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APPEALS, ATTORNEYS,

FAILURE TO IDENTIFY AN APPEALABLE ISSUE IN AN ANDERS BRIEF ARGUING THAT THERE ARE NO NONFRIVOLOUS ISSUES WARRANTING APPEAL DOES NOT NECESSARILY REQUIRE THE ASSIGNMENT OF NEW APPELLATE COUNSEL, HERE THE MISSING ISSUE WAS DEEMED INCONSEQUENTIAL AND THEREFORE THERE WAS NO NEED FOR ANOTHER ASSESSMENT BY ANOTHER ATTORNEY (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Dillon, announced a new rule concerning when new counsel should be assigned because an Anders brief did not demonstrate the absence of any issues which could be raised on appeal. The defendant had pled guilty and received the agreed upon sentence, which was the minimum sentence allowed. The defendant had also waived his right to appeal. The Anders brief addressed the plea and sentence (finding no appealable issues) but did not address the waiver of appeal. The Second Department determined there was no need to assign new counsel to the appeal because whether the waiver of appeal was valid or not, the result would not be affected:

… [A]n Anders brief will not be deemed deficient under Step 1 of the Matter of Giovanni S. [89 AD3d at 252] analysis when assigned counsel fails to identify an issue, if it is demonstrable from the face of the brief that the missing issue would be inconsequential. We do not suggest that this new "Matter of Giovanni S.-Murray rule" be applied where any missing issue would not be inconsequential. Since the brief would be sufficient under these circumstances, the court would then proceed to Step 2 of the Matter of Giovanni S. analysis, which requires an independent review of the record to determine whether counsel's assessment that there are no nonfrivolous issues for appeal is correct. This refinement safeguards the indelible right of a criminal defendant to a conscientious, effective, and zealous advocate that lies at the heart of Anders protection … . At the same time, it recognizes a measure of practicality, that congested courts operating under tight budgets, with limited personnel, and finite taxpayer money, not be required to engage in Sisyphean efforts that cannot, as a matter of law, lead anywhere. People v Murray, 2019 NY Slip Op 01101, Second Dept 2-13-19

ATTORNEYS, MISTRIAL.

WHETHER TO MOVE FOR A MISTRIAL IS A DECISION FOR DEFENSE COUNSEL, NOT DEFENDANT, THE JUDGE'S ALLOWING DEFENDANT TO DECIDE VIOLATED THE SIXTH AMENDMENT RIGHT TO COUNSEL (FOURTH DEPT).

The Fourth Department, although finding the error harmless, determined that the trial judge should not have left the decision whether or not to move for a mistrial up to the defendant, as opposed to defense counsel. The basis for a potential mistrial was the medical examiner's testimony that the drowning death of the victim was a "homicide:"

Defendant … contends in his pro se supplemental brief that he was denied his Sixth Amendment right to counsel when the court allowed him to decide, against the professional judgment of his counsel, not to request a mistrial as the remedy for the Medical Examiner's improper testimony. We agree. "It is well established that a defendant, having accepted the assistance of counsel, retains authority only over certain fundamental decisions regarding the case' such as whether to plead guilty, waive a jury trial, testify in his or her own behalf or take an appeal' " … . Defense counsel has ultimate decision-making authority over matters of trial strategy, including the decision whether to request a mistrial … . Here, defense counsel explained to the court that he recommended that defendant move for a mistrial, but that defendant instructed him not to do so. The court then addressed defendant directly and confirmed that defendant wished to proceed with trial. Thus, the court " denied [defendant] the expert judgment of counsel to which the Sixth Amendment entitles him' " … . People v Szatanek, 2019 NY Slip Op 00794, Fourth Dept 2-1-19

ATTORNEYS, INEFFECTIVE ASSISTANCE.

DEFENSE COUNSEL'S INTRODUCING INTO EVIDENCE A SEARCH WARRANT APPLICATION WHICH IMPLICATED THE DEFENDANT IN CRIMES CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL (THIRD DEPT).

The Third Department, reversing defendant's conviction, determined defense counsel's placing in evidence a search warrant application which included prejudicial information about crimes involving the defendant amounted to ineffective assistance of counsel:

… [R]ather than a single error, we are confronted with a set of three closely-related errors at two stages of the trial: the failure to redact the irrelevant and prejudicial hearsay from the search warrant application before introducing it for the limited purpose of revealing [the applicant's] errors; the failure to request a limiting instruction that would have advised the jury of that purpose; and the subsequent failure to object to the prosecutor's repeated exhortations to the jury to rely on the application's hearsay information as proof of defendant's guilt. These errors, as well as the prejudicial testimony elicited from the detective, gain particular significance in the light of the close nature of the other evidence. The admissible proof that defendant constructively possessed the contraband and had the requisite intent to sell, although adequate to support the verdict, was not overwhelming. Further, the information in the application directly contradicted counsel's theory of defense, which was that the girlfriend, and not defendant, possessed and sold the drugs found in the apartment. Thus, although counsel's challenged conduct took place in the context of an otherwise effective performance, we find that the cumulative effect of his errors deprived defendant of a fair trial and requires reversal of the judgment … . People v Newman, 2019 NY Slip Op 01263, Third Dept 2-20-19

ATTORNEYS, JUDGES.

FAILURE TO GRANT AN ADJOURNMENT TO ALLOW DEFENSE COUNSEL, WHO HAD BEEN ACTING IN A LIMITED ADVISORY CAPACITY, TO ADEQUATELY PREPARE FOR A SUPPRESSION HEARING DEPRIVED DEFENDANT OF EFFECTIVE ASSISTANCE OF COUNSEL, NEW SUPPRESSION HEARING ORDERED, APPEAL HELD IN ABEYANCE (SECOND DEPT).

The Second Department held the appeal in abeyance to allow a new suppression hearing. defense counsel. Defense counsel was acting in a limited advisory capacity when he was asked by the judge to conduct the suppression hearing. Defendant asked for an adjournment to allow counsel to review the voluminous discovery materials, but the request was denied. The Second Department held that the denial of the adjournment deprived defendant of his right to counsel:

"[T]he right of a defendant to be represented by an attorney means more than just having a person with a law degree nominally represent him [or her] upon a trial and ask questions" … . "[T]he right to effective representation includes the right to assistance by an attorney who has taken the time to review and prepare both the law and the facts relevant to the defense and who is familiar with, and able to employ . . . basic principles of criminal law and procedure" … .

Here, the Supreme Court improvidently exercised its discretion in denying the defendant's request for an adjournment to give his attorney more time to prepare for the suppression hearing. Prior to the hearing, counsel acted in the limited capacity of advisor since the defendant wished to proceed pro se. However, at the court's urging, counsel agreed to represent the defendant at the suppression hearing but expressed his concern that he had not had an adequate opportunity to review voluminous discovery materials … . People v Costan, 2019 NY Slip Op 01089, Second Dept 2-13-19

CONTEMPT.

MOTION TO PURGE THE CONTEMPT ORDER REGARDING THE REMOVAL OF SOLID WASTE THAT HAD BEEN DUMPED ON A FIELD BY DEFENDANTS SHOULD HAVE BEEN GRANTED AND THE INCARCERATED DEFENDANT SHOULD BE RELEASED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined defendants' motion to purge the contempt order should have been granted and one of the defendants, Cascino, who had been incarcerated for more than a year to force compliance with the underlying order, should be released. The court had ordered defendants to remove solid waste that had been dumped by then on a field. Much of the material had been removed but questions of fact remained whether all of it had been removed:

… [A] question of fact remains as to whether defendants completed the required remediation. This impasse brings us back to the fundamental problem that the disputed material looks like regular topsoil to the human eye. Despite ongoing removal efforts and Supreme Court having concluded multiple hearings throughout 2016 and 2017 as to the remediation performed, the difficulty of identifying the precise location of any remaining material has left the parties at a continuing impasse.

Given these circumstances, we conclude that to continue Cascino's incarceration any further would serve no viable purpose and cannot be sustained. We are satisfied that the record establishes a significant effort on defendants' part to purge the contempt, while recognizing that there remains some dispute as to whether all the disputed material has been removed. That said, until such time as a definitive showing has been made that the disputed material actually remains and precisely where, it would be improvident to continue Cascino's incarceration. For these reasons, we conclude that the order must be reversed and defendants' motion to purge the contempt granted. Town of Copake v 13 Lackawanna Props., LLC, 2019 NY Slip Op 01271, Third Dept 2-21-19

GUILTY PLEAS, DEPORTATION, JUDGES.

DEFENDANT WAS NOT INFORMED OF THE POSSIBILITY OF DEPORTATION BASED UPON HIS GUILTY PLEA, MATTER REMITTED TO ALLOW A MOTION TO VACATE THE PLEA (SECOND DEPT).

The Second Department determined the record supported defendant's contention that Supreme Court did not inform him of the deportation consequences of his guilty plea. The matter was sent back to allow defendant to move to vacate his plea:

… [W]e remit the matter to the Supreme Court, Queens County, to afford the defendant an opportunity to move to vacate his plea, and for a report by the Supreme Court thereafter. Any such motion shall be made by the defendant within 60 days after the date of this decision and order … and, upon such motion, the defendant will have the burden of establishing that there is a "reasonable probability" that he would not have pleaded guilty had the court advised him of the possibility of deportation… . In its report to this Court, the Supreme Court shall state whether the defendant has now moved to vacate his plea of guilty, and if so, shall set forth its finding as to whether the defendant made the requisite showing or failed to make the requisite showing to entitle him to vacatur of the plea … . People v Hor, 2019 NY Slip Op 00899, Second Dept 2-6-19

IDENTIFICATION, HEARSAY.

DETECTIVE'S TESTIMONY DEMONSTRATED THE WITNESS'S IDENTIFICATION OF DEFENDANT WAS CONFIRMATORY, HEARSAY IS ADMISSIBLE AT A RODRIGUEZ HEARING (FIRST DEPT).

The First Department determined that the detective's testimony at the Rodriguez hearing established that the witness's identification of defendant was confirmatory and noted that the witness need not testify at the hearing because hearsay is admissible:

At a Rodriguez hearing (see People v Rodriguez, 79 NY2d 445 [1992]), a detective's testimony established that a witness was sufficiently familiar with defendant so that his identification of defendant was confirmatory. The

People were not obligated to call the identifying witness … , because the detective gave detailed testimony about the witness's relationship with defendant. The witness knew defendant, a frequent customer in the witness's store, by his first name, and saw him several times a week over a period of three years.

Defendant's request that the witness testify at the Rodriguez hearing was insufficient to preserve his present claim that such testimony was constitutionally required under the Confrontation Clause, and we decline to review it in the interest of justice. As an alternative holding, we reject this claim on the merits, in light of the fundamental difference between a suppression hearing, where hearsay is generally admissible, and a trial … . People v Lee, 2019 NY Slip Op 00824, First Dept 2-5-19

IDENTIFICATION.

POLICE OFFICER WAS PROPERLY ALLOWED TO IDENTIFY DEFENDANTS AS THE PERSONS DEPICTED IN VIDEOTAPES (FIRST DEPT).

The First Department noted that a police officer was properly allowed to identify defendants as persons depicted in videotapes:

The circumstances … warranted testimony by the officer identifying defendants as persons depicted in videotapes … . Notwithstanding the fact that defendants had not changed their appearance subsequent to having been videotaped, the testimony was permissible, because "[the] testimony served to aid the jury in making an independent assessment regarding whether the [men] in the [were] indeed the defendant[s]'"… . Furthermore, the circumstances suggested that the jury would be less able than the officer to determine whether the defendants were seen in the videotapes, given the poor quality of the surveillance tapes, which showed groups of young men, mostly from a distance, thus rendering his testimony appropriate … . The trial court instructed the jurors that the officer's testimony concerning the identities of those seen on video was his opinion and that the ultimate identification determination belonged exclusively to the jury. Furthermore, none of the officer's testimony violated the hearsay rule or defendants' right of confrontation. People v Pinkston, 2019 NY Slip Op 01171, First Dept 2-19-19

INDICTMENTS, JURISDICTIONALLY DEFECTIVE.

PEOPLE'S FAILURE TO PROCURE ANOTHER ACCUSATORY INSTRUMENT AFTER THE COURT REDUCED THE CHARGE RENDERED THE INDICTMENT JURISDICTIONALLY DEFECTIVE, REQUIRING DISMISSAL AFTER TRIAL DESPITE DEFENDANT'S FAILURE TO RAISE THE ISSUE AND THE PRESENTATION OF SUFFICIENT EVIDENCE OF THE REDUCED CHARGE (THIRD DEPT).

The Third Department, reversing the conviction and dismissing the indictment as jurisdictionally defective, determined that the People's failed to file an instrument with the reduced charged ordered by the judge or seek permission to re-present the case to a grand jury. The fact that error was not raised by the defendant and the fact that the reduced charge was supported by sufficient evidence did not matter in the face of the insufficient accusatory instrument:

"Where a court acts to reduce a charge contained in an indictment and the People fail within 30 days to take any action in response to this decision, the order directing the reduction shall take effect and the People are obligated, if they intend to pursue a prosecution, to either file an instrument containing the reduced charge or obtain permission to re-present the matter to a grand jury" … . Inasmuch as the People did nothing after County Court ordered a reduction in the remaining count, "the only charge that remained viable after the expiration of the [30-day] stay was the reduced count" of course of sexual conduct against a child in the first degree … . The People never filed a reduced indictment charging that offense, however, and County Court had no independent power to effectuate the reduction via an amendment to the original indictment … . "A valid and sufficient accusatory instrument is a nonwaivable jurisdictional prerequisite to a criminal prosecution," and the People's failure to file an indictment charging the reduced count precluded County Court from trying and convicting defendant on it … . People v Stone, 2019 NY Slip Op 01264, Third Dept 2-21-19

JAIL PHONE CALLS.

MONITORING AND RECORDING PHONE CALLS MADE BY PRETRIAL DETAINEES WHO ARE NOTIFIED THE CALLS ARE MONITORED AND RECORDED DOES NOT VIOLATE THE FOURTH AMENDMENT, THE RECORDINGS MAY BE SHARED WITH LAW ENFORCEMENT AND PROSECUTORS WITHOUT A WARRANT (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Feinman, over a two-judge dissent, determined recording phone conversation of pretrial detainees who are notified the calls are monitored and recorded does not violate the Fourth Amendment. Therefore such recordings can be shared with law enforcement and prosecutors:

… [W]here detainees are aware that their phone calls are being monitored and recorded, all reasonable expectation of privacy in the content of those phone calls is lost, "and there is no legitimate reason to think that the recordings, like any other evidence lawfully discovered, would not be admissible" … . Moreover, the signs posted near the telephones used by the inmates state that calls are monitored in "accordance with DOC policy" which, according to the DOC Operations Order, provides that while recordings are confidential and not available to the public, the District Attorney's Office may request a copy of an inmate's recorded calls which will be provided upon approval by DOC … . …

We therefore reject defendant's argument that he retained a reasonable expectation of privacy once the calls were lawfully intercepted by DOC and hold that there were no additional Fourth Amendment protections that would prevent DOC from releasing the recording to the District Attorney's Office absent a warrant. People v Diaz, 2019 NY Slip Op 01260, CtApp 2-19-19

JURY INSRUCTIONS, JUSTIFICATION DEFENSE.

TRIAL COURT FAILED TO INSTRUCT THE JURY THAT FINDING DEFENDANT NOT GUILTY OF THE TOP COUNT BASED ON THE JUSTIFICATION DEFENSE PRECLUDED CONSIDERATION OF THE LESSER COUNTS, NEW TRIAL REQUIRED (SECOND DEPT).

The Second Department, reversing defendant's conviction, noted that the trial court failed to instruct the jury that finding the defendant not guilty of the top count (attempted murder) based upon the justification defense would preclude consideration of the lesser counts. Defendant was acquitted of attempted murder but found guilty of assault first:

… [T]he Supreme Court's jury charge in conjunction with the verdict sheet failed to adequately convey to the jury that if it found the defendant not guilty of attempted murder in the second degree based on justification, then "it should simply render a verdict of acquittal and cease deliberation, without regard to" assault in the first degree and reckless endangerment in the first degree … . Thus, the court's instructions, together with the verdict sheet, may have led the jurors to conclude that deliberation on each of the three counts required reconsideration of the justification defense, even if they had already acquitted the defendant of attempted murder in the second degree based on justification … . Since we cannot say with any certainty and there is no way of knowing whether the acquittal on attempted murder in the second degree was based on a finding of justification, a new trial is necessary… . In light of the defendant's acquittal on the charge of attempted murder in the second degree, the highest offense for which the defendant may be retried is assault in the first degree … . People v Rosario, 2019 NY Slip Op 01432, Second Dept 2-27-19

JURY INSTRUCTIONS, ACCESSORIAL LIABILITY, PHOTOGRAPHS.

PHOTOGRAPH OF DEFENDANT WITH A WEAPON PROPERLY ADMITTED DESPITE THE ABSENCE OF EVIDENCE THE DEPICTED WEAPON WAS USED IN THE CHARGED OFFENSE, JURY WAS PROPERLY INSTRUCTED ON ACCESSORIAL LIABILITY DESPITE THE ABSENCE OF AN ALLEGATION OF ACCESSORIAL LIABILITY IN THE INDICTMENT AND DESPITE THE PEOPLE'S THEORY THAT DEFENDANT WAS THE SHOOTER (FIRST DEPT).

The First Department determined a photograph depicting defendant with a weapon was properly admitted into evidence despite the absence of evidence that the weapon in the photograph was the weapon used in the offense. The trial court properly instructed the jury on accessorial liability despite the absence of an allegation of accessorial liability in the indictment and the People's theory that defendant shot the victim:

The court providently exercised its discretion in admitting in evidence a photograph, taken less than two months before the shooting, showing a person, sufficiently established to be defendant, holding a revolver of the type used in the crime. This evidence was relevant to show that defendant had access to such a weapon, thus tending to establish his identity as the perpetrator, and there was no requirement of proof that the revolver in the photograph was the actual weapon used in the crime … . …

The court properly instructed the jury on accessorial liability, notwithstanding that no such language appeared in the indictment and the People's main theory was that defendant personally shot the victim. There was no improper amendment of the indictment, because an indictment charging a defendant as a principal is "not unlawfully amended by the admission of proof and instruction to the jury that a defendant is additionally charged with acting-in-concert to commit the same crime, nor does it impermissibly broaden a defendant's basis of liability, as there is no legal distinction between liability as a principal or criminal culpability as an accomplice" … . A theory that defendant intentionally aided a particular other person, who did the actual shooting, was supported by defendant's own testimony. Although defendant claimed he had not shared the gunman's intent, such intent could be inferred from the totality of the evidence. We reject defendant's claim of unfair surprise, particularly because the theory of accessorial liability arose from defendant's own testimony … . People v Alexander, 2019 NY Slip Op 01341, First Dept 2-26-19

JURY INSTRUCTIONS, ADVERSE INFERENCE.

DEFENDANT ENTITLED TO PERMISSIVE ADVERSE INFERENCE JURY INSTRUCTION BASED UPON THE PEOPLE'S LOSS OR DESTRUCTION OF EVIDENCE REQUESTED BY THE DEFENDANT (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined that the permissive adverse inference jury instruction should have been given because of the loss or destruction of evidence requested by the defendant:

The defendant contends that the Supreme Court should have granted his request for a permissive adverse inference charge with respect to the People's failure to turn over duly requested tape recordings and any other police records related to taped interactions between the undercover officer and a witness to the March 4, 1998, sale, who was also the defendant's unindicted co-defendant. " A permissive adverse inference instruction typically serves as either: (1) a penalty for the government's violation of its statutory and constitutional duties or its destruction of material evidence; or (2) an explanation of logical inferences that may be drawn regarding the government's motives for failing to present certain evidence at trial'" …

We agree with the defendant that the Supreme Court should have granted his request for a permissive adverse inference charge based upon the People's loss or destruction of the material requested by the defendant … . "[A] permissive adverse inference charge should be given where a defendant, using reasonable diligence, has requested evidence reasonably likely to be material, and where that evidence has been destroyed by agents of the State"… . Although the prosecutor stated that the missing tapes were unrelated to the sales at issue and were not recorded on the dates of the buys, he concededly never listened to them. Additionally, the officer who relayed the information that the tapes were not recorded on the dates of the buys to the prosecutor did not testify at trial. People v Torres, 2019 NY Slip Op 01434, Second Dept 2-27-19

JURY INSTRUCTIONS, JUSTIFICATION DEFNSE.

DEFENDANT WAS ENTITLED TO A JURY INSTRUCTION ON THE JUSTIFICATION DEFENSE IN THIS ASSAULT CASE, EVEN THOUGH THE DEFENDANT DENIED ASSAULTING THE VICTIM AT TRIAL (FOURTH DEPT).

The Fourth Department determined defendant was entitled to a new trial on the assault count because the jury was not instructed on the justification defense. The court noted that the instruction was required even though the defendant denied the assault:

Here, defendant testified at trial that the altercation was an unprovoked attack by a number of correction officers in retaliation for earlier grievances he had lodged against prison staff. Defendant testified that he felt "trapped" by the attack and started biting another correction officer in self-defense. Correction officers who witnessed the altercation testified that the two officers involved in the altercation were engaged in a prolonged "struggle" with defendant, during which the three men "wrestl[ed] pretty hard." Although defendant denied causing the injuries of the subject correction officer, that officer testified that defendant did cause his injuries.

Contrary to the People's contention, defendant was entitled to a justification charge, even though at trial he denied assaulting the subject correction officer, and argued that the People failed to prove that he possessed the pen used to injure the subject correction officer. "[A] defendant's entitlement to a charge on a claimed defense is not defeated solely by reason of its inconsistency with some other defense raised or even with the defendant's outright denial that he was involved in the crime" … . Rather, "[a] jury may believe portions of both the defense and prosecution evidence . . . and still find . . . that defendant acted justifiably" … . People v Brown, 2019 NY Slip Op 01023, Fourth Dept 2-8-19

JURY INSTRUCTIONS, LESSER INCLUDED OFFENSES.

THE JURY SHOULD HAVE BEEN INSTRUCTED NOT TO CONSIDER LESSER INCLUDED OFFENSES IF THEY FOUND DEFENDANT NOT GUILTY OF THE HIGHER OFFENSE ON THE BASIS OF JUSTIFICATION, NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined that the jury should have been instructed not to consider lesser offenses if it found defendant was not guilty of the greater charge on the basis of justification. The court noted that, on retrial, the jury should be instructed on two categories of assault third as lesser included offenses. Defendant was charged with attempted murder by stabbing and slashing the victim:

" This Court has held that, in a case involving a claim of self-defense, it is error for the trial court not to instruct the jurors that, if they find the defendant not guilty of a greater charge on the basis of justification, they were not to consider any lesser counts'"… . Such failure constitutes reversible error … .

Here, neither the jury instructions nor the verdict sheet on the whole adequately conveyed the principle that, if the jury found the defendant not guilty of the greater charge of attempted murder in the second degree on the basis of justification, it was not to consider any lesser counts … . On this record, it is impossible to discern whether acquittal of the top count of attempted murder in the second degree was based on the jurors' finding of justification so as to mandate acquittal on the five lesser counts … . People v Akbar, 2019 NY Slip Op 00894, Second Dept 2-6-19

JURY INSTRUCTIONS, LESSER INCLUDED OFFENSES, ASSAULT 3RD.

TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY ON ASSAULT THIRD AS A LESSER INCLUDED OFFENSE, TWO-JUSTICE DISSENT (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined the trial judge properly refused to instruct the jury on the lesser included offense of assault third degree. The dissenters disagreed:

… [T]he court did not err in refusing to charge the jury on the lesser included offense of assault in the third degree (Penal Law § 120.00 [2]). Based on the number and sizes of the scars to her face, there is no reasonable view of the evidence that would support a finding that the victim sustained only a physical injury as opposed to a serious physical injury … . People v Sipp, 2019 NY Slip Op 00771, Fourth Dept 2-1-19

JURY SELECTION, BATSON.

PROSECUTION'S REVERSE-BATSON CHALLENGE TO PEREMPTORY JUROR CHALLENGES BY THE DEFENSE SHOULD NOT HAVE BEEN GRANTED, CONVICTION REVERSED (FIRST DEPT).

The First Department, reversing defendant's conviction, determined that the prosecution's reverse-Batson challenge to defense peremptory juror challenges should not have been granted:

"[A]lthough appellate courts accord great deference to trial judges' step three determinations, . . . there is no record support for Supreme Court's rejection of defense counsel's race-neutral reasons for striking [two panelists]. The People simply failed to meet their burden that racial discrimination was the motivating factor" … . Defense counsel presented facially race-neutral reasons for challenging the panelists at issue based on their having been crime victims or relatives of crime victims … , and there was no evidence of disparate treatment by defense counsel of similarly situated panelists … . The record otherwise fails to support the court's finding that the race-neutral reasons given for these challenges were pretextual. People v Bloise, 2019 NY Slip Op 01363, First Dept 2-26-19

JUVENILE DELINQUENCY, JUDGES.

FAMILY COURT ABUSED ITS DISCRETION BY DENYING THE APPLICATION FOR AN ADJOURNMENT IN CONTEMPLATION OF DISMISSAL IN THIS JUVENILE DELINQUENCY PROCEEDING (SECOND DEPT).

The Second Department, reversing Family Court, determined the court abused its discretion by denying the application for an adjournment in contemplation of dismissal in this juvenile delinquency proceeding:

… [T]he Family Court improvidently exercised its discretion in denying the appellant's application pursuant to Family Court Act § 315.3 for an adjournment in contemplation of dismissal. This proceeding constituted the appellant's first contact with the court system, he took responsibility for his actions, and the record demonstrates that he learned from his mistakes. During the pendency of the proceeding, the appellant readily complied with the supervision imposed by the court and his father's supervision in the home, and he garnered praise from the Probation Department and school officials. Under the circumstances, including the appellant's commendable academic and school attendance record, his mentoring of fellow students at his school, and the minimal risk that he poses to the community, an adjournment in contemplation of dismissal was warranted … . Matter of Nijuel J., 2019 NY Slip Op 00876, Second Dept 2-6-19

MENTAL HYGIENE LAW, SEALING.

COURT RECORDS RELATED TO PROCEEDINGS FOR THE COMMITMENT AND RETENTION OF DANGEROUS MENTALLY ILL ACQUITTEES ARE NOT CLINICAL RECORDS AND THEREFORE ARE NOT SUBJECT TO THE AUTOMATIC SEALING REQUIREMENT IN THE MENTAL HYGIENE LAW (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, determined that the records of Criminal Procedure Law 330.20 proceedings related to the commitment and retention of insanity acquittees (suffering from a dangerous mental disorder) are not "clinical records" within the meaning of the Mental Hygiene Law and, therefore, are not subject to the automatic sealing requirement:

The plain text of Mental Hygiene Law § 33.13 … cuts against defendant's interpretation that the term "clinical record" includes the entire record of court proceedings or dictates to a court how to manage its own records. * * *

Throughout our history, "the institutional value" of open judicial proceedings has fostered "an appearance of fairness" … and ensured "the public interest in having proceedings of courts of justice public, not secret, for the greater security thus given for the proper administration of justice" … . Interpreting Mental Hygiene Law § 33.13, despite the absence of any supporting statutory language, to provide a blanket sealing requirement of an entire court record that is automatically conferred disregards that tradition. In balancing the privacy rights of a defendant with the public's right to know how dangerous mentally ill acquittees are managed by the courts, the legislature eschewed an automatic sealing requirement of the court record. We refuse to disturb that balance today. Here, defendant demanded an automatic seal in stark contrast to a case specific analysis that demands a

court to find good cause sufficient to rebut the legislative presumption of public access for any sealing, in part or whole, upon due consideration of the competing and compelling interests of the public and the parties … . Matter of James Q. (Commissioner of the Off. for People with Dev. Disabilities), 2019 NY Slip Op 01166, CtApp 2-19-19

MERGER, KIDNAPPING.

DEFENDANT'S KIDNAPPING CONVICTIONS VACATED PURSUANT TO THE DOCTRINE OF MERGER, DEFENDANT WAS ALSO CONVICTED OF MURDER, BURGLARY AND ROBBERY, APPEAL CONSIDERED IN THE INTEREST OF JUSTICE (SECOND DEPT).

The Second Department, noting the outcome of the appeal by a co-defendant, in the interest of justice, determined defendant's kidnapping convictions should be vacated pursuant to the merger doctrine. Defendant was convicted of murder, kidnapping, burglary and robbery:

The defendant and Domingo Mateo were indicted on charges of murder in the second degree, kidnapping in the first and second degrees, burglary in the first degree, and robbery in the first and second degrees in connection with a home invasion, which occurred on May 3, 2011, and resulted in the death of one of the occupants of the home. Mateo was tried separately and convicted on all counts. Thereafter, the defendant was tried and convicted on all counts. On Mateo's appeal, this Court found that his conviction of kidnapping in the second degree was precluded by the merger doctrine and modified the judgment of conviction by vacating the conviction of kidnapping in the second degree and the sentence imposed thereon, and dismissing that count of the indictment as to that defendant (see People v Mateo, 148 AD3d 727).

The defendant now contends that his conviction of kidnapping in the second degree was precluded by the merger doctrine. Although his contention is unpreserved for appellate review (see CPL 470.05[2]), we nevertheless reach the issue in the exercise of our interest of justice jurisdiction, vacate the defendant's conviction of kidnapping in the second degree and the sentence imposed thereon, and dismiss that count of the indictment as to the defendant … . People v Mejia, 2019 NY Slip Op 00903, Second Dept 2-6-19

ORDERS OF PROTECTION.

ORDER OF PROTECTION ISSUED IN THE CRIMINAL PROCEEDING PROHIBITING CONTACT BETWEEN FATHER AND DAUGHTER SHOULD BE SUBJECT TO ANY SUBSEQUENT CUSTODY OR VISITATION ORDERS BY FAMILY OR SUPREME COURT (FOURTH DEPT).

The Fourth Department determined the order of protection prohibiting contact between father and daughter should be subject to orders of Family or Supreme Court:

Here, the order of protection issued in this criminal proceeding bars all contact between defendant and his child, and cannot be modified by a subsequent visitation order of Family Court or Supreme Court unless it is first modified or vacated by the criminal court … . We agree with defendant that, under the circumstances of this case, the order of protection should be subject to any subsequent orders of custody and visitation, and we therefore modify the judgment by amending the order of protection in favor of defendant's biological daughter so that contact will be allowed if ordered by Family or Supreme Court in a custody, visitation or child abuse or neglect proceeding … . People v Smart, 2019 NY Slip Op 01043, Fourth Dept 2-8-19

SENTENCING, ATTORNEYS, JUDGES, APPEALS.

WAIVER OF APPEAL DID NOT PRECLUDE CONSIDERATION OF AN ISSUE WHICH AROSE AFTER THE WAIVER, AT SENTENCING ALL WERE UNDER THE MISCONCEPTION DEFENDANT WAS A SECOND FELONY OFFENDER, SENTENCING JUDGE HAD SINCE BECOME THE PUBLIC DEFENDER, THE PUBLIC DEFENDER'S OFFICE COULD NOT, THEREFORE, REPRESENT DEFENDANT (THIRD DEPT).

The Third Department, reversing Supreme Court, determined that defendant's waiver of appeal did not preclude consideration of an issue that came up after the waiver and the public defender's office could not represent defendant because the sentencing judge had since become the public defender. At sentencing and at the time of the waiver of appeal, all were under the misconception defendant was a second felony offender:

… [D]efendant's waiver of the right to appeal regarding his plea to the probation violation was entered under the misconception by all parties that defendant was a second felony drug offender. Accordingly, the waiver does not preclude our review of defendant's appeal on resentencing because "the plea was entered pursuant to conditions that changed after defendant's waiver" … . We agree with defendant's argument on appeal that the Albany County Public Defender's office was precluded, as a matter of law, from representing him at the resentencing hearing because the Public Defender, prior to being appointed to that position, was the County Judge who presided over and initially sentenced him in this matter (see Judiciary Law § 17 …). Accordingly, the judgment resentencing defendant must be reversed and the matter remitted for resentencing, with different representation assigned to defendant. People v Sumter, 2019 NY Slip Op 01460, Third Dept 2-28-19

SENTENCING, PREDICATE FELONY STATUS.

WHERE A DEFENDANT HAS BEEN RESENTENCED BECAUSE THE ORIGINAL SENTENCE WAS ILLEGAL, THE DATE OF THE ORIGINAL SENTENCE CONTROLS FOR DETERMINATION OF PREDICATE FELONY STATUS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a three-judge dissent, reversing the Appellate Division, determined that, where a defendant has been resentenced because the original sentence was illegal, the date of the original sentence, not the subsequent resentence, controls for the purpose of determining predicate felony status:

… [D]efendant's proffered interpretation of Penal Law § 70.06 is not supported by the plain language of that provision, its well-established legislative purpose, or our precedent. Therefore, because the original sentences on defendant's 1989 convictions were imposed before commission of the present felony, the sequentiality requirement of the predicate felony statute was satisfied, and defendant was properly sentenced as a second felony offender. People v Thomas, 2019 NY Slip Op 01167, CtApp 2-19-19

SEX OFFENDER REGISTRATION ACT (SORA).

NO SHOWING THAT POST TRAUMATIC STRESS DISORDER OR A TRAUMATIC BRAIN INJURY INCREASED THE RISK OF REOFFENSE, APPELLATE DIVISION EXERCISED ITS OWN DISCRETION AND REDUCED DEFENDANT'S RISK LEVEL FROM TWO TO ONE (FOURTH DEPT).

The Fourth Department, reversing County Court, determined that defendant should have been adjudicated a level one, not a level two risk:

Although defendant was diagnosed with PTSD [post traumatic stress disorder] and may have sustained a TBI traumatic brain injury], the record is devoid of evidence that any such mental impairment "is causally related to a[ ] risk of reoffense" … . …

Nor is the continuing nature of the crime sufficient to support the upward departure because, even if additional points were assessed for risk factor 4, i.e., continuing course of sexual misconduct, defendant's total risk factor score would not result in defendant's classification as a presumptive level two risk … . Further, there is no basis for an upward departure where, as here, the alleged aggravating factor is adequately taken into account by the risk assessment guidelines … . Finally, although we conclude that defendant's actions in taking the victim across state lines constitute an aggravating factor that is, "as a matter of law, of a kind or to a degree not adequately taken into account by the [risk assessment] guidelines" … , we further conclude that the court improvidently exercised its discretion in granting an upward departure based on that factor under the circumstances of this case. We therefore substitute our own discretion … . People v Logsdon, 2019 NY Slip Op 00998, Fourth Dept 2-8-19

SEX OFFENDER REGISTRATION ACT (SORA).

SCHOOL-GROUNDS RESTRICTION APPLIES ONLY TO OFFENDERS SERVING A SENTENCE FOR ONE OF THE OFFENSES ENUMERATED IN THE EXECUTIVE LAW AT THE TIME OF RELEASE, SINCE PETITIONER, WHO WAS A LEVEL THREE SEX OFFENDER, WAS SERVING A SENTENCE FOR BURGLARY AT THE TIME OF RELEASE, THE SCHOOL-GROUNDS RESTRICTION DID NOT APPLY TO HIM (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Aarons, disagreeing with the Fourth Department, determined that the restriction in the Executive Law prohibiting a sex offender from living within 1000 feet of a school only applied if the sentence being served at the time of release on parole is for one of the offenses enumerated in the statute. Defendant had previously been convicted of a sex offense and had been adjudicated a level three sex offender. But the offense for which he was incarcerated at the time of his release (burglary) is not an enumerated offense:

… [T]he statute is unambiguous and interpret it in the manner advanced by him. In this regard, we read "such person" as plainly and unequivocally referring to "a person serving a sentence for an offense defined in [Penal Law articles 130, 135 or 263 or Penal Law § 255.25, § 255.26 or 255.27]" (Executive Law § 259-c [14]). We are unpersuaded by respondent's contention that "such person" in Executive Law § 259-c (14) can be rationally read to refer only to "a person" or "a person serving a sentence" as stated in the beginning of the statute and without regard to that part of the statute specifying various offenses. Based on the foregoing, we find that the school-grounds restriction provided in Executive Law § 259-c (14) applies either to (1) an offender serving one of the enumerated offenses whose victim was under 18 years old, or (2) an offender serving one of the enumerated offenses who was designated a risk level three sex offender. Because petitioner was not serving a sentence for an offense delineated in Executive Law § 259-c (14), the statute does not apply to him. People v Superintendent, Woodbourne Corr. Facility, 2019 NY Slip Op 01267, Third Dept 2-21-19

SEX OFFENDER REGISTRATION ACT (SORA), STATUORY RAPE.

SORA COURT MAY HAVE OVERASSESSED THE RISK IN A STATUTORY RAPE CASE, MATTER REMITTED FOR PROPER APPLICATION OF THE CRITERIA ANNOUNCED BY THE COURT OF APPEALS IN PEOPLE V GILLOTTI (FIRST DEPT).

The First Department sent the matter back to the SORA court for further consideration of the request for a downward department where defendant was convicted of statutory rape:

In People v Gillotti (23 NY3d 841 [2014]), the Court of Appeals outlined a three-step process for determining whether to grant a defendant's request for a downward departure. First, the hearing court is to determine whether alleged mitigating circumstances are "of a kind or degree not adequately taken into account by the guidelines"… . If so, the court applies a preponderance of the evidence standard (id. at 863) to determine whether the defendant has proven the existence of those circumstances … . Finally, if the first two steps are satisfied, the court must "exercise its discretion by weighing the aggravating and mitigating factors to determine whether the totality of the circumstances warrants" a downward departure to avoid an overassessment of the defendant's dangerousness and risk of sexual reoffense … .

While not entirely clear on this point, the decision of the hearing court in this case suggests that, in this case of statutory rape, the court considered itself bound, as a matter of law, to conclude that the various details of the offense urged as mitigating circumstances by defendant were adequately accounted for by the guidelines. Thus, the court appeared to consider itself unable to engage in the discretionary weighing prescribed in Gillotti's third step. To the extent that the court acted based on this reasoning, it operated on an inaccurate premise that is contradicted by numerous cases that have granted downward departures in a similar context … , as well as the Guidelines themselves (see Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 9 [2006]).

"In cases of statutory rape, the Board has long recognized that strict application of the Guidelines may in some instances result in overassessment of the offender's risk to public safety" … . Accordingly, the fact that in such a case the offender is not assessed any points for force or injury should not be the end of the discussion of whether to grant a downward departure. People v Soto, 2019 NY Slip Op 01184, First Dept 2-19-19

STATUTES, ADMINISTRATIVE CODE, AMMUNITION.

THE EXCLUSIONARY LANGUAGE IN THE NYC ADMINISTRATIVE CODE PROVISION WHICH CRIMINALIZES POSSESSION OF AMMUNITION IS AN EXCEPTION THAT MUST BE AFFIRMATIVELY PLED, CONVICTION REVERSED (FIRST DEPT).

The First Department, reversing defendant's conviction of unlawful possession of ammunition pursuant to New York City Administrative Code § 10-131(i)(3), determined that the exclusionary language in the code provision is an exception which must be affirmatively pled in the accusatory instrument:

We find that the relevant language in section 10-131(i)(3), which makes it a crime to possess pistol or revolver ammunition unless authorized to possess a pistol or revolver, constitutes an exception and not a proviso. Consequently, it was the People's burden to prove that the defendant was not authorized to possess a pistol or revolver within the City of New York. As the People failed to do so, defendant's conviction under section 10-131(i)(3) must be vacated and that count dismissed.

In order to determine whether a statute defining a crime contains "an exception that must be affirmatively pleaded as an element in the accusatory instrument" or "a proviso that need not be pleaded but may be raised by the accused as a bar to prosecution or a defense at trial," one must look to the language of the statute itself … . Indeed, "[i]f the defining statute contains an exception, the indictment must allege that the crime is not within the exception. But when the exception is found outside the statute," it is termed a proviso and "generally is a matter for the defendant to raise in defense" … . "Legislative intent to create an exception [whose existence must be negated by the prosecution] has generally been found when the language of exclusion is contained entirely within" the statute itself … . In contrast, where the language of the exclusion depends on a source outside the statute, courts will infer that the language functions as a proviso … . People v Tatis, 2019 NY Slip Op 01507, First Dept 2-28-19

TESTIMONIAL HEARSAY, DNA.

IT WAS (HARMLESS) ERROR TO ADMIT TESTIMONY OF THE PEOPLE'S DNA EXPERT, THE TESTIMONIAL HEARSAY VIOLATED DEFENDANT'S RIGHT TO CONFRONTATION (SECOND DEPT).

The Second Department determined the testimony of the People's DNA expert violated defendant's right to confrontation. The error was deemed harmless however:

… [T]he Supreme Court should not have admitted, over the defendant's objection, the testimony of the People's DNA expert, as such testimony violated the defendant's right to confrontation… . In order to satisfy the Confrontation Clause where the People seek to introduce testimonial DNA evidence, "an analyst who witnessed, performed or supervised the generation of defendant's DNA profile, or who used his or her independent analysis on the raw data, as opposed to a testifying analyst functioning as a conduit for the conclusions of others, must be available to testify"… . Although the People's expert testified that he conducted a "technical review" of the reports prepared by another criminalist whom he supervises, he did not establish that such review entailed using his own independent analysis on the raw data … .

Even so, the error in admitting the testimonial DNA evidence was harmless since the proof of the defendant's guilt, without reference to the erroneously admitted DNA evidence, was overwhelming and there was no reasonable possibility that the Supreme Court would have acquitted the defendant had it not been for the error … . People v Dyson, 2019 NY Slip Op 01225, Second Dept 2-20-19

WAIVER OF INDICTMENT, JURISDICTIONALLY DEFECTIVE.

THE WAIVER OF INDICTMENT WAS JURISDICTIONALLY DEFECTIVE BECAUSE IT DID NOT INCLUDE THE APPROXIMATE TIME AND PLACE OF THE OFFENSES, THIS IS A MODE OF PROCEEDINGS ERROR, PLEA TO THE SUPERIOR COURT INFORMATION VACATED (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice NeMoyer, reversing County Court, determined the waiver of indictment was jurisdictionally defective in that there was no indication of the time and date of the

alleged offenses (rape). Although defendant had waived his right to appeal, the Fourth Department vacated his guilty plea:

… [T]he written waiver does not contain any data whatsoever regarding the "date and approximate time and place of each offense to be charged in the superior court information," as explicitly required by CPL 195.20. Notwithstanding that defect, County Court determined that the written waiver "fully complie[d] with the provisions of Sections 195.10 and 195.20 of the Criminal Procedure Law" and approved it accordingly (see CPL 195.30 [requiring judicial approval of indictment waiver upon determination that it complies with CPL 195.10 and 195.20]).

The ensuing SCI [superior court information] charged defendant with two counts of second-degree rape under Penal Law § 130.30 (1). Count one alleged that defendant, "between approximately September 1, 2013 and September 9, 2013, in the City of Batavia, County of Genesee, State of New York, being eighteen years old or more, engaged in sexual intercourse with another person less than fifteen years old." Count two alleged that defendant, "on a second occasion between approximately September 1, 2013 and September 9, 2013, in the City of Batavia, County of Genesee, State of New York, being eighteen years old or more, engaged in sexual intercourse with another person less than fifteen years old." * * *

Because "an infringement of defendant's right to be prosecuted only by indictment implicates the jurisdiction of the court" … , the Court of Appeals has repeatedly stressed that the "[f]ailure to adhere to the statutory procedure for waiving indictment" is a "jurisdictional[defect] affecting the organization of the court or the mode of proceedings prescribed by law' " … . People v Colon-colon, 2019 NY Slip Op 01039, Fourth Dept 2-8-19

YOUTHFUL OFFENDERS, JUDGES.

DENIAL OF YOUTHFUL OFFENDER STATUS WAS AN ABUSE OF DISCRETION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined it was an abuse of discretion to deny defendant youthful offender status:

The evidence demonstrated that the defendant, who was only 18 years old when he participated in the subject robbery and had spent nearly two years in pretrial detention prior to pleading guilty to robbery in the first degree, played a relatively minor role in the robbery, which, although serious, was orchestrated by his considerably older brother, who was a repeat offender. The defendant suffers from developmental delays. While the defendant did

participate in the robbery, it was the defendant's brother, not the defendant, who wielded a gun and committed a sexual assault against one of the victims. Additional mitigating circumstances include the defendant's lack of a prior juvenile record, criminal record, or violent history, and his cooperation with the authorities as part of the plea deal. Moreover, the defendant either had graduated from high school or was on the cusp of graduating from high school. Under all the circumstances, the interest of justice would be served by "relieving the defendant from the onus of a criminal record" … . People v Sheldon O., 2019 NY Slip Op 01430, Second Dept 2-27-19

YOUTHFUL OFFENDERS, JUDGES.

SENTENCING COURT MUST CONSIDER YOUTHFUL OFFENDER STATUS EVEN WHERE IT IS NOT REQUESTED OR WHERE DEFENDANT AGREES TO FORGO IT AS PART OF A PLEA BARGAIN (SECOND DEPT).

The Second Department, vacating defendant's sentence, determined defendant's waiver of appeal was invalid and the sentencing court was required to consider youthful offender status, even when not requested:

The defendant's purported waiver of his right to appeal was invalid … . Although the defendant signed a written waiver, the Supreme Court provided the defendant with no explanation as to the nature of the right to appeal and the consequences of waiving it … , nor did the court ask the defendant whether he read the waiver form before signing it … . Moreover, the court conflated the trial rights the defendant waived automatically by pleading guilty with the right to appeal … . In any event, the defendant's contention that the court failed to consider whether to afford him youthful offender treatment would not have been barred by the defendant's general waiver of the right to appeal … .

CPL 720.20(1) requires that the sentencing court "must" determine whether an eligible defendant is to be treated as a youthful offender, even where the defendant fails to request it, or agrees to forgo it as part of a plea bargain … . People v Alleyne, 2019 NY Slip Op 00895, Second Dept 2-6-19