

# CRIMINAL – 2021

## PRETRIAL ISSUES

### Accusatory instrument

#### *People v Ciccone*

71 Misc 3d 5

(App Term, 2<sup>nd</sup> Dept) (3/25/21 DOI)

Attempted 7<sup>th</sup> degree CPCS and 3<sup>rd</sup> degree criminal trespass charges facially insufficient. The information did not state that NO TRESPASSING signs were conspicuously posted. The officer said that he saw that the defendant had crack cocaine in a pocket, but the proof did not support the inference that the officer recognized a controlled substance.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_20363.htm](http://nycourts.gov/reporter/3dseries/2020/2020_20363.htm)

#### *People v Epakchi*

37 NY3d 39

(COA) (4/1/21 DOI)

The Appellate Term (9<sup>th</sup> and 10<sup>th</sup> Dist.) adopted a rule under which, absent special circumstances, re-prosecution of traffic tickets was not permitted when the original prosecution was dismissed due to lack of a supporting deposition requested by the defendant. There was no basis in the CPL for such rule. Judge Wilson dissented. The Appellate Term had not created a rule of law reviewable by the COA. The broader issue was that the COA lacked interest-of-justice jurisdiction.

[http://www.nycourts.gov/reporter/3dseries/2021/2021\\_02018.htm](http://www.nycourts.gov/reporter/3dseries/2021/2021_02018.htm)

#### *People v Angel*

194 AD3d 497

(1<sup>st</sup> Dept) (5/14/21 DOI)

The felony complaint charged 1<sup>st</sup> degree criminal contempt, 3<sup>rd</sup> degree assault, and 2<sup>nd</sup> degree harassment. The defendant agreed to waive prosecution by indictment and plead guilty to aggravated criminal contempt. The SCI was jurisdictionally defective since it did not set forth an offense for which the defendant was held for grand jury action or a lesser included offense.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03001.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03001.htm)

#### *People v McCall*

194 AD3d 1197

(3<sup>rd</sup> Dept) (5/14/21 DOI)

The defendant was charged in a felony complaint with 1<sup>st</sup> degree robbery and held for grand jury action. He waived indictment and was prosecuted by a SCI charging him with attempted 2<sup>nd</sup> degree robbery. The waiver of indictment and SCI were jurisdictionally defective because they did not charge an offense for which the defendant was held for action of a grand jury or a lesser included offense of the original charge.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03083.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03083.htm)

#### *People v Latta*

71 Misc 3d 139 (A)

(App Term) (5/28/21 DOI)

The accusatory instrument, alleging that the defendant possessed marijuana recovered from rear passenger floor in a black bag, was jurisdictionally defective. Possession not sufficiently alleged. No allegation that marijuana was within vehicle.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_50484.htm](http://nycourts.gov/reporter/3dseries/2021/2021_50484.htm)

*People v Zaragoza*

195 AD3d 522

(1<sup>st</sup> Dept) (6/18/21 DOI)

Conviction of attempted forcible touching reversed. The complaint was jurisdictionally defective since it failed to allege that pressure was applied to the victim's sexual or intimate parts.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03915.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03915.htm)

*People v Hardware*

2021 NY Slip Op 06772

(1<sup>st</sup> Dept) (12/3/21 DOI)

Reversal of conviction of persistent sexual abuse. The indictment was jurisdictionally defective because it did not specify which of three qualifying offenses the defendant allegedly committed. Indictment dismissed.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06772.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06772.htm)

*People v Maglione*

2021 NY Slip Op 06775

(1<sup>st</sup> Dept) (12/3/21 DOI)

Waiver of indictment and SCI were jurisdictionally defective. The above crime, set forth in the SCI, was not named in the misdemeanor complaint and was a greater offense than the crimes charged therein; and the defendant, who was arraigned on the misdemeanor complaint, was not held for grand jury action.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06775.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06775.htm)

*People v Karantinidis*

2021 NY Slip Op 51245 (U)

(App Term, 2<sup>nd</sup> Dept) (12/31/21 DOI)

Charge of attempted 2<sup>nd</sup> degree aggravated harassment as set forth in accusatory instrument jurisdictionally defective. The element of "no legitimate purpose of communication" was not alleged.

[People v Karantinidis \(2021 NY Slip Op 51245\(U\)\) \(nycourts.gov\)](http://nycourts.gov/reporter/3dseries/2021/2021_051245(U).htm)

**Discovery**

*People v Stroud*

190 AD3d 1085

(3<sup>rd</sup> Dept) (1/14/21 DOI)

Expedited review of a protective order granted to the People. Appellate justice upheld order to withhold grand jury testimony, identification procedures, and interviews of a certain witness until 30 days before trial. Proceedings could be entirely ex parte based on clear necessity, but generally People should provide notice that certain information was not disclosed and that a protective order was being sought.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_00101.htm](http://nycourts.gov/reporter/3dseries/2021/2021_00101.htm)

*People v Austen*

197 AD3d 861

(4<sup>th</sup> Dept) (8/27/21 DOI)

Concurring justice opined that discovery reforms should not be applied retroactively. The eight-month delay between enactment and effective date indicated that they were meant to apply prospectively; and implementing the new provisions retroactively would severely impact the criminal justice system.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04798.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04798.htm)

*People ex rel. Ferro v Brann*

197 AD3d 787

(2<sup>nd</sup> Dept) (9/3/21 DOI)

COC not complete until all material and information identified as subject to discovery and electronically shared with the defendant were produced. The substitution of a different ADA was not an exceptional circumstance that would render certain time excludable. CPL 30.30 (2) (a) required the defendant's release on bail or upon his own recognizance.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04897.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04897.htm)

### **Prohibition**

*M/O Gentner v Hall*

193 AD3d 1129

(3<sup>rd</sup> Dept) (4/1/21 DOI)

Prohibition to enjoin prosecution granted. Offenses occurred in Saratoga County. "Particular effect" jurisdiction was rare and not available here. The respondent failed to show that the theft of \$3,900 from a nongovernmental entity, serving one town in the county, caused material harm to the well-being of the local community as a whole.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02028.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02028.htm)

### **Right to counsel**

*People v Guevara*

37 NY3d 1014

(COA) (9/9/21 DOI)

New trial. Defense denied admittance to interview of defendant by People's psychologist. Expert's testimony was admitted at trial. The Sixth Amendment right to counsel applied at pretrial psychiatric examinations—a critical stage of the prosecution—to make a defendant's right of cross-examination more effective. The error was not harmless.

[https://www.nycourts.gov/reporter/3dseries/2021/2021\\_04955.htm](https://www.nycourts.gov/reporter/3dseries/2021/2021_04955.htm)

### **Speedy trial**

*People v Reyes*

70 Misc 3d 133 (A)

(App Term, 2<sup>nd</sup> Dept) (1/8/21 DOI)

Dissenter opined that Criminal Court had properly dismissed charges on speedy trial grounds. The People's statement of readiness at arraignment was illusory and disingenuous. The misdemeanor complaint was not properly converted to an information. There was no certificate of translation, even though the People had notice of the complainant's inability to speak English.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_51569.htm](http://nycourts.gov/reporter/3dseries/2020/2020_51569.htm)

*People v Alvarez*

194 AD3d 618

(1<sup>st</sup> Dept) (5/28/21 DOI)

Supreme Court erred in excluding pre-readiness delay. The People did not show the complainant's unavailability or her necessity as a witness, given that she did not remember the accident. The lower court also erred in excluding post-readiness delay, based on the prosecutor's declaration that readiness was "moot" because lead defense counsel was on trial. Counsel had a colleague present.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03286.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03286.htm)

*People v Garai*

2021 NY Slip Op 51199

(1<sup>st</sup> Dept) (12/17/21 DOI)

Dismissal of accusatory instrument. People were not ready within 90 days. Defense counsel was ineffective in not moving to dismiss the information.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_51199.htm](https://nycourts.gov/reporter/3dseries/2021/2021_51199.htm)

### **Temporary order of protection**

*M/O Crawford v Ally*

197 AD3d 27

(1<sup>st</sup> Dept) (6/25/21 DOI)

Mootness exception applied. Mandamus granted. Criminal Court should have held an evidentiary hearing where the TOP issued at arraignment deprived the petitioner of an important liberty/property interest.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_04082.htm](http://nycourts.gov/reporter/3dseries/2021/2021_04082.htm)

### **Waiver of indictment**

*People v Meeks*

192 AD3d 1698

(4<sup>th</sup> Dept) (3/29/21 DOI)

The waiver of indictment was jurisdictionally defective. The defendant was not on notice of the precise crime for which he was waiving prosecution by indictment, and uncertainty implicated double jeopardy.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_01925.htm](http://nycourts.gov/reporter/3dseries/2021/2021_01925.htm)

## **SUPPRESSION ISSUES**

### **Agent of police**

*People v Sneed*

199 AD3d 90

(1<sup>st</sup> Dept) (9/30/21 DOI)

Remand for hearing on the factual issue of whether the security guard who detained the defendant was licensed to exercise police powers or was acting as an agent of police.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05095.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05095.htm)

### **Closed container**

*People v Lewis*

195 AD3d 427

(1<sup>st</sup> Dept) (6/4/21 DOI)

During a search incident to arrest, the officer removed a small envelope from the defendant's pocket and peeked inside. That constituted a search of a closed container. To the extent that the envelope was partly open, its contents were not in plain view or visible until the officer opened the envelope. Absent exigent circumstances, the officer's actions were improper.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03422.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03422.htm)

*People v Collins*

199 AD3d 580

(1<sup>st</sup> Dept) (11/23/21 DOI)

Error to conclude that the search was valid as incident to a lawful arrest. There was no reasonable basis to believe that the backpack's contents might pose a danger to the arresting officers or that the loss of evidence loss was a concern.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06552.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06552.htm)

### **Credible basis**

*People v King*

199 AD3d 1454

(4<sup>th</sup> Dept) (11/22/21 DOI)

Trial court should have suppressed physical evidence recovered from the defendant's person, as well as statements to police. A police officer had approached the vehicle in which the defendant was a passenger because it was parked in a high-crime area, was not running, and had three occupants. There was no evidence of conduct providing an articulable, credible basis for approaching the vehicle.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06499.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06499.htm)

### **Emergency exception/warrantless search of residence**

*People v Hidalgo-Hernandez*

2021 NY Slip Op 07404

(4<sup>th</sup> Dept) (12/27/21 DOI)

Reversal. Warrantless search of home was unconstitutional. Emergency exception did not apply here. The police lacked reasonable grounds to believe there was an immediate need for their help. The unconscious woman they had received 911 call about had been pronounced dead.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_07404.htm](https://nycourts.gov/reporter/3dseries/2021/2021_07404.htm)

### **Exigent circumstances**

*People v Crosse*

197 AD3d 792

(3<sup>rd</sup> Dept) (8/5/21 DOI)

Error to admit skimmer (device to read, decode, store data from magnetic strips) seized in warrantless search. The cooperative defendant was pat-frisked and handcuffed. He was incapable of grabbing the seized fanny pack and backpack. No exigent circumstances existed.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04636.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04636.htm)

### **Founded suspicion**

*People v Jonathas*

192 AD3d 646

(1<sup>st</sup> Dept) (4/1/21 DOI)

Plea case. Suppression denied. Reversed, dismissed. No founded suspicion of criminality. The defendant was a passenger in a car, bearing a Massachusetts license plate, which was stopped for running a red light in a high-crime neighborhood. The driver obeyed an officer's demands but was visibly nervous.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_01954.htm](http://nycourts.gov/reporter/3dseries/2021/2021_01954.htm)

*People v Wright*

195 AD3d 1371

(4<sup>th</sup> Dept) (6/14/21 DOI)

As the defendant and another man walked down the street, three officers descended upon them because the companion appeared to have an open container of an alcoholic beverage inside a paper bag. The defendant bladed his body while grabbing at his waistband. The level-two intrusion was improper, where the officers lacked the requisite founded suspicion.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03675.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03675.htm)

*People v Blandford*

37 NY3d 1062

(COA) (10/15/21 DOI)

The defendant did not contest the legality of the stop, and he consented to a search of the backseat. Instead, an officer did a canine search. There was record support for the determination that a founded suspicion existed, so the issue was beyond further review.

[https://www.nycourts.gov/reporter/3dseries/2021/2021\\_05619.htm](https://www.nycourts.gov/reporter/3dseries/2021/2021_05619.htm)

*People v Brown*

198 AD3d 803

(2<sup>nd</sup> Dept) (10/15/21 DOI)

Reversal, suppression. reversed, suppressed, and remitted. No objective, credible reason to approach nervous defendant and request information. No basis to engage him in a pointed inquiry regarding a bag found inside the store.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05579.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05579.htm)

**Hearing**

*People v Nunez*

190 AD3d 565

(1<sup>st</sup> Dept) (1/22/21 DOI)

Reversal. The People gave notice of their intent to offer evidence of two statements made by the defendant while in custody following arrest. At the initial *Huntley* hearing, the People called a special agent who allegedly overheard the first statement, but not the detective who heard the second one. Later when the special agent was unavailable, the People sought to reopen the suppression hearing to call the detective. Allowing the testimony was error.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_00266.htm](http://nycourts.gov/reporter/3dseries/2021/2021_00266.htm)

*People v Coffie*

192 AD3d 1641

(4<sup>th</sup> Dept) (3/29/21 DOI)

New trial. *Huntley* hearing not held until midst of trial. Error not harmless, given identification issues.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_01884.htm](http://nycourts.gov/reporter/3dseries/2021/2021_01884.htm)

*People v Ibarguen*

2021 NY Slip Op 05617

(COA) (10/15/21 DOI)

Suppression court did not abuse its discretion in summarily denying the motion where the defendant failed to sufficiently allege standing to challenge the search of the premises.

[https://www.nycourts.gov/reporter/3dseries/2021/2021\\_05617.htm](https://www.nycourts.gov/reporter/3dseries/2021/2021_05617.htm)

**Identification**

*People v Francis*

190 AD3d 566

(1<sup>st</sup> Dept) (1/22/21 DOI)

An identification of the defendant—based on a single photo shown to a detective a few days after his very brief viewing of the defendant, who was not otherwise known to him—should have been suppressed as unduly suggestive. The detective’s observation was not so clear that the ID could not have been mistaken so as to render the delayed ID confirmatory.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_00267.htm](http://nycourts.gov/reporter/3dseries/2021/2021_00267.htm)

*People v McGhee*

194 AD3d 498

(1<sup>st</sup> Dept) (5/14/21 DOI)

Two harmless errors. The trial court should have suppressed an identification of the defendant from a surveillance tape. The ID was unduly suggestive, because a detective directed the eyewitness to watch for someone wearing “all brown,” thus singling out the defendant.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03002.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03002.htm)

*People v Little*

198 AD3d 430

(1<sup>st</sup> Dept) (10/7/21 DOI)

Judgment on plea. Remand for *Wade* hearing. In opposing the omnibus motion, the People did not offer sufficient information to enable the suppression court to determine if detective’s ID was confirmatory.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05310.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05310.htm)

*People v Gaworecki*

37 NY3d 225

(COA) (10/8/21 DOI)

The evidence before the Grand Jury did not establish a prima facie case of 2<sup>nd</sup> degree manslaughter. The proof showed that the defendant sold five bags of heroin to the decedent, who died of a heroin overdose five days later. The People did not establish that the defendant acted with the recklessness required for manslaughter or criminally negligent homicide. He knew the heroin was potent and required caution but not that the drugs posed a substantial and unjustifiable risk of death.

[https://www.nycourts.gov/reporter/3dseries/2021/2021\\_05392.htm](https://www.nycourts.gov/reporter/3dseries/2021/2021_05392.htm)

**Impoundment**

*People v Rivera*

192 AD3d 920

(2<sup>nd</sup> Dept) (3/18/21 DOI)

Suppression, reversal, dismissal. People did not establish that the impoundment of vehicle was lawful. No proof that it was parked illegally or that there was a history of burglary or vandalism in the area. No proof as to the requirements of the impoundment policy or compliance with the guidelines.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_08256.htm](http://nycourts.gov/reporter/3dseries/2021/2021_08256.htm)

**Miranda**

*People v Hughes*

199 AD3d 1332

(4<sup>th</sup> Dept) (11/15/21 DOI)

Reversal. The defendant’s un*Mirandized* statements—made when she was questioned for hours at the police station—were the product of custodial interrogation. Questioning changed from investigatory to accusatory. Reasonable person innocent of any crime would not have believed that she was free to leave.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06231.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06231.htm)

*People v Wortham*

2021 NY Slip Op 06530

(COA) (11/23/21 DOI)

Suppression was properly denied. The *Miranda* pedigree exception applied. A defendant’s response to questions reasonably related to police administrative concerns was not suppressible—even if incriminating.

[https://www.nycourts.gov/reporter/3dseries/2021/2021\\_06530.htm](https://www.nycourts.gov/reporter/3dseries/2021/2021_06530.htm)

*People v Teixeira-Ingram*

199 AD3d 1240

(3<sup>rd</sup> Dept) (11/24/21 DOI)

Statements, made in response to questioning by State Police at the barracks, were obtained during a custodial interrogation. He was not validly notified of his rights. The People relied on an inference that a trooper told an investigator that he had read the defendant his rights.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06575.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06575.htm)

**Pat down / no unlawful activity**

*People v Johnson*

2021 NY Slip Op 21353

(2<sup>nd</sup> Dept) (12/31/21 DOI)

Defendant appeared to be under the influence of drugs and taken by ambulance to the hospital. Although the defendant was not taken into custody due to unlawful activity, police were justified in doing a pat down to ensure the safety of the EMTs, hospital staff, and the defendant himself.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_21353.htm](https://nycourts.gov/reporter/3dseries/2021/2021_21353.htm)

**Payton**

*People v Cuencas*

190 AD3d 109

(2<sup>nd</sup> Dept) (1/14/21 DOI)

Addressing a question left open by *People v Xochimitl*, 32 NY3d 1026—whether a home visit by police for the sole purpose of making a warrantless arrest, not otherwise justified by exigent circumstances, violated a defendant’s indelible right to counsel. NY law did not recognize a category of *Payton* violations based on subjective police intent.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_08118.htm](http://nycourts.gov/reporter/3dseries/2020/2020_08118.htm)

**Probable cause**

*People v Kabia*

190 AD3d 1105

(3<sup>rd</sup> Dept) (1/14/21 DOI)

The trial court held that the shotgun shell found on the defendant’s person supplied probable cause to search the vehicle. However, the vehicle was searched before the defendant was. The People’s alternate argument could not be considered since the trial court did not consider it. Reversal and remittal.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_00209.htm](http://nycourts.gov/reporter/3dseries/2021/2021_00209.htm)

*People v White*

192 AD3d 1539

(4<sup>th</sup> Dept) (3/22/21 DOI)

Decision reserved. The trial court erred in denying the defendant’s request for a probable cause hearing. Specific allegations in the defendant’s motion papers sufficiently raised a factual issue on a material point.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_01639.htm](http://nycourts.gov/reporter/3dseries/2021/2021_01639.htm)

*People v Lawrence*

192 AD3d 1686

(4<sup>th</sup> Dept) (3/29/21 DOI)

Dismissal of counts related to a handgun. The officer who searched the vehicle had no safety reasons to insist on retrieving the registration certificate from the glove compartment.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_01921.htm](http://nycourts.gov/reporter/3dseries/2021/2021_01921.htm)

*People v Scottborgh*

71 Misc 3d 131 (A)

(App Term, 2<sup>nd</sup> Dept) (4/22/21 DOI)

Appellate Term reversed conviction. The minimal information relayed did not provide probable cause that the defendant committed a traffic infraction or reasonable suspicion that he committed a criminal act. Moreover, there was no reasonable basis to believe he was the person in distress described in the tip.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_50316.htm](http://nycourts.gov/reporter/3dseries/2021/2021_50316.htm)

*People v Ponder*

194 AD3d 423

(1<sup>st</sup> Dept) (5/7/21 DOI)

CPW 2 dismissed. The odor of marijuana, together with a de minimis amount of pot in the vehicle's center console, did not furnish probable cause to search the trunk. There was no factual nexus between the possession of an amount consistent with personal consumption and the trunk search.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02880.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02880.htm)

*People v Butler*

196 AD3d 28

(3<sup>rd</sup> Dept) (5/21/21 DOI)

Affirmance. One judge dissented. Probable cause—not reasonable suspicion—was needed to justify a canine's contact sniff search of a defendant's person. The Court of Appeals had held that a canine sniff, in the common hallway of an apartment building to detect drugs, required only reasonable suspicion. There was a greater expectation of privacy in one's body than in a common hallway.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03222.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03222.htm)

*People v Sanchez*

196 AD3d 1010

(3<sup>rd</sup> Dept) (7/29/21 DOI)

Odor of marijuana emanating from a vehicle constituted probable cause. Though not applicable here, under the MRTA, the odor of burnt cannabis no longer provided reasonable cause to believe that a crime had been committed, unless a law enforcement officer was investigating whether a person operating a vehicle was impaired by drugs, alcohol, or a combination.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04581.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04581.htm)

*People v Dula*

198 AD3d 463

(1<sup>st</sup> Dept) (10/13/21 DOI)

Reversal. Suppression. The finding that the police officers reasonably believed that a traffic violation (however trivial) occurred was dispositive as to the existence of probable cause to stop the car.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05465.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05465.htm)

**Reasonable suspicion**

*People v Williams*

191 AD3d 1495

(4<sup>th</sup> Dept) (2/12/21 DOI)

The officers stopped the vehicle for a traffic infraction. No reasonable suspicion justifying pursuit. The defendant appeared to reach toward his waistband, was nervous, and "bladed" his body. Suppression.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_00983.htm](http://nycourts.gov/reporter/3dseries/2021/2021_00983.htm)

*People v Benbow*

193 AD3d 869

(2<sup>nd</sup> Dept) (4/15/21 DOI)

Denial of suppression reversed. Dismissal. Police lacked reasonable suspicion to stop the defendant and a companion, based solely on tip that two individuals, one with a gun, were leaving a club. There was no proof about the identity of the tipster or how he/she knew about the gun.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02304.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02304.htm)

*People v Ahmad*

193 AD3d 961

(2<sup>nd</sup> Dept) (4/22/21 DOI)

Reversal and dismissal of weapon conviction. The officer lacked the requisite reasonable suspicion for the traffic stop. The defendant was not following anyone and was not trespassing. There was no indication that criminal activity was at hand.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02404.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02404.htm)

*People v Rhames*

196 AD3d 510

(2<sup>nd</sup> Dept) (7/12/21 DOI)

Reversal. Dismissal. Officer witnesses' testimony conflicted on key points, undermining their credibility. The evidence showed at most that one officer grabbed at the defendant and/or pursued him, without the requisite level of suspicion, and that this illegality precipitated the recovery of evidence.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04242.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04242.htm)

*People v Walls*

37 NY3d 987

(COA) (9/3/21 DOI)

Reversed, dismissed due to bad vehicle stop. People relied on the testimony of the police officer who identified the van using information from the dispatcher and did not observe traffic infractions or conduct suggestive of criminality. The reliability of the tip to the dispatcher was not shown.

[https://www.nycourts.gov/reporter/3dseries/2021/2021\\_04949.htm](https://www.nycourts.gov/reporter/3dseries/2021/2021_04949.htm)

*People v Santy*

198 AD3d 1377

(4<sup>th</sup> Dept) (10/13/21 DOI)

Reversal. Suppression. A pat-down search of a traffic offender was not authorized unless, when the vehicle was stopped, police possessed a reasonable suspicion that the defendant was armed or posed a threat to officer safety. Such predicate was lacking here. The defendant's flat affect and partial disrobement during the stop were odd but did not indicate possible looming danger.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05439.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05439.htm)

**Right to counsel**

*People v Desjardins*

196 AD3d 1177

(4<sup>th</sup> Dept) (7/19/21 DOI)

County Court erred in declining to suppress statements made after the defendant's right to counsel attached. The CPS caseworker who interviewed the defendant was acting as an agent of the police. She was aware that he was being held on criminal charges and was represented; and she worked on a multidisciplinary task force of social services and law enforcement agencies.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04465.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04465.htm)

## **Search incident to arrest**

*People v Mabry*

37 NY3d 933

(COA) (5/28/21 DOI)

The People failed to establish that the warrantless search of the defendant's backpack was a valid search incident to arrest. No evidence indicated that the backpack was in the defendant's immediate control or grabbable area. The record lacked testimony indicating where the bag was in relation to the defendant right before the search.

[http://www.nycourts.gov/reporter/3dseries/2021/2021\\_03348.htm](http://www.nycourts.gov/reporter/3dseries/2021/2021_03348.htm)

## **Search warrant**

*People v Duval*

36 NY3d 384

(COA) (2/12/21 DOI)

Search warrant description sufficiently characterized the defendant's home as a private residence, located at a unique, specified street address. The lower court had properly considered accompanying documents to determine if the description was supported by information available to the detective. No hearing was needed, given the defendant's failure to provide sworn affidavits regarding three separate residential units.

[http://www.nycourts.gov/reporter/3dseries/2021/2021\\_00896.htm](http://www.nycourts.gov/reporter/3dseries/2021/2021_00896.htm)

*People v Gordon*

36 NY3d 420

(COA) (2/18/21 DOI)

A search warrant regarding a particular house at a certain address did not cover two vehicles not described but located on the property. The warrant authorized a search of the defendant's "person" and the "entire premises." The factual materials did not allege that specified vehicles were involved in criminal activity. But police searched two vehicles on the premises. The COA had independent authority to follow existing State constitutional jurisprudence—even if federal constitutional doctrine had changed—in order to safeguard fundamental rights. CPL 690.15 (1) and case law differentiated between premises, vehicles, and persons. Specific descriptions and particularized probable cause were required for each category.

[http://www.nycourts.gov/reporter/3dseries/2021/2021\\_01093.htm](http://www.nycourts.gov/reporter/3dseries/2021/2021_01093.htm)

*People v Schneider*

37 NY3d 187

(COA) (6/4/21 DOI)

CPL 700.05 authorized a NY court to issue a warrant commanding the diversion into NY of a cell phone call between a California resident who had never been to NY and persons not in NY, so that NY officers could listen to the call in NY. The dissenters disagreed, invoking the NY Const., providing explicit protections against unreasonable interception of telephone communication; historical context; and the high number of wiretap applications granted in NY compared to other states.

[http://www.nycourts.gov/reporter/3dseries/2021/2021\\_03486.htm](http://www.nycourts.gov/reporter/3dseries/2021/2021_03486.htm)

*People v Moore*

195 AD3d 1585

(4<sup>th</sup> Dept) (6/18/21 DOI)

Dismissal where drugs were found behind a doorway on stairs leading to the attic—not in a common area—and not in area covered by search warrant.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03975.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03975.htm)

*People v Mortel*

197 AD3d 196

(2<sup>nd</sup> Dept) (7/23/21 DOI)

Reversed, suppressed, dismissed. Law enforcement learned that a specified vehicle would be transporting narcotics at a specified location and time. Troopers made a warrantless stop, search, and seizure. The search was unjustified. The fellow officer rule did not apply, because the subject officer and his basis of knowledge were not identified. Troopers did not testify that they smelled pot; and they did not do an inventory search pursuant to a proper procedure.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04498.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04498.htm)

*People v Mosquito*

197 AD3d 504

(2<sup>nd</sup> Dept) (8/5/21 DOI)

Reversal. Valid vehicle stop. Officer recovered bags of marijuana from car and three credit cards in wallet found in center console. There was no basis to believe the cards might be illicit and to search further. People failed to demonstrate that the credit cards were lawfully seized under the plain view doctrine. Jail time served; indictment dismissed.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04620.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04620.htm)

*People v Brown*

197 AD3d 433

(1<sup>st</sup> Dept) (8/27/21 DOI)

Justices of the Second Department and the citywide Special Narcotics Court issued valid eavesdropping warrants to intercept cell phone calls and electronic messages. The subject calls and messages were made and received in North Carolina but heard and recorded in a Brooklyn NYPD office. Execution of a warrant depended on the officers' actions vis-à-vis the communications—not the target's location or communication devices, or the participants engaged in the call.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04737.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04737.htm)

*People v Herron*

199 AD3d 1476

(4<sup>th</sup> Dept) (11/22/21 DOI)

Part of the search warrant was overbroad. Troopers were permitted to search the defendant's home for "personal papers ... alcohol ... safes ... and any communication and computers that are related to criminal activity, any ... telephone records, cell phones that [may] contain evidence of a crime or illegal activity, and any associated documentation related to any criminal activity." Evidence seized pursuant to the cited language should have been suppressed, but severance was feasible.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06512.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06512.htm)

*People v Pitcher*

199 AD3d 1493

(4<sup>th</sup> Dept) (11/22/21 DOI)

The search warrant was not supported by probable cause. The application relied on a detective's affidavit that was not based on his personal knowledge. Officers who purportedly supplied certain hearsay information were not named. Other hearsay was received from two confidential informants, but they did not testify at a *Darden* hearing after the defense challenged the information.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06526.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06526.htm)

## **Statements / expectation of privacy**

### *People v Williams*

2021 NY Slip Op 21352  
(2<sup>nd</sup> Dept) (12/31/21 DOI)

Suppression of statements. After recorded interrogation, detective returned defendant's cellphone, said he could call his "girl," left, and closed the door. The defendant phoned his girlfriend—a suspected accessory—and another person. The calls were surreptitiously recorded. Having been lured into a false sense of security, the defendant had a reasonable expectation of privacy in his statements.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_21352.htm](https://nycourts.gov/reporter/3dseries/2021/2021_21352.htm)

## **Untimely motion**

### *People v Marte*

197 AD3d 411  
(1<sup>st</sup> Dept) (8/5/21 DOI)

Justice dissented. Trial court improperly rejected mid-trial motion to suppress an Intoxilyzer test result. The merits should have been reviewed based on good cause and the interests of justice. The defendant consented to the test only after expiration of the statutory two-hour period. Counsel rendered ineffective assistance. Remand needed re voluntariness of Intoxilyzer test.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04648.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04648.htm)

## **GUILTY PLEAS**

## **Adverse position**

### *People v Phillip*

(3<sup>rd</sup> Dept) (12/3/21 DOI)  
2021 NY Slip Op 06721

Counsel improperly took a position adverse to the defendant. When counsel stated that he did not believe that there was a factual or legal basis for the defendant's motion to withdraw his plea, Supreme Court should have assigned a new attorney.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06721.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06721.htm)

## **Coerced**

### *People v Thigpen-Williams*

198 AD3d 1366  
(4<sup>th</sup> Dept) (10/13/21 DOI)

Reversal. Plea was coerced. The court warned the defendant that, if he were convicted at trial, he would receive the maximum, to run consecutively to a previously imposed sentence. The unpreserved issue was reached in the interest of justice.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05429.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05429.htm)

### *People v Goodwin*

2021 NY Slip Op 07418  
(4<sup>th</sup> Dept) (12/27/21 DOI)

Reversal and remittal. Sentencing court did not describe the potential sentence range and made statements that were impermissibly coercive and rendered the plea involuntary.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_07418.htm](https://nycourts.gov/reporter/3dseries/2021/2021_07418.htm)

## **Default judgments**

*People v Iverson*

37 NY3d 98

(COA) (5/28/21 DOI)

Under VTL § 1806-a, the trial court may render a default judgment only when the defendant failed to enter a plea by the date specified in the ticket. If the defendant entered a plea of not guilty and demanded a hearing, a default judgment was prohibited.

[http://www.nycourts.gov/reporter/3dseries/2021/2021\\_03347.htm](http://www.nycourts.gov/reporter/3dseries/2021/2021_03347.htm)

## **Direct consequences**

*People v Nguyen*

191 AD3d 1321

(4<sup>th</sup> Dept) (2/8/21 DOI)

Plea vacated. Not until immediately before sentencing did the plea court tell the defendant about the fine, mandatory conditional discharge period, and ignition interlock device.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_00724.htm](http://nycourts.gov/reporter/3dseries/2021/2021_00724.htm)

## **Double jeopardy**

*People v Kattis*

196 AD3d 509

(2<sup>nd</sup> Dept) (7/12/21 DOI)

Second degree course of sexual conduct against a child conviction upon a plea of guilty. Instant indictment and indictment in another county alleged a single continuing, uninterrupted offense against the same victim. Constitutional double jeopardy principles precluded this latter conviction.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04240.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04240.htm)

*People v Lantigua*

198 AD3d 514

(1<sup>st</sup> Dept) (10/25/21 DOI)

Reversal and dismissal. Double jeopardy barred a retrial, except where a defendant requested or consented to the mistrial. Initially these defendants made general motions for a mistrial, but the next day they limited the requests to a mistrial *with prejudice*. So, the trial court should have obtained their unequivocal consent before discharging the first jury or should have continued the trial with that jury.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05671.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05671.htm)

## **Grand jury**

*People v Owens*

191 AD3d 1456

(4<sup>th</sup> Dept) (2/12/21 DOI)

County Court dismissed the original indictment based on the legal insufficiency of evidence before the grand jury. But the People failed to seek leave to resubmit the matter to the second grand jury. The judgment of conviction, based upon a plea of guilty, was reversed.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_00958.htm](http://nycourts.gov/reporter/3dseries/2021/2021_00958.htm)

*People v Johnson*

197 AD3d 725

(2<sup>nd</sup> Dept) (8/27/21 DOI)

County Court erred in denying a defense request to introduce the grand jury testimony of a witness who was unavailable to testify at trial. The proffered proof was material and exculpatory since the description of the shooter was inconsistent with the defendant.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04763.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04763.htm)

*People v Royal-Clanton*

197 AD3d 966

(4<sup>th</sup> Dept) (8/27/21 DOI)

Reversal. The defendant was deprived of his right to testify before the grand jury, and the lower court erred in denying his motion to dismiss the amended indictment. Since the defendant's request was received after the grand jury voted but before the filing of the indictment, under CPL 190.50 (5) (a), he was entitled to a reopening of the grand jury proceeding.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04856.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04856.htm)

*People v Gaworecki*

37 NY3d 225

(COA) (10/8/21 DOI)

The evidence before the Grand Jury did not establish a prima facie case of 2<sup>nd</sup> degree manslaughter. The proof showed that the defendant sold five bags of heroin to the decedent, who died of a heroin overdose five days later. The People did not establish that the defendant acted with the recklessness required for manslaughter or criminally negligent homicide. He knew the heroin was potent and required caution but not that the drugs posed a substantial and unjustifiable risk of death.

[https://www.nycourts.gov/reporter/3dseries/2021/2021\\_05392.htm](https://www.nycourts.gov/reporter/3dseries/2021/2021_05392.htm)

*People v Abdullah*

198 AD3d 1101

(3<sup>rd</sup> Dept) (10/25/21 DOI)

Supreme Court erred in granting the People's ex parte application for leave to resubmit one burglary charge. The People sought to resubmit a burglary 2<sup>nd</sup> charge, purportedly because the first grand jury acted in an irregular manner. But Supreme Court did not make any finding in that regard. Instead, the application was granted because the People had presented a new theory of the case—which was not true. Dismissal.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05742.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05742.htm)

**Gravity knives**

*People v Johnson*

192 AD3d 603

(1<sup>st</sup> Dept) (3/25/21 DOI)

CPW3 conviction dismissed considering recent legislation amending Penal Law §265.01 to decriminalize simple possession of gravity knives, even though law did not apply retroactively.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_01864.htm](http://nycourts.gov/reporter/3dseries/2021/2021_01864.htm)

*People v Minter*

196 AD3d 1073

(4<sup>th</sup> Dept) (7/12/21 DOI)

Conviction based on the defendant's possession of a gravity knife. After conviction, Penal Law § 265.01 (1) was amended. People agreed that the indictment should be dismissed.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04318.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04318.htm)

*People v Elmaskeny*

72 Misc 3d 138 (A)

(App Term, 2<sup>nd</sup> Dept) (8/13/21 DOI)

Penal Law § 265.01 (1) was amended to decriminalize possession of a gravity knife. While the amendment did not apply retroactively, the People did not oppose reversal in interest of justice.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_50766.htm](https://nycourts.gov/reporter/3dseries/2021/2021_50766.htm)

*People v Bullock*

2021 NY Slip Op 51249 (U)

(App Term, 2<sup>nd</sup> Dept) (12/31/21 DOI)

Amendment of Penal Law § 265.01 should be retroactively applied. So, what that People did not have good grace to consent as per the norm.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_51249.htm](https://nycourts.gov/reporter/3dseries/2021/2021_51249.htm)

### **Inadequate colloquy**

*People v Desz*

73 Misc 3d 130 (A)

(App Term) (10/15/21 DOI)

There was virtually no allocution of the unrepresented, inexperienced defendant. The plea court did not ask him whether he had been driving, what incident occurred, or what damage resulted. Further, there was no showing that the defendant waived any constitutional rights.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_50949.htm](https://nycourts.gov/reporter/3dseries/2021/2021_50949.htm)

### **Ineffective assistance**

*People v Beach*

197 AD3d 1440

(3<sup>rd</sup> Dept) (9/24/21 DOI)

The defendant did not validly waive the right to appeal. The defendant argued ineffective assistance, based on counsel's response to the People's question, during the plea colloquy, as to whether the plea and waiver of appeal were entered knowingly, intelligently, and voluntarily. Counsel's affirmation made prior to *People v. Thomas*, did not constitute him taking a position adverse to the defendant.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05048.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05048.htm)

### **Judicial diversion**

*People v Commissiong*

194 AD3d 952

(2<sup>nd</sup> Dept) (5/21/21 DOI)

Appeal from judgment of conviction on drug charge brought up for review denial of motion seeking judicial diversion. Reversal. Review not foreclosed by the guilty plea. Supreme Court abused its discretion in summarily denying application for hearing. Defendant eligible. Evaluation favorable.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03193.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03193.htm)

### **Misadvice**

*People v Osbourne*

191 AD3d 561

(1<sup>st</sup> Dept) (2/18/21 DOI)

Bail jumping reversed and plea vacated. Court misadvised the defendant as to his sentencing exposure if he was convicted after trial.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_01128.htm](http://nycourts.gov/reporter/3dseries/2021/2021_01128.htm)

*People v Buchanan*

194 AD3d 655

(1<sup>st</sup> Dept) (5/28/21 DOI)

The defendant was told that the maximum term was 45 years, but it was 20 years. The disparity rendered the plea involuntary.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03386.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03386.htm)

**Motion to withdraw plea**

*People v Murphy*

191 AD3d 1019

(2<sup>nd</sup> Dept) (2/25/21 DOI)

Prior to sentencing, the defendant moved to withdraw his guilty plea. He claimed innocence and said he pleaded guilty out of fear that prior counsel would not ably represent him. County Court deemed the application to be a CPL 330.30 motion. That was error. It was a CPL 220.60 (3) motion. Remittal.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_08203.htm](http://nycourts.gov/reporter/3dseries/2021/2021_08203.htm)

*People v Fellows*

192 AD3d 701

(2<sup>nd</sup> Dept) (3/4/21 DOI)

Appeal in abeyance. Counsel said the defendant's proposed motion to withdraw the guilty plea would be frivolous. Thus, the defendant received ineffective assistance when counsel took a position adverse to his. The lower court should have appointed new counsel to represent him.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_01269.htm](http://nycourts.gov/reporter/3dseries/2021/2021_01269.htm)

*People v Swain*

192 AD3d 827

(2<sup>nd</sup> Dept) (3/11/21 DOI)

Remittal for hearing on motion to withdraw plea of guilty. There was a question as to whether the defendant understood that the court's purportedly forthcoming bail decision was contingent on the acceptance of the plea offer. When a defendant asks about bail, the court should advise him that such matter will be addressed only after plea negotiations are completed.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_01430.htm](http://nycourts.gov/reporter/3dseries/2021/2021_01430.htm)

*People v Hollman*

197 AD3d 484

(2<sup>nd</sup> Dept) (8/5/21 DOI)

Dissenter: motion to withdraw his plea of guilty should have been granted. Defendant lacked opportunity to discuss case and potential defenses with counsel. Counsel purportedly told the defendant he could take back his plea at any time; misinformed him about the negotiated sentence; and withheld a statement from an exculpatory witness.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04617.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04617.htm)

*People v Gerald*

197 AD3d 1324

(2<sup>nd</sup> Dept) (9/30/21 DOI)

The defendant asserted that he had pleaded guilty because of misunderstandings about constructive possession and the People's evidence of his guilt—all due to IAC. He also claimed innocence. County Court erred in summarily denying his motion to withdraw his plea of guilty.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05130.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05130.htm)

*People v Gumpton*

199 AD3d 1485

(4<sup>th</sup> Dept) (11/22/21 DOI)

County Court erred in denying, without a hearing, the defendant's motion to withdraw her plea. A triable question as to the voluntariness of the plea was raised by defense counsel's affidavit swearing that it was coerced. The matter was remitted.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06519.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06519.htm)

**Negated element**

*People v Gause*

193 AD3d 1074

(2<sup>nd</sup> Dept) (4/29/21 DOI)

Third-degree CPW required "knowingly and unlawfully" possessing "a narcotic drug with intent to sell it." During the plea allocution, the defendant denied that he intended to sell the drugs he possessed, yet the court made no further inquiry.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02543.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02543.htm)

*People v Douglas*

2021 NY Slip Op 06857

(2<sup>nd</sup> Dept) (12/10/21 DOI)

Offense required possession of "a motor vehicle...other than a motorcycle." During his plea allocution, the defendant admitted to possession of a motorcycle. Since element was negated, and court failed in inquiry duty, plea had to be vacated.

[People v Douglas \(2021 NY Slip Op 06857\) \(nycourts.gov\)](http://nycourts.gov/reporter/3dseries/2021/2021_06857.htm)

**Order of protection**

*People v Rosales*

198 AD3d 998

(2<sup>nd</sup> Dept) (10/29/21 DOI)

Order of protection vacated the order in interest of justice. Supreme Court lacked authority to issue the order in favor of a person who was not a victim of, or witness to, crimes to which defendant pleaded guilty.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05874.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05874.htm)

**Peque violations**

*People v Bruno*

191 AD3d 585

(1<sup>st</sup> Dept) (2/25/21 DOI)

Conviction of 3<sup>rd</sup> degree criminal sale of a controlled substance. The appeal was held in abeyance, because it was not clear that the defendant was made aware of any potential *Peque* issues and had reached an informed decision not to raise them.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_01150.htm](http://nycourts.gov/reporter/3dseries/2021/2021_01150.htm)

*People v Tapia*

192 AD3d 706

(2<sup>nd</sup> Dept) (3/4/21 DOI)

Appeal held in abeyance. *Peque* argument reached in the interest of justice. At a joint plea proceeding, Supreme Court advised the codefendant of the possibility that he could be deported because of his plea and asked the defendant, "Do you understand *that*?" Considering the defendant's limited education and need

for a Spanish interpreter, the cryptic inquiry did not ensure his comprehension that he could be deported due to his plea.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_01274.htm](http://nycourts.gov/reporter/3dseries/2021/2021_01274.htm)

*People v Remigio*

192 AD3d 519

(1<sup>st</sup> Dept) (3/18/21 DOI)

Appeal held in abeyance. The defendant was deprived of effective assistance when counsel failed to advise him that a guilty plea to an aggravated felony would result in mandatory deportation. Counsel said only that the plea “may very well result” in deportation.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_01519.htm](http://nycourts.gov/reporter/3dseries/2021/2021_01519.htm)

*People v Torres*

193 AD3d 988

(2<sup>nd</sup> Dept) (4/22/21 DOI)

Appeal held in abeyance. The plea court failed to address the possibility of deportation due to the guilty plea. Upon remittal, defendant would have the opportunity to establish a reasonable probability that he would not have pleaded guilty had the court properly advised him.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02424.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02424.htm)

*People v Arellano-Venegas*

198 AD3d 982

(2<sup>nd</sup> Dept) (10/29/21 DOI)

*Peque* issue unpreserved for appellate review and meritless, where County Court stated: “The plea of guilty will subject you to deportation,” and “neither your attorney, nor I, nor anyone else can guarantee that you will not be deported” as result of the plea.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05865.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05865.htm)

*People v Jones*

(2<sup>nd</sup> Dept) (12/3/21 DOI)

Appeal held in abeyance. Exception to preservation for *Peque* violation. Court noted possible “negative immigration consequences,” deportation was not mentioned, and the court’s admonition was confusing. Thus, the defendant was entitled to a chance to move to vacate his plea.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06701.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06701.htm)

**Promise broken**

*People v Regan*

199 AD3d 1067

(3<sup>rd</sup> Dept) (11/8/21 DOI)

Reversed. The plea was based on a promise that could not be fulfilled—the defendant’s court-ordered participation in shock incarceration.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06007.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06007.htm)

**Rights forfeited**

*People v Velazquez-Hernandez*

193 AD3d 1084

(2<sup>nd</sup> Dept) (4/29/21 DOI)

The plea court did not ensure that the defendant understood the rights he would be giving up by pleading guilty. Relief was granted in the interest of justice.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02550.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02550.htm)

*People v Benitez*

195 AD3d 739

(2<sup>nd</sup> Dept) (6/11/21 DOI)

Drug sale conviction reversed, Trial court did not fulfill duty to ensure defendant had full understanding of the plea consequences, including rights forfeited and period of post-release supervision.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03600.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03600.htm)

### **Statutory speedy trial**

*People v Duggins*

192 AD3d 191

(3<sup>rd</sup> Dept) (1/22/21 DOI)

The defendant argued that the People violated his statutory right to a speedy trial. The appellate court held that CPL 30.30 (6) (guilty plea does not forfeit statutory speedy trial claim) did not apply where, as here, the sentence was imposed prior to the amendment's effective date.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_00336.htm](http://nycourts.gov/reporter/3dseries/2021/2021_00336.htm)

*People v Lara-Medina*

195 AD3d 542

(1<sup>st</sup> Dept) (6/25/21 DOI)

CPL 30.30 (6) (eff. 1/1/20), permitting defendants who pleaded guilty to raise statutory speedy trial claims on appeal, was not applied retroactively.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03997.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03997.htm)

### **VTL**

*People v Brown*

71 Misc 3d 139 (A)

(App Term, 2<sup>nd</sup> Dept) (5/28/21 DOI)

The plea deal included a violation of VTL § 1192 (3). The plea court failed to state the basis of such disposition, as required by subdivision (10).

[http://nycourts.gov/reporter/3dseries/2021/2021\\_50482.htm](http://nycourts.gov/reporter/3dseries/2021/2021_50482.htm)

### **Waivers of appeal**

*People v Momoh*

192 AD3d 915

(2<sup>nd</sup> Dept) (3/18/21 DOI)

Detailed discussion of the defects in the waiver of the right to appeal.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_08251.htm](http://nycourts.gov/reporter/3dseries/2021/2021_08251.htm)

*People v Beach*

197 AD3d 1440

(3<sup>rd</sup> Dept) (9/24/21 DOI)

The defendant did not validly waive the right to appeal. He signed a written waiver to forfeit his right to seek state or federal post-conviction relief, including via CPL Article 440 motions and writs of habeas corpus and error coram nobis. County Court did not overcome the overbroad waiver by explaining that some appellate review survived.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05048.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05048.htm)

*People v David*

2021 NY Slip Op 07319

(3<sup>rd</sup> Dept) (12/27/21 DOI)

Bad waiver of appeal. County Court made no inquiry as to whether the defendant read the written waiver, nor if he understood it. The written document stated that the defendant waived his right to pursue all post-conviction remedies. This overbroad and inaccurate language was not cured by the limited colloquy.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_07319.htm](https://nycourts.gov/reporter/3dseries/2021/2021_07319.htm)

## **TRIALS**

### **Affirmative defense**

*People v Gilbert*

199 AD3d 1048

(3<sup>rd</sup> Dept) (11/8/21 DOI)

Affirmance. Rejection of affirmative defense of lack of criminal responsibility by reason of mental disease or defect. The defendant said that at the time of the killing, she believed that God had ordained her to kill the victim, a demon. But the People presented equally plausible expert testimony that the defendant possessed the requisite capacity.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06003.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06003.htm)

### **Co-defendant deal**

*People v Johnson*

198 AD3d 1320

(4<sup>th</sup> Dept) (10/4/21 DOI)

Reversal and new trial. The trial court induced a plea agreement that required the codefendant to testify against the defendant for a more favorable sentence. By deviating from the role of neutral arbiter, the trial court denied the defendant his due process right to a fair trial.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05217.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05217.htm)

### **CPL 330.30 motion**

*People v Woodard*

199 AD3d 1377

(4<sup>th</sup> Dept) (11/15/21 DOI)

Error to summarily denying the defendant's CPL 330.30 motion. Two jurors' supporting affidavits indicated that other jurors made racist remarks and racial bias may have influenced the verdict.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06256.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06256.htm)

### **CPL 330.20 motion**

*Matter of James Q.*

192 AD3d 1370

(3<sup>rd</sup> Dept) (3/18/21 DOI)

Reversal in CPL 330.20 proceeding. The petitioner presented ample evidence to support continued secure confinement. The challenged decision was perplexing and unsupported by the record. The respondent continued to suffer from a dangerous mental disorder, requiring confinement in a secure facility.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_01545.htm](http://nycourts.gov/reporter/3dseries/2021/2021_01545.htm)

## **Delayed decision**

### *People v Burden*

72 Misc 3d 134 (A)

App Term, 2<sup>nd</sup> Dept) (8/5/21 DOI)

Judgment dismissed in interest of justice. The bench trial lasted only 72 minutes, yet it took 342 days for a decision. There was no excuse for the delay, which was a ground for reversal even absent preservation.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_50712.htm](https://nycourts.gov/reporter/3dseries/2021/2021_50712.htm)

## **Deliberating juror**

### *People v Moody*

2021 NY Slip Op 07599

(2<sup>nd</sup> Dept) (12/31/21 DOI)

Note said jury reached partial verdict. Juror said she was having anxiety attacks and wanted to stop serving. Court erred in not making inquiry before accepting a partial verdict. Record did not reveal whether juror became unable to serve before or after the jury reached a partial verdict. Reversed.

[People v Moody \(2021 NY Slip Op 07599\) \(nycourts.gov\)](https://nycourts.gov/reporter/3dseries/2021/2021_07599.htm)

## **Evidentiary errors**

### ***Audio recording***

#### *People v Melendez*

196 AD3d 647

(2<sup>nd</sup> Dept) (7/23/21 DOI)

New trial. Supreme Court erred in admitting a largely inaudible recording of a controlled meeting. The jury must have speculated as to the contents.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04497.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04497.htm)

### ***Crawford v WA***

#### *People v Lockley*

200 AD3d 117

(2<sup>nd</sup> Dept) (11/16/21 DOI)

Reversal. Right to confrontation was violated when the People introduced testimony of a detective who recounted statements by a non-testifying accomplice incriminating the defendant. *See Crawford v Washington*. The error was not harmless. The People presented a strong circumstantial case, but the accomplice's statement was the only direct evidence linking the defendant to the murder.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06192.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06192.htm)

### ***Expert opinion***

#### *People v Murray*

191 AD3d 1324

(4<sup>th</sup> Dept) (2/8/21 DOI)

Conviction of 3<sup>rd</sup> degree insurance fraud and another crime, in connection with property lost in a house fire. New trial. Trial court erred in allowing an arson investigator to testify that the fire was intentionally set. Opinion was irrelevant to prove any element of the crimes and was prejudicial.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_00722.htm](https://nycourts.gov/reporter/3dseries/2021/2021_00722.htm)

*People v Anderson*  
36 NY3d 1109  
(COA) (5/7/21 DOI)

The defendant was convicted of 2<sup>nd</sup> degree murder for a crime committed at age 14. Expert proof was not necessary to aid the jury in deciding whether the People disproved justification, because adolescent impulsiveness was not an issue beyond the ken of the typical juror.

[http://www.nycourts.gov/reporter/3dseries/2021/2021\\_02735.htm](http://www.nycourts.gov/reporter/3dseries/2021/2021_02735.htm)

*People v Challenger*  
2021 NY Slip Op 06927  
(1<sup>st</sup> Dept) (12/10/21 DOI)

Reversed. The trial court erred in allowing an arresting detective to offer lay opinion testimony that the defendant was the person depicted in two surveillance videos, where the jury was capable of making that determination. The error was not harmless.

[People v Challenger \(2021 NY Slip Op 06927\) \(nycourts.gov\)](http://www.nycourts.gov/reporter/3dseries/2021/2021_06927.htm)

### ***Excited utterance***

*People v Germosen*  
196 AD3d 503  
(2<sup>nd</sup> Dept) (7/12/21 DOI)

Error to let People elicit testimony from officers as to hearsay statements by the complainant a few hours after the incident. Given that delay, the People did not show that the complainant's capacity for reflection remained stilled, and the trial court erred in invoking the excited utterance exception.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04237.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04237.htm)

### ***Frye***

*People v Applewhite*  
195 AD3d 856  
(2<sup>nd</sup> Dept) (6/18/21 DOI)

New trial. Error to deny defense motion to preclude the introduction of DNA testing results and testimony about the Forensic Statistical Tool or to hold a *Frye* hearing.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03847.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03847.htm)

*People v Adeyeye*  
198 AD3d 666  
(2<sup>nd</sup> Dept) (10/7/21 DOI)

Court improperly denied defense motion to preclude the People from introducing DNA testing results derived from use of the Forensic Statistical Tool (FST) without holding *Frye* hearing. Reversal, new trial.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05347.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05347.htm)

*People v Wortham*  
2021 NY Slip Op 06530  
(COA) (11/23/21 DOI)

Reversal was warranted based on the erroneous denial of a *Frye* hearing regarding the admissibility of FST DNA evidence.

[https://www.nycourts.gov/reporter/3dseries/2021/2021\\_06530.htm](https://www.nycourts.gov/reporter/3dseries/2021/2021_06530.htm)

## ***Molineux***

### *People v Rodriguez*

193 AD2d 554

(1<sup>st</sup> Dept) (4/22/21 DOI)

New trial ordered in attempted burglary case. The People introduced extensive *Molineux* evidence relating to two prior burglaries. The prejudicial impact of the evidence far exceeded the probative value. Limiting instructions were insufficient; and the error was not harmless.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02367.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02367.htm)

### *People v Gaylord*

194 AD3d 1189

(3<sup>rd</sup> Dept) (5/14/21 DOI)

It was error to allow the victim's testimony that the defendant punched her in the stomach when fearing she was pregnant, since he had no notice of the *Molineux* proof. But the error was harmless.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03080.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03080.htm)

### *People v Telfair*

198 AD3d 678

(2<sup>nd</sup> Dept) (10/7/21 DOI)

Dissent. The prior gun possession incidents were remote in time and place from the subject incident; involved different guns; and were disconnected from events leading to arrest. The potential for undue prejudice was great.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05355.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05355.htm)

## ***Present sense impression***

### *People v Merritt*

193 AD3d 661

(1<sup>st</sup> Dept) (4/29/21 DOI)

Harmless error to admit the complainant's 911 call as a present sense impression. The complainant said that after incident, he walked block before he thought about the incident and called 911. Call occurred six minutes after incident. Such time for reflection negated the "essential assurance of reliability."

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02615.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02615.htm)

## ***Pretrial silence***

### *People v DeLaCruz*

192 AD3d 1042

(2<sup>nd</sup> Dept) (3/25/21 DOI)

New trial. The People improperly used the defendant's pretrial silence against him on their direct case, and the error was not harmless. Issue reached in the interest of justice.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_01785.htm](http://nycourts.gov/reporter/3dseries/2021/2021_01785.htm)

## ***Sandoval***

### *People v Brannon*

199 AD3d 826

(2<sup>nd</sup> Dept) (11/12/21 DOI)

*Crazy Sandoval* error. No proper balancing as to probative value v prejudice, and ruling was conditioned on whether defense counsel would impeach the People’s witnesses with their criminal histories during cross-examination.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06184.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06184.htm)

### ***Sexual relations***

#### *People v Hansel*

2021 NY Slip Op 07035  
(3<sup>rd</sup> Dept) (12/17/21 DOI)

Reversal and new trial. County Court erred in allowing the victim’s mother to testify that the defendant had a voracious sexual appetite, but then stopped having sex with her. The proof permitted the jury to improperly speculate that he had turned to the victim.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_07035.htm](https://nycourts.gov/reporter/3dseries/2021/2021_07035.htm)

### ***Sirois hearing***

#### *People v Burgess*

192 AD3d 1136  
(2<sup>nd</sup> Dept) (4/1/21 DOI)

New trial. After a *Sirois* hearing, trial court improperly admitted an out-of-court statement of an unavailable witness. The People did not prove that the defendant controlled persons who threatened the witness.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_01993.htm](http://nycourts.gov/reporter/3dseries/2021/2021_01993.htm)

### ***Translators / hearsay***

#### *People v Slade*

37 NY3d 127  
(COA) (5/7/21 DOI)

The use of a translator did not create a hearsay defect in accusatory instruments. Judges Garcia and Rivera dissented. There was a systemic problem where the sufficiency of the accusatory instrument depended on supporting depositions by persons who lacked English-language proficiency. A certificate of translation under penalty of perjury—in which the translator attested to fluency in the relevant languages and affirmed the accuracy of the translation—would have provided confidence in each translation.

[http://www.nycourts.gov/reporter/3dseries/2021/2021\\_02866.htm](http://www.nycourts.gov/reporter/3dseries/2021/2021_02866.htm)

### **Grossly unqualified juror**

#### *People v Thompson*

(1<sup>st</sup> Dept) (12/3/21 DOI)

Reversal and new trial. Trial court erred in discharging a juror and alternate as grossly unqualified. They had engaged in premature deliberations on the subway, but the court should have asked whether they were unable to render an impartial verdict.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06778.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06778.htm)

### **Ineffective assistance**

#### *People v Jennings*

191 AD3d 1429  
(4<sup>th</sup> Dept) (2/12/21 DOI)

Reversal. No valid strategic reason for counsel’s failure to object to repugnant verdicts. The jury was instructed that the People had to prove that the defendant directed the codefendant to emerge from a hiding place and shoot the victim in the head. The codefendant’s acquittal negated an essential element.  
[http://nycourts.gov/reporter/3dseries/2021/2021\\_00944.htm](http://nycourts.gov/reporter/3dseries/2021/2021_00944.htm)

*People v Kashif*

71 Misc 3d 28

(App Term, 2<sup>nd</sup> Dept) (3/25/21 DOI)

New trial. IAC. Defense counsel did not conduct pretrial research to determine whether the defendant had a criminal history; did not seek a *Sandoval* hearing. At trial, counsel asked the defendant about a prior criminal conviction when he was 17 that arose from joyriding in a stolen car—for which he had received a YO adjudication.

[http://www.nycourts.gov/reporter/3dseries/2021/2021\\_21062.htm](http://www.nycourts.gov/reporter/3dseries/2021/2021_21062.htm)

*People v Stackhouse*

194 AD3d 113

(4<sup>th</sup> Dept) (3/29/21 DOI)

Upon the denial of suppression, counsel failed to seek redaction of the defendant’s video-recorded statement. The jury thus heard a reference to the defendant’s history of incarceration. There could be no tactical or strategic reason for such error.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_01883.htm](http://nycourts.gov/reporter/3dseries/2021/2021_01883.htm)

*People v Graham*

2021 NY Slip Op 07068

(1<sup>st</sup> Dept) (12/17/21 DOI)

Defense counsel admitted ineffectiveness in failing to properly investigate and prepare for trial. Yet the defendant did not establish that he was deprived of meaningful representation by conflict-free counsel, where counsel was active at trial, and the defendant’s defense was not impaired.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_07068.htm](https://nycourts.gov/reporter/3dseries/2021/2021_07068.htm)

**Judge’s questioning**

*People v Parker*

197 AD3d 732

(2<sup>nd</sup> Dept) (8/27/21 DOI)

Two justices dissented, opining that the defendant was deprived of a fair trial by Supreme Court’s egregious intervention in asking 200 questions of witnesses. The trial justice acted like a prosecution advocate and undermined the defense strategy, and the issue should be reached in the interest of justice.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04766.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04766.htm)

*People v Martinez*

199 AD3d 834

(2<sup>nd</sup> Dept) (11/12/21 DOI)

New trial before a different judge. The trial judge questioned witnesses extensively, usurped the roles of the attorneys, and created the impression that he was an advocate for the People.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06193.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06193.htm)

**Jury instructions**

*People v Ballo*

191 AD3d 482

(1<sup>st</sup> Dept) (2/12/21 DOI)

Assault case. Proof did not support the defendant's liability as a principal, but prosecutor did not request an accessory liability instruction. Conviction may not be sustained on an acting-in-concert theory that was not submitted to the jury. Verdict finding the defendant guilty as a principal was against the weight.  
[http://nycourts.gov/reporter/3dseries/2021/2021\\_00810.htm](http://nycourts.gov/reporter/3dseries/2021/2021_00810.htm)

*People v Herrera*

193 AD3d 189

(1<sup>st</sup> Dept) (2/25/21 DOI)

Reversal in interest of justice. Justification was central. But the jury instructions failed to convey that acquittal of attempted 1<sup>st</sup> degree assault based on justification would preclude consideration of the lesser included offense of 2<sup>nd</sup> degree assault (*People v Velez*, 131 AD3d 129). The verdict sheet was also incorrect.  
[http://nycourts.gov/reporter/3dseries/2021/2021\\_01148.htm](http://nycourts.gov/reporter/3dseries/2021/2021_01148.htm)

*People v Garcia*

192 AD3d 1463

(4<sup>th</sup> Dept) (3/22/21 DOI)

New trial. The trial court erred in denying a missing witness charge on cumulativeness grounds. The complainant testified that she immediately reported the rape to her boyfriend and, hours later, to her mother. The mother testified, the boyfriend did not. The testimony would have been highly relevant to whether the complainant reported the alleged rape at the first suitable opportunity.  
[http://nycourts.gov/reporter/3dseries/2021/2021\\_01571.htm](http://nycourts.gov/reporter/3dseries/2021/2021_01571.htm)

*People v Crumb*

194 AD3d 739

(2<sup>nd</sup> Dept) (5/7/21 DOI)

Vacatur of convictions of 1<sup>st</sup> degree reckless endangerment, 2<sup>nd</sup> degree assault, and resisting arrest and ordered a new trial on those counts. As to the crimes that occurred after he fled, Supreme Court erred in instructing the jury that geographic jurisdiction over one count conferred jurisdiction over all.  
[http://nycourts.gov/reporter/3dseries/2021/2021\\_02816.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02816.htm)

*People v Ahmeti*

71 Misc 3c 139 (A)

(App Term, 2<sup>nd</sup> Dept) (5/28/21 DOI)

The defendant sought a missing witness charge when the People failed to call the complainant. The motion was denied. That was error. The complainant's testimony would have been material to the People's case. The trial prosecutor said she had been informed by the former prosecutor that the witness had moved back to France but did not confirm that.  
[http://nycourts.gov/reporter/3dseries/2021/2021\\_50481.htm](http://nycourts.gov/reporter/3dseries/2021/2021_50481.htm)

*People v Swift*

195 AD3d 1496

(4<sup>th</sup> Dept) (6/14/21 DOI)

New trial on strangulation. County Court erred in denying request to instruct jury on attempted strangulation 2<sup>nd</sup>, where a reasonable view of the evidence would have supported a finding of no physical injury.  
[http://nycourts.gov/reporter/3dseries/2021/2021\\_03785.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03785.htm)

*People v Taylor*

196 AD3d 851

(3<sup>rd</sup> Dept) (7/12/21 DOI)

Error to deny circumstantial evidence charge. No direct evidence identified the defendant as the shooter or as having possessed a loaded firearm. Indeed, there was no DNA or fingerprint evidence linking him to the

gun found near the scene or the projectiles fired from it. Footage capturing the incident did not depict the defendant with a firearm. Equivocal eyewitness testimony was not direct evidence.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04258.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04258.htm)

*People v Ruiz*

197 AD3d 915

(4<sup>th</sup> Dept) (8/27/21 DOI)

County Court erred in denying a request for a jury instruction on the defense of temporary and lawful possession of a firearm. The defendant testified that she discovered the firearm when someone tried to forcibly enter her home, and she searched for an object to protect herself. Then she shot through the door to scare away the intruder.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04827.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04827.htm)

*People v Singh*

197 AD3d 1332

(2<sup>nd</sup> Dept) (9/30/21 DOI)

New trial. Supreme Court erred in denying request for justification charge on deadly physical force. A rational jury could have found that defendant reasonably believed that such force was necessary.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05134.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05134.htm)

*People v Faison*

198 AD3d 1263

(4<sup>th</sup> Dept) (10/4/21 DOI)

Reversal and new trial. A jury instruction created the chance that the murder conviction was based on a theory different from the one set forth in the indictment, as amplified by the bill of particulars. The depraved indifference theory was limited to the defendant's infliction of head injuries by shaking/hitting the child. The instruction allowed the jury to also consider his inaction after the assault.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05184.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05184.htm)

*People v Neris*

73 Misc 3d 130 (A)

(App Term, 2<sup>nd</sup> Dept) (10/15/21 DOI)

Criminal Court erred in granting the People's request for a missing witness charge as to the defendant's mother. The defendant testified that she was at her mother's house before driving the car. But her mother was not with her then or when she operated the vehicle.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_50952.htm](https://nycourts.gov/reporter/3dseries/2021/2021_50952.htm)

*People v Getman*

199 AD3d 1318

(4<sup>th</sup> Dept) (11/15/21 DOI)

Error to grant People's request to charge 1<sup>st</sup> degree criminal sexual act as a lesser included offense of predatory sexual assault against a child. It was possible to commit the greater offense, as charged in the indictment, without committing the lesser offense.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06224.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06224.htm)

*People v Lamb*

2021 NY Slip Op 07057

(1<sup>st</sup> Dept) (12/17/21 DOI)

Sex trafficking convictions reversed. New trial. The sex trafficking statute had two distinct but linked elements—by an enumerated coercive act, the offender must advance, or profit from, prostitution. The trial court's supplemental instruction erroneously severed the link between the elements.

[https://www.nycourts.gov/reporter/3dseries/2021/2021\\_07057.htm](https://www.nycourts.gov/reporter/3dseries/2021/2021_07057.htm)

### **Jury trial waiver**

*People v Black*

199 AD3d 824

(2<sup>nd</sup> Dept) (11/12/21 DOI)

New trial. Supreme Court failed to ensure that the defendant was fully aware of consequences of waiving right to jury trial. He had no criminal history but had a recent history of paranoid delusional thinking and was being treated with anti-psychotic medication. Yet the court did not ask any questions about the waiver.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06183.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06183.htm)

### **Merger doctrine**

*People v Sims*

199 AD3d 841

(2<sup>nd</sup> Dept) (11/12/21 DOI)

Merger doctrine precluded the unlawful imprisonment conviction and dismissed that count. The confinement of the complaining witness in the defendant's car was only the incidental means to committing other crimes charged.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06200.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06200.htm)

### **Multiplicitous counts**

*People v Edmondson*

191 AD3d 1015

(2<sup>nd</sup> Dept) (2/25/21 DOI)

Convictions of 1<sup>st</sup> degree assault, 1<sup>st</sup> degree robbery were multiplicitous. The jury instructions for the two offenses were essentially identical. Dismissal of assault count in interest of justice.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_08201.htm](http://nycourts.gov/reporter/3dseries/2021/2021_08201.htm)

### **Notice of defendant's statement**

*People v Porter*

192 AD3d 222

(2<sup>nd</sup> Dept) (1/14/21 DOI)

The defendant appealed from a judgment of conviction. At trial, a detective said a safe "needed to be opened." The defendant typed in the combination and opened the safe, which contained drugs and firearms—a communicative act. As to involuntariness, the defendant acted when she was handcuffed and un-Mirandized. CPL 710.30 (1) (a) notice was required but not given. New trial.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_08122.htm](http://nycourts.gov/reporter/3dseries/2020/2020_08122.htm)

### **Oaths**

*People v Van Alphen*

195 AD3d 1307

(3<sup>rd</sup> Dept) (6/25/21 DOI)

The victims, all over age 9, did not give unsworn testimony. The form of the oath was flexible and could be modified, as here, to a child's level of understanding.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_04056.htm](http://nycourts.gov/reporter/3dseries/2021/2021_04056.htm)

## **O’Rama violations**

### *People v Everett*

191 AD3d 696

(2<sup>nd</sup> Dept) (2/4/21 DOI)

New trial was required based on the trial court’s failure to comply with CPL 310.30 and *People v O’Rama*. The jury asked to view a surveillance video. The lower court failed to notify the parties about the jury note, to read its contents into the record, or to respond.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_00575.htm](http://nycourts.gov/reporter/3dseries/2021/2021_00575.htm)

### *People v Jackson*

192 AD3d 486

(1<sup>st</sup> Dept) (3/11/21 DOI)

The trial court’s paraphrasing of part of a jury note from the deliberating jury did not constitute an *O’Rama* mode of proceedings error. The relevant portion unambiguously asked for a rereading of a specific part of the original charge. Although the court should have read the entire note verbatim, the paraphrasing did not undermine defense counsel’s ability to provide input regarding the response.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_01488.htm](http://nycourts.gov/reporter/3dseries/2021/2021_01488.htm)

### *People v Dennis*

192 AD3d 1137

(2<sup>nd</sup> Dept) (4/1/21 DOI)

New trial. Court did not tell counsel the precise contents of a substantive jury note, reporting that it asked for the defendant’s phone call from jail, but not revealing that the note ended with “(transcript).” The judge did not provide the transcript. There was a discrepancy between the recording and the transcript.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_01994.htm](http://nycourts.gov/reporter/3dseries/2021/2021_01994.htm)

### *People v Carillo*

198 AD3d 914

(2<sup>nd</sup> Dept) (10/25/21 DOI)

Reversal. *O’Rama* violation. Substantive jury note was not shown to counsel or read verbatim. Mode-of-proceedings error.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05710.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05710.htm)

## **Prospective jurors**

**(*Antommarchi*, *Batson*, challenge for cause)**

### *People v Padilla*

191 AD3d 1347

(4<sup>th</sup> Dept) (2/8/21 DOI)

New trial. Error to deny challenges for cause to two prospective jurors whose statements raised serious doubts about their ability to render an impartial verdict. Their silence, in response to the court’s question to the entire panel, did not constitute an unequivocal assurance.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_00732.htm](http://nycourts.gov/reporter/3dseries/2021/2021_00732.htm)

### *People v Singleton*

192 AD3d 1536

(4<sup>th</sup> Dept) (3/22/21 DOI)

Decision reserved, remittal. Trial court erred in failing to conduct the *Batson* three-step inquiry, following defense counsel’s objection to the People’s peremptory challenge of a Black prospective juror. After the

defendant made a prima facie showing, the prosecutor offered a race-neutral explanation. Counsel attempted to respond, but the court did not give him the opportunity to argue pretext.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_01638.htm](http://nycourts.gov/reporter/3dseries/2021/2021_01638.htm)

*People v Taylor*

192 AD3d 1134

(2<sup>nd</sup> Dept) (4/1/21 DOI)

New trial. The trial court erred in allowing the People to exercise peremptory challenges to prospective jurors after the defendant and codefendant used challenges as to that same panel.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_01998.htm](http://nycourts.gov/reporter/3dseries/2021/2021_01998.htm)

*People v Coleman*

195 AD3d 1411

(4<sup>th</sup> Dept) (6/14/21 DOI)

New trial. *Batson* violation. Error to allow the prosecutor to exercise a peremptory challenge to exclude a black prospective juror. The court accepted the purported race-neutral reason for the challenge, though it was based on the prosecutor's erroneous recollection of juror's statements.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03695.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03695.htm)

*People v Murray*

197 AD3d 46

(1<sup>st</sup> Dept) (7/2/21 DOI)

New trial. *Batson* violation. At trial, the defendant pro se, an African American, complained that the prosecutor was "excluding all the blacks." The People relied on two pretextual reasons for a peremptory challenge to one prospective juror.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04108.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04108.htm)

*People v Brissett*

196 AD3d 594

(2<sup>nd</sup> Dept) (7/16/21 DOI)

Appeal held in abeyance and remitted to a different judge. Defendant made a prima facie showing of discrimination, based on prosecution peremptory challenges to three black prospective jurors. The trial court erred in failing to proceed to the step two of the *Batson* test.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04366.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04366.htm)

*People v Tillmon*

197 AD3d 956

(4<sup>th</sup> Dept) (8/27/21 DOI)

County Court erred in denying the defense challenge for cause to a prospective juror who was not sure he could be fair and impartial, due to his family's experiences with domestic violence. The trial court failed to thereafter obtain the requisite unequivocal assurance.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04848.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04848.htm)

*People v Majid*

73 Misc 3d 134 (A)

(App Term, 2<sup>nd</sup> Dept) (11/8/21 DOI)

New trial in DWI case. A prospective juror, who had been involved with MADD, had an actual bias and was unable to provide an unequivocal assurance that she could render an impartial verdict. The defendant exhausted his peremptory challenges; the denial of the for-cause challenge was reversible error.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_51025.htm](https://nycourts.gov/reporter/3dseries/2021/2021_51025.htm)

*People v Johnson*

199 AD3d 1017

(2<sup>nd</sup> Dept) (11/24/21 DOI)

New trial. The defendant made a prima facie showing in *Batson* challenge. Regarding a race-neutral reason, the prosecutor said that the subject juror indicated that she wanted to hear from both sides in settling disputes. Defense counsel pointed out that the prosecutor did not strike a prospective white juror—another school counselor who also said that she would need to hear both stories when resolving a conflict at work.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06627.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06627.htm)

*People v Thomas*

(2<sup>nd</sup> Dept) (12/3/21 DOI)

Murder conviction reversed, new trial. Error to deny defense challenge for cause to a prospective juror—a firefighter who worked in the neighborhood where the offenses occurred. He told the trial court that he saw “a lot that goes on in the area” and that police there “defended us, stuck up for us” and he would “lean a little bit more” toward what an officer had to say. No unequivocal assurance of impartiality.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06711.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06711.htm)

*People v Feddaoui*

2021 NY Slip Op 06859

(2<sup>nd</sup> Dept) (12/10/21 DOI)

New trial. Supreme Court erred in denying the defendant’s for-cause challenge to a prospective juror who stated that she would expect the defense to present evidence. Her subsequent responses fell short of providing unequivocal assurances of impartiality.

[People v Feddaoui \(2021 NY Slip Op 06859\) \(nycourts.gov\)](https://nycourts.gov/reporter/3dseries/2021/2021_06859.htm)

*People v Wilkins*

2021 NY Slip Op 06936

(COA) (12/17/21 DOI)

*People v Antommarchi* claim rejected. The defendant acquiesced in the continued voir dire of prospective juror CK in open court and failed to object to his pre-waiver absence from the sidebar with CK.

[https://www.nycourts.gov/reporter/3dseries/2021/2021\\_06936.htm](https://www.nycourts.gov/reporter/3dseries/2021/2021_06936.htm)

*People v Wilson*

2021 NY Slip Op 07305

(2<sup>nd</sup> Dept) (12/27/21 DOI)

Reversal. Error to deny challenges to prospective jurors who trusted testimony too much or did not get People’s burden of proof.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_07305.htm](https://nycourts.gov/reporter/3dseries/2021/2021_07305.htm)

*People v Lewis*

2021 NY Slip Op 07426

(4<sup>th</sup> Dept) (12/27/21 DOI)

Reversal. Error to deny challenges to prospective juror who trusted testimony too much.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_07426.htm](https://nycourts.gov/reporter/3dseries/2021/2021_07426.htm)

**Quantum of evidence**

***Assault***

*People v Ballo*

191 AD3d 482

(1<sup>st</sup> Dept) (2/12/21 DOI)

Assault case. Proof did not support the defendant's liability as a principal, but prosecutor did not request an accessory liability instruction. Conviction may not be sustained on an acting-in-concert theory that was not submitted to the jury. Verdict finding the defendant guilty as a principal was against the weight.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_00810.htm](http://nycourts.gov/reporter/3dseries/2021/2021_00810.htm)

*People v Grosso*

198 AD3d 491

(1<sup>st</sup> Dept) (10/15/21 DOI)

Assault convictions, under an acting-in-concert theory, were not supported by legally sufficient evidence. The People failed to prove that, when the codefendant stabbed the victim, the defendant shared his intent to do so. There was no proof that the defendant knew that the codefendant had a knife or was planning to use it.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05640.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05640.htm)

***Attempted rape***

*People v Rath*

192 AD3d 1600

(4<sup>th</sup> Dept) (3/22/21 DOI)

Dismissal of attempted rape count as to which the bill of particulars alleged that the defendant attempted to have sexual intercourse with victim after striking her in face. No testimony supported those allegations.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_01667.htm](http://nycourts.gov/reporter/3dseries/2021/2021_01667.htm)

***CPW***

*People v Melendez*

198 AD3d 1293

(4<sup>th</sup> Dept) (10/4/21 DOI)

Guilty verdict as to CPW 2 counts against the weight of the evidence, since the People presented no evidence that the firearms were loaded when in the defendant's possession.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05196.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05196.htm)

***Criminal contempt***

*People v Salzburg*

72 Misc 3d 134 (A)

(App Term, 2<sup>nd</sup> Dept) (8/5/21 DOI)

Attempted 2<sup>nd</sup> degree criminal contempt. Reversed. Against the weight of evidence. The expiration date of the order of protection had been changed from 10/8/15 to 10/8/16. The People failed to prove that the revision occurred before the order was given to the defendant in court.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_50716.htm](https://nycourts.gov/reporter/3dseries/2021/2021_50716.htm)

***Criminal mischief***

*People v Jackson*

194 AD3d 622

(1<sup>st</sup> Dept) (5/28/21 DOI)

The First Department dismissed one mischief count because of the lack of proof re reasonable repair costs.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03288.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03288.htm)

## *Coercion*

### *People v McClendon*

199 AD3d 1233

(3<sup>rd</sup> Dept) (11/24/21 DOI)

The conviction of 1<sup>st</sup> degree coercion was not supported by legally sufficient evidence. Because the victim was able to call police, the People failed to establish that the defendant caused her to abstain from conduct that she was legally permitted to engage in due to fear of physical injury.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06573.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06573.htm)

## *CPW*

### *People v Rose*

191 AD3d 697

(2<sup>nd</sup> Dept) (2/4/21 DOI)

CPW conviction against weight of evidence. Temporary possession of the gun did not constitute a crime. The defendant, who was acquitted of murder charge based on justification defense, initially took possession with valid legal excuse. No proof he retained it after opportunities to hand it over to authorities.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_00577.htm](http://nycourts.gov/reporter/3dseries/2021/2021_00577.htm)

### *People v Johnston*

192 AD3d 1516

(4<sup>th</sup> Dept) (3/22/21 DOI)

Modified. Four CPW counts (P.L. § 265.03[3]), were based on the defendant's uninterrupted possession of a single weapon at different times. But the possession of the weapon constituted a single continuing offense for which the defendant could be prosecuted only once. Three CPW counts dismissed.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_01632.htm](http://nycourts.gov/reporter/3dseries/2021/2021_01632.htm)

### *People v Lora*

192 AD3d 1488

(4<sup>th</sup> Dept) (3/22/21 DOI)

Dismissal of counts of 1<sup>st</sup> degree criminal use of a firearm and 3<sup>rd</sup> and 4<sup>th</sup> degree CPW. The evidence, showing only the defendant's presence in the house where a rifle was found, was legally insufficient to establish constructive possession.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_01597.htm](http://nycourts.gov/reporter/3dseries/2021/2021_01597.htm)

### *People v Hawkins*

192 AD3d 1637

(4<sup>th</sup> Dept) (3/29/21 DOI)

CPW 2 counts were dismissed. The proof was legally insufficient to show accessorial liability as to one weapon count. As to the other count, the verdict was against the weight of evidence. The People did not prove that the defendant—finding himself in the presence of a man with a loaded weapon—willingly aided possession of the weapon.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_01882.htm](http://nycourts.gov/reporter/3dseries/2021/2021_01882.htm)

### *People v Santiago*

195 AD3d 1460

(4<sup>th</sup> Dept) (6/14/21 DOI)

Conviction 2<sup>nd</sup> degree CPW modified. There was no proof that the weapon was loaded. The victim testified that, on the date in question, the defendant put the firearm to her head and pulled the trigger twice, but the weapon did not fire. Reduced to criminal possession of a firearm.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03756.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03756.htm)

***Drug possession***

*People v Ponder*

191 AD3d 1409

(4<sup>th</sup> Dept) (2/12/21 DOI)

Reversal of drug conviction based on constructive possession. Although the defendant was present when the police executed a search warrant, no other proof showed that he was an apartment occupant or regularly frequented it.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_00923.htm](http://nycourts.gov/reporter/3dseries/2021/2021_00923.htm)

*People v Cota*

199 AD3d 1237

(3<sup>rd</sup> Dept) (11/24/21 DOI)

Weight of evidence did not support the jury's determination that the defendant constructively possessed crack cocaine. Police responded to a domestic disturbance call at the apartment of the defendant's sister and found drugs in her bedroom under a pile of female clothes. There was no proof that any of the defendant's personal belongings were in that bedroom.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06574.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06574.htm)

***Drug sale***

*People v Moreno*

193 AD3d 881

(2<sup>nd</sup> Dept) (4/15/21 DOI)

Dismissal of drug sale and conspiracy convictions. The evidence was legally insufficient as to both charges. The defendant was merely present during the sale. There was no proof of an overt act.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02316.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02316.htm)

***DWAI***

*People v Koukhta*

72 Misc 3d 126 (A)

(App Term, 2<sup>nd</sup> Dept) (6/25/21 DOI)

Conviction of DWAI reversed. The defendant offered a plausible account that he drove his truck into a tree stump after swerving to avoid a deer and that upon arriving home, he drank more. The People could not refute his story about how he became drunk in interval between the accident and trooper arrival.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_50572.htm](http://nycourts.gov/reporter/3dseries/2021/2021_50572.htm)

*People v Perez*

72 Misc 3d 141 (A)

(App Term, 2<sup>nd</sup> Dept) (9/9/21 DOI)

Conviction for DWAI and unlicensed operation of a vehicle against the weight of the evidence. The People failed to establish that the defendant operated the vehicle. The sole evidence as to operation of the vehicle was the officer's testimony that, at the scene, the defendant said he had been driving. However, the defendant was "very out of it," and at trial, the defendant said that the vehicle owner had been driving.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_50840.htm](https://nycourts.gov/reporter/3dseries/2021/2021_50840.htm)

## ***Escape***

### *People v Bagley*

194 AD3d 1475

(4<sup>th</sup> Dept) (5/10/21 DOI)

First degree escape count dismissed. The proof did not show that the defendant was in custody at the time of the alleged escape. An officer informed the defendant that he was under arrest and tried to pull him from the driver's seat of a vehicle. The defendant drove off, dragging officers across the parking lot.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02964.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02964.htm)

## ***False instrument***

### *People v Saladeen*

194 AD3d 426

(1<sup>st</sup> Dept) (5/7/21 DOI)

Filing false instrument count dismissed. The defendant intentionally caused false statements to be written on officially filed forms—with one exception. The Investigating Supervisor's Report was not prepared, reviewed, or filed by the defendant; and the evidence did not show that he knew that his oral statements to his commanding officer would be memorialized therein.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02760.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02760.htm)

## ***Harassment***

### *People v Lagano*

72 Misc 3d 138 (A)

(App Term, 2<sup>nd</sup> Dept) (8/13/21 DOI)

Proof of 2<sup>nd</sup> degree harassment legally insufficient. While genuine threats of physical harm fell within the scope of the statute, without more, an outburst did not constitute a violation.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_50767.htm](https://nycourts.gov/reporter/3dseries/2021/2021_50767.htm)

## ***Identification***

### *People v Marion*

193 AD3d 762

(2<sup>nd</sup> Dept) (4/15/21 DOI)

Denial of suppression reversed. New trial. Prior to the lineup, the defendant's attorney in another matter identified herself to the arresting officer. Though aware of the representation, the detective doing the lineup failed to notify counsel.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02177.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02177.htm)

### *People v Green*

194 AD3d 1106

(3<sup>rd</sup> Dept) (5/7/21 DOI)

Robbery, assault convictions not supported by legally sufficient evidence. The People failed to prove that the defendant was one of three perpetrators who robbed and assaulted the victim. The victim vaguely described the assailants as three Black men; and the three codefendants pleaded guilty.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02841.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02841.htm)

### *People v Garcia*

194 AD3d 956

(2<sup>nd</sup> Dept) (5/21/21 DOI)

Guilty verdict as to robbery against the weight of evidence. While the defendant was found in possession of a distinctive bandana shortly after the crime near the scene, no witnesses testified that the complainant mentioned a bandana before the arrest. Also, the complainant testified that he had seen the man with the bandana twice before—but that he had never seen the defendant before the crime.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03196.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03196.htm)

*People v Hawkins*

196 AD3d 505

(2<sup>nd</sup> Dept) (7/12/21 DOI)

No officer saw the defendant carrying a bag; neither bystander was able to identify him as the man with the bag; and no forensic evidence linked him to it. True, the bystanders' vague description was consistent with the defendant's general appearance. But such proof—coupled with the defendant's proximity to the crime scene—did not establish his identity as the perpetrator.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04238.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04238.htm)

*People v Rodriguez*

199 AD3d 712

(2<sup>nd</sup> Dept) (11/8/21 DOI)

Verdict was against the weight of evidence. Neither person robbed was able to identify the defendant. The modus operandi of the crimes was not sufficiently distinctive to support an inference that, because evidence incriminated the defendant as to crimes on another date, he also committed the crimes on the subject date.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05990.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05990.htm)

***Kidnapping***

*People v Legrand*

194 AD3d 1073

(2<sup>nd</sup> Dept) (5/28/21 DOI)

Kidnapping proof legally insufficient. The proof did not establish that the defendant: (1) knew that the complainant was a 14-year-old runaway whose parents were looking for her during the one-week period she stayed at his house; (2) intentionally restricted her movements by confining her; or (3) intended to prevent the complainant's liberation by hiding her where she was unlikely to be found.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03333.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03333.htm)

***Larceny***

*People v Badji*

36 NY3d 393

(COA) (2/12/21 DOI)

Conviction of 4<sup>th</sup> degree grand larceny was properly based on the defendant's theft of the victim's intangible credit card information to make purchases. General Business Law § 511-a was applicable, and it said that "credit card" included "any number assigned to a credit card."

[http://www.nycourts.gov/reporter/3dseries/2021/2021\\_00897.htm](http://www.nycourts.gov/reporter/3dseries/2021/2021_00897.htm)

***Obstructing gov't. admin.***

*People v Johnson*

195 AD3d 859

(2<sup>nd</sup> Dept) (6/18/21 DOI)

Dismissal of obstructing governmental administration based on legal insufficiency. The arresting officers said the defendant was argumentative during a traffic stop and uncooperative during the arrest-booking process. That was not a knowing physical interference with the official function.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03851.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03851.htm)

*People v Wilson*

72 Misc 3d 129 (A)

(2<sup>nd</sup> Dept) (7/16/21 DOI)

Reversal of conviction of obstructing governmental administration. The defendant called 911 because her son used her car without permission. Officers found the son was found holding a pocketknife. He dropped the knife as ordered, but was arrested, and the mother tried to allow his escape from a police vehicle. Her conviction was improper since there was no reason arrest the son for menacing an officer.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_50626.htm](https://nycourts.gov/reporter/3dseries/2021/2021_50626.htm)

***Physical injury***

*People v Bowen*

196 AD3d 501

(2<sup>nd</sup> Dept) (7/12/21 DOI)

The complainant testified that he had pain in his back and neck for three weeks, and it hurt when he lifted “something” while working in construction. However, the victim never sought medical treatment and used only a topical cream. Such proof did not show substantial pain or impairment of a physical condition.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04236.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04236.htm)

***Promoting prison contraband***

*People v McLamore*

191 AD3d 1413

(4<sup>th</sup> Dept) (2/12/21 DOI)

Conviction of promoting prison contraband reduced from 1<sup>st</sup> to 2<sup>nd</sup> degree offense. Evidence insufficient to establish that the substance in the packages seized—synthetic marihuana—was dangerous contraband.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_00926.htm](http://nycourts.gov/reporter/3dseries/2021/2021_00926.htm)

***Rape***

*People v O’Donnell*

195 AD3d 1430

(4<sup>th</sup> Dept) (6/14/21 DOI)

Rape 1<sup>st</sup> charges dismissed. Physical abuse in the sexual relationship did not make the sex acts a product of forcible compulsion.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03709.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03709.htm)

*People v Wagoner*

195 AD3d 1595

(4<sup>th</sup> Dept) (6/18/21 DOI)

Rape and prostitution counts reduced. The man at issue denied having sexual contact with the victim, who said she did not believe that the defendant knew what the man was doing to her the night he raped her.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03981.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03981.htm)

## ***Robbery***

### *People v Kourouma*

191 AD3d 542

(1<sup>st</sup> Dept) (2/18/21 DOI)

Robbery conviction to petit larceny. Conduct in snatching a purse dangling from the victim's arm did not involve the required physical force.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_01011.htm](http://nycourts.gov/reporter/3dseries/2021/2021_01011.htm)

### *People v Stackhouse*

194 AD3d 113

(4<sup>th</sup> Dept) (3/29/21 DOI)

Robbery counts were dismissed because the defendant's version of events was supported by the physical evidence and his admission was uncorroborated.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_01883.htm](http://nycourts.gov/reporter/3dseries/2021/2021_01883.htm)

### *People v Costan*

197 AD3d 716

(2<sup>nd</sup> Dept) (8/27/21 DOI)

To sustain the 1<sup>st</sup> degree robbery conviction, the People had to show that the defendant consciously displayed something that could reasonably be perceived as a firearm, with the intent of forcibly taking property, and that the victim perceived the display. The mere verbal threat here was insufficient. The subject count was reduced to 2<sup>nd</sup> degree robbery.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04760.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04760.htm)

## ***Serious physical injury***

### *People v Smith*

193 AD3d 1260

(3<sup>rd</sup> Dept) (4/29/21 DOI)

The verdict as to 2<sup>nd</sup> degree assault was against the weight of the evidence because serious physical injury was not proven. There was no evidence that: the victim lost consciousness after being shot or that a vital organ was damaged; that the injuries caused a substantial risk of death or were life threatening; or that the victim suffered a protracted impairment of health or protracted loss or impairment of an organ's function.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02564.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02564.htm)

### *People v Defio*

2021 NY Slip Op 07400

(4<sup>th</sup> Dept) (12/27/21 DOI)

Serious physical injury not proven. Although the victim said he had a skull fracture, the People's expert said otherwise. The victim also stated that he had ongoing memory problems, but he had suffered prior concussions that could also have caused those issues.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_07400.htm](https://nycourts.gov/reporter/3dseries/2021/2021_07400.htm)

## ***Sexual abuse***

### *People v Warren*

198 AD3d 934

(2<sup>nd</sup> Dept) (10/25/21 DOI)

First degree sexual abuse conviction based upon legally insufficient evidence, since no force separate from the contact itself was used to compel the contact alleged. Issue reached in the interest of justice.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05736.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05736.htm)

### ***Terroristic threat***

*People v DeBlasio*

190 AD3d 595

(1<sup>st</sup> Dept) (1/22/21 DOI)

Conviction of making a terroristic threat reversed, charge dismissed. Proof of “intent to intimidate or coerce a civilian population” was legally insufficient. After an altercation, the defendant, a Muslim, threatened to shoot several Bangladeshi worshippers at his mosque. His threat mentioned no group or population and was apparently based on a personal dispute.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_00376.htm](http://nycourts.gov/reporter/3dseries/2021/2021_00376.htm)

### **Restraints/shackles**

*People v Banch*

198 AD3d 1186

(3<sup>rd</sup> Dept) (10/29/21 DOI)

Error, though harmless, to shackle defendant during trial. Valid reasons included for security or to prevent disruption or escape. Trial court cited inadequate reasons: nature of the crime, correction officers’ suggestions, and the defendant’s outbursts.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05894.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05894.htm)

### **Right to be present**

*People v Brown*

192 AD3d 1603

(4<sup>th</sup> Dept) (3/22/21 DOI)

New trial. Before prospective jurors were brought in, the defendant shouted that the court called him by the wrong name and he could not wear clothes provided to him. The court had the defendant removed, and he was absent for the selection of the first 11 jurors. A defendant has a fundamental right to be present for material stages of trial. A disorderly and disruptive defendant must first be warned that he will be removed if his misconduct continues. There was no warning here.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_01668.htm](http://nycourts.gov/reporter/3dseries/2021/2021_01668.htm)

*People v King*

192 AD3d 1140

(2<sup>nd</sup> Dept) (4/1/21 DOI)

New trial. After the complainant testified that she had been treated for mental health issues, the judge interviewed her in camera, found her psychiatric history irrelevant, and struck that testimony. The interview was a material stage of trial, so the defendant should have been present.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_01996.htm](http://nycourts.gov/reporter/3dseries/2021/2021_01996.htm)

*People v Podmalovsky*

73 Misc 3d 127 (A)

(App Term, 2<sup>nd</sup> Dept) (9/24/21 DOI)

Reversal. When LanguageLine had no Czech interpreter available for the defendant, the judge proceeded without one, noting that the prior Appellate Term decision in this case did not mention the need for an interpreter. That was error.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_50883.htm](https://nycourts.gov/reporter/3dseries/2021/2021_50883.htm)

## **Right to counsel**

### *People v Lemmo*

192 AD3d 1143

(2<sup>nd</sup> Dept) (4/1/21 DOI)

New trial. Before letting the defendant go pro se, the court did not make sure he knew the risks of doing so, the benefits of counsel, and the potential sentence.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_01997.htm](http://nycourts.gov/reporter/3dseries/2021/2021_01997.htm)

### *People v Stackhouse*

194 AD3d 113

(4<sup>th</sup> Dept) (3/29/21 DOI)

A new trial was ordered as to the remaining counts because the defendant's right to counsel was violated. When he made complaints about counsel, the trial court did not do a minimal inquiry and timely act to safeguard his rights.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_01883.htm](http://nycourts.gov/reporter/3dseries/2021/2021_01883.htm)

### *People v Robinson*

195 AD3d 1527

(4<sup>th</sup> Dept) (6/18/21 DOI)

Reversal. The defendant made serious complaints about counsel, indicating a complete collapse in communication. Error to deny request for new counsel without minimal inquiry by court.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03939.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03939.htm)

### *People v Darwish*

195 AD3d 1515

(4<sup>th</sup> Dept) (6/18/21 DOI)

Reversible error to not conduct an inquiry following the defendant's requests for new counsel. Prompted by the defendant's complaints about his defective performance, counsel sought to be relieved. In response, the defendant described a breakdown in communication. Irreconcilable conflict.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03936.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03936.htm)

### *People v Crispino*

197 AD3d 1116

(2<sup>nd</sup> Dept) (9/3/21 DOI)

New trial. Counsel informed Supreme Court that the defendant wished to represent himself at trial. Since the lower court did not conduct the requisite inquiry before allowing the defendant to proceed pro se, the purported waiver of the right to counsel was invalid.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04918.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04918.htm)

### *People v Shanks*

37 NY3d 244

(COA) (10/13/21 DOI)

Reversal. Defendant did not forfeit right to assigned counsel. The two attorneys who had asked to be relieved due to difficulties with defendant did not say that his conduct was egregious.

[https://www.nycourts.gov/reporter/3dseries/2021/2021\\_05450.htm](https://www.nycourts.gov/reporter/3dseries/2021/2021_05450.htm)

### *People v Perry*

198 AD3d 576

(1<sup>st</sup> Dept) (10/29/21 DOI)

Reversal. The colloquy regarding the defendant's request to go pro se was insufficient to waive his right to counsel. The trial court did not do the required searching inquiry or explain charges—despite the defendant's confusion about them—or sentencing exposure.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05826.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05826.htm)

*People v Zahangir*

2021 NY Slip Op 51157

(App Term, 2<sup>nd</sup> Dept) (12/17/21 DOI)

DWI convictions reversed. New trial. The defendant's right to counsel was violated. Legal Aid informed the court that the defendant was financially ineligible. When the defendant said that he could not afford an attorney, the court had a duty to inquire further. But no specific financial information was sought.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_51157.htm](https://nycourts.gov/reporter/3dseries/2021/2021_51157.htm)

*People v Serrano*

2021 NY Slip Op 07037

(3<sup>rd</sup> Dept) (12/17/21 DOI)

Dissent. Rights to counsel and to remain silent are fundamental. The court failed to provide prompt curative instructions that the jury must not draw adverse inferences from the defendant's request for counsel.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_07037.htm](https://nycourts.gov/reporter/3dseries/2021/2021_07037.htm)

**Severance / Joinder**

*People v Santiago*

190 AD3d 502

(1<sup>st</sup> Dept) (1/14/21 DOI)

Motion to sever should have been granted, where DWI and leaving the scene crimes occurred on different dates and were based on different facts, and none of the proof necessary for each offense was material to the other.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_00130.htm](http://nycourts.gov/reporter/3dseries/2021/2021_00130.htm)

*People v Moore*

190 AD3d 500

(1<sup>st</sup> Dept) (1/14/21 DOI)

Counts of burglary in 2<sup>nd</sup> and 3<sup>rd</sup> degree were properly joined on the ground of overlapping evidence. The crimes involved a sufficiently unique M.O. and were legally similar, and the defendant did not make a sufficient showing for discretionary severance.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_00127.htm](http://nycourts.gov/reporter/3dseries/2021/2021_00127.htm)

*People v Bryant*

2021 NY Slip Op 07582

(3<sup>rd</sup> Dept) (12/31/21 DOI)

Reversal County Court erred in denying a defense motion to sever the weapon charge from the remaining counts. The People asserted proof underlying other counts was material and admissible as to the weapon count. Even if the proof completed narrative, probative value was minimal, and it was highly prejudicial.

[People v Bryant \(2021 NY Slip Op 07582\) \(nycourts.gov\)](https://nycourts.gov/reporter/3dseries/2021/2021_07582.htm)

**Statute unconstitutionality**

*People v Hodgdon*

36 NY3d 564

(COA) (4/1/21 DOI)

The Court of Appeals found unconstitutional Executive Law § 552 provisions creating a special prosecutor, possessing authority concurrent with that of District Attorneys, to prosecute individuals accused of abuse or neglect against adults with special needs in residential facilities operated under the State aegis. The law impermissibly gave essential function of constitutional officer to different officer chosen in different way.  
[http://www.nycourts.gov/reporter/3dseries/2021/2021\\_01934.htm](http://www.nycourts.gov/reporter/3dseries/2021/2021_01934.htm)

*People v Agudio*

194 AD3d 1270

(3<sup>rd</sup> Dept) (5/21/21 DOI)

One count of falsely reporting incident dismissed. The defendant made false claim of racially charged incident on social media. P.L. § 240.50 (1) was unconstitutional as applied to posting false tweets.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03224.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03224.htm)

*People v Torres*

37 NY3d 256

(COA) (10/13/21 DOI)

NYC'S Right of the Way (ROW) Law was constitutional. The U.S. Supreme Court has not held that ordinary negligence may never be criminalized. The ROW Law was not preempted. The State legislature did not intend to occupy the field or to make exclusive the mental states set forth in Penal Law Article 15. The VTL authorized NYC to pass laws relating to the right of way.

[https://www.nycourts.gov/reporter/3dseries/2021/2021\\_05448.htm](https://www.nycourts.gov/reporter/3dseries/2021/2021_05448.htm)

**Summation misconduct**

*People v Beck*

196 AD3d 697

(2<sup>nd</sup> Dept) (7/29/21 DOI)

New trial in interest of justice. The cumulative effect of 10 instances of prosecutorial misconduct deprived the defendant of a fair trial. The prosecutor urged that a guilty verdict was the only option; vouched for the credibility of People's witnesses; asked irrelevant questions solely to elicit sympathy for him; denigrated any possible defense; and gave a summation rife with improper comments.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04556.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04556.htm)

*People v Veeney*

197 AD3d 578

(2<sup>nd</sup> Dept) (8/13/21 DOI)

In the interest of justice, the Second Department vacated the conviction of attempted 1<sup>st</sup> degree assault and remitted for a new trial on that count. The prosecutor made numerous improper comments in summation. For example, she misrepresented the evidence in explaining why no shell casings were recovered and referred to stricken testimony indicating that the defendant could have shot a witness. The errors were not harmless, because proof of guilt was not overwhelming.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04673.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04673.htm)

**Territorial jurisdiction**

*People v Cousar*

191 AD3d 694

(2<sup>nd</sup> Dept) (2/4/21 DOI)

The defendant admitted that, while in NJ, he used personal identifying information of a Putnam County, NY resident to access his bank account and steal \$9,000. No elements of the offense occurred in NY, so the

People argued it was a “result offense.” Not. No specific consequence was an element of the crime. The matter was dismissed based on a lack of territorial jurisdiction.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_00573.htm](http://nycourts.gov/reporter/3dseries/2021/2021_00573.htm)

*People v Crumb*

194 AD3d 739

(2<sup>nd</sup> Dept) (5/7/21 DOI)

Vacatur of convictions of 1<sup>st</sup> degree reckless endangerment, 2<sup>nd</sup> degree assault, and resisting arrest and ordered a new trial on those counts. As to the crimes that occurred after he fled, Supreme Court erred in instructing the jury that geographic jurisdiction over one count conferred jurisdiction over all.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02816.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02816.htm)

*People v Roth*

199 AD3d 1380

(4<sup>th</sup> Dept) (11/15/21 DOI)

Trial court lacked geographical jurisdiction since none of the elements of custodial interference occurred in the county. The “injured forum” provisions of CPL 20.40 (2) (c) did not apply; the conduct alleged did not have a materially harmful impact on governmental processes or community welfare in the county.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06257.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06257.htm)

**Theory**

*People v Petersen*

190 AD3d 769

(2<sup>nd</sup> Dept) (1/14/21 DOI)

A defendant has a right to be tried only for the crimes charged in the indictment. That applies to burglary cases regarding the crime the defendant intended to commit. The People’s theory was intent to commit property damage and/or theft. The trial court erred in allowing them to instead argue intent to assault in their summation.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_00193.htm](http://nycourts.gov/reporter/3dseries/2021/2021_00193.htm)

*People v Hursh*

191 AD3d 1453

(4<sup>th</sup> Dept) (2/12/21 DOI)

Right to be tried and convicted only of crimes and theories charged is fundamental and non-waivable. Issues of facial and non-facial duplicity must be preserved. No preservation here, nor interest of justice review.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_00956.htm](http://nycourts.gov/reporter/3dseries/2021/2021_00956.htm)

**Unsworn witness**

*People v Alvarez*

190 AD3d 462

(1<sup>st</sup> Dept) (1/8/21 DOI)

Reversal. Retired detective/juror acted as an unsworn expert during deliberations, offering views within his specialized expertise concerning material issues.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_00092.htm](http://nycourts.gov/reporter/3dseries/2021/2021_00092.htm)

*People v Sammeth*

190 AD3d 1112

(3<sup>rd</sup> Dept) (1/14/21 DOI)

In summation, the prosecutor said that, if there was a conspiracy among police witnesses to make false incriminating statements, “It’s me too.” The prosecutor’s remark was improper, since he acted as an unsworn witness, but it did not cause substantial prejudice. A proper curative instruction was given.  
[http://nycourts.gov/reporter/3dseries/2021/2021\\_00212.htm](http://nycourts.gov/reporter/3dseries/2021/2021_00212.htm)

## **SENTENCING / RESENTENCING**

### **Catu error**

*People v Dillon*

195 AD3d 747

(2<sup>nd</sup> Dept) (6/11/21 DOI)

Judgment reversed, remittal. Supreme Court failed to advise the defendant that, for assault, he would be sentenced to post-release supervision. Plea of guilty to each count had to be vacated, since the counts were all part of one indictment and one judgment, and sentences were to run concurrently.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03607.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03607.htm)

### **Concurrent / consecutive**

*People v Alligood*

192 AD3d 1508

(4<sup>th</sup> Dept) (3/22/21 DOI)

For convictions of 2<sup>nd</sup> degree murder and 2<sup>nd</sup> degree CPW, imposing consecutive sentences was error. The People did not present proof that the defendant’s acts of possessing the loaded firearm and shooting the victim were separate and distinct.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_01628.htm](http://nycourts.gov/reporter/3dseries/2021/2021_01628.htm)

*People v Boyd*

192 AD3d 1659

(4<sup>th</sup> Dept) (3/29/21 DOI)

Consecutive terms for 1<sup>st</sup> degree assault and 2<sup>nd</sup> degree CPW were illegal. The defendant did not knowingly and unlawfully possess loaded firearm before forming intent as to assault. The People had the burden of establishing the legality of consecutive sentences.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_01897.htm](http://nycourts.gov/reporter/3dseries/2021/2021_01897.htm)

*People v Muniz*

193 AD3d 1116

(3<sup>rd</sup> Dept) (4/1/21 DOI)

The defendant appealed from a Warren County Court judgment, convicting him of 3<sup>rd</sup> degree criminal sale of a controlled substance (two counts) and other crimes. The sentences imposed on the drug sale counts must run concurrently. The defendant engaged in a single sale of two drugs.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02023.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02023.htm)

*People v Long*

193 AD3d 978

(2<sup>nd</sup> Dept) (4/22/21 DOI)

Sentence modified. The term for the weapons charge must had to run consecutively to the other terms. People did not establish that the defendant’s possession of a weapon with an intent to use it unlawfully was separate and distinct from his intent to use it to commit the other crimes.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02414.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02414.htm)

*People v Adams*

194 AD3d 730

(2<sup>nd</sup> Dept) (5/7/21 DOI)

Conviction of two counts of 3<sup>rd</sup> degree CPW. Consecutive sentences should not have been imposed, since there was no showing that the acts underlying the crimes were separate and distinct.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02808.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02808.htm)

*People v Argueta*

194 AD3d 857

(2<sup>nd</sup> Dept) (5/14/21 DOI)

The consecutive sentence term for 1<sup>st</sup> degree criminal use of a firearm was improper, where the conviction did not involve display of a loaded operable weapon, and criminal liability was based on conduct of another. *See* Penal Law § 265.09 (2).

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03067.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03067.htm)

*People v Barthel*

199 AD3d 92

(4<sup>th</sup> Dept) (8/27/21 DOI)

County Court erred in directing that the CPW sentence would run consecutively to whatever term Supreme Court imposed the next day at a sentencing proceeding regarding a burglary conviction. Sentencing discretion under Penal Law § 70.25 belonged to the last judge in the sentencing chain.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04834.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04834.htm)

*People v Anarbaev*

198 AD3d 802

(2<sup>nd</sup> Dept) (10/15/21 DOI)

Sentences imposed on convictions of 1<sup>st</sup> degree burglary and aggravated criminal contempt must run concurrently with the sentence for 2<sup>nd</sup> degree murder, since the physical injury element of the crimes was subsumed in the act of causing death.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05578.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05578.htm)

*People v Ortiz*

198 AD3d 924

(2<sup>nd</sup> Dept) (10/25/21 DOI)

Supreme Court erred in directing that the sentence imposed on CPW conviction would run consecutively to the murder term. No proof that the defendant possessed the gun for an unlawful purpose unrelated to shooting at the intended victim or that his possession of the gun was separate and distinct from his shooting.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05726.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05726.htm)

*People v Bazile*

199 AD3d 823

(2<sup>nd</sup> Dept) (11/12/21 DOI)

Terms for 2<sup>nd</sup> degree CPW and 2<sup>nd</sup> degree manslaughter should not run consecutively. No proof established that the defendant's possession of a gun was separate and distinct from his participation in the shootout that resulted in the victim's death.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06182.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06182.htm)

**Conflict of interest**

*People v Miller*

190 AD3d 1029

(3<sup>rd</sup> Dept) (1/8/21 DOI)

Vacatur of sentence. The Albany County Public Defender's Office represented defendant. That office was precluded from representing him at the sentencing hearing because the Public Defender, prior to being appointed to that position, was the County Judge who presided over the plea and deferred sentencing.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_00056.htm](http://nycourts.gov/reporter/3dseries/2021/2021_00056.htm)

### **DLRA**

*People v Williams*

194 AD3d 758

(2<sup>nd</sup> Dept) (5/7/21 DOI)

Where a defendant was eligible for DLRA relief, there was a statutory presumption in favor of resentencing. That presumption was not overcome by the factors invoked by County Court—the defendant's criminal history, the quantity of drugs, and his disciplinary infractions.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02831.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02831.htm)

### **DVSJA**

**(P.L. § 60.12 prospective sentencing)**

*People v Addimando*

197 AD3d 106

(2<sup>nd</sup> Dept) (7/16/21 DOI)

County Court abused its discretion in not imposing an alternative sentence under the DVSJA for the defendant's murder conviction. Term of 19 years–life reduced to 7½ years plus PRS. Preponderance-of-evidence standard applied. Sentencing court applied outdated notions about domestic violence in finding her proof insufficient, thus violating the spirit and purpose of the statute.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04364.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04364.htm)

### **DVSJA**

**(CPL 440.47 resentencing)**

*People v D.L.*

72 Misc 3d 257

(Sup Ct) (3/25/21 DOI)

Resentencing under DVSJA. As child, the defendant was severely sexually abused by his uncle for several years and suffered trauma which continued throughout his adult life and led to his drug addiction. To get cash to buy drugs, the defendant committed burglaries, including the instant crime. Positive testimony from therapist and recovery coach. The court distinguished between trauma as a causal factor of crime and the lower statutory standard of “significant contributing factor.”

[http://www.nycourts.gov/reporter/3dseries/2021/2021\\_21086.htm](http://www.nycourts.gov/reporter/3dseries/2021/2021_21086.htm)

*People v Rangel*

195 AD3d 541

(1<sup>st</sup> Dept) (6/25/21 DOI)

Denial of resentencing pursuant to the DVSJA. The sentencing court had imposed the minimum, which was within the range of reduced sentences available under the DVSJA. The defendant had completed the incarceratory sentence. Given her history and need for services, the PRS period was not excessive.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03995.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03995.htm)

*People v S.M.*

72 Misc 3<sup>rd</sup> 809

(Co Ct) (7/12/21 DOI)

DVSJA resentencing granted. The defendant been convicted of 1<sup>st</sup> degree robbery and sentenced to 9½ years' imprisonment followed by five years' post-release supervision (PRS). She was resentenced to four years' incarceration plus 2½ years' PRS. Her release before the resentencing hearing did not affect her eligibility. She did not have to establish that the abuse was the exclusive or even overriding factor for her criminal conduct. The defendant had an impeccable institutional record. She had developed an excellent reentry plan. PRS was a burden, especially for domestic violence survivors.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_21180.htm](https://nycourts.gov/reporter/3dseries/2021/2021_21180.htm)

*People v D.M.*

72 Misc 3d 960

(Sup Ct) (7/12/21 DOI)

Defendant's DVSJA resentencing granted. The defendant had been convicted of 1<sup>st</sup> degree manslaughter and sentenced to 15 years' imprisonment with five years' PRS. She was resentenced to five years' imprisonment plus four years' PRS. A psychiatrist testified about the defendant's complex trauma history and abuse by the codefendant. Incarceration was re-traumatizing. The DVSJA called for compassion. She completed treatment programs. Community-based programs available upon release were far more effective than prison in allowing survivors to rebuild relationships with their families and contribute to society.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_21178.htm](https://nycourts.gov/reporter/3dseries/2021/2021_21178.htm)

*People v Williams*

198 AD3d 466

(1<sup>st</sup> Dept) (10/13/21 DOI)

Denial of CPL 440.47 motion for resentencing under the DVSJA affirmed. The evidence did not show that the crime victim's behavior toward the defendant constituted substantial abuse. There must be a temporal nexus between the abuse and the offense.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05467.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05467.htm)

### **Enhanced sentence**

*People v Stanley*

191 AD3d 1411

(4<sup>th</sup> Dept) (2/12/21 DOI)

Prior to sentencing, the defendant violated the terms of the plea agreement. Supreme Court imposed an enhanced sentence but had not previously advised the defendant that a higher sentence would include PRS. Plea was not knowing, voluntary, and intelligent.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_00924.htm](http://nycourts.gov/reporter/3dseries/2021/2021_00924.htm)

*People v Ackley*

192 AD3d 1203

(3<sup>rd</sup> Dept) (3/4/21 DOI)

Enhanced sentence improper. The defendant was told a failure to cooperate with Probation could result in an enhanced sentence. But court did not specify that the defendant must not make statements to Probation that were inconsistent with the plea colloquy—which was used as a basis to increase the sentence. The issue survived the unchallenged appeal waiver. The sentencing court did not make a sufficient inquiry. On remittal, County Court had to impose the agreed-upon sentence or let the defendant withdraw his plea.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_01293.htm](http://nycourts.gov/reporter/3dseries/2021/2021_01293.htm)

*People v Patterson*

199 AD3d 1022

(2<sup>nd</sup> Dept) (11/24/21 DOI)

County Court could properly impose an enhanced sentence, but the period of PRS was excessive and was reduced from 20 to five years, as promised in the original plea deal.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06631.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06631.htm)

### **Fees and surcharges**

*People v Chirinos*

190 AD3d 434

(1<sup>st</sup> Dept) (1/8/21 DOI)

The defendant was convicted before enactment of CPL 420.35 (2-a), permitting waiver of fees for persons under age 21. In interest of justice, mandatory surcharge, DNA fee, crime victim assistance fee vacated.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_00038.htm](http://nycourts.gov/reporter/3dseries/2021/2021_00038.htm)

*People v Dixon*

197 AD3d 1053

(1<sup>st</sup> Dept) (9/30/21 DOI)

Supplemental sex offender victim fee vacated; crime was committed before eff. date of P.L. §60.35(1)(b).

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05103.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05103.htm)

### **Ignition interlock device**

*People v Miller*

191 AD3d 802

(2<sup>nd</sup> Dept) (2/12/21 DOI)

The defendant was convicted aggravated DWI (driving while ability impaired by drugs). Vacatur of directive that he install an ignition interlock device—a condition only for offenses involving alcohol.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_00868.htm](http://nycourts.gov/reporter/3dseries/2021/2021_00868.htm)

### **Illegal**

*People v Gary*

197 AD3d 1445

(3<sup>rd</sup> Dept) (9/24/21 DOI)

The defendant was convicted of DWI and sentenced to five years' probation. The sentence was illegally low. Given the defendant's previous 2019 conviction of DWI, an additional penalty of five days in jail or 30 days of community service was required. The remedy was to vacate the sentence and give the defendant the opportunity to withdraw the plea.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05052.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05052.htm)

*People v Wright*

199 AD3d 1025

(2<sup>nd</sup> Dept) (11/24/21 DOI)

The three-year period of post-release supervision for the drug conviction was illegal and was reduced to two years, as authorized under the Penal Law § 70.45 (2) (b).

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06635.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06635.htm)

### **Predicate felony not equivalent**

*People v Ramirez*

192 AD3d 825

(2<sup>nd</sup> Dept) (3/11/21 DOI)

Vacatur of second felony offender adjudication in the interest of justice. The armed robbery conviction in Florida could not be used as a predicate felony in NY.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_01429.htm](http://nycourts.gov/reporter/3dseries/2021/2021_01429.htm)

*People v Johnson*

192 AD3d 909

(2<sup>nd</sup> Dept) (3/18/21 DOI)

In interest of justice, vacatur of second violent felony offender adjudication. The defendant's prior NJ conviction of aggravated assault did not constitute a felony under NY law.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_08246.htm](http://nycourts.gov/reporter/3dseries/2021/2021_08246.htm)

*People v Mohabir*

192 AD3d 1047

(2<sup>nd</sup> Dept) (3/25/21 DOI)

Federal conviction of conspiracy to deal in firearms was not predicate felony conviction, because the federal statute contained different elements than NY equivalent. It was possible to violate the federal statute without engaging in conduct that was a felony in NY. Vacatur of adjudication as a second felony offender.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_01789.htm](http://nycourts.gov/reporter/3dseries/2021/2021_01789.htm)

*People v Simmons*

196 AD3d 154

(1<sup>st</sup> Dept) (6/18/21 DOI)

Affirmance upon appeal from resentencing as second felony offender. App Div did not give preclusive effect to prior decision in this case finding that Pennsylvania drug possession conviction could serve as a predicate felony, and court acknowledged that broader knowledge requirement of the PA statute raised possibility that the defendant could have been convicted without being guilty of a NY felony. However, the accusatory instrument revealed that the PA conviction was equivalent to a NY felony.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03924.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03924.htm)

*People v Jamison*

197 AD3d 569

(2<sup>nd</sup> Dept) (8/13/21 DOI)

Vacatur of second violent felony offender adjudication and remittal. Under the circumstances of the case, resort to the Florida accusatory instrument needed to ascertain the particular acts underlying the defendant's convictions for robbery and possession of a weapon by a felon to determine whether those acts were equivalent to a violent felony in New York.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04668.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04668.htm)

### **Predicate violent felony not considered**

*People v Smith*

197 AD3d 1012

(4<sup>th</sup> Dept) (8/27/21 DOI)

At the time of sentencing, it appeared that the defendant might be a second violent felony offender, but the People failed to file the required CPL 400.15 statement. The matter was remitted for further proceedings.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04883.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04883.htm)

### **Predicate felony tolling periods**

*People v Hall*  
194 AD3d 1372

(4<sup>th</sup> Dept) (5/10/21 DOI)

The sentence for the predicate felony was imposed more than 10 years before the instant offense. The People's SFO statement did not set forth the dates or locations of incarceration. The matter was remitted for a new SFO statement and resentencing.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02901.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02901.htm)

### **Predicate felony unconstitutional**

*People v Moss*  
2021 NY Slip Op 07394

(4<sup>th</sup> Dept) (12/27/21 DOI)

County Court erred in sentencing defendant second child sexual assault felony offender without a hearing. The defendant asserted that, in the prior proceeding, the court coerced him into pleading guilty to a reduced charge by threatening to impose the maximum if he were convicted after trial.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_07394.htm](https://nycourts.gov/reporter/3dseries/2021/2021_07394.htm)

### **Presence**

*People v Cruz*  
198 AD3d 424

(1<sup>st</sup> Dept) (10/7/21 DOI)

Remand for resentencing. The defendant should not have been resented in his absence. *See* CPL 380.40 (1). The record did not show that he was informed of the right to be present and then decided not to appear.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05297.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05297.htm)

### **Probation**

*People v Acuna*  
195 AD3d 854

(2<sup>nd</sup> Dept) (6/18/21 DOI)

Probation condition vacated as not reasonably necessary to ensure that the defendant would lead a law-abiding life. When he committed the crimes, he was not armed or under the influence of any substance, and his criminal history did not include offenses involving weapons or drugs.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03846.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03846.htm)

*People v Blanco-Ortiz*  
196 AD3d 1153

(2<sup>nd</sup> Dept) (7/16/21 DOI)

County Court erred in imposing broad conditions constraining the defendant's use of social networking, the internet, email, and cell phones with a camera. The conditions did not relate to the goals of probation. The conditions should be narrowed to provide that the defendant must not use the internet to access pornographic material or have an internet account for a commercial social networking website.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04447.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04447.htm)

## **Recusal**

### *People v McPhee*

197 AD3d 655

(2<sup>nd</sup> Dept) (8/27/21 DOI)

Sentence vacated. Trial justice should have recused himself from presiding over the sentencing, since the justice's law clerk was a former Queens County Assistant DA who worked on the preliminary stages of this case.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04723.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04723.htm)

## **Reduction explained**

### *People v Cordon*

191 AD3d 1376

(4<sup>th</sup> Dept) (2/8/21 DOI)

Sentences for 2<sup>nd</sup> degree burglary, attempted 2<sup>nd</sup> degree burglary, and two other crimes ordered to run concurrently for several reasons: (1) while serving in the Army, the defendant was injured; (2) as a result of the injury, he developed an opiate addiction; (3) in addition, he struggled with mental illness; (4) he had accepted responsibility for his actions; and (5) he had shown remorse.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_00751.htm](http://nycourts.gov/reporter/3dseries/2021/2021_00751.htm)

### *People v Brown*

192 AD3d 1260

(3<sup>rd</sup> Dept) (3/11/21 DOI)

The defendant was convicted of 2<sup>nd</sup> degree burglary, 4<sup>th</sup> degree grand larceny, 4<sup>th</sup> degree conspiracy, and other offenses. The sentence was found harsh and excessive. The plea agreement failed to mention the possibility of consecutive sentences. Further, the resulting aggregate term of 13½ to 16 years exceeded the People's promise of a maximum of 12 years in prison. All terms to run concurrently.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_01442.htm](http://nycourts.gov/reporter/3dseries/2021/2021_01442.htm)

### *People v Zdatny*

192 AD3d 1581

(4<sup>th</sup> Dept) (3/22/21 DOI)

Sentence for violent crimes reduced. The defendant was age 41 at the time of the crimes, had only one previous crime (a misdemeanor in 2001), and had no prior incidents of violence. Further, he had a history of mental illness and had demonstrated extreme remorse for his actions.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_01659.htm](http://nycourts.gov/reporter/3dseries/2021/2021_01659.htm)

### *People v Colon*

192 AD3d 1567

(4<sup>th</sup> Dept) (3/22/21 DOI)

Sentence for violent crimes reduced. The defendant was age 22, gainfully employed, and had no criminal history. Although he was an accessory to crimes committed at the victim's residence, she was one block away during that incident and did not physically participate. Evidence suggested that the defendant was a victim of repeated domestic abuse by a codefendant.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_01652.htm](http://nycourts.gov/reporter/3dseries/2021/2021_01652.htm)

### *People v Ranot*

194 AD3d 967

(2<sup>nd</sup> Dept) (5/21/21 DOI)

First degree assault. Sentence reduced from 15 to 8 years flat. Crime involved the defendant striking her stepdaughter with the sharp metal handle of a broom, resulting in a permanent wrist injury.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03201.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03201.htm)

*People v Williams*

195 AD3d 1168

(3<sup>rd</sup> Dept) (6/11/21 DOI)

Resentence order modified. An earlier conviction cited as reason for consecutive sentences was vacated. Thus, the sentences were modified to run concurrently.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03634.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03634.htm)

*People v Nelson*

195 AD3d 1442

(4<sup>th</sup> Dept) (6/14/21 DOI)

In a prior appeal, the defendant's conviction was reduced from 1<sup>st</sup> to 2<sup>nd</sup> degree gang assault. The defendant now contended that his resentence was harsh and excessive, because it was the same as the original punishment. The appellate court ordered a reduction to a determinate term of 12 years.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03728.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03728.htm)

*People v O'Donnell*

195 AD3d 1430

(4<sup>th</sup> Dept) (6/14/21 DOI)

Given the defendant's advanced age and lack of a criminal record, the sentence was unduly severe for rape and attempted sexual act. Terms to run concurrently.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03709.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03709.htm)

*People v Swift*

195 AD3d 1496

(4<sup>th</sup> Dept) (6/14/21 DOI)

Burglary terms were too harsh, given the defendant's lack of a record, his psychiatric hospitalizations, and the pretrial offer of five years. Reduced to determinate terms of 10 years.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03785.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03785.htm)

*People v Kerringer*

195 AD3d 861

(2<sup>nd</sup> Dept) (6/18/21 DOI)

Sentence reduced in drug possession case. Excellent discussion of relevant standards of sentence review. In this case, the defendant's employment as a correction officer militated in favor of a severe sentence. However, he had no prior criminal history, took responsibility for actions, expressed remorse, had strong community ties, and supported his parents.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03852.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03852.htm)

*People v Johnson*

197 AD3d 61

(3<sup>rd</sup> Dept) (7/2/21 DOI)

Persistent felony offender adjudication and sentence vacated. Prison term reduced from 15 years to life to five years plus post-release supervision. The sentencing court said expressed racist, dehumanizing comments regarding the defendant's brain growth. Proceedings were unfair, sentence was too harsh.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04162.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04162.htm)

*People v Daskiewich*

196 AD3d 1061

(4<sup>th</sup> Dept) (7/12/21 DOI)

Multiple sex offenses. Aggregate period reduced from 40 to 15 years, while the period of 20 years' post-release supervision was sustained. The new sentence was the same as set forth in the plea offer.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04305.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04305.htm)

*People v Brewer*

196 AD3d 1172

(2<sup>nd</sup> Dept) (7/16/21 DOI)

Sentence for 2<sup>nd</sup> degree murder reduced from 25 years to life to 20 years to life, where the defendant was 18 at the time of the incident.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04461.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04461.htm)

*People v Caballero*

199 AD3d 1468

(4<sup>th</sup> Dept) (11/22/21 DOI)

Punishment for predatory sexual assault against a child and 1st degree criminal sexual act reduced considering the defendant's minimal and remote criminal history.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06509.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06509.htm)

*People v Thompson*

2021 NY Slip Op 06712

(2<sup>nd</sup> Dept) (12/3/21 DOI)

Robbery sentence halved where defendant had no prior convictions but had history of mental illness. While suffering a bipolar episode and armed with a BB gun, he robbed bank. Right after incident, the defendant sought mental health treatment. He was remorseful, paid restitution, and was minimal risk for recidivism.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06712.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06712.htm)

*People v Spruill*

2021 NY Slip Op 06819

(1<sup>st</sup> Dept) (12/10/21 DOI)

Aggregate term of 3½ to 10½ years for grand larceny and other crimes reduced to 2 to 6 years, given the defendant's age, his lack of a criminal record, and the nonviolent nature of the crimes.

[People v Spruill \(2021 NY Slip Op 06819\) \(nycourts.gov\)](https://nycourts.gov/reporter/3dseries/2021/2021_06819.htm)

*People v Hajratalli*

2021 NY Slip Op 07036

(3<sup>rd</sup> Dept) (12/17/21 DOI)

Maximum sentences for burglary, imposed consecutively, amounted to an aggregate prison term of 30 years. That was harsh and excessive. The defendant had no prior criminal history, and his conduct did not result in any physical touching.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_07036.htm](https://nycourts.gov/reporter/3dseries/2021/2021_07036.htm)

*People v Mosley*

2021 NY Slip Op 07395

(4<sup>th</sup> Dept) (12/27/21 DOI)

Max 15 years for burglary reduced to seven years for defendant who was 17 at time of crime.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_07395.htm](https://nycourts.gov/reporter/3dseries/2021/2021_07395.htm)

## **Restitution**

*People v Osborn*

198 AD3d 1363

(4<sup>th</sup> Dept) (10/13/21 DOI)

Restitution order vacated. County Court erred in denying a hearing. Under Penal Law § 60.27 (2), when a court requires restitution, a hearing must be conducted upon the defendant's request.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05426.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05426.htm)

### **Statement**

*People v Brown*

37 NY3d 940

(COA) (5/7/21 DOI)

An enforceable unrestricted waiver of appeal precluded appellate review of the claim that the defendant was denied the statutory right to an opportunity to speak at sentencing. Two judges dissented.

[http://www.nycourts.gov/reporter/3dseries/2021/2021\\_02867.htm](http://www.nycourts.gov/reporter/3dseries/2021/2021_02867.htm)

## **YOUTHFUL OFFENDER**

*People v Reed*

192 AD3d 1481

(4<sup>th</sup> Dept) (3/22/21 DOI)

Decision reserved. County Court erred in failing to determine whether the defendant should receive youthful offender status. Because the defendant was convicted of an armed felony offense, the court first had to determine whether one of two mitigating factors was present.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_01590.htm](http://nycourts.gov/reporter/3dseries/2021/2021_01590.htm)

*People v Johnson*

193 AD3d 1076

(2<sup>nd</sup> Dept) (4/29/21 DOI)

The defendant's conviction of attempted 1<sup>st</sup> degree assault was vacated. CPL 720.20 (1) required a youthful offender determination in every case where the defendant was eligible, even where he/she failed to request it or agreed to forego it as part of a plea bargain. With respect to this armed felony, the court was required to first consider whether the defendant was an eligible youth by considering statutory factors.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02544.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02544.htm)

*People v Terrence L.*

195 AD3d 1041

(2<sup>nd</sup> Dept) (7/2/21 DOI)

YO status granted. Many: (1) Probation endorsed such status; (2) the defendant had no other criminal history; (3) he was cooperative with authorities; (4) he was employed; (5) while incarcerated, the defendant obtained his GED; (6) he now had a child; and (7) the People withheld exculpatory evidence.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04149.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04149.htm)

*People v Dyshawn B.*

196 AD3d 638

(2<sup>nd</sup> Dept) (7/23/21 DOI)

Youthful offender adjudication. Mandatory surcharges and crime victim assistance fees vacated. Juveniles should benefit from amendments enacted when their direct appeals were pending. *See* CPL 420.35 (2-a) (authorizing court to waive certain surcharges/fees for some defendants under age 21).

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04487.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04487.htm)

*People v Morris*

199 AD3d 835

(2<sup>nd</sup> Dept) (11/12/21 DOI)

Sentence vacated. Supreme Court was required to determine whether the defendant was an eligible youth. He pleaded guilty to armed felony offense in which he was sole participant, but he could be eligible if mitigating circumstances bore directly on how the crime was committed. There was no indication that he displayed firearm found in backpack, caused injury, or intended to use weapon against another person.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06195.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06195.htm)

## **SORA**

### **Affirmed**

*People v Bean*

190 AD3d 622

(1<sup>st</sup> Dept) (1/28/21 DOI)

The SORA court correctly assessed 30 points for a prior sex offense based on a California conviction. Such CA felony could be committed by consensual sex with a person under age 18, whereas in NY, a person aged 17 was capable of consent. But the conduct at issue involved oral sexual contact by forcible compulsion, which constituted a felony sex offense in NY.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_00396.htm](http://nycourts.gov/reporter/3dseries/2021/2021_00396.htm)

*People v Chrisley*

193 AD3d 1422

(4<sup>th</sup> Dept) (5/3/21 DOI)

SORA adjudication affirmed, despite error. The court assessed points for continuing course of sexual misconduct. The salient evidence showed only the possibility that something nefarious happened but did not constitute clear and convincing proof. Unlike in other cases involving a victim who sat on a defendant's lap, there was no proof here that the defendant touched the victim illicitly.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02699.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02699.htm)

*People v Rodriguez*

195 AD3d 43

(2<sup>nd</sup> Dept) (6/4/21 DOI)

Without more, a familial relationship between the defendant and victim was not a basis for an upward departure. Abuse of trust in a relationship was not key to assessing points under risk factor 7. *People v Cook*, 29 NY3d 121. The Guidelines required enhanced community notifications where abuse occurred in distant relationships, which indicated an increased risk. Challenged order affirmed.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03475.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03475.htm)

*People v Daniel*

196 AD3d 653

(2<sup>nd</sup> Dept) (7/23/21 DOI)

Affirmed but error in imposing points for the defendant's history of drug/alcohol abuse. His alleged marijuana use occurred long before the offense. At the time of the hearing, the defendant had abstained for 19 years. There was no proof that he was under the influence when the offense occurred.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04501.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04501.htm)

*People v Green*

2021 NY Slip Op 51166

(App Term, 2<sup>nd</sup> Dept) (12/17/21 DOI)

Level-two SORA designation affirmed. People established forcible compulsion against a victim/stranger. A “stranger” is anyone who is not an actual acquaintance of the offender. Such term could encompass someone sharing a train with the defendant, as occurred here.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_51166.htm](https://nycourts.gov/reporter/3dseries/2021/2021_51166.htm)

*People v Solomon*

2021 NY Slip Op 07519

(1<sup>st</sup> Dept) (12/31/21 DOI)

Ten points were properly assessed for the defendant not having accepted responsibility for his sexual misconduct. Participation in sex offender treatment was not dispositive as to factor 12. A defendant must show that he genuinely takes the blame for committing a sexual offense. In statements to police and probation, the defendant minimized or denied responsibility.

[People v Solomon \(2021 NY Slip Op 07519\) \(nycourts.gov\)](https://nycourts.gov/reporter/3dseries/2021/2021_07519.htm)

**Appeal dismissed**

*People v West*

193 AD3d 1127

(3<sup>rd</sup> Dept) (4/1/21 DOI)

The defendant appealed from a Schenectady County Court order, which denied SORA reclassification. The Third Department dismissed the appeal. The challenged bench decision was not an entered and filed order and thus was not an appealable paper.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02027.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02027.htm)

*People v Wassilie*

193 AD3d 1193

(3<sup>rd</sup> Dept) (4/15/21 DOI)

SORA appeal dismissed. Order not entered and filed; and risk assessment instrument did not contain “so ordered” language, so it was not an appealable paper.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02196.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02196.htm)

*People v Ashdown*

195 AD3d 1325

(3<sup>rd</sup> Dept) (6/25/21 DOI)

Appeal as to SORA risk-level classification dismissed. No appeal lies from a decision. The appealable paper is a written order setting forth its determination, findings of fact, and conclusions of law, which has been entered and filed in the court clerk’s office.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_04062.htm](http://nycourts.gov/reporter/3dseries/2021/2021_04062.htm)

**Ineffective Assistance**

*People v Cortez-Moreno*

194 AD3d 953

(2<sup>nd</sup> Dept) (5/21/21 DOI)

New appellate counsel assigned. The defendant sought only the review of the SORA adjudication that he was a level-three risk, but such a matter may not be reviewed on appeal from a judgment of conviction.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03194.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03194.htm)

*People v Bertrand*

194 AD3d 1081

(2<sup>nd</sup> Dept) (5/28/21 DOI)

IAC of SORA counsel. COA soundly rejected only argument counsel made. Counsel's failure to apply for a downward departure, based on an overassessment of risk, revealed a misunderstanding of relevant law.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03338.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03338.htm)

**Modified**

*People v Hatton*

72 Misc 3d 141 (A)

(App Term, 2<sup>nd</sup> Dept) (9/9/21 DOI)

Vacatur of predicate sex offender designation improperly based on a subsequent, not prior, sex offense.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_50838.htm](https://nycourts.gov/reporter/3dseries/2021/2021_50838.htm)

*People v Morana*

198 AD3d 1275

(4<sup>th</sup> Dept) (10/4/21 DOI)

SORA downward departure granted by Appellate Division. The Guidelines did not adequately account for mitigating facts. The defendant had a congenital disease that caused disfigurement and medical issues, requiring many surgeries. As a child, he was bullied and was isolated. He had only one prior misdemeanor. He used child pornography generally when under the influence of drugs taken to quell depression.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05188.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05188.htm)

**People's Appeal**

*People v Buyund*

2021 NY Slip Op 06529

(COA) (11/23/21 DOI)

SORA certification was not part of the sentence. Preservation exception for an illegal sentence did not apply to a challenge to sex-offender certification raised for the first time on an intermediate appeal.

[https://www.nycourts.gov/reporter/3dseries/2021/2021\\_06529.htm](https://www.nycourts.gov/reporter/3dseries/2021/2021_06529.htm)

**Remitted**

*People v Conrad*

193 AD3d 1187

(3<sup>rd</sup> Dept) (4/15/21 DOI)

SORA court used a short form order alluding to the findings of fact and conclusions of law made in open court. They were not sufficient for intelligent review, but the record allowed the appellate court to make own determination. Remittal required because court did not address request for a downward departure.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02194.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02194.htm)

**Reserved**

*People v Delles*

195 AD3d 1434

(4<sup>th</sup> Dept) (6/14/21 DOI)

App Div reserved decision and remitted. SORA court did not comply with the statutory requirement to set forth findings of fact and conclusions of law. The standardized-form order merely listed the risk-factor

point assessments and, in conclusory fashion, identified factors supporting upward departure and denied request for downward departure.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03711.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03711.htm)

*People v Kwiatkowski*

197 AD3d 1363

(3<sup>rd</sup> Dept) (9/3/21 DOI)

SORA written order and hearing transcript failed to set forth the required findings of fact and conclusions of law. The scant record was not sufficiently developed for the appellate court to make its own findings/conclusions. Reversed and remitted.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04934.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04934.htm)

*People v Lane*

2021 NY Slip Op 07324

(3<sup>rd</sup> Dept) (12/27/21 DOI)

Too typical failures of court and the People to fulfill their duties as to SORA determinations, findings/conclusions, and entry of orders did not result in dismissal of appeal because counsel tried to obtain a proper order.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_07324.htm](https://nycourts.gov/reporter/3dseries/2021/2021_07324.htm)

### **Reversed**

*People v Huntley*

191 AD3d 1261

(4<sup>th</sup> Dept) (2/8/21 DOI)

SORA adjudication reversed because court did not conduct the requisite searching inquiry regarding the purported waiver of the right to counsel.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_00688.htm](http://nycourts.gov/reporter/3dseries/2021/2021_00688.htm)

*People v Carmichael*

192 AD3d 924

(2<sup>nd</sup> Dept) (3/18/21 DOI)

SORA level-two adjudication reduced to level one. There was never any sexual contact between the defendant and the victim, so the SORA court improperly assessed points under risk factors 2 and 4.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_08263.htm](http://nycourts.gov/reporter/3dseries/2021/2021_08263.htm)

*People v Hagen*

193 AD3d 991

(2<sup>nd</sup> Dept) (4/22/21 DOI)

SORA designation changed from level three to two. Defendant should have been assessed only 10 points under risk factor 12, since the People did not prove that he refused to participate in treatment. Also, no showing that he an inappropriate living or employment situation.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02426.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02426.htm)

*People v Mott*

195 AD3d 756

(2<sup>nd</sup> Dept) (6/11/21 DOI)

The defendant was a level-two, not-three, sex offender. County Court lacked the discretion to upwardly depart because the People failed to identify aggravating factors. They relied on a prior conviction for public lewdness and indications that the defendant had not accepted responsibility for his sexual misconduct. The prior conviction was accounted for under risk factor 9. Lack of responsibility covered by risk factor 12.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03621.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03621.htm)

*People v Velasquez*

195 AD3d 762

(2<sup>nd</sup> Dept) (6/11/21 DOI)

The defendant a level-two, not -three, sexually violent offender. The existence of a familial relationship between the offender and the victim, standing alone, did not constitute an aggravating factor justifying an upward departure.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03625.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03625.htm)

*People v Sosa*

71 Misc 3d 140 (A)

(App Term 2<sup>nd</sup> Dept) (6/11/21 DOI)

Accusatory instrument properly dismissed on statutory speedy trial grounds. The defendant was charged with DWI per se and common law DWI. The original accusatory instrument was facially insufficient, since factual allegations did not show that the defendant had operated the vehicle—an element of each of the charged offenses.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_50519.htm](http://nycourts.gov/reporter/3dseries/2021/2021_50519.htm)

*People v Canady*

195 AD3d 752

(2<sup>nd</sup> Dept) (6/11/21 DOI)

The defendant was a level-two, not -three, sex offender. SORA court improperly assessed 25 points under risk factor 2 and 20 points under risk factor 4, where the People failed to establish that the defendant engaged in sexual contact with the victims or that, under a theory of accessorial liability, he shared the intent of the victims' clients in engaging in sexual contact.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03618.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03618.htm)

*People v Sestito*

195 AD3d 869

(2<sup>nd</sup> Dept) (6/18/21 DOI)

Request for a downward departure should have been granted. The RAI over assessed the risk of reoffense, given several factors: (1) the few images on the defendant's cell phone; (2) the lack of child pornography on his laptop; (3) the brief period at issue; (4) the defendant's lack of a criminal history; and (5) a psychosexual evaluation report finding a minimal risk of reoffense.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03859.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03859.htm)

*People v Montufar-Tez*

195 AD3d 1052

(2<sup>nd</sup> Dept) (7/2/21 DOI)

SORA determination reversed. Due process violation. SORA court sua sponte assessed additional points not requested by the People or the Board. A defendant had a right to notice of points sought to be assigned.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04158.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04158.htm)

*People v Maldonado-Escobar*

196 AD3d 655

(2<sup>nd</sup> Dept) (7/23/21 DOI)

SORA risk level reduced from two to one. Applying Guidelines to this statutory rape case resulted in an overassessment. The instant offense was the defendant's only sex crime, and he accepted responsibility.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04502.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04502.htm)

*People v Hoffman*

199 AD3d 1080

(3<sup>rd</sup> Dept) (11/8/21 DOI)

Sex offender adjudication reversed. The defendant argued in the SORA court that a downward departure was warranted. In denying such request, County Court did not set forth findings or conclusions.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06013.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06013.htm)

*People v Douglas*

199 AD3d 1380

(4<sup>th</sup> Dept) (11/15/21 DOI)

The defendant appealed from an order of Onondaga County Supreme Court, which determined that he was a level-three risk. Reversed and remitted. The SORA court erred in treating a presumptive override as mandatory and not ruling on the defendant's downward departure application.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06229.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06229.htm)

*People v Baez*

(1<sup>st</sup> Dept) (12/3/21 DOI)

SORA risk level reduced from two to one. As to factor regarding drug or alcohol abuse, there was no proof that he smoked marijuana at the time of the offense or that his use was more than occasional.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06771.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06771.htm)

*People v Edwards*

2021 NY Slip Op 07359

(4<sup>th</sup> Dept) (12/27/21 DOI)

Error to deny downward departure. The defendant established a mitigating factor not adequately considered by the Guidelines. He had been sentenced to one year in jail with no post-release supervision and, due to an oversight, was not registered. No re-offense in seven years between release and SORA hearing.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_07359.htm](https://nycourts.gov/reporter/3dseries/2021/2021_07359.htm)

## **POST-CONVICTION**

### **Anders briefs**

*People v West*

197 AD3d 1436

(3<sup>rd</sup> Dept) (9/24/21 DOI)

Appellate counsel sought to be relieved on the ground that there were no nonfrivolous issues to be raised. The appellate court disagreed, finding an issue of arguable merit as to the appeal waiver that could impact other issues, such as the denial of a youthful offender adjudication and the severity of the sentence.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05043.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05043.htm)

*People v Wolfe*

198 AD3d 822

(2<sup>nd</sup> Dept) (10/15/21 DOI)

Potentially nonfrivolous issues existed, including whether the defendant's plea was knowing, voluntary, and intelligent, given that the lower court did not specify the period of post-release supervision to be imposed or the maximum potential duration.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05597.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05597.htm)

*People v Areizaga*

198 AD3d 981

(2<sup>nd</sup> Dept) (10/29/21 DOI)

*Anders* brief. New counsel. Counsel did not review presentence report or relevant transcript, analyze appeal waiver or issues surviving valid waiver.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05864.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05864.htm)

### **Appeal delayed**

*People v Rodriguez*

199 AD3d 469

(1<sup>st</sup> Dept) (11/12/21 DOI)

Indictment dismissed. Nearly 40-year delay in perfection. Appellate counsel took no steps to file the appeal, be relieved, or communicate with the defendant. He did not know his appeal was never perfected.

Transcripts were lost, and a reconstruction proceeding would be pointless.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06099.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06099.htm)

### **Appellate ethics**

*People v Fudge*

199 AD3d 16

(4<sup>th</sup> Dept) (8/27/21 DOI)

The court severely (and unfairly) criticized defense counsel for failing to confront the weight of unfavorable precedent as to the suppression issue raised; advancing arguments based on sources dehors the record; and baselessly impugning the integrity of a police officer involved in the search.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04801.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04801.htm)

### **Civil rights litigation**

*Snow v Rochester Police Officer*

193 AD3d 1346

(4<sup>th</sup> Dept) (5/3/21 DOI)

Plaintiff was entitled to a trial on excessive force in § 1983 action. There were triable issues as to the degree of her resistance, the threat she posed, and the possibly unreasonable force used in response. For similar reasons, the defendants were not entitled to judgment as a matter of law as to qualified immunity.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02638.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02638.htm)

### **Coram nobis**

*People v Davis*

197 AD3d 659

(2<sup>nd</sup> Dept) (8/27/21 DOI)

Writ of error coram nobis granted. Former counsel was ineffective in failing to seek dismissal of 2<sup>nd</sup> degree murder counts as inclusory concurrent counts of 1<sup>st</sup> degree murder conviction.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04720.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04720.htm)

*People v Slide*

197 AD3d 1184

(2<sup>nd</sup> Dept) (9/17/21 DOI)

Writ of error coram nobis granted. Former appellate counsel failed to contend that County Court erred in not determining if the defendant should be adjudicated a youthful offender. Shortly before the brief was filed, *People v Rudolph* was decided.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04982.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04982.htm)

*People v Thompson*

197 AD3d 1347

(2<sup>nd</sup> Dept) (9/30/21 DOI)

Motion for writ of error coram nobis. Leave granted to file a late notice of appeal from two judgments rendered in 2013. *People v Syville* standard met. Memo of law explained that the defendant asked counsel to file a notice of appeal, but they did not do so.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05135.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05135.htm)

*People v Downing*

2021 NY Slip Op 06698

(2<sup>nd</sup> Dept) (12/3/21 DOI)

Writ of error coram nobis granted. Former appellate counsel failed to file a supplemental brief contending that Supreme Court should have determined whether the defendant deserved youthful offender status, pursuant to *People v Rudolph*, which was decided soon after the appellant's brief was filed.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06698.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06698.htm)

*People v Louis*

2021 NY Slip Op 07307

(2<sup>nd</sup> Dept) (12/27/21 DOI)

Coram nobis granted. Two counts of EDW dismissed based on IAC. Appellate counsel failed to contend that trial counsel was incompetent in not moving to dismiss the misdemeanor counts as time barred.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_07307.htm](https://nycourts.gov/reporter/3dseries/2021/2021_07307.htm)

**Court of Claims Act § 8-b**

*Owens v State*

2021 NY Slip Op 07374

(4<sup>th</sup> Dept) (12/27/21 DOI)

Court of Claims erred in dismissing § 8-b claim. A CPL 290.10 dismissal at a retrial was equivalent to a judicial acquittal. The court improperly assessed the credibility of the proof.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_07374.htm](https://nycourts.gov/reporter/3dseries/2021/2021_07374.htm)

**FOIL**

*Matter of Faustino*

191 AD3d 504

(1<sup>st</sup> Dept) (3/4/21 DOI)

Reversal of denial of petition to compel respondents to disclose body camera videos from an NYPD deadly force incident and the denial of counsel fees. Given voluntary disclosure, the merits were moot, but not the fees/costs. The petitioner prevailed—so what that compliance was voluntary.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_00907.htm](http://nycourts.gov/reporter/3dseries/2021/2021_00907.htm)

*Matter of Edmond v Suffolk County*

197 AD3d 1297

(2<sup>nd</sup> Dept) (9/30/21 DOI)

Attorneys' fees ordered in a CPLR Article 78 proceeding regarding FOIL requests. The petitioners were substantially prevailing parties against the recalcitrant police department.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05121.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05121.htm)

*Oustatcher v Clark*

198 AD3d 420

(1<sup>st</sup> Dept) (10/7/21 DOI)

FOIL dispute. DA's position—that Executive Order 202.8 tolled the obligation and the Covid-19 crisis made it virtually impossible to respond—was unpersuasive. DA must comply with the statute, by immediately granting or denying the requests or by setting a response date, based on enumerated factors. Petitioner was entitled to counsel fees and costs.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05295.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05295.htm)

### **Habeas corpus**

*People ex rel. Johnson v Uhler*

191 AD3d 1065

(3<sup>rd</sup> Dept) (2/4/21 DOI)

The petitioner properly submitted the habeas corpus application without notice. The court did not issue the writ, so the petitioner's obligation to serve the respondent was not triggered. Thus, dismissal based on lack of service incorrect. However, habeas relief was unavailable where the petitioner's claims were, or could have been, raised on direct appeal or via a 440 motion. No basis existed to depart from traditional orderly procedure. Dismissal was correct.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_00603.htm](http://nycourts.gov/reporter/3dseries/2021/2021_00603.htm)

*People ex rel. Figueroa v Keyser*

193 AD3d 1148

(3<sup>rd</sup> Dept) (4/1/21 DOI)

Denial of habe affirmed. The petitioner sought release based on his health conditions, age, and Covid-19 risks. He did not show deliberate indifference by prison officials. To the extent that the lawful sentence became grossly excessive due to pandemic risks, the petitioner had not shown that his punishment was so grossly proportionate to his offense as to be unconstitutionally cruel and unusual punishment.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02035.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02035.htm)

*People ex rel. Valenzuela v Keyser*

197 AD3d 1484

(3<sup>rd</sup> Dept) (9/30/21 DOI)

CPLR Article 70 habeas corpus relief denied. The petitioner did not show that his detention during the pandemic violated his due process or Eighth Amendment rights.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05151.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05151.htm)

*People ex rel. Brown v Dept. of Corr.*

198 AD3d 1360

(4<sup>th</sup> Dept) (10/13/21 DOI)

The petitioner appealed from a judgment of Orleans County Supreme Court, which dismissed a habeas corpus petition seeking his release based on Covid-related risks. Assuming that the petitioner was entitled to effective assistance, considering his having had the benefit of assigned counsel, he received meaningful representation.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05423.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05423.htm)

### **MHL Art. 10**

*State of NY v Michael M.*

193 AD3d 1343

(4<sup>th</sup> Dept) (5/3/21 DOI)

New trial in MHL Art. 10 respondent, who made a timely request and understood the risks of going pro se, as revealed during the requisite inquiry. The trial court erred in denying the request.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02636.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02636.htm)

*State of NY v John T.*

194 AD3d 902

(3<sup>rd</sup> Dept) (5/7/21 DOI)

In a MHL Article 10 proceeding, standby counsel should do victim cross-examinations under relevant balancing test. Appellate court assumed for argument's sake that the respondent had right to go pro se.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02862.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02862.htm)

## **Parole**

*Brown v Board of Parole*

197 AD3d 1424

(3<sup>rd</sup> Dept) (9/17/21 DOI)

Denial of parole affirmed. The respondent did emphasize the petitioner's crime, as the petitioner asserted, but equal weight need not be given to each statutory factor considered. The deportation order against the petitioner was simply another factor to consider.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05003.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05003.htm)

*Coleman v Annucci*

199 AD3d 446

(1<sup>st</sup> Dept) (11/12/21 DOI)

Revocation of parole. Penalty annulled. The respondent abused its discretion when it imposed an assessment that amounted to the full balance of the petitioner's post-release supervision—more than two times greater than his underlying prison term.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06076.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06076.htm)

## **Record on appeal**

*People v Meyers*

191 AD3d 1406

(4<sup>th</sup> Dept) (2/12/21 DOI)

Reconstruction hearing needed. Record lacked jury selection, opening statements, summations, final jury instructions, the handling of a jury note, and the verdict. The transcription of testimony included notations such as "omitted" and "blah, blah."

[http://nycourts.gov/reporter/3dseries/2021/2021\\_00919.htm](http://nycourts.gov/reporter/3dseries/2021/2021_00919.htm)

## **SARA**

*People ex rel. E.S. v Livingston Corr. Fac.*

193 AD3d 57

(4<sup>th</sup> Dept) (2/8/21 DOI)

Article 78 annulling SARA school-ground mandatory condition granted. The petitioner had been adjudicated a YO after attempted rape conviction. Neither the SARA statute nor legislative history indicated that the mandatory condition was for YOs. Further, so doing would contravene the purpose of YO treatment.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_00705.htm](http://nycourts.gov/reporter/3dseries/2021/2021_00705.htm)

*People ex rel. Rivera v Superintendent*

2021 NY Slip Op 07044

(3<sup>rd</sup> Dept) (12/17/21 DOI)

Grant of habeas reversed. Arguments as to SARA and the Ex Post Facto Clause rejected. The constitutional prohibition applied only to penal statutes. SARA was enacted to protect children, not to punish offenders.

[People ex rel. Rivera v Superintendent, Woodbourne Corr. Facility \(2021 NY Slip Op 07044\)](https://nycourts.gov)  
(nycourts.gov)

### **Sealing**

*People v Coulibaly*

198 AD3d 84

(2<sup>nd</sup> Dept) (8/5/21 DOI)

CPL 160.59 motion to seal denied. Affirmed. CPL did not provide for appeal. But proceeding was civil in nature, so court had jurisdiction under CPLR 5701 (a) (2) (v) (appeal of right is available from order resolving motion on notice and affecting substantial right).

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04616.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04616.htm)

*People v Bugge*

197 AD3d 653

(2<sup>nd</sup> Dept) (8/27/21 DOI)

A CPL 160.59 motion to seal a conviction of the crime of unlawful possession of examination questions, in violation of the Civil Service Law and related offenses was summarily denied. Reversed and remitted. The defendant properly appealed as of right pursuant to CPLR 5701 (a) (2) (v). Under the plain terms of the sealing law, the defendant was entitled to a hearing.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04718.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04718.htm)

### **CPL 440.10 motions**

#### ***Affirmed***

*People v Green*

190 AD3d 1094

(3<sup>rd</sup> Dept) (1/14/21 DOI)

Three errors, based on the record on direct appeal and a 440 motion, did not constitute ineffective assistance. Counsel explained why he did not call a weak eyewitness. While counsel did not remember why he did not question a potential witness about bias, the appellate court was unperturbed by the lapse, as well as by his forgetfulness in not seeking a detailed jury charge regarding the voluntariness of the defendant's statement.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_00207.htm](http://nycourts.gov/reporter/3dseries/2021/2021_00207.htm)

*People v Dray*

192 AD3d 542

(1<sup>st</sup> Dept) (3/18/21 DOI)

Summary denial of 440 motion affirmed. The defendant stated that counsel was ineffective in failing: (1) to tell him that the decision to testify was his; and (2) to request an intoxication charge. In opposition, defense counsel stated that he told the defendant it was his absolute right to testify at trial; and an intoxication defense was not meritorious. The reviewing court held that the defendant did not show prejudice as to his decision to testify, and counsel's tactical decisions would not be second-guessed.

[http://www.nycourts.gov/reporter/3dseries/2021/2021\\_01559.htm](http://www.nycourts.gov/reporter/3dseries/2021/2021_01559.htm)

*People v Sposito*

193 AD3d 1296

(3<sup>rd</sup> Dept) (4/22/21 DOI)

One justice dissented in appeal regarding denial of 440 motion. Defense counsel rendered ineffective assistance in waiving a *Huntley* hearing and failing to consult with, or call, experts.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02441.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02441.htm)

*People v Lopez*

193 AD3d 1077

(2<sup>nd</sup> Dept) (4/29/21 DOI)

The defendant's CPL 440.10 motion was denied. The DA moved to dismiss the appeal since the defendant had been deported and was not available to obey the mandate of the court. The Second Department granted the motion, without prejudice to a motion to reinstate the appeal if the defendant returned.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02546.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02546.htm)

*People v Dogan*

37 NY3d 1007

(COA) (9/17/21 DOI)

COA held that County Court properly denied the defendant's CPL 440.10 motion without a hearing. He failed to sufficiently allege a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.

[https://www.nycourts.gov/reporter/3dseries/2021/2021\\_04956.htm](https://www.nycourts.gov/reporter/3dseries/2021/2021_04956.htm)

*People v Terrero*

198 AD3d 930

(2<sup>nd</sup> Dept) (10/25/21 DOI)

Denial of 440 affirmed. Exclusion or inadmissibility was not a direct or deportation consequence of pleading guilty. The defendant did not allege that counsel made any affirmative misrepresentations regarding inadmissibility.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05733.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05733.htm)

*People v Gilmore*

2021 NY Slip Op 06880

(3<sup>rd</sup> Dept) (12/10/21 DOI)

440 denial affirmed. The defendant urged that his constitutional rights to meaningful access to the courts were violated because the jail used a "paging system" that required inmates to request case law by exact citation, thus preventing him from adequately researching the case law. Defendant did not submit sworn allegations substantiating such claims and his efforts to pursue non-frivolous legal claims were hindered.

[People v Gilmore \(2021 NY Slip Op 06880\) \(nycourts.gov\)](http://nycourts.gov/reporter/3dseries/2021/2021_06880.htm)

*Mandamus*

*M/O Cruz v D'Emic*

194 AD3d 927

(2<sup>nd</sup> Dept) (5/21/21 DOI)

Article 78 / mandamus to compel Supreme Court justice to issue written orders deciding the petitioner's motion to reargue as to CPL 440.10 motion. Granted. Clear legal right to the order.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03175.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03175.htm)

*People's appeals*

*People v McGhee*

36 NY3d 1063

(COA) (3/25/21 DOI)

A witness's statement, disclosed by the People after the defendant's trial, was not material for purposes of his *Brady* claim. The "reasonable possibility" standard was not met, where the undisclosed witness's description of the shooter did not differ in any material respect from that of the eyewitness who identified the defendant in court.

[http://www.nycourts.gov/reporter/3dseries/2021/2021\\_01836.htm](http://www.nycourts.gov/reporter/3dseries/2021/2021_01836.htm)

*People v Saunders*

193 AD3d 766

(2<sup>nd</sup> Dept) (4/15/21 DOI)

440 grant upheld based on IAC. The defendant was a citizen of Jamaica and an LPR. His guilty plea rendered him deportable. Counsel misadvised him about that consequence. Prejudice was shown; the defendant could rationally have decided to go to trial, where he had resided here since 1988 and had 5 kids.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02181.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02181.htm)

***Reversed or remanded***

*People v Reed*

191 AD3d 1382

(4<sup>th</sup> Dept) (2/8/21 DOI)

Summary denial of 440 motion reversed. The defendant raised a triable factual issue regarding counsel's ineffective assistance in failing to make a sufficient motion to dismiss on CPL 30.30 grounds. Claim that period when defendant purportedly tried to flee apprehension was excludable was based on mere speculation of a police investigator.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_00758.htm](http://nycourts.gov/reporter/3dseries/2021/2021_00758.htm)

*People v Lanier*

191 AD3d 1094

(3<sup>rd</sup> Dept) (2/18/21 DOI)

Reversal of denial of 440 motion after a hearing. New trial. No legitimate strategy could validate counsel's failure to investigate a potential alibi witness and witnesses who would have refuted testimony about the location of an eyewitness at the time of the shooting.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_01094.htm](http://nycourts.gov/reporter/3dseries/2021/2021_01094.htm)

*People v Stetin*

192 AD3d 1331

(3<sup>rd</sup> Dept) (3/18/21 DOI)

Hearing needed on 440 motion asserting IAC in failure to do a proper investigation. The defendant had proof that he lived at the victim's residence, refuting trial evidence of unlawful entry. Further, three affiants said that the victim recanted.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_01529.htm](http://nycourts.gov/reporter/3dseries/2021/2021_01529.htm)

*People v Breedan*

193 AD3d 756

(2<sup>nd</sup> Dept) (4/15/21 DOI)

440 denial reversed. A codefendant was initially represented by Michael Vecchione, who then joined the DA's office and approved a plea offer made to the defendant before he went to trial. Vecchione may have used privileged information learned as counsel for the alleged accomplice.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02173.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02173.htm)

*People v Davis*

193 AD3d 967

(2<sup>nd</sup> Dept) (4/22/21 DOI)

Reversal of denial of CPL 440.10 motion after a hearing. Hearing evidence showed that defense counsel failed to contact and interview five witnesses who were present at the party where the shooting occurred. Even if certain witnesses' criminal records provided a strategic basis to not call them, it did not excuse the failure to investigate them as possible witnesses.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02408.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02408.htm)

*People v Jennings*

194 AD3d 1418

(4<sup>th</sup> Dept) (5/19/21 DOI)

Error to deny CPL 440.10 motion. Hearing was needed to determine whether the defendant validly waived counsel's potential conflict of interest and whether the conflict operated on the defense.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02937.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02937.htm)

*People v Ramos*

194 AD3d 964

(2<sup>nd</sup> Dept) (5/21/21 DOI)

CPL 440.10 motion to vacate a judgment of conviction. Reversal and new trial. Counsel was ineffective in failing to investigate the alibi defense; impeach the complainant with her grand jury testimony; and object when the People elicited precluded testimony.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03200.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03200.htm)

*People v Bernard*

195 AD3d 740

(2<sup>nd</sup> Dept) (6/11/21 DOI)

Denial of 440 reversed. In motion, the defendant argued IAC based on counsel's failure to advise him of clear immigration consequences of his pleas. The plea transcript did not indicate that counsel advised the defendant about such consequences. Moreover, it appeared that a decision to reject the plea offer would have been rational. The defendant and his partner had four children in this country.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03601.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03601.htm)

*People v Mack*

195 AD3d 1601

(4<sup>th</sup> Dept) (6/18/21 DOI)

Hearing on CPL 440.10 motion ordered. The motion court erred in limiting the scope of the hearing on IAC to alleged errors that could not have been raised on direct appeal.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03982.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03982.htm)

*People v Regan*

196 AD3d 735

(3<sup>rd</sup> Dept) (7/2/21 DOI)

Denial of CPL 440.10 motion reversed. County Court erred in concluding that sufficient facts appeared in the record to resolve allegations of actual innocence and IAC and in not addressing the merits of those matters. Two dissenters said indictment should have been dismissed based on violation of constitutional speedy trial rights. No good reason for the pre-indictment delay of four years.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04161.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04161.htm)

*People v Ross*

197 AD3d 905

(4<sup>th</sup> Dept) (8/27/21 DOI)

Denial of CPL 440.10 motion reversed. Two witnesses submitted affidavits attesting to their willingness to testify, the nature of their exculpatory information, and the fact that defense counsel did not contact them. Hearing required.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04820.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04820.htm)

*People v Soodoo*

73 Misc 3d 16

(App Term, 2<sup>nd</sup> Dept) (10/15/21 DOI)

The defendant appealed from orders denying two CPL 440.10 (1) (k) motions to vacate judgments convicting him of unlawful possession of marihuana. Reversed and dismissed. Immigration consequences the defendant faced due to his guilty pleas set forth by counsel. While CPL 160.50 (a) provided for vacatur of the defendant's convictions, subdivision (c) did not preclude the CPL 440.10 motions.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_21269.htm](https://nycourts.gov/reporter/3dseries/2021/2021_21269.htm)

*People v Chodakowski*

2021 NY Slip Op 06781

(1<sup>st</sup> Dept) (12/3/21 DOI)

Appeal of denial of CPL 440.10 motion. Remand for a hearing. An affidavit from the jury foreperson swore that another juror made "ethnic comments" about the defendant and the complainant, revealing overt bias that cast serious doubt on the fairness of the deliberations and the verdict.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06781.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06781.htm)

**CPL 440.20 motions**

*People v Bell-Bradley*

191 AD3d 1386

(4<sup>th</sup> Dept) (2/8/21 DOI)

Reversal and remittal of denial of CPL 440.20 motion. Argument that federal conviction was not equivalent to a NY felony was not determined in the direct appeal.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_00761.htm](http://nycourts.gov/reporter/3dseries/2021/2021_00761.htm)

*People v Kirby*

196 AD3d 601

(2<sup>nd</sup> Dept) (7/16/21 DOI)

Reversal of denial of defendant's CPL 440.20 motion to set aside a sentence. Remitted for resentencing before a different judge. Supreme Court did not follow CPL 400.15 and 400.16 as to potential persistent violent felony offenders.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04374.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04374.htm)

*People v Garcia*

196 AD3d 700

(2<sup>nd</sup> Dept) (7/29/21 DOI)

Reversal. CPL 440.20 to set aside the sentence granted based on vindictiveness, but court failed to consider matters that occurred after the original sentencing. Updated presentence investigation report including interview with defendant required.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_04558.htm](https://nycourts.gov/reporter/3dseries/2021/2021_04558.htm)

*People v Vanderhorst*

199 AD3d 119

(3<sup>rd</sup> Dept) (9/30/21 DOI)

On direct appeal, the defendant did not argue that his sentence should be vacated because the court failed to determine if he was a youthful offender. He could not properly raise such issue in a CPL 440.20 motion; and Supreme Court erred in granting the application. *People v Rudolph* foreclosed retroactive application of the new rule to collateral proceedings. There was nothing substantively illegal about sentence imposed. The defendant could pursue coram nobis relief.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05141.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05141.htm)

*People v Campanioni*

199 AD3d 474

(1<sup>st</sup> Dept) (11/12/21 DOI)

Denial of 440.20 motion reversed. Federal drug conviction under 21 USC § 841 (a) (1) was not equivalent to a conviction under Penal Law § 220.39, requiring particular knowledge of the drug possessed.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06105.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06105.htm)