CRIMINAL LAW

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INTRODUCTION

This *Survey* covers developments in New York criminal law and procedure during the period of June 30, 2014 to July 1, 2015. Given the large number of cases, the *Survey* focuses on decisions from the Court of Appeals and, where appropriate, discusses cases from trial and

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intermediate appellate courts. The *Survey* also includes a review of new legislative enactments pertaining to criminal law and procedure, as well as the vehicle and traffic law.

I. APPELLATE REVIEW SCOPE AND JURISDICTION

In *People v. Lovett*, the Court held that the appellate division's consolidation of a non-appealable order (denying a defendant's application for resentencing), with other appealable orders (a judgment of conviction and two post judgment motions), did not transform the non-appealable order into one that the Court had jurisdiction to consider.[1] The Court reasoned that "no appeal lies from a determination made in a criminal proceeding unless specifically provided for by statute, and courts 'may not resort to interpretative contrivances to broaden the scope and application of statutes' governing the availability of an appeal."[2]

In *People v. Pacherille*, the Court considered whether the defendant's waiver of his right to an appeal foreclosed appellate review of the trial court's denial of the defendant's request to be sentenced as a youthful offender.[3] The Court held that a valid waiver of the right to appeal is only unenforceable in the narrow instance where the sentencing court entirely abrogated its responsibility to determine whether an eligible youth is entitled to youthful offender status.[4] As the sentencing court discharged its responsibility to determine whether the defendant was entitled to youthful offender status, the Court concluded that the defendant's waiver of his right to appeal foreclosed appellate review of the sentencing court's discretionary decision to deny the defendant youthful offender status.[5]

In *People v. Grubstein*, the Court held that the appellate review

1. 25 N.Y.3d 1088, 1090, 34 N.E.3d 851, 853, 13 N.Y.S.3d 341, 343 (2015).

2. *Id.*, 34 N.E.3d at 852–53, 13 N.Y.S.3d at 342–43 (quoting People v. Pagan, 19 N.Y.3d 368, 370, 971 N.E.2d 347, 348, 948 N.Y.S.2d 217, 218 (2012)); *see also* People v. Bautista, 7 N.Y.3d 838, 838–39, 857 N.E.2d 49, 50, 823 N.Y.S.2d 754, 755 (2006) ("Appeals in criminal cases are strictly limited to those authorized by statute.").

3. 25 N.Y.3d 1021, 1023, 32 N.E.3d 393, 394–95, 10 N.Y.S.3d 178 179–80 (2015).

4. *Id.*

5. *Id.* at 1024, 32 N.E.3d at 395, 10 N.Y.S.3d at 180. Youthful offender procedure and definition of terms are contained in N.Y. CRIM. PROC. LAW § 720.10 (McKinney 2011 & Supp. 2016). Pursuant to the same statute, "where a defendant is eligible to be treated as a youthful offender, the sentencing court 'must' determine whether he or she is to be so treated," and "compliance with this statutory command cannot be dispensed with, even where [a] defendant has failed to ask to be treated as a youthful offender, or has purported to waive his or her right to make such a request." People v. Rudolph, 21 N.Y.3d 497, 499, 997 N.E.2d 457, 500, 974 N.Y.S.2d 885, 886 (2013).

preservation requirements under Criminal Procedure Law section 440.10(2)(c) do not apply in instances where the appeal is predicated on deprivation of right to counsel grounds.[6] Specifically, under Criminal Procedure Law section 440.10(2)(c), "when the record is sufficient to permit review of an issue on direct appeal, a defendant who either has not appealed his conviction or, having appealed, has failed to raise that issue [on appeal] is barred from later asserting it as a basis for post-conviction relief."[7]

In *People v. Graham*, the Court held that, pursuant to Criminal Procedure Law section 470.05(2), the defendant failed to preserve for review the issue of whether "the police were required to again read the defendant his *Miranda* rights when they interviewed him a second time, at his request, and in the presence of counsel."[8] Key to the Court's reasoning was that the defendant failed to raise the same argument at the trial court level, specifically, in his motion papers and at the suppression hearing.[9]

In *People v. Allen*, the Court held that defendant was required to preserve the argument that, based on evidence presented at trial, the charge of attempted murder in the second degree was duplicitous of the charge of murder in the second degree.[10] In so holding, the Court resolved a split in decisions between the First and Second Departments, requiring preservation,[11] and Fourth Department law, holding that preservation is unnecessary.[12] The Court reasoned that "preservation of

6. 24 N.Y.3d 500, 501, 25 N.E.3d 914, 914, 2 N.Y.S.3d 1, 1 (2014).

7. *Id.* at 502, 25 N.E.3d at 915, 2 N.Y.S.3d at 2; *see* N.Y. CRIM. PROC. LAW § 440.10(2)(c) (McKinney 2005 & Supp. 2016) ("Although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's unjustifiable failure to take or perfect an appeal during the prescribed period or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him."); *see also* People v. Cuadrado, 9 N.Y.3d 362, 376, 880 N.E.2d 861, 862, 850 N.Y.S.2d 375, 376 (2007).

8. 25 N.Y.3d 994, 996, 32 N.E.3d 387, 389, 10 N.Y.S.3d 172, 174 (2015). Criminal Procedure Law section 470.05(2) provides, in relevant part, that "when a protest thereto was registered, by the party claiming error, at [a] time . . . when the court had an opportunity of effectively changing the same . . . or if in response to a protest by a party, the court expressly decided the question raised on appeal." N.Y. CRIM. PROC. LAW § 470.05(2) (McKinney 2009 & Supp. 2016).

9. *Graham*, 25 N.Y.3d at 996–97, 32 N.E.3d at 389, 10 N.Y.S.3d at 174.

10. 24 N.Y.3d 441, 449–50, 24 N.E.3d 586, 591, 999 N.Y.S.2d 350, 355 (2014).

11. *Id.* at 449, 24 N.E.3d at 590, 999 N.Y.S.2d at 354; *see* People v. Sinha, 84 A.D.3d 35, 922 N.Y.S.2d 275 (1st Dep't 2011); People v. Nash, 77 A.D.3d 687, 908 N.Y.S.2d 708 (2d Dep't 2010).

12. *Allen*, 24 N.Y.3d at 449, 24 N.E.3d at 590, 999 N.Y.S.2d at 354; *see* People v. Montgomery, 104 A.D.3d 1291, 960 N.Y.S.2d 835 (4th Dep't 2013); People v. Filer, 97

public trial claims is still required . . . [as b]ringing a public trial violation to a judge's attention in the first instance will ensure the timely opportunity to correct such errors."[13]

In *People v. Jones*, the Court abrogated its own jurisdictional rule that "'[t]he power to review a discretionary order denying a motion to vacate judgment upon the ground of newly discovered evidence [brought pursuant to CPL 440.10(1)(g)] ceases at the Appellate Division.'"[14] The Court reasoned that it was not precluded from exercising its,

> "power to determine whether in a particular judgmental and factual setting there has been an abuse of discretion as a matter of law" because, in so doing, [the Court is] not "passing on facts as such, but rather, considering them to the extent that they are a foundation for the application of law."[15]

The Court further held that the appellate division abused its discretion by summarily denying the defendant's motion for an evidentiary hearing,[16] where, in support of his motion, the defendant submitted new evidence establishing that a number of hairs and a fingernail scraping tested for DNA excluded defendant as a contributor, and the People responded with an attorney affirmation containing hearsay statements and opinions.[17]

In *People v. Brown*, the Court, pursuant to Criminal Procedure Law section 450.90(2)(a), declined to review a decision of the appellate division, holding that the trial court should have suppressed the defendants' property and show-up identification, on the grounds that

A.D.3d 1095, 947 N.Y.S.2d 743 (4th Dep't 2012); People v. Boykins, 85 A.D.3d 1554, 924 N.Y.S.2d 711 (4th Dep't 2011).

13. *Allen*, 24 N.Y.3d at 449, 24 N.E.3d at 591, 999 N.Y.S.2d at 355.

14. 24 N.Y.3d 623, 627, 26 N.E.3d 754, 755, 2 N.Y.S.3d 815, 816 (2014) (quoting People v. Crimmins, 38 N.Y.2d 407, 409, 343 N.E.2d 719, 721, 381 N.Y.S.2d 1, 3 (1975)); *see* N.Y. CRIM. PROC. LAW §§ 440.10(1)(g), (g-1) (McKinney 2005 & Sup. 2016) ("At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that: (g-1) Forensic DNA testing of evidence performed since the entry of a judgment, (1) in the case of a defendant convicted after a guilty plea, the court has determined that the defendant has demonstrated a substantial probability that the defendant was actually innocent of the offense of which he or she was convicted, or (2) in the case of a defendant convicted after a trial, the court has determined that there exists a reasonable probability that the verdict would have been more favorable to the defendant.").

15. *Jones*, 24 N.Y.3d at 631, 26 N.E.3d at 758, 2 N.Y.S.3d at 819 (quoting *Crimmins*, 38 N.Y.2d at 425, 343 N.E.2d at 732, 381 N.Y.S.2d at 14).

16. *Id.* at 635, 26 N.E.3d at 761, 2 N.Y.S.3d at 822.

17. *Id.* at 636, 26 N.E.3d at 762, 2 N.Y.S.3d at 823.

police lacked reasonable suspicion to stop and detain them.[18] Emphasizing that, "determinations as to reasonable suspicion typically present a mixed question of law and fact," the Court held that it lacked jurisdiction, since "the Appellate Division reversed the suppression court because, when exercising its independent fact-finding powers, it drew a different inference from the established facts, thus deciding a [non-reviewable] mixed question of law and fact."[19]

In *People v. Crowder*, the Court held that defendant was required to preserve the claim that his plea was not knowing, voluntary, and intelligent because the trial court failed to reiterate the term of his post release supervision (PRS) during the plea colloquy.[20] The Court reasoned that the "[d]efendant and his attorney had [multiple] opportunities to object to the imposition of PRS: at the initial scheduled sentencing . . . and at his sentencing" and, despite this, neither expressed an objection.[21] Reasoning that "defendant had ample opportunity to raise an objection to the PRS component" of his sentence,[22] the Court held that "defendant was required to preserve his claim."[23]

In *People v. Giles*, the Court held that the defendants' motions to set aside their verdicts "were procedurally improper because they were

18. 25 N.Y.3d 973, 975, 31 N.E.3d 1194, 1194, 9 N.Y.S.3d 597, 597 (2015). Criminal Procedure Law section 450.90(2)(a) provides as follows:

> An appeal to the court of appeals from an order of an intermediate appellate court reversing or modifying a judgment, sentence or order of a criminal court may be taken only if: (a) The court of appeals determines that the intermediate appellate court's determination of reversal or modification was on the law alone or upon the law and such facts which, but for the determination of law, would not have led to reversal or modification . . . .

N.Y. CRIM. PROC. LAW § 450.90(2)(a) (McKinney 2005 & Supp. 2016); *see also e.g.*, People v. McRay, 51 N.Y.2d 594, 601, 416 N.E.2d 1015, 1018, 435 N.Y.S.2d 679, 682 (1980) (issues "which involve questions of fact or mixed questions of law and fact, generally are beyond the review powers of [the] Court" and "[t]hus, where the facts are disputed, where credibility is at issue or where reasonable minds may differ as to the inference to be drawn from the established facts, [the] court, absent an error of law, will not disturb the findings of the Appellate Division and the [trial] court.").

19. *Brown*, 25 N.Y.3d at 975–76, 31 N.E.3d at 1195, 9 N.Y.S.3d at 598.

20. 24 N.Y.3d 1134, 1136–37, 26 N.E.3d 1164, 1166, 3 N.Y.S.3d 309, 311 (2015); *see* People v. Catu, 4 N.Y.3d 242, 244–45, 825 N.E.2d 1081, 1082, 792 N.Y.S.2d 887, 888 (2005) ("A trial court has the constitutional duty to ensure that a defendant, before pleading guilty, has a full understanding of what the plea connotes and its consequences," and "[p]ostrelease supervision is significant" and that a defendant "must be aware of the postrelease supervision component of that sentence in order to knowingly, voluntary and intelligently choose among alternative courses of action . . . .").

21. *Crowder*, 24 N.Y.3d at 1136, 26 N.E.3d at 1166, 3 N.Y.S.3d at 311.

22. *Id.*

23. *Id.* at 1136–37, 26 N.E.3d at 1166, 3 N.Y.S.3d at 311.

premised on matters outside" of the trial court's record.[24] The Court reasoned that Criminal Procedure Law section 330.30(1) "did not permit defendants to expand the record to include matters" not contained therein.[25] The Court "express[ed] no opinion on whether a trial court has the authority to consider a CPL 330.30(1) motion as a premature de facto CPL 440.10 motion," as sometimes done by trial courts.[26]

In *People v. Rossi*, the Court held that it was without jurisdiction to review the trial court's application of the "emergency doctrine"[27] to uphold a warrantless search and seizure of a firearm.[28] Of import to the Court was the fact that record evidence supported the trial court's finding as to the duration of the emergency, to wit, the presence of children in a home where defendant shot himself with a firearm.[29]

24. 24 N.Y.3d 1066, 1068, 25 N.E.3d 943, 944, 2 N.Y.S.3d 30, 31 (2014). Under Criminal Procedure Law section 330.30(1), a defendant may move to set aside the verdict on any ground that appears "in the record" that would require a reversal or modification on appeal as a matter of law. N.Y. CRIM. PROC. LAW § 330.30(1) (McKinney 2005 & Supp. 2016). Under the same statute, the motion may be made "[a]t any time after rendition of a verdict of guilty [but] before sentence . . . ." *Id.*

25. *Giles*, 24 N.Y.3d at 1068, 25 N.E.3d at 944, 2 N.Y.S.3d at 31.

26. *Id.*

> Nonrecord matters are brought by way of a CPL 440.10 motion, which under that statute is permissible after sentencing. There is no clear statutory remedy that provides for an attack on a judgment of conviction based on nonrecord matters after verdict but prior to sentencing. Several courts have remedied this gap by considering a defendant's CPL 330.30(1) motion as one made under CPL 440.10 (a de facto CPL 440.10 motion) where fairness and judicial economy are not sacrificed.

Id. at 1078, 25 N.E.3d at 951–52, 2 N.Y.S.3d at 38−39 (Pigott, J., dissenting) (internal quotations omitted); *see* N.Y. CRIM. PROC. LAW § 440.10 (McKinney 2005 & Supp. 2016).

27. 24 N.Y.3d 968, 970, 20 N.E.3d 637, 638, 995 N.Y.S.2d 692, 693 (2014). As a general rule, the "emergency doctrine" excuses or justifies otherwise impermissible police search and seizure conduct that is an objectively reasonable response to an apparently exigent situation, i.e., instances where the police are seeking to help someone in immediate danger. *See, e.g.*, People v. Molnar, 98 N.Y.2d 328, 332, 774 N.E.2d 738, 740–41, 746 N.Y.S.2d 673, 675–76 (2002); People v. Krom, 61 N.Y.2d 187, 198, 461 N.E.2d 276, 280–81, 473 N.Y.S.2d 139, 144 (1984); People v. Mitchell, 39 N.Y.2d 173, 177–78, 347 N.E.2d 607, 609, 383 N.Y.S.2d 246, 248 (1976). The exception is comprised of three elements: (1) the police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property and this belief must be grounded in empirical facts; (2) the search must not be primarily motivated by an intent to arrest and seize evidence; and (3) there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched. *Molnar*, 98 N.Y.2d at 332, 774 N.E.2d at 740−41, 746 N.Y.S.2d at 675–76; *Mitchell*, 39 N.Y.2d at 177–78, 347 N.E.2d at 609, 383 N.Y.S.2d at 248.

28. *Rossi*, 24 N.Y.3d at 970, 20 N.E.3d at 638, 995 N.Y.S.2d at 693.

29. *Id.*

II. DEFENSES

In *People v. Repanti*, the Court rejected the defendant's contention that a harassment violation is a lesser included offense of the crime of attempted assault in the third degree.[30] The Court held that the attempted assault and harassment "counts do not share a common intent element."[31] Specifically, the Court reasoned that:

> [A]s an abstract concept it is possible to intend to annoy, harass or alarm without also intending to injure based on conduct that causes annoyance, harassment or alarm [and,] [s]imilarly, an intent to injure through physical contact involves a purpose of mind focused on a result more serious than that which may be obtained by the mere action of causing annoyance or alarm.[32]

The Court concluded that "the fact that there is a potential subset of cases where it is possible to be guilty of both offenses does not overcome the theoretical impossibility requirement that the elements

30. 24 N.Y.3d 706, 710, 28 N.E.3d 511, 513, 5 N.Y.S.3d 332, 334 (2015) ("To establish that a count is a lesser included offense in accordance with CPL 1.20(37), a defendant must establish 'that it is theoretically impossible to commit the greater crime without at the same time committing the lesser.' Such determination requires the court to compare the statutes in the abstract, without reference to any factual particularities of the underlying prosecution. Thus, the defendant must show that the offense 'is an offense of lesser grade or degree and that in all circumstances, not only in those presented in the particular case, it is impossible to commit the greater crime without concomitantly, by the same conduct, committing the lesser offense.'" (quoting People v. Glover, 57 N.Y.2d 61, 63–64, 439 N.E.2d 376, 377, 453 N.Y.S.2d 660, 661 (1982))). Under Criminal Procedure Law section 1.20(37), a lesser included offense is defined as follows:

> When it is impossible to commit a particular crime without concomitantly committing, by the same conduct, another offense of lesser grade or degree, the latter is, with respect to the former, a "lesser included offense." In any case in which it is legally possible to attempt to commit a crime, an attempt to commit such crime constitutes a lesser included offense with respect thereto.

N.Y. CRIM. PROC. LAW § 1.20(37) (McKinney 2003 & Supp. 2016).

31. *Repanti*, 24 N.Y.3d at 710, 28 N.E.3d at 513, 5 N.Y.S.3d at 334 ("To be guilty of attempted assault in the third degree requires proof that defendant 'engage[d] in conduct which tends to effect the commission of [assault],' with the 'intent to cause physical injury to another.'" (first quoting N.Y. PENAL LAW § 110.00 (McKinney 2009 & Supp. 2016); and then quoting N.Y. PENAL LAW § 120.00(1) (McKinney 2009 & Supp. 2016))). Comparing Penal Law section 120.00(1) with Penal Law section 240.26 shows that "assault requires intent to injure, irrespective of whether the defendant also harbors an intent to harass, annoy or alarm." *Repanti*, 24 N.Y.3d at 710, 28 N.E.3d at 513, 5 N.Y.S.3d at 334; *see* N.Y. PENAL LAW §§ 110.00, 120.00(1). "A conviction for harassment requires that defendant, 'with intent to harass, annoy or alarm another . . . [,] strikes, shoves, kicks or otherwise subjects such other person to physical contact, or attempts or threatens to do the same.'" *Repanti*, 24 N.Y.3d at 710, 28 N.E.3d at 513, 5 N.Y.S.3d at 334 (quoting N.Y. PENAL LAW § 240.26(1) (McKinney 2008 & Supp. 2016)); *see also* People v. Moyer, 27 N.Y.2d 252, 253, 265 N.E.2d 535, 536, 317 N.Y.S.2d 9, 10 (1970).

32. *Repanti*, 24 N.Y.3d at 711, 28 N.E.3d at 513, 5 N.Y.S.3d at 334.

align in all cases."[33]

III. EFFECTIVE ASSISTANCE OF COUNSEL

In *People v. Lovett*, the Court reiterated that the standard of review for effective assistance of counsel, as pertains to defense counsel's failure to raise an objection to a jury instruction, is whether the error was "so obvious that any reasonable lawyer would have objected."[34]

In *People v. Blake*, the Court held that, although an adverse inference charge regarding the loss of a police-made surveillance videotape would have been appropriate, its absence was harmless and, therefore, insufficient to support a claim of ineffective assistance of counsel.[35] In so holding, the Court noted that the jury was fully aware of the loss of the tape and its circumstances; the trial court permitted defense counsel to assert in summation that the missing tape would have supported defendant's claim of self-defense and that tape was deliberately suppressed; and that there was overwhelming evidence refuting defendant's self-defense claim.[36]

In *People v. Keschner*, the Court considered the defendant's ineffective assistance of counsel argument, predicated upon defense counsel's failure to object to faulty jury charges.[37] In addition to other errors, the jury charges, read literally, stated that "anyone who knows of a crime is an accomplice to it" and "may have conveyed to the jury that a defendant who unknowingly assists in a crime, but does not intend that it be committed, is criminally liable . . . imply[ing] that a person who lacks the state of mind required for the commission of an offense may be held liable for it . . . ."[38] However, the Court rejected defendant's claim, concluding that defense counsel's single omission, to

33. *Id.* at 711, 28 N.E.3d at 514, 5 N.Y.S.3d at 335.

34. 25 N.Y.3d 1088, 1091, 34 N.E.3d 851, 853, 13 N.Y.S.3d 341, 343.

35. 24 N.Y.3d 78, 82, 21 N.E.3d 214, 216–17, 996 N.Y.S.3d 585, 587–88 (2014).

36. *Id.* at 82–83, 21 N.E.3d at 217, 996 N.Y.S.3d at 588. The entitlement to an adverse inference charge was established in *People v. Handy*. *Id.* at 82, 21 N.E.3d at 216, 996 N.Y.S.3d at 587. An adverse inference charge is "mandatory upon request 'when a defendant in a criminal case, acting with due diligence, demand[ed] evidence . . . reasonably likely to be of material importance, and that evidence ha[d] been destroyed by the State.'" *Id.* (quoting People v. Handy, 20 N.Y.3d 663, 665, 988 N.E.2d 879, 966 N.Y.S.2d 351 (2013)). Prior to the Court's decision in *Handy*, the availability of the adverse inference charge was discretionary. *Blake*, 24 N.Y.3d at 82, 21 N.E.3d at 216, 996 N.Y.S.3d at 587.

37. 25 N.Y.3d 704, 722, 37 N.E.3d 690, 700, 16 N.Y.S.3d 187, 197 (2015).

38. *Id.*, 37 N.E.3d at 701, 16 N.Y.S.3d at 198 ("[T]he statutory definition of accomplice liability . . . states that a defendant is criminally liable for another person's conduct constituting an offense only if defendant acts 'with the mental culpability required for the commission' of the offense." (quoting N.Y. PENAL LAW § 20.00 (McKinney 2009 & Supp. 2016))).

wit, the failure to object to the flawed jury charges, was not one of the rare cases where a defense counsel's "'error is so [prejudicial,] clear-cut, egregious and decisive that it will overshadow and taint the whole of the representation,'" thereby, depriving the defendant of his constitutional right to effective legal representation.[39]

In *People v. Wright*, the Court held that defense counsel was ineffective because of his repeated failure to object to the prosecution's inaccurate and misleading descriptions of DNA evidence.[40] Specifically, the DNA analysis "did not 'match' defendant's DNA to the DNA collected at the crime scene," as argued by the prosecutor during summation.[41] Rather, the DNA test "indicated that defendant could not be excluded from the pool of male DNA contributors, and the expert testimony provided no statistical comparison to measure the significance of those results."[42] Because DNA was the only evidence connecting defendant to the crime, the Court reasoned that defense counsel should not have allowed this vital evidence misrepresentation to stand unchallenged.[43] As such, the Court held that defense counsel's repeated failure to object amounted to "a pattern of inexcusable mistakes that cannot be attributed to a failed trial strategy," thereby, rendering defense counsel ineffective and denying the defendant a fair trial.[44]

IV. EVIDENCE

In *People v. Lamont*, the Court held that the "defendant's appearance and conduct, and the surrounding events . . . support[ed] an inference that defendant intended to commit" an attempted robbery in the second degree, under Penal Law sections 110.00, 160.10(1), and (2)(b).[45] Facts key to the Court's determination included that the

39. *Id.* at 724, 37 N.E.3d at 702, 16 N.Y.S.3d at 199 (quoting *Blake*, 24 N.Y.3d at 81, 21 N.E.3d at 216, N.Y.S.2d at 587).

40. 25 N.Y.3d 769, 771, 37 N.E.3d 1127, 1128, 16 N.Y.S.3d 485, 486 (2015).

41. *Id.* at 769, 37 N.E.3d at 1129, 16 N.Y.S.3d at 487.

42. *Id.*

43. *Id.*

44. *Id.* at 779, 37 N.E.3d at 1134, 16 N.Y.S.3d at 492; *see also* People v. Oathout, 21 N.Y.3d 127, 132, 989 N.E.2d 936, 940, 967 N.Y.S.2d 654, 658 (2013) (individual errors may not constitute ineffective assistance, but the "cumulative effect of [defense] counsel's actions [can] deprive[a] defendant of meaningful representation." (quoting People v. Arnold, 85 A.D.3d 1330, 1334, 924 N.Y.S2d 679, 683 (3d Dep't 2011))); People v. Ashwal, 39 N.Y.2d 105, 109, 347 N.E.2d 564, 566, 383 N.Y.S.2d 204, 206 (1976) (misconduct of counsel is not immune to attack merely because it occurs during the course of summation).

45. 25 N.Y.3d 315, 319, 33 N.E.3d 1275, 1278, 12 N.Y.S.3d 6, 9 (2015) ("Even absent direct evidence of intent, a conviction may be sustained where sufficient evidence exists to infer the requisite intent from the defendant's conduct and the surrounding

defendant and his accomplice wore masks and gloves to conceal their identity; carried what appeared to be handguns; knocked loudly early in the morning on the rear door of the commercial establishment, an entry point not generally used by the public, with no apparent lawful purpose; and planned an escape in advance by parking a car in the nearby lot.[46]

In *People v. Inoa*, the Court found reversible evidentiary error where the trial court qualified a government agent, intimately involved in the investigation and prosecution of the defendant, to testify as an expert regarding the meaning of coded expressions in police telephone recordings of conversations between the defendant and the co-defendant.[47] The Court reasoned that the agent "ended up testifying beyond any cognizable field of expertise as an apparently omniscient expositor of the facts of the case."[48] As such, the Court held that the same error amounted to a usurpation of the jury's fact-finding role.[49]

In *People v. Garrett*, the Court held that a *Brady* violation was not established predicated on the defendant's claim that the prosecution suppressed civil allegations, involving a detective's use of coercive tactics to extract a confession in an unrelated criminal case.[50] Although the civil allegations could have been used to impeach the detective's credibility as to the legitimacy of the defendant's confession, the Court determined that disclosure of the civil allegations would not have changed result of the defendant's murder prosecution.[51] Specifically, the Court concluded that the civil allegations at issue did not meet the materiality standard for requiring disclosure under *Brady*.[52] Also

circumstances." (citing People v. Rodriguez, 17 N.Y.3d 486, 489, 957 N.E.2d 1133, 1134, 933 N.Y.S.2d 631, 632 (2011))).

46. *Id.* at 317–18, 33 N.E.3d at 1276–77, 12 N.Y.S.3d at 7–8.

47. 25 N.Y.3d 466, 473, 34 N.E.3d 839, 844, 13 N.Y.S.3d 329, 334 (2015).

48. *Id.*

49. *Id.* at 474, 34 N.E.3d at 845, 13 N.Y.S.3d at 335.

> It is, of course, the role of the jury to determine the facts of the case tried before it. The jury may be aided, but not displaced, in the discharge of its fact-finding function by expert testimony where there is reason to suppose that such testimony will elucidate some material aspect of the case that would otherwise resist comprehension by jurors of ordinary training and intelligence.

Id. at 472, 34 N.E.3d at 843, 13 N.Y.S.3d at 333 (citing People v. Cronin, 60 N.Y.2d 430, 432, 458 N.E.2d 351, 352, 470 N.Y.S.2d 110, 111 (1983)).

50. 23 N.Y.3d 878, 891, 18 N.E.3d 722, 732, 994 N.Y.S.2d 22, 32 (2014). "To make out a successful *Brady* claim, 'a defendant must show that (1) the evidence is favorable to the defendant because it is either exculpatory or impeaching in nature; (2) the evidence was suppressed by the prosecution; and (3) prejudice arose because the suppressed evidence was material.'" *Id.* at 885, 18 N.E.3d at 728, 994 N.Y.S.2d at 28 (citing People v. Fuentes, 12 N.Y.3d 259, 263, 907 N.E.3d 286, 289, 879 N.Y.S.2d 373, 376 (2009)).

51. *Id.* at 892, 18 N.E.3d at 733, 994 N.Y.S.2d at 33.

52. *Id.* at 891, 18 N.E.3d at 733, 994 N.Y.S.2d at 33.

important to the Court was the fact that the confession evidence against defendant was corroborated by another, untainted detective witness.[53]

In *People v. Allen*, the Court rejected the defendant's claim that defense counsel was improperly limited by the trial court as to cross-examination of the prosecution's witnesses' prior statements.[54] Since "[a]n accused's right to cross-examine witnesses . . . is not absolute,"[55] the Court reasoned that the trial court "did not abuse its discretion when it ruled that the police reports were inadmissible extrinsic evidence on a collateral matter."[56]

In *People v. Keschner*, the Court also held that, under New York Penal Law sections 460.10(3) and 460.20(1)(a), "the prosecution in an enterprise corruption case may prove that a defendant was a member of a criminal enterprise, with a continuity beyond the scope of individual criminal incidents, without showing that the enterprise would have survived the removal of a key participant."[57] Specifically, the Court reasoned that the meaning of the continuity element was as follows: "to be a criminal enterprise, an organization must continue 'beyond the scope of individual criminal incidents' (Penal Law § 460.10[3]), and must possess 'constancy and capacity exceeding the individual crimes committed under the association's auspices or for its purposes.'"[58]

In *People v. Shaulov*, the Court held that the trial court committed a reversible abuse of discretion error by denying the defendant's motion

53. *Id.* at 892, 18 N.E.3d at 734, 994 N.Y.S.2d at 34.

54. 24 N.Y.3d, 441, 450, 24 N.E.3d 586, 591, 999 N.Y.S.2d 350, 355 (2014).

55. *Id.* (quoting People v. Corby, 6 N.Y.3d 231, 234, 844 N.E.2d 1135, 1137, 811 N.Y.S.2d 613, 615 (2005)).

56. *Id.* at 450, 24 N.E.3d at 591, 999 N.Y.S.2d at 355; *see also* People v. Duncan, 46 N.Y.2d 74, 80, 385 N.E.2d 572, 576, 412 N.Y.S.2d 833, 837–38 (1978) (stating "often collateral to the ultimate issue before the jury and bear[] only upon the credibility of the witness, [their] admissibility is entrusted to the sound discretion of the Trial Judge whose rulings are not subject to review unless there has been an abuse of discretion as a matter of law.").

57. 25 N.Y.3d 704, 709, 37 N.E.3d 690, 691, 16 N.Y.S.3d 187, 188 (2015); *see* N.Y. PENAL LAW § 460.20(1)(a) (McKinney 2008 & Supp. 2016) ("A person is guilty of enterprise corruption when, having knowledge of the existence of a criminal enterprise and the nature of its activities, and being employed by or associated with such enterprise, he: (a) intentionally conducts or participates in the affairs of an enterprise by participating in a pattern of criminal activity . . . ."); N.Y. PENAL LAW § 460.10(3) (McKinney 2008 & Supp. 2016), ("'Criminal enterprise' means a group of persons sharing a common purpose of engaging in criminal conduct, associated in an ascertainable structure distinct from a pattern of criminal activity, and with a continuity of existence, structure and criminal purpose beyond the scope of individual criminal incidents.").

58. *Keschner*, 25 N.Y.3d at 720, 37 N.E.3d at 699, 16 N.Y.S.3d at 196 (citing People v. W. Express Intl., Inc., 19 N.Y.3d 652, 658, 978 N.E.2d 1231, 1234, 954 N.Y.S.2d 763, 766 (2012)).

for a new trial or to strike a portion of the complainant's surprise testimony, to wit, that she promptly disclosed to a friend her alleged sexual encounter with defendant.[59] Prior to trial, the People represented to both the trial court and defense counsel that there "would be no prompt outcry testimony."[60] Based on this, defense counsel formulated his trial strategy, believing that the complainant did not disclose the alleged sexual contact with the defendant to anyone until six months after it occurred.[61] The Court concluded that admission of the prompt outcry testimony was reversible error, because said error eviscerated counsel's credibility with the jury and irreparably undermined his trial strategy from voir dire to the opening statement.[62]

In *People v. Haggerty*, the Court rejected the defendant's challenge to his conviction, on the grounds that admitted testimony about the source of the stolen funds violated the best evidence rule.[63] The defendant argued that, because the ownership terms of a trust were in dispute, the trust instrument should have been admitted, as required by the best evidence rule.[64] The Court held that any such error was harmless, where several other witnesses testified as to ownership of the trust.[65] As such, the Court concluded that the claimed best evidence rule error was not so prejudicial as to deny the defendant a fair trial.[66]

In *People v. Williams*, the Court held that the trial court committed a reversible non-constitutional error under state evidentiary law, by allowing admission of evidence regarding the defendant's pretrial selective silence, to wit, the defendant's failure to tell a detective during a custodial interrogation that he and the alleged victim had consensual

59. 25 N.Y.3d 30, 32, 29 N.E.3d 227, 228, 6 N.Y.S.3d 218, 219 (2015).

60. *Id.*

61. *Id.* at 32–33, 29 N.E.3d at 228, 6 N.Y.S.3d at 219.

62. *Id.* at 35, 29 N.E.3d at 230, 6 N.Y.S.3d at 221; *see* People v. Rice, 75 N.Y.2d 929, 931, 554 N.E.2d 1265, 1266, 555 N.Y.S.2d 677, 678 (1990) (evidence that a victim of sexual assault promptly complained about the incident is admissible to corroborate the allegation that an assault took place); *see also* People v. Davis, 43 N.Y.2d 17, 27, 371 N.E.2d 456, 460, 400 N.Y.S.2d 735, 740 (1977) (relevant evidence may be rejected by the court if its admission would unfairly surprise or create a substantial danger of undue prejudice to a party).

63. 23 N.Y.3d 871, 873, 18 N.E.3d 379, 380, 993 N.Y.S.2d 668, 669 (2014); *see* Schozer v. William Penn Life Ins. Co. of N.Y., 84 N.Y.2d 639, 643, 644 N.E.2d 1353, 1355, 620 N.Y.S.2d 797, 799 (1994) (demonstrating that the best evidence rule protects against fraud, perjury, and inaccurate recollection by allowing the jury to judge a document by its own literal terms and "requires the production of an original writing where its contents are in dispute and sought to be proven.").

64. *Haggerty*, 23 N.Y.3d at 876, 18 N.E.3d at 382, 993 N.Y.S.2d at 671.

65. *Id.* at 876–77, 18 N.E.3d at 382–83, 993 N.Y.S.2d at 671–72.

66. *Id.*

sex and admit or deny the accusations against him.[67] In so holding, the Court summarized the applicable law as follows: "the People generally may not refer to a defendant's silence during their direct case, and, absent unusual circumstances, the People may not use a defendant's silence to impeach his or her trial testimony."[68] Moreover, the Court held that the error was not harmless, even if other evidence of the defendant's guilt was overwhelming.[69] In this regard, the Court reasoned that evidence of the defendant's selective silence, combined with the trial court's refusal to provide a curative instruction to the jury, was highly prejudicial, thus, resulting in a significant probability that, but for the error, the jurors would have acquitted defendant.[70]

In *People v. Ludwig*, the Court upheld the trial court's admission of testimony about a child complainant's prior consistent statements disclosing abuse, to wit, permitting the complainant's half-brother and mother to testify that the complainant revealed to them that she was being abused.[71] The Court concluded that said "testimony was admissible for the nonhearsay purpose of explaining to the jury how and when the sexual abuse came to light, resulting in an investigation and defendant's eventual arrest."[72] As such, the Court rejected the

67. 25 N.Y.3d 185, 194, 31 N.E.3d 103, 108, 8 N.Y.S.3d 641, 646 (2015); *see* People v. Conyers, 52 N.Y.2d 454, 459 & n.2, 420 N.E.2d 933, 935 & n.2, 438 N.Y.S.2d 741, 743 & n.2 (1981) (A defendant's silence is generally ambiguous and "of extremely limited probative worth," as there are many reasons why an individual may choose not to speak to police that are wholly unrelated to the veracity of his or her trial testimony, but that there is a substantial risk that jurors might "construe such silence as an admission and . . . draw an unwarranted inference of guilt.").

68. *Williams*, 25 N.Y.3d at 191, 31 N.E.3d at 106, 8 N.Y.S.3d at 644. Unusual circumstances permitting the use of a defendant's silence to impeach his or her trial testimony has only been found by the Court in two instances. *See* People v. Rothschild, 35 N.Y.2d 355, 360, 320 N.E.2d 639, 641–42, 361 N.Y.S.2d 901, 905 (1974) (inquiry on cross-examination was permissible because the defendant had a duty to inform his superior officers of any bribe and, in light of that duty, his failure to speak was patently inconsistent with defense asserted); People v. Savage, 50 N.Y.2d 673, 679, 409 N.E.2d 858, 861, 431 N.Y.S.2d 382, 384 (1980) (questioning was permissible impeachment because the defendant's conspicuous omission of exculpatory facts in his voluntary statement to police tended to show that his trial testimony was a recent fabrication).

69. *Williams*, 25 N.Y.3d at 194, 31 N.E.3d at 108, 8 N.Y.S.3d at 646.

70. *Id.*

71. 24 N.Y.3d 221, 231–32, 21 N.E.3d 1012, 1018–19, 997 N.Y.S.2d 351, 357–58 (2014).

72. *Id.* at 223, 21 N.E.3d at 1013, 997 N.Y.S.2d at 352; *see also, e.g.*, People v. Rosario, 100 A.D.3d 660, 661, 953 N.Y.S.2d 299, 300–01 (2d Dep't 2012) (recognizing that "nonspecific testimony about [a] child-victim's reports of sexual abuse [does] not constitute improper bolstering . . . [when] offered for the relevant, nonhearsay purpose of explaining the investigative process and completing the narrative of events leading to the defendant's arrest").

defendant's challenge to the testimony predicated on bolstering.[73] In the same case, the Court affirmed a ruling of the trial court to exclude the testimony of the defendant's mother, who was prepared to testify that she overheard the child complainant state that "she only tells what her mother tells she can say," proffered by the defendant as a complainant's prior inconsistent statement.[74] The Court held that this proffered testimony was inadmissible hearsay, not subject to any exception.[75]

In *People v. Cullen* (a companion case to *People v. Ludwig*), the Court similarly held that the trial court did not commit an abuse of discretion evidentiary error, when the prosecution was permitted "to elicit testimony about the fact and timing of complainant's revelations for the nonhearsay purpose of explaining the events," which precipitated in the sex abuse investigation and filing of charges against the defendant.[76] Two judges, concurring in result, also noted that the claimed error would likely have been held harmless, because the trial court confined the admitted statements to the police report and "prohibited witnesses from repeating the complainant's statements concerning the description of the crime itself."[77]

In *People v. Maldonado*, the defendant was convicted of depraved indifference murder as the result of causing a fatal collision with a pedestrian during a high-speed vehicular police chase.[78] The Court held that the trial evidence was legally insufficient[79] to support the

73. *Ludwig*, 24 N.Y.3d at 231–32, 21 N.E.3d at 1018–19, 997 N.Y.S.2d at 357–19; *see* People v. Smith, 22 N.Y.3d 462, 465, 5 N.E.3d 972, 973, 982 N.Y.S.2d 809, 810 (2013) ("The term 'bolstering' is used to describe the presentation in evidence of a prior consistent statement—that is, a statement that a testifying witness has previously made out of court that is in substance the same as his or her in-court testimony.").

74. *Ludwig*, 24 N.Y.3d at 233, 21 N.E.3d at 1019–20, 997 N.Y.S.2d at 358–59.

75. *Id.*

76. 24 N.Y.3d 1014, 1016, 21 N.E.3d 1009, 1011, 997 N.Y.S.2d 348, 350 (2014) (citing *Ludwig*, 24 N.Y.3d at 223, 997 N.Y.S.2d at 352, 21 N.E.3d at 1013).

77. *Id.* (Lippman, J., concurring in result); *see* People v. Crimmins, 36 N.Y.2d 230, 237, 326 N.E.2d 787, 791, 367 N.Y.S.2d 213, 218 (1975) (citing Chapman v. Cal., 386 U.S. 18, 24 (1967)) ("[An error is harmless when] there is no reasonable possibility that the error might have contributed to defendant's conviction and that it was thus harmless beyond a reasonable doubt.").

78. 24 N.Y.3d 48, 50, 18 N.E.3d 391, 393, 993 N.Y.S.2d 680, 682 (2014). "[K]nowingly pursu[ing] risky behavior that endangers others does not necessarily evince depraved indifference," as such, "the mens rea of depraved indifference will rarely be established by risky behavior alone." *Id.* at 53, 18 N.E.3d at 395, 993 N.Y.S.2d at 684; *see also* People v. Lewie, 17 N.Y.3d 348, 359, 953 N.E.2d 760, 766, 929 N.Y.S.2d 522, 528 (2011) ("[A] person who is depravedly indifferent is not just willing to take a grossly unreasonable risk to human life—that person does not care how the risk turns out.").

79. *Maldonado*, 24 N.Y.3d at 53, 18 N.E.3d at 395, 993 N.Y.S.2d at 684; *see* People v. Danielson, 9 N.Y.3d 342, 349, 880 N.E.2d 1, 5, 849 N.Y.S.2d 480, 484 (2007) (quoting People v. Acosta, 80 N.Y.2d 665, 672, 609 N.E.2d 518, 522, 593 N.Y.S.2d 978, 982 (1993))

defendant's depraved indifference murder conviction, because the circumstances of the defendant's "police chase [did] not fit within the narrow category of cases wherein the facts evince a defendant's utter disregard for human life."[80] Key to the Court's reasoning was that the "defendant sought to mitigate the consequences of his reckless driving," when he swerved in an attempt to avoid hitting other vehicles; conduct which evidenced the defendant's lack of depraved indifference.[81] Likewise, although the defendant drove on the wrong side of the road, the Court concluded that his "conduct was episodic and part of his effort to avoid other vehicles while evading the police [and that] [t]his conscious avoidance of risk is the antithesis of a complete disregard for the safety of others."[82] As such, the Court reduced the defendant's conviction to manslaughter in the second degree.[83]

In *People v. Scott*, the Court concluded that the record contained legally sufficient evidence to support the jury's conclusion that the defendant was acting in concert with the co-defendant to cause the death of the alleged victim.[84] Key to the Court's reasoning, was that both the defendant and the co-defendant "act[ed] in a manner intending to cause harm" to the alleged victim.[85]

In *People v. Rivera*, the Court held that the trial court committed reversible evidentiary error by allowing the defendant's psychiatrist to testify about the defendant's admission that he abused the alleged

(noting that a conviction is legally insufficient when there is no "valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt").

80. *Maldonado*, 24 N.Y.3d at 50, 18 N.E.3d at 393, 993 N.Y.S.2d at 682.

81. *Id.* at 53–54, 18 N.E.3d at 395, 993 N.Y.S.2d at 685 (citing People v. Heidgen, 22 N.Y.3d 259, 276, 3 N.E.3d 657, 666, 980 N.Y.S.2d 320, 329 (2013)); *see also* People v. Prindle, 16 N.Y.3d 768, 771, 944 N.E.2d 1130, 1132, 919 N.Y.S.2d 491, 493 (2011); N.Y. PENAL LAW § 125.15(1) (McKinney 2009) ("A person is guilty of manslaughter in the second degree when: [h]e recklessly causes the death of another person.").

82. *Maldonado*, 24 N.Y.3d at 54, 18 N.E.3d at 396, 993 N.Y.S.2d at 685. "What matters in a depraved indifference analysis is that a defendant—even one 'willing to take a grossly unreasonable risk to human life'—'does not care how the risk turns out.'" *Id.* at 56, 18 N.E.3d at 397, 993 N.Y.S.2d at 686–87 (quoting *Lewie*, 17 N.Y.3d at 359, 953 N.E.2d at 766, 929 N.Y.3d at 528).

83. *Id.* at 58, 18 N.E.3d at 399, 993 N.Y.S.2d at 688.

84. 25 N.Y.3d 1107, 1110, 35 N.E.3d 476, 477, 14 N.Y.S.3d 308, 309 (2015); *see also* N.Y. PENAL LAW § 20.00 (McKinney 2009) (stating that when a principal commits a crime, the principal's accomplice may be held liable where the accomplice "acting with the mental culpability required for the commission [of the crime] he solicits, requests, commands, importunes, or intentionally aids [the principal] to engage in [the commission of the crime]"); People v. La Belle, 18 N.Y.2d 405, 412, 222 N.E.2d 727, 730, 276 N.Y.S.2d 105, 110 (1966) (noting that to be liable under an acting-in-concert theory, the accomplice and principal must share a "community of purpose").

85. *Scott*, 25 N.Y.3d at 1110, 35 N.E.3d at 477, 14 N.Y.S.3d at 309.

victim.[86] The Court reasoned that admission of said testimony violated the physician-patient privilege under New York Civil Practice Laws and Rules (CPLR) 4504(a).[87] In so holding, the Court rejected the argument that the admission was within any exception to non-disclosure, under CPLR 4504(a).[88] The Court further reasoned that:

> Regardless of whether a physician is required or permitted by law to report instances of abuse or threatened future harm to authorities, which may involve the disclosure of confidential information, it does not follow that such disclosure necessarily constitutes an abrogation of the evidentiary privilege a criminal defendant enjoys under CPLR 4504(a).[89]

The error was not harmless as, absent eyewitness or physical evidence, the prosecution relied primarily on the psychiatrist's testimony to prove the defendant's guilt.[90]

In *People v. Williams*, the Court affirmed a ruling of the trial court that the grand jury evidence was legally insufficient to find that the defendant acted with depraved indifference to human life, so as to support a charge of reckless endangerment in the first degree under New York Penal Law section 120.25.[91] In this case, the defendant engaged in unprotected sex with the alleged victim, without disclosing his HIV positive status.[92] Key to the Court's reasoning was the fact that there was no evidence that the "defendant exposed the victim to the risk of

86. 25 N.Y.3d 256, 260, 33 N.E.3d 465, 467, 11 N.Y.S.3d 509, 511 (2015).

87. *Id.*; *see* N.Y. C.P.L.R. 4504(a) (McKinney 2007) (providing, in relevant part, that "[u]nless the patient waives the privilege, a person authorized to practice medicine . . . shall not be allowed to disclose any information which he [or she] acquired in attending a patient in a professional capacity, and which was necessary to enable him [or her] to act in that capacity.").

88. *Rivera*, 25 N.Y.3d at 261, 263, 33 N.E.3d at 468, 470, 11 N.Y.S.3d at 512, 514; *see* N.Y. C.P.L.R. 4504(b) (McKinney 2007) (requiring certain physicians and other health professionals "to disclose information indicating that a patient who is under the age of sixteen years has been the victim of a crime").

89. *Rivera*, 25 N.Y.3d at 260–61, 33 N.E.3d at 468, 11 N.Y.S.3d at 512.

90. *Id.* at 265, 33 N.E.3d at 470–71, 11 N.Y.S.3d at 514–15.

91. 24 N.Y.3d 1129, 1131, 26 N.E.3d 1160, 1162, 3 N.Y.S.3d 305, 307 (2015); *see* N.Y. PENAL LAW § 120.25 (McKinney 2009) (noting that a person is guilty of the crime of reckless endangerment in the first degree when: "under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person"); People v. Suarez, 6 N.Y.3d 202, 212–13, 844 N.E.2d 721, 729, 811 N.Y.S.2d 267, 275 (2005) ("A defendant may be convicted of [a] depraved indifference [crime] when but a single person is endangered in only a few rare circumstances . . . [specifically, where the defendant exhibits] wanton cruelty, brutality or callousness directed against a particularly vulnerable victim, combined with utter indifference to the life or safety of the helpless target of the perpetrator's inexcusable acts.").

92. *Williams*, 24 N.Y.3d at 1130–31, 26 N.E.3d at 1161, 3 N.Y.S.3d at 306–07.

HIV infection out of any malevolent desire for the victim to contract the virus, or that he was utterly indifferent to the victim's fate."[93]

V. GUILTY PLEAS

In *People v. Turner*, the Court held that vacatur of the defendant's plea was required where the defendant did not have sufficient knowledge of the terms of the plea at the plea allocution and did not have a sufficient opportunity to move to withdraw the plea, once advised of its terms.[94] In this case, the trial court did not tell the defendant, at time of the plea, that the sentence would include a PRS term and only notified the defendant of the same during sentencing.[95]

In *People v. Sanders*, the Court held that a waiver of appeal colloquy was sufficient, to wit, "no further elaboration was necessary on the phrase 'right to appeal your conviction and sentence to the Appellate Division Second Department.'"[96] The Court noted that, although "the better practice would have been to define the nature of the right to appeal more fully," no further elaboration was necessary; given the entirety of the waiver colloquy and that the right to appeal was adequately described without "lumping it into the panoply of rights normally forfeited upon a guilty plea."[97] The Court also took note of the defendant's extensive experience with the criminal justice system, including, "multiple prior guilty pleas that resulted in terms of imprisonment."[98]

93. *Id.* at 1132, 26 N.E.3d at 1162, 3 N.Y.S.3d at 307–08 (citing People v Lewie, 17 N.Y.3d 348, 359, 953 N.E.2d 760, 766, 929 N.Y.S.2d 522, 528 (2011)).

94. 24 N.Y.3d 254, 258–59, 22 N.E.3d 179, 181–82, 997 N.Y.S.2d 671, 673–74 (2014). "[A] trial court has the constitutional duty to ensure that a defendant, before pleading guilty, has a full understanding of what the plea connotes and its consequences." *Id.* at 258, 22 N.E.3d at 181, 997 N.Y.S.2d at 673 (quoting People v. Catu, 4 N.Y.3d 242, 244–45, 825 N.E.2d 1081, 1082, 792 N.Y.S.2d 887, 888 (2005)). "To meet due process requirements, a defendant 'must be aware of the postrelease supervision component of that sentence in order to knowingly, voluntarily and intelligently choose among alternative courses of action.'" *Id.* (quoting *Catu*, 4 N.Y.3d at 245, 825 N.E.2d at 1082, 792 N.Y.S.2d at 888). "Without such procedures, vacatur of the plea is required." *Id.* (citing *Catu*, 4 N.Y.3d at 245, 825 N.E.2d at 1082, 792 N.Y.S.2d at 888).

95. *Turner*, 24 N.Y.3d at 256, 22 N.E.2d at 180, 997 N.Y.S.2d at 672.

96. 25 N.Y.3d 337, 342, 34 N.E.3d 344, 347, 12 N.Y.S.3d 593, 596 (2015).

97. *Id.* at 341–42, 34 N.E.3d at 347, 12 N.Y.S.3d at 596.

98. *Id.* at 342, 34 N.E.3d at 347, 12 N.Y.S.3d at 596. In evaluating the sufficiency of a waiver colloquy, the criminal experience and background of the accused is a relevant factor. *Id.* at 341, 34 N.E.3d at 347, 12 N.Y.S.3d at 596 (citing People v. Bradshaw, 18 N.Y.3d 257, 264–65, 961 N.E.2d 645, 650, 938 N.Y.S.2d 254, 259 (2011)); *see also* People v. Lopez, 6 N.Y.3d 248, 256, 844 N.E.2d 1145, 1149, 811 N.Y.S.2d 623, 627 (2006) ("[A] trial court need not engage in any particular litany when apprising a defendant pleading guilty of the individual rights abandoned.").

In *People v. Moore*, the Court held that the defendant's guilty plea was not made knowingly, voluntarily, and intelligently, where the trial court did not advise the defendant of the constitutional rights he was waiving.[99]

VI. IDENTIFICATION OF DEFENDANT

In *People v. Pacquette*, the Court held that a detective's viewing of the defendant, after the transaction and confirmation that the backup unit arrested the correct person, was not merely confirmatory, thereby, obviating the need for the prosecution to provide a CPL section 710.30 notice to the defense.[100] The Court held that surveillance of the defendant by the detective did not "constitute an 'observation of . . . defendant . . . so clear that the identification could not be mistaken' thereby obviating the risk of undue suggestiveness."[101]

In *People v. Allen*, the Court held that the defendant's claimed error in the trial court's admission of a lineup identification, "must be deemed harmless beyond a reasonable doubt when considered in light of the overwhelming evidence of defendant's guilt."[102] Facts key to the Court's reasoning included "three eyewitnesses, two of whom knew the defendant personally, ballistics evidence, a confession to one of the witnesses an hour after the shooting, and defendant's strenuous efforts to avoid arrest."[103]

99. 24 N.Y.3d 1030, 1031, 22 N.E.3d 1008, 1008–09, 998 N.Y.S.2d 140, 140–41 (2014); *see also* People v. Tyrell, 22 N.Y.3d 359, 365–66, 4 N.E.3d 346, 350, 981 N.Y.S.2d 336, 340 (2013) (quoting People v. Harris, 61 N.Y.2d 9, 17, 459 N.E.2d 170, 173, 471 N.Y.S.2d 61, 64 (1983) ("Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused intelligently and understandingly rejected his constitutional rights. Anything less is not waiver.").

100. 25 N.Y.3d 575, 579, 35 N.E.3d 845, 848, 14 N.Y.S.3d 775, 778 (2015); *see* N.Y. CRIM. PROC. LAW § 710.30 (McKinney 2011).

101. *Id.* at 580, 35 N.E.3d at 849, 14 N.Y.S.3d at 779 (quoting People v. Boyer, 6 N.Y.3d 427, 432, 846 N.E.2d 461, 464, 813 N.Y.S.2d 31, 34 (2006)).

> When the People intend to offer at trial "testimony regarding an observation of the defendant either at the time or place of the commission of the offense or upon some other occasion relevant to the case, to be given by a witness who has previously identified him as such," the statute requires the People to notify the defense of such intention within 15 days after arraignment and before trial.

Id. at 578–79, 35 N.E.3d at 848, 14 N.Y.S.3d at 778 (quoting N.Y. CRIM. PROC. LAW § 710.30(1)(b)).

102. 24 N.Y.3d 441, 450, 24 N.E.3d 586, 591, 999 N.Y.S.2d 350, 355 (2014) (quoting People v. Owens, 74 N.Y.2d 677, 678, 541 N.E.2d 400, 401, 573 N.Y.S.2d 371, 372 (1989)).

103. *Id.*

VII. JURY TRIAL AND INSTRUCTION

In *People v. Silva*, the Court considered whether a mode of proceedings error occurred under CPL section 310.30 and *People v. O'Rama*, where error occurs when a trial court "accepts a verdict without affirmatively acknowledging or responding to a jury's substantive request for information during deliberations."[104] In this case, the jury sent a note which was marked, but nothing in the trial court's record demonstrated that the trial court informed the parties about the note prior to the jury reaching a verdict.[105] Similarly, in the companion case, *People v. Hanson*, two notes were issued by the jury and marked, but nothing in the record reflected that the trial court was aware of the notes or that the notes were shared with the parties before the jury returned a verdict.[106] In both instances, the Court held that the trial court's failure to apprise counsel about the specific contents of a substantive note from a deliberating jury violated the fundamental tenets of CPL section 310.30 and, as such, qualified as an *O'Rama* mode of proceedings error.[107] In so holding, the Court reiterated the requirement that "[t]he record . . . must indicate compliance with adequate procedures under *O'Rama* because reviewing courts 'cannot assume' that the proper procedure was utilized when the record is devoid of information as to how jury notes were handled."[108]

In *People v. Dubarry*, the Court held that a defendant could not be subject to multiple liability for a single homicide under a "transferred intent" theory, where defendant killed the victim while attempting to

104. *People v. Silva*, 24 N.Y.3d 294, 297, 22 N.E.3d 1022, 1024, 998 N.Y.S.2d 154, 156 (2014) (citing People v. O'Rama, 78 N.Y.2d 270, 579 N.E.2d 189, 574 N.Y.S.2d 159 (1991)).

> CPL 310.30 is the primary statutory authority governing the handling of requests for information from a deliberating jury. It requires trial courts to give "notice to both the people and counsel for the defendant" before responding to a note from a deliberating jury [and] . . . a court's "core responsibility under the statute is both to give meaningful notice to counsel of the specific content of the jurors' request—in order to ensure counsel's opportunity to frame intelligent suggestions for the fairest and least prejudicial response—and to provide a meaningful response to the jury."

Id. at 298–99, 22 N.E.3d at 1025, 998 N.Y.S.2d at 157 (first quoting N.Y. CRIM. PROC. LAW § 310.30 (McKinney 2002); and then quoting People v. Kisoon, 8 N.Y.3d 129, 134, 863 N.E.2d 990, 992, 831 N.Y.S.2d 738, 740 (2007)).

105. *Id.* at 297, 22 N.E.3d at 1024, 998 N.Y.S.2d at 156.

106. *Id.* at 298, 22 N.E.3d at 1024, 998 N.Y.S.2d at 156 (citing People v. Hanson, 100 A.D.3d 771, 771, 953 N.Y.S.2d 684, 685 (2d Dep't 2012)).

107. *Id.* at 299–300, 22 N.E.3d at 1026, 998 N.Y.S.2d at 158 (citing *Kisoon*, 8 N.Y.3d at 133, 863 N.E.2d at 992, 831 N.Y.S.2d at 740); *Hanson*, 100 A.D.3d at 771, 953 N.Y.S.2d at 685.

108. *Silva*, 24 N.Y.3d at 300, 22 N.E.3d at 1026, 998 N.Y.S.2d at 158 (quoting People v. Walston, 23 N.Y.3d 986, 990, 14 N.E.3d 377, 380, 991 N.Y.S.2d 24, 27 (2014)).

kill someone else.[109] Specifically, the Court concluded that that defendant could not be convicted of depraved indifference murder and intentional murder on a "transferred intent" theory, in a case involving the death of the same person and, as such, held that the trial court "erroneously submitted to the jury both charges in the conjunctive rather than in the alternative."[110] In so holding, the Court resolved a split in the law between the Third Department[111] and the First,[112] Second,[113] and Fourth Departments,[114] with regard to the same issue.[115]

In *People v. Kims*, the Court held that the trial court committed reversible error by charging the jury with the "drug factory" presumption, under New York Penal Law section 220.25(2).[116] Under

109. 25 N.Y.3d 161, 165, 31 N.E.3d 86, 89, 8 N.Y.S.3d 624, 627 (2015). "The purpose of the transferred intent theory is 'to ensure that a person will be prosecuted for the crime [that person] intended to commit even when, because of [mistake or other happenstance,] the intended target was not the actual victim.'" *Id.* at 171, 31 N.E.3d at 93, 8 N.Y.S.3d at 631 (quoting People v. Fernandez, 88 N.Y.2d 777, 781, 673 N.E.2d 910, 913, 650 N.Y.S.2d 625, 628 (1996)); *see also Fernandez*, 88 N.Y.2d at 781, 673 N.E.2d at 913, 650 N.Y.S.2d at 628 (citing N.Y. PENAL LAW § 125.25(1) (McKinney 2009)) ("[W]here the resulting death is of a third person who was not the defendant's intended victim, the defendant may nonetheless be held to the same level of criminal liability as if the intended victim were killed."). The "transferred intent" theory is applied where a defendant cannot be convicted of the crime at issue, because the mental and physical elements do not concur as to either the intended or the actual victim and to permit a jury to find a defendant guilty of intentional murder, even though technically lacking an intentional state of mind with respect to the actual victim. *Dubarry*, 25 N.Y.3d at 171, 31 N.E.3d at 93, 8 N.Y.S.3d at 631 (citing *Fernandez*, 88 N.Y.2d at 781, 673 N.E.2d at 913, 650 N.Y.S.2d at 628)); *see also Fernandez*, 88 N.Y.2d at 782, 673 N.E.2d at 913, 650 N.Y.S.2d at 628 (citing Ford v. State, 625 A.2d 984, 999 (Md. 1993)) ("The doctrine thus sets up a fiction that should not be employed to 'multiply criminal liability, but to prevent a defendant who has committed all the elements of a crime (albeit not upon the same victim) from escaping responsibility for that crime.'").

110. *Dubarry*, 25 N.Y.3d at 165, 31 N.E.3d at 89, 8 N.Y.S.3d at 627.

111. *See, e.g.*, People v. Molina, 79 A.D.3d 1371, 1374, 914 N.Y.S.2d 331, 336 (3d Dep't 2010) (citing People v. Timmons, 78 A.D.3d 1241, 1243, 910 N.Y.S.2d 290, 292 (3d Dep't 2010)) (stating that defendant may be found guilty of either intentional murder under the doctrine of "transferred intent," or depraved indifference murder for shooting at an intended victim and killing a bystander).

112. *See, e.g.*, People v. Monserate, 256 A.D.2d 15, 15–16, 682 N.Y.S.2d 25, 26 (1st Dep't 1998) (stating that submission of intentional murder and depraved indifference murder in the conjunctive upheld).

113. *See, e.g.*, People v. Douglas, 73 A.D.3d 30, 33, 901 N.Y.S.2d 57, 60 (2d Dep't 2010) (stating the rule that a defendant cannot be guilty of intentional and reckless crime as to the same individual does not apply where defendant lacks an intent to injure the victim, but the crime is deemed intentional under a theory of "transferred intent").

114. *See, e.g.*, People v. Henderson, 78 A.D.3d 1506, 1507, 911 N.Y.S.2d 521, 522 (4th Dep't 2010) (holding that a defendant may be convicted of both intentional and depraved indifference crimes).

115. *Dubarry*, 25 N.Y.3d at 170, 31 N.E.3d at 93, 8 N.Y.S.3d at 631.

116. 24 N.Y.3d 422, 432, 24 N.E.3d 573, 580, 999 N.Y.S.2d 337, 344 (2014); *see*

the same statute,

> [A] court may charge the jury with a permissible presumption, under which the jury may assume the requisite criminal possession simply because the defendant, while not in actual physical possession, is within a proximate degree of closeness to drugs found in plain view, under circumstances that evince the existence of a drug sale operation.[117]

The Court reasoned that the defendant was not in "close proximity" to the drugs at the time the illegal substances were found by the police, because the defendant was found outside the premises (several feet from the front door of the building where the apartment was located); once outside, the defendant entered and locked his vehicle before the officers approached and arrested him; and the defendant was not in immediate flight from the premises.[118] Accordingly, the Court held that the defendant was not sufficiently near the drugs, so as to evince the defendant's participation in the alleged drug sales operation, as required for the trial court to properly charge the jury with the "drug factory" presumption.[119] Moreover, the error was not harmless, because there was no way to discern whether the jury relied on the erroneous "drug factory" presumption charge or the constructive possession instruction, in convicting the defendant.[120]

In *People v. Cooke*, the Court reaffirmed that "[t]he trial court's failure to make a finding of necessity for [a] stun belt's use does not constitute an unwaivable mode of proceedings error."[121] As the defendant failed to object and, in fact, consented to wearing a stun belt

N.Y. PENAL LAW § 220.25(2) (McKinney 2008) ("The presence of a narcotic drug, narcotic preparation, marihuana or phencyclidine in open view in a room, other than a public place, under circumstances evincing an intent to unlawfully mix, compound, package or otherwise prepare for sale such controlled substance is presumptive evidence of knowing possession thereof by each and every person in close proximity to such controlled substance at the time such controlled substance was found . . . .").

117. *Kims*, 24 N.Y.3d at 432, 24 N.E.3d at 580, 999 N.Y.S.2d at 344 (citing People v. Daniels, 37 N.Y.2d 624, 630–31, 339 N.E.2d 139, 142, 376 N.Y.S.2d 436, 441–42 (1975)).

118. *Id.* at 436, 24 N.E.3d at 583, 999 N.Y.S.2d at 347.

119. *Id.* at 435, 24 N.E.3d at 582–83, 999 N.Y.S.2d at 346–47.

120. *Id.* at 437–38, 24 N.E.3d at 584, 999 N.Y.S.2d at 348 (citing People v. Martinez, 83 N.Y.2d 26, 35, 628 N.E.2d 1320, 1325, 607 N.Y.S.2d 610, 615 (1993)).

121. 24 N.Y.3d 1196, 1197, 27 N.E.3d 469, 469, 3 N.Y.S.3d 755, 755 (2015) (citing People v. Buchanan, 13 N.Y.3d 1, 4, 912 N.E.2d 553, 555, 884 N.Y.S.2d 337, 339 (2009)); *cf. Buchanan*, 13 N.Y.3d at 4, 912 N.E.2d at 555, 884 N.Y.S.2d at 339 ("[A] stun belt may not be required unless the trial court makes findings on the record showing that the particular defendant before him needs such a restraint. A formal hearing may not be necessary, but the trial court must conduct a sufficient inquiry to satisfy itself of the facts that warrant the restraint.").

at trial, the Court held that the defendant waived the "contention that he was denied a fair trial on the ground that he was restrained by means of that security device."[122]

VIII. RIGHT TO CONFRONTATION AND PUBLIC TRIAL

In *People v. Garcia*, the Court considered a defendant's right to confrontation within the context of a testimonial statement.[123] The Court found a violation of the defendant's confrontation rights, because the detective's testimony "went beyond the permissible bounds of 'provid[ing] background information as to how and why the police pursued . . . defendant.'"[124] Specifically, the Court held that the detective's testimony, to wit, that the victim's sister stated that there was friction between the defendant and the victim, "indisputably was a testimonial statement inasmuch as it was procured for the primary purpose of creating an out-of-court substitute for the testimony" of the victim's sister.[125] In contrast, in the companion case of *People v. DeJesus*, the Court held that there was no basis to characterize testimony used against the defendant as a testimonial statement.[126] Here, in response to an inquiry as to whether there came a time when the police began to look for a specific suspect, the detective testified "that the police 'beg[a]n specifically looking for [defendant]' at 4:00 p.m. that afternoon without having 'spoken to [the eyewitness].'"[127] The Court concluded that said statement was "simply . . . not an out-of-court substitute for trial testimony."[128]

In *People v. Dubarry*, the Court also held that the trial court

122. *Cooke*, 24 N.Y.3d at 1197, 27 N.E.3d at 469, 3 N.Y.S.3d at 755 (citing People v. Iannone, 45 N.Y.2d 589, 600, 384 N.E.2d 656, 663–64, 412 N.Y.S.2d 110, 117 (1978)).

123. 25 N.Y.3d 77, 80–81, 30 N.E.3d 137, 139, 7 N.Y.S.3d 246, 248 (2015). As a general rule, "[u]nder the Sixth Amendment of the Federal Constitution and article I, § 6 of the State Constitution, a criminal defendant has the right to be confronted with the witnesses against him or her." *Id.* at 85, 30 N.E.3d at 141, 7 N.Y.S.3d at 250 (first citing U.S. CONST. amend. VI; and then citing N.Y. CONST. art. I, § 6). In addition, "the Federal Confrontation Clause bars 'admission of testimonial statements of a witness who did not appear at trial,' unless that witness was unavailable to testify and the defendant had a prior opportunity to cross-examine him or her." *Id.* at 85, 30 N.E.3d at 142, 7 N.Y.S.3d at 251 (citing Crawford v. Washington, 541 U.S. 36, 53–54 (2004)).

124. *Id.* at 86, 30 N.E.3d at 143, 7 N.Y.S.3d at 252 (citing People v. Tosca, 98 N.Y.2d 660, 661, 773 N.E.2d 1014, 1014, 746 N.Y.S.2d 276, 276 (2002)).

125. *Id.* (citing People v. Pealer, 20 N.Y.3d 447, 453, 985 N.E.2d 903, 906, 962 N.Y.S.2d 592, 595 (2013)).

126. *Garcia*, 25 N.Y.3d at 87–88, 30 N.E.3d at 143–44, 7 N.Y.S.3d at 252–53.

127. *Id.*

128. *Id.* at 88, 30 N.E.3d at 144, 7 N.Y.S.3d at 253 (citing *Pealer*, 20 N.Y.3d at 453, 985 N.E.2d at 906, 962 N.Y.S.2d at 595).

committed reversible error by admitting the grand jury testimony of a witness unwilling to testify at trial based on the exception to defendant's Sixth Amendment right to confrontation, used in instances where a witness is unwilling to testify as the result of a defendant's conduct or the actions of others with the defendant's knowing acquiescence.[129] Key to the Court's analysis was a lack of evidence linking the defendant to the alleged threats made against the witness and her family.[130] For example, the witness at issue could not state when, where, by whom, or under what circumstances she and/or her family were allegedly threatened.[131] As such, the Court reasoned that there was no support for any inference that the defendant planned or engineered the alleged threats.[132]

In *People v. Garay*, the defendant asserted that his Sixth Amendment right to a public trial was violated because the trial court failed to consider, and did not articulate any specific findings of "reasonable alternatives," to closing the courtroom, as required by the four prong standard for courtroom closure set out by the United States Supreme Court.[133] The Court rejected the defendant's argument that "United States Supreme Court precedent requires a trial court to

129. 25 N.Y.3d 161, 174, 31 N.E.3d 86, 95–96, 8 N.Y.S.3d 624, 633–34 (2015) (citing People v. Geraci, 85 N.Y.2d 359, 365, 649 N.E.2d 817, 820, 625 N.Y.S.2d 469, 472 (1995)). Although a defendant has a federal constitutional right to confront the witnesses against him and the grand jury testimony of an unavailable witness is inadmissible as evidence-in-chief, an exception to these prohibitions applies where it is established by clear and convincing evidence that the witness's unavailability was procured by misconduct on the part of the defendant or by the actions of others with the defendant's knowing acquiescence. *Id.* (citing *Geraci*, 85 N.Y.2d at 366, 649 N.E.2d at 821, 625 N.Y.S.2d at 473); *see* U.S. CONST. amend. VI; Crawford v. Washington, 541 U.S. 36, 53–54 (2004); N.Y. CRIM. PROC. LAW § 670.20(1) (McKinney 2009); *Geraci*, 85 N.Y.2d at 365, 649 N.E.2d at 820, 625 N.Y.S.2d at 472 (citing Holtzman v. Hellenbrand, 92 A.D.2d 405, 412–13, 460 N.Y.S.2d 591, 596 (2d Dep't 1983)); People v. Maher, 89 N.Y.2d 456, 461, 677 N.E.2d 728, 730, 654 N.Y.S.2d 1004, 1006 (1997) (citing *Geraci*, 85 N.Y.2d at 370, 649 N.E.2d at 824, 625 N.Y.S.2d at 476). In such a limited instance, the defendant forfeits the right to confrontation and such out-of-court statements are admissible. *Dubarry*, 25 N.Y.3d at 174, 31 N.E.3d at 96, 8 N.Y.S.3d at 634 (citing *Geraci*, 85 N.Y.2d at 366, 649 N.E.2d at 821, 625 N.Y.S.2d at 473).

130. *Id.* at 175, 31 N.E.3d at 96, 8 N.Y.S.3d at 634.

131. *Id.*

132. *Id.*

133. 25 N.Y.3d 62, 65, 30 N.E.3d 145, 146, 7 N.Y.S.3d 254, 255 (2015); *see* Waller v. Ga., 467 U.S. 39, 44 (1984) (quoting Press-Enter. Co. v. Super. Ct. of Cal., 464 U.S. 501, 510 (1984)) ("The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered."); Presley v. Ga., 558 U.S. 209, 214 (2010) (holding that "trial courts are required to consider alternatives to closure even when they are not offered by the parties").

explain, on the record, the alternatives to closure that it considered," rather, holding that, "where the record establishes, as it does here, the need to close a portion of the proceedings, 'it can be implied that the trial court, in ordering closure, determined that no lesser alternative would protect the articulated interest.'"[134]

In *People v. Scott*, the Court rejected the defendant's argument that the trial court committed a mode of proceedings error when it gave the jury a supplemental instruction regarding a clarification of the dates alleged in the indictment in the defendant's absence.[135] After both parties agreed that the trial court could make the correction in their absence, the trial court informed the jury that it received the wrong dates and, further, informed the jury of the correct dates of the alleged crimes.[136] As such, the Court concluded that the trial court's clarification of the dates of the crimes in the indictment to the jury did not require the defendant's presence.[137]

IX. RIGHT TO COUNSEL

In *People v. Carr*, the Court held that the trial court's in camera interviews with a key witness for the prosecution regarding why he repeatedly failed to be present on time for court, without the defendants or their counsel present, violated the defendants' Sixth Amendment right to counsel.[138] The Court determined that the in camera proceeding involved substantive issues, as opposed to ministerial matters.[139] In particular, the trial court disclosed to the parties that the witness looked tired and disheveled, a condition possibly caused by the use of crack cocaine and methadone.[140] The Court reasoned that this information was material, as the same could have been critical to defense counsel's

134. *Garay*, 25 N.Y.3d at 70, 30 N.E.3d at 149, 7 N.Y.S.3d at 258 (quoting People v. Echevarria, 21 N.Y.3d 1, 15, 989 N.E.2d 9, 17–18, 966 N.Y.S.2d 747, 755–56 (2013)).

135. 25 N.Y.3d 1107, 1110, 35 N.E.3d 476, 477, 14 N.Y.S.3d 308, 309 (2015).

136. *Id.* at 1110–11, 35 N.E.3d at 478, 14 N.Y.S.3d at 310.

137. *Id.* at 1111, 35 N.E.3d at 478, 14 N.Y.S.3d at 310 (citing People v. Mehmedi, 69 N.Y.2d 759, 760, 505 N.E.2d 610, 610–11, 513 N.Y.S.2d 100, 100 (1987)).

138. 25 N.Y.3d 105, 107, 30 N.E.3d 865, 866, 8 N.Y.S.3d 222, 223 (2015). "Absent a substantial justification, courts must not examine witnesses about nonministerial matters in camera without counsel present or ex parte." *Id.* at 110, 30 N.E.3d at 868, 8 N.Y.S.3d at 225 (citing People v. Contreras, 12 N.Y.3d 268, 272–73, 907 N.E.2d 282, 285, 879 N.Y.S.2d 369, 372 (2009)). Furthermore, "[t]he denial of the right to counsel at trial 'is of constitutional dimension' and is not subject to harmless error analysis." *Id.* at 112, 30 N.E.3d at 869, 8 N.Y.S.3d at 226 (quoting People v. Hodge, 53 N.Y.2d 313, 320, 423 N.E.2d 1060, 1064, 441 N.Y.S.2d 231, 235 (1981)).

139. *Carr*, 25 N.Y.3d at 113, 30 N.E.3d at 870, 8 N.Y.S.3d at 227.

140. *Id.*

ability to cross examine and impeach the witness.[141]

In *People v. Garay,* the Court held that the trial court's discussion regarding replacing a sick juror with an alternate juror, while the defendant's counsel was absent, was not a mode of proceedings error.[142] Key to the Court's reasoning was the fact that defense counsel knew about the sick juror and was in the courtroom when the trial court told the alternate juror to take the seat of the sick juror.[143] Thus, the Court concluded that "[i]f counsel had any objection to the replacement of the juror, including a desire to be heard further on the issue, he had the time and the opportunity to make his position known."[144] Accordingly, the Court decided that it was incumbent upon defense counsel to raise an objection before the trial proceeded and, as no objection was made, the Court held that the defendant failed to preserve his right to counsel claim for appellate review.[145]

In *People v. Washington*, the Court held that defense counsel's comments in response to the trial court's questions regarding the defendant's allegations of ineffectiveness did not establish a conflict of interest, thereby entitling the defendant to appointment of new counsel.[146] The Court reasoned that no conflict of interest existed, because defense counsel never strayed beyond a factual explanation of his efforts on his client's behalf and did not suggest that the defendant's claims lacked merit, but rather, only informed the trial court when and for how long he met with defendant; what they discussed; what the defense strategy was at trial; and what discovery he gave to defendant.[147]

In *People v. O'Daniel*, the Court rejected the defendant's argument

141. *Id.*

142. 25 N.Y.3d at 67, 30 N.E.3d at 147, 7 N.Y.S.3d at 256 (quoting People v. Gray, 86 N.Y.2d 10, 21, 652 N.E.2d 919, 922, 629 N.Y.S.2d 173, 176 (1995)).

143. *Id.* at 67–68, 30 N.E.3d at 148, 7 N.Y.S.3d at 257.

144. *Id.* at 68, 30 N.E.3d at 148, 7 N.Y.S.3d at 257.

145. *Id.* The Court cautioned that "[c]ertainly, the better practice would have been for the trial judge to await counsel's arrival before placing his decision regarding the juror on the record." *Id.*

146. 25 N.Y.3d 1091, 1095, 34 N.E.3d 853, 856–57, 13 N.Y.S.3d 343, 346–47 (2015).

147. *Id.*; *see also* People v. Sides, 75 N.Y.2d 822, 824, 551 N.E.2d 1233, 1234, 552 N.Y.S.2d 555, 556 (1990) ("The right of an indigent criminal defendant to the services of a court-appointed lawyer does not encompass a right to appointment of successive lawyers at defendant's option." (citing People v. Sawyer, 57 N.Y.2d 12, 18–19, 438 N.E.2d 1133, 1136, 453 N.Y.S.2d 418, 421 (1982)). However, a defendant may be entitled to new counsel "upon showing 'good cause for a substitution,' such as a conflict of interest or other irreconcilable conflict with counsel." (quoting People v. Medina, 44 N.Y.2d 199, 208, 375 N.E.2d 768, 772, 404 N.Y.S.2d 588, 593 (1978))).

that, when defense counsel moved for adjournment, the trial court was obliged to inquire of the defendant whether the defendant was seeking new counsel.[148] The Court reasoned that the trial court did not violate the defendant's constitutional rights by denying his adjournment motions, as nothing was communicated to the trial court to suggest that the defendant was requesting an adjournment to allow himself the opportunity to retain new counsel.[149]

In *People v. Spears*, the Court affirmed the trial court's exercise of discretion in refusing to grant the defendant's request for an adjournment, to allow the defendant to withdraw his guilty plea.[150] Although the defendant claimed that his fundamental right to assistance of counsel was at stake, to wit, that he was unable to speak with counsel regarding withdrawing his plea, the Court concluded that the defendant conferred with counsel on the day of sentencing and, moreover, neither the defendant nor his counsel was able to articulate a ground upon which the defendant's plea could be withdrawn.[151]

In *People v. McLean*, the Court held that the police had an "excellent" reason to believe that the attorney-client relationship ceased between the defendant and his attorney, who represented him in a prior robbery prosecution.[152] Prior to questioning the defendant about an unrelated murder, the police visited the defendant's attorney and asked defense counsel whether he still represented the defendant and defense counsel responded that said representation had concluded.[153] Based on this, the Court reasoned that, prior to questioning the defendant, the police discharged their burden to determine whether the prior attorney-client relationship terminated.[154] Accordingly, the Court held that the

148. 24 N.Y.3d 134, 138, 21 N.E.3d 209, 212, 996 N.Y.S.2d 580, 583 (2014).

149. *Id.* at 138–39, 21 N.E.3d at 212, 996 N.Y.S.2d at 583; *see also* People v. Arroyave, 49 N.Y.2d 264, 271, 401 N.E.2d 393, 397, 425 N.Y.S.2d 282, 286 (1980) (The right to counsel of choice may not be employed "as a means to delay judicial proceedings. The efficient administration of the criminal justice system is a critical concern to society as a whole, and unnecessary adjournments for the purpose of permitting a defendant to retain different counsel will disrupt court dockets, interfere with the right of other criminal defendants to a speedy trial, and inconvenience witnesses, jurors and opposing counsel.").

150. 24 N.Y.3d 1057, 1059, 24 N.E.3d 1082, 1083, 999 N.Y.S.2d 818, 819 (2014); *see also* People v. Singleton, 41 N.Y.2d 402, 405, 361 N.E.2d 1003, 1005, 393 N.Y.S.2d 353, 356 (1977) (citing People v. Oskroba, 305 N.Y. 113, 117, 111 N.E.2d 235, 236 (1953)) (grant of adjournment is within discretion of the trial court).

151. *Spears*, 24 N.Y.3d at 1059–60, 24 N.E.3d at 1083, 999 N.Y.S.2d at 819.

152. 24 N.Y.3d 125, 130, 21 N.E.3d 218, 220, 996 N.Y.S.2d 589, 591 (2014).

153. *Id.*

154. *Id.*; *see* People v. West, 81 N.Y.2d 370, 377, 615 N.E.2d 968, 973, 599 N.Y.S.2d 484, 489 (1993) (once an attorney has entered a proceeding, the defendant cannot be questioned in the absence of counsel, unless he affirmatively waives his right to counsel in

questioning of the defendant at issue did not violate defendant's Sixth Amendment right to counsel.[155]

X. SEARCH AND SEIZURE

In *People v. Gonzalez*, the defendant was arrested for a disorderly conduct violation under Penal Law section 240.20(3), after shouting obscenities at police officers in a subway.[156] The defendant's conduct provoked looks of surprise and curiosity, as well as evasive movements from the passengers.[157] The defendant subsequently moved to suppress the knife found by the police on his person, on the grounds that the police stop for disorderly conduct was illegal.[158] The Court held that suppression of the weapon was required, because the defendant's rant against the police did not, as a matter of law, constitute the violation of disorderly conduct.[159] As such, the police lacked the probable cause necessary to detain, search, and arrest the defendant.[160]

In *People v. Garay*, the Court affirmed the decision of the trial court to deny the defendant's request for a hearing to suppress physical evidence.[161] The defendant's motion to suppress was supported by an affirmation of defense counsel, stating that the "defendant did not consent to a search of his vehicle or his person, that he was not committing a crime at the time he was detained, that he was not engaged in any criminal conduct, and that no contraband was in plain view."[162] Based on this, the Court concluded that the defendant's allegations "failed to raise a legal basis for suppression" under Criminal

the attorney's presence). The failure by the police to make necessary inquiry will result in suppression of a defendant's statements, regardless of what the inquiry would have shown. *West*, 81 N.Y.2d at 379, 615 N.E.2d at 974, 599 N.Y.S.2d at 490. Should the police desire to question after a defendant's right has attached, it is their burden to determine whether the attorney-client relationship has terminated. *Id*. at 380, 615 N.E.2d at 975, 599 N.Y.S.2d at 491.

155. *McLean*, 24 N.Y.3d at 130, 21 N.E.3d at 220, 996 N.Y.S.2d at 591.

156. 25 N.Y.3d 1100, 1101, 35 N.E.3d 478, 479, 14 N.Y.S.3d 310, 311 (2015); *see* N.Y. PENAL LAW § 240.20(3) (McKinney 2008); People v. Baker, 20 N.Y.3d 354, 359–60, 984 N.E.2d 902, 905, 60 N.Y.S.2d 704, 707 (2013) ("Thus, 'a person may be guilty of disorderly conduct only when the situation extends beyond the exchange between the individual disputants to a point where it becomes a potential or immediate public problem'" (quoting People v. Weaver, 16 N.Y.3d 123, 128, 944 N.E.2d 634, 636, 919 N.Y.S.2d 99, 101 (2011))).

157. *Gonzalez*, 25 N.Y.3d at 1101, 35 N.E.3d at 479, 14 N.Y.S.3d at 311.

158. *Id.*

159. *Id.*

160. *Id.*

161. People v. Garay, 25 N.Y.3d 62, 70, 30 N.E.3d 145, 150, 7 N.Y.S.3d 254, 259 (2015).

162. *Id.* at 71, 30 N.E.3d at 150, 7 N.Y.S.3d at 259.

Procedure Law section 710.60(1), which requires that a pre-trial motion to suppress states the ground(s) of the motion and contain sworn allegations of fact supporting such grounds.[163]

In *People v. Guthrie*, the Court held that an officer's objectively reasonable, but mistaken, view of the law justified a DWI traffic stop.[164] Specifically, the stop sign which the defendant was accused of passing was not legal, because it was not properly registered under the village code, as required by Vehicle Traffic Law section 1100(b).[165] Although the Court agreed with the defendant that the officer's good faith belief that defendant violated the Vehicle and Traffic Law was not sufficient to justify the traffic stop, the Court held that the officer's belief that a traffic violation occurred was objectively reasonable.[166] Thus, the Court held that the stop was constitutionally justified, because the officer was not chargeable with knowing whether each and every stop sign was properly registered under the village code,[167] to wit, where the officer's mistake about the law is reasonable, the stop is constitutional.[168]

XI. SENTENCING AND PUNISHMENT

In *People v. Middlebrooks*, the Court held that,

> when a defendant has been convicted of an armed felony or an enumerated sex offense pursuant to CPL 720.10(2)(a)(ii) or (iii), and the only barrier to 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 CPL 720.10(3).[169]

In addition, "the court must make such a determination on the record 'even where [the] defendant has failed to ask to be treated as a youthful

163. *Id.*; *see* N.Y. CRIM. PROC. LAW § 710.60(1) (McKinney 2011 & Supp. 2016) ("The motion papers must state the ground or grounds of the motion and must contain sworn allegations of fact, whether of the defendant or of another person or persons, supporting such grounds. Such allegations may be based upon personal knowledge of the deponent or upon information and belief, provided that in the latter event the sources of such information and the grounds of such belief are stated.").

164. People v. Guthrie, 25 N.Y.3d 130, 132, 30 N.E.3d 880, 882, 8 N.Y.S.3d 237, 239 (2015).

165. *Id.* (citing N.Y. VEH. & TRAF. LAW §1100b (McKinney 2011 & Supp. 2016)).

166. *Id.* at 136, 30 N.E.3d at 885, 8 N.Y.S.3d at 242.

167. *Id.*

168. *Id.* at 132, 30 N.E.3d at 882, 8 N.Y.S.3d at 239.

169. 25 N.Y.3d 516, 527, 35 N.E.3d 464, 471, 14 N.Y.S.3d 296, 303 (2015) (citing N.Y. CRIM. PROC. LAW §720.10 (McKinney 2011)); *see* N.Y. CRIM. PROC. LAW § 720.20(1) (McKinney 2011 & Supp. 2016) ("[u]pon conviction of an eligible youth. . . . the court must determine whether or not the eligible youth is a youthful offender").

offender, or has purported to waive his or her right to make such a request' pursuant to a plea bargain."[170] Further,

> [i]f the court determines, in its discretion, that neither of the CPL 720.10(3) factors exist and states the reasons for that determination on the record, no further determination by the court is required . . . . If, however, the court determines that one or more of the CPL 720.10(3) factors are present, and the defendant is therefore an eligible youth, the court then "must determine whether or not the eligible youth is a youthful offender."[171]

In *People v. Rodriguez*, the Court rejected the defendant's argument that, under Penal Law section 70.25(2), the trial court's imposition of consecutive sentences on the defendant's assault and robbery convictions was unlawful, because the crimes were comprised of a single act.[172] Rather, the Court held that the evidence at trial demonstrated that the assault count and the robbery count were committed by separate and distinct acts.[173] Specifically, that the defendant gestured with a firearm and demanded that the alleged victim relinquish his property.[174] The alleged victim was acquiescing in turning over his property, when, in an action completely unrelated to any use of force necessary to accomplish the robbery, the defendant shot the victim, thereby, assaulting him.[175] Based on this, the Court concluded that the trial court properly exercised its discretion to impose consecutive sentences because, in this case, the separate offenses were committed through separate acts, though they were part of a single transaction.[176]

170. *Middlebrooks*, 25 N.Y.3d at 527, 35 N.E.3d at 471, 14 N.Y.S.3d at 303; *see also* People v. Rudolph, 21 N.Y.3d 497, 499, 997 N.E.2d 457, 457, 974 N.Y.S.2d 885, 885 (2013).

171. *Middlebrooks*, 25 N.Y.3d at 528, 35 N.E.3d at 471, 14 N.Y.S.3d at 303.

172. 25 N.Y.3d 238, 243–44, 32 N.E.3d 930, 933–34, 10 N.Y.S.3d 495, 498–99 (2015); *see* N.Y. PENAL LAW § 70.25(2) (McKinney 2009 & Supp. 2016) (concurrent sentences must be imposed for "two or more offenses committed through a single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other").

173. *Rodriguez*, 25 N.Y.3d at 244, 32 N.E.3d at 934, 10 N.Y.S.3d at 499.

174. *Id.*

175. *Id.*

176. *Id.*; *see* People v. Azaz, 10 N.Y.3d 873, 875, 890 N.E.2d 883, 884, 860 N.Y.S.2d 768, 769 (2008) (quoting People v. Brown, 80 N.Y.2d 361, 364, 604 N.E.2d 1353, 1355, N.Y.S.2d 422, 424 (1992)).

XII. SEX OFFENDER REGISTRATION ACT

In *People v. Lashway*, the Court held that the defendant was not deprived of due process of law, when the trial court refused to grant an adjournment, so as to allow the defendant access to copies of records that the Board reviewed in making its updated Sex Offender Registration Act (SORA) recommendation.[177] Although the defendant had a procedural due process right to prehearing access to the documents at issue,[178] the Court held that the trial court did not abuse its discretion[179] in denying the defendant's request for an adjournment, because the record evidence was overwhelmingly against granting any modification.[180] Thus, the Court reasoned that the defendant was not prejudiced by the trial court's denial of the requested adjournment.[181]

XIII. SPEEDY TRIAL

In *People v. Wells*, the Court held that "the mere lapse of time, following the date on which the order occasioning a retrial becomes final, does not in itself constitute a reasonable period of delay resulting from an appeal within the meaning of CPL 30.30(4)(a)."[182] Key to the Court's reasoning was that the People provided no justification for any "reasonable period of delay" under Criminal Procedure Law section 30.30(4)(a), to be added to the misdemeanor ninety days speedy trial requirement under Criminal Procedure Law section 30.30(1)(b).[183] The

177. 25 N.Y.3d 478, 484, 34 N.E.3d 847, 851, 13 N.Y.S.3d 337, 341 (2015).

178. *Id.* at 484, 34 N.E.3d at 851, 13 N.Y.S.3d at 341; *see* N.Y. CORRECT. LAW § 168-o(4) (McKinney 2014 & Supp. 2016) (providing that a registrant has the right to submit "any information relevant to the review").

179. *Lashway*, 25 N.Y.3d at 484, 34 N.E.3d at 851, 13 N.Y.S.3d at 341. The decision to grant an adjournment is a matter of discretion for the trial court, however, when the protection of fundamental due process rights is involved, that discretionary power is more narrowly construed. *Id.* (citing People v. Spears, 64 N.Y.2d 698, 700, 474 N.E.2d 1189, 1190, 485 N.Y.S.2d 521, 522 (1984)).

180. *Lashway*, 25 N.Y.3d at 484, 34 N.E.3d at 851, 13 N.Y.S.3d at 341.

181. *Id.*

182. 24 N.Y.3d 971, 973, 21 N.E.3d 198, 200, 996 N.Y.S.2d 569, 571 (2014) (quoting People v. Price, 14 N.Y.3d 61,64, 923 N.E.2d 1107, 1109, 896 N.Y.S.2d 719, 721 (2010)); *see* N.Y. CRIM. PROC. LAW § 30.30(4)(a) (McKinney 2003 & Supp. 2016) ("In computing the time within which the people must be ready for trial pursuant to subdivisions one and two, the following periods must be excluded: . . . a reasonable period of delay resulting from other proceedings concerning the defendant, including but not limited to: proceedings for the determination of competency and the period during which defendant is incompetent to stand trial; demand to produce; request for a bill of particulars; pre-trial motions; appeals; trial of other charges; and the period during which such matters are under consideration by the court.").

183. *Wells*, 24 N.Y.3d at 973, 21 N.E.3d at 200, 996 N.Y.S.2d at 571; *see* N.Y. CRIM. PROC. LAW § 30.30(1)(b) (McKinney 2003 & Supp. 2016) (a motion to dismiss on speedy

Court reasoned that a contrary ruling would permit the prosecution to indefinitely delay retrial for the duration of an adjournment in the trial court, even after the Court has denied leave to appeal, without statute of limitations consequences under Criminal Procedure Law section 30.30; a statute meant to discourage prosecutorial inaction.[184]

XIV. STATEMENTS OF DEFENDANT

In *People v. Dunbar*, the prosecution implemented a pre-arraignment interview program.[185] The program consisted of a structured videotaped interview with a suspect immediately prior to arraignment.[186] During the interview, a detective delivered a scripted "preamble" to the *Miranda* warnings, informing the defendants that "this is your opportunity to tell us your story" and "your only opportunity" to do so before going before a judge.[187] After being administered the "preamble," the defendants made statements in their respective interviews, which they later sought to suppress.[188] The Court held that the "preamble" undermined, vitiated, and neutralized the subsequently-communicated *Miranda* warnings, to the extent that the defendants were not "'adequately and effectively advised of the choice [the Fifth Amendment] guarantees' against self-incrimination," prior to making the incriminating statements at issue.[189]

trial grounds must be granted by the court where the people are not ready for trial within: "ninety days of the commencement of a criminal action wherein a defendant is accused of one or more offenses, at least one of which is a misdemeanor punishable by a sentence of imprisonment of more than three months and none of which is a felony").

184. *Wells*, 24 N.Y.3d at 973, 21 N.E.3d at 200, 996 N.Y.S.2d at 571.

185. 24 N.Y.3d 304, 308, 23 N.E.3d 946, 947, 998 N.Y.S.2d 679, 680 (2014).

186. *Id.*

187. *Id.* at 308, 23 N.E.3d at 947–48, 998 N.Y.S.2d at 680.

188. *Id.* at 308, 23 N.E.3d at 948, 998 N.Y.S.2d at 680.

189. *Id.* at 308, 23 N.E.3d at 947–48, 998 N.Y.S.2d at 681. "An individual taken into custody by law enforcement authorities for questioning 'must be adequately and effectively apprised of his rights' safeguarded by the Fifth Amendment privilege against self-incrimination." *Dunbar*, 24 N.Y.3d at 313–14, 23 N.E.3d at 951, 998 N.Y.S.2d at 684 (quoting Miranda v. Arizona, 384 U.S. 436, 467–69 (1966); *see* U.S. CONST. amend V. "First, the authorities must inform a suspect in 'clear and unequivocal terms' of the right to remain silent." *Dunbar*, 24 N.Y.3d at 313–14, 23 N.E.3d at 951, 998 N.Y.S.2d at 684 (citations omitted). "Second, they must make a suspect 'aware not only of the privilege, but also of the consequences of forgoing it' by explaining that 'anything' he says during the interrogation 'can and will be used against [him] in court.'" *Id.* "'[T]o assure that [this] right to choose between silence and speech remains unfettered throughout the interrogation process,' the authorities must also explain to the suspect that he has a right to the presence of an attorney." *Id.* "And finally, so that the right to an attorney is not 'hollow,' the authorities must also advise the suspect 'that if he is indigent a lawyer will be appointed to represent him.'" *Id.*

In *People v. Johnson*, a defendant, charged with one crime, in which matter he was represented by counsel, sought to obtain leniency by providing information to the police about a second, unrelated crime and, thereafter, was charged with committing the second crime.[190] The trial court denied the defendant's motion to suppress the statements made to police about the second crime, on the grounds that said statements were made when the lawyer representing the defendant on the first crime was not present, in violation of the defendant's right to counsel.[191] At the time of the making of the statements regarding the second crime, defense counsel, who represented the defendant on the first crime, was not retained in the second case and the defendant had not been charged with the second crime.[192] The Court reasoned that defense counsel in the first case had "an obligation to be alert to, and to avert if he could, the possibility that defendant's cooperation [in the first case] would hurt rather than help him."[193] As such, the Court held that the "defendant's right to counsel encompassed his conversations with police about the [second case], as long as those conversations were part of an effort to obtain leniency in the [first] case" and "unless the right to counsel was waived, the police should not have questioned defendant about the [second case] in his lawyer's absence."[194]

XV. VERDICTS

In *People v. DeLee*, the Court held that a jury verdict finding the defendant guilty of first-degree manslaughter as a hate crime, but acquitting him of first-degree manslaughter, was inconsistent and repugnant, because all of the elements of first-degree manslaughter were included in the elements of first-degree manslaughter as a hate crime.[195] To find the defendant not guilty of first-degree manslaughter, meant that

190. 24 N.Y.3d 639, 642, 26 N.E.3d 764, 765, 2 N.Y.S.3d 825, 826 (2014).

191. *Id.* at 644, 26 N.E.3d at 766, 2 N.Y.S.3d at 827.

192. *Id.* at 645, 26 N.E.3d at 767, 2 N.Y.S.3d at 828.

193. *Id.*

194. *Id.*; *see also* People v. Arthur, 22 N.Y.2d 325, 329, 239 N.E.2d 537, 539, 292 N.Y.S.2d 663, 666 (1968) ("Once an attorney enters the proceeding, the police may not question the defendant in the absence of counsel unless there is an affirmative waiver, in the presence of the attorney, of the defendant's right to counsel." (citing People v. Vella, 21 N.Y.2d 249, 251, 234 N.E.2d 422, 422, 287 N.Y.S.2d 369, 370 (1967))).

195. 24 N.Y.3d 603, 608–09, 26 N.E.3d 210, 213, 2 N.Y.S.3d 382, 385 (2014). "[W]hen jury verdicts are absolutely inconsistent, the verdict is repugnant. The rationale for the repugnancy doctrine is that the defendant cannot be convicted when the jury actually finds, via a legally inconsistent split verdict, that defendant did not commit an essential element of the crime." *Id.* at 608, 26 N.E.3d at 213, 2 N.Y.S.3d at 385 (citing People v. Tucker, 55 N.Y.2d 1, 9, 431 N.E.2d 617, 620, 447 N.Y.S.2d 132, 135 (1981); People v. Muhammad, 17 N.Y.3d 532, 539, 935 N.Y.S.2d 526, 530, 959 N.E.2d 463, 467 (2011)).

at least one of the elements of first-degree manslaughter as a hate crime was not proven by the prosecution beyond a reasonable doubt.[196] The Court also held that "the People may resubmit the crime of first-degree manslaughter as a hate crime to a new grand jury."[197]

XVI. LEGISLATIVE DEVELOPMENTS

The Legislature enacted a variety of changes to the Criminal Procedure Law and the Vehicle and Traffic Law, which are discussed below.

A. Penal Law

No substantive Penal Law amendments were promulgated by the Legislature during the applicable period covered by this *Survey*.

B. Criminal Procedure Law

The Criminal Procedure Law was amended by adding a new section 60.47, which prohibits the admissibility of evidence at a trial, hearing, or other proceeding in a prosecution for the crimes of prostitution under Penal Law section 230.00 and loitering for the purpose of engaging in a prostitution offense under Penal Law section 240.37.[198] Evidence that a person possessed one or more condoms is now inadmissible for purposes of establishing probable cause for an arrest or proving any person's commission or attempted commission of said prostitution offenses.[199]

196. *DeLee*, 24 N.Y.3d at 609, 26 N.E.3d at 214, 2 N.Y.S.3d at 386.

197. *Id.* at 610, 26 N.E.3d at 215, 2 N.Y.S.3d at 387 (citing People v. Mayo, 48 N.Y.2d 245, 253, 397 N.E.2d 1166, 1171, 422 N.Y.S.2d 361, 366 (1979)). "There is no constitutional or statutory provision that mandates dismissal for a repugnancy error." *Id.* at 610, 26 N.E.3d at 215, 2 N.Y.S.3d at 387. Thus, "permitting a retrial on the repugnant charge upon which the jury convicted, but not on the charge of which the jury actually acquitted defendant, strikes a reasonable balance." *Id*. Where "a trial court finds that an announced verdict is repugnant, it may explain the inconsistency to the jurors and direct them to reconsider their decision." *Id.* at 610–11, 26 N.E.3d at 215, 2 N.Y.S.3d at 387 (citing *Muhammad*, 17 N.Y.3d at 541 n. 5, 959 N.E.2d at 468, 935 N.Y.S.2d at 531).

198. N.Y. CRIM. PROC. LAW § 60.47 (McKinney Supp. 2016). Penal Law section 240.37 can be charged as a violation or a crime depending on the defendant's criminal history. N.Y. PENAL LAW § 240.37 (McKinney 2008). Effective January 19, 2016, a violation of Penal Law section 240.37 is chargeable as a class B misdemeanor, if a defendant was previously convicted of violating Penal Law section 240.37 or the crime of prostitution under Penal Law section 230.00. *Id.* § 240.37(2). A violation of PL section 240.37 is chargeable as a class A misdemeanor, if the loitering offense under PL section 240.37 occurs for the purpose of promoting prostitution as defined in PL Article 230. *Id.* § 240.37(3).

199. *Id.* § 60.47.

Section 170.55(8) of the Criminal Procedure Law, prohibiting the court from issuing an order adjourning an action in contemplation of dismissal if the offense is for a violation of the Vehicle and Traffic Law, or a local law, rule, or ordinance, related to the operation of a motor vehicle (except one related to parking, stopping, or standing), was amended to include an offense "committed by the holder of a commercial learner's permit."[200]

C. Vehicle and Traffic Law

The following were all amended and/or expanded to cover and apply to the owners of a commercial learner's permit: Vehicle and Traffic Law section 201(1)(h)(ii)(A)(1), dealing with the destruction of records in the custody of the commissioner; Vehicle and Traffic Law 503(1)(b), detailing the period of validity of drivers' licenses and learners' permits; Vehicle and Traffic Law 510-a(9), governing the suspension and revocation of commercial driver's licenses; Vehicle and Traffic Law 514(1)(d), governing the certifying of convictions, forfeitures, and nonappearances to the Commissioner and recording convictions; Vehicle and Traffic Law 514-c. dealing with notification of non-resident commercial operator convictions; and Vehicle and Traffic Law 514-a(2) governing the notification of convictions, suspensions, revocations, cancellations and disqualifications by commercial motor vehicle operators.[201] In addition Vehicle and Traffic Law 503(1)(b), pertaining to the validity of commercial learner's permits now states that "a commercial learner's permit shall be valid for no more than one hundred eighty days, except that such permit may be renewed, in the commissioner's discretion, for an additional one hundred eighty days."[202]

The definition of a "Tank vehicle" under Vehicle and Traffic Law 501–a(6) was amended to include vehicles with "tanks having an individual rated capacity of more than one hundred nineteen gallons and an aggregate rated capacity of one thousand gallons or more" and exclude "a commercial motor vehicle transporting an empty storage

200. N.Y. CRIM. PROC. LAW § 170.55(9) (McKinney Supp. 2016); *see* N.Y. CRIM. PROC. LAW § 170.55(2) (McKinney 2007) ("An adjournment in contemplation of dismissal is an adjournment of the action without date ordered with a view to ultimate dismissal of the accusatory instrument in furtherance of justice.").

201. N.Y. VEH. & TRAF. LAW § 201(1)(h)(ii)(A)(1) (McKinney Supp. 2016); N.Y. VEH. & TRAF. LAW § 503(1)(b) (McKinney Supp. 2016); N.Y. VEH. & TRAF. LAW § 510–a(9) (McKinney Supp. 2016); N.Y. VEH. & TRAF. LAW § 514(1)(d) (McKinney Supp. 2016); N.Y. VEH. & TRAF. LAW § 514–c (McKinney Supp. 2016); N.Y. VEH. & TRAF. LAW § 514–a(2) (McKinney Supp. 2016).

202. N.Y. VEH. & TRAF. LAW § 503(1)(b).

container tank, not designed for transportation, with a rated capacity of one thousand gallons or more that is temporarily attached to a flatbed trailer."[203]

Vehicle and Traffic Law 510(6) was amended by adding a new section "o," specifying that if a commercial driver's license or learner's permit is revoked as the result of a conviction for unlawfully leaving the scene of an accident without reporting, "no new commercial driver's license or commercial learner's permit shall be issued for at least one year, nor thereafter except in the discretion of the commissioner."[204]

Finally, Vehicle and Traffic Law section 510-a pertaining to suspension and revocation of commercial driver's licenses and learning permits was amended by adding a new section "10" which deals with consecutive disqualification periods.[205] If a suspension or revocation arises as the result of a second separate incident and is required to be imposed under Part 383.51 of title 49 of the Code of Federal Regulations, such suspension, revocation or disqualification "shall take effect upon the expiration of the minimum period of a suspension, revocation or disqualification required by Part 383.51 of title 49 of the code of federal regulations . . . ."[206] However, a second suspension will run concurrently if: "(a) such suspension, revocation or disqualification is not required by Part 383.51 of title 49 of the code of federal regulations; or (b) such suspension, revocation or disqualification arose from the same incident."[207]

203. N.Y. VEH. & TRAF. LAW § 501–a(6) (McKinney Supp. 2016).
204. N.Y. VEH. & TRAF. LAW § 510(6) (McKinney Supp. 2016).
205. N.Y. VEH. & TRAF. LAW § 510–a(10) (McKinney Supp. 2016).
206. *Id.*; *see* 49 C.F.R. § 383.51.
207. N.Y. VEH. & TRAF. LAW § 510–a(10).