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# DOES THE NEW LAW PROHIBITING VEHICLE SEARCHES BASED ONLY ON THE ODOR OF MARIJUANA APPLY TO PENDING SUPPRESSION MOTIONS ARISING FROM ARRESTS THAT PREDATE THE LAW'S ENACTMENT?

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## INTRODUCTION

On the March 31st, 2021, the New York State Legislature enacted the Marijuana Reform and Taxation Act (MRTA) which, among many other things, legalized the purchase, possession, personal use, and exchange of up to three ounces of marijuana, referred to therein as cannabis. (See Penal Law § 222.05 [1][a-d]).

Penal Law § 222.05 (1) defines CANNABIS, in pertinent part, as consisting of all parts of the cannabis plant, whether growing or not, the seeds thereof, the resin extracted from any part of the plant and every compound, manufacture, salt, derivative mixture or preparation of the plant its seeds or resins.

According to the Legislative Memoranda in support of the law which went into effect immediately upon its enactment, the driving forces behind the change included the failure of the former laws to protect community welfare, their adverse effect on minority populations in terms of disproportionate arrests and incarceration (eight times more arrests of blacks and 5 times for Hispanics) and devastating collateral consequences including lost employment opportunities, denial of housing access, student loan ineligibility and suspended voting rights (Assembly Bill 01248A, Senate Bill 00854-A).

## AUTOMOBILE SEARCHES BASED ON ODOR OF MARIJUANA

In addition to decriminalizing the possession of small (i.e., personal use) amounts of marijuana, the new law also significantly changed the rules relating to the search of motor vehicles (and motorists) based on police detection of the ODOR OF MARIJUANA emanating therefrom.

Under the common law rule, expressed in *People v Chestnut* (43 AD2d 260 [3d Dept 1974], *affd* 36 NY2d 971), and frequently relied on by police and prosecutors, the olfactory detection of marijuana by a trained and experienced officer was deemed sufficient to provide probable cause to search a vehicle (including the trunk) and its occupants for contraband (See also *People v Walker*, 128 AD3d 1499 [4th Dept 2015]).

This represented a generous application of the AUTOMOBILE EXCEPTION to the warrant requirement allowing police to search a lawfully stopped vehicle for contraband, a weapon or evidence of a crime if the police have probable cause to believe that the operator/occupants have committed, are committing

or are about to commit a CRIME and there is some factual nexus between the crime and the object of the search. (See *Carroll v US*, 267 US 132 [1925], *US v Ross*, 455 US 798 [1985]: The scope of a vehicle search is defined by the object of the search and the places where there is probable cause to believe it may be found).

See also *People v Baez* (24 AD3d 112 [1st Dept 2005]): The permissible scope of a warrantless search pursuant to the automobile exception is the equivalent of the type of search that a magistrate would allow based on a particularized description of the place to be searched and the thing to be seized.

More recently, in *People v Ponder* (191 AD3d 1409 [1ST Dept 2021]), the First Department, relying on US v Ross, supra, held that the ODOR of MARIJUANA and OBSERVATION of a SMALL AMOUNT of marijuana (indicative of personal use rather than distribution) DID NOT provide probable cause to search inside the trunk of a vehicle.

Police detectives in that case pulled the defendant over for driving without working taillights. When he rolled down the window, the detectives smelled and observed marijuana smoke. The defendant was removed from the vehicle and patted down. One detective escorted him to the rear of his vehicle while the other looked inside and saw a small amount of loose marijuana in the center console.

The defendant was then placed in the back of the patrol car, and a search of the trunk lead to the discovery of a loaded handgun. After suppression was denied, the defendant pled guilty to Criminal Possession of a Weapon 3d degree and was sentenced as a predicate felony offender to a determine term of five years in prison followed by post-release supervision.

In reversing the conviction, the Appellate Division (AD) first noted that while the automobile exception dispenses with the requirement of a search warrant, there must also be probable cause to believe that contraband and/or evidence of a crime can be found in the vehicle.

Rejecting prior cases holding otherwise (e.g., *People v Mena*, 87 AD3d 946 [1st Dept 2011], *People v Valelle*, 88 AD3d 461 [1st Dept 2011]), the court in Ponder concluded that the sight and smell of small amounts of marijuana do NOT justify a search of the trunk for more marijuana, much less a weapon, absent some other factual basis to believe that contraband or evidence of a crime can be found therein. (Citing, inter alia, *People v Ramos*, 122 AD3d 462 [1st Dept 2014], *People v Romeo*, 15 AD3d 420 [2d Dept 2005]: Smell of marijuana, defendant's possession of a half gram of marijuana and defendant's inability to produce a license did not provide any basis to search a duffel bag in the trunk which contained a gun, especially after a search of the vehicle turned up nothing.

Similarly, in *People v Javier* (2022 NY Slip Op 22136 [Sup Ct. Bronx County 4/25/22]), the court, citing *People v Ponder*, supra, held that police lacked probable cause to search the defendant's vehicle (which turned up a loaded gun) based on the smell of marijuana and the observation of a small amount of it in the center console.

After observing the defendant make a right turn without signaling, the officers followed his vehicle and noticed that the temporary license was expired. They pulled the defendant over, directed him to roll down the window, and when he did so, they smelled "dry" marijuana. When they asked the defendant for his driver's license, he said he did not have it. The defendant then gave a false name.

Upon observing some weed in the center console, one of the officers asked if there was more marijuana in the car. The defendant replied that there were a few baggies in the car. He opened one of them and others contained edible gummies not exceeding two ounces worth.

After getting the defendant out of the vehicle, the officers searched the interior and saw a grocery bag on the rear passenger-side floor with a gun handle sticking out. They removed the bag and seized the weapon.

Noting that this search would have likely been upheld under People v Chestnut, supra, the court noted that the automobile exception permits a vehicle search upon probable cause to believe evidence of a crime or contraband will be found therein, and a piddling amount of pot consistent with personal consumption does not provide a sufficient basis for such an intrusion.

THE NEW STATUTE

Penal Law § 222.05 (3) states that (except as provided in subdivision four below), in ANY CRIMINAL PROCEEDING including PROCEEDINGS pursuant to CPL 710.20 (MOTIONS TO SUPPRESS EVIDENCE), NO FINDING OR DETERMINATION OF REASONABLE CAUSE TO BELIEVE A CRIME HAS BEEN COMMITTED SHALL BE BASED SOLELY ON EVIDENCE OF THE FOLLOWING FACTS AND CIRCUMSTANCES, EITHER INDIVIDUALLY OR IN COMBINATION WITH EACH OTHER:

(a) the ODOR of CANNABIS;
(b) the ODOR of BURNT CANNABIS;
(c) the POSSESSION or SUSPECTED POSESSION of CANNABIS or CONCENTRATED CANNABIS in AMOUNTS AUTHORIZED BY THE SECTION, (i.e., up to 3 ounces or 24 grams respectively per subdivision 1);
(d) the POSSESSION of MULTIPLE CONTAINERS of CANNABIS without evidence of concentrated cannabis in authorized amounts;
(e) the PRESENCE of CASH or CURRENCY in PROXIMITY to CANNABIS or CONCENTRATED CANNABIS; or
(f) the PLANTING, CULTIVATING, HARVESTING, DRYING, PROCESSING or POSSESSING of CULTIVATED CANNABIS per Penal Law § 222.15.

SMELL OF BURNT MARIJUANA IN DWAID INVESTIGATION

4. Paragraph (b) (ODOR of BURNT CANNABIS) does NOT apply when a law enforcement officer is INVESTIGATING whether a person is OPERATING a MOTOR VEHICLE, (vessel or snowmobile) while IMPAIRED BY DRUGS (or under the combined influence of alcohol and any drug[s] in violation of VTL 1192 (4) or (4)(a) or Navigation Law 49-a (2)(e) or Parks Recreation and Historic Preservation Law 25.24 (1)(d).

LIMITED SEARCH

During such investigations, the ODOR of BURNT CANNABIS shall NOT provide PROBABLE CAUSE to SEARCH ANY AREA OF A VEHICLE that is NOT READILY ACCESSIBLE to the DRIVER and REASONABLY LIKELY to CONTAIN EVIDENCE RELEVANT TO THE DRIVER'S CONDITION.

So, unless the officer is investigating the driver for DWAID (or driving under the influence of both alcohol and drugs), the odor of BURNT MARIJUANA will NOT justify a search of a vehicle. When it does, the search MUST BE LIMITED to the area within the driver's immediate reach and must likely contain evidence that is relevant to the driver's condition. (e.g., burning joint).

CRIMINAL PROCEEDING

As noted above, the "no reasonable cause" rule applies in ANY CRIMINAL PROCEEDING including (suppression) proceedings pursuant to CPL 710.20.

CPL 1.20 (18) defines a CRIMINAL PROCEEDING as any proceeding which (a) constitutes PART OF A CRIMINAL ACTION (which, per subdivision 16, commences with the filing of an accusatory instrument) or (b) OCCURS IN A CRIMINAL COURT and is RELATED TO a PROSPECTIVE, PENDING or COMPLETED CRIMINAL ACTION, (in this state or any other jurisdiction) or INVOLVES A CRIMINAL INVESTIGATION.

DOES THE NEW RULE APPLY TO PENDING CASES ARISING FROM ARRESTS THAT PRE-DATE THE CHANGE?

The short answer would appear to be NO. However, an argument could (and probably should be) made that despite the absence of an EXPRESS STATEMENT of legislative intent to apply the new law (in particular, suppression rules) retroactively, doing so would be entirely consistent with the Legislature's condemnation of the former marijuana possession laws as being so entirely ineffectual (in protecting public welfare) discriminatory (in enforcement) and adversely consequential to otherwise law-abiding citizens as to warrant repeal (Article 221), replacement (Article 222) and the creation of opportunities to vacate/reduce convictions and sentences, and seal and expunge records. (CPL 440.46-a).

It is also worth noting that Penal Law § 222.05 (3) states that the no reasonable cause (from the odor of marijuana) rule applies in ANY CRIMINAL PROCEEDING (including those pertaining to suppression) without reference to whether it applies to a crime/arrest that precedes its effective date (3/31/21). An argument could be made that if the proceeding is pending when the new law went into effect, it should be governed by the new rule regardless of whether the seizure of contraband took place before the new law's enactment.

THE FOURTH DEPARTMENT VIEW

In *People v Vaughn* (203 AD3d 1729 [4th Dept 2022), the Fourth Department REJECTED the defendant's argument (on appeal from his conviction by plea to CPW 3d degree) that Penal Law § 222.05(3) should be applied RETROACTIVELY to nullify the search of his vehicle (which the officers approached for being double parked whereupon they detected the odor of burnt marijuana).

The court, citing, inter alia, *People v Oliver* (1 NY2d 152 [1956]), said that it was well settled that statutes dealing with matters OTHER THAN PROCEDURE were NOT INTENDED to be applied retroactively absent a PLAINLY MANIFESTED LEGISLATIVE INTENT to that effect. In the court's estimation, nothing in the plain language of Penal Law § 222.05(3) suggested such an intent. (Citing also, *People v Austen*, 197 AD3d 861 [4th Dept 2021]).

In Austen, the court affirmed the defendant's Rape 1st degree conviction and found that the People had timely provided Rosario material (video-taped statement of the victim) ten days before trial in

accordance with CPL 245.45(1)(a) which had since been changed by the enactment of the new discovery rules (CPL 245.15[1][a] and 245.20) requiring discovery within 20-35 days of arraignment (depending on the defendant's custodial status).

The concurring justice (Hon. Nancy E. Smith) took it upon herself (in view of the majority's silence) to explain why the new statute did not qualify for retroactive application to the defendant's trial. The first step is to discern the Legislature's INTENT by examining the TEXT of the STATUTE and then giving effect to the plain meaning thereof. (Citing, *inter alia, People v M.E.*, 121 AD3d 157 [4th Dept 2014]). Absent a clear indication in the statute itself, the next step is to look at the legislative history for statements of purpose and whether the effective date of the statute is immediate or delayed (*People v Utsey*, 7 NY3d 398 [2006]). As the concurring justice noted, a clear expression of the purpose is required to justify a retrospective application. (Citing *People v Lawrence*, 80 AD3d 1011 [1st Dept 2011]).

PROCEDURAL STATUTES, however, generally qualify for retroactive application (to pending proceedings) except where the Legislature indicates otherwise, for example, where the effect of the new law would be to nullify actions already taken. (Citing *People v Anderson*, 306 AD3d 536 [2d Dept 2003]: Amendment to CPL 310.20 [2]) properly applied retroactively to uphold the trial court's use of an annotated verdict sheet which violated the statute as it existed at the time of trial. A review of the legislative history supported such application).

In Austen, the concurring justice noted that applying CPL 245.10(1)(a) retroactively would NULLIFY the (Rosario disclosure) procedures used in all cases prior to its enactment and in pending cases for the several months between its enactment and effective date. Also, the delay in the statute's effective date supported the conclusion that the statute was meant to apply prospectively. (Citing People v Utsey, supra).

The concurring justice stated that courts deciding whether to apply a statute retroactively should consider: 1. the purpose to be served by the new standards, 2. the extent of reliance by law enforcement on the old standards, and 3. the effect on the administration of justice of a retroactive application of the new standard. (Citing People v Morales, 37 NY2d 262 [1975]).

Noting that the People have consistently relied on the old Rosario rules, the retroactive application of which would severely disrupt the criminal justice system, and absent a clear indication of legislative intent to the contrary, the amendment was meant for prospective application.

SECOND DEPARTMENT IN LINE WITH THE FOURTH DEPARTMENT

In People v Babadzhanov, (204 AD3d 685 [2d Dept 2022]), the Second Department upheld the search of the defendant's vehicle (pulled over for leaving the curb without signaling) based on the smell of marijuana followed by the observation of pot and over a thousand dollars in cash, which led to the discovery of loaded gun in the trunk. (Citing, inter alia, People v Blasich, 73 NY2d 673 [1989]).

The court also determined that Penal Law § 222.05(3) did NOT apply retroactively to this search because there was no expression of legislative intent in favor of such application of the statute. While MRTA did provide for retroactive relief in the form of vacatur or reduction of convictions for former marijuana offenses, and for sealing of records, (see, CPL 440.46-a, CPL 160.50[3]), there was no provision for retroactive application of Penal Law § 222.05(3) that would serve to invalidate an otherwise proper search that led to the discovery of a loaded weapon. Consequently, in the court's view, the

PRESUMPTION of PROSPECTIVE APPLICATION had not been overcome. (Citing *Majewski v Broadalban-Perth Central School District*, 91 NY2d 589 [1998]).

AN ARGUMENT FOR RETROACTIVE APPLICATION

In People v Vaughn, supra, the Fourth Department cited *People v Oliver* (1 NY2d 152 [1956]) for the proposition that statutes (like Penal Law § 222.05[3]) dealing with matters other than procedure are presumed to apply prospectively absent a clear expression of legislative intent otherwise. However, the Oliver court's analysis of the retroactive application of a 1948 amendment (to Penal Law § 486) which removed children under age 15 from the specter of criminal prosecution for crimes (including Murder 1st degree which carried the prospect of the death penalty) to a fratricide committed by the defendant in 1945 when he was 14, provides some basis for arguing that Penal Law § 222.05[3] should also be given retroactive effect.

In April 1945, the defendant who had a family history of mental illness, stabbed his two-year old brother in the chest several times, then dragged him to the bathroom, filled the tub with water and submerged the child. He also set his clothing on fire.

The defendant went to the police station where he admitted his crime and stated that he was trying to get even with his mother. The defendant was psychiatrically examined and deemed to be unfit to stand trial for lack of capacity to understand the proceedings and assist in his defense. He was confined to a state hospital for nine years until he was found competent to proceed.

In 1955, defense counsel argued that the defendant could not be tried for murder in light of the 1948 statutory amendment mandating that children under age 15 could only be subject to treatment as juvenile delinquents (i.e., care, treatment and monitoring) rather than prosecuted as criminals. (Previously, children from age seven to 16 could be prosecuted for every manner of crime including murder which carried the potential for the death penalty).

The trial court rejected the defense's argument, and the jury rejected the defendant's insanity defense.

The Court of Appeals began its analysis by stating the general rule that statutes dealing with non-procedural matters should not be applied retroactively absent a plainly manifested legislative intent to that effect. (Citing *Garzo v Maid of the Mist Steamboat Co.*, 303 NY 516 [1952]). As the Court explained, this rule recognizes that people conduct themselves in accordance with existing laws, and it would be unfair to upset the expectations, rights and liabilities created by such laws by subsequent retroactive changes, especially those which either criminalize formerly innocent conduct or increase the punishment for crimes previously committed, (i.e., *ex post facto* laws). (Citing *People ex rel Pincus v Adams*, 247 NY 447 [1937]).

Conversely, when a criminal statute is repealed, or a penalty reduced, the danger of "ex post facto oppression" is lacking because the new law is deemed to be ameliorative rather than punitive in nature. (Citing *People v Hayes*, 140 NY 484 [1894]). However, under certain so-called "saving clauses," (see General Construction Law §§ 93, 94), the State may seek to retain the right to punish offenses committed before the legislative change under the stricter law then in effect.

The Court explained that at common law, the repeal or amendment of a penal statute barred any further prosecution under that statute for violations committed before the repeal and abated all

pending prosecutions which had not reached final judgment (Citing *Hartung v People*, 22 NY 95 [1863]). It was felt that repeal reflected a "legislative will" that violations of the statute, though committed while it was still in effect, should no longer be regarded as criminal and thus, should not be punished under the repealed statute.

Such reasoning was deemed, however, to yield anomalous results when a new or amended statute treated a crime more harshly and an offense committed before its enactment (under a law that no longer exists) could go unprosecuted and unpunished. Consequently, "saving clauses" were inserted in repealing laws to preserve the State's right to prosecute offenses committed under the repealed statute.

Courts, however, have interpreted such clauses merely as principles of construction which apply in the absence of expressed legislative intent to the contrary and which should be avoided at least insofar as ex post facto laws are concerned. (Citing *People v Roper*, 259 NY 635 [1932]).

With respect to ameliorative statutes (which reduce the punishment for a crime), the Court noted that the lesser penalty may be imposed in ALL CASES DECIDED AFTER THE EFECTIVE DATE OF THE ENACTMENT, EVEN THOUGH THE UNDERLYING ACT MAY HAVE BEEN COMMITTED BEFORE THAT DATE. (Citing *People v Roper*, supra and People v Hayes, supra). In other words, the mitigation of a penalty represents a legislative judgment that the lesser punishment or different treatment is sufficient to satisfy the requirements of the criminal justice system and should be imposed in all cases that subsequently reach the courts.

In the *Oliver* court's view, the 1948 amendment was ameliorative insofar as it released children under age 15 from the prospect of prosecution and punishment as criminals. The legislation was deemed to reflect a more enlightened view that people in their formative years should not be treated like adults but rather dealt with humanely by treatment and supervision as juvenile delinquents. Consequently, to impose penalties previously enforced after the Legislature has deemed them to be ill-suited to children would serve no good purpose.

The Court did acknowledge however, that where legislation may repeal or redefine a crime, the State may seek to retain the right to prosecute for the act previously committed in defiance of the law as it existed. (Citing *People v England*, 91 Hun 152 [1895], *US v Reisinger*, 128 US 398 [1888]). However, as the Court saw it, in makes littles sense to give retroactive effect to a judgment which reduces the penalty for a crime and deny such effect when the judgment eliminates the penalty altogether.

Citing *People v Roper*, supra, the Court concluded that in the absence of a clause excluding offenses committed before 1948 from the amendment, the new law applies to all trials held after its enactment, including those involving crimes that were committed beforehand (*People v Roper*, 259 NY at 179-180).

In the Court' estimation, if it shocked the conscience to try a child between ages seven and 15 for a crime that could, in theory, land him in the electric chair, it is no less offensive to try him in 1955 simply because his childhood crime occurred before the law was changed. And while a change in law cannot a affect a case already brought to judgment with the execution of sentence before its enactment (*Welch v Hudspeth*, 132 F2d 434 [10$^{th}$ Cir. 1942]), where the change in law reflects a judgment that its predecessor was unduly harsh or unjust, a court should not withhold the benefits of the new statute to one tried after its passage just because it cannot do so for those already convicted.

The dissenting judge (Hon. Charles W. Froessel) argued that absent any clear statement of legislative intent to apply the amendment retroactively, there was no basis here for doing so. Also, the plain language of GCL 93, 94 mandated denial of such treatment.

The dissenter also found it grossly unfair that someone who had butchered his baby brother would be allowed to evade prosecution as an adult (in light of the majority's holding) as well as any adjudication in Children's Court (with its goals of treatment and supervision) because he was an adult when his case went to trial.

Considering Oliver, in the context of MRTA, it could be argued that since the new marijuana law was enacted to ameliorate what the Legislature clearly perceived as serious harm done to so many people by an unnecessarily punitive and unjust statutory scheme (Penal Law Article 221), it should be applied to pending cases stemming from arrests that predate its enactment. And if, as the Legislature concluded, minorities have been unfairly and disproportionately targeted for arrest by police, a law that seriously constrains their legal authority to make such arrests following the search a vehicle based on the odor of marijuana, arguably should have retroactive effect.

Worth reading for its analysis of the applicability of Penal Law § 222.05 (3) to a pending administrative hearing on the police department's authority to retain a vehicle seized as an alleged instrumentality of a crime (criminal possession of a weapon in the third degree) pending civil forfeiture proceedings is: the case of In the Matter of the NYC Police Department v Young (Oath Index # 2033/22, memorandum decision 5/26/21).

In that case, on 11/17/20, the respondent (also a defendant in a pending criminal prosecution), was in a double-parked vehicle on a street in the Bronx when two police officers approached and detected a strong odor of marijuana emanating therefrom. They got him out of the car, patted him down and found a loaded .9mm pistol in and inside jacket pocket. A subsequent search of his fanny pack (a fashion felony) revealed nine zip lock bags of marijuana.

The defendant told the officers that he had found the gun in a park and had smoked marijuana earlier that day.

The Administrative judge noted that the petitioner had the burden to show by a preponderance of the evidence that 1. the vehicle was seized pursuant to an arrest that was based upon probable cause, 2. the petitioner was likely to prevail in a civil forfeiture action and 3. retention of the vehicle was necessary to ensure its availability if forfeiture was granted.

Noting that the search would likely be upheld under People v Chestnut, supra, the judge considered (in a hearing conducted in May of 2021) whether her preliminary assessment with respect to probable cause should be made pursuant to Penal Law § 222.05 (3) which had gone into effect two months earlier.

Relying in large measure on the Court of Appeals analysis of ameliorative statutes and the legislative objectives underlying them in People v Oliver, supra, the judge concluded that the police conduct in this administrative matter should be analyzed under the newly enacted statute prohibiting vehicle (or occupant) searches based only on the odor of marijuana. The judge also was persuaded by the Legislature's recitation of wrongs that MRTA was designed to make right and its directive that the new law shall TAKE EFFECT IMMEDIATELY (2021 NY Laws. Ch. 92, section 2).

The judge distinguished People v Utsey (and the companion cases of People v Nelson and *People v Smith*) (7 NY3d 398 [2006]) where the Legislature made clear its intent that the reduced sentencing provisions of the Drug Law Reform Act (DLRA) of 2004 shall apply to CRIMES COMMITTED ON OR AFTER THE EFFECTIVE DATE THEREOF (2004 NY Law Ch. 738, section 41).

Also, persuasive to the ALJ's analysis was the fact that MRTA created a statute (PL 222.05[3]) that applied to the assessment and determination of suppression issues in criminal proceedings (which the judge interpreted as including pending ones).

Acknowledging that MRTA specifically provides for retroactive relief in the form of vacatur and reduction of prior convictions (CPL 440.46-a) and sealing of records (CPL 160.50) and that Penal Law § 222.05[3] is essentially silent on the issue of its applicability to pending cases, the ALJ concluded that these new statutes were not in conflict and thus, could stand together.

Concluding that the search of the defendant violated Penal Law § 222.05 (3), the judge ruled that the petitioner failed to establish its right to retain the respondent's vehicle.

NEW SPEEDY TRIAL RULE NOT RETROACTIVE

In *People v Ali* (7 Misc3d 25 [Sup Ct, App Term 1st Dept 6/19/21]), the court held that the 2019 amendment to CPL 30.30 (which added VTL infractions to the offenses subject to speedy trial dismissal) did NOT apply to the defendant's 2016 DWAI conviction that was challenged on this appeal. (Citing *People v Duggins*, 192 AD3d 191 [3d Dept 2021]).

The court said that there must be a CLEAR EXPRESSION of LEGISLATIVE PURPOSE to permit a retroactive application of a statute, indicating that the legislature has considered the implications of such application and determined that the benefits of doing so outweigh any countervailing costs.

Also, statutory amendments are PRESUMED TO APPLY PROSPECTIVELY, and the EXCEPTION allowing RETROACTIVE APPLICATION of REMEDIAL LEGISLATION and STATUTES GOVERNING PROCEDURAL MATTERS does NOT APPLY HERE because CPL 30.30 (1)(c) created a new (substantive) speedy trial right.

The court also concluded that the delayed effective date of the new law militated against a conclusion of retroactivity. In short, in the court's view, the legislature did NOT clearly express an intention that CPL 30.30 be applied retroactively to cases in which a defendant was SENTENCED before the effective date of the legislation. (Citing *Matter of Regina v Metro Co. LLC v NYS Division of Housing and Community Renewal*, 35 NY3d 32 [2020]).

FINAL THOUGHT

As evident, obtaining retroactive application of Penal Law § 222.05 (3) to pending cases arising from arrests predating its enactment would seem to be an uphill climb on an icy hill after People v Vaughn, supra. However, that decision does little more than recite the general rule that statutes dealing with non-procedural matters should not be so applied in the absence of an express statement to that effect by the Legislature.

However, the authority upon which the court relies (*People v Oliver*) took a more nuanced, in-depth approach that carefully analyzed the purposes of the legislative change and the injustice it sought to

remedy (e.g., the criminal prosecution and harsh punishment of children as if they were adults). Similarly, MRTA was enacted to get rid of what the legislature deemed to be an overly punitive and unevenly enforced statutory scheme that inflicted "generational trauma" upon a particular segment of the population. Moreover, the new law as it relates to criminal prosecutions took effect IMMEDIATELY upon its enactment, and the rule restricting searches based on the odor of marijuana, by its terms, applies to "any criminal proceeding" including "proceedings pursuant to CPL 710.20" (Penal Law § 222.05[3]).

If such a proceeding is commenced after the new law's effective date, it arguably should not matter that the evidence sought to be suppressed was obtained beforehand because the Legislature decided that the old rules (criminalizing the possession of small amounts of marijuana and permitting searches of vehicles based on a whiff) were unjust, and that the new rules satisfy the needs of the criminal justice system (*People v Roper*, supra, *People v Hayes*, supra).

As the number of cases predating 3/31/21 dwindle over time, the issue of retroactive application of the new law should become a dwindling concern. Preferably sooner than later.