CRIMINAL LAW

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INTRODUCTION

This *Survey* of developments in New York State criminal law between July 1, 2011, and June 30, 2012, includes all significant New York Court of Appeals decisions in the area of criminal law and procedure.

I. ACCUSATORY INSTRUMENT DEFECTS

A. Defendant's Admissions

In *People v. Suber*, the Court found the information upon which the defendant was convicted to be legally sufficient despite the fact that it only contained admissions by the defendant and no further evidence to corroborate the defendant's admissions.[1] Correction Law section 168-f(3) and f(4) requires a level-three sex offender to verify one's home address with law enforcement every ninety days and re-register as a sex offender within ten days of changing one's address.[2] The

1. 19 N.Y.3d 247, 249, 969 N.E.2d 770, 771, 946 N.Y.S.2d 552, 553 (2012).
2. N.Y. CORRECT. LAW § 168-f(3)-(4) (McKinney Supp. 2012).

appellate division reversed the conviction, holding that "information must set forth corroboration of an admission and that the lack of corroborative allegations regarding the defendant's residences rendered the accusatory instrument jurisdictionally insufficient."[3] The Court, however, held that an accusatory instrument is not, in and of itself, defective because it fails to set forth corroborative evidence with regard to the specified allegations.[4] However, the Court made sure to note that, "[i]f a case proceeds to trial, the requirement for corroboration in Criminal Procedure Law ("CPL") section 60.50 is triggered and a person cannot 'be convicted of any offense solely upon evidence of a confession or admission made by him without additional proof that the offense charged has been committed.'"[5]

B. Petit Larceny

The Court in *People v. Hightower* found that the accusatory instrument charging the defendant with petit larceny for collecting money for use of his unlimited MetroCard was defective since the New York City Transit Authority ("NYCTA") was never the owner of uncollected funds from the third parties.[6] The defendant was charged, pled guilty, and was convicted of petit larceny[7] when he repeatedly allowed others to use his unlimited MetroCard in exchange for an unknown amount of money.[8] A person is guilty of larceny when, "with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof."[9] The Court found that the violation of the reasonable cause requirement (as set forth in CPL section 100.40(4)(b)) of the accusatory instrument resulted in a jurisdictional defect of such instrument since the NYCTA never owned the funds which the defendant collected from the third parties.[10] Similar to *People v. Nappe*, where it was held that the State was not the "owner" of uncollected taxes since such "taxes were not the property of

3. *Suber*, 19 N.Y.3d at 250, 969 N.E.2d at 772, 946 N.Y.S.2d at 554 (citations omitted).

4. *Id.* at 254, 969 N.E.2d at 775, 946 N.Y.S.2d at 557.

5. *Id.*

6. 18 N.Y.3d 249, 255, 961 N.E.2d 1111, 1114, 938 N.Y.S.2d 500, 503 (2011).

7. *Id.* at 252-53, 961 N.E.2d at 1112-13, 938 N.Y.S.2d at 501-02 (citing N.Y. PENAL LAW § 155.25 (McKinney 2010)).

8. *Hightower*, 18 N.Y.3d at 251, 961 N.E.2d at 1111, 938 N.Y.S.2d at 500.

9. N.Y. PENAL LAW § 155.05(1).

10. *Hightower*, 18 N.Y.3d at 254, 961 N.E.2d at 1114, 938 N.Y.S.2d at 503 (citing N.Y. CRIM. PROC. LAW § 100.40(4)(b) (McKinney 2004)).

the State prior to their remittance[,]"[11] here, the defendant was not in possession, by trust or otherwise, of monies owned by NYCTA.[12] The defendant had already served his sentence, and therefore, the Court simply reversed the order of the appellate division and dismissed the accusatory instrument.[13]

C. Public Place and Public View

In *People v. Jackson*, the Court rejected the defendant's argument that the accusatory instrument charging him with criminal possession of marihuana in the fifth degree was jurisdictionally deficient because it failed to adequately allege that he was in a "'public place'" and that the marihuana was in "'public view'" as required by the offense charged.[14] A person is guilty of criminal possession of marihuana in the fifth degree when he "knowingly and unlawfully possesses . . . marihuana in a public place, as defined in section 240.00 of this chapter, and such marihuana is burning or open to public view."[15] A "'public place'" is "a place to which the public or a substantial group of persons has access, and includes, but is not limited to, highways."[16]

The defendant argued that although he was on a public street, he was in a private vehicle and therefore not in a "public place."[17] The Court looked to the legislative intent of the statute and to other charges that would be undermined by creating such an exception to the "public place" requirement when a person is situated in a private car.[18] In rejecting the defendant's arguments, the Court held that it is the location of the car on a public road and not the private ownership of the vehicle that is controlling.[19]

In its analysis of whether the element of the marihuana being in "public view" was adequately alleged, the Court looked to the legislative intent of the 1977 restructuring of marihuana possession offense, which limited the criminal liability of a person who possesses a small quantity of marihuana in a public place yet conceals the drug.[20] The defendant argued "that the accusatory instrument . . . was too

11. 94 N.Y.2d 564,566, 729 N.E.2d 698,700, 708 N.Y.S.2d 41, 43 (2000).
12. *Hightower*, 18 N.Y.3d at 255, 961 N.E.2d at 1114, 938 N.Y.S.2d at 503.
13. *Id.* at 255-56, 961 N.E.2d at 1113-14, 938 N.Y.S.2d at 502-03.
14. 18 N.Y.3d 738, 740, 967 N.E.2d 1160, 1162, 944 N.Y.S.2d 715, 717 (2012).
15. N.Y. PENAL LAW § 221.10(1) (McKinney 2008).
16. *Id.* § 240.00(1).
17. *Jackson*, 18 N.Y.3d at 741, 967 N.E.2d at 1162, 944 N.Y.S.2d at 717.
18. *See id.* at 743-45, 967 N.E.2d at 1163-65, 944 N.Y.S.2d at 718-20.
19. *Id.* at 746, 967 N.E.2d at 1165, 944 N.Y.S.2d at 720.
20. *Id.* at 746-47, 967 N.E.2d at 1166, 944 N.Y.S.2d at 721.

conclusory to provide reasonable cause to believe that the marihuana was open to public view."[21] The Court disagreed, stating that the "basis for such an allegation can be discerned by drawing reasonable inferences from all the facts set forth in the accusatory instrument."[22] The accusatory instrument alleged that the officer provided facts supporting an inference that the marihuana was in an unconcealed area "that would have been visible to a passerby or motorist."[23] The Court held that it was not required that a member of the public, other than the officer, actually saw the contraband but that it was "susceptible to such viewing."[24]

II. APPEALS

A. Supreme Court's Jurisdiction to Review Registration Decision of Board of Sex Offenders

The Court held in *People v. Liden*[25] that due to "the unusual feature of New York's sex offender registration system . . . [a] determination by the Board of Examiners of Sex Offenders that a person who committed an offense in another state must register in New York is reviewable in a proceeding to determine the offender's risk level."[26] Here, the defendant was erroneously determined to be required to register by the Board, but was denied review of such determination by the supreme court, which then was tasked with assessing him for a risk level after the Board's decision.[27] The supreme court believed itself bound by several appellate division decisions holding that the determination of the need to register may only be challenged in an article 78 proceeding, which has a four-month statute of limitations running from the time the determination becomes "final and binding."[28] While usually the Court has held that a person seeking judicial review of an action by an administrative agency must proceed pursuant to Criminal Practice Law and Rules ("CPLR") article 78, the Court made an exception for this type of case.[29] In this type of proceeding, after the Board of Examiners of Sex Offenders makes a determination adverse to the person affected,

21. *Id.* at 747, 967 N.E.2d at 1166, 944 N.Y.S.2d at 721.
22. *Jackson*, 18 N.Y.3d at 747, 967 N.E.2d at 1166, 944 N.Y.S.2d at 721.
23. *Id.* at 748, 967 N.E.2d at 1167, 944 N.Y.S.2d at 722.
24. *Id.*
25. *See generally* 19 N.Y.3d 271, 969 N.E.2d 751, 946 N.Y.S.2d 533 (2012).
26. 19 N.Y.3d 271, 273, 969 N.E.2d 751, 751-52, 946 N.Y.S.2d 533, 533-34 (2012).
27. *Id.* at 274, 969 N.E.2d at 752, 946 N.Y.S.2d at 534.
28. *Id.* at 274-76, 969 N.E.2d at 752-53, 946 N.Y.S.2d at 534-35 (citing N.Y. C.P.L.R. 217(1) (McKinney 2012)).
29. *Liden*,19 N.Y.3d at 276, 969 N.E.2d at 753, 946 N.Y.S.2d at 535.

there is an automatic referral to the supreme court to determine the alleged sex offender's risk level.[30] The Court found that to require an article 78 proceeding to determine if a person's offense is one that requires them to register while, at the same time, having another court decide the risk level of the person, serves no purpose.[31] Furthermore, since at the time the Board makes a registrability determination, the person affected is often without counsel but will be appointed one for the risk level proceeding, there is a risk that an article 78 statute of limitations would run before counsel is assigned and has had time to focus on the registrability issue.[32] This could result in a court deciding the risk level for someone who the court is not convinced is a sex offender, within the definition of the New York statute.[33] The Court, therefore, reversed the order of the appellate division and, based upon the facts in this case, also reversed the Board's determination that the defendant be required to register as a sex offender.[34]

B. Appeal of Pretrial Order

In both the cases of *People v. Elmer* and *People v. Cooper*, the Court held that appeal of a pretrial issue may be made based upon an oral decision and does not require a written order from the lower court.[35] In *Elmer*, the People appealed "pursuant to CPL [section] 450.20(1) from an oral decision by the trial court granting, in part, the defendant's motion to dismiss the indictment on speedy trial grounds."[36] In *Cooper*, the defendant, pursuant to CPL section 710.70(2), appealed an oral order of the trial court denying his motion to suppress evidence.[37] The appellate division ruled against both appellants finding that "failure to obtain a written order precluded appellate review."[38] The Court sided with both appellants finding that the term "order" encompasses both written and oral orders of the court.[39] The legislature could have limited appeals under both CPL sections 450.20(1) and 710.70(2) by using the specific term "'written order'" as it did in

30. *Id.* at 275, 969 N.E.2d at 753, 946 N.Y.S.2d at 535 (quoting N.Y. CORRECT. LAW § 168-k(2) (McKinney Supp. 2012)).

31. *Liden*, 19 N.Y.3d at 276, 969 N.E.2d at 753, 946 N.Y.S.2d at 535.

32. *Id.*, 969 N.E.2d at 754, 946 N.Y.S.2d at 536.

33. *Id.*

34. *Id.* at 277, 969 N.E.2d at 754, 946 N.Y.S.2d at 536.

35. 19 N.Y.3d 501, 505, 973 N.E.2d 172, 174, 950 N.Y.S.2d 77, 79 (2012).

36. *Id.* (citing N.Y. CRIM. PROC. LAW § 450.20(1) (McKinney 2011)).

37. *Elmer*, 19 N.Y.3d at 505, 973 N.E.2d at 174, 950 N.Y.S.2d at 79 (citing N.Y. CRIM. PROC. LAW § 710.70(2)).

38. *Elmer*, 19 N.Y.3d at 505, 973 N.E.2d at 174, 950 N.Y.S.2d at 79.

39. *Id.*

various sections of both CPL and the Penal Law.[40] Therefore, a statute that allows "an appeal from an 'order'—as opposed to a 'written order'—should be construed to permit an appeal from either a written or oral order."[41] These cases, however, were distinguished from *People v. Coaye*, in which the supreme court orally reduced "an attempted murder charge to a lesser degree and then immediately pronounced sentence, commencing the defendant's 30-day period to appeal the judgment of conviction under CPL section 460.10."[42] In that case, since the oral decision was subsumed by the judgment of conviction and pronouncement of sentence, the Court found it to be potentially unfair to allow the People more time to appeal than the defendant by first requiring the prosecution to procure.[43] In *Coaye*, the court found that the people's time to appeal the reduction in the conviction began at the time of the oral decision, the same as the defense's time to appeal.[44] However, absent a unique circumstance, such as in *Coaye*, the Court has found that it should be policy to allow appeals from oral decisions, in accordance with the appropriate governing criminal statute, when the oral order conclusively disposes of the matter at issue.[45]

In *Elmer*, "the Appellate Division erred . . . by dismissing the appeal," and the matter was "remitted to the Appellate Division . . . for consideration of the merits of the appeal."[46] In *Cooper*, the People additionally argued that the defendant should not be permitted to have his appeal heard because he signed a written waiver of the right to appeal.[47] The Court found that the record failed to demonstrate a full appreciation of the consequence of such an appeal and, therefore, the written waiver would not be the bar.[48]

40. *Id.* at 507, 973 N.E.2d at 175, 950 N.Y.S.2d at 80. *See, e.g.*, N.Y. CRIM. PROC. LAW § 195.30; N.Y. CRIM. PROC. LAW §§ 420.10(6), 420.40(5) (McKinney 2013); N.Y. PENAL LAW § 215.70 (McKinney 2010); N.Y. PENAL LAW § 85.05(3)(b) (McKinney 2009).

41. *Elmer*, 19 N.Y.3d at 507-08, 973 N.E.2d at 176, 950 N.Y.S.2d at 81.

42. *Id.* at 508-09, 973 N.E.2d at 176-77, 950 N.Y.S.2d at 81-82 (citing People v. Coaye, 68 N.Y.2d 857, 858, 501 N.E.2d 18, 18, 508 N.Y.S.2d 410, 410 (1986)).

43. *Elmer*, 19 N.Y.3d at 508, 973 N.E.2d at 176, 950 N.Y.S.2d at 81 (citing *Coaye*, 68 N.Y.2d at 858-59, 501 N.E.2d at 19, 508 N.Y.S.2d at 411).

44. *Elmer*, 19 N.Y.3d at 508, 973 N.E.2d at 176, 950 N.Y.S.2d at 81 (citing *Coaye*, 68 N.Y.2d at 858-59, 501 N.E.2d at 19, 508 N.Y.S.2d at 411).

45. *Elmer*, 19 N.Y.3d at 508, 973 N.E.2d at 176, 950 N.Y.S.2d at 81.

46. *Id.* at 509-10, 973 N.E.2d at 177-78, 950 N.Y.S.2d at 82-83.

47. *Id.* at 510, 973 N.E.2d at 177, 950 N.Y.S.2d at 82.

48. *Id.*, 973 N.E.2d at 178, 950 N.Y.S.2d at 83.

C. Appeal of Conditions of Probation

In *People v. Pagan*, the Court found that a defendant could not appeal from an order made pursuant to CPL section 410.20(1) modifying the conditions of a sentence of probation.[49] The Court concluded that CPL does not authorize such an appeal since it is not an appeal from "'the sentence originally imposed'" or from "'a resentence following an order vacating the original sentence[.]'"[50] Instead, judicial review must be sought in a CPLR article 78 proceeding.[51]

D. Scope of Court of Appeals Review

In *People v. Riley*, the Court affirmed the appellate division decision regarding the defendant's appeal based on the particular facts related to the People returning stolen property to the owner prior to trial.[52] However, the most significant conclusion reached by the Court relates to its dismissal of the People's appeal. The Court held that it did not have the authority under CPL section 470.05 to disturb a ruling made by the appellate division, where the appellate division reached its decision by exercising its discretionary power to reach an unpreserved legal issue.[53]

In *People v. Rodriguez*, the Court held that CPL section 430.10 does not preclude the appellate division from remitting a case back to the trial court for resentencing when a post-judgment motion, or the general appellate process, demands that the sentence must be changed or modified due to its illegality; it is up to the appellate division's discretion, when reversing or modifying an illegal sentence, to remit such sentence to the trial court or to substitute its own legal sentence.[54]

In *People v. William*, the Court held that whether the circumstances of a case give rise to an adequate level of reasonable

49. 19 N.Y.3d 368, 371, 971 N.E.2d 347, 348, 948 N.Y.S.2d 217, 218 (2012) (citing N.Y. CRIM. PROC. LAW § 460.10(a)(1) (McKinney 2011)).

50. *Pagan*, 19 N.Y.3d at 370-71, 971 N.E.2d at 349, 948 N.Y.S.2d at 219 (citation omitted).

51. *Id.*, 971 N.E.2d at 348-49, 948 N.Y.S.2d at 218-19.

52. 19 N.Y.3d 944, 946, 973 N.E.2d 1280, 1281, 950 N.Y.S.2d 506, 507 (2012).

53. *Id.* at 946-47, 973 N.E.2d at 1281-82, 950 N.Y.S.2d at 507-08.

> Just two years ago, in *People v. Caban*, we recognized that 'under our precedents, an Appellate Division reversal that is based on an unpreserved error is considered an exercise of the Appellate Division's interest of justice power, not reviewable in our Court'; therefore, 'if defendant [Caban] failed to preserve the alleged error, she would benefit from her mistake, for *we would be required to dismiss the People's appeal*.'

Id., 973 N.E.2d at 1282, 950 N.Y.S.2d at 508 (citing *Caban*, 14 N.Y.3d 369, 373, 927 N.E.2d 1050, 1051, 901 N.Y.S.2d 566, 567 (2010)).

54. 18 N.Y.3d 667, 671, 967 N.E.2d 661, 663, 944 N.Y.S.2d 438, 440 (2012).

suspicion is beyond the Court's review if the record provides adequate support for the lower court or appellate division's determination.[55] Similarly, the Court held that whether a show-up identification was reasonable in light of the specific facts of a case is beyond the Court's review, if the record supports a finding that one could find the "show-up was reasonable and not unduly suggestive."[56]

In *People v. Plunkett*, the Court decided this case despite the fact that the defendant had pled guilty, which typically results in forfeiture of an appellate claim.[57] However, the Court held that the forfeiture doctrine did not apply in this particular case because the defendant was not appealing the sufficiency of the facts established by the plea.[58] Instead, the defendant's appeal was a purely legal question, i.e. whether the crime with which he was charged and to which he plead guilty was a cognizable offense.[59] As the Court noted, "[a] defendant can admit facts, but cannot by his or her admission mint an offense for which the law does not already provide."[60]

E. Dismissal of Pending Appeal when Defendant Deported

In *People v. Ventura* and *People v. Gardner*, the Court reversed the appellate division's dismissal of two different defendants' appeals, finding that when a defendant is involuntarily deported while his/her appeal is pending, the claim cannot be dismissed as having been abandoned.[61] Here, the defendants were involuntarily deported by Immigration and Customs Enforcement prior to the resolution of their appeals.[62] The Court held that when a defendant has filed a timely notice of appeal and submitted an appellate brief, but is *involuntarily* deported prior to the appeal's resolution, the appellate division cannot dismiss the appeal in his absence, because the defendant did not "voluntarily abscond[ ], forfeiting their right to appeal."[63] The Court held that when one is "involuntarily removed from the country . . . their extrication lack[s] the scornful or contemptuous traits that compel

55. 19 N.Y.3d 891, 893, 971 N.E.2d 859, 859, 948 N.Y.S.2d 578, 578 (2012).

56. *Id.*, 971 N.E.2d at 859-60, 948 N.Y.S.2d at 578.

57. 19 N.Y.3d 400, 405-07, 971 N.E.2d 363, 366-67, 948 N.Y.S.2d 233, 236-37 (2012). Defendant pled guilty to aggravated assault, however, there was an appealable issue as to whether his saliva could be considered a "dangerous instrument" within the meaning of Penal Law section 10.00(13). *Id.* at 408, 971 N.E.2d at 368, 948 N.Y.S.2d at 238.

58. *Id.* at 406-07, 971 N.E.2d at 367, 948 N.Y.S.2d at 236-37.

59. *Id.* at 407, 971 N.E.2d at 367, 948 N.Y.S.2d at 237.

60. *Id.*, 971 N.E.2d at 367, 948 N.Y.S.2d at 237.

61. 17 N.Y.3d 675,t 678, 958 N.E.2d 884, 885, 934 N.Y.S.2d 756, 757 (2011).

62. *Id.* at 679-80, 958 N.E.2d at 886, 934 N.Y.S.2d at 757.

63. *Id.* at 679, 958 N.E.2d at 886, 934 N.Y.S.2d at 758.

courts to dismiss appeals filed by those who elude criminal proceedings."[64]

III. BAIL

The Court in *People ex rel. McManus v. Horn* reversed the order of the appellate division and converted the proceeding to one of a declaratory judgment action, "declaring that CPL section 520.10(2)(b) prohibits the designation of only one form of bail."[65] The supreme court "ordered that bail be set at $20,000 'CASH ONLY.'"[66] Petitioner argued that, under CPL section 520.10(2)(b), the court is required to set a second permissible form of bail.[67] Section 520.10 of the CPL delineates the authorized categories of bail permitted to be imposed and subdivision two specifies two distinct "methods of fixing bail."[68] The first method is where the court sets the amount of bail "'without designating the form or forms in which it may be posted.'"[69] The second is where the court "may direct that the bail be posted in any one of two or more of the forms specified in subdivision one, designated in the alternative, and may designate different amounts varying with the forms."[70] The prosecution argued that the reference to a single "form" of bail and use of the word "may," rather than "must," could be interpreted as allowing the court to set a single form of bail.[71] The Court found that in addition to the necessity of the legislature using the word "may" so as to allow the court discretion of choosing between the two options for fixing bail, providing flexible bail alternatives is consistent with the underlying principles of CPL article 52, namely to improve the availability of pretrial release.[72]

64. *Id.* at 680, 958 N.E.2d at 887, 934 N.Y.S.2d at 758.

65. 18 N.Y.3d 660, 666, 967 N.E.2d 671, 674, 944 N.Y.S.2d 448, 451 (2012).

66. *Id.* at 663, 967 N.E.2d at 672, 944 N.Y.S.2d at 449.

67. *Id.*

68. *Id.* at 664, 967 N.E.2d at 673, 944 N.Y.S.2d at 450.

69. *Id.*, 967 N.E.2d at 673, 944 N.Y.S.2d at 450 (quoting N.Y. CRIM. PROC. LAW § 520.10(2)(a) (McKinney Supp. 2013)).

70. *People ex rel. McManus*, 18 N.Y.3d at 664, 967 N.E.2d at 673, 944 N.Y.S.2d at 450 (quoting N.Y. CRIM. PROC. LAW § 520.10(2)(b)).

71. *People ex rel. McManus*, 18 N.Y.3d at 665, 967 N.E.2d at 673, 944 N.Y.S.2d at 450.

72. *Id.*, 967 N.E.2d at 673-74, 944 N.Y.S.2d at 450-51; *see* Bellamy v. Judges & Justices Authorized to Sit in N.Y.C. Criminal Court, 41 A.D.2d 196, 202, 342 N.Y.S.2d 137, 143-44 (1st Dep't 1973).

IV. INEFFECTIVE ASSISTANCE OF COUNSEL / SUBSTITUTION OF COUNSEL

A. Vacating Plea Pursuant to People v. Padilla

The Court found in *People v. Haffiz* that "while [*Padilla v. Kentucky*][73] may support a vacatur of the plea based on a claim of ineffective assistance of counsel, in this case the claim is predicated on hearsay and facts not found in the record[.]"[74] The defendant claimed that his prior defense counsel was ineffective by misinforming him at the time of his plea that "'sometimes people are not deported.'"[75] In fact, the defendant's felony conviction resulted in mandatory deportation.[76] Both the appellate division and Court looked to the recent United States Supreme Court decision of *Padilla*, which recognized deportation as a "'particularly severe penalty' with a 'close connection to the criminal process' and held that constitutionally effective counsel requires defense counsel to inform his or her client whether a plea carries a risk of deportation."[77] However, a post application made under CPL article 440 was held to be the appropriate method of raising the claim of ineffective assistance of counsel in this context where the claim could be fully developed.[78]

B. "Good Cause" for Substitution of Counsel

In *People v. Smith*, the Court held that the defendant did not show "good cause" for substitution of assigned counsel.[79] Criminal defendants are guaranteed the right to counsel if indigent, and if such a defendant requests a change in assigned counsel, then the change will only be granted if a "good cause" exists.[80] The Court stated that good cause inquiries are undoubtedly case-specific, consequently falling within the trial court's discretion, and necessitate an inquiry by the trial court as to whether the presently assigned counsel "'is reasonably likely to afford a defendant effective assistance and whether the defendant has

73. *See generally* 130 S. Ct. 1473 (2010).

74. *People v. Haffiz*, 19 N.Y.3d 883, 885, 976 N.E.2d 216, 217, 951 N.Y.S.2d 690, 691.

75. *Id.* at 884, 976 N.E.2d at 217, 951 N.Y.S.2d at 691.

76. *Id.*

77. *Id.* (quoting *Padilla*, 130 S. Ct. at 1481-82).

78. *Haffiz*, 19 N.Y.3d at 885, 976 N.E.2d at 217, 951 N.Y.S.2d at 691.

79. 18 N.Y.3d 588, 593, 965 N.E.2d 232, 235, 942 N.Y.S.2d 5, 8 (2012).

80. *Id.* at 592, 965 N.E.2d at 235, 942 N.Y.S.2d at 8 (citing People v. Medina, 44 N.Y.2d 199, 207, 375 N.E.2d 768, 772, 404 N.Y.S.2d 588, 593 (1978)). *See* U.S. Const. amend. VI; N.Y. Const. art. I, § 6. *See also generally* People v. Baldi, 54 N.Y.2d 137, 429 N.E.2d 400, 444 N.Y.S.2d 893 (1981); People v. Koch, 299 N.Y. 378, 87 N.E.2d 417 (1949); People v. Linares 2 N.Y.3d 507, 813 N.E.2d 609, 780 N.Y.S.2d 529 (2004).

unduly delayed in seeking new assignment[.]'"[81] Here, specifically, the Court found that the trial court conducted an inquiry and determined that assigned counsel (1) did, in fact, consider the defendant's motion requests and strategy suggestions; (2) prepared for trial; (3) previously tried numerous cases with the same charges and similar fact patterns; and, (4) was ready for the current trial.[82] The Court held for the People, as the defendant provided no reason for his request, aside from his belief that counsel had not considered his pre-trial motions, and the trial court found that the presently assigned counsel was likely to provide effective representation.[83]

V. DEFENSES

A. Extreme Emotional Disturbance

In *People v. McKenzie*, the Court found that the trial court should have charged the jury with the affirmative defense that the defendant's homicidal acts were committed under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, and upon that theory to afford the jury the option of returning a verdict of manslaughter in the first degree instead of murder.[84] The Court pointed out that the defense of extreme emotional disturbance should have been charged even though "'there was no proof that defendant had a mental infirmity that r[ose] short of a mental disease or defect.'"[85] The Court explained that that language, as it has been used in previous decisions to describe the predicate for an extreme emotional disturbance defense, was not meant to "tether the defense to proof of an underlying psychiatric disorder;" "mental infirmity" in this context refers more broadly to "any reasonably explicable emotional disturbance so extreme as to result in and become manifest as a profound loss of self-control."[86] The Court reiterated that the "subjective element of the extreme emotional disturbance defense may be inferred simply from circumstances indicative of a loss of control and, concomitantly, that it may be established without psychiatric

81. *Smith*, 18 N.Y.3d at 592, 965 N.E.2d at 235, 942 N.Y.S.2d at 8 (quoting *Medina*, 44 N.Y.2d at 208, 375 N.E.2d at 772, 904 N.Y.S.2d at 593).

82. *Smith*, 18 N.Y.3d at 593, 965 N.E.2d at 235, 942 N.Y.S.2d at 8.

83. *Id.*, 965 N.E.2d at 235, 942 N.Y.S.2d at 8.

84. 19 N.Y.3d 463, 465, 976 N.E.2d 217, 219, 951 N.Y.S.2d 691, 693 (2012) (citing N.Y. PENAL LAW § 125.25(1)(a) (McKinney 2009)).

85. *McKenzie*, 19 N.Y.3d at 467, 976 N.E.2d at 221, 951 N.Y.S.2d at 694-95.

86. *Id.*, 976 N.E.2d at 221, 951 N.Y.S.2d at 695.

evidence."[87] The "relevant inquiry was whether the evidence, viewed most favorably to the defendant, presented a triable question;" if the evidence does present a triable question, the reasonableness of defendant's explanation should be decided by the jury, not the trial court.[88]

B. Claim of Right Defense and a Mistake of Fact Defense

In *People v. Pagan*, the Court held that, in the second-degree robbery context of this case, a claim of right defense and a mistake of fact defense are equivalent.[89] The facts involved a defendant, who mistakenly believing that a taxi cab driver owed her money as change for her toll, used a knife in an attempt to forcibly recover the cash.[90] The defense requested that the judge instruct the jury with a mistake of fact instruction, which relieves a person from criminal liability when she engages in conduct "'under a mistaken belief of fact' if '[s]uch factual mistaken negatives the culpable mental state required for the commission of the offense.'"[91]

Instead, the judge instructed the jury with respect to a negative claim of right charge. Specifically, the court informed the jury that a claim of right is not a defense to robbery.[92] The Court found that, in accordance with its prior rulings, although a defense to larceny is that the "'property was appropriated under a claim of right made in good faith,'"[93] that defense may not be raised in a robbery case when a defendant takes money to satisfy a preexisting debt.[94] Even when a claim of right defense is permitted, the court may not instruct the jury of this defense in a robbery case "'regardless of the nature of the property taken.'"[95] Since the mistake of fact defense is governed by the same law that restricts a claim of right defense, under *Green*, the defendant was not entitled to the jury instruction for mistake of fact.[96] In this

87. *Id.* at 467, 976 N.E.2d at 221, 951 N.Y.S.2d at 694-95 (citing People v. Roche, 98 N.Y.2d 70, 75-76, 772 N.E.2d 1133, 1138, 745 N.Y.S.2d 775, 780 (2002); People v. Moye, 66 N.Y.2d 887, 890, 489 N.E.2d 736, 738, 498 N.Y.S.2d 767, 769 (1985)).

88. *McKenzie*, 19 N.Y.3d at 468, 976 N.E.2d at 221, 951 N.Y.S.2d at 695.

89. 19 N.Y.3d 91, 93-94, 968 N.E.2d 960, 961, 945 N.Y.S.2d 606, 607 (2012).

90. *Id.* at 94-95, 968 N.E.2d at 962, 945 N.Y.S.2d at 608.

91. *Id.* at 95-96, 968 N.E.2d at 962-63, 945 N.Y.S.2d at 608-09 (quoting N.Y. PENAL LAW § 15.20(1)(a) (McKinney 2009)).

92. *Pagan*, 19 N.Y.3d at 96, 968 N.E.2d at 963, 945 N.Y.S.2d at 608.

93. *Id.*, 968 N.E.2d at 963, 945 N.Y.S.2d at 609 (quoting N.Y. PENAL LAW § 155.15(1) (McKinney 2010)).

94. *Pagan*, 19 N.Y.2d at 97, 968 N.E.2d at 963, 945 N.Y.S.2d at 609.

95. *Id.* (quoting People v. Green, 5 N.Y.3d 538, 545, 841 N.E.2d 289, 293, 807 N.Y.S.2d 321, 325 (2005)).

96. *Pagan*, 19 N.Y.2d at 97, 968 N.E.2d at 963, 945 N.Y.S.2d at 609.

scenario, the claim of right defense was a specific instance of the more general category of mistake of fact.[97]

The Court's rationale for not allowing a claim of right defense when a defendant takes money to satisfy a preexisting debt is that "the person cannot have a true claim to bills or other currency, because they are fungible."[98] The defendant has no evidence to show that they have a good faith basis to believe that the particular bills are theirs, as opposed to when someone takes chattel such as a painting or car.[99] This is unless the bills in question are considered chattel because they are identifiable, such as a Roman coin, or a bill with a handwritten mark.[100] Because here the defendant could not identify the particular bills she attempted to take by force as being hers, the Court found that the negative right of claim instruction was proper.[101]

Finally, the Court concluded that the People carried its burden of disproving the mistake of fact defense, because the jury could have rationally concluded the defendant had no good faith belief that the bills she tried to take were hers.[102] The Court's rationale for reaching this conclusion stemmed from the defendant's admission that she was using force to try to retrieve money that she had already agreed she owed the cabdriver after having negotiated the amount of her fare.[103]

VI. DISCOVERY

In *People v. Sinha*, the Court held that when determining if a Brady violation, one that results in the reversal of conviction on some counts, necessarily requires reversal of the convictions on the other counts, one must look to the facts on a case-by-case basis.[104] The Court stated that the only way the facts in such a case will dictate reversal on the other counts is if "there is a 'reasonable possibility that the evidence supporting the . . . tainted counts influenced the guilty verdicts on the other [counts].'"[105] Here, the Court upheld the appellate division's

97. *Id.*

98. *Id.*, 968 N.E.2d at 964, 945 N.Y.S.2d at 610.

99. *Id.* at 98, 968 N.E.2d at 964, 945 N.Y.S.2d at 610.

100. *Id.*

101. *Pagan*, 19 N.Y.2d at 98, 968 N.E.2d at 964, 945 N.Y.S.2d at 610.

102. *Id.* at 98-99, 968 N.E.2d at 965, 945 N.Y.S.2d at 611.

103. *Id.*

104. 19 N.Y.3d 932, 934, 976 N.E.2d 223, 224, 951 N.Y.S.2d 697, 698 (2012) (citing People v. Daly, 14 N.Y.3d 848, 849, 928 N.E.2d 683, 684, 902 N.Y.S.2d 499, 500 (2010)).

105. *Sinah*, 19 N.Y.3d at 936, 976 N.E.2d at 224, 951 N.Y.S.2d at 698 (citing *Daly*, 14 N.Y.3d at 849, 928 N.E.2d at 684, 902 N.Y.S.2d at 500 (2010) (quoting People v. Baghai-Kermani, 84 N.Y.2d 525, 532, 644 N.E.2d 1004, 1007, 620 N.Y.S.2d 313, 316 (1994)).

finding as the Brady disclosure errors related only to the impeachment of one of the two victims and the trial judge carefully instructed the jury to decide each count, with regards to each victim separately.[106] Furthermore, there was strong evidence of guilt with respect to the remaining counts for which there were convictions.[107] The Court held that reversal on the counts where no Brady violation occurred was not necessary as there was no reasonable possibility that the taint from the Brady violations could have had any spillover effects on the remaining counts and their subsequent convictions.[108]

VII. DOUBLE JEOPARDY

A. Implied Acquittal Doctrine

In *People v. Gause*, the Court held that the Double Jeopardy Clauses of the Fifth Amendment of the United States Constitution and Article I Section 6 of the New York Constitution forbid the retrial of a defendant on the basis of the implied acquittal doctrine.[109] At trial, the jury was instructed that they could find the defendant guilty of either intentional murder in the second degree or depraved indifference murder.[110] The jury returned a verdict of guilty on the charge of depraved indifference, which was later overturned on appeal on sufficiency grounds.[111] The appellate division concluded that "'the jury never considered the intentional murder count'" and ordered a new trial on that count alone.[112] The defendant was re-tried and convicted of intentional murder in the second degree.[113] In holding that retrial should have been barred by double jeopardy considerations, the Court reasoned that the first jury's decision to convict the defendant of depraved indifference murder and not intentional murder, after being informed by the trial court to choose between "two different theories of how the crime was committed," meant that the jury impliedly acquitted the defendant of intentional murder.[114]

106. *Sinah*, 19 N.Y.3d at 935, 976 N.E.2d at 224, 951 N.Y.S.2d at 698.
107. *Id.*
108. *Id.*
109. 19 N.Y.3d 390, 394-96, 971 N.E.2d 341, 343-44, 948 N.Y.S.2d 211, 213-14 (2012).
110. *Id.* at 395, 971 N.E.2d at 344, 948 N.Y.S.2d at 214.
111. *Id.* at 394, 971 N.E.2d at 343, 948 N.Y.S.2d at 213.
112. *Id.* (citation omitted).
113. *Id.*
114. *Gause*, 19 N.Y.3d at 395, 971 N.E.2d at 344, 948 N.Y.S.2d at 214.

B. Clarification of Ambiguous Sentence

The Court in *People v. Gammon* found that subsequent clarification of an ambiguous sentence, in light of the evidence of the district court's intended sentence, did not violate the defendant's constitutional right to double jeopardy and that the defendant did not acquire the legitimate expectation of finality.[115] The defendant was convicted of driving while intoxicated[116] and was sentenced to a sixty-day term of incarceration and three years' probation.[117] The defendant violated the terms of his probation, and the Court stated that it would promise a sentence of an additional sixty days incarceration in addition to the term the defendant had previously served before being on probation.[118] However, later at sentencing, the Court did not specify that it was ordering an *additional* sixty-day incarceration, and, therefore, the defendant was immediately released when the county jail erroneous credited him with the original sixty-day term.[119] After learning of the release, the district court resentenced him to "120 days in jail which [was] an additional 60 days to the 60 day sentence he already served."[120] The defendant contended that the resentencing violated CPL section 430.10, which provides that, "'[e]xcept as otherwise specifically authorized by law, when the court has imposed a sentence of imprisonment and such sentence is in accordance with law, such sentence may not be changed, suspended or interrupted once the term or period of the sentence has commenced.'"[121] However, courts have "'inherent power to correct their records, where the correction relates to mistakes, or errors, which may be termed clerical in their nature, or where it is made in order to conform the record to the truth.'"[122] The Court distinguished *People v. Williams* where the defendants completed their incarceration and, without being previously advised by the court, had post release supervision imposed.[123]

115. 19 N.Y.3d 893, 896, 973 N.E.2d 160, 162, 950 N.Y.S.2d 65, 67 (2012).

116. *Id.* at 894, 973 N.E.2d at 161, 950 N.Y.S.2d at 66; *see* N.Y. VEH. & TRAF. LAW § 1192(3) (McKinney 2011).

117. *Gammon*, 19 N.Y.3d at 894-95, 973 N.E.2d at 161, 950 N.Y.S.2d at 66.

118. *Id.* at 895, 973 N.E.2d at 161, 950 N.Y.S.2d at 66.

119. *Id.*

120. *Id.*

121. *Id.* (citing N.Y CRIM. PROC. LAW § 430.10 (McKinney 2005)).

122. *Gammon*, 19 N.Y.3d at 895, 973 N.E.2d at 161, 950 N.Y.S.2d at 66 (citing People v. Minaya, 54 N.Y.2d 360, 364, 429 N.E.2d 1161, 1162-63, 445 N.Y.S.2d 690, 691-92 (1981)) (quoting Bohlen v. Metro. Elevated Ry. Co., 121 N.Y. 546, 550-51, 24 N.E. 932, 933 (1890)).

123. 14 N.Y.3d 198, 219, 925 N.E.2d 878, 891, 899 N.Y.S.2d 76, 89 (2010).

C. Resentencing of Defendant to Post-Release Supervision After Expiration of Sentence

In *People v. Velez*, the Court held that the Double Jeopardy Clause bars an attempt to resentence a defendant in situations when a term of post release supervision ("PRS") was illegally omitted from the defendant's original sentence–after the defendant's original sentence has expired.[124] When applying its rule in *Williams*[125] barring adding PRS once an original sentence has been completed, the Court here had to consider what happens when the resentencing procedure is *initiated* before the sentence is complete but the resentencing does not actually occur until after the original sentence expires.[126] Finding that, pursuant to *Williams*, a defendant acquires a "'legitimate expectation of finality'" when his original sentence has been fully served,[127] and this, according its decision in *People v. Lingle*, promotes "'clarity, certainty, and fairness,'"[128] the Court rejected the People's argument that the defendant's expectation of finality ends when the resentencing proceeding begins.[129]

VIII. GRAND JURY AND PROSECUTOR'S AUTHORITY

A. Prosecutor's Authority to Dismiss an Indicted Charge

In *People v. Extale*, the Court reversed the conviction and held that, pursuant to CPL section 210.40(3), whether to dismiss an indicted charge was ultimately a decision in the court's discretion, and not solely that of the prosecution.[130] The defendant was indicted of several crimes including first-degree assault (intentionally causing serious physical injury by means of a dangerous instrument),[131] and first-degree vehicular assault (with criminal negligence, causing serious physical injury while driving intoxicated in the presence of aggravating factors).[132] After his conviction was overturned on appeal and a new trial ordered, the Prosecution withdrew the second count of the

124. 19 N.Y.3d 642, 649, 975 N.E.2d 907, 910, 951 N.Y.S.2d 461, 464 (2012).

125. *Id.* (citing *Williams*, 14 N.Y.3d at 217, 925 N.E.2d at 890, 899 N.Y.S.2d at 88).

126. *Velez*, 19 N.Y.3d at 649-650, 975 N.E.2d at 910, 951 N.Y.S.2d at 464.

127. *Id.* (citing *Williams*, 14 N.Y.3d at 217, 925 N.E.2d at 889, 899 N.Y.S.2d at 87).

128. *Velez*, 19 N.Y.3d at 650, 975 N.E.2d at 910, 951 N.Y.S.2d at 464 (citing People v. Lingle, 16 N.Y.3d 621, 631, 949 N.E.2d 952, 956, 926 N.Y.S.2d 4, 8 (2011)).

129. *Velez*, 19 N.Y.3d at 650-651, 975 N.E.2d at 910, 951 N.Y.S.2d at 464.

130. 18 N.Y.3d 690, 692, 967 N.E.2d 179, 180, 943 N.Y.S.2d 801, 802 (2012).

131. *Id.* at 693, 967 N.E.2d at 180, 943 N.Y.S.2d at 802 (citing N.Y. PENAL LAW § 120.10(1) (McKinney 2009)).

132. *Extale*, 18 N.Y.3d at 693, 967 N.E.2d at 180, 943 N.Y.S.2d at 802 (citing N.Y. PENAL LAW § 120.04(1), (2)(b)).

indictment and proceeded solely on assault in the first degree.[133] After the defendant objected, the trial court allowed the Prosecution to proceed accordingly, and the defendant was later convicted of second-degree assault, a lesser-included offense.[134] The Court noted that nolle prosequi—the power to dismiss an indictment by a prosecutor alone, and not a court—existed in early common law but was later abolished and such power to dismiss an indictment was transferred to the judge.[135] Pursuant to CPL section 210.40(3), "'[a]n order dismissing an indictment in the interest of justice may be issued upon motion of the people or of the court itself as well as upon that of the defendant . . . [u]pon issuing such an order, the court must set forth its reasons therefor upon the record.'"[136] Since the record was clear that the trial judge was deferring to the prosecutor's choice and not making his own decision, the conviction was reversed and a new trial ordered.[137]

The Court held in *People v. Davis* and *People v. McIntosh* that a prosecutor has the authority to withdraw a case submitted to a grand jury where there is no equivalent of a dismissal of the charges, for instance where the grand jury has not yet considered the evidence and the charge.[138] Both cases involved charges being presented to the same grand jury, the substance of which provided that both co-defendants were involved together in an assault.[139] The People, during the presentation, told the grand jury that they would be presenting evidence against only McIntosh at the time and not all of the evidence would be submitted in one session.[140] A witness testified with respect to both defendants, and the people later withdrew the case due to an unavailable witness.[141] Four months later, the People presented evidence naming both Davis and McIntosh, called three witnesses, and procured grand jury indictments against both defendants.[142] The defendants both argued that, pursuant to CPL section 190.75(3), the prosecutor was obligated to secure permission from the court before re-presenting the

133. *Extale*, 18 N.Y.3d at 693, 967 N.E.2d at 180, 943 N.Y.S.2d at 802.

134. *Id.* (citing N.Y. PENAL LAW § 120.05(4)).

135. *Extale*, 18 N.Y.3d at 694, 967 N.E.2d at 181, 943 N.Y.S.2d at 803 (citing People v. Douglas, 60 N.Y.2d 194, 201-02, 456 N.E.2d 1179, 1183, 469 N.Y.S.2d 56, 60 (1983)).

136. *Extale*, 18 N.Y.3d at 695, 967 N.E.2d at 181, 943 N.Y.S.2d at 803 (quoting N.Y. CRIM. PROC. LAW § 210.40(3) (McKinney 2009)).

137. *Extale*, 18 N.Y.3d at 695-96, 967 N.E.2d at 182, 943 N.Y.S.2d at 804.

138. 17 N.Y.3d 633, 639, 959 N.E.2d 498, 501, 935 N.Y.S.2d 561, 564 (2011).

139. *Id.* at 636, 959 N.E.2d at 499, 935 N.Y.S.2d at 562.

140. *Id.* at 639, 959 N.E.2d at 501, 935 N.Y.S.2d at 564.

141. *Id.*

142. *Id.* at 636, 959 N.E.2d at 499, 935 N.Y.S.2d at 562.

case to a second grand jury and that, pursuant to *People v. Wilkens*,[143] the withdrawal was the functional equivalent of a dismissal.[144]

A "dismissal" can be deemed in situations other the actions of the grand jury returning a formal dismissal of a charge, for example through the People's pre-vote withdrawal.[145] The determination of whether such a withdrawal shall be deemed a dismissal—thus, necessitating court permission for a resubmission—depends on whether the grand jury has "considered the evidence and the charge."[146] The Court found that with respect to Davis, since the People never sought an indictment from the original grand jury against him, *Wilkens* did not bar the prosecution from presenting the case against Davis to a second jury even without first seeking leave from the court to do so.[147] The fact that there was testimony implicating Davis in the attack presented to the first grand jury was unavoidable given that the co-defendants were accused of a joint attack.[148] With respect to McIntosh, while the People were certainly seeking an indictment from the first grand jury, the presentation of the case had not progressed to the point where the grand jury had fully considered the evidence and the charges.[149] The Court found that since the People made it clear on the record that they intended to call additional witnesses and that ten days later there was at least one more witness the People intended to call who was unavailable to testify, the holding of *Wilkens* would not require the prosecutor to obtain court permission before resubmitting the withdrawn charge to a second grand jury.[150]

B. Prosecutor's Authority to Resubmit a Charge to Grand Jury

The Court held in *People v. Credle* that it is improper for a prosecutor to unilaterally resubmit the same charge to another grand jury after they withdraw the same charge from a previous grand jury, who returned a vote of "no affirmative action" on whether or not to

143. *See generally* 68 N.Y.2d 269, 501 N.E.2d 542, 508 N.Y.S.2d 893 (1986).

144. *Davis*, 17 N.Y.3d at 637-38, 959 N.E.2d at 500, 935 N.Y.S.2d at 563 (citing *Wilkens*, 68 N.Y.2d at 271, 501 N.E.2d at 542, 508 N.Y.S.2d at 893) (Pursuant to CPL section 190.75, if a grand jury dismisses a case, the charges can be resubmitted to another grand jury only if the People are granted authority by the court.).

145. *Davis*, 17 N.Y.3d at 637, 959 N.E.2d at 500, 935 N.Y.S.2d at 563 (citing *Wilkens*, 68 N.Y.2d at 271, 501 N.E.2d at 542, 508 N.Y.S.2d at 893).

146. *Davis*, 17 N.Y.3d at 637, 959 N.E.2d at 501, 935 N.Y.S.2d at 564 (citing *Wilkens*, 68 N.Y.2d at 271, 501 N.E.2d at 542, 508 N.Y.S.2d at 893).

147. *Davis*, 17 N.Y.3d at 638, 959 N.E.2d at 501, 935 N.Y.S.2d at 564.

148. *Id.*

149. *Id.*

150. *See id*. at 639, 959 N.E.2d at 501, 935 N.Y.S.2d at 564.

indict.[151] The grand jury indicted the co-defendant, but as to the defendant, could not muster the twelve necessary votes to indict, and after two non-conclusive votes, took the option of voting "no affirmative action."[152] The prosecution, later the same day and without seeking leave from the court, resubmitted the charges against the defendant to a second grand jury which returned an indictment.[153] Pursuant to CPL section 190.75(3), once charges submitted to a grand jury are dismissed, "'[they] may not again be submitted to a grand jury unless the court in its discretion authorizes or directs the people to resubmit such charge[s] to the same or another grand jury'" and under certain circumstances charges may be deemed "dismissed" when a prosecutor prematurely takes the charge from the grand jury.[154] It is the intention of the grand jury to check the accusatory power of the prosecutor's office.[155] To allow the prosecutor to re-submit charges until they hit upon an apparently receptive panel, without judicial authorization, would be "incompatible with and erosive of the grand jury's essential role."[156] The Court explained that in *Wilkins*, while there was no technical "dismissal" of the charges.[157] The prosecutor's withdrawal after the grand jury considered the evidence and the charge was tantamount to a dismissal, and therefore would require court permission before such a charge could be resubmitted to a grand jury.[158] "The taking of an inconclusive vote . . . cannot rationally immunize from judicial scrutiny a prosecutor's decision to wrest a case from a grand jury."[159] The critical question is not whether in withdrawing the charge, the prosecutor acted in good faith with respect to the grand jury's prerogative to dispose of matters before it, but rather whether the grand jury had considered the evidence and the charge.[160] Still if a court finds that the reasons for withdrawal are "legitimate" and the underlying circumstances do not provide clear indication that the first grand jury's authority was being subverted, leave to re-present should be granted as

151. 17 N.Y.3d 556, 558, 561-62, 958 N.E.2d 111, 112, 115, 934 N.Y.S.2d 77, 78, 81 (2011) (citations omitted).

152. *Id.* at 558, 958 N.E.2d at 112, 934 N.Y.S.2d at 78.

153. *Id.*

154. *Id.* at 557-58, 958 N.E.2d at 112, 934 N.Y.S.2d at 78 (citing N.Y. CRIM. PROC. LAW § 190.75(3) (McKinney 2011); People v. Wilkins, 68 N.Y.2d 269, 275-76, 501 N.E.2d 542, 545, 508 N.Y.S.2d 893, 896 (1986)).

155. *Credle*, 17 N.Y.3d at 559, 958 N.E.2d at 113, 934 N.Y.S.2d at 79.

156. *Id.* (citation omitted).

157. *See generally* 68 N.Y.2d 269, 501 N.E.2d 542, 508 N.Y.S.2d 893.

158. *Credle*, 17 N.Y.3d at 559, 958 N.E.2d at 113, 934 N.Y.S.2d at 79.

159. *Id.* at 560, 958 N.E.2d at 114, 934 N.Y.S.2d at 80.

160. *See id.* at 559-60, 958 N.E.2d at 113-14, 934 N.Y.S.2d at 79-80 (citation omitted).

a matter of course.[161] Here, the Court dismissed the indictment with leave to the People for an order permitting resubmission of the charges to another grand jury.[162]

IX. EVIDENCE–ADMISSIBILITY

A. Introduction of Later-Discovered Inculpatory DNA Evidence

The Court held in *People v. Kelley* that it was improper for the trial court to allow the People to introduce newly discovered DNA evidence against the defendant at such a late stage of the trial proceedings because it violated the defendant's right to a fair trial.[163] The defendant, charged with sexual conduct against a child and endangering the welfare of a child, already testified and focused his defense on the lack of DNA evidence implicating him.[164] During the trial, the prosecution then disclosed that a towel was analyzed and contained the defendant's DNA.[165] The trial court ruled, over defense counsel's objection, to allow the People to introduce the evidence and that the defendant could retake the stand if he wished.[166] The Court held that either the evidence should have been precluded or the court should have declared a mistrial.[167]

B. Out-of-Court Statements of Co-Defendant

In *People v. Becoats* and *People v. Wright*, the Court held that the trial court erred when it did not allow the defendant, Wright, to put into evidence an out-of-court statement made by the co-defendant, Becoats.[168] The statement, that the co-defendant declared he planned to kill the victim, was made during a conversation overheard by one of the prosecution's witnesses when the defendant Wright was not present.[169] Wright sought to question the witness about this conversation to show his absence from the plan to assault the victim and that this witness participated in the planning session.[170] The Court held that not only would this statement have been admissible as a "'statement of present

161. *Id.* at 562, 958 N.E.2d at 115, 934 N.Y.S.2d at 81 (citing *Wilkens*, 68 N.Y.2d at 276, 501 N.E.2d at 545, 508 N.Y.S.2d at 896).

162. *Credle*, 17 N.Y.3d at 562, 958 N.E.2d at 115, 934 N.Y.S.2d at 81.

163. 19 N.Y.3d 887, 889-90, 972 N.E.2d 111, 113, 948 N.Y.S.2d 870, 872 (2012).

164. *Id.* at 888-89, 972 N.E.2d at 112, 948 N.Y.S.2d at 871.

165. *Id.* at 889, 972 N.E.2d at 112, 948 N.Y.S.2d at 871.

166. *Id.*

167. *Id.* at 890, 972 N.E.2d at 113, 948 N.Y.S.2d at 872.

168. 17 N.Y.3d 643, 655, 958 N.E.2d 865, 870, 934 N.Y.S.2d 737, 742 (2011).

169. *Id.*, 958 N.E.2d at 870-71, 934 N.Y.S.2d at 742.

170. *Id.*, 958 N.E.2d at 871, 934 N.Y.S.2d at 743.

intention'" exception to the hearsay rule, but that it was not in fact hearsay at all, since the statement was not being offered for the truth of the statement.[171] Instead, it was being offered to prove that Wright was not part of the planning meeting and that Becoats was.[172] Furthermore, the Court found that the important exculpatory and relevant nature of this evidence with respect to the defendant was not outweighed by the potential for prejudice against the co-defendant, who purportedly made the statement.[173] The Court therefore affirmed the conviction of Becoats, but it reversed the appellate division order and remitted the case to the supreme court for Wright.[174]

C. Evidence of Complaint's Pre-Trial Show-up Identification of Co-Defendant Not on Trial

In *People v. Thomas*, the Court held that a trial court undoubtedly may admit into evidence a complainant's pretrial show-up identification of a co-defendant who was not on trial.[175] Since such identification testimony can be relevant, the Court found that "[complainant's] testimony concerning his identification of [the co-defendant] was probative of whether [the defendant] had attacked [the complainant] . . . . This is because [complainant's] accuracy in identifying the [co-defendant] . . . was relevant to whether the conditions [of where complainant was robbed] were conducive to observing the other attacker and accurately identifying him at trial."[176]

D. Proof of Refusal to Submit to Blood Alcohol Test

In *People v. Smith*, the Court held that proof of a defendant's voluntary refusal to submit to a blood alcohol test was improperly admitted at trial to establish the defendant's guilt.[177] A defendant need not expressly decline a police officer's request to submit to the test in order to effectuate "a refusal that is admissible at trial" as evidence of a defendant's conscious guilt.[178] For any refusal to be admissible at trial, the officers must first warn the motorist with clear and unequivocal

171. *Id.* (citing Mut. Life Ins. Co., v. Hillmon, 145 U.S. 285, 296 (1892); People v. James, 93 N.Y.2d 620, 629, 717 N.E.2d 1052, 1056, 695 N.Y.S.2d 715, 720 (1999)).

172. *Becoats*, 17 N.Y.3d at 655, 958 N.E.2d at 871, 934 N.Y.S.2d at 743.

173. *Id.* at 656, 958 N.E.2d at 871, 934 N.Y.S.2d at 743.

174. *Id.*

175. 17 N.Y.3d 923, 926-27, 958 N.E.2d 905, 906-07, 934 N.Y.S.2d 776, 777-78 (2011).

176. *Id.*, 958 N.E.2d at 907, 934 N.Y.S.2d at 778.

177. 18 N.Y.3d 544, 551, 965 N.E.2d 928, 932, 942 N.Y.S.2d 426, 431 (2012).

178. *Id.* at 550, 965 N.E.2d at 932, 942 N.Y.S.2d at 430.

language of the effect of refusing such test.[179] Here, the defendant did not expressly refuse the test but asked the officers to speak with counsel three separate times in response to three separate requests to submit to the test.[180] After the third request by the officers, and a third request by the defendant to speak with his counsel, the officers felt that this constituted a refusal to be tested and filled out the refusal form.[181] The Court held, however, that "[s]ince a reasonable motorist in defendant's position would not have understood that . . . further request[s] to speak to an attorney would be interpreted by the troopers as a binding refusal to submit to a chemical test, defendant was not adequately warned that his conduct would constitute a refusal."[182] The Court, furthermore, held that admission of evidence of such refusal at trial is not merely a harmless error.[183]

E. Defendant's Explanation of Statements Made While in Custody

In *People v. Robinson*, the Court found that it was not harmless error when the county court denied the defendant an opportunity to explain fully the statements he made while in police custody since the defendant's statements were both pertinent and probative.[184] The Court has stated that "'[t]he paramount purpose of all rules of evidence is to ensure that the jury will hear all pertinent, reliable and probative evidence which bears on the disputed issues.'"[185] An error is harmless only when there is "overwhelming proof of the defendant's guilt" and no significant probability that the jury would have acquitted the defendant were it not for the error.[186] Here, the Court found that the evidence against the defendant, who had been charged with criminal possession of a weapon, was not overwhelming.[187] "In light of this, defendant's potentially inculpatory statements about the revolver were the sole evidence tending to establish that he knew that the revolver was

179. *Id.* at 546-47, 965 N.E.2d at 929, 942 N.Y.S.2d at 427 (citing N.Y. VEH. & TRAF. LAW § 1194(2)(f) (McKinney 2011)).

180. *Smith*, 18 N.Y.3d at 547, 965 N.E.2d at 929, 942 N.Y.S.2d at 427.

181. *Id.*, 965 N.E.2d at 930, 942 N.Y.S.2d at 428.

182. *Id.* at 551, 965 N.E.2d at 933, 942 N.Y.S.2d at 431.

183. *Id.* at 552, 965 N.E.2d at 933, 942 N.Y.S.2d at 431.

184. 17 N.Y.3d 868, 870, 957 N.E.2d 761, 763, 933 N.Y.S.2d 192, 194 (2011).

185. *Id.*, 957 N.E.2d at 762, 933 N.Y.S.2d at 193 (citing People v. Miller, 39 N.Y.2d 543, 551, 349 N.E.2d 841, 846, 384 N.Y.S.2d 741, 747 (1976)). *See also* People v. Yazum, 13 N.Y.2d 302, 304, 196 N.E.2d 263, 264, 246 N.Y.S.2d 626, 628 (1963).

186. *Robinson*, 17 N.Y.3d at 870, 957 N.E.2d at 763, 933 N.Y.S.2d at 194 (citing People v. Crimmins, 36 N.Y.2d 230, 242, 326 N.E.2d 787, 794, 367 N.Y.S.2d 213, 241 (1975)).

187. *Robinson*, 17 N.Y.3d at 870, 957 N.E.2d at 763, 933 N.Y.S.2d at 194.

in the vehicle when he was stopped" by a police officer during a traffic stop.[188] The Court found that since the "defendant was not allowed the opportunity to explain those statements, the jury was left to reconcile the automobile presumption with the officer's account of defendant's ambiguous statements."[189] "Considering that defendant's explanation may have created doubt in the jury's mind sufficient to rebut the automobile presumption, resulting in an acquittal, it cannot be said that the error was harmless."[190]

F. Expert Testimony

In *People v. Rivers*, an arson case, the Court found that the experts' testimony, ruling out accidental and natural causes of the fires and concluding that one of the fires was intentionally set, did not invade the jury's province.[191] The Court considered the rule set forth in *People v. Grutz* prohibiting expert testimony concerning whether a fire was intentionally set.[192] "This prohibition occurs as dictum in an opinion written in 1914—at a time when fire investigations involved far less technical expertise than they do today."[193] Still, the Court noted that *Grutz* is frequently cited for the proposition that an expert may not invade the province of the jury by testifying that a fire was intentionally set or that the facts are "consistent" with an intentionally set fire.[194]

Here, the Court finally put the *Grutz* proposition to rest.[195] "'The guiding principle is that expert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror.'"[196] "Moreover, this principle applies to testimony regarding both 'the ultimate questions and those of lesser significance.'"[197]

In *People v. Bedessie*, the Court found that "[w]hile in a proper

188. *Id.*

189. *Id.*

190. *Id.*

191. 18 N.Y.3d 222, 228, 960 N.E.2d 419, 423, 936 N.Y.S.2d 650, 654 (2011).

192. *Id.* at 227-28, 960 N.E.2d at 422-23, 936 N.Y.S.2d at 653-54; *see generally* People v. Grutz, 212 N.Y. 72, 105 N.E. 843 (1914), *abrogated by Rivers*, 18 N.Y.3d 222, 960 N.E.2d 419.

193. *Rivers*, 18 N.Y.3d at 227, 960 N.E.2d at 422, 936 N.Y.S.2d at 653.

194. *Id.*

195. *Id.* at 228, 960 N.E.2d at 423, 936 N.Y.S.2d at 654.

196. *Id.* (quoting De Long v. Cnty. of Erie, 60 N.Y.2d 296, 307, 457 N.E.2d 717, 722, 469 N.Y.S.2d 611, 617 (1983) (citations omitted)).

197. *Rivers*, 18 N.Y.2d at 228, 960 N.E.2d at 423, 936 N.Y.S.2d at 654 (quoting People v. Cronin, 60 N.Y.2d 430, 432-33, 458 N.E.2d 351, 352, 470 N.Y.S.2d 110, 111 (1983)).

case expert testimony on the phenomenon of false confession should be admitted," the expert here did not propose relevant testimony, and, therefore, the trial court did not abuse its discretion when it refused to hold a *Frye* hearing.[198] This was the first case where the Court considered the admissibility of expert testimony offered on the issue of reliability of a confession.[199] The Court looked back to its decision in *People v. Lee*[200] regarding the broad principles governing the admissibility of expert psychological testimony.[201] In *Lee*, the Court held that:

> '[A]dmissibility and limits of expert testimony lie primarily in the sound discretion of the trial court,' which should be guided by 'whether the proffered expert testimony would aid a lay jury in reaching a verdict;' 'courts should be wary not to exclude such testimony merely because, to some degree, it invades the jury's province.'[202]

However, with respect to the specific facts of this case and the particular expert proffered, the Court agreed with the trial court that the testimony was not relevant and not likely to assist the jurors in any way.[203] The expert did not proffer testimony that this particular defendant exhibited any of the personality traits that the research purported to make one more likely to give a false confession.[204] Although research also purports to identify certain situational factors regarding the conditions of the interrogation, which might induce someone to make a false confession, the expert here offered only an opinion based only on a vague and general description given by the defendant.[205] "While the expert may not testify as to whether a particular defendant's confession was or was not reliable, the expert's proffer must be relevant to the defendant and the interrogation before the court."[206] Accordingly, the Court affirmed the order of the appellate division, which upheld the trial court's ruling.[207] In *People v. Santiago*, the Court considered the trial court's discretion to limit or deny testimony of an expert on eye-witness identifications, and it reaffirmed

198. 19 N.Y.3d 147, 149, 970 N.E.2d 380, 381, 947 N.Y.S.2d 357, 358 (2012).
199. *Id.* at 149, 970 N.E.2d at 380-81, 947 N.Y.S.2d at 357-58.
200. See generally 96 N.Y.2d 157, 750 N.E.2d 63, 726 N.Y.S.2d 361 (2001).
201. *Bedessie*, 19 N.Y.3d at 149, 970 N.E.2d at 380-81, 947 N.Y.S.2d at 357-58.
202. *Id.* at 156, 970 N.E.2d at 385, 947 N.Y.S.2d at 362 (quoting *Lee*, 96 N.Y.2d at 162, 750 N.E.2d at 66, 726 N.Y.S.2d at 364).
203. *Bedessie*, 19 N.Y.2d at 157, 970 N.E.2d at 386, 947 N.Y.S.2d at 363.
204. *Id.* at 159, 970 N.E.2d at 387, 947 N.Y.S.2d at 364.
205. *Id.*, 970 N.E.2d at 388, 947 N.Y.S.2d at 365.
206. *Id.* at 161, 970 N.E.2d at 389, 947 N.Y.S.2d at 366.
207. *Id.*

the framework it established in *People v. LeGrand*.[208] When the *LeGrand* standards are met, an expert's testimony on eye-witness identification is no longer up to the trial court's discretion.[209] Furthermore, when several factors call corroborating evidence—other evidence connecting the defendant to the crime—into question, then such corroborating evidence will not be sufficient to skip the second stage of the *LeGrand* two-part test.[210] In *People v. Clyde*, the Court held that while allowing physicians to testify about their conclusions regarding the victim's injuries was improper, the error was harmless.[211] The admissibility of such testimony "'turns on whether, given the nature of the subject, the facts cannot be stated or described to the jury in such a manner as to enable them to form an accurate judgment thereon[.]'"[212] Here, the facts could be presented to the jury in such a manner as to enable them to form an accurate judgment regarding the elements of the charges, and thus, the expert testimony was improper.[213] However, the evidence against the defendant was so overwhelming that the Court found that there was no significant probability that the jurors would have reached a verdict had it reached its own conclusion about the injuries sustained.[214]

G. Testimony Regarding a Prior Conviction of a Non-Testifying Codefendant

The Court held in *People v. Hall* that under these set of facts, it was proper for the trial court to allow the prosecution to cross-examine

208. 17 N.Y.3d 661, 668-69, 958 N.E.2d 874, 880, 934 N.Y.S.2d 746, 752 (2011) (citing People v. LeGrand, 8 N.Y.3d 449, 452, 867 N.E.2d 374, 375-76, 835 N.Y.S.2d 523, 524-25 (2007)).

209. *LeGrand*, 8 N.Y.3d at 452, 867 N.E.2d at 375-76, 835 N.Y.S.2d at 524-25. *LeGrand* establishes a two-stage inquiry for whether expert testimony on eye-witness identification must be admitted. *Id.* The first inquiry is: does the case turn on the accuracy of the eyewitness identification because there is little or no corroborating evidence connecting the defendant to the crime? *Id.* Secondly: if the trial court finds it has such a case, then apply the following four factors and determine whether: "testimony is (1) relevant to the witness's identification of defendant; (2) based on principles that are generally accepted within the relevant scientific community; (3) proffered by a qualified expert; and (4) on a topic beyond the ken of the average juror." *Id.* However, on the other hand, if sufficient evidence corroborates the eyewitness's testimony, then it is completely up to the trial court's discretion on whether to admit expert testimony based on eyewitness identifications). *Id.*

210. *Santiago*, 17 N.Y.3d at 669, 958 N.E.2d at 881, 934 N.Y.S.2d at 752.

211. 18 N.Y.3d 145, 154-55, 961 N.E.2d 634, 640, 938 N.Y.S.2d 243, 249 (2011).

212. *Id.* at 154, 961 N.E.2d at 640, 938 N.Y.S.2d at 249 (quoting People v. Cronin, 60 N.Y.2d 430, 432-33, 458 N.E.2d 351, 352, 470 N.Y.S.2d 110, 111 (1983)).

213. *Clyde*, 18 N.Y.3d at 154, 961 N.E.2d at 640, 938 N.Y.S.2d at 249.

214. *Id.* at 154-55, 961 N.E.2d at 640, 938 N.Y.S.2d at 249.

one testifying co-defendant regarding a prior conviction of a non-testifying co-defendant in the same trial.[215] The two defendants were tried together for robbery and had allegedly committed an assault together a year before.[216] When the one testifying defendant denied knowing his co-defendant, this opened the door for the prosecution to question him about the previous assault he had committed with the defendant, although previously the trial court had ruled that the prior conviction could not be brought out during cross-examination pursuant to *People v. Sandoval*.[217] The non-testifying co-defendant objected, arguing that he would be prejudiced by such evidence and that he had not opened the door to this prior conviction since he had not testified.[218] The Court found that the trial court's limitation of the prosecution's questioning, that being of a previous "'fight'" and not the actual conviction, was proper.[219] The court found such despite the fact that the testimony of the co-defendant witness went beyond the instruction and indeed referred to him and the other defendant being "'locked-up for so-called assaulting this guy.'"[220]

H. Molineux Evidence

In *People v. Agina*, the Court, without ruling on the admissibility of the specific prior bad act evidence in question, held that the defendant's identity was not so conclusively established as to prevent the identity exception to the *Molineux* rule against offering prior bad act evidence from being invoked.[221] The Court noted the familiar rule of *People v. Molineux*,[222] in which the court held that "evidence of uncharged crimes is inadmissible where its only relevance is to show defendant's bad character or criminal propensity."[223] However, exceptions to this general rule do exist, including evidence of a similar crime to identify the defendant as the perpetrator of the crime where similarities between the crimes are unusual enough to compel the inference that the defendant committed both, "'unless the defendant's

215. 18 N.Y.3d 122,133, 960 N.E.2d 399, 405, 963 N.Y.S.2d 630, 636 (2011).

216. *Id.* at 132, 960 N.E.2d at 405, 963 N.Y.S.2d at 636.

217. *Id.* at 132-33, 960 N.E.2d at 405, 963 N.Y.S.2d at 636; *see also* People v. Sandoval, 34 N.Y.2d 371, 375, 314 N.E.2d 413, 416, 357 N.Y.S.2d 849, 853-54 (1974).

218. *Hall*, 18 N.Y.3d at 133, 960 N.E.2d at 405, 963 N.Y.S.2d at 636.

219. *Id.*

220. *Id.*

221. 18 N.Y.3d 600, 603, 965 N.E.2d 913, 915, 942 N.Y.S.2d 411, 413 (2012).

222. *See generally* 168 N.Y. 264, 61 N.E. 286 (1901).

223. *Agina*, 18 N.Y.3d at 603, 965 N.E.2d at 915, 942 N.Y.S.2d at 413 (citing *Molineux*, 168 N.Y. at 291, 61 N.E. at 293).

identity is conclusively established by other evidence.'"[224]

In *Agina*, the defendant was accused of beating and torturing his wife over several hours after accusing her of cheating on him.[225] Over a defense objection, the prosecution presented the defendant's ex-wife, who testified that fifteen months earlier the defendant engaged in similar conduct after he accused her of cheating.[226] The defense argued that the evidence was being admitted only for propensity purposes and was prohibited under *Molineux*.[227] The trial court admitted the evidence to prove the identity of the perpetrator.[228] At the conclusion of the trial, the defendant was convicted of attempted first-degree assault, second-degree assault, and unlawful imprisonment.[229]

In affirming the trial court's decision, the Court did not reach a conclusion with regard to the similarities of the offenses.[230] Instead, the Court held that the defendant's identity was not so conclusively established as to prevent the exception from being invoked.[231]

The defendant never asserted that someone else was responsible for the complainant's injuries, but he argued to the jury that the complainant was lying and suggested that the complainant may have inflicted the injuries on herself.[232] The complainant herself never wavered from her testimony that it was her husband who committed the crime, and the majority's opinion had to concede based on these facts that "there was no possibility of *mistaken* identity."[233] However, in reaching its conclusion that the identity of the perpetrator was not so conclusively established as to prevent similar act evidence from being admitted, the Court reasoned that the defendant's suggestion that the complainant was lying may have led the jury to believe that the complainant's identification was "intentionally false."[234] Therefore, the Court reasoned that the identity of the perpetrator was made an issue in the case.[235] Further, while the defendant admitted being present during

224. *Agina*, 18 N.Y.3d at 603, 965 N.E.2d at 915, 942 N.Y.S.2d at 413 (quoting People v. Beam, 57 N.Y.2d 241, 251, 441 N.E.2d 1093, 1098, 455 N.Y.S.2d 575, 580 (1982); People v. Condon, 26 N.Y.2d 139, 142, 257 N.E.2d 615, 616, 309 N.Y.S.2d 152, 154 (1970)).

225. *Agina*, 18 N.Y.3d at 602, 965 N.E.2d at 914, 942 N.Y.S.2d at 412.

226. *Id.*

227. *Id.* at 603, 965 N.E.2d at 914, 942 N.Y.S.2d at 412.

228. *Id.* at 602, 965 N.E.2d at 914, 942 N.Y.S.2d at 412.

229. *Id.*

230. *Agina*, 18 N.Y.2d at 605, 965 N.E.2d at 916, 942 N.Y.S.2d at 414.

231. *Id.*

232. *Id.* at 604, 965 N.E.2d at 916, 942 N.Y.S.2d at 414.

233. *Id.* at 603, 965 N.E.2d at 915, 942 N.Y.S.2d at 413.

234. *Id.*

235. *Agina*, 18 N.Y.3d at 603, 965 N.E.2d at 915, 942 N.Y.S.2d at 413.

some of the time when the complainant's injuries were inflicted and because he suggested the complainant may have inflicted them on herself, the defendant not only did not concede his identity as the perpetrator, but he also "actively disputed" it.[236] For these reasons, the identity exception to *Molineux* was met, and the evidence was offered to show the identity of "the defendant as the person who did the acts, not just as someone who was present at the scene."[237]

The Court held in *People v. Gamble* that it was proper for the trial court to allow testimony regarding uncharged crimes to show that the defendant had a motive for the killings he was charged with.[238] There, the defendant was charged with the murder of his neighbor and her two adult children.[239] The People offered testimony of two witnesses who would establish a motive for the killing, as well as the identity of the perpetrator, by providing necessary background information into the increasingly acrimonious relationship between the defendant and the victim.[240] *Molineux* and its progeny allow such limited presentation of uncharged prior crimes so long as it is probative of some fact other than the defendant's criminal propensity.[241] Here, the supreme court excluded testimony that was overly prejudicial to the defendant, and both the appellate division and the Court found that the witnesses adhered to such limitations and that the allowed testimony was permissible.[242]

In *People v. Cass*, the Court had the first opportunity to address the use of *Molineux* evidence in a case involving the defense of extreme emotional disturbance.[243] It held that the defendant put his state of mind at issue, and therefore, other uncharged crimes and bad acts could be admitted to rebut it.[244] The defendant was charged and convicted of two counts of murder for strangling his roommate.[245] He raised the affirmative defense of extreme emotional disturbance, testifying that the killing was in response to the victim's unexpected sexual advances and

236. *Id.* at 604, 965 N.E.2d at 916, 942 N.Y.S.2d at 414.

237. *Id.* at 604-05, 965 N.E.2d at 916, 943 N.Y.S.2d at 414.

238. 18 N.Y.3d 386, 391, 964 N.E.2d 372, 373, 941 N.Y.S.2d 1, 2 (2012).

239. *Id.*

240. *Id.* at 398, 964 N.E.2d at 374, 378, 941 N.Y.S.2d at 7 (citing People v. Molineux, 168 N.Y. 264, 293, 61 N.E. 286, 294 (1901)).

241. *Gamble*, 18 N.Y.3d at 398, 964 N.E.2d at 378, 941 N.Y.S.2d at 7 (citing People v. Gillyard, 13 N.Y.3d 351, 355, 920 N.E.2d 344, 346, 892 N.Y.S.2d 288, 290 (2009)).

242. *Gamble*, 18 N.Y.3d at 398, 964 N.E.2d at 378-79, 941 N.Y.S.2d at 7-8.

243. People v. Cass, 18 N.Y.3d 553, 555, 965 N.E.2d 918, 921, 942 N.Y.S.2d 416, 419 (2012).

244. *Id.* at 555-56, 965 N.E.2d at 921, 942 N.Y.S.2d at 419.

245. *Id.* at 556-57, 965 N.E.2d at 921-22, 942 N.Y.S.2d at 419-20 (citation omitted).

that the violence was due to the defendant's mental illness caused by being sexually abused as a child.[246] The People moved to permit introduction of defendant's statement regarding a similar, prior, uncharged homicide to show that the defendant deliberately targeted and killed gay men.[247] Proof of intent is one of the exceptions to the general *Molineux* rule in which the "defendant's uncharged crimes or prior misconduct is not admissible if it cannot logically be connected to some specific material issue in the case, and tends only to demonstrate the defendant's propensity to commit the crime charged."[248] The defense of extreme emotional disturbance requires a showing that subjectively the defendant actually lost control and "'acted under the influence of extreme emotional disturbance.'"[249] Objectively, it also requires a "'reasonable explanation' for the defendant's emotional disturbance 'determined from the viewpoint of a person in the defendant's situation under the circumstance as the defendant believed them to be.'"[250] The Court found that evidence of the defendant strangling another man who had allegedly made sexual advances towards him passed the *Molineux* test, since it was relevant to the material issue of intent, not for the defendant's criminal propensity, and the probative value of the evidence outweighed the potential prejudice to the defendant.[251]

X. EVIDENCE—SUFFICIENCY TO SUPPORT CONVICTION

A. Dangerous Instrument

In *People v. Hall*, the Court affirmed the order of the appellate division that vacated the convictions for first-degree robbery and fourth-degree weapon possession based upon a lack of sufficient evidence that the stun gun used during a robbery was a dangerous instrument.[252] Charges of first-degree robbery and possession of a weapon were premised on the theory that the defendant's stun gun used against the

246. *Id.* at 558, 965 N.E.2d at 922, 942 N.Y.S.2d at 420.

247. *Id.* at 557-58, 965 N.E.2d at 922, 942 N.Y.S.2d at 420.

248. *Cass*, 18. N.Y.3d at 559, 965 N.E.2d at 923, 942 N.Y.S.2d at 421 (citing People v. Molineux, 168 N.Y. 264, 293, 61 N.E. 286, 294 (1901); People v. Alvino, 71 N.Y.2d 233, 253, 519 N.E.2d 808, 819, 525 N.Y.S.2d 7, 18 (1987)).

249. *Cass*, 18 N.Y.3d at 561, 965 N.E.2d at 925, 942 N.Y.S.2d at 423 (quoting People v. Casassa, 49 N.Y.2d 668, 678, 404 N.E.2d 1310, 1315, 427 N.Y.S.2d 769, 774 (1980)).

250. *Cass*, 18 N.Y.3d at 561, 965 N.E.2d at 925, 942 N.Y.S.2d at 423 (citing *Casassa*, 49 N.Y.2d at 678, 404 N.E.2d at 1315-16, 427 N.Y.S.2d at 774).

251. *Cass*, 18 N.Y.3d at 561-62, 965 N.E.2d at 925, 942 N.Y.S.2d at 423 (citing *Molineux*, 168 N.Y. at 293, 61 N.E. at 294) (citation omitted).

252. 18 N.Y.3d 122, 127, 960 N.E.2d 339, 401, 936 N.Y.S.2d 630, 632 (2011).

victim was a "'dangerous instrument;'" that being one which, "'under the circumstances in which it was used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury.'"[253] "'Serious physical injury,'" the court noted, is defined as "'physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss of impairment of the function of any bodily organ.'"[254]

Here, the stun gun used was not recovered, and the only evidence of the weapon's potential for harm came from the victim's testimony, "which described pain, a burning sensation and temporary incapacitation."[255] The Court was not persuaded by the People's argument that had the defendant continued to use the stun gun, it "'could have caused burn scars or caused the victim to fall limp and suffer serious physical injury[.]'"[256] This type of speculation is not the requisite proof that the instrument is "'readily capable'" of causing death or serious physical injury.[257]

In *People v. Plunkett*, the Court extended its holding in *People v. Owusu*,[258] that an individual's body part, even if used dangerously to produce injury, is not a "'dangerous instrument' within the meaning of Penal Law Section 10.00(13)."[259] In this case, by finding that an individual's saliva could not be considered a dangerous instrument necessary to support a conviction for aggravated assault on a police officer, the Court extended its opinion to include the saliva of an HIV-positive defendant.[260]

The Court in *People v. Grant* held that defendant's written statement, alone, is not sufficient evidence that he was actually in possession of a dangerous instrument to support a charge of robbery in the first degree pursuant to Penal Law section 160.15(3).[261] There, the defendant presented the bank teller with a handwritten note stating that

253. *Id.* at 128, 960 N.E.2d at 402, 936 N.Y.S.2d at 633 (quoting N.Y. PENAL LAW § 10.00(13) (McKinney 2009)).

254. *Hall*, 18 N.Y.3d at 128, 960 N.E.2d at 402, 936 N.Y.S.2d at 633 (quoting N.Y. PENAL LAW § 10.00(10)).

255. *Hall*, 18 N.Y.3d at 128, 960 N.E.2d at 402, 936 N.Y.S.2d at 633.

256. *Id.* at 129, 960 N.E.2d at 402, 936 N.Y.S.2d at 633.

257. *Id.*

258. 93 N.Y.2d 398, 400, 712 N.E.2d 1228, 1230, 690 N.Y.S.2d 863, 864 (1999).

259. People v. Plunkett, 19 N.Y.3d 400, 408, 971 N.E.2d 363, 368, 948 N.Y.S.2d 233, 238 (2012) (citing N.Y. PENAL LAW § 10.00(13) (McKinney 2009)).

260. *Plunkett*, 19 N.Y.3d at 403, 971 N.E.2d at 364, 948 N.Y.S.2d at 234.

261. 17 N.Y.3d 613, 614, 959 N.E.2d 479, 480, 935 N.Y.S.2d 542, 543 (2011) (citing N.Y. PENAL LAW § 160.15(3)).

he had a gun and demanded money.[262] The teller did not testify to the grand jury that she ever saw a weapon.[263] Citing its decision in *People v. Pena*,[264] the Court agreed with the supreme court's decision to reduce the charge to robbery in the third degree, since the People could not rely solely on the defendant's statement to prove that he actually employed a dangerous instrument at the time of the crime.[265] This was the first opportunity for the Court to address this issue, and it noted that all four departments have previously held that the defendant's statement, without more, is not sufficient proof that he used or threatened to use a dangerous instrument.[266] The Court affirmed the order of the appellate division supporting the supreme court's reduction of the charge to robbery in the third degree.[267]

B. Forcible Compulsion

The Court in *People v. Mack* affirmed the order of the appellate division that had dismissed the indictment of first degree sexual abuse, finding there was a lack of sufficient evidence that the defendant used the required forcible compulsion to subject the victim to sexual contact.[268] The victim, a teenage girl, was on a packed subway when a very heavy man pushed himself on her from behind.[269] When she noticed some "'weird movements'" on her lower back, she tried to move but was impeded by the crush of commuters.[270] After the man left the train, she noticed semen on her jeans and coat.[271] The defendant was charged with first-degree sexual abuse, in which a person "'subjects another person to sexual contact . . . [b]y forcible compulsion.'"[272] The issue here was whether the defendant's actions constituted "forcible compulsion," which is defined as "'means to compel by . . . use of

262. *Grant*, 17 N.Y.3d at 614-15, 959 N.E.2d at 481, 935 N.Y.S.2d at 544.

263. *Id.* at 615, 959 N.E.2d at 481, 935 N.Y.S.2d at 544.

264. 50 N.Y.2d 400, 406, 406 N.E.2d 1347, 1349, 429 N.Y.S.2d 410, 412 (1980).

265. *Grant*, 17 N.Y.3d at 615, 959 N.E.2d at 481, 935 N.Y.S.2d at 544 (citing People v. Pena, 50 N.Y.2d 400, 406, 406 N.E.2d 1347, 1349, 429 N.Y.S.2d 410, 412 (1980)).

266. *Grant*, 17 N.Y.3d at 618, 959 N.E.2d at 483, 935 N.Y.S.2d at 546 (citations omitted).

267. *Id.* at 619, 959 N.E.2d at 484, 935 N.Y.S.2d at 547.

268. 18 N.Y.3d 929, 931-32, 965 N.E.2d 959, 960-61, 942 N.Y.S.2d 457, 458-59 (2012).

269. *Id.* at 930, 965 N.E.2d at 960, 942 N.Y.S.2d at 458.

270. *Id.*

271. *Id.*

272. *Id.* at 931, 965 N.E.2d at 960, 942 N.Y.S.2d at 458 (citing N.Y. PENAL LAW § 130.65(1) (McKinney 2009)).

physical force.'"[273] Upon the defendant's motion to dismiss or reduce the charge, the "Supreme Court concluded that the 'mere close presence of many other passengers in the train [was] not sufficient to establish the requisite use of forcible compulsion'" and reduced the charge to third-degree sexual abuse.[274] That finding was affirmed since there was "no coordinated action by defendant and other passengers to hedge in the victim" and the only physical force used by the defendant was the sexual contact itself.[275] "This is not enough to establish the sexual contact was 'compel[led] by. . . the use of physical force.'"[276]

C. Depraved Indifference Murder

The Court in *People v. Bussey* reversed the order of the appellate division and found that the prosecution failed to demonstrate the utter disregard for the victim's life necessary to uphold a conviction of murder in the second-degree under the theory of depraved indifference.[277] The defendant and two others were "charged with, among other things, three counts of murder in the second-degree (intentional, felony, and depraved indifference) and kidnapping in the first degree" for the kidnapping and beating death of the victim.[278] Two witnesses testified that they saw the defendant walk into the victim's backyard, heard sounds of someone getting hit, heard the victim yelling and screaming, and identified the defendant leaving the backyard.[279] They estimated that the beating lasted ten minutes, and, according to a witness close to one of the codefendants, the defendant was seen beating the victim for several minutes.[280] This witness also testified that the three defendants removed the victim's clothing, wrapped him in a blanket, and drove off in the defendant's vehicle.[281] There was also testimony that the victim struggled to breathe, vomited while his head was wrapped in a blanket, lived for an hour or two after having aspirated the vomit, and eventually died from multiple blunt impact trauma to the head and torso.[282]

At the conclusion of the trial, the defendant moved to dismiss

273. *Mack*, 18 N.Y.3d at 931, 965 N.E.2d at 960, 942 N.Y.S.2d at 458 (citing N.Y. PENAL LAW § 130.00(8)(a)).

274. *Mack*, 18 N.Y.3d at 931, 965 N.E.2d at 960, 942 N.Y.S.2d at 458.

275. *Id.* at 932, 965 N.E.2d at 961, 942 N.Y.S.2d at 459.

276. *Id.*

277. 19 N.Y.3d 231, 236, 970 N.E.2d 404, 407, 947 N.Y.S.2d 381, 384 (2012).

278. *Id.* at 234-35, 970 N.E.2d at 406, 947 N.Y.S.2d at 383.

279. *Id.* at 235, 970 N.E.2d at 406, 947 N.Y.S.2d at 383.

280. *Id.*

281. *Id.*

282. *Bussey*, 19 N.Y.3d at 235, 970 N.E.2d at 406, 947 N.Y.S.2d at 383.

several charges arguing that without knowing when the victim died, evidence did not support a conviction of depraved murder.[283] The trial court denied the motion and the defendant was acquitted of intentional murder and convicted of depraved indifference murder, felony murder, and kidnapping.[284] The Court reversed the depraved indifference murder conviction, finding that the People did not demonstrate the required utter disregard for the victim's life to the extent that he did not care whether the victim was killed.[285] The Court noted that recklessness is an element in both depraved indifference murder and second-degree manslaughter, defined as when a person "'is aware of and consciously disregards a substantial and unjustifiable risk that [a] result [defined by statute] will occur.'"[286] The jury found that the defendant acted recklessly in causing the death of the victim.[287] Further, because the evidence supported the conclusion that the defendant was aware of and consciously disregarded the substantial and unjustified risk that his conduct could cause the death of the victim, the Court reduced the depraved indifference conviction to manslaughter in the second degree.[288]

In *People v. Matos*, the Court held that the evidence that the defendant failed to timely seek medical attention for her severely beaten child, and attempts to cover up the crime did not prove the required mental culpable state to uphold a conviction of depraved indifference murder of a child under the age of eleven.[289] The defendant was convicted of murder in the second-degree as per Penal Law section 125.24(4) (depraved indifference murder of a child under the age of eleven years).[290] The defendant's partner severely beat the defendant's twenty-three-month-old son causing a broken leg, broken ribs, injuries to the child's liver and lungs, and severe internal bleeding.[291] Evidence presented showed that the defendant, who was not present at the time of the beating, learned of her son's injuries by her partner when she returned home and that, out of concern that they would both get in trouble, neglected to contact the police, instead going to a pharmacy to

283. *Id.*
284. *Id.*
285. *Id.* at 236, 970 N.E.2d at 407, 947 N.Y.S.2d at 384.
286. *Id.* (citing N.Y. PENAL LAW § 15.05(3) (McKinney 2009)).
287. *Bussey*, 19 N.Y.3d at 236, 970 N.E.2d at 407, 947 N.Y.S.2d at 384.
288. *Id.*
289. 19 N.Y.3d 470, 473-74, 973 N.E.2d 152, 152-53, 950 N.Y.S.2d 57, 57-58 (2012) (citation omitted).
290. *Id.* at 475, 973 N.E.2d at 154, 950 N.Y.S.2d at 59; N.Y. PENAL LAW § 125.25(4).
291. *Matos*, 19 N.Y.3d at 473, 973 N.E.2d at 153, 950 N.Y.S.2d at 58.

purchase a splint for the child's leg.[292] After creating a makeshift split, she gave her son some ibuprofen and put him to sleep.[293] She left the home to make two phone calls and returned to find the child whimpering with blood flowing from his rectum.[294] After disposing of the bloody clothes and sheets she called the police; however, it was too late, and the child was unresponsive when the Emergency Medical Technician ("EMT") arrived and was pronounced dead at the hospital, having died of "'fatal child abuse syndrome.'"[295] Testimony from medical experts at trial showed that the child would have been in severe pain for several hours before going into shock and losing consciousness.[296]

The Court affirmed the finding of the appellate division that the defendant's failure to seek medical attention for the child fell short of the standard necessary for a conviction based on depraved indifference since, although she cared too little about her child's safety, the evidence did not support a finding that she did not care at all.[297] While the defendant's actions may have come within the first enactment of Penal Law section 125.24 in 1990, which simply considered the "'factual setting in which the risk creating conduct must occur,'"[298] the subsequent case of *People v. Feingold*[299] and its progeny require the prosecution to show a culpable mental state of "'wickedness, evil or inhumanity' so 'as to render the actor as culpable as one whose conscious objective is to kill.'"[300] "Trying to cover up a crime does not prove indifference to it."[301]

D. Intent to Prevent EMT from Performing Their Lawful Duty

The Court found in *People v. Bueno* that the statute in question, Penal Law section 120.05(3), allows for the jury to find the defendant culpable of assaulting an EMT with the intent of preventing the

292. *Id.*
293. *Id.*
294. *Id.* at 474, 973 N.E.2d at 153, 950 N.Y.S.2d at 58.
295. *Id.*
296. *Matos*, 19 N.Y.3d at 474, 973 N.E.2d at 153, 950 N.Y.S.2d at 58.
297. *Id.* at 476-77, 973 N.E.2d at 155, 950 N.Y.S.2d at 60 (citing People v. Lewie, 17 N.Y.3d 348, 359, 953 N.E.2d 760, 766, 929 N.Y.S.2d 522, 528 (2011)).
298. *Matos*, 19 N.Y.3d at 477, 973 N.E.2d at 155, 950 N.Y.S.2d at 60 (citing People v. Register, 60 N.Y.2d 270, 276, 457 N.E.2d 704, 707, 469 N.Y.S.2d 599, 602 (1983)).
299. *See generally* 7 N.Y.3d 288, 852 N.E.2d 1163, 819 N.Y.S.2d 691 (2006).
300. *Matos*, 19 N.Y.3d at 476, 973 N.E.2d at 155, 950 N.Y.S.2d at 60 (citing People v. Suarez, 6 N.Y.3d 202, 214, 844 N.E.2d 721, 730, 811 N.Y.S.2d 267, 276 (2005)).
301. *Matos*, 19 N.Y.3d at 477, 973 N.E.2d at 155, 950 N.Y.S.2d at 60 (citing *Lewie*, 17 N.Y.3d at 360, 953 N.E.2d at 767, 929 N.Y.S.2d at 529).

performance of his lawful duty since, although the EMTs had finished treating the specific injured person for whom they had been called, they were still performing routine job duties at the time the defendant assaulted them.[302] The defendant and a second man attacked two EMTs who had responded to an emergency call at the location.[303] The EMTs were in the process of entering their ambulance after the injured person had refused treatment.[304] There was evidence showing that it was obvious at the scene that the victims of the attack were EMTs.[305] Both sustained injuries requiring hospitalization.[306] The Court was not persuaded by defendant's argument that he had not committed the assault with the required intent to prevent the performance of a lawful duty since the EMTs were finished with the one specific call they had responded to.[307] The Court found that the EMTs were still performing their duties at the time they were attacked and that "[a] jury is entitled to infer that a defendant intended the natural and probable consequences of his acts."[308]

E. Conviction on Sole Witness' Contradictory Testimony

In *People v. Delamota*, the Court of Appeals upheld a conviction that had been based solely on the identification of the defendant by the victim, whose previous description may have been different, or even exculpatory, from the one given at trial.[309] The defendant was convicted of first degree robbery, third and fourth degree weapon possession, and second degree menacing solely based on the testimony of the victim who previous description of the perpetrator may or may not have matched the description he gave at trial.[310] The Court distinguished this case from its holding in *People v. Ledwon*, which "established that a criminal conviction is not supported by legally sufficient evidence if the only evidence of guilt is supplied by a witness who offers inherently contradictory testimony about the defendant's

302. 18 N.Y.3d 160,169-70, 960 N.E.2d 405, 411-12, 936 N.Y.S.2d 636, 642-43 (2011); N.Y. PENAL LAW §120.05(3) (McKinney 2009).

303. *Bueno*, 18 N.Y.3d at 162-64, 960 N.E.2d at 407-08, 936 N.Y.S.2d at 638-39.

304. *Id.* at 163, 960 N.E.2d at 407, 936 N.Y.S.2d at 638.

305. *Id.* at 162, 960 N.E.2d at 407, 936 N.Y.S.2d at 638.

306. *Id.* at 165, 960 N.E.2d at 408-09, 936 N.Y.S.2d at 639-40.

307. *Id.* at 165-66, 960 N.E.2d at 409, 936 N.Y.S.2d at 640.

308. *Bueno*, 18 N.Y.3d at 169, 960 N.E.2d at 412, 936 N.Y.S.2d at 643 (citing People v. Steinberg, 79 N.Y.2d 673, 685, 595 N.E.2d 845, 850, 584 N.Y.S.2d 770, 775 (1992)).

309. 18 N.Y.2d 107, 110, 960 N.E.2d 383, 385, 936 N.Y.S.2d 614, 616 (2011).

310. *Id.* at 110-12, 960 N.E.2d at 385-86, 936 N.Y.S.2d at 616-17.

culpability."[311] Here, while the detective testified that the victim had given him a different description of the person who attacked him during the initial investigation (one which clearly did not match the defendant), the victim witness was unwavering in his trial testimony and provided a description that did match the defendant.[312] The *Ledwon* rule did not control since the witness was able to provide a credible explanation for the discrepant testimony, specifically that the detective simply was not recalling his prior description correctly.[313] Since the jury could have rationally concluded that the victim's recollection was credible and the detective's was not, the testimony of the victim was not inherently inconsistent, and, therefore, the conviction could not be overturned on "'sufficiency grounds,'" despite the Court's subjective assessment of the People's case.[314]

F. Promoting and Possessing a Sexual Performance by a Child (Penal Law Section 263.15-16)

In *People v. Kent*, the Court found the evidence failed to show that the defendant had awareness of "cache files," or temporary Internet files, automatically created and stored on his hard drive, that constitute promoting a sexual performance by a child[315] and possessing a sexual performance by a child.[316] Thus, the Court held that the People had not met its burden of demonstrating defendant's knowing procurement or possession of those files.[317] The Court further concluded that "merely viewing Web images of child pornography does not, absent other proof, constitute either possession or procurement within the meaning of [New York's] Penal Law."[318] The Court looked to a federal court's holdings and found that "a defendant cannot knowingly acquire or possess that which he or she does not know exists."[319] However, "regardless of a defendant's awareness of his computer's cache function, the files stored

311. *Id.* at 110, 960 N.E.2d at 385, 936 N.Y.S.2d at 616 (citing People v. Ledwon, 153 N.Y. 10, 23, 46 N.E. 1046, 1050).

312. *Delamota*, 18 N.Y.3d at 115-16, 960 N.E.2d at 389, 936 N.Y.S.2d at 620.

313. *Id.* at 114-16, 960 N.E.2d at 388-89, 936 N.Y.S.2d at 619-20.

314. *Id.* at 116, 960 N.E.2d at 389, 936 N.Y.S.2d at 620.

315. 19 N.Y.3d 290, 295, 970 N.E.2d 833, 835, 947 N.Y.S.2d 798, 800 (2012); N.Y. PENAL LAW § 263.15 (McKinney 2008).

316. N.Y. PENAL LAW § 263.16.

317. *Kent*, 19 N.Y.3d at 295, 970 N.E.2d at 835, 947 N.Y.S.2d at 800.

318. *Id.*

319. *Id.* at 302, 970 N.E.2d at 840, 947 N.Y.S.2d at 805; *see also* United States v. Kuchinski, 469 F.3d 853, 863 (9th Cir. 2006) (to prosecute a defendant who lacks knowledge about the cache for possession of files stored therein "turns abysmal ignorance into knowledge and a less than valetudinarian grasp into dominion and control.").

in the cache" may be evidence of "the mens rea of both crimes by showing that a defendant did not inadvertently access an illicit image or site or was not mistaken as to its content."[320] Still, "to *possess* those images, however, the defendant's conduct must exceed mere viewing to encompass more affirmative acts of control such as printing, downloading or saving."[321]

G. Health Care Fraud and Grand Larceny

In *People v. Khan*, the Court found that the defendant's convictions for health care fraud in the fourth degree and grand larceny in the third degree were supported by legally sufficient evidence.[322] This was the Court's first opportunity to determine the nature of proof required for a conviction under the recently enacted health care fraud statute.[323] In a legal sufficiency inquiry, the Court's role is "limited to determining whether, 'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"[324] Where the evidence adduced at trial establishes "[']any valid line of reasoning and permissible inferences [that] could lead a rational person' to convict, then the conviction survives a sufficiency review."[325] "'A sufficiency inquiry requires a court to marshal competent facts most favorable to the People and determine whether, as a matter of law, a jury could logically conclude that the People sustained its burden of proof.'"[326]

To establish health care fraud in the fourth degree, the People must prove that the defendant:

> [W]ith intent to defraud a health care plan . . . knowingly and willfully provide[d] materially false information . . . for the purpose of requesting payment from a health plan for a health care item or service

320. *Kent*, 19 N.Y.3d at 301-02, 970 N.E.2d at 840-41, 947 N.Y.S.2d at 805-06.

321. *Id.* at 301, 970 N.E.2d at 840, 947 N.Y.S.2d at 805 (emphasis added).

322. 18 N.Y.3d 535, 537, 965 N.E.2d 901, 902, 942 N.Y.S.2d 399, 400 (2012).

323. *Id.* (citing N.Y. PENAL LAW §§ 177.00-177.30 (McKinney 2010)).

324. *Khan*, 18 N.Y.3d at 541, 965 N.E.2d at 905, 942 N.Y.S.2d at 403 (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)); *see also* People v. Contes, 60 N.Y.2d 620, 621, 454 N.E.2d 932, 932-33, 467 N.Y.S.2d 349, 349-50 (1983).

325. *Khan*, 18 N.Y.3d at 541, 965 N.E.2d at 905, 942 N.Y.S.2d at 403 (quoting People v. Santi, 3 N.Y.3d 234, 246, 818 N.E.2d 1146, 1153, 644 N.Y.S.2d 405, 413 (2004))).

326. *Khan*, 18 N.Y.3d at 541, 965 N.E.2d at 905, 942 N.Y.S.2d at 403 (quoting People v. Danielson, 9 N.Y.3d 342, 349, 880 N.E.2d 1, 5, 849 N.Y.S.2d 480, 484 (2007)).

> and, as a result of such information . . . , [the defendant] or another person receive[d] payment in an amount [to which the defendant or another was] not entitled, [and] the payment wrongfully received . . . from a single health plan, in a period of not more than one year exceed[ed] [$3,000] in the aggregate.[327]

"Further, grand larceny in the third degree is made out when the People prove that the defendant stole property and that the value of the property exceeds $3,000."[328]

The Court found that "the People presented sufficient evidence for a jury to rationally conclude that the pink and orange pills dispensed to . . . [the undercover officer] were different from the drugs listed on the prescriptions presented to defendant," that the defendant knew the fictitious name listed on the prescription would not be the recipient, and that he knowingly and willfully provided materially false information to Medicaid.[329]

H. Custodial Parent Guilty of Kidnapping

In *People v. Leonard*, where defendant used his baby daughter as a hostage, threatening to kill her if the police approached him, the Court found that it is possible for a parent who has custodial rights to a child to be guilty of kidnapping that child.[330] The Court interpreted Penal Law section 135.20: "'A person is guilty of kidnapping in the second degree when he abducts another person.'"[331] The statutory definition of abduct means "'to restrain a person with intent to prevent his liberation by either (a) secreting or holding him in a place where he is not likely to be found, or (b) using or threatening to use deadly physical force.'"[332]

The statutory definition of "restrain" means

> to restrict a person's movements intentionally and unlawfully in such manner as to interfere substantially with his liberty by moving him from one place to another, or by confining him either in the place where the restriction commences or in a place to which he has been moved, without consent and with knowledge that the restriction is unlawful. A person is so moved or confined 'without consent' when

327. *Khan*, 18 N.Y.3d at 542, 965 N.E.2d at 905, 942 N.Y.S.2d at 403 (quoting N.Y. PENAL LAW §§ 177.05, 177.10).

328. *Khan*, 18 N.Y.3d at 542, 965 N.E.2d at 905, 942 N.Y.S.2d at 403; *see* N.Y. PENAL LAW § 155.35.

329. *Khan*, 18 N.Y.3d at 542-43, 965 N.E.2d at 905-06, 942 N.Y.S.2d at 403-04.

330. 19 N.Y.3d 323, 325, 970 N.E.2d 856, 857, 947 N.Y.S.2d 821, 822 (2012).

331. *Id.* at 326, 970 N.E.2d at 858, 947 N.Y.S.2d at 823 (citing N.Y. PENAL LAW § 135.20 (McKinney 2009)).

332. *Leonard*, 19 N.Y.3d at 326, 970 N.E.2d at 858, 947 N.Y.S.2d at 823 (quoting N.Y. PENAL LAW § 135.00(2)).

> such is accomplished by (a) physical force, intimidation or deception, or (b) any means whatever, including acquiescence of the victim, if he is a child less than sixteen years old or an incompetent person and the parent, guardian or other person or institution having lawful control or custody of him has not acquiesced in the movement or confinement.[333]

And Penal Law section 135.30, which says: "In any prosecution for kidnapping, it is an affirmative defense that (a) the defendant was a relative of the person abducted, and (b) his sole purpose was to assume control of such person."[334]

The "[d]efendant argued that he did not 'restrict' [the baby's] 'movements' or 'interfere' with her 'liberty' because a six-week-old child is not capable of going or remaining anywhere voluntarily."[335] The Court found this argument untenable, stating that "it implies that no infant could ever be kidnapped."[336] "A restriction on movement, and an interference with 'liberty,' should be deemed to exist whenever the lawful movement of a person, including the lawful movement of a child by adults, is hindered."[337]

The defendant further argued that it was impossible for him, a custodial parent, to "act unlawfully or without consent, or to know that he was acting unlawfully, either by moving the child or by preventing her from being moved."[338] The Court looked beyond New York's sparse case law to decisions of other states in finding that "there comes a point where even a custodial parent's control over a child's movements is unlawful[.]"[339] In its concurrence with similar holdings from Arizona, Florida, and Iowa, the Court also noted that while custodial kidnapping is not impossible, "[i]t is possible, though only in cases, like this one, where a defendant's conduct is so obviously and unjustifiably dangerous or harmful to the child as to be inconsistent with the idea of lawful custody."[340]

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333. *Leonard*, 19 N.Y.3d at 326-27, 970 N.E.2d at 858, 947 N.Y.S.2d at 823 (quoting N.Y. PENAL LAW § 135.00 (1)).

334. *Leonard*, 19 N.Y.3d at 327, 970 N.E.2d at 858, 947 N.Y.S.2d at 823 (quoting N.Y. PENAL LAW § 135.30).

335. *Leonard*, 19 N.Y.3d at 327, 970 N.E.2d at 858-59, 947 N.Y.S.2d at 823-24.

336. *Id.*, 970 N.E.2d at 859, 947 N.Y.S.2d at 824.

337. *Id.*

338. *Id.*

339. *Id.* at 328, 970 N.E.2d at 859, 947 N.Y.S.2d at 824 (citing State v. Viramontes, 788 P.2d 67, 69 (Ariz. 1990) ("Supreme Court of Arizona upheld a kidnapping conviction under a state that contained a definition of 'restrain' much like New York's"); ARIZ. REV. STAT. ANN. § 13-1301(2) (2010); Davila v. State, 75 So. 3d 192, 197 (Fla. 2011) (citation omitted) (held "that a parent is not exempt from criminal liability for kidnapping his or her own child").

340. *Leonard*, 19 N.Y.3d at 329, 970 N.E.2d at 859, 947 N.Y.S.2d at 824.

The Court held that "defendant's restriction of his daughter's movements was unlawful; that he could not consent to it, because at the time of the crime he did not have 'lawful control or custody' of his daughter; and that the unlawfulness was blatant[.]"[341]

I. Perjury—Materiality of False Testimony

In *People v. Perino*, the Court affirmed the decision of the appellate division modifying the lower court's decision, by finding that although the evidence was legally sufficient to establish defendant's intent to commit perjury, the two answers pertaining to the gun were not material to the prosecution in question.[342] Defendant, a former member of the New York City Police Department, was charged with twelve counts of perjury in the first degree after he falsely answered questions posed to him on cross-examination during the criminal trial of Erik Crespo, for which he was the lead investigator.[343]

The question was whether the defendant's statements were material to the Crespo action. The Court noted that "a necessary element of perjury in the first degree is that the false sworn statement be material to the proceeding in which it is given."[344]

> To be material, the statement need not prove directly the fact in issue; it is sufficient if it is ['']circumstantially material or tends to support and give credit to the witness in respect to the main fact' . . . Thus, a statement that ['']reflect[s] on the matter under consideration' . . . even if only as to the witness's credibility . . . is material for purposes of supporting a perjury charge.[345]

There were several untruthful statements made by the defendant that were brought to the Court for review by both the prosecution and the defense.[346] With respect to the prosecution's appeal of the appellate division's reduction of convictions to perjury in the third degree, the Court dismissed the appeal because "the modification was 'on the law alone or upon the law and such facts which, but for the determination of law, would have led to . . . modification.'"[347] In his appeal, the

341. *Id.*, 970 N.E.2d at 860, 947 N.Y.S.2d at 825.

342. 19 N.Y.3d 85, 88-90, 968 N.E.2d 956, 958-59, 945 N.Y.S.2d 602, 604-05 (2012).

343. *Id.* at 87, 968 N.E.2d at 957-58, 945 N.Y.S.2d at 603-04.

344. *Id.* at 89, 968 N.E.2d at 958, 945 N.Y.S.2d at 604 (citing N.Y. PENAL LAW § 210.15(b) (McKinney 2010)).

345. *Perino*, 19 N.Y.3d at 89, 968 N.E.2d at 959, 945 N.Y.S.2d at 605 (citing People v. Davis, 53 N.Y.2d 164, 171, 423 N.E.2d 341, 345, 440 N.Y.S.2d 864, 868 (1981)).

346. *Perino*, 19 N.Y.3d at 89, 968 N.E.2d at 959, 945 N.Y.S.2d at 605.

347. *Id.* (citing N.Y. CRIM. PROC. LAW § 450.90(2)(a) (McKinney 2005)).

defendant claimed that his other false statements regarding whether he had interrogated Crespo and the context of an alleged spontaneous statement were only relevant to a suppression hearing, were not material to the criminal trial, and thus, did not constitute in that context.[348] The Court disagreed, finding that it was material to the jury to determine, as it may, whether an admitted statement should be disregarded on the ground that such statement was involuntarily made.[349] Thus, it properly reduced the convictions on those two counts of perjury in the first degree to perjury in the third degree, and it affirmed as to the other counts on which defendant was convicted.[350]

J. Manslaughter

In *People v. Ramos*, the Court affirmed the appellate division's ruling that the defendant's conviction for manslaughter in the first degree was supported by legally sufficient evidence.[351] When the evidence is viewed "in the light most favorable to the People, a reasonable jury could have concluded that defendant fired his gun with the intent to cause serious physical injury and, as a result, caused [the victim's] death."[352] The Court found that the jury could determine that defendant was embarrassed when individuals who witnessed his prior altercation on the street mocked him.[353] The timing of the defendant's retrieval of a gun, his use of it to shoot into a group of people standing outside a nearby bodega, and his own after-the-fact statement that he did not believe his small caliber weapon would kill anyone, supported the jury's inference that he believed shooting the gun would cause serious physical injury and that he intended that result.[354] The Court stated that its conclusion is "not negated by the possibility that defendant's conduct also might have been deemed consistent with a reckless state of mind."[355] "There is no contradiction in saying that a defendant intended serious physical injury, and was reckless as to whether or not death occurred."[356] Furthermore, the Court stated that its

348. *Perino*, 19 N.Y.3d at 90, 968 N.E.2d at 959, 945 N.Y.S.2d at 605.
349. *Id.* (citing N.Y. CRIM. PROC. LAW § 710.70(3) (McKinney 2011)).
350. *Perino*, 19 N.Y.3d at 90, 968 N.E.2d at 959, 945 N.Y.S.2d at 605.
351. 19 N.Y.3d 133, 134, 969 N.E.2d 199, 200, 946 N.Y.S.2d 83, 84 (2012).
352. *Id.* at 136, 969 N.E.2d at 201, 946 N.Y.S.2d at 85.
353. *Id.*
354. *Id.*
355. *Id.*
356. *Ramos*, 19 N.Y.3d at 136, 969 N.E.2d at 201, 946 N.Y.S.2d at 85. *See* Suarez v. Byrne, 10 N.Y.3d 523, 540-41, 890 N.E.2d 201, 214, 860 N.Y.S.2d 439, 14-15 (2008); People v. Trappier, 87 N.Y.2d 55, 57, 660 N.E.2d 1131, 1132, 637 N.Y.S.2d 352, 353 (1995)).

opinion here is not "inconsistent with [its] remark that shooting into a crowd is a '[q]uintessential example[ ]' of depraved indifference murder[,]" which the People did not charge in this case.[357]

K. Criminal Possession of a Forged Instrument: Intent

In *People v. Rodriguez*, the Court found that the evidence was legally sufficient to convict the defendant of criminal possession of a forged instrument in the second degree.[358] "'A person is guilty of criminal possession of a forged instrument in the second degree when, with knowledge that it is forged and with intent to defraud, deceive or injure another, he utters or possesses any forged instrument of a kind specified in section 170.10.'"[359] "Forged government identification cards fall under one category of documents specified in Penal Law [section] 170.10."[360] "Because intent is an 'invisible operation of [the] mind,' direct evidence is rarely available (in the absence of an admission) and is unnecessary where there is legally sufficient circumstantial evidence of intent."[361] The defendant relied on *People v. Bailey* and argued that "the evidence of intent was insufficient in this case because he was arrested on a public street and as such there were no surrounding circumstances from which the inference of intent could permissibly be drawn."[362]

The Court distinguished *Bailey* and found "several factors which, taken together, form a sufficient basis for the permissible inference that defendant acted with the requisite intent."[363] The defendant had a motive to assume a false identity because he was aware that the police were searching for him, three of the four documents found in the defendant's possession bore his photograph, the defendant was observed

357. *Ramos*, 19 N.Y.3d at 136-37, 969 N.E.2d at 201-02, 946 N.Y.S.2d at 85-86.

358. 17 N.Y.3d 486, 487, 957 N.E.2d 1133, 1133, 933 N.Y.S.2d 631, 631 (2011).

359. *Id.* at 489, 957 N.E.2d at 1134, 933 N.Y.S.2d at 632 (citing N.Y. PENAL LAW § 170.25 (McKinney 2010)).

360. *Rodriguez*, 17 N.Y.3d at 489, 957 N.E.2d at 1134, 933 N.Y.S.2d at 632 (citing N.Y. PENAL LAW § 170.10(3)).

361. *Rodriguez*, 17 N.Y.3d at 489, 957 N.E.2d at 1134-35, 933 N.Y.S.2d at 632-33 (citing People v. Bracey, 41 N.Y.2d 296, 301, 360 N.E.2d 1094, 1098, 392 N.Y.S.2d 412, 416 (1977) (noting that "intent can also 'be inferred from the defendant's conduct and the surrounding circumstances'").

362. *Rodriguez*, 17 N.Y.3d at 489, 957 N.E.2d at 1135, 933 N.Y.S.2d at 633 (citing People v. Bailey, 13 N.Y.3d 67, 72-73, 915 N.E.2d 611, 614-15, 886 N.Y.S.2d 666, 669-70 (2009). In reversing the conviction for criminal possession of a forged instrument in the first degree, the Court made clear that intent cannot be presumed from knowing possession alone unless there is a statute establishing such a presumption. *Bailey*, 13 N.Y.3d at 72-73, 915 N.E.2d at 614-15, 886 N.Y.S.2d at 669-70.

363. *Rodriguez*, 17 N.Y.3d at 489, 957 N.E.2d at 1135, 933 N.Y.S.2d at 633.

wearing the same clothes he wore in the photographs found in his possession, the defendant carried the false documents separately from his true identification, and the defendant sent a letter to the court requesting to plead guilty.[364] "A conviction for criminal possession of a forged instrument in the second degree requires both knowing possession and intent."[365] "Penal Law [section] 170.25 does not, however, require use or attempted use as an element of the crime (a person is guilty under the statute if he or she utters *or possesses* a forged instrument, so long as that person also has the requisite intent)."[366] "Nor does Penal Law [section] 170.25 require that the contemplated use be imminent."[367] The Court found that "in the absence of use or attempted use, and in the absence of a statutory presumption of intent, there is nevertheless legally sufficient circumstantial evidence of intent to defraud, deceive, or injure."[368] The evidence "provided a solid basis for the jury to infer that defendant had the requisite intent to defraud, deceive, or injure and for it to conclude rationally that defendant was guilty beyond a reasonable doubt."[369]

L. Promptness for Outcry Rule

In *People v. Rosario* and *People v. Parada*, the Court looked at two cases in order to determine what constituted "promptness" with regard to the prompt outcry rule's timing requirement.[370] In *Rosario*, the Court held that "'what might qualify as prompt in one case might not in another.'"[371] The Court stated that the timing requirement inherently attached to "promptness" is entirely dependent on the facts of the case and, generally, the concept of promptness suggests immediacy

364. *Id.* at 489-90, 957 N.E.2d at 1135, 933 N.Y.S.2d at 633.

365. *Id.*

366. *Id.* (citing N.Y. PENAL LAW § 170.25 (McKinney 2010)).

367. *Rodriguez*, 17 N.Y.3d at 490, 957 N.E.2d at 1135, 933 N.Y.S.2d at 633 (citing N.Y. PENAL LAW § 170.25).

368. *Rodriguez*, 17 N.Y.3d at 490, 957 N.E.2d at 1135-36, 933 N.Y.S.2d at 633-34.

369. *Id.* at 491, 957 N.E.2d at 1136, 933 N.Y.S.2d at 634.

370. *Rosario*, 17 N.Y.3d 501, 506, 511-13, 958 N.E.2d 93, 95, 99-100, 934 N.Y.S.2d 59, 61, 65-66 (2011) (quoting People v. McDaniel, 81 N.Y.2d 10, 16, 611 N.E.2d 265, 268, 595 N.Y.S.2d 364, 368 (1993)). "The prompt outcry rule states that 'evidence that a victim of sexual assault promptly complained about the incident is admissible to corroborate the allegation that an assault took place.'" *Rosario*, 17 N.Y.3d at 511, 958 N.E.2d at 99, 934 N.Y.S.2d at 65 (citing People v. Rice, 75 N.Y.2d 929, 931, 554 N.E.2d 1265, 1266, 555 N.Y.S.2d 677, 678 (1990) (Such is an exception to inadmissibility of prior consistent statements of an unimpeached witness "permits evidence that a timely complaint was made," but does not allow further testimony as to the "details of the incident")).

371. *Rosario*, 17 N.Y.3d at 512-513, 958 N.E.2d at 100, 934 N.Y.S.2d at 66 (citing *McDaniel*, 81 N.Y.2d at 17, 611 N.E.2d at 269, 595 N.Y.S.2d at 368).

is not usually met when months have passed since the last incident of abuse, as was the case in *Rosario*.[372] Further, in *Rosario*, the Court found that by referring to the complaint's "'story'" in their opening remarks, defense counsel did not mislead the jury with an implied defense of fabrication to the extent that they would have opened the door to otherwise inadmissible bolstering testimony of a prior consistent statement.[373] In *Parada*, while finding that the defense had not preserved their objection to the admission of the prior "outcry" statement for review, the Court nonetheless held that under those circumstances, the statement was properly admitted by the trial court.[374]

M. Serious Physical Injury

In *People v. Stewart*, the Court modified the defendant's conviction for assault in the first degree to assault in the second degree, because there was no serious physical injury.[375] The Court held that while the victim's injuries were undoubtedly serious, involving "numerous blows with a sharp instrument," the treating emergency room physician stated that the injuries were only superficial without any organ or muscle damage.[376] Consequently, the injuries were not objectively shown to be so serious as to constitute "'serious disfigurement,'" a qualifier for a serious physical injury predicate for first degree assault under Penal Law sections 120.10(1) and 10.00(10).[377] The Court further held that the serious physical injury requirement was not met under the alternative ground, set forth in the same Penal Law provisions, which holds that a serious injury can be proven if the "victim suffered 'protracted impairment of health[,]'" as there was no medical evidence giving rise to even a potential extended health impairment.[378]

372. *Rosario*, 17 N.Y.3d at 513, 958 N.E.2d at 100, 934 N.Y.S.2d at 66.

373. *Id.* at 514, 958 N.E.2d at 101, 934 N.Y.S.2d at 67.

374. *Id.* at 515, 958 N.E.2d at 102, 934 N.Y.S.2d at 68 (citing People v. Aguirre, 1999 N.Y. App. Div. LEXIS 6725, at *1 (1st Dep't June 17,1999) (Where a child victim discloses sexual abuse to her best friend and complainant told her cousin of the abuse a few weeks after defendant anally sodomized her, but complainant made this disclosure before the sexual abuse ended.)).

375. 18 N.Y.3d 831, 832, 962 N.E.2d 764, 764, 939 N.Y.S.2d 273, 273 (2011).

376. *Id.*, 962 N.E.2d at 764-65, 939 N.Y.S.2d at 273-74.

377. *Id.* (citing N.Y. PENAL LAW §§ 120.10(1), 10.00(10) (McKinney 2009)).

378. *Stewart*, 18 N.Y.3d at 832, 962 N.E.2d at 764-65, 939 N.Y.S.2d at 273-74.

XI. JURY TRIALS—PROCEDURES

A. Improper Summation

The Court in *People v. Fisher* ordered a new trial on the basis of the prosecutor's improper summation and defense counsel's ineffective assistance in not making proper objections to the summation.[379] The evidence, the Court found, was far from overwhelming, and, thus, the People's case rested entirely on the credibility of its witnesses, two children who had allegedly been sexually abused by the defendant.[380] The prosecutor, in her summation, went beyond the four corners of the evidence presented at trial and "improperly encouraged inferences of guilt based on facts not in evidence[,]" specifically by referring to alleged prior consistent statements.[381] Further, she improperly testified when she advised the jury that the contemporaneous school behavior of victims could be used as evidence that the crimes occurred.[382] The hazard of an erroneous conviction was further heightened by the prosecutor when she minimized the consideration a parole board would give to the letter her office was to write on behalf of the witness in exchange for his testimony against the defendant.[383] Finally, the prosecutor erred in her summation by admonishing the jury by stating that their acceptance of the testimony of the child witnesses was essential to the administration of justice.[384] In light of these numerous errors, the defense counsel's failure to object deprived the defendant of his right to effective assistance of counsel.[385]

B. Missing Witness Instruction

In affirming the order of the appellate division, the Court held in *People v. Hall* and *People v. Freeman* that while the trial court erred in failing to give a missing witness instruction to the jury as to one defendant, that issue had not been preserved for appeal, and as to the other, the error was harmless.[386] "There are three preconditions to a missing witness instruction: 'First, the witness's knowledge must be material to the trial. Second, the witness must be expected to give noncumulative testimony favorable to the part against whom the charge

379. 18 N.Y.3d 964, 967, 967 N.E.2d 676, 679, 944 N.Y.S.2d 453, 456 (2012).
380. *Id.* at 966, 967 N.E.2d at 678, 944 N.Y.S.2d at 455.
381. *Id.*
382. *Id.*
383. *Id.* at 967, 967 N.E.2d at 678, 944 N.Y.S.2d at 455.
384. *Id.*, 967 N.E.2d at 679, 944 N.Y.S.2d at 456.
385. *Id.*
386. 18 N.Y.3d 122, 129, 960 N.E.2d 399, 402, 936 N.Y.S.2d 630, 633 (2011).

is sought . . . Third, the witness must be available to that party.'"[387] The Court found that as to three of the four alleged missing witnesses, all three conditions were met and that it was irrelevant that the witnesses were also available to the defense.[388] The jury is permitted, as per the instruction, "to draw [a] common-sense inference that a failure to call a seemingly friendly witness suggests some weakness in the party's case,"[389] and the trial judge erred in his rulings on objections and instruction to the jury that the absence of the witness "'is not to form any part of [their] judgment.'"[390] However, before trial, "defendant Hall expressly withdrew his request for a missing witness instruction in return for an opportunity to interview the witnesses in question[.]"[391] The error, as it pertained to Freeman, was harmless since the evidence presented was overwhelming and the court found it impossible to believe that a missing witness instruction would have persuaded a jury to acquit him.[392]

C. For-Cause Challenge to Prospective Juror

The Court held in *People v. Furey* that the county court abused its discretion when it "denied the defendant's for-cause challenge to a prospective juror who had personal and professional relationships with several of the [potential] witnesses."[393] The juror informed the court that she was acquainted with eight of the fourteen witnesses identified by the People.[394] A potential juror may be challenged for cause due to the existence of a preexisting relationship with a potential witness that '"is likely to preclude [the prospective juror] from rendering an impartial verdict.'"[395] Such '"implied bias"' requires automatic exclusion of the juror regardless of whether they declare that the relationship will not affect their ability to be fair and impartial.[396] While not all relationships between a potential juror and a witness or interested party requires disqualification as a matter of law, the frequency of contact and the nature of the relationship are to be

387. *Id.* at 131, 960 N.E.2d at 404, 936 N.Y.S.2d at 635 (quoting People v. Savinon, 100 N.Y.2d 192, 197, 791 N.E.2d 401, 404, 761 N.Y.S.2d 144, 147 (2003)).

388. *Freeman*, 18 N.Y.3d at 131, 960 N.E.2d at 404, 936 N.Y.S.2d at 635.

389. *Id.*

390. *Id.* at 131-32, 960 N.E.2d at 404, 936 N.Y.S.2d at 635.

391. *Id.* at 132, 960 N.E.2d at 404, 936 N.Y.S.2d at 635.

392. *Id.*, 960 N.E.2d at 404-05, 936 N.Y.S.2d at 635-36.

393. 18 N.Y.3d 284,286, 961 N.E.2d 668, 668, 938 N.Y.S.2d 277, 277 (2011).

394. *Id.*, 961 N.E.2d at 668-69, 938 N.Y.S.2d at 277-78.

395. *Id.* at 287, 961 N.E.2d at 669, 938 N.Y.S.2d at 278 (quoting N.Y. CRIM. PROC. LAW § 270.20(1)(c) (McKinney 2002)).

396. *Furey*, 18 N.Y.3d at 287, 961 N.E.2d at 669, 938 N.Y.S.2d at 278.

considered.[397] Here, the Court concluded that, based on those factors, the prospective juror should have been excluded from the jury for cause, and, therefore, the Court reversed the order of the appellate division and ordered a new trial.[398]

The Court in *People v. Guay* held that the supreme court did not abuse its discretion when it dismissed a hearing-impaired juror for cause.[399] During jury selection it became obvious through the juror's answers, as well as his own admission, that he was having difficulty understanding what was being said, especially when someone spoke in a low tone of voice.[400] It was anticipated that some of the child victims would testify, and, as noted by the Prosecution and the Court, children often have trouble speaking up during their testimony.[401] The defendant contended that the supreme court violated the Judiciary Law and the rule of law articulated in *People v. Guzman*,[402] when it dismissed the juror without engaging in adequate inquiry as to his ability to serve and when it failed to accommodate his hearing impairment.[403] Here, the inquiry was conducted by defense counsel during voir dire and, other than the juror's request to sit in the front row, no other inquiry or request for accommodation was made.[404]

Judiciary Law section 510 provides that "[i]n order to qualify as a juror a person must . . . [b]e able to understand and communicate in the English language."[405] "A person's ability to serve as a juror [is a civil right but one which] . . . must be balanced against the accused's fundamental constitutional rights and the State's obligation to provide a fair trial."[406] While under *Guzman*, a hearing impairment does not per se preclude an individual from serving as a juror, the court must determine whether the individual has the ability to '"understand all of the evidence presented, evaluate that evidence in a rational manner, communicate effectively with the other jurors during deliberations, and comprehend the applicable legal principles, as instructed by the

397. *Id.*, 961 N.E.2d at 670, 938 N.Y.S.2d at 279.

398. *Id.* at 288, 961 N.E.2d at 670, 938 N.Y.S.2d at 279 (citing N.Y. CRIM. PROC. LAW § 270.20(1)(c)).

399. 18 N.Y.3d 16, 19, 959 N.E.2d 504, 506, 935 N.Y.S.2d 567, 569 (2011).

400. *Id.* at 20, 959 N.E.2d at 507, 935 N.Y.S.2d at 570.

401. *Id.* at 20-21, 959 N.E.2d at 507, 935 N.Y.S.2d at 570.

402. *See generally* 76 N.Y.2d 1, 555 N.E.2d 259, 556 N.Y.S.2d 7 (1990).

403. *Guay*, 18 N.Y.3d at 21, 959 N.E.2d at 508, 935 N.Y.S.2d at 571 (citing *Guzman*, 76 N.Y.2d at 7, 555 N.E.2d at 262, 556 N.Y.S.2d at 11).

404. *Guay*, 18 N.Y.3d at 23, 959 N.E.2d at 509, 935 N.Y.S.2d at 572.

405. N.Y. JUD. CT. ACTS LAW § 510(4) (McKinney 2003).

406. *Guay*, 18 N.Y.3d at 22, 959 N.E.2d at 508, 935 N.Y.S.2d at 571.

court.'"[407] The record supported the supreme court's determination that the juror was not able to serve; however, the Court emphasized that a better course of action would have been for the supreme court to take steps on its own to inquire as to the juror's auditory limitation and discuss possible accommodation before making such a determination.[408]

D. Improper Jury Charge for Lack of Statutory Definition of "Appropriate" and/or "Deprive," in Robbery Charge

In *People v. Medina*, an appeal from a first degree robbery conviction, the Court held that the trial court's failure to charge the jury with the statutory definition of '"appropriate'" and/or '"deprive,'" which forms part of the definition of larcenous intent, was reversible error; and that defendant's challenge to the jury charge was preserved where "defendant's counsel expressed concern that the jury might not understand the meaning of the phrase '[a]ppropriated for himself' and requested a particular charge as to intent with regard to that phrase, which the court rejected."[409] The Court pointed out that this was not a case of harmless error given that, "[o]n three separate occasions, including on the day the verdict was returned, the jury sent notes to the court evincing that it did not understand the meaning of intent."[410] As this was not authorized by CPL section 310.20 (2), it required that the defendant's conviction be set aside.[411]

E. Repugnant Verdict

In *People v. Muhammad* and *People v. Hill*, the Court held that the verdicts were not repugnant where the jury found that the accused did not possess the weapon with the intent to use unlawfully, but convicted the defendants of intentionally injuring a person with a weapon.[412] "[T]he jury acquitted Muhammad of attempted murder and second-degree weapon possession but found him guilty of first-degree assault."[413] In *Hill*, the jury found the defendant "not guilty of third-degree weapon possession but guilty of second-degree assault."[414] The

407. *Id.* (quoting *Guzman*, 76 N.Y.2d at 5, 555 N.E.2d at 261, 556 N.Y.S.2d at 9).

408. *Guay*, 18 N.Y.3d at 23-24, 959 N.E.2d at 509, 935 N.Y.S.2d at 572.

409. 18 N.Y.3d 98, 100-01, 104, 960 N.E.2d 377, 379, 381, 936 N.Y.S.2d 608, 610, 612 (2011).

410. *Id.* at 103, 105, 960 N.E.2d at 380, 382, 936 N.Y.S.2d at 611, 613.

411. People v. Miller, 18 N.Y.3d 704, 706, 967 N.E.2d 656, 656, 944 N.Y.S.2d 433, 433 (2012) (citing N.Y. CRIM. PROC. LAW § 310.20(2) (McKinney 2002)).

412. 17 N.Y.3d 532, 536, 959 N.E.2d 463, 465, 935 N.Y.S.2d 526, 528 (2011).

413. *Id.*, 959 N.E.2d at 466, 935 N.Y.S.2d at 529.

414. *Id.* at 537, 959 N.E.2d at 466, 935 N.Y.S.2d at 529.

Court found that

> [b]ased on the instructions that were given to the juries and viewed from a theoretical perspective without regard to the evidence presented at these trials, it was possible for these juries to acquit defendants of weapon possession but convict them of assault because the former crime contains an essential element that the latter does not: possession . . . [meaning to] exercise dominion or control over [the object.][415]

To sustain both the second-degree and first-degree assault convictions, there must be proof only that the defendant injured a victim '"by means of"' a weapon, and not necessarily that they "possessed" it as required by the weapon possession charges.[416] Because the repugnancy analysis from *People v. Tucker* requires a review of the "elements of the offenses as charged to the jury without regard to the proof that was actually presented at trial," it cannot be said that the conviction was repugnant.[417]

XII. MERGER DOCTRINE

In *People v. Bussey*, the Court found that that the merger doctrine does not apply to the facts, and, therefore, the defendant's convictions of felony murder and kidnapping could stand.[418] The defendant and two others were charged with three counts of murder in the second degree (intentional, felony, and depraved indifference) and kidnapping in the first degree for the kidnapping and beating death of the victim.[419] Testimony at trial was that the defendant and two others assaulted the victim in a backyard for approximately ten minutes before wrapping him in a blanket and driving him away in the trunk of a car where, one to two hours later, he died.[420] After his conviction for felony murder and kidnapping, the defendant appealed arguing that, with respect to the merger doctrine,[421] the alleged act of kidnapping was not separate and distinct from the acts alleged to constitute murder.[422] The merger doctrine '"is intended to preclude conviction for kidnapping based on

415. *Id.* at 541-42, 959 N.E.2d at 469, 935 N.Y.S.2d at 532.

416. *Id.* at 542, 959 N.E.2d at 470, 935 N.Y.S.2d at 533 (citing N.Y. PENAL LAW § 120.05(2), 120.10(1) (McKinney 2009)).

417. *Muhammad*, 17 N.Y.3d at 542-43, 959 N.E.2d at 470, 935 N.Y.S.2d at 533; People v. Tucker, 55 N.Y.2d 1, 4, 431 N.E.2d 617, 617, 447 N.Y.S.2d 132, 132 (1981).

418. 19 N.Y.3d 231, 238, 970 N.E.2d 404, 408-09, 947 N.Y.S.2d 381, 385-86 (2012).

419. *Id.* at 234-35, 970 N.E.2d at 406, 947 N.Y.S.2d at 383.

420. *Id.* at 235, 970 N.E.2d at 406, 947 N.Y.S.2d at 383.

421. *Id.*

422. *Id.*

acts which are so much the part of another substantive crime that the substantive crime could not have been committed without such acts and that independent criminal responsibility may not fairly be attributed to them.'"[423] Here, the Court found that the People demonstrated that the acts constituting kidnapping and those which led to the victim's death were separate and distinct from the kidnapping.[424] The Court held such after reasoning that the defendant placed the victim in a trunk and dumped the victim eighteen miles away, that he was alive at the time he was taken, and then died one to two hours later before he was able to return or be taken to safety.[425]

XIII. MODE OF PROCEEDINGS ERROR

In *People v. Becoats* and *People v. Wright*, the Court held that mistakenly charging more than one crime in one count of an indictment is not a fundamental error which constitutes a '"mode of proceedings'" error.[426] The general rule is that the Court does not consider claims of error not preserved by the appropriate objection of first instance.[427] However, "[a] defendant in a criminal case cannot waive, or even consent to, error that would affect the organization of the court or the mode of proceedings prescribed by law."[428] The Court found that an unpreserved claim of duplicitousness is not a fundamental error in that sense and declaring it so would open the door to abuse in other cases where defendants charged with multiple offenses could obtain a new trial on the basis of an error they consciously decided not to challenge in the first instance.[429]

XIV. PLEAS OF GUILT AND WAIVER OF APPEAL RIGHTS

In *People v. Maracle*, the Court held that the trial court's plea colloquy of the defendant failed to establish that she "knowingly and intelligently waived her right to appeal the severity of her sentence," and remitted the matter to the appellate division so that it could exercise

423. *Bussey*, 19 N.Y.3d at 237, 970 N.E.2d at 408, 947 N.Y.S.2d at 385 (quoting People v. Cassidy, 40 N.Y.2d 763, 767, 358 N.E.2d 870, 873, 390 N.Y.S.2d 45, 47 (1976)).

424. *Bussey*, 19 N.Y.3d at 238, 970 N.E.2d at 408, 947 N.Y.S.2d at 385.

425. *Id.*

426. 17 N.Y.3d 643, 650-51, 958 N.E.2d 865, 867-68, 934 N.Y.S.2d 737, 739-40 (2011).

427. *Id.* at 650, 958 N.E.2d at 867, 934 N.Y.S.2d at 739 (citing People v. Patterson, 39 N.Y.2d 288, 295, 347 N.E.2d 898, 902, 383 N.Y.S.2d 573, 577 (1976); N.Y. CRIM. PROC. LAW § 470.05, 470.35 (McKinney 2009)).

428. *Becoats*, 17 N.Y.3d at 650, 958 N.E.2d at 867, 934 N.Y.S.2d at 739 (quoting *Patterson*, 39 N.Y.2d at 295, 347 N.E.2d at 902, 383 N.Y.S.2d at 577).

429. *Becoats*, 17 N.Y.3d at 651, 958 N.E.2d at 868, 934 N.Y.S.2d at 740.

its interest of justice authority if it chose to do so.[430] While the trial court advised the defendant that she would be waiving her right to appeal her conviction, the "CPL makes a clear distinction between a conviction and a sentence."[431] The Court distinguished the case from that of *People v. Hidalgo*[432] in which the record was clear that '"the trial court engaged in a full and adequate colloquy, and that [the] defendant expressly waived her right to appeal without limitation.'"[433] Here, the Court advised the defendant that if she were to pay half the restitution by the time of sentencing, she would receive a sentence of probation.[434] While she was told that if she did not pay, there would be no promise as to sentencing and that she would not be able to withdraw her plea, but she was never advised that she would not be able to appeal the harshness of the sentence the court ultimately imposed.[435]

The Court in *People v. McAlpin* held that since the defendant had not been properly advised at the time he entered a plea that his sentence could include PRS, his plea should be vacated and his conviction reversed.[436] The defendant pled guilty to robbery with the understanding that, in addition to receiving Youthful Offender Status, he would receive a term of probation provided he satisfied certain pre-sentencing conditions.[437] He was advised at the time he pled that if he violated the agreement, the sentencing agreement would be vacated and he could receive an imprisonment sentence.[438] He was not advised that he could additionally be sentenced to PRS.[439] When the defendant violated the sentencing agreement, he was sentenced to a determinate prison sentence with PRS.[440] The defendant argued on appeal that in accordance with *People v. Catu*[441] his plea should be vacated, since the Court failed to advise him of the potential of PRS.[442] The Court concurred with this argument and further distinguished the case from

430. 19 N.Y.3d 925, 927, 973 N.E.2d 1272, 1273-74, 950 N.Y.S.2d 498, 499-500 (2012); N.Y. CRIM. PROC. LAW §470.15(6) (McKinney 2009).

431. *Maracle*, 19 N.Y.3d at 928, 973 N.E.2d at 1274, 950 N.Y.S.2d at 500; N.Y. CRIM. PROC. LAW § 1.20(13)-(15) (McKinney 2003)).

432. *See generally* 91 N.Y.2d 733, 698 N.E.2d 46, 675 N.Y.S.2d 327 (1998).

433. *Maracle*, 19 N.Y.3d at 928, 973 N.E.2d at 1274, 950 N.Y.S.2d at 500 (quoting *Hidalgo*, 91 N.Y.2d at 737, 698 N.E.2d at 48, 678 N.Y.S.2d at 329).

434. *Maracle*, 19 N.Y.3d at 926, 973 N.E.2d at 1273, 950 N.Y.S.2d at 499.

435. *Id.* at 926-27, 973 N.E.2d at 1273, 950 N.Y.S.2d at 499.

436. 17 N.Y.3d 936, 938, 960 N.E.2d 435, 436, 936 N.Y.S.2d 666, 667 (2011).

437. *Id.* at 939, 960 N.E.2d at 437, 936 N.Y.S.2d at 668.

438. *Id.*

439. *Id.*

440. *Id.* at 937, 960 N.E.2d at 436, 936 N.Y.S.2d at 667.

441. *See generally* 4 N.Y.3d 242, 825 N.E.2d 1081, 792 N.Y.S.2d 887 (2005).

442. *McAlpin*, 17 N.Y.3d at 937, 960 N.E.2d at 436, 936 N.Y.S.2d at 667.

People v. Murray,[443] in which the defendant had "ample opportunity to object after the initial statement [regarding the alternative sentence] . . . and before the sentence was formally imposed."[444] Here, the defendant was only told that PRS was being imposed moments before the court sentenced him.[445]

In *People v. Alexander*, the Court held that it was not unduly coercive for the trial court to inform the defendant that entering a guilty plea would effectively waive the defendant's right to pursue a yet undecided speedy trial motion on appeal.[446] The defendant filed a pro se speedy trial motion.[447] However, prior to the motion being litigated, the defendant agreed to enter a guilty plea.[448] During the guilty plea colloquy, the trial judge stated, '"[a]nd in addition to waiving his right to appeal, it is also . . . [his] understanding that he will move to withdraw any outstanding writs or any outstanding motions that he has filed, that I have adopted in the past.'"[449] The trial court further went on to state: "'And you understand by taking this plea, all of your outstanding writs and motions that you have are being withdrawn; do you understand that?' to which defendant replied, 'withdrawn.'"[450] The Court construed the nature of this guilty plea colloquy as being distinctly different than a prosecutor conditioning the guilty plea on the defendant waiving their speedy trial rights, a practice New York courts have generally disapproved of.[451] Instead, the Court posited that the trial court was merely explaining to the defendant how his guilty plea would affect the status of his outstanding writs and motions.[452] In this regard, the nature of this particular guilty plea colloquy was no different than if the trial judge would "have said nothing whatsoever on the topic since [the] defendant abandoned the writs and motions by operation of law as soon as he pleaded guilty."[453] The Court held that explaining such to the defendant was not unreasonable and that defendant knew

443. *See generally* 15 N.Y.3d 725, 932 N.E.2d 877, 906 N.Y.S.2d 521 (2010).
444. *McAlpin*, 17 N.Y.3d at 938, 960 N.E.2d at 436, 936 N.Y.S.2d at 667.
445. *Id.*
446. 19 N.Y.3d 203, 219, 970 N.E.2d 409, 420, 947 N.Y.S.2d 386, 397 (2012).
447. *Id.* at 206, 970 N.E.2d at 411, 947 N.Y.S.2d at 388.
448. *Id.* at 207, 970 N.E.2d at 411-12, 947 N.Y.S.3d at 388-89.
449. *Id.*, 970 N.E.2d at 412, 947 N.Y.S.3d at 389.
450. *Id.*
451. *Alexander*, 19 N.Y.3d at 212-20, 920 N.E.2d at 415-20, 947 N.Y.S.2d at 392-97 (citing People v. White, 40 A.D.2d 540, 540-41, 334 N.Y.S.2d 48, 50 (2d Dep't 1972); People v. Blakley, 38 A.D.2d 563, 563, 328 N.Y.S.2d 379, 380 (2d Dep't 1971); People v. Sutton, 175 A.D.2d 272, 273, 573 N.Y.S.2d 915, 915 (2d Dep't 1991)).
452. *Alexander*, 19 N.Y.3d at 219, 970 N.E.2d at 420, 947 N.Y.S.2d at 397.
453. *Id.*

and understood the terms of plea agreement and was willing to accept them.[454]

In *People v. Bradshaw*, the Court held that the record failed to establish that the defendant validly waived his right to appeal when he pled guilty.[455] Twice throughout the pendency of the case, the defendant had been declared incapacitated and in need of custodial care for mental illness.[456] Even when he was eventually deemed fit to proceed, the examining psychologist stressed that he was '"in need of a good deal of support by defense counsel, in order to explain the complexity of this case.'"[457] The record showed that the supreme court made only fleeting reference to the defendant's waiver of his right to appeal when it took his guilty plea, and failed to confirm that the defendant understood its "terse explanation of the nature of the appeal waiver" or that the "defendant possessed an inherent right to appeal a judgment of conviction and sentence."[458] Quoting *People v. Lopez*, the Court noted that a defendant must comprehend that an appeal waiver '"is separate and distinct from those rights automatically forfeited upon a [guilty plea].'"[459] It is the trial court's duty to assess all relevant factors in assessing whether the waiver is knowingly, intelligently, and voluntarily made.[460] These factors include "the nature and terms of the agreement and the age, experience, and background of the accused."[461] This case was distinguished from the Court's holding in *People v. Ramos*,[462] where the waiver of the right to appeal was upheld because the specific waiver was orally acknowledged by the defendant during the colloquy.[463]

XV. RIGHT TO CONFRONTATION

In *People v. Porco*, the Court affirmed the appellate division's ruling that the defendant's Sixth Amendment right to confrontation was

454. *Id.* at 219-20, 970 N.E.2d at 420, 947 N.Y.S.2d at 397 (quoting People v. Seaberg, 74 N.Y.2.d 1, 12, 541 N.E.2d 1022, 1027, 543 N.Y.S.2d 968, 973 (1989)).

455. 18 N.Y.3d 257, 259, 961 N.E.2d 645, 646, 938 N.Y.S.2d 254, 255 (2011).

456. *Id.* at 259-60, 961 N.E.2d at 647, 938 N.Y.S.2d at 256.

457. *Id.* at 260, 961 N.E.2d at 647-48, 938 N.Y.S.2d at 256-57.

458. *Id.* at 261, 961 N.E.2d at 648, 938 N.Y.S.2d at 257.

459. *Id.* at 264, 961 N.E.2d at 650, 938 N.Y.S.2d at 259 (quoting People v. Lopez, 6 N.Y.3d 248, 256, 844 N.E.2d 1145, 1149, 811 N.Y.S.2d 623, 627 (2006)).

460. *Bradshaw*, 18 N.Y.3d at 264, 961 N.E.2d at 650, 938 N.Y.S.2d at 259 (citation omitted).

461. *Id.* at 264-65, 961 N.E.2d at 650, 938 N.Y.S.2d at 259 (quoting People v. Seaberg, 74 N.Y.2d 1, 11, 541 N.E.2d 1022, 1026, 543 N.Y.S.2d 968, 972 (1989)).

462. 7 N.Y.3d 737, 853 N.E.2d 222, 819 N.Y.S.2d 853 (2006).

463. *Bradshaw*, 18 N.Y.3d at 266-67, 961 N.E.2d at 652, 938 N.Y.S.2d at 261.

not violated because any error was harmless.[464] "Trial errors resulting in violation of a criminal defendant's Sixth Amendment right to confrontation 'are considered harmless when, in light of the totality of the evidence, there is no reasonable possibility that the error affected the jury's verdict.'"[465] "Here, overwhelming evidence placed defendant at the family home near Albany, New York, during the predawn hours of November 15, 2004, when the crimes for which he was convicted (the murder of his father and the attempted murder of his mother while they slept) were committed there."[466]

In *People v. Reid*, the Court held that a defendant can open the door to the "admission of testimony that would otherwise be inadmissible under the Confrontation Clause of the United States Constitution."[467] The defendant was convicted of murder in a severed case from his co-defendant, who had confessed to his role in the murder.[468] The Court concluded that "the admission of the testimony that a nontestifying eyewitness told the police [that the defendant] had been present at the murder violated the Confrontation Clause, unless the door was opened to that testimony by the defense counsel's questioning of witnesses."[469] The question then becomes whether a defendant can open the door to testimony that would otherwise violate his Confrontation Clause rights.[470] Several United States courts of appeals decisions have held that '"a defendant can open the door to the admission of evidence otherwise barred by the Confrontation Clause.'"[471] The Court agreed with this consensus.[472] If evidence barred under the Confrontation Clause was inadmissible irrespective of a defendant's actions at trial, then a defendant could attempt to delude a jury "'by selectively revealing only those details of a testimonial statement that are potentially helpful to the defense, while concealing from the jury other details that would tend to explain the portions introduced and place them in context.'"[473] "A defendant could do so

464. 17 N.Y.3d 877, 878, 958 N.E.2d 538, 538, 934 N.Y.S.2d 360, 360 (2011).

465. *Id.*, 958 N.E.2d at 539, 934 N.Y.S.2d at 361 (quoting People v. Douglas, 4 N.Y.3d 777, 779, 826 N.E.2d 796, 797, 793 N.Y.S.2d 825, 826 (2005)).

466. *Porco*, 17 N.Y.3d at 878, 958 N.E.2d at 539, 934 N.Y.S.2d at 361.

467. 19 N.Y.3d 382, 384-85, 971 N.E.2d 353, 354, 948 N.Y.S.2d 223, 224 (2012).

468. *Id.* at 385-87, 971 N.E.2d at 355-56, 948 N.Y.S.2d at 225-26.

469. *Id.* at 387, 971 N.E.2d at 356, 948 N.Y.S.2d at 226.

470. *Id.*

471. *Id.* at 387-88, 971 N.E.2d at 356-57, 948 N.Y.S.2d at 226-27 (quoting United States v. Lopez-Medina, 596 F.3d 716, 733 (10th Cir. 2010).

472. *Reid*, 19 N.Y.3d at 388, 971 N.E.2d at 357, 948 N.Y.S.2d at 227.

473. *Id.* (quoting People v. Ko, 15 A.D.3d 173, 174, 789 N.Y.S.2d 43, 45 (1st Dep't 2005)).

with the secure knowledge that the concealed parts would not be admissible, under the Confrontation Clause."[474] "To avoid such unfairness and to preserve the truth-seeking goals of [] courts," [the Court held] that the "admission of testimony that violates the Confrontation Clause may be proper if the defendant opened the door to its admission."[475] However, this did not complete the Court's inquiry:

> Whether a defendant opened the door to particular, otherwise inadmissible evidence presented to the jury must be decided on a case-by-case basis. The inquiry is twofold—'whether and to what extent, the evidence or argument said to open the door is incomplete and misleading, and what if any otherwise inadmissible evidence is reasonably necessary to correct the misleading impression.'[476]

XVI. SEARCH AND SEIZURE

In *People v. Miranda*, the defendant was charged with criminal possession of a weapon in the fourth degree.[477] The Court held that:

> Where a knife (even if not necessarily an illegal one) becomes plainly visible to a police officer in the course of an authorized common law inquiry due to the suspect's own movement and no intrusive conduct on the officer's part, the officer is permitted to seize it, so long as the ensuing intrusion is 'minimal' and 'consonant with the respect and privacy of the individual.'[478]

The Court found that the officer made a lawful arrest after recovering an illegal gravity knife from the defendant, who he had observed "was armed while questioning him late at night in a high crime area after determining that he was trespassing[.]"[479] Since the officer here "was already engaged in a lawful encounter with defendant prior to spotting the knife," he was "not required to have a reasonable suspicion that the knife he observed was a gravity knife before he took it."[480]

In *People v. Omowale*, the Court determined that, with respect to one of the traffic stops in question, the evidence seized (a stolen license) must be suppressed because law enforcement did not have probable cause to believe that the defendant committed attempted criminal

474. *Reid*, 19 N.Y.3d at 388, 971 N.E.2d at 357, 948 N.Y.S.2d at 227.

475. *Id.*

476. *Id.* (quoting People v. Massie, 2 N.Y.3d 179, 184, 809 N.E.2d 1102, 1105, 777 N.Y.S.2d 794, 797 (2004)).

477. 19 N.Y.3d 912, 914, 974 N.E.2d 661, 662, 950 N.Y.S.2d 615, 616 (2012).

478. *Id.* at 914, 974 N.E.2d at 662, 950 N.Y.S.2d at 616 (quoting People v. De Bour, 40 N.Y.2d 210, 221, 352 N.E.2d 562, 571, 386 N.Y.S.2d 375, 3884 (1976)).

479. *Id.*

480. *Id.*

impersonation in the second degree.[481] Further, the Court found that there was no "probable cause to arrest defendant for criminal possession of stolen property because he was taken into custody before the officers learned that the license had been reported missing."[482] With respect to the other traffic stops in question, the issue was beyond the review of the Court since it was a mix of question of law and fact for which the record supported the appellate division's conclusion.[483]

XVII. SENTENCING

A. The Drug Law Reform Act of 2009

The Court held in *People v. Dais* and *People v. Stanley* that in a resentencing proceeding held pursuant to the Drug Law Reform Act of 2009 ("DRLA"), a de novo review was proper, and the prosecution and defense may introduce new evidence or challenge the evidence of the existence of prior violent and nonviolent felony convictions.[484] The act allows certain persons:

> [I]n the custody of the department of corrections and community supervision convicted of a class B felony offense defined in . . . [Penal Law article 220] which was committed prior to [January 13, 2005]' and 'who is serving an indeterminate sentence with a maximum term of more than three years,' may, subject to certain exclusions, 'apply to be resentenced to a determinate sentence in accordance with . . . [Penal Law sections 60.04 and 70.70] in the court which imposed the sentence.'[485]

Determinate sentences for second felony drug offenders with a prior nonviolent conviction are more lenient than those for an offender with a prior violent conviction.[486] In *Dais*, the issue was "whether the People may introduce a new predicate felony statement at the resentencing proceeding to demonstrate that the defendant must be adjudicated a second felony drug offender whose prior conviction was for a violent felony," although at the original sentencing proceeding he was adjudicated to have had a prior nonviolent felony.[487] It was irrelevant

481. 18 N.Y.3d 825, 827, 962 N.E.2d 252, 252, 938 N.Y.S.2d 831, 831 (2011).

482. *Id.*

483. *Id.*

484. 19 N.Y.3d 335, 339, 342, 970 N.E.2d 849, 851, 853, 947 N.Y.S.2d 814, 816, 818 (2012).

485. *Id.* at 338, 970 N.E.2d at 850, 947 N.Y.S.2d at 815 (quoting N.Y. CRIM. PROC. LAW § 440.46(1) (McKinney 2005)).

486. *Dais*, 19 N.Y.3d at 338, 970 N.E.2d at 850, 947 N.Y.S.2d at 815.

487. *Id.* at 338-39, 970 N.E.2d at 851, 947 N.Y.S.2d at 816.

under the prior sentencing guidelines whether Dais had a prior violent felony conviction.[488] Therefore, the People, at the time of the original sentencing, had no reason to introduce such evidence and the issue was not litigated at the original sentencing.[489] Therefore, the Court found the People should be able to introduce such evidence of a prior violent felony conviction at the resentencing stage, since it would now be relevant under the new sentencing scheme, and the defendant retained his right to challenge the People's predicate statement.[490]

In *Stanley*, the issue was converse: whether, at resentencing, the defendant would be permitted to challenge whether his prior conviction was for a nonviolent felony.[491] The Court found that the defendant could challenge whether his out-of-state convictions, which the People used as part of their predicate felony statement, would be the equivalent of a '"violent'" felony under New York law.[492] The defendant was not previously afforded the right to challenge that designation, and the matter was remitted to the supreme court for him to argue that the conviction should be considered as one of a nonviolent nature.[493] However, the defendant was not entitled to completely vacate his prior felony adjudication since he was given an opportunity at the original sentencing proceeding to argue whether the out-of-state conviction should be considered a felony at all under New York law and failed to do so.[494] Here, the only remaining issue to be decided was the nature of the felony, not the felony status itself.[495]

In *People v. Sosa*, the Court looked at the meaning to be attached to the phrase '"within the preceding ten years'" in connection with CPL section 440.46(5)(a) and the DLRA.[496] The DLRA provides that certain defendants, sentenced under the now-repealed Rockefeller Drug Laws, can apply for resentencing with one condition for application being that the defendant did not commit an exclusion offense within the preceding ten years.[497] In *Sosa*, the People argued that the preceding ten years

488. *Id.* at 344-45, 970 N.E.2d at 855, 947 N.Y.S.2d at 820.
489. *Id.*
490. *Id.* at 345, 970 N.E.2d at 855, 947 N.Y.S.2d at 820.
491. *Stanley*, 19 N.Y.3d at 339, 970 N.E.2d at 851, 947 N.Y.S.2d at 816.
492. *Id.* at 345, 970 N.E.2d at 855, 947 N.Y.S.2d at 820.
493. *Id*.
494. *Id.* at 345-46, 970 N.E.2d at 855-56, 947 N.Y.S.2d at 820-21.
495. *See id.* at 346, 970 N.E.2d at 856, 947 N.Y.S.2d at 821.
496. 18 N.Y.3d 436, 439, 963 N.E.2d 1235, 1236, 940 N.Y.S.2d 534, 535 (2012).
497. *Id.* at 438-39, 963 N.E.2d at 1236, 940 N.Y.S.2d at 535 (quoting N.Y. CRIM. PROC. LAW § 440.46(5)(a) (McKinney 2005)).

> To the extent here relevant, an 'exclusion offense' is defined in that subdivision as 'a crime for which the person was previously convicted within the preceding ten

should mean the ten-year period preceding the offense for which the defendant was sentenced and is seeking resentencing.[498] The defendant, however, argued that the preceding ten years meant the ten years preceding the date of a defendant's application for resentencing under DLRA.[499] The Court, in agreement with the defendant and the appellate division, held that the phrase "within the preceding ten years" requires the defendant to not have committed an exclusion offense within the preceding ten years from the date the application for resentencing was filed.[500]

B. Enhanced Felony Sentencing Criteria for Out-of-State Conviction

In *People v. Yusuf*, the Court examined whether the defendant could be subjected to an enhanced sentence as a second-felony drug offender if the defendant's previous violent felony drug conviction occurred out of state.[501] The Court ultimately upheld the defendant's conviction and sentencing in New York under Penal Law section 70.70, which mandates that enhanced sentences for second felony drug offenders are "meant for prosecutors and sentencing courts to take foreign violent felony convictions into account when determining a defendant's sentencing status[.]"[502] The Court, however, made clear that in order to use a defendant's out-of-jurisdiction felony conviction for any enhanced sentence, the crime upon which the defendant's out-of-state conviction was based must have identical elements to an equivalent crime in New York.[503] An out-of-state felony conviction cannot be used if it would have been possible for the defendant to be

> years, excluding any time during which the offender was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony, which was: (i) a violent felony offense as defined in section 70.02 of the penal law.'

Sosa, 18 N.Y.3d at 438-39, 963 N.E.2d at 1236, 940 N.Y.S.2d at 535.

498. *Sosa*, 18 N.Y.3d at 439, 963 N.E.2d at 1236, 940 N.Y.S.2d at 535.

499. *Id.* (per the DLRA, this ten year period does not include any time in which a defendant was incarcerated).

500. *Id.* at 440, 963 N.E.2d at 1237, 940 N.Y.S.2d at 536 (noting that the conclusion has now been reached by all four departments); *see also* People v. Sosa, 81 A.D.3d 464, 465, 916 N.Y.S.2d 72, 74 (1st Dep't 2011); People v. Lashley, 83 A.D.3d 868, 869, 920 N.Y.S.2d 421, 423 (2d Dep't 2011); People v. Carter, 86 A.D.3d 653, 654, 926 N.Y.S.2d 328, 329 (3d Dep't 2011); People v. Hill, 82 A.D.3d 77, 80, 916 N.Y.S.2d 710, 712 (4th Dep't 2011).

501. 19 N.Y.2d 314, 317, 970 N.E.2d 422, 424, 947 N.Y.S.2d 399, 401 (2012).

502. *Id.* at 320, 970 N.E.2d at 425, 947 N.Y.S.2d at 402 (in reaching its decision, the Court cross-referenced both New York Penal Law section 70.06(1) and New York CPL section 400.21(2), (4), (7) (c)).

503. *Id.* at 321, 970 N.E.2d at 426, 947 N.Y.S.2d at 403 (citing People v. Gonzales, 61 N.Y.2d 586, 589, 463 N.E.2d 1210, 1212, 475 N.Y.S.2d 358, 360 (1984)).

convicted in the out-of-state jurisdiction for conduct that would not constitute a crime in New York.[504]

C. Predicate Felony Conviction Criteria for Prior Federal Conviction

In *People v. Ramos*, the Court held that, "under New York's 'strict equivalency' standard for convictions rendered in other jurisdictions, a federal conviction for conspiracy to commit a drug crime may not serve as a predicate felony for sentencing purposes."[505] Penal Law section 70.06 (1)(b) says:

> For the purpose of determining whether a prior conviction is a predicate felony conviction the following criteria shall apply:
>
> (i) The conviction must have been in this state of a felony, or in any other jurisdiction of an offense for which a sentence to a term of imprisonment in excess of one year or a sentence of death was authorized and is authorized in this state[.][506]

The Court interpreted the words "'is authorized in this state' to require that the crime of which the defendant was convicted in another jurisdiction include all the essential elements of a New York felony."[507] The Court noted that "[a]s a general rule . . . inquiry 'is limited to a comparison of the crimes' elements as they are respectively defined in the foreign and in New York penal statutes."[508] Further, even if the crime actually committed in the foreign jurisdiction may be the equivalent of a felony in New York, which is immaterial if the foreign statute would have permitted a conviction for conduct that did not amount to a New York felony.[509] The Court referred to its test as one of "'strict equivalency,'" and "'technical distinctions between the New York and foreign penal statutes can preclude use of a prior felony as a predicate for enhanced sentencing.'"[510] When the Court compared two relevant statutes in this case, the federal drug conspiracy statute and New York's statutes prohibiting conspiracy, it found a conspicuous

504. *Yusuf*, 19 N.Y.3d at 321, 970 N.E.2d at 426, 947 N.Y.S.2d at 403(citation omitted).

505. 19 N.Y.3d 417, 418, 971 N.E.2d 369, 369, 948 N.Y.S.2d 239, 239 (2012).

506. N.Y. Penal Law § 70.06(1)(b) (McKinney 2009).

507. *Ramos*, 19 N.Y.3d at 419, 971 N.E.2d at 370, 948 N.Y.S.2d at 240 (quoting People v. Muniz, 74 N.Y.2d 464, 467-68, 547 N.E.2d 1160, 1162, 548 N.Y.S.2d 633, 635 (1989)).

508. *Id.*

509. *Ramos*, 19 N.Y.3d at 419, 971 N.E.2d at 370, 948 N.Y.S.2d at 240.

510. *Id.* (quoting North v. Bd. of Examiners of Sex Offenders of N.Y., 8 N.Y.3d 745, 750-51, 871 N.E.2d 1133, 1137, 840 N.Y.S.2d 307, 311 (2007)).

difference.[511] Namely, "[t]he commission of an overt act by one of the conspirators in furtherance of the conspiracy is required under New York, but not under federal, law."[512] "Because New York law requires proof of an element that federal law does not, defendant's federal conspiracy conviction cannot serve as a predicate."[513]

D. Deadline Requirements for Resentencing Under Correction Law 601-d

In *People v. Velez* and *People v. Rodriguez*, the Court looked at the effect of the People's failure to meet all the statutorily proscribed requirements (in this case, deadlines) when resentencing the defendants pursuant to Correction Law section 601-4(4)(d).[514] In both cases, the resentencing was delayed past the prescribed deadlines after the Department of Corrections (the "DOC") had sent timely notice to the sentencing court (pursuant to Correction Law section 601-d).[515] In looking at the plain language of the section governing deadlines for resentencing, as well as a letter from the Division of Criminal Justice Services commenting on the bill, the Court found nothing suggested that a sentencing court would be barred from resentencing a defendant past the 40-day deadline period.[516] Instead, according to the section, the DOC would be required to send a follow up notice to the court and make appropriate notations in its file.[517] The Court held that in cases

511. *Ramos*, 19 N.Y.3d at 419, 971 N.E.2d at 370, 948 N.Y.S.2d at 240 (citing 21 U.S.C. § 846 (2013); N.Y. PENAL LAW § 105.00 (McKinney 2009)).

512. *Ramos*, 19 N.Y.3d at 419-20, 971 N.E.2d at 370, 948 N.Y.S.2d at 240 (citing N.Y. PENAL LAW § 105.20) ("A person shall not be convicted of conspiracy unless an overt act is alleged and proved to have been committed by one of the conspirators in furtherance of the conspiracy")); ("This case asks us to consider whether 21 U.S.C. § 846, the drug conspiracy statute, requires the Government to prove that a conspirator committed an overt act in furtherance of the conspiracy. We conclude that it does not." (quoting United States v. Shabani, 513 U.S. 10, 11 (1994)).

513. *Ramos*, 19 N.Y.3d at 420, 971 N.E.2d at 370, 948 N.Y.S.2d at 240.

514. 19 N.Y.3d 642, 645, 975 N.E.2d 907, 907, 951 N.Y.S.2d 461, 461 (2012) ("Correction Law [section] 601-d provides a procedure for resentencing defendants in cases where the original sentence illegally omitted a term of [PRS.]"). The statute contains a series of deadlines, all running from the date the court receives DOCS's notification: within ten days, the court is required to appoint counsel for the defendant and to calendar a court appearance, within twenty days, an initial court appearance must occur, within thirty days, the court "shall commence a proceeding to consider resentence," and within forty days after receiving the notification, the court "shall . . . issue and enter a written determination and order[.]" N.Y. CORRECT. LAW § 601-d(4)(a), (c), (d) (McKinney 2003).

515. *Velez*, 19 N.Y.3d at 646, 975 N.E.2d at 908, 951 N.Y.S.2d at 462.

516. *Id.* at 648, 975 N.E.2d at 909-10, 951 N.Y.S.2d at 463-64.

517. *Id.* at 647, 975 N.E.2d at 909, 951 N.Y.S.2d at 463 (citing N.Y. CORRECT. LAW § 601-d(6)).

such as these, where the People's failure to meet the statutory deadlines was not egregious, willful, or prejudicial to the defendants, failure to meet one of the deadlines will not be a bar to resentencing a defendant.[518]

E. Calculation of Duration of Order of Protection

In *People v. Williams*, the Court stated that when calculating a defendant's maximum expiration date with regards to a determinate sentence, the duration of an order of protection issued at sentencing must include the period of mandatory PRS.[519] Here, the lower court, at sentencing, issued a full order of protection to last three years from the date of the defendant's maximum time of incarceration.[520] However, the Court held that the order of protection expiration dates must run from the time at which the defendant's mandatory PRS is over, not merely once the defendant is released.[521] The court reasoned that the PRS period is included in calculating any defendant's maximum expiration date for a determinate sentence.[522]

F. Concurrent Versus Consecutive Sentencing

The Court in *People v. Wright* was tasked with determining, "whether Penal Law [section] 70.25(2) precludes the imposition of consecutive sentences for [a] defendant's conviction[] of murder in the first degree and criminal possession of a weapon in the second degree."[523] The court held that under the facts presented and pursuant to Penal Law section 70.25(2), the defendant's sentences must not run consecutively.[524] Penal Law section 70.25(2) provides that, '"sentences imposed for two or more offenses may not run consecutively: (1) where a single act constitutes two offenses, or (2) where a single act constitutes one of the offenses and a material element of the other."'[525] When Penal Law section 70.25(2) is applied to possessory offenses a court must "decide when one act of possession ends and another begins," and "in applying a statute that prohibits possession with a

518. *Velez*, 19 N.Y.3d at 649, 975 N.E.2d at 910, 9951 N.Y.S.2d at 464.

519. 19 N.Y.3d 100, 101-02, 968 N.E.2d 983, 983-84, 945 N.Y.S.2d 629, 629-30 (2012).

520. *Id.* at 102, 968 N.E.2d at 984, 945 N.Y.S.2d at 630.

521. *Id.* at 104-05, 968 N.E.2d at 986, 945 N.Y.S.2d at 632.

522. *Id.*

523. 19 N.Y.3d 359, 361, 971 N.E.2d 358, 359, 948 N.Y.S.2d 228, 229 (2012).

524. *Id.* at 361, 971 N.E.2d at 359, 948 N.Y.S.2d at 229.

525. *Id.* at 363, 971 N.E.2d at 360, 948 N.Y.S.2d at 230 (citing People v. Laureano, 87 N.Y.2d 640, 643, 664 N.E.2d 1212, 1214, 642 N.Y.S.2d 150, 152 (1996)).

particular intent . . . look to the point at which the relevant intent changes."[526] "Thus in applying such a statute it is necessary to consider intent in order to identify the act or acts that constitute the crime."[527] Since second degree possession contains a specific intent element, the People were required to show that the "defendant's possession was marked by an unlawful intent separate and distinct from his intent to shoot the victims."[528] The Court found that "[u]nder the facts presented here, because the crime of second degree weapon possession was completed only upon the shootings," consecutive sentences are prohibited under Penal Law section 70.25(2).[529]

G. Improper Duration of Sentence

In *People v. Yuson*, the defendant, a first-time felony offender, pled guilty to a class D violent felony offense.[530] The lower court, in connection with the defendant's plea, imposed a three-and-a-half-year determinate sentence and promised to impose "the 'minimum' allowable PRS term."[531] The defendant was subsequently given a five-year PRS term.[532] The Court, however, held that the county court erred in issuing such five-year PRS term.[533] The Court reasoned that Penal Law section 70.45(2) does generally require the imposition of a five-year PRS period in connection with the imposition of a determinate sentence of imprisonment.[534] However, the Court noted that the defendant was sentenced pursuant to Penal Law section 70.02(3)(c), which provides for the imposition of determinate sentences of imprisonment for first time violent class D felony convictions.[535] As a result, defendant's PRS should have been determined in accordance with Penal Law section 70.45(2)(e), which "states the term of PRS 'shall be not . . . more than three years whenever a determinate sentence of imprisonment is imposed pursuant to [70.02(3)] . . . upon a conviction of a class D or class E violent felony offense.'"[536]

526. *Wright*, 19 N.Y.3d at 366, 971 N.E.2d at 362, 948 N.Y.S.2d at 232.
527. *Id.*, 971 N.E.2d at 362, 948 N.Y.S.2d at 232.
528. *Id.* at 367, 971 N.E.2d at 363, 948 N.Y.S.2d at 233.
529. *Id.*
530. 19 N.Y.3d 825, 826, 969 N.E.2d 207, 207, 946 N.Y.S.2d 91, 91 (2012).
531. *Id.*, 969 N.E.2d at 208, 946 N.Y.S.2d at 92.
532. *Id.*
533. *Id.*
534. *Id.* (citing N.Y. PENAL LAW § 70.45(2)(e) (McKinney 2013)).
535. *Yuson*, 19 N.Y.3d at 826, 969 N.E.2d at 208, 946 N.Y.S.2d at 92.
536. *Id.*; N.Y. PENAL LAW § 70.45(2)(e).

XVIII. STATUTE OF LIMITATIONS

In *People v. Quinto*, the Court considered whether the information that the complainant disclosed to the police when she was a minor was a "'report[]' to the authorities that was sufficient to bar the availability of the tolling provision in CPL [section] 30.10 (3)(f) in connection with the indictment against defendant."[537] The Court concluded that it was not a "report" within the meaning of the statute "because she neither identified defendant as the perpetrator nor reported or revealed any of the sex offenses charged in the indictment."[538] "Under these facts, the statutes of limitations for the indicted sex crimes did not begin to run until [she] reached 18 years of age."[539] The "triggering 'report' required under the statutory exception refers to a communication that, at a minimum, describes the offender's alleged criminal conduct and the harm inflicted on the victim."[540] Additionally, the Court looked at whether the non-sexual offenses not covered by CPL section 30.10 (3)(f), would be time barred by another tolling provision—CPL section 30.10 (4)(a)(ii)—which may apply to any crime subject to a limitations period.[541] This section only excludes time from the statute of limitation when the police are aware of the commission of an offense if "'the whereabouts of the defendant were continuously unknown and continuously unascertainable by the exercise of reasonable diligence.'"[542] The Court held "CPL [section 30.10 (4)(a)(ii)] did not toll the time between the alleged commission of the offenses and the [complainant's] disclosure."[543] Consequently, the prosecution for the non-sexual misdemeanors and petty offense expired well before the accusatory instrument was issued in this case, and therefore those charges were dismissed.[544]

537. 18 N.Y.3d 409, 412, 416, 964 N.E.2d 379, 381, 384, 941 N.Y.S.2d 8, 10, 13 (2012).

> [E]stablished that the statute of limitations in a prosecution of a sex offense (other than those that are not subject to any limitations period) committed against a minor does not begin to run 'until the child has reached the age of eighteen or the offense is reported to a law enforcement agency or statewide central register of child abuse and maltreatment, whichever occurs earlier.'

Id. at 413, 964 N.E.2d at 381-82, 941 N.Y.S.2d at 10-11 (citing N.Y. CRIM. PROC. LAW § 30.10(3)(f) (McKinney 2003)).

538. *Quinto*, 18 N.Y.3d at 418-19, 964 N.E.2d at 386, 941 N.Y.S.2d at 15.

539. *Id.* at 419, 964 N.E.2d at 386, 941 N.Y.S.2d at 15.

540. *Id.* at 418, 964 N.E.2d at 385, 941 N.Y.S.2d at 14.

541. *Id.* at 419, 964 N.E.2d at 386, 941 N.Y.S.2d at 15.

542. *Id.* (quoting N.Y. CRIM. PROC. LAW § 30.10(4)(a)(ii)).

543. *Quinto*, 18 N.Y.3d at 419, 964 N.E.2d at 386, 941 N.Y.S.2d at 15.

544. *Id.*

XIX. SUPPRESSION

A. Lack of Notice for Eavesdropping Warrant

In *People v. Rodriguez*, the Court held that while CPL section 700.50(3) requires the prosecution to notify the defendant of an eavesdropping warrant within ninety days of the warrant's termination, the People's violation of CPL section 700.50(3) only requires suppression of the eavesdropping evidence when the defendant can show prejudice.[545] The Court stated that the defendant will not be able to show prejudice where the defendant independently knew of an eavesdropping warrant even though the prosecution did not provide proper notice, or if the defendant had an ability to challenge the eavesdropping warrant in a timely manner regardless of whether the notice was met within ninety days.[546]

B. Improper Identification Procedure

In *People v. Delamota*, the Court ordered a new trial based upon the suggestiveness of the identification procedure which was conducted.[547] The suppression court was concerned that the victim's son used as a language interpreter for the victim during the identification procedure, a photo array.[548] However, it allowed the identification to come into evidence because the son denied knowing the defendant.[549] During the trial, other facts were revealed, which strengthened the defendant's claim that the procedure used to identify him was unduly suggestive: (1) the detective acted on unspecified neighborhood gossip regarding the robber's name and information which the victim's son had provided; (2) the detective had also been concerned about the possibility of the son's preexisting familiarity with the defendant and had broached the topic before the identification; (3) the detective "was or should have been aware of the substantial risk that the son was familiar with the defendant" despite the son's assurance otherwise; (4) there was nothing preventing the detective from using an alternate interpreter "who did not have preexisting information about the possible perpetrator or a familial relationship" with the victim; and (5) the detective could not be sure that the "son would accurately translate the conversation."[550] Any one of the facts, or their

545. 19 N.Y.3d 166, 173, 970 N.E.2d 816, 820, 947 N.Y.S.2d 781, 785 (2012).
546. *Id.*, 970 N.E.2d at 819-20, 947 N.Y.S.2d at 784-85.
547. 18 N.Y.3d 107, 110, 960 N.E.2d 383, 385, 936 N.Y.S.2d 614, 616 (2011).
548. *Id.* at 118, 960 N.E.2d at 391, 936 N.Y.S.2d at 622.
549. *Id.*
550. *Id.*

combination, resulted in suggestiveness of the identification which the Court attributed not to the victim's son, but to the detective's decision to use him as the interpreter.[551] The Court held that the identification should have been suppressed, ordered a new trial, and preserved the People's right to attempt to demonstrate, by clear and convincing evidence, that the victim's ability to identify the defendant was not impermissibly influenced by the suggestive pretrial procedure which was used.[552]

XX. SPEEDY TRIAL WAIVER

The Court held in *People v. Dickinson* that the defendant did not waive his right to a speedy trial, pursuant to CPL section 30.30, by engaging in plea negotiations for several months.[553] There was no waiver, written or oral, and the defendant's silence was not deemed a waiver.[554] The Court suggests that prosecutors obtain unambiguous written waivers.[555]

XXI. TRIAL PROCEEDINGS—TREATMENT OF DEFENDANT

In *People v. Gamble*, the Court found that the defendant failed to meet his burden of showing that the minimally invasive procedure of positioning the court officers two inches closer than they normally would be stationed compromised the defendant's right to communicate confidentially with counsel or telegraphed to the jury that he was dangerous.[556] Defense counsel objected several times to court officers stationing themselves directly behind the defendant during the course of his trial for murder, arguing that such positioning deprived the defendant of his constitutional right to communicate confidentially with his attorney and prejudiced him as dangerous in the eyes of the jury.[557] The defendant has a fundamental right to counsel in a criminal case, which includes "'the right to consult counsel in private, without fear or danger that the People, in a criminal prosecution, will have access to

551. *Id.* at 118-19, 960 N.E.2d at 391, 936 N.Y.S.2d at 622.

552. *Delamota*, 18 N.Y.3d at 119, 960 N.E.2d at 391, 936 N.Y.S.2d at 622.

553. 18 N.Y.3d 835, 836, 962 N.E.2d 257, 258, 938 N.Y.S.2d 836, 836 (2011).

554. *Id.*

555. *Id.* (citing People v. Waldron, 6 N.Y.3d 463, 468, 847 N.E.2d 367, 370, 814 N.Y.S.2d 70, 73 (2006)).

556. 18 N.Y.3d 386, 390-91, 393, 397, 964 N.E.2d 372, 373, 375, 378, 941 N.Y.S.2d 1, 2, 4, 7 (2012).

557. *Id.* at 392, 396, 964 N.E.2d at 374-75, 377, 941 N.Y.S.2d at 3-4, 6.

what is being said.'"[558] Further, the Fifth and Sixth Amendments of the United States Constitution guarantee that persons accused shall be able to consult privately with counsel.[559] However, here, the trial court noted that the defendant charged with disciplinary action while in custody acted aggressively in court during the pendency of the case.[560] This formed the basis of the heightened security measures of court officers being stationed directly behind him with their feet on his chair during the trial.[561] Both New York courts and the United States Supreme Court have found that the trial court must "'retain appropriate discretion to control their courtrooms and trial proceedings'"[562] and that it is "'essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all criminal proceedings[.]'"[563]

The Court in *People v. Clyde* found that the county court's use of visible leg shackles on the defendant during trial violated his constitutional rights under *Deck v. Missouri*.[564] In *Deck*, the United States Supreme Court cited three fundamental legal principles: "the presumption of innocence, securing a meaningful defense, and maintaining dignified proceedings."[565] To avoid constitutional error, the court must make specific findings as to the justification for the use of shackles.[566] In *Clyde*, the county court "did not place on the record its reasons for considering leg irons necessary during [defendant's] trial," although the Court found that the defendant's "history would have supported a decision to require shackles."[567] However, "the trial court has to make that determination and articulate its reasons itself."[568] In the absence of such findings, the People must prove "'beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained.'"[569] "A constitutional error is

558. *Id.* at 396, 964 N.E.2d at 377, 941 N.Y.S.2d at 6 (quoting People v. Cooper, 307 N.Y. 253, 259, 120 N.E.2d 813, 816 (1954)).

559. *Gamble*, 18 N.Y.3d at 396, 964 N.E.2d at 377, 941 N.Y.S.2d at 6.

560. *Id.* at 397, 964 N.E.2d at 378, 941 N.Y.S.2d at 7.

561. *Id.*

562. *Id.* at 396-97, 964 N.E.2d at 377, 941 N.Y.S.2d at 6 (quoting People v. Vargas, 88 N.Y.2d 363, 377, 668 N.E.2d 879, 885, 645 N.Y.S.2d 759, 765 (1996)).

563. *Gamble*, 18 N.Y.3d at 397, 964 N.E.2d at 377, 941 N.Y.S.2d at 6 (quoting Illinois v. Allen, 397 U.S. 337, 343 (1970)).

564. People v. Clyde, 18 N.Y.3d 145,148, 961 N.E.2d 634, 636, 938 N.Y.S.2d 243, 245 (2011); Deck v. Missouri, 544 U.S. 622, 634 (2005).

565. *Clyde*, 18 N.Y.3d at 152, 961 N.E.2d at 638, 938 N.Y.S.2d at 247 (citing *Deck*, 544 U.S. at 630-31).

566. *Clyde*, 18 N.Y.3d at 152, 961 N.E.2d at 638, 938 N.Y.S.2d at 247.

567. *Id.*, 961 N.E.2d at 638-69, 938 N.Y.S.2d at 247-48.

568. *Id.* at 153, 961 N.E.2d at 639, 938 N.Y.S.2d at 248.

569. *Id.*, 961 N.E.2d at 638, 938 N.Y.S.2d at 247 (quoting *Deck*, 544 U.S. at 635).

'considered harmless when, in light of the totality of the evidence, there is no reasonable possibility that the error affected the jury's verdict.'"[570] The Court found that the evidence against the defendant was overwhelming, and therefore the constitutional error was harmless.[571]

The Court in *People v. Cruz* held that, since the trial court failed to make findings justifying keeping the defendant in shackles during the trial and the case against the defendant was not overwhelming, such procedure violated the defendant's federal constitutional rights.[572] Over the defendant's objection, the trial judge shackled him during the trial proceedings with an "opaque bunting placed around the defense table to conceal the restraints."[573] "Federal constitutional law 'prohibits the use of physical restraints visible to the jury during a criminal trial, absent a court determination that they are justified by an essential state interest specific to the defendant on trial.'"[574] Since the trial court judge failed to place on the record any findings justifying the use of leg irons, and the record did not show that the shackles were *not* visible to the jury, the Court held that their use violated the defendant's constitutional rights.[575] Since the People conceded that the evidence against the defendant was not overwhelming, they could not meet their burden of showing that the constitutional error was harmless beyond a reasonable doubt, and therefore a new trial was ordered.[576]

XXII. SEVERABILITY OF CODEFENDANTS' CASES

In *People v. Chestnut*, the Court found that the trial court erred under CPL section 200.40(1) when it refused to sever the trials of the co-defendants, and such error was not harmless.[577] Both defendants were tried for robbery with the co-defendant, who was also being tried for multiple drug offenses and resisting arrest stemming from his arrest.[578] The drug and resisting arrest counts had no connection to the

570. *Clyde*, 18 N.Y.3d at 153, 961 N.E.2d at 639, 938 N.Y.S.2d at 248 (quoting People v. Douglas, 4 N.Y.3d 777, 779, 826 N.E.2d 796, 797, 793 N.Y.S.2d 825, 826 (2005)).

571. *Clyde*, 18 N.Y.3d at 154-55, 961 N.E.2d at 640, 938 N.Y.S.2d at 249.

572. 17 N.Y.3d 941, 944-45, 960 N.E.2d 430, 433, 936 N.Y.S.2d 661, 664 (2011).

573. *Id.* at 943, 960 N.E.2d at 432, 936 N.Y.S.2d at 663.

574. *Id.* at 944, 960 N.E.2d at 432, 936 N.Y.S.2d at 663 (quoting *Clyde*, 18 N.Y.3d at 152, 961 N.E.2d at 638, 938 N.Y.S.2d at 247).

575. *Cruz*, 17 N.Y.3d at 944-45, 960 N.E.2d at 433, 936 N.Y.S.2d at 664 (emphasis added).

576. *Id.* at 945, 960 N.E.2d at 433, 936 N.Y.S.2d at 664.

577. 19 N.Y.3d 606, 608, 973 N.E.2d 697, 698, 950 N.Y.S.2d 287, 288 (2012); N.Y. CRIM. PROC. LAW § 200.40(1) (McKinney 2007).

578. *Chestnut*, 19 N.Y.3d at 608, 973 N.E.2d at 698, 950 N.Y.S.2d at 288.

defendant whose counsel, at numerous points during the proceeding, sought to sever the joint trial.[579] Both the defendant and co-defendant were convicted by a jury of robbery, and the co-defendant was also convicted of three drug counts and resisting arrest.[580] On appeal, the defendant argued that the failure of the trial court to sever his trial from that of his co-defendant

> violated [CPL section 200.40(1)], which provides that defendants may be jointly charged in a single indictment if (a) 'all such defendants are jointly charged with every offense;' (b) 'all the offenses charged are based upon a common scheme or plan;' (c) 'all offense charges are based upon the same criminal transaction;' or (d) under certain circumstance where the indictment includes a count of enterprise corruption.[581]

Although, as conceded by the prosecution, the defendants should have been tried separately under this pursuant to CPL section 200.40(1), the appellate division affirmed the convictions, citing that such error was harmless.[582] The harmless error doctrine is applicable only where "(1) the quantum and nature of the evidence against the defendant must be great enough to excise the error, and (2) the casual effect that the error may nevertheless have had on the jury must be overcome."[583]

Here, the Court found that the evidence of the defendant's guilt—an unreliable one-witness identification with no corroborating witness or physical evidence and no incuplatory statement of the defendant—was far from overwhelming.[584] The voluminous testimony of six out of the eleven witnesses and eight of the fifteen exhibits, which presented evidence of the co-defendant's guilt of the unrelated drug and resisting arrest charges, created a prejudicial effect against the defendant which could not be cured with the trial court's instruction.[585] Therefore, the Court reversed the appellate division order and ordered a new trial.[586]

579. *Id.*
580. *Id.* at 610, 973 N.E.2d at 699, 950 N.Y.S.2d at 289.
581. *Id.* (quoting N.Y. CRIM. PROC. LAW § 200.40(1)).
582. *Chestnut*, 19 N.Y.3d at 610, 973 N.E.2d at 699, 950 N.Y.S.2d at 289 (citing People v. Chestnut, 81 A.D.3d 661, 661, 916 N.Y.S.2d 787, 788 (2d Dep't 2011)).
583. *Chestnut*, 19 N.Y.3d at 611-12, 973 N.E.2d at 700, 950 N.Y.S.2d at 290.
584. *Id.* at 612, 973 N.E.2d at 700-01, 950 N.Y.S.2d at 290-91.
585. *Id.* at 613, 973 N.E.2d at 701-02, 950 N.Y.S.2d at 291-92.
586. *Id.* at 614, 973 N.E.2d at 702, 950 N.Y.S.2d at 292.