# NEW YORK APPELLATE DIGEST, LLC

Criminal Law Reversal Report
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An Organized Compilation of the Summaries of Selected Decisions Addressing Criminal Law, Mostly Reversals, Released by Our New York State Appellate Courts and Posted on the New York Appellate Digest Website in March 2022. 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 on Any Page to Return There. Right Click on the Citations to Keep Your Place in the Reversal Report. 

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## APPEALS, STATUTORY GROUNDS FOR APPEAL.

## THE CRIMINAL PROCEDURE LAW SPELLS OUT THE ONLY GROUNDS FOR APPEAL IN A CRIMINAL PROCEEDING; NO APPEAL LIES FROM THE DENIAL OF A MOTION TO CORRECT, AMEND OR SETTLE THE SENTENCING TRANSCRIPT; AND NO APPEAL LIES FROM ADDING A MANDATORY SURCHARGE, WHICH IS NOT PART OF A SENTENCE (THIRD DEPT).

The Third Department determined no appeal lies from an order denying defendant's motion to correct, amend or settle the sentencing transcript or from an order adding the mandatory surcharge:

As a general rule, "no appeal lies from a determination made in a criminal proceeding unless one is provided by the CPL, [which] exclusively provides for rights to appeal in criminal matters" … .A defendant's right to appeal to this Court in a criminal case is "strictly limited to those authorized by statute" … . The … order denying defendant's motion to correct, amend or settle the sentencing transcript and the uniform sentence and commitment form and adding the mandatory surcharge does not fit within the statutory authorization for appeals by a defendant as of right to this Court (see CPL 450.10 …). Defendant's reliance on case law involving the correction of trial records on direct appeals from judgments of conviction is misplaced, given that this appeal is not from the judgment of conviction, which was previously affirmed on appeal (303 AD2d at 830).

With regard to the mandatory surcharge, although it should be "levied at sentencing" (Penal Law § 60.35 [1] [a]), it is not part of the sentence that must be pronounced at the sentencing proceeding … . As such, that part of County Court's order amending the uniform sentence and commitment form by adding the mandatory surcharge did not constitute the imposition of a sentence or a modification of the sentence so as to authorize defendant's appeal therefrom (see CPL 450.10). People v Johnson, 2022 NY Slip Op 01844, Third Dept 3-17-22

Practice Point: The Criminal Procedure Law lays out all the allowed grounds for appeal in a criminal case. The denial of a motion to correct, amend or settle a sentencing transcript is not appealable. The adding of a mandatory surcharge is not part of a sentence and therefore is not appealable.

## APPEALS, WAIVER OF APPEAL, JUDGES.

## DEFENDANT'S WAIVER OF APPEAL WAS NOT VALID; THE COURT'S TERSE INQUIRY ABOUT THE APPEAL WAIVER WAS NOT CURED BY DEFENDANT'S EXECUTION OF A MORE DETAILED WRITTEN WAIVER AFTER SHE WAS SENTENCED AND MORE THAN A YEAR AFTER THE PLEA (THIRD DEPT).

The Third Department affirmed defendant's conviction but noted that the waiver of appeal was not valid:

The record reflects that County Court failed to explain the separate and distinct nature of the appeal waiver to defendant, and the court's terse inquiry, wherein defendant was asked, "Do you understand that as part of this disposition, you're agreeing to waive your right to appeal" and that "normally . . . you have the right to appeal your plea and your sentence," was insufficient to ensure that defendant appreciated the nature and consequences of the rights that she was relinquishing … . Further, despite defendant's execution of a more detailed written waiver, such was executed after she was sentenced and more than a year after the plea was entered … .. Under these circumstances, we find that defendant did not knowingly and intelligently waive her right to appeal … . People v Crispell, 2022 NY Slip Op 01843, Third Dept 3-17-22

Practice Point: The court did not explain the separate and distinct nature of an appeal waiver, as opposed to the waiver of the right to a trial. The inadequacy of the court's explanation was not cured by the more detailed written waiver which was executed after defendant was sentenced and more than a year after the plea.

## BENCH TRIALS, HEARSAY EXCEPTIONS.

## IN A RARE REVERSAL OF A BENCH TRIAL ON EVIDENTIARY GROUNDS, THE 1ST DEPT DETERMINED FOUR OUT-OF-COURT STATEMENTS ALLEGEDLY MADE BY THE VICTIM IN THIS SEXUAL-OFFENSE CASE SHOULD NOT HAVE BEEN ADMITTED UNDER THE "EXCITED UTTERANCE" OR "PROMPT OUTCRY" THEORIES; THE COURT NOTED THAT ONLY THE FACT OF THE COMPLAINT, NOT THE ACCOMPANYING DETAILS, ARE ADMISSIBLE AS A "PROMPT OUTCRY" (FIRST DEPT).

The First Department, reversing defendant's conviction after a nonjury trial, determined four out-of-court statements made by the alleged victim in this sexual-offense case should not have been admitted a "excited utterances." Although two of the statements were "prompt outcries," under that theory only the fact of a complaint, not the details (as provided here) are admissible:

… [T]he trial court admitted four statements made by the alleged victim following the incident, reasoning that they were admissible both as excited utterances and prompt outcries. This was error. The alleged victim's out-of-court statements did not qualify as excited utterances and should not have been admitted for their substance under that hearsay exception … . Although two of the four statements were correctly admitted under the alternative theory that they constituted prompt outcries, under this exception, "only the fact of a complaint, not its accompanying details" is admissible … . It is clear from the record that the trial court considered all four hearsay statements for their substance, and thus, there can be no presumption that the court, as the finder of fact, considered only competent evidence … .. Given the People's strong reliance on the hearsay statements to prove its case, and the court's indication that it intended to review the written statement that was in evidence during deliberation, we cannot say that "the proof of the defendant's guilt, without reference to the error, is overwhelming" and that the error was therefore harmless … . People v Gideon, 2022 NY Slip Op 01746, First Dept 3-15-22

Practice Point: In this nonjury sexual-offense prosecution the court erred by admitting out-of-court statements by the alleged victim under the "prompt outcry" theory. Only the fact of the complaint is admissible, not the accompanying details.

## BURGLARY, HOSPITAL NOT A "DWELLING."

## THE HOSPITAL FROM WHICH LAPTOPS WERE STOLEN WAS NOT A "DWELLING" WITHIN THE MEANING OF THE BURGLARY STATUTE (FIRST DEPT).

The First Department, reversing two of defendant's burglary convictions, determined the hospital from which laptops were stolen was not a "dwelling" as that term is used in the burglary statutes:

Defendant's convictions under counts three and four of the indictment, regarding the 2017 thefts of laptop computers from the Physicians & Surgeons Building at Columbia University Medical Center, were not supported by legally sufficient evidence of the "dwelling" element of burglary in the second degree (see Penal Law § 140.00[3]). There was no evidence that patients stayed overnight in this building. The People's reliance on Penal Law § 140.00(2) is unavailing, because no "unit" within the building is a dwelling. Although the building was part of a large campus covering several blocks, there was insufficient evidence that this building provided defendant with ready access via connecting elevators, stairwells, or corridors to other buildings, where hospital patients stayed overnight and which was, in any event, at a considerable distance … . People v Brown, 2022 NY Slip Op 02205, First Dept 3-31-22

Practice Point: Here a hospital from which laptops had been stolen was not a "dwelling" as that term is used in the burglary statutes.

## CELL SITE LOCATION INFORMATION (CSLI) WARRANT.

## PURSUANT TO A US SUPREME COURT DECISION WHICH CAME DOWN AFTER DEFENDANT'S CONVICTION, DEFENDANT HAS STANDING TO CHALLENGE THE CELL SITE LOCATION INFORMATION (CSLI) WARRANT, MATTER REMITTED (FOURTH DEPT).

The Fourth Department, reserving decision and remitting the matter, determined that, based upon a US Supreme Court decision which came down after defendant's conviction, defendant has standing to challenge the cell site location information (CSLI) warrant:

We agree with defendant … that he has standing to challenge the CSLI search warrant. At the time of the court's decision, controlling caselaw in this Department held that the acquisition of CSLI was not a search under the State or Federal Constitution because a defendant's use of a phone "constituted a voluntary disclosure of his [or her] general location to [the] service provider, and a person does not have a reasonable expectation of privacy in information voluntarily disclosed to third parties" … . Following defendant's conviction, the United States Supreme Court decided Carpenter v United States, 138 S Ct 2206, 2217 [2018]), which held that "an individual maintains a legitimate expectation of privacy in the record of his [or her] physical movements as captured through CSLI" … . As a result of the Carpenter decision, defendant is entitled to a determination on the merits regarding his challenges to the CSLI search warrant. People v Ozkaynak, 2022 NY Slip Op 01700, Fourth Dept 3-11-22

Practice Point: The US Supreme Court ruling that defendants have standing to challenge a cell site location information (CDLI) warrant came down after defendant's conviction in this case. The matter was remitted for a determination of defendant's suppression motion.

## CONSTRUCTIVE POSSESSION.

## THERE WAS NO PROOF DEFENDANT EXERCISED DOMINION AND CONTROL OVER THE AREA WHERE THE DRUGS WERE FOUND; DEFENDANT'S MERE PRESENCE IN THE VICINITY OF THE DRUGS DID NOT PROVE HIS POSSESSION OF THE DRUGS (FOURTH DEPT).

The Fourth Department, reversing defendant's possession of a controlled substance conviction and dismissing the indictment, determined defendant's constructive possession of the drugs was not demonstrated. There was no proof defendant exercised dominion and control over the area in which the drugs were found, as opposed to merely being present in the vicinity of the drugs:

Where there is no evidence that the defendant actually possessed the controlled substance, the People are required to establish that the defendant "exercised 'dominion or control' over the property by a sufficient level of control over the area in which the contraband is found or over the person from whom the contraband is seized" … . The People may establish constructive possession by circumstantial evidence … , but a defendant's mere presence in the area in which contraband is discovered is insufficient to establish constructive possession … . People v Mighty, 2022 NY Slip Op 01923, Fourth Dept 3-18-18

Practice Point: If a defendant does not physically possess the drugs, to prove constructive possession, the People must demonstrate the defendant exercised dominion and control over the area where the drugs were found, perhaps by proving defendant resided there, for example.

## DNA, FRYE HEARING.

## AT THE FRYE HEARING, THE PEOPLE DEMONSTRATED THE ADMISSIBILITY OF THE RESULTS OF DNA ANALYSIS USING THE STRMIX DNA ANALYSIS PROGRAM (FOURTH DEPT).

The Fourth Department, affirming defendant's conviction, determined the Frye hearing sufficiently demonstrated the admissibility of the results of DNA analysis using the STRmix DNA analysis program (STRmix program):

… [T]he People introduced evidence that biological samples were recovered from several locations at the scene of the incident and that those samples were analyzed using the STRmix program, which indicated that defendant's DNA was contained in those samples. Before trial, the People provided defendant with notice of the results of the tests and the program used to conduct them and, at defendant's request, the court ordered a Frye hearing concerning that program …. The People introduced evidence at the hearing that the STRmix program had been the subject of numerous peer-reviewed journal articles and had been evaluated and approved by the National Institute of Standards and Technology and by the Erie County Central Police Services Forensic Laboratory before it began using the STRmix program. In addition, the People established that the STRmix program was being used by numerous forensic testing agencies and laboratories in New York, California, the United States Army, Australia, and New Zealand, and that it had been approved by the DNA Subcommittee of the New York State Forensic Science Committee. People v Bullard-Daniel, 2022 NY Slip Op 01707, Fourth Dept 3-11-22

Practice Point: The Frye hearing in this case demonstrated the results of the DNA analysis done using the STRmix DNA analysis program constituted admissible evidence.

## EMPLOYMENT LAW, CRIMINAL LAW, CORRECTION LAW, ADMINISTRATIVE LAW.

## THE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION (DOCCS) DID NOT ADEQUATELY EXPLAIN THE STATUTORY FACTORS SUPPORTING ITS DENIAL OF PETITIONER'S REQUEST FOR A CERTIFICATE OF GOOD STANDING, WHICH WOULD ALLOW THE FORMER INMATE TO WORK AS A SCHOOL BUS DRIVER; THEREFORE THE DENIAL WAS ARBITRARY; MATTER REMITTED FOR FURTHER PROCEEDINGS (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the Department of Corrections and Community Supervision's (DOCCS's) denial of petitioner's application for a certificate of good conduct (CGC) was not supported by the agency's cursory rulings, rendering the denial arbitrary and requiring remittal for further proceedings. Petitioner, a former inmate with a sexual-offense conviction, sought the certificate of good standing in order to work as a school bus driver:

… [T]he challenged determination is a form letter with blanks to be filled in, and the Assistant Commissioner made no effort to explain his reasoning beyond checking a box next to a sentence stating that petitioner's application was being denied because "[t]he relief to be granted by the [CGC] is inconsistent with public interest." There is no question that such a "cursory letter decision," which mentions only one of the statutory factors set forth in Correction Law § 703-b and offers no discussion of the "grounds for the denial[,] precludes meaningful review of the rationality of the decision" … .

… Correction Law article 23 requires more than a naked reliance on the crime of conviction, and the Assistant Commissioner's affidavit … reflects that DOCCS "failed to comply with the statute and acted in an arbitrary manner" … . Although the record contains other information regarding the circumstances of petitioner's conviction and his subsequent history that might render the denial of his application rational, a "court is powerless to sanction the determination by substituting what it deems a more appropriate or proper basis" … . Matter of Streety v Annucci, 2022 NY Slip Op 02170, Third Dept 3-31-22

Practice Point: If an administrative agency issues a ruling which does adequately explain the statutory factors upon which the ruling is based, making a review of the bases of the ruling impossible, the ruling may be characterized as "arbitrary" and annulled.

## INDICTMENTS, AMENDMENT OF INDICTMENT.

## THE INDICTMENT CHARGED DEFENDANT WITH ASSAULT SECOND AND ATTEMPTED ASSAULT SECOND BUT DID NOT ALLEGE THE USE OF A DEADLY WEAPON OR A DANGEROUS INSTRUMENT; THE PEOPLE'S THEORY AT TRIAL WAS DEFENDANT USED A PVC PIPE AS A DEADLY WEAPON OR A DANGEROUS INSTRUMENT; BUT, TO CORRECT THE FLAWED INDICTMENT, THE JUDGE, A DAY BEFORE THE END OF THE TRIAL, AMENDED THE INDICTMENT TO CHARGE ASSAULT THIRD AND ATTEMPTED ASSUALT THIRD; THE AMENDMENT PREJUDICED THE DEFENDANT (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Oing, vacating defendant's conviction with leave to resubmit, determined the indictment should not have been amended at the end of the trial to charge defendant with assault third and attempted assault third, instead of assault second and attempted assault second as originally charged in the indictment. The indictment did not allege the use of a deadly weapon or dangerous instrument. The last minute amendment was an effort to correct that charging flaw. However the People's theory, before the grand jury and at trial, was defendant used a PVC pipe as a deadly weapon or a dangerous instrument. But, because of the amendment, the jury was not asked to consider the deadly weapon or dangerous instrument element:

An indictment may be amended to correct "matters of form, time, place, names of persons and the like" (CPL 200.70[1]). An amendment must not "change the theory or theories of the prosecution as reflected in the evidence before the grand jury . . . or otherwise tend to prejudice the defendant on the merits" (CPL 200.70[1]). …

… [N]otice could not have been given, because the indictment's deficiency was not discovered until one day before the trial concluded. This unorthodox correction is not the kind of procedure sanctioned under CPL 200.70 or 300.50. The amendment was therefore not a mere correction of a "misnomer" of the offense in the accusatory clauses of the indictment … . …

… [D]efendant was prejudiced by the amendment. The People's theory before the grand jury was that Bari's injuries were caused by the use of a dangerous instrument, i.e., the bike rental sign. The prosecutor in her opening statement made references to the bike rental sign. She did so in her summation even after the court deleted the original second-degree hate crimes and replaced them with third-degree hate crimes. Further, on the People's case, the prosecutor elicited testimony from Bari to support this theory. Thus, the People tried the case from inception to conclusion, and defendant mounted a defense, on the theory that a deadly weapon or a dangerous instrument was used in the commission of the hate crimes. On the last day of the trial, however, the court amended the indictment and charged the jury with variations of third-degree assault, which do not require proof of the existence of a deadly weapon or a dangerous instrument. Thus, after hearing evidence of a dangerous instrument throughout the trial, the jury received instructions that did not require it to find that the People had proven the existence of a dangerous instrument beyond a reasonable doubt to convict defendant of the third-degree hate crimes or the third-degree assault. This result was an impermissible change in the theory of the prosecution. People v Winston, 2022 NY Slip Op 02080, First Dept 3-24-22

Practice Point: Here the indictment was flawed because it charged assault second but did not allege use of a deadly weapon or a dangerous instrument. The People's theory at trial was that defendant used a PVC pipe as a deadly weapon or a dangerous instrument. A day before the end of the trial, the judge amended the indictment to charge assault third. The amendment was improper and prejudiced the defendant.

## INDICTMENTS, SUPERIOR COUNT INFORMATIONS, JURISDICTIONAL DEFECTS.

## BOTH THE INDICTMENT AND THE SUPERIOR COURT INFORMATION CHARGED CRIMES WITH THE ELEMENT THAT THE VICTIM WAS LESS THAN 17; BOTH HAD THE WRONG BIRTH DATE FOR THE VICTIM WHICH THEREBY ALLEGED THE VICTIM WAS MORE THAN 17; THAT IS A JURISDICTIONAL DEFECT WHICH CANNOT BE CORRECTED BY AMENDMENT (THIRD DEPT).

The Third Department, reversing the conviction and dismissing the superior court information, determined that both the indictment and the subsequent superior court information were jurisdictionally defective. Both charged sexual offenses with the victim being less than 17 years old as an element. Both had the wrong birth date for the victim, which placed the victim's age at more than 17 years old. The Third Department noted that the indictment, which was replaced by the superior court information, was improperly amended to reflect the correct birth date:

… [T]he superior court information specifically cited and charged defendant with endangering the welfare of a child under Penal Law § 260.10 (1), which provides that "[a] person is guilty of endangering the welfare of a child when . . . [h]e or she knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old" (Penal Law § 260.10 [1]). However, the superior court information also alleged that, "[o]n or about November 13, 2016, . . . the defendant . . . did knowingly act in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old, . . . having a date of birth of 6/2/1999, by engaging in oral sexual conduct with" the victim. Inasmuch as the offense of endangering the welfare of a child requires that the victim be less than 17 years old, we find that the superior court information was jurisdictionally defective because it failed to effectively charge defendant with the commission of a crime where the date of birth indicated that the victim was 17 at the time of the offense … .

Although a trial court may permit an indictment to be amended "with respect to defects, errors or variances from the proof relating to the matters of form, time, place, names of persons and the like" (CPL 200.70 [1]), an indictment may not "be

amended for the purpose of curing . . . [a] failure thereof to charge or state an offense[] or . . . [l]egal insufficiency of the factual allegations" (CPL 200.70 [2] [a], [b] … ). Here, inasmuch as the first five counts of the indictment charged defendant with offenses that required the victim to be less than 17 years old, such counts suffered from the same jurisdictional defect as the superior court information in that they failed to allege a crime by stating that the victim's date of birth was June 2, 1999 — making the victim 17 years old at the time of the alleged offense on November 13, 2016. As such, County Court had no authority to grant the People's application to amend those counts, "regardless of any consistency with the People's theory before the grand jury" or lack of prejudice to defendant … . People v Solomon, 2022 NY Slip Op 02158, Third Dept 3-31-22

Practice Point: If an element of the crime is that the victim is less than 17, and the indictment and the superior court information have the wrong birth date which puts the victim's age at more than 17, the indictment and the superior court information are jurisdictionally defective and cannot be amended.

## JAIL PHONE CALLS.

### A JAIL PHONE CALL IN WHICH DEFENDANT SAID HE MIGHT PLEAD GUILTY SHOULD NOT HAVE BEEN ADMITTED BECAUSE ITS PREJUDICIAL EFFECT OUTWEIGHED ANY PROBATIVE VALUE; THE PROSECUTOR'S SUMMATION REFERENCE TO THE PORTION OF THE PHONE CALL IN WHICH DEFENDANT SAID HE NEEDED A "PAID LAWYER" WAS AN IMPROPER USE OF THE RIGHT TO COUNSEL AGAINST THE DEFENDANT; NEW TRIAL ORDERED (THIRD DEPT).

The Third Department, reversing defendant's conviction and ordering a new trial, determined a jail phone call in which defendant said he might plead guilty was inadmissible. In addition the prosecutor's comment on summation that defendant said (in that jail phone call) he needed a "paid lawyer" was an improper reference to defendant's right to counsel:

[Defendant] was deprived of a fair trial based upon the admission of a jail phone call wherein he stated that he might as well "cop out to . . . the five years or whatever." The People portrayed this evidence as relevant to show defendant's consciousness of guilt. Even if relevant, evidence of consciousness of guilt is generally considered weak … . That said, defendant's statement that he contemplated taking a plea had little probative value but had a prejudicial effect on him. In this regard, "[s]ince it is widely assumed that only the guilty would consider entering a guilty plea, the knowledge that defendant wanted to plead guilty would make it difficult for the jury to accept the presumption of innocence and to evaluate the evidence fairly" … .

We also agree with defendant's argument that he was prejudiced by the prosecutor's comment on summation that defendant, in the jail phone call, stated that "[h]e need[ed] to get a paid lawyer to see if he can get lesser time." The prosecutor argued to the jury that this statement went to defendant's consciousness of guilt. A prosecutor, however, cannot use a defendant's invocation of his or her constitutional right to counsel against such defendant … . It follows that any commentary to this effect is improper. Accordingly, defendant was prejudiced by the prosecutor's summation … . People v Roberts, 2022 NY Slip Op 02157, Third Dept 3-31-22

Practice Point: Defendant, in a jail phone call, said he might plead guilty and he needed a "paid lawyer." The "might plead guilty" statement should not have been admitted because it was highly prejudicial but had little probative value. The prosecutor's reference in summation to the "need a paid lawyer" statement improperly used defendant's right to counsel against him. These were deemed reversible errors.

## JUDGES, CURTAILED CROSS-EXAMINATION.

## THE CROSS-EXAMINATION OF A DETECTIVE ABOUT STATEMENTS ATTRIBUTED TO THE VICTIM IN THIS SEXUAL-OFFENSE PROSECUTION SHOULD NOT HAVE BEEN CURTAILED BY THE JUDGE; THE ERROR WAS NOT HARMLESS WITH RESPECT TO SEVERAL COUNTS, BUT WAS DEEMED HARMLESS WITH RESPECT TO OTHER COUNTS (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction on several counts, determined the judge's curtailing of the cross-examination of a detective concerning statements attributed the the victim in this sexual-offense prosecution was not harmless error as to those (reversed) counts:

" 'Once a proper foundation is laid, a party may show that an adversary's witness has, on another occasion, made oral or written statements which are inconsistent with some material part of the trial testimony, for the purpose of impeaching the credibility and thereby discrediting the testimony of the witness' " … . "To lay the foundation for contradiction, it is necessary to ask the witness specifically whether he [or she] has made such statements; and the usual and most accurate mode of examining the contradicting witness, is to ask the precise question put to the principal witness" … . Here, defendant laid a proper foundation by eliciting testimony from the victim that was inconsistent with the detective's written report purporting to record the victim's statement, and the court therefore should have permitted cross-examination of the detective regarding that inconsistency … . …

The testimony of the victim was the only direct evidence supporting count one of the indictment, charging criminal sexual act in the third degree, counts three and four of the indictment, charging sexual abuse in the third degree, and counts six and eight of the indictment, charging endangering the welfare of a child. We conclude that the admissible evidence of guilt with respect to those counts is not overwhelming, and that there is a reasonable possibility that the error in curtailing defense counsel's cross-examination of the detective may have contributed to defendant's conviction. People v Kilgore, 2022 NY Slip Op 01709, Fourth Dept 3-11-22

Practice Point: It was error for the judge to curtail the cross-examination of a detective about statements attributed to the victim in this sexual offense

prosecution. The error was deemed reversible with respect to some counts, and harmless with respect to others.

## JURORS, BATSON.

### IN RESPONSE TO A BATSON INQUIRY, THE PROSECUTOR'S REASON FOR STRIKING THE PROSPECTIVE JUROR IN FACT RELATED TO ANOTHER PROSPECTIVE JUROR FOR WHOM DEFENDANT HAD EXERCISED A PEREMPTORY CHALLENGE; NEW TRIAL ORDERED (FOURTH DEPT).

The Fourth Department, reversing defendant's convictions and ordering a new trial, determined that, in response to a Batson inquiry, the prosecutor's reason for striking the prospective juror did not, in fact, relate to the correct prospective juror. Rather, the prosecutor's reason related to another prospective juror for whom the defendant had exercised a peremptory challenge:

… [T]he prosecutor stated that the reason that he exercised a peremptory challenge on the prospective juror at issue was due to "her answer as to why she wanted to sit on the jury." Specifically, the prosecutor explained that the prospective juror expressed an "odd interest in the defendant's right to remain silent, right to testify," and that "[t]he way she answered the question . . . was very strange." However, … the statements the prosecutor attributed to the prospective juror at issue were, in fact, made by a prospective juror upon whom defendant exercised a peremptory strike. Because "a proffered race-neutral reason cannot withstand a Batson objection where it is based on a statement that the prospective juror did not in fact make" … , "an equal protection violation was established" … .People v Douglas, 2022 NY Slip Op 01919, Fourth Dept 3-18-22

Practice Point: If, pursuant to a Batson inquiry, the prosecutor refers to answers given by the wrong prospective juror, a new trial will be ordered.

## POLL OF THE JURY, BRADY MATERIAL, CROSS-EXAMINATION.

## BRADY MATERIAL WAS WITHHELD, CROSS-EXAMINATION ABOUT A COMPLAINANT'S INCOSISTENT STATEMENTS WAS NOT ALLOWED; THE INQUIRY AFTER A POLLED JUROR INDICATED SHE MAY NOT HAVE AGREED WITH THE VERDICT WAS INSUFFICIENT (SECOND DEPT).

The Second Department, vacating the assault second conviction and dismissing the count, and reversing the gang assault and assault first convictions, determined: (1) Brady material was withheld by redacting the name of a 911 caller who indicated defendant was not involved in the assault; (2) cross-examination of a police officer about a discrepancy between a complainant's testimony and a statement attributed to the complainant in a police report should have been allowed; and (3) the judge should have inquired further after a juror indicated she "was not sure" about some of the convictions when the jury was polled:

While the contents of the 911 call may have provided some clues as to the identity of the caller, the defendant should not be forced to guess as to the identity of this caller. In addition, we are satisfied that there was a reasonable possibility that disclosure of the caller's identity and contact information would have led to evidence that would have changed the result of the proceedings … . …

… [T]he court erred in precluding defense counsel from questioning the police witness about the contents of the report and the alleged prior inconsistent statement of complainant one … . …

… [W]hen the jury was polled and asked if the verdict was theirs, juror number nine stated, "Um, I'm not sure, with some, but most of them, yes." Although the Supreme Court thereafter inquired of juror number nine if the verdict announced to the court was her own, it did so by asking her "is that a yes or a no" in the presence of the remaining jurors, despite evidence before the court suggesting that juror number nine may have succumbed to pressure to vote with the majority even though she did not agree with the verdict as to certain counts. The court's inquiry was therefore not sufficient … . People v Ramunni, 2022 NY Slip Op 02022, Second Dept 3-23-22

Practice Point: Here Brady material, the identity of a 911 caller, was withheld, cross-examination about inconsistent statements attributed to a complainant was not allowed, and a juror who, when polled, said she may not have agreed with verdict was not sufficiently questioned by the judge. One count of the indictment was dismissed, and a new trial was ordered on the gang assault and assault first counts.

## PROBATION, CONSENT-TO-SEARCH.

## THE CONSENT-TO-SEARCH PROBATION CONDITION WAS NOT INDIVIDUALLY TAILORED TO THE OFFENSE AND SHOULD NOT HAVE BEEN IMPOSED; IT WAS NOT NECESSARY TO PRESERVE THE ERROR FOR APPEAL AND APPEAL WAS NOT PROHIBITED BY THE DEFENDANT'S WAIVER OF HIS RIGHT TO APPEAL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined there was no justification for the "consent-to-search" probation condition. Defendant stole a cab driver's cell phone and pled guilty to attempted assault. The court noted it was not necessary to preserve the error for appeal and appeal was not prohibited by the waiver of appeal:

The probation department [requested] that as a condition of probation, the defendant be required to consent to a search by a probation officer of his person, vehicle, and place of abode, and the seizure of any illegal drugs, drug paraphernalia, gun/firearm or other weapon, or other contraband found (Condition No. 28). At sentencing, the Supreme Court imposed the consent to search condition of probation. On appeal, the defendant argues that this condition of his probation was improperly imposed.

The defendant correctly argues, and the People do not dispute, that this issue was not required to be preserved for appellate review, and that appellate review is not precluded by his waiver of the right to appeal … .

… [T]he defendant was a first-time offender and was not armed with a weapon at the time he committed the offense. While the defendant told the probation

department that he was under the influence of alcohol at the time of the offense, he was not assessed as being in need of alcohol or substance abuse treatment. Under the circumstances, the consent to search condition of probation was improperly imposed because it was not individually tailored in relation to the offense, and was not, therefore, reasonably related to the defendant's rehabilitation, or necessary to ensure that the defendant will lead a law abiding life … . People v Dranchuk, 2022 NY Slip Op 01312, Second Dept 3-2-22

Practice Point: A probation-condition must be reasonably related to the defendant's rehabilitation. Here there was no reasonable relation between the consent-to-search condition and the defendant, a first-time offender who was not armed at the time of the offense and for whom no alcohol or substance abuse treatment was recommended.

## RESTITUTION, LOST WAGES.

### RESTITUTION IN EXCESS OF THE STATUTORY CAP FOR LOST WAGES WAS IMPROPERLY AWARDED BECAUSE "LOST WAGES" DOES NOT FIT ANY OF THE EXCEPTIONS TO THE CAP RESTRICTION (FOURTH DEPT).

The Fourth Department, modifying County Court, determined the restitution amount which exceeded the statutory cap did not fit into any of the statutory exceptions to the cap restriction. The victim was improperly awarded an amount for lost wages:

… [T]he court erred in imposing restitution and reparation in excess of the statutory cap for the second victim's past lost earnings because, under the plain meaning of the statute, that form of loss does not fall within the exception to the statutory cap pursuant to Penal Law § 60.27 (5) (b) … . In particular, contrary to the court's determination, inasmuch as past lost earnings are wages, salary, or other income that the second victim could have, but did not, earn (see Black's Law Dictionary [11th ed 2019], lost earnings), the excess amount ordered as restitution and reparation for that loss does not constitute reimbursement for "the return of the [second] victim's property" or equivalent thereof (§ 60.27 [5] [b] …). People v Witherow, 2022 NY Slip Op 01691, Fourth Dept 3-11-22

Practice Point: Restitution for lost wages was improperly awarded because "lost wages" does not fit any of the statutory exceptions to the restitution-cap restriction.

## SENTENCING, OFF-THE-RECORD "CONDITION.

## COUNTY COURT SHOULD NOT HAVE ACCORDED ANY WEIGHT TO AN OFF-THE-RECORD "CONDITION" THAT THE PEOPLE WOULD WITHDRAW THEIR CONSENT TO THE PLEA OFFER IF YOUTHFUL OFFENDER STATUS WERE GRANTED; ALTHOUGH THE PEOPLE CAN BARGAIN FOR SUCH A CONDITION, THERE WAS NOTHING ON THE RECORD ABOUT IT; SENTENCE VACATED AND MATTER REMITTED FOR CONSIDERATION OF THE FACTORS FOR A YOUTHFUL OFFENDER ADJUDICATION (THIRD DEPT).

The Third Department, vacating the sentence and remitting the matter, determined County Court failed to consider the relevant factors for adjudicating defendant a youthful offender. Instead the court did not consider the issue at all based on its understanding the People would withdraw their consent to the plea offer if youthful offender status were granted. Although the People may bargain for the right to withdraw consent to the plea agreement is youthful offender treatment is granted, there was no such condition on the record here:

"[I]t is a settled rule of law in this [s]tate that off-the-record promises made in the plea bargaining process will not be recognized where they are flatly contradicted by the record, either by the existence of some on-the-record promise whose terms are inconsistent with those later urged or by the placement on the record of a statement by the pleading defendant that no other promises have been made to induce his [or her] guilty plea" … . The plea proceedings here were devoid of any indication that the People conditioned their consent to the plea agreement upon defendant not receiving youthful offender treatment or that defendant understood such a condition to be part of the agreement, and defendant stated during the plea colloquy that no off-the-record promises had been made to induce his guilty plea. The People further failed to reference their purported right to withdraw consent to the plea agreement when they addressed the question of youthful offender

treatment at sentencing. The alleged off-the-record arrangement was unenforceable given those circumstances and, as such, "County Court should not have accorded any weight to" it … .

… County Court found that defendant was an "eligible youth" for purposes of youthful offender status (CPL 720.10 [2], [3]), the court was obliged to consider the relevant factors and determine whether it would, as a discretionary matter, adjudicate him to be a youthful offender … . People v Irizarry, 2022 NY Slip Op 02159, Third Dept 3-31-22

Practice Point: Here County Court did not consider the factors for adjudicating whether defendant should be afforded youthful offender status based upon on an off-the-record "condition," i.e., that the People would withdraw their consent to the plea offer if the defendant were granted youthful offender status. Although the People can bargain for such a condition, there was nothing on the record about it. Therefore the judge should not have given it any weight and should have considered the factors for a youthful offender adjudication.

## SENTENCING, PENALIZED FOR REJECTING PLEA OFFER.

## DEFENDANT WAS DEPRIVED OF HIS RIGHT TO CONFRONT A WITNESS AGAINST HIM AND WAS PENALIZED FOR REJECTING THE JUDGE'S PLEA OFFER AND GOING TO TRIAL; THE ISSUES WERE NOT PRESERVED BUT WERE CONSIDERED IN THE INTEREST OF JUSTICE (SECOND DEPT).

The Second Department, vacating one conviction and reducing the sentence for another, exercising its interest of justice jurisdiction over the unpreserved errors, determined defendant had been deprived of his right to confront a witness against him and the judge imposed a harsher sentence because defendant exercised his right to a trial:

… [T]he defendant was not afforded the opportunity to cross-examine a DMV employee who was directly involved in sending out the suspension notices or who had personal familiarity with the mailing practices of the DMV's central mail room or with the defendant's driving record … . Thus, the testimony of the DMV

employee was improperly admitted in order to establish an essential element of the crime of aggravated unlicensed operation of a motor vehicle in the third degree in violation of the defendant's right of confrontation … . …

… [P]rior to trial, the Supreme Court made its own plea offer to the defendant of an aggregate term of 1½ years of imprisonment to be followed by a period of 2 years of postrelease supervision in full satisfaction of the 16-count indictment … .The court … stated to the defendant: "You should understand the way I operate is as follows: Before trial with me you get mercy; after trial you get justice" … . The defendant declined the plea offer and proceeded to trial, after which he was acquitted of the top counts of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree. The court then sentenced the defendant on the conviction of criminal possession of a controlled substance in the fourth degree to a term of 5 years of imprisonment to be followed by a period of postrelease supervision of 2 years. People v Ellerbee, 2022 NY Slip Op 02016, Second Dept 3-23-22

Practice Point: Here the DMV employee who had personal knowledge of the mailing of the license suspension notice to defendant and the defendant's driving record apparently was not called as a witness. Therefore defendant was deprived of his right to confront the witness about an essential element of the offense. In addition, the judge imposed a much harsher sentence than that offered as part of a plea bargain. The judge thereby penalized the defendant because he chose to go the trial. Both of these errors were not preserved for appeal but were considered in the interest of justice.

## SENTENCING, PLEA AGREEMENTS.

## DEFENDANT, AT THE TIME OF THE PLEA, AGREED TO A SENTENCE OF 20 DAYS OF COMMUNITY SERVICE; AT SENTENCING, AFTER DEFENDANT HAD COMPLETED THE COMMUNITY SERVICE, THE PROSECUTOR AND DEFENSE COUNSEL ACKNOWLEDGED THAT THE BARGAINED-FOR SENTENCE WAS A ONE-YEAR CONDITIONAL DISCHARGE; ON APPEAL DEFENDANT ARGUED HE NEVER AGREED TO THE CONDITIONAL DISCHARGE AND HIS GUILTY PLEA WAS THEREFORE NOT VOLUNTARY; THE MAJORITY HELD THE ISSUE WAS NOT PRESERVED FOR APPEAL (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DeFiore, over an extensive three-judge dissent, determined defendant's argument that his plea was invalid because he was not informed that a one-year conditional discharge (CD) would be imposed, was not preserved for appeal. Defendant argued only the community-service sentence was agreed to at the time of the plea and the subsequent imposition of the conditional discharge rendered the plea involuntary:

Defendant challenges the voluntariness of his guilty plea, asserting that the court in its plea colloquy failed to advise him that the 20 days of community service to be imposed would be a condition of a sentence of a one-year conditional discharge. At the outset of the sentencing proceeding, the defense counsel and prosecutor affirmatively acknowledged to the court that the bargained-for sentence to be imposed was a conditional discharge. Prior to imposition of that sentence, defendant who had the practical ability to do so, failed to protest or otherwise seek to withdraw his guilty plea. As a result, defendant's claim that the court's imposition of an alleged new sentence rendered his guilty plea involuntary is unpreserved for our review. * * *

**From the dissent:**

Defendant … pleaded guilty to a reduced charge in exchange for a noncarceral sentence of 20 days of community service, along with a mandatory surcharge and temporary suspension of his driver's license. When defendant appeared after completing his community service and without further criminal incident, the

sentencing should have been in accord with the prosecutor and defendant's agreement. Instead, the court imposed additional year-long conditions that were not agreed to and never mentioned during the plea colloquy or prior to sentencing. As a consequence, defendant's plea is invalid … . People v Bush, 2022 NY Slip Op 01956, Ct App 3-22-22

Practice Point: Here defense counsel, at the outset of sentencing, acknowledged that the bargained-for sentence was a one-year conditional discharge. On appeal, the defendant argued that, at the time of the plea, he agreed only to a sentence of 20 days of community service, rendering his guilty plea involuntary. The majority held the issue was not preserved for appeal because defendant was alerted to the conditional-discharge sentence at the time of sentencing and did not move to withdraw his plea. The three-judge dissent agreed with defendant's argument that his plea was involuntary.

## SENTENCING, VICTIM IMPACT STATEMENT.

## IN THIS SEX-OFFENSE CASE, THE SENTENCING JUDGE VIOLATED THE CRIMINAL PROCEDURE LAW BY REFUSING TO DISCLOSE THE VICTIM IMPACT STATEMENT TO THE DEFENDANT WITHOUT PLACING THE REASONS FOR NONDISCLOSURE ON THE RECORD; THE ISSUE SURVIVED THE WAIVER OF APPEAL (THIRD DEPT).

The Third Department, vacating defendant's sentence and remitting for resentencing before a different judge, determined the sentencing judge who reviewed the victim impact statement in this sexual-offense case, and who granted the victim's request to keep the victim impact statement confidential, violated CPL 390.50, which requires the judge to state the reasons, on the record, for not disclosing a victim impact statement to the defendant. The issue survived defendant's waiver of appeal:

… [W]e find that defendant's CPL 390.50 (2) (a) argument must survive the waiver of appeal as the Legislature has, without qualification or restriction, expressly mandated that "[t]he action of the court excepting information from

disclosure shall be subject to appellate review" (CPL 390.50 [2] [a]), and courts "may not create a limitation that the Legislature did not enact" … . …

… [T]he record before us does not reflect any ruling by County Court with respect to the victim's request to except her statement from disclosure. We therefore must conclude that the court failed to set forth "the reasons for its action" on the record, in violation of CPL 390.50 (2) (a) … . The record also does not reflect that any consideration was given to redacting the victim's statement, leaving defendant wholly "unable to verify the accuracy of the information [therein] or meaningfully respond to it," in further contravention of the statute … . What is clear, however, is that defendant never had the opportunity to review the victim's statement and that County Court heavily relied upon it in fashioning its sentence. People v Ortiz, 2022 NY Slip Op 02041, Third Dept 3-24-22

Practice Point: If a sentencing judge wishes to withhold a victim impact statement from the defendant, the reasons for nondisclosure must be placed on the record (CPL 390.50). This issue survives a waiver of appeal.

## SENTENCING, RESTITUTION.

### THE CRITERIA FOR IMPOSING THE MAXIMUM RESTITUTION SURCHARGE OF 10% WERE NOT MET (FOURTH DEPT).

The Fourth Department, reversing (modifying) County Court, determined the criteria for imposing the maximum restitution surcharge of 10% were not met:

… [T]he judgment … is … modified as a matter of discretion in the interest of justice by reducing the surcharge to 5% of the amount of restitution … . * * *

… [T]he court erred in imposing the 10% surcharge because there was no " 'filing of an affidavit of the official or organization designated pursuant to [CPL 420.10 (8)] demonstrating that the actual cost of the collection and administration of restitution . . . in [this] particular case exceeds five percent of the entire amount of the payment or the amount actually collected' " … . People v Webber, 2022 NY Slip Op 01904, Fourth Dept 3-18-22

Practice Point: Before the maximum restitution surcharge of 10% can be imposed, an affidavit must be filed demonstrating the actual cost of collection.

## SENTENCING.

### THE DEFENDANT WAS NOT PRODUCED FOR SENTENCING; HIS RIGHT TO BE PRESENT AT SENTENCING WAS THEREFORE VIOLATED, REQUIRING REMITTAL FOR RESENTENCING (SECOND DEPT).

The Second Department, remitting the matter for resentencing, noted that defendant was deprived of his right to be personally present at his sentencing:

A defendant has a fundamental right to be "personally present at the time sentence is pronounced" … . Here, the defendant was not produced at sentencing on the convictions of assault in the first degree and criminal possession of a weapon in the fourth degree, and the record is devoid of any indication that he expressly waived his right to be present (see CPL 380.40[2] …). … Supreme Court's failure to have the defendant produced at the sentencing proceeding … violated the defendant's fundamental right to be present at the time of sentence…. People v Umar, 2022 NY Slip Op 01818, Second Dept 3-16-22

Practice Point: A defendant has a fundamental right to be personally present at sentencing. Violation of that right requires remittal and resentencing.

## SENTENCING.

### THE JUDGE'S FAILURE TO PRONOUNCE THE DEFINITE TERM COMPONENT OF DEFENDANT'S SENTENCE REQUIRED VACATION OF THE SENTENCE AND REMITTAL FOR RESENTENCING; THE ISSUE SURVIVES A WAIVER OF APPEAL (FOURTH DEPT).

The Fourth Department, vacating defendant's sentence and remitting for resentencing, determined the definite term component of the sentence was not pronounced by the court:

CPL 380.20 provides that a court "must pronounce sentence in every case where a conviction is entered." That statutory requirement is "unyielding" … . A violation of CPL 380.20 "may be addressed on direct appeal notwithstanding [any] valid waiver of the right to appeal or the defendant's failure to preserve the issue for appellate review" … . "When the sentencing court fails to orally pronounce a component of the sentence, the sentence must be vacated and the matter remitted for resentencing in compliance with the statutory scheme" … .

Here, although the certificate of conviction states that defendant was sentenced to a split sentence of a definite term of time served in jail and five years of probation, which is consistent with the sentencing promise made during the plea proceeding, the court failed to orally pronounce during the sentencing proceeding the definite term component of defendant's sentence as required by CPL 380.20 … . People v Adams, 2022 NY Slip Op 01921, Fourth Dept 3-18-22

Practice Point: Every component of a sentence must be "pronounced" by the judge in open court or the sentence will be vacated.

## SEX OFFENDER REGISTRATION ACT (SORA), ACCEPTANCE OF RESPONSIBILITY.

## THE JUDGE SHOULD NOT HAVE, SUA SPONTE, WITHOUT NOTICE TO THE DEFENDANT, ASSESSED 12 POINTS FOR FAILURE TO ACCEPT RESPONSIBILITY; DEFENDANT ACCEPTED RESPONSIBILITY BY PLEADING GUILTY (FOURTH DEPT).

The Fourth Department, reversing County Court, determined the judge should not have, sua sponte, without prior notice to the defendant, assessed 12 points for failure to accept responsibility in this SORA risk level proceeding. The Fourth Department noted defendant pled guilty to statutory rape. Although defendant stated he thought the 16-year-old victim was 18, the guilty plea was an adequate acceptance of responsibility:

… [I]t is well established that " '[a] defendant has both a statutory and constitutional right to notice of points sought to be assigned to him or her so as to be afforded a meaningful opportunity to respond to that assessment' " … . As a result, "a court's sua sponte departure from the Board's recommendation at the hearing, without prior notice, deprives the defendant of a meaningful opportunity to respond" … . …

… [T]he court erred in assessing him 10 points under risk factor 12, for failure to accept responsibility, given that he pleaded guilty and admitted his guilt … . …

… [D]efendant was not afforded a meaningful opportunity to argue against the override [recommended by the board] or in favor of a downward departure … . People v Ritchie, 2022 NY Slip Op 01635, Fourth Dept 3-10-22

Practice Point: In a SORA risk assessment proceeding, the judge cannot, sua sponte, without notice to the defendant, assess points in a category not recommended by the board.

Practice Point: In a SORA risk assessment proceeding, where a defendant has pled guilty, an assessment of 12 points for failure to accept responsibility is not warranted.

## SEX OFFENDER REGISTRATION ACT (SORA), CORRECTION LAW, REINTEGRATION OF SEX OFFENDERS.

## THE CORRECTION LAW DOES NOT REQUIRE AN INMATE RESIDENTIAL TREATMENT FACILITY (RTF) TO PROVIDE SEX OFFENDERS WHO ARE ABOUT TO BE RELEASED WITH REINTEGRATION PROGRAMS IN THE OUTSIDE COMMUNITY, AS OPPOSED TO WITHIN THE PRISON (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined the "residential treatment facility" (RTF) within the Fishkill Correctional Facility complied with the Correction Law. Plaintiffs alleged Fishkill did not provide sufficient opportunities outside the prison facility for reintegrating inmates into the community. Supreme Court agreed. The Third Department held that the Correction Law does not indicate the programs for reintegrating inmates must be offered outside the facility:

A resident in an RTF "may be permitted to leave such facility in accordance with the provisions of [Correction Law § 73]" …. To that end, DOCCS "shall be responsible for securing appropriate education, on-the-job training and employment" for RTF residents (Correction Law § 73 [2]). Furthermore, "[p]rograms directed toward the rehabilitation and total reintegration into the community of persons transferred to a residential treatment facility shall be established" (Correction Law § 73 [3]). That said, nothing in Correction Law § 73 (2) or (3) states specifically where the opportunities provided in a rehabilitative program established by DOCCS or where the education, training or employment to be secured by DOCCS must be located. In other words, there is no statutory mandate providing that DOCCS's obligations under Correction Law § 73 be outside the confines of Fishkill. Alcantara v Annucci, 2022 NY Slip Op 02163, Third Dept 3-31-22

## SEX OFFENDER REGISTRATION ACT (SORA), RESIDENTIAL RESTRICTIONS.

## THE SEXUAL ASSAULT REFORM ACT (SARA), PROHIIBITING CERTAIN SEX OFFENDERS FROM RESIDING WITHIN 1000 FEET OF A SCHOOL, APPLIES TO SEX OFFENDERS WHO ARE UNDER POSTRELEASE SUPERVISION (PRS); THE DISSENT ARGUED SARA, BY ITS TERMS, APPLIES ONLY TO THOSE ON PAROLE OR CONDITIONALLY RELEASED (CT APP).

The Court of Appeals, over an extensive two-judge dissent, determined the residency requirement of the Sexual Assault Reform Act (SARA) is a mandatory condition of postrelease supervision (PRS) for sex offenders subject to SARA. The dissent argued the applicable statutes do not mention postrelease supervision (PRS) and, by their terms, apply only to defendants who are on parole or conditionally released:

In 1998, the legislature enacted the Sentencing Reform Act, amending the Penal Law to largely "abolish parole" for most felony offenses, including serious sexual offenses, and institute determinate terms of imprisonment to be followed by periods of postrelease supervision … . …[T]the legislature added Penal Law § 70.45 (3)—entitled "[c]onditions of post-release supervision"—which provides that the Board of Parole "shall establish and impose conditions of post-release supervision in the same manner and to the same extent as it may establish and impose conditions in accordance with the executive law upon persons who are granted parole or conditional release." Further, Penal Law § 70.40 was amended to add references to postrelease supervision; namely Penal Law § 70.40 (1) (b) provides that "conditions of release including those governing postrelease supervision, shall be such as may be imposed by the [Parole Board] in accordance with the provisions of the executive law." … . …

The SARA residency restriction bars offenders convicted of certain sex offenses from residing within 1,000 feet of a school (see Executive Law § 259-c [14] …). Specifically, it provides that, when certain offenders are "released on parole or conditionally released pursuant to subdivision one or two of this section," the Parole Board "shall require, as a mandatory condition of such release, that such sentenced offender shall refrain from knowingly entering into or upon any school grounds … . …

Penal Law §§ 70.45 (3) and 70.40 (1) (b), when read together with SARA, mandate that the SARA residency restriction be applied equally to offenders released on parole, conditional release, or subject to a period of postrelease supervision. Matter of Alvarez v Annucci, 2022 NY Slip Op 01957 Ct App 3-22-22

Practice Point: The Court of Appeals rejected the argument that the Sexual Assault Reform Act (SARA), which prohibits certain sex offenders from residing within 1000 feet of a school, does not apply to those under postrelease supervision (PRS).

## SEX OFFENDER REGISTRATION ACT (SORA), UPWARD DEPARTURE.

## THE PEOPLE'S APPLICATION FOR AN UPWARD DEPARTURE IN THIS SORA RISK ASSESSMENT PROCEEDING WAS NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE (SECOND DEPT).

The Second Department, reversing (modifying) County Court determine the proof submitted by the People did not support the application for an upward departure in this SORA risk assessment proceeding:

… County Court erred in granting the People's application for an upward departure. The People failed to prove the facts in support of their proffered aggravating factor, including that the defendant engaged in unprotected sexual conduct with the victim, by clear and convincing evidence … . People v Paterno, 2022 NY Slip Op 01470, Second Dept 3-9-22

Practice Point: Any application by the People for an upward departure in a SORA risk assessment proceeding must be supported by clear and convincing evidence. Here the People's upward departure application alleged defendant had unprotected sex with the 15-year-old victim. The appellate court determined the allegation was not supported by clear and convincing evidence.

## SEX OFFENDER REGISTRATION ACT (SORA).

### A SEX OFFENDER CERTIFICATION IS NOT PART OF A DEFENDANT'S SENTENCE; THEREFORE THE CERTIFICATION CANNOT BE SET ASIDE PURSUANT TO A MOTION TO SET ASIDE THE SENTENCE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's certification as a sex offender was not part of his sentence. Therefore the certification could not be set aside pursuant to CPL 440.20:

Prior to the defendant's release from prison, the defendant moved, inter alia, pursuant to CPL 440.20 to vacate his certification as a sex offender on the ground that his certification was unlawful because the crime he was convicted of was not a sex offense or a sexually violent offense under Correction Law § 168-a. The Supreme Court granted that branch of the defendant's motion and set aside so much of the sentence as certified the defendant as a sex offender and required him to pay a sex offender registration fee. The court then resentenced the defendant to the originally-imposed term of imprisonment and post-release supervision. The People appeal.

While a defendant's certification as a sex offender under SORA is part of the judgment of conviction … , "SORA certification is not part of a sentence" … . Thus, the relief sought by the defendant was not available to him under CPL 440.20(1), which only authorizes a motion to set aside a sentence … . People v David, 2022 NY Slip Op 01310, Second Dept 3-2-22

Practice Point: A defendant's certification as a sex offender under SORA is not part of the sentence. Therefore the certification is not a proper subject for a motion to set aside a sentence.

## SIROIS HEARING, RIGHT TO CONFRONT WITNESSES.

## THE JUDGE SHOULD NOT HAVE RELIED ON EVIDENCE GIVEN AT A MATERIAL WITNESS HEARING, FROM WHICH DEFENDANT WAS PROPERLY EXCLUDED, AT A SUBSEQUENT SIROIS HEARING AT WHICH THE WITNESS DID NOT TESTIFY (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction, determined the judge should not have relied upon evidence given at a material witness hearing, from which the defendant was properly excluded, at a subsequent Sirois hearing at which the material witness did not testify:

At [the material witness] hearing, the witness … testified that she had been threatened by defendant, the codefendant, and others in an attempt to prevent her from testifying at trial. Although the court granted the People's application for a material witness order and set bail to ensure the witness's availability, the next day the People requested a Sirois hearing and sought a determination that the witness had been made constructively unavailable to testify at trial by threats attributable to defendant … . …

A defendant generally has no constitutional right to be present at a material witness hearing … ; however, a "[d]efendant's absence from [a Sirois] hearing[] could have a substantial effect on his [or her] ability to defend" … . Here, although there is no dispute that the initial material witness hearing was not intended to address any Sirois or other evidentiary issues … , the court erred in relying on the unchallenged testimony taken therein in making its Sirois determination … . Indeed, the court effectively, and erroneously, incorporated the material witness hearing into the subsequent Sirois hearing by expressly relying on that testimony and on its own observations of the witness's demeanor in making its determination. People v Phillips, 2022 NY Slip Op 01710, Fourth Dept 3-11-22

Practice Point: The judge relied on the witness's testimony at a material witness hearing, at which defendant was not present, for his ruling in a Sirois hearing, at which the witness did not testify. Defendant was thereby deprived of his right to confront the witnesses against him at the Sirois hearing. New trial ordered.

## SPEEDY TRIAL.

### THE SIX-YEAR DELAY, DURING WHICH DEFENDANT WAS INCARCERATED, DEPRIVED DEFENDANT OF HIS RIGHT TO A SPEEDY TRIAL; THE MURDER AND ASSAULT CONVICTIONS AFTER TRIAL REVERSED (FIRST DEPT).

The First Department, reversing defendant's murder and assault convictions after trial, determined defendant have been deprived of his right to a speedy. It was presumed that the delay of six years, during which defendant was incarcerated, prejudiced the defense. The prosecution failed to demonstrate good cause for the delay:

"Where there has been extended delay, it is the People's burden to establish good cause" … . Following defendant's January 2011 arraignment, this case was reassigned to successive Assistant District Attorneys. After the case was assigned to the third and final prosecutor in mid-2014, he waited about one year before seeking to obtain a DNA sample from defendant to be compared with DNA recovered from a plastic cup found outside the garage in which the shootings occurred during a party. That motion was denied because there was no nexus between the cup and the shootings, and because defendant's admitted attendance at the party was undisputed. The People argue that their delay was justified by the reluctance of a retired detective to testify; they cite a note from the detective's doctor stating that he was medically unfit to be cross-examined and argue that the detective was a necessary witness because he conducted the lineup in which the surviving victim identified defendant as the assailant. However, this detective ultimately did not testify at the suppression hearing or trial, and the suppression court credited the hearing testimony of the surviving victim, who knew defendant, and denied the motion to suppress the identification based on that testimony. Moreover, it is undisputed that the retired detective was not needed to introduce defendant's statements, which were introduced through another detective at trial. People v McDonald, 2022 NY Slip Op 02099, First Dept 3-29-22

Practice Point: Here the defendant's murder and assault convictions after trial were reversed because defendant was deprived of his right to a speedy trial. Defendant was incarcerated during the six-year delay, which raised the presumption the defense was prejudiced by the delay. In addition the People were not able to show

a good cause for the delay. The People claimed a detective's poor health precluded him from testifying, but the detective's testimony was not necessary.

## SUPPRESSION.

### CONFLICTING ACCOUNTS OF WHAT THE POLICE OFFICERS SAW WHEN THEY APPROACHED THE VAN IN WHICH DEFENDANT WAS A PASSENGER FAILED TO DEMONSTRATE PROBABLE CAUSE FOR THE SEARCH OF THE VAN; THE WEAPON SEIZED FROM THE VAN SHOULD HAVE BEEN SUPPRESSED; DEFENDANT'S POSSESSION OF A WEAPON CONVICTION REVERSED (SECOND DEPT).

The Second Department, reversing the possession of a weapon conviction, determined defendant's motion to suppress a handgun found in a van in which defendant was a passenger should have been granted. Inconsistencies in the police officer's accounts of what the officers saw when they approached the van rendered the People's proof at the suppression hearing insufficient to demonstrate a lawful search incident to arrest:

The Supreme Court credited the accounts of both Ramos and Pimentel and concluded that what Pimentel testified that he had observed gave the officers probable cause to search the minivan for a gun … . However, the officers' versions of events sharply conflicted with each other as to where the defendant was sitting in the minivan, and what he was doing, when the officers arrived at the minivan's front windows. According to Ramos, the defendant was sitting in the front passenger seat, while Pimentel claimed that the defendant was sitting in the middle row, and attempting to conceal a gun in a bag at his feet. Ramos, though, did not see a gun, furtive movements, or a bag. It seems improbable that, if the defendant did what Pimentel said he did, Ramos could somehow have failed to notice it.

Ramos's and Pimentel's accounts both could not have been true, since both officers acknowledged that they approached the minivan simultaneously and reached the front seats at the same time. People v Austin, 2022 NY Slip Op 01306, Second Dept 3-2-22

Practice Point: Here the two arresting officers' conflicting accounts of what they saw as they approached the van in which defendant was a passenger precluded the People from demonstrating the legality of the search of the van.

## SUPPRESSION.

## THE PEOPLE DID NOT MEET THEIR BURDEN TO SHOW THE LEGALITY OF THE SEIZURE OF DEFENDANT'S CLOTHES BY A DETECTIVE AT THE HOSPITAL WHERE DEFENDANT WAS BEING TREATED FOR A GUNSHOT WOUND; THE CLOTHES AND THE DNA EVIDENCE TAKEN FROM THE CLOTHES SHOULD HAVE BEEN SUPPRESSED; THE ERROR WAS HARMLESS HOWEVER (SECOND DEPT).

The Second Department determined the defendant's clothes seized at the hospital where defendant was being treated for a gunshot wound should have been suppressed. The error was deemed harmless however:

The defendant had a legitimate expectation of privacy in his clothing, and the fact that the police perceived the defendant as a victim rather than a suspect at the time his clothing was seized did not strip the defendant of his Fourth Amendment protection … . Moreover, the People failed to establish that the testifying detective knew that the clothes would have covered the part of the defendant's body where he was shot, as the detective admitted that he did not know what type of clothing was in the bag that was seized … . The People also failed to establish any exigent circumstances to justify seizure of the clothing, as they provided no evidence that the clothing was in danger of being removed or destroyed … . Accordingly, the seizure of the defendant's clothing at the hospital was illegal, and the DNA evidence obtained from the items seized should not have been admitted into evidence at trial … . People v Gough, 2022 NY Slip Op 01317, Second Dept 3-2-22

Practice Point: Here a detective seized defendant's clothes which were in a bag at the hospital where defendant was being treated for a gunshot wound. The clothes and the related DNA evidence should have been suppressed.

## SURVEILLANCE VIDEO, CROSS-EXAMINATION.

## A DETECTIVE WAS PROPERLY ALLOWED TO IDENTIFY DEFENDANT IN A SURVEILLANCE VIDEO; TESTIMONY ABOUT THE "BLINDED" PHOTO ARRAY IDENTIFICATION PROCEDURE WAS PROPERLY ALLOWED; THE DEFENSE CROSS-EXAMINATION ABOUT A WITNESS'S CRIMINAL HISTORY SHOULD NOT HAVE BEEN CURTAILED; ANY ERRORS DEEMED HARMLESS (FOURTH DEPT).

The Fourth Department, finding any evidentiary errors harmless, determined: (1) a detective was properly allowed to identify the defendant in a surveillance video because the People demonstrated the detective had prior contacts with the defendant; (2) testimony about the "blinded" photo identification procedure was properly allowed; and (3) the defense cross-examination about a witness's criminal history should not have been curtailed by the judge:

We conclude that the court did not abuse its discretion in permitting the challenged testimony because the People presented evidence establishing that the police detective was familiar with defendant based on several prior contacts with defendant over the course of several years. Thus, there "was some basis for concluding that the [police detective] was more likely to identify defendant correctly than was the jury" … . …

Testimony about a photo array procedure, and the array itself, may be admitted where, inter alia, the procedure is " 'blinded,' " that is, where the person administering the array procedure does not know the suspect's position in the array (CPL 60.25 [1] [c] [ii]; see CPL 60.30). Here, although the array viewed by the witness was created by the police detective who administered the procedure, the specific procedure conducted was nevertheless blind because the police detective placed three different arrays in envelopes, which he shuffled before having the witness pick one. This procedure is sufficient, in our view, to ensure that, at the time the witness was viewing the array, the police detective did not know the position of defendant in that array … . …

"[C]urtailment [of cross-examination] will be judged improper when it keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony" … . … [W]e conclude that the court erred in limiting defense counsel's cross-examination regarding the underlying facts of a witness's prior drug conviction that occurred two months before the shooting at issue here, inasmuch as those facts bore on the witness's credibility and were not remote or cumulative … . People v Griffin, 2022 NY Slip Op 01698, Fourth Dept 3-11-22

Practice Point: Because the detective had prior contact with the defendant, the detective was properly allowed to identify defendant in a surveillance video.

Practice Point: Testimony about the "blinded" photo array identification procedure was properly allowed.

Practice Point: The defense cross-examination about the witness's criminal history should not have been curtailed.

## TRAFFIC STOPS, ANONYMOUS TIP.

## THE PEOPLE DID NOT DEMONSTRATE THE ANONYMOUS TIP PROVIDED PROBABLE CAUSE TO BELIEVE DEFENDANT WAS IN THE VEHICLE PURSUED AND STOPPED BY THE POLICE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the Peopled failed to demonstrate the arresting officers had probable cause to pursue and stop the vehicle form which defendant attempted to flee. The officers were observing the vehicle because of an anonymous tip:

The United States Supreme Court has "recognized . . . [that] there are situations in which an anonymous tip, sufficiently corroborated, exhibits 'sufficient indicia of reliability to provide reasonable suspicion to make [an] investigatory stop' " … . However, "[s]ince an anonymous tip 'seldom demonstrates the informant's basis of knowledge or veracity,' it can only give rise to reasonable suspicion if accompanied by sufficient indicia of reliability" … . The anonymous tip must be reliable, not only "in its assertion of illegality," but also "in its tendency to identify a determinate person" … . …

The evidence at the suppression hearing established that police officers were dispatched based on an anonymous tip that defendant was in a specific vehicle at a specific location. However, when police responded to the area, neither defendant nor the vehicle was present. Over 3½ hours later, officers observed the vehicle and two individuals inside. The only officer to testify at the suppression hearing admitted that he could not determine whether the occupants of the vehicle were male or female, let alone whether one of them was defendant. Further, the vehicle was not registered to defendant. Nevertheless, the officers activated their emergency lights and attempted to stop the vehicle. People v Ponce, 2022 NY Slip Op 01706, Fourth Dept 3-11-22

Practice Point: An anonymous tip can provide probable cause for a street stop if accompanied by sufficient indicia of reliability, both as to illegality and the identity of the person. Here the People did not demonstrate the anonymous tip was sufficiently reliable.

## TRAFFIC STOPS.

### AFTER A VALID TRAFFIC STOP BASED ON THE LICENSE PLATES NOT MATCHING THE VEHICLE, DEFENDANT PRESENTED HIS TEMPORARY REGISTRATION AND EXPLAINED THE PLATES HAD BEEN TRANSFERRED FROM A DIFFERENT VEHICLE; AT THAT POINT THE AUTHORIZATION TO DETAIN DEFENDANT CEASED; THE SEIZED DRUGS SHOULD HAVE BEEN SUPPRESSED (FOURTH DEPT).

The Fourth Department, reversing defendant possession of a controlled substance conviction and dismissing the indictment, determined the police, after making a valid traffic stop of defendant's vehicle, did not have the authority to detain him after he presented his temporary registration and explained that the license plates had been transferred from another vehicle:

… [T]he justification for the officer's initial detention ceased once defendant showed the officer the temporary registration that had been issued for the vehicle and explained that the license plates on the vehicle had recently been transferred from another vehicle … .. We further conclude that the record does not support the

court's determination that the circumstances following the initial stop provided the officer with probable cause to believe that defendant was violating Vehicle and Traffic Law § 507 (2) … . Indeed, the record does not support the court's finding that, when defendant produced a learner's permit upon being asked to produce his driver's license, the officer asked defendant to exit the vehicle due to the lack of a valid driver's license. Thus, inasmuch as "the initial justification for seizing and detaining defendant . . . was exhausted" at the time of defendant's removal from the vehicle, the evidence seized during the ensuing search of defendant's person, as well as the statements that he made to the police thereafter, should have been suppressed … .People v Betsey-Jones, 2022 NY Slip Op 01924, Fourth Dept 3-18-22

Practice Point: Here the police stopped defendant because the license plates did not match the color and make of defendant's vehicle in the DMV database. Once the the defendant showed the officer his temporary registration and explained the license plates had been transferred from a different vehicle, the justification for the detention of the defendant ceased. Any statements made and evidence seized after that point should have been suppressed.

## TRAFFIC STOPS.

### THE POLICE MISTAKENLY BELIEVED THE MAN IN A MOTEL ROOM (DEFENDANT) WAS A SUSPECT IN A SHOOTING; AN INFORMANT HAD TOLD THE POLICE THE MAN IN THE ROOM WAS FROM ROCHESTER, HIS NICKNAME WAS "JAY" AND HE "HAD A WARRANT;" WHEN THE MAN LEFT THE ROOM, THE POLICE STOPPED HIS TAXI; THE PEOPLE DID NOT DEMONSTRATE THE LEGALITY OF THE STOP (FOURTH DEPT).

The Fourth Department, reversing the denial of defendant's suppression motion and dismissing the indictment, determined the People did not demonstrate the legality of the defective's order to stop the taxi in which defendant was a passenger. An informant told the police a man in a motel room was from Rochester, his nickname was "Jay," and he "had a warrant." The detective believed the man in the motel room was a suspect in a shooting which occurred a month before. Surveillance was set up and the detective was told a man had left the room

and gotten into a taxi. The defective, who did not see the man leave the room, ordered the stop of the taxi: It turned out that defendant was not the shooting suspect. He was charged with possession of a controlled substance:

At the suppression hearing, a police detective testified that he directed the stop of the taxi based on a belief that defendant was in fact a different man whom authorities had identified as a suspect in a shooting that had occurred over a month earlier. …

The detective conceded that he had never seen a still photo of the suspect, that the video of the shooting that he did view lacked detail, and that he was unaware of whether the suspect's actual height, weight, skin tone, or other specific discernable characteristic were on the arrest warrant for the shooting suspect. Further, the informant never identified the man in the motel room as the shooter, and the vague description given, i.e., that the man was from Rochester, that his nickname was the ubiquitous "Jay," and that he "had a warrant", is too generalized to support the reasonable suspicion required for the officers' stop of the taxi … . … This is also not a case in which the "proximity of the defendant to the site of the crime[ and] the brief period of time between the crime and the discovery of the defendant near the location of the crime" added to the totality of circumstances supporting the detective's reasonable suspicion … . People v Singleton, 2022 NY Slip Op 01893, Fourth Dept 3-18-22

Practice Point: The police mistakenly thought the man in a motel room (defendant) was a shooting suspect based upon vague and general allegations made by an informant. When he left the motel room, the defendant's taxi was stopped and he was subsequently charged with possession of a controlled substance. The People did not demonstrate the legality of the stop.

## VOIR DIRE, JUDGES.

### THE JUDGE SHOULD HAVE INQUIRED FURTHER WHEN A PROSPECTIVE JUROR SAID TRAVEL PLANS PROHIBITED HER FROM SERVING BEYOND THE PROJECTED LAST DAY OF THE TRIAL, CONVICTION REVERSED (FIRST DEPT).

The First Department, reversing defendant's conviction, determined the judge should have inquired further when a prospective juror said travel plans prohibited her from serving beyond the projected last day of the trial:

During jury selection, the court advised the panel that the trial could last until April 17, 2018. The panelist at issue stated that she "absolutely" could not serve on April 18, because she had irrevocable travel plans for that day. When defense counsel said that "we are starting to get closer to the 16th, 17th," and asked whether she "may not be able to give [her] best attention" if "we started moving in that direction," the panelist said, "Yes." Counsel challenged this panelist for cause because of the concern that she would have difficulty focusing on the trial due to her travel constraints. In the alternative, counsel sought to question this panelist further. The court denied the challenge because it believed that the trial "should never even get that close." Defendant was compelled to exercise his final peremptory challenge against this panelist. The court should have granted defendant's request for further inquiry to determine her ability to serve … . Given that her travel plans precluded her from serving a single day beyond the court's estimated outer limit for the trial, the panelist gave the impression that she would have difficulty focusing on the trial, as she stated, and that, if selected, she might have been biased in favor of reaching a verdict quickly … . People v Bowman, 2022 NY Slip Op 02208, First Dept 3-31-22

Practice Point: Here a prospective juror had firm travel plans and therefore could not serve beyond the projected last day of the trial. The judge should have inquired further when defense counsel suggested she may have difficulty focusing on the trial. The juror may have been biased in favor of a quick verdict. Defense counsel used a peremptory challenge; new trial ordered.

## YOUTHFUL OFFENDERS.

### SUPREME COURT DID NOT MAKE THE REQUIRED FINDINGS RE: WHETHER DEFENDANT SHOULD BE AFFORDED YOUTHFUL OFFENDER STATUS; MATTER REMITTED (SECOND DEPT).

The Second Department determined Supreme Court did not make the required findings re: whether defendant should be afforded youthful offender status and remitted the matter:

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" … . With regard to the defendant's conviction of criminal possession of a weapon in the second degree …, which, contrary to the defendant's contention, is an armed felony (see CPL 1.20[41]; Penal Law §§ 70.02[1][b]; 265.03[3] …), the People concede that the Supreme Court improperly failed to determine on the record whether the defendant was an "eligible youth" (CPL 720.10[2], [3]) and, if so, whether he should be afforded youthful offender treatment … . With regard to the defendant's conviction of resisting arrest …, the defendant contends, and the People concede, that the court also failed to determine whether he should be afforded youthful offender status (see CPL 720.20[1]). The parties are correct that the record does not demonstrate that the court made either of these required determinations … . People v Hunter, 2022 NY Slip Op 01320, Second Dept 3-2-22

Practice Point: Even where an "armed felony" is involved, a sentencing judge must make findings on the record re: whether an eligible youth should be afforded youthful offender status.