New York State Judicial Institute
Court Attorneys Seminar
Annual Criminal Update

October 10, 2019

Judge Mark D. Cohen
Judge Jill Konviser

New York Law School

Annual Criminal Update

- Presentation in Two Parts
- Goal: Understanding of Recent Important Criminal Procedure and Law Cases
- Judge Konviser: Grand Jury, Guilty Pleas and Trial Practices
- Judge Cohen: Evidence, *Brady*, Confession and Substantive Law

Judge Konviser – Part I

Judge Cohen – Part II

Evidence

"Guide to New York Evidence"

Chief Judge's Judicial Evidence Committee

Statement of Current Law of New York Evidence, Updated Periodically

Accessible Like CJI On Line

http://nycourts.gov/judges/evidence/index.shtml

See, W. Donnino, "*New York's Evidence Guide: The Court System's Best Kept Secret*," N.Y.L.J. 9/11/19 @ p. 6

Can The People Present The Prior Grand Jury Testimony of a Trial Witness Who Maintains That He Has No Recollection of an Assault at Trial?

- Is That Past Recollection Recorded?
- Does This Violate C.P.L. 670.10?
- Does This Implicate The Confrontation Clause?

People v. Carlos Tapia, 33 N.Y.3d 257 (Ct. App. 4/2/19)

- At Defendant's Bronx Assault Trial, NYPD Sergeant Testified That as He and NYPD Lieutenant Driving Back to Precinct at 3 am, He Observed Defendant "Body Slam" a Profusely Bleeding Victim In Street Outside Bar
- DC Then Alerted Court If People Didn't Call Lieutenant, Defense Could Seek Missing Witness Charge

People v. Carlos Tapia, 33 N.Y.3d 257 (Ct. App. 4/2/19)

- Lieutenant Had Retired But When Produced, Claimed to Have No Independent Recollection of the Assault Incident But He Did Recall Assisting in Arrest of Defendant
- People Sought to Introduce Lieutenant's Grand Jury Testimony as Past Recollection Recorded

People v. Carlos Tapia, 33 N.Y.3d 257 (Ct. App. 4/2/19)

- Trial Court Overruled Defendant's Confrontation Objection and Permitted Introduction of GJ Testimony
- Lieutenant's GJ Transcript: "Brief" and "Consistent" With Sergeant's Testimony + That He Saw D Kick V in the Head

People v. Carlos Tapia, 33 N.Y.3d 257 (Ct. App. 4/2/19)

- Trial Judge Provided Limiting Instruction That GJ testimony Was Not "Independent Proof of the Facts" and That it Was Merely "Auxiliary" to the Witness's Testimony
- Defendant Acquitted of Assault 1 But Convicted of Attempted Assault 1
- First Dept. Affirmed 3-2

People v. Carlos Tapia, 33 N.Y.3d 257 (Ct. App. 4/2/19)

- Court of Appeals, Affirmed 4-3 (DiFiore, C.J.)
- C.P.L. 670.10 Provides Foundation For Admission of Prior Statements of Witnesses When Declarant is "Unable to Attend" Due To Death, Illness or Incapacity, or He/She Can't Be Found With Due Diligence, or Is Outside The State or in Federal Custody and Can't Be Produced in Court With Due Diligence

People v. Carlos Tapia, 33 N.Y.3d 257 (Ct. App. 4/2/19)

- But C.P.L. 670.10 is Inapplicable Here
- First, Lieutenant Appeared at Trial "Without Objection"
- Second, He Testified to an "Adequate Foundation" He Had Present Memory Failure, That He Had Testified Before GJ Days After Incident, That at Time Recollection Was Fresh and That a Review of His GJ Testimony Did Not Refresh His Recollection

People v. Carlos Tapia, 33 N.Y.3d 257 (Ct. App. 4/2/19)

- Also, No Confrontation Issue Since Lieutenant Was Present and Cross-Examined and Trial Judge Gave Limiting Instruction
- Compare, *People v. Troy Folk, 173 A.D.3d 403 (1st Dept. 6/4/19)* – GJ testimony Erroneously Admitted as Past Recollection Recorded Where No Foundation GJ Testimony Properly Represented Witness's Recollection and Knowledge When Made

People v. Carlos Tapia, 33 N.Y.3d 257 (Ct. App. 4/2/19)

- Judge Wilson, Joined by Judges Rivera and Fahey, Dissented:
- C.P.L. 670.10 Precluded The Admissibility of Such Testimony, and
- Since Trial of Aaron Burr in 1807 Such Testimony Violates The Confrontation Clause Due to Lack of Effective Cross-Examination

What If The Victim in a Sexual Assault and Child Porn Case Identifies Herself in a Photograph?

- What If The Victim Testifies She Took Some of Them At Her Home and That The Defendant Took Others At a Motel
- And What If The Photos Were Obtained From the Defendants' Camera and Cell Phone?
- Is That Enough to Admit Under *People v. Price, 29 N.Y.3d 472 (2017)*?

What If The Victim in a Sexual Assault and Child Porn Case Identifies Herself in a Photograph?

- Yes, Per *People v. People v. Perry Pendell, 164 A.D.3d 1063 (3rd Dept. 2018), leave grt'ed, 10/23/18*
- Compared to *Price*, "The Testimony Tells Us Not Only Who Was Depicted in the Photographs, But Also Who Took The Photographs, The Time Period During Which The Photographs Were Taken and The Underlying Circumstances."

So Can The People Have a Police Detective Testify That The Person Depicted in a Surveillance Video is the Defendant?

- What If the Detective Arrested The Defendant Two Weeks After the Crime and Briefly Interviewed Him?
- Is That Enough Prior Knowledge For This Lay Witness Testimony?
- Is This Ever Permissible?

People v. Corey Reddick, 164 A.D.3d 526 (2nd Dept. 2018)

- The Answer is "No" On These Facts Per The 2nd Dept.
- While Under Proper Circumstances, A Lay Witness With Some Familiarity of the Defendant May Testify Regarding a Video Image See, *People v, Russell, 79 N.Y.2d 1024, 1025 (1992)* [Defendant's Roommate, His Roommate's Mother, His Landlord and Girlfriend]
- Here, There Was No Basis to Conclude That the Police Detective Was "More Likely Than The Jury to Correctly Determine Whether the Defendant Was Depicted in the Video"

And What If an NYPD Detective Testifies in a Grand Jury Presentation That The Person Depicted in Two Video Recordings Was The Defendant?

- Is That Proper if The Detective Also Testifies That He Knew the Defendant "From The Area"?
- Per *People v. Jayvon McKinney, 171 A.D.3d 855 (1st Dept. 4/18/19):* It's Fine For Grand Jury Since Unlike Trial Jurors, Grand Jurors Have No Way of Comparing The Video to the Defendant's Appearance and Officer Testified Based on Personal Knowledge
- Court However, Expressed No Opinion If This Would Be OK At Trial

How About This as Lay Witness ID Testimony?

- During Weapons Possession Trial, Court Overruled DC Objection When Arresting Officer, While Viewing a Surveillance Recording and Without Prompting, Identified One of the People Depicted
- The Officer Had Never Seen the Defendant Before
- Good or Bad?

Also See People v. Joseph Calderon, 171 A.D.3d 422 (1st Dept. 4/2/19)

- Bad, Per The First Dept.
- On Similar Facts, Where Officer Was Unfamiliar With the Defendant, Here (Again), There Was No Basis to Conclude He was "More Likely to Correctly Identify the Defendant From The [Videotape] Than [Was] The Jury," Quoting *People v. Sanchez, 95 A.D.3d 241 (1st Dept. 2012), aff'ed, 21 N.Y.3d 216 (2013)*

During a Bronx Assault Trial, a Police Detective Testifies That A Victim Described Her Attacker As Being "Male Hispanic, Bald By the Name of Jose Ortiz."

- Is This OK?
- Is This Impermissible Hearsay?
- Is This Impermissible Bolstering?

People v. Jose Ortiz, 168 A.D.3d 482 (1st Dept. 1/15/19)

- It's Impermissible Bolstering
- Quoting, *People v. Smith*, *22 N.Y.3d 462*, *466 (2013)*, Which Construed C.P.L. 60.30, "Testimony By One Witness [e.g., a Police Officer], To A Previous Identification by Another Witness [e.g., a Victim], Is Inadmissible"
- Case Reversed Also For Other Errors: Unqualified Expert Testimony on CSLI, a Failure to Charge Justification and Improper Marshalling of the Evidence

But What If The Statement Identifying the Defendant is Made by The Victim Who Is in an Excited or Agitated State?

- Is That an Exception to C.P.L. 60.30?
- Yes, Per *People v. Bayron Bermudez, 168 A.D.3d 446 (1st Dept. 1/10/19)*
- Testimony in Manhattan Attempted Murder Trial By Victim's Girlfriend That Her Boyfriend Who Had Just Been Shot In The Leg Identified The Defendant as The Person Who Shot Him Held Properly Admissible as Spontaneous Utterance. See *People v. Edwards, 47 N.Y.2d 493, 497 (1979)*, Relied on by the Court

And Is a Detective's Testimony That After a Lineup Was Conducted, The Defendant Was Arrested, Proper?

- No Per *People v. Tremaine Holmes, 167 A.D.3d 1039 (2nd Dept. 2019)*
- *It's Impermissible "Implicit Bolstering" Under People v. Trowbridge, 305 N.Y. 471 (1953)* and Its Progeny
- But Harmless
- See Also *People v. Miguel Ramirez, 164 A.D.3d 1377 (2nd Dept. 2018)* [Same Holding, But No Harmless Error; Robbery Conviction Reversed]

Snap *Crawford* – Hearsay Evidence Quiz

People v. Jahmarley Jones, 166 A.D.3d 803 (2nd Dept. 2018)

- Queens Narco Conspiracy Case Involving S.N.O.W. Gang
- At Trial Two Police Detectives, Adam Georg and Robert Bracero Testified at Trial Based on @ 50 and @70-80 Debriefings After Arrests of S.N.O.W. Gang Members About The "History, Hierarchy, Practices and Language of the S.N.O.W. Gang and Rival Gangs"
- In Particular, Police Witnesses Testified That Following These Debriefings, Defendant Was Arrested For Unlawful Assembly and That Gang Engaged in Violent Conduct
- OK or a *Crawford* Violation?

People v. Jahmarley Jones, 166 A.D.3d 803 (2nd Dept. 2018)

- A *Crawford* Violation – Conspiracy 2 Conviction Reversed by 2nd Department
- Information Derived From Debriefings Was Testimonial Hearsay
- Jury Made to Understand Basis For Defendant's Arrest Was Prior Questioning of Unnamed Gang Members

People v. Jahmarley Jones, 166 A.D.3d 803 (2nd Dept. 2018)

- Also Testimony S.N.O.W. Gang Was Been Targeted For Violence and Had a Reputation For Retaliating Based on These Debriefings Impermissibly Conveyed Hearsay Information Since The Witnesses Never Stated Their Own Independent Opinion
- Finally One Expert, Georg's Testimony Violated *People v. Inoa, 25 N.Y.3d 466, 475 (2015)* By Permitting His to Marshall the Facts and Provide Summation Testimony to the Jury

So Remember *People v. Austin, 30 N.Y.3d 98 (2017)*?

- DNA Criminalists With No Independent Knowledge of DNA Testing May Not Testify as "Conduit" For Testimonial Proof in Laboratory Files
- What If the Criminalist Reviews the Laboratory Files and Reaches His Own Conclusions Since Original Two Criminalists Left Lab to Pursue "Other Endeavors"
- OK to Testify?
- OK For People to Introduce DNA Profiles and Reports?

People v. Angus Pascall, 164 A.D.3d 1265 (2nd Dept. 2018)

- Yes, on Both Per 2nd Department
- Witness Was Not "Conduit" as Criticized in *Austin* But Developed Independent Opinion that Was Cross-Examined
- See Also, *People v. Darryl Walters, 172 A.D.3d 916 (2nd Dept. 5/8/19)* [Same Holding]

So Is a Statement Made to Police Who Respond to an Assault in Progress By a Stabbing Victim That The Defendant Was the Perpetrator and Was Still at Large Properly Admissible?

- Does It Violate *Crawford*?
- What If The Statement Was Made After The Defendant Was Under Arrest?
- Is it Testimonial or Non-Testimonial?

People v. Moreno-Grantini, 167 A.D.3d 471 (1st Dept. 2018)

- Properly Admitted as Non-Testimonial Statements
- While Defendant Never Objected That Offer as Excited Utterance Violated Confrontation Clause, Statements As Alternative Holding, Were Made to Both Determine What Happened and To Ensure Safety Per *Davis v. Washington, 547 U.S. 822 (2006)* and Its Progeny
- Moreover Defendant's Arrest Doesn't Change Determination Because No Evidence Police Officer Who Took Statement Aware of That Fact

An Investigating Detective Testifies That a Non-Testifying Anonymous Informant Told Him that He Was an Eyewitness to a Brooklyn Barbershop Robbery and That The Defendant, By Name, Was The Perpetrator

- Does This Violate The Confrontation Clause?
- Or Is It Properly Admitted as Background Evidence to Explain Why The Police Pursued The Defendant?
- Also, How About Evidence That The Defendant's Step-Father Came to the Barbershop and Apologized For His Step-Son's Actions and Returned One Item Stolen (Keys) and Offered to Replace Another (A Cell-Phone)?

People v. David Gonsalves, 170 A.D.3d 886 (2nd Dept. 3/13/19)

- Both Are NG
- First The Testimony By The Detective That an Anonymous Informant Told Him He Was an Eyewitness and the Defendant Was the Perpetrator, "Went Beyond Permissible Bounds of Providing Background Information"
- Second, The Testimony About the Defendant's Step-Father Was Improper Since There Was Not Evidence The Defendant Ever Participated in or Was in Any Was Connected to His Step-Father's Actions
- Frist Degree Robbery Conviction Reversed

OK, So Are 911 Call's By the Complainant and His Wife in a Robbery-Kidnapping Case Admissible at Trial?

- As a Present Sense Impression?
- As an Excited Utterance?
- Does The Admission of Either Violate the Confrontation Clause?

People v. Omar Hutchinson, 167 A.D.3d 653 (2nd Dept. 2018)

- Per The 2nd Department: They Were Both Properly Admissible
- Complainant's Statements in 911 Call Properly Admissible as Present Sense Impression Since "Sufficiently Contemporaneous" to Events
- Complainant's Wife's Statements in Separate 911 Call Relayed Information She Personally Witnessed or Relayed to Her By Complainant and Properly Admissible as Excited Utterance Exception to Hearsay Rule and Relevant to Her State of Mind

People v. Omar Hutchinson, 167 A.D.3d 653 (2nd Dept. 2018)

- While Court Should Have Provided Limiting Instruction, Failure Was Harmless Error
- See Also, *People v. Emmanuel Almonte, 2019 N.Y. App. Div. Lexis 2009 (6/27/19)* [911 Call Properly Admitted as Excited Utterance By Memo, 5-1 Vote]

What About Admitting Testimony From a Police Officer That Immediately After a Shooting in the Bronx, an Unidentified Woman in a Mini-Van Who Was "Hysterical," Screamed, "That's Him With the Black Hoody Running. He Was Shooting Over There"?

- OK as Evidence in Chief?

People v. Phillip Carr, 168 A.D.3d 551 (1st Dept. 1/22/19)

- Yes, Per the First Department: Murder Conviction Affirmed
- It Was an Excited Utterance
- Also Unredacted Plea Minutes of Two Cooperating Witnesses in Which the Plea Court Expressed an Opinion About the Defendant's Guilt and the Dangers of Testifying Against Him Should Have Been Redacted But Any Error Harmless

People v. Phillip Carr, 168 A.D.3d 551 (1st Dept. 1/22/19)

- Finally, "Non-Verbal Hearsay" Claims Regarding Two Other Declarants Not Properly Preserved or in Alternative Held Properly Admitted Also as Excited Utterance and Moreover, Admitted, "Not For the Truth, But For Legitimate Non-Hearsay Explanatory Purposes" That Outweighed Any Prejudicial Effect
- Confrontation Claims Rejected or Held Harmless

Can a Medical Examiner's Analyst Properly Testify That She Independently Established That the Odds of Finding The DNA Profile Generated From Blood Left at a Burglary That Matched the Defendant's DNA Profile in The General Population Would Be Greater Than 6.8 Trillion?

- Does This Violate the Confrontation Clause?

People v. Jose Velez, 164 A.D.3d 622 (2nd Dept. 2018)

- No Per 2nd Department
- Where Analyst Did Not Act as "Conduit For the Conclusions of Others," [See *People v. John, 27 N.Y.3d 294, 315 (2017)*], No Confrontation Clause Error
- See *People v. Pascall (2nd Dept. 2018)* Previously Discussed For Same Holding

Is It OK To Permit The Testimony of a DMV Supervisor in an Aggravated Unlicensed Case to Testify About The DMV's Procedures Re: Mailing Notices or Revocation and/or Suspension?

- How About Allowing The Supervisor to Read an Affidavit Signed By Another DMV Employee on "Information and Belief" That an Order of Suspension Was Mailed to the Defendant in the Past
- Assume the Supervisor Had No Personal Knowledge.
- OK?

People v. Wayne Stokeling, 165 A.D.3d 1180 (2nd Dept. 2018)

- No Per the 2nd Department
- Citing *People v. Pacer, 6 N.Y.3d 504 (2006)*, This Testimony Violated the Confrontation Clause Under *Crawford*
- Without Cross-Examination of the DMV Employee With Actual Knowledge This is Error Because It Involved an Essential Element of the Crime – Knowledge

The People Present a Department of Corrections Investigator to Establish the Standard Procedures For Recording Prison Phone Calls in the Defendant's Robbery Trial

- The Investigator Gives Detailed Testimony About How The Recordings Were Made
- He Also Outlines The Department Policy Against Alterations of the Recordings and The Retention of the Recordings Pursuant to a Chain of Custody Protocol

The Investigator Has No Knowledge About the Actual Phone Calls or Recordings

- The Defendant Objects on Grounds of Lack of Authentication.
- Sustained or Overruled?

People v. James Thomas, 172 A.D.3d 443 (1st Dept. 5/2/19)

- Overruled – Recordings Properly Admitted Per First Department
- The Investigator Presented a Sufficient Foundation to Support The Recordings Were What They Purported to Be and With Reasonable Assurances That They Were in an Unchanged Condition
- It Was Not Necessary For the Investigator to Have Acquired Any Particular Knowledge About the Calls or Recordings

Experts

Is Expert Testimony Regarding a "Forensic Statistical Tool" [FST] Used to Evaluate the Likelihood A Defendant's DNA Would Be Found on a Gun Admissible?

- Do You Need to Conduct a *Frye* Hearing?
- No, Per *People v. Levan Easley, 171 A.D.3d 785 (2nd Dept. 4/3/19)*
- If a Court of Coordinate Jurisdiction [See *People v LeGrand, 8 N.Y.3d 449 (2009)]* Has Concluded That FST Has Been Peer Reviewed, Accepted in Professional Journals, Presented at Numerous Scientific Conferences and Admitted in Several Criminal Trials in the State, [See *People v. Garcia, 39 Misc.3d 482, 487-477 (Sup. Ct. Bx. Co. 2013)*], No Hearing Required

And On The Issue of "Low Copy Number Typing" [LCNT] DNA and the Forensic Statistic Tool Used by the NYC Medical Examiner

- The Court of Appeals (Rivera, J.) Granted Leave to Appeal to the Court of Appeals on 8/8/18 in *People v. Cadman Williams, 158 A.D.3d 471 (2nd Dept. 2/8/18)* In a Case Where TJ Denied a Frye Hearing on This Issue
- Also, See *People v. Elijah Foster-Bey, 158 A.D.3d 641 (2nd Dept. 2/7/18*), Judge Wilson Granted Leave to Appeal to the Court of Appeals on Same Issue 8/23/18
- Note *People v. Gonzalez, 155 A.D.3d 507 (2nd Dept. 2017)* and *People v. Gibson, 163 A.D.3d 566 (2nd Dept. 7/5/18)* Have Affirmed Holdings That LCNT DNA Is Reliable

Finally, Can a People's Expert in an Attempted Murder Involving an Insanity Defense Be Permitted to Testify That Defendants Asserting Such Claims Often Exaggerate Their Mental Illnesses to Avoid Prison?

- And What If The DA Later Comments on That Testimony During Summation?

People v. Steve Johnson, 2019 N.Y. App. Div. Lexis 6457 (1st Dept. 9/3/19)

- Yes Per the First Department
- The Trial Court's Jury Instructions, Including Its Charge Under C.P.L. 300.10(3), Were Sufficient to Prevent Either The Expert Testimony Or the Summation Remark From Misleading the Jury About the Consequences of an Insanity Acquittal

Molineux

Is "Acting in Concert" or Accessorial Liability a Category of *Molineux* Uncharged Crime/Bad Act Proof?

- Yes, Per *People v. Andre Brown, 164 A.D.3d 1080 (1st Dept. 2018)*
- Defendant Was Lookout While Accomplice Cut Pants of Sleeping Subway Passenger in Attempt to Steal Wallet
- *Per People v. Jackson, 39 N.Y.2d 64, 68 (1976):* Proof of Defendant's Prior Convictions With Same Accomplice In Cases Relating to Thefts From Sleeping Passengers Properly Admitted as *Molineux* Evidence With Limiting Instructions on Issues of Intent, to Rebut Claim of Innocent Bystander and to Demonstrate Accomplice Liability

The DA Wants to Introduce Surveillance Video Recordings Showing the Defendant Present in a Manhattan Restaurant Two Months Prior to Charged Theft Crimes Were Committed

- The Proffer is That This Evidence Would Demonstrate That the Defendant Was Familiar With Restaurant Layout and That He Did Not Mistakenly Believe He Was Permitted to Enter an "Employees Only" Basement
- OK For Identity and Modus Operandi Proof?

People v. James Forbes, 166 A.D.3d 414 (1st Dept. 2018)

- It's NG Per 1st Department
- It Was Unduly Prejudicial Because It "Strongly Suggested The Defendant had Committed a Crime on the Earlier Occasion"
- But The Error Was Harmless Due to Trial Judge's Appropriate Limiting Instructions
- Court of Appeals Granted Leave (Wilson, J.) [2019 N.Y. Lexis 315 (1/29/19)]

So, Defense Counsel at Arraignment Gets a Little Expansive With His Bail Pitch.

- It's So "Expansive" That The People Move to Introduce The Arraignment Transcript as Part of Their Direct Case?
- OK As a Vicarious Admission?
- OK as a "Judicial Admission" by an Authorized Agent of the Defendant?

People v. L.D., 2018 N.Y. Misc. Lexis 2290 (Sup. Ct. Bx. Co. 2018)

- Motion Denied
- While *People v. Castillo, 94 A.D.3d 678 (1st Dept. 2012)* Upheld The Use on XE of an Attorney's Statements to Impeach, the Rule Has Never Been Broadly Extended to Direct Proof. See also *People v. Brown 98 N.Y.2d 226 (2002)* [Murder Conviction Reversed Based on Use of Former Attorney's Notice of Albi to Impeach D
- The Admission of Attorney Statements at Arraignment to Set Bail Not Based on Proper Investigation and Discovery
- Moreover, They May Impact Right to Effective Assistance and Confrontation Rights

Brady

A Cooperating Witness (JA) in a Brooklyn Murder Trial Has a Pending Case on Which He Hopes For Favorable Treatment in Return For His Testimony

- The Witness, However, Has Worked Out His Own Deal on the Pending Case, Involving an 18-24 Month Drug Treatment Program in Return for a Dismissal Prior to Contacting Law Enforcement About Cooperating
- While He Never Had an Understanding, Explicit or Implicit, With the DA About His Pending Case, He "Hoped" He Would Get Leniency
- During The Witness's Testimony, He Admitted the DA Appeared in Drug Court to Assist Him After He Absconded

The People Don't Disclose The Circumstances of the Witness's First Contact With The Police and the Full Extent of the Homicide DA's Appearance in Drug Court

- Is a Unilateral Hope For Leniency *Giglio* Material?
- Is Reversal and New Trial Warranted?
- The 2nd Department Said It Was

People v. John Giuca, 33 N.Y.3d 462 (6/11/19)

- The Court of Appeals 5-1 ((DiFiore, C.J.), Held It Wasn't
- Where There Was Extensive Cross-Examination About His Extensive Criminal Record and Some Indication That DA Intervened on the Witness's Behalf, With No Tacit or Explicit Agreement, There Was No *Brady* Violation Based on a Mere Hope For Leniency

People v. John Giuca, 33 N.Y.3d 462 (6/11/19)

- Thus Citing Several Federal Cases, "Without a Hint of Deal Even If (The Witness) Did Expect to Get Something, The State Could Not Have Known of (The Witness's) Expectation"
- Compare, *People v. Derrick Ulett, 2019 N.Y. Lexis 1775 (Ct. App. 6/27/19)* [7-0; Garcia, J.]: Failure to Provide Surveillance Video Was *Brady* Error Warranting Reversal in Murder Case on Conclusion Reasonable Probability Result Would Have Been More Beneficial to Defendant Had DA Disclosed

Search & Seizure

A Defendant is Observed Entering and Exiting a NYCHA Building and When Stopped, Claims He Was "Visiting a Friend" in the Building

- The Police Stop Him and Ask For ID, Which Is Produced
- The Police Retain the ID and Tell The Defendant, "Stand Right There," While They Check Out The "Friend"
- After They Determined The "Friend" Did Not Know The Defendant, The Defendant Was Arrested For Trespass and Crack Seized Incident to Arrest
- Was The Defendant Lawfully Held at the Scene?

People v. Nicholas Hill, 33 N.Y.3d 990 (5/2/19)

- No Per Court of Appeals 7-0 [Memo]: Lower Court Orders Denying Suppression Reversed
- While There Was a Sufficient Basis For a Level One Inquiry Under *DeBour*, There Was an Insufficient Basis to Justify Any Greater Level Two or Three Intrusion
- Upshot: Retention of ID + "Stand Right There" As Police Instruction Requires at Least Founded and Perhaps Reasonable Suspicion (DeBour, Levels Two or Three)

A Defendant Is Observed to Pull Into a Parking Post Without Signaling. When The Police Approach The Police Learn He Has a Conditional Driver's License and Ascertain He's Been Driving the Car Outside of Conditions

- The Defendant Steps Out of the Car on Request and The Police See a Clear Plastic Bag and a Straw in Plain View in the Front Pocket of His Jeans
- After the Defendant's Arrest for Cocaine Possession, the Police Search the Passenger Compartment and Find Nothing
- The Police Then Opened the Trunk and Found a Semi-Automatic Pistol, More Cocaine and Other Illegal Drugs

The Lower Court Denied Suppression Evidence Seized From the Defendant's Person But Suppressed The Evidence Seized From the Trunk

- Was the Evidence Properly Seized From The Truck Under the Automobile Exception?

People v. Julio Garcia, 2019 NY Slip Op 06509 (2nd Dept. 9/11/19)

- 2nd Department Affirmed County Court Suppression Order On People's Appeal
- Holding: Recovery of Small Quantity of Cocaine in Plain View on Defendant's Person Insufficient to Give Police PC to Believe Additional Contraband Would Be Found in Trunk of Vehicle
- Yes, There Are Cases in Which Circumstantial Evidence of Recent Drug Use in passenger Compartment Gave Rise to Sufficient Proof to Search Trunk But These are Distinguishable, Since Nothing Found in Passenger Compartment

Suppose that as the Police Lawfully Approach a Defendant on a Manhattan Street, the Defendant Suddenly Opens the Front Passenger Door of a Driver-Occupied Car and Dumps a Backpack He Was Carrying Inside

- Suppose Also the Police Search the Backpack, It Has a Revolver and Ammo and the Defendant is Arrested
- Does the Defendant Have Standing to Contest the Search?

People v. William Febo, 167 A.D.3d 451 (1st Dept. 12/16/18)

- No Per 1st Department
- Defendant Abandoned The Bag By Placing It Inside the Car
- His Action Was Not Precipitated By Any Unlawful Police Activity

Everyone Knows About Carpenter v. United States, 138 S.Ct. 2206 (2018)

- Per Roberts, C.J. 5-4, Need Probable Cause "Warrant" For Cell Site Location Information [CSLI] Under 4A
- The 18 U.S.C. 2307(d) Stored Communications Act "Specific and Articulable Facts" Standard Held Inapplicable

But, Suppose The CSLI Is Obtained As a Result of Just an "Order" And Not a "Warrant"?

- And Suppose Further That The Order is Based on Probable Cause?
- Is This Close Enough For Government Work to Be Compliant With *Carpenter*?

People v. Tayquan Clark, 171 A.D.3d 942 (2nd Dept. 4/10/19)

- Per The Second Department – First Appellate Case: It's OK
- The Order Was "Effectively a Warrant"
- But Compare, *People v. Warren Taylor, 2019 NY Slip Op 03823 (2nd Dept. 5/15/19)* [With No Express Finding of PC, Order Insufficient Under *Carpenter*]
- Oh, By the Way, On Remand From the Supreme Court, Use of CSLI by Government Upheld on Good Faith Grounds. *United States v. Carpenter (6th Cir. 6/11/19)*

And Are Jailhouse Recordings of Inmate Telephone Calls Admissible If There is No Warning Notice That the Recordings Could Be Turned Over to the DA?

- We Know, *People v. Johnson*, *27 N.Y.3d 199 (2016)* Held Jailhouse Recordings in General Are OK, But …
- In Order to Be Admissible Does a Defendant Need to Receive Specific Notice That Any Recordings Could Be Turned Over to the DA?

People v. Emmanuel Diaz, 33 N.Y.3d 92 (2/21/19)

- Per Majority of The Court of Appeals 5-2 (Feinman, J.) It's OK
- Per *People v. Johnson*, *27 N.Y.3d 199*, *205-206 (2016)*, Such Recordings Are Not Unreasonable Searches or Seizures Because Detainees Have No Reasonable Expectation of Privacy
- No Specific Warning That Recordings May Be Turned Over to the DA Required
- See Also, *People v. Ali Cisse*, *32 N.Y.3d 1198 (2/21/19)*, Decided Same Day on Implied Consent Ground and *People v. Tyrell Viera*, *172 A.D.3d 762 (2nd Dept. 5/1/19*, For Same Holding Based on *Diaz*.

So Is an Anonymous Tip That Four or Five Men Are "Suspiciously" Going In and Out of a U-Haul Truck as Part of a "Possible Larceny-Burglary" Sufficient Reasonable Suspicion to Stop The Truck Travelling on a Brooklyn Street?

- And Suppose That as a Result of the Stop, a .357 Revolver Used in a Murder is Recovered
- And Also Suppose The Defendant Is Convicted of That Murder?
- Again, is That Good Under *Navarette* and *Agyris*?

People v. Andre Floyd, 171 A.D.3d 787 (2nd Dept. 4/3/19)

- No Per 2nd Dept. Stop Was No Good
- "Even a Reliable Tip Will Justify an Investigative Stop Only if it Creates Reasonable Suspicion That Criminal Activity May Be Afoot" [Citing *Navarette*]
- Tip Merely Consistent With Ordinary Use of Truck and, Moreover, "Lacked Predictive Information."
- While Evidence Sufficient to Sustain Murder Verdict, Case Reversed Due to Erroneous Denial of Suppression

How About an Anonymous Radio Tip That a "Black Man in a Bodega Wearing a Black Coat With a Fur Hood" Had a Gun?

- When The NYPD Arrived @ 1 Minute Later, They Saw D, Fitting Description
- They Asked The Bodega Employees If Everything Was OK and They Said, "Yes"
- The Defendant Then Tried to Exit The Store and as He Did This He Placed His Hand Inside His Jacket
- Is That a Sufficient Basis To Frisk The Defendant?

People v. Paris Brown, 172 A.D.3d 41 (1st Dept. 4/30/19)

- No Per The First Department (Manzanet-Daniels, J.)
- Relying on *Florida v. J.L. 529 U.S. 266, 271 (2000*), The Police Had No Information to Confirm the Tip Which Permitted a *DeBour* Level 2 Common Law Right of Inquiry
- Moreover, The Defendant's Attempt to Exit The Store , Even Considering The Placement of His Hand, Not Elevate The Proof to Reasonable Suspicion + Fear Necessary to Justify a *Terry* Frisk

Does a Search Warrant That Authorizes a Search of The “Entire Premises” and The Person of the Defendant at a Certain Location Include Two Parked Cars Found on the Property?

People v. Tyrone Gordon, 169 A.D.3d 714 (2nd Dept. 2/6/19)

- No Per Second Department
- Where Warrant Failed to Particularize Basis and Authorization For Search of Vehicles, Evidence Seized Properly Suppressed
- Order Affirmed on People's Appeal
- Court of Appeals, Wilson, J., Has Granted Leave to Appeal (4/22/19)

Search & Seizure Update

- *People v. Javon Loney, 164 A.D.3d 523 (2nd Dept. 8/1/18):* Was it Error to Summarily Deny Defendant's Motion for Suppression in Emergency Entry and Search of Area of Home Where D Had No Reasonable Expectation of Privacy?
- Leave to Appeal to the Court of Appeals Granted 3/1/19 (Wilson, J.)

Search & Seizure Update

- *People v. Robert Hinshaw, 170 A.D.3d 1680 (4th Dept. 3/22/19)* [3-2] [Trooper Stop of Car Based on DMV Plate Check Vehicle Should Have Been in Impound Sufficient to Stop Car; Gun Seized = Reasonable Suspicion Further Investigation Required]
- Leave to Appeal to Court of Appeals Also Just Granted

Confessions

The Defendant Waives Her *Miranda* Rights at 9:00 p.m. and Speaks to the Police and an ADA About a Homicide That is Video-Recorded.

- 30 Minutes Into the Interrogation, The Defendant Becomes Emotional and the ADA Says, "Let's Stop the Tape Right Now" and That "There Will Be No Further Questions Until We Resume the Tape."
- The Interrogation Continues The Next Morning After the Defendant is Reminded of Her *Miranda* Rights and Prior Wavier
- The Defendant Thereafter Confesses to Stabbing the Victim and Taking The Victim's Cell Phone, Keys and Wallet.
- Did The Defendant Exercise Her Right to Remain Silent?
- What If At The Huntley Hearing, A Detective Answers "Yes" and "Correct" to XE That The Defendant Did Not "Talk Anymore About The Prior Evening's Videotaped Interview?"
- Does That Change Anything?

Did The Defendant Exercise Her Right to Remain Silent?

- Oh and What If At The *Huntley* Hearing, A Detective Answers "Yes" and "Correct" to XE That The Defendant Did Not "Talk Anymore About The Prior Evening's Videotaped Interview?"
- Does That Change Anything?

People v. Atara Wisdom, 163 A.D.3d 928 (2nd Dept. 2018)

- No Per The Second Department
- There Was No Unequivocal Assertion of the Right to Remain Silent
- "Since The Defendant Remained in the Continuous Custody of the Police in the Interim, Police and Prosecutors Were Free to Resume Their Questioning of the Defendant Within a Reasonable Time and Do So Without Repeating the *Miranda* Warnings."
- The Detective's Hearing Testimony About The Prior Evening's Video Statement Did Not Change The Result

The Police Falsely Tell a *Mirandized* Defendant That They Had Video Surveillance of Him Committing the Crime. He Confesses.

- Is This Undue Deception to Rise to a Due Process Violation Under CPL 60.45?
- No Per *People v. Miguel Martinez, 2018 N.Y. App. Div. Lexis 6004 (2nd Dept. 2018):* Not So Fundamentally Unfair.
- Same: *People v. Holley, 148 A.D.3d 1605 (4th Dept. 2017) & People v. Dickson, 260 A.D.2d 931 (3rd Dept. 1999)*

Keep in Mind: Deception Re: Victim's Condition Has Been Held NG: *People v. Thomas*, *22 N.Y.3d 629, 643 (2014); People v. Aveni*, *100 A.D.3d 228 (2nd Dept. 2014*) But ….

- False Promises a Sex Offense Defendant Could "Wipe the Slate Clean" by Cooperating With Police and Not Go to Jail, Not Unduly Deceptive So as To Render Apology Letter Involuntary. *People v. Scott*, *212 A.D.2d 1047 (4th Dept. 1995)*
- *See Also*, *People v. Robert Henry*, *173 A.D.3d 1470 (3rd Dept. 6/20/19)* [Police Falsely Telling Defendant Statement To Them in Robbery Case Was Not Being Recorded Did Not Make *Miranda* Waiver Involuntary]

Right to Counsel

The Defendant is Interrogated By The Police in a Gang-Related Murder Investigation in a Housing Development.

- Following a *Miranda* Waiver, The Defendant Repeatedly Denied Involvement in the Killing and Stated, “I Got Nothing to Say About This. I Told You What I’ve Got to Say,” and “I’ve Answered Your Questions, I’m Done Talking.”

After a 10-20 Minute Break, The Detective Brought Up That He Knew That the Defendant and His Gang Were Involved in a Drug Dealing at the Housing Project, That He Knew The Defendant Had a Pending Drug Case From the Projects and That He Knew That the Victim in the Murder Case Had been Killed Over a $20 Debt

- The Defendant Stated, "[T]hat Was Just Drugs…I Didn't Have Anything to Do With This Murder."
- The Defendant Had a Lawyer on the Pending Drug Case

- The Detective Returned @ 10 Minutes Later and The Victim's Picture Had Been Placed Face Down on the Table
- The Defendant Then Said "I'll Tell You What Happened," and After Waiving *Miranda* Rights Again, Provided Inculpatory Oral Written and Video Statements

- Did The Police Violate the Defendant's Right to Remain Silent After He Said He Had Nothing to Say?

- Also, Did The Police Violate The Defendant's Right to Counsel by Interspersing Questions on the the Pending Drug Case on Which He Had an Attorney in the Homicide Interrogation Under *People v. Cohen*, *90 N.Y.2d 632 (1997)?*

People v. Roque Silvagnoli, 31 N.Y.3d 1103 (2018)

- A Divided 1st Dept. Held 3-2: No, On the Right to Remain Silent But Yes, On The Right to Counsel Under the *Cohen* Rule = Murder Conviction Reversed [151 A.D.3d 443 (1st Dept. 2017)]

People v. Roque Silvagnoli, 31 N.Y.3d 1103 (2018)

- Per The 2nd Dept. Majority: Although The Reference to the Drug Charges on Which the Defendant Was Represented Was "Brief and Flippant," It Was Not, in Context, "Innocuous or Discreet and Fairly Separable From the Homicide Investigation" Under *People v. Cohen (1997)*
- But No Violation of Right to Remain Silent by Requests to Tell You Side of the Story = No Basis For Suppression on That Theory

People v. Roque Silvagnoli, 31 N.Y.3d 1103 (2018)

- Court of Appeals Reversed 6/12/18 (7-0; Memo): Agreed with the App. Div. Dissenters: Reference to Pending Represented Case Was "Brief, Flippant and Minimal," and as Such, "Discrete and Fairly Separable"
- No Violation of *Cohen* Rule and Conviction Reinstated

The DC in an Attempted Murder Case Tells The Court That His Client Wants a New Attorney Because the Relationship Was Becoming "Almost Adversarial." You Then Ask The Defendant if He Wants to be Heard on the Issue of Substitution.

- The Defendant Says at He Didn't Think His Attorney Was "Fighting For a Defense For Him."
- You Review What DC Had Done For The Defendant on The Record
- The Defendant Again Asks For a New Attorney, Claiming That His Attorney Had Not Kept Him Adequately Informed About the Proceedings
- You Direct DC to Ensure Adequate Communication
- Deny or Grant the Request?

People v. Corvall Hampton, 168 A.D.3d 559 (1st Dept. 1/22/19)

- Per First Department: Denial Affirmed
- Defendant's Allegations About Deteriorated Relationship and Attorney's "Almost Adversarial" Statement Did Not Compel Substitution
- "Vague Conclusory Allegations" Regarding Frustration Especially Here, Not Determinative Where Two Weeks Later at Plea, Defendant Indicated Satisfaction With Attorney
- See Also *People v. George Ventura, 167 A.D.3d 401 (1st Dept. 12/4/18)* [Same Holding Following Two Inquires By Court Regarding D's Frustration With Attorney]

Defense Counsel Wants to Concede the Defendant's Factual Guilt In a Triple Murder Death Penalty Case Order to Obtain a More Beneficial Sentence.

- The Defendant Vociferously Objects
- He Refused to Assert an Insanity Defense and Claimed Corrupt Police Murdered the Victims
- We Know That Defense Counsel Makes Strategic Decisions at Trial With The Defendant Retaining the Personal Decision Whether to Plead Guilty, Waive a Jury, Testify in One's Own Defense or Appeal (and in NY Assert a Mental Disease or Defect or Related Claim)
- So, Is It IAC, If the Defense Attorney Concedes Factual Guilt?

Robert McCoy v. Louisiana, 138 S.Ct. 1500 (2018)

- Yes, Per Majority of Supreme Court (Ginsburg, J.) 6-3
- The Right to Concede Guilt At a Capital Trial is a Personal "Structural" Right of Defendant = Defendant Had Right to Insist Attorney Refrain From Such Strategy
- New Personal Right Added to Rights Personal to Defendant
- Defendant Received IAC When Attorney Conceded Guilt in Guilty and Penalty Stages = No Prejudice Under *Strickland v. Washington, 466 U.S. 668 (1984)* Required

Robert McCoy v. Louisiana, 138 S.Ct. 1500 (2018)

- Justice Alito, Joined by Justices Thomas and Gorsuch, Dissented: No Need To Create New Constitutional Right in Highly Unusual Facts of Case
- Impact in Non-Capital Cases??
- Is There a Right to Defendant "Autonomy" in Directing All Trial Concessions by Counsel?

Compare, Post-*McCoy*

- *People v. Ralph D. Strong*, *165 A.D.3d 1589 (4th Dept. 2018)* [*McCoy* Distinguished; Counsel Did Not Concede the Most Serious Charge (First Degree Murder)]
- *United States v. James J. Rosemond*, *322 F.Supp.3d 482 (S.D.N.Y. 2018)* [*McCoy* distinguished; Counsel's Strategy of Arguing to Jury that Defendant Paid Others to Shoot the Victim in Murder For Hire case Not Ineffective Where Attorney Maintained Insufficient Evidence of Intent]

Self-Representation

- During an Inquiry on a Defendant's Right to Proceed Pro Se, The Defendant Ignores and Refuses to Answer Questions, Hums and Generally Creates a "Chaotic" Presence in the Courtroom.
- Can That Waive a Defendant Right to Self-Representation?

United States v. Adnan Ibrahim Haurun A Hausa, 922 F.3d 129 (2nd Cir. 4/24/19)

- Yes, Because Trial Could Not Assess Pro Se Request Due to Defendant's Conduct, Denial Proper
- Moreover, Defendant's Behavior So "Egregious and Intolerable Misconduct," Denial Error Claim Also Waived

And Two Recent Bail Cases

- So the Court Conducts a Bail Source Hearing Under C.P.L. 520.30 and Determines that While The Source of Collateral for a Bail Bond is Legitimate, The Amount of Collateral Required by the Bond Company is Insufficient.
- Can The Judge Do That?

Bail

- No: Per *People ex rel Evans D. Prieston v. Nassau County Sheriff's Department, 163 A.D.3d 512 (2nd Dept. 2018)* - The Sufficiency of Collateral for a Bond is a Business Decision For the Bond Company and Beyond The Review Powers of the Court
- Court of Appeals Granted Leave, 32 N.Y.3d 905 (9/18/18)

The Court Orders a Remand Without Bail in an Attempted Murder Case Involving:

- A N.Y. County Acting in Concert Case (With the Defendant's 20 Year Old Cousin (Who Was Separately Convicted of Attempted Murder, Burglary and Assault) in the Attempted Murder of Another Psychiatrist
- Bitter Fight Over Custody of Child With Family Court Allegations of Alienation By Defendant From Victim and $1.5 Million in Life Insurance Proceeds For Benefit of Child

The Defendant Offered $1.5 Million Bond Secured by Mother's Florida Home (Which Had $1.6 in Equity) and in a Second Application Raised the Package to $1.5 Million Bond (Against Secured by the Mother's Home, and GPS Monitoring

Defendant Had No Priors But, According to People, Posed a Flight Risk – Arrested Near Syracuse With Passport With Intention of Fleeing to Canada & Failed to Appear 5X in a Family Court Support Proceeding

- Again, The Court Orders a Remand Without Bail in an Attempted Murder Case
- On Habeas Corpus Review: Affirmed or Reversed With Bail Package Ordered?

Matter of State of New York ex rel. Fischetti v. Brann, 166 A.D.3d 29 (1st Dept. 2018)

- Affirmed Per First Department (Tom, J.)
- Bail-Setting Court Determinations Are Not Appealable and Thus Reviewable Only By CPLR Art. 70 Habeas Corpus Abuse of Discretion and a No Rational Basis in Record Analysis
- Applying All Bail Criteria Outlined in Current CPL 510.30, Denial of Bail Proper in Lower Court's Discretion in Particular, Serious Flight Risk, Weight of Evidence and Lengthy Possible Sentence if Convicted
- Per *People ex rel. Kuby v. Merritt*, *96 A.D.3d 607 (1st Dept. 2012)*, No Requirement Of Acceptance of Bail Package From Financially Well-Off Defendants

Of Course The New Bail Legislation is Effective January 1, 2020

- Impact on Pending Cases

Rosario

- So, If Handwritten *Rosario* Material Is Transcribed Into Typewritten Reports and The Handwritten Notes Are Destroyed, Is an Adverse Inference Required Under *People v. Martinez, 22 N.Y.3d 441 (2014)*?

People v. Grevelle Bartley, 163 A.D.3d 435 (1st Dept. 2018)

- Per First Dept.: While No More "Duplicative Equivalent" Exception to Rosario Rule After *People v. Joseph*, *86 N.Y.2d 565 (1995)*, Need "Prejudice" to Require Sanction Under *People v. Martinez*, *22 N.Y.3d 551 (2014)*, … But
- Defense Failure to Show "Any Likelihood of Any Errors or Omissions in the Transcription or Any Other Prejudice" Precluded Imposition of Remedy
- But See, *People v. Urban Fermin*, *150 A.D.3d 876 (2nd Dept. 2017)* "Substantial Prejudice" Required For Sanction

But Under New C.P.L. 245.10, Effective 1/1/20, The "*Rosario* Rule" as We Know It Has Fully Changed

- Unless Subject of Protective Order, All Witness Statements, Reports, Notes, Transcripts Will Be Discoverable Within 15 Days of Arraignment Per New C.P.L 245.20(1)(e)

Substantive Law

So, Is This Sufficient Proof of First and Second Degree Acting in Concert Robbery?

People v. Scharkey James, 2019 App. Div. Lexis 1700 (3/12/19)

- D and Cousin Jermaine, Approached Husband and Wife Victims on West 87th Street in Manhattan
- Jermaine Had Gun in Hands and Directed Husband to Get Up Against and Place His Hand on a Parked Car
- As Husband Did This He Felt The Gun Against His Back or Left Side

People v. Scharkey James, 170 A.D.3d 477 (3/12/19)

- The Defendant Then Moved The Wife Closer to the Building Line and Demanded Her Phone and Cash – She Complied
- Jermaine, With Gun Still Pressed in Husband's Back Demanded The Husband's Money; He Then Pulled His Wallet Out and Dropped it to the Ground
- Jermaine Then Demanded the Husband's Phone and After Some Hesitation, He Complied

People v. Scharkey James, 2019 App. Div. Lexis 1700 (3/12/19)

- D's First and Second Degree Robbery Conviction Affirmed Over Claims he Was at Most Guilty of Third Degree Robbery of the Wife and In Spite of Jury Acquittal of Defendant of Robbing the Husband
- The Defendant and Jermaine Were "Working as a Team" and Thus, Had "Community of Purpose" to Rob Both the Husband and Wife

The People's Proof at the Defendant's Conspiracy Trial Was That The Defendant Was Present at Various Meetings of a Gang, "The Almighty Latin Kings," During Which Time an Arson Was Discussed by Other Gang Members, But Not the Defendant.

Enough to Establish the Crime of Conspiracy?

How About With Proof That Defendant Was A Sworn Member of the Gang, Which Had Organizational Structure, and His Statement That He Was "Part of Something," But "Didn't Do It"?

People v. Casimiro Reyes, 31 N.Y.3d 930 (2018)

- No Per a Court of Appeals Majority [Memo] 5-2
- Mere Presence at Various Gang Meetings During Discussions of Throwing of Molotov Cocktails Insufficient Without Proof Defendant Intended to Join the Conspiracy
- Conspiracy Requires Specific Intent That a Crime be Performed + Proof of an Overt Act Committed by Any Co-Conspirator

People v. Casimiro Reyes, 31 N.Y.3d 930 (2018)

- The Passive Act of "Being Present" Cannot Be Equated With Agreement to Engage in Crimes Discussed at Meeting
- NYS Law Does Not Contain Presumption of Agreement Based on Presence at Meeting During Which Conspiracy is Discussed
- Judge Garcia, Joined by Judge Feinman, Dissented on Conclusion Defendant's Sworn Membership + His Statement Was Sufficient

The Defendant, a McDonald's "Swing Manager" Employee, Is Seated in the Lobby Area of the Restaurant When an Unlicensed Loaded Gun He's Carrying, Accidently Discharges.

- Is He Entitled to The "Place of Business" Exception Under P.L. 265.03(3) to Reduce His C Felony Second Degree Weapons Possession Charge to a Misdemeanor?
- Hint: Is an Employee A "Merchant. Storekeeper or Principal Operator" of the Business?

People v. Akeem Wallace, 31 N.Y.3d 503 (2018)

- No Per Court of Appeals 7-0 (Feinman, J)
- P.L. 265.03(3) "Place of Business" Exception Construed Narrowly in Accord With Well-Settled Definitions Under P.L. Art. 400 to Only When Such a Person is a "Merchant, Storekeeper or Principal Operator of Like Establishment"

People v. Akeem Wallace, 31 N.Y.3d 503 (2018)

- Stein, J., Concurring, Explained: Per Uniform Appellate Division Caselaw and Legislative Intent, Narrow Interpretation "Balances State's Strong Policy in Severely Restricting Possession of Any Firearm With Granting Leniency to Those Persons Who Are Attempting to Protect Certain Areas in Which They Have a Possessory Interest."

Postal Inspectors Observed the Defendant Use a "Fishing Device" (A Water Bottle Coated With a Sticky Substance) to Extract Envelopes Out of a U.S. Mailbox.

- Unbeknownst to the Defendant, the Inspectors Had Inserted $3,000 in Money Orders Into the Mailbox and Were Watching
- During a Grand Jury Presentment, No Evidence Was Presented by the DA That Any of the Planted Envelopes Were Taken Out of the Mailbox
- Sufficient to Support an Attempted Grand Larceny Charge?

People v. Omar Deleon, 157 A.D.3d 649 (1st Dept. 2018)

- Yes, Per the Second Department: Lower Court Dismissal of Indictment Reversed on People's Appeal
- Strict Liability Nature of Attempt Crime Per *People v. Miller, 87 N.Y.2d 211 (1995)* Mandates That Mental Culpability Requirements of Attempt and Completed Crimes Be the Same as a Matter of Law
- Thus, Strict Liability Aggravating Factor of Completed Crime is Not a "Result" to Which an Intent Requirement Attaches When an Attempt to Commit the Completed Crime is Charged
- Leave to Appeal to the Court of Appeals Has Been Granted. 31 N.Y.3d 1116 (2018) (Wilson, J.)

Probation Violations

- Can a Defendant Be Adjudicated in Violation of His Probation For Telling a Probation Officer, “In a … Loud Boisterous, Threatening Voice” That He Would “Blow Her … Up”?
- Does This Violate a Probation Condition That The Defendant Lead a Law-Abiding Life?

People v. Daniel Brooks, 171 A.D.3d 778 (2nd Dept. 4/3/19)

- D Reported to Staten Island Probation Office For Scheduled Meeting With Probation Officer With Infant Daughter
- Probation Officer Directed Him to Return Home and Report Back Next Day Without Child Since She Did Not "Normally" See Probationers With Their Children
- The Defendant Remarked He'd Seen Female Probationers Report With Their Children, And Then

People v. Daniel Brooks, 171 A.D.3d 778 (2nd Dept. 4/3/19)

- As Defendant Walked Away, He Threatened to "Blow [Her] The F… Up to Your Director The Way You Treat Men"
- Defendant Arrested and VOP'ed
- Second Department Reversed and Sentenced to Prison on CPW2 Conviction
- "Angry Outburst" Without More, Insufficient Basis by a Preponderance of the Proof to Conclude: Either OGA or This Was a Failure to Live a Law-Abiding Life

The End

Questions??

Thanks to Jim Fagan and Jennifer Lowry For Their Great Help in Preparing This Presentation

9/13/19