem Beck, __ A.D.3d __, 2021 NY Slip Op 04556 (2nd Dept. 7/28/21)*, where the second department also reversed a defendant's burglary conviction in the interest of justice based on un-objected-to prosecutorial misconduct in summation in which the assistant district attorney vouched for the credibility of witnesses, elicited irrelevant evidence, misstated the law regarding circumstantial and direct evidence and suggested that the jury should not consider scenarios that might render the defendant not guilty.

People v. Gary Peterson, 190 A.D.3d 769 (2nd Dept. 1/13/21).

Because a defendant has a right to be tried for the charges outlined in an indictment, the trial court erred in permitting a prosecutor to argue to the jury on summation during his Queens burglary trial that the defendant illegally entered a home with intent to assault an occupant, where the indictment as modified by the People's bill of particulars alleged that the defendant entered with intent to damage property. In reversing the defendant's burglary conviction but letting stand the defendant's criminal mischief and petit larceny convictions, the second department noted that the rule relating to the right to tried on charges specifically alleged in an indictment applies in cases charging burglary, where it is not normally necessary for the People to demonstrate the exact crime which the defendant intended to commit while inside the building. *See People v Barnes*, 50 N.Y.2d 375, 379 fn. 3 (1980) and *People v Mackey*, 49 N.Y.2d 274, 279 (1980), relied on by the court.

Discharge of Sworn Jurors

People v. Jonathan Batticks, __ N.Y. 3d __, 2020 WL 6136306 (10/20/20) [4/3; DiFiore, C.J.].

A majority of the Court held 4-3 that viewed in context, the repetitive and "gratuitous" use of a racial slur, on five occasions, by defense counsel wile cross-examining the victim during a joint trial with two others in which a juror {Number 6] exclaimed midtrial that she was "very offended" by this action and that if it continued, "I'm leaving," which was met by the trial court's admonishing the juror and counsel and then providing a "carefully crafted" curative instruction, which included a mechanism for any juror to advise the court if they could not be fair or impartial, was not an abuse of discretion. In so ruling, the majority held that the juror was merely reacting to a word she found offensive and as such was not necessarily unfit to continue service and moreover, declined to rule that a *Buford* inquiry, as requested by defense counsel, was required. Judge Wilson, joined by Judges Rivera and Fahey, dissented, quoting, among other things, Harper Lee's, "*To Kill a Mockingbird*," on the conclusion that the juror's outburst required an immediate *Buford* inquiry by the trial judge.

Juror Misconduct

People v. Russell Smith, __ N.Y.3d __ (11/19/20) [7/0; Memorandum], N.Y.L.J. 11/20/20 @ p. 19.

Relying on C.P.L. 330.40 (2)(d)-(f) and *People v. Maragh, 94 N.Y.2d 569, 573-575 (2001*), the Court held that the motion court abused its discretion in denying the defendant's motion to set aside his guilty verdict.

People v. Clayton Alvarez, __ A.D.3d __, 2021 NY Slip Op 00092 (1st Dept. 1/7/21).

The defendant's Manhattan burglary conviction was reversed and a new trial ordered because a juror, who was a retired police detective acted "extensively" as an unsworn expert witness during deliberations by opining on the feasibility of DNA and fingerprint extraction, the likelihood that tests were conducted and evidence was suppressed regarding a set of keys that were in evidence, and the probability that defendant was lying based on his speech patterns and body language. These opinions, which were communicated to and apparently influenced the jury, were within the scope of the juror's specialized expertise and were held explicitly offered on the basis thereof, and at least some of these opinions concerned material issues, including defendant's credibility and whether he entered the victim's apartment by mistake. See *People v Maragh, 94 NY2d 569, 574 (2000),* the leading case on this issue, relied on by the court.

People v. Jeffrey Blunt, 187 A.D.3d 1646 (4th Dept. 10/9/20).

The trial properly denied the defendant's motion to set aside his murder guilty verdict after a hearing on its conclusion that notwithstanding claims that a juror may have had an undisclosed "potentially strained" relationship with the defendant's mother resulting from attending high school and working together, possibly knew about the defendant's criminal history, and purportedly attempted to speak with the mother's husband during a lunch break at trial, any relationship was "superficial" that arose from knowing each other from childhood, and thereafter was "minimal [and] sporadic" over the course of several decades with no history of "enmity" or any "present or past acrimony." Thus, the defendant failed to establish that the juror engaged in misconduct by

deliberately concealing her relationship with the mother and that any claim that the juror "likely obtained unfavorable information" about the defendant was "speculative."

Response to Jury Notes

People v. Ricky Dennis, __ A.D.3d __, 2021 NY Slip Op 01994 (2nd Dept. 3/31/21).

During deliberations in the defendant's Statin Island first degree murder trial, while deliberating, the jury sent a note "asking for [the defendant's] phone call from jail." During the trial this recording with a transcript (not introduced in evidence) as am aid had been presented. The note, however, omitted the word "transcript," which was included at the end of the note in parentheses. The court then stated to the jury that it would play the call again, but would not provide a copy of the transcript, without first reading the note into the record, discussing it with counsel and then indicating what it intended to do. The second department reversed even without an objection on the holding that the trial judge's failure to comply with CPL 310.30 by reading the note verbatim and providing notice of its contents without paraphrasing as required in in accordance with the procedures set forth in *People v O'Rama*, 78 N.Y.2d 270 (1991) and *People v Silva*, 24 NY3d 294, 299 (2014), was mode of proceedings error. In so ruling the second department rejected the People's claim that the note was merely ministerial in nature.

People v. Raphael Jackson, __ A.D,3d __, 2021 NY Slip Op 01488 (1st Dept. 3/11/21).

"Under the circumstances presented," the court's paraphrasing of a part of a note from the deliberating jury which "simply and unambiguously asked for a rereading of a specific part of the court's original charge" did not rise to the level of a mode of proceedings error requiring reversal under *People v O'Rama* (78 NY2d 270 [1991]). In so ruling and affirming the defendant's Manhattan second-degree weapons possession conviction, the first department noted that although the court should have read the entire note into the record verbatim, the paraphrasing did not undermine defense counsel's ability to provide input into the court's response to the note, including the portions of the note that the court did read verbatim.

People v. Anthony Edwards, __ A.D.3d __ (4th Dept. 2/5/21) [#KA-18-01566].

The trial court did not fail to follow required *O'Rama* protocols [see *People v. O'Rama, 78 N.Y.2d*

279 (1991], when on receipt of a deliberating jury's note that requested access to a transcript of a recorded conversation that had not been admitted in evidence (the recording was in evidence), it directed a court officer to advise the jury that this was not available since it was not in evidence. In affirmed, the court held that the response was merely ministerial in nature and thus did not require, notice, input and an advance indication from the court as to the intended method of response**.**

People v. Rasheen Everett, __ A.D.3d __, 2021 NY Slip Op 00575 (2nd Dept. 2/3/21).

On the People's concession, the court reversed the defendant's murder conviction as a mode of proceedings error due to he failure on the part of the trial court to properly comply with the *O'Rama* protocols [see *People v. O'Rama, 78 N.Y.2d 279 (1991*], in connection with notes from a deliberating jury when it failed to notify the parties of the receipt of a note that requested a review of a surveillance tape taken from the victim's building.

People v. Lawrence C. Johnson, __ A.D.3d __, 2020 NY Slip Op 05927 (2nd Dept. 10/21/20).

A deliberating jury in the defendant's criminal contempt trial requested, to hear the recording of the 911 call and for information about the time the caseworker made the 911 call. The trim of the call was critical to the defendant's alibi defense. Outside of the jury's presence, defense counsel requested that the jury be informed that there was no information in the record as to the time of the call. In addition, defense counsel argued that the time printed on the face of one of the compact discs may not have been accurate since there was no testimony verifying that information. While defense counsel conceded that the compact discs were in evidence, he maintained that he did not know that a time was written on the face of one of them. The trial court then noted that defense counsel had been provided with copies of the compact discs during discovery and, during trial, had been shown the compact discs prior to them being admitted into evidence. The court then stated that it intended to tell the jury that no specific time had been testified to but that the compact discs were available for their inspection if they wanted to see them thereby leaving it to the jury to request the physical compact discs. Defense counsel acknowledged that this was a "compromise" and did not object to the court's approach. The 911 recording was then played for the jury in open court and informed the jurors that the court reporter could not find any testimony of the exact time of the 911 call. Over the defendant's earlier objection, the court also advised the jury that the compact discs containing the recording of the 911 call had been marked into evidence and were available for the jurors to view. Ultimately, the jurors requested to see the compact discs, which included the

markings made on the compact discs. The appellate division affirmed on the holding that while no provision authorizes submission of unadmitted exhibits to a deliberating jury, where the compact disc had been admitted without limitation and defense counsel permitted o inspect it before and during trial at the point of admission, the writing on it was part of the exhibit.

People v. Earlin T. Craig, __ A.D.3d __, 2020 NY Slip Op 05916 (2nd Dept. 10/21/20).

The unobjected-to response by the trial court during the defendant's Queens sexual abuse trial to a note that requested a readback of the defendants' testimony that the readback would commence after lunch was not in violation of the requirements of *People v. O'Rama, 78 N.Y.2d 270 (1991),* because it conveyed no information pertaining to the law or facts of the case was merely ministerial and as such, C.P.L. 310.30 was not violated.

Suspension of Deliberations For More Than 24 Hours

People v. Andy Borgella, __ A.D.3d __, 2020 NY Slip Op 07216 (2nd Dept. 12/2/20).

The trial court was within its discretion to suspend jury deliberations for more than 24 hours over defense counsel's objection or a waiver of C.P.L. 310.10 and deny a defense application for a mistrial where a deliberating juror was briefly hospitalized but reported that he would be available for continued service the next day.

Verdicts

People v. Oba Johnson, __ A.D.3d __, 2021 NY Slip Op 04763 (2nd Dept. 8/25/21).

A verdict finding a defendant guilty of murder in the second degree, while acquitting him of conspiracy in the second degree and two counts of criminal possession of a weapon in the second degree, is not legally repugnant. Thus in affirming a Dutchess County conviction, the second department held that "'[A] verdict is repugnant only if it is legally impossible—under all conceivable circumstances—for the jury to have convicted the defendant on one count but not the other.'" quoting *People v Muhammad,* 17 N.Y.3d 532, 539-540 (2011); *see also People v DeLee, 24 N.Y.3d 603, 608 (2014)*. Thus, "In determining whether a verdict is legally repugnant, the court reviews 'the elements of the offenses as charged to the jury without regard to the proof that was

actually presented at trial'" quoting *People v Muhammad*, 17 N.Y.3d at 542; see also *People v Tucker*, 55 NY2d 1, 4). "'If there is a possible theory under which a split verdict could be legally permissible, it cannot be repugnant, regardless of whether that theory has evidentiary support in a particular case,' "quoting *People v Muhammad, 17 N.Y.3d at 540*; see *People v DeLee*, 24 N.Y.3d at 608. Thus, viewing the elements of the offenses as charged to the jury, the acquittal on the count of conspiracy in the second degree did not negate any of the elements of the count of murder in the second degree.

People v. David Alligood, __ A.D.3d __ (4th Dept. 3/19/21) [#17-00271].

After the jury in the defendant's Monroe County murder and related-offenses trial indicated it had reached a verdict, the court clerk asked the jury how it found with respect to the first count, i.e., murder in the second degree, and the foreman responded, "Guilty." The jury had been previously instructed that if they reached a verdict of guilty on that count, they were not to consider the lesser included charge of first-degree manslaughter and thus, where to move on to consider a weapons possession charge. Nonetheless, the court clerk then asked, "[a]s to the second count in the indictment, manslaughter in the first degree, how do you find?" and the foreperson began to respond, "Guilt - -." County Court interrupted the foreperson and correcting the court clerk's error," stated, "I'm sorry. That's a lesser-included charge, so I am going to ask you to go on to Count 2. That would be criminal possession of a weapon." The foreperson thereafter announced the jury's verdict of guilty on the two counts of criminal possession of a weapon in the second degree. Moreover, after the verdict had been fully rendered, the court individually polled the jury to ensure the accuracy of its verdict, which did not include a finding of guilt with respect to manslaughter in the first degree. The fourth department affirmed and rejected claims that the verdict was repugnant on the holding that the "court clerk merely misspoke, the error was immediately corrected, and no jury verdict was rendered on manslaughter in the first degree."

Entry of Default Judgment on Defendant's Failure to Appear in Administrative Traffic Violations Court

People v. Eric J. Iverson/Jack J. Cucceraldo, __ N.Y.3d __ (5/27/21 [6/0; Garcia, J.].

A Court of Appeals, per Garcia, J., unanimously held that a Suffolk County District Court Traffic and Parking Violations Agency [TPVA] judicial hearing officer is not authorized under the Vehicle and Traffic Law to render a default judgment against a defendant charged with a traffic infraction

who first enters a timely not guilty plea but then fails to appear for trial. In so ruling, the Court held that V.T.L. 1806-a(1) expressly forbade such action and that the People's claim that V.T.L. Art. 2-A applied was to be rejected since the latter statute covered agencies in New York City only.

Substantive Law

People v. Richard Gaworecki, __ N.Y.3d __, 2021 WL 4596362 (10/7/21) [7/0; Fahey, J.].

The Court of Appeals held that the evidence presented to the grand jury failed to establish a prima facie case that defendant acted either with the recklessness required to sustain the charge of second-degree manslaughter or the criminal negligence required to sustain the lesser included offense of criminally negligent homicide based on proof that defendant knew that the heroin he sold the decedent was "strong and required caution." In so ruling the Court reversed an appellate division order to the contrary on the conclusion "that the heroin was potent, however, does not equate to a substantial and unjustifiable risk that death would result from the use of the heroin," where the coroner, the decedent's ex-girlfriend, and the other individual who purchased heroin from defendant all testified that it was common knowledge among heroin users that different samples or preparations of heroin had different potencies and that the strength of heroin could vary a great deal among samples. Moreover, the People's evidence demonstrated that the decedent, his ex-girlfriend, and the other individual all used the same sample of heroin purchased from defendant before the date of the decedent's death and survived those encounters. Finally, the People presented insufficient evidence that defendant was "aware of, or failed to perceive, a substantial and unjustifiable risk of death from the heroin he was selling before that date, when he sold heroin to the decedent where the People presented no evidence that defendant had been told that other people had overdosed or died after using the heroin he had sold them.

People v. Danielle Allen, __ N.Y.3d __ (2/11/21) [7/0; Memorandum], N.Y.L.J./law.com 2/16/21.

The Court affirmed the defendant's conviction on the holding that **"[**v]iewing the evidence—including the testimony of a forensic consultant who was qualified, without objection, by the trial court as an expert in crime scene reconstruction and bloodstain pattern analysis" there was a "valid line of reasoning and permissible inferences from which a rational jury could have found that the People disproved the defense of justification beyond a reasonable doubt."

People v. Frederic Badji, 36 N.Y.3d 393 (2/11/21) [5/2; DiFiore, J.].

The defendant's conviction for fourth degree grand larceny based on his having used his employer's personal and corporate credit card number while he was an administrative assistant to make numerous personal purchases, including cellphone equipment and service contracts and Uber rides, even though he never possessed the actual or physical credit card. In affirming, a majority of the Court, per DiFiore, C.J., held that the legislative history to P.L. 155.00(7) and Gen.Bus.L. 511(1), enacted to curb the expansion of economic crimes, supported the notion that a credit card's definition included the intangible number and not necessarily the physical card itself, and moreover rejected the notion that this holding was inconsistent with the definition of debit cards or that asportation as an element of larceny was required in all cases of larceny. Judge Rivera, joined by Judge Wilson dissented on the conclusion that while the defendant might have been guilty of second degree identity theft, a crime he was not prosecuted for, he was not guilty of larceny as defined in the statute by his accessing the credit card account as presented at trial, since he stole nothing tangible.

People v. Benito Lendof-Gonzalez, 36 N.Y.3d 87, 2020 N.Y. Lexis 2639 (11/24/20) [4/3; Feinman, J.], N.Y.L.J. 11/25/20 @ p. 23.

A majority of the Court by a 4-3 vote, per Feinman, J., affirmed an appellate division reversal of the defendant's attempted murder conviction on the holding that the defendant's solicitation of a fellow-inmate to carry out the murder of the defendant's wife and mother-in-law by causing an elaborate overdose, what was furthered by the defendant's providing a detailed "plan" to his supposed "hitman" who reported the scheme to the authorities never moved beyond mere preparation and thus did not progress as required to be "dangerously close" to the completion of the object crime as required to constitute an attempt to commit murder under *People v. Mahboubian, 74 N.Y.2d 174 (1989*) and *People v. Naradzay, 11 N.Y.3d 460 (2008).* Judge Rivera, joined by Judges Fahey and Garcia, dissented on their conclusion that the conduct involved a completion of all necessary steps to consummate the murders.

People v. Raekwon Barnes, __ A.D.3d __ (4th Dept. 8/26/21) [#KA-001039].

The People presented evidence that an officer discovered the gun on a heating duct in the basement of the home where defendant resided, and that defendant used and had access to the basement area

in which the gun was located where forensic evidence established that defendant was a major contributor of the DNA profile from the gun. Thus, the fourth department affirmed the defendant's weapons possession conviction on the holding that that the defendant exercised dominion and control over the gun by a sufficient level of control over the area in which it was discovered. In addition, the appellate division also held that "there was sufficient evidence that defendant's possession of the [gun] was knowing, [inasmuch] as[,] '[g]enerally, possession suffices to permit the inference that the possessor knows what he possesses, especially, but not exclusively, if it is . . . on his premises' " quoting, *People v Diaz, 24 N.Y.3d 1187, 1190 (2015)].*

People v. Bruce Parker, __ A.D.3d __, 2021 NY Slip Op 04766 (2nd Dept. 8/25/21).

There was sufficient evidence of the defendant's constructive possession of a weapon to support a guilty verdict on that charge where, among other things, the evidence established that the defendant resided in the subject premises for six years, that the defendant was aware of the presence of the firearm in the kitchen cabinet above the refrigerator, that the defendant received mail at the subject premises, and that the defendant's DNA was found on the firearm. Based on the foregoing, the jury could reasonably infer that the defendant exercised dominion and control over the area where the firearm was found, and thus, that he constructively possessed it.

People v. Christopher Bowen, 196 A.D.3d 501, 2021 NY Slip Op 04236 (2nd Dept. 7/7/21).

There was insufficient proof of "physical injury" presented at the defendant's Brooklyn assault trial to sustain the jury's verdict where the complainant testified that at the time of the incident he never sought medical attention and "proceeded on his way," that he continued to have pain in his back and neck for approximately three weeks, had pain when he lifted "something" when working in construction, without specifying what "something," was unable to use a pillow to sleep and that he used only a topical pain relief cream to relieve pain. As the second department noted, under these circumstances, there was insufficient evidence from which a jury could rationally infer that the complainant suffered substantial pain or impairment of his physical condition.

People v. Dilber Kukie, et al., __ A.D.3d __, 2021 NY Slip Op 03996 (1st Dept. 6/22/21).

Several defendants' manslaughter conviction and multiple count assault conviction based on proof that the defendants rigged an unauthorized gas line from one East Village Manhattan apartment

building to another without utility approval which then exploded was affirmed on the first department's holding that the fatal explosion was the foreseeable result of the defendants' knowing conduct in deliberately circumventing safety regulations.

People v. Tyrell Johnson, __ A.D.3d __, 2021 NY Slip Op 03851 (2nd Dept. 6/16/21).

There was insufficient proof to sustain the defendant's conviction for obstructing governmental administration where, following a traffic stop for driving under the influence, he was argumentative throughout the traffic stop and arrest-booking process, repeatedly refused to answer the officers' questions, and refused to participate physically in any way in the arrest-booking process, including refusing to stand for a photograph, to provide his fingerprints, or to sign a *Miranda* form. While the People conceded that the defendant did not physically resist the officers, their argument that his conduct constituted physical interference because he refused to cooperate physically in the arrest-booking process was rejected where neither the defendant's conduct during the traffic stop nor his conduct during the arrest-booking process constituted a knowing, physical interference with, and disruption of, the official function being performed by the officers. The defendant did not struggle, physically resist, or do anything to interfere with the officers, and he did not intrude into, or get in the way of, any ongoing police activity as is required. Simply stated, the defendant's "passive unwillingness to cooperate with the officers during the traffic stop and arrest-booking process lacked the requisite intentional physical component."

People v. Dishawn Infinger, __ A.D.3d __ (3rd Dept. 5/13/21) [#110446].

Following an attempt to strip search an inmate at a correctional facility for a weapon, and an altercation with a correctional officer, the officer sustained what he described as "minor pain" with "contusions and swelling . . . to the left side of [his] face" as well as "redness . . . and swelling to [his] knee." The officer remained on duty but described his knee as "sore" and "stiff" after his shift ended. The officer, however, acknowledged that he had knee surgery in 2002, which caused swelling and arthritis on damp or cold days. continued to work for five days before going on a previously planned vacation, but also testified that his knee was "progressively getting worse" and that he was unable to return to work as previously scheduled and then went to the emergency room – where he did not take the pain medication that he was given – and had X rays taken, had knee pain was a "four to five" on the pain scale at that point, intermittent and "like a toothache." The officer underwent knee replacement surgery several months later enduring a "very painful" recovery. The third department affirmed the defendant's second-degree assault conviction on the holding that even assuming eh officer's prior arthritic knee partially caused his injuries, there was sufficient proof of "physical injury" to support the verdict. Compare, *People v. Jerome Smith, 187 A.D.3d 944 (2nd Dept. 6/30/20)* [Victim's complaint of scratches and unspecified soreness on neck and wrist insufficient to sustain "physical injury" element of second-degree assault]

People v. Michael Aragundi, 194 A.D.3d 733, 2021 NY Slip Op 02811 (2nd Dept. 5/5/21).

There was insufficient proof to sustain the defendant's Queens convictions for firs degree gang assault, first degree robbery and second degree assault sufficient to satisfy the element of serious physical injury required in each crime based on proof that the victim sustained multiple lacerations and wounds to his neck, head, chest, and abdomen, none of which affected his internal organs, and which were treated with sutures, according to a treating physician suffered a diminished grip strength in his left hand on the day of the incident and experienced numbness in his left arm that persisted "for a while" after the attack. In so ruling the appellate division, however, modified each conviction to an attempt based on the defendant's having gotten "dangerously close" to the intended crime.

People v. Elijah Saladeen, __ A.D.3d __, 2021 NY Slip Op 02760 (1st Dept. 5/4/21).

The was a sufficient record to support the trial court's finding after a bench trial that the defendant, "an experienced police officer," lacked a reasonable ground to believe that it was necessary to punch the victim repeatedly to prevent the victim from biting him, both when the victim was rear-cuffed and lying face down on the floor of an apartment building lobby and being effectively restrained by defendant and another officer, and after the defendant subsequently brought the victim to the building's rear stairwell without seeking the assistance of any of the other officers present (*see* Penal Law §§ 35.05[1], 35.15[1], 35.30[1][a]).In affirming the defendant's third degree assault (and, with one exception, false filing conviction), the first department also held that the evidence supported the conclusion that all of defendant's punches were unjustified, and also supported the alternative conclusion that even if the initial punch was justified, the subsequent punches were unjustified, and these punches caused additional injury.

People v. Karim Smith, 193 A.D.3d 1260, 2021 NY Slip Op 2564 (3rd Dept. 4/29/21).

Testimony by the victim to a Schenectady County shooting that during a dispute outside a convenience store he was shot in the leg just below the kneecap, that after the incident he went to a friend's house for about 20 minutes, that he had a "burning sensation" with pain at a level of about five to six out of ten, that there was blood that was "trickling" out of the wound, that he took over the counter painkillers, that he eventually was hospitalized for two days, that he was released and walked with crutches, that he has two circular scars and "occasionally had pain for the area of the wound was insufficient to sustain the jury's verdict of second degree assault on a weight of the evidence review. As the third department held, the injury, while "by no means trivial," did not support a finding of serious physical injury as required under P.L. 120.05(4), where they were not

permanent, not a serious disfigurement and not life-threatening. As such the conviction was reduced to third degree assault.

People v. Edward Ferguson, __ A.D.3d __, 2021 NY Slip Op 02563 (3rd Dept. 4/28/21).

Testimony at the defendant's Albany County aggravated vehicular homicide trial regarding the defendant's erratic driving, together with the evidence of his intoxication and blood alcohol content hours after the collision, the speed at which he made the left-hand turn without braking and defendant's failure to yield to oncoming traffic provided a valid line of reasoning and permissible inferences from which the jury could conclude that the defendant engaged in reckless driving and, as a result of intoxication, operated the vehicle in manner that caused the death of his passenger and serious physical injury to the driver of the oncoming vehicle, sufficient to sustain the jury verdict. In affirming, the third department however, held on the People's concession that the defendant's convictions for vehicular manslaughter in the first degree, reckless driving and driving while intoxicated had to be dismissed as inclusory concurrent counts of his convictions for aggravated vehicular homicide.

People v. Elvis Moreno, __ A.D.3d __, 2021 NY Slip Op 02316 (2nd Dept. 4/14/21).

The evidence presented at the defendant's third-degree narcotics sale trial was insufficient to support his Staten Island conviction for third degree criminal sale of a controlled substance where the People's proof reflected simply that the defendant was present in the front passenger seat of the car of a co-defendant who had arranged to sell heroin to an undercover police officer, notwithstanding that the defendant motioned to the undercover to get into the vehicle prior to the sale. In reversing, this conviction and the defendant's conviction also for conspiracy, the second department held that the few words uttered by the defendant to his co-defendant before the undercover officer entered the vehicle did not reflect the defendant's awareness of an imminent sale of heroin, let alone his intent to aid in the commission of the sale and further, there was no evidence that the defendant's alleged hand gesture to the undercover officer was made in response to any request to purchase heroin or that the defendant was even aware of the undercover officer's reason for approaching the vehicle at that time. As the court noted, the evidence derived in part for intercepted telephone calls. reflected that the defendant met his co-defendant to accompany the co-defendant to a driving school before the co-defendant and the undercover officer arranged the meeting, and that the co-defendant told the undercover officer prior to the meeting that he had to "do this thing for my license." Thus, the defendant's "mere presence" during the sale, even with knowledge of what was transpiring at that time, was insufficient to establish the defendant's guilt of criminal sale of a controlled substance in the third degree.

People v. Tasheem Brown, 192 A.D.3d 435, 2021 NY Slip Op 01339 (1st Dept. 3/4/21).

There was sufficient proof as a matter of law to sustain the defendant's second-degree burglary conviction based his having fled his Manhattan apartment after the police received a 911 call of a domestic dispute report, by lowering himself unto a lower floor neighbor's balcony and entering that apartment because he mistakenly thought the police had come to arrest him for an unrelated crime and for which he had previously agreed with the police to surrender at a later date. In affirming the first department held that the defendant intended to commit the crime of resisting arrest when he entered the neighbor's apartment and, citing *People v. Dlugash, 41 N.Y.2d 725 (1977)* and P.L. 15.020(1)(a), was not entitled to reversal because his was mistaken that the police had come to arrest him on the unrelated offense even where the police did not had probable cause to arrest him in the domestic dispute report.

People v. Earnest T. Ruffin, __ A.D.3d __ (3rd Dept. 2/25/21).

There was sufficient proof of the defendant's constructive possession of a weapon based on proof presented at is Saratoga County trial that following a 911 call by the victim of a domestic dispute wo reported that her boyfriend, the defendant, was armed with a weapon, police responded and observed the victim outside her apartment in her car pointing to the defendant who was standing near a black duffle bag that was resting on the steps of the apartment entrance. Additionally, following the defendant's arrest, a pat-down produced a driver's license bearing the defendant's name, a ski mask and a small amount of marijuana. Police located the black duffel bag on the steps outside of the apartment complex, which contained clothing, sneakers, two masks in the shape of skulls (one of which was silver in color and the other blue), ammunition, a handgun magazine, a Springfield Armory XD 40 handgun and a Mossberg shotgun. Multiple police officers testified that, from the time they located the duffel bag until the time that defendant was placed under arrest, they did not observe any other civilians in the vicinity of the bag. The victim's neighbor also testified to that as well. Forensic analysis of the items found in the bag did not reveal any identifiable fingerprints or DNA evidence, other than indicating that male DNA was present on the grip of the handgun and on one of the masks. The People also entered into evidence audio recordings of certain telephone calls that defendant had placed while incarcerated pending trial, during which he expressed knowledge of the duffel bag and the contents located therein. Thus, the defendant asked his sister on one of the calls, "what happened to the duffel bag?" On another call, he informed his sister that there was "one silver and one blue" mask located in the bag. Moreover, the defendant confirmed on other calls that the "guns" were not loaded at the time of his arrest, and that "only one gun is really illegal" and "the other one is a Mossberg." At trial, the defendant's sister confirmed that certain personal items found in the bag belonged to defendant, including a belt, deodorant and sneakers. The People also entered into evidence pictures extracted from defendant's cell phone, that were taken prior to the incident, depicting blue and silver skull masks as well as a handgun that

appeared to have the "Springfield Armory" emblem engrained on it. In affirming, the court noted that while a different verdict was reasonable, there was sufficient proof of dominion and control based on all the inferences in the record, notwithstanding that no witness was able to testify to the defendant's actual possession of the duffle bag. In affirming, the third department also held that where the defendant sought suppression of the items found in the duffel bag on the basis that they were unlawfully seized "as a result of police conduct in violation of [his] substantial right to be secure against unreasonable searches and seizures," he did not allege any facts supporting a reasonable expectation of privacy in the duffel bag, which was partially open when it was found and located in a common area. Thus, the defendant failed to demonstrate standing to challenge the search, to the extent that the lower court did not err in summarily denying his motion.

People v. Bakary Kourouma, __ A.D.3d __, 2021 NY Slip Op 01011 (1st Dept. 2/16/21).

The defendant's conduct of snatching a purse as it was "dangling" from the victim's arm was not on a weight of the evidence review and in the interest of justice insufficient forcible compulsion to sustain the defendant's third-degree robbery conviction. The court, however affirmed the defendant's fourth degree grand larceny conviction on these facts.

People v. Keith L. Ponder, 191 A.D.3d 1429, 2021 NY Slip Op 00923 (4th Dept. 2/11/21).

Although the defendant was present in the apartment at the time the police executed a search warrant, no other evidence was presented "to establish that defendant was an occupant of the apartment or that he regularly frequented it," quoting *People v Swain*, 241 AD2d 695, 696 (3d Dept 1997). At trial, two of the police officers testified that they did not discover anything that belonged to defendant on the premises. The clothing, cell phone, and identification found on the premises belonged instead to other men who were present in the apartment during the execution of the search warrant. Photographs found on the premises included the other men but not defendant. While defendant admitted that he had been at the apartment on one other occasion, the evidence failed to otherwise "specifically connect" the defendant to the apartment in which the contraband was found. Thus, the court reversed the defendant's narcotics possession conviction on a weight of the evidence review on a conclusion that the People failed o establish that the defendant "exercised dominion and control over the [contraband] by a sufficient level of control over the area in which [it was] found," quoting, *People v Burns, 17 AD3d 709, 710* (3d Dept 2005).

People v. Michael McLamore, __ A.D.3d __, 2021 NY Slip Op 00926 (4th Dept. 2/11/21) [# KA-

17-00971.

The defendant's conviction for first degree promoting prison contraband under P.L. 205.25 was modified to second degree promoting prison contraband under P.L. 205.20 on a holding that the People's proof that the defendant smuggled synthetic marijuana that mimics the effects of THC into the Wyoming Correctional Facility on the conclusion that pursuant to *People v. Finley, 10 N.Y.3d 647, 657 (2008),* small amounts of marijuana cannot constitute "dangerous contraband" as is required for a first degree promoting prison contraband conviction and that as such, synthetic marijuana must be considered in similar fashion.

People v. Mardie Ballo, __ A.D.3d __, 2021 NY Slip Op 00810 (1st Dept. 2/9/21).

The defendant was indicted as the sole actor for first degree assault in an incident arising out of a box cutter slashing of a Manhattan delicatessen employee in which the defendant's companion participated in the attack by striking the employee with a baseball bat. The trial court charged the jury with no acting in concert instruction and no objection from either party and provided the attorneys with a written copy of her charge. After summations and the charge, the People belatedly requested an acting in concert charge and defense counsel declined to join the request. The first department reversed the defendant's conviction on the holding that while the law draws no distinction between principal act accessorial liability, a conviction may not be sustained on the latter theory where no such instruction was provided to the jury. In so ruling, the court rejected the People's claim that the defense engaged in "gamesmanship" and as such, should not be rewarded and noted that it was incumbent on the prosecutor, like any party to timely make requests of the court.

People v. Phillip DeBlasio, 190 A.D.3d 595, 2021 NY Slip Op 00376 (1st Dept. 1/22/21).

The defendant's conviction following a bench trial of making a terroristic threat in violation of P.L. 490.20(1), based on proof that during an altercation over either money or a phone, the defendant, a Muslim, threatened to "shoot you guys," referring to several Bangladeshi worshipers at the defendant's mosque, was reversed by the first department. The court concluded that the defendant's conduct did not fit the statute and *People v. Morales, 20 N.Y.3d 240, 247 (2012),* because the threat mentioned no group or population but instead, merely "appears to have been based on a personal dispute." As the court noted in holding the evidence insufficient as a matter of law, "[t]o find that defendant's act amounted to a terroristic threat would trivialize the definition of terrorism by applying it "loosely in situations that do not match our collective understanding of what constitutes a terrorist act," quoting *People v. Morales, supra*. See also *Matter of Jaydon R., __ A.D.3d __, 2021*

NY Slip Op 00176 (2nd Dept. 1/13/21), in which the second department reversed a juvenile delinquency adjudication on a similar ground. There that the respondent, an eighth grader, had also been charged with making a terroristic threat when he was purportedly joking with classmates and stated that he was going to be 14 years old, chopped up in somebody's backyard, and "he's going to get a white person to shoot up the school"

People v. Gary Peterson, __ A.D.3d __, 2021 NY Slip Op 00193 (2nd Dept. 1/13/21).

Where the People's bill of particulars limited their theory that the object crime of the defendant's burglary was larceny, the trial court should not have permitted the prosecutor to argue, and moreover, should not have charged the jury that the defendant could be conviction of burglary based on proof that he intended to commit criminal mischief in his illegal entry. In reversing the defendant's burglary conviction, the appellate division let stand the defendant's criminal mischief conviction and noted that while it is ordinarily not necessary for the prosecution to demonstrate the exact crime the defendant committed while inside the building, where the People took on a greater burden, the defendant's right to be tried only for crimes charged in an indictment was violated.

People v. Jose Bernazard, __ A.D.3d __, 2020 NY Slip Op 07083 (2nd Dept. 11/25/20).

The court reversed and vacated one count of a Queens multiple-count conviction, involving attempted murder, burglary, aggravated criminal contempt and related crimes, i.e., second degree assault on a holding that the People's proof was legally insufficient to establish beyond a reasonable doubt that the child complainant sustained "physical injury as defined in P.L. 10.00(9) where several witnesses described only a "minor injury," stated variously that they saw a "redness" on the child's cheek or a slight swelling under his eye and cheek or a bruise to the right cheek, that was treated with a cold pack. In so ruling, the court held that substantial pain was no established where the child experienced tenderness for only one to two hours after the incident.

People v. John E. Pinnock, 188 A.D.3d 1708 (4th Dept. 11/20/20).

The fourth department held that there was insufficient proof to sustain the defendant's criminally negligent homicide conviction on a weight of the evidence review based on proof that a wheel came off the defendant's truck and thereafter, another truck hit another car which overturned and the driver of that car was killed. In reversing, the appellate court noted that the fact that the defendant

only came into possession of his truck several weeks before the incident and the vehicle had its lasty inspection sticker more than three years prior that was forged, where there was no evidence that the defendant knew the sticker was forged, this, along with evidence that the truck was making "loud grinding noises" in the three days before the fatality and the defendant was told by a vehicle mechanic on the day of the incident that the truck had a problem with its wheel or brakes, that this would cause problems with the steering but that the problem could not have been known by the operator unless the wheel was removed was insufficient to sustain the conviction. Thus, quoting *People v. Conway, 6 N.Y.3d 869, 872 (2006),* the court observed that "the carelessness required for criminal negligence is appreciably more serious than that for ordinary civil negligence, and that the carelessness must be such that its seriousness would be apparent to anyone who shares the community's general sense of right and wrong. *Moreover, criminal negligence requires a defendant to have* engaged in some blameworthy conduct creating or contributing to a substantial and unjustifiable risk *of a proscribed result;* nonperception of a risk, *even if (the proscribed result occurs),* is not enough.*" See also, People v. Cabrera, 10 N.Y.3d 370, 375 (2008), relied on by the court.*

People v. Johnny Bravo, 188 A.D.3d 1086, 2020 Ny Slip Op 06804 (2nd Dept. 11/18/20).

The complainant in a grand larceny prosecution testified that after she was unable to send large amounts of money to her family in Peru she asked the defendant for help. She thus related that she gave the defendant $11,00 to $12,000 to transfer to her family and approximately $40 for his assistance and that she accompanied the defendant to four different money transfer agencies. The next day, however, she learned that the money transfers did not go through due to an error she had made in the recipient's name but that the defendant was able to fix two of the transactions over the phone and moreover, that he agreed to meet her the next day to correct the mistake in the other two money order transactions. She also testified that the defendant did not meet her the next day, that she learned that her family never received the funds and that the defendant had withdrawn the money without her permission. Business records from the money transfer agencies indicated that the transactions had been cancelled with the money refunded. The appellate division reversed the defendant's conviction on a holding that in a weight of the evidence review, the record did not establish that the defendant obtained the funds from the money transfer agencies by means of a false representation that he would meet the complainant to help her fix the error in the recipient's name and moreover that the defendant had the requisite intent not to perform at the time he made the alleged false representation and thus the proof failed to exclude to a moral certainty the hypothesis that the defendant formed the intent to withdraw the money some time after he made the promise to the complainant to meet her to correct the transactions.

People v. Fernando Romualdo, __ A.D.3d __, 2020 NY Slip Op 06559 (2nd Dept. 11/12/20).

A divided second department held 3-1 that there was insufficient proof presented at trial on a weight of the evidence review to sustain the defendant's Suffolk murder and related sex-crimes conviction in a case in which the People's proof was that a 23-year old victim, who had a history of drug use was found dead in a wooded area, that she had been sexually assaulted and killed by strangulation within 12 hours to a day before her body was found, and that the defendant's DNA was matched to a single source partial profile generated from various swab samples taken as part of a sexual assault kit performed on the victim. In reversing, the majority held that where the People presented no evidence that the defendant was at or near the scene of the crime or "linking him in any way to the victim, during the critical time frame in which the murder was believed o have occurred," reversal and a dismissal of the indictment was required. Justice Roman dissented on the conclusion that there was sufficient proof presented to establish the defendant's identity as the perpetrator of the crime, where the forensic proof showed that the defendant's semen was in the victim's body and where the defendant, who lived close to where the body was discovered gave a false statement to the police that he had never had sex with the victim and had never seen her.

People v. Julio Acevedo, 187 A.D.3d 1030, 2020 NY Slip Op 05909 (2nd Dept. 10/21/20).

The defendant's second degree manslaughter and criminally negligent homicide conviction was reversed on a holding that the People's proof during his Brooklyn trial that he was driving his BMV northbound on Kent Avenue when his vehicle struck the driver's side of a Toyota Camry in the process of making a left turn from Wilson Street onto Kent Street after, as eyewitnesses described "serving" driving with speeds between 40 to 50 miles per hour and then up to "at least 60 or 70" miles per hour was insufficient to support the conviction. Quoting *People v. Cabrera, 10 N.Y.3d 377, 378 (2008)* and relying also on *People v. Perry, 70 N.Y.2d 626 (1986),* in a case involving the deaths of two passengers, one of whom was pregnant with an unborn child who did not survive in the other car, the court held that without "some additional affirmative act aside from driving faster than the posted speed limit," the evidence was legally insufficient to "transform 'speeding' into 'dangerous speeding,'" as is required to sustain a mens rea of recklessness or criminal negligence. See *People v. Asaro, 21 N.Y.3d 677 (2013*), also relied on by the court. The court, however, let stand the defendant's conviction for leaving the scene of an incident.

People v. John Tactikos, __ A.D.3d __, 2020 NY Slip Op 05535 (2nd Dept. 10/7/20).

There was insufficient proof to support the defendant's Brooklyn second degree robbery and assault conviction under P.L. 120.05, and 160.10(2)(a) that the defendant caused physical injury to the victim (an element of both crimes), based on proof that during the incident in which the defendant forcibly stole property, he bound her wrists with a coaxial cable, place the cable around her neck and placed her in a choke holed with his arm across her throat and thereafter, the victim testified that her wrist was sore and had redness, that she had a red mark on her neck, that she was "pretty numb" at the time but not experiencing pain, that she declined to go to the hospital and that a few days later, she had difficulty swallowing and her throat was "kind of sore" for "[j]ust a couple of days." In so ruling, the court reduced the defendant's conviction to third degree robbery and third degree attempted assault.

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People v. Steven Branch, __ A.D.3d __, 2020 NY Slip Op 05220 (2nd Dept. 9/30/20).

NYPD police officers executed a search warrant to look for narcotics and related paraphernalia in a Queens apartment where the defendant resided. In a first bedroom, the police found a 9-millimeter Taurus pistol and a loaded magazine for that pistol. The pistol was found in a shoe box inside the closet. Also inside the closet, the officers found a large black bag containing a 20 gauge Winchester shotgun, a .22 caliber Ruger rifle, and 12 20 gauge shotgun cartridges. The pistol, shotgun, and rifle were later found to be operable. The defendant, who resided in the third bedroom of the apartment, was convicted, after a nonjury trial, of, inter alia, criminal possession of a firearm and possession or disposition of an unpermitted rifle or shotgun (two counts). On appeal, the appellate division held that there was insufficient proof of constructive possession of the weapon where there was no proof the defendant ever frequented the bedroom where the weapons were found or kept any belongings there and where the door to that was locked and remained locked for several years after the defendant's brother, who had occupied the room, died.

Nathan Van Buren v. United States, __ U.S. __ (6/3/21) [6/3; Barrett, J.].

A majority of the Court held 6-3, per Barratt, J., that the use of a police computer to retrieve information about a particular license plate in exchange for $5,000 by a former Georgia police sergeant may have violated departmental policy but did not constitute a violation of the federal Computer Fraud and Abuse Act as a felony under 18 U.S.C. 1030(a)(2) on a holding by extensive statutory construction. Justice Thomas, joined by Chief Justice Roberts and Justice Alito, dissented

on their conclusion that the defendant violated a plain reading of the statute because he was not entitled to obtain this information with the improper motive presented. As he noted, "the Act may or may not cover a wide array of conduct because of changes in technology that have occurred since 1984 [the date of its enactment]. But the text makes one thing clear: Using a police database to obtain information in circumstances where that use is expressly forbidden is a crime."

New York State Rifle & Pistol Assoc. v. Corlett, __ U.S. __ (4/26/21).

The Supreme Court granted certiorari to determine whether New York's restriction of the right to carry weapons outside the home by restricting permits for such possession to "good cause" violates the second amendment.

Sentencing

People v. Joseph T. Barthel, __ A.D.3d __, 2021 WL 3783080 (4th Dept. 8/26/21) [#KA-18-00164].

A sentencing court has no power to direct that its sentence will run concurrently or consecutively to another sentence that has not yet been imposed. Thus, when a sentencing court violates that rule and purports to direct the relationship between its present sentence and an anticipated forthcoming sentence, (in this case a day later), the proper remedy is usually to strike the improper directive, not to remit for a new sentencing proceeding at which the court could exercise the very power it lacked originally. However, upon its review of the case, which involved a "brutal crime spree" in Rochester and series of robberies and shootings with an AK-47, but conviction in this separate non-jury trial of weapons possession based on a theory of constructive possession, the fourth department vacated the consecutive sentence directive and otherwise let the sentence stand. In so ruling, this court declined to follow *People v Clapper, 153 A.D.3d 1452, 1453 [3d Dept 2017,* as suggested by the People to allow for a remand and the possibility of the imposition of a consecutive sentence.

People v. John Brady, __ A.D.3d __, 2021 NY Slip Op 03951 (4th Dept. 6/17/21).

Notwithstanding that the certificate of conviction stated that defendant was sentenced on each count to concurrent terms of incarceration of nine years with five years of post-release supervision, the

lower court erred in failing to actually "pronounce sentence on each count" of the conviction (CPL 380.20). *See* CPL 380.20). As such on the People's concession, the case was remitted for re-sentencing.

People v. Melvin Aquino, __ A.D.3d __, 2021 NY Slip Op 02810 (2nd Dept. 5/5/21).

A defendant who has validly waived his right to appeal, may not invoke the appellate division's interest of justice jurisdiction to review his sentence as excessive. See *People v. Echevarria, 180 A.D.3d 703 (2nd Dept. 2020)* relied on by the court.

People v. James Adams, __ A.D.3d __, 143 N.Y.S.3d 568, 2021 NY Slip Op 02808 (2nd Dept. 5/5/21).

The trial court should not have imposed consecutive sentences for the defendant's possession of two separate weapons that were discovered during the execution of a search warrant. Thus, on the People's concession, and pursuant to *People v. McKnight, 16 N.Y.3d 43 (2010*), the second department modified the sentence to be served concurrently on the holding that the single act of possession constituted two offenses.

People v. Gregory Rodriguez, 191 A.D.3d 807 (2nd Dept. 2/10/21).

Where the defendant failed to raise the claim that the trial court should not have imposed an order of protection on the defendant at sentencing the issue was held foreclosed from review on appeal. The court additionally declined to reach the contention in the interest of justice. See *People v. Nieves, 2 N.Y.3d 310, 316-317 (2002*) relied on by the court, among other cases. See also *People v. Charles Brown, __ A.D.3d __, 2021 NY Slip Op 01059 (& 01060) (2nd Dept. 2/17/21),* and *People v. George DiRobertis, __ A.D.3d __, 2021 NY Slip Op 01060 (2nd Dept. 2/17/21),* in which the court ruled in similar fashion and also noted that the "better practice – and best use of judicial resources" is raise the claim in the trial court before resorting to appellate review. But see, *People v. Dequan Grimes, 2021 NY Slip Op 03471 (2nd Dept. 6/2/21)* [order of protection issue reached in interest of justice with no objection at sentencing; order of protection vacated where young children in whose favor orders entered were neither victims nor witnesses under C.P.L. 510.13(4).

People v. Marc A. Miller 191 A.D.3d 802, 2021 NY Slip Op 00868 (2nd Dept. 2/10/21).

On the People's concession, the sentencing court was held to have improperly imposed an ignition interlock device requirement upon the defendant where he pleaded guilty to only aggravated driving while intoxicated in violation of V.T.L. 1192(2-a)(b) for "[d]riving while ability impaired by drugs" (V.T.L. 1192[4]), an offense not involving alcohol. In modifying the sentence the second department held that "[a] court may impose an ignition interlock device as a condition of probation and conditional discharge only for offenses involving alcohol (*see* P.L. 65.10[2][k-1])."

People v. Anthony Morales, 189 A.D.3d 1464, 2020 NY Slip Op 07919 (2nd Dept. 12/23/20).

The trial court's imposition of the maximum period of imprisonment of 41/2 years' incarceration and two years' post-release supervision for the defendant's narcotics conviction, "apparently based upon the defendant's claim during the presentence interview that the judge, the prosecutor, and the jury showed favoritism to the arresting officer, and the defendant did not like how the trial was conducted," warranted the majority of the court to reduce the defendant's sentence as excessive to 2 ½ years incarceration and one year of post-release supervision. As the majority noted, at sentencing, when the trial court asked the defendant to explain that statement, the defendant stated that, although he thought the jury showed "favoritism," he wanted "to move on from this" and that he had "learned (his) lesson." The court, in response, stated that although "[o]bviously this is not the crime of the century," and "you're entitled to your opinion," that opinion demonstrated a "willingness not to accept any responsibility." The majority thus held that a sentence "out of umbrage to criticism as to how the trial was conducted," required modification, "considering the nonviolent nature of the crime involving a relatively small amount of drugs in the defendant's possession, the defendant's reported substance abuse issues, and the fact that the defendant was married and had a young child." Justice Dillon dissented on the conclusion that the record did not reflect an abuse of discretion in the original sentence.

Brett Jones v. Mississippi, __ U.S. __ (4/22/21) [6/3; Kavanaugh, J.].

A sentencing court need not make a separate factual finding of permanent incorrigibility in order to duly sentence a defendant less than eighteen years old who was convicted of a homicide to life without parole.

<u>Defendant's Right to Make a Statement</u>

People v. George Brown, 37 N.Y.3d 940, 2021 WL 1795007 (5/6/21) [4/2; Memorandum].

A majority of the Court of Appeals held that although the statutory right of a defendant to make a statement at sentencing under C.P.L. 380.20 is “deeply rooted,” where the defendant’s waiver of his right to appeal entered at his plea was valid, the claim was not reviewable on appeal. Judge Wlison, joined by Judge Rivera, dissented, relying on historic precedent dating back to Socrates in 399 B.C.E. urged that the error was one of fundamental fairness and as such, the right of allocution was reviewable since the claim did survive bot the guilty plea and appeal waiver.

Consecutive Sentences

People v. Frederick L. Blue, __ A.D.3d __, 2021 NY Slip Op 02305 (2nd Dept. 4/14/21).

The defendant’s consecutive sentences following his conviction by plea to second degree conspiracy and third-degree criminal sale of a controlled substance was affirmed by the appellate division on the holding that each of these crimes were separate and distinct and thus, the P.L. 70.25(2) requirement of concurrent sentences was inapplicable.

People v. Lashawn Brown, __ A.D.3d __, 2021 NY Slip Op 02174 (2nd Dept. 4/7/21).

The court properly imposed consecutive sentences following the defendant’s Brooklyn conviction for robbery by forcibly stealing cell phones from a retail store and the criminal possession of stolen property, the phones themselves, valued in excess of $1,000, in his apartment later the same day on he holding that there was no statutory overlap and that thus, the forcible theft of the phones was distinct from the subsequent possession, even the same day.

Predicate Felonies

People v. Compton Mohabir, __ A.D.3d __, 20201 NY Slip Op 01789 (2nd Dept. 3/24/21).

On the People’s concession, the defendant's federal conviction of conspiracy to deal in firearms under 18 U.S.C. 371 was held not a "predicate felony conviction" (P.L. § 70.06[1][a], [b]), because

the federal conspiracy statute contains different elements than its equivalent in New York such that it is possible to violate the federal statute without engaging in conduct that is a felony in New York See *People v Yusuf*, 19 NY3d 314, 321 (2012) relied on by the court.

United States v. Gerald Scott, __ F.3d __ (2nd Cir. 3/2/21) [en banc], N.Y.L.J. 3/4/21.

A majority of the second circuit per Raggi, J., held 11-2 in an en banc ruling that the state crime of first-degree manslaughter is a categorical violent crime for sentencing purposes under the armed career criminal act 18 U.S.C. 924 (E)(2)(b) as predicate criminal offenses in a case in which the defendant had twice been convicted of this crime prior to his federal conviction. Thus, the defendant's 22-year federal sentence following his federal conviction for robbery and Hobbs act crimes was following a district court re-sentence of 11 years, three months on the conclusion that the prior convictions were not violent.

United States v. Josue Portillo, __ F.3d __, 2020 U.S. App. Lexis 36989 (2nd Cir. 11/24/20).

A 15 year and eleven month old MS-13 gang member's 55 year sentence that was imposed by the district court following his plea of guilty as an adult in connection with his election-style murders of four rival gang members using machetes, an ax, knives and tree limbs in Central Islip, New York was affirmed by the circuit court over claims that it was unreasonably severe. In so ruling, the court distinguished *Miller v. Alabama, 567 U.S. 460 (2012)* which required the consideration of certain factors by the court before a sentence of life without parole may be imposed on a juvenile and moreover noted that with the elimination of federal parole, the defendant, now 19 years old, will be required to remain incarcerated until the age of 71. See H. Sandick & E. Ellman-Golan, "*Circuit Calls for Re-Introduction of Parole for Federal Defendants,"* N.Y.L.J .12/8/20 @ p. 4, for a discussion of the case.

Orders of Protection

Matter of Shamika Crawford v. Ally, __ A.D.3d __, 2021 NY Slip Op 04082 (1st Dept. 6/24/21).

Because the issuance of an order of protection involves the deprivation of a defendant's "significant liberty and property interests," there must be an articulated reason for such an order. Thus, an evidentiary hearing is required on notice to the parties to determine the efficacy of such an application to the extent that an article 78 writ of mandamus requiring such a proceeding should

have been granted by the lower court. In so ruling, the first department, per Webber, J., rejected claims of mootness on grounds that the issue was likely to recur. While the court did not mandate the "precise form of such a hearing," the appellate division noted that "when the defendant presents the court with information showing that there may be an immediate and significant deprivation of a substantial personal or property interest upon issuance of the TOP, the Criminal Court should conduct a prompt evidentiary hearing on notice to all parties and in a manner that enables the judge to ascertain the facts necessary to decide whether or not the TOP should be issued."

Matter of Sophia M. v. James M., __ A.D.3d __, 2021 NY Slip Op 03992 (1st Dept. 6/22/21).

A family court stay-away order of protection issued in a family offense of harassment case that barred the respondent from discussing the petitioner or the case with "anyone familiar with [p]etitioner" (the respondent sent several emails to 53 people and blind-copied the petitioner on each regarding an affair, her medications and a learning disability) was modified on the holding that while the respondent had no first amendment right to send such messages the stay-away order of protection was sufficient to protect the petitioner such that the language noted above was deleted.

People v. Dequan L. Grimes, __ A.D.3d __, 2021 NY Slip Op 03421 (2nd Dept. 6/2/21).

The trial court should not have entered orders of protection against the defendant in favor of two children under the age of three years old who were in the rear of the car that was stopped when the defendant was arrested for narcotics and weapons possession where they could not be characterized as either victims or witnesses under C.P.L. 510.13(4). The appellate division reached the issue in the interest of justice, notwithstanding that there was no objection at sentencing and vacated the orders of protection.

Modifications as Excessive

People v. Nicole Addimando, __ A.D.3d __, 2021 NY Slip Op 0-4364 (2nd Dept. 7/14/21).

The second department, per Rivera, J., modified the defendant's sentence of 19 years to life following her conviction to 7.5 years, plus 5 years post-release supervision on a holding that the Dutchess county court failed to apply the proper criteria under the Domestic Violence Survivor's

Act, P.L. 60.12, effective in 2019, in a case arising out of the shooting of the defendant's domestic partner and the father of her two children. In so ruling, the appellate division, "rejected" the lower court's "methodology, approach, application, and analysis of the three factors, as set forth under Penal Law § 60.12, i.e., "(1) whether the defendant was a victim of domestic violence inflicted by a member of the same family or household; (2) whether the abuse was a significant contributing factor to the defendant's criminal behavior; and (3) whether, having regard for the nature and circumstances of the crime and the history, character, and condition of the defendant, a sentence in accordance with the customary statutory sentencing guidelines would be unduly harsh." Thus, based on "the nature and circumstances of the crime, as well as the history, character, and condition of the defendant," in a case involving a 32-year-old mother of two young children, with no known prior arrests or convictions, who testified that she was repeatedly physically and sexually abused by the deceased, the defendant's sentence was so modified.

People v. Jose Rivera Colon, __ A.D.3d __, 2020 NY Slip Op 06557 (2nd Dept. 11/12/20).

While affirming the defendant's first degree burglary and related-crimes conviction in connection with a knifepoint home invasion perpetrated by the defendant and two other accomplices, which included defense testimony that the defendant and one of the other perpetrators only participated in the burglary due to threats against them by the third perpetrator, the court modified the defendant's sentence of 23 years plus post-release supervision to a term of 20 years.

Pre-Sentence Reports

People v. Craig D. Bullett, 196 A.D.3d 973, 2021 NY Slip Op 04516 (3rd Dept. 7/22/21) [# 111094].

The Defendant pled guilty in Broome County court to narcotics-related offenses and was conditionally promised a sentence to four years plus five years post-release supervision. One of the conditions was that he appear in court when required. He absconded for 12 almost years. When he returned the court determined to enhance his sentence under *Outley* to five and a half years plus five years of post-release supervision and sentenced the defendant without an updated or new pre-sentence report. The third department held that without an objection, the issue was unpreserved for appellate review and moreover, that the sentence imposed was not excessive.

People v. Lance R. Sessoms 193 A.D.3d 1181 (3rd Dept. 4/8/21)

The defendant's request for a copy of his presentence report was properly denied by the trial court where, as a defendant convicted of murder and related crimes in 1988 and sentenced to a prison term of 82 ½ years and not eligible for parole until 2063 and moreover, failed to advance any specific reasons why he required the report. As the third department noted, "C.P.L. 390.50 (2) requires a court – in response to a defendant's written request – to provide such defendant with a copy of his or her presentence investigation report (subject to redaction) for, among other things, 'use before the parole board for release consideration.' In conjunction with such request, however, the defendant must "affirm that he or she anticipates an appearance before the parole board" (CPL 390.50 [2])." Thus, where the defendant would not be eligible for parole until 2063, release of his presentence investigation report is not authorized by C.P.L. 390.50 (2).

Probation Violations

People v. Edgar Acuna, __ A.D.3d __, 2021 NY Slip Op 03846 (2nd Dept. 6/16/21).

Where the defendant was not under the influence of any substance or armed with a weapon when he committed the crimes to which he pled guilty, his criminal history did not include offenses involving substance abuse or weapons, and the issue was not discussed at his plea, the consent to search as a condition of probation was improperly imposed because it was not "reasonably related to the defendant's rehabilitation, or necessary to ensure that the defendant will lead a law-abiding life."

Conditions of Probation

People v. Manuel Blanco-Ortiz. __ A.D.3d __, 2021 NY Slip Op 04447 (4th Dept. 7/16/21).

The fourth department held that the Erie County Supreme Court erred in imposing a condition of probation following the defendant's conviction for attempted first degree sexual abuse, which aside

from prohibiting him from maintaining an account on a social networking site, also prohibited him from "purchasing, possessing, controlling, or having access to any computer or device with internet capabilities" and from maintaining any "internet account," including email, without permission from his probation officer. The appellate division also struck another condition that prohibited the defendant from "owning, renting, or possessing a cell phone with picture taking capabilities or cameras or video recorders for capturing images." In so ruling, the court held that the defendant's lack of a prior criminal history and the lack of evidence in the record linking defendant's use of technology to the underlying offense, did not relate to the goals of probation and thus are not enforceable on that ground. We court however added its own condition: "Probationer shall not use the internet to access pornographic material, shall not access or have an internet account for a commercial social networking website as defined by Penal Law § 65.10 (4-a) (b), and shall not communicate with other individuals or groups for the purpose of promoting sexual relations with persons under the age of 18."

Sex Offenders

People ex rel. Johnson v. Superintendent/People ex rel. Ortiz v. Breslin, 36 NY3d 187 (11/23/20) [Fahey, J. 5/2].

Finding no constitutional violation, the Court approved the holding of level-three sex offenders beyond their conditional release/parole release dates in state correctional facilities known as RTF's (residential treatment facilities) awaiting appropriate SARA-compliant housing in New York City.

People ex rel. Negron v. Superintendent, 36 NY3d 32 (11/23/20) [Garcia, J. 5/2].

Affirming the Third Department, the Court held that SARA (Sexual Assault Reform Act), which restricts eligible offenders released from prison from living within 1,000 feet of schools (*People v. Diack*, 24 NY3d 674 [2015]), applies only to enumerated sex crimes. Accordingly, the parole board incorrectly determined that SARA applied to Negron who had previously been convicted of a SARA qualified sex offense, but was more recently paroled on a non-SARA offense, burglary. Negron, who had been housed in a correctional facility RTF awaiting SARA-compliant housing was granted relief.

People ex rel. McCurdy v. Warden, 36 NY3d 151 (11/23/20) [Stein, J. 4/3].

Following his conviction for attempted sexual abuse 1st degree McCurdy was adjudicated a SORA level 3 sex offender. He was sentenced to three years imprisonment followed by five years PRS. As he approached his release date, the parole board imposed a special condition of PRS requiring

him to be housed in an RTF (*see People ex rel. Johnson,* above) for six months [PL 70.45 (3)]. After the six months expired, he was ordered to remain in RTF housing until SARA-compliant housing could be arranged. The Court of Appeals held that PL 70.45 (3) and Corr. L. 73 (10) authorized this extended RTF housing.

People v. Wayne Conrad, __ A.D.3d __, 2021 NY Slip Op 02194 (3rd Dept. 4/8/21).

The lower court abused its discretion in denying the defendant's request for a downward departure at a SORA hearing to a risk level one classification where the record indicated that the made such a request early in the hearing, in the event that the court placed defendant in the risk level two classification, and submitted a psychological treatment summary in support thereof. In reversing and remitting for a new hearing, the third department held that although the summary was received into evidence and reviewed by the court, the trial court did not address defendant's request but proceeded to consider the substantive risk factors, ultimately concluding that defendant should be placed in the risk level two classification. Thus, where the record did not contain any findings or conclusions with respect to defendant's request, we are unable to ascertain the court's reasoning for implicitly denying it.

Appeals

People v. Leslie K. Olds, __ N.Y.3d __ (4/1/21) (6/0; Memorandum].

The defendant failed to preserve claims that the sentence imposed a re-trial and larceny conviction after a successful appeal was the result of judicial vindictiveness.

People v. Alex Perez, __ N.Y.3d __ (3/30/21) [6/0; Memorandum].

In the circumstances presented, where the proof of defendant's guilt was overwhelming, even after excising certain disputed evidence, there was no reasonable possibility that the admission of that evidence contributed to defendant's conviction and thus, it was harmless beyond a reasonable doubt.

People v. Siendou Coulibaly, __ A.D.3d __, 2021 NY Slip Op 04616 (2nd Dept. 8/4/21).

The second department, per Justice Braithwait-Nelson, held that appellate courts have jurisdiction to consider an appeal from an order denying a motion pursuant to C.P.L. 160.59 to seal a conviction since the determination of such a motion is properly characterized as civil, rather than criminal, in nature, and that, therefore, the defendant may appeal from such an order. Upon considering the merits of the defendant's appeal the motion was held properly denied by the lower court. See also, *People v. Brian K. Bugge, 2021 NY Slip Op 04718 (2nd Dept. 8/18/21*) for a similar ruling on jurisdiction and a ruling that the defendant's history did not require a mandatory denial of his application to seal his conviction for unlawful disclosure of a civil service exam to the extent that the case was remanded for further proceedings.

People v. Michael Vittengel, __ A.D.3d __ (3rd Dept. 6/17/21) [#110662].

Where the defendant had already served his prison term and had been discharged from parole, his claim on appeal that his sentence, which was imposed following a an adjudication that he violated the terms of his probation was deemed moot. The third department further noted that even if the issue were reached, the sentence imposed was not excessive.

People v. Gregory Campbell, __ A.D.3d __, 2021 NY Slip Op 1425 (2nd Dept. 3/10/21).

Citing *(People v Walker, 189 AD3d 1619 (2nd Dept. 2020),* the second department held that the defendant's contention that the sentence imposed on his Queens conviction of attempted robbery in the first degree was cruel and unusual punishment because his health conditions make him especially vulnerable to complications from COVID-19, was based on matters dehors the record, and thus, could not be reviewed on direct appeal. In affirming, the court also held that the defendant's waiver of appeal was valid.

Motions to Vacate Judgments of Conviction

People v. Kevin Dogan, __ N.Y.3d __ (9/14/21) [7/0; Memorandum].

The trial court did not abuse its discretion in summarily denying defendant's C.P.L. 440.10 motion to vacate his judgment of conviction without a hearing because, under the circumstances presented, defendant failed to sufficiently allege "'a reasonable probability that, but for counsel's [alleged] errors, he would not have pleaded guilty and would have insisted on going to trial,'" quoting *People v Hernandez, 22 N.Y.3d 972, 975 (2013*), also quoting *Hill v Lockhart, 474 U.S. 52, 59 (1985).* In affirming the Court further noted that the defendant failed to otherwise "show that the non-record facts sought to be established . . . would entitle him to relief," quoting, *People v Satterfield, 66 NY2d 796, 799 (1985).*

People v. Christopher Stetin, __ A.D.3d __ (3rd Dept. 3/18/21) [#110938/111945].

The summary denial by the county court to vacate the defendant's burglary and assault conviction based on ineffective assistance of counsel based on his trial attorney's failure to conduct a proper investigation and newly discovered evidence in connection with three witnesses who claimed in affidavits and text messages that the eyewitness to the crimes had recanted was error. Regarding the latter claim, the third department noted that while recantation testimony is certainly suspect in the law, this information was not merely impeaching as determined by the lower court, but went directly to the issue of guilt to the extent that the case was remanded for a hearing on these issues and also the additional claim of actual innocence.

People v. Shateek Lanier, __ A.D.3d __, 2021 NY Slip Op 01094 (3rd Dept. 2/18/21).

While the lower court correctly denied the defendant's C.P.L. 440.10 motion to vacate his judgment of conviction for attempted murder and related crimes on a claim of actual innocence, it erred in denying the motion on ineffective assistance of counsel grounds where the record established that defense counsel failed to adequately investigate various eyewitnesses accounts and also failed similarly to investigate certain alibi witnesses.

People v. Daniel Flinn, __ A.D.3d __, 2020 NY Slip Op 06809 (2nd Dept. 11/8/20).

The appellate division reversed a lower court order that summarily denied that defendant's motion to vacate his first-degree robbery conviction based on claims that based on his statements to the probation department in preparation of his pre-sentence report that he only possessed an imitation

weapon, his attorney at his plea was ineffective in failing to advise him that he had a potential affirmative defense. Thus, the matter was remitted for a hearing on the issue and a new determination on the motion.

People v. David Brown, __ A.D.3d __, 2020 NY Slip Op 04849 (2nd Dept. 9/2/20).

Notwithstanding *Lafler v, Cooper, 566 U.S. 156 (2012),* which as a matter of Sixth Amendment law set a federal constitutional remedy for ineffective assistance based on a defense attorney's failure to convey a plea offer to a client that the defendant be entitled to receive that original plea, the terms of C.P.L. 440.10(4) specifically provides that if a motion to vacate is granted the court "must" either vacate the judgment and must dismiss the accusatory instrument, or order a new trial." Thus, an attorney in a Queens prosecution failed to advise his client, the defendant, of a favorable plea offer of 4.5 to 9 years on a sex trafficking charge and thereafter the defendant was convicted at trial of kidnaping, sex trafficking and other related offenses and given a more severe sentence. Following appeal and a remittitur from the appellate division, the defendant was re-offered, at the court's direction that original plea and sentence, but after the defendant accepted it, the court refused the deal and the original sentences were re-imposed. The appellate division held that the remedy required in C.P.L. 440.40(4) of vacating the judgment and dismissal was more beneficial than that required in *Lafle*r since *Lafler's* holding "set the floor, not the ceiling."

Motions to Vacate Sentences

People v. Demetrien Bell-Bradley, __ A.D.3d __ (4th Dept. 2/5/21) [#KA-19-020767].

The trial court should not had summarily denied the defendant's motion to vacate his sentence as illegal, invalid or unauthorized under C.P.L. 440.20, where the basis of the motion was that a prior federal conviction could not form the basis for his sentence as a second felony offender because it lacked a New York equivalent and thus his sentence was illegal, invalid or otherwise unauthorized where the issue was not determined on the prior direct appeal and where the underling facts were not present in the record. As such, because the application was held not procedurally barred, the case was remitted for consideration on the merits.

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Civil Confinement

Matter of State of New York v. Donald G., __ N.Y.3d __ (3/30/21) [6/0; Memorandum].

On the circumstances presented, the trial court did not abuse its discretion as a matter of law in ordering a new trial in the interest of justice on the ground of juror misconduct. As such, the original order entered in Cayuga County Supreme Court was reinstated.

Matter of State of New York v. David S., __ A.D.3d __, 2020 NY Slip Op 06876 (1st Dept. 11/19/20).

The failure by the trial court to have instructed the jury that an anti-social personality disorder [ASPD] diagnosis, standing alone cannot be the basis for a determination that the respondent in a Mental Hygiene Law sex-offender civil commitment trial suffered from a mental abnormality as defined in Mental Hygiene Law 10.00(i) was error and warranted reversal of his civil commitment determination. In so ruling the first department rejected claims that the trial court's instructions were not erroneous since they complied with the Pattern Jury Instructions.

Double Jeopardy

People v. Christopher Kattis, __ A.D.3d __, 2021 NY Slip Op 04240 (2nd Dept. 7/7/21).

The defendant's plea of guilty to the crime of second degree course of sexual conduct against a child in Suffolk County which included a time period that coincided with similar charges in Nassau County precluded his prosecution there. This based on the application of the double jeopardy clause, and on the People's concession, the Nassau conviction was vacated on the holding that the indictments in both counties, viewed together "alleged a single continuing uninterrupted offense against the same victim" and thus was precluded in the second county.

New Criminal Legislation

B. Kamins, "*Annual Review of New Criminal Justice Legislation 2020*," NYS Bar Association October 2020

B. Kamins, "*Annual Review of New Criminal Justice Legislation 2021*," N.Y.L.J. 10/4/21 @ p. 3.

Marijuana Legalization

L. 2021, Ch. 93, signed by the Governor on March 31, 2021 and effective in most parts on that date legalized the recreational possession and use of three ounces or 24 grams of cannabis. It created a new state agency, the Office of Cannabis Management to more strictly control the smoking of marijuana in public with such use under new P.L. 222.10 still unlawful inside automobiles, schools and school buses. It created a new P.L. 222.25-222.65 continues to make it unlawful to possess or sell quantities of cannabis more than three ounces, or six cannabis plants to over 100 pounds of cannabis with graded offenses from violations to up to class C felonies. Of particular note is new P.L. 222.05(3) specifically removes the mere fact of an "odor of cannabis," the odor of burnt cannabis," the possession of "multiple containers of cannabis," the plating or cultivating of cannabis and the possession of currency in close proximity to cannabis to support a finding of reasonable cause to believe a crime has been committed. However, under new P.L. 222.05(4), the smell of burnt cannabis may still provide probable cause in cases involving operating a motor vehicle or vessel while under the influence of drugs or alcohol.

Drivers License Suspension Reform Act (DLSRA)

Amends the Vehicle & Traffic Law (eff. 6/29/21) by ending license suspension for unpaid traffic fines and fees (FTPs), retroactively rescinding all FTP suspensions, mandating income based payment plans for VTL fines, fees & mandatory surcharges. The DLSRA does not end suspensions for failure to appear (FTA) license suspensions.

Judicial Recusal

L. 2020, Ch. 376, effective December 23, 2020, added a new Judiciary Law section 9, to require that when a judge recuses himself or herself from a matter or action, he or she state the reason in writing or on the record with an exception to this requirement if the reason would result in embarrassment or

where the reason is of personal nature that affects the judge or a relative with the sixth degree of consanguinity.

10/10/21

SCBA Lawyers Helping Lawyers Committee

The SCBA Lawyers Helping Lawyers Committee provides free and confidential assistance to those in the legal community who are concerned about their alcohol or drug use and/or mental health or wellbeing or that of a colleague or family member.

Assistance is available to the legal community including attorneys, members of the judiciary, law students, and family members dealing with alcohol or substance abuse disorder, other addictive disorders, anxiety, depression, vicarious trauma, age related cognitive decline and other mental health concerns that affect one's well-being and professional conduct.

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