2021 Annual Conference

Niagara Falls, New York

Discovery & Motion Practice Under New York's New Rules

September 28, 2021
Presented by:
Daniel M. Killelea, Esq.
1.0 MCLE Professional Practice

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Discovery & Motion Practice Under New York's New Rules

New York State Magistrate's Association September 27-28, 2021

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By
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DISCOVERY

I. January 1, 2020: A Revolution in New York State's Discovery Rules

A. Article 240 of the Criminal Procedure Law was repealed, and replaced with Article 245

B. Discovery is no longer only to be supplied to a Defendant upon his/her request; it is now the obligation of the Prosecution to provide it

i. The People must now provide, even absent a request, "all items that relate to the subject matter of the case" (CPL §245.20[1]) —i.e., almost every item or piece of information connected with the investigation, arrest, and prosecution of a Defendant, including:

a. All statements of a Defendant or Co-Defendant, whether intended to be introduced against Defendant or not (CPL §245.20-1[a])

b. Names of witnesses—both civilian and police—as well as contact information for civilian witnesses, and assignments/affiliation of police witnesses (CPL §§245.20[1][c] and 245.20[1][d])

c. Rosario material—statements, notes, recordings, etc. of witnesses (CPL §245.20[1][e]);

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d. Expert Opinions—material forming the basis of an expert's opinion (CPL §245.20[1][f])

e. Recordings—any 911 calls, radio transmissions, body camera footage, etc. (CPL §245.20[1][g])

f. Brady material—any information favorable to a Defendant (CPL §245.20[1][k]);

g. Giglio/Novoa material—information concerning cooperation agreements and conferred benefits (CPL §245.20[1][l]); and

h. Scientific reports, etc.—including information relating to the calibration and maintenance of Portable Breath Testing devices, RADAR devices, and laser devices (CPL §245.20[1][j])

ii. Even Sandoval and Molineux/Ventimiglia information must be provided to the Defendant by the People, and it must be provided within fifteen (15) days of arraignment (CPL §245.20[3])

C. Timing of Discovery now tied to Defendant's arraignment

i. The People have twenty (20) calendar days (n.b.: not business days) from the date of arraignment to provide a Defendant in custody with Discovery (CPL §245.10[a][i]); prior to May 3, 2020, the People only had fifteen (15) calendar days

ii. The People have thirty-five (35) calendar days (n.b.: not business days) from the date of arraignment to provide a Defendant not in custody with Discovery (CPL §245.10[a][ii]); prior to May 3, 2020, the People only had fifteen (15) calendar days

iii. A Defendant must be provided with Discovery "not later than fifteen days before the trial of a simplified information charging a traffic infraction under the vehicle and traffic law, or by an

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information charging one or more petty offenses as defined by the municipal code of a village, town, city, or county, that do not carry a statutorily authorized sentence of imprisonment, and where the defendant stands charged before the court with no crime or offense" (CPL §245.10[a][iii])

iv. The People can apply for an additional thirty (30) calendar days if the discoverable material is exceptionally voluminous, or is not in the actual possession of the People (CPL §245.10[b])

v. The People must file a Certification that they have provided all Discovery to a Defendant, and they cannot declare Readiness for Trial unless and until they have done so (CPL §245.50)

vi. The People's failure to properly Certify that they've satisfied their Discovery obligations can result in the court ordering further discovery, granting a continuance, ordering that a hearing be reopened, ordering that a witness be called or recalled, instructing the jury that it may draw an adverse inference regarding the non-compliance, precluding or striking a witness's testimony or a portion of a witness's testimony, admitting or excluding evidence, ordering a mistrial, ordering the dismissal of all or some of the charges, or making such other order as it deems just under the circumstances (CPL §245.20[4])

D. Anything in possession of Law Enforcement is now deemed in possession of the People

i. CPL §245.20(2) codified prior caselaw to that effect

ii. CPL §245.55 now requires police to make a copy of their entire file for the Prosecution, to preserve all recordings, and to notify the Prosecution in writing of all available information

E. Discoverable Material no longer limited to the eleven (11) categories in CPL §240.20(a) through (k); CPL §245.20 now provides for almost double that number of categories, and is not exclusive

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i. The legislative intent behind this expansion was the promotion of openness (CPL §245.20[7])

ii. Previously, Courts didn't have the authority to order Discovery of materials not encompassed by the Discovery statute ("Items not enumerated therein are not discoverable as a matter of right unless constitutionally or otherwise specially mandated," People v. Colavito, 87 NY2d 423, 427 [1996])

iii. Now, if a Defendant says he can't get certain Discovery without "undue hardship," the Court can order the People to disclose it (CPL §245.30[3])

F. Discovery Rules now apply to Felony Complaints (i.e., pre-indictment Discovery), Misdemeanor Complaints, Traffic Infractions, and Simplified Informations (CPL §245.10[1][a])

G. When the People offer a pre-trial plea to a crime, they must provide the Defendant with all required Discovery prior to the cut-off date for accepting that plea

i. A pre-indictment plea offer requires the Defendant to be provided with required Discovery at least three (3) days before the cut-off date (CPL §245.25), and

ii. A post-indictment plea offer requires the Defendant to be provided with required Discovery at least seven (7) days before the cut-off date (CPL §245.25)

iii. A Defendant who rejects a plea offer may be able to have it "put back on the table" if they can show that their rejection of the offer was materially affected by the People's violation of this Discovery requirement (CPL §245.25)

H. Defendants can agree to waive their right to Discovery and be relieved from their own obligations of Discovery (CPL §245.75)

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BILLS OF PARTICULARS

II. Requests for Bills of Particular—Not Formal Motions (yet…)

A. CPL Articles 200 and 100: Request for a Bill of Particulars (CPL §200.95; CPL §100.45[4])

i. A Bill of Particulars is a written statement by the prosecutor specifying items of factual information which are not recited in the accusatory instrument and which pertain to the offense charged, including the substance of each defendant's conduct and whether he was an accomplice or a principal (CPL §200.95[1][a])

ii. A Request for a Bill of Particulars is a written request served by the defendant upon the People without leave of the Court requesting a Bill of Particulars, specifying the items of factual information desired, and alleging that the defendant cannot adequately prepare or conduct his defense without the information requested (CPL §200.95[1][b])

iii. Doesn't require the People to include matters of evidence relating to how they intend to prove the elements of the offense charged or how they intend to prove any item of factual information included in the BOP (CPL §200.95[1][a])

a. What type of "firearm" is an appropriate request, but…

b. Caliber of weapon is matter of evidence

iv. BOPs are available for Informations, Misdemeanor Complaints, Prosecutor's Informations, and Indictments; i.e., BOPs are available for all accusatory instruments except Felony Complaints and Simplified Informations (CPL §§100.45[4], 200.95)

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v. In most DWI prosecutions, the prosecutor will respond that the defendant has already received a Bill of Particulars at his arraignment—the "DWI Longform/Bill of Particulars" (DCJS Form 3204)

vi. Despite not being a "written response by the prosecutor," it's likely there will be more information included in the DWI Longform than in a formal written response by the prosecutor

vii. Timely request is within 30 days of arraignment or first appearance of counsel (CPL §200.95[3])

viii. Upon timely request by defendant, People have 15 days to comply (CPL §200.95[2])

ix. People's refusal to comply (either in whole or in part) must be in writing (CPL §200.95[4])

x. Request for a Bill of Particulars must allege that defendant cannot adequately prepare or conduct his defense without the information requested (CPL §200.95[1][b])

PRE-TRIAL MOTIONS

III. All motions must be made at the same time wherever practical (CPL §255.20), and standard timeframe is within 45 days of arraignment unless Court grants additional time upon defendant's request (CPL §255.20[1])

A. Dismissal in the Lower Courts

i. Geographical Jurisdiction (CPL Article 20)

a. An offense committed within five hundred yards of the boundary of a particular county with an adjoining county

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in NYS may be prosecuted in either county (CPL §20.40[4][c])

b. An offense committed upon any bridge having terminals in different counties may be prosecuted in either county (CPL §20.40[4][e])

c. An offense committed in a private vehicle during a trip extending through more than one county may be prosecuted in any county through which such vehicle passed in the course of such trip (CPL §20.40[4][g])

d. These same principles apply to the determination of geographical jurisdiction over offenses as between cities, towns, and villages within a particular county (CPL §20.50[1])

e. Where an offense prosecutable in a local criminal court is committed in a city (other than NYC), town or village but within 100 yards of any other city, town or village, it may be prosecuted in either locale (CPL §20.50[2])

ii. Statutory Bases for Motions to Dismiss in Local Court (CPL §170.30)

a. Defective accusatory instrument (CPL §§170.30[1][a], 170.35)

b. Defendant has immunity (CPL §§170.30[1][b], 50.20, 190.40)

c. Double Jeopardy has attached (CPL §§170.30[1][c], 40.20)

d. Statute of Limitations (CPL §§170.30[1][d], 30.10)

e. Speedy Trial Violation (CPL §§170.30[1][e], 30.20, 30.30)

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1. The People must file a Certification that they have provided all Discovery to a Defendant, and they cannot declare Readiness for Trial unless and until they have done so (CPL §245.50)

2. Adjournments with Consent of Defendant or attorney are excludable from calculation (CPL §30.30[4])

3. In misdemeanors, People must be ready for trial within 90 days of commencement of action, and readiness must be placed on the record (People v. Kendzia, 64 NY2d 331 [1985])

4. Post-readiness delay (i.e., when the People cannot proceed to trial after declaring readiness) is calculated using the same analysis as pre-readiness delay

5. Burden is on the Defendant to establish a *prima facie* case of violation of the statute; the People must then show that there is excludable time (People v. Berkowitz, 50 NY2d 333 [1980])—a hearing may be necessary to make final determination

6. Factors for establishing violation of Constitutional Speedy Trial rights (i.e., CPL §30.20) are found in People v. Taranovich (37 NY2d 442 [1975])

f. Some other jurisdictional or legal impediment to conviction of defendant for the offense charged (CPL §170.30[1][f])

g. In furtherance of (or "in the interests of") justice (CPL §170.30[1][g])

iii. Furtherance of Justice (CPL §§ 170.30[1][g], 170.40; 210.20[1][i], 210.40)

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a. Applies to Vehicle & Traffic law offenses, as well as Penal Law offenses (CPL §§170.40[1], 210.40[1])

b. Dismissal required as a matter of judicial discretion by the existence of some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant upon such accusatory instrument or count would constitute or result in injustice (Id.)

c. List of factors to be considered by Court in making determination includes "any other relevant fact indicating that a judgment of conviction would serve no useful purpose" (CPL §§170.40[1][j], 210.40[1][j])

iv. Failure to file charges with Court

a. Occasionally, when defendants are given Appearance Tickets with early return dates on them, copies of those accusatories are not filed with the Court in time for "arraignment"

b. Some local courts will consequently, and upon defense motion, dismiss the accusatory instruments served upon the defendants

c. Double jeopardy does not attach, however, since there was neither a conviction nor a trial—and there was no accusatory instrument filed in a court (CPL §40.30[1])

B. Discovery by Defendant

i. Shouldn't really be necessary any longer for Defendants to bring Discovery Motions to compel disclosure of information, since the People's failure to provide Discovery (and to certify that they've done so) will preclude a Declaration of Readiness

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for Trial—i.e., there's a big incentive for the People to comply with their "automatic" Discovery obligations

ii. Motion to Reinstate Plea Offer (CPL §245.45): if the People fail to comply with Discovery requirements connected with a plea offer, and if it can be shown that this failure materially affected the Defendant's decision not to accept the offer, Defendant can bring a motion to compel the People to reinstate the lapsed or withdrawn plea offer—and if the People refuse, the Court must order preclusion of the withheld information

iii. Protective Orders

a. If good cause can be shown, either party can secure a Protective Order to prevent the disclosure of information otherwise discoverable (CPL §245.70[1]); a hearing must be held within three (3) business days (CPL §245.70[3])

b. A party that has unsuccessfully sought, or unsuccessfully opposed the granting of, a protective order under this section relating to the name, address, contact information or statements of a person may obtain expedited review of that ruling by an individual justice of the intermediate appellate court to which an appeal from a judgment of conviction in the case would be taken (CPL §245.70[6][a]).

iv. Challenges to Certificates of Compliance filed by the People are to be addressed by Motion (CPL §245.50)

C. <u>Discovery by the People</u>

i. Protective Order

a. If good cause can be shown, either party can secure a Protective Order to prevent the disclosure of information otherwise discoverable (CPL §245.70[1]); a hearing must be held within three (3) business days (CPL §245.70[3])

b. The People can also request that any disclosure be restricted to counsel for a Defendant, or that information be redacted and only be available for viewing at the prosecutor's office, a police station, a detention facility, or a court (CPL §245.70[1])

c. A party that has unsuccessfully sought, or unsuccessfully opposed the granting of, a protective order under this section relating to the name, address, contact information or statements of a person may obtain expedited review of that ruling by an individual justice of the intermediate appellate court to which an appeal from a judgment of conviction in the case would be taken (CPL §245.70[6][a]).

ii. Motion to Modify the Time Period for Discovery (CPL §245.70[2])—but not required when the delay is caused by failure to provide transcripts of Grand Jury testimony due to the limited availability of transcription resources (CPL §245.20[1][b])

iii. CPL §245.40 now allows the People to file a Motion to compel Discovery of Non-Testimonial evidence from a Defendant, including:

a. Appearing in a lineup;

b. Speaking for identification by a witness or potential witness;

c. Being fingerprinted;

d. Posing for photographs not involving reenactment of an event;

e. Permitting the taking of samples of the defendant's blood,

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hair, and other materials of the defendant's body that involves no unreasonable intrusion thereof;

f. Providing specimens of the defendant's handwriting; and

g. Submitting to a reasonable physical or medical inspection of the defendant's body.

iv. If a Defendant intends to offer evidence in his/her defense, there are reciprocal Discovery obligations upon the Defendant (CPL §245.20[4]); failure to comply can result in the court ordering further discovery, granting a continuance, ordering that a hearing be reopened, ordering that a witness be called or recalled, instructing the jury that it may draw an adverse inference regarding the non-compliance, precluding or striking a witness's testimony or a portion of a witness's testimony, admitting or excluding evidence, ordering a mistrial, ordering the dismissal of all or some of the charges, or making such other order as it deems just under the circumstances; except that any sanction against the defendant shall comport with the defendant's constitutional right to present a defense, and precluding a defense witness from testifying shall be permissible only upon a finding that the defendant's failure to comply with the discovery obligation or order was willful and motivated by a desire to obtain a tactical advantage (CPL §§240.20[5]; 240.80[2])

D. Bills of Particulars

i. Upon appropriate written motion of defendant for a Bill of Particulars where the prosecution has refused to comply in writing, the Court must (absent a protective order) order the prosecutor to comply with the request (CPL §200.95[5])

ii. Upon appropriate written motion of defendant for a Bill of Particulars where the prosecution has not timely refused to comply, the Court must (absent good cause) order the

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prosecutor to comply with the request, or order one of the other remedies provided by CPL §240.70(1):

a. The Court may grant a continuance;

b. The Court may issue a protective order;

c. The Court may prohibit the introduction of the evidence; or

d. The Court may "take any other appropriate action"

E. Motions to Remove the Action to Another Court

i. CPL §170.15(3) governs removal from one court to another

ii. Applies due to incapacity or disqualification of judge(s)

iii. Applies when Court cannot form a jury

iv. Recusal of Judge is covered under Judiciary Law §14

F. Motions to Suppress

i. Physical Evidence (Mapp v. Ohio, 367 U.S. 643 [1961])

a. Defendant must allege standing in pleadings, then must establish standing at Hearing

b. Standing must be alleged to contest seizure of evidence (CPL §710.20)

c. People v. Ponder (54 N.Y.2d 160 [1981]) describes standing as either a present possessory interest or an expectation of privacy in the area or premises searched

d. Grounds for Motions to Suppress are found CPL §710.20

ii. Statements

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a. People v. Huntley (15 N.Y.2D 72 [1965])

1. To determine if a statement made to public official or one working in cooperation with public official was voluntarily made, and therefore admissible

2. Prosecution has the burden of showing beyond a reasonable doubt that the statement was voluntarily made

3. Defendant must have been put on notice of statement(s) made to a public servant, within 15 days of Arraignment (CPL §710.30[2]) for it to be admissible in People's case-in-chief

4. If no notice is served, statement is to be precluded from use at trial unless defendant has moved to suppress it (CPL §710.30[3])

5. Where a defendant claims a statement should be suppressed because of involuntariness, no factual allegations need be alleged to be entitled to a Hearing (CPL §510.50[3][6])

b. Berkemer v. McCarty (468 U.S. 420 [1984])

1. Roadside questioning is non-custodial for purposes of Miranda

2. Not an absolute, however—if situation evolves into what constitutes custodial questioning, Miranda will apply

c. People v. Berg (92 N.Y.2d 701 [1999])

1. "Reciting the alphabet and counting are not testimonial or communicative" (Berg, at 705)

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2. Left open the question of whether the refusal to perform SFSTs is testimonial or non-testimonial

iii. Identifications (U.S. v. Wade, 388 U.S. 218 [1967])

a. CPL §710.30 requires Defendant be given notice of any police-arranged identification proceedings within 15 days of arraignment

b. No notice required if witness and defendant know each other, or if the pre-trial identification is not the result of police conduct

c. Absent Notice, identifications must otherwise be precluded (CPL §710.30[3]), regardless of any independent basis for the ID (People v. Perez, 177 A.D.2d 657 [2d Dept. 1991], *appeal denied by* 79 N.Y.2d 951 [1992])

iv. Vehicle Stops

a. People v. Ingle (36 N.Y.2d 413 [1975])—articulable reason to stop the vehicle, which must be rational and not due to whim, caprice or prejudice

b. Delaware v. Prouse (440 U.S. 648 [1979])—police cannot stop vehicles absent an articulable reason or reasonable suspicion of criminal activity

c. People v. Rose (67 A.D.3d 1447 [4th Dept. 2009])—"in the time since Ingle 'the Court of Appeals has made it "abundantly clear"…that "police stops of automobiles in this state are legal only pursuant to routine, nonpretextual traffic checks to enforce traffic regulations or where there exists at least a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime"…or where the police have "probable cause to believe that the driver…has committed a traffic violation"' (People v.

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Washburn, 309 A.D.2d 1270, 1271; *see* People v. Robinson, 97 N.Y.2d 341, 348-349; People v. Spencer, 84 N.Y.2d 749, 752-753, *cert denied* 516 U.S. 905; People v. White, 27 A.D.3d 1181)."

d. Mistakes of Law

1. Matter of Byer v. Jackson (241 A.D.2d 943 [4th Dept. 1997])—"Where the officer's belief is based on an erroneous interpretation of law, the stop is illegal at the outset and any further actions by the police as a direct result of the stop are illegal"

2. People v. Rose (*supra*)—flashing of high beams

3. People v. Smith (1 A.D.3d 965 [4th Dept. 2003])—missing front plate

v. Roadblock Stops

a. A roadblock or checkpoint stop is a seizure within the meaning of the Fourth Amendment (People v. Scott, 63 N.Y.2d 518 [1984]; In the Matter of Muhammad F., 94 N.Y.2d 136 [1999]; Michigan Dept. of State Police v. Sitz, 496 U.S. 444 [1990])

b. It's only Constitutional if it follows certain requirements:

1. Must not intrude upon privacy of motorists approaching checkpoint (People v. Scott, *supra*)

2. Must be maintained in accordance with a uniform procedure which affords little discretion to individual officers (Id.) regarding, for example:

I) Which vehicles are to be stopped

II) Which questions are to be asked

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III) Which Standardized Field Sobriety Tests ("SFSTs") are to be conducted

c. Must have adequate precautions to safety, lighting and fair warning of its existence (Ibid.)

d. The plan or directive used by the police in the selection and operation of the checkpoint must be in writing (In the Matter of Muhammad F., *supra*)

e. Checkpoint stops are presumptively unconstitutional, and will be held unconstitutional unless the primary purpose of the checkpoint was not merely to serve the general interest in crime control or to detect evidence of ordinary criminal wrongdoing (City of Indianapolis v. Edmond, 531 U.S. 32 [2000])

f. This cannot be done merely by calling the roadblock a "sobriety checkpoint" (City of Indianapolis v. Edmond, *supra*)

g. The prosecution has the burden of showing that the stated purpose of a checkpoint was its actual purpose (People v. Jackson, 99 N.Y.2d 125 [2002]; *see also*, People v. Trotter, 28 A.D.3d 165 [4th Dept. 2006], *leave to appeal denied by* 6 N.Y.3d 839 [2006])

h. To prove the primary purpose of the checkpoint, the prosecution will be required to present the testimony of a high-ranking police official involved in policy making, not merely an officer who conducted the checkpoint (City of Indianapolis v. Edmond, *supra*)

vi. Probable Cause for Arrest

a. Dunaway v. New York (442 U.S. 200 [1979])

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b. Absent probable cause to arrest for DWI/DWAI, evidence obtained subsequent to arrest should be suppressed

1. Statements

2. Observations

3. Chemical Test Results

c. If Court won't grant a stand-alone Dunaway (i.e., "probable cause") hearing, it should at least allow challenging of probable cause in a Huntley or Mapp hearing (People v. Wise, 46 N.Y.2d 321 [1978])

vii. Court may grant the Motion to Suppress where the People do not deny the allegations in defendant's pleadings (CPL §710.60[2][a])

viii. Court may deny the Motion to Suppress where defendant's pleadings fail to set forth any of the grounds for suppression listed above, or if the facts alleged—even if true—are insufficient as a matter of law to support the Motion (CPL §§710.60[3][a], 710.60[3][b]; People v. Lomax, 50 NY2d 351 [1980])

G. Motions for Separate Trials

i. CPL §100.45 applies CPL §§200.20 & 200.40 to misdemeanor informations and complaints

ii. Co-Defendant represented by attorney who previously represented defendant (People v. Gomberg, 38 NY2d 307 [1975])

iii. Co-Defendant makes a statement that exonerates himself and implicates defendant; jury is unable to follow instruction to ignore statement as it relates to guilt of remaining defendant(s);

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defendant is entitled to severance (Bruton v. United States, 391 U.S. 123 [1968])

IV. Motions in Limine

A. Defendant's Prior Bad Acts in People's Case-in-Chief

i. People must disclose prior bad acts to defendant at least fifteen (15) days before trial (CPL §245.20[3])

ii. People v. Molineux (168 N.Y. 264 [1901])—prior uncharged crimes

iii. People v. Ventimiglia (52 N.Y.2d 350 [1981])—hearing must be held to determine admissibility

B. Defendant's Prior Bad Acts on Cross-Examination

i. People must disclose prior bad acts to defendant at least fifteen (15) days before trial (CPL §245.20[3])

ii. People v. Sandoval (34 N.Y.2d 371 [1974])—burden on defense to show information is more prejudicial than probative

C. Horizontal Gaze Nystagmus

i. Now accepted by NYS Courts: "Such tests have been found to be accepted within the scientific community as a reliable indicator of intoxication and, thus, a court may take judicial notice of the HGN test's acceptability" (People v. Tetrault, 53 A.D.3d 558 [2nd Dept. 2008], *leave to appeal denied by* 11 N.Y.3d 835 [2008]; *citing*, People v. Hammond, 35 A.D.3d 905 [3rd Dept. 2006], leave to appeal denied by 8 N.Y.3d 946 [2007]).

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ii. BUT…Considered a "standardized" field sobriety test; therefore, standard procedures must be followed to allow its admission at trial

iii. In absence of compliance with NHTSA's specific procedures for administration of test, motion in limine should be made to prevent its admission at trial

D. Portable Breath Test ("Alco-Sensor")

i. Evidence relating to administration of Alco-Sensor test, as well as to the results of an Alco-Sensor test, are inadmissible at trial (People v. Thomas, 121 A.D.2d 73 [4th Dept. 1986], order *affirmed*, 70 N.Y.2d 823 [1987])

ii. Admission of such evidence is subject to harmless error analysis, however (People v. Thomas, *supra*), so pre-trial motion in limine should be made

E. Chemical Test to Determine Blood Alcohol Content

i. CPL §710.20(5) authorizing a motion to suppress "a chemical test of the defendant's blood" is also applicable to chemical tests of defendants' breath (People v. Ayala, 89 N.Y.2d 874 [1996])

ii. But even where there is no ground for suppression, a motion in limine should be made where the breath test was administered improperly (e.g., more than two hours after arrest; by an uncertified operator; on an improperly working instrument; etc.)

F. Breath Documents

i. Discovery Response containing incorrect documentation

ii. Remote Calibration of breath-testing instrument

G. Evidence not disclosed in Pre-Trial Plea Negotiations (CPL §245.25)

PRE-TRIAL HEARINGS

V. Pre-Trial Hearings

A. Effort of Defense to limit Prosecution's Evidence

B. Therefore, most often granted based upon Motions to Suppress

C. Requires sworn testimony of witnesses

D. Rosario rule applies—and CPL §245.20(1)(e) requires that Rosario material (People v. Rosario, 9 NY2d 286 [1961]) have been provided to the defense as a part of the People's initial discovery obligation

E. Hearsay is admissible (CPL §710.60[4])

F. Following Hearing(s), Court must make Findings of Fact and Conclusions of Law on the record (CPL §710.60[6])

G. Huntley Hearings

i. To determine whether a statement made by the defendant to a public servant was involuntarily made and is thus suppressible

ii. People must prove Beyond a Reasonable Doubt that the statement was *voluntarily* given

a. To establish voluntariness, People can show that Miranda warnings were given

b. To demonstrate that Defendant waived his right to counsel, the People will attempt to show that there were no threats, duress or coercion

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c. Interrogation must have ceased if defendant requested a lawyer (People v. Cunningham, 49 NY2d 203 [1980])

iii. People will generally call the officer who obtained the statement from Defendant, though hearsay is admissible to establish any material fact (CPL §710.60[4])

iv. Spontaneous utterances of the Defendant which were not the product of any conduct on the part of the police will be admissible (People v. Ferro, 63 NY2d 316 [1984])

v. Defendant may testify—though this is rare

a. Defendant's testimony at the Hearing may be confined to the circumstances surrounding the taking/obtaining of his statement

b. If defense counsel "opens the door" on direct examination of Defendant, however, the People can cross examine Defendant on the issue of his guilt

c. If Defendant does testify, his testimony is inadmissible at trial except to impeach him (should he testify)

H. Mapp Hearings

i. Concerns the admissibility of physical evidence or contraband obtained by law enforcement pursuant to a search and seizure

ii. The Fourth Amendment to the United States Constitution and Article I, Section 12 of the New York State Constitution are identical: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

iii. Defendant must establish standing at the Hearing

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iv. Once Hearing is granted (based upon Motion Papers), Prosecution has the Burden of Proof of showing the legality of the police conduct; then the Defense has the burden of proving the illegality of the search/seizure by a preponderance of the evidence

a. A search and seizure violates the U.S. and State Constitutions unless conducted pursuant to a valid search warrant, by consent, or incident to a lawful arrest

1. Exceptions include: Exigent Circumstances;

2. Plain View Seizures;

3. Vehicle Exception ("grabbable area")

4. Inventory Searches

5. Roadblocks

6. Telephone tips to the Police (but these must pass the Aguilar-Spinelli test and establish the Caller's Reliability and the Basis of the Caller's Knowledge; known citizens are presumed reliable)

b. Where a warrantless seizure has been effected, the burden of proof is on the People to establish that the seizure was justified, and if that is established, the burden shifts to the Defendant to prove illegality (People v. Pettinato, 69 NY2d 653 [1986])

c. Where the justification for a warrantless seizure is consent, the People must show that the consent was voluntarily given

d. If Defendant is able to show that the Search and Seizure was a "fruit of the poisonous tree," then the burden falls once again upon the People to prove admissibility by

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clear and convincing evidence, independent source, or inevitable discovery

I. Wade Hearings

i. To challenge the police conduct in a police-arranged identification proceeding (i.e., was the show-up, line-up or photo array "unduly suggestive?")

ii. Defense has the burden of showing that the identification procedure was unduly suggestive; the People then have to show that there is an independent basis for the in-court identification to be made, and they must show this by clear and convincing evidence

iii. Defendant, even if unsuccessful at the pre-trial Hearing, can argue credibility of the identifier at trial (People v. Ruffino, 110 AD2d 198 [2nd Dept. 1985])

iv. Identification proceedings which were merely "confirmatory" are not subject to suppression (i.e., where there is a strong independent basis, such as a familiarity with the Defendant)

J. Sandoval Hearings

i. If Defendant intends to testify at trial, his attorney will seek a ruling regarding whether proof of prior "bad acts" (e.g., convictions or commission of uncharged crimes) may be used at trial for cross-examination purposes

ii. Burden is on the Defense to show that the prejudicial value of the prior bad acts outweighs the probative value to the finder of fact

iii. "Sandoval Compromise"—allows proof of fact of conviction, but not the underlying facts

K. Molineux/Ventimiglia Hearings

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i. Similar to Sandoval Hearings, but relates to the use of defendant's prior bad acts in the People's case-in-chief

ii. Burden of proof is on the People to show that the probative value of the information outweighs the prejudicial effect

VI. Felony Hearings (CPL Article 180)

A. CPL §180.80

B. The People have 120 hours (5 days), or 144 hours (6 days) if there's a weekend or Holiday

C. No hearsay is admissible, except reports of experts and other documents admissible in the Grand Jury (CPL §180.60[8])

D. People have the burden of proof, and must show that there is reasonable cause to believe a felony was committed by the Defendant—not required to be the felony Defendant stands charged with (CPL §180.70[1])

E. Cross-Examination is permitted of all witnesses (CPL §180.60[4])

F. Defendant has a right to testify BUT he may only call defense witnesses if permitted by the Court in its discretion (CPL §180.60[7])

G. The Court may exclude the public upon application of the Defendant and order that no disclosure be made of the proceedings (CPL §180.60[9])

H. Felony Hearings should be conducted in 1 day, but may be adjourned by the Court in the interests of justice (though absent a showing of good cause, the adjournment may not be for more than 1 day)

I. If the People do not run the Hearing in the allotted time, the Court must release the defendant on his own recognizance unless the People can show good cause, e.g., the victim is still in the hospital, etc. (CPL §180.80[3])

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