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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 April 2024. 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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ACQUITTAL ON THE RAPE AND FORCIBLE TOUCHING CHARGES RENDERED THE "ENDANGERING THE WELFARE OF A CHILD" CONVICTION AGAINST THE WEIGHT OF THE EVIDENCE (SECOND DEPT).

The Second Department, reversing defendant's "endangering the welfare of a child" conviction, determined defendant's acquittal on the rape and forcible touching charges rendered the conviction "against the weight of the evidence:"

In conducting our weight of the evidence review, we consider the jury's acquittal on other counts, and, under the circumstances of this case, find the jury's acquittal on the other counts supportive of a reversal of the conviction on the count of endangering the welfare of a child … . Here, the defendant was charged with, but acquitted of, rape in the second degree, rape in the third degree, and forcible touching, and the alleged conduct that formed the basis of those charges was essentially the same alleged conduct that formed the basis of the charge of endangering the welfare of a child. Once the jury discredited the complainant's testimony with respect to the charges of rape and forcible touching, the record was devoid of any evidence that the defendant "knowingly act[ed] in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old" … , as charged on the count of endangering the welfare of a child. People v Liston, 2024 NY Slip Op 02066, Second Dept 4-17-24

Practice Point; Defendant was acquitted of the rape and forcible touching charges which were based on the same allegations as was the conviction on the "endangering the welfare of a child" charge. The conviction, therefore, was "against the weight of the evidence."

APRIL 17, 2024

APPEALS, DISCIPLINARY HEARINGS (INMATES), CONSTITUTIONAL LAW.

HERE THE FACILITY REVIEW OFFICER VIEWED THE VIDEO EVIDENCE AND EXPRESSED THE CONCLUSION PETITIONER HAD VIOLATED PRISON RULES BEFORE THE DISCIPLINARY HEARING; THAT SAME OFFICER DECIDED PETITIONER'S ADMINISTRATIVE APPEAL; THAT SCENARIO VIOLATED DUE PROCESS; THE MISBEHAVIOR DETERMINATION WAS ANNULLED (THIRD DEPT).

The Third Department, annulling the determination petitioner had violated prison rules, determined the fact that the facility review officer reviewed petitioner's misbehavior report and decided the administrative appeal violated due process:

Petitioner contends … he was denied due process because the facility review officer that reviewed his misbehavior report … also decided petitioner's administrative appeal of the guilty determination as the facility superintendent's designee … . … Generally, the facility review officer is charged with reviewing each misbehavior report issued and, considering the seriousness of the alleged violations in the report, determining the appropriate tier level classification … . Here, petitioner, both during the hearing and in his administrative appeal, challenged certain actions taken by the facility review officer concerning his review of the misbehavior report. … [I]n reviewing the misbehavior report, the facility review officer viewed the video that was to be presented as evidence of guilt at the hearing. Based upon his viewing of the video, the facility review officer informed petitioner in a memorandum prepared prior to the disciplinary hearing that the video shows "you and your visitor acting in an unacceptable manner in the visit room." The review officer further states "that the video does not show your penis being exposed as stated in the [misbehavior] report that's why I downgraded the tiering, . . . it does clearly show your visitor with her right hand between your legs in the groin area and her hand moving in a stroking motion." In light of the fact that certain challenges to the review officer's actions were raised by petitioner in his administrative appeal, as well as the facility review officer's expressed predeterminations regarding petitioner's guilt, we conclude that his serving as the superintendent's designee to decide the appeal denied petitioner a fair and impartial

administrative appeal. Matter of Williams v Panzarella, 2024 NY Slip Op 02118, Third Dept 4-18-24

Practice Point: In the context of prison disciplinary proceedings, the prisoner's right to due process of law is violated when the same officer who viewed the evidence and indicated the prisoner was guilty prior to the hearing also decided the prisoner's administrative appeal.

APRIL 18, 2024

APPEALS, EXTREME EMOTIONAL DISTURBANCE DEFENSE SHOULD NOT HAVE BEEN REJECTED.

DEFENDANT, WHO WAS SUFFERING FROM MENTAL ILLNESS, WAS CONVICTED OF MURDER; THE JURY'S REJECTION OF DEFENDANT'S "EXTREME EMOTIONAL DISTURBANCE" DEFENSE WAS AGAINST THE WEIGHT OF THE EVIDENCE, CONVICTION REDUCED; THE STRONG DISSENT ARGUED DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO SUBMIT EVIDENCE OF DEFENDANT'S MENTAL ILLNESS AT THE SUPPRESSION HEARING (SECOND DEPT).

The Second Department, reducing defendant's murder conviction to manslaughter first degree, over an extensive dissent, determined the jury's determination that defendant failed to prove he was acting "under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse" (Penal Law § 125.25[1][a]), was against the weight of the evidence. Defendant, who suffered from mental illness, had been involuntarily committed to to a medical facility. The victim, who was beaten and strangled, allegedly sexually assaulted defendant in the shower. The dissent argued defense counsel was ineffective in failing to introduce evidence of defendant's mental illness in support of the motion to suppress statements defendant made to a detective:

… [W]e find that the jury's determination that the defendant failed to prove by a preponderance of the evidence that he was acting "under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse"

(Penal Law § 125.25[1][a]) when he killed the victim was against the weight of the evidence. The defendant's state of mind is a subjective question, and the existence of a reasonable excuse is an objective question … . The first element, the "subjective element[,] 'focuses on the defendant's state of mind at the time of the crime and requires sufficient evidence that the defendant's conduct was actually influenced by an extreme emotional disturbance'" … . The second element requires an objective determination as to whether there was a reasonable explanation or excuse for the emotional disturbance, and "[w]hether such a reasonable explanation or excuse exists must be determined by viewing the subjective mental condition of the defendant and the external circumstances as the defendant perceived them to be at the time, 'however inaccurate that perception may have been'" … .

From the dissent:

At the suppression hearing, the People presented the testimony of the detective who had interviewed the defendant. The defense did not present any evidence. Defense counsel was well aware of the … voluminous psychiatric documentation concerning the defendant's mental illness. However, defense counsel failed to move to admit into evidence any of these records. Rather, in support of the motion to suppress, defense counsel merely presented arguments that the defendant's mental state at the time that the Miranda warnings were administered precluded the admissibility of his statements to the detective. People v Andrews, 2024 NY Slip Op 01935, Second Dept 4-10-24

Practice Point: Here, the appellate court determined the jury's rejection of defendant's "extreme emotional disturbance" affirmative defense was against the weight of the evidence. The murder conviction was reduced to manslaughter first degree.

APRIL 10, 2024

ATTORNEYS, CONFLICT WITH DA'S OFFICE, SPECIAL PROSECUTOR.

THE TRANSFER OF DEFENDANT'S CASE TO A SPECIAL PROSECUTOR WAS JUSTIFIED BY THE EXPLANATION OF A CONFLICT WITHIN THE DA'S OFFICE; HOWEVER, THE TRANSFER BACK TO THE DA'S OFFICE WAS NOT BASED ON AN EXPLANATION WHY THE CONFLICT WAS NO LONGER A PROBLEM; THE TRANSFER BACK TO THE DA'S OFFICE WAS REVERSIBLE ERROR (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Pritzker, reversing County Court, determined the prosecution of defendant's case should not have been transferred from the special prosecutor, appointed two months before because of a conflict within the DA's office, back to the DA's office. The Third Department noted that the initial decision to appoint a special prosecutor based on a conflict was supported by the application, but there was no explanation why that conflict no longer existed such that the DA's office could ultimately handle the case:

County Law § 701 does not specifically detail the procedure to be followed when a special prosecutor is relieved of his or her appointment, and there is little case law relevant to this issue …; however, it is apparent that the only options are to either appoint another special prosecutor or to return the matter, if appropriate, to the DA's office. Indeed, certain policy considerations weigh in favor of allowing the DA's office to prosecute the case, namely, a "public interest in having prosecutorial duties performed, where possible, by the constitutional officer chosen by the electorate" … . Here, however, the DA's office had, less than two months prior, sought appointment of a special prosecutor based upon a conflict. Based upon this sworn assertion of a conflict, County Court (Lambert, J.) entered an order disqualifying the DA's office and appointing the special prosecutor. Then, when subsequently returning the matter to the disqualified DA's office, no record was made as to why disqualification was no longer necessary. From the scant record of what occurred here, it is clear that defendant's concerns regarding the DA's office's prior disqualification and possible conflict fell on deaf ears. Thus, because on this record we cannot determine why County Court (Burns, J.) deemed it appropriate to no longer disqualify the DA's office, we find that the court committed reversible

error in returning the matter to the DA's office … . People v Faison, 2024 NY Slip Op 01836, Third Dept 4-4-24

Practice Point: Just as the transfer of a criminal prosecution from the DA's office to a special prosecutor based upon a conflict within the DA's office requires a valid explanation, the transfer of the criminal prosecution from the special prosecutor back to the DA's office requires a valid explanation why the conflict is no longer a problem. Here the absence of an explanation rendered the transfer back to the DA's office reversible error.

APRIL 4, 2024

BRADY MATERIAL, LATE TURN-OVER.

BRADY MATERIAL TURNED OVER TO DEFENDANT AFTER HE PLED GUILTY MAY HAVE AFFECTED HIS DECISIONS ABOUT WHAT PLEA OFFER TO ACCEPT AND WHETHER TO MOVE TO DISMISS CERTAIN CHARGES; THEREFORE DEFENDANT WAS ENTITLED TO AN EVIDENTIARY HEARING ON HIS MOTION TO VACATE THE CONVICTION (THIRD DEPT).

The Third Department, reversing County Court, determined defendant was entitled to a hearing on his motion to vacate his conviction by guilty plea. After the plea a new prosecutor turned over Brady material which had not been disclosed prior to the plea. Under the facts of the case, defendant's awareness of the Brady material may have affected his decision to plead guilty to criminal possession of a weapon, a C felony. Therefore a hearing on the 440 motion should have been held:

… [T]he [Brady] evidence may have had an impact on the other charges that may have had an effect on what defendant was allowed to plead to — specifically, the attempted murder in the second degree and assault in the first degree counts … . … [T]hese charges meant that because defendant was indicted with a class B armed felony offense, his plea of guilty was required to be at least to a class C violent felony offense (see CPL 220.10 [5] [d] [i]). The lowest charge that satisfied this requirement was criminal possession of a weapon in the second degree, meaning

that, based on the evidence before defendant at the time of his plea and sentencing, this was the most favorable charge that he could obtain — a point acknowledged at sentencing. Assuming, without deciding, that such evidence constituted Brady materials that were not disclosed, and further recognizing that the gravamen of the People's main argument suggests that this evidence does impact the other charges against defendant, the record is unclear what impact the disclosure of this evidence may have had on defendant's decision to accept or reject the plea offer — particularly in the context of CPL 220.10 (5) (d) (i) and a potential motion to dismiss certain charges (see CPL 245.25 [2]; see also CPL 440.10 [1] [b], [h] …). Therefore, under the unique circumstances of this case … it was an error for County Court to decide the motion without an evidentiary hearing … . People v Harries, 2024 NY Slip Op 01843, Third Dept 4-4-24

Practice Point: Where the Brady material turned over to the defendant after he pled guilty may have affected his decisions about what plea offer to accept and whether to move to dismiss certain charges, defendant's motion to vacate his conviction should not have been denied without first holding an evidentiary hearing.

APRIL 4, 2024

EVIDENCE, CHAIN OF CUSTODY.

A GAP IN THE CHAIN OF CUSTODY OF THE DRUGS SEIZED FROM DEFENDANT AND A DISCREPANCY IN THE DESCRIPTIONS OF THE BAG CONTAINING THE DRUGS DID NOT RENDER THE DRUGS INADMISSIBLE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Cannataro, over a two-judge dissent, determined a gap in the chain of custody and a discrepancy in the descriptions of the evidence did not render the evidence (white powder in plastic bags) inadmissible. Officer Lin, who seized the evidence, noted a rip in the larger plastic bag. But Osorio, the criminologist who analyzed the white powder, did not notice a rip in the larger bag:

… [T]he record indicates that the gap spanned, at most, only a few hours overnight and "[a]t all times, the drugs apparently remained safely under police control" in

an identifiable location at a precinct station … . Officer Lin testified that she placed the evidence inside an envelope used to voucher drugs, and that the only other person in the office at the time was an administrative officer who was tasked with safeguarding such evidence. In leaving the evidence at the station to resume her patrol, Officer Lin followed a procedure intended to reduce opportunities for error and misconduct … . When Officer Lewis arrived to voucher the evidence, "the drugs were found precisely where they were supposed to be" … . * * *

Defendant also focuses on Osorio's testimony that she did not "see" or write in her worksheet that there were rips in the plastic bags recovered from defendant, which he characterizes as irreconcilable with Officer Lin's testimony about the torn condition of the larger bag. Defendant ignores that the bags were admitted into evidence at trial and the factfinder was expressly encouraged to examine them to confirm Officer Lin's testimony. If the larger bag was torn in some way, Osorio's mere failure to notice that defect would not support an inference of tampering. Because the bag is not part of the record on appeal, it is impossible to discern the existence or extent of any discrepancy, let alone conclude that it rendered the drugs inadmissible…. . People v Baez, 2024 NY Slip Op 02225, CtApp 4-25-24

Practice Point: Here the drugs seized from the defendant were left overnight in a room at the precinct before a voucher was created, and the officer who seized the drugs noticed a rip in the larger plastic bag but the criminologist who analyzed the drugs did not notice such a rip. Despite these issues, the chain of custody was sufficiently proven to render the drugs admissible in evidence.

APRIL 25, 2024

EVIDENCE, TESTIMONIAL EVIDENCE.

HERE THE COURT OF APPEALS CLARIFIED ITS DEFINITION OF "TESTIMONIAL" EVIDENCE; A FORM DOCUMENT USED TO COLLECT PEDIGREE INFORMATION FROM EVERY NYC ARRESTEE IS NOT "AN OUT-OF-COURT SUBSTITUTE FOR TRIAL TESTIMONY," I.E., THE FORM DOCUMENT IS NOT "TESTIMONIAL" AND CAN BE INTRODUCED AT TRIAL AS A BUSINESS RECORD WITHOUT THE TESTIMONY OF THE CREATOR OF THE DOCUMENT; HERE THE DOCUMENT INDICATED DEFENDANT LIVED IN THE BASEMENT AND WAS USED AT TRIAL TO PROVE HE CONSTRUCTIVELY POSSESSED A WEAPON FOUND IN THE BASEMENT (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Halligan, over an extensive dissenting opinion, determined a document created by the Criminal Justice Agency (CJA), which provides pretrial services in NYC, was not "testimonial" in nature and therefore could be introduced in evidence as a business record without affording the defendant the opportunity to confront the creator of the document. The document was created during an interview of the defendant. The defendant was charged with possession of a weapon found in the basement. The CJA document indicated defendant lived in the basement and was introduced at trial to prove his constructive possession of the weapon:

… CJA interviews "nearly all individuals arrested" in New York City "to make a pretrial release recommendation to the court" … . In interviewing arrestees to determine their suitability for pretrial release, CJA employees ask them questions regarding community ties and warrant history, including an arrestee's address, how long they have lived there, their employment status, whether they expect anyone at their arraignment, their education, and other relevant queries. The CJA employee records the answers to these questions on a standardized form titled "Interview Report." The employee also verifies the information provided by the arrestee with a third person, whose contact information the CJA employee obtains from the arrestee, and records that verification in a separate section of the form. The CJA employee then gives the completed form, including a recommendation on whether

the arrestee is suitable for release, to the arraignment judge, the prosecutor, and defense counsel. * * *

We now clarify that in ascertaining whether out-of-court statements are testimonial, courts should inquire, as the U.S. Supreme Court has instructed, "whether in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony' " … . When that standard is met, the statement should be deemed testimonial for purpose of the Confrontation Clause. * * *

We find it significant that a CJA interview report is routinely prepared for all arrestees in New York City. The information collected is the same in every case, regardless of the particular facts or the elements of the relevant crime: the interviewer collects a predetermined set of pedigree information from the defendant and makes a recommendation to the court as to the defendant's suitability for pretrial release … . People v Franklin, 2024 NY Slip Op 02227 CtApp 4-25-24

Practice Point: The Court of Appeals clarified and brought up-to-date its definition of "testimonial" evidence. A document is testimonial if its primary purpose is to create an out-of-court substitute for trial testimony. Here a form document filled out during an intake interview of every NYC arrestee which collects pedigree information was not testimonial, i.e., it was not created as a substitute for trial testimony. Therefore the document could be admitted at trial as a business record without the need for testimony by the creator of the document.

APRIL 25, 2024

IDENTIFICATION, INDEPENDENT-SOURCE HEARING.

THE TRIAL JUDGE SHOULD HAVE HELD AN INDEPENDENT-SOURCE HEARING BEFORE ALLOWING THE UNDERCOVER OFFICER TO IDENTIFY THE DEFENDANT AT TRIAL; HEARING AND NEW TRIAL ORDERED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Troutman, reversing the conviction and ordering an independent-source hearing and a new trial, found the record insufficient to determine whether the undercover officer had an independent source for his in-court identification of the defendant. Supreme Court, rather than holding an independent-source hearing, relied on the undercover officer's prior testimony at the probable cause hearing. But the Court of Appeals found that testimony insufficient:

… [W]e address whether Supreme Court erred when it denied defendant's motion for an independent source hearing and, instead, used an undercover police officer's prior testimony at a probable cause hearing to render a determination on whether the officer had an independent source for his prospective in-court identification of defendant. … [T]he trial court erred in admitting the undercover officer's in-court identification without a hearing record sufficient to support an independent source determination for the identification. * * *

… [At the probable cause hearing] the undercover testified that he had never interacted with the seller before the date in question and did not interact with the seller directly during the buy and bust. Although the undercover described the seller's clothes, he did not provide a physical description of the seller. He did, however, testify about his close proximity to the seller—close enough to hear that the intermediary and the seller were having a conversation, but not their words. … [H]is testimony did not address how long the seller was within his sight or the nature of his confirmatory identification of defendant. People v Williams, 2024 NY Slip Op 02128, CtApp 4-23-24

Practice Point: Here the trial judge relied on the officer's testimony at the probable cause hearing to demonstrate the officer had an independent source for his in-court identification of the defendant. The testimony was deemed too weak to

demonstrate an independent source. New trial and independent-source hearing ordered.

APRIL 23, 2024

IDENTIFICATION, NON-EYEWITNESS IDENTIFICATION IN VIDEO.

BEFORE ADMITTING NON-EYEWITNESS TESTIMONY TO IDENTIFY DEFENDANT IN A VIDEO, THE BASIS SHOULD BE DETERMINED OUTSIDE THE PRESENCE OF THE JURY, THE PARTY OFFERING THE WITNESS MUST DEMONSTRATE THE RELIABILITY OF THE WITNESS, AND THE NEED FOR THE TESTIMONY MUST BE DEMONSTRATED; IN ADDITION, A THOROUGH RECORD MUST BE CREATED AND THE JURY SHOULD BE INSTRUCTED THEY ARE FREE TO REJECT THE NON-EYEWITNESS IDENTIFICATION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Halligan, reversing the Appellate Division, over a concurrence, determined the "non-eyewitness" who purported to identify the defendant in a video was not shown to be sufficiently familiar with the defendant and there was no showing that the jury faced an obstacle to making the identification:

This case concerns an increasingly prevalent issue: when may someone who is not an eyewitness to a crime testify to a jury that the defendant is the person depicted in a photo or video. We hold that such testimony may be admitted where the witness is sufficiently familiar with the defendant that their testimony would be reliable, and there is reason to believe the jury might require such assistance in making its independent assessment. Here, there was no showing that the proffered witness was sufficiently familiar with the defendant to render his testimony helpful, or that the jury faced an obstacle to making the identification that the witness's testimony would have overcome. * * *

… [B]efore admitting lay non-eyewitness identification testimony, a court should inquire as to the basis of the witness's familiarity outside the presence of the jury in a separate hearing or voir dire, as the court properly did here. The party offering

the witness—in most cases the People—bears the burden of establishing that their testimony would both be helpful and necessary. … [I]t is incumbent on both parties to create a thorough record to aid the court in its determination and to allow for meaningful appellate review. … [I]t would be appropriate for the trial court to provide cautionary jury instructions, both at the time of the testimony and during the final charge, explaining to the jury that lay non-eyewitness identification testimony is mere opinion testimony that they may choose to accept or reject, and reminding the jurors that because they are the finders of fact, it is their opinion as to whether the defendant is depicted in the surveillance footage that matters … . People v Mosley, 2024 NY Slip Op 02125, CtApp 4-23-24

Practice Point: Here the Court of Appeals offers guidance on the use of non-eyewitness testimony to identify the defendant in a video. The reliability of the witness and the need for the testimony must be demonstrated outside the presence of the jury. A full record must be made. And the jury should be instructed they are free to reject the testimony.

APRIL 23, 2024

JURIES, ANONYMOUS JURY.

HERE THE JUDGE'S DECISION TO EMPANEL AN ANONYMOUS JURY WAS NOT SUPPORTED BY SUFFICIENT REASONS; NEW TRIAL ORDERED (THIRD DEPT).

The Third Department, reversing defendant's convictions and ordering a new trial, determined the judge had not set forth sufficient reasons for withholding the identities of the jurors. The jury remained anonymous throughout the trial. Jurors were referred to solely by their juror numbers:

… County Court did not cite any threats to this jury and instead based its refusal to disclose the identities of prospective jurors upon a ground that the Court of Appeals has specifically found to be inadequate, namely, "anecdotal accounts from jurors in unrelated cases" … . The People concede that County Court erred in empaneling an anonymous jury, in fact, but argue that reversal is not required because the issue is unpreserved and the error is, in any event, harmless. We

disagree on both counts. First, when County Court announced that it would not disclose the names of the prospective jurors, defense counsel immediately "object[ed] to that" and argued that no factual showing of a need for anonymity had been made in this matter. County Court then "den[ied] [the] application" and "note[d] [the] exception." Defendant therefore preserved the argument for our review by registering an objection to County Court's refusal to disclose the identities of the jurors in a manner that permitted the trial court to address the issue (see CPL 470.05 [2] …). Second, for the reasons set forth in People v Flores (153 AD3d at 193-195), we are unpersuaded that harmless error analysis is applicable to such an error. Thus, reversal and remittal for a new trial is required. People v Heidrich, 2024 NY Slip Op 01841, Third Dept 4-4-24

Practice Point: Although an anonymous jury may be appropriate is some circumstances, the failure to support the decision to withhold the identities of the jurors must be justified by sufficient reasons. Here the reasons (anecdotal account from jurors in other cases) were deemed insufficient and a new trial was ordered.

APRIL 4, 2024

JURIES, GROSSY UNQUALIFIED JUROR.

A JUROR WAS CONVINCED DEFENDANT HAD FOLLOWED HER HOME AND SO INFORMED THE JURY DURING DELIBERATIONS; THE JUROR WAS "GROSSLY UNQUALIFIED" AND DEFENDANT'S MOTION FOR A MISTRIAL SHOULD HAVE BEEN GRANTED (CT APP).

The Court of Appeals, reversing defendant's conviction and ordering a new trial, in a full-fledged opinion by Judge Wilson, determined a juror should have been dismissed as "grossly unqualified," and a mistrial should have been granted:

Upon a jury verdict, the trial court convicted Kenneth Fisher of three counts of third-degree criminal possession of a controlled substance (PL 220.16) arising from two controlled buy operations. He was sentenced to nine years in prison. One of the jurors in Mr. Fisher's case was certain that Mr. Fisher had followed her home after the first day of jury selection, a belief the trial court deemed likely unfounded. Instead of promptly informing the court of her concern, she instead waited three

days, until the case was submitted to the jury, and then expressed her safety concern to the other jurors as they deliberated. Those facts established that the juror was "grossly unqualified" pursuant to CPL 270.35, because it was clear she "possesse[d] a state of mind which would prevent the rendering of an impartial verdict" … . Although the trial judge then elicited some assurances that the juror could put aside her concerns, those assurances were insufficient to support a conclusion that the juror should be retained. Therefore, the juror should have been dismissed and a mistrial granted. * * *

Strongly held, prejudicial beliefs about the defendant which are not based on the trial evidence strike at the heart of the right to an impartial jury, and therefore render a juror "grossly unqualified" unless the bias can be cured or set aside. Given the extent of Juror Six's prejudicial beliefs and her introduction of those beliefs into deliberations, it was error to conclude that the issue was cured merely by "yes" answers to formulaic questions. People v Fisher, 2024 NY Slip Op 02129, CtApp 4-23-24

Practice Point: A juror who believed defendant had followed her home and who so informed the jury during deliberations was "grossly unqualified" requiring a mistrial declaration.

APRIL 23, 2024

JURIES, JUDGES, JURY NOTES, APPEALS.

THERE WAS NO RECORD DEFENSE COUNSEL WAS INFORMED OF THE JURY NOTE AND NO RECORD THE JUDGE RESPONDED TO THE NOTE, A MODE OF PROCEEDINGS ERROR; ALTHOUGH THE NOTE REFERRED ONLY TO ONE COUNT, THE THREE COUNTS WERE FACTUALLY CONNECTED REQUIRING A NEW TRIAL (FIRST DEPT).

The First Department, reversing defendant's conviction and ordering a new trial, determined the absence of a record indicating defense counsel was notified of a note from the jury, or even that the judge responded to the note, was a mode of proceedings error. The People's argument that the note addressed only one count of

the indictment and the convictions on the other counts should survive was rejected. The nature of the jury's question was relevant to all counts:

The fourth note stated: "We the jury request to hear the judge's reading of count 1, including definitions and detail. Further, can you please confirm if it is up to our determination to decide if something is considered as "course of conduct" and "act"? As written on the verdict sheet, count 1 states "engaging in a course off conduct," we want to confirm if this is a typo or not." * * *

When an O'Rama error occurs, the question of whether the error in the proceedings related to some charges requires reversal on the other charges is determined on a case-by-case basis, with 'due regard' for the facts of the case, the nature of the error, and the 'potential for prejudicial impact on the over-all outcome' … .

Here, the three counts of the indictment were alleged to arise from a course or repetition of conduct in violation of the order of protection reasonably perceived as threatening to the victim's safety (count 1), through means both electronic/written (count 2) and telephonic (count 3). Thus, given the underlying factual relationship between the crimes, defendant is entitled to a new trial … . People v Jamison, 2024 NY Slip Op 02286, First Dept 4-30-24

Practice Point: If the record is silent about whether counsel was notified of a jury note and whether the judge even responded to the note, that is a mode of proceedings error.

Practice Point: Although the jury note related to only one of the three counts, the convictions on the other two counts could not survive because all the counts were factually connected.

APRIL 30, 2024

JUVENILE DELINQUENCY, SEX OFFENDER REGISTRATION ACT (SORA).

ALTHOUGH ARTICLE 3 OF THE FAMILY COURT ACT PROHIBITS CONSIDERATION OF A NEW YORK JUVENILE DELINQUENCY ADJUDICATION IN A SORA RISK-LEVEL ASSESSEMENT, CONSIDERATION OF A NEW JERSEY JUVENILE DELINQUENCY ADJUDICATION IS NOT PROHIBITED (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Brathwaite Nelson, determined that, although a New York juvenile delinquency adjudication under article 3 of the Family Court Act cannot be considered in a SORA risk-level determination, a New Jersey juvenile delinquency adjudication can be considered:

Although the express language in the Guidelines provides that a juvenile delinquency adjudication constitutes proof for the assessment of points under risk factors 8 and 9, in People v Campbell (98 AD3d 5), this Court held that a juvenile delinquency adjudication rendered under Family Court Act article 3 could not properly be considered in a SORA proceeding. * * *

… [T]his Court's holding in Campbell does not preclude a SORA court from considering the defendant's New Jersey adjudication. As discussed above, the prohibition in Campbell rested on the language of Family Court Act § 381.2 … . The Legislature, while protecting Family Court Act article 3 proceedings, has also identified the age of a sex offender at the time of the first sex offense to be a factor "indicative of high risk of repeat offense" to be considered under the Guidelines … , in addition to the nature of prior offenses … . While an adjudication or statements made to the court or an officer in a Family Court Act article 3 proceeding may not be used as proof at a SORA hearing, the People are not precluded from establishing the underlying conduct by other means … . The defendant's juvenile delinquency adjudication was not rendered under New York's Family Court Act article 3, and, thus, the provisions of the Family Court Act … do not apply to it. People v Hart, 2024 NY Slip Op 02071, Second Dept 4-17-24

Practice Point: A New York juvenile delinquency adjudication cannot be considered in a SORA risk-level assessment because of a prohibition in the Family

Court Act. Because the Family Court Act does not apply to a New Jersey juvenile delinquency determination, and because New Jersey does not have a similar prohibition, the New Jersey adjudication can be considered in a New York SORA risk-level assessment.

APRIL 17, 2024

MOLINEUX, SANDOVAL, UNCHARGED CRIMES AND BAD ACTS.

ALLOWING EVIDENCE OF UNCHARGED CRIMES AND BAD ACTS UNDER MOLINEUX, AND ALLOWING DEFENDANT HARVEY WEINSTEIN TO BE CROSS-EXAMINED ABOUT THOSE UNCHARGED ALLEGATIONS UNDER SANDOVAL, DEPRIVED HIM OF A FAIR TRIAL; CRIMINAL SEXUAL ACT AND RAPE CONVICTIONS REVERSED AND NEW TRIAL ORDERED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over two three-judge dissenting opinions, reversing defendant's criminal-sexual-act and rape convictions and ordering a new trial, determined the admission of evidence of uncharged crimes and bad acts under Molineux and the Sandoval ruling allowing the defendant to be cross-examined about the uncharged allegations, deprived defendant of a fair trial:

Before trial, the court granted the prosecution's application to admit certain testimony of uncharged crimes and miscellaneous bad acts as an exception to the Molineux rule, prohibiting such evidence, to establish defendant's intent and his understanding of the complainants' lack of consent. Thus, Complainant B could testify about defendant's uncharged sexual assaults against her before and after the charged rape and her awareness of defendant's abusive and threatening behavior, and three other women (the "Molineux Witnesses") could testify regarding defendant's sexual misconduct towards them years before and after the charged offenses involving Complainants A and B.

The court also granted … the prosecution's Sandoval application to cross-examine defendant on a broad range of uncharged bad acts should he testify. … [T]he

prosecution was permitted to ask about, for example, whether defendant: directed a witness to lie to defendant's wife; filed an application for a passport using a friend's social security number; told a woman he "could harm her professionally" but could also offer her a book publishing opportunity; used his entertainment company's budget for personal costs; withdrew from a business deal and asked others to cease its funding; hid a woman's clothes; insisted that members of his staff falsify a photo for a movie poster by photoshopping a female actor's head on another woman's nude body; told a private intelligence firm to manipulate or lie to people; scheduled a business meeting in 2012 with a woman under false pretenses; induced executives to lie on his behalf; made threats and committed acts of violence against people who worked for him; abandoned a colleague by the side of the road in a foreign country; physically attacked his brother; threatened to cut off a colleague's genitals with gardening shears; screamed and cursed at hotel restaurant staff after they told him the kitchen was closed; and threw a table of food. The court also permitted the prosecution to cross-examine defendant about the details of the sexual assault allegations described by the Molineux Witnesses during the prosecution's case-in-chief. People v Weinstein, 2024 NY Slip Op 02222, CtApp 4-25-24

Practice Point: Molineux and Sandoval are still alive and kicking.

APRIL 25, 2024

REMOVAL OF DISRUPTIVE DEFENDANT FROM TRIAL.

IT WAS NOT ERROR TO REMOVE THE DISRUPTIVE DEFENDANT FROM THE COURTROOM WITHOUT WARNING JUST PRIOR THE ANNOUNCEMENT OF THE VERDICT AND THE POLLING OF THE JURY; APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE THE "REMOVAL" ISSUE ON DIRECT APPEAL (CT APP).

The Court of appeals, in a full-fledged opinion by Judge Rivera, over an extensive dissenting opinion, reversing the grant of a writ of coram nobis, determined: (1) defendant was properly removed from court without warning before the verdict and the poll of the jurors; and (2) appellate counsel was not ineffective for failing

to raise defendant's removal from the court on direct appeal. Removal was justified by the defendant's acts of violence, verbal abuse and screaming in the courtroom:

We reject the prosecution's claim that any error was de minimis based on the timing of defendant's removal from the courtroom. There is no material stage of the proceeding that is any less consequential to a defendant's right to be present. However, we agree that the trial court's actions were appropriate under the unique circumstances of this case and in no way contrary to law.

A defendant has a constitutional right "to be present at all material stages of their criminal trial," which includes the reading of the verdict and the polling of the jury … . Further, CPL 260.20 provides that a defendant must be present during the trial but may be removed if they are "disorderly and disruptive" such that the "trial cannot be carried on with [the defendant] in the courtroom [] if , after [they] have been warned by the court that [they] will be removed if [they] continue such conduct, [they] continue to engage in such conduct." A court may dispense with the constitutional and statutory warnings when it is impracticable to give them … . … That was the case here. * * *

The Appellate Division erroneously concluded that the trial court violated defendant's right to be present, and therefore incorrectly granted defendant's writ of error coram nobis on the sole ground that appellate counsel was ineffective for failing to raise this meritless claim on direct appeal … . People v Dunton, 2024 NY Slip Op 02130, CtApp 4-23-24

Practice Point: In situations where warning a disruptive defendant is impractical, it is not error to remove the defendant from the courtroom without warning. Here defendant was removed just prior to the announcement of the verdict and the polling of the jurors, a material stage of the trial. Under the unique circumstances of this case defendant's removal was not error.

APRIL 23, 2024

SEARCHES AND SEIZURES, MANUAL BODY-CAVITY SEARCH.

ABSENT EXIGENT CIRCUMSTANCES, A MANUAL BODY-CAVITY SEARCH MUST BE SPECIFICALLY AUTHORIZED BY A WARRANT; THE DRUGS REMOVED FROM DEFENDANT'S BODY SHOULD HAVE BEEN SUPPRESSED (THIRD DEPT).

The Third Department, reversing County Court, determined the drugs were removed from defendant's body during a manual body-cavity search, which requires a warrant specifically allowing it absent exigent circumstances. The warrant allowing the search of defendant's person did not specifically authorize a manual body-cavity search and no exigent circumstances were alleged. The drugs should have been suppressed:

"There are three distinct and increasingly intrusive types of bodily examinations undertaken by law enforcement after certain arrests"; namely, a strip search, a visual body cavity inspection, and a manual body cavity search … . As relevant here, "[a] 'strip search' requires the arrestee to disrobe so that a police officer can visually inspect the person's body" … , whereas "a visual body cavity inspection involves the inspection of the subject's anal or genital areas without any physical contact by the officer and, in contrast, a manual body cavity search includes some degree of touching or probing of a body cavity that causes a physical intrusion beyond the body's surface" … . * * *

Here, the search warrant that had been previously obtained authorized the search of defendant's person but did not authorize a manual body cavity search. Notably, the warrant application made no such request. Moreover, although exigent circumstances bypassing the warrant requirement may be shown where "the drugs were in imminent danger of being destroyed, disseminated or lost, or that defendant was in medical distress" .. , no such showing has been made here. People v Chase, 2024 NY Slip Op 01837, Third Dept 4-4-24

Practice Point; Here there were no exigent circumstances and the warrant permitting a search of defendant's person did not specifically authorize a manual body-cavity search. The drugs removed from defendant's person during a manual body-cavity search should have been suppressed.

APRIL 4, 2024

SEX OFFENDERS, COMMUNITY-BASED EMPLOYMENT, EDUCATIONAL OR TRAINING OPPORTUNITIES.

DOCCS MUST MAKE SOME EFFORT TO FIND COMMUNITY-BASED EMPLOYMENT, EDUCATIONAL OR TRAINING OPPORTUNITIES FOR SEX OFFENDERS HELD IN THE RESIDENTIAL TREATMENT FACILITY AT FISHKILL CORRECTIONAL FACILITY (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Troutman, over two partial dissents by three judges, reversing (modifying) the appellate division, determined the Department of Corrections and Community Supervision (DOCCS) must make some effort to find community-based employment, educational or training opportunities for sex offenders held in the residential treatment facility (RTF) at Fishkill Correctional Facility:

Plaintiffs are convicted sex offenders who were confined in the Fishkill RTF while on postrelease supervision (PRS). Since 2014, DOCCS has used the Fishkill RTF to confine convicted sex offenders past the maximum expiration dates of their carceral sentences in circumstances where the offenders are unable to find housing in compliance with the requirements of the Sexual Assault Reform Act (SARA), which bars them from living within 1,000 feet of a school … . * * *

We agree with plaintiffs that DOCCS cannot categorically refuse to attempt to secure community-based opportunities for RTF residents. Crucially, while DOCCS surely has discretion in operating its RTF programs, the record here demonstrates that DOCCS is exercising no discretion with respect to community-based opportunities. DOCCS instead offers only speculation that the opportunities would be difficult to secure for the types of offenders housed in that RTF. To be sure, the statute [Correction Law § 73 [1]] establishes no percentage or threshold number of RTF residents who must be allowed outside the facility to engage in community-based activities. But defendants incorrectly construe the permissive phrase, "may be allowed to go outside," to empower DOCCS to bar all RTF residents categorically from accessing community-based opportunities without considering

whether such opportunities are available or appropriate. A comprehensive reading of the statutory provisions cannot support such a construction. By reading the permissive phrase in isolation, defendants read the definitional provision out of the statute, eviscerate the character and purpose of the RTF, and undermine the legislative intent. Alcantara v Annucci, 2024 NY Slip Op 02224, CtApp 4-25-24

Practice Point: The Department of Corrections and Community Supervision cannot interpret the Correction Law such that the purpose of the statute (here finding community-based employment, educational or training opportunities for sex offenders) is thwarted.

APRIL 25, 2024

YOUTHFUL OFFENDERS, CONSENT TO COMMUNITY SERVICE.

A YOUTHFUL OFFENDER MUST CONSENT TO COMMUNITY SERVICE IMPOSED AS PART OF A SENTENCE (SECOND DEPT).

The Second Department, modifying the sentence imposed by County Court, noted that the defendant youthful offender did not consent to community service as part of his sentence, as required by the Penal Law:

… [A] court may require a defendant, as a condition of a sentence of probation, to "[p]erform services for a public or not-for-profit corporation, association, institution[,] or agency" (Penal Law § 65.10[2][h]; cf. CPL 170.55). However, a community service condition "may only be imposed upon conviction of" certain types of crimes, including a "class E felony, or a youthful offender finding replacing any such conviction, where the defendant has consented to the amount and conditions of such service" … . …

… [T]he defendant correctly asserts that "the record is . . . devoid of any indication that [he] actually consented to the terms and conditions of community service imposed at the time of sentencing" … . The comments of defense counsel at sentencing did not provide the requisite consent, as defense counsel's suggestion of community service was made in the context of arguing that a term of incarceration was unwarranted. In any event, even if defense counsel's statements could be construed as providing the defendant's "consent to the possibility of community

service . . . , there is no proof whatsoever on the record that [the] defendant consented to the amount and conditions of the community service actually imposed by [the] County Court, which is what is specifically required by [Penal Law § 65.10(2)(h)]" … . People v Joseph D., 2024 NY Slip Op 02064, Second Dept 4-17-24

Practice Point: Penal Law 65.10 requires the consent of a youthful offender to community service as part of a sentence.

APRIL 17, 2024