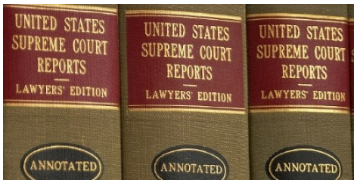
SUFFOLK ACADEMY OF LAW
The Educational Arm of the Suffolk County Bar Association
560 Wheeler Road, Hauppauge, NY 11788
(631) 234-5588



SUFFOLK COUNTY ASSIGNED COUNSEL DEFENDER PLAN
CRIMINAL LAW SERIES
County Court Procedures

FACULTY

Hon. Richard Ambro
Daniel A. Russo, Esq.
Christopher M. Gioe, Esq.

Program Coordinators: Hon. John J. Leo, Hon. John Kelly, Hon. Peter H. Mayer (Retired), Daniel A. Russo, Esq.

November 9, 2021
Suffolk County Bar Association, New York

Like us on:

"The opinions, beliefs and viewpoints expressed herein are those of the authors and do not necessarily reflect the official policy, position or opinion of the Suffolk County Bar Association, Suffolk Academy of Law, their i Board of Directors or any of their members"

Daniel A. Russo, Esq.

Since April 2017 Daniel Russo has served as Administrator for the Suffolk County Assigned Counsel Plan. In that capacity the SCACP has increased to include full time services for assigned counsel. Mr. Russo manages two full time private investigators, a full time social worker and Spanish interpreter. The office provides counsel with expert witnesses and support services.

From 2003 – 2017 Daniel A. Russo was a full time attorney with a private practice focusing primarily in criminal defense. Throughout that time Mr. Russo has represented clients facing every kind of criminal charge. Many of these matters resulted in trials and verdicts.

From 1998 – 2003 Daniel A. Russo was an Assistant District Attorney with the Suffolk County District Attorney's Office. During that tenure Mr. Russo served in the Narcotics, Major Crime and Special Investigations Bureau. During that tenure Mr. Russo prosecuted various cases involving violent street crime resulting in convictions.

State of New York
UNIFIED COURT SYSTEM
SUFFOLK COUNTY
DISTRICT ADMINISTRATIVE JUDGE'S OFFICE
JOHN P. COHALAN, JR. COURT COMPLEX
400 Carleton Avenue
P.O. Box 9080
Central Islip, NY 11722-9080
(631) 208-5610 Fax (631) 853-7741

LAWRENCE K. MARKS
Chief Administrative Judge

ANDREW A. CRECCA
District Administrative Judge
Suffolk County

VITO C. CARUSO
Deputy Chief Administrative Judge
Courts Outside New York City

WARREN G. CLARK, ESQ.
District Executive

MEMORANDUM

TO: All Suffolk County Judicial and Non-Judicial Employees

FROM: Hon. Andrew A. Crecca, District Administrative Judge

DATE: June 25, 2021

RE: **10th Judicial District, Suffolk County Updated Operating Protocols**
Effective June 30, 2021

Throughout the COVID-19 pandemic, our courts have remained open although there have been periods of time that have required modifications to court operations based upon virus metrics. Recently, the metrics (as well as the increasing number of vaccinated New Yorkers) have once again provided an opportunity to gradually increase in-person proceedings in the courthouses. With the expiration of the Governor's Declaration of Emergency, additional in-person appearances are both required and warranted. While civil courts continue to operate with many presumptive virtual appearances, in-person proceedings are required where access to justice and court operations necessitate in-person proceedings. The court system remains nimble and ready to quickly adapt operations as conditions warrant.

The Administrative Judge may enact more restrictive operational protocols as deemed appropriate.

This Plan supersedes the Updated Operating Protocols for the 10th Judicial District, Suffolk County effective April 26, 2021. Commencing, June 30, 2021 all court operations in the 10th Judicial District, Suffolk County, State of New York shall be conducted pursuant to this Plan. To the extent the provisions of these Updated Operating Protocols are inconsistent with the prior protocols as set forth in the April 22, 2020 memorandum, or any previously issued memoranda, the provisions of these Protocols should be relied upon to guide operations.

I. Courthouse Operations

A. Scheduling

1. Calendar times shall be staggered so that different courts (e.g. Family, Criminal, etc.) in the same building start at different times.
2. Each Judge may schedule in-person proceedings in their discretion and in consultation with their Supervising Judge and Chief Clerk. All matters shall be scheduled to maximize court resources, including courtroom space, clerk availability and technology constraints. Judges should be mindful that Supervising Judges and Chief Clerks may be required to indicate times and locations when matters may be scheduled by a particular judge.

B. Occupancy of all courtrooms shall be limited to the lesser of one-half of the posted room occupancy per code or the number of people that can safely socially distance in the courtroom. The Administrative Judge may grant an exception for a specific courtroom or court proceeding.

C. All Judges and court staff shall continue to report to work in their assigned courthouses.

D. All current safety measures and protocols will continue. Court managers and PPE Compliance Coordinators shall take steps to enhance monitoring and compliance with all safety measures including social distancing at all time.

E. Each Suffolk County court facility shall have a space (kiosk or separate room) available for use by litigants who are unable to appear virtually.

II. Court Proceedings

A. All virtual proceedings shall be conducted from the courtroom, as such courtroom is available.

B. Matters that must be heard in-person

1. All proceedings pursuant to the Criminal Procedure Law, unless the use of electronic appearances is authorized pursuant to Criminal Procedure Law Article 182 and the defendant consents.
2. Proceedings pursuant to Mental Hygiene Law Article 10
3. Judicial Surrenders of Parental Rights

C. Matters that may be heard in-person, or a hybrid of in-person and virtual (except as to those matters listed in Paragraph [II][B]), in the discretion of the presiding judge:

1. Matters as designated in Exhibit A
2. Family Court Act Article 10 proceedings
3. Adoptions
4. Civil Evidentiary Hearings and Trials. Jury selection in civil trials shall continue to be supervised by the presiding trial judge.
5. Family Court evidentiary hearings
6. Surrogate's Court citations
7. Eviction proceedings as authorized by law
8. Any proceeding involving a self-represented litigant(s) where the presiding judge determines that holding the proceeding via Microsoft Teams denies the self-represented litigant(s) meaningful access to the proceeding and where the presiding judge determines that the matter can be heard in-person consistent with all OCA safety protocols.
9. Mental Hygiene Law proceedings pertaining to a hospitalized adult are governed by Chief Administrative Judge Lawrence Marks' Administrative Order AO/144/21.
10. General Civil post Note of Issue settlement and pre-trial conferences.

D. The scheduling of jury trials shall be approved by the Administrative Judge in consultation with the Deputy Chief Administrative Judge. Jury trials shall be conducted in each county pursuant to the individual plan submitted to the Administrative Judge by the Supreme and County Court Chief Clerk and pursuant to the District Jury Plans as approved by the Deputy Chief Administrative Judge. Notwithstanding any provision of the aforementioned plans, during a jury trial, occupancy shall be limited to ½ the posted room occupancy per code or the number of people that can safely socially distance in the courtroom. With regard to criminal jury trials, priority should be given to incarcerated defendants. With regard to civil jury trials, priority should be given to trials where the parties consent to a summary jury trial.

E. ALL other matters MUST presumptively be heard virtually, from a courtroom as such courtroom is available using Microsoft Teams video conferencing (using the live courtroom as background; if not appearing from the courtroom, use other appropriate background), or telephone, including but not limited to:

1. General civil conferences particularly those with counsel only (except as to those items listed in [II][C][10])
2. Civil Motion arguments
3. ADR where both parties are represented by counsel and counsel will be present
4. Arbitrations pursuant to the Part 137 Attorney-Client Fee Dispute Resolution Program
5. Small Claims Assessment Review proceedings
6. Other routine court matters, not expressly included in Paragraph II(C)

Exhibit A

A. Criminal matters
   1. arraignments
   2. bail applications, reviews, and writs
   3. temporary orders of protection
   4. resentencing of retained and incarcerated defendants
   5. essential sex offender registration act (SORA) matters

B. Family Court
   1. child protection intake cases involving removal applications
   2. juvenile delinquency cases involving remand placement applications, or modification thereof
   3. emergency family offense petitions/temporary orders of protection
   4. orders to show cause

C. Supreme Court
   1. MHL applications for an assisted outpatient treatment (AOT) plan
   2. emergency applications in guardianship matters
   3. temporary orders of protection (including but not limited to matters involving domestic violence)
   4. emergency applications related to the coronavirus
   5. emergency Election Law applications
   6. extreme risk protection orders (ERPO)

D. Civil/Housing matters
   1. applications addressing landlord lockouts (including reductions in essential services)
   2. applications addressing serious code violations
   3. applications addressing serious repair orders
   4. applications for post-eviction relief

E. Surrogate's Court - Any matter involving an individual who passed away due to COVID-related causes.

THE BRONX DEFENDERS

Ruth Hamilton - Defne Ozgediz - Aimee Carlisle - Ilona Coleman
LEGAL DEPARTMENT, CRIMINAL DEFENSE PRACTICE
October 29, 2020

ARTICLE 245 DISCOVERY GUIDE

Important Updates & Strategic Considerations

87082

TABLE OF CONTENTS

I. PURPOSE OF THIS GUIDE

On January 1, 2020, after years of advocacy, historic criminal justice reforms addressing discovery went into effect across New York State. Since January 1, there have been amendments to the new discovery statute (Article 245) and litigation throughout the state resulting in trial court level decisions—often with conflicting holdings—addressing a host of discovery issues. This guide provides an overview of the key litigation issues that defense attorneys are encountering throughout the state and strategies as to how to address these issues in light of both the statute and conflicting case law. We will continue to revise this guide as we learn more through implementation.

II. DISCOVERY PRODUCTION

The new discovery laws have obviated the need for filing discovery demands. The prosecution MUST disclose "all items and information" relating to the subject matter of the case that are under their control. C.P.L. § 245.20(1). This explicitly includes material that is in the possession of law enforcement. C.P.L. § 245.20(2).

The statute imposes a presumption of disclosure on the prosecution—not on the defense. C.P.L. § 245.20(7).

Why you should NOT file a demand for discovery (at least not before a valid COC is filed):

- Discovery and 30.30 now go hand-in-hand. Until the prosecutor files a valid certificate of compliance ("COC") affirming that they have turned over all discovery, the 30.30 clock runs.
- If you file a demand for discovery *before* the prosecutor files a valid COC, you may be stopping the 30.30 clock without any benefit to your client because the prosecutor was already required to turn everything over.

Cases in which you still may want to file a demand for discovery:

- Making specific demands can elevate the standard of review on appeal if the prosecutor doesn't turn over *Brady* material. *See People v. McGhee*, 180 A.D.3d 26 (1st Dept. 2019) (court used lower standard of "reasonable possibility" of a different verdict instead of "reasonable probability" because defense had made a general request for "witness statements" in a discovery demand and exculpatory statements were not disclosed).

Strategy point: **If you are going to make a discovery demand, wait until the prosecutor has filed a valid COC, unless you have reason to believe *Brady* material exists that could get lost or destroyed.**

III. KEY ISSUES UNDER C.P.L. § 245.20

C.P.L. § 245.20(1)(c): "Adequate contact information":

- The law explicitly states that adequate contact information does not have to be a physical address (although the court can order the disclosure of an address "upon a motion and good cause shown").
    - There is an argument that this violates the Due Process Clause as the defense is required to provide physical addresses for their witnesses under C.P.L. § 245.20(4)(a). *See Wardius v. Oregon*, 412 U.S. 470 (1973) (requiring a category of discovery from defense that is not required from the prosecution is unconstitutional).
- *People v. Gonzalez*, 68 Misc. 3d 1213(A) (Sup. Ct., Kings Co. 2020): contact information for the parent of a child witness is considered adequate contact information.
- Prosecutors have used witness portals and other software to shield witness contact information and alert witnesses that a defense attorney is calling.

Strategy point: **Argue that a "witness portal" is not adequate contact information as it is not in fact the witness's contact information at all and the witness may fear that the prosecutor is monitoring their conversations so may be reluctant to speak with the defense.**

- **Case law on email addresses and witness "portals":**
    - *People v. Feng*, Ind. No. 8071-18 (Sup. Ct., Kings Co., Feb. 20, 2020) (unpublished, see appendix): Witness "portal" not adequate contact information.
    - *Be aware of*:
        - *People v. Adams*, 66 Misc. 3d 918 (Sup. Ct., Queens Co. 2020): An email address is adequate contact information.
        - *People v. Todd*, 67 Misc. 3d 566 (Sup. Ct., Queens Co. 2020): Witness "portal" is adequate under 245.20(1)(c).

C.P.L. § 245.20(1)(k): Exculpatory and impeachment material involving police witnesses:

- The prosecution must disclose impeachment material, including prior bad acts of police witnesses (this was already required under *Brady*. *See, e.g., People v. Rouse*, 34 N.Y.3d 269 (2019); *People v. Smith*, 27 N.Y.3d 652 (2016)). A question remains as to what exactly must be disclosed: whether the fact of CCRB or IAB allegations, or federal lawsuits is sufficient, or whether they must also disclose underlying documents.

***Strategy Point*: Argue that you are entitled to the underlying documents for any IAB or CCRB investigation that did not result in a finding that the allegations were "unfounded." These are statutorily in the prosecutor's possession. *See* § C.P.L. 245.20(2). Cite the statute as well as *Brady, Rouse,* and *Smith*. It is harder to argue they must disclose underlying documents in federal or state lawsuits as those documents are public and the defense has the same access as prosecutors.**

- **Case law on C.P.L. § 245.20(1)(k) and materials for police witness impeachment:**
  - *People v. Randolph*, 2020 WL 5540201 (Sup. Ct., Suffolk Co. 2020): Prosecution must disclose documents relating to both substantiated and unsubstantiated IAB complaints. Where complaints are either unfounded or exonerated, prosecution does not have to disclose to comply with their discovery obligations, but defense can FOIL or subpoena.
  - *People v. Lustig*, 68 Misc. 3d 234 (Sup. Ct., Queens Co. 2020): Prosecution does not have to disclose underlying documents related to federal lawsuits filed against officers because those documents are public and defense has access.
  - *People v. Suprenant*, 2020 WL 5422819 (City Ct., Glens Falls, 2020): Prosecution need only disclose the existence of an officer's disciplinary records and then must "either produce copies of the records or cause such material or information to be made available to defense counsel." Court goes on to say that being "provided with a manner to obtain the records" is sufficient. Prosecution instructed the police department to make copies available to defense upon either a written or oral request (court specifically addresses 50-a and says that it has made personnel records equally accessible to prosecutors and defense).
  - *Be aware of*:
    - *Matter of Certain Police Officers,* 67 Misc. 3d 458 (Co. Ct., Westchester Co. 2020): Prosecution only needs to disclose the fact of misconduct allegations against police witnesses; not required to disclose underlying records related to the allegations.

- ***NOTE***: This case relies on C.R.L. 50-a to justify holding. Now that 50-a has been repealed, argue that this reasoning no longer applies and they must turn over the underlying records—not just disclose the existence of misconduct allegations.

C.P.L. § 245.20 (1)(c): Information relating to identity of 911 callers and certain witnesses:

- In April 2020, the legislature amended this section to permit prosecutors to shield identifying information of certain witnesses without first seeking a protective order. Specifically, prosecutors can now withhold names and other identifying information relating to:
    - 911 callers,
    - Witnesses in sex offense and sex trafficking cases,
    - Confidential informants, and
    - Cases where the client has a substantiated affiliation with a criminal enterprise.
    - ***NOTE:*** You can move court for disclosure and, unlike in other provisions, *there is no good cause requirement.* C.P.L. §§ 245.10(1)(a)(iv)(A), 245.20(1)(g).
    - If you are unsuccessful in moving for disclosure, you can make a due process challenge to your own reciprocal discovery obligations for defense witnesses. *See* C.P.L. § 245.70(4) (good cause for protective order includes constitutional rights or limitation); *see also Wardius v. Oregon*, 412 U.S. 470 (1973) (requiring a category of discovery from defense that is not required from prosecution is unconstitutional).
    - ***NOTE***: For 911 callers, if the prosecution intends to call the person as a witness at a hearing or trial, they must turn over the name and contact information at least 15 days before, or as soon as practicable. C.P.L. § 245.20(1)(g). *There is no such disclosure requirement for other witnesses listed in C.P.L. § 245.20(1)(c).*

Strategy Point: **Where the prosecution withholds discovery on these grounds, you can still file a motion to compel disclosure on constitutional grounds, which supersede the statute, citing to NY and federal constitutions, including: right to due process, to confront witnesses, to a fair trial, and to effective assistance of counsel, which includes adequate time to investigate (see case law below).**

- **Case law on argument that defense is entitled to witness information:**
    - Where disclosure could lead to further investigation: *Smith v. Illinois*, 390 U.S. 129 (1968); *People v. Ulett*, 33 N.Y.3d 512, 521 (2019).

- **Courts can authorize disclosure of evidence even when not favorable where it is relevant, and helpful or material to the defense**: *People v. Waver*, 3 N.Y.3d 748 (2004) (requiring disclosure of undercover police officers' names).
- Disclosure of potential *Brady* witnesses: *People v. Rong He*, 34 N.Y.3d 956, 959 (2019). *People v. Garcia*, 46 A.D.3d 461 (1st Dept. 2007); *Leka v. Portuondo,* 257 F.3d 89 (2d. Cir. 2001); *People v. Robinson*, 34 Misc. 3d 1217(A) (Crim. Ct., Queens Co. 2011).
    - No danger in disclosing exculpatory witnesses: *Johnson v. NYPD,* 257 A.D.2d 343 (1st Dept. 1999) ("the disclosure of information that tends to exonerate a criminal defendant would not be likely to present any apparent danger to the witness from whom it was derived"); *People v. Jackson*, 168 Misc. 2d 182 (Sup. Ct., Bronx Co. 1995), *aff'd*, 264 A.D.2d 683 (1st Dept. 1999).
- Confidential informants: "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957). *See also People v. Andre W.*, 44 N.Y.2d 179 (1978); *People v. Goggins*, 34 N.Y.2d 163 (1974); *People v. Peltak*, 45 N.Y.2d 905 (1978); *People v. Stanfield*, 7 A.D.3d 918, 920 (3d Dept. 2004); *United States v. Saa*, 859 F.2d 1067, 1075 (2d Cir. 1988).

C.P.L. § 245.20(1)(j): Materials from government laboratories conducting testing on evidence:

- The big question here is whether these laboratories are considered to be under the control of the prosecutor and thus whether materials from them must be turned over prior to the filing of a valid COC. So far, courts are split on this issue.
- The only courts in the state that have published opinions on this issue so far are in New York City and reference the Office of the Chief Medical Examiner ("OCME"). If you are outside of New York City, you can still use the reasoning in these cases to support your argument that these materials fall under the control of the prosecution and must be turned over prior to a valid COC being filed.
- The following courts hold that the OCME *is* under the prosecutor's control and these materials are considered in the prosecutor's possession and must be turned over:
    - *People v. Mobley*, Ind. No. 1941-2019 (Sup. Ct., Bronx Co. Feb. 11, 2020) (unpublished).
    - *People v. Adrovic*, 2020 WL 5241352 (Crim. Ct., Kings Co. 2020).
    - *People v. Adams*, 66 Misc. 3d 918 (Sup. Ct., Queens Co. 2020).

- The following courts hold that the OCME is *not* under prosecutorial control and thus materials are not in their possession and they need not turn over to defense to comply with discovery law:
    - *People v. Alford*, 66 Misc. 3d 1233(A) (Crim. Ct., NY Co. 2020).
    - *People v. Lustig*, 68 Misc. 3d 234 (Sup. Ct, Queens Co. 2020).

IV. TIMING OF DISCOVERY PRODUCTION - C.P.L. § 245.10

C.P.L. §§ 245.20(1) and 245.10(1)(a)(iii) require disclosure of discovery "as soon as practicable."

- This is the standard that you should litigate—especially for discovery that is already in the prosecution's possession.

> ***Strategy point:*** **If the prosecution has police paperwork in their file at arraignment, you should (orally) demand this paperwork at that time. Similarly, if they have body camera footage prior to the 180.80 date, you should demand this footage before that date. There is no reason to wait until the discovery deadlines pass to contact the prosecutor or to make records in court about these issues.**

C.P.L. § 245.10(1) lists general deadlines by when the prosecution must turn over discovery:

- Disclosure after the enumerated timeframes renders the prosecution subject to sanctions.
- Where client is in custody: prosecution must turn over discovery within **20** calendar days after arraignment on an accusatory instrument charging a crime. C.P.L. § 245.10(1)(a)(i).
- Where client is not in custody: prosecution must turn over discovery within **35** calendar days after arraignment on an accusatory instrument charging a crime. C.P.L. § 245.10(a)(ii).
- Where client is charged *only* with a traffic infraction or petty offense that does not carry a jail sentence, prosecution must turn over discovery at least **15** days before trial. C.P.L. § 245.10(1)(a)(iii).

Exceptions to timelines in C.P.L. § 245.10(1):

- **Automatic**: C.P.L. § 245.10(1)(a) - Prosecution gets an additional 30 days without having to file a motion for materials that are "exceptionally voluminous" or are not in the "actual possession of the prosecution" *despite diligent, good faith efforts.*

- The law explicitly references video footage from different sources as being something that may potentially be exceptionally voluminous.

Strategy Point: **Where there are discoverable items not in the prosecutor's "actual possession," they do not automatically get 30 additional days to produce those items. In order for this provision to apply, they must show that they have made diligent, good faith efforts to obtain the materials.**

- **By motion**: C.P.L. § 245.70(2). Either party may move the court to change the time periods upon a showing of good cause. This section does not specify that the time period can only be expanded, thus you can move to compel discovery sooner than the C.P.L. § 245.10 deadlines.

Strategy Point: **In general, you should object when the prosecution files a motion seeking an extension under C.P.L. § 245.70. This will preserve the issue for appeal if there is ever a question as to whether sanctions would have been appropriate. It is also possible that the prosecution filing a motion to extend time could: (a) stop the 30.30 clock and/or (b) allow them to file a COC if a judge grants the motion and everything else is turned over (*see* C.P.L. § 245.50(1)).**

  - **Case law finding NO good cause for delayed discovery:**
    - *People v. Bautista*, 67 Misc. 3d 279 (Crim. Ct., Queens Co. 2020): Prosecution failed to show good cause to extend time to produce discovery where they did not specify what had not been turned over and what efforts had been made to provide it. Instead, the motion only stated that the assigned prosecutor had a high case load and had been "endeavoring . . . to come into compliance" with the discovery law.
    - *People v. Carter*, Ind. No. 7213-19 (Sup. Ct., Kings Co. Jan. 6, 2020) (unpublished): Inability of prosecutor's office to comply with C.P.L. 245 "due to manpower deficiencies, technology upgrades and their dependence on the cooperation of other governmental agencies" does not provide good cause to delay discovery production.
- **C.P.L. § 245.20(1)(k)**: Favorable evidence to the defense, including exculpatory evidence and evidence that "provide[s] a basis for a motion to suppress evidence."

- For this evidence, C.P.L. § 245.20(1)(k) has a shorter timeline: "The prosecutor shall disclose the information **expeditiously upon its receipt and shall not delay disclosure if it is obtained earlier** than the time period for disclosure" in C.P.L. 245.10(1).

- **"Supplemental" discovery (i.e., *Sandoval* and *Molineux* evidence)**: Must be turned over "as soon as practicable" but at least 15 days before the first *scheduled* trial date. C.P.L. 245.10(1)(b); 245.20(3).
- **C.P.L. § 245.25**: Guilty pleas:
  - Where the prosecutor makes an offer that requires a plea to a crime, before P can withdraw the offer—and before any court-imposed deadline on the client to accept—the prosecutor must disclose all discovery *in its possession, custody or control.* If the prosecutor withdraws an offer and has not disclosed all discovery, and the court finds that the failure to turn over any piece of required discovery "materially affected the defendant's decision" not to plead guilty, the court *must* preclude the admission of the undisclosed testimony as a *minimum sanction.*
  - Pre-indictment guilty pleas: Prosecutor must disclose all required discovery at least **3** days before expiration of offer. C.P.L. § 245.25(1).
- Any other plea (misdemeanors and indicted felonies): Prosecutor must disclose all required discovery at least **7** days before expiration of offer. C.P.L. § 245.25(2).

***Strategy Point:* Just because the prosecution has not produced all discovery prior to withdrawing an offer does *not* mean you will automatically be entitled to get the offer back or to sanctions. The non-production has to have affected your client's decision not to plead guilty.**

Example: If you have surveillance showing the entirety of the events leading up to your client's arrest, you are unlikely to succeed in getting sanctions if the prosecution simply did not produce police paperwork that offered no new information. And if there are tests that have not been completed (e.g., DNA), those are likely not in the prosecution's possession, and so the fact that you did not have these at the time of the offer is unlikely to lead to sanctions.

C.P.L. § 245.10(1)(c): Client's statements must be turned over 48 hours before the client is scheduled to testify in the grand jury.

- This is more than statement notice; not just "sum and substance," but rather "all written or recorded statements and the substance of all oral statements" made by the defendant to an agent of law enforcement. C.P.L. § 245.20(1)(a).

- The statute does not provide a remedy for the prosecution's failure to turn over statements.

Strategy Point: **If you do not receive your client's statements within 48 hours of when your client is scheduled to testify in the grand jury and the client is incarcerated, argue for release under 180.80 once 120/144 hours have passed from arrest.**

- **Case law on 180.80 release where prosecutor has not produced client's statements 48 hours prior to scheduled testimony:**
  - Your client has a right to testify before an indictment is voted and thus before 180.80 expires and this must be a "meaningful opportunity to testify." *See People v. Evans*, 79 N.Y.2d 407 (1992); *People v. Hawkins*, 193 A.D.2d 524 (1st Dept. 1993). Argue that in order for your client to have a *meaningful* opportunity to to testify, the client must have time to review any statements and if the prosecution does not produce them before 180.80 expires, they should not be allowed to vote the case and therefore your client should be released.
  - *People v. Carswell*, 67 Misc. 3d 444 (Crim. Ct., Bronx Co. 2020): Prosecution must turn over actual video recordings of defendant's statements—not just the "sum and substance" of the recorded statements—48 hours or more before scheduled grand jury testimony. (Note: remedy for failure to comply was not at issue in this case and court suggests in a footnote that the remedy would not be 180.80 release).
  - *Be aware of*:
    - *People v. Weston*, 66 Misc.3d 785 (Crim. Ct., Bronx Co. 2020): 180.80 release is not appropriate sanction for prosecution's failure to produce body camera footage 48 hours prior to scheduled grand jury testimony.

What if prosecution does not comply with discovery deadlines?

- **30.30 runs** until valid COC is filed unless there is something that stops the clock (e.g., an adjournment requested by or consented to by defense, possibly motions filed by prosecution or defense).
- The prosecution is **subject to sanctions** under C.P.L. §§ 245.20(5) and 245.80, but you must show prejudice. This is likely going to be the same standard as under the old discovery law and thus difficult to meet.

V. DISCOVERY REFORMS AND C.P.L. § 30.30

- **C.P.L. § 245.50(3):** "Notwithstanding the provisions of any other law, absent an individualized finding of special circumstances in the instant case by the court before which the charge is pending, *the prosecution shall not be deemed ready for trial* for purposes of section 30.30 of this chapter *until it has filed a proper certificate* pursuant to subdivision one of this section."

Strategy Point: **You should argue that, before a valid COC is filed, a case should be treated as though it is an unconverted misdemeanor or unindicted felony. Every day from arraignment should count towards 30.30 until the prosecution files a valid COC unless there is some other reason time should be excluded (e.g., you file motions or request/consent to an adjournment, or possibly if a bench warrant is ordered). Consider objecting to motion schedules and make the record clear that you are not consenting to adjournments.**

- The discovery statute provides specific timelines by when the prosecution has to turn over discovery (most discovery must be turned over by 15, 20, or 35 days of arraignment). These timelines are unrelated to C.P.L. § 30.30, since the 30.30 clock runs until the prosecution has filed a proper COC (which may occur before or after these deadlines). **The prosecution cannot be deemed ready for trial until they have filed a proper COC, unless the court finds exceptional circumstances**. Pre-reforms case law is instructive on this point:
    - *People v. Sturgis*, 38 N.Y.2d 625, 628-29 (1976) (superseded by statute on other grounds): Prosecution argued that "a backlog of cases, an inadequate staff and a system of priorities in the District Attorney's office" amounted to exceptional circumstances under C.P.L. § 30.30(4)(g). Court held that none of these constituted exceptional circumstances and 30.30 time must therefore be charged.
    - *People v. Colon*, 110 Misc.3d 917, 921-22 (Crim. Ct, NY Co. 1981) *rev'd,* 112 Misc.2d 790 (App. Term, 2d Dept. 1982), *rev'd* and *order reinstated*, 59 N.Y.2d 921 (1983): "Clearly the intent of the Legislature was to assure speedy trials by imposing on the prosecutor, in each case, a strict standard of diligence and blamelessness, excusing him only when delay was caused solely by the defendant or by events beyond the prosecutor's control."

- **Case law on when the 30.30 clock starts running:**
    - Cases holding that 30.30 clock starts at arraignment (or on Jan. 1, 2020 for cases that were arraigned prior to that date):
        - *People v. Rambally*, 68 Misc.3d 1212(A) (Dist. Ct., Nassau Co. 2020).
        - *People v. Akramov*, 67 Misc.3d 558 (Crim. Ct., Kings Co. 2020): Only defense consent to adjournment would stop clock before COC is filed.
        - *People v. Freeman*, 67 Misc.3d 1205(A) (Crim. Ct., Bronx Co. 2020): Statement of readiness prior to Jan. 1 not effective after Jan. 1 where prosecution had not filed COC even though previous adjournment was at defense's request.
            - ***NOTE***: The prosecution is appealing this decision to the Appellate Term, First Department so stay tuned.
        - *People v. Lobato*, 66 Misc.3d 1230(A) (Crim. Ct., Kings Co. 2020).
    - *Be aware of* the following cases where courts found that the time period from arraignment until the statutory discovery deadline is excluded from the 30.30 calculation:
        - *People v. Roland*, 67 Misc.3d 330 (Crim. Ct., Kings Co. 2020) and *People v. Nge*, 67 Misc.3d 650 (Crim. Ct., Kings Co. 2020) (same judge) (finding that the statute gives prosecution 15 days from Jan. 1, 2020 to turn over discovery and that this time is not included in a 30.30 calculation).
        - *People v. Percell*, 67 Misc.3d 190 (Crim. Ct., N.Y. Co. 2020): 30.30 clock did not start on Jan. 1 where defense had requested prior adjournment.
        - *People v. Dobrzenski*, 2020 WL 4432894 (City Ct., Oneida Co. July 30, 2020). ("The first fifteen days from the effective date of the reforms are excludable for speedy trial purposes.")

C.P.L. § 30.30 in cases that were arraigned prior to Jan. 1, 2020:

- In cases where prosecution had stated ready for trial prior to Jan. 1, 2020, courts are split on whether they reverted to a status of un-readiness as of Jan. 1 where no COC was filed.
- Cases holding that 30.30 clock restarted on Jan. 1:
    - *People v. Lobato*, 66 Misc. 3d 1230(A) (Crim. Ct., Kings Co. 2020): Pre-Jan. 1 statement of readiness not effective after Jan. 1, even though defense requested the last 2019 adjournment because it was "made under the old trial readiness standards."
    - *People v. Akramov*, 67 Misc. 3d 558 (Crim. Ct., Kings Co. 2020): 30.30 clock starts on Jan. 1 and runs until COC filed unless defense consents to adjournment.
    - *People v. Freeman*, 67 Misc. 3d 1205(A) (Crim. Ct., Bronx Co. 2020: Statement of readiness prior to Jan. 1 not effective after Jan. 1 where P had not filed COC even where previous adjournment was at D's request.

- *People v. Rambally*, 68 Misc. 3d 1212(A) (Dist. Ct., Nassau Co. 2020): Enactment of C.P.L. 30.30(5) caused a "re-set" of P's readiness status.
- *People v. Adrovic*, 2020 WL 5241352 (Crim. Ct., Kings Co. 2020): P revert to unready status after Jan. 1 if no COC filed; time charged beginning Jan. 16.

- *Be aware of People v. Percell,* 67 Misc. 3d 190 (Crim. Ct., N.Y. Co. 2020): Where defense requested adjournment prior to Jan. 1, clock did not start again on Jan. 1.

C.P.L. § 30.30 and Motion Practice:

Strategy Point: before a COC is filed, you should object to the setting of a motions schedule and you should argue that any period for motions still should be includable in a 30.30 time calculation where no COC has been filed (see section on omnibus motions, below for more on how this advice applies in the context of filing omnibus motions).

Argument that time for motion practice should be includable for purposes of C.P.L. § 30.30

- You should object to the setting of an omnibus schedule prior to the prosecution producing all discovery. However, if the court sets a motions schedule over your objection, there is an argument that the time period for these motions should still be included in the 30.30 calculation where no COC has been filed. This argument also applies where the prosecution has filed a motion for a protective order or a motion to expand the timeframe for turning over discovery.
- **Plain reading of the statute**: "the following periods must be excluded: a reasonable period of delay *resulting from* . . . pre-trial motions" C.P.L. 30.30(4)(a) (emphasis added). The defense filing motions in no way prevents the prosecution from providing discovery. While it could reasonably mean the prosecution can't be ready for trial if they don't know if the case will be dismissed or what hearings might be ordered, there's no reason they can't be collecting and producing discovery at the same time that the defense is filing motions.
    - This reasoning applies equally to situations where the prosecution has filed a motion for a protective order or a motion requesting more time to provide discovery. These motions do not prevent the prosecution from turning over other discovery that is not subject to the motion, so the motion practice cannot be said to be the cause of the delay.
- **Legislative history**: In 1976, the Court of Appeals dismissed a case pursuant to C.P.L. § 30.30 where a bench warrant was ordered for the defendant, who was absent for 1.5 months and the prosecution did not present the case to the grand jury during that time. *People v. Sturgis*, 38 N.Y.2d 625 (1976). It found the time that the defendant was absent was not excludable under C.P.L. § 30.30(4)(c) because at the time, the statute only

excluded time where the delay *resulted from* the defendant's absence. Because the defendant's absence did not prevent the prosecution from presenting the case to the grand jury, the delay was not a result of his absence. In response to *Sturgis*, the legislature amended C.P.L. § 30.30(4)(c) to add 30.30(4)(c)(ii) which explicitly provides that the time period during which a bench warrant is ordered is excludable regardless of whether it is the cause of the delay. *See People v. Bolden*, 81 N.Y.2d 146, 154 (1993). The legislature did not amend any other section of 30.30(4), which suggests that any period covered by C.P.L. § 30.30(4)(a) is only excludable where it is the actual cause of the delay.

- **Case law on unconverted misdemeanors and unindicted felonies is analogous:**
    - Pre-COC cases should be treated the same as unconverted misdemeanors or unindicted felonies. *See, e.g., People v. Lobato,* 66 Misc. 3d 1230(A) (Crim. Ct., Kings Co. 2020).
    - There are pre-reforms cases where the defense filed pre-trial motions or requested an adjournment despite the case being unconverted, and the Court of Appeals found that the time for motion practice or the adjournment was excluded from the 30.30 calculation. The court made clear that the time was excluded because the delay had "been caused by the defendant for his own benefit." *People v. Worley,* 66 N.Y.2d 523 (1985). "[T]his is because of the concept of estoppel or waiver." *Id. See also People v. Meierdiercks*, 68 N.Y.2d 613 (1986). Time was *not* excluded under C.P.L. § 30.30(4)(a).
    - Unconverted cases where motions were ordered over defense objection and, because it was not a defense-requested adjournment, 30.30 time not charged:
        - *People v. Ortiz*, 6 Misc. 3d 1024(A) (Crim. Ct., Bronx Co. 2004).
        - *People v. Knapp*, 164 Misc. 2d 216 (Crim. Ct., Richmond Co. 1995).
        - *People v. Vreeland*, 143 Misc. 2d 141 (Crim. Ct., N.Y. Co. 1989).
    - Even where the defense does not expressly object, as long as the defense is not affirmatively requesting an adjournment or motion schedule, the defense is not consenting and time should be charged. *People v. Liotta*, 176 A.D.2d 110 (1st Dept. 1991) *aff'd* 79 N.Y.2d 841 (1992) (trial court *sua sponte* granted a 28 day adjournment; this was properly charged to the prosecution where defense did not consent).
- However, *be aware of People v. Erby*, 68 Misc. 3d 625 (Sup. Ct, Bronx Co. 2020): Finding the time between a hearing being ordered and the next court date to be excludable, even where no COC is filed. This was based on prior First Department case law holding that the period between a judge's decision on pre-trial motions and the next court date is excludable as a "reasonable time to prepare" for the hearing under C.P.L.

30.30(4)(a). *See e.g., People v. Davis*, 80 A.D.3d 494, 494-95 (1st Dept. 2011); *People v. Green*, 90 A.D.2d 705 (1st Dept. 1982)[1].

Strategy Point: **If you have no motions to file or have already filed motions on your case but the prosecutor still has not filed a COC, *do not consent to adjournments*. Ask for the case to be put on for trial, *not* for discovery compliance to ensure that the record is clear for a later 30.30 motion (unless it is in your client's interest in the particular case to delay).**

[1] Note that there do not appear to be other appellate department decisions on this issue, but given that there are no contradictory appellate decisions, the First Department case law on the issue is binding across the state.

VI. CERTIFICATES OF COMPLIANCE - C.P.L. § 245.50

Prosecutors state-wide have been filing COCs even while acknowledging that there remains outstanding discovery that they have not yet produced.

> ***Strategy Point:*** **Where P files COC without turning over all required discovery but claims "substantial compliance" or "due diligence," you should object to the filing and argue that the 30.30 clock is still running until a "proper" certificate is filed.**

Case law on the validity of COCs where not all discovery has been produced:

- Two favorable cases:
  - *People v. Adrovic*, 2020 WL 5241352 (Crim. Ct., Kings Co. 2020): COC illusory where prosecution did not produce memo books or lab report for drugs, but holding is based on prosecution's failure to show due diligence.
  - *People v. Johnson*, 2020 NY Slip. Op. 33154(U) (Sup. Ct., Albany Co. March 11, 2020): filing of COC in "good faith" insufficient to stop 30.30 clock.
- ***NOTE***: *People v. Napolitano*, 67 Misc.3d 1241(A) (Sup. Ct., N.Y. Co. 2020) (finding that prosecution must turn over all "automatic discovery" prior to filing a COC but that it does not need to produce "supplemental discovery" (i.e. *Molineux* and *Sandoval* evidence) prior to filing COC).
- Cases holding that COCs were valid where they were filed "in good faith" and prosecution has exercised "due diligence," despite missing discovery:
  - *People v. Nelson*, 67 Misc.3d 313 (Co. Ct., Franklin Co. 2020).
  - *People v. Alford*, 66 Misc.3d 1233(A) (Crim. Ct., NY Co. 2020).
  - *People v. Askin,* 68 Misc.3d 372 (Co. Ct., Nassau Co. 2020).
  - *People v. Gonzalez*, 68 Misc.3d 1213(A) (Sup. Ct., Kings Co. 2020).
  - *People v. Knight*, 2020 WL 5224191 (Sup. Ct., Kings Co. 2020).
  - *People v. Lustig*, 68 Misc.3d 234 (Sup. Ct., Queens Co. 2020).

Challenging an invalid COC:

- As of April, 2020, C.P.L. § 245.50(4) now requires "challenges to or questions related to" a COC be done "by motion." However, there is no requirement in the law that the motion be in writing. An oral motion runs less risk of stopping the 30.30 clock.

Strategy Point: **Argue that you should be able to make an oral motion challenging an improper COC. If the judge orders you to file a written motion, you should do so, but note your objection, and, if it becomes relevant later, argue that this litigation did not stop the 30.30 clock.**

VII. RECIPROCAL DISCOVERY - C.P.L. § 245.20(4)

What you need to turn over

- **Witness information and statements**: identifying information and statements of witnesses whom defense *intends to call* at hearing or trial. C.P.L. § 245.20(4)(a). This includes:
  - Names, addresses, birth dates;
  - All statements, written or recorded or summarized in any writing or record, of persons other than defense that relate to the subject matter of the case.
    - ***NOTE***: this is broader than the former reciprocal discovery rule (C.P.L. § 240.25(2)(a)) which only required defense to disclose statements that relate to the subject matter of the witness's testimony.
  - See below for timing exception for impeachment-only witnesses.
- **The following evidence that you *intend to introduce* at a hearing or trial.** *See* C.P.L. §§ 245.20(4)(a) and 245.20(1):
  - Expert opinion evidence;
  - Tapes and electronic recordings;
  - Photographs and drawings;
  - Materials about physical and medical exams, scientific tests, experiments;
  - Summary of promises, rewards, and inducements for witnesses, and copies of related documents;
  - Tangible property relating to subject matter of case.
- **Exceptions to reciprocal discovery obligation:**
  - Work product: "legal research, opinions, theories, or conclusions" of defense counsel or counsel's agents. C.P.L. § 245.65.
    - ***NOTE***: work product does not include materials that are simply summaries of witness statements; summaries of statements must be turned over. *See, e.g.*, *People v. Consolazio*, 40 N.Y.2d 446, 453-54 (1976).
  - Defendant's own statements to defense counsel or counsel's agents. C.P.L. § 245.65.
  - SSNs and tax numbers. C.P.L. § 245.20(6).

How to handle impeachment evidence

- When you intend to call a witness for the sole purpose of impeaching a prosecution witness, you do not have to disclose the name, address, birthdate, or statements of the defense witness until after the prosecution's witness has testified at trial. C.P.L. § 245.10(1)(b).
- Note that this section only explicitly applies to witnesses and not other evidence. However, where you would only introduce evidence to impeach an untruthful witness, and otherwise *do not intend* to introduce the evidence either on the prosecution's case or on your case, you can reasonably argue that you do not intend to use such evidence at trial as you do not have an expectation that the witness will be untruthful.

Strategy Point: **You must consider whether the witness is truly for impeachment only or if there is some likelihood you may want to call the witness for some other purpose. Even if the latter, the reciprocal discovery obligation is only triggered if you actually *intend* to call the witness. If you are not sure whether the witness or evidence is for impeachment only, i.e., if you might use it no matter how the prosecution witnesses testify, but you don't want the prosecutor knowing about it ahead of the trial, consider moving for a ruling from the judge as to discoverability or for a protective order under C.P.L. § 245.70.**

- If disclosing the evidence or the identity of a witness would reveal your theory of defense or would enable a prosecution witness an opportunity to tailor their testimony, you can move for a protective order. C.P.L.§ 245.70(4) (constitutional rights included in good cause factors, which necessarily includes right to a fair trial and right to present a defense).
- The defense can move for the protective order *ex parte*. C.P.L. § 245.70(1); *see also, e.g.*, *People v. Lane*, 56 N.Y.2d 1, 11 (1982) ("if the defendant believes he would be revealing information to which the prosecution is not privy and which would unfairly expose his tactics or strategy, he should request the simple expedient of an in camera review of the damaging information or assertions."); *People v. Lloyd*, 51 N.Y.2d 107, 112 (1980) ("the exact nature of the defense and particularly defense strategy must remain off limits.").

When you need to turn over reciprocal discovery

- No later than 30 calendar days after the prosecutor has served a COC. C.P.L. § 245.10(2).

- Exceptions:
    - Impeachment-only defense witnesses (see above).
    - Materials claimed to be non-discoverable pending a ruling under C.P.L. § 245.70: Defense must notify prosecution in writing that material has not been disclosed under a particular section. C.P.L. § 245.10(2).
    - Extensions for intended expert evidence and intended exhibits: if unavailable within 30 days, time period can be stayed but D shall disclose as soon as practicable. C.P.L. § 245.20(4)(c).
- ***NOTE***: although the defense's reciprocal discovery obligation should not be triggered until the prosecution has filed a *proper* COC, a judge may require the defense to provide discovery within 30 days even if the defense is challenging the prosecution's COC.

Implications for defense investigation

- Two changes to the defense's reciprocal discovery obligations make it important to think about defense investigation strategy and note-taking:
    - (1) You are now required to turn over all statements of a witness that relate to the subject matter of the *case* (not just the subject matter of their *testimony*).
    - (2) The timing of your discovery obligation depends on whether you intend to call the witness for the defense case or solely to impeach a prosecution's witness.
- In light of these changes, if a defense investigator is getting statements from prosecution's witnesses for the purpose of potential impeachment, it is ideal to have a different investigator work on the substantive defense case—e.g. taking photos and measurements, obtaining and authenticating recordings that defense may introduce at hearing or trial, etc.
- Otherwise, if the same investigator obtains impeachment information and substantive defense information, you may be required to turn over everything that the investigator has written if you plan to call that person as a substantive defense witness—including statements from the prosecution's witnesses that you only intend to use for impeachment.

Sanctions for failure to disclose

- C.P.L. § 245.80(1), which addresses sanctions for (a) belated disclosure and (b) lost/destroyed material, applies to both defense and prosecution.
- But, under C.P.L. § 245.80(2), any sanction against defense must comport with defense's constitutional right to present a defense, and precluding a defense witness from testifying is only permissible if the court finds that defense's discovery violation was "willful and motivated by a desire to obtain a tactical advantage."

VIII. NOTES ON OMNIBUS MOTIONS AND THE NEW LAWS

Considerations for the substance of omnibus motions when you have discovery:

- For felonies where you have grand jury minutes, make substantive arguments in motions to dismiss the indictment wherever possible. Specific issues to consider:
    - Consider each element of each count charged—was it made out by the testimony and exhibits?
        - In thinking about this, consider whether there were any violations of rules of evidence (e.g., hearsay, lack of foundation, inadequate authentication). Was any of the evidence introduced in violation of those rules necessary to make out an element?
    - Was your client adequately identified as the person who committed the alleged crimes?
    - Are you aware of material exculpatory information or evidence that was not presented to the grand jury? *See People v. Lee*, 178 Misc. 2d 24 (Sup. Ct., Nassau Co. 1998); *People v. Livingston*, 175 Misc. 2d 322 (Co. Ct., Broome Co. 1997); *People v. Lincoln*, 159 Misc. 2d 242 (Sup. Ct., Queens Co. 1993).
    - Are there any defenses supported by the testimony (e.g., justification, agency, etc.)? While the prosecution likely does not have to disclose the instructions given, you can argue in your motion to dismiss that the judge should review the instructions and should dismiss charges where instructions were not given as to defenses supported by the evidence. *See People v. Valles*, 62 N.Y.2d 36 (1984) (prosecutor need not instruct on mitigating defenses but must present any complete defenses suggested by the evidence); *People v. Gallo*, 135 A.D.3d 92 (4th Dept. 2016); *People v. Samuels*, 12 A.D.3d 695, 698 (2d Dept. 2004).
- For cases where you have some or all discovery and are making factual allegations in the affirmation of your omnibus motion:
    - Where you have a clear video recording or photographs of the events leading up to your client's arrest, you should not make affirmations that contradict what is clearly depicted. However, you otherwise do not have to adopt the police or the prosecutor's version of the facts.

Timelines for filing omnibus motions under new law

- There has been no change to C.P.L. § 255.20(1) requiring that pre-trial motions be filed within 45 days of arraignment or "within such additional time" as the judge may grant you.
- There are two situations in which you now have more time to file. You have 45 days to file a motion to suppress physical evidence from the date that:

- The prosecution discloses that tangible objects were obtained from or allegedly possessed by your client or a co-defendant. C.P.L. § 245.20(1)(m).
- The prosecution turns over all search warrant materials in a case where a search warrant was executed. C.P.L. § 245.20(1)(n).

When judge orders you to file omnibus motion where no (or invalid) COC has been filed

- **OBJECT:** State on the record that you are *not consenting* to the adjournment and you *are not requesting* a motion schedule. Do NOT agree to waive motions, but explain that you believe you are entitled to all of the discovery before filing motions and ask for motions to be tolled until after the prosecution files a valid COC.
  - Argument: While C.P.L. § 255.20 did not change the general timeline for filing pretrial motions, defense does get additional time where the prosecution's discovery discloses that physical evidence was recovered or a search warrant was executed. *See* C.P.L. §§ 245.20(1)(m) and (n). C.P.L. § 255.20(2) states that all pre-trial motions "shall" be filed together wherever practicable. Argue that, since you won't know until you receive a COC whether you will need to file a motion to suppress physical evidence or controvert a search warrant, you should be allowed to wait until then so that you can file all of your motions together, as required by C.P.L. § 255.20(2).
- If the judge either orders you to file motions anyway or says that s/he finds you have waived motions and adjourns the case for some other purpose (e.g. for trial):
  - **FILE MOTIONS:** on the 45th day, or on the day that judge has ordered you to file motions, whichever is LATER. Judges do not have authority to shorten the 45-day period for filing motions. *See Matter of Veloz v. Rothwax*, 65 N.Y.2d 902 (1985). If the judge has set the case on for something other than motions (but has not tolled motions), file on the 45th day.
  - While you could be stopping the 30.30 clock (but see argument in 30.30 section above), it is your ethical obligation to file an omnibus motion in any felony (you must file a motion to inspect and dismiss) and in any misdemeanor case where there is damaging evidence and you have a basis for suppression. This takes precedence over speedy trial considerations.

IX. PROTECTIVE ORDERS - C.P.L. § 245.70

Overview

- **C.P.L. § 245.10(1)(a)(iv)(A):** Where prosecution claims materials are non-discoverable, they must:

- a. Notify defense in writing that it hasn't been produced and the subsection under which it falls and
- b. Disclose the discoverable portions to the extent practicable.

- **C.P.L. § 245.70(1):** Upon a showing of good cause by either party, the court may at any time order that discovery be denied, restricted, conditioned, or deferred, or make such other order as appropriate.
  - Includes making discovery for attorney's eyes only.
  - Court can permit a party seeking or opposing a protective order to submit papers or testify *ex parte* or *in camera*.
- **C.P.L. § 245.70(3):** Prompt hearing
  - Unless defense voluntarily consents to a protective order, the court shall conduct a hearing within three business days to determine good cause.
  - *Added April, 2020*: When defense is charged with a violent felony or A felony (except under PL 220) court may, at prosecution's request, for good cause shown, conduct such hearing in camera and outside presence of defense, provided this shall not affect court's right to receive testimony or papers ex parte or in camera under C.P.L. § 245.70(1).
- **C.P.L. § 245.70(4):** Good cause factors
  - These are almost all directed towards the risk that defense may allegedly pose to prosecution's witnesses.
  - Court balances the good cause factors against the "usefulness of the discovery" to the party opposing the protective order. C.P.L. § 245.70(4).
  - **Case law on good cause**
    - *People v. Nesmith*, 144 A.D.3d 1508 (4th Dept. 2016): Good cause must be based on a factual showing, not conclusory allegations or speculation.
    - *People v Daren Swift*, 2020 NYSlipOp 62172(U) (1st Dept 2020); *People v Mena*, 2020 NYSlipOp 62173(U) (1st Dept. 2020): Policy arguments about the importance of secrecy of grand jury minutes and confidentiality of medical records do not establish good cause for a protective order with respect to those materials.
    - *People v. Beaton, 171 A.D.3d 871* (2d Dept. 2020): the prosecution's affirmation claimed that a witness had been approached by associates of the defendant and that witnesses were intimidated by social media postings. The justice ruled that because the affirmation did not contain an affidavit from anyone with personal knowledge of the circumstances, nor sufficient detail describing these allegations (such as names, dates, times, and screenshots of the social media postings), the affirmation was legally insufficient and the protective order should not have been granted.

- Be aware that most appellate justices who have considered reviews of protective orders have denied them when review was sought by the defense and granted them when review was sought by the prosecution. However, these decisions rarely contain any detail as to the good cause factors provided by the prosecutor and as such are of little precedential value.

Ex Parte Protective Order Motions

- What if I find out the prosecution has moved for an *ex parte* protective order, but the court hasn't issued one yet?
  - Contact the prosecution and court to oppose the issuance of a protective order; request disclosure of any materials (including legal argument) submitted by the prosecution for which there is no good cause to withhold from the defense, and request to be heard at the hearing.
    - *If the client is **not** charged with A felony or VFO*: The court can still receive testimony or moving papers *ex parte* and in camera in all cases (§ 245.70(1)). However, it can only conduct the entire hearing in camera and outside the presence of defense if your client is charged with an A felony or VFO AND the prosecution has shown good cause (C.P.L. § 245.70(3)). This means that if your client is not facing an A or VFO, you are entitled to *at least* be present for the legal arguments at the PO hearing and should request to be heard in opposition.
    - *If a client is charged with A felony or VFO:* Court must find good cause to conduct the protective order hearing in camera and outside the presence of defense C.P.L. § 245.70(3). Challenge any finding of good cause to conduct the hearing *ex parte* and request to be present at the hearing so you can argue against issuance.
- Helpful case law on *ex parte* protective orders:
  - *People v. Bonifacio*, 179 A.D.3d 977 (2d Dept. 2020):
    - [P]roceedings on applications for a protective order should be entirely ex parte only where the applicant has demonstrated the clear necessity for the entirety of the application, and the submissions in support of it, to be shielded from the opposing party. It may be that, even where some aspects of the application should be considered by the court ex parte, other portions of the application may be appropriately disclosable.
  - *People v. Belfon*, 181 A.D.3d 696 (2d Dept. 2020): Prosecution should have been required to disclose to defense counsel the "general nature of the information"

they sought to be protected as well as "the reasons for the application that would not reveal the existence of the information sought to be protected."

- What if I find out the court issued an ex parte protective order? Two options:
  - 1. Object to the issuance of the protective order as soon as possible, and request to be heard. Consider filing a motion to vacate or modify the existing protective order under C.P.L.R. § 2221(a).
    - Argue against the finding of good cause based on information about case/client as well as good cause factors under C.P.L. § 245.70(4).
    - Request access to prosecutor's legal arguments in support of their protective order application (*see Bonifacio, Belfon*) and to be heard at the hearing (*Bonifacio*).
    - Consider requesting, in the alternative, that the withheld material be disclosed for attorney's eyes only (*see* C.P.L. § 245.70(1)).

    -OR-
  - 2. File an Order to Show Cause for expedited appellate review within two days of learning of the issuance of the protective order (see below).
    - While the statute says the review must be sought within two business days of the ruling, it is reasonable to argue that the two days should only start from the date that you learn of the ruling.

Protective Order issued before January 1, 2020

- File a motion to vacate or modify the protective order under CPLR § 2221(a).
- Court should consider the protective order de novo in light of the change in law. *See People v. Beaton*, 179 A.D.3d 871 (2d Dept. 2020).

Expedited Appellate Review

- **Overview: C.P.L. § 245.70(6):**
  - Either side can move by order to show cause and seek appellate review of a protective order decision concerning a witness's name, address, contact information, or statements.
  - Must seek review within TWO BUSINESS DAYS of court's PO ruling.
  - A single justice of the appellate court will review the lower court's decision.
  - Party seeking review must affirm that:
    - The lower court's ruling affects substantial interests
    - Diligent efforts to reach an accommodation of the discovery dispute with opposing counsel failed, or no such accommodation was feasible.

- Standard of Review:
  - Abuse of discretion where lower court has weighed good cause factors against need for discovery. *See Beaton,* 179 A.D.3d 871; *People v. Brown*, 181 A.D.3d 958 (2d Dept. 2020).
  - Error of law where court fails to even consider a statutorily authorized option requested by a party, e.g. disclosure for attorney's eyes only. *See Beaton*, 179 A.D.3d 871.
- Issues to consider:
  - Importance of withheld discovery to the defense: for investigation, preparation for trial, plea negotiation
  - Can request to be heard ex parte before appellate justice if necessary (e.g. if argument about necessity of discovery relates to defense theory or other privileged information)
  - 30.30 implications: there isn't much case law on this as of now, but courts are likely to find that the time spent litigating protective orders is excludable from 30.30 calculation. *See, e.g., People v. Erby*, 68 Misc. 3d 625, 637 ("Non-frivolous motions made in good faith, whether filed by the prosecution or the defense, are excludable under CPL 30.30(4)(a).").

Strategy Point: **You should probably only file for expedited review if you really can't live without the discovery protected by the protective order. This is because appellate courts are unlikely to be our friends in these cases (unless the court granted the protective order with no cause at all) and courts are likely to find that the time spent litigating this is excluded from a later 30.30 calculation.**

X. SUBPOENAS - C.P.L. § 610.20

C.P.L. § 610.20: Changes to the subpoena process:

- The law now explicitly states that the attorney needs only show that the item or witness "is *reasonably likely to be relevant and material*, and the subpoena is not overbroad or unreasonably burdensome." C.P.L. § 610.20(4).
    - **This provision is new** and makes clear that the defense can subpoena materials even where they should also be turned over in discovery because the *only* requirement is that the materials are relevant and material.
- Subpoenas on governmental agencies *no longer require notice to the agency or prosecutor*. C.P.L. § 610.20(3).
    - Subpoenas for these records must still be signed by a judge.
    - Defense must give the agency at least three days to produce the materials except "in the case of emergency" in which case the court can order them to be returned in less time.

Strategy Point: **You are clearly entitled to judicial subpoenas on unindicted felonies. The prior version of C.P.L. § 610.20(3) referenced C.P.L.R. § 2307 which states that a subpoenas duces tecum must be signed by a justice of the supreme court or in the court where the case is to be tried. Some judges used this provision as a basis not to sign subpoenas on unindicted felonies. The law no longer references the C.P.L.R., so there is no longer a basis for judges not to sign these subpoenas.**

APPENDIX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: TAP 2

----------X

THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION/ORDER

IND NO.: 8071-18

QUANYI FENG

Defendant.

----------X

MATTHEW A. SCIARRINO, JR., J.

The defendant is charged with Attempted Murder in the Second Degree and other related charges. Pursuant to CPL § 245.20[1][c], entitled "Automatic discovery," defense counsel is entitled to "[t]he names and adequate contact information for all persons other than law enforcement personnel whom the prosecutor knows to have evidence or information relevant to any offense charged or to any potential defense." In place of providing actual phone numbers, the People offered the use of the WitCom system as to two of their witnesses. Yes, there is an app for that!

On January 30, 2020, defense counsel objected to the use of this system claiming it does not provide adequate contact information in contravention of the plain meaning of CPL § 245.20[1][c] and *People vs. He,* 34 NY2d 956 [2019]).[1] Following defense counsel's objection, this court issued a Preliminary Order requiring defense counsel to make attempts to use the WitCom system and to file a report, detailing attempts to use the WitCom system and highlighting any perceived deficiencies in the system. The court gave the People an opportunity to comment on defense counsel's findings.

[1] The court notes that in arguing that WitCom does not provide adequate contact information, defense counsel states that not every witness has a cell phone and that cell phone numbers often change. This argument seems to suggest defense counsel is requesting no less than the physical address of the witnesses. However, nothing in CPL § 245.20 requires the People to disclose the addresses of their witnesses unless good cause has been shown (CPL § 245.20[1][c]). As this has not been addressed by either party, the court does not reach the issue of good cause.

On January 31, 2020, defense counsel filed her report. The People responded on February 14, 2020. Defense counsel filed a reply on February 19, 2020.

WitCom Background

WitCom is an app available for smartphones developed by Lex Loci Labs. According to the company website, "WitCom facilitates communication between defense attorneys and witnesses without revealing either party's contact information."[2] Currently it is being utilized by the New York County and Kings County District Attorney's Office. Once a prosecutor registers their witnesses in the WitCom system, a link is sent to the witness' cell phone introducing them to WitCom and providing a virtual phone number for assigned defense counsel which the witness can then add to their phone's contacts. Defense counsel, in turn is **required** to download the WitCom app. Once registered with the app, WitCom serves as a portal, which allows counsel to view the names of witnesses that pertain to a relevant case without revealing the witness contact information. Defense counsel may then text or call the witnesses through the WitCom app. Upon doing so, the defense attorney's virtual WitCom number is displayed to the witness who then may accept or decline the phone call or ignore or reply to the text message.

Attorney Utilization of WitCom

In her Attorney Affirmation made pursuant to the Preliminary Order, defense counsel recounted making one phone call and sending one text message to each of the witnesses listed in the WitCom system. She stated that she did not receive a return phone call or text back from either of the witnesses. In their response, the People stated that after defense counsel's phone calls their witnesses did in fact call counsel back. In her reply, defense counsel stated that one witness reached out via WitCom on February 10th, stating that "the lawyer" told her to call. Defense counsel denied ever speaking to a second witness through WitCom. Rather, she stated that also on February 10th, a second witness called her directly on her cell phone from the witness' personal cell phone. Defense counsel also stated that the attorney for the second witness indicated that the assigned prosecutor contacted him three times in one day regarding the witness reaching out to defense counsel. In short, counsel argues that the WitCom system only "worked" because the

[2] Witcom, http://www.witcom.io [accessed February 14, 2020]

assigned prosecutor actively prompted, encouraged and manipulated the witnesses to use the system.

DISCUSSION

The People argue that the WitCom system is adequate because the witnesses did in fact eventually respond to defense counsel. The court disagrees. What may be adequate in one circumstance may not be adequate in another. When a witness or witness statements are in conflict as to material facts, the defense must be given an opportunity to investigate those facts and must be able to contact the witnesses. In *He,* the Court of Appeals Court held that it **would not be adequate for the prosecutor to contact the witnesses and simply give the defense attorney's contact information to them**. Is it then any different for the prosecutor to provide their witness with a virtual phone number of defense counsel and instruct them that counsel may contact them through that number? Now, in some situations, using a third-party app or service may be allowed by the court.[3] In some situations, the third-party app or service may even encourage communication between the witness and defense attorney and the court feels that sometimes being legally right may in reality hurt. The witness may feel more comfortable in using an anonymized number, and may respond, when they may otherwise have ignored and/or blocked the call.

However, in other situations, the very use of WitCom subsumes the investigative role of defense counsel and short circuits the adversarial process by inserting the prosecutor (or their app) as an intermediary between defense counsel and witness. Defense counsel is forced to rely on the witness' willingness to interact with counsel through a virtual number on their personal smart device, or on the prosecutor to prompt said witness. Moreover, use of the WitCom app is contrary to the plain meaning of the statute which calls for the People to provide contact *information.* WitCom – although a novel approach to witness communication – stands for a lack of information, putting defense counsel at an unfair disadvantage.

In today's day and age, adequate contact information is an *active* and *verified* cell phone number or email address, no more and no less.[4] In requiring such disclosure, the witness is free to choose which phone number or email at which they can be contacted. Adequate contact

---

[3] For example, when the People have applied for and are granted a protective order pursuant to CPL § 245.70 that orders the use of a virtual number or app.

[4] *See, People v. Adams,* Sup Ct, Queens County, February 7, 2020, Morris, J., Ind. No. 1263/19

information does not force an attorney to install an app provided by the District Attorney's Office, allowing the prosecutor to assume a role as the gatekeeper between counsel and witness. To argue that the court should accept the WitCom app because millions of people use Uber, Lyft, Grubhub, etc., is ludicrous. Those apps are voluntarily downloaded as a first-world convenience for the consumer. They are in no way akin to forcing an adversarial party to litigation to use an app absent a court order. Even when the defense attorney makes little or no effort to make contact through the app, one cannot say that a third-party app is "adequate contact information." Public defenders, by necessity and their nature, are distrustful of the government. This court, an agent of the government, does not believe that forcing a public defender or other defense attorney to accept an app, paid for by the District Attorney's Office, another arm of the government, meets the intent of the criminal justice reforms that went into effect this year or the holding of *People v. He.* While this court does not in away way, shape or form believe that the District Attorney's Office has any intentions aside from alleviating the worries of their witnesses and allowing defense counsel to do their job, forcing the defense attorney to use the prosecutor's method does not satisfy *People v. He.* Clearly the parties, on their own, may agree to use WitCom – or another means of communication – and as previously discussed, this may in fact result in more actual contact, but that does not mean that use of the app meets the legislative mandate.

This court genuinely believes that the WitCom app could result in more communication, but that is a decision to be made by the defendant's lawyer. Some may choose to use it. However, absent good cause that shows that the app would be needed to protect the witness from contact via cell phone or email, this court will not accept its use.

Accordingly, it is hereby:

ORDERED that the People's use of the WitCom system did not provide adequate contact information; and it is further

ORDERED, that the People are directed to disclose an active and verified email address and cell phone number for their witnesses to defense counsel; and it is further

ORDERED, that this decision is stayed for thirty (30) days.

This case is scheduled next for March 23, 2020.

This opinion shall constitute the Decision and Order of the Court.

Dated: February 20, 2020

Matthew A. Sciarrino, Jr.
Acting Justice, Supreme Court

CRIMINAL PROCEDURE LAW SECTION 30.30 (1) MANUAL

Fall 2021 Edition
(Including 2020 amendments)

DREW R. DuBRIN
SPECIAL ASSISTANT PUBLIC DEFENDER
APPEALS SECTION
MONROE COUNTY PUBLIC DEFENDER'S OFFICE

- **IN GENERAL:** Criminal Procedure Law § 30.30, also known as "statutory speedy trial," requires the prosecution to establish its readiness for trial on an "offense" within a specific codified time period after the commencement of a criminal action (which occurs, generally, by the filing of the initial accusatory). If the prosecution is not ready for trial within the time required, the defendant may be entitled to dismissal of the accusatory instrument, pursuant to CPL 30.30 (1), or release pending trial, pursuant to CPL 30.30 (2). The statute excludes certain designated periods from the time calculation.

    - **Rights Afforded**

        - This statute does not afford the defendant the right to a "speedy trial." That right is provided by CPL 30.20, the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Section Six (the due process clause) of the New York State Constitution. (*See United States v Tigano*, 880 F3d 602 [2d Cir 2018]; *People v Wiggins*, 31 NY3d 1 [2018]; *People v Singer*, 44 NY2d 241 [1978]); *People v Portorreal*, 28 Misc 3d 388 [Crim Ct, Queens County 2010].)

        - The statute does not require the People to speedily *commence* a criminal action (i.e., file an accusatory) after the commission of a crime (*People v Faulkner*, 36 AD3d 1009 [3d Dept 2007]).

        - A defendant's rights under this statute are not dependent in any way on whether he or she is ready for trial (*People v Hall*, 213 AD2d 558 [2d Dept 1995]).

        - Under 30.30 (1), the prosecution's failure to establish its readiness within the designated time period entitles the defendant to dismissal of the accusatory instrument upon which the defendant is being prosecuted – whether it is an indictment, an information, a simplified information (i.e., a simplified traffic information, a simplified parks information, or a simplified environmental conservation information), a prosecutor's information, or a misdemeanor complaint (*see* CPL 1.20 [1], [4] [5] [b]; CPL 170.30 [1] [e]; CPL 210.20 [g]).

            - Felony complaints are not subject to dismissal pursuant to CPL 30.30 (1).

- **Interpreting CPL 30.30**

  - In determining whether a defendant's 30.30 rights have been violated, one must look to the statute's provisions, as well as case law interpreting the provisions (*see e.g. People v Parri*s, 79 NY2d 69 [1992]; *People v Sturgis*, 38 NY2d 625 [1976]).

- **Scope**

  - **"Offense" requirement**: An accusatory is subject to dismissal pursuant to CPL 30.30 (1) only if it charges an "offense," a felony, misdemeanor, violation, or traffic infraction (CPL 30.30 [1] [a-d]; Penal Law § 55.10 [1-4]).

    - An "offense" is "conduct for which a sentence to a term of imprisonment or to a fine is provided by any law of [New York], or by any order, rule or regulation of any governmental instrumentality authorized by law to adopt the same" (Penal Law § 10.00 [1]).

  - **"Felony," "Misdemeanor," or "Violation" requirement:** An accusatory instrument will be subject to 30.30 dismissal only where the defendant has been charged at some point during the "criminal action" with a felony, misdemeanor, or violation.

  - **Traffic infractions *NEW*:** Subdivisions 1 and 2 of 30.30 have been amended to provide that, for 30.30 purposes, "the term offense shall include vehicle and traffic infractions." This is in line with Penal Law § 55.10 (4), which defines a traffic infraction as an "offense," but not "a violation or a misdemeanor by virtue of the sentence prescribed therefor." Thus -- though a traffic infraction is not a felony, misdemeanor, or violation offense (Penal Law §§ 10.00 [3], 55.10 [3] [a], [4]) -- a simplified traffic information may be dismissed on 30.30 grounds where the defendant was also charged at some point in the same criminal action with a felony, misdemeanor, or violation (*see* CPL 30.30 [1] [a-d]; *see People v Galindo,* 70 Misc 3d 16, 19 [App Term 2020]).

- **Municipal ordinances:** A breach of a municipal ordinance may constitute a "violation" "offense," even where punishable only by fine (*People v Lewin*, 8 Misc 3d 99 [App Term 2005]). Penal Law § 10.00 (1) defines an "offense" in part as "conduct for which a sentence to a . . . fine is provided by any . . . ordinance of a political subdivision of this state . . . ." Penal Law § 55.10 (3) defines a "violation" to include an offense not defined by the Penal Law for which "the only sentence provided therein is a fine." Trial level courts are split as to whether a violation of a municipal ordinance for which no imprisonment may be imposed may be subject to 30.30 dismissal (*see People v Kleber*, 168 Misc 2d 824 [Muttontown Just Ct 1996] [concluding that ordinances imposing only a fine are not subject to CPL 30.30 dismissal]; *People v Vancol*, 166 Misc 2d 93 [Westbury Just Ct 1995] [determining that all ordinances are subject to CPL 30.30]; *People v Olsen*, 37 Misc 3d 862 [Massapequa Park Just Ct 2012] [observing, in footnote, analytical error in *Kleber* decision]).

- **Homicide Exception**: Pursuant to 30.30 (3) (a), 30.30 is not applicable where the defendant is charged with murder in the first degree (Penal Law § 125.27), murder in the second degree (Penal Law § 125.25), aggravated murder (Penal Law § 125.26), manslaughter in the first degree (Penal Law § 125.20), manslaughter in the second degree (Penal Law § 125.15), or criminally negligent homicide (Penal Law § 125.10). It should be noted that if the defendant is not charged with any of these particular homicide offenses and is instead charged with aggravated manslaughter in the first or second degree (Penal Law §§ 125.22, 125.21), aggravated criminally negligent homicide, (Penal Law § 125.11), or any vehicular manslaughter offense (Penal Law §§ 125.12, 125.13, 125.14), the accusatory may be subject to dismissal pursuant to CPL 30.30 (1).

    - **Non-homicide charges that are joined:** The homicide exception applies even if a non-homicide charge is joined (*People v Ortiz*, 209 AD2d 332, 334 [1st Dept 1994]).

- **Severance:** A defendant is not entitled to severance of non-homicide counts for the purposes of subjecting the non-homicide counts to 30.30 dismissal (*People v Ortiz*, 209 AD2d at 334). And it has been held that the homicide exception applies to non-homicide charges severed from homicide charges on the theory that "there can be only one criminal action for each set of criminal charges brought against a particular defendant" (*People v Steele*, 165 Misc 2d 283 [Sup Ct 1995]; *see also People v Lomax*, 50 NY2d 351 [1980]).

- **Attempted homicides:** The homicide exception does not apply to the mere attempt to commit any of the enumerated homicides (*see People v Ricart*, 153 AD3d 421 [1st Dept 2017]; *People v Smith*, 155 AD3d 977 [2d Dept 2017]).

- **Dismissal or reduction of homicide charges:** Courts have not yet resolved whether 30.30 (3) (a) is applicable to non-homicide charges in a criminal action in which the defendant initially faced both homicide and non-homicide charges and the homicide charge is later dismissed outright or reduced to a non-homicide charge. However, courts have held that in the 30.30 context, there can be just one criminal action for each set of charges brought against a defendant and that, generally, the rights that apply are those applicable to the highest level offense ever charged in the criminal action (*Lomax*, 50 NY2d 351; *People v Cooper*, 98 NY2d 541 [2002]; *People v Tychanski*, 78 NY2d 909 [1991]).

➢ TIME PERIODS

- **In General:** With limited statutory exception, the time period within which the prosecution must be ready for trial is determined by the *highest* level offense ever charged against the defendant in the criminal action (*see* CPL 30.30 [1] [a], [b], [c]; *Cooper*, 98 NY2d 541; *Tychanski*, 78 NY2d 909).

  - **Felony**: When the highest level offense ever charged is a felony,

the prosecution must establish its readiness within six months (which is not necessarily 180 days) of the commencement of the criminal action (*see e.g. People v Co*x, 161 AD3d 1100, 1100 [2d Dept 2018]).

- **"A" misdemeanor:** When the highest level offense ever charged is an "A" misdemeanor, the prosecution must demonstrate that it is ready within 90 days.

- **"B" Misdemeanor:** When the highest offense ever charged is a "B" misdemeanor, the prosecution must establish its readiness within 60 days.

- **Violations:** And when the highest offense ever charged is just a violation, the prosecution must demonstrate its readiness for trial within 30 days.

- **Multi-count accusatory instruments:** With respect to multi-count accusatory instruments, the controlling period is the one applying to the top count (*Cooper*, 98 NY2d at 543).

- **Multiple accusatory instruments:** Where the criminal action results in multiple accusatory instruments, the general rule is that the applicable time period is the one applying to the highest level offense ever charged (*Tychanski*, 78 NY2d 909). Exceptions to this general rule exist under CPL 30.30 (5) (c), (d), and (e).

- **Reduced charges**: Although there are statutory exceptions (see below), generally speaking, the most serious charge ever brought against the defendant determines which time period applies, regardless of whether that charge is ultimately reduced (*Cooper*, 98 NY2d 541; *Tychanski*,78 NY2d 909]; *People v Cooper*, 90 NY2d 292 [1997]).

    - **Examples:** Where an A misdemeanor is reduced to a B misdemeanor, the 90 day period applies (*Cooper*, 98 NY2d 541). Where a felony complaint is later superseded by a misdemeanor *indictment*, the six month period applies (*Tychanski*, 78 NY2d 909).

- **Statutory Exceptions:**

  - **Where a felony complaint has been replaced by, or converted to, a misdemeanor complaint or misdemeanor information (and not a misdemeanor indictment):** Unless otherwise provided, the applicable period is the one applying to the highest level offense charged in the new accusatory (CPL 30.30 [7] [c]).

    - **Inapplicability of exception**: This exception does not apply if "the aggregate of [the period applicable to the new accusatory instrument] and the period of time, excluding periods provided in [30.30 (4)], already elapsed from the date of the filing of the felony complaint to the date of the filing of the new accusatory instrument exceeds six months." In such circumstances, the original, six month period applies (CPL 30.30 [7] [c]).

  - **Where a felony count of the indictment has been reduced to a petty offense on legal insufficiency grounds and as a result, a reduced indictment or prosecutor's information has been filed:** Unless otherwise provided, the applicable time period is the one applying to the highest level offense charged in the new accusatory (CPL 30.30 [7] [e]).

    - **Inapplicability of exception:** This exception does not apply if the period between the filing of the indictment and the filing of the new accusatory (less any 30.30 [4] excludable time) plus the period applicable to the highest level offense charged in the new accusatory exceeds six months. If that period does exceed six months, then the time period applicable remains six months (CPL 30.30 [7] [e]).

- **Increased charges**: Where the original charge is subsequently elevated to a more serious charge, the applicable period is the one applying to the more serious charge (*Cooper*, 90 NY2d 292).

- **Calculating time period**

  - **Whether to count day the criminal action commenced**:

    - **Where the prosecution must be ready within 90, 60, or 30 days:** To determine the date by which the People must be ready when the time period is being measured by *days* (where the highest level offense charged is a misdemeanor or violation), the day on which the action commenced is to be *excluded* from the time calculation (*People v Stirrup*, 91 NY2d 434, 438 n 2 [1998]; *People v Page*, 240 AD2d 765 [2d Dept 1997]). For example, in a case in which the criminal action commenced on January 1 with the filing of a complaint charging only a violation, the first day counted in the calculation is January 2 and the prosecution must be ready by the end of the 30th day, which is January 31.

    - **Where the prosecution must be ready within six months:** Where the time period is to be measured in terms of months (when the highest level offense charged is a felony), the day the criminal action commenced is not excluded from the calculation. For example, where the criminal action commenced with the filing of a felony complaint on July 19, the prosecution must be ready by end of the day on January 19 (*see People v Goss*, 87 NY2d 792, 793-794 [1996]).

  - **Expiration date falling on a non-business day:** The Third Department has extended the People's time to establish their readiness to the next business day where the expiration date falls on the weekend or a holiday (*see People v Mandela*, 142 AD3d 81 [3d Dept 2016]; *see also People v Powell*, 179 Misc 2d 1047 [App Term 1999]).

  - **Six-month time period measured in calendar months:** Where six months is the applicable period (where the highest level offense charged is a felony), the period is computed in terms of calendar months and, thus, the applicable felony time period may be longer than 180 days (*People v Delacruz*, 241 AD2d 328 [1st

Dept 1997]).

➢ COMMENCING THE 30.30 CLOCK

- **Commencement of criminal action**: The period starts when the criminal action has commenced.

- **General rule:** It is the general rule that the criminal action is deemed to commence with the filing of the *very first* accusatory instrument (*People v Stiles*, 70 NY2d 765 [1987]; *People v Sinistaj*, 67 NY2d 236 [1986]; *People v Brown*, 23 AD3d 703 [3d Dept 2005]; *People v Dearstyne*, 215 AD2d 864 [3d Dept 1995]; *see* CPL 1.20 [17] [defining commencement of the criminal action as the filing of the first accusatory]).

  - **Dismissal of original charges**: Unless otherwise provided, this rule governs even if the original charges are dismissed (*People v Osgood*, 52 NY2d 37 [1980]).

  - **Simplified traffic information:** This rule applies even if the very first accusatory is a simplified traffic information since, under the 2020 amendment, an offense subject to 30.30 dismissal (CPL 30.30 [1] [e]; *see People v May*, 29 Misc 3d 1 [App Term 2010] [holding that prior to the January 1, 2020 amendments, a simplified traffic information does not commence a criminal action for 30.30 purposes because of the inapplicability of 30.30 to traffic violations]; *but see* CPL 30.30 [7] [c] [criminal action commences with first appearance on appearance ticket]).

  - **Superseding accusatory**: Unless otherwise provided, this rule applies even if the original accusatory is "superseded" by a new accusatory (*People v Sanasie*, 238 AD2d 186 [1st Dept 1997]).

  - **Different charges**: Unless otherwise provided, this rule applies even if the new charges replacing the old charges allege a different crime, so long as the new accusatory directly derives from the incident charged in the initial accusatory. Once a criminal action commences, the action includes the filing of any new accusatory instrument directly deriving from the initial one.

(CPL 1.20 [16]; *People v Farkas*, 16 NY3d 190 [2011]; *see People v Chetrick*, 255 AD2d 392 [2d Dept 1998] [acts "so closely related and connected in point of time and circumstance of commission as to constitute a single criminal incident"]; *see also People v Nelson*, 68 AD3d 1252 [3d Dept 2009] ["To the extent that 'the felony complaint and subsequently filed indictment allege[d] separate and distinct criminal transactions, the speedy trial time clock commence[d] to run upon the filing of the indictment with respect to the new charges'"]; *People v Bigwarfe*, 128 AD3d 1170 [3d Dept 2015] [counts two and three of the superseding indictment should not be dismissed as they allege a separate and distinct drug transaction from the one alleged in the felony complaint; count one, however, was required to be dismissed as it did directly derive from the felony complaint].)

- **Jurisdictionally defective accusatory**: Unless otherwise provided, this rule governs even if the first accusatory is jurisdictionally defective (*People v Reyes*, 24 Misc 3d 51 [App Term 2009]).

- **Sealed indictment**: Unless otherwise provided, the filing of a sealed indictment, as the first accusatory, commences the criminal action.

o **Statutory exceptions to the first accusatory instrument rule:**

- **Appearance ticket**: If the defendant has been issued an appearance ticket, the criminal action is said to commence when the defendant first appears "in local criminal court in response to the ticket," not when the accusatory instrument is filed (CPL 30.30 [7] [b]; *Parris*, 79 NY2d 69).

    - **Incarceration**: The date that the defendant first appears in court controls, regardless of whether the defendant is detained on an unrelated charge and was consequently unable to appear in court on the date specified on the appearance ticket or whether the prosecution failed to exercise due diligence to locate the incarcerated defendant (*Parris*, 79 NY2d 69).

- **No accusatory filed**: The date the defendant first appears in court controls, even if no accusatory instrument is filed at the time of the defendant's first court appearance (*People v Stirrup*, 91 NY2d 434 [1998]).

- **No judge**: The date the defendant first appears in court is determinative regardless of whether he actually appears before a judge (*Stirrup*, 91 NY2d 434).

- **Appearance ticket issued by judge in lieu of a bench warrant**: Where a judge directs that an "appearance ticket" be issued upon a defendant's failure to appear in court, in lieu of a bench warrant, the notice to appear should not be deemed an appearance ticket for 30.30 purposes, as an appearance ticket is defined by the CPL as a notice to appear issued by a *law enforcement officer*, not a judge, and *before*, not after, the accusatory has been filed (CPL 1.20 [26], 150.10). CPL 1.20 (26) defines an appearance ticket as a notice to appear issued by a police officer or "public servant, *more fully defined in section 150.10"* "in connection with an accusatory instrument *to be filed* against [the defendant]." CPL 150.10 and 150.20 (3) more fully defines a public servant, for purposes of the issuance of an appearance ticket, as a "police officer or other public servant authorized by state or local law enacted pursuant to the provisions of the municipal home rule to issue the same …." Thus, where the judge directs that an appearance ticket be filed to secure the defendant's presence upon his failure to appear in court as previously scheduled, after the accusatory has been filed, what the judge has issued cannot be said to be an appearance ticket and the criminal action will be deemed to have commenced with the filing of the initial accusatory, not upon the defendant's appearance on the judicially directed "appearance ticket" (*see People v Hauben*, 12 Misc 3d 1172 [A], 2006 WL 1724042 [Nassau District Ct 2006] [a judge is not a public servant for appearance ticket purposes]).

- **Where defendant, who has been issued an appearance ticket, appears pursuant to an arrest warrant:** Pursuant to 30.30 (7) (b)'s plan language, the appearance ticket exception applies only when the defendant appears in "response to an appearance ticket." Where a defendant has been taken into custody on a bench or arrest warrant because he has failed to appearance ticket, and the defendant has appeared pursuant to such a warrant, the appearance ticket exception should not apply.

- **Felony complaint converted to an information, prosecutor's information, or misdemeanor complaint:** The criminal action (i.e., 30.30 clock) commences with the filing of the new accusatory, with the applicable time period being that which applies to the most serious offense charged in the new accusatory (CPL 30.30 [7] [c]).

    - **Inapplicability of exception.** This is true unless "the aggregate of [the period applicable to the new accusatory instrument] and the period of time, excluding periods provided in [30.30 (4)], already elapsed from the date of the filing of the felony complaint to the date of the filing of the new accusatory instrument exceeds six months." Under such circumstances, the criminal action commences with the filing of the felony complaint and the six month time period applies (CPL 30.30 [7] [c]).

    - **Misdemeanor indictments:** Where a felony complaint is later superseded by a misdemeanor *indictment*, the criminal action is deemed to commence with the filing of the felony complaint and the six month period continues to apply (*People v Tychanski*, 78 NY2d 909 [1991]).

- **Felony indictment reduced to a misdemeanor or petty offense, resulting in a reduced indictment or misdemeanor information being filed**: A criminal action commences with the filing of the new accusatory, with the applicable time being that applying to the most serious offense charged in the new accusatory (CPL 30.30 [7] [e]).

- **Inapplicability of exception:** This rule applies unless the period of time between the filing of the indictment and the filing of the new accusatory (less any excludable time [*see* 30.30 (4)]) plus the period applicable to the highest level offense charged in the new accusatory exceeds six months. If that period does exceed six months, then the criminal action will be deemed to have commenced as if the new accusatory had not been filed (typically with the filing of the first accusatory) and the period applicable is that which applies to the indicted (felony) charges, i.e., six months (CPL 30.30 [7] [e]).

▪ **Withdrawn guilty pleas**: Clock commences when the guilty plea is withdrawn (CPL 30.30 [7] [a]).

▪ **Withdrawn pleas of not responsible by reason of mental disease or defect:** Time period commences upon withdrawal of plea (*People v Davis*, 195 AD2d 1 [1st Dept 1994]).

▪ **New trial ordered**: When a new trial has been ordered, the time period begins when the order has become final (CPL 30.30 [7] [a]; *People v Wilson*, 86 NY2d 753 [1995]; *People v Wells*, 24 NY3d 971 [2014]).

- **Motion for reargument:** Where the prosecution has moved for reargument of an appeal it has lost, the order of the appellate court directing a new trial becomes final when the appellate court has denied the prosecution's motion (*People v Blancero*, 289 AD2d 501 [2d Dept 2001]).

- **Pre-order delay**: Periods of delay occurring prior to the new trial order are not part of the computations (*People v Wilson*, 269 AD2d 180 [1st Dept 2000]).

o **Proving when an accusatory was filed:** The time stated on arrest warrant indicating when the original complaint was filed is generally sufficient proof of when the original complaint was filed (*People v Bonner*, 244 AD2d 347 [2d Dept 1997]).

- **Indictment deriving from multiple felony complaints filed on different days and involving separate incidents:** Where different counts of an indictment derive from different felony complaints filed on separate days and involving distinct incidents, there will be multiple criminal actions having distinct periods. Counts deriving from such separate felony complaints must be analyzed separately, possibly resulting in the dismissal of some but not all counts of an indictment (*People v Bigwarfe*, 128 AD3d 1170 [3d Dept 2015]; *People v Sant*, 120 AD3d 517 [2d Dept 2014]).

➢ ESTABLISHING READINESS

- **Introduction:** The prosecution will be deemed ready for trial only where (1) it has made an effective announcement of readiness; (2) it is in fact ready (it has done everything required of it to bring the case to trial); (3***NEW***) it has provided a certification of compliance with disclosure requirements under CPL Article 245; (4 ***NEW***) in local court accusatory cases, it has provided a certification of compliance with local court accusatory instrument requirements; and (5 ***NEW***) the court has conducted an inquiry "on the record" as to the prosecution's actual readiness.

- **Announcement of readiness**: The prosecution will be deemed ready for trial only if it has announced it is ready – either in open court with counsel present or by written notice to defense counsel and the court clerk (*People v Kendzia*, 64 NY2d 331, 337 [1985]).

  - **On-the-record**: Off-the-record assertions of readiness are insufficient (*Kendzia*, 64 NY2d at 337).

    - **Recorded:** This means that in-court assertions of readiness must be recorded by either the court reporter, an electronic recording device, or the court clerk (*Kendzia*, 64 NY2d at 337).

  - **Present readiness**: Statement must be of present readiness, not future readiness. A prosecutor's assertion, "I'll be ready next Monday," for example, is invalid." (*Kendzia*, 64 NY2d at 337)

- **Contemporaneous:** The assertion of readiness must be contemporaneous with readiness. It is insufficient for the prosecution to assert for the first time in an affirmation in opposition to a 30.30 motion that it was ready for trial on an earlier date (*Kendzia,* 64 NY2d at 337, *People v Hamilton*, 46 NY2d 932, 933 [1979]; *e.g. People v Lavrik,* 72 Misc 3d 354, 358 [Crim Court, NY County 2021]).

- **Court congestion**: Delays caused by pre-readiness court congestion do not excuse the prosecution from timely declaring its readiness for trial (*People v Chavis*, 91 NY2d 500 [1998]).

- **Defendant's presence in court**: The defendant need not be present for the statement of readiness to be effective (*People v Carter*, 91 NY2d 795 [1998]).

- **New accusatory:** Where a new accusatory has been filed, following the dismissal of the original accusatory, the prosecution is required to announce its readiness upon the filing of the new accusatory, irrespective of whether it announced its readiness with respect to the original accusatory (*People v Cortes*, 80 NY2d 201, 214-215 [1992]).

- **New trial ordered:** When a new trial has been ordered, the prosecution cannot be ready until it has re-announced their readiness (*People v Wilson*, 86 NY2d 753 [1995]; *People v Dushain*, 247 AD2d 234 [1st Dept 1998]).

- **Off-calendar statement of readiness (a.k.a. *Kendzia* letter):** To be effective, the written statement of readiness must be filed with the court clerk within the statutory period and served on the defendant "promptly" thereafter (*People v Smith*, 82 NY2d 676, 678 [1993]; *People v Freeman*, 38 AD3d 1253 [4th Dept 2007]).

    - **Proper service**:

        - **Service of declaration of readiness after expiration of time period:** It has been held that the prosecution is not required to have served the statement of readiness within the statutory period so

long as service takes place "promptly" after a timely filing of the statement of readiness (*see People v Freeman*, 38 AD3d 1253).

- **Service on former counsel**: Service of statement of readiness on defendant's former counsel found to be ineffective (*People v Chu Zhu*, 171 Misc 2d 298 [Sup Ct 1997], *revd on other grounds*, 245 AD2d 296 [2d Dept 1997]).

- **Service on counsel at wrong address**: A court has found service of statement of readiness on counsel at incorrect address may still be effective if the People "did not have actual notice that the address was incorrect prior to service of the" statement of readiness (*People v Tejada*, 59 Misc 3d 422, 424 [Crim Ct, Bronx County 2018]).

- **Certification of compliance with disclosure requirements (CPL 30.30 [5]) *NEW*:** Unless the defendant has waived CPL 245.20 disclosure requirements or the court has made an individualized finding of "special circumstances," the prosecution will not be considered ready for trial unless its statement of readiness is (1) "accompanied or preceded by a certification of good faith compliance with the disclosure requirements of [CPL 245.20] and (2) the defense has been "afforded an opportunity to be heard on the record as to whether the disclosure requirements have been met." (CPL 30.30 [5]; CPL 245. 50 [3].)

  - **Opportunity to be heard:** The certificate of compliance will not be deemed valid unless the defendant has been given an opportunity to be heard on whether the prosecution has fulfilled its discovery obligations (CPL 30.30 [5]).

  - **Exempted material:** The prosecution may certify good faith compliance where it has not provided material that was lost, destroyed, or otherwise become unavailable, despite due diligence, or material subject to a protective order (CPL 245.50 [1], [3]).

- **Individualized finding of special circumstances:** The failure to "file" a proper certificate of compliance will not render the prosecution unready where the court has made an individualized finding of special circumstances (CPL 245.50 [3]).

    - **Due diligence to provide known discovery:** The prosecution must exercise due diligence and make all reasonable inquiries, to provide discovery. A finding of special circumstances justifying the failure to file a proper certificate of compliance does not excuse the prosecution's failure to exercise due diligence to provide all known discovery (*People v Rodriguez*, 73 Misc 3d 411 [Sup Ct, Queens County 2021]; *People v Cano*, 71 Misc 3d 728, 733-734 [Sup Ct, Queens County 2020]; *People v Adrovic*, 69 Misc 3d 563, 570 [Crim Ct, Kings County 2020])

    - **Timing of the special circumstances finding:** Neither Article 245 nor CPL 30.30 specify when the finding of special circumstances is to be made. It is unclear whether the court must make it in response to an objection to the certificate of compliance or make it in response to 30.30 motion alleging a discovery violation. It is also unclear whether a court can make such a finding where the prosecution has not made a good cause request for an extension of time to of the periods for discovery (*see* CPL 245.70 [2]).

- **CPL 245.50 (1)'s "no adverse consequences" provision**: This provisions states: "No adverse consequence to the prosecutor shall result from the filing of a certificate of compliance in good faith and reasonable under the circumstances; but the court may grant a remedy or sanction for a discovery violation." Trial level courts are split on whether legislature intended for this provision to apply to 30.30 (*see People v Quinlan*, 2021 NY Slip Op 21020, 2021 WL 417125 [Crim Ct Jan. 29, 2021]; *People v Cano*, 2020 NY Slip Op 20365, 2020 WL 8968135 [Sup Ct Dec. 3, 2020]). And, to the extent it is applicable, it is unclear what the provision's scope is – whether it is limited in scope, where, for instance, the prosecution provides discovery but inadvertently

omits the discovery from the certificate of compliance's list of provided material or makes some other technical, non-prejudicial mistake.

- **Supplemental Certificates of Compliance:** The filing of a supplemental certificate of compliance with respect to new discoverable material – which could not have been disclosed earlier with due diligence – does not appear to render previous certificates of compliance invalid or ineffective (*see e.g. People v Askin,* 68 Misc 3d 372, 124 NYS3d 133 [Nassau County Ct 2020]).

- **Questions concerning new provision's application:** CPL 245.50 (1) provides that the certificate of compliance "shall identify the items provided." It further provides that "[n]o adverse consequences to the prosecution or the prosecutor shall result from the filing of a certificate in good faith . . . ." The question arises whether the prosecution will be deemed not to have effectively announced its readiness where it has filed a certificate of compliance that has inadvertently omitted an item it has provided.

- **Certification of compliance with local court accusatory instrument requirements (CPL 30.30 [5-a]) *NEW*:** Where the defendant is being prosecuted by a local court accusatory instrument, the prosecution will not be considered ready for trial unless the prosecution has certified that all counts of the accusatory meet the facial sufficiency requirements for a local court accusatory instrument under CPL 100.15 and 100.40 *and* that those counts not meeting the requirements for facial sufficiency have been dismissed (CPL 30.30 [5-a]; *see People v Lavrik,* 72 Misc 3d 354 [certification of compliance was invalid because it did not state that any unconverted count had been dismissed; instead, it merely certified that all counts "currently charged" satisfied facial sufficiency requirements]).

- **Court inquiry into prosecution's actual readiness (CPL 30.30 [5]) *NEW*:** The prosecution will not be deemed ready upon its statement of readiness unless the court has inquired "on the record" as to the prosecution's actual readiness (*People v Ramirez-Correa,* 71 Misc 3d 570, 572 [Crim Ct, Queens County 2021]).

- **Questions about application:** There are number of unsettled questions about the new provision's application, such as the (1) depth of the inquiry required; (2) whether the People will be deemed unready if the inquiry is not sufficiently probing; and (3) whether the failure to object to lack of inquiry or to the depth of the inquiry will waive the inquiry requirement. As to the third point, it should be argued that the provision's mandatory language – "shall make an inquiry" – makes the inquiry requirement not waivable by silence (*see People v Rudolph*, 21 NY3d 497, 501 [2013]).

- **Actual readiness:** The prosecution must be actually ready for trial for its announcement of readiness to be effective (*People v Brown*, 28 NY3d 392 [2016]).

  - **Readiness defined:** The prosecution will be deemed actually ready where it has done all that is required of it to bring the case to a point where it can be tried "immediately" (*People v Robinson*, 171 AD2d 475, 477 [1st Dept 1991]; *People v England*, 84 NY2d 1, 4 [1994]; *People v Kendzia*, 64 NY2d 331, 337 [1985]). The prosecution will be ready for trial if the case cannot go to trial due to no fault of its own (*People v Goss*, 87 NY2d 792 [1996]).

  - **Presumption:** Prior to the 2020 amendments, it was held that unless shown otherwise, the prosecution's statement of readiness will sufficiently demonstrate its actual readiness (*People v McCorkle*, 265 AD2d 736 [3d Dept 1999]). The announcement of readiness would be presumed to be accurate and truthful (*Brown*, 28 NY3d at 399-400; *People v Bonilla*, 94 AD3d 633, 633 [1st Dept 2012]). New Subdivision 5 now requires a court inquiry into the statement of readiness: a statement of readiness, alone, will never be enough to satisfy readiness requirements (*People v Villamar*, 69 Misc 3d 842, 848 [Crim Ct 2020]). And "[i]f, after conducting its inquiry, the court determines that the People are not ready to proceed to trial, the prosecutor's statement or notice of readiness shall not be valid . . . . " If, upon conducting such an inquiry, the court does not determine the announcement or readiness invalid, the prosecution will be

presumed actually ready unless the defendant shows otherwise (*Brown,* 28 NY3d at 399-400).

- **Compliance with CPL Article 245 disclosure requirements *NEW*:** It is evident that it is the intent of the legislature for the 2020 amendment to require not only that the prosecution file and serve a certificate stating and demonstrating that it has complied with its disclosure obligations, but to also require that the statement be accurate and truthful – i.e., to condition readiness on fulfillment of discovery obligations. (*see People v Quinlan,*71Misc 3d 266 [Crim Ct, NY City]; *People v Cooper*, 71 Misc 3d 559 [NY Co Ct, Erie County 2021; *People v Mashiyach,* 70 Misc 3d 456 [Crim Ct, Kings County 2020]). In short, to be ready, the People must have exercised due diligence and conducted all reasonable inquiries to provide discovery as required by Article 245. CPL 245.50 (1) explicitly allows the prosecution to file and serve its certificate of compliance only "[w]hen the prosecution has provided the discovery." CPL 30.30 (5) and CPL 245.50 (4) explicitly give the defendant an opportunity to challenge in court that the prosecution has in fact provided the required discovery. And CPL 245.50 (3) implicitly expresses that the prosecution cannot be ready unless it has provided discoverable material by expressly carving out an exception to that rule: "A court may deem the prosecution ready for trial pursuant to section 30.30 of this chapter where information that might be considered discoverable under this article cannot be disclosed because it has been lost, destroyed, or otherwise unavailable as provided by paragraph (b) of subdivision one of section 245.80 of this article, despite diligent and good faith efforts, reasonable under the circumstances."

    - **Human error no excuse:** 30.30 (5)'s and 245.50's use of the phrases "good faith" and "reasonable under the circumstances" does not, for 30.30 purposes, excuse a mistake in not providing discovery where the mistake could have been avoided through the exercise of due diligence and with reasonable inquires. CPL 245.50 (trial readiness provision) unequivocally conditions trial readiness on the exercise of "due diligence" to provide discovery: 245.10 (1) permits the certificate of compliance

to be filed only after the prosecution has exercised due diligence and made all reasonable inquiries to disclose and 245.50 (3) makes lost, destroyed, or otherwise unavailable material exempt only to the extent that the prosecution has acted diligently, reasonable, in good faith to make the material available. (*See People v Rodriguez*, 73 Misc 3d 411 [Sup Ct, Queens County 2021]; *People v Cano*, 71 Misc 3d 728, 733-734 [Sup Ct, Queens County 2020]; *People v Adrovic*, 69 Misc 3d 563, 570 [Crim Ct, Kings County 2020].)

- **Lack of prejudice irrelevant:** The lack prejudice is irrelevant to whether the prosecution's failure to provide the require discovery renders it unready for trial (*see People v Adrovic*, 69 Misc 3d 563, 574-575 [Crim Ct, Kings County 2020]). This is apparent from both the plain language of the applicable provisions and the purpose and the spirit of the new discovery rules. CPL 245.50 carves out exceptions to trial readiness-discovery link – lost or destroyed material or material covered by an order of protection. But notably omitted from list is lack of prejudice. Moreover, the objective of Article 245 is to require discovery compliance automatically, without regard to whether the prosecution, the court, or even the defendant think the any material is helpful to the defense (*see* CPL 245.20 ["Automatic discovery"], setting forth a list of items the People must "automatically" provide, irrespective of whether the items might be relevant or helpful to the defense.

- **Pre-arraignment:** The prosecution can be ready for trial prior to the defendant's arraignment on the indictment, as arraigning the defendant is the court's function (*England*, 84 NY2d 1; *People v Price*, 234 AD2d 973 [4th Dept 1997]). However, where the prosecution has secured an indictment so late in the statutory period that it is impossible to arraign the defendant within the period, the statement of readiness prior to arraignment is but illusory (*People v Goss*, 87 NY2d 792 [1996]).

- **Two day rule:** Defendant can be arraigned within the prescribed period only if the indictment was filed at least two days before expiration of the period (CPL 210.10 [2]). Therefore, for the prosecution's pre-arraignment announcement of readiness to be effective, the prosecution must have indicted the defendant at least two days before the time period has expired (*Carter*, 91 NY2d 795]; *People v Freeman*, 38 AD3d 1253 [4th Dept 2007]; *People v Gause*, 286 AD2d 557 [3d Dept 2001]).

- **Subsequent statement of not ready**: After the prosecution has announced ready, its subsequent statement that it is not ready for trial does not necessarily mean that it was not previously ready for trial, as it had claimed (*see People v Pratt*, 186 AD3d 1055 [4th Dept 2020]). Generally, it can be said that the prosecution was not previously ready only if it is shown that its announcement of readiness was made in bad faith or did not reflect an actual present state of readiness (*People v Santana*, 233 AD2d 344 [2d Dept 1996]; *People v South*, 29 Misc 3d 92 [App Term 2010]).

- **Off-calendar declaration of readiness and a request for an adjournment at next court appearance:** Prior to the 2020 amendments to CPL 30.30, the Court of Appeals held that such an off-calendar declaration of readiness is generally "presumed truthful and accurate," despite the subsequent request for an adjournment, though could be rebutted "by a defendant's demonstration that the People were not, in fact ready at the time the statement was filed" (*Brown*, 28 NY3d at 399-400). A 2020 amendment to 30.30, new subdivision 5, however, deems any declaration of readiness invalid unless the court inquires into the accuracy and truthfulness of the off-calendar readiness declaration.

    - **Defendant's burden:** Once the court has conducted such an inquiry, "[t]he defendant then bears the ultimate burden of demonstrating, based on the People's proffered reasons and other relevant circumstances, that the prior statement of readiness was illusory" (*Brown*, 28 NY3d at 400).

- **Subsequent unavailability of evidence:** If, after the announcement of readiness, the prosecution requests an adjournment to obtain additional evidence, the statement of readiness will be considered illusory unless the prosecution can show that, at the time of its statement of readiness, the evidence was available or its case, at the time, did not rest on the availability of the additional evidence (*see People v Sibblies*, 22 NY3d 1174, 1181 [2014] [Graffeo, J., concurring]; *People v Bonilla,* 94 AD3d 633, 633 [1st Dept 2012]).

▪ **Impediments to actual readiness:**

- **Court determination that prosecution is not in fact ready *NEW* (CPL 30.30 [5]):** The prosecution will be deemed unready for trial if the court determines, after conducting the statutorily required inquiry, that the prosecution is not ready for trial.

- **Failure to meet disclosure requirements of CPL Article 245 *NEW* (CPL 30.30 [5]; CPL 245.50).**

- **Prosecution requested adjournment:** The prosecution will be deemed unready upon its request for an adjournment, for the period it specifically requested or, absent a specified request, until it announces its readiness (*People v Stirrup,* 91 NY2d 434, 440 [1998]; *People v People v Cajigas***,** 224 AD2d 370, 371 [1st Dept 1996])

- **Local court accusatory instrument's lack of compliance with the misdemeanor accusatory instrument requirements of CPL 100.15 and 100.40 (CPL 30.30 [5-a]):** The prosecution will not be ready for trial where local court accusatory contains a count that does not comply with the misdemeanor accusatory instrument requirements of CPL 100.15 and 100.40 unless such count has been dismissed.

- **Indictment not yet filed:** The prosecution is not ready

for trial when the indictment has been voted by the grand jury but has not yet been filed with the clerk of the court (*People v Williams*, 32 AD3d 403 [2d Dept 2006]; *People v Gause*, 286 AD2d 557 [3d Dept 2001]).

- **Failure to provide grand jury minutes for inspection:** The prosecution can't be ready for trial where it has failed to provide grand jury minutes necessary to resolve a motion to dismiss (*People v McKenna*, 76 NY2d 59 [1990]; *People v Harris*, 82 NY2d 409 [1993]; *see also People v Miller*, 290 AD2d 814 [3d Dept 2002] [the time chargeable to prosecution, attributable to post-readiness delay in producing grand jury minutes, commences with date defendant moved for inspection of grand jury minutes]).

- **Failure to produce an incarcerated defendant:** The prosecution is not ready for trial when it has failed to produce a defendant incarcerated in another county or state (*People v England*, 84 NY2d 1, 4 [1994]).

- **Failure to file a valid accusatory:** The prosecution cannot be ready for trial if the accusatory is invalid, for the defendant may not be tried on an invalid accusatory, unless the defendant has waived his right to be tried on a valid accusatory instrument (*see People v Weaver*, 34 AD3d 1047, 1049 [3d Dept 2006]; *People v McCummings*, 203 AD2d 656 [3d Dept 1994]; *see also People v Ramcharran*, 61 Misc 3d 234, 237 [Crim Ct, Bronx County 2018] [accusatory failed to allege correct location of offense]; *People v Reyes*, 60 Misc 3d 245, 250 [Crim Ct, Bronx County 2018 [prosecution not ready because it failed to serve a certificate of translation of deposition of non-English speaking complainant]; *People v Friedman*, 48 Misc 3d 817 [Crim Ct, Bronx County 2015] [prosecution unready because information failed to state non-hearsay allegations establishing each element]; *People v Walsh*, 17 Misc 3d 480 [Crim Ct, Kings County 2007] [prosecution not ready because of absence of the docket number on the complainant's corroborating

affidavit converting the misdemeanor complaint to a misdemeanor information; the failure to include the docket number is a facial, as opposed to a latent, defect]; *People v Maslowski*, 187 AD3d 1211 [2d Dept 2020] [where the complainant is non-English speaking and a certificate of translation does not accompany the information]).

- **Misdemeanor complaints:** The prosecution cannot be ready for trial until the misdemeanor complaint has been properly converted to an information, unless prosecution by information has been waived (*People v Gomez*, 30 Misc 3d 643, 651 [Sup Ct 2010]; *People v Gannaway*, 188 Misc 2d 224 [Crim Ct, Broome County 2000] [field tests conducted were insufficient to convert complaint into a prosecutable information and thus the People were not ready for trial]; *People v Peluso*, 192 Misc 2d 33 [Crim Ct, Kings County 2002] [it has been held that the prosecution cannot be ready where it has converted some but not all of the charges of a misdemeanor complaint into a misdemeanor information]).

- **Jurisdictionally defective accusatory:** A defendant does not waive his or her right to be prosecuted by jurisdictionally valid accusatory (i.e. one that alleges each element of the offense charged [s*ee People v Casey*, 95 NY2d 354, 366 (2000)]) simply by failing to move to dismiss the accusatory on the ground that the accusatory is jurisdictionally defective (*see People v Hatton*, 26 NY3d 364 [2015], *revg* 42 Misc 3d 141 [A] [App Term 2014]). This means that the prosecution cannot be ready on a jurisdictionally defective accusatory regardless of whether a motion to dismiss on defectiveness grounds has been made.

- **Accusatory with non-jurisdictional defect:** A trial level court has ruled that the prosecution's announcement of readiness on an accusatory having

a non-jurisdictional defect (one resting upon hearsay allegations) can be effective where the defendant failed to move to dismiss the information as defective, reasoning that by failing to make the motion to dismiss, the defendant thereby "waived" his right to be prosecuted by information supported by non-hearsay allegations (*see People v Davis*, 46 Misc 3d 289 [Ontario County Ct 2014]; *see also People v Wilson*, 27 Misc 3d 1049 [Crim Ct, Kings County 2010] [defendant cannot lie in wait, first raising a challenge to the accusatory instrument in the 30.30 motion, after the time period has expired]). The soundness of the ruling is subject to debate, however. It relies upon *People v Casey* (95 NY2d 354 [2000]) to support the notion that a defendant's failure to move to dismiss the accusatory serves as a waiver of the right to be prosecuted by information supported by non-hearsay allegations. *Casey*, however, held only that by failing to move to dismiss the accusatory, the defendant "waived" *appellate review* of his complaint that the accusatory rested upon hearsay allegations; in other words, the defendant failed to *preserve* the issue for appellate review (*see* CPL 470.05 [2], 470.35). *Casey* does not appear to have held that the defendant literally waived (or knowingly relinquished) his right to be prosecuted by an information resting on non-hearsay allegations.

- **Unawareness of key witness's whereabouts:** the prosecution is not ready for trial when it is unaware of the whereabouts of an essential witness and would be unable to locate and produce the witness on short notice (*People v Robinson*, 171 AD2d 475 [1st Dept 1991]).

- **Non-impediments to readiness:**

  - **Prosecution's inability to make out a prima facie case on some – but not all – counts:** The prosecution can be

ready for trial if it can make out a prima facie case on one or some, but not all, of the charged offenses (*see e.g. People v Sibblie*s, 98 AD3d 458 [1st Dept 2012], *revd on other grounds* 22 NY3d 1174 [2015]; *People v Bargerstock*, 192 AD2d 1058 [4th Dept 1993] [prosecution ready despite unavailability of lab results of rape kit]; *People v Hunter*, 23 AD3d 767 [3d Dept 2005] [same]; *People v Cole*, 24 AD3d 1021 [3d Dept 2005] [prosecution ready for trial despite its motion for a buccal swab of defendant for DNA analysis]; *People v Carey*, 241 AD2d 748 [3d Dept 1997] [prosecution ready despite the unavailability of drug lab results]; *People v Terry*, 225 AD2d 306 [1st Dept 1996] [prosecution can be ready for trial when unavailable evidence is necessary proof for some but not all charged offenses]; *but see People v Mahmood*, 10 Misc 3d 198 [Crim Ct, Kings County 2005] [criminal charge subject to dismissal where the prosecution not ready on the criminal charge but ready on traffic infractions charged in the same accusatory]).

- **Court congestion:** The prosecution can be ready for trial if its only impediment to proceeding to trial is court congestion (*People v Smith*, 82 NY2d 676 [1993]; *People v Figueroa*, 15 AD3d 914 [4th Dept 2005]).

- **Unawareness of witness's current location:** It has been held that the prosecution can be ready for trial even though it is unaware that its key witness has changed jobs, so long as it could readily learn of the witness's whereabouts and secured his attendance at trial within a few days; the prosecution is not required to contact its witnesses on each adjourned date or be able to produce its witnesses at a moment's notice (*People v Dushain*, 247 AD2d 234 [1st Dept 1998])

- **Failure to move to consolidate indictments:** The prosecution can be ready for trial notwithstanding that it hasn't yet moved to consolidate indictments (*People v Newman*, 37 AD3d 621 [2d Dept 2007]).

- **Amendment of indictment:** The fact that the prosecution has moved to amend the indictment does not render the prior announcement of readiness illusory (*People v Niver*, 41 AD3d 961 [3d Dept 2007]).

- **The superseding of a valid indictment:** The mere fact that an indictment has been superseded does not mean that the original indictment was invalid or that the prosecution was not ready for trial until the filing of the new indictment (*People v Stone*, 265 AD2d 891 [4th Dept 1999]).

➢ EXCLUDABLE TIME

- **In general:** Certain periods – identified by statute (CPL 30.30 [4]) – are excluded from the time calculation. Only those periods falling within the specified exclusions qualify. Any period during which the 30.30 clock is ticking will be considered in determining excludable time. Therefore, where the action commences with the filing of an accusatory that is subsequently replaced by a new accusatory, the period to be considered for exclusion begins with the filing of the original accusatory, so long as the new accusatory directly derives from the initial one. This is true even if the new accusatory alleges different charges. (*People v Farkas*, 16 NY3d 190 [2011]; *People v Flowers*, 240 AD2d 894 [3d Dept 1997].)

- **Delay "resulting from" requirement:** Many – but not all – of the excludable time provisions will permit exclusion of periods of delay only when the delay at issue "results from" a particular circumstance (e.g. other proceedings concerning the defendant, the defendant's absence or unavailability, the detention of the defendant in another jurisdiction, or "exceptional circumstances"). By their express language, those excludable time provisions do not allow for exclusion of delay where the particular circumstance at issue (e.g. the defendant's absence or unavailability or "other proceeding") is not the cause of the delay at issue (*see People v Sturgis*, 38 NY2d 625 [1976] [partially abrogated by legislative amendment]; *People v Anderson*, 66 NY2d 529, 536 [1985] ["with respect to postreadiness delay it is the People's delay alone that is to be considered, except where that delay directly 'results from' action taken by the defendant within the meaning of subdivisions 4 (a), 4(b), 4(c) or 4(e), or is occasioned by exceptional

circumstances arising out of defendant's action within the meaning of subdivision 4(g), for otherwise the *causal relationship* required by those subdivisions is not present" (emphasis added)]; *People v Bolden*, 174 AD2d 111, 114 [2d Dept 1992] [explaining that *Sturgis* strictly construed the "resulting from" language, prompting a legislative change only with respect to Subdivision 4 (c), to eliminate the "resulting from" requirement where a bench warrant has been issued for an escaped or absconding defendant]; *see also People v Callender*, 101 Misc 2d 958, 960 [Crim Ct, New York County 1979] ["The *Sturgis* case therefore stands for the proposition that, in order for time to be excludable as resulting from the defendant's conduct, such conduct must have contributed to the failure of the People to answer that they were ready for trial"]).

- **Example:** Where the prosecution's delay in preparedness is due only to the defectiveness of an accusatory (and is no fault of the defendant), exclusion of periods of delay should not be permitted under any of the excludable time provisions requiring that the delay in readiness "result from" a particular circumstance.

- **Chargeability of period:** During any given period, there may be multiple, overlapping types of delay – for instance, the delay in responding to motions to suppress, the delay in filing a valid accusatory instrument, or the delay in providing discovery. Some types of delay may result from an "other proceeding concerning the defendant" while other types of delay, occurring over the same period, may not. Only where all delay during such a period is excluded will the period not be charged to the prosecution. For example, during any given period, there may be delay in responding to motions and delay in filing a valid accusatory instrument. The delay in responding to motions may be excludable as resulting from the defendant's pretrial motions but the delay in filing a valid accusatory, occurring over the same period, will not be excludable as such delay does not result from the defendant's pretrial motions. The period is thus chargeable to the prosecution. (*see People v Callender*, 101 Misc 2d at 960.)

- **Where causal relationships are not required:** There are a number of excludable time provisions that permit exclusion of periods due to a particular circumstance without regard to whether the particular

circumstances caused the delay at issue (*see* 30.30 [4] [c] [ii], [d], [h], [i], [j]; *see also People v Bolden*, 81 NY2d 146, 151-152 [1993] [partially abrogated by legislative amendment]; *People v Kanter*, 173 AD2d 560, 561 [2d Dept 1991] [some periods during which a jurisdictionally defective accusatory is in place may be excludable]; *People v Flowers*, 240 AD3d 894 [3d Dept 1997] [same]). Such periods are per se not chargeable to the prosecution, irrespective of whether the delays occurring during that period can be attributable to actions of the defendant.

- **Requested or consented to adjournments (4 [b]):** The Court of Appeals has held that where the defendant has requested or consented to an adjournment, the defendant waives charging the prosecution with the delay, regardless of whether the adjournment causes the prosecution's delay in readiness. This is so notwithstanding the provision's language entitling the prosecution to exclusion of delay "resulting from" continuances consented to, or requested by, the defendant. The Court of Appeals' interpretation of 4 (b), in contravention of the provision's plain language, rests on the principle of estoppel or waiver. (*People v Worley*, 66 NY2d 523 [1985]; *see also People v Kopciowski*, 68 NY2d 615, 617 [1986] [Where adjournments are allowed at defendant's request, those periods of delay are expressly waived in calculating the prosecution's trial readiness, without the need for the People to trace their lack of readiness to defendant's actions].)

o **Excludable time provisions**

- **"Other proceedings" (30.30 [4] [a]):** Periods of "reasonable" delay "resulting from" "other proceedings concerning the defendant," including pretrial motions, are excludable.

  - **"Resulting from" requirement:** The period during which other proceedings are pending is excludable only to the extent that the prosecution's delay in readiness *results* from the other proceeding (*see e.g. People v Roscoe,* 210 AD2d 1003, 1004 [4th Dept 1994] [where the People were not ready because they failed to provide grand jury minutes to the court for inspection, the period during

which the defendant's *Wade* motion was pending was not excludable as it did not cause the delay in prosecution's readiness]; *People v Rodriguez*, 214 AD2d 1010, 1010 [4th Dept 1995]).

- An "other proceeding" may be said to result in delay even if the other proceeding did not necessarily prevent the prosecution from becoming ready, if it can be shown that the prosecution might have been wasting time or resources by getting ready for trial during the pendency of the other proceeding (*People v Dean*, 45 NY2d 651, 658 [1978]).

- **Particular delay**

  - **Delay in responding to defendant's motion to suppress:** The prosecution cannot be ready for trial until it has responded to the defendant's pretrial motions and presented its witnesses at any ensuing hearing. It has not done everything it needs to do to bring the case to a point that it can be tried. Such delay is excludable as "resulting from" the defendant's pretrial motions to the extent that the delay is "reasonable."

  - **Delay in providing grand jury minutes to the court for inspection:** Where the defendant has moved for inspection of the grand jury minutes, the prosecution cannot be ready for trial until it has provided the grand jury minutes to the court for inspection (*People v McKenna*, 76 NY2d 59). Reasonable delay in doing so is excludable from the calculation as resulting from the defendant's pretrial motion challenging the grand jury proceedings (*People v Jones*, 235 AD2d 297 [1st Dept 1997]).

- ***Delay in providing discovery for filing a proper* certificate of compliance**

  - **20 or 35-day grace period to provide discovery:** Any delay in providing discovery, as required under Art. 245, including the 20 or 35 day grace period, is *not* be excludable under 4 (a) (*see People v* People ex rel. Ferro v Brann**,** 197 AD3d 787 [2d Dept 2021]; *Quinlan,* 71 Misc 3d 266). Art. 245 obligations are a self-executing requirement for readiness (like the filing of a valid accusatory, the testing of evidence, or the locating of a key witness) and thus do not result from an "other proceeding." Indeed, the discovery obligations are no longer triggered by a demand or a pretrial motion (*see* 245.20 ["automatic discovery]). What is more, 4 (a) requires that the "other proceeding" (e.g. motion, demand, bill of particulars request, appeal) *result* in the delay at issue (*People v Otero*, 70 Misc 3d 526, 530 [Albany City Ct 2020] ["Many of the CPL § 30.30 exclusions, however, deal with delays that have no impact on the People'ss ability to provide discovery. For example, delays relating to defense motion practice (CPL § 30.30[4][a]), joinder issues (CPL § 30.30[4][d]), and the out-of-jurisdiction detention of defendants (CPL § 30.30[4][e])]"). Where the delay at issue is the delay in providing discovery, it is not the discovery obligations that are responsible for the delay. To the contrary, Art. 245 requires the prosecution to provide discovery expeditiously, as soon as practicable. "The [20 or 35] days is a deadline for discovery compliance at the risk of sanctions, it is not a grace period or a tolling of the speedy trial clock. The wording of the

statute does not provide for any phase-in or grace period before the People answer ready. If it were the intention of the legislature to offer a grace period to the prosecution, they would have done so" (*People v Villamar*, 69 Misc 3d 842, 849 [Crim Ct 2020] [internal quotation marks omitted]).

- **Omnibus motions:** The filing of an omnibus motion should not result in exclusion of any delay in providing discovery or filing a certificate of compliance. This is so because the delay at issue (the delay in providing discovery or filing a proper CoC) does not "result from" the filing of the motions (*Otero*, 70 Misc 3d at 530). The obligation to provide discovery is automatic and independent of any pretrial motion. And the filing of pretrial motions does not interfere with the prosecution promptly providing discovery or filing a proper certificate of compliance or give it reason to delay discovery compliance (*see People v Roscoe,* 210 AD2d at 1004).

o **Delay in filing a valid accusatory instrument:** Such delay *should not* be excludable pursuant to 4 (a) because the delay does not stem from an "other proceeding" – e.g. the motion to suppress or dismiss. No other proceeding causes the prosecution to delay filing the valid accusatory instrument.

o **Additional time necessary to prepare for trial as a result of the decision on pretrial motion:** Such delay may be excludable (*People v Patel*, 160 AD3d 530, 530 [1st Dept 2018] [excludable period included "reasonable time to prepare after the court's decision on defendant's pretrial motion, where the court had dismissed, with leave to re-

present, the second count of the indictment and adjourned for a control date"]; *People v Davis*, 80 AD3d 494 [1st Dept 2011] [additional time needed to prepare as the result of the granting of a consolidation motion]; *People v Ali*, 195 AD2d 368, 369 [1st Dept 1993] ["With regard to the 39-day adjournment granted to the People to prepare for trial after the denial of defendant's first CPL 30.30 motion, inasmuch as the present case involved numerous defendants and has some evidentiary peculiarities, such period, while arguably too lengthy, cannot be said to have been unreasonable").

- **30-day period following indictment dismissal:** 30 days following the issuance of an order dismissing an indictment or reducing a count of the indictment may be excludable since the effect of the order is stayed for 30 days following the entry of that order (*see* CPL 210.20 [6]).

- **Defendant's testimony before grand jury:** Reasonable delay resulting from need to accommodate defendant's request to testify before grand jury is excludable (*People v Casey*, 61 AD3d 1011 [3d Dept 2009]; *People v Merck*, 63 AD3d 1374 [3d Dept 2009]).

- **"Other proceedings"**

  - **Pretrial motions in general**: The prosecution is entitled to exclude from the time calculation *reasonable* delay resulting from the filing of pretrial motions, including motions to suppress and motions to dismiss. In some instances, the prosecution is entitled to exclude delay caused by the defendant's mere expressed intention to file a motion (*People v Brown*, 99 NY2d 488 [2003]). The time excluded is "the period during which such matters are under consideration"; however, only delay that is

reasonable may be excluded (30.30 [4] [a]; *People v Inswood*, 180 AD2d 649 [2d Dept 1992]).

- **Resulting from requirement:** The pretrial motion will trigger excludable delay only if the motion pretrial motion *results* in the delay at issue.

- **Reasonableness requirement:** The prosecution cannot exclude delay caused by its "abject dilatoriness" in responding to the defendant's motion and in preparing for hearing (*People v Reid*, 245 AD2d 44 [1st Dept 1997]).

    - Delay of over a year in making motion to reargue suppression motion unreasonable and not excludable (*People v Ireland*, 217 AD2d 971 [4th Dept 1995]).

    - Approximately half of the two-month delay resulting from the prosecution's preparation for a suppression hearing was held to be unreasonable (*People v David*, 253 AD2d 642 [1st Dept 1998]).

    - Only 35 of 54 days of delay associated with the defendant's pretrial motions were excludable since 14 of the days it took the prosecution to respond to pretrial motions was reasonable and only 21 of the days it took the court to decide the motion was reasonable delay (*People v Gonzalez*, 266 AD2d 562 [2d Dept 1999]).

o **Motions to terminate prosecution pursuant to CPL 180.85:** The period during which such

motions are pending is *not* excludable (*see* CPL 180.85 [6]).

- **Motion to challenge to the certification of compliance with discovery obligations (CPL 245.50 [4]).** Where the prosecution is unready because it has failed to comply with its discovery obligations, any period associated with a motion brought to challenge the prosecution's certificate of compliance with discovery obligations should not be excludable. That motion does not "result" in the delay at issue – the delay in providing of discovery or the delay in filing a proper certificate of compliance. Rather, the converse is true. The delay (the period during which the prosecution has failed to comply with the discovery obligations) results in the defendant's motion challenging the certification (*see People v Roscoe,* 210 AD2d at 1004; *Otero*, 70 Misc 3d at 530)

- **Motion for inspection of grand jury minutes**: The prosecution may exclude a reasonable period necessary to obtain and inspect grand jury minutes (*People v Beasley*, 69 AD3d 741 [2d Dept 2010], *affd on other grounds*, 16 NY3d 289 [2011]; *People v Del Valle*, 234 AD2d 634 [3d Dept 1997]).

    - **Unreasonable delay:** It has been held that a four-month delay in providing grand jury minutes is unreasonable and thus not entirely excludable (*People v Johnson*, 42 AD3d 753 [3d Dept 2007]).

- **Motions to dismiss/reduce**: The period from defendant's filing of omnibus motion seeking dismissal of indictment until date of dismissal may be excludable except to the extent that the motion has not caused the delay at issue (*People v Roebuck*, 279 AD2d 350 [1st Dept 2001]). If the delay at issue is the delay in filing a valid accusatory

instrument, then the motion to dismiss cannot be said to have resulted in the delay and the period during which the motion is pending should not be excludable.

- **Prosecution's affirmation to reduce felony charge:** It has been held that such affirmation is not a pretrial motion (i.e. other proceeding involving the defendant) and its filing does not result in excludable time pursuant to CPL 30.30 (4) (a) (*People v Thomas*, 59 Misc 3d 64 [App Term 2018]).

- **Suppression motions**: Reasonable delay resulting from defendant's motion to suppress is excludable (*People v Hernandez*, 268 AD2d 344 [4th Dept 2000]). Nevertheless, it can be argued that a motion to suppress will not *result* in *reasonable* delay, and thus the period during which the motion is under consideration is not excludable, where the motion to suppress does not prevent the prosecution from both preparing for the suppression hearing and getting ready for trial or where, in light of the nature of the evidence sought to be suppressed, it would not be a waste of the prosecution's time to simultaneously prepare for the suppression hearing and get ready for trial.

- **Prosecution's motions:** Excludable time includes period of reasonable delay *resulting* from the prosecution's pretrial motions (*People v Sivano*,174 Misc 2d 427 [App Term 1997]; *People v Kelly*, 33 AD3d 461 [1st Dept 2006] [period during which prosecution's motion to consolidate is pending held to be excludable]).

- **Codefendant's motions**: Periods of delay resulting from motions made by codefendant may be excludable (*People v Durette*, 222 AD2d 692 [2d Dept 1995]).

- **Defendant's motions in unrelated case**: Delay due to defendant's motion in unrelated case against defendant, or, in some instances, mere announced intention to file motion, may be excludable (*People v Brown*, 99 NY2d 488 [2003]).

- **Appeals:** Reasonable delay associated with appeals, whether the defendant's or the prosecution's, is excludable under CPL 30.30 (4) (a).

    - **Period to be excluded:** Period between the prosecution's filing notice of appeal from an order dismissing indictment and appellate ruling reinstating that indictment is excludable, but the period between dismissal and the filing of the notice of appeal is not necessarily excludable (*People v Holmes*, 206 AD2d 542 [2d Dept 1994]; *People v Vukel*, 263 AD2d 416 [1st Dept 1999]).

    - **Reasonableness of the delay:** The prosecution may not exclude the entire period of delay due to its appeal if it's dilatory in perfecting the appeal (*People v Muir*, 33 AD3d 1058 [3d Dept 2006]; *People v Womak*, 263 AD2d 409 [1st Dept 1999]). It has been held that the delay in perfecting an appeal to await a decision of the Court of Appeals that would resolve the issue on appeal is excludable as "reasonable" (*People v Barry*, 292 AD2d 281 [1st Dept 2002]).

    - **The period following an order granting a new trial has become final will not automatically be excludable:** Pursuant to CPL 30.30 (5) (a), a new criminal action will be said to have commenced when the intermediate appellate court's order granting

a new trial has become final, typically when a judge of the Court of Appeals has denied the People leave to appeal (*see People v Wells*, 24 NY3d 971 [2014]). The period immediately following the commencement of this new criminal action will not be automatically excluded as a period of delay associated with the defendant's appeal. It will only be excluded if the prosecution establishes on the record justification for the post-appeal delay. (*Wells*, 24 NY3d 971.)

- **Trial on another case:** Reasonable delay resulting from trial of defendant on another indictment is excludable (*People v Oliveri*, 68 AD3d 422 [1st Dept 2009]; *People v Hardy*, 199 AD2d 49 [1st Dept 1993]).

- **Psychiatric evaluation of defendant:** The period of delay resulting from the prosecution's psychiatric evaluation of a defendant raising an insanity defense is excludable as delay resulting from "other proceedings" (*People v Jackson*, 267 AD2d183 [1st Dept 1999]).

- **Defense requested or consented to continuances (30.30 [4] [b]):** This provision renders excludable delay resulting from a continuance granted by the court at the request, or with the consent, of the defendant or his counsel. The provision permits exclusion only if the court has granted the continuance "satisfied that the postponement is in the interest of justice, taking into account the public interest in the prompt dispositions of criminal charges."

  - **Court ordered:** Adjournments are excludable only if court ordered (*People v Suppe*, 224 AD2d 970 [4th Dept 1996]). Thus, the period under which plea negotiations are ongoing is not excludable under this subdivision unless the court has ordered the case continued for that purpose (*People v Dickinson*, 18 NY3d 835 [2011]).

- **Interests of justice**: Adjournments are excludable only if ordered in the interests of justice. (CPL 30.30 [4] [b] ["The court may grant such a continuance only if it is satisfied that the postponement is in the interest of justice"]; *People v Rivas*, 78 AD3d 739 [2d Dept 2010] [holding that an adjournment was not excludable for 30.30 purposes, though court-ordered and expressly consented to by the defendant, because, as the trial court found, the adjournment had not been ordered to further the interests of justice]).

- **Consent or request**: Adjournments are excludable only if consented to or requested by the defendant or counsel (*Suppe*, 224 AD2d 970; *see also People v Coxon*, 242 AD2d 962 [4th Dept 1997] [adjournment not excludable where defendant initially requested adjournment for mental health evaluation; trial court stated that it would grant adjournment only on condition that defendant waive presentment before grand jury; defendant was unwilling to waive that right; and court adjourned the matter without setting another appearance date]).

    - **Clearly expressed:** The defendant will be deemed to have consented to or requested the adjournment only if the request or consent was "clearly expressed by the defendant or defense counsel" (*People v Liotta*, 79 NY2d 841 [1992]; *People v Collins*, 82 NY2d 177 [1993]). It is not enough for the prosecution to make the unsubstantiated claim that the adjournment was "agreed to" or "understood" (*People v Smith*, 110 AD3d 1141, 1143 [3d Dept 2013]).

    - **Failure to object**: The defendant's failure to object to adjournment does not equate to consent (*People v Liotta*, 79 NY2d 841 [1992]; *People v Collins*, 82 NY2d 177 [1993]; *People v Alvarez*, 194 AD3d 618 [1st Dept 2021]).

- **Assertions approving the particular adjourn date:** Defense counsel's statement to the court that a particular adjournment date was "fine" does not constitute consent to the adjournment (*People v Barden*, 27 NY3d 550 [2016]; *People v Brown*, 69 AD3d 871 [2d Dept 2010]; *People v Nunez*, 47 AD3d 545 [1st Dept 2008]; *cf. New York v Hill*, 528 US 110 [2000]).

- **On the record:** Defendant's request for or consent to the adjournment, and the basis for the adjournment, must be on the record (*People v Liotta*, 79 NY2d 841 [1992]; *People v Bissereth*, 194 AD3d 317, 319 [1st Dept 1993]). The onus is upon the prosecution to ensure that the record reflects that the defendant requested or consented to the adjournment on the record (*People v Robinson*, 67 AD3d 1042 [3d Dept 2009]).

- **Defense request for adjournments beyond that initially requested by the prosecution:** Where the prosecution initially requests an adjournment to a specific date, and defense counsel does not expressly consent to that adjournment but, because of counsel's unavailability on that date, requests a later date, the period between the adjourn date requested by the prosecution and the date requested by defense counsel will be excludable *if defense counsel does more than state that he or she is unavailable and instead requests additional time and explains why additional time is needed* (*Barden*, 27 NY3d at 554-555).

- **Adjourn dates set beyond the date requested by either the prosecution or the defense:** Where the court sets the next court date beyond the adjourn date requested by either the prosecution or the defendant, the period beyond the date requested will not be excludable unless defense counsel has clearly expressed consent to the entire adjourned period. Defense counsel's ambiguous statement in response to the adjourn date set by the court – "that's fine" – will not be sufficient to charge the defendant with that additional period. (*Barden*, 27 NY3d at 555-556).

- **Dismissed case**: Defendant is without power to consent to an adjournment of a case that has been terminated by an order of dismissal (*People v Ruparelia*, 187 Misc 2d 704 [Poughkeepsie City Ct 2001]).

- **Defendant-requested delay of indictment**: It has been held that defense counsel's request to delay filing of indictment directly affected the prosecution's readiness, the period is excludable as an adjournment requested by defendant (*People v Greene*, 223 AD2d 474 [1st Dept 1996]). That holding cannot be reconciled with the plain language of the statute, stating that only delay resulting from a continuance "granted by the court" is excludable (*Suppe*, 224 AD2d 970 [4th Dept 1996]; *see also Dickinson*, 18 NY3d 835).

- **Co-defendant's request**: Adjournment requested by co-defendant is excludable where the defendant and co-defendant are tried jointly (*People v Almonte*, 267AD2d 466 [2d Dept 1999]).

- **Defendant who is without counsel:** "A defendant who is without counsel must not be deemed to have consented to a continuance unless he has been advised by the court of his [30.30] rights . . . and the effect of his consent" (CPL 30.30 [4] [b]).

    - Such advisement "must be done on the record in open court" (*id.*).

- **No *resulting* delay required:** While this statutory provision states that the prosecution is entitled to exclusion of "delay" "resulting" from the continuance, the Court of Appeals has held that the prosecution is not required under this provision to show that the continuance actually delayed its readiness for trial. The Court of Appeals has held that where the defendant has requested or consented to an adjournment, the defendant waives

chargeability of the delay, regardless of whether there is a causal link between the adjournment and the prosecution's lack of readiness: the 4 (b) excludable time provision rests generally on theories of estoppel or waiver (*People v Worley*, 66 NY2d 523 [1985]; *see also People v Kopciowski*, 68 NY2d 615, 617 [1986] ["Where adjournments are allowed at defendant's request, those periods of delay are expressly waived in calculating the People's trial readiness, without the need for the People to trace their lack of readiness to defendant's actions"]).

- **Delay due to the defendant's absence or unavailability (30.30[4] [c]):** The clock will stop ticking during the period of delay resulting from the defendant's failure to appear if it isshown that the defendant was "unavailable" or "absent."

  - **Absent**: "Absent" means that the prosecution is *unaware* of the defendant's location and the defendant is attempting to avoid apprehension or prosecution or that the prosecution is unaware of the defendant's location and his location cannot be determined with due diligence (CPL 30.30 [4] [c] [i]).

    - **Avoiding apprehension or prosecution**: The defendant's use of a different name in a subsequent arrest or flight to another jurisdiction may evince an intent to "avoid apprehension" (*People v Motz*, 256 AD2d 46 [1st Dept 1998]; *People v Williams*, 78 AD3d 160 [1st Dept 2010]; *People v Button*, 276 AD2d 229 [4th Dept 2000]).

    - **Incarcerated defendant**: A defendant may be "absent" due to his *unknown* incarceration, if the prosecution has exercised due diligence to locate him or if the defendant, while incarcerated on the other matter, continues to avoid prosecution (CPL 30.30 [4] [c] [i]). However, a defendant is not "absent" if the prosecution is aware of the defendant's incarceration or could have been made aware had it exercised due diligence (*People v*

Lesley, 232 AD2d 259 [1st Dept 1996]).

- **Incarceration under false name:** Where the defendant is incarcerated under a false name but the People have enough information to locate him despite his use of an alias, the defendant will not be considered "absent," assuming that the defendant, by giving the false name, was not attempting to avoid apprehension or prosecution (*Lesley*, 232 AD2d 259).

- **Unavailability:** A defendant is considered unavailable whenever his location is known and his presence cannot be secured even with due diligence.

- **Due diligence**: Due diligence means to exhaust all reasonable investigative leads (*People v Petrianni*, 24 AD3d 1224 [4th Dept 2005]; *People v Grey*, 259 AD2d 246 [3d Dept 1999]; *People v Walter*, 8 AD3d 1109 [4th Dept 2004]; *see also People v Devino*, 110 AD3d 1146, 1149 [3d Dept 2013] [police obligated to diligently utilize "available law enforcement resources" and cannot exclude the delay by relying on implicit "resource-allocation choices"]).

  - **Applicability:** The due diligence question comes into play when the prosecution seeks to exclude delay resulting from the defendant's absence or unavailability. If the prosecution has timely established its readiness for trial within the statutory period, and does not seek to have a period excluded because of the defendant's absence or unavailability, it does not matter whether the prosecution has exercised due diligence to locate or produce the defendant (*People v Carter*, 91 NY2d 795, 799 [1998]).

- **Examples of due diligence:**

  - authorities sent letters to defendant's last known address, repeatedly sought assistance of out-of-state authorities to locate the defendant in that state, and frequently sought information from New York and out-of-state DMV (*People v Petrianni*, 24 AD3d 1224 [4th Dept 2005]);

  - authorities tried to locate defendant, who was known to spend time in both Canada and Plattsburgh, by placing defendant's name in customs' computer (and thereby notified all points of entry); distributed defendant's photo to custom officials, border patrol, Plattsburgh police department, and Canadian authorities; obtained the help of elite squads of police to help locate defendant in Plattsburgh; looked for defendant in motels, malls, and bars known to be frequented by defendant; contacted defendant's relatives in the Plattsburgh area; and used a ruse to lure defendant into a bingo hall (*People v Delarounde*, 201 AD2d 846 [3d Dept 1994]);

  - authorities made visits to defendant's last known address, contacting defendant's relatives and neighbors, and thoroughly investigated all leads (*People v Garrett*, 171 AD2d 153 [2d Dept 1991]);

  - authorities repeatedly visited defendant's last known address, leaving cards with family members when informed that defendant was living on the street, and circulated wanted posters (*People v Lugo*, 140 AD2d 715 [2d Dept 1988]); and

- law enforcement went to defendant's last known home address repeatedly, twice visited defendant's aunt, looked for the defendant at locations he frequented, contacted defendant's last known employer, and checked with the DMV and social services (*People v Hutchenson*, 136 AD2d 737 [2d Dept 1988]).

- **Examples of due diligence lacking:**

  - authorities failed to check with the Department of Probation though the defendant was on probation (*People v Hill*, 71 AD3d 692 [2d Dept 2010]);

  - authorities failed to look for defendant at his mother's home, where he was known to spend nights (*In re Yusef B.*, 268 AD2d 429 [2d Dept 2000]);

  - law enforcement failed to locate the defendant who was incarcerated in a state facility under same name and NYSID number (*People v Ramos*, 230 AD2d 630 [1st Dept 1996]);

  - the government made sporadic computer checks while failing to check defendant's last known address (*People v Davis*, 205 AD2d 697 [2d Dept 1994]); and

  - the State Police confined their efforts to locate the defendant to within the assignment zone of their investigating unit and made unspecified efforts to locate the defendant through governmental agencies, including support collection (*People v Devino*, 110 AD3d at 1149).

- **Automatic exclusion provision**: Regardless of whether diligent efforts have been used to locate the defendant or whether the defendant's absence has caused the delay at issue, the defendant's absence will be excludable where the defendant has either escaped from custody or has failed to appear after being released on bail or his own recognizance, *provided* that the defendant is not held in custody on another matter and a bench warrant has been issued. The time excluded is the entire period between the day the bench warrant is issued and the day the defendant appears in court (CPL 30.30 [4] [c] [ii]; *People v Wells*, 16 AD3d 174 [1st Dept 2005]).

    - **In custody on another matter**: Pursuant to the plain and unambiguous language of this provision, there is no automatic exclusion during any period in which the defendant is being held in custody on another matter. However, that period will be excludable if the prosecution can show that it exercised due diligence to secure the incarcerated defendant's presence (*People v Bussey*, 81 AD3d 1276 [4th Dept 2011]; *People v Newborn*, 42 AD3d 506 [2d Dept 2007]; *People v Mane*, 36 AD3d 1079 [3d Dept 2007]; *see also* CPL 30.30 [4] [e] [excludable time includes "the period of delay resulting from detention of the defendant in another jurisdiction provided the district attorney is aware of such detention and has been diligent and has made reasonable efforts to obtain the presence of the defendant for trial"]).

        - **Contrary holdings:** Some courts have held otherwise and have interpreted the "in custody on another matter" language more narrowly. They have interpreted it to allow automatic exclusion of the period during which the defendant was incarcerated on another matter so long as the defendant was *not in custody at the time he first failed to appear and a bench warrant was issued*. If

the defendant was not in custody at the time the bench warrant was issued and was later taken into custody on another matter, the entire period between the issuance of the bench warrant and the defendant's eventual appearance in court is to be automatically excluded, even the time during which the defendant is in custody on the other matter (*see People v Mapp*, 308 AD2d 463 [2d Dept 2003]; *People v Howard*, 182 Misc 2d 549, 551-553 [Sup Ct 1999]; *People v Penil*, 18 Misc 3d 355 [Sup Ct]).

- **Knowledge of custody status:** It has been further held, however, that when authorities (either the police or he District Attorney) learn of the defendant's subsequent incarceration, the automatic exclusion provision no longer applies (and due diligence to secure the defendant's presence must be shown to establish the defendant's unavailability), whether or not the defendant was incarcerated at the time he first failed to appear and the bench warrant was issued (*see Mapp*, 308 AD2d at 464).

- **Delay resulting from defendant's incarceration in another jurisdiction:** Also excludable is the period of delay resulting from the defendant's detention in another jurisdiction, provided the People are aware of the defendant's detention and the People have been "diligent" and have "made reasonable efforts to obtain the presence of the defendant for trial" (CPL 30.30 [4] [e]). Such period may also be excludable due to the defendant's "unavailability" (CPL 30.30 [4] [c] [i]).

  - **Diligent and reasonable efforts requirement:** The prosecution may exclude delay under this provision only if it shows that the defendant's presence could not be

secured with due diligence. The prosecution, for instance, will not be permitted to exclude the delay if it merely filed a detainer to secure the defendant's presence (*People v Billups*, 105 AD2d 795 [2d Dept 1984]).

- **Futile steps:** However, the due diligence requirement does not mandate that the prosecution seek the defendant's presence where the use of the available procedures is shown to be futile. For instance, it has been held that the due diligence requirement is satisfied were the defendant is held in federal custody in another state, though the prosecution failed to secure defendant's presence through the use of a writ of habeas corpus, where it was shown that the federal government would not relinquish custody of the defendant until the defendant was sentenced (*People v Mungro*, 74 AD3d 1902 [4th Dept 2010], *affd* 17 NY3d 785 [2011]).

- **Defendant held on pending charges in another jurisdiction:** It has been held that the prosecution is not expected to request that the defendant be released to New York while charges are still pending in the other jurisdiction. It is enough that the prosecution is in regular contact with the other jurisdiction while the charges are still pending there. (*People v Durham*, 148 AD3d 1293 [3d Dept 2017]).

- **Federal custody:** Delay associated with the defendant's incarceration in a federal prison is excludable where it is shown that the defendant cannot be produced even with due diligence (*People v Clark*, 66 AD3d 1415 [4th Dept 2009]).

  - **Due diligence requirement:** Adjournments caused by the prosecution's repeated failure to produce defendant from federal custody are not excludable where the prosecution failed to pursue statutorily

prescribed methods for securing the defendant's presence (*People v Scott*, 242 AD2d 478 [1st Dept 1997]).

- **Writ of habeas corpus ad prosequendum:** The prosecution will not be said to have acted diligently and have used reasonable effort to secure a defendant in federal custody where it has not sought his production by way of a writ of habeas corpus ad prosequendum, pursuant to CPL 580.30 (*People v Scott*, 242 AD2d 478 [1st Dept 1997]), unless it shows that use of that procedure would have been futile due to the federal government's unwillingness to allow defendant's production (*People v Gonzalez*, 235 AD2d 366 [1st Dept 1997]).

- **Exceptional Circumstances (30.30 [4] [g])**: Delay caused by "exceptional circumstances" may be excluded:

  - **Court inquiry required "when a statement of unreadiness has followed a statement of readiness" *NEW*:** Under the 2020 amendment, "when a statement of unreadiness has followed a statement of readiness," the period of delay may be excluded as exceptional circumstance only where the court has inquired "as to the reasons for the … unreadiness" and there has been a showing "of sufficient supporting facts."

  - **Unavailability of a witness:** Delay due to the unavailability of a witness will be excludable; however, it is so only if the prosecution can show that it has exercised due diligence in securing the witness (*People v Douglas*, 47 Misc 3d 1218 [Crim Ct, Bronx County 2015]; *People v Zimny*, 188 Misc 2d 600 [Sup Ct 2001]).

    - **Necessity of witness:** Delay in presentment to the grand jury due to a witness's unavailability will be excludable only to the extent that the witness's

testimony was necessary to obtain an indictment (*People v Alvarez,* 194 AD3d 618 [1st Dept 2021]).

- **Disappearance of witness**: delay due to the prosecution's inability to locate a witness is excludable as an exceptional circumstance if the prosecution has exercised due diligence to locate the witness (*People v Thomas*, 210 AD2d 736 [3d Dept 1994]; *see e.g. People v Figaro*, 245 AD2d 300 [2d Dept 1997] [period of delay due to the complainant's disappearance was not excludable, where the prosecution, in an attempt to locate the complainant, made a single visit to the complainant's home and only a "few" phone calls]).

- **Witness's departure to another country**: Delay associated with a witness's departure to another country will be excludable if the prosecution has demonstrated due diligence to secure the witness's attendance – that is to say, "vigorous activity to make the witness available" (*People v Belgrave*, 226 AD2d 550 [2d Dept 1996]; *see e.g. People v Hashim,* 48 Misc 3d 532 [Crim Ct, Bronx County 2015] [prosecution failed to show that due diligence was exercised where the "complainant made no plans to come back to the United States until the [prosecution] gave him a 'firm' trial date"; the prosecution did not show it was unable, despite its best efforts, to schedule trial before the witness's departure or to secure his return; and on "more than one occasion . . . the [prosecution] could have told the witness either not to leave or to return to the United States in anticipation of one of the trial dates"]).

- **Deployment of witness in overseas military service**: Unavailability of key witness due to military deployment is excludable upon a showing of due diligence (*People v Onikosi*, 140 AD3d 516,

517 [1st Dept 2016]; *People v Williams*, 293 AD2d 557 [2d Dept 2002]).

- **Injury or illness of prosecution witness**: The injury or illness of a prosecution witness, rendering the witness unavailable, is an exceptional circumstance (*People v Womak*, 229 AD2d 304 [1st Dept 1996], *affd* 90 NY2d 974 [1997] [period during which arresting officer was unavailable due to maternity leave is excludable delay]; *People v McLeod*, 281 AD2d 325 [1st Dept 2001] [large and cumbersome cast in which officer's right arm was encased constituted a sufficiently restricting injury to qualify officer as medically unable to testify]; *People v Sinanaj*, 291 AD2d 513 [2d Dept 2002] [witness unavailability due to emotional trauma brought on by the crime is an exceptional circumstance]).

- **Police witness's unavailability due to participation in mandatory training:** Period during which the police witness is participating in a mandatory training program is excludable only if the prosecution has demonstrated due diligence to make the witness available. Thus, in *People v Friday* (160 AD3d 1052 [3d Dept 2018]), it was held that such a period could not be excluded as the prosecution made no effort to learn whether the witness could switch to another training program that did not conflict with the trial.

    - **Prosecution's burden**: "Although the prosecutor's representation is typically sufficient to establish the witness's unavailability due to medical reasons, due diligence is not satisfied when the prosecution merely states a naked (albeit valid) reason for the unavailability or rely on hearsay information from family members that the witness is unavailable" (*People v*

Douglas, 47 Misc 3d 1218 [Crim Ct, Bronx County 2015]).

- **Delay resulting from emergency or natural disaster, such as the Covid 19 pandemic.** However, delay will be excluded only to the extent that it is shown that the emergency impaired the People's ability to get ready, even with the exercise of due diligence (*see People ex rel Campbell v Brann*, 193 AD3d 669 [2d Dept 2021] [pandemic not a delay causing exceptional circumstance under the circumstances of the case]). For instance, if the prosecution contends that it could not announce its readiness off calendar, file the necessary supporting depositions, or file a valid certificate of compliance because the Administrative Orders' restriction on filing during the pandemic, the prosecution must show that the Administrative Orders indeed made such filings impossible – that the prosecution was prohibited during the period in question from filing even by mail or electronically (*see e.g. People v Gonzalezyunga*, 71 Misc 3d 1210 [A], 2021 WL 1588663, 2021 NY Slip Op 50346 [U]).

- **Defendant's mental incompetency**: Delay caused by defendant's commitment after being declared incompetent to stand trial is excludable as an exceptional circumstance; the People have no obligation to monitor competency status (*People v Lebron*, 88 NY2d 891 [1996]).

- **Special Prosecutor**: The appointment of a special prosecutor is an exceptional circumstance such that the associated delay is excludable (*People Crandall*, 199 AD2d 867 [3d Dept 1993]; *People v Morgan*, 273 AD2d 323 [2d Dept 2000]).

- **Obtaining evidence from defendant**: Delay associated with obtaining blood and saliva samples from defendant, performing DNA tests, and obtaining results has been held to be excludable as stemming from an exceptional

circumstance (*People v Williams*, 244 AD2d 587 [2d Dept 1997]).

- **DNA testing delay:** Delay associated with obtaining DNA results is not necessarily excludable as an exceptional circumstance. The prosecution may exclude the period only if it shows that the evidence was unavailable during that period despite the exercise of due diligence (*see People v Clarke*, 28 NY3d 48 [2016] [no reasonable excuse for the prosecution's delay in seeking court order for defendant's DNA exemplar]; *People v Huger*, 167 AD3d 1042 [2d Dept 2018] [prosecution failed to demonstrate due diligence in obtaining DNA results]; *People v Gonzalez*, 136 AD3d 581 [1st Dept 2016] [same]; *People v Wearen*, 98 AD3d 535 [2d Dept 2012] [same]).

  - **Example**: "[A]s a result of the People's inaction in obtaining defendant's DNA exemplar, the 161-day period of delay to test the DNA and to produce the DNA report was not excludable from speedy trial computation as an exceptional circumstance" (*Clarke*, 28 NY3d at 53).

- **People's unawareness of charges:** The delay between the date a complaint is filed and the date the prosecution first receives notice of the filing has been held to be excludable where the court clerk or police delay giving the prosecution notice of the filing (*People v Smietana*, 98 NY2d 336 [2002] [the delay between the date of filing of the misdemeanor information by police and the defendant's arraignment on that information is excludable under the "exceptional circumstances" provision, where the police prepared the information without knowledge or involvement of prosecutor, and police did not inform the prosecutor of the charges until the arraignment date]; *see also* CPL 110.20 [requiring that a copy of the accusatory instrument filed in local court be promptly transmitted to

the District Attorney]; *People v Snell*, 158 AD3d 1067, 1068 [4th Dept 2018]; *People v La Bounty*, 104 AD2d 202 [4th Dept 1984]).

- **Failure of local criminal court to transmit divestiture documents not an exceptional circumstance:** The time during which the local criminal court failed to transmit the order, felony complaint and other documents pursuant to CPL 180.30 (1) to County Court is not excludable time under the exceptional circumstances provision as it does not prevent the prosecution from presenting case to the grand jury (*People v Amrhein*, 128 AD3d 1412 [4th Dept 2015]).

- **Adjournments to await appellate decision resolving dispositive legal issue:** Such delay has been held *not* to be occasioned by an exceptional circumstance (*People v Price*, 14 NY3d 61 [2010]).

- **Disaster:** Delay resulting from a natural disaster has been found to be an exceptional circumstance (*People v Sheehan*, 39 Misc 3d 695 [Crim Ct, New York County 2013] [Hurricane Sandy]).

- **No counsel:** The period defendant is without counsel through no fault of the court, except where the defendant proceeds pro se, is excludable (30.30 [4] [f]; *People v Sydlar*, 106 AD3d 1368, 1369 [3d Dept 2013]).

  - **Definition of "without counsel" includes not having counsel present:** The phrase "without counsel" has been given a broader definition than not having an attorney. It includes not having counsel present at the court proceeding (*People v DeLaRrosa*, 236 AD2d 280, 281 [1st Dept 1997]; *People v Bahadur*, 41 AD3d 239 [1st Dept 2007]*; People v Lassiter*, 240 AD2d 293 [1st Dept 1997]; *People v Corporan*, 221 AD2d 168 [1st Dept 1995]).

- **Prosecution's fault:** It has been held that the defendant is not "without counsel" where counsel's absence is the prosecution's fault, for example, where counsel does not appear because the prosecution failed to comply with its obligation to produce incarcerated defendant (*People v Brewer*, 63 AD3d 402 [1st Dept 2009]).

- **Codefendant:** Period during which codefendant is without counsel is excludable (*People v Rouse*, 12 NY3d 728 [2009]).

- **Newly assigned counsel**: A defendant is not "without counsel" within the meaning of the statute when he is recently assigned counsel, even though the lawyer knows nothing about case (*Rouse*, 12 NY3d 728).

- **No showing of delay required:** All periods during which the defendant is without counsel through no fault of the court must be excluded, regardless of whether the defendant's lack of representation actually impeded the People's progress (*People v Huger*, 167 AD3d 1042 [2d Dept 2018]; *People v Aubin*, 245 AD2d 805 [3d Dept 1997]*; see e.g. People v Rickard*, 71 AD3d 1420 [4th Dept 2010] [court excluded period between defendant's arraignment (when court faxed to the Public Defender an assignment order) and the Public Defender's first appearance in court (when the Public Defender advised the District Attorney that the defendant was waiving his preliminary hearing)]).

- **Assigned Counsel Program's failure**: Assigned Counsel Program's failure to provide counsel to the defendant may be deemed the fault of the court, depending upon the relationship and connection between the court and the program (*People v Cortes*, 80 NY2d 201, 209 [1992]; *see e.g. People v Danise*, 59 Misc 3d 829, 831 [City Ct 2018] ["Since it remains the court's responsibility to supervise the assignment of counsel to eligible indigent defendants, the pre-readiness delay caused by the unavailability of a

public defender at arraignment, is considered a fault of the court, and therefore, the People will be charged with this delay"]).

- **Where the District Attorney has directed the defendant to appear for arraignment pursuant to CPL 120.20 (3) or CPL 210.10 (3) in lieu of an arrest warrant or a summons issued by the court (CPL 30.30 [4] [i]):** To be excluded from the 30.30 calculation is the period "prior to the defendant's actual appearance for arraignment in a situation in which the defendant has been directed to appear by the district attorney" in lieu of an arrest warrant or a summons issued by the court.

- **Plea bargaining:** The period of delay resulting from plea bargaining is *not* excludable on that basis alone (*People v Dickinson*, 18 NY3d 835 [2011]). That period may be excludable, however, if the defendant expressly waived his 30.30 rights. A plea bargaining period may also be excludable if the defendant requested or consented to a court-ordered adjournment during that period (*People v Wiggins*, 197 AD2d 802 [3d Dept 1993]). However, the mere silence in the face of an adjournment request for purposes of plea negotiations is not sufficient to waive 30.30 time (*Dickinson*, 18 NY3d at 836; *People v Leubner*, 143 AD3d 1244, 1245 [4th Dept 2016]; *People v Waldron*, 6 NY3d 463 [2006])

- **Waiver**: A period may also be excluded if the defendant or his counsel waived any objection to the delay, either by letter or an in-court declaration (*Waldron*, 6 NY3d 463*; People v Jenkins*, 302 AD2d 978 [4th Dept 2003]; *People v Dougal*, 266 AD2d 574 [3d Dept 1999]).

  - **Clarity requirement:** The waiver will be effective only if it is unambiguous; waiver will not be inferred from silence (*Dickinson*, 18 NY3d 835; *Leubner*, 143 AD3d at 1245). The Court of Appeals has repeatedly advised that prosecutors obtain unambiguous written waivers (*Dickinson*, 18 NY3d at 836).

  - **Rescinding the waiver:** It has been held that defendant's expressed revocation of a plea offer, by itself, does not rescind 30.30 waiver where the waiver agreement expressly requires that any revocation of the waiver be done in writing (*People v Hammond*, 35 AD3d 905 [3d Dept 2006]).

- **Counsel's waiver:** Counsel can effectively waive his client's 30.30 rights (*People v Wheeler*, 159 AD3d 1138, 1141 [3d Dept 2018]; *People v Moore*, 32 AD3d 1354 [4th Dept 2006]).

- **Executive Order:** It has been held that a period may be excluded where there is in effect a governor's executive order directing that time be tolled due to a disaster or other emergency (*People v Sheehan*, 39 Misc 3d 695 [Crim Ct, New York County 2013] [Hurricane Sandy]; *People v Zeolli*, 69 Misc 3d 927 [Cohoes City Ct 2020] [Executive Orders 202.8 (March 20, 2020), 202.48 (July 6, 2020), and 202.67 (October 5, 2020) in response to Covid 19 pandemic]).

  - **Authority:** The authority of the governor to temporarily suspend to respond to an emergency is granted by Executive Law § 29-A.

  - **Limitations on authority applicable to 30.30:**

    - **Suspend not toll:** The Executive Order may "suspend" statutes but not toll time period provisions contained in statutes (Executive Law § 29-A [1]). Pandemic Executive Order 202.8 "tolled" the "specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state , including … the criminal law . . . ."

    - **Specificity:** The Executive Order must specify the statute suspended to insure consistent applications, that jurisdictions uniformly suspend the laws at issue (Executive Law § 29-A [2] [c]; *see Zeolli*, 69 Misc 3d 932-933. The pandemic Executive Orders did not mention CPL 30.30 until July 6, 2020.

    - **Necessity**: Consistent with the separation of powers doctrine, any suspension must be "necessary to cope with the disaster" and that the suspension provides for the minimum deviation from the requirements of the statute (Executive Law § 29-A [1], [2] [b] [e]). Suspension of

30.30 due to emergencies such as the pandemic is of dubious necessity as 30.30 has built in a provision designed to address emergencies that impair the People's ability to get ready for trial. 30.30 4 (g) allows the People to exclude from the calculation any delay that is occasioned by an exceptional circumstance, such as a pandemic or other natural emergency.

- **POST-READINESS DELAY**

  - **Defined**: Dismissal may be warranted even where the prosecution has established its readiness within the statutory period if the prosecution subsequently becomes unready and the aggregate of the pre-readiness and post-readiness delay exceeds the prescribed period (*People v McKenna*, 76 NY2d 59 [1990]; *People v Anderson*, 66 NY2d 529 [1985]).

    - **Test**: The test is whether the prosecution is no longer in fact ready for trial – i.e., whether the prosecution has not done everything required of it to bring the case to a point it can be tried (*People v England*, 84 NY2d 1 [1994]; *People v Robinson*, 171 AD2d 471, 477 [1st Dept 1991]; *People v Kendzia*, 64 NY2d 331 [1985]).

  - **Adjournments:** Where the prosecution requests an adjournment, the entire adjourned period constitutes post-readiness delay unless the prosecution re-announces its readiness during the adjourned period or the prosecution had requested an adjournment for a date certain and the adjournment exceeded the period requested (*People v Betancourt*, 217 AD2d 462 [1st Dept 1995]; *People v Barden*, 27 NY3d 550, 554-556 [2016]).

    - **Re-announcement of readiness:** The prosecution may re-announce its readiness during the adjourned period by filing a notice of readiness and thereby avoid being charged with the entire adjourned period (*People v Stirrup*, 91 NY2d 434 [1998]). ***NEW*** But for such a re-announcement to be effective, the court must conduct an inquiry into the prosecution's actual readiness (CPL 30.30 [5]).

- **Adjourned period beyond what is requested by the prosecution:** Where the court has granted the prosecution's request for an adjournment, but sets the next court date beyond the adjourned period requested by the prosecution due to court congestion, the prosecution will be considered unready only for the adjourned period requested (*People v Alvarez*, 117 AD3d 411 [1st Dept 2014]; *Barden*, 27 NY3d at 554-555).

    - **Prosecution's burden:** The prosecution bears the burden of showing that it had requested a shorter adjournment than that ordered by the court (*People v Miller*, 113 AD3d 885, 887 [3d Dept 2014]).

- **Impediments to readiness:**

    - **Failure to produce incarcerated defendant**: Post-readiness delay exists where the prosecution has failed to produce the defendant incarcerated in the same jurisdiction (*Anderson*, 66 NY2d 529). However, that period may be excludable due to the defendant's unavailability if the defendant is not produced despite the prosecution's diligent efforts to obtain the defendant's presence (*People v Newborn*, 42 AD3d 506 [2d Dept 2007]).

    - **Inability to produce the complainant:** Post-readiness delay exists if the prosecution is unable to secure the attendance of the complainant (*People v Cole*, 73 NY2d 957 [1989]).

    - **Failure to provide grand jury minutes**: Post-readiness delay will be charged to the prosecution where it fails to provide grand jury minutes needed for a decision on a motion to dismiss (*People v McKenna*, 76 NY2d 59 [1990]; *People v Johnson*, 42 AD3d 753 [3d Dept 2007]).

    - **Failure to provide copy of search warrant**: Post-readiness delay will be charged to the prosecution where it fails to provide a copy of search warrant, rendering it impossible for the defendant to move against the search warrant (*People v Daley*, 265 AD2d 566 [2d Dept 1999]).

- **Failure to fulfill disclosure requirements under CPL Article 245 *NEW* (CPL 30.30 [5]; CPL 245.50).** If new discovery arises, following the filing of a certificate of compliance, the prosecution becomes unready, and remains unready, until the prosecution has filed a supplemental certificate of compliance and discloses such material.

- **Non-impediments to readiness:**

  - **Delay caused by court stenographer not under the prosecution's control:** Delay caused by court stenographer's failure to timely provide relevant minutes is not chargeable to the prosecution (*People v Lacey*, 260 AD2d 309 [1st Dept 1999]).

  - **A *non-incarcerated* defendant's failure to appear**: Delay due to the defendant's failure to appear, regardless of whether due diligence is exercised to locate him, is not chargeable to the People (*People v Myers*, 171 AD2d 148 [2d Dept 1991]; *People v Carter*, 91 NY2d 795 [1998]).

  - **Court congestion delay:** Post-readiness delay due to court congestion is not chargeable to the prosecution, as the prosecution is not the cause of such delay (*People v Cortes*, 80 NY2d 201 [1992]).

- **Applicability of CPL 30.30 (4)'s excludable time provisions:** The prosecution's post-readiness delay will not necessarily be "charged" to the prosecution, as periods of post-readiness delay, just like pre-readiness delay, are subject to the excludable time provisions of CPL 30.30 (4) (*People v Kemp*, 251 AD2d 1072 [4th Dept 1998]).

  - ***NEW*** Any post-readiness exclusion due to an exceptional circumstance "must be evaluated by the court after inquiry on the record as to the reasons for the [P]eople's unreadiness and shall only be approved upon a showing of sufficient supporting facts" (CPL 30.30 [g]).

- **Exceptional fact or circumstance (CPL 30.30 [3] [b]):** the court is not required to dismiss an indictment due to post-readiness delay (although it may) where the post-readiness delay is occasioned by

"some exceptional fact or circumstance, including, but not limited to, the sudden unavailability of evidence material to the prosecution's case, when the district attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will become available in a reasonable period" (CPL 30.30 [3] [b]). Note, there is an incongruence between this subdivision, which, through its use of the permissive term "may," seems to allow a court to dismiss an indictment due to post-readiness delay occasioned by an exceptional fact or circumstance and CPL 30.30 (4) (g), which requires exclusion of delay resulting from an exceptional fact or circumstance.

- **Unavailability of prosecutor**: An adjournment requested by the prosecutor due to his own personal unavailability for trial is chargeable to the prosecution where the prosecution fails to show that it would not have been onerous to reassign the case to another prosecutor (*People v DiMeglio*, 294 AD2d 239 [1st Dept 2002]).

➢ PRETRIAL RELEASE

- **In general**: The defendant is entitled to be released on "just and reasonable bail" or his own recognizance if the prosecution fails to become ready within certain time periods (CPL 30.30 [2]). "Just and reasonable bail" is bail within reach of the defendant (*People ex rel. Chakwin on Behalf of Ford v Warden, N.Y. City Corr. Facility*, 63 NY2d 120 [1984]).

- **Commencement of period:** Time clock generally commences from date defendant is committed to custody of sheriff (CPL 30.30 [2]), though statutory exceptions do exist (CPL 30.30 [7]).

- **Periods:** The applicable periods, set forth under subdivision two, are shorter than those that apply under the motion to dismiss provisions of CPL 30.30 (1).

- **Excludable time:** The excludable time provisions of 30.30 (4) apply to a CPL 30.30 (2) motion for pretrial release.

- **Written motion, sworn allegations, and notice not required *NEW* (CPL 30.30 [8]):** "The procedural rules prescribed in [CPL 210.45 (1-

7)] with respect to a motion to dismiss an indictment are not applicable to a motion made pursuant to" CPL 30.30 (2), the pretrial release provision.

- **Prompt hearing required *NEW* (CPL 30.30 [8]): "**If, upon oral argument, a time period is in dispute, the court must promptly conduct a hearing in which the [P]eople must prove that the time period is excludable." Note that this provision, by its expressed terms, contemplates the prosecution avoiding chargeability by proving that the periods at issue are "excludable." It does not contemplate the prosecution avoiding chargeability by demonstrating at the hearing its actual readiness.

➢ PROCEDURE

- **Court's duty upon announcement of readiness *NEW*:** Upon any statement of readiness the court must conduct an on-the-record inquiry as to the actual readiness of the prosecution (CPL 30.30 [5]).

- **Application of 2020 amendments to criminal actions commencing prior to 2020 but continuing past the January 1, 2020 effective date:** "Legislative amendments that take effect during the pendency of a case apply to subsequent proceedings (*see Simonson v Internat'l Bank*, 14 NY2d 281, 289 [1964], but do not serve to invalidate prior proceedings, *see Berkovitz v Arbib & Houlberg, Inc.*, 230 NY 261, 270; *Charbonneau v State*, 148 Misc 2d 891, [Ct. Cl. 1990]). Therefore, the changes in the law that took effect on January 1, 2020 do not invalidate the People's previous statements of readiness. However, beginning on January 1, 2020, the People reverted to a state of unreadiness and could not be deemed ready until filing the proper certificate of compliance required by CPL 245.50." (*People v Nge*, 67 Misc 3d 650, 654 [Crim Ct, Kings County [internal citations altered].)

- **Motion Practice**

  - **Defendant's burden**

    - **Written motion to dismiss before trial**: To invoke 30.30 (1) rights, the defendant must make a written motion to dismiss pursuant to CPL 170.30 (1) (e) or 210.20 (1) (g)

(*see People v Lawrence*, 64 NY2d 200, 203 [1984]). Pursuant to the expressed terms of CPL 210.20 (1) (g), a 30.30 motion to dismiss the *indictment* "*must*" be made before a guilty plea or the trial commences. On the other hand, CPL 170.30 (1) (e) provides that a 30.30 motion to dismiss a misdemeanor information *"should*" be made before the guilty plea or trial commences, suggesting that a court has discretion to entertain such a motion after the plea or trial commences.

- **Waiver of objection to oral motion:** The prosecution waives the writing requirement by failing to object at the time of oral motion (*People v Brye*, 233 AD2d 775 [3d Dept 1996]).

- **Timing of motion:** CPL 255.20's general requirement that pretrial motions be made within 45 days after arraignment does not apply to CPL 30.30 motions (CPL 170.30 [2], 210.20 [2]).

- **Content of papers**: As the defendant has the burden of demonstrating that the prosecution failed to establish its readiness within the statutory period, the defendant's motion papers must contain "sworn allegations that there has been unexcused delay in excess of the statutory maximum" (*People v Beasley*, 16 NY3d 289, 292 [2011]; *People v Brown*, 28 NY3d 392, 405-406 [2016]; *People v Santos*, 68 NY2d 859 [1986]).

  - **Facial sufficiency:** Papers submitted must on their face indicate entitlement to dismissal (*People v Lusby*, 245 AD2d 1110 [4th Dept 1997]).

  - **Allegation of lack of readiness:** If the prosecution fails to announce its readiness within the required period, the defendant must allege that fact in his motion papers (*People v Jackson*, 259 AD2d 376 [1st Dept 1999]). If the prosecution announced its readiness, but was not actually ready, the defendant must alleged in motion papers the specific periods

that the prosecution wasn't ready and how the prosecution wasn't ready during the alleged periods (*Jackson*, 259 AD2d at 376).

- **Disputing excludable time:** The defendant's initial burden does not require him to allege that certain periods are not excludable (*Beasley*, 16 NY3d at 292). It is the prosecution's burden to identify the excludable time (*Beasley*, 16 NY3d at 292-293; *People v Luperon*, 85 NY2d 71, 81-82 [1995]). Only if the prosecution raises excludable time does the defendant have the obligation to refute that the period is excludable (*Beasley*, 16 NY3d at 292-293; *Luperon*, 85 NY2d at 81-82).

- **The failure to dispute alleged excludable time:** Defendant's motion papers must dispute excludable time alleged in the prosecution's responding papers; otherwise the defendant will be deemed to have conceded that the periods are excludable (*see People v Notholt*, 242 AD2d 251 [1st Dept 1997] [period during which, according to the prosecution's papers, defendant requested and consented to adjournment, is excludable, despite the failure of prosecutor to supply minutes in support of contention, where the defendant did not deny the prosecution's contentions]). Therefore, if the alleged excludable time is not disputed in the defendant's initial papers, it will be necessary for the defendant to dispute the allegations with supplemental or reply sworn allegations (*Beasley*, 16 NY3d at 292-293; *People v Daniels*, 36 AD3d 502 [1st Dept 2007]).

- **Notice:** Defendant's motion must give the prosecution reasonable notice as required by CPL 210.45 (1) (*People v Woody*, 24 AD3d 1300 [4th Dept 2005]; *People v Mathias*, 227 AD2d 907 [4th Dept 1996]; *see People v Baxter*, 216 AD2d 931 [4th Dept 1995] [motion to dismiss

indictment served and made returnable on first day of trial does not provide reasonable notice]).

- **Prosecution's Burden**

  - **Demonstrating excludable time:** Once the defendant has alleged an unexcused delay greater than the statutory maximum, the prosecution must demonstrate that there is sufficient excludable time (*People v Berkowitz*, 50 NY2d 333 [1980]). It is incumbent upon the prosecution to "*submit*" "*papers*" setting forth the "particular dates [it] claim[s] should be excluded and the *factual* and statutory basis for each exclusion" (*Santos*, 68 NY2d at 861 [emphasis supplied]). A determination on whether the prosecution met that burden must rest solely on the motion papers, and accompanying documentary evidence, and the evidence presented at the hearing on the motion, if one is held; a determination – whether by the trial court or the reviewing appellate court – must not be based upon documentary evidence, including the minutes of the proceeding, which were not included as part of the motion papers or introduced at the hearing (CPL 30.30 [1]; CPL 210.20 [1] [g]; CPL 210.45 [1], [2], [3], [4], [5], [6]; *see also People v Contrearas*, 227 AD2d 907 [4th Dept 1996] [it is documentary proof "submitted" to the lower court that is to be considered in determining whether a period is to be excluded for 30.30 purposes]).

    - **The prosecution's failure to meet its burden**: Where the prosecution fails to meet this burden, the defendant's motion to dismiss must be granted summarily, i.e., without a hearing (*Santos*, 68 NY2d 859).

    - **Concession of allegations**: The prosecution will be deemed to have conceded what it does not deny in its answering affirmation (*Berkowitz*, 50 NY2d 333).

- **Hearing:** Where the motion papers raise a factual dispute (for example, as to when the accusatory was filed, whether the prosecution announced ready within the designated period, whether the prosecution was in fact ready within the prescribed period, or whether a certain period is excludable) a hearing is necessary so long as the dispute is dispositive of the motion (*People v Sydlar*, 106 AD3d 1368, 1370 [3d Dept 2013]; *People v Smith*, 245 AD2d 534 [2d Dept 1997]).

    - **Hearing not required:** A hearing will not be necessary where the issue in dispute can be resolved by "unquestionable documentary proof" submitted with the motion papers (*see People v Allard*, 113 AD3d 624, 626-627 [2d Dept 2014] [the prosecution can defeat a 30.30 claim without a hearing when it can demonstrate with "unquestionable documentary proof" that the claim has no merit]).

        - **Example**: A transcript or a letter of the defense counsel showing that the defendant consented to an adjournment may be "unquestionable documentary proof" of such consent (*People v Matteson*, 166 AD3d 1300, 1302 [3d Dept 2018]).

        - **Example**: "Calendar and file jacket notations" do not constitute unquestionable proof to meet the prosecution's "burden of demonstrating sufficient excludable time," for "such notations represent simply one person's interpretation of the proceedings" (*Matteson*, 166 AD3d at 1302).

    - **Defendant's hearing burden:** The defendant bears the burden of showing by a preponderance of the evidence that the People were not ready for trial (*People v Dillard*, 79 AD2d 844, 845 [4th Dept 1980]; *People v Brown*, 28 NY3d 392, 405-406 [2016]).

    - **The prosecution's hearing burden:** The prosecution bears the burden of proving that certain periods are excludable (*People v Figaro*, 245 AD2d 300 [2d Dept 1997]; *see People v Martinez*, 268 AD2d 354 [1st Dept 2000] [the prosecution must prove that a witness was indeed "unavailable" for trial, such that the delay occasioned by his unavailability is excludable as an exceptional

circumstance]; *People v Valentine*, 187 Misc 2d 582 [Sup Ct 2001] [where motion papers create a factual dispute over whether the defendant had consented to an adjournment, it is incumbent upon the prosecution to submit relevant supporting documentation from its records and court records]).

- **Pro se motions**: Since a defendant has no constitutional right to hybrid representation, a trial court is not required to entertain a pro se 30.30 motion when the defendant is represented by counsel. Whether to entertain such a motion rests within the sound discretion of the court (*People v Rodriguez*, 95 NY2d 497 [2000]).

- **Appeal**

  - **CPL 30.30 (6) * New *:** "An order finally denying a [30.30] motion to dismiss . . . shall be reviewable upon an appeal from an ensuing judgment of conviction notwithstanding the fact that such judgment is entered upon a plea of guilty."

    - **Guilty plea *NEW*:** As a result of this 2020 amendment, appellate review of 30.30 claims are no longer forfeited by guilty plea.

    - **Waiver of appeal *NEW*:** The mandatory language "shall be reviewable" appears to reflect a legislative intent to confer unqualified reviewability of 30.30 claims, which constitutional speedy trial claims have, and thus makes 30.30 claims reviewable on appeal regardless of whether an appeal waiver has been executed (*see People v Rudolph*, 21 NY3d 497, 501 [2013] [use of obligatory language reflected policy choice to make consideration of a youthful offender adjudication mandatory and non-waivable]; *compare* CPL 710.70 [2] [from which CPL 30.30 [6] was modeled, stating that suppression claims "may be reviewed" from an ensuing judgment]). The First Department and Third Departments, however, disagree (*see People v Person*, 184 AD3d 447 [1st Dept 2020] ["While this phrase clearly creates a reviewability that did not previously exist, the reviewability of an issue does not render it nonwaivable. On the contrary, the general purpose of an appeal waiver is to serve as an agreement not

to raise otherwise reviewable issues on appeal"]; *People v Votow*, 190 AD3d 1162 [3d Dept 2021]).

- **Effective date of new reviewability rules:** The Fourth Department has applied the new reviewability rules to all cases still pending appeal after January 1, 2020, irrespective of when the judgment was entered (*People v Goodison*, 196 AD3d 1049 [4th Dept 2021]; *People v Yannarilli*, 191 AD3d 1327 [4th Dept 2021]). And there is precedent for such retroactive application (*see People v Sullivan*, 18 AD2d 1066 [1st Dept 1963] and *People v Rosen*, 24 AD2d 1009 [2d Dept 1965] [holding that defendants who pleaded guilty prior to the effective date of the statutory amendments making suppression claims reviewable upon a guilty plea were entitled to the benefit of the new reviewability rules because their appeals were not decided until after the effective date of the amendments]). The First and Third Departments, however, have held that a defendant is not entitled to the benefit of the new rules unless the judgment was entered after December 31, 2019 (*People v Lara-Medina*, 195 AD3d 542 [1st Dept 2021]; *People v Acosta*, 189 AD3d 508 [1st Dept 2020]; *People v Duggins*, 192 AD3d 191 [3d Dept 2021]).

- **Preservation for appeal**: A defendant on appeal may raise only those 30.30 contentions argued in the lower court in initial motion papers, reply papers, or at the hearing *or* those which the lower court addressed in its decision (*People v Allard*, 28 NY3d 41, 46-47 [2016]; *People v Goode*, 87 NY2d 1045 [1996]). The appellate court can agree with the defendant that certain periods are not excludable only if the defendant, in the lower court, argued with specificity that the periods were not excludable or the lower court expressly addressed the excludability of those periods upon the defendant's motion. For example, if a defendant argued that from January to July is not excludable because the prosecution's delay in responding to the omnibus motion was "unreasonable," the appellate court will consider only whether that entire period was not excludable. It will not consider, for example, the alternative argument that the shorter period from May to July was not excludable because that particular delay was unreasonable (*Beasley*, 16 NY3d 289). If the prosecution contends in its answering papers that a specific period is excludable, the defendant will have preserved his or her argument that the period is not excludable only to the

extent that the prosecution's particular arguments were addressed in the defendant's original motion or reply papers (*Allard*, 28 NY3d at 46-47; *People v Rosa*, 164 AD3d 1182, 1183 [1st Dept 2018]; *People v Cox*, 161 AD3d 1100, 1100-1101 [2d Dept 2018]; *People v Henderson*, 120 AD3d 1258 [2d Dept 2014]).

- **Decision required:** The defendant's 30.30 claim will be preserved only if the court expressly decides the 30.30 motion (CPL 470.05 [2]; *People v Green*, 19 AD3d 1075 [4th Dept 2005]; *see also* CPL 30.30 [6] [requiring for reviewability "[a]n order finally denying" motion]).

- **Reviewable grounds for affirmance:** An appellate court may affirm a CPL 30.30 ruling only on those grounds that were the basis for the trial court's determination (*People v Concepcion*, 17 NY3d 192 [2011]).

- **Ineffective assistance of counsel:** Where defense counsel has failed to make a meritorious 30.30 motion for dismissal, the defendant will be denied effective assistance of counsel (*People v Devino*, 110 AD3d 1146 [3d Dept 2013]; *People v Sweet*, 79 AD3d 1772 [4th Dept 2010]; *People v Manning*, 52 AD3d 1295 [4th Dept 2008]; *People v Grey*, 257 AD2d 685 [3d Dept 1999]; *People v Miller*, 142 AD2d 970 [4th Dept 1988]).

  - **Merit Requirement:** It has been held that there will be no IAC claim where the record is unclear that the 30.30 claim that counsel failed to pursue actually had merit (*see People v Youngs*, 101 AD3d 1589 [4th Dept 2012]; *People v Brunner*, 16 NY3d 820 [2011] [counsel's failure to make a 30.30 motion did not deny defendant effective assistance counsel where there was negative precedent and applicability of exclusions was debatable]; *but see People v Clermont*, 22 NY3d at 934 [court found counsel ineffective for not vigorously pursuing suppression claim, noting that it was not necessary for the court to resolve whether the motion to suppress actually had merit; it was enough that substantial arguments for and against suppression could be made and the question, which involved "complex *DeBour* jurisprudence," was a close one]).

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.

Please call the
Lawyers Helping Lawyers Helpline at (631) 697-2499
to speak with an attorney who will provide support and recommend resources. All calls are private and confidentiality is protected under Judiciary Law Section 499. (Lawyer Assistance Committee)

Feel Free to Join Us at Our Weekly Recovery Meeting

The Lawyers Helping Lawyers Committee
Recovery Meeting
Open to anyone in the legal profession who has a desire to stop drinking or using other substances.

Every Wednesday at 6PM
United Methodist Church of Hauppauge
473 Townline Road, Hauppauge, NY