Oneida County Public Defender
Criminal Division

PRESENTS

2019 Criminal Law Academy

Saturday, October 26, 2019

Mohawk Valley Community College
Utica Campus
IT Room 225

9:00 a.m. – 4:00 p.m.

Speakers:
Matthew Alpern, Esq., ***NYS Office of Indigent Legal Services***
Jami Blair, Esq., ***NYS Office of Indigent Legal Services***
Timothy Donaher, Esq., ***Monroe County Public Defender***
Jill Paperno, Esq., ***First Assistant Monroe County Public Defender***

This program is being presented in coordination with the:

New York State Defenders Association, Inc.
New York Office of Indigent Legal Services
Oneida County Supplemental Assigned Counsel Program

7 CLE Credits

The Oneida County Public Defender, Criminal Division is an accredited New York State CLE Provider

Oneida County Public Defender, *Criminal Division*

2019 Criminal Law Academy

Agenda

9:00 a.m. – 10:30 a.m. **An Overview of Bail Reform**
What You Need to Know About Arraignment
Timothy Donaher, Esq.
Monroe County Public Defender

10:30 a.m. – 10:40 a.m. **BREAK**

10:40 a.m. – 12:05 p.m. **Discovering Discovery in 2020**
An Overview of the New Discovery Statute
Jill Paperno, Esq.
First Assistant Monroe County Public Defender

12:05 p.m. – 12:50 p.m. **LUNCH**

12:50 p.m. – 2:15 p.m. **Ethical Considerations Arising From Criminal Defense Reforms Pertaining to Pretrial Discovery**
Matthew Alpern, Esq.
Director of Quality Enhancement for Criminal Defense Trials
NYS Office of Indigent Legal Services

2:15 p.m. – 2:30 p.m. **BREAK**

2:30 p.m. – 4:00 p.m. **Marching Through the Minefield**
Navigating Criminal Defense Ethical Considerations With Confidence and Clarity
Matthew Alpern, Esq.
Director of Quality Enhancement for Criminal Defense Trials
NYS Office of Indigent Legal Services

Jami Blair, Esq.
Hurrell-Harring Implementation Attorney, Quality Enhancement
NYS Office of Indigent Legal Services

<u>CLE Credits</u>
3 Ethics
3 Professional Practice
1 Skills

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In Memoriam

Jonathan Gradess (1947 - 2019)

POESTENKILL It is with great sadness that we acknowledge the loss of our beloved husband, father, and friend, Jonathan Gradess after a brief illness. As with everything else in his life, he left us on his own terms with joy and peace in his heart on Wednesday, October 2, 2019. Jonathan was born on August 5, 1947, in New York City, the son of Edward and Ella Gradess. He was raised in New York and Connecticut but for the last 30 years called Poestenkill home. He was a member of the charter class of Hofstra University Law School and spent his entire professional career seeking justice for the downtrodden and disenfranchised among us. For 39 years he was the executive director of the N.Y.S. Defenders Association in Albany and happily retired in 2017. He believed that everyone charged with a crime was entitled the best legal representation and he worked every day toward that end. During his career, he served on many boards and committees including Equal Justice USA, New Yorkers Against the Death Penalty, and the Commission on Restorative Justice of the Roman Catholic Diocese of Albany. He worked tirelessly to abolish the death penalty in New York and throughout the United States. After listening to the stories of the many Forgotten Victims of Attica (the prison employees killed or injured during the uprising), he joined their crusade and took their demands to the legislature and the Governor. While a member of St. Henry's Parish in Averill Park, he started a program to provide furniture to recovering addicts taking the next step in their lives. Jonathan was a deeply spiritual man and his faith led him to see every human being he met as an encounter with the divine. He never wavered in this belief. Wherever he went he carried change in his pocket and offered it joyfully to those who asked for it. Jonathan is survived by his wife, Diane Geary; his sons, Benjamin (Kelli), Michael and Sam; his brother, Roger (Regina); sisters-in-law, Joan Geary and Maryann Geary; brothers-in-law, John Geary and Glenn Geary; nieces and nephew; as well as his dear friend, Colesvintong Florestal. A life-long lover of film, he shared this passion with his family. Jonathan spent many a wonderful afternoon at the Spectrum 8 movie theater. He will be missed by the ticket sellers and concession stand workers. He was certain their popcorn was the best!

Published in the Albany Times Union on October 6, 2019

THE SPEAKERS

Matthew Alpern, Esq., is the Director of Quality Enhancement for Criminal Defense Trials for the New York State Office of Indigent Legal Services. He graduated with a B.A. degree from Emory University in 1985 and received his J.D. from the George Washington University National Law Center in 1989. Matt has dedicated his legal career to providing high quality legal representation to indigent persons accused of criminal offenses. After graduating from law school, Matt joined the Public Defender Service for the District of Columbia, an agency whose national reputation for excellence stems, in part, from its commitment to training, supervision and teamwork. At PDS, Matt worked for ten years in a variety of capacities including Deputy Chief of the Trial Division and Senior Litigation Attorney. During the majority of Matt's tenure at PDS, his caseload consisted of clients accused of high level felony offenses including homicides, sexual assaults, and other armed violent offenses. From 1999 to 2005, Matt served as a Deputy Capital Defender with the New York State Capital Defender Office. At CDO, Matt worked as a trial attorney representing indigent persons facing the death penalty. As part of a team consisting of attorneys, investigators and mitigation specialists, Matt's responsibilities included determining and implementing guilt and penalty phase trial strategies, conducting intensive factual investigation, developing mitigation evidence, and providing support, training and consultation for the capital defense bar. In 2005, after the elimination of the death penalty in New York State, Matt entered private practice with The Proskin Law Firm where he represented both indigent and retained clients accused of criminal offenses. In 2007, Matt returned to full time representation of indigent clients with the Albany County Office of the Alternate Public Defender. As an Assistant Alternate Public Defender, Matt's caseload consisted primarily of clients charged with serious felony offenses. Since 2009, Matt has also been an adjunct professor at Albany Law School, where he teaches Pre-trial Preparation and Trial Practice for criminal cases.

Jami Blair, Esq. is the Hurrell-Harring Implementation Attorney for Quality Improvement. Mr. Blair joined the Office of Indigent Legal Services (ILS) in 2018 as the Hurrell-Harring Implementation Attorney, Quality Enhancement. In this role, Jami helps to develop and monitor quality improvement initiatives as part of the settlement reached in *Hurrell-Harring v. State of NY, 15 N.Y.3d 8 (2010)*. Prior to joining ILS Jami was the Chief Contracting Officer for the NYC Mayor's Office of Criminal Justice where he managed the City's indigent defense portfolio. He is a 2011 graduate of Albany Law School.

Timothy Donaher, Esq. is the Chief Public Defender of Monroe County. He is a 1993 graduate of the University of Buffalo Law School. From 1994 to 2000 Donaher was in private practice handling both criminal and civil cases. In 2000, Donaher started his career as an assistant public defender as an appellate attorney in the Monroe County Public Defender's Office. In February 2008, Donaher was appointed the Monroe County Public Defender where he oversees an office of 73 staff attorneys and 26 support staff. Donaher is a former member of the Office of Court Administration's Committee on Criminal Jury Instructions. He is a member of the Office of Court Administration's Task Force on E-filing in the Criminal Courts, and the New York State Bar Association's Task Force on Criminal Discovery. He is also a Past President of the Chief Defenders Association of New York (CDANY). He is a recipient of the New York State Bar Association's 2017 Denison Ray Award, and the 2016 CDANY Presidential Recognition Award. Donaher is a frequent continuing legal education lecturer, and was an adjunct faculty member of SUNY Brockport (from 2001 to 2011) where he taught courses on constitutional law and the court system.

Jill Paperno, Esq., is a First Assistant Public Defender in the Monroe County Public Defender's Office. Jill graduated from the State University of New York at Albany in 1981 and Buffalo Law School in 1984.

She has worked for the Monroe County Public Defender's Office since 1987. She trained and supervised attorneys in the City Court and Parole sections of the office for ten years as the City Court Supervisor, and since 2009 has supervised felony staff as the Second Assistant Public Defender. She has represented defendants in numerous felony jury trials, including homicides and sex offenses. Ms. Paperno assisted in developing the training program for Monroe County Public Defender's Office staff attorneys, and has presented CLEs on a variety of topics over the years. In 2010 she was awarded the Jeffrey A. Jacobs Memorial Award for outstanding trial work. In 2011 she was named a Rochester Daily Record Leader in Law and awarded the Rochester Daily Record Nathaniel Award. Jill contributed a chapter on handling sex offenses in *Strategies for Handling Sex Crimes*. She is a frequent blogger at *http://newyorkcriminaldefense.blogspot.com*. Her book, *Representing the Accused: A Practical Guide to Criminal Defense*, was published in July of 2012 by West Publishing.

THE SPONSORS & OUR PARTNERS

The Oneida County Public Defender, Criminal Division is fortunate to work with the Oneida County Bar Association and the sponsors of the annual Criminal Law Academy and our Criminal Track Programs. We are grateful to the CLE Committee for granting us the latitude to develop meaningful and significant programs for the criminal defense bar. We are especially appreciative for the help given to us by the Bar Association's Executive Director, Diane Parslow. Without her able assistance, the Academy and the Criminal Track Programs would not be possible.

The Oneida County Bar Association offers a wide range of CLE programs on other topics throughout the year. A full calendar of programs is available at their website *www.oneidacountybar.org*. Oneida County Bar members are eligible to purchase a Sempass which entitles the holder to attend any or all of the programs offered by the Association.

The Oneida County Public Defender, Criminal Division makes several of the materials from our Criminal Track Programs and the Criminal Law Academy available at our website: *http://www.ocgov.net/oneida/pdcriminal/training*. Recently, the Oneida County Public Defender, Criminal Division became an accredited continuing legal education provider thanks to the work of our Regional Immigration Assistant Center Co-Directors, Sharon Ames and Tina Hartwell. This will enable us to offer more training opportunities to our staff and assigned counsel panel members.

The Criminal Law Academy especially takes a lot of time and effort to develop and produce. We would like to acknowledge the assistance of the New York State Defenders Association, Inc. and the new Executive Director Susan Bryant for her support of our programs. NYSDA is also a valuable resource for criminal law practitioners through their website http://www.nysda.org/. Their two-day training conference in Saratoga in July is unsurpassed in the depth and experience of the faculty and the relevant topics presented every year. We encourage you to visit their website and become a member.

We would be remiss if we failed to mention the New York State Association of Criminal Defense Lawyers (NYSACDL). Many of their members have been featured faculty at both the Academy and the Criminal Track Programs and they sponsor many CLE training programs across the state each year. Their listserv provides critical assistance to criminal defense practitioners throughout the year. You can check out their website at http://www.nysacdl.org/.

Last but not least, we gratefully recognize the support and encouragement of the staff of the New York State Office of Indigent Services. Director Bill Leahy and his staff, especially Matt Alpern, Director of Quality Enhancement for Criminal Defense Trials; Joanne Macri, Statewide Chief Implementation Attorney and Patricia Warth, Chief Hurrell-Harring Implementation Attorney.

Our special thanks to Tim Donaher and Jill Paperno from the Monroe County Public Defender's office for taking the time to make presentations on the new bail and discovery statutes. We appreciate their willingness to assist us in preparing the agenda for this year's Academy.

The members of the Criminal Track Program Committee and the faculty of the Fall 2019 Criminal Law Academy welcome you and hope you find the Academy informative and valuable to your practice. As always, we welcome your comments and suggestions for future programs.

An Overview of Bail Reform

What You Need to Know About Arraignment

Timothy Donaher, Esq.
Chief Public Defender
Monroe County

Conducting Arraignments under the new Bail Reform Legislation

October 26, 2019

Oneida County

Bail Reform Legislation-Overview

- Effective January 1, 2020, it implements the New York State Legislature's commitment to reduce the number of persons subject to pretrial incarceration in New York State by limiting the number of persons eligible for bail, and significantly limits the number of persons eligible for remand into custody
  - Most misdemeanors and non-violent felonies are subject to mandatory release at arraignment
- Explicitly states that arraigning courts are to impose the least restrictive condition necessary to ensure a return to court (New legislation rejected attempts to add "preventative detention" to bail statutes)
- Requires arraigning courts to document decisions regarding release status in writing or on the record for purposes of review
- Allows multiple applications to reduce release conditions, but also allows the prosecution (or the court on its own motion) to increase release conditions upon a proper showing
- Now requires courts to conduct evidentiary hearings when altering certain release decisions
- Legislation did not replace in its entirety the previous statutory scheme on securing attendance of defendants and witnesses. As a result, a significant number of the existing "rules" are still in place

Bail Reform Legislation-Overview

- New "jargon"

"Qualifying Offense"

"Misdemeanor Crime of Domestic Violence "

"Supervision by a Pre-Trial Services Agency"

"Non-Qualifying Offense"

"Least Restrictive Non-Monetary Conditions"

"Qualifies for Electronic Monitoring"

Bail Reform – Mandatory Appearance Tickets

- Legislation mandates the issuance of appearance tickets in certain cases. If the top charge is NOT a Class A, B, C or D felony, or Rape 3rd; Criminal Sex Act 3rd; Escape in the 2nd ; Absconding from temporary release 1st; Absconding from a community treatment facility; or Bail Jumping 2nd, an appearance ticket is mandatory UNLESS:
  - The defendant has one or more outstanding warrants
  - The defendant has failed to appear in court within the last two years
  - The defendant has failed to establish their identity
  - The defendant is charged with a crime between "members of the same household"
  - The defendant is charged with a sex offense under Article 130 of the Penal Law
  - It reasonably appears that an order of protection under CPL § 530.13 should be issued
  - The defendant is charged with a crime for which a license suspension is possible
  - The defendant needs medical or mental health care and the court can provide
- Officer may still issue appearance ticket even if one or more of the above exceptions exist

Bail Reform – Mandatory Appearance Tickets

- "The defendant has one or more outstanding local criminal court or superior court warrants"
  - "outstanding local criminal court or superior court warrants". CPL § 10.10 defines "superior court" as: (a) the supreme court; or (b) a county court. "Local criminal court" means: (a) a district court; or (b) the New York City criminal court; or (c) a city court; or (d) a town court; or (e) a village court; or (f) a supreme court justice sitting as a local criminal court; or (g) a county judge sitting as a local criminal court.
  - This language specifically limits "warrants" to these specific New York courts.
- "the person has failed to appear in court proceedings in the last two years"
  - There is no similar limiting language → does this mean out of state warrants would apply?

DA's Take:

fingerprinting, and other preliminary police duties required in the particular case…." Finally, the proper processing of someone being charged with an offense would be required to exclude the first two exceptions for an appearance ticket: (1) having an "outstanding local criminal court or superior court warrant" (150.20(1)(b)(i)) [note that this is in-state warrants due to definitions of the criminal procedure law] and (2) having "failed to appear in court proceedings in the last two years" (150.20(1)(b)(ii)) [note that this can apply to all warrants nationally and even internationally].

Bail Reform – Mandatory Appearance Tickets

- "the person has been given a reasonable opportunity to make their verifiable identity and a method of contact known, and has been unable or unwilling to do so, so that a custodial arrest is necessary to subject the individual to the jurisdiction of the court"
  - Officer can rely upon various factors to determine identity, including:
    - personal knowledge of such person,
    - a person's self-identification, or photographic identification.
    - Photo ID not required if person can establish identity in other ways. Officers MUST accept the following as ID:
      - a valid driver's license or non-driver identification card issued by New York, the federal government, any United States territory, commonwealth or possession, the District of Columbia, a state government or municipal government within the United States or a provincial government of the dominion of Canada;
      - a valid passport issued by the United States government or any other country;
      - an identification card issued by the armed forces of the United States; or a public benefit card.

Bail Reform – Mandatory Appearance Tickets

- "The person is charged with a crime between members of the same household…" CPL § 530.11 defines as:
  - (a) persons related by consanguinity or affinity;
  - (b) persons legally married to one another;
  - (c) persons formerly married to one another regardless of whether they still reside in the same household;
  - (d) persons who have a child in common, regardless of whether such persons have been married or have lived together at any time; and
  - (e) persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time. Factors the court may consider in determining whether a relationship is an "intimate relationship" include but are not limited to: the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship. Neither a casual acquaintance nor ordinary fraternization between two individuals in business or social contexts shall be deemed to constitute an "intimate relationship".

Bail Reform – Mandatory Appearance Tickets

- Person charged with a crime under Article 130 –self explanatory
- Section 530.13: Protection of victims of crimes, other than family offenses:
  - (a) stay away from the home, school, business or place of employment of the victims of, or designated witnesses to, the alleged offense;
  - (b) refrain from harassing, intimidating, threatening or otherwise interfering with the victims of the alleged offense and such members of the family or household of such victims or designated witnesses as shall be specifically named by the court in such order;
  - (c) to refrain from intentionally injuring or killing, without justification, any companion animal (defined by AGM § 350[5]) the defendant knows to be owned, possessed, leased, kept or held by such victim or victims or a minor child residing in such victim's or victims' household.

Bail Reform – Mandatory Appearance Tickets

- "The person is charged with a crime for which the court may suspend or revoke his or her driver license"
- Crimes for which a license suspension is possible:
  - Aggravated Driving While Intoxicated
  - Driving While Intoxicated
  - Driving While Ability Impaired by a Drug
  - Any Homicide, assault or criminal negligence resulting in death from the operation of a motor vehicle
  - Criminal Conviction for a false statement on a driver's license application or registration
  - Leaving the scene of a fatal or personal injury accident

Bail Reform – Mandatory Appearance Tickets

- "it reasonably appears to the officer, based on the observed behavior of the individual in the present contact with the officer and facts regarding the person's condition that indicates a sign of distress to such a degree that the person would face harm without immediate medical or mental health care, that bringing the person before the court would be in such person's interest in addressing that need; provided, however, that before making the arrest, the officer shall make all reasonable efforts to assist the person in securing appropriate services"
  - Drug Courts?
  - Mental Health Court?
  - Opioid Stabilization Part?
  - Behavioral Health Access and Crisis Center?

Bail Reform - Arraignments – Quick Overview

- Court must perform an individualized assessment of the defendant, considering the factors outlined in CPL 510.30(1) AND impose the least restrictive condition necessary to ensure a return to court
- Release options available to the arraigning court depend on whether charge is a "qualifying offense" or a "non-qualifying offense", and whether defendant should be placed under pretrial supervision, or whether the defendant "qualifies for electronic monitoring"
- "Qualifying offense", and "qualifies for electronic monitoring" all have specific statutory definitions
- New securing orders are:
  - Release on own recognizance
  - Release on one or more "non-monetary conditions"
    - Release to Pre-Trial Supervision
    - Release to Electronic Monitoring (if qualifies)
  - Set bail (if qualifies)
  - Remand to custody (if qualifies)

Arraignments Now

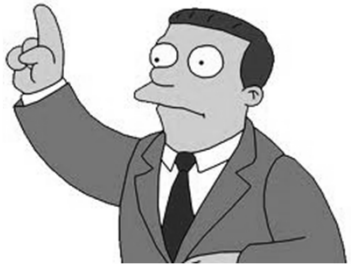
R.O.R!

Bond!

…employment and financial resources…

Character, reputation, habits and mental condition…

…family ties and length of residence in the community…



Bail!

Bail Reform - Arraignments – New Standard

- "With respect to any principal, the court in all cases, unless otherwise provided by law, must impose the least restrictive kind and degree of control or restriction that is necessary to secure the principal's return to court when required. In determining that matter, the court must, on the basis of available information, consider and take into account information about the principal that is relevant to the principal's return to court…" CPL § 510.30(1).
- No matter the seriousness of the offense, the court must use the "least restrictive" securing order to ensure a return to court.
- This new standard applies to the securing order AND any conditions in the securing order, as well as the type and amount of bail (if set)

Bail Reform – Arraignments – Individualized Assessment

OLD Statutory Factors (CPL § 510.30):

- (i) The principal's character, reputation, habits and mental condition;
- (ii) His employment and financial resources; and
- (iii) His family ties and the length of his residence if any in the community; and
- (iv) His criminal record if any; and
- (v) His record of previous adjudication as a juvenile delinquent, as retained pursuant to section 354.2 of the family court act, or, of pending cases where fingerprints are retained pursuant to section 306.1 of such act, or a youthful offender, if any; and
- (vi) His previous record if any in responding to court appearances when required or with respect to flight to avoid criminal prosecution; and
- (vii) Where the principal is charged with a crime or crimes against a member or members of the same family or household as that term is defined in subdivision one of section 530.11 of this title, the following factors:
    - (A) any violation by the principal of an order of protection issued by any court for the protection of a member or members of the same family or household as that term is defined in subdivision one of section 530.11 of this title, whether or not such order of protection is currently in effect; and (B) the principal's history of use or possession of a firearm; and
- (viii) If he is a defendant, the weight of the evidence against him in the pending criminal action and any other factor indicating probability or improbability of conviction; or, in the case of an application for bail or recognizance pending appeal, the merit or lack of merit of the appeal; and
- (ix) If he is a defendant, the sentence which may be or has been imposed upon conviction.

Bail Reform – Arraignments – Individualized Assessment

OLD Statutory Factors (CPL § 510.30):

- (i) ~~The principal's character, reputation, habits and mental condition;~~
- (ii) ~~His employment and financial resources; and~~
- (iii) ~~His family ties and the length of his residence if any in the community; and~~
- (iv) His criminal record if any; and
- (v) His record of previous adjudication as a juvenile delinquent, as retained pursuant to section 354.2 of the family court act, or, of pending cases where fingerprints are retained pursuant to section 306.1 of such act, or a youthful offender, if any; and
- (vi) ~~His previous record if any in responding to court appearances when required or~~ with respect to flight to avoid criminal prosecution; and
- (vii) Where the principal is charged with a crime or crimes against a member or members of the same family or household as that term is defined in subdivision one of section 530.11 of this title, the following factors:
    - (A) any violation by the principal of an order of protection issued by any court for the protection of a member or members of the same family or household as that term is defined in subdivision one of section 530.11 of this title, whether or not such order of protection is currently in effect; and (B) the principal's history of use or possession of a firearm; and
- (viii) ~~If he is a defendant, the weight of the evidence against him in the pending criminal action and any other factor indicating probability or improbability of conviction~~; or, in the case of an application for bail or recognizance pending appeal, the merit or lack of merit of the appeal; and
- (ix) If he is a defendant, the sentence which may be or has been imposed upon conviction.

Bail Reform – Arraignments – Individualized Assessment

NEW Statutory Factors (CPL § 510.30):

- (a) The principal's activities and history;
- (b) If the principal is a defendant, the charges facing the principal;
- (c) The principal's criminal conviction record if any;
- (d) The principal's record of previous adjudication as a juvenile delinquent, as retained pursuant to section 354.2 of the family court act, or, of pending cases where fingerprints are retained pursuant to section 306.1 of such act, or a youthful offender, if any;
- (e) The principal's previous record with respect to flight to avoid criminal prosecution;
- (f) If monetary bail is authorized, according to the restrictions set forth in this title, the principal's individual financial circumstances, and, in cases where bail is authorized, the principal's ability to post bail without posing undue hardship, as well as his or her ability to obtain a secured, unsecured, or partially secured bond;
- (g) Where the principal is charged with a crime or crimes against a member or members of the same family or household as that term is defined in subdivision one of section 530.11 of this title, the following factors:
  - (i) any violation by the principal of an order of protection issued by any court for the protection of a member or members of the same family or household as that term is defined in subdivision one of section 530.11 of this title, whether or not such order of protection is currently in effect; and (ii) the principal's history of use or possession of a firearm; and
- (h) If the principal is a defendant, in the case of an application for a securing order pending appeal, the merit or lack of merit of the appeal.

Bail Reform – Arraignments – Individualized Assessments

- Removed factors that were subjective or had the potential to negatively impact the indigent:
  - (i) The principal's character, reputation, habits and mental condition;
  - (ii) His employment and financial resources; and
  - (iii) His family ties and the length of his residence if any in the community; and
- Also removed:

His previous record if any in responding to court appearances when required or. . .

Old:

(vi) His previous record if any in responding to court appearances when required or with respect to flight to avoid criminal prosecution; and

New:

(e) The principal's previous record with respect to flight to avoid criminal prosecution;

Bail Reform – Arraignments – Individualized Assessment

- Also removed:
  - If he is a defendant, the weight of the evidence against him in the pending criminal action and any other factor indicating probability or improbability of conviction . . .

- Added:
  - (a) The principal's activities and history;
  - (b) If the principal is a defendant, the charges facing the principal;
    - Does not authorize prosecution to outline the strength of the case, only the charges.
  - The word "conviction" was added: "[t]he principal's criminal conviction record if any".
    - Prior arrests that did not result in a conviction are now irrelevant.
  - (f) If monetary bail is authorized, according to the restrictions set forth in this title, the principal's individual financial circumstances, and, in cases where bail is authorized, the principal's ability to post bail without posing undue hardship, as well as his or her ability to obtain a secured, unsecured, or partially secured bond;

Bail Reform – Arraignments – Individualized Assessment- Judges Bench Book (page 8)

General Revised Structure

Existing CPL 510.30 lists numerous factors a court must consider in determining the "kind and degree of control or restriction that is necessary to secure" a defendant's court appearance. CPL 510.30 (2) (a). The new bail statute rewrites those provisions in significant ways, adding new considerations, deleting others and rewriting some. As outlined below, however, the new law also integrates in the middle of these provisions, as one factor, a new "catch-all" category: "information about the principal that is relevant to the principal's return to court, including . . . [t]he principal's activities and history". New CPL 501.30 (1) (a). This provision, unlike current law, would appear to allow *any* information relevant to flight risk to be considered.

These integrated revisions pose the question of how courts should reconcile the "catch-all" with the specific, detailed policy proscriptions contained in the same statute. The answer is clear in one respect. The new statute provides a list of issues courts *must* consider.

The more difficult question is how to think about provisions of current law which have been eliminated, limited or modified. The "catch-all" provides that a court can consider anything relevant to flight risk. On the other hand, it might also be argued that provisions which were eliminated or limited should not be considered, or considered only in their limited, amended form.

Perhaps the best way to read the statute is in its revised form, without considering how it was amended. Under that reading, the statute contains a new list of mandatory considerations. But it also now plainly allows any factor relevant to flight risk to be considered.

Bail Reform – Arraignments – Securing Orders

- "When a principal, whose future court attendance at a criminal action or proceeding is or may be required, comes under the control of a court, such court shall, in accordance with this title, by a securing order release the principal on the principal's own recognizance, release the principal under non-monetary conditions, or, where authorized, fix bail or commit the principal to the custody of the sheriff…" CPL § 510.10(1)
- "release the principal under non-monetary conditions" includes "electronic monitoring" and "supervision by a pretrial services agency"
- Possible Securing Orders:
  - R.O.R.
  - Non-Monetary Conditions
    - Supervision by PreTrial Services Agency
    - Electronic Monitoring (if qualifies)
  - Bail (if qualifies)
  - Remand (if qualifies)

Bail Reform – Arraignments – Securing Orders

- Keep in mind, as court is conducting individualized assessment of defendant, it must determine the least restrictive "kind and degree of control or restriction that is necessary to secure the principal's return to court".

NO MATTER THE CHARGE!!

- Arraigning court must employ a graduated analysis, starting with R.O.R. and assessing, at each stage, whether the considered securing order is the least restrictive condition or order that will ensure a return to court.
- Always be watchful for prosecutor's attempts to "slip" public safety arguments into their arguments supporting more restrictive securing orders

Bail Reform - Qualifying Offenses and Non-Qualifying Offenses

- In considering a possible securing order, the options available to an arraigning court are dependent upon whether the defendant is charged with a “qualifying offense” or a “non-qualifying offense”
- “Qualifying offenses” are defined by statute, and provide the arraigning court more discretion and more options in issuing a securing order
- “Non-qualifying offenses” court is prohibited from setting bail or remanding a defendant to custody
- Although bail and remand are options at arraignment only for “qualifying offenses”, post arraignment they may be options for a violation of a securing order

Bail Reform - Qualifying Offenses and Non-Qualifying Offenses (cont.)

- Qualifying Offenses (CPL § 510.10[4]):
  - Violent felony offenses (PL § 70.02) EXCEPT for burglary in the second degree, PL § 140.25(2) and robbery in the second degree, PL § 160.10(1)
  - Crime involving Witness Tampering under PL §§ 215.11; 215.12; and 215.13 and a crime involving Intimidating a Witness or Victim under PL § 215.15
  - Any class A felony other than an Article 220 offense EXCEPT PL § 220.77 (Operating as a Major Trafficker)

Bail Reform - Qualifying Offenses and Non-Qualifying Offenses (cont.)

- Qualifying Offenses (CPL § 510.10[4]):
  - Felony Sex Offense as defined by PL § 70.80 (this includes attempts or conspiracy to commit if the attempt or underlying crime is a felony)
  - Crime involving Incest defined by PL §§ 255.25; 255.26; and 255.27
  - Misdemeanor defined in PL Article 130
  - Conspiracy 2nd (PL § 105.15) where the underlying allegation is defendant conspired to commit a class A felony under Article 125 of the Penal Law

Bail Reform - Qualifying Offenses and Non-Qualifying Offenses (cont.)

- Qualifying Offenses (CPL § 510.10[4]):
  - Money Laundering in Support of Terrorism in the First Degree (PL § 470.24), and Second Degree (PL § 470.23)
  - Felony crime of terrorism defined in Article 490 of the PL EXCEPT 490.20 (Making a Terroristic Threat)*
  - Criminal Contempt 2nd, subdivision 3 (PL § 215.50[3]); Criminal Contempt 1st, subdivisions (b),(c), or (d) (PL § 215.51); or Aggravated Criminal Contempt (PL § 215.5) and the underlying allegation is that the defendant violated a duly served order of protection where the protected party is a member of the defendant's same family or household as defined in subdivision one of section 530.11 of this article;

Bail Reform - Qualifying Offenses and Non-Qualifying Offenses (cont.)

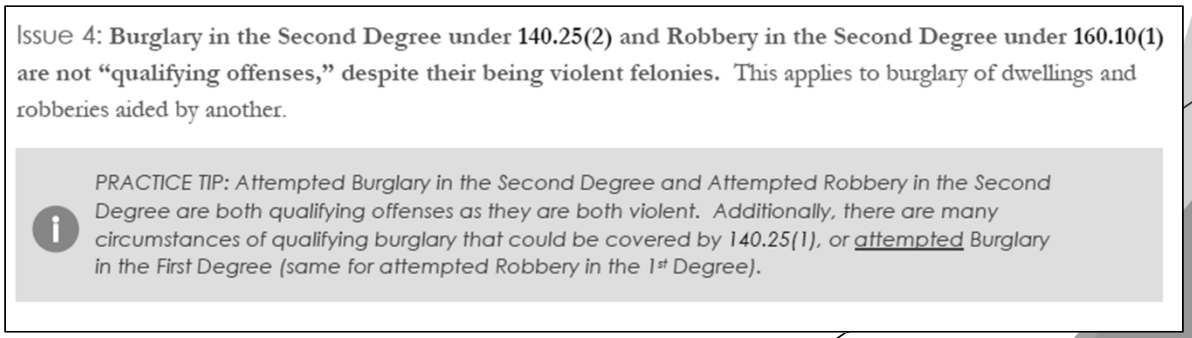
- Qualifying Offenses (CPL § 510.10[4]):
  - Facilitating a Sexual Performance by a Child with a Controlled Substance or Alcohol (PL § 263.30); Use of a Child in a Sexual Performance (PL § 263.05); or Luring a Child (PL § 120.70 subdivision [1])

A list of Qualifying Offenses is in your materials

Bail Reform - Qualifying Offenses and Non-Qualifying Offenses (cont.)

- Potential Issues:
  - Does "crime involving" the delineated offense (e.g. "a crime involving witness tampering under section 215.11") include attempts to commit the crime?
  - Are attempted burglary in the second degree, PL § 140.25(2) and attempted robbery in the second degree, PL § 160.10(1) qualifying offenses?

DA's Take



Issue 4: **Burglary in the Second Degree under 140.25(2) and Robbery in the Second Degree under 160.10(1) are not "qualifying offenses," despite their being violent felonies.** This applies to burglary of dwellings and robberies aided by another.

PRACTICE TIP: Attempted Burglary in the Second Degree and Attempted Robbery in the Second Degree are both qualifying offenses as they are both violent. Additionally, there are many circumstances of qualifying burglary that could be covered by 140.25(1), or attempted Burglary in the First Degree (same for attempted Robbery in the 1st Degree).

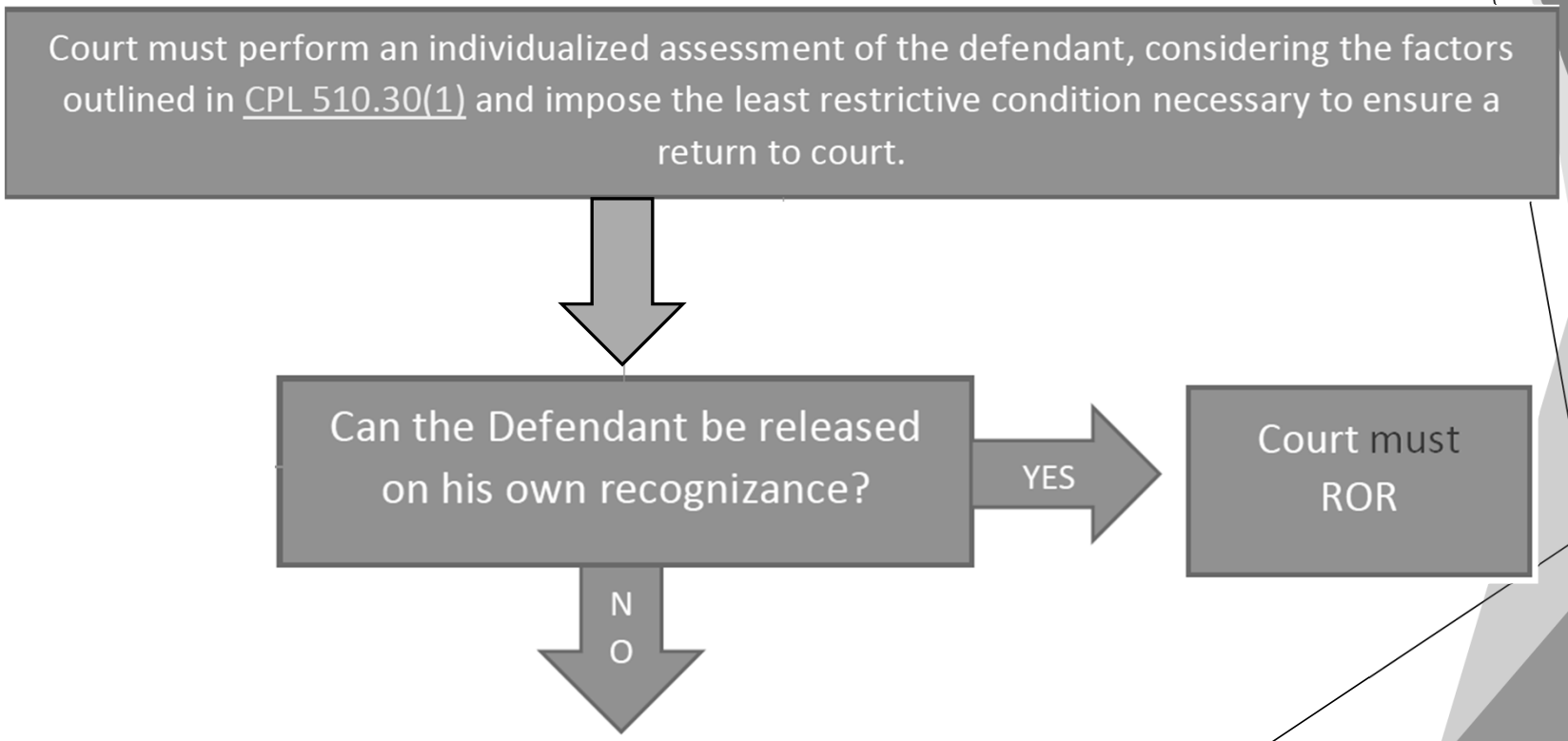
Bail Reform - Qualifying Offenses and Non-Qualifying Offenses (cont.)

- Potential Issues:
  - What about PL § 490.20 (Making a Terroristic Threat)*
    - There is a conflict between CPL §§ 510.10(4)(a) and 510.10(4)(g). 510.10(4)(a) states that a qualifying offense is "a felony enumerated in section 70.02 of the penal law…". PL § 70.02(1)(c) (class D violent felony offenses) states that PL § 490.20 making a terroristic threat is a class D violent felony. However, CPL § 510.10(4)(g) specifically excludes that crime as a qualifying offense. Since the Legislature specifically excluded it, a strong argument exists that this is not a qualifying offense.

Bail Reform – Arraignments on Non-Qualifying Offense - Release on Recognizance

- CPL § 510.10(1):". . .In all such cases, except where another type of securing order is shown to be required by law, the court shall release the principal pending trial on the principal's own recognizance, unless it is demonstrated and the court makes an individualized determination that the principal poses a risk of flight to avoid prosecution. If such a finding is made, the court must select the least restrictive alternative and condition or conditions that will reasonably assure the principal's return to court."
- "The court shall explain its choice of release, release with conditions, bail or remand on the record or in writing."

Bail Reform – Arraignments on Non-Qualifying Offense – Release on Recognizance



Bail Reform – Arraignments on Non-Qualifying Offense - Non-Monetary Conditions

- CPL § 510.10(3):"In cases other than as described in subdivision four of this section the court shall release the principal pending trial on the principal's own recognizance, unless the court finds on the record or in writing that release on the principal's own recognizance will not reasonably assure the principal's return to court. In such instances, the court shall release the principal under non-monetary conditions, selecting the least restrictive alternative and conditions that will reasonably assure the principal's return to court. The court shall explain its choice of alternative and conditions on the record or in writing."

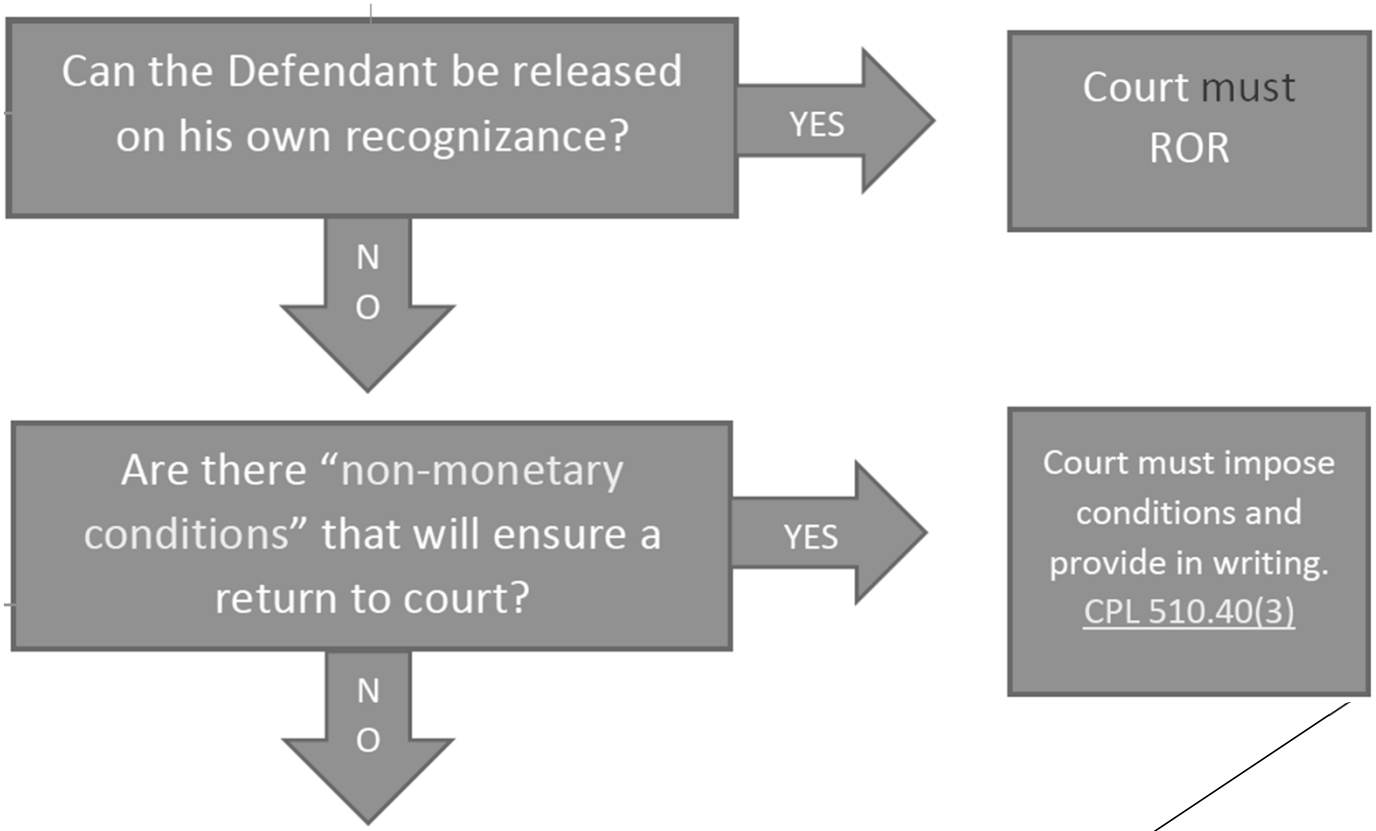
Bail Reform – Arraignments on Non-Qualifying Offense - Non-Monetary Conditions

- CPL § 500.10(3-a): "…A court releases a principal under non-monetary conditions when, . . . it authorizes the person to be at liberty during the pendency of the criminal action or proceeding involved under conditions ordered by the court, which shall be the least restrictive conditions that will reasonably assure the principal's return to court. Such conditions may include, among other conditions reasonable under the circumstances: that the principal be in contact with a pretrial services agency serving principals in that county; that the principal abide by reasonable, specified restrictions on travel that are reasonably related to an actual risk of flight from the jurisdiction; that the principal refrain from possessing a firearm, destructive device or other dangerous weapon;. . ."
  - "contact" with a pretrial services agency is not the same thing as "supervision" by a pretrial services agency
- "A principal shall not be required to pay for any part of the cost of release on non-monetary conditions." (CPL § 500.10[3-a])

Bail Reform – Arraignments on Non-Qualifying Offense - Non-Monetary Conditions

- Other possible conditions?
  - SCRAM?
  - Curfew?
  - Treatment requirements?
- "A principal shall not be required to pay for any part of the cost of release on non-monetary conditions." (CPL § 500.10[3-a])
- If the defendant is released on non-monetary conditions, the court must provide to the defendant, in plain language, a document which informs the defendant of: (1) the conditions to which he is subject; and (2) the consequences of violating the conditions

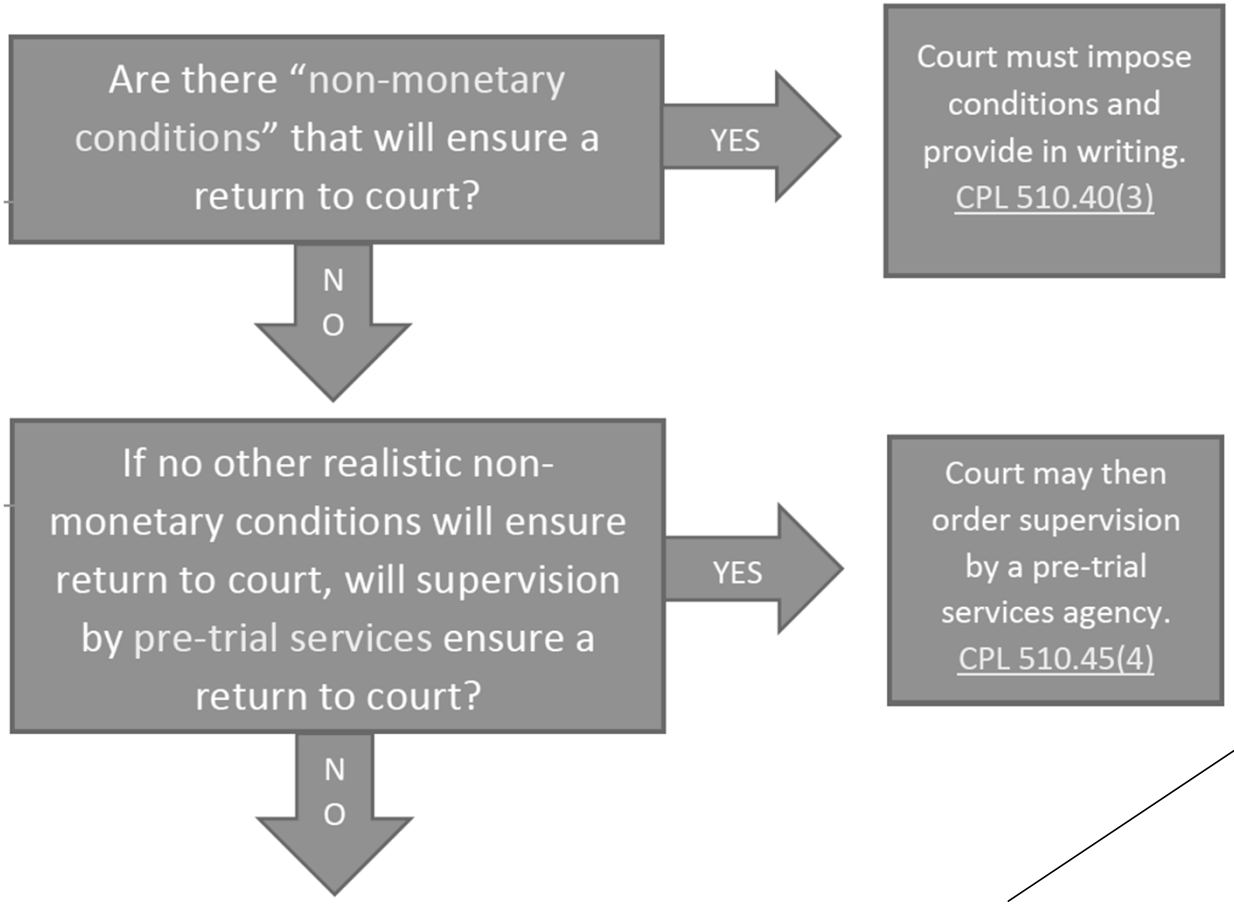
Bail Reform – Arraignments on Non-Qualifying Offense – Non-Monetary Conditions



Bail Reform – Arraignments on Non-Qualifying Offense – Pre-Trial Supervision

- CPL § 500.10(3-a): "…that, when it is shown pursuant to subdivision four of section 510.45 of this title that no other realistic monetary condition or set of non-monetary conditions will suffice to reasonably assure the person's return to court, the person be placed in reasonable pretrial supervision with a pretrial services agency serving principals in that county; …"
- CPL § 510.45(4): "Supervision by a pre-trial services agency may be ordered as a non-monetary condition pursuant to this title only if the court finds, after notice, an opportunity to be heard and an individualized determination explained on the record or in writing, that no other realistic non-monetary condition or set of non-monetary conditions will suffice to reasonably assure the principal's return to court."
- CPL § 510.45(3)(a) and (b) require that any risk assessment instrument used to assess a defendant for the purposes of a determination on the appropriate securing order be provided to the defendant and be designed to: (1) ensure it is free from discrimination on the basis of any protected class; and (2) empirically validated and revalidated (with all relevant data available upon request).

Bail Reform – Arraignments on Non-Qualifying Offense – PreTrial Supervision



Bail Reform – Arraignments on Non-Qualifying Offense – Electronic Monitoring

- CPL § 500.10(3-a): "…that, when it is shown pursuant to paragraph (a) of subdivision four of section 510.40 of this title that no other realistic non-monetary condition or set of non-monetary conditions will suffice to reasonably assure the principal's return to court, the principal's location be monitored with an approved electronic monitoring device, in accordance with such subdivision four of section 510.40 of this title."

Bail Reform – Arraignments on Non-Qualifying Offense – Electronic Monitoring

- CPL § 510.40(4)(a): "Electronic monitoring of a principal's location may be ordered only if the court finds, after notice, an opportunity to be heard and an individualized determination explained on the record or in writing, that the defendant qualifies for electronic monitoring in accordance with subdivision twenty-one of section 500.10 of this title, and no other realistic non-monetary condition or set of non-monetary conditions will suffice to reasonably assure a principal's return to court."

Bail Reform – Arraignments – Electronic Monitoring – Who Qualifies?

- CPL § 500.10(21): “"Qualifies for electronic monitoring," for purposes of subdivision four of section 510.40 of this title, means a person charged with a felony, a misdemeanor crime of domestic violence, a misdemeanor defined in article one hundred thirty of the penal law, a crime and the circumstances of paragraph (b) of subdivision two of section 530.60 of this title apply, or any misdemeanor where the defendant stands previously convicted, within the past five years, of a violent felony offense as defined in section 70.02 of the penal law. For the purposes of this subdivision, in calculating such five year period, any period of time during which the defendant was incarcerated for any reason between the time of the commission of any such previous crime and the time of commission of the present crime shall be excluded and such five year period shall be extended by a period or periods equal to the time served under such incarceration..”

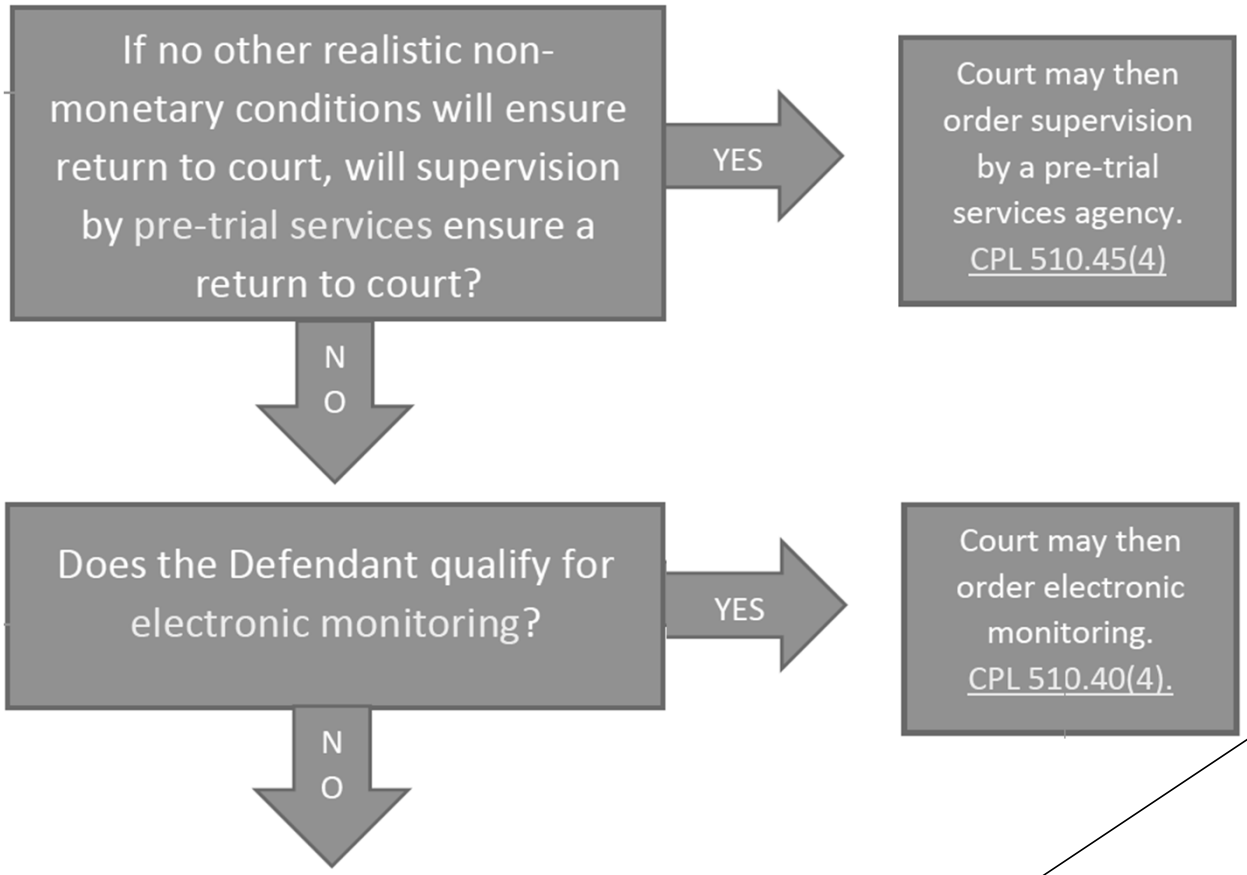
Bail Reform – Arraignments – Electronic Monitoring – Who Qualifies?

- Charged with a felony
- Charged with a misdemeanor crime of domestic violence
  - "Misdemeanor crime of domestic violence," for purposes of subdivision twenty-one of this section, means a misdemeanor under the penal law provisions and circumstances described in subdivision one of section 530.11 of this title." (CPL § 500.10 [22])
    - ~~disorderly conduct~~, harassment in the first degree, ~~harassment in the second degree~~, aggravated harassment in the second degree, sexual misconduct, forcible touching, sexual abuse in the third degree, sexual abuse in the second degree as set forth in subdivision one of section 130.60 of the penal law, ~~stalking in the first degree~~, ~~stalking in the second degree~~, stalking in the third degree, stalking in the fourth degree, criminal mischief, menacing in the second degree, menacing in the third degree, reckless endangerment, ~~strangulation in the first degree, strangulation in the second degree~~, criminal obstruction of breathing or blood circulation, ~~assault in the second degree~~, assault in the third degree, an attempted assault, ~~identity theft in the first degree~~, ~~identity theft in the second degree~~, identity theft in the third degree, ~~grand larceny in the fourth degree, grand larceny in the third degree~~, ~~coercion in the second degree~~ or coercion in the third degree as set forth in subdivisions one, two and three of section 135.60 of the penal law
- Charged with a misdemeanor defined in article one hundred thirty of the penal law

Bail Reform – Arraignments – Electronic Monitoring – Who Qualifies?

- Charged with a crime and the circumstances of paragraph (b) of subdivision two of section 530.60 of this title apply ("certain modifications of a securing order')
  - (i) persistently and willfully failed to appear after notice of scheduled appearances in the case before the court; or
  - (ii) violated an order of protection in the manner prohibited by subdivision (b), (c) or (d) of section 215.51 of the penal law while at liberty; or
  - (iii) stands charged in such criminal action or proceeding with a misdemeanor or violation and, after being so charged, intimidated a victim or witness in violation of section 215.15, 215.16 or 215.17 of the penal law or tampered with a witness in violation of section 215.11, 215.12 or 215.13 of the penal law, law while at liberty; or
  - (iv) stands charged in such action or proceeding with a felony and, after being so charged, committed a felony while at liberty.
- Charged with any misdemeanor where the defendant stands previously convicted, within the past five years, of a violent felony offense as defined in section 70.02 of the penal law. In calculating such five year period, any period of time during which the defendant was incarcerated for any reason between the time of the commission of any such previous crime and the time of commission of the present crime shall be excluded and such five year period shall be extended by a period or periods equal to the time served under such incarceration.

Bail Reform – Arraignments on Non-Qualifying Offense – Electronic Monitoring

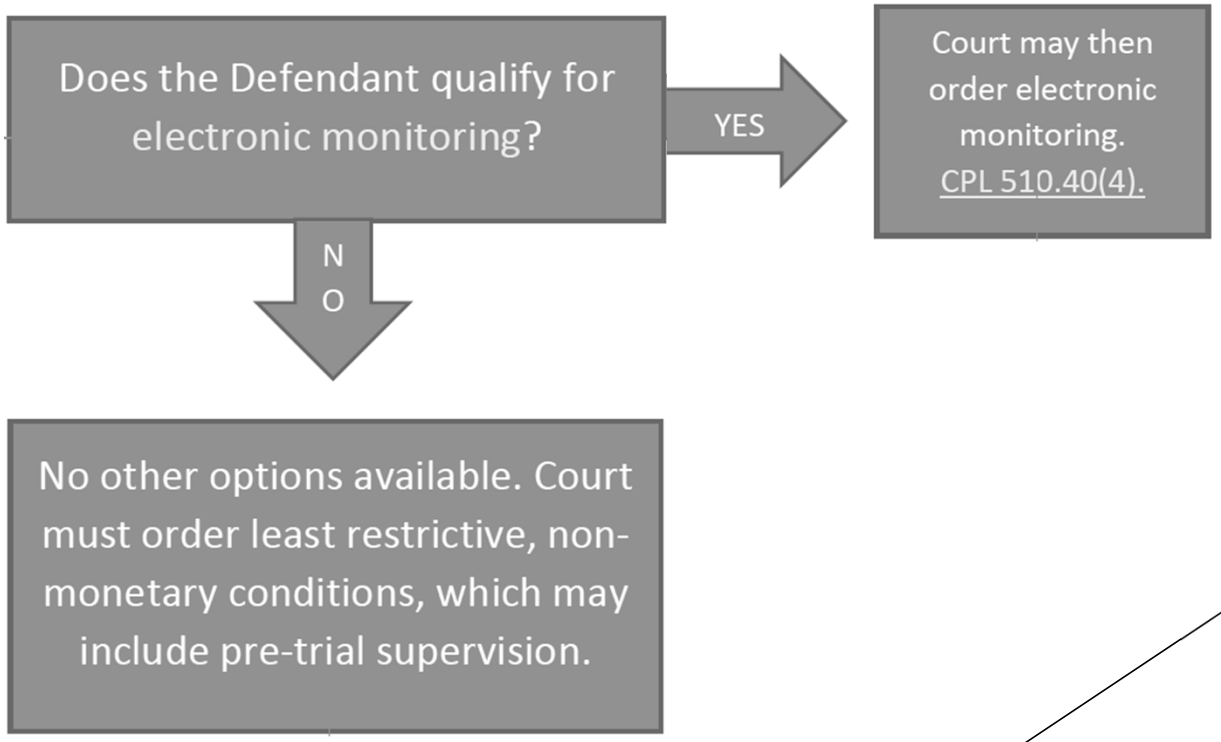


Bail Reform – Arraignments on Non-Qualifying Offense – Electronic Monitoring

- The specific method of electronic monitoring of the principal's location must be approved by the court. It must be the least restrictive procedure and method that will reasonably assure the principal's return to court, and unobtrusive to the greatest extent practicable.
- CPL § 510.40(d): "Electronic monitoring of a principal's location may be for a maximum period of sixty days, and may be renewed for such period, after notice, an opportunity to be heard and a de novo, individualized determination in accordance with this subdivision, which shall be explained on the record or in writing.
- A defendant subject to electronic location monitoring "shall be considered held or confined in custody for purposes" of CPL §§ 180.80 (proceedings on a felony complaint) and 170.70 (failure to convert misdemeanor complaint to information)

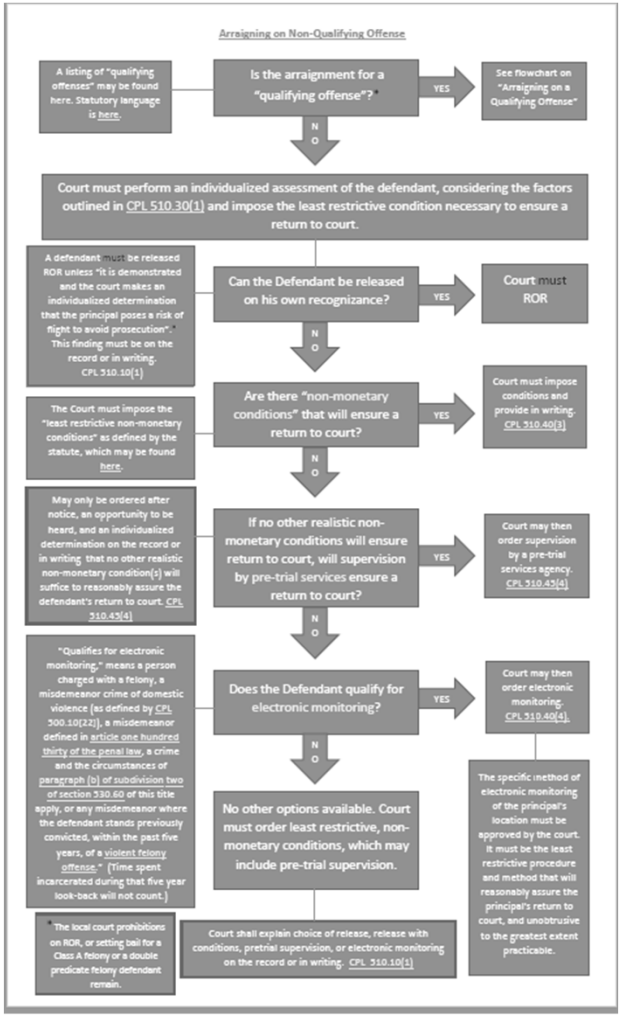
Bail Reform – Arraignments on Non-Qualifying Offense – Electronic Monitoring

If the defendant doesn't qualify for electronic monitoring?



Bail Reform – Arraignments on Non-Qualifying Offense

In your materials



Bail Reform – Arraignments – Securing Orders

- Keep in mind, as court is conducting individualized assessment of defendant, it must determine the least restrictive "kind and degree of control or restriction that is necessary to secure the principal's return to court".

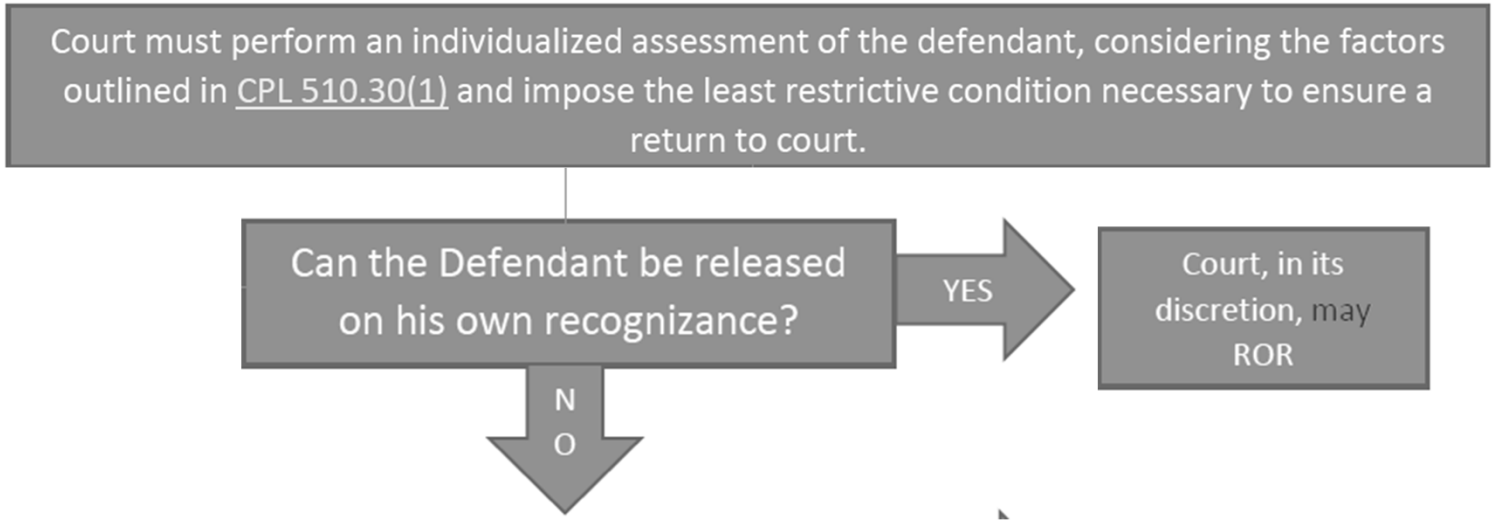
NO MATTER THE CHARGE!!

- Be watchful for prosecutor's attempts to "slip" public safety arguments into their arguments supporting more restrictive securing orders

Bail Reform – Arraignments on Qualifying Offense - Release on Recognizance

- CPL § 510.10(4): "Where the principal stands charged with a qualifying offense, the court, unless otherwise prohibited by law, may in its discretion release the principal pending trial on the principal's own recognizance or under non-monetary conditions, fix bail, or, where the defendant is charged with a qualifying offense which is a felony, the court may commit the principal to the custody of the sheriff."
- Court must explain its choice on the record or in writing.

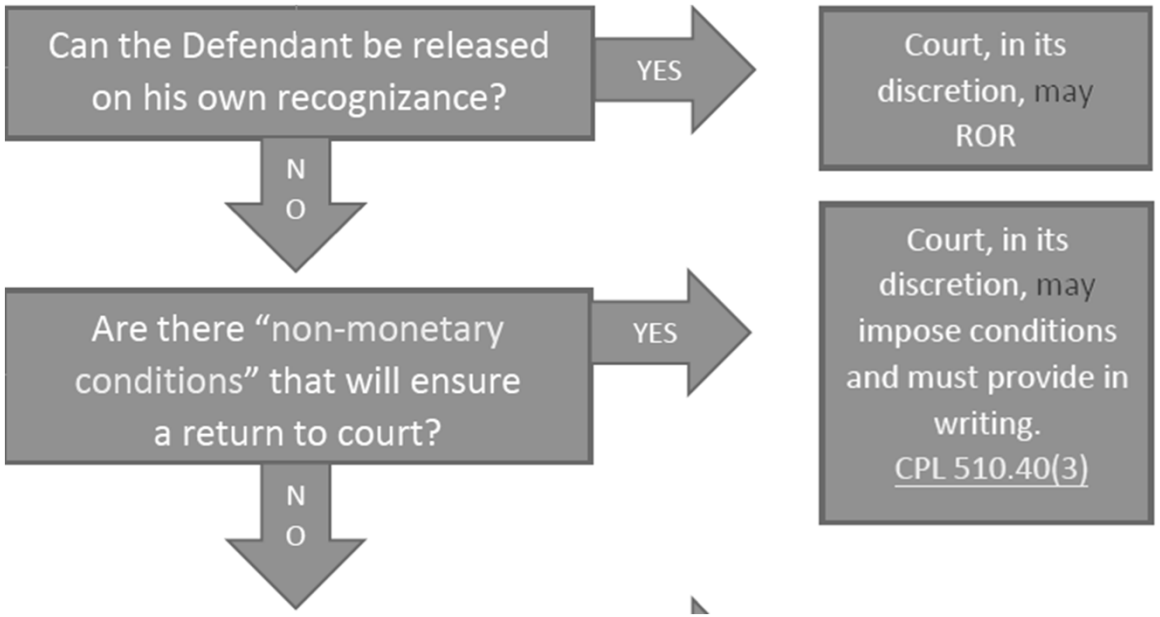
Bail Reform – Arraignments on Qualifying Offense - Release on Recognizance



Bail Reform – Arraignments on Qualifying Offense - Non-Monetary Conditions

- Defined by CPL § 500.10(3-a)
- Such conditions may include, among other conditions reasonable under the circumstances
  - that the principal be in contact with a pretrial services agency serving principals in that county;
    - "contact" with a pretrial services agency is not the same things as "supervision" by a pretrial services agency
  - that the principal abide by reasonable, specified restrictions on travel that are reasonably related to an actual risk of flight from the jurisdiction;
  - that the principal refrain from possessing a firearm, destructive device or other dangerous weapon;. . ."
- "A principal shall not be required to pay for any part of the cost of release on non-monetary conditions." (CPL § 500.10[3-a])

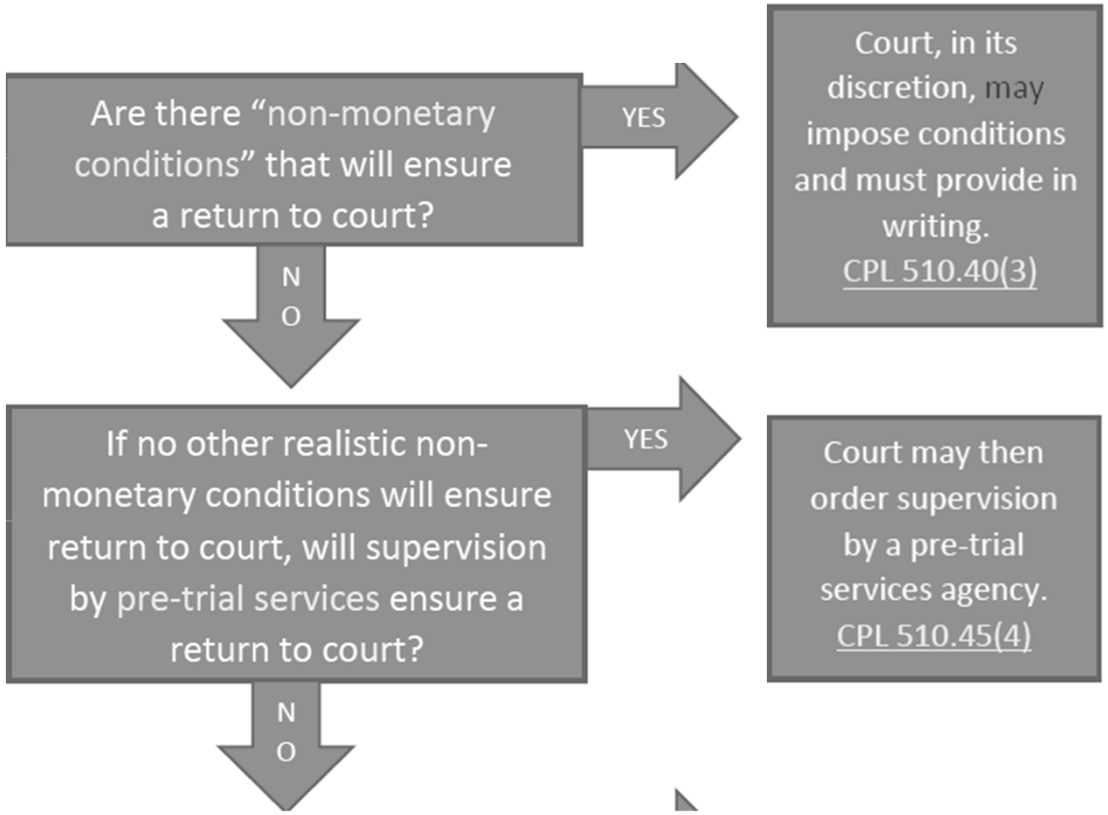
Bail Reform – Arraignments on Qualifying Offense - Non-Monetary Conditions



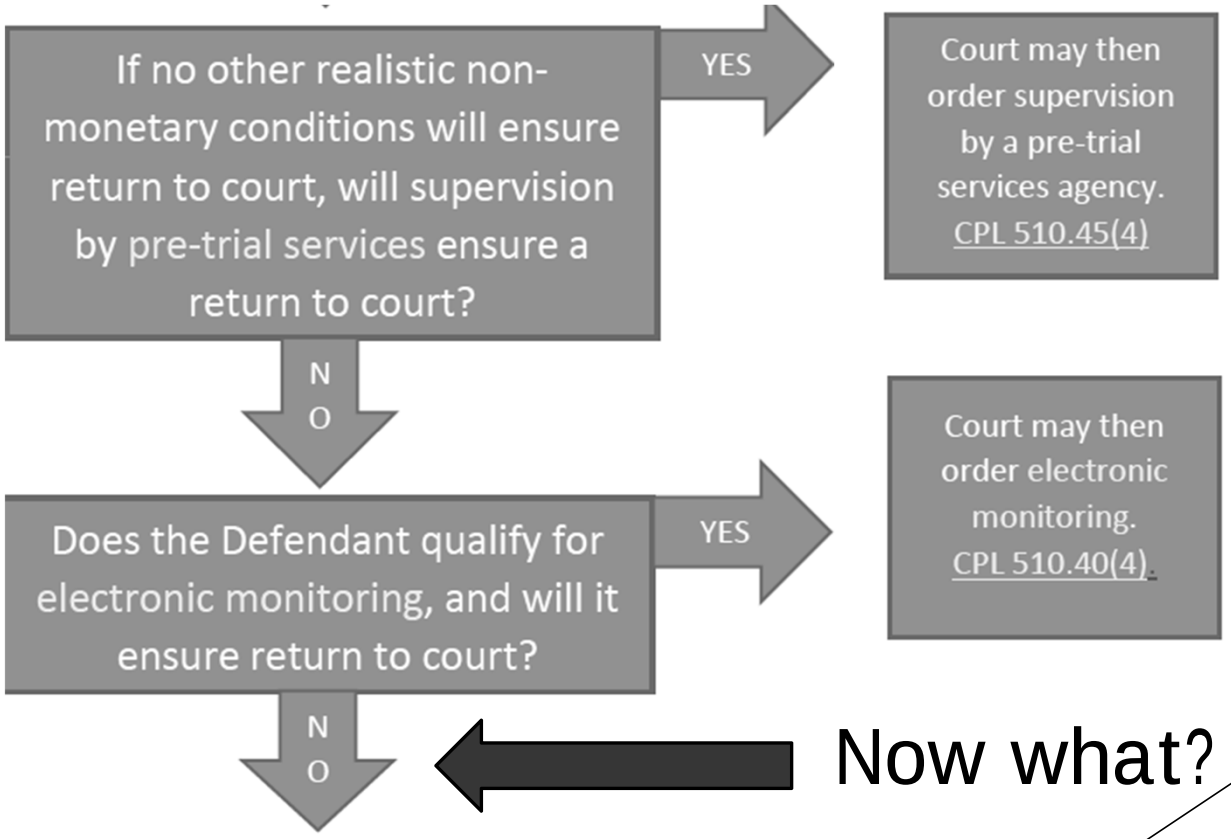
Bail Reform – Arraignments on Qualifying Offense – PreTrial Supervision and Electronic Monitoring

- CPL § 510.45(4): "Supervision by a pre-trial services agency may be ordered as a non-monetary condition pursuant to this title only if the court finds, after notice, an opportunity to be heard and an individualized determination explained on the record or in writing, that no other realistic non-monetary condition or set of non-monetary conditions will suffice to reasonably assure the principal's return to court."
- CPL § 510.40(4)(a): "Electronic monitoring of a principal's location may be ordered only if the court finds, after notice, an opportunity to be heard and an individualized determination explained on the record or in writing, that the defendant qualifies for electronic monitoring in accordance with subdivision twenty-one of section 500.10 of this title, and no other realistic non-monetary condition or set of non-monetary conditions will suffice to reasonably assure a principal's return to court."

Bail Reform – Arraignments on Qualifying Offense - PreTrial Supervision



Bail Reform – Arraignments on Qualifying Offense - Electronic Monitoring



Bail Reform – Arraignments on Qualifying Offense - Bail

- CPL § 510.10(4):"Where the principal stands charged with a qualifying offense, the court, unless otherwise prohibited by law, may in its discretion * * * fix bail, * * *."
- Remember CPL § 510.30 (assessment factors), subd. (f): "If monetary bail is authorized, according to the restrictions set forth in this title, the principal's individual financial circumstances, and, in cases where bail is authorized, the principal's ability to post bail without posing undue hardship, as well as his or her ability to obtain a secured, unsecured, or partially secured bond"
- Remember, "[w]ith respect to any principal, the court in all cases, unless otherwise provided by law, must impose the least restrictive kind and degree of control or restriction that is necessary to secure the principal's return to court …"

Bail Reform – Arraignments on Qualifying Offense - Bail

- Court must consider (1) ability to post bail without posing "undue hardship" AND (2) his or her ability to obtain a secured, unsecured, or partially secured bond
  - Specific statutory factor requires arraigning court to assess the impact of requiting a defendant to post bail and whether this is an "undue hardship"
    - Loss of housing?
    - Medical care?
    - Care for family?

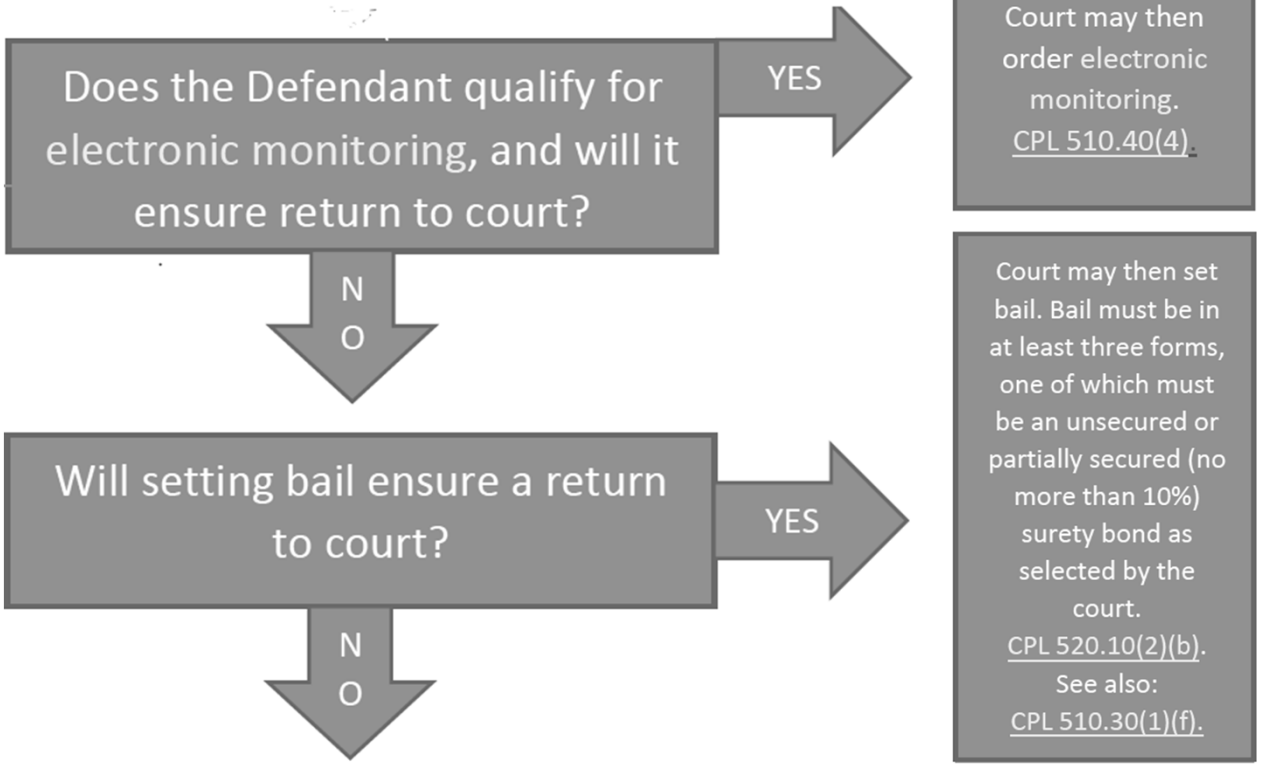
Bail Reform – Arraignments on Qualifying Offense - Bail

- Authorized forms of bail were not changed
- CPL § 520.10 lists the authorized types of bail as:
  - Cash bail
  - Insurance company bail bond
  - Secured surety bond
  - Secured appearance bond
  - Partially secured surety bond
  - Partially secured appearance bond
  - Unsecured surety bond
  - Unsecured appearance bond
- Partially secured means "secured only by a deposit of a sum of money not exceeding ten percent of the total amount of the undertaking."

Bail Reform – Arraignments on Qualifying Offense - Bail

- "The court shall direct that the bail be posted in any one of three or more of the forms specified in subdivision one of this section, designated in the alternative, and may designate different amounts varying with the forms, except that one of the forms shall be either an unsecured or partially secured surety bond, as selected by the court." CPL § 520.10 (2) (b)
- If the court disapproves the bail or bond, the court "shall explain promptly in writing the reasons therefor." CPL § 510.40(2).
- If bail or remand is not ordered, a defendant can request nominal bail on any charge (qualifying or non-qualifying) in an amount and form requested by the defendant. CPL § 510.10(5).

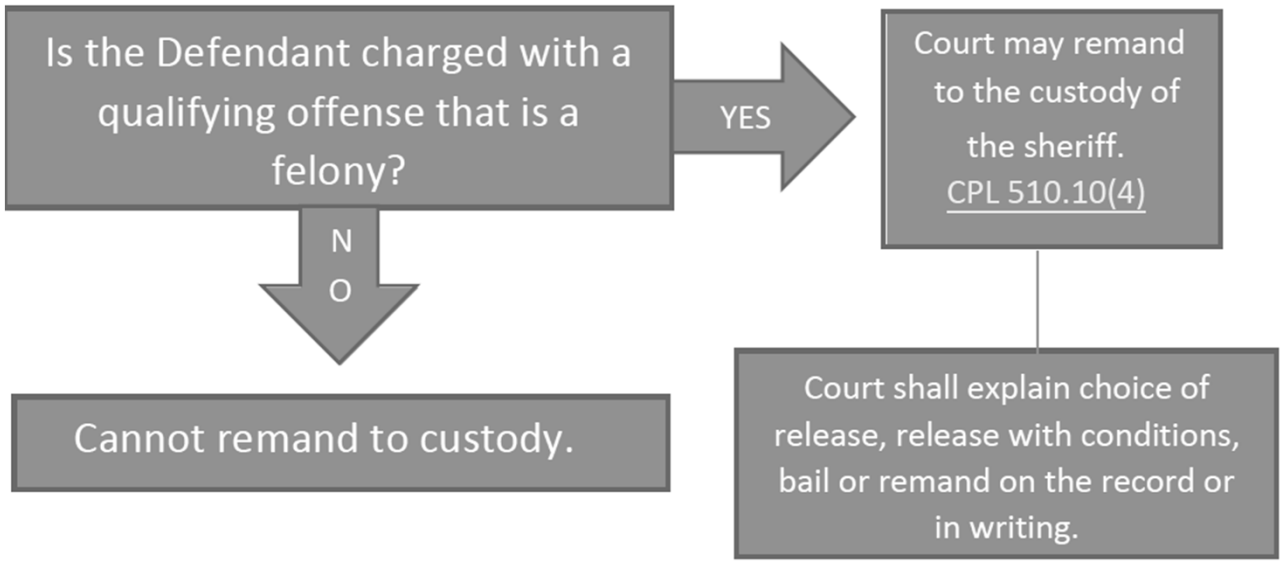
Bail Reform – Arraignments on Qualifying Offense - Bail



Bail Reform – Arraignments on Qualifying Offense - Remand

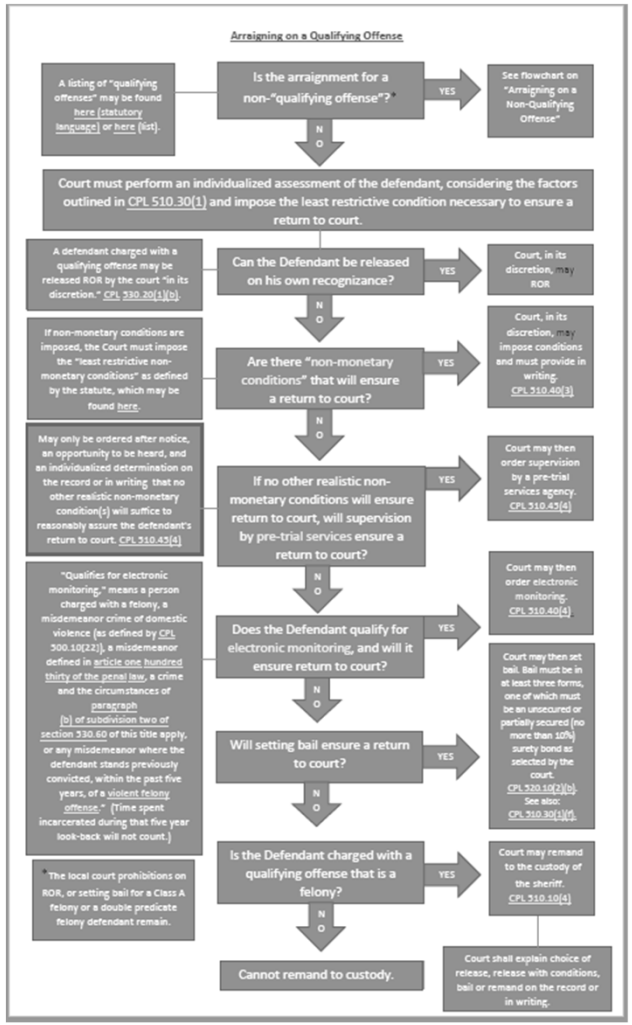
- CPL § 510.10(4): Where the principal stands charged with a qualifying offense, the court, unless otherwise prohibited by law, may in its discretion * * * or, where the defendant is charged with a qualifying offense which is a felony, the court may commit the principal to the custody of the sheriff."
- Although most qualifying offenses are felonies, not all are – make sure you check to see if the charge is both a qualifying offense AND a felony if the arraigning court is considering remand

Bail Reform – Arraignments on Qualifying Offense - Remand



Bail Reform – Arraignments on Qualifying Offense

In your materials



Bail Reform – Arraignments – Additional Considerations

- Remember: arraigning court must explain it's choice of a securing order on the record or in writing
  - If court does NOT ROR, it must make an "individualized determination that the principal poses a risk of flight to avoid prosecution"
  - If court orders release on a non-monetary condition, the court "shall explain its choice of alternative and conditions on the record or in writing" AND provide the defendant a document explaining the conditions and consequences of violating those conditions
  - If the court orders pretrial supervision, it must do so only after "an individualized determination explained on the record or in writing, that no other realistic non-monetary condition or set of conditions will suffice to reasonably assure the [defendant's] return to court"
  - If the court orders electronic monitoring, it must do so only after "an individualized determination explained on the record or in writing, that the defendant qualifies for electronic monitoring. . . and no other realistic non-monetary condition or set of conditions will reasonably assure the defendant's return to court"

Bail Reform – Arraignments – Additional Considerations

- CPL § 530.20(2)(a) still applies- "upstate" local court judges cannot order recognizance or bail when: (1) the defendant is charged with a class A felony; or (2) the defendant has two previous felony convictions
- Local court in arraigning defendant charged with a felony cannot ROR, release on non-monetary conditions, or set bail unless: (1) DA is heard or waives opportunity; and (2) the court and counsel for defendant has a rap sheet, but can be waived (with consent of DA).
- Remember: If bail or remand is not ordered, a defendant can request nominal bail on any charge (qualifying or non-qualifying) in an amount and form requested by the defendant. CPL § 510.10(5).

Bail Reform – Post Arraignment Bail Applications before Arraigning Court

- § 510.20: Application for a change in securing order:
- 1. Upon any occasion when a court has issued a securing order with respect to a principal and the principal is confined in the custody of the sheriff as a result of the securing order or a previously issued securing order, the principal may make an application for recognizance, release under non-monetary conditions or bail.
- 2.
  - (a) The principal is entitled to representation by counsel in the making and presentation of such application. If the principal is financially unable to obtain counsel, counsel shall be assigned to the principal.
  - (b) Upon such application, the principal must be accorded an opportunity to be heard, present evidence and to contend that an order of recognizance, release under non-monetary conditions or, where authorized, bail must or should issue, that the court should release the principal on the principal's own recognizance or under non-monetary conditions rather than fix bail, and that if bail is authorized and fixed it should be in a suggested amount and form.

Bail Reform – Post Arraignment Modifications to Securing Orders before Arraigning Court

- CPL § 510.40(3): "Non-monetary conditions of release shall be individualized and established in writing by the court. At future court appearances, the court shall consider a lessening of conditions or modification of conditions to a less burdensome form based on the principal's compliance with such conditions of release. * **"
- CPL § 510.40(4)(d): "Electronic monitoring of a principal's location may be for a maximum period of sixty days, and may be renewed for such period, after notice, an opportunity to be heard and a de novo, individualized determination in accordance with this subdivision, which shall be explained on the record or in writing. * * *"

Bail Reform – Post Arraignment Bail Applications before Superior Court

- CPL § 530.30:

1. When a criminal action is pending in a local criminal court, . . .a judge of a superior court holding a term thereof in the county, upon application of a defendant, may order recognizance, release under non-monetary conditions or, where authorized, bail when such local criminal court:

(a) Lacks authority to issue such an order, pursuant to the relevant provisions of section 530.20 of this article; or

(b) Has denied an application for recognizance, release under non-monetary conditions or bail; or

(c) Has fixed bail, where authorized, which is excessive; or

(d) Has set a securing order of release under non-monetary conditions which are more restrictive than necessary to reasonably assure the defendant's return to court.

In such case, such superior court judge may vacate the order of such local criminal court and release the defendant on recognizance or under non-monetary conditions, or where authorized, fix bail in a lesser amount or in a less burdensome form, whichever are the least restrictive alternative and conditions that will reasonably assure the defendant's return to court. The court shall explain its choice of alternative and conditions on the record or in writing.

(STILL ONLY GET ONE SUPERIOR COURT BAIL APPLICATION)

Bail Reform – Post Arraignment "Violation Proceedings"

- Possible Violations
  - Violates Release Conditions
    - CPL § 510.40(3)
  - Failure to Appear
    - CPL § 530.60(2)(b)(i)
  - Violates an Order of Protection
    - CPL §§ 530.12, 530.13 AND CPL § 530.60(2)(b)(ii)
  - Commits New Crime
    - CPL § 530.60(2)(a); CPL § 530.60(2)(b)(iii); CPL § 530.60(2)(b)(iv)

Bail Reform – Post Arraignment "Violation Proceedings" – Violates Release Conditions

- Defendant Violates Condition of Release (CPL § 510.40[3]):
  - Violation of condition of release must be "in an important respect"
  - Defendant must have "notice of facts and circumstances of such alleged non-compliance, reasonable under the circumstances"
  - Defendant AND the prosecution must have the opportunity to present "relevant, admissible evidence, relevant witnesses and to cross-examine witnesses"
  - Court must find defendant violated a condition of release in "an important respect" BY CLEAR AND CONVINCING EVIDENCE
- Court must "consider and may select conditions consistent with the court's obligation to impose the least restrictive condition or conditions that will reasonably assure the defendant's return to court."
- "The court shall explain on the record or in writing the reasons for its determination and for any changes to the conditions imposed."

Bail Reform – Post Arraignment "Violation Proceedings" – Fails to Appear

- Defendant Fails to Appear for Court (CPL § 530.60):
  - Must have "persistently and willfully failed to appear after notice of scheduled appearances"
    - Statute requires next court date notifications to be sent to defendant
    - No definition of "persistent and willfully"
    - New CPL § 510.50 prohibits issuance of a bench warrant for non-appearance (except where defendant is charged with a new crime) for 48 hours unless court determines that failure to appear was persistent and willful after a hearing
  - Defendant AND the prosecution must have the opportunity to present "relevant, admissible evidence, relevant witnesses and to cross-examine witnesses"
  - Court must find defendant "persistently and willfully" failed to appear BY CLEAR AND CONVINCING EVIDENCE
- If court determines "persistent(ly) and willfull(ly)" failed to appear, court may set issue a new securing order which may include setting bail BUT court must select least restrictive condition(s) necessary for a return to court.

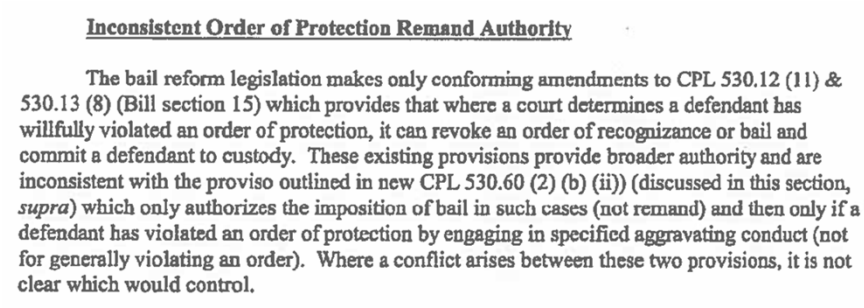
Bail Reform – Post Arraignment "Violation Proceedings" – Violates Order of Protection

- Defendant Violates and Order of Protection (CPL §§ 530.12 and 530.13):
  - If a court determines, after a hearing on competent proof, that the defendant violated an OOP, the court may:
  - "(a) revoke an order of recognizance, release under non-monetary conditions or bail and commit the defendant to custody"; or
  - (b)restore the case to the calendar when there has been an adjournment in contemplation of dismissal and commit the defendant to custody; or
  - (c) revoke a conditional discharge in accordance with section 410.70 of this chapter and impose probation supervision or impose a sentence of imprisonment in accordance with the penal law based on the original conviction; or
  - (d) revoke probation in accordance with section 410.70 of this chapter and impose a sentence of imprisonment in accordance with the penal law based on the original conviction. In addition, if the act which constitutes the violation of the order of protection or temporary order of protection is a crime or a violation the defendant may be charged with and tried for that crime or violation."

Bail Reform – Post Arraignment "Violation Proceedings" – Violates Order of Protection

- Defendant Violates and Order of Protection (CPL § 530.60):
  - This provision is inconsistent with CPL §§ 530.12 and 530.13
  - Violation of an Order of Protection "in the manner prohibited by subdivision (b), (c) or (d) of section 215.51 of the penal law while at liberty" (CPL § 530.60[2][b][ii])
    - Defendant AND the prosecution must have the opportunity to present "relevant, admissible evidence, relevant witnesses and to cross-examine witnesses"
    - Court must find defendant violated the OOP in the manner prohibited by subdivision (b), (c) or (d) of Penal Law § 215.51 BY CLEAR AND CONVINCING EVIDENCE
    - If court determines such violation, court may set issue a new securing order which may include setting bail BUT court must select least restrictive condition(s) necessary for a return to court.

Judge's Bench Book:



Inconsistent Order of Protection Remand Authority

The bail reform legislation makes only conforming amendments to CPL 530.12 (11) & 530.13 (8) (Bill section 15) which provides that where a court determines a defendant has willfully violated an order of protection, it can revoke an order of recognizance or bail and commit a defendant to custody. These existing provisions provide broader authority and are inconsistent with the proviso outlined in new CPL 530.60 (2) (b) (ii)) (discussed in this section, *supra*) which only authorizes the imposition of bail in such cases (not remand) and then only if a defendant has violated an order of protection by engaging in specified aggravating conduct (not for generally violating an order). Where a conflict arises between these two provisions, it is not clear which would control.

Bail Reform – Post Arraignment "Violation Proceedings" – Commits New Crime

- Defendant Charged with Misdemeanor or Violation Commits New Misdemeanor or Violation
  - No additional sanction – securing order imposed at arraignment on new charge
- Defendant Charged with Misdemeanor or Violation Commits a violation of PL §§ 215.15, 215.16 or 215.17 (intimidating a victim or witness) OR PL §§ 215.11, 215.12 or 215.13 (witness tampering) – CPL § 530.60(2)(b)(iii)
  - Defendant AND the prosecution must have the opportunity to present "relevant, admissible evidence, relevant witnesses and to cross-examine witnesses"
  - Court must find defendant violated the OOP in the manner prohibited by subdivision (b), (c) or (d) of Penal Law § 215.51 BY CLEAR AND CONVINCING EVIDENCE
  - If court determines such violation, court may set issue a new securing order which may include setting bail BUT court must select least restrictive condition(s) necessary for a return to court.

Bail Reform – Post Arraignment "Violation Proceedings" – Commits New Crime

- Defendant Charged with Felony commits new Felony that is a Class A OR a Violent Felony Offense OR a violation of PL §§ 215.15, 215.16 or 215.17 (intimidating a victim or witness) – CPL § 530.60(2)(b)(iv)
  - Defendant can be held pending the hearing for 72 hours (with an additional 72 hours on a showing of good cause) (CPL § 530.60[2][e])
  - Court must conduct a hearing
  - Court must determine RESAONABLE CAUSE exists to believe defendant committed new crime
  - If court determines there is reasonable cause to believe defendant committed Class A OR a Violent Felony Offense OR a violation of PL §§ 215.15, 215.16 or 215.17 (intimidating a victim or witness), court may set issue a new securing order which may include REMAND to custody. If court sets BAIL or REMANDS, the new securing order is effective for:
    - (A) For a period not to exceed ninety days exclusive of any periods of adjournment requested by the defendant; or
    - (B) Until the charges contained within the accusatory instrument have been reduced or dismissed such that no count remains which charges the defendant with commission of a felony; or
    - (C) Until reduction or dismissal of the charges contained within the accusatory instrument charging the subsequent offense such that no count remains which charges the defendant with commission of a class A or violent felony offense.

Bail Reform – Post Arraignment "Violation Proceedings" – Commits New Crime

- Defendant Charged with Felony commits new Felony that is NOT a Class A OR a Violent Felony Offense OR a violation of PL §§ 215.15, 215.16 or 215.17 (intimidating a victim or witness) – CPL § 530.60(2)(b)(iv)
  - Defendant AND the prosecution must have the opportunity to present "relevant, admissible evidence, relevant witnesses and to cross-examine witnesses"
  - Court must find defendant committed new crime BY CLEAR AND CONVINCING EVIDENCE
  - If court determines such violation, court may set issue a new securing order which may include setting bail BUT court must select least restrictive condition(s) necessary for a return to court.
- Defendant Charged with Felony commits new Misdemeanor or Violation
  - No additional sanction – securing order imposed at arraignment on new charge

NEW

Article 150 The Appearance Ticket

§ 150.10. Appearance ticket; definition, form and content [Effective January 1, 2020]

1. An appearance ticket is a written notice issued and subscribed by a police officer or other public servant authorized by state law or local law enacted pursuant to the provisions of the municipal home rule law to issue the same, directing a designated person to appear in a designated local criminal court at a designated future time in connection with his alleged commission of a designated offense. A notice conforming to such definition constitutes an appearance ticket regardless of whether it is referred to in some other provision of law as a summons or by any other name or title.
2. When an appearance ticket as defined in subdivision one of this section is issued to a person in conjunction with an offense charged in a simplified information, said appearance ticket shall contain the language, set forth in subdivision four of section 100.25, notifying the defendant of his right to receive a supporting deposition.
3. Before issuing an appearance ticket a police officer or other public servant must inform the arrestee that they may provide their contact information for the purposes of receiving a court notification to remind them of their court appearance date from the court or a certified pretrial services agency. Such contact information may include one or more phone numbers, a residential address or address at which the arrestee receives mail, or an email address. The contact information shall be recorded and be transmitted to the local criminal court as required by section 150.80 of this article.

§ 150.20. Appearance ticket; when and by whom issuable [Effective January 1, 2020]

1.
(a) Whenever a police officer is authorized pursuant to section 140.10 of this title to arrest a person without a warrant for an offense other than a class A, B, C or D felony or a violation of section 130.25, 130.40, 205.10, 205.17, 205.19 or 215.56 of the penal law, he shall, except as set out in paragraph (b) of this subdivision, subject to the provisions of subdivisions three and four of section 150.40 of this title, instead issue to and serve upon such person an appearance ticket.
(b) An officer is not required to issue an appearance ticket if:
(i) the person has one or more outstanding local criminal court or superior court warrants;
(ii) the person has failed to appear in court proceedings in the last two years;
(iii) the person has been given a reasonable opportunity to make their verifiable identity and a method of contact known, and has been unable or unwilling to do so, so that a custodial arrest is necessary to subject the individual to the jurisdiction of the court. For the purposes of this section, an officer may rely on various factors to determine a person's identity, including but not limited to personal knowledge of such person, such person's self-identification, or photographic identification. There is no requirement that a person present photographic identification in order to be issued an appearance ticket in lieu of arrest where the person's identity is otherwise verifiable; however, if offered by such person, an officer shall accept as evidence of identity the following: a valid driver's license or non-driver identification card issued by the commissioner of motor vehicles, the federal government, any United States territory, commonwealth or possession, the District of Columbia, a state government or municipal government within the United States or a provincial government of the dominion of Canada; a valid passport issued by the United States government or any other country; an identification card issued by the armed forces of the United States; a public benefit card, as defined in paragraph (a) of subdivision one of section 158.00 of the penal law;
(iv) the person is charged with a crime between members of the same family or household, as defined in subdivision one of section 530.11 of this chapter;
(v) the person is charged with a crime defined in article 130 of the penal law;

(vi) it reasonably appears the person should be brought before the court for consideration of issuance of an order of protection, pursuant to section 530.13 of this chapter, based on the facts of the crime or offense that the officer has reasonable cause to believe occurred;
(vii) the person is charged with a crime for which the court may suspend or revoke his or her driver license;
(viii) it reasonably appears to the officer, based on the observed behavior of the individual in the present contact with the officer and facts regarding the person's condition that indicates a sign of distress to such a degree that the person would face harm without immediate medical or mental health care, that bringing the person before the court would be in such person's interest in addressing that need; provided, however, that before making the arrest, the officer shall make all reasonable efforts to assist the person in securing appropriate services.
2.
(a) Whenever a police officer has arrested a person without a warrant for an offense other than a class A, B, C or D felony or a violation of section 130.25, 130.40, 205.10, 205.17, 205.19 or 215.56 of the penal law pursuant to section 140.10, or (b) whenever a peace officer, who is not authorized by law to issue an appearance ticket, has arrested a person for an offense other than a class A, B, C or D felony or a violation of section 130.25, 130.40, 205.10, 205.17, 205.19 or 215.56 of the penal law pursuant to section 140.25, and has requested a police officer to issue and serve upon such arrested person an appearance ticket pursuant to subdivision four of section 140.27, or (c) whenever a person has been arrested for an offense other than a class A, B, C or D felony or a violation of section 130.25, 130.40, 205.10, 205.17, 205.19 or 215.56 of the penal law and has been delivered to the custody of an appropriate police officer pursuant to section 140.40, such police officer may, instead of bringing such person before a local criminal court and promptly filing or causing the arresting peace officer or arresting person to file a local criminal court accusatory instrument therewith, issue to and serve upon such person an appearance ticket. The issuance and service of an appearance ticket under such circumstances may be conditioned upon a deposit of pre-arraignment bail, as provided in section 150.30.
3. A public servant other than a police officer, who is specially authorized by state law or local law enacted pursuant to the provisions of the municipal home rule law to issue and serve appearance tickets with respect to designated offenses other than class A, B, C or D felonies or violations of section 130.25, 130.40, 205.10, 205.17, 205.19 or 215.56 of the penal law, may in such cases issue and serve upon a person an appearance ticket when he has reasonable cause to believe that such person has committed a crime, or has committed a petty offense in his presence.

§ 150.30. Appearance ticket; issuance and service thereof after arrest upon posting of pre-arraignment bail [Repealed effective January 1, 2020]

§ 150.40. Appearance ticket; where returnable; how and where served [Effective January 1, 2020]

1. An appearance ticket must be made returnable at a date as soon as possible, but in no event later than twenty days from the date of issuance, or at a later date, with the court's permission due to enrollment in a pre-arraignment diversion program. The appearance ticket shall be made returnable in a local criminal court designated in section 100.55 of this title as one with which an information for the offense in question may be filed.
2. An appearance ticket, other than one issued for a traffic infraction relating to parking, must be served personally, except that an appearance ticket issued for the violation of a local zoning ordinance or local zoning law, or of a building or sanitation code may be served in any manner authorized for service under section three hundred eight of the civil practice law and rules.

3. An appearance ticket may be served anywhere in the county in which the designated offense was allegedly committed or in any adjoining county, and may be served elsewhere as prescribed in subdivision four.
4. A police officer may, for the purpose of serving an appearance ticket upon a person, follow him in continuous close pursuit, commencing either in the county in which the alleged offense was committed or in an adjoining county, in and through any county of the state, and may serve such appearance ticket upon him in any county in which he overtakes him.

§ 150.50. Appearance ticket; filing a local criminal court accusatory instrument; dismissal of insufficient instrument

1. A police officer or other public servant who has issued and served an appearance ticket must, at or before the time such appearance ticket is returnable, file or cause to be filed with the local criminal court in which it is returnable a local criminal court accusatory instrument charging the person named in such appearance ticket with the offense specified therein. Nothing herein contained shall authorize the use of a simplified information when not authorized by law.
2. If such accusatory instrument is not sufficient on its face, as prescribed in section 100.40, and if the court is satisfied that on the basis of the available facts or evidence it would be impossible to draw and file an accusatory instrument which is sufficient on its face, it must dismiss such accusatory instrument.

§ 150.60. Appearance ticket; defendant's failure to appear

If after the service of an appearance ticket and the filing of a local criminal court accusatory instrument charging the offense designated therein, the defendant does not appear in the designated local criminal court at the time such appearance ticket is returnable, the court may issue a summons or a warrant of arrest based upon the local criminal court accusatory instrument filed.

§ 150.70. Appearance ticket; fingerprinting of defendant

Upon the arraignment of a defendant who has not been arrested and whose court attendance has been secured by the issuance and service of an appearance ticket pursuant to subdivision one of section 150.20, the court must, if an offense charged in the accusatory instrument is one specified in subdivision one of section 160.10, direct that the defendant be fingerprinted by the appropriate police officer or agency, and that he appear at an appropriate designated time and place for such purpose.

§ 150.75. Appearance ticket; certain cases

1. The provisions of this section shall apply in any case wherein the defendant is alleged to have committed an offense defined in section 221.05 of the penal law, and no other offense is alleged, notwithstanding any provision of this chapter or any other law to the contrary.
2. Whenever the defendant is arrested without a warrant, an appearance ticket shall promptly be issued and served upon him, as provided in this article. The issuance and service of the appearance ticket may be made conditional upon the posting of pre-arraignment bail as provided in section 150.30 of this chapter but only if the appropriate police officer (a) is unable to ascertain the defendant's identity or residence address; or (b) reasonably suspects that the identification or residence address given by the defendant is not accurate; or (c) reasonably suspects that the defendant does not reside within the state. No warrant of arrest shall be issued unless the defendant has failed to appear in court as required by the terms of the appearance ticket or by the court.

§ 150.80 Court appearance reminders [Effective January 1, 2020]

1. A police officer or other public servant who has issued and served an appearance ticket must, within twenty-four hours of issuance, file or cause to be filed with the local criminal court the appearance ticket and any contact information made available pursuant to subdivision three of section 150.10 of this article.
2. Upon receipt of the appearance ticket and any contact information made available pursuant to subdivision three of section 150.10 of this article, the local criminal court shall issue a court appearance reminder and notify the arrestee of their court appearances by text message, telephone call, electronic mail, or first class mail. The local criminal court may partner with a certified pretrial services agency or agencies in that county to provide such notification and shall include a copy of the appearance ticket.
3. A local criminal court is not required to issue a court appearance reminder if the appearance ticket requires the arrestee's appearance within seventy-two hours of its issuance, or no contact information has been provided.

Article 500 Recognizance, Bail and Commitment

§ 500.10. Recognizance, bail and commitment; definitions of terms [Effective January 1, 2020]

As used in this title, and in this chapter generally, the following terms have the following meanings:
1. "Principal" means a defendant in a criminal action or proceeding, or a person adjudged a material witness therein, or any other person so involved therein that the principal may by law be compelled to appear before a court for the purpose of having such court exercise control over the principal's person to secure the principal's future attendance at the action or proceeding when required, and who in fact either is before the court for such purpose or has been before it and been subjected to such control.
2. "Release on own recognizance." A court releases a principal on the principal's own recognizance when, having acquired control over the principal's person, it permits the principal to be at liberty during the pendency of the criminal action or proceeding involved upon condition that the principal will appear thereat whenever the principal's attendance may be required and will at all times render the principal amenable to the orders and processes of the court.
3. "Fix bail." A court fixes bail when, having acquired control over the person of a principal, it designates a sum of money and stipulates that, if bail in such amount is posted on behalf of the principal and approved, it will permit him to be at liberty during the pendency of the criminal action or proceeding involved.
3-a. "Release under non-monetary conditions." A court releases a principal under non-monetary conditions when, having acquired control over a person, it authorizes the person to be at liberty during the pendency of the criminal action or proceeding involved under conditions ordered by the court, which shall be the least restrictive conditions that will reasonably assure the principal's return to court. Such conditions may include, among other conditions reasonable under the circumstances: that the principal be in contact with a pretrial services agency serving principals in that county; that the principal abide by reasonable, specified restrictions on travel that are reasonably related to an actual risk of flight from the jurisdiction; that the principal refrain from possessing a firearm, destructive device or other dangerous weapon; that, when it is shown pursuant to subdivision four of section 510.45 of this title that no other realistic monetary condition or set of non-monetary conditions will suffice to reasonably assure the person's return to court, the person be placed in reasonable pretrial supervision with a pretrial services agency serving principals in that county; that, when it is shown pursuant to paragraph (a) of subdivision four of section 510.40 of this title that no other realistic non-monetary condition or set of non-monetary conditions will suffice to reasonably assure the principal's return to court, the principal's location be monitored with an approved electronic monitoring device, in accordance with such subdivision four of section 510.40 of this title. A principal shall not be required to pay for any part of the cost of release on non-monetary conditions.
4. "Commit to the custody of the sheriff." A court commits a principal to the custody of the sheriff when, having acquired control over the principal's person, it orders that the principal be confined in the custody of the sheriff during the pendency of the criminal action or proceeding involved.
5. "Securing order" means an order of a court committing a principal to the custody of the sheriff or fixing bail, where authorized, or releasing the principal on the principal's own recognizance or releasing the principal under non-monetary conditions.
6. "Order of recognizance or bail" means a securing order releasing a principal on the principal's own recognizance or under non-monetary conditions or, where authorized, fixing bail.
7. "Application for recognizance or bail" means an application by a principal that the court, instead of committing the principal to or retaining the principal in the custody of the sheriff, either release the principal on the principal's own recognizance, release under non-monetary conditions, or, where authorized, fix bail.
8. "Post bail" means to deposit bail in the amount and form fixed by the court, with the court or with some other authorized public servant or agency.
9. "Bail" means cash bail, a bail bond or money paid with a credit card.
10. "Cash bail" means a sum of money, in the amount designated in an order fixing bail, posted by a principal or by another person on his behalf with a court or other authorized public servant or agency, upon the condition that such money will become forfeit to the people of the state of New York if the principal does not comply with the directions of a court requiring his attendance at the criminal action

or proceeding involved or does not otherwise render himself amenable to the orders and processes of the court.
11. "Obligor" means a person who executes a bail bond on behalf of a principal and thereby assumes the undertaking described therein. The principal himself may be an obligor.
12. "Surety" means an obligor who is not a principal.
13. "Bail bond" means a written undertaking, executed by one or more obligors, that the principal designated in such instrument will, while at liberty as a result of an order fixing bail and of the posting of the bail bond in satisfaction thereof, appear in a designated criminal action or proceeding when his attendance is required and otherwise render himself amenable to the orders and processes of the court, and that in the event that he fails to do so the obligor or obligors will pay to the people of the state of New York a specified sum of money, in the amount designated in the order fixing bail.
14. "Appearance bond" means a bail bond in which the only obligor is the principal.
15. "Surety bond" means a bail bond in which the obligor or obligors consist of one or more sureties or of one or more sureties and the principal.
16. "Insurance company bail bond" means a surety bond, executed in the form prescribed by the superintendent of financial services, in which the surety-obligor is a corporation licensed by the superintendent of financial services to engage in the business of executing bail bonds.
17. "Secured bail bond" means a bail bond secured by either:
(a) Personal property which is not exempt from execution and which, over and above all liabilities and encumbrances, has a value equal to or greater than the total amount of the undertaking; or
(b) Real property having a value of at least twice the total amount of the undertaking. For purposes of this paragraph, value of real property is determined by either:
(i) dividing the last assessed value of such property by the last given equalization rate or in a special assessing unit, as defined in article eighteen of the real property tax law, the appropriate class ratio established pursuant to section twelve hundred two of such law of the assessing municipality wherein the property is situated and by deducting from the resulting figure the total amount of any liens or other encumbrances upon such property; or
(ii) the value of the property as indicated in a certified appraisal report submitted by a state certified general real estate appraiser duly licensed by the department of state as provided in section one hundred sixty-j of the executive law, and by deducting from the appraised value the total amount of any liens or other encumbrances upon such property. A lien report issued by a title insurance company licensed under article sixty-four of the insurance law, that guarantees the correctness of a lien search conducted by it, shall be presumptive proof of liens upon the property.
18. "Partially secured bail bond" means a bail bond secured only by a deposit of a sum of money not exceeding ten percent of the total amount of the undertaking.
19. "Unsecured bail bond" means a bail bond, other than an insurance company bail bond, not secured by any deposit of or lien upon property.
20. "Court" includes, where appropriate, a judge authorized to act as described in a particular statute, though not as a court.
21. "Qualifies for electronic monitoring," for purposes of subdivision four of section 510.40 of this title, means a person charged with a felony, a misdemeanor crime of domestic violence, a misdemeanor defined in article one hundred thirty of the penal law, a crime and the circumstances of paragraph (b) of subdivision two of section 530.60 of this title apply, or any misdemeanor where the defendant stands previously convicted, within the past five years, of a violent felony offense as defined in section 70.02 of the penal law. For the purposes of this subdivision, in calculating such five year period, any period of time during which the defendant was incarcerated for any reason between the time of the commission of any such previous crime and the time of commission of the present crime shall be excluded and such five year period shall be extended by a period or periods equal to the time served under such incarceration.
22. "Misdemeanor crime of domestic violence," for purposes of subdivision twenty-one of this section, means a misdemeanor under the penal law provisions and circumstances described in subdivision one of section 530.11 of this title.

§ 510.10. Securing order; when required; alternatives available; standard to be applied. [Effective January 1, 2020]

1. When a principal, whose future court attendance at a criminal action or proceeding is or may be required, comes under the control of a court, such court shall, in accordance with this title, by a securing order release the principal on the principal's own recognizance, release the principal under non-monetary conditions, or, where authorized, fix bail or commit the principal to the custody of the sheriff. In all such cases, except where another type of securing order is shown to be required by law, the court shall release the principal pending trial on the principal's own recognizance, unless it is demonstrated and the court makes an individualized determination that the principal poses a risk of flight to avoid prosecution. If such a finding is made, the court must select the least restrictive alternative and condition or conditions that will reasonably assure the principal's return to court. The court shall explain its choice of release, release with conditions, bail or remand on the record or in writing.

2. A principal is entitled to representation by counsel under this chapter in preparing an application for release, when a securing order is being considered and when a securing order is being reviewed for modification, revocation or termination. If the principal is financially unable to obtain counsel, counsel shall be assigned to the principal.

3. In cases other than as described in subdivision four of this section the court shall release the principal pending trial on the principal's own recognizance, unless the court finds on the record or in writing that release on the principal's own recognizance will not reasonably assure the principal's return to court. In such instances, the court shall release the principal under non-monetary conditions, selecting the least restrictive alternative and conditions that will reasonably assure the principal's return to court. The court shall explain its choice of alternative and conditions on the record or in writing.

4. Where the principal stands charged with a qualifying offense, the court, unless otherwise prohibited by law, may in its discretion release the principal pending trial on the principal's own recognizance or under non-monetary conditions, fix bail, or, where the defendant is charged with a qualifying offense which is a felony, the court may commit the principal to the custody of the sheriff. A principal stands charged with a qualifying offense for the purposes of this subdivision when he or she stands charged with:

(a) a felony enumerated in section 70.02 of the penal law, other than burglary in the second degree as defined in subdivision two of section 140.25 of the penal law or robbery in the second degree as defined in subdivision one of section 160.10 of the penal law;

(b) a crime involving witness intimidation under section 215.15 of the penal law;

(c) a crime involving witness tampering under section 215.11, 215.12 or 215.13 of the penal law;

(d) a class A felony defined in the penal law, other than in article two hundred twenty of such law with the exception of section 220.77 of such law;

(e) a felony sex offense defined in section 70.80 of the penal law or a crime involving incest as defined in section 255.25, 255.26 or 255.27 of such law, or a misdemeanor defined in article one hundred thirty of such law;

(f) conspiracy in the second degree as defined in section 105.15 of the penal law, where the underlying allegation of such charge is that the defendant conspired to commit a class A felony defined in article one hundred twenty-five of the penal law;

(g) money laundering in support of terrorism in the first degree as defined in section 470.24 of the penal law; money laundering in support of terrorism in the second degree as defined in section 470.23 of the penal law; or a felony crime of terrorism as defined in article four hundred ninety of the penal law, other than the crime defined in section 490.20 of such law;

(h) criminal contempt in the second degree as defined in subdivision three of section 215.50 of the penal law, criminal contempt in the first degree as defined in subdivision (b), (c) or (d) of section 215.51 of the penal law or aggravated criminal contempt as defined in section 215.52 of the penal law, and the underlying allegation of such charge of criminal contempt in the second degree, criminal contempt in the first degree or aggravated criminal contempt is that the defendant violated a duly served order of protection where the protected party is a member of the defendant's same family or household as defined in subdivision one of section 530.11 of this article; or

(i) facilitating a sexual performance by a child with a controlled substance or alcohol as defined in section 263.30 of the penal law, use of a child in a sexual performance as defined in section 263.05 of the penal law or luring a child as defined in subdivision one of section 120.70 of the penal law.
5. Notwithstanding the provisions of subdivisions three and four of this section, with respect to any charge for which bail or remand is not ordered, and for which the court would not or could not otherwise require bail or remand, a defendant may, at any time, request that the court set bail in a nominal amount requested by the defendant in the form specified in paragraph (a) of subdivision one of section 520.10 of this title; if the court is satisfied that the request is voluntary, the court shall set such bail in such amount.
6. When a securing order is revoked or otherwise terminated in the course of an uncompleted action or proceeding but the principal's future court attendance still is or may be required and the principal is still under the control of a court, a new securing order must be issued. When the court revokes or otherwise terminates a securing order which committed the principal to the custody of the sheriff, the court shall give written notification to the sheriff of such revocation or termination of the securing order.

§ 510.15. Commitment of principal under seventeen or eighteen

1. When a principal who is under the age of sixteen is committed to the custody of the sheriff the court must direct that the principal be taken to and lodged in a place certified by the office of children and family services as a juvenile detention facility for the reception of children. When a principal who (a) commencing October first, two thousand eighteen, is sixteen years of age; or (b) commencing October first, two thousand nineteen, is sixteen or seventeen years of age, is committed to the custody of the sheriff, the court must direct that the principal be taken to and lodged in a place certified by the office of children and family services in conjunction with the state commission of correction as a specialized secure juvenile detention facility for older youth. Where such a direction is made the sheriff shall deliver the principal in accordance therewith and such person shall although lodged and cared for in a juvenile detention facility continue to be deemed to be in the custody of the sheriff. No principal under the age specified to whom the provisions of this section may apply shall be detained in any prison, jail, lockup, or other place used for adults convicted of a crime or under arrest and charged with the commission of a crime without the approval of the office of children and family services which shall consult with the commission of correction if the principal is sixteen years of age or older in the case of each principal and the statement of its reasons therefor. The sheriff shall not be liable for any acts done to or by such principal resulting from negligence in the detention of and care for such principal, when the principal is not in the actual custody of the sheriff.
2. Except upon consent of the defendant or for good cause shown, in any case in which a new securing order is issued for a principal previously committed to the custody of the sheriff pursuant to this section, such order shall further direct the sheriff to deliver the principal from a juvenile detention facility to the person or place specified in the order.

§ 510.20. Application for a change in securing order. [Effective January 1, 2020]

1. Upon any occasion when a court has issued a securing order with respect to a principal and the principal is confined in the custody of the sheriff as a result of the securing order or a previously issued securing order, the principal may make an application for recognizance, release under non-monetary conditions or bail.
2.
(a) The principal is entitled to representation by counsel in the making and presentation of such application. If the principal is financially unable to obtain counsel, counsel shall be assigned to the principal.
(b) Upon such application, the principal must be accorded an opportunity to be heard, present evidence and to contend that an order of recognizance, release under non-monetary conditions or, where authorized, bail must or should issue, that the court should release the principal on the

principal's own recognizance or under non-monetary conditions rather than fix bail, and that if bail is authorized and fixed it should be in a suggested amount and form.

§ 510.30. Application for securing order; rules of law and criteria controlling determination. [Effective January 1, 2020]

1.
With respect to any principal, the court in all cases, unless otherwise provided by law, must impose the least restrictive kind and degree of control or restriction that is necessary to secure the principal's return to court when required. In determining that matter, the court must, on the basis of available information, consider and take into account
information about the principal that is relevant to the principal's return to court, including:
(a) The principal's activities and history;
(b) If the principal is a defendant, the charges facing the principal;
(c) The principal's criminal conviction record if any;
(d) The principal's record of previous adjudication as a juvenile delinquent, as retained pursuant to section 354.2 of the family court act, or, of pending cases where fingerprints are retained pursuant to section 306.1 of such act, or a youthful offender, if any;
(e) The principal's previous record with respect to flight to avoid criminal prosecution;
(f) If monetary bail is authorized, according to the restrictions set forth in this title, the principal's individual financial circumstances, and, in cases where bail is authorized, the principal's ability to post bail without posing undue hardship, as well as his or her ability to obtain a secured, unsecured, or partially secured bond;
(g) Where the principal is charged with a crime or crimes against a member or members of the same family or household as that term is defined in subdivision one of section 530.11 of this title, the following factors:
(i) any violation by the principal of an order of protection issued by any court for the protection of a member or members of the same family or household as that term is defined in subdivision one of section 530.11 of this title, whether or not such order of protection is currently in effect; and (ii) the principal's history of use or possession of a firearm; and (h) If the principal is a defendant, in the case of an application for a securing order pending appeal, the merit or lack of merit of the appeal
.
2. Where the principal is a defendant-appellant in a pending appeal from a judgment of conviction, the court must also consider the likelihood of ultimate reversal of the judgment. A determination that the appeal is palpably without merit alone justifies, but does not require, a denial of the application, regardless of any determination made with respect to the factors specified in subdivision one of this section.
3. When bail or recognizance is ordered, the court shall inform the principal, if the principal is a defendant charged with the commission of a felony, that the release is conditional and that the court may revoke the order of release and may be authorized to commit the principal to the custody of the sheriff in accordance with the provisions of subdivision two of section 530.60 of this chapter if the principal commits a subsequent felony while at liberty upon such order.

§ 510.40. Court notification to principal of conditions of release and of alleged violations of conditions of release [Effective January 1, 2020]

1.
Upon ordering that a principal be released on the principal's own recognizance, or released under non-monetary conditions, or, if bail has been fixed, upon the posting of bail, the court must direct the principal to appear in the criminal action or proceeding involved whenever the principal's attendance may be required and to be at all times amenable to the orders and processes of the court. If such principal is in the custody of the sheriff or at liberty upon bail at the time of the order, the court must

direct that the principal be discharged from such custody or, as the case may be, that the principal's bail be exonerated.

2. Upon the issuance of an order fixing bail, where authorized, and upon the posting thereof, the court must examine the bail to determine whether it complies with the order. If it does, the court must, in the absence of some factor or circumstance which in law requires or authorizes disapproval thereof, approve the bail and must issue a certificate of release, authorizing the principal to be at liberty, and, if the principal is in the custody of the sheriff at the time, directing the sheriff to discharge the principal therefrom. If the bail fixed is not posted, or is not approved after being posted, the court must order that the principal be committed to the custody of the sheriff. In the event of any such non-approval, the court shall explain promptly in writing the reasons therefor.

3. Non-monetary conditions of release shall be individualized and established in writing by the court. At future court appearances, the court shall consider a lessening of conditions or modification of conditions to a less burdensome form based on the principal's compliance with such conditions of release. In the event of alleged non-compliance with the conditions of release in an important respect, pursuant to this subdivision, additional conditions may be imposed by the court, on the record or in writing, only after notice of the facts and circumstances of such alleged non-compliance, reasonable under the circumstances, affording the principal and the principal's attorney and the people an opportunity to present relevant, admissible evidence, relevant witnesses and to cross-examine witnesses, and a finding by clear and convincing evidence that the principal violated a condition of release in an important respect. Following such a finding, in determining whether to impose additional conditions for non-compliance, the court shall consider and may select conditions consistent with the court's obligation to impose the least restrictive condition or conditions that will reasonably assure the defendant's return to court. The court shall explain on the record or in writing the reasons for its determination and for any changes to the conditions imposed.

4.

(a) Electronic monitoring of a principal's location may be ordered only if the court finds, after notice, an opportunity to be heard and an individualized determination explained on the record or in writing, that the defendant qualifies for electronic monitoring in accordance with subdivision twenty-one of section 500.10 of this title, and no other realistic non-monetary condition or set of non-monetary conditions will suffice to reasonably assure a principal's return to court.

(b) The specific method of electronic monitoring of the principal's location must be approved by the court. It must be the least restrictive procedure and method that will reasonably assure the principal's return to court, and unobtrusive to the greatest extent practicable.

(c) Electronic monitoring of the location of a principal may be conducted only by a public entity under the supervision and control of a county or municipality or a non-profit entity under contract to the county, municipality or the state. A county or municipality shall be authorized to enter into a contract with another county or municipality in the state to monitor principals under non-monetary conditions of release in its county, but counties, municipalities and the state shall not contract with any private for-profit entity for such purposes.

(d) Electronic monitoring of a principal's location may be for a maximum period of sixty days, and may be renewed for such period, after notice, an opportunity to be heard and a de novo, individualized determination in accordance with this subdivision, which shall be explained on the record or in writing. A defendant subject to electronic location monitoring under this subdivision shall be considered held or confined in custody for purposes of section 180.80 of this chapter and shall be considered committed to the custody of the sheriff for purposes of section 170.70 of the chapter, as applicable.

5. If a principal is released under non-monetary conditions, the court shall, on the record and in an individualized written document provided to the principal, notify the principal, in plain language and a manner sufficiently clear and specific:

(a) of any conditions to which the principal is subject, to serve as a guide for the principal's conduct; and

(b) that the possible consequences for violation of such a condition may include revocation of the securing order and the ordering of a more restrictive securing order.

§ 510.43 Court appearances: additional notifications. [Effective January 1, 2020]

The court or, upon direction of the court, a certified pretrial services agency, shall notify all principals released under non-monetary conditions and on recognizance of all court appearances in advance by text message, telephone call, electronic mail or first class mail. The chief administrator of the courts shall, pursuant to subdivision one of section 10.40 of this chapter, develop a form which shall be offered to the principal at court appearances. On such form, which upon completion shall be retained in the court file, the principal may select one such preferred manner of notice.

§ 510.45 Pretrial services agencies. [Effective January 1, 2020]

1. The office of court administration shall certify and regularly review for recertification one or more pretrial services agencies in each county to monitor principals released under non-monetary conditions. Such office shall maintain a listing on its public website identifying by county each pretrial services agency so certified in the state.
2. Every such agency shall be a public entity under the supervision and control of a county or municipality or a non-profit entity under contract to the county, municipality or the state. A county or municipality shall be authorized to enter into a contract with another county or municipality in the state to monitor principals under non-monetary conditions of release in its county, but counties, municipalities and the state shall not contract with any private for-profit entity for such purposes.
3.
(a) Any questionnaire, instrument or tool used with a principal in the process of considering or determining the principal's possible release on recognizance, release under non-monetary conditions or on bail, or used with a principal in the process of considering or determining a condition or conditions of release or monitoring by a pretrial services agency, shall be promptly made available to the principal and the principal's counsel upon written request. Any such blank form questionnaire, instrument or tool regularly used in the county for such purpose or a related purpose shall be made available to any person promptly upon request.
(b) Any such questionnaire, instrument or tool used to inform determinations on release or conditions of release shall be:
(i) designed and implemented in a way that ensures the results are free from discrimination on the basis of race, national origin, sex, or any other protected class; and
(ii) empirically validated and regularly revalidated, with such validation and revalidation studies and all underlying data, except personal identifying information for any defendant, publicly available upon request.
4. Supervision by a pre-trial services agency may be ordered as a non-monetary condition pursuant to this title only if the court finds, after notice, an opportunity to be heard and an individualized determination explained on the record or in writing, that no other realistic non-monetary condition or set of non-monetary conditions will suffice to reasonably assure the principal's return to court.
5. Each pretrial service agency certified by the office of court administration pursuant to this section shall at the end of each year prepare and file with such office an annual report, which the office shall compile, publish on its website and make available upon request to members of the public. Such reports shall not include any personal identifying information for any individual defendants. Each such report, in addition to other relevant information, shall set forth, disaggregated by each county served:
(a) the number of defendants supervised by the agency;
(b) the length of time (in months) each such person was supervised by the agency prior to acquittal, dismissal, release on recognizance, revocation of release on conditions, and sentencing;
(c) the race, ethnicity, age and sex of each person supervised;
(d) the crimes with which each person supervised was charged;
(e) the number of persons supervised for whom release conditions were modified by the court, describing generally for each person or group of persons the type and nature of the condition or conditions added or removed;
(f) the number of persons supervised for whom release under conditions was revoked by the court, and the basis for such revocations; and

(g) the court disposition in each supervised case, including sentencing information.

§ 510.50. Enforcement of securing order. [Effective January 1, 2020]

1. When the attendance of a principal confined in the custody of the sheriff is required at the criminal action or proceeding at a particular time and place, the court may compel such attendance by directing the sheriff to produce the principal at such time and place. If the principal is at liberty on the principal's own recognizance or non-monetary conditions or on bail, the principal's attendance may be achieved or compelled by various methods, including notification and the issuance of a bench warrant, prescribed by law in provisions governing such matters with respect to the particular kind of action or proceeding involved.
2. Except when the principal is charged with a new crime while at liberty, absent relevant, credible evidence demonstrating that a principal's failure to appear for a scheduled court appearance was willful, the court, prior to issuing a bench warrant for a failure to appear for a scheduled court appearance, shall provide at least forty-eight hours notice to the principal or the principal's counsel that the principal is required to appear, in order to give the principal an opportunity to appear voluntarily.

§ 520.10. Bail and bail bonds; fixing of bail and authorized forms thereof [Effective January 1, 2020]

1. The only authorized forms of bail are the following:
(a) Cash bail.
(b) An insurance company bail bond.
(c) A secured surety bond.
(d) A secured appearance bond.
(e) A partially secured surety bond.
(f) A partially secured appearance bond.
(g) An unsecured surety bond.
(h) An unsecured appearance bond.
(i) Credit card or similar device; provided, however, that notwithstanding any other provision of law, any person posting bail by credit card or similar device also may be required to pay a reasonable administrative fee. The amount of such administrative fee and the time and manner of its payment shall be in accordance with the system established pursuant to subdivision four of section 150.30 of this chapter or paragraph (j) of subdivision two of section two hundred twelve of the judiciary law, as appropriate.
2. The methods of fixing bail are as follows:
(a) A court may designate the amount of the bail without designating the form or forms in which it may be posted. In such case, the bail may be posted in either of the forms specified in paragraphs (g) and (h) of subdivision one;
(b) The court shall direct that the bail be posted in any one of three or more of the forms specified in subdivision one of this section, designated in the alternative, and may designate different amounts varying with the forms, except that one of the forms shall be either an unsecured or partially secured surety bond, as selected by the court.

§ 520.15. Bail and bail bonds; posting of cash bail

1. Where a court has fixed bail pursuant to subdivision two of section 520.10, at any time after the principal has been committed to the custody of the sheriff pending the posting thereof, cash bail in the

amount designated in the order fixing bail may be posted even though such bail was not specified in such order. Cash bail may be deposited with (a) the county treasurer of the county in which the criminal action or proceeding is pending or, in the city of New York with the commissioner of finance, or (b) the court which issued such order, or (c) the sheriff in whose custody the principal has been committed. Upon proof of the deposit of the designated amount the principal must be forthwith released from custody.

2. The person posting cash bail must complete and sign a form which states (a) the name, residential address and occupation of each person posting cash bail; and (b) the title of the criminal action or proceeding involved; and (c) the offense or offenses which are the subjects of the action or proceeding involved, and the status of such action or proceeding; and (d) the name of the principal and the nature of his involvement in or connection with such action or proceeding; and (e) that the person or persons posting cash bail undertake that the principal will appear in such action or proceeding whenever required and will at all times render himself amendable to the orders and processes of the court; and (f) the date of the principal's next appearance in court; and (g) an acknowledgment that the cash bail will be forfeited if the principal does not comply with any requirement or order of process to appear in court; and (h) the amount of money posted as cash bail.

3. Money posted as cash bail is and shall remain the property of the person posting it unless forfeited to the court.

§ 520.20. Bail and bail bonds; posting of bail bond and justifying affidavits; form and contents thereof

1.

(a) Except as provided in paragraph (b) when a bail bond is to be posted in satisfaction of bail, the obligor or obligors must submit to the court a bail bond in the amount fixed, executed in the form prescribed in subdivision two, accompanied by a justifying affidavit of each obligor, executed in the form prescribed in subdivision four.

(b) When a bail bond is to be posted in satisfaction of bail fixed for a defendant charged by information or simplified information or prosecutor's information with one or more traffic infractions and no other offense, the defendant may submit to the court, with the consent of the court, an insurance company bail bond covering the amount fixed, executed in a form prescribed by the superintendent of financial services.

2. Except as provided in paragraph (b) of subdivision one, a bail bond must be subscribed and sworn to by each obligor and must state:

(a) The name, residential address and occupation of each obligor; and

(b) The title of the criminal action or proceeding involved; and

(c) The offense or offenses which are the subjects of the action or proceeding involved, and the status of such action or proceeding; and

(d) The name of the principal and the nature of his involvement in or connection with such action or proceeding; and

(e) That the obligor, or the obligors jointly and severally, undertake that the principal will appear in such action or proceeding whenever required and will at all times render himself amenable to the orders and processes of the court; and

(f) That in the event that the principal does not comply with any such requirement, order or process, such obligor or obligors will pay to the people of the state of New York a designated sum of money fixed by the court.

3. A bail bond posted in the course of a criminal action is effective and binding upon the obligor or obligors until the imposition of sentence or other termination of the action, regardless of whether the action is dismissed in the local criminal court after an indictment on the same charge or charges by a superior court, and regardless of whether such action is partially conducted or prosecuted in a court or courts other than the one in which the action was pending when such bond was posted, unless prior to such termination such order of bail is vacated or revoked or the principal is surrendered, or unless the terms of such bond expressly limit its effectiveness to a lesser period; provided, however, the effectiveness of such bond may only be limited to a lesser period if the obligor or obligors submit notice of the limitation to the court and the district attorney not less than fourteen days before effectiveness ends.

4. A justifying affidavit must be subscribed and sworn to by the obligor-affiant and must state his name, residential address and occupation. Depending upon the kind of bail bond which it justifies, such affidavit must contain further statements as follows:
(a) An affidavit justifying an insurance company bail bond must state:
(i) The amount of the premium paid to the obligor; and
(ii) All security and all promises of indemnity received by the surety-obligor in connection with its execution of the bond, and the name, occupation and residential and business addresses of every person who has given any such indemnifying security or promise.
An action by the surety-obligor against an indemnitor, seeking retention of security deposited by the latter with the former or enforcement of any indemnity agreement of a kind described in this sub-paragraph, will not lie except with respect to agreements and security specified in the justifying affidavit.
(b) An affidavit justifying a secured bail bond must state every item of personal property deposited and of real property pledged as security, the value of each such item, and the nature and amount of every lien or encumbrance thereon.
(c) An affidavit justifying a partially secured bail bond or an unsecured bail bond must state the place and nature of the obligor-affiant's business or employment, the length of time he has been engaged therein, his income during the past year, and his average income over the past five years.

§ 520.30. Bail and bail bonds; examination as to sufficiency

1. Following the posting of a bail bond and the justifying affidavit or affidavits or the posting of cash bail, the court may conduct an inquiry for the purpose of determining the reliability of the obligors or person posting cash bail, the value and sufficiency of any security offered, and whether any feature of the undertaking contravenes public policy; provided that before undertaking an inquiry, of a person posting cash bail the court, after application of the district attorney, must have had reasonable cause to believe that the person posting cash bail is not in rightful possession of money posted as cash bail or that such money constitutes the fruits of criminal or unlawful conduct. The court may inquire into any matter stated or required to be stated in the justifying affidavits, and may also inquire into other matters appropriate to the determination, which include but are not limited to the following:
(a) The background, character and reputation of any obligor, and, in the case of an insurance company bail bond, the qualifications of the surety-obligor and its executing agent; and
(b) The source of any money or property deposited by any obligor as security, and whether any such money or property constitutes the fruits of criminal or unlawful conduct; and
(c) The source of any money or property delivered or agreed to be delivered to any obligor as indemnification on the bond, and whether any such money or property constitutes the fruits of criminal or unlawful conduct; and
(d) The background, character and reputation of any person who has indemnified or agreed to indemnify an obligor upon the bond; and whether any such indemnitor, not being licensed by the superintendent of financial services in accordance with the insurance law, has within a period of one month prior to such indemnity transaction given indemnification or security for like purpose in more than two cases not arising out of the same transaction; and
(e) The source of any money posted as cash bail, and whether any such money constitutes the fruits of criminal or unlawful conduct; and
(f) The background, character and reputation of the person posting cash bail.
2. Upon such inquiry, the court may examine, under oath or otherwise, the obligors and any other persons who may possess material information. The district attorney has a right to attend such inquiry, to call witnesses and to examine any witness in the proceeding. The court may, upon application of the district attorney, adjourn the proceeding for a reasonable period to allow him to investigate the matter.
3. At the conclusion of the inquiry, the court must issue an order either approving or disapproving the bail.

§ 520.40. Transfer of cash bail from local criminal court to superior court

When a local criminal court acquires control over the person of an accused and such court designates the amount of bail that the accused may post and such bail is posted in cash and subsequently the accused is arraigned in superior court where bail is fixed by such court, the accused may request that the cash bail posted in the local criminal court be transferred to the superior court. Notice of such request must be given to the person who posted cash bail. Upon such a request the superior court shall make an order directing the local criminal court to transfer the cash bail that it holds to the superior court for use in the superior court. If there is an overage, the superior court shall order it be paid over to the person who posted the cash bail in the local criminal court. If there is a deficiency, the accused shall post additional bail as directed by the superior court.

§ 530.10. Order of recognizance release under non-monetary conditions or bail; in general. [Effective January 1, 2020]

Under circumstances prescribed in this article, a court, upon application of a defendant charged with or convicted of an offense, is required to issue a securing order for such defendant during the pendency of either:
1. A criminal action based upon such charge; or
2. An appeal taken by the defendant from a judgment of conviction or a sentence or from an order of an intermediate appellate court affirming or modifying a judgment of conviction or a sentence.

§ 530.11. Procedures for family offense matters [Effective January 1, 2020]

1. The family court and the criminal courts shall have concurrent jurisdiction over any proceeding concerning acts which would constitute disorderly conduct, harassment in the first degree, harassment in the second degree, aggravated harassment in the second degree, sexual misconduct, forcible touching, sexual abuse in the third degree, sexual abuse in the second degree as set forth in subdivision one of section 130.60 of the penal law, stalking in the first degree, stalking in the second degree, stalking in the third degree, stalking in the fourth degree, criminal mischief, menacing in the second degree, menacing in the third degree, reckless endangerment, strangulation in the first degree, strangulation in the second degree, criminal obstruction of breathing or blood circulation, assault in the second degree, assault in the third degree, an attempted assault, identity theft in the first degree, identity theft in the second degree, identity theft in the third degree, grand larceny in the fourth degree, grand larceny in the third degree, coercion in the second degree or coercion in the third degree as set forth in subdivisions one, two and three of section 135.60 of the penal law between spouses or former spouses, or between parent and child or between members of the same family or household except that if the respondent would not be criminally responsible by reason of age pursuant to section 30.00 of the penal law, then the family court shall have exclusive jurisdiction over such proceeding. Notwithstanding a complainant's election to proceed in family court, the criminal court shall not be divested of jurisdiction to hear a family offense proceeding pursuant to this section. For purposes of this section, "disorderly conduct" includes disorderly conduct not in a public place. For purposes of this section, "members of the same family or household" with respect to a proceeding in the criminal courts shall mean the following:
(a) persons related by consanguinity or affinity;
(b) persons legally married to one another;
(c) persons formerly married to one another regardless of whether they still reside in the same household;

(d) persons who have a child in common, regardless of whether such persons have been married or have lived together at any time; and
(e) persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time. Factors the court may consider in determining whether a relationship is an "intimate relationship" include but are not limited to: the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship. Neither a casual acquaintance nor ordinary fraternization between two individuals in business or social contexts shall be deemed to constitute an "intimate relationship".
2. Information to petitioner or complainant. The chief administrator of the courts shall designate the appropriate probation officers, warrant officers, sheriffs, police officers, district attorneys or any other law enforcement officials, to inform any petitioner or complainant bringing a proceeding under this section before such proceeding is commenced, of the procedures available for the institution of family offense proceedings, including but not limited to the following:
(a) That there is concurrent jurisdiction with respect to family offenses in both family court and the criminal courts;
(b) That a family court proceeding is a civil proceeding and is for the purpose of attempting to stop the violence, end family disruption and obtain protection. That referrals for counseling, or counseling services, are available through probation for this purpose;
(c) That a proceeding in the criminal courts is for the purpose of prosecution of the offender and can result in a criminal conviction of the offender;
(d) That a proceeding or action subject to the provisions of this section is initiated at the time of the filing of an accusatory instrument or family court petition, not at the time of arrest, or request for arrest, if any;
(e) [Repealed]
(f) That an arrest may precede the commencement of a family court or a criminal court proceeding, but an arrest is not a requirement for commencing either proceeding.
(g) [Repealed]
(h) At such time as the complainant first appears before the court on a complaint or information, the court shall advise the complainant that the complainant may: continue with the proceeding in criminal court; or have the allegations contained therein heard in a family court proceeding; or proceed concurrently in both criminal and family court. Notwithstanding a complainant's election to proceed in family court, the criminal court shall not be divested of jurisdiction to hear a family offense proceeding pursuant to this section;
(i) Nothing herein shall be deemed to limit or restrict complainant's rights to proceed directly and without court referral in either a criminal or family court, or both, as provided for in section one hundred fifteen of the family court act and section 100.07 of this chapter;
(j) [Repealed]
2-a. Upon the filing of an accusatory instrument charging a crime or violation described in subdivision one of this section between members of the same family or household, as such terms are defined in this section, or as soon as the complainant first appears before the court, whichever is sooner, the court shall advise the complainant of the right to proceed in both the criminal and family courts, pursuant to section 100.07 of this chapter.
3. Official responsibility. No official or other person designated pursuant to subdivision two of this section shall discourage or prevent any person who wishes to file a petition or sign a complaint from having access to any court for that purpose.
4. When a person is arrested for an alleged family offense or an alleged violation of an order of protection or temporary order of protection or arrested pursuant to a warrant issued by the supreme or family court, and the supreme or family court, as applicable, is not in session, such person shall be brought before a local criminal court in the county of arrest or in the county in which such warrant is returnable pursuant to article one hundred twenty of this chapter. Such local criminal court may issue any order authorized under subdivision eleven of section 530.12 of this article, section one hundred fifty-four-d or one hundred fifty-five of the family court act or subdivision three-b of section two hundred forty or subdivision two-a of section two hundred fifty-two of the domestic relations law, in addition to discharging other arraignment responsibilities as set forth in this chapter. In making such order, the local criminal court shall consider de novo the recommendation and securing order, if any, made by the supreme or family court as indicated on the warrant or certificate of warrant. Unless the petitioner or complainant requests otherwise, the court, in addition to scheduling further criminal proceedings, if any, regarding such alleged family offense or violation allegation, shall make such

matter returnable in the supreme or family court, as applicable, on the next day such court is in session.

5. Filing and enforcement of out-of-state orders of protection. A valid order of protection or temporary order of protection issued by a court of competent jurisdiction in another state, territorial or tribal jurisdiction shall be accorded full faith and credit and enforced as if it were issued by a court within the state for as long as the order remains in effect in the issuing jurisdiction in accordance with sections two thousand two hundred sixty-five and two thousand two hundred sixty-six of title eighteen of the United States Code.

(a) An order issued by a court of competent jurisdiction in another state, territorial or tribal jurisdiction shall be deemed valid if:

(i) the issuing court had personal jurisdiction over the parties and over the subject matter under the law of the issuing jurisdiction;

(ii) the person against whom the order was issued had reasonable notice and an opportunity to be heard prior to issuance of the order; provided, however, that if the order was a temporary order of protection issued in the absence of such person, that notice had been given and that an opportunity to be heard had been provided within a reasonable period of time after the issuance of the order; and

(iii) in the case of orders of protection or temporary orders of protection issued against both a petitioner, plaintiff or complainant and respondent or defendant, the order or portion thereof sought to be enforced was supported by: (A) a pleading requesting such order, including, but not limited to, a petition, cross-petition or counterclaim; and (B) a judicial finding that the requesting party is entitled to the issuance of the order which may result from a judicial finding of fact, judicial acceptance of an admission by the party against whom the order was issued or judicial finding that the party against whom the order was issued had given knowing, intelligent and voluntary consent to its issuance.

(b) Notwithstanding the provisions of article fifty-four of the civil practice law and rules, an order of protection or temporary order of protection issued by a court of competent jurisdiction in another state, territorial or tribal jurisdiction, accompanied by a sworn affidavit that upon information and belief such order is in effect as written and has not been vacated or modified, may be filed without fee with the clerk of the court, who shall transmit information regarding such order to the statewide registry of orders of protection and warrants established pursuant to section two hundred twenty-one-a of the executive law; provided, however, that such filing and registry entry shall not be required for enforcement of the order.

6. Notice. Every police officer, peace officer or district attorney investigating a family offense under this article shall advise the victim of the availability of a shelter or other services in the community, and shall immediately give the victim written notice of the legal rights and remedies available to a victim of a family offense under the relevant provisions of the criminal procedure law, the family court act and the domestic relations law. Such notice shall be prepared in Spanish and English and if necessary, shall be delivered orally, and shall include but not be limited to the following statement:

If you are the victim of domestic violence, you may request that the officer assist in providing for your safety and that of your children, including providing information on how to obtain a temporary order of protection. You may also request that the officer assist you in obtaining your essential personal effects and locating and taking you, or assist in making arrangements to take you, and your children to a safe place within such officer's jurisdiction, including but not limited to a domestic violence program, a family member's or a friend's residence, or a similar place of safety. When the officer's jurisdiction is more than a single county, you may ask the officer to take you or make arrangements to take you and your children to a place of safety in the county where the incident occurred. If you or your children are in need of medical treatment, you have the right to request that the officer assist you in obtaining such medical treatment. You may request a copy of any incident reports at no cost from the law enforcement agency. You have the right to seek legal counsel of your own choosing and if you proceed in family court and if it is determined that you cannot afford an attorney, one must be appointed to represent you without cost to you.

You may ask the district attorney or a law enforcement officer to file a criminal complaint. You also have the right to file a petition in the family court when a family offense has been committed against you. You have the right to have your petition and request for an order of protection filed on the same day you appear in court, and such request must be heard that same day or the next day court is in session. Either court may issue an order of protection from conduct constituting a family offense which could include, among other provisions, an order for the respondent or defendant to stay away from you and your children. The family court may also order the payment of temporary child support and award temporary custody of your children. If the family court is not in session, you may seek immediate assistance from the criminal court in obtaining an order of protection.

The forms you need to obtain an order of protection are available from the family court and the local criminal court (the addresses and telephone numbers shall be listed). The resources available in this community for information relating to domestic violence, treatment of injuries, and places of safety and shelters can be accessed by calling the following 800 numbers (the statewide English and Spanish language 800 numbers shall be listed and space shall be provided for local domestic violence hotline telephone numbers).
Filing a criminal complaint or a family court petition containing allegations that are knowingly false is a crime.
The division of criminal justice services in consultation with the state office for the prevention of domestic violence shall prepare the form of such written notice consistent with provisions of this section and distribute copies thereof to the appropriate law enforcement officials pursuant to subdivision nine of section eight hundred forty-one of the executive law.
Additionally, copies of such notice shall be provided to the chief administrator of the courts to be distributed to victims of family offenses through the criminal court at such time as such persons first come before the court and to the state department of health for distribution to all hospitals defined under article twenty-eight of the public health law. No cause of action for damages shall arise in favor of any person by reason of any failure to comply with the provisions of this subdivision except upon a showing of gross negligence or willful misconduct.
7. Rules of court regarding concurrent jurisdiction. The chief administrator of the courts, pursuant to paragraph (e) of subdivision two of section two hundred twelve of the judiciary law, shall promulgate rules to facilitate record sharing and other communication between the criminal and family courts, subject to applicable provisions of this chapter and the family court act pertaining to the confidentiality, expungement and sealing of records, when such courts exercise concurrent jurisdiction over family offense proceedings.

§ 530.12. Protection for victims of family offenses. [Effective January 1, 2020]

1. When a criminal action is pending involving a complaint charging any crime or violation between spouses, former spouses, parent and child, or between members of the same family or household, as members of the same family or household are defined in subdivision one of section 530.11 of this article, the court, in addition to any other powers conferred upon it by this chapter may issue a temporary order of protection in conjunction with any securing order committing the defendant to the custody of the sheriff or as a condition of any order of recognizance or bail or an adjournment in contemplation of dismissal.
(a) In addition to any other conditions, such an order may require the defendant:
(1) to stay away from the home, school, business or place of employment of the family or household member or of any designated witness, provided that the court shall make a determination, and shall state such determination in a written decision or on the record, whether to impose a condition pursuant to this paragraph, provided further, however, that failure to make such a determination shall not affect the validity of such temporary order of protection. In making such determination, the court shall consider, but shall not be limited to consideration of, whether the temporary order of protection is likely to achieve its purpose in the absence of such a condition, conduct subject to prior orders of protection, prior incidents of abuse, past or present injury, threats, drug or alcohol abuse, and access to weapons;
(2) to permit a parent, or a person entitled to visitation by a court order or a separation agreement, to visit the child at stated periods;
(3) to refrain from committing a family offense, as defined in subdivision one of section 530.11 of this article, or any criminal offense against the child or against the family or household member or against any person to whom custody of the child is awarded, or from harassing, intimidating or threatening such persons;
(4) to refrain from acts of commission or omission that create an unreasonable risk to the health, safety and welfare of a child, family or household member's life or health;
(5) to permit a designated party to enter the residence during a specified period of time in order to remove personal belongings not in issue in this proceeding or in any other proceeding or action under this chapter, the family court act or the domestic relations law;

(6)
(A) to refrain from intentionally injuring or killing, without justification, any companion animal the defendant knows to be owned, possessed, leased, kept or held by the victim or a minor child residing in the household.
(B) "Companion animal", as used in this section, shall have the same meaning as in subdivision five of section three hundred fifty of the agriculture and markets law;
(7)
(A) to promptly return specified identification documents to the protected party, in whose favor the order of protection or temporary order of protection is issued; provided, however, that such order may: (i) include any appropriate provision designed to ensure that any such document is available for use as evidence in this proceeding, and available if necessary for legitimate use by the party against whom such order is issued; and (ii) specify the manner in which such return shall be accomplished.
(B) For purposes of this subparagraph, "identification document" shall mean any of the following: (i) exclusively in the name of the protected party: birth certificate, passport, social security card, health insurance or other benefits card, a card or document used to access bank, credit or other financial accounts or records, tax returns, any driver's license, and immigration documents including but not limited to a United States permanent resident card and employment authorization document; and (ii) upon motion and after notice and an opportunity to be heard, any of the following, including those that may reflect joint use or ownership, that the court determines are necessary and are appropriately transferred to the protected party: any card or document used to access bank, credit or other financial accounts or records, tax returns, and any other identifying cards and documents.
(b) The court may issue an order, pursuant to section two hundred twenty-seven-c of the real property law, authorizing the party for whose benefit any order of protection has been issued to terminate a lease or rental agreement pursuant to section two hundred twenty-seven-c of the real property law.
2. Notwithstanding any other provision of law, a temporary order of protection issued or continued by a family court pursuant to section eight hundred thirteen of the family court act shall continue in effect, absent action by the appropriate criminal court pursuant to subdivision three of this section, until the defendant is arraigned upon an accusatory instrument filed pursuant to section eight hundred thirteen of the family court act in such criminal court.
3. The court may issue a temporary order of protection ex parte upon the filing of an accusatory instrument and for good cause shown. When a family court order of protection is modified, the criminal court shall forward a copy of such modified order to the family court issuing the original order of protection; provided, however, that where a copy of the modified order is transmitted to the family court by facsimile or other electronic means, the original copy of such modified order and accompanying affidavit shall be forwarded immediately thereafter.
3-a. Emergency powers when family court not in session; issuance of temporary orders of protection. Upon the request of the petitioner, a local criminal court may on an ex parte basis issue a temporary order of protection pending a hearing in family court, provided that a sworn affidavit, verified in accordance with subdivision one of section 100.30 of this chapter, is submitted: (i) alleging that the family court is not in session; (ii) alleging that a family offense, as defined in subdivision one of section eight hundred twelve of the family court act and subdivision one of section 530.11 of this article, has been committed; (iii) alleging that a family offense petition has been filed or will be filed in family court on the next day the court is in session; and (iv) showing good cause. Upon appearance in a local criminal court, the petitioner shall be advised that he or she may continue with the proceeding either in family court or upon the filing of a local criminal court accusatory instrument in criminal court or both. Upon issuance of a temporary order of protection where petitioner requests that it be returnable in family court, the local criminal court shall transfer the matter forthwith to the family court and shall make the matter returnable in family court on the next day the family court is in session, or as soon thereafter as practicable, but in no event more than four calendar days after issuance of the order. The local criminal court, upon issuing a temporary order of protection returnable in family court pursuant to this subdivision, shall immediately forward, in a manner designed to insure arrival before the return date set in the order, a copy of the temporary order of protection and sworn affidavit to the family court and shall provide a copy of such temporary order of protection to the petitioner; provided, however, that where a copy of the temporary order of protection and affidavit are transmitted to the family court by facsimile or other electronic means, the original order and affidavit shall be forwarded to the family court immediately thereafter. Any temporary order of protection issued pursuant to this subdivision shall be issued to the respondent, and copies shall be filed as required in subdivisions six and eight of this section for orders of protection issued pursuant to this section. Any temporary order of protection issued pursuant to this subdivision shall plainly state

the date that such order expires which, in the case of an order returnable in family court, shall be not more than four calendar days after its issuance, unless sooner vacated or modified by the family court. A petitioner requesting a temporary order of protection returnable in family court pursuant to this subdivision in a case in which a family court petition has not been filed shall be informed that such temporary order of protection shall expire as provided for herein, unless the petitioner files a petition pursuant to subdivision one of section eight hundred twenty-one of the family court act on or before the return date in family court and the family court issues a temporary order of protection or order of protection as authorized under article eight of the family court act. Nothing in this subdivision shall limit or restrict the petitioner's right to proceed directly and without court referral in either a criminal or family court, or both, as provided for in section one hundred fifteen of the family court act and section 100.07 of this chapter.

3-b. Emergency powers when family court not in session; modifications of orders of protection or temporary orders of protection. Upon the request of the petitioner, a local criminal court may on an ex parte basis modify a temporary order of protection or order of protection which has been issued under article four, five, six or eight of the family court act pending a hearing in family court, provided that a sworn affidavit verified in accordance with subdivision one of section 100.30 of this chapter is submitted: (i) alleging that the family court is not in session and (ii) showing good cause, including a showing that the existing order is insufficient for the purposes of protection of the petitioner, the petitioner's child or children or other members of the petitioner's family or household. The local criminal court shall make the matter regarding the modification of the order returnable in family court on the next day the family court is in session, or as soon thereafter as practicable, but in no event more than four calendar days after issuance of the modified order. The court shall immediately forward a copy of the modified order, if any, and sworn affidavit to the family court and shall provide a copy of such modified order, if any, and affidavit to the petitioner; provided, however, that where copies of such modified order and affidavit are transmitted to the family court by facsimile or other electronic means, the original copies of such modified order and affidavit shall be forwarded to the family court immediately thereafter. Any modified temporary order of protection or order of protection issued pursuant to this subdivision shall be issued to the respondent and copies shall be filed as required in subdivisions six and eight of this section for orders of protection issued pursuant to this section.

4. The court may issue or extend a temporary order of protection ex parte or on notice simultaneously with the issuance of a warrant for the arrest of defendant. Such temporary order of protection may continue in effect until the day the defendant subsequently appears in court pursuant to such warrant or voluntarily or otherwise.

5. [Eff until Sept 1, 2020] Upon sentencing on a conviction for any crime or violation between spouses, between a parent and child, or between members of the same family or household as defined in subdivision one of section 530.11 of this article, the court may in addition to any other disposition, including a conditional discharge or youthful offender adjudication, enter an order of protection. Where a temporary order of protection was issued, the court shall state on the record the reasons for issuing or not issuing an order of protection. The duration of such an order shall be fixed by the court and: (A) in the case of a felony conviction, shall not exceed the greater of: (i) eight years from the date of such sentencing, or (ii) eight years from the date of the expiration of the maximum term of an indeterminate or the term of a determinate sentence of imprisonment actually imposed; or (B) in the case of a conviction for a class A misdemeanor, shall not exceed the greater of: (i) five years from the date of such sentencing, or (ii) five years from the date of the expiration of the maximum term of a definite or intermittent term actually imposed; or (C) in the case of a conviction for any other offense, shall not exceed the greater of: (i) two years from the date of sentencing, or (ii) two years from the date of the expiration of the maximum term of a definite or intermittent term actually imposed. For purposes of determining the duration of an order of protection entered pursuant to this subdivision, a conviction shall be deemed to include a conviction that has been replaced by a youthful offender adjudication. In addition to any other conditions, such an order may require the defendant:

5. [Eff Sept 1, 2020] Upon sentencing on a conviction for any crime or violation between spouses, between a parent and child, or between members of the same family or household as defined in subdivision one of section 530.11 of this article, the court may in addition to any other disposition, including a conditional discharge or youthful offender adjudication, enter an order of protection. Where a temporary order of protection was issued, the court shall state on the record the reasons for issuing or not issuing an order of protection. The duration of such an order shall be fixed by the court and: (A) in the case of a felony conviction, shall not exceed the greater of: (i) eight years from the date of such sentencing, except where the sentence is or includes a sentence of probation on a conviction for a

felony sexual assault, as provided in subparagraph (iii) of paragraph (a) of subdivision three of section 65.00 of the penal law, in which case, ten years from the date of such sentencing, or (ii) eight years from the date of the expiration of the maximum term of an indeterminate or the term of a determinate sentence of imprisonment actually imposed; or (B) in the case of a conviction for a class A misdemeanor, shall not exceed the greater of: (i) five years from the date of such sentencing, except where the sentence is or includes a sentence of probation on a conviction for a misdemeanor sexual assault, as provided in subparagraph (ii) of paragraph (b) of subdivision three of section 65.00 of the penal law, in which case, six years from the date of such sentencing, or (ii) five years from the date of the expiration of the maximum term of a definite or intermittent term actually imposed; or (C) in the case of a conviction for any other offense, shall not exceed the greater of: (i) two years from the date of sentencing, or (ii) two years from the date of the expiration of the maximum term of a definite or intermittent term actually imposed. For purposes of determining the duration of an order of protection entered pursuant to this subdivision, a conviction shall be deemed to include a conviction that has been replaced by a youthful offender adjudication. In addition to any other conditions, such an order may require the defendant:

(a) to stay away from the home, school, business or place of employment of the family or household member, the other spouse or the child, or of any witness designated by the court, provided that the court shall make a determination, and shall state such determination in a written decision or on the record, whether to impose a condition pursuant to this paragraph, provided further, however, that failure to make such a determination shall not affect the validity of such order of protection. In making such determination, the court shall consider, but shall not be limited to consideration of, whether the order of protection is likely to achieve its purpose in the absence of such a condition, conduct subject to prior orders of protection, prior incidents of abuse, extent of past or present injury, threats, drug or alcohol abuse, and access to weapons;

(b) to permit a parent, or a person entitled to visitation by a court order or a separation agreement, to visit the child at stated periods;

(c) to refrain from committing a family offense, as defined in subdivision one of section 530.11 of this article, or any criminal offense against the child or against the family or household member or against any person to whom custody of the child is awarded, or from harassing, intimidating or threatening such persons; or

(d) to refrain from acts of commission or omission that create an unreasonable risk to the health, safety and welfare of a child, family or household member's life or health;

(e) to permit a designated party to enter the residence during a specified period of time in order to remove personal belongings not in issue in this proceeding or in any other proceeding or action under this chapter, the family court act or the domestic relations law.

6. An order of protection or a temporary order of protection issued pursuant to subdivision one, two, three, four or five of this section shall bear in a conspicuous manner the term "order of protection" or "temporary order of protection" as the case may be and a copy shall be filed by the clerk of the court with the sheriff's office in the county in which the complainant resides, or, if the complainant resides within a city, with the police department of such city. The order of protection or temporary order of protection shall also contain the following notice: "This order of protection will remain in effect even if the protected party has, or consents to have, contact or communication with the party against whom the order is issued. This order of protection can only be modified or terminated by the court. The protected party cannot be held to violate this order nor be arrested for violating this order.". The absence of such language shall not affect the validity of such order. A copy of such order of protection or temporary order of protection may from time to time be filed by the clerk of the court with any other police department or sheriff's office having jurisdiction of the residence, work place, and school of anyone intended to be protected by such order. A copy of the order may also be filed by the complainant at the appropriate police department or sheriff's office having jurisdiction. Any subsequent amendment or revocation of such order shall be filed in the same manner as herein provided.

Such order of protection shall plainly state the date that such order expires.

6-a. The court shall inquire as to the existence of any other orders of protection between the defendant and the person or persons for whom the order of protection is sought.

7. A family offense subject to the provisions of this section which occurs subsequent to the issuance of an order of protection under this chapter shall be deemed a new offense for which the complainant may seek to file a new accusatory instrument and may file a family court petition under article eight of the family court act as provided for in section 100.07 of this chapter.

8. In any proceeding in which an order of protection or temporary order of protection or a warrant has been issued under this section, the clerk of the court shall issue to the complainant and defendant and defense counsel and to any other person affected by the order a copy of the order of protection or temporary order of protection and ensure that a copy of the order of protection or temporary order of protection be transmitted to the local correctional facility where the individual is or will be detained, the state or local correctional facility where the individual is or will be imprisoned, and the supervising probation department or department of corrections and community supervision where the individual is under probation or parole supervision. The presentation of a copy of such order or a warrant to any peace officer acting pursuant to his or her special duties or police officer shall constitute authority for him or her to arrest a person who has violated the terms of such order and bring such person before the court and, otherwise, so far as lies within his or her power, to aid in securing the protection such order was intended to afford. The protected party in whose favor the order of protection or temporary order of protection is issued may not be held to violate an order issued in his or her favor nor may such protected party be arrested for violating such order.
9. If no warrant, order or temporary order of protection has been issued by the court, and an act alleged to be a family offense as defined in section 530.11 of this chapter is the basis of the arrest, the magistrate shall permit the complainant to file a petition, information or accusatory instrument and for reasonable cause shown, shall thereupon hold such respondent or defendant, admit to, fix or accept bail, or parole him or her for hearing before the family court or appropriate criminal court as the complainant shall choose in accordance with the provisions of section 530.11 of this chapter.
10. Punishment for contempt based on a violation of an order of protection or temporary order of protection shall not affect the original criminal action, nor reduce or diminish a sentence upon conviction for the original crime or violation alleged therein or for a lesser included offense thereof.
11. If a defendant is brought before the court for failure to obey any lawful order issued under this section, or an order of protection issued by a court of competent jurisdiction in another state, territorial or tribal jurisdiction, and if, after hearing, the court is satisfied by competent proof that the defendant has willfully failed to obey any such order, the court may:
(a) revoke an order of recognizance or release under non-monetary conditions or revoke an order of bail or order forfeiture of such bail and commit the defendant to custody; or
(b) restore the case to the calendar when there has been an adjournment in contemplation of dismissal and commit the defendant to custody; or
(c) revoke a conditional discharge in accordance with section 410.70 of this chapter and impose probation supervision or impose a sentence of imprisonment in accordance with the penal law based on the original conviction; or
(d) revoke probation in accordance with section 410.70 of this chapter and impose a sentence of imprisonment in accordance with the penal law based on the original conviction. In addition, if the act which constitutes the violation of the order of protection or temporary order of protection is a crime or a violation the defendant may be charged with and tried for that crime or violation.
(e) [Repealed]
12. The chief administrator of the courts shall promulgate appropriate uniform temporary orders of protection and orders of protection forms to be used throughout the state. Such forms shall be promulgated and developed in a manner to ensure the compatability [compatibility] of such forms with the statewide computerized registry established pursuant to section two hundred twenty-one-a of the executive law.
13. Notwithstanding the foregoing provisions, an order of protection, or temporary order of protection when applicable, may be entered against a former spouse and persons who have a child in common, regardless of whether such persons have been married or have lived together at any time, or against a member of the same family or household as defined in subdivision one of section 530.11 of this article.
14. The people shall make reasonable efforts to notify the complainant alleging a crime constituting a family offense when the people have decided to decline prosecution of such crime, to dismiss the criminal charges against the defendant or to enter into a plea agreement. The people shall advise the complainant of the right to file a petition in the family court pursuant to section 100.07 of this chapter and section one hundred fifteen of the family court act.
In any case where allegations of criminal conduct are transferred from the family court to the criminal court pursuant to paragraph (ii) of subdivision (b) of section eight hundred forty-six of the family court act, the people shall advise the family court making the transfer of any decision to file an accusatory

instrument against the family court respondent and shall notify such court of the disposition of such instrument and the sentence, if any, imposed upon such respondent.
Release of a defendant from custody shall not be delayed because of the requirements of this subdivision.
15. Any motion to vacate or modify an order of protection or temporary order of protection shall be on notice to the non-moving party, except as provided in subdivision three-b of this section.

§ 530.13. Protection of victims of crimes, other than family offenses. [Effective January 1, 2020]

1. When any criminal action is pending, and the court has not issued a temporary order of protection pursuant to section 530.12 of this article, the court, in addition to the other powers conferred upon it by this chapter, may for good cause shown issue a temporary order of protection in conjunction with any securing order or an adjournment in contemplation of dismissal. In addition to any other conditions, such an order may require that the defendant:
(a) stay away from the home, school, business or place of employment of the victims of, or designated witnesses to, the alleged offense;
(b) refrain from harassing, intimidating, threatening or otherwise interfering with the victims of the alleged offense and such members of the family or household of such victims or designated witnesses as shall be specifically named by the court in such order;
(c)
1. to refrain from intentionally injuring or killing, without justification, any companion animal the defendant knows to be owned, possessed, leased, kept or held by such victim or victims or a minor child residing in such victim's or victims' household.
2. "Companion animal", as used in this section, shall have the same meaning as in subdivision five of section three hundred fifty of the agriculture and markets law.
In addition to the foregoing provisions, the court may issue an order, pursuant to section two hundred twenty-seven-c of the real property law, authorizing the party for whose benefit any order of protection has been issued to terminate a lease or rental agreement pursuant to section two hundred twenty-seven-c of the real property law.
2. The court may issue a temporary order of protection under this section ex parte upon the filing of an accusatory instrument and for good cause shown.
3. The court may issue or extend a temporary order of protection under this section ex parte simultaneously with the issuance of a warrant for the arrest of the defendant. Such temporary order of protection may continue in effect until the day the defendant subsequently appears in court pursuant to such warrant or voluntarily or otherwise.
4. [Eff until Sept 1, 2020] Upon sentencing on a conviction for any offense, where the court has not issued an order of protection pursuant to section 530.12 of this article, the court may, in addition to any other disposition, including a conditional discharge or youthful offender adjudication, enter an order of protection. Where a temporary order of protection was issued, the court shall state on the record the reasons for issuing or not issuing an order of protection. The duration of such an order shall be fixed by the court and; (A) in the case of a felony conviction, shall not exceed the greater of: (i) eight years from the date of such sentencing, except where the sentence is or includes a sentence of probation on a conviction for a felony sexual assault, as provided in subparagraph (iii) of paragraph (a) of subdivision three of section 65.00 of the penal law, in which case, ten years from the date of such sentencing, or (ii) eight years from the date of the expiration of the maximum term of an indeterminate or the term of a determinate sentence of imprisonment actually imposed; or (B) in the case of a conviction for a class A misdemeanor, shall not exceed the greater of: (i) five years from the date of such sentencing, except where the sentence is or includes a sentence of probation on a conviction for a misdemeanor sexual assault, as provided in subparagraph (ii) of paragraph (b) of subdivision three of section 65.00 of the penal law, in which case, six years from the date of such sentencing or (ii) five years from the date of the expiration of the maximum term of a definite or intermittent term actually imposed; or (C) in the case of a conviction for any other offense, shall not exceed the greater of: (i) two years from the date of sentencing, or (ii) two years from the date of the expiration of the maximum term of a definite or intermittent term actually imposed. For purposes of determining the duration of an order of protection entered pursuant to this subdivision, a conviction

shall be deemed to include a conviction that has been replaced by a youthful offender adjudication. In addition to any other conditions such an order may require that the defendant:
(a) stay away from the home, school, business or place of employment of the victim or victims, or of any witness designated by the court, of such offense;
(b) refrain from harassing, intimidating, threatening or otherwise interfering with the victim or victims of the offense and such members of the family or household of such victim or victims as shall be specifically named by the court in such order;
(c)
1. to refrain from intentionally injuring or killing, without justification, any companion animal the defendant knows to be owned, possessed, leased, kept or held by such victim or victims or a minor child residing in such victim's or victims' household.
2. "Companion animal", as used in this section, shall have the same meaning as in subdivision five of section three hundred fifty of the agriculture and markets law.
4. [Eff Sept 1, 2020] Upon sentencing on a conviction for any offense, where the court has not issued an order of protection pursuant to section 530.12 of this article, the court may, in addition to any other disposition, including a conditional discharge or youthful offender adjudication, enter an order of protection. Where a temporary order of protection was issued, the court shall state on the record the reasons for issuing or not issuing an order of protection. The duration of such an order shall be fixed by the court and, in the case of a felony conviction, shall not exceed the greater of: (i) five years from the date of such sentencing, or (ii) three years from the date of the expiration of the maximum term of an indeterminate sentence of imprisonment actually imposed; or in the case of a conviction for a class A misdemeanor, shall not exceed three years from the date of such sentencing; or in the case of a conviction for any other offense, shall not exceed one year from the date of sentencing. For purposes of determining the duration of an order of protection entered pursuant to this subdivision, a conviction shall be deemed to include a conviction that has been replaced by a youthful offender adjudication. In addition to any other conditions such an order may require that the defendant:
(a) stay away from the home, school, business or place of employment of the victim or victims, or of any witness designated by the court, of such offense;
(b) refrain from harassing, intimidating, threatening or otherwise interfering with the victim or victims of the offense and such members of the family or household of such victim or victims as shall be specifically named by the court in such order;
(c)
1. to refrain from intentionally injuring or killing, without justification, any companion animal the defendant knows to be owned, possessed, leased, kept or held by such victim or victims or a minor child residing in such victim's or victims' household.
2. "Companion animal", as used in this section, shall have the same meaning as in subdivision five of section three hundred fifty of the agriculture and markets law.
5. The court shall inquire as to the existence of any other orders of protection between the defendant and the person or persons for whom the order of protection is sought. An order of protection issued under this section shall plainly state the date that such order expires. Orders of protection issued to protect victims of domestic violence, as defined in section four hundred fifty-nine-a of the social services law, shall be on uniform statewide forms that shall be promulgated by the chief administrator of the courts in a manner to ensure the compatibility of such forms with the statewide registry of orders of protection and warrants established pursuant to section two hundred twenty-one-a of the executive law. A copy of an order of protection or a temporary order of protection issued pursuant to subdivision one, two, three, or four of this section shall be filed by the clerk of the court with the sheriff's office in the county in which such victim or victims reside, or, if the victim or victims reside within a city, with the police department of such city. A copy of such order of protection or temporary order of protection may from time to time be filed by the clerk of the court with any other police department or sheriff's office having jurisdiction of the residence, work place, and school of anyone intended to be protected by such order. A copy of the order may also be filed by the victim or victims at the appropriate police department or sheriff's office having jurisdiction. Any subsequent amendment or revocation of such order shall be filed in the same manner as herein provided.
6. In any proceeding in which an order of protection or temporary order of protection or a warrant has been issued under this section, the clerk of the court shall issue to the victim and the defendant and defense counsel and to any other person affected by the order, a copy of the order of protection or temporary order of protection and ensure that a copy of the order of protection or temporary order of protection be transmitted to the local correctional facility where the individual is or will be detained, the state or local correctional facility where the individual is or will be imprisoned, and the supervising

probation department or department of corrections and community supervision where the individual is under probation or parole supervision. The presentation of a copy of such order or a warrant to any police officer or peace officer acting pursuant to his or her special duties shall constitute authority for him or her to arrest a person who has violated the terms of such order and bring such person before the court and, otherwise, so far as lies within his or her power, to aid in securing the protection such order was intended to afford.

7. Punishment for contempt based upon a violation of an order or [of] protection or temporary order of protection issued under this section shall not affect a pending criminal action, nor reduce or diminish a sentence upon conviction for any other crimes or offenses.

8. If a defendant is brought before the court for failure to obey any lawful order issued under this section and if, after hearing, the court is satisfied by competent proof that the defendant has willfully failed to obey any such order, the court may:

(a) revoke an order of recognizance, release under non-monetary conditions or bail and commit the defendant to custody; or

(b) restore the case to the calendar when there has been an adjournment in contemplation of dismissal and commit the defendant to custody or impose or increase bail pending a trial of the original crime or violation; or

(c) revoke a conditional discharge in accordance with section 410.70 of this chapter and impose probation supervision or impose a sentence of imprisonment in accordance with the penal law based on the original conviction; or

(d) revoke probation in accordance with section 410.70 of this chapter and impose a sentence of imprisonment in accordance with the penal law based on the original conviction. In addition, if the act which constitutes the violation of the order of protection or temporary order of protection is a crime or a violation the defendant may be charged with and tried for that crime or violation.

9. The chief administrator of the courts shall promulgate appropriate uniform temporary order of protection and order of protection forms to be used throughout the state.

§ 530.14. Suspension and revocation of a license to carry, possess, repair or dispose of a firearm or firearms pursuant to section 400.00 of the penal law and ineligibility for such a license; order to surrender firearms

1. Suspension of firearms license and ineligibility for such a license upon issuance of temporary order of protection. Whenever a temporary order of protection is issued pursuant to subdivision one of section 530.12 or subdivision one of section 530.13 of this article:

(a) the court shall suspend any such existing license possessed by the defendant, order the defendant ineligible for such a license and order the immediate surrender of any or all firearms, rifles and shotguns owned or possessed where the court receives information that gives the court good cause to believe that (i) the defendant has a prior conviction of any violent felony offense as defined in section 70.02 of the penal law; (ii) the defendant has previously been found to have willfully failed to obey a prior order of protection and such willful failure involved (A) the infliction of physical injury, as defined in subdivision nine of section 10.00 of the penal law, (B) the use or threatened use of a deadly weapon or dangerous instrument as those terms are defined in subdivisions twelve and thirteen of section 10.00 of the penal law, or (C) behavior constituting any violent felony offense as defined in section 70.02 of the penal law; or (iii) the defendant has a prior conviction for stalking in the first degree as defined in section 120.60 of the penal law, stalking in the second degree as defined in section 120.55 of the penal law, stalking in the third degree as defined in section 120.50 of the penal law or stalking in the fourth degree as defined in section 120.45 of such law; and

(b) the court shall where the court finds a substantial risk that the defendant may use or threaten to use a firearm, rifle or shotgun unlawfully against the person or persons for whose protection the temporary order of protection is issued, suspend any such existing license possessed by the defendant, order the defendant ineligible for such a license and order the immediate surrender

pursuant to subparagraph (f) of paragraph one of subdivision a of section 265.20 and subdivision six of section 400.05 of the penal law, of any or all firearms, rifles and shotguns owned or possessed.

2. Revocation or suspension of firearms license and ineligibility for such a license upon issuance of an order of protection. Whenever an order of protection is issued pursuant to subdivision five of section 530.12 or subdivision four of section 530.13 of this article:

(a) the court shall revoke any such existing license possessed by the defendant, order the defendant ineligible for such a license and order the immediate surrender of any or all firearms, rifles and shotguns owned or possessed where such action is required by section 400.00 of the penal law; and

(b) the court shall where the court finds a substantial risk that the defendant may use or threaten to use a firearm, rifles or shotguns unlawfully against the person or persons for whose protection the order of protection is issued, (i) revoke any such existing license possessed by the defendant, order the defendant ineligible for such a license and order the immediate surrender of any or all firearms, rifles and shotguns owned or possessed or (ii) suspend or continue to suspend any such existing license possessed by the defendant, order the defendant ineligible for such a license and order the immediate surrender pursuant to subparagraph (f) of paragraph one of subdivision a of section 265.20 and subdivision six of section 400.05 of the penal law, of any or all firearms, rifles and shotguns owned or possessed.

3. Revocation or suspension of firearms license and ineligibility for such a license upon a finding of a willful failure to obey an order of protection. Whenever a defendant has been found pursuant to subdivision eleven of section 530.12 or subdivision eight of section 530.13 of this article to have willfully failed to obey an order of protection issued by a court of competent jurisdiction in this state or another state, territorial or tribal jurisdiction, in addition to any other remedies available pursuant to subdivision eleven of section 530.12 or subdivision eight of section 530.13 of this article:

(a) the court shall revoke any such existing license possessed by the defendant, order the defendant ineligible for such a license and order the immediate surrender of any or all firearms, rifles and shotguns owned or possessed where the willful failure to obey such order involved (i) the infliction of physical injury, as defined in subdivision nine of section 10.00 of the penal law, (ii) the use or threatened use of a deadly weapon or dangerous instrument as those terms are defined in subdivisions twelve and thirteen of section 10.00 of the penal law, (iii) behavior constituting any violent felony offense as defined in section 70.02 of the penal law; or (iv) behavior constituting stalking in the first degree as defined in section 120.60 of the penal law, stalking in the second degree as defined in section 120.55 of the penal law, stalking in the third degree as defined in section 120.50 of the penal law or stalking in the fourth degree as defined in section 120.45 of such law; and

(b) the court shall where the court finds a substantial risk that the defendant may use or threaten to use a firearm, rifle or shotgun unlawfully against the person or persons for whose protection the order of protection was issued, (i) revoke any such existing license possessed by the defendant, order the defendant ineligible for such a license and order the immediate surrender pursuant to subparagraph (f) of paragraph one of subdivision a of section 265.20 and subdivision six of section 400.05 of the penal law, of any or all firearms, rifles and shotguns owned or possessed or (ii) suspend any such existing license possessed by the defendant, order the defendant ineligible for such a license and order the immediate surrender pursuant to subparagraph (f) of paragraph one of subdivision a of section 265.20 and subdivision six of section 400.05 of the penal law, of any or all firearms, rifles and shotguns owned or possessed.

4. Suspension. Any suspension order issued pursuant to this section shall remain in effect for the duration of the temporary order of protection or order of protection, unless modified or vacated by the court.

5. Surrender. (a) Where an order to surrender one or more firearms, rifles and shotguns has been issued, the temporary order of protection or order of protection shall specify the place where such weapons shall be surrendered, shall specify a date and time by which the surrender shall be completed and, to the extent possible, shall describe such weapons to be surrendered, and shall direct the authority receiving such surrendered weapons to immediately notify the court of such surrender.

(b) The prompt surrender of one or more firearms, rifles or shotguns pursuant to a court order issued pursuant to this section shall be considered a voluntary surrender for purposes of subparagraph (f) of paragraph one of subdivision a of section 265.20 of the penal law. The disposition of any such weapons shall be in accordance with the provisions of subdivision six of section 400.05 of the penal law; provided, however, that upon termination of any suspension order issued pursuant to this section or section eight hundred forty-two-a of the family court act, upon written application of the subject of the order, with notice and opportunity to be heard to the district attorney, the county attorney, the

protected party, and every licensing officer responsible for issuance of a firearms license to the subject of the order pursuant to article four hundred of the penal law, and upon a written finding that there is no legal impediment to the subject's possession of a surrendered firearm, rifle or shotgun, any court of record exercising criminal jurisdiction may order the return of a firearm, rifle or shotgun not otherwise disposed of in accordance with subdivision six of section 400.05 of the penal law. When issuing such order in connection with any firearm subject to a license requirement under article four hundred of the penal law, if the licensing officer informs the court that he or she will seek to revoke the license, the order shall be stayed by the court until the conclusion of any license revocation proceeding.

(c) The provisions of this section shall not be deemed to limit, restrict or otherwise impair the authority of the court to order and direct the surrender of any or all firearms, rifles and shotguns owned or possessed by a defendant pursuant to sections 530.12 or 530.13 of this article.

6. Notice. (a) Where an order requiring surrender, revocation, suspension or ineligibility has been issued pursuant to this section, any temporary order of protection or order of protection issued shall state that such firearm license has been suspended or revoked or that the defendant is ineligible for such license, as the case may be, and that the defendant is prohibited from possessing any firearm, rifle or shotgun.

(b) The court revoking or suspending the license, ordering the defendant ineligible for such a license, or ordering the surrender of any firearm, rifle or shotgun shall immediately notify the duly constituted police authorities of the locality concerning such action and, in the case of orders of protection and temporary orders of protection issued pursuant to section 530.12 of this article, shall immediately notify the statewide registry of orders of protection.

(c) The court revoking or suspending the license or ordering the defendant ineligible for such a license shall give written notice thereof without unnecessary delay to the division of state police at its office in the city of Albany.

(d) Where an order of revocation, suspension, ineligibility or surrender is modified or vacated, the court shall immediately notify the statewide registry of orders of protection and the duly constituted police authorities of the locality concerning such action and shall give written notice thereof without unnecessary delay to the division of state police at its office in the city of Albany.

7. Hearing. The defendant shall have the right to a hearing before the court regarding any revocation, suspension, ineligibility or surrender order issued pursuant to this section, provided that nothing in this subdivision shall preclude the court from issuing any such order prior to a hearing. Where the court has issued such an order prior to a hearing, it shall commence such hearing within fourteen days of the date such order was issued.

8. Nothing in this section shall delay or otherwise interfere with the issuance of a temporary order of protection or the timely arraignment of a defendant in custody.

§ 530.20. Order of recognizance or bail; by local criminal court when action is pending therein [Effective January 1, 2020]

Securing order by local criminal court when action is pending therein.

When a criminal action is pending in a local criminal court, such court, upon application of a defendant, shall proceed as follows:

1.

(a) In cases other than as described in paragraph (b) of this subdivision the court shall release the principal pending trial on the principal's own recognizance, unless the court finds on the record or in writing that release on the principal's own recognizance will not reasonably assure the principal's return to court. In such instances, the court shall release the principal under non-monetary conditions, selecting the least restrictive alternative and conditions that will reasonably assure the principal's return to court. The court shall explain its choice of alternative and conditions on the record or in writing.

(b) Where the principal stands charged with a qualifying offense, the court, unless otherwise prohibited by law, may in its discretion release the principal pending trial on the principal's own recognizance or under non-monetary conditions, fix bail, or, where the defendant is charged with a qualifying offense

which is a felony, the court may commit the principal to the custody of the sheriff. The court shall explain its choice of release, release with conditions, bail or remand on the record or in writing. A principal stands charged with a qualifying offense when he or she stands charged with:
(i) a felony enumerated in section 70.02 of the penal law, other than burglary in the second degree as defined in subdivision two of section 140.25 of the penal law or robbery in the second degree as defined in subdivision one of section 160.10 of the penal law;
(ii) a crime involving witness intimidation under section 215.15 of the penal law;
(iii) a crime involving witness tampering under section 215.11, 215.12 or 215.13 of the penal law;
(iv) a class A felony defined in the penal law, other than in article two hundred twenty of such law with the exception of section 220.77 of such law;
(v) a felony sex offense defined in section 70.80 of the penal law or a crime involving incest as defined in section 255.25, 255.26 or 255.27 of such law, or a misdemeanor defined in article one hundred thirty of such law;
(vi) conspiracy in the second degree as defined in section 105.15 of the penal law, where the underlying allegation of such charge is that the defendant conspired to commit a class A felony defined in article one hundred twenty-five of the penal law;
(vii) money laundering in support of terrorism in the first degree as defined in section 470.24 of the penal law; money laundering in support of terrorism in the second degree as defined in section 470.23 of the penal law; or a felony crime of terrorism as defined in article four hundred ninety of the penal law, other than the crime defined in section 490.20 of such law;
(viii) criminal contempt in the second degree as defined in subdivision three of section 215.50 of the penal law, criminal contempt in the first degree as defined in subdivision (b), (c) or (d) of section 215.51 of the penal law or aggravated criminal contempt as defined in section 215.52 of the penal law, and the underlying allegation of such charge of criminal contempt in the second degree, criminal contempt in the first degree or aggravated criminal contempt is that the defendant violated a duly served order of protection where the protected party is a member of the defendant's same family or household as defined in subdivision one of section 530.11 of this article; or
(ix) facilitating a sexual performance by a child with a controlled substance or alcohol as defined in section 263.30 of the penal law, use of a child in a sexual performance as defined in section 263.05 of the penal law or luring a child as defined in subdivision one of section 120.70 of the penal law.
(d) Notwithstanding the provisions of paragraphs (a) and (b) of this subdivision, with respect to any charge for which bail or remand is not ordered, and for which the court would not or could not otherwise require bail or remand, a defendant may, at any time, request that the court set bail in a nominal amount requested by the defendant in the form specified in paragraph (a) of subdivision one of section 520.10 of this title; if the court is satisfied that the request is voluntary, the court shall set such bail in such amount.
2. When the defendant is charged, by felony complaint, with a felony, the court may, in its discretion, order recognizance, release under non-monetary conditions, or, where authorized, bail or commit the defendant to the custody of the sheriff except as otherwise provided in subdivision one of this section or this subdivision:
(a) A city court, a town court or a village court may not order recognizance or bail when (i) the defendant is charged with a class A felony, or (ii) the defendant has two previous felony convictions;
(b) No local criminal court may order recognizance, release under non-monetary conditions or bail with respect to a defendant charged with a felony unless and until:
(i) The district attorney has been heard in the matter or, after knowledge or notice of the application and reasonable opportunity to be heard, has failed to appear at the proceeding or has otherwise waived his right to do so; and
(ii) The court and counsel for the defendant have been furnished with a report of the division of criminal justice services concerning the defendant's criminal record, if any, or with a police department report with respect to the defendant's prior arrest and conviction record, if any. If neither report is available, the court, with the consent of the district attorney, may dispense with this requirement; provided, however, that in an emergency, including but not limited to a substantial impairment in the ability of such division or police department to timely furnish such report, such consent shall not be required if, for reasons stated on the record, the court deems it unnecessary. When the court has been furnished with any such report or record, it shall furnish a copy thereof to counsel for the defendant or, if the defendant is not represented by counsel, to the defendant.

§ 530.30. Order of recognizance, release under non-monetary conditions or bail; by superior court judge when action is pending in local criminal court [Effective January 1, 2020]

1. When a criminal action is pending in a local criminal court, other than one consisting of a superior court judge sitting as such, a judge of a superior court holding a term thereof in the county, upon application of a defendant, may order recognizance, release under non-monetary conditions or, where authorized, bail when such local criminal court:
(a) Lacks authority to issue such an order, pursuant to the relevant provisions of section 530.20 of this article; or
(b) Has denied an application for recognizance, release under non-monetary conditions or bail; or
(c) Has fixed bail, where authorized, which is excessive; or
(d) Has set a securing order of release under non-monetary conditions which are more restrictive than necessary to reasonably assure the defendant's return to court.
In such case, such superior court judge may vacate the order of such local criminal court and release the defendant on recognizance or under non-monetary conditions, or where authorized, fix bail in a lesser amount or in a less burdensome form, whichever are the least restrictive alternative and conditions that will reasonably assure the defendant's return to court. The court shall explain its choice of alternative and conditions on the record or in writing.
2. Notwithstanding the provisions of subdivision one of this section, when the defendant is charged with a felony in a local criminal court, a superior court judge may not order recognizance, release under non-monetary conditions or, where authorized, bail unless and until the district attorney has had an opportunity to be heard in the matter and such judge and counsel for the defendant have been furnished with a report as described in subparagraph (ii) of paragraph (b) of subdivision two of section 530.20 of this article.
3. Not more than one application may be made pursuant to this section.

§ 530.40. Order of recognizance or bail; by superior court when action is pending therein [Effective January 1, 2020]

Order of recognizance, release under non-monetary conditions or bail; by superior court when action is pending therein.
When a criminal action is pending in a superior court, such court, upon application of a defendant, must or may order recognizance or bail as follows:
1. When the defendant is charged with an offense or offenses of less than felony grade only, the court must, unless otherwise provided by law, order recognizance or release under non-monetary conditions in accordance with this section.
2. When the defendant is charged with a felony, the court may, unless otherwise provided by law in its discretion, order recognizance, release under non-monetary conditions or, where authorized, bail. In any such case in which an indictment (a) has resulted from an order of a local criminal court holding the defendant for the action of the grand jury, or (b) was filed at a time when a felony complaint charging the same conduct was pending in a local criminal court, and in which such local criminal court or a superior court judge has issued an order of recognizance, release under non-monetary conditions or, where authorized, bail which is still effective, the superior court's order may be in the form of a direction continuing the effectiveness of the previous order.
3. In cases other than as described in subdivision four of this section the court shall release the principal pending trial on the principal's own recognizance, unless the court finds on the record or in writing that release on the principal's own recognizance will not reasonably assure the principal's return to court. In such instances, the court shall release the principal under non-monetary conditions, selecting the least restrictive alternative and conditions that will reasonably assure the principal's

return to court. The court shall explain its choice of alternative and conditions on the record or in writing.

4. Where the principal stands charged with a qualifying offense, the court, unless otherwise prohibited by law, may in its discretion release the principal pending trial on the principal's own recognizance or under non-monetary conditions, fix bail, or, where the defendant is charged with a qualifying offense which is a felony, the court may commit the principal to the custody of the sheriff. The court shall explain its choice of release, release with conditions, bail or remand on the record or in writing. A principal stands charged with a qualifying offense for the purposes of this subdivision when he or she stands charged with:

(a) a felony enumerated in section 70.02 of the penal law, other than burglary in the second degree as defined in subdivision two of section 140.25 of the penal law or robbery in the second degree as defined in subdivision one of section 160.10 of the penal law;

(b) a crime involving witness intimidation under section 215.15 of the penal law;

(c) a crime involving witness tampering under section 215.11, 215.12 or 215.13 of the penal law;

(d) a class A felony defined in the penal law, other than in article two hundred twenty of such law with the exception of section 220.77 of such law;

(e) a felony sex offense defined in section 70.80 of the penal law or a crime involving incest as defined in section 255.25, 255.26 or 255.27 of such law, or a misdemeanor defined in article one hundred thirty of such law;

(f) conspiracy in the second degree as defined in section 105.15 of the penal law, where the underlying allegation of such charge is that the defendant conspired to commit a class A felony defined in article one hundred twenty-five of the penal law;

(g) money laundering in support of terrorism in the first degree as defined in section 470.24 of the penal law; money laundering in support of terrorism in the second degree as defined in section 470.23 of the penal law; or a felony crime of terrorism as defined in article four hundred ninety of the penal law, other than the crime defined in section 490.20 of such law;

(h) criminal contempt in the second degree as defined in subdivision three of section 215.50 of the penal law, criminal contempt in the first degree as defined in subdivision (b), (c) or (d) of section 215.51 of the penal law or aggravated criminal contempt as defined in section 215.52 of the penal law, and the underlying allegation of such charge of criminal contempt in the second degree, criminal contempt in the first degree or aggravated criminal contempt is that the defendant violated a duly served order of protection where the protected party is a member of the defendant's same family or household as defined in subdivision one of section 530.11 of this article; or

(i) facilitating a sexual performance by a child with a controlled substance or alcohol as defined in section 263.30 of the penal law, use of a child in a sexual performance as defined in section 263.05 of the penal law or luring a child as defined in subdivision one of section 120.70 of the penal law.

5. Notwithstanding the provisions of subdivisions three and four of this section, with respect to any charge for which bail or remand is not ordered, and for which the court would not or could not otherwise require bail or remand, a defendant may, at any time, request that the court set bail in a nominal amount requested by the defendant in the form specified in paragraph (a) of subdivision one of section 520.10 of this title; if the court is satisfied that the request is voluntary, the court shall set such bail in such amount.

6. Notwithstanding the provisions of subdivisions two, three and four of this section, a superior court may not order recognizance, release under non-monetary conditions or, where authorized, bail, or permit a defendant to remain at liberty pursuant to an existing order, after the defendant has been convicted of either: (a) a class A felony or (b) any class B or class C felony as defined in article one hundred thirty of the penal law committed or attempted to be committed by a person eighteen years of age or older against a person less than eighteen years of age. In either case the court must commit or remand the defendant to the custody of the sheriff.

7. Notwithstanding the provisions of subdivisions two, three and four of this section, a superior court may not order recognizance, release under non-monetary conditions or, where authorized, bail when the defendant is charged with a felony unless and until the district attorney has had an opportunity to be heard in the matter and such court and counsel for the defendant have been furnished with a report as described in subparagraph (ii) of paragraph (b) of subdivision two of section 530.20 of this article.

§ 530.45. Order of recognizance or bail; after conviction and before sentence [Effective January 1, 2020]

1. When the defendant is at liberty in the course of a criminal action as a result of a prior order of recognizance, release under non-monetary conditions or bail and the court revokes such order and then, where authorized, fixes no bail or fixes bail in a greater amount or in a more burdensome form than was previously fixed and remands or commits defendant to the custody of the sheriff, or issues a more restrictive securing order, a judge designated in subdivision two of this section, upon application of the defendant following conviction of an offense other than a class A felony or a class B or class C felony offense as defined in article one hundred thirty of the penal law committed or attempted to be committed by a person eighteen years of age or older against a person less than eighteen years of age, and before sentencing, may issue a securing order and release the defendant on the defendant's own recognizance, release the defendant under non-monetary conditions, or, where authorized, fix bail or fix bail in a lesser amount or in a less burdensome form, or issue a less restrictive securing order, than fixed by the court in which the conviction was entered.
2. An order as prescribed in subdivision one may be issued by the following judges in the indicated situations:
(a) If the criminal action was pending in supreme court or county court, such order may be issued by a justice of the appellate division of the department in which the conviction was entered.
(b) If the criminal action was pending in a local criminal court, such order may be issued by a judge of a superior court holding a term thereof in the county in which the conviction was entered.
3. An application for an order specified in this section must be made upon reasonable notice to the people, and the people must be accorded adequate opportunity to appear in opposition thereto. Not more than one application may be made pursuant to this section. Defendant must allege in his application that he intends to take an appeal to an intermediate appellate court immediately after sentence is pronounced.
4. Notwithstanding the provisions of subdivision one, if within thirty days after sentence the defendant has not taken an appeal to an intermediate appellate court from the judgment or sentence, the operation of such order terminates and the defendant must surrender himself to the criminal court in which the judgment was entered in order that execution of the judgment be commenced.
5. Notwithstanding the provisions of subdivision one, if within one hundred twenty days after the filing of the notice of appeal such appeal has not been brought to argument in or submitted to the intermediate appellate court, the operation of such order terminates and the defendant must surrender himself to the criminal court in which the judgment was entered in order that execution of the judgment be commenced or resumed; except that this subdivision does not apply where the intermediate appellate court has (a) extended the time for argument or submission of the appeal to a date beyond the specified period of one hundred twenty days, and (b) upon application of the defendant, expressly ordered that the operation of the order continue until the date of the determination of the appeal or some other designated future date or occurrence.
6. Where the defendant is at liberty during the pendency of an appeal as a result of an order issued pursuant to this section, the intermediate appellate court, upon affirmance of the judgment, must by appropriate certificate remit the case to the criminal court in which such judgment was entered. The criminal court must, upon at least two days notice to the defendant, his surety and his attorney, promptly direct the defendant to surrender himself to the criminal court in order that execution of the judgment be commenced or resumed, and if necessary the criminal court may issue a bench warrant to secure his appearance.

§ 530.50. Order of recognizance or bail; during pendency of appeal

A judge who is otherwise authorized pursuant to section 460.50 or section 460.60 to issue an order of recognizance or bail pending the determination of an appeal, may do so unless the defendant received a class A felony sentence or a sentence for any class B or class C felony offense defined in article one

hundred thirty of the penal law committed or attempted to be committed by a person eighteen years of age or older against a person less than eighteen years of age.

§ 530.60. Order of recognizance or bail; revocation thereof [Effective January 1, 2020]

Certain
modifications of a securing order.

1. Whenever in the course of a criminal action or proceeding a defendant is at liberty as a result of an order of recognizance, release under non-monetary conditions or bail issued pursuant to this chapter, and the court considers it necessary to review such order, whether due to a motion by the people or otherwise, the court may, and except as provided in subdivision two of section 510.50 of this title concerning a failure to appear in court, by a bench warrant if necessary, require the defendant to appear before the court. Upon such appearance, the court, for good cause shown, may revoke the order of recognizance, release under non-monetary conditions, or bail. If the defendant is entitled to recognizance, release under non-monetary conditions, or bail as a matter of right, the court must issue another such order. If the defendant is not, the court may either issue such an order or commit the defendant to the custody of the sheriff in accordance with this section.

Where the defendant is committed to the custody of the sheriff and is held on a felony complaint, a new period as provided in section 180.80 of this chapter shall commence to run from the time of the defendant's commitment under this subdivision.

2.

(a) Whenever in the course of a criminal action or proceeding a defendant charged with the commission of a felony is at liberty as a result of an order of recognizance, release under non-monetary conditions or bail issued pursuant to this article it shall be grounds for revoking such order that the court finds reasonable cause to believe the defendant committed one or more specified class A or violent felony offenses or intimidated a victim or witness in violation of section 215.15, 215.16 or 215.17 of the penal law while at liberty.

(b) Except as provided in paragraph (a) of this subdivision or any other law, whenever in the course of a criminal action or proceeding a defendant charged with the commission of an offense is at liberty as a result of an order of recognizance, release under non-monetary conditions or bail issued pursuant to this article it shall be grounds for revoking such order and fixing bail in such criminal action or proceeding when the court has found, by clear and convincing evidence, that the defendant:

(i) persistently and willfully failed to appear after notice of scheduled appearances in the case before the court; or

(ii) violated an order of protection in the manner prohibited by subdivision (b), (c) or (d) of section 215.51 of the penal law while at liberty; or

(iii) stands charged in such criminal action or proceeding with a misdemeanor or violation and, after being so charged, intimidated a victim or witness in violation of section 215.15, 215.16 or 215.17 of the penal law or tampered with a witness in violation of section 215.11, 215.12 or 215.13 of the penal law, law while at liberty; or

(iv) stands charged in such action or proceeding with a felony and, after being so charged, committed a felony while at liberty.

(c) Before revoking an order of recognizance, release under non-monetary conditions, or bail pursuant to this subdivision, the court must hold a hearing and shall receive any relevant, admissible evidence not legally privileged. The defendant may cross-examine witnesses and may present relevant, admissible evidence on his own behalf. Such hearing may be consolidated with, and conducted at the same time as, a felony hearing conducted pursuant to article one hundred eighty of this chapter. A transcript of testimony taken before the grand jury upon presentation of the subsequent offense shall be admissible as evidence during the hearing. The district attorney may move to introduce grand jury testimony of a witness in lieu of that witness' appearance at the hearing.

(d) Revocation of an order of recognizance, release under nonmonetary conditions or bail and a new securing order fixing bail or commitment, as specified in this paragraph and pursuant to this subdivision shall be for the following periods:

(i) Under paragraph (a) of this subdivision, revocation of the order of recognizance, release under non-monetary conditions or, as the case may be, bail, and a new securing order fixing bail or committing the defendant to the custody of the sheriff shall be as follows:
(A) For a period not to exceed ninety days exclusive of any periods of adjournment requested by the defendant; or
(B) Until the charges contained within the accusatory instrument have been reduced or dismissed such that no count remains which charges the defendant with commission of a felony; or
(C) Until reduction or dismissal of the charges contained within the accusatory instrument charging the subsequent offense such that no count remains which charges the defendant with commission of a class A or violent felony offense.
Upon expiration of any of the three periods specified within this subparagraph, whichever is shortest, the court may grant or deny release upon an order of bail or recognizance in accordance with the provisions of this article. Upon conviction to an offense the provisions of article five hundred thirty of this chapter shall apply; and
(ii) Under paragraph (b) of this subdivision, revocation of the order of recognizance, release under non-monetary conditions or, as the case may be, bail shall result in the issuance of a new securing order which may, if otherwise authorized by law, permit the principal's release on recognizance or release under non-monetary conditions, but shall also render the defendant eligible for an order fixing bail provided, however, that in accordance with the principles in this title the court must select the least restrictive alternative and condition or conditions that will reasonably assure the principal's return to court. Nothing in this subparagraph shall be interpreted as shortening the period of detention, or requiring or authorizing any less restrictive form of a securing order, which may be imposed pursuant to any other law.
(e) Notwithstanding the provisions of paragraph (a) or (b) of this subdivision a defendant, against whom a felony complaint has been filed which charges the defendant with commission of a class A or violent felony offense or violation of section 215.15, 215.16 or 215.17 of the penal law committed while he was at liberty as specified therein, may be committed to the custody of the sheriff pending a revocation hearing for a period not to exceed seventy-two hours. An additional period not to exceed seventy-two hours may be granted by the court upon application of the district attorney upon a showing of good cause or where the failure to commence the hearing was due to the defendant's request or occurred with his consent. Such good cause must consist of some compelling fact or circumstance which precluded conducting the hearing within the initial prescribed period.

§ 530.70. Order of recognizance or bail; bench warrant

1. A bench warrant issued by a superior court, by a district court, by the New York City criminal court or by a superior court judge sitting as a local criminal court may be executed anywhere in the state. A bench warrant issued by a city court, a town court or a village court may be executed in the county of issuance or any adjoining county; and it may be executed anywhere else in the state upon the written endorsement thereon of a local criminal court of the county in which the defendant is to be taken into custody. When so endorsed, the warrant is deemed the process of the endorsing court as well as that of the issuing court.
2. A bench warrant may be addressed to: (a) any police officer whose geographical area of employment embraces either the place where the offense charged was allegedly committed or the locality of the court by which the warrant is issued; or (b) any uniformed court officer for a court in the city of New York, the county of Nassau, the county of Suffolk or the county of Westchester or for any other court that is part of the unified court system of the state for execution in the building wherein such court officer is employed or in the immediate vicinity thereof. A bench warrant must be executed in the same manner as a warrant of arrest, as provided in section 120.80, and following the arrest, such executing police officer or court officer must without unnecessary delay bring the defendant before the court in which it is returnable; provided, however, if the court in which the bench warrant is returnable is a city, town or village court, and such court is not available, and the bench warrant is addressed to a police officer, such executing police officer must without unnecessary delay bring the defendant before an alternate local criminal court, as provided in subdivision five of section 120.90; or if the court in which the bench warrant is returnable is a superior court, and such court is

not available, and the bench warrant is addressed to a police officer, such executing police officer may bring the defendant to the local correctional facility of the county in which such court sits, to be detained there until not later than the commencement of the next session of such court occurring on the next business day.
2-a. A court which issues a bench warrant may attach thereto a summary of the basis for the warrant. In any case where, pursuant to subdivision two of this section, a defendant arrested upon a bench warrant is brought before a local criminal court other than the court in which the warrant is returnable, such local criminal court shall consider such summary before issuing a securing order with respect to the defendant.
3. A bench warrant may be executed by (a) any officer to whom it is addressed, or (b) any other police officer delegated to execute it under circumstances prescribed in subdivisions four and five.
4. The issuing court may authorize the delegation of such warrant. Where the issuing court has so authorized, a police officer to whom a bench warrant is addressed may delegate another police officer to whom it is not addressed to execute such warrant as his or her agent when:
(a) He or she has reasonable cause to believe that the defendant is in a particular county other than the one in which the warrant is returnable; and
(b) The geographical area of employment of the delegated police officer embraces the locality where the arrest is to be made.
5. Under circumstances specified in subdivision four, the police officer to whom the bench warrant is addressed may inform the delegated officer, by telecommunication, mail or any other means, of the issuance of the warrant, of the offense charged in the underlying accusatory instrument and of all other pertinent details, and may request him or her to act as his or her agent in arresting the defendant pursuant to such bench warrant. Upon such request, the delegated police officer is to the same extent as the delegating officer, authorized to make such arrest pursuant to the bench warrant within the geographical area of such delegated officer's employment. Upon so arresting the defendant, he or she must without unnecessary delay deliver the defendant or cause him or her to be delivered to the custody of the police officer by whom he or she was so delegated, and the latter must then without unnecessary delay bring the defendant before the court in which such bench warrant is returnable.
6. A bench warrant may be executed by an officer of the state department of corrections and community supervision or a probation officer when the person named within the warrant is under the supervision of the department of corrections and community supervision or a department of probation and the probation officer is authorized by his or her probation director, as the case may be. The warrant must be executed upon the same conditions and in the same manner as is otherwise provided for execution by a police officer.

§ 530.80. Order of recognizance or bail; surrender of defendant

1. At any time before the forfeiture of a bail bond, an obligor may surrender the defendant in his exoneration, or the defendant may surrender himself, to the court in which his case is pending or to the sheriff to whose custody he was committed at the time of giving bail, in the following manner:
(a) A certified copy of the bail bond must be delivered to the sheriff, who must detain the defendant in his custody thereon, as upon a commitment. The sheriff must acknowledge the surrender by a certificate in writing, and must forthwith notify the court in which the case is pending that such surrender has been made.
(b) Upon the bail bond and the certificate of the sheriff, or upon the surrender to the court in which the case is pending, such court must, upon five days notice to the district attorney, order that the bail be exonerated. On filing such order, the bail is exonerated accordingly.
2. For the purpose of surrendering the defendant, an obligor or the person who posted cash bail for the defendant may take him into custody at any place within the state, or he may, by a written authority indorsed on a certified copy of the bail bond, empower any person over twenty years of age to do so.
3. At any time before the forfeiture of cash bail, the defendant may surrender himself or the person who posted bail for the defendant may surrender the defendant in the manner prescribed in subdivision one. In such case, the court must order a return of the money to the person who posted it,

upon producing the certificate of the sheriff showing the surrender, and upon a notice of five days to the district attorney.

§ 216.05. Judicial diversion program; court procedures [Effective January 1, 2020]

1. At any time after the arraignment of an eligible defendant, but prior to the entry of a plea of guilty or the commencement of trial, the court at the request of the eligible defendant, may order an alcohol and substance abuse evaluation. An eligible defendant may decline to participate in such an evaluation at any time. The defendant shall provide a written authorization, in compliance with the requirements of any applicable state or federal laws, rules or regulations authorizing disclosure of the results of the assessment to the defendant's attorney, the prosecutor, the local probation department, the court, authorized court personnel and other individuals specified in such authorization for the sole purpose of determining whether the defendant should be offered judicial diversion for treatment for substance abuse or dependence, alcohol abuse or dependence and any co-occurring mental disorder or mental illness.
2. Upon receipt of the completed alcohol and substance abuse evaluation report, the court shall provide a copy of the report to the eligible defendant and the prosecutor.
3.
(a) Upon receipt of the evaluation report either party may request a hearing on the issue of whether the eligible defendant should be offered alcohol or substance abuse treatment pursuant to this article. At such a proceeding, which shall be held as soon as practicable so as to facilitate early intervention in the event that the defendant is found to need alcohol or substance abuse treatment, the court may consider oral and written arguments, may take testimony from witnesses offered by either party, and may consider any relevant evidence including, but not limited to, evidence that:
(i) the defendant had within the preceding ten years (excluding any time during which the offender was incarcerated for any reason between the time of the acts that led to the youthful offender adjudication and the time of commission of the present offense) been adjudicated a youthful offender for: (A) a violent felony offense as defined in section 70.02 of the penal law; or (B) any offense for which a merit time allowance is not available pursuant to subparagraph (ii) of paragraph (d) of subdivision one of section eight hundred three of the correction law; and
(ii) in the case of a felony offense defined in subdivision four of section 410.91 of this chapter, any statement of or submitted by the victim, as defined in paragraph (a) of subdivision two of section 380.50 of this chapter.
(b) Upon completion of such a proceeding, the court shall consider and make findings of fact with respect to whether:
(i) the defendant is an eligible defendant as defined in subdivision one of section 216.00 of this article;
(ii) the defendant has a history of alcohol or substance abuse or dependence;
(iii) such alcohol or substance abuse or dependence is a contributing factor to the defendant's criminal behavior;
(iv) the defendant's participation in judicial diversion could effectively address such abuse or dependence; and
(v) institutional confinement of the defendant is or may not be necessary for the protection of the public.
4. When an authorized court determines, pursuant to paragraph (b) of subdivision three of this section, that an eligible defendant should be offered alcohol or substance abuse treatment, or when the parties and the court agree to an eligible defendant's participation in alcohol or substance abuse treatment, an eligible defendant may be allowed to participate in the judicial diversion program offered by this article. Prior to the court's issuing an order granting judicial diversion, the eligible defendant shall be required to enter a plea of guilty to the charge or charges; provided, however, that no such guilty plea shall be required when:
(a) the people and the court consent to the entry of such an order without a plea of guilty; or
(b) based on a finding of exceptional circumstances, the court determines that a plea of guilty shall not be required. For purposes of this subdivision, exceptional circumstances exist when, regardless of the ultimate disposition of the case, the entry of a plea of guilty is likely to result in severe collateral consequences.

5. The defendant shall agree on the record or in writing to abide by the release conditions set by the court, which, shall include: participation in a specified period of alcohol or substance abuse treatment at a specified program or programs identified by the court, which may include periods of detoxification, residential or outpatient treatment, or both, as determined after taking into account the views of the health care professional who conducted the alcohol and substance abuse evaluation and any health care professionals responsible for providing such treatment or monitoring the defendant's progress in such treatment; and may include: (i) periodic court appearances, which may include periodic urinalysis; (ii) a requirement that the defendant refrain from engaging in criminal behaviors; (iii) if the defendant needs treatment for opioid abuse or dependence, that he or she may participate in and receive medically prescribed drug treatments under the care of a health care professional licensed or certified under title eight of the education law, acting within his or her lawful scope of practice, provided that no court shall require the use of any specified type or brand of drug during the course of medically prescribed drug treatments.

6. Upon an eligible defendant's agreement to abide by the conditions set by the court, the court shall issue a securing order providing for bail or release on the defendant's own recognizance and conditioning any release upon the agreed upon conditions. The period of alcohol or substance abuse treatment shall begin as specified by the court and as soon as practicable after the defendant's release, taking into account the availability of treatment, so as to facilitate early intervention with respect to the defendant's abuse or condition and the effectiveness of the treatment program. In the event that a treatment program is not immediately available or becomes unavailable during the course of the defendant's participation in the judicial diversion program, the court may release the defendant pursuant to the securing order.

7. When participating in judicial diversion treatment pursuant to this article, any resident of this state who is covered under a private health insurance policy or contract issued for delivery in this state pursuant to article thirty-two, forty-three or forty-seven of the insurance law or article forty-four of the public health law, or who is covered by a self-funded plan which provides coverage for the diagnosis and treatment of chemical abuse and chemical dependence however defined in such policy; shall first seek reimbursement for such treatment in accordance with the provisions of such policy or contract.

8. During the period of a defendant's participation in the judicial diversion program, the court shall retain jurisdiction of the defendant, provided, however, that the court may allow such defendant to (i) reside in another jurisdiction, or (ii) participate in alcohol and substance abuse treatment and other programs in the jurisdiction where the defendant resides or in any other jurisdiction, while participating in a judicial diversion program under conditions set by the court and agreed to by the defendant pursuant to subdivisions five and six of this section. The court may require the defendant to appear in court at any time to enable the court to monitor the defendant's progress in alcohol or substance abuse treatment. The court shall provide notice, reasonable under the circumstances, to the people, the treatment provider, the defendant and the defendant's counsel whenever it orders or otherwise requires the appearance of the defendant in court. Failure to appear as required without reasonable cause therefor shall constitute a violation of the conditions of the court's agreement with the defendant.

9.

(a) If at any time during the defendant's participation in the judicial diversion program, the court has reasonable grounds to believe that the defendant has violated a release condition in an important respect or has willfully failed to appear before the court as requested, the court except as provided in subdivision two of section 510.50 of this chapter regarding a failure to appear, shall direct the defendant to appear or issue a bench warrant to a police officer or an appropriate peace officer directing him or her to take the defendant into custody and bring the defendant before the court without unnecessary delay; provided, however, that under no circumstances shall a defendant who requires treatment for opioid abuse or dependence be deemed to have violated a release condition on the basis of his or her participation in medically prescribed drug treatments under the care of a health care professional licensed or certified under title eight of the education law, acting within his or her lawful scope of practice. The relevant provisions of section 530.60 of this chapter relating to issuance of securing orders shall apply to such proceedings under this subdivision.

(b) In determining whether a defendant violated a condition of his or her release under the judicial diversion program, the court may conduct a summary hearing consistent with due process and sufficient to satisfy the court that the defendant has, in fact, violated the condition.

(c) If the court determines that the defendant has violated a condition of his or her release under the judicial diversion program, the court may modify the conditions thereof, reconsider the order of

recognizance or bail pursuant to subdivision two of section 510.30 of this chapter, or terminate the defendant's participation in the judicial diversion program; and when applicable proceed with the defendant's sentencing in accordance with the agreement. Notwithstanding any provision of law to the contrary, the court may impose any sentence authorized for the crime of conviction in accordance with the plea agreement, or any lesser sentence authorized to be imposed on a felony drug offender pursuant to paragraph (b) or (c) of subdivision two of section 70.70 of the penal law taking into account the length of time the defendant spent in residential treatment and how best to continue treatment while the defendant is serving that sentence. In determining what action to take for a violation of a release condition, the court shall consider all relevant circumstances, including the views of the prosecutor, the defense and the alcohol or substance abuse treatment provider, and the extent to which persons who ultimately successfully complete a drug treatment regimen sometimes relapse by not abstaining from alcohol or substance abuse or by failing to comply fully with all requirements imposed by a treatment program. The court shall also consider using a system of graduated and appropriate responses or sanctions designed to address such inappropriate behaviors, protect public safety and facilitate, where possible, successful completion of the alcohol or substance abuse treatment program.

(d) Nothing in this subdivision shall be construed as preventing a court from terminating a defendant's participation in the judicial diversion program for violating a release condition when such a termination is necessary to preserve public safety. Nor shall anything in this subdivision be construed as precluding the prosecution of a defendant for the commission of a different offense while participating in the judicial diversion program.

(e) A defendant may at any time advise the court that he or she wishes to terminate participation in the judicial diversion program, at which time the court shall proceed with the case and, where applicable, shall impose sentence in accordance with the plea agreement. Notwithstanding any provision of law to the contrary, the court may impose any sentence authorized for the crime of conviction in accordance with the plea agreement, or any lesser sentence authorized to be imposed on a felony drug offender pursuant to paragraph (b) or (c) of subdivision two of section 70.70 of the penal law taking into account the length of time the defendant spent in residential treatment and how best to continue treatment while the defendant is serving that sentence.

10. Upon the court's determination that the defendant has successfully completed the required period of alcohol or substance abuse treatment and has otherwise satisfied the conditions required for successful completion of the judicial diversion program, the court shall comply with the terms and conditions it set for final disposition when it accepted the defendant's agreement to participate in the judicial diversion program. Such disposition may include, but is not limited to: (a) requiring the defendant to undergo a period of interim probation supervision and, upon the defendant's successful completion of the interim probation supervision term, notwithstanding the provision of any other law, permitting the defendant to withdraw his or her guilty plea and dismissing the indictment; or (b) requiring the defendant to undergo a period of interim probation supervision and, upon successful completion of the interim probation supervision term, notwithstanding the provision of any other law, permitting the defendant to withdraw his or her guilty plea, enter a guilty plea to a misdemeanor offense and sentencing the defendant as promised in the plea agreement, which may include a period of probation supervision pursuant to section 65.00 of the penal law; or (c) allowing the defendant to withdraw his or her guilty plea and dismissing the indictment.

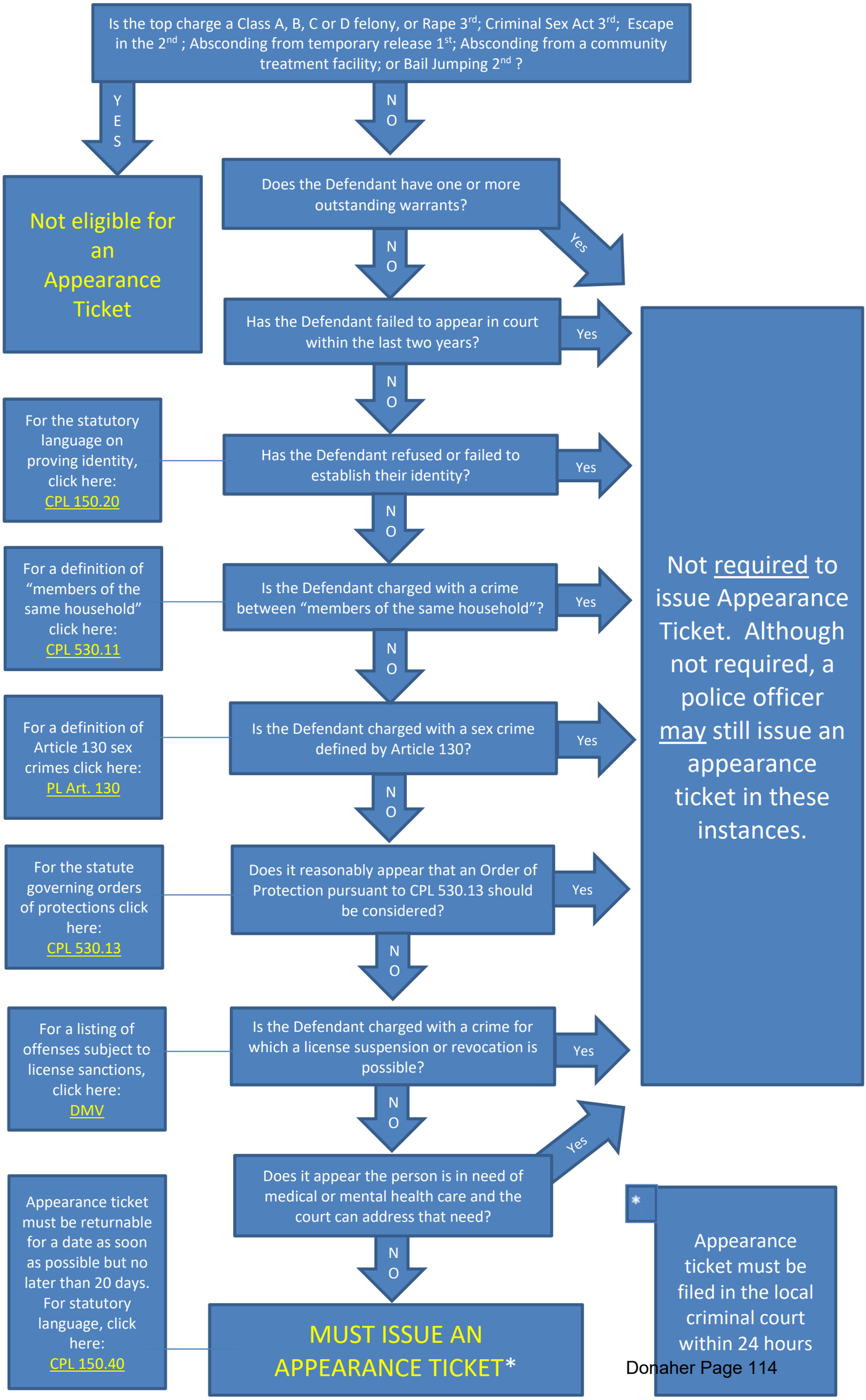
11. Nothing in this article shall be construed as restricting or prohibiting courts or district attorneys from using other lawful procedures or models for placing appropriate persons into alcohol or substance abuse treatment.

§ 410.60. Appearance before court. [Effective January 1, 2020]

A person who has been taken into custody pursuant to section 410.40 or section 410.50 of this article for violation of a condition of a sentence of probation or a sentence of conditional discharge must forthwith be brought before the court that imposed the sentence. Where a violation of probation petition and report has been filed and the person has not been taken into custody nor has a warrant been issued, an initial court appearance shall occur within ten business days of the court's issuance of a notice to appear. If the court has reasonable cause to believe that such person has violated a

condition of the sentence, it may commit such person to the custody of the sheriff, fix bail, release such person under non-monetary conditions or release such person on such person's own recognizance for future appearance at a hearing to be held in accordance with section 410.70 of this article. If the court does not have reasonable cause to believe that such person has violated a condition of the sentence, it must direct that such person be released.

Mandatory Appearance Ticket Provisions



Arraigning on Non-Qualifying Offense

A listing of "qualifying offenses" may be found here. Statutory language is here.

Is the arraignment for a "qualifying offense"?*

YES → See flowchart on "Arraigning on a Qualifying Offense"

NO

Court must perform an individualized assessment of the defendant, considering the factors outlined in CPL 510.30(1) and impose the least restrictive condition necessary to ensure a return to court.

A defendant must be released ROR unless "it is demonstrated and the court makes an individualized determination that the principal poses a risk of flight to avoid prosecution".* This finding must be on the record or in writing. CPL 510.10(1)

Can the Defendant be released on his own recognizance?

YES → Court must ROR

NO

The Court must impose the "least restrictive non-monetary conditions" as defined by the statute, which may be found here.

Are there "non-monetary conditions" that will ensure a return to court?

YES → Court must impose conditions and provide in writing. CPL 510.40(3)

NO

May only be ordered after notice, an opportunity to be heard, and an individualized determination on the record or in writing that no other realistic non-monetary condition(s) will suffice to reasonably assure the defendant's return to court. CPL 510.45(4)

If no other realistic non-monetary conditions will ensure return to court, will supervision by pre-trial services ensure a return to court?

YES → Court may then order supervision by a pre-trial services agency. CPL 510.45(4)

NO

"Qualifies for electronic monitoring," means a person charged with a felony, a misdemeanor crime of domestic violence (as defined by CPL 500.10[22]), a misdemeanor defined in article one hundred thirty of the penal law, a crime and the circumstances of paragraph (b) of subdivision two of section 530.60 of this title apply, or any misdemeanor where the defendant stands previously convicted, within the past five years, of a violent felony offense." (Time spent incarcerated during that five year look-back will not count.)

Does the Defendant qualify for electronic monitoring?

YES → Court may then order electronic monitoring. CPL 510.40(4).

The specific method of electronic monitoring of the principal's location must be approved by the court. It must be the least restrictive procedure and method that will reasonably assure the principal's return to court, and unobtrusive to the greatest extent practicable.

NO

No other options available. Court must order least restrictive, non-monetary conditions, which may include pre-trial supervision.

Court shall explain choice of release, release with conditions, pretrial supervision, or electronic monitoring on the record or in writing. CPL 510.10(1)

*The local court prohibitions on ROR, or setting bail for a Class A felony or a double predicate felony defendant remain.

Arraigning on a Qualifying Offense

A listing of "qualifying offenses" may be found here (statutory language) or here (list).

Is the arraignment for a non-"qualifying offense"?*

YES → See flowchart on "Arraigning on a Non-Qualifying Offense"

NO

Court must perform an individualized assessment of the defendant, considering the factors outlined in CPL 510.30(1) and impose the least restrictive condition necessary to ensure a return to court.

A defendant charged with a qualifying offense may be released ROR by the court "in its discretion." CPL 530.20(1)(b).

Can the Defendant be released on his own recognizance?

YES → Court, in its discretion, may ROR

NO

If non-monetary conditions are imposed, the Court must impose the "least restrictive non-monetary conditions" as defined by the statute, which may be found here.

Are there "non-monetary conditions" that will ensure a return to court?

YES → Court, in its discretion, may impose conditions and must provide in writing. CPL 510.40(3)

NO

May only be ordered after notice, an opportunity to be heard, and an individualized determination on the record or in writing that no other realistic non-monetary condition(s) will suffice to reasonably assure the defendant's return to court. CPL 510.45(4)

If no other realistic non-monetary conditions will ensure return to court, will supervision by pre-trial services ensure a return to court?

YES → Court may then order supervision by a pre-trial services agency. CPL 510.45(4)

NO

"Qualifies for electronic monitoring," means a person charged with a felony, a misdemeanor crime of domestic violence (as defined by CPL 500.10[22]), a misdemeanor defined in article one hundred thirty of the penal law, a crime and the circumstances of paragraph (b) of subdivision two of section 530.60 of this title apply, or any misdemeanor where the defendant stands previously convicted, within the past five years, of a violent felony offense." (Time spent incarcerated during that five year look-back will not count.)

Does the Defendant qualify for electronic monitoring, and will it ensure return to court?

YES → Court may then order electronic monitoring. CPL 510.40(4).

NO

Will setting bail ensure a return to court?

YES → Court may then set bail. Bail must be in at least three forms, one of which must be an unsecured or partially secured (no more than 10%) surety bond as selected by the court. CPL 520.10(2)(b). See also: CPL 510.30(1)(f).

NO

Is the Defendant charged with a qualifying offense that is a felony?

YES → Court may remand to the custody of the sheriff. CPL 510.10(4)

NO

Cannot remand to custody.

Court shall explain choice of release, release with conditions, [illegible] on the record or in writing.

*The local court prohibitions on ROR, or setting bail for a Class A felony or a double predicate felony defendant remain.

Non-Monetary Conditions

- Definition: A court releases a principal under non-monetary conditions when, having acquired control over a person, it authorizes the person to be at liberty during the pendency of the criminal action or proceeding involved under conditions ordered by the court, which shall be the least restrictive conditions that will reasonably assure the principal's return to court. Such conditions must be reasonable under the circumstances. (CPL § 510.10[3-a])
- Statutory Examples:
    - that the principal be in contact with a pretrial services agency serving principals in that county (this is not the same condition as pretrial supervision [see below]);
    - that the principal abide by reasonable, specified restrictions on travel that are reasonably related to an actual risk of flight from the jurisdiction;
    - that the principal refrain from possessing a firearm, destructive device or other dangerous weapon;
    - when it is shown pursuant to subdivision four of CPL § 510.45 that no other realistic monetary condition or set of non-monetary conditions will suffice to reasonably assure the person's return to court, the person be placed in reasonable pretrial supervision with a pretrial services agency serving principals in that county;
    - that, when it is shown pursuant to paragraph (a) of subdivision four of CPL § 510.40 that no other realistic non-monetary condition or set of non-monetary conditions will suffice to reasonably assure the principal's return to court, the principal's location be monitored with an approved electronic monitoring device, in accordance with such subdivision four of CPL § 510.40.
- A defendant cannot be required to pay any cost relating to a non-monetary condition imposed by the court. (CPL § 510.10[3-a])
- Non-monetary conditions must be individualized and provided in writing by the court.
- At future court appearances, the court shall consider a lessening of conditions or modification of conditions to a less burdensome form based on the principal's compliance with such conditions of release. (CPL § 510.43[3])
- If defendant non-compliant in “an important respect”, additional conditions can be imposed: (1) only after notice of the facts and circumstances of such alleged non-compliance, reasonable under the circumstances; (2) affording the principal and the principal's attorney and the people an opportunity to present relevant, admissible evidence, relevant witnesses and to cross-examine witnesses; (3) a finding by **clear and convincing evidence** that the principal violated a condition of release in an important respect; and (4) any new conditions must be consistent with the court's obligation to impose the least restrictive condition or conditions that will reasonably assure the defendant's return to court. New conditions must be imposed on the record or in writing, and the court shall explain on the record or in writing the reasons for its determination and for any changes to the conditions imposed. (CPL § 510.43[3])

Pretrial Services Agencies

- Supervision by a pre-trial services agency may be ordered as a non-monetary condition pursuant to this title only if the court finds, after notice, an opportunity to be heard and an individualized determination explained on the record or in writing, that no other realistic non-monetary condition or set of non-monetary conditions will suffice to reasonably assure the principal's return to court.
- Contact with a pre-trial supervision agency is a possible non-monetary condition listed under CPL § 500.10(3-a). “Contact” and “supervision” are not the same thing. Contact with a pre-trial supervision agency normally requires the person to maintain contact with the agency. Supervision is more intensive, often requiring regular, personal contact with the staff of the agency.
- Any questionnaire, instrument or tool used with a principal in the process of considering or determining the principal's possible release on recognizance, release under non-monetary conditions or on bail, or used with a principal in the process of considering or determining a condition or conditions of release or monitoring by a pretrial services agency, shall be promptly made available to the principal and the principal's counsel upon written request. Any such blank form questionnaire, instrument or tool regularly used in the county for such purpose or a related purpose shall be made available to any person promptly upon request.
- Any such questionnaire, instrument or tool used to inform determinations on release or conditions of release shall be:
    - designed and implemented in a way that ensures the results are free from discrimination on the basis of race, national origin, sex, or any other protected class; and empirically validated and regularly revalidated, with such validation and revalidation studies and all underlying data, except personal identifying information for any defendant, publicly available upon request.

Electronic Monitoring

- Electronic monitoring is only authorized if the defendant is charged with an offense that "qualifies for electronic monitoring" (CPL 510.40[4][a]).
- "Qualifies for electronic monitoring" is defined as: "a person charged with a felony, a misdemeanor crime of domestic violence, a misdemeanor defined in article one hundred thirty of the penal law, a crime and the circumstances of paragraph (b) of subdivision two of section 530.60 of this title apply, or any misdemeanor where the defendant stands previously convicted, within the past five years, of a violent felony offense as defined in section 70.02 of the penal law. For the purposes of this subdivision, in calculating such five year period, any period of time during which the defendant was incarcerated for any reason between the time of the commission of any such previous crime and the time of commission of the present crime shall be excluded and such five year period shall be extended by a period or periods equal to the time served under such incarceration."
    - "Misdemeanor crime of domestic violence" means a misdemeanor under the penal law provisions and circumstances described in subdivision one of section 530.11 of this title.
    - CPL § 530.60(2)(b) states: "[e]xcept as provided in paragraph (a) of this subdivision or any other law, whenever in the course of a criminal action or proceeding a defendant charged with the commission of an offense is at liberty as a result of an order of recognizance, release under non-monetary conditions or bail issued pursuant to this article it shall be grounds for revoking such order and fixing bail in such criminal action or proceeding when the court has found, by clear and convincing evidence, that the defendant:
        (i) persistently and willfully failed to appear after notice of scheduled appearances in the case before the court; or
        (ii) violated an order of protection in the manner prohibited by subdivision (b), (c) or (d) of section 215.51 of the penal law while at liberty; or
        (iii) stands charged in such criminal action or proceeding with a misdemeanor or violation and, after being so charged, intimidated a victim or witness in violation of section 215.15, 215.16 or 215.17 of the penal law or tampered with a witness in violation of section 215.11, 215.12 or 215.13 of the penal law, law while at liberty; or
        (iv) stands charged in such action or proceeding with a felony and, after being so charged, committed a felony while at liberty.
- Electronic monitoring of a principal's location may be ordered only if the court finds, after notice, an opportunity to be heard and an individualized determination explained on the record or in writing, that the defendant qualifies for electronic monitoring, and no other realistic non-monetary condition or set of non-monetary conditions will suffice to reasonably assure a principal's return to court.
- The specific method of electronic monitoring of the principal's location must be approved by the court. It must be the least restrictive procedure and method that will reasonably assure the principal's return to court, and unobtrusive to the greatest extent practicable.
- Electronic monitoring may only be conducted by public entity or a non-profit entity under contract to county, state, or municipality.

- Electronic monitoring of a defendant's location may be for a maximum period of sixty days, and may be renewed for such period, after notice, an opportunity to be heard and a de novo, individualized determination of need for electronic monitoring, which shall be explained on the record or in writing.
- A defendant subject to electronic location monitoring shall be considered held or confined in custody for purposes of CPL § 180.80 and shall be considered committed to the custody of the sheriff for purposes of CPL § 170.70, as applicable.

Qualifying Offenses List**

PL §§ 105.10, 105.13, 105.15 Conspiracy in the fourth, third, and second degrees if the underlying felony is a "felony sex offense" as defined by PL § 70.80(1) ✹
PL § 105.15 Conspiracy second degree if the underlying allegation of such charge is that the defendant conspired to commit a class A felony defined in article one hundred twenty-five of the penal law (CPL 510.10[4][f]) ◘
PL § 105.17 Conspiracy in the first degree ⌂
PL § 120.02 Reckless assault of a child ⊠
PL § 120.05 Assault in the second degree ⊠
PL § 120.06 Gang assault in the second degree □
PL § 110.05(5) and PL § 70.02(1)(c) Attempt to commit ⊠
PL § 120.07 Gang assault in the first degree ♢
PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □
PL § 120.08 Assault on a peace officer, police officer, fireman, etc. □
PL § 110.05(5) and PL § 70.02(1)(c) Attempt to commit ⊠
PL § 120.09 Assault on a judge □
PL § 110.05(5) and PL § 70.02(1)(c) Attempt to commit ⊠
PL § 120.10 Assault in the first degree ♢
PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □
PL § 120.11 Aggravated Assault upon a police officer ♢
PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □
PL § 120.18 Menacing a police officer or peace officer ⊠
PL § 120.60 **subd. (1)** Stalking in the first degree ⊠
PL § 120.70 Luring a child ✚
PL § 121.12 Strangulation in the second degree ⊠
PL § 121.13 Strangulation in the first degree □
PL § 110.05(5) and PL § 70.02(1)(c) Attempt to commit ⊠
PL § 125.11 Aggravated criminally negligent homicide □
PL § 110.05(5) and PL § 70.02(1)(c) Attempt to commit ⊠
PL § 125.20 Manslaughter in the first degree ♢
PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □
PL § 125.21 Aggravated manslaughter in the second degree □
PL § 110.05(5) and PL § 70.02(1)(c) Attempt to commit ⊠
PL § 125.22 Aggravated manslaughter in the first degree ♢
PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □
PL § 125.25 Murder in the Second Degree ⌂
PL § 110.05(3) and PL § 70.02(1)(a) Attempt to commit ♢
PL § 125.26 Aggravated Murder ⌂
PL § 110.05(1) Attempt to commit aggravated murder ⌂
PL § 125.27 Murder in the First Degree ⌂
PL § 110.05(1) Attempt to commit murder in the first degree ⌂
PL § 130.20 Sexual misconduct ✹
PL § 110.05(8) attempt to commit ✹
PL § 130.25 Rape in the third degree ✹

PL § 110.05(7) Attempt to Commit ✹[1]
PL § 130.30 Rape in the second degree ⊠, ✹
PL § 70.80(1) and PL § 110.05(6) Attempt to commit ✹
PL § 130.35 Rape in the first degree ♢, ✹
PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □, ✹
PL § 130.40 Criminal sexual act in the third degree ✹
PL § 110.05(7) Attempt to Commit ✹[2]
PL § 130.45 Criminal sexual act in the second degree ⊠, ✹
PL § 70.80(1) and PL § 110.05(6) Attempt to commit ✹
PL § 130.50 Criminal sexual act in the first degree ♢
PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □
PL § 130.52 Forcible touching ✹
PL § 110.05(8) attempt to commit ✹
PL § 130.53 Persistent sexual abuse ☆
PL § 110.05(8) attempt to commit ✹
PL § 130.55 Sexual abuse in the third degree ✹
PL § 110.05(6) attempt to commit ✹
PL § 130.60 Sexual abuse in the second degree ✹
PL § 110.05(7) Attempt to Commit ✹
PL § 130.65 Sexual abuse in the first degree ⊠
PL § 70.80(1) and PL § 110.05(6) Attempt to commit ✹
PL § 130.65-a Aggravated sexual abuse in the fourth degree ☆, ✹
PL § 130.66 Aggravated sexual abuse in the third degree ⊠, ✹
PL § 70.80(1) and PL § 110.05(6) Attempt to commit ✹
PL § 130.67 Aggravated sexual abuse in the second degree □, ✹
PL § 110.05(5) and PL § 70.02(1)(c) Attempt to commit ⊠, ✹
PL § 130.70 Aggravated sexual abuse in the first degree ♢, ✹
PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □, ✹
PL § 130.75 Course of sexual conduct against a child in the first degree ♢, ✹
PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □, ✹
PL § 130.80 Course of sexual conduct against a child in the second degree ⊠, ✹
PL § 70.80(1) and PL § 110.05(6) Attempt to commit ✹
PL § 130.85 Female genital mutilation ✹
PL § 110.05(7) Attempt to Commit ✹
PL § 130.90 Facilitating a sex offense with a controlled substance ⊠, ✹
PL § 70.80(1) and PL § 110.05(6) Attempt to commit ✹
PL § 130.91 Sexually motivated felony (a person who commits a specified offense outlined in 130.91(2) for the purposes of direct sexual gratification) ✹
PL § 130.95 Predatory sexual assault ⌂
PL § 110.05(2) Attempt to commit ⌂
PL § 130.96 Predatory sexual assault against a child ⌂
PL § 110.05(2) Attempt to commit ⌂

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[1] CPL § 510.10(4)(e) includes in its definition "a misdemeanor defined in article one hundred thirty of such law".

[2] CPL § 510.10(4)(e) includes in its definition "a misdemeanor defined in article one hundred thirty of such law".

PL § 135.20 Kidnapping in the second degree ♢
PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □
PL § 135.25 Kidnapping in the first degree ⌂
PL § 110.05(3) and PL § 70.02(1)(a) Attempt to commit ♢
PL § 135.35 **subd. (3) (a) and (b)** Labor trafficking ⊠
PL § 140.25**(1)** Burglary in the second degree □ (**n.b.** subdivision 2 is not a qualifying offense)
PL § 110.05(5) and PL § 70.02(1)(c) Attempt to commit ⊠
PL § 140.30 Burglary in the first degree ♢
PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □
PL § 150.15 Arson in the second degree ♢
PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □
PL § 150.20 Arson in the first degree ⌂
PL § 110.05(3) and PL § 70.02(1)(a) Attempt to commit ♢
PL § 160.10**(2) and (3)** Robbery in the second degree □ (**n.b.** subdivision 1 is not a qualifying offense)
PL § 110.05(5) and PL § 70.02(1)(c) Attempt to commit ⊠
PL § 160.15 Robbery in the first degree ♢
PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □
PL § 215.11 Tampering with a witness in the third degree ☼
Attempt to Commit[3]
PL § 215.12 Tampering with a witness in the second degree ☼
Attempt to Commit[4]
PL § 215.13 Tampering with a witness in the first degree ☼
Attempt to Commit[5]
PL § 215.15 Intimidating a victim or witness in the third degree ●
Attempt to Commit[6]
PL § 215.16 Intimidating a victim or witness in the second degree ⊠
PL § 215.17 Intimidating a victim or witness in the first degree ♢
PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □
PL § 215.50(3) Criminal contempt in the second degree and the underlying allegation of such charge is that

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[3] The definition of "qualifying offense" includes the language "crime involving" a delineated offense(s). Arguably this includes the attempt of that crime if the attempt is also a crime. See CPL § 510.10(4)(c). Note, however, that the legislation does not include the misdemeanor crime of tampering with a witness in the fourth degree (PL § 215.10). This may support an argument that the Legislature only intended witness tampering crimes that were felony offenses as a "qualifying offense". This would exclude the crime of attempted tampering with a witness in the third degree as that is an A misdemeanor.

[4] Id.

[5] Id.

[6] The definition of "qualifying offense" includes the language "crime involving" a delineated offense(s). Arguably this includes the attempt of that crime if the attempt is also a crime. See CPL § 510.10(4)(b). However, if the legislative intent were to include attempts as a result of this language, this leads to an anomaly. CPL § 510.10(4)(a) states that a qualifying offense is "a felony enumerated in section 70.02 of the penal law…". PL § 70.02(1)(c) (class D violent felony offenses) includes PL § 215.16 intimidating a victim or witness in the second degree. However, the attempt of that crime is not a violent felony offense (see PL § 70.02(1)(d)) and no other provision under CPL § 510.10(4) would appear to make the attempt of that crime a qualifying offense. Thus, there is an argument that "crime involving" does not include attempts, as this would lead to an anomalous result.

the defendant violated a duly served order of protection where the protected party is a member of the defendant's same family or household as defined in subdivision one of section 530.11[7] of this article ✢

PL § 215.51(b),(c), or (d) Criminal contempt in the first degree and the underlying allegation of such charge is that the defendant violated a duly served order of protection where the protected party is a member of the defendant's same family or household as defined in subdivision one of section 530.11 of this article ✢

PL § 215.52 Aggravated criminal contempt and the underlying allegation of such charge is that the defendant violated a duly served order of protection where the protected party is a member of the defendant's same family or household as defined in subdivision one of section 530.11 of this article ✢

PL § 220.77 Operating as Major Trafficker ⌂

PL § 230.05 Patronizing a person for prostitution in the second degree

PL § 230.06 Patronizing a person for prostitution in the first degree ✹

PL § 70.80(1) and PL § 110.05(6) Attempt to commit ✹[8]

PL § 230.11 Aggravated patronizing a minor for prostitution in the third degree ✹

PL § 230.12 Aggravated patronizing a minor for prostitution in the second degree ✹

PL § 70.80(1) and PL § 110.05(6) Attempt to commit ✹

PL § 230.13 Aggravated patronizing a minor for prostitution in the first degree ✹

PL § 70.80(1) and PL § 110.05(4) Attempt to commit ✹

PL § 230.34 **subd.** (5)(a) and (b) Sex trafficking ♢

PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □

PL § 230.34-a Sex trafficking of a child ♢

PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □

PL § 240.55 Falsely reporting an incident in the second degree ☆

PL § 240.60 Falsely reporting an incident in the first degree ⊠

PL § 240.61 Placing a false bomb or hazardous substance in the second degree ☆

PL § 240.62 Placing a false bomb or hazardous substance in the first degree ⊠

PL § 240.63 Placing a false bomb or hazardous substance in as sports stadium or arena, etc. ⊠

PL § 255.25 Incest in the third degree ✹

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[7] CPL 53011 defines "members of the same family or household" as follows:
(a) persons related by consanguinity or affinity;
(b) persons legally married to one another;
(c) persons formerly married to one another regardless of whether they still reside in the same household;
(d) persons who have a child in common, regardless of whether such persons have been married or have lived together at any time; and
(e) persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time. Factors the court may consider in determining whether a relationship is an "intimate relationship" include but are not limited to: the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship. Neither a casual acquaintance nor ordinary fraternization between two individuals in business or social contexts shall be deemed to constitute an "intimate relationship".

[8] PL § 70.80 includes as a "felony sex offense" any attempt to commit the delineated offenses, or a conspiracy to commit the delineated offenses if the attempt or conspiracy crime is a felony.

Attempt to Commit[9]
PL § 255.26 Incest in the second degree ✹
Attempt to Commit[10]
PL § 255.27 Incest in the first degree ♢, ✹
PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □
PL § 263.05 Use of a child in a sexual performance ✚
PL § 263.30 Facilitating a sexual performance by a child with a controlled substance or alcohol ✚
PL § 265.02 (5), (6), (7), (8), (9) and (10) Criminal possession of a weapon in the third degree ⊠
PL § 265.03 Criminal possession of a weapon in the second degree □
PL § 110.05(5) and PL § 70.02(1)(c) Attempt to commit ⊠
PL § 265.04 Criminal possession of a weapon in the first degree ♢
PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □
PL § 265.08 Criminal use of a firearm in the second degree □
PL § 110.05(5) and PL § 70.02(1)(c) Attempt to commit ⊠
PL § 265.09 Criminal use of a firearm in the first degree ♢
PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □
PL § 265.11 Criminal sale of a firearm in the third degree ⊠
PL § 265.12 Criminal sale of a firearm in the second degree □
PL § 110.05(5) and PL § 70.02(1)(c) Attempt to commit ⊠
PL § 265.13 Criminal sale of a firearm in the first degree ♢
PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □
PL § 265.14 Criminal sale of a firearm with the aid of a minor □
PL § 110.05(5) and PL § 70.02(1)(c) Attempt to commit ⊠
PL § 265.19 Aggravated criminal possession of a weapon □
PL § 110.05(5) and PL § 70.02(1)(c) Attempt to commit ⊠
PL § 405.18 Aggravated unpermitted use of indoor pyrotechnics in the first degree ⊠
PL § 460.22 Aggravated Enterprise Corruption ⌂
PL § 470.23 Money laundering in the support of terrorism in the second degree ★
PL § 470.24 Money laundering in the support of terrorism in the first degree ★
PL § 490.10 Soliciting or providing support for an act of terrorism in the second degree ⊠, ★
PL § 110.05(6) Attempt to Commit ★
PL § 490.15 Soliciting or providing support for an act of terrorism in the first degree □, ★
PL § 110.05(5) and PL § 70.02(1)(c) Attempt to commit ⊠, ★
PL § 490.20 Making a terroristic threat ⊠ (**n.b.** see conflict between CPL §§ 510.10[4][a] and 510.10[4][g])[11]
PL § 490.25 Crime of Terrorism, class B offense or higher ⌂, ★
PL § 490.30 Hindering prosecution of terrorism in the second degree □, ★
PL § 110.05(5) and PL § 70.02(1)(c) Attempt to commit ⊠, ★
PL § 490.35 Hindering prosecution of terrorism in the first degree ♢, ★

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[9] CPL § 510.10(4)(e) uses the language "crime involving" the delineated offenses. This arguably includes the attempts.

[10] Id.

[11] There is a conflict between CPL §§ 510.10(4)(a) and 510.10(4)(g). 510.10(4)(a) states that a qualifying offense is "a felony enumerated in section 70.02 of the penal law…". PL § 70.02(1)(c) (class D violent felony offenses) states that PL § 490.20 making a terroristic threat is a class D violent felony. However, CPL § 510.10(4)(g) specifically excludes that crime as a qualifying offense. Since the Legislature specifically excluded it, a strong argument exists that this is not a qualifying offense.

PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □, ★
PL § 490.37 Criminal possession of a chemical or biological weapon in the third degree □, ★
PL § 110.05(5) and PL § 70.02(1)(c) Attempt to commit ⊠, ★
PL § 490.40 Criminal possession of a chemical weapon or biological weapon in the second degree ♢, ★
PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □, ★
PL § 490.45 Criminal possession of a chemical weapon or biological weapon in the first degree ⌂
PL § 110.05(1) Attempt to commit criminal possession of a chemical weapon or biological weapon in the first degree ⌂, ★
PL § 490.47 Criminal use of a chemical weapon or biological weapon in the third degree ♢, ★
PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □, ★
PL § 490.50 Criminal use of a chemical weapon or biological weapon in the second degree ⌂, ★
PL § 110.05(2) Attempt to commit ⌂, ★
PL § 490.55 Criminal use of a chemical weapon or biological weapon in the first degree ⌂, ★
PL § 110.05(1) Attempt to commit criminal use of a chemical weapon or biological weapon in the first degree ⌂, ★

** this list does not account for non-existent, or legally impossible crimes, e.g., attempted manslaughter in the first degree, or attempted assault in the second degree, subd. 3 (see *People v. Campbell*, 72NY2d 602 [1988]).

♢ CPL § 510.10(4)(a) and PL § 70.02(1)(a)
□ CPL § 510.10(4)(a) and PL § 70.02(1)(b)
⊠ CPL § 510.10(4)(a) and PL § 70.02(1)(c)
☆ CPL § 510.10(4)(a) and PL § 70.02(1)(d)
● CPL § 510.10(4)(b)
☼ CPL § 510.10(4)(c)
⌂ CPL § 510.10(4)(d)
✹ CPL § 510.10(4)(e) and PL § 70.80(1)
◘ CPL § 510.10(4)(f)
★ CPL § 510.10(4)(g)
✢ CPL § 510.10(4)(h)
✚ CPL § 510.10(4)(i)

NEW YORK'S BAIL REFORM LAW

A BENCH BOOK FOR JUDGES

Prepared by Daniel Conviser, Acting State Supreme Court Justice
Manhattan Criminal Term

Revised July 11, 2019

TABLE OF CONTENTS

The statute was enacted through an omnibus SFY 2019-2020 "Article VII" budget bill, A-2009-c\S-1509-c, in Part JJJ of that legislation. For each topic, the bill section of this legislation is cited along with a statutory citation.

THE "LEAST RESTRICTIVE ALTERNATIVE" RULE (Bill section 2)

The new statute provides an overarching principle which applies to all securing orders unless otherwise required by law.

> [T]he court shall release the principal pending trial on the principal's own recognizance, unless it is demonstrated and the court makes an individualized determination that the principal poses a risk of flight to avoid prosecution. If such a finding is made, the court must select the least restrictive alternative and condition or conditions that will reasonably assure the principal's return to court. The court shall explain its choice of release, release with conditions, bail or remand on the record or in writing. CPL 510.10 (1).

Defendants have the right to counsel and to have counsel appointed if indigent regarding securing order determinations. CPL 510.10 (2).

AUTHORIZATION FOR "NON-MONETARY" CONDITIONS (Bill section 1-e)

The statute adds a new subdivision 3-a to CPL 500.10 to define "Release under non-monetary conditions". Such conditions are defined as "the least restrictive conditions" which will "reasonably assure the principal's return to court". Those conditions "may include, among other conditions reasonable under the circumstances" that:

- "the principal be in contact with a pretrial services agency . . ."

- "the principal abide by reasonable, specified restrictions on travel that are reasonably related to an actual risk of flight from the jurisdiction;"

- "the principal refrain from possessing a firearm, destructive device or other dangerous weapon;"

- when it is shown pursuant to CPL 510.45 (4) that "no other realistic monetary[1] condition or set of non-monetary conditions will suffice to reasonably assure the person's return to court, the person be placed in reasonable pretrial supervision . . . " or

- when it is shown that "no other realistic non-monetary condition or set of non-monetary conditions will suffice to reasonably assure" a person's return to court, the person be subject to electronic monitoring.

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[1] The word "monetary" here is apparently a typographical error and should likely be "non-monetary".

"A principal shall not be required to pay for any part of the cost of release on non-monetary conditions".

The examples of non-monetary conditions under the statute are not exclusive. Where a pretrial services agency will supervise a defendant, moreover, those agencies will likely recommend conditions. Among the possible conditions which might be considered are:

- Interim probation supervision;

- Home confinement;

- Curfews;

- Drug testing;

- Participation in treatment programs (such as drug, alcohol, anger management, mental health or sex offender treatment);

- Specification of a residence;

- Special conditions for driving while intoxicated or impaired crimes;

- Compliance with an order of protection;

- Limitations on the use of computers or phones;

- Restrictions on presence at particular places (for example, playgrounds for child sex offenders);

- Checking in with the court, or law enforcement agencies; or

- Surrender of a passport or other documents.

It should be noted, however, that the purpose of non-monetary conditions under the statute is to ensure a defendant's return to court, rather than facilitate a defendant's rehabilitation or promote public safety. Those goals, of course, are often not easily separable and indeed one of the five illustrative conditions under the statute is the surrender of firearms and other weapons.

NOTIFICATION OF NON-MONETARY CONDITIONS (Bill section 6)
NOTIFICATION OF COURT APPEARANCES (Bill section 7)

The court must inform defendants released on non-monetary conditions on the record and

in an "individualized written document . . . in plain language and a manner sufficiently clear and specific" of the conditions the defendant will be subject to and "that the possible consequences for violation of such a condition may include revocation of the securing order and the ordering of a more restrictive securing order". CPL 510.40 (5). These non-monetary condition notifications, under the statute's language, are required to be provided by the court (rather than a pretrial services agency) even if a defendant is being supervised by a pretrial agency.

The court or a pretrial services agency directed by the court must also inform all defendants released with non-monetary conditions or on recognizance of upcoming court appearances in advance by text message, telephone, email or first class mail. Each defendant can select his or her preferred notification method on a form developed by OCA which shall be offered to defendants at court appearances. Such forms shall be maintained in court files. CPL 510.43. Under the statute's language, the requirement to notify defendants of upcoming court appearances does not apply to defendants at liberty on bail.

MODIFICATION OF NON-MONETARY CONDITIONS (Bill section 6)

Under new CPL 510.40 (3), where non-monetary conditions have been set: "At future court appearances, the court shall consider a lessening of conditions or modification of conditions to a less burdensome form based on the principal's compliance with such conditions of release".

Upon non-compliance with non-monetary conditions in an "important respect" the Court can consider imposing additional conditions. However, that can only be done after providing the parties with notice of the alleged non-compliance and "affording [the parties] an opportunity to present relevant, admissible evidence, relevant witnesses and to cross-examine witnesses" and a finding by the court by clear and convincing evidence that a principal violated a condition of release. Following such a finding, a court can impose additional non-monetary conditions consistent with the "least restrictive alternative" rule, explaining its determination on the record or in writing.

Where a defendant fails to comply with non-monetary conditions, can the court set bail (or order remand) in an appropriate case, if the Court finds that is the least restrictive alternative available? The answer is "likely yes" for "qualifying offenses" and clearly "no" for non-qualifying offenses. "Qualifying offenses" are those specific crimes (outlined *infra*) for which the court has authority to set bail or order remand initially. There is a reasonable argument that for a qualifying offense, the authority to set bail or order remand may be exercised throughout the case so long as the general "least restrictive alternative" rule and the statute's other general requirements are met.

Bail can also be set where defendants "willfully" and "persistently" fail to appear after receiving "notice of scheduled appearances" or commit certain specified new crimes while at liberty, even if a defendant is not charged with a qualifying offense. *See* new CPL 530.60 (2) (b)

(discussed *infra*). But the statute does not allow bail to be set or remand to be ordered for a non-qualifying offense for a violation of other non-monetary conditions. The new legislation does not modify court contempt powers. Thus contempt might be considered as a remedy where a defendant fails to obey a court's non-monetary conditions order.

ELECTRONIC MONITORING ELIGIBLE CRIMES (Bill section 1-f)

Under new CPL 500.10 (21) & (22) electronic monitoring is an available condition only for:

- Felonies;

- Misdemeanor sex crimes defined by Article 130 of the Penal Law;

- A defendant who may have bail set by virtue of persistently and willfully failing to appear in court as directed or for committing specified new crimes while at liberty pursuant to new CPL 530.60 (2) (b) (discussed *infra*);

- A defendant charged with a misdemeanor crime of "domestic violence" (as defined in CPL 530.11 (1)); or

- Any other misdemeanor where a defendant has been convicted of a violent felony offense within the past five years (not including any period of incarceration).

ELECTRONIC MONITORING RESTRICTIONS (Bill section 6)

To impose electronic monitoring the court must first find through an individualized determination, made on the record or in writing, after providing an opportunity to be heard, that the defendant is eligible for electronic monitoring and that "no other realistic non-monetary condition or set of non-monetary conditions will suffice to reasonably assure a principal's return to court". CPL 510.40 (4) (a). The specific electronic monitoring method must be approved by the court, be the "least restrictive procedure and method" which will reasonably assure a court appearance and be "unobtrusive to the greatest extent practicable". CPL 510.40 (4) (b).

Electronic monitoring may only be conducted by a public entity under the supervision of a county or municipality, or a non-profit organization under contract with a county, municipality or the state. Counties or municipalities can contract with other counties or municipalities to conduct monitoring but "counties, municipalities and the state shall not contract with any private for-profit entity for such purposes". CPL 510.40 (4) (c).

"Electronic monitoring . . . may be for a maximum period of sixty days, and may be renewed for such period, after notice, an opportunity to be heard and a de novo, individualized determination . . . which shall be explained on the record or in writing". CPL 510.40 (4) (d).

Defendants subject to electronic monitoring are considered "held or confined in custody" pursuant to CPL 180.10 and "committed to the custody of the sheriff" under CPL 170.70.

RELEASE APPLICATIONS (Bill section 3)

Under current law, where a defendant is confined on a securing order, he or she may apply for release on recognizance or on bail. CPL 510.20 (1). The statute has been amended to provide, not only that a defendant may be "heard" on such an application, but may also "present evidence". CPL 510.20 (2) (b).

CHANGE IN SECURING ORDER FACTORS (Bill section 5)

General Revised Structure

Existing CPL 510.30 lists numerous factors a court must consider in determining the "kind and degree of control or restriction that is necessary to secure" a defendant's court appearance. CPL 510.30 (2) (a). The new bail statute rewrites those provisions in significant ways, adding new considerations, deleting others and rewriting some. As outlined below, however, the new law also integrates in the middle of these provisions, as one factor, a new "catch-all" category: "information about the principal that is relevant to the principal's return to court, including . . . [t]he principal's activities and history". New CPL 501.30 (1) (a). This provision, unlike current law, would appear to allow *any* information relevant to flight risk to be considered.

These integrated revisions pose the question of how courts should reconcile the "catch-all" with the specific, detailed policy proscriptions contained in the same statute. The answer is clear in one respect. The new statute provides a list of issues courts *must* consider.

The more difficult question is how to think about provisions of current law which have been eliminated, limited or modified. The "catch-all" provides that a court can consider anything relevant to flight risk. On the other hand, it might also be argued that provisions which were eliminated or limited should not be considered, or considered only in their limited, amended form.

Perhaps the best way to read the statute is in its revised form, without considering how it was amended. Under that reading, the statute contains a new list of mandatory considerations. But it also now plainly allows any factor relevant to flight risk to be considered.

Specific Changes Made by the Statute

The new law first eliminates three prior considerations from the statute:

(i) "The principal's character, reputation, habits and mental condition";

(ii) "His employment and financial resources"; and

(iii) "His family ties and the length of his residence if any in the community".

Added to the statute is this new criterion:

"[I]nformation about the principal that is relevant to the principal's return to court, including:

(a) The principal's activities and history;

(b) If the principal is a defendant, the charges facing the principal;

(c) the principal's criminal conviction record, if any." (Here, the phrase under the former law, "criminal record" is changed to "criminal conviction record").

Current CPL 510.30 (2) (a) (vi) is amended to eliminate, as a consideration in setting securing orders, a defendant's record "in responding to court appearances when required" while leaving intact as a consideration the question of whether a defendant engaged in "flight to avoid criminal prosecution".

A new provision in this section, paragraph (f), adds as a consideration a principal's "individual financial circumstances" in cases where bail could be set and the "principal's ability to post bail without posing undue hardship, as well as his or her ability to obtain a secured, unsecured or partially secured bond;".

Existing provisions requiring consideration of violations of orders of protection directed at members of a defendant's family or household and a defendant's history of using or possessing a firearm are substantively unchanged.

Existing CPL 510.30 (2) (viii) & (ix) are largely eliminated. The new bail statute eliminates as a consideration in issuing securing orders "the weight of the evidence against him [the defendant] in the pending criminal action and any other factor indicating probability of conviction" as well as the sentence which would be imposed on a conviction. Left intact is the proviso that a court can consider the merit of an appeal in any case where an appeal is pending as well as an additional provision of current law (CPL 510.30 (2) (b)) which further outlines how the merits of a pending appeal can be considered.

QUALIFYING OFFENSES FOR WHICH BAIL OR REMAND ARE AUTHORIZED
Bill section 2: General Provision
Bill section 16: Substantively Identical Provision for local criminal court securing orders

Bail may be set for a "qualifying offense" and remand may be set for a qualifying offense

which is a felony. CPL 510.10 (4); CPL 530.20 (1). A qualifying offense is:

(a): A "violent felony offense" as defined by Penal Law § 70.02, except Burglary in the Second Degree as defined in Penal Law § 140.25 (2) (burglary of a dwelling) or Robbery in the Second Degree as defined in § 160.10 (1) (a robbery aided by another). (While these burglary and robbery completed crimes are not qualifying offenses, attempts to commit such crimes *are* qualifying offenses, since such attempts are separately defined violent felony offenses. Courts will have to construe this anomaly).

(b) A "a crime involving witness intimidation under section 215.15 of the Penal Law". (Intimidating a victim or witness in the third degree, a Class E felony).[2]

(c): A "a crime involving witness tampering under section 215.11, 215.12 or 215.13 of the penal law".

(d): "a Class A felony defined in the Penal Law, other than in article two hundred twenty of such law with the exception of section 220.77 of such law." (Penal Law § 220.77 is the so-called "drug kingpin" statute: "Operating as a Major Trafficker"). The only narcotics crime which is a qualifying offense is a completed drug kingpin crime.

(e): "a felony sex offense defined in section 70.80 of the penal law or a crime involving incest as defined in section 255.25, 255.26 or 255.27 of such law, or a misdemeanor defined in article one hundred thirty of such law;"

(f): "conspiracy in the second degree as defined in section 105.15 of the penal law, where the underlying allegation of such charge is that the defendant conspired to commit a Class A felony defined in article one hundred twenty-five of the penal law".

(g): (part 1): money laundering in support of terrorism in the first or second degrees (Penal Law §§ 470.24; 470.23).

(g): (part 2): "a felony crime of terrorism as defined in article four hundred ninety of the penal law, other than the crime defined in section 490.20 of such law" (the crime of "Making a Terroristic Threat", a Class D felony).[3]

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[2] In a number of these categories, it is not completely clear whether inchoate crimes: attempts, conspiracies, facilitation or solicitation crimes are qualifying offenses. Where the statute uses the term "involving", as here, a broad construction which includes inchoate crimes is arguably suggested.

[3] While this terroristic threat crime is excluded as an eligible offense here, it is *included* as an eligible offense under the "violent felony offense" category since it is a violent felony offense. It might be most reasonable to construe the exclusion of this crime as a qualifying

(h) "criminal contempt in the second degree as defined in subdivision three of section 215.50 of the penal law, criminal contempt in the first degree as defined in subdivision (b), (c) or (d) of section 215.51 of the penal law or aggravated criminal contempt as defined in section 215.52 of the penal law" where the underlying allegation is that the defendant violated an order of protection concerning a member of the defendant's family or household, as defined in CPL 530.11.

(i): facilitating a sexual performance by a child with a controlled substance or alcohol (Penal Law § 263.30) (a Class B felony), use of a child in a sexual performance (Penal Law § 263.05) (a Class C felony) or luring a child as defined in Penal Law § 120.70 (Class C, D or E felonies).

RETENTION OF JUSTICE COURT REMAND REQUIREMENTS (Bill section 16)

The bill makes only a grammatical change to CPL 530.20 (2) (a) which, in its amended form, provides that: "A city court, a town court or a village court may not order recognizance or bail when (i) the defendant is charged with a Class A felony, or (ii) the defendant has two previous felony convictions;". Many defendants in these categories will not have committed a qualifying offense.

Thus, for non-qualifying offenses, the bail statute's general "qualifying offense" provisions prohibit bail or remand while CPL 530.20 (2) (a) requires remand for certain crimes for the period prior to the transfer of a case to a non-justice court. It might be most reasonable to read this latter provision as an exception to the general rule, although the general rule does not provide such an exception.

REQUIREMENT FOR DOLLAR BAIL (Bill sections 2 & 16)

Where a defendant requests nominal bail (i.e., "dollar bail") in order to receive credit in an instant case for time incarcerated on another charge, the court must grant the request if it finds it is "voluntary". CPL 510.10 (5); 530.20 (d).

REQUIREMENT FOR WRITTEN REASONS WHERE BAIL REJECTED (Bill section 6)

If a court sets bail but does not approve the bail which is submitted, "the court shall explain promptly *in writing* the reasons therefor." CPL 510.40 (2) (emphasis added).

APPEAL OF NON-MONETARY CONDITION REQUIREMENTS (Bill section 17)

The statute allowing defendants to appeal local criminal court bail decisions to a superior court is expanded to also allow such appeals where a local criminal court sets non-monetary conditions which were "more restrictive than necessary to reasonably assure the defendant's

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offense in paragraph (g) here as the controlling provision.

return to court". CPL 530.30 (1). With respect to appeals of both bail or non-monetary condition requirements, the statute adds the requirement that a court "shall explain its choice of alternative and conditions on the record or in writing".

CHANGE IN BAIL FORM REQUIREMENTS (Bill Section 10)

The bail legislation modifies CPL 520.10 (2) (b), which requires that two forms of bail be specified (if the court chooses to specify a bail form), in two important respects. First, the existing requirement that a court set bail in two or more of the specified bail forms is changed to a requirement that the court set bail in three or more forms. Second, the statute provides that "one of the forms shall be either an unsecured or partially secured surety bond, as selected by the court".

ESTABLISHMENT OF PRE-TRIAL SERVICES AGENCIES (Bill Section 8)

New CPL 510.45 sets rules for the establishment of pretrial services agencies to monitor defendants subject to non-monetary conditions. The statute provides that OCA must certify such agencies in each county. The law does not define what "certification" means or what OCA's responsibilities for such agencies should entail. Each entity shall either be a public agency or a non-profit under contract to the state, a county or a municipality. Counties or municipalities may contract with other counties and municipalities to provide services in the county where a defendant is supervised. Counties, municipalities or the state may not contract with for-profit entities "for such purposes".

Defendants are entitled to receive copies of any "questionnaire, instrument or tool" used by a pretrial services agency upon request. Such questionnaires, instruments or tools shall be designed and implemented to ensure they are not discriminatory. They shall be "empirically validated and regularly revalidated, with such validation and revalidation studies and all underlying data, except personal identifying information for any defendant, publicly available upon request". CPL 510.45 (3) (ii).

"Supervision by a pre-trial services agency may be ordered as a non-monetary condition pursuant to this title only if the court finds, after notice, an opportunity to be heard and an individualized determination explained on the record or in writing, that no other realistic non-monetary conditions will suffice to reasonably assure the principal's return to court". CPL 510.45 (4).

OCA is directed to compile and publish detailed annual reports on pretrial agency monitoring. The reports are directed not to contain personal identifying information but must include information on "the race, ethnicity, age and sex" of each person supervised. CPL 510.45 (5)

ADDITIONAL AUTHORITY TO IMPOSE BAIL ON ABSCONDING DEFENDANTS OR FOR COMMISSION OF NEW CRIMES (Bill section 20) Amending CPL 530.60

Defendants at liberty can have bail set, even if they otherwise could not have bail set because they have not been charged with a qualifying offense, "when the court has found, by clear and convincing evidence, that the defendant:

> (i) persistently and willfully failed to appear after notice of scheduled appearances in the case before the court; or
>
> (ii) violated an order of protection in the manner prohibited by subdivision (b), (c) or (d) of section 215.51 of the penal law while at liberty [these are subdivisions of the Class E felony of Criminal Contempt in the First Degree, which occur when a defendant violates an order of protection by taking specific threatening or menacing actions or violates the "stay away" provisions of an order of protection while having a designated history of a previous violation]; or
>
> (iii) stands charged in such criminal action or proceeding with a misdemeanor or violation and, after being so charged, intimidated a victim or witness in violation of section 215.15, 215.16 or 215.17 of the penal law or tampered with a witness in violation of section 215.11, 215.12 or 215.13 of the penal law, law[4] while at liberty; or
>
> (iv) stands charged in such action or proceeding with a felony and, after being so charged, committed a felony while at liberty."

The new bail statute retains existing law (CPL 530.60 (2)) which also provides that a defendant at liberty under an order of recognizance or bail (or, in a conforming amendment under non-monetary conditions) who stands charged with a felony can have that order revoked if there is "reasonable cause" to believe the Defendant committed a Class A felony or violent felony offense or intimidated a victim or witness while at liberty.

Under this provision of existing law regarding the commission of specified new crimes while at liberty on a pending felony charge, there are special evidentiary rules not applicable to other securing order modifications, providing that "the court must hold a hearing and shall receive any relevant, admissible evidence not legally privileged. The defendant may cross-examine witnesses and may present relevant, admissible evidence on his own behalf." These hearings can be consolidated with CPL 180.80 hearings. "The district attorney may move to introduce grand jury testimony of a witness in lieu of that witness' appearance at the hearing".

Under the new bail law, however, all of these evidentiary requirements are made

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[4] The repetition of the word "law" here appears to be a typographical error.

applicable to *any* proceeding in which a court may revoke a securing order or order bail pursuant to this new section CPL 530.60. That is, such hearings must be held if it is alleged a defendant did not commit any new crime but "persistently and willfully" failed to appear.

Under this section, bail can be set for otherwise non-qualifying offenses, provided that "the court must select the least restrictive alternative and condition or conditions that will reasonably assure the principal's return to court". New CPL 530.60 (2) (d) (ii).

The meaning of "willfully"

The mental state "willful" is not defined by the Criminal Procedure Law or the Penal Law, although it is used in statues other than the new bail law. For example, existing CPL 530.12 (11), authorizes a change in a securing order where a defendant "willfully failed to obey" an order of protection. The United States Supreme Court has observed that "willful . . . is a word of many meanings, its construction often being influenced by its context". *U.S. v. Bishop*, 412 U.S. 346, 352 (1973) (citation omitted). It is sometimes simply construed as a synonym for "voluntary" or "intentional". *See Kawaauhau v. Geiger*, 523 US 57 (1998) n. 3 (noting this as the definition provided by Black's Law Dictionary.)

On the other hand, it is also often construed as requiring a "conscious disregard" of a statute. *People v. Smith*, 34 AD2d 524 (1st Dept 1970) (citation omitted). Thus, the United States Supreme Court held, in construing the term "willfully" in a federal tax fraud statute, that the term meant "a voluntary, intentional violation of a known legal duty". *U.S. v. Pomponio*, 429 US 10, 12 (1976).

The meaning which may be most consonant with the legislative design under the new bail law may be the more exacting one, that is, that to establish a defendant's acts were willful, it must be demonstrated that he intentionally violated a known legal duty. The legal duty here would be the obligation to appear in court as directed.

The meaning of "persistently"

The word term "persistently" is also not defined in the new bail statute or under the Penal Law or Criminal Procedure Law. Dictionaries provide the following definitions, among others;

"persistent" "1: existing for a long or longer than usual time or continuously". (Mirriam Webster online dictionary);

"persistently" "happening repeatedly or for a long time, or difficult to get rid of". (Cambridge online English dictionary);

"persistent" "persisting, especially in spite of opposition, obstacles, discouragement, etc.; persevering". (Dictionary.com);

"persistently" "If something happens persistently, it happens again and again or for a long time". (Collins online English dictionary).

The meaning of "notice of scheduled appearances"

It is also a prerequisite to imposing bail under this section that a defendant have received "notice of scheduled appearances". The plural "appearances" appears to require that prior to imposing bail under this section, a defendant must have missed more than one scheduled appearance for which the defendant was notified.

The Argument That These Strictures Do Not Apply to Qualifying Offenses

The new authority provided under this paragraph allows bail to be imposed in cases where it could not be imposed at an initial appearance, because a defendant was not charged with a qualifying offense. But it can also be used where a defendant has been charged with a qualifying offense but is at liberty.

What is less clear is whether, where a court wishes to increase bail or set bail for a defendant charged with a *qualifying* offense who has absconded or committed a specified new crime under this section, the court is limited to the provisions of this subdivision (imposing a variety of requirements including willful and persistent absconding, a "clear and convincing evidence" standard and the requirement for an evidentiary hearing), or, alternatively, may simply increase bail or impose remand (consistent with the least restrictive alternative rule) without abiding by the provisions of this subdivision in reliance on its general authority to set securing orders for qualifying offenses.

As noted *supra*, there is a reasonable argument that the Court's power to set bail or order remand for a qualifying offense is plenary and thus could be used to set bail or order remand for a qualifying offense where a defendant absconded or committed a specified new crime, even if the provisions of CPL 530.60 (discussed here) were not complied with.

Securing Orders Pending Hearing Determinations

As noted here, before "revoking an order of recognizance, release under non-monetary conditions or bail" under this section, the court must conduct a "hearing at which it receives relevant evidence." As noted *supra*, "[t]he defendant may cross-examine witnesses and may present relevant, admissible evidence". Suppose the defendant is returned involuntarily on a bench warrant. The defendant says he wants to conduct a hearing concerning whether he "willfully" and "persistently" failed to appear, a right he has under the statute. Can the court order the hearing to be held forthwith? What kind of securing order can the court impose on the defendant during the hearing or during a period in which the hearing is adjourned?

As noted *supra,* the new bail law applies the provisions of existing law relevant to such evidentiary hearings, which apply when a defendant is charged with Class A, violent felony or witness intimidation crimes, to all of the circumstances under which bail may be imposed for non-qualifying offenses, including willful and persistent absconders. Existing law provides that, to accommodate the need for evidentiary hearings for defendants charged with such new crimes, a defendant may be held in custody for an initial 72 hour period with an additional 72 hour period authorized for good cause. CPL 530.60 (2) (e). (Of course, under existing law, the court might also opt to remand the defendant or set bail on the initial charge, dispensing with any need for such a 72 hour hold).

The new bail law, however, while imposing the hearing requirement on the authority to impose bail for non-qualifying offenses, affirmatively opted *not* to apply the "72 hour plus 72 hour" remand allowance in such cases, except where it already applies under existing law to the commission of new crimes. The result is that evidentiary hearings must be held in absconder or other CPL 530.60 (2) (b) cases where defendants have the right to present evidence, but the statute provides no authority to hold defendants in custody or have bail set pending the outcome of such hearings. The question for courts will be whether there is any inherent authority to set bail or impose remand pending a hearing determination, even though no such authority is provided by the bail statute.

Inconsistent Order of Protection Remand Authority

The bail reform legislation makes only conforming amendments to CPL 530.12 (11) & 530.13 (8) (Bill section 15) which provides that where a court determines a defendant has willfully violated an order of protection, it can revoke an order of recognizance or bail and commit a defendant to custody. These existing provisions provide broader authority and are inconsistent with the proviso outlined in new CPL 530.60 (2) (b) (ii)) (discussed in this section, *supra*) which only authorizes the imposition of bail in such cases (not remand) and then only if a defendant has violated an order of protection by engaging in specified aggravating conduct (not for generally violating an order). Where a conflict arises between these two provisions, it is not clear which would control.

The Clear and Convincing Evidence Standard

This subdivision requires "clear and convincing" evidence before bail may be set. However, with the exception of defendants who are alleged to have absconded, the other categories of new bail authority in this section concern the alleged commission of new crimes for which a defendant "stands charged" or has in fact committed a new crime. Even were a defendant indicted for any of those crimes, however, that would not answer the question of whether there was "clear and convincing" evidence the defendant had committed them. Defendants would then have the right to ask that the "clear and convincing evidence" standard be evaluated through an evidentiary hearing.

A different "reasonable cause to believe" standard for revoking a securing orders, however, exists for defendants charged with felonies who commit new Class A, violent felony offense or witness intimidation crimes under a provision of current law which is retained in the new bail statute. *Compare*, amended CPL 530.60 (2) (a) with new CPL 530.60 (2) (b) (both contained in bill section 20).

THE 48-HOUR BENCH WARRANT RULE (Bill section 9)

> Except when the principal is charged with a new crime while at liberty, absent relevant, credible evidence demonstrating that a principal's failure to appear for a scheduled court appearance was willful, the court, prior to issuing a bench warrant for failure to appear for a scheduled court appearance, shall provide at least forty-eight hours notice to the principal or the principal's counsel that the principal is required to appear, in order to give the principal an opportunity to appear voluntarily". CPL 510.50 (2).

In cases where a court applies the "48-hour rule", it may be more efficient to issue a bench warrant and then stay its execution for 48 hours rather than wait for 48 hours and then issue the warrant.

QUESTION OF WHETHER REMAND OR BAIL CAN BE IMPOSED UPON *CONVICTION* FOR NON-QUALIFYING OFFENSES

It is not clear the Legislature considered what authority courts should have to order defendants to be remanded or have bail set following the conviction for a non-qualifying offense but prior to the imposition of a sentence. It is clear such a remand or bail condition may be set following conviction for a qualifying offense. There is also a separate, largely overlapping category of cases in which remand after conviction is required under current law, a statute for which only conforming amendments were made in the new bail statute. That statute requires remand for defendants convicted of Class A felonies (which are qualifying offenses in any event, except if they are narcotics crimes) and Class B & C sexual assault felonies committed by adults against children (which are also qualifying offenses). (New CPL 530.40 (6) amended by bill section 18). But, except for Class A felony narcotics crimes, there is no authority under the statute to set bail or order remand because a defendant has been convicted but not yet sentenced.

Despite this, there is a reasonable argument that courts have such authority for non-qualifying offenses. First, the direction to release defendants on recognizance or under non-monetary conditions under the statute is described in three statutory provisions as requiring a release "pending trial".[5] This language arguably indicates the Legislature's intent to make these release requirements apply only prior to a conviction. Second, that construction is consistent

[5] CPL510.10 (1) (bill section 2); CPL 510.10 (3) (bill section 2); CPL 530.20 (1) (bill section 16).

with the statute's purpose. The purpose of the statute is to reduce the pre-trial incarceration of defendants who are presumed innocent, except in cases where such incarceration is necessary for particular kinds of offenses to prevent flight. That principle is not implicated for convicted defendants. Third, courts arguably have the inherent authority to remand defendants or set bail upon conviction, at least where a state prison sentence is mandatory.

There is also a reasonable argument that the general "least restrictive alternative" rule does not apply following conviction for either qualifying or non-qualifying offenses, since that rule is expressed in the statute, as outlined immediately *supra*, as applicable "pending trial".

QUESTION OF WHETHER REMAND OR BAIL CAN BE IMPOSED *DURING* A TRIAL FOR A NON-QUALIFYING OFFENSE.

The statutory term "pending trial", as discussed immediately *supra* with respect to the least restrictive alternative rule, also provides textual support for the argument that the rule does not apply and that bail or remand can be ordered for non-qualifying offenses *during* a trial. However, in contrast to the argument that such enhanced authority exists following a conviction, the argument for such authority during a trial is significantly weaker, because such a construction would not appear to comport with the statute's purpose. Defendants whose cases are being tried have the same presumption of innocence as defendants "pending trial" and thus construing the least restrictive alternative rule and the prohibition on bail or remand for non-qualifying offenses as applicable during a trial would appear to promote the statute's general intent.

PRE-ARRAIGNMENT DEFENDANT RAP SHEET REQUIREMENT (Bill section 16)

Under current law, a local criminal court cannot arraign a defendant unless the court is provided with a criminal history report, unless the report is not available and the People consent to proceed without it, or an emergency exists in which case the court can arraign a defendant without a criminal history report and without the People's consent. Under current law: "When the court has been furnished with any such report or record, it shall furnish a copy thereof to counsel for the defendant or, if the defendant is not represented by counsel, to the defendant." CPL 530.20 (2) (b) (ii).

The new bail statute amends this provision to require that "counsel for the defendant" must be provided with a criminal history record at the same time as the court, subject to the same exceptions.

UNCLEAR IMPACT IN CPL ARTICLE 730 EXAMINATIONS

It is not clear the Legislature considered whether the new bail statute applies to CPL 730 examinations.

Under CPL Article 730, an examination to determine competency can be conducted on

either an out-patient basis or while a defendant is remanded or confined in a hospital. The existing authority to hold a defendant in custody in a hospital to conduct a CPL 730 examination where a hospital director informs the court that is necessary for an effective examination was not changed by the bail law and so would appear to still be effective. CPL 730.20 (2). It also seems clear that a defendant charged with a qualifying offense may be held in corrections custody for a CPL 730 examination, provided the Court finds that is the least restrictive alternative.

There does not appear to be any authority, however, to hold a defendant charged with a non-qualifying offense in custody (other than pursuant to a director-recommended hospital confinement or for defendants who abscond or commit certain new crimes while at liberty (under amended CPL 530.60, *supra)*) in order to have a CPL 730 examination conducted.

BAIL APPARENTLY NOT PROHIBITED FOR MATERIAL WITNESSES

It is not clear the Legislature considered whether or how the new bail statute should apply to material witness orders.

Under Article 620 of the Criminal Procedure Law a person alleged or adjudged to be a material witness may have bail set. In bill section 24, the new bail statute made conforming amendments to the material witness article, but did not limit the authority to set bail for material witnesses. There is a reasonable argument that courts continue to have authority to set bail for material witnesses under CPL Article 620 (and material witnesses will generally not be charged with committing either qualifying or non-qualifying offenses). But there are also many unanswered questions about how particular provisions of the new bail law might apply to material witness bail determinations.

MODIFICATION OF BAIL AUTHORITY WHERE SUPERIOR COURT WARRANT IS RETURNED TO A LOCAL CRIMINAL COURT (Bill section 12)

Under CPL 530.11 (4), where a person is arrested on a warrant issued by a supreme or family court and the court is not in session, the defendant is brought before a local criminal court. Under existing law, the local criminal court is required to "consider" any bail recommendation made by the supreme or family court. The new bail statute amends this provision to direct that the local criminal court shall consider such recommendations "de novo". It also provides that the local criminal court shall "consider de novo" any securing order issued by a supreme or family court.

LIMITED IMPACT IN DRUG DIVERSION PROGRAMS (Bill section 21)

The Legislature amended the drug diversion statute (CPL Article 216) in the new bail law.

The bail law amends CPL 216.05 (9) (a) to restrict the circumstances under which a court

can issue a bench warrant or direct the presence of a defendant participating in a drug diversion program. The authority to direct such appearances or issue a warrant for the violation of a release condition is amended to require that such a violation be in an "important respect" before a bench warrant or appearance order may be issued. The authority to direct such appearances or issue a warrant for the failure of a defendant to appear in court as requested is amended to require such a non-appearance be "willful".

The new bail law also cross-references amended CPL 530.60 to make it clear that the "relevant" provisions of this new section are applicable to drug diversion programs under CPL Article 216. Amended CPL 530.60 (discussed *supra*) provides authority to set bail for absconding defendants or those who commit certain new crimes while at liberty.

However, provisions of existing CPL Article 216 which were not amended by the new bail statute provide remand or bail authority for drug diversion defendants which is far more extensive than the new bail law. For example, although defendants participating in drug diversion programs will always be charged or convicted of "non-qualifying offenses", bail and remand may be ordered for such defendants under non-amended provisions of the drug diversion statute.

There is a reasonable argument that this existing more expansive authority continues to apply in diversion cases, especially once a defendant has entered a guilty plea during a diversion period. Thus, one way to read the diversion statute is that, except for the new strictures on warrants discussed here, the authority for bail or remand provided under CPL Article 216 was not diminished by the new bail statute.

EXTRADITION CASES APPARENTLY NOT IMPACTED BY BAIL LAW

It is not clear the Legislature considered whether the new bail statute should have any impact on defendants held for extradition to foreign jurisdictions. The bail statute did not purport to amend the Uniform Criminal Extradition Act (CPL Article 570) and it seems clear the bail statute does not limit the power of courts to hold defendants in custody pending extradition.

Under that statute, courts are also empowered to grant bail to defendants held for extradition (CPL 570.38) although that likely occurs in a minority of cases. There is a textual argument that the new bail statute applies to such bail setting decisions, but such a construction would produce obviously anomalous results. That is because in extradition cases, bail serves as a release mechanism for defendants awaiting extradition, who are generally remanded pending a foreign jurisdiction transfer. Thus, bail in extradition cases will most often be appropriate for less serious "non-qualifying" offenses (for which bail is prohibited under the new statute) rather than for bail-eligible "qualifying offenses". The better reading of the bail statute may be that it has no effect in extradition cases, which are subject to a uniform multi-state statute which the bail law did not amend.

ISSUES ARISING IN INDIAN NATIONS

The new statute raises significant questions with respect to proceedings in Indian Nations subject to its provisions. Most significantly, pretrial services programs in Indian Nations are administered through contracts with the federal government which may have requirements which conflict with the bail statute. These complex issues are not addressed here.

PROBATION VIOLATION CASES APPARENTLY NOT IMPACTED BY BAIL LAW

It is not clear that the Legislature considered whether the new bail statute applies to probation violation cases, but there is a strong argument that the bail law does not impact such proceedings, which are governed by CPL Article 410. First, the bail statute did not amend that article, and did not change its provisions authorizing remand or bail in probation violation cases. Second, persons on probation have been convicted of crimes and thus the underlying concern which motivated the bail statute: preventing the pre-trial incarceration of defendants charged with crimes who are presumed innocent, is not implicated in probation violation proceedings.

THE JANUARY 1, 2020 EFFECTIVE DATE (Bill section 25)

The new bail law provides, without further elaboration: "This act shall take effect on January 1, 2020". It is generally understood that the statute will apply to all cases pending on its effective date. It is also clear the law is not self-implementing and so changes in securing orders will require court determinations. In considering how the law will be implemented, courts could consider the following options:

- Modify securing orders to comply with the new statute before its effective date.

- Issue modification orders which would be effective on January 1 (or January 2) 2020. That is, to avoid a "rush on the court" on January 1 or 2, issue new securing orders in advance with an effective date which complied with the new statute.

- Schedule proceedings on January 1 (or 2) for all defendants subject to securing orders, other than those released on recognizance.

- Wait until previously scheduled court appearances and defense applications before issuing new securing orders. The statute, however, would appear to implicitly require a review of *any* securing order (other than a release on recognizance) to ensure it complied with the statute, at least by January 1, 2020. Thus, simply waiting for defense applications to review non-recognizance securing orders would risk subjecting defendants to unlawful securing orders on and after the law's effective date. Courts should take a proactive approach to ensure timely compliance with the statute's provisions.

Discovering Discovery in 2020

An Overview of the New Discovery Statute

Jill Paperno, Esq.
First Assistant Public Defender
Monroe County

DISCOVERY REFORM

THE 2019 LEGISLATIVE CHANGES TO NEW YORK DISCOVERY

INTRODUCTION TO CHANGES


COMING
ATTRACTIONS

IMPORTANT CHANGES

- Old CPL Article 240 repealed – new statute is Article 245
- No need for discovery demands – discovery will be automatic
- Timing of discovery changes
- Discovery before plea
- Prosecutor deemed in possession of police records
- Presumption in favor of disclosure
- We get grand jury minutes!


MAGICAL MYSTERY
TOUR

SOME DEFINITIONS

- Certificate of compliance – CPL 245.50(1) – by prosecutor – A certificate that "states, after exercising due diligence and making reasonable inquiries to ascertain the existence of material and information subject to discovery, the prosecutor has disclosed and made available all known material and information subject to discovery. It shall also identify items provided." NOTE – DA cannot be ready for trial without certificate of compliance.

DEFINITIONS, CONT'D

- CPL 245.50(2) - Certificate of compliance, by defendant – "The certificate shall state that, after exercising due diligence and making reasonable inquiries to ascertain the existence of material and information subject to discovery, counsel for the defendant has disclosed and made available all known material and information subject to discovery."

DEFINITIONS, CONT'D

- Initial discovery by prosecutor – Discovery prosecutor must supply without discovery demand in first 15 days under CPL 245.10(1)(a).
- Supplemental discovery by prosecutor – Discovery of *Molineux* and *Sandoval* prosecutor must supply without discovery demand pursuant to CPL 245.10(1)(b) at least 15 days before first trial date.
- Defense discovery – Discovery defense must provide within thirty days of receipt of certificate of compliance by prosecutor.
- Protective order – order issued by court pursuant to CPL 245.70 delaying or limiting disclosure to a party.

CPL 245.10 – TIMING OF DISCOVERY 245.10(1)(A)

- 245.10(1)(a) – Initial discovery obligations by prosecutor as required by 245.20(1) shall be met "as soon as practicable but not later than 15 calendar days after defendant's arraignment on indictment, superior court information, prosecutor's information, information, simplified information, misdemeanor complaint or felony complaint.
- Portions can be withheld pending ruling on protective order, but DA must let defense know *in writing* they are doing this, and rest must be provided;
- If especially voluminous or hard to obtain *despite diligent, good faith efforts*, prosecutor gets extra 30 days without motion;

TIMING CONT'D - CPL 245.10(1)(B)- SUPPLEMENTAL DISCOVERY AND (C)- DISCOVERY OF DEFENDANT'S STATEMENTS WHEN PENDING GRAND JURY

- Prosecution must perform supplemental discovery [245.20(3) – *Molineux* and *Sandoval]* as soon as practicable but not less than 15 calendar days before first scheduled trial date;
- Prosecution shall disclose statementss of the defendant as described in 240.20(1)(a) to any defendant arraigned in local criminal court upon currently undisposed of felony charging offense which is or is going to grand jury no later than 48 hours before time scheduled for defendant to testify at grand jury proceeding.

WHAT DOES THIS MEAN FOR PH AND GJ?

- Defendant arraigned
- GJ notice for two days later
- When does statement have to be provided?
- Defendant can request opportunity to testify even if grand jury has voted but this should be before vote
- What if grand jury scheduled for day after arraignment? Motion to Part I to delay?
- If DA goes forward, will motion to dismiss indictment be appropriate?

245.10(2) – DEFENSE DISCOVERY OBLIGATIONS - TIMING

- Defense must perform discovery under 245.20(4) not later than 30 calendar days afte being served with DA certificate of compliance (CPL 245.50), except if moving for protective order under 245.70, but must disclose to prosecutor *in writing* information being withheld.

IF WITHHOLDING PENDING MOTION FOR PROTECTIVE ORDER

- How much must be disclosed to the prosecutor about what is being withheld – names of witnesses? Type of evidence? Or simple assertion that x number of pages or recordings or other categories are being withheld pending determination of a protective order?

CPL 245.20(1) – INITIAL DISCOVERY FOR THE DEFENDANT

245.20(1) "Initial discovery for the defendant. The prosecution shall disclose to the defendant, and permit the defendant to discover, inspect, copy photograph and test, all items and information that relate to the subject matter of the case and are in the possession, custody or control of the prosecution or persons under the prosecution's direction or control, including but not limited to…"

What if officer views private company's helpful video but does not obtain or write report? It's still information, isn't it?

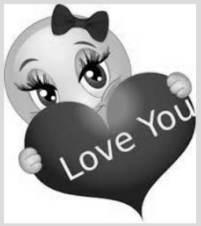
STRAP IN – SUBDIVISIONS (A) THROUGH (U)…

INITIAL DISCOVERY FOR DEFENDANT – 245.20(1)(A) DEFENDANT AND CODEFENDANT STATEMENTS

- 245.20(1)(a) – "All written or recorded statements, and the substance of all oral statements, made by the defendant or a co-defendant to a public servant engaged in law enforcement activity or to a person then acting under his or her direction or in cooperation with him or her."
- Note – broader than prior statute – not just to be tried jointly, not just other than in the course of a criminal transaction.

INITIAL DISCOVERY – 245.20(1)(B) GRAND JURY TRANSCRIPTS

- All transcripts of testimony of "*a person who has testified before a grand jury, including but not limited to the defendant or a co-defendant.*" If due to limited availability of transcription services transcript unavailable in initial disclosure period, time may be stayed up to 30 calendar days without need for motion, except it shall be made as soon as practicable and not less than 30 calendar days before firs scheduled trial date unless 245.70 protective order. (More about timing if court has to review minutes under 245.70 in statute.)
- Fair reading could mean total of 75 days on this.



INITIAL DISCOVERY 245.20(1)(C) WITNESS CONTACT INFORMATION

- Names and contact information for all persons other than law enforcement "whom prosecutor *knows to have evidence or information relevant to any offense charged or to any potential defense thereto*," including which will be called as witnesses. No addresses required unless there is a motion for disclosure of a physical address. Information about confidential informants may be withheld without a CPL 245.70 motion, but defendant must be notified in writing unless court rules otherwise based on good cause shown.
- Note –
  - Those who have evidence or information – not necessarily witnesses
  - Relevant to offense
  - Relevant to POTENTIAL defense
  - May be called as witnesses – doesn't specify hearing or trial

INITIAL DISCOVERY – 245.20(1)(D) LAW ENFORCEMENT CONTACT INFO

- Names and work affiliation for all law enforcement whom prosecutor "knows to have evidence or information relevant to any offense charged or to any potential defense thereto", including which may be called as witnesses.
- Not required to turn over undercover information, not required to make 245.70 motion but must notify defense in writing it has not been disclosed, unless court does not require for good cause shown.
- Note – standard is has information – not will testify
- Including which may be witnesses – does not specify hearing or trial.
- No longer can the police write other officers out of reports, preventing disclosure of who was there.

INITIAL DISCOVERY – 245.20(1)(E) STATEMENTS OF WITNESSES

- "All statements, written or recorded or summarized in any writing or recording, made by persons who have evidence or information relevant to any offense charged or to any potential defense thereto, including all police reports, notes of police and other investigators, and law enforcement agency reports."
- Also includes statements by persons to be called at pre-trial hearings.

INITIAL DISCOVERY – 245.20(1(F)
EXPERT EVIDENCE

- Name, business address, c.v., list of publications, proficiency tests and results in past ten years for each witness DA will call as witness at pre-trial hearings or trial;
- All reports prepared by the expert pertaining to case, or if no report prepared, a written statement of facts and opinions about which expert will testify and summary of grounds for each opinion.
- If with reasonable diligence cannot be done in time period in 245.10, stayed without motion until not less than 60 days before first scheduled trial date unless 245.70 order (reducing time?) . DA must notify defense

245.20(1)(F) CONT'D

- If DA expert is in response to defense, court shall alter trial date if necessary to allow prosecution thirty days to make disclosure and defendant thirty days to prepare and respond to new materials.
- Unlike other provisions, this only applies if calling witness
- Should not be certificate of compliance if they are using expert but no summary or report – supplemental is only where DA *learns of* additional material or information.

INITIAL DISCOVERY - 245.20(1)(G) RECORDINGS

- All electronic recordings including 911, designation by prosecutor of which they intend to use at trial or hearing. If exceed ten hours, DA may disclose only recordings it intends to introduce at trial or hearing with list of source and approximate quantity of other recordings and general subject matter if known, and defense shall have right upon request to obtain recordings not previously disclosed. Must be as soon as practicable but not less than 15 days after defendant's request unless 245.70 protective order.
- Note – if you are not getting all the recordings, request them on the record or in writing.

INITIAL DISCOVERY - 245.20(1)(H) PHOTOGRAPHS AND DRAWINGS

- All photos and drawings made by public servant engaged in law enforcement or made by a person the prosecutor intends to call as a witness at hearing or trial, or which relate to subject matter of the case.

INITIAL DISCOVERY – 245.20(1)(J)
TEST RESULTS

- All reports, records, data, calculations (see statute for detailed description of material) concerning physical or mental examinations, or scientific tests or experiments or comparisons, relating to the criminal action or proceeding, made by or at the direction of law enforcement, or mde by a person the prosecutor intends to call at a hearing or trial, or which prosecutor intends to introduce at hearing or trial.
- This includes lab information management system records, findings relating to conformance with accreditation, and conflicting analyses or results. If the prosecution submitted to a lab not under prosecution's control, court may on motion of party issue subpoenas to lab to cause materials described to be made available for disclosure.

245.20(1)(J) CONT'D

- Statute now requires a) Lab Information Management System reports which track a piece of evidence in a lab; b) findings that a lab failed to conform to industry, accreditation or governmental standards or protocol, and c) conflicting analyses or results notwithstanding final conclusion. Though these may be Brady they are separately required under subdivision j.
- Can be helpful to defense and defense did not often obtain previously;
- Statute now includes requirement that prosecution provide these items;

245.20(1)(J)

- Statute also includes electronically recorded data (ERD) which some cases had previously found not discoverable.
- Make sure you specifically inquire about whether the prosecutor asked for these documents.
- Thank you John Schoeffel of Legal Aid.

INITIAL DISCOVERY – 245.20(1)(K)
BRADY AND BETTER

- All evidence and information including that known to police that tends to (i) negate guilt to a charged offense; (ii) reduce degree or mitigate culpability to charged offense; (iii) support potential defense; (iv) impeach the credibility of a testifying prosecution witness; (v) undermine evidence of defendant's identity as a perpetrator; (vi) provide a basis for a motion to suppress evidence; (vii) mitigate punishment.
- Shall be disclosed whether or not recorded in tangible form, and whether or not the prosecutor credits the information.
- This shall be disclosed expeditiously and not delayed even if time for disclosure has not expired.

INITIAL DISCOVERY – 245.20(1)(L) PROMISES, INDUCEMENTS – MORE *BRADY*

- Summary of "all promises, rewards and inducements made to, or in favor of, persons who may be called as witnesses, as well as requests for consideration by persons who may be called as witnesses and copies of all documents relevant to a promise, reward or inducement."
- The "ask" has to be provided – no more nods and winks without any information to the defense.

INITIAL DISCOVERY – 245.20(1)(M)
RIGHT TO ITEMS SEIZED, LEGAL BASIS FOR ALLEGED POSSESSION

- List of all tangible objects obtained from or possessed by defendant or co-defendant;
- Designation by prosecutor which objects physically possessed, which constructively;
- Which were recovered during search or seizure by public servant or agent;
- Which were allegedly recovered after being abandoned by defendant;
- If prosecution intends to use presumption, shall designate intention as to each such object;
- If reasonably practicable, prosecutor shall also designate location object recovered from;
- Defense may inspect, copy, photograph and test.

INITIAL DISCOVERY – 245.20(1)(N) SEARCH WARRANTS!!!

- Whether search warrant has been executed and all related documents including warrant, application, affidavits, inventory, all property seized, transcripts of testimony supporting applications!
- If prosecution seeks to withhold information, because this is constitutional issue, court must engage in greater scrutiny. *People v. Castillo*, 80 NY2d 578

INITIAL DISCOVERY – 245.20(1)(O)
RESIDUUM ON TANGIBLE PROPERTY

- All tangible property that relates to subject matter of case
- Designation which items prosecution intends to introduce in case-in-chief at trial or pre-trial hearing;
- If prosecution has not formed intent to offer in statutory period ("I don't know if I'm offering it at trial") prosecution shall notify defendant in writing, and time stayed without need for motion, but disclosure shall be made as soon as possible and subject to continuing duty to disclose.

INITIAL DISCOVERY – 245.20(1)(P), (Q) AND (R) CONVICTIONS, PENDING CHARGES AND ARREST DETAILS

- (p) – Complete record of judgments of conviction for all defendants and all persons designated as potential prosecution witnesses under subdivision (c) other than experts.
- (q) – When known to prosecution, existence of any pending criminal action against all persons designated as potential prosecution witnesses under subdivision (c) (and how do they not know if pending in NY?)
- (r) – Date, time and place of arrest of offense(s) charged and of defendant's seizure and arrest – **Does this create additional information for *Mapp* hearings?**

INITIAL DISCOVERY – 245.20(1)(S)
DWI CASES

- In any prosecution alleging violation of V&T, all records of calibration, certification, etc. of instruments used to perform testing for six months before and after test done;
- Discovery time period for records six months after but as soon as practicable and must be supplied earlier of 15 days after receipt or 15 days before first scheduled trial date.

INITIAL DISCOVERY – 245.20(1)(T) UNAUTHORIZED USE OF COMPUTER OR TRESPASS

- In offenses alleging violation of PL 156.05 or 156.10, time place and manner of incident;
- Copy of all electronically stored information as described;
- More specifics – read statute;
- Prosecution cannot turn over illegal computer info – child porn
- Statute specifically recognizes defendant still has right to be free from unreasonable search and seizure under NY and US constitutions

DUTIES OF THE PROSECUTION - 245.20(2)

- Prosecutor shall make diligent, good faith effort to ascertain existence of discoverable material, and to cause it to be disclosed if prosecutor does not possess BUT
- Prosecutor shall not be required to obtain by subpoena material defendant can obtaion;
- ALL items and information related to prosecution of charge in possession of any NY state or local police or law enforcement agency shall be deemed to be in the possession of the prosecution.
- Prosecution shall also identify any lab having contact with evidence related to prosecution of charge.
- Prosecution not required to ascertain existence of witnesses not known to police or other law enforcement.

SUPPLEMENTAL DISCOVERY FOR DEFENDANT CPL 245.20(3)

- Prosecutor shall disclose list of all *misconduct* and criminal acts of defendant not charged in indictment, superior court information, prosecutor's information, information, or simplified information, which prosecutor intends to use at trial for;

  (a) impeaching credibility *(Sandoval)*

  (b) substantive proof of any material issue in case *(Molineux)*

- Prosecutor must designate which (a or b) proof being used for
- (Timing statute 245.10[b] requires disclosure not later than 15 days before first scheduled trial date.)

RECIPROCAL DISCOVERY FOR PROSECUTION - 245.20(4)(A)

- Defendant shall disclose subject to constitutional limitations to prosecutor and permit inspection, copying, photographing, any material and relevant evidence in defendant's or counsel's possession or control that is discoverable under 245.20(1)(f), (g), (h), (j), (l) and (o) which defendant intends to introduce at trial or pre-trial hearing…

REFRESHER – (F), (G), (H), (J), (L) AND (O)

- (f) – Expert opinion evidence
- (g) – Tapes and electronic recordings
- (h) – Photos and drawings
- (j) – Physical and mental exam documents and reports
- (l) – Rewards, promises to witnesses. (Do we have to advise them of their promises they forgot to tell us about?)
- (o) – Tangible property

RECIPROCAL DISCOVERY – 245.20(4)(A) CONT'D

- Must provide names, addresses, birth dates, and all statements, written or recorded or summarized in any writing or recording, of those persons other than the defendant whom defendant intends to call as witnesses at trial or pre-trial hearing
- DA not required to disclose physical addresses 245.10(1)(c). Why are we?
- What if we don't have dobs for police we may call? (Consider 245.70 motion.)
- What if we don't know?
- Reciprocal discovery due within 30 days of certificate from prosecutor – 245.10(2).

RECIPROCAL DISCOVERY – 245.20(4)(B)

- Disclosure of name, address, birth date and statements of defense witness being called for sole purpose of impeachment of prosecution witness is not required until after the prosecution witness has testified at trial.

RECIPROCAL DISCOVERY – 245.20(4)(C)

- If with reasonable diligence, discovery required under (f) (expert opinion) and (o) (tangible property) are unavailable for disclosure within 245.10(2) time period, can be stayed without motion but disclosure shall be made as soon as practicable.

STAY OF AUTOMATIC DISCOVERY – 245.20(5)

- 245.10 (1)-(4) have the effect of a court order and failure to provide discovery may result in application of any remedies or sanctions permissible for violation of court order under CPL 245.80;
- However, if either party believes good cause exists for declining to make any disclosures, party may move for protective order under CPL 245.70 and production shall be stayed;
- Opposing party shall be notified in writing information not disclosed and note section of 245.10(1). If some is discoverable and party seeks protection for part, party must disclose discoverable portion.

PRESUMPTION OF OPENNESS – 245.20(7)

- Presumption in favor of disclosure when interpreting CPL 245.10 (timing of discovery), 245.25 (discovery prior to certain guilty pleas) and 245.20(1) (initial discovery for defendant).
- Question – the legislature applied the presumption to the prosecutor's discovery obligations, even naming the subdivision of CPL 245.20, but not to defense reciprocal discovery – is this an argument we can and should make?

DISCLOSURE PRIOR TO CERTAIN GUILTY PLEAS
CPL 245.25(1) – PRE-INDICTMENT PLEAS

- Subd. 1 – Pre-indictment guilty pleas. Upon felony complaint, if pre—indictment offer, prosecutor must disclose to the defense all items discoverable under 245.20(1) (Initial discovery statute) that are in possession of prosecutor. Must be not less than three calendar days before expiration of guilty plea or deadline imposed by court.
- If prosecution does not comply, defense can make motion alleging violation of subdivision.
- Court must consider impact on defendant's decision to accept/reject offer.
- If court finds materially affected decision, and prosecution will not reinstate lapsed offer, court as minimum sanction must preclude admission of any evidence not disclosed, but may take any other appropriate action.
- Does not apply to 245.70 material unless it was exculpatory;
- Prosecutor may not condition plea offer on waiver of discovery, though defendant may waive discovery.

ISSUES

- Will there be more pressure to "adjourn to set?"
- Should we move to withdraw plea if discovery reflects material that was exculpatory?
- What if discovery demonstrates strong case against defendant – should we move to dismiss the indictment? Will this have to be in five days as defendant might have chosen to testify given new material?
- Other issues?

OTHER GUILTY PLEAS
245.25(2)

- Applies to all other accusatories;
- Prosecutor 245.20(1) discovery in their custody or control not less than 7 days before expration date of any guilty plea offer by the prosecution or deadline imposed by the court.
- If prosecutor does not comply, defendant may file motion.
- Court must consider impact of failure to provide discovery.
- If court finds materially affected defendant's decision, and plea offer is not reinstated, court must preclude admission at trial of any evidence, or take other appropriate action.
- Does not include 245.70 material except exculpatory.
- Guilty plea may not be conditioned on waiver, though defendant may waive.

OCEANS OF MOTIONS

CPL 245.30 – Court orders for preservation, access or discovery

ORDER TO PRESERVE EVIDENCE
245.30(1)

- "At any time, a party may move for a court order to any individual, agency or other entity in possession, custody or control of items which *relate to the subject matter of the case or are otherwise relevant*, requiring that such items be preserved for a specified period of time."
- Court shall hear and rule upon such motions expeditiously.
- Court may modify or vacate order upon showing preservation creates hardship to individual, agency or entity, as long as probative value of evidence is preserved by specified alternative means.
- Does this mean that prosecutors have to move to hold our client's cars, allegedly held as evidence in cases?

ORDER TO GRANT ACCESS TO PREMISES 245.30(2)

- After accusatory filed, and without prejudice to issue subpoena, defendant may move, upon notice to prosecution and any impacted individual, agency or entity, for court order to access crime scene or other premises relevant to subject matter of the case, requiring defense counsel be given reasonable access to inspect, photograph, measure crime scene or premises, and that scene remain unchanged in interim.
- Court shall consider defense expressed need including risk that defendant will be deprived of evidence or information relevant to case, position of any individual or entity with possessory or ownership rights, nature of privacy interest, any perceived or actual hardship to owner/possessor, position of prosecution.
- Court may deny when probative value has been or will be preserved by specified alternative means.
- If court grants access, owner/possessor may request law enforcement be present.

DISCRETIONARY DISCOVERY BY ORDER OF THE COURT – CPL 245.30(3)

- Court may in discretion, upon showing by defense request is reasonable and defendant unable without undue hardship to obtain substantial equivalent by other means, order prosecution or any individual, agency or other entity subject to jurisdiction of court, make available for disclosure to defendant any material or information which relates to subject matter of the case and is reasonably likely to be material.
- Motion must be made on notice to person or entity affected by order.
- Court may, upon request of affected party, modify or vacate if compliance would be unreasonable or will create significant hardship. Party seeking or opposing discretionary discovery can submit papers or testify on the record *ex parte* or in camera.
- For good cause shown, any papers and transcript of testimony may be sealed and made part of appellate record.

WHAT EVIDENCE DOES 245.30(3) COVER? DIFFERENCE BETWEEN THAT AND SUBPOENA?

- Phone records? Facebook? Shotspotter? Who is required testifying party?
- Stored Communications Act
- Not just material but *information* too – Do they have to create information for our use?
- Video from businesses or private residences?
- Lab or lab employee information not covered by statute?
- From DA –
- Prior testimony of expert in another case?
- Tangible evidence held by third parties?
- Bivona stuff?
- Does information mean they may have to sit for an interview?

COURT ORDERED PROCEDURES TO FACILITATE COMPLIANCE – 245.35

To facilitate compliance with discovery statute, and to reduce litigation about discovery, court may issue order:

(1) Requiring prosecutor and defense diligently confer to reach agreement about disputed discovery before seeking court ruling;

(2) Requiring discovery compliance conference between prosecutor, counsel for defendants and court or its staff;

(3) Requiring prosecutor to file additional certificate of compliance that states prosecutor has made reasonable inquiries of all police and others who participated in investigating case about favorable or 245.20(1)(k) (*Brady)* information, including information that was not memorialized or preserved;

(4) Requiring other measures to effectuate goals of the discovery statute.

NON-TESTIMONIAL EVIDENCE FROM THE DEFENDANT – 245.40

- After filing of an accusatory, and subject to constitutional limitations, court may, upon motion of prosecutor showing probable cause to believe defendant committed a crime, clear indication relevant material evidence will be found, and method used is safe and reliable (*Matter of Abe A)*, require defendant to provide non-testimonial evidence including:
- (a) appear in lineup
- (b) speak for identification by witness
- (c) be fingerprinted

NON-TESTIMONIAL, CONT'D

- (d) pose for photographs not involving reenactment
- (e) permit sampling of defendant's blood, hair and other materials of defendant's body that involve no unreasonable intrusion
- (f) provide specimens of defendant's handwriting
- (g) submit to reasonable physical or medical inspection of defendant's body

- Subd 2 – This does not affect court order before filing of accusatory

DNA COMPARISON ORDER – 245.45

- Where property in DA's possession, custody or control consists of DNA profile from probative biological material collected in connection with the investigation of the crime or defendant, or prosecution of defendant, and defendant establishes (a) profile complies with FBI or state keyboard search requirements, whichever applies; (b) data meets state or national DNA index system criteria as applied to law enforcement seeking keyboard search, court may, upon motion of defendant against whom all but complaint are pending, order entity that has access to CODIS to compare DNA against DNA databanks by keyboard searches, upon notice to both parties and entity required to perform search, upon showing by defendant comparison is material to presentation of defense and request is reasonable. Not required to upload.

CERTIFICATE OF COMPLIANCE; READINESS FOR TRIAL – 245.50

1. By prosecution. When a prosecutor has provided 245.20(1) discovery except items subject to 245.70 protective order, they shall serve on defendant and file with court certificate of compliance. It shall state after exercising due diligence and making reasonable inquiries to ascertain existence of material and information subject to discovery, prosecutor has disclosed and made available all known material and information subject to discovery, and will list items provided. If additional discovery later provided before trial under 245.60 (continuing duty) prosecutor shall serve a supplemental certificate identifying additional material and information. No adverse consequence for filing of certificate in good faith, but court may grant remedy or sanction for discovery violation as set forth in 245.80 (remedies for non-compliance).

CERTIFICATE OF COMPLIANCE BY DEFENDANT – 245.50(2)

- When defendant has provided all discovery required by 245.20(4), except those protected by order pursuant to 245.70, defense counsel shall serve upon prosecution and file with court certificate of compliance. Certificate shall state after exercising due diligence and making reasonable inquiries, counsel has turned over all known discoverable material and information.
- Also must identify items provided.
- If additional discovery pursuant to 245.60 (additional information did not know of previously) provided supplemental certificate shall be filed and served identifying additional material and information.
- No adverse consequence if good faith compliance, but court may grant remedy or sanction for violation.

TRIAL READINESS
245.50(3)

- Absent individualized finding of exceptional circumstances by court, prosecution shall not be deemed ready for trial for purposes of CPL 30.30 until it has filed a proper certificate pursuant to CPL 245.50(1).
- This relates to CPL 30.30(5), which requires the court to make inquiry after an announcement of readiness, and provides the defense with the right to challenge the assertion.

Practice tip – save cover letters and time-stamped envelopes, mark the file on dates discovery received and certificate of compliance received.

FLOW OF INFORMATION
245.55

- 1. Sufficient communication for compliance: DA and assistant shall try to ensure flow of information maintained between police and other investigators and DA's office sufficient to obtain control over all material and information pertinent to defendant and offenses charged, including 245.20(k) (*Brady*) material.
- 2. Provision of law enforcement agency files. Absent court order or requirement defense counsel obtain security clearance required by law, upon request of prosecution, each NY and local law enforcement agency shall make available to prosecution complete copy of its records and files related to investigation of case or prosecution of defendant.
- CPL 245.20 –diligent good faith effort to ascertain existence of material or information.

FLOW OF INFORMATION, CONT'D
245.55(3)

- 911 telephone call and police radio transmission electronic recordings, police worn body camera recordings and other police recordings. (a) Whenever recording of 911, transmissions, BWC or other police recording was made or received in connection with investigations, arresting officer or lead detective shall expeditiously notify prosecution in writing upon filing of an accusatory of existence of all known recordings. Prosecutor shall expeditiously take whatever steps are necessary to ensure all such items are preserved. Upon defendant's timely request and designation of specific recording of 911 call, prosecution shall also expeditiously take whatever steps are necessary to ensure it is preserved.

FLOW OF INFORMATION, CONT'D
245.55(3)

- (b) If prosecution fails to disclose electronic recording to defendant pursuant to 245.20(1)(e)(statements by any person), (g)(all tapes or recordings and which will be used by prosecutor) or (k)(*Brady and beyond)* due to failure to comply, court upon motion of defendant shall impose an appropriate remedy or sanction pursuant to section 245.80.

CONTINUING DUTY TO DISCLOSE 245.60

- If either prosecution or defense later learns of additional material which they have duty to disclose, they must expeditiously notify opponent and disclose additional material. This also requires prosecutor expeditiously disclose information that becomes relevant based on reciprocal discovery by defense.

WORK PRODUCT
245.65

- No discovery of work product – records, reports, correspondence, memoranda or internal documents or conclusions of adverse party, its attorney, or attorney's agents, or statements of defendant made to the attorney for the defendant or their agent.
- *People v. Consolazio*, 40 N.Y.2d 446 (1976) – DA's notes discoverable

PROTECTIVE ORDERS
245.70(1)

1. Any discovery subject to protective order.
   - Upon showing of good cause by either party, court may at any time order discovery or inspection of items be denied, restricted, conditioned or deferred, or make other appropriate order;
   - Court may impose as condition to defendant material be available only to counsel for defendant;
   - Court may bar physical copy of discovery to defendant as long as defendant gets access to redacted copies while supervised, in location like prosecutor's office, jail, court, police station…

PROTECTIVE ORDERS, CONT'D
245.70(1)

- If court limits some discovery to defense counsel, court shall inform defendant on record his or her attorney is not permitted to disclose such material to defendant;
  - Impact on attorney client relationship?
- Court may permit party seeking or proposing protective order, or other affected person, to submit papers or testify on record *ex parte* or *in camera*. Any such papers and transcript may be sealed and shall constitute a part of the record on appeal.
- These provisions do not alter burden of proof with regard to matters at issue, including privilege.

PROTECTIVE ORDERS
245.70(2) AND (3)

(2) Modification of time periods for discovery. Upon motion of a party, the court may alter time periods for discovery for *good cause* shown.

(3) Upon a request for protective order, unless defendant voluntarily consents to prosecution request (AND WHY WOULD YOU?), the court shall conduct an "appropriate" hearing within three business days to determine whether good cause has been shown and, when practicable, shall render decision expeditiously. Any materials and transcript may be sealed and shall constitute part of record on appeal.

PROTECTIVE ORDERS CONTINUED -

- Defense response to motion required?
- Burden of proof at hearing?
- Hearsay admissible?
- Defense entitled to present evidence?
- Decision within 3 days? Written decision required?
- Appeal must be within 2 days – expedited transcript? Or detailed notes?

GOOD CAUSE 245.70
TRADITIONAL ARGUMENTS FOR REDACTION/PROTECTIVE ORDERS

PROTECTIVE ORDERS
245.70(4) – GOOD CAUSE NOW

In determining good cause court may consider:

- Constitutional rights or limitations [Right to confront + cross examine, etc];
- Danger to integrity of physical evidence or safety of witness;
- Risk of intimidation, economic reprisal, bribery, harassment or unjustified annoyance or embarrassment to any person, and nature, severity and likelihood of risk;
- Risk of adverse effect upon legitimate needs of law enforcement including protection of confidentiality of informants and nature, severity and likelihood of risk;
    - Recorded jail call with threat?

PROTECTIVE ORDERS
265.70(4) – GOOD CAUSE, CONT'D

- Nature + circumstances of the factual allegations in the case;
- Whether defendant has history of witness intimidation or tampering and nature of that history;
  - Conviction required??
- Nature of stated reasons in support of protective order;
- Nature of witness identifying information sought to be addressed by protective order including option of employing adequate alternative contact information;
- Danger to any person stemming from factors such as defendant's substantiated affiliation with a criminal enterprise as defined in PL 460.10(3) (NO MORE "THE CRIME ANALYSIS CENTER SAYS HE'S A GANG MEMBER")
- Other similar factors.

SUCCESSOR COUNSEL OR PRO SE DEFENDANT

SUCCESSOR COUNSEL OR PRO SE DEFENDANT 245.70(5)

- In cases where attorney-client relationship ends before trial, any material disclosed subject to condition it is only available to counsel for defendant, or limited in dissemination in some other way, shall only be provided to successor counsel under same conditions unless court rules otherwise for good cause shown or prosecutor gives written consent.
- Work product derived from material shall not be given to the defendant unless court rules otherwise or prosecutor agrees.
- If you are relieved, make sure you communicate with court, prosecutor and new counsel about status of records subject to protective order before you turn over file.
- This section also has rules about protected discovery for pro se defendants.

EXPEDITED REVIEW OF ADVERSE RULING 245.70(6)

- (a) A party that has unsuccessfully sought or opposed protective order relating to name, address, contact information or statements of person may obtain expedited review by individual justice of intermediate appellate court to which appeal would be taken;
- (b) Review shall be sought within two business days of adverse or partially adverse ruling, by order to show cause filed with intermediate appellate court. OTSC shall also be timely served on lower court and prosecutor, and accompanied by sworn affirmation stating in good faith (i) ruling affects substantial interests and (ii) diligent efforts to reach accommodation of underlying discovery have failed or no accommodation was feasible. However no diligent efforts statement necessary where opposing party not made aware of application and good cause is shown for omitting service on opposing party. (Presumably, appeal by one who has sought and been denied protective order.)

EXPEDITED REVIEW OF ADVERSE RULING 245.70(6)(C) AND (7)

- (c) Assignment of judge and mode of review determined by rules of that appellate court. Appellate judge may consider any relevant and reliable information bearing on issue, and may dispense with written briefs other than supporting and opposing materials previously submitted to lower court. Appellate judge may dispense with issuance of written opinion, and when practicable shall render decision and order expeditiously.
- This review does not bar raising on appeal as error.
- (7) Compliance with protective order. You better. Or you can be held in contempt under PL 215.50(3).

WAIVER OF DISCOVERY BY DEFENDANT
245.75

- Defendant who does not seek discovery from prosecution shall notify them at arraignment on all accusatories except complaint, or expeditiously thereafter, but before receiving 245.20(1) discovery.
- If defendant declines discovery, defense need not provide 245.20(4) and 245.60 (continuing duty) discovery.
- Waiver must be in writing, filed with the court.
- Waiver does not alter notice requirements of Article 250 [notices of defenses] or other requirements under the law.
- Prosecution may not condition plea offer on waiver.

STRATEGY ON WAIVER OF DISCOVERY

- Why and when would you do this, if ever? (Choosing not to disclose important witness or discovery)
- Is it worth it?
- Cost/benefit analysis

REMEDIES OR SANCTIONS 245.80

- (1) Need for remedy or sanction. (a) When material is disclosed belatedly [as opposed to failure to disclose] , court SHALL impose an appropriate remedy or sanction if party entitled to disclosure shows it was prejudiced. Regardless of showing of prejudice, party entitled shall be given reasonable time to prepare and respond to the new material. (Statute bars last minute discovery dumps.)
  - Show when? At a hearing? If yes, what is burden?
- (b) When material or information is discoverable but cannot be disclosed because lost or destroyed, court SHALL impose appropriate remedy or sanction if party entitled to disclosure shows lost or destroyed information may have contained information relevant to contested issue.
  - Is this in conflict with 245.55(3) requiring no showing of relevance on recordings

REMEDIES OR SANCTIONS 245.80, CONT'D

(2) Available remedies or sanctions. Court may:

- Make further order for discovery;
- Grant continuance;
- Order that hearing be reopened;
- Order witness be called or recalled;

SANCTIONS LIST CONT'D
245.80(2)

- Instruct jury it may draw adverse inference regarding non-compliance (Focus on DA conduct, not just missing evidence?)
- Preclude or strike testimony;
- Admit or exclude evidence;
- Order a mistrial;
- Order dismissal of some or all of the charges;
- Make such other order as it deems just under circumstances.
    - Get creative!

SANCTIONS AGAINST DEFENSE 245.80(2)

- EXCEPT – Any sanction against defendant shall comport with defendant's constitutional right to present a defense, and precluding defense witness shall only be permissible upon finding defendant's failure to comply with discovery was willful and motivated by desire to obtain tactical advantage.

SANCTIONS, CONT'D
245.80(3) – CONSEQUENCES OF PROSECUTION FAILURE TO PROVIDE *ROSARIO*

- (3) Consequences of non-disclosure of statement of testifying prosecution witness.

The failure of the prosecutor to disclose any written or recorded statement made by prosecution witness, relating to subject matter of witness's testimony shall not be grounds for new pre-trial hearing, to set aside conviction, reverse, modify or vacate judgment of conviction, in absence of showing by defendant there is reasonable possibility that the non-disclosure materially contributed to the result of the trial or other proceedings. Nothing shall limit right defendant have to reopen pre-trial hearing when such statements were disclosed before close of proof at trial.

ADMISSIBILITY OF DISCOVERY 245.85

- The fact that a party indicated during discovery process they intended to offer specified evidence or particular witness is not admissible in evidence or as grounds for comment at hearing or trial.

SUBPOENAS 610.20

- Subpoena statute remains largely the same except for a few major changes –
- (3) Three days notice to agency of state or locality of subpoena duces tecum unless emergency;
- Removal of requirement that opposing party (aka prosecutor) be notified of subpoena duces tecum to state agency;
- (4) "The showing required to sustain any subpoena under this section is that the testimony or evidence sought is reasonably likely to be relevant and material to the proceedings, and the subpoena is not overbroad or unreasonably burdensome."

LET'S TALK….

- Fishing expedition?
- Brady type analysis?
- Court's refusal to sign?

OTHER STATUTES

- CPL 65.20 (Closed circuit testimony), 200.95 (bill of particulars), 255.10 and 255.20 (pre-trial motions), 340.30 (provision making certain statutes applicable to misdemeanors), 400.27 (discovery at sentencing state in murder 1), 440.30 (post conviction challenges), 450.10 and 460.80 (appeals), and PL 480.10 (forfeitures) changed to comport with numbering of statute.

2019 CHANGES TO THE CRIMINAL PROCEDURE LAW AND PENAL LAW

Jill Paperno
First Assistant Public Defender
Monroe County Public Defender's Office

Qualifying offenses chart and edits by:
Timothy Donaher
Monroe County Public Defender
Monroe County Public Defender's Office

Note: This version was completed on 7/8/19 and is subject to updates and modification

I. INTRODUCTION

In 2019, the New York State Legislature passed, and Governor Andrew Cuomo signed, sweeping changes to several articles of the Criminal Procedure Law in New York. This bill was the result of years of work of many criminal defense and community organizations, as well as legislators who understood the problems defendants faced navigating a system that prevented them from having even the most basic information about their cases. Up until the implementation of this bill, many indigent defendants across the state were held in custody during the pendency of their cases due to their poverty.

The new statutes are, in general, far more favorable to the defense. They will help to provide transparency to, and increase fairness in, our system. Some of the biggest changes, and those impacting criminal defense providers (and prosecutors) relate to bail, discovery, subpoena practice and speedy trial. The following pages include highlights from the old law, substance of many of the new statutes, and practice tips and comments, in an effort to educate the New York defense community about these changes.

Summary of bail changes

The law relating to bail was changed radically, altering what had been a statute that did not express a preference for bail or release to one that requires release on most misdemeanors and non-violent felonies under most circumstances, either on the initial date of contact between the police and defendant, or by the court at arraignment. The discretion to set bail or impose conditions for release has been limited. There are specified circumstances and charges in which police are not required to release, but absent those charges and circumstances, a defendant must be released instead of being arrested for most violations, misdemeanors and non-violent felonies. The statute was amended to address the requirement for release on these charges by police, local court judges, and superior court judges.

If a defendant is not released by the police based on the mandates of CPL 150.20, the court must also follow strict rules as to whether to release. CPL 150.20 provides a list of circumstances that are exceptions to the presumption of release on most misdemeanors and non-violent felonies. They must be reviewed by the officer, with the requirement that if an officer finds that none of the exceptions apply, the defendant must be released. If a defendant is taken into custody, courts are required to release on most misdemeanors and many non-violent felonies under most circumstances. If a defendant's charges or circumstances falls within one of the categories in which release is not mandatory, there is a strong presumption for many charges that the defendant be released with conditions.

The statute created some new terms, such as "non-monetary conditions" and "misdemeanor crime of domestic violence." Non-monetary conditions are conditions imposed as part of a defendant's release, and may, but are not required to, include pretrial services.

Several statutes require some form of hearing before holding a defendant or imposing non-monetary conditions. Courts must make findings and note them on the record when opting to release with conditions or hold a defendant. In some circumstances, the defendant is entitled to present evidence and cross-examine witnesses when seeking release or reduction of restrictions or bail. **If the statute has a hearing requirement, there is an "H" in bold font next to the provision in this summary.**

Often, the use of male pronouns has been deleted and the phrase "the principal" substituted. "Principal," as defined in CPL 500.10(1) includes both defendants and material witnesses, as well as others compelled to appear before a criminal court. In the following pages, there are times the words "defendant" or "client" have been substituted in order to avoid some repetition. As you read these materials or the statutes, bear in mind that "securing order" (loosely) means an order holding a principal or releasing them – not just detaining them in custody.

The amended statutes are in the following articles (and the discovery statute listed below as CPL 240.44 was included with the bail legislation so it is included in the below list):

Article 150 – The Appearance Ticket
Article 500 – Recognizance, Bail And Commitment – Definitions of Terms
Article 510 – Recognizance, Bail And Commitment – Determination Of Application For Recognizance Or Bail, Issuance Of Securing Orders, And Related Matters
Article 520 – Bail And Bail Bonds
Article 530 – Orders Of Recognizance Or Bail With Respect To Defendants In Criminal Actions And Proceedings – When And By What Courts Authorized
Article 216.05 – Judicial Diversion Program For Certain Offenders
*CPL 240.44 – Discovery – Upon Pre-Trial Hearing
Article 410: Sentences Of Probation, Conditional Discharge And Parole Supervision
Article 620 – Securing Attendance Of Witnesses By Material Witness Order

*Since Article 240 was repealed, it appears this statute is an orphan and perhaps included in error. The new CPL 245 does not distinguish between initial discovery and discovery to be provided at a hearing, so this statute contradicts the new discovery statute.

Statutes fully indented below are quoted directly unless noted otherwise, or unless summaries of parts of the statutes are contained in parentheses.

Summary of discovery changes

The prior discovery statute, Article 240 of the Criminal Procedure Law, was repealed in its entirety and replaced by the new Article 245 of the Criminal Procedure Law. This statute provides for discovery of a broad range of items, described as "initial discovery," within fifteen days of arraignment. Initial discovery now includes many items to which the defense was never previously entitled, as well as traditional discovery items. The list includes written and recorded statements; grand jury testimony for all parties; names and "adequate" contact information for all people other than law enforcement whom

the prosecutor knows to have evidence relevant to the charges or a defense, including those who will be called as witnesses; statements made by persons who have evidence, including those contained in police reports; notes of police and investigators; law enforcement agency reports and so much more.

The new law provides for supplemental discovery, such as *Molineux* and *Sandoval* material, at least fifteen days prior to trial, and bars the claim that the prosecutor hasn't been given records from the officers involved, by deeming those records, essentially, as being within the control of the prosecution.

With all the good there are some less defense-favorable statutes. As in the past, the defense will also be required to provide discovery, and the categories of defense discovery have also been broadened. The defense can opt out of some discovery requirements by giving up the opportunity to obtain discovery from the prosecution (a move not recommended by this writer at this point for most cases).

The statute does allow applications for additional time to provide discovery, and the opportunity to seek protective orders.

Then new discovery statutes also require a certificate of readiness based on compliance with discovery. The prosecution cannot file the certificate unless it has provided discovery. Thus, the failure to provide timely discovery will enable the defense to pursue CPL 30.30 relief. And the laws relating to speedy trial under that statute have been modified to incorporate these new requirements.

The new discovery statutes include:

Section
245.10 Timing of discovery.
245.20 Automatic discovery.
245.25 Disclosure prior to certain guilty pleas.
245.30 Court orders for preservation, access or discovery.
245.35 Court ordered procedures to facilitate compliance.
245.40 Non-testimonial evidence from the defendant.
245.45 DNA comparison order.
245.50 Certificates of compliance; readiness for trial.
245.55 Flow of information.
245.60 Continuing duty to disclose.
245.65 Work product.
245.70 Protective orders.
245.75 Waiver of discovery by defendant.
245.80 Remedies or sanctions for non-compliance.
245.85 Admissibility of discovery.[1]

[1] Although the bail statute titles are listed in the Criminal Procedure Law with capital letters, the discovery bill lists the statutes in the bill with lower case letters following the initial capitalized letter.

Additionally, the Criminal Procedure Law subpoena statute has been modified so that the standard the defense has to meet in order to obtain subpoenas *duces tecum* from state agencies is no longer a *Brady* type of standard, requiring that the defense establish that the material is favorable to the defense. Instead, it requires the material be relevant.

II. PART JJJ OF THE LEGISLATION - STATUTES RELATING TO RELEASE AND BAIL

A. ARTICLE 150 – THE APPEARANCE TICKET

CPL 150.10(3) – Appearance Tickets – Notification of upcoming appearances

Old law: There was no subdivision (3).

New Law: The statute now requires police officers to "inform the arrestee that they may provide their contact information for the purposes of receiving a court notification to remind them of their court appearance date from the court or a certified pretrial services agency" and lists the type of contact information an arrestee may provide. This information will then be transmitted to the local criminal court as required by section CPL 150.80.

Issues: Will this information be kept by police departments to maintain additional profile information about defendants? And will phone numbers be used by police departments to track defendants who may be suspects in other matters. Is this information sealed with the rest of the record upon a favorable disposition? Will this be given to prosecutors?

CPL 150.20(1) – Appearance Tickets – Permissive appearance tickets become mandatory under many circumstances

Old law: Whenever a police officer was "authorized pursuant to section 140.10 to arrest a person without a warrant for an offense other than a class A, B, C or D felony or a violation of section 130.25, 130.40, 205.10, 205.17, 205.19 or 215.56 of the penal law" they could instead issue appearance tickets. These appearance tickets were in lieu of an arrest.

New law:

> 150.20(1)(a) - Whenever a police officer is authorized pursuant to section 140.10 of this title to arrest a person without a warrant for an offense other than a class A, B, C or D felony or a violation of section 130.25, 130.40, 205.10, 205.17, 205.19 or 215.56 of the penal law, he (sic) shall, except as set out in paragraph (b) of this subdivision, subject to the provisions of subdivisions three and four of section 150.40 of this title, instead issue to and serve upon such person an appearance ticket.

What does this mean?

Under the old law, an officer had the discretion under certain circumstances, to issue an appearance ticket to a defendant charged with a violation, misdemeanor or E felony, except for certain offenses listed in paragraph 150.20(1)(a)[2], instead of arresting them. Under the new law, an officer is *required* to issue an appearance ticket for misdemeanors and E felonies except for the offenses listed in in 150.20(1)(a) unless one of the exceptions in paragraph (b) applies. (Those exceptions are quoted from the statute below unless in parentheses):

(i) The person has one or more outstanding local criminal court or superior court warrants;
(ii) The person has failed to appear in court proceedings in the last two years;
(iii) The person has been given a reasonable opportunity to make their verifiable identity and a method of contact known, and has been unable or unwilling to do so, so that a custodial arrest is necessary to subject the individual to the jurisdiction of the court. (The statute explains the ways an officer may identify an individual[3]. Notably, the statute states, "There is no requirement that a person present identification in order to be issued an appearance ticket in lieu of arrest where the person's identity is otherwise verifiable; however, if offered by such person, an officer shall accept as evidence of identity [and the statute proceeds to list acceptable types of identification[4]]).
(iv) The person is charged with a crime between members of the same family or household, **as defined in subdivision one of section 530.11[5]** of this chapter (note – this is broader than what we ordinarily think of as "same family or household," as it can include people in intimate relationships – see footnote 4, below);
(v) The person is charged with a crime defined in article 130 of the penal law (sex offenses);

[2] The listed statutes are all E felonies. They are PL 130.25 – Rape in the third degree; 130.40 – Criminal sexual act in the third degree; 205.10 – Escape in the second degree; 205.17 – Absconding from temporary release in the first degree; 205.19 – Absconding from a community treatment facility; 215.56 – Bail jumping in the second degree.
[3] An officer may rely on various factors to determine identity including but not limited to personal knowledge of the individual, the person's self-identification, or photographic identification. The law specifically notes that photographic identification is not required for a defendant to be issued an appearance ticket if the identity is otherwise verifiable. The statute further notes that a valid driver's license or non-driver ID card issued by the entities in the statute, a valid passport, an ID card issued by the armed forces or a public benefits card may be accepted as ID. CPL 150.20(1)(b)(iii).
[4] See footnote 2, above.
[5] This category is based on relationships listed in CPL 530.11 (Procedures for Family Offense Matters). Those covered by this statute are listed in CPL 530.11(1)(a). They are (a) persons related by consanguinity or affinity, (b) persons legally married to one another, (c) persons formerly married to one another regardless of whether they still live together, (d) persons who have a child in common, and (e) persons who are not related by consanguinity or affinity but are or have been in an intimate relationship whether or not they lived together. The statute sets forth factors to be considered by a court in determining whether people are in an "intimate relationship." (CPL 530.11[1][e]). Those factors include the nature or type of relationship regardless of whether it is sexual in nature, the frequency of interaction between the parties, and the duration of the relationship. Casual acquaintanceships and ordinary interaction in business or social contexts are not "intimate relationships."

(vi) It reasonably appears the person should be brought before the court for consideration of issuance of an order of protection, pursuant to section 530.13[6] of this chapter, based on the facts of the crime or offense that the officer has reasonable cause to believe occurred;

(vii) The person is charged with a crime for which the court may suspend or revoke his or her driver license;

(viii) It reasonably appears to the officer, based on the observed behavior of the individual in the present contact with the officer and facts regarding the person's condition that indicates a sign of distress to such a degree that the person would face harm without immediate medical or mental health care, that bringing the person before the court would be in such person's interest in addressing that need; provided however, that before making the arrest, the officer shall make all reasonable efforts to assist the person in securing appropriate services.

To summarize, ***the default is release*** by the officer for misdemeanors and E felonies except the listed charges (see footnote 2, above), article 130 sex offenses, offenses which may lead to suspension or revocation of a license, or the individual has local or superior court warrants pending, has failed to appear in the last two years, cannot be identified, it is a family offense as defined in CPL 530.11 (which lists the offenses and the relationships necessary for that statute to apply), there is a reasonable belief there should be an order of protection issued in a non-family offense, or the person is in some type of medical or mental health crisis, in which case the officer must first try to respond by securing medical assistance.

If a client is not entitled to an appearance ticket from the officer because the charge or defendant falls within one of the categories which exclude mandatory appearance tickets, can they still get one? Subdivision 1(a) makes an appearance ticket *instead of arrest* mandatory for those who fall within the statute. But if they are not entitled to an appearance ticket under this subdivision, does the officer have discretion to release them anyway? CPL 150.20(2)(a) has not changed. That statute permits an officer to issue an appearance ticket after arrest for E felonies and misdemeanors other than the same offenses listed in the new subdivision 1, listed in footnote 2 above. So officers still have the discretion to issue appearance tickets for those charges. It appears subdivision 150.20(2)(a) was not amended to remove the reference to CPL 150.30 in the last sentence, which was repealed.

Issues we will encounter which may lead police to erroneously hold defendants may include the following, and should be raised at arraignment if a client is in custody:

a. Misunderstanding that if a defendant is not entitled to mandatory release, the officer may believe they must be held pending arraignment (failing to recognize that 150.20(2)(a) still permits discretionary release);
b. In failure to provide identification cases, was the defendant given a reasonable opportunity to identify themselves? Did the officer refuse one of the accepted methods of identification?

[6] CPL 530.13 addresses "Protection of victims of crimes, other than family offenses."

c. In cases involving family offenses, are the parties fairly considered "members of the same family or household?"
d. In cases involving non-family offenses, was it reasonable to believe that there should be an order of protection? Was this belief based on the facts of the alleged crime or offense? (Note – the law that bars arrest for a violation outside an officer's presence (CPL 140.10[1][a]) has not been changed.)
e. Was there a true medical or mental health crisis or was this a pretext? If the crisis has passed is the client entitled to presumptive release?

CPL 150.30 – Appearance ticket; issuance and service thereof after arrest upon posting of pre-arraignment bail - REPEALED

Old law: Although CPL 150.20 authorizes appearance tickets instead of an arrest without a warrant, CPL 150.30 authorized issuance of appearance tickets following arrest without warrant upon posting of pre-arraignment bail which was set either by a desk officer at the station or an officer on the road in certain traffic cases. Release upon desk appearance tickets or "DATs" is a practice commonly used in the New York City region. In our area, it was less common, and defendants in the Monroe County area were usually either released following issuance of appearance tickets without bail or held for arraignment.

New law: This pre-arraignment bail statute is repealed. In reading practice updates from New York City on the new law, when reading "DAT" (desk appearance tickets) in reference to the new statute think "appearance ticket."

CPL 150.40 (1) – Appearance ticket return date and procedures

Old law – Appearance ticket must be made returnable in a designated local criminal court; no timing requirements.

New law – Requires appearance ticket to be returnable on a date "as soon as possible, but in no event later than twenty days from the date of issuance, or at a later date, with the court's permission due to enrollment in a pre-arraignment diversion program.

CPL 150.80 – Court reminders to arrestees

Old law: This statute did not exist.
New law:

> **§ 150.80 Court appearance reminders**.
>
> 1. A police officer or other public servant who has issued and served an appearance ticket must, within twenty-four hours of issuance, file or cause to be filed with the local criminal court the

appearance ticket and any contact information made available pursuant to subdivision three of section 150.10 of this article.
2. Upon receipt of the appearance ticket and any contact information made available pursuant to subdivision three of section 150.10 of this article, the local criminal court shall issue a court appearance reminder and notify the arrestee of their court appearances by text message, telephone call, electronic mail, or first class mail. The local criminal court may partner with a certified pretrial services agency or agencies in that county to provide such notification and shall include a copy of the appearance ticket.
3. A local criminal court is not required to issue a court appearance reminder if the appearance ticket requires the arrestee's appearance within seventy-two hours of its issuance, or no contact information has been provided.

Comment: This statute requires police to provide the information intended for notification of court dates to the defendant, obtained at the time of the issuance of the appearance ticket, to the court. The local court must then issue a reminder. Although pre-trial services organizations were not given additional money in the budget, they may partner with the courts to issue notices to defendants. If no contact information was given by the defendant at the time of the appearance ticket, or the appearance is within 72 hours of the issuance of the ticket, the court does not have to notify the defendant.

Watch for courts giving wrong dates and times as they adjust to this system, and consider whether, if that occurs, that is a basis to object to issuance of an arrest warrant if a client fails to appear. CPL 120.20 provides opportunities to object to issuance of an arrest warrant – such as if an accusatory instrument is not sufficient on its face or does not provide reasonable cause to believe the defendant committed the offense. (CPL 120.20[1][b], CPL 120.20[2]), or if the court is satisfied a defendant will respond to a summons (CPL 120.20[3]).

Remember, arrest warrants are issued when a defendant has not yet appeared for court (CPL 120.10 and 120.20). Bench warrants are issued when a defendant has appeared previously. CPL 1.20[30]

B. ARTICLE 500 – RECOGNIZANCE, BAIL AND COMMITMENT; DEFINITION OF TERMS

CPL 500.10 – Recognizance, bail and commitment; definition of terms.

Old law: The old CPL 500.10 was a definitions statute relating to recognizance, bail and commitment. The new statute changes or adds parts to the definitions, and adds a subdivision 3-a.

Subdivisions 1, 2 and 4 are amended to make the terms defined, “Principal”, “release on own recognizance” and “commit to the custody of the sheriff” gender neutral.

A new subdivision 3-a has been added, titled “Release under non-monetary conditions.” It states:

3-a. "Release under non-monetary conditions." (H)

> A court releases a principal under non-monetary conditions when, having acquired control over a person, it authorizes the person to be at liberty during the pendency of the criminal action or proceeding involved under conditions ordered by the court, which shall be the least restrictive conditions that will reasonably assure the principal's return to court. Such conditions may include, among other conditions reasonable under the circumstances: that the principal be in contact with a pretrial services agency serving principals in that county; that the principal abide by reasonable, specified restrictions on travel that are reasonably related to an actual risk of flight from the jurisdiction; that the principal refrain from possessing a firearm, destructive device or other dangerous weapon; that, when it is shown pursuant to subdivision four of section 510.45 of this title that no other realistic monetary (sic?) condition or set of non-monetary conditions will suffice to reasonably assure the person's return to court, the person be placed in reasonable pretrial supervision with a pretrial services agency serving principals in that county; that, when it is shown pursuant to paragraph (a) of subdivision four of section 510.40 of this title that no other realistic non-monetary condition or set of non-monetary conditions will suffice to reasonably assure the principal's return to court, the principal's location be monitored with an approved electronic monitoring device, in accordance with such subdivision four of section 510.40 of this title. A principal shall not be required to pay for any part of the cost of release on non-monetary conditions.

Comment: This definition statute reflects the default option as release with the least restrictive conditions possible. Although it includes release to "pretrial services" and electronic monitoring as non-monetary conditions, the statute contemplates many other less restrictive options before release to pretrial services or electronic monitoring is imposed.

If the court determines there is a need for some additional condition(s) to ensure release, the condition(s) must be the least restrictive possible and may include restrictions on travel and possession of weapons. The court may order release to pretrial release when it is shown (in other words, the prosecutor or police must establish) that no other realistic non-monetary conditions will ensure return to court. CPL 510.45(4), a new statute discussed more fully below, requires a court finding "after notice, an opportunity to be heard, and an individualized determination explained on the record or in writing, that no other realistic non-monetary conditions will suffice to reasonably assure" return to court before ordering pretrial release.

Notably, although courts do on occasion impose release conditions of evaluation or treatment, they are not listed in the statute. Whether such requirements are contemplated by the legislature as being "non-monetary conditions" will likely be litigated in the future.

A court may also order electronic monitoring, again, under the new CPL 510.40(4)(a), discussed more fully below, if the court finds, after notice, an opportunity to be heard and an individualized determination that the defendant qualifies and no other realistic non-monetary condition will suffice to assure return to court.

Subdivision 5, the definition of "securing order," previously limited to committing to custody, fixing bail or releasing a defendant, was amended to recognize that the imposition of bail must be authorized by law. In other words, if the defendant is entitled to release under the new bail law, the court may not fix bail. The statute also adds the release with "non-monetary conditions." (See 3-a, above.)

Subdivision 6, the definition of "order of recognizance or bail," and **Subdivision 7**, the definition of "application for recognizance or bail," were made gender neutral, had the phrase "non-monetary conditions" added, and added the limitation of setting bail only under "where authorized."

Subdivision 9 adds to the definition of bail, money paid with a credit card. Thus, a credit card is now a statutorily required method that can be used to pay bail. The Monroe County Jail has accepted credit cards for some time, but perhaps other jails did not.

Two other definitions were added to CPL 500.10:

Subd. 21: **Qualifies for electronic monitoring (H)**

Old law: No such definition in CPL 500.10
New law:

> 21. **"Qualifies for electronic monitoring,"** for purposes of subdivision four of section 510.40 of this title, means a person charged with a felony, a misdemeanor crime of domestic violence, a misdemeanor defined in article one hundred thirty of the penal law, a crime and the circumstances of paragraph (b) of subdivision two of section 530.60 of this title apply, or any misdemeanor where the defendant stands previously convicted, within the past five years, of a violent felony offense as defined in section 70.02 of the penal law. For the purposes of this subdivision, in calculating such five year period, any period of time during which the defendant was incarcerated for any reason between the time of the commission of any such previous crime and the time of commission of the present crime shall be excluded and such five year period shall be extended by a period or periods equal to the time served under such incarceration.

This statute sets forth the criteria for determining whether a person may be released to electronic monitoring. (The new CPL 510.40[4], discussed below, permits a court to impose electronic monitoring on certain individuals if the procedures set forth in that statute are applied.)

CPL 500.10(21) provides a list of those who may be subject to this type of release. They are:

i. A person charged with a felony;
ii. A person charged with a misdemeanor crime of domestic violence (as defined in CPL 500.10[22], discussed next);
iii. A person charged with a misdemeanor defined in Penal Law article 130, which contains the sex offense statutes;

iv. Someone to whom the provisions of CPL 530.60(2)(b), relating to revocation or modification of bail or release on the current case, apply; (This statute was amended and is discussed below.)
v. A person who was previously convicted of a VFO within the past five years, jail time excluded.

Subd. 22 Misdemeanor crime of domestic violence

Old law: No such definition in CPL 500.10
New law:

> **22. "Misdemeanor crime of domestic violence**," for purposes of subdivision twenty-one of this section, means a misdemeanor under the penal law provisions and circumstances described in subdivision one of section 530.11 of this title[7].

Comment: Criminal Procedure Law Section 530.11(1) is the statute that sets forth procedures in criminal courts for family offense matters. It defines the relationships that must exist for an offense to be considered a family offense[8], and the charges to which its procedures apply. A person who fits within this category may qualify for release with electronic monitoring, as set forth in subdivision 21, above.

C. ARTICLE 510 – RECOGNIZANCE, BAIL AND COMMITMENT – DETERMINATION OF APPLICATION FOR RECOGNIZANCE OR BAIL, ISSUANCE OF SECURING ORDERS, AND RELATED MATTERS

510.10 – Securing Order; when required; alternatives available; standard to be applied

Old law: This statute was previously titled, "Securing order; when required." The prior statute provided the court with options to release on recognizance, set bail or commit to custody of the sheriff.

[7] The offenses listed in CPL 530.11(1) are disorderly conduct; harassment in the first degree; harassment in the second degree; aggravated harassment in the second degree; sexual misconduct; forcible touching; sexual abuse in the third degree; sexual abuse in the second degree as set forth in PL 130.60(1); stalking in the first degree; stalking in the second degree; criminal mischief; menacing in the second degree; menacing in the third degree; reckless endangerment, strangulation in the first degree, strangulation in the second degree, criminal obstruction of breathing or blood circulation, assault in the second degree, assault in the third degree, attempted assault, identity theft in the first degree, identity theft in the second degree, identity theft in the third degree, grand larceny in the fourth degree, grand larceny in the third degree, coercion in the second degree, coercion in the third degree if charged under PL 135.60(1)(2) or (3), when the listed offenses occur between spouses, former spouses, parent and child, or members of the same family or household. However, one who can invoke the defense of infancy under Section 30 of the Penal Law will not qualify under this statute.

[8] CPL 530.11 defines "members of the same family or household" as persons related by consanguinity or affinity, persons legally married to one another, persons formerly married to one another, persons who have a child in common, and persons in an "intimate relationship" as the statute defines it.

New law: The new title reflects the option for alternatives to detention, sets forth requirements for mandatory release on many charges, and provides procedures for setting and reviewing of conditions of release. The statute modifies the original language and adds subdivisions two through six. It requires courts to apply these rules to principals coming under their control, and does not require an application by the principal for the court to consider release. It states:

> **§ 510.10 Securing order; when required; alternatives available; standard to be applied**.
>
> **Subd. 1**
>
> 1. When a principal, whose future court attendance at a criminal action or proceeding is or may be required, comes under the control of a court, such court shall, in accordance with this title, by a securing order release the principal on the principal's own recognizance, release the principal under non-monetary conditions, or, where authorized, fix bail or commit the principal to the custody of the sheriff. In all such cases, except where another type of securing order is shown to be required by law, the court shall release the principal pending trial on the principal's own recognizance, unless it is demonstrated and the court makes an individualized determination that the principal poses a risk of flight to avoid prosecution. If such a finding is made, the court must select the least restrictive alternative and condition or conditions that will reasonably assure the principal's return to court. The court shall explain its choice of release, release with conditions, bail or remand on the record or in writing.

Comment: This statute sets forth the criteria and standard to be applied by all courts in determining whether to issue a securing order releasing a defendant, releasing them with non-monetary conditions, holding them with bail, or holding them without bail. As with the appearance ticket statute, this law establishes that the default is release with the use of the language "the court shall release the principal pending trial on the principal's own recognizance, unless…" The circumstances in which release on recognizance are not to be granted are:

a. Where another type of securing order is "shown to be required by law";
b. It is demonstrated and the court determines that the principal poses a risk of flight to avoid prosecution.

With the "shown to be required by law" language this statute must be read with the other statutes in order to assess which types of cases and circumstances bar release on recognizance. Those statutes include 510.10(4), which describes "qualifying offenses" that do not qualify for mandatory release (and are discussed more fully below), and the statutes barring release by local criminal courts for certain charges as set forth in CPL 530.20(2).

A court can release on recognizance, release with conditions ("release under non-monetary conditions"), fix bail or hold no bail. Unless the law requires a person be held without bail, or provides the court with discretion to set bail or release with non-monetary conditions, or the court has made an individualized determination that the defendant is a risk of flight, a court *must* release pending trial.

If a court decides that a person poses a risk of flight to avoid prosecution, the court must explain its choice of release or detention on the record or in writing.

This statute sets forth the standards to be applied, but is not specific to the particular courts determining bail. In other words, as you will see below, the bail statute also amended the law relating to local criminal courts, superior courts, and bail review. CPL 510.10 must be read in conjunction with those amended statutes.

Subd. 2

2. A principal is entitled to representation by counsel under this chapter in preparing an application for release, when a securing order is being considered and when a securing order is being reviewed for modification, revocation or termination. If the principal is financially unable to obtain counsel, counsel shall be assigned to the principal.

Comment: At any time the court is considering or reconsidering a defendant's custodial status, the defendant is entitled to counsel. If they cannot afford counsel, counsel shall be assigned.

Subd. 3

3. In cases other than as described in subdivision four of this section the court shall release the principal pending trial on the principal's own recognizance, unless the court finds on the record or in writing that release on the principal's own recognizance will not reasonably assure the principal's return to court. In such instances, the court shall release the principal under non-monetary conditions, selecting the least restrictive alternative and conditions that will reasonably assure the principal's return to court. The court shall explain its choice of alternative and conditions on the record or in writing.

Comment: Subdivision 3, again, sets as the default for the vast majority of cases, release on recognizance. Read with subdivision 4, which sets forth what are called "qualifying offenses" that do not qualify for mandatory release, these cases include misdemeanors, non-violent felonies, and robbery in the second degree and burglary in the second degree[9]. If a judge believes the defendant is not likely to return to court if simply released on recognizance, and the case is not one described in subdivision 4, the court must still release with the least restrictive form of non-monetary conditions deemed appropriate by the judge. In such cases, the court must explain its decision on the record or in writing.

Subd. 4 (Qualifying offenses)

[9] There is a detailed list of qualifying offenses prepared by Monroe County Public Defender Timothy Donaher appended to this manual.

4. Where the principal stands charged with a qualifying offense, the court, unless otherwise prohibited by law, may in its discretion release the principal pending trial on the principal's own recognizance or under non-monetary conditions, fix bail, or, where the defendant is charged with a qualifying offense which is a felony, the court may commit the principal to the custody of the sheriff. A principal stands charged with a qualifying offense for the purposes of this subdivision when he or she stands charged with: (a) a felony enumerated in section 70.02 of the penal law, other than burglary in the second degree as defined in subdivision two of section 140.25 of the penal law or robbery in the second degree as defined in subdivision one of section 160.10 of the penal law; (b) a crime involving witness intimidation under section 215.15 of the penal law; (c) a crime involving witness tampering under section 215.11, 215.12 or 215.13 of the penal law; (d) a class A felony defined in the penal law, other than in article two hundred twenty of such law with the exception of section 220.77 of such law; (e) a felony sex offense defined in section 70.80 of the penal law or a crime involving incest as defined in section 255.25, 255.26 or 255.27 of such law, or a misdemeanor defined in article one hundred thirty of such law; (f) conspiracy in the second degree as defined in section 105.15 of 40 the penal law, where the underlying allegation of such charge is that the defendant conspired to commit a class A felony defined in article one hundred twenty-five of the penal law; (g) money laundering in support of terrorism in the first degree as defined in section 470.24 of the penal law; money laundering in support of terrorism in the second degree as defined in section 470.23 of the penal law; or a felony crime of terrorism as defined in article four hundred ninety of the penal law, other than the crime defined in section 490.20 of such law; (h) criminal contempt in the second degree as defined in subdivision three of section 215.50 of the penal law, criminal contempt in the first degree as defined in subdivision (b), (c) or (d) of section 215.51 of the penal law or aggravated criminal contempt as defined in section 215.52 of the penal law, and the underlying allegation of such charge of criminal contempt in the second degree, criminal contempt in the first degree or aggravated criminal contempt is that the defendant violated a duly served order of protection where the protected party is a member of the defendant's same family or household as defined in subdivision one 2 of section 530.11 of this article; or 3 (i) facilitating a sexual performance by a child with a controlled substance or alcohol as defined in section 263.30 of the penal law, use of a child in a sexual performance as defined in section 263.05 of the penal law or luring a child as defined in subdivision one of section 120.70 of the penal law.

Comment: This subdivision is confusing, but essentially in accordance with subdivision 3, requires release for all charges that are not qualifying offenses. Generally, the charges requiring release are misdemeanors, many non-violent felonies, robbery in the second degree subd. 1 and burglary in the second degree, subd. 2. Because the list includes categories of cases, it will be important to specifically review this statute to determine whether a particular charge is a "qualifying offense." If the defendant is charged with a qualifying offense, unless prohibited by law, the court may still release on recognizance or non-monetary conditions, fix bail, or commit to custody of the sheriff.

"Qualifying offenses" subject a defendant to different treatment than the presumption of release on recognizance. The list of qualifying offenses includes both misdemeanors and felonies. With these

offenses, unless otherwise prohibited by law, a court may release, release under non-monetary conditions, fix bail, or if the charge is a felony, commit the defendant to the custody of the sheriff.

You must read the statute to determine which specific statutorily defined crimes are contained on this list. They are, generally[10]:

a. A felony listed in Penal Law 70.02 (which sets forth violent felonies) except burglary in the second degree subd. 2 and robbery in the second degree, subd. 1. Thus, all VFOs except the robbery and burglary charges specified are qualifying offenses;
b. A crime involving witness intimidation under a statute specified in CPL 510.10(4);
c. A crime involving witness tampering under a statute specified in CPL 510.10(4);
d. A class A felony other than class A controlled substance felonies (except 220.77 of the Penal Law – operating as a major trafficker)
e. A felony sex offense as defined in Penal Law Section 70.80, incest as defined in statutes specified in CPL 510.10(4), or a misdemeanor sex offense as defined in Article 130 of the Penal Law;
f. Conspiracy to commit a homicide;
g. Money laundering in support of terrorism or a felony crime of terrorism;
h. Criminal contempt in the second degree as defined in PL 215.50(3), or listed criminal contempt in the first degree charges, or aggravated criminal contempt as specified in CPL 510.10(4), relating to violations of orders of protection where the protected party is a member of the same family or household;
i. Facilitating a sexual performance by a child with drugs or alcohol, or use of a child in a sexual performance, or luring a child.

Subd. 5

5. Notwithstanding the provisions of subdivisions three and four of this section, with respect to any charge for which bail or remand is not ordered, and for which the court would not or could not otherwise require bail or remand, a defendant may, at any time, request that the court set bail in a nominal amount requested by the defendant in the form specified in paragraph (a) of subdivision one of section 520.10 of this title; if the court is satisfied that the request is voluntary, the court shall set such bail in such amount.

Comment: Even if a defendant is entitled to release on recognizance or non-monetary conditions, if a defendant requests bail be set, the court *shall* do so if the request is voluntary. This applies in cases such as when a defendant is being held on a felony and they want to accrue jail time credit towards the charge they may have been released on, or if they are being held on a violation of probation or parole, a Family Court or a federal charge and it is in their interest to remain in custody on the charge.

[10] A more detailed explanation of qualifying offenses is appended to this manual.

Subd. 6

6. When a securing order is revoked or otherwise terminated in the course of an uncompleted action or proceeding but the principal's future court attendance still is or may be required and the principal is still under the control of a court, a new securing order must be issued. When the court revokes or otherwise terminates a securing order which committed the principal to the custody of the sheriff, the court shall give written notification to the sheriff of such revocation or termination of the securing order.

Comment: The court must issue securing orders each time the custodial status changes.

CPL 510.20 – Application for a change in securing order (H)

Old law: The old law had two subdivisions. Subdivision one permitted a bail application any time a court was required to review bail or when a person was confined in a jail. Subdivision two provided the defendant with the opportunity to be heard and advocate for a type of bail or release.

New law: The new statute modifies the language to conform to the rest of the statute, making the language gender neutral and adding the option of non-monetary conditions. It adds 2(a), which provides for the right to counsel during a bail application. 2(b) provides for the right to offer evidence during a bail application. This statute applies once a defendant has been held in custody on a securing order.

§ 510.20 Application for a change in securing order.

1. Upon any occasion when a court has issued a securing order with respect to a principal and the principal is confined in the custody of the sheriff as a result of the securing order or a previously issued securing order, the principal may make an application for recognizance, release under non-monetary conditions or bail.
2. (a) The principal is entitled to representation by counsel in the making and presentation of such application. If the principal is financially unable to obtain counsel, counsel shall be assigned to the principal.
(b) Upon such application, the principal must be accorded **an opportunity to be heard, present evidence and to contend** (emphasis added) that an order of recognizance, release under non-monetary conditions or, where authorized, bail must or should issue, that the court should release the principal on the principal's own recognizance or under non-monetary conditions rather than fix bail, and that if bail is authorized and fixed it should be in a suggested amount and form.

Comment: The amended bail application statute provides the defense with the right to do more than just argue for a defendant's release; it permits the defense to "offer evidence," though it fails to specify the process to use to offer evidence. This statute must be read in conjunction with the statutes applicable to each individual court, as set forth below.

Practice note: It seems that if the defense wishes to "offer evidence" there cannot be an *in camera* bail application when evidence is being offered. Defense counsel must be cautious to ensure that if evidence is offered, the prosecution cannot use cross-examination or review of the evidence to bolster the prosecution case or undermine the defense.

CPL 510.30 Application for securing order; rules of law and criteria controlling determination

Old law: Subd. 1 - The prior law acknowledged discretion of courts in determining recognizance or bail, noting at times release was required, at times detention was required, and at times the court had full discretion. Subd. 2 provided factors to be considered when release was in the discretion of the court. Subd. 3 required that a court warn a defendant charged with a felony that release was conditional and the court could revoke the order under certain circumstances. Subd. 3, not included below, remains essentially the same. The current statute focuses on prior record, current charges, history of flight and other court-related factors.

New law:

> **§ 510.30 Application for securing order; rules of law and criteria controlling determination.**
>
> 1. With respect to any principal, the court in all cases, unless otherwise provided by law, must impose the least restrictive kind and degree of control or restriction that is necessary to secure the principal's return to court when required. In determining that matter, the court must, on the basis of available information, consider and take into account information about the principal that is relevant to the principal's return to court, including:
> (a) The principal's activities and history;
> (b) If the principal is a defendant, the charges facing the principal;
> (c) The principal's criminal conviction record if any;
> (d) The principal's record of previous adjudication as a juvenile delinquent, as retained pursuant to section 354.2 of the family 32 court act, or, of pending cases where fingerprints are retained pursuant 33 to section 306.1 of such act, or a youthful offender, if any;
> (e) The principal's previous record with respect to flight to avoid criminal prosecution;
> (f) If monetary bail is authorized, according to the restrictions set forth in this title, the principal's individual financial circumstances, and, in cases where bail is authorized, the principal's ability to post bail without posing undue hardship, as well as his or her ability to obtain a secured, unsecured, or partially secured bond;
> (g) Where the principal is charged with a crime or crimes against a member or members of the same family or household as that term is defined in subdivision one of section 530.11 of this title, the following factors:
>
> > (i) any violation by the principal of an order of protection issued by any court for the protection of a member or members of the same family or household as that term is

defined in subdivision one of section 530.11 of this title, whether or not such order of protection is currently in effect; and

(ii) the principal's history of use or possession of a firearm;

(h) If the principal is a defendant, in the case of an application for a securing order pending appeal, the merit or lack of merit of the appeal.

Comment: The new law addressing the criteria for making bail determinations states that the court "must impose the least restrictive kind and degree of control or restriction that is necessary to secure the principal's return to court when required." **This principle, repeated throughout the statute, is a major change that must be emphasized by the defense in all bail applications**.

The criteria for determining bail or release have been changed in several important ways seemingly reflecting the intent to end mass incarceration. The statute removes the consideration of subjective and easily interpreted criteria that the old statute required. Under the old law, the court could consider the principal's "character, reputation, habits and mental condition." These qualities were ripe for infusion of issues of implicit biases and prejudices into bail arguments and consideration, whether intentional or not. This language has been removed from the current statute. Similarly, the bias against indigent defendants has been removed from the language, as the statute no longer requires consideration of employment and financial resources. Instead, the court may consider the defendant's activities and history. The statute also eliminates the requirement that the court consider family ties and length of residence in the community.

CPL 510.40 – Court notification to principal of conditions of release and of alleged violations of conditions of release (H)

Old law: The old statute was titled "Application for recognizance or bail; determination thereof, form of securing order and execution thereof." Subdivision 1 required a court to determine a bail or recognizance application and either release on recognizance, fix bail, or commit to the custody of the sheriff.

New law:

§ 510.40 Court notification to principal of conditions of release and of alleged violations of conditions of release.

1. Upon ordering that a principal be released on the principal's own recognizance, or released under non-monetary conditions, or if bail has been fixed, upon the posting of bail, the court must direct the principal to appear in the criminal action or proceeding involved whenever the principal's attendance may be required and to be at all times amenable to the orders and processes of the court. If such principal is in the custody of the sheriff or at liberty upon bail at the time of the order, the court must direct that the principal be discharged from such custody or, as the case may be, that the principal's bail be exonerated.

2. Upon the issuance of an order fixing bail, where authorized, and upon the posting thereof, the court must examine the bail to determine whether it complies with the order. If it does, the court must, in the absence of some factor or circumstance which in law requires or authorizes disapproval thereof, approve the bail and must issue a certificate of release, authorizing the principal to be at liberty, and, if the principal is in the custody of the sheriff at the time, directing the sheriff to discharge the principal therefrom. If the bail fixed is not posted, or is not approved after being posted, the court must order that the principal be committed to the custody of the sheriff. In the event of any such non-approval, the court shall explain promptly in writing the reasons therefor.

3. Non-monetary conditions of release shall be individualized and established in writing by the court. At future court appearances, the court shall consider a lessening of conditions or modification of conditions to a less burdensome form based on the principal's compliance with such conditions of release. In the event of alleged non-compliance with the conditions of release in an important respect, pursuant to this subdivision, additional conditions may be imposed by the court, on the record or in writing, **only after notice of the facts and circumstances of such alleged non-compliance, reasonable under the circumstances, affording the principal and the principal's attorney and the people an opportunity to present relevant, admissible evidence, relevant witnesses and to cross-examine witnesses, and a finding by clear and convincing evidence that the principal violated a condition of release in an important respect.** (Emphasis added.) Following such a finding, in determining whether to impose additional conditions for non-compliance, the court shall consider and may select conditions consistent with the court's obligation to impose the least restrictive condition or conditions that will reasonably assure the defendant's return to court. The court shall explain on the record or in writing the reasons for its determination and for any changes to the conditions imposed.

4. (a) Electronic monitoring of a principal's location may be ordered only if the court finds, **after notice, an opportunity to be heard** (emphasis added) and an individualized determination explained on the record or in writing, that the defendant qualifies for electronic monitoring in accordance with subdivision twenty-one of section 500.10 of this title, and no other realistic non-monetary condition or set of non-monetary conditions suffice to reasonably assure a principal's return to court.

(b) The specific method of electronic monitoring of the principal's location must be approved by the court. It must be the least restrictive procedure and method that will reasonably assure the principal's return to court, and unobtrusive to the greatest extent practicable.

(c) Electronic monitoring of the location of a principal may be conducted only by a public entity under the supervision and control of a county or municipality or a non-profit entity under contract to the county, municipality or the state. A county or municipality shall be authorized to enter into a contract with another county or municipality in the state to monitor principals under non-monetary conditions of release in its county, but counties, municipalities and the state shall not contract with any private for-profit entity for such purposes.

(d) Electronic monitoring of a principal's location may be for a maximum period of sixty days, and may be renewed for such period, after notice, an opportunity to be heard and a de novo, individualized determination in accordance with this subdivision, which shall be explained on the record or in writing. A defendant subject to electronic location monitoring under this

subdivision shall be considered held or confined in custody for purposes of section 180.80 of this chapter and shall be considered committed to the custody of the sheriff for purposes of section 170.70 of the chapter, as applicable.

5. If a principal is released under non-monetary conditions, the court shall, on the record and in an individualized written document provided to the principal, notify the principal, in plain language and a manner sufficiently clear and specific: (a) of any conditions to which the principal is subject, to serve as a guide for the principal's conduct; and (b) that the possible consequences for violation of such a condition may include revocation of the securing order and the ordering of a more restrictive securing order.

Comment: The new statute keeps some of the prior provisions and renumbers them. The substance of this statute was also significantly changed. The new statute has been expanded to include the types of non-monetary conditions that may be imposed and the circumstances under which that may occur.

Former subdivision one, which merely listed a court's options, was deleted.

Subdivisions one and two in the new statute are former subdivisions two and three, and are largely the same as the prior statute. They address the court's logistics in setting bail or releasing an individual, and require that the court must review bail that will be posted to ensure it comports with the bail order. Subdivision two contains a new provision that If the bail proffered by the defendant is not approved by the court, the court must explain "promptly in writing the reasons" for its decision.

(H) Subdivisions three and four are new. Subdivision three requires that non-monetary conditions of release, such as travel restrictions, must be individualized and set forth in writing. At subsequent court appearances the court must consider reducing the conditions if the principal has complied with conditions of release. If a principal fails to comply "in an important respect," the court may impose greater restrictions. There are procedural requirements that must be met before this happens. They include notice to the principal of the facts and circumstances of the allegation, and other procedural protections including including the right to present relevant, admissible evidence, relevant witnesses and the right to cross-examine witnesses. The court must make a finding by clear and convincing evidence that the principal violated a condition of release in an important respect. Once that occurs, the court must consider and select conditions that are the least restrictive that will reasonably assure the defendant's return to court. The court must explain on the record or in writing the reasons for its determination and changes to the conditions.

Practice note: This is a radical departure from past practice in several ways. First, if a defendant has non-monetary conditions of release, they are entitled to have the court consider whether less burdensome conditions should be imposed if they have been compliant with their conditions. Defendants will now have the opportunity to challenge claims they did not comply with conditions of release through evidentiary hearings which will include the right to present evidence, cross-examine witnesses, and a finding by clear and convincing evidence. A finding of violation does not always mean that the defendant goes to jail. Instead, the law requires that the least restrictive condition that will reasonably assure return to court be imposed.

(H) Subdivision 4 limits the use of electronic monitoring (EM) to those individuals listed in CPL 500.10(21) – defendants charged with felonies, misdemeanor crimes of domestic violence, misdemeanor sex offenses, misdemeanors with prior VFO convictions within five years, or VFOs. EM can only be imposed after notice and an opportunity to be heard. Even in these cases, the court must find that no less burdensome conditions would assure return to court. If imposed, the court must require the least restrictive form of EM. The statute limits which organizations may provide EM services.

The statute limits EM to a maximum period of sixty days, but provides for renewal after another process involving notice, an opportunity to be heard, and another finding. EM time counts as custody time toward the 144 hours in which a preliminary hearing must be held pursuant to CPL 180.80, and the five days in which a misdemeanor complaint must be converted to an information for a defendant to be held in custody under CPL 170.70.

This writer's interpretation of this statute is that if a defendant is held at arraignment on electronic monitoring and the preliminary hearing does not go forward, it appears the defendant is entitled to be released from the monitoring. Similarly, if a misdemeanor complaint is not converted to an information in five days after arraignment, in accordance with CPL 170.70, a defendant should be released from electronic monitoring. However, if other reasons exist to continue holding the defendant on electronic monitoring and the procedural requirements are met, the passage of the 170.70 time and 180.80 time may not be significant.

A principal subject to non-monetary conditions is entitled to a written explanation of the conditions and the consequences of failing to meet them.

CPL 510.43 – Court appearances: additional notifications

Old law: This did not exist.
New law: This provision requires courts or, if directed by the court, pretrial services agencies, to notify all principals released under non-monetary conditions and on recognizance of all court appearances in advance by text message, telephone call, electronic mail or first class mail. The court shall offer a principal a form to complete at court appearances, in which the principal notes their selection of preferred method of notice.

CPL 510.45 – Pretrial services agencies

Subivisions 1-3
Old law: This statute did not exist.
New law: This statute sets forth the requirements of pretrial services agencies that participate in notice and monitoring under the new law. It also sets forth the requirements for any risk assessment instruments relied on in determining the form of release or bail imposed. Subdivision 3(b) requires that the forms avoid discrimination on the basis of race, national origin, sex, or other protected classes.

These questionnaires must also be empirically validated and regularly revalidated, with such validation studies to be made publicly available upon request.

510.45(4) permits the use of supervision by a pretrial services agency as a form of non-monetary condition, but only after "notice, an opportunity to be heard, and an individualized determination that no other realistic non-monetary condition or set of non-monetary conditions will suffice to reasonably assure the principal's return to court."

CPL 510.50 – Enforcement of securing order

Old law: This statute was not divided into subdivisions prior to the new law. It provided the court with the ability to compel attendance of a principal in custody by ordering the sheriff to produce them. If out of custody, it permitted various methods of compelling attendance, including the use of bench warrants.

New law:

> **CPL 510.50 – Enforcement of securing order**
>
> 2. Except when the principal is charged with a new crime while at liberty, absent relevant, credible evidence demonstrating that a principal's failure to appear for a scheduled court appearance was willful, the court, prior to issuing a bench warrant for a failure to appear for a scheduled court appearance, shall provide at least forty-eight hours notice to the principal or the principal's counsel that the principal is required to appear, in order to give the principal an opportunity to appear voluntarily.

Comment: The statute now has two subdivisions. Subdivision one remains essentially the same as the old statute. Subdivision two requires a court give forty-eight hours notice before issuance of a bench warrant so that a principal can appear voluntarily if there is no "relevant, credible evidence" demonstrating the failure to appear was willful.

D. ARTICLE 520 – BAIL AND BAIL BONDS

CPL 520.10 – Bail and bail bonds; fixing of bail and authorized forms thereof.

Old law: This statute set forth the types of bail and bonds that could be used to secure an individual's release.
New law: The only part of this statute that was amended is subdivision 2(b). The amended statute requires the court setting bail to provide at least three options for how bail may be posted, and requires that one of the forms be either an unsecured or partially secured surety bond. Definitions for "unsecured," "surety," and "bail bond" are found in Section 500.10 of the CPL.

E. ARTICLE 530 – ORDERS OF RECOGNIZANCE OR BAIL WITH RESPECT TO DEFENDANTS IN CRIMINAL ACTIONS AND PROCEEDINGS – WHEN AND BY WHAT COURTS AUTHORIZED

CPL 530.10 – Order of recognizance, release under non-monetary conditions or bail; in general.

Old law: Noted a court was required OR authorized to issue a securing order for bail or release of a defendant.

New law: Requires a securing order (which by definition can release, set bail, or impose conditions on release) be issued upon application of a defendant .

CPL 530.11 – Procedures for family offense matters

CPL 530.11(4), though largely untouched, was amended to allow for a *de novo* review of the recommendation and securing order of a Supreme Court or Family Court judge in a family offense case or an alleged violation of an order of protection when the Supreme or Family Court is not in session.

CPL 530.12 – Protection for victims of family offenses

> **Subd. 11 –** This statute was amended to permit a court to review the securing order releasing on non-monetary conditions, bringing the statute into conformity with the new law.

CPL 530.13
Old law – This is the statute that addressed orders of protection in non-family offense cases. The opening paragraph previously seemed to limit issuance of orders of protection for good cause shown to cases in which a defendant was committed to custody or released on pre-trial release or bail.

New law – The court may issue an order of protection even if a defendant is released on recognizance, **for good cause shown** (emphasis added).

> **Subd. (8)(a**) was amended to include in a court's review of release or bail for failure to comply with conditions failure to comply with non-monetary conditions.

CPL 530.20 – Securing order by local criminal court when action is pending therein

This statute was extensively modified. It addresses bail and release for matters pending in local criminal court, including felonies. Subdivisions 1 and 2 are addressed separately below.

While CPL 510.10, discussed above, sets forth the criteria to be used when a principal initially comes under control of a court as well as general principles, and CPL 510.20, discussed above, addresses the method of seeking a change in securing order for an individual confined on a prior securing order in the case, CPL 530.20 addresses the standards and criteria specifically to be used by a local criminal court in

determining whether to release, release under non-monetary conditions, set bail or commit to custody upon application of the defendant to the court.

Since the standards between CPL 510 and 530 are the same, and the initial language in 530.20 noting that these considerations are to be applied "upon application of a defendant," it seems that there may have been an oversight in the drafting of the new law by leaving in the "application of the defendant" language in the new statute. In other words, since the standards of CPL 510 apply to all defendants, under CPL 510 and the overriding principles of release upon least restrictive means possible as soon as possible, there should be no need for application of a defendant to have them applied.

CPL 530.20 – Securing order by local criminal court when action is pending therein

When a criminal action is pending in a local criminal court, such court, upon application of a defendant, shall proceed as follows:

1. (a) In cases other than as described in paragraph (b) of this subdivision the court shall release the principal pending trial on the principal's own recognizance, unless the court finds on the record or in writing that release on the principal's own recognizance will not reasonably assure the principal's return to court. In such instances, the court shall release the principal under non-monetary conditions, selecting the least restrictive alternative and conditions that will reasonably assure the principal's return to court. The court shall explain its choice of alternative and conditions on the record or in writing.
(b) Where the principal stands charged with a qualifying offense, the court, unless otherwise prohibited by law, may in its discretion release the principal pending trial on the principal's own recognizance or under non-monetary conditions, fix bail, or, where the defendant is charged with a qualifying offense which is a felony, the court may commit the principal to the custody of the sheriff. The court shall explain its choice of release, release with conditions, bail or remand on the record or in writing. A principal stands charged with a qualifying offense when he or she stands charged with:
(i) a felony enumerated in section 70.02 of the penal law, other than burglary in the second degree as defined in subdivision two of section 140.25 of the penal law or robbery in the second degree as defined in subdivision one of section 160.10 of the penal law;
(ii) a crime involving witness intimidation under section 215.15 of the penal law;
(iii) a crime involving witness tampering under section 215.11, 215.12 2 or 215.13 of the penal law;
(iv) a class A felony defined in the penal law, other than in article two hundred twenty of such law with the exception of section 220.77 of such law;
(v) a felony sex offense defined in section 70.80 of the penal law or a crime involving incest as defined in section 255.25, 255.26 or 255.27 of such law, or a misdemeanor defined in article one hundred thirty of such law;
(vi) conspiracy in the second degree as defined in section 105.15 of 11 the penal law, where the underlying allegation of such charge is that the defendant conspired to commit a class A felony defined in article one hundred twenty-five of the penal law;

(vii) money laundering in support of terrorism in the first degree as defined in section 470.24 of the penal law; money laundering in support of terrorism in the second degree as defined in section 470.23 of the penal law; or a felony crime of terrorism as defined in article four hundred ninety of the penal law, other than the crime defined in section 490.20 of such law;
(viii) criminal contempt in the second degree as defined in subdivision three of section 215.50 of the penal law, criminal contempt in the 22 first degree as defined in subdivision (b), (c) or (d) of section 215.51 of the penal law or aggravated criminal contempt as defined in section 215.52 of the penal law, and the underlying allegation of such charge of criminal contempt in the second degree, criminal contempt in the first degree or aggravated criminal contempt is that the defendant violated a duly served order of protection where the protected party is a member of the defendant's same family or household as defined in subdivision one of section 530.11 of this article; or
(ix) facilitating a sexual performance by a child with a controlled substance or alcohol as defined in section 263.30 of the penal law, use of a child in a sexual performance as defined in section 263.05 of the penal law or luring a child as defined in subdivision one of section 120.70 of the penal law.
(d) Notwithstanding the provisions of paragraphs (a) and (b) of this subdivision, with respect to any charge for which bail or remand is not ordered, and for which the court would not or could not otherwise require bail or remand, a defendant may, at any time, request that the court set bail in a nominal amount requested by the defendant in the form specified in paragraph (a) of subdivision one of section 520.10 of this title; if the court is satisfied that the request is voluntary, the court shall set such bail in such amount.

Comment: **530.20 (1)(a)**

Old law: The former CPL 530.20 had subdivisions 1 and 2. Subdivision 1 previously required that in cases pending in local criminal court, the court must or may order bail according to the rules set forth in its two subdivisions. If the charge was filed by the listed types of accusatories with offenses of less than felony level, the court was required to order recognizance or bail.

New Law: As with the new CPL 510.10, which provides the standards to be applied in determining when a principal must be released, subjected to non-monetary conditions, supervised by a pre-trial release agency, subjected to electronic monitoring, or held, this statute contains the many big changes in the new bail law. It uses the same standards as Article 510, but applies upon a principals's request for release in local criminal court. Subdivision 1 was greatly expanded to include these changes.

As with CPL 510.10, in cases in which a defendant is charged with a crime other than a "qualifying offense[11]," listed in subdivision b, the court must release the principal. If the court does not believe release on recognizance will ensure the principal's return to court, the court may impose release on the

[11] See the full list of qualifying offenses prepared by Monroe County Public Defender Timothy Donaher, appended to this manual.

least restrictive non-monetary conditions that the court concludes will reasonably assure the principal's return to court, and must explain its decision in writing. The "qualifying offense" list is the same as in CPL 510.10. As noted in that section, the list involves categories of offenses and requires detailed analysis.

The statute limits commitment to custody to circumstances permitted under subdivision 1. In other words, defendants facing misdemeanors and violations, non-violent felonies, and robbery second as charged under subd. 1, and burglary second as charged under subd. 2, charges under the specified subdivisions, are entitled to presumptive release or release with non-monetary conditions if the judge believes that ROR will not reasonably assure the defendant's return and/or the defendant has a charge or circumstances listed under subdivision 1(b), "qualifying offenses".

530.20(1)(b) (Qualifying offenses)

Old law: This statute did not exist.
New law: This is the list of crimes and circumstances that prevent a defendant from being entitled to mandatory release or release under non-monetary conditions. The law still permits a judge to release the principal on their own recognizance or under non-monetary conditions if other statutes do not prohibit such release. The list of qualifying offenses that bar presumptive release is the same as that in CPL 510.10(4).
They are:

i. A violent felony except burglary in the second degree subd. 2 and robbery in the second degree, subd. 1;
ii. A crime involving witness intimidation under Penal Law section 215.15;
iii. A crime involving witness tampering under specified statutes;
iv. A class A felony other than controlled substance felonies (except 220.77 of the Penal Law – operating as a major trafficker);
v. A felony sex offense as defined in Penal Law Section 70.80, incest as defined in specified statutes, or a misdemeanor sex offense as defined in Article 130 of the Penal Law;
vi. Conspiracy to commit a homicide;
vii. Money laundering in support of terrorism or a felony crime of terrorism;
viii. Criminal contempt in the second degree as defined in PL 215.50(3), or listed criminal contempt in the first degree charges, or aggravated criminal contempt as specified in the statute, relating to violations of orders of protection where the protected party is a member of the same family or household;
ix. Facilitating a sexual performance by a child with drugs or alcohol, or use of a child in a sexual performance, or luring a child.

Pursuant to 530.20(1)(d), as with CPL 520.10, a local criminal court may set nominal bail on a defendant entitled to release if a defendant voluntarily requests it.

CPL 530.20(2)

Old law: CPL 530.20(2) addressed the circumstances when a court could set bail or was required to hold an individual charged by felony complaint. It barred a local court from releasing a defendant charged with a Class A felony or one who had two prior felony convictions (double predicates). It also required that the local court hear the prosecutor on bail and that the court review the DCJS criminal history or a locally generated one and provide it to defense counsel before making a decision.

New law:

> 2. When the defendant is charged, by felony complaint, with a felony, the court may, in its discretion, order recognizance, release under non-monetary conditions, or, where authorized, bail or commit the defendant to the custody of the sheriff except as otherwise provided in subdivision one of this section or this subdivision:
> (a) A city court, a town court or a village court may not order recognizance or bail when
> (i) the defendant is charged with a class A felony, or
> (ii) [it appears that] the defendant has two previous felony convictions;
> (b) No local criminal court may order recognizance, release under non-monetary conditions or bail with respect to a defendant charged with a felony unless and until:
> (i) The district attorney has been heard in the matter or, after knowledge or notice of the application and reasonable opportunity to be heard, has failed to appear at the proceeding or has otherwise waived his right to do so; and
> (ii) The court [has] and counsel for the defendant have been furnished with a report of the division of criminal justice services concerning the defendant's criminal record, if any, or with a police department report with respect to the defendant's prior arrest and conviction record, if any. If neither report is available, the court, with the consent of the district attorney, may dispense with this requirement; provided, however, that in an emergency, including but not limited to a substantial impairment in the ability of such division or police department to timely furnish such report, such consent shall not be required if, for reasons stated on the record, the court deems it unnecessary. When the court has been furnished with any such report or record, it shall furnish a copy thereof to counsel for the defendant or, if the defendant is not represented by counsel, to the defendant.

Comment: This statute has remained essentially the same, with a few minor modifications, including the authorization of non-monetary conditions and the limitation that bail be imposed only when authorized. As in the past, city, town and village courts may not set bail on individuals charged with felonies, though judges in other local criminal courts (district courts and NYC Criminal Courts) may.

Notably, it cannot merely "appear that" a defendant has two prior felonies, as under prior law, but the defendant must actually have two prior felonies.

The statute also now requires that counsel for the defendant be provided with the DCJS criminal history reports or police department generated reports.

CPL 530.30 – Order of recognizance, release under non-monetary conditions or bail; by superior court judge when action is pending in local criminal court.

Old law: CPL 530.30 was our bail application statute – the one we relied on to have a judge in Part I set bail in A felony or double predicate cases, reduce bail in other cases, or release our clients when bail was unreasonable. It required that the DA be heard, and limited us to one such application.

New law: CPL 530.30 adds the authority of a superior court judge to release under non-monetary conditions or order bail when authorized. (Presumably, the addition of the "when authorized" language limits setting of bail to when release is not mandatory under the new law. A superior court cannot then impose bail.)

The new CPL 530.30(1) adds subdivision D, which permits a bail application to seek less restrictive non-monetary conditions. The statute now contains language urging least restrictive alternatives and conditions that will reasonably ensure return to court. The court must explain its choice on the record or in writing.

Notably, the statute preserves the right of the prosecutor to be heard, but eliminates the "one bite at the apple" provision, subdivision 3. In other words, a bail application can be made more than once.

CPL 530.40 – Order of recognizance, release under non-monetary conditions or bail; by superior court when action is pending therein.

This statute addresses bail and release in cases that are actually pending in superior court.

Old law: The former CPL 530.40 had four subdivisions. Subdivision 1 addressed bail and release in non-felony cases; subdivision 2 in cases in which a defendant had previously been been released or had bail set, permitting continuation of the prior status; subdivision 3 requiring that a defendant convicted of a class A felony, or certain B or C sex offense felonies committed by certain individuals, such as after plea or conviction after trial be incarcerated; and subdivision 4 requiring a prosecutor be heard and criminal history reviewed.

New law: The statute addressing bail in superior court cases now has seven subdivisions.

Subidivision 1 requires that a person charged with a misdemeanor or violation ("an offense or offenses of less than felony grade only") be released on recognizance or under non-monetary conditions unless they fall within the qualifying offense category *or are otherwise barred from release*. This is a significant change in the statute. The revision of this subdivision eliminates bail or remand as an option for misdemeanors in most cases, instead mandating some form of release.

Most qualifying offenses are felonies. The exceptions on the list are misdemeanor sex offenses, criminal contempt in the second degree, and arguably although not expressly stated, A misdemeanor attempts of the E felonies on the list. If a defendant is charged with a qualifying offense then the review is considered under subdivision 4.

Subdivision 2, which addresses defendants charged with felonies, permits a court, unless otherwise provided by law, in its discretion, to "order recognizance, release under non-monetary conditions, or where authorized, bail." In this situation, the court must return to the new CPL Article 510 which sets forth when release is mandatory and what standards to apply. As with the old law, the court may continue a prior order of a local court or superior court from when the charge was pending in local court.

Subdivision 3 is entirely new, requiring that other than cases listed in subdivision 4, a court shall release a principal pending trial on recognizance unless the court finds release will not reasonably assure the return to court. In those cases, the court shall release with the least restrictive non-monetary conditions that will assure return to court. The court must explain its choice of alternatives and conditions on the record or in writing.

Subdivision 4 If a defendant is charged with a qualifying offense**,** this statute permits a court, in its discretion, to release a defendant on recognizance, under non-monetary conditions, with bail, or if the charge is a felony qualifying offense, commit to custody. The court must explain its choice on the record. The qualifying offenses are the same as previously listed, and the statute must be reviewed to know the details of each qualifying offense:

a. A violent felony except burglary in the second degree subd. 2 and robbery in the second degree, subd. 1;
b. A crime involving witness intimidation of a witness pursuant to Penal Law 215.15;
c. A crime involving witness tampering under specified statutes;
d. A class A felony other than CPCS felonies (except 220.77 of the Penal Law – operating as a major trafficker;
e. A felony sex offense as defined in Penal Law Section 70.80, incest as defined in specified statutes, or a misdemeanor sex offense as defined in Article 130 of the Penal Law;
f. Conspiracy to commit a homicide;
g. Money laundering in support of terrorism or a felony crime of terrorism;
h. Criminal contempt in the second degree as defined in PL 215.50(3), or listed criminal contempt in the first degree charges, or aggravated criminal contempt as specified in the statute, relating to violations of orders of protection where the protected party is a member of the same family or household;
i. Facilitating a sexual performance by a child with drugs or alcohol, or use of a child in a sexual performance, or luring a child.

Subdivision 5 permits a court to set nominal bail if the request from the defendant is voluntary.

Subdivison 6 tracks the prior subdivision 3, barring release of someone **convicted of** (emphasis added, after plea or trial) a class A felony or class B or C sex offense felonies meeting the age criteria of the statute.

Subdivision 7 tracks the prior subdivision 4, requiring that prior to release or bail on a felony, the prosecutor be heard and the court and now adding that defense counsel be furnished with a DCJS report or local criminal history report described in CPL 530.20.

CPL 530.45 – Order of recognizance or bail; after conviction and before sentence.

This statute has six subdivisions. Only subdivision 1 was amended.

Subd. 1
Old law: The prior statute permitted a bail application after revocation of bail after conviction in cases other than A felonies and certain B and C felony sex offenses. The application would have to be made to a judge specified in subdivision 2. Those judges are appellate division judges in cases pending in supreme or county court, and superior court judges in cases pending in local criminal court.

New law: The new law conforms the statute to the current scheme, permitting an application even if the court has simply imposed more restrictive non-monetary conditions. The application must be made to the same judges as previously.

CPL 530.60 – Order of recognizance or bail; revocation thereof (H)

Old law: This statute permitted revocation of bail after good cause was shown. The former subdivision 1 was often used by prosecutors to have defendants held on pending charges when they were charged with new non-violent felonies in order to avoid preliminary hearings. The former subdivision 2 was the statute that had been used by prosecutors to have defendants charged with new violent felonies held while avoiding preliminary hearings. Strangely, defendants had greater due process rights under subdivision 2 when charged with violent felonies than subdivision 1. *People v. McCullough*, 174 Misc. 2d 418. This has changed.

New law: The new law has many subdivisions which will be discussed more fully below.

§ 530.60 Certain modifications of a securing order. (Formerly titled "Order of recognizance or bail; revocation thereof.") **H**

> 1. Whenever in the course of a criminal action or proceeding a defendant is at liberty as a result of an order of recognizance, release under non-monetary conditions or bail issued pursuant to this chapter, and the court considers it necessary to review such order, whether due to a motion by the people or otherwise, the court may, and except as provided in subdivision two of section 510.50 of this title concerning a failure to appear in court, by a bench warrant if necessary,

require the defendant to appear before the court. Upon such appearance, the court, for good cause shown, may revoke the order of recognizance, release under non-monetary conditions, or bail. If the defendant is entitled to recognizance, release under non-monetary conditions, or bail as a matter of right, the court must issue another such order. If the defendant is not, the court may either issue such an order or commit the defendant to the custody of the sheriff in accordance with this section. Where the defendant is committed to the custody of the sheriff and is held on a felony complaint, a new period as provided in section 180.80 of this chapter shall commence to run from the time of the defendant's commitment under this subdivision.

2. (a) Whenever in the course of a criminal action or proceeding a defendant charged with the commission of a felony is at liberty as a result of an order of recognizance, release under non-monetary conditions or bail issued pursuant to this article it shall be grounds for revoking such order that the court finds reasonable cause to believe the defendant committed one or more specified class A or violent felony offenses or intimidated a victim or witness in violation of section 215.15, 215.16 or 215.17 of the penal law while at liberty.

(b) Except as provided in paragraph (a) of this subdivision or any other law, whenever in the course of a criminal action or proceeding a defendant charged with the commission of an offense is at liberty as a result of an order of recognizance, release under non-monetary conditions or bail issued pursuant to this article it shall be grounds for revoking such order and fixing bail in such criminal action or proceeding when the court has found, by clear and convincing evidence, that the defendant:

(i) persistently and willfully failed to appear after notice of scheduled appearances in the case before the court; or
(ii) violated an order of protection in the manner prohibited by subdivision (b), (c) or (d) of section 215.51 of the penal law while at liberty; or
(iii) stands charged in such criminal action or proceeding with a misdemeanor or violation and, after being so charged, intimidated a victim or witness in violation of section 215.15, 215.16 or 215.17 of the penal law or tampered with a witness in violation of section 215.11, 215.12 or 215.13 of the penal law, law while at liberty; or
(iv) stands charged in such action or proceeding with a felony and, after being so charged, committed a felony while at liberty.

(c) Before revoking an order of recognizance, release under non-monetary conditions, or bail pursuant to this subdivision**, the court must hold a hearing and shall receive any relevant, admissible evidence not legally privileged. The defendant may cross-examine witnesses and may present relevant, admissible evidence on his own behalf**. (Emphasis added.) Such hearing may be consolidated with, and conducted at the same time as, a felony hearing conducted pursuant to article one hundred eighty of this chapter. A transcript of testimony taken before the grand jury upon presentation of the subsequent offense shall be admissible as evidence during the hearing. The district attorney may move to introduce grand jury testimony of a witness in lieu of that witness' appearance at the hearing.

(d) Revocation of an order of recognizance, release under nonmonetary conditions or bail and a new securing order fixing bail or commitment, as specified in this paragraph and pursuant to this subdivision shall be for the following periods:

(i) Under paragraph (a) of this subdivision, revocation of the order of recognizance, release under non-monetary conditions or, as the case may be, bail, and a new securing order fixing bail or committing the defendant to the custody of the sheriff shall be as follows:

(A) For a period not to exceed ninety days exclusive of any periods of adjournment requested by the defendant; or
(B) Until the charges contained within the accusatory instrument have been reduced or dismissed such that no count remains which charges the defendant with commission of a felony; or
(C) Until reduction or dismissal of the charges contained within the accusatory instrument charging the subsequent offense such that no count remains which charges the defendant with commission of a class A or violent felony offense.

Upon expiration of any of the three periods specified within this subparagraph, whichever is shortest, the court may grant or deny release upon an order of bail or recognizance in accordance with the provisions of this article. Upon conviction to an offense the provisions of article five hundred thirty of this chapter shall apply; and

(ii) Under paragraph (b) of this subdivision, revocation of the order of recognizance, release under non-monetary conditions or, as the case may be, bail shall result in the issuance of a new securing order which may, if otherwise authorized by law, permit the principal's release on recognizance or release under non-monetary conditions, but shall also render the defendant eligible for an order fixing bail provided, however, that in accordance with the principles in this title the court must select the least restrictive alternative and condition or conditions that will reasonably assure the principal's return to court. Nothing in this subparagraph shall be interpreted as shortening the period of detention, or requiring or authorizing any less restrictive form of a securing order, which may be imposed pursuant to any other law.

(e) Notwithstanding the provisions of paragraph (a) or (b) of this subdivision a defendant, against whom a felony complaint has been filed which charges the defendant with commission of a class A or violent felony offense or violation of section 215.15, 215.16 or 215.17 of the penal law committed while he was at liberty as specified therein, may be committed to the custody of the sheriff pending a revocation hearing for a period not to exceed seventy-two hours. An additional period not to exceed seventy-two hours may be granted by the court upon application of the district attorney upon a showing of good cause or where the failure to commence the hearing was due to the defendant's request or occurred with his consent. Such good cause must consist of some compelling fact or circumstance which precluded conducting the hearing within the initial prescribed period.

Comment: The new law adds several subdivisions to subdivision 2, and adds extensive due process rights for defendants who are subject to possible revocation of release or modification of conditions. It is extremely complicated and detailed. It provides the same due process rights to those charged with violent or non-violent felonies, and limits court review of bail for nonappearances to persistent and willful failure to appear after notice of scheduled appearances – one failure is not enough.

Addressing each subdivision individually, the following important changes have been made:

Subdivision 1:
This subdivision addresses the situations when courts seek to review release or bail due to a change in circumstances or new charges. As subdivision 2 addresses the change in release status for those released on felonies who face specific new charges ("specified class A or violent felony offenses or intimidated a victim or witness in violation of section s215.15, 215.16 or 215.17[12]") , subdivision 1 appears to also address the bail modification of those released on felonies who do not face the charges specified in CPL 530.60(2)(a), or those released on non-felony matters. This subdivision permits a court, for good cause shown, to revoke the order of recognizance, release under non-monetary conditions, or bail. If a defendant is entitled to recognizance, release or bail, the court must issue another order, presumably adding enhanced conditions. If the defendant is not entitled to some form of release or bail, the court may commit to the custody of the sheriff.

Subdivision 1 was amended to include the option to change non-monetary conditions.

Under this statute, the court may require the defendant to appear to have the form of release or bail reconsidered. The court may issue a bench warrant if necessary. However, the statute requires that the court adhere to the limitations of the new CPL Section 510.50, which bars a court from issuing a bench warrant without a forty-eight hour grace period unless there is relevant, credible evidence that the failure to appear was willful.

Notably, if the defendant is committed to the custody of the sheriff on a felony complaint, as with the old (but often ignored)aspect of this statute, a new 180.80 period begins to run.

Previously, the statute did not expressly state that the prosecutor could seek review of release or bail, though it was used by prosecutors to do so, but now the option is explicitly stated.

Subdivision 2:
(a): (Revocation/modification for those out on felonies charged with specified offenses) - The first half of former subdivision 2(a), setting forth grounds for revocation of the original securing order, was included in the new subdivision 2(a). This subdivision applies to those who were previously released or had bail set on a felony, and are newly charged with a "specified" A or violent felony, or intimidating a victim or

[12] Although subdivision 2 refers to "specified" A felonies and violent felony offenses, the statute does not contain any specification. This has not changed from the prior statute.

witness charges listed in the statute. If the court finds reasonable cause to believe the defendant committed a new A felony, violent felony, or intimidating offense as listed in the statute, it is grounds for revoking the original order. Though the statute refers to "specified class A or violent felony offenses," as did the prior statute, the statute does not seem to list these specified class A offenses.

(b) (Revocation for those out on charges who do not fall within subdivision [a]) – This subdivision has been entirely revised, and now sets forth a list of reasons a court may revoke release and fix bail. It requires the court find by clear and convincing evidence that the defendant (i)"persistently and willfully failed to appear after notice of scheduled appearances, (ii) violated an order of protection as specified in 530.60(2)(b)(ii), or (iii) is charged with a misdemeanor or violation and then intimidated or tampered with a victim or witness in violation of the statutes set forth in 530.60(2)(b)(iii), or (iv) is charged with a felony and committed a felony while released on the prior felony.

Although the statute addresses the requirements of clear and convincing evidence for the revocation on some misdemeanor cases, it does not provide guidance as to whether failure to meet other conditions may be the basis for setting bail. As defense counsel, one should argue that if the statute clearly sets forth the criteria for revocation on certain violations or misdemeanors, if those criteria are not met, the court may not revoke or modify the conditions.

As the failure to appear must be persistent, willful and after a notice, defendants should not face bench warrants for a single failure or late appearance.

(c) Subdivision (c) sets forth the procedural requirements a court must follow before revocation. THIS IS HUGE! Pursuant to this subdivision, a court must hold a hearing, and is required to receive any relevant, admissible evidence not privileged. The defendant may cross-examine witnesses and present relevant, admissible evidence.

If the charge is a felony, the hearing may be conducted at the same time as a felony preliminary hearing. A transcript of grand jury testimony is admissible as evidence at the hearing. So a prosecutor who seeks to avoid a hearing by havinga defendant held on a prior charge to "beat the PH" will still have to either present evidence at a 530.60 hearing or provide grand jury testimony at the hearing to the court and defense. Although the statute provides for use of grand jury testimony of witnesses at these hearings, it also provides for an opportunity for the defense to cross-examine witnesses. Defense counsel should request that the court make the witnesses available for cross-examination, though it is anticipated this request may not be successful.

(d) The new subdivision (d) replaces the old subdivision (b) which set forth the periods for which the new securing order may be issued. Under the new law, pursuant to CPL 530.60(2)(d)(i), for those who were out on felonies and found to have committed the class A, VFO or intimidating charges specified in CPL 530.60(2)(a), the time periods listed in this section (which is the same as the former statute) apply. Under 530.60(2)(d)(ii), revocation of the prior securing order shall result in a new securing order which may, if otherwise authorized by law, permit release on recognizance or under non-monetary conditions,

but a court may also set bail. However, the statute urges the least restrictive alternative and conditions that will reasonably assure a principal's return.

(e) For those individuals who had previously been released on a felony complaint, the court may detain them for up to seventy-two hours pending a revocation hearing, and another seventy-two if good cause is shown.

CPL 216.05 – Judicial diversion program; court procedures (Not a strictly bail statute but included in this piece of the legislation.)

Subd. (9)(a)
Old law: This paragraph permitted a court to issue a warrant or direct a defendant to appear in a judicial diversion program court when there were reasonable grounds to believe the defendant had violated a condition of release or failed to appear.

New law: The law now requires that the court have reasonable grounds to believe the defendant violated a release condition *in an important respect* or *willfully* failed to appear. The law also incorporates the two day grace period for appearance following a bench warrant set forth in CPL 510.50. Finally, it incorporates the procedures under CPL 530.60 relating to modification of securing orders (though the statute refers to it as "issuance of securing orders").

CPL 240.44 – Discovery; upon pre-trial hearing

Though this statute relates to discovery laws, it is included in Part JJJ. It appears to be an error, perhaps missed during the flurry of legislation, as Article 240 was repealed by the new discovery bill, and the new law provides for discovery of prior testimony earlier than this amendment.

Subd. 240.44 opening paragraph

Old law: Required hearing discovery be provided at the conclusion of direct examination.

New law: Requires that hearing discovery be provided before the commencement of direct examination.

CPL 410.60 Appearance before court (in violation of probation and conditional discharge cases)

Old law: This statute addresses the procedures for modifying or revoking release of those charged with violating conditions of probation or parole.

New law: The statute was amended to make it gender neutral and provide an alternative of release under non-monetary conditions.

CPL 620.50 - **Material witness order; hearing, determination and execution of order**

Subd. 3 – This subdivision was amended to make the statute referred to in the subdivision conform to the numbering of the new statutes.

III. DISCOVERY REFORM – PART KKK

A. INTRODUCTION

The long-awaited discovery reform finally passed this year. We anticipate that the reforms implemented this year will radically change the practice of criminal defense in New York, and assist in preventing wrongful convictions. But the only way discovery reform will have the beneficial impact we anticipate is if defense attorneys are aware of the law, and read the discovery they are provided. Too often, defense counsel are quick to negotiate deals, fearing indictment, trial, or prolonged litigation. Those counsel must change their perspective on practice, and learn to use the tools the legislature has now provided.

Discovery reform primarily altered two areas of the Criminal Procedure Law – speedy trial (CPL Article 30) and access to information (Former CPL Article 240, now Article 245 - the discovery statute).

In New York, there are two statutes that address the timeliness of prosecutions. One is CPL 30.20(1), which requires a "speedy trial," and the other is CPL 30.30 which imposes specific time limitations on prosecutions.

CPL 30.20 is often thought of as the constitutional speedy trial law. This statute is used to raise due process issues in delays of prosecutions which may not be violations of the statutory speedy trial time limitations contained in CPL 30.30. Because CPL 30.20 case law is fairly unfavorable to the defense, it is difficult to prevail on 30.20 motions. On the other hand, CPL 30.30, the statutory speedy trial claim, is frequently raised as a basis for dismissal of charges, and the defense can prevail if the statutory criteria are met. The 2019 changes in the law affected CPL 30.30, but not CPL 30.20.

B. CPL 30.30 – Speedy trial; time limitations

1. Speedy trial subdivisions 1-4

Old law: Much of the old statute has not changed. Subdivision 1 sets forth the periods in which a prosecutor must be ready for trial. Those time periods have not changed. Subdivision 2 addresses when a defendant would have to be released from custody if the prosecution were not ready for trial. Subdivision 3 provides for the exceptions to application of the statute, and subdivision 4 sets forth the "excludable" periods – periods during a prosecution that do not count towards the 30.30 time that has passed.

New law:

- The new statute adds a subdivision (1)(e) which explicitly includes vehicle and traffic law violations in the definition of "offense" in the periods in which the prosecution must be ready for trial.

- The new statute's subdivision 2 also adds a subdivision (2)(e) in the portion that states the period in which a defendant must be released if the prosecution is not ready for trial.
- The statute is also updated to include commitment to the Office of Children and Family Services as subject to the time limitations.
- Subdivision 4(b) was amended to make it gender neutral, and to require that any potentially excludable time based on a continuance granted at the request of an unrepresented defendant only be excluded if the continuance was granted after the defendant was advised of their rights under the 30.30 rules and the effect of consent *on the record in open court.*
- Subdivision (4)(g) was amended to incorporate the use of certificates of readiness, now part of the discovery statute. If a prosecutor is granted additional time to prepare the case and the time is justified by exceptional circumstances (this was in the old law), and the prosecutor had previously filed a certificate of readiness[13], the court must inquire on the record as to the reasons for the unreadiness and shall only approve the time as excludable upon a showing of "sufficient supporting facts…"

Subdivisions 5 - 8

Old law: The prior statute specifically detailed the dates upon which a criminal action commenced under various circumstances.

- Under subdivision 5(a), the law addressed the calculation of 30.30 time following retrial or withdrawal of plea;
- There was no subdivision 5-a
- Subdivision 6 had previously addressed the requirement that motions to dismiss be made in accordance with CPL 210.45, which sets forth procedures for motions to dismiss.
- The law did not include reference to the Office of Children and Family Services, which are now subject to criminal procedure law requirements for those in their custody whose cases are being handled in youth parts
- Up until now, a defendant had to go to trial to appeal a denial of a 30.30 motion to dismiss.

New law:

> 5. Whenever pursuant to this section a prosecutor states or otherwise provides notice that the people are ready for trial, the court shall make inquiry on the record as to their actual readiness. If, after conducting its inquiry, the court determines that the people are not ready to proceed to trial, the prosecutor's statement or notice of readiness shall not be valid for purposes of this section. Any statement of trial readiness must be accompanied or preceded by a certification of good faith compliance with the disclosure requirements of section 245.20 of this chapter and

[13] Certificates of readiness are documents filed by the prosecution and defense under the new discovery statute reflecting compliance with discovery obligations as discussed below in the section addressing the new discovery statute. Under the new statute, the lack of a certificate of readiness will be a basis for consideration of whether a prosecutor is ready for trial.

the defense shall be afforded an opportunity to be heard on the record as to whether the disclosure requirements have been met. This subdivision shall not apply to cases where the defense has waived disclosure requirements.
5-a. Upon a local criminal court accusatory instrument, a statement of readiness shall not be valid unless the prosecuting attorney certifies that all counts charged in the accusatory instrument meet the requirements of sections 100.15 and 100.40 of this chapter and those counts not meeting the requirements of sections 100.15 and 100.40 of this chapter have been dismissed.
6. An order finally denying a motion to dismiss pursuant to subdivision one of this section shall be reviewable upon an appeal from an ensuing judgment of conviction notwithstanding the fact that such judgment is entered upon a plea of guilty.

Comment:

- **Subdivision 5** creates an entirely new procedural requirement. Instead of the routine declarations that "the people are ready for trial," the law now makes the prosecution assert readiness in ways that will be harder to defend if they are not ready. First, if the prosecution declares readiness, the court must inquire whether they are actually ready. If the court determines they are not, the prosecutor's claim of readiness will not be valid. Second, any statement of readiness must be preceded or accompanied by a certification of good faith compliance with discovery requirements under the new CPL 245.20 (discussed below). And third, the defense will have the opportunity to be heard on the record as to whether the disclosure requirements have been met. The colloquy that has been used by some courts of asking prosecutors whether they are familiar with their discovery or *Brady* obligations will not meet the requirements of this statute.

- **Subdivision 5-a** is also a new statute. This statute focuses on local criminal court accusatory instruments, requiring that all requirements of CPL 100.15 (relating to form and content of informations and misdemeanor and felony complaints) and CPL 100.40 (relating to facial sufficiency of local court and youth part accusatory instruments) be met before a court may consider a statement of readiness valid. The statute further requires that counts not meeting the requirements of CPL 100.15 and 100.40 be dismissed before a statement of readiness is deemed valid.

  Practice tip/question – Previously, there was no timeline other than the CPL 30.30 period in which a misdemeanor complaint had to be converted to an information, though there were restrictions on how long a defendant could be held on a complaint. Under the new law, if the defense does not waive prosecution by information (and why would you waive that in a case that is being litigated?), pursuant to 5-a it seems that the complaints must be converted and the charges that are defective must be dismissed before the prosecution may be considered ready for trial. Thus, in cases in which the defense contends the accusatory instruments are defective, counsel must be vigilant in stating for the record the reasons the prosecutor is not ready, and opposing a finding of readiness.

- **Subivision 6** provides the defense an opportunity to appeal a denial of a motion to dismiss on 30.30 grounds even if one has pleaded guilty. Many defendants over the years have forfeited a solid 30.30 issue when pleading guilty. However, if a defendant waives appeal or waives the right to appeal that issue, they may still lose the opportunity to challenge a speedy trial violation.

- **Subdivision 8**, which now specifically exempts motions made to dismiss charges pursuant to CPL 30.30(2) from the requirements of CPL 210.45(1) through (7). This means that motions to dismiss on these grounds do not have to be made in writing, or meet other requirements in those subdivisions. Additionally, the statute now requires that during oral argument, if a time period is in dispute, the court promptly hold a hearing in which the people must prove time is excludable.

C. THE DISCOVERY STATUTE

1. Introduction

The new discovery statute has been described by defense experts as among the best in the country. It will radically change the way we practice criminal defense in New York. It provides for extensive disclosure by the prosecution before an announcement of readiness for trial, it changes the subpoena statute, it reinforces the types of documents the prosecution is deemed to possess, and generally will bring us unicorns and rainbows. Really!

2. FORMER CPL ARTICLE 240 – DISCOVERY

The former discovery statute, Article 240, was entirely repealed and replaced with Article 245 of the Criminal Procedure Law.

3. ARTICLE 245

Because the statute was so radically changed, the following pages do not include a provision-by-provision comparison with the prior statute.

The new statute is included below, followed by a discussion of each provision.

ARTICLE 245
DISCOVERY

Section

§ 245.10 Timing of discovery.

1. (a) The prosecution shall perform its initial discovery obligations under subdivision one of section 245.20 of this article as soon as practicable but not later than fifteen calendar days after the defendant's arraignment on an indictment, superior court information, prosecutor's information, information, simplified information, misdemeanor complaint or felony complaint. Portions of materials claimed to be non-discoverable may be withheld pending a determination and ruling of the court under section 245.70 of this article; but the defendant shall be notified in writing that information has not been disclosed under a particular subdivision of such section, and the discoverable portions of such materials shall be disclosed to the extent practicable. When the discoverable materials are exceptionally voluminous or, despite diligent, good faith efforts, are otherwise not in the actual possession of the prosecution, the time period in this paragraph may be stayed by up to an additional thirty calendar days without need for a motion pursuant to subdivision two of section 245.70 of this article.

(b) The prosecution shall perform its supplemental discovery obligations under subdivision three of section 245.20 of this article as soon as practicable but not later than fifteen calendar days prior to the first scheduled trial date.

(c) The prosecution shall disclose statements of the defendant as described in paragraph (a) of subdivision one of section 245.20 of this article to any defendant who has been arraigned in a local criminal court upon a currently undisposed of felony complaint charging an offense which is a subject of a prospective or pending grand jury proceeding, no later than forty-eight hours before the time scheduled for the defendant to testify at a grand jury proceeding pursuant to subdivision five of section 190.50 of this part.

Comment:

245.10 – Timing of Discovery
The substantive and procedural aspects of discovery in New York have been radically changed. CPL 245.10 addresses the timing of automatic discovery required by CPL 245.20, the statute that sets forth which items are discoverable. The timing of discovery is divided into initial discovery, which must be provided within the periods set forth in CPL 245.10(1)(a) and supplemental discovery, which must be provided within the period set forth in CPL 245.10(1)(b.

245.10(1)(a) - Initial discovery obligations - Under CPL 245.10, discovery must be provided by the prosecutor within fifteen days of arraignment on all misdemeanor accusatory instruments (simplified information, misdemeanor complaint, information, and prosecutor's information) and felony accusatory instruments (indictment, superior court information, and felony complaint). In other words, within fifteen days of arraignment in local or superior court, the defense is entitled to discovery.

If the prosecution claims portions are non-discoverable, such as materials that may be subject to a protective order, those materials do not have to be turned over until there is a ruling of the court. Under such circumstances, the prosecutor must notify the defense in writing that the information has not been disclosed.

If the materials are exceptionally voluminous, or despite "diligent, good faith efforts" are not in the possession of the prosecutor, the time period may be stayed up to an additional thirty days without need for a prosecution motion. Thus, for voluminous materials or those that the prosecutor has sought but not yet obtained, the prosecutor has the initial fifteen days plus another thirty days before they must move for a protective order (discussed below).

245.10(1)(b) - Supplemental discovery obligations
CPL 245.20(3) provides for supplemental discovery. The material covered by CPL 245.20(3) is what we usually refer to as *Molineux* and *Sandoval* material. Not only must the prosecution provide the material at least fifteen days before trial, but it must also specify whether the evidence is being offered for impeachment (generally *Sandoval*, though sometimes *Molineux)* or substantive proof (*Molineux)*. Under CPL 245.10(b), supplemental discovery must be provided to the defense "as soon as practicable but not later than fifteen calendar days prior to the first scheduled trial date."

245.10(1)(c) - CPL 245.10(c) creates a new requirement that in cases in which defendants are charged with felonies in local criminal court, and their charges are due to be presented to the grand jury, the defense be provided with the defendant's statements at least 48 hours before the time scheduled for the defendant to testify. The statute does not indicate a notice must be served by the defendant that they intend to testify, so it seems there is an argument to be made that if the prosecutor sends a grand jury notice with a quick turn-around, the time scheduled for defendant to testify should trigger the disclosure requirement.

This requirement not only ensures the defense is aware of any claimed statements by the defendant, but also seemingly prevents a prosecutor from scheduling a grand jury presentation in such cases less than 48 hours from arraignment. Additionally, the provision may deter some prosecutors from scheduling cases for presentation if they are not planning on presenting the cases, as the statements have to be turned over before the testimony date.

245.20 Automatic discovery

New law, subd. 1:

> **245.20 Automatic discovery.**
> **1.** Initial discovery for the defendant. The prosecution shall disclose to the defendant, and permit the defendant to discover, inspect, copy, photograph and test, all items and information that relate to the subject matter of the case and are in the possession, custody or control of the prosecution or persons under the prosecution's direction or control, including but not limited to:
> (a) All written or recorded statements, and the substance of all oral statements, made by the defendant or a co-defendant to a public servant engaged in law enforcement activity or to a person then acting under his or her direction or in cooperation with him or her.
> (b) All transcripts of the testimony of a person who has testified before a grand jury, including but not limited to the defendant or a co-defendant. If in the exercise of reasonable diligence, and due to the limited availability of transcription resources, a transcript is unavailable for disclosure within the time period specified in subdivision one of section 245.10 of this article, such time period may be stayed by up to an additional thirty calendar days without need for a motion pursuant to subdivision two of section 245.70 of this article; except that such disclosure shall be made as soon as practicable and not later than thirty calendar days before the first scheduled trial date, unless an order is obtained pursuant to section 245.70 of this article. When the court is required to review grand jury transcripts, the prosecution shall disclose such transcripts to the court expeditiously upon receipt by the prosecutor, notwithstanding the otherwise-applicable time periods for disclosure in this article.
> (c) The names and adequate contact information for all persons other than law enforcement personnel whom the prosecutor knows to have evidence or information relevant to any offense charged or to any potential defense thereto, including a designation by the prosecutor as to which of those persons may be called as witnesses. Nothing in this paragraph shall require the disclosure of physical addresses; provided, however, upon a motion and good cause shown the court may direct the disclosure of a physical address. Information under this subdivision relating to a confidential informant may be withheld, and redacted from discovery materials, without need for a motion pursuant to section 245.70 of this article; but the prosecution shall notify the defendant in writing that such information has not been disclosed, unless the court rules otherwise for good cause shown.
> (d) The name and work affiliation of all law enforcement personnel whom the prosecutor knows to have evidence or information relevant to any offense charged or to any potential defense thereto, including a designation by the prosecutor as to which of those persons may be called as witnesses. Information under this subdivision relating to undercover personnel may be

withheld, and redacted from discovery materials, with out need for a motion pursuant to section 245.70 of this article; but the prosecution shall notify the defendant in writing that such information has not been disclosed, unless the court rules otherwise for good cause shown.
(e) All statements, written or recorded or summarized in any writing or recording, made by persons who have evidence or information relevant to any offense charged or to any potential defense thereto, including all police reports, notes of police and other investigators, and law enforcement agency reports. This provision also includes statements, written or recorded or summarized in any writing or recording, by persons to be called as witnesses at pre-trial hearings.
(f) Expert opinion evidence, including the name, business address, current curriculum vitae, a list of publications, and all proficiency tests and results administered or taken within the past ten years of each expert witness whom the prosecutor intends to call as a witness at trial or a pre-trial hearing, and all reports prepared by the expert that pertain to the case, or if no report is prepared, a written statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. This paragraph does not alter or in any way affect the procedures, obligations or rights set forth in section 250.10 of this title. If in the exercise of reasonable diligence this information is unavailable for disclosure within the time period specified in subdivision one of section 245.10 of this article, that period shall be stayed without need for a motion pursuant to subdivision two of section 245.70 of this article; except that the prosecution shall notify the defendant in writing that such information has not been disclosed, and such disclosure shall be made as soon as practicable and not later than sixty calendar days before the first scheduled trial date, unless an order is obtained pursuant to section 245.70 of this article. When the prosecution's expert witness is being called in response to disclosure of an expert witness by the defendant, the court shall alter a scheduled trial date, if necessary, to allow the prosecution thirty calendar days to make the disclosure and the defendant thirty calendar days to prepare and respond to the new materials.
(g) All tapes or other electronic recordings, including all electronic recordings of 911 telephone calls made or received in connection with the alleged criminal incident, and a designation by the prosecutor as to which of the recordings under this paragraph the prosecution intends introduce at trial or a pre-trial hearing. If the discoverable materials under this paragraph exceed ten hours in total length, the prosecution may disclose only the recordings that it intends to introduce at trial or a pre-trial hearing, along with a list of the source and approximate quantity of other recordings and their general subject matter if known, and the defendant shall have the right upon request to obtain recordings not previously disclosed. The prosecution shall disclose the requested materials as soon as practicable and not less than fifteen calendar days after the defendant's request, unless an order is obtained pursuant to section 245.70 of this article.
(h) All photographs and drawings made or completed by a public servant engaged in law enforcement activity, or which were made by a person whom the prosecutor intends to call as a witness at trial or a pre-trial hearing, or which relate to the subject matter of the case.
(i) All photographs, photocopies and reproductions made by or at the direction of law enforcement personnel of any property prior to its release pursuant to section 450.10 of the penal law.

(j) All reports, documents, records, data, calculations or writings, including but not limited to preliminary tests and screening results and bench notes and analyses performed or stored electronically, concerning physical or mental examinations, or scientific tests or experiments or comparisons, relating to the criminal action or proceeding which were made by or at the request or direction of a public servant engaged in law enforcement activity, or which were made by a person whom the prosecutor intends to call as a witness at trial or a pre-trial hearing, or which the prosecution intends to introduce at trial or a pre-trial hearing. Information under this paragraph also includes, but is not limited to, laboratory information management system records relating to such materials, any preliminary or final findings of nonconformance with accreditation, industry or governmental standards or laboratory protocols, and any conflicting analyses or results by laboratory personnel regardless of the laboratory's final analysis or results. If the prosecution submitted one or more items for testing to, or received results from, a forensic science laboratory or similar entity not under the prosecution's direction or control, the court on motion of a party shall issue subpoenas or orders to such laboratory or entity to cause materials under this paragraph to be made available for disclosure.
(k) All evidence and information, including that which is known to police or other law enforcement agencies acting on the government's behalf in the case, that tends to: (i) negate the defendant's guilt as to a charged offense; (ii) reduce the degree of or mitigate the defendant's culpability as to a charged offense; (iii) support a potential defense to a charged offense; (iv) impeach the credibility of a testifying prosecution witness; (v) undermine evidence of the defendant's identity as a perpetrator of a charged offense; (vi) provide a basis for a motion to suppress evidence; or (vii) mitigate punishment. Information under this subdivision shall be disclosed whether or not such information is recorded in tangible form and irrespective of whether the prosecutor credits the information. The prosecutor shall disclose the information expeditiously upon its receipt and shall not delay disclosure if it is obtained earlier than the time period for disclosure in subdivision one of section 245.10 of this article.
(l) A summary of all promises, rewards and inducements made to, or in favor of, persons who may be called as witnesses, as well as requests for consideration by persons who may be called as witnesses and copies of all documents relevant to a promise, reward or inducement.
(m) A list of all tangible objects obtained from, or allegedly possessed by, the defendant or a co-defendant. The list shall include a designation by the prosecutor as to which objects were physically or constructively possessed by the defendant and were recovered during a search or seizure by a public servant or an agent thereof, and which tangible objects were recovered by a public servant or an agent thereof after allegedly being abandoned by the defendant. If the prosecution intends to prove the defendant's possession of any tangible objects by means of a statutory presumption of possession, it shall designate such intention as to each such object. If reasonably practicable, the prosecution shall also designate the location from which each tangible object was recovered. There is also a right to inspect, copy, photograph and test the listed tangible objects.
(n) Whether a search warrant has been executed and all documents relating thereto, including but not limited to the warrant, the warrant application, supporting affidavits, a police inventory of all property seized under the warrant, and a transcript of all testimony or other oral communications offered in support of the warrant application.

(o) All tangible property that relates to the subject matter of the case, along with a designation of which items the prosecution intends to introduce in its case-in-chief at trial or a pre-trial hearing. If in the exercise of reasonable diligence the prosecutor has not formed an intention within the time period specified in subdivision one of section 245.10 of this article that an item under this subdivision will be introduced at trial or a pre-trial hearing, the prosecution shall notify the defendant in writing, and the time period in which to designate items as exhibits shall be stayed without need for a motion pursuant to subdivision two of section 245.70 of this article; but the disclosure shall be made as soon as practicable and subject to the continuing duty to disclose in section 245.60 of this article.
(p) A complete record of judgments of conviction for all defendants and all persons designated as potential prosecution witnesses pursuant to paragraph (c) of this subdivision, other than those witnesses who are experts.
(q) When it is known to the prosecution, the existence of any pending criminal action against all persons designated as potential prosecution witnesses pursuant to paragraph (c) of this subdivision.
(r) The approximate date, time and place of the offense or offenses charged and of the defendant's seizure and arrest.
(s) In any prosecution alleging a violation of the vehicle and traffic law, where the defendant is charged by indictment, superior court information, prosecutor's information, information, or simplified information, all records of calibration, certification, inspection, repair or maintenance of machines and instruments utilized to perform any scientific tests and experiments, including but not limited to any test of a person's breath, blood, urine or saliva, for the period of six months prior and six months after such test was conducted, including the records of gas chromatography related to the certification of all reference standards and the certification certificate, if any, held by the operator of the machine or instrument. The time period required by subdivision one of section 245.10 of this article shall not apply to the disclosure of records created six months after a test was conducted, but such disclosure shall be made as soon as practicable and in any event, the earlier of fifteen days following receipt, or fifteen days before the first scheduled trial date.
(t) In any prosecution alleging a violation of section 156.05 or 156.10 of the penal law, the time, place and manner such violation occurred.
(u) (i) A copy of all electronically created or stored information seized or obtained by or on behalf of law enforcement from: (A) the defendant as described in subparagraph (ii) of this paragraph; or (B) a source other than the defendant which relates to the subject matter of the case. (ii) If the electronically created or stored information originates from a device, account, or other electronically stored source that the prosecution believes the defendant owned, maintained, or had lawful access to and is within the possession, custody or control of the prosecution or persons under the prosecution's direction or control, the prosecution shall provide a complete copy of the electronically created or stored information from the device or account or other source. (iii) If possession of such electronically created or stored information would be a crime under New York state or federal law, the prosecution shall make those portions of the electronically created or stored information that are not criminal to possess available as specified under this paragraph and shall afford counsel for the defendant access to

inspect contraband portions at a supervised location that provides regular and reasonable hours for such access, such as a prosecutor's office, police station, or court. (iv) This paragraph shall not be construed to alter or in any way affect the right to be free from unreasonable searches and seizures or such other rights a suspect or defendant may derive from the state constitution or the United States constitution. If in the exercise of reasonable diligence the information under this paragraph is not available for disclosure within the time period required by subdivision one of section 245.10 of this article, that period shall be stayed without need for a motion pursuant to subdivision two of section 245.70 of this article, except that the prosecution shall notify the defendant in writing that such information has not been disclosed, and such disclosure shall be made as soon as practicable and not later than forty-five calendar days before the first scheduled trial date, unless an order is obtained pursuant to section 245.70 of this article.

Comment: CPL 245.20 lists the discovery to which each party is now entitled (as of 1/1/20) and circumstances that may warrant delay. The statute addresses initial discovery for the defendant (CPL 245.20[1], which contains the extensive lettered list of discovery subject to statutory disclosure), duties of the prosecution to obtain the discovery (CPL 245.20[2]), supplemental discovery (CPL 245.20[3]), reciprocal discovery (CPL 245.20[4]), stay of automatic discovery (CPL 245.20 [5]), redactions permitted (CPL 245.20[6]), and presumption of openness (CPL 245.20[7]).

Pursuant to CPL 245.20[1]), the prosecution must disclose and permit the defendant to "discover, inspect, copy, photograph and test all items and information that relate to the subject matter of the case and are in the possession, custody or control of the prosecution or persons under (their direction)." Items considered in the prosecution's possession are further explained in CPL 245.20(2).

*The phrase used repeatedly through the statute in referring to information from individuals is "may have evidence or information relevant to any offense charged or to any potential defense thereto." Below, this is described as an individual or individuals "who have evidence." These abbreviated references are marked with an asterisk in the summary list below.

**There are several provisions which permit delay of discovery without a motion, and set forth other time limitations. The phrase often used is "If in the exercise of reasonable diligence…such time period may be stayed by up to an additional thirty calendar days without need for a motion pursuant to subdivision two of section 245.70 of this article." These are marked with two asterisks in the list below.

***Information relating to confidential informants and undercover officers may be withheld as described in the phrase that appears in certain subdivisions - "Information under this subdivision relating to a (the secret witness) may be withheld, and redacted from discovery materials, without need for a motion pursuant to section 245.70 (protective order statute) of this article; but the prosecution shall notify the defendant in writing that such information has not been disclosed, unless the court rules otherwise for good cause shown." This is marked with three asterisks below.

The statute lists the following as material the prosecution must provide as initial discovery:

a) All written and recorded statements, and the substance of all oral statements, made by the defendant or codefendant to law enforcement or their agents;
b) Grand jury testimony of all witnesses. If it cannot be provided due to limited transcription resources, the period may be stayed**. There are additional aspects of timing addressed in this subdivision;
c) Names and "adequate" contact information for all people other than law enforcement whom the prosecutor knows who have evidence*, including which ones may be called as witnesses. Although addresses are not required, upon motion establishing good cause the court may direct disclosure. Information on a confidential informant may be withheld***;
d) Name and work affiliation of all law enforcement who have evidence*, and whether they may be witnesses***;
e) All statements made by persons who have evidence*, including in police reports, notes of police and investigators, and law enforcement agency reports. This includes written, recorded, or summarized in any writing or recording, by persons to be called as witnesses *at pre-trial hearings;*
f) Expert opinion evidence, including name, business address, c.v., list of publications, proficiency tests and results in past ten years, and all reports by the expert that pertain to the case. If no report is prepared, a written statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for such opinion. This can be stayed**, and the provision addresses timing when the prosecution expert is called in response to a defense expert. This provision has detailed timing requirements relating to disclosure prior to trial;
g) All electronic recordings, including 911 calls made or received in connection with the incident, and a designation of which the prosecutor intends to introduce at trial **or at a pre-trial hearing**. If the recordings exceed ten hours this provision sets forth how that is to be addressed;
h) All photographs and drawings made by a public servant engaged in law enforcement activity, or by a person the prosecutor intends to call as a witness at trial **or a pre-trial hearing**, or which relate to the subject matter of the case;
i) All photos and reproductions made by or at the direction of law enforcement of any property before its release pursuant to CPL 450.10 of the Penal Law (relating to release of property collected as evidence to owners);
j) An extensive but non-exclusive list of documents described in this provision relating to physical or mental exams, or scientific tests or experiments or comparisons, relating to the criminal action or proceeding which were made by or at the request or direction of a public servant engaged in law enforcement, or made by a person the prosecutor intends to call at trial **or a pre-trial hearing**, or which the prosecution intends to introduce at either. If the lab is not under the prosecution's control, the court, upon motion of a party **SHALL** issue subpoenas or orders to the laboratory or entity to make the material available for disclosure;
k) All evidence and information favorable to the defense, as spelled out in this provision (*Brady* material) . This "shall be produced expeditiously upon its receipt" and **"irrespective of whether the prosecutor credits the information";**

l) A summary of all promises, rewards and inducements made to or in favor of a person who may be called as a witness, and records as set forth in the provision (more *Brady)*;
m) A list of all tangible objects obtained from or allegedly possessed by the defendant or a co-defendant, a designation of whether the objects were physically or constructively possessed, whether they were recovered during search or seizure, and whether they were recovered after allegedly being abandoned. If the prosecution intends to assert that the defendant possessed the object through a presumption, the prosecutor must state that intention. The prosecution must designate the location from which each object was recovered. The defense has a right to inspect, copy , photograph and test the objects;
n) Whether a search warrant was executed and all documents relating to it;
o) All tangible property relating to the subject matter of the case, including which objects the prosecution intends to introduce in its case-in-chief or at a pre-trial hearing. The timing can be the subject of litigation as provided in this provision;
p) A complete record of judgments of conviction for all defendants and potential prosecution witnesses other than experts (except undisclosed informants, see subd. [c];
q) When known to the prosecution, the existence of any pending criminal action against any potential prosecution witness (except undisclosed informants, see subd. [c]);
r) The approximate date, time and place of the offense(s) charged and of the defendant's seizure and arrest;
s) In a Vehicle and Traffic case, all records relating to scientific tests and experiments including calibration records (see this subdivision for timing and detailed description of records);
t) In computer offenses charged under Penal Law 156.05 or 156.10, the time, place and manner of the violation;
u) Electronically stored or created information seized by law enforcement from the defendant or another source as set forth in CPL 245.20(1)(u)(ii), but if its possession would be illegal (such as child pornography), disclosure procedures as set forth in CPL 245.20(1)(u)(iii) will apply. The production of this discovery may be delayed under subdivision CPL 245.20(1)(u)(iv).

New law, CPL 245.20 subd. 2:

> **2. Duties of the prosecution**. The prosecutor shall make a diligent, good faith effort to ascertain the existence of material or information discoverable under subdivision one of this section and to cause such material or information to be made available for discovery where it exists but is not within the prosecutor's possession, custody or control; provided that the prosecutor shall not be required to obtain by subpoena duces tecum material or information which the defendant may thereby obtain. For purposes of subdivision one of this section, all items and information related to the prosecution of a charge in the possession of any New York state or local police or law enforcement agency shall be deemed to be in the possession of the prosecution. The prosecution shall also identify any laboratory having contact with evidence related to the prosecution of a charge. This subdivision shall not require the prosecutor to ascertain the existence of witnesses not known to the police or another law enforcement agency, or the written or recorded statements thereof, under paragraph (c) or (e) of subdivision one of this section.

Comment Subd. 2 – Duties of the prosecution**. This is another huge improvement in the law.** This statute addresses several of the challenges defense counsel have historically encountered – a) that the prosecutor is unaware of evidence in the possession of police; b) that the prosecutor is not in possession of documents or evidence that are in police agency possession; c) that the laboratory used for testing is not cooperating sufficiently with the prosecution; and d) the failure of police agencies to provide names or information about exculpatory or favorable witnesses or evidence to the defense.

In response to those issues, the statute now:
a) places an affirmative burden on the prosecution to make a "diligent, good faith effort to ascertain the existence" of discoverable material and to provide it;
b) deems all items and information related to the charge in the possession of New York or local police or law enforcement agencies to be in the possession of the prosecution (Does this include probation and parole officers?);
c) requires that the defense be notified of the laboratories having involvement in the case early on, reducing the likelihood of late disclosure of the existence of scientific evidence;
d) requires the information, not just inculpatory information, be provided by police agencies that sometimes overlook or disregard defense-favorable witnesses when they communicate with prosecutors.

New law CPL 245.20 subd. 3:

3. **Supplemental discovery for the defendant**. The prosecution shall disclose to the defendant a list of all misconduct and criminal acts of the defendant not charged in the indictment, superior court information, prosecutor's information, information, or simplified information, which the prosecution intends to use at trial for purposes of (a) impeaching the credibility of the defendant, or (b) as substantive proof of any material issue in the case. In addition the prosecution shall designate whether it intends to use each listed act for impeachment and/or as substantive proof.

Comment:
This statute requires the prosecution to provide to the defense prior bad acts and convictions the prosecution intends to offer at trial either for impeaching the defendant (generally, *Sandoval* material although it can be *Molineux* material) or establishing elements of the charges or other material issues in the case (*Molineux* material). This material must now be provided at least fifteen days before the first scheduled trial date pursuant to CPL 245.10(1)(b). The defense must continue (or if you have not done so before, begin) to engage in vigorous *Sandoval* and *Molineux* pretrial motion and hearing practice.

New law CPL 245.20 subd. 4:

4. Reciprocal discovery for the prosecution.

(a) The defendant shall, subject to constitutional limitations, disclose to the prosecution, and permit the prosecution to discover, inspect, copy or photograph, any material and relevant evidence within the defendant's or counsel for the defendant's possession or control that is discoverable under paragraphs (f), (g), (h), (j), (l) and (o) of subdivision one of this section, which the defendant intends to introduce at trial or a pre-trial hearing, and the names, addresses, birth dates, and all statements, written or recorded or summarized in any writing or recording, of those persons other than the defendant whom the defendant intends to call as witnesses at trial or a pre-trial hearing.
(b) Disclosure of the name, address, birth date, and all statements, written or recorded or summarized in any writing or recording, of a person whom the defendant intends to call as a witness for the sole purpose of impeaching a prosecution witness is not required until after the prosecution witness has testified at trial.
(c) If in the exercise of reasonable diligence the reciprocally discoverable information under paragraph (f) or (o) of subdivision one of this section is unavailable for disclosure within the time period specified in subdivision two of section 245.10 of this article, such time period shall be stayed without need for a motion pursuant to subdivision two of section 245.70 of this article; but the disclosure shall be made as soon as practicable and subject to the continuing duty to disclose in section 245.60 of this article.

Comment: Subdivision 4 expands the discovery the defense must provide to the prosecution. Under CPL 245.10(2), the defense must perform discovery obligations no later than thirty calendar days after being served with the prosecutor's certificate of compliance issued under CPL 245.50(1). The defense may withhold materials the defense claims are non-discoverable pending determination and ruling of the court under CPL 245.70, but must notify the prosecution in writing such information has not been disclosed.

Subdivision (a) sets forth the specific list of discovery the defense must provide, listing the applicable provisions from CPL 245.20(1) – materials described in subdivisions (f), (g), (h), (j), (l) and (o) **which the defendant intends to introduce at trial or a pre-trial hearing.** This requirement, that the defense turn over only what it intends to use, is different from most provisions in 245.20(1), the initial discovery required of prosecutors. In other words, generally prosecutors must disclose all material that falls within discoverable categories, while the defense is generally limited to discovery based on witnesses and evidence it intends to introduce. But it is important to review the specific statutes to comply with the rules on each type of discovery.

Instead of rewriting the statute to reflect the requirements from the defense perspective, this subdivision references prosecution discovery and makes it applicable to the defense. A strictly technical reading would lead to the conclusion that only prosecution discovery must be turned over, but that is not the spirit of this legislation, and this writer believes it would not be wise for defense counsel to make such an argument. A summary of that list follows, with the language modified by this writer to reflect these are defense obligations, with the same asterisk denotations as in CPL 245.20(1) above:

f) Expert opinion evidence, including name, business address, c.v., list of publications, proficiency tests and results in past ten years, and all reports by the expert that pertain to the case. If no report is prepared, a written statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for such opinion. This can be stayed**;
g) All electronic recordings including 911 calls made or received in connection with the incident, and a designation of which the defense intends to introduce at trial or at a pre-trial hearing. If the recordings exceed ten hours this provision addresses how that is to be addressed;
h) All photographs and drawings made by a public servant engaged in law enforcement activity, or by a person the defense intends to call as a witness at trial or a pre-trial hearing, or which relate to the subject matter of the case;
j) An extensive list of documents described in this provision relating to physical or mental exams, or scientific tests or experiments or comparisons, relating to the criminal action or proceeding which were made by or at the request or direction of a public servant engaged in law enforcement, or made by a person the defense intends to call at trial or a pre-trial hearing, or which the defense intends to introduce at either;
l) A summary of all promises, rewards and inducements made to or in favor of a person who may be called as a witness, and records as set forth in the provision;
o) All tangible property relating to the subject matter of the case, including which objects the defense intends to introduce in its case-in-chief or at a pre-trial hearing. The timing can be the subject of litigation as provided in this provision.

The defense must also provide names, addresses, birth dates, and statements whether written, recorded or summarized of those persons the defense intends to call as witnesses. If we are unable to obtain birth dates, from officers we may be calling, for example, we should advise the court and may be required to file a protective order as described in CPL 245.70.

Subdivision (b) limits the requirement that the defense provide information on witnesses solely called for impeachment. We do not have to provide their names, addresses, birth dates and statements until after the prosecution witness against whom the impeaching witness will testify has testified at trial.

Subdivision (c) permits delay of expert and tangible evidence under CPL 245.20(4) if it is unavailable for disclosure**.

CPL 245.20(5) – Stay of automatic discovery

4. Stay of automatic discovery; remedies and sanctions. Section 245.10 and subdivisions one, two, three and four of this section shall have the force and effect of a court order, and failure to provide discovery pursuant to such section or subdivision may result in application of any remedies or sanctions permitted for non-compliance with a court order under section 245.80 of this article. However, if in the judgment of either party good cause exists for declining to make any of the disclosures set forth above, such party may move for a protective order pursuant to section 245.70 of this article and production of the item shall be stayed pending a ruling by the court. The opposing party shall be notified in writing that information has not been disclosed

under a particular section. When some parts of material or information are discoverable but in the judgment of a party good cause exists for declining to disclose other parts, the discoverable parts shall be disclosed and the disclosing party shall give notice in writing that non-discoverable parts have been withheld.

Comment: This is the "we're not kidding" statute, making the new discovery law provisions the equivalent of a court order. What happens when a party violates a court order? They can be found in contempt. Defense counsel is urged, when appropriate, to be prepared to file contempt motions in order both to preserve the issues for appeal, to obtain discovery, and to use the tools made available within the statute. Additionally, there are other sanctions available.

If either party believes that good cause exists for failing to comply with discovery, they cannot simply ignore the statute. They must move for a protective order pursuant to CPL 245.70. Production is stayed during the pendency of a court ruling. The opposing party must be notified in writing discovery has not been disclosed under the particular section. If good cause exists to withhold only parts of discoverable materials, the rest must be turned over.

CPL 245.20(6) - Redactions permitted. Either party may redact social security numbers and tax numbers from disclosures under this article.

CPL 245.20(7) - Presumption of openness. There shall be a presumption in favor of disclosure when interpreting sections 245.10 and 245.25, and subdivision one of section 245.20, of this article.

Comment: These two provisions might appear to be self-explanatory, but CPL 245.20(7) is intriguingly limited. The presumption of openness of discovery applies to CPL 245.10, which relates to timing of discovery, CPL 245.45, which relates to disclosure prior to guilty pleas, and CPL 245.20(1), which relates to the prosecution's initial discovery obligations. It omits the prosecution supplemental discovery (CPL 245.20[3]) and defense discovery (CPL 245.20[4]) from the presumption.

§ 245.25 Disclosure prior to certain guilty pleas.

1. Pre-indictment guilty pleas. Upon a felony complaint, where the prosecution has made a pre-indictment guilty plea offer requiring a plea to a crime, the prosecutor must disclose to the defense, and permit the defense to discover, inspect, copy, photograph and test, all items and information that would be discoverable prior to trial under subdivision one of section 245.20 of this article and are in the possession, custody or control of the prosecution. The prosecution shall disclose the discoverable items and information not less than three calendar days prior to the expiration date of any guilty plea offer by the prosecution or any deadline imposed by the court for acceptance of the guilty plea offer. If the prosecution does not comply with the requirements of this subdivision, then, on a defendant's motion alleging a violation of this subdivision, the court must consider the impact of any violation on the defendant's decision to accept or reject a plea offer. If the court finds that such violation materially affected the defendant's decision, and if the prosecution declines to

reinstate the lapsed or withdrawn plea offer, the court - as a presumptive minimum sanction - must preclude the admission at trial of any evidence not disclosed as required under this subdivision. The court may take other appropriate action as necessary to address the non-compliance. The rights under this subdivision do not apply to items or information that are the subject of a protective order under section 245.70 of this article; but if such information tends to be exculpatory, the court shall reconsider the protective order. A defendant may waive his or her rights under this subdivision; but a guilty plea offer may not be conditioned on such waiver.

2. Other guilty pleas. Upon an indictment, superior court information, prosecutor's information, information, simplified information, or misdemeanor complaint, where the prosecution has made a guilty plea offer requiring a plea to a crime, the prosecutor must disclose to the defense, and permit the defense to discover, inspect, copy, photograph and test, all items and information that would be discoverable prior to trial under subdivision one of section 245.20 of this article and are within the possession, custody or control of the prosecution. The prosecution shall disclose the discoverable items and information not less than seven calendar days prior to the expiration date of any guilty plea offer by the prosecution or any deadline imposed by the court for acceptance of the guilty plea offer. If the prosecution does not comply with the requirements of this subdivision, then, on a defendant's motion alleging a violation of this subdivision, the court must consider the impact of any violation on the defendant's decision to accept or reject a plea offer. If the court finds that such violation materially affected the defendant's decision, and if the prosecution declines to reinstate the lapsed or withdrawn plea offer, the court - as a presumptive minimum sanction - must preclude the admission at trial of any evidence not disclosed as required under this subdivision. The court may take other appropriate action as necessary to address the non-compliance. The rights under this subdivision do not apply to items or information that are the subject of a protective order under section 245.70 of this article; but if such information tends to be exculpatory, the court shall reconsider the protective order. A defendant may waive his or her rights under this subdivision; but a guilty plea offer may not be conditioned on such waiver.

Comment:

CPL 245.25 is another radical departure from the prior practice of criminal law in New York. Most often, defense counsel had to advise a client whether to accept a plea without the benefit of discovery, and without sufficient time to investigate. But defense counsel will now be entitled to discovery. At times in the past, some prosecutors would condition availability of a plea on the defense waiving its right to discovery. This is now against the law.

The two subdivisions are distinguished by the nature of the accusatory instrument that is pending. Subdivision 1 relates to plea offers made during the pendency of a felony complaint. Subdivision 2 relates to plea offers made based on the remaining misdemeanor and felony accusatory instruments. Presumably, the distinction is based on the statutory requirement for a preliminary hearing in 144 hours, and so the discovery period is shorter under subdivision 1.

Under subdivision one, the prosecutor must disclose CPL 245.20(1) initial discovery at least three days before the deadline to take a plea. If the prosecution does not comply and the defense learns of it, the defense may later move to either vacate a plea or move to have the plea offer reinstated. The court must consider the impact of the prosecutor's failure on the defendant's plea decision. If the violation affected the decision and the prosecutor will not reinstate the offer, the court must preclude all evidence not disclosed. Of course, if the withheld information was *Brady* material, the potential sanction may not be a sufficient remedy. A defendant may waive the right to this discovery, but a plea may not be conditioned on it.

Prosecutors may still try to indict cases while holding the vote in order to rush them into grand jury, but the timing here may become a challenge if they do not wish to indict every case. Defense counsel may also face more pressure to adjourn preliminary hearings and toll the time for grand jury in order to obtain discovery and consider plea offers.

This statute raises the question of whether, if a case is indicted without necessary discovery following rejection of a plea offer that was outside the plea restrictions, and plea restrictions apply after indictment, the court may dismiss the indictment with leave to re-present as a sanction.

Subdivision 2 relates to pleas on accusatory instruments other than felony complaints. In every other case, the prosecution must provide the discovery at least seven days before the expiration of the plea offer. As with subdivision 1, upon a motion by the defense if the prosecutor has failed to provide this discovery, the court must determine if the violation materially affected the court's decision, and if the prosecutor does not reinstate the offer, must preclude the admission of the evidence and may consider other options.

CPL 245.30

New law:

> **§ 245.30 Court orders for preservation, access or discovery.**
> **1. Order to preserve evidence**. At any time, a party may move for a court order to any individual, agency or other entity in possession, custody or control of items which relate to the subject matter of the case or are otherwise relevant, requiring that such items be preserved for a specified period of time. The court shall hear and rule upon such motions expeditiously. The court may modify or vacate such an order upon a showing that preservation of particular evidence will create significant hardship to such individual, agency or entity, on condition that the probative value of that evidence is preserved by a specified alternative means.
> **2. Order to grant access to premises**.
> Without prejudice to its ability to issue a subpoena pursuant to this chapter and after an accusatory instrument has been filed, the defendant may move, upon notice to the prosecution and any impacted individual, agency, or entity, for a court order to access a crime scene or other premises relevant to the subject matter of the case, requiring that counsel for the defendant be granted reasonable access to inspect, photograph, or measure such crime scene or premises,

and that the condition of the crime scene or premises remain unchanged in the interim. The court shall consider defendant's expressed need for access to the premises including the risk that defendant will be deprived of evidence or information relevant to the case, the position of any individual or entity with possessory or ownership rights to the premises, the nature of the privacy interest and any perceived or actual hardship of the individual or entity with possessory or ownership rights, and the position of the prosecution with respect to any application for access to the premises. The court may deny access to the premises when the probative value of access to such location has been or will be preserved by specified alternative means. If the court grants access to the premises, the individual or entity with ownership or possessory rights to the premises may request law enforcement presence at the premises while defense counsel or a representative thereof is present.

3. Discretionary discovery by order of the court.

The court in its discretion may, upon a showing by the defendant that the request is reasonable and that the defendant is unable without undue hardship to obtain the substantial equivalent by other means, order the prosecution, or any individual, agency or other entity subject to the jurisdiction of the court, to make available for disclosure to the defendant any material or information which relates to the subject matter of the case and is reasonably likely to be material. A motion under this subdivision must be on notice to any person or entity affected by the order. The court may, on its own, upon request of any person or entity affected by the order, modify or vacate the order if compliance would be unreasonable or will create significant hardship. For good cause shown, the court may permit a party seeking or opposing a discretionary order of discovery under this subdivision, or another affected person or entity, to submit papers or testify on the record ex parte or in camera. For good cause shown, any such papers and a transcript of such testimony may be sealed and shall constitute a part of the record on appeal.

Comment: Subdivision 1 provides for a process for preserving evidence which is the subject matter or relevant to the case from individuals, entities and organizations, including those that are not law enforcement. The party seeking preservation must make a motion pursuant to this subdivision. It does not state that the motion must be in writing.

Subdivision 2 enables a defendant to move for access to premises on notice to the prosecutor and the owner/tenant to photograph, measure or engage in other investigation at the premises. The factors a court must consider (and therefore that must be addressed in a motion) are set forth in the subdivision. Because this motion requires notice to the prosecution and any impacted party, and a review of factors, this motion should be in writing, though the subdivision does not expressly require written motions.

Subdivision 3 addresses discretionary discovery from the prosecutor or “any individual, agency or other entity subject to the jurisdiction of the court.” If a defendant moves for disclosure of any material or information relating to the subject matter of the case which is reasonably likely to be material, a court, in its discretion, may grant such discovery. The statute requires that the request be reasonable, the defense be unable without undue hardship to obtain the substsantial equivalent by other means, and that the motion be on notice to any person affected by the order. The limitations are further set forth in

the statute. As this subdivision also requires a particular showing and review of factors, this motion should also be in writing.

CPL 245.35

New law:

> **§ 245.35 Court ordered procedures to facilitate compliance**. To facilitate compliance with this article, and to reduce or stream line litigation of any disputes about discovery, the court in its discretion may issue an order:
> 1. Requiring that the prosecutor and counsel for the defendant diligently confer to attempt to reach an accommodation as to any dispute concerning discovery prior to seeking a ruling from the court;
> 2. Requiring a discovery compliance conference at a specified time prior to trial between the prosecutor, counsel for all defendants, and the court or its staff;
> 3. Requiring the prosecution to file an additional certificate of compliance that states that the prosecutor and/or an appropriate named agent has made reasonable inquiries of all police officers and other persons who have participated in investigating or evaluating the case about the existence of any favorable evidence or information within paragraph (k) of subdivision one of section 245.20 of this article, including such evidence or information that was not reduced to writing or otherwise memorialized or preserved as evidence, and has disclosed any such information to the defendant; and/or
> 4. Requiring other measures or proceedings designed to carry into effect the goals of this article.

Comment:

The old phrase, "Counsel, you know your discovery obligations, don't you?" should no longer suffice to ensure prosecution compliance with discovery. Under CPL 245.35(1), the court may now insert itself into the discovery process. Under subdivision 1, the court may require meetings between the parties to facilitate discovery and resolve disputes. Under subdivision 2 the court can set a discovery compliance conference.

Under subdivision 3 the court can require the prosecution to file an additional certificate of compliance. This certificate can require the prosecutor confirm they and/or their agent have made reasonable inquiries of all police officers and others involved in the case about the existence of any favorable evidence or information, including such evidence that was not reduced to writing. Although this provision may replace the in-court inquiry of prosecutors as to whether they have complied with their *Brady* obligations, the use of this process is discretionary. Defense counsel that suspects there is *Brady* or other material from police that has not been provided should make use of this provision, requesting that the prosecution state whether they have inquired of all police and other parties whether there is favorable evidence, whether or not reduced to writing, and asking the trial court to require the additional certificate.

Subdivision 4 permits a court to engage in further proceedings or set additional requirements to ensure the goal of expansive discovery is met.

CPL 245.40

New law:

> **§ 245.40 Non-testimonial evidence from the defendant.**
> 1. Availability. After the filing of an accusatory instrument, and subject to constitutional limitations, the court may, upon motion of the prosecution showing probable cause to believe the defendant has committed the crime, a clear indication that relevant material evidence will be found, and that the method used to secure such evidence is safe and reliable, require a defendant to provide non-testimonial evidence, including to:
> (a) Appear in a lineup;
> (b) Speak for identification by a witness or potential witness;
> (c) Be fingerprinted;
> (d) Pose for photographs not involving reenactment of an event;
> (e) Permit the taking of samples of the defendant's blood, hair, and other materials of the defendant's body that involves no unreasonable intrusion thereof;
> (f) Provide specimens of the defendant's handwriting; and
> (g) Submit to a reasonable physical or medical inspection of the defendant's body.
> 2. Limitations. This section shall not be construed to alter or in any way affect the issuance of a similar court order, as may be authorized by law, before the filing of an accusatory instrument, consistent with such rights as the defendant may derive from the state constitution or the United States constitution. This section shall not be construed to alter or in any way affect the administration of a chemical test where otherwise authorized. An order pursuant to this section may be denied, limited or conditioned as provided in section 245.70 of this article.

Comment: This statute is similar to the prior statute permitting the prosecution to obtain samples or other evidence from a defendant after filing of an accusatory instrument. This is usually done in Monroe County by the prosecution moving for an Order to Show Cause, and the defense responding, with a focus on the factors contained both in the statute and the case, *Matter of Abe A.,* 56 NY2d 288 (1982).

CPL 245.45

New law:

> **§ 245.45 DNA comparison order**. Where property in the prosecution's possession, custody, or control consists of a deoxyribonucleic acid ("DNA") profile obtained from probative biological material gathered in connection with the investigation of the crime, or the defendant, or the prosecution of the defendant, and the defendant establishes (a) that such profile complies with

federal bureau of investigation or state requirements, whichever are applicable and as such requirements are applied to law enforcement agencies seeking a keyboard search or similar comparison, and (b) that the data meets state DNA index system or national DNA index system criteria as such criteria are applied to law enforcement agencies seeking such a keyboard search or similar comparison, the court may, upon motion of a defendant against whom an indictment, superior court information, prosecutor's information, information, or simplified information is pending, order an entity that has access to the combined DNA index system or its successor system to compare such DNA profile against DNA databanks by keyboard searches, or a similar method that does not involve uploading, upon notice to both parties and the entity required to perform the search, upon a showing by the defendant that such a comparison is material to the presentation of his or her defense and that the request is reasonable. For purposes of this section, a "keyboard search" shall mean a search of a DNA profile against the databank in which the profile that is searched is not uploaded to or maintained in the databank.

Comment: Under this statute, the defense may now seek DNA comparisons in state and federal databanks for biological material in the prosecutor's possession. The defense must file a motion and establish that the profile complies with federal or state requirements, that the data meets state or national DNA index system criteria, and the comparison of the material is material to the presentation of the defense and the request is reasonable. The statute is clumsily worded and requires notice to "both parties" and the entity, either referencing two parties or the parties and the entity required to perform the search, but does not clearly state who must provide the notice.

CPL 245.50

New law:

§ 245.50 Certificates of compliance; readiness for trial.

1. By the prosecution. When the prosecution has provided the discovery required by subdivision one of section 245.20 of this article, except for any items or information that are the subject of an order pursuant to section 245.70 of this article, it shall serve upon the defendant and file with the court a certificate of compliance. The certificate of compliance shall state that, after exercising due diligence and making reasonable inquiries to ascertain the existence of material and information subject to discovery, the prosecutor has disclosed and made available all known material and information subject to discovery. It shall also identify the items provided. If additional discovery is subsequently provided prior to trial pursuant to section 245.60 of this article, a supplemental certificate shall be served upon the defendant and filed with the court identifying the additional material and information provided. No adverse consequence to the prosecution or the prosecutor shall result from the filing of a certificate of compliance in good faith; but the court may grant a remedy or sanction for a discovery violation as provided in section 245.80 of this article.

2. By the defendant. When the defendant has provided all discovery required by subdivision four of section 245.20 of this article, except for any items or information that are the subject of an order pursuant to section 245.70 of this article, counsel for the defendant shall serve upon

the prosecution and file with the court a certificate of compliance. The certificate shall state that, after exercising due diligence and making reasonable inquiries to ascertain the existence of material and information subject to discovery, counsel for the defendant has disclosed and made available all known material and information subject to discovery. It shall also identify the items provided. If additional discovery is subsequently provided prior to trial pursuant to section 245.60 of this article, a supplemental certificate shall be served upon the prosecution and filed with the court identifying the additional material and information provided. No adverse consequence to the defendant or counsel for the defendant shall result from the filing of a certificate of compliance in good faith; but the court may grant a remedy or sanction for a discovery violation as provided in section 245.80 of this article.

3. Trial readiness. Notwithstanding the provisions of any other law, absent an individualized finding of exceptional circumstances by the court before which the charge is pending, the prosecution shall not be deemed ready for trial for purposes of section 30.30 of this chapter until it has filed a proper certificate pursuant to subdivision one of this section.

Comment: This statute contributes to the radical changes in criminal defense practice in New York. The prosecutor cannot be deemed ready for trial absent exceptional circumstances if they have not filed a certificate of compliance. Thus, there is a ticking clock pressuring them to provide discovery. Subdivision 1 sets forth the requirement and substance of a certificate from the prosecution. Subdivision 2 sets forth the parallel requirements and substance of certificates from the defense. Subdivision 3 puts teeth in the statute, barring readiness for trial without a certificate, and requiring "an individualized finding of exceptional circumstances by the court…" for such time to be excluded.

From January 1, 2020 forward, we will all be watching our 30.30 clocks on cases far more carefully. The claim, "The People are ready for trial" will presumably be meaningless absent a certificate of compliance with discovery. We must learn (and teach staff) to mark on the file dates on which the certificate was received, dates when it appears that additional discovery had not been provided making the original claim illusory (absent protective orders or the delay permitted by statute), and dates the supplement certificates are again filed.

A defense certificate of compliance is attached as an appendix to this manual.

CPL 245.55

New law:

§ 245.55 Flow of information.

1. Sufficient communication for compliance. The district attorney and the assistant responsible for the case, or, if the matter is not being prosecuted by the district attorney, the prosecuting agency and its assigned representative, shall endeavor to ensure that a flow of information is maintained between the police and other investigative personnel and his or her office sufficient to place within his or her possession or control all material and information pertinent to the defendant and the offense or offenses charged, including, but not limited to, any evidence or

information discoverable under paragraph (k) of subdivision one of section 245.20 of this article.

2. Provision of law enforcement agency files. Absent a court order or a requirement that defense counsel obtain a security clearance mandated by law or authorized government regulation, upon request by the prosecution, each New York state and local law enforcement agency shall make available to the prosecution a complete copy of its complete records and files related to the investigation of the case or the prosecution of the defendant for compliance with this article.

3. 911 telephone call and police radio transmission electronic recordings, police worn body camera recordings and other police recordings.

(a) Whenever an electronic recording of a 911 telephone call or a police radio transmission or video or audio footage from a police body-worn camera or other police recording was made or received in connection with the investigation of an apparent criminal incident, the arresting officer or lead detective shall expeditiously notify the prosecution in writing upon the filing of an accusatory instrument of the existence of all such known recordings. The prosecution shall expeditiously take whatever reasonable steps are necessary to ensure that all known electronic recordings of 911 telephone calls, police radio transmissions and video and audio footage and other police recordings made or available in connection with the case are preserved. Upon the defendant's timely request and designation of a specific electronic recording of a 911 telephone call, the prosecution shall also expeditiously take whatever reasonable steps are necessary to ensure that it is preserved.

(b) If the prosecution fails to disclose such an electronic recording to the defendant pursuant to paragraph (e), (g) or (k) of subdivision one of section 245.20 of this article due to a failure to comply with this obligation by police officers or other law enforcement or prosecution personnel, the court upon motion of the defendant shall impose an appropriate remedy or sanction pursuant to section 245.80 of this article.

Comment: As with CPL 245.20(2), this statute addresses the claims made by prosecutors that they do not have the records from the investigators, police, or other law enforcement personnel, and therefore cannot provide them. Subidivision 1(a) requires the prosecutor or their office staff to maintain sufficient "flow of information" to ensure that the prosecutor will have within their control all of the material and information pertinent to the defendant and the offenses charged. Subdivision 2 requires that the law enforcement agencies provide a complete copy of records related to a case. Subdivision 3, which addresses 911 calls, radio transmissions, body worn cameras and other recordings, requires an arresting officer or lead detective to notify the prosecutor in writing of all known recordings. The prosecution must then take all steps necessary to preserve the recordings. If the defense makes a request to preserve a specific 911 call, the prosecution must also take steps to ensure that is preserved.

Subdivision (1)(b) provides a remedy for the prosecutor's failure to disclose an electronic recording under 245.20 (e) (witness statements), (g) (911 or other recordings) or (k) (recordings that constitute *Brady* material) based on police or prosecution failure. In such circumstances, the court "shall" impose an appropriate remedy upon motion of the defense.

CPL 245.60

New law:

> **§ 245.60** Continuing duty to disclose. If either the prosecution or the defendant subsequently learns of additional material or information which it would have been under a duty to disclose pursuant to any provisions of this article had it known of it at the time of a previous discovery obligation or discovery order, it shall expeditiously notify the other party and disclose the additional material and information as required for initial discovery under this article. This section also requires expeditious disclosure by the prosecution of material or information that became relevant to the case or discoverable based on reciprocal discovery received from the defendant pursuant to subdivision four of section 245.20 of this article.

Comment: This statute requires each party to continue to provide discovery when it obtains additional discoverable material. If the prosecution obtains additional material in response to defense discovery, it must provide that.

CPL 245.65

New law:

> **§ 245.65 Work product**. This article does not authorize discovery by a party of those portions of records, reports, correspondence, memoranda, or internal documents of the adverse party which are only the legal research, opinions, theories or conclusions of the adverse party or its attorney or the attorney's agents, or of statements of a defendant, written or recorded or summarized in any writing or recording, made to the attorney for the defendant or the attorney's agents.

Comment: This statute protects attorney work product from disclosure. It also clearly exempts from defense discovery a defendant's statements made to defense counsel or counsel's agents.

CPL 245.70

New law:

> **§ 245.70 Protective orders.**
>
> 1. Any discovery subject to protective order. Upon a showing of good cause by either party, the court may at any time order that discovery or inspection of any kind of material or information under this article be denied, restricted, conditioned or deferred, or make such other order as is appropriate. The court may impose as a condition on discovery to a defendant that the material

or information to be discovered be available only to counsel for the defendant; or, alternatively, that counsel for the defendant, and persons employed by the attorney or appointed by the court to assist in the preparation of a defendant's case, may not disclose physical copies of the discoverable documents to a defendant or to anyone else, provided that the prosecution affords the defendant access to inspect redacted copies of the discoverable documents at a supervised location that provides regular and reasonable hours for such access, such as a prosecutor's office, police station, facility of detention, or court. Should the court impose as a condition that some material or information be available only to counsel for the defendant, the court shall inform the defendant on the record that his or her attorney is not permitted by law to disclose such material or information to the defendant. The court may permit a party seeking or opposing a protective order under this section, or another affected person, to submit papers or testify on the record ex parte or in camera. Any such papers and a transcript of such testimony may be sealed and shall constitute a part of the record on appeal. This section does not alter the allocation of the burden of proof with regard to matters at issue, including privilege.

2. Modification of time periods for discovery. Upon motion of a party in an individual case, the court may alter the time periods for discovery imposed by this article upon a showing of good cause.

3. Prompt hearing. Upon request for a protective order, unless the defendant voluntarily consents to the people's request for a protective order, the court shall conduct an appropriate hearing within three business days to determine whether good cause has been shown and when practicable shall render a decision expeditiously. Any materials submitted and a transcript of the proceeding may be sealed and shall constitute a part of the record on appeal.

4. Showing of good cause. In determining good cause under this section the court may consider: constitutional rights or limitations; danger to the integrity of physical evidence or the safety of a witness; risk of intimidation, economic reprisal, bribery, harassment or unjustified annoyance or embarrassment to any person, and the nature, severity and likelihood of that risk; a risk of an adverse effect upon the legitmate needs of law enforcement, including the protection of the confidentiality of informants, and the nature, severity and likelihood of that risk; the nature and circumstances of the factual allegations in the case; whether the defendant has a history of witness intimidation or tampering and the nature of that history; the nature of the stated reasons in support of a protective order; the nature of the witness identifying information that is sought to be addressed by a protective order, including the option of employing adequate alternative contact information; danger to any person stemming from factors such as a defendant's substantiated affiliation with a criminal enterprise as defined in subdivision three of section 460.10 of the penal law; and other similar factors found to outweigh the usefulness of the discovery.

5. Successor counsel or pro se defendant. In cases in which the attorney-client relationship is terminated prior to trial for any reason, any material or information disclosed subject to a condition that it be available only to counsel for the defendant, or limited in dissemination by protective order or otherwise, shall be provided only to successor counsel for the defendant under the same condition or conditions or be returned to the prosecution, unless the court rules otherwise for good cause shown or the prosecutor gives written consent. Any work product derived from such material or information shall not be provided to the defendant, unless the

court rules otherwise or the prosecutor gives written consent. If the defendant is acting as his or her own attorney, the court may regulate the time, place and manner of access to any discoverable material or information; and it may as appropriate appoint persons to assist the defendant in the investigation or preparation of the case. Upon motion or application of a defendant acting as his or her own attorney, the court may at any time modify or vacate any condition or restriction relating to access to discoverable material or information, for good cause shown.

6. Expedited review of adverse ruling.

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

(b) Such review shall be sought within two business days of the adverse or partially adverse ruling, by order to show cause filed with the intermediate appellate court. The order to show cause shall in addition be timely served on the lower court and on the opposing party, and shall be accompanied by a sworn affirmation stating in good faith (i) that the ruling affects substantial interests, and (ii) that diligent efforts to reach an accommodation of the underlying discovery dispute with opposing counsel failed or that no accommodation was feasible; except that service on the opposing party, and a statement regarding efforts to reach an accommodation, are unnecessary where the opposing party was not made aware of the application for a protective order and good cause is shown for omitting service of the order to show cause on the opposing party. The lower court's order subject to review shall be stayed until the appellate justice renders a determination.

(c) The assignment of the individual appellate justice, and the mode of and procedure for the review, shall be determined by rules of the individual appellate courts. The appellate justice may consider any relevant and reliable information bearing on the issue, and may dispense with written briefs other than supporting and opposing materials previously submitted to the lower court. The appellate justice may dispense with the issuance of a written opinion in rendering his or her decision, and when practicable shall render decision and order expeditiously. Such review, decision and order shall not affect the right of a defendant, in a subsequent appeal from a judgment of conviction, to claim as error the ruling reviewed.

7. Compliance with protective order. Any protective order issued under this article is a mandate of the court for purposes of the offense of criminal contempt in subdivision three of section 215.50 of the penal law.

Comment: CPL 245.70 covers a variety of circumstances in which a party wish to delay or avoid disclosure. Since the party usually seeking to withhold discovery is the prosecution, this statute is likely to be employed more frequently by prosecutors.

The use of protective orders is limited by the requirement that the party seeking an order establish "good cause." Good cause, as set forth in subdivision 4, generally applies to circumstances in which there is a danger that witnesses or evidence may face some negative consequence from disclosure or

prompt disclosure. The statute does not appear to contemplate issuance of orders simply due to voluminous discovery or failure of agencies to comply with parties' efforts to obtain information or documents in order to disclose it. Thus, although a prosecutor may not have not received lab information, or has voluminous materials, or has not obtained police records, and their initial fifteen days for initial discovery and thirty more under the statute have passed, we should oppose their seeking a protective order simply to buy more time. That is not what the "good cause" provision contemplates or how it should be applied.

In contrast, if there is a confidential informant, undercover officer or other individual or information they wish to protect, they will have to do so by seeking a protective order. In cases in which there are fears that witnesses may be harmed, again, protective orders must be sought.

Now that we are entitled to so much discovery, it is likely much of our discovery practice will focus on litigating orders of protection. So first, it is incumbent upon each of us to learn the law relating to this particular statute.

Subd. 1 – This statute permits either party to seek a protective order. The party seeking such an order must establish good cause in order to obtain a court ruling that discovery may be denied, restricted, conditioned or deferred. Significantly, the court may impose as a condition that material only be available to counsel, and not the defendant, or that the defendant not be provided a physical copy though allowed to review. These options have the potential to create a wedge of distrust between counsel and client, and prevent us from fully partnering with clients in developing defenses. If the limitation on physical possession is imposed, the prosecution must ensure arrangements are made for the defendant to view redacted copies, even if in local or state custody. If a defendant is barred from seeing discovery, the court must instruct the defendant on the record that the attorney is not permitted to disclose the information or material to the defendant. The statute also permits *ex parte, in camera* proceedings to determine whether to issue a protective order. The record of the proceedings may be sealed and shall constitute a part of the record on appeal.

Subd 2 – A court may modify the time periods for discovery upon motion of a party, for good cause shown. This does not permit the prosecution to simply ignore discovery deadlines. Prosecutors may attempt to use this provision to seek delay of discovery for as long as possible to gain a tactical advantage. Given the presumption of open discovery set forth in CPL 245.20(7), dilatory tactics should not be tolerated by the court. It will be critically important that the defense make a record of discovery received late following a prosecutor's claim of "good cause," and whether such good cause truly existed. If not, there may be an argument that the claim of compliance with discovery as provided in the certificate of compliance was illusory.

Subd. 3 – If a prosecutor seeks a protective order, the defense is entitled to a prompt hearing within three business days to determine whether good cause has been shown. The court must then issue a decision "expeditiously." Although the defense may waive such a hearing, absent obvious and meritorious grounds, it is not recommended that defense counsel waive these hearings.

Subd. 4 - Showing of good cause – Subdivision 4 lists the factors a court may consider in determining whether good cause exists for an order of protection or restriction on discovery Most of the factors focus on whether the defendant poses a danger to witnesses. As you respond to these motions, be prepared to address the arguments based on these factors. Be ready to respond that the prosecutor's arguments are not based on the concerns of the legislature in writing this statute, that the claims do not sufficiently meet the criteria, and that there is no factual basis for the issues raised – generalized fear is not a reason to deprive the defendant of discovery, particularly as the legislature has sought to ensure the most open, must broad discovery possible. Again, CPL 245.20(7) provides a presumption of openness of discovery.

Subd. 5 addresses successor counsel or a pro se defendant. Pay heed to this statute if there were restrictions ordered on discovery and a subsequent attorney seeks the file, or your client seeks to obtain the file for the next attorney. You may wish to consider marking with tape or bright colors cases in which discovery was restricted.

Subd. 6 – Expedited review!! The losing party in a proceeding on protective orders may obtain expedited review of the ruling by an individual justice of the intermediate appellate court to which an appeal from a conviction in the case would be taken. In felonies, that would be to the Fourth Department. In misdemeanors, it would be to County Court. The review must be sought within two business days of the adverse ruling by order to show cause filed with the court. Subdivision (b) sets forth the procedural and substantive requirements for such motions.

Compliance – Failure to comply with a protective order shall be considered criminal contempt. Don't do this.

CPL 245.75

New law:

> **§ 245.75 Waiver of discovery by defendant**. A defendant who does not seek discovery from the prosecution under this article shall so notify the prosecution and the court at the defendant's arraignment on an indictment, superior court information, prosecutor's information, information, or simplified information, or expeditiously thereafter but before receiving discovery from the prosecution pursuant to subdivision one of section 245.20 of this article, and the defendant need not provide discovery to the prosecution pursuant to subdivision four of section 245.20 and section 245.60 of this article. A waiver shall be in writing, signed for the individual case by counsel for the defendant and filed with the court. Such a waiver does not alter or in any way affect the procedures, obligations or rights set forth in sections 250.10, 250.20 and 250.30 of this title, or otherwise established or required by law. The prosecution may not condition a guilty plea offer on the defense's execution of a waiver under this section.

Comment: If you do not seek discovery from the prosecution, you must notify the prosecution and court at arraignment or soon thereafter. Under such circumstances, the defense is not required to

provide discovery to the prosecution. This statute provides the defense with the option to avoid provision of defense discovery, but at a potentially high cost. Even if you waive discovery, you must still meet your notice obligations (alibi, psychiatric defense, computer defenses) under Article 250 of the CPL.

CPL 245.80

New law:

> **§ 245.80 Remedies or sanctions for non-compliance**.
> **1. Need for remedy or sanction.**
> (a) When material or information is discoverable under this article but is disclosed belatedly, the court shall impose an appropriate remedy or sanction if the party entitled to disclosure shows that it was prejudiced. Regardless of a showing of prejudice the party entitled to disclosure shall be given reasonable time to prepare and respond to the new material.
> (b) When material or information is discoverable under this article but cannot be disclosed because it has been lost or destroyed, the court shall impose an appropriate remedy or sanction if the party entitled to disclosure shows that the lost or destroyed material may have contained some information relevant to a contested issue. The appropriate remedy or sanction is that which is proportionate to the potential ways in which the lost or destroyed material reasonably could have been helpful to the party entitled to disclosure.
> **2. Available remedies or sanctions**. For failure to comply with any discovery order imposed or issued pursuant to this article, the court may make a further order for discovery, grant a continuance, order that a hearing be reopened, order that a witness be called or recalled, instruct the jury that it may draw an adverse inference regarding the non-compliance, preclude or strike a witness's testimony or a portion of a witness's testimony, admit or exclude evidence, order a mistrial, order the dismissal of all or some of the charges, or make such other order as it deems just under the circumstances; except that any sanction against the defendant shall comport with the defendant's constitutional right to present a defense, and precluding a defense witness from testifying shall be permissible only upon a finding that the defendant's failure to comply with the discovery obligation or order was willful and motivated by a desire to obtain a tactical advantage.
> **3. Consequences of non-disclosure of statement of testifying prosecution witness**. The failure of the prosecutor or any agent of the prosecutor to disclose any written or recorded statement made by a prosecution witness which relates to the subject matter of the witness's testimony shall not constitute grounds for any court to order a new pre-trial hearing or set aside a conviction, or reverse, modify or vacate a judgment of conviction, in the absence of a showing by the defendant that there is a reasonable possibility that the non-disclosure materially contributed to the result of the trial or other proceeding; provided, however, that nothing in this section shall affect or limit any right the defendant may have to a reopened pre-trial hearing when such statements were disclosed before the close of evidence at trial.

Comment: No more last minute discovery dumps without recourse.

Subdivision 1(a): Late disclosure - Under subidivision 1, if mandatory statutory discovery is provided late, and if the defense demonstrates it was prejudiced, the court MUST impose a sanction. The sanction, however, is in the discretion of the court as restricted by the statute. Subdivision 2 provides a list of potential sanctions, but you may come up with some that are not on the list. Even without a showing of prejudice, the recipient of the late discovery MUST be given a reasonable time to prepare and respond to the new material. Be aware, this statute operates against the defense as well. If the defense fails to provide statutory discovery, we face a sanction.

Although this statute may provide opposing counsel some legal basis to prevent the defense from introducing evidence, there is a constitutional right to present a defense. This is recognized in subdivision (b) and must be argued vigorously. And although the right to present a defense can be limited by failure to comply with statutory rules (such as failure to provide alibi notice, for example), if the court seeks to prevent you from introducing evidence you must:

a. Argue that your delay or failure was not "willful and motivated by a desire to gain a tactical advantage", as set forth in subdivision 2, and you must set forth the reasons why it could not be helped (if any);
b. Argue that the constitutional right to present a defense trumps the statutory sanction, and courts have held that defendants' constitutional rights should not be unduly or unfairly restricted by state evidentiary rules (see, e.g. *Davis v. Alaska*, 415 U.S. 308 [1974], *Pennsylvania v. Ritchie*, 480 U.S. 39 [1987]);
c. If the court is intent on imposing a sanction, try to create one that is the least impactful on your defense;
d. Move for a mistrial if the sanction harms the defense;
e. Make sure all of the above is done on the record, and that any motions or other documents are marked and made part of the record.

Subdivision 1(b): Lost or destroyed material – If a party learns of material that was lost or destroyed, and if that party shows that "the lost or destroyed material may have contained some information relevant to a contested issue" the court must impose a remedy. "The appropriate remedy or sanction is that which is proportionate to the potential ways in which the lost or destroyed material reasonably could have been helpful to the party entitled to disclosure." Here too, subdivision 2 provides guidance as to the types of sanctions available.

Clearly, the loss of a minor, collateral piece of evidence will require little if any remedy. But if a videorecording or other significant piece of evidence is lost or destroyed, consider whether the appropriate remedy might be dismissal with prejudice, a mistrial, an instruction providing a negative inference (perhaps addressing the prosecution and/or law enforcement obligation and failure to preserve evidence), or even a jury instruction removing one of the elements if the element was more difficult to challenge due to the loss of the evidence. (Why not get creative?)

Subdivision 2: Sanctions – This statute provides a range of suggested sanctions, with limitation when the court is looking to limit admissibility of defense evidence. See comments to 1(a), above.

Subdivision 3 – Subdivision 3 is a prosecution-favorable statute, limiting the consequences of failure by the prosecution to provide a prior statement (*Rosario* material) to the defense. Unless there is a "reasonable possibility that the non-disclosure materially contributed to the result of the trial or other proceeding" you don't get a "do-over." Consequently, you must find a way, when possible, to argue that the failure did contribute – that you would have established particular inconsistencies causing the witness to be deemed unreliable, that you would have introduced or found other evidence, or pursued a different investigation. If the statement is disclosed before close of evidence at trial, you can seek to reopen a pre-trial hearing.

> **§ 245.85 Admissibility of discovery**. The fact that a party has indicated during the discovery process an intention to offer specified evidence or to call a specified witness is not admissible in evidence or grounds for adverse comment at a hearing or a trial.
>
> Comment – This is self-explanatory.

D. OTHER AMENDMENTS TO NEW YORK CRIMINAL PROCEDURE LAW

CPL 610.20

New law:

> **610.20(3)** An attorney for a defendant in a criminal action or proceeding, as an officer of a criminal court, may issue a subpoena of such court, subscribed by himself, for the attendance in such court of any witness whom the defendant is entitled to call in such action or proceeding. An attorney for a defendant may not issue a subpoena duces tecum of the court directed to any department, bureau or agency of the state or of a political subdivision thereof, or to any officer or representative thereof, unless the subpoena is indorsed by the court and provides at least three days for the production of the requested materials. In the case of an emergency, the court may by order dispense with the three-day production period.
>
> **4**. The showing required to sustain any subpoena under this section is that the testimony or evidence sought is reasonably likely to be relevant and material to the proceedings, and the subpoena is not overbroad or unreasonably burdensome.

Comment:

Old law:
The prior law required that a subpoena issued by a defense attorney for governmental records comport with the procedures set forth in CPLR 2307. That statute required a motion be made on at least one

day's notice to the governmental entity *and the adverse party* (prosecutor). The subpoena also had to be served, under that statute, at least twenty-four hours before production was required except in the case of emergency. CPLR 2307 also permits copies to be served, and the custodian's appearance to be waived.

New law:
The new CPL 610.20(3) has eliminated the requirement of notice to opposing counsel (the prosecutor). This evens out the playing field a bit, as prosecutors never had to give notice to defense counsel. But realistically, many state agencies will inform prosecutors of the subpoena. The lack of requirement of notice has an additional benefit. Although previously, some courts had found the prosecutor did not have standing to object to defense subpoenas, some courts concluded prior cases addressing third party standing were inapplicable and routinely permitted prosecutors to object. As prosecutors are not even entitled to notification now, the argument against prosecution standing to object is stronger.

Subdivision 4 – This new subdivision, not present in the prior statute, changes the standard by which courts determine whether to sign our subpoenas for governmental records. (Think child protective services records). Instead of applying what was functionally a *Brady* standard – that the subpoenaed material had to be favorable to the defense – the standard is now "reasonably likely to be relevant and material to the proceedings." And it must not be overbroad or unreasonably burdensome. If courts apply this statute as it is written, this will radically change subpoena practice for defense counsel.

CPL 65.20

New law

> **CPL 65.20(9)** (a) Prior to the commencement of the hearing conducted pursuant to of this section, the district attorney shall, subject to a protective order, comply with the provisions of subdivision one of section 245.20 of this chapter as they concern any witness whom the district attorney intends to call at the hearing and the child witness.
> (b) Before a defendant calls a witness at such hearing, he or she must, subject to a protective order, comply with the provisions of subdivision four of section 245.20 of this chapter as they concern all the witnesses the defendant intends to call at such hearing.

Comment: This statute addresses hearings in which courts must determine whether children are vulnerable child witnesses who may testify on closed circuit TV. It has been modified to update the numbering of the discovery statutes referenced requiring discovery be provided under the appropriate subdivisions of the new statute

CPL 200.95 (Bills of particulars) – This statute changed the number of the discovery statute referenced to conform to the new statute.

CPL 255.10(1)(c) –This statute, relating to the definition of pre-trial motions, was modified to conform the reference to the discovery statute to the new numbering in the new statute.

CPL 255.20(1) – This statute, relating to timing of filing of pretrial motions, has been amended to extend the time for filing of motions to forty-five days from disclosure of tangible property and search warrants as described in CPL 245.20(m) and (n).

CPL 340.30 – This statute, relating to pre-trial discovery and notices of defenses in local court matters, was amended to conform the numbering of the discovery statute to the new statute.

CPL 400.27(14) – This statute, relating to murder in the first degree charges, changes the numbering of the statute relating to discovery to conform to the numbering of the new discovery statute.

CPL 440.30(1)(b) – While seemingly a minor alteration in the statute, CPL 440.30(1)(b), relating to motions to vacate convictions, has been expanded by the deletion of a phrase. The prior statute set forth property the court could order the prosecution to provide to the defense. Previously, the statute defined property by reference to CPL 240.10, which set forth a list of items, excluding attorneys' work product. Under the new law, there is no definition of property and no such exclusion.

PL 450.10 – This Penal Law statute, addressing disposal of stolen property, has been amended to conform the numbering of the discovery statute referenced in subdivision 10 to the new discovery statute.

PL 460.80 – This Penal Law statute, addressing court ordered disclosure in forfeiture cases, conforms the numbering of the statute to the new discovery statute.

PL 460.80 – This statute, relating to forfeiture, conforms the numbering of the statute to the new discovery statute.

APPENDIX

Qualifying Offenses List**

PL §§ 105.10, 105.13, 105.15 Conspiracy in the fourth, third, and second degrees if the underlying felony is a "felony sex offense" as defined by PL § 70.80(1) ✹
PL § 105.15 Conspiracy second degree if the underlying allegation of such charge is that the defendant conspired to commit a class A felony defined in article one hundred twenty-five of the penal law (CPL 510.10[4][f]) ◘
PL § 105.17 Conspiracy in the first degree ⌂
PL § 120.02 Reckless assault of a child ⊠
PL § 120.05 Assault in the second degree ⊠
PL § 120.06 Gang assault in the second degree □
PL § 110.05(5) and PL § 70.02(1)(c) Attempt to commit ⊠
PL § 120.07 Gang assault in the first degree ♢
PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □
PL § 120.08 Assault on a peace officer, police officer, fireman, etc. □
PL § 110.05(5) and PL § 70.02(1)(c) Attempt to commit ⊠
PL § 120.09 Assault on a judge □
PL § 110.05(5) and PL § 70.02(1)(c) Attempt to commit ⊠
PL § 120.10 Assault in the first degree ♢
PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □
PL § 120.11 Aggravated Assault upon a police officer ♢
PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □
PL § 120.18 Menacing a police officer or peace officer ⊠
PL § 120.60 **subd. (1)** Stalking in the first degree ⊠
PL § 120.70 Luring a child ✚
PL § 121.12 Strangulation in the second degree ⊠
PL § 121.13 Strangulation in the first degree □
PL § 110.05(5) and PL § 70.02(1)(c) Attempt to commit ⊠
PL § 125.11 Aggravated criminally negligent homicide □
PL § 110.05(5) and PL § 70.02(1)(c) Attempt to commit ⊠
PL § 125.20 Manslaughter in the first degree ♢
PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □
PL § 125.21 Aggravated manslaughter in the second degree □
PL § 110.05(5) and PL § 70.02(1)(c) Attempt to commit ⊠
PL § 125.22 Aggravated manslaughter in the first degree ♢
PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □
PL § 125.25 Murder in the Second Degree ⌂
PL § 110.05(3) and PL § 70.02(1)(a) Attempt to commit ♢
PL § 125.26 Aggravated Murder ⌂
PL § 110.05(1) Attempt to commit aggravated murder ⌂
PL § 125.27 Murder in the First Degree ⌂
PL § 110.05(1) Attempt to commit murder in the first degree ⌂
PL § 130.20 Sexual misconduct ✹
PL § 110.05(8) attempt to commit ✹
PL § 130.25 Rape in the third degree ✹

PL § 110.05(7) Attempt to Commit ✹[1]
PL § 130.30 Rape in the second degree ⊠, ✹
PL § 70.80(1) and PL § 110.05(6) Attempt to commit ✹
PL § 130.35 Rape in the first degree ♢, ✹
PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □, ✹
PL § 130.40 Criminal sexual act in the third degree ✹
PL § 110.05(7) Attempt to Commit ✹[2]
PL § 130.45 Criminal sexual act in the second degree ⊠, ✹
PL § 70.80(1) and PL § 110.05(6) Attempt to commit ✹
PL § 130.50 Criminal sexual act in the first degree ♢
PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □
PL § 130.52 Forcible touching ✹
PL § 110.05(8) attempt to commit ✹
PL § 130.53 Persistent sexual abuse ☆
PL § 110.05(8) attempt to commit ✹
PL § 130.55 Sexual abuse in the third degree ✹
PL § 110.05(6) attempt to commit ✹
PL § 130.60 Sexual abuse in the second degree ✹
PL § 110.05(7) Attempt to Commit ✹
PL § 130.65 Sexual abuse in the first degree ⊠
PL § 70.80(1) and PL § 110.05(6) Attempt to commit ✹
PL § 130.65-a Aggravated sexual abuse in the fourth degree ☆, ✹
PL § 130.66 Aggravated sexual abuse in the third degree ⊠, ✹
PL § 70.80(1) and PL § 110.05(6) Attempt to commit ✹
PL § 130.67 Aggravated sexual abuse in the second degree □, ✹
PL § 110.05(5) and PL § 70.02(1)(c) Attempt to commit ⊠, ✹
PL § 130.70 Aggravated sexual abuse in the first degree ♢, ✹
PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □, ✹
PL § 130.75 Course of sexual conduct against a child in the first degree ♢, ✹
PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □, ✹
PL § 130.80 Course of sexual conduct against a child in the second degree ⊠, ✹
PL § 70.80(1) and PL § 110.05(6) Attempt to commit ✹
PL § 130.85 Female genital mutilation ✹
PL § 110.05(7) Attempt to Commit ✹
PL § 130.90 Facilitating a sex offense with a controlled substance ⊠, ✹
PL § 70.80(1) and PL § 110.05(6) Attempt to commit ✹
PL § 130.91 Sexually motivated felony (a person who commits a specified offense outlined in 130.91(2) for the purposes of direct sexual gratification) ✹
PL § 130.95 Predatory sexual assault ⌂
PL § 110.05(2) Attempt to commit ⌂
PL § 130.96 Predatory sexual assault against a child ⌂
PL § 110.05(2) Attempt to commit ⌂

[1] CPL § 510.10(4)(e) includes in its definition "a misdemeanor defined in article one hundred thirty of such law".
[2] CPL § 510.10(4)(e) includes in its definition "a misdemeanor defined in article one hundred thirty of such law".

PL § 135.20 Kidnapping in the second degree ♢
PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □
PL § 135.25 Kidnapping in the first degree ⌂
PL § 110.05(3) and PL § 70.02(1)(a) Attempt to commit ♢
PL § 135.35 **subd. (3) (a) and (b)** Labor trafficking ⊠
PL § 140.25**(1)** Burglary in the second degree □ (**n.b.** subdivision 2 is not a qualifying offense)
PL § 110.05(5) and PL § 70.02(1)(c) Attempt to commit ⊠
PL § 140.30 Burglary in the first degree ♢
PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □
PL § 150.15 Arson in the second degree ♢
PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □
PL § 150.20 Arson in the first degree ⌂
PL § 110.05(3) and PL § 70.02(1)(a) Attempt to commit ♢
PL § 160.10**(2) and (3)** Robbery in the second degree □ (**n.b.** subdivision 1 is not a qualifying offense)
PL § 110.05(5) and PL § 70.02(1)(c) Attempt to commit ⊠
PL § 160.15 Robbery in the first degree ♢
PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □
PL § 215.11 Tampering with a witness in the third degree ☼
Attempt to Commit[3]
PL § 215.12 Tampering with a witness in the second degree ☼
Attempt to Commit[4]
PL § 215.13 Tampering with a witness in the first degree ☼
Attempt to Commit[5]
PL § 215.15 Intimidating a victim or witness in the third degree ●
Attempt to Commit[6]
PL § 215.16 Intimidating a victim or witness in the second degree ⊠
PL § 215.17 Intimidating a victim or witness in the first degree ♢
PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □
PL § 215.50(3) Criminal contempt in the second degree and the underlying allegation of such charge is that

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[3] The definition of "qualifying offense" includes the language "crime involving" a delineated offense(s). Arguably this includes the attempt of that crime if the attempt is also a crime. See CPL § 510.10(4)(c). Note, however, that the legislation does not include the misdemeanor crime of tampering with a witness in the fourth degree (PL § 215.10). This may support an argument that the Legislature only intended witness tampering crimes that were felony offenses as a "qualifying offense". This would exclude the crime of attempted tampering with a witness in the third degree as that is an A misdemeanor.

[4] Id.

[5] Id.

[6] The definition of "qualifying offense" includes the language "crime involving" a delineated offense(s). Arguably this includes the attempt of that crime if the attempt is also a crime. See CPL § 510.10(4)(b). However, if the legislative intent were to include attempts as a result of this language, this leads to an anomaly. CPL § 510.10(4)(a) states that a qualifying offense is "a felony enumerated in section 70.02 of the penal law…". PL § 70.02(1)(c) (class D violent felony offenses) includes PL § 215.16 intimidating a victim or witness in the second degree. However, the attempt of that crime is not a violent felony offense (see PL § 70.02(1)(d)) and no other provision under CPL § 510.10(4) would appear to make the attempt of that crime a qualifying offense. Thus, there is an argument that "crime involving" does not include attempts, as this would lead to an anomalous result.

the defendant violated a duly served order of protection where the protected party is a member of the defendant's same family or household as defined in subdivision one of section 530.11[7] of this article ✢

PL § 215.51(b),(c), or (d) Criminal contempt in the first degree and the underlying allegation of such charge is that the defendant violated a duly served order of protection where the protected party is a member of the defendant's same family or household as defined in subdivision one of section 530.11 of this article ✢

PL § 215.52 Aggravated criminal contempt and the underlying allegation of such charge is that the defendant violated a duly served order of protection where the protected party is a member of the defendant's same family or household as defined in subdivision one of section 530.11 of this article ✢

PL § 220.77 Operating as Major Trafficker ⌂

PL § 230.05 Patronizing a person for prostitution in the second degree

PL § 230.06 Patronizing a person for prostitution in the first degree ✹

PL § 70.80(1) and PL § 110.05(6) Attempt to commit ✹[8]

PL § 230.11 Aggravated patronizing a minor for prostitution in the third degree ✹

PL § 230.12 Aggravated patronizing a minor for prostitution in the second degree ✹

PL § 70.80(1) and PL § 110.05(6) Attempt to commit ✹

PL § 230.13 Aggravated patronizing a minor for prostitution in the first degree ✹

PL § 70.80(1) and PL § 110.05(4) Attempt to commit ✹

PL § 230.34 **subd.** (5)(a) and (b) Sex trafficking ♢

PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □

PL § 230.34-a Sex trafficking of a child ♢

PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □

PL § 240.55 Falsely reporting an incident in the second degree ☆

PL § 240.60 Falsely reporting an incident in the first degree ⊠

PL § 240.61 Placing a false bomb or hazardous substance in the second degree ☆

PL § 240.62 Placing a false bomb or hazardous substance in the first degree ⊠

PL § 240.63 Placing a false bomb or hazardous substance in as sports stadium or arena, etc. ⊠

PL § 255.25 Incest in the third degree ✹

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[7] CPL 53011 defines "members of the same family or household" as follows:
(a) persons related by consanguinity or affinity;
(b) persons legally married to one another;
(c) persons formerly married to one another regardless of whether they still reside in the same household;
(d) persons who have a child in common, regardless of whether such persons have been married or have lived together at any time; and
(e) persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time. Factors the court may consider in determining whether a relationship is an "intimate relationship" include but are not limited to: the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship. Neither a casual acquaintance nor ordinary fraternization between two individuals in business or social contexts shall be deemed to constitute an "intimate relationship".

[8] PL § 70.80 includes as a "felony sex offense" any attempt to commit the delineated offenses, or a conspiracy to commit the delineated offenses if the attempt or conspiracy crime is a felony.

Attempt to Commit[9]
PL § 255.26 Incest in the second degree ✹
Attempt to Commit[10]
PL § 255.27 Incest in the first degree ♢, ✹
PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □
PL § 263.05 Use of a child in a sexual performance ✚
PL § 263.30 Facilitating a sexual performance by a child with a controlled substance or alcohol ✚
PL § 265.02 (5), (6), (7), (8), (9) and (10) Criminal possession of a weapon in the third degree ⊠
PL § 265.03 Criminal possession of a weapon in the second degree □
PL § 110.05(5) and PL § 70.02(1)(c) Attempt to commit ⊠
PL § 265.04 Criminal possession of a weapon in the first degree ♢
PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □
PL § 265.08 Criminal use of a firearm in the second degree □
PL § 110.05(5) and PL § 70.02(1)(c) Attempt to commit ⊠
PL § 265.09 Criminal use of a firearm in the first degree ♢
PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □
PL § 265.11 Criminal sale of a firearm in the third degree ⊠
PL § 265.12 Criminal sale of a firearm in the second degree □
PL § 110.05(5) and PL § 70.02(1)(c) Attempt to commit ⊠
PL § 265.13 Criminal sale of a firearm in the first degree ♢
PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □
PL § 265.14 Criminal sale of a firearm with the aid of a minor □
PL § 110.05(5) and PL § 70.02(1)(c) Attempt to commit ⊠
PL § 265.19 Aggravated criminal possession of a weapon □
PL § 110.05(5) and PL § 70.02(1)(c) Attempt to commit ⊠
PL § 405.18 Aggravated unpermitted use of indoor pyrotechnics in the first degree ⊠
PL § 460.22 Aggravated Enterprise Corruption ⌂
PL § 470.23 Money laundering in the support of terrorism in the second degree ★
PL § 470.24 Money laundering in the support of terrorism in the first degree ★
PL § 490.10 Soliciting or providing support for an act of terrorism in the second degree ⊠, ★
PL § 110.05(6) Attempt to Commit ★
PL § 490.15 Soliciting or providing support for an act of terrorism in the first degree □, ★
PL § 110.05(5) and PL § 70.02(1)(c) Attempt to commit ⊠, ★
PL § 490.20 Making a terroristic threat ⊠ (**n.b.** see conflict between CPL §§ 510.10[4][a] and 510.10[4][g])[11]
PL § 490.25 Crime of Terrorism, class B offense or higher ⌂, ★
PL § 490.30 Hindering prosecution of terrorism in the second degree □, ★
PL § 110.05(5) and PL § 70.02(1)(c) Attempt to commit ⊠, ★
PL § 490.35 Hindering prosecution of terrorism in the first degree ♢, ★

[9] CPL § 510.10(4)(e) uses the language "crime involving" the delineated offenses. This arguably includes the attempts.
[10] Id.
[11] There is a conflict between CPL §§ 510.10(4)(a) and 510.10(4)(g). 510.10(4)(a) states that a qualifying offense is "a felony enumerated in section 70.02 of the penal law…". PL § 70.02(1)(c) (class D violent felony offenses) states that PL § 490.20 making a terroristic threat is a class D violent felony. However, CPL § 510.10(4)(g) specifically excludes that crime as a qualifying offense. Since the Legislature specifically excluded it, a strong argument exists that this is not a qualifying offense.

PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □, ★
PL § 490.37 Criminal possession of a chemical or biological weapon in the third degree □, ★
PL § 110.05(5) and PL § 70.02(1)(c) Attempt to commit ⊠, ★
PL § 490.40 Criminal possession of a chemical weapon or biological weapon in the second degree ♢, ★
PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □, ★
PL § 490.45 Criminal possession of a chemical weapon or biological weapon in the first degree ⌂
PL § 110.05(1) Attempt to commit criminal possession of a chemical weapon or biological weapon in the first degree ⌂, ★
PL § 490.47 Criminal use of a chemical weapon or biological weapon in the third degree ♢, ★
PL § 110.05(4) and PL § 70.02(1)(b) Attempt to commit □, ★
PL § 490.50 Criminal use of a chemical weapon or biological weapon in the second degree ⌂, ★
PL § 110.05(2) Attempt to commit ⌂, ★
PL § 490.55 Criminal use of a chemical weapon or biological weapon in the first degree ⌂, ★
PL § 110.05(1) Attempt to commit criminal use of a chemical weapon or biological weapon in the first degree ⌂, ★

** this list does not account for non-existent, or legally impossible crimes, e.g., attempted manslaughter in the first degree, or attempted assault in the second degree, subd. 3 (see *People v. Campbell*, 72NY2d 602 [1988]).

♢ CPL § 510.10(4)(a) and PL § 70.02(1)(a)
□ CPL § 510.10(4)(a) and PL § 70.02(1)(b)
⊠ CPL § 510.10(4)(a) and PL § 70.02(1)(c)
☆ CPL § 510.10(4)(a) and PL § 70.02(1)(d)
● CPL § 510.10(4)(b)
☼ CPL § 510.10(4)(c)
⌂ CPL § 510.10(4)(d)
✹ CPL § 510.10(4)(e) and PL § 70.80(1)
◘ CPL § 510.10(4)(f)
★ CPL § 510.10(4)(g)
✢ CPL § 510.10(4)(h)
✚ CPL § 510.10(4)(i)

STATE OF NEW YORK COUNTY OF MONROE
(Court) COURT

THE PEOPLE OF THE STATE OF NEW YORK,

-vs-

CPL 245.30(1)
NOTICE OF MOTION TO PRESERVE EVIDENCE

(Defendant's name),

Defendant.

Indict. No.
Filed:
Index No.

PLEASE TAKE NOTICE that upon the annexed affirmation of (attorney name), Esq., attorney for the defendant, the undersigned will move this Court, at a criminal term thereof, before the Honorable (Judge, Title, Court, at time and date) or as soon thereafter as counsel may be heard, for the following relief:

A. An Order pursuant to CPL Section 245.30 preserving the following evidence: (list);

B. An Order granting such other and further relief as this Court deems just and proper.

DATED: Rochester, New York
(Date)

Yours, etc.

TIMOTHY DONAHER
Monroe County PublicDefender
BY: (Attorney name)
Special Assistant Public Defender
10 North Fitzhugh Street
Rochester, New York 14614
(585) (attorney phone number)

TO: SANDRA DOORLEY
Monroe County
District Attorney

ATT (prosecutor name)
Assistant District Attorney

(individual or agency in possession of property)

STATE OF NEW YORK COUNTY OF MONROE
SUPREME COURT

THE PEOPLE OF THE STATE OF NEW YORK,

-vs- AFFIRMATION

(defendant name),

Defendant.

STATE OF NEW YORK)
COUNTY OF MONROE) ss.:
CITY OF ROCHESTER)

(attorney name), an attorney admitted to practice in the State of New York, affirms under penalty of perjury pursuant to CPLR 2106 that:

1. I am the Second Assistant Public Defender for the County of Monroe and have been assigned to represent defendant in this action.

2. I make this affirmation in support of the relief requested in the annexed Notice of Motion and for such other and further relief as to this Court may seem just and proper.

STATEMENT OF FACTS

3. That on or about (date) an (type of accusatory instrument) was filed charging the defendant with (list charges).

4. The sources and grounds for your affiant's belief on the allegations made herein are conversations between your affiant and the defendant, an investigation conducted by members on staff at the Monroe County Public Defender`s Office, and a

review of the various and sundry papers filed in connection with this incident.

MOTION TO PRESERVE EVIDENCE

5. CPL Section 245.30(1) states that "(a)t anytime, a party may move for a court order for any individual, agency or other entity in possession, custody or control of items which relate to the subject matter of the case or are otherwise relevant, requiring that such items be preserved for a specified period of time."

6. Defendant is seeking preservation of the following items from the following agencies and/or individuals until a verdict is reached at trial, or if the case is resolved by another disposition, the date of such disposition:

(List item and individual or organization in possession of item.)

7. Defendant submits that the preservation of this evidence is necessary to ensure that the defendant's rights to a fair trial, due process and the right to present a defense as protected by the New York State Constitution and United States Constitution are protected.

8. Defendant further submits that the preservation of these items will not cause a hardship for the following reasons: (List items and why no hardship)

LEAVE TO MAKE FURTHER MOTIONS

9. The defense has attempted to encompass within this motion all possible pretrial requests for relief. I respectfully request that this court grant leave to apply for such other and further relief in the future as may be deemed justified, should the facts and circumstances not now within my knowledge indicate that such additional motions

are warranted.

WHEREFORE, I respectfully request that this Court grant the relief requested herein and such other and further relief as may seem just and proper.

In the event that the prosecution fails to submit responsive pleadings contesting the factual assertions set forth above, the defendant respectfully requests that this Court summarily grant the relief sought herein. (People v. Gruden, 42 N.Y.2d 214).

_____
(Name of attorney)

Affirmed this (date affirmed)

STATE OF NEW YORK COUNTY OF MONROE
(Court) COURT

THE PEOPLE OF THE STATE OF NEW YORK,

-vs-

CPL 245.30(2)
NOTICE OF MOTION
FOR ACCESS TO
PREMISES

(Defendant's name),

Indict. No.
Filed:

Defendant. Index No.

PLEASE TAKE NOTICE that upon the annexed affirmation of (attorney name), Esq., attorney for the defendant, the undersigned will move this Court, at a criminal term thereof, before the Honorable (Judge, Title, Court, at time and date) or as soon thereafter as counsel may be heard, for the following relief:

A. An Order pursuant to CPL Section 245.30(2) granting the defendant access to premises.

B. An Order granting such other and further relief as this Court deems just and proper.

DATED: Rochester, New York
(Date)

Yours, etc.

TIMOTHY DONAHER
Monroe County PublicDefender
BY: (Attorney name)
Special Assistant Public Defender
10 North Fitzhugh Street
Rochester, New York 14614
(585) (attorney phone number)

TO: SANDRA DOORLEY
Monroe County
District Attorney

ATT (prosecutor name)
Assistant District Attorney

(individual or agency in possession of property)

STATE OF NEW YORK COUNTY OF MONROE
SUPREME COURT

THE PEOPLE OF THE STATE OF NEW YORK,

-vs- AFFIRMATION

(Defendant's name),

Defendant.

STATE OF NEW YORK)
COUNTY OF MONROE) ss.:
CITY OF ROCHESTER)

(Attorney name), an attorney admitted to practice in the State of New York, affirms under penalty of perjury pursuant to CPLR 2106 that:

1. I am the Second Assistant Public Defender for the County of Monroe and have been assigned to represent defendant in this action.

2. I make this affirmation in support of the relief requested in the annexed Notice of Motion and for such other and further relief as to this Court may seem just and proper.

STATEMENT OF FACTS

3. That on or about (date) an (type of accusatory instrument) was filed charging the defendant with (list charges).

4. The sources and grounds for your affiant's belief on the allegations made herein are conversations between your affiant and the defendant, an investigation conducted by members on staff at the Monroe County Public Defender`s Office, and a

review of the various and sundry papers filed in connection with this incident.

MOTION FOR ACCESS TO PREMISES

5. Defendant is seeking access to the premises located at (location)

6. CPL Section 245.30(2) states, in pertinent part, that "the defendant may move, upon notice to the prosecution and any impacted individual, agency, or entity, for a court order to access a crime scene or other premises relevant to the subject matter of the case, requiring that counsel for the defendant be granted reasonable access to inspect, photograph, or measure such crime scene or premises, and that the condition of the crime scene or premises remain unchanged in the interim."

7. The statute further states that "(t)he court shall consider defendant's expressed need for access to the premises including the risk that defendant will be deprived of evidence or information relevant to the cse, the position of any individual or entity with possessoroy or ownership rights to the premises, the nature of the privacy interest, and any perceived or actual hardship of the individual or entity with possessory or ownership rights, and the position of the prosecution with respect to any application for access to premises."

8. Defendant submits that the defense must be granted access the premises for the following reasons, and that a substituted viewing of the premises by video or photographs will not suffice:

(Reasons)

9. Defendant further submits that any perceived or actual hardship to the owner

or lessor is minimal, and is outweighed by the defendant's need to access the property.

10. Defendant intends to conduct the investigation of the premises as soon as possible, but will have to engage an (investigator, photographer, technician, other).

11. Defendant submits that the access to premises is necessary to ensure that the defendant's rights to a fair trial, due process and the right to present a defense as protected by the New York State Constitution and United States Constitution are protected.

LEAVE TO MAKE FURTHER MOTIONS

12. The defense has attempted to encompass within this motion all possible pretrial requests for relief. I respectfully request that this court grant leave to apply for such other and further relief in the future as may be deemed justified, should the facts and circumstances not now within my knowledge indicate that such additional motions are warranted.

WHEREFORE, I respectfully request that this Court grant the relief requested herein and such other and further relief as may seem just and proper.

In the event that the prosecution fails to submit responsive pleadings contesting the factual assertions set forth above, the defendant respectfully requests that this Court summarily grant the relief sought herein. (People v. Gruden, 42 N.Y.2d 214).

_____
(Name of attorney)

Affirmed this (date affirmed)

STATE OF NEW YORK COUNTY OF MONROE
(Court) COURT

THE PEOPLE OF THE STATE OF NEW YORK,

CPL 245.30(3)
NOTICE OF MOTION FOR DISCRETIONARY DISCOVERY

-vs-

(Defendant's name),

Indict. No.
Filed:

Defendant. Index No.

PLEASE TAKE NOTICE that upon the annexed affirmation of (attorney name), Esq., attorney for the defendant, the undersigned will move this Court, at a criminal term thereof, before the Honorable (Judge, Title, Court, at time and date) or as soon thereafter as counsel may be heard, for the following relief:

A. An Order pursuant to CPL Section 245.30(3) granting the defendant discretionary discovery.

B. An Order granting such other and further relief as this Court deems just and proper.

DATED: Rochester, New York
(Date)

Yours, etc.

TIMOTHY DONAHER
Monroe County PublicDefender
BY: (Attorney name)
Special Assistant Public Defender
10 North Fitzhugh Street

Rochester, New York 14614
(585) (attorney phone number)

TO: SANDRA DOORLEY
Monroe County
District Attorney

ATT (prosecutor name)
Assistant District Attorney

(individual or agency in possession of property)

STATE OF NEW YORK COUNTY OF MONROE
SUPREME COURT

THE PEOPLE OF THE STATE OF NEW YORK,

-vs- AFFIRMATION

(Defendant name),

Defendant.

STATE OF NEW YORK)
COUNTY OF MONROE) ss.:
CITY OF ROCHESTER)

(attorney name), an attorney admitted to practice in the State of New York, affirms under penalty of perjury pursuant to CPLR 2106 that:

1. I have been assigned to represent defendant in this action.

2. I make this affirmation in support of the relief requested in the annexed Notice of Motion and for such other and further relief as to this Court may seem just and proper.

STATEMENT OF FACTS

3. That on or about (date) an (type of accusatory instrument) was filed charging the defendant with (list charges).

4. The sources and grounds for your affiant's belief on the allegations made herein are conversations between your affiant and the defendant, an investigation conducted by members on staff at the Monroe County Public Defender`s Office, and a review of the various and sundry papers filed in

connection with this incident.

MOTION FOR DISCRETIONARY DISCOVERY

5. Defendant is seeking the following items of discretionary discovery:

(List items and who possesses them)

6. CPL Section 245.30(3) states that, “The court in its discretion may, upon a showing by the defendant that the request is reasonable and that the defendant is unable without undue hardship to obtain the substantial equivalent by other means, order the prosecution, or any individual, agency or other entity subject to the jurisdiction of the court, to make available for disclosure to the defendant any material or information which relates to the subject matter of the case and is reasonably likely to be material.”

7. The statute further requires that the motion be made upon notice to any person or entity affected by the order.

8. Defendant is seeking an order granting the following discretionary discovery from the following individuals and/or entities:

(List of discovery sought and from whom)

9. Defendant further submits that there is no substantial equivalent that can be obtained by other means, and that defendant is unable to access the above-described discovery or any claimed substantial equivalent without undue hardship to the defendant. Defendant submits that the items requested constitute a reasonable request by the defense, as required by the statute. (Add

argument and facts)

10. Defendant submits that the discretionary discovery is necessary to ensure that the defendant's rights to a fair trial, due process and the right to present a defense as protected by the New York State Constitution and United States Constitution are protected.

LEAVE TO MAKE FURTHER MOTIONS

11. The defense has attempted to encompass within this motion all possible pretrial requests for relief. I respectfully request that this court grant leave to apply for such other and further relief in the future as may be deemed justified, should the facts and circumstances not now within my knowledge indicate that such additional motions are warranted.

WHEREFORE, I respectfully request that this Court grant the relief requested herein and such other and further relief as may seem just and proper.

In the event that the prosecution fails to submit responsive pleadings contesting the factual assertions set forth above, the defendant respectfully requests that this

Court summarily grant the relief sought herein. (People v. Gruden, 42 N.Y.2d 214).

_____

(Name of attorney)

Affirmed this (date affirmed)

STATE OF NEW YORK COUNTY OF MONROE
(Court)

THE PEOPLE OF THE STATE OF NEW YORK

CPL 245.30
ORDER OF
DISCOVERY

vs.

JANE DOE,

Defendant.

A motion having been filed on (date) by the defendant, seeking discovery pursuant to CPL section 245.30 (specify subdivision 1 – preserving evidence, 2 – access to premises, or 3 – discretionary discovery), and such motion having been served upon the Monroe County District Attorney's Office as well as the impacted individuals and/or entities as follows:

And argument having been heard on (date), pursuant to CPL Section 245.30 (specify subdivision 1,2 or 3);

And this Court having made the following findings pursuant to CPL Section 245.30 (specify subdivision and findings) it is hereby

ORDERED that the defendant shall/shall not be granted (specify either 1 - preservation of evidence, which evidence, and for how long, 2 - access to premises and date when will be accessed and whether with police, or 3 - discretionary discovery, listing documents, and from whom)

SO ORDERED.

DATED:

_____

HON. (NAME)
MONROE COUNTY COURT JUDGE

STATE OF NEW YORK COUNTY OF (COUNTY)
(COURT)_____

THE PEOPLE OF THE STATE OF NEW YORK

CPL 245.50(2)
DEFENSE
CERTIFICATE OF
COMPLIANCE

-v-

(DEFENDANT)

_____

(Defense attorney name), an attorney admitted to practice in the State of New York, hereby states:

1. I am counsel to Timothy Donaher, Monroe County Public Defender, attorney for the defendant, (Defendant's name).

2. I am the Assistant Public Defender assigned to this case and as such I am fully familiar with its facts and records of this case.

3. After exercising due diligence and making reasonable inquiries to ascertain the existence of material and information subject to discovery, I state that I have disclosed and made available all known material and information subject to discovery pursuant to Criminal Procedure Law Article 245.

5. The items I provided are the following:

(List items)

Dated: Respectfully submitted,

_____
Attorney for defendant

STATE OF NEW YORK: COUNTY OF MONROE
(Intermediate Appellate Court for trial court)

_____

(Defendant's name)

Defendant/Appellant,

-vs-

CPL 245.70(6)
ORDER TO SHOW CAUSE

Index No. _____

Monroe County District Attorney's Office

Respondent.

_____

Defendant (name), having opposed an order of protection in the above named case on (date), and (judge's name and court) having granted such order of protection,

Now, upon reading and filing of defendant's proposed Order to Show Cause and the Affirmation of (defense counsel) and pursuant to CPL Section 245.70(6), it is hereby

ORDERED, that the Respondent(s), SHOW CAUSE before a term of this Court to be held on the __ day of (month and year) at ___ in the ___ noon, or as soon thereafter as counsel can be heard, why the protective order granted by (judge's name) pursuant to CPL 245.70 should not be vacated, and discovery not be granted to petitioner without an order of protection, and it is further

ORDERED, that a copy of this Order to Show Cause and Petition, and all

accompanying papers, be served upon Respondent Monroe County District Attorney's Office on or before (day, month, year) and that such be deemed good and sufficient service, and it is further

Ordered that a copy of this Order to Show Cause and Petition, and all accompanying papers, be served upon (the trial judge) on or before (day, month, year) and that such be deemed good and sufficient service.

Dated: (Date)
Rochester, New York

_____

Judge/Justice of the (name) Court

(Name of prosecutor)
Monroe County District Attorney's Office
Address

(Name of trial judge)
(Address of trial judge)

STATE OF NEW YORK: COUNTY OF MONROE
(Name of court)

_____

(Defendant's name),

Defendant/Appellant,

-vs- AFFIRMATION

Index No. _____

Monroe County District Attorney's Office,

Respondent.

_____

State of New York)
County of Monroe) ss:
City of Rochester

(Name of attorney) being duly sworn, states under penalty of perjury that this Affirmation is prepared by counsel on behalf of (Defendant's name), Defendant/Appellant, seeking an order to show cause why expedited review of an order of protection and reversal of the decision of (trial court judge/justice)'s decision should not be granted respectfully states to the Court:

1. Defendant/Appellant is the defendant in a case being prosecuted by the Respondent, the Monroe County District Attorney's Office under indictment number (number)/CR number (number).

2. The following allegations are made upon information and belief, the sources of which are my own knowledge, conversations with (name of defendant/appellant), and a review of the various and sundry papers associated with this case.

3. Defendant was arraigned on (list charges) on (date) in (court) before the Hon. (judge).

4. On (date) defendant was provided with discovery in this case.

5. On (date), pursuant to CPL 245.10 the prosecution notified defendant that they were withholding (list description or items of discovery) and seeking a protective order pursuant to CPL 245.70 limiting/denying disclosure of the withheld material.

6. On (date), pursuant to CPL 245.70(3), the trial court held a hearing to determine whether a protective order should be granted.

7. On (date) the trial judge, (name) issued an order limiting/denying disclosure of (describe or list items) pursuant to CPL 245.70. The order granting the prosecution's request for an order of protection is attached/was made orally in court on the record, and stated, in sum and substance (describe).

8. The filing of this motion is within two days of the issuance of the trial court's decision regarding the protective order, pursuant to CPL 245.70(6).

9. Defendant/appellant now moves this Court for an Order reversing the decision of (trial court judge) and vacating the protective order for the following reasons:

A. The hearing was untimely

Pursuant to CPL 245.70(3) a hearing must be held within three days of the request for an order of protection. In this case the request was made on (date) and the hearing was held on (date) (or has not been held?).

The defense was detrimentally impacted by the delay for the following reasons:

B. Good cause was not established by the prosecution in its motion for the protective order or at the 245.70(3) hearing.

Pursuant to CPL 245.70(4), the following factors are among those that may be considered by a court in determining whether good cause exists for issuance of an order of protection:

> …constitutional rights or limitations; danger to the integrity of physical evidence or the safety of a witness; risk of intimidation, economic reprisal, bribery, harassment or unjustified annoyance or embarrassment to any person, and the nature, severity and likelihood of that risk; a risk of an adverse effect upon the legitimate needs of law enforcement, including the protection of the confidentiality of informants, and the nature, severity and likelihood of that risk; the nature and circumstances of the factual allegations in the case; whether the defendant has a history of witness intimidation or tampering and the nature of that history; the nature of the stated reasons in support of a protective order; the nature of the witness identifying information that is sought to be addressed by a protective order, including the option of employing adequate alternative contact information; danger to any person stemming from factors such as a defendant's substantial affiliation with a criminal enterprise as defined in subdivision three of section 460.10 of the penal law; and other similar factors found to outweigh the usefulness of the discovery.

In this case the following factors were considered by the Court, but the Court improperly found that allegations in support of those factors supported a finding of good cause:

C. Additionally, the following claims made by the prosecutor constituted a presumption of guilt, and were not supported by any evidence:

D. The defendant is in need of the evidence at issue in order to confront and cross-examine witnesses, and establish the defense theory of the case for the following reasons:

The denial of this evidence will impair defendant's right to confront and cross-examine witnesses and to present a defense as protected by the New York State and United States Constitutions.

E. (Other reasons why order should be reversed)

10. Pursuant to CPL 245.70(6)(b) your affiant asserts that the ruling made by the trial court affects defendant/appellant's substantial interests.

11. Pursuant to CPL 245.70(6)(b) your affiant furthermore asserts that diligent efforts to reach an accommodation of the underlying discovery dispute with opposing counsel has failed and/or no accommodation was feasible. Specifically, on the below-listed dates the defense made the following efforts and was met with the following responses:

WHEREFORE, by this Petition-Affirmation it is respectfully requested that this Court grant an Order:

A. Reversing and vacating the Order of the trial court, issued on (date) granting a protective order to the Respondent and

B. Ordering such other and further relief as this Court deems just and proper.

Dated:

_____

(Attorney name)

Respectfully submitted,

TIMOTHY DONAHER
Monroe County Public Defender
Attorney for Appellant
BY: (name of attorney)
Special Assistant Public Defender
Of Counsel
10 N. Fitzhugh Street
Rochester, New York 14614
(phone)

STATE OF NEW YORK COUNTY OF MONROE
(Court) COURT

THE PEOPLE OF THE STATE OF NEW YORK,

-vs-

CPL 245.70
REPLY OPPOSING
PROTECTIVE ORDER

(Defendant's name),

Defendant.

Indict. No.
Filed:
Index No.

PLEASE TAKE NOTICE that upon the annexed affirmation of (attorney name), Esq., attorney for the defendant, the undersigned will move this Court, at a criminal term thereof, before the Honorable (Judge, Title, Court, at time and date) or as soon thereafter as counsel may be heard, for the following relief:

A. An Order pursuant to CPL Section 245.70 denying the prosecution a protective order;

B. An Order granting such other and further relief as this Court deems just and proper.

DATED: Rochester, New York
(Date)

Yours, etc.

TIMOTHY DONAHER
Monroe County PublicDefender
BY: (Attorney name)
Special Assistant Public Defender
10 North Fitzhugh Street
Rochester, New York 14614
(585) (attorney phone number)

TO: SANDRA DOORLEY
Monroe County
District Attorney

ATT (prosecutor name)
Assistant District Attorney

(individual or agency in possession of property)

STATE OF NEW YORK COUNTY OF MONROE
SUPREME COURT

THE PEOPLE OF THE STATE OF NEW YORK,

-vs- AFFIRMATION

(Defendant's name),

Defendant.

STATE OF NEW YORK)
COUNTY OF MONROE) ss.:
CITY OF ROCHESTER)

(attorney name), an attorney admitted to practice in the State of New York, affirms under penalty of perjury pursuant to CPLR 2106 that:

1. I am the Second Assistant Public Defender for the County of Monroe and have been assigned to represent defendant in this action.

2. I make this affirmation in support of the relief requested in the annexed Notice of Motion and for such other and further relief as to this Court may seem just and proper.

STATEMENT OF FACTS

3. That on or about (date) an (type of accusatory instrument) was filed charging the defendant with (list charges).

4. The sources and grounds for your affiant's belief on the allegations made herein are conversations between your affiant and the defendant, an investigation conducted by members on staff at the Monroe County Public Defender`s Office, and a review of the various and sundry papers filed in connection with this incident.

MOTOIN IN OPPOSITION TO PROTECTIVE ORDER

5. Defendant was notified on (date) that the prosecution was withholding evidence in anticipation of an effort to obtain a protective order pursuant to CPL 245.70.

6. CPL Section 245.70(1) sets forth the circumstances under which a court may grant a protective order limiting disclosure of statutory discovery. That statute states, “Upon a showing of good cause by either party, the court may at any time order that discovery or inspection of any kind of material or information under this article be denied, restricted, conditioned or deferred, or make such other order as is appropriate.”

7. In this case, the prosecution is seeking to restrict access by the defense to (list discovery).

8. CPL 245.70(4) describes the factors the court may consider in determining whether there exists good cause. That subdivision permits the court to consider “danger to the integrity of physical evidence or the safety of a witness, risk of intimidation, economic reprisal, bribery, harassment or unjustified annoyance or embarrassment to any person, and the nature, severity and likelihood of that risk; as well as a myriad of factors relating to law enforcement, whether a defendant has a history of witness intimidation or tampering, and more.

9. Notably, even if a defendant has a history of witness intimidation (which defendant does not), the statute requires an assessment of the nature of that history; such a history does not lead to an automatic grant of an order of protection. Thus, unsubstantiated claims must be given little or no weight by this Court.

10. (Review the factors in the statute)

11. Defendant submits, based on the above review of the factors a court may consider, there has been no good cause shown.

12. Furthermore, this Court may consider "constitutional rights or limitations." Defendant submits that access to full discovery is necessary to ensure that the defendant's rights to a fair trial, due process and the right to present a defense as protected by the New York State Constitution and United States Constitution are protected.

LEAVE TO MAKE FURTHER MOTIONS

13. The defense has attempted to encompass within this motion all possible pretrial requests for relief. I respectfully request that this court grant leave to apply for such other and further relief in the future as may be deemed justified, should the facts and circumstances not now within my knowledge indicate that such additional motions are warranted.

WHEREFORE, I respectfully request that this Court grant the relief requested herein and such other and further relief as may seem just and proper.

In the event that the prosecution fails to submit responsive pleadings contesting the factual assertions set forth above, the defendant respectfully requests that this Court summarily grant the relief sought herein. (People v. Gruden, 42 N.Y.2d 214).

_____
(Name of attorney)

Affirmed this (date affirmed)

Ethical Considerations Arising From Criminal Defense Reforms Pertaining to Pretrial Discovery

Matthew Alpern, Esq.
Director of Quality Enhancement
For
Criminal Defense Trials
NYS Office of Indigent Legal Services

ETHICAL CONSIDERATIONS ARISING FROM CRIMINAL DEFENSE REFORMS PERTAINING TO PRETRIAL DISCOVERY

GENERAL OBLIGATIONS

Statute: CPL Article 245

Issue 1: The new pretrial discovery rules and procedures set forth in CPL §245 are a radical departure from the narrow scope of previous disclosure requirements. They will inevitably become the subject of litigation as to their full scope and effect. What are the obligations of defense counsel in connection with these reforms?

Applicable Ethical Rule: NY ST RPC 1.1 Competence

(a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

(b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.

Practice Pointer: Defense attorneys are ethically bound to fully understand the new statute and zealously pursue full compliance with its requirements.

Issue 2: Judges and Prosecutors may pressure defense attorneys to waive the requirements of CPL Article 245 to save time and resources. What are the obligations of defense counsel in the face of any such pressure?

Applicable Ethical Rule: NY ST RPC 8.4 (e) Misconduct

A lawyer or law firm shall not:

(e) A lawyer may exercise professional judgment to waive or fail to assert a right or position of the client, or accede to reasonable requests of opposing counsel, when doing so does not prejudice the rights of the client.

> Comment: Paragraph (e) permits a lawyer to exercise professional judgment to waive or fail to assert a right of a client, or accede to reasonable requests of opposing counsel in such matters as court proceedings, settings, continuances, and waiver of procedural formalities, as long as doing so does not prejudice the rights of the client. Like paragraphs (f) and (g), paragraph (e) effectively creates a limited exception to the lawyer's obligations under Rule 1.1(c) (a lawyer shall not intentionally "fail to seek the objectives of the client through reasonably available means permitted by law and these Rules" or "prejudice or damage the client during the course of the representation except as permitted or required by these Rules").

Practice Point: Defense attorneys should rarely, if ever, waive prosecutorial compliance with the requirements of CPL Article 245.

This principle applies with particular force to waivers of discovery requirements in connection with plea negotiations since the prosecution cannot condition making a plea offer to a criminal offense on a waiver of discovery.

> See generally Lafler v. Cooper, 566 U.S 156 (2012) (explaining that a fair trial does not remedy inadequate assistance of counsel because "the right to adequate assistance of counsel cannot be defined or enforced without taking into account of the central role plea bargaining plays in securing convictions and determining sentences"); Missouri v. Frye, 566 U.S. 134 (2012) ("The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render . . . adequate assistance of counsel . . . ").

Defense attorneys should also very carefully consider waivers of 30.30 time given the strong connection between speedy trial reforms and enforcement of prosecutorial discovery obligations.

RECIPROCAL DISCOVERY OBLIGATIONS

Statute: Pursuant to CPL 245.20 (4) (a), the defense shall, subject to constitutional limitations, permit the Prosecution to discover, inspect, copy, or photograph any material and relevant evidence within the Defendant's or Counsel for Defendant's possession or control that is discoverable under CPL 245.20 (1) (f) (g) (h) (j) (l) (o) that the Defendant intends to introduce at trial or pretrial hearing and the names, addresses, birth dates, and all statements (written, recorded, summarized) of those persons other than the defendant whom the defendant intends to call as a witness at trial or pretrial hearing.

Issue 1: What are Defense Counsel's general obligations concerning the need to conduct an independent investigation?

Applicable Ethical Rule: NY ST RPC 1.3. Diligence

> (a) A lawyer shall act with reasonable diligence and promptness in representing a client.
>
> (b) A lawyer shall not neglect a legal matter entrusted to the lawyer.
>
> Commentary:
>
> [1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and in advocacy upon the client's behalf.

Applicable Criminal Defense Standard: American Bar Association, ABA Standards for Criminal Justice, Prosecution Function and Defense Function, standard 4–4.1 at 181 [3d ed. 1993], Failure to investigate:

> The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.
>
> Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of

conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities.

Significant Court of Appeals decision: People v. Oliveras, 21 N.Y. 3d 339 (2013)

Basic Facts:

Arrest for murder. Interrogation for 6.5 hrs. Mother informs police that client has mental health history. 730 examinations reveal defendant was fit to stand trial, but also noted he has a learning disability and certain mental health issues. Specifically, both psychiatric experts separately noted that defendant demonstrated a mild impairment of concentration and memory and was previously evaluated for auditory hallucinations. They both noted that defendant's intelligence was in the low average range. Trial counsel sought to build a defense based on defendant's mental weakness undermining the voluntariness of his admissions of guilt. Despite the focus on defendant's mental abilities, trial counsel chose to forgo any investigation of the critical documents concerning defendant's mental condition, and instead, sought to present this defense through the testimony of defendant's mother, an obviously biased witness.

Holding:

Ineffective Assistance of Counsel, conviction reversed

Legal Rule:

Essential to any representation, and to the attorney's consideration of the best course of action on behalf of the client, is the attorney's investigation of the law, the facts, and the issues that are relevant to the case (*see* *Strickland v. Washington*, 466 U.S. 668, 690–691, 104 S.Ct. 2052, 80 L.Ed.2d 674 [1984]). An attorney's strategy is shaped in significant part by the results of the investigation stage of the representation. Thus, "[a] **1246 defendant's right to representation does entitle him to have counsel conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself time for reflection and preparation for trial" (*People v. Bennett*, 29 N.Y.2d 462, 466, 329 N.Y.S.2d 801, 280 N.E.2d 637 [1972] [internal ***226 quotation marks omitted]; *see also* *People v. Droz*, 39 N.Y.2d 457, 462, 384 N.Y.S.2d 404, 348 N.E.2d 880 [1976] ["it is elementary that the right *347 to effective representation includes the right to assistance by an attorney who has

taken the time to review and prepare both the law and the facts relevant to the defense"]).

Decision:

Trial counsel did not fully investigate the case and did not collect the type of information that a lawyer would need in order to determine the best course of action for his or her client. It simply cannot be said that a total failure to investigate the facts of a case, or review pertinent records, constitutes a trial strategy resulting in meaningful representation. There is simply no legitimate explanation for this purported strategy (*see generally* *People v. Benevento*, 91 N.Y.2d 708, 712, 674 N.Y.S.2d 629, 697 N.E.2d 584 [1998]; *see also* *People v. Caban*, 5 N.Y.3d 143, 152, 800 N.Y.S.2d 70, 833 N.E.2d 213 [2005]; *People v. Rivera*, 71 N.Y.2d 705, 709, 530 N.Y.S.2d 52, 525 N.E.2d 698 [1988]). At a bare minimum, trial counsel should have obtained and reviewed the relevant records, and, after considering the pertinent information contained in the records, considered the contents of those records and pursued a strategy informed by both the available evidence and defendant's concerns. This failure seriously compromised defendant's right to a fair trial) (citation omitted).

Practice Point: Defense Counsel must thoroughly investigate the client's case. Failure to do so may constitute an ethical violation, a violation of basic criminal defense representation standards, and may result in a finding of ineffective assistance of counsel.

Issue 2: As set forth above, CPL 245 imposes greater disclosure requirements upon the defense. Moreover, the Court of Appeals has stated in People v. Copicotto, 50 N.Y. 2d 222, 226 (1980) that the "criminal discovery procedure embodied in article 240 . . . evinces a legislative determination that the trial of a criminal charge should not be a sporting event where each side remains ignorant of facts in the hands of the adversary until events unfold at trial." The question then becomes whether to disclose or not to disclose.

Applicable Ethical Rule: NY ST RPC 8.4 (c) (d) Misconduct

A lawyer or law firm shall not:

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

Practice Point: The timing and duty of disclosure of the above-referenced material is subject to a variety of legitimate considerations that substantially impact the scope and timing of defense attorney's obligations. Some examples to consider are set forth below.

Issues pertaining to Constitutional Limitations

Rule: don't have to disclose if doing so would violate client's constitutional rights

Question: how might client's constitutional rights be implicated by disclosure?

-Disclosure could be used by prosecution in developing its case-in-chief

-Incriminating with respect to some unrelated offense

-Unfair where court has allowed DA to withhold significant discovery under a protective order or where Prosecution does not have the same obligation under the statute (i.e., birth dates of defense witnesses)

Wardius v. Oregon, 412 U.S. 470 (1973) (due process violation)

-Witness testimony encompasses statements by client

Issues pertaining to Intent to Call Witness at Trial (belated disclosure)

Rule: don't have to disclose unless intend to call the witness at trial/hearing

Question: when does that intent form (how close to the trial)?

-Honestly have not decided on a theory of defense

-client uncooperative

-haven't located all witnesses necessary to establish defense and so cannot calculate strength of defense

-prosecution has a weak case and may want to challenge proof beyond a reasonable doubt

-No Indictment so don't know what possible defenses could be

-Defense cannot commit to a strategy (DA withholding info)

Some potentially useful caselaw in this area

People v. Gonzalez, 22 N.Y. 3d 539 (2014) (the legislature did not necessarily intend that a defendant be forced to disclose, ahead of trial, that his or her trial strategy depends entirely on evidence to be offered by the People. A defendant may not know at this early juncture what evidence the People intend to admit. -waiting for results of suppression hearing to decide)

People v. Rodriguez, 3 N.Y. 3d 462 (2004) (can alter strategy based on litigation as long as no bad faith)

People v. Harleston, 139 A.D. 3d 412 (1st Dept. 2016) (The court properly exercised its discretion in declining to preclude recorded phone calls made by defendant, notwithstanding that the prosecution did not advise the defense of their existence until the morning of opening statements. There is no basis for disturbing the court's credibility determination that, up until that moment, the prosecutor only intended to use these recordings for possible impeachment)

Some potential factors that may bear on the issue of "intent" to call a witness

-Genuinely on the fence about whether to call witness

-Still investigating for corroborating information
-documents
-other witnesses

-Still investigating negative information
-criminal history
-social media postings

-potential bias toward client
-mental health, substance abuse issues

-Still determining whether witness might have a privilege or is represented by counsel
-witness is possible participant

-Still determining whether witness testimony is admissible
-guilt of another
-relies in part on hearsay

-Prosecution possesses impeaching material

-Witness is reluctant or fearful

-Witness is hostile to the client

-Witness testimony cuts both ways

-Limited availability of preclusion sanction

-Sanctions can't violate Right to Present a Defense

-Lack of investigative resources

-Timing of defense investigation
-Still evaluating prosecution evidence

REPRESENTATIONS TO THE COURT

Statute: Pursuant to CPL 245.50 requires defense counsel is required to "serve on prosecutor and file with the court a certificate of compliance" which states that "after exercising due diligence and making reasonable inquiries, counsel has disclosed and made available all known material and information subject to discovery." The statute adds that there is "no adverse consequence from filing certificate of compliance in good faith."

Issue 2: When might the filing of Certificate of Compliance run afoul of a defense attorney's ethical obligations?

Applicable Ethical Rule: NY ST RPC 3.3 Conduct Before a Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

> Comment [3]: An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein because litigation documents ordinarily present assertions by the client or by someone on the client's behalf and not assertions by the lawyer . . . However, an assertion purporting to be based on the lawyer's own knowledge, as in an affidavit or declaration by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.

Practice Point: The tactical considerations listed above in connection with the defense attorney's formation of the intent to call a witness would apply with equal force in this area.

ADVICE TO WITNESSES

Statute: Pursuant to CPL 245.20 (4) (a) the defense must disclose the names, addresses, birth dates, and all statements (written, recorded, summarized) of those persons other than the defendant whom the defendant intends to call as a witness at trial or pretrial hearing.

Issue: Can the defense attorney request that a defense witness not speak to law enforcement?

Applicable Ethical Rule: NY ST RPC 4.3 Communicating with Unrepresented Persons

> In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

Practice Point: Defense attorneys must refrain from providing legal advice to a witness other than the advice to secure counsel as set forth in the RPC 4.3. Defense counsel may inform the witness that they do not have an obligation to speak with law enforcement officials or to reach out to law enforcement to provide the same information that they have provided to the defense. See People v. Dawson, 50 N.Y. 2d 311, 323 (1980) (prosecution cross-examination of a defense witness who did not come forward is not permitted where the failure to come forward is on the advice of defense counsel). Defense attorneys must also be careful to avoid any conduct that could be construed as witness intimidation or obstruction of justice.

Marching Through the Minefield

Navigating Criminal Defense Ethical Considerations With Confidence and Clarity

Matthew Alpern, Esq.
Director, Quality Enhancement, Criminal Defense Trials
NYS Office of Indigent Legal Services

Jami Blair, Esq.
Hurrell-Harring Implementation Attorney, Quality Enhancement
NYS Office of Indigent Legal Services

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Navigating Criminal Defense Ethical Considerations with Confidence and Clarity

Presented by:

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General Ethics

"The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him." (*Gideon v. Wainwright 83 S.Ct. 792 (1963)*)"

"Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." (Powell v. Alabama 287 U.S. 45 (1932)).

NYRPC PREAMBLE: A LAWYER'S RESPONSIBILITIES

- [1] A lawyer, as a member of the legal profession, is a representative of clients and an officer of the legal system with special responsibility for the quality of justice. As a representative of clients, a lawyer assumes many roles, including advisor, advocate, negotiator, and evaluator. As an officer of the legal system, **each lawyer has a duty to uphold the legal process; to demonstrate respect for the legal system; to seek improvement of the law; and to promote access to the legal system and the administration of justice**. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because, in a constitutional democracy, legal institutions depend on popular participation and support to maintain their authority.

- [2] The touchstone of the client-lawyer relationship is the lawyer's obligation to assert the client's position under the rules of the adversary system, to maintain the client's confidential information except in limited circumstances, and to act with loyalty during the period of the representation.

Competence

NYRPC 1.1 "Competence"

(a) A lawyer should provide competent representation to a client. *Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.*

(b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, *without associating with a lawyer who is competent to handle it*.

(c) A lawyer shall not intentionally:

(1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or

(2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

NYRPC 1.1 "Competence"

- [Comment 2] "A **newly admitted lawyer** can be as competent as a practitioner with long experience"
- [Comment 2] "Competent representation can also be provided through the **association of a lawyer of established competence** in the field in question."
- [Comment 8] "To maintain the requisite knowledge and skill, a lawyer should
  - (i) keep abreast of changes in substantive and procedural law relevant to the lawyer's practice ,
  - (ii) keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information, and
  - (iii) engage in continuing study and education and comply with all applicable continuing legal education requirements under 22 N.Y.C.R.R. Part 1500."
- [Comment 7A] If working with outside lawyer, informed consent from client depends on circumstances. Close direction and supervision, review work -> no consent. More autonomy and material role -> get consent.

NYRPC 5.1 "Responsibilities of Law Firms, Partners, Managers, and Supervisory Lawyers"

(d) A lawyer shall be responsible for a **violation of these Rules by another lawyer** if:

(1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; or

(2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the other lawyer practices or is a **lawyer who has supervisory authority** over the other lawyer; and

(i) **knows of such conduct** at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or

(ii) in the exercise of reasonable management or supervisory authority **should have known** of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.

NYRPC 5.1 "Responsibilities of Law Firms, Partners, Managers, and Supervisory Lawyers"

[Comment 4] Paragraph (d) expresses a general principle of personal responsibility for acts of other lawyers in the law firm. See also Rule 8.4(a).

[Comment 2] Paragraph (b) requires lawyers with management authority within a firm or those having direct supervisory authority over other lawyers to make **reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to these Rules**.

(iv) to ensure that inexperienced lawyers are appropriately supervised.

NYRPC 5.1 "Responsibilities of Law Firms, Partners, Managers, and Supervisory Lawyers"

[Comment 8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by these Rules. See Rule 5.2(a).

Rule 5.2(a) - A lawyer is bound by these Rules **notwithstanding that the lawyer acted at the direction of another person**.

Rule 5.2(b) - A subordinate lawyer does not violate these Rules if that lawyer acts in accordance with a supervisory lawyer's **reasonable resolution of an arguable question of professional duty**.

- [Comment 2] Subordinate should do their own research or consult w/ other lawyers.

Rule 5.3 "Lawyer's Responsibility for Conduct of Nonlawyers"

- Same supervision responsibilities apply to non-lawyers (secretaries, paralegals, law students, investigators, etc.) Esp. confidential information issues under Rule 1.6.

- NYSBA Eth. Op. 1166 (2019) – Good overview of supervisory duties over non-lawyers.
  - Cites Op. 774 which is directly related to supervisory duties over nonlawyers.

- In re Chatarpaul 271 A.D.2d 76 (2000) - Attorney failed to adequately supervise the work of a law graduate (among many other bad calls). Improper conduct in effort to collect fees.

- In re Roman 601 F.3d 189 (2d Cir. 2010) - Attorney failed to adequately supervise the work of an associate attorney. His associate prepared motions and signed Roman's name.

CONFLICT OF INTEREST

"We've discussed honesty as a policy, but, so far, it hasn't gained any momentum."

NYRPC 1.10(e) "Imputation of Conflicts of Interest"

(e) A law firm shall make a written record of its engagements, at or near the time of each new engagement, and **shall implement and maintain a system by which proposed engagements are checked against current and previous engagements** when:

(1) the firm agrees to represent a new client;

(2) the firm agrees to represent an existing client in a new matter;

(3) the firm hires or associates with another lawyer; or

(4) an additional party is named or appears in a pending matter.

NYRPC 1.10(e) "Imputation of Conflicts of Interest"

- Must establish procedures to find conflicts.
  - *See also* Rule 5.1 [Comment 2] – requires lawyers with management authority within a firm or those having direct supervisory authority over other lawyers to **make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to these Rules**.

- [Comment 9] This includes sole practitioners.

- [Comment 9A]
  - Firms/Organizations fault if conflict not determined because of failed system.
  - Still Individual Lawyers fault if she knew or should have know there was a conflict

NYRPC 1.7 "Conflict of Interest: Current Client"

(a) Except as provided in paragraph (b), a lawyer **shall not represent** a client if a reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing differing interests ; or

(2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer **may represent** a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client ;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing .

Joint Representation

- Wood v. Georgia (1981) – 6th amendment interpreted to include right of conflict free counsel.

- US v. Wheat (108 S.Ct. 1692 1988) 5-4 opinion – counsel of choice unless a conflict
  - Case-by-Case analysis.
  - Presumption in favor of counsel of choice unless actual conflict or serious potential for conflict.
  - Dissent did not think there was "serious potential" since D1 already pleaded guilty and D2 pleaded guilty and was awaiting ct approval (which was highly likely). Only a conflict if ct didn't accept plea agreement.

- NYSBA Eth. Op. 1070 (2105) – Co-client asked lawyer to send file to another lawyer, but not tell other co-clients. Opinion – lawyer should keep the request confidential, but should not share the file unless she can disclose the sharing with all co-clients. Presumption that the lawyer will share material information disclosed by one co-client in the matter with the other co-clients. *See also* NYRPC 1.7 [Comment 31].

Joint Representation Factors:

1. Related or Unrelated Matters
2. Timing – is information stale (ex. 2yrs vs. 9yrs) (Rule 1.3 “Diligence”)
3. Informed Consent – Gomberg inquiry
4. Level of defense / zealous advocacy (Rule 1.3 [Comment 1])

Joint Representation: NY Caselaw

(NY) People v. Gomberg 38 N.Y.2d 307 (1975) – NO CONFLICT

- Court must conduct inquiry into potential conflict (Gomberg-Type Inquiry)
- Ruling: Court's official inquiry validates "informed consent"
- Courts are required to make sure each defendant is aware of potential risks and has knowingly chosen to proceed.
- *BUT SEE*
  - *People v. Macerola,* 47 N.Y.2d 257, 264, 417 N.Y.S.2d 908, 391 N.E.2d 990 (1979) (failure to make *Gomberg* inquiry regarding joint representation does not alone deny defendant right to effective assistance of counsel
  - *People v. Cruz,* 63 N.Y.2d 848, 849, 482 N.Y.S.2d 259, 472 N.E.2d 35 (1984) (failure to conduct *Gomberg* inquiry not enough to establish right to new trial).
  - People v. Lombardo 61 NY2d 97 – NO CONFLICT - court's failure to conduct a *Gomberg* inquiry was error, but that reversal was not required because "defendant has not demonstrated 'that a conflict of interest, or at least the significant possibility thereof, did exist'

People v. Gonzalez 30 NY2d 28 (1972) – NO CONFLICT

- no differing interest and vigorous defense

People v. Mattison 67 N.Y.2d 462 (1986) – CONFLICT

- Actual conflict and consent was not informed

Joint Representation: NY Caselaw Cont.

- People v. Perez 70 N.Y.2d 773 (1987) – NO CONFLICT
  - indirect and distinctly remote possibility is not enough. LAS defended both, but unrelated charges dismissed before D's trial. Attorney was not involved in unrelated matter and vigorously cross examined the witness.
  - failure of ct to conduct a Gomberg inquiry NOT reversible error
- People v. Green 145 AD2d 929 (1988) – CONFLICT
  - Attorney never told D of conflict even though he only represented D2 at arraignment.
- People v. Smith 271 A.D.2d 752 (2000) – NO CONFLICT
  - PD office represented informant on unrelated matters and was relieved of representation of informant.
- People v. Watson 26 N.Y.3d 620 (2016) – CONFLICT
  - Determined conflict before trial.

Imputed Conflict

- NY Caselaw
  - People v. Wilkins 28 N.Y.2d 53 (1917) – NO CONFLICT
  - People v. Watson – CONFLICT – Timing
    - potential conflict was known before trial.
- NY Ethics Opinions
  - 935 (2012) – NOT IMPUTED - No per se prohibition against PD rep'ing private clients. Ex. part-time PD can represent private clients even in the same criminal court.
    - BUT, must consider 1.3 "Diligence"; 1.4 Prompt "Communication"; 1.7 Conflicts, among others.
  - 862 (2011) IMPUTED – If PD conflict -> part-time PD can't represent that client in her private practice unless the conflict can be waived (not an actual conflict) and it is waived w/ informed consent.

Duty of Confidentiality

NYRPC 1.6 "Confidentiality of Information"

- NYRPC 1.6(a) – Shall not knowingly disclose, UNLESS
  - (1) the client gives informed consent, as defined in Rule 1.0(j);
  - (2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or
  - (3) the disclosure is permitted by paragraph (b).

- NYRPC 1.6(b) – May disclose
  - BUT, may be required to testify under crime fraud exception even if you don't disclose.

  - NYRPC 1.6(b)(4) – Seeking advice – can disclose in order to get advice. Expert is now attorney's counsel and subject to confidentiality.

NYRPC 1.6 "Confidentiality of Information"

- NYRPC 1.6(b) – May disclose
  - (1) to prevent reasonably certain death or substantial bodily harm;
  - (2) to prevent the client from committing a crime;
  - (3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;
  - (4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;
  - (5) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or (ii) to establish or collect a fee; or
  - (6) when permitted or required under these Rules or to comply with other law or court order.

BUT, may be required to testify under crime fraud exception even if you don't disclose.

NYRPC 1.6 "Confidentiality of Information"

- NYRPC 1.6 [Comment 6]

  " Paragraph (b) permits, but does not require a lawyer to disclose information relating to the representation to accomplish these specified purposes".
  - (i) the seriousness of the potential injury to others if the prospective harm or crime occurs,
  - (ii) the likelihood that it will occur and its imminence,
  - (iii) the apparent absence of any other feasible way to prevent the potential injury,
  - (iv) the extent to which the client may be using the lawyer's services in bringing about the harm or crime,
  - (v) the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action, and
  - (vi) any other aggravating or extenuating circumstances.

Preserving Appellate Rights

Preserving Appellate Rights

- **Standards**
- CPL 460.10(1)(a) **-**Notices of appeal from judgments of conviction must be filed within 30 days of sentence being imposed.
  - Up to 1yr w/ Motion – based on attorney's "improper conduct"
- CPL 380.55 - mechanism for assigned trial counsel to effectuate the assignment of appellate counsel at sentencing by making an application before the sentencing judge for a finding of continued indigency.
- ILS ACP Standards 9.2(n) -18-B attorneys must consult with their trial-level client about whether they wish to appeal, regardless of whether there has been an appeal waiver. If the client wishes to appeal, trial counsel must file a timely notice of appeal.
- ABA Standards for Criminal Justice, Defense Function, 4-8.2.
- ABA Standards for Criminal Justice, Defense Function, 21-2.2.
- NLADA Performance Guidelines for Criminal Defense Representation. Guideline 9.2 (a), (b).
- NYSBA Revised Standards for Providing Mandated Representation. I-7(j).

Preserving Appellate Rights

Caselaw

- Jones v. Barnes – decision to appeal belongs to D.
- McCoy v. Louisiana - decision to appeal belongs to D.
- People v. June 242 AD2d 977 (1997) – The failure to notify the defendant of his right to appeal, in writing, even where there has been an appeal waiver, is improper and violates court rules.
  - A trial attorney who fails to file a notice of appeal requested by her client is constitutionally ineffective, even where there has been a waiver of the right to appeal. *Garza v Idaho*, 139 S Ct 738; *People v Syville*, 15 NY3d 391; *Campusano v United States*, 442 F3d 770 (2d Cir 2006). *See also Roe v Flores-Ortega*, 528 US 470 (lawyer who disregards defendant's specific instruction to file notice of appeal acts in a manner that is professionally unreasonable within meaning of 6th Amendment).

Preserving Appellate Rights

Caselaw Cont.

- People v. Loiseau (2016) – prosecutor used D's admission to his attorney. Proper even though D failed to preserve the issue for appellate review.
  - The failure to advise the defendant of his right to appeal is improper even if there is an appeal waiver. *Rojas-Medina v United States*, 924 F3d 9 (1st Cir.); *People v June*, 242 AD2d 977; *see also Campusano v United States*, 442 F3d 770 (2d Cir.).

- An appeal waiver never forfeits a client's right to appeal. CPL 450.10 (1) authorizes defendants to appeal to the Appellate Division, as a matter of right, from a judgment of conviction. And the Appellate Division has a constitutionally imposed duty "to entertain all appeals from final judgments in criminal cases." *People v Pollenz*, 67 NY2d 264; *see*, NY Const., Art. VI, §4 [k].

The Ethics of Social Media

- *See* **NYSBA Social Media Ethics Guidelines (2019)**

- Guideline 1.A – "Attorney's Social Media Competency (see NYRPC 1.1 – "Competence")
  - A lawyer has a duty to understand the benefits, risks and ethical implications associated with social media, including its use for communication, advertising and research and investigation.

- Gatto v. United Airlines 2013 WL 1285285 (2013) D sought spoliation sanctions against P
  - P injured on job and claimed complete disability
  - D sought Facebook access during discovery
  - **NOTE***:* Facebook objected to providing certain information related to Plaintiff's account due to concerns regarding the Federal Stored Communications Act. Facebook instead recommended that the account holder download the entire contents of the account as an alternative method for obtaining the information.
  - P deactivated his account after getting a notification that it was accessed by unknown account
    - **NOTE**: Facebook had "automatically deleted" the account fourteen days after its deactivation. As a result, the contents of Plaintiff's Facebook account no longer exist and cannot be retrieved.
  - D's motion for adverse inference instructions granted b/c P deactivated Facebook account.

Jury Selection

Guideline 6.A "Lawyers May Conduct Social Media Research"

- A lawyer may use soc. media to research jurors public profiles. (see NYRPC 3.5; 4.1; 5.3; 8.4)
- Think **Passive Viewing** – ABA Formal Op. 466 compared sending a request to accessing a jurors social media to "driving down the juror's street, stopping the car, getting out, and asking the juror for permission to look inside the juror's house because the lawyer cannot see enough when just driving past."

Guideline 6.B "A Juror's Social Media Profile May be Viewed as Long as There is No Communication with the Juror"

- Remember - make sure there is no **auto notice** – This might be communication. (see also NYCBA Formal. Op. 2012-12)

Guideline 6.C – "Deceit Shall Not Be Used to View a Juror's Social Media"

Guideline 6.E "Juror Misconduct"

- Must bring juror misconduct to court. Be careful what you look at. (NYRPC 3.5(d)).

Records

Guideline 3.C "Retention of Social Media Communication with Clients"

- If an attorney utilizes social media to communicate with a client relating to legal representation, the attorney should retain records of those communications, just as she would if the communications were memorialized on paper (ex. can't get ahold by text or email so you decide to private message on Facebook).
  - NYRPC 1.0(x) - expands definition of "writing" to range of electronic communications.
  - NYRPC 1.15 – 7 year retention.

Records

Guideline 5.A "Removing Existing Social Media Information"

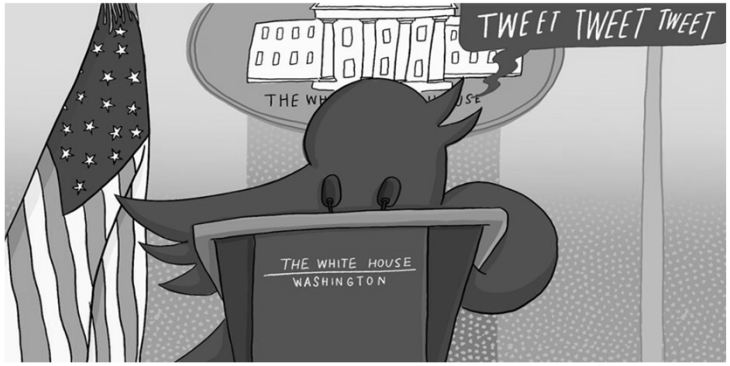
- A lawyer may advise a client as to what content may be maintained or made nonpublic on her social media account, including advising on changing her privacy and/or security settings…
- …A lawyer may also advise a client as to what content may be 'taken down' or removed, whether posted by the client or someone else.
  - However, the lawyer must be **cognizant of preservation obligations** applicable to the client and/or matter, such as a statute, rule, regulation, or common law duty relating to the preservation of information, including legal hold obligations….
  - …Unless an appropriate record of the social media content is preserved, a part or nonparty may not delete information from a social media account that is subject to a duty to preserve."

- [Comment] You can proactively advise client as to what to remove or what security settings required if not related to pending or reasonably anticipated litigation.

Records

Guideline 5.B "Adding New Social Media Content"

A lawyer may advise a client with regard to posting new content on social media, as long as the proposed content is not known to be false by the lawyer.



BUT, a lawyer may not 'direct or facilitate the client's publishing of false or misleading information that may be relevant to a claim.

Private Attorney Accounts (Guideline 2)

- NYCLA Op. 748 – LinkedIn w/ specializations may be "advertising".
  - Recommendations from others fall under NYRPC 7.1(d) and (e).
  - See also NYC Bar Op. 2015-7 (less strict)

- Guideline 2.C – must monitor what others put on your social media.

- Guideline 2.E – communications could create conflicts/ineffective claims.

- Guideline 3.A – informal communication may create attorney – client relationship.

- Guideline 3.C – can't delete accounts used to comm. Unless comm. Is preserved. (NYCBA Op 2008-1).

Viewing Soc. Media

Guideline 4.A Viewing a Public Portion of a Social Media Website"

- Represented - Ok to view public accounts even if represented.
- **Guideline 4.C** - Must get consent by counsel to "friend" represented individual (see NYRPC 4.2)

Guideline 4.B "Contacting an Unrepresented Party and/or Requesting to view a Restricted Social Media Website"

- Unrepresented – ok to "friend" but must tell who you are/affiliation (see NYRPC 4.1; 4.3; 8.4)
- Must follow state guidelines if interacting with individuals in other states.
- *See* also NYCBA Formal Op. 2010-2 (2010)

Guideline 4.D "Lawyer's Use of Agents to Contact a Represented Party"

- Responsible for paralegal, investigator, etc. as well. (see NYRPC 5.3; 8.4)
- If auto receipt/notice of viewing (ex. LinkedIn) = communication esp. if lawyer knows they will get notice.
  - Remember NYRPC 1.1 – competency means you must know platforms policies. So if you claim you're not aware of auto notice, you could still be unethical.