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An Organized Compilation of Summaries of Selected New York State Appellate Decisions Released in December 2019 Addressing Issues Related to Criminal Law. The Summaries Were Posted Weekly on the New York Appellate Digest Website in December. Click on the Entries in the Table of Contents to Go to the Summaries and Click on the Case Citations to Go to the Decisions on the Official New York Courts Website. Click on "Table of Contents" in the Header on Each Page to Return There.

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BRADY MATERIAL.

FAILURE TO INFORM THE DEFENSE ABOUT A SECOND EYEWITNESS TO THE SHOOTING WAS A REVERSIBLE BRADY VIOLATION, THE MOTION TO VACATE SHOULD HAVE BEEN GRANTED; NEW TRIAL ORDERED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Mazzarelli, reversing Supreme Court, over a dissent, granted defendant's motion to vacate his conviction and ordered a new trial, based upon the People's failure to notify the defense of a second eyewitness to the shooting (a Brady violation). The opinion is too detailed factually and too comprehensive legally to fully summarize here:

Several months after the trial concluded, the assistant district attorney who tried the case received an inter-office email attaching a report from a detective who had interviewed an eyewitness to the shooting. The ADA and another prosecutor had themselves interviewed the witness before the trial, having learned that a man who had been arrested for a drug sale near the Polo Grounds told a detective that he had seen the Philips shooting. The prosecutors spoke to the eyewitness in the detective's presence, and no one took notes. Both prosecutors recalled only that the witness said he saw a man in brown clothes go down the 110 step-staircase, shoot Phillips, and go back up the steps. The ADA concluded that the statement was "cumulative" and did not disclose it to the defense. However, after receiving the email, he notified defendant's trial counsel about the witness, and attached the report, which he stated he had not known had ever been created. * * *

Defendant moved pursuant to CPL 440.10 to vacate the judgment of conviction on the ground that it was obtained in violation of his state and federal constitutional rights, including his rights under Brady. Defendant noted that the prosecution failed to disclose that it had interviewed a second eyewitness two years before trial and failed to disclose the report. Defendant's trial lawyer submitted an affirmation in which he explained how timely disclosure of the information would have affected his preparation of the defense, including a misidentification defense. His investigator also submitted an affidavit in which he stated that timely disclosure would have been valuable because the statement contained "several strong leads." For example, he would have spoken to the eyewitness before his memory faded or he became uncooperative, and he would have located the other two people who were sitting with the eyewitness. In addition, the rumor that Phillips robbed Social Security recipients was another lead that would have caused the investigator to seek out people not otherwise on the defense "radar" for potential leads about Phillips or those who wanted to kill him. People v McGhee, 2019 NY Slip Op 09116, First Dept 12-19-19

CONSTRUCTIVE POSSESSION.

DEFENDANT'S PRESENCE WHERE METHAMPHETAMINE WAS BEING PRODUCED AND APPARENT POSSESSION (IN A BACKPACK) OF CHEMICAL REAGENTS (BATTERIES AND SALT) USED IN METH PRODUCTION, WERE INSUFFICIENT TO DEMONSTRATE CONSTRUCTIVE POSSESSION OF METH LAB EQUIPMENT, CONVICTIONS REVERSED (THIRD DEPT).

The Third Department, reversing defendant's convictions relating to his presence in an apartment where methamphetamine was being produced, determined the evidence did not support the defendant's constructive possession of the relevant contraband in the apartment:

… [W]e find that the evidence fell short of establishing that defendant constructively possessed the requisite items with the necessary intent. The uncontroverted evidence established that defendant did not live in or have keys to the apartment or store any of his personal belongings there … . Rather, the evidence demonstrated that the apartment was leased to Stevens and Short, that Schunk had recently been staying in the apartment and that defendant and Gardner had arrived at the apartment, as guests, not long before the police. Stevens, Short and Gardner … adamantly testified that, although he likely knew what was occurring in the apartment, defendant did not participate in the process of preparing, producing or manufacturing the methamphetamine…. . Stevens and Short each testified that defendant did not use methamphetamine that day, that they had never observed defendant use methamphetamine and that defendant was only in the apartment to try to convince Schunk that she needed to enter a rehabilitation program. Stevens also testified that defendant did not know how to make methamphetamine. Further, the responding officers stated that, unlike their observations of Stevens, they did not observe any black soot, which is indicative of methamphetamine production, on defendant's clothing or hands. …

Stevens testified that defendant arrived with a backpack and that batteries (a reagent [used in meth production]) from that backpack went into the bathroom with him and Gardner. Stevens vaguely testified that the backpack contained "lab equipment," but stated that he did not see defendant use anything out of the backpack. The evidence revealed that a backpack was ultimately recovered from the living room and that the backpack contained sea salt, a reagent in the production of methamphetamine, but no "lab equipment."

Viewed in the light most favorable to the People … , the evidence could reasonably support the conclusion that defendant had dominion or control over two reagents — batteries and salt. However, considering the witness testimony and the photographs demonstrating the extremely cluttered state of the living room and apartment overall, the evidence was legally insufficient to establish that defendant "had the ability and intent to exercise

dominion or control over" any of the items of lab equipment seized from the apartment … . People v Gillette, 2019 NY Slip Op 09323, Third Dept 12-26-19

COURTROOM CLOSURE.

COURTROOM SHOULD NOT HAVE BEEN CLOSED TO FAMILY MEMBERS DURING THE UNDERCOVER OFFICER'S TESTIMONY, NEW TRIAL ORDERED (FIRST DEPT).

The First Department, ordering an new trial, determined the defendant's family members should not have been excluded from the courtroom duing the undercover officer's testimony:

The People concede that the trial court erred in excluding defendant's family members from some parts of the trial … . Here, the People failed to show specifically that defendant's family posed a threat to the undercover officer's safety. The court's error requires reversal of the conviction … .

The People acknowledge that a harmless error/lack of prejudice analysis does not apply to courtroom closure errors. Nevertheless, relying on nonbinding Second Circuit case law, they argue that reversal is not warranted because the exclusion of defendant's family was so trivial as not to implicate defendant's right to a public trial (see e.g. Smith v Hollins, 448 F3d 533 [2d Cir 2006]). We need not decide whether a triviality exception exists under State law, because even applying that standard, the closure here cannot be characterized as trivial. Defendant's family was kept out of the courtroom during the entirety of the direct examination, and part of the cross-examination, of an undercover officer who was one of the People's key witnesses. That undercover was one of the officers involved in the narcotics operation that formed the basis of the charge against defendant. He set up the meeting to purchase the drugs, gave the buy money to defendant's accomplice, and received crack cocaine in return. Thus, the exclusion of defendant's family members "from the crux of the [People's] case" was not trivial … . People v Ruffin, 2019 NY Slip Op 08771, First Dept 12-5-19

DANGEROUS INSTRUMENT.

WITHOUT PROOF DEFENDANT USED, ATTEMPTED TO USE, OR THREATENED TO USE THE BOX CUTTER FOUND IN HIS POCKET, THERE WAS NO PROOF THE BOX CUTTER MET THE DEFINITION OF A DANGEROUS INSTRUMENT (FIRST DEPT)

The First Department, reversing defendant's criminal possession of a weapon conviction, determined the proof that defendant simply possessed a box cutter was not enough:

While feeling around defendant's waist, the officer felt a metal object in defendant's shorts. Upon further search, the officer saw the butt end of a box cutter sticking out of the fly of defendant's underwear. The razor of the box cutter was in its sheath and not exposed. He later tested the box cutter to see if it was sharp, and he was able to cut paper with it. Officer McKeever never saw defendant holding the box cutter and did not see him argue with or threaten anyone. * * *

As the jury was charged, a "dangerous instrument" is "any instrument, article or substance, . . . which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or other serious physical injury" … . An object "becomes a dangerous instrument when it is used in a manner which renders it readily capable of causing serious physical injury" … .

Here, there was no proof that defendant used the box cutter, attempted to use it, or threatened to use it as required under the plain terms of the statute in order for it to be a dangerous instrument … . People v Knowles, 2019 NY Slip Op 08770, First Dept 12-5-19

DEPORTATION, MISDEMEANORS, JURY TRIALS.

DEFENDANT, A NONCITIZEN, WAS TOLD DURING HIS PLEA COLLOQUY THAT HE DID NOT HAVE THE RIGHT TO A JURY TRIAL ON THE DEPORTATION-ELIGIBLE B MISDEMEANOR; WHILE THE LEAVE APPLICATION WAS PENDING THE LAW WAS CHANGED TO AFFORD A PERSON IN DEFENDANT'S POSITION THE RIGHT TO A JURY TRIAL; THE MAJORITY UPHELD THE GUILTY PLEA; THE DISSENT ARGUED THE PLEA SHOULD NOT STAND (CT APP).

The Court of Appeals, in a brief memorandum, over an extensive dissenting opinion, determined the accusatory instrument accusing defendant of criminal contempt was sufficient and defendant's guilty plea was voluntary. During the plea colloquy defendant, an noncitizen, was told he did not have the right to a jury trial on the deportation-eligible B misdemeanor. While defendant's leave application to the Court of Appeals was pending, the court decided People v Suazo, 32 NY3d 491, affording persons in defendant's position the right to a jury trial. The dissent argued the guilty plea should be vacated:

From the dissent:

In accordance with the law at the time of defendant Sixtus Udeke's plea allocution, the trial court told defendant, a noncitizen, that he had no right to a trial by jury for a deportation-eligible Class B misdemeanor. While defendant's leave application to this Court was pending, we issued a new rule in People v Suazo (32 NY3d 491 [2018]), recognizing precisely the right defendant was told he did not have during the plea colloquy: that noncitizens like defendant have the right to a trial by jury for crimes carrying the potential penalty of deportation. That rule applies retroactively to defendant's appeal, and it leads to the conclusion that his guilty plea is invalid because he could not have knowingly and intelligently waived a right the court said he did not have. Therefore, I dissent from the majority decision that the guilty plea should stand. People v Udeke, 2019 NY Slip Op 09057, CtApp 12-19-19

DEPORTATION.

JUDGES SHOULD NOT ASK A DEFENDANT WHETHER HE OR SHE IS A US CITIZEN IN PLEA PROCEEDINGS; RATHER JUDGES SHOULD INFORM ALL DEFENDANTS THE PLEA TO A FELONY MAY RESULT IN DEPORTATION IF HE OR SHE IS NOT A US CITIZEN (SECOND DEPT).

The Second Department, over a concurrence, rejected defendant's argument that his plea was involuntary because he was not informed he would be deported as a consequence of the plea. There was no indication in the record that plaintiff was not a US citizen. Defendant told the court he was a citizen. And the pre-sentence report indicated defendant was a naturalized US citizen. However, the Second Department took the opportunity to instruct the courts how the citizenship issue should be handled:

… [A] trial court should not ask a defendant whether he or she is a United States citizen and decide whether to advise the defendant of the plea's deportation consequence based on the defendant's answer. Instead, a trial court should advise all defendants pleading guilty to felonies that, if they are not United States citizens, their felony guilty plea may expose them to deportation . This recommendation is consistent… with the Court of Appeals' pronouncement in Peque: "[T]o protect the rights of the large number of noncitizen defendants pleading guilty to felonies in New York, trial courts must now make all defendants aware that, if they are not United States citizens, their felony guilty pleas may expose them to deportation" … . Additionally, this recommendation is consistent with the legislature's pronouncement in CPL 220.50(7). Although that statute, deemed to be repealed September 1, 2020, indicates, in part, that "[t]he failure to advise the defendant pursuant to this subdivision shall not be deemed to affect the voluntariness of a plea of guilty or the validity of a conviction, nor shall it afford a defendant any rights in a subsequent proceeding relating to such defendant's deportation, exclusion or denial of naturalization[,]" it specifically provides, in part, that "[p]rior to accepting a defendant's plea of guilty to a count or counts of an indictment or a superior court information charging a felony offense, the court must advise the defendant on the record, that if the defendant is not a citizen of the United States, the defendant's plea of guilty and the court's acceptance thereof may result in the defendant's deportation, exclusion from admission to the United States or denial of naturalization pursuant to the laws of the United States"… . Moreover, giving a "short, straightforward statement" … regarding deportation will neither add significantly to the length of the plea proceeding nor encroach meaningfully on the trial court's discretion. Whether a defendant receives the Peque warning should not depend on the defendant having to acknowledge, on the record in open court, that he or she is not a United States citizen, particularly since eliciting noncitizen status may raise, in some cases, concerns of compelled self-incrimination … . People v Williams, 2019 NY Slip Op 09303, Second Dept 12-24-19

EVIDENCE, PROSECUTORIAL MISCONDUCT.

IRRELEVANT PHOTOGRAPHS WERE ADMITTED SOLELY TO AROUSE THE EMOTIONS OF THE JURY; THE PROSECUTOR'S REMARKS IN SUMMATION WERE SIMILARLY IMPROPER; NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing defendant's conviction and ordering a new trial, determined the photographs of the complainant's genitals and anus were irrelevant and should not have been admitted in this sex-offense case. In addition, the court criticized the prosecutor's remarks in summation (unpreserved errors):

"Photographic evidence should be excluded only if its sole purpose is to arouse the emotions of the jury and to prejudice the defendant" … . Here, the complainant's pediatrician, who was called as a witness by the prosecutor, testified that there were no injuries to the complainant's genitals or anus, and that she did not expect to see any injury based upon the complainant's report. Nevertheless, the prosecutor then asked the pediatrician to approach the jurors and display the photographs to them. Under the circumstances of this case, the photographs were irrelevant, and served no purpose other than to inflame the emotions of the jury and to introduce into the trial an impermissible sympathy factor … . The error was then compounded when the prosecutor argued in summation that the complainant had to "get on a table and open up her legs and have her genitals photographed to be shown to 15 strangers . . . What did she gain out of this? Nothing." The improper admission of the photographs cannot be deemed harmless under the circumstances of this case … .

Since there must be a new trial, we note that, although the issue is unpreserved for appellate review, the prosecutor engaged in multiple instances of improper conduct during summation … . For instance, the prosecutor attempted to arouse the sympathies of the jurors … . Additionally, while discussing the character of the defendant, who was a church pastor at the time of trial, the prosecutor referenced the sexual abuse scandals involving the Catholic Church and Orthodox Jewish communities. The prosecutor also pointed out that during jury selection, a prospective juror expressed that she did not feel comfortable sitting on this case because of all the priests who have gotten away with child abuse, and that another prospective juror stated that a family member was raped by a member of the clergy. "[I]n summing up to the jury, counsel must stay within the four corners of the evidence and avoid irrelevant and inflammatory comments which have a tendency to prejudice the jury against the accused" … . People v Lewis, 2019 NY Slip Op 09023, Second Dept 12-18-19

EVIDENCE.

MATTER REMITTED FOR A REOPENED SUPPRESSION HEARING BASED UPON NEW EVIDENCE THAT THE VEHICLE STOP MAY HAVE BEEN BASED UPON INFORMATION FROM AN ANONYMOUS BYSTANDER (SECOND DEPT).

The Second Department, remitting the matter for a reopened suppression hearing, determined the hearing was warranted by new information that the stop of defendant's vehicle may have been based on information from an anonymous source. The defendant had already been convicted of attempted robbery twice after a reversal:

We agree with the defendant that the Supreme Court should have granted his motion to reopen the suppression hearing on those branches of his omnibus motion which were to suppress physical evidence recovered as a result of the stop of the livery car and the identification evidence that followed the stop pursuant to CPL 710.40(4). CPL 710.40(4) permits a court to reopen a suppression hearing if additional pertinent facts have been discovered which the defendant could not have discovered with reasonable diligence before the determination of the original suppression motion … . The additional facts discovered need not necessarily be "outcome-determinative or essential'"; instead, they must be "pertinent" in that they "would materially affect or have affected" the earlier suppression ruling … . Here, the revelation that the livery car description may have come from an anonymous bystander who interjected while translating between the complainant and the sergeant at the scene was previously unknown, and because the sergeant did not previously testify in the case, could not have been discovered with due diligence by the defendant. The information that the livery car description came from an unidentified and anonymous bystander would have affected the earlier suppression determination by placing squarely before the court questions regarding the identity and reliability of the person who described the livery car … . People v Dunbar, 2019 NY Slip Op 09018, Second Dept 12-18-19

EVIDENCE.

PROOF OF A PROBATION VIOLATION SUBMITTED AFTER THE CLOSE OF EVIDENCE SHOULD NOT HAVE BEEN CONSIDERED (SECOND DEPT).

The Second Department determined County Court should not have held defendant violated the probation condition prohibiting him from committing a new crime because the evidence of the new crime was not presented to the court until after the close of evidence:

… [T]he defendant correctly contends that the County Court erred in finding that he violated the condition of his probation prohibiting him from committing any additional crime, offense, or violation based solely on his arrest and indictment for attempted murder. While the court would have been permitted to take judicial notice of the defendant's subsequent indictment for attempted murder … , that evidence was presented after the close of evidence at the revocation of probation hearing. The defendant had no opportunity to be heard regarding the indictment and related documents relied upon by the court. Accordingly, the court should not have found that the defendant violated the condition of his probation based upon the commission of a new crime … . People v Herring, 2019 NY Slip Op 09287, Second Dept 12-24-19

EVIDENCE.

THE SUPPRESSION COURT DID NOT ABUSE ITS DISCRETION BY REOPENING THE SUPPRESSION HEARING AFTER THE PEOPLE HAD RESTED TO ALLOW THE PEOPLE TO PRESENT AN ADDITIONAL WITNESS; THE "ONE FULL OPPORTUNITY" DOCTRINE DOES NOT APPLY IN THE "PRE-RULING" STAGE OF A SUPPRESSION HEARING (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over a two-judge dissenting opinion, held the suppression court did not abuse its discretion by allowing the People to reopen the suppression hearing to present another witness after the People had rested. The court subsequently denied the motion to suppress. The Court of Appeals framed the issue around the "one full opportunity" rule which precludes reopening a hearing in other contexts and decided not to extend the rule to the ""pre-ruling" stage of a suppression hearing:

In Havelka [45 NY2d 636], we applied the "one full opportunity" rule to a holding by an appellate court overturning the decision of the suppression court. In Kevin W [22 NY3d 287}. we applied the same rule to the suppression court's decision to reopen the hearing after its ruling on the merits of the motion. Defendant now asks us to apply the rule at a point still earlier in the process, similarly restricting the suppression court's discretion before any decision is made. This we decline to do.

A basic concern underlying both Havelka and Kevin W. is finality, described as the "haunt[ing] . . . specter of renewed proceedings" after the defendant initially has prevailed … . We explained in Havelka that allowing the People to present additional evidence at a new hearing would render success at the original suppression hearing "nearly meaningless" … . The People, we said, should not get "a second chance to succeed where once they tried and failed" … . However, that concern is absent where no decision on the motion has been rendered by the hearing court: no victory will be rendered "nearly meaningless."

The second issue of concern weighing in favor of the "one full opportunity" rule — the risk of improperly tailored testimony at the reopened proceedings — is significantly lower where the People do not have a formal decision from either an appellate court or the hearing court. People v Cook, 2019 NY Slip Op 09059, CtApp 12-19-19

HABEAS CORPUS.

AN APPLICATION FOR A WRIT OF HABEAS CORPUS IS NOT A VEHICLE FOR ISSUES WHICH COULD HAVE BEEN RAISED IN A DIRECT APPEAL OR A MOTION TO VACATE THE JUDGMENT OF CONVICTION PURSUANT TO CPL 44O (THIRD DEPT).

The Third Department determined petitioner's application for a writ of habeas corpus was properly denied because the issues could have been raised in a direct appeal or in a CPL 440 motion to vacate the conviction:

With regard to petitioner's claim that, pursuant to Penal Law § 70.35, his one-year jail sentences merged with and should have been ordered to run concurrently with his indeterminate sentence, "[h]abeas corpus is not the appropriate remedy for raising claims that could have been raised on direct appeal or in the context of a CPL article 440 motion, even if they are jurisdictional in nature" … . Petitioner's contentions regarding his sentences, including their legality and whether they merged under Penal Law § 70.35, could have been raised on direct appeal or in a motion pursuant to CPL 440.20 … . As we perceive no basis to depart from traditional orderly

procedure, we conclude that Supreme Court properly denied petitioner's application. People ex rel. McCray v Favro, 2019 NY Slip Op 09065, Third Dept 12-19-19

JUDGES, GUILTY PLEAS.

IT IS REVERSIBLE ERROR FOR A JUDGE TO NEGOTIATE A PLEA DEAL WITH A CODEFENDANT IN EXCHANGE FOR TESTIMONY AGAINST THE DEFENDANT (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction, determined the trial judge should not have negotiated a plea deal with a codefendant in exchange for testimony against the defendant:

… [T]he court committed reversible error when it "negotiated and entered into a [plea] agreement with a codefendant[,] requiring that individual to testify against defendant in exchange for a more favorable sentence" … . Here, "by assuming the function of an interested party and deviating from its own role as a neutral arbiter, the trial court denied defendant his due process right to [a] fair trial in a fair tribunal' " … . We therefore reverse the judgment and grant a new trial before a different justice on counts one and two of the indictment … . People v Lawhorn, 2019 NY Slip Op 09223, Fourth Dept 12-20-19

JURORS.

FOR CAUSE CHALLENGE TO A PROSPECTIVE JUROR WAS HANDLED PROPERLY, THERE WAS NO NEED FOR FURTHER INQUIRY OF THE JUROR TO OBTAIN AN UNEQUIVOCAL ASSURANCE THE JUROR COULD BE FAIR (CT APP).

The Court of Appeals, in a brief memorandum, over a three-judge partial dissent, determined the trial court properly handled a for cause challenge to a prospective juror:

The trial court did not abuse its discretion in denying defendant's challenge for cause to a prospective juror pursuant to CPL 270 (1) (b). When defense counsel directly asked the prospective juror, "if you don't hear from [defendant], you don't hear him speak, are you going to hold that against him," she responded, "I don't believe that I would." This response directly refuted any notion that the prospective juror would "hold" defendant's

failure to testify "against him," i.e., that she would be biased in rendering a decision. Viewing this statement "in totality and in context" … , the exchange did not, in the first instance, demonstrate "preexisting opinions that might indicate bias" … . Thus, the trial court was not required to inquire further "to obtain unequivocal assurance that [the juror] could be fair and impartial" … . People v Patterson, 2019 NY Slip Op 08982, CtApp 12-17-19

JURY INSTRUCTIONS, INEFFECTIVE ASSISTANCE.

DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST A JURY CHARGE ON THE LESSER INCLUDED OFFENSE OF PETIT LARCENY; THE VALUE OF THE STOLEN CELL PHONES SHOULD NOT HAVE BEEN ADDED TOGETHER BECAUSE THERE WAS NO PROOF THE CELL PHONES WERE OWNED BY THE SAME OWNER (FIRST DEPT).

The First Department, reversing defendant's conviction, determined: (1) defense counsel was ineffective for failing to request the jury be charged with the lesser included offense of petit larceny in this robbery case involving the theft of cell phones: and (2), the value of the cell phones should not have been added together because there was no proof the phones were owned by the same owner:

Defendant was charged with thefts of cell phones from four wireless phone stores. As to one incident, it was alleged defendant forcibly stole a cell phone in that his showing of a knife to the store employee constituted a threat of force and was perceived by the employee as a threat. While the defense conceded that defendant stole a cell phone, it denied any force was used. Nevertheless, at the charge conference prior to jury deliberations, defense counsel failed to ask for submission of the charge of petit larceny. Since the existing record clearly establishes that this was a mistake, rather than a strategic decision, no CPL 440.10 motion is necessary. When counsel asked for submission of the lesser included offense in the midst of jury deliberations, he expressly admitted that he had been "remiss" in not making a timely request. In any event, counsel could not have been employing an all-or-nothing strategy as to the robbery as argued by the People. This strategy would have made no sense, because the defense was conceding that defendant was guilty of petit larceny as to the other incidents and was already inviting convictions of several misdemeanors. …

Defendant is also entitled to dismissal of the grand larceny charge, which was based upon the improper aggregation of the value of phones taken from two separate AT & T stores on two different days. The People failed to prove that the stores, and the phones located therein, had the same "owner" for the purpose of aggregating multiple thefts … . There was no evidence that these stores were owned by the same corporation, as

opposed to, for example, dealerships separately owned and authorized to sell AT & T wireless products and services ,,, , People v Camacho, 2019 NY Slip Op 08944, First Dept 12-12-19

JURY INSTRUCTIONS.

HARMLESS ERROR ANALYSIS APPLIES TO A JUDGE'S FAILURE TO CHARGE THE JURY IN ACCORDANCE WITH A RULING MADE PRIOR TO SUMMATION, CONVICTIONS AFFIRMED IN THE FACE OF OVERWHELMING EVIDENCE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a concurring opinion and an extensive two-judge dissenting opinion, determined that, in the two cases before the court, the trial court's reversing, after summation, its pre-summation position on a jury instruction was error, but in both cases was harmless error. The opinion is fact-specific and cannot not be fairly summarized here. In Mairena the judge, after agreeing to do so before summation, failed to charge the jury that defendant could not be convicted of manslaughter unless the jury found the fatal injury was caused by a box cutter or a knife. And in Altamirano, after denying the defense request for a jury charge on the innocent possession of a weapon prior to summation, the judge so charged the jury after summation:

In short, Miller [70 NY2d 903] , Greene [75 NY2d 875] and Smalling [29 NY3d 981] have consistently been applied by the appellate courts of this state and continue to be entitled to full precedential force. In those decisions, this Court meant what it expressly stated: a trial court's error in reversing a prior charging decision after summations have been completed is subject to harmless error analysis. …

We conclude that the evidence of guilt in both of the instant cases was overwhelming. Thus, as in Miller, Greene and Smalling, whether the error was harmless turns on the question of whether defendants were prejudiced. Although those cases do not clarify whether the constitutional or nonconstitutional standard applies in evaluating prejudice, we need not resolve that question today because, under either standard, the error in each case was harmless. People v Mairena, 2019 NY Slip Op 08978, CtApp 12-17-19

POLICE OFFICERS.

CROSS-EXAMINATION OF A POLICE OFFICER ABOUT A CIVIL LAWSUIT SHOULD HAVE BEEN ALLOWED; CONVICTION REVERSED (FIRST DEPT).

The First Department, reversing defendant's conviction, determined the hearing and trial courts should have allowed cross-examination of a police officer about a lawsuit naming the officer:

Both the hearing and trial courts erred in denying defendant's request to cross-examine a police officer regarding allegations of misconduct in a civil lawsuit in which it was claimed, among other things, that this particular officer arrested the plaintiff without suspicion of criminality and lodged false charges against him … . The civil complaint contained specific allegations of falsification by this officer that bore on his credibility at both the hearing and trial. At each proceeding, this officer was the only witness for the People. People v Burgess, 2019 NY Slip Op 09364, First Dept 12-26-19

PRO SE, ATTORNEYS.

AN INQUIRY INTO DEFENDANT'S MENTAL HEALTH WAS REQUIRED BEFORE ALLOWING DEFENDANT TO REPRESENT HIMSELF; THE RESULTS OF CPL ARTICLE 730 EXAMS, OF WHICH THE PRESIDING JUDGE WAS NOT MADE AWARE AT THE TIME OF THE REQUEST TO PROCEED PRO SE, INDICATING DEFENDANT MAY BE DELUSIONAL, CONSTITUTED 'RED FLAGS' WARRANTING THE INQUIRY (FIRST DEPT).

The First Department, reversing defendant's conviction, over a dissent, determined defendant's request to represent himself should not have been granted without further inquiry into defendant's mental health. The First Department found that the results of defendant's CPL Article 730 competency exams, finding that defendant may have been delusional, constituted "red flags" that warranted further inquiry before allowing defendant to represent himself:

Not every indication of a defendant's mental infirmity mandates inquiry. Expressions of paranoia or distrust of an attorney, common for many defendants, are not red flags … . Nor is a defendant's belief that he or she was framed by police … . On the other hand, notwithstanding a CPL Article 730 exam finding defendant fit, court

observations that a defendant was irrational and had a tendency to "fly off the handle" warranted a searching inquiry into defendant's mental capacity … . So too, inquiry was warranted where defendant was observed by the court to be unruly, volatile and physically menacing … . In many cases, whether or not the behavior would trigger an inquiry may be a question of degree. * * *

Defendant appeared for trial before a justice who was presiding over the case for the first time. Defense counsel informed the court that defendant wished to proceed pro se. Neither defense counsel nor the prosecution made the court aware of defendant's CPL Article 730 exams or the potential for him to be experiencing delusional thoughts. Although the trial court conducted an extensive colloquy with defendant regarding the waiver of the right to counsel, at no point did the court inquire into defendant's mental health. We find that, notwithstanding other aspects of the record supporting defendant's capacity, the information in the CPL Article 730 reports indicating a potential for delusional thought was a red flag that required a particularized assessment of defendant's mental capacity before resolving his request to proceed pro se … . People v Zi, 2019 NY Slip Op 09353, First Dept 12-26-19

PROSECUTORIAL MISCONDUCT.

PROSECUTOR'S UNTRUE CLAIM, MADE IN SUMMATION, THAT DEFENDANT'S DNA WAS FOUND ON THE WEAPON USED IN THE SHOOTING REQUIRED REVERSAL (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined that the prosecutor's untrue claim, made in summation and immediately objected to, that defendant's DNA was found on the weapon used to shoot the victim, required a new trial:

… [T]he prosecutor's comments during summation that the defendant's DNA was found on the weapon used to shoot the victim had no evidentiary support in the record. The remarks, which were promptly objected to by defense counsel, were highly prejudicial and ultimately deprived the defendant of his right to a fair trial … , particularly as the Supreme Court refused to give any curative instruction or grant a mistrial based upon the prosecutor's improper comments. People v Day, 2019 NY Slip Op 08858, Second Dept 12-11-19

PROSECUTORIAL MISCONDUCT.

PROSECUTORIAL MISCONDUCT DEPRIVED DEFENDANT OF A FAIR TRIAL (SECOND DEPT).

The Second Department, ordering a new trial, determined prosecutorial misconduct deprived defendant of a fair trial:

… [D]uring summation, the prosecutor repeatedly engaged in improper conduct. For instance, the prosecutor denigrated the defense and disparaged the defendant, referring to his self-defense claim as "ridiculous," "insulting," and "ludicrous," and informing the jury that the defendant would "tell you anything" in an effort to "sell you" a story. The prosecutor described the defendant as a "hothead" and a "punk" who could not "take [a] beating like a man" … . Moreover, the prosecutor impinged on the defendant's right to remain silent before arrest by arguing that he could not have acted in self-defense during the altercation because he did not call the 911 emergency number … . Further, the prosecutor improperly invoked the jury's sympathy for the complainant … , vouched for the complainant's credibility … , and interjected her own sense of moral retribution with respect to the complainant's entitlement to use physical force against the defendant, while misleading the jury as to the law on justification … . People v Dawson, 2019 NY Slip Op 08689, Second Dept 12-4-19

RAPE, SEXUAL ASSAULT, GENDER-BASED ANIMUS.

PLAINTIFF'S ALLEGATIONS OF RAPE AND SEXUAL ASSAULT BY DEFENDANT ARE SUFFICIENT TO ALLEGE A CAUSE OF ACTION UNDER NEW YORK CITY'S VICTIMS OF GENDER-MOTIVATED VIOLENCE PROTECTION LAW; THERE IS NO NEED TO ALLEGE SIMILAR ASSAULTS AGAINST OTHER WOMEN TO DEMONSTRATE ANIMUS ON THE BASIS OF GENDER (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Moulton, over a concurring opinion, determined that plaintiff's complaint, alleging rape and sexual assault, stated a valid cause of action under New York City's Victims of Gender-Motivated Violence Protection Law (VGM). The central question on appeal was the meaning of the term "animus." Supreme Court held that allegations defendant had sexually assaulted other women were properly included in the complaint to demonstrate animus. The First Department held plaintiff's allegations of rape and assault, without allegations involving other women, were sufficient:

… [P]laintiff's claims in the amended complaint that she was raped and sexually assaulted are sufficient to allege animus on the basis of gender. She need not allege any further evidence of gender-based animus. Defendant has conceded that the allegations herein are sufficient to show that the acts alleged were "committed because of gender or on the basis of gender." That the alleged rape and sexual assault was "due, at least in part, to an animus based on the victim's gender" is sufficiently pleaded by the nature of the crimes alleged.

Rape and sexual assault are, by definition, actions taken against the victim without the victim's consent … . Without consent, sexual acts such as those alleged in the complaint are a violation of the victim's bodily autonomy and an expression of the perpetrator's contempt for that autonomy. Coerced sexual activity is dehumanizing and fear-inducing. Malice or ill will based on gender is apparent from the alleged commission of the act itself. Animus inheres where consent is absent. Breest v Haggis, 2019 NY Slip Op 09398, First Dept 12-26-19

SEARCH WARRANTS.

SEARCH WARRANT FOR DEFENDANT'S CELL PHONE WAS OVERLY BROAD; GUILTY PLEA VACATED (FIRST DEPT).

The First Department, vacating defendant's guilty plea, determined that the search warrant issued for defendant's cell phone was overly broad in that it authorized a search going back eight months before the conduct alleged in the warrant:

The search warrant for defendant's phones was overbroad. The application alleged that, on September 1, 2016, defendant sent texts to a 13 year old making indecent proposals, and called her on the same day. The warrant authorized examination of defendant's internet usage from January 1 to September 13, 2016, and also authorized, without a time limitation, examination of essentially all the other data on defendant's phones. This failed to satisfy the particularity requirement of both the Fourth Amendment and Article 1, § 12 of New York's Constitution … .

The pivotal question here is whether there was probable cause that evidence of the crimes specified in the warrant would be found in the broad areas specified. Notably, the warrant application alleged two discrete crimes and specified conduct that "began" on September 1, 2016, and, as far as the available information indicated, occurred entirely on that date. While it was of course possible that defendant's phone contained evidence of the specified offenses that predated September 1, there were no specific allegations to that effect. …

The information available to the warrant-issuing court did not support a reasonable belief that evidence of the crimes specified in the warrant would be found in all of the "locations" within defendant's cell phone to which the warrant authorized access — for example, in defendant's browsing history six or seven months before September 1, 2016, or in his emails, the examination of which was authorized without any time restriction … . People v Thompson, 2019 NY Slip Op 08772, First Dept 12-5-19

SEARCH WARRANTS.

THE SEARCH WARRANT WHICH ALLOWED THE SEIZURE OF BUSINESS COMPUTERS, COMPUTER FILES AND BUSINESS DOCUMENTS WITH ONLY A DATE-RESTRICTION AMOUNTED TO A GENERAL WARRANT, THE SEIZED ITEMS SHOULD HAVE BEEN SUPPRESSED (SECOND DEPT).

The Second Department, reversing Supreme Court, over a dissent, determined the search warrant for business computers, computer files and documents amounted to a general warrant, and the items seized should have been suppressed. The warrant was procured by the Office of Attorney General (OAG) and targeted two realty companies which were alleged to have involvement in the illegal construction and demolition of a rent-stabilized building:

The search warrant … permitted the OAG to search and seize broad categories of items relating to 1578 Union Street Realty Corporation, Dream Home Realty, and a number of other businesses allegedly controlled by the defendant through which he had conducted real estate transactions. The items permitted to be searched and seized included: corporate documents; employment records, employee lists, and employment contracts; all calendar books, appointment books, and address books; all computers, computer hard drives, and computer files stored on other media; and all bank, tax and financial records. The warrant did not name or specify any particular crime or offense to which the search was related, and did not incorporate the affidavit by reference. * * *

… [O]ther than a date restriction covering a period of approximately five years, the warrant permitted the OAG to search and seize all computers, hard drives, and computer files stored on other devices, without any guidelines, parameters, or constraints on the type of items to be viewed and seized … . As has been observed by federal courts, where the property to be searched is computer files, "the particularity requirement assumes even greater importance" … since "[t]he potential for privacy violations occasioned by an unbridled exploratory search" of such files is "enormous" … .

Additionally, as to paper documents, the warrant merely identified generic classes of items, effectively permitting the OAG to search and seize virtually all conceivable documents that would be created in the course of operating a business … . People v Melamed, 2019 NY Slip Op 09295, Second Dept 12-24-19

SEX OFFENDER REGISTRATION ACT (SORA).

ALTHOUGH COUNTY COURT ISSUED, ENTERED AND FILED A DECISION ADJUDICATING DEFENDANT A LEVEL THREE SEX OFFENDER, THERE WAS NO LANGUAGE INDICATING THE DECISION WAS A JUDGMENT OR AN ORDER; IN ADDITION, THE RISK ASSESSMENT INSTRUMENT DID NOT INCLUDE "SO ORDERED" LANGUAGE; THEREFORE THERE WAS NO APPEALABLE ORDER BEFORE THE COURT AND THE APPEAL WAS DISMISSED (THIRD DEPT).

The Third Department dismissed the appeal of County Court's SORA risk assessment because County Court did not issue an appealable order:

Following a hearing, County Court rejected defendant's challenge to certain assessed points, adjudicated him as a risk level three sex offender and designated him as a sexually violent offender. Defendant appeals.

An appealable order must be in writing (see CPLR 2219 [a] …), and must contain language that identifies the document as "either a judgment or order of the court"… . Consistent with these mandates, the Sex Offender Registration Act … requires that County Court must "render an order setting forth its determinations and the findings of fact and conclusions of law on which the determinations are based"… . That written order must then be "entered and filed in the office of the clerk of the court where the action is triable" (CPLR 2220 [a] …).

Here, County Court issued a written decision which was subsequently entered and filed. However, the decision contains no language indicating that it is an order or judgment, and it does not appear that a written order was entered and filed … . Moreover, the risk assessment instrument does not contain "so ordered" language so that it may constitute an appealable order … . Accordingly, this appeal is not properly before this Court and must be dismissed … . People v Porter, 2019 NY Slip Op 08743, Third Dept 12-5-19

SEX OFFENDER REGISTRATION ACT (SORA).

DEFENDANT DEMONSTRATED HE WAS UNLIKELY TO REOFFEND; THEREFORE, DESPITE THE SERIOUSNESS OF HIS SEX OFFENSES, HE WAS ENTITLED TO A REDUCTION OF HIS RISK LEVEL FROM THREE TO ONE (SECOND DEPT).

The Second Department, modifying the SORA court, in a comprehensive, full-fledged opinion by Justice Austin, determined defendant sex offender was entitled to a downward modification of his risk assessment from level three to level one:

The defendant's submissions demonstrated that, through his long-term sobriety, strong family support, faith-based and law abiding lifestyle, continuous employment despite his numerous physical disabilities and age, his risk of reoffending is so diminished that a further reduction from his current risk level two to risk level one is appropriate … . * * *

… [I]f a defendant served his or her sentence, rehabilitated himself or herself, and demonstrated no actual likelihood of reoffending, a reduction to a risk level one classification from a level three classification should be a possibility. …

In modifying the Supreme Court's order which reduced the defendant's sex offender risk level classification from three to two, and thereby granting the petition to further reduce the defendant's sex offender risk level designation to a level one, we are not signaling a departure from our strict interpretation of the Guidelines and the legislative history of SORA. Rather, we are following the law, and the policy underlying it, as it applies to this defendant. That is, it is not out of sympathy for his physical condition nor with a blind eye to the defendant's significant criminal past that we render our determination. Rather, we consider these as well as all of the factors—positive and negative—presented at the hearing on his petition for a downward modification in deciding the singular question presented: Did the defendant establish, by clear and convincing evidence, that the risk he poses to the community as a convicted sex offender warrants a downward modification to level one? We answer that question in the affirmative.

To hold otherwise ignores the sincere, positive strides the defendant has made to be a productive, positive member of society. By using the disturbing nature of one's crime as the tipping point in the analysis of a petition such as the one before this Court comes dangerously close to saying, if not holding, that once one has committed a sex crime and has been designated a sex offender level, there is no way he or she can ever be rehabilitated to a legally sufficient extent to warrant a downward modification to the lowest level of supervision. If that were so, then the cited portions of the Guidelines and Correction Law § 168-o(2), which allow annual reevaluation of a

defendant's risk level after it is initially established, would be rendered without meaning and illusory. People v Davis, 2019 NY Slip Op 08720, Second Dept 12-4-19

SEX OFFENDER REGISTRATION ACT (SORA).

DEFENDANT'S CONVICTION OF ATTEMPTED ENDANGERING THE WELFARE OF A CHILD DID NOT MEET THE CRITERIA FOR THE ASSESSMENT OF 30 POINTS UNDER RISK FACTOR 9; DEFENDANT WAS THEREFORE A PRESUMPTIVE LEVEL ONE; HAD THE PEOPLE KNOWN DEFENDANT WAS PRESUMPTIVE LEVEL ONE THEY WOULD HAVE SOUGHT AN UPWARD DEPARTURE; MATTER REMITTED FOR A NEW DETERMINATION (SECOND DEPT).

The Second Department determined defendant's conviction of attempted endangering the welfare of a child did not meet the criteria for assessing 30 points under risk factor 9, and therefore defendant should have been assessed at a presumptive level one. The People argued that had the defendant been assessed at a presumptive level one they would have sought an upward department based on aggravating factors. The matter was remitted for a new determination:

Risk factor 9 requires the assessment of 30 points where "[t]he offender has a prior criminal history that includes a conviction or adjudication for the class A felonies of Murder, Kidnaping or Arson, a violent felony, a misdemeanor sex crime, or endangering the welfare of a child, or any adjudication for a sex offense" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary [hereinafter Guidelines], risk factor 9 [2006]). Here, as the defendant contends, the Supreme Court should not have assessed 30 points under risk factor 9 based on his prior conviction for attempted endangering the welfare of a child inasmuch as that conviction was neither for a felony, nor for a "sex offense" (Correction Law § 168-a[2]), "nor a conviction for actually endangering the welfare of a child" … . Accordingly, only 5 points could be assigned under risk factor 9 for "[p]rior history/no sex crimes or felonies," resulting in a total score of less than 70 points, a presumptive risk level one … . People v Lewis, 2019 NY Slip Op 09045, Second Dept 12-18-19

SEX OFFENDER REGISTRATION ACT (SORA).

PROOF OF MULTIPLE INSTANCES OF SEXUAL CONTACT INSUFFICIENT; RISK ASSESSMENT REDUCED TO LEVEL ONE (SECOND DEPT).

The Second Department, reducing defendant's risk assessment to level one, determined the proof of multiple instances of sexual contact was insufficient:

… [T]he People failed to meet their burden of proof with respect to risk factor 4. Although the People submitted evidence, in the form of the defendant's statements, that he engaged in sexual contact with the victim on three or four occasions, they failed to submit any evidence as to when these instances of sexual contact occurred relative to one another, so as to demonstrate that such instances were separated in time by at least 24 hours, as the People claimed … . Accordingly, the Supreme Court should not have assessed 20 points under risk factor 4. People v Jarama, 2019 NY Slip Op 09044, Second Dept 12-18-19

SEX OFFENDER REGISTRATION ACT (SORA).

PROOF OF OCCASIONAL DRUG USE IN THE REMOTE PAST AND REFERRALS FOR ALLEGED DRUG USE IN PRISON SEVERAL YEARS AGO WAS INSUFFICIENT TO WARRANT THE ASSESSMENT OF 15 POINTS FOR A HISTORY OF DRUG AND ALCOHOL ABUSE (THIRD DEPT).

The Third Department, reversing Supreme Court, determined defendant should not have been assessed 15 points for his history of drug and alcohol abuse. The evidence of drug use was remote in time and drug use was not an aspect of the offense:

Defendant reported that, prior to moving to this area in 1987, he had used cocaine once during his incarceration in Alabama and speed while working in the south, but denied any recent drug use. The information regarding defendant's use of drugs is in the distant past and excessively remote … and, in any event, does not establish a pattern of drug abuse as contemplated by the Sex Offender Registration Act risk assessment guidelines … . In addition, the case summary reflects that, upon being screened by the Department of Corrections and Community Supervision, drug use was not an issue of concern with regard to defendant and he was not, at that time, referred to any alcohol or drug treatment program.

The remaining evidence with regard to defendant's history of drug or alcohol abuse is the general reference to defendant twice being referred to alcohol and drug abuse treatment programs during his 26 years of incarceration for the instant offense "presumptively" due to defendant receiving five tier III disciplinary sanctions for drug use. The most recent referral was several years ago, in 2012. We find that this is insufficient, by itself, to establish a pattern of drug or alcohol abuse by defendant … . People v Brown, 2019 NY Slip Op 08746, Third Dept 12-5-19

SEX OFFENDER REGISTRATION ACT (SORA).

SPANISH-LANGUAGE CONVICTION RECORDS FROM PUERTO RICO, WHICH WERE NOT TRANSLATED, WERE INSUFFICIENT TO PROVE DEFENDANT TO BE A SEX OFFENDER (FOURTH DEPT).

The Fourth Department, vacating the risk level determination, determined the proof defendant was a sex offender was insufficient. The documents relating to a conviction in Puerto Rico were in Spanish and were not translated:

We agree with defendant that, in making its determination that defendant is a sex offender, the Board erred in relying on documents in Spanish that were not accompanied by an English translation (see generally CPLR 2101 [b]). Upon defendant's objection during the SORA hearing to the Board's determination, no additional documents were submitted to support the Board's determination. Thus, there is no English-translated document stating the offense of which defendant was convicted in Puerto Rico, and therefore there is no competent evidence to support the Board's determination that defendant was convicted of a felony offense in another jurisdiction … . In addition, the purported sex offender registration form showing that defendant was required to register in Puerto Rico is entirely in Spanish, and thus there is no competent evidence to support the Board's determination that defendant was required to register as a sex offender in Puerto Rico … . People v Ramos, 2019 NY Slip Op 09153, Fourth Dept 12-20-19

STREET STOPS, DE BOUR.

DEFENDANT WAS PROPERLY PURSUED AND DETAINED BASED UPON HIS DRINKING FROM A CONTAINER IN A PAPER BAG AND RUNNING INSIDE A NEARBY BUILDING; THE INTENT TO DEFRAUD WAS PROPERLY INFERRED FROM DEFENDANT'S POSSESSION OF BOTH REAL AND COUNTERFEIT BILLS, KEPT SEPARATELY ON HIS PERSON (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over an extensive two-judge dissent, determined defendant was properly pursued and detained after a police officer saw him on the street drinking from a container inside a paper bag and then saw him run inside a nearby building as the officer approached. The Court further determined the intent to defraud could be inferred from the defendant's possession of counterfeit bills. The defendant had both counterfeit and real money on his person, kept separately. The issues were succinctly described in the dissent:

From the dissent:

The majority lauds the hot pursuit and forcible detention of Clinton Britt, a man drinking a Lime-A-Rita&TLRtrade; wrapped in a brown paper bag in Times Square shortly before midnight, and his subsequent conviction for intending to spend counterfeit money absent any indication that he attempted or planned to use it, simply because it was found rubber-banded separately from his real money when he was searched upon arrest. Both are mistakes.

The first — let's chase and physically detain people drinking from unseen containers in brown paper bags — is perhaps understandable because of the tremendous difficulty inherent in the mis-application of our De Bour test in many real-world situations. The sad consequence of that mistake is a regression from the legislative and prosecutorial progress eschewing policing based on stereotypes, returning us to the world of broken windows — where police pursue quality of life violations that disproportionately affect the poor (not merely those committing the infractions, but their families, neighbors and communities).

The second — let's equate the separation of real from counterfeit money with the intent to defraud — is inexplicable. It overturns our clear holding in People v Bailey (13 NY3d 67 [2009]), by contravening the most fundamental proposition of evidence: a fact is not evidence unless it makes the disputed issue more likely to be true than it otherwise would be. Put simply, if you knew you had counterfeit money on your person and did not want to use it, you would keep it separate from your real money. That [defendant] kept his real and fake

money separate says nothing about his intent to use it to defraud, deceive or injure anyone, which is a statutory requirement under Penal Law § 170.30. People v Britt, 2019 NY Slip Op 09060, CtApp 12-19-19

VERDICT SHEETS.

THE INCLUSION OF EXTRANEOUS INFORMATION ON THE VERDICT SHEET WHICH DID NOT PROVIDE ANY SUBSTANTIVE INFORMATION ABOUT THE CASE WAS HARMLESS ERROR (THIRD DEPT).

The Third Department determined, although it was error to include extraneous information on the verdict sheet, i.e., that the defendant had authorized the verdict sheet, the error was harmless:

The Court of Appeals has "held that it is reversible error, not subject to harmless error analysis, to provide a jury in a criminal case with a verdict sheet that contains annotations not authorized by CPL 310.20 (2)" … . Moreover, "[t]he basic principle is that nothing of substance can be included that the statute does not authorize" … . * * *

The extraneous statement was not part of the questions posed to the jury; rather, it was at the end of the verdict sheet. It did not change any of the questions to the jury. … [W]e find that the submission to the jury of the … verdict sheet with the statement asserting that defendant authorized it, without his signature, was not reversible error, because the extraneous statement gave no substantive information to the jury about the case and merely indicated that defendant saw the verdict sheet, was aware of his charges and was represented by an attorney … . People v Stover, 2019 NY Slip Op 08734, Third Dept 12-5-19