DISCOVERY/ TRIAL READINESS AND EXCLUDABLE TIME IN THE AGE OF COVID-19

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It used to be (before January 1st 2020 when Discovery Reforms and new Speedy Trial rules took effect), that all the People needed to do to stop the ticking of the speedy trial time clock was to declare on the record or by written notice to the court and the defense (People v Kendzia 64 NY2d 331 [1985]) that they were READY FOR TRIAL (RFT) and that such declaration was meaningful (i.e. true) and not illusory. (People v Chavis 91 NY2d 500 [1998]). In other words, by declaring RFT, the People were representing that they had done everything required of them to bring the case to a point where it could be tried. (People v England 84 NY2d 14 [1994]).

Before the changes in the law which expressly link trial readiness to discovery compliance, the People enjoyed the benefit of the doubt (i.e. a rebuttable presumption of truthfulness and accuracy), when they declared, "the People's investigation is complete, our witnesses are available and the People are ready for trial." (People v Brown 28 NY3d 392 [2016]).

Moreover, while non-compliance with discovery demands, demands for a Bill of Particulars or other prosecutorial obligations could bring varying remedies and sanctions from adjournments to preclusion of undisclosed evidence, it did not necessarily put the People in speedy trial jeopardy (People v Griffin 11 AD3d 1355 [4th dep't 2013]), except, perhaps, when their inaction (e.g. unjustified delay in providing Grand jury minutes to the court for legal sufficiency review), actually impeded a trial from going forward. (People v Johnson 42 AD3d 753 [3d dep't 2007]).

Of course, if an accusatory instrument is not legally sufficient to confer trial jurisdiction upon the court in the first place, (People v Alejandro 70 NY2d 133 [1987]), any declaration of trial readiness would be null and void in any event.

Now, the People's ability to make a meaningful declaration of trial readiness is inextricably tied to their meeting their discovery obligations under CPL Art. 245. As noted in People v Lobato 66 Misc 3d 1230(A) (Sup Ct.Kings County 1/30/20): " the provisions of CPL 245.50(3) and CPL 30.30(5) INTERLACE DISCOVERY COMPLIANCE AND TRIAL READINESS such that (the former) is a CONDITION PRECEDENT to a valid announcement of (RFT) absent exceptional circumstances in a particular case."

CERTIFICATE OF GOOD FAITH COMPLIANCE WITH DISCOVERY. CPL 245.50:

1. When the People have provided discovery required by CPL 245.20 (except for items lost or destroyed [CPL 245.80[b]) or subject to a protective order [CPL 245.70]), they shall SERVE ON THE DEFENDANT and FILE WITH THE COURT a CERTIFICATE OF COMPLIANCE (COC) stating that after the EXERCISE OF DUE DILIGENCE and MAKING REASONABLE INQUIRIES to ascertain the existence of material/information subject to discovery, the People have DISCLOSED and MADE AVAILABLE all known material/information subject to discovery. (Such items must be identified).

If additional discovery is subsequently provided before trial per CPL 245.60, the People must serve and file a SUPPLEMENTAL COC identifying the additional material/information provided.

2. See subdivision 2 regarding the defendant's obligation to provide (within 30 days of service of the People's COC per 245.10 [2]), a COC with respect discovery now required of the defense per CPL 245.20[4]).

TRIAL READINESS: CPL 245.50(3)

Notwithstanding any other provision of law, absent an individualized finding of SPECIAL CIRCUMSTANCES in the instant case before the court where the charges are pending, the People SHALL NOT BE DEEMED RFT per CPL 30.30 UNTIL THEY HAVE FILED A PROPER (i.e. true and accurate) COC.

A court may deem the People RFT per CPL 30.30 where information that might be considered discoverable CANNOT BE DISCLOSED because it has been LOST, DESTROYED or is OTHERWISE UNAVAILABLE despite DILIGENT GOOD FAITH EFFORTS that are REASONABLE under the circumstances.

Any challenges to the sufficiency/validity of a COC MUST be addressed by MOTION.

TRIAL READINESS/INQUIRY BY THE COURT: CPL 30.30(5):

Whenever the People state or otherwise provide notice that they are RFT, the court SHALL MAKE INQUIRY on the record as to their ACTUAL READINESS. If the court determines that the People are NOT RFT, their statement of readiness shall NOT be deemed VALID.

ANY STATEMENT OF READINESS MUST BE ACCOMPANIED OR PRECEDED BY A CERTIFICATE OF GOOD FAITH COMPLIANCE WITH THE DISCLOSURE REQUIREMENTS OF CPL 245.20 AND THE DEFENDANT SHALL BE AFFORDED AN OPPORTUNITY TO BE HEARD ON THE RECORD AS TO WHETHER THE DISCLOSURE REQUIREMENTS HAVE BEEN MET. (This section does not apply where the defendant has WAIVED discovery requirements. [CPL 245.75]).

A declaration of RFT on a LOCAL COURT ACCUSATORY INSTRUMENT (AI) shall NOT be deemed valid UNLESS the People certify that ALL COUNTS CHARGED IN THE AI meet the legal sufficiency requirements of CPL 100.15 and 100.40 and that all those NOT meeting such requirements have been DISMISSED.

Under pre-2020 rules, the People could declare partial readiness on counts that met the requirements of a legally sufficient information. [People v Dion 93 NY2d 893 [1999]). Not so anymore. “Ready” now means “ready on all counts,” not just some.

NEW DISCOVERY TIME TABLES CPL 245.10:

From January 1,2020 until May 3, 2020, the People were required by CPL 245.10(1)(a) (subject to subdivision iv regarding items/information withheld as non-discoverable pending judicial determination under CPL 245.70), to perform their initial discovery obligations AS SOON AS PRACTICABLE (ASAP) but not later than 15 DAYS after the arraignment. The People could get an automatic 30-day exception where the material was EXCEPTIONALLY VOLUMINOUS or were not in the People’s actual possession despite their good faith efforts to obtain them.

After substantial push-back from prosecutors and others in law enforcement that such deadlines were unreasonable, the State Legislature amended the statute to give prosecutors 20 DAYS after arraignment to comply with their initial discovery obligations where the defendant is IN CUSTODY (CPL 245.10[1][a][i[), and 35 days where the defendant is at liberty during the pendency of the case. (CPL 245.10[1][a][ii]).

With respect to Vehicle and Traffic offense and petit offenses, the People must still provide discovery ASAP but NOT LATER THAN 15 DAYS before trial on a Simplified Traffic Information. (The defendant may still move for earlier disclosure per CPL 245.10[1]).

If the People require more time to comply with their discovery obligations despite diligent, good-faith efforts to do so, they may apply (before expiration of their initial deadline), for additional time within the court’s discretion upon a showing of GOOD CAUSE (CPL 245.70 [2] [4]). They should be prepared to show the steps they have already taken, why they have thus far been unsuccessful and provide a reasonable estimate of when the material/information will be obtained. (See People v Adrovic 2020 NY Slip Op. 20218 [Crim. Ct. City of NY 9/3/20).

SOME CASES INTERPRETING THE NEW SPEEDY TRIAL/DISCOVERY RULES:

Lower courts have wasted no time wrestling with the new rules in cases pending before and after they went into effect, taking into account their effect on earlier (i.e. pre-1/1/20) declarations of trial readiness, the applicability (or not) of certain excludable periods under CPL 30.30(4) (e.g. delay due to discovery demands), now that the People’s discovery obligations are AUTOMATIC (i.e. demands no longer required) and the impact of COVID-19 Executive Orders (and corresponding Administrative Court Orders) on the Speedy Trial, Discovery and related statutes in the Criminal Procedure Law.

In People v Roland 67 Misc3d 330 (Crim. Ct. City of NY 2/28/20): the court held that the legislative changes that took effect DURING THE PENDENCY of a case apply to SUBSEQUENT PROCEEDINGS (Simonson v International Bank 14 NY 281 [1964]) but DO NOT serve to INVALIDATE prior proceedings. (Berkovitz v Arbil and Houlberg Inc 230 NY 261 [1921]). Therefore, in that case, while the new law (requiring a COC before the People could properly declare RTF) did not invalidate the People’s earlier declarations of readiness, the People were deemed to have REVERTED to a state of NON-READINESS (as of 1/1/20) and could only become ready upon the filing of a COC.

The issue in Roland was whether the People could claim the benefit if EXCLUDABLE TIME under CPL 30.30(4)(a) notwithstanding their lack of readiness at different points in the prosecution. The defendant was arraigned on 3/31/19 on a misdemeanor complaint charging DWI (VTL 1192-2 and 3), AUO 3d (VTL511-1[A]) and Unlicensed Operation (VTL 509[1]). The case was adjourned to 5/18/19 for the People to convert the complaint to an information On that date, the People did so and declared ready on the charges (except for VTL 600.1[A). The court then adjourned the case to 6/5/19 for Discovery and conversion of the VTL 600.1(A) charge. The court ruled this time excludable under CPL 30.30(4)(A) (i.e. other proceedings relating to the defendant).

On 6/5/19, the People served discovery and the case was adjourned to 7/15/19 for hearings (and conversion of the VTL 600 charge). The court also excluded this time frame. In 7/15/19, the People were NOT READY due to officer unavailability and requested an 11-day adjournment. The court adjourned the case to 9/12/19 but only charged the People with the time they requested since they had previously declared trial ready. (People v Nielson 306 AD2d 500 [2d dep't 2003]).

On 9/12/19 the People were NOT READY (assigned ADA on trial elsewhere), and requested a 21-day adjournment for hearings for which they were charged the time. On 10/18/19, the People were again unready (PO unavailable), and requested an additional 14 days with which they were also charged. On 11/12/19, the People were ready but defense counsel was unavailable. The case was adjourned to 11/20/19 when the People were unready (ADA unavailable, so one more day was charged to the People), and on 11/21/19 the People announced that all pre-trial matters were resolved.

Testimony at a suppression hearing was heard on 11/22-23/19 and the case was adjourned for trial to 12/16/19. (The court deemed the time during which the motion was sub judicia to be excluded). (See also People v Singh 288 AD2d 404 [2d dep't 2001]: adjournments for decision on motions are excludable whether or not the People have declared ready for trial).

On 12/16/19, the court issued its decision on suppression but the People were not ready for trial due to an unavailable witness. They requested a four-day adjournment with which they were charged. On 12/20/19, both sides were ready but no trial parts were available, so the court adjourned the case to 1/6/20. (Time excludable due to court congestion. People v Watson 255 AD2d 344 [2d dept 1998]).

On 1/6/20, under the new rules, the People filed a COC which the defense challenged for failure to provide the intoxylizer operator's certificate and gas chromatography records pertaining to the simulator solution. The court adjourned the case to 1/7/20 for the People to comply. On that day, defense counsel still objected for lack of the simulator records, and the court put the case off until the following day. (Still no records so the court adjourned to 1/13/20. Later, on 1/8/20, the People apparently provided the records and filed a new COC and declaration of RFT).

On 1/13/20, the court inquired into the People's claim of readiness which they confirmed. There was no further opposition from the defense. The defense then requested 30 days to comply with its reciprocal discovery obligations and the court adjourned until 2/24/20.

In the meantime, on 2/10/20, the defense filed a motion to dismiss per CPL 30.30, contending that the period of time from 1/1/20 to 1/8/20 should be charged to the People owing to their non-readiness in the absence of a valid COC.

While acknowledging the People's return to NON-READINESS on 1/1/20, their prior declarations of readiness were still valid (on 5/8/19, 11/12/19 and 12/20/19), and the period from 1/1/20 to 1/8/20 was excludable under CPL 30.30(4)(a) (related to discovery) notwithstanding the People's unreadiness. The court noted that despite changes in CPL 30.30 to correspond with the new discovery statutes (i.e. addition of 30.30[5] requiring a COC as a condition precedent to a valid declaration of readiness), the Legislature left CPL 30.30(4) and all of its exclusions intact.

In the court's view, since CPL 245.10 gave the People 15 days to comply with their automatic discovery obligations, that entire period should be excluded. All told, the court found 87 days chargeable to the People and, therefore, denied the motion to dismiss.

See also People v Otero 2020 NY Slip Op 20295 (Albany City Court 11/9/20) where the court, while perceiving a procedural loophole in CPL 30.30(4)(a), held that the People can be credited with excludable time owing to outstanding discovery demands despite their slow compliance (at least in cases arising before 1/1/20), because inasmuch as the Legislature did not see fit to modify or eliminate any of the excludable periods, it was not the court's place to do so in its stead. (In the court's view, the defendant's remedy would be to seek sanctions under CPL 245.80).

On 7/19/19, the defendant was arraigned on an information charging him with Endangering the Welfare of a Child. The People announced RFT and requested an adjournment for possible disposition. On 7/23/19, no plea deal was reached so the case was adjourned to 9/24/19 for discovery and motions. The case was adjourned several more times, and on 11/19/19, the court set a trial date of 2/19/20.

On 2/11/20, the People made a new plea offer for which the defense requested a one week adjournment to consider. On 2/18/20, the defendant rejected the offer and the court adjourned the matter for trial to 4/20/20.

On 3/20/19, the court, per the Governor's Executive Order (EO) 202.8 declaring a disaster emergency due to COVID-19 and the Chief Administrative Judge's Order closing the courts for all but essential matters (e.g. arraignments, bail, applications for orders of protection, re-sentencing of detained defendants and essential SORA matters), adjourned the case pending further notice.

On 6/26/20, the People filed a COC and declaration of RFT. On 7/20/20, the defendant moved to dismiss on CPL 30.30 grounds, arguing that the People were chargeable with all the time from 1/1/20 until 6/26/20.

The court found that the only period in 2019 chargeable to the People was the adjournment they requested from 7/9 to 7/23 for possible disposition. All remaining delays in that year were due to motions, discovery and other adjournments that did not affect their ability to proceed to trial.

With respect to 2020, the court held that the People were only chargeable with the period from 1/1/20 to 3/20/20, and that any time thereafter was excludable on account of the Governor's Executive ORDER (EO) which suspended the speedy trial statute (See Nevins v Brann 2020 NY Slip Op 20003 [Sup. Ct. Queens County 4/13/20], and EO 202.8 which forestalled CPL 30.30 and the release consequences for non-compliance under CPL 180.80).

On 9/4/20, EO 202.60 modified the suspension of CPL 30.30 to require that speedy trial time limits remain suspended in a jurisdiction until such time as petit juries are re-convened in such jurisdiction. (See also People v Zeolli 2020 NY Slip Op 20253 [Cohoes City Ct 10/17/20]:

Governor's EO'S also suspended six-month limitation on time to restore cases per CPL 170.55(2) after ACD is granted).

On 10/5/20, EO 202.67 lifted the suspension of speedy trial rules. But, on 12/30/20, EO 202.87 suspended CPL 30.30 and 190.80 to toll any time periods set forth therein for the period during which a criminal action is proceeding based on a felony complaint through arraignment on an indictment or SCI and, thereafter, SHALL NOT BE TOLLED).

And see, People v Dobrzenski 2020 NY Slip Op 20107 (Utica City Court 7/30/30) where the court also noted that the new discovery/speedy trial rules did not invalidate previous declarations of trial readiness (citing People v DeMilio 66 Misc 3d 759 [Dutchess County Court 1/7/20], but do require a proper COC as a condition of trial readiness. And, since CPL 245 repealed Article 240, the People reverted to a state of unreadiness after 1/1/20. (Citing People v Nge 123 NYS2d 449 (Crim. Ct. City of NY 2020).

But, in the court's analysis, the EXCLUSIONS STILL APPLY, including the 15 days the People had to comply under CPL 245.10 (1) and defense requests for adjournments (People v Worley 66 NY2d 523 [1985]) whether or not the People have declared RFT. (People v Acquino 163 Misc2d 788 [Yonkers City Court 1995]).

In Dobrzenski, the court charged the People with 56 days (8/6 arraignment to 10/1/19 when the People declared ready, plus 36 days from 1/16/20 to 2/21/20 for a total of 92 days which exceeded the limit of 30.30(1/(B). And, although the subsequent adjournment through 5/13/20 when the People filed their COC was excluded on account of COVID-19, the People had already exceeded their 90 day maximum by 2/21/20.

BUT SEE People v Lobato 66 Misc3d 1230 (A) (Sup Ct Kings County 1/30/20) where the court held that the People CANNOT claim the benefit of an excludable time after 1/1/20 where they have failed to demonstrate due diligence to provide discovery materials as required by the statute, nor demonstrated good cause for an extension of time to comply or shown that there are special circumstances justifying non-disclosure.

On 4/20/19, the defendant was arraigned on charges of Menacing, Criminal Contempt, Endangering the Welfare of a Child and Harassment. The case was adjourned to 6/4/19 to convert the complaint into an information. The People were NOT READY on 6/4/19 and the case was adjourned to 7/29/19.

On 7/18/19, the People filed a superseding information and declared RFT. The case was adjourned to 9/5/19 for discovery. The People partially complied on that date. The case was then adjourned to 10/16/19 for hearing/trial but on that date, the People were NOT READY to proceed. The defendant also served notice of OUTSTANDING DISCOVERY including 911 calls, police radio calls and possible surveillance video. The court adjourned to 11/12/19.

On that date, the People were NOT READY (no complainant), and requested a three-day adjournment. The defense still demanded discovery. The case was put off until 12/12/19 at which time the People were, again NOT READY (no P.O.), and requested a one-day continuance. Defense counsel was not available on 12/13/19, so the court adjourned until 1/7/20.

On 1/3/20, the defendant moved to dismiss per CPL 30.30, contending, inter alia, that 1/1/20-1/3/20 was chargeable to the People because they were back in a "pre-ready" posture and had not filed a COC. (Up to 1/1/20, the People already had accrued 89 days of chargeable time).

The court began its analysis by noting that the new statutes established a "new procedural framework" for discovery compliance and trial readiness, and provides explicit direction with respect to the steps that must be taken for the People to make a valid declaration of trial readiness. The court also noted that the outstanding discovery items including witness statements, police investigative reports, and potential video surveillance of the incident constituted relevant and material evidence within the meaning of CPL 245.10.

Also, the People did not request any extension of time to meet their obligations, nor did they point to an extraordinary circumstances that would justify non-compliance. And, the People's only declaration of trial readiness was at the outset back on 7/8/19.

So, the question, as the court framed it, was whether the People should get the benefit of the time from 12/13/19 to 1/7/20 since the People had only requested a one-day continuance and the defense sought a longer period on account of counsel's unavailability. The court noted that, generally, when defense counsel actively participates in selecting an adjournment date which exceeds the People's request, the defense is deemed to have consented to the later date and the time should be excluded. (People v Liotta 79 NY2d 841 [1982]).

However, the court said that the fact of the defense request alone DOES NOT OVERRULE the People's obligation to meet the appropriate standards for trial readiness in this case. The court noted that the defendant's adjournment request was made under the old rules, and once the new rules went into effect, the trial readiness standard changed and the People CANOT EVADE the mandate of the new law by claiming that an adjournment is excludable without exercising due diligence to meet that standard.

Long story short, as far as this court was concerned, the People were not allowed to claim the benefit of excludable time with unclean hands (i.e. unexplainable on-going failure to comply with discovery and not timely declaring RFT upon a proper COC). Therefore, the court saw fit to charge the People with the additional two days from 1/1/2–1/3/20, thereby bringing them to 91 days of chargeable time.

A similar conclusion was reached in People v Mashiyach 2020 NY Slip Op. (Crim. Ct.Ct Kings County 10/27/20). The defendant was arraigned on charges of Assault 3d degree and other misdemeanors (Menacing, Mischief, CPW 4th), on 7/26/19. The case was adjourned to 9/4/19 to convert the complaint to an information. In the meantime, on 8/30/19, the people filed a superseding information and a statement of trial readiness to which the defense objected.

The case was adjourned to 10/17/19 for discovery by stipulation. (In Kings County, the former practice was for the People to consent to informal discovery in exchange for the defense taking the speedy trial time). However, on 10/17/19, the People did not yet comply and the case was adjourned to 11/8/19. (The prosecutor promised to provide discovery "off calendar"). As of 11/8/19, the People had accumulated 49 days (7/26/19/8/30/19 plus 14 additional days requested to comply with discovery) of speedy trial time.

On the trial date of 12/9/19, the People were not ready (P.O. unavailable), and requested 11 days for a new trial. Defense counsel suggested 1/21/20 as a good date and the court agreed. On that date, the People noted that they had not yet completed discovery, so the court adjourned til 2/11/20 for the People to comply and file a COC.

The parties reportedly conceded that the People were chargeable with 60 days of speedy trial time in 2019 (49 days initially plus the additional 11 days they requested on 12/9/19).

With respect to the time after 1/1/20, the People argued (unsuccessfully) that their original declaration of readiness on 8/30/19 carried over into 2020. The court held that while the People's readiness declaration was valid when made (and carried them up to the end of the year), the new law requiring compliance with discovery as a condition to trial readiness (as evidenced by a COC), put them back in a pre-readiness posture. To hold otherwise, in the court's view, and not charge the People with the time from 1/1/20 to 2/11/20, would serve to undermine the framework of the new laws which link the two elements of discovery compliance and trial readiness.

As the court saw it, the ticking of the speedy trial time clock while the People discharge their discovery obligations reinforces the MANDATED DEADLINES of CPL 245.10(1) just as the potential for sanctions under CPL 245.80(1) imposes consequences for omissions or deficiencies in discovery. Consequently, since the People had not yet met their discovery obligations and had not (indeed, could not) declare(d) trial readiness, the 42 days from 1/1/20-2/11/20 was chargeable to them, thereby taking them 12 days over their 90-day limit.

In People v Rambally 66 Misc3d 1230(A) (Sup Ct Nassau County Dist. Ct. 8/13/20), the People were deemed to have overstepped their speedy trial deadline by one day. On 7/30/19, the defendant was arraigned on charges of DWI, Speeding and Following Too Closely. The People declared RFT on that same date.

On 12/17/19 the People were unready for trial and requested a two-week adjournment. The court re-scheduled the matter to 2/7/20. On that date, the people were not ready and the court adjourned the case to 2/27/20. The People were unready again and the court adjourned to 3/31/20. However, on the 3/16/20, the court shut down due to COVID-19 and adjourned to 4/30/20.

On 3/18/20, the People served the defense with a COC but did not file it with the court. On 3/20/20, the speedy trial statute was tolled by the Executive order. The defendant then moved to dismiss pursuant to CPL 30.30, arguing that the People should be charged with 92 days from 12/17/19 through 3/18/20. The People responded that they should only be charged with the adjournment time that they requested in light of their earlier declaration of readiness. (People v Anderson 66 NY2d 529 [1992]). All told, by the People's calculation, they should have been charged with no more than 53 days.

The court rejected the people's argument that the new statutory rules should apply to them as of 2/7/20, the first scheduled court date after 1/1/20. Unlike cases cited by the People, the adjournment in this case from 12/19/20 was due to the People's unreadiness (rather than requests by the defense (CPL 30.30[4][b]). And, while CPL 245 does not state when the clock on People's discovery obligations begins to run for cases arraigned before 1/1/20, the court noted that there was nothing that prevented the People from completing their discovery obligations, filing a COC and declaring ready for trial at any time between 1/1/20 and 2/7/20. (The court also took note that the case had been pending for six months without full discovery having been provided).

As far as the court was concerned, there is no legislative "grace period," that limits the applicability of the new statutes to the People's first court appearance after 1/1/20. If the Legislature had so intended, it could have said so, but it didn't. (People v Akramov 67 Misc 3d 558 [1st dep't 2020]).

Consequently, the court charged the People with all the time from 12/17/19 to 3/16/20 thereby putting them over their speedy trial limit. (The court also noted that the People had up until 5:30pm on 3/16/20 to file their COC with the court but did not do so).

In People v Adrovic 2020 NY Slip op 20218 (Crim. Ct. City go NY 9/3/20), a DWAID and Misdemeanor drug case that began on 11/19/18 and proceeded over numerous adjournments where the People were sometimes ready and other times not, the bottom line was that when the People filed a COC and declared ready on 1/28/20 and 2/26/20, the court held that the certificate was invalid and the statement of readiness illusory because the People never provided statutorily required discovery including laboratory reports for the controlled substances and police memo books regarding the stop and arrest of the defendant.

Therefore, the entire period from 1/1/20 through 2/18/20 when the defendant brought a 30.30 motion was chargeable to the People, and when combined with earlier chargeable periods, the People were found to be in the speedy trial dead zone by 15 days.

Given the nexus between discovery compliance and the People's ability to declare trial readiness, and considering that the People's obligation with respect to the former no longer requires any demand from the defense, it can well be argued that adjournments (beyond the 20-day and 30-day limits of CPL 245.10) should not be excludable under CPL 30.30(4)(a) (at least insofar as it pertains to a demand to produce for a bill of particulars). This is especially so where the People are dilatory in complying and fail to provide good cause that would justify any additional time to supply the required material/information under CPL 245.70(2).

While some courts, may exclude the statutory time frames for compliance from their speedy trial calculations, counsel should remind the court that the case still commences for speedy trial purposes with the filing of the (first) accusatory instrument (People v Stirrup 91 NY2d 434 [1998]) and the clock starts ticking the very next day. (People v Stiles 70 NY2d 765 [1987]). And, there can be no meaningful declaration of readiness for trial until the People have filed a proper COC.

Counsel should not be shy about taking the People to task by motion when the People's discovery falls short of the requirements set forth in CPL 245.20. Not only will the People be forced to provide the material/information that the defense needs to prepare a proper defense (or perhaps offer a better plea to avoid the hassle of compliance), they may well be running down the clock to the point that when push comes to shove, they've got no life lines left to keep their case from going under.

RECENT FOURTH DEPARTMENT CASES ON SPEEDY TRIAL:

In People v Pratt 2020 NY Slip op 04662 (4th dep't 8/20/20), the Fourth Department reversed the County Court's order which granted the defendant's motion to dismiss the indictment because the lower court erroneously charged the People with the entire period of post-readiness delay (in excess of six months per CPL 30.30 1[A]), due to People's withdrawal (one week before trial) of their earlier statement of readiness, which, in the lower court's view, rendered that declaration illusory.

On 6/20/18, the defendant was arrested for sex offenses after his ex-girlfriend accused him based on Instagram photos that she had received depicting him engaged in sexual acts with the ex's 10-year-old sister. on 9/7/18, the defendant was indicted on charges of Predatory Sex Act Against a Child, Criminal Sex Act 1st degree, and multiple counts of Use of a Child in a Sexual Performance and Promoting Sexual Performance by a Child. The People declared RFT on 9/13/18.

On 5/1/19, one week before the scheduled trial date, the People withdrew their statement of trial readiness, advising that new, possibly exculpatory evidence was found that required

further investigation. (Apparently, due to mistakes made by investigating detectives, the prosecutor was erroneously led to believe that they could not locate the user of the Instagram account that was used to send the photos of the defendant and the victim).

Nine days later, the defense moved to dismiss and the court granted the motion.

The AD noted, first, that the People had six months from the filing of the felony complaint to declare ready for trial. (People v Barden 27 NY3d 550 [2016]). It was undisputed that the 85-day period from 6/20/18 until 9/13/18 was chargeable to the People.

The court explained that the statutory time period is calculated by computing the time elapsed between the filing of the first accusatory instrument and the People's declaration of readiness, subtracting any excludable periods of delay (CPL 30.30 [4]) and then adding in any post-readiness periods of delay that are ACTUALLY ATTRIBUTABLE to the People are which are ineligible for exclusion. (People v Barnett 158 AD3d 1279 [4th dep't 2018]).

The court noted also that TRIAL READINESS requires an on-the-record declaration or written notice of same at a time when the People are actually ready. (People v Kendzia supra, People v Chavis supra). If it is only a prediction or expectation of future readiness, then it is ILLUSORY. (People v England 84 NY2d 1 [1994]) and therefore, does not stop the clock from running against the People.

The AD held found that the defendant had failed to demonstrate that the People were not actually ready for trial when they said so on 9/13/18. He was admittedly unaware of what evidence the People had when they announced readiness (this should no longer be the case under the new rules), and absent proof that a readiness statement does not accurately reflect the People's position, the People are deemed to have discharged their duty under CPL 30.30. (People v Carter 91 NY2d 795 [1998]). (Now, the court, per CPL 30.30[5], must inquire on the record to verify the People's certification of readiness).

The defendant argued that the People had the pertinent information in their possession in October 2018 but waited until a week before trial to examine their own evidence. Therefore, in the defendant's view, all of the time after their declaration of readiness should be charged to them.

The AD held, however, that post-readiness delay should only be charged to the People when the DELAY IS ATTRIBUTABLE to their inaction and DIRECTLY IMPLICATES THEIR ABILITY to proceed to trial. (People v Fulmer 87 AD3d 1385 [4th dep't 2011]). Here, while the People's 11th-hour realization was due to their own failure to properly inspect their evidence, the only delay that was chargeable to them, in the court's estimation, was the additional time they requested to investigate the matter.

Also, their need to investigate further, did NOT, according to the AD, render their earlier declaration of readiness illusory since the record demonstrated that when they did so, they would have been able to to proceed to trial and establish a prima facie case. (People v Hewitt 144 AD3d 1607 {4th dep't 2016]). And, because the defendant moved to dismiss nine days after the People withdrew their statement of readiness, that was the only additional time that should have been charged to the People.

Since the People were only chargeable with 94 days of speedy trial time, they were well within the six-month period of CPL 30.30 (4)(a) (People v Bastion 88 AD3d 1468 [4th dep't 2011]). Accordingly, the lower court's order of dismissal was reversed, the indictment was re-instated and the case was remitted for further proceedings.

Although no issue was raised with respect to discovery under CPL Art. 245, perhaps the defense could have argued that the People failed to comply with their obligation to disclose Brady material (CPL 245.20[1][k]), and in light of the new disclosure deadlines, should have exercised due diligence to investigate the matter long before the trial date was nigh.

The decision is silent as to whether the People filed a proper COC as required by CPL 245.50(1) but if they did not, the defense could have argued that the People had reverted to a state of unreadiness after 1/1/20 (see People v Lobato and People v Roland supra), so that the period from 1/1/20 through 5/9//20 (when the defense brought the motion to dismiss) (roughly 129 days), should have been added to the 85 days that were chargeable before the first declaration of trial readiness. If so, the outcome might have been different.