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CRIMINAL LAW AND PROCEDURE UPDATE 2022

OCTOBER 25, 2022

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Nassau-Suffolk Academies of Law
Annual Criminal Law Update
October 25, 2022

Selected Recent Cases and New Legislation
OCTOBER 2021 -OCTOBER 2022

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Warrantless Searches & Seizures

People v. Kysean Stroud, __ N.Y.3d __ (6/14/22) [7/0; Memorandum].

The Court of Appeals held in a summary disposition memorandum the determination of reasonable suspicion is a mixed question of law and fact which is beyond a further review if there is legally sufficient record support for the determinations of the courts below and that the record contained support for the lower courts' finding of reasonable suspicion to stop the car in which defendant was a passenger.

People v. Kamil Wideman, __ N.Y.3d __ (5/24/22) [7/0; Memorandum].

Because a determination of reasonable suspicion is a mixed question of law and fact which is reviewed in the Court of Appeals for record support justifying the officer's action, ["o]n the unique facts of this case," the Court held that there was indeed such record support for the appellate division's finding of reasonable suspicion for the police officer to conduct the pat frisk for safety.

People v. Reginald E. Blandford, 37 N.Y.3d 1062, 2021 WL 4777292 (10/14/21) [7/0; Memorandum].

The Court of Appeals held that there was sufficient founded suspicion presented at a suppression hearing under *People v. Devone, 15 N.Y.3d 106 (2010)* to sustain the People's burden of establishing the reasonableness of a canine sniff of the exterior of the defendant's car. Thus, as outlined in the third department decision, [190 A.D.3d 1033, 2021 NY Slip Op 00058 (3rd Dept. 1/7/21). a State Police investigator in Elmira, New York saw defendant drive past him at about 5:00 p.m. without wearing a seatbelt. Based upon past surveillance and general police knowledge, the investigator knew that defendant was involved in the illegal sale of narcotics. As the investigator followed defendant's vehicle, he contacted a state trooper who was a canine handler, advised the trooper of what he had seen and asked the trooper to come to the scene to conduct a traffic stop of defendant's vehicle. The investigator watched the defendant drive into the parking lot of a convenience store that was familiar to the investigator as a "trouble spot" for drug transactions. The defendant got out of his vehicle and entered the store, where he remained for about five minutes. When the defendant left the store, he made physical contact with at least one of several people outside the store, which the investigator described as "a handshake, type hug thing." The investigator did not see anything in defendant's hands during this contact, but he testified that, in his professional experience, it was common for participants in outdoor drug transactions to "hug somebody, tap them up, and make an exchange" of currency and narcotics. He described the convenience store as "notorious" for such activity. The defendant and a male passenger then got into defendant's car and drove away. After being contacted by the investigator, the trooper drove with his canine partner to the convenience store. As he arrived, he saw defendant leaving the building with no purchases in his hands. The trooper watched defendant conversing with people outside the store and "giving hand-shakes, high fives, [and] hugs," behaviors that, in the trooper's experience, occurred "routinely" during drug transactions. The trooper followed the defendant's vehicle and, at 5:10 p.m., observed that the license plate was inadequately lit. The trooper turned on his emergency lights to initiate a stop and observed a "slow roll response," in which defendant slowed down but did not immediately stop his vehicle. The trooper saw defendant make "furtive movements" inside the car, ducking down in his seat, moving around, reaching over the passenger seat and doing something that the trooper could not see "in the floorboard area and/or the backseat." He stated that, in his professional experience, this behavior was not typical of most drivers, who usually came to an immediate stop and "s[a]t easy within the seat" when pulled over. After the vehicle stopped, the trooper spoke with defendant at the driver side window and obtained identification information for the defendant and the passenger. The trooper permitted the passenger to leave, asked the defendant to step out of the vehicle and spoke with him briefly about such matters as his reason for visiting the store without making a purchase and the movements he had made in the vehicle. In response, the defendant "talked in a circle" and gave inconsistent answers. The trooper then asked the defendant for permission to search the vehicle. Defendant gave limited consent, agreeing only to a search of the backseat and passenger seat area. The trooper retrieved his canine partner from his vehicle and, at 5:19 p.m., conducted a canine sniff search of the outside of defendant's car. The canine alerted to the outside of the trunk and, when the trunk was opened, to a bag that

contained multiple bags of marihuana, digital scales and other paraphernalia associated with drug sales.

People v. Andre Biggs, __ A.D.3d __, 2022 NY Slip Op 05368 (2nd Dept. 9/28/22).

A divided second department held 3-2 that the stop of the defendant's car on a Queens street by police due to "excessive tinting" of the windows under V.T.L. 375(12)(b) that led to the smell of marijuana and observation of "crumbs of marijuana" was proper. The majority further held that other claims regarding the subsequent impoundment and inventorying of the vehicle following the defendant's arrest, (he had no driver's license) which further resulted in the seizure of crack were not preserved, "by mere implication or osmosis" as a result of the defendant's general motion to suppress. Justices Wooten and Nelson dissented on their conclusion that since the latter two issues were expressly decided by the suppression court adversely to the defendant under *People v. Parker, 32 N.Y.3d 49 (2018)* and C.P.L. 470.05(2), these issues were indeed preserved and, on the merits, there was an insufficient record basis to sustain the stop, impoundment and inventorying of the vehicle.

People v. Shawn Lewis, 208 A.D.3d 595, 2022 NY Slip Op 04920 (2nd Dept. 8/10/22).

Although the defendant was properly detained on reasonable suspicion by the police in the vicinity of Queens robbery following a car pursuit and thereafter subjected to a frisk for officer safety after he was placed in handcuffs where the pat-down resulted in no seizure of any property, the subsequent police removal and search of the defendant's wallet and recovery of identification cards that belonged to the complainant was a Fourth Amendment violation. In ordering suppression on a reversal of a contrary lower court ruling, the second department noted that both the removal of the wallet and subsequent search thereof were improper where there was no exigency demonstrated in the record for the warrantless search of this container. See *People v. Geddes-Kelly, 163 A.D.3d 716 (2nd Dept. 2018*) relied on by the court in reference to the search of the wallet.

People v. Jasmen T. Leonard, 207 A.D.3d 1162, 2022 NY Slip Op 04468 (4th Dept. 7/6/22).

An informant called 911 in Rochester and said: "My parole officer had wanted me to go over and see if this guy is over there and the guy is over here and he's not answering his phone, and I guess he's wanted. He's a guy with guns and all that." The informant also said that "the guy,"

who was dark-skinned and wearing a t-shirt and baseball hat, was in the passenger seat of a green Infiniti located on Hixon Street near Thomas Street. When the 911 operator asked whether the person in question "has been known to carry weapons," the informant responded, "I guess so. He told me he was very violent and needed him off the street like immediately. He's wanted. So, I don't even know the guy's name. All I know is that he's a passenger in the car and he's over there right now." The operator asked what the person was wanted for, to which the informant answered, "I don't have the slightest idea. I don't know - - they don't put information out there like that." Upon request of the operator, the informant identified himself by name, although it is unclear from the record whether the name given was the informant's real name, and provided the number from which he was calling. At the conclusion of the call the operator said that she would send an officer to the area. The officers found a vehicle matching the description given by the 911 caller and followed it, losing sight of the vehicle momentarily but then spotting it stopped on a curb with the passenger standing outside the vehicle. As one of the officers exited the police vehicle and began to approach the passenger, the passenger ran away while holding the left side of his waistband and the officer chased after him. As he was being chased, the passenger threw a black object, believed to be a handgun, over a fence. The passenger, identified as defendant, was apprehended, and a gun was recovered from where the officer saw defendant throw an object. A majority of the fourth department, held 3-2 that the suppression court properly determined that the officers had at least an objective, credible reason to approach defendant and request information and that the defendant's subsequent flight with his hand on his waistband from the approaching officer, combined with the 911 caller's report about a wanted violent parolee who was potentially armed, and the police officers' observations confirming the vehicle and suspect descriptions from the 911 call, provided the officers with reasonable suspicion to pursue the defendant. Justices Smith and Lindley dissented on their conclusion that the officers' pursuit of the defendant was unlawful.

People v. Jermaine Hatchett, 207 A.D.3d 401, 170 N.Y.S.3d 553, 2022 NY Slip Op 04282 (1st Dept. 7/5/22).

Following a hearing conducted on remand, the lower court again denied suppression of a cartridge recovered from defendant's pants pocket, correctly finding that "the police were acting in their public service function in rendering aid when searching the defendant's clothing for identification." Thus, when NYPD police officers arrived in Manhattan, the defendant was lying on the ground and screaming that he had been shot. He appeared to have been shot in the leg, he was drifting in and out of consciousness, and he could not state his name. At that point, the officers were treating defendant as an injured victim rather than a suspect, and were not performing a law enforcement function (*see People v De Bour, 40 NY2d 210, 218-219 (1976)].* Under the circumstances, the first department held that it was reasonable for the officers to believe defendant needed immediate assistance and to search his pants for identification as they waited for him to be transported to the hospital (*see People v Molnar*, 98 NY2d 328, 333

(2002); *People v Mitchell, 39 NY2d 173, 177-178 (1976).* In performing this "public service function, it was reasonable for the police to ascertain the identity of the person they were aiding and to supply that information to medical personnel, and defendant did not appear capable of communicating his identity."

People v. Robert Pruden, 206 A.D.3d 574, 2022 NY Slip Op 04133 (1st Dept. 6/28/22).

The first department affirmed a lower court's denial of suppression on a holding that there was a sufficient basis to support a *DeBour* Level 2 common law right of inquiry. As the court outlined, police officers saw defendant and another man engaging in a transaction involving money, in the Manhattan Port Authority bus terminal, after which the officers heard defendant talking on his phone, saying he had just sold some "sneakers." Based on his experience, an officer recognized this as code for narcotics, which was corroborated by the fact that neither defendant nor the other man was holding sneakers or any packages. In addition, the defendant was in a part of the Terminal that, according to posted signs, at least appeared to be restricted to ticket holders and the defendant responded to the officers' lawful request for information by admitting that he was not a bus passenger.

People v. Montra Hodge, 206 A.D.3d 1682, 2022 NY Slip Op 03821 (4th Dept. 6/9/22).

Upon observing a violation of the Vehicle and Traffic Law, a police officer in Onondaga County initiated a lawful traffic stop of the truck that was occupied by an unlicensed driver and defendant, who were hauling a load for an employer in an attached trailer. The officer then properly directed the driver to exit the vehicle under). The officer spent the first half of the temporary detention—approximately 25 minutes—promptly investigating the identity of the driver, which included searching a Department of Motor Vehicles database, questioning the driver about his real name, calling the employer to verify the identities of the occupants, and ultimately discovering that the driver had repeatedly provided a false name and date of birth, which resulted in his arrest and the subsequent discovery of a controlled substance on his person for which he did not have a prescription. Thereafter, the officer and backup officers who had arrived at the scene appropriately continued the temporary detention by asking defendant whether he had identification such as a license**.** When the defendant did not produce a license, and the driver had been arrested, there was no licensed driver available to remove the vehicle from the interstate highway, the officer therefore called the employer, who indicated that he would arrive shortly to retrieve the vehicle. While waiting for the employer, the officer returned to his patrol vehicle and "diligently" completed paperwork on his computer, which included various tickets and accusatory instruments, an incident report, and database searches. Moreover,

although the police then engaged in a discussion of how to proceed with the traffic stop that lasted several minutes, majority of the fourth department held 3-2 in a memorandum decision that it was not unreasonable for the police to thereafter return to request that defendant exit the truck, and further, although the traffic stop lasted over 45 minutes, based on the "evolution of the stop, . . . [the] detention [was] reasonably related in scope and length to the escalating series of events so as to justify such detention." However, the majority held that the officers, after directing that defendant exit the truck, improperly attempted to perform a pat frisk of defendant's person that was not supported by the requisite level of suspicion. Thus, the police were entitled to direct defendant to exit the truck "as a precautionary measure and without particularized suspicion that the defendant was armed and dangerous. Furthermore, even though defendant, despite being instructed to leave his coat in the truck, grabbed the coat, threw it onto one of the officers, and fled in the grassy area by the side of the interstate highway, instead of submitting to the frisk of his person, the police lacked probable cause to arrest defendant for obstructing governmental administration in the second degree based on his alleged obstruction of the officers' attempted frisk, because that police conduct was not authorized. Thus, per the majority, the suppression court should have suppressed the loaded firearm seized from defendant's person upon his arrest and his subsequent statements to the police and the defendant's plea was vacated. Justices Nemoyer and Centra dissented on the conclusion that while agreeing with the majority that the police did not inordinately prolong the traffic stop, the officers were entitled to pursue and arrest defendant because he committed the offense of obstructing governmental administration by interfering with the officers' lawful search of the vehicle. that they properly requested defendant's identification, and that they properly asked defendant to exit the vehicle. However, rather than walk away from what was an otherwise lawful search of the vehicle, defendant threw his coat at one of the officers and attempted to flee the scene. By that "disruptive conduct" of throwing his coat, defendant "attempt[ed] to prevent a public servant from performing an official function," namely, the lawful vehicle search (Penal Law § 195.05), and provided the officers with probable cause to arrest him for obstructing governmental administration in the second degree. The officers obtained such probable cause before they conducted the search of defendant's person, which revealed the loaded firearm and before they obtained statements from defendant, and thus the county court properly refused to suppress the firearm and statements.

People v. Floyd Thorne, 207 A.D.3d 73, 169 N.Y.S.3d 63, 2022 NY Slip Op 3696 (1st Dept. 6/7/22).

The first department per Manzanet-Daniels, J., by a 4-1 vote, reversed a lower court denial of suppression and held that NYPD police officers lacked the required reasonable suspicion when they conducted a level three forcible stop of a defendant at Lexington Avenue and 86th Street in Manhattan, based on a description that purportedly matched that of a robbery suspect only in that he was "a black male in the vicinity." In so ruling the majority held that a radio run, that described the robbery suspect as "a black male with a firearm on the corner of 81st Street and

Third Avenue," which was later supplemented by information from the complainant that he was "a black male … perhaps five feet, eight inches," he was wearing "dark clothing" and a baseball hat and per the police dispatcher, was headed west on 81st Street, when observed was walking "fast and suspicious," and "made a point of changing direction," and would not make eye-contact, that resulted in the stop of the defendant at 86th Street and Lexington Avenue lacked sufficient specificity reasonable suspicion to forcibly detain him by grabbing his arms and forcing him to the ground which resulted in the discovery of a gun. In reversing the appellate court noted that the defendant crossed the street in front of the police vehicle while the officers were observing him and walked directly toward the officers as he approached the subway entrance, which was "hardly the behavior of someone seeking to avoid contact with the police," was 6'1" and wearing a light gray shirt and the complainant was unable to identify him in a show-up as the perpetrator. Thus, as the majority noted "that a defendant matches a vague, general description, such as the one the complainant gave of the perpetrator, is insufficient to give rise to reasonable suspicion, particularly where, as here, key parts of the description do not match," and the radio run "did not describe the suspect's clothing. But even if we credit the testimony of the officers that they relied on a dispatch description of a suspect wearing 'dark clothing.'" As such, "although defendant was walking at a fast pace and hiding his face from the officers, such equivocal behavior was just as susceptible to an innocent interpretation and may not increase the level of suspicion so as to justify a forcible stop. The defendant's desire not to make eye contact with the officers was equally consistent with an innocent desire as a black male to avoid interactions with the police." Justice Friedman dissented on his conclusion that reasonable suspicion was indeed established for the stop that "was not based solely on defendant's appearance and his presence near the crime scene, but on those factors in combination with his odd behavior when the police were present but had neither approached him nor directed any inquiry to him. When the officers observed defendant, he was not merely walking quickly in the direction of the subway; he was walking with his head turned toward the storefronts lining Third Avenue, perpendicular to his direction of travel, apparently deliberately concealing his face from the police. Again, at that point, the police had not yet approached defendant or said anything to him, so the behavior was not reasonably attributable to a mere innocent desire to be left alone."

People v. Bernard Fabian, 203 A.D.3d 436, 2022 NY Slip Op 3695 (1st Dept. 6/7/22).

The first department held that the Marijuana Regulation and Taxation Act (MRTA), which became effective March 31, 2021—almost three years after defendant's conviction— and in particular, that the odor of burnt or unburnt marihuana could not alone be the basis for probable cause, was inapplicable. As the court noted, in declining to apply this law retroactively, in *People v Pastrana, 2022 NY Slip Op 03058, *2 (1st Dept 2022*), the first department held that " '[n]othing in the plain language of Penal Law § 222.05 (3) indicates that the legislature clearly intended that provision to have retroactive effect' " (A.D.3d, 2022 NY Slip Op 03058, *2 [1st

Dept 2022], quoting *People v Vaughn, 203 AD3d 1729, 1730 (4th Dept 2022)*. This Court's holding in *Pastrana*, is consistent with the recent holdings by the Second and Fourth Departments on this issue (*see People v Babadzhanov, 204 AD3d 685 (2nd Dept. 2022); People v Vaughn, 203 AD3d at 1730.*

People v. Jose Ramirez, 205 A.D.3d 933, 2022 NY Slip Op 03255 (2nd Dept. 5/18/22).

The suppression court properly denied the defendant's motion to suppress physical evidence and his statements to law enforcement officials where the testimony at the suppression hearing established that an NYPD officer had a founded suspicion that criminal activity was afoot in connection with an encounter on a Brooklyn street, which, by virtue of the defendant's flight, ripened into reasonable suspicion to pursue him and detain him, based upon a radio call, an anonymous tip, and a statement by a witness at the scene that a man wearing a gray hoodie who fired a gunshot went in a certain direction, along with observations made by the police officer at the scene.

People v. Lawrence Knight, 205 A.D.3d 928, 2022 NY Slip Op 03252 (2nd Dept. 5/18/22).

The second department held that the lower court properly denied that branch of the defendant's suppression motion which was to suppress a gun recovered from the defendant's vehicle which was parked on a Brooklyn street, where the arresting officer's observation of an open bottle of tequila, and the smell of alcohol emanating from the vehicle, gave him probable cause to suspect a violation of VTL 1227, which prohibits the possession of open containers containing alcohol in a vehicle located upon a public highway, and thus justified his entry into the vehicle to seize the open container and search for additional open containers. Thus, the officer was held lawfully in the position to observe a loaded gun magazine in a partially open backpack located on the passenger's side floorboard and had lawful access to it with the incriminating nature of the gun magazine was readily apparent.

People v. Artur Babadzhanov, 204 A.D.3d 685, 2022 NY Slip Op 02273 (2nd Dept. 4/6/22).

The second department affirmed a Queens Supreme Court denial of suppression in a case involving the warrantless search of an automobile following a valid traffic stop based on the smell of marijuana and in so doing rejected claims that the Marijuana Taxation and Regulation Act, which became effective during the pendency of this appeal, and in particular, the

proscriptions contained in new P.L.222.05(3) which prohibits police searches based solely on the smell of burnt marijuana, applied retroactively. As the court noted, “We discern no expression of legislative intent to apply the new Penal Law § 222.05(3) retroactively so as to invalidate a search that, when conducted, was lawfully supported by probable cause to believe that a substance then contraband in any amount would be found in the car.”

People v. Elijah Gough, 203 A.D.3d 747, 2022 NY Slip Op 01317 (2nd Dept. 3/2/22).

The trial court erred in denying suppression of the defendant’s clothing seized by the police at the hospital he had sought medical attention following his participation in a home invasion-murder during which time he was shot and wounded on the holding. Thus, pursuant to *People v. Sanders, 26 N.Y.3d 773 (2016)*, he had a legitimate expectation of privacy in these items that was violated by the warrantless seizure. In so holding the second department noted that the People failed to present any proof of exigency and the investigating detective could not state which items of clothing matched with the bullet would and that DNA proof derived therefrom was improperly admitted. Nonetheless, the defendant’s murder conviction was affirmed on the holding the this improperly obtained proof was harmless error due to the overwhelming proof of guilt.

People v. Khalik Jones, __ A.D.3d __, 2022 NY Slip Op 00878 (2nd Dept. 2/9/22).

During a suppression hearing an investigating police officer testified that he and another officer were at a railroad station investigating two narcotics tips regarding premises located at a residence Suffolk County. The first tip had been made to the Suffolk County Police Department, and provided the cell phone number of a specific person, who was alleged to be selling heroin from that location. The officer also testified that the second tip was received anonymously from "the city," and gave information about a subject that went by the name of “DA” that would come from the city, take the train to the railroad station in the morning, deal heroin all day from the location and then . . . take that train back home. Because he was on parole, he had to be back into the City by his curfew. Although the second tip did not provide any physical description of DA, the officer testified that he knew from "interaction[s] on the street or a traffic stop or an arrest" that the person known as DA "was a black male subject approximately 30—mid 30s, tall, bald . . . head" who was said to "dress clean." The officer further testified that, a little after 10:00 a.m., he observed a dozen people getting off the train. Most of them went to their cars, but "[o]ne black male subject exited that platform on foot and began walking out of the parking lot." The

man—whom Petrucci identified in court as the defendant—was bald, in his mid-30s, and was wearing jeans and a shirt. The defendant met up with a white female and walked into a deli across the street from the station. After about five minutes, the defendant exited the deli and walked eastbound on Patchogue Avenue. The defendant stopped at the residence and went inside. The officer also testified that he had personally made numerous arrests at the residence next door and described those premises as "probably our number one community complaint in the precinct," and the site of "numerous overdoses." Finally, the officer testified that, as soon as the defendant arrived at the residence "the volume of traffic, both vehicle and pedestrian, picked up significantly." He clarified that meant "cars in and out, people in and out on bikes, on foot." The defendant was "in and out" of the house on numerous times. At one point, the officer observed a black Lincoln Navigator pull into the driveway area of the home, and the defendant "walked over" and "leaned in the front driver's side window" of that vehicle. The officer thus testified that the defendant and the driver engaged in a "very quick and secretive" interaction that was "consistent with a narcotics transaction." He also testified that he next saw a light-colored SUV traveling westbound on the same street. The vehicle parked several houses away from the house next door, and then a white male exited the vehicle and walked toward that driveway where he met the defendant and "exchanged in a secretive exchange consistent with narcotics activity." The officer stated that he "saw a quick hand-to-hand interaction" between the white male and the defendant, but he "did not see any money or drugs," in the “quick interaction. The officer approached the defendant with his "Taser out" and his shield displayed. The defendant was "very compliant" and placed his hands behind his back, and the officer placed the defendant in handcuffs. He asked the defendant if he had any weapons or contraband on him that he should know about, and patted the defendant down, but found nothing, including any drugs or currency. After patting the defendant down, the officer left him standing outside of the police vehicle. The Hispanic male stated that he was there "to buy drugs from DA." No drugs or currency was found on this person, only a crack pipe. The white male - the man mentioned in one of the tips—stated that he was there because he owed "DA" some drug money. No drugs or currency were found on this person so the officers "cut him loose." On cross-examination, the officer clarified that the defendant was "detained" at the time he was initially approached and handcuffed, and was arrested for loitering approximately 30 minutes later, after the police officers had spoken to the two other men discussed above, at which point the defendant was placed inside the police vehicle and brought to the precinct station house. After the defendant was arrested and brought to the precinct station house, another officer noticed a bag containing a powdery substance in the back seat area of the police vehicle where the defendant had been sitting. The substance later tested positive for heroin. The defendant was charged with drug possession and loitering offenses. The second department reversed the lower court denial of suppression

People v. Tony Jennings, __ A.D.3d __, 2022 NY Slip Op 00755 (4th Dept. 2/4/22).

The police lacked reasonable suspicion to justify the seizure of the defendant's vehicle, and therefore the Onondaga County court erred in refusing to suppress both the physical property seized from defendant and the vehicle, as well as inculpatory statements made by defendant during booking following his arrest. In reversing, the fourth department held that the police officers effectively seized defendant's vehicle when they parked their patrol vehicle in such a manner that, for all practical purposes, prevented defendant from driving his vehicle away (see *People v Jennings, 45 N.Y.2d 998, 999 (1978)* Thus, the People did not have "reasonable suspicion that defendant had committed, was committing, or was about to commit a crime" to justify their seizure of the vehicle inasmuch as the seizure was based only on defendant's presence in a vehicle parked in a high crime area, and on the police officers' observation of furtive movements inside the vehicle. See also, People v. Marquez King, 867 N.Y.S.3d 869 (4th Dept. 6/3/22)

People v. Daniel Hall, 202 A.D.3d 1485, 2022 NY Slip Op 00786 (4th Dept. 2/4/22).

There was a sufficient showing of probable cause, based on ariel surveillance and police observation of traffic violations (a defective brake light and a failure to signal) for the police to stop the defendant's truck. Thus, their observations thereafter of marijuana in plain view were proper. In affirming the defendant's conviction for second degree marijuana possession under former P.L. 221.25, the court additionally held that the new Cannabis statute could not, in essence provide the defendant any relief since he possessed more than 16 ounces of marijuana which under the former law was aw felony, but under the new law (P.L. 222.30) was still a misdemeanor.

People v. James Humphrey, 202 A.D.3d 1451, 2022 NY Slip Op 00767 (4th Dept. 2/4/22).

Relying on the information obtained from "an anonymous source," the police lawfully retrieved multiple bags of garbage from a garbage tote at the end of a driveway on two occasions (see *People v Ramirez-Portoreal, 88 N.Y.2d 99, 112-113 (1996); People v Crump, 125 A.D.3d 999, 1000 (2d Dept. 2015); People v. Harris, 83 A.D.3d 1220 (3rd Dept. 2011).* At the time of each "trash pull," the defendant's vehicle was in the driveway. In multiple bags, white residue and narcotics packaging materials were found. The residue taken from the bags secured on both dates was field-tested and yielded a positive reaction for the presence of cocaine. In addition, evidence obtained as a result of those "trash pulls" linked defendant to that address which was sufficient to obtain a search warrant for the home. In affirming the denial of suppression the court held that even assuming, arguendo, that the information obtained from the anonymous source was not reliable, the fourth department concluded that "the evidence in defendant's trash of illegal

activity, even standing alone, was sufficient to support a reasonable belief that drugs and/or evidence of drug sales might be found in defendant's [residence]," quoting *(Harris, 83 AD3d at 1222* [emphasis added]; see also *United States v Leonard, 884 F3d 730, 734-735 (7th Cir 2018)* and to support the issuance of the search warrant. Thus, "[w]hile one search turning up [narcotics] in the trash might be a fluke, two indicate a trend. Whether it be a particularly large quantity of drugs . . . or multiple positive tests of different trash pulls within a fairly short time, both tend to 'suggest [ ] repeated and ongoing drug activity in the residence' " (*Leonard, 884 F3d at 734*, quoting in turn, *United States v Abernathy, 843 F3d 243, 255 [6th Cir 2016]).*

People v. Kevin Townshend, 202 A.D.3d 447 (2nd Dept. 2/3/22).

There was a sufficient *DeBour* Level 2 basis for the police to escort the defendant a few feet away from the scene of an altercations and inquire, "Do you have a knife." In so ruling, the second department held that the lower court properly denied suppression notwithstanding claims that the encounter involved custodial interrogation and thus, *Miranda* warnings since the police query was to clarify the situation.

People v. Dewey Sims, 201 A.D.3d 1248, 2022 NY Slip Op 00471, 2022 WL 242630 (3rd Dept. 1/27/22).

The third department affirmed an Albany County court denial of suppression on the holding that the he stop of the defendant's vehicle was based upon probable cause based on a police officer's testimony that at about 12:35 a.m., he witnessed the defendant rear-end another motorist and then observed the defendant's car moving backwards, as if he was attempting to leave the scene of the accident. As the court noted, "[a] motorist commits the offense of leaving the scene of an accident without reporting when he or she leaves the scene of a motor vehicle accident having cause to know that property damage has occurred without exchanging driver's licenses and insurance identification cards with the other motorist" (see VTL 600 [1] [a]). The defendant had put his vehicle in reverse, in an apparent attempt to leave the scene, and the officer, who witnessed the incident and was at the scene, was required by law to request that driver's licenses and insurance information be exchanged under VTL 600 [1] [b]). While the officer concluded that there was not very much damage, if any, this did not relieve the defendant from compliance with the Vehicle and Traffic Law.

People v. Arthur Collins, 199 A.D.3d 580, 2021 NY Slip Op 06552 (1st Dept. 11/23/21).

NYPD officers received a call about a person trespassing in a Manhattan residential building. When they arrived, the building superintendent identified the defendant, who was “idling” near the building, as the trespasser. Two officers approached and tried to ask him a few questions, but he cursed at them and fled. The officers caught up with the defendant, took him to the ground and handcuffed him. At some point during the pursuit, one officer suffered a knee injury. The other officer handcuffed the defendant, who was wearing a drawstring backpack, and called for backup. While defendant was subdued on the ground and handcuffed with the drawstring backpack still on his back, the uninjured officer patted down defendant and the backpack. At the suppression hearing, when questioned as to why he patted down defendant and the drawstring backpack, the officer merely responded "[f]or our safety." The People never presented further evidence on this claim. The officer also stated that he felt something hard in the backpack during the pat down, which prompted him to look inside the backpack. There he saw a box with the words "9 mm" written on it. The officer removed the box from the backpack, opened it, and saw what he thought was an illegal silencer. He arrested defendant for both criminal trespass and weapon possession. The first department reversed a lower court denial of suppression on the holding that where the record failed to contain evidence supporting a determination that the officer had objective reasonable grounds to believe that the drawstring backpack contained contents that would place his safety at risk or that he was concerned that the bag contained evidence that defendant could destroy. Thus, the circumstances did not demonstrate that any exigency required an immediate search under *People v Mabry, 37 N.Y.3d 933, 934 (2021)* and its progeny. Since defendant's second-degree escape charge was based on his arrest for third-degree criminal possession of a weapon, the defendant's escape conviction was vacated with the additional holding that the lower court properly denied suppression of drugs that were lawfully recovered from defendant at the precinct, because it was a proper search incident to the original lawful arrest for trespass under *People v Lane, 10 NY2d 347, 353 (1961).*

People v. Keith King, __ A.D.3d __, 2021 NY Slip Op 06499 (4th Dept. 11/19/21).

Police officers in Syracuse approached a vehicle in which the defendant was a passenger because the apartment complex at which it was parked was in a “high crime area” and because the vehicle was not running and had three occupants. The hearing record, however, was “devoid … of evidence that the officer was ‘aware of or observed conduct which provided a particularized reason to request information" from the occupants of the vehicle,” quoting, *People v McIntosh, 96 N.Y.2d 521, 527 (2001).* The fourth department thus concluded that the officers lacked the requisite articulable, credible reason for approaching the vehicle and that as such their intrusion was not justified in its inception (*see People v De Bour, 40 N.Y.2d 210, 215 (1976*), to the extent that physical evidence seized from the defendant, as well as the defendant's subsequent statements to the officers were ordered suppressed.

People v. Julio Reynoso, __ Misc.3d __ (Sup. Ct. Kings Co. 2/2/22), N.Y.L.J. 2/18/22.

The Kings County Supreme Court ordered suppression of a handgun seized after a traffic stop of the defendant's vehicle, based on police observations of a n apparently forged temporary Texas license plate on the holding that while the stop was lawful, which was followed by proper direction that the defendant , the driver, and his passenger companion exit the car, a frisk that was p purportedly based on the smell of marijuana without anything else could not be justified where there was no assertion that the defendant was somehow armed and dangerous. In so ruling, the occur eschewed reliance o the recent amendment to P.L. 222.05(3), but instead relied on the officer's lack of experience and training concerning the smell of marijuana and the failure to satisfy the element of safety required for a *Terry* frisk and the holdings of *People v. March, 20 N.Y.2d 98, 101 (1967)* and *People v. Adams, 32 N.Y.2d 45 (1973)* which condemn patdowns of motorists stopped for traffic infractions.

Suppression Motion Practice

People v. Eric Ibarguen, 37 N.Y.3d 1107, 2021 WL 4777276 (10/14/21) [5/2; Memorandum].

A majority of the Court of Appeals affirmed an appellate division order that affirmed a Queens Supreme Court summary denial of a motion to suppress evidence seized as a result of a warrantless entry into a basement apartment occupied by the defendant's girlfriend and daughter on the holding that the defendant, as a casual visitor failed to established standing to complain about the search. While the brief memorandum decision simply held that the allegations in the motion were insufficient to warrant a hearing, the case is interesting because it falls between *Minnesota v. Carter, 525 U.S. 83 (1998*) [no standing for person in home solely to package narcotics] and *Minnesota v. Olson, 495 U.S. 93 (1990)* [an overnight guest in a home has standing]. Judge Wilson, joined by Judge Rivera dissented with Shakespearean allusions to the home as castle and urged that a hearing was required.

People v. Cheichk Fall, 205 A.D.3d 482, 2022 NY Slip Op 03078 *1st Dept. 5/10/22).

The defendant, who was an employee at his mother's store, was properly held by the suppression court to lack a legitimate expectation of privacy in the store's DVR system, and therefore lacked standing to contest the police conduct in taking the video under *People v Ramirez-Portoreal, 88*

N.Y.2d 99, 108 (1996). In affirming the defendant's Manhattan manslaughter conviction, the first department thus held that the testimony at the hearing failed to support defendant's contention that he was effectively an owner or manager of the store. Furthermore, the record supports the court's alternative finding that defendant's father voluntarily consented to the police taking the DVR system, and that he had at least apparent authority to do so under *People v Adams, 53 N.Y.2d 1, 8-9 (1981),* where the police saw the defendant's father unlock and open the store, and he demonstrated his voluntary consent by cooperating and affirmatively helping the police to access the DVR box.

People v. Rashad Farmer, __ A.D.3d __, 2022 NY Slip Op 01313 (2nd Dept. 3/2/22).

Although the lower court erroneously concluded that the defendant lacked standing to complain about the People's acquisition of historic cell-site location information by an "attorney subpoena" [see *Carpenter v. United States, 138 S.Ct. 2206 (2018)*], the records were subsequently obtained (apparently again) pursuant to a search warrant and in any event, their admission at the defendant's Dutchess County aggravated family offense trial was harmless beyond a reasonable doubt in light of the overwhelming proof of guilt.

People v. Gregory Fleming, __ A.D.3d __, 2022 NY Slip Op 00360 (1st Dept. 1/18/22).

The defendant's motion to suppress based on as claim that the police had insufficient probable cause to arrest him alleged sufficient facts pursuant to C.P.L. 710.60 to warrant a hearing where he alleged that the transmitted description that was relied on by the police to arrest him was lacking where the defendant described his own description as a 44-year-old Black man and thus, based on the limited information available to him under *People v. Jones, 95 N.Y.3d 721, 726 (2000),* should not have resulted in summary denial of the application

People v. Marcel Teixeira-Ingram, __ A.D.3d __, 2021 NY Slip Op 06575, 2021 NY WL 5496977 (3rd Dept. 11/24/21).

The People presented evidence through two Troopers at a suppression hearing that a car in which the defendant was an occupant, along with four others was stopped for speeding and thereafter the defendant was arrested along with the others for possession of 6.5 ounces of cocaine. One of the Troopers testified that he read Miranda warnings to two of the occupants but never spoke to

the defendant. A State Police investigator then testified that he spoke with the defendant because another Trooper (apparently referring to the first Trooper) read the defendant his Miranda warnings and when pressed on cross-examination, the investigator conceded he never read the defendant his rights. The third department reversed a denial of suppression of the defendant's statements on the holding that contrary to the People's claim that there was a sufficient inference the investigator talked to the first Trooper who told the investigator that he read defendant his rights, where that Trooper did not testify to having read defendant his rights; he instead testified that he had no conversation with defendant the proof was insufficient. In reversing, the appellate division noted that although hearsay is admissible in suppression hearings this inference based on hearsay is insufficient for the People to prove beyond a reasonable doubt that defendant was advised of his *Miranda* rights before being questioned. Moreover, even if the People had proven that fact, the court noted that the investigator's conclusory assertion that defendant waived his right to counsel supplied no facts from which County Court could have rationally concluded that defendant's waiver of his right to counsel -- or any of his other rights -- was knowing, voluntary and intelligent.

Arrests – Miscellaneous

Police Benevolent Association of the City of New York, Inc. v. New York City, __ A.D.3d __, 2022 NY Slip Op 03329 (1st Dept. 5/17/22).

The first department reversed a lower court order to the contrary and held that a New York City Administrative Code provision [[10-181] that forbids the police from applying pressure or compression by kneeling, sitting or standing on a person's torso to a person's diaphragm in order to subdue him or her was valid. In so ruling the court unanimously rejected claims that the law was overly or unconstitutionally vague, that it was pre-empted, or that the absence of an intent element rendered the provision unlawful.

Search Warrants

Jesus Ferreira v. City of Binghamton, __ N.Y. 3d __, 2022 WL 837566 (3/22/22) 5/2; Singas, J.].

On a certified question from the U.S. Court of Appeals for the 2nd Circuit, whether New York's "special duty" requirement in negligence applies to injuries inflicted by police during the

execution of a “no-knock” search warrant or that it applies only to claims premised upon a municipality’s “negligent failure to protect the plaintiff from injury, held that plaintiffs must establish that a municipality, a majority of the New York Court of Appeals. held 5-2, per Singas, J., that consistent with New York precedent and the purpose of the special duty rule, plaintiffs must establish that a municipality owed them a special duty when they assert a negligence claim but that a special duty may be established when a municipality, acting though its police, plans and executes a no-knock search warrant of a person’s home, and that such a duty “runs to the individuals within the targeted premises at the time the warrant is executed. The majority based its conclusion in a case in which an unarmed man was shot in the stomach by SWAT team police during a “dynamic entry” as part of the execution of a no-knock warrant on its determination that when the police” plan and execute a search warrant, they effectively take control of the targeted premises, knowingly creating an unpredictable and potentially dangerous condition. Judge Wilson, joined by Judge Rivera, dissented on their determination that the municipality should be liable for a breach of a general duty to protect for injuries inflicted during the execution of a no-knock search warrant.

People v. Clarence Alexander, __ A.D.3d __, 2022 NY Slip Op 04585 (3rd Dept. 7/14/22).

Notwithstanding that certain portions of a Schenectady County search warrant to search data on the defendant’s cell phone were overbroad in connection with a sexual abuse investigation involving a minor, the third department, relying on *People v Brown, 96 N.Y.2d 80, 89 (2001),* severed that portion and held that other evidence seized pursuant to the warrant that was found in plain view as developed in the forensic examiner’s extraction report from the phone was properly held not suppressed. The court additionally held that the warrant was sufficiently particularized.

People v. Terrell Forbes, 203 A.D.3d 949, 2022 NY Slip Op 01805 (2nd Dept. 3/16/22).

The suppression court properly denied the defendant's motion to controvert the search warrant and in so doing correctly rejected the defendant’s claim that the warrant failed to meet the *Aguilar-Spinelli* two-prong test required in New York of weighing the (i) the veracity or reliability of the source of the information, and (ii) the basis of the informant's knowledge based on some minimum, reasonable showing. See *People v Griminger, 71 N.Y.2d 635, 639 (1988).* Here, the confidential informant's basis of knowledge was sufficiently established based on personal observations and knowledge, much of which was corroborated by the warrant applicant's own observations and investigation and moreover, the information provided by the informant was "of such quality, considering its source and the circumstances in which it came into possession of the informant, that a reasonable observer would be warranted in determining that the basis of the informant's knowledge was such that it led logically to the conclusion that a

crime had been . . . committed," quoting *People v Jean-Charles, 226 A.D.2d 395, 396 (2nd Dept. 1996).*

People v. Michael M. Socciarelli, 203 A.D.3d 1556 (4th Dept. 3/11/22).

A search warrant application established that a photograph of a "pubescent minor in a sex act" was uploaded from an IP address attributed to a residence where defendant was the sole occupant. That photograph was then shared, via a Facebook account in defendant's name, with a person in the Philippines, where defendant admitted he had Facebook "friends," provided appropriate reasonable cause for its issuance. In affirming an Ontario County denial of suppression the fourth department agreed with many federal courts that "have reached the conclusion that illegal internet activity associated with a particular IP address is a sufficient basis to find a nexus between the unlawful use of the Internet at the IP address and a [device] possessed by the subscriber assigned that address," quoting *People v. Hayon, 57 Misc 3d 963, 970 (Sup. Ct. Kings Co. 2017); see generally People v DeProspero, 20 N.Y.3d 527, 530 [2013].* Thus, based on the information set forth in the application the appellate division concluded that there was probable cause to believe that defendant's electronic devices, including his smartphone, would contain information relevant to a criminal offense, i.e., the dissemination of child pornography. Finally, the court also concluded that the search warrant was not overly broad inasmuch as the description of the electronic files to be seized from defendant's cell phone "was not broader than was justified by the probable cause upon which the warrant[] [was] based," quoting, *People v Crupi, 172 A.D.3d 898, 899 (2nd Dept 2019).*

People v. Amber S. Pitcher, 199 A.D.3d 1493 (4th Dept. 11/19/21).

The majority of the information provided in support of a search warrant application was in an affidavit prepared by a detective, and that affidavit was held to not "permit a reasonable inference that it was based upon [the detective]'s personal knowledge," quoting, *People v Bartholomew, 132 A.D.3d 1279, 1281 (4th Dept 2015).* Thus, the fourth department held that with respect to that aspect of the warrant, the application failed to meet the *Aguilar-Spinelli* test with regard to the sources of that information. Although the detective indicated that he obtained some of that hearsay information from other officers, he did not name the officers and they did not provide affidavits or any basis for their knowledge, thus that information was not sufficiently reliable Other hearsay information was purportedly received from two confidential informants, but, as the court noted, it is well settled that, "once an appropriate challenge by the defense has been raised, the People are required to produce the police informant for an *in camera* inquiry

unless they can demonstrate that the informant is unavailable and cannot be produced through the exercise of due diligence," quoting, *People v Adrion, 82 N.Y.2d 628, 634 (1993)* Here, after the defendant raised a challenge, those two informants did not appear to testify at a *Darden* hearing and the People failed to make a threshold showing that the informant[s are] 'unavailable and cannot be produced through the exercise of due diligence. The People therefore failed to establish the basis of the information allegedly provided by those informants. Finally, although a third confidential informant who submitted an affidavit in support of the warrant testified at the *Darden* hearing, the information that informant provided did not establish the requisite probable cause to support the warrant. As such a Jefferson Count order of suppression was affirmed on a People's appeal.

People v. Christopher E. Herron, __ A.D.3d __, 2021 NY Slip Op 06512 (4th Dept. 11/17/21).

A search warrant approved by an issuing magistrate permitted Troopers to search for, among other things, "personal papers, . . . alcohol, . . . safes, . . . any communication and computers that are related to criminal activity, any . . . telephone records, cell phones that [may] contain evidence of a crime or illegal activity and any associated documentation related to any criminal activity." The fourth department reversed an Allegany County denial of suppression and held that those parts of the warrant were overbroad and any evidence seized pursuant to them should have been suppressed on the theory that severance of the overbroad directive was feasible here because "the warrant was largely specific and based on probable cause, " quoting *People v. Brown, 96 N.Y.2d 80, 88 (2001).* The court remitted the matter for a hearing to determine what evidence, if any, should be suppressed as the fruit of the invalid portion of the search warrant.

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

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

DMV Proceedings

Matter of Pedro Endara-Caicedo v. Department of Motor Vehicles, 36 N.Y.3d 20 (2/15/22) [5/1; DiFiore, C.J.].

A majority of the Court held 5-1, that the two-hour rule in VTL 1194 (2) (a) (1), authorizing a chemical test to be taken from a motorist based upon deemed consent, is not applicable to a Department of Motor Vehicles (DMV) license revocation hearing held pursuant to Vehicle and Traffic Law § 1194 (2) (c) after a motorist's refusal to submit to a chemical test on the conclusion that the "plain text" of VTL 1194 (2) (c) specifically limits the subject matter of the revocation hearing to four enumerated issues and the evidentiary two-hour limit for a deemed consent scenario is not one of those issues. Thus, because VTL 1194 explicitly provides that "the issues at a DMV license revocation hearing "shall be limited to the following": "(1) whether the police had reasonable grounds to believe the motorist was driving in violation of VTLe 1192; (2) whether the arrest was lawful; (3) whether the motorist was sufficiently warned, prior to the refusal, in clear and unequivocal language, that a refusal to submit to the chemical test referenced in VTL 1194 (2) (a) (1) would result in the immediate suspension and subsequent revocation of his or her driver's license, independent of whether the motorist is found guilty of the charge for which he or she was arrested; and (4) whether the motorist refused "to submit to such chemical test or any portion thereof," the majority held the defendant's license was properly revoked by the DMV upon his refusal to consent to a chemical test following his arrest for driving while intoxicated. Judge Rivera dissented on her determination that the motorist's refusal to submit to the test should have been admissible at the DMV revocation hearing.

Miscellaneous

Matter of Stevens v. New York State Division of Criminal Justice Services, __ A.D.3d __, 2022 NY Slip Op 03062 (1st Dept. 5/5/22).

A majority of the first department held by a 4-1 vote, per Gische, J., that the 2017 D.C.J.S. regulation [9 NYCRR 6192] promulgated under the DNA Databank Act, Executive Law 995, et seq., improperly authorized the DCJS to expand its DNA database to search for familial DNA matches to investigate crime. In so ruling, the majority granted standing to relatives to convicted criminal who were required to provide DNA samples to be uploaded to the State's DNA databank and held that due to the lack to explicit authority in the statute and the ongoing controversy about the technique, legislative action was required. The opinion eschewed any determination regarding the process's efficacy or ultimate evidentiary admissibility. Justice Singh dissented on the conclusion that the petitioners in this Article 78 action lacked standing as persons with an "injury in fact" to seek the relief herein,

Confessions

Miranda

People v. Malik Dawson, 38 N.Y.3d 1055 2022 WL 1216195 (4/26/22) [5/2; Memorandum].

A majority of the Court of Appeals held in a summary disposition memorandum 5-2 that a defendant did not validly unequivocally assert his right to counsel during custodial interrogation because his statements in context were conditional in nature. As the majority noted in holding his inculpatory statement and apology letter properly held admissible, whether "[a] suggestion that counsel might be desired; a notification that counsel exists; or a query as to whether counsel ought to be obtained will not suffice" to unequivocally invoke the indelible right to counsel [citing, *People v Mitchell, 2 N.Y.3d 272, 276 (2004*), citing in turn, *People v Roe, 73 N.Y.2d 1004 (1989); People v Fridman, 71 N.Y.2d 845 (1988*); and *People v Hicks, 69 N.Y.2d 969 (1987)].* Furthermore, "[w]hether a particular request is or is not unequivocal is a mixed question of law and fact that must be determined with reference to the circumstances surrounding the request including the defendant's demeanor, manner of expression and the particular words found to have been used by the defendant," quoting *People v. Glover, 87 N.Y.2d at 839*. Judge Wilson, joined by Judge Rivera, dissented on the conclusion that while there was no transcript of the video-taped interrogation of the defendant, who had been placed in custody and detained by the police in a police station on a sexual assault charge and the video-taped recording of the interrogation was sealed and not part of the record, his own transcription reflected a clear request to contact an attorney. Thus, according to Judger Wilson, as *Miranda* rights were being discussed, the defendant asked whether "it was possible to call his lawyer," and a statement that he wanted his lawyer "here, right now." The investigating detective then stated, that it "sounds like you know your Miranda rights," and indicated that he was going to get a telephone to call the attorney. However, when the officer returned he indicated," "Here's the deal, I'm just going to ask you flat out, because we're in the middle of this and this is something we could potentially resolve – do you want your lawyer here or do you want to just figure this out?" The defendant replied, "I really just want to figure this out." The detective then administered *Miranda* warnings that were waived.

People v. Kevin Guerra, 75 Misc.3d 1234[A] (Queens Sup. Ct. 8/8/22) [Mullen, J.].

In a Queens County homicide case, custodial stationhouse statements were suppressed where the court found that defendant unequivocally invoked his right to counsel. After some initial *non-Mirandized* custodial questioning about his employment status (later determined by the court to be "small talk") defendant asked if he was required to answer questions. The detective responded that "obviously it's better to answer questions so we know." The defendant stated, "Like I have a lawyer. I have my number in the phone. I was wondering if maybe we could call him." The detective asked if that's what the defendant wanted, and defendant answered, "Yeah, I have it. But if you want, I could listen to you first really quick." The detective then administered *Miranda* warnings, and after the defendant stated that he understood his rights, he added, "Let's say I don't want to answer all your questions. Maybe I'll listen to it and maybe

some questions I'll answer it." The detective then asked if the defendant was willing to answer questions, and the defendant responded, "Yes." After several minutes of questioning the defendant stated, "We could keep going because I want to know more." The detective then told defendant that the police had crime scene surveillance video to which the defendant responded, "I'll call m lawyer and we'll do a discovery packet." Thereafter, "the defendant told the detective again that he wanted his lawyer and they stopped questioning him." On these facts, the court held that the defendant unequivocally invoked his right to counsel, and that the detective's pre-*Miranda* warning statement that the defendant could benefit himself by answering questions effectively vitiated or neutralized the effect of the subsequent *Miranda* warnings. *People v. Dunbar,* 24 NY3d 304 (2014).

People v. Tyrone Wortham, 37 N.Y.3d 407, 2021 NY Slip Op 06530 (11/23/21) [5/2; Fahey, J.].

Questioning regarding name, address, height, weight, date of birth by the police of the defendant who was present in an apartment during the execution of a search warrant in Brooklyn without *Miranda* warnings and while he was handcuffed fell within the pedigree exception. As such, in a case in which weapons, narcotics and drug paraphrenia were seized during the execution of the warrant, the defendant's statement that he lived in the apartment was properly held admissible by the lower courts since the questioning was administrative in nature under *People v. Rodney, 85 N.Y.2d 289 (293 (1995),* and not designed to elicit and incriminating response. The defendant's conviction, was reversed and remitted due to the failure to the trial court to have conducted a *Frye* hearing (*see Frye v United States*, 293 F. 1013 (D.C. Cir 1923)] on the admissibility of statistical evidence generated by the forensic statistical tool (FST) developed by the New York City Office of Chief Medical Examiner (OCME), where it is alleged that defendant was a contributor to a multiple-source DNA profile as required by *People v. Williams, 35 N.Y.3d 24 (2020)* and *People v. Foster-Bey, 35 N.Y.3d 959 (2020)* and that error was not harmless. Judge Rivera dissented on her conclusion that the pedigree exception did not apply where the defendant was handcuffed and since the inquiry was not about "routine booking" matters. Judge Wilson also dissented on the conclusion that the erroneous admission of the highly material DNA evidence was reversible and thus, the defendant's conviction should be vacated as many sister state courts have done in similar circumstances.

People v. Storm N. Rivera, 206 A.D.3d 1356, 2022 NY Slip Op 04050 (3rd Dept. 6/23/22).

The defendant first went to the Potsdam Police Department in St. Lawrence County in connection with a rape investigation and spoke with an investigator in December 2017 but, after the investigator read the defendant his *Miranda* rights, he stated that he had spoken with an

attorney and did not wish to provide a statement at that time. The interview terminated at that point. The defendant later requested to speak with the investigator and returned to the police department to do so in February 2018. The investigator clarified that defendant previously stated he had an attorney, but that that person ended up not being defendant's attorney and that defendant tried to find an attorney on his own. Defendant appears to have stated that he could not afford an attorney. The investigator then further clarified that the defendant was there on his own accord and was free to leave at any time. The interview ensued and the defendant, who was not restrained in any way, did not at any point request an attorney. At the conclusion of the interview defendant freely left the police station. The third department affirmed a denial of suppression order on the holding that where the defendant had not been charged, he was clearly not in custody given that he was not restrained in any way and was repeatedly told that he was free to leave at any point, which he in fact did at the conclusion of the interview. As such *Miranda* warnings were not required. In affirming a majority of the third department held 4-1 that where the defense counsel failed to object during trial regarding the extent of the trial court's inquiry of a sworn juror who revealed during deliberations that she was a rape victim and in fact, consented to the process, the issue was not preserved on appeal. Justice Aarons dissented on the conclusion that the trial court's "grievous error" in connection with its inquiry of the juror required reversal in the interest of justice.

People v. Ramadan B. Abdullah, 203 A.D.3d 1340, 2022 NY Slip Op 04045 (3rd Dept. 6/23/22).

The defendant was initially detained in a Broome County sporting goods store after he activated a security alarm. Over the next 30 minutes, he was questioned by police officers without *Miranda* warnings who were summoned by store employees regarding his shoplifting some ammunition. The entire interaction at the between the defendant and the four officers show responded was captured by the various body cameras worn by the police involved. Throughout most of the interaction, the four officers were present at the sporting goods store, with at least one officer positioned between defendant and the exit. Critically, shortly after the police arrived, the defendant had been told to empty his pockets and place all of his personal property on the counter and complied. While being detained by the police, defendant asked the police multiple times if he could retrieve his possessions. The police denied each of these requests. Reviewing the body-cam recordings as a whole, the third department held that the questions posed by the police to defendant exceeded that necessary for a mere investigation. Thus, "many of their inquiries were not limited to the petit larceny, the allegation in question, but instead focused on firearms that defendant may have possessed, their location, caliber and defendant's intent as to his usage of same. In o holding the appellate division also held that a reasonable person would have felt free to leave. As such, the defendant's statements at the sporting goods store were determined to have been the product of custodial interrogation and, in the absence of *Miranda* warnings, should have been suppressed by the lower court.

People v. Yoselyn Ortega, 202 A.D.3d 489, 2022 NY Slip Op 00828 (1st Dept. 2/8/22).

The trial court properly denied defendant's motion to suppress statements to the police where the record supported the court's finding that the statements were spontaneous and thus did not require *Miranda* warnings. After killing two children who had been in her care, and being confronted by the children's mother, the defendant attempted suicide and injured her throat. While she was in custody, intubated and sedated at a hospital, she sought the attention of the officer guarding her by tapping on the bed railing, and mouthed that she had "something important to say to him." The defendant communicated by making sounds, mouthing words, and pointing at letters on an alphabet board. Although this difficult form of communication continued sporadically over two hours, the officer (who was not involved in the investigation) did not ask any questions except for asking defendant to verify that he had understood her, and did nothing to prompt or elicit statements on any subject. In affirming, the first department held that his was not the functional equivalent of interrogation because the officer did nothing that was "reasonably likely to elicit an incriminating response." In fact, the defendant did not make any statements about the homicide itself. The first department additionally held that the "[d]efendant's right of confrontation was not violated when an autopsy report prepared by a former medical examiner, who did not testify, was introduced through the testimony of another medical examiner," quoting *People v Acevedo*, 112 A.D.3d 454, 455 (1st Dept 2013). Thus, the report was not testimonial, because it "[did] not link the commission of the crime to a particular person," quoting *People v John*, 27 N.Y.3d 294, 315 (2016). In any event, any error was held harmless under the standards for constitutional error where the cause of death was undisputed and nothing in the autopsy report had any bearing on defendant's defenses of insanity and lack of intent, and to the extent anything in it could be viewed as such, it was cumulative to evidence already before the jury.

People v. Adalberto Marrero, 199 A.D.3d 1471 (4th Dept. 11/17/21).

About 20 minutes into a police interrogation in connection with a shooting in Monroe County and following an initial waiver of *Miranda* rights, the defendant expressly stated that he did not "want to talk about more of this. That's it." Thereafter, a police officer told the defendant that "now [was] the time" for him (the defendant) to provide an explanation for the shooting and that such an explanation would benefit defendant. The fourth department reversed a lower court denial of suppression on the holding that. "[p]roperly administered *Miranda* rights can be rendered inadequate and ineffective when they are contradicted by statements suggesting that there is a price for asserting the rights to remain silent or to counsel, such as foregoing 'a valuable opportunity to speak with an assistant district attorney, to have [the] case[ ] investigated or to assert alibi defenses' " quoting, *People v Muller, 155 A.D.3d 1091, 1092 (3rd Dept 2017),*

also quoting People v. *Dunbar, 24 N.Y.3d 304, 316 (2014)).* Thus, the police officer's statement "improperly implied to defendant that the interrogation would be his "only opportunity to speak" (quoting *Dunbar*, 24 NY3d at 316 [internal quotation marks omitted]), and his advice that providing an explanation would benefit defendant effectively "implied that . . . defendant['s] words would be used to help [him], thus undoing the heart of the warning that anything [he] said could and would be used against [him]" (*id).* The appellate division further concluded that the defendant thereby unequivocally invoked his right to remain silent since no reasonable police officer could have interpreted that statement as anything other than a desire not to talk to the police. Defendant's responses to the police officers when they resumed the interrogation did not negate his prior unequivocal invocation of his right to remain silent because the police officers failed to reread the *Miranda* warnings to defendant before resuming the interrogation and therefore failed to scrupulously honor his right to remain silent. Nevertheless, the fourth department held as a final matter that that any error in failing to suppress defendant's statements was harmless where the evidence of guilt was overwhelming and there was no reasonable possibility that the jury would have acquitted defendant if his statements had been suppressed.

Carlos Vega v. Terrence B. Tekoh, __ U.S. __ (6/23/22) [6/3; Alito,J.].

A majority of the Court per Alito, J., held 6-3 that the failure by police investigators to provide a defendant with *Miranda* warning does not provide a basis for bring a lawsuit under 42 U.S.C. 1983 for a deprivation of civil rights. Thus where a Los Angeles County Sheriff's deputy was investigating allegations that the defendant had sexually assaulted a patient while employed at a medical center and without providing *Miranda* warnings obtained inculpatory statements by way of an apology to the victim and the statement was introduced in evidence at the criminal defendant's trial, where the defendant was acquitted the violation of the "prophylactic" rule of *Miranda* which did not necessarily impact the Fifth Amendment, in turn did not necessarily provide a basis to sue for damages. Justice Kagan, joined by Justices Breyer and Sotomayor dissented, and would have concluded that a violation of the constitutional rule of Miranda must provide a cause of action under 42 U.S.C. 1983.

Self-Representation

People v. Vladimir Duarte, 37 N.Y.3d 1218 (2/15/22) [4/2; Memorandum], N.Y.L.J., 2/18/22 @ p. 1.

A majority of the Court concluded that the appellate term correctly held that the defendant did not unequivocally assert his right to represent himself during a colloquy with the trial court on an

application to relieve his trial counsel when the trial judge denied that application and the defendant immediately thereafter "retort[ed]," I would love to go pro se." In so ruling the Court held that this statement in context" [d]d not reflect a definitive commitment to self-representation," quoting *People v. LaValle, 3 N.Y.3d 88, 106 (2004).* Judge Rivera, joined by Judge Wilson, dissented on the conclusion that the defendant's statement of "seven words" that he would "love to go pro se" was a clear and unequivocal expression that required an inquiry by the court under *People v. McIntyre, 36 N.Y.2d 10 (1974).* See also, *People v. Stanley Holmes, __ A.D.3d __, 2022 NY Slip 03483 (1st Dept. 5/31/22)* for a similar first department holding relying on *Duarte.*

People v. Daniel Williams, __ A.D.3d __, 171 N.Y.S.3d 10, 2022 NY Slip Op 04135 (1ts Dept. 6/28/22).

The first department, per Webber, J., affirmed the defendant's Manhattan attempted second degree robbery of a livery taxi cab driver over claims that the trial judge improperly revoked the defendant's ability to represent himself midtrial due to his inappropriate behavior. In so ruling, the appellate division noted that during the defendant's testimony, the court repeatedly told him to calm down, to slow down, and to stop arguing and putting forth arguments to the jury After the court recessed the proceedings for the day and the exited, the court explained that it had taken these actions because defendant was extremely agitated and as a result, he was not "telling a coherent story." The court then asked that defendant be "taken in the back for a few minutes to calm down." Thereafter the trial judge directed standby attorney to complete the trial by representing the defendant. Noting that the right to self-representation is not absolute, the first department held," the record supported a determination that defendant's conduct prevented the fair and orderly exposition and was not based upon an isolated incident during defendant's testimony. Rather, according to the first department, it was the "culmination of defendant's escalating, agitated behavior." Further, defendant was previously instructed by the trial court that were he allowed to represent himself he was to conduct himself as an attorney would and was to be respectful of everyone in the courtroom yet failed to do so.

People v. Robert Goodwin, 201 A.D.3d 529, 2022 NY Slip Op 00281 (1st Dept. 1/18/22).

At a Manhattan Supreme Court appearance, the defendant, charged with burglary, requested that he be permitted to represent himself, specifically invoking his sixth amendment rights. The calendar judge reserved decision, stating that the hearing judge would rule on his application. At the defendant's next appearance before the same judge, the defendant again requested that he be permitted to proceed pro se, stating that he could not be "forced" to go to trial with his appointed

attorney. The court stated that no one was "forcing" defendant to do anything, but nonetheless indicated that “the more defendant continued to talk over the court and the prosecutor, the less likely he would be found fit to represent himself.” The court adjourned the matter for a hearing and trial, stating that it had neither granted nor denied defendant's application. When defendant continued to reiterate his request, the judge “quipped,” "if it's up to me, I am denying your request," concluding that defendant was disruptive and unable to conduct himself in an orderly manner. At the next appearance before a second judge, the defendant unequivocally stated that he wanted to represent himself, specifically invoking his sixth amendment rights. The court proceeded to make the requisite inquiry, but deferred ruling on the application because defendant stated that he was not feeling 100 percent and was affected by medication. A week later, before a third judge, the defendant noted that he "tried to go pro se." The third judge, referring to a notation in the file, stated that defendant's application to proceed pro se had already been denied. The first department reversed the defendant’s conviction after a jury trial on the holding the successive judges failed to meet the defendant’s request for self-representation and to the extent that the defendant was disruptive on one occasion, that was borne or “frustration,” of not being permitted to proceed pro se, where he was “clearly fit” to do so.

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

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

People v. Dominick Crispino, 197 A.D.3d 1116, 2021 NY Slip Op 04918 (2nd Dept. 9/1/21).

The defendant’s Brooklyn grand larceny conviction was reversed due to the trial court’s failure to have conducted the required searching inquiry regarding the defendant’s determination to represent himself. Thus, notwithstanding the fact the defendant was a disbarred attorney, the record did not demonstrate that the defendant was aware of the dangers and disadvantages of representing himself or the benefits of having trial counsel pursuant to *People v Crampe, 17 N.Y.3d 469, 481 (2011*). As the second department noted. although the record did reflect that the Supreme Court was aware of the defendant's pedigree information, including his status as a disbarred attorney, the court failed to ascertain that the defendant was aware of the risks inherent in proceeding without a trial attorney and the benefits of having counsel represent him at trial.

Right to Counsel

People v. Jose Guevara, 37 N.Y.3d 1014, 2021 WL 4092521, 2021 NY Slip Op 04955 (9/9/21) [7/0; Memorandum].

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

Substitution of Counsel

People v. Nyquan English, __ A.D.3d __, 2021 NY Slip Op 00189 (2nd Dept. 1/12/22).

Prior to conducting a suppression hearing, the lower court was informed that the defendant refused to come to the courtroom, that he did not want to speak with his assigned counsel, and that he wanted to fire his assigned counsel. Instead of bringing the defendant to the courtroom, the court assigned an additional attorney (hereinafter the 18B attorney) to speak with the defendant. On the next court date, assigned counsel informed the court that the relationship between the defendant and assigned counsel had been contentious for some time due to the defendant's lack of access to discovery and assigned counsel's inability to obtain specific evidence that the defendant requested. The 18B attorney then informed the court that the defendant wanted new assigned counsel and characterized "a vast majority" of the defendant's complaints as "problems with legal strategy." Assigned counsel advised the court that it would be a "conflict" to go forward with the suppression hearing because the defendant refused to speak with assigned counsel. The court, at this point with the defendant in the courtroom, denied the defendant's application for new assigned counsel without speaking to the defendant. After the suppression hearing, assigned counsel renewed the defendant's application for new assigned counsel on a subsequent court date, and the court, just prior to jury selection, while the defendant was present, again denied the application without speaking to the defendant, and despite the fact

that assigned counsel reiterated that the defendant would not talk with assigned counsel. The second department reversed the defendant's robbery, weapons possession and narcotics conviction on the holding that the defendant's right to counsel was not adequately protected where his request for new counsel, made through assigned counsel, contained "serious factual allegations concerning the defendant's complaints about his assigned counsel and the breakdown of communications between assigned counsel and the defendant," quoting *People v Porto, 16 NY3d 93, 100 (2010).* Under the circumstances presented here, the trial judge should have spoken directly with the defendant to resolve the claims raised.

Ineffective Assistance

People v. Peter Carmen, __ N.Y.3d __ (4/22/22) [7/0; Memorandum].

Assuming without deciding that the defendant was entitled to effective assistance of counsel at his risk-assessment hearing under the Sexual Offender Registration Act, the record reflected that the defendant received effective assistance during this proceeding.

People v. Angelo Burgos, 38 N.Y.3d 56 (3/17/22)]7/0; Troutman, J.).

Notwithstanding the Second Circuit Court of Appeals prior suspension of defense counsel from the practice of law before that court due to the attorney's deficient appellate flings and misconduct in the federal district court, the defendant's claim that he was provided ineffective assistance during the defendant's gang assault bench trial was rejected by the Court of Appeals on the conclusion that the attorney was not "constructively suspended" from the practice of law in New York. In so ruling, the Court of Appeals held that in spite of the federal order, the defendant remained a duly licensed attorney in New York (he was suspended by New York licensing authorities after the trial on the basis of the federal order and also that he was not obligated to notify his client of the federal suspension where he did timely advise state officials of the federal suspension.

People v. Joseph Sposito, __ N.Y.3d __ (1/6/22) [6/1; Memorandum].

A majority of the he Court of Appeals affirmed the defendant's sexual assault conviction on the holding that he failed to demonstrate that his trial counsel's representation was ineffective. Thus,

where his attorney effectively attempted to disprove a key element of the charged crime, consent, counsel's decision to waive the suppression hearing pursuant and thus allow the defendant's statements into evidence was in accord with a reasonable defense strategy of showing that defendant had consistently maintained that the acts in question were consensual. Counsel's strategy also attempted to take the sting out of defendant's statements and avoided the use of them as impeachment material, which could have cast doubt on defendant's credibility. Finally, contrary to defendant's argument that trial counsel was required to consult with or call expert witnesses, counsel undertook a reasonable strategic choice to focus the jury on the chosen defense, counsel was well- equipped to execute the defense strategy, and counsel in fact obtained key concessions from the People's experts on cross-examination. Judge Wilson dissented for the reasons stated by a dissented justice at the appellate division.

People v. Jermaine Jennings, __ N.Y.3d __, 2021 NY Slip Op 06428 (11/11/21) [7/0; Memorandum].

Defense counsel's failure to challenge the verdict as repugnant did not render the representation ineffective because the issue was not clear-cut and dispositive given the jury charge.

People v. Marshall D. Jackson, __ A.D.3d __, 2022 NY Slip Op 00785 (4th Dept. 2/4/22).

The defendant met his burden of establishing that he received less than meaningful representation during his Oneida County murder trial. Pursuing an EED defense was the best trial strategy for defendant, and defendant demonstrated the absence of any strategic or other legitimate explanation for defense counsel's failure to obtain certain records, her failure to introduce other records in evidence, and her failure to secure an expert to support an EED defense required a reversal of his conviction and a new trial.

People v. Eugene Graham, 201 A.D.3d 143 (1st Dept. 12/16/21) [Moulton, J.].

Notwithstanding defense counsel's admitted own ineffectiveness in failing to properly investigate and prepare a Bronx murder case for trial by to filing a late alibi notice due to his incompetence and his putative belief that the statutory deadlines would not be enforced, his personal problems and his trial schedule. counsel declined to withdraw from representation, the first department, per Justice Moulton held that the defendant failed to demonstrate that based on the totality of circumstances he was deprived of meaningful representation and a fair trial and

moreover that he was deprived of his right to conflict-free counsel, assuming the existence of a conflict.

People v. Adam Thomas, __A.D.3d__, NY Slip Op 05430 (4th Dept. 9/30/22).

In a Monroe County robbery prosecution, on the day prior to jury selection, defense counsel filed a motion requesting permission to file a late notice of alibi. Although defense counsel acknowledged that he became aware of the alibi witness days after the arraignment on the indictment, he failed to file a timely notice of alibi "simply through of his own negligence." His statements established that his failure to file a timely notice of alibi "was not willful or motivated by a desire to obtain a tactical advantage but [was] simply a mistake" Accordingly, "defendant's constitutional right to offer the testimony of the alibi witness outweighed any prejudice to the People or their interest in having the trial begin as scheduled. . . The court therefore abused its discretion in precluding the testimony of the alibi witness" and the conviction was reversed.

Ineffective Assistance of Appellate Counsel

People v. Kevin Louis, __ A.D.3d __, 2021 NY Slip Op 07037 (2nd Dept. 12/22/21).

The defendant's prior appellate counsel provided ineffective assistance on his direct appeal when he failed to argue that two misdemeanor convictions – two counts of endangering the welfare of a child were time-barred by the statute of limitations. While the defendant was convicted of first-degree burglary and rape as well, the court granted the defendant's writ of error coram nobis to this extent.

People v. Sequan Downing, __ A.D.3d __, 2021 NY Slip Op 06698 (2nd Dept. 12/1/21).

The second department granted the defendant's application for a writ of error coram nobis based on appellate counsel's failure to argue on direct appeal that the trial judge failed to consider whether to adjudicate the defendant a youthful offender. In so ruling the appellate division noted that notwithstanding that the Court of Appeals ruling in *People v. Rudolph, 21 N.Y.3d 497 (2013)* was decided shortly after former appellate counsel filed his brief in this case, meaningful representation required that he file an amended or supplemental brief after Rudolph to present the argument. As such the defendant's sentenced was vacated and the case remanded to the trial court for re-sentencing and consideration of the issue.

Bail

People ex rel. Douglas G. Rankin on Behalf of Tyrone Walker, __ A.D.3d __, 2022 NY Slip Op 00153 (2nd Dept. 1/11/22).

The appellate division granted the petitioner's application for as writ of habeas corpus on the holding that pursuant to C.P.L. 530.60(2)(c), the lower court should have held a hearing before revoking the defendant's release with conditions and remanding him without bail on the People's claim that he committed a violent felony offense. As the second department noted, **"**CPL 530.60(2)(a) states that "[w]henever in the course of a criminal action or proceeding a defendant charged with the commission of a felony is at liberty as a result of an order of recognizance, release under non-monetary conditions or bail issued pursuant to this article it shall be grounds for revoking such order that the court finds reasonable cause to believe the defendant committed one or more . . . violent felony offenses." By its express terms, this statutory section applies to situations where a principal is accused of committing violent felony offenses while he or she was "at liberty as a result of . . . bail" on a pending felony charge (*id.*). A principal charged with a felony who was out on bail on that charge necessarily includes individuals charged with qualifying offenses since the setting of bail is not initially authorized for nonqualifying offenses (*see* CPL 510.10[1], [3], [4]). Thus, contrary to the Supreme Court's determination, CPL 530.60(2)(a) clearly applies to the circumstances here. Since the People applied for remand on the sole basis that the principal was accused of committing violent felony offenses while at liberty on the underlying felony charges, the court was required to apply the standard in CPL 530.60(2)(a) and to conduct the hearing mandated in CPL 530.60(2)(c)." As such the case was remanded with instructions to conduct an evidentiary hearing.

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

Brady

Matter of Jayson C., 200 A.D.3d 447, 2021 NY Slip Op 06794 (1st Dept. 12/7/21)

Because a respondent in a juvenile delinquency proceeding has the same right to cross-examine witnesses as a criminal defendant and there is no reason to allow more limited access to impeachment materials in a juvenile suppression or fact-finding hearing than in a criminal suppression hearing or trial the currently effective disclosure provisions of C.P.L. 245.20(1)(k) regarding impeachment material regarding police officer witness's disciplinary records were applicable in family court. As such a family court order denying discovery of these items was reversed. In so ruling, the appellate division noted that the legislature is currently considering a statutory amendment to Fam. Ct. Act 331.1(k) that would require "the very same" discovery as in C.P.L. 245.20(1) by the presentment agency in a family court delinquency proceeding.

Discovery

New C.P.L. Article 245

Discovery Orders

Matter of Tierney v. Kelley, __ A.D.3d __, 2022 NY Slip Op 05168 (2nd Dept. 9/14/22).

A article 78 petition brought by the district attorney to prohibit the enforcement of a trial court order that required the People to produce the entirety of all police department internal affairs files involving police officers who might be People's witnesses in a particular Suffolk County criminal prosecution (*People v. Portillo)* was dismissed on the conclusion that the People were not entitled to this relief since there was no clear showing that the judge had exceeded her authority under the provisions of C.P.L. Art. 245. See also, Matter of Tierney v. Kelley, __ A.D.3d __, 2022 NY Slip Op 05169 (2nd Dept. 9/14/22) for the same holding in a second article 78 petition brought on the same grounds involving a second Suffolk defendant (*People v. Prince).*

Protective Orders

People v. Larenzo Escobales, 204 A.D.3d 1157, 2022 NY Slip Op 02354 (3rd Dept. 4/8/22).

While the People offered arguments supporting good cause why certain materials at issue should not be disclosed to defendant until the eve of trial, the People had no objection to the materials at issue being disclosed to defense counsel and provided no basis to the lower court as

to why defense counsel should not have access to the application or materials or participate fully in the hearing and the county court made no inquiry in that regard. In reversing and modifying the protective order on an expedited appeal, the third department held that where the People offered no basis to withhold these materials from defense counsel and, in fact, pursuant to the proposed order submitted by the People, defense counsel would have been permitted to access them as soon as county court signed the order, "the better practice would have been to permit defense counsel access to the application and materials prior to the hearing on the protective order so that counsel could participate in it to the fullest extent practicable." Thus, "in an appropriate case, "[t]he court *may* permit" ex parte or in camera submissions and proceedings (CPL 245.70 [1] [emphasis added]; *see* CPL 245.70 [3]), CPL article 245 "also recognizes the importance of parties and the court taking available measures to attempt to resolve discovery disputes and reach reasonable accommodation," quoting, *People v Bonifacio*, 179 A.D.3d 977, *979 (2nd Dept. 2020); see* CPL 245.35 [1]; 245.70 [6] [b] [ii]). As such, the appellate division held that to "achieve the goals of the statute, "defense counsel should be excluded from participation in the protective order review process only to the extent necessary to preserve the confidentiality of sensitive information pending the court's determination as to the issuance, and scope, of the protective order," quoting, *People v Nash, 179 A.D.3d 982, 984 (2nd Dept. 2020).*

Sealed Records

Manna Lu-Womng v. City of New York, __ A.D.3d __, 2022 NY Slip Op 02226 (1st Dept. 4/6/22).

A plaintiff in a motor vehicle-pedestrian accident wrongful death case was entitled to records of the driver's guilty plea to an unclassified New York City Code misdemeanor [19-190(b)] which criminalizes failing to yield to a pedestrian who has the right of way on the holding that while C.P.L. 160.55 requires the sealing of records of VTL traffic infractions, this does not cover New York City Code unclassified misdemeanors.

Identifications

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People v. Jassey Sulayman, __ A.D.3d __, 2022 NY Slip Op 04132 (1st Dept. 6/28/22).

The first department reversed the defendant's New York County first degree robbery conviction on the holding that the photo array used in the case was unduly suggestive because defendant was the only person shown wearing "distinctive clothing . . .which fit the description" of the suspect, quoting *People v Owens, 74 N.Y.2d 677, 678 (1989*). Moreover, the distinctive clothing was also an outstanding feature of the identifying witness's description of the robber (*see Raheem v Kelly, 257 F.3d 122, 137 (2d Cir. 2001).* The victim told the police that he "fixated" on the "unusual shirt" the robber was wearing during the incident, a white shirt with a distinctive black design. In the photo array, the visible part of defendant's shirt closely matched the robber's shirt as described by the victim. The fillers, on the other hand, all wore shirts that, to the extent visible in the photos, were solid-colored shirts without any markings or designs. The case was remanded for a new trial with an independent source hearing to be conducted prior thereto.

People v. Levi Challenger, 200 A.D.3d 500, 2021 NY Slip Op 06927 (1st Dept. 12/9/21).

The trial court should not have permitted the arresting detective to give lay opinion testimony that defendant was the person depicted in two surveillance videos where the alleged difference in appearance — the addition of eyeglasses — was de minimis, and the jury had access to photos of defendant without eyeglasses. In reversing the defendant's second-degree robbery conviction, the appellate division held that there was nothing to suggest that the jury, which had ample opportunity to view defendant, was less able than the officer to determine whether he was seen in the videotape." Thus, the probative value of the detective's testimony did not outweigh its prejudicial effect and the error held reversible, especially where the investigating detective's extensive experience carried significant weight in the eyes of the jury. Note that several recent appellate division cases have agreed with this holding, [(*People v Reddick, 164 A.D.3d 526, 527 (2nd Dept. 2018); People v Myrick, 135 A.D.3d 1069, 1074 (3rd Dept. 2016)*); *People v Coleman, 78 A.D.3d 457 (1st Dept 2010*), while one recent decision decided only a week earlier by a different panel of the same court has disagreed, *People v. Donald Lee, 200 A.D.3d 432 (1st Dept. 12/3/21)]* [discussed below].

People v. Donald Lee, 200 A.D.3d 432, 2021 NY Slip Op 06774 (1st Dept. 12/3/21).

The trial court properly exercised its discretion in permitting two police officers to give lay opinion testimony that defendant was the man depicted in a surveillance videotape of the crime. In affirming the defendant's Manhattan first degree burglary conviction, the appellate division

held that this testimony "served to aid the jury in making an independent assessment regarding whether the man in the [video] was indeed the defendant," quoting *People v Russell*, *79 NY2d 1024, 1025 (1992*), where the quality of the videotape was poor, the defendant's appearance had changed, and the officers had spent sufficient time with defendant to be in a better position than the jurors to identify him on the video. The first department further noted that any potential prejudice was minimized by the court's limiting instructions that the officers' testimony was merely to aid the jury in its independent assessment of whether the man in the video was defendant under *People v Sanchez, 21 N.Y.3d 216, 225 2013).*

Rodriquez **Hearings**

People v. Vincent Carmona, 37 N.Y.3d 1016 (10/7/21) [7/0; Memorandum].

The Court of Appeals remitted the case for a *Rodriguez* hearing [79 N.Y.2d 445 (1992)] on the holding that the suppression court erred in summarily denying the defendant's request for suppression of his identification where the prosecution only provided "bare assurances" that the eyewitness was familiar with the defendant. In so ruling the Court noted that the appellate division affirmance based on harmless error improperly relied on record information developed during trial.

People v. Nnaemeka Ugwu, __ A.D.3d __, 2022 NY Slip Op 00634 (1st Dept. 2/1/22).

The trial court correctly determined that the victim was sufficiently familiar with defendant so that her identification of defendant was confirmatory pursuant to *People v Rodriguez*, 79 N.Y.2d 445, 451-453 (1992). The responding officer testified that, over a six-month period of time leading up to the crime, the victim had seen defendant on a regular basis in a park, that defendant had frequently spoken to her as she traversed the park, and that during this time the victim had a clear view of defendant's face. In affirming the defendant's Manhattan second degree assault conviction, the first department noted that although the victim did not testify at the hearing, the People satisfied their burden by way of the officer's detailed testimony about what he learned from the victim. The appellate division also held that the trial court, which permitted defendant to introduce extensive expert testimony about matters potentially relevant to the reliability of the victim's testimony, including possible effects of her use of PCP, properly exercised its discretion in precluding expert testimony that PCP may cause memory loss, on the

holding that because there was no evidence that the victim was suffering from memory loss, there was no foundation for the proposed testimony.

Grand Jury

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

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

Grand Jury Re-Presentations

People v. Yaquin Abdullah, __ A.D.3d __ (3rd Dept. 10/21/21) [#109821/110895].

Pursuant to CPL 190.75 (3), where a grand jury has no billed or dismissed a charge, this charge "may not again be submitted to a grand jury unless the court in its discretion authorizes or directs the [P]eople to resubmit such charge to the same or another grand jury" (see *People v Allen, 32 N.Y.3d 611, 613 (2018); People v Credle, 17 N.Y.3d 556, 557-558 (2011*). Here, despite a no bill having been issued by the first grand jury with respect to an incident charging

defendant with burglary in the second degree as a sexually motivated felony, the People filed an ex parte application seeking permission to resubmit a burglary in the second-degree charge with respect to the same incident to a new grand jury – this time excluding the sexually motivated felony component – contending that the first grand jury had acted in an irregular manner. The third department held that application to re-present insufficient because " the trial court should not authorize resubmission of a charge unless it appears, for example, 'that new evidence has been discovered; that the [g]rand [j]ury failed to give the case a complete and impartial investigation; or that there is a basis for believing that the [g]rand [j]ury otherwise acted in an irregular manner'" quoting, *People v Jones, 206 AD2d 82, 85-86 [3rd Dept. 1994], aff'd, 86 NY2d 493 (1995).*

Accusatory Instruments

People v. Ron Hill, __ N.Y.3d __ (6/16/22)[7/0; Singas, J.].

The defendant was charged, in a complaint, with criminal possession of a controlled substance in the seventh degree (see Penal Law § 220.03), a class A misdemeanor, and possession, manufacture, distribution, sale or offer of sale of synthetic phenethlylamines and synthetic cannabinoids under the State Sanitary Code, a violation (see 10 NYCRR former 9.2; 10 NYCRR 9-1.2). In the factual portion of the accusatory instrument, an officer alleged that he saw defendant possess one "clear ziplock bag containing a shredded dried plant-like material with a chemical odor." "[B]ased upon [his] training and experience, which includes training in the recognition of controlled substances, and their packaging," the officer averred that the "substance is alleged and believed to be SYNTHETIC CANNABINOID/SYNTHETIC MARIJUANA (K2)." The complaint made no reference to Public Health Law § 3306 (g), or its schedule which lists 10 proscribed synthetic cannabinoid substances by specific chemical designation. As such, the Court of Appeals held the accusatory instrument jurisdictionally defective because it failed to properly allege that he possessed one of the synthetic cannabinoid substances listed in Public Health Law § 3306 (g). As the Court noted, **t**he officer "stated in the complaint that, based on his training, he believed that the substance he seized from defendant was "SYNTHETIC CANNABINOID/SYNTHETIC MARIJUANA (K2)" because it was "a shredded dried plant-like material with a chemical odor." These factual allegations however, "gave a non-conclusory description of the substance seized from defendant and while adequate to state the officer's training in identifying controlled substances, did not provide a sufficient basis to support the officer's conclusion.

People v. Marc Mitchell, 38 N.Y.3d 408, 2022 NY Slip Op 003360 (5/24/22) [4/2; Garcia, J.].

A majority of the Court, per Garcia, J., held by a 4-2 vote that a misdemeanor complaint that alleged that the defendant engaged in fraudulent accosting in violation of P.L. 165.30(1), by alleging that he "set up a makeshift table that 'blocked' the sidewalk, requiring pedestrians "'o walk around [him] to continue walking on the sidewalk,' and asked the passersby to '[h]elp the [h]omeless,' sufficiently charged a crime. In so ruling the majority rejected claims that the word, "accost" should be narrowly construed to require "a physical approach and an element of aggressiveness or persistence" that is "directed toward a specific individual, rather than the public at large." In so ruling, the majority relied on general dictionary definitions, which with one exception, define accosting as not requiring persistent aggressive action or conduct. Thus, as noted, **"**not only did the complaint establish that defendant spoke first to the pedestrians by calling out to them, but also that defendant engaged in an affirmative act tantamount to a physical approach, by blocking the sidewalk and forcing passersby to maneuver around him to proceed." Judges Rivera and Wilson dissented on the conclusion that the majority's conclusion "relies on an overly broad view of the phrase 'accost a person' that is contrary to its commonly understood meaning of an affirmative, aggressive act, contact with a specific target, or a directed invitation to engage another."

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

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

People v. Mauriusz Michalski, __ A.D.3d __, 2022 NY Slip Op 04190 (3rd Dept. 6/30/22).

Where the defendant was already indicted Albany County for two counts aggravated criminal contempt, his waiver of indictment and plea of guilty to a superior court information that charged him with one count of second-degree criminal contempt was jurisdictionally defective under C.P.L. 195.10 and the claim held not forfeited by his waiver of appeal. As such, his plea and sentence was vacated and the S.C.I. was ordered dismissed.

People v. Brian Winston ,__ A.D.3d __, 2022 NY Slip Op 02080 (1st Dept. 3/24/22).

The first department, per Oing, J., held that the trial court improperly amended the indictment pursuant to CPL 200.70 at the conclusion of the trial by "replacing in the accusatory clauses the offenses of assault in the second degree as a hate crime and attempted assault in the second degree as a hate crime with the lesser included offenses of assault in the third degree as a hate crime and attempted assault in the third degree as a hate crime in order to conform the indictment to the factual allegations set forth therein." Thus, where towards the end of the People's case in the defendant's Manhattan trial in a case involving an assault allegedly motivated by anti-Muslim animus, defense counsel advised the trial judge that the factual statement of the indictment failed to allege that the victim's injuries were caused by a deadly weapon or a dangerous instrument with respect to the counts charging assault in the second degree as a hate crime and attempted assault in the second degree as a hate crime, the trial court's amendment of the indictment on the People's motion pursuant to C.P.L. 200.70, over objection was error because it prejudiced the defendant by a midtrial change of theory.

People v. Jamel Crumedy, __ A.D.3d __, 2022 NY Slip Op (3rd Dept. 3/3/22).

A count of an indictment that charged the defendant in Columbia County with second degree course of sexual conduct against a child with allegation that it occurred in repeated acts over a six-year time span [i.e. “on or about and between June 8, 2012 and August 18, 2018”] was unreasonable since it did not properly allow the defendant with sufficient notice and thus present him with an opportunity to defend himself. As such, it was properly dismissed by the trial court.

Duplicitous Counts

People v. Macliff Woodley, __ A.D.3d __, 2022 NY Slip Op 00201 (2nd Dept. 1/12/22).

Seven counts of a Brooklyn indictment all charged the defendant with criminal contempt in the second degree, arising from his alleged violation of two orders of protection during two separate incidents that occurred on June 27, 2014. The first order of protection was in favor of a single individual; the second order was in favor of that same person, as well as three others. Neither

the verdict sheet nor the jury charge, however, explained how the testimony and evidence adduced at trial applied to the seven counts—i.e., which counts pertained to which of the two orders of protection and which of the four alleged victims. Thus, on the People's effective concession, the challenged counts were held to have been duplicitous because it was impossible to determine the particular acts upon which the jury reached its verdict with respect to each of the counts. As such, the appellate division vacated the defendant's convictions of criminal contempt in the second degree under those counts and dismissed those counts.

Jurisdiction

People v. Michael Lamb, __ N.Y.3d __, 2021 NY Slip Op 7057 (12/16/21). [6/1 (partial dissent); Memorandum].

Because the sex trafficking statute is comprised of two distinct but linked elements, namely that the offender must advance or profit from prostitution by one of the enumerated coercive acts under P.L. 230.34, the trial court's supplemental instruction, in response to a jury note in a case involving coercive conduct in New Jersey against a victim, with charges brought in New York erroneously severed the required link between those elements. Accordingly, the majority reversed the defendant's sex trafficking convictions and ordered a new trial ordered on those counts. Judge Singas, joined by Chief Judge DiFiore and Judge Cannataro, concurred on the conclusion that the supplemental instruction erroneously "collapsed sex trafficking into a single-element crime would cast too small a net, unjustifiably limiting the jurisdiction of this State to prosecute only those cases where the entire crime occurred in New York. Just as significantly, treating the statute's two elements as unlinked could unjustifiably authorize prosecution of crimes in New York for extraterritorial conduct having no impact on the public safety of the state." Judge Wilson also concurred in a separate opinion on his conclusion that the supplemental instruction was "substantively wrong," since it would "arrogate to New York jurisdiction over crimes over which we have no jurisdiction." Judge Fahey dissented in part on the determination that the majority's conclusion that the trial court's supplemental instruction, in response to the jury's note regarding the elements of sex trafficking, was erroneous could not be reconciled with the majority's implicit conclusion that New York had jurisdiction to prosecute defendant for sex trafficking which was a clear contradiction" and thus the Court's decision "leaves trial courts with no direction as to how to define the elements of sex trafficking for deliberating juries."

Amendments of Accusatory Instruments

People v. Vermia Soloman, __ A,D,3d __, 2022 NY Slip Op 02158 (3rd Dept. 3/31/22).

The defendant was charged by a superior court information that charged defendant with endangering the welfare of a child under Penal Law § 260.10. While it alleged that the victim was less than 17 years of age, it incorrectly stated her date of birth. The third department held that the trial court's amendment of the information over objection was improper under C.P.L. 200.70 and rendered the accusatory instrument jurisdictionally defective since it failed to effectively charge defendant with the commission of a crime where the date of birth indicated that the victim was 17 at the time of the offense. In so ruling the appellate division held that although a trial court may permit an indictment to be amended "with respect to defects, errors or variances from the proof relating to the matters of form, time, place, names of persons and the like" [C.P.L 200.70 (1)], an indictment may not "be amended for the purpose of curing . . . [a] failure thereof to charge or state an offense[] or . . . [l]egal insufficiency of the factual allegations" (CPL 200.70 [2] [a], [b]; *see People v Placido*, 149 AD3d 1157, 1157-1158 [3rd Dept 2017]. As such, County Court had no authority to grant the People's application to amend those counts, "regardless of any consistency with the People's theory before the grand jury" or lack of prejudice to defendant (*People v Boula*, 106 AD3d at 1373; *see* CPL 200.70 [2]; *People v Placido*, 149 AD3d at 1157-1158).

Stays of Dismissal Orders

People v. Jay A. Felli, __ A.D.3d __, 2022 NY Slip Op 04192 (3rd Dept. 6/30/22).

Following the trial court's dismissal of a first-degree promoting prison contraband prosecution on a defense motion to dismiss and the filing of a People's appeal in Schuyler County, the county court stayed its order and directed the lesser included charge of second-degree promoting prison contraband proceed to trial. The third department held that because a trial court has no authority to stay its own dismissal order in this context under C.P.L. 460.20, the ensuing conviction on second degree promoting prison contraband was ordered reversed. However, the defendant's conviction on seventh degree narcotics possession was affirmed.

Speedy Trial

People v. Carlos Galindo, 38 N.Y.3d 199 (6/16/22) [7/0; Rivera, J.].

New provisions of C.P.L. 30.30 (1) (e), added to the speedy trial statute in 2020, and effective while defendant's direct appeal was pending before the Appellate Term, and which sets maximum times for prosecutorial readiness in cases involving accusatory instruments charging traffic infractions jointly with a felony, misdemeanor, or violation were held to not be retroactively applicable to the defendant's 2014 prosecution. As such, the Court reversed an Appellate Term's order insofar as appealed from because the court mistakenly relied on the amended language in granting defendant's motion to dismiss the accusatory instrument.

People ex rel. Nieves v. Molina, __ A.D.3d __, 171 N.Y.S.3d 389, 2022 NY Slip Op 04778 (2nd Dept. 7/29/22).

Because the People did not seek and receive an extension of time to respond to the defendant's omnibus motion, or provide any explanation for the delayed response, they were held "chargeable with the time between the court-imposed deadline to respond to the omnibus motion and the date on which the People actually filed a response" *People ex rel. Ferro v Brann, 197 A.D.3d 787, 788 (2nd Dept. 2021).* Thus, with 13 days chargeable to the People due to their unexplained delay in responding to the omnibus motion, coupled with the 86 days between the date of arraignment and the date upon which the People filed their certificate of compliance pursuant to CPL 245.50, totaled more than 90 days under C.P.L. 30.30(2)(a), more than 90 days of delay in bringing the defendant to trial on a Queens indictment required that the defendant be ordered released on bail.

People v. Joseph Stefanovich, 207 A.D.3d 1047, 171 N.Y.S.3d 660, 2022 NY Slip Op 04241 (4th Dept. 7/1/22).

Weighing the factors to determine if a six year pre-indictment delay in commencing prosecution of the defendant for rape under *People v Taranovich (37 N.Y.2d 442 (1975)* ["(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay"], the a divided fourth department affirmed the defendant conviction by a 4-1 vote on a holding that while the delay was extensive, the crime was serious and there was no malevolent motive on the People's part to prejudice the defendant. Justice Nemoyer dissented on the conclusion that where the People had a DNA match six years prior to commencing prosecution, the defendant's right to a prompt prosecution under *People v. Singer, 44 N.Y.2d 241, 253 (1978).*

People v. Franklin Gardner, __ A.D.3d __, 2022 NY Slip Op 02816 (2nd Dept. 4/27/22).

The second department affirmed the defendant's Brooklyn first-degree rape conviction over claims that the 21-year delay between the crime and his arrest violated his due process right to a prompt prosecution. In so ruling the appellate division noted in evaluating the factors to be considered in a constitutional speedy trial claim under *People v. Taranovich, 37 N.Y.2d 442 (1975),* while the delay of approximately 21 years was substantial, the People met their burden of demonstrating good cause for the delay. Thus, nineteen years of the delay was due to the lack of connection between the semen sample collected at the time of the rape in 1994 and the defendant's DNA profile, which was not developed and uploaded to the law enforcement databases until 2013. Once the police were able to identify a viable suspect, they had a good-faith basis to wait until they could locate the victim to arrest the defendant. Furthermore, the detectives' hearing testimony established that the police made reasonable and diligent efforts to locate the victim, and the defendant was arrested immediately after a detective located and interviewed the victim. The extent of the delay in prosecution was held outweighed by the People's good cause for the delay, the nature of the crime, the fact that there was no period of pretrial incarceration during the period at issue, and the lack of any prejudice from the delay identified by the defendant. Thus, the court held that the defendant was not deprived of his due process right to prompt prosecution.

People v. Anthony Blue, __ A.D.3d __, 2022 NY Slip Op 00977 (1st Dept. 2/15/22).

In a consideration of the required factors to determine whether a Manhattan burglary defendant was deprived of his constitutional right to a speedy trial by the "relatively substantial delay" of 30 months between his arraignment and trial (he was released in his own recognizance six months before trial and represented himself), the first department held the a "substantial" portion of the delay was caused by the defendant's motion practice and the need of the People to coordinate the prosecution of six separate felonies and that as such, the defendant's conviction was affirmed.

People v. Gordon Francis, __ A.D.3d __, 2021 NY Slip Op 05621 (1st Dept. 10/12/21).

The Court affirmed the defendant's New York County murder conviction on the holding that considering the factors set forth in *People v Taranovich, 37 N.Y.2d 442, 445 (1975),* the lower court properly denied defendant's speedy trial motion. As the appellate division noted, "although the delay while the case was pending was substantial, and defendant was incarcerated, the delay was satisfactorily explained." Thus, "[m]ost of the delay was attributable

to motion practice, defense counsel's schedule, and DNA testing to which defendant consented. The review of over 2,000 recorded phone calls by counsel and the defense expert's review of the report on the DNA evidence also contributed to the delay. Furthermore, defendant did not establish that the delay impaired his defense.

Guilty Pleas

People v. Brian Wolfe, __ A.D.3d __, 170 N.Y.S.3d 889, 2022 NY Slip Op 04745 (2nd Dept. 7/27/22).

The lower court's failure to advise the defendant of the precise period of post-release supervision to be imposed at sentence as part of the defendant's Dutchess County plea proceeding rendered his plea insufficiently knowing and voluntary. As the appellate division noted in vacating the plea and remanding**,** "It is not enough for a court to generally inform a defendant that a term of postrelease supervision will be imposed as a part of the sentence" (*People v Cabrera, 189 A.D.3d 1609 (2nd Dept. 2020*, citing *People v Boyd, 12 N.Y.3d 390, 393 (2009).* "Rather, for a plea of guilty to be knowing, intelligent, and voluntary, the court must inform the defendant of either the specific period of postrelease supervision that will be imposed or, at the least, the maximum potential duration of postrelease supervision that may be imposed" *People v Benitez, 195 A.D.3d 739, 740 (2nd Dept. 2021);* see *People v Cabrera, 189 A.D.3d at 1609*.

People v. Dennis Reese, 206 A.D.3d 1461, 2022 NY Slip Op 04194 (3rd Dept. 6/30/22).

At his Ulster County plea allocution to second degree weapons possession, the defendant stated that he kept the weapon in question in a bedroom nightstand and that it was not loaded. P.L. 265.03 (3) requires the possession of a "loaded firearm," meaning "an operable gun with either live ammunition in the gun or held *on [the defendant's] person"* with the gun. [emphasis supplied]. Thus, where the defendant negated that element at sentencing when he stated that the handgun in question was in his bedstand drawer, not on his person, and that it "wasn't loaded." At that point, it was incumbent upon County Court to either "conduct a further inquiry or give . . . defendant an opportunity to withdraw the plea."

People v. Wayne E. Wood, __ A.D.3d __ (3rd Dept. 3/17/22).

The defendant pleaded guilty to attempted first degree rape on a conditionally promised sentence of 10 years plus seven years post-release supervision, after hearing the victim testify at his Tioga County trial and prior to sentencing authored an unsworn letter in which he indicated that he only pleaded guilty because trial counsel believed that the victim was credible and moreover erroneously informed him as to his possible sentencing exposure if he were convicted after trial. However, he never reiterated this claim at sentencing or moved post-plea to withdraw his sworn plea. In affirming, the court rejected claims that his defense attorney was ineffective and moreover that the court was required to conduct an inquiry based on the letter.

People v. Malique Shelton, 202 A.D.3d 1001, 2022 NY Slip Op 01050 (2nd Dept. 2/16/22).

A trial court is not authorized to accept a plea of guilty from a juvenile offender to felony murder where the underlying felony, attempted robbery, is not a crime for which he may be held criminally responsible under C.P.L. 1.20(42)(2) and P.L. 30.00(2), Thus, on the People's concession, that count was ordered set aside. See *People v. Stowe, 15 A.D.3d 597, 598 (2nd Dept. 2005)* relied on by the court for a similar ruling.

People v. Ralph Turane, __ A.D.3d __, 2021 NY Slip Op 07071 (1st Dept. 12/16/21).

On the People's concession, the defendant's first plea, to one count of third-degree sale of a controlled substance, was in full satisfaction of the entire indictment, such that his later plea to a second count of that same indictment was not permissible under *People v Romer, 31 N.Y.2d 919 (1972).* Thus, when the second plea court sought to add a plea to an additional count as part of a renegotiated disposition conditioned on drug treatment, it could only have undertaken by "reinstatement. . . [of the indictment] which could have been accomplished by permitting the defendant to withdraw his original plea of guilty to [the first count]," quoting *Romer at 920.*

***Alford* Pleas**

People v. Michael Vittengl, 203 A.D.3d 1390 (3rd Dept. 3/17/22).

The Warren County court properly accepted the defendant's *Alford* plea (he also admitted to an unrelated probation violation) in order to obtain a more beneficial sentence. In affirming, the third department held that "[a]n Alford plea, wherein the accused is permitted to enter a guilty plea without admitting culpability, may be allowed only where such plea 'is the product of a voluntary and rational choice, and the record before the court contains strong evidence of actual guilt'" quoting *People v Stewart, 307 A.D.2d 533, 534 (3rd Dept. 2003),* in turn also quoting *Matter of Silmon v Travis, 95 N.Y.2d 470, 475 (2000*). As the court noted, "[a] defendant entering an *Alford* plea is not required to make a factual recitation of his or her guilt; rather, "the court may accept the plea if satisfied that there is a sufficient factual basis for the plea based on its review of the information before it" (*People v Stewart, 307 A.D.2d at 534)* and as such, "[p]rotestations of innocence do not preclude the court from accepting an *Alford* plea" (id.)." Here, the record demonstrated that county court apprised defendant of the rights that he would be forfeiting by pleading guilty, including the right to a jury trial, the right to be represented by counsel, the right to remain silent and the right to cross-examine the People's witnesses. In response, the defendant advised that he had been afforded sufficient time to confer with counsel and was satisfied with counsel's services, that he had not been threatened, forced or otherwise pressured to accept the plea, that he was aware of the evidence against him, the strength of the People's case and any potential defenses and that he desired to enter an *Alford* plea in order to conclude the matter and avoid a potentially longer period of incarceration. Indeed, the defendant's assertion on appeal that he requested and was refused an adjournment so that he could further confer with counsel was "belied by the plea colloquy," wherein defendant, when asked if he had been afforded sufficient time to discuss the plea with counsel, replied, "I have had too much time." Since the record contained strong evidence of defendant's guilt and otherwise reflects that defendant's *Alford* plea "was a rational choice to limit the sentencing exposure had he gone to trial," the third department was satisfied that defendant's plea was knowing, intelligent and voluntary.

Immigration Consequences

People v. Vernon Jones, __ A.D.3d __, 2021 NY Slip Op 006701 (2nd Dept. 12/3/21).

Although a defendant generally must mut to withdraw his plea of guilty in order to preserve the claim on appeal, there is an exception where the record fails to reflect that he was aware of the immigration consequences of his plea. Thus, where the defendant was considering whether to undergo a competency to proceed examination under C.P.L. Art. 7230 and the record merely

indicated the defendant's statement that he had been told by his attorney that he had to submit to the 730 examination or "be departed," this was an insufficient warning under *People v. Peque, 22 N.Y.3d 168 (2013).* As such, the case was remanded to permit the defendant an opportunity to withdraw his plea.

People v. Jeriah Bamugo, __A.D.3d __, 2021 NY Slip Op 06363 (2nd Dept. 11/17/21).

The defendant's due process rights were violated due to the trial court's failure to warn him that his pleas could subject him to deportation is excepted from the requirement of preservation because the record does not demonstrate that the defendant was aware that he could be deported as a consequence of his pleas of guilty as required by *People v Peque, 22 NY3d 168, 182-183 (2013)* and its progeny. Indeed, here, the record showed that the court failed to address the possibility of deportation as a consequence of the defendant's pleas of guilty Because there was no indication in the record that the defendant was aware that he could be deported as a result of his pleas the defendant had no "practical ability" to object to the court's comment about immigration consequences or to otherwise tell the court, if he chose, that he would not have pleaded guilty if he had known about the possibility of deportation. As such, the case was remitted to give the defendant an opportunity to move to vacate his pleas of guilty and for a report by the trial court.

Waivers of Appeal

People v. Juan Johnson, __ N.Y.3d __ (2/11/22) [7/0; Memorandum].

Under the totality of the circumstances and on the People's concession that the appeal waiver was invalid because the plea court conflated the right to appeal with those rights automatically forfeited by a guilty plea, the defendant's appeal waiver was held to not foreclose consideration of his suppression claim. As such, the case was remitted to the appellate division.

People v. Eugene Mendoza, __ N.Y.3d __ (11/18/21) [7/0; Memorandum].

On the People's concession, the Court held the defendant's appeal waiver invalid and thus, consideration of his harsh and excessive sentence claim was not foreclosed under *People v Bisono, 36 NY3d 1013, 1017-1018 (2020).*

People v. Bradford L. Shanks, 37 N.Y.3d 244 (10/12/21) [[7/0; Fahey, J.].

The Court of Appeals held that a waiver of appeal entered into by a defendant who was convicted in Otsego County of insurance fraud after a trial in which he represented himself was not in compliance with *People v. Thomas, 34 N.Y.3d 545 (2019)* and its progeny and thus, a defendant's claim that he was deprived of his right to counsel when the county court refused to appoint a seventh attorney to represent him after his initial counsel requested to be relieved could be raised on appeal. The Court additionally held that contrary to the determination by the trial court and appellate division, [173 A.D.3d 1019 (3rd Dept. 2019)], the defendant did not forfeit he right to be represented by an attorney by his behavior.

People v. Duane Williams, __ A.D.3d __ (3rd Dept. 3/17/22).

The third department, per Clark, J., held the defendant's Schenectady County Court appeal waiver was invalid because it was "overbroad and inaccurate" and thus failed to comply with the Court of Appeals mandates in, among other cases, *People v. Bisono, 36 N.Y.3d 1013 (2020).*

People v. Shelby A. Backus, __ A.D.3d __, 2022 NY Slip Op 03949 (3rd Dept. 6/16/22).

Following the defendant's arrest for narcotics possession crimes, she defendant waived her right to indictment, consented to prosecution by superior court information and entered a plea of guilty to one count of criminal possession of a controlled substance in the fifth degree. Following the plea allocution, the county court inquired into the defendant's eligibility for drug treatment court and indicated that it was possible, upon successful completion of the drug court treatment program, to vacate her conviction and reduce it to a misdemeanor. At sentencing, the defendant confirmed that she had enrolled in the Essex County drug court treatment program and the court sentenced her to time served and a five-year term of probation. In December 2020, the defendant moved to withdraw her plea, vacate her felony conviction and allow her to plead guilty to a misdemeanor. The People opposed the motion. In March 2021, County Court granted defendant's motion, finding that the reduction in her conviction was a significant, if not primary, motivating factor in her decision to participate and complete the drug court treatment program. Moreover, the Court indicated that the legislative and executive branches recognized that minimizing the criminal sanction for drug and alcohol offenders who successfully complete treatment is both a significant motivating factor to treat one's addiction and an important public policy benefit (*see* CPL Art 216). However, because the People would not consent to defendant pleading to a misdemeanor offense, the county Court granted the defendant's motion only to the

extent of granting the withdrawal of defendant's guilty plea and vacating her conviction and sentence. The third department affirmed on a People's appeal and held that where C.P.L. 450.20 did not authorize a People's appeal from a motion to withdraw a plea, no appeal was authorized and thus, the court was without jurisdiction to hear one in this context and posture.

People v. Shamel Amos, __ A.D.3d __, 2021 NY Slip Op 05577 (2nd Dept. 10/13/21).

The defendant moved to withdraw his plea prior to the imposition of his sentence and contended that he had a viable defense to the charges which he had not understood at the time that he agreed to plead guilty, and that his plea of guilty was not knowing, intelligent, and voluntary. Specifically, the defendant alleged that he did not reside at his mother's home prior to the execution of the warrant, and that the weapons recovered from his mother's residence did not belong to him. The defendant contended that the weapons belonged to another individual who had been residing at his mother's home and who had placed the weapons inside a closet at that location without the defendant's knowledge or consent. Moreover, His claim that he did not voluntarily possess the weapons at issue. the defendant's claim of innocence was "supported" by evidentiary submissions, which "raised the possibility of a . . . defense" (quoting *People v. Pastor, 28 N.Y.3d 1089, 1090-1091 (2018)* The defendant's submissions thus provided support for his assertion that he did not voluntarily possess the weapons at issue because he was not "aware of his physical possession or control thereof for a sufficient period to have been able to terminate it" (See Penal Law § 15.00[2]). As such, the appellate division reversed on the holding that the lower court should have either granted a hearing on the issue or permitted the defendant to withdraw his plea.

Ineffective Assistance in Plea Bargaining

People v. Natascha Tiger, __ A.D.3d __, 2022 NY Slip Op 04568 (2nd Dept. 7/13/22).

Where there was a reasonable probability that prior counsel's failure to properly investigate the defendant's case which resulted in her Orange County conviction for second degree assault and endangering the welfare of a vulnerable elderly person by seeking out an expert and obtaining

proper files to develop a defense that the victim's injuries were caused not by thermal burns, but by toxic epidermal necrolysis, the lower court's summary denial of her C.P.L. 440.10 motion to vacate was reversed. Thus, the appellate division held that but for these errors, the defendant would not have pleaded guilty to these crimes.

Evidence

Confrontation

People v. Sid C. Franklin, __ A.D.3d __, 2022 NY Slip Op 04308 (2nd Dept. 7/6/22).

The second department reversed the defendant's Queens weapons possession conviction on a holding that the defendant's Confrontation rights were violated because the trial court admitted into evidence a Criminal Justice Agency (CJA) form through an employee of the CJA who did not create the form, and it was not shown that the creator of the form was unavailable. The CJA form listed the defendant's address as the basement of the home where the police searched and recovered a silver gun. As the appellate division noted, "the Confrontation Clause prohibits the introduction of testimonial evidence untested by cross-examination, unless the witness who made the statement is unavailable, and the defendant had a prior opportunity to cross-examine the witness," and here, the testimony of the CJA employee and the CJA form were admitted in order to establish an essential element of the charges of criminal possession of a weapon in the second and third degrees, in violation of the defendant's right of confrontation." Thus, the defendant where the defendant was never given the opportunity to cross-examine the CJA employee who prepared the CJA form, and, in admitting the CJA form through an employee who did not prepare the form, reversal was required because the constitutional error could not be held harmless beyond a reasonable doubt.

People v. Alvin Ellerbee, __ A.D.3d __, 2022 NY Slip Op 02016 (2nd Dept. 3/23/22).

The defendant's Confrontation rights were violated during his Brooklyn narcotics possession and aggravated unlicensed operation of a motor vehicle trial by the admission of testimony from an employee of the Department of Motor Vehicles (hereinafter DMV) regarding notices of suspension of his driver license is unpreserved for appellate review (*see* CPL 470.05[2]). Although the issue was not properly preserved, the second department reached it in the interest of justice and held that the defendant was not afforded the opportunity to cross-examine a DMV employee who was directly involved in sending out the suspension notices or who had personal familiarity with the mailing practices of the DMV's central mail room or with the defendant's driving record. As such, the testimony of the DMV employee was improperly admitted in order to establish an essential element of the crime of aggravated unlicensed operation of a motor vehicle in the third degree in violation of the defendant's right of confrontation under *Crawford.* Thus, the defendant's conviction on that count was vacated. An additional issue regarding sentencing on the remaining counts is discussed below.

Darrel Hemphill v. New York, 142 S.Ct. 681 (1/20/22) [8/1; Sotomayor, J.].

A stray 9-millimeter bullet killed a 2-year-old child after a street fight in the Bronx. Eyewitnesses described the shooter as wearing a blue shirt or sweater. N.Y.P.D. police officers determined Ronnell Gilliam was involved and that Nicholas Morris had been at the scene. A search of Morris' apartment resulted in the seizure of a 9-millimeter cartridge and three .357-caliber bullets. Gilliam initially identified Morris as the shooter, but he subsequently said that the defendant, Darrell Hemphill, Gilliam's cousin, was the shooter. Not crediting Gilliam's recantation, the district attorney charged Morris with the child's murder and possession of a 9-millimeter handgun. Following the collapse of the case against Morris the the State agreed to dismiss the murder charges against Morris if he pleaded guilty to a new charge of possession of a .357 revolver, a weapon that had not killed the victim. Years later, the D.A. charged the defendant with the child's murder after learning that Hemphill's DNA matched a blue sweater found in Gilliam's apartment shortly after the murder. At the defendant's trial, the defense elicited undisputed testimony from a prosecution witness that police had recovered 9-millimeter ammunition from Morris' apartment, thus pointing to Morris as the culprit. Morris was not available to testify at Hemphill's trial because he was outside the United States. Relying on *People v. Reid, 19 N. Y. 3d 382 (2012*), and over the objection of defense counsel, the trial court allowed the State to introduce parts of the transcript of Morris' plea allocution to the .357 gun possession charge as evidence to rebut Hemphill's theory that Morris committed the murder on a theory of opening the door. A majority of the Supreme Court, per Sotomayor, J. held 8-1 that the admission of this evidence deprived the defendant of his right to confront Morris and thus, his plea allocution was inadmissible testimonial hearsay under *Crawford v. Washington, 541 U.S. 36 (2004),* notwithstanding the strategic posture he took at trial. On remand to the New York Court of Appeals and after re-argument, the error was held harmless beyond a reasonable

doubt on the conclusion that there was no reasonable possibility that the admission of the plea allocution contributed to the guilty verdict. 2022 NY Slip Op 04663 (7/21/22)

Hearsay

People v. Patrick Tumolo, __ A.D.3d __, 2022 NY Slip Op 01817 (2nd Dept. 3/16/22).

The trial court properly admitted certain text messages into evidence during the defendant's Suffolk County criminal sex act and related-crime trial because they were not admitted to prove the truth of their content and were relevant for the non-hearsay purpose of explaining the relationship between the parties and to complete the narrative of events leading to the defendant's arrest.

Excited Utterances

People v. Braulio A. Jimenez-Gomez, 198 A.D.3d 443 (1st Dept. 10/7/21).

The trial court properly admitted the victim's text messages as excited utterances during the defendant's forcible touching, sexual abuse and related crimes trial. In affirming, the first department held that the statements in the texts were "clearly precipitated by an event that was startling and traumatic to the victim." Moreover, "[i]n addition to her own testimony, her demeanor, as described by multiple witnesses, indicated that she still remained under the influence of the stress of the incident despite the lapse of time Finally, the appellate division noted that "[a]lthough some of the statements were responses to questions, this did not interrupt the stress and excitement of the underlying traumatic incident."

Present Sense Impression

People v. Tyrone Nelson, __ A.D.3d __, 2022 NY Slip Op 00015 (1st Dept. 1/4/22).

The victim's statement to an emergency medical technician during a 911 call, regarding how he was stabbed in the head through the bedroom door, was admissible under the hearsay exception for statements made for the purpose of medical diagnosis or treatment. However, where his statement indicated that the defendant was the stabber and that the victim was pressing his body against the bedroom door to keep defendant out of the bedroom, that portion exceeded the hearsay exception, because these facts were not germane to diagnosis or treatment. Nonetheless, this error was plainly harmless because, as the court noted, the jury already knew this information through other admissible evidence.

Sandoval

People v. Keith Brannon, __ A.D.3d __, 2021 NY Slip Op 06184 (2nd Dept. 11/10/21).

The trial court erred in improperly conditioning its *Sandoval* ruling on whether defense counsel would impeach the People's witnesses with their criminal histories when it stated that it was "only fair" that the People be able to cross-examine the defendant on his criminal history if the defendant could cross-examine the People's witnesses on their criminal histories, and then stated that such was part of "the balancing act." Further, the trial court suggested that it might change its ruling if the People's witnesses who did not have criminal histories did not testify. In reversing the defendant's Brooklyn weapons possession conviction, the appellate division held that "whether the defendant impeaches the credibility of the People's witnesses during cross-examination based upon those witnesses' criminal histories, or whether the People's witnesses testify, are not relevant factors to consider in making a *Sandoval* ruling" under *Sandoval*.

Molineux

People v. Edmund Huertas, __N.Y. 3d __ (6/14/22) [6/1; Memorandum].

The Court of Appeals held 6-1 in a summary disposition memorandum that, "[u]nder the unique circumstances presented, Supreme Court did not abuse its discretion in reserving decision on the People's pre-trial *Molineux* application which sought to cross-examine defendant regarding the underlying facts of his prior gun-related convictions until after defendant's testimony, at which time the court could determine whether, and to what extent, defendant opened the door to such inquiry." In affirming, the Court also noted that any error in connection therewith was harmless. Judge Wilson dissented and would have reversed, for reasons stated in the dissenting opinion

below of Chambers, J., *(186 AD3d 731, 734-740 (2nd Dept. 2020)* on the conclusion that the defendant did not open the door to this *Molineux* ruling.

People v. Kenneth Mountzouros, 206 A.D.3d 1706, 2022 NY Slip Op 03840 (4th Dept. 6/9/22)

Before trial, the Livingston County Court granted the People's motion seeking to introduce testimony that defendant sexually abused his eldest son in the 1990s, on the ground that the earlier, uncharged conduct was admissible under the modus operandi exception to the *Molineux* rule [*see People v Molineux*, 168 NY 264 (1901)]). The fourth department reversed and held this was error on the conclusion that modus operandi evidence is a "means of establishing the defendant's identity as the perpetrator" under *People v Beam, 57 N.Y.2d 241, 250-251 (1982),* and even assuming, that the defendant's identity as the person who committed the crimes was not conclusively established [*cf. People v Agina*, 18 NY3d 600, 603-605 (2012)], the similarities between the uncharged acts and the charged crimes were not "sufficiently unique to make the evidence of the uncharged crimes probative of the fact that [defendant] committed the [crimes] charged" (*Beam,* 57 NY2d at 251 [internal quotation marks omitted], and finally that the error in admitting the evidence is not harmless.

People v. Harvey Weinstein, 207 A.D.3d 33, 2022 NY Slip Op 03576 (1st Dept. 6/2/22).

The first department per Mazzarelli, J., in an extensive opinion, affirmed the defendant's first-degree criminal sex act and third-degree rape conviction and in so doing, rejected several claims advanced by the defendant, "a highly acclaimed movie and television producer" in conn[rection with sexual assaults on "two women who were trying to make a name for themselves," as actors, regarding 1) *Molineux* proof in connection with these victims and one other who was part of another indicted incident charged as a predatory sexual assault that was acquitted, and three of five other women where were victimized by the defendant's prior criminal and other bad acts, 2) claimed prejudicial spillover in connection with proof regarding the acquitted crime, expert testimony regarding sexual assault trauma and its impact on memory and the ability to recall, 3) statute of limitations claims with regard to the tolling provisions of C.P.L. 30.10, and 4) the claimed erroneous denial of the discharge of a sworn juror on the claim that she was grossly unqualified under C.P.L. 270.35 after it was learned that she had written a purported semi-autobiographical novel that involved allegations of sexual assault notwithstanding the fact that she had denied being a victim of sexual violence during voir dire and a *Sandoval* ruling as well.

Regarding the *Molineux* claim, which was most significant, the first department held that multiple uncharged bad and criminal sexual acts, including some admittedly consensual and in great detail committed prior the charged crimes with respect to both victims were probative and not unduly prejudicial in order to explain the relationship between the defendant and victims, as background and to assist the jury in explaining the narrative. As a corollary to that ruling, the appellate division also held that the trial court properly ruled on the People's *Sandoval* motion to permit cross-examination regarding 28 of 32 specified bad or criminal acts if the defendant were to testify (he did not). Additionally, the appellate division held that the tolling provisions of C.{.L. 30.10(4)(a)(i) applied to the defendant, who was a non-resident of New York due to the fact that he was continuously outside the state for periods of time during the applicable five year period of time. And last, the appellate court held that the trial judge properly exercised its discretion in declining to discharge a sworn juror after three separate *Buford* inquires notwithstanding the juror's having written a purportedly semi-autobiographical novel concerning similar issues regarding sexual assault and abuse, where the juror maintained that she could be fair and impartial.

People v. Devarl M. Dudley, __ A.D.3d __, 2022 NY Slip Op 02014 (2nd Dept. 3/23/22).

The trial court properly permitted the People to elicit evidence of the defendant's prior bad acts as *Molineux* proof. Thus, evidence that the defendant was selling drugs during and before the underlying incident completed the narrative of events, provided necessary background information, and was admissible to establish defendant's motive to commit the crimes of which he was convicted which was tempered by the court's appropriate limiting instructions, to which defense counsel did not object, as to the limited purpose for which that evidence was received.

People v. Gregory M. Noonan, __ A.D.3d __, 2022 NY Slip Op 00777 (4th Dept. 2/4/22)

The trial court did not err in allowing testimony during the defendant's Jefferson County assault trial that the defendant had stated that he previously punched the victim in the stomach because that did not leave marks because the statement was relevant to establish defendant's intent and motive and the probative value of that evidence outweighed the potential for prejudice. See generally *People v Allweiss, 48 N.Y.2d 40, 46-47 (1979).*

People v. John Lides, __ A.D.3d __, 2021 NY Slip Op 07290 (2nd Dept. 12/22/21).

The defendant's Queens course of sexual conduct against a child case was affirmed over claims that the trial court erroneously admitted proof of the defendant's prior bad acts against he

complainant and other members of the household. In affirming, the second department held that this proof was probative as background evidence and as "necessary" evidence to explain a delayed disclosure.

Defendant's Silence

People v. Luis Serrano, __ A.D.3d __, 2021 NY Slip Op 07037 (3rd Dept. 12/16/21).

A majority of the third department held 4-1 per Justice Clark that while it was error for the trial court to have permitted the People to elicit testimony from an investigating detective that the defendant invoked his right to an attorney and to remain silent during an interrogation during his weapons possession and related crime trial in Schenectady, the error was held harmless beyond a reasonable doubt. Justice Colengelo dissented on the conclusion that harmless error analysis could not be applied where the trial court failed to provide curative instructions.

Prompt Outcry

People v. Godsent Gideon, 203 A.D.3d 519, 2022 NY Slip Op 01746 (1st Dept. 3/15/22).

The trial court erroneously admitted four statements made by the alleged victim following the incident, on the theory that they were admissible both as excited utterances and prompt outcries. In reversing the defendant's New York County non-jury conviction, the first department held that the victim's out-of-court statements did not qualify as excited utterances and should not have been admitted "for their substance" under that hearsay exception. The appellate division further noted that *a*lthough two of the four statements were correctly admitted under the alternative theory that they constituted prompt outcries, under this exception, "only the fact of a complaint, not its accompanying details" was actually properly admitted under *People v McDaniel, 81 N.Y.2d 10, 17 (1993)*. Thus, where it was clear from the record that the trial court considered all four hearsay statements for their substance, the proof of guilt was not overwhelming, the People's strong reliance on the hearsay statements to prove its case, and the court's indication that it intended to review the written statement that was in evidence during deliberation, the appellate court held the error reversible

Electronic Evidence-Social Media

People v. Luis A. Rodriguez, 38 N.Y.3d 151, 2022 NY Slip Op 03307 (5/18/22) [7/0; Cannataro, J.].

During the defendant's trial on charges **of** attempted use of a child in a sexual performance, disseminating indecent material to minors in the first degree and endangering the welfare of a child, which arose out of allegations that he, a 43-year-old volley ball coach, engaged in sexual relations with a 15 year old victim, the trial court properly admitted several screenshots of text messages sent by the victim to her 16 year old boyfriend in evidence where they were properly authenticated by the victim under *People v. Patterson, 93 N.Y.2d 80, 99 (1994).* The victim deleted the text messages and then re-set her telephone but the boyfriend saved them and provided them to investigators. Thus, the victim's testimony properly authenticated the messages as true and accurate [see *People v. Price, 29 N.Y.3d 373, 377 (2017)* relating to photographs downloaded from social media and relied on in part by the Court] which testimony was corroborated by the boyfriend and telephone records. As such, an order of the appellate division that reversed two counts of the indictment based on this action was reversed and the conviction reinstated.

People v. Dupree Mayo, 202 A.D.3d 833, 2022 NY Slip Op 00881 (2nd Dept. 2/10/22).

The trial court erred in admitting into evidence a photograph downloaded from a Facebook account allegedly belonging to the defendant and allegedly depicting him wearing certain clothing similar to that worn by the perpetrator in a Brooklyn attempted assault trial. In reversing and ordering a new trial, the second department held that order to admit a photograph into evidence, it must be authenticated by proof that it is genuine and that it has not been tampered with under *People v Price, 29 N.Y.3d 472, 476 (2017).* Thus, in this case the People's only authentication evidence consisted of the testimony of a police witness who searched for the Facebook profile 1½ years after the crime and as such, the prosecution did not proffer any evidence or testimony demonstrating that the photograph was "a fair and accurate representation of the scene depicted or that it was unaltered" (*Price* at 477-478). Indeed, the police witness testified that he did not know whether the photograph had been altered. Furthermore, the People did not present any evidence "to establish that the web page belonged to, and was controlled by, [the] defendant" or any evidence as to when the photograph was created or posted (*id.* at 480; *cf. People v Goldman*, 35 N.Y.3d 582, 595-596 (2020).

People v. Christopher E. James, __ A.D.3d __, 2021 NY Slip Op 06700 (2nd Dept. 12/1/21).

The trial court providently exercised its discretion in reconsidering an evidentiary ruling made during the defendant's first murder trial in Suffolk County regarding text messages between the defendant and the victim, and in granting the People's application to admit only certain of those text messages into evidence at the retrial. In affirming, the appellate division noted that the The text messages allowed in evidence were probative of the victim's state of mind and, thus, of the defendant's motive for killing the victim and that with regard to other text messages proffered by the defendant, the defendant failed to establish that the text messages between the defendant and the victim that the court excluded at the retrial were relevant to a material fact or otherwise met an exception to the rule against hearsay.

Experts

People v. John Wakefield, __ N.Y.3d __ (4/26/22) [7/0; DiFiore, C.J.].

The Court of Appeals, per DiFiore, C.J., unanimously held that the use of the continuous probabilistic genotyping approach by a DNA laboratory, TrueAllele, to generate a statistical likelihood ratio— including the use of peak data below the "stochastic threshold"—of a DNA genotype was generally accepted in the relevant scientific community and also that there was no error in the court's denial of the defendant's request for discovery of the TrueAllele software source code in connection with the *Frye* hearing or for the purpose of his Sixth Amendment right to confront the witness against him at his murder trial. Judge Rivera, joined by Judges Wilson and Troutman concurred in the result bought would have held the admission of this evidence error but harmless beyond a reasonable doubt in light of the overwhelming proof of guilt.

People v. Levan Easley, __ N.Y.3d __ (4/26/22) [4/3; Memorandum].

A majority of the Court of Appeals held in a memorandum opinion by a 4-3 vote that while the admission on evidence of certain DNA proof based on a forensic statistical tool (FST) without a Frye hearing was error based on prior opinions of the Court in *People v Williams, 35 N.Y.3d 24 (2020)* and People *v Foster-Bey, 35 N.Y.3d 959 (2020)* but that the error was harmless based on the overwhelming proof of guilt to the extent that there was "no significant possibility" the jury

would have acquitted without it. *Judges Rivera,* joined by Judges Wilson and Troutman dissented on their conclusion that the error was indeed reversible.

People v. Howard Powell, 37 N.Y.3d 476, 2021 NY Slip Op 06424 (11/18/21) [5/2; DiFiore, C.J.].

A majority of the Court of Appeals affirmed the Queens robbery conviction of a defendant over claims that the trial court abused its discretion in denying the defense application for expert testimony with regard to false confessions under *People v. Bedessie, 19 N.Y.3d 147 (2012*) and false identifications under *People LeGrande, 8 N.Y.3d 449 (2007)*. With respect to the former, the Court held that while the proffered expert, Dr. Allisson Redlich, Ph.D., was highly credentialed and qualified as presented during a Frye hearing, her proposed testimony regarding dispositional and situational factors that could lead to false confessions was not sufficiently "anchor[ed]" in the circumstances present in this case as outlined during the prior *Huntley* hearing. Similarly, the Court also rejected claims regarding a false identification expert, Nancy Franklin, Ph.D., sustaining the trial court's determination that there was a surveillance video of the two robberies charged and that as such an expert was not required. Judge Rivera dissented, joined by Judge Wilson and would have reversed on the holding that the failure to have permitted the expert testimony was an abuse of discretion.

People v. Sulaiman Aamir, 203 A.D.3d 839, 2022 NY Slip Op 01459 (2nd Dept. 3/9/22).

The trial court properly allowed the People's expert to testify as to his calculation of the defendant's unreported tobacco purchases and unpaid tobacco taxes in the defendant's Kings County tax fraud and related-crime prosecution notwithstanding that the testimony went to the ultimate issue in the case since the matter was beyond the ken of the average juror.

People v. Christian Manley, __ A.D.3d __, 2021 NY Slip Op 06814 (1st Dept. 12/7/21).

The court properly exercised its discretion in allowing expert testimony on what the expert described as "community guns" where this matter went beyond a juror's ordinary knowledge. In affirming the defendant's Manhattan weapon s possession conviction, the first department note that this concept involved the methods used by gangs to have their shared firearms ready to use while avoiding being caught in possession of these weapons, including by means of keeping firearms outdoors in closed containers under their constant observation but not on anyone's person and moreover that the expert testimony was necessary to explain the unusual behavior of

defendant and persons who could be inferred to be his fellow gang members regarding their handling of the backpack containing the pistol, including evidence that defendant left the backpack unattended in the gang-controlled courtyard for two hours and tended to prove the defendant's knowing and voluntary possession of the pistol. See *People v Brown, 97 N.Y.2d 500, 506-507 (2002*) and *People v Carroll, 95 N.Y.2d 375, 387 (2000),* cited by the court.

Right to Present Defense

People v. Dashawn Deverow, 38 N.Y.3d 157 (5/24/22) [7/0; Singas, J.].

The defendant's right to present a defense in connection with his claim of justification in his Queens murder prosecution was violated by the trial court's exclusion of the testimony of a witness who observed the shooting. Thus, where the defendant sought to utilize this evidence for impeachment purposes in connection with his efforts to undermine the testimony of a prosecution witness who purported related what happened to support his claim that another group that was part of a gang, the 40 Boys, fired first at him as part of a retaliation and that he then fired back to defendant himself as part of his justification defense, the preclusion by the trial court of this application was reversible. Additionally, the Court also held that three 911 calls were also erroneously excluded on applications to admit them by the defense where they were present sense impressions or excited utterances under *People v. Cantave, 21 N.Y.3d 374, 382 (2013)* and *People v, Vasquez, 88 N.Y.2d 561, 574 (1996),* which error also contributed to the reversal.

People v. Alpha Lisene, __ A.D.3d __, 2022 NY Slip Op 00194 (2nd Dept. 1/12/22).

During the defendant's Brooklyn criminal sex act and related-crime trial the defendant sought to introduce testimony from one Marie Anisca-Oral, a friend of his older sister, on the subject of the reputation for truthfulness and veracity of the eight-year-old complainant's mother (hereinafter the mother), who testified for the prosecution. In order to lay the foundation for such testimony, Anisca-Oral, a staff sergeant in the United States Army, described a community of seven or eight friends and acquaintances, predominantly of Haitian nationality, and generally living within certain neighborhoods in Brooklyn. Anisca-Oral testified that she had known the mother since 1999, that almost everyone she knew also knew the mother, and that every time she saw her acquaintances among this group, the mother's reputation for truthfulness and veracity was discussed. The second department held that the trial court's sustaining of the People's objection to the proffered testimony. We hold that this determination was erroneous on

the ground that it deprived the defendant of his right to present a defense with regard to reputation evidence. Thus, because the "presentation of reputation evidence by a criminal defendant is a matter of right, not discretion, once a proper foundation has been laid," quoting, *People v Fernandez, 17 N.Y.3d 70, 78 (2013),* "[t]he trial court must allow such testimony, once a foundation has been laid, so long as it is relevant to contradict the testimony of a key witness and is limited to general reputation for truth and veracity in the community; the weight given to such evidence should be left in the hands of the jury" (*People v Hanley,* 5 N.Y.3d 108, 112(2005). Contrary to the determination of the Supreme Court, neither the specific number of individuals in the purported community, nor the duration of their respective relationships with the mother was dispositive of whether Anisca-Oral was qualified to testify about the mother's reputation for truthfulness and veracity among their common acquaintances where she was a key prosecution witness.

People v. Vernon Newhall, **206 AD3d 1144 (3d Dept. 6/9/22)[Egan Jr., JP].**

Although deemed harmless error, the third department held that a Sullivan County Court judge erred in defendant's (statutory) rape 2° trial by sustaining the prosecutor's objections to defendant's testimony that that he was on trial for a "false accusation of sexual assault," as well objections to defense counsel's follow-up question as to whether the defendant was "innocent or guilty of these charges." The third department determined that the trial court's reasoning -that the objected-to testimony would invade the province of the jury—was flawed. "[R]egardless of the wording used, the objected-to testimony and question were not designed to usurp [the jury's] function and were instead meant to alert the jury to defendant's factual claim that the charged crimes had not occurred. The attempt to present testimony 'which would establish [defendant's] innocence,' if believed, was proper and did not impinge upon the jury's authority to 'return a guilty verdict based upon the competing facts and inferences of the People's case'" [Internal citations omitted.]

Relevancy

People v. Raymond A. Hansel, 200 A.D.3d 1327, 2021 NY Slip Op 07035 (3rd Dept. 12.16/21).

The third department reversed the defendant's Broome County predatory child sexual abuse and related crime conviction due the erroneous admission of testimony from the victim's mother than while her sexual relations with the defendant prior to the onset on the sexual abuse with her daughter were "abundant," they declined "precipitously" when the sexual assaults began as proof by inference that the defendant's sexual desires were being met elsewhere. In ruling that the error was not harmless, the court held that this evidence was not offered to prove a material element of

the case, the relationship of the parties, nor was it an integral part of the sequence of events leading to the criminal conduct or delay in the disclosure where especially, the People candidly admitted that the purpose of the testimony was to convince the jury that defendant, who the victim's mother testified had exhibited a vociferous sexual appetite, suddenly stopped having frequent sex with her and filled the void with the victim.

Trial Practices

Continuances

People v. Randy Reeves, __ A.D.3d __, 2022 NY Slip Op 04979 (2nd Dept. 8/17/22).

Notwithstanding there was sufficient evidence to convict the defendant of robbery in Queens County which was moreover, supported by the weight of the evidence, the trial court's refusal to grant a one-day continuance of the trial in order that the defendant's out-of-state daughter who was a witness in the case, could attend was reversible error.

COVID-19 Procedures

People v. Fernando Ramirez, __ A.D.3d __, 2022 NY Slip Op 05098 (2d Dept. 8/31/22).

The second department affirmed the defendant's Suffolk County aggravated vehicular homicide and related-crime conviction over claims that the defendant's contention that the trial court's COVID-19 procedures deprived him of the ability to meaningfully participate in jury selection. As the appellate division noted, while a defendant has the right to participate in jury selection which is generally understood to include an "opportunity 'to assess the jurors' facial expressions, demeanor and other subliminal responses as well as the manner and tone of their verbal replies so as to detect any indication of bias or hostility'," quoting *People v Wilkins, 37 N.Y.3d 371, 377 (2021)*, the record did not "support the notion that either face coverings, or spacing due to social distancing, interfered with, or deprived, the defendant of the ability to observe potential jurors, or to otherwise assess their facial expressions and demeanor during voir dire." The court cited only to *United States v. Thompson, 543 F Supp 3d 1156, 1163-1164 (D.N.M. 2021*). for its conclusion. Additionally, the appellate division rejected appellate claims that the trial court should have inquired of the jury following the decedent's widow's weeping during the People's opening where

the court immediately cautioned the widow outside the jury's presence to refrain from additional emotional outburst, stated that the weeping was inconspicuous and there was no contemporaneous objection.

Right to Jury Trial

People v. Cesar Garcia, __ N.Y.3d __ (5/24/22) [4/2; Memorandum].

A defendant's conclusory allegation that he was deportable if convicted "on any of the charged B misdemeanors," supported by a bare citation to 8 USC 1227 (a)(2)(A)(ii), under which "an alien is deportable if 'convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct,'" was held insufficient to establish his right to a jury trial in connection with public lewdness, forcible touching an sexual abuse under *People v. Suazo, 32 N.Y.3d .491 (2018).* Judge Rivera, joined by Judge Wilson, dissented on the conclusion that the defendant's allegations in support of a jury trial were "patently" sufficient, sine under federal law, the crimes involved were noes of moral turpitude.

Prosecutors

People v. Donald Kagan, __ A.D.3d __, 2022 NY Slip Op 02283 (2nd Dept. 4/6/22).

The defendant, who is white, fatally shot the victim, who was black, outside of a movie theater and thereafter, in 1999 was convicted, after a bench trial, presided over by then-Justice Frank J. Barbaro, of murder in the second degree and criminal possession of a weapon in the second degree. As the second department noted, Justice Barbaro, who had been socially and politically "active in civil rights causes" his entire career, contacted defense counsel in 2011 and requested a transcript of the trial. After "reflecting" on the case, Justice Barbaro thereafter asserted that his experiences as a civil rights activist "influenced [his] analysis" of the case, and that he "had incorrectly framed the issue as being whether the defendant was motivated in his actions by racism rather than whether or not his criminal intent was established beyond a reasonable doubt." The second department held that on the basis of these statements, the defendant was deprived of his right to an impartial fact-finder and thus the denial of his motion to vacate his judgment of conviction by the lower court under C.P.L. 440.10(1)(h) was error.

Judicial Recusal, Etc.

Jury Selection

General – Delegation of Judicial Duties

People v. Virgilio Ocampo, 206 A.D.3d 454, 2022 NY Slip Op 03803 (1st Dept. 6/9/22).

The defendant was accused of sexual assault crimes against his girlfriend's six-year-old daughter in the Bronx. On the first day of jury selection, to identify and dismiss prospective jurors who could not be fair and impartial in light of the nature of the charges and the graphic evidence, the court addressed the approximately 200 prospective jurors in groups of approximately 50. The trial judge told each group about the charges and described certain video evidence. All panelists who stated that they could not be fair and impartial in light of these circumstances were excused. When jury selection continued two days later, 92 panelists remained. Because of the size of the group, they were placed in an assembly room down the hall from the courtroom and in the courtroom next door. The court informed the parties that some of the remaining panelists had approached court officers, stating that they had "thought about it" and now believed they could not serve as jurors. The court proposed sending the court clerk to each of the rooms where the jurors were waiting "to ask generally the question of since Tuesday is there anybody who in thinking about the judge's questions believe they can't serve on the case." Any prospective jurors who answered in the affirmative would be brought into the courtroom for further questioning by the court. Defense counsel consented to this procedure. Upon returning to the courtroom, the clerk reported that there were 10 prospective jurors who had "an issue." The 10 panelists were brought to the courtroom, where the court inquired whether, based on "the nature of the case [and] the kind of evidence you will be seeing during the course of this trial," the panelists now thought they could not be fair and impartial. Two of the panelists expressed logistical concerns unrelated to the subject matter of the case, and the court indicated that it would address such matters later. The other eight jurors indicated that, upon further reflection, they could not be fair and impartial. The court excused these jurors and then proceeded with the balance of jury selection. The first department affirmed over claims by the defendant that the clerk's actions were an improper delegation of judicial duties and held: While the clerk's inquiry of the prospective jurors touched on an issue related to juror

qualification, the appellate division agreed with the People that the clerk's inquiry was "fundamentally the performance of a ministerial function." The clerk was not called on to dismiss prospective jurors or to evaluate their responses. Instead, the clerk merely supplied information upon which the court made its own determination" Moreover, the information supplied was simply the panelists' responses to the court's preliminary inquiry, as relayed by the clerk. Thus, "it was the court, not the clerk, that actually inquired into these panelists' fitness to serve," and did not constitute mode of proceedings error.

Challenges For Cause

People v. Elliot Shepherd, __ A.D.3d __, 2022 NY Slip Op 03482 (1st Dept. 5/31/22).

The trial court properly denied the defendant's challenge for cause in Manhattan second-degree robbery trial to a prospective juror who was a prosecutor in a different county (i.e. the Bronx) and the record does not establish any implied bias, that is, that the panelist had any relationship to the prosecution "of such nature that it [was] likely to preclude h[er] from rendering an impartial verdict" (See CPL 270.20[1][c]), and moreover, her answers otherwise established that she could be impartial and acquit if the People did not prove defendant's guilt beyond a reasonable doubt. In affirming, the first department noted that "the panelist did not state that — and defense counsel did not ask whether — she had any contact with or relationship to the trial prosecutor, the New York County District Attorney's Office, or any witness, or any prior familiarity with the instant case, or any connection to any New York County criminal case." Interestingly the second department reached a different result what could be considered similar facts a month earlier in People v. *Melchor Cortes, 204 A.D.3d 939, 2022 WL 1160957, 2022 NY Slip Op 02561 (2nd Dept. 4/20/22),* discussed below.

People v. Melchor Cortes, 204 A.D.3d 939, 2022 WL 1160957, 2022 NY Slip Op 02561 (2nd Dept. 4/20/22).

During jury selection in the defendant's criminal contempt and related-crimes trial, a prospective juror advised the court that she was presently working as an assistant district attorney, within the Queens County district attorney's office, the same agency that was prosecuting the defendant, and that she was familiar with the prosecutor, the defense attorney, and the Justice. On the People's concession, the juror's contemporaneous working relationship with the agency prosecuting the defendant required that juror's dismissal for cause under *People v Furey, 18 N.Y.3d 284, 288 (2011)* due to her "implied bias." Because the defendant challenged this juror for cause and

thereafter exhausted all of his peremptory challenges prior to the completion of jury selection, the court's error in denying the for-cause challenge requires reversal of the judgment of conviction and remittitur for a new trial.

People v. Victor Ledezma, 204 A.D.3d 420, 2022 NY Slip Op 02236 (1st Dept 4/5/22).

The trial court erred in not engaging in a further inquiry of several prospective jurors who indicated that they might be inclined to believe the victims in the defendant's New York County sexual abuse trial because they came forward and thus, reversal was required. Thus, where an unequivocal assurance of impartiality was not obtained by the court from each juror who agreed with statements made by another juror that they could be fair and impartial, a new trial was ordered.

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People v. Robert Bowman, 203 A.D.3d 670, 2022 NY Slip Op 02208 (1st Dept. 3/31/22).

During jury selection in the defendant's Manhattan robbery trial, the lower court advised the panel of prospective jurors that the trial could last until April 17, 2018. A prospective juror at issue stated that she "absolutely" could not serve on April 18, because she had irrevocable travel plans for that day. When defense counsel said that "we are starting to get closer to the 16th, 17th," and asked whether she "may not be able to give [her] best attention" if "we started moving in that direction," the panelist said, "Yes." Defense counsel then challenged this panelist for cause based on her stated concern that she would have difficulty focusing on the trial due to her travel constraints. In the alternative, counsel sought to question this panelist further. The trial judge denied the challenge because it was of the opinion that the trial "should never even get that close." The defendant then exercised his final peremptory challenge against this panelist. The first department reversed the defendant's conviction on the holding that the trial court should have granted defendant's request for further inquiry to determine her ability to serve. As the appellate division noted, "[g]iven that her travel plans precluded her from serving a single day beyond the court's estimated outer limit for the trial, the panelist gave the impression that she would have

difficulty focusing on the trial, as she stated, and that, if selected, she might have been biased in favor of reaching a verdict quickly."

People v. Lorenzo Arline, 203 A.D.3d 843, 2022 NY Slip Op 01462 (3/9/22).

The trial court properly denied the defendant's for-cause challenge of two prospective jurors notwithstanding certain statements made during voir dire that they might credit children's testimony. In affirming the defendant's Queen rape conviction, the appellate division held that the statements did not rise to the level of actual bias or otherwise indicate that the prospective jurors in question would not be able to render an impartial verdict and that where there was no serious doubt regarding fairness, the court was not required to have first obtained a clear expurgatory oath.

People v. Ricardo Wilson, __ A.D.3d __, 2021 NY Slip Op 07305 (2nd Dept. 12/22/21).

The defendant's Queens leaving the scene of an incident without reporting and driving while intoxicated conviction was reversed due to the trial court's failure to have granted the defendant's challenges for cause of three prospective jurors and where the defense exhausted all peremptory challenges. One prospective juror indicated that she would give more credence to police witnesses and was never rehabilitated to the extent of providing the required expurgatory oath and the other two jurors expressed a difficulty in being able to comprehend the People's burden of proof.

People v. Ismail Feddaoui, 200 A.D.3d 789, 2021 NY Slip Op 06857 (2nd Dept. 12/8/21).

Where a prospective juror's statements during the defendant's Queens second degree robbery trial voir dire were to the effect that she would expect the defense to present evidence, this raised a serious doubt about her ability to be impartial and her subsequent responses fell short of being fair and impartial. As such the failure to have granted the defense for-cause challenge required reversal the defendant exhausted his peremptory challenges, the denial of his for-cause challenge under C.P.L. 270.20(2).

People v. Wayne Thomas, 200 A.D.3d 723, 2021 NY Slip Op 06711 (2nd Dept/ 12/3/21).

A prospective juror in the defendant's Staten Island murder trial, who was a firefighter who worked in the neighborhood where the charged offenses occurred, initially stated that he would be "fair," also indicated that it would be "tough" for him not to "lean" toward a police officer-witness. Where the prospective juror never provided unequivocal assurances that he could be fair and impartial and in particular, whether he was retracting the statements indicated he would favor police witnesses, the failure by the trial court to have granted the defense challenge for cause was reversible error.

Pre-Trial Publicity

United States v. Dzhoktar Tsarnaev, __ U.S. __, 142 S.Ct. 1024 (3/4/22) [6/3; Thomas, J.].

A majority of the Supreme Court held 6-3, per Thomas, J., that because a trial judge is afforded wide discretion in conducting jury selection and in particular in meeting concerns regarding pre-trial publicity in the Boston Marathon bombing capital case tried in Boston, there was no requirement that during voir dire, the court ask prospective jurors to list the facts he or she learned from the media and all other sources as a "blanket" question. Thus, where the trial court permitted follow-up questions from defense counsel on several occasions of prospective jurors regarding the specific sources of media knowledge and thus seated 12 jurors out of 256 called. In affirming the six-count death penalty verdict, among other crimes, the majority also held that the trial court was not required to have permitted mitigating evidence regarding the defendant and his brother's participation in an unrelated crime before the bombing to illustrate the purported inter-personal domineering personality of the brother and its affect on the defendant.

Batson

People v. Andrew Douglas, 203 A.D.3d 1682, 2022 NY Slip Op 01919 (4th Dept. 3/18/22).

The trial court's acceptance of the prosecutor's reasons for peremptorily striking a prospective juror on a *Batson* challenge in the defendant's Monroe County weapons possession and assault trial was erroneous where, on the People's concession, the non-pretextual reason proffered

actually related to another prospective juror who was also peremptorily struck. As such, the defendant's conviction was reversed and the case remanded for a new trial.

People v. Cory Johnson, 199 A.D.3d 1017, 20201 NY Slip Op 06627 (2nd Dept. 11/24/21).

During the first three rounds of jury selection in the defendant's Queens narcotics trial, the prosecutor exercised five peremptory challenges to exclude prospective black jurors, including S.K. S.K., who was a school counselor for the New York City Department of Education, indicated that something does not make sense to her when "something doesn't follow logic or kind of like when your children tell you a story about what happened at school, something doesn't make sense, there seems to be a missing part. You are thinking, I am not sure if this is the truth." Following this statement, S.K. also stated that she would not shift the prosecutor's burden of proof beyond a reasonable doubt to the defendant. The People peremptorily challenged this juror and the defendant advanced a *Batson* challenge. The trial court found that the defendant established a step one prima facie showing of discrimination and the court then asked that the prosecutor provide step two race-neutral reasons for exercising peremptory challenges as to the five prospective black jurors. When providing a race-neutral reason for exercising a peremptory challenge regarding S.K., the prosecutor stated that S.K. "is a school counselor and . . . when talking about how she would . . . settle disputes amongst two parties, indicated that she wanted to hear from both sides." As a step three protocol, defense counsel disputed this reason, and argued that the prosecutor did not exercise a peremptory challenge as to prospective white juror N.Z., a school counselor who "indicated that she would need to hear both stories" when working through a conflict between two children at work. The court then acknowledged that the prosecutor did not use a peremptory challenge as to N.Z., and that "[s]he is a white female." The second department held that under these circumstances, the trial court denial of the *Batson* challenge was reversible where the finding that the prosecutor's race-neutral reason for striking S.K. was not a pretext for discrimination was error.

<u>Defendant's *Antommarchi* Right to Be Present at Sidebars</u>

People v. Kesean R. McKenzie-Smith, 38 N.Y.3d 1048, (5/18/22). [6/0; Memorandum].

The Court by summary disposition reversed a contrary holding of the appellate division and held that **t**he Appellate Division erred in holding that defendant's claim under *People v Antommarchi, 80 N.Y.2d 247 (1992)* entitled him to a new trial (see People v Wilkins, 37 NY3d 371, 380 (2021), presumably due to an explicit waiver of the right to be present at side-bars. The case was thus remitted to the fourth department which subsequently affirmed by rejecting claims that the trial

court's preclusion of cross-examination of a prosecution witness was harmless error. 2022 NY Slip Op 04519 (4th Dept. 7/8/22)

People v. William Wilkins, __ N.Y.3d __ (12/14/21) [4/3; DiFiore, C.J.].

A defendant who explicitly waived his *Antommarchi* right to be present at sidebars in the middle of the voir dire proceeding involving a prospective juror [CK] who was ultimately struck when codefendant exercised a peremptory strike, is not entitled to reversal and a new trial based on his unwarned absence from a pre-waiver sidebar conference with that same prospective juror. Thus, a majority of the Court, per Chief Judge DiFiore held that the claimed error, under "these unique circumstances," required defendant's objection in the trial court "given his acquiescence in the post-waiver voir dire of the prospective juror after being invited to express any objection that he may have had regarding the pre-waiver sidebar conference." As such, the defendant's murder and robbery conviction, involving the robbery and shooting of a customer who was waiting outside a retail store to purchase newly released sneakers was affirmed. Judge Fahey, joined by Judges Rivera and Wilson, dissented on the conclusion that there was no doubt that an *Antommarchi* violation of the right to be present during side-bar colloquies with prospective jurors that involved sympathies and biases occurred and that his waiver after the fact, did not validly cover the pre-waiver violations which were reversible.

Courtroom Closure

People v. Dwight Reid, 203 A.D.3d 474, 2022 NY Slip Op 01425 (1st Dept. 3/8/22).

The trial court's midtrial closure of the courtroom to all spectators for the remainder of the trial was upheld as a "provident exercise of discretion" under the "extraordinary circumstances" presented where the trial judge made detailed findings regarding photos taken in the courtroom and posted online, and spectators' other conduct in the courtroom (some of which was directed at the court itself) and elsewhere in the courthouse. In so ruling, the trial court relied on "undisputed facts," as well as its own observations of spectators' intimidating behavior and demeanor, the "seriousness of which was not necessarily reflected in the cold record." Thus, in affirming the defendant's Manhattan murder and weapons possession conviction the first department held that the only alternative to closure offered by the defendant would have been ineffective in preventing intimidation and that the "cumulative effect of all this misconduct by spectators in general

established an overriding interest in closing the courtroom to prevent intimidation." See *Waller v Georgia*, 467 U.S. 39, 48 (1984); *People v Ming Li*, 91 N.Y.2d 913, 917 (1998); *People v Ford*, 133 A.D.3d 442, 443 *(1st Dept. 2015*), relied on by the court.

Right to Be Present

People v. Robert Fecu, __ A.D.3d __, 2022 NY Slip Op 02962 (1st Dept. 5/3/22).

The trial court's reprimands and admonitions directed at the defendant in the presence of the jury were held warranted by his persistent and egregious misconduct, in which he abused his pro se status. Thus, in affirming the defendant's Bronx second-degree contempt trial, the first department also noted that the trial judge's curative instructions minimized any prejudice arising from its comments, and defendant was not deprived of a fair trial under all the circumstances of the case. Moreover, after giving numerous warnings, the court properly exercised its discretion in removing defendant from the courtroom, revoking his pro se status, and directing standby counsel to resume representing defendant. As such, this decision was not based on a single remark by defendant, but on his "persistently obstreperous and disruptive conduct," quoting, *People v Williams, 134 A.D.3d 639, 639 (1st Dept 2015)*, including "routinely interrupting the court, making outrageous speeches, disregarding the court's rulings sustaining objections, and displaying exhibits not in evidence to the jury." Finally, the appellate division held that under the circumstances, the court also properly exercised its discretion in declining to permit defendant to return to the courtroom and that the defendant failed to establish good cause for the appointment of substitute standby counsel under People v Linares, 2 N.Y.3d 507 (2004).

People v. Wilbur Irick, 203 A.D.3d 517, 2022 NY Slip Op 01744 (1st Dept. 3/14/22).

The trial court properly exercised its discretion in removing the defendant from the courtroom during a pre-trial suppression hearing in his Manhattan robbery case based on the defendant's disruptive behavior that included his throwing himself on the floor in an effort to prevent the trial from continuing and after warning him that the trial would continue his absence if he persisted in his misbehavior. The court additionally properly denied the defendant's request for to proceed pro se where it was made after jury selection and after the defendant's continued disruptive behavior

during the initial phases of the trial. Finally, the court properly denied the defendant's request for a potentially lengthy adjournment in order to determine whether to testify in his own defense where the defendant's claimed lack of preparation in order to decide was the result of his own disruptive behavior.

People v. Asim Martinez, __ A.D.3d __, 2022 NY Slip Op 00037 (2nd Dept. 1/5/22).

The second department affirmed the defendant's Staten Island murder conviction on the holding that the trial court did not violate his right to be present when, on the second day of trial, it heard testimony from a single out-of-state witness in his absence. Thus, as the court noted, a defendant's statutory and constitutional right to be present at all material stages of his or her trial may be waived even where, as here, the defendant is in custody at the time of trial. Indeed, "A valid waiver of the right to be present at trial will be implied if the record reflects that the defendant is aware that trial will proceed even though he or she fails to appear," quoting, *People v Forrest, 186 A.D.3d 1395, 1397 (2nd Dept. 2020*). Here, before proceeding in the defendant's absence, the court determined, based on the surrounding circumstances, that the defendant's absence was deliberate, made a record of the reasons for its finding, and exercised its sound discretion upon consideration of all appropriate factors.

People v. Edwin Hernandez, 198 A.D.3d 465, 2021 NY Slip Op 05466 (1st Dept. 10/12/21),

The trial court properly removed the defendant from the courtroom during his New York County robbery trial only the judge issued repeated warnings, which were ignored, and the defendant's disruptive behavior continued. Further, the trial court afforded defendant the opportunity to return to the courtroom the next court date to correct his behavior under *People v. Parker, 57 N.Y.2d 136.141 (1982).* The waiver analysis, however, did not apply to the third day of trial, because the defendant was not warned of the consequences of his failure to appear (*see Parker, 57 NY2d at 141*. However, the first department held that the forfeited his right to be present, because his failure to appear was for the purpose of frustrating the trial (*see* ***People v Sanchez, 65 NY2d 436, 443-444 (1985]).***

Bruton

People v. Brandon Williams, __ A.D.3d __, 2022 WL 1020981, 2022 NY Slip Op 02293 (2nd Dept. 4/6/22).

The defendant's Queens murder and weapons possession conviction was reversed due to the trial court's erroneous denial of the defendant's motion to server his trial from his co-defendant in a case in which the prosecution introduced portions of the co-defendant's video-taped confession in violation of the *Bruton* rule which bars the admission of a non-testifying co-defendant's confession at a joint trial. As the second department observed, "[a]lthough the co-defendant did not specifically name the defendant as a person involved in the shooting, "the jury could easily have inferred" that the defendant was the person who was involved, quoting, *People v Russo, 81 AD3d 666, 667 (2nd Dept. 2011).* "While *Bruton* does not apply, and no violation of the Confrontation Clause exists, when the challenged statements are not incriminating on their face, but only become so when linked with other evidence introduced at trial," quoting, *People v Perry, 187 AD3d 796, 796 (2nd Dept. 2020).* However, *Bruton* applies to statements that "'obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately,'" quoting, *People v Johnson, 27 NY3d 60, 69 (2020),* quoting *Gray v Maryland, 523 US 185, 196 (1998).* The harmful admission of the co-defendant's confession was further exacerbated by the prosecution's references to it on cross-examination and summation.

Cross-Examination of Witnesses

People v. Bryan Aponte, __ A.D.3d __, 2021 NY Slip Op 02813 (2nd Dept. 4/28/22).

Although a trial court is generally granted a "certain degree" of discretion in in terms of intervention in ruling on the admission of evidence and argument thereon, a trial judge's preclusion of defense cross-examination of a prosecution witness regarding her ability to identify the defendant in lineup during a Brooklyn murder trial, along with preclusion of defense argument thereon during summation was reversible. In so ruling the second department noted that "a defendant is . . . entitled to have the jury consider the fairness of pretrial identification procedures in determining whether testimony identifying him as the perpetrator of a crime is sufficient to establish guilt beyond a reasonable doubt," quoting, *People v Ruffino, 110 A.D.2d 198, 198-199 (2nd Dept. 1985).*

People v. Jorge Silva, __ A.D.3d __, 2022 NY Slip Op 02348 (1st Dept. 4/7/22).

The trial court properly permitted the People to impeach the defendant's testimony with statements made in his presence by his counsel at arraignment because there was a reasonable inference that could be drawn that the defendant was the source of the statements regarding his

actions before and during the stabbing of the victim. S*ee People v Brown, 98 N.Y.2d 226, 232-233 (2002*), relied on by the court. The trial judge later ruled that, although the line of questioning had been appropriate, the People would not be permitted to comment on it in summation because defendant denied making the statements and they were not otherwise proven. Because defense counsel agreed to that curative action, defendant's claim that the court should then have also struck the testimony or provided a curative instruction was held unpreserved or alternatively, on the merits, harmless.

Instructions

Justification – Duty to Retreat

People v. Bertrand Dilisme, __ A.D.3d __, 2022 NY Slip Op 05130 (1st Dept. 9/6/22).

The appellate division reversed the defendant's Manhattan assault conviction on the holding that the trial court should have granted the defense's request for a jury instruction that defendant, who asserted a defense of justification, had no duty to retreat from the bathroom he shared with the complainant as a matter of law (Penal Law § 35.15 [2] [a] [i]; *see People v Primus*, 178 A.D.2d 565, 566 [2d Dept 1991] [it was reversible error to charge the jury on duty to retreat where the assault occurred outside a shared bathroom that was part of the defendant's dwelling].In this case, the defendant and the complainant lived in a housing complex where they each had a separate room that gave them access to a shared bathroom to which no one else had access. Under these undisputed facts**,** this bathroom, unlike a hallway bathroom, was accessible only from the respective rooms of defendant and the complainant. As a matter of law, the shared bathroom was held a part of defendant's dwelling, notwithstanding that he shared it with the complainant, as opposed to a common area in the building. Therefore, under Penal Law § 35.15 (2) (a) (i), defendant had no duty to retreat before using deadly physical force to defend himself. Thus. "[g]iven these facts, the court's inaccurate instruction that whether the incident took place in defendant's dwelling depended on the extent to which defendant exercised exclusive possession and control over the area in question could have led the jury to erroneously conclude that the bathroom was not part of defendant's dwelling because he shared it with the complainant and that therefore defendant had a duty to retreat." In so ruling, the first department also noted that the trial court apparently overlooked that the term "dwelling" in Penal Law § 35.15 (2) (a) (i) means "a person's residence, and [that] any definition of the term must therefore account for a myriad of living arrangements . . . [so that a] determination of whether a particular location is part of a defendant's dwelling depends on the extent to which defendant (*and persons actually sharing living quarters with defendant*) exercises exclusive possession and control over the area in question" (*People v Hernandez*, 98 NY2d 175, 182-183 [2002] [emphasis added]). As such, there was simply no factual determination for the jury to make as to whether or not the location of the assault was in a dwelling within the

meaning of Penal Law § 35.15 (2) (a) (i) in considering defendant's justification defense and the error was held reversible.

Temporary Lawful Possession of Weapon

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

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

Submission of Lesser Included Offenses

People v. Luis Serrano, __ N.Y.3d __ (6/16/22) [7/0; Memorandum].

The Court of Appeals held in a summary disposition memorandum that the trial court properly

denied defendant's request to charge assault in the third degree as a lesser included offense of assault in the first degree and moreover that the defendant received effective assistance of counsel.

People v. Crystal Joseph, __ A.D.3d __, 2022 NY Slip Op 02282 (2nd Dept. 4/6/22).

On the People's concession, the crime of second-degree burglary was held to be a lesser included offense of first-degree burglary and thus the defendant's sentence on the former Queens conviction was vacated and the second-degree burglary count was dismissed.

People v. Jayquaine Seignious, 202 A.D.3d 517, 2022 NY Slip Op 00948 (1st Dept. 2/10/22).

The trial court improperly submitted second degree burglary as a lesser included offense of second-degree burglary as a sexually motived crime where, under *People v. Glover, 57 N.Y.2d 61, 64 (1982),* where the People's proof in a case in which several female students outside a dormitory building at NYU in Manhattan where sexually assaulted by the defendant during a nighttime series of attacks, but managed to escape and thereafter, the defendant entered the dormitory. In reversing the defendant's second-degree burglary conviction, the first department held that because of the way the People presented their case, they deprived the defendant of notice of the possibility that the jury would be asked to consider that lesser-included charge. As the appellate division noted, in *People v Barnes, 50 N.Y.2d 375 (1980),* the Court of Appeals observed that, where, as here, the People in a burglary case limit to a particular crime the act that the defendant intended to commit (here, as sexual assault) while unlawfully in a building, "the court is obliged to hold the prosecution to this narrower theory alone" [50 N.Y.2d at 379, fn. 3. See also *People v Rothman, 117 A.D.2d 535 [1st Dept. 1986) and People v Garcia, 29 A.D.3d 255, 262 (1st Dept 2006*), relied on by the court.

Mistrials

Matter of McNair v. McNamara, 206 A.D.3d 1689, 2022 NY Slip Op 03285 (4th Dept. 6/10/22).

The fourth department granted a defendant's Article 78 writ of prohibition to prevent his retrial on weapons possession and related charges after the trial court in Oneida county court sua sponte granted one after the jury was sworn and testimony taken without consent due to the fact that he was unwell with a "a bad cold," and had gone for but had not received the results of a COVID test,

which later came back negative. In so ruling, the appellate division noted there was no manifest necessity for the mistrial, and the court therefore abused its discretion in granting it sua sponte, where the record established that the court did not consider the alternatives to a mistrial, such as a continuance or substitution of another judge (*see People v Thompson*, *90 NY2d 615, 616-617, 621 (1997); see also People v Hampton, 21 N.Y.3d 277,* 287 (2013). "The court has the duty to consider alternatives to a mistrial and to obtain enough information so that it is clear that a mistrial is actually necessary. At that time, the Judge knew he was scheduled to have a COVID-19 test that afternoon. If the result was negative, he could have returned to the courtroom as soon as he was provided with the result. If it was positive, he might have been out for a longer time, but could have reassessed the situation after receiving the test results. It thus was an abuse of discretion to grant a mistrial without the consent of petitioner and without considering the available alternatives.

Discharge of Sworn Jurors

Patrick Colter, 206 A.D.3d 1371, 2022 NY Slip Op 04055 (3rd Dept. 6/23/22).

A majority of the third department, per Fitzgerald, J., affirmed by a 3-2 vote the defendant's Chemung County weapons possession conviction over, among other issues, claims that the trial court erroneously discharged and sworn juror and substituted her with an alternate where there was no objection by the defendant and thus a failure to preserve the contention. Justice Aarons, joined by Justice Fisher would have reversed in the interests of justice to correct the trial court's error in discharging the juror where the juror left sick the day earlier and the court acted only after 30 minutes had expired from the time of the scheduled re-start of trial that day in violation of C.P.L. 270.35(2) without any inquiry as to the juror's absence.

People v. Ricardy Dumervil, 205 A.D.3d 923, 2022 NY Slip Op 03249 (2nd Dept. 5/18/22).

After the jury had been sworn in the defendant's Queens sex trafficking and promoting prostitution trial, a sworn juror in question informed the trial court that she had to attend a medical appointment with her son on a date that would interfere with her jury service. On that date, the juror confirmed that she had to leave court at noon to attend the appointment. The court thus was held to have

properly inquired into the reason for the juror's unavailability and determined that she was, effectively, unavailable on the date set by the court for continuation of the trial [*see* CPL 270.35(2)(a); see also, *People v Jeanty, 94 N.Y.2d 507 (2000)*], relied on by the court. In affirming the second department held that, contrary to the defendant's contention, the "'replacement [of a sworn juror] with an alternate juror is not, as a rule, a violation of the right to trial by jury' as 'there is no material distinction between the regular and alternate jurors, quoting'" *People v Vazquez, 82 A.D.3d 1273, 1275 (2nd Dept. 2011),* in turn also quoting *People v Ballard, 51 A.D.3d 1034, 1036 (2nd Dept. 2008).*

People v. Quixotay Moody, __ A.D.3d __, 2021 NY Slip Op 07559 (2nd Dept. 12/29/21).

The trial court erred in failing to conduct a required *Buford* inquiry of a deliberating juror in a Staten Island assault trial who advised the court by note that she was no longer able to serve and was experiencing heart palpitations, where it was unclear that the jury had reached a partial verdict before being unable to continue deliberating. Thus, where defense counsel requested the inquiry and the court declined and took the partial verdict, the error required reversal because the record was unclear in this respect an speculation regarding the continued ability of the juror to serve or at what point she became unable to serve was not apparent.

People v. Marcus Thompson, 200 A.D.3d 435, 2021 NY Slip Op 06778 (1st Dept. 12/2/21).

The record failed to support the trial court's discharge of a sworn juror and an alternate, over defense objection, as "grossly unqualified," in a case in which the two jurors engaged in premature deliberations while on the subway by discussing the demeanor and testimony of witnesses and the age of the case. Initially, the trial court properly conducted an inquiry of the jurors themselves and confirmed that they had engaged in premature deliberations. However, the first department held that it should have inquired further and ascertained whether they were unable to render an impartial verdict, rather than discharging them as grossly unqualified based solely on the conclusion that, by prematurely deliberating, they had violated the court's instructions not to discuss the case under *People v Buford*, 69 N.Y.2d 290, 298-299 (1987) and its progeny. In reversing the defendant's weapons possession conviction the court noted that "[p]remature deliberation by a juror, by itself, does not render a juror grossly unqualified, quoting *People v Mejias, 21 N.Y.3d 73, 79 (2013*). Thus, the "grossly unqualified" standard for removal of a sworn juror is higher than that for a prospective juror, and "the record must convincingly demonstrate that the sworn juror cannot render an impartial verdict for him or her to be disqualified" (*People v Spencer, 29 N.Y.3d 302, 310 (2017).* Where "nothing express or implied in the jurors' answers suggested that they could not render an

impartial verdict in spite of their conversation and decide the case based solely on the evidence before them," removal was erroneous.

Juror Misconduct

People v. Vernon Hubbard, __ A.D.3d __, 2022 NY Slip Op 00017 (1st Dept. 1/4/22).

The trial court properly denied the defendant's motion to set aside his Bronx manslaughter conviction based on juror misconduct where the juror in question testified at a post-verdict hearing that while cutting meat at home, he remembered the testimony he had heard about how the homicide victim was stabbed in the neck. In affirming the first department noted that there was no support in the record that the juror conducted an experiment at home, and none of the jurors who testified at the hearing indicated that the juror discussed the meat-cutting incident with the other jurors. Additionally, in the jury room during deliberations, the same juror used a piece of cardboard to simulate a knife and briefly made a stabbing motion in an effort to demonstrate or reenact the crime at issue. The court similarly rejected this conduct as improper where based on the evidence at the hearing, that "jurors may conduct a jury room crime reenactment or demonstration provided it involves no more that the jurors' application of everyday experiences, perceptions and common sense to the evidence," quoting *People v Kelly, 11 A.D.3d 133*, 146 (1st Dept 2004), *aff'd* 5 N.Y.3d 116 (2005). Thus, the juror did not become an unsworn witness, or introduce new facts into the deliberations (*see People v Brown*, 48 N.Y.2d 388, 394 (1979), and moreover, did not claim any expertise or convey an expert opinion. Such that. "[g]iven the location, simplicity, and brief duration of the demonstration," the demonstration did not prejudice any substantial right of the defendant.

People v. Szymon Chodakowski, 200 A.D.3d 437, 2021 NY Slip Op 06781 (1st Dept. 12/2/21).

On the People's consent, the case was remanded for a hearing to determine whether ethnic bias tainted the jury's deliberations as alleged by defendant under *Peña-Rodriguez v Colorado,* - US -,

137 S.Ct. 855 (2017) and *People v Leonti , 262 N.Y. 256 (1933).* Thus, where the defendant's CPL Art.440 motion included an affidavit from the jury foreperson, in which he swore that, during deliberations, a juror made ethnic comments concerning defendant and the complainant exhibiting "overt [ethnic] bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict" (*Peña-Rodriguez , - US -, 137 S Ct at 869).* The appellate division provided direction for the scope of the hearing: first determine the veracity of these allegations and if they were found to be true, the court should then, as a matter of federal law, determine whether defendant's Sixth Amendment right to jury trial was denied because "[ethnic] animus was a significant motivating factor in the juror's vote to convict" (*id.*). Further the hearing court was directed to also determine 'more broadly, as a matter of New York State law, whether the juror's statements created a substantial risk of prejudice to the rights of the defendant by coloring the views of the other jurors as well as her own, quoting, (*People v Maragh , 94 N.Y.2d 569, 574 (2000*).

People v. Estaban Santana, __ A.D.3d __, 2021 NY Slip Op 06329 (1st Dept. 11/16/21).

The viewing by jurors during a Bronx attempted robbery trial of a You Tube video recording, never introduced in evidence, of a co-defendant, Benny Lopez, punching a man, which led to the man's death and their discussing it during deliberations (the jurors also exchanged information that Lopez had a violent past) should have resulted in the trial court setting aside the jury's guilty verdict after a hearing on the defendant's C.P.L. 330.30 motion on grounds of juror misconduct. As the appellate division noted, where the case involved on of mistaken identification, this misconduct, involving improper external influences required that action.

Summations

People v. Annmarie Drago, __ A.D.3d __, 2022 NY Slip Op 04561 (2nd Dept. 7/13/22).

While there was sufficient proof to support the defendant's Suffolk County criminally negligent homicide conviction, prosecutorial misconduct in summation required a reversal and a new trial. Thus, where the assistant district attorney mischaracterized the evidence relating to the charge of criminally negligent homicide and confused the jury by repeatedly using language to suggest that the defendant's conduct in striking the victim with the vehicle was intentional or reckless. Specifically, the prosecutor used language such as "*conscious*, blameworthy choices," "*knowingly* commit blameworthy acts," "took a risk that took [the victim's] life," "you don't get to *knowingly choose* to do something wrong," "[y]ou don't get to drive over someone because you feel a mother's memorial is a nuisance," and, illogically, "[s]he failed to perceive that risk, and

she *chose* to go ahead *anyway*" (emphasis added). Moreover, the prosecutor was found to have continually denigrated the defense, referring to defense theories, repeatedly, as "excuses," and also as "garbage," and he falsely and provocatively claimed that the "defense repeatedly argued that the death was an inconvenience and a nuisance." Moreover, the prosecutor continually evoked sympathy for the victim using strong emotional terms and in arguing that the defendant engaged in "blameworthy conduct creating or contributing to a substantial and unjustifiable risk" so as to meet the standard of criminally negligent homicide, the prosecutor, throughout the course of his summation, referred to conduct "not relevant to the driving conduct that formed the basis of the criminally negligent homicide charge." Specifically, the assistant encouraged the jury to consider the defendant's actions which he recurrently characterized as "blameworthy," when determining whether the defendant's conduct was sufficiently blameworthy to constitute criminally negligent homicide. The prejudicial effect of this error was then compounded by repeatedly using inflammatory and emotional language, and assuming facts not in evidence, to describe the defendant's conduct.

Response to Jury Notes

People v. Don Williams, 37 N.Y.3d 314, 2021 NY Slip Op 05421 (11/18/21) [7/0; Garcia. J.].

When a deliberating jury requests supplemental instructions on a statutory law, the court may read back the relevant statute but also simultaneously display the statue on a "visualizer" (presumed in a footnote to "likely" be a document projection device by the Court) over objection of a party. Thus, where, in a Rochester narcotics and weapons possession trial a deliberating jury sent a note to the judge requesting definitions of the law and then clarified that they wanted the elements of the crime, the court properly responded consistent with the *O'Rama* rules by informing counsel that that was what it intended to do and notwithstanding defense counsel's objection to the simultaneously display was thereafter permitted to display the law to the jury on the visualizer without violating C.P.L. 310.30 which permits the court to "give" copies of the statute to the jury on consent of the parties where the projection was merely an electronic reproduction of the statute which was not physically retained by the jury.

People v. Stephon Edwards, __ A.D.3d __, 2022 NY Slip Op 04818 (2nd Dept. 8/3/22).

During the defendant's and a co-defendant's Brooklyn criminal sex act trial a deliberating jury set out 11 notes. During the afternoon of the second day of deliberations, the jury sent three notes in quick succession. Jury note 5, which was signed at 3:11 p.m., reported that a juror wanted "to know if she [would] be able to get to her 4:30 p.m. class." This note was never read into the record. Note number 6, signed less than 20 minutes later, at 3:29 p.m., stated: "We are still deliberating on charges [the word "charges" was crossed out] [a]ll charges [;] on charge 1 for [the defendant] and charge 1-2 for [the codefendant] have nearly reached a verdict." This note was also not read into the record, but the following notation was made on the court action sheet: "CT. EXH. #7—Still deliberating, verdict almost reached. Judge Gary & attys confer on the note—no other action taken at this time." Less than 10 minutes after that, the jury signed note 7, which indicated it had reached a verdict on the charges related to the codefendant, but was "still deliberating on all charges for [the defendant]." The trial court then reconvened the parties in the courtroom and read this note to them. The jury was then returned to the courtroom and rendered a not guilty verdict on both counts pertaining to the codefendant. The court thereafter advised the jurors that it would allow them to deliberate for approximately 15 more minutes before adjourning for the day. While the defendant conceded that Note # 5 was ministerial, his complaint that the failure by the trial court to comply with the *O'Rama* protocols regarding Note #6 was mode of proceedings error was rejected by the appellate division. Thus, the second department held that where the note requested nothing like further instructions or information and simply stated that the jury was deliberating was not substantive. Additionally, the second department held that where the court advised the parties immediately after responding to a request in Jury Note # 8 for crime scene photographs, there was no reversible error.

People v. Jkendric Agee & Michael Figueroa, 206 A.D.3d 1723 (4th Dept. 6/10/22) [KA# 17-00928].

Where the defendant had previously agreed to the jury charge, which instructed jurors that they could request that any of the exhibits be provided to them during deliberations, a deliberating jury's request to be provided with one of two trial exhibits was ministerial such that the trial judge was not required to notify defense counsel or provide them with an opportunity to respond per *O'Rama.*

People v. Santonio J. Jones, 202 A.D.3d 1285, 2022 NY Slip Op 01069 (3rd Dept. 2/17/22).

The defendant was deprived of a fair trial when the trial court directed the People's investigator to enter the jury room for the purpose of demonstrating to the jurors how to operate a digital recorder. Although the claim was not objected-to and thus unpreserved, the issue was reached as a mode of

proceedings error. Thus, per C.P.L. 310.10 (1), a deliberating jury must be "under the supervision of a court officer" or "an *appropriate* public servant" and, "[e]xcept when so authorized by the court or when performing administerial duties with respect to the jurors, such court officer or public servant . . . may not speak to or communicate with [the jurors] or permit any other person to do so" (emphasis added). As such, there was no issue that the investigator was not an appropriate public servant who was permitted to interact with the jury in the deliberation room. In ordering a new trial, the third department held that a reversal was required because that the procedure of allowing a representative of the People to interfere in the jury's secret deliberations, this went "to the essential validity of the process and [is] so fundamental that the entire trial is irreparably tainted," quoting *People v Mack, 27 NY3d 534, 541 (2016).*

People v. Carlos Carillo, __ A.D.3d __, 2021 NY Slip Op 05710 (2nd Dept. 10/20/21).

On the People's concession regarding a violation of *People v. O'Rama, 78 N.Y.2d 270 (1991),* the court reversed the defendant's conviction on the holding that although marked as a court exhibit, the trial transcript did not reflect that the trial court showed or read verbatim to counsel a jury note, which stated: "We would like the DNA results in regards to the blood smear on the banister." Thus, because the court failed to provide counsel with meaningful notice of a substantive jury note, a new trial was ordered.

Substantive Law

Jennifer White v. Cuomo, __ N.Y.3d __, 2022 NY Slip Op 01954 (3/22/22) [6/0; DiFiore, C.J.].

The Court of Appeals, per DiFiore, C.J., held that article 14 of the Racing, Pari-Mutuel Wagering and Breeding Law, which authorized and regulated interactive fantasy sport (IFS) contests, upon a Legislative determination that that IFS contests are not prohibited gambling activities because contestants use "significant skill to select their rosters, creating fantasy teams, and therefore have influence over the outcome of the fantasy contests between IFS participants," and thus rejected a constitutional challenge to the law. In so ruling, the Court held that N.Y. Const. ,Art. I ,Sec 9, which prohibits "gambling," which based on an extensive review of legislative history and application was not violated by IFS contests.

People v. Grace Pietrocarlo, __ N.Y.3d __ (12/14/21) [6/1; Memorandum].

There was sufficient evidence to support the defendant's second-degree assault conviction on an accessorial liability theory based on the People's proof that the defendant along with several other members of the victim's family, including the defendant, the victim's daughter, confronted and repeatedly kicked the victim from "both sides" after he fell to the ground. In affirming the majority noted that although the victim could not specifically identify who delivered each blow, he did identify the assailants—including the defendant—at trial. This evidence, along with other circumstantial proof presented at trial, was sufficient for a reasonable factfinder to infer that defendant shared a "community of purpose" with the other assailants See *People v Allah, 71 N,Y,2d 830, 832 (1988*) cited by the majority. Judge Wilson dissented on the conclusion that there was no proof that the defendant even took part in the assault where the victim stated that he "couldn't even tell who was doing it."

People v. Richard Gaworecki, 37 N.Y.3d 225, 2021 WL 4596362 (10/7/21) [7/0; Fahey, J.].

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

People v. Charles L. Lewis, 208 A.D.3d 989, 172 N.Y.S.3d 792, 2022 NY Slip Op 04846 (4th Dept. 8/4/22).

A majority of the fourth department held by a 3-2 vote that the evidence and the reasonable inferences drawn therefrom established at the defendant's Ontario County trial that, two days before her arrest, the defendant agreed that, in exchange for compensation, she [the defendant is a transgender female] would either drive or otherwise accompany the friend to complete a sale of cocaine. According to the defendant's testimony, the friend indicated that she wanted defendant to accompany her because they were friends and she did not want to be alone with the two people involved in the proposed drug transaction, i.e., the drug dealer and the ostensible buyer. In order for the friend to carry out the proposed drug transaction with the requested assistance of the defendant, the friend first needed to possess the cocaine, and defendant began taking overt action to uphold her commitment by traveling with the friend to a different city and staying in a hotel where, on the day after the first night of their stay, the drug dealer arrived and provided the friend with the cocaine that was to be sold to the ostensible buyer. The next day, the defendant, still acting pursuant to her commitment with the expectation of receiving payment for her service, accompanied the friend—whom the defendant knew possessed the cocaine—to a fast-food restaurant for the ultimate purpose of completing the sale. The ostensible buyer had, however, acted as an informant by reporting to the police that defendant and the friend were in possession of cocaine at the fast-food restaurant. The police responded to the scene, the friend turned over her purse in which the cocaine was located, and seized the cocaine. The friend and the defendant were then arrested. In affirming, the fourth department held that given this evidence, "the jury rationally could have concluded both that defendant had acted with the mental state necessary for the crime of criminal possession of a controlled substance in the [third] degree and that defendant 'intentionally aid[ed] [the friend] to engage in . . . conduct' . . . constituting that offense." [citation omitted]. Justices Whalen and Bannister dissented on their conclusion that the defendant lacked the necessary shared intent to commit the narcotics possession and thus, mere moral support for the friend was insufficient.

People v. Luis L. Mayancela, __ A.D.3d __, 2022 NY Slip Op 04741 (2nd Dept. 7/27/22).

The proof presented by the People at the defendant's Queens gang assault, first degree robbery and second-degree assault trial was that the complainant was stabbed multiple times, by multiple members of a rival gang. A witness testified at trial that the rival gang members were out "mobbing," or searching for members of the complainant's gang to physically harm. According to the trial testimony of the physician who treated the complainant upon the complainant's arrival at a hospital emergency room, the complainant sustained multiple lacerations and wounds to his neck, head, chest, and abdomen, none of which affected his internal organs, and which were treated with sutures. The physician further testified that, during his examination of the complainant on the day of the incident, he noted that the complainant's injuries had caused him to have a diminished grip

strength in his left hand. The complainant testified at the trial that he suffered numbness in his left arm "for a while" after the attack. The second department held that the proof of serious physical injury was insufficient to sustain each conviction on the holding that "[a]lthough the complainant was stabbed multiple times, there was no evidence of serious and protracted disfigurement, protracted impairment of health, or protracted loss or impairment of the function of any bodily organ." However, where the defendant acted with the requisite intent and came "dangerously close to completion, each count was reduced to an attempt.

People v. Gregory Cardona, __ A.D.3d __, 2022 NY Slip Op 04733 (2nd Dept. 7/27/22).

There was insufficient evidence to support the defendant's Orange County conviction for criminally negligent homicide and reckless driving arising out of a single car accident in which the passenger was killed based on proof that while the defendant was travelling westbound on Interstate Route 84, traveling at approximately 74 miles per hour, which exceeded the exit ramp's posted recommended speed of 45 miles per hour and the posted highway speed limit of 65 miles per hour. The People's accident reconstruction witnesses attributed excessive speed, and the defendant's late corrective efforts to navigate the curved profile of the exit ramp by manually steering the wheel, as the reasons why the defendant lost control of the vehicle resulting in a crash that resulted when the car went down an embankment. As the second department held, "the evidence was legally insufficient to establish "the kind of seriously condemnatory behavior" (*People v Cabrera, 10 N.Y.3d 370, 378 (2008*) in addition to speeding that is necessary to "transform 'speeding' into 'dangerous speeding'" (*id.* at 377). The People's evidence established only that the defendant attempted to navigate the curved profile of the exit ramp at an excessive speed, and was late in attempting corrective measures by manually steering the wheel." As the court further noted, "while this conduct reflected poor judgment in the defendant's operation of his vehicle given the roadway environment), it failed to establish that the defendant engaged in "some additional affirmative act aside from driving faster than the posted speed limit," as required to support a finding of criminal negligence or recklessness." (*People v Asaro, 21 N.Y.3d 677, 684 (2013).*

People v. David T. Agan, __ A.D.3d __, 2022 NY Slip Op 04581 (3rd Dept. 7/14/22).

Under New York law, witness elimination murder is committed when a defendant intentionally kills a victim who was a witness to a crime committed on a prior occasion and the death was caused for the purpose of preventing the intended victim's testimony in any criminal action," quoting, *Hoffler v Bezio, 726 F.3d 144, 162-163 (2d Cir 2013).* Thus, "the statute is satisfied if defendant's motivation

to eliminate [the deceased victim] as a witness was a substantial factor in murdering her, quoting *People v Cahill, 2 NY3d 14, 57 (2003).* Thus, where the evidence at the defendant's Columbia County first-degree murder trial did not establish that the deceased victim was an eyewitness to defendant's sex offenses with a victim who was a minor, and there was no evidence that the deceased victim observed defendant and the minor victim engage in sexual relations or sexual conduct, and the minor victim did not disclose the sex offenses to the deceased victim, the proof was insufficient to support this degree of murder. In reducing the charge to second degree murder, the third department noted that most, the deceased victim may have been a "coincidental witness" since she had suspicions of the sex offenses, but she would not have been in a position to provide "powerful, direct evidence" of defendant's criminal sexual acts, quoting *Hoffler v Bezio, 726 F.3d at 163.* Second, there was no evidence that defendant feared that criminal proceedings were imminent or that he was otherwise cognizant of the fact that the deceased victim might be called to testify against him. Thus, aside speculative argument, there was "simply no evidence" in the record that defendant was even aware of the elements of murder in the first degree, let alone that he had this concern at the time of the stabbing.

People v. Ricardo Medina, __ A.D.3d __, 2022 NY Slip Op 04566 (2nd Dept. 7/13/22).

Where the complainant in the defendant's assault trial testified that he was not in pain during the time of the attack and that his bruises lasted a couple of weeks and did not testify that he was in pain after the attack or that he took any medication or sought medical attention. there was insufficient evidence to show that this complainant suffered a physical injury within the meaning of P.L. 10.00(9).

People v. Jose Lopez Sarmiento, 207 A.D.3d 1210, 170 N.Y.S.3d 465, 2022 NY Slip Op 04493 (4th Dept. 7/8/22).

The evidence presented at the defendant's Yates County burglary and assault conviction was legally insufficient to establish that he caused physical injury to the victim by means of a dangerous instrument and thus that the conviction of assault in the second degree is not supported by legally sufficient evidence. P.L. 10.00 (9). The evidence established that defendant attempted to stab the victim and the two struggled over the knife; however, the victim suffered no more than minor cuts to her hands that did not require bandaging and caused only "transient pain." As such, the defendant's assault conviction was reduced to attempted second degree assault.

People v. Emmanuel Santiago, 206 A.D.3d 1466, 2022 NY Slip Op 04196 (3rd Dept. 6/30/22).

The third department reversed the defendant's Albany County conviction for making a terrorist threat on a weight of the evidence review in a case in which the defendant, who was concerned about his incarcerated brother's being harassed by correctional officers, telephoned the Department of Corrections and Community Supervision and told an investigator there, "I'm going to blow an officer's head off." The investigator asked the defendant if that was a threat and the caller replied, "it's not a threat, it's a promise." The caller further stated that "if they touch my brother, I'm gonna blow an officer's head off. They don't know who they're messing with. I don't care if I get in trouble." In reversing the appellate division held that while there was sufficient proof presented that the defendant was the caller, where there was a late notification of the prison facility and no likelihood the defendant could carry out his claim, the evidence failed to establish that defendant "cause[d] a reasonable expectation or fear of the imminent commission" of an offense under the factual circumstance presented under P/L. 490.20 (1).

People v. Lawrence Faucett, 206 A.D.3d 1463, 2022 NY Slip Op 04195 (3rd Dept. 2022).

There was insufficient proof presented at the defendant's Tioga County trial to support his criminally negligent homicide conviction based on evince that the victim and his fellow DOT employees were completing a "throw and go" procedure for filling potholes on Route 17, because of heavy traffic, they were only filling potholes in the right driving lane, for such operations, the driving lane would not be shut down, so one of the protective measures taken was for the victim to sit in his truck to warn drivers of upcoming roadwork, although the victim's vehicle was in the shoulder of the roadway, it was sitting very close to the fog line., the victim's truck was equipped, on its rear, with an orange sign with black lettering that read "Road Work Ahead," and, on the top of the truck, with a large board that had four flashing lights. It was a clear day without precipitation and a video admitted in evidence depicted a demonstration of a similar truck driving at the same speed on the same stretch of roadway for the purpose of illustrated that defendant should have been able to see the victim's vehicle on the side of the road approximately 20 seconds before the accident. However, the proof established that defendant did not see the victim's vehicle and only became aware it was there when he hit it. Immediately after the accident, the defendant told multiple witnesses that a tractor trailer passing on his left "pinched [him] over." There was also testimony that the speed limit in the location of the accident was 65 miles per hour, however defendant was travelling at a speed of, at most, 70 miles per hour. Finally, the defendant was administered a breathalyzer after the accident, which did not indicate that he had any alcohol in his system. In reversing, the third department cited the recent case of *People v. Gaworecki, 37 N.Y.3d*

225 (2021) to outline the parameters of criminally negligent homicide and quoted *People v. Boutin, 75 N.Y.2d 692, 694 (1990*), "[t]he unexplained failure of a driver to see the vehicle with which he [or she] subsequently collided does not, without more, support a conviction for the felony of criminally negligent homicide."

People v. Ryan B. Williams, 206 A.D.3d 1282, 2022 NY Slip Op 03945 (3rd Dept. 6/16/22).

In July 2018, a police officer attempted to effectuate a traffic stop of a vehicle in Ulster County driven by the defendant after receiving a report of erratic driving. After momentarily complying with the stop, the defendant fled and a high-speed chase ensued, which ultimately led to defendant's collision with two vehicles, resulting in the death of one victim and serious physical injuries to two others. The defendant, unconscious, was medevacked from the scene of the accident and his blood was drawn upon intake at the hospital. Testing of that blood revealed that his blood alcohol content was .033%. The defendant was charged with one count of murder in the second degree (depraved indifference murder), four counts of aggravated vehicular homicide, one count of aggravated unlicensed operation of a motor vehicle in the first degree, two counts of assault in the second degree, one count of unlawfully fleeing a police officer in a motor vehicle in the first degree and one count of manslaughter in the second degree. Following a jury trial, defendant was convicted as charged apart from the manslaughter count, which was dismissed as a lesser included offense of murder in the second degree. He was then sentenced to concurrent prison terms, the greatest of which was 25 years to life. A majority of the third department reversed the defendant's depraved indifference conviction by a 4-1 vote on the holding that with no direct evidence of the defendant's mental state, his risky behavior alone that endangered others was on insufficient to establish the required wantonness under *People v. Maldonado, 24 N.Y.3d 48 (2014).*

People v. Ronnie Bunton, 206 A.D.3d 1724, 2022 NY Slip Op 03856 (4th Dept. 6/9/22).

The proof of "physical injury" to support a Monroe County second-degree assault conviction on a police officer consisted of the officer's testimony that he experienced "quite a bit of pain" to his "left upper thigh/groin area" after struggling with defendant when he resisted arrest and that his pain was "a 6 or 7 out of 10 on the pain scale." The fourth department reversed on the holding that There was only a vague description of the injury, and no medical records for the officer were introduced in evidence, and moreover, there was no testimony that the officer took any pain medication for the

injury that the officer did missed work or was there testimony that he was unable to perform any activities because of the pain.

People v. Delroy Golding, 206 A.D.3d 759, 2022 NY Slip Op 03741 (2nd Dept. 6/8/22).

At the defendant's Queens grand larceny trial, the People presented evidence in the form of testimony and a video that the defendant, after walking with a young woman on the blocks surrounding a U-Haul facility and parking lot, entered the U-Haul parking lot, took a key from the after-hours key return box, used the key to open the driver's side door and sat in the van for approximately two minutes, then exited the van without ever moving it. Seconds after the defendant exited the van, plainclothes police officers arrived in unmarked vehicles and arrested the defendant. Although the People contended that the defendant exited the van because he was startled by a police sergeant who testified that he had pulled his unmarked sedan alongside the passenger side of the van and then made eye contact with the defendant, the second department reversed the conviction of insufficient proof where the video established that this testimony was impossible of belief because the defendant exited the van before the sergeant's vehicle pulled alongside the passenger side of the van. As the appellate division noted, from this evidence, a jury could have rationally inferred that the defendant intended to use the van merely temporarily and to prove grand larceny, however, the People had to do more than prove this; they had to prove, in addition, that the defendant intended to "permanently deprive an owner of his or her property or to deprive the owner of it for so extended a period of time that a major portion of its economic value is lost." The court finally held that in the absence of evidence that a larceny was committed, the People also failed to prove a necessary element of criminal possession of stolen property, citing, *People v Colon, 28 NY2d 1, 8-9 (1970).*

People v. Justin T. Palombi, __ A.D.3d __, 2022 NY Slip Op 02896 (4th Dept. 4/29/22).

The defendant's Ontario County third-degree criminally negligent assault conviction arose on proof at trial that he was driving a motor vehicle and a passenger in his vehicle sustained physical injuries and while navigating a curve in the road, his vehicle crossed over the double yellow line into the other lane of travel and forced an oncoming motor vehicle to pull over to avoid a collision. The defendant then moved back into the proper lane but lost control of the vehicle, which went off the road and crashed into a mailbox, tree, and a utility pole. At the time of the incident, defendant had a learner's permit, but no driver's license. The fourth department reversed on a holding that because criminal negligence requires more proof than civil negligence, mere evidence of speeding without more proof to elevate the conduct to "dangerous speeding" is required. As the appellate division

observed, "'The carelessness required for criminal negligence is appreciably more serious than that for ordinary civil negligence, and the carelessness must be such that its *seriousness would be apparent to anyone who shares the community's general sense of right and wrong*. Moreover, criminal negligence requires a defendant to have *engaged in some blameworthy conduct creating or contributing to a substantial and unjustifiable risk* of a proscribed result; *nonperception of a risk*, even if [the proscribed result occurs], *is not enough*,' " [emphasis in original] quoting *People v. Cabrera, 10 N.Y.3d 370, 376 (2008),* quoting in turn, *People v Conway, 6 N..Y3d 869, 872 (2006).*

People v. Jumel Brown, 203 A.D.3d 666, 2022 NY Slip Op 02205 (1st Dept. 3/31/22).

The first department reversed the defendant's second-degree burglary conviction on the holding that his 2017 theft of computer laptops from the Columbia University Hospital of Physicians and Surgeons at Columbia University Medical Center was not from a "dwelling" under P.L. 140.00(3) where the record failed to reflect that this building provided defendant with ready access via connecting elevators, stairwells, or corridors to other buildings, where hospital patients stayed overnight and which was, in any event, at a considerable distance per *People v McCray, 23 NY3d 621, 627-30 (2014).*

People v. Pablo Alvarado, __ A.D.3d __, 2022 NY Slip Op 01800 (2nd Dept. 3/16/22).

Although the defendant failed to preserve for appellate review his claim on appeal the People failed to prove his guilt by legally sufficient evidence because his intoxication rendered him incapable of forming the requisite intent, in any event, viewing the evidence in the light most favorable to the prosecution the evidence was legally sufficient to establish beyond a reasonable doubt that the defendant manifested the requisite criminal intent to support his Queens robbery, larceny and attempted assault convictions of which he was convicted and that the defendant used force to overcome resistance to the taking of property, to support his robbery conviction.

People v. Manani S. Oliveras, 203 A.D.3d 1233, 2022 NY Slip Op (3rd Dept. 3/3/22) [#111643].

The third department affirmed the defendant's Broome County conviction for two second-degree burglaries involving vacant homes, one of which arose out the defendant the defendant's entry into an enclosed porch that was attached to the house with burglars' tools and latex gloves during the night. In affirming the court held that a dwelling did not lose its status as such merely because it had not been occupied for some time and moreover, notwithstanding the prior decease of the owner and that fact that the estate was attempting to sell it because it "could have been occupied" on the night

of the burglary.

People v. Lawrence Austin, __ A.D.3d __, 2022 NY Slip Op 01306 (2nd Dept. 3/2/22).

The defendant's Brooklyn weapons possession conviction was reversed based on what the appellate division concluded were irreconcilable inconsistencies between several investigating detectives' hearing and trial testimony and between two testifying detectives in connection what the circumstances of a traffic stop that resulted in the recovery of the murder weapon from inside the vehicle. In so ruling the second department noted that while not every inconsistency in paperwork and hearing testimony will, of course result in a reversal or suppression, here, it was "impossible to know" what actually happened based on the testimony provided by the officers in connection with this substantial event in the case.

People v. Shawn Daniels, 202 A.D.3d 551, 2022 NY Slip Op 00982 (1st Dept. 2/15/22).

The first department affirmed the defendant's first-degree assault conviction on a holding that there was sufficient proof of "disfigurement" as required in P.L. 120.10(1) and (2) based on evidence supporting the reasonable inference that the more than nine-inch readily visible scar on the victim's head was objectively "distressing and objectionable per *People v. McKinnon, 15 N.Y.3d 311, 315 (2010),* which inference was supported by among other things, photographs showing how the scar appeared at the time of the trial and also that the victim's cuts could only have been caused by a dangerous instrument.

People v. Jean Herrera, 202 A.D.3d 517, 2022 NY Slip Op 00949 (1st Dept. 2/18/22).

There was sufficient evidence to support the defendant's New York County conviction for second-degree depraved indifference murder based on his crashing his car into an oncoming car, killing one person and injuring two others. Thus, while fleeing from the police, the defendant drove 14 blocks against oncoming traffic on the West Side Highway, despite openings in the median between the north and southbound lanes, while running several red lights and driving onto the curb and sidewalk. Additionally, he did not avail himself of parking lots and driveways on the west side of the Highway, where he could have pulled off to avoid any collision with an oncoming vehicle. Instead of utilizing the last available opportunity to turn into the north bound lanes, as the roadway

became the Henry Hudson Parkway, the defendant made the decision to continue driving in the wrong direction and entered onto the Parkway. Parkway has no breaks in the median through which the defendant could have returned to the northbound lanes; moreover, oncoming cars were going even faster there than on the Highway because the speed limit increased from 35 mph to 50 mph. After he got on the Parkway, the defendant remained in the lane immediately to the left of the concrete barrier separating the northbound and southbound lanes, made no effort to change lanes or to swerve to avoid oncoming vehicles and made no effort to stop or slow down, despite the fact that he was now on a parkway. He continued driving this way on the Parkway for seven more blocks at which time he collided, head-on, with a vehicle driving in the proper direction in the southbound lane. In so ruling, the appellate division relied primarily on *People v. Heidgen, 22 N.Y.3d 259, 276 (2013)* and distinguished *People v. Maldonado, 24 N.Y.3d 48 (2014)* and held that
Playing a "game of chicken" at a high-speed going the wrong way on a major highway is the functional equivalent of intentional murder.

People v. Jason Castro, 202 A.D.3d 815, 2022 NY Slip Op 00874 (2nd Dept. 2/9/22).

The evidence before the grand jury was legally sufficient to support the charges of manslaughter in the second degree where, if accepted as true, established that in addition to traveling at the excessive rate of speed of approximately 80 to 90 miles per hour, the defendant's vehicle and a Porsche were weaving in and out of traffic, without braking or signaling. Moreover, as the Porsche and the defendant's vehicle approached a sharp bend in the roadway, they were traveling side-by-side, with the Porsche in the left lane. The defendant's vehicle struck the Porsche while attempting to enter the left lane, which caused the Porsche to hit the left-hand curb of the roadway and fly "at least a couple of hundred feet" in the air before coming to rest "at the bottom of the highway." Two passengers riding in the Porsche were killed. Although the defendant told a police sergeant at the scene that he did not see the Porsche when he attempted to maneuver his vehicle into the left lane and believed that the Porsche was in his blind spot, he also stated that he was "kind of racing" with the Porsche. As such an order of the Rockland County court dismissing the indictment for insufficiency was reversed on a People's appeal and the case remitted.

People v. Liyao Chen, __A.D.3d __, 2021 NY Slip Op 07551 (2nd Dept. 12/29/21).

There was sufficient proof of "physical injury" to sustain the defendant's Brooklyn assault and related-crime conviction based on proof hat the complainant received stiches in a hospital emergency room after the incident and still had a visible scar on the day she testified.

People v. Tyler Cota, 199 A.D.3d 1237, 2021 NY Slip Op 06574 (3rd Dept. 11/24/21).

At trial, an Elmira police officer, his partner and a trainee officer went to an apartment in response to a domestic disturbance call. The defendant's sister, the apartment's owner, informed the officers upon their arrival outside of the apartment building that she wanted the defendant and his friend to leave. After the trainee knocked on the apartment door, the door was locked with a dead bolt. The partner went around the back side of the building and the defendant then opened the apartment door. The trainee testified that the defendant came outside of the apartment and was advised that he was not supposed to be there. Defendant went back inside, the officers followed him inside and defendant's friend was in the living room. While inside, the officers learned from the partner that someone had dropped suspected narcotics out of the apartment window. The officer and the trainee then secured the defendant and his friend and searched the apartment with the sister's consent. The officer testified that, in the living room, he found a small bag of marihuana under the couch cushion and a red backpack that had inside what he recognized to be drug-packaging materials. The red backpack belonged to the defendant, and the officer stated that he did not find any drugs inside of it. The officer and the trainee then searched the south bedroom, where an identification card with the defendant's name was found in a dresser drawer and narcotics packaging materials and knives were found on top of the dresser. According to the officer, one of the knives had a white powdery residue on it but he also admitted that the residue was not tested. The officer also found a sandwich bag in a closet containing what he believed to be powdered cocaine. A camouflage backpack belonging to the defendant's friend was also in the south bedroom, and there were scales and plastic packaging materials in it. The trainee testified that, when he searched the north bedroom — the sister's bedroom — he saw a pile of laundry and, when he moved articles of female clothing aside with his foot, he found a bag of crack cocaine under it. A digital scale was also found in the north bedroom in the vicinity of the crack cocaine. While the apartment was being searched, the defendant was taken to the police station. The officer interviewed the defendant, who advised that he arrived at his sister's apartment 10 minutes before law enforcement had arrived. According to the officer, defendant said that he went to his sister's apartment almost on a daily basis and stayed there for varying periods of time but that he lived somewhere else. The officer also stated that the defendant denied having knowledge of drugs being in the apartment. Finally, the defendant's friend testified on the defendant's behalf and stated that, at the time the officers knocked on the door, he was in the north bedroom and the defendant was in the living room. The friend admitted to throwing drugs out the window and possessing the crack cocaine in the apartment. The friend also testified that the defendant had no knowledge that drugs were in the apartment and that he did not see defendant possess any drugs while therein. The third department reversed the defendant’s narcotics possession conviction on the holding that mere presence was insufficient to sustain the guilty verdict where there was no proof of efforts to exercise dominion and control over the narcotics.

People v. Michael Grosso, __ A.D.3d __, 2021 NY Slip Op 05640 (1st Dept/ 10/14/21).

The defendant's convictions of attempted assault in the first degree and assault in the second degree, charged under an acting in concert theory, were held not supported by legally sufficient evidence on the holding that these charges required proof that when the codefendant stabbed the victim, defendant shared the codefendant's intent to do so; defendant was not convicted of any assault crimes where his liability was based on his intent to commit robbery. Thus, during a robbery attempt, the codefendant stabbed the victim from behind several times with a small knife. However, there was no evidence that defendant, who was standing in front of the victim and restraining him, knew that the codefendant had a knife or was planning to use it. As such, where "the use of the knife was not open and obvious" [*People v Campbell, 79 A.D.3d 624, 624 (1st Dept 2010*)], and the defendant released the victim within seconds of the stabbing, the record did not support a conclusion beyond a reasonable doubt that defendant was aware of the use of the knife but continued to participate in the assault.

Xiulu Ruan (Shakeel Kahn) v. United States, __ U.S. __ (6/27/22) [9/0; Breyer, J.].

A unanimous Supreme Court, with a majority opinion by Jsutice Breyer, joined by several concurring opinions, held that because 18 U.S.C. 841's requirement that a person act "knowingly or intentionally" as a mens rea in connection with illegally dispensing applies to authorization, after a defendant produces evidence that he or she was authorized to dispense the controlled substances in question, the Government must prove beyond a reasonable doubt that the defendant knew that he or she was acting in an unauthorized manner, or intended to do so. Thus, for a conviction the prosecution must prove that a defendant knew or intended that he commit a crime.

New York State Pistol & Rifle Assoc. Inc v. Bruen, Superintendent, __ U.S. __ (6/23/22) [6/3; Thomas, J.].

Consistent with *District* of *Columbia v. Heller, 554 U. S. 570 (2008),* and *McDonald v. Chicago, 561 U. S. 742 (2010),* a majority of the Court held 6-3 that the Second and Fourteenth Amendments protect the right of "an ordinary, law-abiding citizen" to possess a handgun in the home for self-defense is adversely impacted by New York C.P.L 400.00's requirement that "proper cause" for the issuance of a concealed carry pistol license be shown. Thus, where "proper cause" has by case-law equated to special need, that provision was held unconstitutional to the extent that the majority held that the burden falls on the State to show that New York's proper-cause requirement is consistent

with this Nation's historical tradition of firearm regulation. As such, The exercise of this constitutional right does not require individuals to demonstrate to government officers some special need to keep and bear arms in public. Justices Sotomayor and Kagan, joined Breyer, J., dissenting.

Sentencing

People v. Amin Laboriel, __ N.Y.3d __ (6/14/22) [5/2; Memorandum].

A majority of the Court held in s 5-2 summary disposition memorandum that where the defendant's Queens sentence of an authorized prison term with post-release supervision was not illegal, any excessive sentence claim was beyond the scope of this Court's review. .Judge Rivera, joined by Judge Wilson, dissented on her conclusion that where the defendant pled guilty and was promised s sentence of incarceration of three years with five years post-release supervision, the State could not continue to hold him in prison for nine additional months because there was no housing available that was compliant with the Sexual Assault Reform Act [SARA}, and that as such, even though was eventually released after habeas corpus writs were denied. he was entitled to the benefit of his plea bargain to the extent that he should be re-sentenced to conform to his actual prison confinement. .

People v. Donovan Buyand, 37 N.Y.3d 532, 2021 NY Slip Op 06529 (11/23/21) [5/2; Cannataro, J.].

A majority of the Court of Appeals, per Cannataro, J., concluded 5-2, that because a risk assessment determination under the Sex Offender Registration Act (SORA) (Corr. L. Art. 6-C) is not part of a defendant's sentence, the illegal sentence exception to the preservation requirement does not apply when a defendant first raises on intermediate appeal a challenge to the legality of his certification as a sex offender subject to the requirements of SORA. Thus, the defendant was convicted by plea of first-degree burglary as a sexually motivated crime and after sentencing and a waiver of the right to appeal the court thereafter certified the defendant as a sex offender. He objected for the first time only on direct appeal that he was not subject to SORA because first degree burglary was not an enumerated registrable offense under Corr. L. 168-a(2), the majority reversed an appellate division determination that his sentence was illegal [169 A.D.3d 161, 169 (2nd Dept. 2019)], on the holding that a SORA risk assessment is a collateral determination and a remedial, non-punitive determination such that it is separate from a criminal sentence to the extent that the matter was unreviewable on appeal under the illegal sentence exception to preservation. Judge Wilson, joined by Judge Rivera, dissented on the SORA's ambit is part of a sentence under *People v. Hernandez, 15 N.Y.3d 669, 674,*

fn. 4 (2010) and thus, the illegal sentence exception should apply since the sentence was indeed illegal in this case.

Defendant's Right to Make a Statement

People v. Robert Maloy, 204 A.D.3d 1090, 2022 NY Slip Op 02312 (3rd Dept. 4/7/22).

The trial abused its discretion in ordering that prior court approval was required before any further motions were filed. Notably, the authority cited by the county court — 22 NYCRR part 130-1.1 — in the defendant's almost 20-year-old Sullivan County murder prosecution by its own terms applies to only civil actions or proceedings (*see* 22 NYCRR 130-1.1 [a]). The third department further noted that even if such authority does exist in a criminal action [*citing generally Johnson v State of New York, 77 A.D.3d 1034, 1034 n (3rd Dept. 2010*)], the defendant had not engaged in "sufficiently excessive, protracted and/or unwarranted litigation" as to justify such action.

Predicate Felonies

People v. Decourcey Belle, __ A.D.3d __, 2022 NY Slip Op 01399 (1st Dept. 3/3/22).

The New York County plea court correctly adjudicated defendant a second violent felony offender based on his Massachusetts weapon possession conviction, and the motion court correctly declined to set aside the sentence. The Massachusetts statute did not define the term "firearm" any more broadly than the corresponding New York statute. Thus, as outlined by the motion court in its opinion [69 Misc.3d 1204[A], 2020 NY Slip Op 51177[U] (Sup Ct, N.Y. Co, 2020)], including the Massachusetts case law, it was clear that a BB or air gun was not a "firearm" in Massachusetts regardless of the age of the possessor. In affirming, the first department noted that the defendant's reliance on *Commonwealth v Sayers*, 438 Mass. 238 (2002) was misplaced since *Sayers* specifically holds that BB or air guns are firearms under Massachusetts General Laws (Mass Gen Laws) ch. 269 Section 10(j)—not § 10(a)—and affirms prevailing Massachusetts case law holding that a BB or air gun is regulated exclusively by Mass Gen Laws ch. 269 § 12(B) (*see e.g. Commonwealth v Fenton*, 395 Mass. 92, 95 (1985); *Commonwealth v Rhodes*, 389 Mass. 641, 644 (1983). Therefore, the

Massachusetts definition was held no broader in that two states' definitions of "firearm" are indistinguishable overall, despite being structured somewhat differently, and thus are equivalent for predicate felony purposes.

People v. Javon Campanioni, __ A.D.3d __, 2021 NY Slip Op 06105 (1st Dept.11/9/21).

The defendant's adjudication as a second felony offender based on a federal conviction for distribution and possession with intent to distribute cocaine under 21 USC § 841(a)(1) was in error where that provision is not equivalent to Penal Law § 220.39. Thus, because the federal crime has a broader knowledge element, requiring only that the defendant "knowingly or intentionally . . . possess with intent to . . . distribute . . . *a controlled substance*," as opposed to having particular knowledge of the drug type actually possessed" the defendant's sentence was reversed and the case remanded. In so ruling, the first department held that those several prior cases in which it upheld 21 U.S.C § 841(a)(1) as the equivalent of a New York felony did not address this discrepancy in the breadth of the knowledge element; other equivalency issues were raised in those cases.

Constitutionality of Sentences

People v. Jose Matias, 205 A.D..3d 557, 2022 NY Slip Op 03332 (1st Dept. 5/17/22).

A sentence of two consecutive sentences of twenty-five years to life was not unconstitutionally excessive in the case of a sixteen-year-old defendant convicted of two Bronx murders nor did it constitute a de facto sentence of life without parole in violation of *Miller v. Alabama, 567 U.S. 460, 467 (2012),* where the defendant would be 66 when eligible for release, the sentence did not carry with it a mandatory provision of life without parole and where the sentencing court properly considered. All proper circumstances, including the defendant's age and attendant circumstances were Thus considered by the sentencing court.

Re-Sentencing Under Domestic Violence Survivors Justice Act

People v. Thomas Burns, __ A.D.3d __, 2022 NY Slip Op 04638 (2nd Dept. 7/20/22).

In December 1996, when the defendant was 19 years old, he killed his father and his father's girlfriend, Antoinetta Johnston, during an altercation which occurred in the father's home in which all three had resided. The defendant pleaded guilty to manslaughter in the first degree for the death of his father and murder in the second degree for the death of Johnston. The defendant was sentenced to consecutive terms of imprisonment of 3 to 6 years on the manslaughter conviction and 25 years to life on the murder conviction, for an aggregate sentence of 28 years to life imprisonment. Following his application under the Domestic Violence Survivors Justice Act [L 2019, ch 31, § 1; L 2019, ch 55, § 1, part WW, § 1 [eff May 14, 2019]; hereinafter DVSJA), which amended Penal Law § 60.12], the lower court determined that the record established that the defendant was a victim of domestic violence inflicted by his father, with whom he lived, at the time of the underlying offenses, that the father's abuse of the defendant was a significant contributing factor to the defendant's act of killing his father. However, contrary to the court's further determination with regard to the girlfriend, the record also showed that the father's abuse of the defendant was also a significant contributing factor to the murder of Johnston, and considering the cumulative effect of the defendant's abuse at the hands of his father, together with the events immediately surrounding the crimes, and paying particular attention to the circumstances under which the defendant was living, the preponderance of the evidence demonstrates that the father's abuse was a contributing factor to the murder of Johnston. As such, the defendant was ordered to be re-sentenced forthwith under the ameliorative provisions of the DVSJA.

Probation Reports

People v. Voldoymyr Dranchuk, 203 A.D.3d 741, 2022 NY Slip Op 01312 (2nd Dept. 3/2/22).

Where, in preparation of the defendant’s pre-sentence report following his plea of guilty to attempted second degree assault, the defendant, who had no prior convictions and the offense did not involve the use of a weapon, told the probation department that he committed the crime while under the influence of alcohol and the probation department only recommended that the defendant agree to a consent to search condition and did not recommend alcohol conditions, the sentencing court imposition of the search condition was erroneous since it was not individually tailored to the offense of related to the defendant’s rehabilitation or supervision. As such, the condition was vacated and the sentence modified to that extent.

Ignition Interlock

People v. Robert J. Danzy, 203 A.D3d 863, 2022 NY Slip Op 03904 (2nd Dept. 6/15/22).

In directing a Dutchess County defendant to install and maintain a functioning ignition interlock device, the county court failed to also impose a sentence of probation or conditional discharge and therefore failed to comply with the requirements of the statute as required by V.T. L 1193[1][b][ii]; 1198[2][a]. Thus, the ignition interlock device directive was vacated and the matter remitted to the for resentencing to impose upon the defendant a conditional discharge and to require that he install and maintain an ignition interlock device for a period of three years following his release from prison.

Orders of Protection

People v. Christian Rosales, __ A.D.3d __, 2021 NY Slip Op 05874 (2nd Dept. 10/27/21).

The trial court was held to have had no authority to issue an order of protection in an individual's favor since he was neither a victim of, nor a witness to, the crimes to which the defendant pleaded guilty (*see* C.P.L 530.13[4), and where all of the charges for which this person was the alleged complainant were dismissed as a consequence of the defendant's pleas.

People v. John O'Sullivan, __ A.D.3d __ , 2021 NY Slip Op 05821 (2nd Dept. 10/27/21).

The appellate division held that none of several orders of protection entered by the trial court complied with the requirements of C.P.L. 530.13, since two failed to specify any duration, and the duration of the other eight exceeded the maximum time limit set forth in C.P.L. 530.13(4)(A) and moreover, failed to take into account the defendant's jail-time credit (*see* C.P.L 530.13(4). Because the Supreme Court did not announce the duration of the orders of protection at either the plea or sentencing proceedings, the defendant had no practical ability to register a timely objection on this ground, and, thus, the rule of preservation was held not to apply.

Youthful Offenders

People v. Tyjhe Hargrove, __ N.Y.3d __, 2021 NY Slip Op 06427 (11/18/21) [7/0; Memorandum].

Where the People's concession of error, the Court held that "[W]hen a defendant has been convicted of an armed felony . . . and the only barrier to his or her youthful offender eligibility is that conviction, the court is required to determine on the record whether the defendant is an eligible youth by considering the presence or absence of the factors set forth in C.P.L. 720.10 (3)," quoting, *People v Middlebrooks*, 25 N.Y.3d 516, 527-528 (2015; *see also People v Lofton*, 29 N.Y.3d 1097, 1098 [2017], cited by the Court. Thus reversal and remittal was required.

People v. Nicholas Simon, __ A.D.3d __, 2022 NY Slip Op 03277 (3rd Dept. 5/19/22).

Although the defendant was sentenced before the Court of Appeals handed down *People v. Rudolph, 21 N.Y.3d 497 (2013),* (which required the sentencing court to explicitly consider whether an eligible defendant should be afforded a youthful offender adjudication) but also before the appellate process was complete, the third department, per Aarons, J., remanded the case for lower court consideration of the issue. In so ruling the appellate division rejected the defendant's request that it exercise discretion to adjudicate the defendant a youthful offender. In so ruling, the court did not express any opinion as to whether youthful offender adjudication should be afforded the defendant, in the event that the county court were to grant such status upon remittal, which would result in the court imposing a lower sentence than the parties negotiated and moreover noted that the People must be given an opportunity to withdraw consent to the plea bargain under *People v Farrar*, 52 N.Y.2d 302, 307-308 (1981).

People v. Jayquan Irizzary, __ A.D.3d __, 2022 NY Slip Op 02159 (3rd Dept. 3/31/22).

The trial court found that defendant was an "eligible youth" for purposes of youthful offender status [CPL 720.10 (2), (3)], but determined that youthful offender treatment was "not an option" because the People had indicated during plea bargain negotiations that, if youthful offender status were granted, they would take the plea bargain back. Thus the lower court was under the mistaken impression that the prosecutor could properly bargain for the right to withdraw consent to the plea agreement if youthful offender treatment is granted. However, under *People v Rudolph, 21 N.Y.3d 497, 502 (2013)*, while the People are free to recommend that youthful offender treatment be denied at sentencing and, "[i]n the unusual situation where a prosecutor is unwilling to take the chance that a judge will disagree with his or her recommendation", "[i]t is a settled rule of law in this [s]tate that

off-the-record promises made in the plea bargaining process will not be recognized where they are flatly contradicted by the record, either by the existence of some on-the-record promise whose terms are inconsistent with those later urged or by the placement on the record of a statement by the pleading defendant that no other promises have been made to induce his [or her] guilty plea" (*Matter of Benjamin S., 55 N.Y.2d 116, 120 (1982*). As such, where the plea proceedings were devoid of any indication that the People conditioned their consent to the plea agreement upon defendant not receiving youthful offender treatment or that the defendant understood such a condition to be part of the agreement, and the defendant stated during the plea colloquy that no off-the-record promises had been made to induce his guilty plea, the alleged off-the-record arrangement was unenforceable given those circumstances. Therefore, where the lower court found that defendant was an "eligible youth" for purposes of youthful offender status it was obliged to consider the relevant factors and determine whether it would, as a discretionary matter, adjudicate him to be a youthful offender (*see* C.P.L. 720.20; *People v Rudolph*, 21 N.Y.3d at 500) because the lower court failed to exercise its discretion to determine whether youthful offender status was warranted, and that "failure to exercise discretion at sentencing was error" (*People v Farrar*, 52 N.Y.2d 302, 305 [1985]. As such, remittal was required.

Restitution

People v. Michael Jerome Piasta, 207 A.D.3d 1064, 2022 NY Slip Op 04243 (4th Dept. 7/1/22).

The People failed to present sufficient proof by a preponderance of evidence of the actual out-of-pocket losses suffered by the victim in a Genessee County restaurant robbery and related-crimes conviction. Thus, the restaurant manager's testimony, coupled with insurance records was deemed insufficient to the extent that the case was remitted for a hearing. As the fourth department noted, "Whenever the court requires restitution or reparation to be made, the court must make a finding as to the dollar amount of the fruits of the offense and the actual out-of-pocket loss to the victim caused by the offense" and, "[i]f the record does not contain sufficient evidence to support such finding or upon request by the defendant, the court must conduct a hearing upon the issue in accordance with" CPL 400.30 (Penal Law § 60.27 [2]). "At a restitution hearing, the People bear the burden of proving the victim's out-of-pocket loss—the amount necessary to make the victim whole—by a preponderance of the evidence" (*People v Tzitzikalakis*, 8 NY3d 217, 221 [2007]; *see* CPL 400.30 [4]). "

People v. Christopher Jensen, 205 A.D.3d 926, 2022 NY Slip Op 03250 (2nd Dept. 5/18/22).

The second department held that where the issue of restitution was not part of the defendant's plea, his waiver of appeal did not preclude review of the claim that the court-ordered restitution arising out of the defendant's Orange County criminal mischief conviction in connection with a rock thrown through the complainant's window. Thus, as the court noted, "[b]efore a defendant may be directed to pay restitution a hearing must be held if either: (1) the defendant objects to the amount of restitution and the record is insufficient to establish the proper amount; or (2) the defendant requests a hearing,'" quoting, *People v Tippa, 194 A.D.3d 856*, 856-857 (2nd Dept. 2021), quoting, in turn, *People v Morrishill, 127 A.D.3d 993, 994 (2nd Dept. 2015);* see also P.L. 60.27(2). As such, where the defendant objected to the amount, and the record insufficient to formulate a proper conclusion, the case was remanded for that purpose.

People v. David J. Witherow, 203 A.D.3d 1595, 2022 NY Slip Op 01691 (4th Dept. 3/11/22).

The trial court erroneously directed restitution in excess of the statutory cap of $15,000 at the defendant's Canandaigua County sentencing for first degree assault in violation of the clear mandate of P.L. 60.27 where the circumstances present did not fit into any of the statutory exceptions. In modifying, the fourth department held that since past lost earnings are wages, salary, or other income that one of two victims could have, but did not, earn, the excess amount ordered as restitution and reparation for that loss does not constitute reimbursement for "the *return* of the [second] victim's *property*" or equivalent thereof pursuant to § 60.27 (5) (b) [emphasis in original].

Re-Sentencing

People v. Danielle Coles, __ A.D.3d __, 2022 NY Slip Op 00678 (2nd Dept. 2/2/22).

The defendant's motion for re-sentencing under C.P.L. 440.47 made a sufficient preliminary showing that she was, at the time of the offense, a victim of domestic violence by her co-defendant as defined that was inflicted by a family or household member based on affidavits of her mother and sister and a purported transcript of her police interrogation to the extent that the lower court should not have summarily denied her application. As such the case was remanded for a hearing with the lower court to make a determination whether she should be re-sentenced.

Defendant's Right to be Present at Sentencing

People v. Gem M. Umar, 203 A.D.3d 964, 2022 NY Slip Op 01818 (2nd Dept. 3/16/22).

The defendant was not produced at sentencing on his convictions of first degree assault and fourth degree criminal possession of a weapon, and the record did not reflect any indication that he expressly waived his right to be present at this material proceeding [*see* C.P.L. 380.40[2]; see *People v Stewart, 28 N.Y.3d 1091, 1092 (2016)*]. As such and on the People's concession, the trial court's failure to have the defendant produced at the sentencing proceeding for the convictions of assault in the first degree and criminal possession of a weapon in the fourth degree violated the defendant's fundamental right to be present at the time of sentence. Thus, the case was remitted the matter to the trial court for resentencing on those convictions.

Consideration of Uncharged Criminal Conduct

People v. Shamell K. Moore, 203 A.D.3d 140 (3rd Dept. 3/17/22).

In advocating for a nine-year prison sentence on the defendant's Sullivan County weapons possession conviction, the prosecutor informed the sentencing court during the sentencing hearing that, although defendant had no criminal record, interviews with police officers allegedly familiar with defendant revealed that "from the time that he was a child, [defendant] has been involved in various antisocial behaviors, including assaults, trespasses [and] mischiefs and . . . [that] he was a member of the Bloods, a street gang." The A.D.A. also related that the defendant was currently being investigated for his participation in a recent shooting. The defendant, in urging a close to minimum sentence, moved to strike the remarks as outside the record and "unsubstantiated and inflammatory." The sentencing court denied the request and disregarded them as "inuendo, after noting the defendant's "stellar" record while out on supervised release, the court thereafter sentenced the defendant to one year more than the statutory minimum of nine years. Courts may consider reliable information concerning uncharged criminal conduct in sentencing a defendant (see *People v Naranjo, 89 N.Y.2d 1047, 1049 (1997).* Defendant was given an opportunity to contest the remarks and the court characterized them as merely "what the People suspect" and "innuendo." "[I]t was for the court to determine what bearing, if any, [the remarks] should have on the sentence to be imposed," quoting, *People v Brodus, 151 AD3d 1469, 1470 (2017*), and the court chose to disregard them as unreliable. To the extent that defendant argued that the unredacted remarks might cause prejudice to him in the future, we are satisfied that, by expressly disregarding the remarks in response to defendant's objection, the trial court was held to have prevented such prejudice. In affirming, the third department additionally held, that trial courts may consider reliable information concerning uncharged criminal conduct in sentencing a defendant (citing, *People v Naranjo, 89 NY2d at 1049.* Thus, where the defendant was given an opportunity to contest the remarks and the trial court characterized them as merely "what the People suspect" and "innuendo." "it was for the court to determine what bearing, if any, [the remarks] should have on the sentence to be imposed," quoting, *People v Brodus, 151 AD3d at 1470,* and "the court chose to disregard them as unreliable." To the extent that defendant argued that the unredacted remarks might cause prejudice to him in the future, the court indicated that it was satisfied that, by expressly disregarding the remarks in response to defendant's objection, the court prevented such prejudice. See also, *People v. Freddie T. Wright, 206 A.D.3d 965, 2022 NY Slip Op 01820 (2nd Dept. 3/16/22)* [issue unpreserved and on the merits, same holding].

Judicial Vindictiveness

Alvin Ellerbee, 203 A.D.3d 1068, 2022 NY Slip Op 02016 (2nd Dept. 3/23/22).

Prior to trial, the trial court advanced its own plea offer to the defendant of an aggregate term of 1½ years of imprisonment to be followed by a period of 2 years of post-release supervision in full satisfaction of the 16-count indictment in exchange for a plea of guilty to the top counts of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree. The trial judge then stated: "You should understand the way I operate is as

follows: *Before trial with me you get mercy; after trial you get justice*" (emphasis added). The defendant declined the plea offer and proceeded to trial, after which he was acquitted of the top counts of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree. The court then sentenced the defendant on the conviction of criminal possession of a controlled substance in the fourth degree to a term of 5 years of imprisonment to be followed by a period of post-release supervision of 2 years. Although the court did not impose the maximum sentence on that count of 5½ years of imprisonment the court expressed its belief that it had sentenced the defendant "to the maximum on the top count" for which he was convicted at trial. Viewed in conjunction with the court's statement to the defendant that if he declined to take a plea, he would "get justice," not "mercy," the sentence imposed on the count of criminal possession of a controlled substance in the fourth degree was held to have "raised an inference" that the defendant was penalized for exercising his right to a jury trial Thus, the second department reduced the sentence imposed on the conviction of criminal possession of a controlled substance in the fourth degree to a term of imprisonment of 3 years to be followed by a period of post-release supervision of 2 years. Compare, *People v. Qunicy Adams, __ A.D.3d __, 2022 NY Slip Op 005095 (2nd Dept. 8/31/22*), in which the second department of somewhat different facts rejected the claim of judicial vindictiveness in sentencing.

Sex Offenders

People v. Vadimir Krull, __ A.D.3d __, 2022 NY Slip Op 04783 (1st Dept. 8/2/22).

A convicted sex offense defendant who maintains his innocence and thus after a jury trial declines to speak to probation about the offense except to deny criminal responsibility and is appealing the conviction should not have 10 points assessed against him in a Sex Offender Registration Act (SORA) risk assessment because this would violate the defendant's fifth amendment right against self-incrimination.

Richard Alcantara v. Annucci, __ A.D.3d __, 2022 NY Slip Op 02163 (3rd Dept. 3/31/22).

Correction Law 73 does not require the department of corrections to provide residential treatment programs outside a correctional facility to facilitate re-entry to the community for sex offenders who are ready for release (in this case, Fishkill, Correctional Facility). As such, where such inmates were afforded separate facilities within the prison but subject to the same headcounts and other overall prison procedures, did not change the result to the extent that a lower court order holding to the contrary was modified.

Matter of Luis Alvarez v. Annucci, __ N.Y.3d __, 2022 NY Slip Op 01957 (3/22/22) [5/2; Memorandum].

A majority of the Court of Appeals, held 5-2 that the residency restrictions of the Sexual Assault Reform Act (SARA), in particular, that they not live within 1,000 feet of a school or school property, applies equally to eligible offenders released on parole, conditionally released, or subject to a period of post-release supervision. Judge Wilson, joined by Judge Rivera, dissented on the conclusion that the restriction applied only to those sex offenders released on parole or conditionally released, and thus, the defendant, as a level 1 SARA offender released on a period of post-release supervision should be able to live where he wished.

***People v. Wayne Thomas, 200 A.D.3d 723, 2021 NY Slip Op 06711 (2nd Dept/ 12/3/21).**

People ex rel. Danny Rivera v. Warden, __ A.D.3d __, 2021 NY Slip Op 07074 (3rd Dept. 12/16/21).

The third department joined the first and second departments in holding that that portion of the Sexual Assault Reform Act that prohibits a sexual offender from residing within 1,000 of a school [P.L. 220.14; Exec L. 259-c (14)] did not violate the ex post facto clause of the constitution. See *Matter of Devine v Annucci*, 150 A.D.3d 1104, 1107 (1st Dept.2017); *Matter of Williams v Department of Corr. & Community Supervision*, 136 A.D.3d 147, 153 (2nd Dept. 2016).

Appeals

People v. Jeffrey Bush, 38 N.Y.3d 66 (3/22/22) [4/3; DiFiore, C.J.].

In pleading guilty to the misdemeanor count of seventh degree criminal possession of a controlled substance off a pending indictment that charged him with two counts of third-degree controlled substance possession, the defendant was fully allocated and advised by the court that the sentence promise would be "20 days of community service." The court further stated, "[y]ou understand you can't get re-arrested. You must return on the adjournment date. And you must complete the community service or else there will be a one-year jail alternative." At sentencing, after noting that the 20 days of community service had been completed and that the defendant had not been re-arrested, both parties answered "Yes" to the court's query, "And the promise is a C.D.?" The court then elicited from defense counsel that there was "no legal reason why sentence should not be imposed," and was advised that both sides were ready for sentencing. After telling the defendant, "I'm glad you did the community service, and I'm glad the case is over," the court-imposed sentence – "[t]he sentence of the court is a conditional discharge; $250 in court costs" and a six month license suspension." The defendant signed he court's conditional discharge form the same day which set forth the statutory conditions with respect to the conditional discharge under P.L. 65.10(2), and the one year was completed without incident. A majority of the Court, per DiFiore, C.J., held 4-3 that the defendant's claim on appeal that his guilty plea was involuntary because the court did not mention the one-year period was unreviewable on appeal due to the failure to preserve the claim in the trial court. Thus, where there was no dispute that the defendant neither objected to the sentence promise as described during either the plea or sentencing proceeding, nor moved to withdraw his plea or otherwise protested its voluntary nature in a timely manner, the belated claim that he was not entitled to the greater remedy of a dismissal of his indictment as he urged. Judge Rivera, joined by Judges Wilson and Troutman, dissented on the conclusion that the conviction had to not only be reversed because the plea was involuntary and not knowing, but because the defendant had completed the erroneously imposed sentence that included the conditional discharge that was not part of the original plea, the indictment had to be dismissed. Thus, for the dissenters, there was no preservation bar to review on appeal.

People v. Sharon Lashley, __ N.Y.3d __ (12/14/21) [7/0; Memorandum].

Because the defendant failed to challenge the C.P.L. 400.21 predicate felony statement filed by the People at her sentencing, her claim that her sentence was illegal due to the failure to include tolling periods did not present a question of law before the Court of Appeals to review. As such the appellate division's order to the contrary was reversed and the case remitted to that court.

People v. Kevin A Dukes, __ N.Y.3d __, 2021 NY Slip Op (11/23/21) [5/2; Memorandum].

The defendant's argument that portions of the presentence report were inadmissible and should not have been considered was held unpreserved for review in the Court of Appeals by a 5-2 majority of

the Court. Judges Rivera and Wilson dissented for reasons stated in the dissenting memorandum at the appellate division (186 AD3d 1073, 1074-1076 (2020) [Peradotto, J.P. and Lindley, J.].

People v. Fernando Romualdo, __ N.Y.3d __, 2021 NY Slip Op 06430 (11/18/21) [7/0; Memorandum].

The Court of Appeals reversed a divided appellate division reversal of the defendant's Suffolk County murder conviction [188 A.D.3d 928 (2nd Dept. 2020)], on the law and facts that while the intermediate appellate court held that that there was "no evidence" to support the jury's verdict, the appellate division failed to consider the "reasonable inferences" from this evidence and view them "in the People's favor" (*People v Carrel*, 99 NY2d 546, 547 [2002]). Thus, in an unusual ruling, the Court of Appeals held that a rational jury could have inferred from the medical evidence presented at trial that the victim was sexually assaulted immediately prior to her death where the defendant's semen was found on the victim's genitalia, the semen had not transferred to the victim's clothing, which was still in a state of disarray when her body was found, the defendant lived in close proximity to the crime scene, and the defendant falsely denied knowing or having sex with the victim. As such, a rational jury could conclude that defendant was present at the time of the victim's death and killed the victim during the course of, or immediately after, sexually assaulting her to the extent that that the the evidence was legally sufficient to support defendant's conviction. The Court of Appeals further note that since the appellate division failed to properly consider and apply the correct law, it could also consider the weight of the evidence, under *People v. Kancharla, 23 N.Y.3d 294, 303 (2014)*, which was also found sufficient.

People v. Wellington Johnson, __ A.D.3d __, 2022 NY Slip Op 01844 (3rd Dept. 3/17/22).

Because appeals a strictly limited by statute, a defendant could not appeal an issue relating to his obligation to pay the mandatory surcharge following his Madison County murder conviction it could not be addressed by the appellate division and as such, his appeal was dismissed. Thus, although a mandatory surcharge is levied at sentencing it is not considered part of the sentencing proceeding and not reviewable on appeal because C.P.L. 450.10 and 450.30 do not permit appeals in such matters.

People v. Brian Tindley, __ A.D.3d __, 2022 NY Slip Op 00886 (2nd Dept. 2/9/22).

The trial court erred in summarily denying the defendant's motion to vacate his judgment of

conviction for first degree-controlled substance possession and third-degree weapons possession based on ineffective assistance with respect to a plea bargain where former counsel did not request and review the search warrant affidavits, move to controvert the search warrants, or advise him before he pleaded guilty that challenging the legality of the search warrants was an option. As such, the case was remitted to the lower court to conduct the hearing.

People v. Anthony Green, __ A.D.3d __, 2022 NY Slip Op 00315 (2nd Dept. 1/19/22).

The defendant moved to vacate his 1987 Brooklyn murder conviction based on the free-standing claim of actual innocence. In support, he alleged prima facie facts to support the claim of a misidentification in a trial that involved a one-witness identification (that witness later recanted after trial but her testimony on that claim was held to have been unreliable in a C.L.P. 330.30 hearing) with the submission of four affidavits from purported eyewitnesses who alleged he was not the shooter and someone else was. As such, the lower court erred in summarily denying his application since he was entitled to a hearing under *People v. Hamilton, 115 A.D.3d 12, 32 (2014),* and the case was remanded for this proceeding.

Sex Offenders

People v. Mathew Corr, __ A.D.3d __, 2022 NY Slip Op 04183 (2nd Dept. 6/29/22).

The second department, per Brathwaite Nelson, J., held that the 20-year duration of the registration and verification of a level one sex offender [see Corr. L. 168-h(1)], who was convicted of a qualifying sex offense in another jurisdiction, Rhode Island, registered as a sex offender in another state, Massachusetts, and subsequently established residence in New York is not diminished by the period of time that he was registered as a sex offender in another state. Thus, the "initial date of registration" was held to mean the initial date of the offender's registration with the Division of Criminal Justice Services pursuant to New York's Sex Offender Registration Act (Correction Law art 6-C.

Federal Habeas Corpus

David Shinn v. David Martinez Ramirez/David Shinn v. Barry Lee Jones, __ U.S. __ (5/23/22) [6/3; Thomas, J.].

A majority of the Court held that due to principles of federal-state comity and deference, and because federal habeas corpus petitions brought under 28 U.S.C. 2254 are not a substitute for ordinary error correction though appeal, federal courts are not required to conduct hearings in connection with two Arizona capital crime defendants who alleged that their attorneys were ineffective because, in *Rarmiez*'s case, his attorney alleged failed to pursue claims regarding his intellectual disabilities and in *Jones'* case), his attorney failed to conduct a proper investigation, where both claims were not developed in State court. As the majority observed, the habeas corpus procedural rules of exhaustion of claims and procedural default, waiver and bypass are important tools to prevent undue intrusions through federal intrusions into the primary sovereign power of the States to engage in criminal; prosecutions. Justice Sotomayor, joined by Justices Kagan and Breyer, dissented on the determination that the majority decision will leave many without the procedural vehicle to contest the Sixth Amendment's right to effective assistance of counsel.

New Criminal Legislation

B. Kamins, "*Annual Review of New Criminal Justice Legislation 2021,*" NYS Bar Association Nov/Dec 2021 @ p. 46.

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

Bail & Discovery Reform Legislation

L. 2022, Ch. 56, and signed by the Governor on April 9, 2022 as part of the State's budget bills, made certain modifications to the bail and discovery laws. They were effective May, 9, 2022. While maintaining the "least restrictive" condition or conditions to "reasonably assure" the defendant's return to court, and the inability of the court to consider public safety or dangerousness to the community, the Legislature amended C.P.L. 510.30(1) to, aside from continued consideration of the defendant's "activities and history," the "charges facing" the defendant and his or her criminal record, along with the defendant's history of use or possession of a firearm, also whether the "charge is alleged to have caused physical harm to an individual or group of individuals." It also expanded the list of qualifying offenses in which cash bail may be set, including certain weapons crimes not previously covered, C.P.L. 245.50 was amended to require that any supplemental certificate of

discovery compliance detail the basis for the delayed disclosure," and moreover now requires that to the extent that a party is aware of a "potential defect or deficiency" related to a certificate of compliance or supplemental certificate, that party must notify the opposing party "as soon as practicable." Finally, the new legislation specifically states that a prosecutor's discovery obligations "shall not apply to a simplified traffic information charging a traffic infraction or municipal code petty offense that does not carry a statutorily authorized sentence of imprisonment.

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