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Summarizing recent significant New York appellate cases

In this issue we are reprinting summaries of several recent criminal law decisions of note that discuss the Sex Offender Registration Act (SORA), predicate felonies, and New York's Raise the Age Law. Normal issues will resume next week.

SECOND DEPARTMENT

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT, DUE PROCESS

***People v Allen*, 2026 NY Slip Op 04880 (2d Dept August 5, 2026)**

Issue: **Did Supreme Court exceed its authority and violate the defendant's right to due process when, after designating the defendant a level three sex offender following a hearing held in accordance with the Sex Offender Registration Act, it, *sua sponte*, reopened the SORA hearing to reconsider its initial findings and make a new determination of the defendant's risk level designation?**

Facts: Defendant was convicted of rape of a 17-year-old victim, in satisfaction of an 18-count indictment that included allegations of a second rape of a 15-year-old victim. At the end of Defendant's sentence, "the Board of Examiners of Sex Offenders prepared a case summary and risk assessment instrument in accordance with SORA. The case summary detailed the circumstances of the defendant's actions with respect to the 18-year-old victim in September 1989, as well as his alleged actions with respect to the 15-year-old victim in November 1988, both of which involved a forcible rape at either gunpoint or knifepoint. The Board assessed the defendant a total of 160 points on the RAI, which placed the defendant above the 110-point threshold required to designate him as a presumptive level three sex offender, and recommended that the defendant be designated as a level three sex offender." Following a SORA hearing, Supreme Court adopted the Board's recommendation, except for factors 3 and 5, "assessed the defendant 120 points on the RAI, which still rendered him a presumptive level three sex offender, denied the defendant's pro se motion for a downward departure from the presumptive risk level, and designated the defendant a level three sex offender . . . With respect to risk factor 3, the court found that no points should be assessed because the crime to which the defendant pleaded guilty involved only one victim, and not two. With respect to risk factor 5, the court found that no points should be assessed because the crime to which the defendant pleaded guilty involved a victim who was older than 16 years old."

"Thereafter, . . . the Supreme Court, believing that it had made an error in its determination of the defendant's risk level designation, *sua sponte*, reopened the SORA hearing so that it could 're-adjudicate' its findings with respect to risk factors 3, 5, and 9. The defendant appeared with counsel at the reopened hearing. The court explained that it had, on its own accord, requested and obtained the grand jury minutes following the initial SORA hearing. Based on the contents of the grand jury minutes, as well as the contents of evidence received at the initial SORA hearing, the court found that it had erred in failing to assess the defendant 20 points under risk factor 3 and 20 points under risk factor 5. The court also found that it had improperly assessed the defendant 15 points under risk factor 9. As a result, in an order dated June 10, 2019, the court assessed the defendant a total of 145 points rather than 120 points, a presumptive level three risk designation, again denied the defendant's pro se motion for a downward departure from his presumptive risk level, and redesignated the defendant a level three sex offender."

Holding: The Appellate Division, Second Department affirmed the Supreme Court's reopened SORA designation order, using these unique circumstances to explain whether "the inherent authority of a court to reconsider its own intermediate determinations allows a SORA court to, sua sponte, reconsider its determination of a defendant's presumptive risk level designation." Noting that both the First and Fourth Departments have held that a SORA court could reopen risk level determinations to reconsider or correct its prior determinations, the Second Department agreed, reasoning that "[p]reventing the Supreme Court from, *sua sponte*, exercising its inherent authority to correct its own errors of fact and law in failing to assess the defendant points under risk factors 3 and 5 at the initial SORA hearing would undermine the very purpose and objective of SORA and otherwise prevent the expeditious correction of the erroneous determination."

The court held that "the Supreme Court's failure to assess points under risk factors 3 and 5 at the initial SORA hearing was affected by errors of fact and law and was erroneous." The assessment of points for a SORA risk determination is not limited to the crimes for which the defendant was convicted or admissible evidence, but rather may consider reliable hearsay evidence as well as the defendant's entire course of conduct. "Here, the case summary prepared by the Board, which the People submitted at the initial SORA hearing, and which the Supreme Court relied upon in correcting its initial failure to assess points under risk factors 3 and 5, provided clear and convincing evidence to establish that the defendant raped both the 18-year-old victim for which he entered a plea of guilty to rape in the first degree,

as well as a second 15-year-old victim." "Given the Supreme Court's error, and considering the inherent power of a court to reconsider its own intermediate determinations, together with the overriding purposes and objectives of SORA, we find no wrong in the Supreme Court's sua sponte correction of its initial failure to assess points under risk factors 3 and 5. There is no benefit to a defendant, the People, or the public in prohibiting a SORA court tasked with determining an offender's presumptive risk level from, *sua sponte*, correcting its own erroneous determination." The court did note, however, that the SORA court "erred in, sua sponte, obtaining the grand jury minutes and relying on those minutes at the reopened SORA hearing. Nevertheless, given that the case summary provided ample evidence to support the imposition of points under risk factors 3 and 5, under the circumstances of this case, the court's error was harmless."

Nor was defendant denied due process, the court held. Because a SORA proceeding is civil in nature, rather than criminal, and the protections afforded under due process are thus less extensive, the court explained that a SORA defendant was entitled to "notice of points sought to be assessed against him or her and an opportunity to be heard regarding the assessment." He received both here, the court held.

CRIMINAL LAW, PREDICATE FELONY

People v Gardner, 2026 NY Slip Op 05809 (2d Dept Oct. 7, 2026)

Issue: **Does the United States Supreme Court's decision in Erlinger v United States (602 U.S. 821) require, under all circumstances, a jury, rather than a judge, to determine whether a defendant committed a predicate felony within the limitations period set forth in the second felony offender and second violent felony offender statutes before a sentence is imposed?**

Facts: After defendant agreed to plead guilty to "one count of criminal possession of a weapon in the second degree . . . in exchange for . . . a term of imprisonment of seven years to be followed by five years of postrelease supervision," the People advised Supreme Court that defendant had a previous felony conviction for criminal possession of a weapon. The defendant confirmed that he was previously convicted of a felony, but although both convictions were violent felonies, "the court determined that the defendant must be sentenced as a second felony offender rather than a second violent felony offender." The court then sentenced defendant to the agreed-upon sentence.

Thereafter, "the defendant moved pursuant to CPL 440.20(1) to vacate his sentence, contending that resentencing was required because there was a discrepancy between the order of commitment, which indicated that he was convicted as a second felony offender, and the sentence imposed during the sentencing proceedings, when the Supreme Court did not specifically indicate that it was sentencing the defendant as a second felony offender. In response, the People contended that the defendant had been sentenced as a second felony offender, but agreed that he should be resentenced because the court should have sentenced the defendant as a second violent felony offender rather than a second felony offender. However, the defendant argued in a supplemental affirmation that the court could not resentence him as a second violent felony offender because there was a question as to whether the defendant's prior conviction occurred within 10 years of the commission of the instant offense and that the issue had to be determined by a jury, rather than a judge, in accordance with *Erlinger v United States* (602 U.S. 821). According to the defendant, the court was prohibited from empaneling a jury for this sentencing question under CPL 400.15(7)(a), which provides, in relevant part, that where the defendant controverts an allegation regarding his status as a second violent felony offender, a hearing 'must be before the court without jury.'"

The court "granted the defendant's motion to vacate his sentence and resentence him as a first-time violent felony offender. The court found that, pursuant to *Erlinger*, a jury was required to make the necessary findings to determine whether the defendant was a second felony offender, violent or otherwise. As to whether a jury could be empaneled for that purpose, the court found that it was prohibited from doing so under CPL 400.15(7)(a) and that it lacked such authority under Judiciary Law § 2-b(3). Consequently, the court determined that the defendant would be resentenced as a first-time violent felony offender, but that the agreed-upon sentence of a term of imprisonment of seven years followed by five years of postrelease supervision remained proper."

Holding: The Second Department reversed. Under the Sixth and Fourteenth Amendments, the constitutional right to a jury trial requires a jury to determine the facts constituting the elements of a crime, but judges still have substantial "discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute." But what constitutional protections "apply at sentencing when the People seek to enhance a defendant's sentence beyond the range prescribed by the statute under which the defendant was convicted," such as under the persistent felony offender statutes?

Looking first to the United States Supreme Court's holding in *Apprendi v New Jersey* (530 U.S. 466), the Second Department noted that the Supreme Court has held, "other than the fact of a prior conviction, any fact that increases the prescribed range of penalties for a crime must be submitted to a jury, and proved beyond a reasonable doubt. A narrow exception to the *Apprendi* rule exists: a judge may properly determine, without a jury, that the defendant was previously convicted of a crime—the fact of prior conviction. This is because a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees, and a defendant's recidivism—a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence—does not relate to the commission of the offense." Thus, the Court of Appeals has consistently held that "a jury need not make findings as to whether the defendant is subject to New York's predicate felony offender statutes."

The United States Supreme Court's recent decision in *Erlinger v United States*, in which the Supreme Court held that a jury, rather than a judge, must decide whether "predicate offenses are committed on occasions different from one another" for a sentence enhancement under the Armed Career Criminal Act, did not undermine the constitutionality of New York's predicate felony offender sentencing en-

hancement scheme, the Second Department held. As the court explained, "[t]he provision of the ACCA at issue in *Erlinger* is fundamentally different than any provision of New York's second felony and second violent felony offender statutes in that the ACCA requires a factual determination about the defendant's actions and the circumstances surrounding the manner in which the predicate offenses were committed . . . Conversely, the tolling calculation under the subject predicate felony offender statutes does not involve an inquiry into the underlying facts that led to the predicate convictions. Rather, the court is required to determine the dates that a defendant entered and was discharged from a correctional facility upon serving a prior sentence. These ministerial calculations do not implicate any factual determination as to the defendant's actions during a prior crime of conviction and are akin to the fact of prior conviction . . . To protect the rights of a defendant during sentencing as a predicate felony offender, New York's procedural rules provide for a hearing before the judge when the defendant controverts an allegation in the predicate felony statement. That is all that is required—the Constitution does not entitle a defendant to a jury determination on the issue of whether a predicate offense was committed within 10 years of the commission of the instant offense, including any calculation regarding the periods during which the defendant was incarcerated." Therefore, the court held, the trial court "erred in holding that a jury was required to make a finding as to whether the prior sentence was imposed not more than ten years before commission of the felony of which the defendant presently stands convicted."

FOURTH DEPARTMENT

CRIMINAL LAW, RAISE THE AGE LAW

***People v Neyshaliz M. V.*, 2026 NY Slip Op 04581 (4th Dept July 24, 2026)**

Issue: **Should a youthful offender have been disqualified from having her offense heard in Family Court?**

Facts: After the 17-year-old defendant ran away from home, her ex-boyfriend picked her up and she showed him a handgun that she was carrying in her waistband. The two got into a verbal altercation at a convenience store, and the ex-boyfriend was asked to leave. When he returned a short while later, police officers were at the store, and he advised the officers that the defendant was carrying the firearm. "The officers approached defendant inside the store and ordered her to remove her hands from her pockets. When she did so, an officer observed a loaded magazine in her hand and the handgun in her waistband. Defendant was handcuffed, and the officer seized the handgun and ammunition."

Defendant was charged with two counts of criminal possession of a weapon. Because defendant was 17 years old, her offense was presumptively removable to Family Court under New York's Raise the Age Law. The People, however, "sought to prevent removal to Family Court on the ground that defendant 'displayed a firearm . . . in furtherance of such offenses', arguing that defendant 'displayed' the weapon by showing it to her ex-boyfriend, and that she did so in furtherance of the charged offenses. The court agreed with the People that defendant was disqualified from removal to Family Court on that basis." Defendant then pled guilty to one of the weapons possession counts.

Holding: The Appellate Division, Fourth Department, reversed defendant's conviction, holding that County Court improperly determined that she was disqualified from removal to Family Court. The court explained, under New York's Raise the Age Law, the Legislature raised the age of criminal responsibility to 18, and determined that criminal proceedings against 16- and 17-year-olds would be heard in the "youth part" of a "superior court, unless and until their cases are removed to Family Court. The statute creates a presumption of removal to Family Court for adolescent offenders, subject to listed exceptions. Different exceptions may apply depending upon the severity of the offense; generally, for nonviolent offenses, the People may move to prevent removal only upon a showing that 'extraordinary circumstances exist that should prevent the transfer of the action to family court.'" When, however, the defendant has been charged with a Class A non-drug felony or a violent felony, the People may seek to prevent removal on any of three listed grounds, including, as relevant here, "that defendant displayed a firearm, shotgun, rifle or deadly weapon as defined in the penal law in furtherance of the charged offenses."

The court held, here, to further an offense meant to "carry out an act that makes the offense more likely to occur." Contrary to the People's argument, however, "defendant did not 'further' her possession of the weapon merely by displaying it to her ex-boyfriend, even if she did so to emphasize her control of the handgun. Every display of a handgun emphasizes control by the person possessing it, and thus every display would always further the charged offense. So too with the dissent's proposed construction. Every display of a weapon provides evidence of possession—it is not possible to display the weapon without possessing it—and thus there would always be a 'logical nexus' between a display and the possessory offense. Either reading would effectively render meaningless the separate statutory requirement that the display 'further' the charged offense." Thus, the court held, "absent any additional proof that defendant's display somehow advanced her possession of the weapon—something above and beyond merely emphasizing her control of the weapon," County Court erred in preventing the removal of defendant's offenses to Family Court under the Raise the Age Law.

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