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2020: Reforming Discovery Reform

Written Materials for the Rensselaer County Bar Association CLE Presentation on Discovery Amendments and Revisions to the 2019 Bail and Discovery Reforms

This past April, in Part UU of Budget Bill S7506B, the New York State Legislature adopted new amendments to the bail and discovery reform that went into effect January 1, 2020. These new amendments went into effect on May 3, 2020 for the discovery and speedy trial amendments, and July 2, 2020 for the bail amendments.

CPL § 245.10 Timing of Discovery

On January 1, 2020, the new reform introduced automatic discovery to New York's criminal court system. With the original reforms that went into effect in January, a prosecutor was required to provide initial discovery within 15 days of arraignment pursuant to CPL § 245.10(1)(a). Effective May 3, 2020, the new amendment now states that the time periods for initial discovery are dependent on the release status of the accused and addressed in CPL § 245.10(1)(a)(i-ii). For a defendant who is in custody pending trial, initial discovery must be performed within 20 days of the arraignment. CPL § 245.10(1)(a)(i). For a defendant not in custody pending trial, the prosecution must perform their initial discovery obligations within 35 days of the defendant's arraignment. CPL § 245.10(1)(a)(ii).

In addition to the changes in the timeline for initial discovery, the amendment also addresses "exceptionally voluminous" materials. In the original adoption of CPL § 245.10(1)(a), so long as the prosecution demonstrated that the materials were "exceptionally voluminous," or that despite diligent, good faith efforts, the materials were not in the actual possession of the prosecution, the statutory time limit could be stayed temporarily. In the amendment effective May 3, 2020, the legislature explicitly states "when discoverable materials, including video footage from body-worn cameras, surveillance cameras, or dashboard cameras, are exceptionally voluminous. . ." indicating the legislature's intention for prosecutors to use CPL § 245.10(1)(a) as an avenue to obtain an extension of up to 30 days without filing a motion, something that may not have been clear in the original statute.

The next amendment appears in the introduction of CPL § 245.10(1)(a)(iii), which provides initial discovery timelines for certain petty level offenses. This new subsection creates a new categorical discovery timeline (aside from the prosecutor's obligations set forth in CPL § 245.20) when a defendant is charged with a Vehicle and Traffic Law infraction, or a petty

offense defined by the municipal code of a village, town, city, or county, and the charge or charges do not carry a statutorily authorized sentence of imprisonment, and where the defendant stands charged before the court with no crime or offense. In these cases, the initial discovery must be turned over as soon as practicable, but not later than 15 days before the scheduled date of the trial. The new amendment also notes that nothing in this subparagraph will prevent the defense from filing a motion for the disclosure of such evidence at an earlier date.

Withholding information is further expanded upon in the amendment that creates CPL § 245.10(1)(a)(iv)(A). This new subsection allows prosecutors to withhold any non-discoverable information from their discovery materials pending a determination and ruling from the court pursuant to CPL § 245.70. Upon filing this motion, the prosecution must also notify the defense in writing that information will be withheld and any portions deemed discoverable would be disclosed to the extent practicable. Among the non-discoverable materials, the new amendment provides for the withholding of the identity and contact information of the 911 caller or witness to offenses defined under PL § 130 sex offenses, PL § 230.34 sex trafficking, PL § 230.24-a sex trafficking of a child, or any other victim or witness in a case where the defendant has a substantiated affiliation with a criminal enterprise, as defined in PL § 460.10. However, the amendment also allows the defendant to move for the court to compel disclose of the withheld information.

The next amendment introduces CPL § 245.10(1)(a)(iv)(B) motion for extension. This amendment allows prosecutors to request an extension on the timeline for initial discovery when discoverable materials are exceptionally voluminous, or despite diligent, good faith efforts, are otherwise not in the actual possession of the prosecution pursuant to CPL § 245.70. Further, the new amendment states that for the purposes of this article, voluminous materials may include, but are not limited to, video footage from body worn cameras, surveillance footage, or dashboard cameras. This subsection essentially expands on the options for extensions listed in CPL § 245.10(1)(a).

CPL § 245.20 Automatic Discovery

CPL § 245.20(1)(c) civilian list is the next subsection amended by the New York State Legislature. After January 1, 2020, the prosecution was required to turn over the name and adequate contact information for all persons other than law enforcement whom the prosecution knew to have evidence or information relevant to any offense charges or any defenses, and a requirement to indicate whom they intend to call as witnesses. The original statute also explicitly stated that nothing in this paragraph requires the disclosure of physical addresses, however, upon motion and showing of good cause, the court may direct the disclosure of a physical address. Under the amended statute, the prosecutor may, without filing a motion under CPL § 245.70, withhold and redact information under this subdivision relating to the 911 caller's identity, the victim or witness of an offense defined under PL § 130 sex offenses, PL § 230.34 sex trafficking, and PL § 230.34-a sex trafficking of a child, or any witness to a crime where the defendant has a substantial affiliation with a criminal enterprise, as defined in PL § 460.10. Prosecutors could already withhold and redact similar information regarding confidential informants without a motion under the original discovery reform that went into effect January 1, 2020. Unless the

court rules otherwise for good cause shown, the prosecution is then required to notify the defense of that material being withheld.

The next amendment is in CPL § 245.20(1)(f) expert reports and credentials. The original text required the prosecution turn over all proficiency tests and results administered or taken within the last ten years. The new amendment simply changes the requirement from "all" to "a list of" proficiency tests and results administered or taken within the past ten years of each expert witness.

CPL § 245.20(1)(g) sees greater changes derived from the amendment regarding electronic recordings. The amendment to this section allows the prosecution to withhold the names and identifying information of any person who contacted 911 without a protective order pursuant to CPL § 245.70, however, the defense may move for disclosure of said information. Under the new amendment, should the prosecution wish to call the 911 caller as a witness at trial or at a hearing, they are still required to disclose the name and adequate contact information as soon as practicable, but no later than 15 days before trial. No other portion of this subsection was amended.

Scientific Reports and Documentation are contained in CPL § 245.20(1)(j). Notwithstanding the original language, the amendment now explicitly states that the prosecution may not be required to provide information relating to the results of "physical or mental examinations, or scientific tests or experiments or comparisons, unless and until such examinations, tests, or comparisons have been completed." CPL § 245.20(1)(j).

CPL § 245.25 Disclosure Prior to Certain Guilty Pleas

The original text of CPL § 245.25(2) outlines the defendant's right to initial discovery with respect to accepting or rejecting a plea offer. The amendment to this section now requires the prosecution provide initial discovery as soon as practicable but no later than 15 days before the trial of any petty offense defined as a Vehicle and Traffic Law traffic infraction, or a petty offense defined by the municipal code of a village, town, city, or county, and the charge or charges do not carry a statutorily authorized sentence of imprisonment, and where the defendant stands charged before the court with no crime or offense. However, as provided in this subsection, the defense may file a motion to compel such evidence at an earlier date under CPL § 245.20.

The legislature added a new subsection in CPL § 245.25(3) repleader. This new amendment states that a waiver of discovery can be a condition of an agreement between the parties vacating the defendant's original conviction based on an agreement between the parties formed under CPL § 440.10.

CPL 245.30 Court Orders for Preservation, Access, or Discovery

While this chapter was unchanged by the amendments passed on April 3, 2020, recent debate has arisen over a defendant's right to visit and inspect the scene where the crime is alleged to have taken place. CPL § 245.30 governs court orders for the preservation, access and discovery of evidence. CPL § 245.30 provides courts the authority to: order a crime scene

preserved for a specific period of time; order defense be allowed to inspect, photograph and measure the scene provided defense counsel files a motion to do so; and order any materials or information related to the case be turned over to the defense when they are controlled by the prosecution, or any individual, agency or other entity subject to the court's jurisdiction. Specifically, CPL § 245.30(2) allows defense counsel to file a motion for access to a crime scene or premises relevant to the case for the purpose of inspection, photographing or measuring the scene or premises, and requiring the premises remain unchanged in the interim. For defense counsel to gain access, the court must weigh the defense's need for access against the privacy and actual hardship of the premises owner but can still deny the motion if the probative value of the evidence can be preserved in an alternative manner.

Outside the requirements laid out by the legislature, two important questions remain: who is actually able to enter the premises at issue, and when the motion for access must be made. First, CPL § 245.30 explicitly provides for defense counsel to access the premises. However, as noted in People v. Augustus, 2020 NYLJ Lexis 589 (2020), there is no actual authority that provides defendants the right to enter the premises themselves. Rather, a strict reading of CPL § 245.30(2) shows that the statute explicitly provides only for defense counsel or a representative thereof to enter the premises. Neither the statute nor any commentary provide guidance when the defendant proceeds *pro se*. Next is the question of when the defense must file a motion to access to the scene. While CPL § 270.50 governs the issue long after the crime has occurred, some guidance has been given elsewhere. People v. Wilson, 225 A.D.2d 497 (1st Dept. 1996) sought to answer whether the addition of an air conditioning unit and removal of window bars would materially affect the view when recreating the location where a witness observed the events in question. In its ruling, the court held that the addition of an air conditioner and partial destruction of window bars constituted a substantial change that plainly impacted whether a visit to the scene would be helpful. Wilson at 498. As of now, the standard appears to be that the motion must be filed as soon as possible, and before the scene can be "substantially changed."

CPL § 245.50 Certificates of Compliance; Readiness for Trial

The prosecution must file a certificate of compliance upon serving discovery. With the new amendment, the prosecution may now certify compliance for all discovery under CPL § 245.50(1), except for any discoverable materials that are lost or destroyed as defined in CPL § 245.80(1)(b). The statute previously prevented any adverse consequences for a prosecutor who files a second certificate of compliance so long as the filings were done in good faith. Under the new amendment, no adverse effects will come to a prosecutor filing a second certificate of discovery so long as the filings are in good faith and reasonable under the circumstances.

Trial readiness after January 1, 2020, is now based on the disclosure of discovery and filing of a certificate of compliance. CPL § 245.50(3) originally read: "absent an individualized finding of exceptional circumstance 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. . ." Now, the amendment reads: "absent an individualized finding of *special circumstances* in the instant case by the court before which the charge is pending. . ."

[emphasis added]. This is a lower standard for finding that the prosecution is ready for trial prior to filing a certificate of compliance.

This amendment further relaxes the requirement where it states the prosecution may be deemed ready for trial when information that is considered non-discoverable cannot be disclosed because it was lost, destroyed, or otherwise unavailable, despite the prosecution's diligent, reasonable, and good faith efforts. Finally, this amendment provides that the court may still grant a remedy or sanction for a discovery violation pursuant to CPL § 245.80.

In dealing with compliance issues, CPL § 245.50(4) was added to require any defense challenges or questions related to certificates of compliance be made via written motion.

CPL § 245.70 Protective Orders

The legislature next looked to discovery materials subject to protective orders. Originally, the statute provided that "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 order as is appropriate." CPL § 245.70(1). However, after the new amendment, that sentence is lengthened to include the disclosure of the transcript of 911 calls in lieu of the recording of the call itself, seeming to expand the scope of what could be appropriate protective measures.

The next amendment adds onto CPL § 245.70(3) prompt hearing. The original section provided for a hearing within three business days for any protective orders issued, unless the defense consents to the people's request for a protective order. The new amendment continues this provision, while providing an alternative manner to conduct the hearing based on the circumstances. If a defendant is charged with a violent felony defined under PL § 70.02, or a class A felony (not including any PL § 220 drug offenses), the prosecutor may request, upon a showing of good cause, to conduct the hearing in camera and outside the presence of the defendant, so long as the hearing does not affect the court's right to receive testimony or papers ex-parte or in camera as provided for in CPL § 245.70(1).

CPL § 245.75 Waiver of Discovery by Defendant

Waiver of discovery is an option for any defendant who does not wish to receive discovery from the prosecution. CPL § 245.75(1) governs waiver of discovery by the defendant. Prior to the amendment, the waiver only needed to be in writing, signed by the defense attorney and filed with the court. The new amendment to CPL § 245.70(1) now requires the court inquire on the record to ensure that the defendant waiving discovery understands the right to receive discovery, and the right to waive discovery. As was the case prior to the amendment, a defendant's waiver of discovery cannot be a condition of a guilty plea. However, the new amendment explicitly states that defense counsel may advise their client of their right to discovery and their right to waive discovery, but it still may not be a condition of a guilty plea.

The new amendment introduced CPL § 245.75(2), which governs waiver of discovery and repleader. According to the new amendment, if the parties reach an agreement to vacate a

defendant's original conviction under CPL § 440.10, the waiver of discovery can be a condition of repleader.

CPL § 30.30 Speedy Trial; Time Limitations

Discovery and speedy trial have always been interconnected issues. Accordingly, the New York State Legislature also made amendments to CPL § 30.30 which also took effect on May 3, 2020. The majority of the changes made in the CPL § 30.30 amendments are changes in the gendering of the language and the word choice used in the original text.

The first amendment to CPL § 30.30 occurred in CPL § 30.30(2). The amendment here adds one grammar correction and two corrections of gendered language. The amendments read as follows:

> "Except as provided in subdivision three of this section, where a defendant has been committed to the custody of the sheriff or the office of children and family services in a criminal action he or she must be released on bail or on his or her own recognizance, upon such conditions as may be just and reasonable…" CPL § 30.30(2).

The underlined changes add the words "of the" between custody of the sheriff and office of children and family services. Additionally, the text now also reads "he or she" and "his and her" rather than "he" and "his."

The amendment in CPL § 30.30(2)(c) makes a similar change in its amendment changing the phrase "fifteen days from the commencement of his commitment" to "his or her commitment." The paragraph is otherwise unchanged.

In the next paragraph of CPL § 30.30(2), the amendment makes a nearly identical change. Prior to the amendment, the language read "five days from the commencement of his commitment. . ." With the new amendment, the statute reads "five days from the commencement of his or her commitment. . ." This paragraph is otherwise unchanged as well.

In CPL § 30.30(4), the legislature added the phrase "of this section" to clarify their reference to CPL §§ 30.30 (1), (2), which state the applicable time periods for statutory speedy trial.

The next amendment comes in CPL § 30.30(4)(b) where the phrase "or with the consent of, the defendant or his or her counsel." Again the legislature is adding more inclusive gendered language. No other portion of this paragraph is changed by the amendments.

Similarly, the amendment made to CPL § 30.30(4)(b)(ii) adds "of this chapter to clarify that 530.70 references CPL § 530.70 titled Order of Recognizance or Bail; Bench Warrant. The paragraph otherwise remains unchanged.

Again the legislature made a similar change in CPL § 30.30(7)(c), adding "of this chapter" to clarify that 190.70 is in reference to CPL § 190.70 governing prosecutor's

informations being filed with the Grand Jury. No other changes to this paragraph were made. However, the same exact addition "of this chapter" was also made to CPL § 30.30(7)(d) to further clarify the reference to 190.70 to be CPL § 190.70. Again this is the only change made to CPL § 30.30(7)(d) as well.

The next two changes come in CPL § 30.30(7)(e) and CPL § 30.30(7)(f). Both amendments add the phrase "of this chapter" after referencing 210.20 to clarify the statute's reference to CPL § 210.20 titled Motion to Dismiss or Reduce indictment. The new amendment makes no other changes to either of these paragraphs.

Bail Amendments

The New York State Legislature passed Budget Bill S7506B in April, 2020. In Part UU of said bill, the legislature adopted amendments to the bail reform that was previously passed and went into effect on January 1, 2020. The bail amendments that follow went into effect on July 2, 2020.

CPL § 500.10 Recognizance, Bail and Commitment; Definitions of Terms

The first statute amended is CPL § 500.10(3)(3-a) which governs the release of a defendant under non-monetary conditions. The original text read that the conditions of release ordered by the court must be "the least restrictive conditions that would reasonably assure the principal's return to court." CPL § 500.10(3)(3-a). With the amended language, the conditions now must be the least restrictive condition to reasonably assure the principal's return to court and to "reasonably assure the principal's compliance with court conditions." This added condition offers more creativity in not only ensuring the defendant's presence in court, but in ensuring defendants comply with conditions of release set by the court. Additionally, the amendment adds that a "principal shall not be required to pay for any part of the cost of release on non-monetary conditions." An example of this could be ankle monitors placed on those released to the supervision of probation if they are a pre-trial condition of release. Aside from these additions, no other changes were made to CPL § 500.10(3)(3-a).

The next amendment governs travel restrictions as conditions of release. Prior to the amendment, CPL § 500.10(3)(3-a)(b) allowed the court to make reasonable and specific restrictions on travel related to actual risk of flight. Under the new amendment, the court may now ask that the principal surrender his or her passport as a condition of release under CPL § 500.10(3)(3-a)(b).

Continuing with release under non-monetary conditions, CPL § 500.10(3)(3-a)(d) was amended changing one singular but very important word. The original text read, "When it is shown pursuant to subdivision four of section 510.45 of this title that no other realistic monetary condition or set of monetary conditions will suffice to reasonably assure the person's return to court. . . ." The new amendment now reads "no other realistic monetary condition or set of non-monetary conditions," expanding the types of conditions which must be considered in assessing possible pretrial supervision options. No other changes were made to CPL § 500.10(3)(3-a)(d).

In amending the statutes regarding release under non-monetary conditions, the legislature added five paragraphs of new law that make up CPL § 500.10(3)(3-a)(e-i). Pursuant to the new amendments, CPL § 500.10(3)(3-a)(e) now allows the court, as a condition of pretrial release, to prohibit the principal from associating with any person connected with the instant charge. This may include specified victims, witnesses, or co-defendants. Based upon the language of the statute, this condition could be set by the court without the need for a protective order to be issued first.

Next, CPL § 500.10(3)(3-a)(f) allows the courts to refer the defendant to a pretrial services agency that can place the defendant in mandatory programming. Such programming can include counseling, treatment, and intimate partner violence intervention programs. The amendment also provides the court the authority to remove a defendant to a hospital pursuant to Mental Hygiene Law § 9.43 when the circumstances call for such an order.

The next two amendments passed by the legislature are similar to probation conditions. First, CPL § 500.10(3)(3-a)(g) allows the court to require the principal make "diligent efforts" to maintain employment, housing, or enrollment in school or educational programing conditions of pretrial release. These conditions are routinely ordered in Terms and Conditions of sentences of probation. The legislature then amended CPL § 500.10 (3)(3-a)(h) to allow the court to order the defendant to obey any orders of protection issued by the court as a condition of the pretrial release. According to the amendment, this would also include orders of protection issued under CPL § 530.11, which governs procedural law for family offenses and provides for orders of protection in family offenses. Based on the statute, a violation of a protective order would not only be a new charge but would be grounds to revoke the defendant's pretrial release status.

The fifth amendment that was added is CPL § 500.10(3)(3-a)(i). With the new amendment, prosecutors may request conditions for or on behalf of victims in an effort to address the safety of the victim and their family pursuant to CPL § 530.11, which governs procedural law for family offenses.

While continuing with conditions of pretrial release, the amendment to CPL § 500.10(3)(3-a)(j) results in the removing of the formerly last sentence in the paragraph. The legislature removed the prohibition that "a principal shall not be required to pay for any part of the cost of release on non-monetary conditions" from this paragraph, and instead introduced it under CPL § 500.10(3)(3-a), the paragraph that introduces these potential pretrial release conditions.

The next amendment, effective July 2, 2020, is the newly added CPL § 500.10 (3)(3-b). This new section states that the list provided in CPL § 500.10(3)(3-a) is non-exclusive list of conditions, which may be ordered singularly or in combination with one another, and which can be considered and imposed by the court. The court ordering these conditions must ensure that they are reasonable under the circumstances of the defendant and their individualized situation. However, there is no prerequisite condition which must be ordered for the court to order one or more additional conditions; they have discretion on that matter.

<u>CPL § 510.10 Securing Order; When Required; Alternatives Available; Standard to be Applied</u>

CPL § 510.10 governs a court's securing order, when they are required, the available alternatives and the standards that should be applied. In providing for a securing order, the principal would be released on their own recognizance, or alternatively under non-monetary conditions, or in cases where it is authorized, set bail or commit the defendant to the custody of the sheriff's office. The first amendment made by the Legislature in this chapter is under CPL § 510.10(4)(a). Being the first in the list of qualifying offenses, a court would be allowed to grant the release status of their choice ranging from release on recognizance up to committing the defendant to the custody of the sheriff. Previously, this amendment defined a "qualifying offense" under this subdivision as "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." Under the new amendment, burglary in the second degree as defined under PL § 140.25(2) will only be a qualifying offense when the charge includes an allegation that the defendant entered the living area of a dwelling. CPL § 510.10(4)(a).

The next change in qualifying offenses under chapter 510.10(4) was made to paragraph CPL § 510.10(4)(d). Prior to the amendment, the statute provided for confinement of a defendant charged with a class A felony with the exception of any article under PL § 220 other than PL § 220.77, a class A-I felony for operating as a major trafficker. With the amendment, this section now defines qualifying offenses as any class A felony, except for any article under PL § 220 which constitutes an A-I felony. While Operating as a major trafficker is still a qualifying offense, it opens PL § 220 up to any other current and future A-I felonies now being qualifying offenses.

Qualifying offenses that are sex offenses are governed by CPL § 510.10(4)(e). Prior to the amendment, CPL § 510.10(4)(e) the following were qualifying offenses: any felony sex offense under PL § 70.80; any crime involving incest as defined under PL §§ 225.25 incest in the third degree, 225.26 incest in the second degree, or 225.27 incest in the first degree; or a misdemeanor under PL § 130 sex offenses. The amendment went into effect on July 2, 2020 and also includes PL § 230.24 sex trafficking and PL § 230.34-a sex trafficking of a child. In effect, the amendment adds the two sex trafficking felony offenses as qualifying offenses under this subdivision.

Another addition to qualifying offenses comes in CPL § 510.10(4)(g), which governs money laundering in support of terrorism. Prior to the amendment, the paragraph defined these qualifying offenses as: PL § 470.24 first degree money laundering in support of terrorism, or any felony crime of terrorism as defined under PL § 490 with the exception of PL § 490.20 making a terroristic threat. The amendment now also provides for the following qualifying offenses: PL § 470.23 second degree money laundering in support of terrorism, PL § 470.22 third degree money laundering in support of terrorism, and PL § 470.21 fourth degree money laundering in support of terrorism. These additional qualifying offenses do not affect the original qualifying offenses that were effective on January 1, 2020. Rather, they expand the list.

Criminal contempt as a qualifying offense under this subsection of law is governed by CPL § 510.10(4)(h). The statute largely remains unchanged, with the new amendment still

providing for criminal contempt as a qualifying offense under PL § 215.50(3) second degree criminal contempt, PL § 215.51 (b-c) first degree criminal contempt, and PL § 215.52 aggravated criminal contempt, but only where the underlying charge is alleging a violation of a protective order made on behalf of a protected party who is a member of the defendants family or household as defined under CPL § 530.11(1). The sole change in the amendment now changes the word "article" to the word "title" when referring to CPL § 530.11(1), and removes the "or;" at the end of the paragraph to extend the list further to CPL § 510.10(4)(t). The amendment in this subsection does not alter the laws that are deemed qualifying offenses for the purpose of this paragraph.

The next paragraph is the last paragraph which was not newly created by the amendment in this chapter. CPL § 510.10(4)(i) governs sex acts with children, which constitute a qualifying offense. Prior to the amendment, the qualifying offenses listed under this paragraph were PL § 263.30 facilitating a sexual performance by a child with a controlled substance or alcohol, PL § 263.05 use of a child in a sexual performance, and PL § 120.70 (1) luring a child. The new amendment, effective July 2, 2020 now includes PL § 263.10 promoting an obscene sexual performance by a child, and PL § 263.15 promoting a sexual performance by a child as qualifying offenses.

The legislature introduced a new subsection in CPL § 510.10(4)(j), which now provides that any crime alleged to have caused the death of another person as a qualifying offense. There is no indication that chapter 510.10 had any similar equivalent prior to the amendment passed on April 3, 2020.

The legislature next added a paragraph providing for certain crimes committed against family members and members of the same household. CPL § 510.10(4)(k) now provides for the following offenses to be deemed qualifying offenses when committed against members of the same family or household as defined under CPL § 530.11(1): PL § 121.11 criminal obstruction of breathing or blood circulation, PL § 121.12 second degree strangulation; and PL § 135.10 first degree unlawful imprisonment.

The next amendment adds paragraph CPL § 510.10(4)(l), providing for two vehicular qualifying offenses. Effective July 2, 2020, PL § 120.04-a aggravated vehicular assault and PL § 120.04 first degree vehicular assault are now qualifying offenses for the purpose of this chapter.

The legislature also added two hate crime qualifying offenses. CPL § 510.10(4)(m) provides for PL § 120.00 third degree assault and PL § 150.10 third degree arson as qualifying offenses when they are charged as hate crimes under PL § 485.05. Similarly, but aimed at protecting children, the next paragraph, CPL § 510.10(4)(n) provides for PL § 120.12 aggravated assault upon a person younger than 11 years of age and PL § 265.01-a criminal possession of a weapon on school grounds as qualifying offenses for the purpose of this chapter. Both additions are aimed at protecting vulnerable classes when they are victimized or placed in harm's way.

The legislature added a paragraph related to financial theft as a qualifying offense. Under the newly enacted CPL § 510.10(4)(o), the legislature added the following qualifying offenses,

effective July 2, 2020: PL § 225.42 first degree grand larceny, PL § 460.20 enterprise corruption, and PL § 470.20 first degree money laundering.

The legislature also included a sex offender paragraph of qualifying offenses. CPL § 510.10(4)(p) now provides for the following offenses to be defined as qualifying offenses for the purpose of this chapter. CL § 168-t failure to register as a sex offender and PL § 260.10 endangering the welfare of a child are now qualifying offenses when the defendant is a level 3 offender pursuant to CL § 168(1)(6) and when the defendant is required to maintain registration under article 6-c of the Correction Law.

The legislature also addressed evading custody in their amendment, which added CPL § 510.10(4)(q). Under this new paragraph, any crimes that involve bail jumping, listed under PL §§ 215.55, 215.56, or 215.57, or any crimes involving escaping from custody under PL §§ 205.05, 205.10, or 205.15 are now qualifying offenses. Similarly, CPL § 510.10(4)(r) provides for any felony offense committed by a defendant who is serving a term of probation or released to post release supervision as a qualifying offense under this chapter. Continuing this similar pattern of repeating offenses, the legislature also introduced CPL § 510.10(4)(s), which includes as a qualifying offense any felony eligible for persistent offender status pursuant to PL § 70.10.

The final amendment passed by the legislature in this chapter is CPL § 510.10(4)(t). In this section, the amendment now provides for any felony or class A misdemeanor that involves harm to an identifiable person or property for conduct that occurred while the defendant was released on their own recognizance on a charge that involved harm to an identifiable person or property. In order for such an offense to qualify, the prosecution must demonstrate reasonable cause to believe that the defendant was the person who committed both the new crime and the underlying crime. No other changes to amendments made by the legislature occurred in this chapter that were not discussed here.

CPL § 510.40 Court Notification to Principal of Conditions of Release and of Alleged Violations of Conditions of Release

Chapter 510.40 governs court notification of conditions of release and allegations of violations of conditions of release. The amendment to this chapter is in CPL § 510.40(4)(c), a paragraph that governs the use of electronic monitoring of the defendant's location while released under supervision. Prior to the April 3, 2020 amendments, this paragraph provided that location monitoring of a defendant could be performed only by a public entity under the supervision of a county or municipality, or by a non-profit entity contracted to the county, municipality, or state. CPL § 510.40(4)(c) also provided for counties or municipalities to contract and transfer supervision of a defendant ordered by court within their jurisdiction to be supervised under non-monetary conditions by another county or municipality, but such a transfer could not be made to any private for-profit entity. Effective July 2, 2020, the new amendment now adds a restriction that counties, municipalities and the state may contract with private for-profit companies to purchase the electronic monitoring devices, but the monitoring of the data produced by the electronic monitoring devices may only be monitored by employees of that municipality, county, state, or non-profit entity providing supervision. While this amendment is

lengthy, it essentially allows the jurisdiction the authority to purchase electronic monitoring devices while ensuring that the monitoring remain local to the defendant being supervised.

CPL § 510.43 Court Appearances: Additional Notifications

The legislature next amended CPL § 510.43(2), a subsection that governs court appearances and additional notifications. In subsection 1 of this chapter, the court, or a certified pretrial services agency directed by the court, must notify the defendant of their subsequent court dates based on the defendant's preferred method of communication indicated on the form provided and retained by the court. Under the second paragraph of this chapter, which was added on April 3, 2020, once a defendant declines to provide contact information, they will be informed that they will not receive any notifications of subsequent court dates and will then forfeit the opportunity to receive future notifications. However, whether they decline to provide contact information or not, any failure of the court or pretrial services agency to send a notification will in no way be grounds or authorization for the defendant to fail to appear in court, which is consistent with the chapter prior to the adoption of these new amendments.

The next amendments adopted by the legislature appear in chapter 530.20, securing order by a local criminal court when the action is pending therein. In CPL § 530.20(1)(a), the statute provides a presumption that defendants will be released on their own recognizance subject to paragraph b, which enumerates qualifying offenses exempt from this presumption, and to the courts written or on the record finding that a release on recognizance will not reasonably assure the defendant's return. Pursuant to CPL § 530.20(1)(b), when the offense charged is a qualifying offense, as listed below, the court has the authority to release the defendant on his or her own recognizance or under monetary conditions, to fix bail, or to commit defendants to the sheriff's custody, provided the court explain the reasoning for the decision in writing or on the record.

CPL § 530.20 Securing Order by Local Criminal Court when Action is Pending Therein

Prior to the amendment's passage on April 3, 2020, CPL § 530.20(1)(b)(i) defined the first qualifying offense as, "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." With the amendment's passage, burglary in the second degree was removed from this paragraph as a qualifying offense with the exception of cases where burglary second is charged and entering the living area of a dwelling is alleged. CPL § 530.20(1)(b)(i).

The next amendment to the list of qualifying offenses comes in paragraph iv. Prior to the amendment, CPL § 530.20(1)(b)(iv) defined a qualifying offense as a class A felony other than those under PL § 220, with the exception of PL § 220.77, which would still be a qualifying offense. Based on the new amendment, the qualifying offenses under this paragraph are now class A felonies, except for those listed under CPL § 220, unless they are an A-I felony. While PL § 220.77 is still a qualifying offense, the statute now allows other A-I offenses under PL § 220 to qualify as well.

Qualifying sex offenses are governed by CPL § 530.20(1)(b)(v). Prior to the amendment, the following were qualifying offenses under CPL § 530.20(1)(b)(v): any felony sex offense under PL § 70.80; any crime involving incest as defined under PL §§ 225.25 incest in the third degree, 225.26 incest in the second degree, or 225.27 incest in the first degree; and any misdemeanor under PL § 130 sex offenses. The new amendment now adds PL § 230.24 sex trafficking and PL § 230.34-a sex trafficking of a child as qualifying offenses for the purpose of his chapter. In effect, the addition adds the two sex trafficking felony offenses as qualifying offenses under this subdivision.

Another addition to qualifying offenses comes in CPL § 530.20(1)(b)(vii), which governs money laundering in support of terrorism. Prior to the amendment, the paragraph defined these qualifying offenses as PL § 470.24 first degree money laundering in support of terrorism, or any felony crime of terrorism as defined under PL § 490 (with the exception of PL § 490.20 making a terroristic threat). The amendment now also provides for the following qualifying offenses: PL § 470.23 second degree money laundering in support of terrorism, PL § 470.22 third degree money laundering in support of terrorism, and PL § 470.21 fourth degree money laundering in support of terrorism. These additional qualifying offenses do no affect the original qualifying offenses that were effective on January 1, 2020. Rather, they expand the list.

The next paragraph was not newly created by the amendment in this chapter. CPL § 510.10(4)(i) governs sex acts with children that constitute a qualifying offense for the purposes of this chapter. Prior to the amendment, the qualifying offenses listed under this paragraph were PL § 263.30 facilitating a sexual performance by a child with a controlled substance or alcohol, PL § 263.05 use of a child in a sexual performance, and PL § 120.70 (1) luring a child. Under the new amendment, PL § 263.10 promoting an obscene sexual performance by a child and PL § 263.15 promoting a sexual performance by a child are now also qualifying offenses.

The legislature introduced a new subsection in CPL § 530.20(1)(b)(x), which now provides that any crime causing the death of another person is a qualifying offense. There is no indication that chapter 530.20 had any similar equivalent prior to the amendment being passed on April 3, 2020.

The legislature next added a paragraph providing for certain crimes committed against family members and members of the same household. CPL § 530.20(1)(b)(xi) now deems the following as qualifying offenses when committed against members of the same family or household as defined under CPL § 530.11(1): PL § 121.11 criminal obstruction of breathing or blood circulation; PL § 121.12 second degree strangulation; and PL § 135.10 first degree unlawful imprisonment.

The next amendment adds CPL § 530.20(1)(b)(xii), which provides for two vehicular qualifying offenses. Effective July 2, 2020, PL § 120.04-a aggravated vehicular assault and PL § 120.04 first degree vehicular assault are now qualifying offenses for the purpose of this chapter.

The legislature also added two hate crime qualifying offenses. CPL § 530.20(1)(b)(xiii) provides for PL § 120.00 third degree assault and PL § 150.10 third degree arson as qualifying offenses when they are charged as hate crimes under PL § 485.05. Similarly, but aimed at

protecting children, the next paragraph, CPL § 530.20(1)(b)(xiv), provides for PL § 120.12 aggravated assault upon a person younger than 11 years of age and PL § 265.01-a criminal possession of a weapon on school grounds as qualifying offenses for the purpose of this chapter.

The legislature added a paragraph related to financial theft as a qualifying offenses. As of July 2, 2020, CPL § 530.20(1)(b)(xv) includes the following as qualifying offenses: PL § 225.42 first degree grand larceny, PL § 460.20 enterprise corruption, and PL § 470.20 first degree money laundering are listed as qualifying offenses.

CPL § 530.20(1)(b)(xvi) now provides for the following offenses to be defined as qualifying offenses for the purpose of this chapter: CL § 168-t failure to register as a sex offender and PL § 260.10 endangering the welfare of a child when the defendant is a level 3 offender pursuant to CL § 168(1)(6) and when the defendant is required to maintain registration under article 6-c of the Correction Law.

The legislature also addressed evading custody in their amendment that added CPL § 530.20(1)(b)(xvii). Under this new paragraph, any crimes involving bail jumping, listed under PL §§ 215.55, 215.56, or 215.57, or any crimes involving escaping from custody under PL §§ 205.05, 205.10, or 205.15 are now qualifying offenses for the purpose of this chapter. Similarly, CPL § 530.20(1)(b)(xviii) provides for any felony offense committed by a defendant who is serving a term of probation or released to post release supervision as a qualifying offense under this chapter. Continuing this similar pattern of repeating offenses, the legislature introduced CPL § 530.20(1)(b)(xix), which finds a qualifying offense in any felony eligible for persistent offender status under PL § 70.10.

The final amendment passed by the legislature in this chapter is CPL § 530.20(1)(b)(xx). This section now provides for any felony or class A misdemeanor that involves harm to an identifiable person or property for conduct that occurred while the defendant was released on his own recognizance for a charge involving harm to an identifiable person or property. In order to qualify such an offense, the prosecution must demonstrate reasonable cause to believe that the defendant was the person who committed both the new crime and the underlying crime. No other changes to amendments made by the legislature occurred in this chapter that were not discussed here.

CPL § 530.40 Order of Recognizance, Release Under Non-Monetary Conditions or Bail; by Superior Court when Action is Pending Therein

The legislature made no amendments to CPL § 530.40, but they did make amendments to the subsequent chapter, CPL § 530.40. This chapter governs orders of recognizance, release under non-monetary conditions, and bail when the action is pending in superior court. In a superior court, when a defendant is charged with a qualifying offense, the court, unless prohibited by law, has the discretion to release the principal on their own recognizance, under non-monetary conditions, to fix bail, or to commit the defendant to the sheriff's custody, provided the court state its reasoning on the record or in writing. CPL § 530.40(4). In defining the qualifying offenses, the legislature made the following amendments to this chapter.

The first amendment made by the legislature appears under CPL § 530.40(4)(a). Previously, this amendment defined a "qualifying offense" under this subdivision as "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." Under the new amendment, burglary in the second degree as defined under PL § 140.25(2) is a qualifying offense when the charge includes an allegation that the defendant entered the living area of a dwelling. CPL § 530.40(4)(a).

The next amendment made under chapter 530.40(4) was made to paragraph CPL § 530.40(4)(d). Prior to the amendment, the statute provided for confinement of a defendant charged with a class A felony defined by the penal law with the exception of any article under PL § 220 other than PL § 220.77, a class A-I felony for operating as a major trafficker. With the amendment, this section now defines qualifying offenses as any class A felony, except for any article under PL § 220 that constitutes an A-I felony. While Operating as a major trafficker is still a qualifying offense, it opens PL § 220 up to any other current and future A-I felonies now being qualifying offenses.

Qualifying offenses that are sex offenses are governed by CPL § 530.40(4)(e). Prior to the amendment, CPL § 510.10(4)(e) made any felony sex offense under PL § 70.80, any crime involving incest as defined under PL §§ 225.25 incest in the third degree, 225.26 incest in the second degree, 225.27 incest in the first degree, or a misdemeanor under PL § 130 sex offenses as qualifying offenses. The amendment that went into effect on July 2, 2020 now also includes PL § 230.24 sex trafficking and PL § 230.34-a sex trafficking of a child. In effect, the addition adds the two sex trafficking felony offenses as qualifying offenses under this subdivision.

The next amendment comes under CPL § 530.40(4)(g) which governs money laundering in support of terrorism. Prior to the amendment, the paragraph defined these qualifying offenses as PL § 470.24 first degree money laundering in support of terrorism, or any felony crime of terrorism as defined under PL § 490 with the exception of PL § 490.20 making a terroristic threat. The amendment now also provides for the following qualifying offenses: PL § 470.23 second degree money laundering in support of terrorism; PL § 470.22 third degree money laundering in support of terrorism; and PL § 470.21 fourth degree money laundering in support of terrorism. This amendment essentially adds two more qualifying offenses but no other change.

The next paragraph amended is CPL § 530.40(4)(i). This governs sex acts with children that constitute qualifying offenses for the purposes of this chapter. Prior to the amendment, the qualifying offenses listed under this paragraph were PL § 263.30 facilitating a sexual performance by a child with a controlled substance or alcohol, PL § 263.05 use of a child in a sexual performance, and PL § 120.70 (1) luring a child. The new amendment, effective July 2, 2020 will now also include PL § 263.10 promoting an obscene sexual performance by a child and PL § 263.15 promoting a sexual performance by a child as qualifying offenses.

The legislature introduced a new subsection in CPL § 530.40(4)(j), which now provides that any crime alleged to have caused the death of another person is a qualifying offense. There

is no indication chapter 530.40 had any similar equivalent prior to the amendment passed on April 3, 2020.

The legislature next added a paragraph providing for certain crimes committed against family members and members of the same household. CPL § 530.40(4)(k) now provides for the following offenses to be deemed qualifying offenses for the purpose of this chapter when committed against members of the defendant's family or household as defined in CPL § 530.11(1). The offenses are: PL § 121.11 criminal obstruction of breathing or blood circulation, PL § 121.12 second degree strangulation, or PL § 135.10 first degree unlawful imprisonment.

The next amendment adds paragraph CPL § 530.40(4)(l), providing for two vehicular qualifying offenses. Effective July 2, 2020, PL § 120.04-a aggravated vehicular assault and PL § 120.04 first degree vehicular assault are now qualifying offenses for the purpose of this chapter.

The legislature also added two hate crime qualifying offenses. CPL § 530.40(4)(m) provides for PL § 120.00 third degree assault and PL § 150.10 third degree arson as qualifying offenses when they are charged as hate crimes under PL § 485.05. Similarly, but aimed at protecting school children, the next paragraph, CPL § 530.40(4)(n) provides for PL § 120.12 aggravated assault upon a person less than 11 years of age and PL § 265.01-a criminal possession of a weapon on school grounds as qualifying offenses for the purpose of this chapter.

Under the newly introduced CPL § 530.40(4)(o), the legislature added the following offenses as qualifying offenses. Effective July 2, 2020, PL § 225.42 first degree grand larceny, PL § 460.20 enterprise corruption, and PL § 470.20 first degree money laundering are qualifying offenses for the purpose of this chapter.

The legislature also included a sex offender paragraph of qualifying offenses. CPL § 530.40(4)(p) now provides for the following offenses to be defined as qualifying offenses for the purpose of this chapter. CL § 168-t failure to register as a sex offender and PL § 260.10 endangering the welfare of a child are now qualifying offenses when the defendant is a level 3 offender pursuant to CL § 168(1)(6) and when the defendant is required to maintain registration under article 6-c of the Correction Law.

The legislature also addressed evading custody in their amendment, which added CPL § 530.40(4)(q). Under this new paragraph, any crimes involving bail jumping, listed under PL §§ 215.55, 215.56, or 215.57, or any crimes involving escaping from custody under PL §§ 205.05, 205.10, or 205.15 are now qualifying offenses. Similarly, CPL § 530.40(4)(r) provides for any felony offense committed by a defendant who is serving a term of probation or released to post release supervision as a qualifying offense. Continuing this similar pattern of repeating offenses, the legislature also introduced CPL § 530.40(4)(s) which allows a felony, where the defendant qualifies to be charged as a persistent offender under PL § 70.10, to be a qualifying offense for the purposes of this statute.

The final amendment passed by the legislature in this chapter is CPL § 530.40(4)(t). In this paragraph, the amendment provides for any felony or class A misdemeanor that involves harm to an identifiable person or property for conduct that occurred while the defendant was

released on their own recognizance on a charge involving harm to an identifiable person or property. In order to qualify such an offense, the prosecution must demonstrate reasonable cause to believe that the defendant was the person who committed both the new crime and the underlying crime. No other changes to amendments made by the legislature occurred in this chapter that were not discussed here.

CPL § 530.45 Order of Recognizance or Bail; After Conviction and Before Sentence

The legislature's next amendment was the addition of CPL § 530.45(2-a) regarding the principal's release status after conviction but before sentencing. With the new amendment, when a defendant is charged with a nonqualifying offense under CPL § 510.10(b), CPL § 530.20(1)(b), or CPL § 530.40(4), then is convicted of a non-qualifying offense under CPL § 510.10(b), CPL § 530.20(1)(b), or CPL § 530.40(4), the court may issue a new securing order prior to sentencing for the defendant to be released on their own recognizance, under non-monetary conditions as authorized, fix bail, or remand the defendant to the custody of the sheriff. CPL § 530.45(2-a).

CPL § 530.50 Order of Recognizance or Bail; During Pendency of Appeal

The final amendment passed on April 3, 2020 was to add paragraph 2 to CPL § 530.50, which governs orders of recognizance or bail during the pendency of an appeal. Under the new amendment, when a defendant is convicted of an offense that is not a qualifying offense under CPL § 510.10(b), CPL § 530.20(1)(b), or CPL § 530.40(4), the defendant may apply for a securing order to release them on their own recognizance, under non-monetary conditions, or to fix bail. CPL § 530.50(2). Then, pursuant to the decision made by a judge identified in CPL § 460.50(2) and CPL § 460.60(1)(a), the court will issue a securing order to either release the defendant on their own recognizance, under non-monetary conditions, to fix bail, or remand the defendant to the custody of the sheriff. CPL § 530.50(2).

I trust you will find this information useful.

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Materials created by Mary Pat Donnelly, with the assistance of Albany Law Student Intern Matthew Capezzuto '21