CRIMINAL LAW

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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, 2022, to July 1, 2023. The *Survey* focuses on decisions from the Court of Appeals (hereinafter "the Court") during the relevant survey 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 the penal law (hereinafter "PL"), the criminal procedure law (hereinafter "CPL"), and the vehicle and traffic law (hereinafter "VTL").

I. ACCUSATORY INSTRUMENTS

In *People v. Saenger* the defendant argued that the People's failure to specify his current misdemeanor offense in an indictment charging him with the crime of aggravated family offense rendered the same

count of the indictment jurisdictionally defective.[1] The Court agreed with the defendant reasoning that

> [t]he indictment also must 'provide some means of ensuring that the crime for which the defendant is brought to trial is in fact one for which he was indicted by the Grand Jury, rather than some alternative seized upon by the prosecution in light of subsequently discovered evidence.' Here, there is no way of determining from the face of the indictment, even when supplemented by the bill of particulars, what underlying misdemeanor offense the grand jury believed defendant had committed for purposes of aggravated family offense, and therefore no way to ensure that the People could not allege an alternative underlying offense at trial.[2]

II. EVIDENCE

In *People v. Lagano* the Court reviewed whether the evidence at trial was sufficient to convict the defendant of the charge of Harassment in the Second Degree in violation of PL Section 240.26(1).[3] The Court upheld the defendant's conviction based on telephone call evidence that the defendant extorted the victim and threatened to shoot her children; firebomb her home; and kill the entire family.[4] The Court held that a reasonable fact finder could conclude that defendant's

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1. People v. Saenger, 211 N.E.3d 686, 688 (N.Y. 2023).

2. *Id.* at 690–91 (quoting People v. Iannone, 45 N.E.2d 656, 660 (N.Y. 1978)). "The People may ensure the facial validity of an indictment charging a defendant with aggravated family offense simply by specifying the alleged underlying misdemeanor offense, either by incorporating the underlying offense by section number or by stating the definition of the offense." *Id.* at 691 (citation omitted).

3. People v. Lagano, 201 N.E.3d 791, 792 (N.Y. 2022). "A person is guilty of harassment in the second degree when, with intent to harass, annoy or alarm another person," they "strike[ ], shove[ ], kick[ ] or otherwise subject[ ] such other person to physical contact, or attempt[ ] or threaten[ ] to do the same." N.Y. PENAL LAW § 240.26(1) (McKinney 2023).

4. *Lagano*, 201 N.E.3d at 794.

statements were not a mere outburst or said in jest but were rather "escalating threats of deadly violence" directed at the victim and her family.[5]

In *People v. Myers* the defendant argued that a phone call that originated from county jail and was intercepted by law enforcement officials monitoring a wiretap in an unrelated investigation by the New York State Attorney General was inadmissible at trial because the People failed to timely furnish the defendant with a copy of the eavesdropping warrant and underlying application.[6] Specifically, the defendant argued that the recorded conversation obtained from the jail was derived from an intercepted communication within the meaning of CPL 700.05.[7] The Court held that the implied consent given to the jail by the inmate who placed the call in which the defendant and others participated did not convert the wiretap into a consensual recording, thereby, vitiating the protections of CPL article 700.[8] The Court held that the wiretap was an "intercepted communication" within the meaning of CPL 700.05 and that the use of that intercepted call or any evidence "derived therefrom" at trial was subject to the notice requirement of CPL 700.70.[9] As the People failed to provide proper notice, the case was remanded for a new trial.[10]

In *People v. Hartle* the defendant argued that the trial court abused its discretion by denying the defendant's motion to vacate on the grounds of newly discovered evidence without a hearing.[11] The new evidence alleged by the defendant consisted of recovered text messages and photographs obtained through a forensic retrieval process, which technology the defendant claimed was not available at the

5. *Id*. at 794.

6. People v. Myers, 204 N.E.3d 447, 449 (N.Y. 2023).

7. *Id.* CPL 700.70 states that the "contents of any intercepted communication, or evidence derived therefrom[,]" cannot be used at trial unless the People, "within fifteen days after arraignment and before the commencement of the trial, furnish the defendant with a copy of the eavesdropping warrant, and accompanying application, under which interception was authorized or approved." N.Y. CRIM. PROC. LAW §700.70 (McKinney 2023).

8. *Myers*, 204 N.E.3d at 450. Detainees are informed of the monitoring and recording of their calls and, as such, have no objectively reasonable constitutional expectation of privacy in the content of those calls impliedly consenting to the taping of those conversations. *See e.g.,* People v. Diaz, 122 N.E.3d 61, 62 (N.Y. 2019); People v. Williams, 147 N.E.3d 1131, 1145 (N.Y. 2020).

9. *Myers*, 204 N.E.3d at 451.

10. *Id.*

11. People v. Hartle, 214 N.E.3d 472, 472–73 (N.Y. 2023).

time of trial.[12] The Court rejected the defendant's argument on the grounds that the evidence at issue was not newly discovered; to wit: the defendant knew about and was involved in the creation of the evidence; tried to destroy the evidence to conceal his criminal activity; and failed to show that the evidence at issue was inaccessible or could not have been produced at trial with due diligence.[13] The Court also concluded that the affirmation of trial counsel was conclusory and failed to demonstrate due diligence to show that obtaining the newly retrieved evidence was not possible with the existing technology at the time of trial.[14]

In *People v. Hemphill* the defendant argued that the trial court committed reversible error by permitting the admission of a third-party plea allocution as evidence in the defendant's trial in violation of the defendant's rights under the Confrontation Clause of the Sixth Amendment.[15] The Court concluded that the error was harmless based on overwhelming evidence of the defendant's guilt.[16] Specifically, there was overwhelming evidence that the defendant was the shooter including, strong eyewitness testimony describing the defendant's tattoo; evidence of the defendant's clothing; and matching DNA.[17] As such, the Court held that there was no "reasonable possibility" that the erroneously admitted evidence "might have contributed to defendant's conviction."[18]

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12. *Id.* at 473–74. CPL Section 440.10(1)(g) permits the vacatur of a conviction on the basis of newly discovered evidence: "which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence." N.Y. CRIM. PROC. LAW § 440.10 (McKinney 2023).

13. *Hartle,* 214 N.E.3d at 475.

14. *Id.*; "CPL 440.10(g)'s due diligence prong . . . requires that defendant show that the evidence could not have been produced at the trial even with due diligence on the part of defendant*." Id.* at 475; *see also* N.Y. CRIM. PROC. LAW §440.10(g) (McKinney 2023).

15. People v. Hemphill, 196 N.E.3d 365, 365 (N.Y. 2022). This matter was returned to the Court after remand from the Supreme Court of the United States, holding that "[t]he Sixth Amendment speaks with equal clarity: 'In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" Hemphill v. New York, 595 U.S. 140, 142. (2022). Courts may not overlook its command, no matter how noble the motive. *Id.* (citing United States v. Gonzalez-Lopez, 548 U.S. 140, 145 (2006)).

16. *Hemphill,* 196 N.E.3d at 367.

17. *Id.* at 366.

18. *Id.*; *see also* People v. Crimmins, 326 N.E.2d 787 (N.Y. 1975).

III. JURY TRIAL PROCEDURE AND INSTRUCTION

In *People v. Sanders*, the defendant argued that a violation of his due process rights occurred when the trial court directed that the defendant be handcuffed when the jury returned to announce and during the reading of the verdict without providing an explanation.[19] The Court reasoned that "[t]he Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits states from physically restraining a defendant during a criminal trial without an on-the-record, individualized assessment of the state interest specific to a particular trial".[20] The Court concluded that absent a "close judicial scrutiny" prior to the detention and the placing of the "special need" for the restraints on the record, the trial court committed reversible error.[21]

In *People v. Bradford* the defendant claimed error on the grounds that he was mandated by sheriff officials to wear a stun belt at trial and that neither the People nor the trial court were aware of the same.[22] Although it was undisputed that the trial court failed to particularize the need for the defendant to wear a stun belt and that the same was error, the Court held that counsel for the defendant failed to object and, thus, the issue was not preserved for appellate review.[23] The case was remanded to the trial level on the issue of ineffective assistance of counsel for failing to object and preserve the issue for review.[24]

In *People v. Heiserman* the defendant argued that the trial court committed reversible error by refusing to instruct the jury on the justification defense.[25] Specifically, the defendant argued that he was entitled to a justification defense when he charged and punched a jail

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19. People v. Sanders, 205 N.E.3d 423, 424 (N.Y. 2023).

20. *Id.* at 425; *see also* Holbrook v. Flynn, 475 U.S. 560 (1986); *see also* Estelle v. Williams, 425 U.S. 501 (1976).

21. *Sanders,* 205 N.E.3d at 425 (internal citations and quotation marks omitted).

22. People v. Bradford, 217 N.E.3d 24, 25 (N.Y. 2023).

23. *Id.* at 25–26.

24. *Id.* at 26.

25. People v. Heiserman, 201 N.E.3d 1292, 1293 (N.Y. 2022). "A trial court must charge the factfinder on the defense of justification whenever there is evidence to support it." *Id.* (internal citations and quotation marks omitted). "The court must view the evidence in the light most favorable to the defendant, and if there is 'any reasonable view of the evidence [that] would permit the factfinder to conclude that the defendant's conduct was justified,' the charge must be given. *Id.*; *see also* People v. Watts, 442 N.E.2d 1188 (N.Y. 1982); People v. Petty, 852 N.E.2d 1155 (N.Y. 2006).

sergeant after being sprayed in the face with pepper spray for refusing to remove his shoes prior to being lodged.[26] The Court rejected the defendant's argument on the grounds that the sergeant's use of the pepper spray was not excessive or otherwise unlawful and, as such, the defendant was not entitled to a justification defense instruction.[27]

In *People v. Reid*, the defendant argued that the trial court committed reversible error by closing the courtroom to all participants during the trial on the grounds that observers were behaving in an intimidating manner by taking pictures of the trial.[28] Defense counsel objected to the closing of the courtroom and proposed barring all cellphones in the courtroom, as less restrictive, alternative means, of resolving the issue.[29] The Court held that in determining whether to close a courtroom during a trial over a defendant's objection,

> the party seeking to close the [proceedings] must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.[30]

Applying the foregoing principles, the Court held that the record failed to demonstrate the necessary unusual circumstances or the compromising of any interest and agreed with the defendant that his constitutional right to a public trial was infringed.[31]

In *People v. Jimenez* the defendant argued that the indictment against him should have been dismissed at the trial court level because the People failed to charge the grand jury on justification, an exculpatory defense under Penal Law Section 35.05(2); to wit: the "choice of

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26. *Heiserman*, 201 N.E.3d at 1293.

27. *Id.* at 1293–94.

28. *See* People v. Reid, 218 N.E.3d 684, 685 (N.Y. 2023). "The constitutional right to a public trial 'has long been regarded as a fundamental privilege of the defendant in a criminal prosecution.'" *Id.* at 686. (quoting People v. Roberts, 104 N.E.3d 701, 714 (N.Y. 2018); quoting People v. Martin, 949 N.E.2d 491, 495 (N.Y. 2011). "The presumption is that trials will be open to the public, and a trial court's discretion to exclude the public from criminal proceedings 'must be exercised only when unusual circumstances necessitate it.'" *Id.* (quoting *Martin*, 925 N.E. 2d at 493 (internal quotation marks omitted)).

29. *Id.* at 686.

30. *Id.* at 687. *See also* Presley v. Georgia, 558 U.S. 209, 215 (2010). "[T]he particular interest, and threat to that interest, must be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Id.* (internal citations and quotation marks omitted).

31. *Reid*, 218 N.E.3d at 688.

evils" defense.[32] Specifically, the defendant argued that the same defense should have been submitted to the grand jury on the grounds that the defendant hit and inflicted injury upon a small dog to avoid a potentially dangerous dog bite infection.[33] The Court reasoned that the People were not required to charge the grand jury that defendant chose to strike the dog as an emergency measure to avoid immanent private injury to himself, on the grounds that the defendant testified that he was not afraid of the dog, never intended to hurt the dog, and struck the dog by mistake.[34]

In *People v. Muhammad* the defendant argued that the trial court violated his Sixth Amendment right to a public trial by delegating to court officers the implementation of the judge's policy of prohibiting the public from entering or exiting the courtroom while a witness testifies.[35] The fact that the court officers failed to notify or communicate to those waiting that they could enter was key to the Court's determination.[36] Accordingly, the Court reasoned that the exclusion occurred as the result of the adoption of the policy and its delegation to his staff by the trial judge and that members of the public were excluded from the courtroom at a time when they should have had access.[37] As such, the Court held that the trial court violated the defendant's right to a public trial.[38]

In *People v. Ruiz* the People appealed the decision of the Appellate Division granting the defendant a new trial on the grounds that the

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32. People v. Jimenez, 200 N.E.3d 1015, 1016 (N.Y. 2022). Section 190.25(6) of the Criminal Procedure Law states as follows: "[t]he legal advisors of the grand jury are the court and the district attorney," and commands that "[w]here necessary or appropriate, the court or the district attorney, or both, must instruct the grand jury concerning the law with respect to its duties or any matter before it . . . ." N.Y. CRIM. PROC. LAW §190.25(6) (McKinney 2023).

33. *Jimenez*, 200 N.E.3d at 1017. Penal Law Section 35.05(2) provides that conduct that would otherwise be criminal may be justifiable when "[s]uch conduct is necessary as an emergency measure to avoid an imminent . . . private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding such injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue." N.Y. PENAL LAW §35.05(2) (McKinney 2023).

34. *Jimenez*, 200 N.E.3d at 1018.

35. *See* People v. Muhammad, 213 N.E.3d 624, 628 (N.Y. 2023).

36. *See Id.* at 629.

37. *Id.*

38. *Id.* at 630–31.

trial court's decision to deny the defendant's requested instruction on temporary and lawful possession of a weapon charge was error.[39] The trial court held that the charge was unwarranted because the defendant had no legal excuse for possessing the weapon and because the weapon was discharged and, thus, used in a dangerous manner against the victim.[40] The Court held that the defendant is entitled to a charge of a temporary and lawful possession defense when there is evidence presented demonstrating a legal excuse for the possession, as well as facts tending to establish that, once possession has been obtained, the weapon was not used in a dangerous manner.[41] The Court held that because the defendant did not lawfully possess the weapon and used it in a dangerous manner against the victim, there was no reasonable view of the evidence that would support a finding of the tendered defense of temporary and lawful possession.[42]

In *People v. Murray* prior to jury deliberations in the defendant's trial, the trial court discharged the alternate jurors.[43] Subsequently, a trial juror was challenged and removed for cause and the court recalled, questioned, and seated one of the discharged alternates.[44] The defendant argued that the seating of this discharged alternate juror was error.[45] The Court agreed with the defendant, holding that an alternate juror, once discharged, is no longer "available for service" as a

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39. *See* People v. Ruiz, 201 N.E.3d 802, 804 (N.Y. 2022). A trial court must instruct the jury on the material legal principles applicable to the particular case, and, so far as practicable, explain the application of the law to the facts. It is well settled that the jury must be instructed on all claimed defenses which are supported by a reasonable view of the evidence - not by any view of the evidence, however artificial or irrational. A requested charge must be given if there is evidence reasonably supportive of the defense, even if there is other evidence which, if credited, would negate it. *Id.* (internal citations and quotation marks omitted). *See also* People v. McKenzie, 976 N.E.2d 217 (N.Y. 2012); People v. Butts, 533 N.E.2d 660 (N.Y. 1988).

40. *Ruiz*, 213 N.E.3d at 804.

41. *Id.*

42. *Id.* at 805.

43. People v. Murray, 198 N.E.3d 466, 467 (N.Y. 2022).

44. *Id.* The procedure for the replacement of a trial juror with an alternate juror is governed by CPL 270.35(1), as follows: "If an alternate juror or jurors are available for service, the court must order that the discharged juror be replaced by the alternate juror whose name was first drawn and called, provided, however, that if the trial jury has begun its deliberations, the defendant must consent to such replacement . . . If no alternate juror is available, the court must declare a mistrial. . . ." N.Y. CRIM. PROC. LAW § 270.35(1) (McKinney 2023).

45. *Murray*, 198 N.E.3d at 467.

replacement for a trial juror.[46] Key to the Court's reasoning was that the trial judge thanked the alternate jurors for their service and excused them from the case, signifying clearly that the alternates were, in fact, discharged.[47]

IV. Right to Counsel

In *People v. Baines* the defendant argued that his waiver of counsel was not knowing, voluntary, and intelligent.[48] The Court concluded that the trial court failed to warn the defendant of the risks of proceeding pro se and the importance of having a lawyer in an adversarial litigated proceeding, as there was no discussion in the record between the Court and the defendant regarding these issues.[49] The Court also concluded that the "record as a whole [failed to] demonstrate that defendant effectively waived his right to counsel."[50]

V. Sentencing

In *People v. Kaval* the defendant argued that the trial court committed error when it re-sentenced him as a persistent violent felony offender on remittitur after the case was returned to the trial court by the Appellate Division, which vacated the defendant's original sentence.[51] The Court held that the trial court, based on the evidence, "was not precluded from imposing the statutorily required sentence

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46. *Id.* at 468.

47. *Id.* at 469. "Once the court has clearly stated on the record that an alternate juror has no further responsibilities in the case, the alternate juror is discharged." *Id.*; *See also* People v. Aleynikov, 104 N.E.3d 687 (N.Y. 2018).

48. People v. Baines, 197 N.E.3d 1282, 1283 (N.Y. 2022). Criminal defendants have a constitutional right to be represented by counsel or to represent themselves if they so choose. A defendant "must make a knowing, voluntary and intelligent waiver of the right to counsel." "To ascertain whether a waiver is knowing, voluntary and intelligent, a court must undertake a searching inquiry designed to insure that the defendant is aware of the dangers and disadvantages of proceeding without counsel." "Additionally, a searching inquiry encompasses consideration of a defendant's pedigree since such factors as age, level of education, occupation and previous exposure to the legal system may bear on a waiver's validity." *Id.* at 1284–85 (internal citations omitted).

49. *Id.* at 1285. The Court has "consistently refrained from creating a catechism for this inquiry, recognizing that it may occur in a nonformalistic, flexible manner." *Id.* (internal citations and quotation marks omitted).

50. *Id.* at 1285.

51. People v. Kaval, 205 N.E.3d 416, 417 (N.Y. 2022).

. . . particularly given that court's 'inherent authority to correct illegal sentences.'"[52] Key to the Court's determination was the fact that "[a]t the time of resentencing, [the] Supreme Court was on notice of [ ] supplemental evidence of defendant's prior incarceration, which conclusively demonstrate[d] that defendant [was], in fact, a persistent violent felony offender," and that the Appellate Division did not limit, in any way, its remittal with regard to defendants sentence.[53]

VI. SPEEDY TRIAL

In *People v. Johnson* the defendant argued that a pre-indictment delay of eight years between the alleged crime and the indictment deprived him of his right to due process under the State and Federal Constitutions.[54] As there is no length of time that automatically precipitates a due process violation, the Court employed the following five part test to analyze the issue, to wit: "(1) the extent of the delay; (2) the reasons for the delay; (3) the nature of the underlying charge; (4) whether there has been an extended period of pretrial incarceration; and (5) whether there is any indication that the defense has been impaired by reason of the delay."[55] In analyzing the fifth factor, the Court held that the trial court committed reversible error on the grounds that

> [w]hen an indictment contains multiple counts, if delay impacts the defendant's ability to defend one count, it may weaken that defendant's position in plea bargaining, potentially adversely impacting the resulting plea. Thus, the appellate court must consider prejudice measured against all counts pending when the dismissal motion is made, not merely against the crime of conviction.[56]

In *People v. Regan* the defendant argued that a pre-indictment delay of nearly four years violated his due process rights to prompt prosecution under the state constitution.[57] The Court agreed with the defendant that the prosecution engaged in lengthy, unexplained

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52. *Id.* at 418 (internal citations omitted).
53. *Id* at 417.
54. People v. Johnson, 201 N.E.3d 778, 780–81 (N.Y. 2022).
55. *Id.* at 781. The genesis of the five-factor test and other applicable analysis for said factors is found in People v. Taranovich, 335 N.E.2d 303 (N.Y. 1975).
56. *Johnson*, 201 N.E.3d at 783.
57. People v. Regan, 212 N.E.3d 282, 285 (N.Y. 2023). "By statute and constitutional law, New York guarantees criminal defendants the right to a speedy trial and prompt prosecution." *Id.* at 287 (internal citations omitted).

delays, for even simple pre-trial procedures, such as obtaining a warrant for the defendant's DNA which, in this case, took more than three years for the People to accomplish.[58] More than two years of delay could not be explained or excused by the prosecution in any way.[59] Also key to the Court's determination was that the case against the defendant was not complex; the complainant was fully cooperative; and there was no difficulty in processing the DNA evidence once it was finally collected.[60]

VII. LEGISLATIVE DEVELOPMENTS

During the *Survey* period, the Legislature enacted numerous changes to the CPL, PL, and the VTL. The most significant changes are summarized below.

A. Criminal Procedure Law

CPL Sections 570.17 and 140.10 were amended in relation to legally protected health activity providers as pertains to safeguarding against the arrest and extradition of abortion providers.[61]

B. Penal Law

PL Sections 10.00, 20.20, 60.27, and 80.10 were amended in relation to crimes involving the death or serious physical injury of an employee, as well as crimes involving the death or injury of a worker.[62]

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58. *Id.* at 286–95.

59. *Id.* at 294.

60. *Id.* at 292. The factors considered by the Court when evaluating a due process violation based on a delay in commencing prosecution are as follows: "(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay." *Id.* at 288. citing People v. Wiggins, 95 N.E.3d 303 (N.Y. 2018), quoting People v. Taranovich, 335 N.E.2d 303 (N.Y. 1975). "No one factor or combination of the factors . . . is necessarily decisive or determinative of the [prompt prosecution] claim, but rather the particular case must be considered in light of all the factors as they apply to it." *Id*. at 288 (internal citations, quotation marks, and brackets omitted).

61. N.Y. CRIM. PROC. LAW §§ 570.17, 140.10 (McKinney 2023).

62. N.Y. PENAL LAW §§ 10.00, 20.20, 60.27 (McKinney 2023).

PL Section 250.72 was repealed and Sections 250.70 and 250.71 were amended in relation to certain offenses and provisions related to the unlawful dissemination of a personal image.[63]

C. Vehicle & Traffic Law

Although the legislature enacted a number of changes to the VTL during the survey period, the majority of said changes involved amendments to administrative and/or other provisions of the VTL that do not substantively or directly impact upon criminal law or procedure and, as such, the same amendments during the survey period will not be discussed in this work.

63. N.Y. PENAL LAW §§ 250.72, 250.70, 250.71 (McKinney 2023).