CRIMINAL LAW

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INTRODUCTION

This *Survey* of developments in New York State criminal law between July 1, 2012, and June 30, 2013, includes all significant New York Court of Appeals decisions in the area of criminal law and procedure.

I. PRETRIAL MOTIONS

A. Expectation of Privacy

1. In a Guest Room

In *People v. Leach*, the defendant and his brother were charged with multiple counts of attempted murder, attempted assault, reckless endangerment, and weapon possession.[1] The victims told the police that they knew the defendants from school and that they lived in a nearby building.[2] The police arrested the defendant at a nearby building in his grandmother's apartment where the police discovered a loaded firearm.[3] In pretrial motions, the defendant moved to suppress the gun.[4] At the hearing, the defendant's grandmother testified that she was the only one who had keys to her apartment, which had three bedrooms—hers, defendant's, which was furnished with a single bed, and an "extra" one reserved for the exclusive use of other grandchildren when they visited, which was furnished with two beds.[5] The grandmother further testified that "she had nine grandchildren, some lived nearby and two or three slept over in the extra bedroom 'quite often.'"[6] The police recovered the gun from the "extra" guest bedroom.[7] The Court of Appeals, in reviewing these facts, found that the defendant failed to establish a legitimate expectation of privacy in the guest bedroom.[8] The Court found there was no question that the defendant resided in his grandmother's apartment, but the record demonstrated that the grandmother did not want defendant to have unfettered access to all areas of the apartment.[9] She testified that the defendant had his own bedroom, and she reserved the extra or guest bedroom solely for use by other grandchildren when they came to visit.[10] The Court stated that the "record was silent as to whether defendant had ever used that bedroom for any purpose."[11] In conclusion, the Court noted that it was the defendant's burden in "establishing standing by demonstrating a

1. 21 N.Y.3d 969, 970, 993 N.E.2d 1255, 1256, 971 N.Y.S.2d 234, 235 (2013).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* at 970-71, 993 N.E.2d at 1256, 971 N.Y.S.2d at 235.
6. *Leach*, 21 N.Y.3d at 970-71, 993 N.E.2d at 1256, 971 N.Y.S.2d at 235.
7. *Id.* at 971, 993 N.E.2d at 1256, 971 N.Y.S.2d at 235.
8. *Id.* at 972, 993 N.E.2d at 1257, 971 N.Y.S.2d at 236.
9. *Id.* at 971, 993 N.E.2d at 1257, 971 N.Y.S.2d at 236.
10. *Id.* at 971-72, 993 N.E.2d at 1257, 971 N.Y.S.2d at 236.
11. *Leach*, 21 N.Y.3d at 972, 993 N.E.2d at 1257, 971 N.Y.S.2d at 236.

legitimate expectation of privacy in the premises or object searched," and the record supported the lower court's determination that the defendant in this case had failed to do so.[12]

2. In Property Seized by Warrant

In *People v. DeProspero*, the defendant was charged with possessing a sexual performance by a child, based on a single pornographic image of a child found on his computer during a preliminary on-site examination of that device at the time of the execution of a valid warrant issued on May 4, 2009.[13] The warrant also authorized the seizing of memory cards and other digital media and for this property to be forensically examined.[14] After the defendant was sentenced on the initial charge, the People were notified that the forensic examination, which had not been conducted until January 2010 after the defendant's sentencing, had discovered additional pornographic images containing evidence that the defendant had engaged in sexual acts with a child.[15] The People subsequently charged the defendant with predatory sexual assault against a child based upon the newly discovered evidence.[16] The defendant appealed, arguing that "by the time of the January 2010 forensic examination yielding the inculpatory still-frame images, the authority provided by the May 4, 2009 warrant had lapsed—that in the absence of fresh judicial authorization, the January 2010 search was illegal and the evidence obtained from it therefore inadmissible."[17] The Court of Appeals held that the defendant could not have a reasonable and legitimate expectation of privacy "respecting the seized items, which were, pursuant to the warrant and warrant return, to be retained by the police for an unspecified period."[18] Further, the Court held that it did not follow "that the authority of the warrant should be understood to have waned, or defendant's legitimate expectations as to the privacy of his seized property to have commensurately waxed."[19] The Court noted that "neither the Fourth Amendment nor its New York State analogue (N.Y. Const., art. I, § 12) specifically limit the length of time property

12. *Id.* at 971, 993 N.E.2d at 1257, 971 N.Y.S.2d at 236.
13. 20 N.Y.3d 527, 529, 987 N.E.2d 264, 265, 964 N.Y.S.2d 487, 488 (2013).
14. *Id.*
15. *Id.* at 529-30, 987 N.E.2d at 265, 964 N.Y.S.2d at 488.
16. *Id*. at 529, 987 N.E.2d at 264, 964 N.Y.S.2d at 487.
17. *Id.* at 530, 987 N.E.2d at 265, 964 N.Y.S.2d at 488.
18. *DeProspero*, 20 N.Y.3d at 531, 987 N.E.2d at 266, 964 N.Y.S.2d at 489.
19. *Id*.

may be held following a lawful seizure."[20] The Court reasoned that some incidents may arise where the retention and search of property after a lengthy passage of time might be unreasonable and therefore unlawful. The Court stated, while not being settled law, that the "illegal retention of property by the state subsequent to an initial lawful seizure is redressable as a Fourth Amendment violation, that is to say as a continuing 'seizure' which at some point subsequent to its inception lost its justifying predicate."[21] However, on the facts before them the Court stated the "predicate for the seizure and examination of defendant's digital media devices was at least as compelling in January 2010 as it had been in May 2009," and that "there appears no reason to conclude that the warrant did not at the time of the state laboratory examination remain valid and allow both the State's continued custody of the seized property and the 'lesser-related intrusion' involved in that property's inspection."[22]

B. Molineux

1. Completing the Narrative

In *People v. Alfaro*,[23] the defendant moved to preclude the introduction of novelty handcuffs, keys and an imitation firearm, arguing that the items were not used during the commission of the assault and robbery and, therefore, would only serve as prejudicial propensity evidence in violation of *People v. Molineux*.[24] The defendant appealed, relying on the Court of Appeals' decision in *People v. Gillyard*,[25] claiming the admission of the novelty handcuffs, keys, and imitation firearm was erroneously admitted and constituted prior uncharged crimes evidence under *Molineux*.[26] However, the Court held, "[t]he items, which could have been used during the commission of the crimes, were recovered upon defendant's apprehension shortly after the incident and completed the narrative of this particular criminal transaction."[27] The majority concluded that the items "were probative

20. *Id*. at 532, 987 N.E.2d at 267, 964 N.Y.S.2d at 490.

21. *Id*. at 530, 987 N.E.2d at 265-66, 964 N.Y.S.2d at 488-89.

22. *Id.* at 532, 987 N.E.2d at 267, 964 N.Y.S.2d at 490.

23. 19 N.Y.3d 1075, 1075, 979 N.E.2d 1152, 1153, 955 N.Y.S.2d 826, 826 (2012).

24. *Id*. at 1076, 979 N.E.2d at 1153, 955 N.Y.S.2d at 827; 168 N.Y. 264, 61 N.E. 286 (1901).

25. *Alfaro*, 19 N.Y.3d at 1077, 979 N.E.2d at 1154, 955 N.Y.S.2d at 827; People v. Gillyard, 13 N.Y.3d 351, 353, 920 N.E.2d 344, 345, 892 N.Y.S.2d 288, 289 (2009).

26. *Alfaro*, 19 N.Y.3d at 1076, 979 N.E.2d at 1153, 955 N.Y.S.2d at 827.

27. *Id*.

of a material issue at trial, namely, the necessary intent to 'use or threaten the immediate use of physical force upon another person' during the commission of a robbery."[28] The Court distinguished *Gillyard* by stating, in that matter, the handcuffs were not a material issue at trial while in contrast, in case before it, the "admitted evidence completed the narrative of the criminal incident and was probative of the requisite intent to use or threaten physical force in the commission of a robbery."[29] In his dissent Chief Judge Lippman stated "The gist of the common-law rule with which *People v. Molineux* has become so closely identified is that evidence probative only of a propensity to conduct like that charged is not admissible."[30] Judge Lippman writes, the admission of the evidence:

> left the jury to speculate along the lines urged by the trial assistant—that defendant's possession of the gun-like cigarette lighter and toy handcuffs was indicative of a career in robbery and that the victim's accusation of defendant, even if doubtful on the basis of what he claimed to have seen and remembered of the incident, was in a general way believable and might well have hit a deserving mark. Obviously, this is not a permissible path to a guilty verdict.[31]

2. Criminal Propensity

The Court in *People v. Bradley* reviewed the question of whether the admission of testimony by a social worker as to defendant's disclosure of an incident in which she stabbed a male in the thigh should have been precluded under *Molineux*.[32] The defendant argued the testimony was not reliably probative of her state of mind on the occasion of the stabbing for which she stood accused more than a decade later, and introduced an unacceptable risk that the defendant would be convicted on the basis of a perceived propensity on her part to knife merely bothersome men.[33] The Court of Appeals recognized that they "have for some time recognized the broad principle that when there is an issue raised as to whether a defendant acted culpably it may be appropriate to permit the prosecution to respond by adducing evidence of uncharged conduct tending to show that the defendant possessed the

28. *Id*. (citing N.Y. PENAL LAW § 160.00 (McKinney 2009)).

29. *Id*. at 1077, 979 N.E.2d at 1154, 955 N.Y.S.2d at 827.

30. *Id.* at 1078, 979 N.E.2d at 1155, 955 N.Y.S.2d at 828 (Lippman, J., dissenting).

31. *Alfaro*, 19 N.Y.3d at 1081, 979 N.E.2d at 1157, 955 N.Y.S.2d at 830 (Lippman, J., dissenting).

32. 20 N.Y.3d 128, 982 N.E.2d 570, 958 N.Y.S.2d 650 (2012).

33. *Id.* at 133, 982 N.E.2d at 572, 958 N.Y.S.2d at 652.

mens rea necessary to guilt."[34] However "the receipt of evidence of uncharged bad acts, even when offered to prove a subjective element, is not exempt from the general prohibition against evidence actually probative only of criminal propensity."[35] To be admissible, such evidence must be demonstrably relevant to the specific state of mind issue in the case, and it must be found, on balance, more probative than prejudicial."[36] In the case at hand, the Court did not think the trial court erred in permitting the People in the *Molineux* context to introduce on their direct case some evidence anticipatory of the elaborate justification claim defendant would imminently advance, any such evidence had to possess "a natural tendency to disprove [defendant's] specific claim" as to her state of mind.[37] However, the Court held the proffered evidence of the thigh stabbing did not have such probative value.[38]

C. Suppression of Involuntary Statement

In *People v. Guilford*,[39] the defendant confessed to killing his former paramour subsequent to a custodial interrogation lasting 49 and ½ hours.[40] The Court of Appeals was presented with the issue of whether the exclusionary consequence of this marathon interrogation was correctly limited by the trial court to the statements made during the interrogation itself, or whether defendant's suppression motion should have been granted to the further extent of suppressing his subsequent inculpatory statements.[41] The Court began by stating that it is the People's burden to prove the voluntariness of defendant's statements beyond a reasonable doubt as a condition of their receipt at trial.[42] The sufficiency of this showing of "voluntariness" compatible with due process is dependent upon the particular circumstances—"the totality"—of each case.[43] In some situations—where, for example, *Miranda* warnings have been timely given—the requisite inference of voluntariness may be relatively easily drawn. But where there has been official illegality potentially impairing the voluntariness of a subsequent admission, the inference will naturally require a more exacting

34. *Id.*
35. *Id.*
36. *Id.*
37. *Bradley*, 20 N.Y.3d at 134, 982 N.E.2d at 573, 958 N.Y.S.2d at 653.
38. *Id.*
39. 21 N.Y.3d 205, 207, 991 N.E.2d 204, 205, 969 N.Y.S.2d 430, 431 (2013).
40. *Id.* at 207, 991 N.E.2d at 205, 969 N.Y.S.2d at 431.
41. *Id.* at 207-08, 991 N.E.2d at 205, 969 N.Y.S.2d at 431.
42. *Id.* at 208, 991 N.E.2d at 205, 969 N.Y.S.2d at 431.
43. *Id.* at 208, 991 N.E.2d at 206, 969 N.Y.S.2d at 432.

showing.[44] The Court stated that the late interposition of those warnings would be "too late" unless there was a demonstration of a "pronounced break" in interrogation adequate to justify a finding that the defendant was no longer under the sway of the prior questioning when the warnings were given.[45] The Court found that the single reading of the defendant's Miranda rights before the marathon integration could not have inoculated the illegality of the interrogation where he was questioned even after he requested but had not yet been provided an attorney, in violation of his right to counsel; and, denied sleep and meals.[46] The Court found that interrogations, such as the one before it, have historically been condemned by the courts because they are designed to "to break a suspect's will to resist self-incrimination by prolonged and virtually continuous questioning coupled with deprivation of basic human needs, most notably sleep."[47] Further, the Court rejected the People's contention "that the eight-hour 'break' between interrogation and arraignment attenuated the taint of the wrongful interrogation."[48] Rather, the Court held that the additional eight hours in custody before the arraignment "exacerbated, rather than ameliorated, the physical and cognitive debilitation resulting from his 49-and-1/2-hour session."[49] In conclusion, the Court rejected the People's final contention that the entry of counsel guaranteed the voluntariness of defendant's subsequent statements[50] and that the entry of counsel cannot be "presumed capable of neutralizing the effects of extensive coercive interrogation conducted prior to his or her arrival, in violation of Miranda's own dictates."[51] The Court found that by the time of the appearance of counsel, the "die was largely cast"[52] and that ultimately the attorney "became an unintended spectator to his client's confession and was called as a prosecution witness at trial."[53]

44. *Guilford*, 21 N.Y.3d at 208, 991 N.E.2d at 206, 969 N.Y.S.2d at 432.
45. *Id*. at 209, 991 N.E.2d at 206, 969 N.Y.S.2d at 432.
46. *Id.* at 210, 991 N.E.2d at 207, 969 N.Y.S.2d at 433.
47. *Id.* at 212, 991 N.E.2d at 208, 969 N.Y.S.2d at 434.
48. *Id.* at 213, 991 N.E.2d at 209, 969 N.Y.S.2d at 435.
49. *Guilford*, 21 N.Y.3d at 213, 991 N.E.2d at 209, 969 N.Y.S.2d at 435.
50. *Id.* at 213, 991 N.E.2d at 209, 969 N.Y.S.2d at 435.
51. *Id.* at 214, 991 N.E.2d at 210, 969 N.Y.S.2d at 436.
52. *Id.*
53. *Id.*

II. INVENTORY SEARCH

A. Preserve Property and Protect Police

In *People v. Padilla*, the Court reviewed whether the People had met their burden of establishing a valid inventory search.[54] The People at trial proffered written guidelines, the officer's testimony regarding his search of the vehicle, and the resulting list of items retained.[55] The defendant argued that the manner in which the officer conducted his inventory search was not proper, and thus, the entire search was invalid and that the purpose of the search was not only to inventory its contents, but to search for contraband.[56] Further, the defendant argued that because the officer did not follow all the written standard procedures for conducting the inventory search by allowing his sister, who also was a police officer, to remove property from the vehicle as a courtesy made the entire search illegal.[57] The Court disagreed and found that the main objectives of the inventory search to preserve "the property of defendant, to protect the police from a claim of lost property and to protect the police and others from dangerous instruments—were met when the officer complied with defendant's request and gave the items to his sister and then prepared a list of the other items retained by the police."[58] The Court further rejected the defendant's contention that the officer's removal of the speakers was a ruse designed to search for drugs, and the officer's testimony that it was police protocol to remove any owner-installed equipment, was accepted by the hearing court.[59] Additionally, because the intention of the search was to inventory the items in the vehicle, it was reasonable for the officer to check in the seat panels that were askew as part of his inventory and the fact that the officer knew that contraband is often hidden by criminals in the panels did not invalidate the entire search.[60] In her dissent, Judge Rivera held the officers had flagrantly digressed from the guidelines, conducted a warrantless search for drugs in the seat pockets followed by a time-consuming disassembling of the trunk's contents, and therefore should require more than the officer's statements that he was following protocol, or that the property would not be accepted at the pound.[61]

54. 21 N.Y.3d 268, 270, 992 N.E.2d 414, 415, 970 N.Y.S.2d 486, 487 (2013).
55. *Id.* at 272, 992 N.E.2d at 416, 970 N.Y.S.2d at 488.
56. *Id.*
57. *Id.*
58. *Id.* at 273, 992 N.E.2d at 416, 970 N.Y.S.2d at 488.
59. *Padilla*, 21 N.Y.3d at 272, 992 N.E.2d at 416, 970 N.Y.S.2d at 488.
60. *Id.* at 273, 992 N.E.2d at 416-17, 970 N.Y.S.2d at 488-89.
61. *Id*. at 276, 992 N.E.2d at 419, 970 N.Y.S.2d at 491 (Rivera, J., dissenting).

Judge Rivera argued the majority's decision had the "potential to encourage officers to ignore established written police protocols, and use the opportunity provided by circumstances supporting a valid inventory search to instead exercise discretion in such a way as to convert a valid vehicle inventory into a constitutionally impermissible warrantless search."[62]

B. Impounding a Vehicle

In *People v. Walker*, the defendant was indicted for criminal possession of a weapon stemming from the discovery of evidence subsequent to an inventory search after the defendant was arrested for driving with a revoked license.[63] The defendant argued the evidence discovered pursuant to the inventory search should be suppressed due to the fact that the state trooper acted unreasonably when he decided to impound and search the car without inquiring whether the defendant's girlfriend was licensed and authorized to drive it.[64] On the facts before it, the Court held that neither the defendant nor his girlfriend requested of the trooper that the girlfriend drive the car or told him that she had a driver's license and the owner's permission to drive it.[65] The Court held that the trooper was not required, as a matter of constitutional law, to raise the question or to initiate a phone call to the owner.[66] The Court concluded that to impose such a requirement that the arresting officer inquire into whether the vehicle may be turned over to a third party would create an administrative burden but also create confusion in difficult factual situations.[67] However, the Court specifically made clear in its decision that "[t]he issue in this case is a variant of the many that can arise when police arrest the driver of a vehicle, and must decide whether to impound and search the vehicle, or to permit other arrangements," and this Court's instant decision does not attempt to resolve them all; only under these facts, the seizure of the vehicle was not unreasonable.[68]

III. ILLEGAL ARREST

In *People v. Jones*, the defendant was a suspect in a robbery case;

62. *Id.*
63. 20 N.Y.3d 122, 124, 980 N.E.2d 937, 938, 957 N.Y.S.2d 272, 273 (2012).
64. *Id.* at 125, 980 N.E.2d at 938, 957 N.Y.S.2d at 273.
65. *Id.* at 125, 980 N.E.2d at 939, 957 N.Y.S.2d at 274.
66. *Id.*
67. *Id.*
68. *Walker*, 20 N.Y.3d at 125-26, 980 N.E.2d at 939, 957 N.Y.S.2d at 274.

however, prior to his arrest for that charge he was unlawfully arrested for disorderly conduct for the purpose of detaining him such that he could be submitted to a lineup identification.[69] The question before the Court was "whether the connection between the defendant's illegal arrest and his subsequent lineup identification was sufficiently attenuated as to dissipate the taint of the wrongful arrest."[70] The Court stated that in determining whether the taint of an illegal arrest was sufficiently attenuated from subsequently discovered evidence to avoid application of the exclusionary rule, the Court must consider the temporal proximity of the arrest and the evidence at issue, the presence of intervening circumstances and, particularly, the purpose and flagrancy of the official misconduct.[71] The defendant argued that the disorderly conduct charge was a "mere pretext" and that "there is no record support for any conclusion but that the police obtained the lineup identification 'by exploitation' of [defendant's] illegal arrest."[72] Subsequently, at the *Dunaway* hearing,[73] the arresting officer admitted that, "in addition to the disorderly conduct charge—for which he could not issue a summons because defendant lacked identification—he took the defendant into custody because he also believed defendant to be the perpetrator of the earlier robbery."[74] The Court found that initial arrest of defendant was without probable cause and therefore illegal, however, the Court continued that since evidence discovered subsequent to an illegal arrest is not indiscriminately subject to the exclusionary rule, there must be a showing that the People "'somehow exploited or benefited from [the] illegal conduct' such that 'there is a connection between the violation of a constitutional right and the derivative evidence' obtained by the police."[75] In the case before it, the Court held that by the time the arresting officer had affected the illegal arrest, the detective already had in his possession sufficient evidence to establish probable cause for defendant's arrest that was independently gathered.[76] Furthermore, the Court found that the arresting officer's call to the detective within thirty minutes of the defendant's detention had broken the causal connection between the illegal arrest and the lineup identification.[77] In his dissent, Chief Judge Lippman stated that the

69. 21 N.Y.3d 449, 454, 994 N.E.2d 831, 834, 971 N.Y.S.2d 740, 743 (2013).
70. *Jones*, 21 N.Y.3d at 452, 994 N.E.2d at 833, 971 N.Y.S.2d at 742.
71. *Id.* at 455, 994 N.E.2d at 834-35, 971 N.Y.S.2d at 743-744.
72. *Id.* at 456, 994 N.E.2d at 835, 971 N.Y.S.2d at 744.
73. Dunaway v. New York, 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979).
74. *Jones*, 21 N.Y.3d at 456, 994 N.E.2d at 835, 971 N.Y.S.2d at 744.
75. *Id*. at 454, 994 N.E.2d at 834, 971 N.Y.S.2d at 743 (citations omitted).
76. *Id.* at 455, 994 N.E.2d at 835, 971 N.Y.S.2d at 744.
77. *Id.* at 455-56, 994 N.E.2d at 835, 971 N.Y.S.2d at 744.

record "demonstrates that the lineup identification was directly caused by, and the result of the exploitation of the illegal, [and] indeed pretextual, arrest."[78]

IV. *DE BOUR* INQUIRY

In *People v. Garcia*, the Court determined whether a police officer may, without suspicion for the inquiry, ask the occupants of a lawfully stopped vehicle if they possess any weapons.[79] The Court concluded that the officer may not and that the graduated framework set forth in *People v. De Bour*[80] and *People v. Hollman*[81] for evaluating the constitutionality of police-initiated encounters with private citizens applies with equal force to traffic stops.[82] The People in *Garcia* relied upon the decision in *People v. Alvarez*[83] for the proposition that "'an inquiry into weapon possession is not a greater intrusion than the right to remove the occupants from the car' and, therefore, does not require suspicion of criminality."[84] The Court recognized that "[i]n light of the heightened dangers faced by investigating police officers during traffic stops, a police officer may, as a precautionary measure and without particularized suspicion, direct the occupants of a lawfully stopped vehicle to step out of the car."[85] The Court also noted that the U.S. Supreme Court declared in *Mimms* that the "intrusion occasioned by requiring an occupant to 'expose to view very little more of his person than is already exposed' is 'de minimis' and 'cannot prevail when balanced against legitimate concerns for the officer's safety.'"[86] Thus, the Court of Appeals found in *Robinson* that "'[b]rief and uniform precautionary procedures of this kind are not per se unreasonable and unconstitutional' under federal law."[87] However, the Court stated the "rule of *Mimms* and *Robinson* stands independently of that articulated in *De Bour* and *Hollman* and generally used to assess the reasonableness

78. *Id.* at 456-57, 994 N.E.2d at 836, 971 N.Y.S.2d at 745 (Lippman, J., dissenting).

79. 20 N.Y.3d 317, 319, 983 N.E.2d 259, 260, 959 N.Y.S.2d 464, 465 (2012).

80. 40 N.Y.2d 210, 352 N.E.2d 562, 386 N.Y.S.2d 375 (1976).

81. 79 N.Y.2d 181, 590 N.E.2d 204, 581 N.Y.S.2d 619 (1992).

82. *Garcia*, 20 N.Y.3d at 319-20, 983 N.E.2d at 260, 959 N.Y.S.2d at 465.

83. *Id.* at 321, 983 N.E.2d at 260, 959 N.Y.S.2d at 465 (quoting 308 A.D.2d 184, 764 N.Y.S.2d 42 (1st Dep't 2003)).

84. *Id.* (citations omitted).

85. *Id.* at 321, 983 N.E.2d at 261, 959 N.Y.S.2d at 466 (citing People v. Robinson, 74 N.Y.2d 773, 775, 543 N.E.2d 733, 734, 545 N.Y.S.2d 90, 91 (1989)).

86. *Id.* at 321-22, 983 N.E.2d at 261, 959 N.Y.S.2d at 466 (quoting Pennsylvania v. Mimms, 434 U.S. 106, 111, 98 S. Ct. 330, 337, 54 L. Ed. 2d 331, 333 (1977)).

87. *Garcia*, 20 N.Y.3d at 322, 983 N.E.2d at 261, 959 N.Y.S.2d at 466 (quoting *Robinson*, 74 N.Y.2d at 775, 543 N.E.2d at 733, 545 N.Y.S.2d at 91).

of police conduct toward private citizens in New York State."[88] "The *De Bour/Hollman* framework sets out four levels of police-citizen encounters and the attendant, escalating measures of suspicion necessary to justify each. At the initial level, a 'request for information,' a police officer may approach an individual 'when there is some objective credible reason for that interference not necessarily indicative of criminality.'"[89] The Court rejected the People's proposition that an inquiry into weapon possession is not a greater intrusion than the right to remove the occupants from the car by "stating the rule of Mimms and Robinson already guards against the unique danger of a partially concealed automobile occupant by allowing the officer to order occupants out of a car and readily observe their movements."[90] The Court reasoned that rule in *Mimms* and *Robinson* "place[s] automobile occupants in the same position as pedestrians vis-a-vis police officers; the People's proposed rule, on the other hand, would create disparate degrees of constitutional protections based on an individual's mode of transport."[91] The Court concluded that "[w]hether the individual questioned is a pedestrian or an occupant of a vehicle, a police officer who asks a private citizen if he or she is in possession of a weapon must have founded suspicion that criminality is afoot."[92]

V. ATTORNEY CONFLICT OF INTEREST

A. Actual Conflict

In *People v. Solomon*,[93] the attorney "who represented [the] defendant at a pretrial hearing and at trial [also] simultaneously represent[ed], in an unrelated matter, a police officer who testified [on behalf] of the People that [the] defendant had confessed . . . ."[94] At a pretrial hearing and before the police officer was called to testify, the attorney representing the defendant put on the record that she represented the police officer "in an unrelated civil matter," and she said that she had disclosed this to the defendant, and that the defendant "respects the nature of my representation of Detective Kuebler . . .

88. *Garcia*, 20 N.Y.3d at 322, 983 N.E.2d at 261, 959 N.Y.S.2d at 466.

89. *Id.* (quoting People v. De Bour, 40 N.Y.2d 210, 223, 352 N.E.2d 562, 571-72, 386 N.Y.S.2d 375, 384 (1976); citing People v. Hollman, 79 N.Y.2d 181, 184, 590 N.E.2d 204, 205, 581 N.Y.S.2d 619, 620 (1992)).

90. *Garcia*, 20 N.Y.3d at 323, 983 N.E.2d at 262, 959 N.Y.S.2d at 467.

91. *Id.*

92. *Id.* at 324, 983 N.E.2d at 263, 959 N.Y.S.2d at 468.

93. 20 N.Y.3d 91, 980 N.E.2d 505, 956 N.Y.S.2d 457 (2012).

94. *Id.* at 93-94, 980 N.E.2d 505, 506, 956 N.Y.S.2d 457, 458.

and . . . has agreed to waive any conflict in that regard."[95] The judge presiding over the pretrial hearing asked defendant, "Is that correct, Mr. Solomon?" and the defendant replied, "Yes, sir."[96] The record reflects no other discussion with the defendant about the conflict, and discloses nothing further about the nature of counsel's representation of the police officer.[97] The Court in reviewing held the case law "make[s] clear that a defendant in a criminal case may waive an attorney's conflict, but only after an inquiry has shown that the defendant 'has an awareness of the potential risks involved in that course and has knowingly chosen it.'"[98] The Court held that, on the facts before it, the "inquiry here, in which not even the nature of defense counsel's simultaneous representation of [the police officer] was placed on the record, was simply inadequate."[99] The Court in doing so stated, "We have specifically held, and now reaffirm, that '[a] defendant is denied the right to effective assistance of counsel guaranteed by the Sixth Amendment when, absent inquiry by the court and the informed consent of defendant, defense counsel represents interests which are actually in conflict with those of defendant.'"[100]

B. Conflict on Appeal

The Court in *People v. Prescott*[101] reviewed the defendant's claim that he was denied effective assistance of counsel due to an unwaived conflict of interest occasioned by appellate counsel's representation of the defendant's codefendant at the codefendant's sentencing hearing.[102] The People argued that the simultaneous representation was legally inconsequential due its short duration and that the appellate attorney did not represent the codefendant at the time the appeal was perfected.[103] The Court rejected the People's argument and held:

> [the c]onflict is no less significant, nor defendant's ineffective assistance of counsel claim rendered any less meritorious, because appellate counsel's representation of [the defendant] ended prior to

95. *Id.* at 94, 980 N.E.2d at 506, 956 N.Y.S.2d at 458.

96. *Id.*

97. *Id.*

98. *Solomon*, 20 N.Y.3d at 95, 980 N.E.2d at 507, 956 N.Y.S.2d at 459 (quoting People v. Gomberg, 38 N.Y.2d 307, 313-14, 342 N.E.2d 550, 554, 379 N.Y.S. 769, 775 (1975)).

99. *Id.*

100. *Id.* at 97, 980 N.E.2d at 509, 956 N.Y.S.2d at 461 (quoting People v. McDonald, 68 N.Y.2d 1, 8, 496 N.E.2d 844, 847, 505 N.Y.S.2d 824, 827 (1986)).

101. 21 N.Y.3d 925, 990 N.E.2d 125, 967 N.Y.S.2d 887 (2013).

102. *Id.* at 926, 990 N.E.2d at 126, 967 N.Y.S.2d at 888.

103. *Id.*

> completion of defendant's representation. The successive representation concerned substantially related matters, but depended on mutually incompatible legal strategies, which undermined appellate counsel's loyalties. Moreover, conflicts arise even in cases of successive representation.[104]

The Court concluded that "[h]olding otherwise would render an ineffective assistance of counsel claim based on conflict meaningless if the conflicted counsel could merely terminate representation of one party while continuing to represent another."[105]

C. Potential Conflict

In *People v. Sanchez*,[106] the defendant argued that his trial counsel was ineffective as a result of a conflict of interest stemming from Legal Aid's dual representation of the defendant and another man, in an unrelated matter by another Legal Aid attorney, who was a possible suspect in the robbery with which the defendant was charged.[107] The defendant maintained that the trial court had a duty to conduct a *Gomberg* inquiry in order to ensure that he was aware of the nature of the conflict and the risks associated with it.[108] The Court held that the defendant bears the burden of establishing a denial of meaningful representation.[109] The Court stated, "When such a claim is premised on a perceived conflict of interest, our precedent differentiates between actual and potential conflicts."[110] The Court described an actual conflict as one that "exists if an attorney simultaneously represents clients whose interests are opposed and, in such situations, reversal is required if the defendant does not waive the actual conflict."[111] In contrast, the Court held, "a potential conflict that is not waived by the accused requires reversal only if it 'operates' on or 'affects' the defense—i.e., the nature of the attorney-client relationship or underlying circumstances bear a 'substantial relation to the conduct of the

104. *Id.* at 928, 990 N.E.2d at 126-27, 967 N.Y.S.2d at 889-90.

105. *Id.* at 928, 990 N.E.2d at 127, 967 N.Y.S.2d at 890.

106. 21 N.Y.3d 216, 991 N.E.2d 698, 969 N.Y.S.2d 840 (2013).

107. *Id.* at 222, 991 N.E.2d at 702, 969 N.Y.S.2d at 844.

108. *Id.*

109. *Id.* at 222-23, 991 N.E.2d at 702, 969 N.Y.S.2d at 844 (citing People v. Baker, 14 N.Y.3d 266, 270, 926 N.E.2d 240, 243, 899 N.Y.S.2d 733, 736 (2010)).

110. *Id.* at 223, 991 N.E.2d at 702, 969 N.Y.S.2d at 844 (citing *Solomon*, 20 N.Y.3d at 97, 980 N.E.2d at 509, 956 N.Y.S.2d at 461).

111. *Sanchez*, 21 N.Y.3d at 223, 991 N.E.2d at 702, 969 N.Y.S.2d at 844 (citations omitted).

defense.'"[112] The Court further stated, "[the] requirement that a potential conflict have affected, or operated on, or borne a substantial relation to the conduct of the defense—three formulations of the same principle—is not a requirement that [the] defendant show specific prejudice."[113] However, it remains the defendant's "heavy burden" that potential conflict actually operated on the defense, and on the facts before it, the Court held the defendant had not met this burden.

D. Conflict on Client's Motion for Ineffective Counsel

In *People v. Mitchell*[114] and its companion case, *People v. Deliser,*[115] the Court was presented with the issue of whether a conflict of interest arises when, upon a motion to withdraw a guilty plea, the defense counsel takes a position contrary to the motion and thus becomes ineffective.[116] In both cases, the defendants based their motions to withdraw their guilty pleas upon the claim that they were coerced by their defense counsels to plead guilty.[117] The Court in *Mitchell* held:

> "[w]hen certain actions or inaction on the part of defense counsel are challenged on the motion, it may very well be necessary for defense counsel to address the matter when asked to by the court. When doing so, defense counsel should be afforded the opportunity to explain his performance with respect to the plea but may not take a position on the motion that is adverse to the defendant."[118]

In conclusion the Court held that at the point the defense counsel takes a position contrary to his/her client "a conflict of interest arises, and the court must assign a new attorney to represent the defendant on the motion."[119]

VI. REMOVAL OF COUNSEL

In *People v. Griffin*,[120] the Court reviewed whether the trial court's decision to remove counsel without consulting the defendant was an

112. *Id.* (citing People v. Abar, 99 N.Y.2d 406, 409, 786 N.E.2d 1255, 1257, 757 N.Y.S.2d 219, 221 (2003); People v. Ennis, 11 N.Y.3d 403, 410, 900 N.E.2d 915, 920, 872 N.Y.S.2d 364 (2008)).

113. *Id.* (quoting People v. Ortiz, 76 N.Y.2d 652, 657, 564 N.E.2d 630, 633, 563 N.Y.S.2d 20, 23 (1990)).

114. 21 N.Y.3d 964, 993 N.E.2d 405, 970 N.Y.S.2d 919 (2013) (citation omitted).

115. 85 A.D.3d 1047, 925 N.Y.S.2d 882 (2d Dep't 2011).

116. *Mitchell*, 21 N.Y.3d at 966, 993 N.E.2d at 406-07, 970 N.Y.S.2d at 920-21.

117. *Id.*

118. *Id.* at 967, 993 N.E.2d at 407, 970 N.Y.S.2d at 921.

119. *Id.* at 967, 993 N.E.2d at 407, 970 N.Y.S.2d at 921.

120. 20 N.Y.3d 626, 987 N.E.2d 282, 964 N.Y.S.2d 505 (2013).

abuse of discretion, and whether the defendant's subsequent guilty plea with new counsel waived the claim that such removal interfered with his right to counsel.[121] The People argued that the defendant, by pleading guilty, forfeited his Sixth Amendment claim. The Court rejected the People's contention stating, "'Not every claim is forfeited by a guilty plea'" and that "[c]aims related to the integrity of the criminal justice system, and 'rights of a constitutional dimension that go to the very heart of the process,' survive a guilty plea."[122] The Court stated, "'The critical distinction is between defects implicating the integrity of the process, which may survive a guilty plea, and less fundamental flaws, such as evidentiary or technical matters, which do not.'"[123] In the facts before it, the Court held that the removal of defense counsel was part of the trial court's disparate, unjustifiable treatment that went to the fundamental fairness of the system of justice and was so deeply intertwined with the integrity of the process that it survived the defendant's guilty plea.[124] The Court stated:

> [w]hile the right to counsel of choice is qualified, and may cede, under certain circumstances, to concerns of the efficient administration of the criminal justice system, we have made clear that courts cannot arbitrarily interfere with the attorney-client relationship, and interference with that relationship for purpose of case management is not without limits, and is subject to scrutiny.[125]

VII. INEFFECTIVE COUNSEL

A. Ineffective Counsel During Discovery

In *People v. Oliveras*,[126] the Court reviewed the defendant's claim that he was deprived adequate assistance of counsel on the basis that his trial attorney failed to conduct an appropriate investigation of records critical to the defense that his confession was not knowing and voluntary because of a medical history of mental illness.[127] At a CPL 440.10 hearing, the defendant's trial counsel testified that his decision not to obtain the critical medical records was due to the defendant's objection to pursuing a psychiatric defense, and he erroneously believed

121. *Id.* at 628, 987 N.E.2d at 283, 964 N.Y.S.2d at 506.

122. *Id.* at 630, 987 N.E.2d at 284, 964 N.Y.S.2d at 507 (quoting People v. Taylor, 65 N.Y.2d 1, 5, 478 N.E.2d 755, 757, 489 N.Y.S.2d 152, 154 (1985); People v. Hansen, 95 N.Y.2d 277, 230-31, 738 N.E.2d 773, 776, 715 N.Y.S.2d 369, 372 (2000)).

123. *Id.* (quoting *Hansen*, 95 N.Y.2d at 231, 738 N.E.2d at 776, 715 N.Y.S.2d at 372).

124. *Id.*

125. Griffin, 20 N.Y.3d at 630, 987 N.E.2d at 284, 964 N.Y.S.2d at 507.

126. 21 N.Y.3d 339, 993 N.E.2d 1241, 971 N.Y.S.2d 221 (2013).

127. *Id.* at 341, 993 N.E.2d at 1241-42, 971 N.Y.S.2d at 221-22.

that by obtaining the records he would be forced to turn over the records under the rules of discovery even if he never introduced them at trial or presented a formal psychiatric defense.[128] The trial counsel stated that it was his trial strategy to forgo the medical records or use of a medical expert in favor of a trial approach of convincing the jury the defendant was "not playing with a full deck," and thus, his will was overborne by the police interrogation.[129] The trial counsel attempted to achieve this goal by having "this history introduced by defendant's mother, who would discuss her son's educational, institutional, and occupational history."[130] The Court, in reviewing the record before it, rejected the People's argument that trial counsel's decision to forgo obtaining the records constituted a legitimate trial strategy by stating, "[t]he issue is not whether trial counsel's choice to have certain documents excluded from the record constitutes a legitimate trial strategy" because this argument missed the point.[131] The Court stated the real issue is "whether the failure to secure and review crucial documents, that would have undeniably provided valuable information to assist counsel in developing a strategy during the pretrial investigation phase of a criminal case, constitutes meaningful representation as a matter of law."[132] The Court concluded that it "cannot be said that a total failure to investigate the facts of a case, or review pertinent records, constitutes a trial strategy resulting in meaningful representation."[133]

B. Review of Ineffective Counsel Claim

The Court, in *People v. Oathout*,[134] was presented with the issue of what constitutes effective assistance of counsel in the context of a murder trial.[135] The Court, in doing so, stated, "So long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met."[136] On the facts before it, however, the Court found that "[w]hile defense counsel's errors in this case individually may not constitute ineffective assistance, 'the cumulative effect of [defense]

128. *Id*. at 344-45, 993 N.E.2d at 1244-45, 971 N.Y.S. at 224-25.
129. *Id*. at 344-45, 993 N.E.2d at 1244, 971 N.Y.S.2d at 224.
130. *Id.* at 345, 993 N.E.2d at 1244, 971 N.Y.S.2d at 224.
131. *Oliveras*, 21 N.Y.3d at 348, 993 N.E.2d at 1247, 971 N.Y.S.2d at 227.
132. *Id*.
133. *Id.*
134. 21 N.Y.3d 127, 989 N.E.2d 936, 967 N.Y.S.2d 654 (2013).
135. *Id.* at 128, 989 N.E.2d at 937, 967 N.Y.S.2d at 655.
136. *Id.* (quoting People v. Rivera, 71 N.Y.2d 705, 708, 525 N.E.2d 698, 700, 530 N.Y.S.2d 52, 54 (1988)).

counsel's actions deprived defendant of meaningful representation.'"[137] The Court concluded that the "[d]efense counsel's actions throughout this case showed an unfamiliarity with or disregard for basic criminal procedural and evidentiary law."[138] The Court held, "At the very least, a defendant is entitled to representation by counsel that has such basic knowledge, particularly so, when that defendant is facing a major felony with significant liberty implications."[139]

C. Ineffective Counsel on Appeal

In *People v. Townsley*, the issue presented to the Court of Appeals related to appellate counsel's failure to provide effective assistance of counsel.[140] Specifically, the defendant claimed that appellate counsel failed to argue on direct appeal that trial counsel's representation was compromised because of a conflict of interest, specifically with respect to the "advocate-witness rule."[141]

In *Townsley*, the defendant was convicted of murder, attempted murder, and assault and weapons offenses, after a trial in which witnesses testified that he shot two members of rival drug gang.[142] The theory advanced by the defendant at trial was that the leader of the defendant's gang, Simeon Nelson (known as "Sims"), was the real party responsible for the killing.[143] On the eve of the trial, defense counsel met with Simeon Nelson after Nelson had been incarcerated on unrelated offenses.[144] Presumably, Nelson refused to cooperate with defense counsel and left the meeting. At trial, the defendant testified and was asked by the prosecutor about the meeting that had taken place between Nelson and his attorneys.[145] Further, during closing argument, the prosecutor stated in relevant part:

> Is there any testimony by anyone in this trial that they spoke to Sims and confronted him? No. No lawyer for Legal Aid got on the stand and testified. You have no evidence . . . that they confronted Sims.
>
> No, they had their little meeting with Sims to see if he would help them save their client, say it wasn't him, say it was somebody else,

137. *Id.* at 132, 989 N.E.2d at 939-40, 967 N.Y.S.2d at 657-58 (quoting People v. Arnold, 85 A.D.3d 1330, 1334, 924 N.Y.S2d 679, 683 (2011)).
138. *Id.* at 132, 989 N.E.2d at 940, 967 N.Y.S.2d at 658.
139. *Id.*
140. 20 N.Y.3d 294, 982 N.E.2d 1227, 959 N.Y.S.2d 94 (2012).
141. *Id.* at 296, 982 N.E.2d at 1228, 959 N.Y.S.2d at 95.
142. *Id.*
143. *Id.*
144. *Id.* at 297, 982 N.E.2d at 1228, 959 N.Y.S.2d at 95.
145. *Townsley*, 20 N.Y.3d at 297, 982 N.E.2d at 1229, 959 N.Y.S.2d at 96.

give us some information that could get our boy and your friend off.[146]

The defendant argued that the prosecutor's cross-examination and comments during summation essentially amounted to the prosecutor accusing defense counsel of fabricating a defense.[147] The defendant further argued that because fabricating a defense creates issues related to both legal and ethical wrongdoing, defense counsel was essentially compelled to call themselves as witnesses in the case.[148] In doing so, defense counsel could rebut the prosecution's contentions regarding the purpose of the meeting and also protect themselves from claims of wrongdoing. However, pursuant to the "advocate-witnesses" rule, when such a situation arises, defense counsel cannot be both an advocate and a witness, because doing so represents a conflict of interest. Therefore, defense counsel should have withdrawn from the case and called themselves as witness, eliminating the conflict of interest the defendant contends arose following the prosecutor's cross-examination and closing argument.

In rejecting this claim, the Court of Appeals noted that a determination of attorney effectiveness on appeal is gauged by examining the merits of the underlying claim.[149] In this regard, the relevant inquiry is whether "the attorney provided meaningful representation."[150] The Court went on to further note that, "[a]ppellate lawyers 'have latitude in deciding which points to advance' and need not 'brief or argue every issue that may have merit.'[151] In reviewing the performance of appellate counsel, 'the minimum standard of performance required . . . is a very tolerant one.'"[152]

Applying the law to the facts of the case, the Court concluded that appellate counsel was not ineffective for failing to raise the conflict of interest issue on direct appeal.[153] The Court reasoned that the prosecutor's comments did not in fact create a conflict of interest.[154] First, the Court of Appeals reasoned that they could be read as mere demonstration that the witness was not entirely in control of the

146. *Id.*

147. *Id.* at 298, 982 N.E.2d at 1229, 959 N.Y.S.2d at 96.

148. *Id.*

149. *Id.* at 298, 982 N.E.2d at 1229, 959 N.Y.S.2d at 96.

150. *Townsley*, 982 N.E.2d at 1230, 959 N.Y.S.2d at 97 (quoting People v. Baldi, 54 N.Y.2d at 137, 147, 429 N.E.2d 400, 405, 444 N.Y.S.2d 893, 898 (1981)).

151. *Id.* (quoting People v. Stultz, 2 N.Y.3d 277, 285, 810 N.E.2d 883, 888, 778 N.Y.S.2d 431, 436 (2004)).

152. *Id.*

153. *Id.* (quoting People v. Turner, 5 N.Y.3d 476, 480, 840 N.E.2d 123, 125, 806 N.Y.S.2d 154, 156 (2005)).

154. *Id.* at 299, 982 N.E.2d at 1230, 959 N.Y.S.2d at 97.

government, a showing that must be made in order for the defense to receive a missing witness instruction.[155] Second, the Court reasoned that to the extent that the prosecutor's comments insinuated improper behavior on behalf of defense counsel, while inappropriate, they warranted only a rebuke from the trial judge and nothing more.[156] The prosecutor did not say, or arguably imply, that defense counsel had asked the witness to provide false testimony.[157] Therefore, because appellate counsel could have reasonably concluded that no conflict of interest existed; appellate counsel was not ineffective in failing to raise the claim on direct appeal.[158]

VIII. SENTENCING

A. Post-Release Supervision

In *People v. Brinson*[159] and its companion case *People v. Blankymsee*,[160] the Court reviewed the defendants' claims "that the imposition of mandatory postrelease supervision (PRS) to [their] determinate sentences at resentencing violates the Fifth Amendment Double Jeopardy Clause of the federal constitution."[161] The "[d]efendants claimed that they had completed their determinate sentences; therefore imposition of PRS violates the prohibition against multiple punishments."[162] "In both these cases, defendants were resentenced because the sentencing court failed to impose PRS as part of the original sentence."[163] The Court stated the Fifth Amendment's Double Jeopardy Clause prohibits multiple punishments for the same crime, and "[t]his prohibition 'prevents a sentence from being increased once the defendant has a legitimate expectation in the finality of the sentence.'"[164] However, the Court held that in circumstances such as the facts before it, the "defendants are 'presumed to be aware that a determinate prison sentence without a term of PRS is illegal' . . . and [that] courts have an inherent authority to correct illegal sentences."[165]

155. *Townsley*, 20 N.Y.3d at 300, 982 N.E.2d at 1231, 959 N.Y.S.2d at 98.
156. *Id.*
157. *Id.*
158. *Id.* at 301, 982 N.E.2d at 1231, 959 N.Y.S.2d at 98.
159. 21 N.Y.3d 490, 995 N.E.2d 144, 972 N.Y.S.2d 182 (2013).
160. 92 A.D.3d 890, 938 N.Y.S.2d 816 (2d Dep't 2012).
161. *Brinson*, 21 N.Y.3d at 492, 995 N.E.2d at 145, 972 N.Y.S.2d at 183.
162. *Id.*
163. *Id.*
164. *Id.* at 494, 995 N.E.2d at 146, 972 N.Y.S.2d at 184 (quoting People v. Williams, 14 N.Y.3d 198, 215, 925 N.E.2d 878, 888, 899 N.Y.S.2d 76, 86 (2010)).
165. *Id.*

The Court further stated that the opportunity to correct such illegality is not without end, and "there must be a temporal limitation on a court's ability to resentence a defendant since criminal courts do not have perpetual jurisdiction over all persons who were once sentenced for criminal acts."[166] The Court also stated that the "temporal limitation demarcation occurs once the sentence is served and the appeal is completed, or the time for such appeal [h]as expired."[167] Despite the fact the defendants remained incarcerated pursuant to an aggregate sentence which reflected the time imposed for all of the convictions, the defendants argued they had an expectation of finality because by the time of resentencing, they had already completed the determinate sentences for the counts subject to PRS. In rejecting this argument, the Court held that the defendants would only have a legitimate expectation of finality upon completion of their respective aggregated sentences, but until such time, resentencing for purposes of correcting their illegal determinate sentences did not run afoul of the Double Jeopardy Clause and the prohibition against "multiple punishments."[168]

The defendant in *People v. Monk* appealed his conviction on the basis that "the sentence promise was deficient because the judge 'did not explain to [him] at the time of the plea that a violation of the post release supervision could result in his being incarcerated for up to five additional years of imprisonment, over and above the ten years promised by the Court.'"[169] The Court was faced with the question of whether a defendant must be advised of potential consequences for violating PRS as a direct consequence of the defendant's guilty plea or whether these are collateral consequences and thus need not be addressed by the sentencing court.[170] In making this determination the Court stated direct consequences of a plea of which a defendant must be advised consist of the core components of a defendant's sentence, that is, a term of probation or imprisonment, a term of PRS, or a fine; by contrast, collateral consequences which a court is not required to advise defendant of are peculiar to the individual and generally result from the actions taken by agencies the court does not control.[171] The Court concluded that potential violations of PRS were collateral consequences and therefore need not be addressed by the sentencing court because consequences for violating PRS were uncertain at time of plea, as they

166. *Brinson*, 21 N.Y.3d. at 494, 995 N.E.2d at 146, 972 N.Y.S.2d at 184.
167. *Id.*
168. *Id.* at 496, 995 N.E.2d at 148, 972 N.Y.S.2d at 186.
169. 21 N.Y.3d 27, 30, 989 N.E.2d 1, 2, 966 N.Y.S.2d 739, 740 (2013).
170. *Id.* at 31-33, 989 N.E.2d at 3-4, 966 N.Y.S.2d at 741-42.
171. *Id.* at 32, 989 N.E.2d at 3-4, 966 N.Y.S.2d at 741-42.

depended upon how defendant acted in relation to conditions of supervision. The Board of Parole, rather than the court, established conditions of supervision, and the Board of Parole also decided if defendant violated supervision as well as a remedy.[172]

B. Judiciary Law Section 21

The Court in *People v. Hampton* was presented with the question of whether Judiciary Law section 21 prohibits a substitute judge from deciding a question of law presented in a motion argued orally before another judge.[173] The Court held the statute did not bar a judge from deciding or taking part in a decision on a question argued orally when that judge was not present and does not bar a substitute judge from deciding a question of law presented in a motion argued orally before another judge so long as a transcript or recording of the prior argument is available for review, and the substitute indicates on the record the requisite familiarity with the proceedings, and no undue prejudice occurs to the defendant or the People.[174] In reaching this conclusion, the Court rejected the defendant's argument that the substitute judge was barred by the statute because a trial judge must assess witness credibility when making a legal sufficiency determination.[175] In contrast, the Court held that in deciding a motion to set aside a verdict based upon legal sufficiency, it is purely a question of law and does not permit determinations of credibility.[176]

C. Resentencing Pursuant to the Drug Law Reform Act of 2009

In *People v. Norris*, the Court of Appeals addressed the question of whether a sentencing court can make previously imposed consecutive sentences run concurrently when a defendant is resentenced pursuant to the Drug Law Reform Act of 2009 ("DLRA").[177] In *Norris,* two defendants received multiple indeterminate sentences based on each count of criminal sale of a controlled substance.[178] Each sentence ran consecutively for an aggregate indeterminate sentence totaling fifteen to thirty years for each defendant.[179] Pursuant to the enactment of the

172. *Id.* at 32, 989 N.E.2d at 4, 966 N.Y.S.2d at 742.
173. 21 N.Y.3d 277, 279, 992 N.E.2d 1059, 1060, 970 N.Y.S.2d 716, 717 (2013).
174. *Id.*
175. *Id*. at 287, 992 N.E.2d at 1066, 970 N.Y.S.2d at 723.
176. *Id.* at 287, 992 N.E.2d at 1065-66, 970 N.Y.S.2d at 722-23.
177. 20 N.Y.3d 1068, 1072-73, 986 N.E.2d 901, 903, 964 N.Y.S.2d 67, 69 (2013); *see also* N.Y. CRIM. PROC. LAW § 440.46 (McKinney 2014).
178. *Norris*, 20 N.Y.3d at 1070, 986 N.E.2d at 901-02, 964 N.Y.S.2d at 67-68.
179. *Id.* at 1071, 986 N.E.2d at 902, 964 N.Y.S.2d at 68.

DLRA, both defendants sought resentencing to determinate sentences of which the trial court complied.[180] However, while each count upon which both defendants were convicted was made determinate, all of the determinate sentences were to run consecutively of each other, consistent with the original imposition of consecutive sentences imposed by the trial court.[181] As a result, the defendants received aggregate determinate sentence terms of twenty-one and twenty-four years.[182]

Both defendants contended that the trial court had authority not only to resentence the defendants to determinate sentences, but also to run those sentences concurrent to each other.[183] The Court of Appeals disagreed.[184] The Court concluded that pursuant to Penal Law section 70.25, a court is authorized to direct whether sentences run concurrently or consecutively only "[w]hen multiple sentences of imprisonment are imposed on a person at the same time, or when a person who is subject to any undischarged term of imprisonment imposed at a previous time by a court of this state is sentenced to an additional term of imprisonment."[185]

The Court of Appeals reasoned that neither circumstance is presented when a court imposes a determinate sentence pursuant to the DLRA.[186] In concluding that resentencing courts do not have the authority to make previously imposed consecutive sentences run concurrently in the circumstances presented, the Court reasoned that pursuant to Penal Law section 70.25, "[r]esentencing courts are not given the discretion to fashion new sentences or add terms of imprisonment, but are constrained to make an existing sentence determinate in the manner dictated by the DLRA."[187]

In *People v. Monroe*,[188] the defendant was serving a four-and-one-half to nine-year sentence for drug felonies and was subsequently indicted for participating in a narcotics trafficking conspiracy. The defendant pled guilty to the subsequent charges and at sentencing was reassured that his plea of guilty would be conditioned upon the sentence of six to twelve years that would run concurrently with each other and

180. *Id.*
181. *Id.*
182. *Id.*at 1071, 986 N.E.2d at 902, 964 N.Y.S.2d at 68.
183. *Norris*, 20 N.Y.3d at 1071, 986 N.E.2d at 902, 964 N.Y.S.2d at 68.
184. *Id.* at 1072, 986 N.E.2d at 902, 964 N.Y.S.2d at 68.
185. *Id.* at 1072, 986 N.E.2d at 902-03, 964 N.Y.S.2d at 68-69 (citing N.Y. CRIM. PROC. LAW § 70.25 (McKinney 2009)).
186. *Id.* at 1072., 986 N.E.2d at 903, 964 N.Y.S.2d at 69.
187. *Id.*
188. 21 N.Y.3d 875, 876, 988 N.E.2d 497, 498, 965 N.Y.S.2d 762, 762 (2013).

additionally would run *nunc pro tunc*.[189] The sentencing justice specifically reassured the defendant that "it's an additional year and a half in effect before parole."[190] Following the enactment of the DLRA,[191] the Court, resentencing the defendant, reduced his original four-and-a-half to nine-year sentence to three years to be followed by two years of PRS.[192] After the resentencing on the drug felonies, the gap between the minimum terms of incarceration doubled from the year-and-a-half specifically promised by the sentencing judge in the conspiracy case to three years.[193] The defendant on appeal argued that his plea of guilty to the conspiracy charge was unknowing because he was induced by the promise that his plea would only extend his incarceration by a year-and-a-half. The Court held that, on the record before it, there was ample evidence that the defendant, "who was clearly working toward achieving the earliest release date possible, would have pleaded guilty absent this assurance."[194] The Court concluded that, "[g]enerally, 'when a guilty plea has been induced by an unfulfilled promise either the plea must be vacated or the promise honored, but that the choice rests in the discretion of the sentencing court.'"[195]

IX. DEPRAVED INDIFFERENCE MURDER

The defendant in *People v. Martinez*[196] was acquitted of intentional murder but convicted of depraved indifference murder for shooting and killing in the context of a drug deal gone bad.[197] The defendant, a drug dealer, was involved in an argument with the victim, a would-be drug buyer, which escalated into a physical fight that ultimately led to the defendant chasing the victim into a building where he fired four or five shots in close range, hitting the victim in the chest, killing the victim and wounding a bystander.[198] After the close of evidence the defendant moved to have the depraved indifference murder count dismissed, arguing that the evidence demonstrated that if anything, the defendant was guilty of intentional homicide.[199] The majority of the Court of Appeals held the "evidence that defendant, after an altercation with

189. *Id.* at 876, 988 N.E.2d at 498, 965 N.Y.S.2d at 762-63.
190. *Id.* at 877, 988 N.E.2d at 498, 965 N.Y.S.2d at 763.
191. N.Y. CRIM. PROC. LAW § 440.46 (McKinney 2009).
192. *Monroe*, 21.N.Y.3d at 877, 988 N.E.2d at 499, 965 N.Y.S.2d at 763.
193. *Id.*
194. *Id.* at 878, 988 N.E.2d at 499, 965 N.Y.S.2d at 763.
195. *Id.* at 878, 988 N.E.2d at 499, 965 N.Y.S.2d at 763-64 (citations omitted).
196. 20 N.Y.3d 971, 983 N.E.2d 751, 959 N.Y.S.2d 674 (2012).
197. *Id.* at 973, 983 N.E.2d at 752, 959 N.Y.S.2d at 675.
198. *Id.* at 972-973, 983 N.E.2d at 751-752, 959 N.Y.S.2d at 674- 675.
199. *Id.* at 973, 983 N.E.2d at 752, 959 N.Y.S.2d at 675.

[victim], obtained a gun, chased [victim] down, and fired four or five shots at [victim] at near point–blank range," was legally insufficient to establish defendant's guilt of depraved indifference murder.[200] Judge Smith, in his concurrence, looked to the jurisprudence developed under *People v. Register*[201] and *People v. Sanchez*,[202] which established two features of special importance in cases involving "fatal one-on-one shootings or knifings."[203] Concurring, Judge Smith first stated that "the question of the defendant's state of mind" was thought "to be a classic matter for the jury," so that a defendant could be found to have acted recklessly even where there was "compelling circumstantial evidence of intent to cause death."[204] Secondly, when "a defendant's actions created an almost certain risk of death," that was viewed as sufficient in itself to support a finding of "circumstances evincing a depraved indifference to human life."[205] Judge Smith, in looking at the second feature, stated that "defendant's shooting into the victim's torso at point-blank range presented such a transcendent risk of causing his death that it readily meets the level of manifested depravity needed to establish murder under Penal Law § 125.25(2)."[206] However post *Register* and *Sanchez*, the Court's jurisprudence changed by a series of cases that the Court summarized in *Policano v. Herbert*:

> Our interpretation of . . . "under circumstances evincing a depraved indifference to human life" . . . gradually and perceptibly changed from an objectively determined degree-of-risk standard (the *Register* formulation) to a mens rea, beginning with our decision in *Hafeez* in 2003, continuing in our decisions in *Gonzalez*, *Payne* and *Suarez* in 2004 and 2005, and ending with our decision in *Feingold* in 2006. . . . As the many concurring decisions and dissents in these cases and the dissent in this case illustrate, individual judges hold differing views as to where along this trajectory a majority of the Court may have effectively passed the point of no return—the limit beyond which, hard as we may have tried, it was simply not possible to reconcile our developing case law with *Register* and *Sanchez*. There is no doubt, however, that a majority of the Court explicitly overruled *Register* and *Sanchez* in *Feingold*, holding that '"depraved indifference to human

200. *Id.* at 972, 983 N.E.2d at 751, 959 N.Y.S.2d at 674.
201. 60 N.Y.2d 270, 270, 457 N.E.2d 704, 704, 469 N.Y.S.2d 599, 599 (1983).
202. 98 N.Y.2d 373, 373, 777 N.E.2d 204, 204, 748 N.Y.S.2d 312, 312 (2002).
203. *Martinez*, 20 N.Y.3d at 974-975, 983 N.E.2d at 753, 959 N.Y.S.2d at 676.
204. *Id.* at 975, 983 N.E.2d at 753, 959 N.Y.S.2d at 676.
205. *Id.*
206. *Id.* (citing N.Y. PENAL LAW § 125.25(2) (McKinney 2009)).

life" is a culpable mental state."[207]

The concurrence stated that under the current jurisprudence depraved murder convictions cannot be upheld where the evidence of intent to kill is compelling and that intent to kill and "depraved indifference to human life" are incompatible states of mind.[208] Judge Smith quoted *People v. Payne*, in which the Court held that "[w]hile we have identified instances in which a killing could qualify as depraved indifference murder, a point-blank shooting is ordinarily not one of them."[209] Subsequent to the Court's abandonment of the *Register-Sanchez* approach, the defendant's appeal raised the question of how to deal with defendants who, like the defendant in the case before it, were convicted while *Register* remained the law.[210] Judge Smith then turned to his decision in *People v. Jean-Baptiste*[211] in holding that while the "'post-Sanchez case law' did not apply retroactively," the Court would review cases where the defendant had adequately challenged the sufficiency of the proof as to the depraved indifference murder conviction and thus preserved the issue for review.[212] The Court stated "[t]he preservation rule, like our retroactivity holding in *Policano*, serves to prevent the unnecessary overturning of convictions of '[d]efendants who committed vicious crimes but who may have been charged and convicted under the wrong section of the statute.'"[213] Turning to the facts in the present case, Judge Smith found that the defendant had adequately preserved the challenge to the sufficiency of the proof as to the depraved indifference murder conviction and thus preserved the issue for review.[214]

The defendant in *People v. McFadden* presented the issue to the Court as to "whether double jeopardy barred defendant from being retried for criminal possession of a controlled substance in the third degree after a previous jury had deadlocked on that charge, but rendered a partial verdict convicting him of the lesser included offense of criminal possession of a controlled substance in the seventh degree."[215]

207. 7 N.Y.3d 588, 602-03, 859 N.E.2d 484, 494-95, 825 N.Y.S.2d 678, 688-89 (2006).

208. *Martinez*, 20 N.Y.3d at 976, 983 N.E.2d at 754, 959 N.Y.S.2d at 677.

209. *Id.* (quoting People v. Payne, 3 N.Y.2d 266, 270, 819 N.E.2d 634, 635, 786 N.Y.S.2d 116, 117 (2004)).

210. *Id.*

211. 11 N.Y.3d 539, 901 N.E.2d 192, 872 N.Y.S.2d 701 (2008).

212. *Martinez*, 20 N.Y.3d at 976-77, 983 N.E.2d at 754, 959 N.Y.S.2d at 677.

213. *Id*. at 977, 983 N.E.2d at 755, 959 N.Y.S.2d at 678 (quoting People v. Suarez, 6 N.Y.3d 202, 217, 844 N.E.2d 721, 733, 811 N.Y.S.2d 267, 279 (2005)).

214. *Id*.

215. 20 N.Y.3d 260, 262, 982 N.E.2d 1241, 1241, 959 N.Y.S.2d 108, 108 (2012).

During deliberations, the jury sent out a note indicating that one of the jurors requested to be relieved due to health problems that were being exacerbated by the inability of the jury to reach a unanimous verdict on the controlled substance in the third degree charge, but the jury had reached a unanimous verdict on the lesser charge of controlled substance in the seventh degree.[216] The defense counsel requested a mistrial on the controlled substance in the third degree charge but did not object to the Court's acceptance of the partial verdict on the lesser controlled substance in the seventh degree charge.[217] The defense counsel requested the transcripts in order to prepare for the retrial and the parties agreed to select a date for the retrial at the defendant's sentencing proceeding.[218] Prior to the second trial, the defense counsel moved to dismiss the controlled substance in the third degree charge on double jeopardy grounds.[219] The Court of Appeals, in reviewing the case, held "[u]nder the CPL, which contemplates that a jury is properly instructed to consider inclusory concurrent counts in the alternative, a conviction of a lesser offense is deemed an acquittal of the greater counts submitted."[220] However, the Court went on to state that "a defendant can, by his or her conduct, relinquish a double jeopardy claim."[221] Given the facts presented, the Court held that the defense counsel had failed "to object to the improper jury instruction and affirmatively requested a mistrial after the court expressly stated on the record that defendant faced retrial on the top two counts."[222] The Court held that "[h]aving charted his own course by opting for a mistrial and a retrial on the remaining counts, defendant cannot now claim that his retrial is barred."[223]

In *People v. Mox*, the defendant, with a history of mental illness, and charged with murder in the second degree, accepted an offer to plead guilty to the lesser included offense of manslaughter in the first degree under a theory of extreme emotional disturbance.[224] "During the plea colloquy . . . the defendant stated that on the day of the crime, he was 'hearing voices' and feeling painful bodily sensations, was 'in a psychotic state' and had not taken his prescribed medication for several

216. *Id.* at 262, 982 N.E.2d at 1242, 959 N.Y.S.2d at 109.
217. *Id*. at 262-63, 982 N.E.2d at 1242, 959 N.Y.S.2d at 109.
218. *Id*. at 263, 982 N.E.2d at 1242, 959 N.Y.S.2d at 109.
219. *Id*.
220. *McFadden*, 20 N.Y.3d at 264, 982 N.E.2d at 1243, 959 N.Y.S.2d at 110.
221. *Id*. (citing People v. Echevarria, 6 N.Y.3d 89, 92-93, 843 N.E.2d 149, 151, 809 N.Y.S.2d 509, 511 (2005)).
222. *Id*.
223. *Id*.
224. 20 N.Y.3d 936, 937, 982 N.E.2d 590, 591, 958 N.Y.S.2d 670, 671 (2012).

days."[225] The judge accepted the defendant's plea immediately after the defense counsel stated on the record that the defendant had been informed of "'the potential defense of not guilty by reason of mental disease or defect . . . and that he was willing to forgo that defense in order to accept this plea.'"[226] The judge inquired of the defendant if this was true, and the defendant responded it was.[227] There was no further inquiry.[228] Prior to sentencing, the defendant, represented by new counsel, moved pursuant to CPL 220.60 to have the plea withdrawn on the grounds that his waiver was not knowing, voluntary, and intelligent.[229] The Court, in reviewing this case, held that "defendant's statements that he was 'in a psychotic state' and 'hearing voices' on the day of the crime signaled that he may have been suffering from a mental disease or defect at that time and, consequently, was unable to form the intent necessary to commit first-degree manslaughter under Penal Law [section] 125.20(2)."[230] The Court concluded that the trial court "had a duty under *Lopez*[231] and *Serrano*[232] to inquire further into whether defendant's decision to waive a potentially viable insanity defense was an informed one such that his guilty plea was knowing and voluntary" and that the judge's single question did not satisfy this obligation.[233]

The defendant in *People v. Meckwood* argued he should not have been adjudicated a second violent felony offender because it was predicated upon a prior foreign conviction that occurred when he was eighteen years old, and that, had he committed that crime in New York, he could have been adjudicated a youthful offender.[234] The defendant proposed that he was entitled to such status as a youthful offender for the purpose of enhanced sentencing.[235] The defendant further argued that "Penal Law [section] 70.04(1)(b)(v)'s tolling provision violates the Equal Protection Clause of the New York State Constitution."[236] The Court, in rejecting the defendant's first argument, held the New York courts "have declined to retroactively assign youthful offender status to

225. *Id*. at 937-38, 982 N.E.2d at 591, 958 N.Y.S.2d at 671.
226. *Id*. at 938, 982 N.E.2d at 591, 958 N.Y.S.2d at 671.
227. *Id.*
228. *Id.*
229. *Mox*, 20 N.Y.3d at 938, 982 N.E.2d at 591, 958 N.Y.S.2d at 671.
230. *Id.* at 938-39, 982 N.E.2d at 592, 958 N.Y.S.2d at 672.
231. *See* People v. Lopez, 71 N.Y.2d 662, 525 N.E.2d 5, 529 N.Y.S.2d 465 (1988).
232. *See* People v. Serrano, 15 N.Y.2d 304, 206 N.E.2d 330, 258 N.Y.S.2d 386 (1965).
233. *Mox*, 20 N.Y.3d at 939, 982 N.E.2d at 592, 958 N.Y.S.2d at 672.
234. 20 N.Y.3d 69, 71, 980 N.E.2d 501, 502, 956 N.Y.S.2d 453, 454 (2012).
235. *Id.*
236. *Id.*

underlying convictions of foreign jurisdictions even though, had the crimes been committed in New York, such consideration could have been granted."[237] The Court further stated:

> "mere speculation that defendant might have been accorded youthful offender treatment had the offense been committed in New York, where such treatment was not and could not have been accorded by the jurisdiction in which the crime was actually committed, cannot preclude the use of such a conviction as a predicate felony."[238]

In rejecting the defendant's second claim, the Court stated that "'[t]he equal protection clause does not mandate absolute equality of treatment but merely prescribes that, absent a fundamental interest or suspect classification, a legislative classification be rationally related to a legitimate State purpose,'"[239] and "given the absence of a suspect class or a fundamental right at issue, this statutory provision 'need only be supported by some rational basis to survive constitutional scrutiny.'"[240]

The Court of Appeals, in reviewing *People v. Belliard*, held Penal Law section 70.25 (2–a), which requires that a prison term imposed upon a second felony offender run consecutively to a previously imposed undischarged sentence, is "a collateral rather than direct consequence of a conviction in determining the adequacy of a plea allocution."[241] The Court rejected the defendant's claim "that his plea must be vacated because the trial court neglected to inform him that the determinate term of [twelve] years imposed as a result of his plea bargain was to run consecutively to the undischarged portion of the sentence relating to the earlier state drug conviction."[242] The Court concluded that the precedent set in *Gravino*,[243] *Harnett*,[244] and *Gill*[245] establishes that "the consecutive nature of defendant's sentence pursuant to Penal Law [section] 70.25(2–a) [was] a collateral

237. *Id.* at 72, 980 N.E.2d at 502, 956 N.Y.S.2d at 454.

238. *Id.* at 72-73, 980 N.E.2d at 502-03, 956 N.Y.S.2d at 454-55 (quoting People v. Treadwell, 80 A.D.2d 697, 698, 436 N.Y.S.2d 457 (3d Dep't 1981)).

239. *Meckwood*, 20 N.Y.3d at 73, 980 N.E.2d at 503, 956 N.Y.S.2d at 455 (quoting People v. Parker, 41 N.Y.2d 21, 25, 359 N.E.2d 348, 350, 390 N.Y.S.2d 837, 839 (1976)).

240. *Id.* (quoting People v. Walker, 81 N.Y.2d 661, 668, 623 N.E.2d 1, 5-6, 603 N.Y.S.2d 280, 284-85 (1993)).

241. 20 N.Y.3d 381, 383, 985 N.E.2d 415, 416, 961 N.Y.S.2d 820, 821 (2013).

242. *Id.* at 384, 985 N.E.2d at 417, 961 N.Y.S.2d at 822.

243. *See* People v. Gravino, 14 N.Y.3d 546, 928 N.E.2d 1048, 902 N.Y.S.2d 851 (2010).

244. *See* People v. Harnett, 16 N.Y.3d 200, 945 N.E.2d 439, 920 N.Y.S.2d 246 (2011).

245. *See* People ex rel. Gill v. Greene, 12 N.Y.3d 1, 903 N.E.2d 1146, 975 N.Y.S.2d 826 (2009).

consequence" and, therefore, "the failure of the trial court to address the impact of Penal Law [section] 70.25(2–a) during the plea colloquy did not require vacatur of the plea."[246]

The defendant in *People v. Rudolph* was charged with several counts of felony drug possession, committed when he was seventeen years old.[247] The prosecutor stated on the record at the time of defendant's plea that "we can eliminate [youthful offender] as part of the plea bargain" due to the seriousness of the crime.[248] At no time during the defendant's plea or subsequently at his sentencing did the court or defense counsel mention the defendant's eligibility for youthful offender status.[249] Defendant subsequently appealed, arguing that the trial court had erred in failing to address the question of youthful offender eligibility.[250] The Court of Appeals overruled its decision in *People v. McGowen*,[251] stating, "CPL section 720.20(1) says that, where a defendant is eligible to be treated as a youthful offender, the sentencing court 'must' determine whether he or she is to be so treated," and that "compliance with this statutory command cannot be dispensed with, even where defendant has failed to ask to be treated as a youthful offender, or has purported to waive his or her right to make such a request."[252] Judge Graffeo in his concurrence agreed with the majority in overruling *McGowen*; however, the concurring opinion disagreed with the majority to the extent that it concluded that a defendant may not expressly waive youthful offender status as part of a negotiated plea.[253]

In *People v. Hanley*, the defendant, a twenty-one-year-old college student with a history of mental health problems, entered the City College in Manhattan armed with a revolver and a suicide note.[254] When confronted by the police, the defendant brandished the loaded handgun and held a woman hostage by pointing the pistol at her head and threatened to shoot her if anyone moved.[255] The defendant pleaded with the police to shoot him, and when they did not, he let the woman go; he then threatened to shoot himself, but the officers were able to

246. *Belliard*, 20 N.Y.3d at 389, 985 N.E.2d at 420, 961 N.Y.S.2d at 825.
247. 21 N.Y.3d 497, 499, 997 N.E.2d 457, 457, 974 N.Y.S.2d 885, 885 (2013).
248. *Id*. at 500, 997 N.E.2d at 457, 974 N.Y.S.2d at 885.
249. *Id*.
250. *Id*. at 500, 997 N.E.2d at 457-58, 974 N.Y.S.2d at 885-86.
251. 42 N.Y.2d 905, 366 N.E.2d 1347, 397 N.Y.S.2d 993 (1977).
252. *Rudolph*, 21 N.Y.3d at 499, 997 N.E.2d at 457, 974 N.Y.S.2d at 885.
253. *Id.* at 503, 997 N.E.2d at 460, 974 N.Y.S.2d at 888 (Graffeo, J., concurring).
254. 20 N.Y.3d 601, 603, 987 N.E.2d 268, 269, 964 N.Y.S.2d 491, 492.
255. *Id*.

convince the defendant to surrender.[256] The grand jury returned an indictment for second-degree kidnapping, two counts of second-degree weapon possession, and first-degree reckless endangerment.[257] The defense counsel filed a notice of intent to present psychiatric evidence, but, instead of proceeding to trial, the defendant pled guilty to the entire indictment after being promised by the judge that he would be sentenced to twelve to fifteen years and five years of post-release supervision.[258] The defendant subsequently appealed, arguing that his holding of the hostage was incidental to the conduct constituting the reckless endangerment and that the kidnapping count should have merged with the reckless endangerment offense.[259] The People argued that the defendant waived the merger doctrine by pleading guilty to the entire indictment and that he failed to preserve any objection to failure of the trial court to apply it.[260] In reviewing the issue, the Court of Appeals held that the "Court does not consider claims of error not preserved by appropriate objection in the court of first instance."[261] However, the Court stated, "A narrow exception exists for 'so-called "mode of proceedings" errors.'"[262] This exception the Court states encompasses only "the most fundamental flaws"[263] that implicate "jurisdictional matters. . .or rights of a constitutional dimension that go to the very heart of the process."[264] However, aside from the errors contained in this narrow exception, the Court stated the legal issue must be preserved in the trial court.[265] Turning to the merger doctrine, the Court stated it "does not fit within the purpose of the mode of proceedings exception to the preservation rule."[266] The Court held that the "[m]erger is a judicially-devised concept premised on fundamental fairness and an aversion to prosecutorial abuse."[267] The doctrine "is

256. *Id*.

257. *Id.* at 604, 987 N.E.2d at 269, 964 N.Y.S.2d at 492.

258. *Id*.

259. *Hanley*, 20 N.Y.3d at 604, 987 N.E.2d at 270, 964 N.Y.S.2d at 493.

260. *Id*. at 605, 987 N.E.2d at 270, 964 N.Y.S.2d at 493.

261. *Id*. at 604, 987 N.E.2d at 270, 964 N.Y.S.2d at 493 (quoting People v. Becoats, 17 N.Y.3d 643, 650, 958 N.E.2d 865, 867, 934 N.Y.S.2d 737, 739 (2011)).

262. *Id*. (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)).

263. *Id.* (quoting *Becoats*, 17 N.Y.3d at 651, 958 N.E.2d at 867, 934 N.Y.S.2d at 739).

264. *Hanley*, 20 N.Y.3d at 605, 987 N.E.2d at 270, 964 N.Y.S.2d at 493 (quoting People v. Parilla, 8 N.Y.3d 654, 659, 870 N.E.2d 142, 145, 838 N.Y.S.2d 824, 827 (2007)).

265. *Id.*

266. *Id*. at 606, 987 N.E.2d at 271, 964 N.Y.S.2d at 494.

267. *Id*.

designed to prevent inordinately punitive sentences but it is not jurisdictional in nature and does not implicate any fundamental constitutional concerns that strike at the core of the criminal adjudicatory process."[268] In conclusion, the Court held that the merger doctrine must be raised in the trial court, and the defendant's failure to do so means that the Court is precluded from reviewing the issue.[269]

X. SEX OFFENDERS

In *People v. Palmer* and its companion case *People v. Long*, the Court determined the standard of proof necessary for assessing risk factor points under the Sex Offender Registration Act ("SORA").[270] At issue in the two cases was the extent of proof necessary to constitute clear and convincing evidence of "drug or alcohol abuse" under the SORA Guidelines for assessing an additional fifteen points under risk factor eleven if the defendant has a history of drug or alcohol abuse or if they were abusing drugs or alcohol at the time of the sex offense.[271] The Court in reviewing both cases found the People had failed to establish the necessary evidence to meet the standard of clear and convincing evidence.[272] In *Palmer*, the Court held there was no evidence the defendant had a history of alcohol abuse or that he had abused alcohol at the time of the offense.[273] The Court stated, "Clear and convincing evidence of alcohol abuse at the time of the offense might consist of proof of an excessive quantity of alcohol imbibed, proof that the offender was impaired, or proof that there was a direct link between the offender's drinking and his sex predation." However, in Palmer's case, the Court held there was no such evidence, and therefore, the People failed to meet the necessary burden of clear and convincing evidence.[274] In *Long*, the Court held that the People failed to demonstrate that the defendant's ninety minutes of drinking beer constituted alcohol abuse, and they failed to prove how many drinks he imbibed during these ninety minutes, if he is was intoxicated, or what, if any, the alcohol consumption had in connection with the offense.[275] Thus, the Court concluded in both cases that the hearing courts simply

268. *Id.*

269. *Hanley*, 20 N.Y.3d at 606, 987 N.E.2d at 271-2, 964 N.Y.S.2d at 494-5.

270. People v. Palmer, 20 N.Y.3d 373, 376, 984 N.E.2d 917, 918, 960 N.Y.S.2d 719, 720 (2013); People v. Long, 89 A.D.3d 1513, 1513, 933 N.Y.S2d 476, 477 (4th Dep't 2011).

271. *Id.*

272. *Palmer*, 20 N.Y.3d at 376, 984 N.E.2d at 918, 960 N.Y.S.2d at 720.

273. *Id*. at 379, 984 N.E.2d at 921, 960 N.Y.S.2d at 723.

274. *Id.*

275. *Id*.

did not have the evidence before them to determine that there was clear and convincing evidence which allows the assessment of the additional fifteen points under SORA.[276]

In *State of New York v. Shannon S.*, the Court reviewed whether there was legally sufficient evidence to support the finding that the respondent suffered from a mental abnormality as defined under article ten of the Mental Hygiene Law such that he may be civilly committed.[277] The respondent had an extensive criminal record that included various sexual offenses involving non-consenting or underage, adolescent victims.[278] During his incarceration, the respondent was diagnosed with paraphilia not otherwise specified ("paraphilia NOS"), antisocial personality disorder, as well as alcohol abuse.[279] "In a written evaluation report, [the evaluating doctor] concluded that respondent suffer[ed] from a mental abnormality within the meaning of article [ten] of the Mental Hygiene Law that predisposes him to the commission of sexual offenses and makes it difficult for him to control such behavior."[280]

> Specifically, [the doctor] noted that respondent's criminal history "demonstrated a deviant sexual interest in adolescents below the age of consent" and "his six year pattern of sexual offending behavior toward adolescent females, des-pite repeated sanctions, and his pronounced cognitive distortions involving sexual relationships with children indicate the presence of a paraphilic disorder with regard to non-consenting adolescent females."[281]

Respondent argued upon appeal that "absent a diagnosis of a mental disease or disorder listed within the DSM, the evidence is legally insufficient to support a determination that an individual suffers from a mental abnormality under the Mental Hygiene Law."[282] The Court held that "[c]ertain diagnoses may, of course, be premised on such scant or untested evidence and 'be so devoid of content, or so near-universal in [their] rejection by mental health professionals,' as to be violative of constitutional due process and preclude their meaningful use in civil confinement proceedings."[283] However, the Court held that paraphilia

276. *Id*.
277. 20 N.Y.3d 99, 102, 980 N.E.2d 510, 511, 956 N.Y.S.2d 462, 463 (2012).
278. *Id.*
279. *Id*. at 103, 980 N.E.2d at 511, 956 N.Y.S.2d at 463.
280. *Id.*
281. *Id*. at 103, 980 N.E.2d at 511-12, 956 N.Y.S.2d at 463-64.
282. *Shannon S.*, 20 N.Y.3d at 105, 980 N.E.2d at 513, 956 N.Y.S.2d at 465.
283. *Id*. at 106-07, 980 N.E.2d at 514, 956 N.Y.S.2d at 466 (quoting McGee v. Bartow, 593 F.3d 566, 577 (7th Cir. 2010)).

NOS "has been found to be a viable predicate mental disorder or defect that comports with minimal due process."[284] The Court, in rejecting the respondent's claim, stated that "any issue pertaining to the reliability of paraphilia NOS as a predicate condition for a finding of mental abnormality has been viewed as a factor relevant to the weight to be attributed to the diagnosis, an issue properly reserved for resolution by the factfinder."[285] The Court concluded that there was ample evidence to support the hearing court's decision and stated that the "expert witness opined that respondent's 1997, 1999 and 2003 sexual offenses against adolescent victims demonstrated an attraction to nonconsenting minors that satisfied the plain definition of paraphilia NOS and evinced symptoms of hebephilia."[286]

XI. WARRANTS

In *People v. Chisholm*, the "[d]efendant was convicted of multiple drug and weapon possession charges after a search of his home revealed marijuana and two firearms."[287] During pretrial motions, the "defendant moved to suppress the evidence and to controvert the search warrant, which was based on the affidavit of a police officer, her testimony, and the oral deposition of a confidential informant who was brought before the issuing magistrate."[288] The trial court "denied defendant's motion based on the warrant papers alone and without reviewing the transcript of the confidential informant's testimony."[289] The Court of Appeals in reviewing the case held the search warrant and supporting affidavit did not, by themselves, establish probable cause and that "[a] warrant application containing information provided by a confidential informant must demonstrate 'the veracity or reliability of the source of the information.'"[290] The Court stated that the warrant contained no "factual averments" in the police officer's affidavit "that could have afforded the magistrate a basis for determining the reliability of the confidential informant."[291] The Court held that the affidavit did not "state that the informant had a proven 'track record' of supplying reliable information in the past," and it did not establish that the

284. *Id*. at 107, 980 N.E.2d at 514, 956 N.Y.S.2d at 466.
285. *Id.*
286. *Id*. at 107-08, 980 N.E.2d at 515, 956 N.Y.S.2d at 467.
287. 21 N.Y.3d 990, 991, 995 N.E.2d 164, 165, 972 N.Y.S.2d 202, 203 (2013).
288. *Id*. at 991-92, 995 N.E.2d at 165, 972 N.Y.S.2d at 203.
289. *Id.* at 992, 995 N.E.2d at 165, 972 N.Y.S.2d at 203 (quoting People v. Serrano, 93 N.Y.2d 73, 78, 710 N.E.2d 655, 658, 688 N.Y.S.2d 90, 93 (1999)).
290. *Id*. at 992, 995 N.E.2d at 165-166, 972 N.Y.S.2d at 203-204 (citations omitted).
291. *Id*. at 992, 995 N.E.2d at 166, 972 N.Y.S.2d at 204.

informant "was under oath when information was given to the officer."[292] Furthermore, the Court stated the reliability of the confidential informant could not be inferred solely from the statement, set forth in the affidavit, that the informant bought cocaine from defendant.[293] The Court held that, "by upholding the warrant without examining the transcript of the confidential informant's testimony, [the trial court] failed to determine that the magistrate substantially complied with the requirements of CPL 690.40(1)."[294] "This statute provides that in determining a search warrant application, 'the court may examine, under oath, any person whom it believes may possess pertinent information [and] [a]ny such examination must be either recorded or summarized on the record by the court.'"[295] In conclusion, the Court held the case should be remitted to trial court in order for that court "to review the transcript of the confidential informant's testimony and determine whether the warrant was supported by probable cause and that CPL 690.40(1) was substantially complied with."[296]

The defendant in *People v. Gavazzi* argued that the search warrant, which led to the discovery of his possession of printed photographs of young, nude children, did not substantially comply with CPL 690.45(1).[297] The People argued that the mistakes, which included the justice who signed the warrant, included: no designation of his court, his signature was illegible, there was no seal, and the caption typed by the trooper referred to a nonexistent town, were all merely technical.[298] The Court of Appeals, in reviewing the warrant, held that it did not comply with CPL 690.45(1) because on its face the warrant appeared to be "issued by an unidentified judge in a nonexistent court and town in a different county."[299] The Court concluded that the suppression was warranted because "the name requirement of CPL 690.45(1) 'operates directly to protect and preserve a constitutionally guaranteed right of the citizen.'"[300] The Court stated that "[t]he right safeguarded by the name requirement is the right that is protected by the constitutional requirement of a warrant—the right to have a 'neutral and detached

292. *Chisholm*, 21 N.Y.3d at 992, 995 N.E.2d at 166, 972 N.Y.S.2d at 204.
293. *Id*.
294. *Id.* at 993, at 993, 995 N.E.2d at 166, 972 N.Y.S.2d at 204.
295. *Id*. at 993, 995 N.E.2d at 166-167, 972 N.Y.S.2d at 204-205.
296. *Id.* at 994, 995 N.E.2d at 167, 972 N.Y.S.2d at 205.
297. 20 N.Y.3d 907, 908, 981 N.E.2d 256, 257, 957 N.Y.S.2d 660, 661 (2012).
298. *Id.* at 909, 981 N.E.2d at 258, 957 N.Y.S.2d at 662.
299. *Id*.
300. *Id*. (quoting People v. Patterson, 78 N.Y.2d 711, 717, 587 N.E.2d 255, 258, 579 N.Y.S.2d 617, 620 (1991)).

magistrate' sign the warrant to search one's house."[301]

XII. SUFFICIENCY OF ACCUSATORY INSTRUMENT

The issue presented in *People v. Fernandez* was "whether the accusatory instrument was a facially sufficient simplified traffic information, although it was titled 'Complaint/Information,' and contained factual information."[302] The defendant argued "that the accusatory instrument was denominated 'Complaint/Information', and included factual allegations as to only some of the elements of the offense charged, and therefore must be held to be an insufficient misdemeanor complaint, rather than a simplified traffic information."[303] The defendant relied on the Court of Appeals decision in *People v. Casey*[304] for the proposition that a title controls what a document is, and since the document at issue is titled "Complaint/Information," it is a misdemeanor complaint.[305] However, the Court rejected this reading of *Casey* and stated the language relied on by the defendant was "peripheral to the main holding and relevant only to the issue of waiver."[306] The Court explained that misdemeanor information "is an accusatory instrument alleging non-hearsay evidentiary facts supporting every element of the offense charged."[307] The Court explained a defendant may be prosecuted by misdemeanor information alone.[308] However, by contrast, a misdemeanor complaint is a misdemeanor information but with hearsay allegations permitted. A defendant may not be prosecuted by a misdemeanor complaint—and the trial court is required to so inform the defendant—unless prosecution by information is waived, or unless a supporting deposition is filed.[309] The Court stated the "comment in *Casey* was simply about whether the instrument did or did not include hearsay allegations, and what corresponding obligations the trial court had in ensuring that defendant properly waived his rights."[310] "A simplified traffic information need only 'substantially' conform to the requirements of the Commissioner of Motor

301. *Id*. (quoting Johnson v. United States, 333 U.S. 10, 14 (1948)).
302. 20 N.Y.3d 44, 46, 980 N.E.2d 491, 492, 956 N.Y.S.2d 443, 444 (2012).
303. *Id.* at 49, 980 N.E.2d at 494, 956 N.Y.S.2d at 446.
304. 95 N.Y.2d 354, 359, 740 N.E.2d 233, 235, 717 N.Y.S.2d 88, 90 (2000).
305. *Fernandez*, 20 N.Y.3d at 49, 980 N.E.2d at 494, 956 N.Y.S.2d at 446.
306. *Id.* at 50, 980 N.E.2d at 494, 956 N.Y.S.2d at 446.
307. *Id.*
308. *Id.*
309. *Id.*
310. *Fernandez*, 20 N.Y.3d at 50, 980 N.E.2d at 494, 956 N.Y.S.2d at 446.

Vehicles."[311] Therefore the Court concluded that "[t]he title then cannot be dispositive when it is the Legislature's intention that no single part of the form be dispositive."[312] The Court held that "this holistic approach to identifying the form is entirely consistent with the central holding of *Casey*," because the accusatory is sufficient "'[s]o long as the factual allegations of an information give an accused notice sufficient to prepare a defense and are adequately detailed to prevent a defendant from being tried twice for the same offense.'"[313] Furthermore, the Court held that it would be illogical for title of the form to govern the substance because the Commissioner of Motor Vehicles does not require a simplified traffic information to have any title at all.[314] In conclusion, the Court held that the Appellate Court was correct in holding that the principal established in *People v. Ferro*[315] was applicable because an accusatory instrument ambiguously denominated that "Information/Simplified Information" could function as either a regular or a simplified traffic information because the substance of the document, rather than its denomination, controlled.[316]

XIII. SUPERIOR COURT INFORMATION

The question before the Court of Appeals in *People v. Milton* was "whether a superior court information (SCI) is jurisdictionally defective where it names victims not identified in the felony complaint."[317] The Court explained that a defendant in New York may waive his or her right to be indicted by a Grand Jury, and this allows a defendant to "obtain a speedier disposition of the charges against him and the State is spared the time and expense of unnecessary Grand Jury proceedings."[318] However, a SCI cannot contain greater offenses, which contain additional aggravating elements than those contained in the original felony complaint.[319] The Court noted its precedent established that "'the improper inclusion of an offense in a waiver of indictment and SCI is a jurisdictional defect that, when raised on direct appeal, requires

311. *Id.* at 50, 980 N.E.2d at 495, 956 N.Y.S.2d at 447 (citing N.Y. CRIM. PROC. LAW § 100.25 (McKinney 2014)).

312. *Id.*

313. *Id.* at 50, 980 N.E.3d at 495, 956 N.Y.S.2d at 447.

314. *Id.* (citing N.Y. COMP. CODES R. & REGS. tit. 15, § 122.2 (2013)).

315. 22 Misc. 3d 7, 8-9 (Sup. Ct. App. T. 2d Dep't 2008).

316. *Fernandez*, 20 N.Y.3d at 50-51, 980 N.E.2d at 495, 956 N.Y.S.2d at 447 (citing *Ferro*, 22 Misc. 3d at 8-9).

317. 21 N.Y.3d 133, 134, 989 N.E.2d 962, 963, 967 N.Y.S.2d 680, 681 (2013).

318. *Id.* at 135-36, 989 N.E.2d at 964, 967 N.Y.S.2d at 682 (quoting People v. Menchetti, 76 N.Y.2d 473, 476, 561 N.E.2d 536, 538, 560 N.Y.S.2d 760, 762 (1990)).

319. *Id.* at 136, 989 N.E.2d at 964, 967 N.Y.S.2d at 682.

reversal of the conviction and dismissal of the SCI.'"[320] On the facts before it, the Court found that the "offense to which defendant pleaded guilty is the same offense for which he was charged in the felony complaint, and adding the names of the victims in the SCI did not render the offense a different one."[321] The Court concluded that "this case involves precisely the same crime of grand larceny, described in both the felony complaint and the SCI" and, therefore, the SCI "served as a proper jurisdictional predicate for defendant's guilty plea."[322]

XIV. VOIR DIRE

Before jury selection in *People v. Floyd*, the defense counsel informed the judge that defendant's mother was not able to enter the courtroom due to her inability to find a seat.[323] The defense counsel stated at this point "[c]ertainly, as a public spectator, she has an absolute right be present," but was informed by the judge that because the jury panel was larger than normal, the defendant's mother would have to wait outside until a juror was excused.[324] The Court of Appeals found that the defense counsel had properly preserved the objection and that defendants have a constitutional right to a "public trial."[325] The Court concluded that "[m]ere courtroom overcrowding is not an overriding interest justifying courtroom closure, and the trial judge failed to consider reasonable alternatives before excluding defendant's mother from the courtroom."[326]

In *People v. Alvarez* and its companion case *People v. George*, the Court of Appeals concluded that a violation of a defendant's right to a public trial must be preserved in the trial court in order for the issue to be reviewed upon appeal.[327] The Court noted that the right to a public trial "'has long been regarded as a fundamental privilege of the defendant in a criminal prosecution and extends to the voir dire portion of the trial.'"[328] However, the proceedings may be closed when necessary, but the party seeking closure "must advance an overriding interest that is likely to be prejudiced, the closure must be no broader

320. *Id.* (quoting People v. Pierce, 14 N.Y.3d 564, 574, 930 N.E.2d 176, 183, 904 N.Y.S.2d 255, 262 (2010)).

321. *Id.*

322. *Milton*, 21 N.Y.3d at 137, 989 N.E.2d at 965, 967 N.Y.S.2d at 683.

323. 21 N.Y.3d 892, 893, 988 N.E.2d 505, 506, 965 N.Y.S.2d 770, 771 (2013).

324. *Id*.

325. *Id.* at 893, 988 N.E.2d at 507, 965 N.Y.S.2d at 771.

326. *Id*.

327. 20 N.Y.3d 75, 78, 979 N.E.2d 1173, 1174, 955 N.Y.S.2d 846, 847 (2012).

328. *Id*. at 80, 979 N.E.2d at 1175, 955 N.Y.S.2d at 848 (quoting People v. Martin, 16 N.Y.3d 607, 611. 949 N.E.2d 491, 494, 925 N.Y.S.2d 400, 403 (2011)).

than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and . . . must make findings adequate to support the closure."[329] The Court further noted that "[t]he obligation rests with the court to consider alternatives, even where the parties themselves do not offer any."[330] However, the Court rejected the proposition that the failure of the trial court to consider alternatives to closure is a mode of proceedings error and concluded "[w]e have consistently required that errors of constitutional dimension—including the right to a public trial—must be preserved."[331]

The Court of Appeals in *People v. Best* found the trial court had erred in ordering the defendant to remain restrained during the course of his bench trial without articulating a specific justification for doing so.[332] However, the Court did not overturn the defendant's conviction because, while it did find the error to be of a constitutional nature, they found it to be harmless in nature due to the overwhelming evidence of guilt and no reasonable possibility that it affected the outcome of the trial.[333] Citing the United States Supreme Court decision in *Deck v. Missouri*,[334] the Court stated that the defendant had a constitutional "'right to be free of visible shackles, unless there has been a case-specific, on-the-record finding of necessity".[335] The Court concluded that this rule applies equally to a bench trial as it does a jury trial.[336]

The defendant in *People v. Herring* argued on appeal that he was entitled to a new trial due to the fact the judge at his trial failed to properly respond when informed that one of the jurors was sleeping during deliberations.[337] The Court of Appeals rejected the defendant's argument and found that the trial court made sufficient inquiry into alleged inattentiveness of the juror, and thus acted within its discretion in denying defendant's motion to discharge that juror or for mistrial.[338] The Court stated that the trial judge properly called the juror, who was allegedly sleeping, into the courtroom in order to inquire into the accusation. The juror denied accusations of another juror that she was

329. *Id*. (quoting *Martin*, 16 N.Y.3d at 611, 949 N.E.2d at 494, 925 N.Y.S.2d at 403).

330. *Id*. at 80, 979 N.E.2d at 1175, 955 N.Y.S.2d at 848.

331. *Id*. at 81, 979 N.E.2d at 1176, 955 N.Y.S.2d at 849.

332. 19 N.Y.3d 739, 742, 979 N.E.2d 1187, 1197, 955 N.Y.2d 860, 860 (2012).

333. *Id*. at 744, 979 N.E.2d at 1189, 955 N.Y.S.2d at 862.

334. 544 U.S. 622, 624-26, 635 (2005).

335. *Best*, 19 N.Y.3d at 743, 979 N.E.2d at 1188, 955 N.Y.S.2d at 861 (quoting People v. Clyde, 18 N.Y.3d 145, 153, 961 N.E.2d 634, 639, 938 N.Y.S.2d 243, 248 (2011)).

336. *Id.* at 744, 979 N.E.2d at 1189, 955 N.Y.S.2d at 861-62.

337. 19 N.Y.3d 1094, 1095, 979 N.E.2d 1177, 1177, 955 N.Y.S.2d 850, 850-51 (2012).

338. *Id.* at 1096, 979 N.E.2d at 1178, 955 N.Y.S.2d at 851.

sleeping during deliberations and unequivocally represented that she was ready, willing, and able to perform her duties as juror.[339] Thus, the Court found that the trial court reasonably declined to inquire further out of concern for invading the privacy and province of the jury, and the Court then recharged the jury regarding deliberations and how to conduct themselves during deliberations.[340] The Court concluded that "there are circumstances where a juror's behavior during deliberations renders that juror grossly unqualified." However, on the facts before it, the Court found that the trial judge did not abuse her discretion when she decided that the juror was fit to continue to serve on the jury.[341]

XV. SPECIFIC CRIMINAL CHARGES

A. New York's Organized Crime Control Act

The defendants in *People v. Western Express International Inc.*, were indicted for enterprise corruption under New York's Organized Crime Control Act ("OCCA") for allegedly purchasing stolen credit card data through the company they controlled, Western Express International Inc. ("Western Express"), which facilitated transactions by which the stolen credit card data was transferred.[342]

The allegations focused mainly on the defendants' use of unregulated digital internet currencies in order to facilitate the unlawful transactions in stolen credit card data.[343] Western Express, having purchased large sums of the unregulated internet currencies EGold and Webmoney, was an authorized vendor of these forms of tender.[344] It would utilize the internet currency, for a commission, to transfer into a customer internet account held in an assumed name digital currency purchased from it by the customer with U.S. dollars.[345] The digital currency could then be transferred to pay for stolen credit card information, after which the vendor would sell the digital currency received in payment back to Western Express for its value in another digital currency or U.S. dollars, with Western Express taking an additional commission.[346] This transactional pattern lent itself for

339. *Id.* at 1095, 979 N.E.2d at 1178, 955 N.Y.S.2d at 851.
340. *Id.* at 1096, 979 N.E.2d at 1178, 955 N.Y.S.2d at 851.
341. *Id.*
342. 19 N.Y.3d 652, 654-55, 978 N.E.2d 1231, 1231-32, 954 N.Y.S.2d 763, 763-64 (2012).
343. *Id.* at 655, 978 N.E.2d at 1232, 954 N.Y.S.2d at 764.
344. *Id.*
345. *Id.*
346. *Id*.

money laundering purposes by reason of the circumstance that E-currency was not government regulated and that international transactions using it went largely un-scrutinized.[347]

The defendants moved to have the indictments for enterprise corruption dismissed, and the trial court granted the motion upon the ground that the proof before the grand jury, even viewed in a light most favorable to the People, did not make out the existence of a "criminal enterprise."[348] The trial court, in dismissing the indictment, held that the People had failed to establish proof of an "ascertainable structure distinct from a pattern of criminal activity."[349] The appellate division reversed the trial court and reinstated the enterprise corruption indictment and found for the company, Western Express, for the purpose of "actively encourage[ing] more and larger transactions by its participants on an ongoing basis."[350]

The Court began by reviewing New York's OCCA and stated the law was enacted for the purpose of addressing structured criminal enterprises that "were understood to present a distinct evil by reason of their unique capacity to plan and carry out sophisticated crimes on an ongoing basis while insulating their leadership from detection and prosecution."[351] Until the enactment of the OCCA, there was no corollary to the Federal Racketeer Influenced and Corrupt Organizations Act (RICO).[352] For both RICO and the OCCA, the Court stated that it is necessary for the People to distinguish between what are merely patterns of criminal conduct, and on the other hand, what are "patterns of such conduct demonstrably designed to achieve the purposes and promote the interests of organized, structurally distinct criminal entities."[353] Therefore, the Court stated, "[B]oth RICO and the OCCA require the prosecution to prove, in addition to a pattern of criminal activity, the existence of a separate criminal enterprise to which that pattern of activity is beneficially connected."[354] Both statutes require a showing of proof of "an association possessing a continuity of existence, criminal purpose, and structure," or put another way, "constancy and capacity exceeding the individual crimes

347. *Western Express Int'l*, 19 N.Y.3d at 655, 978 N.E.2d at 1232, 954 N.Y.S.2d at 764.

348. *Id*. at 656, 978 N.E.2d at 1233, 954 N.Y.S.2d at 764.

349. *Id.* at 656, 978 N.E.2d at 1233, 954 N.Y.S.2d at 765.

350. *Id.* at 657, 978 N.E.2d at 1233, 954 N.Y.S.2d at 765.

351. *Id*. at 657, 978 N.E.2d at 1234, 954 N.Y.S.2d at 765.

352. *Western Express Int'l*, 19 N.Y.3d at 657, 978 N.E.2d at 1234, 954 N.Y.S.2d at 765.

353. *Id.* at 658, 978 N.E.2d at 1234, 954 N.Y.S.2d at 766.

354. *Id.*

committed under the association's auspices or for its purposes."[355]

The People argued that a "criminal enterprise need not be hierarchical to be structured and that structure may be inferred from patterns of criminal conduct."[356] However, the Court noted while this may be true in theory, it remains a requirement under the OCCA that there be a "common purpose" and that the structure of the criminal enterprise be "ascertainable."[357] On the evidence before it, the Court concluded that the proof indicated "no more than the manner in which international transactions in stolen credit card data were commonly conducted, with or without the use of Western Express's services; it did not support the further inference of a distinct, beneficially related criminal enterprise."[358] The Court distinguished OCCA from RICO, stating that the OCCA "specifically demands that the structure be distinct from the predicate illicit pattern, and not surprisingly there are no New York cases in which the requisite structure has been inferred simply from an underlying pattern."[359] In conclusion, the Court held:

> [T]he websites here involved do not permit the inference of an overarching criminal purpose or organization; while Western Express may have sought to make its websites attractive to carders, the sites themselves presented simply as publicly accessible loci for the conduct of business, the legality of which turned in the end upon the independent agendas of individual users.[360]

B. Criminal Contempt and Burglary

In *People v. Cajigas*, the Court addressed the question of whether a violation of an order of protection can satisfy the mens rea element of burglary by "an intent to commit an act that would not be illegal in the absence of the order."[361] The defendant argued that the Court should "adopt the Fourth Department's rule that the intent element of burglary 'cannot be satisfied by intended conduct that would be innocuous if the order of protection did not prohibit it.'"[362] The People argued the First and Third Departments had held that "a burglary conviction may be

355. *Id.* (citing N.Y. PENAL LAW § 460.10(3) (McKinney 2013); Boyle v. United States, 556 U.S. 938, 946 (2009)).

356. *Id.* at 659, 978 N.E.2d at 1235, 954 N.Y.S.2d at 767.

357. *Western Express Int'l*, 19 N.Y.3d at 659, 978 N.E.2d at 1235, 954 N.Y.S.2d at 767.

358. *Id.*

359. *Id.* at 659-60, 978 N.E.2d at 1235, 954 N.Y.S.2d at 767.

360. *Id.* at 660, 978 N.E.2d at 1236, 954 N.Y.S.2d at 767.

361. 19 N.Y.3d 697, 699, 979 N.E.2d 240, 240, 955 N.Y.S.2d 296, 296 (2012).

362. *Id.* at 701, 979 N.E.2d at 242, 955 N.Y.S.2d at 298 (quoting People v. VanDeWalle, 46 A.D.3d 1351, 1352, 847 N.Y.S.2d 816, 817 (4th Dep't 2007)).

premised on an intent to engage in conduct that would be legal if it was not outlawed by an order of protection."[363] The Court resolved the split among the departments by holding that a violation of an order of protection can serve to satisfy the *mens rea* element of a crime, and the intent to commit this violation inside a building may be used to prove a burglary charge.[364] The Court stated, "To begin, the People are not required to prove the particular crime that the defendant intended to commit inside the burglarized structure."[365] The Court reasoned that acts that would be otherwise legal can and do constitute crimes for the purpose of criminal contempt in the second degree and criminal contempt in the first degree.[366] Additionally, the Court stated that the "fact that the defendant's actions would have been legal but for the issuance of the order of protection does not immunize such conduct from prosecution under these statutes."[367] In conclusion, the Court held "even an act that would otherwise not be illegal can be viewed as a crime and the intent to commit this act inside a building may be used to prove a burglary charge."[368]

C. Forgery

In *People v. Ippolito*, the defendant was an accountant who obtained a legitimately authorized Power of Attorney from the elderly victim and then proceeded to establish a checking account denominated "Eastside Professional Services, Special Escrow for Katherine M. L. [the elderly victim]."[369] The defendant funneled the victim's income from Social Security, a pension, and trusts into the account under his control and then made out checks from this account which he signed as the victim.[370] The defendant was convicted of forgery and appealed on the basis that he could not have committed the act of forgery because the Power of Attorney vested him with the legal right to sign the victim's name on the checks.[371] The Court held that until the power of attorney was revoked, the defendant was vested with unlimited power to sign victim's name on written instruments, precluding any finding that the checks signed by defendant, as attorney–in–fact under that

363. *Id.*
364. *Id.*
365. *Id.*
366. *Cajigas*, 19 N.Y.3d at 701-02, 979 N.E.2d at 242, 955 N.Y.S.2d at 298.
367. *Id*. at 702, 979 N.E.2d at 242, 955 N.Y.S.2d at 298.
368. *Id*.
369. 20 N.Y.3d 615, 618, 987 N.E.2d 276, 276-77, 964 N.Y.S.2d 499, 499-500, (2013).
370. *Id*. at 618, 987 N.E.2d at 277, 964 N.Y.S.2d at 500.
371. *Id*. at 619, 987 N.E.2d at 277, 964 N.Y.S.2d at 500.

document, were forgeries.[372] The Court concluded that, since the defendant was authorized to sign the checks pursuant to the valid Power of Attorney, the People lacked legally sufficient evidence to convict him of Criminal Possession of a Forged Instrument.[373]

D. Terrorism

The Court held that the defendant in *People v. Morales* was entitled to a new trial because the People charged him under the theory of terrorism, which allowed the introduction of evidence that was otherwise inadmissible and unduly prejudiced the jury's ability to fairly adjudicate guilt or innocence.[374] The defendant was a member of a Mexican gang in the Bronx that allegedly targeted and assaulted individuals from rival gangs.[375] The gang also committed robberies and ran an extortion ring in and around its neighborhood in the Bronx.[376] In the summer of 2002, the defendant, along with other gang members, was involved in a brawl with rival gang members where he shot one rival and killed a ten-year-old bystander.[377] The People charged the defendant under the theory of terrorism, arguing that defendant's acts, along with the gang's overall activities, met the definition under Penal Law article 490 of "intent to intimidate or coerce a civilian population."[378] The People argued the defendant and the gang's intention was to "intimidate and coerce" the rival gangs and all Mexican-Americans who resided in the gang's vicinity, and these groups met the definition of "civilian population."[379] The Court rejected the People's argument, stating "the evidence at trial failed to demonstrate that defendant and his fellow gang members committed the acts against [the victim] and his companions with the conscious objective of intimidating every Mexican–American in the territory identified at trial."[380] Rather, the Court found that the proof in the light most favorable to the People demonstrated that the defendant and his fellow gang members targeted the victim because of his affiliation with a rival gang, and because he refused to leave the party they were all attending.[381] Further, the Court held that the legislature had not

372. *Id*. at 624, 987 N.E.2d at 281, 964 N.Y.S.2d at 504.
373. *Id*.
374. 20 N.Y.3d 240, 250, 982 N.E.2d 580, 587, 958 N.Y.S.2d 660, 667 (2012).
375. *Id*. at 244, 982 N.E.2d at 582, 958 N.Y.S.2d at 662.
376. *Id*.
377. *Id*. at 244-45, 982 N.E.2d at 583, 958 N.Y.S.2d at 663.
378. *Id*. at 246, 982 N.E.2d at 583, 958 N.Y.S.2d at 663.
379. *Morales*, 20 N.Y.3d at 246, 982 N.E.2d at 583, 958 N.Y.S.2d at 663.
380. *Id*. at 247, 982 N.E.2d at 584, 958 N.Y.S.2d at 664.
381. *Id*. at 247, 982 N.E.2d at 584-85, 958 N.Y.S.2d at 664-65.

"enacted article 490 of the Penal Law with the intention of elevating gang-on-gang street violence to the status of terrorism as that concept is commonly understood."[382] The Court noted the acts of terrorism cited in the legislatures enactment of the statute, including 9/11, the World Trade Center bombing in 1993, the Oklahoma City bombing in 1995,and then reasoned that acts of terror were not comparable to the crimes allegedly committed by the defendant and his fellow gang members.[383] Thus, the Court found that "[d]efendant's violent, criminal acts as a member of the SJB gang unquestionably resulted in tragic consequences—the needless death of a little girl and the paralysis of a young man—but they were not acts of terrorism within the meaning of Penal Law article 490."[384]

E. Disorderly Conduct

The defendant in *People v. Baker* was arrested for disorderly conduct on a spring evening at around 6:30 p.m. in the City of Rochester.[385] The arresting officer was parked in his marked patrol car when he noticed the defendant's girlfriend standing in front of a house across the street videotaping his activities.[386] Curious about the woman's identity, the officer ran the license plate of the vehicle that was parked in her driveway and discovered that the plate number had been issued for a different type of vehicle than the one that was in the driveway.[387] The officer then stepped out of his car to ask who owned the automobile, and the woman responded that it was her grandfather's vehicle.[388] The officer then reentered his patrol car.[389] A few minutes later, the defendant approached the officer's patrol car, leaned his head into an open window and inquired why the officer had checked the license plate.[390] The officer responded that "he could run a plate if he wanted to."[391] The defendant started backing away from the patrol car towards the middle of the street, swearing at the officer.[392] When the officer asked "what did you say," the defendant repeated the profanity

382. *Id.* at 248, 982 N.E.2d at 585, 958 N.Y.S.2d at 665.
383. *Id.*
384. *Morales*, 20 N.Y.3d at 249, 982 N.E.2d at 586, 958 N.Y.S.2d at 666.
385. 20 N.Y.3d 354, 357, 984 N.E.2d 902, 903, 960 N.Y.S.2d 704, 705 (2013).
386. *Id.*
387. *Id.*
388. *Id.*
389. *Id.*
390. *Baker*, 20 N.Y.3d at 357, 984 N.E.2d at 903, 960 N.Y.S.2d at 705.
391. *Id.*
392. *Id.* at 357, 984 N.E.2d at 904, 960 N.Y.S.2d at 706.

and accused the officer of harassing him.[393] The officer then exited his vehicle and placed the defendant under arrest for disorderly conduct.[394] "These activities apparently attracted the attention of various civilian bystanders and, by the time of the arrest, about [ten] people had congregated on the sidewalk behind the defendant and his girlfriend."[395] The Court of Appeals held that, in reviewing disorderly conduct charges, the determination turns on the presence or absence of adequate proof of public harm.[396] In making this determination of whether the record supports an inference that the requisite mens rea was present, the Court has adopted a contextual analysis which factors include: "the time and place of the episode under scrutiny; the nature and character of the conduct; the number of other people in the vicinity; whether they are drawn to the disturbance and, if so, the nature and number of those attracted; and any other relevant circumstances."[397] After reviewing the Court's precedent in regards to disorderly conduct charges and aforementioned factors, the Court concluded that on the facts before it there was no "basis for the finding of probable cause in this case because the proof is insufficient to support the public harm element."[398] The Court reasoned that, in this case, the incident occurred during daylight hours on a busy city street, and the defendant made two fleeting abusive statements while claiming harassment by the officer who was safely seated in his patrol car.[399] The Court further stated that the entire incident lasted approximately fifteen seconds, the defendant was backing away as he made the abusive statements and there was no basis to believe the officer felt threatened by the statements.[400]

The Court distinguished the case at hand from its prior decisions in *People v. Tichenor*, where the officer alone on a foot patrol late at night was confronted by a defendant on the doorstep of a crowded bar filled with inebriated patrons.[401] The Court also distinguished the case from the facts in the *People v. Weaver*, where a public spectacle was created by that defendant yelling at his new bride in the early of hours of the

393. *Id.*
394. *Id.*
395. *Baker*, 20 N.Y.3d at 357, 984 N.E.2d at 904, 960 N.Y.S.2d at 706.
396. *Id.* at 359, 984 N.E.2d at 905, 960 N.Y.S.2d at 707.
397. *Id.* at 360, 984 N.E.2d at 906, 960 N.Y.S.2d at 708 (quoting People v. Weaver, 16 N.Y.3d 123, 128, 944 N.E.2d 634, 636, 919 N.Y.S.2d 99, 101 (2011)).
398. *Id.* at 362, 984 N.E.2d at 907, 960 N.Y.S.2d at 709.
399. *Id.*
400. *Baker*, 20 N.Y.3d at 362, 984 N.E.2d at 907, 960 N.Y.S.2d at 709.
401. *Id*. (citing People v. Tichenor, 89 N.Y.2d 769, 772, 680 N.E.2d 606, 607, 658 N.Y.S.2d 233, 234 (1997)).

morning in a parking lot, not far from a hotel and local businesses.[402] The Court distinguished *Weaver* in pointing out "the protracted encounter involved more than a brief exchange of words between a defendant and a police officer" and

> the focus of defendant's invective was his wife—his attention was redirected at the police officer only after she came to the woman's assistance—and defendant refused to stop even after multiple warnings by the police, supporting the inference that the disruptive behavior would continue and perhaps escalate absent interruption by the police.[403]

XVI. HARMLESS ERROR REVIEW

The defendant in *People v. Augustine* was convicted of murder and other related charges and appealed his conviction on the basis that his constitutional right to counsel was violated because he was represented by counsel when he was questioned.[404] The defendant, while in jail for a violation of probation ("VOP"), was twice questioned by police about the victim's disappearance, the second time after the victim's body had been discovered.[405] During both meetings, counsel was not present.[406] The defendant claimed that his constitutional right to counsel was violated because he was represented by counsel on the VOP at the time of the questioning.[407] The Court of Appeals held that "[a]ssuming, without deciding, that defendant's indelible right to counsel was violated, any error was harmless beyond a reasonable doubt."[408] The Court concluded that there was overwhelming evidence of the defendant's guilt, and "[t]here is no reasonable possibility that the introduction of the two challenged statements affected defendant's conviction in view of the other evidence, including two counseled statements to police and testimony of numerous witnesses."[409]

The defendant in *People v. Cornelius* appealed his conviction on the basis that the trial court had erred in allowing the admission of two trespass notices—prepared and issued by a non-testifying witness.[410] The defendant argued that these notices constituted "testimonial"

402. *Id*. at 362-63, 984 N.E.2d at 907-08, 960 N.Y.S.2d at 709-10 (2013) (citing *Weaver*, 16 N.Y.3d 123, 128, 944 N.E.2d 634, 636, 919 N.Y.S.2d 99, 101).
403. *Id*.
404. 21 N.Y.3d 949, 950, 991 N.E.2d 707, 707, 969 N.Y.S.2d 849, 850, (2013).
405. *Id*.
406. *Id.*
407. *Id*.
408. *Id*. at 951, 991 N.E.2d at 707, 969 N.Y.S.2d at 849.
409. *Id*.
410. 20 N.Y.3d 1089, 1090, 988 N.E.2d 480, 480, 965 N.Y.S.2d 744, 744 (2013).

evidence and that their admission violated his right of confrontation under *Crawford v. Washington*.[411] The Court of Appeals held that "[a]ssuming, without deciding, that the contents of the 2004 notices were 'testimonial,' their admission in this case was harmless beyond a reasonable doubt."[412] The Court concluded that "the People's main witness, the loss prevention officer, testified that he had personally issued defendant a trespass notice in July 2008, just seven months before the incident in question, and had told defendant that his privilege to enter all Duane Reade stores had been revoked and that defendant could be arrested should he reenter." Thus, in conclusion, the Court held that it was "satisfied beyond a reasonable doubt that the admission of the 2004 notices did not influence the jury's verdict."[413]

XVII. APPOINTMENT OF A SPECIAL PROSECUTOR

In *People v. Adams*, the Court of Appeals held that the county prosecutors' office should have been removed and special prosecutor appointed when the complainant in a criminal case was a sitting city court judge in the same county.[414] In *Adams*, the complainant, a sitting Rochester City Court Judge, accused the defendant, her neighbor and ex-paramour, of committing the crime of misdemeanor aggravated harassment in the second degree by sending her vulgar text messages that were personal in nature.[415] The case was being prosecuted by the Monroe County District Attorney's Office, the county in which the City of Rochester is located.[416] The Monroe County District Attorney's Office appeared before the complainant in her capacity as a Rochester City Court Judge on unrelated cases.[417]

Two different defense attorneys made numerous but ultimately unsuccessful attempts to resolve the matter through plea negotiations.[418] At different points in time throughout the pre-trial proceedings, both defense attorneys made similar motions, requesting that the Monroe County District Attorney be disqualified "on the grounds of actual prejudice and the existence of a conflict of interest" and that a special

411. *Id*. at 1091, 988 N.E.2d at 480-81, 965 N.Y.S.2d at 744 (citing Crawford v. Washington, 541 U.S. 36, 68 (2004)).

412. *Id.* at 1091, 988 N.E.2d at 481, 965 N.Y.S.2d at 744.

413. *Id*.

414. 20 N.Y.3d 608, 613, 987 N.E.2d 272, 273, 964 N.Y.S.2d 495, 498 (2013).

415. *Id*. at 610, 987 N.E.2d at 273, 964 N.Y.S.2d at 496.

416. *Id.*

417. *Id*. at 613, 987 N.E.2d at 275, 964 N.Y.S.2d at 498.

418. *Id*. at 610, 987 N.E.2d at 273, 964 N.Y.S.2d at 496.

prosecutor be appointed.[419] Specifically, both defense counsel argued that the nature of the District Attorney's conflict of interest was in "giving undue weight to the wishes of the victim in screening their case, the District Attorney's office is no longer acting as a fair and impartial official."[420] To that end, one defense attorney stated the prosecutor told him that in most cases they would be able to agree to a plea bargain, but in this case, "due to the position of the victim," he could not reduce the charges because the complainant wished to go to trial.[421] Additionally, defense counsel averred that based on his experience, almost all similarly situated defendants would have been offered a plea bargain involving either a diversionary program or a guilty plea to a non-criminal violation.[422] Both of these motions were denied by the trial court.[423]

The Court of Appeals noted that while a public prosecutor should only be removed to protect the defendant from actual prejudice or a substantial risk of an abuse of confidence, in rare situations, "the appearance of impropriety itself is a ground for disqualification."[424] These grounds exist when "the appearance is such as to 'discourage public confidence in our government and the system of law to which it is dedicated.'"[425] The Court of Appeals further noted that the Monroe County District Attorney's Office did little to counter the claim made by both defense attorneys that the defendant was being treated differently than other defendants because the victim was a sitting city court judge.[426] An issue the Court concluded should have had no bearing on the resolution of the matter because the allegations involved the complainant in her personal and not professional capacity.[427] In finding that a special prosecutor should have been appointed, the Court of Appeals concluded:

> [w]hile we do not find that any actual impropriety occurred, there is an unacceptably great appearance of impropriety—the appearance that the District Attorney's office refused to accept a reduced charge because the complainant was a sitting judge who demanded that the matter got to trial, rather than because a trial was, in its own

419. *Adams*, 20 N.Y.3d at 610, 987 N.E.2d at 273, 964 N.Y.S.2d at 496.
420. *Id*. at 611, 987 N.E.2d at 273-74, 964 N.Y.S.2d at 496-97.
421. *Id*. at 611, 987 N.E.2d at 273, 964 N.Y.S.2d at 496.
422. *Id.* at 611, 987 N.E.2d at 274, 964 N.Y.S.2d at 497.
423. *Id*. at 611, 987 N.E.2d at 273, 964 N.Y.S.2d at 496.
424. *Adams*, 20 N.Y.3d at 612, 987 N.E.2d at 274, 964 N.Y.S.2d at 497 (citing People v. Zimmer, 51 N.Y.2d 390, 396, 414 N.E.2d 705, 708, 434 N.Y.S.2d 206, 209 (1980)).
425. *Id.*
426. *Id.* at 613, 987 N.E.2d at 275, 964 N.Y.S.2d at 498.
427. *Id*.

disinterested judgment, appropriate.[428]

Based on this conclusion, the Court of Appeals reversed the defendant's conviction and remanded the matter back to Rochester City Court.[429]

XVIII. ATTORNEY VERSUS CLIENT DECISIONS IN SELECTING STRATEGY

In *People v. Colville*,[430] the Court of Appeals held that that the decision to seek a jury charge on lesser-included offenses is a matter strategy and tactics that ultimately rests with defense counsel and not the defendant.[431] In *Colville,* the defendant was charged with second-degree murder.[432] The defense attorney requested that the trial court also charge the jury on the lesser-included offenses of first-and second-degree manslaughter.[433] The trial court agreed, but later withdrew the charges on the basis of the defendant's objection to the inclusion of the lesser-included offenses.[434] The jury found the defendant guilty of murder.[435]

The Court of Appeals was called upon to address, "how decision making authority is allocated within the attorney-client relationship with respect to the submission of lesser-included offenses to the jury."[436] Specially, the Court addressed whether the request of lesser-included offenses was a fundamental decision, comparable to how to plead, whether to waive a jury, take the stand, or appeal and therefore reserve to the accused or whether it was a matter of strategy and tactics, ultimately for the defense attorney to decide.[437] Borrowing heavily from the American Bar Association Standard of Criminal Justice 4-5.2, as well as decisions from other jurisdictions, the Court of Appeals concluded that the decision to request lesser-included offense charges was a strategic rather than a fundamental decision.[438] In reaching this

428. *Id.*
429. *Adams*, 20 N.Y.3d at 614, 987 N.E.2d at 275, 964 N.Y.S.2d at 498.
430. 20 N.Y.3d 20, 979 N.E.2d 1125, 955 N.Y.S.2d 799 (2012).
431. *Id*. at 23, 979 N.E.2d at 1126, 955 N.Y.2d at 800.
432. *Id.*
433. *Id.*
434. *Id.*
435. *Colville*, 20 N.Y.3d at 23, 979 N.E.2d at 1126, 955 N.Y.2d at 800.
436. *Id.* at 28, 979 N.E.2d at 1129-30, 955 N.Y.S.2d at 803.
437. *Id.* at 28, 979 N.E.2d at 1130, 955 N.Y.S.2d at 803 (citing Jones v. Barnes, 463 U.S. 745, 751 (1983)).
438. *Id.* at 29-31, 979 N.E.2d at 1130-32, 955 N.Y.S.2d at 806-07. The Court observed that the relevant provisions of the 1980 version of ABA Standards for Criminal Justice 4-5.2 stated that it was important for the defense lawyer to consult fully with the client regarding a request for lesser-included charges. The court further noted that the standard went on to explain, "Indeed, because this decision is so important as well as so similar to the defendant's decision about the charges to which to plead, *the defendant should*

conclusion, the Court essentially put forth two holdings. First, it is the attorney's decision whether to request that the jury be charged with respect to lesser-included offenses.[439] Second, if a trial judge or attorney defers to a defendant with respect to this request, the effect is to deny the defendant the "expert judgment of counsel to which the Sixth Amendment entitles him."[440]

XIX. DUAL TRIALS OF CO-DEFENDANTS WHEN ONE ELECTS A JURY TRIAL AND THE OTHER A BENCH TRIAL

In *People v. Warren*,[441] the Court of Appeals addressed the question of whether the defendant was prejudiced by the trial court's decision not to excuse the jury during the testimony of a co-defendant who had elected to proceed by way of bench trial only.[442] In *Warren*, four co-defendants, Damien Warren, Eric Young, Marvin Howard, and Nathaniel Williams, were jointly indicted on a theory of accomplice liability for second-degree murder and second-degree weapon possession.[443] The week before jury selection, Young waived his right to a jury trial and was offered a plea bargain in exchange for his testimony against the remaining three co-defendants.[444] Howard waived his right to a jury trial and requested to be tried by a judge in the form of a bench trial.[445] However, Warren elected to proceed by way of jury trial.[446] Following Howard's request for a bench trial, Warren's attorney requested that either Howard and Warren be tried separately, or alternatively direct Howard to testify outside of the jury's presence if he took the stand.[447] The judge denied these requests and a joint bench

be the one to decide whether to seek submission to the jury of lesser included offenses. For instance, in a murder prosecution, the defendant rather than then defense attorney, should determine whether the court should be asked to submit to the jury the lesser included offense of manslaughterFalse" Id. at 29, 979 N.E.2d at 1130, 955 N.Y.S.2d at 804 (citing ABA Standard for Criminal Justice 4.5.2 commentary (1980)). However, the Court noted that the last two sentences written above were deleted from the 1993 version of the same standard. The court went onto further note that, "[s]ince issuance of the 1993 ABA Commentary, courts have uniformly decided that whether or not to ask the trial judge to instruct the jury on lesser-included offenses is a matter of strategy and tactics ceded by a defendant to his lawyer. *Id.* at 29, 979 N.E.2d at 1130, 955 N.Y.S.2d at 804 (citing ABA Standard for Criminal Justice 4.5.2 commentary (1980)).

439. *Colville*, 20 N.Y.3d at 23, 979 N.E.2d at 1126, 955 N.Y.S.2d at 800.
440. *Id.* at 32, 979 N.E.2d at 1132, 955 N.Y.S.2d at 806.
441. 20 N.Y.3d 393, 984 N.E.2d 914, 960 N.Y.S.2d 716 (2013).
442. *Id*. at 397, 984 N.E.2d at 916, 960 N.Y.S.2d at 718.
443. *Id.* at 395, 984 N.E.2d at 914, 960 N.Y.S.2d at 716.
444. *Id.*
445. *Id.*
446. *Warren*, 20 N.Y.3d at 395, 984 N.E.2d at 914, 960 N.Y.S.2d at 716.
447. *Id.*

trial and jury trial ensued.[448] At this joint bench/jury trial, Howard testified that Warren was the one who committed the crime and that he was innocent.[449] Warren chose not to testify in his own defense.[450] At the conclusion of the trials, the jury acquitted Nathaniel Williams, the judge acquitted Marvin Howard, and the jury found Damien Warren guilty on all counts.[451]

The Court of Appeals found that based on the above circumstances, the trial judge erred in not granting Warren's requests either for severance or to have the jury excused during his co-defendant's testimony.[452] The Court noted that once Howard waived his right to a jury trial, the situation was akin to trial by dual juries.[453] That the second fact finder was a court and not a jury does not alter the analysis.[454] Trial by dual juries are "at root a modified form of severance" and are to be "evaluated under standards" which "require a showing of prejudice to entitle a defendant to relief."[455] Based on the facts of this particular case, the Court concluded that Howard's testimony did indeed prejudice Warren.[456] First, the Court noted that severance would have been an appropriate remedy because the defenses advanced by Howard and Warren were largely irreconcilable following the defense advanced by Howard through his trial testimony.[457] In light of this fact, if severance was not granted, Warren's jury should not have been permitted to hear Howard's testimony.[458] As a result, the Court reversed Warren's conviction, finding that the trial court's error was not harmless.[459]

XX. FAILURE TO PRESERVE EVIDENCE

The issue presented in *People v. Handy* related to whether the defense is entitled to an adverse inference charge when the defendant demands evidence that is reasonably likely to be of material importance

448. *Id.*
449. *Id.*
450. *Id*. at 396, 984 N.E.2d at 915, 960 N.Y.S.2d at 717.
451. *Warren*, 20 N.Y.3d at 396, 984 N.E.2d at 915, 960 N.Y.S.2d at 717.
452. *Id.* at 397, 984 N.E.2d at 915-16, 960 N.Y.S.2d at 717.
453. *Id.* at 397, 984 N.E.2d at 916, 960 N.Y.S.2d at 718.
454. *Id.* at 397, 984 N.E.2d at 915, 960 N.Y.S.2d at 717.
455. *Id*. (citing People v. Irizarry, 83 N.Y.2d 557, 634 N.E.2d 179, 611 N.Y.S.2d 807 (1994)).
456. *Warren*, 20 N.Y.3d at 398, 984 N.E.2d at 917, 960 N.Y.S.2d at 718.
457. *Id*. at 397, 984 N.E.2d at 916, 960 N.Y.S.2d at 718.
458. *Id.* at 398, 984 N.E.2d at 916, 960 N.Y.S.2d at 718.
459. *Id.*

and that evidence was destroyed by the state.[460] In *Handy*, the defendant was charged in relevant part with assault on a sheriff's deputy in the Monroe County Jail.[461] In a general pre-trial discovery request the defendant asked "[w]hether any electronic surveillance in any form was utilized in this case" and "the location of any such tapes."[462] The People responded in equally general terms that they had provided all discoverable material in their possession.[463] At trial, evidence was adduced that the altercation between the defendant and sheriff's deputy may have been captured on video, although the sheriff's deputy who testified to such indicated that the video in question captured only "a very small part" of the incident.[464] Importantly, the video images were destroyed by the state prior to trial.[465] The defendant requested an adverse inference instruction with respect to this destroyed video, which the trial court refused to give.[466]

At first blush, it appeared as though the New York Court of Appeals would finally answer whether New York would follow the rule articulated by the United States Supreme Court in *Arizona v. Youngblood*, that due process considerations demand that a dismissal of indictment is required *only* when "a criminal defendant can show bad faith on the part of the police."[467] If the Court chose not to follow *Youngblood*, the Court could possibly articulate a rule affording criminal defendants greater protections pursuant to the New York State Constitution.[468] However, the Court of Appeals punted on this important question. Instead, the Court chose to view the particular problem of destroyed evidence through the narrower prism of an adverse witnesses instruction.[469] As a result, the Court specifically held that "under the New York law of evidence, a permissive adverse inference charge should be given where a defendant, using reasonable diligence, has requested evidence reasonably likely to be material, and where that evidence has been destroyed by agents of the State."[470] As a result, of this more narrow holding, the question of how New York courts should resolve matters in which the defendant requests a

460. 20 N.Y.3d 663, 665, 988 N.E.2d 879, 966 N.Y.S.2d 351 (2013).
461. *Id*. at 665, 988 N.E.2d at 879-80, 966 N.Y.S.2d 351-52.
462. *Id.* at 666, 988 N.E.2d at 880, 966 N.Y.S.2d 352.
463. *Id.*
464. *Id.*
465. *Handy*, 20 N.Y.3d at 666, 988 N.E.2d at 880, 966 N.Y.S.2d at 352.
466. *Id.* at 667, 988 N.E.2d at 881, 966 N.Y.2d at 353.
467. *Id.* at 668, 988 N.E.2d at 881, 966 N.Y.2d 353 (citing 488 U.S. 51, 58 (1988)).
468. *Handy*, 20 N.Y.3d at 668, 988 N.E.2d at 882, 966 N.Y.2d at 354.
469. *Id.* at 668-69, 988 N.E.2d at 882, 966 N.Y.2d at 354.
470. *Id.* at 669, 988 N.E.2d at 882, 966 N.Y.2d at 354.

dismissal of an indictment when the state has destroyed evidence that may have been favorable to the accused (the issue squarely presented in *Arizona v. Youngblood*) remains open.

XXI. THE RIGHT TO PRESENT A FULL DEFENSE

In *People v. Spencer*, the Court of Appeals addressed the issue of when a defendant's proffered testimony may be excluded on the basis of its collateral character.[471] In *Spencer*, the defendant was involved in a physical altercation with a third party.[472] Shortly after the altercation, the complainant, an off-duty police officer, arrived at the scene.[473] The complainant and numerous eyewitnesses testified that the defendant punched the complainant and brandished a firearm.[474] Two 911 calls were admitted into evidence as well.[475] The defendant was charged with one count of criminal possession of a weapon in the second degree.[476] At trial, the defendant wished to testify that it was the third party who possessed the firearm and that the complainant falsely implicated the defendant to protect the third party because the complainant and the third party were close friends.[477] Specifically, the defendant wished to testify that, based on his firsthand knowledge, the complainant permitted the third party to deal drugs in front of his house and that the complainant and the third party drag raced cars together.[478] This testimony was precluded by the trial judge on the grounds that it was deemed "collateral."[479] The defendant was found guilty of the weapons charge and received a fifteen-year determinate sentence.[480]

In holding that the trial judge erred in refusing to permit the defendant to testify as indicated above, the Court reiterated its long-held position that "[a] defendant always has the constitutional right to 'present a complete defense.'"[481] While the Court acknowledged that evidence could be precluded on the basis of its collateral nature, it also noted that "provided that counsel has a good faith basis for eliciting the

471. 20 N.Y.3d 954, 956, 982 N.E.2d 1245, 1247, 959 N.Y.S.2d 112, 114 (2012).
472. *Id.* at 955, 982 N.E.2d at 1246, 959 N.Y.S.2d at 113.
473. *Id.*
474. *Id.*
475. *Id.*
476. *Spencer*, 20 N.Y.3d at 955, 982 N.E.2d at 1246, 959 N.Y.S.2d at 113.
477. *Id.* at 955-56, 982 N.E.2d at 1247, 959 N.Y.S.2d at 114.
478. *Id.* at 956, 982 N.E.2d at 1247, 959 N.Y.S.2d at 114.
479. *Id.*
480. *Id.*
481. *Spencer*, 20 N.Y.3d at 956, 982 N.E.2d at 1247, 959 N.Y.S.2d at 114 (citing Crane v. Kentucky, 476 U.S. 683, 690 (1986) (quoting California v. Trombetta, 467 U.S. 479, 485 (1984))).

evidence, 'extrinsic proof tending to establish a reason to fabricate is never collateral and may not be excluded on that ground.'"[482] However, based on the facts of this specific case, including the numerous other witnesses and two 911 calls, the Court concluded the trial court's decision to exclude the defendant's testimony constituted harmless error.[483]

XXII. EXPERT TESTIMONY

A. People v. Williams

In *People v. Williams*, the Court confronted the issue of whether certain hypothetical questions posed by the prosecutor to a testifying expert about Child Sexual Abuse Accommodation Syndrome ("CSAAS") improperly bolstered the People's proof that the defendant was the perpetrator.[484] In *Williams*, two juvenile complainants testified that the defendant had sexually abused them over a period of time.[485] The defendant was charged with second-degree course of sexual assault and rape.[486] During its case in chief, the prosecution called an expert to testify concerning CSAAS.[487] The expert testified that he had never met the complainants nor was rendering any opinion regarding the facts of the case or the victim's credibility.[488] The testimony was admitted for the general purpose of explaining why a child may not have immediately reported sexual abuse.[489] However, during the course of the expert's testimony, over defense objection, the prosecution presented the expert witness with a series of hypothetical questions that mirrored the complainants' testimony and asked if various facets of their testimony were consistent with the syndrome.[490]

The Court provided the following example:

> "Now, Doctor, is it consistent with the syndrome of a child living in her own home with a man who is her mother's live-in-boyfriend, is it consistent with a syndrome that this man would have this child straddle him . . . that this child would not call out to another child

482. *Id.* (quoting People v. Hudy, 73 N.Y.2d 40, 56, 535 N.E.2d 250, 259, 538 N.Y.S.2d 197, 207 (1988)).

483. *Id.* at 956-57, 982 N.E.2d at 1247, 959 N.Y.S.2d at 114.

484. 20 N.Y.3d 579, 582, 987 N.E.2d 260, 261, 964 N.Y.S.2d 483, 484 (2013).

485. *Id.*

486. *Id.* at 582, 987 N.E.2d at 262, 964 N.Y.S.2d at 485.

487. *Id.* at 582-83, 987 N.E.2d at 262, 964 N.Y.S.2d at 485.

488. *Id.* at 582, 987 N.E.2d at 262, 964 N.Y.S.2d at 485.

489. *Williams*, 20 N.Y.3d at 584, 987 N.E.2d at 263, 964 N.Y.S.2d at 486.

490. *Id.* at 583, 987 N.E.2d at 262, 964 N.Y.S.2d at 485.

similar in age who is sleeping in the very next room?"[491]

First, the Court held that even though the expert's testimony was admitted to explain the actions of victims of sexual abuse, the expert could also testify regarding the actions of sexual abusers.[492] The Court reasoned that the admission of an expert's testimony concerning abusers' behavior was proper when such testimony was used to explain that a victim's behavior is consistent with the accommodation syndrome.[493] However, in finding the hypothetical questions improper, the Court reasoned that the hypothetical questions were objectionable because the questions were so closely tailored to the facts of the case.[494] As a result, the expert's testimony had the effect of implying that the expert found the testimony of the particular witnesses credible, even though CSAAS testimony cannot be admitted for this purpose.[495] The Court ultimately found the admission of such testimony was harmless error in light of the other evidence arrayed against the defendant.[496] However, the Court's holding regarding the use of hypothetical questions, specifically in the context of CSAAS testimony, helps to further define the permissible boundaries in which such questions can be asked.

B. People v. Diaz

In *People v. Diaz*, the Court of Appeals confronted two issues: (1) the permissible scope of expert witnesses testimony relating to the behavior of sexual abusers, and (2) Whether it was improper for the trial court to prohibit the defense from calling witnesses who would testify that the complainant had made false allegations regarding sexual abuse in the past.[497]

In *Diaz*, the defendant was charged with course of sexual conduct against a child in the first and second degrees and endangering the welfare of a child.[498] At trial, the prosecutor offered testimony from a psychologist with a particular expertise in the field of child sexual abuse.[499] The expert qualified her testimony by stating that she had no knowledge of the parties in the case and had reached no conclusions

491. *Id.*
492. *Id.* at 584, 987 N.E.2d at 263, 964 N.Y.S.2d at 486.
493. *Id.*
494. *Williams*, 20 N.Y.3d at 584, 987 N.E.2d at 263, 964 N.Y.S.2d at 486.
495. *Id.*
496. *Id.* at 585, 987 N.E.2d at 263, 964 N.Y.S.2d at 486.
497. 20 N.Y.3d 569, 575, 988 N.E.2d 473, 476, 965 N.Y.S.2d 738, 741 (2013).
498. *Id.* at 572, 988 N.E.2d at 474, 965 N.Y.S.2d at 739.
499. *Id.*

with respect to the case at hand.[500] The witnesses initially testified as to why children who are the victims of sexual abuse do not "tell about this right away."[501] However, after offering such testimony, over defense objection, the witness was allowed to testify regarding the behavior not just of the victim, but of the abuser as well.[502] The questions the prosecutor asked in this regard were not posed as hypotheticals and were asked in general terms.[503]

Additionally, the defendant attempted to call a third party witness to the stand who would testify that approximately two years before the instant allegations, the complainant had accused the third party of sexual abuse.[504] The complainant and her mother had denied that the complainant had made such allegations.[505] The trial court would not allow the defendant to offer the testimony of the third party, holding that the testimony was collateral and constituted inadmissible hearsay.[506]

The first issue presented in this case is similar to the issue presented in *People v. Williams* (decided the same day and referenced above in this S*urvey*).[507] Just as in *Williams*, the *Diaz* Court found the expert testimony proffered in this case to be admissible.[508] The Court reasoned that although an expert is specifically permitted to testify regarding the actions of the victims of sexual abuse, they are also permitted to testify to the behavior of sexual abusers to the extent such testimony helps the jury understand the victims' "unusual behavior" (i.e., the actions of the abused in reporting or not reporting the crime).[509] However, unlike *Williams*, the *Diaz* Court found the questions asked by the prosecutor, as well as the experts corresponding testimony, to be general enough in nature that it did not appear to be mirroring the facts of the particular case and was therefore permissible.[510] In a concurring opinion, Judge Rivera rejected this line of reasoning.[511] Judge Rivera

500. *Id.*
501. *Id.*
502. *Diaz*, 20 N.Y.3d at 573, 988 N.E.2d at 474, 965 N.Y.S.2d at 739.
503. *Id.* at 573, 988 N.E.2d at 475, 965 N.Y.S.2d at 740.
504. *Id.* at 575, 988 N.E.2d at 476, 965 N.Y.S.2d at 741.
505. *Id.*
506. *Id.*
507. *Diaz*, 20 N.Y.3d at 575, 988 N.E.2d at 476, 965 N.Y.S.2d at 741 (citing *Williams*, 20 N.Y.3d at 582, 987 N.E.2d at 261, 964 N.Y.S.2d at 484 (2013)).
508. *Id.*
509. *Id.* at 575, 988 N.E.2d at 476, 965 N.Y.S.2d at 741 (citing *Williams*, 20 N.Y.3d at 584, 987 N.E.2d at 263, 964 N.Y.S.2d at 486).
510. *Id.* at 575-76, 988 N.E.2d at 476, 965 N.Y.S.2d at 741 (*cf. Williams*, 20 N.Y.3d at 584, 987 N.E.2d at 263, 964 N.Y.S.2d at 486).
511. *Id.* at 577, 988 N.E.2d at 477, 956 N.Y.S.2d at 742 (Rivera, J., concurring).

opined that the Court's decision in *Williams* was similar enough in nature that it should have compelled the opposite result in *Diaz*.[512] Judge Rivera stated, "It is unclear how a response from an expert to a hypothetical that mirrors the victim's testimony is more problematic than expert testimony submitted outside the context of a hypothetical situation."[513]

However, the *Diaz* Court found that it was error to preclude the third party testimony regarding the victim's previous allegations of sexual abuse.[514] The Court reasoned that while a complainant's prior allegations of sexual abuse are generally inadmissible as a matter of law, prior allegations may be admitted if they "suggest a pattern casting substantial doubt on the validity of the charges."[515] Furthermore, the Court found that once the allegations were denied by the complainant, the third parties testimony should have been properly admitted as a prior inconsistent statement used to rebut the complainant's testimony.[516]

XXIII. BUYERS AGENT DEFENSE

In *People v. Watson*, the Court of Appeals held that "agency defense" theory is not applicable to the charge of criminal facilitation (Penal Law section 115.00 (1)).[517] In *Watson,* the defendant took an undercover police officer to meet a drug dealer, handled the cocaine transaction for the officer, and then gave him the drugs.[518] The defendant was charged with selling cocaine, criminal facilitation, and possessing narcotics.[519] The trial court acquitted the defendant of the sale of cocaine, finding that the defendant was acting as the buyer's agent, but convicted him of facilitation and possession.[520]

The precise issue presented to the Court of Appeals was whether agency defense theory is applicable to the charge of criminal facilitation

512. *Diaz*, 20 N.Y.3d at 577, 988 N.E.2d at 477, 956 N.Y.S.2d at 742. .

513. *Id.*

514. *Id.* at 576, 988 N.E.2d at 476, 965 N.Y.S.2d at 741.

515. *Id.* at 576, 988 N.E.2d at 477, 965 N.Y.S.2d at 741 (quoting People v. Mandel*,* 48 N.Y.2d 952, 953, 401 N.E.2d 185, 187, 425 N.Y.2d 63, 64 (1979)).

516. *Id.* at 576, 988 N.E.2d at 477, 965 N.Y.S.2d at 742.

517. 20 N.Y.3d 182, 189, 981 N.E.2d 265, 270, 957 N.Y.S.2d 669, 674 (2012) (Criminal facilitation in the fourth degree is, in relevant part, "when, believing it probable that he is rendering aid . . . to a person who intends to commit a crime, [the person] engages in conduct which provides such person with the means or opportunity for the commission thereof and which in fact aids such person to commit a felony[.]" N.Y. PENAL LAW § 115.00(1) (McKinney 2014)).

518. *Id.* at 183, 981 N.E.2d at 266, 957 N.Y.S.2d at 670.

519. *Id.*at 183-84, 981 N.E.2d at 266, 957 N.Y.S.2d at 670.

520. *Id.* at 184, 981 N.E.2d at 266, 957 N.Y.S.2d at 670.

of a drug sale in the same manner in which it is applicable to the charge of selling narcotics.[521] The Court of Appeals held that agency defense theory is not applicable to charges of criminal facilitation.[522] The Court reasoned that the plain language of the facilitation statute, which clearly provides for criminal culpability whenever one facilitates the commission of a criminal offense, compelled such a result.[523] Second, the Court reasoned that the agency doctrine's application to those charged with selling narcotics is principally used to reduce the criminal culpability of someone only acting as a buyer's agent from a serious felony to the more lenient punishments imposed for possessory offenses.[524] However, because both criminal facilitation and possession of a controlled substance are class A misdemeanors, the application of the agency doctrine to charges of criminal facilitation is not required as a matter of fundamental fairness.[525]

XXIV. FIRST AMENDMENT APPLICATIONS TO UNLICENSED VENDING REGULATION

The issue presented in *People v. Lam* relates to what, if any, First Amendment limitations constrain the application of laws regulating unlicensed vending.[526] In *Lam*, the defendant was convicted of unlicensed general vending, in violation of Section 20-453 of the Administrative Code of the City of New York, for selling t-shirts in Union Square Park without a vendor's license.[527] The defendant argued that his conviction should be vacated because the vending of t-shirts containing artistic images was constitutionally protected expression pursuant to the First Amendment of the United States Constitution.[528]

The Court held that the defendant's conviction was proper.[529] In reaching this conclusion, the Court of Appeals adopted the test promulgated by the United States Court of Appeals for the Second Circuit in *Mastrovincenzo v. City of New York*.[530] In *Mastrovincenzo*, the Second Circuit held:

521. *Id.*

522. *Watson*, 20 N.Y.3d at 189-90, 981 N.E.2d at 270-71, 957 N.Y.S.2d at 674-75.

523. *Id.*

524. *Id.* at 190, 981 N.E.2d at 271, 957 N.Y.S.2d at 675 (citing People v. Ortiz, 76 N.Y.2d 446, 449, 560 N.E.2d 162, 163, 560 N.Y.S.2d 186, 187).

525. *Id.* at 190, 981 N.E.2d at 271, 957 N.Y.S.2d at 675.

526. 21 N.Y.3d 958, 959-60, 995 N.E.2d 128, 129-30, 972 N.Y.S.2d 166, 167-68 (2013) (citations omitted).

527. *Id*. at 959, 995 N.E.2d at 129, 972 N.Y.S.2d at 167 (citations omitted).

528. *Id*.

529. *Id.*

530. *Id.* (citing Mastrovincenzo v. City of New York, 435 F.3d 78, 91 (2d Cir. 2006)).

> Where an object's dominant purpose is expressive, the vendor of such an object has a stronger claim to protection under the First Amendment; conversely, where an object has a dominant non-expressive purpose, it will be classified as a "mere commercial good[]," the sale of which likely falls outside the scope of the First Amendment.[531]

After adopting the above approach, the Court of Appeals held that the lower appellate court reasonably found that the dominant purpose of selling the t-shirts in question was utilitarian.[532] That court considered, among other factors, the way in which the shirts were displayed and their low, uniform selling price in coming to the conclusion that the t-shirts were primarily commercial goods.[533] In finding that the dominant purpose of the t-shirt sales was non-expressive, the Court of Appeals deemed it unnecessary to determine whether the statute contains ample alternative channels of communication needed to survive a constitutional challenge.[534]

In this regard, while the *Lam* Court's opinion is fairly short, it is significant for two reasons: (1) for the purposes of future claims, the Court of Appeals has indicated that it will employ the above-referenced approach articulated by the Second Circuit in determining whether a commercial sale falls within the ambit of First Amendment protection;[535] (2) the Court of Appeals has not stated as a matter of law that the New York City ordinance in question is constitutional, leaving open future challenges to the constitutionality of the statute.[536]

XXV. FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

In *People v. Cantave*, the Court of Appeals held that the prosecution may not cross-examine a defendant about the underlying facts of an unrelated criminal conviction pending on appeal for the purpose of impeaching the defendant's credibility.[537] In *Cantave*, the defendant was charged with second and third-degree assault.[538] The defendant indicated to the trial court that he planned on testifying that

531. *Mastrovincenzo*, 435 F.3d at 95 (citing Mastrovincenzo v. City of New York, 313 F. Supp. 2d 280, 285 (S.D.N.Y. 2004)).

532. *Lam*, 21 N.Y.3d at 959, 995 N.E.2d at 129, 972 N.Y.S.2d at 167.

533. *Id.* at 959-60, 995 N.E.2d at 129, 972 N.Y.S.2d at 167.

534. *Id.* at 960, 995 N.E.2d at 129, 972 N.Y.S.2d at 167.

535. *Id.* at 959, 995 N.E.2d at 129, 972 N.Y.S.2d at 167 (*Mastrovincenzo*, 435 F.3d at 91).

536. *Id.* at 960, 995 N.E.2d at 129, 972 N.Y.S.2d at 167.

537. People v. Cantave, 21 N.Y.3d 374, 381, 993 N.E.2d 1257, 1263, 971 N.Y.S.2d 237, 242 (2013).

538. *Id.* at 377-78, 993 N.E.2d at 1260, 971 N.Y.S.2d at 239.

he was acting in self-defense at the time of the physical confrontation.[539] The trial court stated that it would allow the prosecution to cross-examine the defendant with respect to a rape conviction, still pending on direct appeal, as well as the underlying facts and the sentence received.[540] Based on the trial court's ruling, the defendant did not testify.[541] He was convicted of third-degree assault.[542]

In reversing the trial court, the Court of Appeals reasoned that the defendant's answers to the prosecution's questions regarding the unrelated criminal matter could still be used to incriminate the defendant if the conviction were reversed and a new trial was granted.[543] While noting that the defendant could still assert his Fifth Amendment right against self-incrimination when cross-examined about the unrelated conviction, the Court observed that in asserting this right "to a jury, it appears as though defendant is admitting the truth of the leading questions posed by the prosecutor."[544] In light of such, the Court reasoned that "taking the Fifth" is highly prejudicial to the defendant in both the instant case and the conviction on appeal.[545] The Court further noted that, in asserting the right against self-incrimination, the defendant must do so with respect to both exculpatory and inculpatory questions, otherwise the privilege may be waived.[546] As a result, being questioned about the facts underlying the previous conviction "'unduly compromises the defendant's right to testify with respect to the case on trial, while simultaneously jeopardizing the correspondingly important right not to incriminate oneself as to the pending matter.'"[547]

XXVI. SIXTH AMENDMENT RIGHT TO A PUBLIC TRIAL

In three consolidated appeals, *People v. Echevarria*, *People v. Moss*, and *People v. Johnson*, the Court of Appeals addressed two separate issues.[548] First, the Court addressed whether public access to a

539. *Id.* at 377, 993 N.E.2d at 1260, 971 N.Y.S.2d at 239

540. *Id.* at 377-78, 993 N.E.2d at 1260, 971 N.Y.S.2d at 239.

541. *Id.* at 378, 993 N.E.2d at 1260, 971 N.Y.S.2d at 239.

542. *Cantave*, 21 N.Y.3d at 378, 993 N.E.2d at 1260, 971 N.Y.S.2d at 239.

543. *Id.* at 380, 993 N.E.2d at 1262, 971 N.Y.S.2d at 241 (citing Mitchell v. United States, 526 U.S. 314, 325 (1999)).

544. *Id.* (citations omitted).

545. *Id.*

546. *Id*. (citations omitted).

547. *Cantave*, 21 N.Y.3d at 381, 993 N.E.2d at 1263, 971 N.Y.S.2d at 241 (quoting People v. Betts, 70 N.Y.2d 289, 295, 514 N.E.2d 865, 868, 520 N.Y.S.2d 370, 373 (1987)).

548. People v. Echevarria, 21 N.Y.3d 1, 11, 989 N.E.2d 9, 15, 966 N.Y.S.2d 747, 753 (2013); *People v. Moss*, 89 A.D.3d 600, 933 N.Y.S.2d 258 (1st Dep't 2011); *People v. Johnson*, 88 A.D.3d 503, 930 N.Y.S.2d 873 (1st Dep't 2011).

court room should be restricted during the testimony of undercover police officers on the ground that closure was necessary to protect their safety.[549] Second, the Court considered whether a trial court that charges the jury with respect to an agency defense is required to list all six agency factors reflected in the pattern Criminal Jury Instructions ("CJI").[550]

In terms of the Sixth Amendment right to a public trial, the Court noted that the right to a public trial is a fundamental, but not absolute, right that in certain limited circumstances may yield to other rights or interests.[551] In noting such, the Court reiterated the existing standard articulated by the United States Supreme Court with respect to when a trial judge may properly close a court room to the public.[552] That standard, as expressed in *Waller v. Georgia*, is as follows:

> [T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.[553]

In the instant cases, the precise issues complained of by the defense related to the first prong (overriding interest) and the third prong (reasonable alternatives) of *Waller*.[554] In addressing the first prong, the Court held that the safety of the testifying police officers may be a sufficient overriding interest.[555] However, the Court noted that a mere assertion of officer safety alone will not suffice.[556] Rather, if the instant cases are to serve as a guide for when a showing of officer safety has been adequately made by the prosecution, that showing will involve a "particularized finding" that requiring the officers to testify in open court will endanger their safety.[557] The closure must be limited to the portions of the proceedings directly implicating the officer's safety and, where appropriate, the trial court can make exceptions to the public

549. *Id.* at 12, 989 N.E.2d at 15, 966 N.Y.S.2d at 753.

550. *Id.* at 20, 989 N.E.2d at 21, 966 N.Y.S.2d at 759.

551. *Id.* at 11, 989 N.E.2d at 14-15, 966 N.Y.S.2d at 752-53 (citations omitted).

552. *Id.* at 11, 989 N.E.2d at 15, 966 N.Y.S.2d at 753.

553. *Echevarria*, 21 N.Y.3d at 11, 989 N.E.2d at 15, 966 N.Y.S.2d at 753 (quoting Waller v. Georgia, 467 U.S. 39, 48 (1984)).

554. *Id*. at 11, 989 N.E.2d at 15, 966 N.Y.S.2d at 753.

555. *Id.* at 12, 989 N.E.2d at 15, 966 N.Y.S.2d at 753 (quoting People v. Ramos, 90 N.Y.2d 490, 498, 685 N.E.2d 492, 496, 662 N.Y.S.2d 739, 743 (1997)).

556. *Id.* at 12, 989 N.E.2d at 15, 966 N.Y.S.2d at 753 (quoting *Ramos*, 90 N.Y.2d at 498, 685 N.E.2d at 496, 662 N.Y.S.2d at 743).

557. *Id.*

closure for members of the defendant's family.[558]

With respect to the third prong of *Waller* (reasonable alternatives to closure), the defense argued that the recent United States Supreme Court decision in *Presley v. Georgia* requires that the trial court always explicitly state on the record that it has considered, but rejected, alternative measures to public closure of a courtroom.[559] However, this argument was rejected by the Court of Appeals.[560] The Court of Appeals held that an accurate reading of *Presley* dictates that no such on-the-record showing was required.[561] Instead, the Court provided that "where the record in a buy-bust case 'makes no mention of alternatives but is otherwise sufficient to establish the need to close the particular proceeding . . . it can be *implied* that the trial court, in ordering closure, determined that no lesser alternative would protect the articulated interest.'"[562]

In terms of the agency charge that a trial court gives to the jury, the Court noted that the pattern jury instruction lists six particular factors that comprise the agency defense.[563] The essence of the Court's holding is that a trial court is not required to list all six factors in charging the jury.[564] However, the charge given to the jury must list as many factors as necessary to ensure that the charge the jury receives is balanced and conveys the proper analytical framework in which the agency defense is to be examined.[565]

XXVII. SIXTH AMENDMENT RIGHT TO CONFRONTATION

In *People v. Pealer*, the Court of Appeals held that the admission of records pertaining to the inspection, maintenance, and calibration of breathalyzer machines, without the testimony of the individual who created those records, does not violate the Confrontation Clause of the Sixth Amendment.[566] In *Pealer*, the defendant was arrested for driving while intoxicated.[567] The defendant agreed to take a breath test, which

558. *Echevarria*, 21 N.Y.3d at 19, 989 N.E.2d at 20-21, 966 N.Y.S.2d at 758-759.

559. *Id.* at 14-15, 989 N.E.2d at 17, 966 N.Y.S.2d at 755 (citing Presley v. Georgia, 558 U.S. 209 (2010)).

560. *Id*. at 18, 989 N.E.2d at 20, 966 N.Y.S.2d at 758.

561. *Id.*

562. *Id.* at 17, 989 N.E.2d at 19, 966 N.Y.S.2d at 757 (quoting *Ramos*, 90 N.Y.2d at 503-04, 685 N.E.2d at 500, 662 N.Y.S.2d at 747)).

563. *Echevarria*, 21 N.Y.3d at 20, 989 N.E.2d at 21, 966 N.Y.S.2d at 759.

564. *Id.* at 20-21, 989 N.E.2d at 22, 966 N.Y.S.2d at 760.

565. *Id.* at 21, 989 N.E.2d at 22, 966 N.Y.S.2d at 760.

566. 20 N.Y.3d. 447, 451, 985 N.E.2d 903, 904, 962 N.Y.S.2d 592, 594 (2013) (citing Crawford v. Washington, 541 U.S. 36 (2004)).

567. *Id.* at 451, 985 N.E.2d at 905, 962 N.Y.S.2d at 594 (citations omitted).

revealed a blood alcohol content at .15%.[568] At trial, "the People offered into evidence documents pertaining to the routine calibration and maintenance of the breathalyzer machine used in defendant's breath test, in order to demonstrate that it was in proper working order at the time defendant was tested."[569] "Specifically, two of the documents certified that the breathalyzer had been calibrated by the New York State Division of Criminal Justice Services in Albany."[570] "The third document stated that a sample of the simulator solution had been analyzed and approved for use in the breathalyzer by the State Police."[571] "The People intended to introduce these records through the testimony of the officer who administered the breathalyzer test to defendant."[572] "Defendant raised a Confrontation Clause challenge to these documents, contending that he was entitled to cross-examine the authors of the three records."[573] The "County Court disagreed and allowed the documents to be received in evidence."[574] "The jury found defendant guilty of DWI as a D felony . . . and defendant was later sentenced to a prison term of [two and one-third to seven] years."[575]

The Court of Appeals noted that pursuant to current Confrontation Clause jurisprudence, the admission of a statement that is deemed "testimonial," without the in-court testimony of the declarant of that statement, violates the Confrontation Clause.[576] In determining if a statement is testimonial, the Court will attempt to ascertain whether the statement was "procured with a primary purpose of creating an out-of-court substitute for trial testimony."[577] "If a different purpose underlies its creation, the issue of admissibility of the statement is subject to federal or state rules of evidence rather than the Sixth Amendment."[578] The Court of Appeals articulated four factors looked at by New York courts in determining whether a statement is testimonial. Those factors are:

568. *Id.*
569. *Id.* at 452, 985 N.E.2d at 905, 962 N.Y.S.2d at 594.
570. *Id.*
571. *Pealer*, 20 N.Y.3d at 452, 985 N.E.2d at 905, 962 N.Y.S.2d at 594.
572. *Id.*
573. *Id.*
574. *Id.*
575. *Id.*
576. *Pealer*, 20 N.Y.3d at 453, 985 N.E.2d at 905, 962 N.Y.S.2d at 595 (citations omitted).
577. *Id*. at 453, 985 N.E.2d at 906, 962 N.Y.S.2d at 595 (quoting Michigan v. Bryant, 131 S. Ct. 1143, 1155 (2011)).
578. *Id.* at 453, 985 N.E.2d at 906, 962 N.Y.S.2d at 595 (quoting *Bryant*, 131 S. Ct. at 1155).

> (1) whether the agency that produced the record is independent of law enforcement; (2) whether it reflects objective facts at the time of their recording; (3) whether the report has been biased in favor of law enforcement; and (4) whether the report accuses the defendant by directly linking him or her to the crime.[579]

In applying these factors to the admission of the calibration and accuracy documents, the Court determined that such documents were not in fact testimonial statements and, therefore, did not implicate the protections afforded by the Confrontation Clause.[580] The Court reasoned that "[i]t may reasonably be inferred that the primary motivation for examining the breathalyzer was to advise the . . . Police Department that its machine was adequately calibrated and operating properly."[581] Moreover, "[t]he testing of the machine was performed by employees of the Division of Criminal Justice Services, an executive agency that is independent of law enforcement agencies, whose task was to ensure the reliability of such machines—not to secure evidence for use in any particular criminal proceeding."[582] "The fact that the scientific test results and the observations of the technicians might be relevant to future prosecutions of unknown defendants was, at most, an ancillary consideration when they inspected and calibrated the machine."[583]

Further, the Court reasoned that "[a]ll three records simply reflected objective facts that were observed at the time of their recording in order to establish that the breathalyzer would produce accurate results, rather than to prove some past event."[584] As a result, the Court concluded that the "documents should be viewed as business records which, as a class, are generally deemed nontestimonial."[585]

579. *Id.* at 454, 985 N.E.2d at 907, 962 N.Y.S.2d at 596 (citing People v. Brown, 13 N.Y.3d 332, 339-40, 918 N.E.2d 927, 931, 890 N.Y.S.2d 415, 419 (2009)).

580. *Id.* at 455-56, 985 N.E.2d at 907-08, 962 N.Y.S.2d at 597-98.

581. *Pealer*, 20 N.Y.3d at 455, 985 N.E.2d at 907, 962 N.Y.S.2d at 596 (citations omitted).

582. *Id.*

583. *Id.* at 455, 985 N.E.2d at 907, 962 N.Y.S.2d at 596-97.

584. *Id.* at 455, 985 N.E.2d at 907, 962 N.Y.S.2d at 597.

585. *Id.* (citations omitted).