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APPEALS.

APPELLATE COUNSEL'S BRIEF IN SUPPORT OF LEAVE TO WITHDRAW WAS DEFICIENT, NEW APPELLATE COUNSEL ASSIGNED (SECOND DEPT).

The Second Department determined appellate counsel's brief in support of a motion to withdraw was deficient:

An appellate court's role in reviewing an attorney's motion to be relieved pursuant to Anders v California (386 US 738) consists of two separate and distinct steps … . Step one requires the appellate court to perform "[an] evaluation of assigned counsel's brief, which must, to be adequate, discuss relevant evidence, with specific references to the record; identify and assess the efficacy of any significant objections, applications, or motions; and identify possible issues for appeal, with reference to the facts of the case and relevant legal authority'" … . Step two requires the appellate court to perform "an independent review of the record' to determine whether counsel's assessment that there are no nonfrivolous issues for appeal is correct'" … .

Here, the brief submitted by the defendant's counsel pursuant to Anders v California (386 US 738) was deficient because it failed to adequately analyze potential appellate issues, including, but not necessarily limited to, whether the defendant's plea of guilty was entered knowingly, intelligently, and voluntarily … . Moreover, upon this Court's independent review of the record, we conclude that nonfrivolous issues exist, including, but not necessarily limited to, whether the defendant's plea of guilty was knowing, intelligent, and voluntary … . Accordingly, under the circumstances, we must assign new counsel to represent the defendant. People v Robinson, 2019 NY Slip Op 06417, Second Dept 8-28-19

ARTIFICIAL INTELLIGENCE, DNA.

THE SOURCE CODE USED TO CONNECT DNA FROM THE MURDER SCENE TO THE DEFENDANT GENERATED A REPORT WHICH IMPLICATED THE DEFENDANT AND WAS THEREFORE TESTIMONIAL, HOWEVER, THE SOURCE CODE, AS A FORM OF ARTIFICIAL INTELLIGENCE, WAS NOT THE DECLARANT; THEREFORE THE FACT THAT DEFENDANT WAS NOT PROVIDED WITH THE SOURCE CODE DID NOT VIOLATE HIS RIGHT TO CONFRONT THE WITNESSES AGAINST HIM (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Pritzker, over a concurrence, determined the evidence concerning the TrueAllele source code used to connect the DNA found at the murder scene to the defendant was testimonial, but the source code, as artificial intelligence, was not the declarant. Therefore the fact that the defendant was not provided with the source code (which was not requested by the defendant during the trial) did not deprive defendant of the right to confront the witnesses against him. Rather, the Third Department found, the witness who testified about how the source code was used in the DNA testing was the declarant. Defendant had raised the intriguing question whether the source code, as a form of artificial intelligence, was the actual declarant triggering the right of confrontation:

Cybergenetics was "acting in the role of assisting the police and prosecutors in developing evidence for use at trial" … . Also, the report reflects TrueAllele's conclusions "upon review of the raw data associated with the testing" … . TrueAllele, by running at the source code's direction, compared DNA found at the crime scene to that of defendant's DNA and generated the report containing the likelihood ratios, which, in effect, implicates defendant in the murder; thus, it is clearly biased in favor of law enforcement … . Accordingly, application of the primary purpose test reveals that the TrueAllele report is testimonial in nature … .

Despite concluding that the TrueAllele report is testimonial, we do not find, given the particular facts of this case, that the source code, even through the medium of the computer, is a declarant. This is not to say that an artificial intelligence-type system could never be a declarant, nor is there little doubt that the report and likelihood ratios at issue were derived through distributed cognition between technology and humans … . Indeed, similar to many expert reports, the testimonial aspects of the TrueAllele report are formulated through a synergy and distributed cognition continuum between human and machine … , but this fact alone does not tip the scale so far

as to transform the source code into a declarant. People v Wakefield, 2019 NY Slip Op 06143, Third Department, 8-15-19

ASSAULT.

NO REASONABLE VIEW OF THE EVIDENCE SUPPORTED ANYTHING LESS THAN SERIOUS PHYSICAL INJURY, REQUEST FOR A JURY CHARGE ON ASSAULT THIRD WAS PROPERLY DENIED (CT APP).

The Court of Appeals, affirming the assault second conviction, determined defendant's request for a jury charge on assault third as a lesser-included offense was properly denied because of the severity of the victim's injuries:

Both live and photographic evidence at trial, ten months after the attack, demonstrated that the victim's face was disfigured with scars above one eyebrow, under the other eye, on her lip and across her neck, and that apart from the scars, her facial structure and appearance had changed significantly. Testimony from her treating physician established that she suffered at least five displaced fractures around her eye sockets and nose, which were left to heal as displaced. Viewed in a light most favorable to defendant … , we agree that no reasonable view of the evidence could support a finding that the victim sustained anything less than a serious physical injury … . People v Sipp, 2019 NY Slip Op 06432, CtApp 8-29-19

ATTORNEYS, STATEMENTS, SEARCHES.

DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE TO SUPPRESS TANGIBLE EVIDENCE SEIZED PURSUANT TO A SEARCH WARRANT WHICH WAS ISSUED BASED UPON UNWARNED STATEMENTS MADE BY DEFENDANT, STATEMENTS WHICH HAD BEEN SUPPRESSED BY THE TRIAL COURT (SECOND DEPT).

The Second Department, reversing defendant's conviction and ordering new suppression motions and a new trial, determined defense counsel was ineffective for failing to move to suppress tangible evidence seized

pursuant to a search warrant which was issued based upon unwarned statements made by the defendant, statements which had been suppressed by the trial court:

Here, defense counsel's assertion of an inappropriate argument in support of the belated suppression motion, and counsel's complete failure to challenge the admissibility of physical evidence seized from the defendant's home based on the Miranda violation … , prejudiced the defendant and rendered counsel's representation ineffective … . People v Corchado, 2019 NY Slip Op 06408, Second Dept 8-28-19

ATTORNEYS.

COUNTY COURT SHOULD HAVE HELD A HEARING ON DEFENDANT'S MOTION TO VACATE HIS CONVICTION ON INEFFECTIVE ASSISTANCE OF COUNSEL GROUNDS, DEFENDANT PRESENTED EVIDENCE AN ALIBI WITNESS WAS NOT INTERVIEWED; A WITNESS'S RECANTATION WAS PROPERLY FOUND UNBELIEVABLE (FOURTH DEPT).

The Fourth Department, reversing County Court, determined a hearing was required on defendant's motion to vacate his conviction on ineffective assistance grounds. The motion alleged that defense counsel did not adequately investigate alibi witnesses. The Fourth Department also held that County Court properly found a witness's recantation of trial testimony unbelievable:

In recognition of the fact that "[t]here is no form of proof so unreliable as recanting testimony" … , courts have set forth a list of factors to be considered where, as here, the newly discovered evidence is recantation evidence, i.e., "(1) the inherent believability of the substance of the recanting testimony; (2) the witness's demeanor both at trial and at the evidentiary hearing; (3) the existence of evidence corroborating the trial testimony; (4) the reasons offered for both the trial testimony and the recantation; (5) the importance of facts established at trial as reaffirmed in the recantation; and (6) the relationship between the witness and defendant as related to a motive to lie" … . Another relevant factor is "whether the recantation refutes the eyewitness testimony of another witness" … . …

… [D]defendant's CPL 440.10 motion was supported by notarized but unsworn statements of two previously unknown individuals who claimed that they would have corroborated the trial testimony of defendant and his mother that defendant was at a party at his mother's home for the entire evening of the shooting. One of those witnesses specifically stated that she was at all times willing to "make [a] statement" but was never contacted

by defense counsel. Two additional witnesses stated that they observed defendant at that party some time after the shooting. While those witnesses do not provide a technical alibi for defendant because they did not discuss defendant's location at the time of the shooting … , they tend to support the alibi evidence that defendant could not have been the shooter because he was at a party at his mother's house for the entire evening … . People v Howard, 2019 NY Slip Op 06309, Fourth Dept 8-22-19

ATTORNEYS.

DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE THE INTOXICATION DEFENSE IN THIS MURDER CASE; THE MANSLAUGHTER CHARGE MUST BE DISMISSED AS AN INCLUSORY CONCURRENT COUNT OF MURDER (SECOND DEPT).

The Second Department determined defendant received effective assistance of counsel but the manslaughter first charge, as a lesser inclusory concurrent count of murder second, must be dismissed. Defendant argued defense counsel was ineffective for failing to raise the intoxication defense in this stabbing case:

Assuming, without deciding, that the evidence at trial was sufficient to warrant an intoxication charge … , defense counsel was not ineffective for failing to request that charge in this case. Defense counsel prudently pursued arguments which sought to present this incident as a perfect storm of unnecessary escalation by the victim, followed by actions taken by the defendant to protect himself and his friends, all resulting in the wholly accidental death of the victim. Defense counsel could have strategically determined that requesting an intoxication charge would have undermined, or distracted from, the narrative the defense had pursued that the defendant was forced to make a decision when faced with the angry victim to protect himself and his friends. Accordingly, the defendant has not demonstrated the absence of strategic or other legitimate explanations for defense counsel's failure to request the intoxication charge … . People v Moreira, 2019 NY Slip Op 06414, Second Dept 8-28-19

FIFTH AMENDMENT, APPEALS, STATEMENTS.

ALLOWING AN UNSWORN WITNESS TO TESTIFY WAS ERROR; ALLOWING QUESTIONING ABOUT A WITNESS'S ASSERTION OF THE FIFTH AMENDMENT PRIVILEGE DEPRIVED DEFENDANT OF A FAIR TRIAL; FIFTH AMENDMENT ISSUES CONSIDERED ON APPEAL IN THE INTEREST OF JUSTICE; 710.30 NOTICE NOT REQUIRED FOR A STATEMENT NOT SUBJECT TO SUPPRESSION; NEW TRIAL ORDERED BEFORE A DIFFERENT JUDGE (SECOND DEPT).

The Second Department, over a concurrence and a dissent, determined the questioning of an unsworn witness (Mitchell) who refused to answer questions pursuant to the Fifth Amendment privilege deprived defendant of a fair trial. The issues pertaining to the witness's refusal to take the oath and testify were nor preserved, but were considered in the interest of justice. The court noted Criminal Procedure Law 710.30 does not apply to statements made voluntarily in a noncoercive, noncustodial setting. Therefore the failure to timely notify the defense of the defendant's admission to the murder made to a confidential informant was not an error. Based upon the trial judge's characterization of the defendant at sentencing, the new trial will be before a different judge:

Since Mitchell refused to take the oath, and was not deemed to be ineligible to take the oath by reason of, inter alia, infancy, mental disease, or defect pursuant to CPL 60.20(2), the Supreme Court erred in allowing Mitchell to testify or be questioned by counsel. The court further erred in giving the jury a charge regarding the corroboration of an unsworn witness …, which permits a jury, under certain conditions, to convict a defendant upon unsworn testimony of a person deemed ineligible to take an oath. …

… .[T]he prejudice to the defendant arose from (1) the prosecutor's posing of leading questions which informed the jury that Mitchell, a person familiar with both the defendant and the victim, had previously identified the defendant as the shooter, (2) the inferences that the prosecutor sought to draw from Mitchell's refusal to testify, and (3) the court's jury instructions that the jury may draw an inference of the defendant's guilt from Mitchell's refusal to testify. …

"Where, as here, a witness asserts [her] Fifth Amendment privilege in the presence of the jury, the effect of the powerful but improper inference of what the witness might have said absent the claim of privilege can neither be quantified nor tested by cross-examination, imperiling the defendant's right to a fair trial" … . "[A] witness's invocation of the Fifth Amendment privilege may amount to reversible error in two instances: one, when the prosecution attempts to build its case on inferences drawn from the witness's assertion of the privilege, and two,

when the inferences unfairly prejudice defendant by adding critical weight' to the prosecution's case in a form not subject to cross-examination" … . People v Ward, 2019 NY Slip Op 06419, Second Dept 8-28-19

GRAND JURIES, ROBBERY.

GRAND JURY EVIDENCE WAS SUFFICIENT TO SUPPORT ROBBERY FIRST DEGREE DESPITE THE VICTIM'S TESTIMONY THAT HE DID NOT SEE A KNIFE (FOURTH DEPT).

The Fourth Department, reversing County Court, determined the evidence presented to the grand jury was sufficient to support the robbery count, despite the victim's testimony he did not see a knife:

… [T]he victim observed a "small silver ring" in defendant's hand. Although the victim did not see the blade of a knife at that time, he thought that defendant had a knife based upon his observation of the shiny, metal object in defendant's hand that defendant tried to press against or jab toward the victim's stomach. After the victim was able to pull away from defendant and warn him not to further approach, defendant walked away, and the victim called the police to report the crime and provide a description of the suspect. A police officer who responded a few minutes later testified that he apprehended defendant a couple blocks away carrying a Swiss Army knife with the blade extended.

… [W]e conclude that the victim's testimony regarding his observation of the object in defendant's hand during the encounter and the officer's testimony regarding defendant's apprehension close in time and place while carrying a knife is legally sufficient to support a prima facie case of robbery in the first degree with respect to defendant's actual possession of a dangerous instrument … . Defendant nonetheless challenges the sufficiency of the evidence on the ground that the victim's further testimony that he "guess[ed]" what he saw "was the edge of [defendant's] Swiss Army knife that he had" constitutes inadmissible hearsay because the victim was repeating information that he must have obtained from the police regarding the precise nature of the object in defendant's possession. Even assuming, arguendo, that such further testimony by the victim constituted inadmissible hearsay, we note that "the submission of some inadmissible evidence will be deemed fatal only when the remaining evidence is insufficient to sustain the indictment" … , and that is not the case here given the sufficiency of the remaining evidence … . People v Rawlinson, 2019 NY Slip Op 06354, Fourth Dept 8-22-19

GRAND JURIES.

COUNTY COURT SHOULD NOT HAVE ACCEPTED GRAND JURY REPORTS RE: THE ALLEGED MISCONDUCT, NONFEASANCE OR NEGLECT IN OFFICE OF THREE PUBLIC OFFICIALS; THE PROSECUTOR DID NOT INSTRUCT THE GRAND JURY ON THE SUBSTANTIVE ASPECTS OF THE PUBLIC OFFICIALS' DUTIES (FOURTH DEPT).

The Fourth Department, reversing County Court, determined that the grand jury reports concerning the alleged misconduct, nonfeasance or neglect in office of three public officials should not have been accepted by County Court. The reports were therefore sealed:

… County Court erred in directing the public filing of three grand jury reports that accused each appellant respectively of misconduct, nonfeasance, or neglect in office (see generally CPL 190.85 [1] [a]). …

"It is incumbent upon the prosecutor to instruct the [g]rand [j]ury regarding the duties and responsibilities of the public servant . . . target[ed by] the probe' " … ."Without a charge as to the substantive aspects of the official's duties, it [is] not only impossible for the [g]rand [j]ury to determine that the public servant was guilty of misconduct, nonfeasance or neglect, but impermissible as well, for it allow[s] the [g]rand [j]ury to simply substitute its judgment for that of the public servant" … . Here, the prosecutor failed to provide the grand jury with any instructions regarding appellants' substantive duties in office. Matter of May/June 2018 Oneida County Grand Jury Report (John Doe #1), 2019 NY Slip Op 06356, Fourth Dept 8-22-19

GRAND JURIES.

FAILURE TO INSTRUCT THE GRAND JURY ON THE "DEFENSE OF PROPERTY" JUSTIFICATION DEFENSE REQUIRED DISMISSAL OF THE MURDER/MANSLAUGHTER INDICTMENT, TWO JUSTICE DISSENT (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined County Court properly dismissed the murder/manslaughter indictment because the grand jury was not charged with the defense of property justification defense. After decedent had twice attacked defendant inside the home, the decedent reentered the home from the front yard and was shot by the defendant:

During a recess in the grand jury proceeding, defendant asked the People to deliver to the grand jury foreperson a letter requesting, among other things, that the grand jurors be charged with respect to the justifiable use of physical force in defense of a person pursuant to Penal Law § 35.15 and the justifiable use of physical force in defense of premises and in defense of a person in the course of a burglary pursuant to § 35.20 (3). The People did not deliver the letter to the foreperson.

The People instructed the grand jury on the law with respect to murder in the second degree (Penal Law § 125.25 [1]), manslaughter in the first degree (§ 125.20 [1]), and the justification defense pursuant to Penal Law § 35.15; however, the People did not instruct the grand jury with respect to the justification defense pursuant to § 35.20 (3).

… [W]e conclude that the court properly dismissed the indictment based on the People's failure to instruct the grand jury on the justification defense pursuant to Penal Law § 35.20 (3) … . A court may dismiss an indictment on the ground that a grand jury proceeding is defective where, inter alia, the proceeding is so irregular "that the integrity thereof is impaired and prejudice to the defendant may result" (CPL 210.35 [5]; see CPL 210.20 [1] [c]). With respect to grand jury instructions, CPL 190.25 (6) provides, as relevant here, that, "[w]here necessary or appropriate, the court or the district attorney, or both, must instruct the grand jury concerning the law with respect to its duties or any matter before it." "If the prosecutor fails to instruct the grand jury on a defense that would eliminate a needless or unfounded prosecution, the proceeding is defective, mandating dismissal of the indictment" … . Under the circumstances of this case, we conclude that an instruction regarding the justification defense pursuant to Penal Law § 35.20 (3) was warranted, and the prosecutor's failure to provide that instruction impaired the integrity of the grand jury proceeding (see CPL 210.35 [5]). Furthermore, we conclude that the error was not cured by the instruction regarding the justification defense under Penal Law § 35.15 … . People v Ball, 2019 NY Slip Op 06295, Fourth Dept 8-22-19

JURIES.

BRIEF PARTICIPATION IN JURY DELIBERATIONS BY AN ALTERNATE WHILE A SWORN JUROR WAS ABSENT VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHT TO A JURY OF 12, DEFENDANT'S MOTION FOR A MISTRIAL SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that defendant's motion for a mistrial should have been granted after the judge learned that an alternate juror had participated in the jury deliberations while a sworn juror was absent. The trial judge denied the mistrial motion after receiving assurances from all the sworn jurors that they could start the deliberations over:

After an undefined period of time, it became apparent to the Supreme Court that an alternate juror briefly participated in deliberations with 11 sworn members of the jury while the 12th sworn juror was absent from the jury room. The court then replaced the alternate juror with the 12th sworn juror and sent the jury back to deliberate before breaking for the day. * * *

"The New York Constitution guarantees every criminal defendant a trial by jury," which includes the right to a jury of 12 … . "A defendant has a constitutional right to a trial by a particular jury chosen according to law, in whose selection [the defendant] has had a voice" … . "At the heart of this right is the need to ensure that jury deliberations are conducted in secret, and not influenced or intruded upon by outside factors" … . The violation of a defendant's right to a jury trial of 12 is a "fundamental defect[ ] in judicial proceedings" … .

CPL 310.10(1) provides, inter alia, that "[f]ollowing the court's charge, . . . the jury must retire to deliberate upon its verdict." Pursuant to CPL 270.30, after the jury has retired to deliberate, the court must either (1) with the consent of the defendant and the People, discharge the alternate jurors, or (2) direct the alternate jurors not to discuss the case and further direct that they be kept separate and apart from the regular jurors. Once deliberations begin, a regular juror may be replaced by an alternate juror only with the defendant's written consent (see CPL 270.35). "[F]ailure to comply with the statutory requirement of written, signed consent results in substitution of an alternate juror during deliberations without an effective, constitutional waiver. Such substitution directly contravenes [People v] Ryan and infringes the defendant's fundamental, constitutional right to trial by a jury of 12" … . People v Larman, 2019 NY Slip Op 06097, Second Dept 8-7-19

MURDER FOR HIRE.

EVIDENCE SUPPORTED THE FIRST DEGREE MURDER CONVICTION BASED UPON DEFENDANT'S HIRING THE KILLER (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined the evidence supported the first degree murder charge, based upon defendant's hiring the killer. The dissent argued the proof of the contract-killing was insufficient. The second degree murder count should have been dismissed:

We and our dissenting colleagues agree on many points. All of us agree that there was sufficient evidence that defendant was complicit in his wife's murder. Further, all of us agree that there is evidence that the principal requested a payment of money from defendant only five days before the murder. Nevertheless, our dissenting colleagues characterize that request as "part of a string of otherwise innocent interactions" between defendant and the principal in the days leading up to the murder. The dissent even offers the possibility that the principal was "seeking a reward" from defendant—not for agreeing to murder defendant's wife, but for unrelated virtuous conduct. We cannot agree. In our view, the jury could rationally have concluded that the principal's request for a payment of money five days before the murder was not "innocent" at all, but in fact was part and parcel of the murder plot. People v Clayton, 2019 NY Slip Op 06284, Fourth Dept 8-22-19

PAROLE, CRIME VICTIMS.

CRIME VICTIMS DO NOT HAVE STANDING TO CHALLENGE A PRISONER'S RELEASE ON PAROLE (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Mulvey, over a concurrence and a dissent, determined that the wife of a police officer murdered in 1971 did not, as a crime victim, have standing to bring an Article 78 proceeding challenging the release on parole of Herman Bell, who was convicted of the murder. Crime victims do not have standing to challenge parole determinations:

As noted by one court that has previously addressed the issue before us: "While a relative of a crime victim may be more emotionally affected by the crime than a member of the general public, that increased emotional effect is not sufficient to confer standing. While statutes have been enacted to permit crime victims the right to be heard

at certain proceedings (see [CPL] 380.50), their status as crime victims has not been held to confer standing to them at any proceeding. Executive Law § 259[-]i sets forth the procedures to be followed by the [B]oard of [P]arole. Executive Law § 259[-]i (2) (c) (A) provides that when considering whether or not to grant discretionary parole release, the [B]oard must consider 'any statement made to the [B]oard by the crime victim or the crime victim's representative where the crime victim is deceased[.]' The statute does not authorize any further participation in the process by a crime victim or the representative of a victim. It does not serve to confer standing to a victim who desires to challenge the determination. While the [c]ourt does not question whether the families of the victims of crime continue to suffer real emotional effects, there has not been a showing of any legal right that is affected by the determination which they seek to challenge" … . Matter of Piagentini v New York State Bd. of Parole, 2019 NY Slip Op 06229, Third Dept 8-22-19

SEARCHES, PROBABLE CAUSE.

IN DENYING A SUPPRESSION MOTION THE JUDGE CAN CONSIDER EVIDENCE SUBMITTED BY THE PEOPLE, EVEN IF THAT EVIDENCE WAS NOT EXPRESSLY RELIED UPON BY THE PEOPLE; OBSERVATION OF WHAT APPEARED TO BE A DRUG TRANSACTION PROVIDED PROBABLE CAUSE; THE AUTOMOBILE EXCEPTION TO THE WARRANT REQUIREMENT APPLIED; THE INVENTORY SEARCH WAS VALID (FOURTH DEPT).

The Fourth Department determined defendant's motion to suppress tangible evidence was properly denied, finding (1) the suppression court could properly consider all the evidence presented by the People, even if the evidence was not expressly relied upon by the People; (2) although the vehicle occupants were seized at the time the police approached, the officers' prior observation of what appeared to be a drug transaction provided probable cause; (3) the search of the vehicle was justified by the automobile exception; and (4) the inventory search was lawful:

… [W]e conclude that the court was entitled to consider legal justifications that were supported by the evidence, even if they were not raised explicitly by the People (see CPL 710.60 [6] …). "By presenting evidence sufficient to support the court's findings, the People met their burden of going forward . . . and the court may rely on any legal justification for police conduct for which there is factual support in the record" … . …

… .[B]efore defendant's seizure, an officer observed defendant conduct what, based on his training and experience, appeared to be a hand-to-hand drug transaction, even though he "couldn't tell" what "items" he had seen during the exchange other than money. Additionally, that officer was in the area conducting surveillance on an unrelated narcotics investigation, raising the inference that the transaction occurred in a drug-prone area. Furthermore, once two other officers approached the vehicle based on the above observations, one officer saw packaging material of the kind used to store narcotics, and the other officer observed that the driver of the vehicle engaged in "furtive" behavior. Based on the totality of those factors, we conclude that the police had probable cause to believe that defendant engaged in a narcotics offense justifying the stop of the vehicle and his arrest … . …

"The [automobile] exception requires both probable cause to search the automobile generally and a nexus between the probable cause to search and the crime for which the arrest is being made' " … . Based on the foregoing, at the time of the search, the police had probable cause to believe that narcotics or packaging materials used in the sale and possession of narcotics were present in the vehicle … . Thus, inasmuch as there was a nexus between the probable cause to search the vehicle and the crime for which defendant was being arrested, we conclude that the police were not required to obtain a warrant … . People v Nichols, 2019 NY Slip Op 06361, Fourth Dept 8-22-19

SEARCHES.

WARRANTLESS SEARCH OF DEFENDANT'S BACKPACK WAS NOT A VALID SEARCH INCIDENT TO ARREST, SEIZED WEAPON SHOULD HAVE BEEN SUPPRESSED (SECOND DEPT).

The Second Department, reversing defendant criminal possession of a weapon conviction and dismissing that count, determined the arresting officers should have conducted the warrantless search of a backpack in which the seized weapon was found. The criteria for a search incident to arrest were not met:

On April 30, 2015, at approximately 2:30 p.m., police officers went to the defendant's home in response, in part, to information they had received from an informant that the defendant was selling drugs out of his home and kept a firearm concealed inside of a distinctive backpack. When the officers arrived, they observed the defendant smoking a marijuana cigarette on the porch of the home. Upon approaching the defendant and identifying themselves, the officers observed the defendant grab a distinctive backpack matching the description given by the informant, curse out loud, and run inside of the house. The officers pursued the defendant, who dropped the backpack inside the front doorway and proceeded up the stairs toward the second floor of the house. The

defendant was apprehended and handcuffed on the stairs. After the defendant was secured, one of the officers at the scene opened the defendant's backpack, inside of which he found a firearm and a quantity of marijuana. …

The protections embodied in article I, § 12 of the New York State Constitution serve to shield citizens from warrantless intrusions on their privacy interests, including their personal effects'" … . "[E]ven a bag within the immediate control or grabbable area' of a suspect at the time of his [or her] arrest may not be subjected to a warrantless search incident to the arrest, unless the circumstances leading to the arrest support a reasonable belief that the suspect may gain possession of a weapon or be able to destroy evidence located in the bag" … . The proof adduced at the suppression hearing failed to establish the presence of such circumstances … . People v Grimes, 2019 NY Slip Op 06411, Second Dept 8-28-19

SENTENCING, PREDICATE SEX OFFENDER.

DEFENDANT SHOULD NOT HAVE BEEN DESIGNATED A PREDICATE SEX OFFENDER BASED UPON A MICHIGAN CONVICTION OF "BREAKING AND ENTERING AN OCCUPIED DWELLING WITH THE INTENT TO COMMIT CRIMINAL SEXUAL CONDUCT IN THE SECOND DEGREE" (SECOND DEPT).

The Second Department determined defendant should not have been classified as a predicate sex offender based upon a Michigan conviction of breaking and entering an occupied dwelling with the intent to commit criminal sexual conduct in the second degree:

Supreme Court should not have, in effect, designated the defendant a predicate sex offender based upon his 1983 Michigan conviction. Where the prior conviction was in a jurisdiction other than New York State, the offense in the other jurisdiction must include all of the essential elements of a crime enumerated as a "sex offense" or "sexually violent offense" in the Correction Law or must require registration as a sex offender in the jurisdiction in which the conviction occurred … . Although the crime of breaking and entering an occupied dwelling with the intent to commit criminal sexual conduct in the second degree in Michigan is equivalent to the offense of burglary in the second degree in New York … , burglary is not classified by the Correction Law as a "sex offense" or a "sexually violent offense" … , and the People did not rely on the 1983 Michigan conviction as constituting a sexually motivated felony. Moreover, the crime of which the defendant was convicted in 1983 is not considered a sex offense requiring registration as a sex offender in Michigan … . Accordingly, the designation of the defendant as a predicate sex offender was improper … . People v Smith, 2019 NY Slip Op 06181, Second Dept 8-21-19

SENTENCING.

SENTENCE AFTER TRIAL, WHICH WAS SIX TIMES LONGER THAN THE SENTENCE OFFERED FOR A PLEA, DEEMED UNDULY HARSH AND SEVERE (FOURTH DEPT).

The Fourth Department reduced defendant's sentence after trial, in part because it was so much greater than the sentence offered in exchange for a plea:

… [T]he aggregate sentence of 60 years, which is statutorily reduced to 50 years (see Penal Law § 70.30 [1] [c], [e] [vi]), is unduly harsh and severe. Defendant has no prior felony convictions. In addition, the People offered, and the court committed to, a plea deal pursuant to which defendant would plead guilty to one count of criminal sexual act in the first degree and be sentenced to a determinate term of 10 years' incarceration with 20 years' postrelease supervision, which was thereafter reduced to a determinate term of nine years' incarceration with 20 years' postrelease supervision. The court nevertheless sentenced defendant upon his conviction to determinate terms of 15 years of incarceration with 20 years' postrelease supervision for the three counts of criminal sexual act in the first degree and the count of rape in the first degree, all to run consecutively. That aggregates to a sentence that is more than six times longer than that of the most recent plea offer, and we conclude that it is unduly harsh and severe … . People v Boyd, 2019 NY Slip Op 06311, Fourth Dept 8-22-19

SENTENCING.

TWELVE YEAR SENTENCE FOR CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE THIRD DEGREE DEEMED UNDULY HARSH AND SEVERE, REDUCED TO SEVEN YEARS IN THE INTEREST OF JUSTICE, TWO-JUSTICE DISSENT (FOURTH DEPT).

The Fourth Department, over a two-justice partial dissent, reduced defendant's sentence in this "criminal possession of a controlled substance third degree" case from 12 to seven years. The period of post-release supervision was reduced from three to one and a half years. Defendant was found in possession of over 35 ounces of cocaine:

… [W]e agree with defendant that, under the circumstances of this case, the resentence is unduly harsh and severe. We therefore modify the resentence as a matter of discretion in the interest of justice by reducing the

sentence of imprisonment to a determinate term of seven years and the period of PRS to a period of 1½ years … . People v Loiz, 2019 NY Slip Op 06240, Fourth Dept 8-22-19

SEX OFFENDER REGISTRATION ACT.

EVIDENCE DID NOT SUPPORT A LEVEL THREE RISK ASSESSMENT, REDUCED TO LEVEL TWO; STANDARD OF PROOF IS PREPONDERANCE NOT CLEAR AND CONVINCING (FOURTH DEPT).

The Fourth Department determined there was insufficient evidence to justify a level three risk assessment. The assessment was reduced to level two. The court noted that County Court should have applied the preponderant evidence standard, not a clear and convincing standard:

… [T]he People did not establish by clear and convincing evidence that defendant had the requisite pattern of drug use, and there is no "indication in the record that drugs . . . played a role in the instant offense" … . * * *

… [T]he hearsay statement by defendant's ex-wife that he is a "marijuana addict" is entitled to no weight. Not only is that statement conclusory and unsupported by any other evidence, nothing in the record suggests that defendant's ex-wife is qualified to diagnose addiction. * * *

… [T]he court erred in assessing him 10 points under risk factor 12, for failure to accept responsibility, given that he "pleaded guilty, admitted his guilt, appeared remorseful when interviewed in connection with the preparation of a presentence report, and apologized" for his conduct … . People v Kowal, 2019 NY Slip Op 06325, Fourth Dept 8-22-19

SEX OFFENDER REGISTRATION ACT.

SORA RISK ASSESSMENT REDUCED TO LEVEL ONE, NO PROOF AGE OF CHILDREN DEPICTED IN PORNOGRAPHY WAS LESS THAN TEN (FOURTH DEPT

The Fourth Department reduced defendant's risk level from two to one, finding there was no proof the children depicted in pornography were less than ten years old:

Defendant was convicted of possessing a sexual performance by a child (Penal Law § 263.16), which requires proof, inter alia, that defendant possessed a play, motion picture, or photograph depicting sexual conduct involving a child who is less than 16 years of age (see §§ 263.00 [1], [4]; 263.16). Consequently, defendant's plea of guilty to that charge does not constitute clear and convincing evidence that 30 points should be assessed under risk factor 5 … . Additionally, the evidence submitted by the People, including the presentence report, did not constitute clear and convincing evidence that any of the victims was 10 years of age or less … . The clear and convincing evidence, including the references to the children in the images possessed by defendant in the presentence report as preadolescent or prepubescent, coupled with the report's definition of such children as being between 10 and 13 years of age, however, supports the imposition of 20 points under risk factor 5 … . People v Spratley, 2019 NY Slip Op 06283, Fourth Dept 8-22-19

SIDEBAR.

DEFENDANT'S ABSENCE FROM SIDEBAR CONFERENCES DURING JURY SELECTION DID NOT REQUIRE REVERSAL (FOURTH DEPT).

The Fourth Department, over a dissent, determined defendant's absence from sidebar conferences did not require reversal:

Defendant contends that the court violated the rule in People v Antommarchi (80 NY2d 247, 250 [1992] …) when it conducted several sidebar conferences in his absence and that reversal is required with respect to two of those conferences. We disagree with defendant that reversal is required as a result of any violation of defendant's Antommarchi rights. It is well settled that a criminal defendant has a statutory right to be present at all material stages of the trial (see CPL 260.20 …), including the sidebar questioning of a prospective juror when the purpose of the questioning is "intended to search out a prospective juror's bias, hostility or predisposition to

believe or discredit the testimony of potential witnesses" … . Nevertheless, "reversal is not required when, because of the matter then at issue before the court or the practical result of the determination of that matter, the defendant's presence could not have afforded him or her any meaningful opportunity to affect the outcome" … . In determining whether the defendant's presence could have afforded him or her such an opportunity, the test is whether the record negates the possibility that the defendant "could have provided valuable input on his [or her] counsel's apparently discretionary choice to excuse those venire persons" … . Thus, reversal is not required where the defendant's attorney does not exercise a choice to exclude a prospective juror, such as where a prospective juror is excused for cause or where the People have exercised a peremptory challenge to the prospective juror … .

… [W]e conclude that defendant had no opportunity to provide any input that might have affected the outcome regarding the relevant prospective jurors. People v Wilkins, 2019 NY Slip Op 06238, Fourth Dept 8-22-19

STATEMENTS.

DEFENDANT WAS NOT IN CUSTODY WHEN HE WAS ASKED POINTED QUESTIONS, NO MIRANDA WARNING REQUIRED; POLICE OFFICER'S SUBJECTIVE BELIEF DEFENDANT WAS NOT FREE TO LEAVE IS IRRELEVANT; RAPE FIRST IS AN INCLUSORY CONCURRENT COUNT OF PREDATORY SEXUAL ASSAULT (FOURTH DEPT).

The Fourth Department determined: (1) the defendant was not in custody when he was asked pointed questions so the Miranda warnings were not required; (2) a police officer's subjective belief defendant was not free to leave is not relevant to a Miranda analysis; and (3) rape first degree is an inclusory current count of predatory sexual assault:

… [T]he evidence establishes, inter alia, that defendant was told at the start of the interview that he was not under arrest and would be going home that day … , and the recording of the interview belies defendant's contention that he was in handcuffs when he was placed in the interview room. Defendant concedes that he indeed was not arrested at the time of the interview, and that he was given a ride home later that day. We reject defendant's contention that, because a police officer testified that defendant was not free to leave during transport to the police station, the court erred in concluding that defendant was not in custody. A police officer's subjective belief " has no bearing on the question whether a suspect was in custody at a particular time . . . [and] the subjective intent of the officer . . . is irrelevant' where, as here, there is no evidence that such subjective intent

was communicated to the defendant" … . Contrary to defendant's further contention, Miranda warnings were not required before the investigators asked pointed questions. It is well settled that "both the elements of police custody' and police interrogation' must be present before law enforcement officials constitutionally are obligated to provide the procedural safeguards imposed upon them by Miranda" … , and the element of custody was absent here. People v Baez, 2019 NY Slip Op 06294, Fourth Dept 8-22-19

STATEMENTS.

UNDER THE CIRCUMSTANCES OF THIS CASE, PRE-MIRANDA QUESTIONING OF THE DEFENDANT ABOUT HIS EMPLOYMENT CONSTITUTED CUSTODIAL INTERROGATION; ALL OF DEFENDANT'S STATEMENTS, PRE- AND POST-MIRANDA, MUST BE SUPPRESSED; JURY SHOULD HAVE BEEN TOLD OUT-OF-COURT STATEMENTS ADMITTED FOR A NONHEARSAY PURPOSE SHOULD NOT BE CONSIDERED FOR THEIR TRUTH (SECOND DEPT).

The Second Department, reversing defendant's conviction, suppressing defendant's statements and ordering a new trial, determined the initial questioning of the defendant, which was not preceded by the Miranda warnings, constituted interrogation. Therefore, those statements and the entire post-Miranda videotaped interrogation, should have been suppressed. The court further noted that statements made by an accomplice in a controlled phone call were admitted for a nonhearsay purpose. Therefore the jury should have been instructed not to rely on those statements for their truth:

… [T]he pre-Miranda questioning was not mere "small talk," but, rather, interrogation … . In particular, the detective was aware, when he questioned the defendant about his employment, that Espinal [an accomplice] claimed to know the defendant from previously working with him at a bar. Indeed, when the questioning resumed after administration of Miranda warnings, it concerned the defendant's work history at bars at or around the time of the incident. Notably, the People assert that they are not claiming that the pedigree exception to the Miranda rule is applicable, and, in any event, the detective admitted at the suppression hearing that, at the time of the interview, he had already recorded the defendant's pedigree information and that such information does not include an individual's employment … . Under these circumstances, the defendant was improperly subjected to custodial interrogation without being advised of his Miranda rights, requiring suppression of those statements … . People v Dorvil, 2019 NY Slip Op 06409, Second Dept 8-28-19

WRONGFUL CONVICTION.

WRONGFUL CONVICTION ACTION PROPERLY DISMISSED, CONVICTION WAS NOT VACATED ON A GROUND ENUMERATED IN THE COURT OF CLAIMS ACT (FOURTH DEPT).

The Fourth Department determined claimant's wrongful conviction action was properly dismissed because claimant's judgment of conviction was not vacated on a ground enumerated in the Court of Claims Act:

… [T]he County Court Judge averred that he vacated claimant's judgment pursuant to CPL 440.10 (1) (f) "and/or" CPL 440.10 (1) (h). More specifically, the County Court Judge determined that the People had committed a Rosario violation, which falls under CPL 440.10 (1) (f) (see People v Jackson, 78 NY2d 638, 645 [1991]), "and/or" a Brady violation, which falls under CPL 440.10 (1) (h) … . The transcript of the hearing at which the County Court Judge vacated the judgment fully corroborates his sworn account of his rationale for overturning claimant's conviction, and the transcript likewise supports the County Court Judge's averment that he effectively denied claimant's CPL article 440 motion to the extent predicated on any provision of CPL 440.10 (1) other than paragraphs (f) or (h). Thus, because paragraphs (f) and (h) of CPL 440.10 (1) "are not enumerated in Court of Claims Act § 8-b (3) (b) (ii), the [court] properly dismissed the claim" … . …

It is possible, as claimant notes, that the facts underlying a successful Brady claim under CPL 440.10 (1) (h) could also give rise to a viable claim of newly discovered evidence under CPL 440.10 (1) (g). That, however, is irrelevant for purposes of Court of Claims Act § 8-b, which allows recovery only where the criminal court actually vacated the judgment on an enumerated ground, and not where the criminal court might have vacated the judgment on an enumerated ground, but did not do so … . Jeanty v State of New York,2019 NY Slip Op 06333, Fourth Dept 8-22-19

YOUTHFUL OFFENDERS, DNA.

A JUDGE HAS THE DISCRETION TO EXPUNGE A YOUTHFUL OFFENDER'S DNA RECORDS, SUPREME COURT REVERSED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Gische, reversing Supreme Court determined: (1) the Executive Law pertains to the local DNA databank maintained by the Office of the Chief Medical Examiner (OCME); (2) an Article 78 mandamus action seeking the expungement of the petitioner-youthful-offender's (YO's) DNA records from the databank was properly brought; and (3) a judge has the discretion to expunge a YO's DNA records. The petitioner voluntarily provided a DNA sample before he was adjudicated a youthful offender. Supreme Court had held it did not have the discretion to expunge the records:

… [W]e hold that the same discretion afforded to a court under the Executive Law to expunge DNA profiles and related records when a conviction is vacated may also be exercised where, as here, a YO disposition replaces a criminal conviction. The motion court, in finding that, as a matter of law, it had no discretion, failed to fulfill its statutory mandate to consider whether in the exercise of discretion, expungement of petitioner's DNA records was warranted in this case. * * *

A YO disposition by its very nature is a judgment of conviction that is vacated and then replaced by a YO determination. This conclusion is supported by the mechanics of the YO statute, its salutary goals, and legislative intent. * * *

Petitioner did not, either expressly or by implication, waive the privilege of nondisclosure and confidentiality by providing his DNA before the court made its determination that he was eligible for YO status. Clearly the Executive Law permits an adult who has voluntarily given his or her DNA in connection with a criminal investigation the right to seek discretionary expungement where a conviction had been reversed or vacated. A youthful offender does not have and should not be afforded fewer pre-YO adjudication protections than an adult in the equivalent circumstances. Matter of Samy F. v Fabrizio, 2019 NY Slip Op 06374, First Dept 8-27-19

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