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APPEALS, INEFFECTIVE ASSISTANCE.

APPELLATE COUNSEL INEFFECTIVE FOR FAILING TO FILE AN AMENDED BRIEF OR A SUPPLEMENTAL BRIEF AFTER THE COURT OF APPEALS RULED SENTENCING COURTS MUST CONSIDER YOUTHFUL OFFENDER STATUS FOR ALL WHO ARE ELIGIBLE (SECOND DEPT).

The Second Department, vacating defendant's sentence, determined appellate counsel was ineffective and granted a writ of coram nobis. Appellate counsel did not raise the sentencing court's failure to consider defendant's eligibility for a youthful offender adjudication. Although the controlling case was decided after the appellate brief was filed, appellate counsel should have amended the brief or submitted a supplemental brief:

… [W]e grant the defendant's application for a writ of error coram nobis, based on former appellate counsel's failure to contend on appeal that the Supreme Court failed to determine whether the defendant should be afforded youthful offender status. As held by the Court of Appeals in People v Rudolph (21 NY3d 497, 501), CPL 720.20(1) requires "that there be a youthful offender determination in every case where the defendant is eligible, even where the defendant fails to request it, or agrees to forgo it as part of a plea bargain." Here, the record does not demonstrate that the court considered whether to adjudicate the defendant a youthful offender, even though the defendant was eligible … . We acknowledge that the Court of Appeals decided Rudolph shortly after former appellate counsel filed the brief on the appeal. However, under the circumstances of this case, after Rudolph was decided, the standard of meaningful representation required former appellate counsel to seek to amend the brief or file a supplemental brief in order to argue that, pursuant to Rudolph, the sentence must be vacated and the matter remitted for determination of the defendant's youthful offender status … . People v Downing, 2021 NY Slip Op 06698, Second Dept 12-1-21

Practice Point: Here appellate counsel was deemed ineffective for failing to file an amended or supplemental brief based upon a Court of Appeals case which came out

after the appellate brief was filed. The case made consideration of youthful offender status mandatory for all eligible youth.

APPEALS, PRESERVATION, DEPORTATION, GUILTY PLEAS.

THERE IS AN EXCEPTION TO THE PRESERVATION REQUIREMENT WHERE A DEFENDANT IS UNAWARE OF THE DEPORTATION CONSEQUENCES OF A GUILTY PLEA AND THEREFORE DID NOT MOVE TO WITHDRAW THE PLEA ON THAT GROUND (SECOND DEPT).

The Second Department, remitting the matter to give the defendant the opportunity to move to vacate his guilty plea on the ground he was not aware of the possibility of deportation. The court explained the relevant exception to the preservation requirement:

"Generally, in order to preserve a claim that a guilty plea is invalid, a defendant must move to withdraw the plea on the same grounds subsequently alleged on appeal or else file a motion to vacate the judgment of conviction pursuant to CPL 440.10" … . Thus, as relevant here, a defendant is ordinarily required to preserve the contention that his or her plea of guilty was not knowing, intelligent, and voluntary because the court failed to advise him or her that the plea could expose him or her to the risk of deportation … .

There is, however, a narrow exception to this general rule. Preservation is not required "where a defendant has no practical ability to object to an error in a plea allocution which is clear from the face of the record" … . The exception applies where the defendant is unaware of the possibility of deportation during the plea and sentencing proceedings, and, therefore, has no opportunity (as well as no motivation) to move to withdraw his or her plea based on the court's failure to apprise him or her of that potential consequence … . A defendant, of course, "can hardly be expected to move to withdraw his [or her] plea on a ground of which he [or she] has no knowledge" … . People v Jones, 2021 NY Slip Op 06701, Second Dept 12-1-21

Practice Point: There is an exception to the preservation requirement where a defendant who pled guilty was unaware of the deportation consequences and therefore could not have preserved the court's failure to so inform him by moving to withdraw the plea.

APPEALS, PRESERVATION, DEFEDANT'S ABSENCE FROM SIDEBAR.

UNDER THE UNIQUE CIRCUMSTANCES OF THIS CASE, AN OBJECTION WAS NECESSARY TO PRESERVE THE ERROR RELATED TO DEFENDANT'S ABSENCE FROM A SIDEBAR CONFERENCE ABOUT A PROSPECTIVE JUROR; DEFENDANT SUBSEQUENTLY WAIVED HIS RIGHT TO BE PRESENT AND WAS GIVEN THE OPPORTUNITY TO OBJECT TO HIS ABSENCE FROM THE PRE-WAIVER SIDEBAR (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a three-judge dissent, determined the defendant's absence from a sidebar conference regarding a prospective juror did not require reversal. Subsequent to the sidebar, defendant waived his right to be present at sidebar conferences and was given the opportunity to object to the pre-waiver sidebar. Under these circumstance, the Court of Appeals held, although normally not required, an objection was necessary to preserve the error for appeal:

When a defendant is not present at a sidebar conference wherein the court actively solicits answers from a prospective juror which relate to issues of bias or hostility, People v Antommarchi (80 NY2d 247 [1992]) requires a new trial in the absence of defendant's waiver of the right to be present. Defendant's protest in the trial court is generally not required. The purpose of the Antommarchi rule, as derived from CPL 260.20, is to provide defendant the opportunity to personally assess the juror's facial expressions and demeanor in order to provide meaningful input on the prospective juror's retention or exclusion from the jury. The question presented on this appeal is whether defendant, having explicitly waived his Antommarchi right to be present at sidebars in the middle of the voir dire proceeding involving a prospective juror who was ultimately struck when codefendant exercised a peremptory strike, is entitled to a new trial based on his absence from a pre-waiver

sidebar conference with that same prospective juror. We conclude that the claimed error, under these unique circumstances, required defendant's protest in the trial court given his acquiescence in the post-waiver voir dire of the prospective juror after being invited to express any objection that he may have had regarding the pre-waiver sidebar conference. People v Wilkins, 2021 NY Slip Op 06936, CtApp 12-14-21

Practice Point: The failure to include defendant in a sidebar conference about a prospective juror is usually reversible error which does not require preservation by objection to be appealable. Here, however, preservation was deemed necessary. The defendant subsequently waived his right to be present at the sidebars and the court gave him the opportunity to object to the pre-waiver sidebar. No objection was made.

APPEALS, PRESERVATION, FAILURE TO CHALLENGE PREDICATE FELONY STATMENT.

DEFENDANT FAILED TO CHALLENGE THE PREDICATE FELONY STATEMENT IN THE LOWER COURT; THEREFORE THE ALLEGED ERROR WAS NOT PRESERVED FOR APPEAL (CT APP).

The Court of Appeals, reversing the Appellate Division, determined the alleged error in the CPL 400.21 predicate felony statement was not preserved for appeal:

Because defendant failed to challenge the CPL 400.21 predicate felony statement filed by the People in the court of first instance, her claim that her sentence was illegal due to the failure to include the tolling periods in that document did not present a question of law for purposes of appellate review … . Defendant's claim was not reviewable under the narrow illegal sentence exception to the preservation requirement because it was not "readily discernible from the trial record" that the sentence the court imposed was not within the permissible range … . People v Lashley, 2021 NY Slip Op 06938, CtApp 12-14-21

Practice Point: To preserve the issue for appeal, an alleged error in a predicate felony statement must be challenged in the lower court. The "illegal-sentence" exception to the preservation requirement did not apply in this case.

APPEALS, SEX OFFENDER REGISTRATION ACT (SORA), RISK-LEVEL ASSESSMENT.

THE REQUIREMENTS FOR AN APPEALABLE ORDER IN A SORA RISK-LEVEL PROCEEDING EXPLAINED (THIRD DEPT).

The Third Department, withholding a decision on the merits of the SORA risk-level determination by County Court until the People enter and serve an appealable order, in a full-fledged opinion by Justice Garry, explained the "appealable order" requirements for SORA proceedings:

Despite the statutory requirement that the court render a written SORA "order setting forth its determinations and the findings of fact and conclusions of law on which the determinations are based" (Correction Law § 168-n [3]), the lack of such orders is a recurring problem … . In some cases, as here, the court states during a bench decision that a so-ordered provision will be provided on the transcript but that does not occur … . In others, the court signs a standard form designating the defendant's risk level classification without "so-ordered" language or specific findings and conclusions … . In each of these situations, this Court generally dismisses the appeal, as we must, because it is not properly before us due to the lack of an appealable order … . This creates a confusing situation in which no proper order exists regarding the defendant's status under SORA (see Correction Law § 168-n [3]).

… Generally, in any civil case, upon a clerk's entry of a written order, the prevailing party should serve a copy of the order, together with notice of entry, upon the losing party (see CPLR 2220 [b]; 5513 [a] …). The losing party, once served with a copy of that entered order and notice of entry, has 30 days to take an appeal as of right (see CPLR 5513 [a]; see also Correction Law § 168-n [3]). Pursuant to SORA, "the district attorney, or his or her designee," is statutorily required to appear at the SORA hearing on behalf of the state and bears the burden

of proving the facts supporting the risk level determination being sought (Correction Law § 168-n [3]). Thus, the People bear the responsibility of ensuring that a written SORA order is entered and that notice of entry, along with a copy of that written order, is served on the defendant. People v Lane, 2021 NY Slip Op 07324, Third Dept 12-23-21

Practice Point: A written order served on the defendant is a prerequisite for an appeal of a SORA risk-level determination.

APPEALS, TRIAL ORDER OF DISMISSAL, BENCH TRIAL, DENIAL IMPLICIT IN VERDICT.

ALTHOUGH THE JUDGE IN THIS BENCH TRIAL DID NOT EXPLICITLY RULE ON DEFENDANT'S MOTION FOR A TRIAL ORDER OF DISMISSAL, THE MAJORITY DETERMINED THE DENIAL OF THE MOTION WAS IMPLICIT IN THE VERDICT AND THEREFORE THE LEGAL INSUFFICIENCY ARGUMENT COULD BE CONSIDERED ON APPEAL; THE DISSENT DISAGREED (FOURTH DEPT).

The Fourth Department, over a dissent, determined the judge in this bench trial implicitly ruled on defendant's motion for a trial order of dismissal when rendering the verdict. The dissent argued an explicit ruling on the motion was a necessary prerequisite to an appeal:

From the dissent:

… [D]uring the nonjury trial, the court expressly reserved decision on defendant's motion for a trial order of dismissal. Although the Criminal Procedure Law requires a court to determine a motion on which it has reserved decision (see CPL 290.10 [1]; 320.20 [4]), the court here never again addressed that motion by name on the record. Rather, in rendering its verdict, the court stated merely that, "based upon the credible trial evidence, this [c]ourt finds the defendant guilty of . . . attempted assault in the second degree [because] there was legally sufficient proof that the defendant intended to cause the victim serious physical injury based upon his conduct, and [in] consideration of all the surrounding circumstances."

In reaching the merits of defendant's legal sufficiency contention, the majority tacitly concludes that the court implicitly denied defendant's motion when it rendered its guilty verdict, likely due to the court's reference to the "legally sufficient proof" supporting its finding of guilt. I respectfully disagree with this approach … . People v Dubois, 2021 NY Slip Op 07364, Third Dept 12-23-21

Practice Point: Here in this bench trial, the denial of defendant's motion for a trial order of dismissal was deemed to be implicit in the verdict.

ASSAULT, SERIOUS INJURY.

THE JURY'S FINDING THAT THE VICTIM SUFFERED "SERIOUS INJURY" WITHIN THE MEANING OF THE ASSAULT SECOND STATUTE WAS AGAINST THE WEIGHT OF THE EVIDENCE (FOURTH DEPT).

The Fourth Department, reversing defendant's assault second conviction, determined the jury's conclusion that the victim suffered "serious injury" was against the weight of the evidence:

Although the victim testified that he sustained a skull fracture … , the People also introduced expert medical testimony establishing that he did not have a skull fracture. In addition, although the victim testified to ongoing memory issues, there is evidence in the record establishing that he had several other concussions that could also have caused those issues, including one that occurred when he was struck by a metal bat only a few months after this incident. Consequently, we cannot conclude that "the jury was justified in finding . . . defendant guilty beyond a reasonable doubt" … . People v Defio, 2021 NY Slip Op 07400, Fourth Dept 12-23-21

Practice Point: Where there is conflicting trial evidence of an essential element of a crime, here the serious-injury element of Assault Second, an appellate court may find a guilty verdict to be against the weight of the evidence. Conflicting trial evidence is the trigger for a "weight of the evidence" argument on appeal.

CIRCUMSTANTIAL EVIDENCE WHICH REQUIRES A JURY TO SPECULATE IN INADMISSIBLE.

TESTIMONY THAT THE FREQUENCY OF SEXUAL RELATIONS BETWEEN DEFENDANT AND HIS WIFE DROPPED OFF PRECIPITOUSLY AT ABOUT THE TIME THE CHILD ALLEGED THE SEXUAL ABUSE BEGAN SHOULD NOT HAVE BEEN ADMITTED BECAUSE IT ALLOWED THE JURY TO SPECULATE ABOUT THE REASON FOR THE DROP-OFF; SEXUAL ASSAULT OF A CHILD AND RAPE CONVICTIONS REVERSED AND NEW TRIAL ORDERED (THIRD DEPT).

The Third Department, reversing defendant predatory-sexual-assault-against-a-child and rape convictions and ordering a new trial, determined it was error to allow defendant's wife to testify that the frequency of their sexual relations dropped off precipitously at about the time the child-victim began to be abused. The testimony was erroneously deemed to constitute circumstantial evidence of the abuse:

… [T]he "fact" testified to, the significant reduction in the frequency of the couple's sexual encounters, is not a fact from which the jury could reasonably infer the existence of a fact material to the charges against defendant, i.e., whether he sexually abused the victim. Rather, it allows the jury to impermissibly speculate that the reason that defendant and the victim's mother had less frequent sex was because he replaced one sexual partner, the victim's mother, with another, the victim. Furthermore, "[i]t is axiomatic that evidence bearing on the sexual climate of a household is inadmissible where it does not tend to prove a material element of the crime charged and is introduced simply to demonstrate a predisposition to commit the subject offense" … . Although such testimony may be admitted if it demonstrates the relationship between the parties or completes a sequence of events … , the testimony in this case was not offered to prove a material element of the case, the relationship of the parties, nor was it an integral part of the sequence of events leading to the criminal conduct or delay in the disclosure. The People candidly admitted that the purpose of the testimony was to convince the jury that defendant, who the victim's mother testified had exhibited a vociferous sexual appetite, suddenly stopped having frequent sex with her and filled the void with the

victim. As such, County Court erred in allowing the testimony. People v Hansel, 2021 NY Slip Op 07035, Third Dept 12-16-21

Practice Point: This case illustrates when the line between a reasonable inference and speculation is crossed by circumstantial evidence. Circumstantial evidence should not be admitted at trial if it invites pure speculation by the jury. Here evidence that the frequency of defendant's sexual relations with his wife dropped off at about the time the alleged abuse of the child began should never have been admitted.

COMMUNITY GUNS, GANGS.

THE TRIAL COURT PROPERLY ALLOWED EXPERT TESTIMONY ABOUT "COMMUNITY GUNS," A CONCEPT USED BY GANGS TO MAKE GUNS AVAILABLE WHILE AVOIDING BEING CAUGHT POSSESSING THE GUNS (FIRST DEPT).

The First Department noted that the trial court properly allowed expert testimony about "community guns," a concept used by gangs to make guns available while avoiding being caught possessing the guns:

The court providently exercised its discretion in allowing expert testimony on what the expert described as "community guns." This concept involved the methods used by gangs to have their shared firearms ready to use while avoiding being caught in possession of these weapons, including by means of keeping firearms outdoors in closed containers under their constant observation but not on anyone's person. This testimony was necessary to explain the unusual behavior of defendant and persons who could be inferred to be his fellow gang members regarding their handling of the backpack containing the pistol, including evidence that defendant left the backpack unattended in the gang-controlled courtyard for two hours. These matters went beyond the general legal concept of constructive possession, they were not within the jurors' ordinary knowledge, and they tended to prove defendant's knowing and voluntary possession of the pistol … . People v Manley, 2021 NY Slip Op 06814, First Dept 12-7-21

Practice Point: Gangs apparently attempt to avoid weapons-possession charges by the concept of "community guns," allowing access to guns from a "neutral" location. In this case, expert testimony explaining the concept of "community guns" was properly allowed,

COURT OF CLAIMS, WRONGFUL CONVICTIONS, TRIAL ORDER OF DISMISSAL EQUALS ACQUITTAL.

FOR PURPOSES OF CLAIMANT'S ACTION FOR WRONGFUL CONVICTION AND IMPRISONMENT, THE TRIAL ORDER OF DISMISSAL IN THE CRIMINAL TRIAL WAS THE EQUIVALENT OF AN ACQUITTAL (FOURTH DEPT).

The Fourth Department, reversing the Court of Claims, determined the claimant was retried and acquitted on criminal charges within the meaning of the Court of Claims Act in this action seeking damages for wrongful conviction and imprisonment:

… [T]he court erred in determining that claimant "was not retried." To the contrary, the record establishes that "a new trial was ordered" and held inasmuch as the jury was sworn, the parties made opening statements, the prosecution called various witnesses and, following the close of the prosecution's case, the criminal court granted claimant's motion for a trial order of dismissal … . …

… [T]he court erred in determining that a trial order of dismissal pursuant to CPL 290.10 was not the equivalent of a finding of not guilty, i.e., an acquittal, for purposes of Court of Claims Act § 8-b (3) (b) (ii). Considering the remedial purpose of the statute (see § 8-b [1]) and the fact that an acquittal is a "useful and relevant indicator of innocence" … , … [T]here is no meaningful distinction for purposes of a claimant's threshold showing between an acquittal by a trier of fact due to failure to prove guilt beyond a reasonable doubt … and a trial order of dismissal due to legally insufficient evidence … . Owens v State of New York, 2021 NY Slip Op 07374, Fourth Dept 12-23-21

Practice Point: For purposes of a wrongful conviction suit in the Court of Claims, the grant of a trial order of dismissal in the underlying criminal trial is the equivalent of an acquittal.

FALSE ARREST, FALSE IMPRISONMENT, EVIDENCE.

FALSE ARREST AND FALSE IMPRISONMENT COMPLAINT PROPERLY DISMISSED AFTER A DEFENSE VERDICT; TWO JUSTICE DISSENT (FOURTH DEPT).

The Fourth Department, over an extensive two-justice dissent, determined the false arrest and false imprisonment action was properly dismissed after a defense verdict at trial. The police were informed that plaintiff, who was walking away, was involved in an altercation. The officer stood in front of plaintiff to inquire. The plaintiff did not respond and walked into the officer. The officer then made a warrantless arrest for obstruction of justice:

We conclude that the officer's act of "stepping in front of [plaintiff] in an attempt to engage him was a continuation of the officer's own common-law right to inquire, not a seizure" … . …

… [W]hile "[a]n individual to whom a police officer addresses a question has a constitutional right not to respond" … , that person does not have the right to attempt to "walk through"—and thereby make physical contact with—the officer … . * * *

From the dissent:

… [T]he officer was not authorized to forcibly stop plaintiff and lacked probable cause to arrest plaintiff for obstructing governmental administration in the second degree for plaintiff's purported obstruction of such an unauthorized forcible stop. Shaw v City of Rochester, 2021 NY Slip Op 07346, Fourth Dept 12-23-21

FAMILY OFFENSE, FAMILY COURT, AGE OF COMPLAINANT.

THE FACT THAT COMPLAINANT TURNED 21 DURING THE FAMILY OFFENSE HEARING DID NOT DEPRIVE FAMILY COURT OF JURISDICTION; NOR DID THE INCAPACITY OF THE COMPLAINANT (SECOND DEPT).

The Second Department, reversing Family Court and remitting the matter, determined Family Court did lose jurisdiction over the family offense proceeding when complainant turned 21. The court noted that even if the complainant is incapacitated (but not judicially declared incompetent) Family Court has jurisdiction:

In the context of a family offense proceeding, the question of subject matter jurisdiction is generally confined to whether a qualifying offense has been committed between parties in a qualifying relationship (see Family Ct Act §§ 115[e]; 812[1] …), irrespective of the complainant's age. Thus, the fact that the complainant attained the age of 21 during the hearing did not deprive the court of jurisdiction to hear and determine this matter.

To the extent the respondent's motion may be construed as challenging the petitioner's ability to prosecute this matter in a representative capacity for the complainant, this does not amount to a jurisdictional defect requiring dismissal of the proceeding … . Indeed, "[a]n incapacitated individual who has not been judicially declared incompetent may sue or be sued in the same manner as any other person" … , and courts must not "shut their eyes to the special need of protection of a litigant actually incompetent but not yet judicially declared such" … . Rather, insofar as the record raises questions of fact as to whether the complainant may require the assistance of a guardian ad litem to protect her interests, the Family Court should have granted the petitioner's request to appoint a guardian to the extent of conducting a hearing to determine whether such an appointment was necessary pursuant to CPLR 1201… . Matter of Vellios v Vellios, 2021 NY Slip Op 07276, Second Dept 12-22-21

Practice Point: The fact that the complainant in this family offense proceeding turned 21 or was incapacitated did not deprive Family Court of subject matter jurisdiction.

FAMILY OFFENSE, RESTRICTIONS ON HEARING EVIDENCE.

IN THIS FAMILY OFFENSE PROCEEDING, THE JUDGE SHOULD NOT HAVE PLACED TIME AND TESTIMONY RESTRICTIONS ON THE HEARING; ORDER REVERSED AND NEW HEARING ORDERED (FIRST DEPT).

The First Department, reversing Family Court and ordering a new hearing in this family offense proceeding, determined the judge should not have placed time and testimony restrictions on the hearing:

Order of fact-finding and disposition … , which, after a hearing, determined that respondent husband committed the family offense of harassment in the second degree, and entered a one-year order of protection directing him … to refrain from assaulting or harassing petitioner wife and the parties' two children … , unanimously reversed … .

Family Court erred in not conducting a full fact-finding hearing. The court improperly restricted the hearing, without notice to the parties to just 15-20 minutes and limited the testimony, including that of petitioner wife. Given this, Family Court is directed to conduct a full hearing on the petition and make the requisite factual findings … . Matter of Kristina M. v Paul M., 2021 NY Slip Op 06957, First Dept 12-14-21

Practice Point: The judge in this family offense proceeding should not have placed time and testimony restrictions on the hearing. New hearing ordered.

GUILTY PLEA IN FULL SATISFACTION OF ALL CHARGES PRECLUDES A SECOND PLEA TO ANY OTHER CHARGE IN THAT INDICTMENT.

AFTER PLEADING GUILTY IN FULL SATISFACTION OF THE CHARGES IN THE INDICTMENT, A SECOND PLEA TO ANOTHER COUNT OF THE INDICTMENT WAS PRECLUDED (FIRST DEPT).

The First Department, vacating defendant's conviction by guilty plea and dismissing the relevant count, determined initial pleas in full satisfaction of the

charges in the indictment precluded a second plea to another count in the indictment:

As the People concede, defendant's first plea, to one count of third-degree sale of a controlled substance, was in full satisfaction of the entire indictment, so that defendant's later plea to a second count of that indictment was not permissible … . When the second plea court sought to add a plea to an additional count as part of a renegotiated disposition conditioned on drug treatment, it could only have done so by "reinstatement. . . [of the indictment] which could have been accomplished by permitting the defendant to withdraw his original plea of guilty to [the first count]" … . People v Turane, 2021 NY Slip Op 07071, First Dept 12-16-21

Practice Point: Once a guilty plea is entered in full satisfaction of the charges in an indictment, a subsequent guilty plea to any of the other charges in the indictment is invalid. In that circumstance, the defendant would need to withdraw his initial guilty plea and the indictment would have to be reinstated.

IDENTIFICATION BY A WITNESS, SUGGESTIVE COMMENTS BY POLICE.

WITH RESPECT TO THE IDENTIFICATION OF THE DEFENDANT BY A WITNESS TO THE CRIME: NO HEARING ON THE SUGGESTIVENESS OF COMMENTS MADE TO THE WITNESS BY THE POLICE WAS NECESSARY BECAUSE THE WITNESS WAS A LONG-TIME ACQUAINTANCE OF THE DEFENDANT (SECOND DEPT).

The Second Department noted that where a witness to the crime is a long-time acquaintance of the defendant, a hearing about the suggestiveness of comments made to the witness by the police is not necessary. In addition, any identification of the defendant by the witness from a photo array 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'" … . Thus, when "the protagonists are known to one another, suggestiveness is not a concern" and a hearing regarding suggestiveness is not required … . Here, the detective's testimony at the

suppression hearing and the complainant's testimony at trial demonstrated that the complainant knew the defendant for approximately three years through mutual friends, the complainant knew the defendant by his alias "Kilo," and the defendant admitted to knowing the complainant. The Supreme Court therefore properly determined that the complainant was impervious to suggestion due to his familiarity with the defendant … . People v Richardson, 2021 NY Slip Op 07287, Second Dept 12-22-21

Practice Point: Here a detective apparently made comments to the witness which suggested the defendant was the perpetrator. No "suggestive-identification" hearing was necessary because it was demonstrated the witness had known the defendant for three years.

IDENTIFICATION BY POLICE.

THE ARRESTING DETECTIVE SHOULD NOT HAVE BEEN ALLOWED TO IDENTIFY THE PERSON DEPICTED IN SURVEILLANCE VIDEOS AS THE DEFENDANT, NEW TRIAL ORDERED (FIRST DEPT).

The First Department, reversing defendant's conviction and ordering a new trial, determined the arresting detective should not have been allowed to identify the person depicted in two surveillance videos as the defendant:

The court should not have permitted the arresting detective to give lay opinion testimony that defendant was the person depicted in two surveillance videos. In this case, the alleged difference in appearance — the addition of eyeglasses — was de minimis, and the jury had access to photos of defendant without eyeglasses … . The People do not point to any case in which lay opinion testimony was permitted based on such a slight change in appearance. Moreover, "no other circumstance suggested that the jury, which had ample opportunity to view defendant, would be any less able than the [officer] to determine whether he was seen in the videotape" … . Indeed, at the time of trial, the arresting detective was a 20-year veteran of the force and had 14 years experience investigating robberies and burglaries on the Lower East Side, where the incident occurred. He had made nearly 600 arrests and assisted in approximately 200 others. Stating twice that the perpetrator in this case was defendant carried significant weight in the eyes of the jury. Although the court

provided limiting instructions, "[t]ruly prejudicial evidence cannot be erased from a juror's mind by the court's instructions" … . People v Challenger, 2021 NY Slip Op 06927, First Dept 12-9-21

Practice Point: As a general rule, if a police officer is no more qualified than a juror to determine if the defendant is depicted in a video, it is error to allow the police officer to identify the person in the video as the defendant. There are exceptions to this rule, when, for example, the video is poor-quality, the police officer has spent time with the defendant, and the defendant's appearance had changed.

IDENTIFICATION BY POLICE.

POLICE OFFICERS PROPERLY ALLOWED TO IDENTIFY THE PERSON IN A SURVEILLANCE VIDEO AS THE DEFENDANT (FIRST DEPT).

The First Department noted that police officers were properly allowed to identify the person in a videotape as the defendant:

The court providently exercised its discretion in permitting two officers to give lay opinion testimony that defendant was the man depicted in a surveillance videotape of the crime. This testimony "served to aid the jury in making an independent assessment regarding whether the man in the was indeed the defendant" … . The quality of the videotape was poor, defendant's appearance had changed, and the officers had spent sufficient time with defendant to be in a better position than the jurors to identify him on the video … . Any potential prejudice was minimized by the court's limiting instructions that the officers' testimony was merely to aid the jury in its independent assessment of whether the man in the video was defendant … . People v Lee, 2021 NY Slip Op 06774, First Dept 12-2-21

Practice Point: In the usual case, a police officer is not better able to identify a person in a video as the defendant than is a juror and such an identification will not be allowed. In this case, the videotape was in poor condition and the officers had spent

time with the defendant, so it was not an abuse of discretion to allow the identification by two police officers.

INDICTMENTS, FAIR NOTICE.

THE PERSISTENT ABUSE STATUTE ENCOMPASSES THREE DISTINCT TYPES OF SEXUAL CONTACT; THE INDICTMENT DID NOT IDENTIFY THE SPECIFIC GENRE OF SEXUAL CONTACT WITH WHICH DEFENDANT WAS CHARGED; THE INDICTMENT THEREFORE DID NOT PROVIDE FAIR NOTICE OF THE ACCUSATIONS (FIRST DEPT).

The First Department, reversing defendant's conviction and dismissing the indictment, determined the indictment failed to charge a particular crime:

The indictment was jurisdictionally defective because it "d[id] not effectively charge the defendant with the commission of a particular crime" … . A person is guilty of persistent sexual abuse … when the person commits any of three separately codified offenses — forcible touching … , second-degree sexual abuse … , or third-degree sexual abuse … — and the remaining requirements of § 130.53, which are not at issue in this case, are met. The indictment in this case charged defendant with "PERSISTENT SEXUAL ABUSE, in violation of Penal Law § 130.53." In its sole factual allegation, it alleged that, in New York County on November 17, 2017, defendant "subjected an individual known to the Grand Jury to sexual contact."

This abbreviated count failed to specify which of the three discrete qualifying offenses defendant was alleged to have committed. The bare allegation of "sexual contact" did not fulfill this function because sexual contact is an element of all three qualifying offenses. In failing to identify the qualifying offense, this count failed to satisfy the fundamental purposes of an indictment. It did not "provide[] the defendant with fair notice of the accusations made against him so that he [would] be able to prepare a defense" and it did not "provide[] some means of ensuring that the crime for which the defendant [was] brought to trial [was] in fact one for which he

was indicted by the Grand Jury" … . People v Hardware, 2021 NY Slip Op 06772, First Dept 12-2-21

Practice Point: If a criminal statute can be violated by different acts, here the term "sexual contact" in the "persistent sexual abuse" statute can mean "forcible touching," "sexual abuse third degree," or "sexual abuse second degree," the failure to identify the specific act alleged renders the indictment constitutionally defective in that it hinders the preparation of a defense and fails to protect against double jeopardy.

INEFFECTIVE ASSISTANCE, ADMISSION BY ATTORNEY.

DESPITE DEFENSE COUNSEL'S ADMISSION BEFORE THE MOTION COURT THAT HE DID NOT PROPERLY INVESTIGATE THIS MURDER CASE, DEFENDANT DID NOT DEMONSTRATE THAT COUNSEL WAS INEFFECTIVE OR THAT THE ALLEGED INEFFECTIVENESS MET THE CRITERIA FOR A CONFLICT OF INTEREST (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Moulton, determined defendant did not demonstrate his attorney provided ineffective assistance, despite the attorney's statements to the trial court acknowledging his failure to timely investigate the case, which led to his request to file a late alibi notice (the request was granted). The defendant told the trial court he did not want to change attorneys. And the trial court appointed a co-counsel. The First Department also rejected the unusual argument that defense counsel's ineffectiveness constituted a conflict of interest:

… [D]efendant has not shown how defense counsel's performance deprived him of a fair trial. Defense counsel's self-proclaimed failures to properly investigate and prepare this murder case for trial are disturbing. Nevertheless, defendant has not shown that counsel's lapses deprived him of any useful information or negatively impacted his ability to mount a defense. Defendant only speculates that a proper investigation and trial preparation might have yielded something helpful to the

defense, but he does not suggest what that exculpatory information might be … . …

Defendant concedes that the conflict here is "not typical" as it is "derived from and centered on [defense counsel's] ineffectiveness." … Defendant argues that the conflict occurred when his counsel refused to withdraw from representation for personal reasons, despite conceding that he did not effectively investigate the case and prepare for trial. However, defendant cannot "demonstrate that the conduct of his defense was in fact affected by the operation of the conflict of interest" … . After defense counsel declined to withdraw and defendant noted that he wished to proceed with counsel, the motion court appointed cocounsel to assist the defense … . … [T]he defense was not affected by operation of the conflict because after defense counsel declined to withdraw, defense counsel and cocounsel effectively represented defendant at trial. People v Graham, 2021 NY Slip Op 07068, First Dept 12-16-21

Practice Point: Although defense counsel admitted to the motion court that he did not adequately prepare for this murder trial, his motion for file a late alibi notice was granted, the court appointed co-counsel for the trial, and the defendant wanted him to continue to represent him. Those facts, and the fact that the trial was handled competently, defeated the ineffective assistance argument on appeal.

JUDGES, THREAT TO IMPOSE A HARSHER SENTENCE IF DEFENDANT DECIDES TO GO TO TRIAL.

THE JUDGE'S THREAT TO IMPOSE A MUCH HARSHER SENTENCE SHOULD THE DEFENDANT BE CONVICTED AT TRIAL AMOUNTED TO COERCION RENDERING THE PLEA INVOLUNTARY; ALTHOUGH THE ISSUE WAS NOT PRESERVED FOR APPEAL, THE PLEA WAS VACATED IN THE INTEREST OF JUSTICE (FOURTH DEPT).

The Fourth Department, vacating defendant's guilty plea in the interest of justice, determined the judge's threat to impose a much harsher sentence if the defendant were to be convicted at trial amounted to coercion:

During a court appearance at which County Court extended a plea offer that called for an aggregate sentence of 15 years to life imprisonment, the court informed defendant that "my policy is if a defendant gets convicted at trial, that means that individual has not accepted responsibility for the conduct that they've been convicted of, and . . . [i]n all likelihood the sentence [after trial] would not even be close to the 20 years [to life sought by the People], it would be much more — — many more years and you are looking at a potential [of] 100 years to life." The court issued a virtually identical admonition at the next appearance, and defendant subsequently accepted the court's offer of 15 years to life imprisonment.

… [T]he court's statements during plea negotiations did "not amount to a description of the range of the potential sentences but, rather, they constitute[d] impermissible coercion, 'rendering the plea involuntary and requiring its vacatur' " … . People v Goodwin, 2021 NY Slip Op 07418, Fourth Dept 12-23-21

Practice Point: The judge's threat to impose a harsher sentence should the defendant decide to go to trial rendered the guilty plea involuntary.

JURORS, JUROR COULD NOT CONTINUE, ACCEPTANCE OF PARTIAL VERDICT.

THE JUDGE SHOULD NOT HAVE ACCEPTED A PARTIAL VERDICT WITHOUT INTERVIEWING THE JUROR WHO HAD INFORMED THE COURT SHE COULD NOT CONTINUE DELIBERATING BECAUSE SHE WAS SUFFERING ANXIETY ATTACKS; BECAUSE THE JUROR WAS NOT QUESTIONED, IT IS IMPOSSIBLE TO KNOW WHETHER THE PARTIAL VERDICT WAS REACHED BEFORE THE JUROR BECAME UNABLE TO CONTINUE (SECOND DEPT).

The Second Department, reversing defendant's conviction and ordering a new trial, determined the judge should have interviewed a juror who said she was suffering anxiety attacks and could not continue deliberations. The judge did not question the juror and accepted a partial verdict, without knowing whether the partial verdict was reached before the juror became unable to continue:

"The Court of Appeals, in People v Buford (69 NY2d 290, 299), set forth the basic framework to be followed when conduct occurs during a trial that may be the basis for disqualifying a juror. The court should conduct an in camera inquiry of the juror, in which counsel should be permitted to participate if they desire, and evaluate the nature and importance of the information and its impact on the case. In addition, the trial court's reasons for its ruling should be placed on the record . . . [and] the court may not speculate as to possible partiality of the juror" … . "Although the Court of Appeals acknowledged that an 'in camera inquiry may not be necessary in the unusual case . . . where the court, the attorneys, and defendant all agree that there is no possibility that the juror's impartiality could be affected and that there is no reason to question the juror,' here, defense counsel wanted the juror to be questioned" … .

The Supreme Court erred in failing to conduct an in camera "probing and tactful inquiry" (People v Buford, 69 NY2d at 299) of juror number 11 before accepting the partial verdict … . As a result of the court's failure to make any inquiry of the juror, it is unknown whether the juror became unable to serve before, or after, the jury had reportedly reached a verdict on one of the counts … . People v Moody, 2021 NY Slip Op 07559, Second Dept 12-29-21

Practice Point: When a juror tells the judge he/she cannot continue deliberating, the judge cannot accept a partial verdict reached before the juror asked to be excused without making sure he/she was able to participate at the time the partial verdict was reached.

JURORS, ASSURANCES NOT TO CONSIDER DEFENDANT'S FAILURE TO TESTIFY.

THE MAJORITY CONCLUDED JUROR 15 WAS ONE OF TWO JURORS WHO GAVE A NON-VERBAL ASSURANCE HE WOULD NOT HOLD IT AGAINST THE DEFENDANT IF HE DID NOT TESTIFY; THE DISSENT ARGUED THE RECORD DOES NOT IDENTIFY JUROR 15 AS ONE OF THE TWO JURORS AND DID NOT DESCRIBE THE NATURE OF THE NON-VERBAL ASSURANCE (FOURTH DEPT).

The Fourth Department, over a dissent, determined that a juror gave a non-verbal assurance that he would not hold it against the defendant if he did not testify. The dissent argued the record did not clearly indicate which jurors gave the non-verbal assurance:

We disagree with the dissent that "[t]here is no indication in the record that prospective juror number 15 was one of the two prospective jurors who were acknowledged by the court as having given some form of nonverbal assurance that they could follow its instructions." Only three prospective jurors were questioned by defense counsel regarding their desire to hear from defendant. In response to the court's follow-up questions, one prospective juror unequivocally indicated that he could not follow the court's instructions regarding defendant's failure to testify, and the court went on to ask, "[o]kay, anyone else? Can you follow that instruction whether you believe in it or not? I mean, obviously we talked about this. You both can? Okay. All right, thanks" … . Having already spoken to one of the three prospective jurors, it is clear that the court was addressing the remaining two prospective jurors who had expressed a desire to hear from defendant—including prospective juror number 15. Furthermore, in denying defense counsel's for-cause challenge, the court stated on the record that both prospective juror number 15 and prospective juror number 16 "said they could follow [its] instructions. I asked them exactly on that . . . but they said no, they could follow it."

From the dissent:

There is no indication in the record that prospective juror number 15 was one of the two prospective jurors who were acknowledged by the court as having given

some form of a nonverbal assurance that they could follow its instruction, and the nature of the nonverbal assurance provided by those prospective jurors is not identified in the record. People v Smith, 2021 NY Slip Op 07406, Fourth Dept 12-23-21

JURORS, ETHNIC BIAS, CONSTITUTIONAL LAW.

COMMENTS ALLEGEDLY MADE BY A JUROR DURING DELIBERATIONS EXPRESSING ETHNIC BIAS REQUIRED A HEARING AND FINDINGS WHETHER DEFENDANT'S CONSTITUTIONAL RIGHTS, BOTH FEDERAL AND STATE, WERE VIOLATED (FIRST DEPT).

The First Department remitted the matter for a hearing on defendant's motion to vacate the judgment, Defendant's motion included an affidavit from the jury foreperson alleging a juror exhibited ethnic bias during deliberations:

The People consent to this matter being remanded for a hearing to determine whether ethnic bias tainted the jury's deliberations as alleged by defendant (see PeÑa-Rodriguez v Colorado, – US -, 137 S Ct 855 [2017]; People v Leonti , 262 NY 256 [1933]). Defendant's CPL 440 motion included an affidavit from the jury foreperson, in which he swore that, during deliberations, a juror made ethnic comments concerning defendant and the complainant exhibiting "overt [ethnic] bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict" (PeÑa-Rodriguez , – US -, 137 S Ct at 869).

At the hearing, the court should determine the veracity of these allegations. Should the court find these allegations to be true, it should determine, as a matter of federal law, whether defendant's Sixth Amendment right to jury trial was denied because "[ethnic] animus was a significant motivating factor in the juror's vote to convict" … . The court should also determine more broadly, as a matter of New York State law, whether the juror's statements "created a substantial risk of prejudice to the rights of the defendant by coloring the views of the other jurors as well as her own" … . People v Chodakowski, 2021 NY Slip Op 06781, First Dept 12-2-21

Practice Point: A juror's statements during deliberations evincing ethnic bias may violate a defendant's Sixth Amendment right to a jury trial and may prejudice the jurors in violation of the New York State Constitution.

JURORS, EXPECT DEFENSE TO PRESENT EVIDENCE.

THE DEFENSE FOR CAUSE CHALLENGE TO A JUROR WHO SAID SHE WOULD EXPECT THAT THE DEFENSE WOULD PRESENT EVIDENCE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined the defense for cause challenge to a juror should have been granted:

"[A] prospective juror whose statements raise a serious doubt regarding the ability to be impartial must be excused unless the juror states unequivocally on the record that he or she can be fair and impartial" … . Here, the prospective juror's statements to the effect that she would expect the defense to present evidence raised a serious doubt about her ability to be impartial and her subsequent responses fell short of providing "unequivocal assurances of impartiality" … . People v Feddaoui, 2021 NY Slip Op 06859, Second Dept 12-8-21

Practice Point: A prospective juror who expects the defense to present evidence is not qualified to serve on the jury.

JURORS, PREMATURE DELIBERATIONS.

JURORS WHO ENGAGED IN PREMATURE DELIBERATIONS SHOULD NOT HAVE BEEN DISCHARGED AS "GROSSLY UNQUALIFIED" ABSENT A FINDING THEY COULD NOT RENDER AN IMPARTIAL VERDICT (FIRST DEPT).

The First Department, reversing defendant's conviction and ordering a new trial, determined two jurors, who engaged in premature deliberations by discussing the

case on the subway, should not have been discharged, over a defense objection, as "grossly unqualified:"

The record does not support the court's discharge of a juror and an alternate, over defense objection, as "grossly unqualified." The record establishes that the two jurors engaged in premature deliberations while on the subway by discussing the demeanor and testimony of witnesses and the age of the case. Initially, the court properly conducted an inquiry of the jurors themselves and confirmed that they had engaged in premature deliberations. However, it should have inquired further and ascertained whether they were unable to render an impartial verdict, rather than discharging them as grossly unqualified based solely on the conclusion that, by prematurely deliberating, they had violated the court's instructions not to discuss the case … . "Premature deliberation by a juror, by itself, does not render a juror grossly unqualified" … . The "grossly unqualified" standard for removal of a sworn juror is higher than that for a prospective juror, and "the record must convincingly demonstrate that the sworn juror cannot render an impartial verdict for him or her to be disqualified"… . Nothing express or implied in the jurors' answers suggested that they could not render an impartial verdict in spite of their conversation and decide the case based solely on the evidence before them … . People v Thompson, 2021 NY Slip Op 06778, First Dept 12-2-21

Practice Point: Here two jurors discussed the case on the subway before deliberations began. The trial court dismissed them as "grossly unqualified." The court should not have found the jurors unqualified without first questioning them and concluding from their answers they could not render an impartial verdict based solely on the evidence.

JURORS, TEND TO BELIEVE POLICE.

THE FOR CAUSE CHALLENGE TO A PROSPECTIVE JUROR WHO SAID HE WOULD BE INCLINED TO BELIEVE THE TESTIMONY OF POLICE OFFICERS SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction, determined the for cause challenge to a juror who said he would tend to believe the testimony of police officers should have been granted, despite the assurances elicited by the judge:

… [T]he statement of the prospective juror during voir dire with respect to the credibility of the testimony of police officers or bias in favor of the police cast serious doubt on his ability to render an impartial verdict, and the prospective juror failed to provide "unequivocal assurance that [he could] set aside any bias and render an impartial verdict based on the evidence" … . Specifically, after the prospective juror stated that he was a former correction officer and had "a lot of friends and family members" in law enforcement, he agreed that he would "be inclined to give more credibility to an officer than [he] would a lay person," explained that, based on his experiences, he found police to be "honest people," and specifically described one of the officers who would later testify for the People as "an honest person." Although the court inquired further of the prospective juror, we conclude that the prospective juror's answers to the questions asked by the court were "insufficient to constitute . . . an unequivocal declaration" that he could set aside any bias and render an impartial verdict … . People v Harrison, 2021 NY Slip Op 07445, Fourth Dept 12-23-21

Practice Point: A juror who is inclined to believe police witnesses should be successfully challenged "for cause."

JURORS, TEND TO BELIEVE THE POLICE.

THE CHALLENGE TO A JUROR WHO SAID HE WOULD FAVOR THE TESTIMONY OF THE POLICE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing defendant's conviction and ordering a new trial, determined the challenge to a juror who said he would favor the police testimony should have been granted:

… [D]uring voir dire, one prospective juror, a firefighter who worked in the neighborhood where the offenses occurred, told the Supreme Court that he "personally see[s] a lot that goes on in the area[ ]." While he initially indicated that he could be fair and impartial, he subsequently stated that the police in the neighborhood "defended us, stuck up for us," and added that he would "lean a little bit more to what [a police officer] had to say" and it would be "tough" for him not to credit police officer testimony because he had "seen it" himself. Although, when he was questioned by the court, he indicated that he would treat police officers' testimony the same as the testimony of civilian witnesses, when asked whether he was "retracting" what he had said about "favoring police testimony," he did not answer in the affirmative. Instead, he stated that he would evaluate police testimony based on what he had experienced.

Thus, at no point did the prospective juror provide "'an unequivocal assurance' that [he] could 'set aside any bias and render an impartial verdict based on the evidence'" … . Since the defendant exercised a peremptory challenge to remove the prospective juror and exhausted his allotment of peremptory challenges prior to the completion of jury selection, the judgment of conviction must be reversed and a new trial ordered … . People v Thomas, 2021 NY Slip Op 06711, Second Dept 12-1-21

Practice Point: Here a juror said he would favor the testimony of the police and the court did not elicit his assurance he could set aside his bias. The defense challenge to that juror should have been granted.

JURORS, UNABLE TO UNDERSTAND BURDEN OF PROOF.

FOR CAUSE CHALLENGES TO TWO JURORS WHO WERE UNABLE TO UNDERSTAND THE PEOPLE'S BURDEN OF PROOF SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing defendant's conviction and ordering a new trial, determined for cause challenges to three jurors should have been granted:

One of the three prospective jurors demonstrated that he would give more credence to a police officer testifying than to a civilian witness, and the court failed to elicit an unequivocal assurance that the prospective juror could render an impartial verdict based on the evidence … . The other two prospective jurors provided answers that demonstrated an inability to comprehend the People's burden of proof even after the court provided a straightforward explanation of this principle during voir dire … . People v Wilson, 2021 NY Slip Op 07305, Second Dept 12-22-21

Practice Point: Here two jurors who could not understand the People's burden of proof should have been discharged for cause.

PLEA COLLOQUY DID NOT ADMIT CRIME.

DEFENDANT, DURING THE PLEA COLLOQUY, DID NOT ADMIT HE POSSESSED A STOLEN "MOTOR VEHICLE," AS OPPOSED TO A "MOTOR CYCLE," AND THE JUDGE DID NOT INQUIRE FURTHER; THE ISSUE NEED NOT BE PRESERVED FOR APPEAL BY A MOTION TO WITHDRAW THE PLEA; GUILTY PLEA VACATED (SECOND DEPT).

The Second Department, vacating defendant's guilty plea, determined the judge should have inquired further when defendant did not admit he possessed a "motor vehicle," as opposed to a "motor cycle." The court noted the issue may be raised on appeal without having moved to withdraw the plea:

As charged here, criminal possession of stolen property in the fourth degree requires possession of "a motor vehicle . . . other than a motorcycle" … . During

his plea allocution the defendant admitted to possession of "a motor cycle." No further inquiry was made by the Supreme Court.

"[W]here a defendant's factual recitation negates an essential element of the crime pleaded to, the court may not accept the plea without making further inquiry to ensure that defendant understands the nature of the charge and that the plea is intelligently entered" … . Where, as here, the court fails in its duty to inquire further, a defendant may raise a claim regarding the validity of the plea even without having moved to withdraw the plea … .

Here, as the defendant contends and the People correctly concede, the Supreme Court's failure to inquire into the validity of the plea after the allocution clearly negated an essential element of the crime requires reversal of the judgment of conviction … . People v Douglas, 2021 NY Slip Op 06857, Second Dept 12-8-21

Practice Point: Here the charged offense required possession of a stolen "motor vehicle" and the statute specifically excluded "motorcycles" from its reach. The defendant, during the plea colloquy, acknowledged possessing a "motor cycle" and the judge did not conduct any further inquiry. The guilty plea was invalid because the colloquy negated an essential element of the offense.

RAPE, NO EVIDNCE OF FORCE OR THREATS.

THE COMPLAINANT WAS CAJOLED BY OTHERS, NOT THE DEFENDANT, TO HAVE SEX WITH DEFENDANT IN FRONT OF THE OTHERS; THERE WAS NO EVIDENCE FORCE WAS USED AND NO EVIDENCE OF ANY THREATS TO USE FORCE; RAPE FIRST CONVICTION REVERSED (SECOND DEPT).

The Second Department, reversing defendant's conviction and dismissing the indictment, determined there was no evidence of forcible compulsion in this Rape First case. The complainant was cajoled by others, not including the defendant, to have sex with the defendant in front of the others. But there was no evidence defendant used force and no overt or implied threats to use force:

… [S]ince the complainant had never spoken with the defendant prior to the alleged sexual assault, there was no reason, even from her subjective point of view, to fear that he would physically harm her if she did not do what Franiqua and Franeisha were pressuring her to do … .

… The complainant said repeatedly during her testimony that she was uncomfortable throughout the incident, that she "fe[lt] like [she] had no control" over what was happening, and that there was "nothing [she] could do" to stop it. But she never connected those feelings to a fear of being physically injured, or some other similarly serious consequence … .

… [T]here was no testimony that the complainant had been physically abused by Franiqua prior to this incident, and no evidence that the defendant was aware that Franiqua was acting abusively towards the complainant, regardless of when that conduct began. Beyond that, the complainant acknowledged that at least some of her discomfort was attributable to the "whole situation," including, understandably, that several people were present. People v Graham, 2021 NY Slip Op 06699, Second Dept 12-1-21

Practice Point: Here the complainant was cajoled by others, not including the defendant, to have sex with defendant in front of the others. There was no evidence force or threats of force were involved. The Rape First conviction was reversed.

RIGHT TO COUNSEL, INVOCATION IMPROPERLY INTRODUCED AT TRIAL.

THE ELICITATION OF TESTIMONY FROM A DETECTIVE THAT DEFENDANT INVOKED HIS RIGHT TO COUNSEL AND HIS RIGHT AGAINST SELF-INCRIMINATION WAS SUBJECT TO A HARMLESS ERROR ANALYSIS AND DID NOT REQUIRE REVERSAL; THE DISSENT ARGUED THE ABSENCE OF A CURATIVE INSTRUCTION RENDERED THE ERROR REVERSIBLE (THIRD DEPT).

The Third Department determined the People's improper elicitation of a detective's testimony that defendant invoked his right to counsel and his right against self-incrimination was subject to a harmless error analysis and did not require reversal. The dissent disagreed:

A defendant's invocation of his or her right against self-incrimination and/or his or her right to counsel during a custodial interrogation may not be used against him or her as part of the People's case-in-chief … . This is because such evidence "creates a prejudicial inference of consciousness of guilt" … . However, the People's improper elicitation of the prejudicial evidence does not automatically result in a reversal of the judgment of conviction, even in the absence of a curative instruction or in the face of a deficient curative instruction … . Rather, any such constitutional error is subject to a harmless error analysis … . * * *

From the dissent:

The majority would have this Court engage in a harmless error analysis, whereas I would follow this Court's articulation in People v Knowles (42 AD3d at 665), rejecting such an analysis if the trial court fails to provide "prompt and emphatic curative instructions that the jury may not draw any adverse inferences from [the] defendant's request for counsel." As County Court failed to do so here, defendant's conviction should be reversed. People v Serrano, 2021 NY Slip Op 07037, Third Dept 12-16-21

Practice Point: It is black letter law that a jury should never learn the defendant invoked his right to counsel and his right to remain silent when questioned by the police. The issue here was whether the error was subject to the harmless error

analysis on appeal. The majority held that it was. The dissent argued the fact that no curative instruction was given to the jury rendered the error reversible.

SEARCH AND SEIZURE, EMERGENCY EXCEPTION TO WARRANT REQUIREMENT.

THE WARRANTLESS SEARCH OF THE RESIDENCE WAS NOT JUSTIFIED BY THE EMERGENCY EXCEPTION TO THE WARRANT REQUIREMENT (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction and dismissing the indictment, determined the warrantless search of defendant's residence by an evidence technician was not justified under the emergency exception to the warrant requirement. A woman called 911 and reported she had found her roommate unconscious in the residence. When the evidence technician arrived she was told the roommate was dead. The technician then went through the residence taking pictures. She discovered what appeared to be illegal drugs. A search warrant was issued and drugs and a handgun were seized:

The court held that the initial search of the residence by the evidence technician was justified under the emergency exception to the warrant requirement, which permits a warrantless search in the presence of three elements: " '(1) the police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property and this belief must be grounded in empirical facts; (2) the search must not be primarily motivated by an intent to arrest and seize evidence; and (3) there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched' " … . …

Prior to engaging in her initial search, … the evidence technician had observed the body in the bathroom, and her suppression hearing testimony did not include any observation suggesting that a crime had occurred, much less that an assailant was still in the home or that there was an ongoing risk of harm … . … [N]othing in the 911 call or in the testimony of the officers who initially arrived at the residence suggested that the woman had been the victim of an attack … . … [T]he evidence

technician lacked a " 'reasonable basis, approximating probable cause' " to associate any emergency that might have once existed, i.e., an unresponsive woman lying in the bathroom, to the search of the bedrooms of the residence … . People v Hidalgo-Hernandez, 2021 NY Slip Op 07404, Fourth Dept 12-23-21

Practice Point: Here the police responded to a 911 call about the caller's roommate who was unconscious on the floor. The police determined the roommate had died. There was nothing to indicate an "emergency" at the time a police technician searched the house and saw drugs. Therefore the motion to suppress the items found in a subsequent search pursuant to a warrant should have been granted.

SET ASIDE SENTENCE.

A SENTENCE CANNOT BE SET ASIDE AS EXCESSIVE PURSUANT TO A CPL 440.20 MOTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion to set aside the sentence should not have been granted. A sentence may not be set aside as excessive pursuant to a Criminal Procedure Law (CPL) 440.20 motion:

The defendant moved, inter alia, pursuant to CPL 440.20 to set aside the sentence. The Supreme Court granted that branch of the motion, and resentenced the … .

To the extent that the Supreme Court set aside the sentence as excessive, such determination was in error, as a "claim that [a] sentence is excessive may not be raised on a CPL 440.20 motion" … .

[T]he defendant did not show that the sentence should be set aside as illegal or unauthorized (see CPL 440.20). The sentence did not violate the prohibition against cruel and unusual punishment, as there existed no exceptional circumstances warranting modification of the terms of imprisonment, which were within the statutory limits … . People v Chambers, 2021 NY Slip Op 07267, Second Dept 12-22-21

Practice Point: A motion to set aside a sentence as excessive but not illegal is not a proper subject for a motion pursuant to CPL 440.20.

SEVERENCE, MOLINEUX EVIDENCE.

PURSUANT TO A MOLINEUX ANALYSIS, THE WEAPON-POSSESSION COUNT SHOULD HAVE BEEN SEVERED FROM THE MENACING AND ASSAULT COUNTS, IN WHICH DISPLAY OF A WEAPON WAS ALLEGED; THE SIROIS HEARING DID NOT DEMONSTRATE THE DEFENDANT CAUSED THE VICTIM TO REFUSE TO TESTIFY, THEREFORE THE VICTIM'S GRAND JURY TESTIMONY WAS NOT ADMISSIBLE; NEW TRIAL ORDERED (THIRD DEPT).

The Third Department, reversing defendant's conviction and ordering a new trial, over a partial dissent, determined: (1) the weapon-possession count should have been severed from the assault and menacing counts under a Molineux analysis; (2) the Sirois hearing did not demonstrate that the alleged victim refused to testify because of intimidation by the defendant, therefore the victim's grand jury testimony should not have been read to the jury; and (3) under Molineux, evidence of the defendant's possession of marijuana and defendant's participation in a program related to the police department's "Crime Analysis Center" should not have been admitted:

… [B]y refusing to sever the assault and menacing charges from the weapon charge, County Court permitted highly prejudicial evidence to be placed before the jury. Proof that a handgun was recovered from defendant's residence could lend credence to the victim's claim that a handgun — albeit a different one — was displayed during the course of the assault and menacing. Similarly, if the jury credited the victim's grand jury testimony relative to defendant displaying a weapon during her encounter with him, the jury could be more likely to believe that the handgun recovered from defendant's residence did indeed belong to him. * * *

Although the proof adduced [at the Sirois hearing] certainly established that the victim felt threatened and did not wish to testify, such proof fell short of demonstrating, by clear and convincing evidence, that defendant — or someone acting at his behest — orchestrated the victim's unavailability for trial. People v Bryant, 2021 NY Slip Op 07582, Third Dept 12-30-21

Practice Point: Here the weapon-possession charge re: a handgun recovered from defendant's residence should have been severed from the assault and menacing counts under a Molineux analysis. The assault and menacing counts included allegations of the display of a weapon, Therefore the weapon-possession count was deemed to be more prejudicial than probative.

SEX OFFENDER REGISTRATION ACT (SORA), ACCEPTANCE OF RESPONSIBILITY, PRISON SEX OFFENDER TREATMENT PROGRAM.

PARTICIPATION IN A PRISON SEX OFFENDER TREATMENT PROGRAM WAS NOT ENOUGH TO AVOID A 10-POINT ASSESSMENT FOR FAILURE TO ACCEPT RESPONSIBILITY IN THIS SORA RISK-LEVEL PROCEEDING (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Higgitt, determined defendant's participation in a prison sex offender treatment program did not preclude the assessment of 10 points for failing to accept responsibility for his misconduct. The additional 10 points raised defendant's risk level from two to three:

Factor 12 of the Sex Offender Registration Act (SORA) Risk Assessment Guidelines allows for the assessment of 10 points for a sex offender if he "has not accepted responsibility for his sexual misconduct." This appeal raises the issue of whether (and to what extent) a sex offender's participation in a sex offender treatment program is evidence that he has accepted responsibility for his misconduct. We conclude that a sex offender's participation in a sex offender treatment program is some evidence that the offender has accepted responsibility and that such evidence must be considered in conjunction with any other reliable evidence bearing on the subject (e.g., statements by the sex offender). In light of all of the evidence relevant to the subject of defendant's acceptance of responsibility for his misconduct, including his participation in a sex offender treatment program and his statements minimizing or denying responsibility for his misconduct, the SORA court correctly concluded that the People established, by clear and convincing evidence, that defendant had not genuinely accepted responsibility for

his misconduct, and, accordingly, properly assessed defendant 10 points for Factor 12. People v Solomon, 2021 NY Slip Op 07519, First Dept 12-28-21

Practice Point: In a SORA risk-level proceeding, the defendant's participation in a prison sex offender treatment program does not necessarily warrant a finding the defendant has accepted responsibility for his actions.

SEX OFFENDER REGISTRATION ACT (SORA), DOWNWARD DEPARTURE, MITIGATING FACTORS.

THE SORA COURT SHOULD HAVE CONSIDERED THAT THE DEFENDANT DID NOT REOFFEND DURING AN EXTENDED TIME WHEN HE WAS NOT SUPERVISED AS A MITIGATING FACTOR WHICH MAY WARRANT A DOWNWARD DEPARTURE IN THIS SORA RISK-LEVEL PROCEEDING (FOURTH DEPT).

The Fourth Department, reversing (modifying) County Court, determined County Court should have considered whether a downward department from the risk-level guidelines was warranted. Defendant, through and oversight, with respect to a previous conviction, was not registered as a sex offender and did not reoffend despite the absence of supervision:

… [T]he fact that defendant was at liberty while unsupervised for an extended period of time without any reoffending conduct is a mitigating factor not adequately taken into account by the guidelines … , and it is undisputed that defendant established the existence of that mitigating factor by a preponderance of the evidence … .

In view of the [SORA] court's conclusion, it did not exercise its discretion to determine whether the totality of the circumstances warrants a departure to avoid an overassessment of defendant's dangerousness and risk of sexual recidivism. … [W]e reverse the order and remit the matter to County Court to make that determination … . People v Edwards, 2021 NY Slip Op 07359, Fourth Dept 12-23-21

Practice Point: Here the defendant sex offender, due to a mistake, was not supervised when released for an extended period of time and did not reoffend. The SORA court should have considered that issue which was raised in defendant's motion for a downward departure.

SEX OFFENDER REGISTRATION ACT (SORA), USE OF MARIJUANA.

EVIDENCE. EVIDENCE OF OCCASIONAL MARIJUANA USE DID NOT SUPPORT THE ASSESSMENT OF 15 POINTS IN THIS SORA RISK-LEVEL PROCEEDING (FIRST DEPT).

The First Department determined the evidence did not support the SORA risk-level assessment of 15 points for drug and alcohol abuse:

Defendant admitted to occasional marijuana use, and there is no evidence that he had smoked marijuana at the time of the offense. The only evidence of prior drug treatment was as a condition of parole, on a nondrug-related conviction, that was completed in 2005. There is no evidence that defendant's use of marijuana was established as anything more than occasional social use, and accordingly it does not warrant assessment of points under the risk factor for drug abuse. People v Baez, 2021 NY Slip Op 06771, First Dept 12-2-21

Practice Point: Occasional marijuana use did not support the assessment of 15 points in this SORA risk-level proceeding.

SEX TRAFFICKING, JURY INSTRUCTIONS.

THE SEX TRAFFICKING STATUTE HAS TWO LINKED BUT DISTINCT ELEMENTS WHICH WERE PROPERLY EXPLAINED TO THE JURY IN THE INITIAL JURY INSTRUCTIONS; HOWEVER THE SUPPLEMENTAL INSTRUCTION IN RESPONSE TO A JURY NOTE ERRONEOUSLY COLLAPSED THE STATUTE TO A SINGLE ELEMENT; NEW TRIAL ORDERED ON THE SEX TRAFFICKING COUNTS (CT APP).

The Court of Appeals, in a brief memorandum, vacating the sex trafficking convictions and ordering a new trial, over two lengthy concurrences and a dissent, determined the supplemental jury instruction failed to explain to the jury that the sex trafficking statute has two linked but distinct elements which must be proven to convict. The positions taken by the concurrences differ and are too nuanced to fairly summarize here:

The sex trafficking statute is comprised of two distinct but linked elements, namely the offender must advance or profit from prostitution by one of the enumerated coercive acts (see Penal Law § 230.34). The trial court's supplemental instruction, in response to a jury note, erroneously severed the required link between those elements. Accordingly, defendant's sex trafficking convictions should be vacated, and a new trial held on those counts … . * * *

From Judge Singas's Concurrence:

Collapsing sex trafficking into a single-element crime would cast too small a net, unjustifiably limiting the jurisdiction of this State to prosecute only those cases where the entire crime occurred in New York. Just as significantly, treating the statute's two elements as unlinked could unjustifiably authorize prosecution of crimes in New York for extraterritorial conduct having no impact on the public safety of the state. Accordingly, we would hold that the sex trafficking statute is comprised of two discrete yet connected elements, to wit, the offender must advance or profit from prostitution through coercive acts taken in furtherance of his or her prostitution enterprise. People v Lamb, 2021 NY Slip Op 07057, CtApp 12-16-21

Practice Point: The Sex Trafficking statute has two distinct but linked elements which must be explained to the jury. Here the initial instructions correctly the explained the two linked elements, but the supplemental instruction severed the link between the two elements, requiring a new trial.

SEXUAL ASSAULT REFORM ACT (SARA), CONSTITUTIONAL LAW.

THE SEXUAL ASSAULT REFORM ACT (SARA), WHICH PLACES RESTRICTIONS ON WHERE SEX OFFENDERS CAN RESIDE AFTER RELEASE FROM PRISON, DOES NOT VIOLATE THE EX POST FACTO CLAUSE OF THE US CONSTITUTION (THIRD DEPT).

The Third Department, reversing Supreme Court and agreeing with the First and Second Departments, determined the Sexual Assault Reform Act (SARA), which prohibits petitioner-sex-offender from residing within 1000 feet of school grounds, did not violate the Ex Post Facto clause of the US Constitution:

Because petitioner was unable to locate housing in New York City that fulfilled the residency requirements imposed by SARA, even with respondents' assistance (see Correction Law § 201 [5]), he remained incarcerated. * * *

We are guided … by a recent case concerning individuals in a situation akin to petitioner's, in which the Court of Appeals held that "the temporary confinement of sex offenders in correctional facilities, while on a waiting list for SARA-compliant [New York City Department of Homeless Services] housing, is rationally related to a conceivable, legitimate government purpose of keeping level three sex offenders more than 1,000 feet away from schools," and "[t]he existence of less restrictive methods of monitoring [individuals in these circumstances] during this period does not invalidate the use of correctional facilities" … . …

… "[i]n assessing the constitutionality of a statute, this Court does not review the merits or wisdom of the Legislature's decisions on matters of public policy, and the fact that the restrictions are difficult and cumbersome is not enough to make them unconstitutional. Although one can argue that such laws are too extreme or represent an over-reaction to the fear of sexual abuse of children, they do not

violate the [E]x [P]ost [F]acto [C]lause" … . People ex rel. Rivera v Superintendent, Woodbourne Corr. Facility, 2021 NY Slip Op 07044, Third Dept 12-16-21

Practice Point: The Sexual Assault Reform Act (SARA), which imposes restrictions on where sex offenders may live, and may result in temporary confinement until a residence is found, does not violate Ex Post Facto clause of the US Constitution.

SUPERIOR COURT INFORMATION, WAIVER OF INDICTMENT.

THE WAIVER OF INDICTMENT AND SUPERIOR COURT INFORMATION WERE JURISDICTIONALLY DEFECTIVE (FIRST DEPT).

The First Department, reversing defendant's conviction by guilty plea and dismissing the superior court information (SCI), determined the waiver of indictment and SCI were jurisdictionally defective:

… [D]efendant's waiver of indictment and subsequent SCI were jurisdictionally defective, because the charged crime of attempted robbery in the third degree in the SCI was not named in the misdemeanor complaint and was a greater offense than those charged therein (see CPL 195.20 …). The waiver of indictment was also jurisdictionally infirm because defendant, who was arraigned on a misdemeanor complaint, was not held for grand jury action (see CPL 195.10[1]…). People v Maglione, 2021 NY Slip Op 06775, First Dept 12-2-21

Practice Point: A superior court information (SCI) is jurisdictionally defective if it charges an offense greater than any offense charged in the underlying misdemeanor complaint.

Practice Point: A waiver of indictment is jurisdictionally defective where, as here, the defendant was not held for grand jury action on the underlying misdemeanor complaint.

SUPPRESSION HEARING, INCREDIBLE TESTIMONY BY POLICE.

ALTHOUGH THE MAJORITY AFFIRMED DEFENDANT'S CONVICTION, THE TWO DISSENTERS WOULD HAVE DISMISSED THE INDICTMENT BECAUSE THE TESTIMONY OF THE POLICE OFFICERS AT THE SUPPRESSION HEARING DESCRIBING THE TRAFFIC STOP WAS NOT CREDIBLE (FOURTH DEPT).

The Fourth Department, affirming defendant's conviction, rejected the argument that the police officer's testimony at the suppression hearing describing the traffic stop was incredible. The two-justice dissent disgreed:

From the dissent:

… [W]e conclude that "the significant inconsistencies and gaps in memory . . . [in] the testimony of the police officers who testified at the hearing bear negatively on their overall credibility" … . Neither of the two officers who testified could recall with clarity any of the details of their stop of the vehicle in which defendant was a passenger, with one officer acknowledging that the only thing that he could recall was that he "smelled mari[h]uana." The officers disagreed whether that smell was of burnt or burning marihuana. Inasmuch as both officers testified that they each had conducted innumerable traffic stops where marihuana was involved, their inability to recall further details regarding this particular stop undermines the reliability of the officers' testimony. We therefore conclude that, because the lapses in the officers' memory of the stop render their testimony unworthy of belief, the People failed to meet their burden of coming forward with sufficient evidence to establish the legality of the police conduct in the first instance … . People v Stroud, 2021 NY Slip Op 07375, Fourth Dept 12-23-21

Practice Point: Although the majority didn't buy the argument here, inconsistencies in police testimony at a suppression hearing may be justify granting the motion to suppress because the prosecution did not meet its burden to demonstrate the legality of the police conduct.

VICTIMS OF CRIME, CIVIL SUITS BY, YOUTHFUL OFFENDERS.

THE EXTENSION OF THE STATUTE OF LIMITATIONS IN CPLR 213-B(1) WHICH ALLOWS A VICTIM OF A CRIME TO SUE THE PERPETRATOR WITHIN SEVEN YEARS OF THE DATE OF CRIME APPLIES ONLY WHERE THE PERPETRATOR HAS BEEN "CONVICTED OF [THE] CRIME;" A PERPETRATOR WHO HAS BEEN ADJUDICATED A YOUTHFUL OFFENDER HAS NOT BEEN "CONVICTED OF A CRIME" WITHIN THE MEANING OF CPLR 213-B(1) (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Connelly, in a matter of first impression, determined CPLR 213-b(1) does not extend the statute of limitations for civil actions against someone "convicted of a crime" where that person has been adjudicated a youthful offender. Here plaintiff, Anthony Pitt, was accused of rape by Ericka Feagles. The charges against Pitt were resolved in his favor in October 2011. Although Feagles was subsequently charged with falsely reporting an incident and making a false written statement, she was adjudicated a youthful offender in connection with those charges in April 2012. Plaintiff's August 2016 suit against Feagles would only be timely if the seven-year extension of the statute of limitations in CPLR 213-b(1) applied. The Second Department determined being adjudicated a youthful offender does not equate to being "convicted of a crime." Therefore the extension in CPLR 213-b(1) did not apply and plaintiff's suit was time-barred. The court noted the plaintiff could have brought an intentional tort action within the applicable one-year statute of limitations:

CPLR 213-b, entitled "Action by a victim of a criminal offense," provides, as relevant, that "an action by a crime victim . . . may be commenced to recover damages from a defendant: (1) convicted of a crime which is the subject of such action, for any injury or loss resulting therefrom within seven years of the date of the crime" … . * * *

… [W]e … must consider the competing legislative purpose of the youthful offender statute. In enacting the youthful offender statute, the legislature sought to relieve youthful offenders of the consequences of a criminal conviction and give them a "second chance" … . It would be inconsistent with that legislative purpose

to allow plaintiffs to commence civil actions against youthful offenders long after the conduct underlying the adjudication occurred … .

Our determination does not prohibit civil actions against defendants for the conduct underlying youthful offender adjudications. We simply hold that plaintiffs must commence such actions within the applicable statutes of limitations, without the benefit of the seven-year extension provided in CPLR 213-b(1). We note that here, the plaintiffs commenced the prior action within the applicable one-year statute of limitations for intentional torts and would have had a timely action against Feagles had they properly served her. The plaintiffs did not do so. Pitt v Feagles, 2021 NY Slip Op 07299, Second Dept 12-22-21

Practice Point: The extended seven-year statute of limitations for actions by victims of sex offenders is triggered by the "conviction" of the sex offender. Here the defendant was adjudicated a youthful offender. Therefore the seven-year extension did not apply.