PLEA ALLOCUTION NEGATED AN ESSENTIAL ELEMENT OF THE CHARGED VIOLATION OF THE CORRECTION LAW, THE ISSUE SURVIVES THE FAILURE TO MOVE TO WITHDRAW THE PLEA AND THE WAIVER OF APPEAL (SECOND DEPT).

The Second Department, reversing defendant's conviction for a violation of the Correction Law, determined that the plea allocution negated an essential element of the offense. Because the voluntariness of the plea was called into question the issue survived the failure to move to withdraw the plea and the waiver of appeal:

> A sex offender is required to register with the Division "no later than ten calendar days after any change of address" and to pay a fee of ten dollars "each time such offender registers any change of address" (Correction Law § 168-f[4]). A sex offender who fails to so register within the required time period is guilty of a felony (seeCorrection Law § 168-t).
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> As the defendant contends, his factual allocution during the plea proceeding negated an essential element of the offense charged, thereby casting significant doubt upon his guilt. Specifically, the defendant indicated that he provided the Division with the address of a homeless shelter that he was using, although he acknowledged that there were some nights when he could not stay in the shelter. He explained "sometimes if you don't get there in time all the beds are taken, so sometimes you get turned away." On those days, the defendant asserted, he stayed at a friend's house instead. These statements tended to demonstrate that the defendant did not, in fact, change his address and thus, was not required to notify the Division … . People v Wright, 2019 NY Slip Op 05428, Second Dept 7-3-19

VIRGINIA MURDER CONVICTION WHICH REQUIRED DEFENDANT TO REGISTER AS A SEX OFFENDER IN VIRGINIA DID NOT QUALIFY DEFENDANT AS A SEX OFFENDER IN NEW YORK (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant should not have been adjudicated a sex offender in New York based upon a murder conviction in Virginia, where he was required to register as a sex offender under Virginia law. The defendant was convicted of murdering a three year old child who had suffered trauma to his genitalia:

> The defendant subsequently relocated to New York in November 2017. Following a hearing pursuant to Correction Law article 6-C, the Supreme Court adjudicated the defendant a level three sex offender. Insofar as relevant to this appeal, the court determined that the defendant's mandatory registration under Virginia law made him a "sex offender" under Correction Law § 168-a(2)(d)(ii). The defendant appeals.
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> The victim's extensive injuries in this case included "significant traumatic injuries to [his] scrotum and penis," which were described at trial by the prosecution's expert medical witness as having been inflicted "within hours to one day from the time of [the infant's] death" and were "caused by blunt force trauma, probably squeezing" … . Nevertheless, as the People correctly concede, the order appealed from must be reversed in light of the Court of Appeals' recent opinion in People v Diaz (32 NY3d 538), which held that mandatory registration as a murderer under Virginia Code § 9.1-902(D) does not qualify the defendant as a "sex offender" within the meaning of Correction Law § 168-a(2)(d)(ii). People v Covington, 2019 NY Slip Op 05429, Second Dept 7-3-19

A FACEBOOK ACCOUNT IS NOT AN 'INTERNET IDENTIFIER' WITHIN THE MEANING OF THE CORRECTION LAW, THEREFORE DEFENDANT SEX OFFENDER'S FAILURE TO DISCLOSE IT TO THE DIVISION OF CRIMINAL JUSTICE SERVICES IS NOT A CRIME (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Fahey, affirming the Appellate Division, determined defendant, a sex offender, did not violate the Correction Law by failing to disclose his Facebook account. The Facebook account was not an "internet identifier" which must be disclosed under the Correction Law:

> … [T]he Appellate Division correctly concluded that Facebook is not an "internet identifier," and that the existence of a Facebook account—as opposed to the internet identifiers a sex offender may use to access Facebook or interact with other users on Facebook—need not be disclosed to DCJS [Division of Criminal Justice Services] pursuant to Correction Law § 168-f (4). As the People concede, this was the legal theory upon which the indictment was based. The indictment therefore accuses defendant of performing acts that "simply do not constitute a crime" and is jurisdictionally defective … . People v Ellis, 2019 NY Slip Op 05183, CtApp 6-27-19

ALTHOUGH DEFENDANT WAS REQUIRED TO REGISTER AS A SEX OFFENDER IN VIRGINIA, THERE WAS NO SEX-RELATED ELEMENT IN THE VIRGINIA OFFENSE, DEFENDANT NEED NOT REGISTER AS A SEX OFFENDER IN NEW YORK (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Feinman, over a three-judge dissenting opinion, determined that defendant need not register as a sex offender in New York based upon a murder conviction in Virginia, even though Virginia law required such registration. There was no sex-related element in the offense. Defendant, in 1989, at age 19, murdered his half-sister because she was harassing him. At the time, he said he was "hearing voices telling him to kill people:"

> Blind deference to another jurisdiction's registry without asking, fundamentally, whether that jurisdiction considers its own registrant a sex offender would contravene the plain and limiting language of section 168-a (2) (d) (ii) and could subject an entire class of defendants with no relation to SORA's purpose to its strict requirements. * * *
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> In concluding that SORA does not require defendant's registration because Virginia does not consider defendant a sex offender, we reserve weightier issues of a foreign registry's potential conflict with New York's due process guarantees or public policy for another day. ...
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> ... Our holding today merely requires a court or the Board to determine—not based on "intuition," but rather on the offense of conviction and its relation to the foreign registry statute—whether the out-of-state defendant is considered a sex offender before requiring registration under SORA. ...
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> Defendant's out-of-state felony conviction did not require him to "register as a sex offender" in Virginia under Correction Law § 168-a (2) (d) (ii) and, thus, he should not be required to register as a sex offender in New York. People v Diaz, 2018 NY Slip Op 08424, CtApp 12-11-18

THE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION MET ITS STATUTORY BURDEN TO ASSIST PETITIONER, A SEX OFFENDER, IN FINDING SUITABLE HOUSING UPON RELEASE, APPELLATE DIVISION REVERSED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a partial dissent and an extensive dissenting opinion, determined that the Department of Corrections and Community Supervision (DOCCS) had met its burden of providing assistance to sex offenders in finding suitable housing upon release. Here the petitioner was transferred to a residential treatment facility (RTF) when his sentence was complete because he was unable to find suitable housing as required by the Sexual Assault Reform Act (SARA):

> Correction Law § 201 (5) requires DOCCS to assist inmates prior to release and under supervision to secure housing. DOCCS has interpreted its obligation under the statute as satisfied when it actively investigates and approves residences that have been identified by inmates and when it provides the inmates with adequate resources to allow them to propose residences for investigation and approval. This interpretation is consistent with the plain language of the statute as well as the larger statutory framework. While the agency is free, in its discretion, to provide additional assistance to inmates in locating SARA-compliant housing — particularly where an inmate is nearing the maximum expiration date or is residing in an RTF with the associated restrictions on the ability to conduct a comprehensive search — there is no statutory basis in Correction Law § 201 (5) for imposing such an obligation.
>
> As to whether DOCCS met its obligation in this particular case, the record demonstrates that petitioner met biweekly with an ORC regarding SARA-compliant housing and also met several times with his parole officer. Petitioner was able to propose 58 residences which DOCCS investigated for SARA-compliance. The agency also affirmatively identified at least two housing options for petitioner in New York City — one was rejected by petitioner on the basis that he could not afford it and the other was the shelter in Manhattan where he was ultimately housed. Certainly, the record reflects that DOCCS provided more than passive assistance, given that it affirmatively contacted other agencies and providers on petitioner's behalf because of his financial needs. Indeed, petitioner was successfully placed with New York City's DHS through DOCCS' efforts, which were adequate to meet its statutory obligation to provide assistance.
>
> Finally, we agree with the Appellate Division that there was insufficient record evidence to establish that DOCCS' determination to place petitioner at the Woodbourne RTF was irrational or that the conditions of his placement at that facility were in violation of the

agency’s statutory or regulatory obligations … .Matter of Gonzalez v Annucci, 2018 NY Slip Op 08057, CtApp 11-27-18

CRIMINAL LAW (THE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION MET ITS STATUTORY BURDEN TO ASSIST PETITIONER, A SEX OFFENDER, IN FINDING SUITABLE HOUSING UPON RELEASE, APPELLATE DIVISION REVERSED (CT APP))/CORRECTION LAW (SEX OFFENDERS, HOUSING, THE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION MET ITS STATUTORY BURDEN TO ASSIST PETITIONER, A SEX OFFENDER, IN FINDING SUITABLE HOUSING UPON RELEASE, APPELLATE DIVISION REVERSED (CT APP))/DEPARTMENT OF CORRECTIONS AND COMMUNITY SERVICES (DOCCS) (THE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION MET ITS STATUTORY BURDEN TO ASSIST PETITIONER, A SEX OFFENDER, IN FINDING SUITABLE HOUSING UPON RELEASE, APPELLATE DIVISION REVERSED (CT APP))/SEX OFFENDERS (THE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION MET ITS STATUTORY BURDEN TO ASSIST PETITIONER, A SEX OFFENDER, IN FINDING SUITABLE HOUSING UPON RELEASE, APPELLATE DIVISION REVERSED (CT APP))/CORRECTION LAW (SEX OFFENDERS, HOUSING, THE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION MET ITS STATUTORY BURDEN TO ASSIST PETITIONER, A SEX OFFENDER, IN FINDING SUITABLE HOUSING UPON RELEASE, APPELLATE DIVISION REVERSED (CT APP))

UNDER THE EQUAL ACCESS TO JUSTICE ACT, PETITIONER, AN INMATE WHO WAS INITIALLY DENIED ENTRY INTO A PRISON NURSERY PROGRAM FOR HER AND HER CHILD, WAS NOT ENTITLED TO ATTORNEYS’ FEES FOR THE REVERSAL OF THE DENIAL 2ND DEPT.

The Second Department that petitioner’s request for attorneys’ fees pursuant to the Equal Access to Justice Act (EAJA) was properly denied. Although petitioner’s application to participate in the prison’s nursery program was improperly denied and she and her child were subsequently admitted to the program by Supreme Court, the facts did not justify the award of attorneys’ fees:

> In March 2015, the petitioner moved pursuant to the New York State Equal Access to Justice Act (CPLR art 86; hereinafter the EAJA) for an award of attorneys’ fees and expenses. In an order dated August 31, 2015, the Supreme Court denied the petitioner’s motion on the grounds that the respondents’ decision to deny her application for admission to the Nursery Program was “substantially justified” and that “special circumstances make an award unjust” (CPLR 8601[a]). The petitioner appeals.
>
> Under the EAJA, “a court shall award to a prevailing party, other than the state, fees and other expenses incurred by such party in any civil action brought against the state, unless the court finds that the position of the state was substantially justified or that special circumstances make an award unjust” (CPLR 8601[a]). An award of attorneys’ fees under the EAJA is generally left to the sound discretion of the Supreme Court … . “The determination of whether the State’s position was substantially justified is committed to the sound discretion of the court of first instance and is reviewable as an exercise of judicial discretion” … .
>
> Under the circumstances of this case, the Supreme Court did not improvidently exercise its discretion in concluding that the respondents’ position was substantially justified, notwithstanding the court’s underlying conclusion that the respondents’ determination to deny the petitioner’s application for admission to the Nursery Program should be annulled … . In particular, the evidence in support of the respondents’ position would satisfy a reasonable person that it was not “desirable for the welfare of [the] child” to remain with the petitioner for purposes of the EAJA … . Contrary to the petitioner’s contention, although the court found that the respondents failed to consider certain factors, including the petitioner’s current achievements and the supervised nature of the Nursery Program, there was no evidence in the record that the respondents “willfully ignored” those factors. Moreover, this is not a case where the respondents failed to conduct any assessment as to whether the subject child’s welfare would best be served by remaining with the petitioner … . Matter of Losurdo v New York State Dept. of Corr. & Community Supervision, 2017 NY Slip Op 05603, 2nd Dept 7-12-17

CIVIL PROCEDURE LAW (EQUAL ACCESS TO JUSTICE ACT, ATTORNEYS’ FEES, UNDER THE EQUAL ACCESS TO JUSTICE ACT, PETITIONER, AN INMATE WHO WAS INITIALLY DENIED ENTRY INTO A PRISON NURSERY PROGRAM FOR HER AND HER CHILD, WAS NOT ENTITLED TO ATTORNEYS’ FEES FOR THE REVERSAL OF THE DENIAL 2ND DEPT)/CORRECTIONS LAW (EQUAL ACCESS TO JUSTICE ACT, ATTORNEYS’ FEES, UNDER THE EQUAL ACCESS TO JUSTICE ACT, PETITIONER, AN INMATE WHO WAS INITIALLY DENIED ENTRY INTO A PRISON NURSERY PROGRAM FOR HER AND HER CHILD, WAS NOT ENTITLED TO ATTORNEYS’ FEES FOR THE REVERSAL OF THE DENIAL 2ND DEPT)/ATTORNEYS (EQUAL ACCESS TO JUSTICE ACT, ATTORNEYS’ FEES, UNDER THE EQUAL ACCESS TO JUSTICE ACT, PETITIONER, AN INMATE WHO WAS INITIALLY DENIED ENTRY INTO A PRISON NURSERY PROGRAM FOR HER AND HER CHILD, WAS NOT ENTITLED TO ATTORNEYS’ FEES FOR THE REVERSAL OF THE DENIAL 2ND DEPT)/EQUAL ACCESS TO JUSTICE ACT (ATTORNEYS’ FEES, UNDER THE EQUAL ACCESS TO JUSTICE ACT, PETITIONER, AN INMATE WHO WAS INITIALLY DENIED ENTRY INTO A PRISON NURSERY PROGRAM FOR HER AND HER CHILD, WAS NOT ENTITLED TO ATTORNEYS’ FEES FOR THE REVERSAL OF THE DENIAL 2ND DEPT)

POLICE DEPARTMENT CAN REFUSE EMPLOYMENT IN A CIVILIAN POSITION BASED SOLELY UPON THE APPLICANT'S CRIMINAL RECORD WITHOUT APPLYING THE HIRING CRITERIA GENERALLY REQUIRED BY THE CORRECTIONS LAW.

The First Department, as a matter of first impression, determined the police department (NYPD) could refuse to hire petitioner as a civilian police communication technician (PCT) solely because petitioner had a criminal record, without regard to the criteria set out in Corrections Law article 23-a. The Corrections Law, in an effort to support the hiring of persons with a criminal record, generally requires employers to determine whether an applicant's criminal record has a direct relationship with the responsibilities of the job and/or whether employment of the applicant would pose an unreasonable risk to the public. The First Department concluded the Corrections Law excluded law enforcement from the reach of its hiring criteria:

> Article 23-A broadly provides that employers, whether public or private, are prohibited from unfairly discriminating against persons previously convicted of one or more criminal offenses, unless after consideration of certain enumerated statutory factors, the employer determines that there is direct relationship between the offense(s) and the duties or responsibilities inherent in the license or employment sought or held by the individual, or such employment or license poses an unreasonable risk to the public, etc. (Correction Law §§ 752, 753). The statute defines the term "employment" as follows: "(5) Employment' means any occupation, vocation or employment, or any form of vocational or educational training. Provided, however, that "employment" shall not, for the purposes of this article, include membership in any law enforcement agency" (Correction Law § 750[5] emphasis added). Matter of Belgrave v City of New York, 2016 NY Slip Op 01548, 1st Dept 3-3-16

EMPLOYMENT LAW (POLICE DEPARTMENT CAN REFUSE EMPLOYMENT IN A CIVILIAN POSITION SOLELY ON THE BASIS OF THE APPLICANT'S CRIMINAL RECORD)/CORRECTIONS LAW (POLICE DEPARTMENT CAN REFUSE EMPLOYMENT IN A CIVILIAN POSITION SOLELY ON THE BASIS OF THE APPLICANT'S CRIMINAL RECORD)/MUNICIPAL LAW (POLICE DEPARTMENT CAN REFUSE EMPLOYMENT IN A CIVILIAN POSITION SOLELY ON THE BASIS OF THE APPLICANT'S CRIMINAL RECORD)

Criteria for Exercising Jurisdiction Over Foreign Corporation Based On Presence of Subsidiary Within Jurisdiction—the "Department Doctrine"

The Second Department explained when the presence of a subsidiary within the jurisdiction of the court can be sufficient to exercise jurisdiction over the foreign parent under the so-called "department doctrine" (the subsidiary must be a virtual "department" of the parent):

> If control exercised by the domestic corporation over the foreign corporation … . Such control may be manifested in numerous ways and, thus, the method by which such control may be demonstrated will necessarily depend on the attendant facts … . Although the Court of Appeals has noted that it "has never held a foreign corporation present on the basis of control, unless there was in existence at least a parent-subsidiary relationship," it has nevertheless indicated that this factor is not dispositive … . "The control over [a] subsidiary's activities . . . must be so complete that the subsidiary is, in fact, merely a department of the parent" … . It is only when the two corporations are "in fact, if not in name . . . one and the same corporation, [that] there is realistically no basis for distinguishing between them" for jurisdictional purposes … . Goel v Ramachandran, 2013 NY Slip Op 07708, 2nd Dept 11-20-13

Application for Certification as NYC School Bus Driver Should Have Been Denied Because of Past Drug Convictions

The First Department, over a dissent, reversed Supreme Court's order that petitioner, who had been convicted of two drug offenses (felonies) in the past, be certified as a NYC Department of Education school bus driver. The First Department explained the relevant criteria as follows:

> Where the applicant seeks employment with the New York City Department of Education, the School Chancellor's regulations apply and Regulation C-105 establishes procedures to be followed …for background investigations of pedagogical and administrative applicants. Regulation C-105 incorporates by reference article 23-A of the Correction Law. Correction Law § 752 (et seq.) prohibits unfair discrimination against a person previously convicted of a crime "unless: (1) there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual; or (2) the issuance or continuation of the license or the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals." Correction Law § 753(a) – (h), which set forth eight factors a public agency must consider in connection with an application for a license, include the person's duties and responsibilities, the bearing, if any, the criminal offense(s)

will have on the person's "fitness or ability" to perform his or her duties, the time that has elapsed since the occurrence of the crime(s), the seriousness of the crime, information about the applicant's reputation, etc., and the legitimate interest of the agency in protecting the safety and welfare of specific individuals or the general public. Regulation C-105 provides further that in reviewing the record of an applicant who has a prior criminal conviction, DOE is particularly concerned with offenses, among others, that involve the possession, distribution or selling of controlled substances.

The Chancellor's Regulation, like the Corrections Law, provides that where the applicant has a certificate of relief from disabilities, that certificate "shall" also be considered (Correction Law § 753[3]). The certificate, however, only creates a "presumption of rehabilitation" with respect to the crime the individual was convicted of, it does not create a prima facie entitlement to the license the person is applying for… . **Matter of Dempsey v NYC Dept of Educ, 2013 NY Slip Op 05289, 1st Dept 7-16-13**

Supreme Court's Denial of Application for Stationary Engineer License Based on Applicant's Criminal Record Reversed

The First Department, in this and several other similar rulings, reversed Supreme Court's denial of petitioner's application for a stationary engineer license determining that petitioner's criminal record bore no relationship to the duties of a stationary engineer:

> The determination to deny petitioner's renewal application for a stationary engineer license was in violation of lawful procedure and lacked a rational basis. Respondents arbitrarily concluded that petitioner's prior federal conviction for conspiracy bore a direct relationship to the duties and responsibilities attendant to a stationary engineer, the license for which he sought renewal after having his license renewed several times (see Correction Law § 750[3]; 752[2];…. Petitioner's prior conviction resulted from the misuse of his administrative powers in his former position, which granted him control over hiring, payroll, and selection of vendors. Such actions bear no direct relationship to the equipment maintenance duties and responsibilities inherent in the stationary engineer license, and thus do not satisfy the first exception to the general prohibition of discrimination against persons previously convicted of criminal offenses (see Correction Law § 752[1]). **Matter of Donovan v LiMandri, 2013 NY Slip Op 04737, 1st Dept 6-25-13**