CRIMINAL LAW

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CONTENTS

INTRODUCTION

This *Survey* covers developments in criminal law from cases decided by the Court of Appeals during the *Survey* period of June 30, 2015 to July 1, 2016 and, where appropriate, discusses cases from other New York trial and intermediate appellate courts. This *Survey* also includes a review of changes made to the Penal Law, Criminal Procedure

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Law (CPL), and the Vehicle and Traffic Law (VTL) enacted by the New York State Legislature during the *Survey* period.

I. APPELLATE REVIEW SCOPE AND JURISDICTION

In *People v. Panton*, the Court held that the defendant failed to preserve for appellate review the argument that her post-*Miranda* written and video statements should have been suppressed because the police engaged in an improper pre-*Miranda* custodial interrogation.[1] Specifically, the Court concluded that the defendant failed to raise said argument at the trial court in her suppression motion or at the suppression hearing.[2]

In *People v. Nicholson*, the Court rejected the defendant's argument that the appellate division exceeded its statutory authority under CPL § 470.15(1), by deciding that the "People's rebuttal witness testimony was admissible on a ground different from that of the trial court."[3] Rather than rendering a prohibited "decision on grounds explicitly different from those of the trial court, or on grounds that were clearly resolved in a defendant's favor," the Court held that "[w]here a trial court does not identify the predicate for its ruling, the [a]ppellate [d]ivision acts appropriately in considering the import of the trial judge's stated reasoning."[4] The Court further held that nothing in CPL § 470.15(1) "prohibits an appellate court from considering the record and the proffer colloquy with counsel to understand the context of the trial court's ultimate determination, as it did in the defendant's case."[5]

In *People v. Miranda*, the defendant argued that a warrantless search of his satchel was unlawful, as beyond the scope of a search incident to the defendant's arrest.[6] The Court held that the defendant's argument was

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1. 27 N.Y.3d 1144, 1144–45, 57 N.E.3d 1095, 1096, 37 N.Y.S.3d 58, 59 (2016) (citing People v. Gonzalez, 55 N.Y.2d 887, 888, 433 N.E.2d 1266, 1267, 449 N.Y.S.2d 18, 19 (1982)).

2. *Id.* at 1145, 57 N.E.3d at 1096, 37 N.Y.S.3d at 59 (citing *Gonzalez*, 55 N.Y.2d at 888, 433 N.E.2d at 1267, 449 N.Y.S.2d at 19).

3. 26 N.Y.3d 813, 817–18, 824, 48 N.E.3d 944, 947, 951, 28 N.Y.S.3d 663, 966, 670 (2016). CPL § 470.15(1) provides the following:

> Upon an appeal to an intermediate appellate court from a judgment, sentence or order of a criminal court, such intermediate appellate court may consider and determine any question of law or issue of fact involving error or defect in the criminal court proceedings which may have adversely affected the appellant.

N.Y. CRIM. PROC. LAW § 470.15(1) (McKinney 2009).

4. *Nicholson*, 26 N.Y.3d at 825–26, 48 N.E.3d at 952, 28 N.Y.S.3d at 671 (citing People v. Concepcion, 17 N.Y.3d 192, 195, 953 N.E.2d 779, 781, 929 N.Y.S.2d 541, 543 (2011)).

5. *Id.* at 825, 48 N.E.3d at 952, 28 N.Y.S.3d at 671 (citing *Concepcion*, 17 N.Y.3d at 195, 953 N.E.2d at 781, 929 N.Y.S.2d at 543).

6. 27 N.Y.3d 931, 932, 50 N.E.3d 224, 225, 30 N.Y.S.3d 600, 601 (2016).

not preserved for appellate review because the trial court did not expressly decide the issue raised by the defendant on appeal.[7] Specifically, the issue decided by the trial court at the defendant's suppression hearing was whether the police had probable cause to arrest the defendant.[8]

In *People v. Morris*, the Court held that the trial court's failure to discuss a jury note and its intended response with counsel before recalling the jury into the courtroom, along with its failure to fulfill the responsibility of providing a meaningful response to the jury's inquiry was not a mode of proceedings error.[9] Key to the Court's reasoning was the fact that defense counsel had meaningful notice of the jury's note; was aware that the trial court failed to read the testimony requested by the jury; and, despite this, defense counsel failed to object.[10] The Court concluded that the same facts "remove[d] the claimed error from the very narrow class of mode of proceedings errors" for which no preservation is required.[11]

In *People v. Harrison*, the Court held that intermediate appellate courts are prohibited from dismissing pending direct appeals due to a

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7. *Id.* at 932–33, 50 N.E.3d at 225, 30 N.Y.S.3d at 601.

8. *Id.* CPL § 470.05 provides, in relevant part, the following:

> For purposes of appeal, a question of law with respect to a ruling or instruction of a criminal court during a trial or proceeding is presented when a protest thereto was registered, by the party claiming error, at the time of such ruling or instruction or at any subsequent time when the court had an opportunity of effectively changing the same. Such protest need not be in the form of an "exception" but is sufficient if the party made his position with respect to the ruling or instruction known to the court, or if in response to a protest by a party, the court expressly decided the question raised on appeal.

N.Y. CRIM. PROC. LAW § 470.05(2) (McKinney 2009).

9. 27 N.Y.3d 1096, 1098, 55 N.E.3d 1025, 1026, 36 N.Y.S.3d 52, 53 (2016) (citing People v. Morris, 120 A.D.3d 835, 836–37, 991 N.Y.S.2d 454, 456–57 (2d Dep't 2014)). As a general rule, errors in criminal cases are reviewable on appeal only if they are adequately preserved via objection at trial by the appellant. *Id.* (first citing People v. Nealon, 26 N.Y.3d 152, 160–62, 41 N.E.3d 1130, 1135–37, 20 N.Y.S.3d 315, 320–22 (2015); then citing People v. Keschner, 25 N.Y.3d 704, 721–22, 37 N.E.3d 690, 700, 16 N.Y.S.3d 187, 197 (2015); and then citing People v. Duncan, 46 N.Y.2d 74, 80, 835 N.E.2d 572, 576, 412 N.Y.S.2d 833, 837 (1978)). "[A] 'very narrow' exception to the" preservation rule exists for "a limited class of [mode of proceedings] errors that 'go to the essential validity of the process and are so fundamental that the entire trial is irreparably tainted.'" People v. Rivera, 23 N.Y.3d 827, 831, 18 N.E.3d 367, 369–70, 993 N.Y.S.2d 656, 658–59 (2014) (quoting People v. Kelly, 5 N.Y.3d 116, 119–20, 832 N.E.2d 1179, 1181, 799 N.Y.S.2d 763, 765 (2005)) (first citing People v. Mehmedi, 69 N.Y.2d 759, 760, 505 N.E.2d 610, 610–11, 513 N.Y.S.2d 100, 100–01 (1987); and then citing People v. Patterson, 39 N.Y.2d 288, 294–96, 347 N.E.2d 898, 902–03, 383 N.Y.S.2d 573, 576–77 (1976)).

10. *Morris*, 27 N.Y.3d at 1097–98, 55 N.E.3d at 1025–26, 36 N.Y.S.3d at 52–53.

11. *Id.* at 1098, 55 N.E.3d at 1026, 36 N.Y.S.3d at 53 (citing People v. Mack, 27 N.Y.3d 534, 536, 56 N.E.3d 1041, 1043, 37 N.Y.S.3d 68, 70 (2016)).

defendant's involuntary deportation, regardless of the contentions raised by the defendant on appeal.[12] In addition, consistent with the Court's authority to dismiss pending permissive appeals due to the defendant's involuntary deportation, the Court further held that intermediate appellate courts are permitted, in their discretionary authority, to dismiss permissive appeals on the same grounds.[13]

In *People v. Wallace*, the defendant argued that the trial court's handling of a jury request to take notes during the reading of jury charges and the court's delegating, to a court officer, the delivery of an answer to a jury question constituted a mode of proceedings error.[14] The Court disagreed, holding that the defendant's failure to object at the trial court level precluded a review of the defendant's contentions.[15] In the same case, the defendant further argued that his statement to the police and the subsequent physical evidence recovered should have been suppressed.[16] As in *Miranda*, the Court held that the defendant's appellate argument was not preserved for review because it was not raised by the defendant at the trial court level.[17]

In *People v. Mack*, a deliberating jury sent the trial court three notes, which were read into the record in the presence of the defendant and his counsel.[18] Thereafter, the trial court accepted a verdict without responding to the notes sent by the jury during deliberations.[19] As in *Morris*, the Court held "that where counsel has meaningful notice of the content of a jury note and of the trial court's response, or lack thereof, to that note," no mode of proceedings error occurs, "and counsel is required to preserve [by objection] any claim of error for appellate review."[20]

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12. 27 N.Y.3d 281, 287–88, 52 N.E.3d 223, 227, 32 N.Y.S.3d 560, 564 (2016). Pursuant to CPL § 450.10, all criminal defendants are afforded a fundamental right to a direct appeal of their convictions to the intermediate appellate courts. N.Y. CRIM. PROC. LAW § 450.10 (McKinney 2005); *see also* People v. Ventura, 17 N.Y.3d 675, 679–79, 958 N.E.2d 884, 885–86, 934 N.Y.S.2d 756, 757–58 (2011).

13. *Harrison*, 27 N.Y.3d at 284, 288, 52 N.E.3d at 224, 227, 32 N.Y.S.3d at 561, 564. Pursuant to CPL § 450.15, "a defendant has no fundamental right or basic entitlement to appeal where the defendant must seek permission to appeal to the intermediate appellate court." *Id.* at 288, 52 N.E.3d at 227, 32 N.Y.S.3d at 564 (citing N.Y. CRIM. PROC. LAW § 450.15 (McKinney 2005)).

14. 27 N.Y.3d 1037, 1039, 53 N.E.3d 705, 706, 33 N.Y.S.3d 828, 829 (2016).

15. *Id.* (citing People v. Mays, 20 N.Y.3d 969, 971, 982 N.E.2d 1252, 1253, 959 N.Y.S.2d 119, 120 (2012)).

16. *Id.* at 1038–39, 53 N.E.3d at 706, 33 N.Y.S.3d at 829.

17. *Id.* at 1038, 53 N.E.3d at 705, 33 N.Y.S.3d at 828; *see also* People v. Miranda, 27 N.Y.3d 931, 932, 50 N.E.3d 224, 225, 30 N.Y.S.3d 600, 601 (2016).

18. 27 N.Y.3d 534, 537, 55 N.E.3d 1041, 1044, 36 N.Y.S.3d 68, 71 (2016).

19. *Id.* at 538, 55 N.E.3d at 1044, 36 N.Y.S.3d at 71.

20. *Id.* at 537, 55 N.E.3d at 1044, 36 N.Y.S.3d at 71; *see also* People v. O'Rama, 78

In *People v. Rosario*, the Court held that two defendants could not employ coram nobis relief as a means to pursue a direct appeal of their criminal convictions after the defendants' time to appeal expired under CPL §§ 460.10(1)(a) and 460.30.[21] The Court held that coram nobis relief "is extraordinary relief only to be provided 'in rare case[s]' when 'a right to appeal was extinguished "due solely to the unconstitutionally deficient performance of counsel."'"[22] As such, the Court rejected the defendants' arguments on the grounds that neither of the defendants claimed that their respective counsel failed to file a notice of appeal and there was no proof that defense counsel failed to apprise the defendants of their appellate rights.[23]

In *People v. Smith*, two defendants argued that tape recording of proceedings in town or village justice courts should be deemed equivalent to a record taken by a court stenographer and, as such, their appeals filed without an affidavit of errors were properly taken under CPL § 460.10.[24]

N.Y.2d 270, 277, 279–80, 579 N.E.2d 189, 192–94, 574 N.Y.S.2d 159, 162–64 (1991) (citing People v. Malloy, 55 N.Y.2d 296, 301, 434 N.E.2d 237, 239, 449 N.Y.S.2d 168, 170 (1982)). CPL § 310.30 requires trial courts to provide meaningful notice to counsel of a substantive inquiry from a deliberating jury, and that "'meaningful notice' . . . means notice of the actual specific content of the jurors' request." *O'Rama*, 78 N.Y.2d at 277, 579 N.E.2d at 192, 574 N.Y.S.2d at 162. CPL § 310.30 provides, in relevant part, the following:

> At any time during its deliberation, the jury may request the court for further instruction or information with respect to the law, with respect to the content or substance of any trial evidence, or with respect to any other matter pertinent to the jury's consideration of the case. Upon such a request, the court must direct that the jury be returned to the courtroom and, after notice to both the people and counsel for the defendant, and in the presence of the defendant, must give such requested information or instruction as the court deems proper.

N.Y. CRIM. PROC. LAW § 310.30 (McKinney 2017).

21. 26 N.Y.3d 597, 601, 604, 46 N.E.3d 1043, 1044, 1047, 26 N.Y.S.3d 490, 491, 494 (2015). Under CPL § 460.10(1)(a), an appeal must be filed within thirty days after imposition of sentence. N.Y. CRIM. PROC. LAW § 460.10(1)(a) (McKinney 2005). Pursuant to CPL § 460.30, an appellate court may grant an extension of time to file a notice of appeal if the defendant makes a motion, with due diligence, after the thirty days under CPL § 460.10(1)(a) has expired but, in no event, more than one year thereafter. N.Y. CRIM. PROC. LAW § 460.30 (McKinney 2005).

22. *Rosario*, 26 N.Y.3d at 603, 46 N.E.3d at 1045, 26 N.Y.S.3d at 492 (quoting People v. Andrews, 23 N.Y.3d 605, 611, 17 N.E.3d 491, 494–95, 993 N.Y.S.2d 236, 239–40 (2014)) (citing People v. Syville, 15 N.Y.3d 391, 398, 938 N.E.2d 910, 914, 912 N.Y.S.2d 477, 481 (2010)); *see also Andrews*, 23 N.Y.3d at 611, 17 N.E.3d at 494–96, 993 N.Y.S.2d at 239–40 (citing *Syville*, 15 N.Y.3d at 398, 938 N.E.2d at 914, 912 N.Y.S.2d at 481); *Syville*, 15 N.Y.3d at 398, 938 N.E.2d at 914, 912 N.Y.S.2d at 481.

23. *Rosario*, 26 N.Y.3d at 603, 46 N.E.3d at 1046, 26 N.Y.S.3d at 493.

24. 27 N.Y.3d 643, 647–49, 57 N.E.3d 48, 50–52, 36 N.Y.S.3d 856, 858–60 (2016) (citing C.P.L. § 460.10).

> [CPL § 460.10] provides two different procedures for "appeal[s] taken as of right to a county court or to an appellate term." Where "the underlying proceedings were recorded by a court stenographer," an appellant is required to file a notice of appeal,

The Court held that the plain language of the statute requires an affidavit of errors to be filed where the underlying proceedings were not recorded by a court stenographer and, as such, the defendant's failure to file an affidavit of errors was a jurisdictional defect prohibiting the intermediate appellate courts from considering the defendants' appeals.[25]

In *People v. King*, the defendant argued a mode of proceedings error occurred when "the trial court abdicated its judicial function by allowing prospective jurors to opt out of serving on the jury due to a hardship and delegated that function to the clerk and the prospective jurors."[26] The Court found error because "[t]he trial court's hardship questioning occurred before formal voir dire, and focused on matters that were extraneous to their fitness to serve and might have led to a prospective juror's inability to serve because of work commitments and family obligations."[27] However, the Court held that the defendant's right to a trial by jury was not impaired by the procedure employed by the trial court and, as such, the defendant was not relieved of the obligation to object to the procedure used in order to preserve the same for appellate review.[28]

In *People v. Reynolds*, the Court held that the defendant failed to preserve the claim that his plea of guilty should be vacated because of illegal presentence conditions imposed by the trial court.[29] Although an

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> and "the appeal is deemed to have been taken" "[u]pon filing and service of the notice of appeal" in the manner prescribed by the statute. Where "the underlying proceedings were not recorded by a court stenographer[,] . . . the appellant must file," within 30 days, "either (i) an affidavit of errors, setting forth alleged errors or defects in the proceedings which are the subjects of the appeal, or (ii) a notice of appeal." If the appellant chooses to file a notice of appeal, he or she must then file an affidavit of errors within 30 days of the filing of that notice. "[T]he appeal is deemed to have been taken" "[u]pon filing and service of the affidavit of errors as prescribed."

Id. at 647–48, 57 N.E.3d at 50–51, 36 N.Y.S.3d at 858–59 (alterations in original) (omission in original) (citing C.P.L. § 460.10); *see* C.P.L. § 460.10.

25. *Smith*, 27 N.Y.3d at 646, 650, 57 N.E.3d at 49, 52, 36 N.Y.S.3d at 857, 860.

26. 27 N.Y.3d 147, 151, 153, 157–58, 50 N.E.3d 869, 871, 873, 876, 31 N.Y.S.3d 402, 404, 406, 409 (2016).

27. *Id.* at 155–56, 50 N.E.3d at 874, 31 N.Y.S.3d at 407 ("[CPL § 270.15] expressly mandates that the trial court direct that the names of at least twelve members of the panel be drawn and called, at which time those members 'shall take their places in the jury box and shall be immediately sworn to answer truthfully questions asked them relative to their qualifications to serve as jurors in the action.'" (quoting N.Y. CRIM. PROC. LAW § 270.15(1)(a) (McKinney 2014)) (citing C.P.L. § 270.15)).

28. *Id.* at 157, 50 N.E.3d at 875, 31 N.Y.S.3d at 409 (first citing People v. Kelly, 5 N.Y.3d 116, 119–20, 852 N.E.2d 1179, 1181, 799 N.Y.S.2d 763, 765 (2005); and then citing People v. Casanova, 62 A.D.3d 88, 92, 875 N.Y.S.2d 31, 34 (1st Dep't 2009)).

29. 27 N.Y.3d 1099, 1101, 55 N.E.3d 1036, 1037, 36 N.Y.S.3d 63, 64 (2016); *see* People v. Williams, 27 N.Y.3d 212, 214, 51 N.E.3d 528, 530, 32 N.Y.S.3d 17, 19 (2016) ("When a defendant pleads guilty to a crime, he or she generally must move to withdraw the plea or

illegal sentence is a "narrow exception" to the preservation rule, the Court held that the defendant's sentence was predicated upon lawful presentence conditions; to wit, that the defendant remain incarcerated for an additional six months; remain arrest free for a period of time after his release from custody; and not violate an order of protection.[30]

In *People v. Williams*, the Court held that the defendant's argument to vacate his plea on due process and voluntariness grounds was not preserved for appellate review.[31] Although the trial court granted defense counsel an adjournment to review the People's proposed sentencing and, at sentencing, allowed counsel and the defendant a full opportunity be heard, no objection was lodged upon the grounds raised by the defendant on appeal.[32] As such, the Court concluded that the defendant's failure to object rendered his claims unpreserved for appellate review.[33]

In *People v. Nealon*, the defendant argued that the trial court committed a mode of proceedings error when it failed to discuss substantive jury notes with counsel outside the presence of the jury.[34] Specifically, the trial court read the contents of the jury's notes into the record in open court and in the presence of counsel, the defendant, and the jury, before providing its responses.[35] Defense counsel did not object to the trial court's procedure or its responses to the jury notes.[36] The Court held that "[b]y reading the notes verbatim into the record in the presence of counsel and the jury, the trial court complied with its core responsibility to give counsel meaningful notice of the jury's notes" and, as no objection was made, the defendant's claimed error was unpreserved for the appellate review.[37]

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otherwise object to its entry prior to the imposition of sentence to preserve a challenge to the validity of the plea for appellate review.").

30. *Reynolds*, 27 N.Y.3d at 1100–01, 55 N.E.3d at 1037–38, 36 N.Y.S.3d at 64–65 (citing People v. Nieves, 2 N.Y.3d 310, 315, 811 N.E.2d 13, 17, 778 N.Y.S.2d 751, 755 (2004)).

31. *Williams*, 27 N.Y.3d at 214, 222, 51 N.E.3d at 530, 535, 32 N.Y.S.3d at 19, 24.

32. *Id.* at 217–18, 51 N.E.3d at 532, 32 N.Y.S.3d at 21.

33. *Id.* at 225, 51 N.E.3d at 537, 32 N.Y.S.3d at 26.

34. 26 N.Y.3d 152, 154, 41 N.E.3d 1130, 1131, 20 N.Y.S.3d 315, 316 (2015).

35. *Id.* at 155, 160, 162, 41 N.E.3d at 1131, 1135, 1137, 20 N.Y.S.3d at 316, 320, 322.

36. *Id.* at 155, 41 N.E.3d at 1131–32, 20 N.Y.S.3d at 316–17.

37. *Id.* at 160–61, 41 N.E.3d at 1135–36, 20 N.Y.S.3d at 320–21 (citing People v. Alcide, 21 N.Y.3d 687, 694, 998 N.E.2d 1056, 1060, 976 N.Y.2d 432, 436 (2013); then citing People v. Williams, 21 N.Y.3d 932, 934–35, 991 N.E.2d 195, 197, 969 N.Y.S.2d 421, 423 (2013); and then citing People v. Ramirez, 15 N.Y.3d 824, 825–26, 935 N.E.2d 791, 791, 909 N.Y.S.2d 1, 1 (2010)) ("Where, as here, defense counsel had notice of a jury note and 'failed to object . . . when the error could have been cured,' lack of preservation bars the claim." (quoting *Williams*, 21 N.Y.3d at 935, 991 N.E.2d at 197, 969 N.Y.S.2d at 423)). The Court has repeatedly held that its

decision in *O'Rama* "was not designed 'to mandate adherence to a rigid set of

In *People v. Varenga*, the defendant argued that his judgment of conviction did not become final until one year and thirty days after he was sentenced, on the grounds that the same date represented the last day that he could have sought an extension from the appellate division to file a late notice of appeal pursuant to CPL § 460.30(1).[38] The defendant did not make a motion for leave to file a late notice of appeal and the appellate division did not grant the defendant the same relief.[39] The Court reasoned that the defendant requested the relief at issue only because it was available, "not because [the defendant] . . . demonstrated entitlement to its relief."[40] As such, the Court held

> that where a defendant does not take a timely direct appeal from the judgment, and does not move for leave to file a late notice of appeal pursuant to [CPL § 460.30(1)], the judgment becomes final 30 days after sentencing, on the last day that a defendant has an inviolable right to file a notice of appeal pursuant to [CPL § 460.10(1)(a)].[41]

II. DEFENSES

In *People v. Hatton*, the defendant argued that the factual portion of the information charging him with the crime of forcible touching, to wit, that the defendant "smacked the buttocks" of the complainant, was insufficient.[42] The Court held that the same allegation in the information

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> procedures, but rather to delineate a set of guidelines calculated to maximize participation by counsel at a time when counsel's input is most meaningful.'" As such, we have recognized that "some departures from the procedures outlined in *O'Rama* may be subject to rules of preservation."

Id. at 158, 41 N.E.3d at 1133–34, 20 N.Y.S.3d at 318–19 (first quoting People v. Silva, 24 N.Y.3d 294, 299, 22 N.E.3d 1022, 1025–26, 998 N.Y.S.2d 154, 157–58 (2014); and then quoting People v. Kisoon, 8 N.Y.3d 129, 135, 863 N.E.2d 990, 993, 831 N.Y.S.2d 738, 741 (2007)) (first citing *Silva*, 24 N.Y.3d at 299, 22 N.E.3d at 1025–26, 998 N.Y.S.2d at 157–58; and then citing People v. Walston, 23 N.Y.3d 986, 989, 14 N.E.3d 377, 379, 991 N.Y.S.2d 24, 26 (2014)).

38. 26 N.Y.3d 529, 531, 533, 536–38, 45 N.E.3d 945, 946–47, 950–51, 25 N.Y.S.3d 49, 50–51, 54–55 (2015).

39. *Id.* at 531–32, 45 N.E.3d at 946, 25 N.Y.S.3d at 50.

40. *Id.*

41. *Id.* at 532, 45 N.E.3d at 946, 25 N.Y.S.3d at 50.

42. 26 N.Y.3d 364, 366–67, 369, 371, 44 N.E.3d 188, 190–93, 23 N.Y.S.3d 113, 115–18 (2015) (first citing N.Y. PENAL LAW § 100.40(1)(b) (McKinney 2004); then citing People v. Dumway, 23 N.Y.3d 518, 522, 16 N.E.3d 1150, 1152, 992 N.Y.S.2d 672, 674 (2014); and then citing PENAL § 100.40(1)(c)) ("[T]he factual part of the instrument must establish reasonable cause to believe that the defendant committed the offense charged in the accusatory part of the information, and must contain 'nonhearsay allegations which, if true, establish every element of the offense charged and the defendant's commission thereof.'" (quoting *Dumway*, 23 N.Y.3d at 522, 16 N.E.3d at 1152, 992 N.Y.S.2d at 674) (first citing PENAL § 100.40(1)(b); and then citing PENAL § 100.40(1)(c))); *see* PENAL § 100.40(1). Penal Law § 130.52 provides, in relevant part, the following: "A person is guilty of forcible touching

satisfied the actus reus, complainant's lack of consent, and purpose; to wit, the defendant touched the complainant without legitimate purpose or for purposes of degrading her.[43]

III. Effective Assistance of Counsel

In *People v. Bilal*, the Court held that defense counsel failed to provide meaningful representation to a defendant charged with felony criminal possession of a weapon in the second degree because defense counsel, absent "strategic or other legitimate explanation[]," failed to move to suppress the gun recovered during the defendant's encounter with the police.[44] Rather than vacating the conviction, the Court held that the defendant was entitled to a suppression hearing and, if suppression was granted, a new trial.[45] If suppression was not granted by the trial court, the Court held that "the judgment should be amended to reflect" the same result.[46]

In *People v. Parson*, the defendant argued that he was denied effective assistance of counsel based on defense counsel's scope of cross-examination at the physical evidence suppression hearing.[47] The Court declined to engage in "hindsight review" of defense counsel's cross-examination, holding, "[C]ounsel's efforts should not be second-guessed with the clarity of hindsight to determine how the defense might have

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when such person intentionally, and for no legitimate purpose[] forcibly touches the sexual or other intimate parts of another person for the purpose of degrading or abusing such person, or for the purpose of gratifying the actor's sexual desire . . . ." N.Y. PENAL LAW § 130.52(1) (McKinney Supp. 2017); *see also* N.Y. PENAL LAW § 130.05 (McKinney 2009 & Supp. 2017) (requiring that the act of forcible touching be committed without the victim's consent; to wit, "the victim does not expressly or impliedly acquiesce in the actor's conduct").

43. *Hatton*, 26 N.Y.3d at 369–70, 44 N.E.3d at 192, 23 N.Y.S.3d at 117; *see* PENAL § 130.52.

44. 27 N.Y.3d 961, 962, 49 N.E.3d 1155, 1156, 29 N.Y.S.3d 863, 864 (2016) (quoting People v. Rivera, 71 N.Y.2d 705, 709, 525 N.E.2d 698, 700, 530 N.Y.S.2d 52, 54 (1988)) (citing N.Y. PENAL LAW § 265.03(3) (McKinney 2008)). A defendant advancing an ineffective assistance claim must "'demonstrate the absence of strategic or other legitimate explanations' for counsel's alleged shortcomings." People v. Benevento, 91 N.Y.2d 708, 712, 697 N.E.2d 584, 587, 674 N.Y.S.2d 629, 632 (1998) (quoting *Rivera*, 71 N.Y.2d at 709, 525 N.E.2d at 700, 530 N.Y.S.2d at 54) (first citing People v. Flores, 84 N.Y.2d 184, 187, 639 N.E.2d 19, 19, 615 N.Y.S.2d 662, 663–64 (1994); then citing People v. Bennett, 29 N.Y.2d 462, 465, 280 N.E.2d 637, 637, 329 N.Y.S.2d 801, 801 (1972); then citing People v. Droz, 39 N.Y.2d 457, 463, 448 N.E.2d 880, 883, 384 N.Y.S.2d 404, 407–08 (1976); and then citing People v. Gonzalez, 47 N.Y.2d 606, 611, 393 N.E.2d 987, 990–91, 419 N.Y.S.2d 913, 916–17 (1979)).

45. *Bilal*, 27 N.Y.3d at 962, 49 N.E.3d at 1156, 29 N.Y.S.3d at 864 (first citing People v. Clermont, 22 N.Y.3d 931, 934, 999 N.E.2d 1149, 1152, 977 N.Y.S.2d 704, 707 (2013); and then citing People v. Millan, 69 N.Y.2d 514, 520–21, 508 N.E.2d 903, 906, 516 N.Y.S.2d 168, 171 (1987)); *see* N.Y. CRIM. PROC. LAW § 440.10(4) (McKinney 2005 & Supp. 2017).

46. *Bilal*, 27 N.Y.3d at 962, 49 N.E.3d at 1156, 29 N.Y.S.3d at 864.

47. 27 N.Y.3d 1107, 1108, 55 N.E.3d 1058, 1059–60, 36 N.Y.S.3d 85, 86–87 (2016).

been more effective."[48] The Court's conclusion was further supported by proof in the record "that defense counsel conducted a competent cross-examination of the witnesses at the suppression hearing and provided the court with cogent legal arguments to support his motion."[49]

In *People v. Nicholson*, the defendant argued that his counsel was ineffective by failing to object and request a limiting instruction as to the jury's use of testimony regarding the defendant's prior bad acts.[50] The Court rejected the defendant's argument because the defendant failed to demonstrate "that counsel lacked a strategic use for the testimony."[51]

In *People v. Carver*, the defendant argued that his counsel was ineffective by failing to seek suppression of stolen property via a challenge to the legality of the defendant's traffic stop and subsequent search.[52] The Court disagreed, holding that the record was "devoid of any indication that counsel could have presented a colorable argument challenging the legality of the traffic stop."[53] The Court also reasoned that, even if a viable challenge to the legality of the frisk could have been made, defense counsel "may have made a legitimate strategic decision not to move to suppress."[54] The Court also rejected the defendant's argument that defense counsel failed to provide him with meaningful representation based on the brevity of defense counsel's statement at sentencing.[55] Key to the Court's reasoning was that, in addition to the statement made by defense counsel, the defendant presented his own argument at sentencing.[56]

In *People v. Griggs*, the defendant argued that defense counsel was ineffective because he failed to move to dismiss the defendant's charges based on the People's questioning of the defendant before the Grand Jury

48. *Id.* at 1108, 55 N.E.3d at 1059–60, 36 N.Y.S.3d at 86–87 (citing *Benevento*, 91 N.Y.2d at 712, 697 N.E.2d at 587, 674 N.Y.S.2d at 632).

49. *Id.* at 1108, 55 N.E.3d at 1060, 36 N.Y.S.3d at 87.

50. 26 N.Y.3d 813, 829–31, 48 N.E.3d 944, 955–56, 28 N.Y.S.3d 663, 675–76 (2016) (first citing Strickland v. Washington, 466 U.S. 668, 687 (1984); and then citing *Benevento*, 91 N.Y.2d at 712, 697 N.E.2d at 587, 674 N.Y.S.2d at 632). Under federal law "ineffective assistance of counsel requires both that 'counsel's performance was deficient' and that the 'deficient performance prejudiced the [defendant].'" *Id.* at 830, 48 N.E.3d at 956, 28 N.Y.S.3d at 675 (quoting *Strickland*, 466 U.S. at 687). Under the New York State Constitution "[t]he core of the inquiry is whether [the] defendant received meaningful representation." *Id.* at 830–31, 48 N.E.3d at 956, 28 N.Y.S.3d at 675 (quoting *Benevento*, 91 N.Y.2d at 712, 697 N.E.2d at 587, 674 N.Y.S.2d at 632).

51. *Id.* at 824, 831, 48 N.E.3d at 952, 957, 28 N.Y.S.3d at 671, 676.

52. 27 N.Y.3d 418, 420, 53 N.E.3d 734, 735, 33 N.Y.S.3d 857, 858 (2016).

53. *Id.* at 420–21, 53 N.E.3d at 735, 33 N.Y.S.3d at 858.

54. *Id.* at 421, 53 N.E.3d at 736, 33 N.Y.S.3d at 859.

55. *Id.*

56. *Id.*

regarding a pending indictment.[57] The Court rejected the defendant's argument on the grounds that "defense counsel's decision . . . was reasonable in light of the limited nature of the questioning and the remedial instruction provided" at the Grand Jury.[58] Moreover, the Court held that the "defendant's conduct substantially affected [and undermined defense] counsel's ability to object and preserve arguments" by the defendant's repeated requests to proceed pro se.[59]

In *People v. Caldavado*, the Court held that the trial court erred by denying the defendant's motion to vacate her conviction under CPL § 440(1)(h) on grounds of ineffective assistance of counsel without an evidentiary hearing.[60] The Court reasoned that the defendant's proof, including, two experts who described lines of inquiry that could have been advantageous to the defendant, but were not pursued at trial, together with a statement from defense counsel "that he would not call an expert at trial because it would be 'pointless' to do so in light of the number of experts being called by the People," raised a question of fact "as to whether counsel's alleged deficiencies were merely the result of a reasonable, but unsuccessful, trial strategy, or whether counsel failed to 'pursue the minimal investigation required under the circumstances,'" thereby, necessitating a hearing.[61]

In *People v. Gross*, the defendant argued that trial counsel was ineffective because she failed to call an expert witness to testify about the absence of physical evidence and did not request a limiting instruction that the victim's "testimony concerning the disclosures she made to other individuals should not be accepted for the truth of her allegations."[62] The

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57. 27 N.Y.3d 602, 604–07, 56 N.E.3d 203, 204–06, 36 N.Y.S.3d 421, 422–24 (2016).

58. *Id.* at 607, 56 N.E.3d at 206, 36 N.Y.S.3d at 424.

59. *Id.* at 605, 607, 56 N.E.3d at 205–06, 36 N.Y.S.3d at 423–24.

60. 26 N.Y.3d 1034, 1036–37, 43 N.E.3d 369, 370–71, 22 N.Y.S.3d 159, 160–61 (2015) (first citing People v. Zeh, 22 N.Y.3d 1144, 1146, 9 N.E.3d 366, 367, 986 N.Y.S.2d 16, 17 (2014); and then citing People v. Jenkins, 68 N.Y.2d 896, 898, 501 N.E.2d 586, 587, 508 N.Y.S.2d 937, 938 (1986)). Ineffective assistance of counsel claims are often brought under CPL § 440(1)(h) provides the following:

> At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that[] [t]he judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States.

N.Y. CRIM. PROC. LAW § 440.10(1)(h) (McKinney 2005).

61. *Caldavado*, 26 N.Y.3d at 1036–37, 43 N.E.3d at 370–71, 22 N.Y.S.3d at 160–61 (first citing People v. Oliveras, 21 N.Y.3d 339, 348, 993 N.E.2d 1241, 1246, 971 N.Y.S.2d 221, 226 (2013); then citing *Zeh*, 22 N.Y.3d at 1146, 9 N.E.3d at 367, 986 N.Y.S.2d at 17; and then citing *Jenkins*, 68 N.Y.2d at 898, 501 N.E.2d at 587, 508 N.Y.S.2d at 938).

62. 26 N.Y.3d 689, 694, 696, 47 N.E.3d 738, 742, 744, 27 N.Y.S.3d 459, 463, 465 (2016) (first citing People v. Benevento, 91 N.Y.2d 708, 712, 697 N.E.2d 584, 587, 674 N.Y.S.2d 629, 632 (1998); and then citing People v. Baldi, 54 N.Y.2d 137, 147, 429 N.E.2d 400, 405,

Court rejected the defendant's expert witness argument because the defendant did not include, as part of his appeal, an affidavit from a medical expert to support his absence of physical evidence theory.[63] The Court also rejected the defendant's limiting instruction argument in light of the "totality" of the meaningful representation given by trial counsel.[64]

In *People v. Ambers*, the defendant argued that counsel was ineffective by failing to seek the dismissal of time-barred charges and by failing to object to statements made by the prosecution at summation.[65] As to the defendant's time-barred charges, the Court held that defense counsel's actions were reasonable as counsel "may have strategically decided to allow the lesser charges of endangering the welfare of a child to remain in order to allow the jury to convict the defendant of that crime rather than the greater charges of rape and course of sexual conduct against a child."[66] As to the alleged failure to object during summation, the Court held that defense counsel was not ineffective, given that counsel objected thirty times during the People's summation and that the trial court's limiting instructions eliminated any potential prejudice to the defendant.[67]

In *People v. Wragg*, the defendant argued that counsel was ineffective by revealing to the jury that the alleged victim previously identified the defendant as the assailant when the defendant's sole defense was that the victim misidentified him.[68] The Court refused to second-guess counsel's trial strategy because, during voir dire, counsel asked questions to elicit from potential jurors whether they were open to the possibility that the victim made an honest mistake about the identity of the perpetrator and, based on the record, the jurors were, in fact, open to the possibility that the victim identified the wrong person as the assailant.[69]

In *People v. Negron*, the defendant argued that he received

444 N.Y.S.2d 893, 898 (1981)).

63. *Id.* at 694, 47 N.E.3d at 742, 27 N.Y.S.3d at 463.

64. *Id.* at 696, 47 N.E.3d at 744, 27 N.Y.S.3d at 465 (first citing *Benevento*, 91 N.Y.2d at 712, 697 N.E.2d at 587, 674 N.Y.S.2d at 632; and then citing *Baldi*, 54 N.Y.2d at 146–47, 429 N.E.2d at 405, 444 N.Y.S.2d at 898).

65. 26 N.Y.3d 313, 315, 43 N.E.3d 757, 758, 22 N.Y.S.3d 400, 401 (2015).

66. *Id.* at 319–20, 43 N.E.3d at 761–62, 22 N.Y.S.3d at 404–05.

67. *Id.* at 320, 43 N.E.3d at 762, 22 N.Y.S.3d at 405 (first citing People v. Tosca, 98 N.Y.2d 660, 661, 773 N.E.2d 1014, 1014, 746 N.Y.S.2d 276, 276 (2002); then citing People v. Galloway, 54 N.Y.2d 396, 399, 430 N.E.2d 885, 886, 446 N.Y.S.2d 9, 10 (1981); and then citing People v. Arce, 42 N.Y.2d 179, 190–91, 366 N.E.2d 279, 285–86, 397 N.Y.S.2d 619, 626 (1977)).

68. 26 N.Y.3d 403, 410, 44 N.E.3d 898, 903, 23 N.Y.S.3d 600, 605 (2015).

69. *Id.*

ineffective assistance of counsel when his attorney failed to object to the trial court's use of the incorrect standard in ruling upon the defendant's request to offer third-party culpability evidence.[70] The Court agreed, holding that "[h]ad the [trial] court conducted the proper analysis, a determination that the third-party culpability evidence was admissible would have been permissible."[71] In addition, trial counsel stated in an affidavit "he had done no research on third-party culpability, was unaware of the correct legal standard and had no excuse or strategic explanation for the lapse in representation."[72]

In *People v. Wright*, the defendant argued that his conviction should be vacated pursuant to CPL § 440.10, on the grounds that his attorney simultaneously represented the district attorney, thereby, creating a conflict of interest.[73] The Court rejected the defendant's claim, concluding that the same was based on "unsubstantiated and conclusory allegations of simultaneous representation."[74] Key to the Court's reasoning was the fact that the district attorney submitted affirmations stating that no simultaneous representation ever took place.[75]

In *People v. Watson*, the defendant argued that the trial court deprived him of counsel of his choosing by relieving the defendant's assigned counsel and appointing conflict-free counsel to represent the defendant.[76] Specifically, prior to trial, the defendant's assigned counsel, employed by New York County Defender Services, discovered that

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70. 26 N.Y.3d 262, 268, 43 N.E.3d 362, 366–67, 22 N.Y.S.3d 152, 156–57 (2015) (citing People v. Primo, 96 N.Y.2d 351, 355–57, 753 N.E.2d 164, 167–68, 728 N.Y.S.2d 735, 738–39 (2001)) ("Prior to being overruled . . . the 'clear link' standard had required the defendant to 'do more than raise a mere suspicion that another person committed the crime,' that is, to show 'a clear link between the third party and the crime in question.'" (quoting *Primo*, 96 N.Y.2d at 355, 753 N.E.2d at 167, 728 N.Y.S.2d at 738)). Under the current rule, "third-party culpability evidence should be evaluated in accordance with ordinary evidentiary principles—by balancing probative value against the potential for 'undue prejudice, delay and confusion.'" *Id.* (quoting *Primo*, 96 N.Y.2d at 356–57, 753 N.E.2d at 168, 728 N.Y.S.2d at 739).

71. *Id.* at 269, 43 N.E.3d at 367, 22 N.Y.S.3d at 157 (citing People v. Oliveras, 21 N.Y.3d 339, 348, 993 N.E.2d 1241, 1246, 971 N.Y.S.2d 221, 226 (2013)).

72. *Id.*

73. 27 N.Y.3d 516, 519, 54 N.E.3d 1157, 1159, 35 N.Y.S.3d 286, 288 (2016).

74. *Id.* at 521, 54 N.E.3d at 1161, 35 N.Y.S.3d at 290.

75. *Id.* at 519–21, 54 N.E.3d at 1160–61, 35 N.Y.S.3d at 289–90 (first citing N.Y. COUNTY LAW § 702 (McKinney 2004 & Supp. 2015); and then citing People v. Gruden, 42 N.Y.2d 214, 215, 366 N.E.2d 794, 795, 397 N.Y.S.2d 704, 705 (1977)).

76. 26 N.Y.3d 620, 622, 46 N.E.3d 1057, 1058–59, 26 N.Y.S.3d 504, 505–06 (2016). "A determination to substitute or disqualify counsel falls within the trial court's discretion." *Id.* at 624, 46 N.E.3d at 1060, 26 N.Y.S.3d at 507 (first citing People v. Carncross, 14 N.Y.3d 319, 330, 927 N.E.2d 532, 538, 901 N.Y.S.2d 112, 118 (2010); and then citing People v. Tineo, 64 N.Y.2d 531, 536, 479 N.E.2d 795, 798, 490 N.Y.S.2d 159, 162 (1985)).

another attorney from the same organization previously represented the codefendant in the case on criminal charges arising from the same incident.[77] The Court rejected the defendant's argument on the grounds that defense counsel became aware of the conflict prior to trial; the organization's representation of the codefendant arose from the same incident that led to the defendant's arrest; and the original defense counsel's supervisors prohibited him from attempting to locate, question, or cross examine the codefendant.[78] As such, the Court reasoned that "even if the institutional representation of [the codefendant] did not, in and of itself, present a conflict, such a conflict was created by the conditions imposed by [the organization], which hampered [original counsel's] ability to zealously and single-mindedly represent the defendant."[79]

In *People v. Pavone*, the defendant argued that his counsel was ineffective due to defense counsel's failure to object to the People's references to the defendant's silence during trial testimony and the prosecutor's summation and the failure of defense counsel to provide certain audio recordings to the defendant's expert witness for trial preparation.[80] The Court held that defense counsel may have had a strategic reason for permitting the testimony at issue; to wit, the testimony supported the defendant's Extreme Emotional Disturbance defense and, as such, held that counsel was not ineffective.[81] The Court also held that defense counsel's alleged failure to provide audio recordings to the expert did not render counsel ineffective, as this was not a "case where counsel wholly fail[ed] to provide an expert without any basis upon which to develop an opinion, or provide[d] an expert with incorrect information."[82]

In *People v. King*, the defendant argued that defense counsel was ineffective for failing to object to the prosecutor's alleged denigration of the defendant's alibi defense; to wit, the prosecutor stated that certain defense witnesses had not come forward until the day before trial.[83] The Court held that the trial court's curative instructions regarding the same alleviated any prejudice.[84] The defendant also argued that counsel was ineffective by failing to object to gender bias statements made by the

77. *Id.* at 623, 625, 46 N.E.3d at 1059, 1061, 26 N.Y.S.3d at 506, 508.

78. *Id.* at 626, 46 N.E.3d at 1061–62, 26 N.Y.S.3d at 508–09.

79. *Id.* at 626–27, 46 N.E.3d at 1062, 26 N.Y.S.3d at 509.

80. 26 N.Y.3d 629, 638, 642, 646, 47 N.E.3d 56, 63, 67, 69, 26 N.Y.S.3d 728, 735, 739, 741 (2015).

81. *Id.* at 647, 47 N.E.3d at 70, 26 N.Y.S.3d at 742.

82. *Id.*

83. 27 N.Y.3d 147, 158–59, 50 N.E.3d 869, 877, 31 N.Y.S.3d 402, 410 (2016).

84. *Id.*

prosecutor at summation.[85] Although the Court reasoned "that the prosecutor's appeal to [the] defendant's [female] gender was inexcusable and irrelevant," patently improper, and inflammatory, it held that the same remarks "were so over the top and ridiculous that defense counsel may very well have made a strategic decision not to object to the inflammatory comments out of a reasonable belief that the jury would be alienated by the prosecutor's boorish comments."[86]

In *People v. Henderson*, the defendant argued "that he received ineffective assistance of counsel based on his attorney's failure to provide the expert with photographs or hospital records of the victim's stab wounds and to inform the expert that the victim had 'snitched' on [the] defendant."[87] The Court held that the record as a whole revealed that the defendant received meaningful representation.[88] Specifically, the Court refused to second-guess defense counsel's strategy as, during summation, defense counsel stated to the jury that "she believed the pictures of the victim's stab wounds were potentially inflammatory, unnecessary for the expert's evaluation of [the] defendant's mental state and no more useful than the extensive information he had already been provided."[89]

In *People v. Hogan*, the defendant argued that counsel was ineffective for making a decision that the defendant would not testify before the grand jury without consulting the defendant and for failing to timely move to dismiss the indictment for insufficient notice of the grand jury proceeding.[90] The Court rejected the defendant's arguments, holding that "while the better practice may be for counsel to consult with his or

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85. *Id.* at 151, 158–59, 50 N.E.3d at 871, 876–77, 31 N.Y.S.3d at 404, 409–10.

86. *Id.* at 158–59, 50 N.E.3d at 876–77, 31 N.Y.S.3d at 158–59.

87. 27 N.Y.3d 509, 513, 54 N.E.3d 1145, 1147, 35 N.Y.S.3d 274, 276 (2016).

88. *Id.* (citing People v. Baldi, 54 N.Y.2d 137, 147, 429 N.E.2d 400, 405, 444 N.Y.S.2d 893, 898 (1981)).

89. *Id.* at 513–14, 54 N.E.3d at 1148, 35 N.Y.S.3d at 277.

90. 26 N.Y.3d 779, 785, 48 N.E.3d 58, 63, 28 N.Y.S.3d 1, 6 (2016).

> "It is well established that a defendant, having accepted the assistance of counsel, retains authority only over certain fundamental decisions regarding the case." Fundamental decisions belonging to a defendant are those "such as whether to plead guilty, waive a jury trial, testify in his or her own behalf or take an appeal." In contrast, strategic decisions regarding the conduct of trial, which remain in the purview of counsel, include those such as whether to seek a jury charge on lesser-included offenses, the selection of particular jurors, and whether to consent to a mistrial.

Id. at 786, 48 N.E.3d at 63, 28 N.Y.S.3d at 6 (quoting People v. Colon, 90 N.Y.2d 824, 825–26, 682 N.E.2d 978, 979, 660 N.Y.S.2d 377, 378 (1997)) (first citing People v. Colville, 20 N.Y.3d 20, 28, 979 N.E.2d 1125, 1129, 955 N.Y.S.2d 799, 803 (2012); then citing People v. Ferguson, 67 N.Y.2d 383, 390, 494 N.E.2d 77, 81, 502 N.Y.S.2d 972, 976 (1986); then citing *Colville*, 20 N.Y.3d at 32, 979 N.E.2d at 1129–30, 955 N.Y.S.2d at 803; then citing *Colon*, 90 N.Y.2d at 826, 682 N.E.2d at 979, 660 N.Y.S.2d at 378; and then citing *Ferguson*, 67 N.Y.2d at 390, 494 N.E.2d at 82, 502 N.Y.S.2d at 977).

her client . . . the decision of whether to have a defendant testify before a grand jury is a strategic decision within counsel's authority to make."[91] As to the defendant's untimely motion argument, the Court held "that ineffective assistance is not established by a defendant's allegations that counsel failed to make a meritless motion."[92]

In *People v. Harris*, the defendant argued that counsel was ineffective by failing to move to dismiss a time-barred count of petit larceny.[93] The Court concluded that defense counsel had no strategic reason or purpose for failing to raise the statute of limitations defense as against the time-barred charge and, as such, reversed the defendant's conviction because counsel was ineffective.[94]

In *People v. Gray*, the defendant argued that his counsel was ineffective in deciding not to move to reopen his statement suppression hearing because the testimony of the police at trial about the defendant's statement was different than the facts adduced at the statement suppression hearing.[95] The Court rejected the defendant's argument, holding that defense counsel "pursued a legitimate strategy in forgoing an unavailing motion to reopen the hearing and attempting to use the exculpatory part of the defendant's pre-break statement to discredit the post-break statement in the eyes of the jury."[96] The Court also noted that "had counsel sought a reopened hearing, the detective would have had the opportunity to strengthen his account of the interrogation and the voluntariness of the defendant's statements, potentially placing the People in a better position to undermine counsel's efforts to attack the credibility of the post-break statement at trial."[97]

IV. EVIDENCE

In *People v. Nicholson*, the defendant argued that the trial court erred when it allowed expert testimony on Child Sexual Abuse Accommodation Syndrome (CSAAS), on the grounds that the same testimony was unnecessary and irrelevant because voir dire showed that

91. *Id.* at 787, 48 N.E.3d at 64, 28 N.Y.S.3d at 7.

92. *Id.* at 787, 48 N.E.3d at 64–65, 28 N.Y.S.3d at 7–8 (citing People v. Stultz, 2 N.Y.3d 277, 287, 810 N.E.2d 883, 890, 778 N.Y.S.2d 431, 438 (2004)).

93. 26 N.Y.3d 321, 324, 43 N.E.3d 750, 752, 22 N.Y.S.3d 393, 395 (2015).

94. *Id.* at 325, 43 N.E.3d at 752–53, 22 N.Y.S.3d at 395–96 (first citing People v. Turner, 5 N.Y.3d 476, 478, 840 N.E.2d 123, 124, 806 N.Y.S.2d 154, 155 (2005); then citing People v. Evans, 16 N.Y.3d 571, 576, 949 N.E.2d 457, 459, 925 N.Y.S.2d 366, 368 (2011); and then citing People v. Ambers, 26 N.Y.3d 313, 319–20, 43 N.E.3d 757, 761–62, 22 N.Y.S.3d 400, 404–05 (2015)).

95. 27 N.Y.3d 78, 80, 49 N.E.3d 1180, 1181, 29 N.Y.S.3d 888, 888 (2016).

96. *Id.* at 83, 49 N.E.3d at 1183, 29 N.Y.S.3d at 891.

97. *Id.* at 84, 49 N.E.3d at 1183, 29 N.Y.S.3d at 891.

prospective jurors understood the reasons for a child victim's delayed disclosure of sexual abuse.[98] In rejecting the defendant's argument, the Court reasoned that (1) not every prospective juror was questioned and affirmatively responded to questions dealing with behavior associated with CSAAS; (2) there was "no consistent juror viewpoint discernable from voir dire"; and (3) even if responses from certain jurors reflected a basic appreciation of behavior associated with CSAAS, the same did not necessarily equate to the jurors having "a high level of comprehension of 'the dynamics of sexually and physically abusive relationships within a family' at issue in [the] case . . . which [were] generally not as familiar to the lay juror."[99]

In *People v. Israel*, a defendant charged with criminal homicide pursued an extreme emotional disturbance defense based on his Post-Traumatic Stress Disorder (PTSD) in an attempt to mitigate his criminal liability.[100] The defendant argued that he was deprived of a fair trial when the trial court permitted the People to illicit three uncharged bad acts.[101] The Court held that "evidence of uncharged crimes or bad acts is admissible to rebut an extreme emotional disturbance defense where the evidence has 'some "logical relationship" to, and a "direct bearing upon," the People's effort to disprove' the defense, and the probative value of the evidence outweighs its prejudicial effect."[102] Applying the same rule, the Court rejected the defendant's argument as to two of the bad acts occurring prior to the charged crime because the testimony at issue "tended to refute the subjective element of the defendant's defense, i.e., that he actually acted under the influence of PTSD" and was a person of peaceable character prior to the charged crime.[103] Applying the same standard, the Court held that it was error for the trial court to allow the People to illicit an uncharged bad act occurring after the charged crime but, further, held that the same error was harmless given the limiting jury instruction given by the court and the overwhelming proof of the defendant's guilt.[104]

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98. 26 N.Y.3d 813, 827, 48 N.E.3d 944, 954, 28 N.Y.S.3d 663, 673 (2016).

99. *Id.* at 828, 829, 48 N.E.3d at 954, 955, 28 N.Y.S.3d at 673, 674 (citing People v. Taylor, 75 N.Y.2d 277, 288, 552 N.E.2d 131, 135, 552 N.Y.S.2d 883, 887 (1990)).

100. 26 N.Y.3d 236, 239, 43 N.E.3d 728, 730, 22 N.Y.S.3d 371, 373 (2015) (first citing N.Y. PENAL LAW § 125.25(1)(a) (McKinney 2009); and then citing N.Y. PENAL LAW § 125.27(2)(a) (McKinney 2009)).

101. *Id.* at 242, 43 N.E.3d at 732, 22 N.Y.S.3d at 375.

102. *Id.* at 243, 43 N.E.3d at 733, 22 N.Y.S.3d at 376 (first citing People v. Cass, 18 N.Y.3d 553, 562, 965 N.E.2d 918, 926, 942 N.Y.S.2d 416, 424 (2012); and then citing People v. Bradley, 20 N.Y.3d 128, 133, 982 N.E.2d 570, 573, 958 N.Y.S.2d 650, 653 (2012)).

103. *Id.* at 240, 243–44, 43 N.E.3d at 731, 733–34, 22 N.Y.S.3d at 374, 376–77.

104. *Id.* at 244, 43 N.E.3d at 734, 22 N.Y.S.3d at 377 (first citing *Bradley*, 20 N.Y.3d at

In *People v. Smith*, the Court considered three appeals focusing on the issue of whether the trial court erred, under the abuse of discretion standard, "in precluding any cross-examination into allegations of a law enforcement officer's prior misconduct made in an unrelated federal lawsuit."[105] The Court held that the applicable rule is as follows:

> [f]irst, counsel must present a good faith basis for inquiring, namely the lawsuit relied upon; second, specific allegations that are relevant to the credibility of the law enforcement witness must be identified; and third, the trial judge exercises discretion in assessing whether inquiry into such allegations would confuse or mislead the jury, or create a substantial risk of undue prejudice to the parties.[106]

The Court held the same error harmless where there was proof of overwhelming guilt offered by other witnesses not involved in the federal lawsuits, negating a significant probability that the jury would have acquitted the defendant had impeachment been permitted.[107] However, the same error was not held harmless where evidence of the defendant's guilt hinged on the testimony of police officers named in the federal lawsuit, specifically, the contraband was not connected to the defendant by any forensic evidence.[108]

In *People v. Harris*, the Court considered whether the defendant was denied a fair trial when the trial court allowed the prosecution to elicit prior testimony from three witnesses from an unrelated murder case in the case against the defendant.[109] The Court held that the challenged evidence was more probative than prejudicial because it was relevant as to the state of mind of the defendant's accusers and "it allowed the jury to have all of the relevant facts before it to decide whether to credit defense counsel's arguments or the three girls' testimony concerning the

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134, 982 N.E.2d at 573, 958 N.Y.S.2d at 653; then citing People v. Santarelli, 49 N.Y.2d 241, 251, 401 N.E.2d 199, 205, 425 N.Y.S.2d 77, 83 (1980); then citing People v. Arafet, 13 N.Y.3d 460, 467, 920 N.E.2d 919, 923, 892 N.Y.S.2d 812, 816 (2009); and then citing People v. Crimmins, 36 N.Y.2d 230, 241, 326 N.E.2d 787, 793–94, 367 N.Y.S.2d 213, 222 (1975)). An evidentiary error of this type committed by the trial court is harmless unless there is a "significant probability, on [the] record, that the jury would have acquitted [the] defendant of [the charged crime] but for the admission of the testimony" at issue. *Id.* (first citing *Arafet*, 13 N.Y.3d at 467, 920 N.E.2d at 923, 892 N.Y.S.2d at 816; and then citing *Crimmins*, 36 N.Y.2d at 241, 326 N.E.2d at 793–94, 367 N.Y.S.2d at 222).

105. 27 N.Y.3d 652, 659, 57 N.E.3d 53, 57, 36 N.Y.S.3d 861, 865 (2016).

106. *Id.* at 662, 57 N.E.3d at 59, 36 N.Y.S.3d at 867 (first citing Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986); and then citing People v. Harrell, 209 A.D.2d 160, 160, 618 N.Y.S.2d 631, 631–32 (1st Dep't 1994)).

107. *Id.* at 665, 670, 57 N.E.3d at 61, 65, 36 N.Y.S.3d at 869, 873.

108. *Id.* at 668, 57 N.E.3d at 63, 36 N.Y.S.3d at 871.

109. 26 N.Y.3d 1, 4–5, 40 N.E.3d 560, 561–62, 18 N.Y.S.3d 583, 584–85 (2015).

charges against the defendant."[110]

In *People v. Denson*, the defendant argued that the trial court erred by allowing *Molineux*[111] evidence of the defendant's prior sex offense conviction as evidence of the defendant's intent to commit the crimes of kidnapping and endangering the welfare of a child with which the defendant was charged.[112] The Court rejected the defendant's argument because the evidence at the *Ventimiglia* hearing, held by the trial court, showed an actual link between the offenses; the offenses closely resembled one another based on the defendant's distinctive pattern of behavior; and expert testimony established that the defendant was re-living the previous sex offense.[113] In the same appeal, the defendant challenged the sufficiency of the evidence as to attempt; to wit, the defendant argued that based on the victim's acquiescence, the evidence failed to establish he engaged in conduct that came dangerously near the commission of the completed crime.[114] The Court disagreed, holding the following:

> [I]n determining whether the People established by legally sufficient evidence that defendant came dangerously near to completing the kidnapping, we focus on the steps defendant took to accomplish the crime, rather than on the actions or disposition of the particular child

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110. *Id.* at 5, 40 N.E.3d at 562, 18 N.Y.S.3d at 585 ("Generally, 'all relevant evidence is admissible unless its admission violates some exclusionary rule. Evidence is relevant if it has any tendency in reason to prove the existence of any material fact.' However, '[e]ven where relevant evidence is admissible, it may still be excluded in the exercise of the trial court's discretion if its probative value is substantially outweighed by the potential for prejudice.'" (alteration in original) (first quoting People v. Scarola, 71 N.Y.2d 769, 777, 525 N.E.2d 728, 732, 530 N.Y.S.2d 83, 86 (1988); and then quoting People v. Mateo, 2 N.Y.3d 383, 424–25, 811 N.E.2d 1053, 1079, 779 N.Y.S.2d 399, 425 (2004)) (citing *Scarola*, 71 N.Y.2d at 777, 525 N.E.2d at 732, 530 N.Y.S.2d at 86)).

111. *See* People v. Molineux, 168 N.Y. 264, 292, 61 N.E. 286, 294 (1901) (citing Coleman v. People, 55 N.Y. 81, 90 (1873)).

112. 26 N.Y.3d 179, 183, 42 N.E.3d 676, 679, 21 N.Y.S.3d 179, 182 (2015).

> In assessing whether evidence of a defendant's prior criminal acts should be admitted at trial, a trial court is required to engage in a two-step analysis. First, the trial court must determine whether the People have "identif[ied] some material issue, other than the defendant's criminal propensity, to which the evidence is directly relevant." If the People have met that burden, the trial court must then "weigh the evidence's probative value against its potential for undue prejudice to the defendant. If the evidence has substantial probative value and is directly relevant to the purpose—other than to show criminal propensity—for which it is offered, the probative value of the evidence outweighs the danger of prejudice and the court may admit the evidence."

Id. at 186, 42 N.E.3d at 681–82, 21 N.Y.S.3d at 184–85 (alteration in original) (quoting People v. Cass, 18 N.Y.3d 553, 560, 965 N.E.2d 918, 924, 942 N.Y.S.2d 416, 422 (2012)) (citing People v. Alvino, 71 N.Y.2d 233, 242, 519 N.E.2d 808, 812, 525 N.Y.S.2d 7, 11 (1987)).

113. *Id.* at 188, 42 N.E.3d at 683, 21 N.Y.S.3d at 186.

114. *Id.* at 190, 42 N.E.3d at 685, 21 N.Y.S.3d at 188.

> victim, and whether defendant's conduct was "potentially and immediately dangerous."[115]

In *People v. Soto*, the Court held that "an unavailable witness's statement to a defense investigator—that she, not the defendant, was the driver at the time of the accident and that she fled the scene—should have been admitted as a declaration against interest."[116] Central to the Court's decision was the fact that the witness was aware, at the time of the making of the statement, that the same was against her interest.[117]

In *People v. Frankline*, the defendant challenged his conviction on the grounds that the trial court allowed evidence that was prejudicially excessive in scope, when the victim was permitted to testify about the defendant's prior acts of violence against her.[118] The Court disagreed on the grounds that the evidence "concerned the same parties, and served the nonpropensity purpose of directly explaining her relationship with the defendant and his motive."[119] The fact that the trial court gave limiting instructions to the jury as to the permissible use of the evidence before and after the testimony and in the final charge to the jury was also key to the Court's decision.[120]

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115. *Id.* at 191, 42 N.E.3d at 685, 21 N.Y.S.3d at 188 (quoting People v. Mahboubian, 74 N.Y.2d 174, 191, 543 N.E.2d 34, 43, 544 N.Y.S.2d 769, 778 (1989)).

116. 26 N.Y.3d 455, 457, 44 N.E.3d 930, 931, 23 N.Y.S.3d 632, 633 (2015).

> A statement qualifies as a declaration against interest if four elements are met: (1) the declarant is unavailable to testify as a witness; (2) when the statement was made, the declarant was aware that it was adverse to his or her penal interest; (3) the declarant has competent knowledge of the facts underlying the statement; and (4) supporting circumstances independent of the statement itself attest to its trustworthiness and reliability.

Id. at 460–61, 44 N.E.3d at 933–34, 23 N.Y.S.3d at 635–36 (citing People v. Settles, 46 N.Y.2d 154, 167, 385 N.E.2d 612, 619, 412 N.Y.S.2d 874, 882 (1978)).

117. *Id.* at 457, 44 N.E.3d at 931, 23 N.Y.S.3d at 633.

118. 27 N.Y.3d 1113, 1114, 57 N.E.3d 26, 27, 36 N.Y.S.3d 834, 835 (2016).

> The People may not rely on prior bad acts as evidence of a defendant's propensity to commit the crimes charged, but the evidence may be admissible, as here, for background and to establish a defendant's motive. Previous acts of intimate partner violence may be nonpropensity evidence "probative of [a defendant's] motive and intent to assault [the] victim" and which "provide[s] necessary background information on the nature of the [defendant and victim's] relationship."

Id. at 1115, 57 N.E.3d at 28, 36 N.Y.S.3d at 836 (alterations in original) (quoting People v. Dorm, 12 N.Y.3d 16, 19, 903 N.E.2d 263, 265, 874 N.Y.S.2d 866, 868 (2009)) (first citing People v. Monlineux, 168 N.Y. 264, 297, 313, 61 N.E. 286, 296, 301–02 (1901); then citing People v. Resek, 3 N.Y.3d 385, 390, 821 N.E.2d 108, 110, 787 N.Y.S.2d 683, 685 (2004); and then citing People v. Till, 87 N.Y.2d 835, 837, 661 N.E.2d 153, 154, 637 N.Y.S.2d 681, 682 (1995)).

119. *Id.* at 1117, 57 N.E.3d at 29, 36 N.Y.S.3d at 837.

120. *Id.* at 1116, 57 N.E.3d at 29, 36 N.Y.S.3d at 837 (citing People v. Stanard, 31 N.Y.2d 143, 147–48, 297 N.E.2d 77, 80, 344 N.Y.S.2d 331, 334–35 (1973)).

In *People v. Negron*, the defendant argued that the People committed a *Brady* violation by failing to disclose that another individual was arrested in the building where the witnesses stated the perpetrator ran with the weapon used in the shooting with which the defendant was charged.[121] The Court agreed with the defendant and ordered a new trial, on the grounds that there was a reasonable possibility that the verdict would have been different if the information about the other individual had been disclosed by the People.[122] Key to Court's analysis was the fact that evidence against the defendant was not overwhelming; to wit, there was no physical evidence tying the defendant to the shooting; only one out of the five eyewitnesses identified the defendant as the perpetrator; and evidence of the caliber of the ammunition was favorable to the defense.[123]

In *People v. DiPippo*, the defendant argued that the trial court abused its discretion by refusing to allow the defendant to introduce third-party culpability evidence.[124] Initially, the Court concluded that the declarations of the third-party were admissible and, when considered in combination with other evidence, the "defendant's third-party culpability proffer was compelling and highly probative of the question of who killed the victim."[125] In addition, the Court "recognized that reverse *Molineux* evidence—i.e., evidence that a third party has committed bad acts similar to those the defendant is charged with committing—is relevant to, and can support, a third-party culpability proffer where the crimes reflect a 'modus operandi' connecting the third party to the charged crimes."[126] Key to the Court's reasoning was that the defendant's proffer demonstrated that there were at least two other victims of sexual assault by the third-party who, like the victim in the crime the defendant was charged with, were known to the third-party; were similar in age to the victim in the defendant's case; and, most importantly, had shoved articles of clothing in their mouths, which was consistent with the state of the

121. 26 N.Y.3d 262, 269, 43 N.E.3d 362, 367, 22 N.Y.S.3d 152, 157 (2015) ("Under *Brady*, 'the prosecution's failure to disclose to the defense evidence in its possession both favorable and material to the defense entitles the defendant to a new trial.'" (quoting People v. Vilardi, 76 N.Y.2d 67, 73, 555 N.E.2d 915, 917, 556 N.Y.S.2d 518, 520 (1990))); *see* Brady v. Maryland, 373 U.S. 83, 87 (1963).

122. *Negron*, 26 N.Y.3d at 270, 43 N.E.3d at 367–68, 22 N.Y.S.3d at 157–58.

123. *Id.* at 270, 43 N.E.3d at 368, 22 N.Y.S.3d at 158.

124. 27 N.Y.3d 127, 130–31, 50 N.E.3d 889, 889–90, 31 N.Y.S.3d 421, 422–23 (2016).

125. *Id.* at 138, 50 N.E.3d at 895, 31 N.Y.S.3d at 428.

126. *Id.* (first citing People v. Schulz, 4 N.Y.3d 521, 528, 829 N.E.2d 1192, 1196, 797 N.Y.S.2d 24, 28 (2005); then citing People v. Bunge, 70 A.D.3d 710, 711, 894 N.Y.S.2d 97, 98 (2d Dep't 2010); then citing United States v. Aboumoussallem, 726 F.2d 906, 911 (2d Cir. 1984); and then citing State v. Garfole, 76 N.J. 445, 451, 388 A.2d 587, 590 (1978)).

victim's body in the defendant's case.[127] Accordingly, the Court determined that the acts of the third-party were "sufficiently unique for those bad acts to qualify as modus operandi evidence connecting" the third-party to the death of the victim in the defendant's case.[128]

In *People v. Powell*, the Court rejected the defendant's argument that the trial court erred by precluding the defendant's offer of proof for admission of third-party culpability evidence.[129] The Court held that the defendant's proposed third-party culpability evidence consisting of speculative assertions that some other unidentified individual had motive and opportunity to harm the victim was ill-defined and speculative and, as such, insufficient to support admission of third-party culpability evidence.[130]

In *People v. Keschner*, the Court held "that the prosecution in an enterprise corruption case may prove that a defendant was a member of a criminal enterprise, with a continuity beyond the scope of individual criminal incidents, without showing that the enterprise would have survived the removal of a key participant."[131] The Court reasoned that "requir[ing] a criminal enterprise to be able to survive the removal of a key figure, [would enable] criminal organizations [to] avoid enhanced penalties simply by placing all control in the hands of one person."[132] A such, the Court held that the statutory requirement is not that the group would continue in the absence of a key participant, but rather that it continues to exist "beyond the scope of individual criminal incidents"; to wit, "[i]f a group persist[ed], [] in the form of a 'structured, purposeful criminal organization,' beyond the time required to commit individual crimes, the continuity element of criminal enterprise is met."[133]

In *People v. Berry*, the Court rejected three evidentiary errors

127. *Id.* at 139, 50 N.E.3d at 896, 31 N.Y.S.3d at 429.

128. *Id.* (citing People v. Allweiss, 48 N.Y.2d 40, 48, 396 N.E.2d 735, 739, 421 N.Y.S.2d 341, 345 (1979)).

129. 27 N.Y.3d 523, 526, 55 N.E.3d 435, 436, 35 N.Y.S.3d 675, 676 (2016).

130. *Id.* at 531–32, 55 N.E.3d at 440, 35 N.Y.S.3d at 680 (citing People v. Gamble, 18 N.Y.3d 386, 398–99, 964 N.E.2d 372, 379, 941 N.Y.S.2d 1, 8 (2012)) ("[A]dmission of third-party culpability evidence does not necessarily require a specific accusation that an identified individual committed the crime.").

131. 25 N.Y.3d 704, 709, 37 N.E.3d 690, 691, 16 N.Y.S.3d 187, 188 (2015). The same holding abrogated *People v. Yarmy*, 171 Misc. 2d 13, 20–21, 651 N.Y.S.2d 840, 845 (Sup. Ct. N.Y. Cty. 1996). *Id.* at 721, 37 N.E.3d at 700, 16 N.Y.S.3d at 196. In order for a group to constitute a criminal enterprise it must exhibit "continuity of existence, structure and criminal purpose beyond the scope of individual criminal incidents." N.Y. PENAL. LAW § 460.10(3) (McKinney Supp. 2017).

132. *Keschner*, 25 N.Y.3d at 720, 37 N.E.3d at 699, 16 N.Y.S.3d at 196.

133. *Id.* (first quoting PENAL § 460.10(3); and then quoting People v. W. Express Int'l, Inc., 19 N.Y.3d 652, 658–59, 978 N.E.2d 1231, 1235, 954 N.Y.S.2d 763, 767 (2012)).

claimed by the defendant.[134] First, the defendant argued that the People were permitted to call a witness, in bad faith, for the sole purpose of questioning about topics the People knew would require the witness to invoke his Fifth Amendment privilege.[135] The Court disagreed based on proof in the record that the People called the witness at issue for legitimate reasons (e.g., "to provide a clear picture of events leading up to the shooting and its immediate aftermath").[136] Second, the defendant argued that the trial court erred under CPL § 60.35, when it allowed the People to impeach their own witness by showing that the witness previously made statements that were inconsistent with his trial testimony.[137] The Court held that the trial court properly allowed the People to introduce their witness's "redacted statement for the purpose of impeaching him because portions of his testimony were contrary to what he had told police two years earlier and 'affirmatively damaged' the People's case."[138] Finally, the defendant argued that the trial court erred by precluding his "expert from testifying about the effect of high stress on the accuracy of an identification."[139] Again, the Court disagreed, holding that this was not a situation where the trial court precluded all expert testimony on the same issue, rather, the Court concluded that "the trial court . . . made a reasoned determination concerning the kinds of expert testimony that were relevant."[140]

In *People v. Pavone*, the Court held that the People's use of the defendant's post-arrest silence to challenge his credibility regarding a possible fabrication of his Extreme Emotional Disturbance defense was a violation of the Due Process Clause of the New York State Constitution.[141] In so holding, the Court reasoned that the basis for a defendant's silence when confronted by law enforcement is varied and may "include 'awareness that [the defendant] is under no obligation to

134. 27 N.Y.3d 10, 15, 17, 19, 49 N.E.3d 703, 707–09, 29 N.Y.S.3d 234, 238–40 (2016) (citing N.Y. CRIM. PROC. LAW § 60.35 (McKinney 2016)).

135. *Id.* at 15–16, 49 N.E.3d at 707, 29 N.Y.S.3d at 238 ("It is . . . reversible error for the trial court to permit the prosecutor to deliberately call a witness for the sole purpose of eliciting a claim of privilege." (first citing People v. Pollock, 21 N.Y.2d 206, 212–13, 234 N.E.2d 223, 226, 287 N.Y.S.2d 49, 53 (1967); and then citing People v. Vargas, 86 N.Y.2d 215, 221, 654 N.E.2d 1221, 1224, 630 N.Y.S.2d 973, 976 (1995))).

136. *Id.* at 17, 49 N.E.3d at 708, 29 N.Y.S.3d at 239.

137. *Id.* CPL § 60.35 provides, in relevant part, the following: When a witness called by a party "gives testimony upon a material issue of the case which tends to disprove the position of such party, such party may introduce evidence that such witness has previously made . . . a written statement signed by him . . . contradictory to such testimony." C.P.L. § 60.35(1).

138. *Berry*, 27 N.Y.3d at 18, 49 N.E.3d at 708, 29 N.Y.S.3d at 239.

139. *Id.* at 18, 49 N.E.3d at 709, 29 N.Y.S.3d at 240.

140. *Id.* at 20, 49 N.E.3d at 710, 29 N.Y.S.3d at 241.

141. 26 N.Y.3d 629, 639, 641, 47 N.E.3d 56, 64–65, 26 N.Y.S.3d 728, 736–37 (2015).

speak or to the natural caution that arises from [the] knowledge that anything [said] might later be used against [the defendant] at trial'" or "a belief that the defendant's effort to exonerate oneself would be futile."[142] Moreover, "[w]hile a defendant's silence is ambiguous and lacks probative value, '[j]urors, who may not be sensitive to the wide variety of alternative explanations for a defendant's pretrial silence, may assign much more weight to it than is warranted and thus the evidence may create a substantial risk of prejudice.'"[143] However, because evidence of the defendant's guilt was overwhelming, the Court concluded that there was no reasonable possibility that the error might have contributed to the defendant's conviction.[144]

In *People v. King*, the defendant argued that the trial court committed reversible error by precluding "her from introducing evidence that she claimed demonstrated that people other than [the] defendant committed the crimes."[145] The Court rejected the defendant's argument, holding that the trial court properly refused to permit the evidence at issue because it was "hearsay, not probative and too speculative to demonstrate that" someone other than the defendant was involved in the crime.[146]

In *People v. Hogan*, the defendant argued that trial court, as fact finder, improperly considered the drug factory presumption under Penal Law § 220.25.[147] Based on the fact that the "[d]efendant's former girlfriend admitted that the bagged crack, loose cocaine and baggies were in plain view, and that she was in the process of 'moving' the cocaine that she was '[p]robably' going to sell" and the testimony of the police "that [the] defendant was found in close proximity to the cocaine and that the

142. *Id.* at 641, 47 N.E.3d at 66, 26 N.Y.S.3d at 738 (quoting People v. Conyers, 52 N.Y.2d 454, 458, 420 N.E.2d 933, 935, 438 N.Y.S.2d 741, 743 (1981)) (first citing United States v. Hale, 422 U.S. 171, 176–77 (1975); and then citing *Conyers*, 52 N.Y.2d at 458, 420 N.E.2d at 935, 438 N.Y.S.2d at 743).

143. *Id.* (second alteration in original) (quoting People v. De George, 73 N.Y.2d 614, 619, 541 N.E.2d 11, 14, 543 N.Y.S.2d 11, 14 (1989)) (citing *Hale*, 422 U.S. at 180). A defendant's pre-arrest silence cannot be used against a defendant in the People's case in chief. *De George*, 73 N.Y.2d at 620–21, 541 N.E.2d at 14, 543 N.Y.S.2d at 14.

144. *Pavone*, 26 N.Y.3d at 638, 646, 47 N.E.3d at 64, 69, 26 N.Y.S.3d at 735, 741.

145. 27 N.Y.3d 147, 151, 157, 50 N.E.3d 869, 871, 876, 31 N.Y.S.3d 402, 404, 409 (2016).

146. *Id.* at 158, 50 N.E.3d at 876, 31 N.Y.S.3d at 409.

147. 26 N.Y.3d 779, 783, 48 N.E.3d 58, 61, 28 N.Y.S.3d 1, 4 (2016). Penal Law § 220.25 provides, in relevant part, the following:

> The presence of a narcotic drug . . . in open view in a room, other than a public place, under circumstances evincing an intent to unlawfully mix, compound, package or otherwise prepare for sale such controlled substance is presumptive evidence of knowing possession thereof by each and every person in close proximity to such controlled substance at the time such controlled substance was found . . . .

N.Y. PENAL LAW § 220.25(2) (McKinney 2008).

drugs, baggies and razor blade were in open view," the Court held that the trial court properly granted the People's request that it consider the drug factory presumption.[148]

In *People v. Badalamenti*, the defendant argued that the trial court erred by allowing evidence of a telephone recording made by the father of a child victim, during which the defendant threatened to hit the child, specifically, that the same was prohibited eavesdropping under Penal Law § 250.05 and was, therefore, inadmissible under Civil Practice Law and Rules (CPLR) § 4506(1).[149] The Court held "that the definition of consent, in the context of 'mechanical overhearing of a conversation' pursuant to Penal Law § 250.00(2), includes vicarious consent, on behalf of a minor child" if the trial court determines "(1) that a parent or guardian had a good faith belief that the recording of a conversation to which the child was a party was necessary to serve the best interests of the child and (2) that there was an objectively reasonable basis for this belief."[150] The Court further held that the trial court properly permitted the evidence at issue because the prosecution "sufficiently demonstrated that the father had a good faith, objectively reasonable basis to believe that it was necessary for the welfare of his son to record the violent conversation he [overheard]."[151]

In *People v. McCullough*, the Court affirmed the trial court's exercise of discretion in precluding testimony from an identification expert about certain factors that could have influenced a witness's ability to make a positive identification of the defendant.[152] Specifically, the

148. *Hogan*, 26 N.Y.3d at 784–85, 48 N.E.3d at 62, 28 N.Y.S.3d at 5.

149. 27 N.Y.3d 423, 428, 438, 54 N.E.3d 32, 35, 42, 34 N.Y.S.3d 360, 363, 370 (2016). As to eavesdropping, a Class E Felony, Penal Law § 250.05 provides, in relevant part, the following: "A person is guilty of eavesdropping when he unlawfully engages in wiretapping, mechanical overhearing of a conversation, or intercepting or accessing of an electronic communication." N.Y. PENAL LAW § 250.05 (McKinney 2008). "Mechanical overhearing of a conversation" is defined as "the intentional overhearing or recording of a conversation or discussion, without the consent of at least one party thereto, by a person not present thereat, by means of any instrument, device or equipment." N.Y. PENAL LAW § 250.00(2) (McKinney 2008). CPLR 4506 provides, in relevant part, the following: "The contents of any overheard or recorded communication, conversation or discussion, or evidence derived therefrom, which has been obtained by conduct constituting the crime of eavesdropping, as defined by section 250.05 of the penal law, may not be received in evidence in any trial," except as against the individual alleged to have committed the crime of eavesdropping. N.Y. C.P.L.R. 4506(1) (McKinney 2007).

150. *Badalamenti*, 27 N.Y.3d at 426–27, 54 N.E.3d at 34, 34 N.Y.S.3d at 362 (quoting PENAL § 250.00(2)).

151. *Id.* at 437–38, 54 N.E.3d at 41, 34 N.Y.S.3d at 369.

152. 27 N.Y.3d 1158, 1161, 58 N.E.3d 386, 388, 37 N.Y.S.3d 214, 216 (2016) ("The decision to admit or exclude expert testimony concerning factors that affect the reliability of eyewitness identifications rests within the sound discretion of the trial court." (citing People

Court held that under the standard balancing test of prejudice versus probative value, the trial court properly performed its "function by weighing the request to introduce such testimony 'against other relevant factors, such as the centrality of the identification issue and the existence of corroborating evidence.'"[153]

In *People v. Gary*, the defense and prosecution stipulated to the admission of certain exhibits as evidence in chief for all purposes.[154] Following receipt of intervening testimony, defense counsel objected to the receipt into evidence of a hand written note on one of the exhibits and moved to strike testimony regarding the same from the record.[155] The Court held that the trial court did not abuse its discretion in denying the request of defense counsel, on the grounds that significant testimony regarding the notation had been received without objection and the defendant offered no explanation for failing to object.[156]

In *People v. Ortiz*, the defendant first argued that the doctrine of collateral estoppel barred the People from introducing, at the defendant's second trial, evidence that the defendant threatened the victim of a burglary with a razor blade when the jury acquitted the defendant of charges involving the use or threatened use of said weapon at the first trial.[157] The Court rejected the defendant's argument on the grounds that the application of the collateral estoppel doctrine would result in key witnesses at the second trial having to give incomplete, misleading, and materially altered testimony to the jury.[158] In the same case, the defendant also argued that the trial court erred when it allowed the prosecution to introduce a statement made by defense counsel at arraignment that was

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v. Lee, 96 N.Y.2d 157, 160, 750 N.E.2d 63, 65, 726 N.Y.S.2d 361, 363 (2001))).

153. *Id.* (quoting *Lee*, 96 N.Y.2d at 163, 750 N.E.2d at 67, 726 N.Y.S.2d at 365) (citing People v. LeGrand, 8 N.Y.3d 449, 459, 867 N.E.2d 374, 379, 835 N.Y.S.2d 523, 528 (2007)).

154. 26 N.Y.3d 1017, 1018, 41 N.E.3d 1142, 1143, 20 N.Y.S.3d 327, 328 (2015).

155. *Id.* at 1019, 41 N.E.3d at 1144, 20 N.Y.S.3d at 329 ("Although courts are ordinarily bound to enforce party stipulations, where a party has in the interests of judicial economy stipulated to the admission of voluminous materials and there are among them scattered items, both prejudicial and ordinarily inadmissible that may reasonably have escaped counsel's attention, there is no rule preventing an exercise of judicial discretion to relieve the party, at least in part, from the stipulation, particularly where doing so would not significantly prejudice the other side." (citing *In re* Petition of N.Y., Lackawanna & W. R.R. Co., 98 N.Y. 447, 453 (1885))).

156. *Id.* at 1019–20, 41 N.E.3d at 1144, 20 N.Y.S.3d at 329 (citing People v. Carroll, 95 N.Y.2d 375, 385, 740 N.E.2d 1084, 1089, 718 N.Y.S.2d 10, 15 (2000)).

157. 26 N.Y.3d 430, 433, 44 N.E.3d 924, 925, 23 N.Y.S.3d 626, 627 (2015). In the context of a criminal case, the doctrine of collateral estoppel bars relitigation—in a second case—"issues resolved in a defendant's favor at an earlier trial." *Id.* at 435, 44 N.E.3d at 927, 23 N.Y.S.3d at 629 (citing People v. Acevedo, 69 N.Y.2d 478, 484, 508 N.E.2d 665, 669, 515 N.Y.S.2d 753, 758 (1987)).

158. *Id.* at 437, 44 N.E.3d at 928, 23 N.Y.S.3d at 630.

damaging to the defendant's case and, at the same time, denied defense counsel's motion to withdraw.[159] Specifically, at arraignment, defense counsel mistakenly stated on the record that the defendant told her the alleged victim attacked the defendant with a knife rather than a razor blade.[160] The Court held that, based on the advocate-witness rule, the trial court should have either allowed defense counsel to withdraw or declared a mistrial, as the defendant's credibility was attacked and the only way for defense counsel to rehabilitate the same was to impugn her own.[161]

In *People v. Berry*, the defendant argued that his conviction for unlawfully dealing with a child under Penal Law § 260.20 was not supported by legally sufficient evidence.[162] The Court held that

> to establish that a defendant permitted a child to enter or remain in a particular place, premises, or establishment, under Penal Law § 260.20(1), the People must show that [the] defendant's relation to the child *or* to the place, premises or establishment was of such a kind that [the] defendant had some ability to control the child, so as to permit the child to enter or remain in the place in question.[163]

The Court reversed the defendant's conviction because "the People offered no evidence [to] support[] the conclusion that the defendant could prevent the children from remaining on the premises or, conversely, allow them to remain."[164] Specifically, there was no evidence offered "that [the] defendant ever fed, babysat, [was ever alone with] or otherwise cared for the children in any manner or had any authority over them."[165]

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159. *Id.* at 433, 44 N.E.3d at 925, 23 N.Y.S.3d at 627.

160. *Id.* at 434–35, 44 N.E.3d at 926, 23 N.Y.S.3d at 628.

161. *Ortiz*, 26 N.Y.3d at 437–39, 44 N.E.3d at 929, 23 N.Y.S.3d at 631. Pursuant to the advocate-witness rule, "a lawyer must withdraw from representation when it becomes apparent that she must testify on behalf of her own client." *Id.* at 437–38, 44 N.E.3d at 929, 23 N.Y.S.3d at 631 (first citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-102 (AM. BAR ASS'N 1980); then citing 22 N.Y.C.R.R. § 1200 (2015); and then citing People v. Berroa, 99 N.Y.2d 134, 140, 782 N.E.2d 1148, 1153, 753 N.Y.S.2d 12, 17 (2002)) ("[An attorney] should not continue to serve as an advocate when it is obvious that the lawyer will be called as a witness on behalf of the client.").

162. 27 N.Y.3d 591, 593, 56 N.E.3d 207, 208, 36 N.Y.S.3d 425, 426 (2016) (quoting N.Y. PENAL LAW § 260.20(1) (McKinney 2008 & Supp. 2015)). Under Penal Law § 260.20(1),

> [a] person is guilty [of the Class A misdemeanor] of unlawfully dealing with a child . . . when[] [h]e [or she] knowingly permits a child less than eighteen years old to enter or remain in or upon a place, premises or establishment where sexual activity . . . or activity involving controlled substances . . . or involving marihuana . . . is maintained or conducted, and he knows or has reason to know that such activity is being maintained or conducted.

PENAL § 260.20(1).

163. *Berry*, 27 N.Y.3d at 598, 56 N.E.3d at 211, 36 N.Y.S.3d at 429.

164. *Id.* at 599, 56 N.E.3d at 212, 36 N.Y.S.3d at 430.

165. *Id.*

V. GUILTY PLEAS

In *People v. Sougou*, the Court rejected the arguments of two defendants that their plea allocutions were insufficient to establish that they entered knowing and intelligent pleas.[166] In *Sougou*, the trial court

> asked specifically whether [the] defendant had discussed the plea and the sentence, as described in open court, with his lawyer; whether [the] defendant was pleading voluntarily and of his own free will; and whether [the] defendant understood that he was giving up his right to a trial and to hearings on the search and seizure evidence.[167]

In *Thompson*, the trial court asked the defendant "whether she wanted to enter a plea of guilty to harassment, a violation and not a crime, and whether she understood that by pleading guilty she was giving up her right to trial" and inquired whether anyone had forced her to enter the plea.[168] As both the defendants answered affirmatively to the trial court's plea allocution questions, the Court rejected the defendants' arguments that their plea allocutions were insufficient.[169]

In *People v. Conceicao*, the defendant argued that his plea was not knowing and voluntary because he was not informed by the trial court of the constitutional rights he was waiving; to wit, the right to a trial by jury, the right to confront one's accusers and the privilege against self-incrimination.[170] The Court held that the defendant's plea was invalid because his only interaction with the trial court consisted of the defendant stating that he wished to plead guilty and the record contained no discussion of any of the circumstances surrounding the plea, the rights waived by the defendant, or whether the defendant spoke with his attorney before entering the plea.[171]

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166. 26 N.Y.3d 1052, 1054, 44 N.E.3d 196, 197, 23 N.Y.S.3d 121, 122 (2015) (first citing Boykin v. Alabama, 395 U.S. 238, 243 (1969); and then citing People v. Harris, 61 N.Y.2d 9, 18, 459 N.E.2d 170, 174, 471 N.Y.S.2d 61, 65 (1983)). Although the trial court is obligated to make sure that the defendant has a full understanding of the plea and its consequences, the trial judge need not "enumerate all [of] the rights waived during the course of the plea allocution." *Id.* at 1054–55, 44 N.E.3d at 198, 23 N.Y.S.3d at 123 (first citing *Harris*, 61 N.Y.2d at 18–19, 459 N.E.2d at 174–75, 471 N.Y.S.2d at 65–66; and then citing People v. Tyrell, 22 N.Y.3d 359, 365, 4 N.E.3d 346, 349–50, 981 N.Y.S.2d 336, 339–40 (2013)).

167. *Id.* at 1055, 44 N.E.3d at 198, 23 N.Y.S.3d at 123.

168. *Id.* at 1056, 44 N.E.3d at 199, 23 N.Y.S.3d at 124.

169. *Id.* at 1054–56, 44 N.E.3d at 197–99, 23 N.Y.S.3d at 122–24.

170. 26 N.Y.3d 375, 379–80, 44 N.E.3d 199, 201–02, 23 N.Y.S.3d 124, 126–27 (2015) (citing *Boykin*, 395 U.S. at 243) ("[T]he failure to recite the *Boykin* rights does not automatically invalidate an otherwise voluntary and intelligent plea. Where the record as a whole affirmatively shows that the defendant intentionally relinquished [his or her *Boykin*] rights, the plea will be upheld.").

171. *Id.* at 384, 44 N.E.3d at 205, 23 N.Y.S.3d at 130.

In *People v. Manor*, the defendant argued that the trial court abused its discretion by denying the defendant's motion to withdraw his guilty plea without holding a hearing.[172] The Court rejected the defendant's argument because the trial court offered both parties the chance to be heard in furtherance of the written motion to withdraw the defendant's plea and both parties declined.[173] Accordingly, the Court concluded that the motion was properly decided by the trial court on submission.[174]

VI. IDENTIFICATION OF DEFENDANT

In *People v. Marshall*, the Court held that "upon [the] defendant's motion, a [trial] court must hold a formal pretrial hearing to determine whether the police or prosecutor conducted an out-of-court identification procedure that exposed the witness to [the] defendant's identity in an unduly suggestive manner," regardless of whether identification was for trial preparation or another purpose.[175] In so holding, the Court abrogated its prior decision in *People v. Herner*, holding that no identification procedure occurred and, as such, no CPL § 710.30 notice was required, when the prosecution showed the victim a photograph of a lineup in preparation for trial.[176] The Court further concluded the same error was harmless because there was "record support for the trial court's alternative finding of an independent source for the complainant's in-court identification of [the] defendant."[177]

In *People v. Pacquette*, the Court refused to excuse the People from the statutory requirement under CPL § 710.30, which requires the People to notify a defendant, within fifteen days of the defendant's arraignment, of the People's intention to offer at trial testimony that a police officer previously identified the defendant.[178] Although the People argued and the trial court held that the identification was merely confirmatory, the

172. 27 N.Y.3d 1012, 1013, 54 N.E.3d 1143, 1144, 35 N.Y.S.3d 272, 273 (2016).

173. *Id.* at 1014, 54 N.E.3d at 1144–45, 35 N.Y.S.3d at 273–74 (citing People v. Alexander, 97 N.Y.2d 483, 486, 769 N.E.2d 802, 805, 743 N.Y.S.2d 45, 48 (2002)).

174. *Id.* at 1014, 54 N.E.3d at 1144, 35 N.Y.S.3d at 273.

175. 26 N.Y.3d 495, 506, 45 N.E.3d 954, 962, 25 N.Y.S.3d 58, 66 (2015) (citing People v. Boyer, 6 N.Y.3d 427, 431, 846 N.E.3d 461, 463, 813 N.Y.S.2d 31, 33 (2006)).

176. *Id.* at 504–05, 45 N.E.3d at 961, 25 N.Y.S.3d at 65 (first citing People v. Herner, 85 N.Y.2d 877, 878, 649 N.E.2d 1198, 1199, 626 N.Y.S.2d 54, 55 (1995); and then citing N.Y. CRIM. PROC. LAW § 710.30 (McKinney 2011)).

177. *Id.* at 498, 45 N.E.3d at 956, 25 N.Y.S.3d at 60.

178. 25 N.Y.3d 575, 577, 35 N.E.3d 845, 847, 14 N.Y.S.3d 775, 777 (2015) (citing C.P.L. § 710.30). If the prosecution intends to offer "testimony regarding an observation of the defendant either at the time or place of the commission of the offense or upon some other occasion relevant to the case, to be given by a witness who has previously identified him as such, they must" notify the defense of such intention within fifteen days after arraignment and prior to trial. C.P.L. § 710.30(1)–(2).

Court disagreed because the identification was made by an undercover officer who observed the defendant during the drug transaction.[179] As such, the Court reasoned that the police officer's observation of the defendant was not so clear as to eliminate the risk of undue suggestiveness.[180]

In *People v. Holley*, the Court held that failure of the police to preserve a record of a computer-generated array of photographs shown to an identifying witness gave rise to a rebuttable presumption that the array was unduly suggestive.[181] However, the Court concluded that the People overcame the presumption because the police "entered enough information about the perpetrator's physical features to ensure that the photo manager system would generate 'a fair selection of photos,' rather than an array in which [the] defendant's image would stand out as markedly different."[182] The Court also rejected the defendant's unduly suggestive argument on the ground that that the defendant was the only individual in the lineup meeting the age and weight description given by the witness.[183]

VII. JURY TRIAL AND INSTRUCTION

In *People v. Durant*, the Court considered whether the common law invariably requires the "trial court to issue an adverse inference charge whenever the police could, but failed to, electronically record an interrogation."[184] The Court held that although the "better practice would be for the police to use the equipment at their disposal to record interrogations," a trial court "does not necessarily abuse its discretion or otherwise commit legal error [as a matter of law] by declining to issue the [adverse inference] charge [to a deliberating jury] in every case in

179. *Pacquette*, 25 N.Y.3d at 579–80, 35 N.E.3d at 848–49, 14 N.Y.S.3d at 778–79 (first citing People v. Wharton 74 N.Y.2d 921, 922–23, 549 N.E.2d 462, 463, 550 N.Y.S.2d 260, 261 (1989); and then citing *Boyer*, 6 N.Y.3d at 432, 846 N.E.3d at 464, 813 N.Y.S.2d at 34).

180. *Id.* at 580, 35 N.E.3d at 849, 14 N.Y.S.3d at 779 (citing *Boyer*, 6 N.Y.3d at 432, 846 N.E.3d at 464, 813 N.Y.S.2d at 34).

181. 26 N.Y.3d 514, 517, 45 N.E.3d 936, 937, 25 N.Y.S.3d 40, 41 (2015) ("The obligation to preserve is not diminished by the type of system used. Computer screen or mug shots book, the People's obligation is the same.").

182. *Id.* at 525, 45 N.E.3d at 942–43, 25 N.Y.S.3d at 46–47 (quoting People v. Holley, 116 A.D.3d 442, 442, 982 N.Y.S.2d 761, 762 (1st Dep't 2014)).

183. *Id.* at 525, 45 N.E.3d at 943, 25 N.Y.S.3d at 47 ("'[A] numerical age difference' existing 'between a defendant and the fillers in a lineup, without more, is not sufficient to create a substantial likelihood that the defendant would be singled out for identification.'" (alteration in original) (quoting People v. Jackson, 98 N.Y.2d 555, 558–59, 780 N.E.2d 162, 164–65, 750 N.Y.S.2d 561, 563–64 (2002))).

184. 26 N.Y.3d 341, 352–53, 44 N.E.3d 173, 181, 23 N.Y.S.3d 98, 106 (2015).

which the police fail to record a custodial interrogation."[185] Key to the Court's reasoning was the determination that the "proposed jury instruction was neither required as a penalty for governmental malfeasance nor akin to a missing witness charge."[186]

In *People v. Hardy*, the Court concluded that a surveillance video showing the defendant taking the victim's property was direct evidence of his guilt of larceny and, as such, the defendant was not entitled to a circumstantial evidence charge.[187] The Court held that the video was not required to be dispositive of the defendant's guilt in order to constitute direct evidence, rather, the video was "direct evidence of . . . larceny" because, based on the video, no inference was necessary "to conclude that [the] defendant exercised dominion and control over [property] in a manner that was wholly inconsistent with" rights of the owner.[188] The Court further held that the trial court did not err in denying the defendant's request for a mistrial after the jury sent two notes that they were unable to reach a unanimous verdict, because at each "juncture[] the circumstances indicated that further deliberations might be fruitful."[189]

In *People v. Nelson*, the defendant argued that he was deprived of a fair trial when the trial court allowed spectators to wear T-shirts bearing a photograph of the deceased victim, over the objection of defense counsel.[190] Although the Court rejected a per se rule mandating reversal

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185. *Id.* at 344, 44 N.E.3d at 175, 23 N.Y.S.3d at 100.

186. *Id.* at 355, 44 N.E.3d at 183, 23 N.Y.S.3d at 108.

187. 26 N.Y.3d 245, 247, 43 N.E.3d 734, 737, 22 N.Y.S.3d 377, 380 (2015).

> It is well settled that a trial court must grant a defendant's request for a circumstantial evidence charge when the proof of the defendant's guilt rests solely on circumstantial evidence. By contrast, where there is both direct and circumstantial evidence of the defendant's guilt, such a charge need not be given.

Id. at 249, 43 N.E.3d at 738, 22 N.Y.S.3d at 381 (first citing People v. Santiago, 22 N.Y.3d 990, 991–92, 3 N.E.3d 1137, 1138, 980 N.Y.S.2d 889, 890 (2013); then citing People v. Roldan, 88 N.Y.2d 826, 827, 666 N.E.2d 553, 554, 643 N.Y.S.2d 960, 961 (1996); then citing People v. Brian, 84 N.Y.2d 887, 889, 644 N.E.2d 1345, 1346, 620 N.Y.S.2d 789, 790 (1994); and then citing People v. Barnes, 50 N.Y.2d 375, 380, 406 N.E.2d 1071, 1073–74, 429 N.Y.S.2d 178, 180 (1980)).

188. *Id.* at 250–51, 43 N.E.3d at 739, 22 N.Y.S.3d at 382 (citing People v. Jennings, 69 N.Y.2d 103, 118, 504 N.E.2d 1079, 1086, 512 N.Y.S.2d 652, 659 (1986)) ("[E]ven if a particular item of evidence does not conclusively require a guilty verdict, so long as the evidence proves directly a fact in question, the evidence is direct evidence of guilt.").

189. *Hardy*, 26 N.Y.3d at 248, 252, 43 N.E.3d at 737, 740, 22 N.Y.S.3d at 380, 383 (quoting People v. Hardy, 115 A.D.3d 511, 512, 981 N.Y.S.2d 722, 723 (1st Dep't 2014)).

190. 27 N.Y.3d 361, 364, 53 N.E.3d 691, 694, 33 N.Y.S.3d 814, 817 (2016). "Trial courts have the inherent authority and the affirmative obligation to control conduct and decorum in the courtroom, in order to promote the fair administration of justice for all." *Id.* at 367, 53 N.E.3d at 696, 33 N.Y.S.3d at 819 (first citing Katz v. Murtagh, 28 N.Y.2d 234, 238–40, 269 N.E.2d 816, 818–19, 321 N.Y.S.2d 104, 107–09 (1974); then citing People v. Mendola, 2 N.Y.2d 270, 276, 140 N.E.2d 353, 356, 159 N.Y.S.2d 473, 477–78 (1957); then citing People

when a spectator displays a photograph of a deceased victim during trial, the Court concluded that the same display should be prohibited in the courtroom during trial.[191] However, the Court concluded that the trial court's error was harmless, based on overwhelming proof of the defendant's guilt and the lack of significant probability that the error contributed to the verdict.[192] The facts key to this determination included that only a few individuals were wearing the T-shirts; the T-shirts contained no messages asking "the jury to convict [the] defendant or otherwise convey" a belief about his guilt; and "[t]he spectators did not call attention to themselves or their shirts."[193]

In *People v. Mendez*, the Court held that the trial court committed reversible error when it failed to inform the attorneys or address on the record two notes from the jury requesting translated Spanish-to-English transcripts of telephone calls made by the defendant while he was in jail awaiting trial.[194] As "the trial court expressly invited the jurors to ask for the transcripts during deliberations and told them the procedure by which they could see the transcripts," the Court held that "the jury's requests for the transcripts required a substantive response" from the trial court, whose response was entirely missing from the record.[195]

In *People v. Walker*, the Court considered whether "the standard criminal jury instruction on the 'initial aggressor exception' to the justification defense misstates the applicable law where [the] defendant

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v. Jelke, 308 N.Y. 56, 63, 123 N.E.2d 769, 772 (1954); and then citing 22 N.Y.C.R.R. § 100.3(b)(2) (2015)).

191. *Id.* at 371, 53 N.E.3d at 699, 33 N.Y.S.3d at 822 (first citing People v. Nelson, 125 A.D.3d 58, 63, 998 N.Y.S.2d 216, 221 (2d Dep't 2014); and then citing *Nelson*, 125 A.D.3d at 67–68, 998 N.Y.S.2d at 224 (Dickerson, J., dissenting)). Rather than impose a rigid per se rule, the Court held as follows:

> Whether the trial court should intervene, and what intervention is appropriate, must depend upon the facts and circumstances of each particular case. The trial court may consider such factors as[] the particular nature of the spectator conduct at issue; how many spectators are involved; the duration of the conduct; whether the involved spectators have called attention to themselves in some way; where the spectators are seated in the courtroom; whether the jury can see or did see the spectator conduct; whether the involved spectators are part of some recognizable organization or group; whether the spectator conduct is the result of some intentional effort to influence the jury or merely an unintended display of emotion; and whether intervention will correct an ongoing problem or will simply serve to highlight a brief instance of misconduct for the jury. This list is not exhaustive, inasmuch as we do not presume to anticipate all of the various forms of spectator conduct that may occur during any given trial.

Id. at 369, 53 N.E.3d at 698, 33 N.Y.S.3d at 821.

192. *Id.* at 372–73, 53 N.E.3d at 700, 33 N.Y.S.3d at 823.

193. *Nelson*, 27 N.Y.3d at 373, 53 N.E.3d at 700, 33 N.Y.S.3d at 823.

194. 26 N.Y.3d 1004, 1005, 41 N.E.3d 785, 786, 19 N.Y.S.3d 821, 822 (2015).

195. *Id.* at 1005, 41 N.E.3d at 786–87, 19 N.Y.S.3d at 822–23 (citing People v. Silva, 24 N.Y.3d 294, 300, 22 N.E.3d 1022, 1026–27, 998 N.Y.S.2d 154, 158–59 (2014)).

claimed that he intervened in an ongoing fight that began in his absence in order to shield a third party from an unlawful attack."[196] The Court concluded that the standard/pattern jury instruction was misleading absent a supplemental charge "on the meaning of 'initial aggressor' in the defense-of-another scenario" as follows:

> "[T]he intervenor[,] somehow initiated or participated in the initiation of the original struggle or reasonably should have known that [his brother, as] the person being defended[,] initiated the original conflict, then justification is not a defense. . . . If [the defendant] had nothing to do with [the] original conflict *and* had no reason to know who initiated the first conflict, then the defense is available."[197]

The Court further concluded that the same error "was not harmless because the evidence d[id] not overwhelmingly demonstrate that [the] defendant was involved in the initiation of the physical confrontation, that he was the first to use deadly physical force, or that he had reason to know who initiated the original conflict."[198]

In *People v. Taylor*, the Court held that the trial court abused its discretion and committed reversible error when, in response to a note from the jury requesting to see evidence, the trial court, over objection of counsel, failed to provide the jury "a substantial portion of requested evidence regarding the potential bias of key prosecution witnesses and then suggest[ed] to the jury that there [was] no other evidence relevant to its inquiry."[199] Specifically, defense counsel argued that the trial court's response; to wit, providing the jury with the written cooperation agreement was incomplete without a readback of the witnesses' testimony about the benefits they received, including the following: career-related, sentencing, and pretrial release.[200] The Court reasoned that

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196. 26 N.Y.3d 170, 171, 42 N.E.3d 688, 689, 21 N.Y.S.3d 191, 192 (2015). In the event of a defective jury charge, "[r]eversal is appropriate—even if the standard criminal jury instruction is given—when the charge, 'read . . . as a whole against the background of the evidence produced at the trial,' likely confused the jury regarding the correct rules to be applied in arriving at a decision." *Id.* at 174–75, 42 N.E.3d at 691, 21 N.Y.S.3d at 194 (quoting People v. Andujas, 79 N.Y.2d 113, 118, 588 N.E.2d 754, 757, 580 N.Y.S.2d 719, 722 (1992)) (citing People v. Umali, 10 N.Y.3d 417, 427, 888 N.E.2d 1046, 1052, 859 N.Y.S.2d 104, 110 (2008)).

197. *Id.* at 177, 42 N.E.3d at 693, 21 N.Y.S.3d at 196 (second, third, fourth, and sixth alterations in original) (omission in original) (quoting People v. Melendez, 155 Misc. 2d 196, 201–02, 588 N.Y.S.2d 718, 719 (Sup. Ct. Kings Cty. 1992)).

198. *Id.* (citing People v. Petty, 7 N.Y.3d 277, 285–86, 852 N.E.2d 1155, 1161–62, 819 N.Y.S.2d 684, 689–90 (2006)).

199. 26 N.Y.3d 217, 219, 221–20, 43 N.E.3d 350, 351–52, 22 N.Y.S.3d 140, 141–42 (2015).

200. *Id.* at 222, 43 N.E.3d at 353, 22 N.Y.S.3d at 143.

In determining whether the trial court abused its discretion and committed reversible

the issue of the prosecution's favorable treatment of the witnesses "was essential to the jury's ability to judge the credibility of the sole witnesses to identify the defendant as" having committed the crime, especially, in light of "the lack of any other testimony or physical evidence" against the defendant and the witnesses' past criminal records.[201]

In *People v. Harris*, the defendant argued that the trial court erred when it denied his motion to remove a potential juror for cause during voir dire because the juror stated "that a witness might testify untruthfully by reason of forgetfulness or might simply be unintentionally mistaken," as opposed to giving knowingly false testimony.[202] The Court rejected the defendant's argument on the grounds that the willingness of the juror "to entertain ethically benign explanations for untruthfulness did not bespeak utter credulity in the face of sworn averment; it did not reasonably raise a red flag that he possessed 'a state of mind that [was] likely to preclude him from rendering an impartial verdict,'" or to follow the standard jury instructions regarding his "obligation to judge whether a witness is telling the truth, and whether any falsehood is deliberate."[203]

VIII. RIGHT TO CONFRONTATION AND PUBLIC TRIAL

In *People v. Cedeno*, the Court held it was reversible error and a violation of the defendant's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution for the trial court to admit into evidence a redacted statement to police from a nontestifying codefendant.[204] Key to the Court's reasoning was the fact that the jury

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> error, "[t]he factors to be evaluated are the form of the jury's question, which may have to be clarified before it can be answered, the particular issue of which inquiry is made, the [information] actually given and the presence or absence of prejudice to the defendant."

Id. at 224, 43 N.E.3d at 354, 22 N.Y.S.3d at 144 (alterations in original) (quoting People v. Malloy, 55 N.Y.2d 296, 302, 434 N.E.2d 237, 240, 449 N.Y.S.2d 168, 171 (1982)) (citing People v. Steinberg, 79 N.Y.2d 673, 684, 595 N.E.2d 845, 850, 584 N.Y.S.2d 770, 775 (1992)).

201. *Id.* at 226, 43 N.E.3d at 355–56, 22 N.Y.S.3d at 145–46.

202. 26 N.Y.3d 321, 324, 43 N.E.3d 750, 752, 22 N.Y.S.3d 393, 395 (2015).

203. *Id.* at 325, 43 N.E.3d at 752, 22 N.Y.S.3d at 395 (alteration in original) (quoting N.Y. CRIM. PROC. LAW § 270.20(1)(b) (McKinney 2014)) ("A challenge for cause is an objection to a prospective juror and may be made only on the ground that[] [h]e has a state of mind that is likely to preclude him from rendering an impartial verdict based upon the evidence adduced at the trial.").

204. 27 N.Y.3d 110, 114, 50 N.E.3d 901, 903, 31 N.Y.S.3d 434, 436 (2016) (citing Bruton v. United States, 391 U.S. 123, 126 (1968)). "[T]he Confrontation Clause 'prohibits the use of "testimonial" hearsay against a defendant in a criminal case, even if the hearsay is reliable, unless the defendant has a chance to cross-examine the out-of-court declarant.'" *Id.* at 116–17, 50 N.E.3d at 905, 31 N.Y.S.3d at 438 (quoting People v. Goldstein, 6 N.Y.3d 119, 127, 843 N.E.2d 727, 732, 810 N.Y.S.2d 100, 105 (2005)).

learned "that a declarant defendant specifically identified a [codefendant] as an accomplice in the charged crime"; to wit, the statement of the nontestifying codefendant was insufficiently redacted, thus, allowing the jury to interpret its admissions as incriminating the defendant.[205]

In *People v. Johnson*, the Court held that the defendant's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution were violated when the trial court allowed "into evidence, at a joint trial, a non-testifying codefendant's out-of-court statements which establish an element of the charged crime, and independently and powerfully incriminate [the] defendant in the underlying criminal conduct."[206] Key to the Court's holding was that "the codefendant's statements were facially incriminating as to [the] defendant because they placed him in joint possession of the proceeds of the robbery with which he was charged, and connected [the] defendant to drug-related activity."[207] Further, the Court rejected the People's argument that the error was harmless or could be minimized by a curative instruction, holding that the same "could not avoid the substantial risk that the jury would 'look[] to the incriminating extrajudicial statements in determining [the defendant's] guilt.'"[208]

In *People v. John*, the defendant argued that his Sixth Amendment right to confrontation was

> violated when the People introduced DNA reports into evidence, asserting that [the] defendant's DNA profile was found on the gun that was the subject of the charged possessory weapon offense, without producing a single witness who conducted, witnessed or supervised the laboratory's generation of the DNA profile from the gun or [the] defendant's exemplar.[209]

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205. *Id.* at 120, 50 N.E.3d at 908, 31 N.Y.S.3d at 441 (quoting United States v. Jass, 569 F.3d 47, 60 (2d Cir. 2009)) (citing People v. Wheeler, 62 N.Y.2d 867, 869, 466 N.E.2d 846, 847, 478 N.Y.S.2d 254, 255 (1984)).

206. 27 N.Y.3d 60, 63, 49 N.E.3d 1143, 1145, 29 N.Y.S.3d 851, 853 (2016).

207. *Id.*

208. *Id.* at 70, 49 N.E.3d at 1149–50, 29 N.Y.S.3d at 857–58 (first alteration in original) (quoting *Bruton*, 391 U.S. at 126).

209. 27 N.Y.3d 294, 297, 52 N.E.3d 1114, 1115, 33 N.Y.S.3d 88, 89 (2016). In general, "if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness." *Id.* at 303, 52 N.E.3d at 1120, 33 N.Y.S.3d at 94 (quoting Bullcoming v. New Mexico, 564 U.S. 647, 657 (2011)).

> Statements that are considered testimonial include, "affidavits, . . . similar pretrial statements that declarants would reasonably expect to be used prosecutorially . . . [and] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

The Court held that "[t]he fact that [the] defendant's DNA profile was found on the gun was established by testimonial hearsay in the laboratory report, which could not be admitted as a business record without honoring the right of confrontation."[210]

IX. RIGHT TO COUNSEL

In *People v. Johnson*, the defendant argued that the People's use at trial of certain portions of recorded telephone calls made by him while detained at the Rikers Island Correctional Facility was a violation of his Sixth Amendment right to counsel because the People were able to obtain information about his "defense strategy and decision-making, outside the presence of counsel."[211] The Court rejected the defendant's argument because the correctional facility "did not serve as an agent of the State when it recorded the calls it turned over to the [People]. [The] [d]efendant was not induced by any promise[] or coerced by the" correctional facility to make the calls, and the correctional facility did not "solicit[], elicit[], encourage[] or provoke[]" the calls, all of which were made even though the defendant knew he was being recorded.[212]

X. SEARCH AND SEIZURE

In *People v. Joseph*, the defendant argued that the police lacked probable cause to arrest him and, as a result, moved to suppress physical evidence; to wit, the bag of cocaine recovered by the police after a search of his person incident to arrest.[213] The Court rejected the defendant's argument on the grounds that a confidential informant provided information that the surveillance target, an individual other than the

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Id. (alteration in original) (omissions in original) (quoting Crawford v. Washington, 541 U.S. 36, 51–52 (2004)).

210. *Id.* at 308–09, 52 N.E.3d at 1123–24, 33 N.Y.S.3d at 97–98. "Forensic evidence reports admitted into evidence for proving the truth of the matter asserted are not exempt from the Confrontation Clause under *Crawford* and its progeny." *Id.* at 303, 52 N.E.3d at 1120, 33 N.Y.S.3d at 94.

211. 27 N.Y.3d 199, 205, 51 N.E.3d 545, 549, 32 N.Y.S.3d 34, 38 (2016).

> [The Sixth Amendment] right to counsel protects an accused in pretrial dealings with the overwhelming, coercive power of the State [], by excluding incriminating evidence obtained by the State in violation of that right. Concomitantly, the exclusion of incriminating evidence obtained by agents of the State operates to deter their interference with the rights of the accused.

Id. at 206, 51 N.E.3d at 549, 32 N.Y.S.3d at 38 (second alteration in original) (quoting People v. Velasquez, 68 N.Y.2d 533, 537, 503 N.E.2d 481, 483, 510 N.Y.S.2d 833, 835 (1986)).

212. *Id.*

213. 27 N.Y.3d 1009, 1010–11, 51 N.E.3d 560, 561–62, 32 N.Y.S.3d 49, 50–51 (2016) (citing People v. Oden, 36 N.Y.2d 382, 384, 329 N.E.2d 188, 190, 368 N.Y.S.2d 508, 511 (1975)).

defendant who was in the same car as the defendant at the time of the arrest, was engaged in drug trafficking activity, and the manner in which the defendant removed the bag containing the contraband from the vehicle gave the police the requisite probable cause for the defendant's arrest.[214]

In *People v. Crooks*, the defendant argued that he was entitled to a *Darden*[215] hearing "to determine whether the information provided by a confidential informant (CI) was sufficient to establish probable cause to support a search warrant for [the] defendant's apartment."[216] The Court held that "there was a basis in the record for the" trial court to determine "that the police established probable cause based on their own independent observations" of the defendant, "without having to rely on the statements of the CI" and, as such, "a *Darden* hearing was not required."[217] Specifically, the police visually observed the confidential informant interacting with the defendant, electronically monitored the purchases via a live audio transmitter, and found the confidential informant in possession of contraband after the transactions.[218]

In *People v. Barksdale*, the defendant challenged the determination of the trial court "that the police had an objective credible reason to approach [him] and request information," thus initiating the encounter that culminated in the defendant's arrest and the seizure of contraband.[219] The Court rejected the defendant's argument on the grounds "that the encounter occurred in a private space restricted by signage and a lock and that police assistance in combating trespassing" was sought by the property owner.[220] The Court reasoned that "the coupling of [the] defendant's presence in the subject building with the private and protected nature of that location" gave the police "an objective credible reason to request information from [the] defendant."[221]

214. *Id.* at 1011, 51 N.E.3d at 562, 32 N.Y.S.3d at 51 (quoting People v. Jones, 90 N.Y.2d 835, 837, 683 N.E.2d 14, 15, 660 N.Y.S.2d 549, 550 (1997)) (citing People v. Edwards, 95 N.Y.2d 486, 494, 741 N.E.3d 876, 880–81, 719 N.Y.S.2d 202, 206–07 (2000)).

215. *See* People v. Darden, 34 N.Y.2d 177, 181, 313 N.E.2d 49, 52, 356 N.Y.S.2d 582, 585–86 (1974).

216. 27 N.Y.3d 609, 610, 56 N.E.3d 222, 223, 36 N.Y.S.3d 440, 441 (2016) (citing *Darden*, 34 N.Y.2d at 181, 313 N.E.2d at 52, 356 N.Y.S.2d at 585–86).

217. *Id.*

218. *Id.* at 615, 56 N.E.3d at 226, 36 N.Y.S.3d at 444.

219. 26 N.Y.3d 139, 141, 41 N.E.3d 1111, 1111–12, 20 N.Y.S.3d 296, 296–97 (2015).

220. *Id.* at 143, 41 N.E.3d at 1113, 20 N.Y.S.3d at 298.

221. *Id.* at 143–44, 41 N.E.3d at 1113–14, 20 N.Y.S.3d at 298–99.

XI. SENTENCING AND PUNISHMENT

In *People v. Wragg*, the defendant argued that "he should be resentenced because the People failed to file a predicate felony conviction statement prior to the commencement of trial, as provided in [CPL § 400.19(2)]."[222] The Court disagreed, holding that "the specific language in [CPL § 400.19(2)] upon which [the] defendant relie[d] merely permits filing of the statement before commencement of a trial. It does not prohibit filing afterward[], and before sentencing."[223]

In *People v. Golo*, the defendant argued that the trial court erred when it denied the defendant's motion to be resentenced on his criminal sale of a controlled substance conviction pursuant to the Drug Law Reform Act of 2009 "without the parties being present, and without offering [the] defendant an opportunity to appear."[224] Based on the mandatory language in CPL § 440.46(3); to wit, upon "a defendant's application for resentencing, '[t]he court shall offer an opportunity for a hearing and bring the applicant before it,'" the Court held "that it was error for the courts below to decide [the defendant's] resentencing motion without giving him an opportunity to be heard."[225]

In *People v. Thompson*, the defendant was convicted of a felony in June of 1994 and sentenced to probation.[226] In December of 1995, the defendant violated probation and was resentenced to prison.[227] The Court reasoned "that the revocation of probation under Penal Law § 60.01 [was] not the analogue of [an] annulment of a sentence" and, as such, held "that the original sentence control[led] for the purposes of determining eligibility under the look-back period in" the second violent felony

222. 26 N.Y.3d 403, 412–13, 44 N.E.3d 898, 905, 23 N.Y.S.3d 600, 607 (2015). CPL § 400.19(2) provides, in relevant part, the following:

> Statement to be filed. When information available to the people prior to the trial of a felony offense for a sexual assault against a child indicates that the defendant may have previously been subjected to a predicate felony conviction for a sexual assault against a child, a statement may be filed by the prosecutor at any time before trial commences.

N.Y. CRIM. PROC. LAW § 400.19(2) (McKinney 2005).

223. *Wragg*, 26 N.Y.3d at 414–15, 44 N.E.3d at 906, 23 N.Y.S.3d at 608.

224. 26 N.Y.3d 358, 360–61, 44 N.E.3d 185, 186, 23 N.Y.S.3d 110, 111 (2015). As relevant here, the Drug Law Reform Act of 2009 is codified at N.Y. CRIM. PROC. LAW § 440.46 (McKinney Supp. 2017).

225. *Golo*, 26 N.Y.3d at 362, 44 N.E.3d at 187, 23 N.Y.S.3d at 112 (first alteration in original) (quoting N.Y. CRIM. PROC. LAW § 440.46(3) (McKinney Supp. 2014)).

226. 26 N.Y.3d 678, 681, 47 N.E.3d 704, 705, 27 N.Y.S.3d 425, 426 (2016) (first citing N.Y. PENAL LAW § 120.10(1) (McKinney 2009); and then citing N.Y. PENAL LAW § 70.04(1)(b) (McKinney 2009)).

227. *Id.*

offender statute contained in Penal Law § 70.04.[228] Upon the same grounds, the Court held that the defendant was improperly sentenced as a second violent felony offender.[229]

In *People v. Jurgins*, the defendant argued that his prior conviction in Washington, D.C., for an attempted robbery was not equivalent to any New York felony and, as such, that he was incorrectly adjudicated a predicate felony offender based on the same conviction.[230] As under the D.C. statute, "a person can be convicted of the D.C. crime without committing an act that would qualify as a felony in New York (i.e., by pickpocketing)," the Court held that the "defendant's D.C. conviction for attempt to commit robbery was not a proper basis for a predicate felony offender adjudication."[231]

In *People v. Small*, the defendant argued that the sentencing court incorrectly adjudicated him a second violent felony offender, on the grounds that that one of the periods of the defendant's incarceration for a parole violation should not have been used to extend the ten-year limit because a habeas court concluded that the defendant had been unlawfully confined and ordered his immediate release from confinement.[232] Despite

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228. *Id.* at 682, 47 N.E.3d at 705, 27 N.Y.S.3d at 426 (first citing N.Y. PENAL LAW § 60.01 (McKinney 2009); and then citing PENAL § 70.04(1)(b)).

229. *Id.*

230. 26 N.Y.3d 607, 610, 46 N.E.3d 1048, 1049, 26 N.Y.S.3d 495, 496 (2015).

> A [CPL § 440.20] motion is the proper vehicle for raising a challenge to a sentence as "unauthorized, illegally imposed or otherwise invalid as a matter of law." . . .
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> . . . .
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> . . . [A] prior out-of-state conviction qualifies as a predicate felony conviction if it involved "an offense for which a sentence to a term of imprisonment in excess of one year . . . was authorized and is authorized in this state." . . .
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> . . . .
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> . . . The general rule limits [the] inquiry "to a comparison of the crimes' elements as they are respectively defined in the foreign and New York penal statutes. In this regard, courts generally should consider only the statutes defining the relevant crimes, and may not consider the allegations contained in the accusatory instrument underlying the foreign conviction.

Id. at 612–13, 46 N.E.3d at 1051–52, 26 N.Y.S.3d at 498–99 (first quoting N.Y. CRIM. PROC. LAW § 440.20(1) (McKinney 2005); then quoting PENAL § 70.06(1)(b)(i); and then 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)) (first citing PENAL § 70.06; then citing People v. Yusuf, 19 N.Y.3d 314, 321, 970 N.E.2d 422, 426, 947 N.Y.S.2d 399, 403 (2012); and then citing People v. Olah, 300 N.Y. 96, 98, 89 N.E.2d 329, 330 (1949)).

231. *Id.* at 615, 46 N.E.3d at 1053, 26 N.Y.S.3d at 500 (citing People v. Ramos, 19 N.Y.3d 417, 420, 971 N.E.2d 369, 370, 948 N.Y.S.2d 239, 240 (2012)).

232. 26 N.Y.3d 253, 257, 43 N.E.3d 740, 742, 22 N.Y.S.3d 383, 385 (2015). Penal Law § 70.04 provides, in relevant part, the following: "[A]ny period of time during which the person was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony" is excluded from the ten-year calculation. N.Y. PENAL LAW § 70.04(1)(b)(v) (McKinney 2009).

the fact that the habeas court did not vacate the defendant's parole violation, the Court held that "a period of incarceration [that] has been deemed unlawful and unsupported by evidence . . . should not be used to extend the ten-year limitation on prior violent felony convictions."[233]

In *People v. Rossborough*, a case of first impression, the defendant argued that the trial court erred under CPL § 380.40 by sentencing him in absentia after he pled guilty to a felony.[234] The Court rejected the defendant's argument on the grounds that the "defendant specifically sought to waive this right, did so on the record in the presence of his attorney, was apprised by the court that he had an absolute right to personally appear, and expressly agreed to have his attorney appear at sentencing on his behalf."[235] In addition, the trial court "assured [the] defendant that it would not sentence him in absentia if circumstances indicated that the plea agreement could not be honored."[236]

XII. SPEEDY TRIAL

In *People v. Barden*, the Court held that under CPL § 30.30, the period of delay resulting from court congestion, beyond date to which the defendant charged with a felony sought adjournment, should have been charged to the People for purposes of speedy trial calculations.[237] In so holding, the Court rejected the People's argument that defense "counsel's accommodation of the court's schedule—merely by failing to express an

233. *Small*, 26 N.Y.3d at 260–61, 43 N.E.3d at 744–45, 22 N.Y.S.3d at 387–88.

234. 27 N.Y.3d 485, 488–89, 54 N.E.3d 71, 73–74, 34 N.Y.S.3d 399, 401–02 (2016) (citing N.Y. CRIM. PROC. LAW § 380.40(1) (McKinney 2005)). In general, under CPL § 380.40, "[t]he defendant must be personally present at the time sentence is pronounced." C.P.L. § 380.40(1). However, "where [a] sentence is to be pronounced for a misdemeanor or for a petty offense, the court may, on motion of the defendant [accompanied by a waiver, signed and acknowledged by the defendant, reciting the maximum sentence that may be imposed for the offense and stating that the defendant waives the right to be personally present at the time sentence is pronounced], dispense with the requirement that the defendant be personally present." C.P.L. § 380.40(2). No such exception is provided for felony sentencing. *Id.*

235. *Rossborough*, 27 N.Y.3d at 489, 54 N.E.3d at 74, 34 N.Y.S.3d at 402.

236. *Id.*

237. 27 N.Y.3d 550, 552, 55 N.E.3d 1053, 1055, 36 N.Y.S.3d 80, 82 (2016). When "a felony is included in an indictment, the People must be ready for trial within six months, after subtracting excludable time." *Id.* at 553, 55 N.E.3d at 1055, 36 N.Y.S.3d at 82 (citing N.Y. CRIM. PROC. LAW § 30.30(1)(a) (McKinney 2003)). "[P]re-readiness delays arising from court congestion or court scheduling problems are chargeable to the People, because court delays do not prevent the People from being ready or declaring readiness in a written off-calendar statement." *Id.* (first citing People v. Chavis, 91 N.Y.2d 500, 504, 695 N.E.2d 1110, 1111, 673 N.Y.S.2d 29, 30 (1998); then citing People v. Smith, 82 N.Y.2d 676, 678, 619 N.E.2d 403, 404, 601 N.Y.S.2d 466, 467 (1993); then citing People v. Kendzia, 64 N.Y.2d 331, 337–38, 476 N.E.2d 287, 290, 486 N.Y.S.2d 888, 891 (1985); and then citing People v. Brothers, 50 N.Y.2d 413, 417, 407 N.E.2d 405, 407, 429 N.Y.S.2d 558, 560 (1980)).

objection to the alternate date proposed by the court after it indicated that the date suggested by counsel was not available" should, under CPL § 30.30, be considered as consent to the adjournment.[238] Rather, "[a]djournments consented to by the defense must be *clearly expressed* to relieve the People of the responsibility for that portion of the delay."[239]

XIII. STATEMENTS OF DEFENDANT

In *People v. Romero*, the Court held that the defendant's pre-*Miranda* custodial statement in response to police questioning regarding whether the defendant wished to make a statement should have been suppressed.[240] However, the Court determined that the same error "was harmless beyond a reasonable doubt in light of the overwhelming evidence against the defendant and there being no reasonable possibility that his statement contributed to the verdict."[241]

In *People v. Jin Cheng Lin*, the defendant argued that his confession was not voluntary because it was obtained by the police at the end of a lengthy and unjustified pre-arraignment delay, lasting a total of twenty-eight hours following his arrest in violation of CPL § 140.20(1).[242] The Court held that, pursuant to CPL § 140.20(1), the length of the defendant's pre-arraignment delay was undue, unnecessary, and "troubling," thereby, rejecting the People's argument that the same was

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238. *Id.* at 556, 55 N.E.3d at 1057, 36 N.Y.S.3d at 84.

239. *Id.* (quoting *Smith*, 82 N.Y.2d at 678, 619 N.E.2d at 404, 601 N.Y.S.2d at 467) (citing People v. Liotta, 79 N.Y.2d 841, 843, 588 N.E.2d 82, 83, 580 N.Y.S.2d 184, 185 (1992)).

240. 27 N.Y.3d 981, 982, 51 N.E.3d 554, 555, 32 N.Y.S.3d 43, 44 (2016).

241. *Id.* (citing People v. Rivera, 57 N.Y.2d 453, 456, 443 N.E.2d 439, 440, 457 N.Y.S.2d 191, 192 (1982)).

242. 26 N.Y.3d 701, 720, 47 N.E.3d 718, 731, 27 N.Y.S.3d 439, 452 (2016).

> In order to assess the voluntariness of [a] defendant's statements, a court must consider the totality of the circumstances because "[a] series of circumstances may each alone be insufficient to cause a confession to be deemed involuntary, but yet in combination they may have that qualitative or quantitative effect." Statements must not be "products of coercion, either physical or psychological," meaning that they must be the "result of a 'free and unconstrained choice by [their] maker.'"

Id. at 719, 47 N.E.3d at 730, 27 N.Y.S.3d at 451 (alterations in original) (first quoting People v. Anderson, 42 N.Y.2d 35, 38, 364 N.E.2d 1318, 1320, 396 N.Y.S.2d 625, 627 (1977); and then quoting People v. Thomas, 22 N.Y.3d 629, 641, 8 N.E.3d 308, 313, 985 N.Y.S.2d 193, 198 (2014)). CPL § 140.20 provides, in relevant part, the following:

> Upon arresting a person without a warrant, a police officer, after performing without unnecessary delay all recording, fingerprinting and other preliminary police duties required in the particular case, must . . . without unnecessary delay bring the arrested person or cause him to be brought before a local criminal court and file therewith an appropriate accusatory instrument charging him with the offense or offenses in question.

N.Y. CRIM. PROC. LAW § 140.20(1) (McKinney 2004 & Supp. 2017).

necessary due to reason of an ongoing police investigation.[243] However, the Court ruled that, under the totality of the circumstances standard, the defendant's confession was voluntary, as his detainment did not involve an emotional and physical breakdown as the result of "deprivation of food, water, and sleep during the course of a prolonged interrogation, with [the] defendant[] confined and isolated from all but law enforcement personnel" or an instance where the defendant was "led to believe that [he] had to bargain for [his] right to counsel."[244] The Court also rejected the defendant's argument that his waiver of *Miranda* was not knowing, intelligent, and voluntary on the grounds that the defendant lacked comprehension of the English language.[245] Key to the Court's determination was the fact that the defendant spoke English to the police with no difficulty, the defendant requested no clarification of his rights, the defendant went to school in the United States for seven years, and the defendant's confession was penned in his own hand in English.[246]

XIV. LEGISLATIVE DEVELOPMENTS

During the *Survey* period, the New York State Legislature enacted a variety of changes to the PL, the CPL, and the VTL, which are discussed below.

A. Penal Law

The Penal Law was amended by adding a new section 260.22 titled "Facilitating female genital mutilation."[247] The new provision makes it unlawful and a class A misdemeanor to intentionally aid in the commission or attempted commission of the crime of Female Genital Mutilation, as defined in Penal Law § 130.85.[248]

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243. *Jin Cheng Lin*, 26 N.Y.3d at 723, 47 N.E.3d at 733–34, 27 N.Y.S.3d at 454–55.

244. *Id.* at 719, 724, 47 N.E.3d at 730, 734, 27 N.Y.S.3d at 451, 455 (first citing *Anderson*, 42 N.Y.2d at 38, 364 N.E.2d at 1320, 396 N.Y.S.2d at 627; and then citing *Thomas*, 22 N.Y.3d at 641, 8 N.E.3d at 313, 985 N.Y.S.2d at 198).

245. *Id.* at 725–26, 47 N.E.3d at 735–36, 27 N.Y.S.3d at 456–57 (first citing Miranda v. Arizona, 384 U.S. 436, 444 (1966); and then citing People v. Dunbar, 24 N.Y.3d 304, 314, 23 N.E.3d 946, 951–52, 998 N.Y.S.2d 679, 684–85 (2014)).

246. *Id.* at 726, 47 N.E.3d at 735–36, 27 N.Y.S.3d at 456–57.

247. Act of June 8, 2016, 2016 McKinney's Sess. Law News no. 3, ch. 49, at 391 (codified at N.Y. PENAL LAW § 260.22 (McKinney Supp. 2017)).

248. PENAL § 260.22. Penal Law § 130.85 provides the following:

> A person is guilty of female genital mutilation when: (a) a person knowingly circumcises, excises, or infibulates the whole or any part of the labia majora or labia minora or clitoris of another person who has not reached eighteen years of age; or (b) being a parent, guardian or other person legally responsible and charged with the care or custody of a child less than eighteen years old, he or she knowingly consents to the circumcision, excision or infibulation of whole or part of such child's labia majora or

B. Criminal Procedure Law

CPL § 216.05, governing participation in treatment for opiate abuse or dependence under the judicial diversion program, was amended to provide "that no court shall require the use of any specified type or brand of drug during the course of medically prescribed drug treatments."[249]

CPL § 20.40, governing the determination of where crimes that span more than one county within the state may be prosecuted, was amended by adding new subsections (n)(i) and (ii), covering organized retail theft crimes.[250] The new legislation reads as follows:

> An organized retail theft crime, where the defendant knows that such crime is a part of a coordinated plan, scheme or venture of organized retail theft crimes committed by two or more persons, may be prosecuted in any county in which such defendant committed at least one such organized retail theft crime; provided, however, that the county of prosecution is contiguous to another county in which one or more of such other organized retail theft crimes was committed.[251]

In addition, the new amendment provides the following:

> Multiple organized retail theft crimes committed by the same defendant may be joined in one indictment if authorized and appropriate in accordance with the provisions of section 200.20 . . . provided, however, that notwithstanding section 200.40 . . . no more than one defendant may be charged in the same indictment or prosecuted as part of the same trial.[252]

Under the same Act, CPL § 100.45(1), containing the statutory authority for the application of CPL provisions governing severance and consolidation practice for indictments to local criminal court accusatory instruments, other than a simplified information (i.e., prosecutor's information and misdemeanor complaint) was amended to include the new subsection (n) of CPL § 20.40, as discussed above.[253]

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labia minora or clitoris.

N.Y. PENAL LAW § 130.85 (McKinney 2009).

249. Act of June 22, 2016, 2016 McKinney's Sess. Law News no. 4, ch. 67, at 396 (codified at N.Y. CRIM. PROC. LAW § 216.05(5) (McKinney Supp. 2017)).

250. Act of June 8, 2016, 2016 McKinney's Sess. Law News no. 3, ch. 63, at 392–93 (codified at N.Y. CRIM. PROC. LAW § 20.40 (McKinney Supp. 2017)). The new subsection 20.40(n)(ii) defines an "organized retail theft crime" as "the crime of larceny, including by trick, fraud, embezzlement, stealing or false pretenses, of retail merchandise in quantities that would not normally be purchased for personal use or consumption, for the purposes of reselling, trading, or otherwise reentering such retail merchandise in commerce." C.P.L. § 20.40(n)(ii).

251. C.P.L. § 20.40(n)(i).

252. *Id.*

253. Act of June 8, 2016, 2016 McKinney's Sess. Law News no. 3, ch. 63, at 392–93

C. Vehicle and Traffic Law

VTL § 1804, governing the imposition of fines, penalties, or forfeiture when a VTL charge is dismissed was amended as follows:

> A municipality may only impose a fine, penalty, forfeiture, or any other fee or surcharge against a person charged with a violation of this chapter or any local law, ordinance, order, rule, regulation or administrative code adopted pursuant to this chapter if such person is convicted of or found liable for a violation of this chapter or any local law, ordinance, order, rule, regulation or administrative code adopted pursuant to this chapter in satisfaction of such charge.[254]

VTL § 501-a(4)(b)(i) was amended to include "covered" farm vehicles.[255] VTL § 501-a was further amended by adding a new subsections 8(a)–(d) containing definitions and rules applicable to "covered farm vehicles."[256] The definition of "P" endorsements under VTL § 501(2)(b)(iv) was amended to include the following: "[A]ny motor vehicle with a gross vehicle weight or gross vehicle weight rating of more than twenty-six thousand pounds which is designed to transport passengers in commerce. . . . [T]he gross vehicle weight of a vehicle shall mean the actual weight of the vehicle and the load."[257]

Finally, the Legislature also made several administrative amendments applicable to the comptroller and the commissioner under VTL §§ 317(5), 318(1-a)(b), 399-1, 410(5)(a), 423-a(6), 503(2)(c-1), 2231(2).[258] Given their narrow scope and application, the same amendments will not be discussed in detail.

(codified at N.Y. CRIM. PROC. LAW § 100.45(1) (McKinney Supp. 2017)).

254. Act of Mar. 21, 2016, 2016 McKinney's Sess. Law News no. 1, ch. 16, at 23 (codified at N.Y. VEH. & TRAF. LAW § 1804 (McKinney Supp. 2017)).

255. Act of Apr. 12, 2016, 2016 McKinney's Sess. Law News no. 2, ch. 58, at 211 (codified at N.Y. VEH. & TRAF. LAW § 501-a(4)(b)(i) (McKinney Supp. 2017)).

256. *Id.* (codified at N.Y. VEH. & TRAF. LAW § 501-a(8)(a)–(d) (McKinney Supp. 2017)).

257. *Id.* at 211–12 (codified at N.Y. VEH. & TRAF. LAW § 501(2)(b)(iv) (McKinney Supp. 2017)).

258. *Id.* at 208–10, 238 (codified at N.Y. VEH. & TRAF. LAW §§ 317(5), 318(1-a)(b), 399-1, 410(5)(a), 423-a(6), 503(2)(c-1), 2231(2) (McKinney Supp. 2017)).