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An Organized Compilation of the Summaries of Selected New York State Appellate Decisions Addressing Criminal Law Released in June 2020 and Posted Weekly on the New York Appellate Digest Website. 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 of Any Page to Return There.

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APPEAL, WAIVER OF.

SUPREME COURT MISCHARACTERIZED THE SCOPE OF THE WAIVER OF APPEAL BY NOT CLARIFYING THAT CERTAIN FUNDAMENTAL ISSUES REMAIN APPEALABLE DESPITE THE WAIVER; WAIVER INVALID (SECOND DEPT).

The Second Department determined Supreme Court mischaracterized the scope of the waiver of appeal rendering the waiver invalid:

… [T]he court mischaracterized the effect of the waiver on the defendant's right to appeal. In this regard, the court, after describing the function of an appellate court, concluded its explanation of the waiver by stating: "What all this means, though, is that this plea and the sentence I am going to impose are final and that higher court will not have a chance to review it."

"The improper description of the scope of the appellate rights relinquished by the waiver is refuted by . . . precedent, whereby a defendant retains the right to appellate review of very selective fundamental issues, including the voluntariness of the plea and appeal waiver, legality of the sentence and the jurisdiction of the court" … . Accordingly, it was incorrect for the Supreme Court to convey to the defendant that an appellate court would have no authority to review the plea or the sentence under any circumstances.

Furthermore, the record in this case does not include any "clarifying language" indicating that "appellate review remained available for certain issues" or that "the right to take an appeal was retained" … . Although the People cite to a written waiver that was apparently signed by the defendant, the Supreme Court "failed to confirm that [the defendant] understood the contents of the written waiver[ ]" … . In any event, the written waiver does not indicate that appellate review remained for certain limited issues, but rather, merely stated that "[the] sentence and conviction will be final" … . People v Christopher B., 2020 NY Slip Op 03242, Second Dept 6-10-20

APPEAL, WAIVER OF.

WHERE A TRIAL JUDGE DEMANDS A WAIVER OF APPEAL, THE JUDGE SHOULD PLACE HIS OR HER REASONS ON THE RECORD SO THE DEMAND IS NOT SEEN AS A TOOL FOR AVOIDING APPELLATE REVIEW; THE JUDGE-DEMANDED WAIVER WAS NOT ENFORCED IN THIS CASE (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Scheinkman, determined defendant's waiver of appeal was not enforceable for two reasons: (1) the waiver was demanded by the judge, not the People; and (2) the waiver was demanded after the guilty plea and the sentence promise (therefore defendant did not receive a material benefit from the waiver). The court noted that a waiver demanded by a judge could be seen a tool for avoiding appellate review. Therefore, the Second Department held the judge should put his or her reasons for demanding a waiver on the record. Turning to the merits, the Second Department affirmed the conviction:

We do not foreclose the possibility that there may be circumstances where the trial court has a legitimate interest in conditioning its acceptance of a plea and determination of a sentence upon an appeal waiver that the prosecution has not requested. While the prosecution need not articulate any reason for including a demand for an appeal waiver in its settlement offer, where it is the court that makes the demand, the court should articulate on the record its reasons for doing so in order to dispel any concern that the court's demand is motivated solely as a means of avoiding appellate review of its decisions. Here, the Supreme Court did not set forth any reason for demanding an appeal waiver, and none is apparent on the record. Accordingly, we will not enforce the defendant's purported waiver of the right to appeal. People v Sutton, 2020 NY Slip Op 03400, Second Dept 6-17-20

APPEALS, WEIGHT OF THE EVIDENCE, DEPRAVED INDIFFERENCE.

THE DEPRAVED-INDIFFERENCE ELEMENT OF THE CHARGED OFFENSES WAS NOT SUPPORTED BY THE WEIGHT OF THE EVIDENCE; ALTHOUGH DEFENDANT'S ATTEMPTS TO CARE FOR BURNS ON THE CHILD'S LEGS WERE GROSSLY INADEQUATE, THOSE MEASURES DID NOT SUPPORT A FINDING DEFENDANT DID NOT CARE AT ALL ABOUT THE CONDITION OF THE CHILD (SECOND DEPT).

The Second Department, reducing defendant's assault and reckless endangerment convictions, over a dissent, determined the depraved-indifference element of the charges was not supported by the weight of the evidence. The defendant's 20-month-old foster child had second and third degree burns on his legs. Mother consistently explained she heard screaming coming from the bathroom where she saw the child trying to get out of the tub and the child's three-year-old sister standing outside the tub as the tub was filling up with hot water. The People tried to prove, through an expert (Yurt), that the child had been held in hot water. But there were inconsistencies in the expert's testimony. Defendant explained that she was afraid to take the child to the hospital and instead tried to treat the burns after talking to a pharmacist and going on line:

The inconsistencies in Yurt's [the People's expert's] testimony undermined the People's already tenuous theory that the defendant affirmatively caused the burns. …

Accordingly, to establish the "depraved indifference" element of the subject offenses, we are left with the defendant's failure to obtain proper medical care for the child. This case is thus squarely controlled by Lewie and Matos. As in those cases, while the evidence in this case shows that the defendant "cared much too little about [the] child's safety, it cannot support a finding that she did not care at all" (People v Lewie, 17 NY3d at 359; see People v Matos, 19 NY3d at 476). Like the defendant in Matos, the defendant in the present case took measures, "albeit woefully inadequate" ones, to care for the child, by inquiring about proper burn care at a pharmacy, purchasing ointments and bandages, and keeping the burns covered. Those measures are commensurate with the measures taken by the defendant in Matos who reacted to a beating that caused her child severe internal bleeding and multiple broken bones by making a homemade splint for her son's leg and giving him ibuprofen (see id. at 476). People v Verneus, 2020 NY Slip Op 03256, Second Dept 6-10-2o

APPEALS, WEIGHT OF THE EVIDENCE.

RECKLESS ENDANGERMENT AND MENACING A POLICE OFFICER CONVICTIONS WERE AGAINST THE WEIGHT OF THE EVIDENCE (FOURTH DEPT).

The Fourth Department reversed two of defendant's convictions as against the weight of the evidence. Defendant was charged with reckless endangerment first degree and menacing a police officer. It was alleged defendant fired a weapon during a foot chase. The two officers heard a gunshot but no bullet or casing was found:

… [T]he jury would have had to resort to sheer speculation to find that defendant displayed or fired a weapon, much less that he fired a weapon intentionally. The officers' testimony that they "heard" a gunshot from some distance away does not prove beyond a reasonable doubt, for purposes of the menacing charge, that defendant visually displayed the weapon that discharged the shot. Nor does such testimony prove beyond a reasonable doubt, for purposes of the reckless endangerment charge, that the shot was fired toward the officers and thereby created a grave risk of death to them. Indeed, the second officer's testimony that he "believed" that defendant had shot at the officers is speculative and is contradicted by his contemporaneous statement that the gun might have discharged accidentally. People v Thomas, 2020 NY Slip Op 03318, Fourth Dept 6-12-20

APPEALS.

14-MONTH DELAY IN THE TRANSCRIPTION OF THE RECORD DID NOT DEPRIVE DEFENDANT OF HIS RIGHT TO APPEAL (THIRD DEPT).

The Third Department determined the 14-month stenographic delay, which prevented the perfection of defendant's appeal until after his release, did not deprive him of due process of law. Defendant contested his resentence after pleading guilty to a probation violation:

Defendant argues that he was deprived of his right to appeal — and, thus, his right to due process — by approximately 14 months of stenographic delays prior to him obtaining the complete record in this matter so as to perfect his appeal … . He asserts that, because he has since been released from custody, and, thus, may no longer reasonably challenge the propriety of the resentence imposed — apparently the only issue taken with

regard to the underlying proceedings — this Court should vacate, with prejudice, Supreme Court's finding that he violated his probation and dismiss the associated declaration of delinquency … .

Despite the unfortunate appellate delay, defendant has failed to establish that it resulted in prejudice so as to warrant the summary remedy he seeks … ; his sole argument regarding his resentence would have been equally unpersuasive had it been before us on any earlier date. * * * Without some showing of how he has been prejudiced by this singular claim being rendered moot, we cannot conclude that defendant suffered a deprivation of due process by the delays alleged … . People v McCray, 2020 NY Slip Op 03154, Third Dept 6-4-20

APPEALS.

AFTER REVERSAL BY THE COURT OF APPEALS, DEFENDANT'S SUPPRESSION MOTION WAS GRANTED AND HIS GUILTY PLEA WAS VACATED; EVEN THOUGH DEFENDANT'S SUPPRESSION MOTION DID NOT RELATE TO THE OFFENSE TO WHICH DEFENDANT PLED GUILTY, THE APPELLATE DIVISION SHOULD HAVE REACHED THE MERITS OF THE MOTION BECAUSE OF ITS POTENTIAL EFFECT ON THE DECISION TO PLEAD GUILTY TO ANOTHER OFFENSE IN FULL SATISFACTION OF ALL THE CHARGES (FOURTH DEPT).

The Fourth Department, after a reversal by the Court of Appeals, determined defendant's motion to suppress evidence seized after a street stop should have been granted and vacated defendant's guilty plea. Defendant was charged with two burglaries on different days. Defendant pled guilty to one of the burglaries in satisfaction of both. Defendant appealed the denial of the suppression motion related to the street stop. The Fourth Department did not reach the merits of the appeal because the suppression motion did not involve the offense to which defendant pled guilty. The Court of Appeals reversed, finding that the denial of the suppression motion was appealable because of its potential effect on the decision to plead guilty in satisfaction of both charges:

A majority of this Court concluded that " the judgment of conviction on appeal here did not ensue from the denial of the motion to suppress [relating solely to count two] and the latter [wa]s, therefore, not reviewable' pursuant to CPL 710.70 (2)" … . The Court of Appeals reversed, stating that "the Appellate Division may review an order denying a motion to suppress evidence where, as here, the contested evidence pertained to a count—contained in the same accusatory instrument as the count defendant pleaded guilty to—that was satisfied by the plea" … . The Court of Appeals remitted the matter to this Court to rule on defendant's suppression contention.

Upon remittitur, we now agree with defendant that Supreme Court erred in refusing to suppress physical evidence seized as a result of his unlawful detention on October 3, 2014 … . We further agree with defendant that such error was not harmless under the circumstances (see id. at 1424). We therefore reverse the judgment, vacate the plea, grant that part of the omnibus motion seeking to suppress the physical evidence seized from defendant on October 3, 2014, and remit the matter to Supreme Court, Monroe County, for further proceedings on the indictment. People v Holz, 2020 NY Slip Op 03345, Fourth Dept 6-12-20

APPEALS.

EVEN THOUGH THE US SUPREME COURT CASE REQUIRING WARRANTS FOR CELL SITE LOCATION DATA WAS NOT DECIDED AT THE TIME OF TRIAL, PRESERVATION OF THAT ISSUE FOR APPEAL IS STILL NECESSARY; A DEFENDANT MAY BE INDICTED FOR BOTH DEPRAVED INDIFFERENCE AND INTENTIONAL MURDER; CONSECUTIVE SENTENCES FOR THE SHOOTINGS AND POSSESSION OF A WEAPON WERE APPROPRIATE (FIRST DEPT).

The First Department, affirming defendant's murder, assault and weapon-possession convictions, and affirming the denial of defendant's motion to vacate the convictions, determined: (1) the issue re: the warrantless procurement of cell site location data was not preserved, and preservation was necessary despite the fact that the US Supreme Court case requiring warrants was not decided at the time of trial; (2) the defendant was properly indicted, by different grand juries, for both depraved indifference and intentional murder; and (3) consecutive sentences for possession of a weapon and the shootings were appropriate:

At trial, defendant did not preserve any claim relating to cell site location information obtained without a warrant, and the motion court providently exercised its discretion under CPL 440.10(2)(b) when it rejected defendant's attempt to raise this issue by way of a postconviction motion. Defendant asserts that it would have been futile for trial counsel to raise the issue because the Supreme Court of the United States had not yet decided Carpenter v United States (585 US __, 138 S Ct 2206 [2018]), a case that we assume, without deciding, applies here because defendant's direct appeal was pending at the time that case was decided. We conclude that defendant should not be permitted to avoid the consequences of the lack of preservation. Although Carpenter had not yet been decided, and trial counsel may have reasonably declined to challenge the cell site information, defendant had the same opportunity to advocate for a change in the law as did the litigant who ultimately succeeded in doing so … . In

the closely related context of preservation, the Court of Appeals has expressly rejected the argument that an "appellant should not be penalized for his failure to anticipate the shape of things to come" … . * * *

A grand jury's indictment of defendant for depraved indifference murder, after a prior grand jury had indicted him for intentional murder, did not violate CPL 170.95(3). The second presentation did not require permission from the court, because the first indictment cannot be deemed a dismissal of the depraved indifference count in the absence of any indication that the first grand jury was aware of or considered that charge … . The rule that a person may not be convicted of both intentional and depraved indifference murder … applies to verdicts after trial, not indictments. These charges may be presented to a trial jury in the alternative (as occurred in this case, where defendant was acquitted of depraved murder but nevertheless claims a spillover effect). Furthermore, the People were not required to present both charges to the same grand jury … . People v Crum, 2020 NY Slip Op 03282, First Dept 6-11-20

APPEALS.

SUPPRESSION COURT'S FAILURE TO EXPLAIN THE BASIS FOR DENYING THE MOTION TO SUPPRESS PRECLUDED DETERMINATION OF THE APPEAL; MATTER REMITTED (SECOND DEPT).

The Second Department, holding the appeal and remitting the matter, noted that the suppression court's failure to provide the basis for its denial of defendant's suppression motion precluded determination of the appeal:

The defendant's appeal from the order must be dismissed, as no appeal lies, as of right or by permission, from an order denying a motion to suppress evidence (see CPL 450.10, 450.15 …). The issues raised on the appeal from the order are brought up for review on the appeal from the judgment.

"Upon an appeal to an intermediate appellate court from a judgment, sentence or order of a criminal court, such intermediate appellate court may consider and determine any question of law or issue of fact involving error or defect in the criminal court proceedings which may have adversely affected the appellant" (CPL 470.15[1]). The Court of Appeals "has construed CPL 470.15(1) as a legislative restriction on the Appellate Division's power to review issues either decided in an appellant's favor, or not ruled upon, by the trial court" … . "CPL 470.15(1) bars [the Appellate Division] from affirming a judgment, sentence or order on a ground not decided adversely to the appellant by the trial court'" … .

… [W]e must hold the appeal from the judgment in abeyance and remit the matter to the Supreme Court … to articulate the basis or bases for its denial of those branches of the defendant's omnibus motion which were to suppress physical evidence and his statement to law enforcement officials. People v Rice, 2020 NY Slip Op 03402, Second Dept 6-17-20

APPEALS.

THE APPELLATE DIVISION COULD NOT DECIDE THE APPEAL OF THE DENIAL OF A SUPPRESSION MOTION ON A GROUND NOT RELIED UPON BY THE SUPPRESSION COURT (CT APP).

The Court of Appeals, reversing the Appellate Division, determined the Appellate Division could not decide the appeal of the denial of a suppression motion on a ground (exigent circumstances) that was not relied on by the suppression court:

… [D]efendant moved to suppress physical evidence found inside a suitcase that he was carrying at the time of his arrest, relying on People v Gokey (60 NY2d 309 [1983]), and arguing that exigent circumstances were needed to justify a warrantless search of the closed suitcase. Supreme Court determined that Gokey did not apply and, therefore, made no findings regarding the existence of exigent circumstances. The Appellate Division affirmed on a different ground, determining, as both defendant and the People argued, that Gokey did apply and accepting the People's argument that exigent circumstances—namely, the protection of evidence or the safety of the police or the public—justified the search … .

"Upon an appeal to an intermediate appellate court from a judgment, sentence or order of a criminal court, such intermediate appellate court may consider and determine any question of law or issue of fact involving error or defect in the criminal court proceedings which may have adversely affected the appellant" (CPL 470.15 [1]). "This provision is a legislative restriction on the Appellate Division's power to review issues either decided in an appellant's favor, or not ruled upon, by the trial court'" … . The statute " bars the Appellate Division from affirming a judgment, sentence or order on a ground not decided adversely to the appellant by the trial court'" … . This "restriction applies in equal force to this Court which itself has no broader review powers'" … .

Here, the Appellate Division did not err in determining that Gokey was applicable, the only reviewable issue before it. However, "[b]ecause the suppression court did not deny the motion on the ground that there were exigent circumstances, that issue was not decided adversely to defendant and it could not be invoked by the

Appellate Division" … . Accordingly, the Appellate Division erred in deciding that issue. People v Harris, 2020 NY Slip Op 03208, CtApp 6-9-20

ATTORNEYS, INEFFECTIVE ASSISTANCE.

DEFENDANT'S MOTION TO VACATE HIS CONVICTION SHOULD HAVE BEEN GRANTED; DEFENSE COUNSEL DID NOT ATTEMPT TO SECURE THE TESTIMONY OF A WITNESS WHO WOULD TESTIFY THAT HER BOYFRIEND, WHO USED TO BE THE BOYFRIEND OF THE MURDER VICTIM, CONFESSED TO KILLING THE VICTIM (FOURTH DEPT).

The Fourth Department, reversing County Court, over a two-justice dissent, determined defendant's motion to vacate his murder conviction on ineffective assistance grounds should have been granted. Defendant demonstrated that a witness was willing to testify that her boyfriend had confessed to the murder. When the witness did not show up to testify, defense counsel did not attempt to secure her attendance:

… [A]t the time of the trial, defense counsel explicitly informed the court, on the record, that his strategy was to call the witness and present her exculpatory testimony. In this regard, defense counsel stated, "[t]here's one other issue that may or may not come up . . . [that has] to do with [the witness]. [The witness] had a conversation with her then-boyfriend . . . who had been the boyfriend of [the victim] where [the boyfriend] made a tape recording of his voice, identifying his name, his date of birth and his social security number, and indicated there that he killed [the victim]. His words were I killed the bitch. I killed the bitch. I killed the bitch.' And that is the substance of a police report that I received from [the prosecutor]." When the court asked how defense counsel intended to introduce this testimony, he responded, "[w]ell, I intend to call [the witness], should she appear in court. She was subpoenaed. She appeared on Thursday pursuant to the subpoena as well and told me this information for the first time. I don't know whether she's going to be here when we need to call her, which is why I thought maybe we'd wait and see if she showed up and not take the Court's time to do extra research on this issue. But since you've asked me to bring up any possible issues, I would put her on the witness stand and make an offer of proof to the Court and attempt to prove her reliability of the information that she's giving under the Settles case relating to a statement against [the boyfriend's] penal interest." When the court then asked whether "[the witness's] testimony would relate to this particular homicide," defense counsel responded, "Oh yes. Yes." Nevertheless, and consistent with defense counsel's representation that he would pursue the testimony only if the witness appeared as directed, defense counsel took no further action to secure the witness's presence when she did not appear … . We agree with defendant that the failure to secure the witness's attendance was deficient

conduct and that the record discloses no tactical reason for defense counsel's actions … . People v Borcyk, 2020 NY Slip Op 03359, Fourth Dept 6-12-20

ATTORNEYS, INEFFECTIVE ASSISTANCE, STREET STOPS.

THE SECTION OF THE VEHICLE AND TRAFFIC LAW RELIED ON BY THE POLICE FOR THE VEHICLE STOP MAY NOT HAVE BEEN APPLICABLE AND THE STOP THEREFORE MAY HAVE BEEN ILLEGAL; DEFENSE COUNSEL'S FAILURE TO MAKE A MOTION TO SUPPRESS ON THAT GROUND CONSTITUTED INEFFECTIVE ASSISTANCE; PLEA VACATED AND MATTER REMITTED (FOURTH DEPT).

The Fourth Department, vacating defendant's guilty plea, determined the initial stop of the vehicle in which defendant attempted to flee from a public housing complex parking area may not have been justified and the defense attorney was ineffective for failing to move to suppress on that ground. The vehicle stop was based on the alleged violation of Vehicle and Traffic Law 1211 (unsafe backing). But the statute does not apply to parking areas, as opposed to parking lots. The Fourth Department held the application of the law to a parking area would not constitute an objectively reasonable mistake of law which could justify the stop. On the record before it, however, the Fourth Department could not determine whether the area in question met the statutory definition of a parking lot:

… [D]efendant had a valid argument that the initial vehicle stop was unlawful because the parking area in which the police purportedly observed unsafe backing was not a "parking lot" within the meaning of Vehicle and Traffic Law § 129-b … . …

Defendant also had a valid argument that the initial vehicle stop could not be justified due to the police officers' objectively reasonable, yet mistaken, belief that the parking area was a "parking lot" as defined by Vehicle and Traffic Law § 129-b … ….

Although contentions that defense counsel was ineffective survive only to the extent that "the plea bargaining process was infected by [the] allegedly ineffective assistance or that . . . defendant entered the plea because of [defense counsel's] allegedly poor performance" … , the court's consideration of the aforementioned arguments here would likely have resulted in suppression of the handgun and, concomitantly, dismissal of some or all of the indictment … . We therefore conclude that defendant demonstrated that "there is a reasonable probability

that, but for counsel's error[], [defendant] would not have pleaded guilty" … . People v Allen, 2020 NY Slip Op 03295, Fourth Dept 6-12-20

ATTORNEYS, INEFFECTIVE ASSISTANCE.

DEFENDANT ALLEGED DEFENSE COUNSEL OVERSTATED THE RISK OF DEPORTATION CAUSING HIM TO REJECT A FAVORABLE PLEA OFFER; DEFENDANT ENTITLED TO A HEARING ON HIS MOTION TO VACATE HIS CONVICTION BASED UPON INEFFECTIVE ASSISTANCE (FIRST DEPT).

The First Department, reversing Supreme Court, determined a hearing was necessary on defendant's motion to vacate his conviction based upon ineffective assistance of counsel. Defendant alleged defense counsel overstated the risk of deportation causing defendant to reject a favorable plea offer:

A defense attorney's performance is deficient as a matter of law where he or she fails to accurately advise a client of the risk of deportation … . Here, defendant complains that his counsel overstated the immigration consequences of accepting an offer of a guilty plea to petit larceny by advising him that it would "definitely" result in deportation, when in fact it would only have rendered him deportable with the possibility of discretionary relief. Thus, defendant asserts that he rejected a favorable plea offer based on erroneous advice that the conviction would result in mandatory deportation.

We find that a hearing is necessary to determine whether counsel inaccurately advised defendant of the risk of deportation and if so, whether defendant was prejudiced by the attorney's misadvice … . People v Qinghua Ni, 2020 NY Slip Op 03621, First Dept 6-25-20

ATTORNEYS, PROSECUTORIAL MISCONDUCT, COMFORT DOGS.

IT MAY HAVE BEEN ERROR TO ALLOW THE VICTIM TO TESTIFY ACCOMPANIED BY A DOG, BUT THE ISSUE WAS NOT PRESERVED; ALTHOUGH THE PROSECUTOR MADE AN IMPROPER COMMENT IT DID NOT REQUIRE REVERSAL; PROSECUTORS ADMONISHED THAT THEIR ROLE IS TO ENSURE JUSTICE IS DONE, NOT SIMPLY SEEK CONVICTIONS (FOURTH DEPT).

The Fourth Department, affirming defendant's conviction, noted that allowing the adult victim to testify accompanied by a dog may have been an error but was unpreserved. The court also found that a remark made by the prosecutor was improper (but not reversible error) and took the opportunity to address prosecutorial misconduct generally:

We conclude that defendant's contention that the court abused its discretion when it permitted the adult victim to testify while accompanied by a dog is unpreserved because defendant did not object to that arrangement … . … Even assuming, arguendo, that defense counsel erred in not objecting to the court's decision to let the victim testify while accompanied by a dog … , we conclude that the failure to object did not amount to ineffective assistance … .

… [I]t was improper for the prosecutor on summation to characterize defense counsel's summation as evincing "a Brock Turner mentality"—inflaming the passions of the jury by specifically referring to a recent sexual assault case of nationwide notoriety that involved allegations similar to those made against defendant … .

… [W]e … take this opportunity to remind the People that " [i]t is not enough for [a prosecutor] to be intent on the prosecution of [the] case. Granted that [the prosecutor's] paramount obligation is to the public, [he or she] must never lose sight of the fact that a defendant, as an integral member of the body politic, is entitled to a full measure of fairness. Put another way, [the prosecutor's] mission is not so much to convict as it is to achieve a just result' " … . To that end, we emphasize that "[p]rosecutors play a distinctive role in the search for truth in criminal cases. As public officers they are charged not simply with seeking convictions but also with ensuring that justice is done. This role gives rise to special responsibilities—constitutional, statutory, ethical, personal—to safeguard the integrity of criminal proceedings and fairness in the criminal process" … . People v Carlson, 2020 NY Slip Op 03336, Fourth Dept 6-12-20

BRADY MATERIAL, INDICTMENTS.

EXCULPATORY (BRADY) EVIDENCE IN THE COMPLAINANT'S MENTAL HEALTH RECORDS WAS REDACTED BY THE JUDGE; TWO INDICTMENT COUNTS WERE MULTIPLICITOUS; NEW TRIAL ORDERED IN THIS SEXUAL ABUSE CASE (SECOND DEPT).

The Second Department, reversing defendant's sexual abuse convictions, determined the defendant was entitled to exculpatory (Brady) evidence in the complainant's mental health records which was redacted by the judge. The Second Department noted that, upon retrial, two counts of sexual abuse related to a continuous incident were multiplicitous and one of the counts must be dismissed:

The complainant and the defendant each testified and presented sharply divergent accounts of the events that were alleged to have occurred during the summer of 2009. The record shows that a determination of credibility was key to the jury's consideration of this case, as the jury acquitted the defendant of the charge of rape in the first degree but convicted him of the charges alleging sexual abuse in the first degree. Thus, the redacted portion of the complainant's mental health records which contains the statement "[s]exual abuse denied" and the portion of the checklist reflecting that "[s]exual abuse (lifetime)" was not checked off could be viewed by the jury as exculpatory and materially relevant to the matter … . Since the jury had to weigh the credibility of the complainant and the defendant, this evidence, if disclosed, may have changed the result of the proceeding. Accordingly, the judgment must be reversed and the matter remitted for a new trial. People v Butler, 2020 NY Slip Op 03374, Second Dept 6-17-20

CITIZEN'S ARREST.

FEDERAL CUSTOMS AND BORDER PATROL MARINE INTERDICTION AGENT IS NOT A PEACE OFFICER UNDER NEW YORK LAW; THEREFORE THE AGENT MADE A VALID CITIZEN'S ARREST OF AN ERRATIC DRIVER HE OBSERVED WHILE ON THE HIGHWAY; MOTION TO SUPPRESS THE WEAPON FOUND IN DEFENDANT'S CAR SHOULD NOT HAVE BEEN GRANTED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Feinman, reversing the Appellate Division, over a dissent, determined the federal marine interdiction agent with US Customs and Border Protection (CBP) was not

a peace officer under New York law and, therefore, could effect a citizen's arrest. The federal agent observed defendant driving erratically and putting other drivers in danger so he activated his emergency lights and pulled the driver over. The agent stayed in his vehicle and called the Buffalo police. After the Buffalo police arrived, the agent left. The police found a weapon in defendant's car and he was charged with criminal possession of a weapon. Supreme Court granted defendant's motion to suppress and the Fourth Department affirmed. Both courts relied on People v Williams (4 NY3d 535 [2005]) which held that peace officers could not make a citizen's arrest. The Court of Appeals reasoned that Williams did not control because the federal agent in this case was not a peace officer under the relevant New York statutory definitions and therefore could make a citizen's arrest:

Because the agent who stopped defendant in this case is not considered a federal law enforcement officer with peace officer powers pursuant to CPL 2.10 and 2.15, he could not have improperly circumvented the jurisdictional limitations on the powers reserved for those members of law enforcement under CPL 140.25, as the peace officers in Williams did. In other words, the agent's conduct here did not violate the Legislature's prescribed limits on a peace officer's arrest powers because he is not, in fact, a peace officer. …

… [A]side from the clear limits as to the justifiable use of physical force that may be applied during an arrest by a private citizen (CPL 35.30 [4]; CPL 140.35 [3]), as well as the requirement that "[s]uch person must inform the person whom he [or she] is arresting of the reason for such arrest unless he [or she] encounters physical resistance, flight or other factors rendering such procedure impractical" (CPL 140.35 [2]), nothing in the citizen's arrest statutes themselves set forth the methods that must be employed when, as here, a crime is committed in the responding citizen's presence (see CPL 140.30, 140.40 …). We reiterate that whether this stop comported with constitutional principles or the express terms of the arrest statutes is simply not before us, as defendant failed to raise any such arguments before the suppression court. People v Page, 2020 NY Slip Op 03265, CtApp 6-11-20

CONCURRENT INCLUSORY COUNTS.

THE TWO COUNTS OF ROBBERY THIRD WERE CONCURRENT INCLUSORY COUNTS OF THE TWO COUNTS OF ROBBERY SECOND; CONVICTIONS ON THE ROBBERY SECOND COUNTS REQUIRED VACATION OF THE CONVICTIONS ON THE ROBBERY THIRD COUNTS AND THE RELATED SENTENCES (SECOND DEPT).

The Second Department noted that the two robbery third degree counts were concurrent inclusory counts of the two robbery second degree counts and must be dismissed:

The two counts of robbery in the third degree were concurrent inclusory counts of the two counts of robbery in the second degree (see CPL 300.30[4]; People v Hutson, 43 AD3d 959, 959; People v Gibson, 295 AD2d 529, 530). A verdict of guilt upon the greater count is deemed a dismissal of every lesser count (see CPL 300.40[3]). Accordingly, we vacate the convictions of robbery in the third degree and the sentences imposed thereon, and dismiss those counts of the indictment … . People v Wingate, 2020 NY Slip Op 03398, Second Dept 6-17-20

DEPRAVED INDIFFERENCE.

THE OPINION CHANGING THE CRITERIA FOR THE DEPRAVED-INDIFFERENCE MENS REA CAME DOWN BEFORE DEFENDANT'S CONVICTION BECAME FINAL; DESPITE THE AFFIRMANCE OF DEFENDANT'S MURDER CONVICTION ON APPEAL, THE DENIAL OF A MOTION TO REARGUE THE APPEAL, THE DENIAL OF THE MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS, AND THE DENIAL OF DEFENDANT'S PETITION FOR A WRIT OF HABEAS CORPUS IN FEDERAL COURT, SUPREME COURT SHOULD HAVE GRANTED DEFENDANT'S MOTION TO VACATE HIS CONVICTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion to vacate his depraved-indifference murder conviction should have been granted. The Court of Appeals opinion which changed the proof requirements for the depraved indifference mens rea was issued before defendant's conviction became

final. The proof at defendant's trial demonstrated defendant acted intentionally as opposed acting with "depraved indifference:"

… [T]he defendant moved pursuant to CPL 440.10(1)(h) to vacate so much of the judgment as convicted him of depraved indifference murder, arguing that, in light of People v Payne (3 NY3d 266), which was decided 15 days after this Court affirmed the judgment of conviction on his direct appeal but before his conviction became final (see Policano v Herbert, 7 NY3d at 593), the evidence at trial was legally insufficient to establish that he acted with the requisite mens rea for depraved indifference murder. The Supreme Court denied the motion without a hearing, as both procedurally barred by CPL 440.10(2)(a) and meritless. The court reasoned that the defendant's legal sufficiency argument based on the change of law set forth in People v Payne had been addressed and rejected by this Court in denying the defendant's motion for leave to reargue his direct appeal, by the Court of Appeals in denying the defendant's motion for leave to appeal, and by the federal court in denying the defendant's petition for a writ of habeas corpus. With respect to the merits of the defendant's motion, the Supreme Court determined that, viewing the evidence in the light most favorable to the prosecution, the evidence was legally sufficient to support the jury's verdict. * * *

… [T]he trial evidence was not legally sufficient to support a verdict of guilt of depraved indifference murder (see People v Payne, 3 NY3d at 272; People v Hernandez, 167 AD3d at 940). People v Illis, 2020 NY Slip Op 03535, Second Dept 6-24-20

DISMISS, MOTION TO, INTEREST OF JUSTICE.

DEFENDANT'S MOTION TO DISMISS IN THE INTEREST OF JUSTICE SHOULD NOT HAVE BEEN GRANTED; THE MOTION, BROUGHT AFTER CONVICTION BY A JURY, WAS UNTIMELY AND NOT WARRANTED ON THE MERITS (SECOND DEPT).

The Second Department, in an appeal by the People, determined defendant's motion to dismiss the criminal mischief count in the interest of justice, after conviction by a jury, should not have been granted. The motion was untimely and not warranted on the merits:

The People argue on appeal, as they did in opposition to the defendant's motion, that the motion was untimely and therefore should have been denied on that basis. We agree. Under the circumstances, the Supreme Court should have denied the branch of the defendant's motion which was pursuant to CPL 210.40(1), as he failed to show good cause for seeking that relief more than 45 days after his arraignment … .

In any event, we are not persuaded that the interest of justice was served by the dismissal of the criminal mischief in the third degree count of the indictment in this case. "The power to dismiss an indictment in furtherance of justice is to be exercised sparingly, in those cases where there is some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant upon such indictment . . . would constitute or result in injustice'" … . In this case, the Supreme Court improvidently exercised its discretion in substituting its own judgment concerning the credibility of the trial witnesses and the culpability of the defendant for that of the jury … . Additionally, "[t]here is nothing in the record before us that marks the prosecution of this defendant as extraordinary or one which cries out for justice beyond the confines of conventional considerations" … . Accordingly, we reinstate the count of criminal mischief in the third degree, and remit the matter for sentencing. People v Pfail, 2020 NY Slip Op 03252, Second Dept 6-10-20

DNA.

FRYE HEARING SHOULD HAVE BEEN HELD TO DETERMINE THE ADMISSIBILITY OF DNA EVIDENCE DERIVED USING THE FORENSIC STATISTICAL TOOL (FST); NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing defendant's conviction and ordering a new trial, determined either the DNA evidence should have been precluded, or a Frye hearing should have been held for DNA evidence derived using the Forensic Statistical Tool (FST):

Prior to trial, the defendant moved to preclude evidence sought to be introduced by the People regarding DNA testing derived from the use of the Forensic Statistical Tool (hereinafter FST), or alternatively, to conduct a hearing pursuant to Frye v United States (293 F 1013 [DC Cir]) to determine the admissibility of such evidence. The Supreme Court denied the defendant's motion, finding that FST was generally accepted in the scientific community.

Based upon the recent determinations by the Court of Appeals in People v Foster-Bey (_____ NY3d _____, 2020 NY Slip Op 02124) and People v Williams (_____ NY3d _____, 2020 NY Slip Op 02123), we find that it was an abuse of discretion as a matter of law for the Supreme Court to admit the FST evidence without first holding a Frye hearing "given [the] defendant's showing that there was uncertainty regarding whether such proof was generally accepted in the relevant scientific community at the time of [the defendant's] motion" … . Additionally, we find that the error was not harmless … . Without this forensic evidence, proof of the defendant's guilt was not overwhelming as the only additional evidence linking the defendant to the weapon was the

testimony of a lay witness which was circumstantial in nature. People v Pelt, 2020 NY Slip Op 03250, Second Dept 6-10-20

EXPERTS.

DEFENSE 'FALSE CONFESSION' EXPERT SHOULD HAVE BEEN ALLOWED TO TESTIFY, CONVICTION REVERSED; RIGHT TO CONFRONT WITNESSES NOT VIOLATED BY STATEMENTS IN THE VIDEO INTERROGATION THAT NONTESTIFYING WITNESSES HAD IMPLICATED THE DEFENDANT (SECOND DEPT).

The Second Department, reversing defendant's murder conviction, determined the defense "false confession" expert should have been allowed to testify. The defendant was 15 when arrested. He maintained his innocence for two hours and 45 minutes of interrogation before confessing. The Second Department rejected defendant's argument that he was denied his right to confront witnesses by statements in the video interrogation that nontestifying witnesses had implicated the defendant:

Contrary to the defendant's contention, his right to confrontation was not violated when the Supreme Court allowed into evidence portions of his videotaped statement to law enforcement officials that contained statements that nontestifying witnesses had implicated him in the crime. The statements were not received for their truth, but to explain the defendant's reaction to hearing them … . Further, the court properly instructed the jury that it was not to consider any of the statements as evidence against the defendant, and the jury is presumed to have followed this admonition … . * * *

… Supreme Court improvidently exercised its discretion in denying the defendant's application to permit testimony from his expert witness on the issue of false confessions. We have previously determined that "it cannot be said that psychological studies bearing on the reliability of a confession are, as a general matter, within the ken of the typical juror'" … . Thus, here, the court should not have precluded the testimony of the defendant's expert witness on this ground.

Further, "[w]ith regard to expert testimony on the phenomenon of false confessions, in order to be admissible, the expert's proffer must be relevant to the [particular] defendant and interrogation before the court'" … . Here, the report of the defendant's expert was sufficiently detailed so that it was relevant to this particular defendant, including discussing characteristics that heightened his vulnerability to manipulation, and the interrogation

conducted by the detectives, such as the techniques that were utilized and the improper participation of the defendant's mother during the interview. People v Churaman, 2020 NY Slip Op 03526, Second Dept 6-24-20

GRAND JURY, INSTRUCTIONS, DEFENSES.

FAILURE TO INSTRUCT THE GRAND JURY ON THE DEFENSE OF PROPERTY JUSTIFICATION DEFENSE REQUIRED DISMISSAL OF THE MURDER/MANSLAUGHTER INDICTMENT (CT APP).

The Court of Appeals affirmed for the reasons stated in the Fourth Department's memorandum. People v Ball, 2020 NY Slip Op 03209, CtApp 6-9-20

SUMMARY OF THE AUGUST 22, 2019, MEMORANDUM AFFIRMED BY THE COURT OF APPEALS ON JUNE 9, 2020

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

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

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

… [W]e conclude that the court properly dismissed the indictment based on the People's failure to instruct the grand jury on the justification defense pursuant to Penal Law § 35.20 (3) … . A court may dismiss an indictment on the ground that a grand jury proceeding is defective where, inter alia, the proceeding is so irregular "that the integrity thereof is impaired and prejudice to the defendant may result" (CPL 210.35 [5]; see CPL 210.20 [1] [c]). With respect to grand jury instructions, CPL 190.25 (6) provides, as relevant here,

that, "[w]here necessary or appropriate, the court or the district attorney, or both, must instruct the grand jury concerning the law with respect to its duties or any matter before it." "If the prosecutor fails to instruct the grand jury on a defense that would eliminate a needless or unfounded prosecution, the proceeding is defective, mandating dismissal of the indictment" … . Under the circumstances of this case, we conclude that an instruction regarding the justification defense pursuant to Penal Law § 35.20 (3) was warranted, and the prosecutor's failure to provide that instruction impaired the integrity of the grand jury proceeding (see CPL 210.35 [5]). Furthermore, we conclude that the error was not cured by the instruction regarding the justification defense under Penal Law § 35.15 … . People v Ball, 2019 NY Slip Op 06295, Fourth Dept 8-22-19

GUILTY PLEAS, WITHDRAWAL OF.

DEFENDANT SHOULD HAVE BEEN ALLOWED TO EXPLAIN WHY HE WANTED TO WITHDRAW HIS GUILTY PLEA; MATTER REMITTED (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, remitting the matter to Supreme Court to allow defendant to explain his desire to withdraw his plea, determined the sentencing court should not have prevented defendant from giving his reasons:

The court convened for sentencing, at which time defense counsel stated that defendant wanted to withdraw the plea, explaining that defendant had done his own legal research and determined that the appeal waiver encompassed issues that he wanted to raise on appeal. Defense counsel asked to be relieved due to an unspecified conflict of interest. Defense counsel, speaking in hypothetical terms, argued that withdrawal of the plea may be justified if defendant did not receive meaningful representation. The court questioned defendant directly. Defendant confirmed that he wanted to withdraw his plea. The prosecutor then asked the court to inquire into defendant's grounds for the motion. Defense counsel objected, and the court ruled in defense counsel's favor, apparently on the ground that such questioning might impermissibly intrude on privileged conversations. "[T]hat's something you'd have to talk to a lawyer about," the court explained, "[b]ut I'm going to deny that request." The court added that defendant had executed a written appeal waiver. Defendant began to explain why he had executed the waiver, but the court stopped him from doing so, stating, "It's not your turn to talk right now." …

Although we agree with our dissenting colleagues that defense counsel did not take a position adverse to defendant, under the circumstances of this case, we conclude that the court erroneously deprived defendant of a

reasonable opportunity to present his contentions in support of his motion to withdraw the plea … . People v Ramos, 2020 NY Slip Op 03364, Fourth Dept 6-12-20

HABEAS CORPUS, COVID-19.

HABEAS CORPUS PETITION ORDERING THE RELEASE OF A PRISONER BECAUSE OF THE RISK POSED BY COVID-19 SHOULD NOT HAVE BEEN GRANTED; THE PETITION DID NOT DEMONSTRATE THE PRISON OFFICIALS WERE DELIBERATELY INDIFFERENT TO THE RISK (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Devine, reversing Supreme Court, determined the habeas corpus petition seeking the release from prison of a 68-year-old prisoner because of the danger of contracting COVID-19 should not have been granted. At the time the appeal was heard, the inmate, Muntaqim, was hospitalized with COVID-19. The appeal was heard as an exception to the mootness doctrine because the situation is likely to recur. Although the petition established Muntaqim was incarcerated under conditions which could cause him serious harm, the petition did not demonstrate the prison personnel were deliberately indifferent to the risk. The prison respondents outlined the steps taken and the prison to reduce the spread of the disease:

Petitioner arguably established that Muntaqim was "incarcerated under conditions posing a substantial risk of serious harm" … . Annexed to the petition is a letter from a physician who discussed Muntaqim's medical condition and opined that he was at extreme risk of "a serious and possible fatal outcome if infected with the novel coronavirus" responsible for causing COVID-19, as well as a letter from a group of physicians who explained that the novel coronavirus is quite infectious and that serious outbreaks in prisons were inevitable given the close contact between individuals inherent to the prison setting. … What petitioner failed to demonstrate, however, was deliberate indifference on the part of prison officials. Petitioner provided nothing from anyone with firsthand knowledge — including Muntaqim, who neither verified the petition nor submitted an affidavit in support of it — as to what was being done to combat the spread of the novel coronavirus at SCF [Sullivan Correctional Facility] or to protect inmates at high risk from COVID-19. In contrast, respondents came forward with the affidavit of respondent Superintendent of SCF, who detailed the steps that had been taken up to that point to prevent the introduction of the novel coronavirus into the facility and reduce the risks of potential transmission. … Supreme Court determined that DOCCS had "done nothing wrong" in its response to the burgeoning threat. Petitioner has not demonstrated the subjective element of deliberate indifference required to establish an Eighth Amendment violation. People ex rel. Carroll v Keyser, 2020 NY Slip Op 03169, Third Dept 6-4-20

HEARSAY, INCONSISTENT STATEMENTS.

HEARSAY STATEMENTS BY THE ONLY WITNESS TO IDENTIFY DEFENDANT AS A PERPETRATOR INDICATED THE WITNESS WAS NOT IN FACT ABLE TO IDENTIFY ANY OF THE PERPETRATORS; THE INCONSISTENT STATEMENTS SHOULD HAVE BEEN ADMITTED BECAUSE THEY WENT TO A CORE ISSUE IN THE CASE IMPLICATING THE RIGHT TO PUT ON A DEFENSE; CONVICTION REVERSED (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined that a hearsay statement allegedly made by the only witness (Lindsay) to identify the defendant as one of the masked intruders in this home-invasion murder-assault-burglary case should have been allowed in evidence. Lindsay, who was shot by one of the intruders, initially claimed he could not identify anyone because they were wearing face-coverings. He later identified the defendant and the others, claiming that he initially did not identify them because he was afraid. The witness who was not allowed to testify, Boyd, is Lindsay's brother. Boyd would have testified that Lindsay repeatedly told him he could not identify any of the intruders. Boyd had contacted defense counsel only after Lindsay testified so no foundation for Boyd's testimony had been laid. The prosecutor was willing to allow Lindsay to be recalled for that purpose:

"Once a proper foundation is laid, a party may show that an adversary's witness has, on another occasion, made oral or written statements which are inconsistent with some material part of the trial testimony, for the purpose of impeaching the credibility and thereby discrediting the testimony of the witness" … . "Since evidence of inconsistent statements is often collateral to the ultimate issue before the [trier of fact] and bears only upon the credibility of the witness, its admissibility is entrusted to the sound discretion of the Trial Judge'" … . Indeed, "[i]t is well established that the trial courts have broad discretion to keep the proceedings within manageable limits and to curtail exploration of collateral matters" … . However, "the trial court's discretion in this area is circumscribed by the defendant's constitutional rights to present a defense and confront his accusers" … . "Thus, while a trial court may preclude impeachment evidence that is speculative, remote, or collateral, [that] rule . . . has no application where the issue to which the evidence relates is material in the sense that it is relevant to the very issues that the [trier of fact] must decide'" … .

"Where the truth of the matter asserted in the proffered inconsistent statement is relevant to a core factual issue of a case, its relevancy is not restricted to the issue of credibility and its probative value is not dependent on the inconsistent statement" … . Under such circumstances, the right to present a defense may "encompass[ ] the

right to place before the [trier of fact] secondary forms of evidence, such as hearsay" … . "Indeed where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice'" … . People v Butts, 2020 NY Slip Op 03243, Second Dept 6-10-20

INTOXICATION DEFENSE.

DEFENDANT WAS ENTITLED TO A JURY INSTRUCTION ON THE INTOXICATION DEFENSE; DEFENDANT SHOULD HAVE BEEN ALLOWED TO ATTEMPT TO LAY FOUNDATIONS FOR THE ADMISSION OF POLICE AND DISTRICT ATTORNEY BUSINESS RECORDS IN SUPPORT OF HIS INTOXICATION DEFENSE; NEW TRIAL ORDERED DESPITE DEFENDANT'S COMPLETION OF HIS SENTENCE (SECOND DEPT).

The Second Department, reversing defendant's forcible touching and sexual abuse convictions and ordering a new trial, despite defendant's having completed his sentence, determined defendant was entitled to a jury instruction on the intoxication defense, and defendant was wrongly precluded from attempting to lay foundations for the admission of certain police and district-attorney's-office business records supporting the intoxication defense:

The defendant also sought to introduce as a business record a Desk Appearance Ticket Investigation form (hereinafter the DAT form) which contains information from the arresting officer at the time of the arrest. Specifically, the DAT form contains the arresting officer's notation, "intox," and a box checked by the arresting officer indicating "under the influence of drugs/marihuana to the degree that he may endanger himself or others." The arresting officer testified that he had completed the form in his own handwriting. As the defendant contends, the trial court should have allowed the defendant to introduce the DAT form as an admissible business record of the Police Department … . …

The defendant likewise sought to introduce an Early Case Assessment Bureau sheet (hereinafter the ECAB sheet) apparently created by the Police Department or the District Attorney's office, as well as the testimony of the individual who created it to establish the foundation for its admission as a business record. The ECAB sheet supports the defendant's request for an intoxication charge and also provides a basis for impeachment of the arresting officer's testimony as to his perceptions of the defendant's condition at the time of the arrest. * * * Had the defendant been permitted to explore the circumstances under which the ECAB sheet was created, the

defendant may have established that the statements contained in the ECAB sheet were admissible for the truth of those statements … . People v Sabirov, 2020 NY Slip Op 03378, Second Dept 6-17-20

JUDGES.

TRIAL JUDGE ASSUMED THE ROLE OF THE PROSECUTOR AND ELICITED CRUCIAL IDENTIFICATION TESTIMONY, NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, ordering a new trial, determined the trial judge assumed the role of the prosecutor in eliciting crucial identification testimony:

"While neither the nature of our adversary system nor the constitutional requirement of a fair trial preclude a trial court from assuming an active role in the truth-seeking process,' the court's discretion in this area is not unfettered" … . The principle restraining the court's discretion is that a trial judge's "function is to protect the record, not to make it" … . Accordingly, while a trial judge may intervene in a trial to clarify confusing testimony and facilitate the orderly and expeditious progress of the trial, the court may not take on "the function or appearance of an advocate" … .

Here, the record demonstrates that after the two complainants, in response to questions by the prosecutor, were unable to positively identify the defendant as the perpetrator of the robbery, the Supreme Court improperly assumed the appearance or the function of an advocate by questioning the complainants until it elicited a positive in-court identification of the defendant from each of them … . Under these circumstances, the court's decision to elicit such testimony was an improper exercise of discretion and deprived the defendant of a fair trial. People v Mitchell, 2020 NY Slip Op 03541, Second Dept 6-24-20

JURORS.

STEP ONE OF DEFENDANT'S BATSON CHALLENGE PROPERLY REJECTED AS VAGUE AND CONCLUSORY; THERE WAS NO CONCEPCION BARRIER TO AFFIRMING THE TRIAL COURT'S STEP-ONE RULING; THE REQUEST FOR THE CROSS-RACIAL IDENTIFICATION JURY INSTRUCTION SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, over a dissent, determined defendant's step one Batson challenge was properly rejected as a vague and conclusory assertion that did not create a so-called Concepcion problem. The dissent argued the scenario presented a classic Concepcion problem. The court noted that the cross-racial identification jury instruction should have been given but found the error harmless:

… [D]efense counsel stated that the prospective juror in question was the "only black juror" who had not already been dismissed for cause and there was "no indication" that the juror would be "anything other than fair and impartial to both sides." After considering defendant's argument at step one, the court observed that defendant had failed to demonstrate a discriminatory pattern of strikes and denied his application without prompting the prosecutor to provide a race-neutral reason at step two … . Insofar as the court based its reasoning on the erroneous notion that a discriminatory pattern of strikes must be shown, that reasoning was flawed … . Nevertheless, because defendant failed to establish a prima facie case at step one, the court properly denied his application without further inquiry … .

Our dissenting colleague concludes that we have a Concepcion problem (see generally People v Concepcion, 17 NY3d 192, 197-198 [2011]), but we respectfully disagree. Whether a defendant has demonstrated a discriminatory pattern of peremptory strikes goes to the issue of whether that defendant has established a prima facie case at step one of the Batson inquiry (see generally Bolling, 79 NY2d at 324). Because the court relied on that ground in denying the application, Concepcion does not preclude us from affirming the judgment on the same ground, i.e., that defendant failed to establish a prima facie case at step one … . …

Where, as here, "a witness's identification of the defendant is at issue, and the identifying witness and defendant appear to be of different races, a trial court is required to give, upon request, during final instructions, a jury charge on the cross-race effect" … . People v Boyd, 2020 NY Slip Op 03342, Fourth Dept 6-12-20

JURORS.

THE TRIAL JUDGE DID NOT MAKE AN ADEQUATE INQUIRY ABOUT THE REASONS FOR A SITTING JUROR'S ABSENCE BEFORE SUBSTITUTING AN ALTERNATE JUROR; NEW TRIAL ORDERED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, reversing the Appellate Division, determined the trial judge did not make an adequate inquiry about a sitting juror's absence before substituting an alternate juror for the sitting juror (Juror Number 9). The defendant had moved for a mistrial on that ground:

… [T]he trial court failed to conduct the requisite "reasonably thorough inquiry" before substituting Alternate Number 1 for Juror Number 9 (see CPL 270.35 [2] [a]). When it ordered the substitution, the court had merely stated its "belie[f]" that Juror Number 9 had an "appointment for a family member," and incorrectly claimed that Juror Number 9 had stated during voir dire that she had a medical appointment for her son in Rochester. Not only did the court provide only limited — and inaccurate — reasons to support a finding of unavailability, there is nothing on the record reflecting that it made any inquiry into Juror Number 9's whereabouts or likelihood of appearing prior to ordering the substitution of Juror Number 9 with Alternate Number 1. On this record, the court failed to satisfy the requirement that a trial court conduct a "reasonably thorough inquiry" to ensure that its substitution determination is adequately informed … . People v Lang, 2020 NY Slip Op 03487, CtApp 6-23-20

JURY NOTES.

COURT'S ERRORS IN DEALING WITH NOTES FROM THE JURY, INCLUDING SUBSTITUTING THE WORD 'INITIALLY' FOR 'INTENTIONALLY,' REQUIRED REVERSAL (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined the court's handling of jury notes constituted reversible error:

… [I]n a note marked as court exhibit 8, the jury posited a question about the elements of resisting arrest. When reading that note into the record, the Supreme Court substituted the word "initially" in place of the word "intentionally," forming a substantively different question than that posed by the jury. The court again substituted the word "initially" in place of the word "intentionally" when it read the note aloud later in the proceedings.

Since there is no indication in the record that court exhibit 8 was shown to the parties, the court's erroneous use of a substantively different word than that used by the jury when it read the note into the record, and its repetition of that same error later in the proceedings, constituted mode of proceedings errors. In addition, although the jury submitted to the court a note marked as court exhibit 10 to clarify which portions of the testimony of certain witnesses the jury wished to have read back, the court did not read court exhibit 10 into the record at any point, and the record does not show that the court ever informed the parties that this note had been received. As a result of the errors regarding these jury notes, we must reverse the defendant's conviction of resisting arrest … . People v Petrizzo, 2020 NY Slip Op 03251, Second Dept 6-10-20

JUVENILE DELINQUENCY.

FAMILY COURT SHOULD HAVE GRANTED THE APPLICATION FOR AN ADJOURNMENT IN CONTEMPLATION OF DISMISSAL IN THIS JUVENILE DELINQUENCY PROCEEDING (SECOND DEPT).

The Second Department determined Family Court should have granted the application for an adjournment in contemplation of dismissal in this juvenile delinquency proceeding:

" The Family Court has broad discretion in determining whether to adjourn a proceeding in contemplation of dismissal'" … . Factors that are relevant to a court's discretionary determination of whether to adjourn a proceeding in contemplation of dismissal include a respondent's criminal and disciplinary history, history of drug or alcohol use, academic and school attendance record, association with gang activity, acceptance of responsibility for his or her actions, the nature of the underlying incident, recommendations made in a probation or mental health report, the degree to which the respondent's parent or guardian is involved in the respondent's home and academic life, and the ability of the parent or guardian to provide adequate supervision … .

Here, the Family Court improvidently exercised its discretion in denying the appellant's application pursuant to Family Court Act § 315.3 for an adjournment in contemplation of dismissal. Under the circumstances here, including the fact that this proceeding constituted the appellant's first contact with the court system, he took responsibility for his actions and expressed remorse, he voluntarily participated in counseling during the pendency of the proceeding, and he maintained a strong academic and school attendance record, an adjournment in contemplation of dismissal was warranted … . Matter of Maximo M., 2020 NY Slip Op 03428, Second Dept 6-17-20

LESSER INCLUDED OFFENSES.

CONVICTION OF COURSE OF SEXUAL CONDUCT AGAINST A CHILD FIRST DEGREE MUST BE VACATED AS A LESSER INCLUDED OFFENSE OF PREDATORY SEXUAL ASSAULT AGAINST A CHILD (SECOND DEPT).

The Second Department noted that defendant's conviction of course of sexual conduct against a child in the first degrees must be vacated as a lesser included offense:

… [T]he defendant's conviction of course of sexual conduct against a child in the first degree under Penal Law § 130.75(1)(a) must be vacated and that count of the indictment dismissed, since that count is a lesser included offense of the crime of predatory sexual assault against a child under Penal Law § 130.96 … . People v Jones, 2020 NY Slip Op 03406, Second Dept 6-17-20

PAROLE.

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

The Court of appeals affirmed the Third Department's decision upholding the rescission of petitioner's parole:

Judicial intervention in Parole Board determinations is warranted "only when there is a showing of irrationality bordering on impropriety" … . Petitioner failed to make such a showing here with regard to the Parole Board's determination to rescind his parole release. Matter of Benson v New York State Bd. of Parole, 2020 NY Slip Op 03207, CtApp 6-9-20

SUMMARY OF THE OCTOBER 31, 2019, DECISION AFFIRMED BY THE COURT OF APPEALS ON JUNE 9, 2020

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

In August 2016, letters were sent from the Department of Corrections and Community Supervision to the Albany County District Attorney's office and the judge who imposed the sentence informing them that petitioner was scheduled to appear before respondent.Petitioner appeared before respondent in December 2017, after which he was granted parole with an open release date in February 2018. Thereafter, in January 2018, a victim impact hearing was held at which the victim's mother and two brothers gave victim impact statements. After this hearing, petitioner was served with a notice of rescission hearing, which was subsequently held in February 2018. Following the rescission hearing, petitioner's open release date was rescinded and a hold period of nine months was imposed. This determination was upheld on administrative appeal. Petitioner thereafter commenced this CPLR article 78 proceeding.

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

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

POLICE OFFICERS, CROSS-EXAMINATION.

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

The First Department, reversing defendant's conviction, determined cross-examination of a police officer about misconduct in a civil suit should have been allowed:

The trial court erred in denying defendant's request to cross-examine a police Sergeant regarding allegations of misconduct in a civil lawsuit in which it was claimed that this police Sergeant and a police detective arrested the plaintiff without suspicion of criminality and lodged false charges against him … . The civil complaint contained allegations of falsification specific to this officer (and another officer), which bore on his credibility at the trial.

Contrary to the People's allegations, the error was not harmless. The police sergeant's credibility was critical because he was the only eyewitness to the crime … . Although the sergeant's testimony was corroborated by other evidence, none of this corroborating evidence was sufficient, on its own, to prove defendant's guilt, as all of it relied on the sergeant's testimony for context. People v Conner, 2020 NY Slip Op 03200, First Dept 6-4-20

PRISON CONTRABAND.

COCAINE IS NOT DANGEROUS CONTRABAND WITHIN THE MEANING OF PROMOTING PRISON CONTRABAND IN THE FIRST DEGREE; CONVICTION REDUCED TO PROMOTING PRISON CONTRABAND IN THE SECOND DEGREE (PROHIBITING 'CONTRABAND,' AS OPPOSED TO 'DANGEROUS CONTRABAND') (FOURTH DEPT).

The Fourth Department, reversing (modifying) County Court, in a full-fledged opinion by Justice Troutman, over a two-justice concurrence and a dissent, determined cocaine does not meet the statutory definition of dangerous contraband within the meaning of the offense of promoting prison contraband in the first degree. The defendant's conviction, based upon the possession of three baggies of cocaine, was reduced to promoting prison contraband in the second degree:

"A person is guilty of promoting prison contraband in the first degree when . . . [that person] knowingly and unlawfully introduces any dangerous contraband into a detention facility" (Penal Law § 205.25 [1]). "Dangerous

contraband" is defined as any contraband that is "capable of such use as may endanger the safety or security of a detention facility or any person therein" (§ 205.00 [4]). "[T]he test for determining whether an item is dangerous contraband is whether its particular characteristics are such that there is a substantial probability that the item will be used in a manner that is likely to cause death or other serious injury, to facilitate an escape, or to bring about other major threats to a detention facility's institutional safety or security" … . " [W]eapons, tools, explosives and similar articles likely to facilitate escape or cause disorder, damage or physical injury are examples of dangerous contraband,' " whereas an " alcoholic beverage is an example of [ordinary] contraband' " … . Drugs, unlike weapons, are not inherently dangerous, and thus general penological concerns about the drug possessed that "are not addressed to the specific use and effects of the particular drug are insufficient to meet the definition of dangerous contraband" … . * * *

Central to our dissenting colleague's analysis is a distinction between narcotic and non-narcotic controlled substances. The unstated premise is that cocaine is classified as a narcotic because it is inherently dangerous. We respectfully disagree with that premise. Cocaine may be unhealthy, but it is not a narcotic, at least not from a scientific, medical, or pharmacological viewpoint … . People v Simmons, 2020 NY Slip Op 03350, Fourth Dept 6-12-20

SEARCHES, BORDERS.

WARRANTLESS MANUAL SEARCH OF DEFENDANT'S IPAD AT JFK AIRPORT PROPER; CRITERIA FOR SEARCHES OF ELECTRONIC DEVICES AT BORDERS EXPLAINED (SECOND DEPT).

The Second Department determined defendant's iPad was properly searched by a Department of Homeland Security (DHS) agent at JFK airport after defendant, an airline pilot, had flown from Montreal to JFK. Based upon an investigation in Texas, DHS believed defendant may have had child pornography on his iPad. Defendant was asked to provide the password after he was told the iPad would be seized if he did not provide the password. Defendant provided the password and child pornography was found:

Because "[t]he Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border," and "the expectation of privacy is less at the border than it is in the interior"… , border searches are generally deemed reasonable "simply by virtue of the fact that they occur at the border" … . Thus, "[r]outine searches of the persons and effects of entrants are not subject to any requirement of reasonable

suspicion, probable cause, or warrant" … . However, "highly intrusive searches" may require reasonable suspicion in light of the significance of the individual "dignity and privacy interests" infringed … .

While federal circuit courts are split as to whether reasonable suspicion or something less than that is required to justify a manual search of an electronic device for contraband at the border, no court has required a warrant or probable cause for either a manual or forensic search of an electronic device for contraband at the border … . Even assuming reasonable suspicion was required, here, the DHS Agents possessed reasonable suspicion to search the defendant's iPad for child pornography … . …

Further, contrary to the defendant's contention, the defendant was not coerced into entering the password to unlock his iPad, in violation of his right against self-incrimination, his right to due process, or CPL 60.45. The defendant, who was told that he was free to leave, was not in custody when he was asked to enter the password … . The fact that the defendant's iPad would be detained if he did not enter the password did not mean that he was "subjected to the coercive atmosphere of a custodial confinement"… . Further, since the DHS Agents had reasonable suspicion that contraband could be found on the iPad, the Agents could perform a forensic search of the iPad without a warrant … . People v Perkins, 2020 NY Slip Op 03425, Second Dept 6-17-20

SENTENCING.

ALTHOUGH THE PERSISTENT FELONY OFFENDER STATUS WAS AUTHORIZED AND LEGAL, THE APPELLATE DIVISION EXERCISED ITS DISCRETION TO FIND DEFENDANT SHOULD NOT HAVE BEEN SENTENCED AS A PERSISTENT FELONY OFFENDER AND REDUCED HIS SENTENCE (FOURTH DEPT).

The Fourth Department, exercising its discretion, determined, although authorized and legal, defendant should not have been sentenced as a persistent felony offender. The Fourth Department reduced his sentence. The court noted that defendant had been offered a much shorter sentence as part of a plea bargain:

Even where the sentencing court does not err as a matter of law in adjudicating a defendant to be a persistent felony offender, "[t]he Appellate Division, in its own discretion, may conclude that a persistent felony offender sentence is too harsh or otherwise improvident" … . "A determination by the Appellate Division to vacate a harsh or severe persistent felony offender finding is authorized by CPL 470.20 (6), which grants the Appellate Division discretion to modify sentences in the interest of justice without deference to the sentencing court" … . …

Despite defendant's frequent involvement with law enforcement, he has only two prior felony convictions: one in 1981 for burglary in the second degree and one in 2002 for driving while intoxicated. Moreover, a sentence of 20 years to life is a particularly harsh penalty in light of the People's final pretrial plea offer of 6 to 9 years' incarceration. Thus, as a matter of discretion in the interest of justice, we modify the judgment by vacating the finding that defendant is a persistent felony offender and we hereby modify the sentences imposed and sentence defendant as a second felony offender by reducing the sentence imposed for arson in the third degree under count one of the indictment to an indeterminate term of incarceration of 3 to 6 years and reducing the sentences imposed for menacing a police officer or peace officer under counts two, four, five, and seven of the indictment to determinate terms of incarceration of 7 years followed by 5 years of postrelease supervision. People v Garno, 2020 NY Slip Op 03311, Fourth Dept 6-12-20

SENTENCING.

CONSECUTIVE PERIODS OF POSTRELEASE SUPERVISION VIOLATED THE PENAL LAW; ERROR DID NOT NEED TO BE PRESERVED (FOURTH DEPT).

The Fourth Department noted that consecutive periods of postrelease supervision violated the Penal Law and the issue did not need to be preserved:

County Court erred in imposing consecutive periods of postrelease supervision in violation of Penal Law § 70.45 (5) (c) … . Although defendant failed to preserve that contention for our review, the lack of preservation "is of no moment, inasmuch as we cannot allow an illegal sentence to stand" … . We therefore modify the judgment by directing that the periods of postrelease supervision imposed shall run concurrently. People v Hyde, 2020 NY Slip Op 03319, Fourth Dept 6-12-20

SENTENCING.

DEFENDANT WAS ADJUDICATED A YOUTHFUL OFFENDER AND SENTENCED TO 60 DAYS IN JAIL AND FIVE YEARS PROBATION FOR STEALING A BREAKFAST SANDWICH FROM A RESTAURANT; EXTENSIVE DISSENT ARGUED THE SENTENCE WAS HARSH AND EXCESSIVE (FIRST DEPT).

The First Department upheld the defendant's sentence as a youthful offender to 60 days in jail and five years probation. Defendant stole a breakfast sandwich from a restaurant after throwing a banana at an employee, jumping over the counter, saying he had gun, and leaving the restaurant with the sandwich. This decision is significant because of the extensive dissent arguing the sentence was too harsh. People v Guilermo P., 2020 NY Slip Op 03464, First Dept 6-18-20

SENTENCING.

THE SENTENCE FOR KIDNAPPING MUST RUN CONCURRENTLY WITH THE SENTENCE FOR FELONY MURDER; MOTION TO VACATE THE CONVICTION PROPERLY BROUGHT PURSUANT TO CRIMINAL PROCEDURE LAW 440.20 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined: (1) the judge should have analyzed the motion to vacate the conviction under Criminal Procedure Law (CPL) 440.20, as well as 440.10; (2) the sentence for kidnapping should be concurrent with the sentence for felony murder; and (3) the judge failed to address whether the running of the kidnapping sentence consecutively to the other murder convictions violated defendant's rights to equal protection. Matter remitted for consideration of the equal-protection argument:

The Supreme Court erred in construing the defendant's motion as one solely pursuant to CPL 440.10. Rather, the motion also sought resentencing on the basis that the kidnapping sentence "was unauthorized, illegally imposed or otherwise invalid as a matter of law" (CPL 440.20[1]) because it should have been made to run concurrently with the felony murder conviction under count three of the indictment, and it should have been made to run concurrently with all of the murder convictions based on his rights to equal protection. That branch of the motion was properly made pursuant to CPL 440.20 (see CPL 440.20[4]). …

… [T]he imposition of consecutive sentences for the kidnapping conviction under count four of the indictment and the felony murder conviction under count three of the indictment was unlawful, since the kidnapping … , of which the defendant was convicted under count four of the indictment, also constituted the underlying felony in his murder conviction under count three of the indictment, thereby constituting a "material element" of that crime (Penal Law § 70.25[2] …). …

The Supreme Court failed to address the only remaining issue raised by the defendant on this appeal—that the running of the sentence on the kidnapping conviction consecutively to the sentences on the other murder convictions violated his rights to equal protection. Accordingly, we remit the matter to the Supreme Court, Queens County, for a determination of that issue. People v Khan, 2020 NY Slip Op 03537, Second Dept 6-24-20

SEX OFFENDER REGISTRATION ACT (SORA).

PEOPLE'S REQUEST FOR AN UPWARD DEPARTURE IN THIS SORA RISK ASSESSMENT PROCEEDING SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the People's request for an upward department in this SORA risk assessment proceeding should not have been granted:

The Supreme Court should not have granted the People's request for an upward departure. "A departure from the presumptive risk level is generally the exception, not the rule. Where the People seek an upward departure, they must identify an aggravating factor that tends to establish a higher likelihood of reoffense or danger to the community not adequately taken into account by the Guidelines, and prove the facts in support of the aggravating factor by clear and convincing evidence" … . If the People do not satisfy these two requirements, "the court does not have the discretion to depart from the presumptive risk level" … .

Here, the People failed to establish that the defendant's conduct was so brutal, heinous, extreme, or depraved as to amount to an aggravating factor that tends to establish a higher likelihood of reoffense or danger to the community not adequately taken into account by the Guidelines … . People v Murray, 2020 NY Slip Op 03554, Second Dept 6-24-20

SEX OFFENDER REGISTRATION ACT (SORA).

PETITIONER SOUGHT A REDUCTION OF HIS 1996 LEVEL THREE SEX OFFENDER CLASSIFICATION BUT COUNTY COURT DENIED THE PETITION WITHOUT REQUESTING AN UPDATED RECOMMENDATION FROM THE BOARD OF EXAMINERS OF SEX OFFENDERS IN VIOLATION OF THE CORRECTION LAW; ORDER REVERSED AND MATTER REMITTED (THIRD DEPT).

The Third Department, reversing County Court, determined County Court's failure to request an updated recommendation from the Board of Examiners of Sex Offenders violated the Correction Law. Petitioner was classified a level three sex offender in 1996 and filed a petition to reduce his classification to level one:

The Correction Law requires that, upon receipt of such petition to modify a sex offender's level of notification, "the court shall forward a copy of the petition to the [B]oard and request an updated recommendation pertaining to the sex offender" (Correction Law § 168-o [4]). Upon such a request, the Board must provide an updated recommendation … . Generally, only "[a]fter reviewing the recommendation received from the [B]oard and any relevant materials and evidence" may the court grant or deny the petition for modification … .

Notwithstanding these statutory mandates, the record reflects that County Court failed to comply with them. The parties acknowledged at oral argument that an updated recommendation from the Board was not requested. Furthermore, the court did not review an updated recommendation before denying defendant's petition. Given that these procedural requirements of Correction Law § 168-o (4) were not met, the order must be reversed … . People v Kaminski, 2020 NY Slip Op 03431, Third Dept 6-18-20

SEX OFFENDER REGISTRATION ACT (SORA).

SUPREME COURT'S DENIAL OF DEFENDANT'S PETITION TO MODIFY HIS SORA RISK LEVEL CLASSIFICATION WITHOUT HOLDING A HEARING VIOLATED THE CORRECTION LAW (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the failure to hold a hearing on defendant's petition to modify his risk level classification violated Correction Law 168-o(4):

… [T]he defendant moved pursuant to Correction Law § 168-o(2) for a downward modification of his risk level classification under the Sex Offender Registration Act … . The Supreme Court denied the defendant's petition without holding a hearing. We reverse.

Since the Supreme Court failed to conduct a hearing on the defendant's petition, as set forth in Correction Law § 168-o(4), we reverse the order and remit the matter to the Supreme Court, Queens County, for a hearing and, thereafter, a new determination of the defendant's petition … . People v Banuchi, 2020 NY Slip Op 03553, Second Dept 6-24-20

SEXUAL ABUSE, PUBLIC NUISANCE.

COMPLAINT AGAINST THE DIOCESE OF BUFFALO ALLEGING SEXUAL ABUSE BY A PRIEST DID NOT STATE A CAUSE OF ACTION FOR PUBLIC NUISANCE (FOURTH DEPT).

The Fourth Department determined the complaint seeking damages and injunctive relief against the Diocese of Buffalo NY stemming from alleged sexual abuse by a priest did not state a cause of action for public nuisance based on common law and Penal Law 240.45 (criminal nuisance). The court noted that a nuisance suit in this context would conflict or compete with the classification system under the Sex Offender Registration Act and, to the extent plaintiff seeks damages, a suit pursuant to the Child Victims Act is available:

"Conduct does not become a public nuisance merely because it interferes with . . . a large number of persons. There must be some interference with a public right. A public right is one common to all members of the general public. It is collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured" … . Here, the complaint alleges the infringement of, at most, a common right of a particular subset of the community, i.e., a group of Roman Catholic parishioners in the area of the Diocese who attended or were active in the priest's parishes. The complaint does not allege that the general public was exposed to the priest's conduct, nor does it otherwise allege interference with a collective right belonging to all members of the public … . …

Penal Law § 240.45 does not imply a private right of action under the circumstances presented here. "Where a penal statute does not expressly confer a private right of action on individuals pursuing civil relief, recovery under such a statute may be had only if a private right of action may fairly be implied' " … . Three essential factors are considered in determining whether a private right of action may fairly be implied: "(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a

private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme" … . Golden v The Diocese of Buffalo, NY, 2020 NY Slip Op 03354, Fourth Dept, 6-12-20

STREET STOPS, SEARCHES.

THE MAJORITY HELD THE WARRANTLESS SEARCH OF DEFENDANT'S BACKPACK WAS JUSTIFIED BECAUSE IT OCCURRED CLOSE IN TIME TO DEFENDANT'S ARREST ON THE STREET AND WAS JUSTIFIED BY EXIGENT CIRCUMSTANCES; THE DISSENT ARGUED THERE WAS NO PROOF THE BACKPACK WAS WITHIN THE GRABBABLE AREA AND NO PROOF OF EXIGENT CIRCUMSTANCES (SECOND DEPT).

The Second Department, over a dissent, determined the warrantless search of defendant's backpack occurred close in time to the arrest and was justified by exigent circumstances. The dissent argued there was no evidence the backpack was within the grabbable area of the defendant and no evidence there were exigent circumstances. Defendant had fallen off his bicycle after he was stopped by the police, the complainant had identified the defendant at the scene, and there were five or six officers around the defendant at the time of the search of the backpack:

According to the testimony adduced at the suppression hearing, after being chased by the police, the defendant fell off his bicycle onto the street. When the complainant arrived one minute later and identified the defendant, the defendant was standing up and had not yet been handcuffed. Immediately after the complainant's identification, the defendant was placed under arrest. Approximately two minutes after the defendant's arrest, the police searched the subject backpack which was "on the street, at the location of the arrest." These facts show that the arrest and search of the backpack were for all practical purposes conducted at the same time and in the same place … . Additionally, at the time of the arrest, the backpack, which was "on the street, at the location of the arrest," could have been accessed by the defendant and had not yet been reduced to the exclusive control of the police.

Additionally, the circumstances support a reasonable belief that the search of the backpack was necessary to ensure the safety of the arresting officers and the public. The police responded to and arrested the defendant for a burglary, a violent crime. In addition, the defendant was not cooperative with the police. Indeed, the defendant was arrested at the conclusion of a police chase, following his flight from the police on a bicycle. Moreover, the

setting of the defendant's arrest and search of the backpack was a public street. These circumstances gave rise to objective and legitimate reasons for the search of the backpack … . People v Mabry, 2020 NY Slip Op 03540, Second Dept 6-24-20

STREET STOPS, SEARCHES.

WARRANTLESS SEARCH OF DEFENDANT'S BACKPACK AFTER HE WAS HANDCUFFED NOT JUSTIFIED; CONVICTION REVERSED (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined the warrantless search of defendant's backpack was not justified. The appeal was heard because the waiver of appeal was deemed invalid:

Officer Musa approached the defendant, who, in response to Officer Musa's inquiry, provided his name. The defendant was carrying a backpack, and Officer Musa observed what appeared to be credit cards or identification cards in an outside mesh pocket. Officer Musa arrested the defendant for criminal trespass, handcuffed him, and removed the backpack from the defendant. Officer Musa then searched the backpack at the scene of the arrest … . * * *

" All warrantless searches presumptively are unreasonable per se,' and, thus, [w]here a warrant has not been obtained, it is the People who have the burden of overcoming' this presumption of unreasonableness" …. " [E]ven a bag within the immediate control or grabbable area' of a suspect at the time of his [or her] arrest may not be subjected to a warrantless search incident to the arrest, unless the circumstances leading to the arrest support a reasonable belief that the suspect may gain possession of a weapon or be able to destroy evidence located in the bag'" … . People v Chy, 2020 NY Slip Op 03244, Second Dept 6-10-20

SUPERIOR COURT INFORMATION, WAIVER OF INDICTMENT.

ABSENCE OF APPROXIMATE TIME OF THE OFFENSE IN THE SUPERIOR COURT INFORMATION (SCI) WAS NOT JURISDICTIONAL AND WAS THEREFORE WAIVED BY THE GUILTY PLEA; ABSENCE OF DA'S SIGNATURE ON THE WAIVER OF INDICTMENT DID NOT INVALIDATE IT; CONSECUTIVE SENTENCES FOR CRIMES ARISING FROM ONE CONTINUOUS INCIDENT WERE NOT ILLEGAL (THIRD DEPT).

The Third Department determined: (1) the failure to include the approximate time of the offense in the Superior Court Information (SCI) was not a jurisdictional defect and the defect was waived by the guilty plea; (2) the district attorney's failure to sign the waiver of indictment did not invalidate it; and (3) consecutive sentences for possession of a stolen car and damage caused to a police car (by the stolen car) were appropriate:

… [W]here, as here, the approximate time of the offenses is nonelemental and the defendant makes no argument that he or she lacked notice of the precise crimes for which he or she waived prosecution by indictment, the omission of such information is a nonjurisdictional defect, and, thus, any challenge with respect thereto is forfeited by a guilty plea … . We also note that, here, the approximate time of the offenses is readily ascertainable from the local court accusatory instruments … . …

… [T]he record contains a copy of defendant's written waiver of indictment, which, although signed by defendant in open court in the presence of counsel, reveals a blank signature line intended for the District Attorney's endorsement. However, the record also reveals that an order approving that waiver was entered by County Court thereafter (see CPL 195.30), and, therein, the court expressly found, among other things, that the waiver was consented to by the District Attorney (see CPL 195.10 [1] [c]). Under these circumstances, we view the absence of the District Attorney's endorsement on the written waiver of indictment to be a technical violation of the statute that in no way infringed upon defendant's right to indictment by a grand jury … . …

… [W]hile the … crimes occurred in the course of one continuous criminal incident, the charges arose from separate, distinct acts … . County Court's imposition of consecutive sentences with respect to those crimes was therefore not illegal. People v Light, 2020 NY Slip Op 03148, Third Dept 6-4-20