
# 2019 Annual Conference

## Lake Placid, New York

New York State Criminal Case Law Update:
2018-2019

**September 16, 2019**
**Presented by:**
**Hon. Robert G. Bogle**
**1.0 MCLE (0.5 Prof. Practice, 0.5 Skills)**
**1.0 CJE**

This program has been approved for credit in New York State for all attorneys including those who are Newly Admitted (less than 24 months) and adminstered by the Onondaga County Bar Asssociation.

Judge Robert G. Bogle is currently a Nassau County Court Judge and Acting New York State Supreme Court Justice. He is also the Supervising Judge of the Nassau County 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 State Advisory Committee on Judicial Ethics and is the author of nine (9) Legal textbooks all currently in print. He served as Valley Stream Village Justice (1986-2016), Acting Long Beach City Court Judge (1996-2015), as well as President of the New York State Magistrates Association (2004-2005) and 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 Justice Courts.

He has 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).

# SUMMARY

## NEW YORK STATE CRIMINAL CASELAW UPDATE : 2018-2019

The one (1) hour program will include a review of the latest New York State cases of interest, concerning Criminal Law and Criminal Procedure. Special emphasis will be on the most recent Court of Appeals cases.

## Prompt Prosecution as Required by Due Process

In People v. Wiggins, 31 NY3d 1, 72 NYS3d 1 (2018) the Court found that it was error to apply case law interpreting C.L. 30.30 "to conclude that adjournments granted with co-defendant Armstead's consent should not be chargeable here." The defendant was charged, along with co-defendant Armstead, with murder in the second degree, two counts of attempted murder in the second degree, and criminal possession of a weapon in the second degree. The motion seeking severance was granted. For two and a half years, the People tried to persuade Armstead to testify against the defendant and kept adjourning the case to make this happen. Armstead refused to testify against the defendant. While the defendant was in jail, he was arrested and convicted of other crimes stemming from a jailhouse altercation, which lead to further jail time. Armstead had several trials, with only partial convictions, and the three trials led to mistrials, while his fourth trial led to a conviction of criminal possession of a weapon. During Armstead's trials and the People trying to get Armstead to agree to testify against the defendant, the defendant originally filed a speedy trial motion, but later withdrew it after pleading guilty. While the People were attempting to get Armstead's cooperation against the defendant, the defendant was in jail for six years, three months, and twenty-five days.

The Appellate Division found that there was no speedy trial violation and the Court of Appeals reversed. The Court found that "the problem of prosecutorial readiness address by CPL 30.30 and the constitutional speedy trial right are not analogous." " Although the words "speedy trial" appear in the title to CPL 30.30 and the section is often referred to as expressing a statutory right to a speedy trial, in both form and intention it articulates only the right of a defendant to a dismissal where the people are not ready for trial." (quoting *People v. Brothers*, 50 NY2d 413). CPL 30.30 (4)(d) "generally excludes from time chargeable to the People reasonable periods of delay attributable to a co-defendant because those delays are not the result of prosecutorial unreadiness." Therefore, "although many of the adjournments, both before and after the People decided to try Armstead first, were at Armstead's request or on his consent, each criminal defendant has an individual constitutional right to a speedy trial that cannot be rendered meaningless by the dilatory tactics of his or her co-defendant." (see, Constitutional Right to Speedy Trial Under CPL 30.20)

Here, the delay was "extraordinary" and while good faith by the People as to justification could be presumed, the defendant was incarcerated the entire time. Therefore, although no specific prejudice was alleged against the sixteen (16) year old defendant, the Court of Appeals dismissal of the case on Constitutional Due Process speedy trial grounds in accordance with CPL 30.20.

## Identification of Defendant - Photo Identification, Generally

In People v. Price, 29 NY3d 472, 58 NYS3d 259 (2017), the Court of Appeals held that the trial court in defendant's robbery prosecution erred in admitting into evidence a photograph purportedly of defendant holding a firearm and money obtained from an internet profile page allegedly belonging to defendant, where the People failed to proffer a sufficient foundation to

authenticate the photograph as a fair and accurate representation of defendant hold a gun. The victim was unable to identify the weapon in the photograph as that which was used in the robbery, and no other witnesses testified that the photograph was a fair and accurate representation of the scene depicted. There was no evidence regarding whether defendant was known to use an account of the website in question, whether he had ever communicated with anyone through the account or whether the account could be traced to electronic devices owned by him. Nor did the People proffer any evidence indicating whether the account was password protected or accessible by others, whether non-account holders could post pictures to the account or whether the website permitted defendant to remove pictures from his account if he objected to what was depicted therein. The authentication requirement cannot be satisfied solely by proof that defendant's surname and picture appeared on the profile page. Thus, even if the photograph could have been authenticated through proof that the webpage on which it was found was attributable to defendant, the People's proffered authentication evidence failed to actually demonstrate that defendant was aware of, let alone exercised dominion or control over, the profile page in question.

## Spontaneous Declarations

In People v. Cummings, 31 NY3d 204, 75 NYS3d 484 (2018), a shooting occurred where one of the three victims was able to call 911. In the background, an unidentified speaker said " Yo, It was Twanek man! It was Twanek Man!" (The name of the defendant).

The first trial judge did not allow the statement into evidence and the trial resulted in a hung jury. However, during the second trial, the new trial judge allowed the statement in under a hearsay exception.

The Court of Appeals held the second trial judge was in error and a new trial was ordered as the error was not harmless. The Court noted that although the 911 call was made close in time to the shooting and the fingerprints of the defendant were found on a nearby minivan, and cell-phone data placed him close to the scene, the declarant was not identified and no proof that he personally observed the shooting, thus making the statement inadmissible under either the excited utterance or spontaneous statement exceptions under the hearing rule.

Lastly, the Court noted that in any event that the subsequent trial judge is not bound by the law of the case doctrine, as the issue was strictly evidentiary.

## Opinion Evidence, Generally

In People v. Austin, 30 NY3d 98, 64 NYS3d 650 (2017), the defendant's burglary conviction was reversed because of the admission of improper DNA evidence. During the trial, it was revealed that the criminalist who was going to testify concerning DNA matches with the crime scenes was basing the conclusions on results that had been determined by other analysts. Defense counsel's hearsay objections relied upon the Supreme Court's decision in *Melendez-Diaz v. Massachusetts*, 557 US 305 (2009). As the Court of Appeals commented those objections were "frustrated by the court."

The Court further noted that the DNA reports were never placed into evidence and the criminalist was permitted to read extensively from the files, a clear testimonial Crawford violation. People v. John, 27 NY3d 294 (2016).

The prosecution's expert testified as to matches "without having conducted, witnessed or supervised the generation of the DNA profiles." In overturning the conviction, the Court of Appeals wrote that "the criminalist's testimony was nothing more than a parroting of hearsay statements, made by other analysts and of which he had no personal knowledge."

**Stop and Frisk**

In People v. Perez, 31 NY3d 964, 73 NYS3d 508 (2018), the police were conducting a vertical patrol of a New York City Housing Authority building in a high crime area and interviewing tenants in search of a robbery suspect in an investigation unrelated to this case. Defendant got off the elevator, observed the police officers-who were approximately eight feet away with shields displayed- and immediately retreated into the elevator. Defendant ignored an officer's request that he hold the door and instead "kept pressing the button" and the elevator doors closed. In light of this behavior, as well as the building's history of narcotics and trespass activity, the police followed defendant to determine whether he lived in the building. Rather than respond to the officer's questions, defendant turned away from the police to face the wall, held his head down with the hood of his sweatshirt over his head, and kept his hands hidden inside his sweatshirt. The officer immediately noticed a large bulge in defendant's right arm, which defendant held stiffly and straight down from his body in an unnatural position. The officer testified that defendant's behavior in conjunction with his refusal to respond to the officer's repeated requests for defendant to indicate whether he had any weapons, and to show his hands, led him to feel compelled for his safety to confirm whether defendant had a weapon by conducting a limited search of defendant's wrist area. When the officer touched the defendant's wrist, he felt a metal object, lifted the sleeve of the defendant's shirt, saw the point of a blade, and ordered him to "drop it." Defendant did not comply and officers had to pull the weapon-a two-foot-long machete-from defendant's shirt. Minutes later, the officer learned of a recent robbery in the area involving a machete-wielding suspect wearing clothing matching that worn by defendant. Defendant was charged and convicted in connection with that robbery.

The trial court, after hearing a police officer's testimony regarding the encounter, applied the framework for evaluating the propriety of police-initiated encounters with private citizens (see People v. DeBour, 40 NY2d 210 [1976]), and found that "all of the police actions were justified from their inception." A majority of the Appellate Division panel affirmed, finding that "[based] on all of the attendant circumstances, including the manner in which defendant was holding his arm and his refusal to state whether he was armed or to show his hands when asked, " the officers were authorized to search defendant for a weapon (People v. Perez, 142 AD3d 410, 415-416[1st Dept.]). The issue on appeal to the Court of Appeals is whether the police conduct conformed to DeBour, presents a mixed question of law and fact (see People v. Barksdale, 26 NY3d 139,143 [2015]).

The Court of Appeals concluded, under the testimony provided by the arresting officer that the

trial judge found credible, under the De Bour Doctrine, police conduct was constitutionally proper.

## Sealing of Past Convictions (NEW)

New York's new sealing statute now aligns the state with a majority of other states in addressing the collateral consequences of past convictions. A new section, Criminal Procedure Law § 160.59, applies to all offenders (adults, adolescent offenders and juvenile offenders) who have past convictions. It is the first time, New York will seal prior convictions - the current law only sealed violations and dismissed cases.

Under the new statute, an application can be made to seal up two convictions, only one of which can be a felony. To qualify for sealing, at least ten years must have elapsed from the date of sentence or the release from incarceration, whichever comes later. CPL 160.59 (5). The application must be made to the sentencing judge and if the applicant has two convictions, the application must be made to the judge who resided over the higher classification of crime. If the two crimes are misdemeanors, the application must be made to the judge who sentenced the defendant on the later date.

If the prosecutor objects to the application, he or she has 45 days to file an objection and a court can conduct a hearing to make a determination. Pursuant to the statute, the court must consider any relevant factors including the impact of sealing upon the defendant's reentry or rehabilitation as well as the impact on public safety and the public's confidence. CPL 160.59 (7).

Certain convictions are not eligible for sealing, including violent felonies, sex offenses under Article 130 of the Penal Law, homicides, A felonies, and an offense for which registration as a sex offender is required. CPL 160.59 (1).

The new sealing statute is different from the current sealing statutes (CPL §§ 160.50 and 160.55). First, unlike the current statutes, the new law permits the Department of Criminal Justice Services to retain the fingerprint and photographs of the defendant. In addition, the new law permits a number of "qualified agencies," including prosecutor offices, to have access to these records.

Finally, a defendant cannot be required to waive the right to apply for sealing as part of any plea agreement. CPL 160.59 (11). In addition, an inquiry about a prior sealed conviction will constitute an unlawful discriminatory practice. Executive Law 296 (16).

## DNA TESTING

In People v. Smith, 30 NY3d 626, 69 NYS3d 566 (2017) the People had filed a motion to compel the defendant to submit to DNA testing by way of a buccal swab. On the next court date, the application of defense counsel to be relieved (due to failure of the defendant to pay counsel) was granted and the People's DNA discovery motion was granted. The now unrepresented defendant later appeared in court, where the judge engaged in a colloquy telling defendant there was no

basis to challenge the People's motion. The defendant stated he had not spoken to an attorney regarding the issue, did not wish to consent and requested the availability of an attorney to advise him, to which the judge said "I know of no basis for fighting (the test)and "I know the law!"

The Court of Appeals held that when a court grants defense counsel's request to be relieved and immediately thereafter grants a DNA discovery motion, and upon the first subsequent appearance of the defendant fails to allow him assistance of counsel after he requests counsel and after he opposes the Peoples's application, it is a violation under the Sixth Amendment of the United States Constitution and Article I, sec 6, of the New York State Constitution. The Court held it was constitutionally improper under the defendant's right to counsel to not have the advice of an attorney where the concern was the taking of potentially incriminating DNA evidence. The court chose not to dismiss the indictment, however, and remitted the case to the trial court for further proceedings.

## Psychiatric Examination of Defendant

In People v. Silburn, 31 NY3d 144, 74 NYS3d 781 (2018), the defendant argued that the court denied the defendant his right to self-representation by not allowing him to proceed pro se and to also have standby counsel and that he was deprived his right of a fair trial when the court precluded his psychiatric testimony for failure to serve notice on the People pursuant to CPL 250.10.

Defendant claimed that his right to proceed pro se with standby counsel present was denied. Defendant wanted standby counsel to question the witnesses and then wanted to be able to also question the witnesses if counsel failed to ask certain questions. The Court of Appeals affirmed the lower courts decision. It held that what the defendant was actually proposing was "hybrid counsel," which is not allowed.

"Defendant [also] argues that the trial court erred in precluding his unnoticed psychiatric evidence because a challenge to the voluntariness of a confession pursuant to CPL 710.70 is not a "defense" and is thus outside the ambit of CPL 250.10 (1)(c)."The Court held the defendant's argument completely ignores the legislative intent, "our precedent espousing the very purpose of notice, and the fact that, if a defendant's confession was the primary evidence of guilt and the defendant raises the issue of voluntariness at trial, then voluntariness could be a complete defense to the crime." The Court has previously held that the basic language of the statute requires notice to offer "psychiatric evidence irrespective of whether the expert actually examined the defendant." [T]he applicability of CPL 250.10 to the instant case is wholly consistent with our longstanding interpretation that there can be no surprise psychiatric evidence and that pretrial notice is necessary base upon "principles of fairness and the integrity of the trial process".

Finally, the defendant argues that the "court's refusal to excuse the lack of notice was an abuse of discretion since," under the statute, the court may accept late notice in the interest of justice if good cause is found. The Court found that there was no good cause found because defense counsel knew of the defendant's mental illness and that the mental illness did not render the defendant incapable of knowingly and willingly waiving his Miranda rights and that there was no valid excuse for the defendant's untimeliness.

## Conduct of Jurors

In People v. Kudzal, 31 NY3d 478, 80 NYS3d 189 (2018) a spectator, reported that during a recess, two of the jurors were overheard making obscene remarks about the defendant, on trial for murder. The spectator, who was also the defendant's girlfriend and had previously been ejected from the court for misconduct in the hallway, was placed under oath and testified as to the allegations. The Court did not give credence to the spectator's testimony and as such found no necessity an inquiry of the jurors under People v. Buford, 69 NY2d 290 (1987).

The Court of Appeals agreed that the trial judge, upon determining the non-credibility of the spectator, was under no obligation to inquire of the jurors under Buford. The Court noted "the

allegations of the misconduct did not come from a jury note" but from a third party. Here, The trial Court, when presented with a third party allegation of juror misconduct, rather than immediately question the jurors, and possibly unnecessarily intruding on the sanctity of the jury, instead chose to question the source of the allegation as to its reliability." As such, the Court concluded, under the circumstances proper constitutional procedures were followed in accordance with CPL 270.35.

## "Grossly Unqualified to Serve" Standard for Discharge of Sworn Juror

In People v. Spencer, 29 NY3d 302, 56 NYS3d 494 (2017), on the fourth day of deliberations, the single "hold out" juror asked the court clerk what does she need "to do to get excused". During an extensive inquiry by the Court, the juror repeatedly stated that she was unable to discharge her duty. When the judge stated that there is no way to go forward without her and "there's no way we can excuse you," the juror said "so it's just that I make a decision based on my emotions just to get it out of the way?" When the judge continued to press to decide the case on the facts and law, the juror stated, " I feel like I'm giving up my conscience" and that "I don't think I have it in me" to do that. A verdict of guilty is reached shortly thereafter.

The Court of Appeals reversed, noting that although judges are accorded great latitude in determining if a juror is "grossly unqualified" to serve under CPL 270.35(1). Here, it was clear the juror could not render an impartial verdict and there was no likelihood that the Court could compel the juror to reach a fair verdict under the ongoing circumstances.

## Identification of Defendant

In People v. Boone, 30 NY3d 521, 69 NYS3d 215 (2017), the Court of Appeals held that the Court must provide a C.J.I cross-racial identification jury charge on request where in all cases the defendant and eyewitness/victims are of different races. The Court held that failure to do so will result in reversible error and it is not relevant that there was no expert testimony. The Court based its ruling on the "near consensus" among experts that people of different races have "significantly greater difficulty" in accurately identifying members of a different race other than their own race. The Court noted that other jurisdictions such as New Jersey, Massachusetts, Hawaii and the 2011 N.Y.S. Judicial Task Force has all made similar determinations or recommendations.

## Submission of Supplementary Material to Jury

In People v. O'Kane, 30 NY3d 669, 70 NYS3d 877 (2018) the defendant argued ineffective assistance of counsel due to the fact that his attorney consented to verdict sheet annotations beyond those permitted by CPL 310.20. The defendant was charged with fourteen counts that were tried to the jury. A four page verdict sheet was provided by the court and "[t]o help the jurors distinguish between the many similar allegations covering more than three hundred different acts committed over twelve distinct time periods, the court annotated each count on the verdict sheet with a date or date range and a short description of the alleged criminal conduct." The defendant argued that his counsel's consent to the descriptions of the alleged criminal conduct constituted ineffective assistance of counsel. The Court of Appeals found that the defense counsel's summation proved that defense counsel had a sound strategic plan in choosing to consent to the verdict sheet, so there was no finding of ineffective assistance of counsel.

## Time of Rendition of Verdict

In People v. Harris, 31 NY3d 1183, 82 NYS3d 321 ( 2018), at the end of the non-jury bench trial for a Class B Misdemeanor and related charges, the trial judge announced that the Court would exercise its "prerogative" not to hear closing arguments, even though the day before the judge granted the parties permission to deliver summations. Immediately thereafter, the judge delivered a guilty verdict and sentenced the defendant to 90 days incarceration.

The Court of Appeals found the trial judge violated the Sixth Amendment United States Constitutional right to counsel when that court denied the defense counsel the opportunity to present a summation. It was not constitutionally proper to allow the trial judge the discretion of either granting or denying the opportunity to give a summation, particularly in light of the fact the charge resulted in an imposition of a 90 day jail sentence.

## Appeal by Defendant to Intermediate Court

In People v. Novak, 30 NY3d 222, 66 NYS3d 147 (2017), the Court of Appeals held that a trial judge could not subsequently hear an appeal on a prior trial before him. Here, the defendant was arrested for driving while impaired. The judge, sitting in City Court, denied the defendant's dismissal motion and then found him guilty in a bench trial.

The defendant appealed to County Court. As the appeal was pending, the trial judge was elected to County Court and was assigned defendant's single judge appeal. The conviction and sentence were upheld.

The Court of Appeals ruled that the judge should have recused himself from the appeal. The Court of Appeals acknowledged that there was no statutory rule requiring recusal, but "there was a clear abrogation of our State's court structure that guarantees one level of independent factual review as of right." The case was remanded to County Court for review by a different judge.

## Examination As to Sufficiency

In Gevorkyan v. Judelson, 29 NY3d 452, 58 NYS3d 253 (2017) the Court of Appeals held that a Bail Bond Company defined as a "bail business" under New York Insurance Law (NYIL) 6801 (a)(1) may not retain its "premium or compensation" as described under NYIL 6804 (a) and must return the "premium or compensation" to the appropriate party where the bond posted pursuant to CPL 520.20 is denied at a bail-sufficiency hearing conducted pursuant to CPL 520.30. Here, the bond was set at 2 million dollars and the premium at issue was $120,560. The Court added the sum should be returned here, particularly since the premium had not been earned under either the NYIL or CPL, and the defendant who was the subject of the bond was never admitted to bail, thus the Bail Bond Company endured no risk.

## Time to Apply for Remission of Forfeiture

In Matter of EBIC Ins. Co, 59 Misc.3d 357, 68 NYS3d 841 (Sup. Ct: Nassau Co. 2017) the trial judge forfeited bail on January 11, 2016, with a certified copy of the court order sent to the surety with notice that a motion to be made for remittance be made no later that the expiration of the one year statute of limitations under CPL 540.30(2). A motion to vacate the forfeiture and remittance of bails was made August 14, 2017, a full eight (8) months after the statute of limitations had expired. The trial court then considered if the one year statute of limitations under CPL 540.30(2) is in violation of Federal and New York State Constitutional due process consideration.

The Court noted that it has been held that remission of forfeiture of a bail bond is considered an "Act of Grace" which the legislature may take away if it no longer deems it serves its continued purpose. Remission is purely statutory and its provisions must be strictly construed. The act of remission is not a "claim of relief as of right", and therefore, the right of the one seeking remission is balanced against the stronger interests of the state.

The Court added "thus, as a limited statutorily created right, bail remission due process considerations are set at minimum when balanced against far more significant state interests. The legislature limited remission to a one year period because the state's interest may become irreparably damaged. This is particularly significant as the county treasurer would no longer be able to release the bail as it would no longer be in the county's possession. Indeed, one Appellate Division has declared that the one year limited period is jurisdictional in nature and cannot be waived as a result, [see People v. Cotto, 262 AD3d 138, 698 NYS2d 98 (1st Dept. 1999)]. In conclusion, the Court found CPL § 540.30(2) constitutional under both the Federal and New York State Constitutions and therefore finds no grounds to vacate the forfeiture or remit bail.

## Seizure in the "Sanctuary" of Defendant's Home

In People v. Garvin, 30 NY3d 174, 66 NYS3d 161 (2017), the Court of Appeals ruled that the Court would not overrule its precedent permitting the police to execute a warrantless arrest in the threshold of a residence when the suspect voluntarily answered the door and the police do not cross the threshold.

The court wrote that there was no reason to overrule its "longstanding rule" permitting an arrest under these circumstances. The facts of this case were common to this type of situation. The defendant was wanted for a crime, the police had probable cause to arrest him, and they went to his residence. The arresting officer knocked on the apartment door and it was opened by defendant. As the defendant stood in the threshold, the officer told him he was under arrest, had the defendant turn to be handcuffed, and removed him from the apartment. The police never entered the residence.

The majority concluded that there was no *Payton* violation because there was no entry by the police. In explaining the rule's viability, the court wrote, "overruling our prior cases would present an unacceptable obstruction to law enforcement, eliminate a clear and workable rule that has guided the courts for decades, undermine predictability in the law and reliance upon our decisions."

## Automobile Exception

In People v. Hardee, 30 NY3d 991, 66 NYS3d 196 (2017), a vehicle and traffic stop occurred where there was driver and one passenger. The officers noticed that the defendant was "hyper" and "glanced back" towards the car after initially refusing to exit the vehicle. The defendant was then handcuffed and "started resisting" and "tensed up" as they asked the passenger to exit as well. When she exited the car, the officers observed a maroon colored bag inside, which was picked up, opened and it contained a firearm. Under a question of law and fact, the Court of Appeals held the hearing court was correct in denying suppression, as there was a substantial danger to the safety of the officers to justify the search.

## Exigent Circumstances

In People v. Silverston, 29 NY3d 1006, 54 NYS3d 632(2017), there was a robbery of a convenience store in which a few dollars were take from a donation jar at knifepoint, and the defendant fled. Base on information provided by an eyewitness, (WM, in 50's with small knife and wearing a coat, gloves and scarf), the police learned that a person fitting the defendant's description had just moved into a nearby apartment. Police officers responded and observed the defendant, through windows alone in the small apartment, lying in bed, watching TV. He appeared to be in a "stupor". They also observed a pair of gloves on the kitchen table that looked like the gloves described as being worn by the alleged perpetrator. The officers knocked on the door for 10 minutes and yelled for the defendant to "Show your hands. Come out!" The defendant made eye contact with police and roller over, but did nothing else. The knife had not yet been recovered.

The police thereafter entered the premises and arrested the defendant. As a mixed question of law and fact, the Court of Appeals upheld the determination of the hearing court that had denied he suppression motion, on the grounds of exigent circumstances.

## Prosecutor's Duty to Disclose

The Appellate Division has held that the defendant is not entitled to pre-trial notice for a potential Wade hearing in connection with a voice identification by a detective in a drug sale and possession case. People v. Guzman, 153 AD3d 1273, 61 NYS3d 573 (2nd Dept. 2017). As such, the Appellate Court ruled the Court did not err in denying the motion to preclude under CPL 710.30.

## Effect of Youthful Offender Status

In People v. Francis, 30 NY3d 737, 71 NYS3d 394 (2018), the defendant challenged his designation as a level 2 sex offender, claiming that the State board of Examiners of Sex Offenders may not consider his Youthful Offender status when assessing his risk to reoffend. The defendant maintained that "the Boards/ interpretation of its authority under SORA conflicts with the Criminal Procedure law's youthful offender provisions." The Court found that the Boards' consideration of a youthful offender adjudication does not conflict with the CPL. The defendant was awarded a score of 115 points, 25 of which were based on his criminal history from the youthful offender adjudication, by the Board's RAI. "Defense counsel challenged the 25 points, arguing that because a YO adjudication is not a conviction, it may not be considered as part of defendant's criminal history for the purposes of SORA." The Appellate Division affirmed, as did the Court of Appeals, stating "The Board has not unreasonably construed SORA as permitting it access to YO records for the limited purpose of assessing an offender's risk of reoffense and recommending a risk level designation to the SORA court; nor has the Board violated the CPL." The defendant also claimed that since the CPL required Youthful Offender-related records to be treated as confidential, "the Board may not rely on the information contained in such records." However, the Court found that CPL 720.35 (2) provides the board with access to the documents and is used in the furtherance of SORA, so it is proper.

In addition, the defendant argued that automatic assessment of points violates the purpose of CPL 720, which is to "spare youths the lifetime stigma of a criminal conviction" because it "draws heavily from the legislative policy that animates the youthful offender statutory framework." "SORA requires that the Board's recommendation to the SORA court remain confidential and shall not be available for public inspection and that the SORA court "seal any portion of the [B]oard's file pertaining to the sex offender that contains material that is confidential under any state or federal law." (quoting Correction Law § 168-1[6]). Therefore, the Board's consideration does not violate the primary intent of CPL 720.

## "Raise The Age" (NEW)

As of October 1, 2018, all 16-year olds and, on October 1, 2019, all 17-year olds with a few

exceptions, will no longer be criminally responsible for misdemeanors - those charges will now be adjudicated in Family Court where the individual may be adjudicated a "juvenile delinquent." The only exception is where the misdemeanor is either accompanied by a felony charge, is the result of a guilty plea in satisfaction of felony charges, or falls under the Vehicle and Traffic law. In those instances, the misdemeanor charges will remain in the local criminal court. In addition, traffic infractions and standalone violations will continue to adjudicated in local criminal courts.

The adjudication of felonies for the age group is more complicated. All felony cases will originate in a newly established Youth part in the Superior Court in each county, presided over by Family Court judges who will receive specialized training in juvenile justice and adolescent development. CPL 722.10.

A 16-year old or 17-year old who is charged with a felony under the new law is designated an "adolescent offender" (AO) and, upon arrest, the AO will be arraigned in the Youth Part, CPL 1.20 (44). Thus, individuals in this age group will bypass the local criminal court completely unless they are arrested at a time when the Youth Part is not in session, *e.g.*, at night or on the weekend. At those times, the AO must be arraigned before special "accessible magistrates" designated by the presiding justice of each Appellate Division. These magistrates must be specially trained in juvenile justice and adolescent development and, presumably, current local criminal court judges would fill the role of "accessible magistrates." CPL 722.20 and CPL 722.21.

Once an adolescent offender is arraigned in the Youth Part, there is a provision for the case to be removed to Family Court where the individual could be adjudicated a "juvenile delinquent." Whether a case is removed depends on the severity of the offense.

When an adolescent offender is charged with any crime *other* than (1) a class A (non-drug) felony; (2) a violent felony; or (3) a felony for which a juvenile offender would be criminally responsible under CPL § 1.20 (42), the statute comes close to a presumption in favor of a removal to Family court.

The statute provides that the case "shall" be removed to Family court *unless* the prosecutor files a motion within 30 days of the arraignment to prevent the removal. Ultimately, the court shall grant the motion for removal unless it determines that "extraordinary circumstances" exist that prevent the transfer to the Family Court. The statute does not define "extraordinary circumstances." CPL 722.23 (1).

When an adolescent offender is charged with a class A (non-drug) felony, or a violent felony, the court must adjourn the case no later than six calendar days after the arraignment. At the second appearance, the court must review the accusatory instrument to determine whether the case should be removed to Family Court. In order for the prosecutor to prevent the removal he or she must prove by a preponderance of the evidence that one of the following is established in the accusatory instrument: (1) the defendant caused "significant physical injury" (not defined) to a non-participant in the offense; (2) the defendant displayed a firearm, shotgun, rifle, or deadly weapon; or (3) or the defendant unlawfully engaged in sexual intercourse, oral sexual conduct,

anal sexual contact or sexual contact. CPL 722.23 (2).

If the prosecution satisfies its burden the case remains in the Youth Part and the defendant is prosecuted as an adult. Should the defendant be convicted, the court "shall consider the age of the defendant in exercising its discretion at sentencing. Penal Law 60.10 (a).

Under the new statute, *juvenile offenders* are arraigned in the Youth Part after their arrest and thus bypass the local criminal court unless the Youth Part is not in session. CPL 722.20. The procedures for removing juvenile offenders to Family Court remains the same as under the prior statute although the numbering of the sections has changed. CPL 722.20.

It should be noted that juvenile offenders and adolescent offenders who are not removed to Family Court are prosecuted as adults in the Youth part. Nonetheless, they are still eligible for youthful offender treatment.