CRIMINAL LAW

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CONTENTS

INTRODUCTION

This *Survey* covers developments in New York criminal law and procedure during the period of June 30, 2016 to July 1, 2017. Given the large number of cases, the *Survey* focuses on decisions from the Court of Appeals and, where appropriate, discusses cases from trial and intermediate appellate courts. The *Survey* also includes a review of new legislative enactments pertaining to criminal law, criminal procedure, and the vehicle and traffic law.

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I. APPELLATE REVIEW SCOPE AND JURISDICTION

In *People v. Staton*, the defendant argued that the pretrial photo array was "unduly suggestive because he appeared older than the fillers and was the only [one in the array] with salt-and-pepper hair."[1] The Court held that this issue was beyond its review because the finding of the appellate division that the array was "not unduly suggestive [was] supported by the record."[2]

In *People v. Allard*, the prosecution argued that the defendant's Criminal Procedure Law (CPL) § 30.30 claim was not properly preserved for review because the defendant failed to file a response to the People's identified time exclusions setting forth the "legal or factual impediments" to the exclusions claimed by the People.[3] The defendant, in turn, argued that he was statutorily entitled to a hearing under CPL § 210.45 without having to challenge the People's "claimed exclusions."[4] The Court concluded that while the People sufficiently demonstrated a factual dispute requiring a hearing, the same was "inadequate to warrant [the trial court's] summary denial of the motion," and, accordingly, the "defendant was entitled to the hearing he requested in his moving papers" pursuant to CPL § 210.45(5)(c).[5] However, in reaching this conclusion, the Court

1. 28 N.Y.3d 1160, 1161, 71 N.E.3d 939, 939–40, 49 N.Y.S.3d 351, 351–52 (2017).

2. *Id.* at 1161, 71 N.E.3d at 940, 49 N.Y.S.3d at 352 (citing People v. Holley, 26 N.Y.3d 514, 524, 45 N.E.3d 936, 942, 25 N.Y.S.3d 40, 46 (2015)).

3. 28 N.Y.3d 41, 44–45, 63 N.E.3d 1140, 1141–42, 41 N.Y.S.3d 196, 197–98 (2016) (first quoting People v. Luperon, 85 N.Y.2d 71, 78, 647 N.E.2d 1243, 1246–47, 623 N.Y.S.2d 735, 738–39 (1995); and then quoting People v. Goode, 87 N.Y.2d 1045, 1047, 666 N.E.2d 182, 183, 643 N.Y.S.2d 477, 478 (1996)) (first citing People v. Beasley, 16 N.Y.3d 289, 292, 946 N.E.2d 166, 168, 921 N.Y.S.2d 178, 180 (2011); and then citing *Goode*, 87 N.Y.2d at 1047, 666 N.E.2d at 183, 643 N.Y.S.2d at 478). In order to preserve a CPL § 30.30 claim for review, "[A] defendant bears the initial burden of alleging that the People were not ready for trial within the statutorily prescribed time period." *Id.* at 45, 63 N.E.3d at 1142, 41 N.Y.S.3d at 198 (citing *Goode*, 87 N.Y.2d at 1047, 666 N.E.2d at 183, 643 N.Y.S.2d at 478). "The People, in opposition, 'must ordinarily identify the exclusions on which they intend to rely.'" *Id.* (quoting *Luperon*, 85 N.Y.2d at 78, 647 N.E.2d at 1247, 643 N.Y.S.2d at 739). "A defendant 'preserves challenges to the People's reliance on those exclusions for appellate review by identifying any legal or factual impediments to the use of those exclusions.'" *Id.* (quoting *Goode*, 87 N.Y.2d at 1047, 666 N.E.2d at 183, 643 N.Y.S.2d at 478).

4. *Id.* at 45, 63 N.E.3d at 1142–43, 41 N.Y.S.3d at 198–99 (first quoting N.Y. CRIM. PROC. LAW § 210.45(3) (McKinney 2007); and then quoting N.Y. C.P.L. § 210.45(5)(c)) ("Specifically, pursuant to CPL [§] 210.45, once 'all papers of both parties have been filed,' including any 'documentary evidence,' the motion court must determine 'whether the motion is determinable without a hearing to resolve questions of fact.'"). "The court may deny the motion without a hearing only if . . . the People have 'conclusively refuted' an allegation of fact essential to support the motion 'by unquestionable documentary proof.'" *Allard*, 28 N.Y.3d at 45, 63 N.E.3d at 1142–43, 41 N.Y.S.3d at 198–99 (quoting N.Y. C.P.L. § 210.45(5)(c)).

5. *Id.* at 46, 63 N.E.3d at 1143, 41 N.Y.S.3d at 199 (quoting People v. Gruden, 42 N.Y.2d

warned that "[i]n the absence of a hearing, a defendant's substantive CPL § 30.30 arguments will be unpreserved," and, as such, "a defendant would be well-advised to raise any CPL § 30.30 arguments" in his initial submission or a reply, "so as to ensure their preservation."[6]

In *People v. Guerin*, the Court held that the defendant's conviction for trespass under the Environmental Conservation Law was not preserved for review.[7] Specifically, the Court held that the defendant's argument—that the People's evidence of the location of the warning signs on the property was deficient—was not raised by the defendant in the trial court.[8]

In *People v. Pastor*, the Court held that the defendant's challenges to his conviction were not preserved for appellate review.[9] As to the defendant's alleged justification defense argument, the Court held that the "[d]efendant had 'an opportunity to seek relief from the sentencing court' by moving to withdraw his plea based on his alleged justification defense . . . [but] said nothing during the plea colloquy or the sentencing proceeding that negated an element of the crime or raised the possibility of a justification defense . . . ."[10] As to the defendant's argument that the trial court "failed to advise him of the immigration consequences of his . . . plea," the Court likewise held that the defendant was "obligated to move to withdraw his plea on that ground before the sentencing court" to preserve the same issue for appellate review.[11]

In *People v. Fisher*, the "defendant challenge[d] the trial court's denial of his motion to withdraw his plea on [the] grounds [that]: (1) [his] plea was not voluntary, knowing and intelligent because" it was entered without knowledge of certain exculpatory information contained in the People's notes; and (2) he was "innocent of hindering prosecution" because the codefendant, whose prosecution he allegedly hindered, was acquitted.[12] The Court rejected the defendant's voluntariness argument

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214, 217, 366 N.E.2d 794, 797, 397 N.Y.S.2d 704, 706 (1977)) (citing N.Y. C.P.L. § 210.45(5)(c)).

6. *Id.* at 46–47, 63 N.E.3d at 1143–44, 41 N.Y.S.3d at 199–200 (quoting *Beasley*, 16 N.Y.3d at 292–93, 946 N.E.2d at 168, 921 N.Y.S.2d at 180).

7. 28 N.Y.3d 1152, 1153, 71 N.E.3d 555, 556, 49 N.Y.S.3d 64, 65 (2017) (first citing N.Y. ENVTL. CONSERV. LAW § 11-2111(2) (McKinney 2017); and then citing People v. Hines, 97 N.Y.2d 56, 62, 762 N.E.2d 329, 333, 736 N.Y.S.2d 643, 647 (2001)).

8. *Id.* (citing *Hines*, 97 N.Y.2d at 62, 762 N.E.2d at 333, 736 N.Y.S.2d at 647).

9. 28 N.Y.3d 1089, 1090, 68 N.E.3d 42, 43, 45 N.Y.S.3d 317, 318 (2016).

10. *Id.* at 1090–91, 68 N.E.3d at 43, 45 N.Y.S.3d at 318 (quoting People v. Conceicao, 26 N.Y.3d 375, 381–82, 44 N.E.3d 199, 203, 23 N.Y.S.3d 124, 128 (2015)).

11. *Id.* at 1091, 68 N.E.3d at 43, 45 N.Y.S.3d at 318 (first citing People v. Peque, 22 N.Y.3d 168, 182–83, 3 N.E.3d 617, 626, 980 N.Y.S.2d 280, 289 (2013)).

12. 28 N.Y.3d 717, 721–22, 71 N.E.3d 932, 935, 49 N.Y.S.3d 344, 347 (2017) (quoting

on the grounds that, although the prosecutor's notes were *Rosario*[13] material, "the notes do not refer to [the] defendant's acts or intention, and, as such, [did] not directly or expressly provide evidence favorable to [the] defendant by negating or placing in doubt his criminal acts."[14] The Court also rejected the defendant's second challenge because, as to the charge of hindering prosecution, the "defendant's criminal culpability is not dependent on the assisted person's arrest or conviction" and because "an acquittal is only a finding of reasonable doubt, not a finding that [the person tried] is in fact innocent."[15]

In *People v. Morales*, the Court reversed the appellate division's dismissal of the defendant's direct appeal, without prejudice, on the grounds that the defendant was involuntarily deported prior to the appeal, his whereabouts were unknown, and the defendant failed to communicate with appellate counsel.[16] In so holding, the Court reiterated that intermediate appellate courts are prohibited "from dismissing pending direct appeals due to [a] defendant's involuntary deportation, regardless of the contentions raised by the defendant on appeal" or "any causal relationship between the defendant's conviction and deportation."[17]

In *People v. Flowers*, the defendant's case was returned to the trial

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People v. Bryce, 88 N.Y.2d 124, 128, 666 N.E.2d 221, 223, 643 N.Y.S.2d 516, 518 (1996)) ("[S]uppression of 'favorable evidence in the People's possession [that] is material to either guilt or punishment' is a violation of a defendant's federal and state due process rights."). To demonstrate a violation, the "defendant must show that (1) the evidence is favorable to the defendant because it is either exculpatory or impeaching in nature; (2) the evidence was suppressed by the prosecution; and (3) prejudice arose because the suppressed evidence was material[;]" to wit, the evidence would have materially affected the defendant's decision to plead rather than go to trial. *Id.* at 723, 71 N.E.3d at 935, 49 N.Y.S.3d at 347 (quoting People v. Fuentes, 12 N.Y.3d 259, 263, 907 N.E.2d 286, 289, 879 N.Y.S.2d 373, 376 (2009)). "A defendant is guilty of hindering prosecution in the second degree when the defendant 'renders criminal assistance to a person who has committed a class B or class C felony.'" *Id.* at 723, 71 N.E.3d at 936, 49 N.Y.S.3d at 349 (quoting N.Y. PENAL LAW § 205.60 (McKinney 2010)).

13. *See* People v. Rosario, 9 N.Y.2d 286, 290, 173 N.E.2d 881, 883–84, 213 N.Y.S.2d 448, 451 (1961) (quoting People v. Davis, 18 N.W. 362, 364 (Mich. 1884)) (citing People v. Walsh, 262 N.Y. 140, 150, 186 N.E. 422, 425 (1933)) ("[D]efense should be given the benefit of any information that can legitimately tend to overthrow the case made for the prosecution, or to show that it is unworthy of credence[.]") (internal quotation marks omitted)).

14. *Fisher*, 28 N.Y.3d at 722, 71 N.E.3d at 936, 49 N.Y.S.3d at 348.

15. *Id.* at 723, 71 N.E.3d at 937, 49 N.Y.S.3d at 349 (quoting People v. O'Toole, 22 N.Y.3d 335, 338, 3 N.E.3d 687, 690, 980 N.Y.S.2d 350, 353 (2013)) (citing People v. Chico, 90 N.Y.2d 585, 588, 687 N.E.2d 1288, 1290, 665 N.Y.S.2d 5, 7 (1997)).

16. 28 N.Y.3d 1087, 1088–89, 66 N.E.3d 1090, 1091–92, 44 N.Y.S.3d 372, 373–74 (2016).

17. *Id.* at 1089, 66 N.E.3d at 1091, 44 N.Y.S.3d at 373 (quoting People v. Harrison, 27 N.Y.3d 281, 284, 287, 52 N.E.3d 223, 224, 226, 32 N.Y.S.3d 560, 561, 563 (2016)) (citing People v. Ventura, 17 N.Y.3d 675, 679–81, 958 N.E.2d 884, 886–87, 934 N.Y.S.2d 756, 758–59 (2011)).

court by the appellate division for re-sentencing on the grounds that trial court "improperly considered" at sentencing "a crime that was dismissed at trial for lack of legally sufficient evidence."[18] After the trial court issued the same sentence, the defendant appealed, arguing that the same amounted to a "mode of proceedings error."[19] The Court rejected the defendant's argument because the alleged error was not a "fundamental flaw[]" and because the sentence re-imposed by the trial court was not "illegal."[20] In addition, as the defendant did not preserve the same argument at sentencing by objecting, the Court further held that the defendant's claim was not preserved for review.[21]

In *People v. Slocum*, "[t]he [a]ppellate [d]ivision concluded that [the] defendant unequivocally invoked his right to counsel" and that, as a result, "his statements should have been suppressed" at trial.[22] The Court concluded that, pursuant to CPL § 450.90(2)(a), said determination "was not 'on the law alone or upon the law and such facts which, but for the determination of law, would not have led to reversal.'"[23] Accordingly, the Court held that it had no jurisdiction to hear the People's appeal.[24]

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18. 97 A.D.3d 693, 693, 947 N.Y.S.2d 886, 886 (2d Dep't 2012) (first citing People v. Grant, 94 A.D.3d 1139, 1141–42, 942 N.Y.S.2d 223, 227 (2d Dep't 2012); then citing People v. Harvey, 76 A.D.3d 605, 606, 905 N.Y.S.2d 514, 515 (2d Dep't 2010); then citing People v. Pacquette, 73 A.D.3d 1088, 1088, 900 N.Y.S.2d 683, 683 (2d Dep't 2010); then citing People v. Romero, 71 A.D.3d 795, 796, 896 N.Y.S.2d 417, 419 (2d Dep't 2010); and then citing People v. Schrader, 23 A.D.3d 585, 585–86, 806 N.Y.S.2d 613, 614 (2d Dep't 2005)).

19. People v. Flowers, 28 N.Y.3d 536, 539–40, 68 N.E.3d 1228, 1230–31, 46 N.Y.S.3d 497, 500 (2016) (citing People v. Flowers, 121 A.D.3d 1014, 1014, 993 N.Y.S.2d 921, 921 (2d Dep't 2014)).

20. *Id.* at 540, 68 N.E.3d at 1231, 46 N.Y.S.3d at 500 (first quoting People v. Becoats, 17 N.Y.3d 643, 651, 958 N.E.2d 865, 867, 934 N.Y.S.2d 737, 739 (2011); and then quoting People v. Nieves, 2 N.Y.3d 310, 315, 811 N.E.2d 13, 17, 778 N.Y.S.2d 751, 755 (2004)). "[E]ven after a sentencing court disregards factors that were improperly considered, a reduction is not required so long as the remaining factors continue to justify the previously-imposed sentence." *Id.* at 542, 68 N.E.3d at 1232, 46 N.Y.S.3d at 502.

21. *Id.* at 540, 68 N.E.3d at 1231, 46 N.Y.S.3d at 500–01 (citing N.Y. CRIM. PROC. LAW § 470.05(2) (McKinney 2009)).

22. 29 N.Y.3d 954, 956, 73 N.E.3d 841, 841, 51 N.Y.S.3d 485, 485 (2017). "Whether a request for counsel is unequivocal presents a mixed question of law and fact." *Id.* (first citing People v. Porter, 9 N.Y.3d 966, 967, 878 N.E.2d 998, 999, 848 N.Y.S.2d 583, 583 (2007); and then citing People v. Glover, 87 N.Y.2d 838, 839, 661 N.E.2d 155, 156, 637 N.Y.S.2d 683, 684 (1995)).

23. *Id.* at 955–56, 73 N.E.3d at 841, 51 N.Y.S.3d at 485 (citing N.Y. C.P.L. § 450.90(2)(a) (McKinney 2005 & Supp. 2018)). C.P.L. § 450.90(2)(a) provides that: "An appeal to the court of appeals from an order of an intermediate appellate court reversing or modifying a judgment, sentence or order of a criminal court may be taken only if: (a) [t]he court of appeals determines that the intermediate appellate court's determination of reversal or modification was on the law alone or upon the law and such facts which, but for the determination of law, would not have led to reversal or modification . . . ." N.Y. C.P.L. § 450.90(2)(a).

24. *Slocum*, 29 N.Y.3d at 956, 73 N.E.3d at 842, 51 N.Y.S.3d at 486.

In *People v. Jackson*, the defendant challenged his conviction by arguing that the trial court "issued an erroneous *Sandoval*[25] ruling and denied his right to be present at a sidebar conference . . . ."[26] As to the defendant's first challenge, the Court concluded that the same was unpreserved for review because the defendant failed to make the same argument by objecting "at the time of the alleged erroneous ruling."[27] As to the defendant's second challenge, the Court held that the same was not reviewable because the defendant validly waived, in writing, his right to be present at the sidebar conferences.[28]

In *People v. Pena*, the defendant argued "that his aggregate sentence violate[d] the Eighth Amendment of the United States Constitution" and Article I, Section 5 of the New York Constitution.[29] The Court held that the defendant failed to preserve his constitutional claims for review.[30] Specifically, "although [the] defendant generally objected to the length of the sentence" issued by the trial court, he failed to raise the constitutional arguments advanced on appeal.[31] The Court reasoned that because the trial court "was never given an opportunity to address any of [the defendant's] constitutional challenges," the same claims were unpreserved for the Court's review.[32]

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25. A testifying defendant may be questioned by the People about his prior convictions and/or bad acts. *See* People v. Sandoval, 34 N.Y.2d 371, 373, 314 N.E.2d 413, 415, 357 N.Y.S.2d 849, 852 (1974).

26. 29 N.Y.3d 18, 20, 74 N.E.3d 302, 303, 52 N.Y.S.3d 63, 64 (2017).

27. *Id.* at 22–23, 74 N.E.3d at 304, 52 N.Y.S.3d at 65. "As with other questions of law concerning a ruling or instruction, a challenge based on a *Sandoval* error must be preserved for appellate review by a specific, timely objection." *Id.* at 22, 74 N.E.3d at 304, 52 N.Y.S.3d at 65 (first citing People v. Cantave, 21 N.Y.3d 374, 378, 993 N.E.2d 1257, 1261, 971 N.Y.S.2d 237, 240 (2013); and then citing People v. Gray, 86 N.Y.2d 10, 19, 652 N.E.2d 919, 921, 629 N.Y.S.2d 173, 175 (1995); and then citing N.Y. CRIM. PROC. LAW § 470.05(2) (McKinney 2009)). "To preserve an issue for review, counsel must register an objection and apprise the court of grounds upon which the objection is based 'at the time' of the allegedly erroneous ruling 'or at any subsequent time when the court had an opportunity of effectively changing the same.'" *Id.* (first quoting *Cantave*, 21 N.Y.3d at 378, 993 N.E.2d at 1261, 971 N.Y.S.2d at 240; and then quoting N.Y. C.P.L. § 470.05(2)).

28. *Id.* at 24, 74 N.E.3d at 305–06, 52 N.Y.S.3d at 66–67. Under CPL § 260.20, "[a] defendant must be personally present during the trial of an indictment." N.Y. CRIM. PROC. LAW § 260.20 (McKinney 2014). "However, a defendant may waive the right to be present at sidebar." *Jackson*, 29 N.Y.3d at 24, 74 N.E.3d at 305, 52 N.Y.S.3d at 66 (citing People v. Vargas, 88 N.Y.2d 363, 375–76, 668 N.E.2d 879, 884, 645 N.Y.S.2d 759, 764 (1996)).

29. 28 N.Y.3d 727, 729, 71 N.E.3d 930, 931, 49 N.Y.S.3d 342, 343 (2017) (first citing U.S. CONST. amend. VIII; and then citing N.Y. CONST. art V).

30. *Id.* at 730, 71 N.E.3d at 931, 49 N.Y.S.3d at 343.

31. *Id.*

32. *Id.* (quoting People v. Ingram, 67 N.Y.2d 897, 899, 492 N.E.2d 1220, 1221, 501 N.Y.S.2d 804, 805 (1986)) (citing United States v. Rivera, 546 F.3d 245, 254 (2d Cir. 2008)).

II. DEFENSES

In *People v. Sparks*, the defendant argued that the trial court improperly "refused to instruct the jury on the defense of justification."[33] The Court rejected the defendant's argument because there was "no reasonable view of the evidence that would have permitted the factfinder to conclude that the defendant's conduct was justified."[34] Specifically, the Court reasoned that there was no evidence in the record to objectively support the belief that the defendant was in danger of being harmed via the imminent use of unlawful physical force by the victim at the time that the defendant used force against the victim.[35]

III. EFFECTIVE ASSISTANCE OF COUNSEL

In *People v. Speaks*, the defendant argued that his counsel was ineffective because he failed "to object to [certain] comments made by the prosecutor during summation . . . ."[36] The Court rejected the defendant's argument on the grounds that "[t]hroughout the course of the trial, defense counsel, demonstrating his familiarity with the relevant law and the particular facts of the case, vigorously advocated for [the] defendant, made proper objections and appropriate motions, competently cross-examined witnesses, and presented a cogent defense case."[37]

In *People v. Clark*, the defendant argued that he was denied effective assistance of counsel because his attorney failed to present a justification defense, after the defendant specifically instructed his attorney to only pursue a misidentification defense.[38] The Court rejected the defendant's argument because defense counsel "vigorously pursued the defense [the] defendant approved rather than the one [the] defendant rejected outright."[39] Key to the Court's reasoning was that the misidentification

33. 29 N.Y.3d 932, 934, 73 N.E.3d 354, 355, 51 N.Y.S.3d 14, 15 (2017).

34. *Id.* (first citing People v. Cox, 92 N.Y.2d 1002, 1004, 707 N.E.2d 428, 429, 684 N.Y.S.2d 473, 474 (1998); and then citing People v. Petty, 7 N.Y.3d 277, 284, 852 N.E.2d 1155, 1161, 819 N.Y.S.2d 684, 689 (2006)).

35. *Id.* at 935, 73 N.E.3d at 356, 51 N.Y.S.3d at 16 (quoting People v. Umali, 10 N.Y.3d 417, 425, 888 N.E.2d 1046, 1051, 859 N.Y.S.2d 104, 109 (2008)) (first citing People v. Wesley, 76 N.Y.2d 555, 559, 563 N.E.2d 21, 24, 561 N.Y.S.2d 707, 710 (1990); and then citing N.Y. PENAL LAW § 35.15(1) (McKinney 2009)).

36. 28 N.Y.3d 990, 992, 65 N.E.3d 673, 674, 42 N.Y.S.3d 644, 645 (2016).

37. *Id.* (alteration in original) (quoting People v. Baldi, 54 N.Y.2d 137, 147, 429 N.E.2d 400, 405, 444 N.Y.S.2d 893, 898 (1981)) ("A defendant receives effective assistance of counsel '[s]o 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.'").

38. 28 N.Y.3d 556, 562, 69 N.E.3d 604, 608, 46 N.Y.S.3d 817, 821 (2016).

39. *Id.* at 564, 69 N.E.3d at 609, 46 N.Y.S.3d at 822.

theory advanced by defense counsel "had the potential to achieve [the] defendant's acquittal on all charges," whereas, a successful justification defense would have "resulted in [the defendant's] acquittal on the murder charge," but not on the assault charge.[40] As such, the Court concluded that defense counsel's efforts and strategy in advancing only the misidentification defense "w[ere] consistent with strategic decisions [made by] a reasonably competent attorney."[41] The Court also rejected the defendant's claim for ineffective assistance of counsel because defense counsel failed to object when the trial court ordered the courtroom cleared during *voir dire* to ensure seating for prospective jurors.[42] In so holding, the Court recognized the judicially sanctioned practice "of excluding the public and family members" to accommodate for limited seating.[43]

In *People v. Flowers*, discussed in Part I, the defendant also argued that he was deprived effective assistance of counsel when his attorney failed to object to the re-sentence term issued by the trial court.[44] The Court rejected the defendant's argument because, as set forth above, the "defendant's resentencing claim fail[ed] on its merit," therefore, "defense counsel [could not] be deemed ineffective for declining to assert [a meritless argument]."[45]

In *People v. Honghirun*, the defendant argued that his trial counsel was ineffective when he failed "to object to . . . testimony regarding the victim's disclosures" arising from defense counsel's "ignorance or misunderstanding of the law on prompt outcry testimony . . . ."[46] The Court concluded that "[i]nstead of objecting to that testimony, counsel strategically chose to use the evidence to [the] defendant's advantage by exploring the substance of, and the circumstances surrounding, the

40. *Id.* at 564, 69 N.E.3d at 609–10, 46 N.Y.S.3d at 822–23.

41. *Id.* at 564, 69 N.E.3d at 610, 46 N.Y.S.3d at 823 (first alteration in original) (quoting People v. Benevento, 91 N.Y.2d 708, 712, 697 N.E.2d 584, 587, 674 N.Y.S.2d 629, 632 (1998)).

42. *Id.* at 565, 69 N.E.3d at 610–11, 46 N.Y.S.3d at 823–24 (citing People v. Rivera, 71 N.Y.2d 705, 708, 525 N.E.2d 698, 700, 530 N.Y.S.2d 52, 54 (1988)).

43. *Clark*, 28 N.Y.3d at 565, 69 N.E.3d at 610–11, 46 N.Y.S.3d at 823–24 (first citing People v. Colon, 71 N.Y.2d 410, 418, 521 N.E.2d 1075, 1079–80, 526 N.Y.S.2d 932, 937 (1988); then citing People v. Varela, 22 A.D.3d 264, 265, 804 N.Y.S.2d 16, 18 (1st Dep't 2005); and then citing People v. Gibbons, 18 A.D.3d 773, 773, 795 N.Y.S.2d 700, 701 (2d Dep't 2005)).

44. 28 N.Y.3d 536, 541, 68 N.E.3d 1228, 1231, 46 N.Y.S.3d 497, 501 (2016).

45. *Id.* at 543, 68 N.E.3d at 1233, 46 N.Y.S.3d at 502. "Counsel will not be deemed ineffective for failing to pursue an argument that has 'little or no chance of success.'" *Id.* at 541, 68 N.E.3d at 1231, 46 N.Y.S.3d at 501 (quoting People v. Caban, 5 N.Y.3d 143, 152, 833 N.E.2d 213, 220, 800 N.Y.S.2d 70, 77 (2005)).

46. 29 N.Y.3d 284, 289, 78 N.E.3d 804, 807, 56 N.Y.S.3d 275, 278 (2017).

disclosure in depth to support the defense of recent fabrication."[47] As such, the Court reasoned that, although defense counsel's strategy was ultimately not successful, the defendant failed to establish that counsel was ineffective.[48]

In *People v. Ramsaran*, the defendant argued that his counsel was ineffective for failing to object to the prosecutor's summation "that the victim's DNA was 'on' [the] defendant's sweatshirt."[49] The Court rejected the defendant's argument because the People's forensic expert provided a specific statistical comparison to measure the significance of the DNA results.[50]

In *People v. Bank*, the defendant argued that his counsel was ineffective when counsel incorrectly advised the defendant that his sentences were, by statute, "required to run consecutively."[51] The Court rejected the defendant's argument holding that, although there was no dispute that counsel's advice was incorrect, there was no possibility that a reduced plea would have been offered to the defendant.[52] As such, the Court reasoned that the erroneous advice of counsel did not affect "the outcome of the proceeding."[53]

In *People v. Castillo*, the Court rejected the codefendants' argument that they were denied effective assistance of counsel because defense counsel failed to object to the trial court's general charge on causation.[54] Key to the Court's reasoning was that "the jury instructions, viewed in totality, neither improperly shifted the burden to co-defendants nor relieved the People of their burden to prove guilt beyond a reasonable doubt."[55]

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47. *Id.* at 290, 78 N.E.3d at 808, 56 N.Y.S.3d at 279.

48. *Id.* at 290–91, 78 N.E.3d at 808, 56 N.Y.S.3d at 279 (first quoting People v. Benevento, 91 N.Y.2d 708, 712, 697 N.E.2d 584, 587, 674 N.Y.S.2d 629, 632 (1998); and then quoting People v. Baldi, 54 N.Y.2d 137, 146, 429 N.E.3d 400, 405, 444 N.Y.S.2d 893, 898 (1981)) (citing People v. Pavone, 26 N.Y.3d 629, 647, 47 N.E.3d 56, 70, 26 N.Y.S.3d 728, 742 (2015)).

49. 29 N.Y.3d 1070, 1071, 79 N.E.3d 1120, 1121, 57 N.Y.S.3d 457, 458 (2017).

50. *Id.* (quoting People v. Wright, 25 N.Y.3d 769, 771, 37 N.E.3d 1127, 1129, 16 N.Y.S.3d 485, 487 (2015)).

51. 28 N.Y.3d 131, 137, 65 N.E.3d 680, 683, 42 N.Y.S.3d 651, 654 (2016).

52. *Id.* at 137–38, 65 N.E.3d at 683, 42 N.Y.S.3d at 654 (citing N.Y. PENAL LAW § 70.25(2) (McKinney 2009 & Supp. 2018)).

53. *Id.* at 138, 65 N.E.3d at 683, 42 N.Y.S.3d at 654.

54. *See* 29 N.Y.3d 935, 937, 73 N.E.3d 341, 341, 51 N.Y.S.3d 1, 1 (2017) (first citing People v. Thomas, 50 N.Y.2d 467, 472, 407 N.E.2d 430, 432, 429 N.Y.S.2d 584, 587 (1980); and then citing People v. Drake, 7 N.Y.3d 28, 34, 850 N.E.2d 630, 633, 817 N.Y.S.2d 583, 586 (2006)).

55. *Id.* (first citing *Thomas*, 50 N.Y.2d at 472, 407 N.E.2d at 432, 429 N.Y.S.2d at 587; and then citing *Drake*, 7 N.Y.3d at 34, 850 N.E.2d at 633, 817 N.Y.S.2d at 586).

In *People v. Henderson*, the defendant argued that his counsel was ineffective because "trial counsel's motion to dismiss the indictment on CPL § 30.30 grounds failed to argue that the People [were chargeable with] certain periods of delay" resulting from testing of DNA evidence.[56] Specifically, it was the defendant's contention "that had defense counsel argued that [said] delays were chargeable to the People under CPL [§] 30.30, the indictment would have been dismissed."[57] The Court rejected the defendant's argument because there was "nothing in the record to demonstrate that the People were not diligent in requesting [the] DNA testing . . . or that the manner in which the DNA testing was conducted . . . was inconsistent with standard laboratory protocols."[58]

In *People v. Anderson*, the defendant argued that his trial counsel was ineffective because he failed to object to the People's use at summation of a PowerPoint presentation containing captions and markings which mischaracterized the evidence.[59] The Court rejected the defendant's argument, holding that the slides at issue were a fair comment on the evidence and the reasonable inferences to be drawn therefrom.[60] As such, the Court concluded that counsel was not ineffective for failing to object to the prosecutor's use of the slides.[61]

In *People v. Couser*, the defendant argued that his attorney's advice, given prior to the defendant taking a plea to attempted murder, that the defendant's sentence after the same conviction could be directed to run consecutively to his other sentences, rendered counsel's assistance ineffective.[62] Because the appellate division affirmed the sentencing court's conclusion that the sentences could run consecutively, the Court concluded that counsel's advice to the defendant, "even if erroneous," did not render defense counsel ineffective.[63]

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56. 28 N.Y.3d 63, 65, 64 N.E.3d 284, 284–85, 41 N.Y.S.3d 464, 464–65 (2016).

57. *Id.* at 66, 64 N.E.3d at 285, 41 N.Y.S.3d at 465.

58. *Id.*

59. *See* 29 N.Y.3d 69, 74, 74 N.E.3d 639, 642, 52 N.Y.S.3d 256, 259 (2017).

60. *Id.* at 72, 74, 74 N.E.3d at 641–42, 52 N.Y.S.3d at 258–59. "PowerPoint 'slides depicting an already admitted photograph, with captions accurately tracking prior [] testimony, might reasonably be regarded as relevant and fair [] commentary on the [] evidence, and not simply an appeal to the jury's emotions.'" *Id.* at 72, 74 N.E.3d at 641, 52 N.Y.S.3d at 258 (alterations in original) (quoting People v. Santiago, 22 N.Y.3d 740, 751, 9 N.E.3d 870, 877, 986 N.Y.S.2d 375, 382 (2014)). "PowerPoint slides may properly be used in summation where, as here, the added captions or markings are consistent with the trial evidence and the fair inferences to be drawn from that evidence." *Id.*

61. *Id.* at 71, 74 N.E.3d at 640, 52 N.Y.S.3d at 257.

62. 28 N.Y.3d 368, 378, 68 N.E.3d 26, 32, 45 N.Y.S.3d 301, 307 (2016).

63. *Id.* at 378, 68 N.E.3d at 32–33, 45 N.Y.S.3d at 307–08 (citing People v. Modica, 64 N.Y.2d 828, 829, 476 N.E.2d 330, 331, 486 N.Y.S.2d 931, 932 (1985)); People v. Couser, 126 A.D.3d 1419, 1421, 5 N.Y.S.3d 787, 790 (4th Dep't 2015).

IV. EVIDENCE

In *People v. Peguero-Sanchez*, the Court held that evidence consisting of the defendant's text messages was properly admitted by the trial court "to rebut [the] defendant's version of . . . events surrounding his arrest."[64] Key to the Court's reasoning was that the text messages at issue were relevant to the same issue required to be decided by the jury.[65]

In *People v. Speaks*, discussed in Part III, the defendant also argued that the trial court erred by permitting a detective to testify about the description of the perpetrators given by a nontestifying witness over a hearsay objection from the defendant's counsel.[66] The Court rejected the defendant's argument because the testimony "was accompanied by a curative instruction . . . that it was not admitted for [the] truth," was the same general nonhearsay description given by other trial witnesses, and was also consistent with footage of the perpetrators in a video admitted into evidence.[67] As such, the Court concluded that the same evidence was permissible "as background information to explain why the police were able to capture relevant surveillance footage."[68]

In *People v. Hernandez*, the Court rejected the defendant's argument that the trial court erred when it allowed two witnesses to testify about statements made to them by a child shortly after the child was abused, and again several hours later at the hospital, under the excited utterance rule.[69] The Court concluded that the child's statements made shortly after

64. 29 N.Y.3d 965, 967, 74 N.E.3d 301, 301, 52 N.Y.S.3d 62, 62 (2017).

65. *Id.* (quoting People v. Cade, 73 N.Y.2d 904, 905, 536 N.E.2d 616, 617, 539 N.Y.S.2d 287, 288 (1989)) (citing People v. Harris, 57 N.Y.2d 335, 345, 442 N.E.2d 1205, 1209, 456 N.Y.S.2d 694, 698 (1982)).

66. 28 N.Y.3d 990, 991–92, 65 N.E.3d 673, 674, 42 N.Y.S.3d 644, 645 (2016) (citing People v. Gray, 86 N.Y.2d 10, 19, 652 N.E.2d 919, 921, 629 N.Y.S.2d 173, 175 (1995)).

67. *Id.*

68. *Id.* at 992, 65 N.E.3d at 674, 42 N.Y.S.3d at 645 (citing People v. Tosca, 98 N.Y.2d 660, 661, 773 N.E.2d 1014, 1014, 746 N.Y.S.2d 276, 276 (2002) (mem.)).

69. 28 N.Y.3d 1056, 1057, 65 N.E.3d 1272, 1273, 43 N.Y.S.3d 237, 238–39 (2016). The excited utterance exception to the hearsay rule "permits a court to admit an out-of-court statement made in response to a startling or upsetting event, if the circumstances surrounding the statement reveal that it was made while the declarant was under the stress of excitement and 'lack[ed] the reflective capacity essential for fabrication.'" *Id.* (alteration in original) (quoting People v. Johnson, 1 N.Y.3d 302, 306, 804 N.E.2d 402, 405, 772 N.Y.S.2d 238, 241 (2003)). "The decision to admit hearsay as an excited utterance is left to the sound judgment of the trial court, which must consider, among other things, the nature of the startling event, the amount of time between the event and the statement, and the activities of the declarant in the interim." *Id.* at 1057, 65 N.E.3d at 1273, 43 N.Y.S.3d at 239 (citing People v. Edwards, 47 N.Y.2d 493, 497, 392 N.E.2d 1229, 1231, 419 N.Y.S.2d 45, 47 (1979)). "Above all, the decisive factor is whether the surrounding circumstances reasonably justify the conclusion that the remarks were not made under the impetus of studied reflection." *Id.* (quoting *Edwards*, 47 N.Y.2d at 497, 392 N.E.2d at 1231, 419 N.Y.S.2d at 47).

the abuse were properly admitted because they "were made within a half hour of the startling event, while the child was still under the stress of excitement . . . ."[70] As to the later statements made by the child at the hospital, the Court held that, even if the child's "stress of excitement had sufficiently abated," any error in admitting the statements was harmless, given the overwhelming proof of the defendant's guilt.[71]

In *People v. Jones*, the defendant challenged the trial court's ruling allowing a detective to testify about a damaging hearsay statement describing the defendant's conduct made to the detective by an unidentified witness under the excited utterance exception to the hearsay rule.[72] The Court held that the statement at issue was admissible as an excited utterance because the statement was made to the detective immediately after the event and before the witness had an opportunity for studied reflection.[73] Furthermore, the Court held that the detective's own observations corroborated the witness's statement sufficiently enough "to allow its admission at trial."[74]

In *People v. Whitehead*, the Court rejected the defendant's argument that the evidence at trial was insufficient to support his drug possession conviction because "the People did not recover or introduce [at trial] any of the cocaine that [the] defendant was charged with possessing . . . ."[75] Reasoning that "direct evidence in the form of contraband or other physical evidence is not the only adequate proof," the Court held that the People presented sufficient evidence at trial to sustain the conviction in the form of intercepted phone calls, visual surveillance, and witness testimony.[76]

In *People v. Frumusa*, the Court rejected the defendant's argument that the trial court abused its discretion by admitting into evidence a contempt order issued against the defendant arising from a civil action involving the same funds the defendant was charged with stealing.[77] The

70. *Hernandez*, 28 N.Y.3d at 1057, 65 N.E.3d at 1273–74, 43 N.Y.S.3d at 239 (citing People v. Brown, 70 N.Y.2d 513, 518, 517 N.E.2d 515, 517, 522 N.Y.S.2d 837, 839 (1987)).

71. *Id.* at 1058, 65 N.E.3d at 1274, 43 N.Y.S.3d at 239 (citing People v. Crimmins, 36 N.Y.2d 230, 241–42, 326 N.E.2d 787, 794, 367 N.Y.S.2d 213, 222 (1975)).

72. 28 N.Y.3d 1037, 1038–39, 65 N.E.3d 699, 700, 42 N.Y.S.3d 669, 670 (2016).

73. *Id.* at 1039, 65 N.E.3d at 700, 42 N.Y.S.3d at 670.

74. *Id.* at 1039, 65 N.E.3d at 700, 42 N.Y.S.3d at 670–71 (citing People v. Brown, 80 N.Y.2d 729, 736–37, 610 N.E.2d 369, 373–74, 594 N.Y.S.2d 696, 700–01 (1993)).

75. 29 N.Y.3d 956, 958, 73 N.E.3d 842, 843, 51 N.Y.S.3d 486, 487 (2017).

76. *Id.* (quoting People v. Samuels, 99 N.Y.2d 20, 24, 780 N.E.2d 513, 516, 750 N.Y.S.2d 828, 831 (2002)).

77. 29 N.Y.3d 364, 366, 79 N.E.3d 495, 496–97, 57 N.Y.S.3d 103, 104–05 (2017).

Court held that the contempt order was not *Molineux*[78] evidence on the grounds that, although the evidence at issue was relevant to the same crime for which the defendant was tried, there was no danger that the jury drew an "improper inference of propensity because no separate crime or bad act committed by the defendant [was] placed before the jury."[79] The Court further held that the civil order was not unduly prejudicial because it was entered against the defendant's business, rather than the defendant individually, and because the defendant conceded at trial that he took and transferred the money at issue from the business without legal authority.[80]

In *People v. Williams*, the defendant argued that he was deprived a fair trial by the prosecutor's use of annotated PowerPoint images that failed to accurately represent the trial evidence at summation.[81] The Court rejected the defendant's argument because the trial court stopped the slideshow, instructed the jury to disregard the slides, and repeatedly instructed the jury that statements of counsel were not evidence and that the jury was the sole judge of the facts.[82]

In *People v. Leonard*, the Court held that the trial court erred in allowing the prosecution to introduce testimony from the victim about a prior incident where the defendant allegedly assaulted her in a similar manner as *Molineux* evidence.[83] Specifically, the Court reasoned that the testimony at issue was classic propensity evidence, "tending to show that [the] defendant committed the charged crime because he had done it

78. *Id.* at 366, 79 N.E.3d at 496, 57 N.Y.S.3d at 104; *see* People v. Molineux, 168 N.Y. 264, 305–06, 61 N.E. 286, 299 (1901). "[T]he familiar *Molineux* rule states that evidence of a defendant's uncharged crimes or prior misconduct is not admissible if it cannot logically be connected to some specific material issue in the case, and tends only to demonstrate the defendant's propensity to commit the crime charged." *Frumusa*, 29 N.Y.3d at 369, 79 N.E.3d at 498–99, 57 N.Y.S.3d at 106–07 (quoting People v. Cass, 18 N.Y.3d 553, 559, 965 N.E.2d 918, 923, 942 N.Y.S.2d 416, 421 (2012)). "*Molineux* evidence is presumptively inadmissible unless it is relevant to some material issue in the case and the trial court determines in its discretion that the probative value of the evidence outweighs the risk of undue prejudice to the defendant." *Id.* at 369, 79 N.E.3d at 499, 57 N.Y.S.3d at 107 (first citing *Cass*, 18 N.Y.3d at 560, 965 N.E.2d at 924, 942 N.Y.S.2d at 422; and then citing People v. Alvino, 71 N.Y.2d 233, 242, 519 N.E.2d 808, 812, 525 N.Y.S.2d 7, 11–12 (1987)).

79. *Frumusa*, 29 N.Y.3d at 370, 79 N.E.3d at 499, 57 N.Y.S.3d at 107.

80. *Id.* at 372–73, 79 N.E.3d at 501, 57 N.Y.S.3d at 109.

81. 29 N.Y.3d 84, 86, 74 N.E.3d 649, 650, 52 N.Y.S.3d 266, 267 (2017).

82. *See id.* at 89, 74 N.E.3d at 653, 52 N.Y.S.3d at 270. "There is no inherent problem with the use of a PowerPoint presentation as a visual aid in connection with closing arguments. Indeed, it can be an effective tool. But, the long-standing rules governing the bounds of proper conduct in summation apply equally to a PowerPoint presentation. In other words, if it would be improper to make a particular statement, it would likewise be improper to display it." *Id.* at 89, 74 N.E.3d at 652, 52 N.Y.S.3d at 269 (citing People v. Anderson, 29 N.Y.3d 69, 72, 74 N.E.3d 639, 641, 52 N.Y.S.3d 256, 258 (2017)).

83. 29 N.Y.3d 1, 4, 73 N.E.3d 344, 345, 51 N.Y.S.3d 4, 5 (2017).

before."[84] In so holding, the Court rejected the People's arguments that the same evidence was admissible under the necessary background information, intent, and motive exceptions to the *Molineux* rule.[85]

In *People v. Bethune*, the Court rejected the defendant's challenge to his conviction on the grounds that the trial court resettled the transcript without holding the reconstruction hearing requested by the defendant.[86] The Court held that "[e]ven when a judge's recollection of the disputed or missing portion of a transcript is unclear, other information may suffice to allow him or her to resettle the record without a reconstruction hearing."[87] The Court found no abuse of discretion based on the trial court's consideration of the certified corrected transcript, the undisputed portions of the transcript and, most significantly, the failure of either party to object to what would have been prominent and obvious misstatements.[88]

In *People v. Davis*, the Court held that the People offered sufficient evidence at trial to support the defendant's conviction for murder in the second degree, by establishing that it was reasonably foreseeable that the defendant's actions in unlawfully entering the victim's home and assaulting him would cause the victim's death.[89] Specifically, the People's "expert medical witness opined that the cause of death was the stress of the mugging, in combination with the hip fracture and subsequent surgery, which 'precipitated the myocardial infarction with

84. *Id.* at 7, 73 N.E.3d at 348, 51 N.Y.S.3d at 8.

85. *Id.* at 7–8, 73 N.E.3d at 347–48, 51 N.Y.S.3d at 7–8. "In *People v. Molineux*, [the Court] identified a non-exhaustive list of five exceptions or purposes, for which uncharged crimes might be relevant, to show: (1) intent, (2) motive, (3) knowledge, (4) common scheme or plan, or (5) identity of the defendant." *Id.* at 7, 73 N.E.3d at 347, 51 N.Y.S.3d at 7. "[I]n *People v. Dorm*, [the Court] explained that prior uncharged crimes may also be used to 'provide[ ] necessary background information on the nature of the relationship and place[ ] the charged conduct in context.'" *Id.* (second alteration in original) (quoting People v. Dorm, 12 N.Y.3d 16, 19, 903 N.E.2d 263, 265, 874 N.Y.S.2d 866, 868 (2009)). "*Molineux* evidence will not be admitted if it 'is actually of slight value when compared to the possible prejudice to the accused.'" *Leonard*, 29 N.Y.3d at 7, 73 N.E.3d at 347, 51 N.Y.S.3d at 7 (citing People v. Arafet, 13 N.Y.3d 460, 465, 920 N.E.2d 919, 922, 892 N.Y.S.2d 812, 815 (2009)).

86. 29 N.Y.3d 539, 541, 81 N.E.3d 835, 836, 59 N.Y.S.3d 301, 302 (2017).

87. *Id.* at 542, 81 N.E.3d at 837, 59 N.Y.S.3d at 303.

88. *Id.* at 543, 81 N.E.3d at 837, 59 N.Y.S.3d at 303. "[N]ot every dispute about the record mandates a reconstruction hearing." *Id.* at 542, 81 N.E.3d at 836, 59 N.Y.S.3d at 302 (quoting People v. Santorelli, 95 N.Y.2d 412, 424, 741 N.E.2d 493, 499, 718 N.Y.S.2d 696, 702 (2000)).

89. 28 N.Y.3d 294, 296, 66 N.E.3d 1076, 1078, 44 N.Y.S.3d 358, 360 (2016). As to felony murder in the second degree, the People were required to prove that the defendant's conduct was "a sufficiently direct cause" of the victim's death. *Id.* at 300, 66 N.E.3d at 1080, 44 N.Y.S.3d at 363 (quoting People v. Matos, 83 N.Y.2d 509, 511, 634 N.E.2d 157, 158, 611 N.Y.S.2d 785, 786 (1994)) (citing N.Y. PENAL LAW § 125.25(3) (McKinney 2009)).

subsequent cardiac arrest and ultimate death.'"[90] The Court concluded that the same testimony was sufficient to satisfy the actual contributory cause and foreseeability elements of the crime.[91] The Court also rejected the defendant's conviction challenge on grounds that the only evidence in support of his conviction was accomplice testimony in violation of CPL § 60.22(1).[92] Specifically, the Court held that video and telephone record evidence closely corroborated the testimony of all three accomplice witnesses.[93]

In *People v. Valentin*, the Court held that the trial court did not abuse its discretion by permitting the People to introduce evidence of the defendant's prior drug sale conviction to establish the element of intent to sell where the defendant interposed the agency defense.[94] Specifically,

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90. *Davis*, 28 N.Y.3d at 300–01, 66 N.E.3d at 1080–81, 44 N.Y.S.3d at 362–63 (quoting *In re* Anthony M., 63 N.Y.2d 270, 277, 471 N.E.2d 447, 450, 481 N.Y.S.2d 675, 679 (1984)). "Sufficiently direct causation is established by proof of the following: (1) that [the] defendant's actions were an actual contributory cause of [the] death, in the sense that they forged a link in the chain of causes which actually brought about the death and (2) that the fatal result was reasonably foreseeable." *Id.* (alteration in original) (internal quotation marks omitted) (first quoting *In re Anthony M.*, 63 N.Y.2d at 280, 471 N.E.2d at 452, 481 N.Y.S.2d at 680; and then quoting People v. Hernandez, 82 N.Y.2d 309, 314, 624 N.E.2d 661, 663, 604 N.Y.S.2d 524, 526 (1993)).

91. *Id.* at 301, 66 N.E.3d at 1081, 44 N.Y.S.3d at 363. "With respect to [the] defendant's actions being an 'actual contributory cause of [the] death' . . . so long as 'the necessary causative link is established, other causes, such as a victim's preexisting condition, will not relieve the defendant of responsibility for homicide.'" *Id.* at 300, 66 N.E.3d at 1080, 44 N.Y.S.3d at 362 (alteration in original) (quoting *In re Anthony M.*, 63 N.Y.2d at 280, 471 N.E.2d at 452, 481 N.Y.S.2d at 680.) "With respect to foreseeability of the death, the People must prove that the ultimate harm is something which should have been foreseen as being reasonably related to the acts of the accused." *Id.* at 301, 66 N.E.3d at 1081, 44 N.Y.S.3d at 363 (quoting People v. Kibbe, 35 N.Y.2d 407, 412, 321 N.E.2d 773, 776, 362 N.Y.S.2d 848, 852–53 (1974)).

92. *Davis*, 28 N.Y.3d at 302–03, 66 N.E.3d at 1082, 44 N.Y.S.3d at 364 (quoting N.Y. CRIM. PROC. LAW § 60.22(1) (McKinney 2016)). "Pursuant to CPL [§] 60.22(1), '[a] defendant may not be convicted of any offense upon the testimony of an accomplice unsupported by corroborative evidence tending to connect the defendant with the commission of such offense.'" *Id.* at 303, 66 N.E.3d at 1082, 44 N.Y.S.3d at 364 (second alteration in original) (quoting N.Y. C.P.L. § 60.22(1)).

93. *Id.* (quoting People v. Reome, 15 N.Y.3d 188, 194, 933 N.E.2d 186, 190, 906 N.Y.S.2d 788, 792 (2010)). Corroborative evidence is sufficient "if it tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the accomplice is telling the truth." *Id.* (internal quotation marks omitted) (quoting *Reome*, 15 N.Y.3d at 191–92, 933 N.E.2d at 188, 906 N.Y.S.2d at 790).

94. 29 N.Y.3d 150, 156, 75 N.E.3d 1153, 1158, 53 N.Y.S.3d 592, 597 (2017). "[U]nder the agency defense, 'one who acts solely as the agent of a purchaser of narcotics cannot be convicted of the crime of criminal sale of a controlled substance.'" *Id.* at 155, 75 N.E.3d at 1157, 53 N.Y.S.3d at 596 (quoting People v. Roche, 45 N.Y.2d 78, 81, 379 N.E.2d 208, 210, 407 N.Y.S.2d 682, 684 (1978)). "In New York, '[t]o be an agent of his buyer, a narcotics merchant must be a mere extension of the buyer.' Indeed, 'the agent must have no direct

"when the defendant interposes an agency defense—essentially disputing that his transfer of drugs to the buyer was with the intent to sell—evidence of prior uncharged drug sales is admissible to establish the element of intent on a sale count."[95]

In *People v. Vining*, the Court held that the trial court did not abuse its discretion by admitting into evidence a telephone call between the defendant and the victim as an adoptive admission based on the defendant's silence and evasive responses.[96] Key to the Court's reasoning was the fact that the trial court made a proper threshold determination, based on context of the call, that the defendant heard and understood the victim's allegations against him but "chose to give evasive and manipulative responses."[97] The fact that the telephone call was recorded while the defendant was incarcerated did not alter the Court's analysis.[98]

In *People v. Brewer*, the Court concluded that evidence of the defendant's drug use was an uncharged crime or bad act that was properly admitted by the trial court as *Molineux* evidence "because it was not proffered to show [the] defendant's propensity toward crime, but to corroborate details of the victims' testimony."[99] The Court also concluded that evidence of the defendant's prior sexual acts with consenting adults was not *Molineux* or other propensity evidence because the same evidence was neither a crime nor a prior bad act and showed no

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interest in the contraband being sold,' and '[h]is function must be performed without any profit motive.'" *Id.* (alterations in original) (first quoting People v. Argibay, 45 N.Y.2d 45, 53, 379 N.E.2d 191, 195, 407 N.Y.S.2d 664, 668 (1978); and then quoting *Roche*, 45 N.Y.2d at 85, 379 N.E.2d at 212, 407 N.Y.S.2d at 686).

95. *Id.* at 156, 75 N.E.3d at 1158, 53 N.Y.S.3d at 597 (first citing People v. Alvino, 71 N.Y.2d 233, 246, 519 N.E.2d 808, 816, 525 N.Y.S.2d 7, 15 (1987); and then citing People v. Chong, 45 N.Y.2d 64, 75, 379 N.E.2d 200, 207, 407 N.Y.S.2d 674, 680 (1978)).

96. 28 N.Y.3d 686, 692, 71 N.E.3d 563, 567, 49 N.Y.S.3d 72, 76 (2017). "An adoptive admission occurs 'when a party acknowledges and assents to something already uttered by another person, which thus becomes effectively the party's own admission.'" *Id.* at 690, 71 N.E.3d at 565, 49 N.Y.S.3d at 74 (quoting People v. Campney, 94 N.Y.2d 307, 311, 726 N.E.2d 468, 470, 704 N.Y.S.2d 916, 918 (1999)).

97. *Id.* at 691, 71 N.E.3d at 566, 49 N.Y.S.3d at 75.

98. *See id.* at 692–93, 71 N.E.3d at 567, 49 N.Y.S.3d at 76 (quoting People v. Johnson, 27 N.Y.3d 199, 206, 51 N.E.3d 545, 549, 32 N.Y.S.3d 34, 38 (2016)). Specifically, the defendant was not induced or coerced by anyone to make detrimental admissions and the mere act of recording by the jail is no different from anyone listening to a statement freely made by the defendant. *Id.* (quoting *Johnson*, 27 N.Y.3d at 206, 51 N.E.3d at 549, 32 N.Y.S.3d at 38).

99. (*Brewer II*), 28 N.Y.3d 271, 275, 66 N.E.3d 1057, 1060, 44 N.Y.S.3d 339, 342 (2016) (first citing People v. Molineux, 168 N.Y. 264, 295, 61 N.E. 286, 295 (1901); and then citing People v. Brewer (*Brewer I*), 129 A.D.3d 1619, 1620, 12 N.Y.S.3d 453, 455 (4th Dep't 2015)).

propensity to commit the crimes for which the defendant was tried.[100] In so holding, the Court rejected the defendant's argument that the same evidence was more prejudicial than probative.[101] Finally, the Court concluded that the trial court properly allowed a witness to testify about the victim's disclosing of abuse under the prompt outcry and excited utterance exceptions to the hearsay rule.[102]

In *People v. Flanagan*, the defendant argued that there was insufficient evidence at trial to support his conviction for official misconduct and conspiracy under the theories of malfeasance and nonfeasance.[103] As a matter of first impression, the Court also considered whether the trial court erred by allowing the admission of evidence pursuant to the conspirator exception to the hearsay rule.[104] As to malfeasance, the Court held that the evidence was sufficient to support the conviction based on the defendant's use of his position of power to manipulate evidence with the goal of improperly terminating a pending

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100. *Id.* at 276, 66 N.E.3d at 1060, 44 N.Y.S.3d at 343 (citing *Brewer I*, 129 A.D.3d at 1620, 12 N.Y.S.3d at 455).

101. *See id.* at 277, 66 N.E.3d at 1061, 44 N.Y.S.3d at 343.

> Evidence which helps establish a defendant's guilt always can be considered evidence that 'prejudices' him or her. But the probative value of a piece of evidence is not automatically outweighed by prejudice merely because the evidence is compelling. Here, '[t]he point is that the damage resulted from something other than its tendency to prove propensity. That suggests that the evidence must have been relevant to something else, as indeed it was. . . . If this evidence was damaging, it was because it had the intended effect—it undermined the defendant's theory.'

Id. (alteration in original) (omission in original) (quoting People v. Hudy, 73 N.Y.2d 40, 72, 535 N.E.2d 250, 269, 538 N.Y.S.2d 197, 216–17 (1988) (Wachtler, J., dissenting)) (citing People v. Walker, 83 N.Y.2d 455, 463, 633 N.E.2d 472, 476–77, 611 N.Y.S.2d 118, 122–23 (1994)).

102. *Id.* at 278, 66 N.E.3d at 1062, 44 N.Y.S.3d at 344. "Generally, the 'prompt outcry exception' to the hearsay rule is limited to testimony that a timely complaint was made, and 'does not allow the further testimony concerning details of the incident.'" *Brewer II*, 28 N.Y.3d at 278, 66 N.E.3d at 1062, 44 N.Y.S.3d at 344 (quoting People v. Rice, 75 N.Y.2d 929, 932, 554 N.E.2d 1265, 1266–67, 555 N.Y.S.2d 677, 678–79 (1990)). An excited utterance is a statement that is "made while the victim was under the continuing influence of the stress and excitement generated by the initial event." *Id.* (internal quotation marks omitted) (quoting People v. Medina, 53 A.D.3d 1046, 1047, 861 N.Y.S.2d 546, 547 (4th Dep't 2008)).

103. 28 N.Y.3d 644, 648, 71 N.E.3d 541, 543, 49 N.Y.S.3d 50, 52 (2017).

104. *Id.* at 663, 71 N.E.3d at 554, 49 N.Y.S.3d at 63. "The standard for reviewing the legal sufficiency of evidence in a criminal case is whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 656, 71 N.E.3d at 549, 49 N.Y.S.3d at 58 (internal quotation marks omitted) (quoting People v. Contes, 60 N.Y.2d 620, 621, 454 N.E.2d 932, 932–33, 467 N.Y.S.2d 349, 349–50 (1983)).

felony investigation.[105] As to nonfeasance, the Court held that the evidence was sufficient to support the conviction based on the fact that the termination of the investigation after the defendant and his accomplices became involved "could not be attributed to any legitimate reason."[106] As to conspiracy, the Court held that the evidence was sufficient, particularly, as to the "coconspirators' agreement to commit the crime of official misconduct."[107] Finally, as an issue of first impression, the Court held that "statements made after a conspirator's alleged active involvement in the conspiracy has ceased, but the conspiracy continues, are admissible unless this conspirator has unequivocally communicated his or her withdrawal from the conspiracy to the coconspirators."[108]

In *People v. Price*, the Court reversed the defendant's conviction and ordered a new trial because a photograph of the defendant was not properly authenticated.[109] The Court concluded that the People's proof failed to establish the requisite authentication to render the photograph admissible into evidence by showing that the photograph "accurately represents the subject matter depicted," through a witness with

105. *Id.* at 658, 71 N.E.3d at 550, 49 N.Y.S.3d at 59. "In order to be guilty of official misconduct for malfeasance a defendant (1) must commit an act that constitutes an unauthorized exercise of his or her official functions, (2) knowing that the act is unauthorized, (3) with the intent to obtain a benefit or deprive another of a benefit." *Id.* at 657, 71 N.E.3d at 549–50, 49 N.Y.S.3d at 58–59 (citing N.Y. PENAL LAW § 195.00(1) (McKinney 2010)).

106. *Flanagan*, 28 N.Y.3d at 661, 71 N.E.3d at 553, 49 N.Y.S.3d at 62. In order to be guilty of official misconduct for nonfeasance, "a defendant (1) must knowingly refrain from performing a duty imposed by law or clearly inherent in the nature of his or her office (2) with the intent to obtain a benefit or deprive another of a benefit." *Id.* at 660, 71 N.E.3d at 551–52, 49 N.Y.S.3d at 60–61 (citing PENAL § 195.00(2)).

107. *Id.* at 663, 71 N.E.3d at 554, 49 N.Y.S.3d at 63. "To be guilty of conspiracy in the sixth degree, a defendant (1) must 'with intent that conduct constituting a *crime* be performed' (2) 'agree[ ] with one or more persons to engage in or cause the performance of such conduct.'" *Id.* at 662, 71 N.E.3d at 553, 49 N.Y.S.3d at 62 (omission in original) (quoting N.Y. PENAL LAW § 105.00 (McKinney 2009)).

108. *Id.* at 664, 71 N.E.3d at 555, 49 N.Y.S.3d at 64 (citing United States v. Brown, 332 F.3d 363, 374 (6th Cir. 2003)).

109. 29 N.Y.3d 472, 480, 80 N.E.3d 1005, 1011, 58 N.Y.S.3d 259, 265 (2017).

> In order for a piece of evidence to be of probative value, there must be proof that it is what its proponent says it is. The requirement of authentication is thus a condition precedent to admitting evidence. Accuracy or authenticity is established by proof that the offered evidence is genuine and that there has been no tampering with it.

Id. at 476, 80 N.E.3d at 1008–09, 58 N.Y.S.3d at 262–63 (internal quotation marks omitted) (first quoting United States v. Sliker, 751 F.2d 477, 497 (2d Cir. 1984); and then quoting People v. McGee, 49 N.Y.2d 48, 59, 399 N.E.2d 1177, 1183, 424 N.Y.S.2d 157, 163 (1979)) (citing RANDOLPH N. JONAKAIT ET AL., NEW YORK EVIDENTIARY FOUNDATIONS 51 (2d ed. 1998 & Supp. 2017)).

knowledge of the facts or expert testimony.[110] Specifically, no witness testified that the photograph at issue "was a fair and accurate representation of the scene depicted."[111]

In *People v. Patterson*, the Court considered whether to uphold the admission of trial evidence consisting of subscriber information in pre-paid cell phone records as nonhearsay evidence located within a business record.[112] The Court concluded that the subscriber information was properly admitted because it was not introduced for the truth of the matters asserted therein.[113] Specifically, the information was admitted for the limited, nonhearsay purpose of showing that one of the individuals who activated the cell phone numbers identified themselves as the defendant and that said individual also gave certain pedigree information that was otherwise associated with the defendant.[114] As such, the Court held that the court below properly determined that the information at issue was independently admissible.[115]

In *People v. Chery*, the defendant argued that the trial court erred by concluding that the defendant's omissions from his spontaneous post-detention statement to the police was the proper subject of impeachment.[116] The Court held that the omitted information from the defendant's post-detention statement to the police was admissible for purposes of impeachment because the defendant "elected to provide some explanation of what happened at the scene, and it was unnatural to have omitted the significantly more favorable version of events to which he

110. *Id.* at 477, 80 N.E.3d at 1009, 58 N.Y.S.3d at 263 (internal quotation marks omitted) (quoting People v. Byrnes, 33 N.Y.2d 343, 347, 308 N.E.2d 435, 437, 352 N.Y.S.2d 913, 916 (1974)) (first citing New York v. Patterson, 93 N.Y.2d 80, 84, 710 N.E.2d 665, 668, 688 N.Y.S.2d 101, 104 (1999); then citing JONAKAIT ET AL., *supra* note 109, at 90; then citing RICHARD T. FARRELL, PRINCE, RICHARDSON ON EVIDENCE § 4-212 (11th ed. 1995 & Supp. 2008); and then citing EDITH L. FISCH, FISCH ON NEW YORK EVIDENCE 82–83 (2d ed. 1977)).

111. *Id.* at 477–78, 80 N.E.3d at 1009–10, 58 N.Y.S.3d at 263–64 (first citing People v. Marra, 21 N.Y.3d 979, 981, 994 N.E.2d 387, 387–88, 971 N.Y.2d 491, 491–92 (2013); then citing *Byrnes*, 33 N.Y.2d at 347, 308 N.E.2d at 437, 352 N.Y.S.2d at 915; then citing Alberti v. N.Y., Lake Erie & W. R.R. Co., 118 N.Y. 77, 88, 23 N.E. 35, 37–38 (1889); and then citing Zegarelli v. Hughes, 3 N.Y.3d 64, 69, 814 N.E.2d 795, 798, 781 N.Y.S.2d 488, 491 (2004)).

112. 28 N.Y.3d 544, 546, 68 N.E.3d 1242, 1243, 46 N.Y.S.3d 511, 512 (2016).

113. *Id.* at 552–53, 68 N.E.3d at 1247–48, 46 N.Y.S.3d at 516–17.

114. *Id.* at 552, 68 N.E.3d at 1248, 46 N.Y.S.3d at 516 (citing United States v. Lieberman, 637 F.2d 95, 101 (2d Cir. 1980)).

115. *Id.* at 546, 68 N.E.3d at 1243, 46 N.Y.S.3d at 512.

116. 28 N.Y.3d 139, 142, 65 N.E.3d 684, 685, 42 N.Y.S.3d 655, 656 (2016). "[I]t is a well-established principle of state evidentiary law that evidence of a defendant's pretrial silence is generally inadmissible." *Id.* at 144, 65 N.E.3d at 687, 42 N.Y.S.3d at 657 (internal quotation marks omitted) (quoting People v. Williams, 25 N.Y.3d 185, 190, 31 N.E.3d 103, 106, 8 N.Y.S.3d 641, 644 (2015)).

testified at trial—that complainant had assaulted him."[117] Key to the Court's reasoning was that the "defendant admitted in his direct testimony that he was not silent and that he had given the police his version of complainant's misconduct at the scene. Consequently, the credibility of his initial spontaneous statement was legitimately called into question by his trial testimony."[118]

In *People v. Kangas*, the defendant argued that the trial court erred by admitting into evidence a test record of the simulator solution used during the breathalyzer administered to the defendant because the certifications contained within the exhibit did not contain a verification that the record could not be tampered with pursuant to New York Civil Practice Law and Rules (CPLR) 4539(b).[119] The Court held that CPLR 4539(b) did not apply to the documents at issue because they were originally created in electronic form.[120] The Court further held that the same documents were properly admitted by the trial court pursuant to CPLR 4518(a).[121]

V. GUILTY PLEAS

In *People v. Guerrero*, the Court rejected the defendant's challenge to the legal sufficiency of the DNA indictment based on its failure to identify him as the perpetrator by name.[122] The Court reasoned that the alleged defect was not jurisdictional in nature and, therefore, did not survive the defendant's guilty plea; to wit, "[b]y pleading guilty, [the] defendant acknowledged that he was the person who committed the offense."[123] Based on similar reasoning, the Court rejected the

117. *Id.* at 145, 65 N.E.3d at 687, 42 N.Y.S.3d at 658. "[W]hen given circumstances make it most unnatural to omit certain information from a statement, the fact of the omission is itself admissible for purposes of impeachment." *Id.* at 144, 65 N.E.3d at 687, 42 N.Y.S.3d at 658 (internal quotation marks omitted) (quoting People v. Savage, 50 N.Y.2d 673, 679, 409 N.E.2d 858, 861, 431 N.Y.S.2d 382, 384 (1980)).

118. *Id.* at 145, 65 N.E.3d at 687, 42 N.Y.S.3d at 658.

119. 28 N.Y.3d 984, 985, 63 N.E.3d 1133, 1134, 41 N.Y.S.3d 189, 190 (2016).

120. *Id.* (quoting N.Y. C.P.L.R. 4539(a)–(b) (McKinney 2007)) (citing People v. Rath, 41 Misc. 3d 869, 872–80, 975 N.Y.S.2d 567, 569–75 (Dist. Ct. Nassau Cty. 2013)) ("CPLR 4539(b) applies only when a document that originally existed in hard copy form is scanned to store a digital 'image' of the hard copy document, and then a 'reproduction' of the digital image is printed in the ordinary course of business.").

121. *Id.* at 985, 63 N.E.3d at 1135, 41 N.Y.S.3d at 191. CPLR 4518(a) provides that an "electronic record . . . shall be admissible in a tangible exhibit that is a true and accurate representation of such electronic record." *Id.* (omission in original) (internal quotation marks omitted) (quoting N.Y. C.P.L.R. 4518(a) (McKinney 2007)).

122. 28 N.Y.3d 110, 117, 65 N.E.3d 51, 57, 42 N.Y.S.3d 80, 86 (2016).

123. *Id.* "An indictment is rendered jurisdictionally defective only if it does not charge the defendant with the commission of a particular crime, by, for example, failing to allege every

defendant's claim that his challenge to the amended indictment based on hearsay grounds survived his guilty plea.[124] Specifically, the Court reasoned that "by pleading guilty to the amended indictment, [the] defendant forfeited the argument that the People improperly utilized the hearsay statements to link [the] defendant's DNA to the DNA profile contained in the DNA indictment."[125]

In *People v. Bryant*, the defendant argued that his waiver of his right to appeal was not made knowingly and intelligently.[126] The Court rejected the defendant's argument because the defendant's verbal waiver was accompanied by a detailed written waiver stating that "the right to appeal is separate and distinct from other rights automatically forfeited upon a plea of guilty."[127] Accordingly, the Court concluded that the record sufficiently demonstrated that the defendant knowingly and intelligently waived his right to appeal.[128]

In *People v. Couser*, discussed in Part III, the defendant also argued that the trial court's failure to perform a factual allocution at sentencing rendered his *Alford* plea to first-degree attempted murder involuntary.[129] The Court rejected the defendant's argument, holding that "[t]he extensive factual recitation of the trial evidence presented by both defense counsel and the People was sufficient for the [trial] court to be satisfied that there was 'strong evidence of guilt,' such that an *Alford* plea was appropriate under the circumstances."[130]

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material element of the crime charged, or alleging acts that do not equal a crime at all." *Id.* at 116, 65 N.E.3d at 56, 42 N.Y.S.3d at 85 (internal quotation marks omitted) (quoting People v. Hansen, 95 N.Y.2d 227, 231, 738 N.E.2d 773, 777, 715 N.Y.S.2d 369, 373 (2000)).

124. *Id.* at 117, 65 N.E.3d at 57, 42 N.Y.S.3d at 86.

125. *Id.* (first citing *Hansen*, 95 N.Y.2d at 231–32, 738 N.E.2d at 777, 715 N.Y.S.2d at 373; then citing People v. McGuire, 122 A.D. 947, 947 (2d Dep't 2014), *lv. denied*, 26 N.Y.3d 969, 969, 40 N.E.3d 584, 584, 18 N.Y.S.3d 606, 606 (2015); then citing People v. McKinney, 122 A.D.3d 1083, 1083, 995 N.Y.S.2d 854, 855 (3d Dep't 2014), *lv. denied*, 25 N.Y.3d 1167, 1167, 36 N.E.3d 102, 102, 15 N.Y.S.3d 299, 299 (2015); and then citing People v. Torres, 117 A.D.3d 1497, 1498, 984 N.Y.S.2d 530, 531 (4th Dep't 2014), *lv. denied*, 24 N.Y.3d 963, 963, 20 N.E.3d 1002, 1002, 996 N.Y.S.2d 222, 222 (2014)).

126. *See* 28 N.Y.3d 1094, 1096, 68 N.E.3d 60, 61, 45 N.Y.S.3d 335, 336 (2016).

127. *Id.*

128. *Id.*

129. 28 N.Y.3d 368, 378, 68 N.E.3d 26, 33, 45 N.Y.S.3d 301, 308 (2016). "An Alford plea is permitted in New York only when 'it is the product of a voluntary and rational choice, and the record before the court contains strong evidence of actual guilt.'" *Id.* at 379, 68 N.E.3d at 33, 45 N.Y.S.3d at 308 (quoting Silmon v. Travis, 95 N.Y.2d 470, 475, 741 N.E.2d 501, 503, 718 N.Y.S.2d 704, 706 (2000)).

130. *Id.*

VI. IDENTIFICATION OF THE DEFENDANT

In *People v. Perkins*, the Court rejected the bright line rule that "a witness's prior mention of a distinctive feature can be a determinative factor in a lineup's suggestiveness," departing from prior appellate division cases holding "that a defendant's distinctive feature does not render a lineup unduly suggestive unless that feature figured prominently in the witness's description."[131] After rejecting the rule that a lineup's suggestiveness should turn solely on whether a defendant's distinctive feature figured prominently in a witness's prior description, the Court held that "a witness's prior description is but one factor a court should consider in determining whether the lineup is one that 'create[s] a substantial likelihood that the defendant would be singled out for identification.'"[132]

VII. JURY TRIAL AND INSTRUCTION

In *People v. Smalling*, the Court held that it was reversible error for the trial court to charge the jury on constructive possession after agreeing at a charge conference to the People's request not to issue the same charge.[133] The Court concluded that said error prejudiced the defendant and was, therefore, not harmless.[134]

In *People v. Wiggs*, the defendant argued that the trial court committed a mode of proceedings error by failing to respond to the jury's outstanding request for a read-back of testimony prior to verdict.[135] The Court reasoned that the trial court discharged its responsibility to provide defense counsel with meaningful notice of the jury's note by reading it

131. 28 N.Y.3d 432, 436–37, 68 N.E.3d 679, 682, 45 N.Y.S.3d 860, 863 (2016) (first citing People v. Jordan, 44 A.D.3d 875, 876, 843 N.Y.S.2d 450, 451 (2d Dep't 2007); and then citing People v. Ryan, 45 A.D.3d 1363, 1364, 845 N.Y.S.2d 885, 886 (4th Dep't 2007)). "[W]hether a lineup is unduly suggestive is a mixed question of law and fact, and so long as there is record support for a suppression court's conclusion, the issue is beyond" the Court's review. *Id.* at 436, 68 N.E.3d at 681–82, 45 N.Y.S.3d at 862–63 (citing People v. McBride, 14 N.Y.3d 440, 448, 928 N.E.2d 1027, 1032, 902 N.Y.S.2d 830, 835 (2010)).

132. *Id.* at 437, 68 N.E.3d at 682, 45 N.Y.S.3d at 863 (alteration in original) (quoting People v. Chipp, 75 N.Y.2d 327, 336, 552 N.E.2d 608, 613, 553 N.Y.S.2d 72, 77 (1990)).

133. 29 N.Y.3d 981, 982, 75 N.E.3d 665, 666, 53 N.Y.S.3d 248, 249 (2017) (first citing N.Y. CRIM. PROC. LAW § 300.10 (McKinney 2017); and then citing People v. Greene, 75 N.Y.2d 875, 877, 553 N.E.2d 1014, 1015, 554 N.Y.S.2d 466, 467 (1990)).

134. *Id.* (citing People v. Nevins, 16 A.D.3d 1046, 1047, 791 N.Y.S.2d 771, 772 (4th Dep't 2005), *lv. denied*, 4 N.Y.3d 889, 889, 831 N.E.2d 979, 979, 798 N.Y.S.2d 734, 734 (2005), *cert. denied*, 548 U.S. 911, 911 (2006)).

135. 28 N.Y.3d 987, 989, 63 N.E.3d 1132, 1133, 41 N.Y.S.3d 188, 189 (2016) (citing People v. Mack, 27 N.Y.3d 534, 537, 55 N.E.3d 1041, 1049, 36 N.Y.S.3d 68, 76 (2016)).

verbatim into the record in the presence of all counsel.[136] As defense counsel failed to object, the Court ruled that the error was not preserved for review.[137]

In *People v. Pabon*, the defendant argued that the trial court, with the judge sitting as the finder of fact, committed reversible error by reading a document not in evidence and by taking notes, using a computer and a telephone during testimony.[138] The Court rejected the defendant's argument, holding that the judge, in a nonjury trial, serves both as the finder of fact and must also discharge the judicial obligations in overseeing the trial and, as such, "may take notes and rely on technological instruments to facilitate the proper discharge of these judicial duties."[139]

In *People v. Finkelstein*, the defendant argued that the trial court erred by refusing "to instruct the jury on the lesser included offense of coercion in the second degree."[140] Specifically, the defendant argued that there was "a reasonable view of the evidence which would support a finding that the defendant committed such lesser offense but did not commit the greater" offense of coercion in the first degree.[141] The Court rejected the defendant's argument because the means of the defendant's coercion; to wit, threatening the victim's clients to drive away her business, as well as threats of physical injury and death, had the "heinous quality contemplated by the first-degree statute, and therefore the second-degree charge was not warranted."[142]

In *People v. Morgan*, the defendant argued "that the trial court's supplemental instruction in response to [a] defective verdict was coercive because it did not include language conveying that the jurors were not to surrender their conscientiously held beliefs [and or] specifically refer to cautionary language contained in the [trial] court's previous deadlock charge."[143] The Court rejected the defendant's argument because, when

136. *Id.* (citing People v. Nealon, 26 N.Y.3d 152, 160, 41 N.E.3d 1130, 1135, 20 N.Y.S.3d 315, 320 (2015)).

137. *Id.* (quoting *Mack*, 27 N.Y.3d at 544, 55 N.E.3d at 1049, 36 N.Y.S.3d at 76).

138. 28 N.Y.3d 147, 151, 65 N.E.3d 688, 690, 42 N.Y.S.3d 659, 661 (2016).

139. *Id.* at 158, 65 N.E.3d at 695, 42 N.Y.S.3d at 666.

140. 28 N.Y.3d 345, 348, 68 N.E.3d 64, 66, 45 N.Y.S.3d 339, 341 (2016).

141. *Id.* (quoting N.Y. CRIM. PROC. LAW § 300.50(1) (McKinney 2017)).

142. *Id.* at 349, 68 N.E.3d at 67, 45 N.Y.S.3d at 342. "[S]econd-degree coercion should be charged as a lesser included offense only in the 'unusual factual situation' in which the coercion by threat of personal or property injury lacks 'the heinousness ordinarily associated with this manner of commission of the crime.'" *Id.* at 349, 68 N.E.3d at 66, 45 N.Y.S.3d at 341 (quoting People v. Discala, 45 N.Y.2d 38, 43, 379 N.E.2d 187, 190, 407 N.Y.S.2d 660, 663–64 (1978)).

143. 28 N.Y.3d 516, 521, 68 N.E.3d 1224, 1226, 46 N.Y.S.3d 493, 496 (2016).

the jury was not unanimous, the trial court simply "provided clarification that, in order to constitute a verdict, all jurors had to agree."[144] Furthermore, the trial court "stressed that the jurors should 'attempt' to reach a verdict, thereby leaving 'open the possibility that the jurors would have principled disagreements that would prevent them from reaching a unanimous verdict.'"[145]

In *People v. Viruet*, the defendant argued that the trial court erred by refusing to issue an adverse inference charge to the jury with respect to video surveillance footage of the crime scene that was collected by a law enforcement agent but lost prior to trial.[146] The Court held that refusing to give the adverse inference charge was error because the defendant acted with due diligence in demanding evidence that was destroyed by the State, which evidence was reasonably likely to be of material importance; to wit, video footage of the crime the defendant was charged with committing.[147] However, the Court concluded that the error was

144. *Id.* at 522, 68 N.E.3d at 1227, 46 N.Y.S.3d at 497. Pursuant to CPL § 310.80, if in response to polling "any juror answers in the negative, the court must refuse to accept the verdict and must direct the jury to resume its deliberation." N.Y. CRIM. PROC. LAW § 310.80 (McKinney 2017)).

145. *Morgan*, 28 N.Y.3d at 522, 68 N.E.3d at 1227–28, 46 N.Y.S.3d at 497 (quoting United States v. McDonald, 759 F.3d 220, 224 (2d Cir. 2014)) (citing People v. Pagan, 45 N.Y.2d 725, 726, 380 N.E.2d 299, 300, 408 N.Y.S.2d 473, 474 (1978)).

> When confronting a potential deadlock, a court may give a supplemental jury charge that 'encourage[s]' the jurors to reach a unanimous verdict. However, the court 'must not attempt to coerce or compel the jury to agree upon a particular verdict, or any verdict' and should not 'prod jurors through prejudicial innuendoes or coerce them with untoward pressure to reach an agreement.' Nor should the instruction 'impermissibly single[] out [any juror] for noncompliance with the majority' or suggest 'that the jury would be forced to continue deliberations indefinitely.'

Id. at 521, 68 N.E.3d at 1227, 46 N.Y.S.3d at 496 (alterations in original) (quoting *Pagan*, 45 N.Y.2d at 726–27, 380 N.E.2d at 300–01, 778 N.Y.S.2d at 474) (citing People v. Aponte, 2 N.Y.3d 304, 308, 810 N.E.2d 899, 901, 778 N.Y.S.2d 447, 449 (2004)).

146. 29 N.Y.3d 527, 532, 81 N.E.3d 828, 830, 59 N.Y.S.3d 294, 296 (2017) (quoting People v. Handy, 20 N.Y.3d 663, 665, 988 N.E.2d 879, 879, 966 N.Y.S.2d 351, 351 (2013)).

147. *Id.* at 532, 81 N.E.3d at 830–31, 59 N.Y.S.3d at 296–97 (quoting *Handy*, 20 N.Y.3d at 665, 998 N.E.2d at 879, 966 N.Y.S.2d at 351). "[W]hen a defendant in a criminal case, acting with due diligence, demands evidence that is reasonably likely to be of material importance, and that evidence has been destroyed by the State, the defendant is entitled to an adverse inference charge." *Id.* at 532, 81 N.E.3d at 830, 59 N.Y.S.3d at 296 (internal quotation marks omitted) (quoting *Handy*, 20 N.Y.3d at 665, 988 N.E.2d at 880, 966 N.Y.S.2d at 351). "In such circumstances, the charge is no longer 'discretionary,' but is 'mandatory upon request.'" *Id.* (quoting People v. Blake, 24 N.Y.3d 78, 82, 21 N.E.3d 214, 216, 996 N.Y.S.2d 585, 587 (2014)).

harmless, given the overwhelming proof of the defendant's guilt.[148]

In *People v. Then*, the defendant argued that he was denied a fair trial when, for half a day of jury selection, he was compelled to wear orange correctional pants rather than civilian clothing.[149] The Court rejected the defendant's argument because there was no evidence in the record "that [the] defendant's orange correctional pants were visible to the jury and the clothing that was visible to the jury was clearly not identifiable as correctional garb."[150]

In *People v. Warrington*, the Court held that the trial court erred by excusing a prospective juror for cause in a murder trial.[151] The Court reasoned that even though the prospective juror initially expressed an opinion indicating that she had a bias in connection with the victim's young age, upon follow-up by the trial court, the prospective juror's "assurances to the [trial] court adequately expressed her ability and willingness to adhere to her obligation to acquit [the] defendant if the evidence [so] required . . . ."[152] As such, the same established that the juror would render an impartial verdict untainted by any previous bias or sympathy for the young victim.[153]

In *People v. Valentin*, the Court held that "[t]he trial court did not

148. *Viruet*, 29 N.Y.3d at 533, 81 N.E.3d at 831, 59 N.Y.S.3d at 297. "Errors of law of nonconstitutional magnitude may be found harmless where 'the proof of the defendant's guilt, without reference to the error, is overwhelming' and where there is no 'significant probability . . . that the jury would have acquitted the defendant had it not been for the error." *Id.* (quoting People v. Byer, 21 N.Y.3d 887, 889, 988 N.E.2d 507, 508, 965 N.Y.S.2d 771, 773 (2013)).

149. 28 N.Y.3d 1170, 1171, 71 N.E.3d 535, 535, 49 N.Y.S.3d 44, 44 (2017).

150. *Id.* at 1173, 71 N.E.3d at 536, 49 N.Y.S.3d at 45 (citing People v. Harper, 47 N.Y.2d 857, 858, 392 N.E.2d 1244, 1245, 419 N.Y.S.2d 61, 62 (1979)).

151. 28 N.Y.3d 1116, 1117, 68 N.E.3d 70, 72, 45 N.Y.S.3d 345, 347 (2016) (citing People v. Warrington, 130 A.D.3d 1368, 1371, 15 N.Y.S.3d 256, 259 (3d Dep't 2015)). "CPL [§] 270.20(1)(b) provides that a party may challenge a potential juror for cause if the juror 'has a state of mind that is likely to preclude him [or her] from rendering an impartial verdict based upon the evidence adduced at the trial.'" *Id.* at 1119, 68 N.E.3d at 73, 45 N.Y.S.3d at 348 (alteration in original) (quoting People v. Harris, 19 N.Y.3d 679, 685, 978 N.E.2d 1246, 1249, 954 N.Y.S.2d 777, 780 (2012)) (citing N.Y. CRIM. PROC. LAW § 270.20(1)(b) (McKinney 2014)).

152. *Id.* at 1121–22, 68 N.E.3d at 74, 45 N.Y.S.3d at 349 (citing People v. Johnson, 94 N.Y.2d 600, 615, 730 N.E.2d 932, 940, 709 N.Y.S.2d 134, 142 (2000)).

153. *Id.* (citing *Johnson*, 94 N.Y.2d at 615, 730 N.E.2d at 940, 709 N.Y.S.2d at 142). "[A] prospective juror must, first and foremost, in unequivocal terms, 'expressly state that his [or her] prior state of mind concerning either the case or either of the parties will not influence [the] verdict.'" *Id.* at 1120, 68 N.E.3d at 73, 45 N.Y.S.3d at 348 (second and third alterations in original) (first citing People v. Biondo, 41 N.Y.2d 483, 485, 362 N.E.2d 576, 578, 393 N.Y.S.2d 944, 945 (1977); then citing People v. Blyden, 55 N.Y.2d 73, 78, 432 N.E.2d 758, 760, 447 N.Y.S.2d 886, 888 (1982); and then citing *Johnson*, 94 N.Y.2d at 612, 730 N.E.2d at 938, 709 N.Y.S.2d at 140).

commit . . . error by including an initial aggressor exception in its justification charge."[154] Key to the Court's reasoning was the fact that there was a reasonable view of the evidence that the defendant was the initial aggressor in the use of deadly physical force.[155] As such, the Court concluded that the same factual determination was properly before the jury.[156]

In *People v. Bridgeforth*, the Court held that the skin color of a prospective juror is a cognizable classification upon which a *Batson*[157] challenge to the People's use of peremptory strikes may be based.[158] In so holding, the Court recognized the existence of juror discrimination on the basis of the prospective juror's skin color.[159] Because the trial court held that the defendant failed to make a prima facie showing of discrimination when he challenged the prosecutor's use of peremptory strikes to exclude dark-colored women, the Court found error and reversed the defendant's conviction.[160]

In *People v. Spencer*, the Court held that the trial court erred in failing to discharge a sworn juror who repeatedly stated during deliberations that she could not set aside her emotions and could not decide the case on the facts and the law.[161] The Court reasoned that because the juror at issue unambiguously stated that she was unable to render an impartial verdict based solely on the evidence and the law, the trial court should have discharged her as "grossly unqualified to serve" pursuant to CPL § 270.35(1) and that the trial court's failure to do so

154. 29 N.Y.3d 57, 59, 74 N.E.3d 632, 632, 52 N.Y.S.3d 249, 249 (2017). "It is well settled that, '[i]n evaluating a challenged jury instruction, [the Court] view[s] the charge as a whole in order to determine whether a claimed deficiency in the jury charge requires reversal.'" *Id.* at 61, 74 N.E.3d at 634, 52 N.Y.S.3d at 251 (first alteration in original) (quoting People v. Walker, 26 N.Y.3d 170, 174, 42 N.E.3d 688, 691, 21 N.Y.S.3d 191, 194 (2015)).

155. *Id.*

156. *Id.* at 62, 74 N.E.3d at 634–35, 52 N.Y.S.3d at 251–52 (citing N.Y. PENAL LAW § 35.15 (McKinney 2009)).

157. *See* Batson v. Kentucky, 476 U.S. 79, 97–98 (1986) (outlining a three (3) step process to be applied when a defendant challenges the use of peremptory strikes during voir dire to exclude potential jurors for pretextual reasons, as follows: (1) the movant must make a prima facie showing that the peremptory strike was used to discriminate; (2) if a showing under step one is made, the burden shifts to the opposing party to articulate a non-discriminatory reason for striking the juror; and (3) the trial court must determine, based on the arguments presented by the parties, whether the proffered reason for the peremptory strike was pretextual and whether the movant has shown purposeful discrimination).

158. 28 N.Y.3d 567, 570–71, 69 N.E.3d 611, 613, 46 N.Y.S.3d 824, 826 (2016).

159. *Id.* at 571, 69 N.E.3d at 613, 46 N.Y.S.3d at 826.

160. *Id.* at 576–77, 69 N.E.3d at 617, 46 N.Y.S.3d at 830.

161. 29 N.Y.3d 302, 304, 78 N.E.3d 1178, 1179, 56 N.Y.S.3d 494, 495 (2017) (citing People v. Buford, 69 N.Y.2d 290, 300, 506 N.E.2d 901, 906, 514 N.Y.S.2d 191, 196 (1987)).

entitled the defendant to a new trial.[162]

VIII. RIGHT TO CONFRONTATION AND PUBLIC TRIAL

In *People v. Stone*, the defendant argued that the trial court erred in denying his motion for a mistrial because the testimony of a witness violated his Confrontation Clause rights.[163] Specifically, a detective testified that the defendant became a suspect after the detective spoke with the defendant's wife, a nontestifying witness.[164] The Court rejected the defendant's argument on the grounds that the testimony was susceptible to countervailing inferences and because the trial court gave a curative instruction, at the time of the offending testimony and again during the jury charge that the offending testimony was stricken and could not be considered by the jury for any purpose.[165]

In *People v. Hao Lin*, the defendant challenged his driving while intoxicated conviction under the Confrontation Clause by arguing that the police officer who testified at trial regarding his breath test directly observed the test, but did not personally administer the test.[166] The Court reasoned that "[b]ecause the officer testified based on his own

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162. *Id.* at 304, 78 N.E.3d at 1179, 56 N.Y.S.3d at 495 (quoting N.Y. CRIM. PROC. LAW § 270.35(1) (McKinney 2014)). CPL § 270.35(1) provides, in relevant part, as follows:

> If at any time after the trial jury has been sworn and before the rendition of its verdict . . . the court finds, from facts unknown at the time of the selection of the jury, that a juror is grossly unqualified to serve in the case . . . the court must discharge such juror. . . . If no alternate juror is available, the court must declare a mistrial . . .

N.Y. C.P.L. § 270.35(1).

163. 29 N.Y.3d 166, 170, 78 N.E.3d 175, 178, 55 N.Y.S.3d 730, 733 (2017). "An error impacting a constitutional right may only be considered harmless when the evidence is overwhelming and 'there is no reasonable possibility that the error might have contributed to [the] defendant's conviction and that it was thus harmless beyond a reasonable doubt.'" *Id.* at 171, 78 N.E.3d at 178, 55 N.Y.S.3d at 733 (quoting People v. Crimmins, 36 N.Y.2d 230, 237, 326 N.E.2d 787, 791, 367 N.Y.S.2d 213, 218 (1975)).

164. *Id.* at 170–71, 78 N.E.3d at 177–78, 55 N.Y.S.3d at 732–33.

165. *Id.* at 171–73, 78 N.E.3d at 178–79, 55 N.Y.S.3d at 733–34 (first citing People v. Cedeno, 27 N.Y.3d 110, 118, 50 N.E.3d 901, 906, 31 N.Y.S.3d 434, 439 (2016); and then citing Richardson v. Marsh, 481 U.S. 200, 208 (1987)). "A jury is assumed to follow the instructions of the court." *Id.* at 171, 78 N.E.3d at 178, 55 N.Y.S.3d at 733 (citing People v. Baker, 14 N.Y.3d 266, 274, 926 N.E.2d 240, 245, 899 N.Y.S.2d 733, 738 (2010)).

166. 28 N.Y.3d 701, 703, 71 N.E.3d 941, 942, 49 N.Y.S.3d 353, 354 (2017). "In general, the Confrontation Clause of the Sixth Amendment renders inadmissible the testimony of a witness against a criminal defendant 'unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination.'" *Id.* at 704, 71 N.E.3d at 943, 49 N.Y.S.3d at 355 (quoting Melendez-Diaz v. Massachusetts, 557 U.S. 305, 309 (2009)) (citing People v. Pealer, 20 N.Y.3d 447, 453, 985 N.E.2d 903, 905, 962 N.Y.S.2d 592, 595 (2013)).

observations and conclusions, rather than as a surrogate for his partner who actually administered the test, and none of the nontestifying officer's hearsay statements were admitted against [the] defendant . . . [the] defendant's rights under the Confrontation Clause were not violated."[167] Key to the Court's reasoning was the fact that the testifying witness was a certified and experienced operator of the breath test machine, was present for the entire testing protocol, was able to determine whether the machine was successfully self-calibrating by observation and listening, and saw the breathalyzer machine print out the results.[168]

IX. RIGHT TO COUNSEL

In *People v. Finkelstein*, discussed in Part VII, the defendant also argued that the trial court violated his right to proceed pro se.[169] The Court rejected the defendant's argument on the basis of the trial court's determination that the defendant "had abused his privileges of phone and law library access while incarcerated pending trial in such a way that jeopardized his ability to prepare for trial."[170]

X. SEARCH AND SEIZURE

In *People v. Gayden*, the defendant appealed the trial court's denial of his motion to suppress the gun dropped by the defendant during his flight from the police.[171] The Court concluded that there was record support for the determination of the trial court; to wit, "that the defendant's flight upon seeing the [police] provided the officer with the requisite reasonable suspicion of criminal activity to warrant [the] pursuit of [the] defendant, and the fact that [the] defendant dropped the gun during the pursuit gave rise to probable cause [for the defendant's arrest]."[172]

In *People v. Sivertson*, the Court concluded that the decision of the appellate division, holding that the warrantless entry by police into the

167. *Id.* at 703, 71 N.E.3d at 942, 49 N.Y.S.3d at 354.

168. *Id.* at 706–07, 71 N.E.3d at 944–45, 49 N.Y.S.3d at 356–57.

169. *See* 28 N.Y.3d 345, 349, 68 N.E.3d 64, 67, 45 N.Y.S.3d 339, 342 (2016).

170. *Id.*

171. 28 N.Y.3d 1035, 1037, 65 N.E.3d 696, 697, 42 N.Y.S.3d 667, 668 (2016) (citing People v. Gayden, 126 A.D.3d 1518, 1518, 4 N.Y.S.3d 806, 807 (4th Dep't 2015)).

172. *Id.* (citing *Gayden*, 126 A.D.3d at 1518–19, 4 N.Y.S.3d at 807). "The issue of whether the [] officer had reasonable suspicion to pursue [the] defendant is a mixed question of law and fact, limiting [the Court's] review." *Id.* (citing People v. Moore, 6 N.Y.3d 496, 500–01, 847 N.E.2d 1141, 1144, 814 N.Y.S.2d 567, 570 (2006) (holding that a parolee's constitutional right to be secure against unreasonable searches and seizures is not violated when his apartment is searched, without a search warrant, by his parole officer if the latter's conduct is rationally and reasonably related to the performance of his duty as a parole officer)).

defendant's home was justified by exigent circumstances, was supported by evidence in the record.[173] Because the issue presented was a mixed question of law and fact, and there was support in the record for the appellate division's conclusion, the Court held that the issue was beyond its further review.[174]

In *People v. McMillan*, the defendant argued that the warrantless search of his vehicle was unlawful "because it was premised wholly on his status as a parolee, but was conducted by police officers, not by his parole officer."[175] The Court rejected the defendant's argument because "[t]he detectives had a high degree of individualized suspicion based on a tip from a known individual that . . . [the] defendant had a [gun] in [the] vehicle," which tip also correctly identified the defendant's vehicle and its location.[176] As such, the Court reasoned that the tip, taken together with the defendant's reduced expectation of privacy as a parolee, provided sufficient record evidence that the search of the defendant's vehicle was lawful and reasonable.[177]

XI. SENTENCING AND PUNISHMENT

In *People v. Lofton*, the defendant argued that the trial court erred when it failed to consider the defendant's eligibility for a youthful offender adjudication.[178] The Court agreed that the trial court "failed to make an on-the-record determination as to whether the defendant was eligible for a youthful offender adjudication by first 'considering the presence or absence of the factors set forth in CPL [§] 720.10(3).'"[179]

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173. 29 N.Y.3d 1006, 1007, 77 N.E.3d 349, 350, 54 N.Y.S.3d 632, 633 (2017) (first citing People v. Gibson, 24 N.Y.3d 1125, 1125, 26 N.E.3d 1175, 1175, 3 N.Y.S.3d 320, 320 (2015); then citing People v. Brown, 95 N.Y.2d 942, 943, 745 N.E.2d 383, 383, 722 N.Y.S.2d 464, 464 (2002); and then citing People v. Hallman, 92 N.Y.2d 840, 842, 699 N.E.2d 423, 423, 677 N.Y.S.2d 64, 64 (1998)).

174. *Id.* "The [mixed question of law and fact] rule applies 'where the facts are disputed . . . or where reasonable minds may differ as to the inference to be drawn [from the established facts].'" *Id.* (second alteration in original) (omission in original) (quoting People v. Harrison, 57 N.Y.2d 470, 477, 443 N.E.2d 447, 451, 457 N.Y.S.2d 199, 203 (1982)).

175. 29 N.Y.3d 145, 148, 75 N.E.3d 1151, 1152, 53 N.Y.S.3d 590, 591 (2017) "[A] parolee does 'not surrender [the] constitutional rights against unreasonable searches and seizures,' merely by virtue of being on parole." *Id.* (quoting People v. Huntley, 43 N.Y.2d 175, 181, 371 N.E.2d 794, 796, 401 N.Y.S.2d 31, 34 (1977)).

176. *Id.* at 149, 75 N.E.3d at 1153, 53 N.Y.S.3d at 592.

177. *Id.*

178. 29 N.Y.3d 1097, 1098, 81 N.E.3d 839, 840, 59 N.Y.S.3d 305, 306 (2017).

179. *Id.* (quoting People v. Middlebrooks, 25 N.Y.3d 516, 527, 35 N.E.3d 464, 471, 14 N.Y.S.3d 296, 303 (2015)). CPL § 720.10(3) provides, in relevant part, as follows: "Where the court determines that the eligible youth is a youthful offender, the court shall make a statement on the record of the reasons for its determination." N.Y. CRIM. PROC. LAW § 720.10(3) (McKinney 2011).

In *People v. Stewart*, the People argued that the defendant properly waived his right to be present at sentencing "by having his counsel speak on his behalf."[180] The Court rejected the People's argument and returned the case to the trial court for resentencing because the record was devoid of any waiver "by [the] defendant himself, whether oral or in writing."[181]

In *People v. Couser*, discussed in Parts III and V, the Court rejected the defendant's argument that the trial court abused its discretion by ordering that the defendant's sentences for attempted first degree robbery and first degree robbery be imposed consecutively.[182] The Court reasoned that the robbery was a single criminal episode and that the taking of the victim's purse was a separate and distinct act from the attempted robberies achieved by the defendant's waving of a gun.[183] Accordingly, the Court concluded that "once the People offer evidence of the existence of a separate and distinct act, the trial court ha[d] discretion to order consecutive sentences."[184]

In *People v. Smith*, the Court held that its prior decision in *People v. Catu*,[185] holding that a trial court's failure to advise a defendant, prior to entry of his plea, of the defendant's post release supervision sentence to be imposed as result of pleading guilty required automatic vacatur of the plea on due process grounds, without a showing of prejudice by the defendant, was a new rule and, as such, did not apply retroactively in

180. 28 N.Y.3d 1091, 1092, 68 N.E.3d 43, 44, 45 N.Y.S.3d 318, 319 (2016). "A defendant has the right to be present at all material stages of trial, including sentencing." *Id.* (first citing People v. Ciaccio, 47 N.Y.2d 431, 436, 391 N.E.2d 1347, 1349, 418 N.Y.S.2d 371, 373 (1979); and then citing N.Y. CRIM. PROC. LAW § 380.40(1) (McKinney 2005)).

181. *Id.* at 1092–93, 68 N.E.3d at 44, 45 N.Y.S.3d at 319. "[A] defendant who has been convicted of a felony may waive his right to be present at sentencing, but must do so 'expressly.'" *Id.* at 1092, 68 N.E.3d at 44, 45 N.Y.S.3d at 319 (citing People v. Rossborough, 27 N.Y.3d 485, 488, 54 N.E.3d 71, 73, 34 N.Y.S.3d 399, 401 (2016)).

182. *See* 28 N.Y.3d 368, 372, 68 N.E.3d 26, 28, 45 N.Y.S.3d 301, 303 (2016). PL § 70.25(2) provides, in relevant part, as follows: "When more than one sentence of imprisonment is imposed on a person for two or more offenses committed through a single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other, the sentences . . . must run concurrently." N.Y. PENAL LAW § 70.25(2) (McKinney 2009 & Supp. 2018). The Court has interpreted PL § 70.25(2) to require that "sentences imposed for two or more offenses may not run consecutively: (1) where a single act constitutes two offenses, or (2) where a single act constitutes one of the offenses and a material element of the other." *Couser*, 28 N.Y.3d at 375, 68 N.E.3d at 30, 45 N.Y.S.3d at 305 (quoting People v. Laureano, 87 N.Y.2d 640, 643, 664 N.E.2d 1212, 1214, 642 N.Y.S.2d 150, 152 (1996)) (citing People v. Battles, 16 N.Y.3d 54, 58, 942 N.E.2d 1026, 1028, 917 N.Y.S.2d 601, 603 (2010)).

183. *Couser*, 28 N.Y.3d at 376, 68 N.E.3d at 31, 45 N.Y.S.3d at 306.

184. *Id.* at 377, 68 N.E.3d at 32, 45 N.Y.S.3d at 307.

185. *See* 4 N.Y.3d 242, 244, 825 N.E.2d 1081, 1081, 792 N.Y.S.2d 887, 887 (2005).

enhanced sentence proceedings.[186] Accordingly, the Court concluded that the same rule did not prevent use of the defendant's prior conviction as a prior predicate violent felony offense, for purpose of establishing that he was second violent felony offender.[187]

In *People v. Prindle*, the Court rejected the defendant's challenge to his sentence under the discretionary persistent felony offender sentencing scheme.[188] Specifically, the Court rejected the defendant's argument that in light of the decision in *Alleyne v. United States*,[189] New York's discretionary persistent felony offender sentencing scheme violates the holding of the U.S. Supreme Court in *Apprendi v. New Jersey*[190] and the defendant's due process and Sixth Amendment rights.[191] The Court upheld the constitutionality of New York's discretionary persistent felony offender sentencing scheme and, further, held that the defendant's constitutional rights were not violated.[192]

In *People v. Minemier*, the Court rejected the defendant's argument that the trial court was required to state, on the record, its reasons for denying the defendant youthful offender status.[193] However, the trial court failed to adequately set forth on the record the basis for its refusal to disclose to the defense certain statements that were reviewed and considered by the court for sentencing purposes.[194] As such, the Court concluded that the trial court's sentencing violated CPL § 390.50, as well as the defendant's due process rights.[195]

XII. TIME LIMITS AND SPEEDY TRIAL

In *People v. Pabon*, discussed in Part VII, the defendant also argued that his prosecution for course of sexual conduct in the first degree in violation of Penal Law (PL) § 130.75(1)(a) was time-barred because the applicable five-year limitations period set forth under CPL § 30.10(3)(e)

186. 28 N.Y.3d 191, 196, 66 N.E.3d 641, 644, 43 N.Y.S.3d 771, 774 (2016).

187. *See id.* at 211, 66 N.E.3d at 655, 43 N.Y.S.3d at 785.

188. 29 N.Y.3d 463, 465–66, 80 N.E.3d 1026, 1027, 58 N.Y.S.3d 280, 281 (2017) (citing People v. Quinones, 12 N.Y.3d 116, 119, 906 N.E.2d 1033, 1034, 879 N.Y.S.2d 1, 2 (2009)).

189. *See* 570 U.S. 99, 102, 133 S. Ct. 2151, 2163–64 (2013).

190. *See* 530 U.S. 466, 490 (2000).

191. *Prindle*, 29 N.Y.3d at 468, 80 N.E.3d at 1029, 58 N.Y.S.3d at 283.

192. *Id.* at 465–66, 80 N.E.3d at 1027, 58 N.Y.S.3d at 281 (citing *Quinones*, 12 N.Y.3d at 119, 906 N.E.2d at 907, 879 N.Y.S.2d at 2).

193. 29 N.Y.3d 414, 416, 80 N.E.3d 389, 390, 57 N.Y.S.3d 696, 697 (2017).

194. *Id.* at 416–17, 80 N.E.3d at 390, 57 N.Y.S.3d at 697–98 (citing N.Y. CRIM. PROC. LAW § 390.50 (McKinney 2005 & Sup. 2017)).

195. *Id.* (citing N.Y. C.P.L. § 390.50). Under CPL § 390.50, pre-sentence investigation reports are presumptively confidential, however, disclosure to the parties is required for sentencing purposes. *Id.* at 422, 80 N.E.3d at 394, 57 N.Y.S.3d at 701–02 (citing N.Y. C.P.L. § 390.50).

expired before the filing of the felony complaint, which period of limitations was not tolled under CPL § 30.10(3)(f).[196] Specifically, the defendant's acts at issue were committed between 1998 and 1999, and were disclosed to the police in 2012, when the victim was twenty-one years old.[197] The Court rejected the defendant's argument, holding that the legislature eliminated the statute of limitations in CPL § 30.10(3)(e) for course of sexual conduct against a child in the first degree, and in its place, by amendment to CPL § 30.10(2)(a), provided that prosecution "may be commenced at any time."[198] As such, the Court concluded that the crime underlying the defendant's conviction was "expressly encompassed by CPL § 30.10(3)(f), and involves the type of conduct the legislature sought to address by expansive, albeit delayed, prosecution of multiple acts of sexual abuse against a minor."[199]

In *People v. Brown*, three "defendants moved to dismiss the accusatory instrument on speedy trial grounds pursuant to CPL [§] 30.30(1), arguing that the People's off-calendar statements of readiness were illusory because the People were not ready for trial at the next court appearance."[200] The Court held that the People's statement of readiness "is presumed truthful and accurate—a presumption that can be rebutted by a defendant's demonstration that the People were not, in fact, ready at the time the statement was filed."[201] The Court further held that if the People's statement of readiness is challenged,

> the People must establish a valid reason for their change in readiness status to ensure that a sufficient record is made for the court to determine whether the delay is excludable . . . [and] [t]he defendant then bears the ultimate burden of demonstrating, based on the People's proffered reasons and other relevant circumstances, that the prior statement of readiness was illusory.[202]

In *People v. Clarke*, the Court held that the appellate division correctly determined that the People failed to exercise due diligence in seeking the defendant's DNA to conduct comparative testing with the DNA obtained from the gun that was the subject of the defendant's

196. 28 N.Y.3d 147, 151–52, 65 N.E.3d 688, 690–91, 42 N.Y.S.3d 659, 661 (2016) (citing N.Y. CRIM. PROC. LAW § 30.10(3)(e)–(f) (McKinney 2003)).

197. *Id.* at 150, 65 N.E.3d at 690, 42 N.Y.S.3d at 660 (citing N.Y. PENAL LAW § 130.75 (McKinney 2009)).

198. *Id.* at 152, 65 N.E.3d at 691, 42 N.Y.S.3d at 662 (quoting N.Y. C.P.L. § 30.10(2)(a)).

199. *Id.* at 151–52, 65 N.E.3d at 691, 42 N.Y.S.3d at 661 (citing N.Y. C.P.L. § 30.10(3)(f)).

200. 28 N.Y.3d 392, 399, 68 N.E.3d 45, 48, 45 N.Y.S.3d 320, 323 (2016) (citing N.Y. CRIM. PROC. LAW § 30.30(1) (McKinney 2003)).

201. *Id.* at 399–400, 68 N.E.3d at 48, 45 N.Y.S.3d at 323.

202. *Id.* at 400, 68 N.E.3d at 48, 45 N.Y.S.3d at 323.

weapons charges.[203] As such, the Court concluded that the 161-day period at issue was not excludable from the CPL § 30.30 speedy trial computation.[204] The Court reasoned that the People had affirmative obligation to diligently ascertain the existence of all laboratory reports of scientific tests performed at the request of law enforcement on gun swabs, even if the People were not aware of the testing on the gun swabs because it involved a new advance in scientific technology and that the same excuses failed to qualify as an exceptional circumstance under CPL § 30.30(4)(g) to avoid the time at issue being chargeable against the People.[205]

XIV. LEGISLATIVE DEVELOPMENTS

During the *Survey* period, the Legislature enacted a variety of changes to the Penal Law, Criminal Procedure Law, and the Vehicle and Traffic Law, which are discussed below.

A. Penal Law

PL § 30.00(1), "Infancy," was amended by changing the age of persons not criminally responsible for conduct from less than sixteen to less than seventeen, or commencing October 1, 2019, to less than eighteen years old.[206] PL § 30.00(3) was amended to include various crimes for which an infant retains criminal responsibility.[207]

PL § 70.00(5), "Life imprisonment without parole," was amended by making it applicable, for certain crimes, to individuals eighteen years

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203. 28 N.Y.3d 48, 50, 63 N.E.3d 1144, 1145, 41 N.Y.S.3d 200, 201 (2016).

204. *Id.* at 53, 63 N.E.3d at 1147, 41 N.Y.S.3d at 203.

205. *Id.* at 52–53, 63 N.E.3d at 1147, 41 N.Y.S.3d at 203 (first citing N.Y. CRIM. PROC. LAW § 240 (McKinney 2014); and then citing People v. DaGata, 86 N.Y.2d 40, 44, 652 N.E.2d 932, 934, 629 N.Y.S.2d 186, 188 (1995)). Under CPL § 30.30(4),

> [i]n computing the time within which the people must be ready for trial pursuant to subdivisions one and two, the following periods must be excluded: . . . (g) other periods of delay occasioned by exceptional circumstances, including but not limited to, the period of delay resulting from a continuance granted at the request of a district attorney if (i) the continuance is granted because of the unavailability of evidence material to the people's case, when the district attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will become available in a reasonable period; or (ii) the continuance is granted to allow the district attorney additional time to prepare the people's case and additional time is justified by the exceptional circumstances of the case.

N.Y. CRIM. PROC. LAW § 30.30(4)(g) (McKinney 2003 & Supp. 2018).

206. Act of April 10, 2017, 2017 McKinney's Sess. Law News no. 2, ch. 59, at 428–29 (codified at N.Y. PENAL LAW § 30.00(1) (McKinney Supp. 2018)).

207. *Id.* at 449 (codified at PENAL § 30.00(3)).

of age or older at the time of the commission of the crime and by adding that "[a] defendant who was seventeen years of age or younger at the time of the commission of the crime may be sentenced, in accordance with law, to the applicable indeterminate sentence with a maximum term of life imprisonment."[208]

The PL was amended by adding a new § 60.10-a, "Authorized disposition; adolescent offender," reading as follows:

> When an adolescent offender is convicted of an offense, the court shall sentence the defendant to any sentence authorized to be imposed on a person who committed such offense at age eighteen or older. When a sentence is imposed, the court shall consider the age of the defendant in exercising its discretion at sentencing.[209]

PL § 70.20(a) governing confinement for a juvenile offender, adolescent offender, or a juvenile offender or adolescent offender who is adjudicated a youthful offender to the department of corrections and community supervision and/or an adolescent offender facility, depending on the age of the individual and the type of sentence imposed (e.g., determinate or indeterminate) was extensively amended, adding new §§ (a-1) and (a-2).[210]

B. Criminal Procedure Law

CPL § 1.20(32), defining "District attorney," was expanded to include "inspector general of New York for transportation or his or her deputies when acting pursuant to article four-B of the executive law."[211]

Section 60.45 of the CPL was amended by adding a new subdivision 3(a)–(e) governing the video recording requirements of custodial interrogations by a public servant at a detention facility, including, the giving of any required advice of the rights of the individual being questioned, and the waiver of any rights by the individual.[212]

Section 60.25 of the CPL, governing identification by means of previous recognition, in absence of present identification, and § 60.30, governing identification by means of previous recognition, in addition to present identification, were amended as to testimony that may be given by a witness, where the observation is made pursuant to a blind or blinded procedure, a pictorial, photographic, electronic, filmed, or video recorded

208. *Id.* at 430 (codified at N.Y. PENAL LAW § 70.00(5) (McKinney Supp. 2018)).

209. *Id.* (codified at N.Y. PENAL LAW § 60.10-a (McKinney Supp. 2018)).

210. *Id.* at 430–31 (codified at N.Y. PENAL LAW § 70.20(4)(a-1)–(a-2) (McKinney Supp. 2018)).

211. 2017 McKinney's Sess. Law News no. 2, ch. 59, at 381–82 (codified at N.Y. CRIM. PROC. LAW § 1.20(32) (McKinney Supp. 2018)).

212. *Id.* at 405–06 (codified at N.Y. C.P.L. § 60.45 (McKinney Supp. 2018)).

reproduction of a person whom he or she recognized as the same person whom he or she had observed on the first or incriminating occasion.[213] Requirements governing pictorial, photographic, electronic, filmed, or video recorded reproduction evidence were also added to CPL §§ 710.20 and 710.30.[214]

CPL § 1.20 was amended by adding a new subdivision 44, "Adolescent Offender."[215] Article 722 was added, governing procedures and proceedings against juvenile and adolescent offenders. Specifically, the sections added under Article 722 include the following:

- 722.00—probation case plans;
- 722.10—youth part of the superior court established;
- 722.20—proceedings upon felony complaint; juvenile offender;
- 722.21—proceedings upon felony complaint; adolescent offender;
- 722.22—motion to remove juvenile offender to family court;
- 722.23—removal of adolescent offenders to family court; and
- 722.24—applicability of chapter to actions and matters involving juvenile offenders or adolescent offenders.[216]

In conjunction with the new CPL Article 722, the following sections of the CPL were amended to include new procedures for juvenile and adolescent offenders:

- 725.05—Order of removal;
- 725.20—Record of certain actions removed;
- 100.05—Commencement of action; in general;
- 100.10—Local criminal court accusatory instruments; definitions thereof;
- 100.40—Local criminal court accusatory instruments; sufficiency on face;
- 100.60—Youth part of the superior court accusatory instruments; in what courts filed;
- 110.10—Methods of requiring defendant's appearance in local criminal court for arraignment; in general;

213. *Id.* at 407–08 (codified at N.Y. C.P.L. §§ 60.25, 60.30 (McKinney Supp. 2018)).
214. *Id.* at 408 (codified at N.Y. C.P.L. §§ 710.20, 710.30 (McKinney Supp. 2018)).
215. *Id.* at 412 (codified at N.Y. C.P.L. § 1.20(44) (McKinney Supp. 2018)).
216. 2017 McKinney's Sess. Law News no. 2, ch. 59, at 412 (codified at N.Y. C.P.L. §§ 722.00–722.24 (McKinney Supp. 2018)).

- 110.20—Local criminal court accusatory instruments; notice thereof to district attorney;
- 120.20—Warrant of arrest; when issuable;
- 120.30—Warrant of arrest; by what courts issuable and in what courts returnable;
- 120.55— Warrant of arrest; defendant under parole or probation supervision;
- 120.70—Warrant of arrest; where executable;
- 120.90—Warrant of arrest; procedure after arrest;
- 130.10—Summons; definition, function, form and content;
- 130.30—Summons; when issuable;
- 140.20—Arrest without a warrant; procedure after arrest by police officer;
- 140.27—Arrest without a warrant; when and how made; procedure after arrest by peace officer;
- 140.40—Arrest without a warrant; by person acting other than as a police officer or a peace officer; procedure after arrest;
- 180.75—Proceedings upon felony complaint; juvenile offender;
- 180.80—Proceedings upon felony complaint; release of defendant from custody upon failure of timely disposition;
- 190.80—Grand jury; release of defendant upon failure of timely grand jury action;
- 190.71—Grand jury; direction to file request for removal to family court;
- 200.20—Indictment; what offenses may be charged; joinder of offenses and consolidation of indictments;
- 210.30—Motion to dismiss or reduce indictment on ground of insufficiency of grand jury evidence; motion to inspect grand jury minutes;
- 210.43—Motion to remove juvenile offender to family court (repealed);
- 255.10—Definitions;
- 330.25—Removal after verdict;
- 410.40—Notice to appear, warrant;
- 410.90-a—Superior court; youth part;
- 510.15—Commitment of principal under sixteen; and

- 160.59—Sealing of certain convictions.[217]

Given the wide scope and application of the foregoing amendments dealing with juvenile and adolescent offenders, the same will not be discussed by this *Survey* in detail.

C. Vehicle and Traffic Law

The following sections of the Vehicle & Traffic Law (VTL) were amended:

- 385—Dimensions and weights of vehicles;
- 518—Reciprocal agreements concerning suspension or revocation of registration of a motor vehicle for violations of toll collection regulations;
- 491—Period of validity of identification card; required fees;
- 503—Period of validity of drivers' licenses, learners' permits and applications; required fees[218]; and
- 404-cc—Distinctive 'Cure Childhood Cancer' plates.[219]

New VTL §§ 1691–1700 were added, governing transportation network company (TNC) drivers, defined as any individual who (a) receives connections to potential passengers and related services from a TNC in exchange for payment of a fee to the TNC; and (b) uses a TNC vehicle to offer or provide a TNC prearranged trip to TNC passengers upon connection through a digital network controlled by a TNC in exchange for compensation or payment of a fee.[220] VTL §§ 1696 and 1699, dealing with TNC drivers' permits and applications, were amended to disqualify individuals listed on the sex offender registry or those individuals required to register as a sex offender from approval or receipt of said permits.[221] VTL § 370—Indemnity bonds or insurance policies; notice of accident, § 600—Leaving scene of an incident without reporting, and § 601—Leaving scene of injury to certain animals without reporting, were also amended to include provisions covering TNC

217. *Id.* at 419–28, 431 (codified at N.Y. C.P.L. §§ 725.05; 725.20; 100.05; 100.10; 100.40; 100.60; 110.10; 110.20; 120.20; 120.30; 120.55; 120.70; 120.90; 130.10; 130.30; 140.20; 140.27; 140.40; 180.75; 180.80; 190.80; 190.71; 200.20; 210.30; 210.43; 255.10; 330.25; 410.40; 410.90-a; 510.15; 160.59 (McKinney Supp. 2018)).

218. Act of April 20, 2017, 2017 McKinney's Sess. Law News no. 2, ch. 58, at 210–12 (codified at N.Y. VEH. & TRAF. LAW §§ 385, 518, 491, 503 (McKinney Supp. 2018)).

219. Act of March 15, 2017, 2017 McKinney's Sess. Law News no. 1, ch. 21, at 983 (codified at N.Y. VEH. & TRAF. LAW § 404-cc (McKinney Supp. 2018)).

220. 2017 McKinney's Sess. Law News no. 2, ch. 59, at 315 (codified at N.Y. VEH. & TRAF. LAW § 1691–1700 (McKinney Supp. 2018)).

221. Act of June 29, 2017, 2017 McKinney's Sess. Law News no. 3, ch. 60, at 548 (codified at N.Y. VEH. & TRAF. LAW §§ 1696, 1699 (McKinney Supp. 2018)).

drivers.[222]

222. 2017 McKinney's Sess. Law News no. 2, ch. 59, at 26 (codified at N.Y. VEH. & TRAF. LAW §§ 370, 600, 601 (McKinney Supp. 2018)).