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An Organized Compilation of the Summaries of Selected New York State Appellate Decisions Addressing Criminal Evidence Released July1, 2020, through December 31, 2020. The Entries in the Table of Contents Link to the Summaries which Link to the Decisions on the Official New York Courts Website. Click on "Table of Contents" in the Header to Return There.

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710.30 NOTICE.

DEFENDANT WAS ENTITLED TO NOTICE THE PEOPLE WERE GOING TO PRESENT EVIDENCE SHE TYPED IN THE COMBINATION TO A SAFE IN RESPONSE TO A REQUEST FROM A DETECTIVE, NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing defendant's conviction, in a full-fledged opinion by Justice Chambers, determined defendant was entitled to notice that the People were going to introduce evidence that she typed in the combination of a safe in response to a request from a detective:

Here, the Supreme Court erred in determining that the defendant's act of typing in the combination to the safe, which was made in direct response to Detective Theodore's request that the safe "needed to be opened," did not amount to a statement made to a law enforcement officer which, "if involuntarily made would render the evidence thereof suppressible upon motion pursuant to [CPL 710.20(3)]" … .

It is well settled that "any pertinent communication, whether made by statement or conduct," may be suppressed if made in violation of the defendant's right against self-incrimination … . Our view is that the defendant physically entering the combination to open the safe, rather than verbally communicating that combination to the police … , does not make her response any less communicative or testimonial in nature, since the act unquestionably expressed the contents of the defendant's mind … . To the extent our decision in People v Morales (248 AD2d 731) suggests a different conclusion, it should no longer be followed.

Moreover, since the defendant's knowledge of the safe's combination was the only evidence establishing her dominion and control over its contents, the act of unlocking the safe was undoubtedly incriminating … . In addition, the fact that the defendant was still in handcuffs and had not yet been advised of her Miranda rights when Detective Theodore made his request raises questions as to whether her act of unlocking the safe was voluntary … . Thus, this is not a situation where the requirement of a CPL 710.30 notice was obviated because there was no question of the voluntariness of the challenged statement. People v Porter, 2020 NY Slip Op 08122, Second Dept 12-30-20

ALIBI EVIDENCE.

ALTHOUGH DEFENDANT DID NOT GIVE TIMELY NOTICE OF ALIBI EVIDENCE, COUNTY COURT DEPRIVED DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE BY PRECLUDING THE ALIBI EVIDENCE; THE UNPRESERVED ERROR WAS CONSIDERED IN THE INTEREST OF JUSTICE (THIRD DEPT).

The Third Department, reversing the grand larceny conviction in the interest of justice, determined defendant's late request to present alibi evidence should have been granted:

County Court abused its discretion by precluding defendant from introducing testimony from defendant's father at trial. … The court rested its entire conclusion on the failure to comply with the Criminal Procedure Law and that good cause was not shown, despite the fact that defendant was not given an opportunity to respond to the People's informal motion to preclude the alibi testimony. Notably, the court did not make any findings that defendant had an improper purpose in providing the late notice nor did it weigh the possibility of prejudice to the People against the right of defendant to present a defense … . Instead, the court, without hearing from defendant, implemented the most "drastic sanction" without considering any lesser sanctions that may have protected the People from potential prejudice … . In making the appropriate inquiry, alibi testimony would have been important to defendant's defense given that much of the People's argument was based on accomplice testimony and that the People would not have been prejudiced as they were already aware of the father's statement. "Therefore, we find that County Court violated defendant's constitutional right to present a defense" … . People v Lukosavich, 2020 NY Slip Op 07953, Third Dept 12-24-20

APPEALS, LEGAL SUFFICIENCY VERSUS WEIGHT OF THE EVIDENCE.

ALTHOUGH THE EVIDENCE WAS DEEMED LEGALLY SUFFICIENT TO SUPPORT THE CONVICTIONS STEMMING FROM AN ATTACK ON THE COMPLAINANT, THOSE CONVICTIONS WERE DEEMED AGAINST THE WEIGHT OF THE EVIDENCE BECAUSE OF THE WEAKNESS OR ABSENCE OF IDENTIFICATION EVIDENCE (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined: (1) the evidence of a sexual touching of complainant by defendant captured on video in the laundromat

was legally insufficient; (2) the evidence that defendant attacked the complainant after she left the laundromat was legally sufficient; (3) but the convictions stemming from the attack on the complainant after she left the laundromat were against the weight of the evidence because of the weakness or absence of identification evidence. So this is a rare decision where the evidence was explicitly found legally sufficient but the related convictions were found to be against the weight of the evidence:

Viewing the evidence in the light most favorable to the prosecution, here, there was legally sufficient evidence to support the defendant's convictions of sexual abuse in the first degree and criminal obstruction of breathing or blood circulation. The surveillance video footage showed the defendant leaving the laundromat just after the complainant had left. Both the complainant and the defendant were shown walking down Woodhaven Boulevard, and the defendant's clothing matched the complainant's description of the clothes worn by her assailant. Therefore, a rational juror could have concluded that the defendant was the perpetrator of the assault on the complainant that occurred near her home.

However, the evidence was not legally sufficient to support the defendant's conviction of sexual abuse in the third degree. …

… [O]ur viewing of the video recording taken inside the laundromat did not establish that the contact between the defendant and the complainant as he was exiting the laundromat was of a sexual nature. At best, the video was ambiguous as to the nature of the touching depicted. * * *

In the face of the markedly disparate descriptions offered by the detectives and the complainant, and in the absence of an in-court identification, the verdict of the jury finding the defendant guilty of sexual abuse in the first degree and criminal obstruction of breathing or blood circulation was against the weight of the evidence … . People v Kassebaum, 2020 NY Slip Op 05529, Second Dept 10-7-20

APPEALS, SUPPRESSION RULINGS.

SUPREME COURT SHOULD NOT HAVE DENIED SUPPRESSION ON A GROUND NOT RAISED BY THE PARTIES; THE APPELLATE COURT IS POWERLESS TO REVIEW THAT ISSUE; THE APPELLATE COURT IS ALSO POWERLESS TO REVIEW THE SECOND GROUND FOR SUPPRESSION ARGUED BY THE PEOPLE ON APPEAL BECAUSE THAT SECOND ISSUE WAS RESOLVED BELOW IN DEFENDANT'S FAVOR; MATTER SENT BACK TO SUPREME COURT FOR REVIEW OF THE SECOND ISSUE SHOULD THE PEOPLE BE SO ADVISED (SECOND DEPT).

The Second Department determined: (1) the motion court should not have decided the suppression motion on a ground not raised by the parties and the appellate court is powerless to review that issue (search valid pursuant to the automobile exception); (2) the other ground for upholding suppression argued by the People on appeal was decided in defendant's favor and therefore the appellate court cannot review it (search valid as an inventory search). The denial of the suppression motion was reversed and the matter was sent back for review of the inventory search issue should the People be so advised:

The People's current contention that the search of the defendant's SUV was proper under the automobile exception to the warrant requirement because the police had probable cause to believe that the SUV contained a weapon is improperly raised for the first time on appeal … . … [T]he hearing record reveals … the People were relying solely on the theory that the gun was recovered pursuant to a lawful inventory search after the SUV was removed from the location. This Court "cannot uphold conduct of the police, and thereby affirm a trial court's denial of suppression of evidence obtained pursuant to such conduct, on a factual theory not argued by the People before the trial court" … . …

As an alternative ground for upholding the suppression ruling, the People argue, as they did in the Supreme Court, that the recovery of the gun was lawful pursuant to a valid inventory search. However, because the Supreme Court decided the inventory search issue in the defendant's favor, this Court is precluded from reviewing that issue on the defendant's appeal … . … Under the circumstances presented here, where we lack statutory authority to review an issue resolved in the appellant's favor at a suppression hearing, the Court of Appeals has instructed that the required remedy is to "reverse the denial of suppression and remit the case to [the] Supreme Court for further proceedings" with respect to that issue … . People v Tates, 2020 NY Slip Op 07405, Second Dept 12-9-20

APPEALS, WEIGHT OF THE EVIDENCE.

THE SIX 'LURING A CHILD' CONVICTIONS WERE AGAINST THE WEIGHT OF THE EVIDENCE (FOURTH DEPT).

The Fourth Department, reversing the "luring a child" convictions, over a two-justice dissent, determined the convictions were against the weight of the evidence. The court noted that if the evidence of an element of an offense is legally insufficient the conviction of that offense is against the weight of the evidence:

The evidence at trial established that, when defendant was 30 years old, he met 16-year-old BD on an adult dating website. The two thereafter communicated via cell phone, text messages, Facebook messaging, Skype and Snapchat. Shortly thereafter, NS, a friend of BD, initiated contact with defendant through Facebook. NS was also 16 years old at the time. While communicating for weeks with both BD and NS via cell phone, text messages, Facebook, Skype and Snapchat, defendant lied about his age and his military status, among other things. Also, he flattered the girls by saying that they were "really cute" and that he "really liked" them. Both girls lived in Ontario County and were juniors in high school.

Defendant eventually met NS in person and drove her to his house in Monroe County, where they had sexual intercourse. Over the ensuing two or three weeks, defendant drove NS to his house three more times to engage in sexual activity. In the meantime, defendant twice had both sexual intercourse and oral sexual contact with BD, once at her house in Ontario County after picking her up at school and driving her home, and the other time at his house after driving her there. * * *

… [T]o convict defendant of luring a child, the People were required to establish that, on or about the dates alleged in the indictment, defendant lured the victims into his motor vehicle, that the victims were less than 17 years of age, and that defendant engaged in that activity for the purpose of committing a felony sex offense against the victims … . In our view, the People failed to prove that defendant lured the victims into a motor vehicle. …

The fact that defendant drove the victims to his house days and weeks later cannot transform his statements into luring. People v Ringrose, 2020 NY Slip Op 04719, Fourth Dept 8-20-20

ASSAULT, DANGEROUS INSTRUMENT.

THE FINDING THAT DEFENDANT USED THE CONCRETE SIDEWALK AS A DANGEROUS INSTRUMENT WAS NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE; DEFENDANT PUNCHED THE VICTIM WHEN THE VICTIM WAS STANDING, THE VICTIM FELL TO THE SIDEWALK, AND DEFENDANT CONTINUED TO PUNCH THE VICTIM, CAUSING THE VICTIM'S DEATH (FOURTH DEPT).

The Fourth Department, reversing the reckless assault conviction, determined the allegation the defendant used the concrete sidewalk as a dangerous instrument was not supported by legally sufficient evidence:

Defendant appeals from a judgment convicting him, after a nonjury trial, of two counts of assault in the second degree (Penal Law § 120.05 [1] [intentional assault], [4] [reckless assault]), arising from an altercation during which he punched the victim in the face approximately three times, causing the victim to fall and hit his head on the concrete sidewalk, then continued to punch the victim while he was lying on the ground unconscious. The victim died as a result of his injuries. * * *

Although a sidewalk or concrete surface can be "used" as a dangerous instrument … , the testimony of the eyewitnesses establishes that the blows to the victim, which were delivered using a cross-wise motion, were not executed in such a way as to establish that defendant consciously disregarded a substantial and unjustifiable risk that the victim's head would have contact with the concrete … . Under the circumstances presented, there is no "valid line of reasoning and permissible inferences from which a rational [person]" could conclude that defendant recklessly used the sidewalk as a dangerous instrument … . People v Desius, 2020 NY Slip Op 06611, Fourth Dept 11-13-20

ASSAULT, PHYSICAL INJURY.

THE EVIDENCE OF PHYSICAL INJURY WAS LEGALLY INSUFFICIENT; ASSAULT SECOND CONVICTION VACATED; UNPRESERVED ISSUE CONSIDERED ON APPEAL IN THE INTEREST OF JUSTICE (SECOND DEPT).

The Second Department, vacating the assault second conviction, considering the issue in the interest of justice, determined the evidence of physical injury was legally insufficient:

Viewing the evidence in the light most favorable to the prosecution … , it was legally insufficient to establish, beyond a reasonable doubt, that the child complainant sustained a "physical injury" within the meaning of Penal Law § 10.00(9). Physical injury is defined as "impairment of physical condition or substantial pain"… . The several witnesses described only a minor injury, stated variously that they saw "a redness" on the child's cheek, or a slight swelling under his eye and cheek, or a bruise to the right cheek, which was treated with a cold pack. Nor did the record support a finding that the child complainant experienced substantial pain because he experienced only tenderness for one to two hours after the incident. Accordingly, there was insufficient evidence that the child complainant suffered a "physical injury" within the meaning of Penal Law § 10.00(9) … . People v Bernazard, 2020 NY Slip Op 07083, Second Dept 11-25-20

ASSAULT, PHYSICAL INJURY.

THE EVIDENCE OF PHYSICAL INJURY WAS LEGALLY INSUFFICIENT, ASSAULT THIRD CONVICTION REVERSED (SECOND DEPT).

The Second Department, reversing defendant's assault third conviction, determined the evidence of "physical injury" was legally insufficient:

Physical injury is defined as "impairment of physical condition or substantial pain" (Penal Law § 10.00[9]). Although the question of whether physical injury has been established is generally for the jury to decide, "there is an objective level . . . below which the question is one of law" … . Here, the complainant testified that the defendant pushed him to the ground, and slapped him several times in the face. The complainant testified that he cried because he "was in a lot of pain." There was no evidence, however, corroborating the complainant's subjective description of the degree of pain he experienced … . There was no testimony about the duration of the pain, whether the shove or slaps left any visible bruising, swelling, or redness, or whether the defendant sought medical treatment or missed any time from work or school … . Under these circumstances, there was legally insufficient evidence from which a jury could infer that the complainant suffered substantial pain as a result of being pushed to the ground and slapped several times in the face … . People v Jhagroo, 2020 NY Slip Op 04580, Second Dept 8-19-20

ASSAULT, ROBBERY, PHYSICAL INJURY.

ROBBERY AND ASSAULT SECOND CONVICTIONS WERE AGAINST THE WEIGHT OF THE EVIDENCE BECAUSE OF THE WEAKNESS OF THE EVIDENCE OF PHYSICAL INJURY (SECOND DEPT).

The Second Department, reducing defendant's convictions, determined the robbery and assault second degree convictions were against the weight of the evidence because of the weakness of the evidence of physical injury. The convictions were reduced to robbery and assault third degree:

"Physical injury" is defined as "impairment of physical condition or substantial pain" (Penal Law § 10.00[9]). …

Here, the victim gave testimony about an incident in which the defendant attacked her and forcibly stole property from her. During the incident, the defendant pushed the victim down onto a bed, bound her wrists with a coaxial cable, placed the cable around her neck, and placed her in a choke hold with his arm across her throat. After the incident, the victim had an indentation on her wrist where the cord had been tied, her wrist was sore and had redness, and she had a red mark on her neck. She was "pretty numb" at the time and was not experiencing pain. She declined to go to the hospital. A few days later, she had difficulty swallowing and her throat was "kind of sore" for "[j]ust a couple of days." When she testified before the grand jury, approximately one week after the incident, she was asked if she had any pain or discomfort, and she answered, "just the muscle in my arm." Under these particular facts, the weight of the evidence does not support a finding that the victim suffered impairment of physical condition or substantial pain. Accordingly, we reduce the conviction of robbery in the second degree to robbery in the third degree … . People v Tactikos, 2020 NY Slip Op 05535, Second Dept 10-7-20

ASSAULT, SERIOUS DISFIGUREMENT.

ALTHOUGH THE VICTIM'S FACIAL SCARS WERE SHOWN TO THE JURY NO DESCRIPTION OF THE SCARS APPEARS IN THE TRIAL RECORD AND NO PHOTOGRAPH OF THE SCARS WAS INTRODUCED; THEREFORE THE SERIOUS DISFIGUREMENT ELEMENT OF ASSAULT FIRST WAS NOT DEMONSTRATED AND THE ASSAULT FIRST CONVICTION WAS AGAINST THE WEIGHT OF THE EVIDENCE; CONVICTION REDUCED TO ATTEMPTED ASSAULT FIRST (THIRD DEPT).

The Third Department, finding the assault first conviction to be against the weight of the evidence and reducing it to attempted assault first, determined the record of the evidence presented at trial did not support the serious disfigurement element in this knife attack case:

The testimonial, photographic and documentary evidence demonstrated that the victim sustained a laceration to his right cheek that was approximately four centimeters long, as well as a similarly sized laceration transversing the tip of his nose to his right nostril. Both lacerations were sutured by a plastic surgeon. Although the evidence clearly demonstrated the locations of the lacerations and their size prior to and immediately after suturing, the record is imprecise as to the extent and appearance of any resulting facial scars. The People did not introduce a photograph depicting the victim's nose and right cheek at the time of trial or any time after the sutures had been removed and the lacerations healed … . Further, although the physician who treated the victim testified that the victim was expected to have facial scars and the victim did in fact display facial scars to the jury, the People failed to make a contemporaneous record of what the jury observed, so as to demonstrate the extent and appearance of those scars … . Moreover, despite their prominent locations, there is no indication that the relatively small facial lacerations produced jagged, uneven or "unusually disturbing" scars … . In the absence of a photograph depicting the victim's facial scars or an on-the-record description of the victim's scars at the time of trial, we cannot conclude that the record evidence supports a finding of serious disfigurement … . People v Harris, 2020 NY Slip Op 04431, Third Dept 8-6-20

ASSAULT, SERIOUS PHYSICAL INJURY.

EVIDENCE OF SERIOUS PHYSICAL INJURY INSUFFICIENT, ASSAULT SECOND CONVICTION VACATED (SECOND DEPT).

The Second Department, vacating the assault second conviction, determined the evidence of "serious physical injury" was insufficient:

The Legislature has defined the term "[s]erious physical injury" to mean "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ" … .

Here … the evidence at the trial failed to demonstrate that the complainant suffered the protracted impairment of the function of a bodily organ as a result of the attack charged in count 2 of the indictment. This prong of the statute, by the plain language of the word "protracted," requires evidence that the effects of the physical injury were experienced over an "extended" period of time … . The People fail to cite to any evidence in this case, medical or otherwise, to show that the injury to the complainant resulted in any "protracted impairment" in the functioning of any of the complainant's organs … . People v Clark, 2020 NY Slip Op 07911, Second Dept 12-23-20

ATTEMPT, STING OPERATION.

DEFENDANT WAS THE TARGET OF A STING WHERE THE INVESTIGATOR POSED AS THE STEPFATHER OF A 14-YEAR-OLD GIRL WITH WHOM THE DEFENDANT WAS INVITED TO HAVE SEX; WHEN THE INVESTIGATOR SUMMONED THE STEPDAUGHTER TO MEET THE DEFENDANT, HE GOT UP AND WALKED AWAY; THE ATTEMPTED RAPE, CRIMINAL SEXUAL ACT AND ENDANGERING THE WELFARE OF A CHILD CONVICTIONS WERE NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE (THIRD DEPT).

The Third Department, reversing defendant's convictions and dismissing the indictment, determined defendant did not come close enough to committing the sexual offenses suggested by the undercover investigator to meet the criteria for attempted rape,

attempted criminal sexual act, and attempted endangering the welfare of a child. The undercover investigator suggested sex with his fictional 14-year-old stepdaughter. When the investigator indicated he was summoning the stepdaughter to meet the defendant, the defendant got up and walked away:

… [W]e cannot conclude that defendant came dangerously near engaging in sexual intercourse or oral sexual contact of any iteration with a minor under the age of 15 or any other act that would likely be injurious to the physical, mental or moral welfare of a child … . Although defendant engaged in conversations contemplating sexual contact with a 14-year-old and drove to a location where he was told a 14-year-old would be, under the circumstances of this case, his conduct did not pass the stage of mere preparation and bring him dangerously close to committing the attempted crimes of rape in the second degree, a criminal sexual act in the second degree or an act endangering the welfare of a child … . Moreover, intent to engage in sexual intercourse and the criminal sexual acts charged in the indictment cannot be inferred from the evidence, particularly given defendant's passive and noncommittal statements when discussing potential contact with the 14-year-old stepdaughter, as well as the fact that defendant did not bring a condom or any other sexual item to the campsite … . Accordingly, inasmuch as the verdict is not supported by legally sufficient evidence, we reverse the judgment of conviction and dismiss the indictment … . People v Hiedeman, 2020 NY Slip Op 07954, Third Dept 12-24-20

ATTEMPT.

CONVERSATIONS ABOUT AND PLANNING OF THE MURDER OF DEFENDANT'S WIFE AND MOTHER-IN-LAW DID NOT CONSTITUTE LEGALLY SUFFICIENT EVIDENCE OF ATTEMPTED MURDER (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Feinman, over a three-judge dissent, determined the evidence of attempted first and second degree murder was legally insufficient. Defendant's conversations and planning with a feigned confederate did not constitute an "actual step" toward killing his wife and mother-in-law:

… [T]he only conduct to be considered is defendant's own acts because his purported accomplice [MS], who was working with the authorities, did not take any steps toward

furthering the planned murders other than listening to defendant's scheme. MS did not, for example, acquire the instrumentality for the crimes (such as drugs or poison), verify the existence of the keys and obtain them from the stated location, or stake out the address supplied by defendant to make sure that the wife and mother-in-law were present at the location specified. Nevertheless, the People, mostly by parsing defendant's communications with MS, argue that defendant engaged in sufficient conduct by: (1) promising to provide a house to MS; (2) giving MS the purported address of the targets; (3) instructing MS when to carry out the murders; (4) providing MS with a hand-drawn map of the location of the third party's house, where MS was to drop off the children after the murders; (5) handing MS a detailed plan of how to carry out the murders; (6) telling MS the location of the keys to the house; (7) calling MS's girlfriend to arrange for MS to visit the jail; (8) writing a fake suicide note; (9) showing MS the suicide note; and (10) creating a prearranged code to discuss the postmortem over the recorded jail phone.

Not only are these acts "preparatory in a dictionary sense" … , they are also limited to the planning stages of committing the offense: they specify the who, what, where, when, and how of defendant's murder plans. Notably absent are any acts that can be deemed to bring the crimes dangerously close to completion. People v Lendof-Gonzalez, 2020 NY Slip Op 06940, CtApp 11-24-20

AUTHENTICATION, SOCIAL MEDIA.

ALTHOUGH HARMLESS, IT WAS ERROR TO ADMIT THE CONTENT OF SOCIAL MEDIA ACCOUNTS WITHOUT AUTHENTICATING THE ACCOUNTS, PHOTOGRAPHS AND STATEMENTS (SECOND DEPT).

The Second Department determined it was (harmless) error to admit in evidence the content of social media accounts which was not authenticated:

We disagree … with the Supreme Court's determination admitting into evidence certain content from various social media accounts … . The People failed to present sufficient evidence that the subject social media accounts belonged to the defendant, that the photographs on the accounts were accurate and authentic, or that the statements found on one of the accounts were made by the defendant … . People v Upson, 2020 NY Slip Op 04876, Second Dept 9-2-2020

BEST EVIDENCE RULE, DESTROYED VIDEO.

AN EXCEPTION TO THE BEST EVIDENCE RULE APPLIED, ALLOWING TESTIMONY DESCRIBING THE CONTENTS OF DESTROYED VIDEO SURVEILLANCE (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice Bannister, determined an exception to the best evidence rule applied and testimony about the contents of a destroyed video surveillance was properly admitted in this grand larceny case:

Defendant appeals from a judgment … arising from the theft of wireless speakers valued in excess of $3,000 from a Target store … . Prior to trial, the People moved in limine for permission to introduce testimony from the store's asset protection team leader (APT leader) regarding the contents of destroyed video surveillance footage that had depicted the incident. * * *

The best evidence rule "simply requires the production of an original writing where its contents are in dispute and sought to be proven" … "The rule protects against fraud, perjury, and inaccurate recollection by allowing the [factfinder] to judge a document by its own literal terms" … . "Under a long-recognized exception to the best evidence rule, secondary evidence of the contents of an unproduced original may be admitted upon threshold factual findings by the trial court that the proponent of the substitute has sufficiently explained the unavailability of the primary evidence . . . and has not procured its loss or destruction in bad faith" … . The proponent of the secondary evidence "has the heavy burden of establishing, preliminarily to the court's satisfaction, that it is a reliable and accurate portrayal of the original. Thus, as a threshold matter, the trial court must be satisfied that the proffered evidence is authentic and correctly reflects the contents of the original before ruling on its admissibility" … . * * *

… [T]he People met their burden of establishing that the APT leader's testimony regarding the unpreserved footage was a reliable and accurate portrayal of the contents of that footage … . People v Jackson, 2020 NY Slip Op 07744, Fourth Dept 12-23-20

BRUTON, CO-DEFENDANT'S REDACTED STATEMENT.

CO-DEFENDANT'S REDACTED STATEMENT SHOULD NOT HAVE BEEN ALLOWED IN EVIDENCE, NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined the co-defendant's redacted admission should not have been admitted in evidence:

… [W]e agree with the defendant that, under the instant circumstances, the Supreme Court's admission of codefendant Jason Villanueva's redacted statement to the police violated the rule articulated in Bruton v United States (391 US 123), because the subject redaction would have caused the jurors to "realize that the confession refers specifically to the defendant" or to one of the other nonconfessing codefendants … . In addition, the error was not harmless. "[I]t cannot be said that 'there is no reasonable possibility that the erroneously admitted [statement] contributed to the conviction'" … , given that the statement was inconsistent with the defendant's justification defense, and the court failed to give the jurors a proper limiting instruction to only consider the statement against Villanueva. People v Casares, 2020 NY Slip Op 05520, Second Dept 10-7-20

BURDEN OF GOING FORWARD, SUPPRESSION HEARINGS.

DEFENDANT WAS ARRESTED BY OFFICERS WHO BELIEVED HE WAS DEFENDANT'S BROTHER FOR WHOM THERE WERE OUTSTANDING ARREST WARRANTS; THE PEOPLE FAILED TO MEET THEIR BURDEN OF GOING FORWARD AT THE SUPPRESSION HEARING BECAUSE THEY FAILED TO PROVE THE EXISTENCE AND VALIDITY OF THE ARREST WARRANTS (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction and dismissing the indictment, over a two-justice dissent, determined defendant's motion to suppress the weapon seized from after he fled the police should have been granted. At the suppression hearing the officers testified they thought defendant was defendant's brother and approached defendant because they aware of outstanding warrants for the brother's arrest. To meet their burden of going forward at the suppression hearing, the People were required to prove the existence and validity of the arrest warrants, but no such proof was presented:

… ” [T]he arrest of a person who is mistakenly thought to be someone else is valid if the arresting officer (a) has probable cause to arrest the person sought, and (b) reasonably believed the person arrested was the person sought’ ” … . The ” reasonableness of the arresting officers’ conduct must be determined by considering the totality of the circumstances surrounding the arrest’ ” … . Thus, to establish a lawful arrest of defendant, the People were required to establish the existence of a validly issued arrest warrant for defendant’s brother or probable cause to arrest him … and, here, the People concede that the police arrested defendant based only upon the arrest warrants issued for defendant’s brother.

Contrary to the People’s position and the dissent’s assertion, we conclude that defendant challenged the existence and validity of the arrest warrants for his brother by questioning the police witnesses at the suppression hearing concerning the status of the arrest warrants and whether they were still valid … . Notably, the court acknowledged and “accept[ed] that the [d]efendant [was] in fact contesting the validity of [the] warrants.” Once defendant challenged the existence and validity of the arrest warrants, the People were ” required to make a further evidentiary showing by producing the . . . warrant[s]’ ” … , or “reliable evidence that the warrant[s were] active and valid” … . Here, the People failed to meet their burden inasmuch as they failed to produce the arrest warrants themselves or other reliable evidence that the warrants were active and valid … . People v Dortch, 2020 NY Slip Op 04711, Fourth Dept 8-20-20

COMPETENCE.

UNDER THE CIRCUMSTANCES, SUPREME COURT SHOULD HAVE GRANTED THE DEFENSE AND PROSECUTION’S JOINT REQUEST TO HAVE THE DEFENDANT’S COMPETENCE TO STAND TRIAL EVALUATED; ONCE A DEFENDANT IS DEEMED COMPETENT TO STAND TRIAL, THE DECISION WHETHER TO PRESENT AN INSANITY DEFENSE IS THE DEFENDANT’S, NOT THE COURT’S, TO MAKE (SECOND DEPT).

The Second Department, reversing the convictions, determined: (1) the trial judge should not have rejected the request by both defense counsel and the prosecutor to have the defendant’s mental health and fitness for trial evaluated; and (2) once a defendant is found competent to stand trial the decision whether to present an insanity defense is the

defendant's alone. Here defense counsel was ordered by the judge to present an insanity defense, over defendant's objection:

… [W]hen confronted with evidence that the defendant was not taking his required medication and was not able to communicate rationally with his attorney, the Supreme Court should have granted the joint applications of the People and the defense to have the defendant examined pursuant to CPL 730.30(1) to determine his fitness to proceed … . …

… [A] defendant found competent to stand trial has the ultimate authority, even over counsel's objection, to reject the use of a psychiatric defense … . Thus, once the Supreme Court determined the defendant to be competent to stand trial, it should not have interfered with that authority by "order[ing]" defense counsel, over the defendant's objection, to present an insanity defense. People v Bellucci, 2020 NY Slip Op 07215, Second Dept 12-2-20

CONSTRUCTIVE POSSESSION.

INSUFFICIENT EVIDENCE DEFENDANT CONSTRUCTIVELY POSSESSED WEAPONS FOUND IN A LOCKED ROOM BELONGING TO DEFENDANT'S DECEASED BROTHER; WEAPONS POSSESSION CONVICTIONS WERE AGAINST THE WEIGHT OF THE EVIDENCE (SECOND DEPT).

The Second Department, reversing the possession-of-a-weapon convictions, determined the evidence of constructive possession was insufficient and the convictions were therefore against the weight of the evidence:

The evidence demonstrated that the defendant resided in the third bedroom of the searched premises, and that the defendant's brother had resided in the first bedroom up until his death in 2014 or 2015. There was also testimony that, after the defendant's brother passed away, the door to the first bedroom was locked and remained locked. There was no evidence that the defendant frequented the first bedroom, had a key to that room or kept his belongings in that room. Although the police witnesses testified that they could not recall any damage to the door to the first bedroom, the defense introduced a photograph depicting damage to the door and frame after the search.

Moreover, although the police officers recovered a magazine containing seven 9 millimeter cartridges from the defendant's bedroom, the evidence demonstrated that it was not the correct magazine for the pistol recovered from the first bedroom; it had to be manipulated in order to function properly with the pistol. Apart from the magazine, there was no other evidence connecting the defendant to the first bedroom or the weapons found therein. People v Branch, 2020 NY Slip Op 05220, Second Dept 9-30-20

CONTEMPT.

ALTHOUGH THE DEFENDANT VIOLATED THE ORDER OF PROTECTION BY GOING INSIDE THE PROTECTED PERSON'S HOUSE, THERE WAS INSUFFICIENT EVIDENCE OF ANY CONTACT WITH THE PROTECTED PERSON; CRIMINAL CONTEMPT FIRST CONVICTION REDUCED TO CRIMINAL CONTEMPT SECOND (FOURTH DEPT).

The Fourth Department, reducing the criminal contempt first conviction to criminal contempt second, determined the evidence was legally insufficient. The defendant violated the order of protection by going inside the protected person's house but there was insufficient evidence of any contact between the defendant and the protected person:

… [T]he People adduced legally insufficient evidence that defendant intentionally violated "that part" of the protective order that required him to "stay away from the [protected] person," as required for a conviction for criminal contempt in the first degree under Penal Law § 215.51 (c) … . Rather, the evidence proves only that defendant committed the lesser included offense of criminal contempt in the second degree under section 215.50 (3) by going to the protected person's house, and we therefore modify the judgment accordingly … . People v Crittenden, 2020 NY Slip Op 06901, Fourth Dept 11-20-20

CONTEMPT.

THE UNIQUE PROOF REQUIREMENTS FOR CRIMINAL CONTEMPT FIRST DEGREE FOR VIOLATION OF AN ORDER OF PROTECTION WERE NOT MET; THE FACT THAT DEFENDANT STIPULATED TO THE ACCURACY OF AN INACCURATE SPECIAL INFORMATION ABOUT A PRIOR CRIMINAL CONTEMPT CONVICTION DOES NOT REQUIRE A DIFFERENT RESULT (FOURTH DEPT).

The Fourth Department reduced the criminal contempt first degree convictions to criminal contempt second degree for violation of an order of protection, explaining the proof requirements for criminal contempt first were not met and noting that defendant's stipulation to an inaccurate special information re a predicate offense does not require a different result:

The People were required to establish as an element of the offense of criminal contempt in the first degree that defendant had been previously convicted, within the preceding five years, of the crime of aggravated criminal contempt or criminal contempt in the first or second degree "for violating an order of protection" that "require[d] the . . . defendant to stay away from the person or persons on whose behalf the order was issued" (Penal Law § 215.51 [c]). Thus, this is a situation where the enhancing element of an offense is not merely the existence of a prior conviction, but also the existence of additional facts related to that prior conviction … . The special information filed by the People to assert the existence of the predicate conviction (see CPL 200.60 [1], [2]) alleges only that defendant previously had been convicted of the crime of criminal contempt in the second degree, without specifying whether that previous conviction involved the violation of an order of protection or of any stay-away provision therein … .

The fact that defendant stipulated to the accuracy of the imprecise special information did not relieve the People of their burden of establishing the predicate conviction and related facts as part of their case-in-chief … . People v Barrett, 2020 NY Slip Op 06899, Fourth Dept 11-20-20

CRIMINAL NEGLIGENCE.

A WHEEL CAME OFF DEFENDANT'S TRUCK CAUSING A FREAK ACCIDENT INVOLVING TWO OTHER VEHICLES RESULTING IN THE DEATH OF A DRIVER; THE CRIMINALLY NEGLIGENT HOMICIDE CONVICTION WAS AGAINST THE WEIGHT OF THE EVIDENCE; AT MOST, DEFENDANT FAILED TO PERCEIVE THE RISK CREATED BY A NOISY WHEEL (FOURTH DEPT).

The Fourth Department, reversing defendant's criminally negligent homicide conviction, determined the evidence was against the weight of the evidence. Apparently, a wheel came of defendant's truck, another truck hit the wheel and overturned on a car, killing the driver:

The testimony at trial established that defendant came into possession of the pickup truck several weeks before the accident, but that its last valid inspection was three years before the accident. Although the People established that the pickup truck had a forged inspection sticker, there was no evidence that defendant knew it was forged. Several witnesses testified that, in the three days preceding the accident, the pickup truck was making loud grinding noises and that, either the day before the accident or the day of the accident, defendant asked a person with mechanical experience what that person thought might be the issue. That person opined that the noise was likely being caused by a wheel or the brakes.

An inspection of the driver's side wheel and truck after the accident established some significant problems with the wheel, and witnesses testified that the existence of problems would have been noticeable and would have created issues with steering. The testimony also established, however, that the severity of the problems could not have been known to the operator unless the wheel was removed from the truck. * * *

At most, the evidence established that defendant failed to perceive a risk, which does establish criminal negligence beyond a reasonable doubt … . People v Pinnock, 2020 NY Slip Op 06884, Fourth Dept 11-20-20

CRIMINAL NEGLIGENCE.

THE MANSLAUGHTER AND CRIMINALLY NEGLIGENT HOMICIDE CONVICTIONS STEMMING FROM A FATAL TRAFFIC ACCIDENT WERE NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE (SECOND DEPT).

The Second Department, reversing the manslaughter and criminally negligence homicide convictions stemming from a traffic accident, determined the evidence was legally insufficient. There was evidence provided by another driver (Duke) that defendant was driving above the speed limit before the collision (which Duke did not witness), but nothing else. Two passengers and an unborn child died in the collision:

… [T]he evidence was legally insufficient to establish "the kind of seriously condemnatory behavior" in addition to speeding that is necessary to "transform 'speeding' into 'dangerous speeding'" … . While Duke testified that the defendant's vehicle "swerv[ed] around" her into the left lane to pass, she did not testify that the defendant's vehicle came close to hitting her vehicle, that she had to engage in any evasive measures to avoid an accident, that there were any vehicles in the left lane when the defendant moved into it, or that the defendant swerved back in front of her after passing her … . Rather, Duke testified that after the defendant moved into the left lane, she waited for him to pass before getting into the left lane behind him. Moreover, Duke testified that the defendant was driving at a slower rate while moving into the left lane to pass her before speeding up after he moved into the left lane, and that the defendant obeyed a red traffic signal, pausing and not again accelerating until the traffic signal "turned green." Duke also stated that there were "no more lights" between that traffic signal and the location of the accident, and thus, there is no indication that the defendant disregarded any red traffic signals. Further, the People presented no evidence that the defendant proceeded in disregard of a warning to slow down or of a dangerous driving condition … . Evidence was presented that Kent Avenue, which is partly situated in an industrial area, is not a busy road and generally has "very few cars" on it around the time when the accident occurred. Thus, the People failed to establish that the defendant engaged in "some additional affirmative act aside from driving faster than the posted speed limit," as required to support a finding of recklessness or criminal negligence … . People v Acevedo, 2020 NY Slip Op 05909, Second Dept 10-21-20

DARDEN HEARINGS.

PROOF AT DARDEN HEARING DID NOT DEMONSTRATE THAT THE PURPORTED CONFIDENTIAL INFORMANT EXISTED AND PROVIDED SUFFICIENT INFORMATION TO SUPPORT THE ISSUANCE OF A SEARCH WARRANT (SECOND DEPT).

The Second Department, reversing Supreme Court, over a two-justice dissent, determined the Darden hearing did not support the finding that the purported confidential informant existed and provided sufficient information for the issuance of the search warrant:

The Darden rule is necessary to insure "that the confidential informant both exists and gave the police information sufficient to establish probable cause, while protecting the informant's identity" … . The rule, which "gives clear guidance to lower courts and guarantees that the protections of the Fourth Amendment have not been circumvented" … , "is necessary to properly test the officer's credibility" … , and is "designed to protect against the contingency, of legitimate concern to a defendant, that the informer might have been wholly imaginary and the communication from him [or her] entirely fabricated" … . …

Here, the Supreme Court's credibility determinations are not supported by the record. As will be shown, there were substantial material discrepancies between the detective's affidavit in support of the search warrant, and the testimonies of the alleged CI and the detective at the Darden hearing pertaining to (1) the CI's track record of reliability, (2) the prior relationship between the detective and the CI, and (3) the facts and circumstances of the alleged controlled buy or buys at the subject apartment. Consequently, we find that the People failed to meet their burden at the Darden hearing. People v Nettles, 2020 NY Slip Op 04776, Second Dept 8-26-20

DEFENSE WITNESSES, PRECLUSION.

DEFENDANT WAS NOT ACTING IN BAD FAITH IN SEEKING THE TESTIMONY OF CERTAIN WITNESSES; THE TESTIMONY SHOULD NOT HAVE BEEN PRECLUDED; CONVICTIONS REVERSED (SECOND DEPT).

The Second Department, reversing defendant's scheme to defraud conviction, determined defendant should not have been precluded from calling witnesses in good faith:

"Pursuant to Penal Law § 155.15(1) [i]n any prosecution for larceny committed by trespassory taking or embezzlement, it is an affirmative defense that the property was appropriated under a claim of right made in good faith'" … . In this case, the defendant claimed that the money from the grant from OCFS [Office of Children & Family Service] was appropriated mistakenly but in good faith as reimbursement for expenses he personally paid for events occurring in 2008 and 2009, after the grant was awarded but in a time period not covered by the grant. The defendant intended to call as witnesses, a videographer who would attest to the fact that he "got paid" for services at a 2009 event, and others who would testify as to other expenses at that event. …

The record does not establish that the defendant was acting in bad faith in seeking to present the testimony of these witnesses at the trial. The proposed testimony did not deal with a collateral issue … , but, rather, went to the heart of the defendant's claim of right defense. Thus, it was error for the Supreme Court to have prospectively precluded the defendant's witnesses from testifying, and, under the facts of this case, that error cannot be deemed harmless. People v Wills, 2020 NY Slip Op 04976, Second Dept 9-16-20

DISCLOSURE.

SOME RESTRICTIONS ON DISCLOSURE SHOULD HAVE BEEN IMPOSED BY COUNTY COURT (SECOND DEPT).

The Second Department, reversing County Court, determined some restrictions on making discovery available to the defense should have been imposed:

Applying the factors set forth in CPL 245.70(4), including the concerns for witness safety and protection, I conclude that the County Court improvidently exercised its discretion in denying the People's request in its entirety. Under the particular facts and circumstances of this case … the County Court should have directed disclosure of the audio and video recordings of the narcotics sales be made available forthwith to defense counsel only, to be viewed at the prosecutor's office. Additionally, the County Court should have delayed disclosure of the names, addresses, and contact information of the confidential informant and undercover personnel until the commencement of the trial. People v Zayas, 2020 NY Slip Op 05236, Second Dept 9-30-20

DISCLOSURE.

SUPREME COURT SHOULD NOT HAVE REQUIRED DEFENSE COUNSEL TO SEEK COURT APPROVAL BEFORE ALLOWING INVESTIGATORS OR OTHER EMPLOYEES ACCESS TO RECORDINGS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined Supreme Court should not have required that defense counsel seek court approval before allowing investigators or other employees access to recordings:

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

Applying the factors set forth in CPL 245.70(4), including concerns for witness safety and protection, I conclude that the Supreme Court improvidently exercised its discretion in requiring defense counsel to seek approval of the court before exhibiting the subject recordings to investigators or others employed by counsel. Under the particular circumstances of this case, the court should have permitted defense counsel to disclose the recordings to those employed by counsel or appointed to assist in the defense, without

prior approval from the Supreme Court … . People v Clarke, 2020 NY Slip Op 05221, Second Dept 9-30-20

DNA, WARRANT APPLICATION, AUTHENTICATION OF VIDEO.

DEFENSE COUNSEL WAS GIVEN NOTICE AND THE OPPORTUNITY TO BE HEARD BEFORE THE ISSUANCE OF THE WARRANT TO TAKE A DNA SAMPLE FROM THE DEFENDANT; DEFENSE COUNSEL WAS NOT ENTITLED TO DISCOVERY OF THE WARRANT APPLICATION PRIOR TO THE ISSUANCE OF THE WARRANT TO ASSESS PROBABLE CAUSE; A VIDEO DEPICTING DEFENDANT WAS PROPERLY AUTHENTICATED; APPELLATE DIVISION REVERSED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a concurrence and a two-judge dissent, reversing the Appellate Division, determined defendant was not entitled to review the application for the warrant to collect DNA evidence from the defendant's person before the warrant was issued. Defense counsel was given notice and an opportunity to be heard on the application and did not contest the reasonableness of the bodily intrusion at that time. The Appellate Division held (1) the defense was entitled to review the search warrant application before the warrant was issued (to assess probable cause) and (2) a video depicting the defendant was not properly authenticated. The Court of Appeals reversed on both issues:

The [Appellate Division] held that Supreme Court erred in precluding defense counsel from reviewing the search warrant application and in denying counsel the opportunity to be heard on the issue of probable cause. The Court rejected the People's argument that Abe A. [56 NY2d 288] requires notice only for the first level of intrusion—seizure of the person—and held that the due process requirement of notice and an opportunity to be heard is likewise required for the subsequent search and seizure of corporeal evidence. The Court also held that the People failed to adequately authenticate the YouTube video … . * * *

It is evident that Abe A.'s requirement of notice and an opportunity to be heard in the pre-execution stage of a warrant authorizing the seizure of evidence by bodily intrusion was satisfied in this case. Defense counsel, having received notice of the hearing on the warrant, was given an opportunity to be heard on the application, other than on the issue of probable cause. Counsel failed to direct any argument to the nature of the intrusion,

the value of comparative DNA analysis evidence or the sufficiency of the safeguards preventing unwarranted disclosure of the results of his DNA testing, either at the hearing or in his motion to suppress. … [T]he method and procedures employed in taking the saliva undoubtedly respected relevant Fourth Amendment standards of reasonableness, and defendant's claim that the failure to provide him discovery of the extant probable cause and an adversarial hearing nonetheless warrants the invocation of the exclusionary rule is without constitutional basis.

[With respect to the video,] …defendant did not dispute that he was the individual who appeared in the video reciting certain words [and] the video contains distinctive identifying characteristics … . … [T]estimony … provided evidence pertinent to the timing of the making of the video—including defendant's admission of his future intent to make the video the next morning … —and the video was uploaded to YouTube close in time to the homicide. … [T]he video was introduced for its relevance to defendant's motive related to territorial gang activity—which is not an element of the offense—rather than specifically offered for its truth. People v Goldman, 2020 NY Slip Op 05977, Ct App 10-22-20

DNA.

DNA FOUND ON THE MURDER VICTIM'S BODY WAS LINKED TO THE DEFENDANT WHO WAS ARRESTED TWO YEARS AFTER THE MURDER; THERE WAS NO OTHER EVIDENCE CONNECTING DEFENDANT TO THE VICTIM OR TO THE AREA WHERE THE VICTIM WAS FOUND; THE SECOND DEPARTMENT, OVER AN EXTENSIVE DISSENT, FOUND THE EVIDENCE LEGALLY INSUFFICIENT TO SUPPORT THE CONVICTION (SECOND DEPT).

The Second Department, reversing defendant's murder conviction, over an extensive dissent, determined the evidence was legally insufficient. Defendant was arrested two years after the victim's death based upon DNA found on the victim. No evidence placing defendant near the scene of the crime was presented:

On the morning of October 3, 2013, the 23-year-old victim, who had a history of drug use, was found dead in a wooded area known as Froehlich Farms, in Suffolk County. The victim's injuries, as well as the condition in which her body was found, indicated that she had been sexually assaulted and killed by strangulation within 12 hours to a day before her body was found. More than two years after her death, the defendant was charged

with murder in the second degree after his DNA profile was matched to a single source partial profile generated from various swab samples taken as part of a sexual assault kit performed on the victim.

At the trial, the People presented no evidence placing the defendant at or near the scene of the crime, or linking him in any way to the victim, during the critical time frame in which the murder was believed to have occurred. Nor did the People offer any evidence showing that the sexual contact between the defendant and the victim occurred at or near the time of the murder. At most, the DNA evidence established, beyond a reasonable doubt, that the defendant had sexual contact with the victim at some unspecified time and place. People v Romualdo, 2020 NY Slip Op 06559, Second Dept 11-12-20

DNA.

THE DEFENDANT'S DNA ON THE WEAPON AND DEFENDANT'S PRESENCE AS A PASSENGER IN THE CAR WHERE THE WEAPON WAS FOUND WERE NOT SUFFICIENT TO PROVE DEFENDANT POSSESSED THE WEAPON AT THE TIME ALLEGED IN THE INDICTMENT; DEFENDANT'S CONVICTION REVERSED BASED ON A WEIGHT OF THE EVIDENCE ANALYSIS (FOURTH DEPT).

The Fourth Department, reversing defendant's possession of a weapon conviction, applying a weight of the evidence analysis, determined the defendant's DNA on the weapon and his presence as a passenger in the car where the weapon was found was not enough:

It is undisputed that the driver owned the vehicle and that the duffle bag belonged to him as well. The People relied on evidence that defendant's DNA profile matched that of the major contributor to DNA found on the handgun and that the driver was excluded as a contributor thereto. Although " an inference could be made [from that evidence] that defendant had physically possessed the gun at some point in time' " … , that evidence alone … does not establish that defendant actually possessed the handgun on the date and at the time alleged in the indictment … . …

Defendant was not the owner or operator of the vehicle, nor did the duffle bag in the locked trunk belong to him, and there was no evidence that defendant possessed or had access to the keys for the vehicle or that he had any access to or control over the trunk

and duffle bag … . Contrary to the People's contention, defendant's statement to the police did not constitute an admission that he had possessed the handgun … or that he knew about its presence in the duffle bag and, in any event, mere knowledge of the presence of the handgun would not establish constructive possession … . People v Hunt, 2020 NY Slip Op 04270, Fourth Dept 7-24-20

DUAL JURIES.

THE "DUAL JURY" PROCEDURE USED TO TRY DEFENDANT, WHO WAS CONVICTED, AND THE CO-DEFENDANT, WHO WAS ACQUITTED, ALLOWED THE CO-DEFENDANT'S ATTORNEY TO ACT AS A SECOND PROSECUTOR; CONVICTIONS REVERSED AND NEW TRIAL ORDERED (FIRST DEPT).

The First Department, reversing defendant's (Feliciano's) murder and robbery convictions, determined the "dual jury" procedure used to try Feliciano and his co-defendant, Roberts, deprived Feliciano of a fair trial. Feliciano's defense was he was with Roberts when Roberts committed the crimes but did not participate. Roberts' defense was he did not participate in the crimes at all. Feliciano was convicted and Roberts was acquitted:

In reviewing Feliciano's claim on appeal that he was entitled to a severance, we are required to consider the entire record, including, retrospectively, the full trial record … . Feliciano must demonstrate that he was unduly prejudiced by the severance and that a joint trial "substantially impair[ed defendant's] defense" … . "[T]he level of prejudice required to override the strong public policy favoring joinder" exists "where the core of each defense is in irreconcilable conflict with the other and where there is a significant danger, as both defenses are portrayed to the trial court, that the conflict alone would lead the jury to infer defendant's guilt" … . A trial before dual juries, which constitutes a modified form of severance, is to be used sparingly and is evaluated under standards for reviewing severance motions generally, as set forth above … . * * *

[Damaging] … testimony and evidence was unsolicited by the People and would never have been presented to Feliciano's jury, but for Roberts' cross examination. Roberts' counsel's pursuit of his client's defense, contemporaneously undermined Feliciano's. Accordingly, he effectively became a "second prosecutor" and was able to impeach … witnesses to Feliciano's detriment in a manner that the People were unable to. Under

these circumstances, a dual jury trial was improper as it did not prevent Feliciano from being prejudiced by Roberts' antagonistic defense … . People v Feliciano, 2020 NY Slip Op 07145, First Dept 12-1-20

EXCEPTION VERUS PROVISO.

THE ELEMENT OF THE UNLAWFUL POSSESSION OF AMMUNITION STATUTE WHICH REQUIRES PROOF THE DEFENDANT WAS NOT AUTHORIZED TO POSSESS A PISTOL OR REVOLVER IS AN EXCEPTION, NOT A PROVISO; CONVICTION VACATED IN THE INTEREST OF JUSTICE DESPITE LACK OF PRESERVATION (FIRST DEPT).

The First Department, vacating defendant's conviction of unlawful possession of ammunition pursuant to NYC Administrative Code 10-131[i][3], determined the language of the statute required that the People prove defendant was not authorized to possess a pistol or a revolver, which was not established by the evidence:

… [T]he language of the ammunition possession statute (Administrative Code § 10-131[i][3]) concerning authorization to possess a pistol or revolver within the City is an exception, not a proviso (Tatis, 170 AD3d at 48). Therefore, the People were required to prove, as an element of the offense, that defendant was not authorized to possess a pistol or revolver, regardless of whether defendant raised the issue in the first instance (id.). The evidence at trial did not establish that fact. Accordingly, we exercise our interest of justice jurisdiction to vacate that conviction. People v Anonymous, 2020 NY Slip Op 05689, First Dept 10-13-20

GRAND JURIES, JUSTIFICATION DEFENSE.

THE CHARGES AGAINST DEFENDANT STEMMED FROM HIS STRIKING AND SERIOUSLY INJURING AN EIGHT-POUND DOG; THERE WAS NO NEED TO INSTRUCT THE GRAND JURY ON THE JUSTIFICATION DEFENSE; INDICTMENT REINSTATED OVER A DISSENT (SECOND DEPT).

The Second Department, reversing Supreme Court on the People's appeal, over an extensive dissent, determined the grand jury proceedings were not defective due to the

prosecutor's failure to instruct the grand jury on the justification defense. The charges against the defendant stemmed from his striking and severely injuring a dog. The Second Department held a reasonable view of the evidence did not warrant the justification instruction:

"'[A] prosecutor should instruct the Grand Jury on any complete defense supported by the evidence which has the potential for eliminating a needless or unfounded prosecution'" … . "The failure to charge justification constitutes reversible error only when the defense is 'supported by a reasonable view of the evidence—not by any view of the evidence, however artificial or irrational'" … . …

There is no reasonable view of the evidence that forcefully striking and injuring the approximate eight-pound terrier poodle in the manner undertaken by the defendant, who was approximately 6 feet tall and weighed 200 pounds, was necessary as an emergency measure to avoid, at most, a bite by this small animal through denim pants. People v Jimenez, 2020 NY Slip Op 07223, Second Dept 12-2-20

GRAND JURIES.

GRAND JURY EVIDENCE WAS LEGALLY SUFFICIENT IN THIS AGGRAVATED UNLICENSED OPERATION CASE; THE INDICTMENT SHOULD NOT HAVE BEEN DISMISSED (THIRD DEPT).

The Third Department, reversing County Court, determined, on the People's appeal, the evidence presented to the grand jury was legally sufficient to support the charged crimes (aggravated unlicensed operation of a motor vehicle). One issue was whether the ID defendant showed to the officer at the traffic stop was sufficient to connect the defendant to the Department of Motor Vehicles abstract:

In view of defendant's admission to the police officer during the stop that he did not have a driver's license, as well as the information in the certified abstract from the Department of Motor Vehicles, the evidence was legally sufficient to support the charges in the indictment … . Furthermore, by producing the identification card to the police officer, defendant adopted the information therein, including his date of birth … . Accordingly, contrary to defendant's assertion … , there was admissible evidence connecting defendant to the abstract. Because the record discloses that the evidence before the

grand jury was legally sufficient to support the charged crimes, the indictment must be reinstated … . People v Reid, 2020 NY Slip Op 03827, Third Dept 7-9-20

GRAND JURIES.

GRAND JURY EVIDENCE WAS SUFFICIENT TO SUPPORT THE STRANGULATION COUNT DESPITE THE ABSENCE OF A DEFINITION OF THE "STUPOR" ELEMENT OF THE OFFENSE (FOURTH DEPT).

The Fourth Department, reversing County Court on a People's appeal and reinstating the strangulation count, determined the evidence before the grand jury was sufficient to charge strangulation. County Court had reduced the charge to criminal obstruction of breathing or blood circulation. County Court ruled the People had not presented evidence sufficient to support the theory the strangulation caused "stupor" citing the People's failure to define the term:

In order to sustain the charge of strangulation in the second degree against defendant, the People were required to present to the grand jury legally sufficient evidence of the following three elements: (1) that defendant applied pressure on the throat or neck of the alleged victim; (2) that defendant did so with the intent to impede the normal breathing or circulation of the blood of the alleged victim; and (3) that defendant thereby caused stupor, loss of consciousness for any period of time, or any other physical injury or impairment to the alleged victim … .

… [T]he prosecutor's instructions to the grand jury comported with the statute and mirrored the pattern criminal jury instructions … , and we conclude that the failure of the prosecutor to offer a definition of the term "stupor" did not impair the integrity of the grand jury proceedings or potentially prejudice defendant … .

… [T]he alleged victim testified before the grand jury that defendant "put both of his hands around [her] neck and choked [her] until [she] could barely breathe anymore" and "was starting to lose consciousness." She was "pushed up against the wall and the door" and felt "[v]ery light-headed and kind of like—like there was a buzzing in [her] head and everything was starting to turn purple in [her] vision before—by the time [the alleged victim] got him to let go." People v Ruvalcaba, 2020 NY Slip Op 05354, Fourth Dept 10-2-20

GRAND LARCENY BY FALSE REPRESENTATION.

THE CONVICTION FOR GRAND LARCENY BY FALSE REPRESENTATION WAS NOT SUPPORTED BY THE WEIGHT OF THE EVIDENCE; THERE WAS NO EVIDENCE DEFENDANT RECEIVED ADDITIONAL FUNDS AFTER MAKING THE ALLEGED FALSE REPRESENTATION AND NO EVIDENCE DEFENDANT INTENDED TO APPROPRIATE THE FUNDS AT THE TIME THE ALLEGED FALSE REPRESENTATION WAS MADE (SECOND DEPT).

The Second Department, reversing defendant's grand-larceny-by-false-representation conviction was against the weight of the evidence. There was no evidence defendant received any additional money after making the alleged false representation and no evidence defendant intended to appropriate the funds at the time the alleged false representation was made:

… [T]he complainant testified that she was unable to send large amounts of money to Peru and had asked the defendant to assist her with sending money to her family in Peru. She testified that on November 3, 2014, she gave the defendant $11,000 to $12,000 to transfer to her family in Peru and approximately $40 for his assistance. She testified that she accompanied the defendant to four different money transfer agencies. However, according to the complainant's testimony, she learned on November 4, 2014, that the money transfers did not go through due to an error she had made in the recipient's name. The complainant testified that the defendant was able to fix two of the transactions over the phone and agreed to meet her the next day, November 5, 2014, to go to the other two money transfer agencies (hereinafter the subject money transfer agencies) to correct the mistake in the recipient's name. She testified that the defendant did not meet her on November 5, 2014, she subsequently learned that her family never received the funds from the subject money transfer agencies, and the defendant had withdrawn the money without her permission. Business records from the subject money transfer agencies indicated that the transactions had been cancelled with the money refunded. Representatives from the subject money transfer agencies testified that their policies required cancellations to be done in person by the person who initiated the transaction.

On appeal, the defendant contends that the evidence was legally insufficient to establish that he obtained the subject funds by means of a false representation and that he had the requisite intent not to perform at the time he made the representation that he would meet

the complainant and help her fix the recipient's name on the transactions at the subject money transfer agencies. People v Bravo, 2020 NY Slip Op 06804, Second Dept 11-18-20

GUILTY PLEAS, INTOXICATION DEFENSE.

SUPREME COURT SHOULD HAVE ENSURED DEFENDANT WAS KNOWINGLY AND INTELLIGENTLY WAIVING THE INTOXICATION DEFENSE BEFORE ACCEPTING DEFENDANT'S GUILTY PLEA; IN THE PLEA COLLOQUY DEFENDANT TOLD THE COURT HE WAS DRUNK AND DIDN'T KNOW WHAT HE WAS DOING (FIRST DEPT).

The First Department, vacating defendant's guilty plea (attempted burglary), determined Supreme Court should have ensured that the defendant understood he was waiving the intoxication defense by pleading guilty. During the plea colloquy defendant indicated he was drunk and didn't know what he was doing when he entered a woman's hotel room:

Once defendant raised the possible defense of intoxication during the allocution, the court was obligated to determine if he understood the defense, whether he in fact, had a viable defense and whether he wanted to waive the same … .

Defendant's statement that he entered the victim's hotel room "looking for money from the lady" did not effectively recant his earlier statement as to intoxication and did not relieve the court of its duty to engage in an additional inquiry into defendant's understanding of the intoxication defense or the facts of the offense … . People v Muniz-Cayetano, 2020 NY Slip Op 05156, First Dept 9-29-20

GUILTY PLEAS.

DEFENDANT SHOULD HAVE BEEN GRANTED A HEARING ON HIS MOTION TO VACATE HIS CONVICTION BY GUILTY PLEA ON INEFFECTIVE ASSISTANCE GROUNDS; DEFENDANT RAISED A QUESTION WHETHER DEFENSE COUNSEL SHOULD HAVE INFORMED HIM OF AN AFFIRMATIVE DEFENSE TO THE ROBBERY FIRST CHARGE (SECOND DEPT).

The Second Department, reversing County Court, determined defendant was entitled to a hearing on his motion to vacate his conviction by guilty plea based on ineffective assistance of counsel. Defendant raise a question whether he should have been informed about the an affirmative defense to robbery first degree, i.e., that the object displayed during the crime was not a loaded, operable weapon:

A defendant has the right to the effective assistance of counsel before deciding whether to plead guilty … . That requirement is met under the New York State Constitution when defense counsel provides "meaningful representation" … . In cases asserting ineffective assistance of counsel in the context of a guilty plea, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial, or that the outcome of the proceedings would have been different" … .

It is an affirmative defense to a charge of robbery in the first degree under Penal Law § 160.15(4) that the object displayed during the course of the crime "was not a loaded weapon from which a shot, readily capable of producing death or other serious physical injury, could be discharged" … . The defendant's averments in his affidavit in support of his motion, along with the PSR, were sufficient to warrant a hearing on the issue of whether his counsel was ineffective for failing to advise him of this potential affirmative defense to the charges to which he pleaded guilty … . People v Flinn, 2020 NY Slip Op 06809, Second Dept 11-18-20

GUILTY PLEAS.

THE RECORD WAS NOT SUFFICIENT FOR CONSIDERATION OF THE INEFFECTIVE ASSISTANCE ARGUMENT RE WHETHER DEFENDANT WAS ADEQUATELY INFORMED OF THE DEPORTATION CONSEQUENCES OF HIS GUILTY PLEA; THE PRECISE NATURE OF COUNSEL'S ADVICE WAS NOT IN THE RECORD; TWO-JUSTICE DISSENT (FIRST DEPT).

The First Department, over a two-justice dissent, determined the record was insufficient to preserve the ineffective assistance of counsel argument. The defendant argued that he was insufficiently informed about the deportation-risk associated with his guilty plea. The majority held that the record did not reflect the precise advice given by counsel and therefore the appropriate mechanism for review is a CPL 440.10 motion. The dissenters argued the record was sufficient to send the matter back for a motion to vacate the plea:

We do not agree with defendant's attempt to exempt himself from the necessity of making a CPL 440.10 motion based on his counsel's statements at the plea hearing concerning the off-the-record advice concerning immigration that had been rendered. To reiterate, counsel's statements to the court, on their face, are general in nature and do not purport to describe the contents of the immigration advice that defendant actually received. The statement that defendant had been advised of "all possible consequences" was consistent both with accurate advice that the plea would subject him to mandatory deportation and with inaccurate advice that failed to warn him of that consequence. We cannot, on this record, tell whether the advice actually given was accurate or inaccurate. Certainly, it cannot be said that counsel's statement establishes "irrefutably" … that the advice given was inaccurate, as is required to render a CPL 440.10 motion unnecessary. People v Gomez, 2020 NY Slip Op 04518, First Dept 8-13-20

HEARSAY, EXTRINSIC DOCUMENTARY EVIDENCE.

ALTHOUGH SECONDARY EVIDENCE (HEARSAY TESTIMONY) AND EXTRINSIC DOCUMENTARY EVIDENCE ARE NOT ADMISSIBLE FOR COLLATERAL MATTERS LIKE IMPEACHING CREDIBILITY, SUCH EVIDENCE IS ADMISSIBLE WHEN IT IS RELEVANT TO A CORE ISSUE; HERE THE CONTENTS OF A NOTE PRESENTED TO A BANK EMPLOYEE WAS RELEVANT TO THE 'THREATENED USE OF FORCE' ELEMENT OF ROBBERY (FOURTH DEPT).

The Fourth Department, reversing defendant's robbery conviction and ordering a new trial on that count, determined the defendant should have been allowed to present a witness to demonstrate the note he presented to the bank employee did not threaten the use of force (an element of the robbery charge). The Fourth Department noted that secondary evidence (hearsay testimony) and extrinsic documentary evidence, which is prohibited for collateral issues, may be admissible when the evidence is relevant to a core issue:

"It is well established that the party who is cross-examining a witness cannot introduce extrinsic documentary evidence or call other witnesses to contradict a witness' answers concerning collateral matters solely for the purpose of impeaching that witness' credibility" … . That rule, however, "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 jury 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' " … . Here, defendant sought to call a witness whose testimony related to the content of the note defendant presented to the bank employee in the first incident. Defendant specifically sought to establish that the note he presented contained language that, according to defendant, did not threaten the immediate use of force, contrary to the testimony of the bank employee who received it. Although a threat of immediate use of force may be implicit and does not require the use of any specific words … , the use of threatening language is nevertheless a factor for the jury to consider when determining whether the defendant presented such a threat … . Inasmuch as the content of the note was relevant to whether defendant, either explicitly or implicitly, threatened the use of force, we conclude that the proposed testimony pertained to a noncollateral issue and that the court should have allowed the

proposed witness to testify … . People v Snow, 2020 NY Slip Op 04024, Fourth Dept 7-17-20

INCREDIBLE TESTIMONY BY POLICE, SUPPRESSION HEARINGS.

THE POLICE WITNESSES AT THE SUPPRESSION HEARING WERE NOT CREDIBLE; THEREFORE DEFENDANT'S SUPPRESSION MOTION SHOULD HAVE BEEN GRANTED AND THE INDICTMENT DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice Miller, determined defendant's motion to suppress should have been granted because the People's witnesses at the suppression hearing were not credible. Therefore the People did not meet their burden to show the legality of the police conduct. The indictment was dismissed. The police witnesses offered conflicting versions of the stop of the car in which defendant was a passenger and the ability to determine, from outside the car, that a credit card on the console was forged:

"Given the severely undermined credibility of the arresting officer[s], it is unclear exactly what happened during the encounter between the officer[s] and the defendant, and the hearing court was confronted with choices of possible scenarios" … . Under similar circumstances, this Court has stated that, "where credibility is in issue, multiple choice questions are neither desirable nor acceptable," and the fact-finder should refuse to "select a credible version based upon guesswork"… . …

… [W]e decline to credit any of the testimony of the People's witnesses … . Accordingly, "[u]pon scrutiny of the People's evidence at the suppression hearing, we can only conclude that they failed to carry their burden of going forward and demonstrating the legality of the police conduct in the first instance[,]" including the legality of the stop … . In view of this failure, "all further actions by the police as a direct result of the stop were illegal . . . [and] the evidence recovered as a result of the unlawful stop must be suppressed" … . Accordingly, "exercising our independent power of factual review, we conclude that the defendant's motion to suppress . . . should have been granted"… . Without the suppressed evidence, there would not be legally sufficient evidence to prove the defendant's guilt. Accordingly, the indictment must be dismissed … . People v Harris, 2020 NY Slip Op 08079, Second Dept 12-30-20

INDICTMENTS, DUPLICITOUS, MOLINEUX.

ALL BUT ONE COUNT OF THE INDICTMENT WAS RENDERED DUPLICITOUS BY THE CHILD-VICTIM'S GRAND JURY TESTIMONY IN THIS SEXUAL ABUSE CASE; THE SIMILAR UNCHARGED OFFENSES SHOULD NOT HAVE BEEN ADMITTED UNDER MOLINEUX AS BACKGROUND EVIDENCE; NEW TRIAL ORDERED (THIRD DEPT).

The Third Department, reversing defendant's conviction and ordering a new trial determined: (1) the duplicitous counts of the indictment should have been dismissed pre-trial, not post-trial; (2) the evidence of similar uncharged offenses under Molineux should not have been admitted as "background evidence." The defendant was charged with sexual abuse of a child. With the exception of one incident (count 1), the child was not able to pinpoint when the abuse happened. All but count 1 were rendered duplicitous by the grand jury testimony (indicating that more than one offense occurred in the one-month time-frame of the indictment counts). In addition, the similar uncharged allegations were too prejudicial to be allowed under Molineux:

"[U]nder . . . Molineux jurisprudence, we begin with the premise that uncharged crimes are inadmissible and, from there, carve out exceptions" … . The proffered Molineux evidence was not necessary to resolve any ambiguity as to count 1, and thus was beyond the Molineux exception for background information as provided by County Court in its ruling … . If the court had dismissed counts 2 through 13 as duplicitous prior to the People's presentation of their case-in-chief, that likely would have changed the court's calculus as to the admission of the victim's testimony regarding uncharged crimes — including whether to allow testimony regarding the incidents referred to in those dismissed counts, which would no longer be direct evidence of charged crimes. Even if the testimony regarding the uncharged criminal conduct was permissible for a nonpropensity purpose, its prejudicial nature outweighed the minimal probative value that may be attributed to it as to count 1 … . While in some circumstances the undue prejudice resulting from Molineux evidence may be mitigated by a limiting instruction, here such an instruction was only provided once in the final charge to the jury, and not at the time of the victim's testimony, despite County Court having indicated that those instructions would be provided at the time that such evidence was admitted … . People v Holtslander, 2020 NY Slip Op 07250, Third Dept 12-3-20

INDICTMENTS, DUPLICITOUS.

THE DUPLICITY IN THE INDICTMENT WAS REMEDIED BY DETAILS PROVIDED TO THE DEFENSE PRIOR TO TRIAL AND BY DETAILED TRIAL EVIDENCE (FOURTH DEPT).

The Fourth Department held the prosecutor had remedied the duplicity in the indictment by providing information in a supplemental bill of particulars and a "trial indictment" after the motion to dismiss for duplicity was made, information corroborated by detailed trial evidence;

With respect to the counts of criminal sexual act in the first degree, after defendant made his motion, the prosecutor provided him with a supplemental bill of particulars that identified a precise date for each of the first 10 counts of criminal sexual act in the first degree. We conclude that dismissal of those counts is not required because the duplicity was "cured by reference to a bill of particulars supplementing the indictment" … . ,,,

With respect to the counts of rape in the first degree, although the duplicity of those counts was left unaddressed by the supplemental bill of particulars, before trial, the prosecutor provided defendant with a document styled as a "trial indictment," which indicated that the People intended to prove a specific instance with respect to each of the counts on which defendant was ultimately convicted … . In addition, the People provided evidence of those specific instances of forced sexual intercourse at trial by offering the testimony of the victim … . The victim's testimony was detailed, graphic, and corroborated by receipts, photographs, and emails that allowed the victim to pinpoint the precise dates on which each of those incidents of forced sexual intercourse occurred. "Because defendant was convicted only of those counts of [rape in the first degree] where pretrial notice of specific instances was given and where those specific instances were proved at trial" … , we conclude that dismissal of those counts as duplicitous was not required. People v Quiros, 2020 NY Slip Op 04279, Fourth Dept 7-24-20

INVENTORY SEARCH, VEHICLES.

ALL THE ITEMS IN DEFENDANT'S CAR WERE NOT LISTED IN A WRITTEN INVENTORY, IN VIOLATION OF THE POLICE DEPARTMENT'S INVENTORY-SEARCH POLICY; THEREFORE THE FIREARM WAS NOT FOUND DURING A VALID INVENTORY SEARCH AND SHOULD HAVE BEEN SUPPRESSED (THIRD DEPT).

The Third Department, reversing Supreme Court, over a dissent, determined the firearm seized from defendant's car before the car was towed from a crash scene was not found in a valid inventory search. No written inventory was created. The Third Department held that, under the Albany Police inventory search policy, which the court found reasonable, all items in the vehicle should be listed in written inventory. The dissent argued the policy only required "valuable" property to be listed:

Despite the reasonableness of the policy, [Officer] Elliott's testimony reveals that he did not comply with it and, therefore, Supreme Court erred in denying defendant's suppression motion. To that end, Elliott testified that it is the Albany Police Department's policy, as related to inventory searches, that "[a]nything valuable is . . . logged and placed into our property for safekeeping." Elliott further testified that, because nothing of value was found in the car, nothing was seized and an inventory list was not created relative to the contents of the vehicle. This testimony conflates the requirement that a written inventory always be created with the discretion given to police officers to determine which property is valuable and, as such, must be taken into custody for safekeeping. Thus, from his testimony, it is apparent that Elliott did not comply with the policy regarding inventory searches, as it clearly mandates that an inventory search always be completed and the vehicle be "completely inventoried," not allowing for discretion of the individual officers … . People v Jones, 2020 NY Slip Op 03826, Third Dept 7-9-20

INVOLUNTARY POSSESSION OF A WEAPON, JURY INSTRUCTIONS.

EVEN THOUGH THE DEFENDANT ARGUED HE NEVER HAD ACTUAL OR CONSTRUCTIVE POSSESSION OF THE WEAPON FOUND IN ANOTHER'S HOUSE, DEFENDANT WAS ENTITLED TO THE "INVOLUNTARY POSSESSION" JURY INSTRUCTION; POSSESSION, EITHER ACTUAL OR CONSTRUCTIVE, IS NOT VOLUNTARY IF IT IS FOR SO BRIEF A PERIOD OF TIME THAT THE DEFENDANT COULD NOT HAVE TERMINATED POSSESSION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over a three-judge dissent, reversing defendant's conviction, determined there was a reasonable view of the evidence which supported a jury instruction on voluntary (involuntary) possession of a weapon. In addition to actual and constructive possession, there is the concept of involuntary possession. Both actual and constructive possession can be involuntary if it is so fleeting that the defendant was not able to terminate possession. Defendant argued he was a guest for the night in the house where the weapon was found and did not possess it all, either actually or constructively. The Court of Appeals noted that "involuntary possession" conflicted with "no possession at all," but the jury still should have been instructed on involuntary possession because there was evidence to support the instruction:

The distinction among constructive, knowing, and voluntary possession that defendant emphasizes is reflected in the Criminal Jury Instructions' model charge on voluntary possession, which provides that "[p]ossession . . . is voluntary when the possessor was aware of [their] physical possession or control . . . for a sufficient period to have been able to terminate the possession" (CJI2d [NY] Voluntary Possession § 15.00 [2] … . * * *

… [T]he trial court denied the charge here, not because the requested charge lacked evidentiary support, but because the court considered the proposed language more confusing than helpful. … . This determination was in error because the requested charge did not inject confusion into the instructions. Rather, it addressed an entirely different aspect of the charged possessory crime: the temporal requirement of voluntary possession. Indeed, the requested charge would have clarified the law because the charge, as erroneously given, allowed the jury to conclude that if defendant had control over the area where the gun was found—i.e., the bedroom—then he had constructive possession of the gun, regardless of how long he was actually aware of its presence. This is not an accurate statement of the relevant law where, as here, there is a reasonable

view of the evidence that the possession may not have been voluntary. People v J.L., 2020 NY Slip Op 07663, CtApp 12-17-20

JURY INSTRUCTIONS.

BECAUSE THE TRIAL JUDGE OMITTED A PORTION OF THE BURGLARY JURY INSTRUCTIONS AND THE PEOPLE DID NOT OBJECT, THE PEOPLE ARE HELD TO THE PROOF REQUIRED BY THE INCOMPLETE INSTRUCTIONS; THE BURGLARY CONVICTION WAS THEREFORE AGAINST THE WEIGHT OF THE EVIDENCE; DEFENSE COUNSEL'S FAILURE TO MAKE A SPEEDY TRIAL MOTION DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE BECAUSE THE ISSUE WAS NOT CLEAR-CUT AND DISPOSITIVE (SECOND DEPT).

The Second Department, reversing the burglary conviction as against the weight of the evidence, determined the People were held to the proof required by the the jury instructions to which the People did not object. The portion of the instructions which explained that entry into a private area of a building after entering the building through a public area constitutes unlawful entry was left out. Because the defendant entered the building through a public entrance, the People did not prove unlawful entry as charged to the jury. The Second Department also held that defense counsel's failure to make a speedy trial motion did not constitute ineffective assistance because it was not clear the motion would succeed:

While the failure to make a meritorious speedy trial motion can constitute ineffective assistance of counsel … , the speedy trial violation must have been "clear-cut and dispositive" … . In other words, the motion must not only be meritorious … , it generally must not require resolution of novel issues, or resolution of whether debatable exclusions of time are applicable … . Here, the issue cannot be fairly characterized as "clear-cut and dispositive" so as to render defense counsel ineffective for failing to make such a motion … . * * *

The testimony at trial was unequivocal that the defendant and two cohorts entered the subject premises, a self-storage facility, during business hours, using the entrance designated for use by the public. The defendant's entry into the premises was therefore lawful … . While the defendant's subsequent act of entering a nonpublic area of the premises could constitute an unlawful entry (see Penal Law § 140.00[5] …), in light of

the Supreme Court's charge omitting that portion of the instruction elaborating upon license and privilege as it applies to nonpublic areas within public places, and asking the jury whether the defendant unlawfully entered the premises generally, it was factually insufficient to prove that the defendant's entry was unlawful. People v McKinnon, 2020 NY Slip Op 05056, Second Dept 9-23-30

JUSTIFICATION DEFNSE, JURY INSTRUCTIONS, ASSAULT.

THE JURY SHOULD HAVE BEEN INSTRUCTED ON THE JUSTIFICATION DEFENSE IN THIS ASSAULT AND RESISTING ARREST CASE; DEFENDANT KICKED AND FLAILED AS HE WAS SUBDUED BY MORE THAN EIGHT POLICE OFFICERS (FIRST DEPT).

The First Department, reversing defendant's conviction, determined the jury should have been instructed on the justification defense:

Defendant's request to charge justification, with regard to his kicking and flailing as officers tried to subdue and arrest him, should have been granted … . Penal Law § 35.27 permits a defendant to claim justification where there is a reasonable view of the evidence that he or she is the victim of excessive police force … . When a defendant requests such a charge, the trial court "must view the record in the light most favorable to the defendant and determine whether any reasonable view of the evidence would permit the factfinder to conclude that the defendant's conduct was justified." … Viewed in the light most favorable to the defense, the testimony and video evidence show that after defendant resisted police efforts to handcuff him, approximately eight additional officers joined in a struggle, punching and tazing defendant, and the police lieutenant used a baton to roll defendant's Achilles tendon. These facts warranted a justification charge. People v Banyan, 2020 NY Slip Op 06060, First Dept 10-27-20

MAIL, SEIZURE BY PROSECUTION.

THE EX PARTE ORDER ALLOWING THE PROSECUTOR TO SEIZE AND READ DEFENDANT'S NON-LEGAL MAIL DID NOT REQUIRE DISQUALIFICATION OF THE PROSECUTOR OR A MISTRIAL; THE PROSECUTOR'S DEMONSTRATION OF THE OPERATION OF THE MURDER WEAPON (A KNIFE) DID NOT WARRANT A MISTRIAL; AND THE FAILURE TO NOTIFY THE COURT AND THE ATTORNEYS OF THE JURY NOTE REQUESTING THE EXAMINATION OF THE KNIFE WAS NOT AN O'RAMA VIOLATION AND DID NOT WARRANT A MISTRIAL (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Oing, affirmed defendant's murder conviction after addressing several unusual issues in depth: (1) The prosecutor obtained a ex parte order allowing the opening and reading of defendant's non-legal mail to determine whether defendant was threatening an eyewitness. After reading two batches of mail, the prosecutor determined no threats were being made, informed defense counsel of the order and turned the mail over to defense counsel. The First Department determined there were no related grounds for disqualifying the prosecutor or for granting a mistrial. (2) When the defendant was on the stand he denied knowing the knife (murder weapon) could be flipped open with one hand. During her questioning the prosecutor demonstrated that the knife could be flipped open. The Second Department determined the "prosecutor-as-an-unsworn witness" argument did not warrant a mistrial, in part because of the curative instructions to the jury. (3) The knife was brought into the jury room after a request from the jury about which the court and the attorneys were not made aware. The judge and the attorneys had agreed that the jury's examination of the knife would be allowed and the examination was done according to the agreed procedure. This was not an O'Rama violation because it involved only the examination of a physical object, not an instruction or the substance of any trial evidence. Therefore a mistrial on this ground was not warranted. People v Jenkins, 2020 NY Slip Op 04014, First Dept 7-16-20

MIRANDA.

DEFENDANT TOLD THE POLICE HE DIDN'T WANT TO TALK, HIS STATEMENT SHOULD HAVE BEEN SUPPRESSED BUT THE ERROR WAS HARMLESS; CONSECUTIVE SENTENCES FOR POSSESSION OF THE KNIFE AND MURDER BY STABBING FOUND PROPER (FOURTH DEPT).

The Fourth Department determined defendant's statement should have been suppressed but found the error harmless. The Fourth Department further held that defendant was properly sentenced to consecutive sentences for possession of the knife and murder by stabbing:

… [D]efendant unequivocally informed the police immediately after being advised of his Miranda rights that "he didn't want to talk." No reasonable police officer could have interpreted that statement as anything other than a desire not to talk to the police … . Regardless, the police continued the interrogation, thereby failing to " scrupulously honor[ ]' defendant's right to remain silent" … .

Nevertheless, the error is harmless because the evidence of defendant's guilt is overwhelming and there is no reasonable possibility that any error in admitting defendant's statements to the police contributed to his conviction … . * * *

In cases concerning consecutive sentencing in the CPW [criminal possession of a weapon] context, we employ a framework that "appropriately reflects the heightened level of integration between the possession and the ensuing substantive crime for which the weapon was used" … . To determine whether a single act constituted both offenses under section 70.25 (2), we look to when the crime of possession was completed, i.e., both the actus reus and mens rea … ."Only where the act of possession is accomplished before the commission of the ensuing crime and with a mental state that both satisfies the statutory mens rea element and is discrete from that of the underlying crime may consecutive sentences be imposed" … . Consecutive sentencing is permissible here because defendant's act of possessing the knife was accomplished before he used it to kill the victim and "defendant's possession [thereof] was marked by an unlawful intent separate and distinct from" his intent with respect to the homicide … . Indeed, the mental state associated with the CPW count, i.e., intent to use the knife unlawfully, is discrete from the mental state associated with the homicide count, i.e., negligence … . People v Colon, 2020 NY Slip Op 04257, Fourth Dept 7-24-20

MISSING WITNESS, JURY INSTRUCTIONS.

\DEFENDANT'S REQUEST FOR THE MISSING WITNESS JURY INSTRUCTION SHOULD HAVE BEEN GRANTED, CONVICTION REVERSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's request for a missing witness jury instruction should have been granted. Defendant was charged with contempt stemming from the violation of a protective order. It was alleged defendant pushed his former girlfriend to the ground in the presence of her date. Her date was subpoenaed by the People and was ready to testify but was not called by the People:

The proponent of a missing witness charge "initially must demonstrate only three things via a prompt request for the charge: (1) that there is an uncalled witness believed to be knowledgeable about a material issue pending in the case,' (2) that such witness can be expected to testify favorably to the opposing party,' and (3) that such party has failed to call' the witness to testify" … . "The party opposing the charge, in order to defeat the proponent's initial showing, must either account for the witness's absence or demonstrate that the charge would not be appropriate" … . "This burden can be met by demonstrating that the witness is not knowledgeable about the issue, that the issue is not material or relevant, that although the issue is material or relevant, the testimony would be cumulative to other evidence, that the witness is not available', or that the witness is not under the party's control' such that he [or she] would not be expected to testify in his or her favor" … . If the party opposing the charge meets its burden to rebut the proponent's prima facie showing, "the proponent retains the ultimate burden to show that the charge would be appropriate" … .

Here, the defendant met his prima facie burden to show that the complainant's date was believed to be knowledgeable about a material issue pending in the case and was expected to testify favorably to the People, who had failed to call him to testify. According to the complainant, her date was present during the incident … and was a victim during that incident. The People failed to rebut this prima facie showing … . Contrary to the People's contention, they failed to establish that the complainant's date was unavailable as a witness. He appeared in court pursuant to the People's so-ordered subpoena, and his counsel stated that although he did not wish to be a witness, he was outside the courtroom and was prepared to testify. Further, the People did not establish that the

complainant's date was not under the People's "control," such that he would not be expected to testify in their favor, given that he allegedly was on a date with the complainant when the defendant lunged at them, threatened them, and pushed the complainant to the ground. Moreover, the People did not demonstrate that the testimony would have been cumulative. People v Sanchez2020 NY Slip Op 04494, Second Dept 8-12-20

MOLINEUX, PHOTOGRAPH WITH A WEAPON.

A PHOTOGRAPH OF DEFENDANT WITH A HANDGUN TAKEN SIX WEEKS BEFORE THE SHOOTING WAS PROPERLY ADMITTED IN EVIDENCE AS TENDING TO SHOW HIS IDENTITY AS THE SHOOTER (FIRST DEPT).

The First Department noted that a photograph of defendant with a small handgun taken six weeks before the charged shooting was properly admitted in evidence:

A photograph of defendant holding a small handgun, taken approximately six weeks before the charged shooting, and recovered from defendant's phone pursuant to the warrant, was properly admitted. It could be inferred from video footage introduced at trial that a small handgun was used in the shooting. As in People v Alexander (169 AD3d 571 [1st Dept 2019], lv denied 34 NY3d 927 [2019]), the photograph was "relevant to show that defendant had access to such a weapon, thus tending to establish his identity as the perpetrator, and there was no requirement of proof that the [firearm] in the photograph was the actual weapon used in the crime" … . People v Bush, 2020 NY Slip Op 07722, First Dept 12-22-20

MOLINEUX.

EVIDENCE OF A 1990 ROBBERY AND SEXUAL ASSAULT TO PROVE IDENTITY SHOULD NOT HAVE BEEN ADMITTED; THE SIMILARITIES WERE NOT STRONG ENOUGH (SECOND DEPT).

The Second Department, reversing defendant's attempted rape conviction, determined the evidence of a 1990 robbery and sexual assault should not have been admitted as

evidence of the identity of the perpetrator. But the burglary, robbery and sexual abuse convictions, apparently stemming from the same incident, were not disturbed:

… [T]he similarities between the alleged 1990 robbery and sexual assault and the attack on the complainant were not sufficiently unique or unusual and did not establish a distinctive modus operandi relevant to establishing the defendant's identity as the perpetrator in this case. While both incidents involved robberies and sexual assaults of unaccompanied Caucasian women, during daytime hours, in the lobbies of residential buildings, these similarities were not so unique as to give rise to an inference that the perpetrator of each crime was the same individual … . Accordingly, the Supreme Court erred in permitting the People to present evidence regarding the 1990 robbery and assault in order to establish the defendant's identity … .

The error was harmless as to all of the charges except the attempted rape in the first degree since the proof of the defendant's guilt, without reference to the erroneously admitted Molineux evidence, was overwhelming as to those other charges, and there was no reasonable possibility that the jury would have acquitted the defendant on those charges had it not been for the error … . Furthermore, the erroneous admission of the Molineux evidence did not deprive the defendant of a fair trial … . We reach a different conclusion with respect to the defendant's conviction of attempted rape in the first degree. Because the evidence of the defendant's guilt of that charge was not overwhelming, the error cannot be deemed harmless, and the defendant's conviction of that charge must be vacated and a new trial ordered as to that charge … . People v Duncan, 2020 NY Slip Op 07090, Second Dept 11-25-20

MOLINEUX.

THE PEOPLE SHOULD NOT HAVE BEEN ALLOWED TO PRESENT EVIDENCE OF A PRIOR UNCHARGED SHOOTING; DEFENSE COUNSEL DID NOT OPEN THE DOOR FOR THAT EVIDENCE; THE PROSECUTOR SHOULD NOT HAVE BEEN ALLOWED TO TREAT THE PEOPLE'S WITNESSES AS HOSTILE WITNESSES; NEW TRIAL ORDERED (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction of attempted murder and ordering a new trial, determined evidence of a prior uncharged shooting should not have

been admitted and the prosecutor should not have been allowed to cross-examine the People's witnesses as hostile witnesses:

County Court erred by permitting the prosecutor to present evidence of a prior uncharged shooting under the theory that defense counsel opened the door to such evidence … . …

… [T]he 'opening the door' theory does not provide an independent basis for introducing new evidence on redirect; nor does it afford a party the opportunity to place evidence before the jury that should have been brought out on direct examination" … . Instead that "principle merely allows a party to explain or clarify on redirect matters that have been put in issue for the first time on cross-examination, and the trial court should normally exclude all evidence which has not been made necessary by the opponent's case in reply" … . * * *

The prosecutor … assumed the risk of the adverse testimony by "calling the witness[es] . . . in the face of the forewarning" [about what they would say]. … [A]t the time of the relevant questioning, the court had not granted the prosecutor permission to treat either witness as hostile … . … [T]he prosecutor improperly "use[d the] prior statement[s] for the purpose of refreshing the recollection of the witness[es] in a manner that disclose[d their] contents to the trier of the facts" (CPL 60.35 [3]). People v Sylvester, 2020 NY Slip Op 06891, Fourth Dept 11-20-20

MOLINEUX.

THE PRIOR BAD ACT EVIDENCE EXCEEDED THAT ALLOWED BY THE MOLINEUX RULING, DEFENDANT'S MURDER CONVICTION REVERSED IN THE INTEREST OF JUSTICE (THIRD DEPT).

The Third Department determined defendant's murder conviction must be reversed in the interest of justice because the evidence of prior bad acts exceeded that allowed by the court's Molineux ruling:

Defendant also challenges certain testimony by the victim's niece as being beyond the scope of County Court's Molineux ruling. As part of its Molineux application, the People requested that they be allowed to offer proof about instances of verbal and emotional abuse by defendant toward the victim. The court granted the application and permitted

the People to elicit such evidence. At trial, however, the niece testified that the victim told her that defendant once grabbed her arm in a store because he did not like who she was talking to and that bruises on her legs were caused by defendant. The niece further testified that she observed defendant kick the victim in the stomach. That said, incidents of physical abuse by defendant were not part of the People's Molineux application. As such, the niece's testimony, some of which was hearsay, exceeded the scope of the court's Molineux ruling and deprived defendant of a fair trial … .

Because the evidence of defendant's guilt was not overwhelming, there must be a new trial … . We note that defendant did not object to the niece's testimony and, consequently, failed to preserve this argument . Despite this infirmity, we deem it appropriate under the particular circumstance… s of this case to exercise our interest of justice jurisdiction and reverse the judgment (see CPL 470.15 [6] [a]). People v Callahan, 2020 NY Slip Op 04618, Third Dept 8-20-20

MOVIES.

ALTHOUGH THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING A VIOLENT COURTROOM SCENE IN A MOVIE TO BE PLAYED FOR THE JURY BECAUSE THE DEFENDANT HAD QUOTED DIALOGUE FROM IT, THE ERROR WAS HARMLESS; THE DISSENT ARGUED IT WAS NOT HARMLESS ERROR (FOURTH DEPT).

The Fourth Department determined it was harmless error to allow the prosecutor in this murder case to show part of a movie from which the defendant had posted dialogue. The dissent argued the error was not harmless:

… [T]he court abused its discretion when it permitted the prosecutor to play for the jury a scene from the film, The Boondock Saints. The scene takes place inside a courtroom, where the protagonists threaten everyone with pistols. Some people in the scene, presumably those playing the jurors, watch in astonishment while ducking for cover. The protagonists make loud, self-aggrandizing statements, declaring themselves vigilantes tasked by God with bringing justice to the world (e.g. "Each day we will spill their blood till it rains down from the sky!"). For those who do not behave morally, the protagonists offer a message: "One day you will look behind you and you will see we three . . . and we will send you to whichever God you wish." The protagonists put their guns to the back of the

defendant's head while he is knelt on the floor in an execution-style pose. Gunfire erupts, and everyone runs out of the courthouse screaming.

The prosecutor's ostensible reason for playing that particular scene was to rebut defendant's testimony that he was coerced by his accomplice into participating in the murder and subsequently lying to the police. The relevance of that scene is that defendant posted quotations from it on social media two days after the victim's murder and one day before he gave the allegedly coerced statement to the police. …

Because the probative value of the scene from The Boondock Saints video was substantially outweighed by the danger that its admission would prejudice defendant or mislead the jury, the court abused its discretion in admitting it … . People v Horn, 2020 NY Slip Op 04712, Fourth Dept 8-20-20

OPINION EVIDENCE, FOUNDATION.

PROPER FOUNDATION FOR EXPERT OPINION EVIDENCE FINDING THAT THE TESTED SUBSTANCES CONTAINED COCAINE WAS NOT LAID AND THE TESTIMONY WAS THEREFORE INADMISSIBLE; CONVICTIONS ON TWO DRUG-POSSESSION COUNTS REVERSED, NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing defendant's conviction on two drug possession counts, determined the People did not provide a proper foundation for the testimony of two experts who tested the substances alleged to contain cocaine:

The opinion testimony by these experts was inadmissible, because the People failed to lay a foundation for the competence of the testimony. "[A]n expert who tests a substance for the presence of cocaine may not rely solely upon a test involving a comparison of the substance at issue to a known standard when the accuracy of the known standard is not established" … . Here, the evidence adduced at trial reflected that Lin and Lopez each tested the purity of a sample of the substance recovered from the defendant by using a test which relied upon a comparison to a known standard. The People failed to introduce any direct evidence as to the accuracy of the standard used for comparison. Although an expert's testimony that a substance contains cocaine is admissible when it is "not based solely upon comparative tests using a known standard but also on a series of other tests not involving known standards" … , here, the People failed to establish that either Lin or

Lopez performed any other tests that did not involve comparison to a known standard. Thus, the Supreme Court should not have permitted their testimony, and a new trial is required on the counts charging criminal possession of a controlled substance in the fifth degree … . People v Campbell, 2020 NY Slip Op 03800, Second Dept 7-8-20

OPINION EVIDENCE, POLICE OFFICERS.

POLICE OFFICER'S OPINION A HOMICIDE HAD BEEN COMMITTED AND THE VICTIM'S MOTHER'S TESTIMONY ABOUT THE VICTIM'S PERSONAL BACKGROUND SHOULD NOT HAVE BEEN ADMITTED; OPINION ISSUE REVIEWED IN THE INTEREST OF JUSTICE; MANSLAUGHTER CONVICTION REVERSED (FOURTH DEPT).

The Fourth Department, reversing defendant's manslaughter conviction, determined the investigating officer's opinion that the death was a homicide and the victim's mother's testimony about the personal background of the victim should not have been admitted:

Defendant's contention that County Court erred in allowing an investigating police officer to testify regarding his opinion that a homicide was committed in this case is preserved for our review only in part … . To the extent that defendant's contention is unpreserved, we exercise our power to review it as a matter of discretion in the interest of justice … , and we conclude that the court erred in admitting that testimony because it " 'usurp[ed] the jury's fact-finding function' " … .

We further agree with defendant that the court erred in permitting the victim's mother to testify regarding the victim's personal background, including various aspects of the victim's life and his family relationships. It is well settled that "testimony about [a] victim['s] personal background[] that is immaterial to any issue at trial should be excluded" … and, here, the testimony of the victim's mother regarding the victim's personal background was not relevant to a material issue at trial. People v Salone, 2020 NY Slip Op 06903, Fourth Dept 11-20-20

ROBBERY, BURGLARY, PHYSICAL INJURY.

EVIDENCE OF PHYSICAL INJURY LEGALLY INSUFFICIENT, ROBBERY AND BURGLARY FIRST CONVICTIONS REDUCED (SECOND DEPT).

The Second Department, reducing defendants' convictions, determined the evidence of physical injury was legally insufficient:

Physical injury is defined as "impairment of physical condition or substantial pain" (Penal Law § 10.00[9]). The complainant stated that her injuries consisted of a laceration on her neck from the defendant pulling off her necklace and scratches on her wrist from the defendant pulling off her bracelets. She did not go to the hospital and testified that her neck was sore and her wrist felt a little sore and afterwards she had pain in her neck and wrist, although she did not specify when the pain began or as to its duration. The officer who responded to the scene testified that the complainant had a scratch on her neck. Under these circumstances, there was insufficient evidence from which a jury could infer that the complainant suffered substantial pain or impairment of her physical condition … . Accordingly, the defendant's convictions of burglary in the first degree and robbery in the second degree should be reduced to burglary in the second degree and robbery in the third degree, respectively, which lesser crimes were proven at trial … . People v Smith, 2020 NY Slip Op 05782, Second Dept 10-14-20

RODRIGUEZ HEARING.

ALTHOUGH IT WAS ERROR TO DENY THE DEFENSE REQUEST FOR A RODRIGUEZ HEARING BASED UPON THE PROSECUTOR'S ASSERTION THE COMPLAINANT AND THE DEFENDANT KNEW EACH OTHER, THE TRIAL TESTIMONY DEMONSTRATED THE COMPLAINANT AND DEFENDANT IN FACT KNEW EACH OTHER; THE DISSENT ARGUED THE COURT OF APPEALS REQUIRES THAT THE IDENTIFICATION ISSUE BE RESOLVED BEFORE TRIAL (SECOND DEPT).

The Second Department affirmed defendant's conviction over a substantive dissent. Arguing against a Wade hearing addressing the suggestiveness of the complainant's identification of the defendant from single photograph displays, the prosecutor told the

judge the complainant and the defendant knew each other and the identification procedures were merely confirmatory. Defendant denied knowing the complainant and requested a Rodriguez hearing. The judge denied the request based on the People's assertion the identification procedures were confirmatory. The denial of the Rodriguez hearing was deemed to be error, but the majority concluded the hearing was not necessary because the trial testimony demonstrated the complainant knew the defendant. The dissent argued the Court of Appeals, in the Rodriguez case, required resolution of the identification issue before trial:

The Supreme Court erred in relying on the People's mere assurances of familiarity in denying the defendant's pretrial request for a Rodriguez hearing … . Nevertheless, a hearing with regard to the single-photograph identifications made by the complainant soon after the shooting was ultimately unnecessary inasmuch as the complainant's trial testimony demonstrated that he was sufficiently familiar with the defendant, whom he knew and referred to by the defendant's street name,"Chulo," such that the complainant's identification of the defendant from the photo display was merely confirmatory … . * * * When a crime has been committed by a . . . long-time acquaintance of a witness there is little or no risk that comments by the police, however suggestive, will lead the witness to identify the wrong person'" … . Any suggestiveness of the initial photo identification procedure or the purported taint thereafter was not a concern since " the protagonists are known to one another'" … . People v Carmona, 2020 NY Slip Op 03672, Second Dept 7-1-20

SANDOVAL.

RULING THAT DEFENDANT COULD BE CROSS-EXAMINED ABOUT THREE PRIOR GUN-RELATED CONVICTIONS IF HE TESTIFIED THE SHOOTING WAS AN ACCIDENT DID NOT DEPRIVE DEFENDANT OF THE RIGHT TO PUT ON A DEFENSE; TWO DISSENTERS DISAGREED (SECOND DEPT).

The Second Department, affirming defendant's murder conviction, over a two-justice dissent, determined Molineux the ruling that defendant could be cross-examined about his three prior gun-related convictions if he were to testify the shooting was an accident did not deprive defendant of the right to put on a defense. The dissenter argued that it did:

Prior to trial, the Supreme Court ruled that if the defendant were to testify that the shooting was an accident, the People would be permitted to offer evidence, through their cross-examination of him, of the facts underlying his three prior gun-related convictions … . The defendant contends that this ruling deprived him of his due process right to a fair trial as it deterred him from testifying at trial. Contrary to the defendant's contention, and the position of our dissenting colleagues, the court's Molineux ruling did not deprive the defendant of his right to a fair trial … . Moreover, any error in the ruling was harmless, as there was overwhelming evidence of the defendant's guilt and no reasonable possibility that any error might have contributed to the defendant's conviction … . * * *

From the dissent:

… [T]he fact that the defendant committed gun-related offenses against persons other than the victim nearly 20 years before the subject shooting bears no relevance whatsoever to the issue of whether the subject shooting was an accident. In my view, permitting the People to elicit the underlying facts of prior gun-related acts that were totally unrelated to the victim would serve only to demonstrate that the defendant had a propensity for gun violence … . Consequently, the Supreme Court's pretrial ruling in this case cannot be justified under Molineux and, thus, the ruling effectively precluded the defendant from presenting a defense. People v Huertas, 2020 NY Slip Op 04577, Second Dept 8-19-20

SEARCH AND SEIZURE, VEHICLES.

THE IMPOUNDMENT AND SEARCH OF DEFENDANT'S CAR, WHICH WAS LEGALLY PARKED AT THE TIME OF DEFENDANT'S ARREST, WERE ILLEGAL; THE SEIZED EVIDENCE SHOULD HAVE BEEN SUPPRESSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the impoundment of defendant's car, which was legally parked car at the time of defendant's arrest, was illegal. The subsequent search of the car was not a valid inventory search. The seized evidence should have been suppressed:

… [T]he Supreme Court should have granted that branch of the defendant's omnibus motion which was to suppress the physical evidence recovered from his vehicle. The People failed to establish the lawfulness of the impoundment of the defendant's vehicle

and subsequent inventory search … . At the suppression hearing, the arresting officer testified that the defendant's vehicle was legally parked at the time of the defendant's arrest, and there was no testimony regarding posted time limits pertaining to the parking space. Further, although the officer testified that he impounded the defendant's vehicle for "safekeeping," the People presented no evidence demonstrating any history of burglary or vandalism in the area where the defendant had parked his vehicle. Thus, the People failed to establish that the impoundment of the defendant's vehicle was in the interests of public safety or part of the police's community caretaking function … . Moreover, while the arresting officer testified that "[t]here is [an] NYPD procedure when someone is arrested and you have to take the car into safekeeping," the People failed to present evidence of what such a procedure required or whether the arresting officer complied with such a procedure when he impounded the defendant's vehicle … . People v King, 2020 NY Slip Op 06288, Second Dept 11-4-20

SEARCH AND SEIZURE, VEHICLES.

AN ALLEGED CONTROLLED SUBSTANCE WAS NOT IN PLAIN VIEW IN THE VEHICLE; THEREFORE THE WARRANTLESS SEARCH OF A CLOSED CONTAINER IN THE VEHICLE, WHICH REVEALED A WEAPON, WAS NOT JUSTIFIED; WEAPONS CHARGES DISMISSED (SECOND DEPT).

The Second Department, dismissing the weapons charges, determined the search of defendant's vehicle was not justified. The officer (Chowdhury) saw the top of a prescription bottle, pulled the bottle out of a pouch, determined it contained a controlled substance, a searched a closed container to find the weapon:

Chowdhury observed "two clear cups of brown liquid, alcohol" in the cup holders in the vehicle's front console and smelled an odor of alcohol emanating from the vehicle. Chowdhury asked the defendant and an individual in the front passenger seat to exit the vehicle, and they complied. Chowdhury further testified that the rear passenger side door was open and that, with the aid of a flashlight, he observed the "white top" of a prescription bottle sticking out of the pouch on the back of the front passenger seat. Chowdhury then entered the vehicle, pulled the bottle out, and observed that it was clear, with no prescription label, and had unlabeled white pills inside that Chowdhury and [officer] Carrieri identified as Oxycodone. Carrieri then began searching the vehicle for any

weapons or other contraband and found a handgun inside of a closed compartment under the rug behind the driver's seat. The defendant was arrested, and later made a statement to the police regarding the gun. …

The Supreme Court should have granted that branch of the defendant's omnibus motion which was to suppress the gun and his statement. The officers' observations of the brown liquid in the cups in the front console and the smell emanating from the vehicle gave them probable cause to suspect a violation of Vehicle and Traffic Law § 1227, which prohibits the possession of open containers containing alcohol in a vehicle located upon a public highway, and would have justified their entry into the vehicle to seize the cups of liquid and search for additional open containers … . However, since there was nothing from Officer Chowdhury's observation of the top of the prescription bottle located in the seat pocket that indicated that the bottle contained contraband, there was no justification for his removal of the bottle and detailed inspection of it and its contents or for the subsequent search of the car for weapons or other contraband. Chowdhury testified that it was only after he pulled the bottle out of the pouch and pulled upward on the top of it that he was able to see that it was unlabeled and contained what he identified as Oxycodone. Thus, contrary to the People's contention, it cannot be said that a suspected controlled substance was in plain sight … . People v Boykin, 2020 NY Slip Op 07085, Second Dept 11-25-20

SENTENCING.

DEFENDANT SHOULD HAVE BEEN SENTENCED AS A SECOND FELONY OFFENDER RE TWO COUNTS OF CRIMINAL POSSESSION OF A WEAPON THIRD DEGREE, WHICH ARE NOT VIOLENT FELONIES (FOURTH DEPT).

The Fourth Department determined the sentences for two counts of criminal possession of a weapon third degree, D felonies, were illegal:

… [T]he determinate terms of incarceration of seven years imposed on counts 2 and 10 of the indictment, for criminal possession of a weapon in the third degree, class D felonies, are illegal. Those crimes are not violent felonies (see generally Penal Law § 70.02 [1] [c]), and therefore, the court should have sentenced defendant as a second felony offender on those counts and imposed indeterminate terms of incarceration (see § 70.06 [3] [d];

[4] [b]). Furthermore, inasmuch as defendant must be sentenced to indeterminate terms of incarceration, he is not subject to a period of postrelease supervision on those counts (see § 70.45 [1 …). People v Lovette, 2020 NY Slip Op 06892, Fourth Dept 11-20-20

SENTENCING.

THE PERSISTENT FELONY OFFENDER STATEMENT WAS INADEQUATE BECAUSE IT DID NOT CLEARLY INDICATE THE PERIODS OF DEFENDANT'S PRIOR INCARCERATION; THEREFORE, BECAUSE THE TEN-YEAR CUT-OFF PERIOD IS TOLLED DURING INCARCERATION, IT COULD NOT BE DETERMINED WHETHER DEFENDANT'S PRIOR FELONIES FELL WITHIN THE TEN-YEAR CUT-OFF PERIOD FOR A VALID PERSISTENT FELONY OFFENDER SENTENCE (FOURTH DEPT).

The Fourth Department, reversing County Court, determined the persistent felony offender statement was inadequate because it did not clearly describe the periods of defendant's incarceration, which tolls the ten-year cut off for consideration of prior felonies. The matter was remitted for the submission of a valid statement and resentencing:

The sentences upon the predicate violent felony convictions "must have been imposed not more than ten years before commission of the felony of which the defendant presently stands convicted" (§ 70.04 [1] [b] [iv]). However, "[i]n calculating the ten year period . . . , any period of time during which the person was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony shall be excluded and such ten year period shall be extended by a period or periods equal to the time served under such incarceration" (§ 70.04 [1] [b] [v]). It is undisputed that, here, the sentences for defendant's two prior violent felony convictions were imposed more than 10 years before defendant committed the subject violent felony offense (see §§ 70.04 [1] [b]; 70.08 [1] [a], [b]). Thus, the prior violent felony convictions may be considered predicate violent felony convictions only in accordance with the tolling provision of section 70.04 (1) (b) (v) based upon defendant's subsequent periods of incarceration.

Because the tolling provision of Penal Law § 70.04 (1) (b) (v) is implicated, the persistent violent felony offender statement filed by the People was required to "set forth the date of

commencement and the date of termination as well as the place of imprisonment for each period of incarceration to be used for tolling of the ten year limitation" (CPL 400.15 [2]; see CPL 400.16 [1], [2]). Here, however, the statement filed by the People did not comply with that requirement … . Moreover, contrary to the position taken by the People that the statement substantially complies with CPL 400.15, the absence of the required information deprived defendant of the requisite "reasonable notice and an opportunity to be heard" with respect to the tolling period … . People v Watkins, 2020 NY Slip Op 04265, Fourth Dept 7-24-20

SENTENCING.

THE SENTENCES FOR ASSAULT AND POSSESSION OF A WEAPON SHOULD NOT HAVE BEEN IMPOSED CONSECUTIVELY (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the evidence did not support consecutive sentences for assault second and criminal possession of a weapon second:

… [T]he sentence imposed on the conviction of assault in the second degree should not run consecutively to the sentence imposed on the conviction of attempted criminal possession of a weapon in the second degree. There were no facts adduced at the defendant's plea allocution to establish that the defendant attempted to possess " a loaded firearm before forming the intent to cause a crime with that weapon'" … . People v Goodman, 2020 NY Slip Op 04857, Second Dept 9-2-20

SPEEDY TRIAL, DUE DILIGENCE.

THE PEOPLE DEMONSTRATED THE EXERCISE OF DUE DILIGENCE IN ATTEMPTING TO LOCATE THE DEFENDANT; DEFENDANT'S MOTION TO DISMISS THE INDICTMENT ON SPEEDY TRIAL GROUNDS SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing County Court on the People's appeal, determined the indictment should not have been dismissed on speedy trial grounds because the People demonstrated the exercise of due diligence in attempting to locate the absent defendant:

In computing the time within which the People must be ready for trial, the court must exclude, inter alia, the period of delay resulting from defendant's absence (see CPL 30.30 [4] [c] [i]). "A defendant must be considered absent whenever his location is unknown and he is attempting to avoid apprehension or prosecution, or his location cannot be determined by due diligence" (id.). …

… [W]e conclude that the People established that they exercised due diligence in attempting to locate defendant during the time period at issue at the hearing. Law enforcement officers routinely checked computer databases, social media outlets, criminal history reports and information from other government agencies to attempt to identify locations where defendant might be located. In addition, officers investigated all of the addresses associated with defendant to varying degrees, speaking with maintenance workers, neighbors, tenants, and defendant's mother. In attempting to conduct subsequent interviews with defendant's mother, law enforcement officers learned that she no longer resided at the same address. Law enforcement officers also contacted and spoke with all of defendant's known employers. Although law enforcement officers did not conduct a full investigation of one address that appeared on one credit agency report, one of the officers testified at the hearing that credit reports were not reliable because "anyone . . . could go apply for a credit card online today and write [any address] on the application." Without any corroboration of defendant's affiliation with that address, the officer did not investigate beyond driving to the address and verifying that it was a commercial and retail building. Ultimately … the officers' periodic database searches yielded a potential address in Georgia.

"[N]otwithstanding the fact that greater efforts could have been undertaken"… , we conclude that the People established that they exercised the requisite due diligence in

attempting to locate defendant during the time period at issue … . People v Anderson, 2020 NY Slip Op 06881, Fourth Dept 11-20-20

SPEEDY TRIAL.

ALTHOUGH THE PEOPLE SHOULD HAVE DISCOVERED THE PROBLEM WITH CERTAIN EVIDENCE SOONER, FOR SPEEDY TRIAL PURPOSES THE PEOPLE CAN BE CHARGED ONLY WITH THE TIME NECESSARY TO INVESTIGATE THE NEWLY DISCOVERED EVIDENTIARY ISSUE; THE NEED FOR MORE INVESTIGATION DID NOT INVALIDATE THE PEOPLE'S STATEMENT OF READINESS WHICH WAS WITHDRAWN; THEREFORE THE INDICTMENT SHOULD NOT HAVE BEEN DISMISSED ON SPEEDY TRIAL GROUNDS (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the indictment should not have been dismissed on speedy trial grounds. The People withdrew their statement of readiness stating that there was newly discovered evidence. Supreme Court found that the evidence was available early on and should have been discovered had the People been diligent.

The record shows that the People were not aware until April 30, 2019 that mistakes by police detectives had incorrectly led them to conclude that they could not locate the user of the Instagram account that had been used to send the photographs of defendant engaging in sexual acts with the victim to defendant's ex-girlfriend. While we agree with the court that the People's late realization was entirely due to the People's failure to properly inspect the evidence within their possession, the time chargeable to the People is only the delay that is directly attributable to their inaction, and that which directly implicated their ability to proceed to trial … . Thus, the delay that is chargeable to the People due to their inaction with respect to the photographs is any additional time that they required to investigate the matter, which they could have previously investigated. Moreover, the People's need to further investigate the photographs did not render their prior statement of readiness illusory because the record shows that, at the time they announced their readiness, the People would have been able to establish a prima facie case and proceed at trial … . People v Pratt, 2020 NY Slip Op 04662, fourth Dept 8-20-20

STREET STOPS.

CITIZEN INFORMANT WHO WALKED INTO THE POLICE STATION PROVIDED SUFFICIENT INFORMATION TO JUSTIFY APPROACHING A VAN IN WHICH DEFENDANT WAS SLEEPING, LEADING TO DEFENDANT'S ARREST; A TWO-JUSTICE DISSENT ARGUED THE INFORMATION PROVIDED BY THE FACE-TO-FACE INTERVIEW WITH THE INFORMANT DID NOT PROVIDE THE POLICE WITH REASONABLE SUSPICION (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined the police, after interviewing a citizen informant who walked into the police station, had reasonable suspicion to approach a van in which the defendant was sleeping. Thereafter the police were justified in asking the defendant to step out of the van for safety reasons and in arresting the defendant when an officer saw a handgun in defendant's waistband. The dissent argued the informant (who identified himself to the police but was not identified to the defendant) did not provide sufficiently detailed information to justify approaching the van:

…[T]he testimony of a police officer during the suppression hearing established that a citizen informant walked into a police station at 4:30 a.m. and reported that two men had "ripped him off" during "a drug deal gone wrong." The informant, who identified himself by name to the officer but whose identity was not disclosed to defendant, appeared to be angry and upset and did not seem to be intoxicated. The informant alleged, inter alia, that the two men were in a purple minivan at a specific address on Stevens Street in the City of Buffalo, and that "there were drugs in the vehicle" and one of the men "was holding [a] handgun in his lap." The police officer interviewed the informant for 10 to 15 minutes, during which time the officer had an opportunity to evaluate his reliability on the basis of his appearance and demeanor … . The informant's reliability was enhanced because he identified himself to the officer and reported that he had attempted to take part in a drug transaction, thus making a declaration against penal interest and subjecting himself to potential prosecution for his own criminal activity … . The informant also waited at the police station while officers investigated the allegations, thereby subjecting himself to "the criminal sanctions attendant upon falsely reporting information to the authorities" … . Thus, we conclude that the People established the reliability of the informant by

establishing that the officer obtained information from him during a face-to-face encounter … , and that information did not constitute an anonymous tip … .

From the dissent:

… [A]lthough the majority relies on the ability of the police "to evaluate [the] reliability [of the informant]" during face-to-face contact … , the testimony of the police officer who met the informant reveals that the officer lacked sufficient information to make such an evaluation. The officer believed that the informant appeared agitated, and conceded that he did not know whether the informant was sober. The informant offered the officer no description of the men who purportedly "ripped him off" or how the alleged drug deal had gone wrong, and the officer testified that he never even asked the informant when that incident took place. Instead, the informant offered no more than the description of the outside of a vehicle … . People v Edwards, 2020 NY Slip Op 05672, Fourth Dept 10-9-20

STREET STOPS.

POLICE DID NOT HAVE REASONABLE SUSPICION DEFENDANT WAS ENGAGED IN CRIMINAL ACTIVITY AT THE TIME OF THE STOP AND PURSUIT; THEREFORE THE WEAPON DISCARDED BY DEFENDANT SHOULD HAVE BEEN SUPPRESSED (FIRST DEPT).

The First Department, reversing Supreme Court and dismissing the indictment, determined the police who stopped and pursued the defendant did not have reasonable suspicion of criminal activity at the outset. So the weapon discarded by the defendant should have been suppressed:

"Police pursuit is regarded as significantly impeding a person's freedom of movement, thus requiring justification by reasonable suspicion that a crime has been, is being, or is about to be committed" … . By contrast, "mere surveillance need not be justified by reasonable suspicion" … .

Although the police actions began as permissible observation, while following defendant slowly in their car without turning on their lights or sirens … , observation gave way to pursuit when the officers turned on their lights and sirens to cross the street against traffic and pull up ahead of defendant. Even crediting one of the officer's testimony that his intent

was to get a better view and alert oncoming traffic, not to cut off, block, or alarm defendant, the objective impact of this maneuver was "intimidating" and communicated "an attempt to capture or . . . intrude upon [defendant's] freedom of movement" … .

Because it is undisputed that the circumstances before this police activity were not sufficient to create reasonable suspicion, it was unlawful and could not be validated by any subsequently acquired suspicion … . When defendant discarded a handgun during the course of the illegal pursuit, he did not voluntarily abandon it and it should have been suppressed … . People v Collins, 2020 NY Slip Op 03852, First Dept 7-9-20

STREET STOPS.

THE POLICE CAR FOLLOWED DEFENDANT, FIVE FEET BEHIND HIM, AS HE WALKED THROUGH A NARROW PASSAGEWAY; THE POLICE WERE NOT IN PURSUIT AND THE HANDGUN DISCARDED BY THE DEFENDANT WAS PROPERLY SEIZED (FOURTH DEPT).

The Fourth Department determined the police, who followed defendant in a police car as he walked through a narrow passageway (a cut-through) between two streets, were not in pursuit of defendant. Therefore the weapon discarded by the defendant was properly seized:

The evidence at the suppression hearing established that a police officer responding to the sound of gunshots observed a person walking towards him a few blocks away from the location of the incident. The officer lost sight of the person before he was able to speak with him to determine whether the person had heard the gunshots, but he relayed over the police radio a generic physical description of the person he had encountered and that person's location. Shortly thereafter, a second police officer encountered defendant not far from the radioed position. The second officer engaged defendant in a brief conversation from her patrol vehicle, after which defendant entered a nearby cut-through—i.e., a pedestrian pathway that connected two streets. When defendant first entered the cut-through, the second officer did not consider him a suspect in the shooting and he was not engaged in any unlawful activity. Nonetheless, the second officer, still in her patrol vehicle and now accompanied by another officer in a separate patrol vehicle, followed defendant along the pathway, maintaining a distance of about five feet from defendant. The cut-through was so narrow at one point that the officers would not have

been able to open the doors of their patrol vehicles. When defendant reached the end of the cut-through, he removed a handgun from his pocket and ran. As he ran, defendant discarded the handgun and was thereafter arrested. * * *

The police did not activate their vehicles' overhead lights or sirens, exit their vehicles, or significantly limit defendant's freedom of movement along the pedestrian path … . Indeed, defendant remained free to keep walking down the path, even if at one point on the path he could not have turned around and traveled in the opposite direction. People v Allen, 2020 NY Slip Op 06594, Fourth Dept 11-13-20

STREET STOPS.

THE ROBBERY CONVICTION WAS AGAINST THE WEIGHT OF THE EVIDENCE; THE STOP AND FRISK OF DEFENDANT WAS NOT JUSTIFIED; THE SHOWUP IDENTIFICATION SHOULD HAVE BEEN SUPPRESSED (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction after trial and dismissing the indictment, in a full-fledged opinion by Justice Troutman, over a concurring opinion, determined the robbery conviction was against the weight of the evidence and the showup identification should have been suppressed. The opinion is comprehensive, well worth study, and cannot be fairly summarized here:

… [T]here is considerable objective evidence supporting defendant's innocence. Defendant was found standing in a driveway half a mile from the crime scene only seven minutes after it occurred, wearing clothing different from the clothing worn by the gunman. He was not in possession of the fruits of the crime or of a firearm. There was no testimony that he was out of breath or that he displayed other signs of having recently run a distance. To the contrary, his boots were not even laced. The possibility that he changed clothes and hid the items in his companion's residence across the street was questionable in the first instance given the timing of the events, and was severely undercut by the fact that the police obtained permission to search the residence and did so without finding anything linking defendant to the crime. Furthermore, the police investigation established that a person other than defendant possessed the fruits of the robbery, particularly the victim's cell phone, and that person's act in fleeing from the police when the phone alarm sounded was indicative of consciousness of guilt … . Other objective evidence, particularly the dog

tracking, established that the gunman never turned west off of Genesee Street toward the place where defendant was found, but continued to run down Genesee Street in a southerly direction. * * *

The testimony of the officer who initiated this street encounter established that he explored only "one of" several side streets in a residential neighborhood and seized the first young black man in a hooded sweatshirt who he found. It must be plainly stated—the law does not allow the police to stop and frisk any young black man within a half-mile radius of an armed robbery based solely upon a general description.

FROM THE CONCURRENCE:

In my view, reversal is required here solely on the ground that Supreme Court erred in refusing to suppress the showup identification testimony because it was not sufficiently attenuated from the police officer's unlawful stop and detention of defendant … . People v Miller, 2020 NY Slip Op 06667, Fourth Dept 11-13-20

STREET STOPS.

THE WAIVER OF APPEAL WAS INVALID BECAUSE THE JUDGE SUGGESTED THE WAIVER WAS AN ABSOLUTE BAR TO APPEAL; THE OFFICER WHO APPROACHED DEFENDANT ON THE STREET WAS NOT JUSTIFIED IN REACHING FOR AN OBJECT IN DEFENDANT'S SWEATSHIRT POCKET; DEFENDANT'S FLIGHT AND DISCARDING OF THE WEAPON WAS NOT INDEPENDENT OF THE OFFICER'S UNJUSTIFIED ACTIONS; THE GUN SHOULD HAVE BEEN SUPPRESSED (SECOND DEPT).

The Second Department, finding the waiver of appeal invalid, granted defendant's suppression motion and dismissed the indictment. The officer who approached defendant saw the shape of something heavy in defendant's sweatshirt pocket, said "what's this" and reached for it. At that point defendant ran and discarded a weapon:

When explaining the waiver of the right to appeal, the Supreme Court stated, inter alia, that as a result of the waiver, the defendant was "giving up [his] independent right to appeal [his] case to a higher court," and that the case "ends here" upon sentencing. These statements incorrectly suggested that the waiver may be an absolute bar to the taking of an appeal … . …

The officer was justified in conducting a common-law inquiry, and the officer was permitted to ask the defendant if he was carrying a weapon … . However, the officer was not justified in attempting to touch the defendant's sweatshirt pocket as a minimally intrusive self-protective measure, since the defendant did not engage in any conduct justifying such an intrusion … . The defendant's response of fleeing and discarding the gun was not "an independent act involving a calculated risk attenuated from the underlying [illegal] police conduct" … . People v Soler, 2020 NY Slip Op 07404, Second Dept 12-9-20

STRIP SEARCHES.

THE STRIP SEARCH OF DEFENDANT WAS JUSTIFIED AND CONDUCTED PROPERLY (THIRD DEPT).

The Third Department determined the strip search of defendant, which resulted in the seizure of cocaine, was proper:

"[I]t is clear that a strip search must be founded on a reasonable suspicion that the arrestee is concealing evidence underneath clothing and the search must be conducted in a reasonable manner" … . The trooper testified at the suppression hearing that the search of the vehicle led to the discovery of 1.1 grams of marihuana in the center console. A K-9 search of the vehicle revealed "hits" at both the center console and the driver's seat. According to the trooper, during the transport of defendant to the State Police barracks, the smell of marihuana was "overwhelming." At the barracks, defendant was handcuffed to a bench and the trooper continued to smell marihuana. Each time the trooper asked defendant if he had marihuana on him, he denied it. After defendant was advised that he was to be strip-searched, he was taken to a private interview room and the search was conducted by two male officers. Defendant was asked to remove one article of clothing at a time; when he was down to his underwear, defendant handed over the marihuana, and the cocaine was revealed shortly thereafter. Given this evidence, a reasonable suspicion existed that defendant was concealing evidence and we find that the search was conducted in a reasonable manner … . People v Hightower, 2020 NY Slip Op 04513, Third Dept 8-13-20

TEMPORARY LAWFUL POSSESSION OF A WEAPON.

DEFENDANT, WHO ACCEPTED POSSESSION OF THE WEAPON FROM HIS FRIEND, DID SO IN ANTICIPATION OF A POSSIBLE CONFRONTATION; DURING THE CONFRONTATION DEFENDANT SHOT TWO PEOPLE; THE ARGUMENT THAT DEFENDANT ACTED IN SELF-DEFENSE DID NOT RENDER DEFENDANT'S POSSESSION OF THE WEAPON TEMPORARY AND LAWFUL (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Stein, over two concurring opinions, determined defendant was not entitled to a jury instruction on temporary and lawful possession of a firearm. Defendant was leaving a friend's apartment building when he saw a man, Carson, pull a gun out of his pocket. Defendant and Carson had a history of violent confrontations, including shootings. Defendant went back to his friend's (Foe's) apartment. Foe picked up a loaded gun and offered to walk defendant out of the building. When they got to the lobby Foe handed defendant the gun. When defendant saw Carson he believed Carson was about to shoot him and defendant shot Carson and a bystander:

… "[A] defendant may not be guilty of unlawful possession if the jury finds that [the defendant] found the weapon shortly before [the defendant's] possession of it was discovered and [the defendant] intended to turn it over to the authorities" … . We have also indicated that temporary and lawful possession may result where a defendant "took [the firearm] from an assailant in the course of a fight" … and the circumstances do not otherwise evince an intent to maintain unlawful possession of the weapon . In such scenarios, "[t]he innocent nature of the possession negates . . . the criminal act of possession" … . Ultimately, whether the weapon is found fortuitously or obtained by disarming an attacker, "the underlying purpose of the charge is to foster a civic duty on the part of citizens to surrender dangerous weapons to the police" … . …

… [D]efendant's possession did not "result temporarily and incidentally from the performance of some lawful act, [such] as disarming a wrongful possessor" or unexpected discovery … . Rather, under the circumstances presented here, defendant's contention that his possession should be legally excused on the grounds of self-defense amounts to a claim that he was entitled to possess the weapon for his protection. Even crediting defendant's testimony that he had been confronted by Carson at the building's exit earlier and that Carson had displayed a firearm at that time, defendant testified that he then safely retreated to Foe's apartment. There was no evidence suggesting that Carson chased after defendant when he re-entered the building, or that Carson had any

awareness of defendant's location in the building. Further, defendant admitted that he accepted possession of the firearm from Foe in the stairwell, at a time when he was unaware of Carson's whereabouts and was not facing any imminent threat to his safety. Defendant then chose to retain possession of the firearm and to enter the lobby with the weapon in his hand. Under these circumstances, the only reasonable conclusion to be drawn from the evidence is that defendant armed himself in anticipation of a potential confrontation; however, the law is clear that defendant "may not avoid the criminal [possession] charge by claiming that he possessed the weapon for his protection" … . People v Williams, 2020 NY Slip Op 07664, CtApp 12-17-20

TRAFFIC STOPS.

AN INDICATION THE DEFENDANT'S VEHICLE HAD BEEN IMPOUNDED, REVEALED WHEN THE TROOPER RAN THE PLATES, DID NOT SUPPORT THE TRAFFIC STOP; THE WEAPON AND DRUGS FOUND IN THE VEHICLE SHOULD HAVE BEEN SUPPRESSED; APPELLATE DIVISION REVERSED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, over a concurring opinion and an extensive dissenting opinion, reversing the Appellate Division, determined the state trooper did not have probable cause or reasonable suspicion to support the traffic stop. The weapon and drugs found in a search of defendant's (Mr. Hinshaw's) car should have been suppressed. The stop was based entirely on an indication the car had been impounded revealed when the officer ran the plates. The notice explicitly stated it "should not be treated as a stolen vehicle hit:"

The trooper here did not observe any violations of the Vehicle and Traffic Law and "everything looked good." Putting aside the result of the license plate inquiry, "[t]he trooper candidly testified that he had had no reason to stop defendant" … . …

The result of the license plate check provided neither probable cause to conclude a traffic infraction had occurred nor any basis for an objectively reasonable belief that criminal behavior had occurred or was afoot. Although the People and our dissenting colleague argue that the trooper understood the "generic" impound notification to require further investigation as to its cause, the trooper's speculation that the car could have been impounded for "registration . . . problems," the "plates could have been suspended,"

"insurance could have been suspended," or the vehicle could have been stolen was just that — pure speculation … . * * *

Because "there was not even a suggestion that the conduct of the defendant or his companions had been furtive in character before the police interfered with their car's progress," and "the record here is bare of any objective evidence of criminal activity as of the time of the stop" … , the stop of Mr. Hinshaw's vehicle was invalid. People v Hinshaw, 2020 NY Slip Op 04816, CtApp 9-1-20

TRAFFIC STOPS.

ANONYMOUS 911 CALL JUSTIFIED TRAFFIC STOP; DISSENT DISAGREED (FOURTH DEPT).

The Fourth Department, over a dissent, determined an anonymous 911 call provided reasonable suspicion for a traffic stop, officer safety warranted handcuffing the defendant and seeing a rifle in the car provided probable cause for arrest. The dissent argued the anonymous 911 call did not justify the traffic stop:

… "[P]olice stops of automobiles in New York State are legal 'when there exists at least a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime' " … . The evidence at the suppression hearing established that police officers were dispatched based on a 911 call reporting a group of people at a specific location, one of whom had been observed getting into a van while possessing "a long gun." The dispatch provided the license plate number of a van in which the group had driven away from the location where they had been seen by the 911 caller. One or two minutes after the dispatch, one of the responding officers located the van in the area. The officer confirmed that the van's license plate number matched the one provided in the dispatch, and he initiated a traffic stop. Contrary to defendant's assertion, "the totality of the information known to the police at the time of the stop of [the van] 'supported a reasonable suspicion of criminal activity . . . [, i.e.,] that quantum of knowledge sufficient to induce an ordinarily prudent and cautious [person] under the circumstances to believe criminal activity is at hand' " … . In particular, we conclude that the 911 call as relayed in the dispatch "contained sufficient information about

defendant[‘s] unlawful possession of a weapon to create reasonable suspicion” justifying the stop of the van … . People v Walls, 2020 NY Slip Op 05337, Fourth Dept 10-2-20

TRAFFIC STOPS.

DEFENDANT’S PRESENCE NEAR A SUSPECTED DRUG HOUSE IN A HIGH CRIME AREA GAVE RISE TO ONLY A GROUNDED SUSPICION; THE ATTEMPT TO STOP THE CAR IN WHICH DEFENDANT WAS A PASSENGER WAS NOT JUSTIFIED BY REASONABLE SUSPICION; THE MOTION TO SUPPRESS THE SEIZED EVIDENCE AND THE SHOWUP IDENTIFICATION SHOULD HAVE BEEN GRANTED; DEFENDANT’S GUILTY PLEA, WHICH ENCOMPASSED AN UNRELATED OFFENSE, WAS VACATED IN ITS ENTIRETY (FOURTH DEPT).

The Fourth Department, reversing Supreme Court’s denial of a suppression motion and vacating defendant’s guilty plea, determined defendant’s presence near a suspected drug house gave rise only to a founded suspicion which would justify an approach and a common inquiry by the police. Instead, the police attempted to stop the car in which defendant was a passenger and arrested defendant after he ran into his residence. Cocaine and heroin were seized from the defendant. The Fourth Department held that all the seized evidence and the showup identification should have been suppressed. In addition, the court vacated the entire guilty plea which encompassed an unrelated offense:

A detective who could see only the front area of the residence to be searched observed multiple people whom he suspected to be customers arrive at and depart from the back area of the residence through the driveway. The detective also twice saw defendant come to the front yard of the residence to smoke a cigarette then return to the back area. Defendant eventually left the residence as a passenger in a vehicle. The detective conveyed the vehicle’s plate number and direction of travel to an officer in a “take down” car, who followed defendant and attempted to effect a stop of the vehicle by activating the patrol vehicle’s lights. The vehicle in which defendant was a passenger slowed and defendant jumped out and fled on foot into his own residence, where he was arrested soon after and found to be in possession of cocaine and heroin. …

Based on defendant’s proximity to a suspected drug house and his otherwise innocuous behavior … , the officer had, at most, a “founded suspicion that criminal activity [was]

afoot," which permitted him to approach defendant and make a common-law inquiry … . The mere fact that defendant was located in an alleged high crime area "does not supply that requisite reasonable suspicion, in the absence of 'other objective indicia of criminality' . . . , and no such evidence was presented at the suppression hearing" … . …

… [A]lthough defendant's conviction of a second count of criminal possession of a controlled substance in the fifth degree arises from a separate incident, his plea of guilty "was expressly conditioned on the negotiated agreement that [he] would receive concurrent sentences on the separate counts to which he pleaded," and thus the plea must be vacated in its entirety … . People v Martinez-Gonzalez, 2020 NY Slip Op 06593, Fourth Dept 11-13-20

TRAFFIC STOPS.

EVEN IF THE OFFICER WERE WRONG ABOUT WHETHER A NON-FUNCTIONING CENTER BRAKE LIGHT VIOLATES THE VEHICLE AND TRAFFIC LAW, THE OFFICER'S INTERPRETATION OF THE LAW WAS OBJECTIVELY REASONABLE; THEREFORE THE STOP WAS VALID AND THE SUPPRESSION MOTION SHOULD NOT HAVE BEEN GRANTED (CT APP).

The Court of Appeals, reversing the Appellate Term, over a concurring memorandum, a concurring opinion, and two dissenting opinions, determined the police officer who stopped defendant reasonably believed the non-functioning center brake light violated the Vehicle and Traffic Law. Therefore the stop was valid and the DWI evidence should not have been suppressed. The Vehicle and Traffic Law requires at least two functioning brake lights. Here there were two functioning lights but the center brake light was not working:

We conclude that the officer's interpretation of the Vehicle and Traffic Law was objectively reasonable. Vehicle and Traffic Law § 375 (40) (b) mandates that motor vehicles manufactured after a certain date be "equipped with at least two stop lamps, one on each side, each of which shall display a red to amber light visible at least five hundred feet from the rear of the vehicle when the brake of such vehicle is applied." Vehicle and Traffic Law § 376 (1) (a) prohibits, in relevant part, (1) operating a vehicle "during the period from one-half hour after sunset to one-half hour before sunrise, unless such vehicle is equipped with lamps of a type approved by the commissioner which are lighted and in

good working condition"; and (2) operating a vehicle at any time "unless such vehicle is equipped with signaling devices and reflectors of a type approved by the commissioner which are in good working condition." Vehicle and Traffic Law § 375 (19), in turn, prohibits the operation of a motor vehicle on highways or streets if the vehicle "is defectively equipped and lighted." Taken together, these provisions could reasonably be read to require that all lamps and signaling devices be in good working condition, and that all equipment and lighting be non-defective, regardless of whether a vehicle is actually required to be equipped with those lamps, signaling devices, equipment, or lights. Even assuming the officer was in fact mistaken on the law, it was nevertheless objectively reasonable to conclude that defendant's non-functioning center brake light violated the Vehicle and Traffic Law … . Because any error of law by the officer was reasonable, there was probable cause justifying the stop … . People v Pena, 2020 NY Slip Op 06836, CtApp 11-19-20

TRAFFIC STOPS.

POLICE OFFICER WAS JUSTIFIED IN FOLLOWING DEFENDANT'S CAR AFTER OBSERVING A TRAFFIC VIOLATION, DIRECTING THE OCCUPANTS OF THE CAR TO RETURN TO THE CAR AFTER IT PULLED INTO A RESIDENTIAL DRIVEWAY, AND DETAINING THE DEFENDANT AND CONDUCTING A SEARCH ON THE PROPERTY AFTER THE HOMEOWNER SAID HE DID NOT KNOW THE OCCUPANTS OF THE CAR (THIRD DEPT).

The Third Department determined the police officer acted properly in following the defendant's car after observing a traffic violation, directing the occupants of the car to return to car after it pulled into a residential driveway, detaining the defendant when the homeowner said he did not know the defendant and the others, and arresting the defendant after a weapon was found after a search behind the house:

The officer observed a traffic infraction when the vehicle ran a stop sign … and was accordingly justified in approaching the vehicle after he had caught up to it … . Defendant suggests that the traffic infraction was a pretext for making the approach, but that contention is unpreserved for our review … . As a result, although one might reasonably question why the officer, upon seeing a traffic violation of sufficient gravity to cause him to make a U-turn and follow the vehicle, did not put on his siren or emergency lights, and then approached the vehicle with more apparent interest in the passengers than the

driver, the record was not developed on the possibility of an ulterior motive for the officer's actions. It follows that the record affords no basis for defendant's speculation as to the officer's motivations. We are, in any event, bound by controlling precedent that those speculative motivations would not render an otherwise proper approach invalid … .

The officer had discretion to "control the scene in a way that maximize[d]" safety as the approach unfolded, could have directed defendant to exit the vehicle had he been in it and, in … view of the heightened safety concerns stemming from defendant's refusal to return to the vehicle and brief disappearance behind the house, was free to direct that defendant sit on the hood of the vehicle upon his return … . Shortly thereafter, the officer learned that the homeowner did not know anyone in the vehicle despite their claims and had watched defendant throw something away behind the house. The foregoing created a reasonable suspicion of criminal activity by defendant that warranted his detention, after which the handgun was recovered and afforded probable cause for his arrest … . People v Price, 2020 NY Slip Op 04430, Third Dept 8-6-20

TRAFFIC STOPS.

THE OFFICER WHO STOPPED THE CAR IN WHICH DEFENDANT WAS A PASSENGER AFTER HEARING GUN SHOTS DID NOT HAVE THE REASONABLE SUSPICION NEEDED FOR THE SEIZURE OF A VEHICLE; THE SEIZED EVIDENCE SHOULD HAVE BEEN SUPPRESSED; INDICTMENT DISMISSED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court and dismissing the indictment, determined the police did not have reasonable suspicion justifying the stop of the car in which defendant was a passenger. The seized evidence should have been suppressed. The officer who stopped the car had heard gunshots, drove in the direction of the shots, passed two intersecting streets, and then saw defendant's car moving slowly:

Considering the "totality of the circumstances" here … , we conclude that the People failed to establish the legality of the police conduct … . As noted, the People established that the police stopped the vehicle less than two minutes after hearing the shots fired, the incident occurred in the early morning hours, the police did not see any pedestrian or vehicular traffic other than the subject vehicle after the shots were fired, and the vehicle was found in proximity to the location of the shots fired. The police, however, were not

given a description of the vehicle involved or even informed whether there was a vehicle involved … , the officer did not give any testimony regarding whether he saw any pedestrian or vehicle traffic before hearing the shots fired … , and the vehicle was not fleeing from the area where shots were fired … . Rather, the subject vehicle was simply a vehicle that was in the general vicinity of the area where shots were heard … . As the officer correctly recognized, the police had a founded suspicion that criminal activity was afoot to justify a common-law right to inquire … , but they did not have the required reasonable suspicion to justify the seizure of the vehicle. People v Fitts, 2020 NY Slip Op 06654, Fourth Dept 11-13-20

TRAFFIC STOPS.

THE POLICE DID NOT HAVE REASONABLE SUSPICION TO JUSTIFY THE TRAFFIC STOP AND DID NOT HAVE PROBABLE CAUSE TO ARREST AT THE TIME DEFENDANT GOT OUT OF THE CAR; THE STATEMENTS MADE BY DEFENDANT AND THE COCAINE SEIZED FROM HIS PERSON SHOULD HAVE BEEN SUPPRESSED (FOURTH DEPT).

The Fourth Department, reversing the convictions related to statement which should have been suppressed, determined the police did not have reasonable suspicion to justify a traffic stop and did not have probable to handcuff the defendant, a de facto arrest, when he got out of the car. Therefore the statements which led to the search and seizure of cocaine, as well as the seized cocaine, should have been suppressed:

Inasmuch as the officer conducting the surveillance and directing the stop of defendant "did not see what the defendant and [the alleged buyer] exchanged, could not see if one of the [participants] gave the other something in return for something else, and did not see money pass between the two [individuals]," we conclude that the officers detaining defendant lacked reasonable suspicion to do so … .

… Although the use of handcuffs does not automatically transform a defendant's detention into a de facto arrest … , such use must be justified by some additional circumstances, such as a threat of evasive conduct … . …

… [T]here was no testimony that the officer who handcuffed defendant "reasonably suspect[ed] that he [was] in danger of physical injury by virtue of [defendant] being armed"

… . “[T]he test for determining whether a defendant is in custody or has been subjected to a de facto arrest is ‘what a reasonable [person], innocent of any crime, would have thought had he [or she] been in the defendant’s position’ ” … . People v Hernandez, 2020 NY Slip Op 05321, Fourth Dept 9-30-20

TRAFFIC STOPS.

THE TRAFFIC STOP WAS BASED ON A COMPUTER-GENERATED “SIMILARITY HIT;” AT THE SUPPRESSION HEARING THE PEOPLE DID NOT MEET THEIR BURDEN OF GOING FORWARD BECAUSE THE BASIS OF THE “SIMILARITY HIT” WAS NOT DEMONSTRATED; THIS PRESENTED A QUESTION OF LAW REVIEWABLE BY THE COURT OF APPEALS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Feinman, reversing the Appellate Division, determined the People did not meet their burden of going forward at the suppression hearing because they did not make a minimum showing of reasonable suspicion for the traffic stop. Whether the People meet that burden has been deemed a question of law which the Court of Appeals can address. Whether a stop was justified by reasonable suspicion is usually a mixed law and fact question which the Court of Appeals can not review. Here the traffic stop was based on a so-called “similarity hit” generated by the Department of Motor Vehicles database. A “similarity hit” apparently indicates some possible connection between the registered owner of a vehicle and an outstanding warrant. But, at the suppression hearing, the People did not present any evidence of the basis for the “similarity hit;”

According to the officer, a “similarity hit” is generated “based on the name of the registered owner, the date of birth[,] and other aliases.” He testified that the system considers “certain parameters” when identifying “similarity hits,” but he did not know how the Department of Motor Vehicles set those parameters. Nor did he testify as to any specifics of this match.

… [T]he officer did not think that the driver was the subject of the “similarity hit” because the driver was female and the registered owner was male. As the officer stepped around the vehicle to look at the registration and inspection stickers, he spotted a handgun on the floor under the front passenger seat, in which defendant was sitting. After defendant was arrested, the officer checked the MDT [mobile data terminal] information and

discovered that the person with the warrant did not, in fact, match the vehicle's registered owner or anyone else in the vehicle. The officer did not testify as to the name, date of birth, or address of the registered owner, or provide the specific identifying facts of the person set forth in the arrest warrant. …

While information generated by running a license-plate number through a government database may provide police with reasonable suspicion to stop a vehicle …, the information's sufficiency to establish reasonable suspicion is not presumed … . Thus, when police stop a vehicle based solely on such information, and the defendant, as here, challenges its sufficiency, the People must present evidence of the content of the information … . People v Balkman, 2020 NY Slip Op 06838, CtApp 11-19-20

VACATE CONVICTION, BRADY MATERIAL.

DEFENDANT'S MOTION TO VACATE HIS 1999 MURDER CONVICTION BASED UPON THE PROSECUTION'S FAILURE TO TURN OVER BRADY MATERIAL PROPERLY GRANTED (SECOND DEPT).

The Second Department determined defendant's motion to vacate his 1999 murder conviction based upon the prosecution's failure to turn over Brady material regarding a prosecution witness (Corti) was properly granted:

The People are obligated to disclose exculpatory evidence in their possession which is favorable to the defendant and material to the issues of guilt or innocence … . Moreover, the duty of disclosing exculpatory material extends to disclosure of evidence impeaching the credibility of a prosecution witness whose testimony may be determinative of guilt or innocence … .

Here, the defendant was not provided with material regarding Cort's participation as a witness in two unrelated homicide trials, along with prior agreements between Cort and law enforcement, including her use as a confidential informant by police and her placement in a witness relocation program following her participation in one of the unrelated homicide trials, during which her rent was paid by the Office of the Kings County District Attorney for approximately one year. This material contradicted Cort's trial testimony that she did not have any "deals" with law enforcement and had not been in touch with the District Attorney's Office "for a long period of time," as well as the

prosecutor's arguments during summation that Cort "never took a deal" and "never asked for anything in return." Significantly, Cort's credibility was critical as she was the People's only witness to testify that it was the defendant who shot the victim, and there was no other trial evidence directly linking the defendant to the crime … . Under these circumstances, in the context of the entire trial, Cort's involvement with law enforcement "was both favorable and material to the defense, and the People's failure to disclose this information to the defense violated defendant's constitutional right to due process" … . In addition, the errors were compounded by the prosecution's repetition and emphasis on the misinformation during summation … . People v Rodriguez, 2020 NY Slip Op 05234, Second Dept 9-30-20

VACATE CONVICTION, HEARING REQUIRED.

DESPITE HAVING MADE A PRIOR MOTION TO VACATE HIS CONVICTION ON INEFFECTIVE ASSISTANCE GROUNDS, DEFENDANT WAS ENTITLED TO A HEARING ON THE INSTANT MOTION WHICH WAS SUPPORTED BY AN AFFIDAVIT BY HIS ATTORNEY WHO ACKNOWLEDGED HE TOLD DEFENDANT A GUILTY PLEA WOULD NOT RESULT IN DEPORTATION (THIRD DEPT).

The Third Department, reversing County Court, determined defendant was entitled to a hearing on his motion to vacate his conviction on ineffective assistance grounds. The fact that defendant had made a similar motion which was denied did not preclude the instant motion which, unlike the prior motion, was supported by an affidavit from the attorney who handled defendant's guilty plea. Defendant argued he would not have pled guilty had he been aware of the deportation consequences:

Contrary to the People's contention, defendant's failure to include an affidavit from this attorney on the first CPL article 440 motion did not preclude him from filing the second CPL article 440 motion that did contain such an affidavit (see CPL 440.10 [3] [c]…). We further note that County Court's denial of defendant's motion was not mandatory as CPL 440.10 (3) provides that "in the interest of justice and for good cause shown [the court] may in its discretion grant the motion if it is otherwise meritorious and vacate the judgment" … .

In that vein, we note the numerous statements made in the supporting affidavit of defendant's former attorney with respect to his representation of defendant in his 2000

criminal matter. The affidavit indicates that, upon being retained by defendant, his sole focus was on negotiating a favorable split sentence that would allow defendant to be released from custody as soon as possible. He admits that, in pursuing a favorable sentence, he did not conduct any investigation of the facts surrounding the underlying criminal offense, initiate any preindictment discovery or otherwise raise what he now identifies are arguably fatal deficiencies in the charges brought against defendant. With respect to defendant's allegation that he was affirmatively misinformed regarding the potential immigration consequences of entering a guilty plea to a class C drug felony, the attorney candidly concedes that, despite being aware of the fact that defendant was only a lawful permanent resident and not a citizen of the United States at the time that defendant entered his September 2000 guilty plea, he specifically advised defendant that his guilty plea would have no effect on his lawful permanent resident status and that he would not be deported from the country. People v Perez, 2020 NY Slip Op 03825, Third Dept 7-9-20

VACATE CONVICTION, HEARING REQUIRED.

THE MOTION TO VACATE DEFENDANT'S CONVICTION ON INEFFECTIVE ASSISTANCE GROUNDS SHOULD NOT HAVE BEEN DENIED WITHOUT HOLDING A HEARING; THE RECORD WAS NOT SUFFICIENT FOR DIRECT APPEAL AND THE MOTION PAPERS RAISED QUESTIONS REQUIRING A HEARING (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant's motion to vacate his conviction on ineffective assistance grounds should not have been denied without holding a hearing. The record was not sufficient for a direct appeal on the issue, and the motion raised ineffective assistance questions requiring a hearing:

Defendant's motion, alleging ineffective assistance of counsel in various respects, should not have been denied on the ground that the trial record is sufficient to permit appellate review (CPL 440.10[2][b]). The trial record does not establish whether counsel's alleged deficiencies in handling suppression and trial issues were based on legitimate trial strategy. Moreover, the motion was supported by motion counsel's affirmation detailing his conversation with trial counsel, which raised serious questions about counsel's performance as to several matters. Furthermore, the court improvidently exercised its discretion to the extent that it denied the motion, without granting a hearing, based on

CPL 440.30(4)(d) … . As noted, motion counsel's affirmation recounted a conversation with trial counsel that tended to support some of the ineffectiveness claims. Motion counsel also averred that trial counsel ultimately refused to submit an affirmation in support of the motion. Under the circumstances, the motion court should have granted a hearing to enable trial counsel to be subpoenaed to testify or otherwise present evidence explaining whether there were strategic or other reasons for his decisions … . People v McCray, 2020 NY Slip Op 06219, First Dept 10-29-20

VACATE CONVICTION, NEWLY DISCOVERED EVIDENCE.

DEFENDANT'S MOTION TO VACATE HIS CONVICTION OF A 1996 MURDER BASED UPON NEWLY DISCOVERED EVIDENCE OF THIRD-PARTY CULPABILITY PROPERLY GRANTED (SECOND DEPT).

The Second Department determined County Court properly granted defendant's motion to vacate his conviction stemming from a 1996 murder, despite defendant's confession, based upon evidence of third-party culpability, i.e., statements allegedly made by Gombert to Santoro about Gombert's involvement in the crime:

… [W]e find that the newly discovered evidence "is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant" (CPL 440.10[1][g]). A reasonable jury could credit Santoro's testimony regarding the statements made by Gombert, including that he could not be charged with the rape and murder of the victim because "[t]hey already got the other suckers," and find that such statements raise a reasonable doubt as to the defendant's involvement in the subject crimes … . Moreover, had Santoro's testimony been available to the defendant at trial, defense counsel could have advanced the theory that Gombert was the actual perpetrator of the crimes, rather than merely denying the defendant's involvement … . In fact, the codefendant was acquitted following his third trial, at which Santoro's testimony was admitted for the first time.

Further, although the evidence presented at the defendant's trial included the defendant's statement confessing to the crimes, the record reveals the existence of circumstances casting doubt on that statement. The portion of the defendant's statement regarding how he tied the victim's hands together was inconsistent with the testimony of a medical

examiner for the People as to the manner in which the victim was “hogtied” with rope. In addition, the defendant presented testimony at trial from a polygraph examiner, who opined that the defendant was telling the truth during a polygraph examination when he initially denied raping and killing the victim. People v Krivak, 2020 NY Slip Op 05226, Second Dept 9-30-20

VEHICULAR MANSLAUGHTER, MARIJUANA.

IN A VEHICULAR MANSLAUGHTER CASE, THE STANDARD OF PROOF OF IMPAIRMENT FROM MARIJUANA IS THE SAME AS THE STANDARD OF PROOF OF IMPAIRMENT FROM ALCOHOL (THIRD DEPT).

The Third Department, in a comprehensive opinion by Justice Lynch, affirmed defendant’s conviction stemming from a collision with a motorcycle at a time when defendant was impaired by marijuana (THC). The decision, which lays out the law of vehicular manslaughter, carefully goes through evidence of impairment and causation. The opinion is too detailed to be fairly summarized here. It is worth noting that, on the issue of impairment, the opinion indicates a prior decision describing a different standard of proof of impairment for marijuana, as opposed to alcohol, should no longer be followed. The same standard of proof of impairment is applied to the drugs enumerated in Public Health Law 3306, including marijuana, as is applied to alcohol:

… [T]he degree of impairment necessary to convict a motorist of vehicular manslaughter in the second degree based upon a death that was caused while such motorist was under the influence of one of the drugs enumerated in Public Health Law § 3306 (which includes marihuana) is the same degree of impairment as would be necessary to sustain a conviction of driving while intoxicated by alcohol — namely, the People must prove that such motorist was “incapable of employing the physical and mental abilities which he [or she was] expected to possess in order to operate a vehicle as a reasonable and prudent driver” … . To the extent that this Court’s decision in People v Rossi (163 AD2d 660, 662 [1990], lv denied 76 NY2d 943 [1990]) can be read as holding that a conviction of vehicular manslaughter in second degree based upon a violation of Vehicle and Traffic Law § 1192 (4) only requires proof that the motorist was impaired “to any extent,” it should no longer be followed. People v Caden N., 2020 NY Slip Op 05979, Third Dept 10-22-20

WEAPON NOT USED IN THE OFFENSE.

IT WAS ERROR TO ALLOW IN EVIDENCE PHOTOGRAPHS OF A BAYONET WHICH WAS NOT THE WEAPON USED IN THE STABBING; THE MAJORITY FOUND THE ERROR HARMLESS, THE DISSENT DISAGREED (FIRST DEPT).

The First Department, over an extensive dissent, determined admitting in evidence photographs of a bayonet which was not used in the stabbing was harmless error. The dissent argued the error was not harmless in this first degree manslaughter case:

The court should not have permitted the People to introduce photographs taken by the police of an M9 bayonet that was found in a collection of knives in defendant's bedroom, but was concededly not the weapon used in the crime. The photographs were irrelevant as demonstrative evidence … , because nothing in the record provided a basis for the court to conclude that the bayonet in the photographs resembled the weapon that defendant used to stab the victim … . Even assuming that defendant's statement supported the inference that the unrecovered weapon used in the crime was also a bayonet, and that it came from defendant's collection, there was no evidence that all of defendant's bayonets, which could have come from different eras and armed forces, looked like M9s.

FROM THE DISSENT:

… [T]he People told the jury in its summation that a bayonet knife is designed to kill people; that killing people is the only use for a bayonet knife; that a bayonet knife is not used to open things; and that the army and military gives out weapons, like bayonet knives, to kill people. None of these statements were elicited during the testimony of any witness or made in response to defense counsel's summation, nor could they have been reasonably inferred from the evidence. People v Guevara, 2020 NY Slip Op 07297, First Dept 12-3-20

WITNESS TAMPERING.

WITNESS TAMPERING CONVICTION AFTER TRIAL REVERSED; NO CHARGES WERE PENDING AT THE TIME OF THE COMMUNICATIONS WITH THE WITNESS (FOURTH DEPT).

The Fourth Department, reversing the witness tampering conviction and dismissing the indictment, determined the evidence was legally insufficient:

On appeal from a judgment convicting him upon a jury verdict of tampering with a witness in the third degree … , defendant contends that the conviction is based upon legally insufficient evidence. We agree. Although the evidence established that defendant assaulted the victim in violation of an order of protection and a few days later left the victim voicemails threatening her with violence if she pressed charges against him, defendant had not yet been arrested or charged with a crime in connection with the violation of the order of protection at the time he left the voicemails. Thus, at that time, the victim was not "about to be called as a witness in a criminal proceeding" … . People v Diroma, 2020 NY Slip Op 07817, Fourth Dept 12-23-20

YOUTHFUL OFFENDERS, MITIGATING CIRCUMSTANCES.

CONSIDERING ALL THE MITIGATING FACTORS, DEFENDANT SHOULD HAVE BEEN ADJUDICATED A YOUTHFUL OFFENDER (FOURTH DEPT).

The Fourth Department, reversing defendant's assault conviction in the interest of justice and adjudicating defendant a youthful offender, in a full-fledged, comprehensive opinion by Justice Troutman, determined mitigating factors supported youthful offender status. Defendant was attacked by another high school student and didn't realize the victim, a teacher, had intervened. The defendant injured the teacher's hand with a knife. The Fourth Department went through all the so-called Cruikshank mitigating factors (People v Cruickshank, 105 AD2d 325, 334 [3d Dept 1985]) and further noted the sentencing court did not abuse its discretion by considering additional factors not mentioned in Cruikshank. All involved, including the prosecutor, the victim and the probation department, had recommended a youthful offender adjudication:

In addition to the Cruickshank factors, the parties raised and the court considered additional matters related to equity and discrimination. We reject defendant's contention that the court abused its discretion in considering matters outside the Cruickshank factors. The applicable precedent states that the factors that must be considered "include" those nine factors … , and thus, as a matter of logic, those factors were never meant to be an exhaustive list of considerations. We conclude that matters of equity and discrimination are appropriate for sentencing courts to consider. Although we do not conclude that the court abused its discretion, we urge future courts to consider whether a defendant may be facing discrimination based on protected characteristics such as race or gender and to take an intersectional approach by considering the combined effect of the defendant's specific characteristics and any bias that may arise therefrom … . Here, the prosecutor employed appropriate and effective restorative justice techniques and advocated for the result he believed just. We note that "prosecutors have 'special responsibilities . . . to safeguard the integrity of criminal proceedings and fairness in the criminal process' " … , and this prosecutor deserves to be commended for discharging those responsibilities here. People v Z.H., 2020 NY Slip Op 07824,, Fourth Dept 12-23-20

YOUTHFUL OFFENDERS.

CRIMINAL POSSESSION OF A WEAPON THIRD DEGREE IS NOT AN ARMED FELONY; MATTER REMITTED FOR A NEW YOUTHFUL OFFENDER STATUS DETERMINATION (SECOND DEPT).

The Second Department determined defendant was eligible for youthful offender status because criminal possession of a weapon third degree is not an armed felony:

The Supreme Court denied the defendant's application for youthful offender status based upon its mistaken belief that he had been convicted of an armed felony, which required the court to find either mitigating circumstances that bear directly upon the manner in which the crime was committed or that the defendant was only a minor participant in the crime (see CPL 720.10[3]). The People correctly concede that the court erred in finding that the defendant had been convicted of an armed felony, since criminal possession of a weapon in the third degree pursuant to Penal Law 265.02(7) does not require proof that the firearm was loaded (see CPL 1.20[41] …). Thus, the defendant was eligible for

youthful offender treatment without any finding of mitigation (see CPL 720.10[2]). Accordingly, we remit the matter … for a new determination of the defendant's application for youthful offender status and resentencing thereafter. People v Javon L., 2020 NY Slip Op 07094, Second Dept 11-25-20