CRIMINAL LAW

David E. Zukher†

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INTRODUCTION

This *Survey* covers case law decisions in the field of New York criminal law and procedure during the period of June 30, 2018 to July 1, 2019. Given the large number of cases, the *Survey* focuses on decisions from the Court of Appeals (hereinafter "the Court") during the relevant time period and, where appropriate, discusses cases from trial and intermediate appellate courts. The *Survey* also includes a brief review of new significant legislative enactments pertaining to criminal law and criminal procedure.

† David E. Zukher is an attorney admitted to practice law in New York and North Carolina. Mr. Zukher is the Managing Partner of Weisberg & Zukher, PLLC, a private practice firm focusing on criminal law and general civil litigation. He received his J.D. from Syracuse University College of Law graduating, *magna cum laude*, in May 1999. Mr. Zukher served as a member of the *Syracuse Law Review* in 1998 and as an Executive Editor in 1999. He is a member of the Justinian Honorary Law Society and the Order of the Coif, as well as the recipient of the Robert M. Anderson Publication Award and the Law Review Distinguished Service Award. Mr. Zukher was selected for membership into The National Trial Lawyers: Top 100 Criminal Defense Trial Lawyers for the year 2016. The author gratefully acknowledges the contribution of his paralegal, Karla R. Pavese, for her help in preparing this work.

I. APPELLATE REVIEW SCOPE AND JURISDICTION

In *People v. Grimes*, the Court held that defense

> counsel's failure to file a timely criminal leave application (CLA) to th[e] Court within the thirty-day . . . timeframe provided by CPL [Section] 460.10(5)(a)[] or move pursuant to CPL [Section] 460.30 within the one-year grace period for an extension to cure the error[] d[id] not deprive . . . defendant of [his] constitutional right to . . . effective assistance of counsel or due process under the Sixth and Fourteenth Amendments of the United States Constitution.[1]

The Court reasoned that, absent a constitutional violation, "a defendant cannot resort to *coram nobis* [relief] to abrogate the one-year time limitation on the remedy provided in CPL 460.30."[2] The Court further concluded that the defendant did not have a constitutional right to assistance of counsel in applying for leave to appeal to the Court, and thus counsel's alleged ineffective assistance in failing to apply for leave was not a constitutional violation that allowed the defendant to extend time to apply for leave by writ of error *coram nobis*.[3]

II. EFFECTIVE ASSISTANCE OF COUNSEL

In *People v. Lopez-Mendoza*, the defendant argued that his counsel was ineffective based on defense counsel's alleged failure to review and understand the importance of a surveillance video that contradicted the defendant's grand jury testimony.[4] The Court concluded the defendant failed to show that he was denied meaningful representation because, although the video demonstrated the falsity of the defendant's Grand Jury testimony, the jury never learned of the same, as the defendant was not

1. 32 N.Y.3d 302, 304, 115 N.E.3d 587, 590, 91 N.Y.S.3d 315, 318 (2018) (citing People v. Andrews, 23 N.Y.3d 605, 616, 17 N.E.3d 491, 498, 993 N.Y.S.2d 236, 243 (2014)).

2. *Id.*; N.Y. CRIM. PROC. LAW § 460.30 (McKinney 2005).

3. *See Grimes*, 32 N.Y.3d at 319, 115 N.E.3d at 601, 91 N.Y.S.3d at 329.

> There is no federal constitutional right to appellate review and no state constitutional right to appellate review in a criminal case, except to the Court of Appeals where the judgment is of death and as otherwise legislatively provided . . . . 'The Sixth Amendment does not encompass the right to appeal or the right to counsel in appellate proceedings. Nor does due process guarantee the right to an appeal.'

Id. at 310, 115 N.E.3d at 594, 91 N.Y.S.3d at 322 (first citing McKane v. Durston, 153 U.S. 684, 687–88 (2013); and then citing N.Y. CONST. ART. VI, § 3) (quoting People v. West, 100 N.Y.2d 23, 27, 789 N.E.2d 615, 618, 759 N.Y.S.2d 437, 440 (2003)).

4. 33 N.Y.3d 565, 567, 130 N.E.3d 862, 863, 106 N.Y.S.3d 266, 267 (2019). ("The defendant 'bears the ultimate burden of showing . . . the absence of strategic or other legitimate explanations for counsel's challenged actions.'"). *Id.* at 572, 130 N.E.3d at 867, 106 N.Y.S.3d at 271.

subjected to cross examination by the people based on his testimony to the Grand Jury at trial.[5]

In *People v. Alvarez*, the defendant argued that he was denied effective assistance of counsel based on alleged ineffective communications with defense counsel, the poor quality of appellate counsel's brief, and defense counsel's failure to file a criminal leave application to the Court.[6] Although the Court stated that defense counsel's brief was "not a model to be emulated," the Court concluded that the overall "fairness of defendant's direct appeal was not compromised by appellate counsel's performance."[7] The Court also concluded that the defendant failed to provide "proof that his [counsel] failed to adequately communicate with him"[8] and that appellate counsel's failure to file a criminal leave application to the Court was not "ineffective assistance of counsel under either the Federal or the State Constitutions."[9]

In *People v. Brown*, the Court held that the trial court abused its discretion in denying the defendant a hearing on the defendant's CPL section 440.10 motion to vacate murder and weapons-possession convictions predicated upon an alleged conflict of interest between the defendant and defense counsel.[10] In support of the motion to vacate, the defendant submitted his own affidavit, the affirmation of appellate counsel, along with a record of prison phone calls evidencing an alleged conflict of interest, involving the source of payments made to defense counsel for legal fees.[11] As such, the Court held that the trial court

5. *Id*. at 572, 130 N.E.3d at 867, 106 N.Y.S.3d at 271.

6. *See* 33 N.Y.3d 286, 288, 125 N.E.3d 117, 119, 101 N.Y.S.3d 702, 704 (2019).

7. *Id*. at 290–91, 292, 125 N.E.3d at 121, 122, 101 N.Y.S.3d at 705–06, 707.

8. *Id*. at 291, 125 N.E.3d at 121, 101 N.Y.S.3d at 706.

9. *Id*. at 294, 125 N.E.3d at 123, 101 N.Y.S.3d at 708 (first citing People v. Grimes, 32 N.Y.3d 302, 306, 115 N.E.3d 587, 591, 91 N.Y.S.3d 315, 319 (2018); and then citing People v. Andrews, 23 N.Y.3d 605, 616, 17 N.E.3d 491, 498, 993 N.Y.S.2d 236, 243 (2014)).

10. 33 N.Y.3d 983, 985, 987, 124 N.E.3d 247, 249, 251, 100 N.Y.S.3d 697, 699, 701 (2019).

> An actual conflict of interest arises when an attorney 'ha[s] divided and incompatible loyalties within the same matter necessarily preclusive of single-minded advocacy.' A potential conflict, on the other hand, is one that may never be realized. When alerted to a conflict, the trial court must ascertain whether the defendant 'has an awareness of the potential risks involved in that course and has knowingly chosen it.'

Id. at 987, 124 N.E.3d at 250, 100 N.Y.S.3d at 700 (first quoting People v. Cortez, 22 N.Y.3d 1061, 1068, 4 N.E.3d 952, 956, 981 N.Y.S.2d 651, 655 (2014) (Lippman, J., concurring); and then quoting People v. Mattison, 67 N.Y.2d 462, 468, 494 N.E.2d 1374, 1377, 503 N.Y.S.2d 709, 712 (1986)).

11. *Id.* at 985–86, 124 N.E.3d at 249, 100 N.Y.S.3d at 699.

"abused its discretion in determining that a hearing was not warranted to address the allegations contained in the defendant's CPL 440.10 motion" as to whether there existed a conflict of interest warranting reversal.[12]

III. EVIDENCE

In *People v. Ulett*, the Court held that the people's failure to disclose to the defense surveillance video of the crime scene taken at the time of the alleged victim's murder amounted to a *Brady* violation.[13] The Court reasoned that surveillance video of crime scene at time of victim's murder, including images of the victim at time he was shot and a key prosecution witness, was material evidence.[14] Key factors in the Court's prejudice analysis were that "no forensic evidence link[ed] defendant to the [alleged] murder;"[15] the video could have been used to impeach eyewitnesses or provide leads for additional admissible evidence, including evidence that another shooter may have been responsible for the alleged victim's death; and that the people's closing argument denied the existence of the video.[16]

In *People v. Giuca*, the Court held that evidence that a jailhouse informant witness, pending a burglary prosecution, was participating in a drug treatment program was not *Brady* material.[17] The Court reasoned that to the extent that the same information constituted favorable impeachment material, there was no reasonable possibility that the

12. *Id.* at 987, 124 N.E.3d at 251, 100 N.Y.S.3d at 701.

13. *See* 33 N.Y.3d 512, 514, 129 N.E.3d 909, 910, 105 N.Y.S.3d 371, 372 (2019).

> That duty to disclose encompasses impeachment evidence as well as exculpatory evidence. 'The rule applies regardless of the good or bad faith of the prosecutor, for its purpose is not to punish misconduct but to insure that the accused receives a fair trial.' To establish a Brady violation warranting a new trial, 'a defendant must show that (1) the evidence is favorable to the defendant because it is either exculpatory or impeaching in nature; (2) the evidence was suppressed by the prosecution; and (3) prejudice arose because the suppressed evidence was material.'

Id. at 514–15, 129 N.E.3d at 910–11, 105 N.Y.S.3d at 372–73 (first citing Strickler v. Greene, 527 U.S. 263, 280 (1999); then citing Giglio v. U.S., 405 U.S. 150, 154–55 (1972); and then citing *Strickler*, 527 U.S. at 281–82) (first quoting People v. Bryce, 88 N.Y.2d 124, 129, 666 N.E.2d 221, 223, 643 N.Y.S.2d 516, 518 (1996); and then quoting People v. Hayes, 17 N.Y.3d 46, 50, 950 N.E.2d 118, 121, 926 N.Y.S.2d 382, 385 (2011)).

14. *See id.* at 520–21, 129 N.E.3d at 914–15, 105 N.Y.S.3d at 376–77.

15. *Id.* at 520, 129 N.E.3d at 914, 105 N.Y.S.3d at 376 (citing Banks v. Dretke, 540 U.S. 668, 701 (2004)).

16. *Id.* at 521, 129 N.E.3d at 915, 105 N.Y.S.3d at 377.

17. *See* 33 N.Y.3d 462, 466, 467, 128 N.E.3d 655, 657, 658, 104 N.Y.S.3d 577, 579, 580 (2019).

verdict would have been different if the information at issue had been disclosed.[18] Specifically, the Court concluded that there was "ample impeachment material," and therefore, the fact that the witness was in a drug program where he committed several program violations, including, leaving treatment and bringing cigarettes into the facility, would not have "changed the jury's verdict."[19]

In *People v. Tapia*, the Court held that a portion of a testifying witness's prior grand jury testimony was properly admitted as a past recollection recorded to supplement the witness's trial testimony, "as there was a proper foundation for receipt of the evidence."[20] The Court also held that "[s]ince the declarant of that out-of-court statement was a live witness at trial, [the] defendant's Sixth Amendment right to confrontation was not violated."[21]

In *People v. Garland*, the defendant challenged his conviction for assault in the first degree on the grounds that the evidence against him at trial was not legally sufficient to establish the element of "serious physical injury" as defined in Penal Law section 10.00(10).[22] While the

18. *Id.* at 466, 128 N.E.3d at 657, 104 N.Y.S.3d at 579.

19. *Id*. at 478, 128 N.E.3d at 666, 104 N.Y.S.3d at 588.

20. 33 N.Y.3d 257, 260, 124 N.E.3d 210, 212, 100 N.Y.S.3d 660, 662 (2019).

> At trial, when a witness testifies in the presence of defendant and before the trier of fact, the evidentiary doctrine of past recollection recorded allows 'a memorandum made of a fact known or an event observed in the past of which the witness lacks sufficient present recollection [to] be received in evidence as a supplement to the witness's oral testimony.' The foundational requirements for the admissibility of a past recollection recorded are: 1) the witness must have observed the matter recorded; 2) the recollection must have been fairly fresh at the time when it was recorded; 3) the witness must currently be able to testify that the record is a correct representation of his or her knowledge and recollection at the time it was made; and 4) the witness must lack sufficient present recollection of the information recorded. . . . The admissibility of such evidence is committed to the sound discretion of the trial court in determining whether the appropriate foundational requirements have been met.

Id. at 264, 124 N.E.3d at 215, 100 N.Y.S.3d at 665 (quoting People v. Taylor, 80 N.Y.2d 1, 8, 598 N.E.2d 693, 696, 586 N.Y.S.2d 545, 548 (1992) (first citing *Taylor*, 80 N.Y.2d at 8, 598 N.E.2d at 696, 586 N.Y.S.2d at 548; and then citing *Taylor*, 80 N.Y.2d at 9, 598 N.E.2d at 696, 586 N.Y.S.2d at 548).

21. *Id.* "Significantly, the right to confrontation guarantees not only the right to cross-examine all witnesses, but also the ability to literally confront the witness who is providing testimony against the accused in a face-to-face encounter before the trier of fact." *Id.* at 269, 124 N.E.3d at 219, 100 N.Y.S.3d at 669 (first citing Coy v. Iowa, 487 U.S. 1012, 1016 (1988); and then citing Cal. v. Green, 399 U.S. 149, 157–58 (1970)).

22. 32 N.Y.3d 1094, 1095, 114 N.E.3d 1071, 1072, 90 N.Y.S.3d 618, 619 (2018). Penal Law section 10.00(10) defines serious physical injury as "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement,

alleged victim suffered no permanent disability as a result of being shot in the leg by defendant after he fired five shots into a crowd, the Court rejected the defendant's argument based on evidence of the alleged victim's level of pain at the hospital; antibiotics and tetanus medication prescribed; and bullet fragments which remained in the alleged victim's leg causing pain and interfering with daily activities of living, such as sports.[23]

IV. GUILTY PLEAS/CONVICTIONS

In *People v. Towns*, the defendant challenged his conviction on the grounds that the trial court denied him his due process right to a fair trial in a fair tribunal by personally negotiating and entering into a quid pro quo cooperation agreement with a codefendant.[24] Specifically, "the trial court negotiated and entered into a cooperation agreement with a codefendant requiring that individual to testify against defendant in exchange for a more favorable sentence."[25] The Court concluded "that the trial court abandoned the role of a neutral arbiter and assumed the function of an interested party, thereby creating a specter of bias that require[d] reversal."[26]

V. IDENTIFICATION OF DEFENDANT

In *People v. Brown*, *supra*, the Court also held that an identification of the defendant by a witness to defendant shooting his weapon was admissible in the defendant's prosecution for depraved indifference murder.[27] Specifically, the Court determined that there was support in the record for the determination made by the trial court.[28] Key to the Court's

protracted impairment of health or protracted loss or impairment of the function of any bodily organ." N.Y. PENAL LAW § 10.00(10) (McKinney 2009).

23. *Id.* at 1096, 114 N.E.3d at 1073, 90 N.Y.S.3d at 620. *See also id.* at 1097, 114 N.E.3d at 1074, 90 N.Y.S.3d at 620–21 (Wilson, J., dissenting).

24. *See* 33 N.Y.3d 326, 330, 125 N.E.3d 816, 818, 102 N.Y.S.3d 151, 153 (2019). "A fair trial in a fair tribunal is a basic requirement of due process." *Id.* (quoting In re Murchison, 349 U.S. 133, 136 (1995)) (first citing U.S. CONST. amend. XIV, § 1; and then citing N.Y. CONST. art. 1, § 6).

25. *Id.* at 328, 125 N.E.3d at 817, 102 N.Y.S.3d at 152.

26. *Id.*

27. *See* 33 N.Y.3d 983, 984, 986, 124 N.E.3d 247, 248, 250, 100 N.Y.S.3d 697, 698, 700. *See supra* Part II (discussing the Court's determination that the trial court abused its discretion in denying defendant a hearing on defendant's CPL 440.10 motion to vacate predicated upon an alleged conflict of interest between defendant and defense counsel.).

28. *Id.* at 986, 124 N.E.3d at 250, 100 N.Y.S.3d at 700. "[W]hether a photo [display] is unduly suggestive is a mixed question of law and fact and [the Court's] review is limited to whether there is support in the record for the finding" of the trial court. *Id.* (citing People v. Holley, 26 N.Y.3d 514, 524, 45 N.E.3d 936, 942, 25 N.Y.S.3d 40, 46 (2015)).

reasoning was that the accidental viewing of the defendant's photograph by the witness was not police-arranged and that the identification of the defendant was otherwise reliable.[29]

VI. JURY TRIAL AND INSTRUCTION

In *People v. McIntosh*, the defendant argued that the trial court "erred in denying defendant's request to submit the crimes of manslaughter in the second degree and criminally negligent homicide to the jury as lesser included offenses of the charged crimes of murder in the second degree and manslaughter in the first degree."[30] The Court held that

> the jury's guilty verdict on the indictment's highest count despite the availability of the next lesser included offense for their consideration, 'forecloses [defendant's] challenge to the court's refusal to charge the remote lesser included offenses,' because it dispels any speculation as to whether the jury might have reached a guilty verdict on 'still lower degree[s] of homicide.'[31]

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

> The People's failure to obtain court permission to resubmit a murder count to a new grand jury after the first grand jury deadlocked on that charge violated Criminal Procedure Law § 190.75(3), and Supreme Court erred in denying defendant's pretrial motion to dismiss the murder count in the second indictment on that ground.[32]

However, applying the doctrine of "spillover analysis," the Court concluded that the same error did not require a reversal of the defendant's conviction on a jointly tried count contained in a separate valid indictment.[33] Key to the Court's reasoning was the people's assertion "that all of the evidence admitted to prove defendant's guilt of murder in

29. *See id.*

30. *See* 33 N.Y.3d 1064, 1065, 128 N.E.3d 173, 173, 104 N.Y.S.3d 46, 46 (2019).

31. *Id.* at 1065, 128 N.E.3d at 174, 104 N.Y.S.3d at 47 (first quoting People v. Boettcher, 69 N.Y.2d 174, 180, 505 N.E.2d 594, 596, 513 N.Y.S.2d 83, 85 (1987); and then quoting People v. Brown, 203 N.Y. 44, 50, 96 N.E. 367, 369 (1911)).

32. 32 N.Y.3d 611, 614, 118 N.E.3d 897, 899, 94 N.Y.S.3d 235, 237 (2018). *See* N.Y. CRIM. PROC. LAW § 190.75(3) (McKinney 2007).

33. *Id.* at 620–21, 118 N.E.3d at 904, 94 N.Y.S.3d at 242. While spillover analysis is highly case-specific, it generally requires the Court to "evaluate the individual facts of the case, the nature of the error and its potential for prejudicial impact on the overall outcome" and "[r]eversal is required if there is a reasonable possibility that the jury's decision to convict on the tainted counts influenced its guilty verdict on the remaining counts in a meaningful way." *Id.* at 620, 118 N.E.3d at 904, 94 N.Y.S.3d at 242 (quoting People v. Morales, 20 N.Y.3d 240, 250, 982 N.E.2d 580, 586, 958 N.Y.S.2d 660, 666 (2012)).

the second degree was also admissible to prove his guilt of manslaughter in the first degree," which the defendant did not dispute.[34]

In *People v. Malloy*, the defendant challenged his conviction on the grounds that the people failed to provide a race-neutral basis for striking an African American prospective juror.[35] The Court rejected the defendant's argument as, based on the record, the Court concluded that the people's stated reason for dismissing the juror, to wit—"the prospective juror was 'dismissive and rude'"—was a valid and legitimate, race-neutral, explanation for dismissing the juror, which was only done after extensive questioning by the trial court.[36]

In *People v. Almonte*, the defendant argued that the trial court erred by denying the defendant's request to charge the jury on the lesser included offense of assault in the third degree.[37] The Court concluded that the "[d]efendant failed to 'show that there [was] a reasonable view of the evidence in the particular case that would support a finding that he committed the lesser included offense but not the greater.'"[38] Accordingly, the Court stated that charging the lesser included offense "'would [have] force[d] the jury to resort to sheer speculation.'"[39]

In *People v. Brown*, the defendant argued that the trial court erred by refusing to charge the jury with a justification defense at defendant's trial for murder in the second degree.[40] The Court rejected the defendant's

34. *Id.* at 621, 118 N.E.3d at 904, 94 N.Y.S.3d at 242.

35. *See* 33 N.Y.3d 1078, 1079, 128 N.E.3d 673, 673, 104 N.Y.S.3d 595, 595 (2019).

36. *See id.*

37. *See* 33 N.Y.3d. 1083, 1084, 130 N.E.3d 873, 874, 106 N.Y.S.3d 277, 278 (2019) (citing N.Y. PENAL LAW § 120.00(1) (McKinney 2009)).

38. *Id.* (quoting People v. Rivera, 23 N.Y.3d 112, 120, 12 N.E.3d 444, 449, 989 N.Y.S.2d 446, 451 (2014)).

39. *Id.* at 1084, 130 N.E.3d at 874–75, 106 N.Y.S.3d at 278–79 (quoting People v. Discala, 45 N.Y.2d 38, 43, 379 N.E.2d 187, 191, 407 N.Y.S.2d 660, 664 (1978)) (citing *Rivera*, 23 N.Y.3d at 121, 12 N.E.3d at 450, 989 N.Y.S.2d at 452).

40. *See* 33 N.Y.3d 316, 320, 125 N.E.3d 808, 811, 102 N.Y.S.3d 143, 146 (2019).

> [A] defendant is justified in using 'deadly physical force' upon another only if that defendant 'reasonably believes that such other person is using or about to use deadly physical force.' In other words, both that 'he believed deadly force was necessary to avert the imminent use of deadly force [and that] in light of all the circumstances . . . a reasonable person could have had these beliefs.' . . . [A] defendant is never justified in using deadly physical force if that defendant is the 'initial aggressor:' the first person in an altercation who uses or threatens the imminent use of deadly physical force. 'Justification is a defense, not an affirmative defense, and therefore the People bear the burden of disproving it beyond a reasonable doubt.'

Id. at 320–321, 125 N.E.3d at 811, 102 N.Y.S.3d at 146 (first quoting N.Y. PENAL LAW § 35.15(2)(a) (McKinney 2009); then quoting People v. Goetz, 68 N.Y.2d 96, 115, 497 N.E.2d

argument on the grounds that there was no evidence that (a) the defendant withdrew or attempted to withdraw after drawing his gun, and (b) the alleged victim was not the initial deadly force aggressor.[41]

In *People v. Meyers*, the defendant argued that CPL section 310.30 required a reversal of his conviction, after the defendant's appellate counsel, while preparing the defendant's appeal, discovered a purported jury note marked as an exhibit in court file which was not referenced on the record.[42] The Court concluded that a reconstruction hearing, rather than reversal and new trial, was the proper remedy.[43] Specifically, the Court reasoned that a reconstruction hearing was the proper remedy "to determine whether [the exhibit] reflected a 'jury . . . request [to] the court for further instruction or information' such that those obligations were triggered."[44] The Court rejected the defendant's argument on the grounds that it was determined, following the reconstruction hearing, that the exhibit was a draft note that the jury discarded.[45]

In *People v. Vega*, the defendant argued that the trial court erred by instructing the jury that if it found beyond a reasonable doubt that the defendant used a dangerous instrument, then it should apply the legal rules pertaining to the justified use of deadly physical force.[46] The Court stated that there was no per se rule pursuant to which justification defense instructions were appropriate in the defendant's case and it reasoned:

> as in every case where the defendant requests a justification charge, trial courts must view the record in the light most favorable to the defendant and determine whether any reasonable view of the evidence would permit the factfinder to conclude that the defendant's conduct was justified, and, if so, which instructions are applicable.[47]

The Court rejected the defendant's argument, as there was "no reasonable view of the evidence that the defendant merely 'attempted' or

41, 52, 506 N.Y.S.2d 18, 29 (1986); and then quoting In re Y.K., 87 N.Y.2d 430, 433, 663 N.E.2d 313, 314, 639 N.Y.S.2d 1001, 1002, (1996)) (first citing PENAL § 35.15(1)(b); and then citing People v. Petty, 7 N.Y.3d 277, 285, 852 N.E.2d 1155, 1161, 819 N.Y.S.2d 684, 689 (2006)).

41. *See id.* at 323, 125 N.E.3d at 813, 102 N.Y.S.3d at 148.

42. *See* 33 N.Y.3d 1018, 1020, 125 N.E.3d 822, 823, 102 N.Y.S.3d 157, 158 (2019).

43. *See id.*

44. *Id.* (quoting N.Y. CRIMINAL PROC. LAW § 310.30 (McKinney 2017)).

45. *Id.* at 1020, 125 N.E.3d at 823–24, 102 N.Y.S.3d at 158– 59.

46. *See* 33 N.Y.3d 1002, 1004, 125 N.E.3d 805, 806, 102 N.Y.S.3d 140, 141 (2019) (citing N.Y. PENAL LAW § 35.15(2) (McKinney 2009)).

47. *Id.* at 1004–05, 125 N.E.3d at 806, 102 N.Y.S.3d at 141 (first citing People v. Petty, 7 N.Y.3d 277, 284, 852 N.E.2d 1155, 1161, 819 N.Y.S.2d 684, 689 (2006); and then citing People v. McManus, 67 N.Y.2d 541, 549, 496 N.E.2d 202, 207, 505 N.Y.S.2d 43, 48 (1986)).

'threatened' to use the belt in a manner readily capable of causing death or serious physical injury but that he did not 'use' it in that manner."[48]

In *People v. Suazo*, a case of first impression, the defendant argued that, "although the Sixth Amendment right to a jury trial did not automatically attach to the crimes with which he was charged" because they were class B misdemeanors, punishable by less than a six-month term of incarceration, said crimes carried an additional severe penalty beyond incarceration to wit: deportation, which penalty defendant argued entitled him to a jury trial under the Sixth Amendment.[49] The Court agreed with the defendant that deportation was a "substantial and unique consequence," overturned the conviction, and ordered a new jury trial for the defendant on the grounds that "even if deportation is technically collateral, it is undoubtedly a severe statutory penalty that flows from the federal government as the result of a state criminal conviction."[50]

VII. RIGHT TO CONFRONTATION AND PUBLIC TRIAL

In *People v. Lopez-Mendoza*, *supra*, the defendant also argued that the trial court violated his Sixth Amendment rights by permitting the introduction of DNA evidence through testimony of an analyst who did not generate the DNA profile taken from the defendant's buccal swab.[51] The Court held that the issue at trial was whether the alleged victim consented to sexual contact with the defendant.[52] Accordingly, the Court concluded that "[b]ecause the DNA evidence did not go to the determinative issue of consent, any error in admitting it was harmless."[53]

48. *Id.* at 1005, 125 N.E.3d at 807, 102 N.Y.S.3d at 141 (citing PENAL §§ 10.00(11), (13)).

49. 32 N.Y.3d 491, 499, 118 N.E.3d 168, 175, 93 N.Y.S.3d 629, 635 (2018). "The Sixth Amendment 'requires that defendants accused of serious crimes be afforded the right to trial by jury[,] so-called petty offenses' may be tried without a jury'." *Id.* at 495, 118 N.E.3d 173, 93 N.Y.S.3d at 633 (quoting Baldwin v. N.Y., 399 U.S. 66, 68 (1970)). *See also* N.Y. CRIM. PROC. LAW § 340.40(2) (McKinney 2018) (requiring that the trial of an information in a local criminal court be a single judge trial unless the information charges any misdemeanors, in which case the defendant "must be accorded a jury trial . . . except that in the New York [C]ity criminal court the trial of an information which charges a misdemeanor for which the authorized term of imprisonment is not more than six months must be a single judge trial.").

50. *Suazo*, 32 N.Y.3d at 503, 509, 118 N.E.3d at 178, 182, 93 N.Y.S.3d at 639, 643 (quoting People v. Peque, 22 N.Y.3d 168, 193, 3 N.E.3d 617, 635, 980 N.Y.S.2d 280, 298 (2013)).

51. 33 N.Y.3d 565, 567, 106 N.Y.S.3d 266, 267 (2019). *See supra* Part II (discussing the Court's determination that the defendant failed to show he was denied meaningful representation on his ineffective assistance of counsel claim.).

52. *Id.* at 573, 106 N.Y.S.3d at 271.

53. *Id.*

VIII. RIGHT TO COUNSEL

In *People v. Gregory*, the defendant argued that the trial court erred when it refused his request to proceed pro se.[54] The Court rejected the defendant's argument on the grounds that the "defendant engaged in malingering insofar as he was competent to proceed but persisted in his efforts to avoid trial."[55] The Court concluded that the defendant "engaged in conduct which would prevent the fair and orderly exposition of the issues" and, as such, held that the trial court did not abuse its discretion in denying the defendant's request to proceed pro se.[56]

In *People v. Crespo*, the defendant challenged the decision of the trial court to deny his request to proceed pro se, which request was made after eleven jurors were selected and sworn as trial jurors.[57] The Court reasoned that the defendant's request was untimely as a matter of law because it was made after commencement of the trial, to wit: after jury selection began.[58] Accordingly, the Court held that the trial court properly denied the "defendant's request to proceed pro se, made near the conclusion of jury selection," without a hearing.[59]

IX. SENTENCING

In *People v. Malloy*, *supra*, the defendant also challenged his conviction on the grounds that the trial court unlawfully imposed consecutive sentences for the crimes of criminal weapon possession and murder.[60] The Court rejected the defendant's argument because evidence showed that the defendant was in possession of the gun for several minutes before approaching the alleged victim, thus, "supporting the conclusion that defendant possessed the weapon for a sufficient period of

54. *See* 33 N.Y.3d 1017, 1018, 15 N.E.3d 831, 831, 102 N.Y.S.3d 166, 166 (2019) (citing People v. McIntyre, 36 N.Y.2d 10, 17, 364 N.Y.S.2d 837, 844 (1974)).

55. *Id.*

56. *Id.* (citing *McIntyre*, 36 N.Y.2d at 17, 364 N.Y.S.2d at 844 (1974)).

57. *See* 32 N.Y.3d 176, 178, 112 N.E.3d 1243, 1245, 88 N.Y.S.3d 120, 122 (2018). The Court applied a three-prong analysis to determine when a defendant in a criminal case may invoke the right to proceed pro se: "(1) the request [must be] unequivocal and timely asserted, (2) there [must have] been a knowing and intelligent waiver of the right to counsel, and (3) the defendant [must] not engage[] . . . in conduct which would prevent the fair and orderly expositions of the issues." *Id.* (citing *McIntyre*, 36 N.Y.2d at 17, 364 N.Y.S.2d at 844).

58. *Id.* at 185, 112 N.E.3d at 1250, 88 N.Y.S.3d at 127.

59. *Id.* at 178, 112 N.E.3d at 1245, 88 N.Y.S.3d at 122.

60. 33 N.Y.3d 1078, 1080, 128 N.E.3d 673, 674, 104 N.Y.S.3d 595, 596 (2019). *See supra* Part VI (discussing the Court's determination that the people's stated reason for dismissing the juror in question was a valid and legitimate, race-neutral, explanation done after extensive questioning by the trial court).

time before forming the specific intent to kill."[61] As such, the Court held that consecutive sentencing was permissible.[62]

In the *Matter of James Q*, the defendant argued that the confidentiality provision of Mental Hygiene Law section 33.13 required an automatic sealing of the entire court record of all proceedings for insanity acquittees with dangerous mental disorders as defined under CPL section 330.20.[63] Based on the language of the statute and a legislative history analysis, the Court rejected the defendant's argument concluding that:

> the clinical record created separately by the facility in accordance with Mental Hygiene Law § 33.13 cannot encapsulate the discrete record of a defendant's court retention proceedings, created independently by the court pursuant to CPL 330.20, simply because information of defendant's legal status, essentially derived from the court record, is repeated in the clinical record.[64]

In *People v. Hakes*, as a condition of his probation, the Court required the defendant to wear and pay for an alcohol monitoring bracelet upon his release from jail.[65] The defendant stopped paying for the bracelet, "claimed that an injury interfered with his ability to work and earn the income necessary to pay the monitoring fee," and challenged the trial court's determination to revoke the defendant's probation and impose a state prison term sentence for a violation of the same condition of his probation.[66] The Court rejected the defendant's argument, holding that a sentencing court may require the defendant to pay the costs and fees associated with the monitoring of an alcohol monitoring bracelet, as

61. *Id.* "So long as a defendant knowingly unlawfully possesses a loaded firearm before forming the intent to cause a crime with that weapon, the possessory crime has already been completed, and consecutive sentencing is permissible." *Id.* (quoting People v. Brown, 21 N.Y.3d 739, 751, 999 N.E.2d 1168, 1174–75, 977 N.Y.S.2d 723, 729–30 (2013)).

62. *Id.*

63. *See* 32 N.Y.3d 671, 673, 120 N.E.3d 358, 359, 96 N.Y.S.3d 159, 160 (2019).

> Mental Hygiene Law § 33.13 protects the confidentiality of the clinical records of patients and clients as maintained by facilities licensed or operated by the Office of Mental Health or the Office for People with Developmental Disabilities . . . 'CPL 330.20 governs the procedure to be followed after a criminal court has entered a judgment that defendant is not responsible by reason of mental disease or defect.'

Id. at 673, 675, 120 N.E.3d at 358–59, 360, 96 N.Y.S.3d at 159–60, 161 (quoting Jamie R. v. Consilvio, 6 N.Y.3d 138, 141, 844 N.E.2d 285, 286, 810 N.Y.S.2d 738, 739 (2006)) (citing People v. Stone, 73 N.Y.2d 296, 300, 536 N.E.2d 1137, 1139, 539 N.Y.S.2d 718, 720 (1989)).

64. *Id.* at 678, 120 N.E.3d at 362, 96 N.Y.S.3d at 163.

65. 32 N.Y.3d 624, 627, 118 N.E.3d 883, 885, 94 N.Y.S.3d 221, 223 (2018).

66. *Id.*

condition of probation, provided that doing so would reasonably promote rehabilitative goals of probation.[67]

In *People v. Rodriguez*, the defendant appealed the imposition of two consecutive twenty-year term sentences for his convictions, imposed by the trial court as a result of the defendant's violation of a pre-sentence cooperation agreement when the defendant refused to testify against a co-defendant.[68] The Court rejected the defendant's argument and upheld the sentence of the trial court.[69] Key to the Court's reasoning was the fact that the cooperation agreement cautioned the defendant that a "'fail[ure] to fully and successfully cooperate' would result in forfeiture of the sentencing promise and imposition of an enhanced sentence;" that the "defendant confirmed on the record that he understood [said] aspect of the cooperation agreement;" and that "[t]he plain language of the agreement was objectively susceptible to but one interpretation."[70]

X. SUPPRESSION

In *People v. Sanchez*, the defendant argued that the trial court improperly denied his motion to suppress certain statements to the police.[71] The Court rejected the defendant's argument on the grounds that there was adequate support on the record for the trial court's determination that the confidential informant had a sufficient "basis for his knowledge of the information he transmitted and that such information was reliable."[72]

XI. LEGISLATIVE DEVELOPMENTS

During the *Survey* period, the Legislature enacted sweeping changes to the Criminal Procedure Law (hereinafter "CPL") and the Penal Law (hereinafter "PL"). The most significant of the changes are summarized below. The new legislation is, generally, far more favorable to the defense and involves extensive changes to bail, discovery procedures, speedy trial, and subpoena practice.

67. *See id.* at 631, 118 N.E.3d at 888, 94 N.Y.S.3d at 226 (citing N.Y. PENAL LAW § 65.10 (McKinney 2009)).

68. *See* 33 N.Y.3d 956, 957, 123 N.E.3d 255, 256, 99 N.Y.S.3d 771, 772 (2019).

69. *Id.*

70. *Id.* (citing People v. Cataldo, 39 N.Y.2d 578, 580, 349 N.E.2d 863, 864, 384 N.Y.S.2d 763, 764 (1976)).

71. *See* 32 N.Y.3d 1021, 1023, 112 N.E.3d 312, 314, 87 N.Y.S.3d 135, 137 (2018).

72. *Id.* (first citing People v. Johnson, 66 N.Y.2d 398, 402, 488 N.E.2d 439, 441, 497 N.Y.S.2d 618, 621 (1985)); then citing People v. DiFalco, 80 N.Y.2d 693, 698, 610 N.E.2d 352, 355, 594 N.Y.S.2d 679, 682 (1993); and then citing People v. Rodriguez, 52 N.Y.2d 483, 489, 420 N.E.2d 946, 950, 438 N.Y.S.2d 754, 758 (1981)).

A. Bail

The rules pertaining to the release of defendant on bail have been significantly revised to curtail the holding of indigent defendants in custody during the pendency of their violation, misdemeanor, and non-violent felony criminal cases.[73] Changes were made to or are in the form of the following new/revised legislation: Article 150 (appearance tickets); Article 500 (definitions—recognizance, bail, and commitment); Article 510 (determination of application for recognizance or bail, issuance of securing orders and related matters); Article 520 (bail and bail bonds); Article 530 (orders of recognizance or bail); Article 216.05 (judicial diversion program); CPL Section 240.44 (discovery for pre-trial hearings); Article 410 (sentences of probation, conditional discharge, and parole supervision); Article 620 (material witness order to secure attendance of witness).[74]

The new legislation now expresses a preference for release or the setting of bail for defendants charged with most misdemeanor and non-violent felonies at initial time of contact between the defendant and the police or the court at arraignment.[75] As to the police, the new legislation establishes specified circumstances and charges, the absence of which mandates that the defendant be released by the police after being arrested for most violations, misdemeanors, and non-violent felonies.[76] If the defendant is taken into custody by the police, the court's broad discretion to set bail or impose conditions for the defendant's release has also been abridged, in favor of release of the defendant absent enumerated charges or circumstances.[77] Even if the defendant's charges are encompassed by a category or a set of circumstances that don't dictate mandatory release, there is a strong presumption under the new law that the defendant be released with conditions.[78] Several of the legislative amendments now require that the court hold a hearing, on the record, and make findings when deciding to hold a defendant pending prosecution or to impose conditions for the defendant's release.[79] In certain instances, the

73. *See generally* Act of Apr. 12, 2019, 2019 McKinney's Sess. Laws News no. 1, ch. 59, at 503–38 (amending the New York Criminal Procedure Law).

74. *See id.*

75. *See e.g.*, N.Y. CRIM. PROC. LAW § 510.30(1) (McKinney Supp. 2020) ("[T]he court in all cases, unless otherwise provided by law, must impose the least restrictive kind and degree of control or restriction that is necessary to secure the principal's return to court when required.").

76. *See id.* § 510.10(3).

77. *Id.*

78. *See id.* § 510.10(5).

79. *See id.* § 510.20.

defendant can now present evidence and cross-examine witnesses at a hearing seeking the defendant's pretrial release or the reduction of bail.[80]

B. Discovery

Article 240 of the CPL, governing the discovery process in criminal cases, was entirely repealed and replaced by the new CPL Article 245.[81] The new/revised legislation, among other changes includes: CPL 245.10 (timing of discovery); CPL 245.20 (automatic discovery); CPL 245.25 (disclosure prior to certain pleas); CPL 245.30 (preservation, access, and discovery); CPL 245.35 (court ordered procedures to facilitate compliance); CPL 245.40 (non-testimonial evidence from defendant); CPL 245.45 (DNA comparison order CPL 245.50 (certificates of compliance and trial readiness); CPL 245.55 (flow of information); CPL 245.60 (continuing duty to disclose); CPL 245.65 (work product); CPL 245.70 (protective orders); CPL 245.75 (waiver of discovery by the defense); CPL 245.80 (sanctions/remedies for non-compliance); and CPL 245.85 (admissibility of discovery).[82]

As initial discovery, the new statute now provides for broad and early discovery of traditional and new items which the defense was not previously entitled to, which must all be provided by the prosecution to the defense within fifteen (15) days of arraignment, including, among others: recorded witness statements; grand jury testimony; contact information (address/telephone) for witnesses and those known to have relevant evidence; and all police notes and reports.[83] The new legislation also provides for supplemental discovery of *Molineux* and *Sandoval* related material at least fifteen (15) days prior to trial.[84] The rules governing categories of certain discovery to be provided by the defense to the prosecution have also been broadened.[85] Under the new scheme, the defense can opt-out of some of the discovery requirements by foregoing the opportunity to obtain discovery from the prosecution and additional time periods to provide discovery or seek protective orders are available.[86] The amended discovery legislation now requires a certificate of readiness for discovery compliance, which certificate cannot be filed by the prosecution absent compliance with the new discovery rules.[87] The

80. *See* CRIM. PROC. § 510.20 (McKinney Supp. 2020)).
81. *See* Act of Apr. 12, 2019, *supra* note 73, at 523.
82. *See id.* at 524–538.
83. CRIM. PROC. §§ 245.10(1)(a), 245.20.
84. *Id.* §§ 245.10(1)(b), 245.20(3).
85. *See id.* § 245.20.
86. *Id.* § 245.75.
87. *Id.* § 245.50(1).

failure to produce timely discovery will now entitle the defense to relief under CPL 30.30, which law was also amended to incorporate the new discovery requirements.[88] Finally, the CPL subpoena standard for obtaining information from state agencies was modified, to wit: from a *Brady* type favorable to the defense standard to a lesser showing by the defense that the material sought is merely relevant.[89]

88. *See* CRIM. PROC. §§ 245.80(b), 30.30.
89. *Id.* § 245.20(1)(k).