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September 6- 10, 2021

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APPEALS.

THE NOTICE OF APPEAL WAS TIMELY SERVED BUT WAS NOT TIMELY FILED WITH THE CLERK OF THE COURT; THE 3RD DEPARTMENT DISMISSED THE APPEAL; THE APPELLATE COURT HAS THE DISCRETION TO ALLOW A LATE FILING; MATTER REMITTED (CT APP).

The Court of Appeals, reversing the Appellate Division, determined that, although the pro se inmate-petitioner did not timely file the notice of appeal, the notice was timely served and the Third Department could have exercised discretion to allow a late filing. The matter was remitted because the Third Department's decision was silent about the reasons for dismissing the appeal:

... [P]etitioner argues that the Appellate Division should have applied a pro se inmate "mailbox rule" to deem the notice of appeal timely filed upon delivery to prison authorities for forwarding to the appropriate court.

CPLR 5515 (1) provides that an appeal is taken when, in addition to being duly served, the notice of appeal is "fil[ed] . . . in the office where the judgment or order of the court of original instance is entered." The CPLR further clarifies that "papers required to be filed shall be filed with the clerk of the court in which the action is triable" (CPLR 2102 [a]). Thus, by its express terms, the CPLR indicates that filing occurs when the clerk's office receives the notice of appeal. Indeed, "filing" has long been understood to occur only upon actual receipt by the appropriate court clerk A "mailbox rule" for filing would also contravene the clear distinctions between filing and service drawn by the legislature inasmuch as the CPLR directs that, unlike filing, "service by mail shall be complete upon mailing" (CPLR 2103 [b] [2]). .. * *

... [T]he legislature has given courts the authority to excuse untimely filing under certain circumstances. CPLR 5520 provides that, "[i]f an appellant either serves or files a timely notice of appeal . . . , but neglects through mistake or excusable neglect to do another required act within the time limited, the court from or to which the

appeal is taken . . . may grant an extension of time for curing the omission” (CPLR 5520 [a]). *Matter of Miller v Annucci*, 2021 NY Slip Op 04954, CtApp 9-9-21

CRIMINAL LAW, ATTORNEYS.

A PSYCHIATRIC EXAM IS A CRITICAL STAGE OF A PROSECUTION AT WHICH DEFENDANT HAS THE RIGHT TO COUNSEL; THE EXCLUSION OF DEFENSE COUNSEL FROM THE EXAM WAS NOT HARMLESS ERROR; CONVICTION REVERSED (CT APP).

The Court of Appeals, reversing defendant’s manslaughter conviction, determined the exclusion of defense counsel from the psychiatric exam by the People’s expert was not harmless error:

After defendant provided timely notice that he intended to present psychiatric evidence at trial, he was twice interviewed by a clinical psychologist engaged by the People (see CPL 250.10 [2], [3]). Although defense counsel was present at the first examination, the expert denied defense counsel admittance to the second examination. Over defense counsel’s objection that defendant’s right to counsel had been violated, the expert’s testimony was admitted at trial. On defendant’s appeal, the Appellate Division affirmed, holding that defendant’s constitutional right to counsel had been violated but that the error was harmless

In *Matter of Lee v County Ct. of Erie County* (27 NY2d 432 [1971]), we held that defendants’ Sixth Amendment right to counsel applies at pre-trial psychiatric examinations “to make more effective [a defendant’s] basic right of cross-examination” . . . In *Lee*, we cited to *United States v Wade’s* (388 US 218 [1967]) definition of a critical stage of the prosecution as ““any stage of the prosecution, formal or informal, in court or out, where’ ‘the presence of his counsel is necessary to preserve the defendant’s basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself”” We thus held that pretrial psychiatric examinations are a critical stage of the prosecution.

... The People—not the defendant—bear the burden of showing that “there was no reasonable possibility that the trial court’s admission” of that part of the expert’s testimony based on the uncounseled examination “affected the jury’s verdict” Under the circumstances of this case, the expert’s testimony at trial was based in part on the examination undertaken in violation of defendant’s constitutional right to counsel, and we cannot say that the error was harmless [People v Guevara, 2021 NY Slip Op 04955, CtApp 9-9-21](#)

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