# NEW YORK APPELLATE DIGEST, LLC

Criminal Law
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An Organized Compilation of Summaries of Selected Decisions Addressing Criminal Law Released by the New York State Appellate Courts in February 2020. The Issues Are Described in the Table of Contents. The Entries in the Table of Contents Link to the Summaries Which Link to the Decisions on the Official New York Courts Website. Click on "Table of Contents" in the Header to Return There.

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# ACCUSATORY INSTRUMENTS.

## INFORMATION CHARGING OBSTRUCTING GOVERNMENT ADMINISTRATION DID NOT INCLUDE FACTUAL ALLEGATIONS DESCRIBING THE OFFICIAL FUNCTION WHICH WAS OBSTRUCTED AND WAS THEREFORE JURISDICTIONALLY DEFECTIVE (CT APP).

The Court of Appeals, reversing the Appellate Term, determined the accusatory information (information) charging defendant with obstructing government administration was jurisidictionally defective because it did not include factual allegations of the official function alleged to have been obstructed:

Defendant was convicted of obstructing governmental administration in the second degree for backing his vehicle away from police officers who were attempting to execute a warrant to search the vehicle. Prior to trial, defendant moved to dismiss the accusatory instrument, arguing that it was facially insufficient because it failed to put him on notice of the "official function" with which he was alleged to have interfered (Penal Law § 195.05). Specifically, defendant asserted that the accusatory instrument was defective because it lacked any reference to the search warrant and alleged in a conclusory fashion that defendant's actions were intentionally taken to prevent the police officers from "effecting a proper vehicle stop." …

… [W]ith regard to the "official function" element of the obstruction charge, the accusatory instrument lacked factual allegations providing defendant with notice of the official function with which he was charged with interfering—namely, a police stop of defendant in his vehicle in order to execute a search warrant (Penal Law § 195.05). Defendant therefore lacked sufficient notice to prepare his defense, rendering the information jurisdictionally defective … . People v Wheeler, 2020 NY Slip Op 00998, CtApp 2-13-20

## APPEALS, JUDGES.

## SUPREME COURT DID NOT RULE ON DEFENDANT'S MOTION FOR A TRIAL ORDER OF DISMISSAL, MATTER REMITTED FOR A RULING (FOURTH DEPT).

The Fourth Department, remitting the matter to Supreme Court, noted that Supreme Court did not rule on defendant's motion for a trial order of dismissal:

Defendant … contends that the evidence is legally insufficient to support the conviction with respect to the weapon possession counts and that the court thus erred in denying his motion for a trial order of dismissal. At the close of the People's case, defendant moved for a trial order of dismissal on the ground that the evidence was legally insufficient to establish his possession of certain weapons, and the court reserved decision. Defendant renewed his motion at the conclusion of all the evidence, and the court again reserved decision. There is no indication in the record that the court ruled on defendant's motion. We do not address defendant's contention because, "in accordance with People v Concepcion (17 NY3d 192, 197-198 [2011]) and People v LaFontaine (92 NY2d 470, 474 [1998], rearg denied 93 NY2d 849 [1999]), we cannot deem the court's failure to rule on the . . . motion as a denial thereof" … . We therefore hold the case, reserve decision, and remit the matter to Supreme Court for a ruling on defendant's motion … . People v Bennett, 2020 NY Slip Op 00957, Fourth Dept 2-7-20

## APPEALS.

## 'ANDERS' BRIEF DEFICIENT; NEW COUNSEL ASSIGNED FOR THE APPEAL (SECOND DEPT).

The Second Department determined the "Anders" appellate brief submitted by counsel was deficient and assigned new counsel for the appeal:

The brief submitted by the appellant's counsel pursuant to Anders v California (386 US 738) is deficient because it fails to contain an adequate statement of facts and fails to analyze potential appellate issues or highlight facts in the record that might arguably support the appeal … . The statement of facts does not review, in any detail, the Supreme Court's advisements to the appellant regarding the rights he was waiving, the inquiries made of the appellant to ensure that the admission was knowingly and voluntarily entered, or the appellant's responses to any of those advisements and inquiries … . Since the brief does not demonstrate that assigned counsel fulfilled

his obligations under Anders v California, we must assign new counsel to represent the appellant … . People v Morales, 2020 NY Slip Op 01188, Second Dept 2-19-20

Similar issues and result in People v Santos, 2020 NY Slip Op 01193, Second Dept 2-19-20

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## APPEALS.

## THE WAIVER OF APPEAL WAS NOT KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY MADE (SECOND DEPT).

The Second Department determined defendant's waiver of appeal was not knowingly, voluntarily and intelligently made. Executing a written waiver does not fix a deficient colloquy:

A defendant should … " receive an explanation of the nature of the right to appeal, which essentially advises that this right entails the opportunity to argue, before a higher court, any issues pertaining to the defendant's conviction and sentence and to have that higher court decide whether the conviction or sentence should be set aside based upon any of those issues . . . [and] that appellate counsel will be appointed in the event that he or she were indigent"' … . … [T]he Criminal Jury Instructions & Model Colloquies, available online through the New York State Unified Court System's website, include a model colloquy for the waiver of the right to appeal … . While the use of the model colloquy is not mandatory, its use may nevertheless "substantially reduce the difficulties" … , provided that the trial judges retain and use flexibility to undertake individualized inquiries as appropriate.

Here, the record does not establish that the defendant knowingly, voluntarily, and intelligently waived his right to appeal … . The County Court's terse colloquy during the plea allocution failed to sufficiently advise the defendant of the nature of his right to appeal and the consequences of waiving that right … . Although the defendant executed a written appeal waiver form, a written waiver is not a complete substitute for an on-the-record explanation of the nature of the right to appeal … . Moreover, the defendant was not informed of the maximum sentence that could be imposed if he failed to comply with the conditions of his plea agreement … . Thus, the purported appeal waiver does not preclude appellate review of the defendant's contention that the enhanced sentence was excessive. People v Slade, 2020 NY Slip Op 01366, Second Dept 2-26-20

## ARREST, SEARCH AND SEIZURE.

## UNDERCOVER OFFICER'S DISTRESS SIGNAL, A GROUP OF MEN NEAR THE UNDERCOVER OFFICER YELLING, DEFENDANT'S STRUGGLING WITH THE UNDERCOVER OFFICER, DEFENDANT'S BREAKING FREE OF AN OFFICER'S RESTRAINT AND RUNNING, DEFENDANT'S FORCIBLY TAKING PROPERTY FROM THE UNDERCOVER OFFICER, AND THE FELLOW OFFICER RULE, COMBINED TO JUSTIFY THE SEIZURE AND SEARCH OF DEFENDANT; THE MOTION COURT PROPERLY REOPENED THE SUPPRESSION HEARING TO ALLOW THE PEOPLE TO SUBMIT ADDITIONAL TESTIMONY (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Webber, determined that the police had probable cause to arrest defendant at the time defendant was seized and searched. Therefore defendant's suppression motion was properly denied. The court noted that the distress signal made by the undercover officer together with the observation by Officer Regina of a group of men near the undercover officer yelling provided reasonable suspicion. Seeing defendant struggling with the undercover officer and the defendant's breaking free and running when an officer attempted to restrain him provided probable cause for arrest. The First Department further determined the suppression hearing was properly reopened to allow the People to present additional testimony. The evidence at the reopened hearing provided another lawful basis for defendant's arrest (the defendant had forcibly taken property from the undercover officer–probable cause imputed to the arresting officer by the fellow officer rule):

While Regina's testimony established the requisite probable cause to arrest defendant, the court providently exercised its discretion in granting the People's motion to reopen the suppression hearing before rendering a decision in order to permit the People to call an officer with additional information tending to establish reasonable suspicion … .The court had not made any ruling, and the circumstances did not pose a risk of tailored testimony.

Upon granting the People's motion to present additional evidence, the court expressly stated that it had not yet rendered a decision … . Despite defendant's arguments to the contrary, there is nothing in the hearing transcript to suggest that the court previously forecasted its decision or provided guidance to the People. The court's very brief remark at the end of the initial hearing about an aspect of the facts cannot be viewed as "direction from the court" … , and was highly unlikely to result in tailored testimony … .

The evidence adduced at the reopened hearing established another lawful basis for defendant's arrest. The undercover officer testified that, as he was attempting to buy drugs from another person, defendant interfered and forcibly took property from the officer. This gave the undercover officer probable cause to arrest defendant for robbery, which may be imputed to the arresting officer by way of the fellow officer rule … . The combination of the undercover officer's distress signal, the field team officers' observation of defendant in a struggle with the undercover officer, and the undercover officer's act of chasing defendant satisfied the requirement that the arresting officer act on "direction of" or "communication with" a fellow officer … . The court's general finding of probable cause can be reasonably interpreted as encompassing this theory … . People v Fraser, 2020 NY Slip Op 01037, First Dept 2-13-20

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## ATTORNEYS, EVIDENCE.

## PROSECUTORIAL MISCONDUCT AND IRRELEVANT MOLINEUX EVIDENCE REQUIRED REVERSAL (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined that prosecutorial misconduct and the admission of irrelevant evidence of another crime required reversal:

"[O]n summation, a prosecutor may not improperly encourage[ ] inferences of guilt based on facts not in evidence'" … As we determined in People v Ramirez (150 AD3d at 899-900), the prosecutor here improperly suggested that the jury should disregard the grand jury testimony of one of the People's main witnesses, and invited the jury to speculate that a missing witness would have given supporting testimony if he had been called to testify. …

"The rule of Molineux is familiar: Evidence of uncharged crimes is inadmissible where its only purpose is to show bad character or propensity towards crime" … . However, "evidence of other crimes may be admitted to show motive, intent, the absence of mistake or accident, a common scheme or plan or the identity of the guilty party" … . "In addition, evidence of uncharged crimes may be admitted as necessary background material when relevant to a contested issue in the case, or to complete the narrative of the events if such evidence is inextricably interwoven with the crime charged" … . "Still, even if technically relevant for one of these or some other legitimate purpose, Molineux evidence will not be admitted if it is actually of slight value when compared to the possible prejudice to the accused'" … .

The fact that the defendant allegedly resisted arrest six months after the incident in question after violating an order of protection against him held by one of the complainants was not relevant in this matter. The defendant

was not resisting arrest for the crimes charged at trial, and resisting arrest in this instance was too far removed from the underlying incident to be deemed admissible as evidence of consciousness of guilt … . People v Ramirez, 2020 NY Slip Op 01087, Second Dept 2-13-20

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## ATTORNEYS.

## DECISION WHETHER TO ADMIT OR DENY ALLEGATIONS IN A PREDICATE FELONY STATEMENT IS RESERVED TO DEFENDANT PERSONALLY, NOT DEFENSE COUNSEL (FOURTH DEPT).

The Fourth Department noted that the decision whether to admit or deny the allegations in a predicate felony statement is reserved to the defendant personally, not defense counsel:

… [W]hether to admit or controvert the allegations in a predicate felony statement is a "fundamental" decision "comparable to how to plead and whether to waive a jury, take the stand or appeal," and it is "therefore reserved to the accused" personally … . Thus, the court did not violate defendant's right to counsel by accepting his personal decision to controvert the allegations in the People's predicate felony statement notwithstanding defense counsel's contrary views and advice … . Defendant's related assertion that defense counsel was ineffective for failing to adequately apprise him of the ramifications of contesting the predicate felony statement is belied by the record … . People v Favors, 2020 NY Slip Op 00968, Fourth Dept 2-7-20

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## DISCOVERY.

## PEOPLE'S REQUEST TO DENY DISCLOSURE BECAUSE OF CONCERNS FOR WITNESS SAFETY SHOULD HAVE BEEN GRANTED IN ITS ENTIRETY (SECOND DEPT).

The Second Department determined the prosecutor's request to deny disclosure of certain exhibits should have been granted:

Pursuant to CPL 245.70(6), a party who has unsuccessfully sought, or opposed the granting of, a protective order relating to the name, address, contact information, or statements of a person may obtain expedited review by an

individual justice of the intermediate appellate court to which an appeal from a judgment of conviction would be taken. Although the statute does not specify what standard the intermediate appellate justice is to apply in performing the expedited review, I concur that where, as here, "the issue involves balancing the defendant's interest in obtaining information for defense purposes against concerns for witness safety and protection, the question is appropriately framed as whether the determination made by the trial court was a provident exercise of discretion" … .

Applying these standards to the matters at hand, I conclude that the Supreme Court's determination to grant the People's request only to the extent indicated was an improvident exercise of discretion. Under the particular facts and circumstances presented, concerns for witness safety and protection far outweigh the usefulness of the discovery of the material or information in question. Consequently, I grant the People's application to review pursuant to CPL 245.70(6) and modify the protective order accordingly. People v Reyes, 2020 NY Slip Op 01275, Second Dept 2-21-20

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## DISCOVERY.

## PROTECTIVE ORDER DELAYING DISCOVERY UNTIL 45 DAYS BEFORE TRIAL GRANTED BY THE APPELLATE COURT (SECOND DEPT).

The Second Department, reversing Supreme Court, granted the People's application for a protective order delaying release of discovery until 45 days before trial:

Pursuant to CPL 245.70(6), a party who has unsuccessfully sought, or opposed the granting of, a protective order relating to the name, address, contact information, or statements of a person may obtain expedited review by an individual justice of the intermediate appellate court to which an appeal from a judgment of conviction would be taken. Where, as here, "the issue involves balancing the defendant's interest in obtaining information for defense purposes against concerns for witness safety and protection, the question is appropriately framed as whether the determination made by the trial court was a provident exercise of discretion" … .

Applying the factors set forth in CPL 245.70(4), including concerns for witness safety and protection, I conclude that the Supreme Court improvidently exercised its discretion in directing immediate disclosure of the subject materials to counsel for the defendant and his investigator. Under the particular facts and circumstances of this case, the Supreme Court should have delayed disclosure of the subject materials to counsel for the defendant and his investigator until 45 days before trial. People v Brown, 2020 NY Slip Op 01439, Second Dept 2-28-20

## EVIDENCE, APPEALS.

## SEX TRAFFICKING CONVICTION AGAINST THE WEIGHT OF THE EVIDENCE (FIRST DEPT).

The First Department, reversing the sex trafficking conviction, determined there was insufficient evidence defendant used force or participated in a scheme to compel the alleged victim to engage in prostitution by threat of physical harm. The sex trafficking conviction was deemed to be against the weight of the evidence:

The evidence showed that the alleged victim, her mother, and a third woman, sought to earn more money than they were earning in Florida, that they voluntarily traveled with defendant to New York to earn money as prostitutes, and that defendant left them alone at times in Florida and New York. There was no evidence presented at trial that defendant ever threatened to harm the alleged victim if she failed to begin or continue working as a prostitute. A detective described a call he overheard between defendant and the alleged victim, after she was apprehended, in which defendant was angry because he believed that she did not get money from a client. However, this does not suffice to prove any use of force or a "scheme" to compel her to work as a prostitute. Similarly, although the third woman in the group that came with defendant from Florida testified that she was a "little intimidated" by an argument over money between defendant and another man, this does not establish the required threat of harm, even assuming the alleged victim also saw and heard the argument. People v Hayes, 2020 NY Slip Op 00832, First Dept 2-4-20

## EVIDENCE.

## ANONYMOUS 911 CALL WAS NOT ADMISSIBLE AS AN EXCITED UTTERANCE OR AS A PRESENT SENSE IMPRESSION; CONVICTION REVERSED (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined the recording of the 911 call was not admissible as an excited utterance or as a present sense impression:

… [T]he People did not present sufficient facts from which it could be inferred that the anonymous caller personally observed the incident … . The anonymous caller merely stated to the 911 operator that "[s]omebody just got shot on East 19th and Albemarle" and that it "was a guy with crutches. He started to shoot." Nothing in

these brief, conclusory statements, which were made at least five minutes after the shooting occurred, suggested that the caller was reporting something that he saw, as opposed to something he was told … . Moreover, although there was testimony that the call was made from a payphone located in the vicinity of the shooting, the People did not demonstrate that the payphone was situated outdoors or in a place where the actual site of the shooting would be visible. Accordingly, the statement did not qualify as an "excited utterance" … .

For similar reasons, the declarations of the 911 caller were not admissible under the "present sense impression" exception to the hearsay rule. " Present sense impression' declarations . . . are descriptions of events made by a person who is perceiving the event as it is unfolding" … . Here, as just explained, the People failed to demonstrate that the anonymous caller was describing events that he actually perceived. People v Thelismond, 2020 NY Slip Op 01368, Second Dept 2-26-20

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## EVIDENCE.

## PROOF OF THE VALUE OF THE STOLEN ITEMS WAS INSUFFICIENT; GRAND LARCENY 3RD DEGREE CONVICTION NOT SUPPORTED BY THE WEIGHT OF THE EVIDENCE (SECOND DEPT).

The Second Department determined the grand larceny third degree charged was against the weight of the evidence because the value of the stolen items was not proven:

The People were required to establish that the market value of the stolen items at the time of the crime exceeded $3,000 (see Penal Law § 155.20[1]). Here, the stolen property consisted of two handguns, several items of jewelry, and a computer tablet. The complainant testified that (1) the purchase price of the .40 caliber Smith & Wesson automatic handgun was $800 and that he purchased it "[a]pproximately four years" before the burglary; (2) the purchase price of the .380 Ruger automatic handgun was $600 and that he purchased it "[t]wo years" before the burglary; and (3) he cleaned both guns regularly, and they were both operable. The People's ballistics expert testified that the retail value of each firearm was "anywhere from $500 to $1,000."

However, the only evidence of the value of the remaining stolen items was the complainant's testimony regarding the purchase price of some of those items, and he did not testify as to when he purchased those items, their market value, or the cost to replace them. Although a "victim is competent to supply evidence of original cost" … , "evidence of the original purchase price, without more, will not satisfy the People's burden" … . On this record, we cannot conclude that the fact-finder could "reasonably infer, rather than merely speculate" that the

value of all of the stolen goods exceeded the statutory threshold of $3,000 … . Accordingly, we find that the evidence was insufficient to establish that the value of the property taken exceeded $3,000 … . People v Rivera, 2020 NY Slip Op 01192, Second Dept 2-19-20

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## EVIDENCE.

## REVOLVER FOUND BY A PASSERBY SEVEN BLOCKS FROM THE CRIME SCENE SHOULD NOT HAVE BEEN ADMITTED IN EVIDENCE; ERROR DEEMED HARMLESS HOWEVER (SECOND DEPT).

The Second Department determined a revolver found by a passerby seven blocks from the scene of the crime should not have been admitted in evidence. The error was harmless however:

Supreme Court should not have admitted into evidence a revolver that was recovered by the police from underneath a vehicle five to seven blocks away from the scene of the crime and approximately seven hours after the shooting. The revolver was discovered by a passerby, who notified the police. "When real evidence is purported to be the actual object associated with a crime, the proof of accuracy has two elements. The offering party must establish, first, that the evidence is identical to that involved in the crime; and, second, that it has not been tampered with" … . At trial, the only eyewitness at the scene of the shooting who observed the defendant armed with a firearm testified that the defendant was armed with a "[s]ilver, long barrel" revolver. Contrary to the court's determination, although that testimony was somewhat consistent with the defendant's description of his revolver, it was insufficient to provide reasonable assurances that the revolver that was admitted into evidence was the same revolver used by the defendant during the shooting … . No forensic evidence was recovered from the subject revolver linking it to the defendant, and more significantly, the eyewitness was never asked, either by the police after the revolver was recovered or by the prosecution at trial, to identify the revolver as the "actual object" used by the defendant during the shooting … . Further, there was no evidence in the record to support the court's independent observation that the revolver that was admitted into evidence was "very uncommon" and a "very, very unique gun." People v Deverow, 2020 NY Slip Op 01359, Second Dept 2-26-20

## JURORS.

## THE RECORD DID NOT DEMONSTRATE A SELECTED UNSWORN JUROR COULD NOT RENDER AN IMPARTIAL VERDICT BECAUSE OF AN OUT-OF-TOWN MEETING ON THE DAY BEFORE THE TRIAL WAS LIKELY TO CONCLUDE, THE PEOPLE'S FOR CAUSE CHALLENGE SHOULD NOT HAVE BEEN GRANTED, NEW TRIAL ORDERED (FIRST DEPT).

The First Department, reversing defendant's conviction, determined the judge should not have granted the People's for cause challenge to a selected by unsworn juror. Although the juror had an important out-of-town meeting on the day before the trial was to conclude, the record did not demonstrate the juror could not render an impartial verdict on that ground:

The record did not justify the court's discharge for cause of a selected but unsworn juror. Both defendant and the People initially declined to challenge the juror peremptorily or for cause. However, the prosecutor challenged the juror for cause, over defense objection, after the court, concerned about an important out-of-town meeting that the prospective juror was scheduled to attend on a day before the anticipated conclusion of the trial, announced that it would grant such a challenge. Although subsequent questioning demonstrated that rescheduling the meeting would be inconvenient for the juror, it did not establish that the juror, who never directly asked to be excused for hardship or otherwise, had "a state of mind that [was] likely to preclude him from rendering an impartial verdict based on the evidence adduced at the trial" … . By way of contrast, in People v Williams (44 AD3d 326, 326 [1st Dept 2007], lv denied 9 NY3d 1010]), we found that the selected but unsworn juror at issue was unfit for service because her scheduling conflict involving a funeral "would make it difficult for her to focus on the trial." Here, the juror's responses did not establish a sufficient basis to sustain a challenge for cause, which was the only issue presented to and ruled upon by the court. People v Manning, 2020 NY Slip Op 01308, First Dept 2-25-20

## JURY INSTRUCTIONS.

## JURY SHOULD NOT HAVE BEEN CHARGED ON THE 'COMBAT BY AGREEMENT' EXCEPTION TO THE JUSTIFICATION DEFENSE, CRITERIA EXPLAINED; ERROR DEEMED HARMLESS HOWEVER (SECOND DEPT).

Although the error was deemed harmless, the Second Department determined the jury should not have been instructed on the "combat by agreement" exception to the justification defense. Defendant was on a bus when rival gang members got on the bus. Defendant (14 years old) pulled out a gun and shot, killing an innocent passenger:

Supreme Court should not have charged the jury with respect to the combat by agreement exception to the justification defense. The court granted the People's request for the instruction based upon generalized evidence that the defendant was a member of a gang which had a rivalry with other local gangs, including the gang with which the persons who approached the defendant were affiliated. However, any evidence of an alleged agreement in this case was tacit, open-ended as to time and place, and applicable to all members of the gangs of the parties involved as well as to all members of their affiliate gangs. The combat by agreement exception to justification is generally limited to agreements to combat between specific individuals or small groups on discrete occasions … . As there was no evidence of a combat agreement between the defendant and the specific persons who approached him on the bus, or among rival gang members during a discrete period of time or at a specific location, there was no reasonable view of the evidence that the combat by agreement exception applied to negate a justification defense in this case … . People v Anderson, 2020 NY Slip Op 01179, Second Dept 2-19-20

## JURY NOTES.

## RECORD DOES NOT DEMONSTRATE DEFENSE COUNSEL WAS MADE AWARE OF A JUROR'S COMPLAINTS ABOUT THE DELIBERATIONS AND THE CONTENTS OF A NOTE FROM THE JURY; THE FOR CAUSE CHALLENGES TO TWO JURORS SHOULD HAVE BEEN GRANTED; DNA TESTING OF GUM DISCARDED BY THE DEFENDANT WHILE IN CUSTODY WAS PROPER (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined the for cause challenges to two jurors should have been granted and the record does not indicate defense counsel was made aware of a juror's complaint to the judge about the deliberations and the contents of a note from the jury. The decision dealt with several suppression issues, including the finding that DNA testing of a piece of gum discarded by the defendant when he was in custody was proper:

At the commencement of the second day of deliberations, the court met with counsel and deliberating juror C.H., who had left the court a telephone message expressing concerns about deliberations. This conversation took place outside the defendant's presence. Although the court properly attempted to keep its communication with C.H. ministerial by simply directing her to put her concerns in writing, C.H. refused to accept the court's directions, expressing concerns about the course of deliberations, including a concern that someone was "stirring the jury" and that other jurors had been "influenced." The court eventually directed a court officer to return C.H. to the jury room and provide her with writing materials. * * *

After the colloquy with C.H. and following an off-the-record discussion, the defendant was returned to the courtroom, and the court stated that it had received a note from the jury which had been marked as Court Exhibit X and "sealed with the consent of all parties." No further discussion of Court Exhibit X appears on the record. * * *

We cannot assume, from the County Court's statement that the parties agreed to seal the note, that counsel was made aware of the exact contents of the note since "an insufficient record cannot be overcome with speculation about what might have occurred. The presumption of regularity cannot salvage an O'Rama error of this nature" … . Moreover, since the failure to disclose a jury note to counsel is a mode of proceedings error, it cannot be overlooked as harmless even where the evidence is otherwise overwhelming … . People v Kluge, 2020 NY Slip Op 00878, Second Dept 2-5-20

## MENTAL DISORDER, JUDGES, APPEALS.

## FAILURE TO HOLD A HEARING TO DETERMINE DEFENDANT'S MENTAL CONDITION AFTER TWO PSYCHIATRISTS FOUND DEFENDANT SUFFERED FROM A DANGEROUS MENTAL CONDITION WAS REVERSIBLE ERROR; ALTHOUGH THE ERROR WAS NOT PRESERVED, THE APPEAL WAS CONSIDERED IN THE INTEREST OF JUSTICE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined it was reversible error to fail to conduct a hearing to determine defendant's mental condition after defendant had been examined by two psychiatrists who concluded defendant suffered from a dangerous mental condition. The error was not preserved but was reviewed in the interest of justice:

Defendant now appeals, by permission of this Court, from an amended order that, upon the court's finding that defendant suffered from a dangerous mental disorder, committed him to the custody of the Commissioner of Mental Health for confinement in a secure facility.

… CPL 330.20 (6) provides that, "[a]fter the examination reports are submitted, the court must, within [10] days of the receipt of such reports, conduct an initial hearing to determine the defendant's present mental condition" … . In this case, however, the court did not conduct an initial hearing. We agree with defendant that, as the People correctly concede, the court's failure to conduct the requisite initial hearing constitutes reversible error … . Although defendant failed to preserve his contention for our review … , we nevertheless review it in the interest of justice … . People v David T., 2020 NY Slip Op 00964, Fourth Dept 2-7-20

## MENTAL DISORDER, ATTORNEYS, APPEALS.

## DEFENSE COUNSEL INEFFECTIVE FOR CONCEDING DEFENDANT SUFFERS FROM A DANGEROUS MENTAL DISORDER; COUNTY COURT SHOULD HAVE HELD THE MANDATORY STATUTORY HEARING; APPEAL IS NOT ACADEMIC BECAUSE OF LASTING CONSEQUENCES OF THE 'DANGEROUS MENTAL DISORDER' FINDING (SECOND DEPT).

The Second Department, reversing County Court, determined defendant did not receive effective assistance of counsel because the attorney conceded defendant suffered from a dangerous mental disorder. County Court should have held the mandatory statutory hearing. The appeal is not academic because of the lasting effect of the finding defendant suffers from a dangerous mental disorder:

Although the commitment order has expired by its own terms, the appeal is not academic because the County Court's determination that the defendant has a dangerous mental disorder has lasting consequences that will affect all future proceedings regarding his commitment and release … .

The initial hearing under CPL 330.20(6) is a critical stage of the proceedings during which the defendant is entitled to the effective assistance of counsel … . Here, there was simply no legitimate strategy that could have warranted defense counsel's concession that the defendant suffered from a dangerous mental disorder, implicitly consenting to the defendant's confinement in a secure facility … . As defense counsel failed to provide meaningful representation, the defendant was deprived of the effective assistance of counsel … .

Neither the defendant's nor defense counsel's concession to a finding of dangerous mental disorder can relieve the County Court from the obligation to provide the initial statutory hearing, which is mandatory (see CPL 330.20[6] … ). People v Juan R., 2020 NY Slip Op 01190, Second Dept 2-19-20

## SENTENCING, APPEALS.

## THE COURT, DEFENSE COUNSEL AND THE PROSECUTOR WERE UNDER THE MISCONCEPTION DEFENDANT WAS ELIGIBLE FOR A PAROLE SUPERVISION SENTENCE AT THE TIME DEFENDANT PLED GUILTY; THEREFORE THE MATTER CAN BE CONSIDERED ON APPEAL IN THE ABSENCE OF PRESERVATION; PLEA VACATED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendant was not eligible for a parole supervision sentence and the court, defense counsel and the prosecutor mistakenly believed defendant was eligible. Defendant's guilty plea was based upon the understanding the court would consider such a sentence (which the court ultimately did not impose). Because all parties misunderstood the law, defendant could not be expected to have preserved the error by moving to withdraw his plea and the matter can therefore be considered on appeal:

… [W]e conclude that defendant's plea should be vacated because "[i]t is impossible to have confidence, on a record like this, that defendant had a clear understanding of what he was doing when he entered his plea" … . In short, we "cannot countenance a conviction that seems to be based on complete confusion by all concerned" … . Where, as here, "the prosecutor, defense counsel and the court all suffered from the same misunderstanding of the [court's sentencing discretion], it would be unreasonable to conclude that defendant understood it" … . Although the court did not commit to a sentence of parole supervision under CPL 410.91, it erroneously indicated that defendant was eligible for such a sentence and stated that it would consider such a sentence, among all sentencing options, at sentencing—it did not qualify its statement or advise defendant that there was a possibility that he was not eligible for such a sentence … . We therefore reverse the judgment, vacate the plea, and remit the matter to Supreme Court for further proceedings on the superior court information. In light of our determination, we do not reach defendant's remaining contentions. People v Work, 2020 NY Slip Op 00962, Fourth Dept 2-7-20

## SENTENCING, EVIDENCE.

## THE ERRONEOUSLY UNSEALED RECORD OF A CRIMINAL PROCEEDING TERMINATED IN FAVOR OF THE DEFENDANT SHOULD NOT HAVE BEEN CONSIDERED BY THE SENTENCING COURT, MATTER REMITTED FOR RESENTENCING (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, reversing the Appellate Division, over a three-judge dissenting opinion, determined the sentencing court should not have considered the erroneously unsealed records of a prior criminal action which was terminated in favor of the defendant. The matter was sent back for resentencing. "A court is without authority to consider for sentencing purposes erroneously unsealed official records of a prior criminal action or proceeding terminated in favor of the defendant. Where violation of the sealing mandate of CPL 160.50 impacts the ultimate sentence, the error warrants appropriate correction. Such is the case here, where the court imposed on defendant a higher sentence than promised at his plea, based on its finding that the unsealed trial record—which the court mistakenly believed it could consider—established defendant's violation of a pre-sentence condition of his plea:"

Before sentencing, defendant was arrested and prosecuted for a crime allegedly committed after entering his plea. At defendant's request, the sentencing court agreed to adjourn defendant's sentencing pending resolution of the matter. The jury acquitted defendant of the new charge and the official record, including the trial transcript, was sealed in accordance with CPL 160.50.

The day following that acquittal, the prosecutor informed the court which had accepted defendant's criminal possession plea that the People would be requesting an enhanced sentence on the criminal possession conviction because defendant violated a pre-sentence condition of the plea by engaging in criminal conduct during the sentencing adjournment, as made clear by defendant's trial testimony in the other case. The prosecutor then moved to unseal the records in the prior criminal action terminated by acquittal, arguing "justice requires" unsealing because the trial testimony was relevant to defendant's request to be sentenced under the terms of his plea. The court granted the motion. People v Anonymous, 2020 NY Slip Op 01113, CtApp 2-18-20

## SENTENCING, YOUTHFUL OFFENDER.

## DEFENDANT, ALTHOUGH CONVICTED OF AN ARMED FELONY, SHOULD HAVE BEEN ACCORDED YOUTHFUL OFFENDER STATUS, CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, reversing County Court, determined defendant should have been accorded youthful offender status, despite the armed felony conviction:

As the defendant was convicted of an armed felony (see CPL 1.20[41]), he was eligible to have this conviction replaced with a youthful offender adjudication only if, inter alia, there were "mitigating circumstances that [bore] directly upon the manner in which the crime was committed" (CPL 720.10[3][i]). Mitigating circumstances include "[f]actors directly' flowing from and relating to [the] defendant's personal conduct while committing the crime," but generally, do not include the "defendant's age, background, criminal history and drug habit" … . Here, while there is no question that the defendant stands convicted of a serious crime, no physical harm or injury resulted to the complainant from the incident … , and the defendant was an "eligible youth" under CPL 720.10(2) for purposes of youthful offender treatment.

Moreover, in the exercise of our discretion, we determine that the defendant should be granted youthful offender treatment … . In making such a determination, factors to be considered by the court include "the gravity of the crime and manner in which it was committed, mitigating circumstances, defendant's prior criminal record, prior acts of violence, recommendations in the presentence reports, defendant's reputation, the level of cooperation with authorities, defendant's attitude toward society and respect for the law, and the prospects for rehabilitation and hope for a future constructive life" … . Here, the evidence demonstrated that the defendant was only 16 years old when he participated in the subject robbery, using a BB gun. The defendant has no prior criminal record or violent history. He has strong family support. The presentence report recommended that the defendant be adjudicated a youthful offender and be sentenced to a term of probation supervision. Indeed, the recommendation in the presentence report was that "the defendant be given another chance to change his behavior and do better for himself and not let this one bad choice as a 16 year old determine the path for his adult life." Moreover, the presentence report indicated that the defendant expressed genuine remorse and a sincere desire to make better choices in the future. Under all these circumstances, the interest of justice would be served by "relieving the defendant from the onus of a criminal record" … . People v Carlos M.-A., 2020 NY Slip Op 01083, Second Dept 2-13-20

## SENTENCING, APPEALS.

## DEFENDANT MAY NOT APPEAL OR COLLATERALLY ATTACK AN "ILLEGALLY LENIENT" SENTENCE BECAUSE THE SENTENCE DID NOT ADVERSELY AFFECT THE DEFENDANT (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, determined that the defendant may not appeal from an "illegally lenient" sentence because the sentence did not adversely affect the defendant. The defendant was attempting to have prior sentences declared illegal to avoid a subsequent "persistent felony offender" classification. Defendant had used aliases and had been given "illegally lenient" sentences because the sentencing court was unaware of the prior conviction(s):

The Appellate Division [held] that it could not consider the merits of defendant's appeal because denial of the motion — leaving in place defendant's illegally lenient sentence — had not "adversely affected" defendant within the meaning of CPL 470.15 … . When a defendant moves to vacate a sentence on the ground that it is illegally lenient, denial of such a motion is not reviewable because any purported "error or defect in the criminal court proceedings" has not "adversely affected" the defendant (CPL 470.15 [1]). Accordingly, we affirm.

Defendant's criminal history consists of at least four felony convictions over a fifteen-year period. During this time, it appears that he repeatedly attempted to conceal that history, primarily through the use of aliases. To a remarkable degree, though a recidivist, he avoided enhanced punishment required by statute. Instead, he obtained sentences that were "illegally lenient" given his actual status as a predicate felon. However, in 1997, the court, based on the evidence of defendant's prior convictions, sentenced him to a term of twenty-three years to life in prison as a persistent violent felony offender (see Penal Law § 70.08). Since then, by direct appeal and collateral attack, defendant has tried to overturn the illegally lenient sentences that were previously imposed based on his incomplete criminal history, with the ultimate goal of invalidating his 1997 persistent violent felony offender sentence. People v Francis, 2020 NY Slip Op 00996, CtApp 2-13-20

## SENTENCING, EVIDENCE.

## EVIDENCE DID NOT SUPPORT CONSECUTIVE SENTENCES FOR CRIMINAL POSSESSION OF A WEAPON AND MURDER (SECOND DEPT).

The Second Department determined the trial evidence did not support consecutive sentences for criminal possession of a weapon and murder:

We agree with the defendant that the sentencing court could not lawfully direct that the sentence imposed upon one of the convictions of criminal possession of a weapon in the second degree run consecutive to the sentence imposed upon the conviction of murder in the second degree. As the defendant correctly contends, it is impossible, based on the indictment or the trial court's charge, to determine whether the act that formed the basis of the jury's verdict on the criminal possession of a weapon in the second degree counts was not the basis for its conviction on the murder in the second degree count. Therefore, the People have failed to meet their burden of proving the validity of consecutive sentences … . People v McClinton, 2020 NY Slip Op 00879, Second Department 2-5-20

## SENTENCING.

## ONCE A COURT SENTENCES A DEFENDANT TO SHOCK INCARCERATION, THE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION (DOCCS) DOES NOT HAVE THE AUTHORITY TO DETERMINE THE DEFENDANT IS NOT ELIGIBLE; APPEAL HEARD AS AN EXCEPTION TO THE MOOTNESS DOCTRINE (THIRD DEPT).

The Third Department, in full-fledged opinion by Justice Reynolds Fitzgerald, determined the Department of Corrections and Community Supervision (DOCCS) did not have the authority to find the peititioner was not eligible for the shock incarceration based upon his drug-related prison disciplinary history. Although the appeal was moot because petitioner had completed the program, the appeal was heard as an exception to the mootness doctrine because the scenario is likely to recur:

Once an inmate has been judicially ordered into the program, DOCCS' participation under Penal Law § 60.04 (7) is expressly limited to its administration of the program, i.e., the completion, discipline and removal of an

inmate from the program. If the Legislature intended DOCCS to have administrative discretion as to the eligibility criteria, it could have said so. It is a canon of statutory interpretation that a court cannot by implication supply in a statute a provision that it is reasonable to suppose the Legislature intended to omit (see McKinney's Cons Laws of NY, Statutes § 74). The doctrine of expressio unius est exclusio alterius applies. The specification that DOCCS shall oversee completion, discipline and removal from the program implies in the strongest sense that the omission of DOCCS' administrative eligibility regulation was intentional and not inadvertent … . Matter of Matzell v Annucci, 2020 NY Slip Op 01425. Third Dept 2-27-20

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## SEX OFFENDERS, EVIDENCE.

## 'RELIABLE HEARSAY' IN A PRESENTENCE INVESTIGATION (PSI) REPORT IS A SUFFICIENT BASIS FOR A FINDING DEFENDANT USED VIOLENCE IN THE COMMISSION OF A SEX OFFENSE; LEVEL TWO RISK ASSESSMENT UPHELD (CT APP).

The Court of Appeals, over an extensive two-judge dissent, determined documentary evidence of "reliable hearsay" was sufficient for a finding defendant used violence to coerce the child victim in this "course of sexual conduct against a child" case, Therefore defendant was properly adjudicated a level two risk of reoffense:

At a SORA hearing conducted as defendant was nearing completion of his prison sentence, he was adjudicated a level two risk of reoffense due, in part, to the assessment of ten points under risk factor one, use of violence. That finding was based on information in the Presentence Investigation (PSI) report prepared in connection with the offense stating that "[o]n one or more occasions, he used physical force to coerce the victim into cooperation," information also included in the case summary prepared by the Board of Examiners of Sex Offenders. Defendant argues that this evidence was insufficient to supply evidence of use of violence because it constituted hearsay and did not more specifically describe his conduct. …

SORA adjudications, by design, are typically based on documentary evidence under the statute's "reliable hearsay" standard. Case summaries and PSI reports meet that standard … , meaning they can provide sufficient evidence to support the imposition of points. PSI reports are prepared by probation officers who investigate the circumstances surrounding the commission of the offense, defendant's record of delinquency or criminality, family situation and social, employment, economic, educational and personal history, analyzing that data to provide a sentencing recommendation (see CPL 390.30[1]). Their primary function is to assist a criminal court in determining the appropriate sentence for the particular defendant based on the specific offense. Defendants

have a right to review the report prior to sentencing (see CPL 390.50[2][a]) and may challenge the accuracy of any facts contained therein at that time (see CPL 400.10). * * *

Because there is record support for the imposition of points under risk factor one, there is no basis to disturb the Appellate Division order. People v Diaz, 2020 NY Slip Op 01114, CtApp 2-18-20

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## SEX OFFENDERS, EVIDENCE.

## EVIDENCE OF VOYEURISTIC DISORDER SHOULD NOT HAVE BEEN CONSIDERED IN THIS SEX OFFENDER CIVIL COMMITMENT PROCEEDING; THE HARE PSYCHOPATHY CHECKLIST-REVISED (PCL-R) WAS PROPERLY RELIED UPON (SECOND DEPT).

The Second Department, affirming the finding that appellant sex offender required civil management, found that the expert's (Charder's) testimony about appellant's voyeuristic-disorder diagnosis should not have been credited. The Second Department further held the Frye hearing demonstrated that the Hare Psychopathy Checklist-Revised (PCL-R) is widely accepted and used in the psychological and psychiatric communities:

… [W]e agree with the appellant that Charder's testimony regarding her diagnosis of a voyeuristic disorder should not have been credited. Charder admitted that her diagnosis of a voyeuristic disorder was inconsistent with the diagnostic criteria contained in section 302.82 of the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition. Although her decision to apply an alternative definition of voyeuristic disorder does not necessarily render this diagnosis insufficient to establish a mental abnormality … , Charder failed to clearly set forth the diagnostic criteria that she utilized in diagnosing the appellant under this alternative definition of voyeuristic disorder … , and she otherwise failed to explain the basis of her opinion that certain conduct attributed to the appellant was "voyeuristic," thus rendering such testimony conclusory … . * * *

… [T]he evidence adduced at the Frye hearing demonstrated that the PCL-R has enjoyed long and widespread use within the psychological and psychiatric communities as a tool to measure psychopathy. Even the expert witness called by the appellant to testify at the Frye hearing acknowledged that the PCL-R is generally accepted for this purpose. Although there was evidence adduced at the hearing indicating that the PCL-R has been criticized for a lack of "inter-rater reliability" and having an "allegiance effect," the evidence adduced at the hearing showed that such problems could be effectively mitigated through proper training. Similarly, although there was evidence indicating that the PCL-R was not designed to function as a direct and stand-alone test of

whether an individual has a mental abnormality within the meaning of the statute, expert testimony established that it could nevertheless "contribute to an assessment of the presence of mental abnormality." Matter of State of New York v Marcello A., 2020 NY Slip Op 01067, Second Dept 2-13-20

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## SEX OFFENDERS.

## SCHOOL-GROUNDS-PROXIMITY-RESIDENCE PROHIBITION APPLIED TO PETITIONER, A LEVEL THREE SEX OFFENDER, EVEN THOUGH THE OFFENSE FOR WHICH HE WAS BEING PAROLED WAS BURGLARY; SECOND DEPARTMENT DISAGREED WITH THE RESOLUTION OF THIS ISSUE BY THE THIRD AND FOURTH DEPARTMENTS; APPEAL WAS HEARD AS AN EXCEPTION TO THE MOOTNESS DOCTRINE (SECOND DEPT).

The Second Department, reversing Supreme Court and disagreeing with the Third and Fourth Departments, determined Executive Law 259-c (14), which prohibits sex offenders from entering school grounds, applied to petitioner in this habeas corpus proceeding. Petitioner had been designated a level three sex offender and was subsequently arrested and incarcerated for burglary. He was not released on parole for the burglary conviction when his sentence was complete because housing which complied with the school-grounds condition could not be found. Although the habeas corpus petition was moot because defendant had been released at the time of the appeal, the exception to the mootness doctrine allowed appellate review:

Executive Law § 259-c(14) provides, in relevant part, that "where a person serving a sentence for an offense defined in [Penal Law articles 130, 135, or 263, or Penal Law §§ 255.25, 255.26, or 255.27] and the victim of such offense was under the age of [18] at the time of such offense or such person has been designated a level three sex offender pursuant to [Correction Law § 168-l(6)], is released on parole or conditionally released pursuant to [Executive Law § 259-c(1) or (2)], the [Board of Parole] shall require, as a mandatory condition of such release, that such sentenced offender shall refrain from knowingly entering into or upon any school grounds, as that term is defined in [Penal Law § 220.00(14)], . . . while one or more of such persons under the age of [18] are present."

As a result of its inartful wording and use of the term "such person," Executive Law § 259-c(14) has been interpreted in opposing fashion by the Appellate Division, Third Department (see People ex rel. Negron v Superintendent Woodbourne Corr. Facility, 170 AD3d 12) and the Appellate Division, Fourth Department (see People ex rel. Garcia v Annucci, 167 AD3d 199). Inasmuch as the statute is amenable to competing

interpretations, we agree with the appellants that the language of the statute is ambiguous and should be interpreted with reference to its legislative history and the purpose of the enactment of the 2005 amendment … . The legislative history clearly supports an interpretation that imposes the SARA [Sexual Assault Reform Act]-residency requirement based on either an offender's conviction of a specifically enumerated offense against an underage victim or the offender's status as a level three sex offender … . People ex rel. Rosario v Superintendent, Fishkill Corr. Facility, 2020 NY Slip Op 01178, Second Dept 2-19-20

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## SPEEDY TRIAL.

## 28-YEAR PRE-INDICTMENT DELAY IN THIS MURDER CASE DID NOT VIOLATE DEFENDANT'S RIGHT TO DUE PROCESS; DNA PROFILE STEMMING FROM DEFENDANT'S 2008 ARREST MATCHED BLOOD EVIDENCE FROM THE 1984 MURDER (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Chambers, determined the 28 year pre-indictment delay in this murder case did not violate defendant's due process rights. Defendant was arrested in 2008 and his DNA profile was obtained. He had been a suspect in the 1984 murder and the blood evidence from the murder was linked to the defendant:

… [T]he preindictment delay of more than 28 years was undoubtedly extraordinary, a fact that weighs in favor of the defendant … . However, under the circumstances presented, the People met their burden of demonstrating good cause for the delay … . The record of the Singer hearing supports the hearing court's determination that the People acted in good faith in deferring commencement of the prosecution until after they were able to match the defendant's DNA profile with the one found on some of the blood-stained items recovered from the crime scene.

While the defendant correctly points out that DNA testing of the crime scene evidence could have been performed years earlier, there is nothing to suggest that such tests would have yielded any meaningful information, as the defendant's own DNA profile was not available to investigators for comparative purposes until it was entered into CODIS in March of 2008. Nor are we persuaded by the defendant's contention that the People could have sought a court order compelling the defendant to produce a DNA sample for analysis before 2008 … . Considering that the outcome of such a proceeding, under the particular facts of this case, would be very difficult to predict … , we are loath to saddle the People with an affirmative duty to embark upon a course

that could ultimately prove unsuccessful, and possibly jeopardize an ongoing investigation. People v Innab, 2020 NY Slip Op 01363, Second Dept 2-26-20

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## SPEEDY TRIAL.

## COUNTY COURT SHOULD HAVE HELD A HEARING ON DEFENDANT'S MOTION TO DISMISS ON SPEEDY TRIAL GROUNDS; THE PROSECUTION WAS NOT STARTED UNTIL 22 MONTHS AFTER THE INCIDENT; MATTER REMITTED (SECOND DEPT).

The Second Department, remitting the matter for a hearing, determined defendant should have been afforded a hearing on his motion to dismiss for a speedy trial violation. Defendant was charged with damaging his wife's computer in a domestic incident. The charge was not brought for 22 months:

"[U]nder state due process principles, lengthy and unjustifiable delay in commencing the prosecution may require dismissal even though no actual prejudice to the defendant is shown'" … . However, " a determination made in good faith to defer commencement of the prosecution for further investigation or for other sufficient reasons, will not deprive the defendant of due process of law even though the delay may cause some prejudice to the defense'" … .. "Where there has been extended delay, it is the People's burden to establish good cause" … .

Here, the County Court failed to appropriately balance the requisite factors and improperly denied, without a hearing, the defendant's motion to dismiss the indictment on the ground that he was deprived of due process by the People's unjustified delay in prosecution. Under the circumstances presented, which included a delay of approximately 22 months from the time of the incident to the filing of the indictment and arraignment, the People's failure on the record to establish a good faith legitimate reason for the delay, and the defendant's claim of prejudice, the County Court should have conducted a hearing before determining that the delay in prosecution was not in violation of the defendant's due process rights … . People v Clark, 2020 NY Slip Op 01180, Second Dept 2-19-20

## STREET STOPS, SEARCH AND SEIZURE.

## SUPREME COURT PROPERLY FOUND THAT THE OFFICER DID NOT HAVE SUFFICIENT GROUNDS TO STOP DEFENDANT ON THE STREET, DETAIN HIM, SEARCH HIS BAG AND TRANSPORT HIM TO THE BURGLARY SCENE FOR A SHOWUP IDENTIFICATION (FOURTH DEPT).

The Fourth Department affirmed Supreme Court's ruling that the officer did not have a sufficient basis for detaining the defendant on the street, searching defendant's bag and transporting defendant to the burglary scene:

The evidence at the suppression hearing established that the officer who initiated the encounter with defendant was responding to a radio dispatch of a burglary in progress. Because other officers were already at the scene of the burglary when he arrived, the officer canvassed the nearby area in his patrol car. Shortly thereafter, the officer noticed defendant three blocks from the burglary scene, walking alone and carrying a bag and a cell phone. The officer approached defendant, exited his vehicle, and asked defendant what he was doing, and defendant stated that he was looking through garbage cans. The officer then searched defendant's bag in order to check for weapons and informed defendant that he was going to drive defendant back to the scene of the burglary in order to determine whether defendant was a suspect. The officer placed defendant in the back of the patrol car and drove him to the scene of the crime, where a showup identification was conducted and defendant was identified as the burglar and arrested. The evidence also established that, prior to beginning his shift on the day of the encounter, the officer received a "be on the lookout" (BOLO) photograph depicting defendant and reflecting that defendant may have been involved in a prior burglary.

Contrary to the People's contention, we perceive no basis in the record for disturbing the court's finding that the officer did not recognize defendant as the individual depicted in the BOLO until after he drove defendant to the scene of the burglary for the showup identification … .

Although the officer justified the search of defendant's bag as a check for weapons, the record does not reflect that, at any time during the encounter, the officer "reasonably suspected that defendant was armed and posed a threat to [his] safety" … . Further, all the officer could definitively recall of the initial radio dispatch reporting the burglary in progress was that it described the suspect as a male, although the officer also testified that the dispatch might have identified the suspect as Hispanic and wearing a dark hooded sweatshirt. The vague description of the suspect provided by the radio dispatch, as recounted by the officer at the suppression hearing, did not provide the officer with the requisite reasonable suspicion to effect what was at least a forcible detention of defendant and to transport him to take part in a showup identification … . People v Nazario, 2020 NY Slip Op 00955, Fourth Dept 2-7-20

## TRIALS, JUDGES.

## DEFENDANT'S FAMILY MEMBERS SHOULD NOT HAVE BEEN EXCLUDED FROM THE COURTROOM DURING THE TESTIMONY BY THE UNDERCOVER OFFICERS, CONVICTIONS REVERSED (FIRST DEPT).

The First Department, reversing defendant's conviction, determined the trial court should not have excluded defendant's family members from the trial during the testimony of the undercover officers:

Following a Hinton hearing at which there was no testimony that defendant or any member of his family threatened or otherwise posed a threat to either of two testifying undercover officers, defense counsel requested that family members be permitted to attend the officers' trial testimony. Although the prosecutor made no argument in opposition to this application, the court denied it, without making any supporting findings. This was error. "[A]n order of closure that does not make an exception for family members will be considered overbroad, unless the prosecution can show specific reasons why the family members must be excluded" … . We reject the People's argument that the defense was obligated to identify specific family members who might attend the proceedings, in the absence of any request by the prosecutor or the court that it do so, as incompatible with the "presumption of openness" that applies in this context … . Moreover the court did not ask any questions to clarify which family members wanted to attend before issuing the closure order. People v Rivera, 2020 NY Slip Op 01035, First Dept 2-13-20