New York State Judicial Institute
Citywide Association of Court Attorneys: Selected Cases Re: Identifications, Confessions/RTC/IAC, Discovery, Evidence & Substantive Law

New York, New York

October 20, 2015

Judge Mark D. Cohen

Identification – Show-Ups

During a Show-up, In a Case Involving a Robbery by a Suspect With a Striped Shirt, The Complainant Hesitates to Make the ID?

What if The Police Then Drape The Striped Shirt on the Perp?

If The ID is Made Only at That Point, Is It Unduly Suggestive?

People v. Kenyatta James, 128 A.D.3d 723 (2nd Dept. 2015)

- Yes Per 2nd Dep't 3-1
- One Witness ID (22 Year Old CW) in Newburgh, NY Purse-Snatching Robbery Involving Suspect Described as a 20 Year Old "Light-Skinned Black Male" Wearing a Brown and White Striped Shirt
- D Arrested Minutes Later – He Was 5'8", 33 Years Old, a Black Male, Shirtless, Wearing Shorts and Carrying a Red and Blue Striped Shirt, Which He Dropped to the Ground
- When CW Hesitated to Make ID in Show-Up, Police First Had CW ID Shirt and Then Held Striped Shirt Up Against D's Chest, Which Resulted in ID
- Court Distinguished *P v. Brisco, 99 N.Y.2d 596 (2009)* [Maroon Shorts Held Up Against D in Show-Up OK] Show-Up Unreliable Due to Police Action]
- Justice Dillon Dissented: Show-Up Timely and Properly Conducted Per *Brisco* and *P v. Dunbar, 104 A.D.3d 1st 198 (2nd Dept.), aff'ed 24 A.D.3d 304 (2014*) [Similar Facts]

Suppose The CW First ID's The Proceeds In a One-Witness Robbery Case And Then ID's The D Who is Displayed With Four Other Perps in a Show-Up?

What If the Photos of the Show-up Are Lost?

Same Result = Suppression?

Suppose The Suppression Court Finds The Show-up Unduly Suggestive, Can It Also Make an Alternative Independent Basis Finding of the CW Never Testifies.

People v. Jason Buckery, 2015 N.Y. App. Div. Lexis 5554 (2nd Dept. 2015)

- D and 3 Others Stopped by Police While Standing in Front of Store Within Close Spatial and Temporal Proximity of Knifepoint Robbery in Queens
  - Description: Three Black Males and One Indian Male
  - Protective Search Revealed Nothing
- At Suppression Hearing, PO Testified That Prior to Show-Up, He Walked Up to CW With Wallet (I.e., The Proceeds), and After This Was ID'ed, The CW ID'ed All Suspects
- So, The Short Answer: Suppression = Unduly Suggestive
  - While Prompt Show-Ups Are Generally Allowed, People Have Burden Per *P v. Ortiz, 97 N.Y.2d 533 537* of Producing "Some Evidence" Procedure Not Suggestive
- Here, First Displaying Proceeds and Then Conducting Show-up NG, Coupled With Loss of Photos of Show-Up, Required Suppression
- But, Since CW Never Testified at Suppression Hearing, No Independent Basis Finding Can Be Made BUT Remand for DeNovo Hearing
  - But What About *P v. Burts, 78 N.Y.2d 20 (1991)???*
    - No Bifurcated *Wade* Hearings

So, Is The Failure to Preserve Computerized Photo Arrays Shown to a CW Fatal For The People in a *Wade* Hearing?

People v. John Robinson, 123 A.D.3d 1062 (2nd Dept. 2014)

- D Arrested For Three Brooklyn Robberies
- At *Wade* Hearing Detective Testified Two CW's Viewed Several Screens of Police-Computer Generated Photo-Arrays
  - D Was 18; Fillers Were 18,29, 30 and 35
- D ID'ed
- Computer Images Never Retained
- Lower Court Order Denying Suppression Reversed
- While Failure to Preserve Does Not Require Suppression, Here *Wade* Hearing Testimony Was Insufficiently Detailed to Establish Lack of Undue Suggestiveness
- Independent Source Hearing Ordered Per *P v. Coleman, 60 A.D.3d 1079, 1080 (2nd Dept.. 2010)*

Confessions, Right to Counsel & IAC

The Defendant in a Cayuga County Child Sexual Assault Case Has a Full-Scale IQ of 68 and a Verbal Comprehension IQ of 63. The People's Forensic Psychiatrist Testifies at the *Huntley* Hearing That While He Was "Not That Retarded" and Could Understand His *Miranda* Rights, The Defense Expert Testifies That While He Could Understand The Words of the *Miranda* Warnings, He Was "Very Suggestable," to a False Confession, Could Only Read on a Third Grade Level and Thus Not Capable of Intelligently Waiving His *Miranda* Rights." The Interrogation is Videotaped. Your Ruling?

Suppression or Not?

People v. Robert M. Knapp, 124 A.D.3d 36 (4th Dept. 2014)

- Per 4th Dep't: Suppression Required
  - County Court Order Reversed
- Per *P v. Williams, 62 N.Y.2d 285, 289 (1984),* "Close Scrutiny" Required of Totality of Circumstances For D's of "Subnormal Intelligence"
- Rights Administered in a "Relatively Rapid" Fashion Which Likely Confused
- Insufficient Proof of Intelligent Wavier BRD
- Distinguishable From *Williams* [20 Year Old, Functionally Illiterate Mentally Retarded D Validly Waived *Miranda* Rights]

An 18 Year Old Illiterate D Purports To Waive His *Miranda* Rights in a Gun Case During a Police Interrogation. After Providing an Oral and Written Confession, an ADA Conducts a Videotaped Interrogation. During Her Presentation of Miranda Rights, The D Asks, “What is an Attorney?” The ADA Answers First, “I am an Attorney” But Quickly Follows Up With a Statement That The D Had a Right to Speak to One Before Speaking to Her or the Police (The D Asked, “I Can?”), But That If He Wanted One, He Couldn’t Speak to Her “Now.”

The Defendant Then Says He Wants to Talk Now and Repeats What He Told the Police.

Are These Confessions (Police and ADA) Good?

People v. Willi Adames, 121 A.D.3d 507 (1st Dept. 2014)

- Per 1st Dep’t: Not Admissible – Lower Court Denial of Suppression Reversed
- With “Confusion” Express by D Regarding RTC, ADA Failed to Clearly Convey Basic *Miranda* Warning in Required “Clear and Unequivocal Terms.”
- No Knowing and Voluntary Waiver = Conviction Reversed – No Harmless Error

The Police Take The D Into Custody Four Years After a Bronx Murder. After Arriving at the Police Station, a Detective Asks The D if She Knows Why She's There. She Says No. The Detective Leaves the Room and Returns Several Minutes Later. He Then Tells Her That She Knows. The D Admits to Contact With the Victim Immediately Prior to the Murder. The Detective Then Provides *Miranda* Warnings Which Are Waived.

Suppose the D Provides an Oral Statement Over the Next 40 Minutes, a Written Statement Over the Following 30 Minutes and Later, After Almost a 3 Hours Break, Provides a Video Confession to an ADA, With Fresh Warnings Provided Before the 3rd Statement.

Good or Not?

Attenuated or Tainted?

People v. Sparkle Daniel, 122 A.D.3d 401 (1st Dept. 2014)

- D Taken Into Custody in 2007 Re: 2003 Murder of 91 Year Old in Bronx
- When Asked by Detective if She Knew Why She Was There, She Answered "No."
- After Detective Left and Returned, She Admitted She Did Know and That She and Co-D Saw V Outside Home and Asked to Use Phone
- D Provided a Waived Miranda Rights and Gave Oral, Written and Video Confessions
- 1st Dep't Majority Reversed Lower Court Denial of Suppression 4-1– Per *P v. Paulman, 5 N.Y.3d 122, 130 (2005)* – With No "Time Differential" Three Statements Part of "Continuous Chain of Events" That Followed Un-Mirandized Statements
  - Court Rejected Claim D Not In Custody During Initial Query
  - No Dissipation of Taint by Detective Leaving Room

The D's Friend Tells The Police That a Lawyer's On His Way to the Precinct Where D Has Surrendered.

That's Not an Invocation or the RTC?

Is It?

People v. Ricardo McCray, 121 A.D.3d 1549 (4th Dept. 2014)

- After a Buffalo Shooting Spree, the D Surrendered to the Police at a Television Station With the Aid off a "Community Activist"
- The Activist Told The Police That an Attorney Was On His Way There
- 4th Dep't Held: Incriminating Statements Obtained During 15 Minute Period Before Attorney Arrived Obtained After Valid Miranda :Waiver Admissible
  - D Never Unequivocally Invoked RTC
- "Well-Settled" TP, Not Affiliated With Law Firm May Not Indelibly Trigger D's RTC

The Police Want to Talk to the Defendant at the Police Station About an Assault. They Call Him and Ask Him to Come Down. He Inquires: "Maybe I Should Bring an Attorney? The Detective Says, It's Up to You.

Invocation or Equivocal?

And Anyway, Is the Defendant in Custody?

People v. James Fiorino, 2015 N.Y. Lexis 6259 (3rd Dept. 2015)

- No Per 3rd Dept. 5-0
- D Was Not In Custody When He Made Inquiry Over Phone to Police About “Bringing an Attorney”
- Even if He Was When He Arrived at Precinct, the Inquiry Was Not Unequivocal Statement Necessary to Trigger RTC

Following the Radio Call of a Robbery in Progress in Queens, The Police Arrive at the Scene and See 2 V's Bound and Gagged. Though Hand Gestures, The V's Motion That the Perps Ran Around the Corner. The Police Go There and They Spot 2 Pedestrians (the Only People on the Street), One of Whom Discards a Gun. The 2 Then Run Out of Sight. Moments Later They Hear the Door of a Car Slam. The Police Stop It and Find It Contains 3 Men, 2 of Whom Are the Pedestrians. They Then Arrest The D-Driver Who "Fumbles" While He Tried to Put Keys in Ignition.

The D Then Provides an Inculpatory Statement After *Miranda* Warnings.

So, PC to Arrest D or Not?

People v. Angel Delvillartron, 120 A.D.3d 1429 (2nd Dept. 2014)

- No Per 2nd Dep't Memo Per 3-1 Vote
- While There Was Reasonable Suspicion to Forcibly Detain D Briefly for Investigatory Purposes, There Was No PC For Arrest
- "Fumbling" for Keys While Sitting in Lawful Parking Space on Street Made it "Just as Likely D Was Not Complicit" as Getaway Driver
- Justice LaSalle Dissented: D's Conduct Was Not "Innocuous" Since Sufficient PC D Acting in Concert With Others
- But All Members of Panel Agreed Insufficient Proof D Acted in Concert with Others for CPSP Conviction

Ineffective Assistance

During the D's 1992 Buffalo Murder Trial, The DA Presented Testimony That a Key Prosecution Witness Was Threatened by the Defendant Prior to Her Testimony.

DC Failed to Object.

Is That IAC?

People v. Kharye Jarvis, 25 N.Y.3d 968 (2015)

- Prior to Trial, Trial Court Precluded Inquiry That DA's Witness (C. Barnwell) Had Been Threatened Unless Door Opened on XE
- When Barnwell Testified, DC Never Argued Preclusion Order Prohibited This Testimony
- DC Also Presented Alibi Evidence From 3 Witnesses For "Wrong Day of the Week" – June 4 Instead of June 3
- Court of Appeals [Memo] Held 5-1 IAC, Where People's Evidence Was "Particularly Weak" and Reversed
- Judge Pigott Dissented: DC Capably Argued 2 Motions, Conducted Mid-Trial *Molinuex* Hearing, Delivered a "Cogent" Opening Statement, XE'ed P's Witnesses, Lodged Appropriate Objections and Offered an "Articulate Closing" = No IAC on This

Defense Counsel Learns That The Victim as Per a SANE Examination in a Sexual Assault Case Had No Physical Marks and Displayed No Signs of Bleeding. He Also Discovers That the Victim Suffered Form a Bleeding Disorder That Made Her Likely to Bleed From Even Minimal Trauma.

Suppose There is No Forensic Corroboration to the Sexual Assaults.

Is It IAC, if DC Fails to Investigate and Educate Himself Re: The Bleeding Disorder and then Use it During Trial?

People v. Vincent Cassala, 2015 N.Y. App. Div. Lexis 6040 (3rd Dept. 2015)

- Yes Per 3rd Dept. 5-0 (Rose, J.)
- DC Acknowledged at C.P.L. Art. 440 Hearing Hear Was Aware of SANE Notation V Suffered From Bleeding Disorder - Von Willebrand Disease [VWD] But Had to Signs of Physical Injury in Claimed to Have Been Forcible Sexual Attack
- D Submitted Proof of ER Doctor: Presence of VWD in Victim Would Have Made Presence of Bruising or Bleeding During Forcible Non-Consensual Anal Intercourse
- Failure to Investigate, Educate Self and Use at Trial to Undermine Credibility of V = Prejudicial and Thus, IAC
  - Additional Ground: DC Failed to Object to Testimony of D's Former W Re: D's Preference for Anal Sex

The D is Charged With Murdering His Former Girlfriend by Stabbing Her 19 Times as She Attempted to Flee From a Car. There are Three Eyewitnesses (Two Passersby) to the Stabbing. DC Is Aware D Has History of Reported Psychiatric Symptoms, and Treatment and Gets Authorization From the Court For a Forensic Psychiatric Exam.

What if DC Fails to Obtain D's Psych Records and Pursue the Psychiatric Exam and Goes to Trial Without This?

IAC or Insufficient Proof EED or Not Responsible Defense Would Have Succeeded?

Grant or Deny?

People v. Daryl Graham, 129 A.D.3d 860 (2nd Dept. 2015)

- 2nd Dep't Reversed and Granted NT 4-0 (Memo)
- State Appeals (Sup. Ct & App. Div. Denied Applications; Per Fed'l Writ, 2nd Cir Remanded Case Back to State Court; Sup. Ct. Conducted Hearing and Denied Application
- Where Case "Hinged Almost Entirely … on [the People's] Ability to Prove the D's State of Mind" and Counsel Failed to Take Minimal Steps to Obtain Records and Have then Evaluated by Expert to Determine Whether to Present a Psychiatric Defense or Obtain Forensic Evaluation = IAC
  - Citing *P v. Ennis, 11 N.Y.3d 403, 413 (   ):* Unlike Federal IAC, Prejudice is Not Indespensible Element of IAC Under NY Law

During Summation, the DA Repeatedly Overstates and Mischaracterizes the Extent of Critical DNA Proof in a Rochester Strangulation Murder Case. Defense Counsel Never Objects.

IAC or Misplaced Strategy Gone Bad?

People v. Howard S. Wright, 2015 NY Lexis 1528 (7/1/15)

- Per Court of Appeals (Rivera, J.) 5-1: (With Prosecutorial Misconduct Factored as Well) = IAC
- DA "Affirmatively Misrepresented" Extent of DNA Proof by Arguing D and Associate "Left Their DNA All Over the Crime" With No Reasonable Explanation" for D's DNA on V's Body
- Forensic Proof: At Least 2 Contributors of DNA in One Location and Four in Another With DNA Proof Merely Not Excluding D
- DC Failure to Object Not Part of Reasonable Trial Strategy
- Judge Pigott Dissented: Single Error "In a Vacuum" Not IAC

Discovery - *Brady*

A Key Prosecution Witness Who Corroborates The Defendant's Confession, Sells Drugs on The Evening After He Testifies at Trial. The People Do Not Reveal This Until Several Months After the Verdict.

Is This *Brady/Giglio* Violation (i.e., Post-Testimony Impeachment Material) Sufficient to Upset the Verdict?

People v. Jameek Stilley, 128 A.D.3d 88 (1st Dept. 2015)

- No – Per First Dept.
- Post-Testimony Impeachment Obligation Along With Standard of Review in *Brady* Failure Cases Issues = This Was *Brady* Material
- Holding: Although This Was Impeachment Material, Record Unclear When DA Learned of This … And
- While Facts Raise “Concerns,” Even Excluding Witness’s Testimony, No Reasonable Possibility Result Would Have Been Different With This Information

The People Provide Various Records to the Defense at the Beginning of Jury Selection in a Murder Case. Certain Documents [A ”Request For Records Check” & A NYSPIN Request Form Info Re: D and Co-D] Reflect That D’s Were Being Investigated by the Police Before They Were Interviewed by them and This is Contrary to Police Testimony at Trial.

Assume the Records Would Be Useful for Impeachment Purposes, What if The Materials Were Buried in a “Voluminous Amount of Other Documentation” Without Specification.

Is This a *Brady* Error or Was There Timely and Proper Production?

People v. Everton Wagstaffe & Reginald Connor, 120 A.D.3d 1361 (2nd Dept. 2014)

- Yes - Per 2nd Dep't 4-0 [Memo]
  - 1993 Brooklyn Murder Conviction
- Where People Failed to Identify Materials Actually Provided They Would Have Been Helpful to Support Defense Case, That a Key Witness (Capella) Led Police to the Defendants
  - Manner in Which Documents Provided [They Were Not "Properly Disclosed"} Curtailed D's Meaningful Ability to XE and Impeach
  - They Were "Buried" in Large Document Dump
- With General *Brad*y Demand, There was "Reasonable Probability" Result Would Be Different Since Defense Couldn't Use This Material in Manner Provided
- Due to Passage of Time, and Death of Main Witness, Capella, JOC Reversed and <u>Indictment Dismissed</u>

Are Statements Made by a Non-Testifying Child Victim to a Teacher Testimonial or Not Under *Crawford*?

Ohio v. Darius Clark, 132 S.Ct. 2173 (2015)

- 3 Year Old Child – "L.P." Observed by Pre-School Teacher in Lunchroom to Have Bloodshot; When Asked What Happened, LP Said He Fell
- When They Moved to Brighter Lights of Classroom, Teacher Observed "Red Marks, Like Whips of Some Sort" on LP's Face
- When Asked Who Did This, LP Seemed "Kind of Bewildered" and Answered "Something Like Dee, Dee" and Indicated on Question Whether Dee Was Big of Little, That Dee is "Big"
  - Dee is D's Nickname
  - D Denied Abuse When He Picked Up Child
- Teacher Called Child Abuse Hotline; LP Later Examined by Social Worker and Doctor
  - Black Eye, Belt Marks on Back and Stomach, and Bruises All Over Body on LP
- After Conviction, Ohio Appellate Courts Reversed = LP's Statements Testimonial and Erroneously Admitted

Ohio v. Darius Clark, 132 S.Ct. 2173 (2015)

- SCOTUS Per Alito, J., Reversed 9-0 With Several Concurring Opinions
- "Primary Purpose" of L.P. and Teacher Was Not to Assist in Prosecution = Statements Non-Testimonial Per *Hammon v. Indiana, 547 U.S. 813 (2006)* and *Michigan v. Bryant, 652 U.S, 344 (2011)*
- Where Statement Made to Civilian (Like Teacher), Existence of Emergency is Not Touchstone of Determination of Whether Statement Testimonial "Vel Non"
- Fact Teacher Mandatory Reporter, Relevant But Not Determinative
- *Duhs v. Capra* Ruling Now at Issue

If the Operator Who Conducted an Intoxilizer Breath Test is Unavailable, Can The Results Be Related by Another Police Officer?

Suppose the Other Officer (A Videographer) Testifies He Saw The Machine Operate Properly (But Didn't See The Temperature Display) and Even Saw The Machine Print Out the Test Results.

Can the Present Officer Testify Not Only to His Observations of the D But Also to the Results of the Intoxilizer Test?

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Can the Present Officer Testify Not Only to His Observations of the D But Also to the Results of the Intoxilizer Test?

People v. Hao Lin, 46 Misc.3d 2015 (App. Term 2nd Dept. 2015)

- No – Per Appellate Term
- Since Testifying Witness Did Not Observe Intoxilizer Temperature Display, Which is an "Essential Part of the 13 Step Operational Checklist," e Testimony Violated *Crawford*
- And Error Not Harmless Under Reasonable Possibility Standard Per: *People v. Porco, 17 N.Y.3d 877 (2011)*
  - Evidence "Highly Prejudicial" With "Less Than Overwhelming Proof of Guilt"
- See Also, *P v. Omar Cartegena,, 126 A.D.3d 913 (2nd Dept. 2015)* [Admission of Non-Testifying DNA Analyst Report With Testimony of DNA Supervisor on Results Error Held Harmless]
- But Compare, *People v. Jonathan Flores, __ Misc.3d __ (Dist. Ct. Nassau Co,. 2015)*
  - Intoxilizer Breath Test Card Admitted and Held Not Violative of *Crawford* Notwithstanding Unavailability of Testing Officer Due to Death

So, Is *Crawford* Applicable in Suppression Hearings?

- No – Per *People v. Mitchell, 124 A.D.3d 912 (2nd Dept. 2015)* Standard *Mapp-Dunaway* Stop of Car Issue in DWI Case: D Observed by PO Travelling 110 MPH Travelling on LIE at Exit 46; D Had Glassy Eyes and Strong Odor of Alcohol, Etc.
  - Driver Stopped at Exit 50
- Problem: Observing PO Had Died and 2nd PO Who Went to Scene, Testified at Suppression Hearting to What First Told Him at Stop
- 2nd Dept. Reversed Trial Court Order of Suppression of Evidence and Statements on People's Appeals
  - Lower Court Found PO Credible, But Held D had Right to Confront Unavailable Witness
- People Not Required to Produce Unavailable Witness at Hearing Per C.P.L. 710.60

The Defendant Himself Requests That the Court Read the Transcript of His Non-Testifying Co-Defendant's Plea Allocution. The Attorney Objects on *Crawford* Grounds.

Should The Court Accede to the Request or Is This a Decision for the Attorney?

Can Confrontation Rights Be Waived or is the a Question of Effective Assistance of Counsel?

The Court Grants the Request.

People v. Victor Lee, 120 A.D.3d 1037 (1st Dept. 2014)

- Per 1st Dept: Reversed - Decisions on the Introduction of Evidence Are For the Attorney to Decide
- By Granting the Request the Defendant Was Deprived of the Right to Counsel
- See *People v. Colville, 20 N.Y.3 20 (2012)* [2012] Cited by Court

The D Is Charged With Bribing 3 Witnesses Who Identified His Brother in a Murder in Brooklyn.

Should The Court Permit the DA to Elicit Proof That 2 Days Before a 4th Witness Against The D Was Murdered As *Molineux* Proof or Proper Proof Otherwise?

People v. Dupree Harris, 2015 N.Y. Lexis 3241 (10/15/15)

- Yes, Per Court of Appeals 6-0 [Pigott, J.]: Evidence Properly Presented With Limiting Instructions to:
  - Explain State of Mind of Three Witnesses and Why They Ranted
  - Demonstrate Background Regarding Why Witnesses Were Placed in Protective Custody
- Thus, Allowed Jury to Have All Relevant Facts Regarding Whether to Credit Witnesses' Testimony or DC's Arguments
- No Direct Holding on *Molinuex*

So, Are the Results of a Field or Portable Sobriety Test, an "Alco-Sensor," Ever Admissible in a Defendant's DWI Case?

People v. Jamel Santiago, 47 Misc.3d 195 (Sup. Ct. Bx. Co. 2015)

- Bronx Supreme Court (Newbauer, J.) Denied DA's In Limine Motion to Admit Results of Intoximeter Alcosensor Field Sobriety Test in D's DWI Trial Following Foundational Hearing But In Dicta Held May Be Admissible in Appropriate Cases
  - Dicta Noted as Contrary to Court of Appeals Ruling in *P v. Thomas, 121 A.D.2d 73 (4th Dept. 1986), aff'ed 70 N.Y.2d 823 (1987*) But…
  - Consistent With Trend in Several Lower Courts to Identify Criteria For Admission of Such Evidence
- Alcosensor Instrument:
  - Properly Functioning
  - Certified by State and Federal Regulators
  - Deemed Reliable by Consensus Within Scientific Community and Technological Advances
  - More Than a "Crude 'Breath Test'"
- No F*rye* Hearing Required But..
- Evidence Inadmissible Here Since Police Failed to Wait for 15-20 Minute Period
- See also, *People v. Mark George, 2015 N.Y. Missc. Lexis 1870 Cr. Ct. Kings Co. 2015)*: Similar Ruling- Field Test Results Not Admitted Due to Failure to Document 20 Minute Period and "Distracting" Accident Scene

So, What About Admitting PBT Results, Not For Truth But On Issue of D’s State of Mind in DWI Case?

Good or Bad?

People v. Carlos Palencia, 130 A.D.3d 1032 (2nd Dept. 2015)

- Troopers Respond to Nassau Rear-End Collision
- After Observation of Signs of Intoxication, Police Administer Field Sobriety Tests (HGN, Walk and Turn, One-Legged Elevation), Portable Breath Test Administered = "Positive" Results, But Not Recorded
- At Barracks, D Only Exhaled "Short Breaths" in "Drager" Breath Instrument; After 5th Try, Deemed Refusal by Troopers
- P's In Limine Application to Admit Field Breath Test Result on D's State of Mind Re: His Subsequent Conduct Granted With Limiting Instructions at End of Trial
- Majority of Appellate Division Held 3-2 Reversible
  - PBT Device Reliability Not Accepted in Scientific Community
  - Undue Risk Jurors Considered PBT Result as Evidence of Intoxication, Especially Where Limiting Instruction Only Provided "Only at the End of the Trial."
- *P v. Kulk, 013 A.D.3d 1038, 1040 (3rd Dept. 2013*): Same Holding

But Wait ….

People v. George Turner, 47 Misc.3d 100 (App. Term 1st Dep't 2015)

- People's Proof at D's Manhattan DWI Trial Included Police Observations, .11 Intoxilizer 5000 Breath Test Result at Precinct and Results of Portable Field Breath Results
- Appellate Term Affirmed: Rejected Claims Field Test Results Erroneously Admitted in Evidence
  - Device on NYS DOH List of Approved Breath-Testing Instruments
  - Device Was in Proper Working Order
  - Test Properly Admitted
- In Any Event, Proof of Guilt Overwhelming = Any Error Harmless

Substantive Law

Is It Tampering With a Witness For a Person Who Set Up a Narcotics Deal, But Not Charged, (His Friend in the Deal Was), to "Out" The Confidential Informant on Facebook With a Warning, "Snitches Get Stiches" and Comment, "I Hope She Gets What's Coming to Her"?

People v. Thomas Horton, 24 N.Y.3d 985 (2014)

- Per Unanimous Court of Appeals [Memo] – Yes
- D Not Only "Outed" CI on Facebook, But Also Posted Uploaded Clip on YouTube of Surveillance Video
- "Viewed in Light Most Favorable to People, D Knew CI Might Testify in Proceeding (Against Friend and "Potentially Himself") and Wrongfully Sought to Stop Her From Doing So"
  - Jury Might Have Reasonably Inferred "Coded Threats" Posted on Internet Communications Intended to Induce CI Not to Testify

A Defendant Has Unprotected Sexual Relations With a Friend After He Knew That He Had Been Diagnosed as HIV Positive. The Victim Must Take Medication For the Rest of His Life and Suffers From Anxiety, Nausea and Other Symptoms.

Is The Defendant Properly Charged With Reckless Endangerment in the First Degree Based on a Depraved Indifference State of Mind?

People v. Terrance Williams, 24 N.Y.3d 1129 (2014)

- No Per Court of Appeals: 6-1 [Memo]
  - Lower Court Orders Reducing Indictment Affirmed
- Insufficient Proof of Required "Utter Indifference to the Life or Safety" of Victim or That Charged Acts Undertaken
- With "Any Malevolent Desire For the Victim to Contract the Virus"
- "Without a Doubt, Defendant's Conduct Was Reckless Selfish and Reprehensible," But Under Our Caselaw, Not a Prima Facie Case of Depraved Indifference

The Defendant Assaults an Obese Victim Who Suffers From Heart Disease During a Home Invasion Robbery. The Victim Has a Heart Attack and Dies.

Is This Proof Sufficient To Sustain a Felony-Murder Conviction?

People v. Mathew A. Davis, 126 A.D.3d 1516 (4th Dept. 2015)

- No – Per 4th Dept.
- D and 2 Female Accomplices Planned to Rob 41 Year Old Overweight V With Heart Condition Whom One Female Had Befriended on Facebook – Met Alone in His Apartment
- After One Female Co-Conspirator Left Apt., D Assaulted V in Struggle and at Some Point During or After, D Died of Heart Attack
- Felony Murder Charge Dismissed: Death Not Reasonably Foreseeable But Burglary and Robbery Convictions Affirmed
  - D's Actions to be Culpable Must Be "Actual Contributing Cause" With "Obscure or Merely Probable Connection Between Assault and Death Insufficient

The D Unlawfully Enters The Basement of a Manhattan Deli Through the Open Sidewalk Doors in a Building With Apartments Immediately Above on the Upper 6 Floors.

There is No Direct Connection Between the Deli and the Apartments.

Burglary 2 or 3?

People v. Ronell Joseph, 124 A.D.3d 437 (1st Dept. 2015)

- Burglary 2: Per 1st Dep't Majority [Memo] 4-1
- Per *P v. McCray, 23 N.Y.3d 621 (2014*), This Building, Deli With Basement on First Floor With Apartments on 6 Upper Floors Was a "Dwelling"
- Where Proof of "Close Contiguity" [See *P v. Quinn, 71 N.Y. 561 (1878*)] Between Residential and Non-Residential Element and Building Not Large, Residents of Apartments Could Be Aware of Burglar's Presence
  - It Could Not be Said There Was "Virtually No Risk" of This
- Justice Manzanet-Daniels Dissented: Basement Entirely Shut Off and Thus "Inaccessible" From Apartments
  - Deli Workers Locked D in "Vault-Like" Basement While They Called Police

The D & 2 Others Break Into An Apt. Looking for 2 People They Suspect Robbed Them of Drugs and Money. They Can't Find Them But Find The V and GF in Upstairs Bedroom. After a Fight in Which The GF Hit D Over Head With Bottle, The D and Others Ran Out and Retreated to Nearby Associate's Apt. D Took Knife, Stated He was "Going to Kill Him," Returned to V's Apt. and Stabbed Him (And Also Smashed Another Bottle Over His Head) to Death.

Felony-Murder 2?

People v. William Henderson, 2015 NY Lexis 1480 (6/30/15)

- Court of Appeals, Per Judge Abdus-Salaam, 7-0: Felony-Murder
- Where D Testified (At First Trial; Introduced at This Trial) He Did Not Intend to Kill V But Just "Hurt" Him Because He "Just Got Mad" When He Was Assaulted by Him & Wanted to "Even the Odds"
- Sufficient Evidence Per *P v. Miller, 32 N.Y.2d 157 (1973),* D Committed or Attempted to Commit One of 10 Enumerated Felonies Under P.L. 125.25(3), i.e., Assault When He Re-entered Apt.
- Court Rejected D's Claim He Intended to Commit Only Murder and that Felony Murder Based on "Double-Counted" Predicate
  - Question Left Open in *P v. Cahill, 2 N.Y.3d 14 (2003),* [Capital Felony Murder] Whether Person Who Enters Building With Intent to Kill May Be Properly Convicted of Felony-Murder, Still Unresolved

D and Co-D Exited Car at Same Time on Bklyn Street and Got Into Fight With V. After D Hit V With Bottle, Co-D Came Towards V With Bat and Fatally Struck Him.

Is This Proof Sufficient For an Acting in Concert First Degree Manslaughter Conviction?

People v. Hakim B. Scott, 2015 N.Y. Lexis 1424 (6/12/15)

- While D and 2 Others in SUV 12/7/08 in Bklyn, Co-D Driver (Phoenix) Yells Homophobic Slurs at 2 Brothers (Jose & Romel) Walking in Street
- In Response, One Of Brothers Kicked SUV
- D Exited Car, First Smashed Glass Over Jose's Head and Then Chased Romel Down Block With Broken Bottle
- Co-D Phoenix Exited SUV (At Some Point), Removed Baseball Bat and Beat Jose (V), Who Falls Unconscious and Later Dies
- Court of Appeals Per Memo, 7-0, Affirmed Conviction
- While "Close Case," With Conflicting Proof, Sufficient Evidence to Support "Community of Purpose" For Acting in Concert Manslaughter Conviction Based on D and Co-D, Phoenix, Conduct
  - D and Phoenix Out of Car at Same Time Acting to Cause Harm to Jose
  - Prosecution W Testified Saw Phoenix Swing Bat at One of Brothers While D Present

The Police Execute SW in D’s Apt. and Find Bundled Glassines of Heroin and Drug Paraphernalia in Plain View in Her Bedroom. There are 4 Children Present (The D’s 3 Children and Her Niece), Along With her Co-D and the Father of the Children. The Co-D Testifies Drugs Were His.

Is This Sufficient Proof to Support D’s CPCS 7 and Unlawfully Dealing With a Child Conviction?

People v. Sandra Diaz, 24 N.Y.3d 1187 (2015)

- Per Court of Appeals [Memo]: Yes
- Police Find 30 Bundled Glassines of Heroin, 26 Glassines Containing Heroin Residue, 35 Pills of Suboxone in Plain View in Bedroom During SW Execution
  - Some Narco Found in Dresser Drawer Mixed in With D's Personal Belongings
  - D Leaseholder of Apt.
  - Co-D Testified Drugs Were His
  - D Testified Unaware of Drugs
- D Acquitted of Possession With Intent to Sell
- Still Sufficient Dominion and Control Over Narco, Etc., With Co-D
  - Proof Permitted Inference of Knowing Possession of Drugs & Paraphernalia
  - This Was Commercial Drug Trafficking in Apt. With Children Present
- People "Only Required to Establish That She Knowingly Permitted Children to Remain of Premises Where She Had Every Reason to Believe This Illegal Drug Activity Was Taking Place"

D and Accomplice Appear at Wendy's Restaurant at 6:30 a.m., Masked and Armed, Carrying Backpack and Seek Entry Thru Rear Door Not Used by Public With Escape Car Parked Nearby. The Employees Refuse Them Entry and Call the Police. The Police Respond to 911 Call and Find D and Co-D Behind Some Crates.

Sufficient Proof of Attempted Robbery?

People v. Jafari Lamont, 25 N.Y.3d 315 (2015)

- Yes, Per Court of Appeals (Rivera, J.), 6-0
- In Affirming Court Rejected Claims D's Behavior Was "Equivocal"
- Conduct of D and Co-D Sufficient to Establish Intent to Rob
  - Appearance in Particular Dress and Means to Carry Away Stolen Property During Early Morning Hours at Non-Public Entrance With Planned Escape Car Parked Nearby Indicated Familiarity With Operation, Planning

The Police Pursue A Person (Claudia Nunez) Into a Queens Apartment Where the Defendant is Located. As the Police Enter, The Defendant Says, "Sic Em" and Releases a Pit Bull Who Bites One of the Officers In the Face.

Assuming There Was No Basis to Pursue Ms. Nunez Into the Apartment, Can the Defendant Be Properly Convicted of OGA and Assault 2 [P.L. 120.05(3)]?.

FYI, The Defendant Was Also Convicted of Assault 2 Under P.L. 120.05(2)

People v. Jeffrey Cofield, 2015 N.Y. Slip Op 06515 (2nd Dept. 2015)

- No Per Second Dept [Memo]
- A Defendant May Not Be Convicted of OGA (and Also Assault 2 Under P.L. 120.05(3) – Police Officer Assault] Unless The Police Are Engaged in Authorized Conduct
- Per *P v. Nunez, 111 A.D.3d 854 (2nd Dept. 2013)* [Insufficient Reasonable Suspicion to Pursue Into Apt
- Assault 2 Under P.L. 120.05(2) [Causing P.I. With Dangerous Instrument] Affirmed

Miscellaneous

The Defendant is an Undocumented Immigrant. After His DWI Conviction, the People Recommend a Split Sentence and the Defendant Requests Probation.

Can You Deny Probation and Impose a Jail Sentence on the Conclusion that an Undocumented Defendant Can Never Receive Probation Because He Would Immediately Be in Violation of the Condition that He Obey All Laws, Federal and State?

People v. Luis Cesar, 2015 N.Y. Slip Op 06252 (2nd Dept. 2015)

- No Per 2nd Dept. 4-0 (Dillon, J.)
- Court May Consider a Defendant's Undocumented Immigration Status at Sentencing
  - The Decision to Impose Probation May "Legitimately" Affected by Factors Related to Undocumented Status (E.g., Likelihood of Deportation, D's History of Illegal Re-Entries, D's Employability)
- But, "It is Impermissible for a Sentencing Court to Refuse to Consider a Sentence of Probation for an Undocumented Defendant Solely on the Basis of His or Her Immigration Status" = It Can't Be the "Sole" Factor
  - This Violates Due Process and Equal Protection of State and Federal Constitutions
- Sentence Improper = Vacated and Case Remitted for Re-Sentencing

The Defendant Moves to Vacate His 20 Year old Murder Conviction Based on Claims That 1) At the Time of Trial, The Proof Was That the Actual Shooter Was "Dominican," & He Is Puerto Rican, 2) The Partial Recantation of One of Two EW's and 3) Two New Alibi Witnesses.

Per *P v. Hamilton, 115 A.D.3d 12 (2nd Dept. 2014)*, is This Proof of "Actual Innocence" Sufficient to Warrant a Hearing or Should the Application be Summarily Denied?

People v. Rafael Jimenez, 46 Misc.3d 1220(A) (Sup. Ct. Bx. Co. 2015)

- Per Bronx Supreme Court (Newman, J.) C.P.L. Art. 440.10, Summarily Denied
- To Establish Claim D Must Prove by "Clear and Convincing Evidence" That Assertions Are "Highly Probable
- Claim, D, as Puerto Rican, Would Never Utter Dominican Profanity, Far "Fetched"
- Partial Recantation: EW Now Says He ID'ed D Only Because Police Told Him D Was a "Dominican" Not Reliable
- 2 New Alibi Witnesses "Vague" and Do Not Exclude D From Crime
- See *People v. Irizarry, 991 N.Y.S.2d 748 (Co. Ct. Westchester Co. 2014)*

The End

Questions??