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APPEALS, DENIAL OF APPLICATION FOR RESENTENCING UNDER THE DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT (DVSJA).

NO APPEAL LIES FROM COUNTY COURT'S DISMISSAL WITHOUT PREJUDICE OF DEFENDANT'S APPLICATION FOR RESENTENCING UNDER THE DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT (DVSJA).

The Third Department, in a full-fledged opinion by Justice Powers, affirming County Court, determined no appeal lies from the dismissal-without-prejudice of defendant's application for resentencing under the Domestic Violence Survivors Justice Act (DVSJA):

… [County Court] dismissed the application without prejudice finding that, although she met the step one eligibility criteria for an alternative sentence, "there [was] no [corroborating] evidence nor even allegations presented that [d]efendant was, at the time of the offense, a victim of domestic violence subjected to substantial abuse inflicted by a member of her family or household" as required by CPL 440.47 (2) (c) … . * * *

Where, as here, the Legislature specifically provides for appealability of certain orders but not others, "an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded" … . "[S]ince the Legislature failed to provide for an appeal from the [dismissal] of an application

for resentencing pursuant to [Penal Law § 60.12 and CPL 440.47 (2) (c)], no appeal was intended" … . "Where the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used" … . Here, the Legislature intended a different result as to the appealability of orders dismissing without prejudice under step one or step two and an order denying an application on the merits after a hearing under step three, and this Court must give effect to that intention … . Had an appeal from a dismissal without prejudice been intended under step one or step two of the DVSJA, "the [L]egislature could easily have so stated" … . Rather, the language utilized by the Legislature — specifically that dismissal is without prejudice — mandates that the appropriate remedy in this situation is for a defendant to file a new application satisfying the evidentiary requirements of CPL 440.47. Thus, as "[a]ppeals in criminal cases are strictly limited to those authorized by statute," this appeal is not properly before this Court and must be dismissed … . People v Melissa OO., 2024 NY Slip Op 05920, Third Dept 11-27-24

Practice Point: Criminal appeals are creatures of statutes. Here the DVSJA did not provide for an appeal of the dismissal-without-prejudice of defendant's application for resentencing. County Court dismissed the application because defendant did not submit evidence she was a victim of domestic abuse.

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APPEALS, WAIVER OF APPEAL INVALID, JUDGES.

THE DEFENDANT'S WAIVER OF APPEAL WAS INVALID BECAUSE THE JUDGE FAILED TO ADVISE DEFENDANT (1) THAT THE STATE WOULD BEAR THE COSTS OF AN APPEAL IF THE DEFENDANT COULD NOT AFFORD THEM; AND (2) THE WAIVER DID NOT ENCOMPASS THE LOSS OF RIGHTS TO COUNSEL AND THE WAIVER OF COSTS, FEES, AND EXPENSES; IN ADDITION THE JUDGE DID NOT ASCERTAIN WHETHER DEFFENDANT READ AND UNDERSTOOD THE WRITTEN WAIVER FORM, OR WHETHER DEFENDANT HAD DISCUSSED THE WAIVER WITH COUNSEL (SECOND DEPT).

The Second Department determined defendant's waiver of appeal was invalid:

… [T]he defendant's purported waiver of his right to appeal was invalid. Among other things, during the appeal waiver colloquy, the Supreme Court failed to advise the defendant that if he could not afford the costs of an appeal or of an attorney to represent him on appeal, then the State would bear those costs … or to advise the defendant that the waiver of the right to appeal did not encompass the loss of attendant rights to counsel and the waiver of costs, fees, and expenses … . Although the defendant executed a written appeal waiver form, the court failed to ascertain on the record whether the defendant had read the written waiver, was aware of all of its contents, and had discussed the entire written waiver with counsel, including the portion of the written waiver addressing the attendant rights to counsel and the waiver of costs, fees, and expenses … . Thus, under the circumstances of this case, the defendant did not knowingly, voluntarily, and intelligently waive his right to appeal, and the purported appeal waiver does not preclude appellate review of any of the defendant's contentions … . People v Mingo, 2025 NY Slip Op 06335, Second Dept 11-19-25

Practice Point: Consult this decision for insight into what a judge must advise and ask the defendant to ensure the waiver of appeal is knowing and intelligent.

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DISCOVERY, CERTIFICATE OF COMPLIANCE, JUDGES, ATTORNEYS.

IN DETERMINING WHETHER THE PEOPLE'S CERTIFICATE OF COMPLIANCE WITH THEIR DISCOVERY OBLIGATIONS WAS VALID THE MOTION COURT RULED THE PEOPLE HAD ACTED IN GOOD FAITH; THE MATTER WAS REMITTED FOR THE APPLICATION OF THE CORRECT STANDARD: WHETHER THE PEOPLE ACTED WITH DUE DILIGENCE AND MADE REASONABLE EFFORTS TO SATISFIY THEIR OBLIGATIONS (FOURTH DEPT).

The Fourth Department remitted the matter for a new determination whether the People's certificate of compliance (COC) with their discovery obligations was valid. The motion judge held the People "acted in good faith." The appropriate inquiry is whether the People exercised due diligence and made reasonable efforts to satisfy their obligations:

… [T]he court erred in concluding that the People's initial COC was proper solely on the basis that the People acted in good faith with respect to their discovery obligations. The court was required to determine whether the People satisfied their burden of establishing that they exercised due diligence and made reasonable efforts to satisfy their obligations under CPL article 245 at the time they filed their initial COC … . In light of the court's failure to consider whether the People met that burden, we hold the case, reserve decision and remit the matter to Supreme Court to make that determination and, if appropriate, to determine whether the statement of readiness was valid and whether the People were ready within the requisite time period (see CPL 30.30 [1] [a]). People v Mosley, 2025 NY Slip Op 06484, Fourth Dept 11-21-25

Practice Point: The standard for determining whether the People's certificate of compliance with their discovery obligations is valid is "due diligence," not "good faith."

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FREEDOM OF INFORMATION LAW (FOIL), DISTRICT ATTORNEY'S DATASHEET.

THE DISTRICT ATTORNEY'S DATASHEET IS AN ATTORNEY-WORK-PRODUCT WHICH IS NOT SUBJECT TO FOIL DISCLOSURE; BECAUSE PETITIONER DID NOT SUBSTANTIALLY PREVAIL IN THE FOIL PROCEEDINGS, PETITIONER WAS NOT ENTITLED TO AN AWARD OF ATTORNEY'S FEES (FIRST DEPT).

The First Department, reversing Supreme Court, determined the District Attorney's (D.A.'s) datasheet was an attorney-work-product which was not subject to a FOIL disclosure:

Supreme Court appropriately ordered an in camera inspection of all records responsive to petitioner's FOIL request, including the datasheet that was ultimately produced with redaction of personal information regarding certain people involved in the relevant criminal matter (Public Officers Law § 84 et seq.). However, those records should not have included the D.A. datasheet. This Court has previously held that the D.A. datasheet constitutes attorney work product, as it contains the analysis and conclusions of the intake attorney … . As a result, CPLR 3101(c) protects the datasheet from disclosure under FOIL, and it is not subject to disclosure even with redactions … .

In light of this determination, the award of attorneys' fees is unwarranted, as petitioner has not "substantially prevailed" in its appeal of respondent's denial … . Furthermore, even had petitioner substantially prevailed, Supreme Court made no "find[ing] that the agency had no reasonable basis for denying access," and thus, there was no basis for an award of attorneys' fees to petitioner … . Matter of Law Off. of Cyrus Joubin v Manhattan Dist. Attorney's Off., 2025 NY Slip Op 06283, First Dept 11-18-25

Practice Point: A FOIL request for a District Attorney's datasheet will be denied because the datasheet is privileged (attorney-work-product).

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INCLUSORY-CONCURRENT-COUNT AND LESSER-INCLUDED-OFFENSE CONVICTIONS REVERSED.

DEFENDANT WAS CONVICTED OF ASSAULT ON A PEACE OFFICER AND ASSAULT SECOND; THE ASSAULT SECOND CONVICTION WAS REVERSED BECAUSE (1) ASSAULT SECOND IS AN INCLUSORY CONCURRENT COUNT OF ASSAULT ON A PEACE OFFICER, AND (2) ASSAULT SECOND IS A LESSER INCLUDED OFFENSE OF ASSAULT ON A PEACE OFFICER (FOURTH DEPT).

The Fourth Department reversed the assault second conviction because assault second is an inclusory concurrent count of assault on a peace officer:

… [T]he conviction of assault in the second degree cannot stand. … [T]his Court has previously determined that assault in the second degree "is an inclusory concurrent count of assault on a [peace] officer" … . Moreover, as charged here, assault in the second degree "is a lesser included offense of assault on a [peace] officer" … . As a result, that part of the judgment convicting defendant of assault in the second degree must be reversed and count 4 of the indictment dismissed … . People v Engles, 2025 NY Slip Op 06412, Fourth Dept 11-21-25

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INEFFECTIVE ASSISTANCE, SPOLIATION, FAILURE TO REQUEST ADVERSE INFERENCE CHARGE AT SUPPRESSION HEARING.

DEFENDANT MOVED TO SUPPRESS THE WEAPON SEIZED FROM DEFENDANT'S VEHICLE AFTER A TRAFFIC STOP ON THE GROUND THERE WAS NO PROBABLE CAUSE FOR THE STOP; THE POLICE CLAIMED THE REASON FOR THE STOP WAS DEFENDANT'S FAILURE TO WEAR A SEATBELT; SURVEILLANCE VIDEOS WHICH WOULD HAVE SHOWN WHETHER DEFENDANT WAS WEARING A SEARBELT WERE NOT PRESERVED; DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST AN ADVERSE INFERENCE CHARGE IN CONNECTION WITH THE SUPPRESSION MOTION; MATTER REMITTED (FOURTH DEPT).

The Fourth Department, remitting the matter for legal argument and, if defendant so requests, reopening of the suppression hearing, determined defendant did not receive effective assistance of counsel. Surveillance videos which would have shown whether defendant was not wearing a seatbelt (the claimed probable cause for the stop) were not preserved. Defendant moved to suppress the weapon seized from the vehicle on the ground there was no probable cause for the traffic stop. Defense counsel was deemed ineffective for failing the request an adverse inference charge:

… [T]he single omission of failing to request that the court consider an adverse inference charge at the suppression hearing deprived defendant of meaningful representation … . Defense counsel's error in failing to make that argument was sufficiently egregious and prejudicial as to deprive defendant of his constitutional right to effective legal representation because the only evidence presented by the People at the hearing was testimony from one of the arresting officers, whose testimony was inconsistent at times, and an adverse inference charge could have successfully undermined the officer's testimony on the issue of probable cause to stop defendant, i.e., whether defendant was, in fact, not wearing a seatbelt. Indeed, suppression of the gun that was seized as a result of defendant's encounter with the police would have been dispositive of the sole count of the indictment, charging

defendant with criminal possession of a weapon in the second degree … . Under the circumstances of this case, defense counsel's failure to request an adverse inference charge could not have been grounded in legitimate strategy … . We note that defendant's contention survives his guilty plea inasmuch as he demonstrated that defense counsel's error infected the plea bargaining process … .

We therefore conditionally modify the judgment by remitting the matter to Supreme Court "for further proceedings on the suppression application, to include legal argument by counsel for both parties and, if defendant so elects, reopening of the hearing" … . In the event that defendant prevails on the suppression application, the judgment is reversed, the plea is vacated and the indictment is dismissed and, if the People prevail, then the judgment "should be amended to reflect that result" … . People v Evans, 2025 NY Slip Op 06477, Fourth Dept 11-21-25

Practice Point: Here surveillance videos which would have shown whether defendant was not wearing a seatbelt (the claimed probable cause for the traffic stop) were not preserved. Defendant moved to suppress the weapon seized from the vehicle on the ground there was no probable cause for the stop. Defense counsel was deemed ineffective for failing to request an adverse inference charge with respect to the suppression hearing. The remedy: the matter was remitted for legal argument and, if defendant requests, reopening of the suppression hearing.

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JUDGES, YOUTHFUL OFFENDER ADJUDICATION, DISCRETION.

THE SENTENCING COURT DID NOT ABUSE ITS DISCRETION IN DENYING A YOUTHFUL OFFENDER ADJUDICATION, DESPITE THIS BEING DEFENDANT'S FIRST CONTACT WITH THE JUDICIAL SYSTEM, HIS ACQUITTAL OF THE MOST SERIOUS CHARGES, AND AFFIDAVITS FROM SEVERAL JURORS IN SUPPORT OF THE MOTION TO SET ASIDE THE VERDICT; THERE WAS A SUBSTANTIVE DISSENT (THIRD DEPT).

The Third Department, affirming defendant's attempted assault conviction and the denial of youthful offender status, over a dissent, determined the trial court did not abuse its discretion in denying the request for a youthful offender adjudication. The victim was slashed with a knife in the abdomen and arm. It was defendant's first contact with the criminal justice system. Affidavits from some of the jurors were submitted in support of defendant's motion to set aside the verdict:

… Supreme Court noted that it had received multiple letters in support of defendant which indicated that he was of "upstanding character." The court agreed with defendant's assertion that this was his first involvement with the criminal justice system and that he had avoided circumstances like this in the past. The court considered these facts in imposing the sentence, but also that there was no evidence that any other individual had been involved in the physical altercation between defendant and the victim. The court expressly disbelieved defendant's explanation that he carried the knife at all times because he feared for his safety, in view of the fact that defendant's presence with the knife was explicitly requested. The court noted that if defendant was truly afraid for his safety the appropriate response would be to call campus police, not show up to the fight with knife in tow. The court also paid importance to defendant's failure to take accountability or acknowledge that his actions caused the victim's injury, despite having expressed generalized sympathy for the victim. The court found that, although eligible for youthful offender status, the circumstances of the crime did not warrant granting the request and imposed a five-year term of incarceration. * * *

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From the dissent:

… "[Y]outhful offender designations are given to those who have a real likelihood of turning their lives around, and the protection gives these individuals the opportunity for a fresh start, without a criminal record" … . That is precisely what the facts of this case present: an individual who made a grave mistake but appears motivated to redeem himself. In my view, although defendant's crime is significant, justice is better served by imposing a sentence that is commensurate with the severity of his crime while also permitting him to become a productive member of society upon release, which will occur at a critical time in his transition to adult life … . People v Hall, 2025 NY Slip Op 06366, Third Dept 11-20-25

Practice Point: Consult this decision for insight into the broad discretion accorded a judge in determining whether to adjudicate a defendant a youthful offender.

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JURIES, RIGHT TO TRIAL BY TWELVE JURORS FORFEITED.

A DEFENDANT, BY HIS OR HER CONDUCT, CAN FORFEIT THE RIGHT TO A TRIAL BY 12 JURORS; HERE DEFENDANT APPROACHED THE JURY FOREMAN AT THE FOREMAN'S HOME AND THE FOREMAN WAS DISCHARGED; THE TRIAL JUDGE PROPERLY PROCEEDED WITH 11 JURORS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Troutman, determined defendant, by his egregious conduct directed at the jury foreperson, forfeited his right to a 12-person jury and the trial properly proceeded to a verdict with the remaining 11 jurors:

The foreperson testified that the court adjourned at around 1:00 the day before and, at around 1:25, he took a rideshare home. Outside the gate to his home, a man approached him "on behalf of" defendant and said that defendant was innocent and "being extorted." The man handed him documents, three of which the foreperson produced for the court. The foreperson asked how the man knew where he lived; the man said: "Public records." The foreperson testified that he was unsure if the

man was the same person as defendant and denied telling the ADA that it was defendant. He described the man as the same height as himself, of indeterminate race, dark-skinned but lighter than himself, average build, and wearing a hat, sunglasses, and a jacket with a high collar. In addition, it was overcast and rainy. The whole interaction lasted under a minute, after which the foreperson went inside and called the ADA [the foreperson's friend, not the trial ADA] "in a bit of a panic," concerned for his family's safety. He then contacted the court on the ADA's advice. He testified that he could not be impartial. With the agreement of the parties, the court discharged him from the jury, reminded him that the case was ongoing, and instructed him not to speak to anyone about his experience. * * *

Whether forfeiture applies to the right to a jury of 12 is an issue of first impression, but forfeiture has been applied to many constitutional rights in the criminal procedure context. For example, a defendant may forfeit the right to counsel by engaging in " 'egregious conduct,' " albeit "only as a matter of 'extreme, last-resort . . . analysis' " in cases involving brutal, violent, or persistent abuse … . Use of "violence, threats or chicanery" to make a witness unavailable may result in the forfeiture of the right to confront the witness … . A defendant may forfeit the right to be present at all stages of trial by engaging in courtroom conduct so disruptive that the trial cannot proceed in their presence … . Likewise, a pro se defendant's disruptive conduct may result in the forfeiture of the right to self-representation … .

We see no reason to exclude the right to trial by a jury of exactly 12 persons from the universe of forfeitable rights. People v Sargeant, 2025 NY Slip Op 06361, CtApp 11-20-25

Practice Point; A defendant, by his or her conduct, can forfeit the right to a trial by 12 jurors. Here the defendant approached the jury foreman at the foreman's home resulting in the foreman's discharge from the jury. The trial judge properly proceeded with 11 jurors.

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PROBATION CONDITIONS, JUDGES, EVIDENCE.

THE "REFRAIN FROM GANG-RELATED ASSOCIATIONS" PROBATION CONDITIONS WERE STRUCK BECAUSE THERE WAS NO EVIDENCE DEFENDANT HAD ANY CONNECTION WITH GANGS (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined a probation condition imposed by the court must be stricken because it was not shown to be related to "defendant's rehabilitative prospects:"

Defendant's challenges to two of his probation conditions as unrelated to his rehabilitation do not require preservation and survive his waiver of the right to appeal … . * * *

… [T]he probation condition requiring defendant to "[r]efrain from wearing or displaying gang paraphernalia and having any association with a gang or members of a gang if directed by the Department of Probation" must be stricken, as there is no evidence that defendant's crime was connected to any gang activities or that he has any history of gang membership or gang … . Accordingly, this condition was not reasonably necessary to further defendant's rehabilitative prospects based on his background and proclivities …. . People v Holguin, 2025 NY Slip Op 06141, First Dept 11-6-25

Practice Point: Challenges to probation conditions need not be preserved for appeal and survive a waiver of appeal.

Practice Point: The appellate courts will strike probation conditions which are not demonstrated to be relevant to the defendant's offense. Two other decisions, not summarized here, were released this week in which the probation condition requiring defendant to financially support dependents was struck because it was not shown to be relevant to defendant's rehabilitation for the charged offense. (People v Bonfante, 2025 NY Slip Op 06068, Second Dept 11-6-25; People v Larkin, 2025 NY Slip Op 06077, Second Dept 11-6-25)

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SEARCHES AND SEIZURES, WARRANT APPLICATION, BASIS OF INFORMANT'S KNOWLEDGE.

THE SEARCH WARRANT WAS BASED UPON STATEMENTS BY AN INFORMANT; BUT THE WARRANT APPLICATION DID NOT DEMONSTRATE THE BASIS OF THE INFORMANT'S KNOWLEDGE; THEREFORE THE EVIDENCE SEIZED PURSUANT TO THE WARRANT SHOULD HAVE BEEN SUPPRESSED (CT APP).

The Second Department, reversing the Appellate Division, determined the search warrant failed the basis of knowledge requirement of the Aguilar-Spinelli test. The seized evidence should have been suppressed, requiring the dismissal of several counts:

… [W]e hold that as a matter of law the evidence provided in support of the 205 Curtis Street search warrant failed to satisfy the basis of knowledge requirement of the Aguilar-Spinelli test … . The general allegation that the informant was "aware that narcotics are kept inside the location" provides no indication "that the information was based upon personal observation" … . Likewise, the informant's statement that at some unidentified point in time the informant had conducted a narcotics transaction at that address "did not describe defendant's activities with sufficient particularity to warrant an inference of personal knowledge" … . Nor was the information conveyed by the informant corroborated by police observation … . Accordingly, the informant's statements fail to meet the requirements of Aguilar-Spinelli and, because there are no other allegations in the search warrant affidavit to establish "a reasonable belief that an offense has been or is being committed or that evidence of a crime may" have been found at 205 Curtis Street … , the search warrant for that address was not supported by probable cause, and the evidence seized there should have been suppressed. People v Berry, 2025 NY Slip Op 06358, Second Dept 11-20-25

Practice Point: If a search warrant is based upon an informant's statement, to be valid, the warrant application must demonstrate the information was based upon the informant's personal knowledge.

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SEX OFFENDER REGISTRATION ACT (SORA), REQUEST FOR A RISK-LEVEL REDUCTION.

MISDEMEANOR CONVICTIONS WHICH DID NOT INVOLVE VIOLENCE OR SEXUAL CONDUCT WERE PROPERLY CONSIDERED BY COUNTY COURT IN DENYING DEFENDANT'S REQUEST FOR A SORA RISK-LEVEL REDUCTION TO LEVEL ONE, DESPITE THE BOARD OF EXAMINERS OF SEX OFFENDERS' STATEMENT IT "WOULD NOT OPPOSE" A LEVEL ONE RISK ASSESSMENT (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Troutman, over an extensive three-judge dissent, determined County Court properly reduced defendant's SORA risk-level from three to two, and properly refused to reduce the risk-level to one. The Court of Appeals concluded the 2003 misdemeanor convictions, which did not involve violence or sexual conduct, were properly considered by County Court in denying the level one assessment:

Defendant served 21 years in prison. At first, he denied responsibility for his criminal conduct and refused to participate in sex offender treatment, but he eventually took responsibility and enrolled in treatment, which he completed. Defendant was released to parole in 1998, and the sentencing court determined him to be a level three risk pursuant to SORA. … In 2003, while still on parole, defendant was convicted of two misdemeanors: attempted auto stripping and attempted possession of burglary tools. He has no other convictions since his 1998 release.

In 2021, defendant petitioned under Correction Law § 168-o (2) to modify his risk level classification to level one. Defendant argued that he posed a low risk of reoffense based on his engagement in one-on-one outpatient sex offender treatment from 1998 to 2008; his steady full-time employment, including his current job, which he had held for 17 years; his stable and loving relationship with his wife, whom he met in 2008; his role as stepfather to his wife's daughter; and his age of 66 years. Defendant also noted that he had fully complied with his SORA obligations since his release 23 years earlier and, aside from his 2003 misdemeanor conviction, had not reoffended. He submitted letters of support from his counselor, wife, and stepdaughter. In addition, he submitted the report of an expert

psychologist who examined him and concluded that his risk of reoffense was low, and that requiring him to register at risk level three was no longer necessary for purposes of public safety. At the court's request … , the Board submitted an "updated recommendation" stating that it "would not oppose" defendant's request for a modification to level one. * * *

[The] evidence included the nature of the underlying offense, which defendant committed while on parole for a prior sex crime, defendant's prior offenses, and defendant's 2003 misdemeanor conviction of crimes committed while on parole for the underlying offense, for which he received a parole violation. Although the misdemeanors appear to have involved no violence or sexual component, we cannot conclude that the court's consideration of that factor, along with all the other factors, constitutes an abuse of discretion as a matter of law. * * *

… [T]he question is whether his more recent criminal conduct bears on the risk of his committing future sex offenses. Under the dissent's proposed rule, the SORA court would be prohibited from considering that defendant violated the law and his parole [in 2003] when he was caught with burglary tools after being convicted of raping a young woman during the course of a burglary also committed while defendant was on parole … . We decline to endorse that untenable result. People v Shader, 2024 NY Slip Op 05873, CtApp 11-26-24

Practice Point: Here the Board of Examiners of Sex Offenders (Board) did not oppose a defendant's request for a risk-level reduction to level one. The Court of Appeals upheld County Court's level-two designation, which was based in part of two misdemeanor convictions of nonviolent offenses which did not involve sexual conduct. There was an extensive dissent.

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WITNESS-IDENTIFICATION OF DEFENDANT, CRITERIA FOR EXPERT TESTIMONY.

THE CRITERIA FOR ALLOWING EXPERT TESTIMONY ON WITNESS-IDENTIFICATION OF A DEFENDANT CLARIFIED; WHETHER TO ALLOW SUCH EVIDENCE DOES NOT TURN ON THE EXISTENCE OR THE STRENGTH OF CORROBORATING EVIDENCE; HERE EXPERT TESTIMONY ON CROSS-RACIAL IDENTIFICATION WAS PROPERLY ALLOWED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Troutman, over an extensive dissent, affirming defendant's conviction, clarified the criteria for admitting expert testimony on witness identification of a defendant. Here limited expert testimony was allowed on cross-racial identification:

Questions of the admissibility and scope of expert testimony concerning the factors that affect the reliability of eyewitness identifications in a particular case are addressed to the trial court's sound discretion … . Courts deciding those questions apply traditional evidentiary principles … , which require the courts to weigh the testimony's probative value against its prospect of causing undue prejudice to the opposing party, confusing the issues, misleading the jury, or unduly delaying trial … .

On an application to admit expert testimony of this sort, the trial court may need to determine whether the expert testimony is beyond the ken of the average juror or generally accepted in the scientific community … . Indeed, in Abney, we reversed and ordered a new trial where the trial court abused its discretion in denying an application to present expert testimony on several factors, concluding that the court should have held a Frye hearing to resolve the issue of general acceptance … . While general acceptance may be established at a Frye hearing, a hearing is not necessary in all cases … . General acceptance may be established through legal precedent … . Where the defendant fails to demonstrate that a topic of the proffered expert testimony is generally accepted in the relevant scientific community, the trial court should exclude or limit the testimony as appropriate … .

Courts must not decide whether evidence is admissible based solely on the existence or strength of corroborating evidence … . Nor should courts require adequate corroborating evidence as a prerequisite to weighing other considerations

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pertinent to admissibility … . Rather, courts should be guided by "whether the proffered expert testimony 'would aid a lay jury in reaching a verdict' " … . People v Vaughn, 2024 NY Slip Op 05874, CtApp 111-26-24

Practice Point: Whether to allow expert testimony on witness-identification of a defendant does not turn on the existence or strength of corroborating evidence.

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