4.33 Exception or Proviso

(1) A statute or administrative rule may provide for the exclusion of liability for an offense. If the People are required to plead the inapplicability of the exclusion and at trial disprove it beyond a reasonable doubt, the exclusion is deemed an "exception." If the People are not required to plead the inapplicability of the exclusion or at trial disprove it unless raised by the defendant, the exclusion is deemed a "proviso."

(2) When an exclusion to liability for an offense *is not specified* in the definition of the offense, absent the expressed intent of the enacting body to the contrary, the exclusion is a "proviso," and the People are not required to plead the inapplicability of the exclusion; when, however, the exclusion is raised at trial, the People must disprove it beyond a reasonable doubt.

(3) (a) When an exclusion to liability for an offense *is specified* in the definition of the offense, absent the expressed intent of the enacting body to the contrary as detailed in paragraph (b), the exclusion is an "exception," and the People are required to plead the inapplicability of the "exclusion," and at trial the People must disprove it beyond a reasonable doubt.

(b) When the intent of an enacting body is not expressly stated, their intent is assumed to be what would constitute a "common sense and reasonable pleading" of the exclusion.

(i) In determining whether "common sense and reasonable pleading" may excuse the People from pleading the inapplicability of an exclusion stated in the definition of an offense and disproving it at trial unless raised by the defendant, a court may consider, for example:

(1) whether the exclusion, by its own terms, or by incorporation of a separate statute, includes myriad factual scenarios that would require the People to go to intolerable lengths to negate.

(2) whether the exclusion is uniquely within the defendant's knowledge.

Note

Subdivision (1). A Penal Law statute may designate a "defense" or "affirmative defense" to a defined offense. The People bear the burden of disproving a "defense" beyond a reasonable doubt. The defendant bears the burden of establishing an affirmative defense by a preponderance of the evidence. (Penal Law § 25.00.)

In addition to a "defense" or "affirmative defense," there may be provisions in or outside the definition of an offense that "exclude" liability for the offense in stated circumstances. No statute, however, defines the evidentiary burden of the People or of the defendant with respect to the "exclusion."

When decisional law requires the People to plead the inapplicability of the exclusion and at trial disprove an exclusion beyond a reasonable doubt, the exclusionary clause is deemed an "exception"; when decisional law does not require the People to plead the inapplicability of the exclusion or disprove it at trial unless the defendant raises it, the exclusionary clause is deemed a "proviso" (*People v Devinny*, 227 NY 397, 401 [1919] ["The general rule is that in dealing with a statutory crime exceptions must be negatived by the prosecution and provisos utilized as a matter of defense. Attempts to apply this general rule and distinguish between exceptions and provisos have resulted in many technicalities and in much (subtlety)"]; *People v Davis*, 13 NY3d 17, 31 [2009] ["Although the murky contours of 'exceptions' and 'provisos' have long been the subject of debate . . . , we continue to utilize those ancient labels"]; *People v Santana*, 7 NY3d 234, 237 [2006] ["We therefore conclude that the . . . clause operates as a proviso that the accused may raise in defense of the charge rather than an exception that must be pleaded by the People in the accusatory instrument. . . . If an accused timely raises the issue, the People must, of course, establish beyond a reasonable doubt that the . . . proviso does not apply"]).

"[T]he distinction between a proviso and an exception will be wholly disregarded, if necessary to give effect to the manifest intention of the Legislature" (*Davis* at 31, quoting McKinney's Cons Laws of NY, Book 1, Statutes § 211, Comment at 369). Thus, that the exclusion is "introduced by 'except' is not

determinative” (*Davis* at 31, quoting McKinney's Cons Laws of NY, Book 1, Statutes § 211, Comment at 370).

On occasion, decisional law may use the term “exception” generically to include the terms of art of “exception” and “proviso” (*e.g. People v Kohut*, 30 NY2d 183, 187 [1972] [“If the defining statute contains an exception, the indictment must allege that the crime is not within the exception. But when the exception is found outside the statute, the exception generally is a matter for the defendant to raise in defense, either under the general issue or by affirmative defense”]).

Unlike New York law, federal decisional law has a fairly settled rule “that an indictment or other pleading founded on a general provision defining the elements of an offense, or of a right conferred, need not negative the matter of an exception made by a proviso or other distinct clause, whether in the same section or elsewhere, and that it is incumbent on one who relies on such an exception to set it up and establish it” (*McKelvey v United States*, 260 US 353, 357 [1922]; *Dixon v United States*, 548 US 1, 13 [2006]).

In New York, to determine the effect of an “exclusion,” courts look to the legislative intent, which, unless expressly stated, assumes the application of “common sense and reasonable pleading” (*Devinny* at 401 [“The two classes of provisions—exceptions and provisos—frequently come closely together and the rule of differentiation ought to be so applied as to comply with the requirements of common sense and reasonable pleading”]; *Santana*, 7 NY3d at 237 [“As a matter of ‘common sense and reasonable pleading’ (*People v Devinny*, 227 NY 397, 401 [1919]), we do not believe that the Legislature intended to require the People to negate” the exception in issue]; *Davis* at 31).

Factors that may be considered to determine legislative intent include: (1) is the exclusion set forth inside the definition of the penal offense or outside that definition in another statute; or (2) if the exclusion is defined inside the definition of the penal offense, does it reference a statute outside the definition of the offense; (3) does the exclusion require the People to go to “intolerable lengths” to plead and negate the exclusion; and (4) does the exclusion recite facts “uniquely within a defendant’s knowledge” (*Davis* at 31-32).

Subdivision (2) recites the rule as summarized in *People v Kohut* (30 NY2d 183, 187 [1972]), namely, when the exclusionary language “is found outside the statute [that defines an offense], the [exclusion] generally is a matter for the defendant to raise in defense, either under the general issue or by affirmative defense.” Following that rule, *Kohut* held that the indictment was not defective for “failure to allege facts tolling the Statute of Limitations,” which are found outside the statute defining the offense (*Kohut* at 195).

A classic example is found in the prohibitions on possession of a firearm in Penal Law article 265. The exemptions from liability for those possessory crimes

are in a separate section (Penal Law § 265.20). Thus, the People are not obligated to plead the inapplicability of a statutory exemption from liability, such as ownership of a license, nor are the People obligated to disprove an exemption unless the defendant places it in issue. (*See People v Washington*, 209 AD2d 162, 163 [1st Dept 1994], *affd* 86 NY2d 853 [1995].)

Even though the exclusionary language may be recited in the definition of the offense, it may yet be held to be outside the statute defining the offense when the exclusionary language incorporates the application of a statute that is outside the statute defining the offense (*Santana*, 7 NY3d 234). In *Santana*, the defendant was charged with "criminal contempt in the second degree" (Penal Law § 215.50 [3]). The definition of the offense required intentional disobedience or resistance of a court order "except in cases involving or growing out of labor disputes as defined by [Judiciary Law § 753-a (2)]." That "exclusionary language" in the Penal Law definition of criminal contempt, the Court stated, "does not provide a complete definition of the class of cases that the Legislature intended to remove from the ambit of criminal contempt because the statute refers to a definition of 'labor disputes' set forth *outside* the Penal Law" (*Santana* at 237 [emphasis added]). Also, the Court noted, the Judiciary Law provision "delineates the multiple circumstances that constitute 'labor disputes' and the various parties who can engage in such disagreements" (*id.*). Thus, as a matter of " 'common sense and reasonable pleading' . . . , we do not believe that the Legislature intended to require the People to negate each of the alternatives specified in Judiciary Law § 753-a" (*Santana* at 237; s*ee Davis* at 31 ["In *Santana*, we applied the general rule that qualifying language found outside the text of a relevant Penal Law provision is in the nature of a 'proviso' . . . but our ultimate conclusion was premised on the belief that the Legislature could not reasonably have intended the People to negate the existence of each of the myriad labor disputes delineated in Judiciary Law § 753-a"]).

Subdivision (3) (a) sets forth the general rule that applies when the exclusionary language is wholly contained in the definition of the statute; namely, absent intent of the enacting body to the contrary, the People are required to plead the inapplicability of the exclusionary language and at trial must disprove its application beyond a reasonable doubt. That rule is also derived from *Kohut* (30 NY2d at 187 ["If the defining statute contains an exception, the indictment must allege that the crime is not within the exception"]).

An example of that rule is illustrated in the definition of "criminal possession of a weapon" set forth in Penal Law § 265.03 (3)—formerly Penal Law § 265.02 (4)—which states that a person is guilty of the crime when that person "possesses any loaded firearm. Such possession shall not . . . constitute a violation of this subdivision if such possession takes place in such person's home or place of business." (*People v Rodriguez*, 68 NY2d 674 [1986], *revg for reasons stated in dissenting op at* 113 AD2d 337, 343-348.) *Rodriguez* held that the People were required to plead and prove at trial that the possession of the loaded firearm was not in the defendant's home or place of business. (*See Santana*, 7 NY3d at 237

[“Legislative intent to create an exception has generally been found when the language of exclusion is contained entirely within a Penal Law provision. For example, the ‘home or place of business’ exception found in Penal Law (former) § 265.02 (4) . . . does not require reference to another statute to determine its applicability”].)

Subdivision (3) (b) sets forth what may be viewed as an exception to the general rule stated in subdivision (3) (a), that is, instances when legislative intent, seen through the prism of “common sense and reasonable pleading,” does not require exclusionary language stated in the definition of an offense to be pled or disproved at trial absent the defendant placing the exception in issue. See the discussion of *Santana* in subdivision (2) and in particular the comment in *Davis* that, in addition to the exception in *Santana* being “found outside the text” of the definition of the statute, the Court of Appeals “conclusion was premised on the belief that the Legislature could not reasonably have intended the People to negate the existence” of myriad items included in the exception (*Davis* at 31).

In *Davis*, the defendant was convicted of a misdemeanor based upon his violation of a New York City Department of Parks and Recreation rule which prohibited individuals in city parks after their “posted closing times” (*Davis* at 20-21). The rule contained “qualifying language stating that a person may disregard a park sign ‘upon order by a Police Officer or designated Department employee’ ” (*id.*). In response to the defendant’s argument that the People were required to plead that the exception did not apply (and therefore ultimately to disprove its application at trial), the Court said:

> “The main goal of the interpretative rules governing exceptions and provisos is to discover the intention of the enacting body. . . .
>
> “Here, we conclude that, as a matter of common sense and reasonable pleading (*see Devinny*, 227 NY at 401; *accord Santana*, 7 NY3d at 237), the City’s Parks Department did not intend that the People plead and prove that no police officer or Parks Department employee had authorized defendant to ignore a posted closing time. *Such information is uniquely within a defendant’s knowledge*, and *to require the People to plead and negate the existence of the relevant permission would require them to go to ‘intolerable lengths’* . . . . These efforts would serve ‘[n]o useful purpose of narrowing issues or giving notice,’ but would merely give rise to ‘technicalitie[s that] could be used belatedly to stifle an otherwise viable prosecution’ (*cf. People v Kohut*, 30 NY2d 183, 191 [1972]). As such, we hold that the Parks Department intended the police officer/department employee qualifying language to operate as a ‘proviso’ that must be pleaded and proved by the defendant” (*Davis* at 31-32 [emphasis added]; *see Devinny* at 401 [“In the case at bar if it should be held that an indictment must negative all of the cases

> referred to in the statute as not being unlawful, it would be drawn out to intolerable lengths"]).

Finally, it should be noted that on rare occasion the legislature will state expressly its intention on what is required of a statutory exception. (*E.g.* Public Health Law § 3396 [1] ["In any civil, criminal or administrative action or proceeding brought for the enforcement of any provision of (article 33, Controlled Substances), it shall not be necessary to negate or disprove any exception, excuse, proviso or exemption contained in this article, and the burden of proof of any such exception, excuse, proviso, or exemption shall be upon the person claiming its benefit"].)