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An Organized Compilation of Summaries of Decisions Addressing Criminal Law Released by Our Appellate Courts in November, 2019 and Posted Weekly (in November) on the New York Appellate Digest Website. Click on the Entries in the Table of Contents to Go to the Summaries and Click on "Table of Contents" in the Header to Return There. The Summaries Are Linked to the Decisions on the Official New York Courts' Website.

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APPEALS, WAIVER OF RIGHT TO APPEAL.

TO BE ENFORCEABLE, A WAIVER OF APPEAL MUST BE SUPPORTED BY A SENTENCING COMMITMENT OR OTHER CONSIDERATION (FOURTH DEPT).

The Fourth Department noted that a waiver of appeal, to be enforceable, must be supported by a sentence promise as consideration:

Defendant correctly argues in his main brief that his waiver of the right to appeal is invalid because he pleaded guilty to the sole count of the indictment " without receiving a sentencing commitment or any other consideration' " … . County Court's promise to consider imposing a sentence below the statutory maximum merely restated its preexisting statutory and common-law obligation to impose an appropriate legal sentence … , and we agree with defendant that such a promise is the equivalent of no promise at all and cannot supply the consideration necessary to enforce a waiver of the right to appeal . As the Second Circuit explained in invalidating a waiver of the right to appeal under similar circumstances… , such an illusory promise is not consideration for a waiver because it affords the defendant "no benefit . . . beyond what he would have gotten by pleading guilty without an agreement" … . People v Schmidinger, 2019 NY Slip Op 08324, Fourth Dept 11-15-19

APPEALS, WAIVER RIGHT TO APPEAL.

IN AN IMPORTANT CLARIFICATION OF THE LAW, THE WAIVERS OF APPEAL IN TWO OF THE THREE APPEALS BEFORE THE COURT WERE DECLARED INVALID BECAUSE THE DEFENDANT WAS GIVEN THE ERRONEOUS IMPRESSION THAT ALL AVENUES OF APPEAL AND COLLATERAL RELIEF ARE CUT OFF BY THE WAIVER (CT APP).

The Court of Appeals, in a comprehensive opinion by Judge DiFiore, over several concurring and two dissenting opinions, determined that the waivers of appeal in two of the three appeals before the court were invalid. The opinion is an important clarification of the law and is too detailed to fairly summarize here. In a nutshell, a court should not give the defendant the impression that all appellate avenues, including the filing of a Notice of Appeal, collateral relief, and the availability of counsel, are cut off by the waiver of appeal. The court approved the Unified Court System's Model Colloquy:

… [T]he Model Colloquy for the waiver of right to appeal drafted by the Unified Court System's Criminal Jury Instructions and Model Colloquy Committee neatly synthesizes our precedent and the governing principles and provides a solid reference for a better practice. The Model Colloquy provides a concise statement conveying the distinction missing in most shorthand colloquies — that: "[b]y waiving your right to appeal, you do not give up your right to take an appeal by filing a notice of appeal . . . within 30 days of the sentence. But, if you take an appeal, you are by this waiver giving up the right to have the appellate court consider most claims of error,[] and whether the sentence I impose, whatever it may be, is excessive and should be modified. As a result, the conviction by this plea and sentence will normally be final" (NY Model Colloquies, Waiver of Right to Appeal [emphasis added]). There is no mention made of an absolute bar to the taking of an appeal or any purported waiver of collateral or federal relief in the Model Colloquy or to the complete loss of the right to counsel to prosecute the direct appeal … . People v Thomas, 2019 NY Slip Op 08545, Ct App 11-26-19

ASSAULT.

PLEA TO ASSAULT FIRST WAS DEFECTIVE BECAUSE THE INTENT TO INFLICT SERIOUS PHYSICAL INJURY WAS NOT STATED IN THE ALLOCUTION (SECOND DEPT).

The Second Department, reversing the judgment, determined the plea to assault first was defective because the intent to inflict serious physical injury was not stated in the allocution:

During the plea colloquy, the Supreme Court stated, and the defendant admitted, the elements of assault in the first degree as including an intent to inflict physical injury and conduct which in fact causes physical injury. However, the crime of assault in the first degree, as defined in Penal Law § 120.10(1), requires an intent to inflict serious physical injury and conduct which in fact causes serious physical injury. Under the circumstances, since the defendant admitted harboring an intent and inflicting an injury other than those required for the commission of assault in the first degree, the defendant's plea of guilty must be vacated, as her allocution failed to make out the requisite elements of that crime … . People v Steele-Warrick, 2019 NY Slip Op 08428, Second Dept 11-20-19

ATTEMPT.

THE ATTEMPTED GANG ASSAULT CHARGE WAS A LEGAL IMPOSSIBILITY FOR TRIAL PURPOSES (FIRST DEPT).

The First Department, vacating defendant's conviction, determined the charged crime was a legal impossibility:

"[A]ttempted gang assault in the second degree is a legal impossibility for trial purposes" … . "One cannot attempt to create an unintended result" … . People v Delacruz, 2019 NY Slip Op 08498, First Dept 11-21-19

ATTORNEY GENERAL, AUTHORITY TO PROSECUTE.

BASED UPON EXECUTIVE LAW 63 AND TWO EXECUTIVE ORDERS ISSUED BY GOVERNOR CUOMO, THE ATTORNEY GENERAL HAS THE AUTHORITY TO INVESTIGATE AND CHARGE PERJURY ALLEGEDLY COMMITTED BY A DISTRICT ATTORNEY BEFORE A GRAND JURY CONVENED BY THE ATTORNEY GENERAL TO INVESTIGATE THE POLICE SHOOTING OF AN UNARMED CIVILIAN (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Mulvey, reversing Supreme Court, determined that defendant, a district attorney, could be prosecuted by the Attorney General (OAG) for perjury allegedly committed by the district attorney before a grand jury convened by the Attorney General. The grand jury was convened to investigate whether the district attorney had engaged in misconduct when investigating the police shooting of an unarmed civilian. The authority of the Attorney General's investigation and indictment is Executive Law 63 and two Executive Orders issued by Gov. Cuomo:

Executive Law § 63 (13) provides that the Attorney General "shall . . . [p]rosecute any person for perjury committed during the course of any investigation conducted by the [A]ttorney[][G]eneral pursuant to statute . . . [and] [i]n all such proceedings, the [A]ttorney[][G]eneral may appear . . . before any court or any grand jury and exercise all the powers and perform all the duties necessary or required to be exercised or performed in prosecuting any such person for such offense." * * *

Although Executive Law § 63 (2) permits and requires the Governor to define — in the pertinent executive order — the scope of OAG's authority regarding a particular investigation or prosecution … , the investigation is still

conducted pursuant to that statute, albeit within a scope defined by the executive order. The Legislature, by enacting Executive Law § 63 (2), statutorily gave power to the Governor to call upon OAG to conduct investigations. That the statute and executive order must necessarily work in tandem does not diminish or eliminate the statute as a source of authority for OAG to conduct the investigation.

Here, as typical under these situations, OAG obtained authority to conduct the 2017 grand jury investigation through a combination of Executive Law § 63 (2) and EO163. The statute gives OAG power, but only when the Governor "require[s]" OAG to act … . Relatedly, the Governor would have no authority to give powers to the Attorney General — through an executive order or otherwise — without the Legislature having granted the Governor that ability. Indeed, the Court of Appeals has noted "that the Attorney[]General has no general authority to conduct [criminal] prosecutions and is without any prosecutorial power except when specifically authorized by statute" … . Therefore, we reject the conclusion that the phrase "pursuant to statute" excludes investigations conducted by OAG pursuant to an executive order issued by the Governor under the authority granted to him by statute, namely, Executive Law § 63 (2). OAG's authority to investigate defendant was derived from that statute, at least indirectly through the conduit of an executive order issued thereunder. People v Abelove, 2019 NY Slip Op 08453, Third Dept 11-21-19

ATTORNEYS, INEFFECTIVE ASSISTANCE, DEPORTATION.

DEFENDANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL; DEFENSE COUNSEL PROBABLY COULD HAVE WORKED OUT A PLEA TO AN OFFENSE WHICH DID NOT MANDATE DEPORTATION (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant did not receive effective assistance of counsel because there was a reasonable possibility a plea to something less than an aggravated felony could have been worked, with no mandatory deportation consequences:

At the hearing, defense counsel candidly admitted that he did not know, at the time of defendant's plea, what an aggravated felony was, and that he mistakenly believed that defendant's prior youthful offender adjudication, which resulted in a violation of probation charge that was disposed of at the same time as the instant plea, already rendered him deportable. However, New York YO adjudications are not considered criminal convictions for purposes of immigration law … . …

Accordingly, he did not attempt to obtain a sentence of less than one year on the third-degree conviction, which would have prevented it from being an aggravated felony, subjecting defendant, who is in removal proceedings, to mandatory deportation … . Counsel admitted that he had no strategic reason for not doing so; he simply did not know that defendant's negotiated sentence of one to three years rendered robbery in the third degree an aggravated felony, or that defendant's youthful offender adjudication did not render him deportable. People v Richards, 2019 NY Slip Op 08268, First Dept 11-14-19

ATTORNEYS, INEFFECTIVE ASSISTANCE, DEPORTATION.

DEFENDANT WAS DEPRIVED OF EFFECTIVE ASSISTANCE WHEN DEFENSE COUNSEL TOLD HIM HE "MOST LIKELY" WOULD BE DEPORTED WHEN DEPORTATION WAS MANDATORY; APPEAL HELD IN ABEYANCE TO ALLOW DEFENDANT TO MOVE TO VACATE HIS PLEA; ONE DISSENT (FIRST DEPT).

The First Department, over a dissent, determined defendant did not receive effective assistance of counsel because his attorney told him he would "most likely" be deported when deportation was mandatory. The dissenter argued the record was not sufficient to conclude, as a matter of law, defense counsel was ineffective and a CPL 440 motion should be brought to flesh out the facts:

Defendant was deprived of effective assistance when his counsel advised his client that because of his plea, he "will most likely be deported["],since it is clear that defendant's drug-related conviction would trigger mandatory deportation under 8 USC § 1227 (a)(2)(B)(i) … . The remarks made by counsel on the record to the judge, as to what he advised his client with regard to the immigration consequences of his plea, are sufficient to permit review on direct appeal … . Thus, we hold this matter in abeyance to afford defendant the opportunity to move to vacate his plea upon a showing that there is a reasonable probability that he would not have pleaded guilty had he been made aware of the deportation consequences of his plea. People v Johnson, 2019 NY Slip Op 08348, First Dept 11-19-19

ATTORNEYS, RIGHT TO COUNSEL.

AFTER AN INITIAL WAIVER OF HIS RIGHT TO REMAIN SILENT, DEFENDANT BECAME INCREASINGLY UNWILLING TO ANSWER QUESTIONS AND FINALLY SAID "MAYBE" HE SHOULD GET A LAWYER BECAUSE HE DIDN'T WANT TO INCRIMINATE HIMSELF, FROM THAT POINT ON THE INTERROGATION VIDEO SHOULD HAVE BEEN SUPPRESSED (THIRD DEPT).

The Third Department, reversing defendant's conviction, determined defendant's motion to suppress statements made after the assertion of his right to counsel should have been suppressed:

… [T]he People admitted into evidence a DVD video recording of the first 50 minutes and 55 seconds of defendant's custodial interrogation. … A review of that video recording shows that defendant was advised of and acknowledged his Miranda rights in writing roughly 16 minutes into the custodial interrogation, after having made small talk with the detective questioning him. For the next 24 minutes, defendant openly and respectfully answered questions regarding the events that transpired earlier that morning, including whether he entered the apartment building, which he maintained that he did not. However, 40 minutes into the interview, defendant became increasingly quiet and less eager to engage in conversation. Indeed, the detective spoke for roughly 3½ minutes, with little to no contribution from defendant, and attempted to appeal to defendant "as a father." Defendant asked if he would be at the police station all weekend, to which the detective said, 'no.' The detective then asked defendant to tell him what had happened, but he was met with silence, prompting him to ask again. In response, defendant stated, "maybe I should get a lawyer. I completely understand what you're saying and I agree with you, but I don't want to f**k myself." In our view, defendant's marked change in expression and demeanor at this stage of the interrogation, together with his reference to an attorney and his clear statement that he did not want to incriminate himself, constituted an unequivocal request for counsel and an exercise of his right to remain silent … . Thus, the video recording of the interrogation should have been stopped at 48 minutes and 48 seconds, just before defendant unequivocally invoked his right to counsel. Accordingly, County Court should have granted defendant's motion to suppress all statements made thereafter. People v Harris, 2019 NY Slip Op 53943, Third Dept 11-27-19

FREEDOM OF INFORMATION LAW (FOIL).

REPORTS BY THE DISTRICT ATTORNEY'S CONVICTION REVIEW UNIT (CRU) EXONERATING CONVICTED PERSONS ARE EXEMPT FROM DISCLOSURE UNDER THE FREEDOM OF INFORMATION LAW (FOIL); AN EXONERATED PERSON MAY WAIVE THE SEALING REQUIREMENT (CPL 160.50) AND CONSENT TO DISCLOSURE OF A REPORT; THE RELEASED REPORT HERE IS SUBJECT TO REDACTION DETERMINED IN AN IN CAMERA REVIEW BY A JUDGE (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Connolly, determined: (1) the redacted report of the District Attorney's Conviction Review Unit (CRU) concerning the exoneration of Jabbar Washington was properly made available to the New York Times because Washington consented to the unsealing of the document (CPL 160.50(a)(d)); (2) absent such consent, the CRU reports are exempt from disclosure under FOIL; and (3) the redaction of the Washington report should be reviewed by a judge (in camerao review):

CPL 160.50 does not define what constitutes an official record relating to an arrest or prosecution, and the Court of Appeals has held that "bright line rules are not wholly appropriate in this area" … . …

… [T]he CRU's final reports constitute official records created in connection with the arrest and prosecution of the persons whose convictions were ultimately vacated through the conviction review process. At the time the reports were created, the subjects of the reports stood convicted as the result of prosecutorial action. The reports are "official records" in that they were created by the DA's office itself for the purpose of scrutinizing the propriety of each of the subject convictions. …

… [T]hat the CRU's reports might serve a broader public purpose in leading to reform of police agencies or prosecutors' offices, is not a basis to overlook the protections endowed by CPL 160.50 to the individuals exonerated through the CRU's work. Matter of New York Times Co. v District Attorney of Kings County, 2019 NY Slip Op 08410, Second Dept 11-20-19

IDENTIFICATION.

ALLOWING LOSS PREVENTION OFFICERS TO IDENTIFY DEFENDANT IN A SURVEILLANCE VIDEO MAY HAVE BEEN ERROR BUT WAS NOT DEMONSTRATED TO CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL (FOURTH DEPT).

The Fourth Department determined defense counsel's failure to object to testimony of loss prevention officers identifying defendant in a surveillance video was not demonstrated to amount to ineffective assistance:

Although we agree with defendant that there is no basis in the record to conclude that the loss prevention officers who gave testimony identifying defendant as an individual depicted in the surveillance video were more likely to correctly identify defendant from the video than the jury … , we further conclude that defendant failed to "demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcoming[]" in failing to object to the admission of that testimony … . People v Hines, 2019 NY Slip Op 08032, Fourth Dept 11-8-19

INCLUSORY CONCURRENT COUNTS.

CONVICTIONS OF INCLUSORY CONCURRENT COUNTS VACATED (SECOND DEPT).

The Second Department determined inclusory concurrent counts must be dismissed and the related convictions and sentences vacated:

… [A]s charged, the counts alleging driving while ability impaired by alcohol in violation of Vehicle and Traffic Law § 1192(1) and aggravated unlicensed operation of a motor vehicle in the second degree were inclusory concurrent counts of the count alleging aggravated unlicensed operation of a motor vehicle in the first degree (see CPL 300.30[4]; 300.40[3][b]; Vehicle and Traffic Law §§ 511[2][a][ii]; [3][a][i]; 1192). Accordingly, the defendant's convictions of driving while ability impaired by alcohol in violation of Vehicle and Traffic Law § 1192(1) and aggravated unlicensed operation of a motor vehicle in the second degree and the sentences imposed thereon must be vacated, and those counts of the indictment dismissed. Under the circumstances of this case, the defendant's contention that the mandatory surcharge and crime victim assistance fee must be reduced is more appropriately raised before the Supreme Court and, accordingly, we remit the matter to the Supreme Court … to consider this issue … . People v Delcid, 2019 NY Slip Op 08575, Second Dept 11-27-19

INDICTMENTS.

CONSPIRACY COUNTS FATALLY FLAWED, NO OVERT ACT WAS ALLEGED, CONVICTIONS REVERSED, COUNTS DISMISSED (THIRD DEPT),

The Third Department, reversing defendant's conspiracy convictions, determined the conspiracy counts were fatally flawed because no overt act was alleged:

"A person shall not be convicted of conspiracy unless an overt act is alleged and proved to have been committed by one of the conspirators in furtherance of the conspiracy" (Penal Law § 105.20 [emphasis added] …). Here, the two conspiracy counts neither allege that an overt act was committed nor include factual allegations describing such an act. There is no assertion that defendant took any action beyond agreeing "to engage in or cause the performance of a class B felony." Accordingly, defendant's convictions of conspiracy in the fourth degree under count 3 … and count 2 … must be reversed and the sentences imposed thereon vacated. Given that these two conspiracy counts were jurisdictionally defective and not subject to amendment (see CPL 200.50 [7] [a]; 200.70 [2] [a], [b] …), said counts are dismissed … . People v Mackie, 2019 NY Slip Op 53940, Third Dept 11-27-19

JUDGES.

JUDGE SHOULD NOT HAVE REFUSED TO CONSIDER THE PEOPLE'S LATE RESPONSE TO DEFENDANT'S MOTION TO DISMISS ON SPEEDY TRIAL GROUNDS, NOTWITHSTANDING THE PEOPLE'S FAILURE TO ADHERE TO THE COURT'S MOTION TIMETABLE (FIRST DEPT).

The First Department, reversing Supreme Court, over a two-justice dissent, determined the trial judge should not have refused to consider a late response to the defense motion to dismiss on speedy trial grounds (CPL 30.30):

Clearly, trial courts have considerable discretion in administering litigation and managing their dockets … . We agree with the dissent that parties are obligated to honor court-imposed deadlines. However, it is also axiomatic that justice is best served when cases are decided on the merits. …

Here, the People sought to file their opposition papers on the decision date, some 15 days after the due date. This was not the situation in People v Cole, 73 NY2d 957 [1989], which was cited by the motion court, where the People failed to submit any opposition papers. Further, there is nothing in the record to suggest that there was any history of dilatory conduct or a blatant disregard of court directives on the part of the People. Rather, this appears to be an isolated lapse.

While we are certainly cognizant of the frustration occasioned by the failure of the People to adhere to the motion schedule, summarily granting the defense motion to dismiss without considering the merits of the response the People had prepared was improper. As the People argue, the charges here are serious. Defendant was indicted on numerous weapons possession charges. Dismissal of those charges without a full and complete determination of the motion to dismiss on its merits was unduly harsh. Less drastic remedies, including charging the People for the 15-day delay, were available … . People v Lora, 2019 NY Slip Op 08478, First Dept 11-21-19

JUDGES.

TRIAL JUDGE SHOULD NOT HAVE LIMITED DEFENSE CROSS-EXAMINATION OF A WITNESS TESTIFYING ABOUT DNA TRANSFER, AND SHOULD NOT HAVE INSTRUCTED THE JURY TO ACCEPT A POLICE OFFICER'S EXPLANATION, NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined the trial judge should not have limited cross-examination of the prosecution's witness about DNA transfer, and should not have instructed the jury, during defense counsel's summation, to accept the testimony of a prosecution witness:

… [T]he defendant's contention that his right to confrontation was violated when the Supreme Court limited cross-examination of a prosecution witness on the issue of DNA transfer is preserved for appellate review … . Furthermore, the court's limitation of defense counsel's cross-examination with regard to DNA transfer was an improvident exercise of discretion, since the testimony defense counsel sought to elicit would have been relevant and would not have confused or misled the jury … . Moreover, under the circumstances presented, the error was not harmless, as there is a reasonable possibility that the error contributed to the defendant's convictions … .

We also agree with the defendant's contention that his right to a fair trial was violated when, during summation, defense counsel attacked the credibility of the testimony of certain police officers regarding wanted posters, and the Supreme Court instructed the jury, "there was testimony on that. The jurors will be bound by its recollection

of the testimony and the explanation." Since a "jury is presumed to follow the court's instructions" … , the court's instruction, which bound the jury to accept the officer's explanation, rather than to rely on its recollection of the testimony and the evidence, was erroneous. People v Kennedy, 2019 NY Slip Op 07899, Second Dept 11-6-19

JURORS.

A JUROR'S ATTEMPT TO DEVELOP A RELATIONSHIP WITH A JAILED COOPERATING PROSECUTION WITNESS DURING DELIBERATIONS EXHIBITED ACTUAL AND IMPLIED BIAS REQUIRING A NEW TRIAL; A HARMLESS ERROR ANALYSIS IS NOT APPLICABLE (FIRST DEPT).

The First Department, reversing defendant's conviction and ordering a new trial, in a full-fledged opinion by Justice Renwick, determined that a juror who attempted to develop a relationship with a jailed cooperating prosecution witness during deliberations exhibited actual and implied bias, thereby depriving defendant of a fair trial. Although the juror and the witness were not able to speak to each other during deliberations, there was a missed call. After the trial the juror developed a serious relationship with the witness through letters and phone calls and expressed a desire to marry the witness. The First Department noted that a harmless error analysis was not appropriate:

Juror misconduct includes both "actual bias" and "implied bias." Despite its name, "actual" bias merely requires proof of "a state of mind" that is "likely" to preclude a juror from rendering an impartial verdict … . Under CPL 270.20(1)(b), "[a]ctual bias. . . is not limited . . . to situations where a prospective juror has formed an opinion as to the defendant's guilt" … . It may be demonstrated where a prospective juror's conduct indicates her inability to follow the court's instructions.

"Implied bias" exists where a juror "bears some … relationship to any such person [defendant, witness, prosecution] of such nature that it is likely to preclude [the juror] from rendering an impartial verdict" (CPL 270.20[1][c] …). "[T]he frequency of contact and nature of the parties' relationship are to be considered in determining whether disqualification is necessary" … .

Implied bias "requires automatic exclusion from jury service regardless of whether the prospective juror declares that the relationship will not affect [his or] her ability to be fair and impartial" … .

Here, there was both actual and implied bias. The misconduct by Juror No. 6 was willful and blatant – the juror was admittedly attracted to the witness, a cooperating witness testifying on behalf of the People, and sought to develop a relationship with him while jury deliberations were still underway – even though she knew this was not permitted. The juror knew during deliberations that the witness had tried to call her back, suggesting that the interest was mutual, and the juror is now in a very serious relationship with the witness and seeks to marry him. Although the juror denied that her feelings about the witness affected her thinking about defendant, she was at least arguably more likely to credit his testimony and could subconsciously have sought to aide the side with which the witness was aligned … . People v McGregor, 2019 NY Slip Op 08283, First Dept 11-14-19

JURY INSTRUCTIONS.

INNOCENT POSSESSION OF A WEAPON. JURY SHOULD HAVE BEEN INSTRUCTED ON THE "INNOCENT POSSESSION OF A WEAPON" DEFENSE, CONVICTIONS REVERSED (THIRD DEPT).

The Third Department, reversing defendant's possession of a weapon convictions, determined the jury should have been instructed on the "innocent possession of a weapon" defense. Defendant testified the person who had just robbed him dropped the sweatshirt, which had a handgun in the pocket. According to the defendant's testimony, just as defendant picked up the sweatshirt the police pulled up:

The Criminal Jury Instructions provide, in relevant part, that "[a] person has innocent possession of a weapon when he or she comes into possession of the weapon in an excusable manner and maintains possession, or intends to maintain possession, of the weapon only long enough to dispose of it safely. There is no single factor that by itself determines whether there was innocent possession. In making that determination, [the jury] may consider any evidence which establishes that the defendant had knowing possession of a weapon, the manner in which the weapon came into the defendant's possession, the length of time the weapon remained in his/her possession, whether the defendant had an intent to use the weapon unlawfully or to safely dispose of it, the defendant's opportunity, if any, to turn the weapon over to the police or other appropriate authority, and whether and how the defendant disposed of the weapon" (CJI2d[NY] Temporary and Lawful Possession).

Here, defendant's testimony, if credited, provides sufficient facts from which the jury could find a lawful basis for defendant having temporarily and innocently possessed the subject pistol without having had any intent to use it in a dangerous manner or an opportunity to subsequently turn it over to police … . People v Mack, 2019 NY Slip Op 53930, Third Dept 11-27-19

JURY TRIAL.

BECAUSE THE B MISDEMEANOR CARRIES DEPORTATION AS A POTENTIAL PENALTY, DEFENDANT IS ENTITLED TO A JURY TRIAL (SECOND DEPT).

The Second Department reversed defendant's conviction based upon a recent Court of Appeals case which held a defendant charged with a misdemeanor which carries deportation as a potential penalty is entitled to a jury trial:

… [T]he defendant, a noncitizen, is entitled to a jury trial under the Sixth Amendment of the United States Constitution because the charged crime of attempted assault in the third degree, a class B misdemeanor, carries a potential penalty of deportation (see People v Suazo, 32 NY3d 491). We note that because People v Suazo was decided after this matter was argued but before it was decided, the change of the law set forth therein therefore applies to the defendant … . Accordingly, we reverse the judgment of conviction and grant a new trial. People v Ahsan, 2019 NY Slip Op 08571, Second Dept 11-27-19

JUVENILE DELINQUENCY.

MOTHER WAS NOT ADVISED OF THE RIGHTS HER SON WAS GIVING UP BY ADMITTING TO THE OFFENSE IN THIS JUVENILE DELINQUENCY PROCEEDING, NEW FACT-FINDING ORDERED (FIRST DEPT).

The First Department, reversing Family Court in this juvenile delinquency proceeding, determined appellant's mother was not advised of the rights appellant was giving up by admitting to the offense:

Family Court … adjudicated appellant a juvenile delinquent … upon his admission that he committed an act that, if committed by an adult, would constitute criminal facilitation in the fourth degree, and placed him on probation for a period of 12 months … .

As the presentment agency concedes, appellant's admission was defective because the court's allocution of appellant's mother failed to advise her of the rights appellant was waiving as a result of his admission and the

dispositional consequences of appellant's admission (see Family Ct Act § 321.3[1]). However, because appellant violated his probation, which was extended and remains in effect, we agree with the presentment agency that the petition should not be dismissed, and that the matter should be remanded for a new fact-finding determination on both petitions covered by the disposition … . Matter of Kwesi P., 2019 NY Slip Op 08359, First Dept 11-19-19

MOLINEUX.

EVIDENCE DEFENDANT HAD BEEN ACCUSED OF FRAUDULENTLY PRACTICING DENTISTRY IN THE PAST WAS NOT RELEVANT TO THE INSTANT PROCEEDING ALLEGING THE UNLICENSED PRACTICE OF DENTISTRY; THE PREJUDICIAL EFFECT WAS EXACERBATED BY REFERENCES TO THE ALLEGED FRAUD BY THE PROSECUTOR IN SUMMATION AND BY THE JUDGE IN THE INSTRUCTIONS TO THE JURY; DEFENDANT'S CONVICTION REVERSED (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined that the probative value of evidence submitted to the jury was outweighed by its prejudicial effect. Defendant was charged under the Education Law with practicing dentistry without a license. Defendant alleged he was legally acting as a clinical director in a dental office. The jury was presented with evidence indicating defendant had been previously accused of practicing dentistry fraudulently:

Evidence that the defendant voluntarily surrendered his license to practice dentistry in 2000 was properly admitted to show that the defendant was unlicensed and was aware that he was unlicensed. However, the evidence submitted to the jury, which consisted of the defendant's "application to surrender license," stated not only that he was voluntarily surrendering his license, but also that he was doing so because he was "under investigation for allegations that [he] practiced the profession of dentistry fraudulently, within the purview and meaning of New York Education Law section 6509(2), and committed unprofessional conduct by engaging in conduct in the practice of the profession of dentistry evidencing moral unfitness to practice." During summation, the prosecutor argued that the defendant had surrendered his license because he "had practiced the profession of dentistry fraudulently." Thereafter, during the Supreme Court's instructions to the jury, the court instructed the jurors that "there was evidence in the case that on another occasion, the defendant engaged in criminal conduct and was convicted of a crime," which was "offered as evidence for [the jurors'] consideration on the questions

of whether those facts are inextricably interwoven with the crimes charged, if [they] find the evidence believable, [they] may consider it for that limited purpose and for none other."

The references to fraud and moral turpitude were not relevant to the issue of whether the defendant was unlicensed and was aware that he was unlicensed. Under the circumstances, any probative value of the evidence of the prior fraud was outweighed by its prejudicial effect … . People v Hollander, 2019 NY Slip Op 07950, Second Dept 11-6-19

OPIOIDS.

DEFENDANT, A PAIN MANAGEMENT PHYSICIAN WHO OPERATED A "PILL MILL," WAS PROPERLY CONVICTED OF RECKLESS MANSLAUGHTER IN THE DEATHS OF TWO PATIENTS WHO DIED OF OPIOID OVERDOSE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over a dissenting opinion, determined that defendant, a pain-management doctor, was properly convicted of manslaughter, recklessly causing the death of two persons [Haeg and Pappoid] to whom defendant prescribed opioids as part of a "pill mill" operation:

… [W]e conclude that the evidence was sufficient to support the jury's finding that defendant acted recklessly. A rational juror could have concluded, based on a valid line of reasoning and permissible inferences, that defendant was aware of and consciously disregarded a substantial and unjustifiable risk that Haeg and Rappold would take more drugs than prescribed and would die by overdose, and, given defendant's position as their medical doctor, that defendant's conduct constituted a "gross deviation from the standard of conduct that a reasonable person would observe in the situation" (Penal Law § 15.05 [3]). * * *

The fact that Haeg and Rappold took the substances defendant prescribed for them in a greater dosage than prescribed is neither an intervening, independent agency nor unforeseeable. It is a direct and foreseeable result of defendant's reckless conduct. As explained, viewing the evidence in the light most favorable to the People, a rational juror could conclude that defendant was aware of and consciously disregarded a substantial and unjustifiable risk that Haeg and Rappold would take the medications he prescribed at a higher dose than prescribed in order to attain a narcotic high rather than for legitimate pain management, and that they would die as a result. People v Stan XuHui Li, 2019 NY Slip Op 08544, Ct App 11-26-19

POLICE OFFICERS, CROSS-EXAMINATION.

DEFENSE COUNSEL SHOULD HAVE BEEN ALLOWED TWO CROSS-EXAMINE THE TWO POLICE OFFICERS WHO IDENTIFIED THE DEFENDANT AS THE SHOOTER ABOUT ALLEGATIONS OF THE OFFICERS' DISHONESTY ARISING FROM OTHER COURT PROCEEDINGS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Fahey, reversing defendant's conviction, determined the trial court abused its discretion when it denied defense counsel's requests to cross-examine the two police witnesses about prior acts of dishonesty. The two officers presented the only evidence which identified the defendant as the shooter in this attempted murder prosecution:

At the suppression hearing held before trial, that officer's testimony supported defendant's contention that, in preparing to testify in an unrelated federal criminal proceeding, he had misled the prosecutor in that case with respect to his involvement in a ticket-fixing scheme. … Defense counsel … was not permitted to explore what defense counsel characterized as that officer's lies to the federal prosecutor regarding those activities.

… [T]he court limited exploration of that officer's prior bad acts to his participation in the ticket-fixing scheme, and did not permit inquiry with respect to that officer's deceit of the federal prosecutor.

That ruling was an abuse of discretion as a matter of law. * * *

We also conclude that the trial court abused its discretion as a matter of law in precluding cross-examination of both officers with respect to prior judicial determinations that addressed the credibility of their prior testimony in judicial proceedings. People v Rouse, 2019 NY Slip Op 08522, Ct App 11-25-19

SANDOVAL

SANDOVAL RULING THAT DEFENDANT COULD BE CROSS-EXAMINED ABOUT A 1991 BURGLARY WAS ERROR; DEFENDANT HAD AN UNBLEMISHED RECORD FOR THE LAST 23 YEARS; ERROR DEEMED HARMLESS (THIRD DEPT).

The Third Department determined County Court should not have ruled defendant could be cross-examined about a 1991 burglary conviction in this assault, DWI and reckless driving case arising from a single car accident. The

defendant's record had been unblemished for 23 years, when he was released from prison. The defendant argued that, but for the Sandoval ruling, he would have testified. The Third Department found the error harmless, however:

In gauging whether a conviction is too remote, courts often consider the period of time during which the defendant was incarcerated, as County Court did here. For instance, in People v Wright (38 AD3d 1004 [2007], lv denied 9 NY3d 853 [2007]), this Court allowed inquiry about 20-year-old rape and robbery convictions where the defendant had been released from prison "only nine months prior to the present offense" … .

By comparison, here, defendant had been released from prison for 23 years, with an unblemished record leading up to this event. Under these circumstances, we conclude that County Court abused its discretion in allowing inquiry into the 1991 conviction, which was simply too remote … . People v Cole, 2019 NY Slip Op 08452, Third Dept 11-21-19

SEARCHES AND SEIZURES.

SEIZURE OF DEFENDANT WAS BASED UPON AN ANONYMOUS TIP, SEIZED EVIDENCE SHOULD HAVE BEEN SUPPRESSED (FOURTH DEPT).

The Fourth Department, reversing the relevant convictions, determined the police officer effectively seized defendant by blocking defendant's car based upon an anonymous tip. The evidence seized from the car should have been suppressed:

The conviction of criminal possession of a weapon in the second degree arises from a police encounter during which an officer received information from an anonymous 911 call that drugs were being sold out of a vehicle. The officer arrived on the scene and observed a legally parked vehicle matching the description given by the anonymous caller and further observed defendant in a fully reclined position in the driver's seat. The officer parked his patrol car alongside defendant's vehicle in such a manner as to prevent defendant from driving away and, as the People stipulated in their post-hearing memorandum, the officer thereby effectively seized the vehicle. We agree with defendant that the police lacked reasonable suspicion to justify the initial seizure, and thus County Court erred in refusing to suppress both the tangible property seized, i.e., the weapon and marihuana found in the vehicle, and the statements defendant made to the police at the time of his arrest … . Based on the anonymous tip and defendant's otherwise innocuous behavior … , the officer had, at most, a "founded suspicion

that criminal activity [was] afoot," which permitted him to approach the vehicle and make a common-law inquiry of its occupants ,,, . The officer did not make any "confirmatory observations" of the criminal behavior reported by the 911 caller … and therefore did not have "a reasonable suspicion that [defendant] was involved in a felony or misdemeanor" to justify the seizure … . People v Williams, 2019 NY Slip Op 08048, Fourth Dept 11-8-19

SEARCHES AND SEIZURES, SEARCH WARRANTS.

THE STREET ADDRESS OF THE PRIVATE RESIDENCE TO BE SEARCHED SUFFICIENTLY IDENTIFIED THE PROPERTY NOTWITHSTANDING THAT PUBLIC RECORDS INDICATED THREE RESIDENTIAL UNITS AT THAT ADDRESS; THE SEARCH WARRANT WAS VALID (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Tom, over a two-justice dissent. determined that the description in the search warrant of the property to be searched was sufficient, notwithstanding that public records showed three residential units at that street address:

The dissent relies on allegations in defense counsel's affirmation to argue for a more differentiated internal living structure. However, since an attorney's affirmation is not evidence, the endeavor is unavailing. The dissent also relies on the affidavit submitted by defendant's mother to counter the position of the People that the house was a private family residence. In view of the obvious likelihood of a compelling personal interest motivating the mother, we also decline to accept this as reliable evidence in the effort to controvert the warrant and the additional material in the record.

The only indication that the house legally could have been occupied as separate units was in the extrinsic materials supplied by defendant in moving to controvert the warrant, consisting of public records showing that the house contained three units. However, the fact that city records reflected that the house could be occupied as three units for tax or zoning purposes does not require a conclusion that it was. There likely are numerous legal two- or three-family residential houses that remain occupied by single families. The classifications of these houses relate to tax or land use matters that have no necessary bearing on the facial validity of a warrant. People v Duval, 2019 NY Slip Op 08542, First Dept 11-26-19

SENTENCING, INEFFECTIVE ASSISTANCE.

PARKER WARNINGS WERE INADEQUATE BUT THE ERROR WAS NOT PRESERVED FOR APPEAL; HOWEVER DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE ENHANCED SENTENCE; SENTENCE VACATED AND MATTER REMITTED (THIRD DEPT).

The Third Department, vacating defendant's sentence, determined the Parker warnings were inadequate. Although the error was not preserved for appeal, defense counsel was deemed ineffective for failing to challenge the enhanced sentence:

Defendant contends that Supreme Court erroneously imposed the enhanced sentence given that it did not specifically inform him as part of the Parker admonishment that a consequence of failing to appear for sentencing was the imposition of a greater sentence. … This claim is unpreserved inasmuch as the record does not reveal that defendant objected to the enhanced sentence or moved to withdraw his guilty plea … . The lack of preservation, however, is attributable to the deficiencies of defendant's trial counsel, who represented him both during the plea proceedings and at sentencing. Counsel was ineffective in failing to challenge the enhanced sentence as there was no strategic reason for failing to do so, particularly in light of the clear omissions that were made by Supreme Court in administering the Parker admonishment … . In view of this, we excuse the lack of preservation and address the merits … . The record reveals that Supreme Court did not provide defendant with a sufficient Parker admonishment that included the sentencing consequences and that it imposed the enhanced sentence without affording him an opportunity to withdraw his plea. Accordingly, we vacate the sentence and remit the matter to Supreme Court to either impose the agreed-upon sentence or provide defendant with an opportunity to withdraw his guilty plea … . People v Barnes, 2019 NY Slip Op 53934, Third Dept 11-27-19

SENTENCING, ORDER OF PROTECTION.

PROBATION ONLY IS NOT A LEGAL SENTENCE FOR ASSAULT SECOND; ORDER OF PROTECTION SHOULD NOT HAVE BEEN ISSUED IN FAVOR OF A PERSON WHO WAS NOT A VICTIM OR WITNESS (SECOND DEPT).

The Second Department determined the defendant could not be sentenced to probation only for assault and Supreme Court should not have issue an order of protection in favor of a person who was not a victim or a witness:

Penal Law § 60.05(5) mandates that a person convicted of the class D violent felony offense of assault in the second degree be sentenced to a term of imprisonment … . Such a sentence could consist of a determinate term of imprisonment of at least two years and no more than seven years … , or alternatively, a definite term of imprisonment of one year or less under Penal Law § 70.00(4) or an intermittent term of imprisonment under Penal Law § 85.00 … . Moreover, a split sentence of imprisonment and probation is also authorized … .

Consequently, as the defendant argues and the People concede, the defendant's sentence of a term of probation only with respect to his conviction of assault in the second degree was illegal, and the sentence must be vacated and the matter remitted to the Supreme Court, Richmond County for resentencing or to allow the defendant to withdraw his plea of guilty … .

The defendant, a first time felony offender, requests that his sentence be equivalent to the amount of time that he has already served in connection with this conviction. Such a sentence would be a legal sentence if the sentencing court, in considering the circumstances of the crime and the defendant's character, deems such a sentence to be proper … .

Further, as the defendant argues and the People concede, the Supreme Court had no authority to issue an order of protection in favor of an individual who was neither a victim of nor a witness to the crime to which the defendant pleaded guilty … . People v Ferguson, 2019 NY Slip Op 08424, Second Dept 11-20-19

SENTENCING, PRESENTENCE REPORT.

DEFENDANT ENTITLED TO A HEARING ON WHAT SHOULD BE REDACTED FROM THE PRESENTENCE REPORT BUT IS NOT ENTITLED TO RESENTENCING (FOURTH DEPT).

The Fourth Department determined defendant in this manslaughter case was entitled to a hearing to determine what information should be redacted from the presentence report. However she was not entitled to resentencing:

Defendant … contends that this matter should be remitted for a conference or summary hearing to determine what information should be redacted from the presentence report. We agree, and we note that the People do not oppose remittal for that purpose. The record establishes that defendant sent a letter to County Court objecting to certain portions of the report, including references to her failure to cooperate with law enforcement and to her invocation of her right to counsel. At sentencing, the court acknowledged the objections and indicated that it agreed with some, but not all, of them. The court, however, failed to articulate which portions should be redacted.

Accordingly, because "defendant was not properly afforded an opportunity to challenge the contents of the presentence report" … , we hold the case and remit the matter to County Court for further proceedings in accordance with our decision.

To the extent that defendant contends that she is entitled to be resentenced based on the alleged errors in the presentence report, we reject that contention inasmuch as there is no indication that the court relied on the alleged improper information contained in the report in sentencing her … . People v Ferguson, 2019 NY Slip Op 08016, Fourth Dept 11-8-19

SENTENCING.

DEFENDANT WAS NOT INFORMED THAT THE SENTENCE WOULD INCLUDE POSTRELEASE SUPERVISION AT THE TIME OF THE PLEA, ALTHOUGH HE WAS INFORMED THE SENTENCE PROMISE WAS CONDITIONED UPON NO FURTHER ARRESTS; DEFENDANT WAS ARRESTED TWICE BEFORE SENTENCING AND AN ENHANCED SENTENCE, INCLUDING POSTRELEASE SUPERVISION, WAS IMPOSED; PLEA WAS NOT VOLUNTARY; ERROR APPEALABLE DESPITE LACK OF PRESERVATION (SECOND DEPT).

The Second Department, vacating defendant's guilty plea, determined that the plea was not voluntary because defendant was not informed that the sentence would include a period of postrelease supervision. At the time of the plea, defendant was told the 1 – 3 1/2 year sentence promise was conditioned upon no additional arrests. Defendant was arrested twice before sentencing. The court imposed an enhanced sentence which included a period of postrelease supervision which was not mentioned at the time of the plea. The error was appealable despite the lack of preservation:

Contrary to the People's contention, the defendant was not required to preserve for appellate review his current claim that his plea of guilty was not knowingly, voluntarily, and intelligently entered based on the County Court's failure to mention the postrelease supervision component of his sentence at the plea proceeding, since he had no knowledge of, or opportunity to challenge, that portion of his sentence prior to its imposition … . …

… [T]he record reflects that the defendant was not made aware at the time he entered his plea that the terms of his sentence would include a period of postrelease supervision … , nor did he have a sufficient opportunity to

move to withdraw his plea on that basis before the court imposed sentence … . Accordingly, the judgment must be reversed, the plea of guilty vacated … . People v Walton, 2019 NY Slip Op 08230, Second Dept 11-13-19

SENTENCING.

FAILURE TO MENTION RESTITUTION IN DEFENDANT'S PRESENCE REQUIRES VACATION OF THE SENTENCE; DISCREPANCY BETWEEN THE AMOUNT OF RESTITUTION IN THE PLEA AGREEMENT AND THE CONFESSION OF JUDGMENT MUST BE REMEDIED UPON RESENTENCING (FOURTH DEPT).

The Fourth Department vacated defendant's sentence because the sentencing court did not mention restitution as part of the sentence in defendant's presence. The error survives a lack of preservation and a waiver of appeal. The Fourth Department noted that any discrepancy between the restitution amount in the plea agreement and the amount in the confession of judgment must be remedied upon resentencing:

… [D]efendant contends, and the People concede, that his confession of judgment with respect to restitution must be voided because the amount thereof differs from the amount of restitution contemplated by the plea bargain. Although not raised by the parties, we conclude that defendant's sentence must be vacated in its entirety because County Court failed to pronounce the sentence of restitution in open court … .

"CPL 380.20 and 380.40 (1) collectively require that courts must pronounce sentence in every case where a conviction is entered' and that—subject to limited exceptions not relevant here— [t]he defendant must be personally present at the time sentence is pronounced' " … . Restitution is a component of the sentence to which CPL 380.20 and CPL 380.40 (1) apply … . The requirements of CPL 380.20 and CPL 380.40 (1) are "unyielding" … , and their violation may be addressed on direct appeal notwithstanding a valid waiver of the right to appeal or the defendant's failure to preserve the issue for appellate review … . When the sentencing court fails to orally pronounce a component of the sentence, the sentence must be vacated and the matter remitted for resentencing in compliance with the statutory scheme … . People v Cleveland, 2019 NY Slip Op 08308, Fourth Dept 11-15-19

SENTENCING.

PROBATION SENTENCE WHICH EFFECTIVELY EXTENDED THE PROBATION-PERIOD TO SIX YEARS WAS ILLEGAL (THIRD DEPT).

The Third Department determined that defendant's probation sentence was illegal because it exceeded five years. Defendant's probation was continued after the violation:

When a probation violation is sustained and the court continues the sentence, the court may extend the sentence for a period constituting the time from when a defendant is declared delinquent to when a determination is made on such delinquency, which in this case was from September 2016 to September 2017 (see CPL 410.70 [5]). The record reflects that defendant was originally sentenced to the maximum term of probation of five years (see Penal Law § 65.00 [3] [a] [i]), and County Court continued that sentence. Although the court was authorized to extend the sentence to account for the time between September 2016 and September 2017 (see CPL 410.70 [5]), by doing so in this case and having defendant's probation end in 2022, it impermissibly expanded the term of probation beyond the statutory maximum. In other words, assuming that defendant served the whole term of probation, he would have been on probation from September 2015 to September 2016 and then again from September 2017 to September 2022, which is six years total. Given that the sentence imposed was illegal, the matter must be remitted for resentencing. People v Vanhyning, 2019 NY Slip Op 08451, Third Dept 11-21-19

SENTENCING.

SENTENCES MUST RUN CONCURRENTLY, NOT CONSECUTIVELY; ERROR NEED NOT BE PRESERVED (FOURTH DEPT).

The Fourth Department determined defendant's sentences should run concurrently, not consecutively, noting that preservation of the error was not required:

… [T]he sentence is illegal insofar as County Court directed that the sentences imposed on the two counts charging criminal possession of a weapon in the second degree run consecutively to the sentence imposed on the count charging assault in the second degree. We note that defendant's contention does not require preservation … . The People had the burden of establishing that consecutive sentences were legal, i.e., that the crimes were committed through separate acts or omissions (… see generally Penal Law § 70.25 [2]), and they failed to meet

that burden. With respect to the count charging criminal possession of a weapon in the second degree under Penal Law § 265.03 (1) (b), "the People neither alleged nor proved that defendant's possession [of the gun] was marked by an unlawful intent separate and distinct from his intent to shoot the victim[]" … . With respect to the count charging criminal possession of a weapon in the second degree under Penal Law § 265.03 (3), there was no evidence presented at trial that defendant's act of possessing a loaded firearm "was separate and distinct from" his act of shooting the victim … . People v Tripp, 2019 NY Slip Op 08339, Second Dept 11-15-19

SEVERANCE.

MOTION FOR SEVERANCE SHOULD HAVE BEEN GRANTED; DEFENDANT AND CO-DEFENDANT EACH CLAIMED THE OTHER POSSESSED THE COCAINE FOUND IN THE CAR AFTER A TRAFFIC STOP (THIRD DEPT).

The Third Department, reversing defendant's conviction, determined defendant's (Maldonaldo's) trial should have been severed from the co-defendant's trial;

… [W]e agree with defendant that his motion for a separate trial should have been granted (see CPL 200.40 [1]). "[S]everance is compelled where the core of each defense is in irreconcilable conflict with the other and where there is a significant danger, as both defenses are portrayed to the trial court, that the conflict alone would lead the jury to infer [the] defendant's guilt" … . Through counsel and by testifying on his own behalf, Maldonado denied knowledge of the cocaine's existence in his car and instead pointed the finger at defendant. Specifically, he testified that defendant had brought the Bugles chip bag into the car, that he did not know the contents of that bag, that he would not have allowed the bag in his car if he did and that defendant had his hands in the area where the bag was later discovered when the traffic stop was initiated. In contrast, defendant argued — through counsel and without testifying — that he lacked knowledge of the cocaine's presence in the car and that the cocaine must have belonged to Maldonado, given that it was found in Maldonado's car and that he had a criminal history involving drug possession and distribution — a subject brought out during cross-examination of Maldonado. By seeking to implicate each other, defendant's and Maldonado's defenses were clearly antagonistic, mutually exclusive and irreconcilable, and created "a significant possibility that the jury unjustifiably concluded by virtue of the conflict itself that both defenses were incredible and gave undue weight to the [People's] evidence" … . People v Colon, 2019 NY Slip Op 08449,Third Dept 11-21-19

SEX OFFENDER REGISTRATION ACT (SORA).

BURGLARY AS A SEXUALLY MOTIVATED OFFENSE FIRST DEGREE IS NOT A REGISTERABLE OFFENSE UNDER SORA; A SEX OFFENDER CLASSIFICATION IS APPEALABLE WHEN THE ERROR IS NOT PRESERVED (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice LaSalle, determined that burglary as a sexually motivated felony first degree (Penal Law 140.30[2]) is not a registerable offense under SORA, the result of an apparently unintended omission from the Correction Law. Defendant had attempted to rape the victim after breaking into her house. The court noted that a sex offender classification is appealable even when the alleged error is not preserved:

… [W]hen looking first at the statutory text of Correction Law § 168-a(2)(a), we find that the language employed is clear and unambiguous. As written, subparagraph (iii) of section 168-a(2)(a) specifically defines a sex offense as "a conviction of or a conviction for an attempt to commit any provisions of the foregoing sections committed or attempted . . . as a sexually motivated felony defined in section 130.91 of such law." Thus, as the defendant contends, according to the language of the statute as amended, burglary in the first degree as a sexually motivated felony is not a registerable sex offense under SORA. While this may not have been the intent of the Legislature, the omission of a critical grammatical signpost or a parenthetical number preceding "as a sexually motivated felony" clearly limits the qualifying sexually motivated felony offenses only to those enumerated in subparagraphs (i) and (ii) … . "The maxim expressio unius est exclusio alterius is applied in the construction of the statutes, so that where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded" … . People v Buyund, 2019 NY Slip Op 08207, Second Dept 11-13-19

SEX OFFENDER REGISTRATION ACT (SORA).

DEFENDANT WAS ENTITLED TO A DOWNWARD DEPARTURE IN THIS STATUTORY RAPE CASE (SECOND DEPT).

The Second Department, reducing defendant's risk assessment from level 2 to level 1, determined a downward department was appropriate because the statutory rape conviction involved consensual sex and defendant had no other sexual offenses in his history:

In cases of statutory rape, the Board has long recognized that strict application of the Guidelines may in some instances result in overassessment of the offender's risk to public safety. The Guidelines provide that "[t]he Board or a court may choose to depart downward in an appropriate case and in those instances where (i) the victim's lack of consent is due only to inability to consent by virtue of age and (ii) scoring 25 points in this category results in an over-assessment of the offender's risk to public safety" … .

Considering all of the circumstances present here, including that this offense is the only sex-related crime in the defendant's history, as well as the fact that the defendant's overall score of 80 points, as reduced by the Supreme Court, was near the low end of the range applicable to a presumptive level two designation (75 to 105 points), the assessment of 25 points under risk factor 2 results in an overassessment of the defendant's risk to public safety … . Accordingly, a downward departure was appropriate, and the defendant should have been designated a level one sex offender. People v Fisher, 2019 NY Slip Op 07893, Second Dept 11-6-19

WAIVER OF INDICTMENT.

THE WAIVER OF INDICTMENT IS JURISDICTIONALLY DEFECTIVE FOR FAILURE TO INCLUDE THE APPROXIMATE TIME OF EACH OFFENSE (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction by guilty plea, determined the waiver of indictment was jurisdictionally defective for failure state the approximate time of each offense:

A jurisdictionally valid waiver of indictment must contain, inter alia, the "approximate time" of each offense charged in the superior court information (SCI) … . That requirement is strictly enforced … . " [S]ubstantial compliance will not be tolerated' " … . Here, the waiver of indictment does not contain the approximate time of the offense … . Inasmuch as the SCI also does not contain that information, we need not consider whether to adopt the so-called "single document" rule … . We therefore reverse the judgment, vacate the plea and waiver of indictment, and dismiss the SCI … . People v Denis, 2019 NY Slip Op 08047, Fourth Dept 11-8-19

WAIVER OF INDICTMENT.

WAIVER OF INDICTMENT JURISDICTIONALLY DEFECTIVE; APPROXIMATE TIME OF THE OFFENSE NOT INCLUDED (FOURTH DEPT).

The Fourth Department determined the waiver of indictment was jurisdictionally defective because it did not include the approximate time of the offense:

A written waiver of indictment must be executed in strict compliance with the requirements of CPL 195.20 … , which in relevant part provides that such a waiver shall contain the "approximate time . . . of each offense to be charged in the [SCI]" (CPL 195.20). The People correctly concede that the written waiver of indictment failed to contain the approximate time of each offense and, because strict compliance with CPL 195.20 is required, we agree with defendant that the waiver was defective … . Contrary to the People's contention, even if we assume, arguendo, that we are able to read an SCI in conjunction with a written waiver of indictment in order to cure a defect therein, that would not cure the defect in the written waiver in this case because the SCI does not state the approximate time of each offense … . People v Laws, 2019 NY Slip Op 08332, Fourth Dept 11-15-19

WAIVER OF INDICTMENT.

WAIVER OF INDICTMENT JURISDICTIONALLY DEFECTIVE; IT DID NOT INCLUDE THE APPROXIMATE TIME OF THE OFFENSE (FOURTH DEPT).

The Fourth Department vacated the plea and waiver of indictment because the approximate of the offense was not included in the waiver:

… [D]efendant contends that her waiver of indictment is jurisdictionally defective because it did not contain the "approximate time" of the offense (CPL 195.20). We agree. A jurisdictionally valid waiver of indictment must contain, inter alia, the "approximate time" of each offense charged in the superior court information (SCI) … . "The law demands strict and literal compliance with the constitutional and statutory framework for waiving indictment" … . " [S]ubstantial compliance [with CPL 195.20] will not be tolerated' " … because "compliance with [its] literal terms . . . is the sine qua non of the voluntariness of an indictment waiver" … . Here, as the People correctly concede, the waiver of indictment does not contain the approximate time of the offense … . Moreover, we note that this is not a case " where the time of the offense is unknown or, perhaps, unknowable'

so as to excuse the absence of such information" … . People v Kerce, 2019 NY Slip Op 08310, Fourth Dept 11-15-19