COUNTY COURT'S POST-JUDGMENT DENIAL OF DEFENDANT'S SUPPRESSION MOTION, AFTER A HEARING HELD PURSUANT TO THE SECOND CIRCUIT'S ORDER RE: DEFENDANT'S PETITION FOR A WRIT OF HABEAS CORPUS, WAS AN INTERMEDIATE ORDER WHICH IS NOT APPEALABLE; MATTER REMITTED TO ALLOW COUNTY COURT TO AMEND THE JUDGMENT OF CONVICTION TO REFLECT THE RECENT DENIAL OF THE SUPPRESSION MOTION; THE AMENDED JUDGMENT OF CONVICTION WOULD THEN BE APPEALABLE (THIRD DEPT).

The Third Department determined the post-judgment order denying defendant's motion to suppress his statements was an intermediate order which was not appealable. The Second Circuit, pursuant to defendant's petition for a writ of habeas corpus, ordered defendant's release unless a state court adjudicated the voluntariness of his confession (made in 1986 when defendant was 16). County Court held a new suppression hearing and issued the order denying suppression. The Third Department sent the matter back to allow the amendment of the judgment of conviction to reflect the recent denial of the suppression motion, which would then be appealable:

> Although not raised by the parties, we must first address the threshold issue of the appealability of County Court's order. Indeed, an order denying a defendant's suppression motion is an unreviewable intermediate order (see CPL 450.10). Ordinarily, in the course of a criminal proceeding, suppression hearings occur prior to a judgment of conviction and are reviewed incident to the direct appeal from that judgment. Nevertheless, there are cases, including the instant appeal, where a suppression hearing occurred after entry of a judgment of conviction … . In each of these cases, the trial court was specifically instructed that, if the defendant did not prevail in the suppression hearing, the judgment of conviction should be amended to reflect that fact … . Here, however, the Second Circuit did not advise County Court to take this step … , and there is no evidence in the record that an amended judgement of conviction was entered after the People prevailed at the suppression hearing.
>
> Accordingly, because an amended judgment of conviction has not been entered, we must dismiss this appeal. This harsh outcome appears at odds with the federal habeas corpus remand, which, in our view, was intended to permit review of the suppression hearing until finally decided by the court of last resort. However, this dismissal provides County Court the opportunity to amend the judgment of conviction to reflect the denial of the suppression motion, and defendant could then appeal as of right from the amended judgment of conviction (see CPL 450.10 [1]). People v Dearstyne, 2020 NY Slip Op 02951, Third Dept 5-21-20

THE CONCEPTS OF 'OVERWHELMING EVIDENCE' AND 'HARMLESS ERROR' DISCUSSED IN DEPTH; THE MAJORITY FOUND THE EVIDENCE OVERWHELMING AND THE ERROR HARMLESS; THE CONCURRENCE FOUND THE EVIDENCE WAS NOT OVERWHELMING BUT FOUND THE ERROR HARMLESS UNDER A DIFFERENT ANALYSIS; THE DISSENT FOUND THE EVIDENCE WAS NOT OVERWHELMING AND THE ERROR WAS NOT HARMLESS (THIRD DEPT).

The Third Department reached different conclusions about how the erroneous denial of defendant's motion to suppress the cell site location data should be treated on appeal under a harmless error analysis. The majority and the concurrence applied different harmless error analyses but concluded the conviction should be affirmed. The dissent argued the error was not harmless requiring a new trial. The decision includes useful, comprehensive discussions of "overwhelming evidence" and "harmless error. "The dissent summarized the three positions as follows:

> **From the dissent:**
>
> In essence, the majority applies the longstanding New York test of first assessing whether the evidence adduced at trial was overwhelming in favor of conviction, concludes that it was, and therefore the admission of the cell phone location data was harmless since it could not have influenced the result of the trial. The concurrence disagrees with the finding that the evidence of guilt was overwhelming, but finds the error of admitting the cell phone location data nonetheless harmless; the concurrence maintains that, since its effect was to favor, or disfavor, the contentions of each side equally, this is one of the exceedingly rare cases where, despite the absence of overwhelming evidence of guilt, the admission of tainted evidence, however misguided, was, in the words of the leading Court of Appeals case of People v Crimmins (36 NY2d 230, 242 [1975]), nothing more than the "sheerest technicality." Because I believe that the other evidence of defendant's guilt was not overwhelming, and the effect of admitting the cell phone location data not necessarily neutral, I dissent and would reverse the judgment of conviction. People v Perez, 2020 NY Slip Op 02684, Third Dept 5-7-20

DEFENDANT WAS NOT INFORMED OF THE DEPORTATION CONSEQUENCES OF HIS GUILTY PLEA, MATTER REMANDED; DEFENDANT WAS NOT INFORMED THAT BY PLEADING GUILTY TO A PROBATION VIOLATION HE WAS GIVING UP HIS RIGHT TO A HEARING; APPEAL CONSIDERED IN THE INTEREST OF JUSTICE (FIRST DEPT).

The First Department, remanding the matter, determined defendant was not advised he could be deported based on his guilty plea, and further determined defendant's plea to a probation violation was defective because he was not informed he was giving up his right to a hearing. Although the issue was not preserved by a motion to withdraw the plea, the appeal was heard in the interest of justice:

> When defendant, a noncitizen, pleaded guilty to criminal possession of a firearm, the court did not advise him that if he was not a citizen, he could be deported as a consequence of his plea. Even though he did not move to withdraw his guilty plea, there is no evidence that defendant knew about the possibility of deportation during the plea and sentencing proceedings. As such, the claim falls within the "narrow exception" to the preservation doctrine (People v Peque, 22 NY3d 168, 183 [2013], cert denied 574 US 850 [2014]). Therefore, defendant should be afforded the opportunity to move to vacate his plea upon a showing that there is a "reasonable probability" that he would not have pleaded guilty had the court advised him of the possibility of deportation (id. at 198). Accordingly, we remit for the remedy set forth in Peque (id. at 200-201), and we hold the appeal in abeyance for that purpose.
>
> Furthermore, defendant's guilty plea to violation of probation was defective because there was no allocution about whether defendant understood that he was giving up his right to a hearing on the violation. While there is no mandatory catechism, Supreme Court failed to "advise defendant of his rights or the consequences regarding an admission to violating probation, including that he understood that he was entitled to a hearing on the issue and that he was waiving that right" … . Although defendant never moved to withdraw this plea and his claim is unpreserved, we review it in the interest of justice. People v Pinnock, 2020 NY Slip Op 02731, First Dept 5-7-20

ALTHOUGH DEFENDANT'S SUPPRESSION MOTION RELATED TO A THEFT ON OCTOBER 3 AND DEFENDANT PLED GUILTY TO A DIFFERENT THEFT ON OCTOBER 1 IN SATISFACTION OF BOTH, DEFENDANT WAS ENTITLED TO APPELLATE REVIEW OF HIS SUPPRESSION MOTION; THE APPELLATE DIVISION'S DENIAL OF REVIEW REVERSED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Fahey, reversing the Appellate Division, determined defendant was entitled to appellate review of the denial of his suppression motion even though the suppression motion did not relate to the offense to which defendant pled guilty. The defendant was charged with two thefts from the same residence on different days, a laptop computer taken on October 1 and jewelry taken on October 3. The police stopped the defendant on the street on October 3 and seized the jewelry. The suppression hearing related to that street stop. The defendant pled guilty to the theft of the computer and the jewelry-theft was satisfied by the plea. The Fourth Department held defendant was not entitled to appellate review of the jewelry-related suppression motion because defendant pled to the computer-theft. The case was sent back for review of the denial of the suppression motion:

> Defendant was charged by indictment with two counts of burglary in the second degree … . The first count related to the laptop computer, taken from a dwelling on October 1, 2014; the second count related to the jewelry, which was taken from the same dwelling on October 3, 2014, the day of the arrest.
>
> Defendant moved to suppress the jewelry, contending that his detention and the seizure of the jewelry violated his right to freedom from unreasonable searches and seizures …. Following a suppression hearing, with testimony from two of the police officers present at the arrest, Supreme Court denied defendant's motion, concluding that the police had "reasonable suspicion that a crime had been committed and that the defendant was the perpetrator."
>
> Defendant, a predicate felony offender who was facing a maximum sentence of 30 years in prison if convicted of both counts of burglary, pleaded guilty to one count of burglary in the second degree, in satisfaction of the entire indictment. … [D]efendant pleaded guilty to the October 1 burglary, as charged in the count pertaining to the theft of the laptop computer, in satisfaction of the count charging the October 3 burglary of jewelry, which was the subject of his motion to suppress. * * *
>
> "[W]hen a conviction is based on a plea of guilty an appellate court will rarely, if ever, be able to determine whether an erroneous denial of a motion to suppress contributed to the defendant's decision, unless at the time of the plea he states or reveals his reason for pleading guilty" … . * * *

> A defendant who pleads guilty to one count will invariably take into consideration that other counts are satisfied by the plea. Importantly, a count satisfied by a guilty plea bears the double jeopardy consequences of a judgment of conviction. The judgment in this case prevents the People from prosecuting defendant again for the October 3, 2014 burglary, even though defendant did not plead to that count … . People v Holz, 2020 NY Slip Op 02682, CtApp 5-7-20

THE RECORD DID NOT SUPPORT DEFENDANT'S ARGUMENT THAT DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE AN ALLEGEDLY BIASED JUROR; THE RECORD DID NOT SUPPORT A CONSTITUTIONAL INEFFECTIVE ASSISTANCE CLAIM; THEREFORE DIRECT APPEAL, AS OPPOSED TO A MOTION TO VACATE THE CONVICTION, WAS NOT AVAILABLE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a comprehensive, extended dissenting opinion, determined defendant's constitutional ineffective assistance argument based upon defense counsel's failure to challenge an allegedly biased juror was properly rejected. The record was deemed insufficient to support the constitutional challenge. A motion to vacate the conviction, pursuant to Criminal Procedure Law section 440, based upon matters not in the record, may be the only avenue available to the defendant here. The defendant was charged with depraved indifference murder stemming from a drive-by shooting:

> We reject defendant's argument here that prospective juror number 10's statements during voir dire reflect actual bias against defendant predicated on any evidence precluding the juror from rendering an impartial verdict, as opposed to general discomfort with the case based on media coverage. Contrary to defendant's assertion, the juror's verbatim statements did not reveal what about the case gave rise to his uneasiness — whether it be the seemingly random nature of the shooting, the defendant's or victim's identity, or the manner in which the police investigated … . Nor did this juror convey that his uneasiness was connected to any particular personal experience or relationship, … or whether his impressions risked predisposition toward the prosecution or defense. Moreover, as both the prosecutor and trial court indicated in questioning the juror, this case turned not on a dispute about the nature of the crime but on the prosecutor's ability to prove that this defendant committed it — an issue not impacted by the juror's apprehension. * * *
>
> A defendant's views at trial about a prospective juror as conveyed to counsel are relevant to an ineffectiveness claim based on the joint decision to accept that juror. Here, where we do not know what was said between defendant and his counsel or how that conversation may have affected counsel's impression of prospective juror number 10, the ineffective assistance claim cannot be resolved on direct appeal. People v Maffei, 2020 NY Slip Op 02680, CtApp 5-7-20

DEFENDANT WAS GIVEN THE ERRONEOUS IMPRESSION THE WAIVER OF APPEAL FORECLOSED ALL APPELLATE RIGHTS; THE WAIVER WAS THEREFORE INVALID (FOURTH DEPT).

The Fourth Department determined defendant's waiver of appeal was not valid because the court gave the erroneous impression all appellate rights were given up by the waiver:

> County Court's oral explanation of the waiver suggested that defendant was entirely ceding any ability to challenge his guilty plea on appeal, but such an "improper description of the scope of the appellate rights relinquished by the waiver is refuted by . . . precedent, whereby a defendant retains the right to appellate review of very selective fundamental issues, including the voluntariness of the plea" … . In addition, by further explaining that the cost of the plea bargain was that defendant would no longer have the right ordinarily afforded to other defendants to appeal to a higher court any decision the court had made, the court "mischaracterized the waiver of the right to appeal, portraying it in effect as an absolute bar' to the taking of an appeal" … . The written waiver executed by defendant did not contain clarifying language; instead, it perpetuated the mischaracterization that the appeal waiver constituted an absolute bar to the taking of a first-tier direct appeal and even stated that the rights defendant was waiving included the "right to have an attorney appointed" if he could not afford one and the "right to submit a brief and argue before an appellate court issues relating to [his] sentence and conviction" … . Where, as here, the "trial court has utterly mischaracterized the nature of the right a defendant was being asked to cede,' [this] [C]ourt cannot be certain that the defendant comprehended the nature of the waiver of appellate rights' " … . People v Youngs, 2020 NY Slip Op 02558, Fourth Dept 5-1-20

DEFENDANT, FROM THE OUTSET, CLAIMED A MAN SHE HAD JUST MET AT A BAR WAS DRIVING HER CAR WHEN IT WENT OFF THE ROAD AND THEN FLED THE SCENE; THE DWI CONVICTIONS WERE AGAINST THE WEIGHT OF THE EVIDENCE (FOURTH DEPT).

The Fourth Department, reversing the Driving While Intoxicated (DWI) convictions, determined the convictions were against the weight of the evidence. The defendant claimed from the outset that her car, which had gone off the road, was driven by a man she just met at a bar and who fled after the accident. There was no direct evidence defendant was the driver:

> Defendant's assertion that the car had been operated by an individual named Paul was not inconsistent with the evidence at trial. Although defendant's request that the passing motorist not call 911 constituted evidence of consciousness of guilt, it is well settled that consciousness of guilt evidence is a "weak" form of evidence ... . The failure of defendant to provide a more detailed description of Paul did little to disprove defendant's hypothesis of innocence, given the general nature of the questions posed to her and their emphasis on contact information for Paul that defendant reasonably was not in a position to provide. Finally, the testimony of the investigator that the position of the driver's seat in the car was inconsistent with the car being driven by someone who is 5 feet 10 inches tall, as opposed to defendant's height of 5 feet 7 inches, may have been persuasive if there were other such circumstantial evidence, but no other evidence existed here. Giving the evidence the weight it should be accorded, therefore, we find that the People failed to establish, beyond a reasonable doubt, that defendant operated the car that had gone off the roadway ... . People v Bradbury, 2020 NY Slip Op 02577, Fourth Dept 5-1-20

THE WORKERS' COMPENSATION BOARD MADE SEVERAL DECISIONS BUT REMITTED THE MATTER TO THE WORKERS' COMPENSATION LAW JUDGE FOR ADDITIONAL RULINGS; THE ORDER APPEALED FROM THEREFORE WAS NONFINAL; APPEAL DISMISSED (THIRD DEPT).

The Third Department determined the decision by the Workers' Compensation Board was nonfinal and therefore the appeal could not be considered:

> In reviewing these various decisions, the Board found, among other things, that claimant was entitled to awards from April 14, 1997 to September 1, 2011 at the previously established temporary partial disability rate of 66.6% and that claimant had reached maximum medical improvement, but remitted the case to the WCLJ [Workers' Compensation Law Judge] for a determination of issues related to claimant's alleged violation of Workers' Compensation Law § 114-a, permanency and loss of wage-earning capacity ... .
>
> This appeal must be dismissed. "We will not conduct a piecemeal review of the issues presented in a nonfinal decision in workers' compensation cases that will be reviewable upon an appeal of the Board's final decision" ... . "Board decisions which neither decide all substantive issues nor involve a threshold legal issue are not appealable" ... . As none of the arguments raised on this appeal address potentially dispositive threshold legal questions, and "the nonfinal decision may be reviewed upon an appeal from the Board's final determination, this appeal must be dismissed" ... . Matter of Navarro v General Motors, 2020 NY Slip Op 02504, Third Dept 4-30-20

HEARING REQUIRED TO DETERMINE THE AMOUNT OF RESTITUTION AND TO WHOM RESTITUTION SHOULD BE PAID; UNPRESERVED ERRORS CONSIDERED ON APPEAL IN THE INTEREST OF JUSTICE (FOURTH DEPT).

The Fourth Department determined the record did not include sufficient evidence to support the restitution order and remitted the matter for a hearing:

> Defendant's contention in her main brief that the court erred in ordering her to pay restitution without a hearing is not preserved for our review inasmuch as defendant "did not request a hearing to determine the [proper amount of restitution] or otherwise challenge the amount of the restitution order during the sentencing proceeding" ... . We nevertheless exercise our power to review that contention as a matter of discretion in the interest of justice ... . Moreover, even assuming, arguendo, that defendant's further

challenge to the court's purported failure to direct restitution to an appropriate person or entity… required preservation under these circumstances … , we likewise exercise our power to reach that unpreserved contention as a matter of discretion in the interest of justice … . As the People correctly concede, the record does not contain sufficient evidence to establish the amount of restitution imposed, nor does it establish the recipient of the restitution … . We therefore modify the judgment by vacating that part of the sentence ordering restitution, and we remit the matter to County Court for a hearing to determine restitution in compliance with Penal Law § 60.27. People v Meyers, 2020 NY Slip Op 02419, Fourth Dept 4-24-20

FATHER WAS DENIED DUE PROCESS WHEN THE COURT TOOK SIX MONTHS TO HOLD A POST-DISPOSITIONAL HEARING AFTER A FAILED TRIAL DISCHARGE OF THE CHILDREN TO FATHER; THE CHILDREN WERE FINALLY RETURNED TO FATHER AND THE APPEAL WAS CONSIDERED AS AN EXCEPTION TO THE MOOTNESS DOCTRINE (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Singh, determined that father was entitled to an expedited post-dispositional hearing after the children were removed from the father's custody based upon a failed trial discharge. The children were eventually returned to father, but the hearing took six months and the children were not returned to father until eight months after the decision was issued. The First Department ruled on the appeal as an exception to the mootness doctrine, finding that this situation was likely to recur. The court held that father was entitled to an "expedited hearing" after the children were removed under due process principles:

> We find that a parent's private interest in having custody of his or her children, the children's private interest in residing with their parent, and the undisputed harm to these interests are factors that merit equal consideration. On this record, ACS [Administration for Children's Services] fails to establish that the lengthy delay was related to its interest in protecting the children. Rather, the hearing was prolonged over six months because of the court's and attorneys' scheduling conflicts. There is no indication that the completion of the hearing was caused by difficult legal issues, or by the need to obtain elusive evidence, or by some other factor related to an accurate assessment of the best interest of the children … .
>
> Even though this is a post-dispositional matter, the father is entitled to the strict due process safeguards afforded in neglect proceedings. "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State" … . This rationale equally applies to the primacy of a parent's fundamental liberty interest, and the importance of procedural due process in protecting that interest, particularly when a parent and child are physically separated … . Accordingly, we find that a parent is entitled to a prompt hearing on the agency's determination to remove the children from his or her physical custody through a failed trial discharge. Matter of F.W. (Monroe W.), 2020 NY Slip Op 02385, First Dept 4-23-20