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Reversal Report
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An Organized Compilation of Summaries of Selected Decisions Addressing Criminal Law, Mostly Reversals, Released by Our New York State Appellate Courts and Posted on the New York Appellate Digest in June 2025. 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, PRESERVATION OF ERROR, ATTORNEY FAILED TO INVOKE THE CONFRONTATION CLAUSE IN MOTION TO DISMISS.

A POLICE OFFICER DESCRIBED STATEMENTS MADE BY THE VICTIMS BUT THE VICTIMS DID NOT TESTIFY; ALTHOUGH DEFENSE COUNSEL MENTIONED THE LACK OF CROSS-EXAMINATION IN A SUFFICIENCY-OF-EVIDENCE ARGUMENT, THE CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES WAS NOT SPECIFICALLY RAISED; THEREFORE THE CONSTITUTIONAL ISSUE WAS NOT PRESERVED FOR APPEAL; THERE WAS AN EXTENSIVE THREE-JUDGE DISSENT (CT APP).

The Court of Appeals, affirming defendant's conviction, over a three-judge dissent, determined the constitutional "confrontation" issue first raised on appeal had not been preserved. A police officer testified about the identities and physical descriptions of the assailants provided by one of the victims while she was being treated in an ambulance. The victims were expected to testify but never did:

Defendant's motion at the close of the People's case did not invoke the Confrontation Clause and the colloquy that took place between defense counsel and the court makes clear that the motion to dismiss was neither intended nor understood to raise a constitutional issue. Moreover, counsel did not invoke or rely

on any caselaw dealing with constitutional protections. Instead, counsel made evidentiary arguments regarding the persuasive quality of the prosecution's proof and, when asked by the court, confirmed that the motion was limited to the sufficiency of the evidence. Further, the timing of defendant's motion at the close of the People's case—which defense counsel specifically referred to as "a trial order of dismissal" …—suggests that defendant's aim was not to challenge testimony of the victim's statements as violative of his right to confrontation, but simply as failing to meet the evidentiary bar for a prima facie case … . Additionally, counsel repeatedly told the court that his motion was "focus[ed]" on the third-degree robbery charge, demonstrating that the argument was a legal insufficiency one, rather than a Confrontation Clause challenge, which would necessarily apply to all charges with equal force. Contrary to defendant's argument, the mere reference to a lack of cross-examination was insufficient to alert the court that defendant was making a constitutional argument … . People v Bacon, 2025 NY Slip Op 03692, CtApp 6-18-25

Practice Point: Here the violation of defendant's constitutional right to confront the witnesses against him was a viable issue because statements made by two witness were described by a police officer but the witnesses did not testify. Although defense counsel mentioned the inability to cross-examine the witnesses in a "sufficiency-of-evidence" argument before the trial court, the constitutional confrontation argument was not specifically raised. The majority, over an extensive three-judge dissent, determined the constitutional issue was not preserved for appeal.

June 18, 2025

BAIL.

MAKING A TERRORISTIC THREAT IS A BAILABLE FELONY (CT APP).

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Hallligan, over a three-judge dissent, determined "making a terroristic threat" is a bailable felony:

Michael Cavagnolo was arrested and charged with making a terroristic threat after he repeatedly called the Hyde Park Police Department emergency line threatening to commit violent acts against officers, their families, and Police Department property. County Court fixed bail pursuant to CPL 510.10 (4) (a). That paragraph makes bailable all violent felony offenses listed in Penal Law § 70.02, with two specific exceptions. One of the offenses listed in Penal Law § 70.02 is the crime of making a terroristic threat (see Penal Law § 70.02 [1] [c]). Paragraph (g) of CPL 510.10 (4), however, makes bailable the felony crimes of terrorism defined in Penal Law article 490 but expressly excludes the crime of making a terroristic threat.

Although these two paragraphs are difficult to reconcile, the text and disjunctive structure of CPL 510.10 (4) indicate that paragraph (g) was not intended to narrow the independent authorization provided in paragraph (a) to set monetary bail for all violent felony offenses listed therein. We therefore hold that making a terroristic threat is a bail-eligible offense. Accordingly, we reverse. People ex rel. Ellis v Imperati, 2025 NY Slip Op 03646, CtApp 6-17-25

Practice Point: Despite seemingly conflicting statutory provisions, "making a terroristic threat" was deemed a bailable felony by the Court of Appeals.

June 17, 2025

BAIL, OFFENSES COMMITTED WHILE ON BAIL, JUDGES.

BAIL MAY BE IMPOSED ON A DEFENDANT WHO IS CHARGED WITH COMMITTING NEW OFFENSES WHILE OUT ON BAIL, EVEN IF THE NEW OFFENSES WOULD NOT OTHERWISE QUALIFY FOR THE IMPOSITION OF BAIL (CT APP).

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Garcia, over a two-judge concurrence, determined a defendant who commits new offenses when out on bail is subject to the imposition of bail for the new offenses, even when the new offenses would not otherwise have qualified for the imposition of bail:

CPL 510.10 (4) (t) provides a judge with discretion to set bail on certain otherwise non-qualifying offenses committed after a defendant has been "released under conditions" on a prior charge. The issue raised on this appeal is whether a defendant who is arrested on new charges after having been released on bail on the prior, underlying charge is "released under conditions" within the meaning of that provision. We hold that the statute applies in such circumstances, and because affirmative habeas relief is no longer available, we reverse the Appellate Division … .

The 2019 bail reform legislation eliminated cash bail for most crimes, except for certain specified qualifying offenses listed in CPL 510.10 (4) … . In 2020, the legislature amended subdivision (4) by expanding the categories of offenses that qualified for bail. The changes included the addition of CPL 510.10 (4) (t), a harm-on-harm provision, by which "an otherwise non-qualifying offense may be converted into a qualifying offense" … . Under that provision, certain ineligible crimes may otherwise qualify for bail if those crimes "arose from conduct occurring while the defendant was released on his or her own recognizance, released under conditions or had yet to be arraigned after the issuance of a desk appearance ticket for a separate felony or class A misdemeanor involving harm to an identifiable person or property" … . For purposes of section (4) (t), the underlying crime need not be a qualifying offense … . People ex rel. Welch v Maginley-Liddie, 2025 NY Slip Op 03645, CtApp 6-17-25

Practice Point: Where a defendant is charged with new offenses committed while on bail, bail may be imposed for the new offenses even where they otherwise would not qualify for the imposition of bail.

June 17, 2025

CONSTRUCTIVE POSSESSION OF DRUGS, CONVICTION AGAINST THE WEIGHT OF THE EVIDENCE, APPEALS.

ALTHOUGH THE EVIDENCE OF DEFENDANT'S CONSTRUCTIVE POSSESSION OF DRUGS AND DRUG PARAPHERNALIA FOUND IN HIS GIRLFRIEND'S APARTMENT WAS DEEMED LEGALLY SUFFICIENT, THE FINDING THAT DEFENDANT CONSTRUCTIVELY POSSESSED THE DRUGS AND PRAPHERNALIA WAS DEEMED AGAINST THE WEIGHT OF THE EVIDENCE (FOURTH DEPT).

The Fourth Department, reversing defendant's bench-trial conviction of criminal possession of a controlled substance and criminally using drug paraphernalia, determined the finding that defendant constructively possessed the drugs and paraphernalia located in his girlfriend's apartment was against the weight of the evidence. Note that the Fourth Department concluded there was legally sufficient evidence of constructive possession:

… "[W]here there is no evidence that the defendant actually possessed the controlled substance or drug paraphernalia, the People are required to establish that the defendant exercised dominion or control over the property by a sufficient level of control over the area in which the contraband is found" … . The People may establish such constructive possession by circumstantial evidence … , "but a defendant's mere presence in the area in which the contraband is discovered is insufficient to establish constructive possession" … .

Here, while the People adduced evidence establishing that defendant had a key to the apartment and stayed there "from time to time," defendant was not a party to the lease and a search of the premises did not reveal anything to "specifically connect[ ] defendant to the places where the contraband was ultimately found" … . Moreover, none of the contraband was in plain view … and, thus, no statutory presumption of defendant's knowing possession applied … .

We conclude that the weight of the evidence does not support a finding that defendant "exercised dominion or control over the [contraband] by a sufficient level of control over the area in which [it was] found" … . People v Smith, 2025 NY Slip Op 03454, Fourth Dept 6-6-25

Practice Point: Consult this decision for an example of when evidence is legally sufficient to withstand a motion for a trial order of dismissal but a finding based on that same evidence is deemed "against the weight of the evidence."

June 6, 2025

DISCOVERY, POLICE DISCIPLINARY RECORDS.

ALTHOUGH A REVIEW OF POLICE DISCIPLINARY RECORDS BY A PANEL OF SENIOR PROSECUTORS IN RESPONSE TO A DEFENDANT'S DISCOVERY DEMAND IS NOT PERMITTED, THE REMEDY FOR SUCH A REVIEW IS NOT GRANTING DEFENDANT'S SPEEDY TRIAL MOTION; RATHER THE MATTER IS REMITTED FOR A REVIEW OF THE RECORDS BY THE TRIAL JUDGE AND A FINDING WHETHER THE PEOPLE EXERCISED DUE DILIGENCE; IF NOT, DEFENDANT'S SPEEDY TRIAL MOTION CAN BE CONSIDERED (FOURTH DEPT).

The Fourth Department, remitting the matter, held that the trial judge should review the police disciplinary records, which had been reviewed by a panel of senior prosecutors before they were provided to the defense, to determine if any relevant records were improperly withheld. If the People did not exercise due diligence, the certificate of compliance could be illusory and defendant might be entitled to a speedy-trial dismissal. The court noted that prior caselaw has ruled that the review of police disciplinary records by a panel of senior prosecutors is not permitted:

According to defendant, reversal is required because, as in People v Sumler (228 AD3d 1350, 1354 [4th Dept 2024]) and People v Rojas-Aponte (224 AD3d 1264, 1266 [4th Dept 2024]), the People used a screening panel of senior prosecutors to determine which police disciplinary records were related to the subject matter of the case, i.e., subject to discovery as impeachment material under CPL 245.20 (1) (k), and which police disciplinary matters did not relate to the subject matter of the case and thus not subject to automatic discovery. Although the People's use of a

screening panel in this case is not permitted under our prior case law, we do not agree with defendant that he is necessarily entitled to dismissal under CPL 30.30.

Instead, we hold the case, reserve decision, and remit the matter to County Court for the court to determine whether the People withheld any police disciplinary records that relate to the subject matter of the case. If the court determines that there were disciplinary records subject to disclosure that were not turned over to the defense in a timely manner, then the court must determine whether the People exercised due diligence in locating and disclosing those records … . People v Sanders, 2025 NY Slip Op 03884, Fourth Dept 6-27-25

Practice Point: A review by senior prosecutors to determine whether police disciplinary records should be provided to the defense is not permitted.

Practice Point: Where, as here, that review process was used, the remedy is remitting the matter for a review of the records by the trial judge and a finding whether the People exercised due diligence.

June 27, 2025

EVIDENCE, INSUFFICIENT EVIDENCE OF VALUE OF STOLEN PROPERTY.

THE CONCLUSORY STATEMENTS BY THE OWNER OF THE STOLEN CAR AND AN INVESTIGATING OFFICER FAILED TO DEMONSTRATE THE VALUE OF THE CAR WAS GREATER THAN $3000; CRIMINAL POSSESSION OF STOLEN PROPERTY THIRD DEGREE CONVICTION REVERSED (FOURTH DEPT).

The Fourth Department, reversing the possession-of-stolen-property-third-degree conviction, determined the value of the stolen property, a vehicle, was not proven:

Here, in addition to photographs of the vehicle admitted in evidence, the victim testified that he purchased the subject 2010 Toyota Prius as a new vehicle for approximately $20,000, that he drove it 240,000 miles over the course of the subsequent 12 years, and that it was in a "[h]eavily used," albeit running, condition

when it was stolen. Although the victim testified that he had previously consulted the "blue book" when considering whether to sell the vehicle, he ultimately provided, based on the condition of the vehicle and unspecified research, only vague testimony that his "guess" or "approximate estimation" was that the vehicle was valued at $4,000, which constituted a "[c]onclusory statement[or] rough estimate[ ] of value [that is] not sufficient to establish the value of the property" at the time of its theft … . Moreover, although a police officer testified that he estimated that the vehicle was valued between $6,000 and $10,000 based on his observations of the vehicle and consultation with the "blue book," that testimony was also conclusory. Indeed, there was no evidence that the officer had accurately ascertained the "blue book" value—which inexplicably varied significantly from the victim's estimate—by appropriately accounting for the age, mileage, and condition of the vehicle … . Based on the evidence of value in the record, we cannot conclude " 'that the jury ha[d] a reasonable basis for inferring, rather than speculating, that the value of the property exceeded the statutory threshold' of $3,000″ … . Consequently, we conclude on this record that the evidence is legally insufficient to establish that the value of the stolen vehicle was greater than $3,000 … . People v Szurgot, 2025 NY Slip Op 03906, Fourth Dept 6-27-25

Practice Point: Here the conclusory statements by the owner of the stolen car and the investigating officer estimating the value of the car constituted legally insufficient evidence that the value of the stolen property was greater than $3000.

June 27, 2025

GUILTY PLEAS, JUDGES, APPEALS, CONSTITUTIONAL LAW.

THE JUDGE'S PROVIDING ERRONEOUS INFORMATION ABOUT THE MAXIMUM SENTENCE DEFENDANT WAS FACING NEED NOT BE PRESERVED FOR APPEAL AND RENDERED THE GUILTY PLEA INVOLUNTARY (THIRD DEPT).

he Third Department, reversing defendant's conviction by guilty plea, determined the judge's providing erroneous information about the maximum sentence

defendant was facing did not need to be preserved for appeal and rendered the guilty plea involuntary:

… County Court advised [defendant] that, if he elected to proceed to trial and was convicted of all offenses as a second felony drug offender, he faced a sentencing exposure of 36 years in prison rather than the correct, capped term of 30 years … . … [A]s the Court of Appeals recently made clear, where "the court provides the defendant with erroneous information concerning their maximum sentencing exposure that is contrary to the undisputed text of the Penal Law, fails to correct its error on the record, and the defendant has no apparent reason to question the accuracy of that information, the defendant need not preserve a challenge to the voluntariness of the guilty plea on that ground" … . * * *

Although defendant here was no stranger to the criminal justice system and received a reasonable sentencing commitment from County Court, the plea colloquy itself reflects that defendant believed that he had been overcharged and questioned whether he would be convicted if he went to trial. Defendant made clear during the plea colloquy, in fact, that he was only pleading guilty to the indictment because he would rather[*3]"get the high/low of 16/14″ than go to trial and risk "more time in state prison." Even then, defendant remained conflicted about pleading guilty until the moment he entered his formal plea, asking County Court immediately before he did so to repeat the potential sentencing exposure he faced if he did not "want to go through all of this and [went] to trial." … .People v Shaw, 2025 NY Slip Op 03358, Third Dept 6-5-25

Practice Point" Here the judge told defendant he was facing 36 years in prison when the actual maximum was 30. That error need not be preserved for appeal and, based on defendant's remarks and questions at sentencing, was deemed to have rendered defendant's guilty plea involuntary.

June 5, 2025

HARASSMENT AS A FAMILY OFFENSE, FAMILY LAW.

THE FAMILY OFFENSE OF HARASSMENT REQUIRES A COURSE OF CONDUCT; A SINGLE, ISOLATED INCIDENT IS INSUFFICIENT (SECOND DEPT).

The Second Department, reversing (modifying) Family Court, determined the evidence of the family offense of harassment was not sufficient. A single isolated incident is not enough:

" … [A] person commits the family offense of harassment in the second degree when, with intent to harass, annoy, or alarm another person, he or she 'engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose'" … . "[T]here is no question that an isolated incident cannot support a finding of harassment" … .

Here, contrary to the Family Court's finding, the father failed to establish by a fair preponderance of the evidence that the mother committed the family offense of harassment in the second degree, as the father failed to identify more than an isolated incident (see Penal Law § 240.26[3] …). The father testified to only one isolated incident involving a verbal dispute that he had with the mother and her husband … . That dispute occurred on the driveway of the father's home when the mother and her husband dropped off the child at the father's home, instead of at a police station, which the father claimed was the agreed upon exchange location. Matter of Martinez v Toole, 2025 NY Slip Op 03721, Second Dept 6-18-25

Practice Point: The family offense of harassment requires proof of a course of conduct, a single incident does not suffice.

June 18, 2025

IDENTIFICATION PROCEDURE, UNDULY SUGGESTIVE.

THE IDENTIFICATION PROCEDURE WHICH USED DEFENDANT'S ARREST PHOTOGRAPH WAS UNDULY SUGGESTIVE REQUIRING SUPPRESSION OF THE RELATED IDENTIFICATIONS (SECOND DEPT).

The Second Department, reversing the burglary conviction and ordering a new trial on that count, determined the identification procedure, using an arrest photograph of the defendant, was unduly suggestive and the related identifications should have been suppressed:

Although the complainant's identification of a Facebook photograph was not the product of a police-arranged identification procedure, the complainant's identifications of the defendant from a single arrest photograph were the result of unduly suggestive identification procedures, and those identifications should have been suppressed … . Thus, the defendant is entitled to a new trial on the count of burglary in the second degree, to be preceded by a hearing to determine whether an independent source exists for the complainant's identification of the defendant … . People v Wheeler, 2025 NY Slip Op 03747, Second Dept 6-18-25

Practice Point: Here the complainant's identifications of the defendant from an arrest photograph should have been suppressed. The procedure was unduly suggestive.

June 18, 2025

IDENTIFICATION WAS NOT CONFIRMATORY AND SHOULD HAVE BEEN SUPPRESSED.

WHEN A WITNESS'S IDENTIFICATION OF THE DEFENDANT FROM A PHOTOGRAPH SHOWN TO HIM BY THE POLICE IS DEEMED "CONFIRMATORY," THAT CONCLUSION IS TANTAMOUNT TO A DETERMINATION AS A MATTER OF LAW THAT THE POLICE IDENTIFICATION PROCEDURE WAS NOT SUGGESTIVE AND COULD NOT HAVE LED TO THE MISIDENTIFICATION OF THE DEFENDANT BECAUSE THE WITNESS KNEW THE DEFENDANT WELL; HERE THE PROOF THE IDENTIFICATION WAS CONFIRMATORY WAS INSUFFICIENT; THE IDENTIFICATION TESTIMONY SHOULD HAVE BEEN SUPPRESSED; NEW TRIAL ORDERED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, suppressing identification testimony and ordering a new trial, determined the evidence did not support the conclusion the witness's identification of the defendant from a photograph shown to him by the police was "confirmatory." Deeming an identification as confirmatory is tantamount to finding there is no chance the police identification procedure could lead to misidentification because the witness knows the defendant well:

"A court's invocation of the 'confirmatory identification' exception is . . . tantamount to a conclusion that, as a matter of law, the witness is so familiar with the defendant that there is 'little or no risk' that police suggestion could lead to a misidentification" … . "In effect, it is a ruling that however suggestive or unfair the identification procedure might be, there is virtually no possibility that the witness could misidentify the defendant" … . "The People bear the burden in any instance they claim that a citizen identification procedure was 'merely confirmatory' " … . "[T]he People must show that the protagonists are known to one another, or where . . . there is no mutual relationship, that the witness knows defendant so well as to be impervious to police suggestion" … . "[W]hether the exception applies depends on the extent of the prior relationship, which is necessarily a question of degree" … . In determining whether the witness is sufficiently familiar with the defendant,

a court may consider factors such as "the number of times [the witness] viewed [the] defendant prior to the crime, the duration and nature of the encounters, the setting, the period of time over which the viewings occurred, the time elapsed between the crime and the previous viewings, and whether the two had any conversations" … .

Here … the evidence was insufficient to establish that the witness's pretrial photo identification of defendant was confirmatory as a matter of law because, "[a]lthough the witness testified that he knew defendant because he had seen him 'a couple of times' at the barber shop, and that the two had each other's phone numbers, [the witness] also testified that he did not know defendant well, that he knew him only by a common nickname, and that they never spoke again after the assault" … . … [T]he witness testified at trial that he had seen defendant a couple times at the barber shop … , and the evidence at the hearing similarly established that the witness had either interacted with defendant twice or approximately four or five times including a couple of times at the barber shop. … [T]he witness testified … that he knew defendant "not much but a little bit," that he knew defendant only by his nickname and not his given name, and that he never heard from defendant again after the assault … . People v Alcaraz-Ubiles, 2025 NY Slip Op 03929, Fourth Dept 6-27-25

Practice Point: Consult this decision for insight into the quantum of evidence necessary to prove a witness's identification of the defendant from a photograph shown to him by the police was "confirmatory" because the defendant was well known to the witness.

June 27, 2025

INCLUSORY CONCURRENT COUNTS, MURDER SECOND.

HERE THE MURDER SECOND DEGREE COUNTS MUST BE DISMISSED AS INCLUSORY CONCURRENT COUNTS OF THE COUNT OF MURDER IN THE FIRST DEGREE (FOURT DEPT).

The Fourth Department, modifying the judgment of conviction, noted that the murder second degree counts must be dismissed as inclusory concurrent counts of

the count of murder in the first degree. People v Dean, 2025 NY Slip Op 03878, Fourth Dept 6-27-25

June 27, 2025

INEFFECTIVE ASSISTANCE, ATTORNEYS, EVIDENCE.

DEFENSE COUNSEL WAS INEFFECTIVE FOR NOT MOVING TO SUPPRESS CREDIT CARDS SEIZED DURING THE EXECUTION OF A SEARCH WARRANT WHICH WERE NOT WITHIN THE SCOPE OF THE WARRANT; THE INCRIMINATING NATURE OF THE CREDIT CARDS WAS NOT IMMEDIATELEY APPARENT (SECOND DEPT).

The Second Department, reversing defendant's conviction and ordering a new trial, determined defense counsel was ineffective in failing to move to suppress credit cards seized during the execution of a search warrant. The credit cards were not within the scope of the warrant and there was no showing the incriminating nature of the credit cards was immediately apparent to the officer who seized them:

… [I]n an affirmation in support of the defendant's CPL 440.10 motion, trial counsel averred that he "failed to consider that the seized credit cards were not described in the search warrant" and that he "failed to research the applicable law on exceptions to the warrant requirement." Trial counsel admitted that his subsequent failure to move to suppress the credit cards in particular was not the result of a strategic decision and that he would have so moved if he had researched the law concerning the plain view exception to the warrant requirement. Thus, by his own admission, trial counsel's failure to move for suppression of the credit cards due to their warrantless seizure cannot be characterized as a legitimate strategic decision … .

Defense counsel's "investigation of the law, the facts, and the issues that are relevant to the case" is "[e]ssential to any representation, and to the attorney's consideration of the best course of action on behalf of the client" … . Since the defendant established that trial 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" … he demonstrated that he did not receive effective assistance of counsel. Thus, the Supreme Court should have granted the defendant's motion pursuant to CPL 440.10 to vacate the judgment of conviction on this basis and ordered a new trial. People v Goodluck, 2025 NY Slip Op 03343, Second Dept 6-4-25

Practice Point: Here defense counsel's failure to investigate the law regarding the seizure of evidence outside the scope of a search warrant was deemed ineffective assistance requiring a new trial. Note that defense counsel, in support of defendant's motion, submitted an affirmation admitting the failure to investigate and acknowledging that the omission was not a deliberate defense strategy.

June 4, 2025

INEFFECTIVE ASSISTANCE, ATTORNEYS.

DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTOR'S REPEATED CLAIMS, DURING SUMMATION, THAT EVERYTHING THE JURY HEARD FROM DEFENDANT WERE "LIES;" MANSLAUGHTER CONVICTION REVERSED AND NEW TRIAL ORDERED (CT APP).

The Court of Appeals, reversing defendant's manslaughter conviction and ordering a new trial, in a full-fledged opinion by Judge Halligan, with two concurrences, determined defense counsel was ineffective for failing to object to the prosecutor's claims during summation that defendant had repeatedly lied. Defendant had been abused by the victim and had asserted the justification defense. She testified she stabbed the victim once in fear for her life when the victim lunged at her, after he had raped her:

During summation, the prosecutor sought to undermine the defendant's justification defense by suggesting that the defendant was not credible. In furtherance of that strategy, the prosecutor told the jury, "You never heard testimony that [the defendant] was in fear for her life. You never heard testimony that she was in fear of serious injury. Nothing." As the People concede, this

statement was false. The defendant had, in fact, testified that immediately before the stabbing she was "scared for my life," and when subsequently asked whether she had testified that she was "afraid for your life," the defendant responded "Yes, I was."

Additionally, the prosecutor claimed in summation that the defendant had lied on the stand, using the word "lie" or "lies" fourteen times in total. Among other comments, the prosecutor claimed that "the only thing we can get out of [the defendant] are lies"; that her testimony was "unsubstantiated wild lies"; and that her testimony was "[m]eant to distract you from . . . the endless lies she has told you throughout this entire process." The prosecutor also posed rhetorical questions along similar lines to the jury: "How could you possibly believe one thing that comes out of her mouth after all the lies she told you?" and "What wouldn't she lie about?" Following summations, the court excused the jury and expressed concern about "[t]he repeated use of the word lies, which I also was going to limit if not eliminate," but noted that it did not do so as the word "had been used throughout the trial without objection and I didn't think it was proper for me to do it at this point."

Defense counsel did not object either to the prosecutor's flat misstatement of the defendant's testimony that she feared for her life or to the repeated use of the word "lies." People v T.P., 2025 NY Slip Op 03642, CtApp 6-17-25

Practice Point: Consult this decision for insight into when a prosecutor can go too far in summation.

June 17, 2025

JURY INSTRUCTIONS, AFFIRMATIVE DEFENSE TO FELONY MURDER.

EVEN WHERE THERE IS EVIDENCE DEFENDANT INTENTIONALLY AIDED IN THE COMMISSION OF THE UNDERLYING FELONY, THE TRIAL JUDGE MUST INSTRUCT THE JURY ON THE FELONY-MURDER AFFIRMATIVE DEFENSE WHERE THERE IS EVIDENCE THE DEFENDANT DID NOT PARTICIPATE IN THE ACTS CAUSING THE VICTIM'S DEATH AND THERE IS EVIDENCE TO SUPPORT ALL THE ELEMENTS OF THE DEFENSE (FOURTH DEPT).

The Fourth Department, reversing the murder second degree conviction and ordering a new trial, determined the judge should have given the jury instruction for the affirmative defense to felony murder. When defendant's back was turned, a co-defendant shot and killed a man standing at the passenger door of a vehicle. Defendant then knocked to the ground a woman standing at the driver's side of the vehicle and stole her purse. Defendant was not armed and stated to the police he did not know the co-defendant intended to commit a crime:

It is an affirmative defense to felony murder that the defendant "(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and (b) Was not armed with a deadly weapon, or any instrument, article or substance [*2]readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and (c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and (d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury" (Penal Law § 125.25 [3]). * * *

Even where, as here, the evidence shows that a defendant "intentionally aided [the primary assailant] in the commission of" the underlying felony, a trial court errs in refusing to charge the affirmative defense to felony murder where there is evidence that the defendant "did not participate in the acts causing the victim's death" … . Here, the trial evidence was "reasonably supportive of the view" that defendant satisfied the four elements of the affirmative defense and, "regardless of evidence

to the contrary, the court [was] without discretion to deny the charge, and error in this regard requires reversal and a new trial" … . People v Rosa, 2025 NY Slip Op 03907, Fourth Dept 6-27-25

Practice Point: Where there is evidence to support the elements of the affirmative defense to felony murder, the judge has no discretion and must instruct the jury on the defense, even where there is evidence to the contrary.

June 27, 2025

JURY INSTRUCTIONS, INNOCENT POSSESSION OF A WEAPON.

DEFENDANT CLAIMED HE TOOK POSSESSION OF THE VICTIM'S GUN AND FIRED AFTER THE VICTIM FIRED AT HIM; DEFENDANT WAS ACQUITTED OF ATTEMPTED MURDER, ATTEMPTED ASSAULT AND ASSAULT BUT CONVICTED OF CRIMINAL POSSESSION OF A WEAPON; THE JURY SHOULD HAVE BEEN INSTRUCTED ON "TEMPORARY LAWFUL POSSESSION OF A WEAPON;" NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing defendant's possession of a weapon conviction and ordering a new trial, determined the defense request for a jury instruction on lawful possession of a weapon should have been granted. Defendant raised the justification defense and was acquitted of the attempted murder, attempted assault and assault charges:

According to the defense theory, Farmer [the victim] fired several shots at the defendant before the defendant took possession of a gun and fired back at Farmer. Defense counsel also requested a charge on the defense of justification … as to the counts of criminal possession of a weapon, and a charge on the defense of temporary and lawful possession of a weapon as to those counts. The Supreme Court issued a deadly physical force justification charge, but declined to instruct the jury on the defenses of justification pursuant to Penal Law § 35.05(2) and temporary and lawful possession of a weapon with respect to the counts of criminal possession of a weapon. * * *

As reflected by the fact that the jury acquitted the defendant of the charges of attempted murder in the second degree, assault in the second degree, and attempted assault in the first degree, based upon a justification defense, there was a reasonable view of the evidence that the defendant took possession of the gun with a valid legal excuse … . The fact that the defendant fired a gun on a public street does "not negate a defendant's entitlement to a temporary lawful possession instruction where the shooting was justified and the possession was otherwise lawful" … . Further, "the defendant's intent to turn the subject weapon over to the lawful authorities is not a necessary element of the defense of temporary and lawful possession" … . Moreover, there is no evidence that the defendant retained the gun after fleeing the location of the shooting … . People v Walker, 2025 NY Slip Op 03830, Second Dept 6-25-25

Practice Point: Defendant claimed he took possession of the victim's gun and fired only after the victim had fired at him. The jury should have been instructed on "temporary lawful possession of a weapon."

June 25, 2025

JURY NOTE, MISSING TRANSCRIPT OF RESPONSE TO JURY NOTE DOES NOT WARRANT REVERSAL, MOTION TO VACATE CONVICTION REQUIRED HEARING.

A MISSING JURY-NOTE-RESPONSE TRANSCRIPT DOES NOT WARRANT REVERSAL UNLESS THE DEFENDANT SHOWS ENTITLEMENT TO A RECONSTRUCTION HEARING AND THE TRANSCRIPT CANNOT BE RECONSTRUCTED, NOT THE CASE HERE; WHEN A MOTION TO VACATE A CONVICTION ON INEFFECTIVE-ASSISTANCE GROUNDS TURNS ON FACTS OUTSIDE THE RECORD, DENIAL WITHOUT A HEARING IS AN ABUSE OF DISCRETION (CT APP).

The Court of Appeals, remitting the matter for a hearing, in a full-fledged opinion by Judge Singas, determined (1) the absence of the transcript of a response to a jury note did not require reversal, and (2) defendant's motion to vacate his

conviction on ineffective-assistance grounds should not have been denied without a hearing:

Re: missing response-to-a-jury-note transcript:

… [A] missing transcript alone does not entitle a defendant to the extreme remedy of vacatur, but may entitle a defendant to a reconstruction hearing … . To be sure, if a defendant shows that they are entitled to a reconstruction hearing, and that the missing transcript at issue "cannot be reconstructed . . . , there must be a reversal" … . But defendant has not made that showing. Thus, the missing transcript does not warrant reversing defendant's conviction.

Re: motion to vacate conviction, ineffective assistance:

Where a defendant moves to vacate their conviction under CPL 440.10, the court "must" decide "whether the motion is determinable without a hearing to resolve questions of fact" … . The court "may deny" the motion summarily under enumerated circumstances, including where purported facts essential to the motion are unsupported by "sworn allegations" that "substantiat[e] or tend[ ] to substantiate" those facts … , or where such a fact "is contradicted by a court record or other official document" and "there is no reasonable possibility that [the] allegation is true" … . We review a CPL article 440 motion's summary denial for abuse of discretion … .

Defendant's ineffective assistance claim cannot be decided without first resolving questions of fact. Defense counsel's affirmation, together with the trial record, suggest that counsel may have lacked a strategic or other legitimate basis for one or more of his actions relating to eyewitness identification testimony at the heart of the People's proof. Whether counsel in fact had such a basis for his conduct turns on factual information outside the present record that should be developed at an evidentiary hearing. People v Salas, 2025 NY Slip Op 03603, CtApp 6-12-25

Practice Point: A missing jury-note-response transcript does not require reversal unless the defendant shows entitlement to a reconstruction hearing and the transcript cannot be reconstructed.

Practice Point: Where a motion to vacate the conviction on ineffective-assistance grounds turns on facts outside the record, here the strategic or other legitimate

basis for counsel's actions, it is an abuse of discretion to deny the motion without a hearing.

June 12, 2025

JUVENILE DELINQUENCY, RESTITUTION, JUDGES.

WITHOUT AN AGREEMENT ON THE RECORD, A FAMILY COURT JUDGE CANNOT ORDER RESTITUTION IN A JUVENILE DELINQUENCY PROCEEDING FOR ITEMS NOT RECITED IN THE PETITION (THIRD DEPT).

The Third Department, reversing Family Court in this juvenile delinquency proceeding, determined there was nothing in he record demonstrating respondent (juvenile) accepted an admission in exchange for restitution on all charges. The order of restitution was reversed:

Family Court may order a person who has been adjudicated a juvenile delinquent to make "restitution in an amount representing a fair and reasonable cost to replace the property [or] repair the damage caused by" him or her (Family Ct Act § 353.6 [1] [a]). In doing so, Family Court has "broad discretion" in determining the proper disposition in a juvenile delinquency proceeding … , but, as a court of limited jurisdiction, remains constrained to exercise the powers granted to it by statute … . Unlike the Penal Law, which permits restitution for damage to property that was not alleged in the charging document but still "part of the same criminal transaction" (Penal Law § 60.27 [4] [a]), there is "no parallel provision in Family Court Act § 353.6," thus restitution is generally limited to those items recited in the petition … . To this further point, "a juvenile may be required to pay restitution for a charge to which he or she did not admit only where there is a recorded agreement to accept an admission in exchange for restitution" … . Matter of Juan Z. (Juan Z.), 2025 NY Slip Op 03674, Third Dept 6-18-25

Practice Point: Unlike under the Penal Law, the ability of a Family Court judge under the Family Court Act to order restitution in a juvenile delinquency proceeding is limited to the items recited in the petition and/or in an agreement on the record.

June 18, 2025

MARIJUANA REGULATION AND TAXATION ACT PRECLUDED SEARCH OF VEHICLE BASED ON ODOR OF MARIJUANA.

THE MARIJUANA REGULATION AND TAXATION ACT (MRTA) APPLIES TO THE EVIDENCE PRESENTED AT A SUPPRESSION HEARING AND PRECLUDES A FINDING OF PROBABLE CAUSE TO SEARCH A VEHICLE BASED SOLELY ON THE ODOR OF MARIJUANA; THEREFORE THE STATUTE APPLIES HERE WHERE, ALTHOUGH THE SEARCH WAS PRE-ENACTMENT, THE SUPPRESSION HEARING WAS POST-ENACTMENT (THIRD DEPT).

The Third Department, granting defendant's suppression motion and vacating defendant's guilty plea, in a full-fledged opinion by Justice Lynch, over a dissent, determined the Marijuana Regulation and Taxation Act (MRTA), which prohibits the search of a vehicle based solely on the odor of marijuana, applied to defendant's case, even though the statute had not been enacted at the time of the search. The statute had been enacted at the time of the suppression hearing:

On this appeal, we are tasked with answering a question left open by the Court of Appeals in People v Pastrana (41 NY3d 23, 29 [2023] …) — namely, whether Penal Law § 222.05 (3) (a), enacted as part of the Marihuana Regulation and Taxation Act (hereinafter MRTA), applies to a post-enactment suppression hearing concerning a pre-enactment search. * * *

… Penal Law § 222.05 (3) (a) — enacted as part of the MRTA — provides that "in any criminal proceeding including proceedings pursuant to [CPL] 710.20 . . . , no finding or determination of reasonable cause to believe a crime has been committed shall be based solely on evidence of . . . the odor of cannabis" … . CPL 710.20 pertains to motions to suppress evidence. By this comprehensive and present tense language, Penal Law § 222.05 (3) (a) expressly limits a suppression court's authority to base a probable cause finding solely upon evidence of the odor of marihuana without regard to when the vehicle search occurred. * * *

… [T]his provision is directed at the present evidentiary findings of a court, "and no real question of retroactive effect on past conduct or events is presented" … . Since Penal Law § 222.05 (3) (a) was in effect at the time of the suppression hearing and the suppression court's probable cause finding was based solely upon the fact that the trooper smelled the odor of marihuana emanating from the vehicle, that determination was erroneous as a matter of law … . People v Martin, 2025 NY Slip Op 03842, Third Dept 6-26-25

Practice Point: Here the Marijuana Regulation and Taxation Act (MRTA) was deemed to apply to the evidence which can be considered at a probable-cause-to-search-a-vehicle hearing. Therefore there was no need to apply the statute retroactively where the search was pre-enactment but the suppression hearing was post-enactment.

June 26, 2025

MIRANDA RIGHTS NOT READ TO DEFENDANT, SUPPRESSION SHOULD HAVE BEEN GRANTED.

THE DETECTIVE DID NOT READ THE MIRANDA RIGHTS TO DEFENDANT AND IT IS CLEAR FROM THE VIDEOTAPE THAT DEFENDANT COULD NOT HAVE READ THE WRITTEN EXPLANATION OF THOSE RIGHTS BEFORE HE WAIVED THEM; THE PEOPLE, THEREFORE, DID NOT PROVE DEFENDANT KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY WAIVED THE MIRANDA RIGHTS; THE MOTION TO SUPPRESS DEFENDANT'S STATEMENTS SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing the conviction, suppressing defendant's statements and ordering a new trial, over a dissent, determined the People did not demonstrate defendant knowingly, intelligently and voluntarily waived his right to remain silent and his right to counsel before speaking with the detective. The detective never explained the Miranda rights verbally. Defendant was given a paper

which explained the rights. The videotape of defendant's interview showed that defendant looked at the paper for no more than five seconds before signing it:

As can be seen from the videotape, neither the detective nor defendant read all of the Miranda rights out loud and, while they did discuss Miranda in general, the focus of the oral interaction was about the waiver of the right to counsel and not the other rights described on the Miranda form. There is no indication that defendant actually read all of the warnings or comprehended them. Indeed, the videotape establishes that defendant looked at the form for less than five seconds before he reached for the pen to sign it. Based on our review of the video, we conclude that it is highly improbable, if not impossible, for defendant to have read to himself all of the Miranda warnings during the five seconds the piece of paper was in front of him before he signed. More to the point, the People failed to meet their burden of proving beyond a reasonable doubt that defendant was adequately apprised of his relevant constitutional rights before waiving them.

Although "[t]here is no rule, statutory or otherwise, requiring that Miranda warnings be read to a suspect" … , there is no evidence in this case that defendant was actually "administered" such rights … or that such rights were "verbally outline[d]" to him … . People v Marsh, 2025 NY Slip Op 03874, Fourth Dept 6-27-25

Practice Point: There is no requirement that the police read the Miranda rights to a suspect out loud. But the People have the burden of proving the defendant knowingly, intelligently and voluntarily waived those rights before defendant was interviewed. Here the videotape of the interview demonstrated the detective did not explain the rights verbally. Rather, the detective provided defendant with a paper explaining the rights. The videotape demonstrated defendant looked at the paper for no more than five seconds before signing it. The People therefore failed to prove a knowing, intelligent and voluntary waiver of the Miranda rights and suppression was warranted.

June 27, 2025

MOTION TO DISMISS PURSUANT TO CPL 40.40(2), SEPARATE PROSECUTIONS OF JOINABLE OFFENSES, CONSTITUTIONAL LAW, EVIDENCE.

DEFENDANT PLED GUILTY TO TWO COUNTS OF CRIMINAL POSSESSION OF A WEAPON; MONTHS LATER THE PEOPLE INDICTED THE DEFENDANT ON A MURDER CHARGE, BASED ON THE SAME FACTS; COUNTY COURT PROPERLY DENIED DEFENDANT'S CPL 40.40 MOTION TO DISMISS THE MURDER INDICTMENT; THERE WAS A STRONG, COMPREHENSIVE DISSENT (FOURTH DEPT).

The Fourth Department, affirming County Court's denial of defendant's motion to dismiss the murder indictment (CPL 40.40(2)), determined that the criminal possession of a weapon charges to which defendant pled guilty were not a barrier to a subsequent murder charge based on the same underlying facts. There was a comprehensive dissent:

… [O]n or about November 20, 2021, the 90-year-old victim was shot and killed in her home. When police officers arrived at the scene, defendant, the victim's granddaughter, was found in the house and appeared to be in distress. Defendant gave the officers conflicting accounts of what had happened to her grandmother but consistently stated that there were guns in the house that defendant had been playing with. A pistol and a revolver were recovered from the home. The People presented evidence to a grand jury relating to the two firearms. The evidence included witness testimony from various police officers about the crime scene, including that the victim appeared to have suffered a gunshot wound to the chest and about statements made to them by defendant. Defendant was indicted on two counts of criminal possession of a firearm (Penal Law § 265.01-b [1]), and she pleaded guilty to both counts. * * *

"CPL 40.40 prohibits a separate prosecution of joinable offenses that arise out of the same transaction and involve different and distinct elements under circumstances wherein no violation of the double jeopardy principle can validly be maintained but the equities nevertheless seem to preclude separate prosecutions" … . Under CPL 40.40 (1), "[w]here two or more offenses are joinable in a single

accusatory instrument against a person by reason of being based upon the same criminal transaction, . . . such person may not, under circumstances prescribed in this section, be separately prosecuted for such offenses." A "criminal transaction" is defined as "conduct which establishes at least one offense, and which is comprised of two or more or a group of acts either (a) so closely related and connected in point of time and circumstance of commission as to constitute a single criminal incident, or (b) so closely related in criminal purpose or objective as to constitute elements or integral parts of a single criminal venture" (CPL 40.10 [2]). "When (a) one of two or more joinable offenses [that are joinable in a single accusatory instrument against a person by reason of being based upon the same criminal transaction] is charged in an accusatory instrument, and (b) another is not charged therein, or in any other accusatory instrument filed in the same court, despite possession by the [P]eople of evidence legally sufficient to support a conviction of the defendant for such uncharged offense, and (c) either a trial of the existing accusatory instrument is commenced or the action thereon is disposed of by a plea of guilty, any subsequent prosecution for the uncharged offense is thereby barred" (CPL 40.40 [2] …). Under the facts and circumstances of this case, we conclude that the conduct related to possession of the firearms and that related to the murder involved separate and distinct criminal acts that were not part of the same criminal transaction … . Thus, the murder count was properly charged on a separate accusatory instrument and the People did not violate CPL 40.40.

From the dissent:

… [P]rosecution of the murder charge is barred by CPL 40.40 (2) because it is joinable under CPL 200.20 (2) (a) with the criminal possession of a firearm offenses charged in the prior indictment, and the People possessed legally sufficient evidence to support a murder conviction against defendant when she pleaded guilty to the firearm offenses. Where, as here, "the evidence against a person is in the prosecutor's hands, [they] may not—as a player in a game of chance—deal out indictments one at a time" … . People v Harris, 2025 NY Slip Op 03419, Fourth Dept 6-6-25

Practice Point: Here defendant pled guilty to two counts of criminal possession of a weapon and was subsequently indicted for murder based on the same facts. The majority upheld the denial of the CPL 40.40(2) motion to dismiss the indictment,

concluding the possession-of-a-weapon and murder charges were not part of the same criminal transaction. There was a strong dissent.

June 6, 2025

PROBATION CONDITIONS, APPEALS.

A WAIVER OF APPEAL DOES NOT PRECLUDE A CHALLENGE TO A PROBATION CONDITION ALLOWING WARRANTLESS SEARCHES; THE CONDITION ALLOWING WARRANTLESS SEARCHES FOR DRUGS WAS NOT REASONABLY RELATED TO DEFENDANT'S REHABILITATION (FIRST DEPT).

The First Department determined (1) a waiver of appeal does not preclude a challenge to a probation condition allowing warrantless searches, and (2) there was no justification for the condition allowing warrantless searches for drugs:

Defendant's appeal waiver does not foreclose his challenge to the condition of probation requiring that he consent to warrantless searches of his person, vehicle, and home for weapons, drugs, and drug paraphernalia … , which also does not require preservation … . To the extent this condition authorized the Department of Probation to conduct warrantless searches for weapons, we find that it was "reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so" … , "given that he was armed with a sharp object when he committed this violent offense" … .

However, the portion of the condition of probation authorizing warrantless searches by a probation officer for illegal drugs and drug paraphernalia "was not reasonably related to defendant's rehabilitation" … . Defendant's crime "did not appear connected to the sale or use of drugs" (id.), he was not "under the influence of any substance" when he committed the offense, and he "had no history of offenses involving substance abuse" … . People v Rivera, 2025 NY Slip Op 03654, First Dept 6-17-25

Practice Point: A wavier of appeal does not preclude a challenge to a probation condition allowing warrantless searches.

Practice Point: A condition of probation allowing warrantless searches for drugs is not appropriate where there is no history of drug offenses.

June 17, 2025

PROBATION CONDITIONS, JUDGES, APPEALS.

NOTHING IN DEFENDANT'S CRIMINAL HISTORY INVOLVED SUBSTANCE ABUSE OR WEAPONS; THEREFORE THE PROBATION CONDITION THAT DEFENDANT SUBMIT TO SEARCHES OF HIS PERSON, VEHICLE AND HOME WAS STRUCK (FIRST DEPT).

The First Department, striking a probation condition, determined (1) the requirement that defendant submit to warrantless searches of his person, vehicle and home was not appropriate, and (2) the challenge to the probation condition survived defendant's waiver of appeal:

Defendant's challenge to the condition of probation requiring that he consent to warrantless searches of his person, vehicle, and home survives the appeal waiver … . "Defendant was not under the influence of any substance or armed with a weapon when he committed the crime of which he was convicted, and he had no history of offenses involving substance abuse or weapons" … . Accordingly, the consent-search condition was not necessary to ensure that he will lead a law-abiding life (… see Penal Law § 65.10[1]), or reasonably related to defendant's rehabilitation (see Penal Law § 65.10[2][l]), rendering the condition improperly imposed … . People v Avila, 2025 NY Slip Op 03286, First Dept 6-3-25

Practice Point: Where a defendant's criminal history does not involve drugs or weapons, requiring defendant to submit to warrantless searches as a condition of probation is not supported.

June 3, 2025

SEARCHES AND SEIZURES, IMPROPER INVENTORY SEARCH.

THE POLICE SUSPECTED DEFENDANT HAD SPECIFIC WEAPONS IN A SPECIFIC VEHICLE; AFTER A TRAFFIC STOP, THE POLICE SEARCHED THE CAR AND FOUND A WEAPON; LATER THEY SEARCHED THE CAR AGAIN AND FOUND A SECOND WEAPON; ONLY AFTER THE SEARCHES DID THEY START TO FILL OUT THE INVENTORY SEARCH FORM; THIS WAS NOT A VALID INVENTORY SEARCH; THE WEAPONS SHOULD HAVE BEEN SUPPRESSED (FOURTH DEPT).

The Fourth Department, reversing County Court, determined the weapons seized from defendant's vehicle after a traffic stop should have been suppressed. The police were looking for specific weapons in a specific car at the time of the search. Therefore the search could not be considered a valid inventory search:

… [T]he record reveals that the purported inventory search was actually a pretext to search for contraband. At the suppression hearing, the testimony and body-worn camera footage established that one of the officers who stopped defendant's vehicle identified him and testified that defendant had, earlier that day, been identified as someone likely to be in possession of a weapon. Following the traffic stop and while defendant was being detained pursuant to an outstanding arrest warrant, two other officers arrived on the scene. One of the arriving officers identified the vehicle defendant was driving as one that the police thought defendant would be using and would be keeping a weapon in. The other arriving officer promptly began searching the front passenger area of the vehicle; he opened the glove box and found a weapon, prompting a police officer to observe "oh, there it is." At that point, another officer said "let's check for the second one," and shortly thereafter a second weapon was found in the same spot, precisely as predicted by that officer. * * *

Our conclusion is not based merely on the fact that, in conducting the first search, the "officers knew that contraband might be recovered" from the vehicle … . Rather, the evidence at the suppression hearing demonstrated that the officers' purpose in conducting the first search was to find specific weapons in a specific vehicle possessed by a specific person, i.e., defendant. We also note that the

officers did not begin the second search until about ten minutes after the weapons were discovered, and it was only at that time that an officer began filling out an inventory search form. The facts that the inventory search form was not made contemporaneously with the first search, as required by Buffalo Police Department policy, and that it was incomplete to the extent it failed to note, as required, obvious damage to the vehicle, merely underscores and corroborates our conclusion that the first search of the vehicle was pretextual. People v Cunningham, 2025 NY Slip Op 03890, Fourth Dept 6-27-25

Practice Point: Here the fact that the police did not start filling out the inventory-search form until after two searches of the vehicle had turned up weapons demonstrated the attempt to color the warrantless search as an inventory search was a ruse.

June 27, 2025

SEARCHES AND SEIZURES, WARRANTLESS, NO-TRESPASSING SIGN.

NO-TRESPASSING AND PRIVATE-PROPERTY SIGNS WERE POSTED ON THE PROPERTY WHERE DEFENDANT'S VEHICLE WAS PARKED; THEREFORE THE DEPUTY WHO WALKED UP THE DRIVEWAY TO EXAMINE DEFENDANT'S VEHICLE CONDUCTED AN ILLEGAL, WARRANTLESS SEARCH; THE VEHICLE, DEFENDANT'S STATEMENTS AND THE EVIDENCE SEIZED PURSUANT TO SUBSEQUENT SEARCH WARRANTS SHOULD HAVE BEEN SUPPRESSED; THE VEHICLE HAD BEEN INVOLVED IN A FATAL ACCIDENT AND THE DRIVER HAD FLED THE SCENE (THIRD DEPT).

The Third Department, reversing defendant's conviction and granting the motion to dismiss, determined the posted "No Trespassing" and "Private Property" signs created "a reasonable expectation of privacy" for the driveway of the property where defendant's vehicle was parked. Therefore, the deputy who walked up the driveway to examine the defendant's vehicle conducted an illegal search. The vehicle, which had stuck and killed one bicyclist and seriously injured another, as

well as the defendant's statements and evidence seized pursuant to subsequent search warrants, should have been suppressed:

… [T]wo bicyclists were struck by a motor vehicle … . One bicyclist died, and the other was severely injured. The driver fled the scene. After speaking with witnesses and collecting physical evidence from the roadway, the police determined that the involved vehicle was a gray Jeep Cherokee. At some point thereafter, a sheriff's deputy discovered a vehicle matching this description parked in the driveway on property where defendant resided as a tenant. Because the front of the vehicle was not visible from the street, the deputy walked up the driveway in order to perform a closer inspection. Alongside the driveway were posted signs stating, "No Trespassing" and "Private Property." The deputy observed blood on, and front-end damage to, the vehicle, consistent with the crash, and radioed his findings to his fellow law enforcement officers. In response, a sheriff's investigator traveled to the residence. After conferring with the deputy, the investigator talked to the owner of the property and obtained surveillance footage. The investigator then spoke to defendant and secured her consent to search the vehicle. Defendant was taken to a hospital for a blood test and to the State Police barracks for a further interview. The investigator later applied for and obtained two search warrants, one for the vehicle and the other for defendant's cell phone records. * * *

"Warrantless searches and seizures within the privacy of the home are presumptively unreasonable, subject only to carefully circumscribed exceptions to the warrant requirement" … . That said, a person will not necessarily be entitled to the same protection in a private driveway leading to a home unless he or she has exhibited "some outward manifestation" of a reasonable expectation of privacy in this area … . In that regard, New York law recognizes that the posting of a "No Trespassing" sign on private property constitutes such a manifestation … . Therefore, a police officer seeking to conduct a search on posted property may only do so with a warrant or while operating under a recognized exception to the warrant requirement … . People v Suprunchik, 2025 NY Slip Op 03364, Third Dept 6-5-25

Practice Point: The posting of "No Trespassing" of "Private Property" signs on the curtilage of a residence manifests a reasonable expectation of privacy in the curtilage and triggers the need for a warrant before entering the curtilage. Here the

deputy walked up the driveway to inspect a vehicle which the deputy suspected had been involved in a fatal accident. The deputy saw blood on the front of the vehicle. That was an illegal warrantless search requiring suppression of the vehicle, statements made by the defendant, and evidence seized pursuant to subsequent search warrants.

June 5, 2025

SELF-INCRIMINATION, DEFENDANT COMPELLED TO OPEN CELL PHONE WITH FINGERPRINT.

IN THIS CHILD PORNOGRAPHY CASE, COMPELLING DEFENDANT TO UNLOCK THE CELL PHONE WITH HIS FINGERPRINT AMOUNTED TO TESTIMONIAL EVIDENCE THAT HE OWNED, CONTROLLED AND HAD ACCESS TO THE CONTENTS OF THE PHONE, A VIOLATION OF HIS FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION; THE MOTION TO SUPPRESS THE TESTIMONIAL EVIDENCE AND THE CONTENTS OF THE PHONE SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice Ogden, determined compelling defendant to unlock his cell phone with his finger (the cell phone was programmed to recognize defendant's fingerprint) violated defendant's Fifth Amendment right against self-incrimination. The police were acting pursuant to a child-pornography search warrant when defendant was compelled to unlock the phone. The cell phone contained child pornography. Defendant pled guilty. The issue on appeal was whether defendant's motion to suppress the images on the phone should have been granted:

… [T]he People do not dispute that the opening of the cell phone was compelled and incriminating. We are thus tasked with determining whether defendant's compelled opening of his cell phone, upon the warrant's execution, had a testimonial aspect sufficient to trigger Fifth Amendment protection.

… [W]e conclude that defendant's "act of unlocking the phone represented the thoughts 'I know how to open the phone,' 'I have control over and access to this phone,' and 'the print of this specific finger is the password to this phone' " … . The biometric data defendant provided "directly announce[d] [defendant's] access to and control over the phone, as well as his mental knowledge of how to unlock the device" … . The act of production cases also support the conclusion that, upon execution of the warrant, defendant's compelled unlocking of his phone through biometric data was testimonial. We conclude that "in response to the command to unlock the phone, [defendant] opened it, [and] that act disclosed his control over the phone [and] his knowledge of how to access it" … . At a minimum, the authentication through biometric data implicitly communicated that the contents contained therein were in defendant's possession or control … .

… [T]he way in which the warrant was executed effectively required defendant to answer "a series of questions about ownership or control over the phone, including how it could be opened and by whom" … .

… "Because the compelled opening of the cellphone [during the execution of the search warrant] was testimonial, both the message and any evidence obtained from that communication must be suppressed" … . People v Manganiello, 2025 NY Slip Op 03873, Fourth Dept 6-27-25

Practice Point: At least where there is a question whether defendant owns and controls a cell phone which contains child pornography, compelling defendant to unlock the phone with his fingerprint is tantamount to defendant's testimony that defendant owns, controls and has access to the contents of the phone—constituting a violation of a defendant's Fifth Amendment right against self-incrimination.

June 27, 2025

SENTENCE REDUCED PURSUANT TO THE DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT, POSTRELEASE PERIOD SHOULD NOT HAVE BEEN REDUCED.

HERE DEFENDANT'S SENTENCE WAS REDUCED PURSUANT TO THE DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT (DVSJA) AFTER SHE HAD BEEN IMPRISONED LONGER THAN THE MAXIMUM ALLOWED BY THE DVSJA; THE EXCESS PRISON TIME SHOULD NOT HAVE BEEN CREDITED TO ELIMINATE THE PERIOD OF POSTRELEASE SUPERVISION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, over a two-judge dissent, determined defendant's (Brenda's) sentence was properly reduced by the Appellate Division pursuant to the Domestic Violence Survivors Justice Act (DVSJA), but the excess time Brenda was imprisoned beyond the maximum allowed by the DVSJA should not been credited to eliminate the period of postrelease supervision:

The DVSJA requires that resentenced defendants be given a period of postrelease supervision. Penal Law § 70.45 (2) (f) … states that that the period of postrelease supervision for resentences imposed under Penal Law § 60.12 (8) "shall be" not less than two and one-half years nor more than five years. That requirement is specific to DVSJA resentences. * * *

… [T]he Appellate Division was within its plenary factual review power when it reversed and reduced Brenda's sentence pursuant to the DVSJA, but because the court's imposition of the maximum term of postrelease supervision may have been based on its erroneous conclusion that time Brenda spent incarcerated beyond that imposed by the DVSJA resentencing could be credited against the term of postrelease supervision required by the DVSJA, the order of the Appellate Division should be modified, without costs, by remitting the case to the Appellate Division for further proceedings in accordance with this opinion … . People v Brenda WW., 2025 NY Slip Op 03643, CtApp 7-17-25

Practice Point: The Appellate Division has the power to make a "de novo" determination whether a defendant is entitled to a sentence reduction pursuant to the Domestic Violence Survivors Justice Act (DVSJA).

Practice Point: Where a defendant's sentence is reduced under the DVSJA to a term below the amount of time already served by the defendant, the excess time cannot be credited towed the period of postrelease supervision.

June 17, 2025

SENTENCING, REDACT PRESENTENCE REPORT REFERENCES TO ACQUITTALS.

THE SENTENCING COURT SHOULD REDACT FROM THE PRESENTENCE REPORT ANY REFERENCE TO CRIMINAL CONDUCT OF WHICH THE DEFENDANT WAS ACQUITTED (FOURTH DEPT).

The Fourth Department determined defendant's presentence report should have been redacted to remove reference to criminal conduct of which defendant was acquitted:

We agree with defendant, however, that the court erred in failing to redact improper statements from the presentence report (PSR) because they reference criminal conduct of which defendant was acquitted … . Specifically, we agree with defendant that the inclusion in the PSR of statements regarding alleged sexual offenses by defendant involving another child, of which he was acquitted, "was inappropriate and inflammatory" … . We therefore direct County Court to redact the sentence on page 10 of the PSR referring to a statement by the victim "that there could be another victim . . . who was inappropriately touched by [defendant]"; the quotation on page 10 from an investigator stating that defendant " 'was having sexual intercourse with another underage female as well. High risk for children' "; and the sentence on page 12 referring to a disclosure "that [defendant] has been sexually assaulting [the other victim] since she was nine years old" from all copies of defendant's PSR. People v Wilmet, 2025 NY Slip Op 03901, Fourth Dept 6-27-25

Practice Point: A presentence report should not include any references to criminal conduct of which defendant was acquitted.

June 27, 2025

SENTENCING, RESENTENCED TO LONGER SENTENCE, DEFENDANT MUST BE GIVEN THE OPPORTUNITY TO WITHDRAW PLEA, JUDGES.

DEFENDANT PLED GUILTY IN RETURN FOR A SENTENCE WHICH WAS LATER DETERMINED TO BE UNAUTHORIZED; DEFENDANT THEN CONSENTED TO A RESENTENCE WHICH WAS LONGER THAN THAT ORIGINALLY PROMISED; BECAUSE DEFENDANT WAS NOT EXPRESSLY AFFORDED THE OPPORTUNITY TO WITHDRAW HER PLEA, THE RESENTENCE WAS VACATED AND THE MATTER REMITTED; THE SENTENCING JUDGE CAN FASHION A SENTENCE WHICH IS IN ACCORDANCE WITH THE ORIGINAL PROMISE BY REDUCING THE OFFENSE CHARGED (THIRD DEPT).

The Third Department, vacating the resentence and remitting the matter, determined defendant was not given the opportunity withdraw her plea when she was resentenced:

Defendant … contends that because she entered a guilty plea with a sentencing promise — 10 years in prison, to be followed by five years of postrelease supervision — that was unauthorized, her plea was not knowing, voluntary or intelligent and she should have been afforded an opportunity to withdraw her guilty plea prior to resentencing. Initially, we note that "the illegality of the promised sentence does not, in itself, render a defendant's guilty plea unknowing and involuntary" … and defendant did not preserve her voluntariness claim … . Regarding resentencing, where, as here, a plea bargain provides for a sentence that is not legal and an illegal sentence is imposed, "the trial court ha[s the] inherent power to correct [the] illegal sentence" … . However, "when a defendant's guilty plea has been induced by a sentencing promise that the court later determines is inappropriate or illegal, that court must afford the defendant the opportunity to

withdraw the plea or honor the plea-inducing promise" … . County Court could have either afforded defendant an opportunity to withdraw her guilty plea which, if she declined, would permit imposition of a lawful sentence, or "reduce[d] the sentence or the crime charged so that the sentence upon which the plea bargain was based can legally be imposed," thereby honoring defendant's sentencing expectations that induced her guilty plea … . However, at resentencing, the court did not "impose another lawful sentence that comport[ed] with . . . defendant's legitimate [sentencing] expectations" … but, instead, merely procured defendant's consent to a longer resentence which was not comparable to that contemplated by the plea agreement, without expressly affording her an opportunity to withdraw her guilty plea prior to that consent. This was error and, accordingly, the resentence must be vacated and the matter remitted to County Court to afford defendant an opportunity to move to withdraw her guilty plea or fashion a remedy to honor the sentencing promise … . People v Harrigan, 2025 NY Slip Op 03669, Third Dept 6-18-25

Practice Point: Here defendant consented to a longer sentence than that which was promised without being afforded the opportunity to withdraw her plea. The resentence was therefore vacated. The Third Department noted that the judge has the power to fashion a sentence which is in accordance with the original promise by reducing the charged crime.

June 18, 2025

SEX OFFENDER REGISTRATION ACT (SORA), DEFENDANT WAS NOT NOTIFIED OF INFORMATION USED BY THE JUDGE FOR AN UPWARD DEPARTURE.

THE SORA HEARING JUDGE SHOULD NOT HAVE GRANTED AN UPWARD DEPARTURE, INCREASING DEFENDANT'S SORA RISK LEVEL, BASED ON INFORMATION WHICH WAS NOT IN THE RISK ASSESSMENT INSTRUMENT (RAI) OR RAISED BY THE PEOPLE AT THE HEARING; TO DO SO VIOLATED DEFENDANT'S RIGHT TO DUE PROCESS (FOURTH DEPT).

The Fourth Department, reversing County Court, determined the judge should not have increased defendant's SORA risk-level based upon information which was not included in the risk assessment instrument (RAI) or raised by the People at the SORA hearing:

"The due process guarantees in the United States and New York Constitutions require that a defendant be afforded notice of the hearing to determine [their] risk level pursuant to SORA and a meaningful opportunity to respond to the [RAI]" … . It is therefore improper for a court to depart from the presumptive risk level based on a ground for departure that has never been raised (see id.). Here, because defendant's employment was not presented as a basis for departure in the RAI or by the People at the hearing, defendant was not afforded notice and a meaningful opportunity to respond to it … . We therefore reverse the order, vacate defendant's risk level determination, and remit the matter to County Court for a new risk level determination and, if necessary, a new hearing in compliance with Correction Law § 168-n (3) and defendant's due process rights … . People v Lincoln, 2025 NY Slip Op 03930, Fourth Dept 6-27-25

Practice Point: A defendant is entitled to notice of all the evidence which the court will rely for a SORA risk-level assessment such that the defendant has an opportunity to respond.

June 27, 2025

SUPPRESSION, STATEMENTS MADE AFTER ASSERTION OF RIGHT TO REMAIN SILENT.

ALL STATEMENTS MADE BY DEFENDANT AFTER HE RESPONDED "NO SIR." WHEN ASKED IF HE WAS WILLING TO ANSWER QUESTIONS SHOULD HAVE BEEN SUPPRESSED (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction, vacating his plea, and granting part of the suppression motion, over a partial dissent, determined that all the statements defendant made after he responded "No sir" when asked if he was willing to answer questions should have been suppressed. The dissent argued statements made before defendant was read his Miranda rights should also be suppressed:

Defendant contends that the court erred in refusing to suppress his post-Miranda statements inasmuch as they were made after he invoked his right to remain silent by answering "No, sir" when asked if he would be willing to answer questions after being advised of his Miranda rights. We agree. " '[I]n order to terminate questioning, the assertion by a defendant of [the] right to remain silent must be unequivocal and unqualified' " … . Whether a defendant's "request was 'unequivocal is a mixed question of law and fact that must be determined with reference to the circumstances surrounding the request[,] including the defendant's demeanor, manner of expression and the particular words found to have been used by the defendant' " … . Here, we conclude that defendant clearly communicated a desire to cease all questioning indefinitely when he responded "No, sir" to the verbal and written inquiries about whether he was willing to answer questions … .

We further agree with defendant that the court erred in refusing to suppress the holding cell statements, which were also made after defendant unequivocally and unqualifiedly asserted his right to remain silent. Contrary to the People's assertion that the statements were made spontaneously at a time when the detective was seeking "pedigree information," we conclude that the People did not establish that the detective's questions "were reasonably related to the police's administrative concerns" rather than "a disguised attempt at investigatory interrogation" … . People v Sullivan, 2025 NY Slip Op 03494, Fourth Dept 6-6-25

Practice Point: If a defendant is asked whether he is willing to answer questions and answers "no," any subsequent statements must be suppressed.

June 6, 2025