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ISSUES TO DEVELOP AT TRIAL

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This ITD issue invites you to preserve certain claims by specifically citing and discussing New York's state constitution. As you are probable aware, our state constitution can create a higher standard for protecting individual rights compared to the federal constitution. In certain areas, the state constitution's higher level of protection is well-established. In other areas, such as the prohibition against cruel and unusual punishment, we encourage you to push the envelope, particularly if your client is young and facing a potentially lengthy sentence after conviction.

Below, we provide some brief background and a "cheat sheet" to help you develop these objections and arguments at the trial level. We flag issues to develop where the law is in flux, where New York has not directly addressed or decided whether it will follow the federal courts, or, conversely, where there is an argument that New York provides less protection than the federal constitution requires.

While you do not need to make a detailed, law-review type argument to preserve the issue (although please do if you are so inspired!), you should do more than simply cite the state constitution in making your objection or argument.

Background

When it comes to protecting constitutional rights, the federal constitution provides the floor, not the ceiling. While New York is forbidden from providing less protection than the federal constitution, it is free to provide greater protections and interpret the parallel provisions in our state constitution in ways that expand individual rights beyond the federal baseline. *See People v. PJ Video Inc.*, 68 N.Y.2d 296, 302 (1986) ("Although State courts may not circumscribe rights guaranteed by the Federal Constitution, they may interpret their own law to supplement or expand them.").

The power of New York courts to interpret rights more expansively than the federal constitution presents opportunities for you to make arguments before the trial court. It is likely the trial court will be reluctant to be so bold, but properly preserved, the argument could be crucial to future appellate litigation.

With certain constitutional rights, the Court of Appeals has already held that the New York Constitution provides greater protection than the federal constitution. When the error at issue implicates these rights, object under the federal and state constitutions, and cite the following cases to bolster your argument that the conduct at issue violated your client's constitutional rights. Your argument will be stronger if the error implicates the specific issues addressed in the

cases below, but even if not, citing the cases will illustrate the body of protective law under the state constitution generally in this area. As the cases cited are not intended to be exhaustive, please supplement with additional research. You may find a case that is more directly on point with the error you are confronting.

In other cases, as with the cruel and unusual punishment clause discussed at the end of the ITD, you will be writing on something of a clean slate. The New York Cout of Appeals has not thus far interpreted the state constitution more protectively than the federal constitution. *See, e.g., People v. Thompson*, 83 N.Y.2d 477 (1994)("Moreover, the evolving nature of the protection against cruel and inhuman punishment under the United States and New York State Constitutions includes examination of proportionality under contemporary standards."). Your arguments will be directed toward creating a record for why broader protection with this provision is also appropriate.

Please also note the "issues to develop" that we flag. These are just a few of the many issues ripe for preserving either because the state constitution should provide more protection than the federal constitution currently does, or because New York law appears to violate the federal constitution by providing less protection - forbidden.

There are many opportunities to develop this area and we hope going forward to provide a running list of issues to develop specific to the state constitution. We encourage you to be attuned to issues that suggest room to argue for a more protective rule.

Search and Seizure (U.S. Const., amend IV, XIV ; N.Y. Const., art I, § 12).

New York has a long history of interpreting our state constitution to provide greater protections against state incursions than the federal constitution.

Our state will do so when, as the Court of Appeals has put it, "the aims of predictability and precision in judicial review of search and seizure cases . . . are best promoted by applying State constitutional standards," and when the "constitutional protections we have enjoyed in this State have in fact been diluted by subsequent decisions of a more recent Supreme Court." *People v. Gordon*, 36 N.Y.3d 420, 436 (2020); *People v. Dunn*, 77 N.Y.2d 19, 24 (1990) ("At the outset, we note that in the past this Court has not hesitated to interpret article I, § 12 independently of its Federal counterpart when the analysis adopted by the Supreme Court in a given area has threatened to undercut the right of our citizens to be free from unreasonable government intrusions. Because we conclude that the *Place* analysis does just that, we decline to follow it.") (internal citations omitted).

Using this general statement, try to show that application of a broader, more protective rule is necessary to further our State's particular and longstanding concern for privacy interests. You can cite to the cases below, which all relied on the state constitution, to support reliance on the state constitution.

People v. Gordon, 36 N.Y.3d 420 (2021) - warrant application failed to establish probable cause for vehicle searches under Art. 1, § 12 of the State Constitution. Constitutional requirement of

particularity not met.

People v. Hinshaw, 35 N.Y.3d 427 (2020) - clarifying and reaffirming that, unlike in federal court, the police must have probable cause, rather than reasonable suspicion, in order to stop a driver for a traffic infraction.

People v. Class, 67 N.Y.2d 431 (1986) - on remand from the U.S. Supreme Court finding no Fourth Amendment violation, maintaining that law enforcement's nonconsensual entry into glove compartment after a stop for a traffic infraction violates art. 1, § 12 of the State Constitution.

People v. Bigelow, 66 N.Y.2d 417 (1985) - rejecting federal "good-faith" exception to exclusionary rule as a matter of state constitutional law.

People v. Gokey, 60 N.Y.2d 309 (1983) - Under the State Constitution, the warrantless search of personal property within arrestee's grabbable area incident to arrest must be justified by either the safety of the public and the arresting officer; and the protection of evidence from destruction or concealment

People v. DeBour, 40 N.Y. 210 (1976) - creating a four-tiered framework for evaluating police-citizen encounters that is more protective of the rights of individuals "to be free from aggressive governmental interference")

Issues to develop:

- **Does extending a traffic stop to conduct a canine search require reasonable suspicion or only founded suspicion?** Here, New York law has required only founded suspicion, *see People v. Devone*, 15 N.Y.3d 106 (2010), but federal courts have required reasonable suspicion. *See Rodriguez v. United States*, 575 U.S. 348 (2015). In this case, you should preserve the argument that *Devone* is unconstitutional because, although "our state constitution can provide greater protections than the U.S. Constitution . . . it cannot provide less." *People v. Blandford*, 37 N.Y.3d 1062, 1073 (2021)(Wilson, J., dissenting). Judge Wilson said in his dissent in *Blandford* that *Rodriguez* rendered *Devone* unconstitutional.

- **Does the much-criticized "*Atwater*" rule (*Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) that permits a custodial arrest for any offense no matter how minor violate our State Constitution?** In *Atwater*, a motorist was arrested, handcuffed, and taken to jail for failing to wear her seat belt, fasten her children in seat belts, driving without a license, and failing to provide proof of insurance. The USSC found no Fourth Amendment violation.

- **Whether an individual who stops in response to a command to stop or other show of police authority has been "seized" requiring reasonable suspicion rather than just a founded suspicion?** The prosecution might cite *People v. Bora*, 83 N.Y.2d 531 (1994), where the Court of Appeals held that a command to stop doesn't constitute a seizure. But

the individual there didn't stop. You should argue that both the federal and state constitutions require finding a seizure where there is a command plus submission. A different state rule would be unconstitutional in light of *Hodari D. v. California*, 499 U.S. 621, 626 (1991), which held that a seizure *doesn't* occur if the suspect does not yield, but, in equating arrest with seizure, stated, "[a]n arrest requires either physical force . . . or, where that is absent, submission to the assertion of authority.

- **Does an individual lose their expectation of privacy, and thus their standing to challenge a governmental intrusion, if they previously shared with third parties (such as banks or phone providers) the information the prosecution has seized?** In *Carpenter v. U.S.*, 585 U.S. 296, 297-98 (2018), the USSC found that cell-site location information is an exception to the "third-party" doctrine but did not have reason to address other forms of technologies or other kinds of records. If you have such a situation that implicates this doctrine, remember that you, as movant, have the burden of establishing standing, and argue you do, likening to *Carpenter/*CSLI if you can, and rely on our more protective state constitution in any case, citing the body of caselaw above.

- **Under the New York Constitution, does a violation of knock-and-announce rules require suppression?** In *Hudson v. Michigan*, 547 U.S. 586 (2006), the Supreme Court held that it did not, but New York should provide greater protections of the privacy of the home.

- **Does the emergency/exigency exception to the warrant requirement require that the "search must not be primarily motivated by intent to arrest and seize evidence."** *People v. Mitchell*, 39 N.Y.3d 173, 177-78 (1976). In *Mitchell*, the Court of Appeals adopted this subjective-intent requirement under the Fourth Amendment, but the Supreme Court later rejected it in *Brigham City v. Utah*, 547 U.S. 398, 401 (2006). It is now an open question whether the Court of Appeals should retain the *Mitchell*-subjective-intent standard under the New York Constitution.

<u>Right to Counsel (U.S. Const., amend VI, XIV, N.Y. Const., art. 1, § 6)</u>

"The safeguards guaranteed by this State's Right to Counsel Clause are unique (N.Y. Const., art. I, § 6). By constitutional and statutory interpretation, we have established a protective body of law in this area resting on concerns of due process, self-incrimination and the right to counsel provisions of the State Constitution which is substantially greater than that recognized by other State jurisdictions and far more expansive than the Federal counterpart." *People v. Harris*, 77 N.Y.2d 434, 439 (1977). *People v. Samuels*, 49 N.Y.2d 218 (1980) - indelible right to counsel attaches when the police commence formal proceedings by filing an accusatory instrument; once an arrest warrant is authorized, criminal proceedings have begun, the indelible right to counsel attaches, police may not question a suspect in the absence of an attorney.

People v. Skinner, 52 N.Y.2d 24 (1980) -any waiver of the right to counsel must be made in the presence of counsel once the right to counsel has attached. This case emphasized that the protection extends to any police-initiated interaction after the right to counsel has been invoked.

People v. Rogers, 48 N.Y.2d 167 (1979) - once an attorney has entered the proceeding, thereby signifying that the police should cease questioning, a defendant in custody may not be further interrogated in the absence of counsel, even with respect to "unrelated" matters.

Due Process (U.S. Const., amend. XIV; N.Y. Const., art. 1, § 6)

People v. LaValle, 3 N.Y.3d 88 (2004) - the "deadlock instruction" required by New York's death penalty statute violated due process under the state constitution by potentially coercing jurors into voting for the death penalty and thus undermining the fair and impartial deliberation required in capital cases. "This Court has repeatedly construed the State Constitution's Due Process Clause to provide greater protection than its federal counterpart as construed by the Supreme Court. . . .In doing so, we have often found that a Supreme Court rule represents a departure from an earlier rule, which was consistent with our own established law or with fundamental justice and fairness."

People v. Isaacson, 44 N.Y.2d 511 (1978) - setting forth factors to determine whether police conduct in obtaining evidence through deceptive practices violated state constitutional due process protections. "[T]he views expressed by some members of the Supreme Court, as well as those of other courts and respected commentators, illustrate and articulate the need for a due process analysis of the boundaries of permissible police conduct. We therefore decide this case under our own State Constitution."

People v. Adams, 53 N.Y.2d 241 (1981) – while under the Federal Constitution, a suggestive pretrial identification is inadmissible only if the totality of circumstances presents a risk of irreparable misidentification, *Manson v. Brathwaite*, 432 U.S. 98 (1977), New York has adopted a more restrictive rule under the State Constitution which per se excludes improper show-ups and evidence derived therefrom.

Issues to develop:

- **Whether barring reverse-propensity evidence (e.g. in a self-defense case, to show that alleged victim was the likely aggressor) violates the state due process clause.** The Court of Appeals in *People v. Guerra*, 39 N.Y.3d 1158 (2023) dodged deciding this on the ground that the prior offenses were YO adjudications. Judge Wilson dissented, finding that the law that allows use of the victim's prior offenses only under certain narrow circumstances is "archaic," and "out–of-step" with other jurisdictions.

- **Whether the independent source doctrine violates due process under the state constitution and should be eliminated.** The independent source doctrine permits a witness to make an in-court identification notwithstanding the exclusion of an unduly suggestive out-of-court identification, if the prosecution can prove by clear and convincing evidence that the witness's identification rests on a source independent of the unnecessarily suggestive confrontation (such as the circumstances of the offense). Your argument would be that the independent source doctrine violates due process because it

doesn't cure the risk of an unreliable identification – in-court identifications are as suggestive as any show-up identification.

Right against Self-Incrimination (U.S. Const., amend. V, XIV; N.Y. Const., art 1, § 6).

People v. Bethea, 67 N.Y.2d 364 (1986) - maintaining the *Chapple* rule that statements obtained as part of a continuous custodial interrogation are inadmissible under the state constitution.

Issues to develop:

- **Does the so-called "*Huffman* exception" to *Miranda* (*People v. Huffman*, 41 N.Y.2d 29 (1976), which has been interpreted broadly to permit the police to briefly question a person in custody in order to clarify the situation, violate the federal constitution**, which, as interpreted by the Supreme Court, allows only for a narrow "public safety" exception to *Miranda*. *See New York v. Quarles*, 467 U.S. 649 (1984). Here, again, you'll be arguing that New York cannot go below the floor of federal constitutional protection and that, as our state cases have interpreted and applied *Huffman*, New York has.

- **Does the exclusionary rule apply to the physical fruits of a *Miranda* violation?** In *United States v. Patane*, 542 U.S. 630 (2004), the USSC held, as matter of federal constitutional law, that a *Miranda* violation does not require suppression of physical evidence flowing from that violation. The Appellate Divisions have thus far either continued to suppress without citing *Patane* or specifically declined to address the issue, and the Court of Appeals has not decided whether it applies under the state constitution. If you have this fruits issue and the People raise *Patane*, cite the state constitution and then make a robust argument under the state constitution. Some state courts have already rejected *Patane* on state constitutional grounds. Look to them for some good reasoning. *See, e.g., State v. Peterson*, 923 A.2d 585 (Vt. 2007); *State v. Farris*, 849 N.E.2d 985 (Ohio 2006); *State v. Knapp*, 700 N.W.2d 899 (Wis. 2005); *Com. v. Martin*, 827 N.E.2d 198 (Mass. 2005).

- **Can a citizen's decision to refuse to answer the door when the police knock be used as proof of consciousness of guilt.** No guilty inference may be drawn from the exercise of a constitutional right, particularly when it reflects no more than a decision not to engage with the police. The Fifth and Fourteenth Amendments "forbid[] either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Griffin v. California*, 380 U.S. 609, 615 (1965). Corresponding provisions of the New York State Constitution and evidentiary rules provide even greater protections against using a person's silence to prove guilt. *See People v. Conyers*, 52 N.Y.2d 454 (1981) (holding as a matter of New York evidentiary law that prearrest silence may not be used to impeach defendant's trial testimony); *People v. DeGeorge*, 73 N.Y.2d 614, 620-21 (1989)(holding as a matter of New York State constitutional law that pre-arrest silence may not be used as direct proof of guilt); *cf., People v. Pavone*, 26 N.Y.3d 629, 642-43 (holding as a matter of New York State constitutional law that post-arrest may not be used to impeach defendant). Use these more protective examples to

argue that even if the federal constitution doesn't bar use of an individual's non-response as consciousness of guilt evidence, the state constitution does.

Cruel and Unusual Punishment (U.S. Const., amend. VIII, XIV; N.Y. Const., art 1, § 5)

There is no developed body of caselaw establishing a more protective interpretation of our state constitution with respect to cruel and unusual punishments. Therefore, unlike in the above examples, where you can point to an established body of law or cases referencing our state's independence with respect to the issue, your job will include creating a record that shows why our constitution should be interpreted more expansively.

We believe the strongest case for expanding state constitutional protections in this area is with respect to the sentencing of young people, specifically those under 21, at the time of the offense.

Make your argument at sentencing, in support of a minimum sentence. Your overarching argument should be that evolving standards of decency require interpreting our state constitution to provide greater protections in the sentencing of young people. Imposing any sentence beyond the minimum would violate New York's cruel and unusual punishment clause and the evolving standards of decency that must inform any interpretation of the clause. Of course, couple this with any other arguments to get leniency – investigating and presenting mitigating factors, for example, putting in a PPI, and getting letters of support.

For your constitutional argument, the starting point is *People v. P.J. Video, Inc.*, 68 N.Y.2d 296 (1986), which sets forth the basic analysis: To determine whether a state constitutional right provides broader protections than its federal counterpart, a New York court must conduct both an "interpretive" and "non-interpretive" analysis. *Id.* at 302-303. An interpretive analysis considers only textual differences between the state and federal clauses. *Id.* A non-interpretive analysis "proceeds from a judicial perception of sound policy, justice, and fundamental fairness." *Id.* at 303; *People v. Hale*, 173 Misc.2d 140 (N.Y. County Sup. Ct. 1997).

A non-interpretive analysis may consider a broad number of factors, including: "any preexisting State statutory or common law defining the scope of the individual right in question; the history and traditions of the State in its protection of the individual right; any identification of the right in the State Constitution as being one of peculiar State or local concern; and any distinctive attitudes of the State citizenry toward the definition, scope or protection of the individual right." *P.J. Video*, 68 N.Y.2d at 303.

Interpretive analysis: The text of the state constitution and federal constitution are identical with respect to the clause, so you don't have a readily apparent argument here. However, as the Court said in *P.J. Video*, "the interest of Federal-State uniformity…is simply one consideration to be balanced against considerations that may argue for a different state rule." *Id.* at 304. Where fundamental constitutional rights are concerned, "the practical need for uniformity can seldom be a decisive factor." *Id.*

Non-Interpretive: Here, your approach should be to argue that New York has historically shown

such a particular regard for youth that the cruel and unusual sentencing clause must be interpreted more expansively where the sentencing of youth is involved, and that current New York laws support this too. Citing the items below should be enough to support and preserve a non-interpretive analysis.

- debates at the 1846 constitutional conventions concerning the proper voting age and minimum age to be eligible for gubernatorial office – which were set respectively at 21 and 30. These debates show a recognition that there are differences between adults and young people in terms of what can be expected of them.

- New York's historic concern with rehabilitation as the guiding principle with respect to the punishment of youth, as shown by its early creation of "penitentiaries" and houses of refuge which were committed to the purpose of reforming young people - including, int eh case of Elmira, which was originally conceived as such a place of rehabilitation, for offenders up to the age of 30.

- the myriad New York laws that make the cutoff for many privileges and responsibilities of adulthood 21 – alcohol, license to carry a firearm, tobacco, marijuana, gambling.

- the incontrovertible neuroscience showing that young adult brains, even up to at least 25, are still developing such that young people behave with less judgment and more recklessly, particularly in the presence of peers, and have tremendous capacity for change.

Use these arguments to support that New York has a long history of, and a current concern with, treating young people commensurate with their age such that our state constitution and evolving standards of decency forbid the imposition of any sentence beyond the minimum on a person under 21 at the time of the offense.

GOOD LUCK AND HAPPY HOLIDAYS!