2019 Criminal Justice Reforms – Preliminary Advisory

Below is an initial Practice Advisory summarizing highlights of the Criminal Justice Reforms. Detailed Practice Advisories on each issue will be distributed in the near future. Trainings for all CDP attorneys (including weekend dates with Comp Days) will also be announced soon.

These reforms will dramatically help our clients and fundamentally alter our practice in many ways. Thank you to everyone at LAS and our community partners who worked hard to make these changes happen!

The reforms are effective January 1, 2020. They will apply to all cases pending on that date – regardless of when the case commenced. Until then, with respect to some of the reforms (especially bail and discovery), we strongly urge counsel to try to seek voluntary or court-ordered compliance based on legislative intent and fairness – and, as the effective date approaches, based on the DA's imminent need to be in compliance. Judges and prosecutors have enormous amounts of discretion to enact these changes today.

Here is an overview of some of the principal changes:

Bail:

With respect to bail, all signs were pointing toward ending cash bail in New York State. However, the landscape changed after law enforcement and a judicial task force began a concentrated push to add a public safety consideration to the statute. It became clear that there was no path for us to get a bill that would end cash bail without the addition of a public safety consideration. Luckily the bill that passed does not include a public safety consideration, drastically reduces the use of cash bail through mandatory release, and provides additional procedural and due process safeguards.

The bill has a mandatory DAT provision that provides court notifications for everything up to an E Felony. At the arrest phase, the bill mandates that an arresting officer must issue a Desk Appearance Ticket in all cases except those where the arrest is for a Class A, B, C, or D felony or a violation of some sex offenses, escape, and bail jumping. There are circumstances where the police are not required to issues DATs even on eligible cases, for example if the court can issue an order of protection or suspend/revoke a driver's license. The arrestee "may" provide contact information to receive court notifications, including a phone number or email address.

The bill has a mandatory release or release with nonmonetary conditions for almost all misdemeanors and non-violent felonies. All persons charged with misdemeanors (except sex offenses and DV contempt), non-violent felonies, robbery in the second, and burglary in the second, must be released on their own recognizance unless it is demonstrated and the court makes a determination that the principal poses a risk of flight to avoid prosecution. Otherwise, they must be released with nonmonetary conditions (pretrial services) that are the least restrictive condition(s) that will reasonably assure the principal's return to court.

For all other charges the system will largely remain the same. When charged with a "qualifying offense" the court may release the person on his or her own recognizance or under non-monetary conditions, fix bail, or if the offense is a qualifying felony, the court may remand the person. The offenses that qualify for money bail or remand are: violent felony offenses (except Rob 2 [aided] and Burg 2 [of a dwelling]); felony witness intimidation; felony witness tampering; Class A felonies other than drugs (except a "director of a drug organization" under 220.77); some felony sex offenses under 70.80; incest involving children; terrorism charges except 490.20; conspiracy to commit Class A felony under P.L. 125; and misdemeanor sex offenses and DV misdemeanor contempt (still not remand eligible, continue to be eligible for bail as under current law).

Money bail now has additional protections from abuse. If monetary bail is set on a person charged with a qualifying offense, the court must set it in three forms including either *unsecured* or *partially secured* security bond. When setting money bail the court must consider the principal's financial circumstances, ability to post bail without posing an undue hardship, and the principal's ability to obtain a secured, unsecured or partially secured bond. Courts will now have to issue on the record findings to justify their decision-making.

New options will be available to courts to aid people in returning to court instead of using money bail. In all instances, the court or a designated pretrial service agency will notify all people ROR'd or released with conditions of all court appearances in advance by text messages, telephone call, email or first class mail. Prior to issuing a bench warrant for a failure to appear for a scheduled court date, the court will provide 48 hours' notice to the principal or principal's counsel that the principal is required to appear in order to give him or her the opportunity to voluntarily appear.

Additionally, electronic monitoring will be available for a limited subset of cases, but will be placed behind rigorous due process protections. Electronic monitoring is considered incarceration for 180.80 and 170.70 purposes, and may only be imposed for 60 days with the option of continuing only upon a de novo review before a court. Electronic monitoring must also be the least restrictive means to ensure return to court and be "unobtrusive to the greatest extent possible."

There are many more provisions in this bill. We will send a full summary of the bill shortly.

Speedy Trial / CPL 30.30:

DA's "ready" statement is not valid unless DA has filed a proper "certificate of compliance" affirming that discovery obligations under new CPL 245.20 discovery statute are complete (unless court finds "exceptional circumstances").

"Partial readiness" / "partial conversion" is no longer a valid doctrine for misdemeanors – DA cannot state "ready" on some counts without certifying that all other counts are converted or dismissed.

VTL infractions are considered "offenses" for 30.30 purposes – this eliminates the problem of a lingering VTL 1192(1) or 509 count after a 30.30 dismissal of higher charges.

Where DA states "ready" for trial, the judge must make an inquiry on the record as to their actual readiness.

30.30 release motions no longer have to follow the procedural rules for motions to dismiss – so they can be made orally and do not need to be on advance notice to DA. Where periods are in dispute, the judge must conduct a prompt hearing and DA has burden of proving excludability.

Denial of a 30.30 dismissal motion can be appealed following a guilty plea (but is still subject to a valid waiver of appeal).

Subpoenas:

The new statute discards the 24-hour notice requirement for defense subpoenas on government agencies, as well as any requirement of service on the DA. The defense now only needs a court-indorsed subpoena for governmental agencies, with minimum of 3 days for the agency to comply. The DA is not notified unless the agency voluntarily informs DA.

When a subpoena is challenged by a motion to quash or questioned by the judge prior to indorsement, **the defense must only show a factual predicate that the item or witness is "reasonably likely to be relevant and *material* to the proceedings."** The prior standard set by case law was an advance showing that the item or witness was likely be "relevant and *exculpatory*."

Discovery:

Discovery is automatic – not by written "demands" or discovery motions.

Statute requires true "open file" discovery from DA. The provision listing the DA's discovery obligations states that DAs must disclose "*all items and information that relate to the subject matter of the case*" and that are in DA's or law enforcement's possession, "including *but not limited to*" all of the listed items. It also states that when interpreting DA's discovery obligations, there is a **"presumption of openness"** and **"presumption in favor of disclosure."**

There is also a right to **full discovery before withdrawal of plea offers by the DA** (in situations where the offer requires a plea to a crime).

Discovery **from the defense** is also greatly expanded.

Timing of DA's Discovery:

DA's discovery occurs "as soon as practicable but not later than **15 calendar days after defendant's arraignment" on any accusatory instrument** – including a misdemeanor complaint, felony complaint, or any other instrument. This means that the DA's discovery clock starts to run at criminal court arraignment in almost all cases.

The DA's fifteen-day period can be extended without motion by up to 30 calendar days if discoverable materials are exceptionally voluminous, or if they are not in the DA's actual possession "despite diligent, good faith efforts." If DAs are allowed to invoke this extension, full discovery will be required 45 days after first appearance.

There are certain automatic timing extensions for some types of evidence (grand jury minutes, expert witness information, exhibits, electronically stored information).

DA can seek court-ordered modification of discovery time periods "in an individual case" based on showing of "good cause."

There is a special rule for the client's statements to law enforcement. Where the client has been arraigned on a felony complaint, the DA must disclose **all such statements no later than 48 hours before the scheduled time for defendant to testify at the grand jury**.

DA must file and serve a "certificate of compliance" upon completion of discovery (aside from items under a protective order). Certificate must affirm due diligence and reasonable inquiries; turnover of all known information; and list disclosed items.

As noted in the "speedy trial" summary above, **DAs cannot validly state "ready" to stop the CPL 30.30 clock until a proper certificate of compliance is filed/served** (unless court finds "exceptional circumstances" – a high standard under existing 30.30 case law).

DA discloses defendant's **prior bad acts** that will be offered under either *Molineux* or *Sandoval* "not later than **15 calendar days before trial."**

DA's Discovery (Within 15/45 Days of First Appearance) Includes:

Defendant's and co-defendant(s)' statements to a public servant engaged in law enforcement activity. This is no longer limited to "jointly tried" co-defendants, and no longer excludes statements made in course of criminal transaction.

Grand jury transcripts of any person who testified in relation to the subject matter of the case, including defendants. Obviously, in many cases, grand jury proceedings will not have occurred (or minutes will not have been transcribed) when discovery is due 15 (or 45) days after first appearance. The DA gets an additional automatic 30-day extension if grand jury transcripts are unavailable due to limited court reporter resources (so disclosure in that situation can occur 75 days after first appearance). Beyond 75 days, DA must seek court-ordered modification of discovery time period, and the minutes are subject to the general "continuing duty to disclose."

Names and "adequate contact information" for <u>all persons</u> (not just testifying witnesses) whom DA knows have information relevant to any charged offense or potential defense. DA also must designate witnesses who "may be called." Physical address not required, but defense can move for disclosure of physical address for "good cause."

All written or recorded statements of <u>all persons</u> whom DA knows have information relevant to any charged offense or potential defense, including all police and law enforcement agency reports and notes of police and other investigators.

Expert opinion evidence, including credentials (CV, list of publications, and proficiency tests/results from past 10 years) and all written reports or, if no report exists, a written summary of facts/opinions in testimony and grounds for all opinions.

All electronic recordings, including all 911 calls and all other recordings up to 10 hours in total length. If more than 10 hours exist, DA must turn over those it intends to introduce at trial or hearing, plus known information describing additional recordings. Defense counsel then has right to obtain any of the other recordings it wants within 15 calendar days of request.

All photos and drawings.

All reports of scientific tests/examinations, including all records, underlying data, calculations and writings

All favorable evidence and information known to DAs and law enforcement personnel acting in the case. This provision uses the same categories as OCA's "Brady Order," but all disclosures are moved up to 15 days (or 45 days) after first appearance. It also specifies that DAs must disclose "expeditiously upon its receipt."

List of all potentially suppressible tangible objects recovered from defendant or co-defendant, with DA's designation of: actual or constructive possession, abandonment, whether DA will rely on statutory presumption of possession, and location where each item recovered if practicable. Right to inspect or test property as well.

Search warrants and related documents.

"All tangible property" that relates to subject matter of case, including designation of which exhibits DA will introduce at trial or pretrial hearing.

Complete record of judgments of conviction for all intended DA witnesses and all defendants.

DWI cases – records of calibration/certification/inspection/repair/maintenance for all testing devices for the periods 6 months before and 6 months after the test, including gas chromatography reference standard records.

Electronically stored information ("ESI" – from computers, cell phones, social media accounts, etc.) seized or obtained by or on behalf of law enforcement, either from the defendant or from another source that relates to the subject matter of the case. If device/account belongs to the defendant, DA must disclose complete copy of all of the ESI on device/account.

***Pre-Plea Discovery*:**

If the DA makes an offer that requires a plea to a crime (but not a violation), the DA must disclose all items and information that would be discoverable prior to trial **not less than 3 days before the plea deadline for felony complaints or not less than 7 days before the plea deadline for other accusatory instruments**. The shorter period for felony complaints is designed to accommodate CPL 180.80 deadlines. Note that the pre-plea discovery provisions do not seem to apply to a sentencing promise by the judge on a plea to the top charge.

DAs cannot condition making a plea offer on waiver of discovery rights.

Where the defendant has rejected the plea offer and a violation of this discovery requirement is discovered, then the judge must consider the impact of the violation on defendant's decision to accept or reject the offer. **If the violation "materially affected" the decision and DA refuses to reinstate the offer, the court "must" – "as a presumptive minimum sanction" – "preclude the admission at trial** of any evidence not disclosed as required" by statute.

Courts may also take "other appropriate action as necessary" on pre-plea discovery violations. For example, if the discovery violation involved a defendant who entered a plea (as opposed to one who did not accept the offer), the remedy could be vacating the conviction when the discovery violation involved a *Brady* violation that would have changed the defendant's decision.

***Discovery From Defense*:**

Defense must provide its discovery to DA **30 calendar days after service of DA's "certificate of compliance"** affirming DA completed discovery. There are automatic timing extensions for certain types of evidence (expert witness information and exhibits).

Defense discovery obligations have been expanded to include witness names and statements within this 30-day period. But when the defense intends to call a witness for the "sole purpose of impeaching" a DA's witness, it does not have to disclose the person's name/address or statements until after DA's witness has testified at trial. This rule will have significant practice implications for our investigations.

Discovery from defense applies only to 8 specific things that defense "intends to introduce" at trial or hearing, including:

▪ **(1.)** Names, addresses and birth dates of witnesses whom defense intends to call at trial or hearing. ▪ **(2.)** Written and recorded statements of witnesses whom defense intends to call at trial or hearing (other than the defendant). ▪ **(3.)** Expert opinion evidence for experts whom defense intends to call at trial or hearing, including credentials and reports and underlying documents. If no written report was made, a written statement of facts/opinions to which the expert will testify must be disclosed. ▪ **(4.)** Recordings that defense intends to introduce at trial or hearing. ▪ **(5.)** Photos/drawings that defense intends to introduce at trial or hearing. ▪ **(6.)** Other exhibits ("tangible property") that defense intends to introduce at trial or hearing. ▪ **(7.)** Scientific testing/examination reports and documents that the defense intends to introduce at trial

or hearing. ▪ **(8.)** Summary of promises/rewards/inducements to intended defense witnesses, and requests for consideration by intended defense witnesses.

Defense counsel must file/serve a "certificate of compliance" upon completion of discovery (aside from items under a protective order). Certificate must affirm due diligence and reasonable inquiries; turnover of all required information; and list disclosed items.

Other Notable Discovery Provisions:

Every New York police or law enforcement agency must, upon DA's request, **make available to DA a "complete copy of its complete records and files"** relating to case to facilitate discovery compliance.

Arresting officer or lead detective must expeditiously notify DA about **all known 911 calls, police radio transmissions, and other police video and audio footage and body-cam recordings** "made or received in connection with the investigation of an apparent criminal incident" – and DA must expeditiously take all reasonable steps to ensure all known recordings "made or available in connection with the case" are preserved. If DA fails to disclose a recording due to any failure to comply with this provision, court "shall" impose an appropriate sanction.

Defense may move for a **court order that grants defense access to a relevant location or premises** to inspect, take photographs, or make measurements.

Defense may move for a **court order that grants discretionary discovery of any other items or information** not covered by the statute.

There are newly codified standards for imposing sanctions/remedies for discovery violations, based on existing case law.

Either party can obtain **expedited review by a single appellate justice of a ruling that grants or denies a protective order** relating to the name, contact information or statements of a person.

Note on Varying Start Dates for Different Statutory Clocks:

Counsel must remember that the new CPL Article 245 (discovery), CPL 710.30 (statement/identification notices), and CPL 30.30 (speedy trial) will each have different triggering dates! Specifically:

▪ **(1.)** Under the discovery statute (Art. 245), the DA's 15-day (or 45-day) period to provide discovery starts to run upon defendant's *arraignment on any accusatory instrument*, including a misdemeanor complaint or felony complaint. ▪ **(2.)** Under the statement/identification notice statute (710.30), the DA's 15-day period to give notices starts to run upon defendant's *arraignment on an information or indictment*. ▪ **(3.)** Under the "speedy trial" statute (30.30), the clock starts to run upon *filing of any accusatory instrument*, including a misdemeanor complaint or felony complaint. ▪ **(4.)** But for DATs (which will be more common given the new bail reforms), the 30.30 clock starts to run *on the date when the defendant first appears* in court in

response to the DAT [see 30.30(5)(b)] (for discovery in DAT cases, the DA's clock to provide discovery will still begin when defendant is *arraigned on a complaint*).

364-Day Maximum Sentence for Misdemeanors:

The bill reduces the maximum sentence of Class A and certain unclassified misdemeanors from 1 year to 364 days. This law will benefit immigrant New Yorkers in several important ways.

It will eliminate the possibility of New York misdemeanors becoming aggravated felonies because of a one year sentence. The Immigration and Nationality Act defines many aggravated felony offenses – including Theft offenses, Crimes of Violence, and counterfeiting offenses – by an actual sentence of one year or longer. By reducing the possible maximum sentence, the bill eliminates the potential plea bargain of "an A and a year" and the possibility of a non-citizen defendant receiving an aggravated felony as a result of being convicted of an A misdemeanor after trial. In addition to subjecting a non-citizen to mandatary detention while in removal proceedings and to barring an lawful permanent resident from applying for United States citizenship, an aggravated felony conviction after 1996 leads to certain deportation.

The new law will also mean that one New York misdemeanor conviction that is a crime involving moral turpitude will no longer render a lawful permanent resident deportable from the United States. As a result of this bill it will take at least two misdemeanor crimes involving moral turpitude – whether they be A or B misdemeanors – to trigger the deportation statute.

Finally, under current immigration law, one crime involving moral turpitude that is an A misdemeanor or more serious bars non-citizens from applying for Non-LPR Cancellation of Removal – the only form of relief available in removal proceedings to many of our undocumented clients who have children, spouses, or parents who are U.S. citizens or lawful permanent residents. The new law should make it possible for many more of our non-citizen clients to successfully defend themselves against deportation and to remain with their families as contributing members of our communities.

Other Significant Reforms:

An end to license suspension for non-driving drug convictions.

A prohibition on employment and housing discrimination against people with open ACDs.

Application of Article 23A protections against baseless discrimination for people with criminal records to certain state-operated professional licenses.

A prohibition on release of mugshots for certain cases (still unclear if/how this will work).

An expedited closure of 3 state prisons.

A requirement for local police chiefs to report to DCJS on police use of force with demographic data and for the latter agency to release it publicly annually, and a version of the Domestic Violence Survivors Justice Act.

Asset forfeiture reforms.

Additional detailed Practice Advisories on these issues – and trainings for staff – will follow!

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