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Syracuse, New York

Court of Appeals
Criminal Procedure Update

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Instructor:
Hon. Robert G. Bogle
MCLE: 1.0 Professional Practice

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Presenter

Hon. Robert G. Bogle
Acting New York State Supreme Court Justice

Robert G. Bogle is a Nassau County Court Judge and Acting New York State Supreme Court Justice. He is also the Supervising Judge of the Nassau County Town and Village Courts. He is an Adjunct Professor of criminal Justice for graduate and undergraduate students at the C.W. Post Campus of Long Island University. He is a member of the New York Starte Advisory Committee on Judicial ethics and is a lecturer for the Judicial Education Program for he Office of Court Administration. Judge Bogle has published numerous articles and court decisions in the field of Criminal Court Practice. He is the Co-Author of "Village, Towns and District Courts in New York," by Thomson Reuters. He is the author of "Criminal Procedure in New York" (4 volumes) and is Directing Editor "McKinney's Forms Criminal Procedure Law" (4 volumes), both published by Thomson Reuters. He served as Valley Stream Village Justice (1986-2016) and Acting Long Beach City Court Judge (1996-2015), as well as President of the new York State Magistrates Association (2004-2005) and President of the Nassau County Magistrates Association (1995-96). In 2006, he received the New York State Magistrate of the Year Award and in 2008 he received the Frank Santagata Bar Association Award for service to the Nassau County Courts.

He also served as Chief Court Attorney for the Nassau County Court Law Dept. (1999-2015), Law Secretary to the Hon. Ira H. Wexner, Supervising Judge of the Nassau County District and County Courts (1988-1999) and Deputy Nassau County Attorney for the Appeals and Major Litigation Bureaus (1983-1988). He is a graduate of Hofstra University School of Law and Niagara University (BA Cum Laude) and attended Cornell University and George Washington University. He has two sons, James and Robert and is married to his wife Kathleen.

COURT OF APPEALS

CRIMINAL PROCEDURE

UPDATE

2022-2023

Judge Robert G. Bogle
Supervising Judge of
the Nassau County Village Courts

Commencing Criminal Action in the Local Criminal Court

In People v. Hill, 38 NY3d 460, 174 NYS3d 340 (2022), the Court of Appeals has held that allegations in a misdemeanor complaint did not establish reasonable cause to believe the defendant committed the crime of criminal possession of controlled substance in the seventh degree. The Court further held that the officer's training in identifying controlled substances by making a description of the substance seized from defendant, including that it was synthetic cannabinoid, was insufficient since the Public Health Law criminalized only subset of synthetic cannabinoids and accusatory instrument's factual assertions did not identify listed illegal synthetic cannabinoid. NY CPL § 100.40 (4)(B); NY Penal Law §§ 220.00 (5), 220.03; NY Public Health Law § 3306(g). Also, in People v. Mitchell, 38 NY3d 408, 174 NYS3d 1 (2022), the Court of Appeals noted a misdemeanor complaint alleging fraudulent accosting by means of a trick, swindle, or confidence game was supported by reasonable cause, as required for facial sufficiency. The complaint alleged that the defendant was standing on street corner next to two milk crates set up as a table, that on the table was a black box with slot for money and fliers describing how to donate to homeless shelters, that defendant positioned table to block sidewalk, causing at least 75 pedestrians to have to walk around him, that he asked pedestrians to help the homeless, that he was unable to tell the police officer name of church that allegedly received donations or name of person who received money, and that while he told the officer he was president of named homeless outreach organization and he gave officer laminated card stating his affiliation, he later admitted that most proceeds went to himself. [see Penal Law § 165.30 (1)].

Changes to New York Bail Reform Effective June 2, 2023

On May 2, 2023, the Legislature passed, and, on May 3, 2023, the Governor signed S4006-C / A3006-C-the Education, Labor, and Family Assistance Article VII Budget Bill. SubPart A of Part VV amends the Criminal Procedural Law regarding the issuance of securing orders (the "2023 Amendments") and will become effective thirty (30)days from enactment - Friday, June 2, 2023.

Preliminary Considerations

Although the 2023 Amendments entail some significant changes to Bail Reform, which are discussed below, in the vast majority of securing order proceedings, the entail explicit touchstone for determining the appropriate monetary and/or non-monetary conditions to be set remains the same - reasonably assuring a principal's return to court. *See* CPL 510.10 (1) (as amended). The list of qualifying offenses has also been left unchanged. *See* CPL 510.10 (4). Additionally, it should be noted that the enumerated factors for the Court to consider in drafting a securing order have not been amended and still include the principal's :

- Activities and history,
- Charges,
- Criminal conviction history,
- Adjudications as a juvenile delinquent and other such pending matters,
- Adjudications as a youthful offender,
- Record of flight to avoid criminal prosecution,
- Financial circumstances if monetary bail is authorized (ability to post bail without posing undue hardship),
- Violations of orders of protection

- History of use or possession of a firearm
- Whether charges caused serious harm to an individual or group of individuals, and
- The merit or lack of merit of the appeal if order is issued on a matter so pending.

See CPL 510.10 (1)(a)-(j). Moreover, the 2023 Amendments discussed herein cannot and do not attempt to override or otherwise abrogate in any way the pre-existing constitutional consideration that must circumscribe all pre-trial detention decisions. *See*, e.g. State ex rel. Barrett on Behalf of Galanis v. Koehler, 132 AD2d 491, 491 (1st Dept. 1987) (quoting United States v. Salerno, 481 U.S. 739 (1987).

Removal of the Least Restrictive Alternative Analysis and the Presumption of Release

Among the most prominent of the changes contained in the 2023 Amendments is the wholesale removal of the "least restrictive alternative" analysis as an explicit statutory requirement for securing order determinations. To this end, under Section 1 of the 2023 Amendments, CPL 500.10 (3-A) has been amended.

Under the revised CPL 510.10 (1), the Court must now "consider the kind of degree of control or restriction necessary to reasonably assure the principal's return to court, and select a securing order consistent with its determination under this subdivision." Id. (as amended). In so amending CPL 510.10 (1), Section 2 of the 2023 Amendments not only removes the "least restrictive alternative" standard but also, for bail-qualifying offenses, eliminates the explicit statutory presumption of release on recognizance.

Under the revised CPL 510.10 (3), the explicit statutory

presumption for release on recognizance remains for non-qualifying offenses and the authority to set securing orders continues to be tied to flight risk. The relevant new provision for non-qualifying offenses states that release on recognizance is required unless such a release doesn't "reasonably assure the principal's return to court." In such a circumstance, non-monetary conditions must be set which will "reasonably assure the principal's return to court."

Section 5 of the legislation amends CPL 510.10 (3) and (4)(b) also to remove "least restrictive alternative" analysis for non-monetary conditions generally and for electronic monitoring.

The discretion of the Court to select an appropriate securing order is also explicitly referenced separately in Section 2 of the legislation through the addition of a new introductory paragraph to CPL 510.10:

> The imposition of a specific type of securing order is in some cases required by law and in other cases within the discretion of the court in accordance with the principles of, and pursuant to its authority granted under, this title.

Combined Monetary and Non-Monetary Securing Orders

Separately, the 2023 Amendments clarify the permissibility of combining non-monetary with monetary conditions, explicitly permitting such dual-form securing orders for offenses where monetary bail is already authorized. CPL 510.20 (10 AND 2 (B).

Previously, courts widely assumed this authority was reasonably implied, and indirectly appellate decisions supported this conclusion having themselves directed such dual-form securing

orders that included both monetary bail and non-monetary conditions.

Court Ordered Mental Health and Chemical Dependence Treatment and Crisis Stabilization Centers

Although also likely already permissible, the 2023 Amendments explicitly permit the Court to order a defendant to attend treatment for mental health and chemical dependency as a non-monetary condition of release through pre-trial services and, separately, to refer them to a crisis stabilization center by amending CPL 500.10 (F).

Revocation Hearing Changes in Securing Order Analysis

Finally, under certain circumstances potentially present during securing order revocation proceedings, the Court now may impose conditions of release based upon a determination that they are necessary to ensure a defendant complies with court conditions and orders in addition to reasonably assuring a principal's return to court to face prosecution. To this end, Section 11 of the 2023 Amendments amends CPL 530.60.

CPL 530.60 (2)(b) Allows the Court to set a new securing order during a revocation hearing based upon what is reasonably necessary to assure a principal's return to court and to assure their compliance with court orders and conditions more generally. This exception would only be applicable when such a principal is shown by clear and convincing evidence to have committed Criminal Contempt in the First Degree, under PL § 215.51(b), ©, or (d), for violating an order or protection; witness/victim intimidation or tampering, under PL §§ 215.11, 215.12, 215.13, 215.15, 215.16, or 215.17; or another felony while at liberty when already charged

with a felony.

Grand Jury

In People v. Jimenez, 39 NY3d 74, 180 NYS3d 48 (2022), the Court of Appeals noted that "choice-of-evils" defense, under which the offense is justifiable and not criminal when defendant's conduct is necessary as emergency measure to avoid imminent injury, is limited in application and intended to be available in rare and highly unusual circumstances. Penal Law § 35.05(2).

Defendant's testimony before grand jury, that he mistakenly struck small dog with broomstick during physical altercation with former acquaintance's uncle and that he had no intention of hurting the dog, foreclosed possibility that he struck the dog to avoid potentially-infections bite by choice, as would be required to establish "choice-of-evils" defense to charges for second-degree criminal mischief, aggravated cruelty to animals, and overdriving, torturing, or injuring animal and thus, instruction on "choice-of-evils" defense was not warranted. Penal Law §§35.05(2), 145.10; Agriculture and Markets Law §§353, 353-a.

Waiver of Indictment

In People v. Solomon, 39 NY3d 1114, 186 NYS3d 849 (2023), the Court of Appeals noted that, as a matter of law, a defendant may waive their constitutional right to grand jury presentment and indictment and proceed by SCI in accordance with the strict technical requirements of CPL 195.10(2). Here, the SCI was filed after the grand jury indicted the defendant and thus the SCI failed to comply with the statutory prerequisites. Accordingly, the SCI is a nullity and was properly dismissed, ruled the Court.

Indictments

In People v. Saenger, ___NY3d___, 2023 WL3510422(2023), The Court of Appeals held that the prosecution's failure to specify current misdemeanor offense in count of indictment charging defendant with aggravated family offense rendered that count jurisdictionally defective, even though prosecution provided defendant with bill of particulars, and indictment separately charged defendant with second degree criminal contempt. The Court added that merely alleging that defendant had committed one of the statute's 18 listed misdemeanor offenses, without specifying which one, did not provide him with notice sufficient to enable him to prepare defense , and bill of particulars simply contained factual recitation of defendant's alleged conduct, but did not clarify underlying misdemeanor offense.

Motion to Dismiss Indictment

In People v. DeStefano, 74 Misc3d 858,164 Misc3d 412 (Nassau Co. Sup. Ct. 2022), the defendant failed to show good cause for failing to make a supplemental motion to suppress evidence collected from pole camera within statutory 45-day period for filing pre-trial motions, prosecution for failure to register or to verify as a sex offender more than 10 calendar days after changing his address, arising from allegations that he was observed entering a particular house each night and leaving the next morning for 14 days. Although the tape from the pole cameras was not available during filing period, where defense counsel was informed of pole video and potential use of curtilage location at the time of the arrest, defendant's omnibus motion did not address any discussion of the pole camera, and motion to suppress was filed nearly five months after receipt of the video. [see US Const. Amend. 4; NY CPL § 255.20(1); NY Correction Law § 168-F(4)].

Illegal Search and Seizure

In People v. Johnson, ___NYS3d___ 2023 WL 3510428(2023), the Court held that the police officer lacked reasonable suspicion that suspect committed or was about to commit crime, so as to justify stop and frisk of suspect after he exited parked car and walked down the street in the area that had recently experienced reported rise in violent crime; suspect's alleged actions prior to frisk, including moving rom driver's seat to passenger side of car, moving his upper torso back toward driver's eat, pulling up his pants and attempting to buckle his belt, and appearing nervous while questioned, did not support reasonable view that the suspect was armed or involved in criminal activity rather, suspect's actions constituted nothing more than innocuous behavior, sole reliance on which would impermissibly reduce foundation for intrusion to nothing but whim or caprice.

Search Warrants

In People v. DeStefano, 74 Misc 3d 858, 164 NYS3d 412 (Nassau Co. Sup. Ct. 2022), the trial judge held that the Fourth Amendment did not preclude officers' isolated and warrantless use of a stationary video cameras installed on top of public utility poles on public property and directed at home of defendant, where defendant did not exhibit an actual subjection expectation of privacy in the goings-on outside of the house, as no fence had been erected nor did he otherwise try to shield the front of the house from public view, the pole camera did not penetrate walls or windows of defendant's house so as to hear and record confidential information, cameras did not explore details of defendant's house that would previously have been unknowable without physical intrusion, and the technology had been in existence for decades.

Eavesdropping Warrant

In People v. Myers, 39 NY3d 130, 183 NYS3d 811 (2023), the Court of Appeals held that a correctional facility's recording of inmate's call to an individual who was subject of a wiretap, in which others, including defendant, who made incriminating statements regarding involvement in fatal hit-and-run accident, that was "derived" from wiretap, which was "intercepted communication," and thus People were required to furnish defendant with copy of eavesdropping warrant withing 15 days after arraignment and before commencement of trial, in prosecution for leaving the scene of an incident resulting in death without reporting. The Court added that, in listening to wiretap, the detective heard incriminating statements about hit-and-run, identified defendant as the declarant, and directed authorities to recording. See CPL §§ 700.05(3)(A), 700.70; VTL § 600(2)(a).

Right to Counsel

In People v. Baines, 39 NY3d 1, 176 NYS3d 843 (2022), the Court of Appeals held that the defendant's waiver of right to counsel was not knowing, voluntary and intelligent at prosecution for rape, criminal sexual act, sex trafficking, promoting prostitution, assault, sexual abuse, unlawful imprisonment, and coercion. The Court added that the court's exploration of the issue did not warn defendant of risks of proceeding pro se or apprise him of importance of lawyer in adversarial system, and trial court's statement to defendant that it was "not a great idea" to represent himself, that defendant was putting himself "in a very bad position," and that a lawyer would have knowledge of criminal procedure that defendant did not were generalized warnings and did not satisfy requirement for a searching inquiry. U.S. Const. Amend 6.

Speedy Trial

In People v. Regan, ___NY3d___, 2023 WL 2529534(2023), the Court of Appeals held that a pre-indictment delay for almost four years resulted in a state constitutional speedy trial violation under CPL 30.20. The Court noted that the prosecutor's proffered reason for considerable extent of pre-indictment delay, i.e., it took almost four years to file an indictment for first-degree rape, was factor weighing in favor to find a violation of state the constitutional due process right to prompt prosecution. The Court noted 24 months of delay were wholly unexplained, seven months at point late in timeline were flimsily justified as necessary to decide that case required DNA evidence and then to figure out how to get DNA evidence from defendant, and People's negligence in failing to employ readily available legal procedures for obtaining DNA evidence was not neutral factor.

The Court added, while the nature of underlying charge, i.e., first-degree rape, was neutral factor when determining whether considerable extent of pre-indictment delay, i.e., it took almost four years to file an indictment, violated defendant's state constitutional due process right to prompt prosecution; while the crime was heinous, preparation for prosecuting the crime was not complex because the only missing evidence was DNA evidence from defendant, which could have been obtained with speed and ease if the People had not been negligent in failing to employ readily available legal procedures, NY Const. art. 1, § 6; NY Penal Law § 130.35(2).

The Court further ruled that under state constitutional due process, the primary responsibility for assuring prompt prosecution rests with the prosecutors, and prosecutors may not needlessly

delay without an acceptable excuse or justification, so a sufficiently lengthy unexplained delay may require dismissal of the indictment altogether. NY Const. art. 1, § 6.

The Court concluded, the pre-indictment delay, i.e., took almost four years to file an indictment for first-degree rape, violated defendant's state constitutional due process right to prompt prosecution. The Court noted the extent of delay was considerable, and the People offered no explanation for most of the delay and offered only flimsy justification, that the People needed to decide that the case required DNA evidence and then figure out how to get DNA evidence from defendant. NY Const. art. 1, § 6.

Speedy Trial

In People v. Galindo, 38 NY3d 199, 171 NYS3d 865 (2022), the Court of Appeals held that under the newly amended CPL 30.30(1)(e) as to the amendment to the speedy trial statute, which was intended to include traffic infractions in list of offenses subject to time limits for when a prosecutor must declare readiness for trial, such amendments did not apply retroactively to criminal actions commenced before its effective date. Therefore as the amendment, which was made effective while defendant's direct appeal was pending, had no application to defendant's direct appeal from his judgment of conviction for various traffic infractions. The Court concluded that there was nothing in the text of the statute that required retroactive application, and legislative history did not support interpretation of amendments as retroactive given that legislature delayed amendment's effective date for eight months indicating its intent that amendment applied prospectively.

Procedure

In People v. Johnson, 39 NY3d 92, 181 NYS3d 161 (2023), the fact that defendant, who was indicted for rape in the first and second degree, pled guilty only to rape in the second degree did not mean that pre-indictment delay of nearly eight years could not have impaired his ability to defend himself, for purposes of determining whether defendant was deprived of right to speedy trial. The Court ruled that prejudice to defendant had to be measured against all pending counts when defendant moved to dismiss indictment, rather than merely against crime of conviction. US Const. Amends. 6, 14; NY Penal Law §130.30 (1). The fact that defendant was incarcerated prior to indictment for rape did not weigh in favor of his claim that a nearly eight year pre-indictment delay deprived him of the right to speedy trial, where defendant was incarcerated on wholly unrelated matter. US Const. Amends. 6, 14.

Youthful Offender Procedure

In People v. Guerra, ___NY3d___ 2023 WL 2529524 (2023), the Court of Appeals held that evidence of specific violent conduct underlying four of the victim's prior youthful offender adjudications was not admissible for purpose of proving that victim was the initial aggressor with respect to deadly physical force, unless defendant was aware of the specific acts at the time of the assault, in prosecution for assault in second degree, in which defendant raised a justification defense.

The court noted that youthful offender designations are given to those who have a real likelihood of turning their lives around, and the protection gives these individuals the opportunity for a fresh start, without a criminal record. Accordingly, the reversal in the Appellate Division is affirmed.

Trial : Jury Selection and Opening Statements

In People v. Garcia, 38 NY3d 1137, 173 NYS3d 192 (2022), the Court of Appeals noted that it is a non-citizen defendant's burden to overcome the presumption that the crime charged is petty, in order to establish a Sixth Amendment right to a jury trial on an offense involving moral turpitude that would subject the defendant to deportation. [see US const. Amend. 6; Immigration and Nationality Act § 237, 8 USCA § 1227 (a)(2)(A)(iii)]. The Court added that a non-citizen defendant's bare assertion that he was deportable if convicted "on any of the charged B misdemeanors, " specifically, attempted forcible touching, public lewdness, and third degree sexual abuse, with mere citation to statute providing that non-citizen was deportable if "convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct," was insufficient to overcome presumption that crimes charged were petty and would not subject him to deportation, and thus did not entitle him to a jury trial under the Sixth Amendment.

Trial: Presentation of Evidence

In People v. Hemphill, 38 NY3d 1182, 175 NYS3d 226 (2022), the Court of Appeals held that the trial court's error in admitting a third party's plea allocution in violation of Confrontation Clause was harmless, in prosecution for murder in the second degree. The Court noted that the evidence of defendant's guilt was overwhelming, plea allocution neither exculpated third party nor inculpated defendant as shooter, thus allowing defendant to argue to jury that third party was the perpetrator, and it merely supported the conclusion that the third party possessed a magnum revolver on the day in question, and the witness had already testified to that alleged fact, and prosecutor's reliance on the plea was exceedingly minimal. [US Const. Amend. 6].

Conduct of Trial Judge

In People v. Sanders, 39 NY3d 216, 184 NYS3d 703 (2023), the Court of Appeals held that the trial judge violated due process by ordering defendant to be handcuffed when the jury returned to announce its verdict without providing an on-the-record, individualized explanation for the restraints.

The Court concluded that the due process clause of the Fourteenth Amendment prohibits States from physically restraining a defendant during a criminal trial without an on-the-record, individualized assessment of the state interest specific to a particular trial, and thus, trial court has a constitutional obligation to conduct close judicial scrutiny before ordering a defendant restrained. US Const. Amend. 14.

Submission to Jury and Rendition of Verdict

In People v. Murray, 39 NY3d 10, 177 NYS3d 191 (2022), once the Court has clearly stated on the record that an alternate juror has no further responsibilities in the case, the alternate juror is "discharged," and is not available for service pursuant to the statute authorizing a trial court to replace a discharged trial juror with an alternate juror who is available for service. CPL § 270.35.

The Court added that a discharged alternate juror is not "available for service," within the meaning of statute authorizing a trial court to replace a discharged trial juror with an alternate juror who is available for service, as the terms "discharged" and "available for service" with respect to alternate jurors are mutually exclusive. NY CPL § 270.30(1).

The Court concluded where the alternate jurors have been discharged, the court's sole remedy for the dismissal of a trial juror

is to declare a mistrial. CPL § 270.35(1).

Motion to Set Aside Verdict

In People v. Hartle, ___NY3d___, 2023 WL 3010323 (2023), the Court of Appeals held that County Court did not abuse its discretion in denying defendant's motion to vacate his rape conviction on the basis of newly discovered evidence without a hearing. The Court noted that the defendant's new evidence claim was based on recovery of previously deleted text messages and photographs from victim's cell phone obtained through forensic retrieval process that allegedly was not available at the time of trial, but defendant knew about, was involved in creation of, and believed he had destroyed those text messages and photographs from his own phone well before trial in effort to conceal criminal activity. The Court held that the defendant did not show that evidence was inaccessible before trial or that he had tried to obtain it, and defendant had argued at trial that absence of evidence supported his claim of actual innocense. [See, NY CPL § 440.10(1)(g)].

Sentencing

In People v. Talluto, 39 NY3d 306, 186 NYS3d 78 (2022), the Court of Appeals held that the trial court was required by the Sex Offender Registration Act (SORA) to designate the defendant a sexually violent offender because he was convicted of a felony under Michigan law, which required him to register as a sex offender in that state, regardless of whether defendant's Michigan offence was violent in nature. The Court concluded that even if SORA's foreign jurisdiction clause contained a legislative drafting error, given the identical language in SORA's definition of "sex offense" and "sexually violent offense" with respect to a felony in another jurisdiction, the court did not have license to ignore SORA's clear and unambiguous language, under which a felony in

any other jurisdiction for which the offender was required to register as a sex offender therein was a sexually violent offense. NY Correction Law §§168-a(2)(d), 168-a(3)(b), 168-a(7)(b); Mich. Comp. Laws Ann. § 28.721 et seq.

Demonstrative or Real Evidence

In People v. Rodriguez, 38 NY3d 151, 169 NYS3d 910 (2022), the Court of Appeals held that printouts of screenshots of text messages containing sexual content sent by defendant to a 15 year old victim, which images victim's boyfriend captured before victim deleted them from her phone, were properly authenticated, in trial for attempted use of child in sexual performance, disseminating indecent material to minor, and endangering the welfare of a child. The victim testified that screenshots fairly and accurately represented text messages sent from defendant's cell phone number, boyfriend identified screenshots as same ones he took from victim's phone, and telephone records of call detail information for defendant's subscriber number corroborated that he sent victim numerous text messages during relevant time period.

Acquisition of Demonstrative Evidence

In People v. Wakefield, 38 NY3d 367, 174 NYS3d 312 (2022), the Court of Appeals held in a case that primarily concerned the admissibility of DNA mixture interpretation evidence generated by the TrueAllele Casework System. The Court concluded that the Supreme Court did not abuse its discretion in finding, following a *Frye* hearing, that TrueAllele's use of the continuous probalistic genotyping approach to generate a statistical likelihood ration-including the use of peak data below the stochastic threshold-of a DNA genotype is generally accepted in the relevant scientific community. The Court also held that there was no error in the court's denial of a defendant's request for discovery of the

TrueAllele software source code in connection with the *Frye* hearing or for the purpose of his Sixth Amendment right to confront the witness against him at trial, as the software in issue was not confrontational in nature. In a similar factual case, the Court of Appeals noted the Court erred in not conducting a *Frye* hearing, however as the evidence was overwhelming, the error was harmless. People v. Easley, 38 NY3d 1010, 168 NYS3d 395 (2022).

Hearsay

In People v. Deverow, 38 NY3d 157, 171 NYS3d 29 (2022, the Court of Appeals reversed a trial court verdict where the trial court's evidentiary errors, in excluding testimony that contradicted only eyewitness's account of shootout in which defendant purportedly fired shots into a group of people and killed victim, and excluding three 911 calls placed around time of shooting that were admissible under present sense impression exception to hearsay, were not harmless, so as to warrant reversal of convictions for second-degree murder and criminal possession of weapon in second degree and new trial; precluded testimony could have contradicted sole eyewitness who negated defendant's justification defense, and admission of 911 calls could have allowed defendant to buttress justification defense.