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The Second Department, reversing defendant's conviction, determined that the court was wrong when it informed defendant he retained the right to appeal the ruling on the speedy trial motion (CPL 30.30) after his guilty plea. Therefore defendant was entitled to the opportunity to withdraw his plea in this attempted murder case:

A defendant who has entered a plea of guilty "forfeit[s] his [or her] right to claim that he [or she] was deprived of a speedy trial under CPL 30.30" … . However, where a defendant's plea is predicated upon a false assurance that, notwithstanding the plea, the defendant can nonetheless contest the denial of a CPL 30.30 motion, the defendant is entitled, if he or she wishes, to withdraw the plea of guilty … .

Here, it is clear from the record that the defendant pleaded guilty in reliance upon a promise from the Supreme Court that, upon his plea of guilty, he would retain the right to appeal the denial of his motion pursuant to CPL 30.30 to dismiss the indictment. However, that promise cannot be fulfilled … . Therefore, as the People concede, the defendant is entitled to withdraw his plea of guilty … . People v Hernandez, 2019 NY Slip Op 07605, Second Dept 10-23-19

APPEALS.

THE APPEAL OF AN UNPRESERVED ISSUE DID NOT PRESENT A QUESTION OF LAW REVIEWABLE BY THE COURT OF APPEALS, THREE JUDGES DISSENTED (CT APP).

The Court of Appeals, over an extensive two-judge dissenting opinion, and another dissent, determined that the modification by the Appellate Division could not be appealed:

"[A]n Appellate Division reversal [or modification] based on an unpreserved error is considered an exercise of the Appellate Division's interest of justice power" … . Moreover, the Appellate Division's characterization of its own holding (i.e., "on the law" or "on the facts") is not binding; in determining jurisdiction, we look behind that characterization to discern the basis of the ruling … . …

Here, it is undisputed that, in vacating the first-degree robbery count (without disturbing the second-degree robbery convictions …), the Appellate Division relied upon an unpreserved argument concerning the proper interpretation of and minimum proof required to establish the weapon display element of the first-degree offense … . As we have repeatedly recognized, for jurisdictional purposes an unpreserved issue of this nature does not present a question of law. Thus, the Appellate Division determination — the basis of the order of modification — was not "on the law alone" but was necessarily made as a matter of discretion in the interest of justice … . People v Allende, 2019 NY Slip Op 07523, Ct App 10-22-19

ARREST.

ALTHOUGH THE COMPLAINANT IDENTIFIED THE DEFENDANT FROM A PHOTO ARRAY IN A PROCEDURE CONDUCTED BY A POLICE OFFICER, THERE WAS NO PROOF OF THE BASIS FOR DEFENDANT'S ARREST BY ANOTHER OFFICER, THEREFORE DEFENDANT'S SUPPRESSION MOTION SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the evidence did not demonstrate that the officer who arrested defendant had probable cause to do so. Therefore defendant's motion to suppress should have been granted. The People presented evidence that Officer Gorman conducted a photo identification procedure and,

after the robbery complainant identified the defendant, Officer Gorman issued an "I-card." But there was no evidence of the arresting officer's basis for arrest:

Under the fellow officer rule, "even if an arresting officer lacks personal knowledge sufficient to establish probable cause, the arrest will be lawful if the officer acts upon the direction of or as a result of communication with a superior or [fellow] officer or another police department provided that the police as a whole were in possession of information sufficient to constitute probable cause to make the arrest'" … .The evidence presented by the People did not establish that the officer who actually arrested the defendant had probable cause to do so … . Officer Gorman testified that he issued an I-Card for the defendant, but he also testified that the defendant was arrested "on a different matter." The People did not present any testimony from the arresting officer as to what information he possessed or how he received that information … . Therefore, contrary to the People's contention, there was insufficient evidence from which to infer that the police arrested the defendant pursuant to the I-Card or at the direction of Officer Gorman … . Furthermore, the People presented no evidence at the hearing regarding the circumstances of the defendant's arrest or the charges on which he was arrested, nor do they argue on appeal that there was any source of probable cause for the defendant's arrest other than the I-Card. People v Hightower, 2019 NY Slip Op 07280, Second Dept 10-9-19

ASSAULT, APPEALS.

PROOF DID NOT DEMONSTRATE THAT THE VICTIM'S EYE INJURY ROSE TO THE LEVEL OF 'SERIOUS PHYSICAL INJURY;' BASED UPON A WEIGHT OF THE EVIDENCE ANALYSIS, ASSAULT FIRST REDUCED TO ASSAULT SECOND (SECOND DEPT).

The Second Department, applying a weight of the evidence analysis, determined the People did not present sufficient proof to demonstrate the victim's eye injury rose to the level of "serious physical injury" and reduced the Assault First conviction to Assault Second. Defendant threw a brick from an overpass which struck the windshield of the victim's car, sending glass into her eye:

Before the incident, the victim had not experienced blurry vision in her left eye. She testified that her overall vision worsened since the incident, and that she has a permanent scar on her cornea. At the time of trial, the victim visited the doctor every six months for evaluation of her corneal scar. She acknowledged, however, that before the incident, she wore eyeglasses. The medical records indicated that she had been diagnosed and treated for an eye condition, blepharitis. The medical records further indicated that, in a follow-up visit in February

2016, the victim reported no pain or change in vision. Notably, the People did not proffer any medical testimony to interpret and explain the medical records; explain the nature, severity, and prognosis of the victim's eye injury; or to explain whether any preexisting eye condition or conditions were affected by the incident, or whether any such preexisting eye condition was a cause of any of her current complaints … .

Upon the exercise of our factual review power, we conclude that the verdict convicting the defendant of assault in the first degree and assault in the second degree was against the weight of the evidence. Given the lack of medical testimony to explain the nature of the victim's eye injury, an acquittal on the charges of assault in the first degree and assault in the second degree would have been reasonable. Giving appropriate weight to the evidence submitted on the issue of " [s]erious physical injury,'" we conclude that the jury was not justified in finding that the People proved, beyond a reasonable doubt, that the victim's eye injury created a substantial risk of death or constituted a "serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ" (Penal Law § 10.00[10] …). People v Palant, 2019 NY Slip Op 07289, Second Dept 10-9-19

ATTEMPTED MURDER.

PHYSICAL INJURY IS NOT AN ELEMENT OF ATTEMPTED MURDER; REQUEST FOR MISSING WITNESS JURY INSTRUCTION BASED UPON THE COMPLAINANT'S FAILURE TO TESTIFY PROPERLY DENIED; PERSISTENT FELONY SENTENCING PROCEDURE WAS NOT FOLLOWED (SECOND DEPT).

The Second Department affirmed defendant's attempted murder conviction, noting that proof of attempted murder does not require proof of serious injury, or any injury at all. The court further noted that the complainant was not under the People's control and therefore the request for the missing witness jury instruction was properly denied. Defendant, however, was not properly sentenced:

… [W]e note that while none of the complainant's injuries in this case were life-threatening, "the crime of attempted murder does not require actual physical injury to a victim at all" … . Here, the forensic evidence showing that two separate knives were used in the attack, coupled with the fact that the defendant, still holding a knife, chased the complainant outside the apartment complex and broke off his attack only after a bystander intervened, provides factually sufficient evidence of the defendant's intent to kill.

Contrary to the defendant's contentions, the County Court properly declined to give a missing witness charge with regard to the complainant, as the record reflects that the complainant was not under the People's control … . …

The sentencing minutes do not establish that the County Court asked the defendant whether he wished to controvert any allegations made in the statement filed pursuant to CPL 400.16(2) … . Accordingly, we vacate the sentences and remit the matter to the County Court, Suffolk County, for resentencing in accordance with CPL 400.16 … . People v Gunn, 2019 NY Slip Op 07279, Second Dept 10-9-19

BRADY MATERIAL.

BRADY MATERIAL WHICH CONTRADICTED THE PEOPLE'S THEORY OF THE CASE SHOULD HAVE BEEN PROVIDED TO THE DEFENSE, CONVICTION REVERSED (CT APP).

The Court of Appeals, reversing defendant's conviction, determined that defendant should have been provided with exculpatory (Brady) evidence. Eyewitnesses to the assault made statements that there were two perpetrators, which directly contradicted the People's theory that defendant was the sole perpetrator:

The first two prongs of Brady being satisfied, our inquiry thus turns to whether the suppressed information was material. "In New York, the test of materiality where . . . the defendant has made a specific request for the evidence in question is whether there is a reasonable possibility' that the verdict would have been different if the evidence had been disclosed" … . … [B]oth witnesses' statements, if true, would have directly contradicted the People's theory of the case that defendant was the sole perpetrator. Although the People presented other evidence of defendant's guilt, the only witness who identified defendant at trial initially told the police that he did not see the perpetrator's face. Considering that the nightclub owner provided the police with the name of another possible assailant, and based on the other evidence presented at trial, it is clear that access at least to him could have allowed defendant to develop additional facts, which in turn could have aided him in establishing additional or alternative theories to support his defense. Given the substance of the nightclub owner's statements and the nature of the People's case, we cannot say—under our less demanding standard—that there was no "reasonable possibility" that the defense's investigation of the witnesses would not have affected the outcome of defendant's trial … . People v Rong He, 2019 NY Slip Op 07477, CtApp 10-17-19

CIRCUMSTANTIAL EVIDENCE.

THE STANDARD OF PROOF REQUIRED IN AN ENTIRELY CIRCUMSTANTIAL-EVIDENCE CASE WAS NOT MET IN THIS MURDER PROSECUTION; CONVICTION REVERSED AS AGAINST THE WEIGHT OF THE EVIDENCE (SECOND DEPT).

The Second Department, reversing defendant's murder conviction, determined the conviction was against the weight of the evidence. There was no forensic evidence linking defendant to the murder, which occurred 11 years before the trial, and the circumstantial evidence merely raised the possibility defendant committed the murder. The decision recounts the evidence in a level of detail which cannot be fairly summarized here:

Where the prosecution relies entirely on circumstantial evidence, before the fact-finder can draw an inference of guilt, that inference must be the only one that can fairly and reasonably be drawn from the proven facts, and the evidence must exclude beyond a reasonable doubt every reasonable hypothesis of innocence … . The inferences to be drawn from the People's evidence in this case as to coincidence of time, place, and behavior are sufficient only to create suspicion. The evidence presented at trial is not inconsistent with the defendant's innocence, and any determination of guilt requires too much speculation to fill the gaps in the People's evidence to constitute proof beyond a reasonable doubt. * * *

[T]he evidence presented at trial supports the possibility that the defendant was the person who killed Perez. "[H]owever, speculation and conjecture are no substitute for proof beyond a reasonable doubt" … . It is not enough for the jury to determine "that the defendant is probably guilty" … . The People must prove beyond a reasonable doubt that the defendant is the person who committed the crime. On this record, we find that the jury was not justified in finding the defendant guilty beyond a reasonable doubt. People v Clavell, 2019 NY Slip Op 07271, Second Dept 10-10-19

COGNIZABLE CRIME, MODE OF PROCEEDINGS ERROR.

ATTEMPTED MENACING OF A POLICE OFFICER IS NOT A COGNIZABLE CRIME; CHARGING ATTEMPTED MENACING OF A POLICE OFFICER IS A MODE OF PROCEEDINGS ERROR THAT NEED NOT BE PRESERVED (FOURTH DEPT).

The Fourth Department determined that attempted menacing of a police officer is not a cognizable crime because "attempt" is included in the offense. This was a mode of proceedings error that did not have to be preserved:

We agree with defendant … that his conviction of attempted menacing a police officer or peace officer must be reversed because that offense is not a legally cognizable crime. As relevant here, Penal Law § 120.18 provides that "[a] person is guilty of menacing a police officer or peace officer when he or she intentionally places or attempts to place a police officer . . . in reasonable fear of physical injury, serious physical injury or death by displaying a deadly weapon, . . . pistol, . . . or other firearm, whether operable or not, where such officer was in the course of performing his or her official duties and the defendant knew or reasonably should have known that such victim was a police officer." Thus, according to the definition of menacing a police officer or peace officer set forth in the Penal Law, the attempt to commit the crime is already an element of the offense, and "there cannot be an attempt to commit a crime which is itself a mere attempt to do an act or accomplish a result" … . Although defendant failed to raise this issue at trial, preservation is not required inasmuch as this issue constitutes a mode of proceedings error … . People v Dibble, 2019 NY Slip Op 07165, Fourth Dept 10-4-19

DOUBLE JEOPARDY, JURIES.

THE SECOND TRIAL VIOLATED THE DOUBLE JEOPARDY PROHIBITION; THE FIRST TRIAL COULD HAVE CONTINUED WITH ELEVEN JURORS AFTER A JUROR WAS DISQUALIFIED DURING DELIBERATIONS (SECOND DEPT).

The Second Department, after the second trial was finished, determined that the second trial violated the double jeopardy prohibition. In the first trial, a juror talked to an attorney about the evidence and, during deliberations, told the other jurors what the attorney said. That juror was disqualified. The People moved for a mistrial. The defendant opposed and was willing to proceed with eleven jurors. The judge declared a mistrial:

When a mistrial is declared without the consent of or over the objection of a defendant, a retrial is precluded unless " there was manifest necessity for the mistrial or the ends of public justice would be defeated'" … . …

… [T]he People have not met their burden of demonstrating that the declaration of a mistrial was manifestly necessary. While it is undisputed that juror number 11 was grossly unqualified to continue serving, the Supreme Court abused its discretion in declaring a mistrial without considering other alternatives. The defendant specifically indicated his desire to waive trial by a jury of 12 individuals and proceed with the remaining 11 jurors, an option that has been endorsed by the Court of Appeals … . Under the circumstances presented, as urged by defense counsel, it would have been appropriate to poll the remainder of the jurors to ascertain whether they could render an impartial verdict … . Moreover, as the improper information imparted to the jurors did not significantly prejudice the People, the court should have considered whether a specific curative instruction could have clarified what constituted "evidence" and whether such an instruction could have cured the impropriety … . Accordingly, there was an insufficient basis in the record for the declaration of a mistrial, and thus, a retrial was precluded. People v Smith, 2019 NY Slip Op 07622, Second Dept 10-23-19

DOUBLE JEOPARDY.

THE PROHIBITION OF DOUBLE JEOPARDY DID NOT PRECLUDE THE PROSECUTION BASED UPON THE THEFT OF GOLDMAN SACHS SOURCE CODE UNDER A STATE STATUTE AFTER DEFENDANT'S CONVICTION UNDER A FEDERAL STATUTE WAS REVERSED; THE STATE STATUTE INCLUDED AN ELEMENT NOT INCLUDED IN THE FEDERAL STATUTE (FIRST DEPT).

The First Department determined defendant's prosecution for unlawful use of secret scientific material did not violate the prohibition against double jeopardy. Defendant, while working for Goldman Sachs, had uploaded source code to a server in Germany. He was first charged under a federal statute, the National Stolen Property Act (NSPA). The Second Circuit reversed the NSPA conviction because the source code was deemed "intangible" at the time of the theft (when it was transmitted) and therefore did not meet the definition of "goods" in the federal statute. However, the state statute under which defendant was subsequently prosecuted, unlawful use of secret scientific material, included tangible electronically reproduced material, and the source code reproduced on the German server met that criteria:

Defendant's argument rests on the claim that the "goods" element of the NSPA, which undisputedly requires that the property transported be "tangible," is equivalent to the "tangible reproduction" element of New York's

unlawful use statute. That statute provides that "[a] person is guilty of unlawful use of secret scientific material when, with intent to appropriate . . . the use of secret scientific material, and having no right to do so and no reasonable ground to believe that he [or she] has such right, [the person] makes a tangible reproduction or representation of such secret scientific material by means of writing, photographing, drawing, mechanically or electronically reproducing or recording such secret scientific material" (Penal Law § 165.07). * * *

… [T]he Second Circuit did not hold that the source codes were intangible as they existed on the German server. Rather, it held that "at the time of the theft" … — which was the same as the time that the codes were transmitted — the codes were purely intangible. Because the elements are not equivalent, there is no inconsistency between the Second Circuit's determination that the codes were intangible when transported and this Court's determination that defendant made a tangible reproduction when he uploaded them to the German server, where they resided within a physical medium. People v Aleynikov, 2019 NY Slip Op 07211, First Dept 10-18-19

DRUG SALE.

DEFENDANT'S DRUG SALE CONVICTION WAS AGAINST THE WEIGHT OF THE EVIDENCE (FIRST DEPT).

The First Department reversed defendant's drug-sale conviction as against the weight of the evidence. The police saw a woman approach defendant and the woman had a $10 bag of crack cocaine in her mouth when the police stopped her. The defendant had $10 in his pocket but no drugs on him. No exchange between the two was observed:

Two police officers testified that they observed defendant in a high drug trafficking area. They both saw defendant approach a man and talk to him. The man gave defendant money and there was an "exchange," but the officers did not see what was exchanged. Shortly thereafter, one of the officers witnessed a woman approach defendant. The officer saw the woman speak to defendant and then touch his hand, but the officer did not see any money or drugs exchanged. Defendant and the woman separated, and the officer approached the woman. The officer identified herself, said that she just saw what happened, and heard the woman chewing on something. She asked the woman to spit out the object, which turned out to be a small bag containing $10 worth of crack cocaine. The officer never saw the woman put the bag in her mouth or even bring her hand to her mouth. The police then arrested the woman and defendant. Defendant did not have any drugs on him, but had $10 in his sweatshirt pocket and other denominations of cash in his pants pocket.

In the exercise of our factual review power, we conclude that the People did not prove beyond any reasonable doubt that defendant sold cocaine to the woman, which was the only crime charged. The officer who witnessed the transaction acknowledged she did not observe an exchange of anything, including money, drugs or unidentified objects, between defendant and the woman. In addition, the People's theory that the woman put the bag in her mouth after purchasing it from defendant was contradicted by the officer's testimony that she never saw the woman put anything into her mouth, or even put her hand to her mouth. Furthermore, the People's theory that defendant sold two $10 bags, one to the man and the other to the woman, was inconsistent with the cash found on defendant. People v Correa, 2019 NY Slip Op 07017, First Dept 10-1-19

EAVESDROPPING.

COURT HAD JURISDICTION TO ISSUE EAVESDROPPING WARRANTS TO INTERCEPT CELL PHONE CALLS AND TEXT MESSAGES SENT AND RECEIVED OUTSIDE NEW YORK STATE (SECOND DEPT).

The Second Department determined Supreme Court had jurisdiction to issue eavesdropping warrants to intercept cell phone calls and text messages made and received outside New York State:

"[A]ny justice of the supreme court of the judicial district in which the eavesdropping warrant is to be executed" (CPL 700.05[4]) "may issue an eavesdropping warrant . . . upon ex parte application of an applicant who is authorized by law to investigate, prosecute or participate in the prosecution of the particular designated offense which is the subject of the application" (CPL 700.10[1]). Although the word "execute" is not defined in CPL article 700, the plain meaning of the word "execute" and the use of that word in relevant sections of the Criminal Procedure Law reveal that an eavesdropping warrant is "executed" when a communication is intercepted by law enforcement officers, that is, when the communication is "intentionally overheard or recorded" by law enforcement officers (CPL 700.05[3][a]; see CPL 700.35[1]). Here, the eavesdropping warrants were executed in Kings County, New York, where the communications were intercepted by the New York City Police Department … . Therefore, under the applicable provisions of the Criminal Procedure Law, a Justice of the Supreme Court, Kings County, had jurisdiction to issue the eavesdropping warrants.

Moreover, we reject the defendant's argument that the eavesdropping warrants, which were authorized for the purpose of investigating crimes that were occurring in New York, constituted an unconstitutional extraterritorial application of New York State law … . People v Schneider, 2019 NY Slip Op 07424, Second Dept 10-16-19

FAMILY OFFENSE, JURISDICTION.

HEARING NECESSARY TO DETERMINE WHETHER FAMILY COURT HAS SUBJECT MATTER JURISDICTION IN THIS FAMILY OFFENSE PROCEEDING; JURISDICTION DEPENDS ON THE NATURE OF THE RELATIONSHIP BETWEEN THE PARTIES (SECOND DEPT).

The Second Department, reversing Family Court, determined a hearing was necessary on whether the court had subject matter jurisdiction for the petition seeking an order of protection:

… [T]he petitioner commenced this proceeding pursuant to Family Court Act article 8 seeking an order of protection against Cynthia J. Brock. The petitioner alleged, inter alia, that she and Brock were in an intimate relationship in that the petitioner was the paternal great grandmother of Brock's child, and that she and Brock had "lived together in the past." The petitioner further alleged that although her grandson and the child had moved out of her home a month earlier, Brock continued to routinely drop off the child at the petitioner's home after Brock's parental access time with the child, and used these opportunities to threaten, abuse, and annoy the petitioner. The petitioner also alleged that Brock telephoned the child on a daily basis, and verbally harassed the petitioner on the phone. Subsequently, Brock made an application to dismiss the petition for lack of subject matter jurisdiction on the ground that the relationship between her and the petitioner did not qualify as an "intimate relationship" within the meaning of Family Court Act § 812(1)(e). The Family Court granted the application and dismissed the petition.

The Family Court is a court of limited subject matter jurisdiction, and "cannot exercise powers beyond those granted to it by statute"… . Pursuant to Family Court Act § 812(1), the Family Court's jurisdiction in family offense proceedings is limited to certain proscribed criminal acts that occur "between spouses or former spouses, or between parent and child or between members of the same family or household" … . For purposes of Family Court Act article 8, "members of the same family or household" include, inter alia, "persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time" … . Expressly excluded from the ambit of "intimate relationship" are "casual acquaintance[s]" and "ordinary fraternization between two individuals in business or social contexts" … . Beyond those delineated exclusions, what qualifies as an intimate relationship within the meaning of Family Court Act § 812(1)(e) is determined on a case-by-case basis … . Relevant factors include "the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the

persons; and the duration of the relationship … . Matter of Hamrahi v Brock, 2019 NY Slip Op 07781, Second Dept 10-30-19

FIFTH AMENDMENT PRIVILEGE.

TRIAL JUDGE PROPERLY REFUSED TO COMPEL THE WITNESS WHO ASSERTED HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION TO TESTIFY OR TO ASSERT THE PRIVILEGE IN FRONT OF THE JURY (THIRD DEPT).

The Third Department determined the trial judge properly refused to compel a witness (Chandler, an accomplice in the defendant's offenses) who asserted his Fifth Amendment privilege against self-incrimination to testify or to assert the privilege in the presence of the jury:

Chandler — who had entered a guilty plea, but was awaiting sentencing — was produced in court. Outside the presence of the jury, Chandler's counsel indicated that Chandler intended to exercise his privilege against self-incrimination based on the possibility that he could further incriminate himself, expose himself to perjury charges and/or provide testimony that could adversely impact his upcoming sentencing proceeding. Chandler confirmed under oath that he would invoke the privilege if called as a witness and, when questioned by defendant in the context of that inquiry, did in fact invoke the privilege. Supreme Court acknowledged that Chandler's plea agreement was contingent upon "no information coming to the [c]ourt's attention about prior criminal conduct that the [c]ourt did not know about." Such unknown prior criminal conduct could potentially include crimes relating to defendant's claim that Chandler coerced him into participating in the schemes to defraud. There was no basis for Supreme Court to conclude that Chandler's "invocation of the privilege was clearly contumacious, nor was it patently clear that [Chandler's testimony] could not subject him to prosecution" … . Accordingly, we discern no abuse of discretion in Supreme Court's refusal to compel Chandler to testify or to require him to assert the privilege in the presence of the jury … . Although defendant certainly had the right to call witnesses and present a defense, he had "no right to compel testimony over a claim of recognized privilege" … . People v Jones, 2019 NY Slip Op 07647, Third Dept 10-24-19

GRAND JURIES.

PROOF PRESENTED TO THE GRAND JURY DID NOT SUPPORT ATTEMPTED THIRD OR FOURTH DEGREE LARCENY, APPELLATE DIVISION REVERSED (CT APP).

The Court of Appeals, reversing (modifying) the Appellate Division, determined the evidence presented to the grand jury was not sufficient to support attempted third or fourth degree larceny. Apparently defendant used a sticky object to "fish" mail out of a mailbox. Although there were money orders in the mailbox, the money orders were not stuck to the object:

Viewed in the light most favorable to the People, the evidence presented to the grand jury was insufficient to demonstrate that defendant came dangerously close to taking property valued in excess of $3,000 or $1,000. There was no evidence that the items attached to defendant's mailbox fishing apparatus had any monetary value, no evidence of the volume of the mail contained in the mailbox or whether it was physically possible for defendant to procure the two money orders deposited in the mailbox by the government investigators amidst the other mail, no evidence as to whether the fishing device was immediately reusable, and no evidence that defendant intended to make successive attempts at fishing out the contents of the mailbox in question. Furthermore, the fact that defendant stated he would be paid $100 for each mailbox fished does not establish that he came dangerously close to stealing property valued at more than $3,000 or $1,000. People v Deleon, 2019 NY Slip Op 07522, CtApp 10-22-19

GRAVITY KNIVES.

POSSESSION OF A GRAVITY KNIFE CHARGE DISMISSED EVEN THOUGH THE STATUTE DECRIMINALIZING SUCH POSSESSION IS NOT TO BE APPLIED RETROACTIVELY (FIRST DEPT).

The First Department determined the indictment charging possession of a gravity knife based upon the statute decriminalizing such possession, even though the statute is not to be applied retroactively:

With respect to the weapon conviction, involving a gravity knife, the People, in the exercise of their broad prosecutorial discretion, have agreed that the indictment should be dismissed under the particular circumstances of the case and in light of recent legislation amending Penal Law § 265.01 to effectively decriminalize the simple

possession of gravity knives, notwithstanding that this law does not apply retroactively. We agree … . People v Caviness, 2019 NY Slip Op 07494, First Dept 10-17-19

GUILTY PLEAS, APPEALS.

DEFENDANT'S WAIVER OF APPEAL DID NOT REMAIN VALID AFTER DEFENDANT PLED GUILTY TO A DIFFERENT CRIME WHEN THE INITIAL SENTENCE PROMISE COULD NOT BE FULFILLED (SECOND DEPT).

The Second Department determined defendant's waiver of appeal was invalid because his consent to the waiver was not renewed after he pled to a different crime after the initial sentence promise could not met:

… [T]he Supreme Court was unable to fulfill its sentencing commitment because the sentence it had promised was illegal … . Although the defendant ultimately agreed to plead guilty to a different crime in return for a different sentence, the modification of the material terms of the original plea agreement "vitiated defendant's knowing and intelligent entry of the waiver of appeal"… . Under such circumstances, "it was incumbent on the court to elicit defendant's continuing consent to waive his right to appeal" … . Since the court did not obtain the defendant's continuing consent to waive his right to appeal after the material terms of the original plea agreement were changed, the defendant is not precluded from arguing that the sentence imposed was excessive … . People v Ellison, 2019 NY Slip Op 07413, Second Dept 10-16-19

GUILTY PLEAS, APPEALS.

RESPONDENT, WHO HAD BEEN ADJUDICATED A JUVENILE DELINQUENT, WAS NOT GIVEN SUFFICIENT INFORMATION BEFORE ADMITTING TO A PROBATION VIOLATION, THE PETITION WAS DISMISSED; THE ERROR DID NOT REQUIRE PRESERVATION AND THE APPEAL WAS NOT MOOT BECAUSE OF THE COLLATERAL CONSEQUENCES OF A JUVENILE DELINQUENCY ADJUDICATION (THIRD DEPT).

The Third Department, dismissing the petition, determined that respondent, who had been adjudicated a juvenile delinquent, was not provided sufficient information before admitting to a probation violation. Because of the collateral consequences of a "juvenile delinquent" adjudication, the appeal is not moot, even though the period of respondent's custody and care under the Office of Children and Family Services had expired. In addition, the error did not required preservation:

Initially, we note that preservation of this claim was not required … . Family Ct Act § 321.3 (1) requires a court to advise a respondent of his or her right to a fact-finding hearing and to question both the respondent and his or her parent, if present, as to whether the respondent committed the act contained in the admission, whether the respondent is voluntarily waiving his or her right to a fact-finding hearing, and whether the respondent is aware of the possible specific dispositional orders … . The May 2018 allocution did not meet these statutory requirements. Although Family Court did advise respondent, to some extent, regarding his rights, the failure to meet the statutory mandates rendered the allocution inadequate. Critically, although respondent's mother was present, the court failed to question her regarding respondent's waiver of the fact-finding hearing … or about his failure to attend counseling. Instead, respondent was merely asked whether he had sufficient time to speak to his parents about the allocution … . Moreover, the court did not determine whether respondent and his mother understood the possible specific dispositional orders that might result from his allocution … . Although it was stated that placement outside the home was an available option, the court did not "ascertain whether [respondent] and his parent[] were aware of the full extent of such a disposition" … . Matter of Elijah X., 2019 NY Slip Op 07464, Third Dept 10-17-19

GUILTY PLEAS, SENTENCE PROMISE.

DEFENDANT WAS ENTITLED EITHER TO THE VACATION OF HIS GUILTY PLEA OR TO A SENTENCE WHICH CONFORMED WITH THE SENTENCE PROMISE; DEFENDANT'S 440 MOTION WAS NOT BARRED BY PROVISIONS OF CPL 440.10 (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendant was entitled to either the vacation of his guilty plea or the imposition of a sentence which conformed to the plea bargain. Defendant had pled guilty to a drug possession charge and was told at the time of the plea he would not serve more than a year and a half in addition to his concurrent Massachusetts sentence. However, the Massachusetts sentence was subsequently reduced because of a cooperation agreement. Defendant's 440 motion was not barred by CPL 440.10 (2) (c) or (2) (b):

… [D]efendant's motion is not barred by CPL 440.10 (2) (c) inasmuch as the relevant ground for relief did not arise until several years after the deadline to file a direct appeal from the judgment had expired. Further, contrary to the court's determination, defendant's motion is not barred by CPL 440.10 (2) (b) inasmuch as he never filed a direct appeal from the judgment.

On the merits, it is well settled that, "[g]enerally, when a guilty plea has been induced by an unfulfilled promise either the plea must be vacated or the promise honored' " … . Here, the "reduction of the preexisting sentence nullified a benefit that was expressly promised and was a material inducement to the guilty plea" … , i.e., "the judge's specific representation [that defendant's guilty plea in New York] would thereby extend his [aggregate] incarceratory term by a year and a half only" … . People v Valerio, 2019 NY Slip Op 07192, Fourth Dept 10-3-19

GUILTY PLEAS.

DEFENDANT'S PLEA TO A PROBATION VIOLATION WAS NOT VOLUNTARY AND MUST BE VACATED (THIRD DEPT).

The Third Department, reversing County Court, determined defendant's plea to a probation violation was involuntary and must be vacated:

The record reflects that the People's final plea offer came with a prison sentence of 1½ years followed by six years of PRS. When defendant indicated that he wanted to admit to the probation violation and argue for a more lenient sentence, County Court stated that it could not "override" the recommended sentence unless defendant declined the offer and proceeded to a hearing. The court further told defendant that, if he took the offer, it was "up to the People" as to whether a lesser sentence could be considered. The People then turned down defendant's proposal to cap his sentencing exposure at 1½ years in prison and stated that they would recommend a higher sentence if defendant rejected the offer and were found guilty following a hearing. Defendant thereafter accepted the offer.

The foregoing reflects, and the People concede, that County Court abdicated its responsibility to carefully consider all facts available at the time of sentencing and fashion an appropriate sentence …. Inasmuch as the proceedings were also marred by the People's admittedly inappropriate threat to seek a harsher sentence if defendant rejected the offer and was found guilty after a hearing, however, the plea itself was involuntary. Thus, defendant is entitled to vacatur of his plea … , People v Roberts, 2019 NY Slip Op 07448, Third Dept 10-17-19

IDENTIFICATION.

THE PRESUMPTION OF SUGGESTIVENESS RAISED BY THE PEOPLE'S FAILURE TO PRESENT THE PHOTO ARRAYS USED BY THE WITNESS TO IDENTIFY THE DEFENDANT WAS OVERCOME BY THE EVIDENCE OF THE SHEER NUMBER OF PHOTOS VIEWED BY THE WITNESS (SECOND DEPT).

The Second Department determined the witness's identification of the defendant from photographs properly survived the motion to dismiss. The presumption of suggestiveness was overcome by the evidence of the sheer number of photographs shown to the witness. The court also held that rape first degree is a lesser included count of predatory sexual assault which was dismissed by the conviction on the higher court:

… [A]lthough the People did not produce in court the photographic arrays displayed through the use of the photo manager system, which gives rise to a presumption of suggestiveness, the People nevertheless rebutted that presumption and sustained their initial burden through the testimony of the detective, which established that she utilized the various databases applying the description of the perpetrator supplied by the complainant … . The detective testified that the complainant was shown the computer-generated photo arrays a day after the incident occurred and then again three days later. The detective's unrebutted testimony established that 700 to 1,000 photographs were generated by the photo manager system, which were displayed in smaller arrays of

photographs, from which, during the third viewing session, the complainant identified the defendant as the person who assaulted her … . "[W]hen a photographic identification procedure involves showing a witness a preexisting file consisting of a large number of photographs, the sheer volume and scope of [the] procedure militates against the presence of suggestiveness'" … . Moreover, the complainant eventually identified the defendant in a lineup. People v Castello, 2019 NY Slip Op 07085, Second Dept 10-2-19

INDICTMENTS.

TRIAL EVIDENCE RENDERED THE SINGLE-COUNT INDICTMENT DUPLICITOUS REQUIRING REVERSAL (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction, determined the trial evidence rendered the single-count indictment duplicitous. Defendant was charged with criminal mischief:

We agree with defendant, however, that the single-count indictment was rendered duplicitous by the trial evidence. CPL 200.30 (1) provides that "[e]ach count of an indictment may charge one offense only." Thus, "acts which separately and individually make out distinct crimes must be charged in separate and distinct counts" … . Here, the indictment charged defendant with damaging "the road surface at the intersection of Woolhouse Road and County Road #32" and thus was not facially defective. At trial, however, the evidence established that defendant committed two distinct offenses by damaging two different portions of the road at that intersection at two different times. Consequently, "[r]eversal is required because the jury may have convicted defendant of an unindicted [act of criminal mischief], resulting in the usurpation by the prosecutor of the exclusive power of the [g]rand [j]ury to determine the charges . . . , as well as the danger that . . . different jurors convicted defendant based on different acts … . People v Kniffin, 2019 NY Slip Op 07176, Fourth Dept 10-4-19

JURIES.

COURT SHOULD HAVE INQUIRED OF JURORS WHETHER THEIR CONCERNS ABOUT NOT BEING PAID BY THEIR EMPLOYERS DURING JURY DUTY WOULD AFFECT THEIR ABILITY TO RENDER AN IMPARTIAL VERDICT, NEW TRIAL ORDERED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the trial judge should have conducted further inquiry when three jurors stated that they could not continue deliberating because they were not being paid by their employers for the days they were on jury duty:

The court should have granted the defense request for inquiries into whether the financial pressure the jurors were experiencing had any bearing on their ability to deliberate fairly. In People v Hines (191 AD2d 274 [1st Dept 1993], lv denied 81 NY2d 1074 [1993]), this Court held that although "financial hardship is generally not a sufficient reason to warrant discharge when the trial is near completion," the trial court "should have ascertained whether the juror's financial difficulties would have affected his ability to deliberate impartially" (id. at 276). Similarly, in People v Cook (52 AD3d 255, 256 [1st Dept 2008], lv denied 11 NY3d 735 [2008]), we observed that "a juror's personal or financial inconvenience alone would be insufficient to establish the requisite manifest necessity" for a mistrial, but we went on to state that the fact that "the juror was unable to declare her continued ability to deliberate fairly" weighed in favor of a mistrial.

Here, the jury's note raised the possibility that one or more of the jurors referred to was unqualified, and the fact that they did not specifically volunteer, in their colloquies with the court, that financial pressures might compromise their impartiality did not obviate the necessity of an inquiry. People v Alexander, 2019 NY Slip Op 07715, First Dept 10-29-19

JURIES.

DEFENSE PEREMPTORY CHALLENGES TO WHITE JURORS NOT SUPPORTED BY RACE-NEUTRAL REASONS; THE ALLEGED ERROR IN INSTRUCTING THE JURY ON THE JUSTIFICATION DEFENSE WAS NOT PRESERVED (SECOND DEPT).

The Second Department determined defense peremptory challenges to prospective white jurors were not justified on race-neutral grounds and the alleged error in instructing the jury on the justification defense was not preserved:

The defendant contends that the Supreme Court erred in disallowing his peremptory challenges to two prospective white jurors because he provided sufficient race-neutral explanations for challenging them … . However, defense counsel's proffered explanations for challenging the two jurors "amounted, essentially, to no reason at all" … . Thus, we agree with the court's determination that the proffered explanations were pretextual and with the court's disallowal of the defendant's peremptory challenges. Moreover, the court did not act improperly by, sua sponte, directing the defendant's counsel to provide race-neutral explanations for the peremptory challenges … .

The defendant contends that the Supreme Court's instruction to the jury regarding the defense of justification was erroneous because the court included an instruction regarding the use of physical force to resist arrest. This contention is without merit. The justification charge, taken as a whole, correctly instructed the jury as to the defense of justification, and was a correct statement of the applicable law (see CPL 300.10[2] …). The defendant also contends that the justification instruction was erroneous because the court did not instruct the jurors that, if they found the defendant not guilty of charges of attempted murder in the first degree based on the defense of justification, they were not to consider the lesser counts of aggravated assault upon a police officer and attempted aggravated assault upon a police officer. The defendant failed to preserve this contention for appellate review, and we decline to review this issue in the exercise of our interest of justice jurisdiction … . People v Foxworth, 2019 NY Slip Op 07790, Second Dept 10-30-19

JURIES.

FOR CAUSE CHALLENGES TO TWO JURORS SHOULD HAVE BEEN GRANTED, CONVICTION REVERSED (THIRD DEPT).

The Third Department, reversing defendant's conviction, determined the defense for cause challenges to two jurors should have been granted in this rape prosecution:

During voir dire, when counsel asked prospective juror No. 2 if she thought that this was the right case for her to sit on, she responded, "I'm not sure. I teach youth. I have five children. That's where my sympathy would lie. . . . [T]he victim was probably about 20 years old. I would have a tendency to be biased in that direction." Counsel then asked if those thoughts might make it difficult for prospective juror No. 2 to weigh the evidence. She responded, "I don't think so. I think I could be biased. I'm sorry, unbiased. I do lean toward sympathy with the youth. That's where my life is." She then mentioned that she was very involved in church youth organizations and teaches ninth and tenth grade girls.

Prospective juror No. 3 acknowledged that he was having a hard time listening to the subject matter of the case during voir dire because he has four younger sisters and a daughter. When asked if he could "get beyond the allegations and really weigh the evidence" or whether that might be a problem, he responded, "I'd like to say I could be impartial, but until everything comes out it's difficult to say." No further questions were asked of these potential jurors by counsel or Supreme Court.

Supreme Court denied defendant's challenges to these prospective jurors for cause, asserting that each had said he or she could be fair and impartial. Although prospective juror No. 2 did say she could be unbiased, she again stated immediately thereafter that she leaned toward sympathy with youth and worked with young girls, indicating an inclination toward the young female victim. Prospective juror No. 3 made an equivocal statement regarding his partiality. As neither prospective juror unequivocally stated that he or she could be impartial, the court should have posed questions to rehabilitate them by obtaining such assurances or, if rehabilitation was not possible, excused the prospective jurors … . People v Jackson, 2019 NY Slip Op 07442, Third Dept 10-17-19

JURIES.

JUROR MISCONDUCT WARRANTED A NEW TRIAL IN THIS MURDER CASE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, affirming the Appellate Division, determined juror misconduct deprived defendant [Dr. Neulander] of a fair trial:

The Appellate Division concluded that the trial court abused its discretion by denying [defendant's] CPL 330.30 motion to set aside the verdict against him based on that juror misconduct. … [H]e is entitled to a new trial. "Nothing is more basic to the criminal process than the right of an accused to a trial by an impartial jury" … .

… [A] jury convicted Dr. Neulander of murdering his wife and tampering with physical evidence. Throughout the trial, one of the jurors, Juror 12, sent and received hundreds of text messages about the case. Certain text messages sent and received by Juror 12 were troublesome and inconsistent with the trial court's repeated instructions not to discuss the case with any person and to report any attempts by anyone to discuss the case with a juror. Juror 12 also accessed local media websites that were covering the trial extensively. In order to hide her misconduct, Juror 12 lied under oath to the court, deceived the People and the court by providing a false affidavit and tendering doctored text message exchanges in support of that affidavit, selectively deleted other text messages she deemed "problematic," and deleted her now-irretrievable internet browsing history. The cumulative effect of Juror 12's extreme deception and dishonesty compels us to conclude that her "improper conduct . . . may have affected a substantial right of defendant" (CPL 330.30[2]). People v Neulander, 2019 NY Slip Op 07521, CtApp 10-22-19

JURY INSTRUCTIONS.

JURY INSTRUCTIONS ON THE JUSTIFICATION DEFENSE WERE ADEQUATE, ARGUMENTS TO THE CONTRARY WERE NOT PRESERVED (FIRST DEPT).

The First Department determined the jury was properly instructed on the justification defense and any argument that the court's instructions and the jury sheet did not comply with Velez (requiring the instruction that acquittal on the top count based upon the justification defense requires that deliberations on the lesser counts stop) was not preserved:

Defendant also asked the court, pursuant to People v Velez (131 AD3d 129 [1st Dept 2015]) and its progeny, to charge that, if the jury acquitted him of the higher count of attempted first degree assault based on justification, then it should not continue with deliberations on the lower count of second-degree assault.

The court charged the jury on the defense of justification to prevent a burglary, but declined to give a justification charge based on defense of a person. The court also told the jury that if they find defendant not guilty of either count in the indictment by reason of justification, they must also find defendant not guilty of the other count as well "because justification is a complete defense to both counts of the indictment." Finally, the court instructed the jury on the elements of each crime, with the third element of both being "that the defendant was not justified." During deliberations, the jury asked the court for reinstruction on the elements of the charged crimes. In a supplemental charge, the trial court reread the elements of each offense, with both including the element "that the defendant was not justified." The jury returned a verdict finding defendant not guilty of attempted assault in the first degree, but guilty of assault in the second degree.

On appeal, defendant contends that the court's initial and supplemental charges did not comply with Velez, and that the verdict sheet erroneously omitted the issue of justification. These claims are unpreserved. During a colloquy on the Velez issue, the court showed defense counsel a copy of its proposed charge, and defense counsel expressly agreed that it "satisfies Velez." Further, defense counsel made no objection to the charge as given. As to the supplemental charge, defense counsel never asked the court to repeat its Velez instruction, and did not object to its absence after the charge was given. Likewise, defendant made no objections to the verdict sheet. Under the circumstances, we decline to exercise our interest of justice jurisdiction to review these unpreserved claims. People v Davis, 2019 NY Slip Op 07754, First Dept 10-29-19

JUVENILES, FAMILY COURT.

JUDGE HAD THE AUTHORITY TO SEVER TWO COUNTS IN AN INDICTMENT AND REMOVE THE MATTER, INVOLVING A JUVENILE, TO FAMILY COURT; THE PEOPLE'S ARTICLE 78 SEEKING PROHIBITION DENIED AND DISMISSED (FIRST DEPT).

The First Department denied the People's Article 78 action seeking to vacate an order by the respondent judge severing two counts which had been combined in an indictment and removing the charges to Family Court. The People objected to removing the prosecution of a 16-year-old to Family Court. In order the facilitate the removal, respondent judge severed the two counts. The People unsuccessfully argued the judged did not have the authority to sever the counts, and therefore could not send the charges to Family Court:

"[T]he extraordinary remedy of prohibition lies only where there is a clear legal right, and only when a court . . . acts or threatens to act either without jurisdiction or in excess of its authorized powers in a proceeding over which it has jurisdiction" … . "Use of the writ is, and must be, restricted so as to prevent incessant interruption of pending judicial proceedings by those seeking collateral review of adverse determinations made during the course of those proceedings" … .

There is no merit in the People's contention that the court lacks the authority to sever charges that were joined in a single indictment. This argument would have validity in cases where charges were properly joinable in a single indictment. However, the law is clear that the determination of whether the charges were, in fact, properly joinable in the first instance, is a duty of the court that is not delegated to the prosecution or the grand jury.

The court has a duty to examine the indictment to determine whether joinder is proper pursuant to CPL 200.20(a) or (b). Notably, the People have not provided any precedent to support their position to the contrary. Courts routinely rule on the issue of whether charges in an indictment are properly joinable under CPL 200.20(2) and sever those charges that are not … .

While the People disagree with the court's finding that the … charges were not properly joinable under CPL 200.20(2)(b), determination of this issue is not before us in this article 78 proceeding. Rather, we are only asked, and we only have the authority, to determine whether the court acted without jurisdiction or in excess of its authority. Matter of Vance v Roberts, 2019 NY Slip Op 07358, First Dept 10-10-19

MATERIAL STAGE OF TRIAL, RIGHT TO BE PRESENT.

DEFENDANT HAD A RIGHT TO BE PRESENT WHEN THE PROSECUTOR SUCCESSFULLY ARGUED ADDITIONAL MOLINEUX EVIDENCE SHOULD BE ADMITTED AT TRIAL, NEW TRIAL ORDERED (FIRST DEPT).

The First Department, reversing defendant's conviction, determined defendant's absence from the judge's ruling on whether Molineux evidence was admissible violated his right to be present at material stages of the trial. Although defendant was present when the Molineux arguments were made, the prosecutor made further arguments at the time of the ruling, which led to additional Molineux evidence being presented at trial:

… [T]he trial court conducted an initial Ventimiglia hearing with defendant present to address the prosecution's Molineux application, which sought to admit evidence of defendant's alleged prior assault on his then-girlfriend.

After the parties made their arguments, the trial court postponed the issuance of its ruling. On the date the trial court intended to issue its ruling, it noted that defendant had not yet been produced, and defense counsel stated that he would prefer if the court issued its ruling with defendant present. The court stated that defendant's presence was not required since it was merely issuing a legal ruling and began ruling on the application. The People then sought to include new factual details of the prior assault not mentioned at the earlier proceeding where defendant was present (i.e. that defendant choked his then-girlfriend to the point that she almost lost consciousness). The trial court advised the prosecutor to leave out any testimony regarding these new details since these facts were not included in the original application. However, the prosecutor stressed that these new facts were "critical" for the jury to understand why the victim feared defendant, and the trial court allowed the prosecutor to elicit testimony from the witness.

Defendant should have been afforded the opportunity to be present given that the prosecutor's introduction of these new facts, in effect, expanded the original Molineux application and involved factual matters of which defendant may have had peculiar knowledge. Defendant was in the best position to either deny the new factual details, point out errors in the prosecutor's account of the details, or provide defense counsel with details that would have been useful in advancing his position … . People v Calderon, 2019 NY Slip Op 07707, First Dept 10-24-19

MISDEMEANOR COMPLAINT.

THE TOP COUNT OF A MISDEMEANOR COMPLAINT WAS NOT SUPPORTED BY SWORN ALLEGATIONS OF FACT, BUT THE LESSER COUNTS WERE SUPPORTED; A GUILTY PLEA TO THE JURISDICTIONALLY DEFECTIVE TOP COUNT DID NOT WAIVE THE DEFECT AND DEFENDANT'S CONVICTION WAS PROPERLY REVERSED (CT APP).

The Court of Appeals, in a two sentence memorandum decision, followed by two lengthy concurring opinions, and a lengthy three-judge dissenting opinion, determined the Appellate Term properly reversed defendant's guilty plea to a jurisdictionally defective count of a misdemeanor complaint. The top count of the misdemeanor complaint (oxycodone possession) was not sufficiently supported by the factual deposition, but the lesser counts of the complaint (marijuana possession) were supported. Defendant pled guilty to the top count. Defendant's guilty plea did not waive the jurisdictional defect:

Even if the accusatory instrument properly sets out a lower-grade offense, a defendant's challenge to a conviction based on the jurisdictional deficiency of a higher-grade crime of a multi-count complaint is not waived by the defendant's guilty plea. The Appellate Term properly reversed the judgment of conviction and sentence on the ground "that it was jurisdictionally defective as to the crime of which defendant was actually convicted" (People v Hightower, 18 NY3d 249, 254 [2011]). People v Thiam, 2019 NY Slip Op 07712, CtApp 1-29-19

MOLINEUX.

DEFENSE COUNSEL'S QUESTIONS WHETHER COMPLAINANTS HAD HIRED LAWYERS AND HAD SUED DEFENDANT-TEACHER AND THE SCHOOL DISTRICT IN THIS CHILD SEX ABUSE CASE DID NOT OPEN THE DOOR TO ALL EVIDENCE OF DEFENDANT'S ALLEGED PRIOR SEXUAL ABUSE OF CHILDREN, CONVICTION REVERSED BECAUSE DEFENDANT WAS DEPRIVED OF A FAIR TRIAL; JUDGE SHOULD NOT HAVE PARTICIPATED IN A READBACK OF TESTIMONY (SECOND DEPT).

The Second Department, reversing defendant's conviction in this child sex abuse prosecution, determined that the trial court should not have allowed the prosecution to present all evidence of defendant's alleged prior sexual abuse of children after defense counsel asked complainants whether they had hired a lawyer and were suing the defendant-teacher and the school district based upon defendant's alleged sexual abuse of children. Re-direct should have been limited to only the evidence necessary to clarify and explain the reasons for the witness's hiring a lawyer and bringing a lawsuit. The Second Department also noted that the trial judge should have participated in the readback of testimony and the harmless error analysis is not applicable:

… [D]efense counsel asked questions regarding the civil actions in an attempt to impeach credibility and establish that a motivation for some of the complainants' testimony against the defendant was monetary gain or a pecuniary interest. This line of inquiry did not open an unfettered passageway for the People to elicit extensive and prejudicial evidence regarding alleged uncharged complaints. The extraneous testimony of alleged uncharged complaints did not serve to explain or clarify whether the civil actions provided certain complainants with a financial incentive to testify.

Moreover, the admission of evidence of alleged uncharged complaints violated the basic principle underlying Molineux and its progeny that "a criminal case should be tried on the facts and not on the basis of a defendant's propensity to commit the crime charged …". …

The Court of Appeals has explained that "if in any instance, an appellate court concludes that there has been such error of a trial court, such misconduct of a prosecutor, such inadequacy of defense counsel, or such other wrong as to have operated to deny any individual defendant his fundamental right to a fair trial, the reviewing court must reverse the conviction and grant a new trial, quite without regard to any evaluation as to whether the errors contributed to the defendant's conviction" … . People v Watts, 2019 NY Slip Op 07426, Second Dept 10-16-19

NOT RESPONSIBLE BY REASON OF MENTAL DISEASE OR DEFECT, APPEALS.

NO APPEAL LIES FROM THE DENIAL OF A MOTION TO WITHDRAW A PLEA OF NOT RESPONSIBLE BY REASON OF MENTAL DISEASE OR DEFECT (SECOND DEPT).

The Second Department determined that no appeal lies from the denial of a motion to withdraw a plea of not responsible by reason of mental disease or defect:

… [A] motion pursuant to CPL 220.60 seeking to withdraw a plea to an indictment is part of a criminal action or, at the least, "related to a . . . completed criminal action," so as to come within the statutory definition of a "[c]riminal proceeding" (CPL 1.20[18]; …). Moreover, in light of the nature of the relief sought in the motion, the motion is, by its nature, criminal, rather than civil … . Accordingly, proper statutory authority under the Criminal Procedure Law must exist in order for the defendant to appeal from the denial of the motion … .

Such statutory authority does not exist. CPL 450.10 only provides that a defendant may appeal as of right from a judgment, sentence, or order made pursuant to specified provisions of CPL article 440, and thus, does not provide for appellate review, as of right, from an order denying a motion pursuant to CPL 220.60, to withdraw a plea of not responsible by reason of mental disease or defect. Nor does CPL 450.15 allow for such an appeal by permission, as that statute only permits an appeal from orders made pursuant to specified provisions of CPL article 440, and "[a] sentence . . . not otherwise appealable as of right" (CPL 450.15[3]). Finally, there is no avenue for appeal through CPL 330.20, which permits a party "to proceedings conducted in accordance with the provisions of this section" to appeal, by permission, from certain orders rendered under CPL 330.20 (CPL 330.20[21]). The orders specified do not include an order denying a motion pursuant to CPL 220.60 to withdraw the plea … . People v Delano F., 2019 NY Slip Op 07089, Second Dept 10-2-19

ORDER OF PROTECTION.

FATHER'S PETITION FOR CUSTODY OR PARENTING TIME SHOULD NOT HAVE DISMISSED BASED UPON AN ORDER OF PROTECTION ISSUED IN A CRIMINAL MATTER BEFORE THE CHILD WAS BORN (THIRD DEPT).

The Third Department, reversing Family Court, determined an order of protective issue in a criminal proceeding before the child was born did not prohibit contact between the child and father. Father's petition seeking custody and/or parenting time should not have been dismissed on that ground:

At the initial appearance on the petition, Family Court stated that the order of protection had been issued in a criminal matter and that it barred the putative father from having any direct or indirect contact with the mother. The mother then moved to dismiss the petition, arguing that the order of protection rendered the petition moot. Family Court agreed and granted the motion. The putative father appeals.

The order of protection at issue — a copy of which is not in the record but the terms of which we take judicial notice — was issued prior to the child's birth and does not bar the putative father from having contact with the child. It is not, as a result, fatal to the putative father's petition … . Remittal is therefore required for Family Court to consider whether an order of filiation should be issued (see Family Ct Act § 564) and, if so, whether contact with the putative father would be in the best interests of the child and could be accomplished without contravening the terms of the order of protection … . Matter of Justin M. v Valencia N., 2019 NY Slip Op 07453, Third Dept 10-17-19

PAROLE.

CONDITION OF PAROLE THAT PETITIONER NEVER ENTER QUEENS COUNTY WITH NO PROVISION FOR OBTAINING PERMISSION TO TRAVEL THERE VIOLATED PETITIONER'S RIGHT TO TRAVEL AND RIGHT TO ASSOCIATE (FIRST DEPT).

The First Department, reversing Supreme Court, determined the condition of petitioner's post release supervision prohibiting him from entering Queens County (where the assault victim resides), without any option to travel there with permission, violated petitioner's right to travel and right to associate and was arbitrary and capricious:

Release conditions that implicate certain fundamental rights, such as the right to travel and the right to associate, have been held permissible as long as "reasonably related" to a petitioner's criminal history and future chances of recidivism … .

The special condition, as noted, provides, "I will not leave New York City . . . [including Queens] without written permission from my parole officer (including work purposes). I understand that I am not to travel under any circumstances to the borough of Queens." Barring petitioner from the entire county of Queens under all circumstances, without any clear right to seek, or ability to obtain, a waiver from respondents, is a categorical ban impinging upon his rights to travel and association, and, for this reason alone, the travel restriction must be vacated as arbitrary and capricious, as it is not "reasonably related" to petitioner's criminal history and future chances of recidivism … .

Accordingly, we remand this matter for respondents to issue a new travel restriction. The restriction must be clear and "reasonably related" to petitioner's criminal history and future chance of recidivism … . Unlike the vacated restriction, the new restriction should specify that any travel restrictions are subject to case-by-case exceptions for legitimate reasons, which petitioner may request from his parole officer. Matter of Cobb v New York State Dept. of Corr. & Community Supervision, 2019 NY Slip Op 07480, First Dept 10-17-19

PAROLE.

PETITIONER WAS INITIALLY APPROVED FOR PAROLE, BUT AFTER THE VICTIM IMPACT HEARING A RESCISSION HEARING WAS HELD AND PAROLE WAS RESCINDED; THE RESCISSION WAS PROPERLY BASED UPON VICTIM IMPACT STATEMENTS SUPPLYING INFORMATION WHICH WAS NOT "NEW" BUT WHICH WAS NOT PREVIOUSLY KNOWN TO THE PAROLE BOARD (THIRD DEPT).

The Third Department, over a two-justice dissent, determined petitioner's parole was properly rescinded after a rescission hearing was triggered by a victim impact hearing:

In August 2016, letters were sent from the Department of Corrections and Community Supervision to the Albany County District Attorney's office and the judge who imposed the sentence informing them that petitioner was scheduled to appear before respondent.Petitioner appeared before respondent in December 2017, after which he was granted parole with an open release date in February 2018. Thereafter, in January 2018, a victim impact

hearing was held at which the victim's mother and two brothers gave victim impact statements. After this hearing, petitioner was served with a notice of rescission hearing, which was subsequently held in February 2018. Following the rescission hearing, petitioner's open release date was rescinded and a hold period of nine months was imposed. This determination was upheld on administrative appeal. Petitioner thereafter commenced this CPLR article 78 proceeding.

Petitioner argues that the victim impact statements and letters from the District Attorney's office and sentencing judge disclosed no new facts about petitioner's crime. … . … Although we agree that the letters should not have been considered as they did not reveal any information not previously known by respondent, this argument must fail with respect to the victim impact statements because neither the relevant regulation, nor the existing case law, requires that "new" information must be disclosed for parole to be rescinded (see 9 NYCRR 8002.5) … Simply stated, although the regulation provides that such information must be "significant" and "not known" by respondent at the time of the original hearing, the origin of this information need not be "new" … .

Here, respondent was presented with previously unknown information from the mother, including that she was so traumatized by her son's death that she did everything she could to avoid thinking about it, including never visiting his grave. The mother explained that, in the 25 years since the victim's death, she has not celebrated Christmas, Thanksgiving or her other sons' birthdays. She described how she thought that, once petitioner went to prison, it was done, and that she was safe, but she no longer felt safe. Matter of Benson v New York State Bd. of Parole, 2019 NY Slip Op 07829, Third Dept 10-31-19

PRIOR CONSISTENT STATEMENT.

ALLOWING THE INTRODUCTION OF A WITNESS'S GRAND JURY TESTIMONY AS A PRIOR CONSISTENT STATEMENT WAS (HARMLESS) ERROR (THIRD DEPT).

The Third Department determined it was (harmless) error to allow the People to introduce a witness's grand jury testimony as a prior consistent statement to counter the implication of recent fabrication raised on cross-examination:

"A witness'[s] trial testimony ordinarily may not be bolstered with pretrial statements" … . Prior consistent statements, however, may be used to rebut a claim of recent fabrication to the extent that such a statement predated the motive to falsify … . …

… [W]e conclude that Supreme Court erred in allowing the People to utilize her grand jury testimony. That said, given that the admission of bolstering testimony constitutes nonconstitutional error … , we find that the error is harmless and there is not a significant probability that the jury would have acquitted defendant but for this error … . The inconsistency speaks to which direction the shooter dispersed during what was described as a chaotic scene, not to the key issue of identification. As recited above, four witnesses identified defendant as the shooter. As such, we find that the error here is of no moment. People v Johnson, 2019 NY Slip Op 07646, Third Dept 10-24-19

RAPE SHIELD LAW.

DNA EVIDENCE TO DEMONSTRATE THE COMPLAINANT'S SEXUAL HISTORY PROPERLY EXCLUDED AS A VIOLATION OF THE RAPE SHIELD LAW (SECOND DEPT).

The Second Department determined Supreme Court correctly refused to allow defendant to present DNA evidence to demonstrate the complainant's sexual history in this sexual offense case:

We agree with the Supreme Court's determination to preclude the introduction of certain DNA evidence at trial. Introducing evidence of additional DNA donors not linked to the defendant for the purpose of demonstrating the complainant's sexual history with persons other than the defendant falls "squarely within the ambit of the Rape Shield Law, which generally prohibits [e]vidence of a victim's sexual conduct' in a prosecution for a sex offense under Penal Law article 130 (CPL 60.42) because such evidence . . . serves only to harass the alleged victim and confuse the jurors'" … . Moreover, the evidence sought to be admitted was not relevant to any defense … . Contrary to the defendant's contention, introducing the evidence through a witness other than the complainant does not render the Rape Shield Law inapplicable … . People v Hubsher, 2019 NY Slip Op 07416, Second Dept 10-16-19

REPUGNANT VERDICT, AGENCY DEFENSE.

UNDER A WEIGHT OF THE EVIDENCE ANALYSIS, THE PEOPLE DID NOT DISPROVE DEFENDANT'S AGENCY DEFENSE; THE VERDICT WAS REPUGNANT IN THAT GUILTY AND NOT GUILTY FINDINGS CAN NOT BE RECONCILED (SECOND DEPT).

The Second Department vacated defendant's convictions in this drug/possession/sale case, finding the People did not disprove the agency defense with respect to one of the two transactions, and the verdict was repugnant in the sense guilty and not guilty findings could not be reconciled. With respect to the agency defense, the Second Department applied a "weight of the evidence" analysis. The facts are too complex to fairly summarize here:

The following factors are considered in evaluating the strength of an agency defense: "(1) did the defendant act as a mere extension of the buyer throughout the relationship, with no independent desire to promote the transaction; (2) was the purchase suggested by the buyer; (3) did the defendant have any previous acquaintance with the seller; (4) did the defendant exhibit any salesman like behavior; (5) did the defendant use his [or her] own funds; (6) did the defendant procure from many sources for a single buyer; (7) did the buyer pay the seller directly; (8) did the defendant stand to profit; and (9) was any reward promised in advance" … . …

A verdict is repugnant only if, when viewed in light of the elements of each crime as charged to the jury, "it is legally impossible—under all conceivable circumstances—for the jury to have convicted the defendant on one count but not the other" … . The purpose of the rule is to ensure that an individual is not convicted of a crime of which a jury has necessarily decided that one of the essential elements was not proven beyond a reasonable doubt … . People v Cruz, 2019 NY Slip Op 07273, Second Dept 10-9-19

RESTITUTION.

RESTITUTION ORDERED AT SENTENCING (ABOUT $45OO) WAS ABOUT $500 HIGHER THAN THE AMOUNT AGREED TO IN THE PLEA DEAL, DEFENDANT SHOULD HAVE BEEN GIVEN THE OPPORTUNITY TO WITHDRAW HIS PLEA (THIRD DEPT).

The Third Department, over a two-justice dissent, determined that defendant is entitled to the opportunity to withdraw his plea because the amount of restitution ordered by the sentencing judge was about $500 higher than the amount ($4100) agreed to in the plea deal:

… "[A] sentencing court may not impose a more severe sentence than one bargained for without providing the defendant the opportunity to withdraw his or her plea" … . Because the restitution imposed exceeds the amount presented by the People to which defendant agreed at the time of the plea and he seeks, among other things, vacatur of the plea, we deem it appropriate to exercise our interest of justice jurisdiction to take corrective action … . Accordingly, we remit the matter for the purpose of allowing defendant to either accept the enhanced restitution amount or give defendant an opportunity to withdraw his plea … . People v Waldron, 2019 NY Slip Op 07116, Third Dept 10-3-19

RIFHT TO COUNSEL.

DEFENDANT WAS DEPRIVED OF HIS RIGHT TO COUNSEL WHEN THE JUDGE TOLD HIM NOT TO DISCUSS HIS TRIAL TESTIMONY WITH DEFENSE COUNSEL DURING A TWO-DAY ADJOURNMENT; ALTHOUGH THE LEGAL-SUFFICIENCY AND RIGHT-TO-COUNSEL ISSUES WERE NOT PRESERVED, THE APPEAL WAS HEARD IN THE INTEREST OF JUSTICE (SECOND DEPT).

The Second Department, reversing defendant's convictions on several counts in the interest of justice because the evidence was legally insufficient, noted that a new trial was required on the remaining counts because defendant was deprived of his right to counsel. The trial judge told the defendant he could not discuss his trial testimony with his counsel during a two-day adjournment:

With regard to the third and seventeenth through twenty-third counts of the indictment, the defendant's convictions must be reversed because he was deprived of the right to counsel when the County Court instructed him not to discuss his trial testimony with his attorney during a two-day adjournment … . Although the defendant failed to preserve this issue for appellate review, we reach the issue as a matter of discretion in the interest of justice … . People v Peloso, 2019 NY Slip Op 07614, Second Dept 10-23-19

SEARCHES, PAROLE.

NEW JERSEY PAROLEE'S CONSENT TO SEARCH AS A CONDITION OF PAROLE DID NOT APPLY TO A SEARCH DONE BY NEW YORK CITY POLICE IN QUEENS; STATEMENTS MADE WITHOUT MIRANDA WARNINGS, INCLUDING THE CONSENT TO SEARCH, AS WELL AS THE FRUITS OF THE SEARCH, PROPERLY SUPPRESSED (SECOND DEPT).

The Second Department determined Supreme Court properly suppressed statements made without Miranda warnings, including the consent to search a safe, as well as the firearms seized from the safe. Although defendant was on parole in New Jersey, the search was done in Queens by New York City police. Therefore the consent to search provided by parolees as a condition of parole was not applicable:

… [A]lthough Soto had consented to searches by New Jersey parole officers as a condition of his parole, the record reveals that the NYPD officers, not the New Jersey parole officers, searched the safe after they were notified that the New Jersey parole officers found what appeared to be heroin in the apartment. Accordingly, the People cannot rely on Soto's consent given as a condition of parole to justify the warrantless search of the safe … . Furthermore, since the NYPD officers failed to advise Soto of his Miranda rights prior to questioning him and obtaining his consent to open the safe, his statements regarding the safe and his consent to open it cannot be characterized as voluntary … . Moreover, the People failed to proffer any argument as to why the warrantless search was proper as to Santiago. Accordingly, we agree with the Supreme Court's determination granting those branches of Soto's omnibus motion which were to suppress the firearms evidence and the statements made by him to the NYPD officers without the benefit of Miranda warnings, and that branch of Santiago's omnibus motion which was to suppress the firearms evidence … . People v Santiago, 2019 NY Slip Op 07099, Second Dept 10-2-19

SEARCHES.

POLICE OFFICER'S WARRANTLESS ENTRY INTO A METH LAB WAS JUSTIFIED BY WHAT WAS IN PLAIN VIEW THROUGH A PARTIALLY OPEN DOOR AND THE OFFICER'S CONCERN FOR THE SAFETY OF PEOPLE INSIDE A NEARBY TRAILER (THIRD DEPT).

The Third Department determined a warrantless search and seizure of a meth lab was valid and defendant's motion to suppress was properly denied. Four police officers went to defendant's property based upon a tip defendant was operating a meth lab there. Before going to the property, the police learned defendant and his girlfriend had purchased Sudafed, which is used to make methanphetamine, and that their subsequent attempts to buy Sudafed were denied. Once on the property officer DeMuth was able to see into the lab through a partially open door. He entered the lab, allegedly because he feared for the safety of persons in a nearby trailer:

All of the attendant circumstances, including DeMuth's knowledge of the tip and defendant's conduct in running out the back door, justified DeMuth's actions in conducting a limited protective sweep, which consisted of walking to the base of the trailer's back steps, where the unknown item had been dropped, and peering inside the shed . The record establishes that, once DeMuth was lawfully in position, he was able to observe the incriminating evidence in plain view inside the shed … . …

DeMuth testified that his observations, together with his knowledge of the tip and the information obtained from the national precursor log, led him to believe that there was an active methamphetamine lab inside the shed. He stated that, based upon his training and experience regarding the dangers of methamphetamine production, particularly the risk of explosion, he immediately became concerned for the safety of the inhabitants of the trailer (which included several children), himself and his fellow officers and that he fully opened the door to the shed to provide ventilation. DeMuth's testimony demonstrated that he had objectively reasonable grounds for believing that the contents of the shed posed an immediate danger to everyone present on the scene and, thus, that his actions in opening the door to the shed were justified … . The record establishes that the methamphetamine lab was subsequently seized by the New York State Police Contaminated Crime Scene Emergency Response Team. In view of all of the foregoing, we find that the warrantless search and seizure of the methamphetamine lab was justified by exceptions to the warrant requirement. People v Richards, 2019 NY Slip Op 07810, Third Dept 10-31-19

SEARCHES.

THE MOTION TO SUPPRESS SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING BECAUSE DEFENSE COUNSEL HAD NOT BEEN PROVIDED WITH A COPY OF THE SEARCH WARRANT AT THE TIME THE MOTION WAS MADE (SECOND DEPT).

The Second Department, reversing County Court, determined the motion to suppress should not have been granted without a hearing because defense counsel had not been provided with a copy of the search warrant at the time the motion was made:

In evaluating whether a defendant's factual allegations in a suppression motion are sufficient to warrant a hearing, the court must assess "(1) the face of the pleadings, (2) assessed in conjunction with the context of the motion, and (3) defendant's access to information" … .

We disagree with the County Court's decision to deny that branch of the defendant's omnibus motion which sought to controvert the search warrant without holding a hearing, as defense counsel did not have access to even a redacted copy of the search warrant applications at the time the motion was made … . Although in moving to controvert the search warrant, defense counsel did not make precise factual averments, he was not required to do so as he did not have access to the search warrant applications at issue … . People v Lambey, 2019 NY Slip Op 07793, Second Dept 10-30-19

SEARCHES.

THE POLICE DID NOT HAVE A REASONABLE SUSPICION DEFENDANT WAS CONCEALING DRUGS ON HIS PERSON WHEN THEY CONDUCTED A STRIP SEARCH, DRUGS SEIZED DURING THE STRIP SEARCH SHOULD HAVE BEEN SUPPRESSED (THIRD DEPT).

The Third Department, reversing defendant's drug-possession conviction, in a full-fledged opinion by Justice Mulvey, determined that the police did not have a reasonable suspicion defendant was concealing drugs on his person at the time of the strip search. The drugs found in the search should have been suppressed:

Strip searches "cannot be routinely undertaken as incident to all drug arrests," but must be based on "specific and articulable facts which, along with any logical deductions, reasonably prompted the intrusion" … . Courts consider several factors when determining whether, under the totality of the circumstances, the police had reasonable suspicion to conduct "a strip search, including the defendant's excessive nervousness, unusual conduct, information showing pertinent criminal propensities, informant's tips, loose-fitting or bulky clothing, an itinerary suggestive of wrongdoing, incriminating matter discovered during a less intrusive search, lack of employment, indications of drug addiction, information derived from others arrested or searched contemporaneously, and evasive or contradictory answers to questions" … . * * *

Based on the information that Tibbs planned to purchase cocaine from Pinkney, made the round trip to New York City and routinely went to defendant's apartment after such purchases to cook the powder cocaine into crack cocaine, along with other evidence of the conspiracy that had been ongoing for months, the officers had probable cause to believe that defendant had committed a conspiracy offense.

The evidence at the hearing did not, however, support a strip search. The officers knew that Tibbs had purchased a large quantity of cocaine and that drug traffickers frequently secrete narcotics on their person. Yet they could not identify the other people who were in the vehicle when it returned from New York City, leaving no proof that defendant had accompanied Tibbs to purchase the drugs. People v Turner, 2019 NY Slip Op 07443, Third Dept 10-17-19

SEARCHES.

THE SEARCH WARRANT WAS IMPROPERLY ADDRESSED TO CORRECTIONS OFFICERS, WHO ARE NOT POLICE OFFICERS, AS WELL AS POLICES OFFICERS, AND THE SEARCH WAS CONDUCTED BY BOTH POLICE OFFICERS AND CORRECTIONS OFFICERS; NEITHER THE SEARCH WARRANT NOR THE SEARCH WAS THEREBY RENDERED INVALID (SECOND DEPT).

The Second Department determined defendant's motion to suppress on the ground that corrections officers, who are not police officers, participated in the search of his property was properly denied:

The defendant is correct that the search warrant was improperly addressed to the Special Operations Group, since it includes members who are not police officers within the meaning of the statute (see CPL 690.25[1]; see also CPL 2.10[25]). However, "[s]earch warrants should be tested in a commonsense and realistic manner with

minor omissions and inaccuracies not affecting an otherwise valid warrant" … . Indeed, the fact that a search warrant is partially but not wholly invalid does not necessarily require suppression of the evidence that was recovered pursuant to such a warrant . Under the circumstances of this case, including the fact that the search warrant here was … otherwise properly addressed to sworn police officers in conformity with CPL 690.25(1), the additional inclusion of the members of the Special Operation Group who were not police officers was "analogous to a clerical omission which did not invalidate the warrant" … .

Furthermore, under the circumstances of this case, we conclude that the participation by members of the Special Operations Group in the execution of the search warrant did not invalidate the search or otherwise require suppression of the physical evidence at issue. Although the Criminal Procedure Law only authorizes "[a] police officer" to execute a search warrant … , the participation by an individual who does not meet this statutory definition "is not inherently improper"… . Indeed, courts have upheld the validity of a search where civilians participated in the execution of a search warrant … . Under such circumstances, "civilians who act at the behest of the State are treated as police agents, subject to the same controls and restrictions of the Fourth Amendment as the police themselves" … . People v Ward, 2019 NY Slip Op 07624, Second Dept 10-23-19

SEX OFFENDER REGISTRATION ACT (SORA).

DEFENDANT'S CONNECTICUT CONVICTION WAS NOT EQUIVALENT TO A NEW YORK REGISTRABLE OFFENSE; THE CIVIL APPEALS STANDARDS APPLY; ALTHOUGH NOT PRESERVED, THE ISSUE PRESENTS A PURE QUESTION OF LAW, COULD NOT HAVE BEEN AVOIDED IF RAISED BELOW AND THE RECORD WAS SUFFICIENT FOR REVIEW (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant need not register as a sex offender in New York based upon a Connecticut misdemeanor conviction which was not equivalent to New York's first-degree sexual abuse statute. The court noted that the civil appeals standards apply and preservation of the error was not required because the appeal presents a pure question of law, the issue could not have been avoided if raised below, and the record is sufficient for review:

In 2003, defendant was convicted in Connecticut of two counts of fourth-degree sexual assault. To the extent relevant here, a person is guilty of that misdemeanor when he "subjects another person to sexual contact who is . . . physically helpless, or. . . subjects another person to sexual contact without such other person's consent" (Conn Gen Stat § 53a-73a[a][1][D],[2]). The physical helplessness element would make the crime the equivalent

of first-degree sexual abuse (Penal Law § 130.65[2]), a registrable offense in New York. In the absence of that element, the crime is the equivalent of third-degree sexual abuse (Penal Law § 130.55), which is not registrable.

Equivalency, based on a comparison of essential elements (see Corr Law § 168-a[1],[2][d]), may be established when "the conduct underlying the foreign conviction . . . is, in fact, within the scope of the New York offense" … . Here, the hearing court relied on undisputed documentary evidence that each victim "felt paralyzed" while being sexually abused by defendant; one victim "just froze" and the other "was afraid to confront" him. There is no indication, however, that either victim was physiologically incapable of speech, drugged into a stupor, or otherwise unable to communicate her unwillingness to submit to the sexual contact … . …

The issue is properly reviewable on this appeal, notwithstanding defendant's failure to raise it before the hearing court. While we agree with the People that preservation considerations applicable to civil appeals apply here, those considerations do not bar review. This appeal presents a pure question of law. This issue could not have been avoided if raised before the hearing court, and it is reviewable on the existing record … . Moreover, the hearing court expressly ruled on the issue in its detailed decision. People v Burden, 2019 NY Slip Op 07497, First Dept 10-17-19

SEX OFFENDER REGISTRATION ACT (SORA).

PROOF OF AN UNCHARGED SEXUAL OFFENSE RELIED UPON FOR AN UPWARD DEPARTURE WAS INSUFFICIENT; LEVEL THREE ASSESSMENT REDUCED TO LEVEL TWO (SECOND DEPT).

The Second Department reduced the defendant's sex offender level from three to two because the evidence of an uncharged sexual offense was not sufficient:

… [A]lthough the defendant's presumptive risk level was level two, the People contended that an upward departure was warranted based upon evidence that, approximately three months before the charged crime was committed, the defendant committed an uncharged sex offense against a different victim who allegedly was 15 years old at the time. While the People presented DNA evidence establishing that the defendant had sexual contact with the second alleged victim, the only evidence of that alleged victim's age was a statement in a police report that she was 15 years old, and, since the police report stated that the alleged victim's sexual contact with the defendant was willing, the bare notation of the victim's age was the only proof of the crime on which the People relied. Thus, the Supreme Court should not have granted an upward departure since the evidence of the

alleged victim's age was not supported by a "detailed victim statement[ ]" … or otherwise corroborated … . People v Torres, 2019 NY Slip Op 07629, Second Dept 10-23-19

SEX OFFENDER REGISTRATION ACT (SORA).

THE CRIME TO WHICH DEFENDANT PLED DID NOT HAVE A FORCIBLE COMPULSION ELEMENT SO 10 POINTS SHOULD NOT HAVE BEEN ASSESSED ON THAT GROUND; HOWEVER THE MATTER WAS SENT BACK BECAUSE AN UPWARD DEPARTURE MIGHT BE WARRANTED (FOURTH DEPT).

The Fourth Department, reversing County Court, determined the offense to which defendant pled guilty, criminal sexual act in the first degree, does not have forcible compulsion as an element and therefore the risk assessment must be reduced by 10 points. However the court noted that an upward department might be appropriate and sent the matter back:

… [T]he court erred in that assessment inasmuch as defendant pleaded guilty to criminal sexual act in the first degree under subdivision (3) of Penal Law § 130.50, which does not require evidence of forcible compulsion … , and there was no other evidence in the record establishing that defendant used forcible compulsion in committing the crime. When those 10 points are subtracted, defendant's total score makes him a presumptive level two risk.

Nevertheless, we note that an upward departure from the presumptive level may be warranted, i.e., there may be evidence of "an aggravating . . . factor of a kind, or to a degree, that is otherwise not adequately taken into account by the guidelines"… . Here, however, "because defendant was determined to be a level three sex offender, County Court had no reason to consider whether clear and convincing evidence exists to warrant such a departure" … . People v Weber, 2019 NY Slip Op 07197, Fourth Dept 10-4-19

SUPERIOR COURT INFORMATION.

A SUPERIOR COURT INFORMATION CANNOT INCLUDE A JOINABLE OFFENSE WHICH IS GREATER IN DEGREE THAN THE OFFENSE FOR WHICH THE DEFENDANT WAS HELD FOR THE ACTION OF THE GRAND JURY (THIRD DEPT).

The Third Department, resolving a question of first impression, determined that a Superior Court Information (SCI) is jurisdictionally defective if it charges a joinable offense which is greater in degree than the offense for which the defendant was held for the action of the grand jury. The jurisdictional question survives the guilty plea, the failure to preserve and the waiver of appeal:

… [T]he constitutional waiver provision makes no reference to joinable offenses, providing only that prosecution by an SCI is limited to an offense or offenses for which a person is 'held for the action of a grand jury upon a charge for such an offense' (NY Const, art I, § 6 …). A literal interpretation of the phrase 'any offense or offenses properly joinable therewith' in CPL 195.20 would permit the circumvention of this constitutional imperative by the simple expedient of permitting the inclusion of joinable offenses in a higher degree or grade that were never charged in a felony complaint. Such a statutory interpretation is inconsistent with and undermines the protections provided in NY Constitution, article I, § 6. It is well settled 'that the Legislature in performing its law-making function may not enlarge upon or abridge the Constitution' … , and that "courts must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional" … .

Applying these principles, we conclude that a joinable offense may not be included in a waiver of indictment and SCI unless that offense, or a lesser included offense, was charged in a felony complaint and the defendant was therefore held for the action of a grand jury upon that charge … . People v Coss, 2019 NY Slip Op 07445, Third Dept 10-17-19

TRAFFIC STOPS.

ALTHOUGH DEFENDANT DID NOT VIOLATE THE VEHICLE AND TRAFFIC LAW IN MAKING A LEFT TURN, THE OFFICER REASONABLY BELIEVED THERE WAS A VIOLATION; THE TRAFFIC STOP WAS JUSTIFIED AND THE SUPPRESSION MOTION WAS PROPERLY DENIED (FOURTH DEPT).

The Fourth Department determined: (1) the left turn made by the defendant from the right-most lane did not violate Vehicle and Traffic Law 1160; and (2) the officer who stopped the defendant reasonably believed the turn was a traffic violation. Therefore the traffic stop was justified:

Unlike the language used in other subsections of section 1160, the language of subsection (b) does not specify how close to the center line a vehicle must be when it completes its turn, nor does it designate a specific lane within which the vehicle must complete the turn (compare § 1160 [b] with § 1160 [a], [c], [e]). In light of the more specific language employed elsewhere in the statute, we read the use of the more general phrase "right of the center line" as meaningful and intentional … . Indeed, reading "right of the center line" to mean the lane to the immediate right of the center line, or as close to center as possible, would improperly render the more specific language used elsewhere in the statute superfluous … . …

… [S]uppression [of the seized weapon] is not required here because the stop was the result of the officer's objectively reasonable belief that he observed a traffic violation … . In light of " the reality that an officer may suddenly confront a situation in the field as to which the application of a statute is unclear—however clear it may later become[,]' " an officer's misreading of a statute that is susceptible of multiple interpretations and has not been definitively construed by New York appellate courts may amount to a reasonable mistake of law justifying a traffic stop … . Notwithstanding our interpretation of Vehicle and Traffic Law § 1160 (b) above, the "right of the center line" language is, in our view, susceptible of multiple interpretations, including the interpretation taken by the officer here, and the ambiguity has not previously been definitively construed. People v Turner, 2019 NY Slip Op 07190, Fourth Dept 10-3-19

WAIVER OF INDICTMENT, SUPERIOR COURT INFORMATION.

WAIVER OF INDICTMENT WAS JURISDICTIONALLY DEFECTIVE BECAUSE IT DID NOT INCLUDE THE TIME AND PLACE OF THE OFFENSE (THIRD DEPT).

The Third Department, reversing defendant's conviction by guilty plea, determined the waiver of indictment was jurisdictionally defected because the time and place of the offense were not included:

… [A] waiver of indictment must be executed in strict compliance with CPL 195.20, which specifically requires, as is relevant here, that it set forth the "date and approximate time and place of each offense to be charged in the [SCI]" … . Although the statutory requirements of CPL 195.20 may be satisfied by reading the waiver of indictment and the SCI [superior court information] as a single document, here, neither document set forth the time of the charged offense (see CPL 195.20 …). Further, "this is not a 'situation where the time of the offense is unknown or, perhaps, unknowable' so as to excuse the absence of such information" … . Indeed, the felony complaint contains information regarding the time that the offense occurred … . We find unavailing the People's assertion that reference in the waiver of the indictment to the underlying felony complaint, which contains the time of the offense, to be sufficient to comply with the clear and simple statutorily-required information. In view of the foregoing, the waiver of indictment and the related SCI are jurisdictionally defective, thereby requiring that the plea be vacated and the SCI dismissed … . People v Walley, 2019 NY Slip Op 07816, Third Dept 10-31-19