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ACCESSORIAL LIABILITY, APPEALS.

THERE WAS LEGALLY INSUFFICIENT EVIDENCE DEFENDANT SHARED THE CO-DEFENDANT'S INTENT TO KILL, IN ADDITION, DEFENDANT'S CONVICTION UNDER AN ACCESSORIAL LIABILITY THEORY WAS AGAINST THE WEIGHT OF THE EVIDENCE (FOURTH DEPT).

The Fourt

h Department, reversing defendant's conviction and dismissing the indictment, determined there was legally insufficient evidence that the defendant shared the co-defendant's intent to kill, and the verdict was against the weight of the evidence. The co-defendant walked up to the defendant on the street and shot him. The defendant was present at the scene and picked the co-defendant up and drove away after the shooting. The defendant was convicted under an accomplice or accessorial liability theory:

A "defendant's presence at the scene of the crime, alone, is insufficient for a finding of criminal liability" … . Indeed, evidence that a defendant was at the crime scene and even assisted the perpetrator in removing evidence of that crime is insufficient to support a defendant's conviction where the People fail to offer evidence from which the jury could rationally exclude the possibility that the defendant was without knowledge of the perpetrator's intent … . "An aider and abettor must share the intent or purpose of the principal actor, and there can be no partnership in an act where there is no community of purpose"… . We have no difficulty concluding that there is a valid line of reasoning and permissible inferences by which the jury could have found that defendant intentionally aided the codefendant after the murder, but we cannot conclude that there is legally sufficient evidence to support the inference that defendant shared the codefendant's intent to kill the victim … . The People offered no motive for the crime … , and the evidence indicating that defendant was staring at the victim 40 minutes before the shooting and that defendant may have dropped off the codefendant at the bar prior to the shooting was plainly insufficient to establish that defendant was aware of and shared the codefendant's intent to kill the victim … . * * *

Even assuming, arguendo, that the evidence is legally sufficient, viewing the evidence in light of the elements of the crime as charged to the jury … , we further conclude that the verdict is against the weight of the evidence … . A review of the weight of the evidence requires us to first determine whether an acquittal would not have been unreasonable … . If so, we must " weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony' " … . We conclude that an

acquittal would not have been unreasonable in this case and, based on the weight of the evidence, we further conclude that the jury was not justified in finding defendant guilty beyond a reasonable doubt. People v Mcdonald, 2019 NY Slip Op 03494, Fourth Dept 5-3-19

ADOPTIVE ADMISSIONS, JAIL PHONE CALLS.

DEFENDANT'S PHONE CONVERSATION WITH HIS MOTHER SHOULD NOT HAVE BEEN ADMITTED AS AN ADOPTIVE ADMISSION, SENTENCE FOR CRIMINAL POSSESSION OF A WEAPON SHOULD HAVE BEEN CONCURRENT WITH THE SENTENCE FOR MURDER (SECOND DEPT).

The Second Department determined a recording of defendant's phone conversation with his mother, made when defendant was in jail, should not have been admitted as an adoptive admission. The error was deemed harmless however. The Second Department further determined that the sentences for criminal possession of a weapon should be concurrent with the sentence for murder. There was no evidence the weapon was possessed for an unlawful purpose other than the shooting:

The defendant contends that the Supreme Court should not have permitted the People to introduce into evidence, as an adoptive admission of guilt, a recording of a telephone call that he made to his mother while he was incarcerated at Rikers Island Correctional Facility. We agree. "Generally, an adoptive admission is allowed when a party acknowledges and assents to something already uttered by another person, which thus becomes effectively the party's own admission" . Here, the People failed to establish that the defendant assented to the statements uttered by his mother during the telephone call … . …

The evidence adduced at trial failed to establish that the defendant possessed the gun for an unlawful purpose unrelated to shooting at the intended victim, resulting in the death of the victim (see Penal Law § 265.03[1][b]…), or that his possession of a gun was separate and distinct from his shooting of the victim (see Penal Law § 265.03[3] …). Accordingly, the terms of imprisonment imposed upon the defendant's convictions of criminal possession of a weapon in the second degree should run concurrently with the sentence imposed upon his conviction of murder in the second degree. People v King, 2019 NY Slip Op 03813, Second Dept 5-15-19

ATTORNEYS, INEFFECTIVE ASSISTANCE, SPEEDY TRIAL.

DEFENSE COUNSEL MISCALCULATED THE NUMBER OF DAYS OF DELAY ATTRIBUTABLE TO THE PEOPLE IN THE SPEEDY TRIAL MOTION, WHICH CONSTITUTED INEFFECTIVE ASSISTANCE, CONVICTION REVERSED, INDICTMENT DISMISSED (FIRST DEPT).

The Second Department, reversing defendant's conviction and dismissing the indictment, determined defense counsel's failure to properly calculate the days of delay attributable to the People for the speedy trial motion constituted ineffective assistance:

Defendant was denied the effective assistance of counsel … with regard to his speedy trial motion. In his CPL 30.30(2) motion for defendant's release, defense counsel mistakenly calculated 99 days of includable time, instead of the correct calculation of 103 days. The People conceded the 99 days, and the court released defendant. When defense counsel thereafter moved to dismiss the indictment under CPL 30.30(1), defense counsel and the prosecutor repeated that error in calculating the delay as 99 days, with the court ultimately finding only 181 days of includable time and denying the motion. Had counsel correctly calculated 103 days of chargeable time, the includable time would have totaled 185 days, rather than 181, and defendant's speedy trial claim would have been meritorious. We have considered and rejected the People's arguments concerning the 63-day period following defendant's uncontested motion for release from custody, which the court found to be includable in its ultimate calculation on the dismissal motion. People v Coulibaly, 2019 NY Slip Op 04289, First Dept 5-30-19\

ATTORNEYS, CONFLICT OF INTEREST.

DEFENDANT PLED GUILTY TO THE CHARGES IN TWO INDICTMENTS, WITH RESPECT TO ONE OF THE INDICTMENTS, COUNSEL WHO NEGOTIATED THE PLEA OFFER HAD BEEN RELIEVED AS DEFENSE COUNSEL BECAUSE OF A CONFLICT OF INTEREST, CONVICTIONS REVERSED (SECOND DEPT).

The Second Department reversed defendant's convictions by guilty plea because defense counsel had a conflict of interest:

The defendant was charged under Indictment No. 13-00668 with murder in the second degree, criminal possession of a weapon in the second degree, and criminal possession of a weapon in the third degree. The

defendant was later charged under Indictment No. 14-00627 with assault in the second degree and assault in the third degree. Following a pretrial hearing on Indictment No. 13-00668, the defendant's counsel (hereinafter the attorney), who represented the defendant on the charges under both Indictment Nos. 13-00668 and 14-00627, learned that he had a conflict of interest with the defendant, as the attorney's law office also represented, on unrelated charges, the prosecution's principal witness in the case under Indictment No. 13-00668. The witness was to testify that he saw the defendant shoot and kill the unarmed victim. The County Court granted the attorney's motion to be relieved as defense counsel in the case under Indictment No. 13-00668. However, the attorney remained as the defendant's counsel on the charges under Indictment No. 14-00627.

The defendant ultimately pleaded guilty to certain charges on both indictments in exchange for a reduced sentence.

… The defendant was denied his right to effective assistance of counsel when the attorney, who had been relieved as the defendant's counsel on Indictment No. 13-00668 because of a conflict of interest with the prosecution's principal witness, made a plea offer with respect to that indictment . The defendant failed to receive representation that was conflict-free and singlemindedly devoted to his best interests as required by both the Constitution of the United States and the New York State Constitution … . People v Hill, 2019 NY Slip Op 03810, Second Dept 6-15-19

ATTORNEYS, INEFFECTIVE ASSISTANCE.

DEFENDANT'S PAPERS SUFFICIENTLY RAISED A QUESTION WHETHER HE WAS DENIED HIS RIGHT TO EFFECTIVE COUNSEL BECAUSE OF COUNSEL'S CONFLICT OF INTEREST, DENIAL OF DEFENDANT'S MOTION TO VACATE HIS CONVICTION WITHOUT A HEARING WAS AN ABUSE OF DISCRETION (CT APP).

The Court of Appeals, over a dissenting opinion by Judge Stein, determined that defendant was entitled to a hearing on his motion to vacate his conviction on the ground his attorney (Chabrowe) was ineffective because of a conflict of interest. Defendant alleged a party (Salaam) who was present at the scene of the depraved indifference murder committed by defendant was represented by Chabrowe and had paid Chabrowe's fees on defendant's behalf:

Although defendant had informed the trial court during the Gomberg inquiry that he or his family had hired Chabrowe, he alleged that Salaam paid Chabrowe to represent defendant, resulting in an undisclosed and "unwaivable" conflict, and that Chabrowe failed to explain any possible conflict of interest related to Salaam's payment of defendant's legal fees. In addition to his own affidavit, defendant submitted an affirmation from his current appellate counsel, who relayed details of a conversation he affirmed he had with Chabrowe about the payment of defendant's legal fees. Defendant also relied on recorded prison phone calls, which purportedly corroborate defendant's allegation that Salaam hired and paid for his attorney. * * *

We review the summary denial of a CPL 440.10 motion under an abuse of discretion standard. On this record, we conclude that Supreme Court abused its discretion in determining that a hearing was not warranted to address the allegations contained in defendant's CPL 440.10 motion regarding Chabrowe's representation of defendant and whether any conflict of interest existed warranting reversal. People v Brown, 2019 NY Slip Op 03404, CtApp 5-2-19

AUTOMOBILE EXCEPTION, SEARCHES.

AUTOMOBILE EXCEPTION TO THE WARRANT REQUIREMENT APPLIES TO PARKED UNOCCUPIED CARS, SMELL OF MARIHUANA (FROM OUTSIDE THE CLOSED UNOCCUPIED CAR) PROVIDED PROBABLE CAUSE TO SEARCH THE CAR, OFFICER'S SUBJECTIVE INTENT TO SEARCH THE CAR BEFORE HE SMELLED THE MARIHUANA IS IRRELEVANT (THIRD DEPT).

The Third Department determined the warrantless search of defendant's car, which was parked outside the apartment where defendant had been arrested, was valid under the automobile exception to the warrant requirement. The officer who opened the car door with keys taken from the defendant, testified that he smelled marihuana as he approached the car, and that he intended to search the car before he smelled the marijuana. The Third Department held that the officer's subjective intent to search before he smelled the marihuana did not invalidate the search, and the officer's claim he could smell marihuana outside a closed car was a credibility issue resolved by County Court:

The automobile exception to the warrant requirement is not based solely upon the mobility of vehicles, but also on the "reduced expectation of privacy in an automobile" … . Thus, the automobile exception is not limited to vehicles that are moving or occupied when observed by police and may also be applied when, as here, a vehicle is parked in "a public place where access [is] not meaningfully restricted" … . …

The warrantless search was permissible under the automobile exception. "[I]t is well established that the 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" … . …

… [P]robable cause analysis is based upon reasonableness, and a search or seizure is permissible where, as here, "the circumstances, viewed objectively, justify the action" … . As the smell of marihuana outside the vehicle objectively provided probable cause for the warrantless search, the lieutenant's subjective intentions are irrelevant. People v Hines, 2019 NY Slip Op 03853, Third Dept 5-16-19

CELL SITE LOCATION DATA, WARRANT REQUIREMENT.

CELL SITE LOCATION INFORMATION (CSLI) SHOULD NOT HAVE BEEN ADMITTED IN EVIDENCE BECAUSE IT WAS PROCURED WITHOUT A WARRANT, ERROR HARMLESS HOWEVER, SENTENCES FOR CRIMINAL SEXUAL ACT AND CRIMINAL IMPERSONATION SHOULD HAVE BEEN CONCURRENT (SECOND DEPT).

The Second Department determined the cell site location information (CSLI) should not have been admitted because the information was procured without a warrant. The error was deemed harmless. The Second Department further determined the sentences for criminal sexual act and criminal impersonation should have been concurrent:

The defendant contends that the People violated his federal constitutional right against unreasonable searches and seizures (see US Const Amend IV) by obtaining his historical cell site location information (hereinafter CSLI) without first obtaining a warrant. Although the defendant did not object on this ground to the admission of the CSLI at trial, his contention has merit and should be considered in light of the United States Supreme Court's recent holding in Carpenter v United States (_____ US _____, 138 S Ct 2206). Contrary to the People's contention, under the circumstances, the trial court's order requiring release of the CSLI under the Stored Communications Act (18 USC § 2703[d]), which order made no express finding of probable cause, was not effectively a warrant supported by probable cause … . …

As the People correctly concede, because criminal sexual act in the first degree (Penal Law § 130.50[1]) constituted one of the offenses and a material element of the other offense, criminal impersonation in the first

degree (Penal Law § 190.26[1]), the trial court should not have imposed consecutive sentences on these convictions … . People v Taylor, 2019 NY Slip Op 03823, Second Dept 5-15-19

CROSS-EXAMINATION, POLICE OFFICERS, CIVIL SUIT.

DEFENDANT WAS PROPERLY PROHIBITED FROM CROSS-EXAMINING A POLICE OFFICER ABOUT FALSE ARREST AND POLICE BRUTALITY LAWSUITS FILED AGAINST THE OFFICER (SECOND DEPT).

The Second Department noted that the defendant was properly prohibited from cross-examining a police officer about four federal lawsuits filed against the officer:

The Supreme Court providently exercised its discretion in prohibiting the defendant from cross-examining a police witness with respect to the allegations of false arrest and/or police brutality in four federal lawsuits filed against that witness. "Where a lawsuit has not resulted in an adverse finding against a police officer . . . defendants should not be permitted to ask a witness if he or she has been sued, if the case was settled (unless there was an admission of wrongdoing) or if the criminal charges related to the plaintiffs in those actions were dismissed. However, subject to the trial court's discretion, defendants should be permitted to ask questions based on the specific allegations of the lawsuit if the allegations are relevant to the credibility of the witness" … . "In cross-examining a law enforcement witness, the same standard for good faith basis and specific allegations relevant to credibility applies, as does the same broad latitude to preclude or limit cross-examination" . "First, counsel must present a good faith basis for inquiring, namely, the lawsuit relied upon; second, specific allegations that are relevant to the credibility of the law enforcement witness must be identified; and third, the trial judge exercises discretion in assessing whether inquiry into such allegations would confuse or mislead t… he jury, or create a substantial risk of undue prejudice to the parties"… . Here, the complaints in each of the identified actions contain only allegations of unlawful police conduct by large groups of officers, and did not set forth specific acts of misconduct against the police witness individually. Thus, cross-examination of this witness regarding the federal lawsuits was properly denied … . People v Crupi, 2019 NY Slip Op 03614, Second Dept 5-8-19

DARDEN HEARING REQUIRED.

PROBABLE CAUSE FOR THE SEARCH OF AN APARTMENT DEPENDED UPON INFORMATION FROM THE CONFIDENTIAL INFORMANT, A DARDEN HEARING WAS THEREFORE NECESSARY, MATTER REMITTED FOR THE HEARING (SECOND DEPT).

The Second Department determined Supreme Court should have held a Darden hearing because the detective observed the confidential informant (CI) enter the building but did not observe the CI go to the apartment where the drugs were allegedly purchased. Therefore probable cause for the search of the apartment depended upon the CI's information. The appeal was held in abeyance and the matter was remitted for the hearing:

The Court of Appeals has held that a Darden hearing is necessary where there is insufficient evidence to establish probable cause without information provided by a confidential informant … . "[A] Darden rule is necessary in order to fulfill the underlying purpose of Darden: insuring that the confidential informant both exists and gave the police information sufficient to establish probable cause, while protecting the informant's identity. The surest way to accomplish this task is to produce the informant for an in camera examination" … . This procedure is "designed to protect against the contingency, of legitimate concern to a defendant, that the informer might have been wholly imaginary and the communication from him [or her] entirely fabricated" … . "[T]he court should conduct an in camera inquiry outside the presence of defendant and his [or her] counsel, and make a summary report regarding the existence of the informer and communications made by the CI to the police, taking precautions to protect the anonymity of the CI to the maximum extent possible" … . People v Nettles, 2019 NY Slip Op 03816, Second Dept 5-15-19

EXCITED UTTERANCES.

911 CALL MADE FIVE MINUTES AFTER THE ASSAULT PROPERLY ADMITTED AS AN EXCITED UTTERANCE, AN EXCEPTION TO THE HEARSAY RULE (SECOND DEPT).

The Second Department determined the victim's 911 call was properly admitted as an excited utterance, even though the call was made about five minutes after the assault with a butcher knife:

"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 determination of admissibility of a statement as an excited utterance is entrusted in the first instance to the trial court, which "must assess not only the nature of the startling event and the amount of time which has elapsed between the occurrence and the statement, but also the activities of the declarant in the interim to ascertain if there was significant opportunity to deviate from the truth" … . Here, the evidence demonstrated that the 911 calls qualified as excited utterances. First, the nature of the attack on the complainant was the type of startling event that would cause "physical shock or trauma" … . Further, the 911 calls were made only approximately five minutes after the event, and in those intervening minutes, the complainant ran across the street from the scene of the incident to his apartment to bandage his wound. Under these circumstances, this short interval of time did not "detract[ ] from [the] spontaneity" of the statements … . People v Jaber, 2019 NY Slip Op 03988, Second Dept 5-22-19

GUILTY PLEAS, JUDGES, KNOWING AND VOLUNTARY, APPEALS.

ALTHOUGH THE ARGUMENT WAS NOT PRESERVED, THE APPEAL WAS CONSIDERED IN THE INTEREST OF JUSTICE, DEFENDANT INDICATED HE DID NOT UNDERSTAND THE NATURE OF THE CRIME TO WHICH HE PLED GUILTY BUT THE JUDGE MADE NO FURTHER INQUIRY, THE PLEA WAS THEREFORE NOT KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY ENTERED (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction in the interest of justice, determined defendant's guilty plea was not knowingly, intelligently and voluntarily entered:

We agree with defendant that his plea was not knowingly, intelligently, and voluntarily entered … . Although defendant failed to preserve that contention for our review because "his motion to withdraw his plea was made on grounds different from those advanced on appeal" … , and this case does not fall within the "narrow exception" to the preservation rule … , we exercise our power to review defendant's contention as a matter of discretion in the interest of justice … .

"A trial court has the constitutional duty to ensure that a defendant, before pleading guilty, has a full understanding of what the plea connotes and its consequences" … . After Supreme Court accepted defendant's

guilty plea, defendant stated that he was confused by the plea proceeding, and the court asked him if he had any questions about the consequences of pleading guilty. Defendant then made a series of remarks from which it became apparent that he did not understand the nature of the crime to which he had entered his guilty plea. Although defendant was "obviously confused," the court made no further inquiry whether he understood the plea or its consequences … . People v Hector, 2019 NY Slip Op 03504, Fourth Dept 5-3-19

INCLUSORY CONCURRENT COUNTS.

INCLUSORY CONCURRENT COUNTS OF THE AGGRAVATED VEHICULAR HOMICIDE CONVICTIONS SHOULD HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department dismissed the inclusory concurrent counts of the aggravated vehicular homicide convictions:

As the People correctly concede, the defendant's convictions of vehicular manslaughter in the first degree (Penal Law § 125.13[3], [4]), vehicular manslaughter in the second degree (Penal Law § 125.12[1]), reckless driving (Vehicle and Traffic Law § 1212), and operating a motor vehicle while under the influence of drugs (Vehicle and Traffic Law § 1192[4]) must be vacated and those counts of the indictment must be dismissed as inclusory concurrent counts of the convictions of aggravated vehicular homicide (see CPL 300.40[3][b]; Penal Law § 125.14[3], [4]…). People v Aniano, 2019 NY Slip Op 03797, Second Dept 5-15-19

INDICTMENTS, NOT AUTHORIZED.

THE COURT DID NOT AUTHORIZE THE SECOND SUPERSEDING INDICTMENT PROCURED BY THE PEOPLE AFTER A MISTRIAL, THE SECOND SUPERSEDING INDICTMENT WAS A NULLITY, CONVICTION REVERSED (THIRD DEPT).

The Third Department, reversing defendant's conviction, determined the second superseding indictment, procured after a mistrial, was a nullity:

Before trial commenced, the People obtained a superseding indictment … . A jury trial on the superseding indictment ensued; however, after the jury was impaneled and sworn, defendant's motion for a mistrial was granted. The People subsequently obtained a second superseding indictment … . …

… [T]he second superseding indictment is a nullity and assert, therefore, that defendant's conviction must be reversed and the matter remitted for further proceedings on the first superseding indictment. In declaring a mistrial, County Court did not dismiss the superseding indictment or authorize the People to re-present new charges to a grand jury. Accordingly, the People were limited to retrying defendant upon the superseding indictment, and the second superseding indictment was a nullity … . Where, as here, an indictment is a nullity, "any action or consequence that flowed from its filing . . . was necessarily a nullity as well"… . Accordingly, the judgment must be reversed. People v Moseley, 2019 NY Slip Op 03408, Third Dept 5-2-19

JUDGES, DIRECT NEGOTIATION OF PLEA DEAL.

THE TRIAL JUDGE'S NEGOTIATION OF A PLEA DEAL DIRECTLY WITH THE CO-DEFENDANT, IN RETURN FOR THE CO-DEFENDANT'S ESSENTIAL TESTIMONY IDENTIFYING THE DEFENDANT AS ONE OF THE ROBBERS DEPICTED IN A VIDEO, DEPRIVED DEFENDANT OF HIS RIGHT TO A FAIR TRIAL (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a concurrence, reversing the Appellate Division, determined the trial judge had deprived defendant of a fair trial by negotiating a plea agreement directly with the co-defendant in return for the co-defendant's testimony against the defendant. Although the defendant and co-defendant in this robbery case were captured on video, their faces were covered. At trial the co-defendant identified the defendant as the person depicted in the video:

It is undisputed that, as the Appellate Division concluded, the trial court "personally negotiate[ed] and enter[ed] into a quid pro quo cooperation agreement with the codefendant whereby the court promised to sentence the codefendant within a specific range in exchange for his testimony against defendant" (151 AD3d at 1639). In so doing, the trial court improperly "assume[d] the advocacy role traditionally reserved for counsel" … and ventured from its own role as a neutral arbiter "[s]tationed above the clamor of counsel or the partisan pursuit of procedural or substantive advantage" … . Indeed, whatever its subjective intentions, the trial court effectively procured a witness in support of the prosecution by inducing the codefendant to testify concerning statements the codefendant made to police—which identified defendant as one of the robbers—in exchange for the promise

of a more lenient sentence. Significantly, by tying its assessment of the truthfulness of the codefendant's testimony to that individual's prior statements to police, the trial court essentially directed the codefendant on how the codefendant must testify in order to receive the benefit of the bargain … . Under these circumstances, the trial court's conduct "conflicted impermissibly with the notion of fundamental fairness" … . That is, by assuming the function of an interested party and deviating from its own role as a neutral arbiter, the trial court denied defendant his due process right to "[a] fair trial in a fair tribunal" (In re Murchison, 349 US at 136). This error is not subject to harmless error review and requires reversal … . People v Towns, 2019 NY Slip Op 03527, CtApp 5-7-19

JURY INSTRUCTIONS, JUSTIFICATION DEFENSE.

BECAUSE THE DEFENDANT DREW HIS GUN BEFORE THE UNARMED VICTIM "SWIPED" AT IT, THE DEFENDANT WAS THE INITIAL "DEADLY FORCE" AGGRESSOR AND WAS NOT ENTITLED TO THE JUSTIFICATION-DEFENSE JURY INSTRUCTION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, reversing the Appellate Division, determined defendant (Mr. Brown) was not entitled to the jury instruction on the justification defense. The Court of Appeals found that the defendant was the initial "deadly force" aggressor because he was wielding the gun before the unarmed victim (Mr. Cabbagestalk) "swiped" at the gun:

Mr. Wolf [an eyewitness who testified at trial] said he heard the older man [defendant] say, "Stay away from my daughter, don't come around here." Mr. Cabbagestalk responded, "you can't tell me where to be." According to Mr. Wolf, Mr. Cabbagestalk was "getting in the older guy's face a little bit," "trying to back him down," and Mr. Marshall [who was with Mr. Cabbagestalk] was trying to calm Mr. Cabbagestalk down.

Mr. Wolf testified … he observed Mr. Cabbagestalk throwing a few punches at Mr. Brown but that he believed those punches did not reach Mr. Brown. Mr. Wolf also testified that Mr. Brown was holding a gun slightly "above waist high" and "pointed away from him." Mr. Cabbagestalk then "swiped" at Mr. Brown's gun … … [A]t some point before Mr. Cabbagestalk's last swing or swipe, Mr. Cabbagestalk said, "if you going to pull a gun out, you got to use it." Mr. Brown did just that, shooting Mr. Cabbagestalk in the chest. * * *

Because Mr. Brown's drawing of his gun under these circumstances constituted the imminent threat of deadly physical force, the "initial aggressor" rule bars Mr. Brown from claiming justification unless a reasonable jury

could conclude either: (1) that Mr. Brown withdrew from the encounter after drawing his gun, communicated that withdrawal to Mr. Cabbagestalk, and Mr. Cabbagestalk thereafter used or threatened imminent use of deadly physical force (Penal Law § 35.15[1][b]), or (2) that Mr. Cabbagestalk himself was the initial "deadly force" aggressor. No reasonable jury could reach either conclusion based on the evidence in this case, even viewing the evidence in the light most favorable to Mr. Brown (as we must). People v Brown, 2019 NY Slip Op 03529, CtApp 5-7-19

JURY INSTRUCTIONS, WRITTEN INSTRUCTIONS, DANGEROUS INSTRUMENT.

PROVIDING WRITTEN INSTRUCTIONS TO THE JURY OVER DEFENDANT'S OBJECTION REQUIRED REVERSAL AND A NEW TRIAL, HOT LIQUID CAN BE A DANGEROUS INSTRUMENT WITHIN THE MEANING OF THE PENAL LAW (FIRST DEPT).

The First Department, reversing defendant's conviction, determined that "defendant is entitled to a new trial because the court provided written instructions to the jury, at its request, but over defendant's objection (see People v Johnson , 81 NY2d 980 [1993])." The court also noted that the jury could have reasonably found that the hot liquid thrown by defendant qualified as a dangerous instrument (see Penal Law §§ 10.00[10],[13]; see also People v Adolph , 299 AD2d 257, 257 [1st Dept 2002], lv denied 99 NY2d 579 [2003])." People v Peralta, 2019 NY Slip Op 03539, First Dept 5-7-19

JURY INSTRUCTIONS, JUSTIFICATION DEFENSE.

THE MAJORITY DID NOT RULE OUT THE POSSIBILITY THAT THE NON-DEADLY-FORCE JUSTIFICATION-DEFENSE JURY INSTRUCTION COULD BE APPROPRIATE IN A SECOND DEGREE ASSAULT CASE, BUT HELD THAT GIVING THE DEADLY-FORCE JUSTIFICATION-DEFENSE INSTRUCTION WAS NOT ERROR HERE (CT APP).

The Court of Appeals, over a concurrence, determined the jury was properly instructed on the "deadly force" justification defense on the assault second count. Defendant was convicted of beating the victim with a belt with

a metal buckle, which was deemed a "dangerous instrument." The defendant argued he was entitled to the "non-deadly" or "ordinary" physical force justification-defense jury instruction:

The Penal Law defines "[d]eadly physical force" as "physical force which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury" (Penal Law § 10.00 [11]). A "[d]angerous instrument" is defined as "any instrument, article, or substance . . . which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury" (id. § 10.00 [13]). Defendant argues that the statutory definitions, while similar, are not identical and that a jury may convict a defendant of a crime containing a dangerous instrument element without necessarily concluding that the defendant used deadly physical force. …

There is no per se rule regarding which justification instructions are appropriate based solely on the fact that the defendant has been charged with second-degree assault with a dangerous instrument. Instead, as in every case where the defendant requests a justification charge, trial courts must view the record in the light most favorable to the defendant and determine whether any reasonable view of the evidence would permit the factfinder to conclude that the defendant's conduct was justified, and, if so, which instructions are applicable … .

Under the particular circumstances of this case, the jury instruction does not require reversal … . Viewing the record in the light most favorable to defendant, there is no reasonable view of the evidence that defendant merely "attempted" or "threatened" to use the belt in a manner readily capable of causing death or serious physical injury … but that he did not "use" it in that manner … . People v Vega, 2019 NY Slip Op 03530, CtApp 5-7-19

JURY NOTES, RECONSTRUCTION HEARING.

JURY NOTE FOUND IN THE COURT FILE BY APPELLATE COUNSEL WAS, AFTER A RECONSTRUCTION HEARING, DETERMINED TO HAVE BEEN A DRAFT WHICH WAS DISCARDED BY THE JURY, AS OPPOSED TO A NOTE OF WHICH COUNSEL SHOULD HAVE BEEN NOTIFIED, THEREFORE THE PROHIBITION OF RECONSTRUCTION HEARINGS WITH RESPECT TO THE HANDLING OF JURY NOTES DID NOT APPLY (CT APP).

The Court of Appeals, over a substantive concurrence, determined, based upon a reconstruction hearing held by Supreme Court at the direction of the Appellate Division, a jury note found in the court file by appellate counsel

was a draft that was discarded by the jury. Therefore the strict requirements surrounding notification of counsel of the contents of notes from the jury, and the prohibition of reconstruction hearings in that context, did not apply:

We recently held that where the record does not establish that counsel was provided meaningful notice of the contents of a substantive jury note, "the sole remedy is reversal and a new trial," not a reconstruction hearing (People v Parker, 32 NY3d 49, 62 [2018]). However, the purpose of the reconstruction hearing at issue here was not to determine whether the court complied with the counsel notice requirements of CPL 310.30 and People v O'Rama (78 NY2d 270, 276 [1991]). Instead, the hearing was to determine whether, in the first instance, Exhibit XIV reflected a "jury . . . request [to] the court for further instruction or information" (CPL 310.30) such that those obligations were triggered. Moreover, the finding of the courts below, following the reconstruction hearing, that Exhibit XIV was a draft note that the jury discarded is supported by the record and, thus, beyond our further review. People v Meyers, 2019 NY Slip Op 03658, CtApp 5-9-19

JURY SELECTION, FOR CAUSE CHALLENGE.

DEFENDANT'S FOR CAUSE CHALLENGE TO A PROSPECTIVE JUROR WHO SAID HE WAS 'NOT SURE' HE COULD BE IMPARTIAL SHOULD HAVE BEEN GRANTED, CONVICTION REVERSED (FIRST DEPT).

The First Department, reversing defendant's conviction, determined defendant's for cause challenge to a prospective juror should have been granted:

The challenged panelist made a statement reflecting a state of mind likely to preclude the rendering of an impartial verdict (see CPL 270.20[1][b]), and the court did not elicit an unequivocal assurance that in rendering a verdict based on the evidence, the panelist could set aside any bias … . The juror expressly stated that he was "not sure" he could be impartial in a case involving a registered sex offender. His general statement about needing to hear the facts did not address his ability to overcome the specific bias he had expressed. "If there is any doubt about a prospective juror's impartiality, trial courts should err on the side of excusing the juror, since at worst the court will have replaced one impartial juror with another" … . People v Rodriguez, 2019 NY Slip Op 03734, First Dept 5-14-19

JURY SELECTION, BATSON CHALLENGES.

IN THE FACE OF BATSON CHALLENGES, THE FACTS THAT A JUROR HAD SERVED ON A HUNG JURY AND WORKED AT A SOUP KITCHEN AND ANOTHER JUROR WORKED FOR A COMMUNITY ORGANIZATION HELPING HIV-POSITIVE DRUG USERS WERE DEEMED VALID, RACE-NEUTRAL REASONS FOR STRIKING THE JURORS, THE CONCURRENCE NOTED THESE REASONS WERE BASED UPON QUESTIONABLE ASSUMPTIONS (FIRST DEPT)

The First Department determined the reasons provided by the prosecutor for striking jurors in the face of Batson challenges were race-neutral. The concurrence called into question the validity of striking jurors on the basis of a "questionable assumption that social service workers, who volunteer in soup kitchens and work in HIV clinics, and persons who satisfy their civic duty as jurors in trials resulting in hung juries, are unduly sympathetic to criminal defendants:"

The court properly denied defendant's application pursuant to Batson v Kentucky (476 US 79 [1986]). … The record supports the court's finding that the nondiscriminatory reasons provided by the prosecutor for the challenges … were not pretextual. One panelist had previously served on a hung jury, which we have found to be a valid race-neutral reason for a peremptory challenge … . An additional non-pretextual explanation for challenging this panelist was the prosecutor's association of her service as a coordinator at a soup kitchen with possible associations with drug users, which raised a concern with the prosecutor that she might have harbored sympathy towards a defendant charged with drug offenses. Somewhat analogously, we previously have found the absence of a racial pretext for peremptory challenges premised on a panelist's social service orientation, which might lead the panelist to sympathize with someone in the defendant's position … . People v Teran, 2019 NY Slip Op 03532, First Dept 5-7-19

MENTAL HYGIENE LAW, SEX OFFENDERS.

EVIDENCE THAT DEFENDANT SEX OFFENDER SUFFERS FROM UNSPECIFIED PARAPHILIC DISORDER (USPD) MAY BE ADMISSIBLE IN AN ARTICLE 10 TRIAL, THE EVIDENCE WAS EXCLUDED BELOW, VERDICT VACATED AND PETITION REINSTATED (FIRST DEPT).

The First Department, reversing Supreme Court, determined that evidence of unspecified paraphilic disorder (USPD) can be admitted in a sex offender civil management trial. The evidence was excluded at the Mental Hygiene Law article 10 trial. The verdict that defendant does not suffer from a mental abnormality was vacated and the petition was reinstated:

In Matter of State of New York v Hilton C. (158 AD3d 707 [2d Dept 2018] …), the Second Department held that the evidence in the record before it, which is similar to the evidence in the record presently before us, failed to establish that "the diagnosis of unspecified paraphilic disorder [USPD] has achieved general acceptance in the psychiatric and psychological communities so as to make expert testimony on that diagnosis admissible" … . In the absence of any other New York State appellate authority, Supreme Court … that USPD was precluded as a diagnosis in article 10 proceedings.

However, we find, contrary to the Second Department, and consistent with the decision in Matter of Luis S. v State of New York (166 AD3d 1550 [4th Dept 2018]) that the type of evidence presented at the Frye hearing … in this case — such as the evidence concerning the inclusion of USPD as a diagnosis in the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), which signals its general acceptance by the psychiatric community — is sufficient to satisfy the State's burden of showing that the USPD diagnosis meets the Frye standard.

Accordingly, the verdict that respondent does not suffer from a mental abnormality, rendered after the article 10 trial, from which USPD evidence was excluded, must be vacated, the petition reinstated, and the matter remanded for further proceedings, including a determination whether the evidence meets the threshold standard of reliability and admissibility … . Matter of State of New York v Jerome A., 2019 NY Slip Op 03531, First Dept 5-7-19

PAROLE, CIVIL CONTEMPT FINDING AGAINST PAROLE BOARD CHAIR.

FINDING OF CIVIL CONTEMPT AGAINST THE CHAIR OF THE NYS PAROLE BOARD WAS WARRANTED, ALTHOUGH ORDERED TO CONDUCT A DE NOVO HEARING ON PETITIONER-INMATE'S APPLICATION FOR RELEASE ON PAROLE, THE EVIDENCE SUPPORTED THE CONCLUSION THAT THE BOARD DENIED PAROLE BASED ON THE SEVERITY OF THE OFFENSE ALONE, WITHOUT CONSIDERING THE STRONG FACTORS WHICH FAVORED RELEASE (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Leventhal, determined that the Chair of the NYS Parole Board was properly held in contempt for failing to comply with an order granting petitioner, in inmate who had served 40 years in prison for murdering a police office, a de novo hearing on his application for parole release. The court noted that this is the first time a court had held a parole board chair in contempt. The court found that the Board based its denial of parole solely on the severity of the offense, and did not consider the strong factors favoring release, in violation of the order:

Here, under the unique facts of this particular case, we agree with the Supreme Court's exercise of its discretion in granting the petitioner's motion to hold the appellant … in civil contempt for the Board's failure to comply with the Supreme Court's judgment dated October 2, 2015. In the judgment dated October 2, 2015, the Supreme Court, after concluding, among other things, that the Board's determination to deny parole release was not supported by an application of the factual record to the statutory factors set forth in Executive Law § 259-i, that the Board's determination was based exclusively on the severity of the petitioner's offense, and that there was no rational support in the record for the Board's determination, remitted the matter to the Board "to make a de novo determination on petitioner's request for parole release" to be held before a different panel of the Board.

As previously noted, the Board did not appeal from that judgment. Rather, it purported to comply with the judgment by rendering a new determination following a de novo interview before a different panel and, in its written decision and in the transcript of the interview, purported to comply with its responsibilities to consider the requisite statutory factors. However, the Supreme Court, after conducting an evidentiary hearing, decided that the Board again denied parole release exclusively on the basis of the underlying conviction without giving consideration to the statutory factors. Consequently, the Supreme Court held that a finding of civil contempt was warranted. Matter of Ferrante v Stanford, 2019 NY Slip Op 03334, Second Dept 5-1-19

PAROLE.

PAROLE BOARD DID NOT CONSIDER PETITIONER'S YOUTH AT THE TIME OF THE OFFENSES AND APPEARS TO HAVE DENIED PETITIONER'S APPLICATION FOR RELEASE ON PAROLE SOLELY BASED ON THE SERIOUSNESS OF THE OFFENSES, DE NOVO INTERVIEW IN FRONT OF A DIFFERENT PANEL ORDERED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the parole board did not support the denial of petitioner's application for release on parole with detailed reasons as required by Executive Law 259-i[2][a][i]. Petitioner was a juvenile at the time of the murders during a robbery attempt. He has been incarcerated for 36 years. He earned college degrees and assumed an leadership role in helping inmates. The Second Department concluded the parole board focused on the nature of the offenses and did not take petitioner's youth at the time of the offenses, or his accomplishments, into consideration:

"[A] juvenile homicide offender . . . has a substantive constitutional right not to be punished with life imprisonment for a crime reflect[ing] transient immaturity'"… . "[T]he foundational principle' of the Eighth Amendment jurisprudence regarding punishment for juveniles is that [the] imposition of a [s]tate's most severe penalties on juvenile offenders cannot proceed as though they were not children'" … . "A parole board is no more entitled to subject an offender to the penalty of life in prison in contravention of this rule than is a legislature or a sentencing court"… . Consequently, "[f]or those persons convicted of crimes committed as juveniles who, but for a favorable parole determination will be punished by life in prison, the [Parole] Board must consider youth and its attendant characteristics in relationship to the commission of the crime at issue" … . …

Neither the transcript of the September 2016 interview nor the Parole Board's September 2016 determination shows that the Parole Board considered the petitioner's youth at the time and "its attendant characteristics" in relationship to the crimes he committed. Instead, the record reflects that the Parole Board did not factor in the petitioner's age at the time and the impact that his age had on his decisions and actions during the commission of these crimes when it decided to deny him parole release based on "the serious nature of the instant offenses." Matter of Rivera v Stanford, 2019 NY Slip Op 03601, Second Dept 5-8-19

PAROLEES, SEARCHES, REASONABLE SUSPICION.

PAROLE OFFICER'S SEARCH OF PAROLEE'S APARTMENT, BASED UPON A TIP FROM A PERSON KNOWN TO THE PAROLE OFFICER, WAS SUPPORTED BY REASONABLE SUSPICION, TWO-JUSTICE DISSENT (THIRD DEPT).

The Third Department, reversing Supreme Court, over a two-justice dissent, determined that the parole officer's, Rosa's, search of defendant-parolee's apartment, which was based on a tip from a person known to the parole officer, was supported by reasonable suspicion:

Although a parolee does "not surrender his [or her] constitutional rights against unreasonable searches and seizures[,] . . . what may be unreasonable with respect to an individual who is not on parole may be reasonable with respect to one who is" … . Accordingly, a search of a parolee undertaken by a parole officer is constitutional if "the conduct of the parole officer was rationally and reasonably related to the performance of the parole officer's duty . . . [and was] substantially related to the performance of duty in the particular circumstances" … . A parole officer's duty is twofold and sometimes inconsistent in nature because a parole officer not only "has an obligation to detect and to prevent parole violations for the protection of the public from the commission of further crimes[, but] he [or she] also has a responsibility to the parolee to prevent violations of parole and to assist [the parolee] to a proper reintegration into [the parolee's] community" … .

Here, there can be little doubt that Rosa's search of defendant's residence due to the informant's tip was reasonably related to Rosa's duties as a parole officer … . Therefore, the key inquiry is whether Rosa, based upon the information provided by the informant, had reasonable suspicion to conduct the search … . Rosa's testimony at the suppression hearing revealed that the information was not from an anonymous tipster (compare People v Burry, 52 AD3d at 858), but rather was from another parolee with whom Rosa was familiar and with whom he had interacted prior to receiving the information. Rosa testified that the informant indicated that he or she had firsthand knowledge of the drug activity at defendant's residence. Therefore, based upon the circumstances of this case — including that defendant had been on parole for less than a month and therefore had no proven track record of compliance with parole rules — Rosa's search of defendant's residence was founded on reasonable suspicion and, as such, was lawful … . People v Wade, 2019 NY Slip Op 03851. Third Dept 5-16-19

SANDOVAL, JUDGES.

TRIAL JUDGE ALLOWED THE PROSECUTOR TO QUESTION DEFENDANT ABOUT THE FACTS UNDERLYING PRIOR CONVICTIONS IN VIOLATION OF THE SANDOVAL RULING, CONVICTIONS REVERSED (SECOND DEPT).

The Second Department, reversing defendant's convictions, determined the trial judge implicitly changed the Sandoval ruling by allowing the prosecutor to cross-examine the defendant about the underlying facts of prior convictions:

Prior to the trial, the Supreme Court conducted a Sandoval hearing (see People v Sandoval, 34 NY2d 371), after which the court ruled that, should the defendant testify on his own behalf, the People would be permitted to ask whether he had two prior felony convictions. However, the People were not permitted to elicit the underlying facts of either of those crimes. …

Without seeking an amendment of the Supreme Court's Sandoval ruling, the prosecutor then asked whether he was being arrested that day in 2008 "because there was a DNA match of [him] committing a burglary." Defense counsel objected, the objection was overruled, and the defendant denied that this was true. The prosecutor persisted in that line of inquiry, and asked whether the defendant had been convicted of burglary in the third degree in 2009. The defendant responded that "[y]es [he] was convicted of a case in 2008." Nonetheless, without asking for a modified Sandoval ruling, the prosecutor brought up, no less than six times, that the 2008 conviction was for burglary and involved DNA, going so far to ask the defendant to "explain" the facts of his 2008 conviction, with the court instructing the defendant to do so. In one instance, after asking the defendant to confirm that he was charged in the instant case with burglary in the second degree, the prosecutor remarked, in effect, that the instant crime was "the same type of DNA hit that happened back in 2008." …

The defendant here was denied … [the right to make an informed choice whether to testify] when, after making what he believed to be an informed judgment and taking the witness stand, the Supreme Court implicitly changed the ruling upon which he relied by allowing the prosecutor to continue her course of prejudicial questioning despite objections from defense counsel. People v Walters, 2019 NY Slip Op 03632, Second Dept 5-8-19

SEALING, HARVEY WEINSTEIN TRIAL.

MOLINEUX/SANDOVAL HEARING IN THE HARVEY WEINSTEIN SEXUAL MISCONDUCT PROSECUTION WAS PROPERLY CLOSED TO THE PUBLIC AND THE RECORD OF THE HEARING WAS PROPERLY SEALED, NEWS-MEDIA COMPANIES' PETITION TO UNSEAL THE RECORD DENIED (FIRST DEPT).

The First Department denied the Article 78 petition brought by news-media companies seeking to unseal the Molineux/Sandoval hearing transcript in the felony sexual misconduct prosecution of Harvey Weinstein. The presiding judge had closed the hearing to the public and sealed the record of it:

While the First Amendment guarantees the public and the press a qualified right of access to criminal trials … , this right of access may be limited where courtroom closure is necessitated by a compelling state governmental interest, and where the closure is narrowly tailored to serve that interest … . Such compelling interests may include the defendant's right to a fair trial, including the right to "fundamental fairness in the jury selection process" … . …

Proceedings cannot be closed unless specific findings are made on the record, demonstrating that "closure is essential to preserve higher values and is narrowly tailored to serve that interest" … . Where the interest asserted is the right of the accused to a fair trial, specific findings must be made demonstrating that, "there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent," and "reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights" … .

The subject matter of the Molineux /Sandoval hearing – allegations of prior uncharged sexual offenses by the defendant, the admissibilty of which is disputed – was likely to be prejudicial and inflammatory. Further, some or all of the allegations may have been determined to be inadmissible at trial, or may not be offered at trial even if found potentially admissible. Contrary to petitioners' suggestion, the People have represented that some of the information has not yet been made public. Matter of New York Times Co. v Burke, 2019 NY Slip Op 03903, First Dept 5-16-19

SEARCHES, EMERGENCY EXCEPTION.

THE WARRANTLESS SEARCH OF A HOME TO RETRIEVE A HANDGUN DEFENDANT HAD THROWN UNDER A CHAIR IN THE PRESENCE OF THE POLICE WAS NOT JUSTIFIED UNDER ANY EXCEPTION TO THE WARRANT REQUIREMENT, THE PLAIN VIEW DOCTRINE DID NOT APPLY BECAUSE THE OFFICER DID NOT KNOW WHAT THE DEFENDANT HAD THROWN UNDER THE CHAIR, THE EMERGENCY EXCEPTION DID NOT APPLY BECAUSE THE DEFENDANT WAS IN CUSTODY WHEN THE OFFICER REENTERED THE HOME TO LOOK UNDER THE CHAIR (SECOND DEPT).

The Second Department determined the handgun seized in a warrantless search inside a home should have been suppressed, and subsequent statements made by the defendant should have been suppressed as the fruit of the illegal search. The defendant's psychiatrist had called the police to tell them defendant had a gun and was paranoid. The defendant had previously threatened to shoot police officers. Officer Temple was given permission by defendant's mother to enter the home. Then defendant ran to the back of the house and threw something under a chair. After the defendant was in custody Officer Temple went back into the house, lifted up the chair and seized a handgun from under the chair. Up until that point Officer Temple did not know what the object was, so the plain-view justification for a warrantless search was not available:

Contrary to the People's contention, the consent of the defendant's mother to the police to enter the home to speak with the defendant did not constitute a consent to Officer Temple's search of the living room … . Moreover, contrary to the People's contention, the seizure of the firearm does not fall within the plain view exception … . Officer Temple's testimony as to what he believed the object was, based upon the 911 call, his police experience, and military training, does not meet the requirement of the plain view doctrine, since he testified that he did not know what the object was until he moved the chair … . The People do not assert on appeal that the seizure was lawful pursuant to the emergency exception and, in any event, any exigency abated once the defendant was detained … .

Under the circumstances of this case, the physical evidence that was recovered from the residence must be suppressed, as the search was illegal, and the defendant's subsequent statements to law enforcement officials must be suppressed as fruit of the poisonous tree … . People v Hickey, 2019 NY Slip Op 03364, Second Dept 5-1-19

SENTENCING, JUDGES, SENTENCE-COMMITMENT, PRESENTENCE REPORT, APPEALS.

WAIVER OF APPEAL INVALID, COURT NOT BOUND BY PURPORTED COMMITMENT TO A PARTICULAR SENTENCE AT THE TIME OF THE PLEA, PRESENTENCE REPORT INADEQUATE, SENTENCE REVERSED (SECOND DEPT).

The Second Department, reversing defendant's sentence and remitting for resentencing, determined defendant's waiver of appeal was invalid and the sentencing court did not have sufficient information about the defendant at the time of sentencing. The presentence investigation report was incomplete, in part because there was no interpreter available. The Second Department further determined that the sentencing court could not be bound by a purported commitment to the prosecutor at the time of the plea to impose a particular sentence:

Given the defendant's inexperience with the criminal justice system, the Supreme Court's terse colloquy at the plea allocution was insufficient to advise the defendant of the nature of the right to appeal … . There is no indication in the record that the defendant understood the distinction between the right to appeal and the other trial rights that are forfeited incident to a plea of guilty … . Although the defendant signed a written waiver of the right to appeal, nothing in the record demonstrates that the document was translated for the defendant, who required the use of a Sinhala interpreter, before it was presented to him for signature … . …

"…. [A] sentence negotiated prior to the plea, and in most cases prior to receipt of a presentence report, does not automatically become the sentence of the court" … . The determination of an appropriate sentence requires the court to exercise its discretion "after due consideration given to, among other things, the crime charged, the particular circumstances of the individual before the court and the purpose of a penal sanction, i.e., societal protection, rehabilitation and deterrence" … . …

Most troubling … is that in preparing the presentence investigation report for the Supreme Court in advance of sentencing, the Department of Probation did not interview the defendant because it was "unable to secure an interpreter" on two scheduled dates for an interview. Thus, the presentence investigation report does not contain any information regarding the defendant's mental status, educational background, employment history, or military background. The report indicates that the defendant's physiological health was "unknown," and that his psychological condition was "unavailable." Even though the Department of Probation did not interview the defendant, the report indicates that the defendant "reported no use of controlled substances and/or alcohol."

Under the circumstances here, the information contained in the record of the plea proceeding, the sentencing proceeding, and the presentence investigation report was insufficient for a sentencing court to exercise discretion in determining an appropriate sentence. People v Pelige, 2019 NY Slip Op 04204, Second Dept 5-29-19

SEX OFFENDER REGISTRATION ACT (SORA), JUDGES, DUE PROCESS.

JUDGE'S SUA SPONTE ASSESSMENT OF POINTS ON A GROUND OF WHICH THE DEFENDANT WAS NOT NOTIFIED VIOLATED DEFENDANT'S DUE PROCESS RIGHT TO NOTICE AND AN OPPORTUNITY TO RESPOND (FOURTH DEPT).

The Fourth Department, reversing County Court's SORA risk assessment, determined that the judge's assessing points on a ground of which defendant was not given prior notice was a violation of due process. The issue was considered on appeal in the interest of justice (there was no objection at the SORA hearing):

"The due process guarantees in the United States and New York Constitutions require that a defendant be afforded notice of the hearing to determine his or her risk level pursuant to SORA and a meaningful opportunity to respond to the risk level assessment" . As a result, "[a] defendant has both a statutory and constitutional right to notice of points sought to be assigned" … , and "a court's sua sponte departure from the Board's recommendation at the hearing, without prior notice, deprives the defendant of a meaningful opportunity to respond" … . Here, neither the Board nor the People requested the assessment of points for a continuing course of sexual misconduct on the ground that defendant engaged in three or more acts of sexual contact with the victim over a period of at least two weeks … . At the conclusion of the SORA hearing, however, the court proceeded to assign additional points under that category on the ground that the grand jury testimony of the victim's mother established that there was a third uncharged incident of sexual contact. Defendant was never provided any notice that points would be assessed as a result of a third uncharged incident and thus was not given a meaningful opportunity to respond to the court's risk level assessment. People v Chrisley, 2019 NY Slip Op 03505, Fourth Dept 5-3-19

SEX OFFENDER REGISTRATION ACT (SORA), AUTOMATIC OVERRIDE.

THE TERM 'AUTOMATIC OVERRIDE' DOES NOT MANDATE THAT AN OFFENDER WITH A PRIOR SEX-CRIME FELONY BE CLASSIFIED A LEVEL THREE SEX OFFENDER, BOTH COUNTY COURT AND DEFENSE COUNSEL MISUNDERSTOOD THE TERM (THIRD DEPT).

The Third Department, reversing County Court, determined that both County Court and defense counsel misunderstood the meaning of "automatic override" in the context of whether an offender who has a prior felony sex-crime conviction mandates a level three classification:

… [T]he use of the words "automatically" or "automatic override" does not mandate that a particular individual be classified as a risk level three sex offender; rather, the "automatic" nature of the override results in a presumptive risk level three classification — a classification from which a court indeed may depart based upon the evidence presented … . Thus, "the application of the override for a prior felony sex crime is presumptive, not mandatory or automatic" … , and "[t]reating the presumptive override as mandatory is a ground for reversal" … . …

Defense counsel's misunderstanding of the override — as evidenced by his erroneous statement that defendant's prior felony conviction for a sex crime resulted in "an automatic override" to a risk level three classification — deprived defendant of the opportunity to present factors in support of a downward departure; similarly, County Court's misapplication of the override — premised upon the court's mistaken belief that "a mandatory override to a risk level [three] status" was "required" — foreclosed any inquiry into whether the presumptive risk level three classification was in fact warranted … . People v Jones, 2019 NY Slip Op 04060, Third Dept 5-22-19

STATEMENTS. MIRANDA, HANDCUFFS.

STATEMENTS MADE BY THE DEFENDANT WHEN HE WAS HANDCUFFED IN THE BACK SEAT OF A POLICE CAR SHOULD HAVE BEEN SUPPRESSED, TANGIBLE EVIDENCE RETRIEVED AS A RESULT OF THE STATEMENTS SHOULD HAVE BEEN SUPPRESSED AS WELL (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined defendant's statements, made when he was handcuffed in the back seat of a police car, should have been suppressed. Defendant had possession of a wallet and had demanded money from the owner of the wallet in exchange for its return. The owner of the wallet went to the police. The police spoke to the defendant on the phone, and he again demanded money for the wallet. The defendant again demanded money for the wallet when the police went to his house. The wallet was retrieved after defendant made the statements in the police car, so the wallet should have been suppressed as well:

Not only was the defendant handcuffed in the back seat of a police vehicle, the detectives testified that the defendant was bargaining with them for his freedom by offering to get the wallet if they would remove the handcuffs and release him. Detective Bookstein specifically testified that the defendant was not free to leave the police vehicle. The record also demonstrates that the statements that the defendant made to the detectives during their conversation with him about the wallet were the result of the functional equivalent of interrogation and should have been suppressed … . People v Torres. 2019 NY Slip Op 03380, Second Dept 5-1-19

STREET STOPS, DE BOUR.

HAVING DEFENDANT WAIT WITH TWO POLICE OFFICERS WHILE A THIRD TOOK HIS ID TO AN APARTMENT TO VERIFY DEFENDANT'S CLAIM HE WAS VISITING A FRIEND IN THE APARTMENT WAS NOT JUSTIFIED UNDER DE BOUR, CONVICTION REVERSED (CT APP).

The Court of Appeals, reversing the Appellate Division in this street stop case, determined having defendant "stand right there" with two police officers, while a third took defendant's ID to an apartment to verify defendant's claim he was visiting a friend there, was not justified under De Bour:

Defendant … was approached by New York Police Department officers after they observed him exiting and reentering a building in a New York City Housing Authority development several times. Upon the officers' request, defendant explained that he was visiting a friend who lived in the building. The officers asked defendant for his identification, which he provided. An officer then took defendant's identification to the eleventh floor of the building to verify whether the occupant of the apartment defendant identified knew him … . Another officer instructed defendant to "stand right there" under the watch of two officers. When the first officer returned, having determined that the occupant of the apartment did not know defendant, defendant was arrested for trespassing. At the precinct, officers conducted a search of defendant's person incident to his arrest and recovered 42 bags of crack cocaine from his groin area. * * *

At its inception, this was "a general, nonthreatening encounter in which an individual is approached for an articulable reason and asked briefly about his or her identity, destination, or reason for being in the area" … . That request implicated only level one of De Bour … and required only an objective credible reason to make basic inquiries of defendant … . On this record, the initial inquiry was justified.

However, the record demonstrates that the encounter thereafter rose beyond a level-one request for information, which the People failed to justify as lawful. Consequently, the People have failed to preserve any argument that the encounter in this case was justified under levels two or three of De Bour. People v Hill, 2019 NY Slip Op 03405, CtApp 5-2-19

SUPERIOR COURT INFORMATION.

THE SUPERIOR COURT INFORMATION TO WHICH DEFENDANT PLED GUILTY WAS JURISDICTIONALLY DEFECTIVE BECAUSE IT DID NOT INCLUDE AN OFFENSE CHARGED IN THE FELONY COMPLAINT OR A LESSER INCLUDED OFFENSE (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 an offense that was charged in the felony complaint or a lesser included offense:

… [T]he waiver of indictment and SCI are jurisdictionally defective because they did not charge an "offense for which the defendant was held for action of a grand jury" (CPL 195.20 …). Pursuant to CPL 195.20, a waiver of indictment must contain "each offense to be charged in the [SCI]" which "may include any offense for which the defendant was held for action of a grand jury and any offense or offenses properly joinable." To that end, "a

defendant is held for the action of a [g]rand [j]ury on both the offense charged in the felony complaint as well as its lesser included offenses" … , because, "[f]or purposes of waiver of indictment, a charge that is a lesser included offense of a crime charged in the felony complaint is viewed as the 'same offense' and may be substituted for the original charge in a waiver of indictment and SCI"… . Accordingly, "a defendant may waive indictment and plead guilty to an SCI that names a different offense from that charged in the felony complaint only when the crime named in the SCI is a lesser included offense of the original charge" … . …

Inasmuch as it is possible to commit the crime charged in the felony complaint — possession of a loaded weapon — without committing the crime charged in the SCI — possession with intent to use the weapon unlawfully — the crime charged in the SCI is not a lesser included offense of the former and the SCI could not serve as a proper jurisdictional predicate for defendant's guilty plea … . People v Diego, 2019 NY Slip Op 04054, Third Dept 5-22-19

VICTIM WITNESS PROTECTION ACT.

NEITHER THE VICTIM WITNESS PROTECTION ACT NOR THE MANDATORY VICTIM RESTITUTION ACT PROVIDES A PRIVATE RIGHT OF ACTION FOR A JUDGMENT BASED SOLELY UPON RESTITUTION ORDERED IN A CRIMINAL CASE (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Acosta, determined that neither the Victim Witness Protection Act (VWPA) nor the Mandatory Victim Restitution Act (MVRA) provided for a private right of action for a judgment based solely upon restitution ordered in a criminal case:

… [T]he VWPA makes civil remedies available to collect restitution but does not make restitution a civil judgment that can simply be enforced in a private suit … . Rather, a victim may pursue a civil action for damages in connection with the injuries that resulted in a restitution order, and the restitution order may provide assistance in proving liability, but the petitioner may not rely entirely on the restitution order and the amount ordered in the criminal action. Thus, the petitioner can separately plead and prove liability and damages under either a statutory or a common-law cause of action if the restitution order fails to satisfy the victim … . …

Some cases may support the conclusion that under the MVRA, a victim who has obtained a lien on property based on a restitution order may enforce that lien in a special court proceeding … . However, these cases provide no support for the conclusion that a victim may enforce the abstract judgment itself without obtaining a lien, especially given that this would contradict the language of 18 USC § 3664(m), explicitly requiring a lien.

Petitioner has obtained an abstract of judgment, but never recorded it as a lien on defendant's property or brought an action to enforce it. … [T]he MVRA does not provide a cause of action for a private victim to enforce an abstract judgment on a restitution order, which is exactly what petitioner is seeking to do. Therefore, petitioner has no standing under the MVRA. Matter of Mikhlov v Festinger, 2019 NY Slip Op 04046, First Dept 5-23-19

YOUTHFUL OFFENDERS, JUDGES.

SENTENCING COURT MUST MAKE A THRESHOLD DETERMINATION WHETHER DEFENDANT IS ELIGIBLE FOR YOUTHFUL OFFENDER STATUS IN THIS FIRST DEGREE RAPE CASE, SENTENCE VACATED (THIRD DEPT).

The Third Department vacated defendant's sentence for rape first degree and remitted the matter for a determination of defendant's eligibility for youthful offender status:

… [A] "youth" is defined as "a person charged with a crime alleged to have been committed when he [or she] was at least [16] years old and less than [19] years old" (CPL 720.10 [1]), and an "eligible youth" is "a youth who is eligible to be found a youthful offender" (CPL 720.10 [2]). "Every youth is so eligible" (CPL 720.10 [2]) — subject to certain statutory exceptions including, as pertinent here, a conviction for "rape in the first degree . . ., except as provided in [CPL 720.10 (3)]" … . To that end, CPL 720.10 (3) provides, in relevant part, that "a youth who has been convicted of . . . rape in the first degree . . . is an eligible youth if the court determines that one or more [statutory] factors exist," including "mitigating circumstances that bear directly upon the manner in which the crime was committed" … . …

Defendant was 17 years old at the time of the underlying offense and, despite his conviction of rape in the first degree, he was not statutorily precluded from being found to be an eligible youth (see CPL 720.10 [3]). Where, as here, a defendant has been convicted of an enumerated sex offense … , the sentencing court, "in order to fulfill its responsibility under CPL 720.20 (1) to make a youthful offender determination for every eligible youth, . . . must make the threshold determination as to whether the defendant is an eligible youth by considering the factors set forth in CPL 720.10 (3)" … — "'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" … . People v Robertucci, 2019 NY Slip Op 04057, Third Dept 5-23-19