NEW YORK APPELLATE DIGEST, INC.

Criminal Law
Reversal Report
December 2025

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 December 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.

Table of Contents

Contents

ACCOMPLICE LIABILITY, NO EVIDENCE DEFENDANT SHARED SHOOTER'S INTENT.

THE DEFENDANT DROVE THE SHOOTER TO AND AWAY FROM THE MURDER SCENE; BUT THERE WAS NO EVIDENCE DEFENDANT SHARED THE SHOOTER'S INTENT TO KILL; DEFENDANT'S MURDER CONVICTION AS AN ACCOMPLICE WAS NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE AND WAS AGAINST THE WEIGHT OF THE EVIDENCE (FOURTH DEPT).

The Fourth Department, reversing defendant's murder conviction and dismissing the indictment, determined the evidence that defendant drove to shooter to various locations, including the scend of the murder, there was no evidence defendant shared the shooter's intent. Therefore the evidence was legally insufficient and the conviction was against the weight of the evidence:

… [A] "… defendant's presence at the scene of the crime, alone, is insufficient for a finding of criminal liability" … . Indeed, evidence that a defendant was at the crime scene and even assisted the perpetrator in removing evidence of that crime is insufficient to support a defendant's conviction where the People fail to offer evidence from which the jury could rationally exclude the possibility that the defendant was without knowledge of the perpetrator's intent … . … Here, we have no difficulty concluding, based on the video evidence showing defendant picking up the codefendant immediately after the shots were fired and speeding away from the scene, that there is a valid line of reasoning and permissible inferences by which the jury could have found that defendant intentionally aided the codefendant after the murder, but we cannot conclude that there is legally sufficient evidence to support the inference that defendant shared the codefendant's intent to kill the victim … . … [T]here was no evidence at trial establishing that defendant and the codefendant had any conversations pertaining to the shooting of the victim; indeed, there is hardly any evidence establishing that defendant and the codefendant had much, if any interaction with each other before the day of the murder.

Consequently, we conclude that the evidence was insufficient to establish that defendant was aware of, and shared, the codefendant's intent to kill the victim … . People v Scott, 2025 NY Slip Op 07167, Fourth Dept 12-23-25

Practice Point: To be guilty of murder as an accomplice, there must be proof defendant shared the killer's intent. Here there was proof the defendant drove the shooter to the murder scene and drove the shooter away from the murder scene. But there was no evidence defendant was aware of the shooter's plan to kill, or even that the shooter was armed. Indictment dismissed.

December 23, 2025

APPEALS, ORDER DENYING SUPPRESSION HEARING WAS A FINAL ORDER, DESPITE "LEAVE TO RENEW" LANGUAGE, AND THEREFORE WAS APPEALABLE.

THE PEOPLE AGREED DEFENDANT'S ALLEGATIONS IN THE OMNIBUS MOTION WARRANTED A SUPPRESSION HEARING BUT ARGUED THE ISSUE WAS NOT PRESERVED BECAUSE THE ORDER DENYING A SUPPRESSION HEARING INCLUDED THE PHRASE "WITH LEAVE TO RENEW UPON A SHOWING OF SUFFICIENT FACTUAL ALLEGATIONS" RENDERING THE ORDER NONFINAL AND UNAPPEALABLE; THE FIRST DEPARTMENT NOTED THAT NO OTHER EVIDENCE CAME TO LIGHT WHICH COULD HAVE SUPPORTED A RENEWAL MOTION; THE ORDER WAS THEREFORE DEEMED FINAL AND APPEALABLE (FIRST DEPT).

The First Department, holding defendant's plea and sentencing in abeyance, remitted the matter for a Mapp/Dunaway hearing to determine whether the seizure of a gun dropped by the defendant was facilitated by unlawful police conduct. In the omnibus motions defendant argued that he dropped the gun as a spontaneous response to the police officers' approaching and then chasing him without reasonable suspicion. On appeal, the People agreed defendant was entitled to a hearing. The contested issue on appeal was whether the order denying the

suppression motion "with leave to renew upon a showing of sufficient factual allegations" rendered the order nonfinal and therefore unappealable. The First Department determined the order was final:

The issue in contention on this appeal is whether the court's summary denial of defendant's suppression motion — which ended with the statement that the motion "is denied, with leave to renew upon a showing of sufficient factual allegations" — qualifies as an "order finally denying a motion to suppress evidence" which would preserve the suppression issue for appeal under CPL 710.70(2). While phrases like "leave to renew" or "leave to submit" may be some indicia of a lack of finality under CPL 710.70(2), they do not, standing alone, render a court's ruling nonfinal.
* * *

… [T]he court incorrectly rejected the defendant's detailed recitation of his suppression theory and there was no further evidence produced by the People that could bolster defendant's theory on renewal.

Accordingly, we remit to Supreme Court to hold a Mapp/Dunaway hearing. People v Diaby, 2025 NY Slip Op 07343, First Dept 12-30-25

Practice Point: Here the People argued that the order denying a suppression hearing was nonfinal and therefore unappealable because it included the phrase "with leave to renew upon a showing of sufficient factual allegations." The First Department noted that this was not a case where additional evidence came to light which would have supported renewal and the defendant failed to make a renewal motion. Here no new evidence came to light. The denial of the suppression motion was therefore deemed a final, appealable order.

December 30, 2025

DEPRAVED INDIFFERENCE CRITERIA ANALYZED IN DEPTH BY MAJORITY AND DISSENTERS.

DEFENDANT WAS CONVICTED OF SECOND DEGREE MURDER (DEPRAVED INDIFFERENCE) AND FIRST DEGREE MANSLAUGHTER (RECKLESS) FOR THE DEATH OF A SEVERELY ABUSED CHILD; THE EXTENSIVE DISCUSSIONS OF THE "DEPRAVED INDIFFERENCE" ELEMENT BY THE MAJORITY AND DISSENT ILLUSTRATE THE DIFFICULTY OF PROVING BOTH "DEPRAVITY" AND "INDIFFERENCE" (THIRD DEPT).

The Third Department, affirming defendant's second degree murder (depraved indifference) and first degree manslaughter (reckless) convictions for the death of a severely abused child, over an comprehensive dissent, determined the facts supported the "depraved indifference" element. The dissent disagreed:

Contrary to defendant's contentions, the fact that he began immediate life-saving measures on the victim and called his wife to summon medical aid does not dictate a different result. Rather "[t]he People were required to show that defendant had the necessary mens rea of callous indifference when the crime occurred, not at all times thereafter" … . Thus, where the defendant is the one who inflicted the fatal injuries, the sincerity and motivation behind post-injury rescue efforts distill to "implicated credibility questions for the jury to resolve" … . We find no reason to disturb the jury's finding that defendant's "belated expressions of concern did not reflect any [genuine] interest in the victim's welfare" … .

From the dissent:

Ask 12 random people on the street to describe the mental state of someone who stomps on a young child's stomach so hard that it kills him. Each will say something like, "cruel," "brutal," [*9]"monstrous" — maybe even "depraved" … . The jurors here rationally arrived at the same conclusion — and, indeed, "the horrific nature of defendant's assault of the [victim] was clearly intended to be encompassed within the depraved indifference murder of a child statute" … .

But depravity is not enough. Depraved indifference to human life "is something even worse" … . To prove this rare state of mind, there must be evidence of "wanton cruelty, brutality, or callousness, combined with an utter indifference as to whether the victim lives or dies" … . That combination is not present here. Consequently, defendant's conviction of depraved indifference murder must be reversed, and that count of the indictment dismissed. People v Greene, 2025 NY Slip Op 06931, Third Dept 12-11-25

Practice Point: "Depraved indifference" is a troublesome concept. How do the People prove both "depravity" and "indifference?" Consult this decision for an in-depth discussion.

December 11, 2025

FALSE CONFESSION EXPERT'S TESTIMONY WAS ERRONEOUSLY RESTRICTED, NEW TRIAL.

THE JUDGE'S RESTRICTIONS ON THE TESTIMONY OF THE DEFENSE "FALSE CONFESSION" EXPERT, AND THE DENIAL OF DEFENDANT'S REQUEST FOR A "PROMISE BY POLICE" JURY INSTRUCTION REQUIRED A NEW TRIAL (SECOND DEPT).

The Second Department, reversing defendant's murder conviction and ordering a new trial, determined the judge erroneously restricted the defense false-confession-expert's testimony and erroneously denied defendant's request for a "Promise by Police" jury instruction (defendant testified the police made promises to him during the 12-hour interrogation):

… [T]he court limited the scope of the defendant's expert's testimony by precluding the mention of a study by the Innocence Project, which found that of the more than 300 people who had been, at the time, exonerated by DNA, approximately 25% of those people had confessed, and a study conducted at the University of Michigan Law School, where researchers found that of the 1,405 exonerations that took place between 1989 and 2012, 10% of the people had falsely confessed, and people with mental illness or intellectual disability were

overrepresented in those who had done so. Here, the court improperly concluded that those studies were not relevant … .

…[T]he studies were relevant to illustrate the risk of false confessions, and specifically, a study related to mental disability is proper in this case where the defendant was found to have an IQ lower then 93% of individuals in his age group. … [T]he court limited the scope of the expert's testimony as to existing research on false confessions … . The court further compounded this error by denying admission of a portion of the defendant's expert's curriculum vitae, ruling, without basis, that the titles of certain articles listed therein would be inappropriate for a jury to see, thereby depriving the jury of information relevant to the credibility and weight of the expert's testimony … . Moreover, these errors allowed the People's expert to testify that research in the area of false confessions is scant and that the study of false confessions and the evaluation of psychological vulnerabilities was a "primitive subdiscipline." … [T]he court also scheduled the trial on a date that the defendant's expert was not available. Although the use of video recorded testimony is not error, "[l]ive televised testimony is certainly not the equivalent of in-person testimony" … . As such, the jury was able to observe the in-court testimony of the People's expert, but was only able to observe the defendant's expert on a television screen, and even that testimony was edited to exclude the aforementioned studies. People v Grigoroff, 2025 NY Slip Op 07400, Second Dept 12-31-25

Practice Point: Consult this decision for insight into how restrictions placed on an expert's testimony can create the impression there is little or no support for the expert's conclusions in the relevant literature. Here, because the defense expert was not allowed to discuss the studies upon which his "false confession" conclusions were based, the People's expert was able to tell the jury "false confession" research is "scant" and is a "primitive subdiscipline." In addition, the trial was scheduled when the People's expert could attend, but the defense expert could not, forcing the defense expert to submit videotaped testimony.

December 31, 2025

FAMILY COURT, REMOVAL TO FAMILY COURT NOT PRECLUDED WHERE 16-YEAR-OLD WAS CHARGED AS AN ACCOMPLICE TO MURDER.

ALTHOUGH THE 16-YEAR-OLD DEFENDANT IN THIS MURDER CASE WAS CHARGED AS AN ACCOMPLICE, ACCOMPLICE-LIABILITY STANDING ALONE DOES NOT PRECLUDE REMOVAL TO FAMILY COURT; A GUILTY PLEA DOES NOT FORFEIT AN APPELLATE CHALLENGE TO THE DENIAL OF REMOVAL; THE WAIVER OF APPEAL WAS INVALID BECAUSE IT PURPORTED TO FORECLOSE ALL APPELLATE CHALLENGES (FOURTH DEPT).

The Fourth Department, vacating defendant's guilty plea, over a two-justice dissent, determined (1) defendant's waiver of appeal was invalid because it purported to foreclose all appellate challenges; and (2) the statutory procedure for removing the 16-year-old defendant's prosecution to Family Court was violated. The fact that defendant was charged as an accomplice in this carjacking/murder case did not disqualify the defendant from the removal procedure. Once the removal procedure is started, the People have 30 days to demonstrate removal is not appropriate. The majority disagreed with the dissent's argument that the "removal-to-Family-Court-issue" was forfeited by defendant's guilty plea:

Defendant orally waived his right to appeal and executed a written waiver thereof. The language in the written waiver, however, is "inaccurate and misleading insofar as it purports to impose 'an absolute bar to the taking of a direct appeal' and to deprive defendant of his 'attendant rights to counsel and poor person relief, [as well as] all postconviction relief separate from the direct appeal' " … . * * *

Defendant contends that the court erred in concluding that the People established by a preponderance of the evidence that defendant "caused significant physical injury to a person other than a participant in the offense" (CPL 722.23 [2] [c] [i]) and that defendant was therefore disqualified from having the matter transferred to Family Court. Initially, we respectfully disagree with our dissenting colleagues that defendant's contention is forfeited by his guilty plea. It is undisputed that a guilty plea does not "extinguish every claim on appeal" and that the issues that are not

forfeited by the plea generally "relate either to jurisdictional matters . . . or to rights of a constitutional dimension that go to the very heart of the process" … . * * *

The plain language of CPL 722.23 (2) (c) supports the conclusion that the Legislature did not intend for the circumstances disqualifying an adolescent offender from removal to Family Court to be coextensive with criminal liability, including principles of accessorial liability, for a statutorily designated violent crime. Indeed, such a result could have been achieved by disqualifying adolescent offenders based solely on the crime charged without reference to any further factors. People v Jacobs, 2025 NY Slip Op 07124, Fourth Dept 12-23-25

Practice Point: Here the 16-year-old defendant should not have been denied removal to Family Court solely based on accomplice liability for murder. The right to challenge the denial of removal was not forfeited by defendant's guilty plea. The waiver of appeal was invalid because it purported to foreclose all appellate challenges.

December 23, 2025

FAMILY OFFENSE, JURISDICTION OF FAMILY COURT REQUIRES "INTIMATE RELATIIONSHIP."

WHETHER FAMILY COURT HAD JURISDICTION OVER THIS FAMILY OFFENSE PROCEEDING DEPENDED ON WHETHER THERE WAS AN "INTIMATE RELATIONSHIP" BETWEEN PETITIONER AND RESPONDENT; THE EXISTENCE OF AN "INTIMATE RELATIONSHIP" IS A FACT-INTENSIVE INQUIRY WHICH, WHEN IN DISPUTE, REQUIRES A HEARING; MATTER REMITTED FOR THE HEARING (THIRD DEPT).

The Third Department, reversing Family Court, determined the judge should have ordered a hearing to determine whether the respondent had an "intimate relationship" with the petitioner such that a family offense proceeding alleging identify theft could be brought by the petitioner against the respondent. Whether an "intimate relationship" exist is a fact-intensive inquiry and when it is in dispute a hearing should be held:

Family Court's jurisdiction in family offense proceedings, as defined by Family Ct Act § 812 (1), extends to enumerated offenses occurring between members of the same family or household, including those "persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time" … . While the statute does not define "intimate relationship," it expressly excludes casual acquaintances and ordinary social or business associations … . In determining whether an intimate relationship exists, courts consider, among other things, "the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship" … . Additionally, "the relationship should be direct [and] not one based upon a connection with a third party" … . Whether an intimate relationship exists is a fact-intensive inquiry to be resolved on a case-by-case basis … . When the existence of an intimate relationship is in dispute, or the record is insufficient to permit determination as a matter of law, Family Court should conduct a hearing before dismissing the petition for lack of jurisdiction … . Matter of McCarra v Chiaramonte, 2025 NY Slip Op 07352, Third Dept 12-31-25

Practice Point: Family Court has jurisdiction over family offense proceedings involving unrelated parties if there exists an "intimate relationship" between the parties. Determining whether there is an "intimate relationship" is a fact-intensive inquiry usually requires a hearing.

December 31, 2025

GRAND JURIES, PROSECUTOR'S FAILURE TO INSTRUCT ON THE JUSTIFICATION DEFENSE REQUIRED REVERSAL.

THE PROSECUTOR'S FAILURE TO INSTRUCT THE GRAND JURY ON THE JUSTIFICATION DEFENSE REQUIRED REVERSAL AFTER TRIAL AND DISMISSAL OF THE INDICTMENT (WITHOUT PREJUDICE) (SECOND DEPT).

The Second Department, reversing defendant's conviction and dismissing the indictment (without prejudice), determined the prosecutor erroneously failed to explain the justification defense to the grand jury. Although defendant had a knife, there was evidence the victim had a gun and was the initial aggressor:

If the District Attorney fails to instruct the grand jury on a defense that would eliminate a needless or unfounded prosecution, the proceeding is defective, mandating dismissal of the indictment (see id. § 210.35[5] …). "'[A] prosecutor should instruct the [g]rand [j]ury on any complete defense supported by the evidence which has the potential for eliminating a needless or unfounded prosecution'" … . "Where the evidence before the grand jury supports it, the charge on justification must be given" … .

"In determining whether the evidence supports a justification defense, the record must be viewed in the light most favorable to the defendant" … . Here, a surveillance video shown to the grand jury indicated that the defendant approached Graves inside a store while holding a knife. Nevertheless, when viewing the evidence in the light most favorable to the defendant, there is a reasonable view of the evidence that the defendant was not the initial aggressor, Graves pointed a gun at the defendant, the defendant stabbed Graves to defend himself from the imminent use of deadly physical force against him, and the defendant could not safely retreat (see Penal Law § 35.15[2][a] …). People v Mead, 2025 NY Slip Op 07412, Second Dept 12-31-25

Practice Point: Where the evidence viewed in the light most favorable to the defendant satisfies the criteria for a defense to the offense, the prosecutor must so instruct the grand jury. Failure to do so renders the grand jury proceeding defective and the indictment must be dismissed, even after a conviction at trial.

December 31, 2025

GUILTY PLEA NOT COERECED BY JUDGE.

DEFENDANT WAS NOT COERCED INTO PLEADING GUILTY; THE JUDGE'S DESCRIBING THE POSSIBLE RANGE OF SENTENCING, PLEADING GUILTY TO AVOID A HARSHER SENTENCE, THE JUDGE'S COMMENTING ON THE STRENGTH OF THE PEOPLE'S CASE, AND COUNSEL'S TELLING DEFENDANT THE SENTENCE WOULD LIKELY BE HARSHER AFTER TRIAL, DID NOT AMOUNT TO "COERCION" (FOURTH DEPT).

The Fourth Department, affirming defendant's conviction, over a dissent, determined defendant's guilty plea was knowing, intelligent and voluntary, the dissent disagreed:

[D]espite the court's initial inclination to end the plea proceeding and allow the matter to proceed to trial and its indication that it could not accept a plea that was not voluntary, the court continued with the plea proceeding after defendant emphatically insisted that the plea "is voluntary . . . is voluntary . . . is voluntary" and that the court was not pressuring him. Defendant was given another opportunity to consult with defense counsel and then indicated that he wanted to proceed with the plea, and the court thereafter asked again whether defendant, with intent to cause serious physical injury, did in fact cause such injury to the victim by repeatedly stabbing her, to which defendant answered in the affirmative. The court then followed up one more time by asking defendant whether he was telling the truth when he answered that prior question, to which defendant again responded in the affirmative. Therefore, contrary to the dissent's suggestion that the law required more of the court, the record reflects that the court "properly conducted such [a further] inquiry and that defendant's responses to the court's subsequent questions removed [any] doubt about [his] guilt" with respect to the previously negated elements of assault in the first degree … . …

n any event, we conclude that defendant's challenge to the voluntariness of the plea lacks merit. Indeed, defendant's contention that the court coerced him into accepting the plea is belied by the record because, during the plea colloquy, defendant denied that he had been threatened or otherwise pressured into pleading guilty and, moreover, defendant specifically denied that the court had pressured him into taking a plea … . Further, contrary to defendant's assertion, "[a]lthough it is well settled that '[a] defendant may not be induced to plead guilty by the threat of a heavier sentence if [the defendant] decides to proceed to trial,' " we conclude that the statements made by the court " 'amount to a description of the range of the potential sentences' rather than impermissible coercion" … . The fact that defendant " 'may have pleaded guilty to avoid receiving a harsher sentence does not render his plea coerced' " … . Likewise, contrary to defendant's assertion, we conclude on this record that the court "did not coerce defendant into pleading guilty merely . . . by commenting on the strength of the People's evidence against him" … . Contrary to defendant's related assertion, we conclude that "defense counsel's advice that [defendant] was unlikely to prevail at trial and that he would likely receive a harsher sentence if convicted after trial . . . does not constitute coercion" … . People v Freeman, 2025 NY Slip Op 07125, Fourth Dept 12-23-25

Practice Point: Consult this decision for insight into what does and does not amount to "coercion" in the context of a guilty plea.

December 23, 2025

HUMANE ALTERNATIVES TO LONG-TERM CONFINEMENT ACT, INMATES.

PURSUANT TO THE "HUMANE ALTERNATIVES TO LONG-TERM CONFINEMENT ACT (HALT ACT)," AN INMATE WHO IS FACING SEGREGATED CONFINEMENT HAS A RIGHT TO THE PRESENCE OF COUNSEL AT THE DISPOSITIONAL PHASE OF THE DISCIPLINARY HEARING (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Powers, determined that the incarcerated petitioner had a right to have his attorney present during the

dispositional phase of the disciplinary hearing after he was found guilty of possession of a weapon. The Hearing Officer had determined counsel's presence was "no longer necessary" in violation of the "Humane Alternatives to Long-Term Solitary Confinement Act" (the HALT Act—Correction Law 137):

… [F]ollowing the passage of the HALT Act, Correction Law § 137 provides that an incarcerated individual "shall be permitted to be represented" during a disciplinary hearing that may result in placement in segregated confinement "by any attorney or law student, or" with certain limitations, "any paralegal or incarcerated person" (Correction Law § 137 [6] [l]). The pertinent regulations have since also been amended to specify that "[w]here an incarcerated individual is placed in, or pending possible placement in, segregated confinement pending a disciplinary hearing or superintendent's hearing, such incarcerated individual shall be permitted to be represented by," as is relevant here, "an attorney, having good standing, admitted to practice in any state" (7 NYCRR 251-5.2 [a] [1]).

Therefore, pursuant to both statute and regulation, if an incarcerated individual so chooses, he or she is entitled to have representation present during a disciplinary hearing when the permissible sanctions include the imposition of segregated confinement. Contrary to the Hearing Officer's determination, the dispositional phase is an integral aspect of the disciplinary hearing and the statutory and regulatory right to representation at issue here extends to that phase of the hearing. Matter of Wingate v Martuscello, 2025 NY Slip Op 07048, Third Dept 12-18-25

December 18, 2025

INCLUSORY CONCURENT COUNT AND CONTINUING OFFENSE CONVICTIONS VACATED.

ON APPEAL, CONVICTIONS FOR "INCLUSORY, CONCURRENT COUNTS" WERE VACATED, AND SEPARATE CONVICTIONS FOR A "CONTINUING OFFENSE" WERE VACATED (SECOND DEPT).

The Second Department determined several inclusory concurrent counts and certain convictions for a "continuing offense" must be vacated:

CPL 300.30(4) provides that "[c]oncurrent counts are 'inclusory' when the offense charged in one is greater than any of those charged in the others and when the latter are all lesser offenses included within the greater" … . CPL 300.40(3)(b) provides, in relevant part, that with respect to inclusory concurrent counts, "[a] verdict of guilty upon the greatest count submitted is deemed a dismissal of every lesser count submitted" … . Here, the defendant was convicted of five counts of criminal possession of a weapon in the second degree … and three counts of criminal possession of a firearm … . Because the counts charging criminal possession of a weapon in the second degree and criminal possession of a firearm are inclusory concurrent counts, the convictions of criminal possession of a firearm … must be vacated … .

… The defendant's convictions of criminal possession of a weapon in the second degree under counts 4 and 10 of the indictment subjected the defendant to double jeopardy. "An indictment cannot charge a defendant with more than one count of a crime that can be characterized as a continuing offense unless there has been an interruption in the course of conduct" … . Here, the indictment charged the defendant with three separate counts of criminal possession of a weapon in the second degree under Penal Law § 265.03(3) for the uninterrupted possession of single weapon. Such possession was continuous and "'constituted a single offense for which he could be prosecuted only once'" … . As such, we vacate the defendant's convictions of criminal possession of a weapon in the second degree under counts 4 and 10 of the indictment, vacate the sentences imposed thereon, and dismiss those counts of the indictment. People v Stewart, 2025 NY Slip Op 06737, Second Dept 12-3-25

Practice Point: Here criminal possession of firearm convictions were vacated as "inclusory, concurrent counts" of criminal possession of a weapon second degree.

Practice Point: Here three criminal possession of a weapon convictions related to a single "continuing offense" of criminal possession of a weapon. Two of the convictions were therefore vacated.

December 3, 2025

JURY INSTRUCTIONS, JUSTIFICATION-DEFENSE JURY CHARGE SHOULD HAVE BEEN GIVIEN DESPITE DENIAL DEFENDANT WAS THE ASSAILANT.

ALTHOUGH THE DEFENSE IN THIS MURDER CASE WAS BASED ON THE LACK OF EVIDENCE THAT DEFENDANT WAS THE ASSAILANT, THE DEFENDANT WAS STILL ENTITLTED TO A JUSTIFICATION-DEFENSE JURY-INSTRUCTION; THE DENIAL OF THE REQUEST FOR THE JUSTIFICATION-DEFENSE JURY CHARGE WAS REVERSIBLE ERROR; IN ADDITION, THE TRIAL COURT VIOLATED CVIL RIGHTS LAW 52 BY ALLOWING THE MEDIA TO RECORD TESTIMONIAL PORTIONS OF THE TRIAL (THIRD DEPT).

The Third Department, reversing defendant's murder conviction and ordering a new trial, determined the defense request for a justification-defense jury-instruction should have been granted. The defendant and the victim got into a bar fight after defendant called the victim names. The victim, who was larger than the defendant, initially knocked defendant down. After the defendant got up, the victim was stabbed. The knife which stabbed the victim was not found It was not clear who was the initial aggressor in the fight. And there was evidence the victim may have had a knife. The Third Department noted that the court erred when it allowed audiovisual coverage of the testimonial portion of the trial (Civil Rights Law 52):

"A justification charge must be given if there is any reasonable view of the evidence, when it is considered in the light most favorable to the defendant, that would allow the jury to conclude that the defendant's actions were justified" … . In order "for a defendant to be entitled to a justification charge with respect to the use of deadly physical force, the record must contain evidence that the defendant reasonably believed that the victim was using or was about to use deadly physical force and that the defendant could not safely retreat" … . A charge on the defense of justification remains appropriate where a defendant pursued other defense strategies at trial, including that he or she did not intend to cause the victim's death … ,was not present or was not the assailant … .The failure to provide a

justification charge under such circumstances constitutes reversible error warranting a new trial … .

Here, the evidence in the record fails to indicate who was the initial aggressor with respect to the use of physical force, but rather suggests both individuals started fighting immediately after someone — presumably defendant — yelled derogatory remarks at the victim. It was unrefuted that the victim was larger than defendant and had gained the upper hand during the fight, knocking defendant down with several blows. The further question is whether or not defendant was the initial aggressor with respect to deadly physical force … . … [T]he police recovered an open folding knife on the patio adjacent the picnic tables where the altercation began, near a pool of blood. … [A] reasoned view of the evidence is that the victim had unfolded the knife prior to being stabbed by defendant. * * * [W]e believe that there was a reasonable view of the evidence which would permit the jury to conclude that defendant's conduct was justified … . People v Mack, 2025 NY Slip Op 06757, Third Dept 12-4-25

Practice Point: No matter what the defense strategy is, a defendant is entitled to a justification-defense jury instruction if a reasonable view of the evidence would support finding defendant's conduct justified.

Practice Point: Civil Rights Law 52 prohibits audiovisual coverage of the testimonial portion of a criminal trial.

December 4, 2025

OUT-OF-STATE CONVICTION WAS NOT DEMONSTRATE TO BE EQUIVALENT TO A NEW YORK VIOLENT FELONY; PERSISTENT VIOLENT FELONY OFFENDER ADJUDICATION VACATED.

THE PEOPLE DID NOT PROVE A VERMONT OFFENSE WAS EQUIVALENT TO A NEW YORK VIOLENT FELONY OFFENSE; THEREFORE THE PERSISTENT VIOLENT FELONY OFFENDER ADJUDICATION WAS VACATED (SECOND DEPT).

The Second Department, vacating defendant's persistent violent felony offender adjudication, determined the People did not prove that a Vermont assault and robbery offense was the equivalent to a New York violent felony offense:

While the defendant admitted at sentencing that he was the person convicted of two prior felonies … , the People failed to satisfy their burden of establishing that the defendant was convicted of an offense in a foreign jurisdiction that is equivalent to a violent felony in New York … . The People failed to demonstrate that the Vermont offense of assault and robbery with a dangerous weapon … is equivalent to a New York criminal offense designated as a violent felony … . Accordingly, we modify the judgment by vacating the defendant's adjudication as a persistent violent felony offender and the sentences imposed thereon, and we remit the matter to the Supreme Court … for resentencing … . People v Parris, 2025 NY Slip Op 07028, Second Dept 12-17-25

Practice Point: If a foreign conviction is the basis of a persistent violent felony offender adjudication, the People must prove the foreign offense is the equivalent of a New York violent felony. If the People fail to prove the equivalence the adjudication will be vacated on appeal.

December 17, 2025

PROBATION CONDITION INVALID, APPEAL WAIVER INVALID.

THE PROBATION CONDITION REQUIRING DEFENDANT TO CONSENT TO SEARCHES FOR DRUGS AND WEAPONS WAS NOT REASONABLY RELATED TO HIS REHABILITATION FOR DISORDERLY CONDUCT; THE APPEAL WAIVER WAS INVALID (SECOND DEPT).

The Second Department determined defendant's waiver of appeal was not valid and went on to find that the probation condition requiring defendant to consent to "search of his person, vehicle, and place of abode, and the seizure of any illegal drugs, drug paraphernalia, gun/firearm, or other weapon or contraband" was not reasonably related to his rehabilitation for disorderly conduct:

… [The record does not demonstrate that the defendant knowingly, voluntarily, and intelligently waived his right to appeal … . The Supreme Court's oral explanation of the appeal waiver and its consequences was unclear and incomplete, and the written waiver cannot be relied upon to cure the deficiency because "the court did not ascertain on the record whether the defendant had read the written waiver, discussed it with his attorney, or was aware of its contents" … .

… [T]he conditions of probation "shall be such as the court, in its discretion, deems reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him [or her] to do so" (Penal Law § 65.10[1]). In addition to specific conditions enumerated in the statute, the court may, in its discretion, impose "any other conditions reasonably related to [the defendant's] rehabilitation" … and "any other reasonable condition as the court shall determine to be necessary or appropriate to ameliorate the conduct which gave rise to the offense or to prevent the incarceration of the defendant" … . Therefore, sentencing courts may require a defendant to consent to searches by his or her probation officer for weapons, illegal drugs, or other contraband so long as the condition is "individually tailored in relation to the offense" and "the defendant's particular circumstances, including his or her background, history, and proclivities" … .

Here, the defendant's only prior conviction was for disorderly conduct, a violation … , the offense at issue did not involve the use of a weapon or alcohol or other substances, and the defendant was not under the influence of any substances at the

time of the offense. … [T]he Supreme Court improvidently exercised its discretion in imposing Condition No. 28, as that condition "was not individually tailored in relation to the offense, and was not, therefore, reasonably related to the defendant's rehabilitation, or necessary to ensure that the defendant will lead a law-abiding life" … . People v Gibson, 2025 NY Slip Op 06724, Second Dept 12-3-25

Practice Point: Here the defendant was convicted of disorderly conduct which did not involve a weapon or drugs. The probation condition requiring defendant to submit to searches for drugs or weapons was struck.

December 3, 2025

PROBATION CONDITION INVALID.

THE PROBATION CONDITION REQUIRING DEFENDANT TO SUPPORT DEPENDENTS AND MEET FAMILY RESPONSIBILITIES WAS NOT REASONABLY RELATED TO DEFENDANT'S REHABILITATION; DEFENDANT WAS CONVICTED OF ASSAULT (SECOND DEPT).

The Second Department, striking the probation condition requiring defendant to "support dependents and meet other family responsibilities', determined the condition was not reasonably related to the defendant's rehabilitation. Defendant was convicted of assault:

Pursuant to Penal Law § 65.10(1), the conditions of probation "shall be such as the court, in its discretion, deems reasonably necessary to insure that the defendant will lead a law-abiding life or assist him [or her] to do so" … . "In Penal Law § 65.10(2), the Legislature set forth a list of conditions intended to be rehabilitative" … , including the condition that a defendant "[s]upport his [or her] dependents and meet other family responsibilities" (Penal Law § 65.10[2][f]). "The statute 'quite clearly restricts probation conditions to those reasonably related to a defendant's rehabilitation'" … . All enumerated probation conditions under Penal Law 65.10 must be "tailored to the particular defendant's case" … .

Under the circumstances of this case, the Supreme Court improperly imposed Condition No. 14. This condition was "not individually tailored in relation to the

offense and therefore, was not reasonably related to the defendant's rehabilitation or necessary to insure that he will lead a law-abiding life" … . People v Aldea, 2025 NY Slip Op 06716, Second Dept 12-3-25

Practice Point: Courts are striking the probation condition requiring defendant to support dependents when it is not related to the underlying offense, assault in this case.

December 3, 2025

RIGHT TO REMAIN SILENT UNEQUIVOCALLY ASSERTED.

EVERY STATEMENT DEFENDANT MADE AFTER HE TOLD THE OFFICERS "I AIN'T GOT NOTHING TO TALK ABOUT" SHOULD HAVE BEEN SUPPRESSED (FOURTH DEPT).

The Fourth Department, vacating defendant's guilty plea, determined defendant had unequivocally asserted his right to remain silent and all statements defendant made thereafter should have been suppressed:

After defendant indicated that he understood [the Miranda] rights, the officer asked whether defendant would agree to waive them and speak to the officer. Defendant did not respond in the affirmative. Instead, he said, "I ain't got nothing to talk about. I just want to go to jail. I want to go to sleep." * * *

… [D]efendant said in no uncertain terms that he did not want to talk to the officer and instead wanted to be taken to jail … , and "[n]o reasonable police officer could have interpreted that statement as anything other than a desire not to talk to the police" … . The officer nevertheless continued to ask defendant questions that were "reasonably likely to elicit an incriminating response" … . Under the circumstances, we conclude that the court's determination that defendant did not unequivocally invoke his right to remain silent is "unsupported by the record" … . People v Williams, 2025 NY Slip Op 07158, Fourth Dept 12-23-25

Practice Point: If a defendant tells the police "I ain't got nothing to talk about" and the police continue questioning him, that is a Miranda violation requiring suppression.

December 23, 2025

ROBBERY, DISPLAY OF BB GUN SUPPORTED ROBBERY FIRST DEGREE CONVICTION.

DEFENDANT, WHO WAS CHARGED WITH FIRST DEGREE ROBBERY, PRESENTED NO EVIDENCE THE BB GUN DISPLAYED DURING THE ROBBERY WAS NOT CAPABLE OF CAUSING DEATH OR SERIOUS INJURY; THEREFORE THE TRIAL JUDGE PROPERLY REFUSED TO INSTRUCT THE JURY ON THE "DISPLAYED-WEAPON-COULD-NOT-CAUSE-DEATH-OR-SERIOUS-INJURY" AFFIRMATIVE DEFENSE; A THREE-JUDGE DISSENT ARGUED THAT, BECAUSE IT WAS UNCONTROVERTED THAT DEFENDANT DISPLAYED A BB GUN, SECOND DEGREE ROBBERY WAS THE ONLY AVAILABLE CHARGE (CT APP).

The Court of Appeals, affirming the Appellate Division on different grounds, in a full-fledged opinion by Judge Troutman, over a three-judge dissent, determined the trial judge properly refused to instruct the jury on the affirmative defense that the weapon displayed by defendant during the robbery was not capable of causing death or serious injury. Defendant had displayed BB gun during the robbery and was charged with first degree robbery. The dissent argued that, because it was uncontroverted that defendant displayed a BB gun, second degree robbery is the only available charge. Penal Law 160.15(4) provides "A person is guilty of robbery in the first degree when he forcibly steals property and when, in the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime:* * * [d]isplays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; except that in any prosecution under this subdivision, it is an affirmative defense that such pistol, revolver, rifle, shotgun, machine gun or other firearm was not a loaded weapon from which a shot, readily capable of producing death or other serious physical injury, could be discharged.

Nothing contained in this subdivision shall constitute a defense to a prosecution for, or preclude a conviction of, robbery in the second degree … .":

… [T]he court properly denied [defendant's] request to charge the jury on the affirmative defense. "When a defense declared by statute to be an 'affirmative defense' is raised at a trial, the defendant has the burden of establishing such defense by a preponderance of the evidence" (Penal Law § 25.00 [2]). The court must charge the affirmative defense to robbery in the first degree when, viewing the evidence in the light most favorable to the defendant, there is "sufficient evidence for the jury to find by a preponderance of the evidence that the elements of the defense are satisfied, i.e., that the object displayed was not a loaded weapon [readily] capable of producing death or other serious physical injury" … . BB guns are capable of producing injury, including but not limited to protracted impairment of vision … . Whether a particular BB gun is "readily capable" of doing so is not a question that we can decide as a matter of law … .

Here, although defendant made a prima facie showing that the object he displayed during the robbery was a BB gun that the police recovered from his home, he presented no evidence concerning the capabilities of that particular gun. Given the absence of such evidence, "the members of the jury could do no more than speculate that defendant's gun was not [readily] capable of causing death or other serious physical injury, and thus the court properly denied defendant's request to submit the issue to them" … . People v Smith, 2025 NY Slip Op 07082, CtApp 12-18-25

Practice Point: When a defendant seeks a jury instruction on an affirmative defense, the defendant has the burden to establish the defense by a preponderance of the evidence. Here the defendant argued the BB gun he displayed during the robbery could not cause death or serious injury and he was therefore entitled to a jury instruction on the "displayed weapon could not cause death or serious injury" affirmative-defense to first degree robbery. But because defendant presented no evidence on the capabilities of the BB gun, the Court of Appeals held the defendant did not meet his burden of proof and the trial judge properly denied the request for the affirmative-defense jury instruction.

December 18, 2025

SEX OFFENDER REGISTRATION ACT (SORA), EVIDENCE DID NOT SUPPORT USE OF DRUGS.

THERE WAS NO EVIDENCE DEFENDANT USED DRUGS TO EXCESS AT THE TIME OF THE OFFENSE OR IN THE PAST; THE 15 POINT ASSESSMENT UNDER RISK FACTOR 11 WAS THEREFORE ELIMINATED, REDUCING THE RISK LEVEL FROM THREE TO TWO (SECOND DEPT).

The Second Department, reducing the SORA risk assessment from level three to level two, determined the evidence did not support assessing 15 points for using drugs to excess:

"In order to support the assessment of points under risk factor 11, . . . the People must show by clear and convincing evidence that the offender used drugs or alcohol in excess either at the time of the crime or repeatedly in the past" … . Here, the People failed to present clear and convincing evidence that the defendant's marijuana use on the date of the offense was excessive or "causally linked to the sexual assault" … . The People's evidence was also insufficient to establish that the defendant used marijuana or other substances in excess repeatedly in the past … . Without the assessment of points under risk factor 11, the defendant's point total was 100, which is within the range for a presumptive level two designation. People v Gregory, 2025 NY Slip Op 07420, Second Dept 12-31-25

December 31, 2025

SEX OFFENDER REGISTRATION ACT (SORA), JUDGES, RISK-LEVEL ASSESSMENT NOT SUPPORTED BY FINDINGS OF FACT AND CONCLUSIONS OF LAW.

REMITTAL IS NECESSARY BECAUSE THE SORA RISK-LEVEL-ASSESSEMENT WAS NOT SUPPORTED IN THE RECORD BY FINDINGS OF FACT AND CONCLUSIONS OF LAW AS REQUIRED BY THE CORRECTION LAW; DEFENDANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL IN THAT AN AVAILABLE GROUND FOR A DOWNWARD DEPARTURE WAS NOT RAISED (THIRD DEPT).

The Third Department, reversing County Court, determined (1) appellate review of the SORA risk-level assessment was precluded by the judge's failure to place on the record its findings of fact and conclusions of law as required by the Correction Law, and (2) defendant did not receive effective assistance of counsel in that there was a ground for a downward departure which was not raised. Defendant was assessed 30 points based on a prior conviction for endangering the welfare of a child. However there was no sexual offense involved in that conviction and a downward departure was therefore possible:

"The failure to include the necessary findings prevents this Court from conducting a meaningful appellate review of defendant's designation as a risk level two sex offender and would, alone, require remittal for County Court to comply with the statute" (… see Correction Law § 168-n [3] …). * * *

… County Court was required to assess 30 points under risk factor 9 based upon defendant's undisputed prior conviction of endangering the welfare of a child, "without regard to whether the underlying offense involved conduct that is sexual in nature" … . This is because "[t]he Board decided to treat endangering the welfare of a child as if it were a sex crime because it generally involves sexual misconduct, especially when it is part of a plea bargained disposition" … . However, the risk assessment guidelines also provide that, "[w]here a review of the record indicates that there was no such [sexual] misconduct, a departure may be warranted" … . People v Pribble, 2025 NY Slip Op 06936, Third Dept 12-11-25

Practice Point: If a SORA risk-level-assessment is not supported by findings of fact and conclusions of law in the record appellate review is not possible and remittal is required.

Practice Point: If, as here, there is an available ground for a downward departure which is not raised, the defendant did not receive effective assistance of counsel.

December 11, 2025

STREET STOP UNJUSTIFIED.

THE POLICE STARTED FOLLOWING DEFENDANT BECAUSE THEY THOUGHT HE CROSSED THE STREET TO AVOID THEM; THE POLICE DID NOT HAVE GROUNDS FOR A COMMON-LAW INQUIRY AND NOTHING DEFENDANT DID AFTER THE STREET STOP JUSTIFIED THE LEVEL THREE SEIZURE OF THE DEFENDANT; THE WEAPON FOUND IN DEFENDANT'S POCKET SHOULD HAVE BEEN SUPPRESSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined what the police saw did not warrant a common-law inquiry on the street and the subsequent level three seizure of the defendant was not justified. Apparently the police felt defendant crossed the street to avoid them, the police followed him and saw him pass something to a woman, after defendant was stopped he was told to take his hand out of his jacket pocket and did so, the officer testified a heavy object was in the jacket pocket, the defendant was then handcuffed and a handgun was found in the pocket:

Defendant's suppression motion should have been granted. Although we decline to disturb the court's credibility determinations … , notwithstanding our concerns about discrepancies between the officers' testimony and what is shown in the body-worn camera footage, the initial inquiry and subsequent seizure were still unjustified. Even crediting the officers' testimony that their suspicion was aroused when defendant and the woman crossed the street to avoid their patrol car, and then they later observed him pass a small object to the woman, the totality of the

circumstances did not give rise to the level of suspicion required for a common-law inquiry … . Neither officer could identify what object was passed from defendant to the woman — one testified that "it could have been anything" — nor otherwise articulate why, from this innocuous behavior, they had a "founded suspicion that criminality was afoot" to warrant a level two encounter … . The police were not responding to a call, there was ambiguous testimony as to whether the encounter took place in a high crime area, and the woman did not give defendant money in exchange or immediately leave "without any kind social interaction" … .

Similarly, this Court's review of the record, including the body-worn camera video recording of the encounter, indicates that the police were not justified in their escalation to the level three seizure in restraining defendant's wrists simply because, after he was detained, and defendant complied with the officers' request that he show his hands, he turned his body away from one officer, who observed a "shift in weight" in defendant's jacket pocket … . Even if there had been a bulge in defendant's pocket, that observation alone does not imply a reasonable conclusion that defendant was armed … . Defendant's hands were in clear view when the officers seized him, and nothing in the record indicates that defendant was armed or posed a threat to safety to justify him being frisked … . People v Small, 2025 NY Slip Op 06665, First Dept 12-2-25

Practice Point: This decision illustrates the level of suspicion required to justify a common-law inquiry on the street. Here the police thought the defendant crossed the street to avoid them and they saw defendant pass something to a woman, but could not say what it was. That was not enough.

Practice Point: This decision also illustrates the level of suspicion required to justify a level three seizure on the street. Here defendant was told to remove his hand from his pocket and did so. The police testified there was a bulge in the pocket, but defendant's hands were visible. The police were not justified in handcuffing the defendant and searching his pocket.

December 2, 2025

WAIVER OF RIGHT TO COUNSEL INSUFFICIENT.

DEFENDANT'S WAIVER OF HIS RIGHT TO COUNSEL WAS NOT KNOWING, INTELLIGENT AND VOLUNTARY; NEW HEARINGS AND TRIAL ORDERED; CRITERIA EXPLAINED IN SOME DETAIL (FIRST DEPT).

The First Department, ordering new hearings and a new trial, determined defendant's waiver of his right to counsel was not knowing, voluntary and intelligent:

Defendant's criminal history, which included drug possession and sale convictions dating back to 1992, and his in-court remarks regarding his history of substance abuse issues and present drug use constituted a "red flag" which should have triggered at least a brief inquiry into defendant's mental capacity and comprehension of the proceedings … . The record also does not "affirmatively disclose" that the court "delved into [] defendant's age, education, occupation, previous exposure to legal procedures and other relevant factors bearing on a competent, intelligent, voluntary waiver" … . As the trial judge was only assigned to defendant's case about a month before trial, this was not a case where the judge "had numerous opportunities to see and hear defendant firsthand" to evaluate his knowledge and familiarity with the criminal justice system … .

Moreover, the court's colloquy did not "accomplish the goals of adequately warning a defendant of the risks inherent in proceeding pro se, and apprising a defendant of the singular importance of the lawyer in the adversarial system of adjudication" … . Although defendant correctly recited the charges against him, he also suggested that he could get convicted of additional charges, and the record does not reflect that he was ever informed of the potential aggregate sentence he faced after trial … . The court reminded defendant that he was "not trained as a lawyer" and did not "understand about cross-examination," so it was "dangerous" and not in his best interests to proceed pro se; these "brief, generalized warnings do not satisfy the requirement for a searching inquiry" … . "The court failed to warn defendant about the numerous pitfalls of representing himself before and at trial, such as unfamiliarity with legal terms, concepts, and case names; the potential challenges of cross-examining witnesses and delivering an opening statement and

summation as a pro se criminal defendant" … . People v Rivera, 2025 NY Slip Op 07231, First Dept 12-23-25

Practice Point: Consult this decision for insight into what a judge must explain to a defendant seeking to waive the right to counsel.

December 23, 2025

WAIVER OF RIGHT TO COUNSEL INSUFFICIENT.

THE TRIAL JUDGE DID NOT ENSURE THAT DEFENDANT'S WAIVER OF HIS RIGHT TO COUNSEL WAS KNOWING AND INTELLIGENT, CRITERIA EXPLAINED; NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing defendant's conviction and ordering a new trial, determined the trial judge did not ensure the pro se defendant was aware of the risks of representing himself or the benefits of having an attorney:

… [T]he court failed to conduct the requisite inquiry before allowing the defendant to proceed pro se and the record does not reveal that the defendant was aware of the disadvantages of representing himself or the benefits of having an attorney … . A court must determine that the defendant's waiver of the right to counsel is made competently, intelligently, and voluntarily before allowing that defendant to represent himself or herself … . To make that evaluation, the court "must undertake a 'searching inquiry' designed to 'insur[e] that a defendant [is] aware of the dangers and disadvantages of proceeding without counsel'" … . The court's inquiry "must accomplish the goals of adequately warning a defendant of the risks inherent in proceeding pro se, and apprising a defendant of the singular importance of the lawyer in the adversarial system of adjudication" … .

Here, the record does not demonstrate that the Supreme Court inquired about the defendant's pedigree information, aside from the fact that he did not have a law license, or that the court ascertained whether the defendant was aware of the risks inherent in proceeding without a trial attorney and the benefits of having counsel represent him at trial … . The court failed to ensure that the defendant understood the potential sentence that could be imposed or the dangers and disadvantages of

self-representation … . The court neither "tested defendant's understanding of choosing self-representation nor provided a reliable basis for appellate review" … . In addition, the defendant continually engaged in disruptive or obstreperous conduct … . Under these circumstances, the defendant's purported waiver of his right to counsel was ineffective and the defendant is entitled to a new trial … . People v Hall, 2025 NY Slip Op 06727, Second Dept 12-3-25

Practice Point: Consult this decision for insight into how a judge, faced with a defendant who wishes to represent himself, should handle the "searching Inquiry" to ensure the defendant is aware of the risks.

December 3, 2025