# CRIMINAL 2020

## COVID-19

**Habeas corpus**

*People ex rel. Carroll v Keyser*
184 AD3d 189
(3rd Dept) (6/5/20 DOI)
Reversal of grant of habeas corpus application on behalf of inmate. The petitioner failed to meet the ultimate burden of demonstrating that the inmate's detention was illegal. There was no showing of deliberate indifference by prison officials, who detailed many steps taken to prevent the spread of the virus. The petitioner further alleged that, although the sentence was lawful when imposed, it became grossly excessive due to the risks created by the pandemic. The reviewing court found it doubtful that a sentence proper at the time of imposition could become grossly disproportionate as a result of changed conditions, and opined that such a challenge should be raised in a post-conviction motion to the sentencing court.
http://nycourts.gov/reporter/3dseries/2020/2020_03169.htm

*Matter of People ex rel. Stoughton v Brann*
185 AD3d 521
(1st Dept) (7/24/20 DOI)
The First Department affirmed the denial of mass applications for writs of habeas corpus on behalf of defendants incarcerated on Rikers' Island and offered guidance, concluding that habeas courts reviewing cases during the pandemic should perform individualized assessments and consider: (1) each petitioner's risk of flight; (2) the particular health factors as documented by medical records and physician affirmations where practical; (3) the specific conditions of the petitioner's confinement; and (4) the environment into which the petitioner would be released and whether there was a plan to protect that person from contracting the virus and to monitor their health. Such information would permit courts to balance the competing interests; make decisions recognizing the potentially serious implications of confinement on detainees with underlying health conditions; and ensure the State's ability to enforce the law against those who might not return to face justice once released.
http://nycourts.gov/reporter/3dseries/2020/2020_04236.htm

*People ex rel. Tse v Barometre*
188 AD3d 714
(2nd Dept) (11/5/20)
The petitioner appealed from a judgment which refused to issue an order to show cause pursuant to CPLR 7003 (a). Reversed. The supporting petition alleged that named inmates were being imprisoned in violation of the 8th Amendment. In light of certain conditions of individual inmates and unalterable conditions of incarceration, there were allegedly no measures that could protect the inmates from a grave risk of serious illness posed by Covid-19. The only remedy was immediate release. Such allegations were cognizable in a habeas corpus proceeding.
http://nycourts.gov/reporter/3dseries/2020/2020_06280.htm

# PRETRIAL

**Accusatory instruments**

*People v Lawrence*
179 AD3d 1155
(3rd Dept) (1/3/20 DOI)
Indictment was jurisdictionally defective, appellate counsel was ineffective. Less than 25 grams of pot possessed by the defendant did not constitute dangerous contraband.
http://nycourts.gov/reporter/3dseries/2020/2020_00004.htm

*People v Elric YY.*
179 AD3d 1304
(3d Dept) (1/20/20 DOI)
Waiver of indictment and SCI did not set forth approximate time of offense. However, under *People v Thomas* (COA, 11/26/19, affirming *People v Lang*, 165 AD3d 1584), this was non-elemental factual information; and the guilty plea forfeited such arguments regarding defects in the accusatory instrument.
http://nycourts.gov/reporter/3dseries/2020/2020_00326.htm

*People v Wheeler*
34 NY3d 1134
(COA) (2/24/20 DOI)
The defendant was convicted of 2nd degree obstructing governmental administration for backing his vehicle away from police officers. The Information lacked factual allegations providing notice of the official function the defendant allegedly interfered with—a police stop in his vehicle to execute a warrant to search the vehicle—so it was jurisdictionally defective.
http://www.nycourts.gov/reporter/3dseries/2020/2020_00998.htm

*People v Middleton*
35 NY3d 952
(COA) (4/30/20 DOI)
Information regarding official misconduct was jurisdictionally valid. It alleged that, while working as a treatment program aide at a correctional facility, the defendant disclosed information to an inmate regarding an unusual incident, in violation of the employee manual she signed. The defendant admitted that she printed the paperwork on a facility computer and allowed the inmate to take the document to his cell. One could infer that she meant to benefit herself or inmates.
http://www.nycourts.gov/reporter/3dseries/2020/2020_02530.htm

*People v Mathis*
185 AD3d 1094
(3rd Dept) (7/3/20 DOI)
As a result of an amendment of the indictment, the defendant was charged with a different crime than the one voted on by the grand jury. The record established only that the grand jury indicted the defendant for violating Penal Law § 120.05 (7), not subdivision (3), as was charged in the amended instrument. The claim was not waived by the guilty plea and could be raised for the first time on appeal. Reversal.
http://nycourts.gov/reporter/3dseries/2020/2020_03696.htm

*People v Hardy*
35 NY3d 466
(COA) (10/16/20 DOI)

The lower courts erred in permitting the amendment of an erroneous date in an information. The Appellate Term had affirmed a conviction for criminal contempt, finding that courts had the inherent authority to permit factual amendments that did not surprise or prejudice the defendant. *See People v Easton,* 307 NY 336. *Easton* interpreted amendments under a defunct statutory landscape. The instant matter was governed by the CPL. For complaints and informations, the Legislature did not permit factual amendments regarding time, place, or names. The instant amendment implicated a fundamental defect and presented a nonwaivable jurisdictional issue.
http://www.nycourts.gov/reporter/3dseries/2020/2020_05803.htm

*People v Parsons*
69 Misc 3d 11
App Term, 1st Dept) (10/22/20 DOI)
Accusatory instrument charging 7th degree criminal possession of a controlled substance dismissed. The information did not contain sufficient non-conclusory allegations to establish the basis for the officer's belief that the substance seized was a controlled substance. There were no allegations as to the nature of the packaging and no non-conclusory statements suggesting the presence of other indicia of criminality.
http://nycourts.gov/reporter/3dseries/2020/2020_20268.htm

*People v Walley*
2020 NY Slip Op 07691
(COA) (12/24/20 DOI)
The Third Department found defective the waiver-of-indictment form, since it did not include the approx. time of the crime. The Court of Appeals reversed. After the challenged order was rendered, *People v Lang*, 34 NY3d 545, held that a guilty plea forfeited a claim as to omission of non-elemental factual information.
http://www.nycourts.gov/reporter/3dseries/2020/2020_07691.htm

**Bail**

*State ex rel. Meyer v Brann*
186 AD3d 1163
(1st Dept) (10/1/20 DOI)
Bail was reduced from a $100,000 partially secured surety bond to a $50,000 bond for several reasons: the petitioner was charged with nonviolent felonies, had no prior record, had voluntarily returned to court after release on a $3,000 partially secured bond, and had family ties.
http://nycourts.gov/reporter/3dseries/2020/2020_05145.htm

**Competency**

*People v Bellucci*
2020 NY Slip Op 07215
(2nd Dept) (12/3/20 DOI)
Reversal. Defendant was deemed incompetent to stand trial four times. Supreme Court erred in: (1) denying two pretrial, joint requests for a CPL 730.30 exam, which were based on the defendant's inability to communicate rationally with counsel; and (2) demanding that defense counsel present an insanity defense.
http://nycourts.gov/reporter/3dseries/2020/2020_07215.htm

**Consolidation / Severance**

*People v Lao*
188 AD3d 540
(1st Dept) (11/20/20 DOI)

The trial court properly consolidated two indictments charging separate burglaries. Evidence regarding the second burglary was admissible to prove the first. When arrested for the later crime, the defendant and his codefendant were wearing the same distinctive clothing as the persons in a surveillance videotape of the earlier crime.
http://nycourts.gov/reporter/3dseries/2020/2020_06721.htm

*People v Feliciano*
2020 NY Slip Op 07145
(1st Dept) (12/3/20 DOI)
Reversal and new trial. Trial court erred in denying severance and using "dual jury" procedure, which did not prevent prejudice to the defendant due to the codefendant's antagonistic defense.
http://nycourts.gov/reporter/3dseries/2020/2020_07145.htm

**Delay in prosecution**

*People v Clark*
180 AD3d 925
(2nd Dept) (2/24/20 DOI)
Error to deny, without a hearing, the defendant's motion to dismiss the indictment based on the People's unjustified delay in prosecution. Relevant circumstances included 22 months from the incident to the indictment; the People's failure to offer a reason for the delay; and the defendant's claim of prejudice.
http://nycourts.gov/reporter/3dseries/2020/2020_01180.htm

**Discovery (CPL 245.70 [6] review)**

*People v Morales-Aguilar*
186 AD3d 786
(2nd Dept) (8/28/20 DOI)
Upon CPL 245.70 (6) review of a protective order, appellate justice granted relief to the People, permitting them to withhold from the defense, until the completion of jury selection, all subject documents. The challenged order was an improvident exercise of discretion. Under the circumstances presented, concerns for witness safety far outweighed the value of the discovery to the defense.
http://nycourts.gov/reporter/3dseries/2020/2020_04721.htm

*People v Clarke*
186 AD3d 1707
(2nd Dept) (10/1/20 DOI)
The defendant sought to vacate or modify a protective order. A Second Department justice modified. Error to require defense counsel to seek court approval before showing records to investigators or others employed by counsel or appointed to assist in the defense.
http://nycourts.gov/reporter/3dseries/2020/2020_05221.htm

*People v Zayas*
186 AD3d 1726
(2nd Dept) (10/1/20 DOI)
The People sought to vacate or modify a protective order regarding discovery. A Second Department justice modified. The trial court should have directed that disclosure of recordings of the drug sales would be made available forthwith to defense counsel only, to be viewed at the prosecutor's office; and should have delayed, until the commencement of trial, the disclosure of the names, addresses, and contact information of the confidential informant and undercover personnel.
http://nycourts.gov/reporter/3dseries/2020/2020_05236.htm

*People v Singh*
187 AD3d 691
(2nd Dept) (10/8/20 DOI)
Discovery statute permitted the People to withhold and redact, without a motion, subject names, contact information, and work affiliation. The People should have sought a protective order only regarding mandatory discovery material, and should have provided detailed facts as to good cause.
http://nycourts.gov/reporter/3dseries/2020/2020_05479.htm

*People v Harrigan*
187 AD3d 830
(2nd Dept) (10/8/20 DOI)
The disclosure of the names of three of the complainants would be delayed until the commencement of trial; the disclosure of the names of those complainants' parents would occur 15 days prior to trial; and both sets of names would be provided only to defense counsel.
http://nycourts.gov/reporter/3dseries/2020/2020_05612.htm

**Double jeopardy**

*People v Manafort*
187 AD3d 612
(1st Dept) (10/22/20 DOI)
People's appealed. Affirmance. Supreme Court properly granting the defendant's motion to dismiss the indictment based on statutory double jeopardy. The federal charges of which the defendant was convicted involved the same fraud and the same victims as charged in the NY indictment. The CPL 40.20 (2) (b) exception did not apply.
http://nycourts.gov/reporter/3dseries/2020/2020_06027.htm

**Grand jury**

*People v Clark*
182 AD3d 703
(3rd Dept) (4/10/20 DOI)
The People faxed to the Conflict Defender a notice stating that the matter would be presented to the grand jury, but not specifying a presentment date. The next day, the People presented the matter to the grand jury. County Court properly granted the defendant's motion to dismiss the indictment pursuant to CPL 190.50 (5), since the People failed to give him a reasonable opportunity to testify before the grand jury.
http://nycourts.gov/reporter/3dseries/2020/2020_02204.htm

*People v Ruvalcaba*
187 AD3d 1533
(4th Dept) (10/8/20 DOI)
Trial court erred in granting motion to reduce count of 2nd degree strangulation to criminal obstruction of breathing or blood circulation. Grand jury need not be instructed with the same precision as a petit jury and could apply natural meaning of "stupor". Evidence was legally sufficient. The victim said the brute choked her until she was starting to lose consciousness. The People did not limit their case to the "stupor" theory; the crime could also be based on the defendant having caused "any other physical injury or impairment."
http://nycourts.gov/reporter/3dseries/2020/2020_05354.htm

*People v Edwards*
36 NY3d 946
(COA) (11/25/20 DOI)

The Grand Jury proof was legally sufficient to show that the defendant acted with depraved indifference to human life so as to support a charge of 1st degree assault charges. There was evidence that, to evade police, the intoxicated defendant sped at 119 mph, swerved in front of oncoming traffic, and crashed into a wall.
http://www.nycourts.gov/reporter/3dseries/2020/2020_06941.htm

**Speedy trial / prompt prosecution**

*People v Person*
184 AD3d 447, *lv denied* 35 NY3d 1069
(1st Dept) (6/12/20 DOI)
Formerly, a defendant who pleaded guilty automatically forfeited appellate review of denial of a statutory speedy trial motion. Effective January 1, 2020, CPL 30.30 (6) was amended to provide that "an order finally denying a [30.30] motion to dismiss…shall be reviewable upon appeal from an ensuing judgment of conviction, notwithstanding the fact that such judgment is entered upon a plea of guilty." The amendment created reviewability that did not previously exist. However, by validly waiving the right to appeal, a defendant could voluntarily relinquish otherwise mandatory review.
http://nycourts.gov/reporter/3dseries/2020/2020_03278.htm

*People v Maslowski*
187 AD3d 1211
(2nd Dept) (10/29/20 DOI)
People's appeal. CPL 30.30 motion to dismiss felony properly granted. Prior determination on original misdemeanor complaint, finding certain days chargeable to the People, was law of the case.
http://nycourts.gov/reporter/3dseries/2020/2020_06146.htm

*People v Jones*
187 AD3d 934
(2nd Dept) (10/16/20 DOI)
Guilty plea case. The 31-month delay between discovery of the DNA evidence linking the defendant to the robbery and his arrest was substantial, but was not due process violation as to right to prompt prosecution. Offense was serious; the defendant was not incarcerated on the instant charges; he did not show prejudice.
http://nycourts.gov/reporter/3dseries/2020/2020_05774.htm

**Suppression**

***Arrest warrant***

*People v Dortch*
186 AD3d 1114
(4th Dept) (8/21/20 DOI)
Error to deny suppression. Reversal and dismissal. Police arrested the defendant based on arrest warrants issued for his brother. Once the defendant challenged the existence and validity of the warrants at the suppression hearing, the People were required to produce the warrants or other reliable evidence that they were active and valid. They failed to do so
http://nycourts.gov/reporter/3dseries/2020/2020_04711.htm

***Credibility***

*People v Harris*
2020 NY Slip Op 08079
(2nd Dept) (12/31/20 DOI)

Reversal of denial of suppression and judgment of conviction; dismissal of indictment. Great discussion of incredible police sergeant testimony. Since the People failed to demonstrate the legality of the stop, suppression was required.
http://nycourts.gov/reporter/3dseries/2020/2020_08079.htm

***Custodial interrogations***

*People v McCabe*
182 AD3d 772
(3rd Dept) (4/17/20 DOI)
County Court committed reversible error in denying the defendant's motion to suppress his un-*Mirandized* statements. After arriving at the crime scene and finding the defendant in the driveway, a police officer entered the residence where the victim was being treated by the defendant's mother. The officer informed the defendant that he was being detained for questioning. After handcuffing the defendant and placing him in the patrol car, the officer asked him, "What happened?" The defendant responded that he "snapped" and "wanted her to feel the pain he had." The incident was over, the parties had been identified, and medical assistance had been requested. The custodial questioning constituted interrogation.
http://nycourts.gov/reporter/3dseries/2020/2020_02288.htm

*People v Sylvester*
187 AD3d 798
(2nd Dept) (10/8/20 DOI)
Affirmance, but trial court should have suppressed un-*Mirandized* statement made by the defendant to a police officer. The officer's utterances—"What happened?" and "I need to hear both sides of the story. Tell me what happened"—were interrogative. Further, the handcuffed defendant was in police custody when he made the statement. Error was harmless.
http://nycourts.gov/reporter/3dseries/2020/2020_05534.htm

***Impoundment***

*People v Weeks*
182 AD3d 539
(2nd Dept) (4/3/20 DOI)
Reversal, suppression, dismissal. The impoundment of the defendant's vehicle was unlawful. The vehicle was legally parked. While an officer testified that the vehicle was impounded to safeguard against burglary, there was no evidence as to a history of burglary in the area, nor any evidence as to an NYPD impoundment policy, what the policy required, or whether the arresting officer complied with the policy.
http://nycourts.gov/reporter/3dseries/2020/2020_02198.htm

*People v King*
188 AD3d 721
(2nd Dept) (11/5/20 DOI)
CPW convictions vacated, counts dismissed. The arresting officer testified that the vehicle was legally parked. The People did not show that impoundment served public safety or the police community-caretaking function. Further, the People did not offer proof about NYPD procedures. Due to the unlawful impoundment, the evidence yielded by the inventory search had to be suppressed.
http://nycourts.gov/reporter/3dseries/2020/2020_06288.htm

***Ineffective assistance***

*People v Allen*
184 AD3d 1076
(4th Dept) (6/15/20 DOI)
Supreme Court erred in allowing evidence obtained after police stopped vehicle in which the defendant was a passenger, based on the driver's unsafe backing out. VTL§ 1211 (a) as to operating vehicle in reverse, did not apply. Counsel's failure to raise the dispositive argument at the suppression hearing was IAC.
http://nycourts.gov/reporter/3dseries/2020/2020_03295.htm

*People v Persen*
185 AD3d 1288
(3rd Dept) (7/24/20 DOI)
Defense counsel was ineffective. At the suppression hearing, he/she asked only four questions, waived closing argument, and declined to submit a post-hearing memo; and the sole suppression argument in defense papers was premised on factually inaccurate information. New trial was not warranted, in light of the overwhelming proof of guilt.
http://nycourts.gov/reporter/3dseries/2020/2020_04204.htm

***Lineup***

*People v Colsen*
181 AD3d 618
(2nd Dept) (3/9/20 DOI)
The hearing court erred in finding the lineup not unduly suggestive. The defendant was the only person with dreadlocks, which featured prominently in the complainant's description of one assailant. In the lineup, the dreadlocks were distinctive and visible, even though the defendant and fillers wore hats.
http://nycourts.gov/reporter/3dseries/2020/2020_01514.htm

***No founded suspicion***

*People v Wallace*
181 AD3d 1214
(4th Dept) (3/16/20 DOI)
Officer asked what was in the defendant's bag, a level-two intrusion, without a founded suspicion. Suppression ordered.
http://nycourts.gov/reporter/3dseries/2020/2020_01796.htm

***No probable cause***

*People v Kamenev*
179 AD3d 837
(2nd Dept) (1/20/20 DOI)
Police lacked probable cause to arrest the defendant, and motion to suppress lineup ID testimony and his statements to police should have been granted. Facts relied on were innocuous—that the defendant was seen riding a bike near the scene of the crime shortly before the shooting.
http://nycourts.gov/reporter/3dseries/2020/2020_00301.htm

*People v Johnson*
183 AD3d 1256
(4th Dept) (5/4/20 DOI)

Drugs and weapons convictions upon guilty plea dismissed due to suppression error. Traffic stop for not using a blinker. The defendant made furtive movements toward the center console and fled. After his arrest, deputy opened car door, smelled marijuana, found crack cocaine under armrest. Upon getting search warrant, deputy seized handgun from glove compartment. No probable cause to open door and search. Requisite nexus lacking since deputy did not smell pot until after opening door.
http://nycourts.gov/reporter/3dseries/2020/2020_02576.htm

*People v Thorpe*
183 AD3d 844
(2nd Dept) (5/22/20 DOI)
The suppression hearing evidence established that, after receiving a report of a burglary, an officer stopped the defendant as he walked near the crime, because he matched a description of "a suspect in dark clothing." When the officer asked him for identification, the defendant began to put his hand in his pants pockets, and the officer stopped him and told him to place his hands on his head. The officer then saw bulges in the defendant's pants pockets, patted his clothing, felt a bulge, put his hands into the defendant's pockets, and pulled out a big wad cash of cash. Suppression was proper. After the pat-down, further intrusion unlawful.
http://nycourts.gov/reporter/3dseries/2020/2020_02941.htm

*People v Boykin*
188 AD3d 1244
(2nd Dept) (11/25/20 DOI)
Weapon possession counts dismissed. Officers' observations of a brown liquid in cups in the front console of a vehicle driven by the defendant, and smell of alcohol emanating, provided probable cause. But nothing indicated that a prescription bottle in the seat pocket contained contraband validating ensuing search.
http://nycourts.gov/reporter/3dseries/2020/2020_07085.htm

***No reasonable suspicion***

*People v Nazario*
180 AD3d 1355
(4th Dept) (2/10/20 DOI)
Suppression was proper where officer did not recognize the defendant from BOLO information, which thus could not be used to validate the officer's conduct. Search of bag was improper; no proof officer could have reasonably suspected that the defendant was armed and posed a threat to his safety.
http://nycourts.gov/reporter/3dseries/2020/2020_00955.htm

*People v Hinshaw*
35 NY3d 427
(COA) (9/3/20 DOI)
The question presented was whether a State trooper had reasonable suspicion to stop the defendant's car based solely on a license plate check revealing that the vehicle had been impounded and stating that, "it should not be treated as a stolen vehicle hit—no further action should be taken based solely on the impound response." The majority found that the trooper had no objective basis to believe that the apparent removal of the car from an impound lot was indicative of criminality. Addressing an issue not presented, the COA reaffirmed that an officer must have probable cause to stop a vehicle for a traffic infraction. In dissent, Judge Garcia offered a novel take on relevant law and the powers of police—mystical and yet here sadly mistaken—to discern criminality.
http://www.nycourts.gov/reporter/3dseries/2020/2020_04816.htm

*People v Hernandez*
187 AD3d 1502
(4th Dept) (10/5/20 DOI)
County Court erred in declining to suppress the defendant's statements made to police at the scene of his initial detention, and the cocaine seized as a result of those statements. The police lacked reasonable suspicion to detain the defendant. An officer—who was conducting surveillance at the parking lot of a shopping plaza known for drug transactions—saw the defendant approach a car in a remote part of the lot, but could not see any hand-to-hand transaction. Police stopped the defendant, handcuffed him, and questioned him. Such detention was an illicit de facto arrest.
http://nycourts.gov/reporter/3dseries/2020/2020_05321.htm

*People v Walls*
187 AD3d 1527
(4th Dept) (10/5/20 DOI)
Dissenter opined that the police lacked reasonable suspicion of criminal activity. An officer testified that he received a dispatch call regarding someone dressed in dark clothing entering a van with a specified license plate and an occupant with a long gun. The contents of the 911 call that prompted the dispatch were not entered into evidence, and the People offered no proof to establish the basis of the caller's knowledge.
http://nycourts.gov/reporter/3dseries/2020/2020_05337.htm

*People v Fitts*
188 AD3d 1676
(4th Dept) (11/13/20 DOI)
Conviction of 2nd degree CPW reversed, count dismissed. Since the subject vehicle was in the general vicinity of the area where shots were heard, police had a founded suspicion that criminal activity was afoot, so as to justify a right to inquire. But they lacked the required reasonable suspicion to seize the vehicle.
http://nycourts.gov/reporter/3dseries/2020/2020_06654.htm

*People v Martinez-Gonzalez*
188 AD3d 1593
(4th Dept) (11/13/20 DOI)
Conviction of 5th degree criminal possession of a controlled substance reversed. Based on the defendant's proximity to a suspected drug house, police had at most a founded suspicion that criminal activity was afoot, but not reasonable suspicion to justify the vehicle stop.
http://nycourts.gov/reporter/3dseries/2020/2020_06593.htm

*People v Balkman*
35 NY3d 556
(COA) (11/20/20 DOI)
Information generated by running a license-plate number through a government database may provide police with reasonable suspicion to stop a vehicle. When police stop a vehicle based solely on such information and the defendant challenges its sufficiency, the People must present evidence of the content of the information. They failed to do so here. Thus, the suppression court could not independently evaluate whether the officer had reasonable suspicion to make the stop.
http://www.nycourts.gov/reporter/3dseries/2020/2020_06838.htm

*People v Pena*
2020 NY Slip Op 06838
(COA) (11/20/20 DOI)
The sole issue was whether the officer's belief—that the defendant violated the VTL by operating a vehicle with a non-functioning center brake light—was objectively reasonable. The COA concluded that it was.

Judge Wilson dissented. There was no probable cause because the legislature had not authorized the stop of a vehicle with two working brakes lights, one on each side, and the officer's error was not objectively reasonable. Judge Rivera also dissented. An ambiguous law was not a justification to relax constitutional protections. Mistaken, unlawful stops should not be incentivized.
http://www.nycourts.gov/reporter/3dseries/2020/2020_06836.htm

***Peace officers/citizens' arrest***

*People v Page*
35 NY3d 199
(COA) (6/12/20 DOI)
Marine interdiction agents were not encompassed in CPL 2.15, which accorded limited peace officer powers to certain federal law enforcement officers. The instant arrest was a valid citizen's arrest. Judge Fahey dissented. The majority expanded the ability of law enforcement to effect arrests they had no authority to make, under the guise of a citizen's arrest, and undermined the rationale of *People v Williams*, 4 NY3d 535—to deter vigilantism and ensure that persons chosen to protect citizens from crime may be readily identified, and persons effectuating citizens' arrests must do so without pretense of other authority.
http://www.nycourts.gov/reporter/3dseries/2020/2020_03265.htm

***Preservation***

*People v Crum*
184 AD3d 454
(1st Dept) (6/12/20 DOI)
At trial, the defendant did not preserve any claim relating to cell-site location information obtained without a warrant. The motion court properly rejected the attempt to raise the issue via a post-conviction motion. The defendant asserted that it would have been futile for trial counsel to raise the issue, because SCOTUS had not yet decided *Carpenter v U.S.* The appellate court concluded that the defendant was required to preserve the issue by advocating for a change in the law.
http://nycourts.gov/reporter/3dseries/2020/2020_03282.htm

***Protective search***

*People v Soler*
2020 NY Slip Op 07404
(2nd Dept) (12/10/20 DOI)
Plea case. The defendant was observed with his hands at his side, and an officer saw a heavy L-shaped object in his sweatshirt pocket. The officer was justified in conducting a common-law inquiry and asking the defendant if he was carrying a weapon. However, the officer should not have tried to touch the defendant's pocket. The defendant's response of fleeing and discarding the gun was not an independent act involving a calculated risk attenuated from the illegal police conduct.
http://nycourts.gov/reporter/3dseries/2020/2020_07404.htm

***Racial bias***

*People v Price*
186 AD3d 903
(3rd Dept) (8/7/20 DOI)
The challenged judgment was affirmed. Two concurring justices expressed concern that the arresting officer did not make a routine traffic stop and provided no plausible explanation for that failure. Events then escalated, culminating in police detaining the defendant on the roof of his vehicle. This raised another

concern—why the officers reacted as they did in the context of a simple traffic infraction with no heightened safety concern. "One unfortunate conclusion" that could reasonably be drawn from the record was that "undertones of racial bias" could explain police actions. "Bias, racial or otherwise, will not be allowed to legitimatize the unconstitutional intrusion upon any citizen's freedom of movement."
http://nycourts.gov/reporter/3dseries/2020/2020_04430.htm

*People v Miller*
2020 NY Slip Op 06667
(4th Dept) (11/13/20 DOI)
In dictum, trial court castigated for egregiously erroneous suppression ruling and declared: "It must be plainly stated—the law does not allow the police to stop and frisk any young black man within a half-mile radius of an armed robbery based solely upon a general description."
http://nycourts.gov/reporter/3dseries/2020/2020_06667.htm

***Reviewability***

*People v Grimes*
181 AD3d 1251
(4th Dept) (3/16/20 DOI)
The lower court erred in ruling without resolving whether the pat frisk was lawful, and the appellate court lacked the power to review issues not ruled upon, so the matter was remitted.
http://nycourts.gov/reporter/3dseries/2020/2020_01818.htm

*People v Holz*
35 NY3d 55
(COA) (5/8/20 DOI)
CPL 710.70 (2) gives a defendant the right to review of a suppression order "upon an appeal from an ensuing judgment of conviction, notwithstanding the fact that such judgment is entered upon a plea of guilty." That provision encompasses a suppression order related to a count, satisfied by a guilty plea, to which the defendant did not plead guilty, a unanimous Court of Appeals held.
http://www.nycourts.gov/reporter/3dseries/2020/2020_02682.htm

*People v Chy*
184 AD3d 664
(2nd Dept) (6/12/20 DOI)
The search was not justified as incident to a lawful arrest. The officer did not act out of concerns for safety or evidence preservation. The People contended that, even if the search was unlawful, the defendant's statements were admissible, because they were sufficiently attenuated so as to purge the taint of the illegal search. Since Supreme Court did not rule on that issue, remittal was required.
http://nycourts.gov/reporter/3dseries/2020/2020_03244.htm

*People v Harris*
35 NY3d 1010
(COA) (6/12/20 DOI)
In denying suppression, Supreme Court found *People v Gokey*, 60 NY2d 309, did not apply, and thus made no findings regarding exigent circumstances. In affirming, the App Div invoked different ground. That was improper. Intermediate appellate court may determine any question of law or issue of fact involving error or defect which may have adversely affected appellant. Since suppression court did not deny motion based on exigent circumstances, issue was not decided adversely to him and could not be invoked by App Div.
http://www.nycourts.gov/reporter/3dseries/2020/2020_03208.htm

*People v Collins*
186 AD3d 421
(1st Dept) (8/14/20 DOI)
The First Department held the appeal in abeyance and remanded. The appellate court agreed that police had probable cause to arrest the defendant. On appeal, the People argued that the police search of the bag was reasonable because exigent circumstances existed. However, the reviewing court could not reach that issue, because the lower court did not rule on it.
http://nycourts.gov/reporter/3dseries/2020/2020_04517.htm

*People v Tates*
2020 NY Slip Op 07405
(2nd Dept) (12/10/20 DOI)
CPW 2 vacated. At the suppression hearing, the People argued that the gun was properly recovered pursuant to an inventory search. The hearing court disagreed, but found that police had probable cause to search the vehicle pursuant to the automobile exception. That holding was improper, where the People did not argue such theory. As an alternative ground on appeal, the People argued valid inventory search. Because Supreme Court had decided that question for the defendant, appellate review of the issue was precluded.
http://nycourts.gov/reporter/3dseries/2020/2020_07405.htm

***Search incident to arrest***

*People v Chy*
184 AD3d 664
(2nd Dept) (6/12/20 DOI)
The search was not justified as incident to a lawful arrest. The officer did not act out of concerns for safety or evidence preservation.
http://nycourts.gov/reporter/3dseries/2020/2020_03244.htm

***Search warrants***

*People v Morehouse*
183 AD3d 1180
(3rd Dept) (5/29/20 DOI)
The defendant argued that a search warrant was issued without probable cause, because the application was based on possession of synthetic cannabinoids, which is not illegal under the Penal Law. While the P.L. did not prohibit the possession of synthetic cannabinoids, the State Sanitary Code did (10 NYCRR 9-1.2), and a violation was punishable by a fine and/or 15 days' incarceration.
http://nycourts.gov/reporter/3dseries/2020/2020_03048.htm

*People v Nettles*
186 AD3d 861
(2nd Dept) (8/28/20 DOI)
Reversal and dismissal of indictment. *Darden* hearing upon a motion to controvert a search warrant revealed substantial material discrepancies between the detective's affidavit and the purported CI's testimony. Their description of facts surrounding controlled buys materially diverged. Moreover, in his affidavit, the detective said that the CI provided reliable information once before, but the detective did not indicate that he ever personally worked with the CI. In contrast, the purported CI testified that he worked with the detective 100 times before and had sworn out 100 search warrants for him.
http://nycourts.gov/reporter/3dseries/2020/2020_04776.htm

*People v Goldman*
35 NY3d 582
(COA) (10/22/20 DOI)
People's appeal. Reversal. Pursuant to *Matter of Abe A*., 56 NY2d 288, the hearing court properly precluded defense counsel from reviewing the People's application for a search warrant to obtain a saliva sample for DNA purposes, where the defendant had not been charged and was in custody on an unrelated charge. Judge Rivera dissented, joined by Judge Wilson. The majority had sanctioned the government's ex parte request to remove genetic material from an uncharged suspect without a showing of a risk of flight or destruction of potential evidence. The defendant's due process rights were violated.
http://www.nycourts.gov/reporter/3dseries/2020/2020_05977.htm

*People v Boothe*
188 AD3d 1242
(2nd Dept) (11/25/20 DOI)
The appeal brought up for review the denial of the defendant's motion to controvert a search warrant and suppress evidence. Officer's statement, that the defendant's cell phone contained information relevant to robbery, contained no supporting factual allegations and was insufficient to establish probable cause.
http://nycourts.gov/reporter/3dseries/2020/2020_07084.htm

***Show-up identification***

*People v Miller*
2020 NY Slip Op 06667
(4th Dept) (11/13/20 DOI)
In dictum, trial court castigated for egregiously erroneous suppression ruling and declared: "It must be plainly stated—the law does not allow the police to stop and frisk any young black man within a half-mile radius of an armed robbery based solely upon a general description."
http://nycourts.gov/reporter/3dseries/2020/2020_06667.htm

# GUILTY PLEAS

**Amended indictment**

*People v Mathis*
185 AD3d 1094
(3rd Dept) (7/3/20 DOI)
As a result of an amendment of the indictment, the defendant was charged with a different crime than the one voted on by the grand jury. The record established only that the grand jury indicted the defendant for violating Penal Law § 120.05 (7), not subdivision (3), as was charged in the amended instrument. The claim was not waived by the guilty plea and could be raised for the first time on appeal. Reversal.
http://nycourts.gov/reporter/3dseries/2020/2020_03696.htm

***Anders* brief**

*People v Davis*
188 AD3d 1303
(3rd Dept) (11/5/20 DOI)
In response to *Anders* brief, new counsel assigned. Issues of arguable merit included the propriety of the suppression ruling, which was followed by the guilty plea. *See* CPL 710.27 (2) (order finally denying

motion to suppress evidence may be reviewed on an appeal from ensuing judgment of conviction, even if judgment was entered upon plea of guilty).
http://nycourts.gov/reporter/3dseries/2020/2020_06313.htm

**_Boykin_ rights**

*People v Oliver*
185 AD3d 1099
(3rd Dept) (7/3/20 DOI)
The plea of guilty was not knowing, voluntary, and intelligent. The issue was not precluded by the appeal waiver and was preserved by a motion to withdraw the plea. County Court did not ascertain whether the defendant had conferred with counsel regarding the constitutional rights waived.
http://nycourts.gov/reporter/3dseries/2020/2020_03697.htm

*People v Cubas-Escoto*
2020 NY Slip Op 51423
(App Term, 2nd Dept) (12/3/20 DOI)
Claim re bad plea reviewable despite no motion to withdraw the plea or vacate the judgment, because plea and sentence occurred on the same date. Reversal because neither plea court nor counsel discussed *Boykin* rights with the defendant about such rights.
http://nycourts.gov/reporter/3dseries/2020/2020_51423.htm

*People v Drayton*
2020 NY Slip Op 07952
(3rd Dept) (12/24/20 DOI)
Vacatur of guilty plea. Defendant not adequately advised of constitutional rights forfeited.
http://nycourts.gov/reporter/3dseries/2020/2020_07952.htm

**Coercion**

*People v Shields*
181 AD3d 1193
(4th Dept) (3/16/20 DOI)
At an appearance prior to the plea proceeding, the court stated that, if the defendant decided to reject the plea offer and was convicted after trial, the court would impose the maximum sentence on the top count and consecutive time on an unnamed additional count. Such statements constituted impermissible coercion. The unpreserved issue was reached in the interest of justice.
http://nycourts.gov/reporter/3dseries/2020/2020_01767.htm

*People v Smith*
187 AD3d 1246
(3rd Dept) (10/5/20 DOI)
Rejection of argument that plea was involuntary because the defendant felt pressured to accept the offer. The purported pressure was just the situational coercion faced by many defendants offered a plea deal.
http://nycourts.gov/reporter/3dseries/2020/2020_05258.htm

*People v Davis*
187 AD3d 1291
(3rd Dept) (10/12/20 DOI)
Third Department rejected the argument that the plea court erred in denying the defendant's motion to withdraw his plea. Even if the defendant's girlfriend was the owner of the cocaine found in the car he drove,

the defendant's motion did not negate his constructive ownership of the drugs. Further, his claim that he felt pressure to take the plea deal merely described typical "situational coercion."
http://nycourts.gov/reporter/3dseries/2020/2020_05556.htm

*People v Hollmond*
2020 NY Slip Op 07222
(2nd Dept) (12/3/20 DOI)
Reversal of denial of motion to withdraw guilty plea, which was motivated in part by unduly coercive circumstances. Trial court failed to ensure that the defendant, confined at distant facilities, was transferred to local facility, despite urgent pleas by defense counsel about inability to have meaningful communication and prepare for trial. The defendant promptly moved to withdraw his plea, and the People did not allege that any prejudice would result.
http://nycourts.gov/reporter/3dseries/2020/2020_07222.htm

**Cognitive ability**

*People v Patillo*
185 AD3d 46
(1st Dept) (7/3/20 DOI)
Plea of guilty to murder vacated in the interest of justice. The defendant had been diagnosed as mentally retarded and had an IQ of 56. Clearly, a standard plea allocution would be nearly incomprehensible to him. Yet the plea court made no effort to translate the usual litany into language the defendant could understand.
http://nycourts.gov/reporter/3dseries/2020/2020_03754.htm

**Gravity knife**

*People v Merrill*
187 AD3d 1058
(2nd Dept) (10/22/20 DOI)
Conviction of attempted 3rd degree CPW (gravity knife) upon plea of guilty reversed. Simple possession of a gravity knife had been decriminalized. Even though the statute did not take effect until after his conviction, dismissed warranted in the interest of justice.
http://nycourts.gov/reporter/3dseries/2020/2020_05936.htm

**Hearing re security guards**

*People v Flanders*
187 AD3d 483
(1st Dept) (10/8/20 DOI)
The defendant appealed from a judgment, convicting him criminal possession of a forged instrument. The plea court erred in denying defense motion for a hearing on whether the store security guards involved in his detention were licensed to exercise police powers or were acting as agents of the police.
http://nycourts.gov/reporter/3dseries/2020/2020_05600.htm

**Ineffective assistance**

*People v Maldonado*
183 AD3d 1129
(3rd Dept) (5/22/20 DOI)
On the scheduled sentencing date, the defendant expressed dissatisfaction with counsel and moved pro se to withdraw her guilty plea. On an adjourn date, defense counsel made several statements detrimental to

the defendant. A conflict of interest arose; the sentencing court was required to relieve counsel. On a subsequent date, still represented by original counsel, the defendant was sentenced. Supreme Court deprived the defendant of her right to effective assistance of counsel.
http://nycourts.gov/reporter/3dseries/2020/2020_02953.htm

*People v Lee*
188 AD3d 1685
(4th Dept) (11/13/20 DOI)
Appellate court reserved decision. The defendant was deprived of effective assistance. Counsel called his pro se plea withdrawal application "silly." Matter was remitted for the assignment of new counsel and a de novo determination of the defendant's motion.
http://nycourts.gov/reporter/3dseries/2020/2020_06666.htm

**_Padilla_ violations**

*People v Gomez*
186 AD3d 422
(1st Dept) (8/14/20 DOI)
Direct appeal raising IAC claim. Affirmance. One judge dissented. At the plea hearing, the court asked, "Do we have any *Padilla* issue here?" Defense counsel responded that he had spoken to the defendant "about all possible consequences." The defendant then pleaded guilty to the crime, an aggravated felony. The consequences were not "possible," but virtually certain. The majority failed to explain why this case was not governed by many previous decisions holding that the court could review an IAC claim where counsel represented that he advised the client of possible immigration consequences when the defendant, in fact, faced mandatory deportation.
http://nycourts.gov/reporter/3dseries/2020/2020_04518.htm

***See also Post-Conviction – CPL 440.10 motions – Padilla violations.***

**_Peque_ violations**

*People v Arana*
179 AD3d 826
(2nd Dept) (1/20/20 DOI)
Plea court failed to address deportation. Appeals court gave defendant chance to move to vacate his plea.
http://nycourts.gov/reporter/3dseries/2020/2020_00290.htm

*People v Delorbe*
35 NY3d 112
(COA) (4/3/20 DOI)
Failure to preserve *Peque* claim. A year before the plea proceeding, the People provided the defendant with a generic notice of immigration consequences. The notice adequately alerted the defendant about immigration consequences. At sentencing, the defendant did not seek to withdraw his plea or inquire about a possible immigration impact.
http://www.nycourts.gov/reporter/3dseries/2020/2020_02126.htm

*People v Pinnock*
183 AD3d 424
(1st Dept) (5/8/20 DOI)
When the defendant, a noncitizen, pleaded guilty to a firearm possession charge, the plea court did not advise him that, if he was not a citizen, he could be deported as a consequence of his plea. Although the

defendant did not move to withdraw his plea, there was no evidence that he knew about the possibility of deportation during the plea and sentencing proceedings. Thus, his claim fell within the narrow exception to the preservation doctrine. *See People v Peque*.
http://nycourts.gov/reporter/3dseries/2020/2020_02731.htm

*People v Singh*
185 AD3d 480
(1st Dept) (7/20/20 DOI)
The plea court did not advise the defendant that, if he was not a U.S. citizen, he could be deported as a result of his plea, as later required in *People v Peque*, but there was no reasonable possibility that he could show prejudice, where he was deportable based on prior and subsequent convictions.
http://nycourts.gov/reporter/3dseries/2020/2020_03978.htm

*People v Jumale*
186 AD3d 1101
(4th Dept) (8/21/20 DOI)
The defendant, a noncitizen, contended that his guilty plea was not validly entered because Supreme Court failed to advise him of potential deportation consequences. The record established that the court did not make the *Peque* advisal. The case was remitted so defendant had an opportunity to move to vacate his plea.
http://nycourts.gov/reporter/3dseries/2020/2020_04697.htm

*People v Nikoghosyan*
68 Misc 3d 130(A)
(App Term, 2nd Dept.) (8/28/20 DOI)
The plea court violated *People v Peque*. Assuming *Peque* applied to misdemeanors, the record did not demonstrate that the court mentioned, or that the defendant was otherwise aware of, the possibility of deportation. Sentence was imposed immediately after entry of the plea; and the defendant was not otherwise made aware of the deportation consequences of his plea. Preservation exception. Remittal.
http://nycourts.gov/reporter/3dseries/2020/2020_50952.htm

*People v Ulanov*
188 AD3d 1271
(2nd Dept) (11/25/20 DOI)
Remittal. Plea court failed to advise the defendant of the possibility that she could be deported as a consequence of her guilty plea, as required by *People v Peque*. The defendant's contention that her due process rights were violated by such failure was excepted from the preservation requirement.
http://nycourts.gov/reporter/3dseries/2020/2020_07108.htm

*People v Tagiev*
(2020 NY Slip Op 20314
(App Term, 2nd Dept) (12/3/20 DOI)
While warning of possible deportation, court did not recite the CPL 220.50 (7) admonition. Assuming that court had *Peque* duty for misdemeanor plea, statement here was adequate.
http://nycourts.gov/reporter/3dseries/2020/2020_20314.htm

*People v Joseph*
2020 NY Slip Op 07472
(1st Dept) (12/10/20 DOI)
Pleas vacated. In inducing the defendant to plead guilty, the court repeatedly said that he faced a possible sentence of 45 years for three open burglaries, but failed to reveal that such an aggregate sentence would

have been automatically reduced to 20 years. The exception to the preservation doctrine applied. The sentence misinformation meant the plea was not knowing, voluntary, and intelligent.
http://nycourts.gov/reporter/3dseries/2020/2020_07472.htm

**Post-release supervision**

*People v Cabrera*
2020 NY Slip Op 08074
(2nd Dept) (12/31/20 DOI)
To meet due process, a court imposing post-release supervision must inform the defendant of specific period or maximum potential duration. Here County Court did not specify either. Plea was thus not knowing, voluntary, and intelligent.
http://nycourts.gov/reporter/3dseries/2020/2020_08074.htm

**Preservation exceptions**

*People v Pinnock*
183 AD3d 424
(1st Dept) (5/8/20 DOI)
When the defendant, a noncitizen, pleaded guilty to a firearm possession charge, the plea court did not advise him that, if he was not a citizen, he could be deported as a consequence of his plea. Although the defendant did not move to withdraw his plea, there was no evidence that he knew about the possibility of deportation during the plea and sentencing proceedings. Thus, his claim fell within the narrow exception to the preservation doctrine. *See People v Peque*.
http://nycourts.gov/reporter/3dseries/2020/2020_02731.htm

*People v Tavarez*
184 AD3d 416
(1st Dept) (6/5/20 DOI)
A claim that a defective count impacted a decision to plead guilty was not exempt from the requirement for preservation, such as via a plea withdrawal motion. Further, there was no basis to reverse in this case.
http://nycourts.gov/reporter/3dseries/2020/2020_03185.htm

*People v Hernandez*
185 AD3d 1428
(4th Dept) (7/20/20 DOI)
The defendant negated the element of "intent to commit a crime therein" of the burglary charge. Trespass could not itself be used as the sole predicate crime. Supreme Court failed to further inquire to ensure that the plea was intelligently entered. Rare exception to preservation requirement applied.
http://nycourts.gov/reporter/3dseries/2020/2020_04049.htm

*People v Nikoghosyan*
68 Misc 3d 130(A)
(App Term, 2nd Dept.) (8/28/20 DOI)
The plea court violated *People v Peque*. Assuming *Peque* applied to misdemeanors, the record did not demonstrate that the court mentioned, or that the defendant was otherwise aware of, the possibility of deportation. Sentence was imposed immediately after entry of the plea; and the defendant was not otherwise made aware of the deportation consequences of his plea. Preservation exception. Remittal.
http://nycourts.gov/reporter/3dseries/2020/2020_50952.htm

*People v Muniz-Cayetano*
186 AD3d 1169
(1st Dept) (10/1/20 DOI)
Reversal of attempted burglary conviction. In the allocution, the defendant repeatedly stated that, at the time of the offense, he was drunk. He also said, "I lost my mind…I don't know what I was doing." When he thus raised a possible intoxication defense, the plea court failed to fulfill its duty of further inquiry.
http://nycourts.gov/reporter/3dseries/2020/2020_05156.htm

*People v Carl*
188 AD3d 1304
(3rd Dept) (11/5/20 DOI)
The defendant's contention that his guilty pleas were not knowing, voluntary, and intelligent survived his appeal waiver. Preservation by an appropriate post-allocution motion was not required. First, the pleas and sentencing occurred in the same proceeding. Second, he could not have made a CPL 440.10 motion, because the alleged error was clear from the face of the record. However, the plea was not defective.
http://nycourts.gov/reporter/3dseries/2020/2020_06314.htm

*People v Ulanov*
188 AD3d 1271
(2nd Dept) (11/25/20 DOI)
Remittal. Plea court failed to advise the defendant of the possibility that she could be deported as a consequence of her guilty plea, as required by *People v Peque*. The defendant's contention that her due process rights were violated by such failure was excepted from the preservation requirement.
http://nycourts.gov/reporter/3dseries/2020/2020_07108.htm

*People v Cubas-Escoto*
2020 NY Slip Op 51423
(App Term, 2nd Dept) (12/3/20 DOI)
Claim re bad plea reviewable despite no motion to withdraw the plea or vacate the judgment, because plea and sentence occurred on the same date. Reversal because neither plea court nor counsel discussed *Boykin* rights with the defendant about such rights.
http://nycourts.gov/reporter/3dseries/2020/2020_51423.htm

**Right to counsel**

*People v Sears*
181 AD3d 1290
(4th Dept) (3/23/20 DOI)
Reversal, because the defendant's right to counsel was violated when a defense attorney who actively participated in the preliminary stages of the defense became employed as an ADA by the office prosecuting the defendant's ongoing case.
http://nycourts.gov/reporter/3dseries/2020/2020_01974.htm

**Reviewability**

*People v Holz*
35 NY3d 55
(COA) (5/8/20 DOI)
CPL 710.70 (2) gives a defendant the right to review of a suppression order "upon an appeal from an ensuing judgment of conviction, notwithstanding the fact that such judgment is entered upon a plea of

guilty." That provision encompasses a suppression order related to a count, satisfied by a guilty plea, to which the defendant did not plead guilty, a unanimous Court of Appeals held.
http://www.nycourts.gov/reporter/3dseries/2020/2020_02682.htm

*People v Person*
184 AD3d 447, *lv denied* 35 NY3d 1069
(1st Dept) (6/12/20 DOI)
Formerly, a defendant who pleaded guilty automatically forfeited appellate review of denial of a statutory speedy trial motion. Effective January 1, 2020, CPL 30.30 (6) was amended to provide that "an order finally denying a [30.30] motion to dismiss…shall be reviewable upon appeal from an ensuing judgment of conviction, notwithstanding the fact that such judgment is entered upon a plea of guilty." The amendment created reviewability that did not previously exist. However, by validly waiving the right to appeal, a defendant could voluntarily relinquish otherwise mandatory review.
http://nycourts.gov/reporter/3dseries/2020/2020_03278.htm

**Sentence misinformation**

*People v Joseph*
2020 NY Slip Op 07472
(1st Dept) (12/10/20 DOI)
Pleas vacated. In inducing the defendant to plead guilty, the court repeatedly said that he faced a possible sentence of 45 years for three open burglaries, but failed to reveal that such an aggregate sentence would have been automatically reduced to 20 years. The exception to the preservation doctrine applied. The sentence misinformation meant the plea was not knowing, voluntary, and intelligent.
http://nycourts.gov/reporter/3dseries/2020/2020_07472.htm

**Waivers of appeal**

*People v Barrales*
179 AD3d 1313
(3rd Dept) (1/20/20 DOI)
Invalid appeal waiver. Written doc did not explain issues waived and inaccurately stated that the defendant gave up the right to have counsel assigned, file an appeal, or seek post-conviction relief in any court. Under *People v Thomas*, 34 NY3d 545, waiver was unenforceable.
http://nycourts.gov/reporter/3dseries/2020/2020_00329.htm

*People v Burdo*
179 AD3d 1355
(3rd Dept) (1/24/20)
Appeal waiver invalid. County Court did not explain "separate and distinct" element. Not clear the defendant signed written document in open court after conferring with counsel.
http://nycourts.gov/reporter/3dseries/2020/2020_00456.htm

*People v Ecchevaria*
180 AD3d 703
(2nd Dept) (2/10/20 DOI).
Purported waiver of the right to appeal was invalid. In light of the defendant's young age and inexperience with the criminal justice system, the terse oral colloquy was insufficient.
http://nycourts.gov/reporter/3dseries/2020/2020_00875.htm

*People v Frias*
180 AD3d 704
(2nd Dept) (2/10/20 DOI)
Purported waiver of his right to appeal was invalid. Erroneous statement was made by court: that by signing the written waiver, the defendant was giving up his right to appeal "any issue that may arise from this case, including sentencing." Written waiver did not overcome flaws.
http://nycourts.gov/reporter/3dseries/2020/2020_00876.htm

*People v Brown*
180 AD3d 1341
(4th Dept) (2/10/20 DOI)
Waiver of right to appeal invalid, because lower court told the defendant he could obtain no further review of the conviction or sentence by a higher court.
http://nycourts.gov/reporter/3dseries/2020/2020_00944.htm

*People v Marcel G.*
183 AD3d 667
(2nd Dept) (5/8/20 DOI)
The purported waiver of the right to appeal was invalid. The defendant's youth, limited education, and lack of experience with the criminal justice system warranted a more thorough explanation; and there was no indication on the record that he read the written waiver.
http://www.courts.state.ny.us/courts/ad2/Handdowns/2020/Decisions/D62758.pdf

*People v Sutton*
184 AD3d 236
(2nd Dept) (6/19/20 DOI)
Supreme Court insisted on the waiver as a condition of the plea. But judicial extraction of such a waiver, could create the appearance that the court sought to insulate its decision from review. The waiver was gratuitously demanded after the plea deal had been struck.
http://nycourts.gov/reporter/3dseries/2020/2020_03400.htm

*People v Anderson*
184 AD3d 1020
(COA) (6/25/20 DOI)
Waiver of appeal invalid. The plea court advised the defendant that the appellate rights being relinquished were listed on the written waiver, which contained overbroad language. There was no indication that the defendant—a first-time felony offender—understood that he retained the right to some appellate review.
http://nycourts.gov/reporter/3dseries/2020/2020_03571.htm

*People v Tomko*
185 AD3d 1356
(3rd Dept) (7/31/20 DOI)
The waiver of the right to appeal was not knowing, intelligent, and voluntary. The plea court's brief colloquy with the defendant—a first-time offender—failed to ensure that she understood the terms and/or consequences of the appeal waiver.
http://nycourts.gov/reporter/3dseries/2020/2020_04346.htm

*People v Reynolds*
186 AD3D 1535
(2nd Dept) (9/25/20 DOI)

The purported waiver of the right to appeal was invalid. A preprinted form stated that the waiver encompassed any issue as to a predicate felony or enhanced sentence and barred post-conviction claims. Those misstatements were not corrected by Supreme Court in the colloquy. The challenged suppression ruling was reviewable.
http://nycourts.gov/reporter/3dseries/2020/2020_05057.htm

*People v Harlee*
187 ADd3d 1586
(4th Dept) (10/5/20 DOI)
Purported waiver of right to appeal was invalid. The written waiver and oral colloquy mischaracterized the true nature of the waiver in referring to an absolute bar to a direct appeal, the loss of the right to assignment of counsel, and the forfeiture of the right to submit a brief or argue any issues.
http://nycourts.gov/reporter/3dseries/2020/2020_05386.htm

*People v Joseph*
187 AD3d 1050
(2nd Dept) (10/22/20 DOI)
Purported waiver of his right to appeal was invalid because the plea court incorrectly stated that the appellate rights waived constituted an absolute bar to a direct appeal and failed to inform the defendant of issues available for review.
http://nycourts.gov/reporter/3dseries/2020/2020_05928.htm

*People v Gudanowski*
187 AD3d 1205
(2nd Dept) (10/29/20 DOI)
Court erroneously stated that the waiver constituted an absolute bar to taking a direct appeal and having counsel assigned, and failed to advise the defendant about the claims that survived a valid waiver.
http://nycourts.gov/reporter/3dseries/2020/2020_06141.htm

*People v Platel*
187 AD3d 1216
(2nd Dept) (10/29/20 DOI)
Waiver of the right to appeal unenforceable. Trial court mischaracterized rights the defendant was being asked to cede. Given his age, lack of experience in criminal justice system, and mental health history, the court's misleading colloquy did not ensure that he understood waiver.
http://nycourts.gov/reporter/3dseries/2020/2020_06150.htm

*People v Bisono*
2020 NY Slip Op 07484
(COA) (12/18/20 DOI)
The Court of Appeals reversed 10 Appellate Division orders, finding unenforceable the purported waivers of appeal. In oral colloquies and written forms, the waivers mischaracterized the rights being ceded. In one case, *People v Daniels*, Judges Garcia and Stein dissented, complaining that the majority went beyond the requirements of *People v Thomas*, 34 NY3d 545.
http://www.nycourts.gov/reporter/3dseries/2020/2020_07484.htm

# TRIALS

## Adjournment

*People v Bryan*
179 AD3d 489
(1st Dept) (1/20/20 DOI)
Court erred in denying one-day adjournment so defense could call absent witness with material testimony.
http://nycourts.gov/reporter/3dseries/2020/2020_00243.htm

## Alternate juror

*People v Murray*
2020 NY Slip Op 08007
(1st Dept) (12/31/20 DOI)
A dissenter opined that the trial court erred in seating a discharged alternate juror. No alternate juror was "available for service" so the court lacked authority to seat the alternate, the dissent asserted.
http://nycourts.gov/reporter/3dseries/2020/2020_08007.htm

## Co-defendant agreement

*People v Greenspan*
186 AD3d 505
(2nd Dept) (8/7/20 DOI)
In murder case, new trial before a different justice ordered. In exchange for the codefendant's guilty plea to attempted 2nd degree robbery, the People promised to recommend a determinate term of 2 to 7 years. The trial court offered probation if the codefendant testified against the defendant. Such agreement was reversible error. The trial court abandoned the role of a neutral arbiter and acted as an interested party.
http://nycourts.gov/reporter/3dseries/2020/2020_04408.htm

## Courtroom closure

*People v Rivera*
180 AD3d 514
(1st Dept) (2/24/20 DOI)
Error to exclude family members from courtroom during testimony of undercover officers, where prosecutor did not oppose the defense request, the court made no supporting findings, and there was no request that the family members be identified.
http://nycourts.gov/reporter/3dseries/2020/2020_01035.htm

## CPL 710.30 notice

*People v Garcia*
2020 NY Slip Op 51415
(App Term, 2nd Dept) (12/3/20 DOI)
Reversed. At trial, the People were required, but failed, to establish that they provided CPL 710.30 notice of evidence of statements allegedly made by the defendant to police.
http://nycourts.gov/reporter/3dseries/2020/2020_51415.htm

**Discharge of jurors**

*People v Alleyne*
179 AD3d 712
(2nd Dept) (1/13/20 DOI)
Juror's work trip was lame reason to excuse her after both sides rested. She was not "unavailable" within meaning of CPL 270.35 (1). Reversal and new trial.
http://nycourts.gov/reporter/3dseries/2020/2020_00154.htm

*People v Manning*
180 AD3d 605
(1st Dept) (2/28/20 DOI)
Reversal due to the unjustified discharge for cause of a selected but unsworn juror, based on concerns about juror's out-of-town meeting during trial. Record did not show that his state of mind would have prevented him from rendering an impartial verdict.
http://nycourts.gov/reporter/3dseries/2020/2020_01308.htm

*People v Lang*
35 NY3d 222
(COA) (6/25/20 DOI)
Reversal. The trial judge discharged a sworn juror as unavailable without the requisite inquiry and notice. Court judge informed the parties that juror 9 was absent, due to an important appointment for a family member. Without stating that a substitution would occur, the court seated alternate 1 in place of juror 9. There was no inquiry into juror 9's likelihood of appearing. At a recess, defense counsel objected and later moved for a mistrial.
http://www.nycourts.gov/reporter/3dseries/2020/2020_03487.htm

*People v Batticks*
35 NY3d 561
(COA) (10/22/20 DOI)
The trial judge did not err in declining to conduct a *Buford* (69 NY2d 290) inquiry in response to a juror's outburst, upon the repeated use of a racial slur that had purportedly uttered by a co-defendant during the cross-examination of a prosecution witness. Counsel asked the trial court to conduct an inquiry to determine if the juror was grossly unqualified. The court denied such relief. Judge Wilson dissented, joined by Judges Rivera and Fahey. The required action was a *Buford* inquiry into the juror's impartiality or, on consent, her replacement with an alternate. Our system must not tolerate outlandish behavior by jurors. The defendant's right to a fair trial was violated.
http://www.nycourts.gov/reporter/3dseries/2020/2020_05840.htm

**Duplicitous counts**

*People v Holtslander*
2020 NY Slip Op 07250
(3rd Dept) (12/3/20 DOI)
Dismissal of duplicitous charges after trial was too late. Error to deny pretrial motion. Jury heard proof about 12 incidents as to the dismissed counts. Further, County Court wrongly permitted evidence of uncharged crimes; prejudicial nature of *Molineux* proof outweighed probative value.
http://nycourts.gov/reporter/3dseries/2020/2020_07250.htm

## Evidentiary errors

### *Alibi witness*

*People v Lukosavich*
2020 NY Slip Op 07953
(3rd Dept) (12/24/20 DOI)
Reversal. Error to preclude alibi testimony of the defendant's father. Defense was not given chance to respond to motion to preclude. No improper purpose in the late alibi notice. Less drastic sanctions available. People knew of father's statement. Alibi proof was key to defense. Error was not harmless.
http://nycourts.gov/reporter/3dseries/2020/2020_07953.htm

### *Authentication*

*People v Goldman*
2020 NY Slip Op 05977
(COA) (10/22/20 DOI)
People's appeal. Reversal. The People properly authenticated music video posted on social media. Judges Rivera and Wilson dissented. There was no testimony from anyone involved in the video's creation, nor was there any expert testimony as to its unaltered state. The video tainted deliberations by depicting defendant as glorifying street violence and embracing gang life.
http://www.nycourts.gov/reporter/3dseries/2020/2020_05977.htm

*People v Rodriguez*
187 AD3d 1063
(2nd Dept) (10/22/20 DOI)
In trial for attempted use of a child in a sexual performance and disseminating indecent material to a minor, and another crime, trial court erred in admitting screenshots purporting to depict portions of a text conversation between the defendant and the complainant. Neither the text messages nor the complainant's testimony were sufficient to establish that the defendant was the author. New trial ordered.
http://nycourts.gov/reporter/3dseries/2020/2020_05944.htm

*People v Moneke*
2020 NY Slip Op 52493
(App Term, 2nd Dept) (12/24/20 DOI)
Reversal. Trial court improperly admitted an Instagram video purportedly depicting the offense. The People did not establish that the video was a fair and accurate representation of offense.
http://nycourts.gov/reporter/3dseries/2020/2020_51493.htm

### *Bruton violations*

*People v Stone*
179 AD3d 1287
(3rd Dept) (1/20/20 DOI)
Defendant and co-defendant jointly tried. Error for trial court to admit a statement of the co-defendant that incriminated the defendant. Violation of right to confrontation.
http://nycourts.gov/reporter/3dseries/2020/2020_00323.htm

*People v Casares*
187 AD3d 779
(2nd Dept) (10/8/20 DOI)

Reversal of murder conviction, new trial. The admission of a codefendant's redacted statement to the police violated *Bruton v U.S.* (391 US 123), because the redaction would have revealed that the confession referred to the defendant.
http://nycourts.gov/reporter/3dseries/2020/2020_05520.htm

***Collateral v material proof***

*People v Hemphill*
35 NY3d 1035
(COA) (6/25/20 DOI)
The Court of Appeals upheld a murder conviction. Judge Fahey dissented. An eyewitness gave false testimony in stating that she had not identified a third party in the crime. The defense was not allowed to call a Grand Jury reporter to reveal the truth. In the dissenter's view, the ruling was reversible error. Evidence tending to show that a witness was fabricating testimony was never collateral.
http://www.nycourts.gov/reporter/3dseries/2020/2020_03567.htm

*People v Snow*
185 AD3d 1400
(4th Dept) (7/20/20 DOI)
Error to not allow the defendant to call a witness whose testimony related to the content of the note he presented to the bank employee in the first robbery incident. The note contained language that purportedly did not threaten the immediate use of force—contrary to a witness's testimony.
http://nycourts.gov/reporter/3dseries/2020/2020_04024.htm

***"Complainant" vs. "victim"***

*People v Horton*
181 AD3d 986
(3rd Dept) (3/9/20 DOI)
The complainant should not be referred to as the "victim," since such label dilutes the presumption of innocence. Other jurisdictions have expanded restrictions on the use of the term in additional contexts where the complainant's credibility is in issue.
http://nycourts.gov/reporter/3dseries/2020/2020_01530.htm

***Cross-examination***

*People v Vasquez*
182 AD3d 438
(1st Dept) (4/10/20 DOI)
The defendant was convicted based on his role in the crimes along with three other participants, including Francisco Calderon. While the prosecutor improperly cross-examined Calderon, the error was harmless. Two justices dissented. The cross-examination left the impression that the defendant had participated with Calderon as a getaway driver in a spree of uncharged violent robberies. Such propensity evidence must not be admitted at trial.
http://nycourts.gov/reporter/3dseries/2020/2020_02237.htm

*People v Conner*
184 AD3d 431
(1st Dept) (6/5/20 DOI)
The trial court erred in denying the defendant's request to cross-examine a police sergeant regarding allegations of misconduct in a civil lawsuit, in which it was claimed that the sergeant arrested the plaintiff

without suspicion of criminality and lodged false charges against him. The civil complaint contained allegations bearing on the sergeant's credibility at the instant trial.
http://nycourts.gov/reporter/3dseries/2020/2020_03200.htm

***Demonstration***

*People v Jenkins*
186 AD3d 31
(1st Dept) (7/20/20 DOI)
The defendant contended that the court should have granted a motion for a mistrial, based on the prosecutor becoming an unsworn witness. She made an irrelevant demonstration, showing that the defendant's knife could be opened in ways other than what he described. The argument was preserved for review, despite a three-day delay in raising it. The trial court curative charge was sufficient to prevent prejudice.
http://nycourts.gov/reporter/3dseries/2020/2020_04014.htm

*People v Goldman*, 12/29/20
2020 NY Slip Op 08009
(1st Dept) (12/31/20 DOI)
Trial court properly let a detective testify about the meaning of a gang term, since coded communications are a proper subject of expert testimony; the proof dealt mostly with matters outside jurors' ken; and the defendant was not intimately involved in the investigation.
http://nycourts.gov/reporter/3dseries/2020/2020_08009.htm

***Frye hearing***

*People v Williams*
2020 NY Slip Op 02123
(COA) (4/3/20 DOI)
The trial court abused its discretion as a matter of law in refusing to hold a *Frye* hearing to assess the general acceptance within the scientific community of Low Copy Number (LCN) DNA evidence and the Forensic Statistical Tool (FST) used by the Office of the Chief Medical Examiner of NYC. Judicial caution should govern the admission of developing scientific evidence in criminal proceedings. Scientific community approval—not judicial fiat—was the litmus test. However, *sound* prior judicial opinions could validate a trial court's decision to admit evidence without a *Frye* inquiry.
http://www.nycourts.gov/reporter/3dseries/2020/2020_02123.htm

*People v Foster-Bey*
2020 NY Slip Op 02124
(COA) (4/10/20 DOI)
Standard DNA analysis could not connect this defendant to the subject gun, so the People sought to introduce evidence based on LCN typing and FST analysis. The trial court denied a motion to preclude evidence, without a *Frye* hearing. The defense cited persuasive scholarly writing. The motion court relied on flawed trial-court decisions. But the error was harmless.
http://www.nycourts.gov/reporter/3dseries/2020/2020_02124.htm

*People v Pelt*
184 AD3d 672
(2nd Dept) (6/12/20 DOI)
Prior to trial, the defendant moved to preclude evidence regarding DNA testing derived from the use of the FST or for a *Frye* hearing. Supreme Court denied the motion. The trial court erred in not holding a hearing.

There was uncertainty regarding whether the FST had been generally accepted in the relevant scientific community at the time of the motion.
http://nycourts.gov/reporter/3dseries/2020/2020_03250.htm

***Hearsay***

*People v Thelismond*
180 AD3d 1076
(2nd Dept) (2/28/20 DOI)
Reversible error in admitting recording of anonymous 911 call. The caller said somebody got shot, but not that the caller saw the shooting. Neither excited utterance nor present sense impression exception applied.
http://nycourts.gov/reporter/3dseries/2020/2020_01368.htm

***Mental health records***

*People v Butler*
184 AD3d 704
(2nd Dept) (6/19/20 DOI)
Reversal and a new trial. Before trial, the defendant requested copies of the complainant's mental health records, relating to her counseling after disclosure of the purported abuse. Following in camera review, Supreme Court redacted most of the records, including arguably exculpatory material.
http://nycourts.gov/reporter/3dseries/2020/2020_03374.htm

***Molineux***

*People v Ramirez*
180 AD3d 811
(2nd Dept) (2/24/20 DOI)
An erroneous *Molineux* ruling occurred. It was not relevant that the defendant allegedly resisted arrest six months following the incident in question after violating an order of protection.
http://nycourts.gov/reporter/3dseries/2020/2020_01087.htm

*People v Huertas*
186 AD3d 731
(2nd Dept) (8/21/20 DOI)
Murder conviction sustained. Dissenters decried *Molineux* ruling. The prosecutor sought to cross-examine the defendant as to underlying facts of prior gun-related convictions, if he testified that instant shooting was an accident. The court granted the motion and denied the defendant's application to introduce his written statement regarding the claimed accident. The dissenters observed that, if the defendant had testified consistent with his statement to police, proof concerning the underlying facts of his decades-old gun-related convictions had no relevance to any material issue. Therefore, such evidence should have been excluded.
http://nycourts.gov/reporter/3dseries/2020/2020_04577.htm

*People v Callahan*
186 AD3d 943
(3rd Dept) (8/21/20 DOI)
Murder conviction reversed in interest of justice. County Court granted the People's application to offer proof of *verbal and emotional* abuse by the defendant of the victim, but a prosecution witness testified about *physical* abuse. The testimony was in part hearsay, it exceeded the scope of the *Molineux* ruling, and it deprived the defendant of a fair trial.
http://nycourts.gov/reporter/3dseries/2020/2020_04618.htm

*People v Duncan*
188 AD3d 1249
(2nd Dept) (11/25/20 DOI)
New trial granted. Trial court erred in permitting the People to present *Molineux* evidence regarding the defendant's prior convictions for robbery and sexual assault. The similarities between those crimes and the instant offense were not sufficiently unique or unusual to establish a distinctive M.O.
http://nycourts.gov/reporter/3dseries/2020/2020_07090.htm

*People v Holtslander*
2020 NY Slip Op 07250
(3rd Dept) (12/3/20 DOI)
Dismissal of duplicitous charges after trial was too late. Error to deny pretrial motion. Jury heard proof about 12 incidents as to the dismissed counts. Further, County Court wrongly permitted evidence of uncharged crimes; prejudicial nature of *Molineux* proof outweighed probative value.
http://nycourts.gov/reporter/3dseries/2020/2020_07250.htm

***Opinion***

*People v Urena*
183 AD3d 534
(1st Dept) (5/29/20 DOI)
Error to receive detective's opinion testimony that object the defendant appeared to be holding in surveillance videos was a knife. But no reasonable probability that the error contributed to the verdict.
http://nycourts.gov/reporter/3dseries/2020/2020_03073.htm

*People v Salone*
188 AD3d 1742
(4th Dept) (11/23/20 DOI)
The trial court erred in allowing: (1) a police officer to opine that a homicide was committed, since that usurped the jury's fact-finding function; and (2) testimony about the victim's personal background, which was immaterial to any issue at trial.
http://nycourts.gov/reporter/3dseries/2020/2020_06903.htm

*People v Goldman*
188 AD3d 610
(1st Dept) (11/25/20 DOI)
The trial court properly permitted a police detective to testify, as an expert on gang language, regarding the meaning of an expression allegedly uttered by the defendant during the relevant incident. The interpretation of coded communications is a proper subject of expert opinion.
http://nycourts.gov/reporter/3dseries/2020/2020_06965.htm

***Right to confrontation: DNA***

*People v Tsintzelis*
35 NY3d 925
(COA) (3/27/20 DOI)
The admission of DNA lab reports, through the testimony of an analyst who did not perform or supervise the DNA testing, violated the defendants' confrontation clause rights. The errors were not harmless.
http://www.nycourts.gov/reporter/3dseries/2020/2020_02026.htm
*People v Butler*
183 AD3d 665

(2nd Dept) (5/8/20 DOI)
When confronted with testimonial DNA evidence at trial, a defendant is entitled to cross-examine analyst who witnessed, performed or supervised generation of the defendant's DNA profile or used her independent analysis on raw data. The People failed to establish that the analyst who testified played such a role.
http://nycourts.gov/reporter/3dseries/2020/2020_02676.htm

***Right to silence***

*People v Chapman*
182 AD3d 862
(3rd Dept) (4/24/20 DOI)
County Court erred in admitting a redacted video of the defendant's police interrogation. The video consisted of police recounting their case against the defendant and being met largely with silence from a dismissive defendant. The evidence of selective silence lacked probative value and was highly prejudicial.
http://nycourts.gov/reporter/3dseries/2020/2020_02330.htm

***Same weapon***

*People v Deverow*
180 AD3d 1064
(2nd Dept) (2/28/20 DOI)
Error to admit revolver recovered from underneath a vehicle located several blocks from crime scene. Proof was insufficient to provide reasonable assurances that the revolver was the weapon used in the shooting.
http://nycourts.gov/reporter/3dseries/2020/2020_01359.htm

***Sandoval***

*People v Sylvester*
2020 NY Slip Op 06891
(4th Dept) (11/23/20 DOI)
Error to permit evidence of prior uncharged shooting under theory that defense counsel opened the door by cross-examination of law enforcement witness. The cross did not create a misleading impression warranting further explanation. In any event, it was error to permit the People to supplement their direct case with four additional witnesses, since such proof far exceeded that necessary to confirm the salient facts.
http://nycourts.gov/reporter/3dseries/2020/2020_06891.htm

*People v Lowe*
2020 NY Slip Op 07918
(2nd Dept) (12/24/20 DOI)
In *Sandoval* ruling, court should not have held that prosecutor could cross-examine the defendant about facts underlying prior convictions. Prejudice outweighed probative value. But error was harmless.
http://nycourts.gov/reporter/3dseries/2020/2020_07918.htm

*People v Konneh*
2020 NY Slip Op 52524
(1st Dept) (12/24/20 DOI)
Reversal since sua sponte, trial court raised and considered recent prior conviction for same offense, and there were many gaps in the transcript due to inaudibility.
http://nycourts.gov/reporter/3dseries/2020/2020_51524.htm

**Ex post facto**

*People v Torres*
179 AD3d 543
(1st Dept) (1/24/20 DOI)
Conviction of 2nd degree incest violated Ex Post Facto Clause, because it was based on conduct that occurred before statute became effective.
http://nycourts.gov/reporter/3dseries/2020/2020_00480.htm

**Ineffective assistance**

*People v Maffei*
35 NY3d 264
(COA) (5/8/20 DOI)
The defendant contended that he was denied effective assistance based on counsel's failure to challenge a prospective juror. Finding that a CPL 440.10 motion was needed to present such argument, the Court of Appeals upheld a conviction for 2nd degree murder. Judge Rivera dissented. A single error may qualify as IAC. Jury selection was a strategic decision solely within the province of defense counsel. The majority had, in effect, adopted a per se rule that IAC claims must be considered via a 440 motion.
http://www.nycourts.gov/reporter/3dseries/2020/2020_02680.htm

*People v Sonds*
183 AD3d 919
(2nd Dept) (5/29/20 DOI)
The defendant pro se made CPL 330.30 motion. Counsel said that he would not adopt it because it was not "viable," and presented matters not "for the purview of the court." Supreme Court declined to review the motion. By taking an adverse position, counsel deprived him of effective assistance. Remitted.
http://nycourts.gov/reporter/3dseries/2020/2020_03036.htm

*People v Allen*
2020 NY Slip Op 07302
(1st Dept) (12/3/20 DOI)
Ineffective assistance when defense counsel deferred to defendant as to whether to seek a jury charge on a lesser included offense. But error was harmless.
http://nycourts.gov/reporter/3dseries/2020/2020_07302.htm

*People v Lakhani*
2020 NY Slip Op 20342
(App Term, 2nd Dept) (12/24/20 DOI)
Ineffective assistance. Fair trial right violated. Defense counsel elicited damaging expert and failed to object to burden-shifting questions and summation comments by prosecutor invoked such questions.
http://nycourts.gov/reporter/3dseries/2020/2020_20342.htm

**Intrusive trial judge**

*People v Savillo*
185 AD3d 840
(2nd Dept) (7/20/20 DOI)
Jury instruction error. Reversal. New trial was to be held before a different justice, because the instant justice extensively questioned witnesses and created impression court was an advocate for the prosecution.
http://nycourts.gov/reporter/3dseries/2020/2020_03928.htm

**Jury charge**

*People v Spencer*
181 AD3d 1257
(4th Dept) (3/16/20 DOI)
Assault count was based on legally insufficient evidence. The People did not object when their theory of **transferred intent** was not reflected in the jury instruction on the assault charges. Appellate review of sufficiency was limited to the instruction as given without objection; and there was insufficient evidence that the defendant knew that either victim was present or intended any harm to them.
http://nycourts.gov/reporter/3dseries/2020/2020_01823.htm

*People v Swem*
182 AD3d 1050
(4th Dept) (4/27/20 DOI)
County Court erred in denying the defendant's request for a **circumstantial evidence** instruction. At a crowded house party, there were multiple physical fights. The victim was involved in fights with at least two others; was stabbed five times; and had one wound that was 5" deep. The defendant was seen fighting with the victim, but not holding a knife, and no blood was found in the room where they fought.
http://nycourts.gov/reporter/3dseries/2020/2020_02435.htm

*People v Lee*
183 AD3d 1183
(3rd Dept) (5/29/20 DOI)
The indictment charged that the defendant acted with the **intent to cause the death** of the decedent. On appeal, he urged that the court gave an improper supplemental instruction. When the jury asked if the murder charge was specific to the killing of the decedent, the court said yes. The jury then asked if intent could go to the fact that the defendant intentionally fired the gun at whomever walked out the door, and the court said yes. The People were not bound by the indictment, because the victim's identity was not an element of the crime. The supplemental instruction did not impermissibly alter the theory of the prosecution.
http://nycourts.gov/reporter/3dseries/2020/2020_03049.htm

*People v Sabirov*
184 AD3d 714
(2nd Dept) (6/19/20 DOI)
An **intoxication** instruction should have been given. The complainants testified that the defendant did not appear drunk at the time of the incident, and the arresting officer did not recall how the defendant appeared upon arrest. However, the officer's notes and the defendant's testimony supported the requested charge.
http://nycourts.gov/reporter/3dseries/2020/2020_03378.htm

*People v Savillo*
185 AD3d 840
(2nd Dept) (7/20/20 DOI)
After Supreme Court instructed the jury on **justification**, the defendant was found not guilty of the 1st degree assault and guilty of 2nd degree assault and another crime. The jury failed to convey that, if the jury found the defendant not guilty of assault 1st based on justification, it should cease deliberations.
http://nycourts.gov/reporter/3dseries/2020/2020_03928.htm

*People v Macon*
186 AD3d 430
(1st Dept) (8/14/20 DOI)

The defendant challenged the court's jury instructions and verdict sheet on the ground that they failed to convey that an acquittal on the top count, based on a **justification** defense, necessitated an acquittal of the lesser count. The court declined to exercise interest of justice jurisdiction to review the unpreserved claims.
http://nycourts.gov/reporter/3dseries/2020/2020_04519.htm

*People v Sanchez*
186 AD3d 626
(2nd Dept) (8/14/20 DOI)
The Second Department reversed and ordered a new trial. The charges arose from two incidents involving the defendant's former girlfriend—the complainant. In the second incident, the complainant and her date were returning to her car, when the defendant allegedly jumped out at them. Supreme Court erred in denying the defendant's application for a **missing witness** charge as to the complainant's companion. The defendant met his prima facie burden of showing that the missing witness was believed to be knowledgeable about a material issue pending in the case; and he was expected to testify favorably to the People. The People failed to rebut the showing and to establish that the complainant's date was unavailable. Further, the People did not establish that the complainant's companion was not under their control.
http://nycourts.gov/reporter/3dseries/2020/2020_04494.htm

*People v McKinnon*
186 AD3d 1533
(2nd Dept) (9/25/20 DOI)
A 3rd degree **burglary** conviction was against the weight of evidence. The defendant used a public entrance to a self-storage facility during business hours and then entered a non-public area. As to the jury charge, the People did not object to an omission from the definition of "enter or remain unlawfully"; the trial court did not instruct the jury that a license or privilege to enter a building partly open to the public does not allow for entry into an area not open to the public. The People were bound to satisfy the heavier burden.
http://nycourts.gov/reporter/3dseries/2020/2020_05056.htm

*People v Banyan*
187 AD3d 643
(1st Dept) (10/29/20 DOI)
New trial. The trial court erred in denying the defense request for a **justification** charge as to the defendant's kicking and flailing when officers tried to subdue and arrest him. Penal Law § 35.27 permitted justification claims based on excessive police force.
http://nycourts.gov/reporter/3dseries/2020/2020_06060.htm

*People v J.L.*
2020 NY Slip Op 07663
(COA) (12/18/20 DOI)
The trial court's denial of the defendant's request for a jury instruction on **voluntary possession,** in connection with a 3rd degree CPW count, constituted reversible error requiring a new trial. There was a reasonable view of the evidence that, to the extent the defendant possessed the weapon at all, such possession was not voluntary.
http://www.nycourts.gov/reporter/3dseries/2020/2020_07663.htm

*People v Williams*
2020 NY Slip Op 07664
(COA) (12/18/20 DOI)
The defendant was not entitled to a jury charge regarding **temporary and lawful possession** and was properly convicted for unlawfully possessing a firearm used in a shooting. He admitted that he accepted

possession of the firearm when not facing any imminent threat to his safety. In anticipation of a potential confrontation, he then chose to retain possession of the firearm.
http://www.nycourts.gov/reporter/3dseries/2020/2020_07664.htm

**Multiplicitous counts**

*People v O'Brien*
186 AD3d 1406
(2nd Dept) (9/18/20 DOI)
In the interest of justice, the appellate court found that three of the four counts of vehicular manslaughter were multiplicitous; the People were only required to prove that the defendant violated one subdivision of VTL § 1192 to prove his guilt under Penal Law § 125.12 (1).
http://nycourts.gov/reporter/3dseries/2020/2020_04971.htm

***O'Rama* violations**

*People v Kluge*
180 AD3d 705
(2nd Dept) (2/10/20 DOI)
Mode of proceedings errors required reversal. The defendant was not present when deliberating juror expressed concerns about pressure on jury. As to ensuing jury note, court failed to comply with CPL 310.30.
http://nycourts.gov/reporter/3dseries/2020/2020_00878.htm

*People v Petrizzo*
184 AD3d 673
(2nd Dept) (6/12/20 DOI)
Supreme Court failed to comply with CPL 310.30 and *People v O'Rama*, 78 NY2d 270. In a note, the jury asked about the elements of resisting arrest. Twice when reading the note, Supreme Court substituted the word "initially" in place of "intentionally."
http://nycourts.gov/reporter/3dseries/2020/2020_03251.htm

*People v Grant*
187 AD3d 1043
(2nd Dept) (10/22/20 DOI)
Writ of error coram nobis granted, resulting in reversal of murder conviction and new trial. Court did not read substantive jury note to defendant or give counsel a chance to respond. Since the court did not comply with its core CPL 310.30 duties, reversal was mandated. Given the *O'Rama* violation, there could be no valid reason for counsel's failure to contend that a mode of proceedings error occurred.
http://nycourts.gov/reporter/3dseries/2020/2020_05922.htm

*People v Powell*
188 AD3d 1266
(2nd Dept) (11/25/20 DOI)
Grant of application for a writ of error coram nobis. New trial ordered. Supreme Court failed to comply with CPL 310.30 and *People v O'Rama* in handling jury notes. No strategic decision could explain appellate counsel's failure to make the dispositive argument on appeal.
http://nycourts.gov/reporter/3dseries/2020/2020_07102.htm

**Prospective jurors**

*People v Maffei*
35 NY3d 264
(COA) (5/8/20 DOI)
The defendant contended that he was denied effective assistance based on counsel's failure to challenge a prospective juror. Finding that a CPL 440.10 motion was needed to present such argument, the Court of Appeals upheld a conviction for 2nd degree murder. Judge Rivera dissented. A single error may qualify as IAC. Jury selection was a strategic decision solely within the province of defense counsel. The majority had, in effect, adopted a per se rule that IAC claims must be considered via a 440 motion.
http://www.nycourts.gov/reporter/3dseries/2020/2020_02680.htm

*People v Laverpool*
185 AD3d 541
(1st Dept) (7/3/20 DOI)
New trial. The trial court erred in denying a challenge for cause to a panelist who said he could not be "fully fair" if the defendant did not testify and "defend himself." No unequivocal assurances. The panelist said that, if the defendant did not take the stand, he would "not hold it against him, but—I don't know."
http://nycourts.gov/reporter/3dseries/2020/2020_03745.htm

*People v Cobb*
185 AD3d 1432
(4th Dept) (7/20/20 DOI)
Error to deny challenge for cause. Prospective juror said that her friendship with a prosecution witness might affect her ability to be fair and impartial, and did not give an unequivocal assurance of impartiality.
http://nycourts.gov/reporter/3dseries/2020/2020_04055.htm

*People v McKenzie-Smith*
187 AD3d 1668
(4th Dept) (10/12/20 DOI)
New murder trial. *Antommarchi* violation. At the outset of jury selection, there was no discussion of the defendant's right to be present during sidebar conferences. He did not waive that right during round one, counsel used a peremptory challenge after a sidebar conference at which the defendant was not present.
http://nycourts.gov/reporter/3dseries/2020/2020_05653.htm

**Quantum of evidence**

***Assault***

*People v Spencer*
181 AD3d 1257
(4th Dept) (3/16/20 DOI)
Assault count was based on legally insufficient evidence. The People did not object when their theory of transferred intent was not reflected in the jury instruction on the assault charges. Appellate review of sufficiency was limited to the instruction as given without objection; and there was insufficient evidence that the defendant knew that either victim was present or intended any harm to them.
http://nycourts.gov/reporter/3dseries/2020/2020_01823.htm

*People v Verneus*
184 AD3d 678
(2nd Dept) (6/12/20 DOI)

Assault and reckless endangerment convictions were reduced in connection with injuries sustained by the defendant's infant foster child, who had serious burns on 12% of his body. The defendant said that the child was accidently scalded while unattended in the bathtub, and she then treated him with ointment and bandages. People failed to prove depraved indifference based on her failure to obtain proper medical care.
http://nycourts.gov/reporter/3dseries/2020/2020_03256.htm

*People v Desius*
188 AD3d 1626
(4th Dept) (11/13/20 DOI)
Conviction of 2nd degree assault reversed, count dismissed, because the evidence was legally insufficient. The defendant punched the victim in the face, causing him to fall and hit his head on the concrete sidewalk. The blows inflicted did not establish that the defendant consciously disregarded a substantial and unjustifiable risk that the victim's head would have contact with the concrete.
http://nycourts.gov/reporter/3dseries/2020/2020_06611.htm

***Attempted escape***

*People v Gonzalez*
183 AD3d 663
(2nd Dept) (5/8/20 DOI)
The defendant's contention that the evidence was legally insufficient to support the attempted escape conviction was unpreserved, but reached in the interest of justice. Count dismissed. The evidence did not establish that the defendant was under arrest when he allegedly attempted to open the door of the police car in which he was being detained.
http://nycourts.gov/reporter/3dseries/2020/2020_02675.htm

***Attempted murder***

*People v Lendof-Gonzalez*
2020 NY Slip Op 06940
(COA) (11/25/20 DOI)
A fellow jail inmate agreed with the defendant's plan to kill his wife and mother-in-law, but did nothing to effectuate the crimes, instead contacting and aiding authorities. The Fourth Department found insufficient evidence of attempted murder. There was no proof that this defendant and his feigned confederate took any actual step, beyond mere conversations and planning, toward achieving the plan.
http://www.nycourts.gov/reporter/3dseries/2020/2020_06940.htm

*People v Walker*
188 AD3d 1274
(2nd Dept) (11/25/20)
Attempted murder conviction was against the weight of evidence. The conviction was based on testimony of the eyewitness to a murder, who stated that after his brother was shot, the witness moved toward the defendant, who shot at him three times but missed.
http://nycourts.gov/reporter/3dseries/2020/2020_07110.htm

***Attempted rape***

*People v Hiedeman*
2020 NY Slip Op 07954
(3rd Dept) (12/24/20 DOI)

Dismissal of attempted 2nd degree rape and related crimes. Proof did not establish that the defendant came dangerously near having sexual contact with the purported victim. He discussed contemplated sexual contact with teen and drove to designated spot, but conduct did not go beyond preparation.
http://nycourts.gov/reporter/3dseries/2020/2020_07954.htm

***Burglary***

*People v McKinnon*
186 AD3d 1533
(2nd Dept) (9/25/20 DOI)
A 3rd degree burglary conviction was against the weight of evidence. The defendant used a public entrance to a self-storage facility during business hours and then entered a non-public area. As to the jury charge, the People did not object to an omission from the definition of "enter or remain unlawfully"; the trial court did not instruct the jury that a license or privilege to enter a building partly open to the public does not allow for entry into an area not open to the public. The People were bound to satisfy the heavier burden.
http://nycourts.gov/reporter/3dseries/2020/2020_05056.htm

***Burglar tools, possession of***

*People v Clarke*
188 AD3d 468
(1st Dept) (11/12/20 DOI)
Vacatur of conviction for possession of burglar's tools conviction as against the weight of evidence, finding that the proof did not warrant the conclusion that the "object at issue" met the statutory definition.
http://nycourts.gov/reporter/3dseries/2020/2020_06401.htm

***Criminal contempt 1***

*People v Crittenden*
188 AD3d 1739
(4th Dept) (11/20/20 DOI)
Conviction of 1st degree criminal contempt reduced to 2nd degree offense. No proof that the defendant intentionally violated that part of the protective order that required him to stay away from the protected person, who was supposed to be on a week-long trip away from his house when the defendant arrived there.
http://nycourts.gov/reporter/3dseries/2020/2020_06901.htm

*People v Brown*
2020 NY Slip Op 08011
(1st Dept) (12/31/20 DOI)
The contempt conviction was valid. After the order of protection was issued and before its violation, *People v Golb* (23 NY3d 455) declared unconstitutional Penal Law § 240.30 (1) (a). The instant order was voidable.
http://nycourts.gov/reporter/3dseries/2020/2020_08011.htm

***Criminally negligent homicide***

*People v Derival*
181 AD3d 918
(2nd Dept) (3/27/20 DOI)
Indictment for criminally negligent homicide dismissed since verdict was against the weight of the evidence. The case arose out of collisions among three vehicles. The People did not establish that the

defendant failed to perceive a substantial and unjustifiable risk, thus causing the death of his passenger. No single consistent version of the accident emerged. Even the People's experts were at odds with each other.
http://nycourts.gov/reporter/3dseries/2020/2020_02072.htm

*People v Acevedo*
187 AD3d 1030
(2nd Dept) (10/22/20 DOI)
Guilty verdicts of manslaughter 2/criminally negligent homicide were not supported by legally sufficient evidence. The People did not show that defendant engaged in affirmative act, aside from speeding.
http://nycourts.gov/reporter/3dseries/2020/2020_05909.htm

*People v Pinnock*
188 AD3d 1708
(4th Dept) (11/23/20 DOI)
The verdict of criminally negligent homicide was against the weight of evidence. The severity of mechanical problems with the defendant's truck were not readily apparent. Even if the defendant had realized that the tire might come off, he could not have foreseen the ensuing freak accident—the tire coming to rest in the road, and causing a truck to overturn and fall on a car, killing its driver.
http://nycourts.gov/reporter/3dseries/2020/2020_06884.htm

***DWI***

*People v Bradbury*
183 AD3d 1257
(4th Dept) (5/4/20 DOI)
People failed to establish that the defendant operated car. Conviction upon jury verdict of two counts of felony DWI reversed. Passing motorist saw the defendant off the road, and the defendant said, "Don't call 911," but motorist did. The defendant said the car had been driven by a man she had met at a bar the night before. She was intoxicated. Story was plausible. Request that the motorist not call 911 was weak evidence.
http://nycourts.gov/reporter/3dseries/2020/2020_02577.htm

***Falsely reporting a crime***

*People v Burwell*
183 AD3d 173
(3rd Dept) (4/10/20 DOI)
The defendant was charged with knowingly circulating via social media a false allegation that she was the victim of a racially motivated assault. The Third Department dismissed that count for falsely reporting a crime. As applied here, Penal Law § 240.50 (1) was unconstitutionally broad in criminalizing the false speech. The Twitter storm that ensued after the defendant posted false tweets did not cause "public alarm."
http://nycourts.gov/reporter/3dseries/2020/2020_02205.htm

***Firearm possession***

*People v Branch*
186 AD3d 1705
(2nd Dept) (10/1/20 DOI)
Firearm convictions based on constructive possession were against the weight of evidence. The defendant resided in the third bedroom of the searched premises. His brother had resided in the first bedroom—where

the weapons were found—until his death. There was testimony that the door to the first bedroom remained locked, and no proof that the defendant frequented the first bedroom, had a key, or kept his things there.
http://nycourts.gov/reporter/3dseries/2020/2020_05220.htm

***Forged instrument***

*People v Johnson*
183 AD3d 401
(1st Dept) (5/8/20 DOI)
The evidence was legally insufficient to support the conviction of 2nd degree criminal possession of forged instrument. The People failed to prove that the defendant knew that four Rangers tickets were counterfeit.
http://nycourts.gov/reporter/3dseries/2020/2020_02708.htm

*People v Filan*
2020 NY Slip Op 08078
(2nd Dept) (12/31/20 DOI)
Counts for 2nd degree forgery had to be vacated. An individual may be charged with both forgery and criminal possession of forged instrument, but cannot be convicted of both as to same forged instrument.
http://nycourts.gov/reporter/3dseries/2020/2020_08078.htm

***Justification defense***

*People v Allen*
183 AD3d 1284
(4th Dept) (5/4/20 DOI)
In manslaughter case, dissenter opined People failed to disprove the justification defense beyond a reasonable doubt. The defendant called 911 and said her boyfriend tried to kill her. There was blood on her and everywhere in house. The defendant had bruises and cuts. She told paramedic that the decedent tried to kill her and told police he choked her. A neighbor heard someone say, "Don't kill me."
http://nycourts.gov/reporter/3dseries/2020/2020_02595.htm

***Larceny***

*People v Rivera*
180 AD3d 989
(2nd Dept) (2/24/20 DOI)
Conviction reduced from grand larceny 3rd to 4th degree. As to some of items, the only evidence of the value was the complainant's testimony regarding the purchase price.
http://nycourts.gov/reporter/3dseries/2020/2020_01192.htm

*People v Bravo*
188 AD3d 1086
(2nd Dept) (11/20/20 DOI)
Reversal of conviction based on a theory of larceny by false promise. The verdict was against the weight of evidence; the proof did not establish that the defendant obtained the funds by a false representation and with the requisite intent.
http://nycourts.gov/reporter/3dseries/2020/2020_06804.htm

***Luring child***

*People v Ringrose*
186 AD3d 1137
(4th Dept) (8/21/20 DOI)
Luring child not proven. At trial, the People argued that the defendant induced the victims to enter his vehicle by making numerous false statements to them before he met them in person and by flattering them about their appearances. However, the defendant's utterances, made well before rendezvous plans, were not designed to persuade the victims to enter his vehicle.
http://nycourts.gov/reporter/3dseries/2020/2020_04719.htm

***Manslaughter***

*People v Acevedo*
187 AD3d 1030
(2nd Dept) (10/22/20 DOI)
Guilty verdicts of manslaughter 2/criminally negligent homicide were not supported by legally sufficient evidence. The People did not show that defendant engaged in affirmative act, aside from speeding.
http://nycourts.gov/reporter/3dseries/2020/2020_05909.htm

*People v Caden N.*
189 AD3d 84
(3rd Dept) (10/22/20 DOI)
The defendant was adjudicated a YO for having committed acts constituting 1st degree vehicular manslaughter. Affirmed. As to causation, the People showed that, by abruptly turning left in front of a motorcycle, the defendant set in motion events that led to the deaths of that vehicle's driver and passenger.
http://nycourts.gov/reporter/3dseries/2020/2020_05979.htm

***Menacing***

*People v Thomas*
184 AD3d 1118
(4th Dept) (6/15/20 DOI)
The guilty verdict as to 1st degree reckless endangerment and menacing a police officer or peace officer was against the weight of evidence, where the People's evidence consisted of one officer's testimony that, while pursuing the defendant on foot, he heard a gunshot from about 10' feet away, and a second officer's testimony that he heard a shot from his northwest and believed that the defendant had fired at them.
http://nycourts.gov/reporter/3dseries/2020/2020_03318.htm

*People v Abellard*
2020 NY Slip Op 08072
(2nd Dept) (12/31/20 DOI)
Menacing conviction vacated. The victim testified that the defendant was not holding the knife in a threatening manner, and the evidence did not show that he placed the victim in fear of physical injury.
http://nycourts.gov/reporter/3dseries/2020/2020_08072.htm

***Perjury***

*People v Talmadge*
186 AD3d 1780
(3rd Dept) (9/18/20 DOI)

Perjury conviction upheld. The defendant's false testimony about consuming alcohol while possessing a firearm was material to the pistol permit reinstatement proceeding.
http://nycourts.gov/reporter/3dseries/2020/2020_05000.htm

***Physical injury***

*People v Harris*
186 AD3d 907
(3rd Dept) (8/7/20 DOI)
The victim's two facial scars did not constitute a serious physical injury, so as to support the conviction for 1st degree assault. Although the victim did display scars to the jury, the People failed to make a contemporaneous record of what the jury observed. There was no indication that the small facial lacerations produced jagged or "unusually disturbing" scars. Reduction to attempted 1st degree assault.
http://nycourts.gov/reporter/3dseries/2020/2020_04431.htm

*People v Jhagroo*
186 AD3d 741
(2nd Dept) (8/21/20 DOI)
Assault conviction vacated. Legally insufficient evidence of physical injury. Victim said the defendant pushed him to the ground and slapped him, and the complainant felt "a lot of pain." No evidence corroborated the subjective description of pain. No testimony addressed the duration of pain; whether the shove or slaps left visible bruising, swelling; whether the vic sought medical treatment or missed work.
http://nycourts.gov/reporter/3dseries/2020/2020_04580.htm

*People v Tactikos*
187 AD3d 800
(2nd Dept) (10/8/20 DOI)
The defendant was convicted of 2nd degree robbery and 2nd degree assault. The Second Department reduced both convictions to 3rd degree offenses, because the weight of evidence did not support a finding of physical injury. Victim, who declined to go to the hospital, had difficulty swallowing and sore throat for few days.
http://nycourts.gov/reporter/3dseries/2020/2020_05535.htm

*People v Smith*
187 AD3d 944
(2nd Dept) (10/16/20 DOI)
Legally insufficient evidence to establish physical injury. The complainant said that she had a cut on her neck and scratches on her wrist and felt a little sore. Convictions reduced.
http://nycourts.gov/reporter/3dseries/2020/2020_05782.htm

*People v Bernazard*
188 AD3d 1289
(2nd Dept) (11/25/20 DOI)
Proof was legally insufficient to prove physical injury. The victim suffered a minor injury, described as a redness or bruise on child's cheek or slight swelling under eye, treated with a cold pack.
http://nycourts.gov/reporter/3dseries/2020/2020_07083.htm

***Promoting prison contraband***

*People v Simmons*
184 AD3d 326
(4th Dept) (6/15/20 DOI)

A conviction of 1st degree promoting prison contraband was reduced to a 2nd degree offense and remitted for sentencing. There legally insufficient evidence that three baggies of cocaine found on the defendant were dangerous contraband. Though perhaps unhealthy, cocaine was not inherently dangerous.
http://nycourts.gov/reporter/3dseries/2020/2020_03350.htm

***Reckless endangerment***

*People v Verneus*
184 AD3d 678
(2nd Dept) (6/12/20 DOI)
Assault and reckless endangerment convictions were reduced in connection with injuries sustained by the defendant's infant foster child, who had serious burns on 12% of his body. The defendant said that the child was accidently scalded while unattended in the bathtub, and she then treated him with ointment and bandages. People failed to prove depraved indifference based on her failure to obtain proper medical care.
http://nycourts.gov/reporter/3dseries/2020/2020_03256.htm

*People v Thomas*
184 AD3d 1118
(4th Dept) (6/15/20 DOI)
The guilty verdict as to 1st degree reckless endangerment and menacing a police officer or peace officer was against the weight of evidence, where the People's evidence consisted of one officer's testimony that, while pursuing the defendant on foot, he heard a gunshot from about 10' feet away, and a second officer's testimony that he heard a shot from his northwest and believed that the defendant had fired at them.
http://nycourts.gov/reporter/3dseries/2020/2020_03318.htm

***Robbery***

*People v James*
179 AD3d 1095
(2nd Dept) (2/3/20 DOI)
Robbery verdict was against weight of evidence where complainant struggled to recall details of crime, and her description of perpetrator did not match the defendant's appearance.
http://nycourts.gov/reporter/3dseries/2020/2020_00615.htm

*People v Mann*
184 AD3d 670
(2nd Dept) (6/12/20 DOI)
Verdict against weight e. The complainant described perpetrator as balding with no facial hair. The participants in the lineup wore hats to conceal their hairlines, but the defendant's significant facial hair was visible. Although shirts of participants were covered, the D's shoulders were visible. He was the only participant wearing yellow shirt. The victim said she recognized the shirt.
http://nycourts.gov/reporter/3dseries/2020/2020_03249.htm

*People v Miller*
2020 NY Slip Op 06667
(4th Dept) (11/13/20 DOI)
Conviction of 1st degree robbery reversed as against the weight of evidence. Eyewitness ID was unreliable: show-up ID was suggestive; gun was displayed, causing stress to victim; the incident was brief; lighting was dim. The defendant was found standing in a driveway half a mile from the crime scene seven minutes after the crime occurred, wearing clothing different from that worn by the gunman.
http://nycourts.gov/reporter/3dseries/2020/2020_06667.htm

***Serious physical injury***

*People v Clark*
2020 NY Slip Op 07911
(2nd Dept) (12/24/20 DOI)
2nd degree assault dismissed The People did not produce medical proof to demonstrate that victim suffered requisite protracted impairment of the function of a bodily organ so as to show serious physical injury.
http://nycourts.gov/reporter/3dseries/2020/2020_07911.htm

***Sex abuse***

*People v Kassebaum*
187 AD3d 786
(2nd Dept) (10/8/20 DOI)
The evidence was not legally sufficient to support the conviction of 3rd degree sexual abuse. The video recording of the incident did not establish that the contact between the defendant and the complainant was sexual; and the ambiguity was not clarified by the complainant's testimony.
http://nycourts.gov/reporter/3dseries/2020/2020_05529.htm

***Sex trafficking***

*People v Hayes*
180 AD3d 423
(1st Dept) (2/10/20 DOI)
No showing that the defendant used force to induce the alleged victim to engage in prostitution. Dismissal.
http://nycourts.gov/reporter/3dseries/2020/2020_00832.htm

***Tampering***

*People v Zachary*
179 AD3d 722
(2nd Dept) (1/13/20 DOI)
Proof of tampering with physical evidence was legally insufficient, where police were in pursuit for a violation of the open-container law when the defendant discarded a plastic bag containing pot.
http://nycourts.gov/reporter/3dseries/2020/2020_00165.htm

*People v DiRoma*
2020 NY Slip Op 07817
(4th Dept) (12/24/20 DOI)
Dismissal of 3rd degree tampering with a witness. After assaulting the victim, the defendant left voicemails threatening violence if she pressed charges. Since he had not yet been arrested, the victim was not "about to be called as a witness in a criminal proceeding."
http://nycourts.gov/reporter/3dseries/2020/2020_07817.htm

***Vehicular homicide***

*People v Whilby*
188 AD3d 425
(1st Dept) (11/5/20 DOI)
In vehicular homicide case, trial court properly precluded the defendant from presenting expert testimony to establish that, if the victim had been wearing a seatbelt, he would have suffered minor injuries. The proof

was irrelevant. The People only needed to prove that the defendant's action forged a link in the chain of causes that brought about the death and that the fatal result was reasonably foreseeable.
http://nycourts.gov/reporter/3dseries/2020/2020_06361.htm

**Right to be present**

*People v Antoine*
2020 NY Slip Op 07907
(2nd Dept) (12/24/20 DOI)
Reversal. After the verdict was read, the defendant had an outburst. The trial court told court officers to remove him from the courtroom, and they did so after more outbursts. The court erred in not first warning the defendant that he would be taken out of the courtroom if his disruptions continued.
http://nycourts.gov/reporter/3dseries/2020/2020_07907.htm

**Right to present defense**

*People v Butts*
184 AD3d 660
(2nd Dept) (6/12/20 DOI)
The defendant was deprived of a fair trial. A victim testified that he recognized the defendant, because at some point a scarf no longer covered the defendant's face. After the victim's testimony, his brother contacted defense counsel to report that the victim told him that he had not seen the intruders' faces. Supreme Court should not have precluded the material and exculpatory testimony, which went directly to the victim's credibility and to the defendant's guilt.
http://nycourts.gov/reporter/3dseries/2020/2020_03243.htm

*People v Wills*
186 AD3d 1416
(2nd Dept) (9/18/20 DOI)
New trial. The defendant was deprived of his right to present witnesses of his own choosing. The testimony of a defendant's witness should not be prospectively excluded unless it is offered in palpably bad faith. Here the proposed testimony went to the heart of the defendant's defense.
http://nycourts.gov/reporter/3dseries/2020/2020_04976.htm

**Self-representation**

*People v Trammell*
183 AD3d 155
(1st Dept) (4/3/20 DOI)
Reversal and a new trial, because the defendant was deprived of his right to represent himself. His insistent entreaties were erroneously and summarily rejected. The trial court ordered 730 examinations and assigned successive defense counsel, notwithstanding valid complaints about counsel's flaws.
http://nycourts.gov/reporter/3dseries/2020/2020_02190.htm

*People v Rogers*
186 AD3d 1046
(4th Dept) (8/21/20 DOI)
Appellate court rejected contention that the trial court—which did not reveal the maximum sentence to the defendant—erred in granting his request to proceed pro se. *Cf. People v Rodriguez*, 158 AD3d 143 (1st Dept 2018) (waiver of right to counsel invalid; court failed to ensure defendant knew of sentencing exposure).
http://nycourts.gov/reporter/3dseries/2020/2020_04658.htm

**Severance**

*People v Moore*
181 AD3d 719
(1st Dept) (3/16/20 DOI)
Court erred in denying severance of charges arising from two robberies. The defendant had important testimony to give in the first case as to a duress defense and had a genuine need to refrain from testifying in the second case due to an adverse *Sandoval* ruling.
http://nycourts.gov/reporter/3dseries/2020/2020_01645.htm

**Substitute counsel**

*People v Collier*
187 AD3d 416
(1st Dept) (10/1/20 DOI)
The trial court properly denied the defendant's request, made on the eve of trial, for new assigned counsel. His expression of generalized discomfort with counsel did not constitute good cause for a substitution.
http://nycourts.gov/reporter/3dseries/2020/2020_05298.htm

*People v Narvaez*
187 AD3d 418
(1st Dept) (10/1/20 DOI)
The defendant failed to demonstrate good cause for assignment of substitute counsel. His complaints were generalized and conclusory. It was okay that his attorney reported to the court that a mental health professional said there was no reason to question the defendant's mental competency.
http://nycourts.gov/reporter/3dseries/2020/2020_05300.htm

*People v Nelson*
2020 NY Slip Op 07400
(2nd Dept) (12/10/20 DOI)
Trial court properly denied request for new assigned counsel. The right to court-appointed counsel did not include appointment of successive lawyers on request. A trial court must consider substitution only where the defendant made a serious, specific complaint.
http://nycourts.gov/reporter/3dseries/2020/2020_07400.htm

**Summation**

*People v Ramirez*
180 AD3d 811
(2nd Dept) (2/24/20 DOI)
The prosecutor made improper, prejudicial statements in summation by suggesting that jurors should disregard the grand jury testimony of a central prosecution witness, and by inviting the jurors to speculate that, if called to testify, a missing witness would have given supporting testimony. Reversal.
http://nycourts.gov/reporter/3dseries/2020/2020_01087.htm

*People v Carlson*
184 AD3d 1139
(4th Dept) (6/15/20 DOI)
A closing comment by the People, characterizing defense counsel's summation as evincing "a Brock Turner mentality," was improper but did not deprive the defendant of a fair trial. The appellate court admonished

the People: a defendant is entitled to a full measure of fairness; and the prosecutor must search for the truth, ensure that justice is done, and safeguard the integrity and fairness of criminal proceedings.
http://nycourts.gov/reporter/3dseries/2020/2020_03336.htm

**Territorial jurisdiction**

*People v Lamb*
188 AD3d 470
(1st Dept) (11/12/20 DOI)
People proved beyond a reasonable doubt that NY had territorial jurisdiction over the sex trafficking counts, because the defendant's conduct in this State was sufficient to establish an element of the crime. *See* CPL 20.20 (1) (a). During the relevant period, threatening conduct against a particular person occurred in NJ, but the defendant advanced prostitution in NY by advertising services online.
http://nycourts.gov/reporter/3dseries/2020/2020_06405.htm

**Verdict sheet**

*People v Ford*
187 AD3d 550
(1st Dept) (10/16/20 DOI)
Reversal. Upon consent, trial court rejected verdict of guilty of lesser included offense of 2nd degree manslaughter, based on verdict sheet notation that vote on that count was divided. Court should have polled the jury to see if the guilty verdict—which was announced in court by the foreperson—was unanimous.
http://nycourts.gov/reporter/3dseries/2020/2020_05824.htm

*People v Chappell*
187 AD3d 1319
(3rd Dept) (10/22/20 DOI)
Decision withheld. County Court made notations on the verdict sheet not authorized under CPL 310.20 (2), so the defendant's consent was required, but charge conference held off the record. Remittal.
http://nycourts.gov/reporter/3dseries/2020/2020_05978.htm

**330.20 motions**

*People v David T.*
180 AD3d 1370
(4th Dept) (2/10/20 DOI)
Reversal in CPL 330.20 proceeding, where court failed to conduct initial hearing required by statute.
http://nycourts.gov/reporter/3dseries/2020/2020_00964.htm

*People v Juan R.*
180 AD3d 935
(2nd Dept) (2/24/20 DOI)
The defendant was committed to a secure facility for six months, pursuant to CPL 330.20 (6), upon a finding that he had a dangerous mental disorder. Reversed. No valid strategy could have warranted defense concession that the defendant suffered from dangerous mental disorder; and hearing was mandatory.
http://nycourts.gov/reporter/3dseries/2020/2020_01190.htm

**330.30 motions**

*People v Guillen*
179 AD3d 539
(1st Dept) (1/24/20 DOI)
Hearing needed on motion where, based on note the jury foreperson sent, it appeared that she wanted to date a prosecution assistant; and another juror failed to reveal a close relationship with a witness.
http://nycourts.gov/reporter/3dseries/2020/2020_00387.htm

*People v Newman*
182 AD3d 1067
(4th Dept) (4/27/20 DOI)
County Court erred in summarily denying a CPL 330.30 motion to set aside the conviction for menacing peace officers. Alleged jury misconduct involved a reenactment, thus requiring the court to inquire into whether the jury's conduct was a conscious experiment directly material to a critical issue that may have colored the jurors' views and prejudiced the defendant.
http://nycourts.gov/reporter/3dseries/2020/2020_02449.htm

*People v Sonds*
183 AD3d 919
(2nd Dept) (5/29/20 DOI)
Prior to sentencing, the defendant pro se made a CPL 330.30 motion. Defense counsel said that he would not adopt the motion because it was not "viable," and it presented matters not "for the purview of the court." Supreme Court declined to review the motion. By taking a position adverse to the defendant, counsel deprived him of effective assistance. The matter was remitted.
http://nycourts.gov/reporter/3dseries/2020/2020_03036.htm

*People v Taylor*
187 AD3d 58
(2nd Dept) (8/28/20 DOI)
CPL 330.30 motion should not have been granted; verdict reinstated. The defendant's argument regarding a factually inconsistent verdict was unpreserved and thus did not fit within subdivision (1). Failure of preservation: counsel made pro forma motion for a trial order of dismissal. After the close of evidence, there was no timely request for dismissal of relevant count. After verdict was returned, but before jurors were discharged, defense counsel missed final opportunity to assert factual inconsistency claim.
http://nycourts.gov/reporter/3dseries/2020/2020_04790.htm

*People v Blunt*
187 AD3d 1646
(4th Dept) (10/12/20 DOI)
CPL 330.30 motion based on juror misconduct properly denied. The hearing evidence established that the subject juror and the defendant's mother had a superficial relationship arising from knowing each other during childhood and thereafter having minimal contact over several decades. The juror's failure to disclose the relationship appeared to be inadvertent. In any event, the defendant failed to show that any misconduct may have affected a substantial right.
http://nycourts.gov/reporter/3dseries/2020/2020_05639.htm

# SENTENCING/YO

**Consecutive/concurrent**

*People v Francis*
34 NY3d 464
(COA) (2/24/20 DOI)
The jurisdictional restrictions of CPL 470.15 (1) did not apply to appeals of CPL 440.20 orders. By its plain terms, the statute limited review to errors that hurt the appellant in the instant proceedings.
http://www.nycourts.gov/reporter/3dseries/2020/2020_00996.htm

*People v Banks*
181 AD3d 973
(3rd Dept) (3/9/20 DOI)
The imposition of consecutive terms for the assault convictions was error. Eyewitnesses heard five shots. Four bullets were recovered from the victims and one from the bar where the incident occurred. No proof showed that any victim was struck by a bullet that did not first pass through another victim.
http://nycourts.gov/reporter/3dseries/2020/2020_01525.htm

*People v Burns*
183 AD3d 835
(2nd Dept) (5/22/20 DOI)
The defendant was sentenced concurrent indeterminate terms of 5 to 15 years on manslaughter convictions, to run consecutively to concurrent 7-year terms on assault convictions. The Second Department modified. All sentences would run concurrently, since the assault and manslaughter crimes arose out of the same operative facts—the defendant's act of recklessly driving her car into another vehicle.
http://nycourts.gov/reporter/3dseries/2020/2020_02933.htm

*People v Hyde*
184 AD3d 1121
(4th Dept) (6/15/20 DOI)
The periods of post-release supervision should have been ordered to run concurrently. The issue was unpreserved, but the appellate court could not allow an illegal sentence to stand.
http://nycourts.gov/reporter/3dseries/2020/2020_03319.htm

*People v Khan*
184 AD3d 864
(COA) (6/25/20 DOI)
Reversal of order denying CPL 440.20. Consecutive sentences for the kidnapping and felony murder convictions were unlawful, since the kidnapping was the underlying felony in the felony murder. Thus, those sentences had to run concurrently. Remittal on a further argument: that running the kidnapping sentence consecutively to the sentences for the other murder convictions violated the defendant's equal protection rights, in that a codefendant received concurrent sentences for such counts.
http://nycourts.gov/reporter/3dseries/2020/2020_03537.htm

*People v Goodman*
186 AD3d 1244
(2nd Dept (9/3/20 DOI)

Upon conviction of 2nd degree assault and attempted 2nd degree CPW, the defendant was sentenced to consecutive terms of six years. The terms had to run concurrently. The plea allocution did not show that the defendant tried to possess a loaded firearm before forming the intent to cause a crime with the weapon.
http://nycourts.gov/reporter/3dseries/2020/2020_04857.htm

*People v Powell*
187 AD3d 611
(1st Dept) (10/22/20 DOI)
The defendant received consecutive terms for 3rd degree robbery and 4th degree larceny and imposing consecutive terms. That was error, the sentences had to be served concurrently, because the crimes were committed through a single act.
http://nycourts.gov/reporter/3dseries/2020/2020_06026.htm

*People v Mahon*
188 AD3d 915
(2nd Dept) (11/12/20 DOI)
Resentence imposed for CPW 2 had to run concurrently with the resentence for attempted 2nd degree murder and 1st degree assault, which related to the same complainant.
http://nycourts.gov/reporter/3dseries/2020/2020_06550.htm

**Discretion of court**

*People v Kinchoy*
186 AD3d 1838
(3rd Dept) (9/25/20 DOI)
The defendant argued that the plea court abdicated its duty to impose a fair sentence. Such issue survived the valid waiver of appeal. The trial court retained discretion to impose the appropriate punishment. County Court may have misapprehended the scope of its discretion, but did not express concerns about the fairness of the sentence imposed pursuant to the plea deal. Affirmance.
http://nycourts.gov/reporter/3dseries/2020/2020_05098.htm

*People v Ruise*
2020 NY Slip Op 07785
(4th Dept) (12/24/20 DOI)
Sentence vacated. When the defendant violated the terms of interim probation, the court failed to exercise its discretion, instead automatically imposing the term previously discussed.
http://nycourts.gov/reporter/3dseries/2020/2020_07785.htm

**Enhanced sentence**

*People v Blanford*
179 AD3d 1388
(3rd Dept) (2/3/20 DOI)
Where court did not warn the defendant that positive drug test could result in enhanced sentence, its imposition was error. Remittal for original sentence or chance to withdraw guilty plea.
http://nycourts.gov/reporter/3dseries/2020/2020_00646.htm

*People v Drayton*
2020 NY Slip Op 07952
(3rd Dept) (12/24/20 DOI)

Vacatur of guilty plea. Defendant not adequately advised of constitutional rights forfeited. Also, error to impose enhanced sentence. At the plea colloquy, the People had recommended concurrent terms of 3½ years plus supervision. But court imposed nine-year terms, without stating reason.
http://nycourts.gov/reporter/3dseries/2020/2020_07952.htm

**Ineffective assistance**

*People v Jones*
181 AD3d 714
(2nd Dept) (3/16/20 DOI)
The defendant was deprived of effective assistance of counsel at sentencing, since counsel made no substantive arguments on his behalf and displayed no meaningful knowledge of the case or his background.
http://nycourts.gov/reporter/3dseries/2020/2020_01640.htm

**Persistent felony offender**

*People v Garno*
184 AD3d 1106
(4th Dept) (6/15/20 DOI)
A persistent felony offender adjudication was vacated, and the sentence reduced. Twenty years to life was too harsh in light of the defendant's record of only two prior felonies and the plea offer of 6 to 9 years.
http://nycourts.gov/reporter/3dseries/2020/2020_03311.htm

*People v Hill*
186 AD3d 730
(2nd Dept) (8/21/20 DOI)
Sentences vacated. The defendant's adjudication as a persistent violent felony offender—based on the convictions enumerated in the People's CPL 400.16 statement—was improper, since he committed the second predicate violent felony offense before he was sentenced for the first one.
http://nycourts.gov/reporter/3dseries/2020/2020_04575.htm

*People v Jackson*
187 AD3d 446
(1st Dept) (10/8/20 DOI)
The defendant, who was sentenced as a persistent violent felony offender, was foreclosed from contesting the constitutionality of a 1992 conviction, which had been relied upon in 2004 in adjudicating him as a second felony offender. The claim of IAC was unreviewable; the record did not reveal counsel's reason for not attacking the 1992 conviction.
http://nycourts.gov/reporter/3dseries/2020/2020_05461.htm

*People v Smith*
187 AD3d 944
(2nd Dept) (10/16/20 DOI)
The defendant should not have been adjudicated persistent violent felony offender. People failed to establish that 10-year period, between sentence imposed for a prior felony and present felony, was sufficiently tolled.
http://nycourts.gov/reporter/3dseries/2020/2020_05782.htm

*People v Robinson*
187 AD3d 1216
(2nd Dept) (10/29/20 DOI)

Vacatur of sentence imposed. The defendant was improperly adjudicated a persistent violent felony offender, where he committed his second violent felony before sentencing for first felony conviction.
http://nycourts.gov/reporter/3dseries/2020/2020_06151.htm

**Post-release supervision**

*People v Hyde*
184 AD3d 1121
(4th Dept) (6/15/20 DOI)
The periods of post-release supervision should have been ordered to run concurrently. The issue was unpreserved, but the appellate court could not allow an illegal sentence to stand.
http://nycourts.gov/reporter/3dseries/2020/2020_03319.htm

*People v Kelly*
186 AD3d 506
(2nd Dept) (8/7/20 DOI)
The defendant's sentence included five years' post-release supervision, as a second felony drug offender previously convicted of a violent felony. The PRS period was illegal; it should have been 1½ to 3 years.
http://nycourts.gov/reporter/3dseries/2020/2020_04409.htm

**Predicate felonies**

*People v Huntress*
181 AD3d 1204
(4th Dept) (3/16/20 DOI)
The defendant was improperly sentenced as a second felony offender. The predicate conviction, the Pennsylvania crime of receiving stolen property, was not the equivalent of NY's 4th degree CPW.
http://nycourts.gov/reporter/3dseries/2020/2020_01778.htm

*People v Dyce*
186 AD3d 1241
(2nd Dept) (9/3/20 DOI)
The defendant was sentenced as a second felony offender. The predicate crime (a federal conviction for possession of a firearm with an obliterated serial number) was improperly used for enhanced sentencing purposes, since the crime did not include the element that the firearm be operable and thus was not equivalent to a NY felony.
http://nycourts.gov/reporter/3dseries/2020/2020_04853.htm

*People v Herbin*
187 AD3d 520
(1st Dept) (10/16/20 DOI)
The defendant was sentenced as a second felony offender. Because the predicate felony had been reversed, the defendant sought vacatur of the sentence. Such claim was not preserved and should have been presented in a CPL 440.20 motion, but relief was granted in the interest of justice.
http://nycourts.gov/reporter/3dseries/2020/2020_05701.htm

*People v Sylvester*
184 AD3d 1106
(1st Dept) (10/16/20 DOI)

The plea court properly adjudicated the defendant a second felony drug offender. His federal robbery conviction was equivalent to NY larceny by extortion. Further, the defendant's prior NC conviction was akin to our 3rd degree burglary.
http://nycourts.gov/reporter/3dseries/2020/2020_05702.htm

*People v Cabassa*
188 AD3d 416
(2nd Dept) (11/5/20 DOI)
In the interest of justice, adjudication as second felony offender vacated. The defendant's federal conviction of unlawful possession of a firearm was not a predicate felony, since that crime did not require that the firearm be operable.
http://nycourts.gov/reporter/3dseries/2020/2020_06282.htm

**Presence of defendant**

*People v Dais*
180 AD3d 417
(1st Dept) (2/10/20 DOI)
Because the defendant was absent when court imposed post-release supervision, he had to be resentenced.
http://nycourts.gov/reporter/3dseries/2020/2020_00828.htm

*People v Rodriguez*
186 AD3d 625
(2nd Dept) (8/14/20 DOI)
The defendant appealed from a resentence for his conviction of 1st degree course of sexual conduct against a child, upon his plea of guilty. Reversed and remitted. A defendant has a fundamental right to be personally present when sentence is pronounced, and that extends to resentencing. This defendant was not produced at resentencing, and the record was devoid of any indication that he expressly waived his right to be present.
http://nycourts.gov/reporter/3dseries/2020/2020_04493.htm

**Probation conditions**

*People v Romanelli*
188 AD3d 1354
(3rd Dept) (11/12/20 DOI)
Nothing in Penal Law § 65.10 limited application of the conditions in subdivision (4-a) to probationers who qualified as sex offenders. The defendant acknowledged that the victim—the daughter of a former girlfriend—sometimes slept in his bed and he had seen her naked. The conditions imposed were reasonable.
http://nycourts.gov/reporter/3dseries/2020/2020_06414.htm

**Pronouncement of sentence**

*People v Tyrek M.*
183 AD3d 915
(2nd Dept) (5/29/20 DOI)
As to a split sentence, the sentencing court neglected to recite the term of probation. Under CPL 380.20, courts must pronounce sentence in every case where a conviction is entered. A violation of the statute may be addressed on direct appeal, despite a valid waiver of the right to appeal and failure to preserve. Sentence imposed upon YO adjudication vacated.
http://nycourts.gov/reporter/3dseries/2020/2020_03031.htm

*People v Jemmott*
184 AD3d 586
(2nd Dept) (6/5/20 DOI)
Reversal. The lower court did not pronounce the length of the term of probation in open court. The matter was remitted for resentencing in accordance with CPL 380.20.
http://nycourts.gov/reporter/3dseries/2020/2020_03130.htm

*People v Childs*
186 AD3d 500
(2nd Dept) (8/7/20 DOI)
Sentence vacated. CPL 380.20 states that the court "must pronounce sentence in every case where a conviction is entered." As part of the negotiated disposition, this defendant was promised a three-year term of probation, but the sentencing court failed to orally pronounce that term.
http://nycourts.gov/reporter/3dseries/2020/2020_04404.htm

**Reduction explained**

*People v Rankin*
181 AD3d 1293
(4th Dept) (3/23/20 DOI)
The defendant was convicted of 2nd degree murder in the death of a rival gang member and was sentenced to 23 years to life. The reviewing court reduced the sentence to a term of 18 years to life, noting that the **defendant was only 18** years old at the time of the incident.
http://nycourts.gov/reporter/3dseries/2020/2020_01976.htm

*People v Fenton*
182 AD3d 1048
(4th Dept) (4/27/20 DOI)
The Fourth Department reduced sentence from 7½ to 2½ years, followed by post-release supervision. At the time of the sale of $50 worth of cocaine, the **defendant was 56 and had a minimal criminal record**. His son, who arranged the sale, pleaded guilty and got probation.
http://nycourts.gov/reporter/3dseries/2020/2020_02428.htm

*People v Guilermo P.*
184 AD3d 481
(1st Dept) (6/19/20 DOI)
The defendant was sentenced a YO for robbery 3rd to 60 days' incarceration and five years' probation. The Second Department affirmed the sentence. One justice dissented, opining that the probation term should be reduced to a period of three years. The defendant's **actions were minor**. Three years was the maximum probation period for the original misdemeanor charges. Aside from a minor drug offense, he did not have any other contact with the criminal justice system.
http://nycourts.gov/reporter/3dseries/2020/2020_03464.htm

*People v Spinac*
185 AD3d 498
(1st Dept (7/20/20 DOI)
The First Department reduced the sentence for 2nd degree assault and other crimes. The defendant had terrorized the attorneys and staff at the law firm representing his wife in a divorce. The reviewing court nevertheless "extend[ed] to him the compassion and consideration he neglected to show the four women simply doing their jobs," citing his **age, chronic health conditions**, and nearly completed sentence.
http://nycourts.gov/reporter/3dseries/2020/2020_04002.htm

*People v Jeffords*
185 AD3d 1417
(4th Dept) (7/20/20 DOI)
Manslaughter term reduced by five years due to defendant's unspecified background, show of **remorse**, and lack of prior criminal history.
http://nycourts.gov/reporter/3dseries/2020/2020_04037.htm

*People v Persen*
185 AD3d 1288
(3rd Dept) (7/24/20 DOI)
A sentence for 3rd degree CPW was reduced from 1½-4½ years in state prison to time served, based on the circumstances of the crime, the defendant's **minimal criminal history, status as a crime victim, mental health issues, steady employment, and familial relationship**s.
http://nycourts.gov/reporter/3dseries/2020/2020_04204.htm

*People v Griffin*
187 AD3d 1656
(4th Dept) (10/12/20 DOI)
Sentence for VOP unduly severe in light of the defendant's **young age, minimal criminal history**, and efforts to address substance abuse issues. Also cited were the nonviolent nature of the crimes and the relatively minor infraction for which the defendant was discharged from her treatment program, resulting in the VOP.
http://nycourts.gov/reporter/3dseries/2020/2020_05645.htm

*People v Joseph*
187 AD3d 1050
(2nd Dept) (10/22/20 DOI)
Although the defendant had served his sentence, the sentence might have **potential immigration consequences**. Sentence reduced from one year to 364 days.
http://nycourts.gov/reporter/3dseries/2020/2020_05928.htm

*People v Colon*
188 AD3d 926
(2nd Dept) (11/12/20 DOI)
Sentence for burglary reduced. The defendant had three children and limited criminal history; did not use a weapon or threaten anyone during crime, and no one was injured; and he expressed **remorse**.
http://nycourts.gov/reporter/3dseries/2020/2020_06557.htm

*People v Murphy*
188 AD3d 1668
(4th Dept) (11/13/20 DOI)
Sentence for 1st degree criminal possession of a forged instrument sentence reduced an indeterminate term of 2 to 6 years to 1 to 3 years, given the defendant's **minimal criminal history, the nonviolent nature of the offense**, and the fact that this was his first relapse while participating in the drug treatment court program.
http://nycourts.gov/reporter/3dseries/2020/2020_06640.htm

*People v Hicks*
188 AD3d 1681
(4th Dept) (11/13/20 DOI)

Sentence for 5th degree criminal possession of a controlled substance reduced to a determinate term of one year in jail, citing the defendant's **minimal criminal history**, the nature of the instant offense, and the circumstances of his incarceration.
http://nycourts.gov/reporter/3dseries/2020/2020_06660.htm

*People v Watt*
2020 NY Slip Op 07721
(1st Dept) (12/24/20 DOI)
A prison term for attempted murder and other crimes was reduced from 14 to 10 years, despite the brutality of the crime. The defendant suffered from **mental illness** and intellectual disability and was only age 19 at the time of the attack.
http://nycourts.gov/reporter/3dseries/2020/2020_07721.htm

*People v Morales*
2020 NY Slip Op 07919
(2nd Dept) (12/24/20 DOI)
Sentence for drug possession reduced from max to minimum. The defendant had only one prior felony, was **age 23**, and had a new marriage and infant son. The **nonviolent crime** involved a small amount of drugs; and the defendant had substance abuse issues.
http://nycourts.gov/reporter/3dseries/2020/2020_07919.htm

**Restitution**

*People v Grant*
185 AD3d 608
(2nd Dept) (7/3/20 DOI)
The defendant's sentence included a direction that he should make restitution of $39K for the victim's family. The Second Department modified. The amount violated the $15,000 statutory cap.
http://nycourts.gov/reporter/3dseries/2020/2020_03674.htm

*People v Gravell*
185 AD3d 1354
(3rd Dept) (7/31/20 DOI)
The sentencing court ordered restitution in an amount exceeding the plea deal figure. The defendant failed to preserve his claim by requesting a hearing or objecting at sentencing to the restitution amount; but the appellate court took corrective action in the interest of justice. The matter was remitted to give the defendant the opportunity to accept the sentence with the enhanced restitution award or to withdraw his guilty plea.
http://nycourts.gov/reporter/3dseries/2020/2020_04344.htm

**Right to address court**

*People v Taylor*
186 AD3d 510
(2nd Dept) (8/7/20 DOI)
At resentencing, the defendant's request to address the court was denied. A defendant is entitled to make a statement personally on his own behalf. *See* CPL 380.50 (1). The statute applied to resentencing, not just initial sentencing. Reversal.
http://nycourts.gov/reporter/3dseries/2020/2020_04413.htm

**Right to counsel**

*People v Caswell*
2020 NY Slip Op 07810
(4th Dept) (12/24/20 DOI)
Defendant was deprived of his right to counsel when resentencing court failed to assign an attorney requested. The defendant could not effectively contest SFO status or argue against the maximum.
http://nycourts.gov/reporter/3dseries/2020/2020_07810.htm

**Sealed records**

*People v Anonymous*
34 NY3d 641
(COA) (2/24/20 DOI)
A trial court is without authority to consider, for sentencing purposes, erroneously unsealed official records of a prior criminal proceeding terminated in favor of the defendant. The exception at CPL 160.50 (1) (d) (ii) (access permitted where law enforcement agency shows that justice so requires) did not apply here.
http://www.nycourts.gov/reporter/3dseries/2020/2020_01113.htm

**Second violent felony offender**

*People v Bell*
188 AD3d 904
(2nd Dept) (11/12/20 DOI)
Supreme Court was not authorized to adjudicate the defendant a second violent felony offender (SVFO), because the instant conviction was for a class A felony. However, the error could not have affected the sentence imposed.
http://nycourts.gov/reporter/3dseries/2020/2020_06540.htm

**Shock incarceration**

*Matter of Matzell v Annucci*
183 AD3d 1
(3rd Dept) (2/28/20 DOI)
DOCCS could not consider an inmate's disciplinary record to deny shock incarceration. DLRA amendment gave sentencing court authority to order shock incarceration if the defendant was eligible. DOCCS no longer made ultimate determination.
http://nycourts.gov/reporter/3dseries/2020/2020_01425.htm

**Vindictive sentence**

*People v Diaz*
2020 NY Slip Op 07392
(2nd Dept) (12/10/20 DOI)
Determinate term reduced. Supreme Court erred in enhancing the original sentence. Under the NY Constitution, a presumption of vindictiveness applied where a defendant successfully appealed an initial conviction and was re-tried, convicted, and given a greater sentence. There was no objective information as to conduct by the defendant legitimizing a higher sentence.
http://nycourts.gov/reporter/3dseries/2020/2020_07392.htm

**Violation of plea agreement**

*People v Stevens*
186 AD3d 1833
(3rd Dept) (9/25/20 DOI)
Imposition of 365-day jail sentence and $1,000 fine did not reflect plea agreement. Issue survived the appeal waiver, which excluded the issue. The defendant served her jail time; the fine was vacated.
http://nycourts.gov/reporter/3dseries/2020/2020_05093.htm

**YO granted**

*People v Carlos M.-A.*
180 AD3d 808
(2nd Dept) (2/24/20 DOI)
The defendant was convicted of an armed felony, but was eligible for a YO adjudication. Mitigating circumstances supporting YO treatment included that: (1) the defendant was only 16 at the time of the crime; (2) he had no prior criminal record; (3) he had strong family support; (4) the presentence report recommended a YO adjudication; and (5) the defendant expressed remorse.
http://nycourts.gov/reporter/3dseries/2020/2020_01083.htm

*People v Nicholas G.*
181 AD3d 1273
4th Dept (3/16/20 DOI)
YO ordered where: (1) the defendant was 17 at the time of the crimes and had no criminal record or history of violence or sex offending; (2) he had cognitive limitations, learning disabilities, and mental health issues; (3) he accepted responsibility and expressed genuine remorse; and (4) the Probation Department and reviewing psychologist recommended YO treatment.
http://nycourts.gov/reporter/3dseries/2020/2020_01828.htm

*People v Marcel G.*
183 AD3d 667
(2nd Dept) (5/8/20 DOI)
The defendant was convicted of attempted 2nd degree robbery. The Second Department adjudicated the defendant to be a youthful offender. The defendant, who was 17 at the time of the offenses, admitted his guilt and took responsibility for his actions. As part of his plea conditions, he successfully completed a treatment program, passing every drug test administered. The PSI report recommended YO status.
http://www.courts.state.ny.us/courts/ad2/Handdowns/2020/Decisions/D62758.pdf

*People v John E.*
2020 NY Slip Op 51498
(App Term, 2nd Dept) (12/24/20 DOI)
YO was mandatory for the defendant, age 18 at the time of the crime. *See* CPL 720.20 (1) (b) (court must find eligible youth to be YO where conviction is in local criminal court and prior to guilty plea, youth was not convicted of crime or found to be YO).
http://nycourts.gov/reporter/3dseries/2020/2020_51498.htm

*People v Z.H.*
2020 NY Slip Op 07824)
(4th Dept) (12/24/20 DOI)

2nd degree assault. Defendant should have been found youthful offender. Defendant was not violent—she carried the knife because she was bullied. Prosecutor, probation officer, and victim recommended YO. In jail, defendant obtained high school diploma and was accepted to college.
http://nycourts.gov/reporter/3dseries/2020/2020_07824.htm

**YO not considered**

***Armed felony***

*People v Allen*
179 AD3d 941
(2nd Dept) (1/24/20 DOI)
Court failed to consider whether youth charged with armed felony was eligible for YO treatment and, if so, whether such status should be granted.
http://nycourts.gov/reporter/3dseries/2020/2020_00423.htm

*People v Ochoa*
182 AD3d 410
(1st Dept) (4/3/20 DOI)
The defendant was convicted of 2nd degree CPW, upon his plea of guilty. The First Department vacated the sentence and remanded for a further youthful offender determination. The lower court erred in finding the defendant presumptively ineligible for YO, based on his commission of an armed felony. Under CPL 720.10, an armed felony required possession of a deadly weapon. Since a loaded firearm was not always a deadly weapon, the defendant's conviction for possessing a loaded firearm was not an armed felony.
http://nycourts.gov/reporter/3dseries/2020/2020_02156.htm

*People v Jones*
182 AD3d 698
(3rd Dept) (4/10/20 DOI)
It was unclear whether the lower court recognized that the defendant had pleaded guilty to an armed felony and that a judicial finding regarding YO-eligibility, based on the CPL 720.10 (3) factors, was required. There was no reference at the plea or sentencing to an armed felony. The sentence was vacated.
http://nycourts.gov/reporter/3dseries/2020/2020_02202.htm

*People v Williams*
185 AD3d 1456
(4th Dept) (7/20/20 DOI)
No determination as to whether the defendant should be afforded YO. Armed felony offense. So he was ineligible unless the court determined that a requisite factor mitigating was present. Remittal.
http://nycourts.gov/reporter/3dseries/2020/2020_04092.htm

***Other cases***

*People v Blanton*
179 AD3d 715
(2nd Dept) (1/13/20 DOI)
Defendant pleaded guilty. Supreme Court failed to consider YO status, though the defendant was eligible. CPL 720.20 (1) mandated violated. *See People v Rudolph*, 21 NY3d 497. Sentence vacated, remittal.
http://nycourts.gov/reporter/3dseries/2020/2020_00156.htm

*People v Giron*
181 AD3d 710
(2nd Dept) (3/16/20 DOI)
The sentencing court must determine whether an eligible youth is a YO. The defendant was an eligible youth, yet the mandated determination was not made. Sentence vacated.
http://nycourts.gov/reporter/3dseries/2020/2020_01637.htm

*People v Shabazz*
183 AD3d 494
(1st Dept) (5/22/20 DOI)
The defendant was convicted of attempted 1st degree assault. The First Department modified to the extent of vacating the sentence and remanding for a YO determination. As the People conceded, based on *People v Rudolph*, 21 NY3d 497, the defendant was entitled to resentencing for an express YO determination.
http://nycourts.gov/reporter/3dseries/2020/2020_02974.htm

*People v Shehi*
185 AD3d 610
(2nd Dept) (7/3/20 DOI)
Appeals held in abeyance. The lower court imposed the promised sentences without considering whether the defendant should be afforded youthful offender treatment. Supreme Court was directed to determine whether the defendant, who had served his sentences, should be afforded YO.
http://nycourts.gov/reporter/3dseries/2020/2020_03676.htm

*People v Baldwin*
186 AD3d 498
(2nd Dept) (8/7/20 DOI)
CPL 720.20 requires a court to make a YO determination in every case where the defendant is eligible, even where he or she did not request such status or agreed to forego it as part of a plea bargain. The defendant was eligible for YO treatment, but Supreme Court failed to consider the matter. Vacatur, remittal.
http://nycourts.gov/reporter/3dseries/2020/2020_04401.htm

*People v Kostyk*
186 AD3d 744
(2nd Dept) (8/21/20 DOI)
Even though the defendant was an eligible youth, record did not demonstrate that, at the time of sentencing, the Supreme Court considered and determined whether he should be treated as a YO. Sentence vacated.
http://nycourts.gov/reporter/3dseries/2020/2020_04582.htm

*People v Battle*
187 AD3d 1203
(2nd Dept) (10/29/20 DOI)
Vacatur of sentence imposed. Failure to determine whether the defendant should be afforded YO status.
http://nycourts.gov/reporter/3dseries/2020/2020_06135.htm

# SORA

**Level reduced**

*People v Pittman*
179 AD3d 955
(2nd Dept) (1/24/20 DOI)
Reduction from level three to two. Upward departure was error. Criminal history was covered by Guidelines. Prior criminal conduct for which the defendant was not convicted did not meet clear and convincing evidence standard.
http://nycourts.gov/reporter/3dseries/2020/2020_00443.htm

*People v Maund*
181 AD3d 1331
(4th Dept) (3/23/20 DOI)
SORA risk level reduced from three to two, because the People failed to prove that the defendant committed a continuing course of sexual misconduct—risk factor 4. The sole evidence presented was the case summary prepared by the Board of Examiners. At the hearing, the defendant denied that he engaged in a continuing course of sexual misconduct. Where the defendant contested the factual allegations, the case summary alone was insufficient to satisfy the People's burden.
http://nycourts.gov/reporter/3dseries/2020/2020_02011.htm

*People v Murray*
184 AD3d 882
(COA) (6/25/20 DOI)
The defendant appealed from a Supreme Court order designating him a level-two sex offender. The Second Department reversed and reduced his status to level one. The SORA court should not have granted an upward departure. The People failed to establish that the defendant's conduct was an aggravating factor not adequately taken into account by the Guidelines.
http://nycourts.gov/reporter/3dseries/2020/2020_03554.htm

*People v Blue*
186 AD3d 1088
(4th Dept) (8/21/20 DOI)
Reduction from level two to one. The SORA court improperly assessed 25 points under risk factor two for sexual contact with the victim and 20 points under risk factor 4 for engaging in a continuing course of sexual misconduct. The People did not establish that there was any sexual contact between the defendant and the victim or that the defendant shared the intent of the victim's clients regarding sexual contact.
http://nycourts.gov/reporter/3dseries/2020/2020_04689.htm

*People v Sanchez*
186 AD3d 880
(2nd Dept) (8/28/20 DOI)
SORA level reduced to two. Error to deny downward departure. Medical evidence demonstrated that the defendant, who used a wheelchair, had had a stroke that caused permanent paralysis on his right side. He had no disciplinary infractions during long period of imprisonment. There was only a remote likelihood he would reoffend or would present a danger to the community.
http://nycourts.gov/reporter/3dseries/2020/2020_04796.htm

*People v Hernandez*
187 AD3d 1227
(2nd Dept) (10/29/20 DOI)
SORA status reduced from level two to one. Record did not support the assessment of 10 points under risk factor 13, for unsatisfactory conduct while confined. Misdemeanor conviction for promoting prison contraband occurred four years before the SORA hearing.
http://nycourts.gov/reporter/3dseries/2020/2020_06159.htm

*People v Brocato*
188 AD3d 728
(2nd Dept) (11/5/20 DOI)
Order adjudicating the defendant as level-two sex offender reversed. In statutory rape cases, strict application of the Guidelines sometimes resulted in an overassessment of risk to public safety. A downward departure was fair because this was the defendant's only sex-related crime; he accepted responsibility for the offense; and he was sentenced to only one year of probation.
http://nycourts.gov/reporter/3dseries/2020/2020_06295.htm

*People v Gonzalez*
2020 NY Slip Op 97468
(1st Dept) (12/10/20 DOI)
Reduction to level one. The SORA court ignored a compelling basis for a downward departure to correct the overassessment of the defendant's risk of recidivism resulting from scoring under risk factors three and seven. *People v Gillotti*, 23 NY3d 841, warned of overassessments under such factors in child pornography cases. The Board of Examiners recommended level one here. The defendant's federal crime was based on conduct at the very low end. According to an evaluating psychologist, he was very unlikely to reoffend.
http://nycourts.gov/reporter/3dseries/2020/2020_07468.htm

**Reversal, remittal**

*People v Wilke*
181 AD3d 1324
(4th Dept) (3/23/20 DOI)
The defendant was found to be a level-two risk. The Fourth Department reversed and remitted. County Court violated his right to due process by sua sponte assessing points on a theory not raised by the Board of Examiners or the People.
http://nycourts.gov/reporter/3dseries/2020/2020_02002.htm

*People v Kaminski*
184 AD3d 951
(3rd Dept) (6/19/20 DOI)
A petition to reduce the sex offender risk level was denied. That was error. The SORA court did not consider an updated recommendation from the Board of Examiners. *See* Correction Law § 168-o (2).
http://nycourts.gov/reporter/3dseries/2020/2020_03431.htm

*People v Banuchi*
184 AD3d 881
(COA) (6/25/20 DOI)
The defendant appealed from an order which denied his petition to modify his SORA risk-level classification. The Second Department reversed and remitted. Supreme Court denied the petition without holding a hearing. That was error. *See* Correction Law § 168–o (4).
http://nycourts.gov/reporter/3dseries/2020/2020_03553.htm

*People v Gatling*
188 AD3d 1765
(4th Dept) (11/23/20 DOI)
Defendant adjudicated as level-two risk under SORA. Decision reserved. County Court failed to set forth the findings of fact and conclusions of law.
http://nycourts.gov/reporter/3dseries/2020/2020_06921.htm

**Affirmed**

*People v Thomas*
179 AD3d 444
(1st Dept) (1/13/20 DOI).
Error to assess 15 points under risk factor for accepting responsibility, but defendant was still level three.
http://nycourts.gov/reporter/3dseries/2020/2020_00084.htm

*People v Diaz*
34 NY3d 1179
(COA) (2/24/20 DOI)
A statement in the PSI report ("on one or more occasions, he used physical force to coerce the victim into cooperation") was "reliable hearsay," justifying an assessment of 10 points for use of force standard. Judges and Wilson dissented. The unattributed conclusory hearsay sentence was not reliable and did not constitute clear and convincing evidence of forcible compulsion.
http://www.nycourts.gov/reporter/3dseries/2020/2020_01114.htm

*People v Perez*
2020 NY Slip Op 02096
(COA) (3/27/20 DOI)
The SORA hearing court did not err in assessing 30 points for risk factor 9. It was proper to rely on the underlying conduct of the foreign conviction. Judge Wilson dissented, joined by Judge Rivera.
http://www.nycourts.gov/reporter/3dseries/2020/2020_02096.htm

*People v Dukes*
186 AD3d 1073
(4th Dept) (8/21/20 DOI)
SORA adjudication upheld. Dissenters saw error in reliance on the facts underlying two JD adjudications to grant an upward departure. It appeared that the PSR summary used was based upon the defendant's admissions, which would render the summary inadmissible under Family Ct Act § 381.2 (1).
http://nycourts.gov/reporter/3dseries/2020/2020_04679.htm

*People v Aleman*
187 AD3d 482
(1st Dept) (10/8/20)
The defendant should not have scored 15 points for a history of drug of alcohol abuse, given the absence of any reliable evidence of the defendant's use of drugs or alcohol at the time of the offense, and in light of insufficient evidence that he engaged in substance abuse repeatedly in the past. However, the defendant automatically qualified as a level-three offender, based on a prior NJ felony sex crime conviction.
http://nycourts.gov/reporter/3dseries/2020/2020_05597.htm

*People v Romulus*
2020 NY Slip Op 07512
(1st Dept) (12/18/20 DOI)

The defendant appealed from an order of Bronx County Supreme Court, which found him a level-two sex offender. A dissenter opined that the defendant should have been adjudicated as level one. The guidelines did not account for these: (1) an expert evaluation stating that the defendant presented a low risk; (2) the statutory nature of the rape offense; and (3) the points for lack of community supervision—an element which flowed from the plea bargain.
http://nycourts.gov/reporter/3dseries/2020/2020_07512.htm

# POST-DISPOSITION

## Attorney discipline

*M/O Kurtzrock*
2020 NY Slip Op 08114
(2nd Dept) (12/31/20 DOI)
ADA suspended from practice of law for two years based on egregious *Brady* violations meriting the strongest possible condemnation. Powerful discussion of ethical obligations under *Brady* and the Rules of Prof. Conduct.
http://nycourts.gov/reporter/3dseries/2020/2020_08114.htm

## Coram nobis

*People v Grant*
187 AD3d 1043
(2nd Dept) (10/22/20 DOI)
Writ of error coram nobis granted, resulting in reversal of murder conviction and new trial. Court did not read substantive jury note to defendant or give counsel a chance to respond. Since the court did not comply with its core CPL 310.30 duties, reversal was mandated. Given the *O'Rama* violation, there could be no valid reason for counsel's failure to contend that a mode of proceedings error occurred.
http://nycourts.gov/reporter/3dseries/2020/2020_05922.htm

*People v Powell*
188 AD3d 1266
(2nd Dept) (11/25/20 DOI)
Grant of application for a writ of error coram nobis. New trial ordered. Supreme Court failed to comply with CPL 310.30 and *People v O'Rama* in handling jury notes. No strategic decision could explain appellate counsel's failure to make the dispositive argument on appeal.
http://nycourts.gov/reporter/3dseries/2020/2020_07102.htm

## CPL 440.10 motions

### *Brady*

*People v Brown*
183 AD3d 910
(2nd Dept) (5/29/20 DOI)
There was no *Brady* violation based on the People's failure to disclose a fingerprint comparison report. *Brady* does not require a prosecutor to supply exculpatory evidence about which the defendant should reasonably have known.
http://nycourts.gov/reporter/3dseries/2020/2020_03021.htm

***Gravity knife***

*People v Alston*
184 AD3d 415
(1st Dept) (6/5/20 DOI)
Denial of a 440 motion reversed. The People agreed that the conviction should be vacated in light of legislation amending Penal Law § 265.01 to decriminalize the simple possession of gravity knives.
http://nycourts.gov/reporter/3dseries/2020/2020_03183.htm

***Ineffective assistance***
***(not immigration-related)***

*People v Martin*
179 AD3d 428
(1st Dept) (1/13/20 DOI)
A material factual dispute warranted a hearing, where motion counsel reported that defense counsel said he did not realize he could have called an expert about the defendant not possessing the requisite mental state for murder, but the prosecution stated the opposite.
http://nycourts.gov/reporter/3dseries/2020/2020_00067.htm

*People v Scott*
181 AD3d 1220
(4th Dept) (3/16/20 DOI)
Hearing on 440.10 motion needed. Counsel was purportedly ineffective in failing to call an alibi witness who would have testified that he was with the defendant in North Carolina at the time of the murder.
http://nycourts.gov/reporter/3dseries/2020/2020_01807.htm

*People v Fox*
181 AD3d 1228
(4th Dept) (3/16/20 DOI)
Hearing on 440.10 motion needed. An affiant said the defendant borrowed his jacket and did not know drugs were in the pockets, yet counsel did not call such witness.
http://nycourts.gov/reporter/3dseries/2020/2020_01809.htm

*People v Maffei*
35 NY3d 264
(COA) (5/8/20 DOI)
The defendant contended that he was denied effective assistance based on counsel's failure to challenge a prospective juror. Finding that a CPL 440.10 motion was needed to present such argument, the Court of Appeals upheld a conviction for 2nd degree murder. Judge Rivera dissented. A single error may qualify as IAC. Jury selection was a strategic decision solely within the province of defense counsel.
http://www.nycourts.gov/reporter/3dseries/2020/2020_02680.htm

*People v Borcyk*
184 AD3d 1183
(4th Dept) (6/15/20 DOI)
A CPL 440.10 motion should not have been denied. A new trial was ordered based on ineffective assistance of counsel. At the time of trial, counsel spoke with a witness who said that her former boyfriend admitted killing the victim. Such proof supported the defense theory. Yet when the critical, exculpatory witness failed to appear at trial, defense counsel took no action to secure her presence.
http://nycourts.gov/reporter/3dseries/2020/2020_03359.htm

*People v Fernandez*
185 AD3d 527
(1st Dept) (7/31/20 DOI)
CPL 440.10 motion was supported by an affirmation detailing futile attempts to obtain a statement from trial counsel as to his actions. The motion court summarily denied the 440 motion. That was error. Upon remand, counsel could be subpoenaed to present evidence as to strategic reasons, or not, for his decisions.
http://nycourts.gov/reporter/3dseries/2020/2020_04368.htm

*People v Brown*
186 AD3d 1236
(2nd Dept) (9/3/20 DOI)
The appellate court disapproved of Supreme Court's approach to a 440 motion. The motion court in effect said to the defendant: "You won. No, just kidding." After concluding that the defendant received IAC as to a rejected plea offer, the court failed to vacate the judgment, rejected a re-offered plea agreement, and left the conviction and sentence undisturbed. CPL 440.10(4), and common sense, were thus violated. Reversal.
http://nycourts.gov/reporter/3dseries/2020/2020_04849.htm

*People v McCray*
187 AD3d 679
(1st Dept) (10/29/20 DOI)
Order denying CPL 440.10 motion reversed. Motion court erroneously found that the trial record was sufficient to permit appellate review of the claim of ineffective assistance of counsel, and erred in not holding a hearing to address the serious questions presented by motion counsel's affirmation.
http://nycourts.gov/reporter/3dseries/2020/2020_06219.htm

*People v Flinn*
188 AD3d 1093
(2nd Dept) (11/20/20 DOI)
Reversal of ordering denying 440.10 motion. The plea of guilty was predicated upon his display of what appeared to be a gun in the course of forcibly stealing property on two separate occasions. A presentence investigation report indicated that the defendant offered no explanation for the "*imitation weapon"* he carried during the crimes. The defendant asserted that he had received ineffective assistance since counsel did not advise him of a potential affirmative defense. Hearing needed.
http://nycourts.gov/reporter/3dseries/2020/2020_06809.htm

*People v Drayton*
2020 NY Slip Op 07951
(3rd Dept) (12/24/20 DOI)
Error to not review IAC claims in 440, not capable of resolution on direct appeal. The defendant said that counsel did not interview alibi witnesses and obtain surveillance video.
http://nycourts.gov/reporter/3dseries/2020/2020_07951.htm

***Padilla violations***

*People v Martinez*
180 AD3d 190
(1st Dept) (1/20/10 DOI)
Reversal of summary denial of 440 motion. Counsel said deportation was possible, but it was mandatory. In finding no prejudice, Supreme Court erred in focusing on events in 2017, not at the time of the 2007 plea. Much proof of the defendant's primary purpose of remaining in the U.S. Remand to different justice.
http://nycourts.gov/reporter/3dseries/2020/2020_00252.htm

*People v Lantigua*
184 AD3d 80
(1st Dept) (4/30/20 DOI)
Error to summarily deny CPL 440.10 motion regarding IAC as to advice on immigration consequences. In unsworn letter, counsel admitted his flawed performance. The defendant received no relevant advice at the plea proceedings. The motion court should not have focused on likelihood that the defendant would have been convicted after trial. IAC claim may succeed even where a favorable outcome is unlikely. The defendant faced only a short sentence if convicted after trial and he had family here.
http://nycourts.gov/reporter/3dseries/2020/2020_02557.htm

*People v George*
183 AD3d 436
(1st Dept) (5/15/20 DOI)
The defendant's guilty plea subjected him to mandatory deportation. His 440 motion charged that defense counsel was ineffective in failing to make any effort to negotiate a plea with less severe immigration consequences. Plea counsel did not consider immigration impact, according to a supporting affidavit. Where the alleged IAC was the failure to negotiate an immigration-friendly plea, the defendant must show a reasonable probability that the People would have made such an offer. The defendant made such showing. Motion court abused its discretion in denying the 440 motion without a hearing.
http://nycourts.gov/reporter/3dseries/2020/2020_02852.htm

*People v Ni*
184 AD3d 541
(COA) (6/25/20 DOI)
The defendant was convicted, after a jury trial, of 3rd degree grand larceny and other crimes. In a 440 motion, he asserted that his attorney advised him that a guilty plea to petit larceny would result in mandatory deportation. In fact, such a plea would only have rendered the defendant deportable with the possibility of discretionary relief. The defendant claimed that he rejected a favorable plea offer based on the misadvice. A hearing was necessary to determine whether counsel gave erroneous guidance and the defendant was thereby prejudiced.
http://nycourts.gov/reporter/3dseries/2020/2020_03621.htm

***Other reversals***

*People v Illis*
184 AD3d 859
(COA) (6/25/20 DOI)
Reversal of order denying 440 motion to vacate murder conviction. Before the conviction became final, *People v Payne*, 3 NY3d 266, set forth a new standard for depraved indifference murder. The motion court erred in equating the denial of the defendant's leave application with a rejection of arguments based on the changed law. Because the trial evidence was not legally sufficient, the murder count was dismissed.
http://nycourts.gov/reporter/3dseries/2020/2020_03535.htm

*People v Mineccia*
185 AD3d 1408
(4th Dept) (7/20/20 DOI)
Waiver of a jury trial was invalid because the defendant was not told that the prosecutor for preliminary proceedings was appointed as confidential law clerk to the trial court. 440 motion granted. New trial.
http://nycourts.gov/reporter/3dseries/2020/2020_04028.htm

*People v Blue*
185 AD3d 510
(1st Dept) (7/24/20 DOI)
In a 440 motion, the defendant urged that his CPL 30.30 and constitutional rights to a speedy trial were violated. Supreme Court failed to analyze the constitutional argument, so the matter was remanded.
http://nycourts.gov/reporter/3dseries/2020/2020_04231.htm

*People v Mirabella*
187 AD3d 1589
(4th Dept) (10/5/20 DOI)
Error to summarily deny CPL 440.10 motion to vacate judgment. Hearing was needed as to whether defense counsel fulfilled his duty of advising the defendant that the decision to testify was ultimately his to make, not defense counsel's. The defendant made a proper showing for a hearing by asserting a viable legal basis for the motion, substantiated by his own unrefuted sworn allegations and other evidentiary submissions.
http://nycourts.gov/reporter/3dseries/2020/2020_05388.htm

***People's appeals***

*People v Rodriguez*
186 AD3d 1724
(2nd Dept) (10/1/20 DOI)
People's appeal. Affirmance of order granting CPL 440.10 motion to vacate a murder conviction, without a hearing. The defendant was not provided with material regarding the role of the sole eyewitness against him, as a witness in two unrelated homicide trials; her use as a confidential informant; her placement in a witness relocation program, after her participation in one of those trials; and the DA's payment of her rent for one year. Such material contradicted the eyewitness's trial testimony in this case.
http://nycourts.gov/reporter/3dseries/2020/2020_05234.htm

*People v Rivera*
2020 NY Slip Op 07508
(1st Dept) (12/28/20 DOI)
The People appealed from an order, summarily granting the defendant's CPL 440.10 motion to vacate a judgment of conviction. Affirmed. The defendant had claimed that he formed a criminal intent only after entering the complainant's hospital room, yet counsel did not tell him that the intent had to exist before the entering/remaining.
http://nycourts.gov/reporter/3dseries/2020/2020_07508.htm

***Denial affirmed***

*People v Gardine*
185 AD3d 500
(1st Dept) (7/20/20 DOI)
A CPL 440.10 motion was properly denied, where an investigator recounted conversations with eyewitnesses to the homicide, but their affidavits were not submitted; and the defendant failed to explain the two-decade delay in investigating and resulting witness reliability concerns.
http://nycourts.gov/reporter/3dseries/2020/2020_04005.htm

*People v Harley*
187 AD3d 549
(1st Dept) (10/16/20 DOI)

Affirmance of summary denial of 440 motion. Defense counsel had interviewed witness at issue after the defendant's arrest. Even if proposed testimony was new evidence, it was tenuous.
http://nycourts.gov/reporter/3dseries/2020/2020_05823.htm

*People v Lovell*
188 AD3d 1255
(2nd Dept) (11/25/20 DOI)
CPL 440.10 motion to vacate a judgment was based on IAC. While the defendant alleged that counsel told him only that pleading guilty *might* have an effect on his immigration status, the record demonstrated that counsel informed him that pleading guilty *will* have an effect on such status. Denial affirmed.
http://nycourts.gov/reporter/3dseries/2020/2020_07095.htm

**CPL 440.20 motions**

*People v Khan*
184 AD3d 864
(COA) (6/25/20 DOI)
Reversal of order denying CPL 440.20. Consecutive sentences for the kidnapping and felony murder convictions were unlawful, since the kidnapping was the underlying felony in the felony murder. Thus, those sentences had to run concurrently. Remittal on a further argument: that running the kidnapping sentence consecutively to the sentences for the other murder convictions violated the defendant's equal protection rights, in that a codefendant received concurrent sentences for such counts.
http://nycourts.gov/reporter/3dseries/2020/2020_03537.htm

*People v Hall*
188 AD3d 1416
(3rd Dept) (11/20/20 DOI)
The record did not reflect that the defendant raised the legality of the consecutive sentences at, or prior to, sentencing, he did not waive the issue. His CPL 440.20 was a proper vehicle for such a challenge, where it was not previously decided upon appeal. However, the instant motion was properly denied, since consecutive sentences were lawful under Penal Law § 70.25.
http://nycourts.gov/reporter/3dseries/2020/2020_06825.htm

**MHL Art. 10**

*M/O State of NY v Richard F.*
180 AD3d 1339
(4th Dept) (2/10/20 DOI)
MHL Article 10 order finding that the defendant was a dangerous sex offender requiring confinement was error, where it defied unanimous expert proof.
http://nycourts.gov/reporter/3dseries/2020/2020_00943.htm

*Matter of State of NY v Donald G.*
186 AD3d 1127
(4th Dept) (8/28/20 DOI)
MHL Art. 10 proceeding. Error to grant petitioner's CPLR 4404 (a) motion to set aside verdict and order a new trial based on juror misconduct. The foreperson did not reveal that his father had been a correction officer; and his father purportedly said—"if inmates wanted to do something in prison, they could do it." No prejudice resulted where several jurors were associated with law enforcement and expressed notion that inmates engaged in unsavory activities; and experts testified about sexual misbehavior in prison.
http://nycourts.gov/reporter/3dseries/2020/2020_04716.htm

*M/O State of NY v Ronald S.*
186 AD3d 1227
(2nd Dept) (9/3/20 DOI)
Following a *Frye* hearing in a proceeding pursuant to Mental Hygiene Law Article 10, the record failed to support Supreme Court's finding of general acceptance of the subject diagnosis in the relevant communities, where they were rejected for inclusion in the DSM; and no clear definition or criteria for the diagnoses existed. A new trial was ordered.
http://nycourts.gov/reporter/3dseries/2020/2020_04845.htm

*Matter of State of NY v Kerry K.*
188 AD3d 30
(2nd Dept) (9/11/20 DOI)
An order committing the respondent to a secure treatment facility pending a new trial was affirmed. In a prior order, the trial court directed that the respondent be released to the community under SIST. The Second Department reversed, and pending the new trial, the State moved to re-confine the respondent. MHL §10.06 (k) controlled: if there is probable cause to believe sex offender requires civil management due to mental abnormality, he must be committed until trial is over).
http://nycourts.gov/reporter/3dseries/2020/2020_04844.htm

*M/O State v Kenneth II.*
190 AD3d 33
(3rd Dept) (10/22/20 DOI)
Ineffective assistance in MHL Art. 10 proceeding. Counsel should have moved for a *Frye* hearing to challenge the diagnosis of other specified paraphilic disorder (nonconsent). Court of Appeals decisions set stage for such a challenge; no tactical reason not to seize the opportunity. This single failing deprived the respondent of effective assistance. Decision withheld; remand for *Frye* hearing.
http://nycourts.gov/reporter/3dseries/2020/2020_05980.htm

*M/O State of NY v David S.*
188 AD3d 584
(1st Dept) (11/20/20 DOI)
In MHL Article 10 proceeding, new trial due to error in denying supplemental jury instruction. Where there is an ASPD diagnosis, the charge must state that ASPD, standing alone, cannot be used to support a finding that a respondent has a mental abnormality. *See Matter of State of NY v Donald DD.*, 24 NY3d 174.
http://nycourts.gov/reporter/3dseries/2020/2020_06876.htm

**Parole**

*M/O Benson v NYS Bd. of Parole*
35 NY3d 1007
(COA) (6/12/20 DOI)
The petitioner appealed from a Third Department order upholding the Parole Board's determination rescinding parole release. The Court of Appeals affirmed. Judicial intervention in Parole Board determinations was warranted only when there was a showing of irrationality bordering on impropriety. The petitioner failed to make such a showing.
http://www.nycourts.gov/reporter/3dseries/2020/2020_03207.htm

**Retrial barred**

*Matter of Bannister v Wiley*
179 AD3d 579
(1st Dept) (2/3/20 DOI)
Article 78 petition in nature of prohibition granted. Trial court erred in declaring a mistrial to accommodate juror's travel plans. Retrial barred by double jeopardy clauses of U.S. and NYS Constitutions. Indictment dismissed.
http://nycourts.gov/reporter/3dseries/2020/2020_00522.htm

**SARA**

*People ex rel. Rosario v Superintendent*
180 AD3d 920
(2nd Dept) (2/24/20 DOI)
As a result of inartful language, Executive Law § 259-c (14) had been interpreted in opposing fashion by the Third and Fourth Departments. The legislative history supported an interpretation that imposed the SARA-residency requirement based on either an offender's conviction of a specifically enumerated offense against an underage victim ***or*** the offender's status as a level-three sex offender.
http://nycourts.gov/reporter/3dseries/2020/2020_01178.htm

*M/O Green v LaClair*
182 AD3d 877
(3rd Dept) (4/24/20 DOI)
Based on burglary and robbery convictions and his previous designation as risk-level three designation, the petitioner was found subject to SARA. That was error. The crimes for which the petitioner was serving a sentence were not enumerated offenses. The Exec. Law § 259-c (14) school-grounds restriction applied to offender serving sentence for enumerated Penal Law offense, where in addition, either the victim was under age 18 at time of offense or the defendant was designated risk-level three sex offender.
http://nycourts.gov/reporter/3dseries/2020/2020_02338.htm

*People ex rel. Negron v Super., Woodbourne Corr. Fac.*
2020 NY Slip Op 06935
(COA) (11/25/20)
The SARA school-grounds provision is mandatory only for level-three offenders serving a sentence for a crime enumerated in the statute. The holding, which resolved a split in authority among the Appellate Division Departments, was based on the natural meaning of the text and the history of the statute's 2005 amendment. Judge Fahey dissented in an opinion in which Chief Judge DiFiore concurred.
http://www.nycourts.gov/reporter/3dseries/2020/2020_06935.htm

*People ex rel. Johnson v Super., Adirondack Corr. Fac.*
2020 NY Slip Op 06934
(COA) (11/25/20 DOI)
The COA found no constitutional infirmity in temporary confinement in correctional facilities of level-three sex offenders, wait-listed for SARA-compliant shelter, after they would otherwise have been released to parole or PRS. Judges Rivera and Wilson wrote separate dissents.
http://www.nycourts.gov/reporter/3dseries/2020/2020_06934.htm

*People ex rel. McCurdy v Warden, Westchester Co. Corr. Fac.*
2020 NY Slip Op 06933
(COA) (11/25/20 DOI)

DOCCS had the authority to place a level-three sex offender who completed six months of PRS in a prison RFT when he could not find SARA-compliant housing, the COA held in a 4-3 decision.
http://www.nycourts.gov/reporter/3dseries/2020/2020_06933.htm

**Sealing records**

*People v Shrayef*
181 AD3d 935
(2nd Dept) (3/27/20 DOI)
The defendant's CPL 160.59 motion to seal his conviction of 2nd degree money laundering was denied. The Second Department affirmed. Weighing in favor of sealing were the time since the defendant's conviction and his lack of contacts, before or since, with the criminal justice system. However, weighing against relief were the circumstances and seriousness of the offense, including the defendant's central role.
http://nycourts.gov/reporter/3dseries/2020/2020_02073.htm

**VOP**

*People v McCray*
184 AD3d 912
(3rd Dept) (6/5/20 DOI)
A 14-month delay in receiving transcripts, which mooted the issue of the resentence upon the VOP, was not a due process violation. The delay did not prejudice the defendant.
http://nycourts.gov/reporter/3dseries/2020/2020_03154.htm