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Criminal Law
Reversal Report
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An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Addressing Criminal Law, Released by Our New York State Appellate Courts and Posted on the New York Appellate Digest Website in February 2023. The Entries in the Table of Contents Link to the Summaries Which Link to the Full 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, TRIAL ORDER OF DISMISSAL, JUDGES.

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The Fourth Department, remitting the matter for a ruling, determined the trial judge never ruled on defendant's motion for a trial order of dismissal:

At the close of the People's case, defendant moved for a trial order of dismissal, arguing … that the People failed to make a prima facie case with respect to the second count of the indictment. There is no indication in the record that the court ruled on that part of defendant's motion. We lack the power to review defendant's contention that the evidence is legally insufficient to support the conviction of burglary in the second degree because, "in accordance with People v Concepcion (17 NY3d 192, 197-198 [2011]) and People v LaFontaine (92 NY2d 470, 474 [1998], rearg denied 93 NY2d 849 [1999]), we cannot deem the court's failure to

rule on the . . . motion as a denial thereof" … . People v Desmond, 2023 NY Slip Op 00791, Fourth Dept 2-10-23

Practice Point: The trial judge's failure to rule on a motion for a trial order of dismissal is not a denial which an appellate court can consider; here the matter was remitted for a ruling.

FEBRUARY 10, 2023

ATTORNEYS, INEFFECTIVE ASSISTANCE.

DEFENSE COUNSEL MOVED TO SUPPRESS AN UNNOTICED EYEWITNESS IDENTIFICATION OF THE DEFENDANT AFTER BEING TOLD THE IDENTIFICATION WOULD BE PRECLUDED IF HE DID NOT MOVE TO SUPPRESS; DEFENSE COUNSEL INTRODUCED DEFENDANT'S MUG SHOT DESPITE THE SUPPRESSION OF THE PHOTO ID; DEFENSE COUNSEL DID NOT OBJECT TO A DETECTIVE'S IMPROPER IDENTIFICATION OF THE DEFENDANT IN A BLURRY VIDEO; THE MOTION TO VACATE DEFENDANT'S CONVICTION ON INEFFECTIVE ASSSISTANCE GROUNDS SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant's motion to vacate his conviction on ineffective assistance grounds should have been granted. Defense counsel moved to suppress an unnoticed eyewitness identification knowing that the evidence would have been precluded had he not moved to suppress. Defense counsel introduced the mug shot of the defendant, despite the suppression of the photo identification. Defense counsel did not object to the improper identification of the defendant in a blurry video by a detective:

The record does not support the hearing court's determination that counsel's waiver of preclusion of the unnoticed identification made by the sole eyewitness to the shooting was a legitimate trial strategy … . … [T]rial counsel initially did not appreciate that by moving to suppress the identification, he waived preclusion of the unnoticed identification under CPL 710.30(3). …

… [A]lthough the suppression hearing court had suppressed this witness's photo identification of defendant, counsel nevertheless introduced at trial the mug shot shown to the witness. …

… [T]rial counsel did not object to a detective's improper identification of defendant in a blurry video … . People v McCray, 2023 NY Slip Op 00502, First Dept 2-2-23

Practice Point: If the People do not provide timely notice of an identification of the defendant, the evidence will be precluded. If however a motion to suppress the identification is made, it will not be precluded. Here making the motion to suppress was deemed ineffective assistance.

Practice Point: Counsel was ineffective for introducing the mug shot of the defendant after the photo identification had been suppressed.

Practice Point: Counsel was ineffective for failing to object to a detective's improper identification of the defendant in a blurry video.

FEBRUARY 2, 2023

ATTORNEYS, INEFFECTIVE ASSISTANCE.

DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO INVESTIGATE THE ROBBERY VICTIM'S STATEMENT THAT DEFENDANT WAS NOT ONE OF THE PERPETRATORS; NEW TRIAL ORDERED (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction, determined defendant did not receive effective assistance counsel in that counsel did not investigate the robbery victim's statement which indicated defendant was not one of the perpetrators:

… [T]he second victim's hearing testimony that defendant was not present during the shooting is consistent with his initial statement to law enforcement, and it is also "wholly consistent with the theory pursued by [defense] counsel [at trial], namely that defendant was not present at the shooting and that the crime was instead committed by [different] individual[s]"… . Additionally, although the motion court chose to … discredit the second victim's testimony, with respect to

whether the second victim ever named for him the two individuals that the second victim believed carried out the attempted robbery, there is no evidence in the hearing record contrary to the second victim's testimony that he would have named those individuals at trial had he been called … .

… [T]he hearing record discloses no tactical reason for defense counsel's failure to interview the second victim … . Inasmuch as defendant established that defense counsel "did not fully investigate the case and did not collect the type of information that a lawyer would need in order to determine the best course of action" … , we conclude that defense counsel's deficient conduct was "sufficiently egregious and prejudicial as to compromise [the] right to a fair trial" … . People v Everson, 2023 NY Slip Op 00761, Fourth Dept 2-10-23

Practice Point: Although defense counsel may have made an appropriate strategic decision re: whether to call the robbery victim as a witness, counsel was ineffective in failing to investigate the victim's statement that defendant was not one of the perpetrators.

FEBRUARY 10, 2023

DISCIPLINARY HEARINGS (INMATES), DRUGS.

THE SUBSTANCE FOUND ON PETITIONER-INMATE'S PERSON WAS NOT TESTED OR OTHERWISE IDENTIFIED AS A DRUG; THE DRUG POSSESSION AND DISTRIBUTION, AS WELL AS THE SMUGGLING, DETERMINATIONS ANNULLED (THIRD DEPT).

The Third Department, held the drug possession and distribution, as well as the smuggling, determinations should be annulled. A drug sniffing dog alerted to a substance on petitioner-inmate's person but no testing or other identification of the substance was done:

At the prison disciplinary hearing, it was established that the suspected substance was not subjected to chemical testing, nor was there any evidence indicating that facility pharmacy or nursing staff inspected or visually identified the substance ,,, . Rather, the substance was visually identified as synthetic marihuana by the OSI K-9 officer. However, the regulation does not authorize an OSI officer to identify suspected substances as drugs. Similarly, testimony regarding the K-9 alerting to

petitioner's groin area did not suffice to comply with the regulation. While there was testimony that petitioner admitted that he possessed K2, this would, at most, establish a charge of possession of contraband, but not drug possession. Unlike a drug-related disciplinary charge, which requires compliance with the aforementioned identification procedures … , the prohibition on contraband merely depends on whether or not an item is authorized … . In light of the lack of compliance with regulatory procedures, the identity of the substance was not properly established …

As for the remaining charge of smuggling, this charge only requires that "any item" be smuggled in or out of the facility or from one area to another … , and does not require proof that the item was a drug or contraband. However, in finding petitioner guilty of this charge, the Hearing Officer expressly based his finding on the OSI K-9 officer's conclusion that the substance was synthetic marihuana, and therefore must have been smuggled in from outside the facility. As noted above, this conclusion was flawed. Given that, and because there was no proof at the hearing that the substance in question was moved from one area to another, the finding as to this charge is also unsupported by substantial evidence and must be annulled. Matter of Then v Annucci, 2023 NY Slip Op 01037, Third Dept 2-23-23

Practice Point: The substance must be tested or otherwise identified by a professional as a drug before a drug possession or distribution determination against an inmate will be upheld.

FEBRUARY 23, 2023

EAVESDROPPIING.

THE ATTORNEY GENERAL'S OFFICE WAS MONITORING A WIRETAP WHEN DEFENDANT WAS OVERHEARD IN A CALL WHICH HAD ORIGINATED FROM THE COUNTY JAIL; LOCAL POLICE WERE ALERTED TO THE CONVERSATION AND THE POLICE OBTAINED THE RECORDING FROM THE JAIL; ALTHOUGH THE JAIL RECORDING WAS NOT AN "INTERCEPTED CONVERSATION" WITHING THE MEANING OF CPL 700.70, IT WAS EVIDENCE DERIVED FROM AN "INTERCEPTED CONVERSTION" TRIGGERING THE CPL 700.70 NOTICE REQUIREMENTS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, reversing the appellate division, determined the failure to provide defendant with notice of a recorded phone conversation was improper. The Attorney General's office was monitoring a wiretap in an unrelated case when defendant was overheard in a call originating from the county jail talking about a fatal hit-and-run accident. Local police were informed of the defendant's conversation and they obtained a recording of it made by the county jail. The jail recording, which was introduced at trial, was not an "intercepted conversation" within the meaning of Criminal Procedure Law 700.70. But the conversation overheard pursuant to the wiretap which alerted the police to the jail conversation was an "intercepted conversation" which triggered the CPL 700.70 notice:

> The People produced the recording … to defendant in discovery but did not furnish defendant with a copy of the wiretap warrant and underlying application within the fifteen-day period prescribed by CPL 700.70. Several months after defendant was arraigned, the People informed defendant by letter that the police were "alerted" to the call by the wiretap. Defendant moved to preclude the call from evidence on the grounds that the People failed to adhere to the CPL 700.70 notice procedure. * * *
>
> The substance of the wiretap recording informed law enforcement that the same conversation had been recorded by [jail], leading the Syracuse Police directly to the recording that the People used as evidence at defendant's trial. In listening to the wiretap, a detective heard incriminating statements about the hit-and-run, identified defendant as the declarant, and directed authorities to the [jail] recording. Clearly, the [jail] call is evidence derived from the wiretap. … [I]t is not certain that police investigating the hit-and-run would otherwise have discovered the

call—indeed, the inmate who placed the call had no apparent connection to the hit-and-run incident. Because the wiretap was an "intercepted communication," the People's failure to timely furnish defendant with a copy of the eavesdropping warrant and underlying application precluded the admission of the wiretap recording and any evidence derived therefrom—namely, the jail recording—into evidence at trial … . People v Myers, 2023 NY Slip Op 00691, CtApp 2-9-23

Practice Point: Recorded jail conversations are not considered "intercepted conversations" triggering the notice requirements of CPL 700.70. But here the police were alerted to the jail conversation by monitoring a wiretap in an unrelated case. Therefore the jail's recording of the conversation was evidence derived from an "intercepted conversation" triggering the CPL 700.70 notice requirements.

FEBRUARY 9, 2023

EXPERT EVIDENCE, DRUGS.

THE EXPERTS WHO TESTIFIED THE SEIZED SUBSTANCES CONTAINED HEROIN OR COCAINE RELIED ON COMPARISONS WITH STANDARD SAMPLES IN THEIR LABS BUT NO EVIDENCE WAS OFFERED TO DEMONSTRATE THE ACCURACY OF THE SAMPLES; THEREFORE THE EXPERTS' OPINIONS RELIED ON EVIDENCE NOT IN THE RECORD; CONVICTIONS REVERSED (SECOND DEPT).

The Second Department, reversing the convictions which relied on expert evidence that the seized substances contained cocaine or heroin, determined the experts relied on evidence which was not in the record. Therefore a proper foundation had not been laid for the conclusions that the substances contained cocaine and heroin:

Here, each of the People's five experts testified to arriving at the conclusion that the substance tested was either heroin or cocaine by comparing the substance with a standard sample in the laboratory that was known to be heroin or cocaine. When questioned about the accuracy of the known standard, the experts testified generally that the sample reference material was obtained from chemical manufacturers. Some of the experts testified that the samples came with certifications, which might have established the sample's accuracy, but no such certifications were offered into evidence. Some of the experts testified that the

sample reference material generally is tested upon arrival at the laboratory, but none of the experts could testify to personal knowledge of the testing of the known standard that she or he used in this case, and the People did not introduce any evidence establishing that such independent testing had occurred. …

Although an expert's testimony that a substance contains a narcotic drug may be admissible when it is not based solely upon comparative tests using known standards, but is also based on other tests not involving known standards, or other facts in evidence … , here, two of the experts relied solely upon the comparative tests, and their testimony should have been stricken …. Further, while the other three experts testified that before using the comparative tests to confirm the identity of the substance, she or he employed one or more presumptive tests, each of those presumptive tests merely demonstrated the possibility that cocaine or heroin might be present in the substance, but did not confirm the presence of the narcotic drug. It was the comparison to the known standard that enabled each expert to conclude that the substance tested was heroin or cocaine … . People v Ramis, 2023 NY Slip Op 01013, Second Dept 2-22-23

Practice Point: If an expert's opinion relies on information that is not in the record, a proper foundation for the opinion has not been laid. Here the experts' opinions that seized substances contained cocaine and heroin were based on comparison with samples in the lab, but no evidence demonstrating the accuracy of the samples was presented.

FEBRUARY 22, 2023

FAMILY OFFENSES, PLEA ALLOCUTION, JUDGES.

THE JUDGE FAILED TO INQUIRE FURTHER DURING THE PLEA ALLOCUTION WHEN DEFENDANT SAID HE DID NOT VIOLATE THE ORDER OF PROTECTION INTENTIONALLY; THERE IS NO NEED TO PRESERVE A DEFECTIVE-ALLOCUTION ERROR; CONVICTION REVERSED (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction of an aggravated family offense by guilty plea, determined the judge should have inquired further when defendant stated he did not intend to violate the order of protection when he sent a

letter to the protected person. A defective allocution will be considered on appeal in the absence of preservation:

… [A]fter acknowledging his awareness of the valid and effective order of protection directing him to have no contact with the protected person, defendant stated that he "didn't intentionally violate" the order of protection by sending the protected person a letter and instead asserted that any violation "was unintentional." Following an off-the-record discussion between defendant and defense counsel, defendant admitted that sending the letter did, in fact, violate the order of protection, but the court did not inquire, and defendant never clarified, whether his conscious objective was to disobey the order of protection … . Contrary to the People's assertion, which "conflates the culpable mental states for acts done 'intentionally' … and those done 'knowingly' … , this is not a case in which defendant's "further statements removed any doubt regarding th[e requisite] intent" … . People v Vanwuyckhuyse, 2023 NY Slip Op 00754, Fourth Dept 2-10-23

Practice Point: The defendant said he did not intend to violate the order of protection during the plea allocution and the judge did not make the required inquiry. An allocution error need not be preserved for appeal by moving to withdraw the plea. The conviction was reversed.

FEBRUARY 10, 2023

HANDCUFFS, JUDGES.

HERE IT WAS REVERSIBLE ERROR TO PLACE THE DEFENDANT IN HANDCUFFS, WITHOUT EXPLANATION, BEFORE THE JURY RETURNED TO ANNOUNCE THE VERDICT; AT THAT POINT THE DEFENDANT IS CONSIDERED INNOCENT AND RESTRAINING THE DEFENDANT WITHOUT EXPLANATION IS CONSTITUTIONALLY PROHIBITED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, determined the defendant should not have been handcuffed when the jury returned to announce the verdict: At that point the defendant is considered innocent and the defendant may be prejudiced if the jury is polled. Here defense counsel expressly objected to the handcuffs on those grounds:

… [T]he reading of the verdict is an integral part of the guilt-determination phase. … "[A] verdict reported by the jury is not final unless properly recorded and accepted by the court" … . Indeed, in accordance with CPL 310.80, the trial court must order the jury to resume deliberations when polling elicits a negative answer from one or more jurors. As a consequence, until the jury returns to the courtroom, publicly announces the verdict and, if polled, confirms the verdict, there is no finding of guilt, defendant is still presumed innocent, and the constitutional prohibition on restraining a defendant without explanation remains in full force. People v Sanders, 2023 NY Slip Op 00692, CtApp 2-9-23

Practice Point: Restraining a defendant during the guilt-determination phase of the trial in unconstitutional unless adequately explained. A defendant is considered innocent until the verdict is announced and the jury is polled. In this case it was deemed reversible error to place the defendant in handcuffs, without explanation, over defense counsel's objection, before the jury returned with the verdict.

FEBRUARY 9, 2023

INCLUSORY CONCURRENT COUNTS.

THE MURDER SECOND DEGREE COUNTS MUST BE DISMISSED AS INCLUSORY CONCURRENT COUNTS OF THE MURDER FIRST DEGREE CONVICTION (THIRD DEPT).

The Third Department, affirming defendant's convictions in this arson-murder case, noted that the two murder second degree counts were conclusory concurrent counts of the murder first degree count and must be dismissed:

… [T]he judgment must be modified, as the two counts of murder in the second degree upon which defendant was convicted are inclusory concurrent counts of the count of murder in the first degree, upon which he was also convicted (see CPL 300.40 [3] [b]). We therefore reverse his convictions for murder in the second degree and dismiss the corresponding counts in the indictment … . People v Truitt, 2023 NY Slip Op 01028, Third Dept 2-23-23

Practice Point: Here the murder second degree counts were dismissed as inclusory concurrent counts of murder first degree.

FEBRUARY 23, 2023

JUDGES, ATTORNEYS, APPEARANCE OF CONFLICT OF INTEREST.

THE JUDGE'S LAW CLERK WHEN DEFENDANT'S MOTION TO VACATE HIS CONVICTION WAS MADE WAS THE DISTRICT ATTORNEY WHEN DEFENDANT WAS INDICTED AND PROSECUTED; THE APPEARANCE OF A CONFLICT OF INTEREST REQUIRED REVERSAL AND REMITTAL; ALTHOUGH THE ISSUE WAS NOT BEFORE COUNTY COURT, THE ISSUE WAS CONSIDERED ON APPEAL IN THE INTEREST OF JUSTICE (THIRD DEPT).

The Third Department, reversing the denial of defendant's motion to vacate his conviction, determined the fact that the judge's law clerk was District Attorney at the time of defendant's indictment and prosecution presented the appearance of a conflict of interest:

… [T]he law clerk here does not appear to have been directly involved in defendant's case during her term as District Attorney, nor do the allegations contained within defendant's CPL 440.10 motion implicate the law clerk's conduct in her former capacity as District Attorney. That said, it has been observed that "[a] law clerk is probably the one participant in the judicial process whose duties and responsibilities are most intimately connected with the judge's own exercise of the judicial function" … , and it is well settled that "[n]ot only must judges actually be neutral, they must appear so as well" … . Accordingly, it was an improvident exercise of County Court's discretion to rule upon defendant's CPL 440.10 motion under these circumstances … . People v Thornton, 2023 NY Slip Op 00460, Third Dept 2-2-23

Practice Point: Although the issue was not raised in County Court, the Third Department considered the issue in the interest of justice and reversed the denial of defendant's motion to vacate his conviction because of the appearance of a conflict of interest. The judge's law clerk was the District Attorney at the time defendant was indicted and prosecuted.

FEBRUARY 2, 2023

JUDGES, FAILURE TO INFORM DEFENDANT OF POSTRELEASE SUPERVISION.

THE JUDGE'S FAILURE TO INFORM DEFENDANT OF POSTRELEASE SUPERVISION RENDERED DEFENDANT'S ADMISSION TO A PROBATION VIOLATION INVALID; THE ISSUE WAS CONSIDERED ON APPEAL DESPITE THE ABSENCE OF A MOTION TO WITHDRAW THE ADMISSION (FOURTH DEPT).

The Fourth Department, reversing County Court, determined the judge's failure to inform defendant of postrelease supervision rendered the admission invalid. The issue may be raised on appeal despite the absence of a motion to withdraw the plea:

Defendant contends that his admission was not knowing, voluntary and intelligent because County Court failed to inform him at any time that he would be subject to postrelease supervision if the court sentenced him to prison. We agree. The People contend that defendant's challenge to the voluntariness of his admission is not preserved for our review, inasmuch as he failed to move to withdraw his admission, but we reject that contention. Although defendant pleaded guilty to a probation violation, as opposed to a crime, "where a trial judge does not fulfill the obligation to advise a defendant of postrelease supervision during the plea allocution, the defendant may challenge the plea as not knowing, voluntary and intelligent on direct appeal, notwithstanding the absence of a postallocution motion" … . People v Bell, 2023 NY Slip Op 00594, Fourth Dept 2-3-23

Practice Point: Here the judge did not inform the defendant of postrelease supervision before he admitted to a probation violation. The admission was reversed on appeal despite the absence of a motion to withdraw the admission.

FEBRUARY 3, 2023

JURORS, JUDGES, SLEEPING JUROR.

AFTER COMPLAINING THAT A JUROR APPEARED TO BE SLEEPING AT TIMES, DEFENSE COUNSEL MADE A MOTION TO DISQUALIFY HIM; THE JUDGE DID NOT MAKE AN ADEQUATE INQUIRY BEFORE DENYING THE MOTION; CONVICTION REVERSED (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined the judge did not make a sufficient inquiry of juror number 2 after complaints from defense counsel and the prosecutor that he appeared to be sleeping at times. The judge's denial of the defense motion to disqualify the juror was therefore based on speculation:

The court never asked juror number two during any of the inquiries if he had fallen asleep or was sleepy. During the third inquiry, the court did not ask juror number two about defense counsel's specific observations, including that juror number two had allegedly put his head back with his eyes closed and his mouth dropped. The court also failed to ask juror number two what he meant by his equivocal statement that he "[m]ore or less" understood the jury charge, or to ask if there were any specific portions of the jury charge that juror number two did not understand. Although the court did state at one point that "[w]e have not seen [juror number two] sleeping," the statement, in context, indicates that the court was correcting defense counsel's misstatement, rather than making its own observation. Likewise, a statement by a court officer that he had not observed juror number two sleeping was not determinative in this case because defense counsel's assertion that the officer was seated behind juror number two was uncontradicted … . Since the court failed to ask during the third inquiry whether juror number two had fallen asleep during the jury charge, whether he had difficulty staying awake, or about any of defense counsel's specific observations, its determination that juror number two was not grossly unqualified to serve was based on speculation … . People v Mentor, 2023 NY Slip Op 00677, Second Dept 2-8-23

Practice Point: When it appears a juror has been sleeping at times and a motion to disqualify the juror is made, the judge must make a sufficient inquiry before ruling on the motion. Here the denial of the motion to disqualify was not preceded by a sufficient inquiry and defendant's conviction was reversed.

FEBRUARY 8, 2023

JURY INSTRUCTIONS.

BASED ON THE PEOPLE'S THEORY, THE JURY SHOULD NOT HAVE BEEN INSTRUCTED POSSESSION OF A WEAPON IS PRESUMPTIVE EVIDENCE OF AN INTENT TO USE IT UNLAWFULLY AGAINST ANOTHER; DEFENDANT'S REQUEST TO CALL A WITNESS SHOULD NOT HAVE BEEN DENIED; DEFENDANT'S REQUEST FOR $1000 TO HIRE A PSYCHIATRIC EXPERT SHOULD NOT HAVE BEEN DENIED; NEW TRIAL ORDERED (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction, determined the judge (1) should not have instructed the jury that possession of a weapon is presumptive evidence of an intent to use it unlawfully against another (2) should not have prevented defendant from calling as a witness a nurse practitioner who treated him at a psychiatric facility and (3) should have granted defendant's request pursuant to the County Law for $1000 to hire a psychiatric expert:

County Court erred in charging the jury with respect to the presumption set forth in Penal Law § 265.15 (4) concerning the possession of weapons, i.e., that the possession by any person of any weapon is presumptive evidence of intent to use the same unlawfully against another. Pursuant to the statute, that presumption applies only where the defendant possesses the weapon in question (see Penal Law § 265.15 [4] …). Here, the People did not proceed on any theory that defendant had possession of the weapon at issue. … .

… [T]he court abused its discretion by precluding defendant from calling a proposed witness at trial, namely, a nurse practitioner who treated him at the Mohawk Valley Psychiatric Center prior to the incident, on the grounds that her testimony was not relevant and that defendant failed to give timely notice under CPL 250.10 (1) (c). It is well settled that "[a criminal] defendant has a fundamental right to call witnesses in his [or her] own behalf" … . Here, defendant established that the proposed witness would have provided relevant testimony with respect to his defense and also established good cause for the delay in the notice, and the People failed to establish any prejudice … .

"Pursuant to County Law § 722-c, upon a finding of necessity, a court shall authorize expert services on behalf of a defendant, and only in extraordinary

circumstances may a court provide for compensation in excess of $1,000 per expert" … . Here, we conclude that the court abused its discretion by denying defendant's application on the sole ground that defendant had a retained attorney … . People v Osman, 2023 NY Slip Op 00581, Fourth Dept 2-3-23

Practice Point: Based on the People's theory the jury should not have been instructed that possession of weapon is presumptive evidence of an intent to use it unlawfully against another. The defendant's request to call a witness who could offer relevant evidence should not have been denied where the delay in notification was explained and there was no prejudice. The defendant's request pursuant to the County Law for $1000 to hire a psychiatric expert should have been granted.

FEBRUARY 3, 2023

JURY INSTRUCTIONS. EVIDENCE.

EVEN THOUGH DEFENDANT CLAIMED THE STABBING INJURIES WERE ACCIDENTAL, HE WAS ENTITLED TO A JURY INTSTRUCTION ON THE JUSTIFICATION DEFENSE (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction, determined defendant was entitled to have the jury instructed on the justification defense despite his claim the stabbing injuries were an accident. Defendant alleged the complainant attacked him with a knife and, in self-defense, he grabbed her arm and pinned it behind her back, causing the injuries. The court noted that the trial judge stuck with his opinion the justification defense is not available when it is alleged the injury was accidental or unintentional after he was presented with case law to the contrary:

It has long been settled law that "[a] defendant is entitled to a justification charge if there is some reasonable view of the evidence to support it, even if the defendant alleges that the victim's injuries were accidentally inflicted" … . That is so because "the defense of justification applies fully to a defendant's risk-creating conduct, even though it had unintended consequences" … . Here, defendant's statements during his interview with a police investigator, an audio recording of which was introduced in evidence by the People, indicated that the stabbing injuries sustained by the complainant were the unintended result of defendant's defensive maneuvers. In particular, defendant asserted that the complainant, while intoxicated,

confronted him with a knife and swung it at him, thereby prompting him to act defensively by twisting the complainant's arm behind her back with the knife still in her hand and pinning it against her. Contrary to the court's determination, defendant's statements "do[ ] not defeat his entitlement to a justification charge" … . People v Rayford, 2023 NY Slip Op 00786, Fourth Dept 2-10-23

Practice Point: A defendant's claim that the injuries were accidentally or unintentionally inflicted does not necessarily preclude a jury instruction on the justification defense.

FEBRUARY 10, 2023

PARENT-CHILD PRIVILEGE.

THE RECORDED CONVERSATION BETWEEN THE 15-YEAR-OLD DEFENDANT AND HIS FATHER IN THE POLICE INTERVIEW ROOM IS PROTECTED BY PARENT-CHILD PRIVILEGE AND SHOULD HAVE BEEN SUPPRESSED (FOURTH DEPT).

The Fourth Department, reversing defendant's murder convictions, determined the recorded conversation between the 15-year-old defendant and his father in the interview room at the police station was protected by parent-child privilege and should have been suppressed. The defendant had requested a lawyer and the police had left the interview room at the time the conversation was recorded:

We conclude that a parent-child privilege did arise under the circumstances of this case … . The application of the privilege is not dependent on a finding of police misconduct … . … [W]e recognize, as other courts have, that a young defendant will naturally look to a parent "as a primary source of help and advice" … The statements defendant now seeks to suppress were made in an attempt to utilize his father as such a source of assistance. "It would not be consistent with basic fairness to exact as a price for that assistance, his acquiescence to the overhearing presence of government agents" … . People v Kemp, 2023 NY Slip Op 00776, Fourth Dept 2-10-23

Practice Point: Here the Fourth Department recognized a parent-child privilege and suppressed a recorded conversation between the 15-year-old defendant and his father which took place in the police interview room. The defendant had just

requested a lawyer and the police had left the room. But the recording equipment was still operating.

FEBRUARY 10, 2023

PLEA ALLOCUTION, JUDGES.

THE PLEA ALLOCUTION RAISED THE POSSIBILITY OF DURESS AS AN AFFIRMATIVE DEFENSE; THE JUDGE MADE NO INQUIRY INTO THE VALIDITY OF PLEA; CONVICTION REVERSED DESPITE DEFENDANT'S FAILURE TO MOVE TO WITHDRAW THE PLEA (SECOND DEPT).

The Second Department, reversing defendant's conviction by guilty plea, determined the plea allocution raised duress as a possible affirmative defense and the judge did not inquire into the validity of the plea. The issue was considered on appeal despite the failure to move to withdraw the plea:

To be valid, a plea of guilty must be entered voluntarily, knowingly, and intelligently … . Generally, a defendant must preserve for appellate review a challenge to the validity of a guilty plea … . When, however, a "defendant's recitation of the facts underlying the crime pleaded to clearly casts significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea," the court has a duty to inquire further to make sure that the defendant understands the nature of the charge and that the plea has been intelligently entered … . Where the court failed 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 … .

In this case, the defendant's contention challenging the validity of his plea of guilty is unpreserved for appellate review since he did not move to withdraw his plea or otherwise raise that issue prior to the imposition of sentence … . However, the County Court's failure to inquire into the validity of the plea after the defendant's allocution raised the possibility of an affirmative defense based on duress (see Penal Law § 40.00) permits the defendant to challenge the sufficiency of the allocution on direct appeal, and requires reversal of the judgment of conviction … . People v Rodriguez, 2023 NY Slip Op 00678, Second Dept 2-8-23

Practice Point: Here the defendant's allocution raised the possibility he had duress as an affirmative defense but the judge made no inquiry into the validity of the plea. Despite the defendant's failure to preserve the error by moving to withdraw the plea, the appellate court reversed his conviction.

FEBRUARY 8, 2023

PRESENTENCE REPORTS, JUDGES.

A PRESENTENCE REPORT MUST BE CREATED FOR EACH OFFENSE; HERE THE JUDGE USED A PRESENTENCE REPORT PREPARED FOR A DIFFERENT UNRELATED OFFENSE; THE SENTENCE WAS ILLEGALLY IMPOSED (SECOND DEPT).

The Second Department, vacating defendant's sentence, determined the sentencing court should not have used a presentence report created for an earlier, unrelated offense. A unique presentence report for each offense is mandatory:

CPL 390.20 provides that "[i]n any case where a person is convicted of a felony, the court must order a pre-sentence investigation of the defendant and it may not pronounce sentence until it has received a written report of such investigation" (CPL 390.20[1]). This statutory language is mandatory … and a sentencing court's failure to obtain a presentence report renders the sentence imposed invalid as a matter of law … .

Here, the County Court sentenced the defendant on the murder conviction without ordering or receiving a presentence report relating to the murder conviction. Instead, the court relied on a presentence report prepared in connection with the defendant's conviction of attempted criminal possession of a controlled substance in the third degree, the facts and circumstances of which were not related to the facts and circumstances of the murder conviction. … [T]his did not satisfy the requirements of CPL 390.20, and therefore the sentence was illegally imposed. People v Shearer, 2023 NY Slip Op 00445, Second Dept 2-1-23

Practice Point: A judge cannot use a presentence report prepared for one offense in a sentencing for a different, unrelated offense.

FEBRUARY 1, 2023

RESTITUTION HEARING.

A RESTITUTION HEARING IS REQUIRED WHEN (1) THE DEFENDANT REQUESTS IT, AND (2) WHEN THE EVIDENCE OF THE AMOUNT IS INSUFFICIENT (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Wooten, clarified when a restitution hearing is required:

Pursuant to Penal Law § 60.27, in sentencing a criminal defendant, the court may require the defendant to pay restitution of the fruits of an offense for which he or she was convicted. Under certain circumstances set forth in the statute, the court must first conduct a hearing to determine the appropriate amount of restitution. However, this Court's case law has not consistently articulated the circumstances which trigger the need for a restitution hearing in accordance with the statute. Thus, we take this opportunity to clarify that a restitution hearing is required when either (1) the defendant requests such a hearing, or (2) the record does not contain sufficient evidence to establish the appropriate amount of restitution. People v Chung, 2023 NY Slip Op 00880, Second Dept 2-15-23

Practice Point: A restitution hearing is required when a defendant requests it and when the evidence of the amount is insufficient.

FEBRUARY 15, 2023

SEARCH WARRANTS, POLICE ENTRY.

THE MAJORITY HELD THE RECORD WAS SILENT ON WHETHER THE POLICE, WHO DID NOT APPLY FOR A NO-KNOCK WARRANT, ENTERED THE APARTMENT WITHOUT PROPER NOTICE TO THE OCCUPANTS AND THE ISSUE WAS NOT PRESERVED FOR APPEAL; THE DISSENT ARGUED THE ISSUE CAN BE ADDRESSED ON APPEAL UNDER INEFFECTIVE ASSISTANCE (FAILURE TO MOVE TO SUPPRESS), THE RECORD SUPPORTED AN UNAUTHORIZED NO-KNOCK ENTRY AND THE SEIZED EVIDENCE SHOULD HAVE BEEN SUPPRESSED (THIRD DEPT).

The Third Department, over a two-justice dissent, determined the issue whether the police did not give proper notice to the occupants prior to entering and searching premises was not preserved for appeal. The two dissenters argued the issue can be addressed by the appellate court under the ineffective-assistance argument (no motion to suppress based on failure to provide proper notice before entering) and the seized evidence should have been suppressed. The police did not apply for a no-knock warrant and, according to the dissent, entered the apartment using a battering ram before announcing their presence:

… [T]he record is silent as to what the police said or did prior to effectuating entry into the apartment. Thus, without resort to inappropriate speculation, it simply cannot be concluded from the record before us that the police failed to knock and announce their presence before forcefully entering the apartment. * * *

From the dissent:

In our view, the record confirms, by the police officers' own trial testimony, that they did not provide any advance notice prior to entering the apartment where defendant was ultimately apprehended. The record shows that members of the involved emergency response team (hereinafter ERT) entered the apartment through a rear door into a kitchen area that led to a living room. When asked how the door was opened, Jason Blowers — a police officer with the City of Johnstown Police Department — explained that "the breacher opened the door, the mechanical breach . . . . He hit the door with a ram." Sergeant Michael Pendrick, the first member of the ERT to enter the apartment, confirmed as much, testifying: "[a]s we approached the rear apartment door . . . another officer had breached the

door, the door popped open." People v Hayward, 2023 NY Slip Op 00461, Third Dept 2-2-23

Practice Point: The majority found the record silent on whether the police, who did not apply for a no-knock warrant, entered the apartment without giving proper notice to the occupants and held the issue was not preserved for appeal. The two-justice dissent argued the issue could be addressed on appeal as ineffective-assistance (failure to move to suppress) and the evidence demonstrated the police entered with a battering ram before announcing their presence.

FEBRUARY 2, 2023

SEARCH WARRANTS.

ALTHOUGH THE SEARCH WARRANT DESCRIBED THE RESIDENCE AS HAVING TWO ENTRANCE DOORS, ONE LEADING TO THE AREA WHERE THE INFORMANT SAW THE FIREARMS AND ONE LEADING TO A STAIRWAY TO THE SECOND FLOOR (WHICH THE INFORMANT HAD NOT VISITED), THE WARRANT WAS NOT SEVERABLE AND WAS THEREFORE OVERBROAD (SECOND DEPT).

The Second Department determined Supreme Court properly found the search warrant overly broad and suppressed the seized evidence. The warrant described the premises to be searched as having two exterior doors, one leading to the area described by the confidential informant who had seen firearms there, and the other leading to stairs to the second floor. The informant had never been upstairs and nothing was seized from upstairs. The issue was whether the part of the warrant which authorized the search of the upstairs could be severed from the part of the warrant describing the area visited by the informant. The court reasoned that severance would be justified if the warrant described two separate apartments. But because the warrant described the premises as a single residence, it was overbroad:

Unlike the warrant in Hansen [38 NY2d 17], which authorized the search of two obviously separate places—a home and a vehicle—the language of the warrant in this case was ambiguous, and failed to clearly delineate whether it authorized a search of a single residence or two separate residences. The warrant did refer to the premises as a "two-family home," with a "right main entrance" that led to "a living

room, a kitchen, and bedrooms," and a "left main entrance," which led to "a set of stairs that lead up to a living room, a kitchen and bedrooms," which may have suggested that the building contained two separate apartments. Yet, the warrant referred to the premises as the "Subject Location" and "the residence," and instead of using words like "apartment" or "unit," it referred to the rooms on the first floor as being "at the residence," and referred to the rooms on the second floor as being "at the rear of the residence."

In light of this ambiguity, a reviewing court could not determine that the warrant authorized the search of two separate places without impermissibly engaging in "retrospective surgery, dehors the language of the warrant, [to] cut away the illegal portions of the area to be searched and by judicially revised description save evidence recovered from a more narrowly limited area" … . People v Capers, 2023 NY Slip Op 01011, Second Dept 2-22-23

Practice Point: The Court of Appeals has held that where a warrant describes two distinct areas to be searched, a vehicle and a residence for example, and the search of one of the areas was not supported by probable cause, the warrant may be severed. Here, although there were two entrances to the premises, it was described as a single residence and therefore was not severable.

FEBRUARY 22, 2023

SEX OFFENDER REGISTRATION ACT (SORA), APPEALS.

DEFENDANT WAS NOT GIVEN THE REQUIRED 20-DAY NOTICE OF THE SORA RISK LEVEL HEARING, A VIOLATION OF DUE PROCESS; ALTHOUGH DEFENDANT DID NOT APPEAR AT THE HEARING, HE CAN APPEAL THE UPWARD DEPARTURE TO LEVEL THREE (THIRD DEPT).

The Third Department, reversing County Court, determined petitioner could appeal the 2006 level three sex offender risk level classification, despite his failure to appear at the hearing, because he was not given 20-days notice prior to the hearing:

Although the hearing took place on June 25, 2003, defendant was only advised of it in a letter dated June 11, 2003.Accordingly, defendant's due process rights were violated given that he was not afforded the minimum 20-day notice as required by statute … . The People respond that defendant explained in a letter sent after the

June 2003 hearing that he chose not to attend that hearing because he did not think he would be classified at risk level three. This letter, however, postdated the hearing and any explanation made therein does not amount to a waiver of the right to appear at the hearing. Furthermore, defendant's posthearing explanation does not obviate the notice requirements that defendant must be statutorily given prior to the hearing. People v Lockrow, 2023 NY Slip Op 01030, Third Dept 2-23-23

Practice Point: Here defendant was not given the required 20-day notice of the upcoming SORA risk level hearing, which violated his due process rights. He therefore could appeal the upward departure to level three.

FEBRUARY 23, 2023

SEX OFFENDER REGISTRATION ACT (SORA), CONSTITUTIONAL LAW, CORRECTION LAW.

THE CORRECTION LAW REQUIRING A SEX OFFENDER TO VERIFY HIS OR HER ADDRESS EVERY NINETY DAYS IS VOID FOR VAGUENESS AS APPLIED TO HOMELESS SEX OFFENDERS (FIRST DEPT).

The First Department, vacating defendant's guilty pleas, in a full-fledged opinion by Justice Renwick, determined the Correction-Law requirement that a sex offender verify his or her address every 90 days is void for vagueness as applied to homeless sex offenders:

… [T]he question is whether the reporting requirements of Correction Law § 168-f(3) provided sufficient notice to defendant of what conduct was mandated by the statute when he left his previous residence address, a homeless shelter, but possessed no new permanent or temporary residence with an address. According to its plain language, Correction Law § 168-f(3) mandates that offenders register a change of residence by providing a specific new "address." The statute, however, contains no objective standard or guidelines that would put homeless sex offenders without an address on notice of what conduct is required of them. Under these circumstances, such transient offenders can only guess at what is meant by the requirement that they register their new "address." Similarly, the change of address reporting requirement fails to provide even minimal guidelines for the registering

authorities in these regards, thus encouraging arbitrary enforcement. People v Allen, 2023 NY Slip Op 00496, First Dept 2-2-23

Practice Point: The Correction Law requiring a sex offender to verify his or her address every ninety days is void for vagueness as applied to homeless sex offenders.

FEBRUARY 2, 2023

SEX OFFENDER REGISTRATION ACT (SORA), DOWNWARD DEPARTURE.

DEFENDANT WAS ENTITLED TO A DOWNWARD DEPARTURE TO LEVEL ONE; THE PRIOR RAPE (THE JUSTIFICATION FOR COUNTY COURT'S LEVEL THREE DESIGNATION) STEMMED FROM AN ONGOING RELATIONSHIP WITH THE VICTIM WHO WAS UNABLE TO CONSENT SOLELY BECAUSE OF HER AGE (SECOND DEPT).

The Second Department, reversing County Court, determined defendant was entitled to a downward departure to a level one sex offender designation. County Court had designated defendant a lever three offender because of a prior rape-third conviction. The rape-third conviction was based solely on the victim's inability to consent due to her age. The defendant and the victim had been in a long-term relationship:

… [T]he unusual circumstances established by the defendant … are not accounted for by the Guidelines and tend to demonstrate a lower likelihood of reoffense and danger to the community. With respect to the first felony conviction serving as a predicate for the override, rape in the third degree, the People acknowledged that the victim's lack of consent was solely by reason of inability to consent because of her age. Further, the record reflects that conduct underlying this crime was an ongoing relationship between the defendant and the victim. During this relationship, a video depicting sexual conduct between the defendant and the victim was taken. This video, depicting the same conduct for which the defendant was convicted of rape in the third degree and designated a level one sex offender, was discovered by a probation officer approximately a year later, and served as the basis for the defendant's second sex-related felony conviction, possessing a sexual

performance by a child. People v Hernandez, 2023 NY Slip Op 00451, Second Dept 2-1-23

Practice Point: Here defendant was entitled to a downward departure to a level one sex offender designation. The rape which County Court relied on for a level three designation stemmed from an ongoing relationship with the victim who was unable to consent solely because of her age.

FEBRUARY 1, 2023

STREET STOPS, SEARCHES.

THE MAJORITY CONCLUDED THAT EVEN IF DEFENDANT WAS ILLEGALLY FRISKED AND DETAINED OUTSIDE OF HIS VEHICLE, THE DEPUTY'S SEEING COCAINE ON THE DRIVER'S SEAT PROVIDED PROBABLE CAUSE FOR THE SEARCH OF THE VEHICLE; THE TWO-JUSTICE DISSENT ARGUED THE OBSERVATION OF THE DRUGS WAS A PRODUCT OF THE ILLEGAL FRISK AND DETENTION OF THE DEFENDANT (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined the motion to suppress evidence seized from a vehicle was properly denied. After observing what appeared to be a drug transaction the defective called for assistance. As one of the deputies approached defendant's vehicle, defendant got out and walked toward the deputy. The deputy frisked the defendant, found nothing and told defendant to wait behind his vehicle. The deputy then walked to defendant's vehicle where he saw a rolled up dollar bill and white powder on the driver's seat. The dissent argued the deputy did not have reasonable suspicion of a crime when defendant was frisked and his observation of the drugs in the car was a product of the illegal detention of defendant:

The court properly determined that, based on the totality of the observations by the detective, which he communicated with the deputy … , the deputy had a reasonable suspicion that defendant was involved in a drug transaction … . In any event, "the seizure of [the items inside the vehicle] was not the result of the allegedly illegal detention of defendant, who was outside the parked vehicle when the police officer approached and detained him" … . Even if the deputy had not detained defendant, he could have simply walked up to the vehicle, looked in the

window, and observed the drugs in plain view on the driver's seat. Contrary to defendant's further contention, the deputy's observations of the rolled-up dollar bill and white powdery substance provided probable cause to arrest defendant for possession of drugs … . People v Messano, 2023 NY Slip Op 00769, Fourth Dept 2-10-23

Practice Point: Here the defendant was frisked and detained as he walked toward the deputy from his car. The deputy then looked inside defendant's car a saw drugs. The majority held that even if defendant was illegally detained outside the car, the deputy's observation of the drugs justified the search. The two-justice dissent argued the observation of the drugs was the product of the illegal detention.

FEBRUARY 10, 2023

STREET STOPS.

DEFENDANT WAS NOT FREE TO LEAVE AFTER A STREET STOP AND WAS INTERROGATED WITHOUT HAVING BEEN AFFORDED THE MIRANDA WARNINGS; THE DEFENDANT'S STATEMENTS SHOULD HAVE BEEN SUPPRESSED (SECOND DEPT).

The Second Department, reversing Supreme Court and suppressing defendant's statements, determined defendant was in custody after a street stop and was interrogated without the Miranda warnings:

At a pretrial suppression hearing, a police officer testified … he stopped the defendant and another male, both of whom matched the description of individuals suspected of leaving the scene of a motor vehicle accident where a motorcyclist had been struck. At that time, the defendant and the other male were detained and were not "free to leave." Further, at least ten police vehicles responded to the location, along with several officers.

Thereafter, without advising the defendant of his Miranda rights … , a state trooper asked the defendant his name and performed a "quick cursory pat down" of the defendant's person. The state trooper then engaged in what he indicated was a "more detailed conversation" with the defendant. Specifically, the state trooper inquired whether the defendant was the operator of the subject vehicle. According to the state trooper, in response thereto, the defendant initially admitted that he was

the operator of that vehicle, but then "quickly corrected himself and stated that he took the train" to the location. The state trooper proceeded to ask the defendant additional details relating to the train trip, including "which train he took to that location, which stop he got off at, and where his trip began." The state trooper testified that the defendant "couldn't give . . . an answer to any of those questions." At the time that the state trooper asked these questions, the defendant was placed with his hands on the hood of a police car. Additionally, the "entire street was pretty much blocked off by police vehicles." People v Trice, 2023 NY Slip Op 01015, Second Dept 2-22-23

Practice Point: Here the defendant was stopped on the street and several police vehicles and ten police officers were at the scene. A state trooper questioned him while defendant was standing with his hands on the hood of a police car. The defendant was in custody and had not been afforded the Miranda warnings. His statements should have been suppressed.

FEBRUARY 22, 2023

SUPPRESSION HEARING, EVIDENCE.

THE PEOPLE DID NOT MEET THEIR "BURDEN OF GOING FORWARD" BY PRESENTING SUFFICIENT PROOF OF THE LEGALITY OF POLICE CONDUCT AT THE SUPPRESSION HEARING; THERE WAS NO EVIDENCE THE OFFICERS WHO ARRESTED DEFENDANT WERE MADE AWARE OF THE CO-DEFENDANT'S STATEMENT WHICH WAS THE BASIS OF THE ARREST; THE FACT THAT GAPS IN THE PEOPLE'S PROOF MAY HAVE BEEN FILLED IN BY THE DEFENDANT'S TESTIMONY AT THE HEARING DIDN'T CURE THE DEFICIENCY (FIRST DEPT).

The First Department, reversing defendant's conviction and suppressing his postarrest statement, determined the People did not meet their "burden of coming forward" with proof of the legality of police conduct. The fact that some of the gaps in the proof might have been filled by the defendant's testimony at the suppression hearing did not cure the defect:

The People failed to submit evidence sufficient to support the suppression court's findings, thus failing to meet their burden of coming forward … . Although the

officers who arrested defendant were not required to testify, the People's initial evidentiary presentation, consisting of the testimony of the investigating detective, was insufficient to permit the inference that information constituting probable cause was transmitted by the detective to the officers effectuating the arrest of defendant, as required to meet the People's prima facie burden of establishing the legality of the challenged police conduct and shift the burden of persuasion to defendant … . Although defendant testified after the People rested, we need not consider whether defendant's testimony before the suppression court could have been used to remedy deficiencies in the People's presentation. As the People repeatedly informed the court, they relied solely on the detective's testimony to meet their burden. Further, the suppression court discredited defendant's testimony as "unworthy of belief" and based its decision to deny defendant's motion to suppress solely on the testimony of the detective, which it credited. People v Watkins, 2023 NY Slip Op 00742, First Dept 2-9-23

Practice Point: The People have a burden of proof at a suppression hearing called the "burden of going forward." To meet the burden the People was demonstrate the legality of the police conduct. Here there was no evidence the officers who arrested the defendant were aware of the statement by the codefendant which was the basis for the arrest. Therefore defendant's postarrest statement should have been suppressed.

FEBRUARY 9, 2023

UNNOTICED STATEMENT, EVIDENCE.

THE ADMISSION OF AN UNNOTICED STATEMENT BY DEFENDANT WAS NOT HARMLESS ERROR; ALTHOUGH THE PEOPLE HAD DISCLOSED THE INTERVIEW IN WHICH THE STATEMENT WAS MADE, THEY DID NOT DISCLOSE THE SPECIFIC STATEMENT; THE DEFENDANT MOVED TO PRECLUDE THE STATEMENT AT TRIAL (FIRST DEPT).

The First Department, reversing defendant's convictions, determined the evidence defendant knew the codefendant was armed and shared the codefendant's intent to cause serious injury was legally insufficient. Although the robbery second conviction was based on legally sufficient evidence, an unnoticed statement was allowed in evidence at trial, a reversible error:

… [D]efendant is entitled to a new trial on the second-degree robbery count. The People should not have been permitted to submit evidence of defendant's August 9, 2016 statement to a detective regarding defendant's discussion with the victim about the value of the latter's jewelry because this statement was not properly noticed pursuant to CPL 710.30(1)(a). Although the People disclosed the interview generally, they did not disclose this particular statement … . At a suppression hearing, defendant only moved to suppress other statements not at issue on appeal, and the statement at issue was first revealed during trial testimony, at which time defendant moved for preclusion on the ground of lack of notice. People v Weathers, 2023 NY Slip Op 00741, First Dept 2-9-23

Practice Point: If the People attempt to introduce a statement made by the defendant which was not provided in the CPL 710.30 notice, and no motion to suppress the statement had been made, introduction of the statement at trial must be precluded. In this case, it was not enough that the People disclosed the interview from which the statement was taken. No notice of the specific statement had been provided.

FEBRUARY 9, 2023