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The Third Department affirmed defendant's conviction of aggravated cruelty to animals (Agriculture and Markets Law 353-a) noting that the justification defense (on which the jury was instructed) applies only to persons, not animals. The defendant unsuccessfully argued the presentence report should have been ignored because his attorney was not present during the interview with the Probation Department:

Defendant contends that the court should have disregarded the report in its entirety and ordered a new one because the Probation Department did not abide by counsel's request to be present for the presentence interview. "New York's right to counsel applies to every critical stage of the criminal proceeding" … . However, in light of the nonadversarial nature of a routine presentence interview by a probation officer, courts have held that such an interview does not constitute a critical stage of the proceedings … . Therefore, defendant did not have a right to have counsel present during that interview. In any event, County Court granted defendant's request to strike the portion of the report containing defendant's statement related to this crime. People v Brinkley, 2019 NY Slip Op 05728, Third Dept 7-18-19

APPEALS, ATTORNEYS, JUDGES.

THE TRIAL JUDGE'S FAILURE TO PUT ON THE RECORD THE REASONS FOR REQUIRING DEFENDANT TO WEAR A STUN BELT WAS NOT A MODE OF PROCEEDINGS ERROR AND COUNSEL'S FAILURE TO OBJECT WAS NOT INEFFECTIVE ASSISTANCE, THE RELEVANT PROCEDURAL REQUIREMENTS WERE NOT ANNOUNCED BY THE COURT OF APPEALS UNTIL EIGHT YEARS AFTER THE TRIAL; THE LOSS OF TRIAL EXHIBITS DEMONSTRATING WHETHER THE PEREMPTORY JUROR CHALLENGES WERE EXHAUSTED IS HELD AGAINST THE DEFENDANT BECAUSE OF HIS FAILURE TO SEEK A TIMELY RECONSTRUCTION HEARING (FOURTH DEPT)

The Fourth Department affirmed defendant's murder conviction and the denial of his motion to vacate the judgment of conviction in a decision addressing several substantive issues not summarized here. The trial court's failure to put on the record the reasons for requiring defendant to wear a stun belt during trial was not a mode of proceedings error and the failure to object was not ineffective assistance because the relevant procedural requirements were not announced by the Court of Appeals until eight years after defendant's trial. The apparent loss of exhibits which would demonstrate whether defendant exhausted the peremptory juror challenges was held against the defendant because of the passage of time and the failure to seek a timely reconstruction hearing:

Assuming, arguendo, that defendant was forced to wear a stun belt, we need not reverse the court's order denying defendant's CPL 440.10 motion because defendant failed to object to the use of a stun belt, and the improper use of a stun belt is not a mode of proceedings error … . Thus, the failure to object to the stun belt's use means that "reversal would not have been required" on a direct appeal … . As a result, even on the merits, there is no basis upon which to vacate the judgment of conviction … . Defendant further contends that trial counsel was ineffective in failing to object to the use of a stun belt. We disagree. The seminal case requiring that a court place findings of fact on the record before requiring a defendant to wear a stun belt is … , which was decided eight years after the judgment in this case. Although the Court's decision in Buchanan "did not announce "new" rules of law' "… , we nevertheless conclude that trial counsel was not ineffective in failing to anticipate the procedural requirements established by the Court's decision in Buchanan … . * * *

… [D]efendant has provided no explanation for the 14-year delay between the judgment and direct appeal, and "there was nothing to prevent [defendant] from pursuing his appeal" … . Moreover, defendant "has not shown that, if he had acted diligently, an adequate reconstruction of those proceedings could not have been achieved"

… . Had defendant, through his former, privately retained appellate counsel, perfected his appeal in a timely manner, it is possible that the slips of paper might still have been with the file, and it is highly probable that the relevant parties would have been able to recall whether defendant exhausted his peremptory challenges. Where, as here, the lengthy delay is attributable to a defendant's action or inaction, the weight of appellate authority holds that the absence of the relevant transcripts or exhibits should be held against the defendant and the judgment affirmed … . People v Osman, 2019 NY Slip Op 05903, Fourth Dept 7-31-19

APPEALS, EVIDENCE.

DEFENDANT'S MANSLAUGHTER CONVICTION REVERSED AS AGAINST THE WEIGHT OF THE EVIDENCE, TWO-JUSTICE DISSENT (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, reversed defendant's manslaughter conviction as against the weight of the evidence. The defendant had been alone with the victim, his girlfriend's 13-month-old son, for a short time on the day the baby vomited and was gasping for breath (May 2). The baby died hours later at the hospital. Blunt force head trauma was deemed the cause of death. The defendant was not arrested until four years later after mother had unsuccessfully attempted to have the defendant admit to harming the child in recorded phone conversations. The medical examiner testified on direct that the baby was injured on May 2. But on cross the medical examiner acknowledged the baby could have been injured on May 1, when defendant had no contact with the baby. Other people had access to the baby on May 1, but they were not interviewed because the medical examiner had told the investigators the injuries occurred on May 2:

The only evidence adduced at trial that was not within the knowledge of the police in 2010, when they decided not to arrest defendant, was the testimony of a woman who dated him from 2008 to 2013, with a one-year break in 2010 when he dated [the baby's mother]. The witness testified that, in the years following the victim's death, defendant would sometimes talk about the victim and become emotional but would say that he was not guilty and "didn't do it." When questioned by the prosecutor about a written statement she had given to the police, the witness testified that defendant "admitted to doing something to the baby but he never said what or why." On cross-examination, the witness testified that defendant, whom she had not dated for years, never admitted that he harmed the victim. All in all, the witness' testimony was of only marginal probative value.

Given the equivocal medical evidence with respect to the time frame within which the fatal injuries could have been inflicted, the weakness of the circumstantial evidence, and the lack of direct evidence that defendant caused

the victim's injuries, we conclude that the People failed to prove defendant's guilt beyond a reasonable doubt … . People v Gonzalez, 2019 NY Slip Op 05947, Fourth Dept 7-31-19

APPEALS, EVIDENCE.

THE PEOPLE DID NOT PROVE DEFENDANT POSSESSED A RAZOR BLADE PARTIALLY WRAPPED IN TAPE WITH THE INTENT TO USE IT UNLAWFULLY AGAINST ANOTHER, THE CONVICTION WAS AGAINST THE WEIGHT OF THE EVIDENCE (SECOND DEPT).

The Second Department, reversing defendant's conviction as against the weight of the evidence, determined the People did not prove that defendant possessed a razor blade partially wrapped in tape with the intent to use it unlawfully against another:

Penal Law § 265.15(4) provides, in relevant part, that "[t]he possession by any person of any . . . weapon, instrument, appliance or substance designed, made or adapted for use primarily as a weapon, is presumptive evidence of intent to use the same unlawfully against another."

"The presumption of unlawful intent under Penal Law § 265.15(4), like all statutory presumptions in New York, is a permissive presumption, meaning that [it] allows, but does not require, the trier of fact to accept the presumed fact, and does not shift to the defendant the burden of proof'" … . "Before the presumption may apply, the People must establish beyond a reasonable doubt the predicate fact or facts the statute requires be proved'" … . "If the People succeed in this endeavor, they are entitled to rely on the presumption, which form[s] part of the support for [their] prima facie case' against the defendant" … . "The presumption may be rebutted by any evidence in the case; that is, evidence presented by the defendant or the People" … "Evidence rebutting the presumption will not negate the existence of a prima facie case; rather it presents an alternate set of facts, or inferences from facts, to the jury. The jury then has the right to choose between the two versions'" … . …

… [T]he People failed to establish beyond a reasonable doubt that the razor blade recovered from the defendant was "designed, made or adapted for use primarily as a weapon" … . There was no testimony by the detectives indicating that they knew based on their experience that the primary use of this type of instrument, by virtue of being wrapped in black tape, was as a weapon, or that they attempted to ascertain from the defendant the manner in which he utilized the blade … . Furthermore, there was no evidence from which it could be inferred that the

defendant considered the instrument to be a weapon … . People v Rodgers, 2019 NY Slip Op 06002, Second Dept 7-31-19

APPEALS, SENTENCING, IMMIGRATION LAW.

WAIVER OF APPEAL INVALID; ALREADY COMPLETED SENTENCE REDUCED BECAUSE OF THE IMMIGRATION CONSEQUENCES OF THE ORIGINAL SENTENCE; MATTER CONSIDERED ON APPEAL IN THE INTEREST OF JUSTICE (SECOND DEPT).

The Second Department, reducing the defendant's already completed sentence in the interest of justice, determined the waiver of appeal was invalid and the immigration consequences of defendant's sentence warranted a reduction to 364 days:

Given the defendant's age of 20 years, that he had dropped out of high school in the 11th grade, that he had documented mental health issues, and his limited experience in the criminal justice system, the Supreme Court's terse colloquy regarding the appeal waiver was insufficient … . A written appeal waiver, such as the one signed by the defendant, is "not a complete substitute for an on-the-record explanation of the nature of the right to appeal" … . It is not "sufficient for the trial court to defer to the defendant's off-the-record conversations with defense counsel by merely confirming with defense counsel that he or she has discussed the waiver of the right to appeal with the defendant" … . Thus, the appeal waiver does not preclude review of the defendant's excessive sentence claim.

Although the defendant has served his respective sentences, the question of whether the sentences imposed should be reduced is not academic, because those sentences may have potential immigration consequences … .

Considering all of the relevant circumstances of this case, including the potential immigration consequences to the defendant, his sentences should be reduced to concurrent definite terms of imprisonment of 364 days … . People v Bakayoko, 2019 NY Slip Op 05677, Second Dept 7-17-19

APPEALS.

DEFENDANT'S WAIVER OF AN APPEAL FROM A JURY VERDICT (AS OPPOSED TO A GUILTY PLEA) WAS VALID (THIRD DEPT).

The Third Department, affirming defendant's conviction, determined a defendant may validly waive an appeal from a jury verdict:

… "[A] defendant may waive his or her right to appeal from a jury verdict" … . The People set forth the terms of the postverdict agreement on the record, including that defendant would waive his right to appeal for a sentencing commitment of time served. County Court then engaged in a thorough colloquy with defendant, during which defendant acknowledged that he had discussed the agreement with counsel to his satisfaction and understood it. County Court explained the right to appeal from the conviction and eventual sentence, distinguished it from the trial rights that defendant had exercised and made clear that defendant was being asked to give it up as part of the agreement. Defendant confirmed that he understood all of this and orally waived his right to appeal. He further executed a written waiver that was handed up prior to sentencing, a document that included assurances that it had been signed by defendant in open court after consulting with defense counsel. We are satisfied from the foregoing that, notwithstanding isolated uses of language more appropriate for a waiver executed as part of a plea agreement, defendant knowingly, voluntarily and intelligently waived his right to appeal … . People v Shanks, 2019 NY Slip Op 05724, Third Dept 7-18-19

ARTICLE 78, JUDGES, ATTORNEYS.

ARTICLE 78 ACTION SEEKING TO PROHIBIT THE TRIAL JUDGE IN A CRIMINAL CASE FROM EXCLUDING TESTIMONY AS PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE DISMISSED AS INAPPROPRIATE; MATTER CONSIDERED AS AN EXCEPTION TO THE MOOTNESS DOCTRINE (THIRD DEPT).

The Third Department determined the Article 78 proceeding brought by the district attorney against the trial judge in a criminal case seeking prohibition should have been dismissed. The trial judge had ruled that the conversations between an attorney and the defendant at the scene of the crime were protected by attorney-client privilege. The Article 78 action sought to prohibit the trial judge from adhering to that ruling. At the time of this

Article 78 proceeding the criminal trial was over and defendant had been convicted. The matter was considered as an exception to the mootness doctrine:

Prohibition is an extraordinary remedy and, in cases involving the exercise of judicial authority, "is available only where there is a clear legal right, and then only when a court . . . acts or threatens to act either without jurisdiction or in excess of its authorized powers" … . Respondent had jurisdiction over the criminal action against Mercer … and was empowered to preclude Doyle from testifying about matters protected by the attorney-client privilege … . Petitioner's core complaint is that respondent erred in determining the scope of that privilege, and she may be correct … . Nevertheless, "prohibition will not lie as a means of seeking collateral review of mere trial errors of substantive law or procedure, however egregious the error may be, and however cleverly the error may be characterized by counsel as an excess of jurisdiction or power" … . To allow review of such matters would have an array of negative impacts, encouraging gamesmanship, "erect[ing] an additional avenue of judicial scrutiny in a collateral proceeding and . . . frustrat[ing] the statutory or even constitutional limits on review" … . Thus, inasmuch as petitioner does not point to "an unlawful use or abuse of the entire action or proceeding," but rather "an unlawful procedure or error in the action or proceeding itself related to the proper purpose of the action or proceeding," prohibition will not lie … . Matter of Heggen v Sise, 2019 NY Slip Op 05620, Third Dept 7-10-19

ATTORNEYS, PRIVILEGE.

EVIDENCE PROPERLY ADMITTED AT TRIAL PURSUANT TO THE CRIME-FRAUD EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE, THE SEARCH WARRANT WAS EXECUTED AT AND THE EVIDENCE WAS SEIZED FROM THE SARATOGA COUNTY PUBLIC DEFENDER'S OFFICE (THIRD DEPT).

The Third Department, in affirming defendant's predatory sexual assault against a child and child pornography convictions, noted that evidence was seized from the Saratoga County Public Defender's Office and the evidence was admissible at trial pursuant to the crime-fraud exception to the attorney-client privilege. The facts are not described in any detail:

Defendant … contends that County Court improperly denied his motion to suppress items seized from the Saratoga County Public Defender's office * * *. … [U]pon review of the search warrant application and accompanying sworn statements, we conclude that County Court properly determined that there was probable cause to issue the warrant … . With respect to defendant's claim of attorney-client privilege, we find that the

crime-fraud exception applied because there was reasonable cause to believe that the items seized pursuant to the search warrant constituted physical evidence of a crime and that their delivery to counsel was for the purpose of concealing evidence, not for seeking legal advice … . People v Gannon, 2019 NY Slip Op 05591, Third Dept 7-11-19

FAMILY LAW.

IN THIS NEGLECT PROCEEDING STEMMING FROM THE PARENTS' REFUSAL TO ALLOW THEIR TEENAGE CHILD TO RETURN HOME, THE PARENTS SHOULD HAVE BEEN ALLOWED TO PRESENT EVIDENCE OF THEIR TEENAGE CHILD'S BEHAVIOR WHICH RESULTED IN CRIMINAL PROCEEDINGS AND AN ORDER OF PROTECTION IN FAVOR OF FATHER, AS WELL AS EVIDENCE OF THEIR ATTEMPTS TO MEET WITH THE AGENCY AND WORK OUT A PLAN (FIRST DEPT).

The First Department, reversing Family Court, determined that respondent-parents should have been allowed to present evidence of their teenage child's behavior in this neglect proceeding. The parents refused to allow the child to return home after a physical fight between the child and father which resulted in criminal proceedings against the child and an order of protection in favor of the father:

Parents are obligated to support a child under the age of 21 (Family Court Act § 413[1][a]) and to exercise a "minimum degree of care" in supplying the child with adequate food, clothing, shelter, and education … . In determining whether a parent has neglected a child by failing to meet that standard, the court "must evaluate parental behavior objectively," by asking whether "a reasonable and prudent parent [would] have so acted, or failed to act, under the circumstances then and there existing" … . This Court has concluded in many circumstances that a child's history of disciplinary issues did not justify a parent in excluding the child from the home while failing to cooperate with the agency's efforts to address the child's problems and to return the child to the home … .

However, none of those cases involved pending criminal proceedings and an order of protection against the child and in favor of one parent. Respondents were entitled to a full and fair opportunity to present evidence … showing that they acted reasonably as prudent parents under all the circumstances … , and that, based on a founded fear it would be unsafe for the child to return home, they were unable to continue to care for him … . Instead, the court limited evidence to the time period alleged in the petition, precluding respondents from

presenting other evidence concerning the child's behavior. Respondents also were precluded from presenting evidence of their attorney's communications with the agency, which was offered to show their willingness to meet and plan with the agency provided that the child was not present and their attorney could be present. Matter of Elijah M. (Robin M.), 2019 NY Slip Op 05471, First Dept 7-9-19

FAMILY LAW.

SUMMARY JUDGMENT, BASED IN PART ON THE COLLATERAL ESTOPPEL EFFECT OF RESPONDENT'S CONVICTION FOR ENDANGERING THE WELFARE OF A CHILD, PROPERLY GRANTED (THIRD DEPT).

The Third Department determined petitioner's motion for summary judgment in this neglect proceeding was properly granted. The motion was based in party on respondent's endangering-the-welfare-of-a-child conviction:

… "[A] criminal conviction may be given collateral estoppel effect in a Family Court proceeding where (1) the identical issue has been resolved, and (2) the defendant in the criminal action had a full and fair opportunity to litigate the issue of his or her criminal conduct" … . Defendant does not dispute that he had a full and fair opportunity to litigate his criminal conduct before the trial court … . … In order to find a defendant guilty of endangering the welfare of a child, it must be proven that "[h]e or she knowingly act[ed] in a manner likely to be injurious to the physical, mental or moral welfare of a child less than [17] years old" (Penal Law § 260.10 [1]). In turn, "[t]o establish neglect, [a] petitioner must prove by a preponderance of the evidence that a child's physical, mental or emotional condition was harmed or is in imminent danger of harm as a result of a failure on the part of the parent to exercise a minimum degree of care" … . …

… [T]the factual allegations underlying respondent's conviction were adequate to support the finding of neglect. Matter of Lilliana K. (Ronald K.), 2019 NY Slip Op 05358, Third Dept 7-3-19

GUILTY PLEAS, ATTORNEYS.

DEFENDANT SUBMITTED EVIDENCE RAISING CONCERNS ABOUT WHETHER HIS GUILTY PLEA WAS ENTERED VOLUNTARILY AND WHETHER HE RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL, DEFENDANT'S MOTION TO VACATE THE JUDGMENT OF CONVICTION SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING (THIRD DEPT).

The Third Department, reversing County Court, determined defendant's motion to vacate his conviction by guilty plea should not have been denied without a hearing. Defendant presented DNA evidence of a genetic inability to metabolize certain medications he was taking to address his mental health. In addition, defendant raised issues concerning ineffective assistance of counsel. Defense counsel, who was aware of defendant's mental health issues, had sent a letter to the court requesting to withdraw as counsel immediately after defendant told the court he felt coerced into pleading guilty. Three days later defendant entered a guilty plea saying he was not coerced. The court noted that the DNA evidence submitted by the defendant was not the kind of DNA evidence (i.e., demonstrating innocence) which can be used as the basis of a motion to vacate a judgment of conviction:

Given the evidence of defendant's metabolic deficiency and the ongoing efforts to chemically treat his mental health issues before and after his guilty plea, further development of the record is required to determine whether defendant's mental capacity was impaired at the time of his plea and, if so, whether he was able to knowingly, voluntarily and intelligently plead guilty to attempted murder in the second degree … . …

… [D]efense counsel stated to defendant on multiple occasions that he had "absolutely no defense" to the charged crimes. In our view, defendant's submissions demonstrate the need for further development of the record regarding off-the-record conversations that took place between defendant and defense counsel regarding defendant's case and possible defenses, … so as to discern whether defendant knowingly, voluntarily and intelligently waived any potential defenses, including an involuntary intoxication defense or the defense of not responsible by reason of mental disease or defect … .

… [D]efense counsel stated, among other things, that, should defendant refuse to plead guilty, he would no longer agree to represent defendant and, in attempting to dissuade defendant from proceeding to trial, invoked the potential disgrace to his family. People v Adamo, 2019 NY Slip Op 05813, Third Dept 7-25-19

GUILTY PLEAS, SENTENCING.

DEFENDANT WAS ENTITLED TO FURTHER INQUIRY TO DETERMINE WHETHER SHE VIOLATED THE PLEA AGREEMENT, COUNTY COURT DID NOT SENTENCE HER IN ACCORDANCE WITH THE PLEA AGREEMENT BASED SOLELY ON THE PROSECUTOR'S ASSERTION SHE DID NOT COMPLETE A MENTAL HEALTH COURT PROGRAM (SECOND DEPT).

The Second Department determined defendant was entitled to further inquiry into whether she violated the terms of her plea agreement. Defendant was not sentenced in accordance with the agreement based solely on the prosecutor's assertion she had not successfully completed a Mental Health Court program:

The County Court failed to conduct an inquiry sufficient to assure that the defendant had, in fact, violated the terms of the plea agreement and that the information upon which it based the sentence was reliable and accurate … . Thus, we remit the matter … for a sufficient inquiry and a new determination as to whether the defendant violated the terms of the plea agreement, and for resentencing thereafter.

Moreover, as acknowledged by the People, the County Court should not have pronounced sentence without first receiving a presentence investigation report … . People v Dimon, 2019 NY Slip Op 05417, Second Dept 7-3-19

GUILTY PLEAS.

GUILTY PLEA VACATED IN THE INTEREST OF JUSTICE, COLLOQUY DID NOT INFORM DEFENDANT OF ALL THE RIGHTS SHE WAS GIVING UP (THIRD DEPT).

The Third Department, reversing County Court and vacating defendant's guilty plea, over a two-justice concurrence and a dissent, exercised its interest of justice appellate jurisdiction because defendant was not fully informed of the rights she was giving up by entering a guilty plea. The concurrence argued that the potential consequences of the relief granted by an appellate court should not be part of the equation in exercising the interest of justice jurisdiction. The majority noted that defendant had already served her sentence and will now

face the original charges. The dissent argued this was not an appropriate case for invoking the interest of justice appellate jurisdiction:

In a notably brief plea colloquy, County Court advised defendant that, by pleading guilty, she would forever relinquish "the right to go to trial, the right to testify, to call witnesses, [and to] cross-examine the People's witness[es]." There was no discussion of the privilege against self-incrimination or the right to be tried by a jury, nor was there any inquiry into whether defendant had conferred with counsel and understood the constitutional rights that she was automatically waiving by pleading guilty … . "While there is no mandatory catechism required of a pleading defendant, there must be an affirmative showing on the record that the defendant waived his or her constitutional rights" … . As this record contains no such showing, the guilty plea is invalid … . People v Glover, 2019 NY Slip Op 05587, Third Dept 7-11-19

GUILTY PLEAS.

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

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

A sex offender is required to register with the Division "no later than ten calendar days after any change of address" and to pay a fee of ten dollars "each time such offender registers any change of address" (Correction Law § 168-f[4]). A sex offender who fails to so register within the required time period is guilty of a felony (seeCorrection Law § 168-t).

As the defendant contends, his factual allocution during the plea proceeding negated an essential element of the offense charged, thereby casting significant doubt upon his guilt. Specifically, the defendant indicated that he provided the Division with the address of a homeless shelter that he was using, although he acknowledged that there were some nights when he could not stay in the shelter. He explained "sometimes if you don't get there in time all the beds are taken, so sometimes you get turned away." On those days, the defendant asserted, he stayed at a friend's house instead. These statements tended to demonstrate that the defendant did not, in fact, change

his address and thus, was not required to notify the Division … . People v Wright, 2019 NY Slip Op 05428, Second Dept 7-3-19

IDENTIFICATION, ATTORNEYS.

WITNESS DID NOT IDENTIFY THE DEFENDANT AT A LINEUP, SAYING ONLY SHE WAS 'LEANING TOWARD' CHOOSING THE DEFENDANT, THAT TESTIMONY WAS INADMISSIBLE UNDER CPL 60.25; PROSECUTOR'S REMARKS IN SUMMATION HARSHLY CRITICIZED (SECOND DEPT).

The Second Department, reversing defendant's conviction in the interest of justice, determined a witness's testimony about a lineup identification procedure in which the witness indicated only she was "leaning toward" choosing the defendant was inadmissible. The Second Department further criticized the prosecutor's summation:

… [T]he foundational requirements of CPL 60.25 were not met …. CPL 60.25 is principally concerned with cases where a witness who has validly identified a defendant on a prior occasion is, nevertheless, unable to make a trial identification due to a lapse of memory … permits a witness to testify in a criminal proceeding about his or her own prior identification where the witness is "unable at the proceeding to state, on the basis of present recollection, whether or not the defendant is the person in question" … . The second witness never identified the defendant at the lineup and, thus, there was no prior identification for her to testify about under CPL 60.25 … .

Notably, the impact of the second witness's testimony was highly prejudicial to the defendant. Identification was a crucial and contested issue in this case. Without the second witness's testimony regarding whom she would "lean toward," the evidence of identity consisted primarily of the testimony of the first witness, whose veracity and credibility were questioned because he had lied to detectives and an assistant district attorney, absconded from a police station, and received an extremely favorable cooperation agreement in exchange for his testimony at the defendant's trial. …

… [T]he prosecutor improperly argued to the jury that there were "no coincidences," that the defendant was not the "unluckiest guy" in Brooklyn, that "the evidence fits together . . . all the pieces connect," that "all the evidence points directly at [the defendant] . . . because he's guilty. Because he did these crimes," … and that the jury would have to do "a lot of mental gymnastics to believe the defendant did not commit this crime." She vouched for the credibility of the first witness, arguing that if he had been lying, he would have testified that the defendant

"stab[bed] two people." The prosecutor also referred to the defendant as engaging in "machismo" at the time of the events in question. People v Robles, 2019 NY Slip Op 05572, Second Dept 7-10-19

INCLUSORY CONCURRENT COUNTS.

CONVICTIONS OF INCLUSORY CONCURRENT COUNTS OF AGGRAVATED UNLICENSED OPERATION OF A MOTOR VEHICLE FIRST DEGREE VACATED (SECOND DEPT).

The Second Department determined vacated defendant's conviction of two inclusory concurrent counts of the court alleging aggravated operation of a operation of a motor vehicle in the first degree:

… [T]he counts alleging driving while intoxicated as a felony in violation of Vehicle and Traffic Law § 1192(3) and aggravated unlicensed operation of a motor vehicle in the second degree were inclusory concurrent counts of the count alleging aggravated unlicensed operation of a motor vehicle in the first degree (see CPL 300.30[4]; 300.40[3][b]; Vehicle and Traffic Law §§ 511[2][a][ii]; [3][a][i]; 1192). Accordingly, the defendant's convictions of driving while intoxicated as a felony in violation of Vehicle and Traffic Law § 1192(3), and aggravated unlicensed operation of a motor vehicle in the second degree and the sentences imposed thereon must be vacated, and those counts of the indictment dismissed. Under the circumstances of this case, the defendant's contention that the mandatory surcharge and crime victim assistance fee must be reduced is more appropriately raised before the Supreme Court and, accordingly, we remit the matter to the Supreme Court, Nassau County, to consider this issue … . People v Delcid, 2019 NY Slip Op 05788, Second Dept 7-24-19

INDICTMENTS.

GRAND JURY EVIDENCE SUPPORTED THE MANSLAUGHTER CHARGE BASED UPON THE SALE OF HEROIN WHICH ALLEGEDLY CAUSED THE VICTIM'S DEATH; COUNTY COURT SHOULD NOT HAVE DISMISSED THE MANSLAUGHTER COUNT (THIRD DEPT).

The Third Department, reversing County Court, over a dissent, determined the evidence of manslaughter presented to the grand jury was legally sufficient. Defendant allegedly provided very strong heroin to the victim, causing victim's death:

"In the context of grand jury proceedings, legal sufficiency means prima facie proof of the crimes charged, not proof beyond a reasonable doubt" … . Thus, "if the [People have] established a prima facie case, the evidence is legally sufficient even though its quality or weight may be so dubious as to preclude indictment or conviction pursuant to other requirements" … . …

… [I]n order to find a defendant guilty of manslaughter in the second degree, the People are required to show that he or she "recklessly cause[d] the death of another person" (Penal Law § 125.15 [1]). "A person acts recklessly with respect to a result or to a circumstance . . . when he [or she] is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists" … . …

Given defendant's knowledge of the potency of the drugs that he was distributing and their potential lethality, it is evident that the nature of the risk involved was of such degree "that defendant's failure to perceive it constituted a gross deviation from the standard of care that a reasonable person would observe in the situation" and that his actions were a sufficiently direct cause of the victim's death for him to face the judgment of a jury … . People v Gaworecki, 2019 NY Slip Op 05725, Third Dept 7-18-19

INDICTMENTS.

SUPREME COURT SHOULD NOT HAVE GRANTED DEFENDANT'S MOTION TO DISMISS THE INDICTMENT IN THE FURTHERANCE OF JUSTICE WITHOUT HOLDING A HEARING BECAUSE ESSENTIAL FACTS WERE IN DISPUTE (SECOND DEPT).

The Second Department, reversing Supreme Court, in an appeal by the People, determined defendant's motion to dismiss an indictment in the furtherance of justice should not have been granted without a hearing because the facts were in dispute. The Second Department also noted that the defendant had demonstrated good cause for bringing the motion after the 45-day deadline:

… [T]he Supreme Court should not have decided the motion without conducting a hearing. CPL 210.40 authorizes the court to dismiss an indictment or any count thereof in furtherance of justice, as a matter of judicial discretion, when, after considering certain enumerated factors, the court finds "the existence of some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant upon such indictment or count would constitute or result in injustice"… . In deciding such a motion, "a court must strike a sensitive balance between the individual and the State' interests to determine whether the ends of justice are served by dismissal of the indictment" … . "Such a value judgment hinge[s] on the production of facts in the possession of the prosecution and the defendant'"… . CPL 210.45 requires a hearing when the facts essential to the determination of a motion made pursuant to CPL 210.40 are in dispute … . Here, since the essential facts were in dispute, the court should have conducted a hearing before making its findings of fact … . People v Burke, 2019 NY Slip Op 05991, Second Dept 7-31-19

INVENTORY SEARCH.

THE PEOPLE DID NOT DEMONSTRATE THE SEARCH OF DEFENDANT'S VEHICLE WAS A VALID INVENTORY SEARCH; THE RECORD SUPPORTED COUNTY COURT'S CONCLUSION THE INVENTORY SEARCH WAS A 'PRETEXT' FOR A SEARCH FOR INCRIMINATING EVIDENCE (THIRD DEPT).

The Third Department, in this appeal by the People, determined that the search of defendant's vehicle was not a valid inventory search and the related suppression motion was properly granted:

Although not fatal to the establishment of a valid inventory search … , the People did not admit the relevant tow and impound policy into evidence. The People also failed to ask any substantive questions of the deputy sheriff to establish that the policy was sufficiently standardized, that it was reasonable and that the deputy sheriff followed it in this case. The deputy sheriff only vaguely stated that he conducted the inventory search, radioed for a tow truck and completed the vehicle impound inventory report in accordance with the policy. Further, although the deputy sheriff filled out the impound inventory report, which indicates that the inventory search began at 9:55 a.m., he testified that the search began prior to that time and did not provide any explanation for the discrepancy. Moreover, there was contradictory testimony as to where the deputy sheriff found defendant's wallet — inside the vehicle or on defendant's person. Significantly, if defendant's wallet was inside the vehicle, as the deputy sheriff testified that it was, then the deputy sheriff allegedly took the wallet out of the vehicle but did not include it in the vehicle impound inventory report. In short, the People did not establish the circumstances under which searching the wallet and the closed trunk was justified under the policy … .

… [T]he record supports County Court's conclusion that the alleged inventory search was a "pretext" to locate incriminating evidence. People v Espinoza, 2019 NY Slip Op 05592, Third Dept 7-11-19

JUDGES, APPEALS.

EXCESSIVE INTERFERENCE BY THE TRIAL JUDGE DEPRIVED DEFENDANT OF A FAIR TRIAL; ISSUE CONSIDERED ON APPEAL IN THE INTEREST OF JUSTICE (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined the judge's intervention usurped the roles of the attorneys and deprived defendant of a fair trial. Defense counsel did not object but the issue was considered on appeal in the interest of justice:

"[W]hile a trial judge may intervene in a trial to clarify confusing testimony and facilitate the orderly and expeditious progress of the trial, the court may not take on the function or appearance of an advocate'" … . "The principle restraining the court's discretion is that a trial judge's function is to protect the record, not to make it'"… . Hence, "when the trial judge interjects often and indulges in an extended questioning of witnesses, even where those questions would be proper if they came from trial counsel, the trial judge's participation presents significant risks of prejudicial unfairness" … .

In this case, the Supreme Court engaged in extensive questioning of witnesses, usurped the roles of the attorneys, elicited and assisted in developing facts damaging to the defense on direct examination of the People's witnesses,

bolstered the witnesses' credibility, interrupted cross-examination, and generally created the impression that it was an advocate on behalf of the People. People v Ramsey, 2019 NY Slip Op 05571, Second Dept 7-10-19

JUDGES, ATTORNEYS.

TRIAL COURT DID NOT, AS PROMISED, INSTRUCT THE JURY ON THE PURPOSES OF INTRODUCING HEARSAY EVIDENCE OF THE CHILD-VICTIM'S DISCLOSURES OF SEXUAL ASSAULT AND DEFENSE COUNSEL DID NOT OBJECT; THE MAJORITY CONCLUDED THE ISSUE WAS NOT PRESERVED FOR APPEAL; TWO DISSENTERS ARGUED THE ERROR WAS REVERSIBLE AND DEFENSE COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined that any error in the trial court's failure to instruct the jury on the purposes for the introductions of evidence of the child-victim's disclosure of sexual assault in 2009 and in 2014, evidence which would otherwise be inadmissible bolstering, was not preserved. The dissenters argued that the error was reversible and defense counsel's failure to object constituted ineffective assistance:

From the dissent:

Prior to trial, the People moved in limine for permission to introduce evidence that the victim reported an incident of sexual contact with defendant to her aunt in 2009, and that she again disclosed the incident in 2014. The court concluded that the People could introduce evidence that the victim made a prompt complaint in 2009 if they laid a proper foundation establishing that the complaint was made at the first suitable opportunity, and that they could introduce evidence that the victim reported the contact in 2014 for the sole purpose of establishing how the investigative process began at that time. The court indicated that it would provide an appropriate limiting instruction if the evidence was introduced.

At trial, the People introduced evidence that the victim reported the sexual contact to her aunt in 2009 and to several other people at various times in 2014 and 2015. Nevertheless, the court did not give a limiting instruction either when the testimony was given or at the end of the case. Although we agree with the majority that defendant failed to preserve for our review his contention that the court erred in failing to give the promised charge, we conclude that defendant was deprived of a fair trial by that error, and we would exercise our power to review that contention as a matter of discretion in the interest of justice. * * *

… [Defendant] was deprived of effective assistance by his attorney's failure to object the court's failure to give the promised limiting instruction. The majority concludes that defense counsel's failure to preserve that issue does not rise to the level of ineffective assistance, citing People v Gross(26 NY3d 689, 696 [2016]). We respectfully disagree. In Gross, the majority of the Court of Appeals concluded that defense counsel may not have objected to the prosecutor's comments on the evidence for tactical reasons. Here, there was no possible tactical basis for "defense counsel's inexplicable failure to object" when the court failed to give the promised limiting instruction … . People v Hymes, 2019 NY Slip Op 05441, Fourth Dept 7-5-19

JURORS, CUSTODIAL INTERROGATION, ATTORNEYS.

FOR CAUSE CHALLENGE TO A JUROR WHO FELT POLICE OFFICERS WOULD NOT LIE SHOULD HAVE BEEN GRANTED; STATEMENTS MADE UNDER CUSTODIAL INTERROGATION IN DEFENDANT'S HOME SHOULD HAVE BEEN SUPPRESSED; STATEMENTS MADE AFTER DEFENDANT INVOKED HIS RIGHT TO COUNSEL SHOULD HAVE BEEN SUPPRESSED (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction and granting a new trial, determined that a defense for-cause challenge to a juror should have been granted, unwarned statements made by the defendant in his home were in response to custodial interrogation, and the statements made at the police station were made after defendant had invoked his right to counsel:

… [B]y repeatedly insisting that police officers were unlikely to lie under oath because doing so would endanger their pensions, the prospective juror "cast serious doubt on [her] ability to render a fair verdict under the proper legal standards" and to follow the court's instructions concerning, at a minimum, issues of witness credibility … . The court was therefore "required to elicit some unequivocal assurance from the . . . prospective juror[] that [she was] able to reach a verdict based entirely upon the court's instructions on the law" … . No such assurances were obtained from the prospective juror, …

… [I]t is undisputed that defendant was ordered out of his bedroom by police officers in the middle of the night, directed to remain in a vestibule outside his apartment, and thereafter subjected to pointed, accusatory questions for about an hour. Under those circumstances, we agree with defendant that a reasonable person, innocent of any crime, would not have felt free to leave, and that he was thus in custody during the questioning … . …

… [D]efendant unequivocally invoked his right to counsel by stating "I think I will take the lawyer" or "I think I need a lawyer" … . Thus, we agree with defendant that his statements following his unequivocal invocation of his right to counsel at the police station should have been suppressed as well … . People v Hernandez, 2019 NY Slip Op 05844, Fourth Dept 7-31-19

JURORS.

DEFENDANT'S MOTION TO SET ASIDE THE VERDICT, BASED UPON A JUROR'S KNOWLEDGE AND CONDUCT, SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING (FOURTH DEPT).

The Fourth Department determined defendant's motion to set aside the verdict, based upon a connection between a juror and defendant's mother, should not have been denied without a hearing:

… [T]he court erred in summarily denying his motion to set aside the verdict pursuant to CPL 330.30 (2). The sworn allegations in support of defendant's motion, including those in the affidavit of his mother, indicated that a juror may have had an undisclosed, potentially strained relationship with the mother resulting from attending high school and working together, possibly knew about defendant's criminal history, and purportedly attempted to speak with the mother's husband during a lunch break at trial, and that the alleged misconduct was "not known to the defendant prior to rendition of the verdict" … . We conclude that the allegations " required a hearing on the issue whether the juror's alleged misconduct prejudiced a substantial right of defendant' " … . We therefore hold the case, reserve decision and remit the matter to County Court to conduct a hearing on defendant's CPL 330.30 motion. People v Blunt, 2019 NY Slip Op 05917, Fourth Dept 7-31-19

JURY NOTES, APPEALS.

RECORD IS NOT SUFFICIENT TO DETERMINE HOW THE TRIAL COURT HANDLED NOTES FROM THE JURY, NEW TRIAL ORDERED; CHALLENGE TO THE PROPRIETY OF HOLDING A RECONSTRUCTION HEARING IS MOOT AND WILL NOT BE CONSIDERED AS AN EXCEPTION TO THE MOOTNESS DOCTRINE (FOURTH DEPT).

The Fourth Department, reversing the conviction, determined the record was not sufficient to determine how the trial court handled notes from the jury and reversal was therefore required:

… [R]eversal is required as a result of " the absence of record proof that the trial court complied with its [meaningful notice obligation] under CPL 310.30′ " in response to two substantive jury notes … . Here, the stenographer was unable to transcribe the final day of the trial that included County Court's handling of the jury notes due to an error that rendered the subject electronic stenographic notes unrecoverable, and a reconstruction hearing failed to establish the court's on-the-record handling of those notes. We "cannot assume that the proper procedure was utilized when the record is devoid of information as to how jury notes were handled" … . We therefore reverse the judgment and grant a new trial. In light of our determination, defendant's challenge to the propriety of holding a reconstruction hearing under these circumstances is moot, and we reject defendant's contention that his challenge falls within the exception to the mootness doctrine … . People v Grimes, 2019 NY Slip Op 05461, Fourth Dept 7-5-19

JURY NOTES.

MATTER REMITTED FOR A HEARING ON WHETHER THE TRIAL COURT WAS, OR SHOULD HAVE BEEN, AWARE OF A NOTE FROM THE JURY SUCH THAT THE RESPONSIBILITY TO NOTIFY COUNSEL WAS TRIGGERED (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Garry, holding the appeal in abeyance, determined a hearing was required to determine whether the trial court was aware, or should have been aware, of the existence of a note from the jury such that the court's responsibility to alert counsel was triggered:

We find this case similar to People v Meyers (___ NY3d ___, 2019 NY Slip Op 03658 [2019]), in which the Court of Appeals addressed the circumstance where a purported jury note that had been marked as a court exhibit was discovered in the court file after the trial, presenting circumstances suggesting that it may have been a draft that the jury discarded or chose not to submit to the trial court. * * *

Here, as in Meyers, we are presented with a scanty and ambiguous record, precluding this Court from determining whether County Court's core responsibilities were triggered by its knowledge of the note or by circumstances that should have alerted the court to its presence. Accordingly, we remit the matter for a hearing to assess the circumstances pertaining to the events at trial during the jury's deliberations and the acceptance of its verdict, including the transmission, receipt, marking and communication to the court of all three notes, and for a report to this Court setting out the court's findings. People v Johnson, 2019 NY Slip Op 05344, Third Dept 7-3-19

JUSTIFICATION DEFENSE, DANGEROUS INSTRUMENT.

THE EVIDENCE DEFENDANT USED A PEN TO PUNCTURE THE CHEEK OF THE VICTIM CONSTITUTED EVIDENCE THE DEFENDANT USED A DANGEROUS INSTRUMENT IN THIS ASSAULT SECOND CASE, THE DEFENDANT WAS NOT ENTITLED TO A JURY INSTRUCTION ON THE ORDINARY-NONDEADLY-FORCE JUSTIFICATION DEFENSE (FIRST DEPT).

The First Department determined defendant's request for a jury instruction on the ordinary-nondeadly-force justification defense in this Assault Second prosecution was properly denied. The defendant did not request a jury instruction on the deadly-force-justification defense. Defendant's use of a pen to puncture the victim's cheek constituted use of a dangerous instrument:

The video surveillance captures the defendant reaching into his bag or pocket with his right hand and then immediately striking the complainant with that same hand. Photographs of the complainant's cheek reflect what appears to be a puncture of the cheek. The photograph of the outside of the complainant's cheek shows that there was a thin, horizontal cut adjacent to the round through-and-through puncture on the complainant's cheek, consistent with a sharp object, such as the point of a pen, scratching the complainant's cheek before the object plunged into it.

The record further reveals that police officers who arrived at the scene observed the complainant bleeding from a puncture wound on the side of his face. At the time of defendant's arrest, the police recovered a pen that defendant was holding in his right hand. …

Under the facts presented, the only possible justification charge that would have been available to defendant would have been a charge of justifiable use of deadly, not ordinary, physical force (see Penal Law § 35.15[2]; People v Mickens, 219 AD2d 543, 544 [1st Dept 1995] …). People v Marishaw, 2019 NY Slip Op 05320, First Dept 7-2-19

JUSTIFICATION DEFENSE.

ALTHOUGH THE JURY WAS PROPERLY INSTRUCTED TO ACQUIT ON ALL COUNTS IF THE JUSTIFICATION DEFENSE APPLIED, THE VERDICT SHEET DID NOT MENTION THE JUSTIFICATION DEFENSE WHICH MAY HAVE GIVEN THE JURY THE IMPRESSION THE JUSTIFICATION DEFENSE SHOULD BE CONSIDERED SEPARATELY FOR EACH COUNT, CONVICTION REVERSED (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined that the failure to include the justification defense on the verdict sheet may have led the jurors to believe they had to reconsider the justification defense for each count. The judge had correctly instructed the jurors to acquit on all counts if the justification defense applied, but the omission from the verdict sheet was enough to call the verdict into question:

Supreme Court properly instructed the jurors to consider justification as an element of each count submitted for their consideration. The court also properly instructed the jurors that they must find the defendant not guilty of all counts if they found that the People failed to disprove the defendant's justification defense.

However, the verdict sheet did not mention justification, and instructed the jurors to "continue to" the following count if they found the defendant not guilty of count one, two, three, or four. Therefore, the Supreme Court's instructions, taken together as a whole, may have led the jurors to conclude that deliberation on each crime required reconsideration of the justification defense, even if they had already acquitted the defendant of the previous count based on justification … . There is now no way of knowing whether the jurors acquitted the

defendant of the greater counts on the ground of justification so as to mandate acquittal on the lesser counts … . People v Smith, 2019 NY Slip Op 06004, Second Dept 7-31-19

JUSTIFICATION DEFENSE.

FAILURE TO INSTRUCT THE JURY THAT ACQUITTAL ON THE TOP COUNT BASED UPON THE JUSTIFICATION DEFENSE REQUIRED ACQUITTAL ON ALL THE RELATED LESSER COUNTS REQUIRED REVERSAL (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the jury was not properly instructed on the justification defense. The defendant was acquitted of the top count, attempted murder, and was convicted attempted assault first, a lesser included offense. The jury was not told that an acquittal on the top count based upon the justification defense required an acquittal on all the counts to which the justification defense applied. The issue was not preserved but was considered in the interest of justice:

"[I]n a case involving a claim of self-defense, it is error for the trial court not to instruct the [jury] that, if [it finds] the defendant not guilty of a greater charge on the basis of justification, [it is] not to consider any lesser counts" … . Such failure constitutes reversible error … . …

… [T]he court's instructions, together with the verdict sheet, failed to adequately convey to the jury that, if it found defendant not guilty of attempted murder in the second degree based on justification, it was not to consider the lesser counts to which the justification defense applied … . People v Daniels, 2019 NY Slip Op 05343, Third Dept 7-3-19

KIDNAPPING.

THE VICTIM IN THIS KIDNAPPING CASE ASKED THE DEFENDANT IF SHE COULD GO WITH HIM TO FLORIDA; THE JURY SHOULD HAVE BEEN INSTRUCTED THAT THE INTENT TO VIOLATE OR ABUSE THE VICTIM MUST HAVE EXISTED FOR MORE THAN 12 HOURS, A NEW TRIAL WAS ORDERED ON THAT GROUND; BOTH THE CONCURRENCE AND THE DISSENT ARGUED THERE HAD BEEN NO RESTRAINT WITHIN THE MEANING OF THE KIDNAPPING STATUTE (FOURTH DEPT).

The Fourth Department, over a concurrence and a dissent, determined the jury instruction on the intent element of kidnapping was wrong requiring reversal. Defendant, who was over 21, drove to Florida with the victim, who was 14, and had sex with her during the trip. The victim asked defendant if she could come with him and snuck out of the house without her mother's knowledge. The concurrence argued the restraint element of kidnapping was not proven, but agreed with the majority because that element had been conceded by the defense. The dissent would have reversed and dismissed the indictment, finding the conviction was against the weight of the evidence:

… [T]he weight of the evidence supports a determination that defendant did not innocently acquiesce to the mere request of a 14-year-old acquaintance to drive her to Florida, but rather took advantage of a 14-year-old child's age and inexperience, by driving the victim across multiple state lines, away from her family, in order to engage in an unlawful sexual relationship with a child. * * *

We interpret the statute to mean that kidnapping in the first degree requires that a defendant both restrain a victim for more than 12 hours and possess, for more than 12 hours during the period of restraint, the intent to violate or abuse the victim sexually. Here, however, the court instructed the jury that "intent does not require advanced planning, nor is it necessary that the intent be in the person's mind for any particular period of time." … [W]e conclude that the instruction was erroneous inasmuch as it permitted the jury to find that the element of intent pursuant to section 135.25 (2) (a) had been established even if the jury did not find that the intent existed for more than 12 hours during a period of over 12 hours of restraint. * * *

FROM THE DISSENT: Under these circumstances, it cannot be said that defendant either "secreted" or "held" the victim in his car, or that he intended to prevent her "liberation." She was there voluntarily and of her own accord, which is the very antithesis of being "secreted" or "held" somewhere. People v Vail, 2019 NY Slip Op 05848, Fourth Dept 7-31-19

MENTAL HYGIENE LAW, SEX OFFENDERS.

STATE DID NOT DEMONSTRATE APPELLANT SEX OFFENDER WAS UNABLE TO CONTROL HIS BEHAVIOR, AS OPPOSED TO HAVING DIFFICULTY CONTROLLING HIS BEHAVIOR; THEREFORE RELEASE WITH STRICT SUPERVISION, AS OPPOSED TO CIVIL COMMITMENT, WAS ORDERED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the expert testimony offered by the State did not demonstrate the appellant sex offender was unable to control his behavior, requiring civil commitment, as opposed to having difficulty controlling his behavior, requiring strict supervision. Therefore appellant should be released under a regimen of strict and intensive supervision and treatment:

… [T]he State failed to present clear and convincing evidence that the appellant has an "inability to control sexual misconduct" … . In this regard, the State relied on, inter alia, the testimony of Dr. Stuart Kirschner, a psychologist, at the mental abnormality trial; a "dispositional addendum" report that Kirschner submitted; and a report from a psychologist for the New York State Office of Mental Health, Dr. Trevor Floyd. While Kirschner testified that the appellant had difficulty controlling his actions due to certain impulse control problems, Kirschner also testified that it was "very difficult" to ascertain whether an individual committed a crime because he or she was unable to control his or her conduct or because he or she chose not to control it, and that the distinction between the two was largely "irrelevant." This testimony, considered in conjunction with the other evidence presented by the State, was not sufficient to support a finding, by clear and convincing evidence, that the appellant had an "inabilityto control sexual misconduct" … . Furthermore, Floyd's report, which was based on his own interview with and psychological testing of the appellant, opined that there was insufficient evidence to conclude that the appellant had an inability to control his behavior such that he was a danger to others. The appellant's expert reached a similar conclusion, opining that the appellant was a "good candidate for release under conditions of strict and intensive supervision and treatment." Matter of State of New York v Ted B., 2019 NY Slip Op 05550, Second Dept 7-10-19

MOLINEUX, PROMPT OUTCRY.

EVIDENCE OF PRIOR UNCHARGED SEXUAL OFFENSES WAS NOT ADMISSIBLE UNDER MOLINEUX, HEARSAY EVIDENCE OF VICTIM'S DISCLOSURE TWO AND A HALF YEARS AFTER THE ALLEGED INCIDENT WAS NOT ADMISSIBLE AS A PROMPT OUTCRY, CONVICTION REVERSED (THIRD DEPT).

The Third Department, reversing County Court, determined detailed evidence of prior uncharged sexual offenses was not admissible under Molineux. The defendant was charged with criminal sexual act alleging defendant asked a six or seven year old boy to perform oral sex on him. The People presented in their direct case the testimony of two female relatives of the defendant alleging sexual offenses occurring more than seven years before the victim's disclosure in the instant case. County Court also erroneously allowed hearsay about the victim's disclosure, two and a half years after the alleged incident, under the prompt outcry exception to the hearsay rule:

The female relatives specifically testified to repeated instances of oral sex, vaginal sex and digital penetration by defendant, and one of the female relatives stated that defendant forced her and the other female relative to perform sexual acts upon each other as he watched. Contrary to County Court's conclusion, such detailed testimony was not necessary to complete the narrative as to how and why the victim's disclosure occurred … . Additionally, the prior uncharged acts did not bear a sufficient similarity to the incident underlying the charged crimes so as to constitute, as the People argued, a common scheme or plan or demonstrate defendant's intent or motive … . Accordingly, as the People failed to establish that the proffered evidence was probative of a material issue other than defendant's criminal propensity, County Court erred in permitting such evidence … . Moreover, even if the proffered evidence were relevant to some nonpropensity purpose, County Court erroneously determined that the probative value of the evidence outweighed its prejudicial effect … . People v Saxe, 2019 NY Slip Op 05345, Third Dept 7-3-19

PAROLE SEARCH.

EVIDENCE WAS SEIZED DURING A WARRANTLESS PAROLE SEARCH AT A TIME WHEN DEFENDANT'S POST RELEASE SUPERVISION (PRS) HAD BEEN IMPOSED ADMINISTRATIVELY, WHICH HAS SINCE BEEN FOUND UNCONSTITUTIONAL; BECAUSE THE LAW CONCERNING THE REQUIREMENT OF JUDICIAL IMPOSITION OF PRS IS NOW CLEAR, SUPPRESSING THE EVIDENCE WOULD HAVE NO DETERRENT EFFECT AND IS NOT THEREFORE NECESSARY (FOURTH DEPT).

The Fourth Department determined the ammunition seized during a warrantless parole search of defendant's residence, and which was connected to a shooting, was not subject to suppression. At the time of the search, defendant's post release supervision (PRS) had been imposed administratively and not by a judge–a procedure which has since been rendered invalid by statute. The Fourth Department held that, under these facts, the exclusionary rule, which usually requires suppression of the fruits of a warrantless search, would have no deterrent effect and need not be applied:

… [T]he improper conduct sought to be deterred by application of the exclusionary rule in this case is the unauthorized administrative imposition of PRS by a state entity rather than a sentencing judge. In that regard, defendant contends that the state criminal justice system disregarded the Second Circuit's decision in Earley v Murray (451 F3d 71 [2d Cir 2006]), which held that the administrative imposition of PRS is unconstitutional … , and he contends that application of the exclusionary rule here is necessary to deter similar "misconduct" in the future. We reject that contention.

First, when the parole search took place, in 2007, the issue whether it is proper for the state to administratively impose PRS had not yet been settled … . Second, and more importantly, it is now settled as a matter of state statutory law that only a court may lawfully pronounce a term of PRS as a component of a sentence … and, consequently, all the relevant government actors are now well aware of the law. Under the circumstances, the deterrent effect of applying the exclusionary rule is marginal or nonexistent … . People v Lloyd, 2019 NY Slip Op 05855, Fourth Dept 7-31-19

PAROLE SEARCH.

HANDGUN FOUND IN A COAT IN A CLOSET BY A PAROLE OFFICER WITH A PAROLE ABSCONDER WARRANT SHOULD NOT HAVE BEEN SUPPRESSED (FOURTH DEPT).

The First Department, reversing the suppression court in an appeal by the People, determined the handgun found during a search of defendant's bedroom pursuant to a parole warrant should not have been suppressed. The parole officer testified she was searching a closet to see if defendant was hiding there when she felt a handgun in the pocket of a jacket she had seen defendant wearing:

In Huntley, the Court of Appeals "relied on the dual nature of a parole officer's duties and a parolee's reduced expectation of privacy to hold that a parolee's constitutional right to be secure against unreasonable searches and seizures is not violated when a parole officer conducts a warrantless search that is rationally and reasonably related to the performance of the parole officer's duties" (… see Huntley, 43 NY2d at 179, 181 …). "It would not be enough necessarily that there was some rational connection; the particular conduct must also have been substantially related to the performance of duty in the particular circumstances" … .

Applying this standard, we find that Parole Officer Williams, whose testimony the hearing court credited, acted lawfully in retrieving the firearm from defendant's jacket pocket. While executing a valid parole warrant, and in the course of searching for defendant pursuant to that warrant, Williams inadvertently felt an object, that both she and her supervisor believed to be a gun, in the jacket pocket. Because parolees are not permitted to possess firearms, Williams's discovery meant that defendant was in further violation of the conditions of his supervised release. Thus, the minimally invasive step of retrieving the gun from the pocket was "rationally and reasonably related to the performance of [her] duty as [defendant's] parole officer" … . People v Jennings, 2019 NY Slip Op 05838, First Dept 7-30-19

PROBATION.

DEFENDANT'S PROBATION SHOULD NOT HAVE BEEN REVOKED ABSENT A HEARING OR AN ADMISSION (FOURTH DEPT).

The Fourth Department, reversing County Court, determined defendant's probation should not have been revoked absent a hearing or an admission:

"A court may not revoke a sentence of probation without finding that the defendant has violated a condition [there]of . . . and affording [him or her] an opportunity to be heard (see CPL 410.70 [1]). The statutory requirements may be satisfied either by conducting a revocation hearing pursuant to CPL 410.70 (3) . . . , or through an admission by the defendant of the violation, coupled with a proper waiver of [his or her] right to a hearing" … . Here, as the People correctly concede, defendant never admitted to violating his probation and the court never conducted a revocation hearing. People v Ayotunji A., 2019 NY Slip Op 05916, Fourth Dept 7-31-19

SENTENCING.

ALTHOUGH DEFENDANT MET THE CRITERIA FOR A PERSISTENT FELONY OFFENDER THE RESULTING SENTENCE WAS TOO HARSH; SENTENCE REDUCED BY THE APPELLATE DIVISION (FOURTH DEPT).

The Fourth Department determined that, although defendant met the criteria for a persistent felony offender, he should not have been sentenced as a persistent felony offense due to the nature of his prior offenses. His sentence was reduced from 15 to life to 9 to 18 years. Defendant had been offered 2 !/2 to 5 prior to trial:

… [T]he imposition of persistent felony offender status is unduly harsh and severe. The sentencing court's determination to sentence a defendant as a persistent felony offender "cannot be held erroneous as a matter of law, unless [that] court acts arbitrarily or irrationally" … . Even where the sentencing court does not err as a matter of law in adjudicating a defendant to be a persistent felony offender, "[t]he Appellate Division, in its own discretion, may conclude that a persistent felony offender sentence is too harsh or otherwise improvident" … . "In this way, the Appellate Division can and should mitigate inappropriately severe applications of the statute" … . "A determination by the Appellate Division to vacate a harsh or severe persistent felony offender finding is authorized by CPL 470.20 (6), which grants the Appellate Division discretion to modify sentences in the interest of justice without deference to the sentencing court' " … . People v Brown, 2019 NY Slip Op 05454, Fourth Dept 7-5-19

SENTENCING.

DEFENDANT'S SENTENCE REDUCED FROM 12 TO FIVE YEARS BASED UPON THE PLEA OFFERS, THE LACK OF PRIOR FELONY CONVICTIONS, DEFENDANT'S MENTAL HEALTH ISSUES, AND THE VICTIMS' OPPOSITION TO INCARCERATION (FOURTH DEPT).

The Fourth Department reduced defendant's sentence from 12 to five years, taking into account the plea offers of probation only and five years, the lack of any prior felony convictions, her mental health problems, and the victims' opposition to incarceration:

… [T]he 12-year term of incarceration imposed on the count of burglary in the first degree is unduly harsh and severe. Before indictment, defendant was offered the opportunity to plead to a charge for which probation was a sentencing option. After indictment, she was offered the opportunity to plead guilty to the charges with a sentence promise of five years. At the time of the latter offer, all of the relevant facts were known to the court, including those related to defendant's history of mental illness. The victims of the offenses were defendant's parents, and they opposed a lengthy prison sentence, contending that she needed treatment not incarceration. Indeed, defendant's mother stated at sentencing that her daughter needed mental health treatment and that "jail [was] not the answer."

Moreover, all of defendant's prior convictions, none of which were felonies, were committed within three years of these offenses and only after defendant began to suffer from significant mental health issues. Under the circumstances of this case, where no new facts were set forth during the nonjury trial and the victims were opposed to incarceration, we conclude that the sentence on the burglary count should be reduced to a determinate term of incarceration of five years … . People v Mccoy, 2019 NY Slip Op 05851, Fourth Dept 7-31-19

SEX OFFENDER REGISTRATION ACT (SORA).

DEFENDANT WHO KIDNAPPED HER BIOLOGICAL CHILD WAS NOT EXEMPT FROM SORA REGISTRATION (FOURTH DEPT).

The Fourth Department determined defendant's waiver of appeal was invalid but rejected her argument that she was exempt for SORA registration because she is the parent of the kidnapping victim, who had been adopted by a family:

The victim of the kidnapping was defendant's biological child, who had been removed from defendant's care more than eight years earlier following allegations of abuse concerning the victim's sibling. Defendant surrendered her parental rights to both the victim and the victim's sibling, and the children were adopted by a family.

"SORA defines sex offender' to include any person who is convicted of' any of a number of crimes listed in the statute . . . SORA requires all people included in this definition to register as sex offenders" … . The list of offenses provided in the statute includes "section 135.05, 135.10, 135.20 or 135.25 of [the Penal Law] relating to kidnapping offenses, provided the victim of such kidnapping . . . is less than seventeen years old and the offender is not the parent of the victim" … . Although we have not yet had the occasion to address whether a biological parent who has surrendered his or her parental rights and whose child has been adopted is entitled to the benefit of the parent exemption set forth in the SORA statute, in People v Brown (264 AD2d 12 [4th Dept 2000]), this Court determined that, in a prosecution for kidnapping, such a person could not assert as an affirmative defense that he or she was a relative of the victim … inasmuch as a biological parent's status as a "parent" with respect to an adopted child was terminated " in all respects' " by an order of adoption … . Applying that same reasoning here, we conclude that defendant, the biological mother of an adopted child who she kidnapped, is not a parent of the victim for the purposes of SORA, and thus defendant is not exempt from SORA registration. People v Weir, 2019 NY Slip Op 05896, Fourth Dept 7-31-19

SEX OFFENDER REGISTRATION ACT (SORA).

THE LAW REQUIRING THAT SEX OFFENDERS CANNOT RESIDE WITHIN 1000 FEET OF SCHOOL GROUNDS IS NOT UNCONSTITUTIONAL, EVEN AS APPLIED TO AN OFFENDER WHOSE SEX OFFENSES INVOLVED ADULTS (THIRD DEPT).

The Third Department, over a two-justice concurrence, determined defendant sex offender, in this habeas corpus proceeding, was not entitled to release on parole on the ground that the law prohibiting him from residing within 1000 feet of school grounds was unconstitutional. The concurrence called into question the effects of the law. Petitioner's sex offenses involved adults, not children:

… [A]lthough the open parole release date granted to petitioner cannot be revoked absent procedural due process, we are unpersuaded that he has a further "liberty interest [or] fundamental right . . . to be free from special conditions of parole" regarding his residence under either the Federal or the State Constitution … . …

… [P]etitioner has not satisfied his "heavy burden of showing that [Executive Law § 259-c (14)] is 'so unrelated to the achievement of any combination of legitimate purposes' as to be irrational" … . Petitioner may or may not be correct when he says that the mandatory condition does not achieve its legitimate goals, but the argument that there are "better or wiser ways to achieve the law's stated objectives" must be addressed to the Legislature … . Thus, the mandatory condition comports with substantive due process, and petitioner is not entitled to immediate release. People ex rel. Johnson v Superintendent, Adirondack Corr. Facility, 2019 NY Slip Op 05359, Third Dept 7-3-19

SEX OFFENDER REGISTRATION ACT (SORA).

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

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

The defendant subsequently relocated to New York in November 2017. Following a hearing pursuant to Correction Law article 6-C, the Supreme Court adjudicated the defendant a level three sex offender. Insofar as relevant to this appeal, the court determined that the defendant's mandatory registration under Virginia law made him a "sex offender" under Correction Law § 168-a(2)(d)(ii). The defendant appeals.

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

SPECIAL PROSECUTORS.

SPECIAL PROSECUTOR DID NOT HAVE THE AUTHORITY TO PROSECUTE A CRIMINAL OFFENSE ON BEHALF OF THE JUSTICE CENTER FOR PROTECTION OF PEOPLE WITH SPECIAL NEEDS; THE DISTRICT ATTORNEY DID NOT KNOWINGLY CONSENT AND DID NOT MAINTAIN CONTROL OVER THE PROSECUTION; INDICTMENT DISMISSED (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Rumsey, determined that the special prosecutor did not have the authority to prosecute a substance abuse counselor who allegedly sexually abused a 16-year-old patient. The special prosecutor was from the Justice Center for Protection of People with Special Needs. Because the special prosecutor did not have have the knowing and express consent to the prosecution by the district attorney, the indictment was dismissed:

In 2012, the Legislature enacted the Protection of People with Special Needs Act (Executive Law § 550 et seq.) to protect individuals "who are vulnerable because of their reliance on professional caregivers to help them overcome physical, cognitive and other challenges" … by creating a new state agency, the Justice Center, and mandating, among other things, that it employ a special prosecutor appointed by the Governor (hereinafter the Special Prosecutor) to investigate and prosecute criminal offenses involving abuse and neglect of vulnerable persons by employees of specified types of facilities and service agencies … . Although the Act specifically authorizes the Special Prosecutor to "exercise all the powers and perform all the duties in respect of such actions or proceedings which the district attorney would otherwise be authorized or required to exercise or perform"… , it also prohibits the Special Prosecutor from "interfer[ing] with the ability of district attorneys at any time to receive complaints, investigate and prosecute any suspected abuse or neglect" … . …

… [T]here is no constitutional support for the Legislature's attempt to provide for "the gubernatorial appointment of a non-elected special prosecutor, independent of the [d]istrict [a]ttorneys and with unfettered prosecutorial power" … . …

We turn … to consideration of whether the Albany County District Attorney validly consented to prosecution of defendant by the Special Prosecutor. … [T]he District Attorney did not exercise his essential prosecutorial power to determine whether defendant should be prosecuted but, rather, merely acquiesced in the prosecution by the Special Prosecutor, whom he mistakenly believed already possessed the independent power to prosecute

defendant. Second, the District Attorney failed to expressly retain ultimate responsibility for defendant's prosecution … . People v Hodgdon, 2019 NY Slip Op 05596, Third Dept 7-11-19

SPEEDY TRIAL.

87 DAY DELAY ATTRIBUTABLE TO THE PEOPLE DESPITE THE 'READY FOR TRIAL' ANNOUNCEMENT AND THE ABSENCE OF A SPECIFIC REQUEST FOR AN ADJOURNMENT, INDICTMENT DISMISSED ON SPEEDY TRIAL GROUNDS (FOURTH DEPT).

The Fourth Department, reversing Supreme Court and dismissing the indictment on speedy trial grounds, determined the 87 day delay during which the People sought a superseding indictment was attributable to the People despite their "ready for trial" announcement and despite the absence of a specific request for an adjournment:

… [The]period of delay was "attributable to [the People's] inaction and directly implicate[d] their ability to proceed to trial" on a charge of CPCS in the fifth degree, i.e., the crime that the People sought to add by way of a superseding indictment and the sole crime for which defendant was ultimately convicted … . Contrary to the court's determination, the 87-day period was not attributable to the court given that it was "the People's inaction [in securing a superseding indictment that] resulted in a delay in the court's [trial of the action]" … . Contrary to the People's contention, it is well established that postreadiness delay may be assessed "notwithstanding that the People have answered ready for trial within the statutory time limit" … and notwithstanding the absence of an explicit prosecutorial request for an adjournment … . Although certain periods of time may be excluded from assessment as postreadiness delay where the People successfully invoke one of the exceptions enumerated in CPL 30.30 (4) … , the People have identified no exception that might excuse the 87-day delay at issue here … . People v Johnson, 2019 NY Slip Op 05920, Fourth Dept 7-31-19

STREET STOPS.

THE PURSUIT OF DEFENDANT WAS NOT JUSTIFIED AND DEFENDANT'S DISCARDING THE HANDGUN WAS IN RESPONSE TO POLICE ILLEGALITY, THE HANDGUN WAS NOT ABANDONED AND SHOULD HAVE BEEN SUPPRESSED (FOURTH DEPT).

The Fourth Department, vacating the guilty plea and dismissing the indictment, determined the handgun discarded by the defendant during a police chase should have been suppressed. The police were responding to information that a black male had discharged a weapon. There were several black males in the area and nothing indicated defendant was involved in criminal activity. The defendant did not abandon the weapon because it was discarded in response to police illegality:

… [T]he officer's action of pursuing defendant in response to his flight was not justified at its inception inasmuch as there were no specific circumstances indicating that defendant may have been engaged in criminal activity so as to give rise to reasonable suspicion … . Although the officer observed defendant walking in the general vicinity of the reported gun shots, that observation does not provide the "requisite reasonable suspicion, in the absence of other objective indicia of criminality' " that would justify pursuit, and no such evidence was presented at the suppression hearing … . In the absence of other identifying information, the fact that defendant may have matched the vague, generic description of the suspect as a black male, which could have applied to any number of individuals in the area of the large apartment complex with hundreds of residents, did not sufficiently indicate that defendant may have been engaged in criminal activity … . Thus, the pursuit of defendant was unlawful. * * *

… [D]defendant's act of discarding the handgun was "spontaneous and precipitated by the unlawful pursuit by the police" and, therefore, the handgun should have been suppressed … . People v Jones, 2019 NY Slip Op 05940, Fourth Dept 7-31-19

TESTIMONIAL HEARSAY, SUMMATION WITNESSES.

POLICE OFFICERS' TESTIMONY BASED UPON DEBRIEFING GANG MEMBERS WAS INADMISSIBLE TESTIMONIAL HEARSAY AND THE POLICE OFFICERS, WHO WERE QUALIFIED AS GANG EXPERTS, ACTED AS IMPERMISSIBLE SUMMATION WITNESSES, NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined that the testimony of two police officers (qualified by the court as gang experts(about information gleaned from interviewing gang members was testimonial hearsay, in violation of Crawford, and the police experts acted as summation witnesses, in violation of Iona:

During the trial, the Supreme Court declared Detective Adam Georg an expert "in the hierarchy, practices, [and] languages of the S.N.O.W. Gang and other gangs." Similarly, the court declared Lieutenant Robert Bracero an expert "in the history, hierarchy, practices and language of the S.N.O.W. Gang and rival gangs." Georg testified that his knowledge of the S.N.O.W. Gang was derived from, among other things, approximately 70 to 80 debriefings of S.N.O.W. Gang members, many of whom had been arrested and were in custody at the police station or in jail. Similarly, Bracero testified that he debriefed approximately 50 S.N.O.W. Gang members after their arrests. * * *

… [T]he defendant contends that Georg's and Bracero's testimony violated Crawford v Washington (541 US 36) by permitting the introduction into evidence of out-of-court testimonial statements made by absent witnesses who were never subjected to cross examination … , and that Georg's testimony also ran afoul of the proscription against police experts acting as summation witnesses, in violation of People v Inoa (25 NY3d 466, 474-475). …

… .[F]or the reasons set forth in our decision and order on appeal by one of the codefendants (People v Jones, 166 AD3d 803), the testimony of Georg and Bracero violated Crawford and Inoa. Since the evidence of the defendant's guilt, without reference to the errors, was far from overwhelming, these errors were not harmless … . People v Campbell, 2019 NY Slip Op 05992, Second Dept 7-31-19

YOUTHFUL OFFENDER.

ADJUDICATING DEFENDANT A YOUTHFUL OFFENDER FOR ONE CHARGE DID NOT REQUIRE A YOUTHFUL OFFENDER ADJUDICATION FOR AN UNRELATED CHARGE, EVEN THOUGH BOTH CHARGES WERE PART OF A JOINT PLEA AGREEMENT (THIRD DEPT).

The Third Department determined that the youthful offender adjudication for one charge did not require the court to adjudicate defendant a youthful offender for an unrelated charge, even though both charges were subject to a joint plea agreement:

Defendant's primary contention is that County Court, having adjudicated him as a youthful offender on the unrelated charge, was also required to adjudicate him a youthful offender on the burglary charge. This is incorrect. Defendant relies upon CPL 720.20 (2), which provides, as relevant here, that, "[w]here an eligible youth is convicted of two or more crimes . . . set forth in two or more accusatory instruments consolidated for trial purposes, the court must not find [the youth] a youthful offender with respect to any such conviction . . . unless it finds him a youthful offender with respect to all such convictions" … . Contrary to defendant's erroneous supposition, the accusatory instruments to which he pleaded guilty, i.e., the superior court informations charging him with burglary and the unrelated crime, were never "consolidated for trial purposes" so as to require a youthful offender adjudication on both or neither of the convictions (CPL 720.20 [2] …). Although both accusatory instruments were ultimately resolved under a joint agreement, defendant pleaded guilty to two separate superior court informations, and the record does not reflect that either party moved to consolidate them, that they were ordered joined for trial or, indeed, that they could have been properly joined (see CPL 200.20 [2], [4]; see also CPL 200.15). Consequently, "the sentencing court was authorized in its discretion to determine that the defendant was a youthful offender with respect to either or both convictions"… , and was not compelled to confer youthful offender status at sentencing on the burglary conviction. People v Turner, 2019 NY Slip Op 05718, Third Dept 7-18-19