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APPEALS.

CONVICTION AFFIRMED, THREE-JUDGE DISSENT ARGUED THE APPELLATE DIVISION EXCEEDED ITS AUTHORITY BY AFFIRMING ON A SEARCH-RELATED GROUND THAT WAS NOT RULED ON BY SUPREME COURT (CT APP).

The Court of Appeals, over a three-judge dissent, affirmed the suppression determination, without explaining the facts. The dissent mentions the facts briefly but argues that the Appellate Division exceeded its jurisdiction by affirming the conviction on a search-related ground that was not ruled on by Supreme Court:

The present case clearly falls into the category where the trial court's decision has discrete sections enabling an appellate court to discern which issues it has considered and decided, and yet the Appellate Division reviewed an issue that the trial court had not decided adversely to defendant, offering "an entirely distinct alternative ground for affirmance" … . If a suppression court writes a "fully articulated" decision adverse to a defendant … , but omits discussion of a particular issue raised by the defendant, our law mandates that an appellate court cannot resolve the issue and must remit. Whether our interpretation of CPL 470.15 (1), in LaFontaine [92 NY2d at 474] and its progeny, is "undesirable from a policy point of view" … is a question for another day. LaFontaine is the law and, until such time as that precedent is overruled, "we are constrained by that decision, and . . . cannot be arbitrary in applying it" … . People v Hill, 2019 NY Slip Op 05187, CtApp 6-27-19

APPEALS.

APPEAL OF THE STATUTORY SPEEDY TRIAL ISSUE FORECLOSED BY THE GUILTY PLEA AND THE WAIVER OF APPEAL; THE STATEMENT-SUPPRESSION ISSUE FORECLOSED BY THE WAIVER OF APPEAL; THE CONSTITUTIONAL SPEEDY TRIAL ISSUE WAS ABANDONED (FOURTH DEPT).

The Fourth Department noted: (1) the statutory speedy trial issue is foreclosed by defendant's guilty plea; (2) the statutory speedy trial issue is foreclosed by the waiver of appeal; (3) the statement-suppression issue is foreclosed by the waiver of appeal; and (4) because defendant pled guilty before Supreme Court decided the constitutional speedy trial issue that issue was abandoned. People v Hardy, 2019 NY Slip Op 04555, Fourth Dept 6-7-19

APPEALS, LEGAL SUFFICIENCY, GRAND JURY.

COUNTY COURT'S DETERMINATION THE EVIDENCE BEFORE THE GRAND JURY WAS LEGALLY SUFFICIENT IS NOT REVIEWABLE AFTER A CONVICTION BASED UPON LEGALLY SUFFICIENT EVIDENCE (FOURTH DEPT).

The Fourth Department noted that appellate review of a court's determination of the sufficiency of the evidence presented to the grand jury is not reviewing upon appeal of a conviction based upon legally sufficient trial evidence:

Defendant's contention regarding the legal sufficiency of the evidence with respect to the operability of the stun gun is not preserved for our review inasmuch as her motion for a trial order of dismissal was not " specifically directed' at [that] alleged" deficiency in the proof … . In any event, the evidence, which included the testimony of a firearms examiner who tested the device at issue, viewed in the light most favorable to the People … , is legally sufficient to support the conviction. …

County Court's determination with respect to the legal sufficiency of the evidence before the grand jury is "not reviewable upon an appeal from an ensuing judgment of conviction based upon legally sufficient trial evidence" (CPL 210.30 [6] …). People v Washington, 2019 NY Slip Op 04553, Fourth Dept 6-7-19

ARREST, BENCH WARRANT, SPEEDY TRIAL.

THE FACT THAT THE BENCH WARRANT WAS BASED UPON A CHARGE FOR WHICH THE STATUTORY SPEEDY TRIAL PERIOD HAD EXPIRED DID NOT INVALIDATE THE EXECUTION OF THE WARRANT AND THE RESULTING ARREST FOR RESISTING ARREST (FOURTH DEPT).

The Fourth Department noted that the fact that the statutory speedy trial period had expired at the time the bench warrant was executed did not invalidate the arrest for resisting arrest:

[I]t is undisputed that the warrant was facially valid, and it necessarily follows that the officer was authorized to arrest defendant for purposes of the resisting arrest statute … .

… [T]he fact that the statutory speedy trial period had expired on the charge underlying the bench warrant did not vitiate the warrant's facial validity and thereby negate the officer's authority to execute it for purposes of the resisting arrest statute … . Indeed, it is well established that an officer's authority to arrest does not hinge on the ultimate success of the underlying prosecution, if any … . People v Lowman, 2019 NY Slip Op 04823, Fourth Dept 6-14-19

ARTICLE 78, DIRECT APPEAL IS THE REMEDY.

COUNTY COURT DENIED PETITIONER'S MOTION TO DISMISS AN INDICTMENT ON THE GROUND THE PEOPLE HAD LEGALLY SUFFICIENT EVIDENCE TO SUPPORT THE INDICTMENT AT THE TIME HE PLED GUILTY TO A PRIOR INDICTMENT (CPL 40.40); PETITIONER'S REMEDY IS DIRECT APPEAL, NOT THE INSTANT ARTICLE 78 PETITION SEEKING PROHIBITION OR MANDAMUS (THIRD DEPT).

The Third Department determined petitioner must seek review of the denial of a motion to dismiss an indictment pursuant to CPL 40.40 by direct appeal, not by the instant Article 78 action for prohibition or mandamus re: the district attorney and the judge. Petitioner moved to dismiss the indictment on the ground that the People had legally sufficient evidence to support the indictment at the time he pled guilty to a prior indictment. County Court denied that motion without a hearing, even though County Court noted it could not determine whether the People had legally sufficient evidence at the time petitioner pled guilty:

The District Attorney contends that petitioner may not obtain collateral review of County Court's denial of his motion through a CPLR article 78 proceeding. We agree. "Neither [of the extraordinary remedies of] prohibition nor mandamus lies as a means to obtain collateral review of an alleged error of law particularly where, as here, there is an adequate remedy at law by way of a direct appeal" … . Any error in County Court's decision denying petitioner's motion to dismiss indictment No. 3 without a hearing is, at most, a mere error of law that does not justify the invocation of the extraordinary remedies sought … . Matter of Davis v Nichols, 2019 NY Slip Op 04794, Third Dept 6-13-19

ATTORNEYS, CONFLICT OF INTEREST.

PUBLIC DEFENDER'S OFFICE REPRESENTED DEFENDANT AND THE CONFIDENTIAL INFORMANT, CONVICTION REVERSED (THIRD DEPT).

The Third Department, reversing defendant's conviction, determined that the public defender's office represented both the defendant and the confidential informant (CI) creating a conflict of interest. Although the issue was apparently not preserved, the appellate court considered the issue in the interest of justice:

"A defendant is denied the right to effective assistance of counsel guaranteed by the Sixth Amendment when, absent inquiry by the court and the informed consent of [the] defendant, defense counsel represents interests which are actually in conflict with those of [the] defendant" … . "Discussions of the effect of a lawyer's conflict of interest on a defendant's right to the effective assistance of counsel distinguish between a potential conflict and an actual conflict" … . "An actual conflict exists if an attorney simultaneously represents clients whose interests are opposed and, in such situations, reversal is required if the defendant does not waive the actual conflict. In contrast, a potential conflict that is not waived by the accused requires reversal only if it operates on or affects the defense" … .

Here, the People concede that the Public Defender's office was simultaneously representing both defendant and the CI during the pendency of this criminal action, and defendant and the CI had opposing interests. Inasmuch as defendant never waived the conflict, reversal of the judgment is warranted … . People v Palmer, 2019 NY Slip Op 05228, Third Dept 6-27-19

ATTORNEYS, RIGHT TO COUNSEL, STATEMENT.

DEFENDANT'S STATEMENT TO HIS MOTHER, ON THE PHONE, ABOUT NEEDING THE ASSISTANCE OF AN ATTORNEY SHOULD NOT HAVE BEEN ADMITTED IN EVIDENCE, ERROR WAS HARMLESS HOWEVER (SECOND DEPT).

The Second Department determined a statement defendant made to his mother about needing the assistance of an attorney should not have been admitted. The error was deemed harmless however:

We agree with the defendant that the Supreme Court should not have admitted into evidence a statement the defendant made to his mother, during a recorded telephone call, that involved him invoking his right to counsel. During the telephone call, the defendant stated that, with the assistance of an attorney, he could "get around" the fact that he had touched the gun earlier in the day. The court initially ruled that this statement was inadmissible. However, during a pretrial proceeding, the People argued that this statement should be admitted, as it demonstrated the defendant's consciousness of guilt. Over the defendant's objection that this statement was inadmissible since it revealed his decision to engage legal representation, the court permitted its introduction into evidence. "It has long been the rule in this State that, once a criminal proceeding has formally commenced, the accused has an absolute constitutional and statutory right to the assistance of counsel at every stage of the proceeding" … . Accordingly, evidence which has the jury infer guilt from the fact that a criminal defendant exercised his or her right to counsel should not be admitted … . Here, the admission of this statement was an improper infringement on the defendant's exercise of his right to counsel … . People v James, 2019 NY Slip Op 05150, Second Dept 6-26-19

ATTORNEYS, INEFFECTIVE ASSISTANCE, DEPORATION.

DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO INFORM DEFENDANT THE AGGRAVATED FELONY TO WHICH DEFENDANT PLED GUILTY SUBJECTED HIM TO MANDATORY DEPORTATION, APPEAL HELD IN ABEYANCE TO ALLOW DEFENDANT TO MOVE TO VACATE HIS PLEA (FIRST DEPT).

The First Department determined defendant received ineffective of assistance of counsel. Counsel did not inform defendant he would be subject to mandatory deportation based upon his plea to an aggravated felony:

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 he been made aware of the deportation consequences of his plea … and we hold the appeal in abeyance for that purpose. While defendant requests that his conviction be replaced by a conviction under a different subdivision of Penal Law § 220.16 that may entail less onerous immigration consequences, we find that to be an inappropriate remedy, and we instead order a hearing. People v Disla, 2019 NY Slip Op 04995, First Dept 6-20-19

ATTORNEYS, INEFFECTIVE ASSISTANCE, DNA.

THE RECORD WAS INSUFFICIENT TO ALLOW THE CONCLUSION THAT DEFENDANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL, A POST-TRIAL EVIDENTIARY PROCEEDING MIGHT ANSWER THE QUESTIONS LEFT OPEN BY THE TRIAL RECORD; ANY ERROR IN ADMITTING DNA EVIDENCE WHERE CONSENT, NOT IDENTITY, IS THE ISSUE IS HARMLESS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, over a dissent, determined (1) the record was insufficient to demonstrate defendant did not receive effective assistance of counsel and (2) because the DNA evidence was not offered to identify the defendant any error in introducing it was harmless. The defendant argued that defense counsel did not review the surveillance video the People provided and pursued a theory at trial that was at odds with the video evidence. In addition, defense counsel told the jury in his opening statement that defendant would testify (he did not testify), The defendant, who worked at a hotel, unlocked a hotel-room door for a couple who were drunk. At some point defendant had sexual contact with the woman while the man slept. Defendant said the sexual contact was consensual. The video evidence contradicted the time-line the defendant had described. The majority concluded the record evidence was not sufficient to conclude that defense counsel did not review or did not understand the significance of the video evidence, and the failure to call the defendant as a witness did not prove ineffective assistance as a matter of law. To make a sufficient record, a 440 motion would be necessary:

Mr. Lopez-Mendoza argues that his attorney's opening statement undermined his case by promising the defendant would take the stand and making arguments contradicted by video evidence, then failing to call defendant to the stand and closing with a new version of events. The ineffective assistance, he argues, was caused by either his attorney's failure to review the video evidence or his failure to understand its importance. Either way, Mr. Lopez-Mendoza contends, that failure proved disastrous.

The defendant "bears the ultimate burden of showing . . . the absence of strategic or other legitimate explanations for counsel's challenged actions" … . The record here is insufficient to make that showing. Although "[i]t simply cannot be said that a total failure to investigate the facts of a case, or review pertinent records, constitutes a trial strategy resulting in meaningful representation"… , the limited record in this case does not conclusively establish that counsel was ineffective. On its own, the decision not to call a witness after promising to do so does not establish ineffective assistance of counsel as a matter of law … . * * *

"[T]he lack of an adequate record bars review on direct appeal . . . wherever the record falls short of establishing conclusively the merit of the defendant's claim" … . Here, it is "essential[] that an appellate attack on the effectiveness of counsel be bottomed on an evidentiary exploration by collateral or post-conviction proceeding brought under CPL 440.10" … . Such a proceeding could answer the questions left open on this record, including whether counsel reviewed the video evidence at all, or whether he may have misunderstood that the evidence was flatly inconsistent with his opening argument. People v Lopez-Mendoza, 2019 NY Slip Op 04759, CtApp 6-13-19

ATTORNEYS, INEFFECTIVE ASSISTANCE.

DEFENSE COUNSEL SUCCESSFULLY PURSUED A MISIDENTIFICATION DEFENSE THROUGHOUT THE TRIAL BUT CONCEDED THE ISSUE IN SUMMATION, DEFENDANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL; A WITNESS MAY IDENTIFY THE DEFENDANT AT TRIAL DESPITE A PROCEDURALLY-DEFECTIVE PRE-TRIAL IDENTIFICATION (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined defendant did not receive effective assistance of counsel. During the trial the victim of the robbery twice misidentified the defendant before identifying the defendant, first indicating he did not see the defendant in the courtroom and then indicating a spectator was the assailant. Defense counsel pursued the misidentification defense throughout the trial, successfully challenging the admission of a surveillance video. But in summation defense counsel essentially conceded that defendant was one of the assailants. The Second Department noted that a witness who participated in a procedurally-defective pretrial identification procedure may still identify the defendant at trial if the People demonstrate the in-court identification is based upon the witness's independent observation of the defendant, here the observations made during the robbery itself:

"A witness may identify the perpetrator of a crime as part of his or her in-court testimony, notwithstanding the existence of a procedurally-defective pretrial identification procedure, provided that the People establish by clear and convincing evidence that the in-court identification is based upon the witness's independent observation of the defendant" … . Here, contrary to the defendant's contention, at an independent source hearing, the prosecution proved by clear and convincing evidence that the complainant's in-court identification of the defendant would be based on his independent observations during the robbery … . * * *

… [D]efense counsel's confused and contradictory actions, effectively conceding the dispositive issue, deprived the defendant of his right to the effective assistance of counsel … . Given defense counsel's opening statement and his conduct throughout the course of the trial in advancing his misidentification defense, his decision to abandon his chosen defense midstream in favor of a nebulous and contradictory argument that no forcible taking of property had occurred, "was so unreasonable, inconsistent, and devoid of any possibility of success that it does not even rise to the level of trial strategy" … . Under the circumstances, the defendant was deprived of the effective assistance of counsel and is entitled to a new trial. People v Goondall, 2019 NY Slip Op 04721, Second Dept 6-12-19

ATTORNEYS, RIGHT TO COUNSEL, INEFFECTIVE ASSISTANCE.

DEFENDANT COMPLAINED THAT HIS ATTORNEY HAD NOT FILED OMNIBUS MOTIONS BUT DEFENSE COUNSEL SAID HE HAD FILED THEM AND THE COURT SAID IT HAD RECEIVED THEM; IN FACT, HOWEVER NO MOTIONS HAD BEEN FILED; DEFENDANT'S COMPLAINTS ABOUT HIS ASSIGNED COUNSEL WARRANTED FURTHER INQUIRY BY THE COURT; DEFENDANT WAS DEPRIVED OF HIS RIGHT TO COUNSEL, NEW TRIAL ORDERED (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction and ordering a new trial, determined that defendant's complaints about his assigned counsel were sufficient to warrant further inquiry by the court:

… [D]efendant "articulated complaints about his assigned counsel that were sufficiently serious to trigger the court's duty to engage in an inquiry regarding those complaints"… At a pretrial appearance, defendant requested that the court assign him new counsel because, among other things, defense counsel had failed to file discovery demands and omnibus motions. After defendant's request, defense counsel erroneously stated, "[t]hose were filed already," and the court stated, "I have them here. I'm holding them in my hand." However, the People concede that, although certain discovery demands were served on the People, defense counsel never filed any omnibus motions.

Upon being told that omnibus motions had been filed, defendant informed the court that he had never received them. The court replied, "Well, that's a different issue, okay? So you've got to get a copy of your paperwork, all right? What else?" The court never conducted an inquiry into defendant's serious complaint that defense counsel failed to file any omnibus motions and, instead, proceeded under the mistaken belief that they had been filed.

Although "[t]he court might well have found upon limited inquiry that defendant's request was without genuine basis, . . . it could not so summarily dismiss th[at] request" based on a mistaken belief that omnibus motions had been filed … . Thus, we conclude that the court violated defendant's right to counsel by failing to make a minimal inquiry concerning his serious complaint, and we therefore reverse the judgment and grant a new trial … . People v Edwards, 2019 NY Slip Op 04537, Fourth Dept 6-7-19

ATTORNEYS, INEFFECTIVE ASSISTANCE, JUDGES.

THE JUDGE SHOULD HAVE ALLOWED DEFENDANT TO EXPLAIN HIS CLAIM THAT HE WAS RECEIVING INEFFECTIVE ASSISTANCE OF COUNSEL AND HIS REQUEST FOR NEW COUNSEL, PLEA VACATED (FOURTH DEPT).

The Fourth Department, vacating defendant's guilty plea, determined defendant should have been given the opportunity to explain his reasons for requesting a new attorney:

… [D]uring the plea colloquy, defendant attempted to inform the court that he was pleading guilty only because he was not receiving effective assistance of counsel. Although vague and conclusory complaints about counsel generally are insufficient to trigger the court's duty to make an inquiry … , the court here "failed to provide defendant with an opportunity to explain his complaints" … . The court refused to accept defendant's pro se letter regarding the matter and did not otherwise allow defendant to expand upon his claim of ineffective assistance of counsel. Defendant's "request may well have been a frivolous delaying tactic" … . Nevertheless, we conclude that the court had "no basis to completely cut off the discussion without hearing any explanation" … . A "defendant must at least be given an opportunity to state the basis for his [or her] application" … . People v Jones, 2019 NY Slip Op 04543, Fourth Dept 6-7-19

ATTORNEYS, INEFFECTIVE ASSISTANCE.

THE COURT SHOULD HAVE HELD A HEARING TO DETERMINE WHETHER DEFENDANT WAS INFORMED BY DEFENSE COUNSEL OF A PLEA OFFER WHICH WAS MORE LENIENT THAN THE OFFER TO WHICH HE PLED (THIRD DEPT).

The Third Department, reversing County Court, determined that the court should have held a hearing to determine whether defendant was informed of a plea offer by defense counsel. Defendant argued the failure to inform him of the plea offer, which was more lenient than the offer to which he pled, constituted ineffective assistance of counsel:

To make out "an ineffective assistance of counsel claim based upon the defense counsel's failure to adequately inform the defendant of a plea offer," a defendant must show "that the People made the plea offer, that the defendant was not adequately informed of the offer, that there was a reasonable probability that the defendant would have accepted the offer had counsel adequately communicated it to him [or her], and that there was a reasonable likelihood that neither the People nor the court would have blocked the alleged agreement" … . …

There is no dispute that the People made a preindictment plea offer more lenient than the one that defendant later accepted — an offer that the People presumably extended "in a fair and honest manner" and believed would pass muster with County Court … — and that the offer was rejected and withdrawn. Defendant averred that he did not know about this offer and would have accepted it. People v Nitchman, 2019 NY Slip Op 04501, Third Dept 6-6-19

ATTORNEYS, CONFLICT OF INTEREST, INEFFECTIVE ASSISTANCE.

DEFENDANT WAS NOT ADEQUATELY INFORMED OF THE RISKS OF CONTINUING TO BE REPRESENTED BY DEFENSE COUNSEL IN THE PLEA PROCEEDINGS AFTER THE JUDGE AND DEFENSE COUNSEL WERE INFORMED DEFENSE COUNSEL'S FORMER AND CURRENT CLIENTS WOULD BE WITNESSES AT DEFENDANT'S TRIAL, DEFENDANT WAS THEREBY DEPRIVED OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL (THIRD DEPT).

The Third Department determined the judge did not adequately inform defendant of the risks of continuing to be represented by defense counsel in the plea proceedings after defense counsel and the judge had been informed of a conflict of interest should the matter go to trial. Several persons who would be called as witnesses by the People were former or current clients of defense counsel:

Once informed of the conflict, County Court had a duty to inquire whether defendant understood the risks of defense counsel's continued representation and, knowing those risks, was choosing to waive the conflict … . However, the court did not make such an inquiry. Rather, the court merely informed defendant, while simultaneously reiterating the plea agreement that defense counsel had secured for him, that defense counsel would "probably" have a conflict if the matter continued. Therefore, defense counsel's conflicted representation of defendant, absent a proper and informed waiver, deprived defendant of his right to the effective assistance of counsel … . People v Marshall, 2019 NY Slip Op 04499, Third Dept 6-6-19

ATTORNEYS, PRO SE.

DEFENDANT'S REQUEST TO REPRESENT HIMSELF WAS PROPERLY DENIED AND THERE WAS SUPPORT IN THE RECORD FOR THE EXISTENCE OF PROBABLE CAUSE TO ARREST (CT APP).

The Court of Appeals, affirming defendant's conviction, determined the defendant's request to proceed pro se was properly denied and there was support in the record for the existence of probable cause to arrest. The Court of Appeals did not discuss the facts. The link to the Second Department decision is here:

The trial court concluded—based upon, among other things, its own observations of defendant's conduct throughout these lengthy proceedings and the testimony of defendant's attending physician—that defendant engaged in malingering insofar as he was competent to proceed but persisted in his efforts to avoid trial. Inasmuch as defendant "engaged in conduct which would prevent the fair and orderly exposition of the issues," we conclude that the trial court did not abuse its discretion in denying defendant's request to proceed pro se …. Moreover, the existence of record support for the determination of the courts below that the pursuit of defendant by the police was justified by a "reasonable suspicion" of criminal activity forecloses our further review of that issue … . People v Gregory, 2019 NY Slip Op 04450, CtApp 6-6-19

ATTORNEYS, INTEGRITY OF GRAND JURY.

COUNTY COURT SHOULD NOT HAVE DETERMINED THE INTEGRITY OF THE GRAND JURY WAS COMPROMISED BY THE PROSECUTOR'S FAILURE TO INQUIRE FURTHER INTO THE POTENTIAL BIAS OF A GRAND JUROR, A TEACHER, WHO HAD TAUGHT THE DEFENDANT TEN YEARS BEFORE, INDICTMENT REINSTATED (THIRD DEPT).

The Third Department, reversing County Court, determined, on the People's appeal, that the integrity of the grand jury was not affected by the prosecutor's alleged failure to inquire about the potential bias of a grand juror. One of the grand jurors was a teacher and the defendant had been his student 10 years before:

"Dismissal of an indictment pursuant to CPL 210.35 (5) is a drastic, exceptional remedy and should thus be limited to those instances where prosecutorial wrongdoing, fraudulent conduct or errors potentially prejudice the ultimate decision reached by the grand jury" . "The likelihood of prejudice turns on the particular facts of each case, including the weight and nature of the admissible proof adduced to support the indictment and the degree of inapp… ropriate prosecutorial influence or bias" … . Prejudice may arise based upon a close relationship between a grand juror and a witness … . …

The record discloses that one of the grand jurors knew one of the testifying witnesses. The grand juror, who used to be a teacher and had been retired for 10 years, stated that the witness was a former student and that he had not seen the witness since the student left his class. The grand juror was then asked whether there was anything else that would affect his ability to be fair and impartial, to which he responded, "No." In our view, the relationship between the grand juror and the witness was not a close relationship so as to give rise to the possibility of prejudice … . Furthermore, although the prosecutor's voir dire of the grand juror was brief, we are satisfied that,

based upon his unequivocal response thereto, the grand juror's impartiality was not compromised … . People v Henriquez, 2019 NY Slip Op 04503, Third Dept 6-6-19

ATTORNEYS, JURY NULLIFICATION, INEFFECTIVE ASSISTANCE.

IN THE FACE OF OVERWHELMING EVIDENCE, DEFENSE COUNSEL EFFECTIVELY CONCEDED GUILT AND URGED JURY NULLIFICATION ON THE BURGLARY CHARGE BECAUSE THERE WAS NO BREAK-IN AND THE STOLEN ITEMS WERE NOT WORTH MUCH, THE COURT OF APPEALS HELD THAT DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL (CT APP).

The Court of Appeals determined defendant was not deprived of effective assistance of counsel because counsel effectively conceded defendant stole items from the lobby of an apartment building. Defense counsel argued defendant was overcharged (burglary) because, although defendant had no right to be in the lobby, there was no break-in and the stolen items were of minimal value. The Court of Appeals noted that it has held that a defendant cannot argue jury nullification to the jury:

… [I]n People v Weinberg, we concluded that defendant's argument that "he should have been permitted by the trial court to present the concept of jury nullification during summation is foreclosed by our holding in People v Goetz" (83 NY2d 262, 268 [1994]). Relying on Goetz, we explained that "[p]ermitting defense counsel instead [to en]courage the jury to abdicate its primary function would directly contravene the trial court's authority, recognized [in] Goetz, to instruct the jury that they must follow and properly apply the law" (id.).

We cannot say that, on this record when viewed in totality, defendant was provided with less than meaningful representation. Here, defense counsel was eminently familiar with the facts of the case and the evidence elicited, including the details of the surveillance video and the photographic exhibits. Given the truly overwhelming evidence against his client on all the charges, and constrained by the limited legitimate defense strategies available, counsel raised what he reasonably perceived could be factual issues in the case, such as the method of defendant's entry into the building. Counsel's performance included cogent opening and closing arguments, a motion to dismiss after the People's case-in-chief, and thorough cross-examinations of the People's witnesses. Moreover, the trial court did not curb counsel's jury nullification summation arguments. As a result, the whole

record of counsel's performance demonstrates that defendant has failed to sustain his burden that he was deprived of meaningful representation … . People v Mendoza, 2019 NY Slip Op 04758. CtApp 6-13-19

ATTORNEYS , INEFFECTIVE ASSISTANCE, SPEEDY TRIAL.

DEFENDANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, DEFENSE COUNSEL RELIED ON A CONSTITUTIONAL SPEEDY TRIAL ARGUMENT WHEN DEFENDANT WAS ENTITLED TO DISMISSAL OF THE INDICTMENT PURSUANT TO THE SPEEDY TRIAL STATUTE (FOURTH DEPT).

The Fourth Department, vacating defendant's guilty plea, determined defense counsel was ineffective because defendant was entitled to dismissal of the indictment pursuant to the speedy trial statute. Defense counsel was aware of the correct dates, but only argued defendant was deprived of his constitutional right to a speedy trial and did not correct County Court's erroneous time calculation:

Although defense counsel set forth the pertinent dates of the commencement of the action and defendant's arraignment, at which time the People announced their readiness for trial (see CPL 30.30 [1] [a]), he failed to argue that the relevant period exceeded six months and was a clear violation of defendant's statutory speedy trial rights. Instead, defense counsel focused on the constitutional speedy trial claim. At oral argument of the motion, the court addressed the statutory speedy trial claim, set forth the pertinent dates, and then stated that, according to its calculation, "without specifically crunching the numbers, but by estimates, that is a period of five months and seven days." After addressing the circumstances of the superceding indictment and the constitutional speedy trial claim, the court asked defense counsel if there were "any fact[s] that would be pertinent that [it] did not recite in discussing the matter." Instead of pointing out the court's erroneous calculation of the statutory speedy trial period, defense counsel stated, "I think my motion was essentially based on the 30.20 Constitutional speedy trial . . ." … . …

Here, although, as noted, defense counsel made a speedy trial claim, we conclude that there was no strategic or legitimate explanation for defense counsel's failure to alert the court that it had inaccurately calculated that only five months and seven days had passed between the commencement of the action and the People's statement of readiness and that, instead, more than six months had elapsed … . People v Bloodworth, 2019 NY Slip Op 05284, Fourth Dept 6-28-19

BRADY MATERIAL, SURVEILLANCE VIDEO.

SURVEILLANCE VIDEO CONSTITUTED BRADY MATERIAL WHICH COULD HAVE AFFECTED THE OUTCOME OF THE TRIAL, THE PROSECUTOR HAD SEEN THE VIDEO BUT TOLD THE JURY NO VIDEO EXISTED, CONVICTION REVERSED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, reversing the Appellate Division, determined the People's failure to turn over to the defense a surveillance video which captured people (not the defendant) present at the time the victim was shot, as well as the victim falling, required a new trial. The prosecutor had seen the video and considered it irrelevant. In her summation, the prosecutor said there was no video of the incident:

In New York, where the defense "did not specifically request the information, the test of materiality is whether there is a reasonable probability that had it been disclosed to the defense, the result would have been different'" … . Defendant concedes that the "reasonable probability" standard applies here. In determining materiality, the "question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence" … . The "defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict" … . Defendant need only show that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict" … . * * *

It requires no frame-by-frame review to grasp that the video would have become the focal point of defendant's trial. It would have set the scene of the murder, identified other potential witnesses, served to impeach eyewitness testimony, and provided a basis for an argument that other suspects might have been involved in the shooting. Instead of playing that role at trial, the video was withheld from the defense and the jury was told it did not exist. The aggregate effect of the suppression of this evidence undermines confidence in the verdict and therefore defendant is entitled to a new trial. People v Ulett, 2019 NY Slip Op 05060, CtApp 6-26-19

BRADY MATERIAL.

ANY BRADY VIOLATIONS WERE NOT "MATERIAL" IN THAT THERE WAS NO REASONABLE POSSIBILITY THE EVIDENCE WOULD HAVE CHANGED THE JURY'S VERDICT, DEFENDANT'S MOTION TO VACATE HIS CONVICTION SHOULD NOT HAVE BEEN GRANTED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a dissent, reversing the Appellate Division, determined defendant's motion to vacate his conviction based upon the People's failure to turn over Brady material relevant to the impeachment of a key prosecution witness (JA), and the prosecutor's failure to correct that witness's testimony, should not have been granted. The opinion includes a detailed recitation of the evidence which can not be fairly summarized here. In a nutshell, the Court of Appeals held that any Brady violation that might have occurred, in light of the extensive impeachment evidence forcefully used by defense counsel, the violation was not "material" in that it could not have affected the verdict:

… [D]efendant brought [a] CPL 440.10 motion to vacate his conviction … . … [D]efendant asserted that the People had violated their Brady obligation by failing to turn over evidence that there was an agreement to confer a benefit on JA in exchange for his testimony at defendant's murder trial. In addition, defendant asserted that the trial prosecutor personally intervened in JA's burglary case by procuring his release without bail during the June 13th drug court appearance, failed to correct JA's trial testimony to specify that she was the "DA" who participated on June 13th, and failed to correct his characterization of his performance as 'good' in the drug treatment program … . * * *

"To make out a successful Brady claim, a defendant must show that (1) the evidence is favorable to the defendant because it is either exculpatory or impeaching in nature; (2) the evidence was suppressed by the prosecution; and (3) prejudice arose because the suppressed evidence was material" … . In New York, where a defendant made a specific discovery request for a document, and the information was not disclosed, we measure the third prong of the materiality of the suppressed Brady material by considering whether there is a reasonable possibility that disclosure of the evidence would have changed the result of the proceedings … . In the absence of a specific request by defendant, materiality is established if there is a "reasonable probability" that the result would have been different if the evidence had been disclosed — meaning " a probability sufficient to undermine the court's confidence in the outcome of the trial' " … . * * *

In determining that a Brady violation occurred, the Appellate Division failed to do the required materiality analysis as to the suppressed information. * * *

… [T]o say that there was ample impeachment evidence at trial against the witness on multiple levels is an understatement. … [T]here is no reasonable possibility that the knowledge that the trial prosecutor was the specific ADA who stood up for the People at the June 13th appearance and that JA was still in a drug program despite additional program violations — leaving treatment and bringing cigarettes into a facility — would have changed the jury's verdict. People v Giuca, 2019 NY Slip Op 04642, CtApp 6-11-19

CHARACTER EVIDENCE, NEGATIVE CHARACTER EVIDENCE.

THE NEGATIVE CHARACTER TESTIMONY WAS PROPERLY STRUCK, NOT BECAUSE SUCH EVIDENCE IS GENERALLY INADMISSIBLE, BUT BECAUSE THE WITNESS WAS ONLY FAMILIAR WITH THE DEFENDANT'S CHARACTER IN THE WORKPLACE, WHICH WAS NOT RELEVANT TO THE ALLEGED SEXUAL MISCONDUCT WITH A CHILD (SECOND DEPT).

The Second Department determined the negative character evidence was properly stricken. Negative character evidence (i.e., that the witness never heard that defendant acted in a sexually inappropriate or sexually abusive manner in the workplace) is admissible if it relates to the appropriate community. Here the community the witness testified about was the workplace, which was not the relevant community because the alleged sexual misconduct with a child occurred in secret and outside the workplace:

Contrary to the conclusion of the Supreme Court, negative evidence of reputation—i.e., that the witness never heard anyone say anything negative about the defendant—can constitute relevant character evidence … . However, relevant character evidence must be of reputation generally in the community where the crime occurred … . Although that community is more broadly defined in modern times … , the defendant's reputation in the workplace for lack of sexual impropriety was in no way relevant to whether he sexually abused a child in secret and outside of the workplace. Accordingly, the character evidence was properly stricken, since that evidence was irrelevant. People v Durrant, 2019 NY Slip Op 04716, Second Dept 6-12-19

CONSTRUCTIVE POSSESSION, NEW DEFINITION?.

DEFENDANT CONSTRUCTIVELY POSSESSED STOLEN PROPERTY FOUND IN THE BOILER ROOM OF A GARAGE WHERE DEFENDANT AND TWO OTHERS WERE HIDING FROM THE POLICE AFTER A MUGGING; VICTIM WAS PROPERLY ALLOWED TO IDENTIFY THE DEFENDANT IN COURT, DESPITE THE SUPPRESSION OF THE SHOWUP IDENTIFICATION (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Tom, determined defendant was properly convicted of constructive possession of property taken during a mugging, even though defendant, although present, did not participate in the mugging and was acquitted of robbery. The First Department further held that the victim was properly allowed to identify the defendant at trial, despite the suppression of the showup identification. The defendant was convicted on the theory that he constructively possessed the stolen property which (apparently) was found in the locked boiler room of a garage where he and the other two men involved were found hiding by the police:

… [T]he People established, by clear and convincing evidence, that the victim had a basis for her in-court identification of defendant independent of a previously suppressed showup procedure. A number of factors support the independent source finding ,,, , even when viewed in the light of modern scientific knowledge regarding identifications. The victim had an unobstructed view of defendant and the other two perpetrators, under good lighting, at close range, and had sufficient time to observe them while she was being attacked. …

Defendant's presence, his hiding in an oily sump pit inside with the two robbers, and his attempt to physically resist detention compel the conclusion that defendant manifested a consciousness of guilt. Police testimony thus clearly established that defendant had been a participant in the criminal venture and that he exercised dominion and control over the room where the perpetrators were essentially trapped in close proximity to the stolen property, and thereby exercised dominion and control over, and thus joint constructive possession of, the property itself. People v Santiago, 2019 NY Slip Op 04897, First Dept 6-18-19

CORRECTION LAW, INTERNET IDENTIFIER, SEX OFFENDER.

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

DOUBLE JEOPARDY.

BOTH THE FEDERAL AND STATE CONSTITUTIONS REQUIRE THE SAME BLOCKBURGER TEST FOR DOUBLE JEOPARDY (FOURTH DEPT).

The Fourth Department determined the test for double jeopardy under the state constitution is the same as under the federal constitution:

"Under the Federal Constitution, double jeopardy arises only upon separate prosecutions arising out of the same offence' " … . The United States Supreme Court employs a "same-elements" test, also known as the Blockburger test (Blockburger v United States, 284 US 299 [1932]), that "inquires whether each offense contains an element not contained in the other; if not, they are the same offence' and double jeopardy bars additional punishment and successive prosecution" … . Here, the elements of DWI (see Vehicle and Traffic Law § 1192 [2], [3]) and leaving the scene of a property damage incident without reporting (see § 600 [1] [a]) are not the same; among other things, a person does not need to be intoxicated to be found guilty of leaving the scene

of a property damage incident without reporting, and does not need to cause property damage to be found guilty of DWI. …

… [T]he Court of Appeals has held that "[t]he Double Jeopardy Clauses in the State and Federal Constitutions are nearly identically worded, and we have never suggested that state constitutional double jeopardy protection differs from its federal counterpart" … , the Court of Appeals set forth the Blockburger test, not the same conduct test, when analyzing a defendant's claim that the double jeopardy clauses of both the Federal and State Constitutions barred a subsequent prosecution. We therefore conclude that the constitutional double jeopardy analysis is the same under federal and state law, and that there is no constitutional double jeopardy violation here … . Matter of McNerlin v Argento, 2019 NY Slip Op 04554, Fourth Dept 6-7-19

DEPRAVED INDIFFERENCE, APPEALS.

2003 DEPRAVED INDIFFERENCE MURDER CONVICTION REVERSED, THE CASE WAS ON APPEAL WHEN THE COURT OF APPEALS DETERMINED AN INTENTIONAL MURDER OF A SINGLE VICTIM WITH A WEAPON DOES NOT MEET THE CRITERIA FOR DEPRAVED INDIFFERENCE MURDER (FOURTH DEPT).

The Fourth Department determined a 2003 murder depraved indifference murder conviction must be reversed because the case was on appeal when the law of depraved indifference murder was clarified to exclude the intentional murder of a single victim with a weapon:

… [W]e conclude that the evidence establishes that defendant accosted decedent, who was leaving a grocery store. Defendant, who told police investigators he had been informed that decedent had been sent by another man to injure defendant, confronted decedent, grabbed him by either his clothing or by a gold necklace that he was wearing, and dragged him across the street. A friend of decedent's attempted to intervene at some point, at which time defendant displayed a weapon and attempted to shoot the friend, but the gun did not fire. Defendant struck decedent in the face with the handgun, and decedent's friend ran to his car and drove it toward the location where defendant was with decedent. Defendant then fired the weapon approximately eight times. At least six of those shots hit decedent, including two shots that entered his back, and two shots hit the car that decedent's friend was driving. …

In his motion for a trial order of dismissal with respect to the count of depraved indifference murder, defense counsel argued that defendant's "conduct was intentional or it was nothing at all. If this isn't intentional I don't know what is." Thus, the issue raised on this de novo appeal was presented to Supreme Court and is therefore preserved for our review.

Next, although defendant was convicted before the Court of Appeals decided People v Feingold (7 NY3d 288, 296 [2006]), which definitively stated for the first time that the depraved indifference element of depraved indifference murder is a culpable mental state rather than the circumstances under which the killing is committed, the People correctly concede that the Feingold standard applies to this appeal inasmuch as defendant's direct appeal was pending when Feingold was decided … . People v Parris, 2019 NY Slip Op 04828, Fourth Dept 6-14-19

FAMILY OFFENSES, APPEALS.

FAMILY OFFENSE OF HARASSMENT UPHELD, SEXUAL MISCONDUCT, ASSAULT SECOND AND CRIMINAL OBSTRUCTION OF BREATHING NOT SUPPORTED BY THE EVIDENCE (FIRST DEPT).

The First Department, in this Family Law family offense proceeding, determined the evidence supported harassment second, but did not support one count of sexual misconduct, assault in the second degree, or criminal obstruction of breathing or blood circulation. Petitioner admitted that she expected payment for sex and did not demonstrate a lack of consent with respect to one of the sexual misconduct counts. Biting petitioner's ear during sex did not constitute assault second (teeth being the dangerous instrument). And restricting petitioner's breathing during sex was not a crime because respondent stopped immediately when petitioner expressed discomfort. With respect to harassment, the court wrote:

The record shows, inter alia, that respondent threatened petitioner that he would take the steps necessary to cause her to lose her immigration status and rights to the child if she stopped prostituting herself to him, thereby evincing respondent's intent to harass and alarm petitioner (Penal Law § 240.26[3]) and his inducing petitioner to engage in a sexual relationship with him by instilling fear in her … . Matter of Irena K. v Francesco S., 2019 NY Slip Op 05066, First Dept 6-25-19

FAMILY OFFENSES, PETITION DEFICIENT.

THE FAMILY OFFENSE PETITION DID NOT ALLEGE ALL THE ELEMENTS OF HARASSMENT SECOND DEGREE AND WAS PROPERLY DISMISSED (FOURTH DEPT).

The Fourth Department determined the portion of the family-offense petition which charged harassment in the second degree was properly dismissed because it did not allege all the elements of the offense:

A person commits harassment in the second degree under Penal Law § 240.26 (3) when he or she, "with intent to harass, annoy or alarm another person[,] engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose" … . Thus, "[t]o be viable under the circumstances here, the [petition was] required to allege that respondent[, inter alia,] engaged in a course of conduct that did alarm or seriously annoy petitioner and the conduct served no legitimate purpose" … . Although the petition before us accuses respondent of engaging in a course of conduct that annoyed and alarmed petitioner, nowhere does it allege that respondent's alleged course of conduct "serve[d] no legitimate purpose" (§ 240.26 [3]). Thus, the petition does not adequately plead an allegation that respondent committed harassment in the second degree under section 240.26 (3), and the court therefore properly dismissed the petition to that extent … . Matter of Rohrback v Monaco, 2019 NY Slip Op 04851, Fourth Dept 6-14-19

GRAND JURY TESTIMONY, INADMISSIBLE AT TRIAL, WITNESS CLAIMED LACK OF MEMORY.

IT WAS REVERSIBLE ERROR TO ADMIT A WITNESS'S GRAND JURY TESTIMONY, THE WITNESS'S CLAIM HE COULD NOT REMEMBER THE EVENTS WAS NOT SO DAMAGING TO THE PEOPLE'S CASE AS TO ALLOW THE GRAND JURY EVIDENCE FOR IMPEACHMENT PURPOSES (FIRST DEPT).

The First Department, reversing defendant's conviction, determined that admitting the grand jury testimony of a witness was reversible error. The witness's testimony at trial that he couldn't remember the events was not so damaging to the People's case as to justify impeachment:

The People concede that the trial court erred in admitting the grand jury testimony of a witness indicating that defendant fired an errant shot that struck a bystander as defendant and a companion fled from another group following a verbal altercation. Specifically, the People acknowledge that the testimony was not admissible under the past recollection recorded exception to the hearsay rule, because the witness did not testify at trial that the grand jury testimony "correctly represented his knowledge and recollection when made" … , and was not admissible for impeachment purposes under CPL 60.35 because the witness's trial testimony that he could not remember the relevant events did not "affirmatively damage[] the case of the party calling him" … . People v Folk, 2019 NY Slip Op 04321, First Dept 6-4-19

IDENTIFICATION, FAILURE TO IDENTIFY.

DEFENDANT SHOULD HAVE BEEN ALLOWED TO PRESENT HEARSAY EVIDENCE DEMONSTRATING ONE OF THE ROBBERY VICTIMS, WHO DID NOT TESTIFY, FAILED TO IDENTIFY THE DEFENDANT IN A LINEUP, CONVICTION REVERSED (FIRST DEPT).

The First Department, reversing defendant's conviction, determined the defendant should have been allowed to present evidence that one of the robbery victims, who did not testify, failed to identify the defendant at a lineup, even though there was evidence the victim falsely claimed he/she could not identify anyone:

The court erred in denying defendant's application, expressly made under Chambers v Mississippi (410 US 284 [1973]), to receive testimony that one of the robbery victims, who was unavailable to testify at trial, failed to identify defendant at a lineup. Of the requirements for admission of exculpatory hearsay evidence, the only one in dispute is the reliability of the nonidentification. Although there were reasons to suspect that this victim may have falsely claimed to be unable to identify anyone in the lineup, the nonidentification plainly bore sufficient "indicia of reliability" under the applicable standard, which "hinges upon reliability rather than credibility"… . Where the proponent of the statement " is able to establish this possibility of trustworthiness, it is the function of the jury alone to determine whether the declaration is sufficient to create reasonable doubt of guilt'" … . People v Cook, 2019 NY Slip Op 05210, First Dept 6-27-19

IDENTIFICATION, TAINTED BY VIDEO SHOWN TO VICTIM.

THE ROBBERY VICTIM'S IDENTIFICATION OF DEFENDANT IN A PHOTO ARRAY AFTER THE POLICE HAD SHOWN THE ROBBERY VICTIM A CELL PHONE PHOTO DEPICTING THE DEFENDANT USING A TASER ON SOMEONE SHOULD HAVE BEEN SUPPRESSED, THE ROBBER HAD THREATENED THE VICTIM WITH A TASER (SECOND DEPT).

The Second Department, reversing defendant's conviction for one of two robberies charged in the indictment, determined the pretrial identification of the defendant by the robbery victim, Fisher, should have been suppressed. The police were given a cell phone found at the robbery scene. The robber had used a Taser in the Fisher robbery. In the cell phone was a photo of a man using a Taser on a person. Fisher told the police the man in the photo using a Taser was the man who robbed him. Fisher subsequently identified the defendant in a photo array. Even though Fisher's in-court identification of defendant was deemed admissible, the suppression error was not harmless:

… [T]he procedure employed by the detective in showing Fisher the cell phone videos was a police-arranged identification procedure, even though the police did not arrange the content of the videos on the phone. The procedure by which Fisher viewed the videos occurred at the "deliberate direction of the State," and not as a result of mere happenstance … . The People failed to meet their initial burden of establishing the reasonableness of the police conduct and the lack of any undue suggestiveness created by the video identification procedure. By showing Fisher the cell phone and telling him that the phone was recovered from the scene of the robbery, the detective suggested that the phone may belong to one of the perpetrators of the robbery. One of the videos portrayed an individual using a taser on someone else, which was similar to Fisher's description of the circumstances of the robbery. Fisher identified the defendant's photograph in a photo array only after he was shown the video. Further, contrary to the People's contention, it cannot be said that the video did not single out or portray the individual with the taser in a negative light. The video portrayed the individual committing a violent criminal act against another person … . Accordingly, the court should have suppressed the video identification on the ground that the identification procedure was unduly suggestive. People v Jones, 2019 NY Slip Op 04966, Second Dept 6-19-19

JURIES, HESITATION WHEN POLLED.

THE JUDGE PROPERLY HANDLED A JUROR'S HESITATION WHEN THE JURY WAS POLLED, THE JUROR WAS QUESTIONED BY THE JUDGE OUTSIDE THE PRESENCE OF THE JURY, THE JUDGE DETERMINED THE JUROR WAS NOT UNDER IMPROPER PRESSURE AND SENT THE JURY BACK FOR FURTHER DELIBERATIONS (SECOND DEPT).

The Second Department determined the trial judge properly handled a juror's (juror number two's) hesitation when the jury was polled. Outside the presence of the jury, the judge asked the juror about his reasons for hesitation, determined it was not caused by improper pressure, and sent the jury back for more deliberations:

… [T]he Supreme Court providently exercised its discretion in denying his motion for a mistrial based upon juror number two's hesitation in affirming the verdict. "[T]he jury must, if either party makes such an application, be polled and each juror separately asked whether the verdict announced by the foreman is in all respects his verdict. If . . . any juror answers in the negative, the court must refuse to accept the verdict and must direct the jury to resume its deliberation" (CPL 310.80). Here, the court appropriately conducted an inquiry, outside the other jurors' presence, into why juror number two hesitated in affirming the verdict, and further obtained clarification as to the reasons he gave … . Juror number two's responses clarified that the pressure he perceived did not "[arise] out of matters extraneous to the jury's deliberations or not properly within their scope" … . Further, his responses established that the "verdict [was] not the product of actual or threatened physical harm" … . Accordingly, we agree with the court's determination to instruct the jury to continue deliberating … . People v Folkes, 2019 NY Slip Op 04719, Second Dept 6-12-19

JURY INSTRUCTIONS, LESSER INCLUDED OFFENSES.

ANY ERROR IN FAILING TO INSTRUCT THE JURY ON LESSER INCLUDED OFFENSES WAS HARMLESS BECAUSE DEFENDANT WAS CONVICTED OF THE TOP COUNT AND THE HIGHEST LESSER INCLUDED OFFENSE WAS AVAILABLE TO THE JURY (CT APP).

The Court of Appeals determined denying a request for the jury to be instructed on lesser included offenses in this murder case was harmless error:

Even assuming the court erred in denying defendant's request to submit the crimes of manslaughter in the second degree and criminally negligent homicide to the jury as lesser included offenses of the charged crimes of murder in the second degree and manslaughter in the first degree, the error was harmless … . The Appellate Division properly concluded that defendant's conviction of the lesser inclusory count of first-degree manslaughter, which it dismissed as required by CPL 300.40 (3) (b), did not change the harmless error analysis. Under the circumstances presented here, the jury's guilty verdict on the indictment's highest count despite the availability of the next lesser included offense for their consideration, "forecloses [defendant's] challenge to the court's refusal to charge the remote lesser included offenses" … , because it dispels any speculation as to whether the jury might have reached a guilty verdict on "still lower degree[s] of homicide" … . People v McIntosh, 2019 NY Slip Op 05186, CtApp 6-27-19

JURY INSTRUCTIONS, LESSER INCLUDED OFFENSES.

DENIAL OF THE REQUEST TO INSTRUCT THE JURY ON ASSAULT THIRD AS A LESSER INCLUDED OFFENSE AND THE ADMISSION OF THE 911 CALL AS AN EXCITED UTTERANCE WERE NOT REVERSIBLE ERRORS (CT APP).

The Court of Appeals, over an extensive dissenting opinion, as well as another brief dissenting opinion, determined the denial of defendant's request for a jury instruction on the lesser included offense of assault third degree, and the admission of the 911 call as an excited utterance was harmless error. The facts are explained only in the dissent and are not summarized here:

Defendant failed to "show that there [was] a reasonable view of the evidence in the particular case that would support a finding that he committed the lesser included offense but not the greater" … . Although "[i]n determining whether such a reasonable view exists, the evidence must be viewed in the light most favorable to [the] defendant" … , charging the lesser included offense here "would [have] force[d] the jury to resort to sheer speculation" … .

Nor does Supreme Court's admission of the call between the victim and the 911 operator require reversal. "A spontaneous declaration or excited utterance—made contemporaneously or immediately after a startling event—which asserts the circumstances of that occasion as observed by the declarant' is an exception to the prohibition on hearsay" … . "The test is whether the utterance was made before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective power to be yet in abeyance'" … . Assuming, without deciding, that it was error to admit the 911 call, any such error would have been harmless … . People v Almonte, 2019 NY Slip Op 05185, CtApp 6-27-19

JURY INSTRUCTIONS, LESSER INCLULDED OFFENSES.

REQUEST TO SUBMIT CPCS SEVENTH DEGREE TO THE JURY AS A LESSER INCLUDED OFFENSE OF CPCS FIFTH DEGREE SHOULD HAVE BEEN GRANTED, NEW TRIAL ORDERED ON THAT COUNT (FOURTH DEPT).

The Fourth Department determined the request to submit Criminal Possession of a Controlled Substance (CPCS) seventh degree to the jury as a lesser included offense of COCS fifth degree should have been granted:

We agree with defendant, however, that the court erred in refusing to submit CPCS in the seventh degree (Penal Law § 220.03) to the jury as a lesser included offense of CPCS in the fifth degree. A party who seeks to have a lesser included offense submitted to the jury must satisfy a two-pronged test: "First, the crime must be a lesser included offense within the meaning of Criminal Procedure Law § 1.20 (37) . . . Second, the party making the request for a charge-down must then show that there is a reasonable view of the evidence in the particular case that would support a finding that [the defendant] committed the lesser included offense but not the greater' " … . Both prongs are satisfied here. CPCS in the seventh degree is a lesser included offense of CPCS in the fifth degree under Penal Law § 220.06 (5) … . Furthermore, there is a reasonable view of the evidence that defendant committed the lesser offense but not the greater … . A person is guilty of CPCS in the fifth degree when he or she knowingly and unlawfully possesses cocaine weighing 500 milligrams or more (see § 220.06 [5]), whereas a person is guilty of CPCS in the seventh degree when he or she knowingly and unlawfully possesses a controlled

substance (see § 220.03). In his trial testimony, defendant denied possessing the crack rock, but admitted to possessing the dime bags. A forensic chemist testified that the weight of the crack rock was greater than the aggregate weight of the pure cocaine in the rock and the dime bags combined. If the jury credited defendant's testimony with respect to the rock, it reasonably could have found that defendant possessed some amount of cocaine, but that the People failed to establish that he possessed cocaine weighing 500 milligrams or more. We therefore modify the judgment by reversing that part convicting defendant of CPCS in the fifth degree, and we grant defendant a new trial on that count. People v Patterson, 2019 NY Slip Op 04825, Fourth Dept 6-14-19

JURY NOTES, NO RECORD OF DISCUSSION OF NOTE, ATTORNEY-CLINT PRIVILEGE, SENTENCING.

NO RECORD OF JUDGE'S DISCUSSION OF A JURY NOTE WITH COUNSEL, MURDER CONVICTION REVERSED; DEFENDANT AUTHORIZED HIS AGENT TO SHOW HIS LETTER TO HIS ATTORNEY TO A THIRD PARTY, NO ATTORNEY-CLIENT PRIVILEGE; SENTENCES CANNOT BE CONSECUTIVE FOR CRIMES WITH THE SAME ACTUS REUS (THIRD DEPT).

The Third Department determined (1) because there was no record of the judge's discussion of a jury note with counsel, the murder conviction (the only count to which the jury note was relevant) must be reversed. (2) although defendant's girlfriend was defendant's agent for the purpose of delivering defendant's letter, which was mailed to her, to his attorney, there was evidence defendant authorized his girlfriend's mother to read the letter. therefore the attorney-client privilege was lost, (3) the unauthorized use of a vehicle charge has the same actus reus as the robbery and grand larceny charges, therefore the sentence for unauthorized use of a vehicle cannot run consecutively with the sentences for robbery and grand larceny, but it can run consecutively to the sentences for the burglary and criminal possession of stolen property charges:

A divided Court of Appeals has held that meaningful notice is not provided where there is no record indicating that counsel was informed of the "precise contents" of the note before the response is given to the jury, or where the trial court paraphrases or summarizes a jury note …. Given the court's statement to the jury that it had an off-the-record conversation with counsel regarding the note, it would not be unreasonable to believe that County Court had informed counsel of the note's precise contents. However, the record contains no specific indication that the court provided counsel with the precise content of the note before it delivered its response to the jury, nor was the note read verbatim on the record before the response was given. Thus, the record fails to establish

that counsel had the opportunity to participate in the formation of the court's response to the jury's substantive inquiry. * * *

In these circumstances, we conclude that [defendant's girlfriend] was acting as defendant's agent. Thus, whether the letter was protected by the attorney-client privilege turns on whether defendant had a reasonable expectation of confidentiality when he sent it to [her]. In that regard, there was contradictory evidence regarding whether defendant authorized [her] to share a copy of the letter with her mother, which County Court resolved by determining that defendant had authorized disclosure to [her] mother … . The determination that defendant specifically authorized disclosure of the letter to a third party, i.e., [his girlfriend's] mother, established that defendant had no reasonable expectation of confidentiality and, therefore, defeated the attorney-client privilege. Thus, County Court did not err in admitting the letter. People v Henry, 2019 NY Slip Op 05024, Third Dept 6-20-19

LEGAL SUFFICIENCY, CIRCUMSTANTIAL EIDENCE, CONSCIOUSNESS OF GUILT.

IN AN EXHAUSTIVE DECISION WHICH DISCUSSED ONLY THE CONVOLUTED FACTS OF THIS MURDER CASE, THE MAJORITY AFFIRMED THE CONVICTION, OVER A DISSENT WHICH CALLED INTO QUESTION THE IDENTIFICATION OF THE DEFENDANT AS THE SHOOTER (FIRST DEPT).

The First Department, in an extensive, detailed, exhaustive rendition of the convoluted facts in this murder case, over a dissent, affirmed defendant's conviction, finding the evidence legally sufficient. The victim was a two-year-old child in a van who was struck by a stray bullet. Major issues were whether the accomplice testimony was sufficiently corroborated and whether the jury was made aware that one of the eyewitnesses had identified a person other than the defendant, Morris, as the shooter. Morris was initially charged with the murder and went to trial which ended in a mistrial. He then pled guilty, against his attorney's advice, to an apparently unrelated possession of a weapon charge. The shooting took place in 2006. Defendant was arrested and indicted in 2013 and went to trial in 2015. The majority appeared to rely heavily on evidence of consciousness of guilt (the defendant gave up a business in New York and fled to North Carolina). People v Hemphill, 2019 NY Slip Op 04646, First Dept 6-11-19

LEGAL SUFFICIENCY, ACCUSATORY INSTRUMENT, DRIVING WHILE INTOXICATED.

THE FACTUAL ALLEGATIONS IN THIS COMMON LAW DRIVING WHILE INTOXICATED CASE WERE SUFFICIENT TO ALLEGE DEFENDANT WAS THE OPERATOR OF THE VEHICLE, APPELLATE TERM REVERSED (CT APP).

The Court of Appeals, reversing the Appellate Term, determined the "factual allegations in the accusatory instrument were sufficient to support the inference that defendant was the operator of the vehicle involved in the accident and, thus, Appellate Term erroneously dismissed the accusatory instrument on that ground." The facts of the case were not described. The Appellate Term decision is: People v Esposito (Monique) 2018 NY Slip Op 28245 Decided on August 3, 2018 Appellate Term, Second Department. People v Esposito, 2019 NY Slip Op 04448, CtApp 6-6-19

LEGAL SUFFICIENCY, SUBSTANCE NOT SHOWN TO BE COCAINE, GRAND JURY.

LEGALLY INSUFFICIENT EVIDENCE THAT THE SUBSTANCE REFERENCED IN THE GRAND JURY TESTIMONY WAS COCAINE, INDICTMENT PROPERLY DISMISSED (THIRD DEPT).

The Third Department, in an appeal by the People, affirmed County Court's dismissal of the indictment because there was legally insufficient evidence that the substance involved was cocaine:

"'Legally sufficient evidence' means competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof" (CPL 70.10 [1] …). "The reviewing court must consider whether the evidence, viewed most favorably to the People, if unexplained and uncontradicted — and deferring all questions as to the weight or quality of the evidence — would warrant conviction" … . "[I]n a drug-related prosecution[, as we have here,] the People's case is legally sufficient if the evidence provides a 'reliable basis' for inferring the presence of a controlled substance" … . "More than conclusory assertions that the defendant possessed a drug are required at the [g]rand [j]ury stage" … . …

The evidence presented to the grand jury consisted of sparse testimony from the CI and an investigator involved in the controlled transactions, with most of the substance of that testimony having been supplied through leading questions. As to the first transaction, the CI testified, in a conclusory manner, that he believed the substance to be crack cocaine, without providing any description of the substance or explanation for his belief … , and, with respect to the second transaction, the CI did not express any belief as to the nature of the substance he received from defendant … . Additionally, although the investigator testified that he received white chunky substances from the CI, his testimony surrounding the testing of those substances was sorely lacking. He did not provide any detail as to his training and experience in field testing, explain how field testing occurs or specifically identify what he did in this case to determine that both substances were cocaine. People v Carlin, 2019 NY Slip Op 04788, Third Dept 6-13-19

LEGAL SUFFICIENCY, SECOND INDICTMENT, GRAND JURY.

MATTER SENT BACK FOR A DETERMINATION WHETHER THE PEOPLE PRESENTED NEW EVIDENCE TO THE SECOND GRAND JURY AFTER A 'NO BILL,' THE PEOPLE WERE GRANTED PERMISSION TO RE-PRESENT ON THE GROUND THAT NEW EVIDENCE WAS AVAILABLE (FOURTH DEPT).

The Fourth Department sent the case back for a ruling on a portion of defendant's omnibus motions. The grand jury had returned a "no bill" on the leaving the scene of a serious injury accident. The People sought to re-present the charges to a new grand jury alleging that a witness who had given false testimony had agreed to testify truthfully. Defendant, in her omnibus motion, asked to court to compare the testimony given to both grand juries to see if new evidence was actually presented at the second grand jury:

CPL 190.75 (3) provides that where, as here, charges have been dismissed by the grand jury, they "may not again be submitted to a grand jury unless the court in its discretion authorizes or directs the [P]eople to resubmit such charge[s] to the same or another grand jury." "Leave may be granted only once, and the [People are] required to justify resubmission" … . "[T]here should not be a resubmission unless it appears, for example, that new evidence has been discovered since the former submission; that the [g]rand [j]ury failed to give the case a complete and impartial investigation; or that there is a basis for believing that the [g]rand [j]ury otherwise acted in an irregular manner" … . …

… "[W]e cannot deem the court's failure to rule on [that part of] the . . . motion as a denial thereof"… . We therefore hold the case, reserve decision, and remit the matter to Supreme Court for a determination whether the

People, in fact, presented new evidence to the second grand jury and, if not, whether dismissal of the indictment is warranted on that ground … . People v Ballowe, 2019 NY Slip Op 04566, Fourth Dept 6-7-19

MISSING WITNESS, PEOPLE MUST SHOW TESTIMONY WOULD BE CUMULATIVE.

THE DEFENSE MADE A PRIMA FACIE SHOWING THAT THE MISSING WITNESS JURY INSTRUCTION WAS APPROPRIATE, THE TRIAL COURT IMPROPERLY PLACED THE BURDEN TO DEMONSTRATE THE WITNESS'S TESTIMONY WOULD NOT BE CUMULATIVE ON THE DEFENDANT, THE PEOPLE DID NOT MEET THEIR BURDEN TO DEMONSTRATE THE TESTIMONY WOULD BE CUMULATIVE (CT APP).

The Court of Appeals, reversing defendant's conviction, reversing the Appellate Division, in a full-fledged opinion by Judge Feinman, determined that the trial court's analysis of the defense request for a missing witness jury instruction improperly shifted the burden to the defendant to show that the testimony would not be cumulative. The witness, Dees, was with the shooting victim and was shot himself. The witness was the first to see the shooter in a car that passed by and tried to push the shooter away when the shooter approached:

In Gonzalez [68 NY2d 424], we established the analytical framework for deciding a request for a missing witness instruction. The proponent initially must demonstrate only three things via a prompt request for the charge: (1) "that there is an uncalled witness believed to be knowledgeable about a material issue pending in the case," (2) "that such witness can be expected to testify favorably to the opposing party," and (3) "that such party has failed to call" the witness to testify … . The party opposing the charge can defeat the initial showing by accounting for the witness's absence or demonstrating that the charge would not be appropriate … . "This burden can be met by demonstrating," among other things, that "the testimony would be cumulative to other evidence" … . If the party opposing the charge meets its burden by rebutting the prima facie showing, the proponent retains the ultimate burden to show that the charge would be appropriate … . We have repeatedly reiterated Gonzalez's specific burden-shifting analysis … , but we have never required the proponent of a missing witness charge to negate cumulativeness to meet the prima facie burden … . * * *

Given that defendant, as the proponent of the missing witness charge, met his initial burden, the People were required to rebut that showing by establishing why the charge was inappropriate. They failed to do so. The People simply asserted, without explanation, that Dees's testimony on the issue of identification would be cumulative

because "there is absolutely no indication that [Dees] would be able to provide anything that wasn't provided by [the victim]." This conclusory argument was insufficient to satisfy the People's burden in response to defendant's prima facie showing … . … Dees's testimony would not have been "trivial or cumulative"; due to inconsistencies in the victim's descriptions of the incident and what the shooter was wearing, the issue of identification was "in sharp dispute . . . and the testimony of the only additional person who was present [during the shooting] might have made the difference" … . People v Smith, 2019 NY Slip Op 04447, CtApp 6-6-19

POLICE OFFICERS, ASSAULT OF POLICE OFFICER, LAWFUL DUTY ELEMENT NOT PROVEN.

THE PEOPLE DID NOT PROVE THE POLICE OFFICER DEFENDANT PUNCHED WAS ENGAGED IN A LAWFUL DUTY AT THE TIME OF THE ASSAULT, THE PEOPLE ARE HELD TO THE 'HEAVIER BURDEN' IN THE DEFINITION OF 'LAWFUL DUTY' PROVIDED TO THE JURY WITHOUT OBJECTION, DEFENDANT'S ASSAULT CONVICTION WAS AGAINST THE WEIGHT OF THE EVIDENCE (SECOND DEPT).

The Second Department reversed defendant's assault conviction. Defendant and his brother were sitting on an elevated subway grate when they were approached by two police officers. Defendant's brother became angry, telling one of the officers to leave him alone and yelling. Defendant restrained his brother, telling him to calm down. At some point defendant suddenly punched one of the police officers. The jury was instructed that, to find the defendant guilty of a violation of Penal Law 120.05(3), the injured police officer must have been engaged in a lawful duty at the time of the assault. The definition of "lawful duty" provided to the jury included a "heavier burden" of proof, to which the People must be held because there was no objection to the instruction. Pursuant to the law as provided to the jury, defendant's assault conviction was against the weight of the evidence:

Since the People failed to register any objection to the Supreme Court's supplemental charge, they were bound to satisfy the heavier burden of proof contained therein … , and we must weigh the evidence in light of the elements of the crimes as charged to the jury without objection … .

The consistent testimony of the two police officers shows that they were not in the process of arresting the defendant when the assault occurred. Moreover, while the trial evidence establishes that the defendant's brother was yelling profanities at the female officer and displaying irate behavior, neither of the officers testified that they intended at any time to arrest the defendant's brother for any offense, or were attempting to do so at the

time of the assault. Under these circumstances, and particularly in light of the highly specific supplemental charge given by the trial court on the meaning of "lawful duty," the evidence was factually insufficient to prove that the female officer was engaged in a lawful duty, as that term was defined to the jury by the Supreme Court, at the time of the assault by the defendant … . People v Truluck, 2019 NY Slip Op 04969, Second Dept 6-19-19

PAROLE.

PAROLE BOARD MAY CONSIDER SUCH FACTORS AS REMORSE AND INSIGHT INTO THE OFFENSE, EVEN THOUGH THOSE FACTORS ARE NOT LISTED IN THE CONTROLLING STATUTE (THIRD DEPT).

The Third Department, affirming the denial of release on parole, noted that the parole board may properly consider remorse and insight into the offense, even though those factors are not listed in the statute:

Petitioner argues that the Board improperly questioned him regarding both what caused him to commit the crimes and why he initially failed to accept responsibility, resulting in the two young victims having to testify in court against him. "[W]hile the Board may not consider factors outside the scope of the applicable statute . . ., it can consider factors — such as remorse and insight into the offense — that are not enumerated in the statute but nonetheless relevant to an assessment of whether an inmate presents a danger to the community" … . As the Board's questions challenged by petitioner were aimed at petitioner's remorse, his acceptance of responsibility and insight into the crimes, they were not improper … and did not deprive petitioner of a fair hearing. Matter of Payne v Stanford, 2019 NY Slip Op 05242, Third Dept 6-27-19

PAROLE, INACCURATE INFORMATION ABOUT OFFENSES.

ADMINISTRATIVE APPEAL OF THE DENIAL OF DEFENDANT'S APPLICATION FOR PAROLE WAS TAINTED BY INACCURATE INFORMATION ABOUT THE OFFENSES COMMITTED BY DEFENDANT (THIRD DEPT).

The Third Department, reversing Supreme Court, determined that the administrative appeal of the denial of parole was tainted by inaccurate information about the offenses committed by defendant:

… [T]he claim asserted by petitioner is preserved as it could not have been raised upon administrative appeal. Specifically, petitioner challenges the fact that the administrative appeals unit relied upon inaccurate information regarding his criminal history in affirming the Board's denial of parole. A review of the statement by the appeals unit inaccurately reported that petitioner murdered six, as opposed to four, people. "Because of the likelihood that such error may have affected" the decision to affirm the Board's denial of petitioner's request for parole release, proper administrative review is required … . Matter of Torres v Stanford, 2019 NY Slip Op 05043, Third Dept 6-20-19

PAROLE, BOARD CONSIDERED ALL RELEVANT FACTORS.

PETITIONER WAS 14 IN 1990 WHEN HE MURDERED A CLASSMATE AND THE CHILD SHE WAS BABYSITTING, THE PAROLE BOARD PROPERLY DENIED PAROLE FOR THE FIFTH TIME, THE RECORD DEMONSTRATES THE BOARD CONSIDERED ALL THE RELEVANT FACTORS AND DID NOT BASE THEIR DECISION SOLELY ON THE SERIOUSNESS OF THE OFFENSE (SECOND DEPT).

The Second Department determined the denial of parole to petitioner, who, in 1990, had killed a 15-year-old classmate, and the 17-month-old child she was babysitting, was not irrational. Although petitioner had made strong rehabilitative and educational efforts, the parole board properly considered all the relevant factors and did not make their decision on the basis of the seriousness of the offense alone:

We note that the literature in the record indicates that the effects of encephalitis could include "[a] lack of awareness and insensitivity" and a "lack of warmth and empathy." We further note that the Parole Board found that the petitioner appeared to have a "disconnect" and that his remorse was "shallow." Nevertheless, the interview record and the text of the subject determination establish that the requisite statutory factors were properly considered, and the record does not support the conclusion that the Parole Board's determination evinces irrationality bordering on impropriety. Contrary to the petitioner's contention, the Parole Board considered the petitioner's "youth and its attendant characteristics in relationship to the commission of the crime[s] at issue" … , and did not base its determination solely upon the seriousness of the offenses … . In addition, the interview transcript indicates that the Parole Board took into account a number of other factors that reflected well on the petitioner, but determined that these factors did not outweigh the factors that militated against granting parole. The Parole Board was not required to give each factor equal weight and was entitled to

place greater emphasis on the severity of the petitioner's crimes … . Matter of Campbell v Stanford, 2019 NY Slip Op 04936, Second Dept 6-19-19

PROBATION, NOTIFICATION OF VIOLATIONS INSUFFICIENT, PROOF OF VIOLATION INSUFFICIENT.

DEFENDANT WAS NOT PROPERLY NOTIFIED OF THE ALLEGED VIOLATIONS OF PROBATION AND THE FINDING THAT DEFENDANT VIOLATED A CONDITION WAS NOT SUPPORTED BY A PREPONDERANCE OF THE EVIDENCE (THIRD DEPT).

The Third Department, reversing County Court, determined defendant was not properly notified of alleged violations of probation and the proof did not support a finding that defendant violated a condition of probation:

Where a violation of probation is alleged to have occurred, a written statement must be filed with the court and provided to defendant "setting forth the condition or conditions of the sentence violated and a reasonable description of the time, place and manner in which the violation occurred" (CPL 410.70 [2] …). Here, the details of the alleged violations in the uniform court report only included the that defendant violated condition 2, which required her to obey all state and federal laws, by engaging in conduct that led to her September 2015 and March 2016 arrests. Although a different section of the uniform court report summarizing defendant's probation supervision referenced other incidents that County Court made findings with respect thereto, the uniform court report only alleged that defendant violated condition 2 of the terms of her probation (see CPL 410.70 [2]). Moreover, defendant's probation officer acknowledged in her testimony that defendant was not charged in the uniform court report with violating conditions 8, 12 and 16. Notwithstanding the testimony that was allowed at the hearing with regard to conditions 8, 12 and 16, defendant was not provided with a written statement informing her that she was also being charged with violating these conditions of her probation. Accordingly, County Court's finding that defendant violated these terms of her probation was improper (see CPL 410.70 [2]…). …

Condition 2 of the terms of defendant's probation required her to obey all federal, state and local laws and notify her probation officer immediately if questioned or arrested by a law enforcement agency or if convicted of a new offense. In support of its allegation that defendant violated this condition, the People adduced the testimony of defendant's probation officer who testified, in relevant part, that defendant notified her of both the September 2015 and March 2016 arrests and charges. Beyond the probation officer's testimony that defendant had been arrested on two occasions, no additional evidence or proof was offered as to the underlying acts. Accordingly,

County Court's finding that defendant violated condition 2 of her probation was not supported by a preponderance of the evidence … . People v Johnson, 2019 NY Slip Op 05018, Third Dept 6-20-19

PROBATION, ILLEGAL CONDITIONS, APPEALS.

ARGUMENT THAT PROBATION CONDITIONS ARE ILLEGAL SURVIVES A WAIVER OF APPEAL AND THE FAILURE TO PRESERVE THE ERROR (FOURTH DEPT).

The Fourth Department noted that defendant's argument that the conditions of his probation were illegal survived a waiver of appeal and the failure to preserve the error:

Defendant further contends … that the court imposed several unlawful conditions of probation. Initially, we note that defendant's contentions are not encompassed by the valid waiver of the right to appeal because they are based on challenges to the legality of the sentence … . Additionally, although defendant failed to preserve those contentions for our review, there is a "narrow exception to [the] preservation rule permitting appellate review when a sentence's illegality is readily discernible from the trial record" … , and that exception encompasses a contention that a "probation condition is unlawful because it is not reasonably related to rehabilitation or is outside the authority of the court to impose" … . We conclude that, inasmuch as defendant's challenges to the conditions of probation here "implicate the legality of defendant's sentence and any illegality is evident on the face of the record, those claims are not barred by . . . defendant's failure to preserve them" … . …

With respect to the merits, the People correctly concede that the court erred in barring defendant from all use of the internet. The statute provides that a sentencing "court may require that the defendant comply with a reasonable limitation on his or her use of the internet . . . provided that the court shall not prohibit such sentenced offender from using the internet in connection with education, lawful employment or search for lawful employment" … . People v Castaneda, 2019 NY Slip Op 04860, Fourth Dept 6-14-19

PSYCHIATRIC EVIDENCE, LATE NOTICE, JUDGES.

COUNTY COURT ABUSED ITS DISCRETION BY REFUSING TO ALLOW DEFENDANT TO SUBMIT A LATE NOTICE OF HIS INTENT TO PRESENT PSYCHIATRIC EVIDENCE, CONVICTION REVERSED (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined County Court abused its discretion by not allowing defendant to serve a late notice of his intent to offer psychiatric evidence:

"Psychiatric evidence is not admissible upon a trial unless the defendant serves upon the people and files with the court a written notice of his intention to present psychiatric evidence. Such notice must be served and filed before trial and not more than thirty days after entry of the plea of not guilty to the indictment. In the interest of justice and for good cause shown, however, the court may permit such service and filing to be made at any later time prior to the close of the evidence" (CPL 250.10[2]). Contrary to the defendant's contention, the evidence he proffered, in opposition to the People's motion, for the purpose of negating intent, constituted "psychiatric evidence" under the statute (CPL 250.10[1] …). The defendant failed to provide the People with timely notice of his intent to offer this evidence. However, the determination as to whether late notice should be permitted is a discretionary one, which requires the court to weigh the defendant's constitutional right to present witnesses in his own defense against the prejudice to the People arising from late notice … .

Here, the record indicates that the trial court failed to exercise any discretion over whether to permit the defendant to serve late notice of his intent to offer psychiatric evidence … . Exercising our own discretion, we conclude that, under the particular circumstances of this case, the defendant should have been granted permission to serve late notice, and the People's preclusion motion therefore should have been denied. The evidence that the defendant previously had suffered auditory hallucinations had high probative value to corroborate the defendant's testimony that he entered the home with the intent to aid a woman who was yelling, rather than to damage the house … . Further, the preclusion of testimony regarding those portions of the defendant's conversation with the responding officer which involved his past auditory hallucinations, and his resultant hospitalization, deprived the jury of the full context of the interaction. Any prejudice to the People was substantially outweighed by the defendant's extremely strong interest in presenting the evidence … . People v Morris, 2019 NY Slip Op 05160, Second Dept 6-26-19

SEARCHES, HANDCUFFS, INCIDENT TO ARREST, EXIGENT CIRCUMSTANCES.

SEARCH OF A SUITCASE WAS A VALID SEARCH INCIDENT TO ARREST JUSTIFIED BY EXIGENT CIRCUMSTANCES, DESPITE THE FACT THAT DEFENDANT HAD BEEN HANDCUFFED AND WAS IN THE PRESENCE OF AS MANY AS EIGHT POLICE OFFICERS (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Webber, over an extensive, two-justice dissenting opinion, determined that the search of a suitcase was a valid search incident to arrest, even though defendant, who had let go of the suitcase, had been handcuffed. Defendant had been observed by the arresting officer (Ayala) coming out of several stores and placing apparently stolen items into the suitcase. At the time the suitcase was searched, defendant was handcuffed and had been approached on the street by approximately eight police officers:

Officer Ayala's testimony that a knife was recovered from both defendant and Chauncey also established that there were exigent circumstances justifying the search of the suitcase … . …

… [A]n officer need not affirmatively testify to the exigency … . Rather, the exigent circumstances need only be inferred from the circumstances of the arrest … . …

Ayala's search of the suitcase was also justified to prevent the loss or destruction of evidence, as Ayala believed defendant and codefendant Chauncey had stolen clothing from approximately three stores and placed the clothing in the suitcase … . The dissent continues to ignore the facts that the suitcase was large enough to conceal a weapon and that the officer had just seen defendant stealing merchandise and placing it in the suitcase. Officer Ayala did not know whether there were weapons contained in the bag. …

The testimony of Officer Ayala established that the suitcase was not in the exclusive control of the police at the time of the search. It remained at defendant's feet where he dropped it. Additionally, it has been consistently held that "[w]hether in fact defendant could have had access to the briefcase at the moment it was being searched is irrelevant" … .

That defendant was handcuffed in no way negates a finding of exigent circumstances justifying a warrantless search … . Although defendant was handcuffed during the search of the suitcase, there was a "realistic possibility" that he could have used means other than his hands "such as kicking or shoving the arresting officer

– to disrupt the arrest process in order to gain a weapon or destroy evidence" … . People v Harris, 2019 NY Slip Op 05099, First Dept 6-25-19

SENTENCING, CONSECUTIVE.

THE FACTS SUPPORTED CONSECUTIVE SENTENCES FOR CRIMINAL POSSESSION OF A WEAPON AND MURDER, DEFENDANT WAS SEEN IN POSSESSION OF THE WEAPON SEVERAL MINUTES BEFORE THE DEFENDANT APPROACHED THE VICTIM (CT APP).

The Court of Appeals, affirming defendant's conviction, noted that the consecutive sentences for possession of a weapon and murder were supported by the facts:

"So long as a defendant knowingly unlawfully possesses a loaded firearm before forming the intent to cause a crime with that weapon, the possessory crime has already been completed, and consecutive sentencing is permissible"… . Here, the record supports Supreme Court's imposition of consecutive sentences. Video surveillance evidence showed defendant in possession of the gun several minutes before approaching the victim, supporting the conclusion that defendant possessed the weapon for a sufficient period of time before forming the specific intent to kill. Thus, consecutive sentencing was permissible. People v Malloy, 2019 NY Slip Op 05061, CtApp 6-25-19

SENTENCING, RESTITUTION.

SENTENCING COURT MUST DIRECT THE MANNER IN WHICH RESTITUTION IS TO BE PAID, MATTER REMITTED, ISSUE SURVIVES A WAIVER OF APPEAL AND THE FAILURE TO PRESERVE THE ERROR (FOURTH DEPT).

The Fourth Department determined the sentencing court's failure to direct how the restitution is to be paid required remittal. This illegal sentence issue is not foreclosed by a waiver of appeal or the failure to preserve the issue:

… [T]here is merit to defendant's contention that the restitution component of his sentence must be vacated because the court failed to direct the manner of payment, in violation of CPL 420.10 (1). Defendant's contention is a challenge to the legality of the sentence and thus survives his waiver of the right to appeal … and, based upon "the essential nature of the right to be sentenced as provided by law," we review that contention notwithstanding defendant's failure to raise it at sentencing … . Although we affirm the amount of restitution ordered by the court, we modify the judgment by vacating that part of the sentence ordering restitution … , and we remit the matter to County Court to fix the manner in which the restitution is to be paid. People v Lamagna, 2019 NY Slip Op 04849, Fourth Dept 6-14-19

SENTENCING, JUVENILE OFFENDERS.

RE: A JUVENILE OFFENDER, THE SURCHARGE AND CRIME VICTIM ASSISTANCE FEE SHOULD NOT HAVE BEEN ASSESSED, AND THE CONSECUTIVE 2 TO 6 SENTENCES ARE ILLEGAL (FOURTH DEPT).

The Fourth Department determined, because defendant is a juvenile offender, the surcharge and crime victim assistance fee must be vacated and the two consecutive 2 to 6 year sentences were illegal:

The People correctly concede in each appeal that the surcharge and crime victim assistance fee must be vacated because defendant is a juvenile offender (… Penal Law §§ 60.00 [2]; 60.10 …). We therefore modify the adjudication in each appeal accordingly.

The People further correctly concede in each appeal that the aggregate duration of the two consecutive sentences, i.e., 2 to 6 years, is illegal (see Penal Law §§ 60.02 [2]; 70.00 [2] [e]; [3] [b] …), and that defendant's challenge to the illegal sentence in each appeal survives his waiver of his right to appeal and does not require preservation … . People v Antonio J., 2019 NY Slip Op 04826, Fourth Dept 6-14-19

SENTENCING, UNDULY HARSH OR SEVERE.

CONSECUTIVE SENTENCES FOR THE SALE OF SMALL AMOUNTS OF COCAINE UNDULY HARSH, CONCURRENT SENTENCES IMPOSED (FOURTH DEPT).

The Fourth Department determined the consecutive sentences for the sale of small amounts of cocaine was unduly harsh and imposed concurrent sentences. The defendant had been promised concurrent sentences of four years prior to trial. After trial consecutive seven-year sentences were imposed:

Here, the record establishes that defendant was 35 years old at the time of these events, and that his only prior record consisted of misdemeanor offenses. He was convicted in Oneida County Court of a similar offense to these crimes, arising from an incident that occurred contemporaneously with these crimes, and he was sentenced to a determinate term of two years' incarceration plus two years' postrelease supervision on that conviction. The crimes at issue involved sales of small amounts of cocaine, and the record contains no indication that defendant is a large-scale drug dealer. Although prior to trial the court had agreed that, if defendant pleaded guilty, it would impose a sentence of four years' incarceration on each count to run concurrent with each other and the Oneida County sentence, after the trial the court imposed determinate terms of seven years' incarceration plus two years' postrelease supervision on each count, to run consecutively to each other. People v Reid, 2019 NY Slip Op 04565, Fourth Dept 6-7-19

SENTENCING, IN ABSENTIA, JUDGES.

ALTHOUGH DEFENDANT WAS WARNED HE WOULD BE SENTENCED EVEN IF HE DIDN'T APPEAR AT SENTENCING, THE JUDGE SHOULD NOT HAVE SENTENCED DEFENDANT IN ABSENTIA WITHOUT FIRST INQUIRING INTO THE REASON AND WHETHER DEFENDANT COULD BE LOCATED (THIRD DEPT).

The Third Department, vacating the defendant's sentence, determined defendant should not have been sentenced in absentia:

Defendant had a waivable right to be present at sentencing, and he was indisputably informed of that right "and of the consequences for failing to appear, including the fact that the proceedings would go forward in his . . . absence" … . Nevertheless, "before proceeding in the absence of a defendant who fails to appear, the court must conduct an inquiry into the reason for the absence and consider whether the defendant could be located within a reasonable period of time" … . County Court did not make that inquiry and, indeed, rejected defense counsel's request for an adjournment to look into the reasons for defendant's absence. Thus, County Court erred in sentencing defendant in absentia … . People v Cutler, 2019 NY Slip Op 04504, Third Dept 6-619

SENTENCING, RESTITUTION, PLEA AGREEMENT, RIGHT TO COUNSEL, GUILTY PLEAS, APPEALS.

RESTITUTION SHOULD NOT HAVE BEEN ORDERED BECAUSE IT WAS NOT PART OF THE PLEA AGREEMENT, THE ARGUMENT SURVIVES THE GUILTY PLEA AND THE WAIVER OF APPEAL; DEFENDANT'S CONTENTION HE WAS DEPRIVED OF HIS RIGHT TO COUNSEL DID NOT SURVIVE THE WAIVER OF APPEAL BECAUSE DEFENDANT DID NOT ASSERT THE DEPRIVATION INFECTED THE PLEA AGREEMENT OR THE VOLUNTARINESS OF THE PLEA (FOURTH DEPT).

The Fourth Department determined restitution should not have been ordered because it was not part of the plea agreement. The court noted that defendant's argument he was deprived of his right to counsel with respect to his decision to testify before the grand jury was not forfeited by his guilty plea, but was encompassed by his waiver of appeal. The Fourth Department declined to follow a Third Department decision which held a deprivation-of-counsel argument survives a waiver of appeal irrespective of whether the deprivation infected the guilty plea. Here defendant did not assert that the alleged deprivation of his right to counsel infected the plea bargaining process or tainted the voluntariness of the plea:

Defendant's further contention that County Court erred in ordering him to pay restitution because restitution was not part of the plea agreement survives both his guilty plea and his unchallenged waiver of the right to appeal … . Moreover, contrary to the People's contention, defendant preserved his contention for appellate review by objecting to the imposition of restitution on the same ground he now advances … . On the merits, it is undisputed that the plea bargain did not include restitution, and the court therefore erred in awarding restitution without affording defendant the opportunity to withdraw his plea … . People v Richardson, 2019 NY Slip Op 05310, Second Dept 6-28-19

SENTENCING, ILLEGAL, APPEALS.

IF A DEFENDANT IS NOT SENTENCED AS A PREDICATE FELON THE MINIMUM SENTENCE MUST BE ONE-THIRD OF THE MAXIMUM, NOT ONE-HALF AS IT WAS HERE, AN APPELLATE COURT CAN NOT LET AN ILLEGAL SENTENCE STAND (FOURTH DEPT).

The Fourth Department noted that, where a defendant is not sentenced as a predicate felon, the minimum sentence is one-third of the maximum, not one-half of the maximum:

We note, however, that the court imposed an illegal sentence of 3½ to 7 years' imprisonment on defendant's conviction for CPW in the third degree. Because defendant was not sentenced as a predicate felon, the minimum period of her indeterminate sentence on this conviction must be one-third of the maximum period, not one-half as fixed by the court (see Penal Law § 70.00 [3] [b]). "Although the issue is not raised by either party, we cannot allow an illegal sentence to stand" … . We therefore modify the judgment by reducing defendant's sentence on that count to an indeterminate term of 2⅓ to 7 years' imprisonment. People v Simpson, 2019 NY Slip Op 04538, Fourth Dept 6-7-19

SENTENCING, PARKER WARNINGS, ATTORNEYS, INEFFECTIVE ASSISTANCE.

THE PARKER WARNINGS DID NOT SPECIFICALLY WARN DEFENDANT HIS SENTENCE WOULD BE ENHANCED IF HE WERE ARRESTED BETWEEN THE PLEA AND SENTENCING, DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE THE ENHANCED SENTENCE ON THAT GROUND, MATTER REMITTED FOR SENTENCING TO THE AGREED TERM OR FOR AN OPPORTUNITY FOR DEFENDANT TO WITHDRAW HIS PLEA (THIRD DEPT).

The Third Department, reversing County Court, determined the Parker warnings [notifying defendant of the enhanced sentencing consequences of misconduct between the plea and the sentencing] were inadequate and defendant's counsel was ineffective for not raising the issue. Defendant's sentence was five years longer than the sentence promised at the time of the plea because he was rearrested. The Parker warnings did not clearly

inform defendant his sentence would be enhanced if he was rearrested. The failure to preserve the error was excused because of the ineffective assistance. The Parker warnings, in relevant part, were as follows: " COURT: Don't get in any trouble at the jail, don't get rearrested, don't get involved with contraband, or break the law, or anything like that in jail, you can do that? DEFENDANT: Yes, sir COURT: Thirdly, the [P]robation [D]epartment is going to be in to see you. They are going to do a presentence report. I ask you to be cooperative with them and honest with them and continue to express the remorse that you show here today because if you don't cooperate with them, and if you are not honest with them, or if you don't continue to accept remorse and responsibility for what you did then your plea will stand and I will be free to impose a sentence of 25 years to life and say things to make sure that you never see parole, so, please, cooperate with your probation officer:"

… [C]ounsel was ineffective for failing to challenge the enhanced sentence on the ground that County Court did not insure that defendant was fully aware of the consequences of being rearrested prior to sentencing. A successful challenge to the enhanced sentence would have resulted in County Court having to either impose the agreed-upon sentence or provide defendant with an opportunity to withdraw his plea … . … People v Hunter, 2019 NY Slip Op 04496, Third Dept 6-6-19

SENTENCING, JUDGES, GUILTY PLEAS, APPEALS.

DEFENDANT'S STATEMENTS AT SENTENCING RAISED THE INTOXICATION DEFENSE REQUIRING FURTHER INQUIRY BY THE COURT, ISSUE CONSIDERED AS AN EXCEPTION TO THE PRESERVATION REQUIREMENT, CONVICTION BY GUILTY PLEA REVERSED (THIRD DEPT).

The Third Department, reversing defendant's conviction by guilty plea, determined defendant's statements at sentencing, indicating that he was intoxicated at the time he committed the crimes (assault), required further inquiry by the court. The Third Department noted that the issue constitutes an exception to the preservation requirement:

The statements made by defendant at sentencing, which raised the possibility of an intoxication defense and called into question the intent element of assault in the first degree (see Penal Law § 120.10 [1]), were sufficient to trigger the narrow exception to the preservation requirement, thereby imposing a duty of further inquiry upon County Court "to ensure that defendant's guilty plea was knowing and voluntary" … . … [D]efendant did not say anything during the course of the plea colloquy that suggested a possible intoxication defense … , and defendant's statements at sentencing contradicted his sworn admissions during the plea colloquy … . However,

"statements made by a defendant that negate an element of the crime to which a plea has been entered, raise the possibility of a [particular] defense or otherwise suggest an involuntary plea require[] the trial court to then conduct a further inquiry or give the defendant an opportunity to withdraw the plea" … . County Court did not pursue either of those avenues here. People v Skyers, 2019 NY Slip Op 05233, Third Dept 6-27-19

SENTENCING, JUVENILE DELINQUENT.

13-YEAR-OLD WHO, AS A FIRST OFFENSE, PARTICIPATED IN AN ASSAULT (USING A MINI OR SOUVENIR BASEBALL BAT) OF A COUPLE BY HER FATHER AND HER FATHER'S GIRLFRIEND PROPERLY ADJUDICATED A JUVENILE DELINQUENT AND SENTENCED TO A 12-MONTH PERIOD OF PROBATION WITH MENTAL HEALTH SERVICES AND SCHOOL MONITORING, STRONG TWO-JUSTICE DISSENT (FIRST DEPT).

The First Department, over an extensive two-justice dissent, determined the juvenile delinquent adjudication, the 12-month probation period, mental health services and school monitoring were appropriate. The dissenters argued an adjournment in contemplation of dismissal (ACD) was the appropriate disposition for this first offense. Appellant was 13 when her father, her father's girlfriend and an unidentified man assaulted a couple. The father was panhandling in the subway and the couple had allegedly refuse to give the father money. Appellant apparently participated in the assault by striking the woman with a mini or souvenir baseball bat:

Although this was appellant's first arrest, she was a participant in an unprovoked violent attack on two strangers. There is no dispute that appellant's father instigated the attack. In the ensuing melee, appellant repeatedly struck the female complainant with a mini or souvenir baseball bat, while the father's girlfriend continuously punched the complainant. Appellant continued the attack by joining her father and his girlfriend in chasing the two complainants, who were able to seek refuge in a restaurant where they called 911. After the police arrived, the complainants were transported by ambulance to the hospital to be treated for their injuries. The female complainant suffered from anxiety after the attack and continuing to the time of trial, and intended to relocate to another borough as a result of the attack. The dissent parses the incident focusing on the injuries inflicted by appellant, but as part of a group assault she is responsible for the consequences of the attack.

In addition to the seriousness of the offense, the available information supported the conclusions that appellant would benefit from engagement in mental health services and monitoring with regard to her school attendance and her academic performance and that she was in need of a longer period of supervision than the six-month

period that an adjournment in contemplation of dismissal would have provided … . We find no abuse of discretion in the decision of the court, which heard the evidence and observed appellant throughout the proceedings. We note that appellant may seek relief from the juvenile delinquent adjudication when she reaches the age of 17 … . Matter of A.V., 2019 NY Slip Op 04996, First Dept 6-20-19

SENTENCING, YOUTHFUL OFFENDERS, JUDGES, APPEALS.

COURT MUST CONSIDER WHETHER DEFENDANT SHOULD BE AFFORDED YOUTHFUL OFFENDER STATUS, A VALID WAIVER OF APPEAL DOES NOT BAR RAISING THE ISSUE (SECOND DEPT).

The Second Department, vacating the sentence and sending the matter back because the court did not consider whether defendant should be afforded youthful offender status, noted that a valid waiver of appeal would not bar raising this issue on appeal (the waiver here was deemed invalid):

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 such treatment, or agrees to forgo it as part of a plea agreement . Contrary to the People's contention, the … defendant's waiver of his right to appeal was invalid because the Supreme Court failed to confirm that the defendant understood the nature of the right to appeal and the consequences of waiving it … . In any event, a valid waiver would not bar the defendant's contention that the court failed to consider youthful offender treatment … . People v Ramirez. 2019 NY Slip Op 04727, Second Dept 6-12-19

SENTENCING, YOUTHFUL OFFENDERS, JUDGES.

THE SENTENCING COURT DID NOT FOLLOW THE CORRECT PROCEDURE FOR DETERMINING WHETHER DEFENDANT WAS ELIGIBLE FOR YOUTHFUL OFFENDER STATUS; EVEN WHERE THE DEFENDANT COMMITTED AN ARMED FELONY, WHICH CAN DISQUALIFY A DEFENDANT FROM THE STATUS, THE STATUTORY FACTORS WHICH WOULD NONETHELESS ALLOW YOUTHFUL OFFENDER STATUS MUST BE CONSIDERED AND PLACED ON THE RECORD (THIRD DEPT).

The Third Department determined Supreme Court did not follow the correct procedure with respect to whether the defendant should be afforded youthful offender status. Although the defendant pled guilty to an armed felony, which can render him ineligible for youthful offender status, the court was required to consider the factors which would render him eligible despite the armed felony and to do so on the record:

… [T]he Court of Appeals has held that, "when a defendant has been convicted of an armed felony . . ., and the only barrier to his or her youthful offender eligibility is that conviction, the court is required to determine on the record whether the defendant is an eligible youth by considering the presence or absence of the factors set forth in CPL 720.10 (3). The court must make such a determination on the record 'even where the defendant has failed to ask to be treated as a youthful offender, or has purported to waive his or her right to make such a request' pursuant to a plea bargain"… . If the court determines that the offender is not an eligible youth, the inquiry is at an end; however, "if the court determines that the defendant is an eligible youth based on the presence of one or more of the CPL 720.10 (3) factors, . . . [t]he court [then] must exercise its discretion a second time to determine whether the eligible youth should be granted youthful offender treatment pursuant to CPL 720.20 (1)" … . …

The record before us does not conclusively establish that Supreme Court reached a determination, as required by CPL 720.10, regarding defendant's eligibility for youthful offender treatment in the first instance. The court made no mention of the factors set forth in CPL 720.10 (3) and, instead of first determining defendant's eligibility for youthful offender treatment pursuant to that statute, appears to have moved to the second step and determined that youthful offender treatment was inappropriate under CPL 720.20. People v Colon, 2019 NY Slip Op 04498, Third Dept 6-6-19

SEX OFFENDER REGISTRATION ACT (SORA), DOWNWARD DEPARTURE, JUDGES.

DEFENDANT'S APPLICATION FOR A DOWNWARD DEPARTURE SHOULD HAVE BEEN CONSIDERED, INSTEAD THE APPLICATION WAS DISMISSED AS 'PREMATURE,' MATTER REMITTED (SECOND DEPT).

The Second Department Supreme Court should have considered defendant'a application for a downward departure and remitted the matter:

The Supreme Court is required to make a determination with respect to a defendant's risk level 30 calendar days prior to discharge, parole, or release (see Correction Law § 168-n). As part of its determination with respect to a defendant's risk level, the court may depart downwardly from the presumptive risk level. A defendant seeking a downward departure from the presumptive risk level has the initial burden of "(1) identifying, as a matter of law, an appropriate mitigating factor, namely, a factor which tends to establish a lower likelihood of reoffense or danger to the community and is of a kind, or to a degree, that is otherwise not adequately taken into account by the [SORA] Guidelines; and (2) establishing the facts in support of its existence by a preponderance of the evidence" … . If the defendant makes that twofold showing, the court must exercise its discretion by weighing the mitigating factor to determine whether the totality of the circumstances warrants a departure to avoid an overassessment of the defendant's dangerousness and risk of sexual recidivism … .

As the People correctly concede, the Supreme Court should not have denied the defendant's application for a downward departure as premature, but instead, should have addressed the merits of the application … . People v Powell, 2019 NY Slip Op 05170, Second Dept 6-26-19

SIDEBAR, RIGHT TO BE PRESENT, THERAPY DOG SHOULD NOT ACCOMPANY WITNESS WHEN TESTIFYING.

DEFENDANT DID NOT WAIVE HIS RIGHT TO BE PRESENT AT A SIDEBAR DISCUSSION WITH A PROSPECTIVE JUROR; UPON RETRIAL AN ADULT WITNESS SHOULD NOT TESTIFY WHILE ACCOMPANIED BY A THERAPY DOG (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction, determined defendant did not waive his right to be present when a prospective juror told the judge and attorneys that she was not sure she had completely answered a voir dire question. Defendant was not in the courtroom when the judge asked defense counsel if he wanted his client present and defense counsel said he was "okay with it." The juror then said that her son was a convicted felon. The Fourth Department also held that upon retrial an adult witness should not be allowed to testify accompanied by a therapy dog:

Initially, we conclude that the situation at issue here constituted a material stage of trial inasmuch as the prospective juror volunteered information about her son's status as a convicted felon. This information was relevant to a question asked earlier during voir dire: "Have any of you or anyone close to you been a victim of a crime, a witness to a crime, been accused of a crime, or participated in any way in a criminal proceeding?" That question was intended to be relevant to, inter alia, potential bias … . …

We further conclude that, under the circumstances of this case, defendant did not waive his right to be present. It is well established that a defendant has the right to be present at every material stage of a trial, including matters such as questioning prospective jurors regarding bias … . "It is equally clear, however, that such right may be voluntarily waived by a defendant or the defendant's attorney' " and that "a defendant's waiver in this regard may be either express or implied" … . Here, without defendant being physically present in the courtroom, and with counsel simply stating to the court, "I'm okay with [his absence]," we perceive no basis to conclude that there was either an implicit or explicit waiver. Defendant's absence from the courtroom when the prospective juror raised the issue of potential bias made it impossible for him to knowingly and voluntarily waive his right to be present … . People v Geddis, 2019 NY Slip Op 04819, Fourth Dept 6-14-19

STATEMENTS IN CONTROLLED PHONE CALL, MIRANDA, CUSTODY.

STATEMENTS MADE BY DEFENDANT DURING A CONTROLLED PHONE CONVERSATION WITH THE MOTHER OF THE ALLEGED CHILD VICTIM SHOULD NOT HAVE BEEN SUPPRESSED; STATEMENTS MADE BY DEFENDANT IN A CLOSED ROOM AT THE SHERIFF'S OFFICE, WHERE DEFENDANT WAS INTERROGATED AND CONFRONTED WITH HIS INCULPATORY STATEMENTS, SHOULD NOT HAVE BEEN SUPPRESSED; ALTHOUGH DEFENDANT WAS INTERROGATED, HE WAS NOT IN CUSTODY (FOURTH DEPT).

The Fourth Department, on an appeal by the People in this child sexual contact case, determined defendant's statement, made during a controlled phone conversation with the mother of the child, should not have been suppressed. The Fourth Department further found that statements made by the defendant during interrogation at the sheriff's office should not have been suppressed because the defendant was not in custody at the time of the interrogation:

… [W]e conclude that the mother "did not make a threat [or a promise] that would create a substantial risk that defendant might falsely incriminate himself"… . We further conclude that the controlled call did not constitute an unconstitutionally coercive police tactic; nor were the tactics employed by the mother during the call unconstitutionally coercive (see generally CPL 60.45 [2] [b] [ii] …), and "[d]eceptive police stratagems in securing a statement need not result in involuntariness without some showing that the deception was so fundamentally unfair as to deny due process or that a promise or threat was made that could induce a false confession' " … . …

… [A]lthough defendant's interview occurred at the Sheriff's Office, that fact "does not necessarily mean that he is to be considered in custody' " … . Defendant voluntarily agreed to meet the investigators at the Sheriff's Office and arranged for his own transportation to and from the interview … . When defendant arrived, the investigators informed him that he was free to leave … . In fact, defendant left the Sheriff's Office at the conclusion of the interview despite making inculpatory statements. Further, defendant was not restrained during the interview, and the door to the interview room was unlocked … . Although the investigators confronted defendant with the statements that he made during the controlled call, the fact that the questioning may have turned accusatory in nature did not render the interview custodial given the other circumstances present in this case … . People v Morris, 2019 NY Slip Op 05264, Fourth Dept 6-28-19

STATEMENTS, CONSTRUCTIVE POSSESSION, ANSWER TO "WHERE DO YOU RESIDE" IS NOT PEDIGREE INFORMATION.

IN THIS CONSTRUCTIVE POSSESSION CASE, THE INVESTIGATOR'S ASKING DEFENDANT WHERE HE RESIDED WAS DESIGNED TO ELICIT AN INCRIMINATING RESPONSE, THEREFORE DEFENDANT'S RESPONSE WAS NOT PEDIGREE INFORMATION AND A CPL 710.30 NOTICE WAS REQUIRED, ADMISSION OF THE STATEMENT WAS HARMLESS ERROR HOWEVER (FOURTH DEPT).

The Fourth Department determined the defendant's answer to the investigator's asking where defendant resided, for which no CPL 710.30 notice was provided, was not pedigree information and should not have been admitted in evidence. The drug-possession charge was founded on constructive possession. Therefore asking defendant where he resided was designed to elicit an incriminating response. The error was deemed harmless however:

Defendant also contends that the court erred in admitting in evidence an oral statement of defendant regarding his address for which no CPL 710.30 notice had been given. The statement at issue was defendant's response to a question about where he resided, and it was made to one of the principal investigators, who had executed a search warrant at the home of defendant's parents. As the People correctly concede, defendant's statement regarding his address was not pedigree information for which no CPL 710.30 notice was required … because, under the circumstances of this case, the investigator's question was likely to elicit an incriminating admission and had a "necessary connection to an essential element of [the possessory] crime[] charged" … . The court thus erred in admitting the statement in evidence in the absence of a CPL 710.30 notice … . People v Tucker, 2019 NY Slip Op 05274, Fourth Dept 6-28-19

STATEMENTS, HANDCUFFS, MIRANDA, CUSTODY.

ALTHOUGH THE DEFENDANT WAS HANDCUFFED AND SITTING ON THE BACKSEAT OF A POLICE CAR WHEN HE WAS ASKED QUESTIONS, INCLUDING WHETHER HE HAD BEEN DRINKING, BY THE OFFICER WHO MADE THE TRAFFIC STOP, THE DEFENDANT WAS NOT IN CUSTODY WHEN THE QUESTIONS WERE ASKED (FOURTH DEPT).

The Fourth Department determined defendant, although handcuffed and seated on the backseat of a police car, was not in custody such that his answers to questions, including whether he had anything to drink, should be suppressed. The officer observed defendant commit several traffic infractions, then the defendant got out of the car, staggering. The defendant would not stop and go back to his car when the officer told him to. When the officer caught up to him he smelled alcohol. The officer then handcuffed the defendant and had him sit on the backseat of the police car with his feet outside the car on the ground:

Contrary to defendant's contention, we conclude that his answers to the sergeant's questions were not the product of a custodial interrogation requiring Miranda warnings. " It is well established that not every forcible detention constitutes an arrest' " … and, under the circumstances noted above, we agree with the court that the sergeant's use of handcuffs did not transform the detention into a de facto arrest. Rather, the sergeant's use of the handcuffs to effect the detention was warranted in light of the threat that defendant might take additional evasive action … .

We further conclude that seating defendant on the back seat of the police vehicle did not transform the sergeant's questioning into a custodial interrogation. The sergeant lawfully, although forcibly, detained defendant for investigatory purposes based on his observation of defendant committing several traffic infractions … . Given defendant's visible intoxication, staggering gait, and prior evasive actions, a " less intrusive means of fulfilling the police investigation' " than seating defendant partially in the police vehicle " was not readily apparent' " … . Here, the sergeant's "action fell short of the level of intrusion upon defendant's liberty and privacy that constitutes an arrest" … . In addition, the sergeant's questions were investigatory rather than custodial in nature … . People v Mcdonald, 2019 NY Slip Op 04546, Fourth Dept 6-7-19

STATUTES, DEFINITION OF MOTOR VEHICLE. VEHICULAR MANSLAUGHTER.

ATV'S ARE NOT MOTOR VEHICLES WITHIN THE MEANING OF PENAL LAW 125.13 (1) (FIRST DEGREE VEHICULAR MANSLAUGHTER); CONCURRENT INCLUSORY COUNTS OF PENAL LAW 125.13 (3) DISMISSED (THIRD DEPT).

The Third Department dismissed certain counts of the indictment which stemmed from an accident involving an ATV (all-terrain vehicle). A passenger in the ATV, driven by defendant, was thrown from the ATV and killed. Defendant was alleged to have been driving while intoxicated and was convicted of vehicular manslaughter in the first degree, vehicular manslaughter in the second degree, aggravated driving while intoxicated and driving while intoxicated. The Third Department determined that one of the first degree vehicular manslaughter counts must be dismissed because ATV's are not motor vehicles within the meaning of that statute (Penal Law 125.13 (1)). The court also found that three concurrent inclusory counts must be dismissed:

ATVs are specifically excluded by the plain language of the relevant definition of motor vehicle. As relevant herein, the Penal Law defines "vehicle" to include a "motor vehicle," which is further defined in the Vehicle and Traffic Law as "[e]very vehicle operated or driven upon a public highway which is propelled by any power other than muscular power, except. . . [ATVs] as defined in [Vehicle and Traffic Law] article [48-B]" (Vehicle and Traffic Law § 125 …; see Penal Law § 10.00 [14]). This specific exclusion of ATVs from the definition of motor vehicle is further evident from two statutes that contain provisions that would be unnecessary if ATVs were included in the definition of motor vehicle. First, the crime of vehicular manslaughter in the second degree contains separate provisions for incidents that arise from the operation of motor vehicles (see Penal Law § 125.12 [1]) and ATVs (see Penal Law § 125.12 [3]) and, second, the Vehicle and Traffic Law contains a provision specifically providing that ATVs are motor vehicles for the purpose of Vehicle and Traffic Law article 31, which prohibits the intoxicated operation of a motor vehicle (see Vehicle and Traffic Law § 2404 [5]). Thus, we are constrained to conclude that ATVs are not motor vehicles for purposes of the Penal Law. Accordingly, the weight of the evidence does not support defendant's conviction for vehicular manslaughter in the first degree under Penal Law § 125.13 (1) (count 1). * * *

Defendant contends that his convictions under counts 3, 4, 5, 6 and 7 must be dismissed as inclusory concurrent counts of the conviction of vehicular manslaughter in the first degree under count 2 (see CPL 300.40 [3] [b]). "Concurrent counts are 'inclusory' when the offense charged in one is greater than any of those charged in the others and when the latter are all lesser offenses included within the greater" (CPL 300.30 [4]). The People concede that defendant's conviction of vehicular manslaughter in the first degree under count 2 requires that

counts 3, 4, 6 and 7 be dismissed as inclusory concurrent counts. However, they accurately note that count 5 — charging aggravated driving while intoxicated — is not an inclusory concurrent count of vehicular manslaughter in the first degree as charged pursuant to Penal Law § 125.13 (3) in count 2 because it is possible to commit the latter without also committing the former … . People v Wager, 2019 NY Slip Op 04786, Third Dept 6-13-19

STREET STOPS, DE BOUR, BLOCKING VEHICLE.

BLOCKING THE CAR IN WHICH DEFENDANT WAS A PASSENGER WAS A JUSTIFIABLE LEVEL TWO INTRUSION, THE SUBSEQUENT LEVEL THREE INTRUSION WAS JUSTIFIED BY THE INFORMATION KNOWN TO THE POLICE AT THE TIME THE DEFENDANT STARTED TO GET OUT OF THE CAR AS THE POLICE APPROACHED (FOURTH DEPT).

The Fourth Department determined the blocking of the car in which defendant was a passenger by parking at the entrance to the driveway was only a permissible level two intrusion:

The charges against defendant arose after the police, who were investigating a recent stabbing, encountered defendant in a vehicle matching the description and anticipated location of the stabbing suspect's vehicle given in a police dispatch.

We conclude that the police conduct was justified in its inception and at every subsequent stage of the encounter leading to defendant's arrest … . Contrary to defendant's contention, the police action in pulling up behind the subject vehicle, which had parked in defendant's driveway after passing the officers' patrol car, constituted only a level two intrusion … despite the fact that a police vehicle blocked the subject vehicle's egress from the driveway … . The police at that point had the requisite founded suspicion to justify the level two intrusion.

The police escalated the encounter to a level three intrusion when they approached defendant, who had begun to exit the vehicle, and ordered him to remain in the vehicle … . Evaluating the totality of the circumstances … , we conclude that the police conduct was justified by the officers' reasonable suspicion that defendant was the suspect described in the dispatch … . The officers found defendant less than two miles away from the scene of the stabbing, which had occurred approximately 20 minutes earlier. Defendant's gender, race, height, and weight matched the description of the stabbing suspect. Furthermore, witnesses at the scene of the stabbing informed the police that the suspect left the scene in a small silver vehicle driven by a black female and that the vehicle may have been headed toward a residence on Mark Avenue. Defendant was a passenger in a silver vehicle driven

by a black female, and the driveway in which the driver parked the vehicle was 50 to 75 yards from Mark Avenue. People v Pettiford, 2019 NY Slip Op 04620, Fourth Dept 6-7-19

STREET STOPS, DE BOUR, SEARCHES, MARIJUANA SMELL.

A FOUNDED SUSPICION OF CRIMINALITY WAS NOT A SUFFICIENT GROUND FOR A PAT SEARCH; HOWEVER THE SMELL OF MARIJUANA, ABOUT WHICH THE OFFICER TESTIFIED, WOULD JUSTIFY A SEARCH; BECAUSE THE SUPPRESSION COURT DID NOT RULE ON THE MARIJUANA-SMELL ISSUE, THE MATTER WAS REMITTED FOR A RULING (FOURTH DEPT).

The Fourth Department determined that, although the suppression court determined the police officer had a founded suspicion of criminality when he ordered defendant out of the car, a founded suspicion of criminality did not justify ordering the defendant to place his hands on the patrol car in preparation for a pat search. However. the officer testified he smelled marijuana, which would justify and search. Because the court did not rule on that issue, the matter was sent back for a ruling:

Upon approaching the vehicle, the officer observed that there were two occupants, one of whom, i.e., defendant, was moving around in the backseat and putting his hands in his front pocket as if he was "stuffing something either in his coat or in his pants as if to conceal it from [the officer]." … The officer asked the driver and defendant for identification and thereafter learned that the driver's license of the driver had been revoked and that defendant did not have a driver's license.

The officer directed defendant to exit the vehicle and place his hands on the patrol car so that the officer could conduct a pat search. Defendant exited the vehicle as directed but thereafter fled, discarding components of a 9 millimeter Glock semiautomatic pistol as he ran. …

Because the driver pulled over of his own volition before the officer activated his emergency lights to initiate a traffic stop, the officer needed only an articulable basis to lawfully approach the occupants of the vehicle and request information … . That basis was supplied by the officer's observation that the vehicle was being operated in violation of Vehicle and Traffic Law § 375 (2) (a) (1) … . Thus, the officer's conduct "was justified in its inception" … .

The court determined that the officer had a founded suspicion of criminality prior to ordering defendant to exit the vehicle for the pat search. A founded suspicion of criminality standing alone, however, was insufficient to justify the officer's conduct in ordering defendant to place his hands on the patrol car in preparation for a pat search … . Nevertheless, in making its determination, the court credited the officer's testimony that he smelled fresh marihuana emanating from the vehicle and was experienced in detecting marihuana. It is well settled that "[t]he odor of marihuana emanating from a vehicle, when detected by an officer qualified by training and experience to recognize it, is sufficient to constitute probable cause to search a vehicle and its occupants" … . People v Green, 2019 NY Slip Op 04608, Fourth Dept 6-7-19

SUFFICIENCY OF EVIDENCE, AGE AND TIME ELEMENTS.

PEOPLE FAILED TO PROVE THE VICTIM-AGE AND TIME-PERIOD ELEMENTS OF PREDATORY SEXUAL ASSAULT AGAINST A CHILD, CONVICTION REVERSED (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction for predatory sexual assault against a child. Essentially the People did not present evidence to support the assaults occurred before the victim turned 13 or during a period of less than three months (statutory criteria):

Without narrowing the time frame, it is entirely possible that the testified-to instances of anal sexual conduct that allegedly occurred at that residence happened before the statute's effective date or after the victim turned 13 years old. The People also failed to establish that the criminal conduct occurred over a period of time not less than three months in duration (see Penal Law §§ 130.96, 130.75 [1]). In short, there were no "markers" in the evidence at trial about when the conduct occurred that would allow the jury to conclude that defendant committed predatory sexual assault against a child at the relevant time … . People v Partridge, 2019 NY Slip Op 04848, Fourth Dept 6-14-19

SUFFICIENCY OF EVIDENCE, AGE ELEMENT.

THE STATUTE WHICH CRIMINALIZES AN ASSAULT ON A PERSON 65 OR OLDER BY A PERSON MORE THAN TEN YEARS YOUNGER DOES NOT REQUIRE PROOF THE ASSAILANT KNEW THE AGE OF THE VICTIM (FOURTH DEPT).

The Fourth Department determined that the statute which criminalizes a younger person's causing injury to a person 65 or older does not require proof that attacker know the victim is 65 or older:

Defendant appeals from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [12]). The conviction arises out of a physical altercation that occurred when defendant and his friend encountered the victim in the parking lot of a tavern shortly after the victim interacted with the friend's girlfriend at the bar. At the time of the altercation, defendant was 31 years old and the victim was 69 years old. Defendant contends that County Court erred in determining that Penal Law § 120.05 (12) did not require the People to prove that he knew that the victim was 65 years of age or older. We reject that contention. * * *

Contrary to defendant's contention, however, nothing in the statutory text requires that the actor know the age of the injured person; rather, by providing that the defendant must act "[w]ith intent to cause physical injury to a person who is [65] years of age or older" and must cause "such injury to such person," the statute simply requires that the person whom the actor intentionally injures be, as a matter of fact, 65 years of age or older (§ 120.05 [12] [emphasis added]). That reading is consistent with the pattern Criminal Jury Instructions, which provide that the People must prove beyond a reasonable doubt that, with respect to the age element, the injured person was 65 years of age or older at the time of the crime (see CJI2d[NY] Penal Law § 120.05 [12]) . People v Burman, 2019 NY Slip Op 04820, Fourth Dept 6-14-19

SUPERIOR COURT INFORMATION, JURISDICTIONALLY DEFECTIVE.

SUPERIOR COURT INFORMATION IS JURISDICTIONALLY DEFECTIVE FOR FAILURE TO INCLUDE THE TIME OF THE OFFENSE, ISSUE NEED NOT BE PRESERVED (THIRD DEPT).

The Third Department, reversing defendant's conviction, determined the superior court information (SCI) to which defendant pled guilty was jurisdictionally defective because it did not include the time of

the offense. The error survives the guilty plea and waiver of appeal and is not subject to the preservation requirement:

… [T]he People concede and we agree that the waiver of indictment is invalid and the SCI is jurisdictionally defective for failure to set forth the approximate time of the offense in accordance with CPL 195.20 … . **People v Jones, 2019 NY Slip Op 05236, Third Dept 6-27-19**

SUPERIOR COURT INFORMATION, JURISDICTIONALLY DEFECTIVE.

THE SUPERIOR COURT INFORMATION (SCI) DID NOT INCLUDE THE TIME OF THE OFFENSE AND WAS THEREFORE JURISDICTIONALLY DEFECTIVE (THIRD DEPT).

The Third Department reversed defendant's conviction and dismissed the Superior Court Information (SCI) because there was no reference to the time of the offense:

A waiver of indictment must be executed in strict compliance with the requirements of CPL 195.20, which provides, as pertinent here, that it shall include the "approximate time . . . of each offense to be charged in the [SCI]" … . Although "courts may read both [the SCI and the waiver of indictment] together, as a single document, to satisfy the requirements of CPL 195.20," it is undisputed that here neither contained any reference to the time of the offense … . Further, this is not a case "where the time of the offense is unknown, or, perhaps, unknowable so as to excuse the absence of such information" … . Indeed, a specific time was provided in the felony complaint. People v Vaughn, 2019 NY Slip Op 04500, Third Dept 6-6-19

SUPERIOR COURT INFORMATION, INCORRECT DOCUMENT, JURISDICTIONALLY DEFECTIVE.

A SUPERIOR COURT INFORMATION (SCI) IS NOT AN APPROPRIATE CHARGING DOCUMENT AFTER AN INDICTMENT HAS COME DOWN; IN ADDITION THE SCI HERE WAS JURISDICTIONALLY DEFECTIVE BECAUSE IT DID NOT INCLUDE THE ORIGINAL CHARGE OR A LESSER INCLUDED OFFENSE (THIRD DEPT).

The Third Department, reversing County Court and dismissing the Superior Court Information (SCI), determined the SCI was an improper vehicle for defendant's guilty plea because the grand jury had already handed down an indictment. In addition the SCI was jurisdictionally defective because it did not include the original charge or a lesser included offense:

CPL 195.10 (2) (b) provides that a defendant may waive indictment and consent to be prosecuted by a SCI in "the appropriate superior court, at any time prior to the filing of an indictment by the grand jury." However, "waiver of indictment attempted after a [g]rand [j]ury actually indicts is generally invalid under CPL 195.10 (2) (b) because the plain words of the statute require a waiver be made prior to the filing of an indictment" … .

It is well settled that the general purpose and objectives of constitutional and statutory boundaries with respect to the waiver of indictment are to permit a defendant "to go directly to trial without waiting for a grand jury to hand up an indictment, [thereby] affording a defendant the opportunity for a speedier disposition of charges [and] eliminating unnecessary [g]rand [j]ury proceedings" … . When the grand jury has already acted, and those motivations are no longer present, waiver of indictment is not authorized, even where defendant has consented to the devised procedure … .

Here, an indictment had been filed — to which defendant pleaded guilty — prior to defendant agreeing to be prosecuted by way of an SCI. Although the indictment was subsequently dismissed, the dismissal was not due to any defect requiring such dismissal (see CPL 210.20), County Court did not authorize resubmission of the charge to the grand jury (see CPL 210.45 [9]) and a new felony complaint was never filed. Therefore, defendant was not placed on a formal preindictment procedural track … . People v Eggleston, 2019 NY Slip Op 04497, Second Dept 6-6-19

WITNESS INTIMIDATION, GRAND JURY TESTIMONY, HEARSAY ADMISSIBLE.

COUNTY COURT PROPERLY FOUND THAT DEFENDANT USED HIS RELATIONSHIP WITH A WITNESS TO PRESSURE HER NOT TO TESTIFY, THE WITNESS'S GRAND JURY TESTIMONY WAS PROPERLY ADMITTED IN EVIDENCE (FOURTH DEPT).

The Fourth Department determined County Court properly determined the defendant pressured a witness to refuse to testify at trial. Therefore the witness's grand jury testimony was properly admitted in evidence:

Defendant contends that County Court erred in determining, following a Sirois hearing, that the People presented clear and convincing evidence that defendant "wrongfully made use of his relationship with the victim in order to pressure her to violate her duty to testify" … . …

The People presented evidence that the missing witness was ready and willing to testify while defendant was in jail during the grand jury proceedings but became reluctant after defendant was released and the trial date drew closer. Days prior to the trial, the witness's mother observed the witness leave with defendant and their child for several hours. When the witness returned to the mother's home, the witness "started talking about the subpoena that she had received. Started saying things like they can't do anything to me if I don't show up. The subpoena wasn't served properly. There's nothing that they can do if I don't show up to court. Things of that nature." The mother reported to the prosecutor that she had never heard the witness use legal terminology like that before. …

Defendant's relative also observed the witness in defendant's home during the time in which law enforcement officers were attempting to locate her on a material witness warrant. Further, although the prosecution never informed the witness of the updated trial schedule following the witness's failure to appear, the witness appeared at court two days after the Sirois hearing "at the perfect moment to save defendant from the impending admission of her damning grand jury testimony" … . People v Haile, 2019 NY Slip Op 04547, Fourth Dept 6-7-19