# COURT ATTORNEYS' CLE, OCT. 20, 2015

## COURT OF APPEALS ROUNDUP
## JOHN WALSH

## The following are case summaries. Each case should be read in full.

**1. Matter of Soares v. Carter,** 25 NY3d 1011 (Contempt)
Deft's, after participating in demonstrations in support of the Occupy Movement, were charged with disorderly conduct. In addition, one was charged with resisting. The DA offered each a six-month ACD. City Court refused to accept the offers unless they were combined with a requirement of community service. Defts rejected that condition.
The People then sent a letter to the court indicating that they had decided to discontinue prosecuting defts' cases. Defts moved to dismiss the charges against them based in part upon the People's letter. The court denied defts' motions to dismiss, holding that the People had not complied with the proper procedures for terminating a case under the CPL, and that if the People "failed to appear at the next scheduled court date, the court may be forced to utilize one of the few available options left to it under these circumstances, including, but not limited to, its contempt powers."[1]
The People sent a second letter to the court reiterating that, although they would be present at any scheduled court dates, they would not call any witnesses. During a scheduled suppression hearing, the People informed the court that they had no witnesses to call; to which the Judge responded that the People had no witnesses to call because they refused to call them and were thereby willfully refusing to participate. The Judge again noted that he could use the court's contempt powers if the People continued to refuse to participate. The DA then commenced this Article 78. SC granted prohibition to the extent of enjoining the Judge from enforcing his orders compelling the People to call witnesses. The AD affirmed SC's grant of the narrowly tailored writ, and we agree.
"Prohibition is available to restrain an inferior court or Judge from exceeding its or his [or her] powers in a proceeding over which the court has jurisdiction" (LaRocca v. Lane, 37 N.Y.2d 575; Matter of Lee v. County Court, 27 N.Y.2d 432). To demonstrate a clear legal right to the writ of prohibition, a petitioner is required to show that the challenged action was "in reality so serious an excess of power incontrovertibly justifying and requiring summary correction" (LaRocca).
Separation of powers is the bedrock of the system of govt in establishing three coordinate and coequal branches of govt, each charged with performing particular functions" (Maron v. Silver, 14 NY3d 230). Under the doctrine of separation of powers, courts lack the authority to compel the prosecution of criminal actions (Cantwell v. Ryan, 3 NY3d 626). Such a right is solely within the broad authority and discretion of the DA's executive power to conduct all phases of criminal prosecution (CL 700 (1); Cajigas, 19 NY3d 697).
The courts below correctly determined that a trial court cannot order the People to call witnesses at a suppression hearing or enforce such a directive through its contempt powers. Any attempt by the Judge here to compel prosecution through the use of his contempt power exceeded his jurisdictional authority. It is within the sole discretion of each da's executive power to orchestrate the prosecution of those who violate the

criminal laws of this State (CL 700[1]; NY Const, art XIII §13). Where the court assumes the role of the da by compelling prosecution, it has acted beyond its jurisdiction. Thus, issuance of a writ here to preclude a limited *ultra vires* act was appropriate. Contrary to the Judge's argument, the writ does not prohibit him from exercising his general contempt powers to enforce lawful orders or ensure the DA's compliance with the CPL. Rather, the writ is limited to prohibiting him from requiring the People to pursue prosecution, namely by calling witnesses or putting on proof at the suppression hearing. Consequently, the courts below properly granted the writ.

Fn 1. The People indicated that they chose not to move to dismiss the charges pursuant to CPL 170.40(1), because in their view the Judge would likely deny the motion.

**2. People v. Inoa**, 25 NY3d 466 (Expert who is investigating officer)

[The case was a long investigation involving multiple wiretap recordings involving multiple parties. In 1999, Gutierrez ran a drug ring from a particular corner when he and others were arrested, tried and convicted of drug sales. When his 5 year prison sentence was nearing completion, he desired to return to the same spot and hired the defendant to kill the victim who had taken the spot over. The victim was subsequently shot to death. To assist in understanding the many recordings, the prosecutor used Det. Rivera, who was familiar with this particular gang and the 1999 investigation as well as the speaking voices and lingo they used, to prepare a transcript. In the course of translating and preparing a transcript, Rivera had multiple conversations with the girlfriend of Gutierrez and another woman, who were cooperating People's witnesses.]

At trial, Rivera was qualified by the court as an expert in decoding phone conversations. Some of his testimony bore upon the meanings of what were evidently consistently employed code words (e.g., "onion" for marijuana package, "toy" and "malacachin" for gun, and "sneakers" for thousands of dollars), but the bulk of it, covering a considerable portion of the trial transcript, consisted of interpreting portions of the phone conversation transcripts which, although sometimes veiled in their reference and import, were not encoded. Rivera's transcript explications did not, in the main, draw upon any body of non-case specific expertise, but rather the information that he had acquired from various sources, most notably the girlfriend, as a member of the team investigating and prosecuting the murder. His interpretations essentially harmonized the recorded conversations with the prosecution's overall theory of how the murder plot was carried out, and almost without exception concurred with her account of what had been communicated between the co-conspirators.

It is the role of the jury to determine the facts of the case tried before it. The jury may be aided, but not displaced, in the discharge of its fact-finding function by expert testimony where there is reason to suppose that such testimony will elucidate some material aspect of the case that would otherwise resist comprehension by jurors of ordinary training and intelligence (Cronin, 60 NY2d 430 [1983]). The decision to allow the testimony of an expert is generally discretionary. That said, there are situations -- and this is one -- in which an expert so palpably overtakes the jury's function to decide matters within its unaided competence, that abuse may be found.

We have, e.g. permitted expert testimony by a police sergeant respecting the way in which street-level drug sales are transacted to help a jury understand why the failure to recover drugs or marked buy-money from an individual apprehended in a buy-and-bust is

not necessarily indicative of the accused's misid (Brown, 97 NY2d 500 [2002]). The testimony of the sergeant in Brown, however, was carefully limited by the court to a discrete issue beyond the ken of ordinary jurors, and the sergeant was not himself involved in the underlying investigation and gave no testimony as to what had actually occurred during the buy-and-bust. The situation is very different where a police officer, qualified as an expert, has participated in the investigation of the matter being tried and, with the mantel of an expert steeped in the particulars of the case, gives seemingly authoritative testimony directly instructive of what facts the jury should find. The Second Circuit has dealt with this in US v Mejia (545 F3d 179 [2d Cir 2008]) and US v Dukagjini (326 F3d 45 [2d Cir 2002]).

While there is here no developed denial-of-confrontation claim presented -- probably because the principal body of hearsay relied upon by Rivera, composed of co-conspirator hearsay, did not contain statements that would qualify as testimonial under Crawford (541 US 36 [2004]) and because the principal out-of-court declarants with whom he consulted, the two women, testified at trial and were subject to cross-- there appears little else to separate this case in its presentation of the basic evidentiary issue from Mejia and Dukagjini. Here, as in those cases, the trial court qualified a govt agent, intimately involved in the investigation and development of the prosecution, to testify as an expert and the agent ended up testifying beyond any cognizable field of expertise as an apparently omniscient expositor of the facts of the case.

3. **People v. Pacquette**, 25 NY3d 575 (710.30 ID notice)
Narcotics officers were conducting a drug enforcement effort. An undercover (UC) equipped with $200 in pre-recorded buy money (PRBM) purchased crack from a man. Officer Vanacore, surveying the transaction from his vantage point across the street (40' away), communicated his observations to a backup unit.
Upon completion of the sale, Vanacore communicated with the backup unit, indicating that the transaction was complete and id'ing the seller as a "male black who was tall, wore a light-colored sweatshirt and a dark baseball hat." Within minutes, the backup unit approached the site and the subject fled. Vanacore left the scene in order to assist in the apprehension of an additional suspect. Deft was subsequently arrested by the backup unit. Upon return to his original post, Vanacore observed deft in the custody of the backup unit and communicated to the arresting officer that deft was the person he had observed with the UC. Additionally, the UC made a confirmatory showup ID of the deft. Upon searching deft, officers recovered $20 in PRBM.
Prior to trial, deft was served with 710.30(1)(b) notice pertaining to the UC's pretrial id. Deft moved to suppress that id testimony on the ground that show-up ids are inherently suggestive. Following a Wade, the court denied deft's motion, holding that the UC's out-of-court id was confirmatory and therefore admissible.
At trial, during the da's opening, the da informed the jury that it would hear testimony from not only the uc, but also Vanacore, who, along with the uc, viewed d shortly after the transaction and confirmed that the backup unit arrested the correct person. D moved to preclude Vanacore's prospective testimony, arguing that the People had not provided him with notice concerning Vanacore's id testimony. Following a mid-trial Wharton hearing, the court determined Vanacore's id was confirmatory & therefore admissible

without the need for notice. D was convicted of sale. AD affirmed holding Vanacore's id "was confirmatory and thus did not require 710.30 (1) (b) notice" (112 AD3d 405).

II.

"710.30 could not be clearer" (Boyer, 6 NY3d 427). When the People intend to offer at trial "testimony regarding an observation of deft either at the time or place of the commission of the offense or upon some other occasion relevant to the case, to be given by a witness who has previously id'd him as such," the statute requires the People to notify the defense of such intention within 15 days after arraignment and before trial (710.30 [1] [b]). Not only is "the statutory mandate . . . plain" but the procedure is "simple" (Boyer). The People serve their notice upon deft, deft has an opportunity to move to suppress and the court may hold a Wade. If the People fail to provide notice, the da may be precluded from introducing such evidence at trial.

710.30 is "a legislative response to the problem of suggestive and misleading pretrial id procedures" (Gissendanner, 48 NY2d 543). In enacting the requirement, the Legislature "attempted to deal effectively with the reality that not all police-arranged ids are free from unconstitutional taint" (Newball, 76 NY2d 587 [1990]).

The purpose of the notice requirement is two-fold: provide the defense with "an opportunity, prior to trial, to investigate the circumstances of the evidence procured by the state and prepare the defense accordingly" and "permits an orderly hearing and determination of the issue of the fact . . . thereby **preventing the interruption of trial** to challenge initially the admission into evidence of the id" (Briggs, 38 NY2d 319). Thus, the statute contemplates "*pretrial* resolution of the admissibility of id testimony where it is alleged that an improper pcdure occurred" (Rodriguez, 79 NY2d 445 [1992]). "If no notice is given before trial, the purposes of the statute may be defeated" (Briggs).

The People, relying on Wharton (74 NY2d 921 [1989]), argue that the trial court properly determined that Vanacore's id was merely confirmatory, thereby obviating the need for 710.30 notice. We disagree. In Wharton, deft was provided with notice and made a pretrial suppression motion on the id. His challenge was whether he was entitled to a Wade. We held that deft was not entitled to the hearing because the "officer's observation of deft was not of a kind ordinarily burdened or compromised by forbidden suggestiveness". There, the "id was made by a trained UC who observed deft during the face-to-face drug transaction knowing deft would shortly be arrested".

In this case, unlike Wharton, Vanacore's surveillance of deft does not constitute an "observation of deft so clear that the id could not be mistaken" thereby obviating the risk of undue suggestiveness (Boyer). Therefore, the People were required to serve their notice concerning Vanacore's observations. "To conclude otherwise directly contravenes the simple procedure that has been mandated by the Legislature and would permit the People to avoid their statutory obligation". Indeed, the People indicated that they typically do provide notice in these circumstances and inadvertently failed to do so in this case.

4. **People v. Middlebrooks**, 25 NY3d 516 (YO)

When a deft who would otherwise be an eligible youth has been convicted of an armed felony, the court is required to make a determination on the record as to whether one or more of the 720.10 (3) factors exists and deft is, therefore, an eligible youth. Based on a plain reading of the statute and Rudolph (21 NY3d 497 [2013]), the court is required to

make a determination on the record, even if deft does not request it or has agreed to forgo YO as part of a plea bargain.

A person charged with a crime committed when he was at least 16 and less than 19 is a "youth" (720.10 [1]). All "youths" are eligible to be granted YO, with certain exceptions (720.10 [2]). One exception is a conviction of an armed felony (720.10 [2] [a] [ii]). 720.10 (3) expressly provides, however, that a youth convicted of an armed felony is eligible for YO if the court determines that there are mitigating circumstances bearing directly upon the manner in which the crime was committed, or, if deft was not the sole participant in the crime, that the d's participation was relatively minor**. It is the court's responsibility to determine the presence or absence of these 720.10 (3) factors, and thus to determine deft's eligibility for YO treatment.**

Middlebrooks

Deft, charged with four counts of robbery committed when he was 18, plead to all four counts for 15/5prs, concurrent. At sentence, neither deft nor dc nor the court mentioned YO.

Lowe

Deft, 18 years old, was charged with CPW 2. The probation report stated he was eligible to be adjudicated a YO and recommended that he be granted YO. Dc requested that deft be granted YO or, in the alternative, the minimum adult sentence. Without expressly ruling on dc's request for a YO, the court sentenced Lowe to 10/5prs.

It is undisputed that both defts were "youths" within 720.10 (1) and had never before been convicted of a crime; that both would be "eligible youths", i.e., eligible to be granted YO, but for the fact that their convictions to be replaced by YO adjudications were armed felonies (720.10 [2] [a] [ii]; CPL 1.20 [41]).

In Rudolph, deft had been convicted of felony drug possession & did not ask the court to adjudicate him a yo. We noted that 720.20 (1) provides that " 'upon conviction of an eligible youth, . . . the court *must* determine whether or not the eligible youth is a yo' ". We held that "the legislature's use of the word 'must' reflected a policy choice that there be a yo determination in every case where deft is eligible, even where the deft fails to request it, or agrees to forgo it as part of a plea bargain".

Although deft was convicted of an armed felony, he still could have received a YO adjudication if the court had made the applicable findings under 720.10 (3). As Rudolph noted, there may be 'cases in which the interests of the community demand that YO be denied, and that the young offender be sentenced like any other criminal; . . . but the court must make the decision in every case. Thus, because deft was eligible for YO if any of the factors in 720.10 (3) were found to exist, the court had to make a determination even though deft did not request it.

720.10 (2) provides that youths convicted of a class A-I or A-II felony, who have "previously been convicted and sentenced for a felony," or who have "previously been adjudicated a YO following conviction of a felony or have been adjudicated a juvenile delinquent who committed a designated felony as defined in the FCA" are ineligible for YO. The Legislature provided no exceptions to ineligibility for those categories of offenders. The court has no discretion in the matter.

720.10 (2) also includes those convicted of armed felonies or certain sex offenses in the general class of ineligible ds. In contrast to the other categories of offenders, however, the Legislature has provided that those ds convicted of an armed felony or an enumerated

sex offense are eligible youths under certain circumstances. 720.10 (2) provides youths convicted of an armed felony or an enumerated sex offense are not eligible youths "except as provided in subd 3". In turn, subd (3) provides that notwithstanding the provisions of subd 2, a youth who has been convicted of an armed felony offense or of rape/csa 1, or agg. sexual abuse is an eligible youth if the court determines that one or more of the following factors exist: (i) mitigating circumstances that bear directly upon the manner in which the crime was committed; or (ii) where the deft was not the sole participant in the crime, d's participation was relatively minor although not so minor as to constitute a defense to the prosecution" (720.10 [3].

In other words, if the court determines that one or more of the factors provided by 720.10 (3) are present, a deft who has been convicted of an armed felony is an eligible youth, "notwithstanding the provisions of subd 2." For every eligible youth that comes before it, the sentencing court "must" determine whether the eligible youth is a YO (720.20 [1]; Rudolph). The court cannot comply with the mandate of 720.20 (1), which requires the court to determine the YO status of every eligible youth, unless the court first makes the threshold determination as to whether the deft is, in fact, an eligible youth.

If deft committed the crime when he was of an eligible age and none of the exceptions in 720.10 (2) applies, deft is an eligible youth, and the court is then required by 720.20 (1) to determine whether the deft should be adjudicated a YO. If deft was not of eligible age, or was of eligible age but was convicted of an A-I or A-II felony, has previously been convicted and sentenced for a felony, or has previously been adjudicated YO following a felony conviction, deft is not an eligible youth, and the court has no discretion to determine otherwise. Where, however, deft has been convicted of an armed felony or certain sex offenses, in order to fulfill its responsibility under 720.20 (1), the court must make the threshold determination as to whether the deft is an eligible youth by considering the factors set forth in 720.10 (3).

Of course, as with the determination regarding the YO adjudication, there will be many cases in which the factors set forth in 720.10 (3) are clearly absent, and, in such cases, the court's determination that d is not an eligible youth will be a proper exercise of its discretion (see Rudolph). In those cases, after the court determines on the record that the 720.10 (3) factors do not exist and that the deft therefore is not an eligible youth, no further determination is required. Nonetheless, to fulfill its obligation to make a YO determination on the record for every eligible youth, the court must necessarily engage in the threshold exercise of its discretion to determine whether a deft convicted of an armed felony or an enumerated sex offense is an eligible youth due to the presence of the 720.10 (3) factors. In simpler terms, "the court must make the decision in every case" (Rudolph). It must be emphasized that if the court determines that the deft is an eligible youth based on the presence of one or more of the 720.10 (3) factors, the court is under no obligation to then grant d a YO adjudication. The court simply must exercise its discretion a 2nd time to determine whether the eligible youth should be granted YO pursuant to 720.20 (1). On that determination, the court is not limited to the two factors set forth in 720.10 (3), which are the only factors the court may consider when determining whether a deft convicted of an armed felony is an eligible youth. Rather, in making the ultimate determination as to the YO adjudication, the court may consider the broad range of factors pertinent to any YO determination (see Cruickshank, 105 AD2d 325 [3d Dept 1985], affd sub nom. Dawn Maria C., 67 NY2d 625 [1986]).

Therefore, based on a plain reading of 720.10 and Rudolph, we hold that when a deft has been convicted of an armed felony or an enumerated sex offense pursuant to 720.10 (2) (a) (ii) or (iii), and the only barrier to YO eligibility is that conviction, the court is required to determine on the record whether deft is an eligible youth by considering the presence or absence of the factors set forth in 720.10 (3). The court must make such a determination on the record "even where deft has failed to ask to be treated as a YO, or has purported to waive his right to make such a request" pursuant to a plea bargain (Rudolph). If the court determines, in its discretion, that neither of the 720.10 (3) factors exist and states the reasons for that determination on the record, no further determination by the court is required. If, however, the court determines that one or more of the 720.10 (3) factors are present, and the deft is therefore an eligible youth, the court then "must determine whether or not the eligible youth is a YO" (720.20 [1]).

**5. People v. Pacherille**, 25 NY3d 1021 (YO)
D plead guilty to 110/murder 2 for 11/5prs and waived his right to appeal.
At sentencing, the court was presented with letters from the community, defts sentencing memo and psychiatric reports, a letter from the victim and the PSR concerning deft's prospects for rehabilitation. Upon consideration of all the information before it, the court denied deft's request for YO. While acknowledging deft's mental illness, the court determined that the illness did not outweigh the "seriousness of the crime nor its impact on the victim and the community." As a result, the court concluded that the interests of justice would not be served by granting YO. Deft was then sentenced in accord with the plea agreement.
A plea generally "marks the end of a criminal case, not a gateway to further litigation" (*Taylor,* 65 N.Y.2d 1). Plea bargaining includes the surrender of many guaranteed rights, such as the right to a trial by jury and to confrontation (*Hansen,* 95 N.Y.2d 227 [2000]).
A deft may waive the right to appeal as a condition of a plea bargain. "Generally, an appeal waiver will encompass any issue that does not involve a right of constitutional dimension going to 'the very heart of the process' " (*Lopez,* 6 NY3d 248). The right to a speedy trial, challenges to the legality of a court-imposed sentence, questions about a deft's competency to stand trial, and whether the waiver was obtained in a constitutionally acceptable manner cannot be foreclosed from appellate review (*Callahan,* 80 N.Y.2d 273).
*Rudolph* (21 NY3d 497), held that under 720.20(1) "where a deft is eligible to be treated as a YO, the court 'must' determine whether he or she is to be so treated;" that "compliance with this statutory command cannot be dispensed with, even where a deft has failed to ask to be treated as a YO, or has purported to waive his right to make such a request"(*id.*). Thus, we created a narrow exception that when a sentencing court has entirely abrogated its responsibility to determine whether an eligible youth (720.10[1], [2] ) is entitled to YO, an appeal waiver would not foreclose review of the court's failure to make that determination. Here, the sentencing court did, indeed, consider d's YO status upon his request.
Once considered, YO is a matter left to the sound discretion of the sentencing court and therefore any review is limited (720.20[1][a]). As held in *Lopez*, "when a deft enters into a guilty plea that includes a valid waiver of the right to appeal, that waiver includes any challenge to the severity of the sentence. By pg and waiving the right to appeal, a deft has

forgone review of the terms of the plea, including harshness or excessiveness of the sentence". To the extent deft appeals the harshness of his sentence or the sentencing court's exercise of discretion in denying YO, his appeal waiver forecloses the claim. We therefore conclude that a valid waiver of the right to appeal, while not enforceable in the face of a *failure* to consider YO, forecloses appellate review of a sentencing court's discretionary decision to deny YO once a court has considered such treatment. Accordingly, our review of the denial of deft's request is precluded by his appeal waiver, the validity of which he does not contest (*Brabham,* 83 AD3d 1225 [3d Dept 2011]).

6. **People v. Sanders** 25 NY3d 337 (Waiver of right to appeal)

The deft is seeking to overturn his waiver of appeal so as to have the appellate court consider the lower court's denial of his Huntley motion.

At issue is whether his plea allocution was adequate to effect a valid waiver of the right to appeal. The record, including the colloquy and the other relevant facts, such as proof of deft's experience and background, is sufficient to uphold the waiver of his right to appeal as knowing, intelligent and voluntary.

In a May 2009 gang assault of a 16-year-old, deft stabbed to death. After Miranda & 2 hours of questioning, deft admitted the stabbing. After his Huntley was denied in part, he plead guilty on the eve of trial.

During the colloquy, CC set forth the terms of the plea, and the da conducted the voir dire,[1] discussing rights normally forfeited upon a plea, inquired as to whether deft was pleading voluntarily because he was guilty, and reviewed potential collateral consequences of the plea; advised deft of the consequences he could face if he failed to voluntarily appear for sentencing or committed another crime prior thereto. Regarding the waiver of the right to appeal, the following then took place between da and deft:

"Q Do you understand that as a condition of this plea you are waiving the right to appeal your conviction and sentence to the AD Second Department? A Yes.

Q Have you discussed this waiver of the right to appeal with your atty? A Yes.

Q In consideration of this negotiated plea, do you now voluntarily waive your right to appeal your conviction and sentence under this indictment? A Yes."

Immediately thereafter, the da asked dc whether he was "withdrawing all motions made by you whether pending or decided?" Counsel responded "Yes, withdrawn." The da conducted the factual allocution and the court accepted the plea.

II.

The statutory right to appeal may be waived if the waiver is knowing, intelligent & voluntary (Seaberg 74 NY2d 1). A trial court must review the waiver and consider all the relevant facts and circumstances surrounding the waiver, including the nature and terms of the agreement and the age, experience and bkgrd of the accused" (id.; Calvi, 89 NY2d 868 [1996]; Callahan, 80 NY2d 273. The court must also ensure that deft's "full appreciation of the consequences and understanding of the terms and conditions of the

[1] The parties have not addressed the fact that the da, as opposed to the court, conducted most of the allocution. Although the Depts are divided on the propriety of delegation of this important function, it has been "long criticized" (Robbins, 33 AD3d 1127[2006]) and we are troubled by it. As noted in Nixon, 21 NY2d 338,the allocution is "best left to the discretion of the court."

plea, including a waiver of the right to appeal, are apparent on the face of the record (Seaberg; Callahan). Seaberg held the court should have required deft to state his understanding and acceptance" of the details of the plea bargain on the record; nevertheless, we upheld the waiver in that case despite the fact that the deft did not personally participate in the court's colloquy with dc, given the other relevant facts on the record that demonstrated the deft's understanding of the waiver (Moissett, 76 NY2d 909). Although we have since "underscored the critical nature of a court's colloquy with a d explaining the right relinquished by an appeal waiver" (Lopez, 6 NY3d 248), we have continued to require assessment of all of the relevant factors surrounding the waiver, including the experience and background of d (Bradshaw, 18 NY3d 257 [2011]). Moreover, we have never abandoned our oft-stated instruction that "a court need not engage in any particular litany when apprising a deft pleading guilty of the individual rights abandoned" (Lopez; Bradshaw; Kemp, 94 NY2d 831). We have not set forth the absolute minimum that must be conveyed to a pleading deft in the plea colloquy in order for the right to appeal to be validly waived. We have long rejected that approach on the ground that "a sound discretion exercised in cases on an individual basis is best rather than to mandate a uniform procedure which, like as not, would become a purely ritualistic device.

III.

In this case, the record sufficiently demonstrates that deft knowingly and intelligently waived his right to appeal. There is no meaningful distinction between the colloquy here and the colloquy upheld in Nicholson (companion case to Lopez), in which deft acknowledged his understanding that he was "giving up his right to appeal, that is, to take to a higher court than this one any of the legal issues connected with this case". As in Nicholson, the colloquy here was sufficient because County Court adequately described the right to appeal without lumping it into the panoply of rights normally forfeited upon a plea. In fact, the People went even further and obtained deft's confirmation that he had discussed the waiver of the right with his attorney and that he was waiving such right in consideration of his negotiated plea, as well as counsel's confirmation that all motions pending or decided were being withdrawn. Thus, while the better practice would have been to define the nature of the right to appeal more fully -- as the court did in Nicholson -- AD correctly determined that no further elaboration was necessary on the phrase "right to appeal your conviction and sentence to the AD Second Dept" in view of the whole colloquy, particularly given this deft's background, including his extensive experience with the system and multiple prior pleas that resulted in terms of imprisonment.[2]

**7. People v. Carr,** 25 NY3d 105 (In camera questioning of DA's witness)

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[2] While the factors raised by the dissent -- whether a d has previously entered a plea waiving rights to appeal, signed a written appeal waiver or taken a prior appeal -- certainly would be relevant to determining d's understanding of the terms of a waiver, our review of a d's bkgrnd, as it impacts upon the validity of an appeal waiver, has not been so confined (Bradshaw; Seaberg). Deft was 27 at the plea and had a rap sheet that stretched back 10 years. His prior convictions obtained on pleas include a 2003 violent felony, as well as federal, NJ & Penn convictions. Deft was also convicted of a federal felony while on parole and was on supervised release at the time of the stabbing.

The court violated defts' right to counsel by holding an in camera proceeding without counsel present to discuss with the People's main witness the witness's mental and physical ability to testify. As witness's mental and physical health were inextricably tied to his credibility, a nonministerial issue for trial, the court violated defts' right to counsel by denying dc access to the proceeding.
During trial, Rose, the People's eyewitness and a 30 year crack addict, failed to appear twice. The first time, he appeared after trial was adjourned and the da sent investigators to look for him. The court questioned him in camera to determine why he was late. The substance of that first discussion is mostly unknown. At that time, dc requested to be present during any potential, future proceeding with the witness to discuss the reasons for his failure to appear. Instead, after Rose failed to appear the 2nd time, the court held an in camera, off-the-record discussion with him to ascertain the extent of the his illness and when he would be able to testify. SC relayed the discussion to dc, stating that the witness was "in bad shape," that he was suffering from a migraine and needed a half day to recover, and that he denied he was suffering from alcohol abuse or affected by crack cocaine.
Absent a substantial justification, courts must not examine witnesses about nonministerial matters in camera without counsel present or ex parte (*Contreras,* 12 NY3d 268; *Goggins,* 34 N.Y.2d 163). "An *in-camera* examination of the witnesses, that is ex parte or without the parties represented would, in our view, arguably trifle with the constitutional right to confrontation and the right to counsel" (*Goggins*).

8. **People v. Rivera**, 25 NY3d 256
D, while seeking treatment from a psychiatrist, admitted to sexually abusing an 11-year-old relative. The psychiatrist notified ACS of deft's admission. Subsequently, at trial, over objection, the trial court permitted the psychiatrist to testify that d had made the admission. The issue is whether the trial court's ruling ran afoul of the physician-patient privilege (4504 [a]). We hold that it did.
Prior to trial, the People moved for the issuance of a subpoena duces tecum seeking deft's psychological records for in-camera review by the trial court. Specifically, the People sought records that included any admission deft may have made concerning the crimes charged in the indictment, which, they argued, could be released as either an exception to or waiver of the physician-patient privilege.
Following the in-camera review of the records, SC held that the admissions deft made to his psychiatrist were privileged because they were made in the course of diagnosis and treatment of his condition. However, the court, while refusing to allow "the full extent of d's admissions" to be used, held that, because the psychiatrist had disclosed the reported abuse to ACS, the fact that d had admitted to the abuse was admissible at trial.
At trial, the child testified concerning the abuse she sustained. The People then called deft's psychiatrist, who testified that d admitted to having sexually abused the child.
II.
The trial court's ruling in allowing d's psychiatrist to testify concerning deft's admission that he abused the child. violated the physician-patient privilege.
4504 (a) provides, as relevant to this appeal, that "[u]nless the patient waives the privilege, a person authorized to practice medicine . . . shall not be allowed to disclose any information which he [or she] acquired in attending a patient in a professional

capacity, and which was necessary to enable him [or her] to act in that capacity." The People do not argue that d waived the privilege, nor do they dispute that there was a "professional relationship" between d and his psychiatrist. Nor do the People contend that the information conveyed by deft to his psychiatrist was not necessary for his treatment. Rather, they claim that, because deft's admission related to the sexual abuse of a child, it was not privileged since deft had no reason to believe that it would remain confidential. Regardless of whether a physician is required or permitted by law to report instances of abuse or threatened future harm to authorities, which may involve the disclosure of confidential information, it does not follow that such disclosure necessarily constitutes an abrogation of the evidentiary privilege a deft enjoys under CPLR 4504 (a).

The privilege serves several objectives: it encourages unrestrained communication between a patient and his or her medical provider so that the patient may obtain diagnosis and treatment without fear of embarrassment over potential disclosure; it encourages physicians to be forthright in recording their patients' confidential information; and it protects "patients' reasonable privacy expectations against disclosure of sensitive personal information" (Matter of Grand Jury Investigation in N.Y. County, 98 NY2d 525).

The People argue that because the Legislature has carved out several exceptions to the privilege, deft could not reasonably have expected his statements to remain confidential in the context of a criminal proceeding. Those exceptions, however, underscore that whenever the Legislature has decided to limit the privilege's scope, it has done so through the enactment of specific legislation to address the particular subject matter. If the Legislature had, in fact, decided to create an additional exception permitting a criminal def's mental health professional to testify against the deft in a criminal proceeding, it would have done so. Indeed, given the number of statutory exceptions to the privilege, the legislative concept is clear that exceptions to the statutorily-enacted physician-patient privilege are for the Legislature to declare and we need look no further than CPLR 4504 itself which contains those exceptions (see CPLR 4504 [b] [requiring certain physicians and other health professionals "to disclose information indicating that a patient who is under 16 has been a victim of a crime"], [c] [requiring physicians and nurses "to disclose any information as to the mental or physical condition of a deceased patient privileged under subd (a)" in certain designated circumstances]).

When the Legislature has sought to either limit or abrogate the privilege beyond the confines of section 4504, it has been clear in its intent (see SSL § 384-b [3][h] [privilege not available in a pcding seeking an order committing the guardianship and custody of a destitute or dependent child]; SSL 413 [identifying class of mandatory reporters of suspect child abuse and maltreatment]; SSL 415 [reports of suspected child abuse or maltreatment must be made in writing and "shall be admissible in evidence in any proceedings relating to child abuse or maltreatment"]); FCA 1046 [a] [vii] [privilege "shall (not) be a ground for excluding evidence which would otherwise be admissible" in abuse and neglect proceedings]; MHL 81.09 [d] [permitting court evaluator in guardianship pcdings to apply for permission to inspect medical and psychiatric records of alleged incapacitated persons, and allowing the court to order such disclosure notwithstanding the physician-patient privilege]; PHL 3373 ["for purposes of duties arising out of" article 33, relating to controlled substances, "no communication made to a practitioner shall be deemed confidential within the meaning of the CPLR"]).

We have acknowledged that although the physician patient privilege is in derogation of the common law, it should be afforded a "broad and liberal construction to carry out its policy" of encouraging full disclosure by patients so that they may secure treatment. Conversely, exceptions that limit the privilege are afforded a narrow construction (see Sinski, 88 NY2d 487). From these statutorily-enacted exceptions, it is evident that the Legislature has made considered judgments in deciding when the physician-patient privilege should give way to what it deems to be greater interests, namely, proceedings involving allegations of child abuse, maltreatment and neglect, and guardianship of allegedly incapacitated persons. The Legislature has determined that the protection of children is of paramount importance, so much so that it has either limited or abrogated the privilege through statutory enactments. The People erroneously assert that these exceptions place offenders on notice that the physician-patient privilege does not apply to statements or admissions triggering a duty to disclose. But it is one thing to allow the introduction of statements or admissions in child protection proceedings, whose aim is the protection of children, and quite another to allow the introduction of those same statements, through a deft's psychiatrist, at a criminal proceeding, where the People seek to punish the defendant and potentially deprive him of his liberty.

Evidentiary standards are necessarily lower in the former proceedings than in the latter because the interests involved are different. Thus, the relaxed evidentiary standards in child protection proceedings lend no credence to the People's argument that defendant should have known that any admission of abuse he made to his psychiatrist would not be kept confidential.

The Legislature has not created an express exception permitting a psychiatrist to testify concerning an admission made by a criminal defendant during the course of a professional relationship where the admission was made for purposes of diagnosis and treatment. Even if a patient is cognizant of his psychiatrist's reporting obligations under child protection statutes, that does not mean that he should have any expectation that statements made during treatment will be used against him in a criminal matter.

**9. People v. Kims**, 24 NY3d 422 (Drug factory presumption)

The presumption provides: “presence of a narcotic drug…in open view in a room, other than a public place, under circumstances evincing an intent to unlawfully mix, compound, package or otherwise prepare for sale such controlled substance is presumptive evidence of knowing possession thereof by each and every person in close proximity to such controlled substance at the time such controlled substance was found....” P.L. 220.25(2)

The purpose of the statute is to deal with situations when police execute a search warrant of a ‘drug factory’ and find narcotics in open view in a room. Occupants, who moments before were packaging the drugs, proclaim innocence and disclaim ownership or any connection with it. The police are then left uncertain as to whom to arrest. By including within the statute all persons based on physical closeness, regardless of property interest in the location, the drafters sought to address the difficulty of prosecuting persons other than the owner or lessee.

Given the language of the statute and its purpose, a deft is in “close proximity” within 220.25(2) when the deft is sufficiently near the drugs so as to evince participation in an apparent drug sales operation, thus supporting a presumption of knowing possession. The

statute anticipates an outer boundary beyond which the presumption does not apply, for "close proximity" defines a spatial element requiring that deft's physical location is legally meaningful and suggestive of criminal involvement, but not so distant as to vitiate the experientially-based, real-world justification for presuming deft has criminal possession.

The decisive consideration for a court determining "close proximity" is the distance between the deft and the drugs. This determination is necessarily fact specific. Still, based on the text, the intent of the statute, and judicial construction of 220.25(2), we glean certain general principles that guide a court's analysis:

1. "Room, other than a public place" supports the application of the presumption to persons who are physically present in the room where drugs are found.

2. Deft is apprehended on the premises, but outside the room where drugs are found. As long as the proximity requirement is satisfied, nothing limits the statute's reach to persons caught in the room itself. However, the proximity determination requires careful consideration of the underlying facts related to the deft's location on the premises when the drugs are found (*Rosado,* 96 AD3d 547 [deft fled to bathroom from bedroom where drugs were found]; *Pressley*, 294 A.D.2d 886 [4th Dept 2002][deft in room adjacent to room where drugs were found]; *Riddick,* 159 A.D.2d 596 [2d Dept 1990] [deft was in hallway adjacent to room with drugs]; *Garcia,* 156 A.D.2d 710 [2d Dept 1989] [deft in the bathroom, drugs in another room of the apartment]).

Structural barriers may be a factor in determining whether the deft falls within the intended statutory coverage, but are not a per se bar (*Hayes,* 175 A.D.2d 13 [4th Dept 1991][deft in a room separated from drugs by French doors]; *Andrews,* 216 A.D.2d 571 [2d Dept 1995][deft in loft above table with drugs]). As the drafters indicated, the statute is intended to apply to a deft who hides "in closets, bathrooms or other convenient recesses" (*McCall,* 137 A.D.2d 561 [2d Dept 1988] [deft discovered lying behind a bar 50' from contraband]). Thus, the legislative purpose is furthered by an interpretation that takes into account the layout of the premises

3. Once a deft has left the premises the justification for presuming knowing possession is less tenable. The presumption may apply in cases where a deft has exited the premises, when the deft is caught in immediate flight, or apprehended fleeing the premises "upon the sudden appearance of the police". We need not determine how far from the premises d may be apprehended and still be subject to the presumption. We note, however, that the boundary in these cases is not limitless. Suffice it to say, that each incremental enlargement of the distance between the deft and the premises where the drugs are found tests the underlying justification of the presumption, and makes it susceptible to challenge.

II.

In this case, deft was not in close proximity. He was not in the room where the drugs were found, in an adjacent room within the same apartment, or in a "closet, bathroom or other convenient recess." Nor was he found immediately outside the premises while trying to escape.

He was found outside the premises, several feet from the front door to the building where the apartment was located. Once outside, he entered and locked his vehicle before the officers approached and eventually arrested him. There was no evidence to suggest that

he was in immediate flight from the premise when he walked out into the driveway. The officers entered the apartment several minutes after he had exited and was arrested.
To the extent the People argue that the presumption applies so long as a deft is under surveillance the entire time after the defendant exits the premises, we reject this interpretation of the statute because it lacks a definable end point. For example, we can discern no way to distinguish deft's case from one in which the officers find a deft down the street, or perhaps a mile away, from the house. Following the People's reasoning to its logical conclusion, so long as at all times a deft is under surveillance, the presumption applies regardless of the deft's distance from the premises. As such, the People's interpretation would lead to uncertainty, and fails to provide appropriate guidance as to how far an officer may pursue a deft before reaching the outer expanse of the statute. We believe that this interpretation potentially extends the presumption to defts and scenarios that are beyond the statute's intended coverage, and lends itself to abuse.

**10. People v. Garrett**, 23 NY3d 878 (Brady; Constructive knowledge by DA)
The deft contends his confession was obtained by physical and psychological abuse. During the cross-examination of the cop, dc asked about a federal lawsuit against the officer alleging that he used physical force to obtain a confession in an unrelated case. That case was settled.
At issue is whether the da had constructive knowledge of this lawsuit and failed to disclose it under *Brady*. Exculpatory or impeaching evidence is subject to *Brady* disclosure only if it is within the da's custody, possession, or control. "Possession and control" encompasses evidence known only to police investigators and not to the da. There is a limit, however.
The da may be in "constructive" possession of information known to govt officials who "engaged in a joint or cooperative investigation" of the case. When police and other govt agents investigate or provide information with the goal of prosecuting a deft, they act as "an arm of the prosecution," and the knowledge they gather may reasonably be imputed to the da under *Brady*.
A police officer's secret knowledge of his own prior illegal conduct in an unrelated case will not be imputed to the da who had no actual knowledge of the officer's bad acts. The officer is "not acting as an 'arm of the prosecution" when he conceals his own criminal activity in a prior, unrelated case, and the People therefore have no duty to discover and disclose the officer's "collateral criminal conduct" under *Brady*.

11. **People v. Walston**, 23 NY3d 986 (Jury note; O'Rama)
During deliberations, the jury sent a note: "Power Point—Judge's directions on Manslaughter/Murder in the Second Degree -(Intent)." The court told the parties that the jury "wanted the Judge's directions on manslaughter and murder 2," but did not mention the note's "intent" language. The court paraphrased the note to the jury by stating "you have asked for a readback of manslaughter and murder".
CPL 310.30 requires that when the court receives a request for readback or information with respect to the law, it must give *meaningful* notice to the parties. "Meaningful" means "notice of the *actual specific content* of the jurors' request". "Meaningful notice" and a "meaningful response" to the jury's request, comprise the trial court's core responsibilities (*Kisoon,* 8 NY3d 129). To meet those responsibilities, the suggested procedure for

handling jury notes is: 1. Mark the note as a court exhibit and read it into the record before the jury is called in (ensuring adequate appellate review); 2. Afford counsel an opportunity to suggest responses; 3. Inform counsel of the substance of court's proposed response (giving counsel an opportunity to suggest appropriate modifications before the jury is returned to the courtroom); and 4. Read the note aloud in open court before the jury so that any inaccuracies may be corrected by the individual jurors.

**12. People v. McCray**, 23 NY3d 621 (Burglary of dwelling)
When should a burglary of a non-residential part of a building, used partly for residential purposes, be treated as the burglary of a dwelling?
Where a building consists of 2 or more units separately secured or occupied, each shall be deemed both a separate building in itself & a part of the main building (P.L.140.00(2)).
In Quinn, 71 NY 561, the lower floors of a building consisted of a shop while people lived on the upper floors. There was no internal communication between the shop and living quarters; it was necessary to go into a yard, and then up a stairwell. The deft broke into a room in the shop. Quinn treated this as a dwelling burglary.
The Quinn Rule is that a burglary of a dwelling is committed whenever a burglary is committed in a building that contains a dwelling under the roof and within the four walls of the structure UNLESS it is a large building AND the living quarters are remote and inaccessible (inaccessibility means more than a lack of communication or instant accessibility).
In this case, the deft broke into a hotel employees' locker by accessing a stairwell and using the same stairwell broke into a commercial space that was separate from but attached to the hotel. Held that both burglaries are of a dwelling.
Quinn rule: Burglary of dwelling is committed whenever a burglary is committed in a building that contains a dwelling under the roof and within the four walls UNLESS, it is a large building and the living quarters are remote and inaccessible.

**13. People v. Johnson**, 23 NY3d 973 (Plea)
This was a 2 count rape case (physically helpless & forcible). The victim had no memory of the rape remembering only drinking in a bar & going home in a disheveled condition. After arriving home, she found that she had been sexually assaulted. Her missing cell phone was traced to deft and semen from a rape kit matched his DNA.
Deft. pg to rape 2 (mentally incapacitated- temporarily incapable of appraising or controlling conduct owing to the influence of a substance administered without consent). There is no indication in the record that she was incapacitated by anything other than voluntary intoxication.
It is unlikely the deft. actually committed the crime to which he pg but that would not make his plea invalid. Where a deft enters a negotiated plea to a lesser crime than one with which he is charged, no factual basis for the plea is required (*Clairborne,* 29 N.Y.2d 950; *Moore,* 71 N.Y.2d 1002). Indeed, defts. can even pg to crimes that do not exist (*Foster*, 19 N.Y.2d 150 [plea to attempt a crime of which intent is not an element]).
In this case, however, at the plea the parties and court were unaware of *Clairborne,* and thought it necessary to find a basis in fact for the plea. The court had the deft admit that he encountered the victim when she was "too drunk to really make a decision about whether she did or did not want to have sex"; "she was mentally incapacitated apparently

from drinking"; he "had intercouse with her anyway." The allocution provided no support for the idea that she was mentally incapacitated.
Before sentence, the deft moved to withdraw his plea, asserting that he "was not fully aware of the circumstances involved" & "is not guilty of the offense to which he plead.
We vacate the plea. Although the entire allocution was unnecessary, and although even if it were necessary we would not require that it prove every element of the crime charged (*Goldstein*, 12 NY3d 295), we simply cannot countenance a conviction that seems to be based on complete confusion by all concerned (*Worden*, 22 NY3d 982). The court and dc believed, mistakenly, that it was necessary to put on the record facts showing that the victim was mentally incapacitated; and they apparently also believed, equally mistakenly, that they had done so. It is impossible to have confidence, on a record like this, that deft had a clear understanding of what he was doing when he pg.
Ed. Note: Keizer, 100 NY2d 114, holds that a person charged with a misdemeanor can plead guilty to a violation even though it is not a lesser offense was not charged.

**14. People v. Maldonado**, 24 NY3d 48 (Depraved indifference)
[This depraved murder case involved the deft stealing a minivan and being pursued by police thorough a mixed commercial-residential neighborhood.
[He ran red lights at midday through crowded streets, travelling between 40-50 mph, going the wrong way down one-way streets, swerving, as he drove north, into the southbound lane to pass slower vehicles and avoid congestion, and then shifted back into the northbound lane, narrowly missing a pedestrian, didn't brake or slow down and finally ran a red light and struck a woman in a crosswalk. She hit the passenger side of the windshield with such force that her body landed more than 100' down the avenue. She died at the scene. He increased speed to 50 to 70 and eventually crashed into a parked car, where he was apprehended.]
Deft contends that the proper charged is reckless manslaughter, not depraved murder.
Deft said he tried to avoid hitting cars and pedestrians; did not know the neighborhood well and drove down the one-way streets by mistake; was avoiding cars as he evaded the police; thought he "hit the girl in the hand or something." He decided to crash into the parked car to avoid hurting anyone else. He also expressed remorse.

Held: Not the culpable mental state of depraved indifference. No utter disregard for the value of human life. Depraved indifference murder properly applies only to a small, and finite, category of cases where the conduct is at least as morally reprehensible as intentional murder" (*Suarez*, 6 NY3d 202).
A deft who knowingly pursues risky behavior that endangers others does not necessarily evince depraved indifference. A person who is depravedly indifferent is not just willing to take a grossly unreasonable risk to human life-that person does not care how the risk turns out (Lewie, 17 NY3d 348 [2011]). Depraved indifference will rarely be established by risky behavior alone.
Here, deft sought to mitigate the consequences of his reckless driving because he "actively attempted to avoid hitting other vehicles" by swerving, conduct which establishes a lack of depraved indifference. Although he drove on the wrong side of the road, this conduct was episodic and part of his effort to avoid other vehicles while evading the police. This conscious avoidance of risk is the antithesis of a complete

disregard for the safety of others. Deft was unquestionably reckless, but he was not depravedly indifferent.

**15. People v. Williams,** 24 NY3d 1129 (Depraved indifference)
Prior to engaging in unprotected sex, the victim asked deft four times if it was safe and the deft reassured him that it was. The had previously discussed HIV and the need to be careful to avoid infection.
Subsequently, the deft informed the victim that he might be HIV positive; that a previous sexual partner of his was infected and that the two had engaged in unprotected sex. The victim eventually was tested after becoming very only to find that he was HIV positive. He has taken medication to stave off infection. Without this medication, he would eventually develop AIDS.
Two months after the victim found out that he was HIV positive, deft sent a letter admitting that he had been diagnosed HIV positive before he and the victim became intimate. He expressed remorse about lying, saying "…I sincerely apologize for giving you HIV;" "I made my biggest mistake the night I said I didn't want to use a condom knowing my status…"
At issue is the legal sufficiency of a reckless endangerment 1st degree count.
Reckless endangerment 1st consists of four elements: conduct that creates a grave and unjustifiable risk of another's death; awareness and conscious disregard of that risk; the grave and unjustifiable risk is of a nature and degree that constitutes a gross deviation from the standard of conduct a reasonable person would observe in the situation; and the conduct occurred under circumstances evincing a depraved indifference to human life.

Depraved indifference is a culpable mental state (Feingold, 7 NY3d 288 [2006]). As explained in Suarez (6 NY3d 202 [2005]), "a deft may be convicted of [a depraved indifference crime] when but a single person is endangered in only a few rare circumstances"; specifically, where the deft exhibits "wanton cruelty, brutality or callousness directed against a particularly vulnerable victim, combined with utter indifference to the life or safety of the helpless target of the perpetrator's inexcusable acts" (id.). Here, there is no evidence that deft exposed the victim to the risk of HIV infection out of any malevolent desire for the victim to contract the virus, or that he was utterly indifferent to the victim's fate (see Lewie, 17 NY3d 348 [2011] [deft did not exhibit depraved indifference when she failed to stop the abuse of her child; although "the evidence . . . showed that she cared much too little about her child's safety, it cannot support a finding that she did not care at all"]). *
Fn* The dissent objects that "it is irrelevant that d may have expressed remorse six months after he and the victim had unprotected sex". But "the mens rea of depraved indifference to human life can, like any other mens rea, be proved by circumstantial evidence" (Feingold). Certainly, d's unprompted confession and expression of guilt and contrition constitute circumstantial evidence of his state of mind when he disingenuously persuaded the victim to engage in unprotected sex. The point here, though, is that there is simply no evidence in the grand jury record, circumstantial or otherwise, of wanton cruelty, brutality or callousness toward the fate of a single victim.

Finally, we need not and do not decide whether HIV infection creates a grave and unjustifiable risk of death in light of the medical advances in treatment made since the scourge of AIDS was first identified.

**16. People v. McLean**, 24 NY3d 971 (Right to counsel)
The deft pg to robbery & his sentence was capped at 12 years, with the understanding that he could get less time if he provided information about a murder.
After entering his plea, deft & dc met with Det. Sims in Oct, 2003. He told Sims that Baker and Kendu, whom he id'd from photo arrays, shot someone and he met them after the shooting. Sims found the story unconvincing & d was sentenced to 12–years.
In 2006, Baker told Sims that the deft himself took part in the murder. Seeking to speak to the deft again, Sims visited the lawyer to see whether he continued to represent deft or what the nature of his representation was." When asked whether he was still representing deft. the lawyer answered "No, I'm not" "I represented McLean in the robbery .... you can go talk to him if you want to." "He's been sentenced. The robbery case is over."
Sims saw the deft in prison without a lawyer present. He gave *Miranda*, but did not ask if deft was still represented and the deft volunteered nothing on that subject. The deft made an incriminating statement.
In *West,* 81 N.Y.2d 370, the deft had been represented in a 1982 lineup, which did not result in any charges. In 1985 and 1986, the police, having "made no attempt to determine whether deft was still represented," arranged for a ci to speak to deft and to tape the conversations. We held that the failure to make inquiry required suppression, regardless of what the inquiry would have shown: "Should the police have desired to question after the deft's right had attached, it was their burden to determine whether the attorney-client relationship had terminated".
Here, the police had reason to believe that the attorney-client relationship had ceased: the attorney had told them. By asking the question and getting an unequivocal answer, the police discharged their burden. Although they could have explained to counsel exactly why they were eager to talk to the deft, or they could have asked deft whether the relationship had reached an end, they are not required to take all imaginable steps to protect a right to counsel.

**17. People v. Johnson**, 24 NY3d 639 (Right to counsel)
Similar to McLean, the deft sought to obtain leniency by providing information about a second, unrelated crime. Here also, deft was charged with committing the second crime. The People offered in evidence statements made to police when the lawyer who represented him in the first case was not present.
In *McLean,* the 1st case was over when deft was questioned and the lawyer who had handled first case told police the representation had ended.
Here, the first case and counsel's representation of deft in it, were continuing when the deft. was questioned about the second case.
The deft, arrested for burglary, said he had information about a stabbing. This led to a meeting on Oct 12, with deft; dc in the burglary, police officers and an ada. The meeting began with the signing of a "Queen–for–a–Day" agreement, in which deft agreed to "fully and truthfully respond to any and all questions" put to him, and the da agreed that any statement responsive to any such question "will not be used as direct evidence in any

prosecution brought" against deft, except one for perjury or contempt. The agreement would be "null and void" if deft violated any of its terms.
After extensive questioning, the police were skeptical of some aspects of the story, but nevertheless concluded that he would be a useful cooperating witness. They asked him if he would "wire up" to talk to Bajwa, who deft stated was the stabber, and deft agreed.
On April 19, deft, without dc present, met with two officers and made the statements that are in issue here. Dc said he knew before the April 19 meeting that the police would be in touch with his client but it was his understanding that deft "would present himself and be wired up." He did not believe that deft "was going to be interrogated." The police testified that they viewed the meeting as a session to plan for the recorded conversation between deft and Bajwa.
At the meeting the officers and deft talked at length about the stabbing, the deft admitted to stabbing the victim himself. Deft waived *Miranda* and continued talking. There is no evidence that any effort was made, at any time on April 19, to contact d's lawyer.
The stabbing cannot be neatly separated from dc's rep of deft in the burglary. Deft had pinned his hopes for a favorable result in the burglary on his cooperation in the stabbing. Under these circumstances, dc's duty to his client required him to concern himself with both cases.
Dc was not, of course, retained to defend the stabbing: before the April 19 meeting, deft had not been charged with the stabbing, and no such charge seemed likely. But dc's obligation in defending the burglary included an obligation to be alert to, and to avert if he could, the possibility that deft's cooperation would hurt rather than help him. No responsible lawyer in dc's situation would concern himself with the burglary alone, indifferent to the disaster that might strike d if he incriminated himself in the stabbing.
D's right to counsel encompassed his conversation with police about the stabbing, as long as those conversations were part of an effort to obtain leniency in the burglary in which dc represented him. Thus, unless the right to counsel was waived, the police should not have questioned the deft about the stabbing in dc's absence.
This does not conflict with *McLean,* where cops interviewed deft after the first case was over, and where counsel who represented the deft in the first case assured police that that representation was at an end.

**18. People v. Williams,** 25 NY3d 185 (DA use of selective silence in case in chief)
The da made reference in their case-in-chief to deft's selective silence during custodial interrogation, after he had waived *Miranda* and agreed to speak to police. We hold, as a matter of state evidentiary law, that evidence of a deft's selective silence generally may not be used by the da as part of their case-in-chief, either to allow the jury to infer deft's admission of guilt or to impeach the credibility of his version of events when he has not testified.
The victim alleges the deft arrived at her apartment unannounced; gained entry by a ruse and then raped her in the bathroom; she testified that the bathroom sink crashed to the floor as she struggled with d.
After deft waived Miranda, he was evasive. He admitted that he knew the victim, but when the detective asked him specific questions about the incident, he either did not respond or repeated the detective's questions back to him. When asked whether he had sex with her, he did not answer. There was a DNA match to saliva on her shoulder. In

addition, the victim had a bruise and scratches on her body, and the sink in her bathroom was broken off from the wall.
The da in opening told jurors they would hear deft's grand jury testimony, during which he asserted that he and the victim had consensual sex; that they would be able to compare this testimony with his statements during the custodial interview, which the da characterized as "not outright denying what had happened, but not admitting to it either." Dc objected to the part of the opening referring to deft's postarrest silence.

[Editor's Note: The following are the rules relating to pre-trial silence in general:
Rules:
1. Common Law Rules of Evidence
Use of pre-trial silence, on direct or to impeach, absent special circumstances, is a violation of the common law rules of evidence.
E.g., DeGeorge, 73 NY2d 614: Bar shooting. Cop asked 'what happened' 'who shot him'. No one spoke. Then, after MW deft told his story. Can't be impeached for his pre-trial silence.

WHY?

a) Pre-trial silence is usually ambiguous and its probative value is limited. It's ambiguous because an innocent person may have many reasons for not speaking.

i) They may be aware that they have no obligation to speak;

ii) It may be the natural caution of a person who knows that anything said can be used against him;

iii) They may have a belief that efforts at exoneration would be futile;

iv) An attorney may have instructed them not to speak;

v) Mistrust of law enforcement.

WHAT ARE THE SPECIAL CIRCUMSTANCES?

a) Public servants (cops) who have a duty to speak.

i) Rothschild, 35 NY2d 355- didn't tell superiors about undercover operation.

ii) Bowen, 65 AD2d 364- didn't tell responding cops that he went into the garage to make an arrest.

2. Constitutional Prohibitions
It's an overlay on the common law rules of evidence

a) E.g.: Deft exercised the right to remain silent and then took the stand and testified to an alibi. Can't cross him re: failure to speak after MW nor his arrest silence as direct evidence.
Jenkins v. Anderson, 447 US 231, held if a deft is not given MW & doesn't specifically indicate he's relying on the right to remain silent, he can be impeached with his silence. Conyers holds that the NYS constitution prohibits this.

NOTE: Harris v. NY, 401 US 222, is not a silence case. Deft spoke after MW & then gave a different story at trial. OK to cross him with the inconsistent statement.

WHAT IF?---
Deft waives MW & gives essential facts of his involvement in the crime. He later testifies at trial to exculpatory circumstances. Can he be crossed as to his failure to relate these facts to the cops? Yes. Not a violation of the Const. (Savage, 50 NY2d 673)

In Savage, witneeses saw deft shoot victim. After MW, deft said "I'm glad I'm caught. I'm tired." The deft said he shot him during a dispute. At trial, deft testified victim tried to rob him and the gun went off by accident. Da contends recent fabrication. "Did you tell the cop he tried to rob you?"
He chose to speak after MW. He told cop he possessed the gun; he used it to shoot victim; that he shot him in the course of a dispute; that it took place in front of the bar.
What was omitted was not an inconsequential detail or collateral matter but a fact of overwhelming significance.
When it would be most unnatural to omit certain information from a statement, the fact of omission is itself admissible for purposes of impeachment.
Reference to the omission, because of its negative nature, could not serve substantively as evidence in chief- just impeachment.
On request, the court should charge the jury that the deft was under no obligation to have continued speaking.
Deft should be given an opportunity to explain his omissions.

In Williams, unlike Savage, the deft did not make any statement. This is a pure silence case.

**19. People v. Turner**, 24 NY3d 254 (PRS)
The deft plead guilty to 110/murder 2 for 15 years. The court failed to mention PRS at the plea. In the middle of the subsequent sentencing, the following transpired:
"DA: Judge, I believe—I can't recall if the PRS period was discussed at the time of plea. I think we should probably make a record of that now so it is clear.
"CT: I intend to make a 5 year period of PRS.
"DA: Ms. Turner, have you had a chance to talk about that with your attorney? ` "Deft: Yes.
"DA: Do you understand that that's part of your plea, at the end of your prison sentence you will be on parole supervision for a period of five years? "Deft: Correct.
"DA: You still wish to go through with sentencing today? "Deft: Yes."
The court imposed the sentence promised at the plea, plus five years PRS.
*Catu*, 4 NY3d 242, held that "a trial court has the constitutional duty to ensure that a deft, before pleading guilty, has a full understanding of what the plea connotes and its consequences". To meet due process requirements, a deft "must be aware of the PRS component of that sentence in order to knowingly, intelligently and voluntarily choose among alternative courses of action". Without such procedures, vacatur of the plea is required.
A deft cannot be expected to object to a constitutional deprivation of which she is unaware. As recognized in *Louree*, where deft was only notified of PRS at the end of the sentencing, the deft "can hardly be expected to move to withdraw the plea on a ground of

which he has no knowledge" (8 NY3d 541). And, in that circumstance, the failure to seek to withdraw the plea does not preclude appellate review of the due process claim.
*Murray*, 15 NY3d 725, held that deft's challenge to his plea on due process grounds was not preserved because he was informed at the allocution that he would receive a two-year PRS term, but then was notified at the outset of the sentencing that he would receive a three-year term. Deft in *Murray* knew that PRS would be a part of the sentence when he accepted the plea and was therefore mindful that his imprisonment might be extended if he were to violate the terms of his PRS. Because Murray was notified of the PRS term at the plea, and was advised at the commencement of the sentencing hearing that the PRS term had changed, preservation by an objection was both possible and necessary.
Here, the court did not advise deft at the plea that her sentence would include any PRS, and only notified her of PRS in the middle of sentencing. The same reasoning that applied in *Catu* and *Louree* applies here: the deft did not have sufficient knowledge of the terms of the plea at the allocution and, when later advised, did not have sufficient opportunity to move to withdraw her plea.
Moreover, the da, not the court, led the sentencing colloquy and may have misled deft by telling her that PRS was "part of her plea."

**20. People v. Crowder**, 24 NY3d 1134 (PRS)
On April 18, the court set forth a proposed plea bargain on the record. Deft was informed that the minimum the People could offer was "a D violent and the minimum on that is 2 years…with 1 ½ to 3 years post release supervision or parole." The court advised that he could accept the plea bargain that day, but also offered some time to think it over. The deft indicated that he wanted more time.
Three days later, deft returned and informed the court that he "wanted to take the plea." The court reiterated the prison term but this time failed to mention the PRS. The court accepted the deft's request to attend a drug program before sentence, on the condition that he continue probation supervision and submit to drug testing. He was warned that his sentence would be enhanced if he failed to comply with the court's conditions prior to sentencing. Deft pg.
On May 17, probation informed the court that deft had failed to cooperate or undertake drug testing. His father had also been unable to locate deft and believed, he had relapsed. Deft failed to appear at sentence on July 15. The court granted a two-week adjournment for counsel to attempt to locate him. He was unable to do so, and deft failed to appear again on the rescheduled sentence date of July 28. On that date, the court sentenced deft, in absentia, to 5/3 years PRS. Counsel did not object to the PRS component of the sentence.
Deft was arrested and produced on August 17. The court began by recounting deft's plea, including the PRS, and failure to appear at sentencing. No objection to PRS was made at that time either.
Deft argues that his conviction should be vacated under Catu (4 NY3d 242 [2005]) on the basis that the court failed to apprise him of PRS at the time of his plea.
*Catu* held that "the trial court has the constitutional duty to ensure that a deft, before pleading guilty, has a full understanding of what the plea connotes and its consequences". A court is not required to engage in any particular litany when allocuting a deft, but the record must be clear that the plea represents a voluntary and intelligent choice among the

alternative courses of action open to the deft. We found that "a d "must be aware of the postrelease supervision component of that sentence in order to knowingly, voluntary and intelligently choose among alternative courses of action" (id.).
D claims that his plea was not knowing, voluntary and intelligent under Catu because the court failed to reiterate the term of PRS during the plea. Under the circumstances of this case, deft was required to preserve his claim. Deft and counsel had three opportunities to object to the PRS: at the initial scheduled sentencing July 15, at sentencing on July 28, and at the appearance on August 17. Neither expressed any objection to the PRS. Because deft had ample opportunity to raise an objection to the PRS prior to and during these proceedings, deft was required to preserve his claim (Murray, 15 NY3d 725 [2010]).

**21. People v. Sweat**, 24 NY3d 348 (Double jeopardy)
A trial court's imposition of a contempt sentence in a summary proceeding, based on the contemnor's refusal to testify at his brother's criminal trial after the contemnor had been granted transactional immunity, was remedial rather than punitive, and thus, double jeopardy did not bar subsequent prosecution for criminal contempt under the Penal Law. After imposition of the contempt sentence, the trial court continued to inquire of the contemnor and his counsel whether the contemnor was willing to testify, indicating that the contemnor still had an opportunity to comply with the law. The contempt order did not contain a plain and specific statement of punishment to be imposed, as would be required for criminal contempt in a summary proceeding under the Judiciary Law.

**22. People v. Dunbar**, 24 NY3d 304 (Miranda)
The Queens DA implemented a central booking pre-arraignment interview program in which an ada & detective interviewed a suspect immediately prior to arraignment. During this interview, the officer delivered a scripted "preamble" to the *Miranda* warnings. We hold that the preamble undermined the subsequently communicated *Miranda* warnings to the extent that defts were not "adequately and effectively' advised of the choice the Fifth Amendment guarantees" against self-incrimination (*Missouri v. Seibert,* 542 U.S. 600) before they agreed to speak with authorities.
The 'preamble' consisted of the following:
The ada described the charges, including the date, time and place. The officer informed deft that "in a few minutes I am going to read you your rights. After that, you will be given an opportunity to explain what you did and what happened at that date, time and place." She then delivered the preamble as follows:
"If you have an alibi, give me as much information as you can, including the names of any people you were with. If your version of what happened is different from what we've been told, this is your opportunity to tell us your story. If there is something you need us to investigate about this case you have to tell us now so we can look into it. Even if you have already spoken to someone else you do not have to talk to us.
"This will be your only opportunity to speak with us before you go to court on these charges."
Then, without a break, the deft was informed that "I'm going to read you your rights now, and then you can decide if you want to speak with us, O.K.?" She then advised "You have the right to be arraigned without undue delay; that is, to be brought before a judge, to be advised of the charges against you, to have an attorney assigned to or appointed for

you, and to have the question of bail decided by the court"; gave the *Miranda* warnings; and, finally, asked "Now that I have advised you of your rights, are you willing to answer questions?"

II.

*Seibert* rebuffed an attempt to end run *Miranda. Seibert* addressed the question-first-and-warn-later police protocol that called for giving a suspect no warnings until after interrogation had produced a confession. At that point, the interrogator would deliver *Miranda* warnings and, assuming the suspect waived, repeat the questioning to elicit the information already provided in the prewarning statement. It was held that, under these circumstances, the warnings could not function "effectively" as *Miranda* requires.

Here, the People argue that where no interrogation precedes a suspect's *Miranda* waiver (unlike *Seibert* ) and *Miranda* rights are fully administered and waived, police statements or conduct prior to the waiver bear only on the question of whether the waiver was knowing, voluntary and intelligent under the totality of the circumstances—a factual inquiry to be made on a case-by-case basis.

But "the inquiry is ... whether the warnings reasonably 'convey to a suspect his rights as required by *Miranda*'" (*Duckworth v. Eagan,* 492 U.S. 195). Thus in *Seibert,* the issue was whether, in light of the protocol employed by the police, "the warnings could effectively advise the suspect that he had a real choice about giving an admissible statement".

Here, the issue, as in *Seibert,* is whether a standardized procedure vitiated or at least neutralized the effect of the subsequently-delivered warnings. We agree that the preamble, which is at best confusing and at worst misleading, rendered the subsequent *Miranda* warnings inadequate and ineffective in advising ds of their rights.

Before they were read *Miranda,* defts were warned, for all intents and purposes, that remaining silent or invoking the right to counsel would come at a price—they would be giving up a valuable opportunity to speak with an ada, to have their cases investigated or to assert alibi defenses. The statements to "give me as much information as you can," that "this is your opportunity to tell us your story" and that you "have to tell us now" directly contradicted the later warning that they had the right to remain silent. By advising them that speaking would facilitate an investigation, the interrogators implied that these ds' words would be used to help them, thus undoing the heart of the warning that anything they said could and would be used against them. And the statement that the pre-arraignment interrogation was their "only opportunity" to speak falsely suggested that requesting counsel would cause them to lose the chance to talk to an ada.

In sum, the issue is not whether, under the totality of the circumstances, these waivers were valid, but rather whether or not ds were ever "clearly informed" of their *Miranda* rights in the first place, as is constitutionally required.

They were not: the preamble undercut the meaning of all four warnings. Certainly, if the warnings were preceded by statements that were *directly* contrary to those warnings (*e.g.,* you are required to answer our questions; your statements will be used to help you; you are not entitled to a lawyer) there would be no need to examine the totality of the circumstances to determine if a *Miranda* waiver was knowing, voluntary and intelligent. The preamble did the same thing, albeit in an indirect, more subtle way. While a lawyer would not be fooled, a reasonable person in these ds' shoes might well have concluded,

after having listened to the preamble, that it was in his best interest to get out his side of the story—fast.

**23. People v. Brumfield,** 24 NY3d 1126 (190.50)
The deft was denied his right to testify before the grand jury. CPL 190.50(5) provides that a deft must be permitted to testify before a grand jury if he serves upon the People a notice of intent to testify, appears at the designated time and place, and signs and submits a waiver of immunity. The parties do not dispute that deft complied with the first two requirements. Rather, the issue presented is whether he complied with the third requirement of signing a waiver of immunity. CPL 190.45(1) provides:
"A waiver of immunity is a written instrument subscribed by a person who is or is about to become a witness in a grand jury proceeding, stipulating that he waives his privilege against self-incrimination and any possible or prospective immunity to which he would otherwise become entitled, pursuant to section 190.40.... "
The People presented deft with a waiver of immunity form that included the provisions required by CPL 190.45, and the following three additional provisions that are not required under that statute: 1. Deft's right to talk to a lawyer before deciding whether to sign the waiver, and before testifying; 2. Deft understands "that the possible questioning before will not be limited to any specific subjects, matters or areas of conduct;" 3. Deft consents to the use against him of any testimony given by him "or evidence hereby produced by him upon any investigation, hearing, trial, prosecution or proceeding."
Deft struck out those three additional provisions and signed the form. Because he would not sign an unaltered from, he was not permitted to testify.
The statutory right to testify was violated. This right "must be scrupulously protected" (Smith, 87 N.Y.2d 715 [1996]). Even with the deletions, the deft complied with the waiver of immunity as required under CPL 190.45; that is, he left intact the provisions that stated he waived his privilege against self-incrimination and any immunity to which he would be entitled. He was only required to meet the requirements of the statute, and nothing more to make a valid written waiver of immunity. When a deft meets the waiver of immunity requirements of 190.45, he must be permitted to testify.

**22. People v. Garcia,** 25 NY3d 77 (Crawford & background info)
There are two cases considered by the Court.
Garcia
The deft was charged with shooting Colon to death during an argument on the street. A witness saw him do but didn't pick him out of a photo array because she was "more comfortable seeing ... the person in person because in the picture they looked different." She picked him out in a lineup two years later.
The investigating detective testified that he met with the victim's sister several weeks after the shooting. On direct examination, the officer testified:
"Q. Without telling us specifically what you talked about, ... did she assist you in your investigation of this case? "A. Yes, she did.
"Q. Did she tell you whether victim was having a problem with anyone in particular? "A. Yes, she did. "Q. Who was that? "A. The deft." He also testified that they knew each other quite awhile from the neighborhood.

The case, therefore, hinged on the eyewitness' identification and the officers hearsay of the reported strife between victim and deft.
DeJesus
The victim was shot to death in a dispute outside a neighborhood bar.
The da sought to introduce evidence that the victim's family called police 12 hours after the shooting and said they got an anonymous call identifying the shooter as "Joshua" who lived with hisgrandparents at a particular address; to show "why police focused in on ... deft and how they came to put his photo in a photo array, how they came to show it to witnesses, and how deft was a suspect from the day the actual homicide took place."
The court directed that the da could ask "based on your investigation on that day, did you have a suspect in mind," without mentioning the anonymous call.
Discussion
The Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial," unless that witness was unavailable to testify & deft had a prior opportunity to cross him. The Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted".
Otherwise inadmissible evidence that "provides background information as to how & why the police pursued and confronted a deft" may be admitted to help a jury understand a case in context "if the evidence's probative value in explaining the pursuit outweighs any undue prejudice to deft," and if the evidence is accompanied by a "proper limiting instruction'.
II.
In Garcia, the detective's testimony as to his conversation with the sister went beyond the permissible bounds of providing background information. The testimony that the sister had said that there was friction between deft & victim was a testimonial statement as it was procured for the primary purpose of creating an out-of-court substitute for the testimony of the sister regarding that discord, which discord arguably gave a motive. It exceeded that which was necessary to explain the police pursuit of deft. Since the case turned on the id of deft by a single eyewitness, who was not well-acquainted with deft and who did not id him until 2 years after the crime, we cannot conclude that the error in admitting that testimony is harmless.
III.
When asked whether there came a time when police began to look for a specific suspect, the cop merely agreed that the police "began specifically looking for deft" at 4p.m. without having "spoken to the eyewitness." There is no basis to characterize that state as testimonial—it is not an out-of-court substitute for trial testimony.
Further, this is not a case in which there was an inferential breach of deft's confrontation rights. "The relevant question in determining whether testimony contains an implicit accusation and thus is testimonial, is whether the way the da solicited the testimony made the source and content of the conversation clear" (*Ryan v. Miller,* 303 F3d 231 [2d Cir; *see Dukagjini,* 326 F3d 45 [2d Cir2003]). Even assuming, arguendo, the *Ryan* litmus test applies here, there was no violation of confrontation rights. Deft's point at trial that the disputed testimony gave the "clear implication" that "some unknown anonymous caller said that deft must have been the suspect" is mere supposition.

**25. People v. Flanders**, 25 NY3d 997 (Charge)

The deft. shot the victim with a .22 and a .380. The indictment in alleging the facts for the assault and reckless endangerment counts, alleged the counts in the conjunctive, e.g., "…caused such serious physical injury with a .22 rifle **and** .380 semi-automatic."
The court instructed the jury using the indictment's conjunctive language. During deliberations the jury sent out a note asking whether the must believe that both weapons were involved. The court replied that they could convict if they found that either or both were involved "…as long as you find there was a deadly weapon involved."
Held: the People were not required to prove the deft used both weapons because the offenses may be committed by doing any one of several things.

**26. People v. Dubarry,** 25 NY3d 161 (Transferred intent; Sirois)
A deft may not be subject to multiple liability for a single homicide under a "transferred intent" theory, where he kills one victim in the course of attempting to kill someone else. He cannot be convicted of depraved murder and intentional murder on a transferred intent theory in a case involving the death of the same person. The trial court erroneously submitted to the jury both charges in the conjunctive rather than in the alternative.

In addition, the People sought to present eyewitness testimony of one of the building's residents who had previously testified before the grand jury that he saw deft fire the initial shot. At trial he refused to testify because of threats against his family by an opposing gang, the Israelites. Outside of the jury's presence the court held a *Sirois* hearing to determine whether deft procured the witness's refusal by threats or violence.
The witness recounted how just the day before, his brother and sister visited him and told him that they were "getting hostility around the neighborhood" because he "was making a statement against the defts." His brother told him that the Israelites thought the witness was a "snitch". His sister informed him that someone had told her that the Israelites suspected the witness of snitching and that the Israelites were "serious." The witness stated that his siblings' demeanor during the visit indicated to him that these were indeed threats.
The witness informed the court that he was fearful because his family still lived in the neighborhood where the shooting occurred, and he thought his brother and sister would be hurt if he testified; that he had not told anyone that he had cooperated and he did not even know until that day that the People intended to call him at trial.
Based on this testimony the court allowed the da to read the witness's grand jury testimony into evidence.

This evidence was insufficient to establish deft's misconduct.
The witness identified "the Israelites" as the source of the threats, but provided no evidence linking deft to the threats or anyone who approached his siblings.
The People failed to submit evidence that deft communicated with anyone about the witness and his possible testimony, or that deft "had the opportunity to arrange and orchestrate" any threats against the witness's family (*Cotto,* 92 N.Y.2d 68). Instead, the People promoted the inference that because they informed the deft that the witness was going to testify, and the witness himself did not tell anyone that he was cooperating in the case, deft must have been the source of the Isrealites's suspicions about the witness. Even if the inference of a communication were appropriate on this record, the additional

inference that the communication was necessarily intended and structured to procure the witness's unavailability is based on nothing more than pure speculation.
Assuming deft told someone that the witness was going to testify for the People, that alone does not constitute witness tampering or coercive behavior. In order to infer the misconduct required by our case law, there must be some analytic basis to trace the threats back to deft (Smart, 23 NY3d 213 [2014][da must demonstrate by clear and convincing evidence that deft engaged in misconduct aimed at least in part at preventing the witness from testifying and that deft's misdeeds were a significant cause of the witness's decision not to testify"].
Here, the only possible connection between deft and the source of the threats is deft's association with the Israelite congregation. Yet, more than membership is necessary to establish clear and convincing evidence of misconduct, and in this case the record lacks any facts from which to infer deft is behind the Israelites' threats. For example, there is no evidence that deft controlled the group's actions, influenced members of the group to act, or that he persuaded any individual Israelite to threaten the w's family.

**27**. **People v. Henderson,** 25 NY3d 534 (Felony murder)
Is there sufficient proof to support felony murder, based upon the underlying predicate felony of burglary.
Deft, his cousin and a friend broke into an apt looking for two whom they suspected had robbed them of drugs and money that were kept in an associate's nearby apt. When deft broke down the door, the suspected thieves were not inside. Rather, the victim and his girlfriend were in an upstairs bedroom. Deft was screaming and asking for the whereabouts of the individuals he believed had stolen the drugs. The victim told deft to leave. Deft then punched the victim in the face and a fistfight ensued. The victim's girlfriend hit deft over the head with a bottle. At some point, deft and the other men ran out of the apt, returning to their associate's apt.
Deft took a knife out of the knife block in his associate's kitchen, telling his associate that he was "going to kill him," referring to the victim. Deft returned to the victim's apt holding the knife in his hand. The victim's girlfriend ran out the backdoor to a neighbor's apt and called 911. As she ran out, she heard glass shattering. A bottle had apparently been broken over the victim's head. She then ran back and saw the victim with shards of glass protruding from his scalp and blood pouring from his back. He said he thought he had been stabbed, and thereafter lost consciousness and died.
The associate testified for the People, stating that deft, deft's cousin and their friend had left her apt for a period of time, and when they returned, deft appeared upset, was "pacing back and forth and then ... took a kitchen knife." She heard deft say that he was "going to kill him." The associate asked deft to put the knife back, but he did not comply.
Deft did not testify; however, his testimony from his first trial was read into the record. In that statement, deft testified that while he was going to his associate's apt, the victim made a racial slur and threw a bottle at him. He admitted to breaking into the victim's apartment, fighting with him, and returning with a knife. D testified that he did not intend to kill the victim, but he "wanted to hurt him like he hurt me with the bottle."
D was convicted of felony murder, man 1, burg 1 & 2 and assault. AD rejected d's argument that "the evidence of felony murder was legally insufficient because the predicate burglary is based upon his conceded intent to commit an assault".

A person is guilty of murder if he or she commits or attempts to commit one of ten enumerated felonies, burglary being one, "and, in the course of and in furtherance of such crime ... causes the death of another." To establish burglary, the deft must "knowingly enter or remain unlawfully in a building with intent to commit a crime therein".

Deft argues that the evidence demonstrates that the second time he entered the apt, he did so with the intent to kill; that a felony murder conviction cannot be predicated on burglary when the intended crime underlying the burglary is murder, because to do so would double-count a single mens rea of intent to kill. There was evidence at trial, however, that deft's intent when he re-entered the apartment was to commit assault, not kill the victim. Deft testified that he initially retrieved the knife because "he was mad he got assaulted" by the victim "and he wanted to even the odds." He admitted that upon his reentry, he immediately began to fight with the victim. He denied returning to the apartment to kill the victim, but admitted he intended to "hurt" him. Deft stabbed the victim only after the victim "swung" at him. Although deft told his associate that he wanted to kill the victim, viewing the evidence, as we must, in the light most favorable to the People (*Delamota*, 18 N.Y.3d 107; *Conway*, 6 N.Y.3d 869), a rational trier of fact could conclude that, based upon deft's own statements, deft committed burglary when he entered the apt with the intent to assault the victim and during that burglary deft caused the victim's death.

*Miller* (32 N.Y.2d 157 [1973]) held a felony murder conviction may be predicated upon the commission of a burglary where the underlying intent is to assault the victim. In that case, deft broke into an apt intending to assault one of the occupants, Fennell. Deft entered the apt and stabbed Fennell in the arm while spraying a chemical in Fennell's face. Aleem, Fennell's roommate, came to Fennell's aid, and deft killed Aleem by stabbing him in the chest. We held that a felony murder charge predicated on burglary was sufficient for conviction of felony murder on those facts, despite the argument that the intent to commit assault underlying the burglary merged with the homicide.

Although *Miller* involved two victims, *Miller* is applicable here. The intent in *Miller* to assault one victim when unlawfully entering the apt, combined with the murder that resulted in the course of and in furtherance of the burglary, was sufficient to support a felony murder conviction. *Miller* was not limited to circumstances where a deft killed a victim other than the one he or she intended to harm. Here, deft unlawfully entered the victim's apartment with the singular intent to assault him, but caused his death. D's felony murder conviction, therefore, is supported by legally sufficient evidence.

We need not address whether a person who enters a building with the intent to kill may properly be convicted of felony murder.

**28**. **People v. Washington**, 25 NY3d 1091 (Substitution of counsel)

Prior to trial, deft filed a *pro se* motion seeking new dc; deft's application included a form "Affidavit in Support of Motion for Reassignment of Counsel," in which he circled every one of the 10 possible grounds of ineffectiveness listed. Deft also included a "Statement of Facts," in which he alleged that his atty "failed to produce . . . discovery materials" and "denied to formulate an Omnibus motion to contest . . . lack of id, or to preserve requested pre-trial hearings." Deft further asserted that his atty ignored his requests to counter "the lack of id and the negative results of the DNA test," and "refused to take heed to defts factual version of events, and to further discuss or develop possible defense

strategies beneficial to him." The motion papers were postmarked about six weeks before trial, but deft mailed the materials to "Part 80," and the trial was moved to Part 13. Although it is not clear from the record whether dc or the DA actually received the papers prior to trial, deft did not mention the motion to SC or counsel before or during trial.
At sentencing, the judge advised the da & dc that he had received the *pro se* motion four days after the verdict. SC asked dc if he wanted to comment on the motion, to which counsel responded that he "didn't want to put himself in opposition to deft;" that certain items in the motion were "incorrect," but he did not elaborate.
The judge then asked deft why he did not call attention to the motion or any of his complaints. Deft claimed that he had tried to talk with the judge about the motion before trial, but a court officer prevented him. The judge expressed disbelief about this explanation and noted that, in any event, deft "had many, many, many, many other moments after that" when he and the judge "spoke person to person and deft never raised this." On the merits, the judge viewed deft's allegations skeptically, "based on [his] observations during the course of the trial." Specifically, the judge addressed deft:"You say things in here that are not true. You say that you had no discovery. It was evident to me that you had discovery. It was evident to me you had all the discovery. You complained about negative DNA results. The testimony in the trial is that there were positive DNA results. You complained that your attorney didn't discuss strategy with you. I know he discussed strategy with you. I don't see anything in here based on my observations during the course of the trial that any of this is true."
The judge then invited deft to air his complaints of ineffective assistance. Deft asserted dc "never did discuss any strategy" with him before trial, despite deft's numerous requests; that dc failed to meet with him before trial, except for a "7 to 8 minute" video conference a week or two beforehand, during which he and his attorney didn't really "connect." Apart from this video conference, deft complained, he "never really had a chance to discuss anything with counsel prior to being in court." Finally, deft alleged that his attorney provided him only "some of the discovery" that he had sought. Deft eventually admitted, however, that he did receive the discovery he requested.
The judge next asked dc to respond to deft's statements, and counsel explained what he had done prior to trial; specifically, he "recalled speaking to deft on the phone. The video conference was, in fact, we had one, it was longer than that. The only problem was they had delivered deft late to the conference area and I think it went for about 15 minutes or so. From the outset, I think it's pretty clear that strategy here was to indicate to the jury that the id was incorrect. We challenged id here during the hearing before the trial, cross examination dealt with id. I think that was clearly what the strategy was according to what deft was dealing with."
The judge also asked dc if he discussed trial strategy with his client and if he provided deft with discovery. Counsel stated that he was "sure" he discussed strategy with deft before trial, and that he gave deft "a good deal of discovery," "everything I had up until the beginning of trial."
The judge commented that the motion was untimely and, in any event, "from what he heard from deft and dc, he would not have granted the motion" because deft had not been truthful about what his attorney "did and did not do," and he "accepted" dc's version of events. Indeed, the judge added, he had observed that deft "came into court every day

with discovery in his hands, consulted with dc during jury selection and trial, [and] decided not to testify after conferring with counsel."
Based on his personal observations and inquiry, the judge denied deft's motion.
"The right of an indigent deft to the services of a court-appointed lawyer does not encompass a right to appointment of successive lawyers at deft's option" (*Sides*, 75 NY2d 822). A deft may be entitled to new dc, however, "upon showing good cause for a substitution, such as a conflict of interest or other irreconcilable conflict with counsel" (*id*). Here, deft claims that he was entitled to new dc because dc's responses to the allegations of ineffectiveness created an actual conflict of interest.
Although an attorney is not obligated to comment on a client's *pro se* motions or arguments, he may address allegations of ineffectiveness "when asked to by the court" and "should be afforded the opportunity to explain his performance" (Mitchell, 21 NY3d 964; *Nelson*, 7 NY3d at 884).
We have held that dc takes a position adverse to his client when stating that deft's motion lacks merit (*Mitchell*), or that deft, who is challenging the voluntariness of his plea, "made a knowing plea . . . [that] was in his best interest" (*Deliser*, decided with *Mitchell*). Conversely, we have held that dc does *not* create an actual conflict merely by "outlining his efforts on his client's behalf" (*Nelson*) and "defending his performance".
We conclude dc's comments in response to the judge's questions did not establish an actual conflict. Dc did not suggest that his client's claims lacked merit. Rather, he informed the judge when he met with deft and for how long, what they discussed, what the defense strategy was at trial and what discovery he gave or did not give to deft. Thus, he never strayed beyond a factual explanation of his efforts on his client's behalf.

**29. Matter of Kasckarow v. Board of Examiners,** 25 NY3d 1029 (SORA)
Petitioner, in Florida, entered a nolo contendre plea to sexual battery with a 15 year old classmate. Sentence was adjourned for four years while the petitioner was placed on probation. He was required to register as a sex offender under the Florida SORA act. He notified the New York Board of his intention to move to New York and contends that nolo pleas are not recognized in New York.
Corr. Law Sect. 168-a (1) defines a sex offense as a conviction. Foreign nolo pleas and Alford pleas are convictions under the statute.

**30. People v. Ford,** 25 NY3d 939 (SORA)
Deft, imprisoned as the result of a sexual abuse 1st plea, committed 16 tier II and 4 tier III disciplinary violations. As a consequence of the disciplinary penalties, deft was prevented from participating in sex offender treatment.
The following are the pertinent factors in this case:
Factor 12: Acceptance of Responsibility 1: The offender has not accepted responsibility for his sexual misconduct (10 pts) 2: The offender has refused or been expelled from treatment subsequent to sentencing (15 pts)
Factor 13: Conduct While Confined or Under Supervision , 1: The offender's adjustment to confinement or supervision has been unsatisfactory (10pts) 2: The offender's adjustment to confinement or supervision has been unsatisfactory and has included inappropriate sexual conduct (20 pts)

The Board assessed the deft a level two with 10 points under Factor 13 for unsatisfactory conduct while confined. It did not assess points for post-offense behavior under Factor 12 but recommended an upward departure to level 3 based on the violent and opportunistic nature of his crime, his failure to participate in sex offender treatment, and his lack of remorse for the crime.
The SORA Guidelines provide: "An offender who does not accept responsibility for his conduct or minimizes what occurred is a poor prospect for rehabilitation. Such acknowledgment is critical, since an offender's ability to identify and modify the thoughts and behaviors that are proximal to his sexual misconduct is often a prerequisite to stopping that misconduct."
In calculating an offender's risk level for post-offense behavior, 15 points are added under Factor 12 if an "offender has refused or been expelled from treatment since such conduct is powerful evidence of the offender's continued denial and his unwillingness to alter his behavior." Alternatively, the Board may assess 10 points under Factor 12 for failure to accept responsibility based on other facts indicating the d's lack of remorse.
We hold that inability to participate in sex offender treatment due to disciplinary violations is not tantamount to a refusal to participate in treatment under the SORA Guidelines. Refusal contemplates an intentional explicit rejection of what is being offered. There is no indication here that deft explicitly refused treatment. Conduct that places him in a position where he could not receive treatment is not equal to refusal to participate in treatment. Inferring refusal from a disciplinary record is not supported by the Guidelines, which state that points should be assessed where a deft refuses treatment or is expelled from treatment.
Beyond assessing points under Factor 13 for his conduct while confined, the People may seek an upward departure based on the RAI not adequately taking into account the considerable number of disciplinary violations incurred. Additionally, they may seek an upward departure based on his not receiving sex offender treatment. This is a route available to the People to account for a deft's repeated disciplinary violations. SC erred as a matter of law in determining that deft's disciplinary violations were tantamount to a refusal to participate in sex offender treatment.

**31. People v. Moore**, 24 NY3d 1030 (Allocution; Boykin rights)
The defendant was charged with four counts of 220.03. At arraignment, there was a brief discussion between defense counsel, the ada and the court concerning the terms of a disposition, which then lead to deft's plea and sentencing. The court did not address deft and deft did not speak; nor was deft advised of any constitutional rights he was waiving. Deft now claims his constitutional rights were violated because the record fails to establish his plea was knowing, voluntary and intelligent.
*Tyrell*, 22 NY3d 359, held that "presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused intelligently and understandingly rejected his constitutional rights. Anything less is not waiver".

**32. People v. Blake**, 24 NY3d 78 (Ineffective assistance; destruction of video)
The deft, charged with shooting three men, claimed that they were attacking him with razors and raised the justification defense. Dc, in summation, claimed the defense would

have been objectively verified had the tape from a video surveillance camera periodically trained upon the location been timely retrieved instead of having been left in the recording device and recorded over due to an unexplained oversight. Dc, however, did not request, as she could have, a charge permitting, but not requiring, the jury to infer that the content of the missing tape would not have been favorable to the prosecution. Deft contenda the failure to ask for the charge rendered counsel's representation constitutionally ineffective.
The entitlement to an adverse inference charge, such as the one dc allegedly neglected to seek, was not conclusively established until 2013 when we decided *Handy* (20 NY3d 663). It was in *Handy* that we first held such a charge to be mandatory upon request "when a d, acting with due diligence, demanded evidence ... reasonably likely to be of material importance, and that evidence had been destroyed by the State". Before *Handy,* the availability of the charge was discretionary. Perhaps it was a mistake not to seek the charge, which likely would have been given as a matter of discretion, but if it was a mistake, it was not one so obvious and unmitigated by the balance of the representational effort as singly to support a claim for ineffective assistance.
We do not exclude the possibility that, post-*Handy,* the failure to request a *Handy* charge could support an ineffective assistance claim.

**33. People v. Wells**, 24 NY3d 971 (30.30)
The da appealed an assault 3 conviction that had been reversed by the AT for an improper jury charge. The case was in local criminal court due to the AT order for a new trial.
On May 10, , while the da's application for leave to appeal was still pending, the case was adjourned until June 21. The Court of Appeals denied the People's leave application on May 14.
Because of a clerical error in CC, the case was not placed on the June 21st calendar, and no one was present on that date. The da discovered the mistake in July and a new date of August 23, was set. At no time did the People declare themselves ready for trial.
At issue is whether the People are charged with 101 days from May 10 to August 23.
When a conviction is reversed and the case is sent back for a retrial, "the criminal action ... must be deemed to have commenced on ... the date the order occasioning a retrial becomes final" (30.30[5][a]).
Under 30.30(5)(a) a new action commenced when the leave to appeal from the AT's order was denied. The da contends 30.30[4][a] provides "in computing the time within which the people must be ready for trial ... a reasonable period of delay resulting from other proceedings concerning the deft, including but not limited to: ... *appeals;* ... and the period during which such matters are under consideration by the court" must be excluded. The mere lapse of time, following the date on which the order occasioning a retrial becomes final, does not in itself constitute a reasonable period of delay resulting from an appeal within the meaning of 30.30(4)(a). Otherwise, the People would be permitted to delay retrial for the duration of an adjournment in the trial court, no matter how lengthy, even after a Judge of our Court has denied leave to appeal, without consequence under 30.30. Such a rule would be inconsistent with "the dominant legislative intent informing 30.30, namely, to discourage prosecutorial inaction" (*Price,* 14 NY3d 61 [2010]).
The period from May 10, to August 23, was not automatically excludable as time resulting from an appeal under 30.30(4)(a). The da provided no justification for any

"reasonable period of delay" under 30.30(4)(a) to be added to the 90 days provided under 30.30(1)(b).

**34. People v. Spears,** 24 NY3d 1057 (Adjournment at sentence)
The deft plead guilty and the case was adjourned for two months for sentence (the deft was not incarcerated).
On sentence date, the deft asked for an adjournment to discuss taking his plea back. The deft told the court that he tried to contact his lawyer yesterday but to no avail. The lawyer stated that they discussed this issue 'this morning'. When asked by the court why he wanted to withdraw his plea, the defendant said that he wanted to look at his legal options because 'it's a very big decision'. The court said that his reasons were not sufficient and sentenced the defendant.
The Court of Appeals affirmed his conviction holding that he spoke with his lawyer that morning and there were no grounds on the record to support a plea withdrawal.

**35. People v. Baret**, 23 NY3d 777 (Padilla)
*Padilla v. Kentucky* (559 U.S. 356 [2010]) held that the 6th Amend requires defense counsel to advise noncitizen clients about the risk of deportation arising from a plea. *Chaidez v. US* (133 S Ct 1103 [2013]) held *Padilla* is not retroactive in federal collateral review. It is now not retroactive in NY postconviction pcdings.