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IRRELEVANT PROBATION CONDITION, JUDGES.

THE UNDERLYING OFFENSE AND DEFENDANT'S LIMITED HISTORY OF ALCOHOL ABUSE DID NOT WARRANT A PROBATION CONDITION REQUIRING CONSENT TO SEARCHES FOR WEAPONS, DRUGS AND OTHER CONTRABAND (FIRST DEPT).

The First Department struck the probation condition requiring defendant's consent to searches for weapons, drugs and other contraband:

The court improperly imposed, as a condition of defendant's probation, a requirement that he consent to a search by his probation officer of his person, vehicle, or home for weapons, drugs, drug paraphernalia, and other contraband. Defendant was not armed with a weapon during the underlying offense and had no history of violence or use of weapons … . Defendant did not have a history of abusing illicit substances and was not assessed as being in need of drug abuse treatment … . Although defendant admitted to a limited history of alcohol abuse, before and at the time of the instant offense, the consent-search condition, as written, "is not limited to conform" to the "certain limited circumstances where alcohol becomes contraband for the purposes of" that condition … . People v Aquirre, 2026 NY Slip Op 00025, First Dept 1-6-25

Practice Point: The First Department struck a probation condition requiring consent to searches for weapons, drugs and other contraband, which was not justified by the underlying offense or defendant's limited history of alcohol abuse.

January 6, 2026

IRRELEVANT PROBATION CONDITIONS, JUDGES, APPEALS, CONSTITUTIONAL LAW.

TWO IRRELEVANT PROBATION CONDITIONS STRUCK, NON-CONSTITUTIONAL CHALLENGES TO PROBATION CONDITIONS NEED NOT BE PRESERVED; FACIAL CONSTITUTIONAL CHALLENGES SURVIVE A WAIVER OF APPEAL BUT MUST BE PRESERVED; AS-APPLIED CONSTITUTIONAL CHALLENGES ARE PRECLUDED BY THE WAIVER OF APPEAL (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined (1) non-constitutional challenges to probation conditions need not be preserved for appeal; (2) although the facial constitutional challenges to probation conditions survive a waiver of appeal, they were not preserved for appeal; (3), the as-applied constitutional challenges are precluded by the waiver of appeal; and (4) two probation conditions must be struck as not relevant to defendant's criminal history or personal life. In addition, the decision identifies several probation conditions which were deemed properly imposed in this drug-possession case:

At the time of his arrest, defendant possessed 100 glassines of heroin and 50 vials of crack cocaine. Accordingly, the sentencing court providently deemed it "reasonably necessary" to order defendant to "[a]void injurious or vicious habits; refrain from frequenting unlawful or disreputable places; and . . . not consort with disreputable people" "to insure that the defendant will lead a law-abiding life or to assist him to do so" … . Based on defendant's selling of heroin, the court also properly ordered him to "[w]ork faithfully at a suitable employment or pursue a course of study or vocational training … that can lead to suitable employment" and to "[s]ubmit proof of such employment, study or training … . For the same reason, the court providently required defendant to submit to testing for alcohol and illegal substances and to participate in substance abuse programming … . …

There is … no evidence to support requiring defendant, who has no children, to "[s]upport dependents and meet other family responsibilities" … . … [T]here is no evidence to support requiring defendant to "[r]efrain from wearing or displaying

gang paraphernalia and having any association with a gang or members of a gang … ". People v Tompson, 2026 NY Slip Op 00325, First Dept 1-27-26

Practice Point: Consult this decision for insight into what probation conditions are appropriate for a drug-possession conviction.

Practice Point: Consult this decision for insight into the appealability of challenges to probation conditions.

January 27, 2026

IRRELEVANT PROBATION CONDITIONS, JUDGES, APPEALS.

THE PROBATION CONDITION PROHIBITING ASSOCIATION WITH GANGS WAS STRICKEN BECAUSE THE CONDITION WAS NOT RELEVANT TO THE UNDERLYING OFFENSE OR DEFENDANT'S REHABILITATION; THE ISSUE SURVIVES A WAIVER OF APPEAL AND A LACK OF PRESERVATION (FIRST DEPT).

The First Department, striking a probation condition, determined the condition prohibiting defendant's association with gangs was not related to defendant's rehabilitation: The First Department noted that the issue survives a waiver of appeal and a lack of preservation:

Defendant's appeal waiver does not foreclose her challenges to the legality of the conditions of her probation under Penal Law § 65.10(1) and do not require preservation … . …

… [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 because there is no evidence that defendant's actions were connected to gang activity or that she had a history of gang membership, rendering this condition neither reasonably related to her rehabilitation nor necessary to ensure that she leads a law-abiding life (… Penal Law § 65.10[1]). People v Johnson, 2026 NY Slip Op 00029, First Dept 1-6-25

Practice Point: The appellate courts are striking probation conditions not shown to be relevant to the underlying offense or criminal history.

Same issue and result in People v Seymore, 2026 NY Slip Op 00028, First Dept 1-6-25

January 6, 2026

IRRELEVANT PROBATION CONDITIONS, JUDGES.

NINE OF ELEVEN PROBATION CONDITIONS STRICKEN AS NOT REASONABLY RELATED TO DEFENDANT'S REHABILITATION, INCLUDING THE CONDITION THAT DEFENDANT PAY THE MANDATORY SURCHARGE AND OTHER FEES (FIRST DEPT).

The First Department determined nine probation conditions must be stricken as not reasonably related to the defendant's rehabilitation:

… [N]ine conditions were "not reasonably related to defendant's rehabilitation, or necessary to ensure that he will lead a law-abiding life" (… Penal Law § 65.10[1]). There is no evidence that defendant had a history of gang affiliation or that his offense was connected to gang activity, and as such the condition related to a prohibition on gang affiliation … .

Considering defendant's denial of drug and alcohol use, the Department of Probation's assessment of defendant for substance abuse with no recommendation for further treatment, and the lack of any evidence defendant's offense involved drug or alcohol use, conditions related to drug and alcohol testing and treatment … .

The condition of defendant's probation requiring that he pay the mandatory surcharge and other fees … is not reasonably related to defendant's rehabilitation, or necessary to ensure that he will lead a law-abiding life, and must be stricken … .

The remaining conditions that must be stricken … are not applicable to defendant or reasonably related to his rehabilitation … . People v Balogh, 2026 NY Slip Op 00323, First Dept 1-22-26

Practice Point: Here the probation condition that defendant pay the mandatory surcharge and other fees was stricken as not reasonably related to defendant's rehabilitation.

January 22, 2026

JUDGES, EXCESSIVE QUESTIONING BY JUDGE, APPEALS.

EXCESSIVE QUESTIONING BY THE TRIAL JUDGE WHICH TOOK ON THE FUNCTION AND APPEARANCE OF AN ADVOCATE DEPRIVED DEFENDANT OF A FAIR TRIAL (SECOND DEPT).

The Second Department, reversing defendant's conviction and ordering a new trial, determined the trial judge deprived defendant of a fair trial by excessive questioning ot eh defendant which "took on the function and appearance of an advocate." The error was not preserved but the appeal was considered in the interest of justice:

Supreme Court engaged extensively in its own areas of inquiry, which detailed the nature of the complainant's injury and clarified whether the injury was likely to have been intentionally caused by a sharp instrument. The court asked numerous leading questions of the People's witness, a paramedic, as to what the paramedic observed, and guided the prosecution at length in its questioning of the paramedic. The court also assisted the prosecution in laying a foundation for the admission of evidence and repeatedly engaged in lengthy colloquies with various prosecution witnesses in order to effectively instruct these witnesses how to refresh their recollections in order to provide evidence favorable to the prosecution.

Viewing the record as a whole, the Supreme Court improperly took on the function and appearance of an advocate, at times even engaging in commentary on the testimony against the defendant, as well as on questions posed by defense counsel. The court's conduct left the impression that its opinion favored the credibility of the People's witnesses and the merits of the People's case … , thus depriving the defendant of a fair trial … . People v Coleman, 2026 NY Slip Op 00145, Second Dept 1-14-26

Practice Point: Here the trial judge engaged in questioning of witnesses which took on the function and appearance of an advocate, depriving defendant of a fair trial. Although the issue was not preserved, the appeal was considered in the interest of justice.

January 14, 2026

JURY NOTES, JUDGES, ATTORNEYS.

PROVIDING COUNSEL WITH "MEANINGFUL NOTICE" OF THE CONTENTS OF A NOTE FROM THE JURY DOES NOT NECESSARILY REQUIRE READING THE NOTE INTO THE RECORD VERBATIM; THERE WAS A TWO-JUSTICE DISSENT (FIRST DEPT).

The First Department, affirming the convictions, over a two-justice dissent. determined the judge did not commit a mode of proceedings error when responding to two notes from the jury. The dissenters argued the notes should have been read into the record "verbatim:"

In People v O'Rama (78 NY2d 270 [1991]), the Court of Appeals in addressing the "notice" requirement contained in CPL 310.30, held that "notice" means "meaningful" notice to counsel of the "actual specific content of the jurors' request" … . * * *

O'Rama suggested that upon receipt of a written jury request, the note should be marked as a jury exhibit before the jury is recalled into the courtroom and read into the record in the presence of counsel. After the contents are placed on the record, counsel should be afforded a full opportunity to suggest appropriate responses. Finally, the court should read the communication in open court in the presence of counsel, the defendant and the jury … . However, failure to strictly follow this suggested procedure does not always result in a violation of the notice requirements of CPL 310.30 or rise to the level of a mode of proceedings error, as the designation of a mode of proceedings error is "reserved for the most fundamental flaws. The error must go to the essential validity of the process and be so fundamental that the entire trial is irreparably tainted" … . * * *

… [S]trict adherence to the "best practice" procedure suggested in O'Rama is not required so long as the fundamental purpose of CPL 310.30 is achieved, which is providing counsel with meaningful notice of the contents of a jury note so that counsel has an opportunity to provide meaningful input to the court's response. People v Vilella, 2026 NY Slip Op 00097, First Dept 1-13-26

Practice Point: The majority held that providing counsel with "meaningful notice" of the contents of a jury not did not require reading the note into the record verbatim. There was a two-justice dissent.

January 13, 2026

PROBATION CONDITION STRUCK DUE TO INDIGENCY, CRIMINAL LAW, JUDGES, APPEALS, CONSTITUTIONAL LAW.

THE PROBATION-CONDITION REQUIRING DEFENDANT TO PAY THE MANDATORY SURCHARGE AND COURT FEES WAS STRUCK BECAUSE DEFENDANT IS INDIGENT; THE FACIAL CONSTITUTIONAL CHALLENGES TO PROBATION CONDITIONS WERE NOT PRESERVED (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined (1) the challenge to the probation condition that defendant pay the mandatory surcharge and court fees survives the waiver of appeal; (2) the condition should be struck because defendant is indigent; (3) the facial constitutional challenges to probation conditions were not preserved:

In determining whether a condition is reasonably necessary and related to a defendant's rehabilitation, the Court must consider the particular circumstances of a defendant's case … .

Defendant, who is indigent and a first-time offender, has only sporadic income and otherwise has been supported by his mother. Under these circumstances, the requirement that he pay a total of $375 in surcharges and fees as a condition of probation "will not assist in ensuring [that] he leads a law-abiding life and is not

reasonably related to his rehabilitation" … . Accordingly, that condition is stricken. People v Acosta, 2026 NY Slip Op 00324, First Dept 1-27-26

Practice Point: The probation-condition requiring payment of the mandatory surcharge and court fees should not have been imposed on this indigent defendant.

January 27, 2026

SENTENCING EXPOSURE CONFUSION, GUILTY PLEAS VACATED, JUDGES.

DEFENDANT BASED HIS DECISION TO PLEAD GUILTY, IN PART, ON INACCURATE INFORMATION ABOUT HIS SENTENCING EXPOSURE; GUILTY PLEAS VACATED (FIRST DEPT).

The First Department, vacating defendant's guilty pleas, determined the misinformation provided to the defendant about his sentencing exposure rendered the pleas invalid:

Defendant was told that he faced the possibility of serving two consecutive 15-year sentences if he elected to go to trial. At most, however, he was facing 20 years because of the statutory cap (see Penal Law § 70.30 [1] [e] [i]). Unbeknown to him, he was weighing the benefit of a plea offer of 20 years when in reality, it was the maximum he would serve even if convicted after trial. Defendant was not told about the capping statute and therefore lacked a "full understanding of what his plea connotes and of its consequence" … . This is particularly true because defendant's guilty plea afforded him the exact sentence he would have served. The record is also clear that defendant remained conflicted about pleading guilty and sought to withdraw his plea.

The totality of the circumstances reflect that defendant's sentencing exposure played a decisive role in his decision to plead guilty, and his erroneous understanding that he faced 30 years in prison if he was convicted after trial had an "impact on [his] judgment" significant enough to render his guilty plea not knowing, voluntary and intelligent … . People v Ramos, 2026 NY Slip Op 00430, First Dept 1-29-26

Practice Point: Here defendant agreed to a 20-year sentence with the understanding he could be sentenced to 30 years after trial. In fact, his sentence after trial would be capped at 20 years. His guilty pleas were not knowing, voluntary and intelligent.

January 29, 2026

SENTENCING, CONFUSION RE CONCURRENT OR CONSECUTIVE, JUDGES.

ALTHOUGH THE JUDGE DID NOT COMMIT TO CONCURRENT SENTENCES, THE PLEA AGREEMENT CONTEMPLATED CONCURRENT SENTENCES AND THE JUDGE'S STATEMENTS CREATED CONFUSION ON THE ISSUE; IN THE INTEREST OF JUSTICE, AND TAKING INTO ACCOUNT THE CONTENTS OF THE PRESENTENCE REPORT, THE CONSECUTIVE SENTENCES WERE VACATED AND CONCURRENT SENTENCES WERE IMPOSED (THIRD DEPT).

The Third Department, directing that defendant's sentences be served concurrently, not consecutively, determined that the plea agreement contemplated the imposition of concurrent sentences and the judge's confusing and ambiguous language in the plea colloquy warranted modification of the sentence:

We recognize that the imposition of consecutive sentences was authorized under Penal Law § 70.25 (2) … , and that County Court did not make any express sentencing commitment to defendant. However, the plea agreement contemplated the imposition of concurrent sentences, County Court stated during the plea proceedings that the maximum term of imprisonment defendant faced on a class C violent felony was 15 years, and the court used confusing and ambiguous language during the plea colloquy regarding the possibility of consecutive sentencing … . In light of the confusion, defendant seeks vacatur of his plea or modification of the sentence to reflect a concurrent sentence. On this record, and after accounting for the circumstances set forth in the PSR, we find that the imposition of concurrent

sentences is appropriate and modify the judgment accordingly … . People v Bonville, 2026 NY Slip Op 00039, Third Dept 1-8-25

Practice Point: Here it is possible the defendant entered the plea agreement with the understanding that the sentences would run concurrently. Although the judge did not commit to concurrent sentences, the judge's statements on the issue were confusing and ambiguous. The Third Department, in the interest of justice, after reviewing the presentence report, imposed concurrent sentences.

January 8, 2026

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

DISAGREEING WITH THE THIRD DEPARTMENT, THE SECOND DEPARTMENT HELD THAT THE "DISMISSAL WITHOUT PREJUDICE" OF A MOTION FOR A REDUCED SENTENCE PURSUANT TO THE DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT (DVSJA) FOR FAILURE TO PROVIDE SUFFICIENT EVIDENCE CORROBORATING THAT DEFENDANT WAS A VICTIM OF DOMESTIC VIOLENCE IS APPEALABLE (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice LaSalle, disagreeing with the Third Department, determined that the "dismissal without prejudice" of a motion for a reduced sentence pursuant to the Domestic Violence Survivors Justice Act (DVSJA) constitutes a denial of the motion which is appealable:

… [W]e disagree with the Third Department and conclude that under the plain language of CPL 440.47(3)(a), an order "dismissing" a resentencing application at step two pursuant to CPL 440.47(2)(d) is an order "denying resentencing" … , rendering it appealable as of right pursuant to CPL 440.47(3)(a). This is because the effect of an order "dismissing" a resentencing application is that the defendant has been denied resentencing. We conclude that the fact that the statute uses the word "dismiss" in CPL 440.47(2)(d) (when indicating what the court shall do with an application for resentencing that does not contain evidence corroborating the

defendant's claim that he or she was a victim of domestic violence at the time of the offense) and "denying" in CPL 440.47(3)(a) (when indicating what orders an appeal may be taken from) does not mean that the Legislature did not intend for a defendant to be able to appeal from an order determining that a defendant has failed to provide evidence … corroborating the defendant's claim that he or she was a victim of domestic violence at the time of the offense. People v Nymeen C., 2026 NY Slip Op 00144, Second Dept 1-14-26

Practice Point: There is a split of authority on the question whether the "denial without prejudice" of a defendant's motion for a reduced sentence pursuant to the Domestic Violence Survivors Justice Act (DVSJA) is appealable. It is not appealable in the Third Department but is appealable in the Second Department.

January 14, 2026

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

BETWEEN DEFENDANT'S GUILTY PLEA AND SENTENCING, THE COURT HELD A HEARING ON WHETHER DEFENDANT WAS ENTITLED TO ALTERNATIVE SENTENCING PURSUANT TO THE DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT (DVSJA); AT THE HEARING DEFENDANT TESTIFIED SHE ACTED IN SELF DEFENSE WHEN SHE STABBED THE VICTIM; THAT TESTIMONY TRIGGERED THE NEED FOR FURTHER EXPLORATION BY THE JUDGE; THE MAJORITY APPLIED AN EXCEPTION TO THE PRESERVATION REQUIREMENT TO CONSIDER THE APPEAL AND REVERSE; TWO DISSENTERS ARGUED THE EXCEPTION TO THE PRESEVATION REQUIREMENT DID NOT APPLY (THIRD DEPT).

The Third Department, reversing defendant's conviction by guilty plea, over a two-justice dissent, determined defendant raised a question whether defendant stabbed the victim in self-defense in open court between the plea and sentencing which the

judge was required to, but failed to explore. The majority applied an exception to the preservation requirement triggered when an element of the crime is negated by the defendant in open court between the plea and the sentencing. Although nothing in the in the plea colloquy negated an element of the crime, during the post-plea hearing on defendant's application for alternative sentencing pursuant to the Domestic Violence Survivors Justice Act (DVSJA) defendant testified she acted in self defense. The two dissenters argued the exception to the preservation requirement did not apply and the appeal should not have been considered:

Defendant made no statements during the plea colloquy or at sentencing that negated an element of the crimes to which she pleaded guilty, raised the possibility of a particular defense or suggested an involuntary plea so as to implicate the narrow exception to the preservation rule … . That said, the narrow exception to the preservation rule is implicated whenever a defendant "negate[s] an element of the crime to which a plea has been entered or make[s] [a] statement[ ] suggestive of an involuntary plea" in open court between the plea and sentencing, obliging the trial court to "conduct a further inquiry or give the defendant an opportunity to withdraw the plea" … .

From the dissent:

… [D]efendant's statements during the DVSJA hearing did not signify a lack of understanding about the nature of the charges to which she pleaded guilty or that her plea was involuntary. We are mindful that defendant's statements during the hearing suggest that she had a potential justification defense, but the hearing was contemplated by the plea agreement itself, the statements were made for the purpose of establishing defendant's entitlement to a reduced sentence under Penal Law § 60.12 and defendant twice reaffirmed her plea during the hearing. Notably, at the end of the hearing, defense counsel expressly stated that defendant had "knowingly plea[ded guilty to the indictment." Under these particular circumstances and when considered in context, defendant's postplea statements "did not raise a legitimate question about the voluntariness of [defendant's] plea" … so as to impose upon the court a duty of further inquiry to ensure that the plea was knowing, voluntary and intelligent … . People v Brown-Shook, 2026 NY Slip Op 00172, Third Dept 1-16-26

Practice Point: Here the defendant pled guilty and moved for an alternative sentence under the DVSJA. At the DVSJA hearing she testified she stabbed the victim in self defense. There is a narrow exception to the preservation requirement when a defendant negates an element of the crime in open court between pleading guilty and sentencing. Over a two-justice dissent, the majority applied the preservation exception and reversed on the ground the judge did not explore the possibility defendant had acted in self defense.

January 15, 2026

SEX OFFENDER REGISTRATION ACT (SORA), CONSTITUTIONAL LAW, SIX-YEAR DELAY.

THE SIX-YEAR DELAY BETWEEN DEFENDANT'S SEXUAL-MISCONDUCT GUILTY PLEA AND THE SORA RISK-ASSESSMENT HEARING DID NOT DEPRIVE DEFENDANT OF HIS RIGHT TO DUE PROCESS OF LAW (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over a two-judge concurrence, determined that the six-year delay between defendant's guilty plea to sexual misconduct and the SORA risk-level assessment hearing did not deprive defendant of his right to due process of law:

Defendant pled guilty to one count of sexual misconduct, a sex offense requiring registration under the Sex Offender Registration Act (SORA). Nevertheless, defendant was not notified of his SORA registration requirements, and approximately six years passed from the time of his plea before this mistake was brought to the attention of the Board of Examiners of Sex Offenders. After a full, albeit delayed, SORA proceeding, defendant was designated a level one sex offender, the least restrictive designation available, with the required twenty-year registration period ordered nunc pro tunc from the date of his release. Defendant claims that the delay between his plea and his SORA hearing violated his substantive due process rights. We disagree and hold that defendant failed to make the required showing that the delay prejudiced his ability to present his case to the

SORA court and for that reason, we affirm. People v Collier, 2026 NY Slip Op 00074, CtApp 1-8-26

Practice Point: Consult this opinion for a discussion of the substantive and procedural due process protections raised by a six-year delay in holding a SORA risk-level assessment hearing.

January 8, 2026

WAIVER OF INDICTMENT, APPEALS, CONSTITUTIONAL LAW.

THE RECORD DOES NOT DEMONSTRATE THE WAIVER OF INDICTMENT WAS SIGNED IN OPEN COURT; THE ISSUE NEED NOT BE PRESERVED FOR APPEAL; CONVICTION REVERSED (FIRST DEPT).

The First Department, reversing defendant's conviction, determined the waiver of indictment was invalid because it was not signed in open court:

Defendant's waiver of indictment … was invalid because the record does not demonstrate that defendant satisfied the requirement of NY Constitution, art 1, § 6 and CPL 195.20 that the written waiver of indictment must be signed by the defendant in open court in the presence of his or her counsel … . The indictment waiver was dated February 3, 2021, the same date on which the SCI was issued, but a date on which there appears to have been no appearance in this case. Further, the court's description of the indictment waiver suggested that the court understood it to have been signed before the day of the plea. The record as a whole does not clearly support an inference that the "open court" requirement was satisfied. A less than compelling inference does not fulfill the "unequivocal dictate" that the record demonstrate that the defendant signed the waiver in open court … . "Compliance with this unequivocal dictate is indispensable to a knowing and intelligent waiver and the failure to adhere to this strict procedure is a jurisdictional defect which survives a guilty plea and appeal waiver and need not be preserved" … . People v Perez, 2026 NY Slip Op 00210, First Dept 1-15-26

Practice Point; If the record does not unequivocally demonstrate a waiver of indictment was signed in open court, the guilty plea is invalid. The issue need not be preserved for appeal.

January 15, 2026