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An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Addressing Criminal Law, Released by Our New York State Appellate Courts and Posted on the New York Appellate Digest Website in October, 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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ACCOMPLICE LIABILITY, NO EVIDENCE OF SHARED INTENT, APPEALS.

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The Third Department, reversing defendant's conviction and dismissing the indictment, determined that, although the proof demonstrated defendant's awareness that the co-defendant possessed a firearm, that awareness alone did not give rise to accomplice liability for the co-defendant's criminal possession of a weapon: Defendant was convicted after a four-day trial. The Third Department held the conviction was not supported by the weight of the evidence:

We agree with defendant that his conviction is against the weight of the evidence. … [T]he jury could rely on testimony by the People's witnesses describing defendant's conduct during the incident as evidence that defendant was aware the codefendant possessed the subject handgun before the codefendant displayed it to those witnesses … . Still, accessorial liability requires evidence directed at the equally important actus reus element, i.e., that " 'the accomplice must have intentionally aided the principal in bringing forth a result' " … . Here, even though "defendant's conduct suggested that he may have known that [the codefendant] had a gun, there was no proof that . . . defendant solicited, requested, commanded, importuned, or intentionally aided him to possess the gun" … . What defendant did or said in furtherance of the codefendant's possession of the subject handgun was left to the jurors' imaginations … . Such speculation cannot be the basis for defendant's guilt beyond a reasonable doubt … . People v Goodman, 2024 NY Slip Op 05249, Third Dept 10-24-24

Practice Point: To be convicted of a co-defendant's criminal possession of a weapon under an accomplice theory, the proof must demonstrate the defendant solicited, requested, commanded, importuned or intentionally aided the co-defendant to possess the gun (in addition to the mens rea, the actus reus must be proven).

October 24, 2024

APPEALS, COURT OF APPEALS REVIEW OF WEIGHT OF THE EVIDENCE ANALYSIS.

THE CRITERIA FOR A COURT-OF-APPEALS REVIEW OF AN APPELLATE DIVISION'S WEIGHT-OF-THE-EVIDENCE ANALYSIS IS EXPLAINED; HERE DEFENDANT'S MANSLAUGHTER CONVICTION, BASED ENTIRELY ON CIRCUMSTANTIAL EVIDENCE, WAS PROPERLY REVIEWED BY THE APPELLATE DIVISION, WHICH AFFIRMED THE CONVICTION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Halligan, over two concurring opinions and an extensive dissenting opinion by Judge Wilson, determined the Appellate Division properly conducted a weight-of-the-evidence review of an entirely circumstantial manslaughter prosecution (affirming the conviction):

Jorge Baque's five-month-old daughter was found unresponsive in her crib at 6:30 a.m. on July 30, 2016. Despite efforts to resuscitate her, she was declared dead. An autopsy revealed that the victim had sustained injuries consistent with abusive head trauma and violent shaking. Baque was arrested and charged with manslaughter in the second degree and endangering the welfare of a child. * * *

The question before us is whether the Appellate Division erred as a matter of law in conducting its review of the weight of the evidence, in this purely circumstantial case. Weight of the evidence review is a "unique" power afforded to intermediate appellate courts, and one that they exercise regularly … . It requires the Appellate Division to "independently assess all the proof" and "to serve, in effect, as a second jury" … . * * *

This Court reviews a weight of the evidence determination to assess whether the "order and writings of the intermediate appellate court manifest a lack of application of [its] review power" … . "[W]e cannot review a weight of the evidence challenge unless the intermediate appellate court manifestly failed to consider the issue or did so using an incorrect legal principle" … . We have never required the Appellate Division to "manifest its weight of evidence review power

by writing in all criminal cases" … . Indeed, the Appellate Division "could have summarily affirmed without explicitly addressing the merits of defendant's challenge to the weight of the evidence" … . People v Baque, 2024 NY Slip Op 05244, CtApp 10-24-22

Practice Point: This decision is a rare Court-of-Appeals review of an appellate division's weight-of-the-evidence affirmance of a conviction based entirely on circumstantial evidence. The unique criteria for review by the Court of Appeals is explained.

October 24, 2024

ASSAULT, ALTHOUGH VICTIM'S JAW WAS BROKEN, SERIOUS PHYSICAL INJURY NOT PROVEN, EVIDENCE, APPEALS.

ALTHOUGH THERE WAS EVIDENCE THE VICTIM'S JAW WAS FRACTURED, THERE WAS INSUFFICIENT PROOF THE VICTIM SUFFERED "SERIOUS PHYSICAL INJURY" WITHIN THE MEANING OF PENAL LAW SECTION 10 (10); DEFENDANT'S ASSAULT SECOND CONVICTION WAS REDUCED TO ASSAULT THIRD (THIRD DEPT).

The Third Department, finding that the proof the victim suffered "serious physical injury" in this assault case insufficient, reduced defendant's conviction from assault second to assault third. There was evidence the victim suffered a fractured jaw which was wired shut for weeks. But the evidence did not establish a "protracted impairment of health or … function of any bodily organ:"

As to the victim's injuries, an oral surgeon who examined the victim diagnosed him with a fracture to the left side of his mandible, consistent with facial trauma, and performed a surgical procedure to wire the victim's jaw shut. The victim testified that his jaw was wired shut for several weeks and that he was unable to eat solid food for six weeks, causing him to lose approximately 25 pounds. At the trial, which was approximately 10 months after the incident, the victim continued to experience very occasional pain that he described as similar to arthritis. Although we do not minimize the trauma and pain suffered by the victim, the record is devoid of evidence about the injury's effect on the victim's daily living to support a finding that he sustained a "protracted impairment of health or . . . of the function

of any bodily organ" (Penal Law § 10.00 [10] …). Consequently, we are constrained to find that the verdict convicting defendant of assault in the second degree is against the weight of the evidence, as the record does not establish that the victim suffered a "serious physical injury," as that term is defined in Penal Law § 10.00 (10) … . People v Dillon, 2024 NY Slip Op 05246, Third Dept 10-24-24

Practice Point: Consult this decision to gain some insight into what "serious physical injury" means as an element of Assault 2nd.

October 24, 2024

ATTORNEYS, CONFLICT OF INTEREST, CONSTITUTIONAL LAW.

EVIDENCE DEFENDANT'S AND THE CODEFENDANT'S ATTORNEYS SHARED THE SAME OFFICE AND WORKED CLOSELY TOGETHER REQUIRED A HEARING ON DEFENDANT'S MOTION TO VACATE HIS CONVICTION; DEFENDANT ARGUED HE WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL BY A CONFLICT OF INTEREST (THIRD DEPT).

The Third Department, reversing County Court, determined a hearing was required on defendant's motion to vacate his conviction on the ground that his attorney was ineffective because of a conflict of interest between his attorney and the codefendant's attorney. The two attorneys (Reilly and Roberts) have the same address and there was evidence that they worked closely together, even if they were not members of the same firm:

… [W]hen "an ineffective assistance of counsel claim is premised upon a perceived conflict of interest, the law draws a distinction between actual and potential conflicts" … . First, "[a]n actual conflict exists if an attorney simultaneously represents clients whose interests are opposed and, in such situations, reversal is required if the defendant does not waive the actual conflict" … . The same is true for attorneys associated with the same firm simultaneously representing clients in a criminal matter … . Alternatively, where a potential

conflict exists, reversal is only required where "a defendant shows that a potential conflict actually operated on the conduct of [the] defense" … . * * *

… County Court … recognized that it was undisputed that Reilly and Roberts maintained the same address for their law practice. Each of the affidavits in support further reflected that the attorneys gave the impression that they were associated in the same law firm or that they had worked closely with each other. Both defendant and the codefendant acknowledged that they were not advised of a potential conflict of interest, and our review of the record fails to reveal any consent or waiver by defendant for such alleged conflicts. While it is true that defendant failed to provide an affidavit from either attorney, or explain why he was unable to obtain same, this is not automatically fatal to his motion — particularly where many of the facts are corroborated in the record … . This is particularly true considering that the codefendant alleged his speedy trial challenge was waived by Roberts to allow defendant to accept a plea and be sentenced, demonstrating that Reilly and Roberts had been at least aware of each other's strategy in resolving the charges against their respective client. Yet, there exists a stark contrast of the sentences between defendant, who received 12 years of incarceration with 5 years of postrelease supervision, and the codefendant, who allegedly received time served. These differences are not explained in the record before us, and give rise to questions of fact about whether the relationship between Reilly and Roberts may have operated on the defense by impairing the best strategy for defendant … . People v Rasul, 2025 NY Slip Op 05722, Third Dept 10-16-25

Practice Point: Defendant moved to vacate his conviction on the ground he was deprived effective assistance of counsel because of a conflict of interest. There was evidence his and the codefendant's attorneys shared the same address and worked closely together. The nonrecord evidence of a potential conflict of interest required a hearing.

October 16, 2025

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DISCOVERY, SPEEDY TRIAL, EVIDENCE, CONSTITUTIONAL LAW.

THE DEFENSE WAS TIMELY PROVIDED WITH IMPEACHMENT INFORMATION REGARDING AN ARRESTING OFFICER; THE FACT THAT AN ADDITIONAL DOCUMENT WITH THAT INFORMATION WAS PROVIDED AFTER THE CERTIFICATE OF COMPLIANCE (COC) WAS FILED, DID NOT RENDER THE PROSECUTION UNTIMELY (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Singas, over a two-judge dissent, determined the prosecution's failure to turn over an Internal Affairs Bureau (IAB) report which was relevant to the credibility of one of the arresting officers (Congedo) before the filing of the certificate of compliance (COC) with the discovery timetable did not render the prosecution untimely. The opinion is fact-specific. The prosecution had timely alerted the defense to a federal lawsuit based on the alleged misbehavior of the arresting officer described in the IAB report. The majority concluded the allegations in the lawsuit constituted timely notice of the relevant information in the IAB report. The dissent disagreed because the report included information not referenced in the federal lawsuit:

… CPL 245.20 (1) (k) (iv) does not require production of a document just because it provides additional information not in other impeachment material. The question instead is whether the document "tends to . . . impeach the credibility of a testifying prosecution witness" … Here, the IAB report does not. Our conclusion is not based on any prejudice analysis, but on application of the relevant statutory language. * * *

Because the IAB report did not contain any separate allegations of misconduct against Congedo nor any support for the amended complaint's allegations as they pertained to Congedo, it did not have any "tend[ency] to . . . impeach" her credibility (CPL 245.20 [1] [k] [iv]). …

… [T]he IAB report itself has no impeachment value. This is not a prejudice consideration … . Rather, CPL 245.20 (1) (k) (iv)'s "tends to . . . impeach" standard inserts considerations of evidentiary value into the disclosure requirement itself. Nothing in CPL 245.20 (1) (k) (iv) additionally requires the People to disclose every single document referencing impeachment material subject to

disclosure based solely on that reference. People v Fuentes, 2025 NY Slip Op 05872, CtApp 10-23-25

Practice Point: Re: discovery of information which may be used to impeach an arresting officer, the prosecution is not required to turn over every document which references the impeachment material. Here the defense was given timely notice of a federal lawsuit which included the impeachment material. The fact that a report which referenced the impeachment material was not turned over to the defense until after the certificate of compliance (COC) was filed did not invalidate the COC.

October 23, 2025

DISCOVERY, SPEEDY TRIAL, FAILURE TO TURN OVER IMPEACHMENT EVIDENCE, ATTORNEYS, CONSTITUTIONAL LAW.

THE PEOPLE'S FAILURE TO TURN OVER TO THE DEFENSE A VIDEO CONTAINING IMPEACHMENT MATERIAL PRIOR TO FILING A CERTIFICATE OF COMPLIANCE RENDERED THE CERTIFICATE OF COMPLIANCE AND THE STATEMENT OF READINESS ILLUSORY; INDICTMENT DISMISSED (THIRD DEPT).

The Third Department, reversing defendant's conviction and dismissing the indictment on speedy trial grounds, in a full-fledged opinion by Justice Pritzker, determined the People were required to turn over a child advocacy center (CAC) video before filing a certificate of compliance (COC) and statement of readiness (SOR). The CAC video was not turned over until 20 days before trial:

… [T]he People conceded that the CAC video contained impeachment evidence based upon certain statements made by the victim … , and also that the CAC video had been turned over by the CAC to law enforcement and, as such, was in the People's possession as of January 22, 2020 … . Despite this, the CAC video was not turned over to defendant until September 1, 2021, 20 days before trial, even though the People filed an earlier COC and SOR in October 2020. Specifically, the COC dated October 16, 2020 referenced an index detailing the materials that had

been disclosed to defendant as of that date. This index reveals two compliance reports, one dated February 28, 2020 and the other dated October 1, 2020. As relevant here, the February 28, 2020 compliance report lists a document titled "CAC Chain of Custody – 01.22.2020.pdf" as having been turned over to defendant. There is no dispute that, while this chain of custody form for the CAC video was included in discovery, the video itself was not. * * *

… [H]ere, we are faced with a situation where the People certified, allegedly in good faith, that "the prosecutor has disclosed and made available all known material and information subject to discovery" … , despite knowing full well that they were intentionally withholding the CAC video. As such, we find that the People did not file the October 2020 COC in good faith as they did not make "all known material and information subject to discovery" available to defendant … . Further compounding their error, the People did not give defendant any notice of this withholding, either by withholding the CAC video and requesting a protective order … in the first instance, or, later, giving defendant notice that the CAC video was purportedly being withheld so as not to disclose any identifying information of the victim … . … [B]ecause we find that the October 2020 COC and SOR were illusory, the People did not validly announce readiness for trial until September 2021, which the People concede would be outside of the applicable six-month CPL 30.30 time frame. Thus, this Court must dismiss the indictment … . People v Mazelie, 2025 NY Slip Op 05849, Third Dept 10-23-25

Practice Point: Here the People's failure to turn over impeachment evidence before filing the certificate of compliance rendered the certificate illusory and required dismissal of the indictment.

October 23, 2025

EVIDENCE, DEFENDANT'S RECORDED JAIL PHONE CALLS, ATTORNEYS, CONSTITUTIONAL LAW.

UNDER THE FACTS, THE PRO SE DEFENDANT WAS NOT DEPRIVED OF HIS RIGHT TO PUT ON A DEFENSE BY THE PEOPLE'S ACCESS TO HIS RECORDED JAIL PHONE CALLS; DEFENDANT EFFECTIVELY WAIVED HIS RIGHT TO COUNSEL (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Troutman, affirming the Appellate Division, determined (1) the fact that the People had access to defendant's recorded jail phone calls did not, under the facts, deprive the pro se defendant of his right to present a defense, and (2) the defendant effectively waived his right to counsel:

Under the particular facts of this case, however, we conclude that defendant's right to present a defense was not impaired by the monitoring of his jail phone calls. Defendant was out on bail for nearly the entire two years between indictment and his mid-trial remand, including more than six months while representing himself, giving him ample time to prepare his witnesses. Even after remand, there is no dispute that defendant had means other than the recorded phone lines to prepare his witnesses. Indeed, the record establishes that defendant's daughter visited him in jail at his request before he called her to testify so that they could continue their trial preparations in person. The court was proactive in protecting defendant's rights, permitting him time in the courtroom to speak to each of his witnesses in private before their testimony. In addition, when defendant asked to adjourn for the weekend to prepare his witnesses, the court stated that it would take the matter up in the morning, at which time it was agreed that defendant would testify for most of the remainder of the week. The court also noted that defendant had been assigned a legal advisor and an investigator, both of whom had the expertise and wherewithal to assist in the preparation of the defense.

Although the People's monitoring of an incarcerated pro se defendant's jail phone calls may have a chilling effect on the defendant's trial preparation that threatens the right to present a defense—particularly if the People are able to make use of the information in the calls in the pending trial—the facts here are otherwise. Defendant became aware that the People were listening to his phone conversations only after he had presented the direct testimony of his daughter and an expert. Aside from himself, the only remaining defense witnesses provided character

testimony and little else that could be considered relevant to the case. Thus, any chilling effect here was negligible. People v Dixon, 2024 NY Slip Op 05176, CtApp 10-22-24

Practice Point: Under the facts of this case, the pro se defendant was not deprived of his right to present a defense by the People's access to his recorded jail phone calls.

Practice Point: Here the defendant effectively waived his right to counsel.

October 22, 2024

GUILTY PLEAS, DEFENDANT DID NOT ADMIT INTENT, CONSTITUTIONAL LAW, EVIDENCE, JUDGES.

DEFENDANT DID NOT ADMIT HE INTENDED TO COMMIT A CRIME IN THE BUILDING HE ENTERED AND REMAINED UNLAWFULLY; THEREFORE THE PLEA ALLOCUTION DID NOT ESTABLISH THE ELEMENTS OF ATTEMPTED BURGLARY; DEFENDANT'S VIOLATION OF A STAY-AWAY ORDER IS NOT ENOUGH; PLEA VACATED (FIRST DEPT).

The First Department, vacating defendant's plea to attempted burglary, determined defendant's plea allocution negated an essential element of the offense, thereby calling into question the voluntariness of the plea: Burglary requires the intent to commit a crime while unlawfully entering or remaining in a building. Defendant did not admit he intended to commit a crime in the building. The fact that he violated a stay-away order by entering the building was not sufficient:

During the plea allocution the court asked defendant if it was true that he knowingly entered and remained unlawfully at the premises, which is a dwelling, and attempted to commit a crime inside. Defendant responded, "That wasn't my intent, but I did remain unlawfully." Defense counsel then stated "Yes, there was a protective order which he violated." The court then asked defendant, "That was with the intent to violate the order of protection, is that right"? Defendant responded, "Yes."

A key element of burglary is establishing the defendant's intent in entering or remaining unlawfully in a building to commit a crime therein … . The violation of a stay-away provision in an order of protection, alone, cannot, without more, be used to establish the requisite state of mind to elevate criminal trespass to a burglary … .

Once defendant denied his intent to commit a crime within the premises, the court was required to inquire further to ensure that defendant's guilty plea was, in fact, knowing and voluntary … . As the People concede, given that the court failed to inquire and improperly accepted the guilty plea, the plea must be vacated … . People v Gee, 2025 NY Slip Op 05924, First Dept 10-28-25

Practice Point: To constitute burglary, the defendant must intend to commit a crime when entering or remaining in a building. It is not enough that, by entering the building, the defendant violated a stay-away order. The defendant must have intended to commit a crime in the building.

October 28, 2025

GUILTY PLEAS, VOLUNTARINESS, INEFFECTIVE ASSISTANCE, ATTORNEYS, CONSTITUTIONAL LAW.

DEFENDANT RAISED QUESTIONS ABOUT THE VOLUNTARINESS OF HIS PLEA TO FIRST DEGREE MURDER SUFFICIENT TO WARRANT A HEARING ON HIS MOTION TO VACATE THE JUDGMENT OF CONVICTION (THIRD DEPT).

The Third Department, reversing County Court, determined defendant had raised questions about the voluntariness of his plea to first degree murder (for killing his parents) which required a hearing on his motion to vacate his plea. Defendant was sentenced to life imprisonment without parole. In his motion to vacate his plea, defendant alleged his attorneys told him that the death penalty for first degree murder was going to be overturned and thereafter his sentence could be reduced. Defendant also alleged his guilty plea was induced in part by his cousin's offer to pay him $10,000 if he pled guilty and renounced any claim to his parents' estate:

According to defendant, after he had received the offer of payment, he remained reticent to accept the plea offer; however, by his telling, consideration of that payment together with his averment as to trial counsel's misadvice of a potential reduced sentence ultimately persuaded him to accept the offer to plead guilty and be sentenced to life without parole. In support of that account, motion counsel and defendant's investigator recounted trial counsel's representation that defendant's initial objection to accepting the plea offer diminished once the $10,000 payment had been offered. In support of defendant's motion, he presented further evidence that $10,000 was paid to him after he entered his plea by way of two separate $5,000 checks, one of which was provided by his cousin. The evidence of that payment and the corresponding account that it influenced defendant's deliberations as to whether to accept the plea, considered alongside the misadvice that he was purportedly provided, create an issue of fact as to whether he was subjected to something more "than the type of situational coercion faced by many defendants who are offered a plea deal" … .

All told, we find that defendant's submissions in support of his motion are sufficient to raise an issue of fact warranting a hearing with respect to deficiencies in his representation … and the effect on the voluntariness of his plea … . … With respect to both his claims, defendant bears the burden of establishing his entitlement to relief by a preponderance of the evidence (see CPL 440.30 [6]). As to his contention of deficient representation, defendant will bear the burden of proving that he was misadvised about the potential to have his sentence reduced in the future if he took the People's plea offer and, but for that misadvice, there is a reasonable probability that he would have chosen to proceed to trial … . … [A]t this juncture the question "is whether defendant has made sufficient allegations to warrant an evidentiary hearing, not whether defendant has satisfied his burden of proof" … . People v Mower, 2025 NY Slip Op 05851, Third Dept 10-23-25

Practice Point: Consult this decision for insight into the allegations and proof which will be sufficient to require a hearing on whether defendant's guilty plea was voluntarily entered in the context of a post-appeal motion to vacate the judgment of conviction.

October 23, 2025

HABEAS CORPUS, DENIAL OF BAIL AFTER REVERSAL, JUDGES, CONSTITUTIONAL LAW.

DEFENDANT'S CONVICTION WAS REVERSED AND DEFENDANT APPLIED FOR BAIL; SUPREME COURT DENIED THE REQUEST WITHOUT THE REQUIRED EXPLANATION AND WITHOUT MAKING THE REQUIRED FLIGHT RISK DETERMINATION; DEFENDANT FILED A HABEAS CORPUS PETITION; PETITION HELD IN ABEYANCE PENDING THE ISSUANCE OF A NEW SECURING ORDER (CT APP).

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Halligan, over a two-judge concurring opinion, determined the habeas petition should be held in abeyance and a new securing order which complies with Criminal Procedure Law (CPL) 510.10 should be issued:

While awaiting retrial after his criminal conviction was reversed on appeal, defendant Diego Guerra applied for a new securing order under the current version of the bail law. That statute requires a court to "make an individualized determination" as to the defendant's flight risk and to "explain the basis for its determination and its choice of securing order on the record or in writing" (CPL 510.10 [1]; see also 530.40 [4]). Supreme Court ordered the defendant remanded to custody but neither explained that decision nor made an explicit determination as to flight risk.

Defense counsel filed this habeas petition in the Appellate Division, and we now review that Court's dismissal of the writ. We conclude that Supreme Court abused its discretion by failing to make an individualized flight risk determination and to explain both the basis for that determination and the choice of securing order, as required by statute. Accordingly, we reverse and remand to the Appellate Division for issuance of a new securing order in compliance with CPL 510.10. People ex rel. Kon v Lynelle Maginley-Liddie, 2025 NY Slip Op 05785, CtApp 10-21-25

Practice Point: Pursuant to CPL 510.10, in denying a request for bail, the judge must make an individualized flight-risk determination and explain the basis of that

determination and the choice of securing order. The failure to comply with those statutory requirements is an abuse of discretion.

October 21, 2025

INEFFECTIVE ASSISTANCE, ATTORNEYS, EVIDENCE, CONSTITUTIONAL LAW.

DEFENSE COUNSEL'S MISUNDERSTANDING OF THE ELEMENTS OF A CHARGED OFFENSE RESULTED IN THE PRESENTATION OF EVIDENCE BY THE DEFENDANT WHICH PROVED THE COMMISSION OF THE OFFENSE; DEFENSE COUNSEL WAS INEFFECTIVE; NEW TRIAL ORDERED (FIRST DEPT).

The First Department, reversing defendant's conviction and ordering a new trial, determined defense counsel was ineffective for failing to understand the nature of one of the criminal charges and presenting evidence which proved defendant's commission of the charged offense. "Penal Law § 120.05(7) provides that a person is guilty of assault in the second degree when "[h]aving been charged with or convicted of a crime and while confined in a correctional facility, . . . with intent to cause physical injury to another person, he causes such injury to such person or to a third person" … . Defendant presented evidence he intended to punch another inmate but struck a corrections officer, thereby proving all the elements of the offense:

… [T]he record reveals that defense counsel's trial strategy rested on the erroneous theory that defendant could not be found guilty of the charged offense if it could be proved that the correction officer was not the intended target of the assault. At trial, defense counsel called his client to testify. Defendant testified that while incarcerated, he became involved in an altercation with another inmate. He explained that during the encounter, he threw a "sucker punch" at that inmate, but in so doing, struck the correction officer instead. Defendant averred that the correction officer was not his intended target.

During summation, defense counsel compounded this error by incorrectly stating the required elements of Penal Law § 120.05(7) and declaring that in order to find defendant guilty of the charge, it must be proved that defendant intended to hit the correction officer. However, proving that the intended target of the assault was the correction officer is not a material element of the crime charged. Thus, counsel's defense strategy constituted an admission to the jury of the elements necessary to prove the assault in the second-degree count (see Penal Law § 120.05[7]). Moreover, defense counsel's argument to the court that he did not believe that the prosecution could amend its theory based on defendant's testimony demonstrated yet another critical misunderstanding, of settled New York law that pertained to the entire defense strategy … . People v Calderon, 2025 NY Slip Op 05755, First Dept 10-16-25

Practice Point: Here, defense counsel's failure to understand the elements of a charged offense constituted ineffective assistance, resulting in reversal and a new trial.

October 16, 2025

INEFFECTIVE ASSISTANCE, FAILURE TO MAKE A NOVEL ARGUMENT, ATTORNEYS.

THE FAILURE TO MOVE TO SUPPRESS THE EVIDENCE SEIZED PURSUANT TO A SEARCH WARRANT ON THE GROUND THE POLICE VIOLATED THE "KNOCK AND ANNOUNCE" RULE DOES NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THE ISSUE IS "NOVEL" (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Troutman, affirming the Appellate Division, over a three-judge concurrence which argued the case should have been disposed of based on the inadequacy of the record and not on the merits, determined the "single error" attributed to defense counsel did not amount to ineffective assistance. Defendant argued a motion to suppress should have been made on the ground the police violated the knock-and-announce rule when executing the warrant:

We have recognized that a single error in an otherwise competent performance may be sufficiently "egregious and prejudicial as to deprive a defendant of [the] constitutional right to effective legal representation" … . To "rise to that level," however, defense counsel's omission "must typically involve an issue that is so clear-cut and dispositive that no reasonable defense counsel would have failed to assert it, and it must be evident that the decision to forgo the contention could not have been grounded in a legitimate trial strategy" … .

That standard is not satisfied if the "omitted argument was not so compelling that a failure to make it amounted to ineffective assistance of counsel" … . We have stated that counsel is not ineffective when the success of the argument the defendant claims should have been made by counsel "depended on the resolution of novel questions" … , or when, at the time of the defendant's trial, "there was no clear appellate authority" supporting the argument the defendant claims that counsel should have made … .

The United States Supreme Court has held that a violation of the knock-and-announce rule by police when executing a search warrant does not require the application of the exclusionary rule under the Federal Constitution (see generally Hudson v Michigan, 547 US 586 [2006]). Defendant acknowledges that no New York appellate decision has decided to the contrary, either by distinguishing Hudson, on the basis of the New York Constitution, or otherwise. Indeed, defendant concedes that the issue is novel. We need not and do not resolve the merits of that question on this appeal. We merely hold that the issue was not so clear-cut and dispositive that no reasonable defense attorney would have failed to assert it, and therefore "defendant's claim of ineffective assistance must fail" … . People v Hayward, 2024 NY Slip Op 05243, CtApp 10-22-24

Practice Point: A single error by defense counsel may rise to the level of ineffective assistance, but not, as here, where the issue defense counsel failed to raise is deemed "novel."

October 24, 2024

INTERROGATION, ADMISSIONS, PREJUDICE OUTWEIGHED PROBATIVE VALUE, EVIDENCE.

DEFENDANT TOOK A CELL PHONE PICTURE OF THE VICTIM IN THE SHOWER THROUGH A HIGH WINDOW; HE CLAIMED THE PHOTO WAS TAKEN ACCIDENTALLY WHEN HE WAS TRYING TO PHOTOGRAPH LIGHTNING; DEFENDANT, IN ANSWER TO A QUESTION BY THE POLICE ABOUT WHETHER THIS WAS A "PATTERN," ADMITTED HE HAD SURREPTITIOUSLY TAKEN SIMILAR PHOTOS OF HIS WIFE; THE PREJUDICIAL EFFECT OF HIS APPARENT ADMISSION TO A "PATTERN" OF SIMILAR BEHAVIOR OUTWEIGHED ITS PROBATIVE EFFECT; NEW TRIAL ORDERED (THIRD DEPT).

The Third Department, reversing defendant's conviction and ordering a new trial, determined that prior bad act "Molineux" evidence should not have been admitted because its probative value was outweighed by its prejudicial effect. Defendant, using his cell phone, had taken a picture of the victim in the shower through a high window. In his interview with the police defendant admitted taking similar pictures of his wife: "When confronted with a conversation that law enforcement allegedly had with his wife and whether the subject conduct was in fact part of a 'pattern,' defendant … admitted that he had previously engaged in similar surreptitious photography of his wife." Defendant claimed the picture of the victim was taken accidentally when he was trying to photograph lightning:

[From the police interview with defendant:] "Now what's the deal with when I asked your wife if this has been an issue in the past, she says you've done it to her, the exact same thing in the shower, and you guys have had blowouts," adding, "So this has been a pattern, you know, it's not like it was an accidental lightning strike thing." Defendant replied, "I understand that. Yes, it's my wife. I'm madly in love with her. I think she's absolutely beautiful. Yeah, I've done that to my wife." * * *

A criminal purpose cannot be readily inferred from the generally equivocal act of taking a photograph, later deleted, in the location where defendant was standing. Thus, defendant's admission to previously taking surreptitious photographs of

another woman while she showered because of his sexual interest in her was directly relevant to that legitimate nonpropensity issue … . Further, by inserting an innocent explanation for the charged conduct into the case, defendant's prior similar acts had obvious relevance as tending to refute the possibility of mistake or accident … . * * *

… [A]lthough the challenged prior bad act evidence was highly probative with respect to the foregoing legitimate purposes, there is no way around the fact that the gratuitous "pattern" allegation made by law enforcement while questioning defendant substantially tipped the scale. It was an abuse of discretion not to redact that portion of the interview, together with defendant's ambiguous "I understand that" response, prior to admitting the recording into evidence — particularly in view of how excisable it was. People v Siciliano, 2025 NY Slip Op 05721, Third Dept 10-16-25

Practice Point: Consult this decision for an example of evidence which fits a Molineux category [here a seeming admission to a "pattern" of taking surreptitious photos of women in the shower to counter defendant's claim the photo of the victim in the shower was taken accidentally], but is inadmissible because the evidence is more prejudicial than probative.

October 16, 2025

JURY INSTRUCTIONS, JUDGES.

THE JUDGE READ THE WRONG DEFINITION OF THE CHARGED OFFENSE TO THE JURY; NEW TRIAL ON THAT CHARGE ORDERED (THIRD DEPT).

The Third Department, reversing defendant's attempted robbery first degree conviction and ordering a new trial on that count, determined County Court provided the jury with the wrong definition of the offense:

Defendant was charged with attempted robbery in the first degree pursuant to Penal Law § 160.15 (2), defined as forcibly stealing property while armed with a deadly weapon. When the court instructed the jury on this count, it initially made

reference to the requirement of being armed with a deadly weapon. However, when thereafter summarizing the elements of this crime, the court omitted the deadly weapon element and instead substituted in its place the element of causing serious physical injury to the victim, which is a different theory of robbery in the first degree … . This error was repeated by the court when the jury asked for the definitions of the crimes to be read back. Under these circumstances, the jury was left to consider an internally inconsistent definition of attempted robbery. Given that " 'the charge, read as a whole against the background of the evidence produced at trial, likely confused the jury regarding the correct rules to be applied in arriving at a decision' " … , the court's error was not harmless and remittal for a new trial on this count is necessary … . People v Smith, 2025 NY Slip Op 05847, Third Dept 10-23-25

Practice Point: Here the judge's reading the wrong definition of the charged offense to the jury required a new trial on that charge.

October 23, 2025

MOLINEUX EVIDENCE IMPROPERLY ADMITTED, JUDGES.

THE PROOF OF ALL THE CHARGES, INCLUDING THE DEPRAVED INDIFFERENCE MURDER OF A TWO-YEAR-OLD CHILD, WAS SUFFICIENT TO SUPPORT THE CONVICTIONS; HOWEVER THE IMPROPER ADMISSION OF MOLINEUX EVIDENCE AND OTHER EVIDENTIARY ERRORS DEPRIVED DEFENDANT OF A FAIR TRIAL; NEW TRIAL ORDERED (THIRD DEPT).

The Third Department, reversing the conviction and ordering a new trial, determined that the proof was sufficient to support all the convictions, including depraved indifference murder of a two-year-old child. Defendant claimed the child fell from a bunk bed. But the injuries were catastrophic and included a depressed skull fracture. A new trial was required because of evidentiary errors by the judge, including the admission of prior crimes and bad acts as Molineux evidence:

Prior to trial, County Court partially granted the People's Molineux application to the extent of allowing testimony pertaining to defendant's prior acts of domestic violence and aggression toward the mother, as well as his 2011 conviction of aggravated driving while intoxicated (hereinafter DWI) with a minor in the car. … The People elicited trial testimony from the mother about a December 2017 incident in which defendant became explosively angry while drinking and "trash[ed]" her house; however, "[n]othing was physical" on that occasion. The mother also testified about a January 2018 incident in which defendant was physically violent, revealing that he had repeatedly punched her in the face and in the arm on that occasion. The People were allowed to introduce photographs of the bruises the mother sustained during the January 2018 incident. The evidence regarding defendant's DWI conviction was referenced during his interview at the Sheriff's Department in connection with the underlying incident, which was published to the jury.

The December 2017 incident of aggression did not involve physical violence, as alleged here, and was not probative of any issue in this case … . … [T]he photographs depicting the mother's injuries from the January 2018 incident should not have been admitted into evidence, as they provided the]jury with a visualization of defendant's past violent conduct and were extremely prejudicial in the context of a prosecution requiring proof that defendant acted with a level of depravity sufficient to sustain a conviction under Penal Law § 125.25 (4) … . … The evidence pertaining to defendant's 2011 DWI conviction also should not have been admitted, as it was not probative of any issue in the case, did not fit within any recognized Molineux exception, and was unduly prejudicial since it involved a different child and tended to suggest to the jury that defendant was previously reckless with a minor in his care while consuming alcohol. Since the proof of defendant's guilt was entirely circumstantial and was not overwhelming, these improper Molineux rulings cannot be considered harmless … . People v Bohn, 2025 NY Slip Op 05846, Third Dept 10-23-25

Practice Point: Consult this decision for insight into what is and what is not admissible prior crime and bad-act (Molineux) evidence in a murder trial.

October 23, 2025

PROSECUTORS, SPECIAL DISTRICT ATTORNEY, COUNTY LAW, ATTORNEYS, APPEALS, JUDGES.

DEFENDANT WAS PROSECUTED AND CONVICTED BY A SPECIAL DISTRICT ATTORNEY WHO DID NOT MEET THE RESIDENCY REQUIREMENTS IN THE COUNTY LAW; THE ISSUE WAS RAISED FOR THE FIRST TIME ON APPEAL; THE INDICTMENT WAS PROPERLY DISMISSED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Troutman, affirming the Fourth Department, determined the court was without authority to appoint a special district attorney who did not meet the residency requirements in the County Law. The defendant, who was convicted, raised the issue for the first time on direct appeal. The indictment was dismissed:

Defendant was charged in Orleans County with various counts of larceny based on allegations that he improperly sold a vehicle that was given to him for repairs and retained the proceeds. The Orleans County District Attorney moved to be disqualified from the case due to his relationship with the alleged victim. County Court granted the application and appointed a special district attorney pursuant to County Law § 701 (1) (a). That statute provides that when the district attorney is disqualified from acting in a particular case, "a superior criminal court in the county wherein the action is triable may . . . appoint some attorney at law having an office in or residing in the county, or any adjoining county, to act as special district attorney during the absence, inability or disqualification of the district attorney and such assistants as he or she may have."

It is undisputed that the special district attorney did not have an office in or reside in Orleans County or any adjoining county and therefore did not satisfy the statute's residency requirement. Although defendant received correspondence during the course of the prosecution that listed addresses for the special district attorney located in Erie County—which does not adjoin Orleans County—defendant did not challenge the special district attorney's appointment or otherwise raise the issue before the trial court. After defendant was convicted, however, he

raised the issue on direct appeal. The Appellate Division agreed with defendant that the court exceeded its authority by appointing a special district attorney who did not satisfy the residency requirement and dismissed the indictment on this ground … . People v Callara, 2025 NY Slip Op 05739, CtApp 10-16-25

Practice Point: Here defendant was prosecuted and convicted by a special district attorney who did not meet the residency requirements in the County Law. The issue was first raised on appeal. The appellate court properly dismissed the indictment because the lower court did not have the authority to appoint a special district attorney in violation of the residency provisions of the County Law.

October 16, 2025

SEARCHES AND SEIZURES, EVIDENCE, CONSTITUTIONAL LAW.

THE SEARCH WAS NOT A VALID INVENTORY SEARCH; THE HANDGUN FOUND IN DEFENDANT'S VEHICLE SHOULD HAVE BEEN SUPPRESSED (THIRD DEPT).

The Third Department, reversing County Court's denial of defendant's suppression motion, determined the search of defendant's vehicle was not a valid inventory search and the handgun should have been suppressed:

"To be constitutionally valid, an inventory search must be [reasonable and] conducted according to a familiar routine procedure" … . The established procedure should be designed to "meet the legitimate objectives of the search," such as protecting the owner's property and insuring police against claims of lost or stolen property, "while limiting the discretion of the officer in the field". Here, the second deputy failed to adhere to the requirements set forth in the relevant inventory policy. Namely, he did not obtain the approval of his shift supervisor before beginning the alleged inventory procedure. Further, although not explicitly written in the policy, the second deputy also admitted that he deviated from normal procedure when he failed to complete the inventory report as he conducted the inventory. People v Grandoit, 2025 NY Slip Op 05720, Third Dept 10-16-25

Practice Point: Consult this decision for insight into how the legitimacy of an inventory search is determined by a reviewing court.

October 16, 2025

SEARCHES AND SEIZURES, EVIDENCE, MENTAL HYGIENE LAW.

THE SEARCH OF THE UNCONSCIOUS OR SLEEPING DEFENDANT'S POCKETS WAS NOT A SEARCH INCIDENT TO ARREST OR A SEARCH PURSUANT TO THE MENTAL HYGIENE LAW; THE SEIZED COCAINE SHOULD HAVE BEEN SUPPRESSED; INDICTMENT DISMISSED (FOURTH DEPT).

The Fourth Department, vacating defendant's guilty plea and dismissing the drug-possession indictment, determined the police officer's search of defendant's pocket while he was unconscious was not a valid search incident to arrest a was not justified under the Mental Hygiene Law. The police entered the apartment with the tenant's permission to search for a person for whom they had an arrest warrant. The tenant told the police the defendant had the same first name as the name on the warrant but that defendant was not the person they were looking for. Defendant was sitting at the kitchen table either unconscious or asleep. When the police officer couldn't wake the defendant up, the officer searched his pockets and found cocaine:

The officers called an ambulance for defendant, but when the ambulance arrived, the medical personnel were able to wake defendant and determined that he did not need medical care. During his testimony at the suppression hearing, the officer asserted that Mental Hygiene Law § 22.09 permitted him to search defendant inasmuch as he was planning to call an ambulance to transport defendant. The suppression court determined that the officer's search of defendant's person was justified by Mental Hygiene Law § 22.09 and that the search was analogous to a search incident to arrest.

… The People correctly concede that the officer did not believe that defendant had committed a crime before he searched defendant's pockets, and thus the search was

not conducted incident to a lawful arrest … . … [W]e cannot conclude that the police officer was acting pursuant to Mental Hygiene Law § 22.09 because, contrary to the People's assertion, there was insufficient evidence that defendant was in danger of harming himself or others … . People v Ruise, 2025 NY Slip Op 05589, Fourth Dept 10-10-25

Practice Point: For a warrantless search of a person to be justified under the Mental Hygiene Law there must be evidence the defendant is in danger of harming himself or others.

October 10, 2025

SEARCHES AND SEIZURES, STREET STOPS, EVIDENCE, CONSTITUTIONAL LAW.

THERE WAS NO PROOF THE OFFICER WHO FRISKED THE DEFENDANT AND REMOVED A WALLET FROM DEFENDANT'S POCKET SUSPECTED THE WALLET WAS A WEAPON; THE WALLET, WHICH HAD BEEN STOLEN FROM THE VICTIM, SHOULD HAVE BEEN SUPPRESSED; BECAUSE THE WALLET TENDED TO IDENTIFY DEFENDANT AS THE ROBBER, THE ERROR WAS NOT HARMLESS; NEW TRIAL ORDERED ON THE ROBBERY-RELATED OFFENSES (SECOND DEPT).

The Second Department, reversing the robbery-related convictions and ordering a new trial, determined the police did not have a lawful basis for removing a wallet from defendant's pocket and examining its contents. There was no evidence that the lawful frisk of the defendant indicated the presence of a weapon. The wallet, which had been stolen from the victim, should have been suppressed. Because the robber was wearing a mask, finding the wallet on defendant's person tended to identify defendant as the robber. The error in failing to suppress the wallet, therefore, was not harmless:

… [E]ven assuming that the officers were justified in performing a protective frisk … , there was no justification for searching the defendant's pants pocket, reaching

into it, and removing the wallet. In the course of conducting a protective pat-down based upon reasonable suspicion, "[o]nce an officer has concluded that no weapon is present, the search is over and there is no authority for further intrusion" … . There was no evidence presented at the suppression hearing that, during his frisk of the defendant, Nelson [the police officer] felt anything in the defendant's pocket that seemed to be a weapon or that could have posed a danger to the officers at the scene. Indeed, Nelson did not testify at the hearing. Accordingly, there was no lawful basis for removing the wallet from the defendant's pocket … , and that act violated the defendant's Fourth Amendment right to be free from unreasonable searches and seizures … . The officers committed an additional constitutional violation when, after retrieving the wallet from the defendant's pocket, they opened it and conducted a warrantless search of its contents … . Since the officers lacked the factual predicate necessary to search the defendant's pocket and the wallet's contents, the People failed to satisfy their burden of going forward to establish the legality of the police conduct in the first instance, and thus the wallet and its contents, seized as a result of that search, should have been suppressed … . People v Lewis, 2025 NY Slip Op 05823, Second Dept 10-22-25

Practice Point: If a street frisk does not indicate the presence of a weapon, the seizure and examination of a wallet found in defendant's pocket has no lawful basis.

October 22, 2025

SENTENCING, CRITERIA FOR CONSECUTIVE AND CONCURRENT, JUDGES.

DEFENDANT, PRETENDING TO BE SOMEONE ELSE, TOOK DELIVERY OF TIRES AND FALSELY SIGNED THE INVOICE; THE DEFENDANT WAS PROPERLY SENTENCED TO CONSECUTIVE TERMS OF INCARCERATION FOR LARCENY AND FORGERY; THE CRITERIA FOR CONSECUTIVE AND CONCURRENT SENTENCES EXPLAINED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, determined consecutive sentences were properly imposed for defendant's larceny and forgery convictions:

… [T]he Exxpress Tire Delivery Company received a telephone order from Basil Ford Truck Center by someone identifying themselves as Joe Basil Jr., for next-day delivery. The following day, … the driver called a number … for "Joe Junior" for additional delivery instructions. The man who answered the call told the driver to take the tires to a business adjacent to the Basil Ford Truck Center. When the driver arrived at the location he saw "a truck with a trailer" parked "on the side of the building" with a man standing next to it. He asked the man—who he identified in-court as defendant—"if he was taking the tires for delivery," to which the man responded "yes." Defendant … told the driver that he was an employee of the Basil family. The two loaded the tires onto the trailer and the driver then presented defendant with the tire invoice, which defendant falsely signed: "Joe Basil." * * *

… [I]n accordance with section 70.25 (2), "sentences imposed for two or more offenses may not run consecutively: (1) where a single act constitutes two offenses, or (2) where a single act constitutes one of the offenses and a material element of the other" … .

Under the first prong, "where the actus reus is a single inseparable act that violates more than one statute, [a] single punishment must be imposed" … . * * * Here … defendant accomplished the taking once the driver loaded the tires onto defendant's trailer, which preceded defendant falsely signing the invoice … .

As to the second prong, courts "first look to the statutory definitions of the crimes at issue to discern whether the actus reus elements overlap" … . * * *

… [B]ecause forgery is not the exclusive means to accomplish a larceny by false pretenses, forgery is not "a necessary component" of the larceny count "in the legislative classification and definitional sense" … . … [U]nder this prong, we do not consider "the act-specific circumstances and proof of a crime" … . People v McGovern, 2024 NY Slip Op 05242, CtApp 10-24-24

Practice Point: Consult this decision for an explanation of the criteria for consecutive versus concurrent sentences where two crimes stem from closely related actions—here taking possession of property by false pretenses (larceny) and then falsely signing an invoice for the property(forgery).

October 24, 2024

SENTENCING, DEFENDANT'S RIGHT TO PERSONALLY CHALLENGE PREDICATE FELONY ALLEGATIONS, JUDGES, ATTORNEYS, CONSTITUTIONAL LAW.

THE DEFENDANT, PERSONALLY, MUST BE GIVEN THE OPPORTUNITY TO CONTROVERT THE PROSECUTION'S PREDICATE FELONY ALLLEGATIONS, AND TO CHALLENGE THE CONSTITUTIONALITY OF THE PREDICATE FELONY SENTENCING SCHEME, EVEN WHEN DEFENSE COUNSEL CONCEDES THE ISSUE; MATTER REMITTED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, remitted the matter to give defendant the opportunity to personally controvert the prosecution's predicate felony allegations, and to challenge the constitutionality of the predicate felony sentencing scheme, despite the defense attorney's concession of the issue:

… [D]efendant's challenge to his sentence has merit. The court denied defendant his statutory right to personally controvert the prosecution's predicate felony allegations when it refused to consider his specific challenge and instead accepted defense counsel's concession of the issue. Since the court summarily declared defendant a predicate felon and imposed an enhanced sentence, we modify and remit to Supreme Court, where defendant may controvert the predicate felony

allegations and have an opportunity to assert his separate constitutional challenge to the Criminal Procedure Law's predicate felony sentencing scheme. * * *

… Based on the full text of CPL 400.15 (3) and its placement in the predicate sentencing statutory scheme, we conclude that a court must ask the defendant personally if they wish to controvert any allegations in the prosecution's statement. A totality of factors support this conclusion. First, CPL 400.15 (3) requires that the defendant receive a copy of the statement and that the court ask them if they wish to controvert any allegation contained therein. This procedure thus mandates that the defendant personally has notice of the allegations against them and a corresponding opportunity to be heard. Second, CPL 400.15 (3) refers to the defendant using personal pronouns, which is a deviation from the rest of the statute's impersonal diction … .

Third, given the significant consequences of the decision to controvert and the information relevant to making that decision, it is unlikely that the legislature intended for defense counsel to be able to refuse to controvert in the face of the defendant's opposition, without any further inquiry by the court. Indeed, the failure to controvert results in an automatic sentence enhancement in the present case and in any future sentences and therefore has lifetime ramifications … . …

These factors, considered together, make clear that the term "defendant," as written in CPL 400.15 (3), refers to the defendant personally. In these key ways, CPL 400.15 (3) differs from provisions of the CPL that refer to the "defendant" interchangeably with "the defense," without additional language suggesting that the legislature requires a court to direct its inquiry to the defendant. People v Wright, 2025 NY Slip Op 05869, CtApp 10-23-25

Practice Point: A defendant, personally, must be given the opportunity to controvert the prosecution's predicate felony allegations, and to challenge the constitutionality of the predicate felony sentencing scheme, even in the face of defense counsel's concession of the issue. Here the matter was remitted for that purpose.

October 23, 2025

SENTENCING, DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT (DVSJA), FAMILY LAW, APPEALS.

POST-RELEASE SUPERVISION (PRS) CAN PROPERLY BE IMPOSED WHERE A DEFENDANT IS SENTENCED UNDER THE DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT (DVSJA); DEFENDANT WAIVED HER RIGHT TO APPEAL THE SENTENCE AS EXCESSIVE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, determined five years post-release supervision (PRS) was properly imposed as part of defendant's sentence and defendant waived the right to appeal her sentence as excessive. Defendant pled guilty to second-degree murder and was sentenced to ten years incarceration under the Domestic Violence Survivors Justice Act (DVSJA):

Defendant does not challenge the carceral component of her sentence. Instead, she asserts that the court had no statutory authority to impose five years' PRS on a defendant convicted of a class A felony and sentenced under the DVSJA. We may review defendant's claim that her sentence is illegal even though, as we explain, her appeal waiver is valid … . However, defendant misinterprets the statutory scheme, and her claim boils down to a policy argument best suited for the legislature, not the judiciary. * * *

The legislative history of the DVSJA supports our straightforward reading of the Penal Law, and our conclusion that the legislature only intended to give judges discretion to reduce the periods of incarceration for certain defendants who are domestic violence survivors, not to wholly eliminate PRS in such cases … . * * *

… [T]he court specifically advised defendant that certain issues would survive the waiver, and counsel confirmed that they had reviewed those issues with defendant. The written waiver further clarified that, as explained in defendant's conversation with the court and counsel, defendant was waiving any claim that her sentence is excessive. Under these circumstances, the Appellate Division properly concluded that defendant knowingly, intelligently and voluntarily waived her excessive sentence claim. People v Hernandez, 2025 NY Slip Op 05874, CtApp 10-23-25

Practice Point: Post-release supervision (PRS) can properly be imposed where a defendant is sentenced under the Domestic Violence Survivors Justice Act (DVSJA).

October 23, 2025

SENTENCING, JUDGES, APPEALS.

DEFENDANT WAS NOT NOTIFIED THAT IF HE FAILED TO PAY RESTITUTION HIS SENTENCE WOULD BE ENHANCED; ENHANCED SENTENCE VACATED AND AGREED-UPON SENTENCE IMPOSED (THIRD DEPT).

The Third Department, vacating defendant's enhanced sentence and imposing the agreed-upon sentence, determined defendant was not given notice that his failure to pay restitution would result in an enhanced sentence. The agreed sentence was 2 to 6 years and the enhanced sentence was 4 to 12 years:

Defendant argues that County Court erred in imposing a prison sentence in excess of that promised in the plea agreement and requests that this Court resentence him to the agreed-upon term of 2 to 6 years in prison, without remanding the matter to County Court. Defendant contends that while payment of restitution was contemplated prior to sentencing, County Court never advised him that if he failed to pay restitution by the sentencing date it could impose an enhanced prison sentence. We agree. Defendant's argument survives his unchallenged appeal waiver … . However, given that the court's enhanced sentence was pronounced at the very end of the sentencing proceeding, without advance warning that it was considering an enhanced sentence or even a clear finding that defendant had violated an express condition of the plea agreement, we find that he had no practical ability to raise an objection and, thus, preservation was not required … . Under settled law, "the violation of an explicit and objective plea condition that was accepted by the defendant can result in the imposition of an enhanced sentence, and, conversely, a sentencing court may not impose an enhanced sentence unless it has informed the defendant of specific conditions that the defendant must abide by or risk such enhancement, or give the defendant an opportunity to withdraw his or her plea

before the enhanced sentence is imposed" … . People v Nestler, 2025 NY Slip Op 05852, Third Dept 10-23-25

Practice Point: Consult this decision for an explanation of the criteria which allow a judge to ignore an agreed-upon sentence and impose an enhanced sentence.

October 23, 2025

SENTENCING, APPEALS, EVIDENCE.

THE ADDITIONAL FIVE-YEAR CONSECUTIVE SENTENCES PURSUANT TO PENAL LAW 265.09 (2) DID NOT APPLY TO FIVE COUNTS OF THE INDICTMENT; THE APPEAL OF AN ILLEGAL SENTENCE DOES NOT REQUIRE PRESERVATION (FOURTH DEPT).

The Fourth Department determined several of the additional consecutive five-year sentences pursuant to Penal Law 265.09(2) were illegal. The court noted that preservation is not required for the appeal of an illegal sentence:

… [Penal Law 265.09(2)] provides in relevant part that, "[n]otwithstanding any other provision of law to the contrary, when a person is convicted of criminal use of a firearm in the first degree as defined in [Penal Law § 265.09 (1)], the court shall impose an additional consecutive sentence of five years to the sentence imposed on the underlying class B violent felony offense where the person convicted of such crime displays a loaded weapon from which a shot, readily capable of producing death or other serious injury may be discharged, in furtherance of the commission of such crime" … . …

… [T]he sentence enhancement provision does not apply to his conviction of burglary in the first degree under count 2… and robbery in the first degree under count 5 … . Given that the use or display of a firearm is an element of each of those crimes and "the use or display of that same firearm cannot also be the predicate for criminal [use] of a firearm in the first degree" … , neither of those crimes may serve as "the underlying class B violent felony offense" upon which the court could impose an additional consecutive sentence of five years … .

… [T]he sentence enhancement provision does not apply to his conviction of burglary in the first degree under count 3… . * * * Defendant's conviction under Penal Law § 265.09 (1) (a) "did not involve the display of a loaded, operable weapon" … , and the victim—the only person other than defendant who was present in the room where the shooting occurred—had no recollection of defendant's entry into the apartment or of the events that transpired during the shooting that caused his physical injuries … . People v Clea, 2025 NY Slip Op 05590, Fourth Dept 10-10-25

Practice Point: Consult this decision for insight into when the five-year consecutive-sentence enhancement for display of a fireman is not allowed by Penal Law 265.09 (2).

October 10, 2025

SEX OFFENDER REGISTRATION ACT (SORA), APPEALS, EVIDENCE, CONSTITUTIONAL LAW.

DEFENDANT'S DENIAL OF GUILT MADE WHEN HIS APPEAL WAS PENDING CANNOT BE USED AS THE BASIS FOR THE ASSESSMENT OF POINTS IN A SORA RISK-LEVEL PROCEEDING FOR "FAILURE TO ACCEPT RESPONSIBILITY" (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court in this SORA risk-assessment proceeding, determined defendant should not have been assessed 10 points for failure to accept responsibility because his denial of guilt was made when his appeal was pending:

… [T]he court should not have assessed 10 points under risk factor 12 for failure to accept responsibility. Defendant's denials of guilt were made at the time his appeal from his underlying conviction was pending. "Requiring defendant to accept responsibility could potentially result in his admissions being used against him in any retrial, violating his Fifth Amendment right against self-incrimination" … . People v Wallace, 2024 NY Slip Op 05189, First Dept 10-22-24

Practice Point: A denial of guilt made when defendant's appeal was pending and there was a chance for a retrial cannot be used against him in a SORA risk-level assessment.

October 22, 2024

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

THE JUDGE'S ASSESSING SORA RISK-LEVEL POINTS NOT REQUESTED BY THE PEOPLE VIOLATED DEFENDANT'S RIGHT TO DUE PROCESS OF LAW; THE JUDGE FAILED TO MAKE THE FINDINGS REQUIRED BY THE CORRECTION LAW FOR AN UPWARD DEPARTURE; DETERMINATION VACATED (FOURTH DEPT).

The Fourth Department, reversing the SORA risk level determination, held that the judge violated defendant's right to due process of law by assessing points that were not requested by the People, and violated the Correction Law requirements for imposing an upward departure:

Although defendant failed to object to the assessment of points … when the court rendered its oral decision, we "review defendant's contention in the interest of justice in light of the substantial infringement upon [her] due process and statutory rights" … .

… [T]he court failed to comply with the requirement of Correction Law § 168-n (3) that it set forth the findings of fact and conclusions of law upon which it based its decision to grant the People's request for an upward departure … . In its decision, the court merely concluded, under the first part of the relevant three-part analysis, that the People had identified "aggravating . . . circumstances . . . of a kind or to a degree not adequately taken into account by the guidelines" … . At no time in its decision did the court render a determination on the other two parts of the relevant analysis. Rather, after identifying the aggravating circumstances, the court conclusorily granted the People's application for an upward departure, without ever "weighing the aggravating and mitigating factors to determine

whether the totality of the circumstances warrants a departure to avoid an over- or under-assessment of the defendant's dangerousness and risk of sexual recidivism" … . People v Ridley, 2025 NY Slip Op 05599, Fourth Dept 10-10-25

Practice Point: If a judge assesses SORA risk-level points not requested by the People, the defendant's due process rights are violated.

Practice Point: In granting an upward departure in a SORA risk-level-assessment proceeding, the judge must make the findings required by the Correction Law.

October 10, 2025

SEX OFFENDER REGISTRATION ACT (SORA), CORRECTION LAW, DEFENDANT'S RIGHT TO BE PRESENT AT THE RISK-LEVEL-ASSESSMENT PROCEEDING, JUDGES.

THE WAS NO PROOF DEFENDANT VOLUNTARILY WAIVED HIS RIGHT TO BE PRESENT AT THE SORA RISK-LEVEL HEARING; ORDER REVERSED AND MATTER REMITTED FOR A NEW HEARING (SECOND DEPT).

The Second Department, reversing the SORA risk-level determination, held that the record did not establish that defendant waived his right to be present at the risk-level hearing:

"A sex offender facing risk level classification under SORA has a due process right to be present at the SORA hearing" (… see Correction Law § 168-n[3]). "To establish whether a defendant, by failing to appear at a SORA hearing, has waived the right to be present, evidence must be shown that the defendant was advised of the hearing date, of the right to be present at the hearing, and that the hearing would be conducted in his or her absence" … . "Before proceeding in the defendant's absence, the court must make an inquiry and recite on the record the facts and reasons it relied upon in determining that the defendant's absence was deliberate" (… see Correction Law § 168-n[6]). Here, defense counsel expressly stated that the defendant was not waiving his right to be present after he failed to

appear for the SORA hearing, and there is no evidence in the record that the defendant was made aware of the consequences of failing to appear for the SORA hearing or that his absence … was deliberate.

Since the record fails to establish that the defendant voluntarily waived his right to be present at the SORA hearing, the order must be reversed and the matter remitted to the Supreme Court, Kings County, for a new risk level assessment hearing and a new determination thereafter, to be preceded by notice to the defendant in accordance with Correction Law § 168-n(3). People v Blount, 2025 NY Slip Op 05972, Second Dept 10-29-25

Practice Point: Consult this decision for insight into what must be placed on the record to explain a defendant's absence from a SORA risk-level-assessment proceeding.

October 29, 2025

SEX OFFENDER REGISTRATION ACT (SORA), DOWNWARD DEPARTURE.

THE FACT THAT DEFENDANT HAD BEEN AT LIBERTY FOR 11 YEARS WITHOUT COMMITTING A SEX OFFENSE AND THE FOUR-YEAR DIFFERENCE IN AGE BETWEEN DEFENDANT AND THE VICTIM WARRANTED A DOWNWARD DEPARTURE TO LEVEL ONE (SECOND DEPT).

The Second Department, granting defendant a downward departure to level one in this SORA risk-assessment proceeding, determined the fact that during 11 years of liberty defendant has not committed a sex offense, and the four-year age-difference between defendant and the victim, should have been considered by the SORA court:

… [T]he defendant has been at liberty for more than 11 years without committing an additional sex offense or violent felony. Additionally, although the Supreme Court properly assessed the defendant points on the risk assessment instrument based on both the victim's age (risk factor 5) and the defendant's age at the time of

his first offense (risk factor 8), the court did not adequately account for the age difference between the victim and the defendant, which was approximately four years and two months, as an appropriate mitigating factor … .

Under the totality of the circumstances, including that the defendant was already on the cusp of the range applicable to a presumptive risk level two designation … , we designate the defendant a level one sex offender … . People v Wildman, 2024 NY Slip Op 05229, Second Dept 10-23-24

Practice Point: 11 years of liberty without committing a sex offense and the four-year age gap between defendant and the victim warranted a downward departure to level one in this SORA risk-level proceeding.

October 23, 2024

SPEEDY TRIAL, EVIDENCE.

THE PEOPLE DID NOT DEMONSTRATE THEY EXERCISED DUE DILIGENCE IN BRINGING A POLICE OFFICER TO COURT TO TESTIFY AT A PRETRIAL HEARING; THE 33-DAY DELAY WAS UNREASONABLE AND CHARGEABLE TO THE PEOPLE; DEFENDANT'S SPEEDY TRIAL MOTION SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department determined defendant's speedy trial motion should have been granted and the indictment was dismissed. A 33-day delay in having a police officer come to court to testify at a pretrial hearing was deemed unreasonable and chargeable to the People:

The People announced readiness in July 2021 and, subsequently, a combined Huntley and Mapp hearing was held on December 8, 2021. After two officers from the Rochester Police Department testified at that hearing, the prosecutor stated that a third officer was "currently not allowed to come to court due to an ongoing investigation by the Attorney General's Office." The prosecutor said that he was unsure of "who" was telling the officer "not to come to court." The court thus adjourned the hearing and, ultimately, the officer testified on January 10, 2022, i.e., 33 days later.

… The People failed to establish that they exercised due diligence, i.e. " 'credible, vigorous activity' to make the witness available" … . People v Beason, 2025 NY Slip Op 05598, Fourth Dept 10-10-25

Practice Point: Here a 33-day unexplained delay in bringing a police officer to court to testify at a pretrial hearing was deemed unreasonable and chargeable to the People.

October 10, 2025

SUMMATIONS, ATTORNEYS, JUDGES.

DEFENDANT WAS NOT UNDULY PREJUDICED BY CODEFENDANT'S ATTORNEY'S SUMMATION-ARGUMENT THAT DEFENDANT WAS A SHOOTER AND THE CODEFENDANT WAS NOT; THE TRIAL EVIDENCE DID NOT POINT TO THAT CONCLUSION AND THE JURY WAS INSTRUCTED THAT SUMMATIONS ARE NOT EVIDENCE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Cannataro, affirming the Fourth Department, determined that the trial judge properly denied the defendant's motion to sever the trials of the codefendants. The charges stemmed from a drive-by shooting in which two guns were fired. The trial evidence did not demonstrate defendant's lack of involvement. In summation the codefendant's attorney argued defendant was one of the shooters and the codefendant was not:

Where counsel for a codefendant essentially functioned as "a second prosecutor" and elicited damaging evidence against the defendant, we have held that severance was required based on the "compelling prejudice" to the defendant … . No similar degree of prejudice was created by codefendant's closing argument here.

… [D]efendant raised the specter of a potential irreconcilable conflict between the defenses prior to trial, but apart from the comments made in summation, the defenses were remarkably consistent in their primary focus on discrediting the eyewitness. Although Bordies' [the codefendant's] argument that the evidence supported the conclusion that defendant was guilty was diametrically opposed to

defendant's claim of innocence, this type of discord emerging between codefendants only in summation did not rise to the level of an irreconcilable conflict for purposes of severance in these particular circumstances.

Moreover, the trial court properly instructed the jury that the attorneys' arguments were not evidence and should not be considered as evidence when they judged the facts. That being so, and given that the jury is presumed to have followed the court's instructions … , any conflict raised solely by counsel's arguments could not have formed the basis of the jury's verdict. In sum, there was no "undue" prejudice to defendant. People v Everson, 2025 NY Slip Op 05738, CtApp 10-16-25

Practice Point: Consult this opinion for insight into when the severance of codefendants' trials is required and when it is not.

October 16, 2025

SUPPRESSION OF STATEMENTS, EVIDENCE, CONSTITUTIONAL LAW.

THE DEFENDANT SAID "HE DIDN'T WANT TO TALK ABOUT THAT ..." AND THE POLICE STOPPED QUESTIONING HIM; AN HOUR AN A HALF LATER THE POLICE RESUMED QUESTIONING WITHOUT RE-READING THE MIRANDA RIGHTS; THOSE STATEMENTS SHOULD HAVE BEEN SUPPRESSED; NEW TRIAL ORDERED (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction and ordering a new trial, determined the statements made by defendant after he invoked his right to remain silent should have suppressed. The questioning stopped after defendant said "he didn't want to talk about that …". The questioning resumed an hour and a half later without a re-reading of defendant's Miranda rights:

… [A]fter the police told defendant that they considered him a suspect in the underlying shooting and asked him "for his side of the story," defendant continually stated that "he didn't want to talk about that and [that] he'd rather take his chances." We conclude that defendant thereby unequivocally invoked his right to remain silent … inasmuch as "[n]o reasonable police officer could have

interpreted that statement as anything other than a desire not to talk to the police" … . Indeed, the actions of the police in response to defendant's statement demonstrated that they understood his statement to be an unequivocal invocation of his right to remain silent—i.e., they promptly ceased their questioning of defendant and left the interrogation room for a prolonged period of time … . Defendant's responses to a police officer when the officer resumed the interrogation—which occurred about an hour and a half after the prior questioning ceased—did not negate defendant's prior unequivocal invocation of his right to remain silent because the police officer failed to reread the Miranda warnings to defendant before resuming the interrogation and therefore failed to scrupulously honor his right to remain silent … . People v Surles, 2025 NY Slip Op 05603, Fourth Dept 10-10-25

Practice Point: Here the police stopped questioning defendant when he said "he didn't want to talk about that …". An hour and half later the police resumed questioning without re-reading the Miranda rights. Those statement should have been suppressed.

October 10, 2025

SUPPRESSION OF STATEMENTS, MIRANDA VIOLATION, EVIDENCE, CONSTITUTIONAL LAW.

AFTER BREAKING UP A FIGHT BETWEEN TWO MEN ON THE STREET AND HANDCUFFING THEM, THE POLICE QUESTIONED DEFENDANT WITHOUT GIVING THE MIRANDA WARNINGS; DEFENDANT'S ADMISSION HE HAD PUNCHED THE VICTIM SHOULD HAVE BEEN SUPPRESSED; THE ERROR WAS HARMLESS HOWEVER (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Cannataro, determined defendant was subjected to custodial interrogation when he was questioned on the street after he was handcuffed. Because the Miranda warnings were not given, defendant's admission to punching the victim should have been suppressed. However the error was harmless in light of the other evidence, including a video.

The police approached defendant and the victim, who were fighting, on the street. Both men were handcuffed and then questioned:

… [I]t is not dispositive that defendant was questioned in the immediate aftermath of the altercation, while the officers were still determining whether a crime had occurred—circumstances Supreme Court seemingly relied on in deeming the encounter a "classic case of investigatory questioning" that did not require Miranda warnings. Our case law draws no categorical distinction between interrogation and so-called investigatory questioning. Interrogation is almost definitionally investigatory in nature. And while we have recognized a "distinction between coercive interrogation and permissible street inquiry" … , the most salient difference between these categories is not when the questioning takes place, but the presence or absence of custody … . As we have explained, "routine police investigation of suspicious conduct on the street generally does not entail a significant deprivation of freedom which would require Miranda warnings" … . Absent "both the elements of police 'custody' and police 'interrogation,' " there is no "constitutional requirement that the police recite interrogation warnings when they direct questions or comments at members of the public or solicit information and assistance" … . But where, as here, investigatory questions are directed to a person who is in custody, under circumstances police should know are likely to yield an incriminating response, Miranda warnings are required. People v Robinson, 2025 NY Slip Op 05871, CtApp 10-23-25

Practice Point: Here the police broke up a street fight, handcuffed both men, and then questioned them. Even though the police were still investigating what happened when defendant was questioned, defendant was "in custody" and was being "interrogated," mandating the Miranda warnings.

October 23, 2025

TEMPORARY CONFINEMENT OF SEX OFFENDERS, MENTAL HYGIENE LAW, CONSTITUTIONAL LAW.

THE PROVISION OF THE MENTAL HYGIENE LAW WHICH ALLOWS TEMPORARY CONFINEMENT OF SEX OFFENDERS WITHOUT THE OFFENDER'S PARTICIPATION AT THE PROBABLE CAUSE STAGE IS CONSTITUTIONAL (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Singas, affirming the Appellate Division, over a two-judge dissenting opinion, determined the procedure under the Mental Hygiene Law which allows the temporary confinement of sex offenders without the offender's participation at the probable cause stage is constitutional:

This appeal requires us to examine whether certain provisions of Mental Hygiene Law § 10.11 (d) (4) satisfy procedural due process. Those provisions govern the procedure for the temporary confinement of sex offenders adjudicated to have "mental abnormalities"—but released from confinement to strict and intensive supervision and treatment (SIST)—pending a final SIST revocation hearing. * * *

This appeal concerns the initial step in the process for revoking SIST. "If a parole officer has reasonable cause to believe that" a respondent has violated a SIST condition, or if an "evaluation or report by a treating professional indicat[es] that the person may be a dangerous sex offender requiring confinement," a parole officer may take the violator into custody and transport them to a facility for a psychiatric evaluation, which must take place within five days … . Once the violator is taken into custody, DOCCS must "promptly" notify the Attorney General and the Mental Hygiene Legal Service (MHLS), which provides legal representation to article 10 respondents … . The Attorney General may then petition for confinement or a petition to modify the conditions within five days … The petition must "be served promptly on the respondent and [MHLS]," and the court must appoint legal counsel to represent the respondent and provide counsel with a copy of the psychiatric evaluation … . If the Attorney General files a petition seeking confinement,

"then the court shall promptly review the petition and, based on the allegations in the petition and any accompanying papers, determine whether there is probable cause to believe that the respondent is a dangerous sex offender requiring

confinement. Upon the finding of probable cause, the respondent may be retained in a local correctional facility or a secure treatment facility pending the conclusion of the proceeding" … .

* * * "The respondent shall not be released pending the completion of the hearing" … . People ex rel. Neville v Toulon, 2024 NY Slip Op 05178, CtApp 10-22-24

Practice Point: The provision of the Mental Hygiene Law which allows temporary confinement of sex offenders without the offender's participation at the probable cause stage is constitutional.

October 22, 2024

WAIVER OF INDICTMENT PROCEDURE NOT FOLLOWED, JUDGES.

THE RECORD DID NOT DEMONSTRATE COMPLIANCE WITH THE WAIVER-OF-INDICTMENT PROCEDURE, A JURISDICTIONAL DEFECT; PLEA VACATED; PLEA TO A SUBSEQUENT INDICTMENT INDUCED BY A CONCURRENT SENTENCE PROMISE VACATED AS WELL (FIRST DEPT).

The First Department, reversing defendant's convictions by guilty pleas, determined the failure to comply with the waiver-of-indictment procedure required vacation of the plea, as well as the vacation of a plea induced by a concurrent sentence promise:

The record fails to demonstrate compliance with CPL 195.20. There is no evidence that defendant signed the indictment waiver in open court when the plea was entered because it is not dated as the same day as the plea. The court's order affirming compliance with CPL 195.10 and 195.20 is also not dated and the court did not confirm on the record that defendant signed the waiver or make any reference whatsoever to it at the time of the plea. …

The failure to comply with CPL 195.20 is a jurisdictional defect that requires reversal of the judgment of conviction and dismissal of the superior court information … .

… [D]ismissal of the information necessitates dismissal of defendant's subsequent plea … . Defendant pleaded guilty to first-degree robbery in exchange for a

sentence of five years' incarceration and five years' postrelease supervision, to run concurrently … . Where, as here, a defendant's guilty plea is "induced by the understanding that the sentence would be concurrent with the sentence imposed for [the prior] conviction, since set aside, the plea must be vacated" … . People v Smith, 2025 NY Slip Op 05902, First Dept 10-23-25

Practice Point: Failure to comply with the waiver-of-indictment procedure is a jurisdictional defect requiring vacation of the plea. A plea to a subsequent indictment induced by a concurrent sentence promise must also be vacated.

October 23, 2025

WAIVER OF RIGHT TO COUNSEL DOES NOT REQUIRE INFORMING DEFENDANT OF MAXIMUM SENTENCE, SPEEDY-TRIAL TIME ASSOCIATED WITH JOINDER OF A CO-DEFENDANT CHARGED TO DEFENDANT, ATTORNEYS, JUDGES.

IN ORDER TO KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY WAIVE THE RIGHT TO COUNSEL, THE DEFENDANT NEED NOT BE INFORMED OF HIS MAXIMUM SENTENCING EXPOSURE IN YEARS; THE "SPEEDY TRIAL" TIME ASSOCIATED WITH THE JOINDER OF A CO-DEFENDANT FOR TRIAL IS CHARGED TO THE DEFENDANT, EVEN WHERE THE DEFENDANT HAD NOT YET BEEN ARRAIGNED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Halligan, over a dissenting opinion by Judge Rivera, affirming the Appellate Division, determined (1) in order to effectively waive the right to counsel, a defendant need not be informed of his maximum sentencing exposure in years, and (2) the pre-arraignment delay associated with the joinder for trial with a co-defendant is not chargeable to the People:

Defendant Anthony Blue challenges his criminal conviction for five counts of second-degree burglary. Blue argues that a criminal defendant cannot make a knowing, voluntary, and intelligent waiver of the right to counsel unless the trial judge specifically apprises the defendant of his maximum sentencing exposure in years. Rather than imposing a bright-line rule such as this, we have said that a

court must ensure a defendant is adequately warned of the dangers and disadvantages of self-representation before allowing him to proceed pro se. A review of the record here confirms that Blue had such an understanding at the time he waived his right to counsel.

Blue also argues that his indictment should have been dismissed on statutory speedy-trial grounds. CPL 30.30 (4) (d), broadly speaking, excludes from the time chargeable to the People a reasonable period of delay when a defendant is joined for trial with a co-defendant. Blue contends this provision does not apply to pre-arraignment time, but the Appellate Division correctly concluded that it does. Thus the 57 days between indictment and arraignment chargeable to Blue's co-defendant were also chargeable to Blue, even though he had not yet been arraigned. People v Blue, 2024 NY Slip Op 05175, CtApp 10-22-24

Practice Point: A defendant can effectively waive the right to counsel without being informed of his maximum sentencing exposure in years.

Practice Point: Even though defendant had not yet been arraigned, the time associated with joining a co-defendant for trial was chargeable to the defendant.

October 22, 2024