



Public Defense Backup Center REPORT

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Defender News

High Courts Take up Eyewitness Testimony

Reports of wrongful conviction cases involving mistaken or false eyewitness testimony, and demands that the criminal justice system effectively address this issue, continue to accrete. A recent United Press International story is an example, one that discussed the case of recently-executed Troy Davis in the context of the United States Supreme Court’s grant of certiorari in a New Hampshire eyewitness case entitled *Perry v New Hampshire* (No. 10-8974). (www.upi.com/Top_News/US/2011/10/16/Under-the-US-Supreme-Court-Unreliable-eyewitnesses-put-defendants-on-death-row/UPI-70051318750200/.) Meanwhile, New York’s neighbor state remains on the cutting edge of judicial efforts to curb erroneous identifications—and convictions—based on faulty police identification procedures.

New Jersey Supreme Court Issues Guidelines

New Jersey, which in 2001 became the first state to establish modern police guidelines designed to prevent mistaken suspect identifications at lineups, has again made eyewitness identification news. Its Supreme Court, after a year-long review of police procedures used when witnesses are asked to identify suspects, has ordered changes to the way courts evaluate identification evidence at trial and instruct juries in eyewitness cases. (www.timesunion.com/news/article/NJ-court-orders-changes-to-witness-ID-evidence-2138866.php#ixzz1VxTdvOhJ; www.innocenceproject.org/Content/New_Jersey_Supreme_Court_Issues_Landmark_Decision_Mandating_Major_Changes_in_the_Way_Courts_Handle_Identification_Procedures.php.) The decision in *State v Henderson* (27 A3d 872), can be found online at <http://pdfserver.am.law.com/nj/Henderson-A8-08.pdf>.

As even a glance through the long opinion’s Table of Contents shows, the court examined scientific research on how memory works, setting out an array of variables relating to identification procedures and the individuals who are asked to make identifications through those pro-

cedures. The court examined the response of law enforcement and reform agencies across the nation to the science. Finding the scientific evidence presented on remand to be “both reliable and useful,” the court concluded that the “Manson/Madison Test Needs to be Revised,” referring to *Manson v Brathwaite*, 432 US 98 (1977) and *State v Madison*, 109 NJ 223 (1998). As summarized on Findlaw, *Henderson* held that where there is some evidence of police suggestiveness, the court must hold a full pretrial hearing and consider *all* relevant variables, and, if the identification is admitted, “juries must be given fact-specific instructions explaining factors that may impact reliability.” (<http://blogs.findlaw.com/decided/2011/08/eyewitness-id-evidence-changed-by-landmark-nj-supreme-court-decision.html>.)

Henderson could have a major impact, as some attorneys believe that obtaining instructions that point out problems with eyewitness identification evidence and provide a guide to evaluating it may be the most important legal tactic where the issue exists. Nationally-recognized eyewitness expert Gary Wells calls *Henderson* “arguably the most sophisticated and detailed reasoning and ruling in the history of any [US] court on the issue of eyewitness identification.” Wells is one of the authors of a newly-released American Judicature Society study, “A Test of the Simultaneous vs. Sequential Lineup Methods: An Initial Report of the AJS National Eyewitness Identification Field Studies.” (www.ajs.org/wc/pdfs/EWID_Print_Friendly.pdf.) Wells says *Henderson* “is likely to be much more significant than” *Perry v New Hampshire* (No. 10-8974), now pending in the nation’s highest court. *Perry*, he says, “is the wrong case and the issues in *Perry* are the wrong issues.” (www.psychology.ia

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state.edu/~glwells/New%20Hampshire%20v.%20Perry%20commentary%20-%20Wells.htm.)

New Hampshire ID Case to be Heard in US Supreme Court

The question presented in *Perry* is, as stated in the plain English version posted on SCOTUSblog: “In a criminal case, is a court required to exclude eyewitness identification evidence whenever the identification was made under circumstances that make the identification unreliable because they tended to suggest that the defendant was responsible for the crime, or only when the police are responsible for the circumstances that make the identification unreliable?” (www.scotusblog.com/case-files/cases/perry-v-new-hampshire.)

Some observers are pessimistic about the court finding that identification testimony cannot be considered whenever circumstances point to its unreliability regardless of whether those circumstances were created by state actors. A court that said in 2009 that inmates have no due process right to access for testing purposes DNA evidence that could prove their innocence is thought unlikely to say due process requires implementation of broad eyewitness identification reform. (*New York Times*, 8/23/2011.)

Eyewitness Identification Issues Are Tangled up with Brady

Mistaken identifications that occur due to circumstantial effects on perception and memory are only a part of the eyewitness testimony problem. Misidentifications deliberately created, advanced, or protected by prosecutors and police to ensure a conviction also make a shocking contribution to cases of wrongful convictions and overcharging. Individuals at the scene of a crime may identify another as the primary perpetrator to protect themselves from suspicion or to ingratiate themselves with the authorities for other purposes. They may do this spontaneously or after being pressured. If a fact-finder never hears that an eyewitness initially did not identify the defendant, or could not describe the perpetrator at all, that eyewitness’s confident in-court identification of the defendant will almost assuredly lead to conviction.

This term, the Supreme Court is hearing a Louisiana case, *Smith v Cain* (No. 10-8145), that involves the withholding of *Brady* material relating to identification testimony. Just why the court granted cert is a matter of conjecture, as the case seems heavily “fact-bound,” but it certainly bears watching.

Juan Smith was convicted of being one of several gunmen who killed five people in a home invasion. The following is some of the information that the prosecution did not disclose. The principle prosecution witness, who testified that Smith was the first gunman through the door, had initially said he could not describe any of the intrud-

ers; he first identified Smith months later, from a photo array, after being hospitalized for alcohol abuse. The State is claiming his initial statement was not “material.” The State also claims that an undisclosed hospital report containing that witness’s allegation that a detective harassed him to make an identification did not support an inferential “leap” that the harassment affected the reliability of the witness’s identification of Smith. As to other information that was withheld, the State downplays an undisclosed statement by a neighbor that he saw *masked* gunmen leaving the home, on the grounds that the neighbor was not inside where the shooting occurred. Similarly, the State dismisses the importance of an undisclosed denial by one of the gunmen, who was injured in the incident, that Smith was with him on the grounds that the gunman would reasonably do so to avoid being a “snitch.” (www.law.com, 10/4/2011.)

COA Again Addresses Admission of ID Expert Testimony

Very recently, the Court of Appeals issued another in a lengthening line of decisions relating to the admission of expert testimony about eyewitness identification. The trial court was found to have erred in denying the defendant’s motion in limine to secure expert testimony on several psychological factors affecting the accuracy of identification. As in prior opinions, the specific types of expert testimony that should have been admitted were parsed carefully based on the factual circumstances of the case. At the time of the initial denial of the motion in limine, the case turned on the accuracy of a single eyewitness identification.

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The court rejected the prosecution's contention that the need for expert testimony was nullified by the testimony at trial by other witnesses corroborating the accuser's identification. Proposed expert testimony concerning unconscious transference would have been relevant to the testimony of those corroborating witnesses, the high court found. See *People v Santiago*, 2011 NY Slip Op 7303 (10/20/2011). The case will be summarized in the next issue of the *REPORT*.

Cert Denied in Battles

The Supreme Court has denied certiorari in *Battles v State of New York* (No. 10-9465 [10/3/2011]). The case challenged the constitutionality of New York's discretionary persistent felony offender statutes under *Apprendi v New Jersey* (530 US 466 [2000]) and its progeny.

Courts Issue Rulings on Immigration/Criminal Law Issues

Recent court rulings that can affect cases in which the client is a foreign national include a Court of Appeals decision about direct appeals when a defendant has been deported and two federal rulings on New York laws as aggravated felonies for immigration purposes.

Don't Dismiss Appeals Just Because a Defendant is Deported

Just as the *REPORT* went to press, the Court of Appeals held that dismissal of a criminal appeal involving an involuntarily deported individual before Appellate Division review of the appeal is an abuse of discretion. See *People v Ventura*, 2011 NY Slip Op 07475 (10/25/2011).

New Rulings on New York Laws as Aggravated Felonies

Below are two rulings on whether certain New York offenses constitute aggravated felonies for federal immigration law purposes. For further information, contact NYSDA's Criminal Defense Immigration Project at (518) 465-3524 or (716) 913-3200.

3rd-Degree Promoting Prostitution is not an Aggravated Felony

Third-degree promoting prostitution (Penal Law 20.00 and 230.25) is not an aggravated felony, the Second Circuit held recently. New York's definition of "prostitution" is broader than that in the Immigration and Nationality Act (INA). The court found the applicable definition, INA 101(a)(43)(K)(i), includes only sexual intercourse for hire. Where a state criminal statute punishes

conduct falling outside the INA's definition, the state crime does not constitute an aggravated felony. See *Prus v Holder*, 10-599-ag (2d Cir 9/28/2011).

Although a conviction of third-degree promoting prostitution may not be defined as an aggravated felony, such a conviction can still result in a charge of inadmissibility pursuant to INA 212(a)(2)(D)(ii) in some circumstances.

Attempted 3rd-Degree Arson is an Aggravated Felony

The New York offense of attempted third-degree arson (Penal Law 110 and 150.10) was recently deemed an aggravated felony. In *Matter of Bautista*, 25 I&N Dec 616 (BIA 2011), the Board of Immigration Appeals rejected the contention of a man from the Dominican Republic that New York law sufficiently differed from the federal law in that the federal arson must involve property in interstate commerce (or owned by the federal government). The Board followed an earlier decision, *Matter of Vasquez-Muniz*, 23 I&N Dec 207 (BIA 2002), which noted that 8 USC 101(a)(43) specifies that the term "aggravated felony" applies to offenses described in the applicable portion of the Immigration and Nationality Act, whether such offenses were violations of federal or state law.

Be Sure You Have Graybook Correction of CPL 410.10(1)

The contents of subsection (1) of the Criminal Procedure Law 410.10 (Specification of conditions of the sentence) were misprinted in the 2011 "Graybook"—Lexis Nexis's *New York Criminal Statutes and Rules*, 2011 Edition. The correct language of the subsection is:

When the court pronounces a sentence of probation or of conditional discharge it must specify as part of the sentence the conditions to be complied with. Where the sentence is one of probation, the defendant must be given a written copy of the conditions at the time sentence is imposed. In any case where the defendant is given a written copy of the conditions, a copy thereof must be filed with and become part of the record of the case, and it is not necessary to specify the conditions orally.

The language that was printed in the Graybook came from CPL 410.80(1). Lexis has been notified of the error and indicated that it will be corrected in the 2012 edition.

Criminal and Family Law Legislative Changes

This issue features Al O'Connor's annual review of new and amended laws affecting criminal defense practice,

such as new crimes (*e.g.*, assault on a judge, prostitution in a school zone), amendments to the Criminal Procedure Law and the Vehicle and Traffic Law, and the extension of several sunset clauses. Also, several legislative changes relevant to the family court practitioner appear below.

Legislature Extends Sentencing Laws

Contrary to what you might have heard or been led to believe from the Graybook and similar legal publications, no changes in New York's sentencing laws went into effect on September 1, 2011. The Graybook notations concerning new laws going into effect on September 1st were based on the assumption that the 1995 Sentencing Reform Act and 1998's Jenna's Law would expire on that date. Needless to say, these laws, which ushered in determinate sentencing and post-release supervision, were extended by the legislature when they were originally scheduled to sunset in 2005. Since then, these laws and many others that have been coupled to them, have been extended every 2 years, most recently to September 1, 2013.

Legislative Changes to the Family Court Act and Related Laws

This year, the Legislature enacted several changes to the Family Court Act and related family law provisions, including:

- Chapter 592 (A.7794-A) Effective: January 12, 2012.
 - Amends Family Court Act (FCA) 437-a to give Family Court judges the authority to order all support obligors, not just respondents, who are unemployed to seek employment or to participate in job training, employment counseling, or other programs designed to lead to employment provided such programs are available. The law continues to exempt those who receive supplemental security income or social security disability benefits from employment-related orders;
 - Amends FCA 454(2) to authorize the court to impose employment-related orders on all child support obligors, not just those who are obligated to pay support for applicants or recipients of public assistance; and
 - Amends Social Services Law (SSL) 111-h(2) by replacing the word "respondent" with the phrase "support obligor."
- A.7836-A (passed Senate & Assembly; awaiting delivery to the governor) Effective: upon governor's signature—creates a new FCA article 10-C (Destitute Children)

This bill was recommended by the Chief Administrative Judge's Family Court Advisory and Rules Committee. In its 2011 report (www.nycourts.gov/ip/

judiciary.legislative/2011-FamilyCourt-ADV-Report.pdf), the Committee noted that the repeal of SSL 392 in 2005 "left destitute children without a procedural vehicle for placement into foster care, when necessary, and for periodic review of that placement." Social Services Law 371(3) defines destitute child as "a child who, through no neglect on the part of its parent, guardian or custodian, is" destitute or homeless; wanting or suffering due to a lack of sufficient food; under 18 years of age who is absent from his/her legal residence without the consent of a parent, legal guardian, or custodian; under 18 years of age who is without a place of shelter where supervision and care are available; or a former foster care youth under 21 years of age who was previously in the custody of a local department of social services or other authorized department and who was discharged from foster care due to failure to consent to continuing placement, who has returned to foster care under FCA 1091.

The bill amends FCA 249 and 262 to add article 10-C proceedings to the list of family court proceedings in which children and respondents, parents or other persons legally responsible, foster parents, or other persons having physical or legal custody of the child have a right to counsel. The Report on Legislation by the Family Court & Family Law Committee of the New York City Bar states that the bill "appropriately prescribes attempts to locate and serve missing parents . . . [and] incorporates preliminary proceedings to determine whether a child can be safely returned home in those rare instances when a parent appears. This is a necessary component since the placement of a child, even one who is destitute, into the custody of a social services agency implicates a parent's liberty interest in the care of her child." (www2.nycbar.org/pdf/report/uploads/20072150-ReportonA.7836-AS.5694-Arechildrenwhocomeinlocalsocialservicesdistricts.pdf.)

The bill also repeals FCA 1059, which, as noted by the Family Court Advisory and Rules Committee, "is anachronistic, conflicts with more recent legislation regarding abandoned children and erroneously implies that termination of parental rights proceedings should be routinely filed in situations involving destitute and abandoned children."

- Chapters 45 (A.6823) & 377 (A.8108-A)—amendments to Social Services Law sections related to the family assessment response (FAR) program (established by Chapter 452 of the Laws of 2007).
 - According to the sponsor's memo, Chapter 45 makes "permanent legislation permitting social services districts, with authorization from the Office of Children and Family Services (OCFS), to utilize a differential response program for appropriate reports of abuse

and maltreatment, and would make New York City eligible to participate in such program.”

—Chapter 377 authorizes disclosure of FAR reports/ records to the subject of the report and to the family court in certain circumstances and establishes provisions as to redisclosure of FAR records.

—A January 2011 report on the implementation, initial outcomes, and impacts of the family differential response program is available on the Office of Children and Family Services website at www.ocfs.state.ny.us/main/reports/CPS%20Differential%20Response%20Evaluation%20Final%20Report_%20Jan%202011.pdf.

• Chapter 11 (A.627) Effective: April 13, 2011—amendments to SSL article 6-A (Domestic Violence Prevention Act).

—Amends SSL 459-a(1) by specifically including in the definition of victim of domestic violence acts of aggravated harassment, sexual misconduct, forcible touching, sexual abuse, stalking, criminal mischief, criminal obstruction of breathing or blood circulation, and strangulation; and

—Amends SSL 459-a(2) by adding to the definition of family or household members unrelated persons “who are or have been in an intimate relationship regardless of whether such persons have lived together at any time.”

Additional information about these legislative changes and others is available at www.nycourts.gov/courts/ad4/AFC/Handouts/Supplemental%20Handouts/Solomon-ChildWelfareUpdate-08-23-11.pdf (Child Welfare Caselaw/Legislative Update, Gary Solomon, The Legal Aid Society, Juvenile Rights Practice) and www.nysac.org/legislative-action/documents/2011LegislativeSession.pdf.

Generations of Defenders Came Together: NYSDA’s 44th Annual Meeting and Conference

Forty-eight years after *Gideon*, NYSDA’s 2011 Annual Meeting and Conference brought together lawyers whose efforts to fulfill its mandate across the years deserve praise and encouragement. Lawyers already in practice when *Gideon* came down faced—and helped bring about—a paradigm shift. Lawyers who entered the profession when public defense programs were already established helped shape those programs and identify the need for further change. And lawyers still in the early part of their careers today are working to provide quality representation in a time of diminishing resources and, we hope, a shift to a newer and better public defense para-

digim that depends on their example and leadership to come into being.

Clients and their lawyers face challenges today that did not exist in 1963. Immigration consequences of criminal convictions, harsh mandatory sentences, increased prosecutorial power, and a punitive culture in criminal and family court alike have raised the stakes. Promised resources never appeared, or have been withdrawn. In the midst of difficult times, coming together to celebrate good work was especially satisfying.

Pittari and Shapiro Receive Service of Justice Award

Two attorneys who have done much for clients and for the Association received a Service of Justice award this year. Middletown attorney Norman Shapiro, a founding member of the Association, recently stepped down from NYSDA’s Board of Directors where he had served as a Vice President since 1980. Stephen J. Pittari, who joined NYSDA three years after Shapiro’s first election as an officer and became a long-time Board member, recently retired as head of the Westchester County Legal Aid Society. Both have contributed a great deal of time to NYSDA over the years and each has—in quite different ways—encouraged his peers and those who joined the profession after him to offer the best possible representation to public defense clients. In their acceptance speeches, each offered recollections and challenges.

Shapiro noted that in the beginning, the Association, like the legal profession itself, was a male bastion that now benefits from the contributions of women as well. Fittingly, recognition was given on the same evening to a young woman for her work on behalf of public defense clients.

Toole and Horton Feted

Heather Toole is a staff attorney in the Ulster County Public Defender Office who represents people in family court matters such as custody/visitation, guardianship, family offense, paternity, neglect, and support violation cases. She received the 2011 Kevin M. Andersen Memorial Award, created by the Genesee County Public Defender’s Office. The Andersen Award honors an attorney who has been in practice less than fifteen years, practices in the area of indigent defense, and exemplifies the sense of justice, determination, and compassion that were Kevin’s hallmarks.

The Wilfred R. O’Connor Award, created by NYSDA’s Board to recognize a public defense attorney in practice fifteen or more years who exemplifies the client-centered sense of justice, persistence, and compassion that characterized Bill’s life, was presented to Genesee County Public Defender Gary Horton. Horton works to meet client needs in many client-centered ways, such as pushing to

ensure that the local drug treatment court really helps clients and advocating for quality community-based mental health services.

For more information, see the press release at <http://readme.readmedia.com/Heather-Toole-Gary-Horton-Stephen-Pittari-and-Norman-Shapiro-Receive-Awards-at-NYSDA-Conference-in-Saratoga/2883699>.

Following the awards, Bill Leahy of the Indigent Legal Services (ILS) Office gave a keynote address. He set out the host of problems that the ILS Office and Board were created to address, barriers to solving those problems, and the determination with which he and his staff are taking on their duties.

Conference CLE

The continuing legal education offered at the conference included information for long-time lawyers and those newer to practice. For example, Marika Meis and Justine Olderman of the Bronx Defenders brought new energy and analysis to the ages-old topic of bail advocacy. They provided material basic enough for neophyte attorneys and a motivating message for everyone: while judges typically set only two of nine forms of bail that are legally available, don't forget that in a given case, one of the little-used types might provide a way to free your client. Hard questions and inspiration were presented by Don Thompson, speaking about Guilty Pleas and Wrongful Convictions, while Ellen Yaroshefsky offered ethical insights about difficult scenarios such as representing the competent but mentally ill client. The program was rounded out by ever-popular updates on Court of Appeals and United State Supreme Court decisions; a session focusing on the "fading" right to counsel; another on what criminal defense attorneys need to know about immigration detainers; and a look by Marvin Schechter at "Disturbing and Emerging Trends" in forensic science evidence.

Forensic Science: Take Nothing for Granted

In the two years since the National Academies of Science Press published "Strengthening Forensic Science in the United States: A Path Forward," lawyers have tried with varying success to challenge the validity of entire forensic areas, the competence of particular forensic "scientists," and the admissibility of particular evidence on a variety of grounds. Marvin Schechter's materials from his Annual Conference presentation, noted above, are one source of information on developments in this area. Others include:

- *Reference Manual on Scientific Evidence* has recently been released in a third edition by The National

Research Council. Developed to guide trial judges, the manual now includes chapters on neuroscience, mental health, and forensic science. For more information, see www.nap.edu/catalog.php?record_id=13163.

- "Shepardizing Science: Is an Article Fact or Fiction?" was written by NYSDA's Director of Legal Information Services, Ken Strutin, for the *New York Law Journal*. The article notes that when research misconduct is uncovered after initial peer review failed to note it, redressing the impact of publication is difficult. Other authors may continue to cite a study after it has been retracted. Strutin notes that "quality control of scholarly literature would benefit from something resembling a Shepard's for scientific research," and that in the absence of such a tool, "an expert in the citation analysis of scientific literature can play a crucial role in litigation." (www.law.com, 9/27/2011.)
- *The Fingerprint Sourcebook* is a new publication released by the National Institute of Justice. (www.nij.gov/pubs-sum/225320.htm.) It contains several chapters on various aspects of fingerprint identification, written by different authors. Attorneys may want to keep in mind when consulting the *Sourcebook* that its preface lauds the FBI's leadership in this area; the *REPORT* has noted past instances where the FBI's forensic "leadership" has proven fallible. See, e.g., the *REPORT*, Vol. XX, No. 4 [Aug-Oct 2005], pp. 1-2. Chapter 15 of the *Sourcebook*, "Special Abilities and Vulnerabilities in Forensic Expertise," was added "because of contemporary importance placed on that research," according to the preface. It may be of particular interest to attorneys. Among concepts that might prove helpful in examining experts are:
 - "it is incumbent upon practicing examiners to treat their professional practice as a scientific endeavor in which they continue to question all aspects of their examinations, gather data on the effectiveness and accuracy of their decisions, and refine training and best practices procedures to avoid cognitive contamination and optimize their decision-making;"
 - "continuous blind testing of expert performance is an important aspect that is not currently implemented in most places;"
 - initial analysis of the latent print can be affected—in positive and negative ways—by seeing the inked "tenprint" to which the latent print is to be compared; and
 - new technologies may eliminate some cognitive and psychological issues involved in fingerprint analysis and exacerbate or even create others.
- "Microfluidics' Could Cut DNA Analysis Time for Police" is a blog post describing a new method developed in Britain, and now coming to Baltimore, for pro-

cessing DNA samples that would allow police to test evidence in as little as three hours. (www.thecrimereport.org/news/crime-and-justice-news/2011-09-balt-dna.) If such procedures come to New York, attorneys here will have to consider challenging both the underlying procedure and its implementation and application in individual cases. While some DNA analysis procedures are widely accepted, new ones should not be accepted without rigorous inquiry, and the potential for human error—deliberate and accidental—may increase if machines are installed in police departments for nearly-instantaneous testing of DNA.

- *State v Wright*, 253 P3d 838 (Mont 2011), is a decision from earlier this year rejecting a defense claim that false and misleading expert testimony contributed to a conviction. It illustrates how difficult DNA challenges can be. Expert testimony that purports to link a client (or an accuser) to evidence in the case involves difficult scientific and sometimes statistical precepts. The abstract of an essay on the *Wright* decision says that the Montana Supreme Court failed to adequately articulate or analyze the alleged error. That error, the “expected value fallacy” “consists of thinking that the expected number of matching DNA profiles necessarily is the only plausible number of such profiles,” the abstract states. (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1921082.)

Forensic Psychology Materials

New resources are also available for forensics outside the realm of physical evidence. The American Psychological Association has approved, after a nine-year revision process, new *Specialty Guidelines for Forensic Psychology*. Approved on August 3, 2011 and scheduled for publication in the *American Psychologist* journal, the guidelines are available in the meantime at www.ap-ls.org/aboutpsychlaw/SGFP_Final_Approved_2011.pdf.

A detailed account of how an impressive legal team used psychologists and others to derail a recent sex abuse prosecution reminiscent of infamous cases like the McMartin Preschool case in the 1980s was published in *The Champion* (magazine of the National Association of Criminal Defense Lawyers [NACDL]) at the beginning of this year. The article is available at www.nacdl.org/Champion.aspx?id=14692.

Nassau Crime Lab Saga Continues

Nassau County District Attorney Kathleen Rice has announced that testing by the now-closed Nassau County Police Department crime lab will be reviewed in misdemeanor as well as felony drug cases. The number of cases requiring retesting and the time span involved has not yet been determined. (www.law.com, 10/17/2011.) Other fall-

out from the on-going crime lab scandal includes the release of a man serving a felony prison sentence; he received a new, misdemeanor sentence of time served after only 0.52 grams of material (0.39 grams of that pure cocaine) was found to be available for re-testing. The amount initially alleged to have been found was 2.521 grams (1.696 grams of which was allegedly found to be pure cocaine). A news account reported one expert’s opinion that “it’s unlikely that the lab used 77 percent of the cocaine during the initial test.” (*Newsday*, 10/4/2011.)

In a separate court proceeding relating to the Nassau lab contretemps, an attorney with the Division of Criminal Justice Services testified that a computer file had been found containing an unsigned letter dated in 2008 from DCJS to several Nassau officials. The letter predates the time that officials such as former police Commissioner Lawrence Mulvey have admitted knowing about problems in the lab. No proof that the DCJS letter was sent was offered. (*Newsday*, 9/1/2011.)

The Nassau lab was put on probation in August 2006 by the American Society of Crime Laboratory Directors Laboratory Accreditation Board (ASCLD/LAB), which found critical errors at the lab as far back as September 2005. According to one account, “ASCLD/LAB had so many concerns that it sent back inspectors in April 2007 for an interim check of the lab that was not part of the regular inspection cycle.” The probation was lifted in 2007, but in 2010 the lab was again placed on probation—the only one in the country. (*Newsday*, 8/14/2011.) Given that North Carolina based ASCLD/LAB is believed by some to be too “cozy” with at least one of the labs it was overseeing, its actions with regard to the Nassau lab stand out. One article indicates that ASCLD/LAB allowed lab supervisors in a North Carolina facility to select the cases subject to review; a later independent audit report, triggered by a case of wrongful conviction, found a pattern of “selective exclusion of test results” in lab reports there. (*The Champion*, May 2011.)

As the Nassau and many other lab scandals show, defense lawyers can take nothing for granted with regard to lab reports, results, and testimony.

Updates on Federal and Local Sex Offender Registration Laws

New York Will Not Implement Federal Adam Walsh Act

Asserting that New York State’s existing laws and risk assessment method provide effective protection against sexual predators, the Cuomo Administration has declined to implement the Sex Offender Registration and Notification Act (SORNA) provisions of the Adam Walsh Act. On the eve of the July 27 deadline, only 14 states, nine

tribes, and Guam had “substantially implemented” SORNA. Difficulties plague the states that have; Ohio has faced over 7,000 legal claims and years of litigation due to its SORNA laws. The effects of tight registration requirements have been debated, and many feel the fiscal and social costs outweigh any benefits of SORNA, while some argue the provisions have actually been detrimental to the result they seek. Among the differences between New York laws and SORNA, many of which illustrate deep public policy divisions, is the federal requirement that many more juveniles register as sex offenders than are required to do so under New York law. (www.law.com, 10/7/2011; www.cnn.com/2011/CRIME/07/28/sex.offender.adam.walsh.act/; www.theatlantic.com/nation/archive/2011/07/overzealous-sex-offender-laws-harm-public-safety/241917/.)

Saratoga Sex Offender Law Latest to be Overturned

In the past two years, a number of decisions have come down involving local residency and occupational restrictions on sex offenders, including some in recent months. These decisions rest on the doctrine of pre-emption: the local laws cannot be enforced as they are preempted by statewide legislation creating a scheme or plan to regulate sex offenders in New York. This issue arises when a locality attempts to restrict the activities or residence of sex offenders to a greater degree than does the state law.

For example, Saratoga County Local Law 5-2006 prohibited all sex offenders from living and working within 1,000 feet of schools, parks, pools, etc. Contrast this with the state-wide version which limits such restrictions to persons on parole or probation designated Level 3 sex offenders or, regardless of risk level score, persons who were convicted of an offense involving a minor. *See* Executive Law 259-c(14); Penal Law 65.10(4-a), (5-a); *People v Burnette*, Index No. 20104397 (County Ct, Saratoga Co 7/12/2011). Other local ordinances have sought to require additional spatial limitations such as a 2,000-foot restriction from certain areas. The result of such on-upmanship on the part of local legislators is a confusing and overlapping collage of state and local rules, difficult to uncover or decipher, leading to a regressive pattern of re-arrest and conviction, and likely to drive affected offenders from locality to locality or underground, making supervision more difficult or impossible.

Fortunately, courts are stepping in. In July, Saratoga County Judge J. Jerry Scarano struck down that local ordinance. He concluded that:

[T]he New York State Legislature has enacted a comprehensive and detailed regulatory scheme pertaining to sex offenders which clearly evinces its intent to occupy the entire field. Thus, its intent

to preempt any local law regulating the same subject matter may be inferred.

Earlier this year, District Court Judge Valerie Alexander struck down Nassau County Local Law 4-2006, which barred registered sex offenders from, among other things, living within a thousand feet of a school. *See People v Diack*, Docket No. NA 29159/09 (District Ct, Nassau Co 3/18/2011). Provisions in Rockland, Rensselaer, and Albany Counties had been struck under the pre-emption doctrine. (*See* the *REPORT*, Vol. XXIV, No. 1 [Jan-Feb 2009], p. 4 and Vol. XXIV, No. 3 [June-Aug 2009], p. 4.)

A federal court has agreed with state court rulings that pre-emption applies. In June, a judge in the Western District ruled that a City of Geneva Municipal Code provision had been pre-empted by state law and that federal constitutional challenges to the law therefore did not need to be considered. *See Terrance v City of Geneva*, No. 10-CV-6450T (WDNY 6/28/2011).

NYSDA has been a leader on this issue. Staff Attorney Al O'Connor’s article in the *New York Law Journal* (11/24/2008), proposing the pre-emption doctrine as a viable strategy to challenge local sex offender ordinances in New York, has been cited in several of the court opinions.

Clients should not have to live under the threat of arrest on the basis of oppressive, illegal local residency or occupational restrictions. For a copy of the preemption decisions and other materials, attorneys should contact the Backup Center.

Authenticating Facebook Evidence Made Harder in Connecticut

The Connecticut Court of Appeals has held that a trial court properly refused to admit into evidence a computer printout purporting to contain Facebook messages from a witness to a defendant where the witness testified that she did not send the messages and that her Facebook account had been “hacked.” *See State v Eleck*, 130 Conn App 632 (2011). The court, on the one hand, said that “[a]n electronic document may continue to be authenticated by traditional means such as the direct testimony of the purported author or circumstantial evidence of ‘distinctive characteristics’ in the document that identify the author.” However, the court said, where an issue was raised as to whether a third party may have sent the messages, “it was incumbent on the defendant, as the proponent, to advance other foundational proof to authenticate that the proffered messages did, in fact, come from [the witness] and not simply from her Facebook account.”

Defense lawyers who seek to introduce Facebook or similar social media site evidence following rulings such as the one in *Eleck* will have to consider getting someone from the social media entity to testify. And even if the social media site does not successfully resist a subpoena,

it may not be able to conclusively say whether an account was compromised, allowing unauthorized persons to use it.

Courts around the country that have considered the introduction of social media evidence have split as to the requirements. (*Connecticut Law Tribune*, 9/5/2011.)

Recent New York State Bar Opinions on Conflicts of Interest; Limiting Scope of Representation

The New York State Bar Association's Committee on Professional Ethics has released several ethics opinions this year applying the new Rules of Professional Conduct to questions of criminal and family court conflicts of interest, the propriety of limiting the scope of representation in a criminal case, and the collection of contingency fees in cases involving violations of the Vehicle and Traffic Law. The full text of the opinions listed below and other Committee opinions are available on the State Bar's website, www.nysba.org.

• **Conflicts of Interest**

Opinion 859 (3/25/2011)—Digest: "A part-time Department of Social Services attorney's representation, in a criminal proceeding, of a private client who is also a respondent in unrelated child abuse and neglect proceedings brought by Social Services, creates an incurable conflict of interest that is imputed to the other members of the Social Services legal unit."

Opinion 862 (5/10/2011)—Digest: "A part-time Assistant Public Defender cannot, in his private practice, represent a client that another full-time or part-time Assistant Public Defender in the same Public Defender office cannot represent because of a conflict of interest unless the conflict can be and is waived."

Opinion 874 (7/20/2011)—Digest: "An attorney who represents criminal defendants in a town court may not accept a position as a part-time prosecutor of vehicle and traffic offenses."

• **Scope of Representation**

Opinion 856 (3/17/2011)—Digest: "A lawyer may limit the scope of representation of a client provided that the client gives informed consent to the limitation, the scope of the representation is reasonable under the circumstances, and the limitation is not prejudicial to the administration of justice. However, even if the original limitation is permissible, the ethical obligation to represent the client may extend beyond the initial limitation contemplated by the lawyer and client if withdrawal from the representation requires court permission and the court withholds or denies that permission." The question posed to the Committee was whether a lawyer

may limit representation of a client in a criminal case to representation for arraignment purposes only.

• **Contingency Fees**

Opinion 880 (10/6/2011)—Digest: "Prohibition of contingent fees in criminal matters is inapplicable to simple traffic infractions which are expressly deemed non-criminal; violations of the Vehicle and Traffic Law which constitute misdemeanors or felonies are subject to the prohibition on contingent fees. In agreements to provide legal services for such violations and in advertising related thereto, it must be clear that contingent fees are not available with respect to misdemeanor or felony charges. In criminal matters, an agreement to refund a fee paid in advance upon the occurrence of a certain outcome may be deemed a prohibited contingent fee."

Legal Action Center Has New Publications

The Legal Action Center (LAC) in New York City has a new, updated version of its popular publication on rap sheets. *Your New York State Rap Sheet: A Guide to Getting, Understanding & Correcting Your Criminal Record* (2011) is available on their website. (www.lac.org/doc_library/lac/publications/YourRapSheet.pdf.)

Also available on LAC's website (www.lac.org) is its newest brochure, *Changes to the Rockefeller Drug Laws and What They Mean for You*. This guide explains the 2004, 2005, and 2009 amendments to the Rockefeller Drug Laws (RDL).

Other organizations providing information on the drug law reforms include the Center for Community Alternatives; their website offers a blog, <http://makingreformreality.blogspot.com/>, and a webpage dedicated to the defense of drug cases, focusing on the RDL reforms, with links to recent resentencing decisions, sample pleadings, and other items. (www.communityalternatives.org/publications/drugCases.html.)

The *REPORT* has published articles by CCA on RDL changes. For example, the last issue contained a CCA practice tip on "Advocating for Conditional Sealing—CPL § 160.58," and the issue before that included "CPL Article 216 Judicial Diversion Issues: Strategies for Effective Advocacy." NYSDA's legislative and caselaw updates have also included RDL reform developments. In this issue, several case summaries address application of RDL amendments. See *People v Milton*, *People v Jenkins*, and *People v Anonymous* (1st Dept) and *People v Carter* and *People v Devivo* (3rd Dept), pp. 21, 22, 29, 31.

(continued on page 35)

CONFERENCES & SEMINARS

Sponsor: New York County Lawyers' Association
Theme: The Myth of Parental Alienation Syndrome and Its Impact on Women in Child Custody Cases
Date: December 8, 2011
Place: New York City
Contact: NYCLA: tel (212) 267-6646; fax (212) 267-1745; website www.nycla.org

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Criminal Defense Trial Tactics 2011
Date: December 9, 2011
Place: Nyack, NY
Contact: NYSACDL: tel (212) 532-4434; fax (888) 239-4665; website www.nysacdl.org

Sponsor: National Association of Criminal Defense Lawyers
Theme: 32nd Annual Advanced Criminal Law Seminar
Dates: January 15–20, 2012
Place: Aspen, CO
Contact: NACDL: tel (202) 872-8600 x636 (Gerald Lippert); fax (202) 872-8690; email glippert@nacdl.org; website www.nacdl.org/meetings

Sponsor: National Association of Criminal Defense Lawyers
Theme: Challenging Charges of Sexual Assault—2012 Midwinter Meeting & Seminar
Dates: February 16–19, 2012
Place: Ft. Lauderdale, FL
Contact: NACDL: tel (202) 872-8600; fax (202) 872-8690; website www.nacdl.org/meetings

Sponsor: National Legal Aid & Defender Association
Theme: Appellate Defender Training
Dates: February 16–19, 2012
Place: Baltimore, MD
Contact: NLADA: tel (202) 452-0620; fax (202) 872-1031; website www.nlada.org/Training

Sponsor: National Legal Aid & Defender Association
Theme: 2012 Life and Liberty in the Balance: A Capital and Criminal Defense Litigation and Investigation Conference
Dates: March 3–6, 2012
Place: St. Louis, MO
Contact: NLADA: tel (202) 452-0620; fax (202) 872-1031; website www.nlada.org/Training

Sponsor: **New York State Defenders Association**
Theme: **26th Annual Metropolitan Trainer**
Date: **March 10, 2012**
Place: **New York City**
Contact: **NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org**

Sponsor: **New York State Defenders Association**
Theme: **45th Annual Meeting and Conference**
Dates: **July 22–24, 2012**
Place: **Saratoga Springs, NY**
Contact: **NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org** ☞

Job Opportunities

The Constitution Project, a nonprofit public policy organization based in Washington DC, seeks a **Policy Counsel** for its Rule of Law Program. The Rule of Law Program addresses threats to the rule of law and to our constitutional safeguards, including national security policies developed after September 11 that reduce transparency and accountability and undermine fundamental principles of fairness and due process. The Policy Counsel will work with high-level experts to develop consensus reports and recommendations for policy reforms, and promote the reforms through advocacy and public education campaigns. The Policy Counsel will also work with major law firms on amicus briefs supporting the Project's policy goals in the courts, with allies in the advocacy community, and with Members of Congress and congressional staff in support of

those goals. A competitive salary and benefits are available. Applicants should have: a law degree from an accredited law school; at least 3 years' experience in legal and/or policy work; experience with policymaking or policy analysis; outstanding research and writing skills; a proven ability to work as a member of a team; and the ability to manage competing demands. EOE. We welcome candidates who contribute to the diversity of our staff. For more information and how to apply, visit www.constitutionproject.org/pdf/10_05_11_JobDescriptionROL_PolicyCounsel.pdf

The Office of the State Public Defender is looking for an experienced manager with a passion for state service and the ability to lead a complex organization. The Chief Public Defender works with the

Public Defender Commission to manage the statewide Public Defender System which delivers assigned counsel services in State, County, Municipal, and City courts. This position requires a JD from an ABA accredited law school. Candidates must be eligible to sit for the Montana Bar Exam although current admission to the Montana Bar is preferred. Applicants should have at least six years of practical experience in law, preferably in litigation of criminal and civil law, and five years of progressively responsible management and supervisory experience. The State of Montana is committed to equal opportunity, nondiscrimination, and harassment prevention in all aspects of employment. Deadline: November 30, 2011. For more information, visit <http://publicdefender.mt.gov/VacancyAnn.pdf>. ☞

2011 Legislative Review

By Al O'Connor*

Penal Law

- **Chap. 148 (A.409-D) (New crime—assault on a judge). Effective: November 17, 2011.**

Establishes the new crime of assault on a judge:

Penal Law § 120.09 Assault on a judge.

A person is guilty of assault on a judge when, with intent to cause serious physical injury and prevent a judge from performing official judicial duties, he or she causes serious physical injury to such judge. For the purposes of this section, the term judge shall mean a judge of a court of record or a justice court.

(Class C violent felony)

- **Chap. 26 (S.1882) (Sexual abuse in the first degree — age amendment). Effective: November 1, 2011.**

Adds a new subdivision (4) to Penal Law § 130.65 to provide that a person is guilty of sexual abuse in the first degree (Class D violent felony) when, being 21 years of age or older, he or she subjects a person under the age of 13 to sexual contact.

- **Chap. 191 (S.1313-B) (Prostitution adjacent to schools and within the direct view of children). Effective: November 17, 2011.**

Establishes the new crime of prostitution in a school zone (Penal Law § 230.03 — Class A misdemeanor) and promoting prostitution in a school zone (Penal Law § 230.19 — Class E felony). The new offenses apply to defendants who are 19 years of age or older and engage in prostitution or promoting prostitution in a school zone during school hours, and when the defendant knows or reasonably should know the prostitution activity is “within the direct view of children attending such school.” School zone is defined as follows:

- (a) in or on or within any building, structure, athletic playing field, playground or land contained within the real property boundary line of a public or private elementary, parochial, intermediate, junior high, vocational, or high school, or
- (b) any public sidewalk, street, parking lot, park, playground or private land, located immediately adjacent to the boundary line of such school [Penal Law § 230.03(2)].

- **Chap. 205 (S.5455-B) (Sexual contact between employees and inmates). Effective: November 1, 2011.**

* *Al O'Connor is a Backup Center Staff Attorney. He coordinates the Association's amicus and legislative work and annually summarizes legislation relevant to criminal defense.*

Amends Penal Law § 130.05(3)(e) to add to the list of employees subject to criminal prosecution for having sexual contact with prisoners or parolees to whom they are not married. The section now applies to employees providing “institutional parole services or direct supervision to” inmates and those released to community supervision. (Also amends Penal Law § 130.05 pertaining to employees of the Office of Children and Family Services)

- **Chap. 215 (S.5623) (Promoting prostitution). Effective: November 17, 2011.**

Amends Penal Law § 230.20 by adding a new subdivision pertaining to distribution of obscene promotional material.

Penal Law § 230.20(2)

A person is guilty of promoting prostitution in the fourth degree when he or she knowingly:

With intent to advance or profit from prostitution, distributes or disseminates to ten or more people in a public place obscene material as such terms are defined by subdivisions one and two of section 235.00 of this title, or material that depicts nudity, as such term is defined by subdivision one of section 245.10 of this part.

- **Chap. 130 (A.4769-C) (Controlled substances — “bath salts”). Effective: August 14, 2011.**

Adds “bath salts” containing 4- methylmethcathinone (also known as mephedrone) and methylenedioxypropyrolerone (also known as MDPV) to the list of Schedule I controlled substances [Public Health Law § 3306(f)(9), (10)].

- **Chap. 327 (S.2510-B) (Obstruction of governmental duties by means of a bomb). Effective: November 1, 2011.**

Establishes the new crime of obstruction of governmental duties by means of a bomb, destructive device, explosive, or hazardous substance.

Penal Law § 195.17

A person is guilty of obstruction of governmental duties by means of a bomb, destructive device, explosive, or hazardous substance when he or she, in furtherance of a felony offense, knowingly and unlawfully installs or causes to be installed a bomb, destructive device, explosive, or hazardous substance, in any object, place, or compartment that is subject to a search so as to obstruct, prevent, hinder or delay the administration of law or performance of a government function.

(Class D felony).

➤ **Chap. 528 (A.7698) (Disruption of a religious service — buffer zone). Effective: March 21, 2012**

Extends from 100 to 300 feet the no-disruption buffer zone around religious services, funerals, burials and memorial services.

Penal Law § 240.21

A person is guilty of disruption or disturbance of a religious service, funeral, burial or memorial service when he or she makes unreasonable noise or disturbance while at a lawfully assembled religious service, funeral, burial or memorial service, or within three hundred feet thereof, with intent to cause annoyance or alarm or recklessly creating a risk thereof.

(Class A misdemeanor).

➤ **Chap. 313 (A.7811-B) (Unauthorized recording). Effective: November 1, 2011.**

Amends Penal Law § 275.00(6) to redefine a “recording” for purposes of anti-piracy laws:

6. “Recording” means an original phonograph record, disc, tape, audio or video cassette, wire, film, *hard drive, flash drive, memory card, or other data storage device* or any other medium on *which* such sounds, images, or both sounds and images are or can be recorded or otherwise stored, or a copy or reproduction that duplicates in whole or in part the original. [italicized words are new].

The legislation also amends Penal Law § 60.27 to provide that a victim of unauthorized recording offense includes “any owner or lawful producer of a master recording, or a trade association that represents such owner or lawful producer”

➤ **Chap. 357 (S.5658) (Criminal possession of a weapon in the fourth degree — antique weapons). Effective: January 30, 2012.**

Adds antique firearms, black powder rifles, black powder shotguns, and any muzzle-loading firearm to the list of firearms that may not be lawfully possessed by a person with a felony conviction or conviction for a serious offense under Penal Law § 265.01 (4).

➤ **Chap. 8 (S.2510-B) (Gambling device — definition). Effective: March 25, 2011.**

Amends Penal Law § 225.00(7-a) to clarify that “[a] machine which awards free or extended play is not a gambling device merely because such free or extended play may constitute something of value provided that the outcome depends on the skill of the player and not in a material degree upon an element of chance.”

Criminal Procedure Law

➤ **Chap. 154 (A.2063-C) (Good Samaritan exception to criminal liability for certain drug crimes when reporting a suspected overdose). Effective: September 18, 2011.**

This legislation confers immunity from prosecution for certain crimes when a person seeks emergency assistance for someone who is experiencing a drug or alcohol overdose. The immunity shall also apply when a person seeks emergency help for himself or herself. If the police discover or otherwise obtain evidence of a drug or alcohol related crime when responding to the emergency, the person who sought medical assistance will have immunity from prosecution for most drug crimes, possession of alcohol by persons under age 21, and drug paraphernalia offenses. Immunity will not apply to Class A-I drug offenses, or to drug sales “involving sale for consideration or other benefit or gain.” However, the legislation establishes an affirmative defense for drug or marijuana sale crimes (except A-I and A-II felonies) when the defendant sought the emergency assistance, and has not previously been convicted of a Class A-I, A-II or B felony drug crime.

CPL § 220.78 Witness of victim of drug or alcohol overdose.

1. A person who, in good faith, seeks health care for someone who is experiencing a drug or alcohol overdose or other life threatening medical emergency shall not be charged or prosecuted for a controlled substance offense under article [220] or a marijuana offense under article [221] of this title, other than an offense involving sale for consideration or other benefit or gain, or charged or prosecuted for possession of alcohol by a person under the age of twenty-one years under section [65-c] of the alcoholic beverage control law, or for possession of drug paraphernalia under article [39] of the general business law, with respect to any controlled substance, marijuana, alcohol or paraphernalia that was obtained as a result of such seeking or receiving of health care.

....

3. Definitions. As used in this section the following terms shall have the following meanings:

(a) “drug or alcohol overdose” or “overdose” means an acute condition including, but not limited to, physical illness, coma, mania, hysteria or death, which is the result of consumption or use of a controlled substance or alcohol and relates to an adverse reaction to or the quantity of the controlled substance or alcohol or a substance with which the controlled substance or alcohol was combined; provided that a patient’s condition shall be deemed to be a

drug or alcohol overdose if a prudent layperson, possessing an average knowledge of medicine and health, could reasonably believe that the condition is in fact a drug or alcohol overdose and (except as to death) requires health care.

(b) "Health care" means the professional services provided to a person experiencing a drug or alcohol overdose by a health care professional licensed, registered or certified under title eight of the education law or article thirty of the public health law who, acting within his or her lawful scope of practice, may provide diagnosis, treatment or emergency services for a person experiencing a drug or alcohol overdose.

➤ **Chap. 58 (S.2808-D) (ACODs prohibited for commercial license holders). Effective: May 30, 2011.**

Adds a new subdivision 9 to CPL § 170.55 to prohibit courts from issuing adjournments in contemplation of dismissal for VTL offenses (other than parking-related ones) to holders of commercial licenses:

CPL § 170.55(9):

Notwithstanding any other provision of this section, a court may not issue an order adjourning an action in contemplation of dismissal if the offense is for a violation of the vehicle and traffic law related to the operation of a motor vehicle (except one related to parking, stopping or standing), or a violation of a local law, rule or ordinance related to the operation of a motor vehicle (except one related to parking, stopping or standing), if such offense was committed by the holder of a commercial driver's license or was committed in a commercial motor vehicle, as defined in subdivision four of section five hundred one-a of the vehicle and traffic law.

➤ **Chap. 177 (A.7930) (Papers to accompany order of commitment). Effective: September 1, 2011.**

Requires that a certificate of conviction specify the section and subdivision of law under which the conviction was entered, and that any order of protection issued by the court at the time of sentencing be delivered to the correctional facility with the defendant's order of commitment (new CPL § 380.65).

➤ **Chap. 9 (A.88) (Family offense orders of protection). Effective: May 13, 2011.**

Amends CPL § 530.12 to provide that final orders of protection in family offense matters shall issue from the date of sentencing, not the date of conviction.

➤ **Chap. 565 (S.4469) (CPL § 180.80 period following release and recommitment on felony complaint).**

Effective: October 23, 2011

Amends CPL § 530.60 to provide that a new CPL § 180.80 period shall commence upon the recommitment of a defendant who was previously released on a felony complaint.

➤ **Chap. 258 (A.698-D) (Crime of domestic violence — procedure). Effective: November 29, 2011.**

Establishes a procedure to determine whether a defendant convicted of certain misdemeanor crimes (listed below) is related to the victim for purposes of notification to DCJS and the FBI, and subsequent enforcement of federal laws prohibiting gun purchases and possession by persons convicted of crimes of domestic violence (new CPL §§ 370.15, 380.97). The federal law applies to crimes "committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim." 18 U.S.C. § 921(a)(33)(a)(ii).

The covered crimes include: assault and attempted assault in the third degree, menacing and attempted menacing in the second degree, criminal obstruction of breathing or blood circulation (and attempt to commit the same), forcible touching and attempted forcible touching.

➤ **Chap. 186 (A.8247-A) (Statutory double jeopardy exception — Tax crimes). Effective: October 18, 2011.**

Adds a new subparagraph (i) to CPL § 40.20(2) to permit separate prosecutions of certain tax crimes based upon the same act or criminal transaction where:

One of the offenses consists of a violation of 18 U.S.C. 371, where the object of the conspiracy is to attempt in any manner to evade or default any federal income tax or the payment thereof, or a violation of 26 U.S.C. 7201, 26 U.S.C. 7202, 26 U.S.C. 7203, 26 U.S.C. 7204, 26 U.S.C. 7205, 26 U.S.C. 7206 or 26 U.S.C. 7212(A), where the purpose is to evade or defeat any federal income tax or the payment thereof, and the other offense is committed for the purpose of evading or defeating any New York state or New York city income taxes and is defined in article one hundred fifty-five of the Penal Law, article one hundred seventy of the penal Law, article thirty-seven of the tax law or chapter forty of title eleven of the administrative code of the city of New York.

➤ **Chap. ___ (S.5734-A) (Charitable bail organizations). Effective: 90 days after governor's signature.**

Adds a new section (21) to CPL § 500.10 to define a charitable bail organization as a "non-profit organization organized under section 501 (c) 3 of title 26 of the United

States code, registered as a charity pursuant to article seven-A of the executive law, and organized for the purpose of posting cash bail on behalf of poor persons.” The subsection goes on to provide that “[a] charitable cash bail organization shall not charge a premium nor receive compensation for cash bail given or provided pursuant to this chapter.”

Sex Offender Registration Act

- **Chap. 532 (A.7950) (SORA — employment address for level 2 offenders). Effective: September 23, 2011.**

Amends Correction Law § 168-f(2)(b-1) to require level 2, as well as level 3, offenders to report their employment addresses to DCJS as part of the annual registration process. Eliminates the requirement that DCJS maintain and distribute a hard copy of the sex offender subdirectory to law enforcement agencies.

The legislation also authorizes law enforcement to release the *exact* address of level 2 offenders to entities with vulnerable populations. (Prior law authorized release of an approximate address.)

- **Chap. ___ (A.424) (SORA — procedure when registrant fails to verify with DCJS). Effective: 60 days after governor’s signature.**

Amends the Sex Offender Registration Act (SORA) to provide that law enforcement officers shall visit the last known address of a Megan’s Law (SORA) registrant who fails to annually verify his address with DCJS; provides for up to a \$200 civil penalty to cover the costs of law enforcement for the visit [Correction Law § 168-f(2)].

- **Chap. 513 (A.5661) (SORA — new offense and new information disclosure authorized). Effective: September 23, 2011 (Registration required for persons convicted of new listed crime where offense was committed before September 23, 2011 provided that sentence was not completed before that date).**

Adds the crime of attempted unlawful surveillance in the second degree under subdivisions 2, 3, or 4 of Penal Law § 250.45 to the list of registerable offenses under Megan’s Law (SORA). A court can decline to order the defendant convicted of such crime to register when, “having regard to the nature and circumstances of the crime and to the history and character of the defendant, [it] is of the opinion that registration would be unduly harsh and inappropriate.”

- **Chap. 507 (A.2565) (SORA — type of supervision). Effective: September 23, 2011.**

Amends Correction Law § 168-b(1)(c) to require disclosure of the “type of assigned supervision and the length of time of such supervision” in the sex offender registry.

Vehicle and Traffic Law

- **Chap. 60, Part D (S.2810-C) (Driver’s License Suspension after Drug Conviction). Sunset Clause eliminated.**

In 1993, the Legislature passed a law requiring a 6-month suspension of the driver’s license, or a 6-month delay in eligibility for a driver’s license, of any person convicted of a misdemeanor or felony drug offense, including juvenile and youthful offender adjudications (L. 1993, Chap. 533). The sunset clause of this legislation has eliminated and the law is now permanent.

- **Chap. 109 (S.5643) (Use of cell phone while driving — primary offense). Effective: July 12, 2011.**

Makes use of a cell phone or other handheld electronic device while driving a primary VTL violation that can independently justify a traffic stop. Previously, a motorist could only be ticketed for the offense when stopped for committing another violation.

- **Chap. 376 (A.7932) (DMV records — free access for legal aid societies). Effective: August 3, 2011.**

Amends VTL § 202(1) to provide free access to DMV records for a “legal aid bureau or society or other private entity when acting pursuant to section seven hundred twenty-two of the county law.” Note: public defenders were already afforded free access to DMV records under the statute.

- **Chap. 400 (A.3518-A) (School bus drivers — list of disqualifying criminal convictions). Effective: February 12, 2012.**

Establishes a comprehensive list of scores of criminal convictions that disqualify a person from being a school bus driver [VTL § 509-cc(4)].

- **Chap. 458 (S.2769-B) (VTL — due care to avoid hazard vehicles). Effective: August 17, 2011.**

Requires motorists to “exercise due care to avoid colliding with a hazard vehicle which is parked, stopped or standing on the shoulder or on any portion of [a] highway . . . [and] is displaying one or more amber lights . . .” For motorists on parkways or controlled access highways, due care shall include, but not be limited to, moving from the lane nearest the hazard vehicle [VTL § 1144-a(b)].

Prisons — Jails — Parole

- **Chap. 62 (S.2812) (Consolidation of the Division of Parole and Department of Correctional Services). Effective: March 29, 2011.**

Chapter 62 consolidates the former Division of Parole and Department of Correctional Services into a newly formed Department of Corrections and Community

Supervision. The new agency has the “combined responsibilities” of the former ones and is charged with “provid[ing] for a seamless network for the care, custody, treatment and supervision of a person from the day a sentence of state imprisonment commences until the day such person is discharged from supervision.” The consolidation does not affect the Board of Parole, as distinct from the Division of Parole. The Board “retain[s] its authority to make release decisions based on board of parole members’ independent judgment and application of statutory criteria as well as decisions regarding revocations of release.” However, the establishment of terms and conditions of release to supervision will now be made by the Department of Corrections and Community Supervision, not the Board. The consolidation does not bring about any major changes in the law governing inmates and persons under supervision. But the Board of Parole’s statutory responsibility to establish “guidelines” for parole release decision-making (an obligation that has not been updated in over 25 years) has been changed to provide that the Board shall establish “procedures” for such decision-making. The “procedures shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release, and assist members of [the board] in determining which inmates may be released to parole supervision.”

➤ **Chap. 299 (A.7237) (Ontario County Jail). Effective: August 3, 2011.**

Amends Correction Law § 500-a to permit the Ontario County Correctional Facility to be used for the detention of persons under arrest and awaiting arraignment.

➤ **Chap. ___ (A.1363-B) (Payment of parole supervision fees). Effective: upon governor’s signature.**

Provides that a parole supervision fee shall not be collected by supervising parole officers, but shall be deposited at a central location designated by the parole office [Correction Law § 201(9)(e)].

➤ **Chap. 488 (S.5757) (Certificates of relief from civil disability — timing). Effective: August 17, 2011.**

Amends Correction Law § 702(1) to promote issuance of certificates of relief from civil disability at the time of sentence. The amendment provides that when a court imposes a sentence of local jail, a revocable sentence or lesser sanction, upon application of the defendant the court “shall initially determine the fitness of an eligible offender for such certificate prior to or at the time sentence is pronounced.”

Miscellaneous

➤ **Chap. 543 (A.8368) (E-filing in criminal courts — advi-**

sory committee). Effective: September 23, 2011.

Authorizes the chief administrative judge to create an advisory committee to consult with her regarding the development of a program for filing by electronic means in criminal actions and proceedings under Family Court Act Articles 3 and 10.

➤ **Chap. 131 (A.6037-A) (Sale of smoking paraphernalia to minors). Effective: January 1, 2012.**

Amends Public Health Law § 1339-aa and 1330-cc to prohibit the sale of smoking paraphernalia (pipe, water pipe, hookah, rolling papers, vaporizer of any other device, equipment or apparatus designed for the inhalation of tobacco) and shisha (tobacco mixed with syrup) to minors.

➤ **Chap. 307 (A.7465-A) (Subpoena for medical records). Effective: August 3, 2011.**

Amends CPLR § 2302(b) to clarify that “[i]n the absence of an authorization by a patient, a trial subpoena duces tecum for the patient’s medical records may only be issued by a court.”

➤ **Chap. 97 (S.5856) (Crimes in OMH facilities — state payment for prosecution). Effective: July 24, 2011.**

Requires the state to pay prosecution and defense costs of any prosecution of a prison inmate for a crime committed while the inmate-patient was committed to the custody of the Office of Mental Health (new MHL § 29.28).

➤ **Chap. 534 (A.8091) (Office of Victim Services awards — new offenses). Effective: December 22, 2011.**

Amends Executive Law § 631(12) to add criminal obstruction of breathing or blood circulation to the list of offenses that can result in an award to the victim by the Office of Victim Services.

➤ **Chap. 91 (S.3777-A) (Mandatory child abuse reporters — day camp directors). Effective: June 22, 2011.**

Adds directors of overnight and day camps to the list of persons who are required to report suspected child abuse under the Social Services Law (Social Services Law § 413(1)(a)).

➤ **Chap. 29 (A.55-A) (Interstate Compact for Juveniles). Effective: June 23, 2011.**

Enacts the most current Interstate Compact for Juveniles to provide for orderly interstate management of juveniles who are under parole or probation supervision (Executive Law § 501-e).

➤ **Chap. 309 (A.7632) (Family offense petitions). Effective: August 3, 2011.**

Amends Family Court Act § 821(1)(a) to add criminal obstruction of breathing or blood circulation and strangu-

lation to the list of offenses that may support a Family Court Article 8 petition.

➤ **Chap. 176 (A.7869-A) (Railroad trespassing). Effective: January 16, 2012.**

Amends § 83-a of the Railroad Law to provide that knowing, unauthorized use of motor vehicles, recreational vehicles, all terrain vehicles (in addition to snowmobiles), and the riding of animals on railroad property or tracks shall constitute trespassing as a violation. First offense: \$100–\$250 fine; second offense: \$250–\$500 fine.

➤ **Chap. 332 (S.3237-A) (Offense upgrade — animal fighting). Effective: September 2, 2011.**

Upgrades the offense of being present as a spectator at an animal fighting exhibition [Agriculture and Markets Law § 351(5)(b)] from a violation to a Class B misdemeanor.

Sunset Clause Extended

➤ **Chap. 57 (S.2807-C) (Omnibus sunset extender)**

Extends the sunset clauses of the following programs and laws to September 1, 2013:

- Jenna’s Law (1998) and Sentencing Reform Act (1995)
- Correction Law § 189 — \$1 weekly incarceration fee
- CPLR § 1101(f) — Fees for inmate filings
- CPL Article 65 — Closed circuit testimony of certain child witnesses
- Family Protection and Domestic Violence Intervention Act of 1994 (*e.g.*, mandatory arrest)
- CPL Article 182 — Electronic court appearances in certain counties
- Penal Law §§ 205.16, 205.17, 205.18, 205.19 — Absconding offenses
- VTL § 1809 — Mandatory surcharges

➤ **Chap. 101 (S.4071)**

Sunset clause for driver’s license suspension for failure to pay child support extended to September 1, 2013. ☪

2011 Annual Meeting and Conference: Recognizing Generations of Defenders



Norman Shapiro (r), a founding NYSDA member and long-time Board Vice President, receiving a 2011 Service of Justice Award; he is shown with Board President Edward J. Nowak.



Gary Horton, Genesee County Public Defender, accepting the Wilfred R. O’Connor Award, which honors exceptional, client-centered work by a public defense attorney in practice 15 or more years.



Heather Toole, Ulster County Assistant Public Defender, addressing conferees after she was given the Kevin M. Andersen Award, created by the Genesee County Public Defender Office to recognize outstanding work by public defense attorneys who have been in practice less than 15 years.



Stephen J. Pittari, recently-retired head of the Westchester County Legal Aid Society and continuing NYSDA Board member, speaking after being presented with a 2011 Service of Justice Award, which recognizes those who have been of great assistance to the Association and its Backup Center, and/or who have generously and meaningfully served the defender and client community.

The following are short summaries of recent appellate decisions relevant to the public defense community. These summaries do not necessarily reflect all the issues decided in a case. A careful reading of the full opinion is required to determine a decision's potential value to a particular case or issue.

For those reading the REPORT online, the name of each case summarized is hyperlinked to the slip opinion. For those reading the REPORT in print form, the website for accessing slip opinions is provided at the beginning of each section (Court of Appeals, First Department, etc.), and the exact date of each case is provided so the case may be easily located at that site or elsewhere.

United States Supreme Court

In the online version of the *REPORT*, the name of each case summarized is hyperlinked to the opinion on the US Supreme Court's website, www.supremecourt.gov/opinions/. Supreme Court decisions are also available on a variety of websites, including Cornell University Law School's Legal Information Institute's website, www.law.cornell.edu.

Aliens

Death Penalty (Due Process) (International) (Legislation)

Federal Legislation

[Leal Garcia v Texas](#), 564 US __, 131 Sct 2866 (7/7/2011)

Holding: Neither due process nor the government's argument that the Court act "in support of our 'future jurisdiction to review the judgment'" requires a stay of the petitioner's execution so that Congress may consider whether to enact legislation implementing the International Court of Justice's decision in *Case Concerning Avena and Other Mexican Nationals (Mex. v US)* (2004 ICJ 12), which held that the United States violated the Vienna Convention by failing to notify the petitioner of his right to consular assistance. That argument is foreclosed by *Medellin v Texas* (552 US 491 [2008]). The bare introduction of a Senate bill three years after *Medellin* does not justify a stay. "We decline to follow the United States' suggestion of granting a stay to allow Leal to bring a claim based on hypothetical legislation when it cannot even bring itself to say that his attempt to overturn his conviction has any prospect of success."

Dissent: [Breyer, J] A stay should be granted. The state's interest in the petitioner's immediate execution 16 years after his conviction does not outweigh the United

States' interest in complying with its international legal obligations, the related foreign policy implications, the possibility of congressional action, and "the consequent injustice involved should that legislation, coming too late for Leal, help others in identical circumstances"

New York State Court of Appeals

In the online version of the *REPORT*, the name of each case summarized is hyperlinked to the opinion provided on the website of the New York Official Reports, www.nycourts.gov/reporter/Decisions.htm.

Appeals and Writs (Preservation of Error for Review)

Search and Seizure (Standing to Move to Suppress)

[People v Holmes](#), 17 NY3d 824, 929 NYS2d 788 (9/8/2011)

Holding: "On review of submissions pursuant to section 500.11 of the Rules, order reversed and case remitted to the Appellate Division, Fourth Department, for consideration of issues raised but not determined on the appeal to that court (*see People v Hunter*, 17 NY3d 725 [2011])."

Appeals and Writs (Questions of Law and Fact)

Search and Seizure (Detention) (Motions to Suppress [CPL Article 710])

[People v Williams](#), 17 NY3d 834, __ NYS2d __ (9/13/2011)

Holding: This court cannot review the mixed questions of law and fact in this case, *ie*, the reasonableness of the seizure, the existence of probable cause or reasonable suspicion, the classification of a detention as an arrest, and the attenuation of the evidence seizure from police misconduct, because the Appellate Division's findings that there was no probable cause for the arrest and that the evidence seizure was not attenuated from the arrest nor was it derived from a sufficiently independent source are supported by the record. The defendant's conviction must be vacated and a new trial ordered as it is reasonably possible that the introduction of the illegally seized evidence affected the verdict. And the defendant's unrelated conviction must be vacated because it was based on a guilty plea for which the defendant was promised a sentence that would run concurrently with the sentence in this case.

Appeals and Writs (Scope and Extent of Review)

Assault (Evidence) (Lesser Included Offenses)

Evidence (Sufficiency) (Weight)

[People v Brown](#), 2011 NY Slip Op 07146 (10/13/2011)

NY Court of Appeals *continued*

Holding: The evidence was insufficient to support a finding that the defendant, during an escalating incident of horseplay, knew and consciously disregarded a known risk that pouring water onto her nephew from a pot heating on the stove would burn him. The conviction of second-degree reckless assault must be reduced to third-degree negligent assault. Further, the defendant is entitled to a weight of the evidence review, which the Appellate Division failed to conduct.

Counsel (Right to Counsel) (Right to Self-Representation)

People v Crampe, 2011 NY Slip Op 07148 (10/13/2011)

Holding: In both cases considered here, the courts failed to make the searching inquiries required before permitting each defendant to waive his right to counsel and represent himself. In *Crampe*, the defendant replied, “I guess[] so, your Honor;” when asked if he was proceeding pro se. The town justice then handed him a form order meant to apply to his six pending cases; read the order aloud; said that the defendant’s failure to accept a referral to the public defense office would act as an election of his right to proceed without a lawyer and as a waiver of the right to counsel; and said the defendant’s failure to appear with counsel would “be deemed an acknowledgment of the advice and warnings of this Court relative to the right to counsel.” As the defendant signed the order and left, the judge cautioned him to appear with or without a lawyer on the date set for trial, and added “I advise you to get a lawyer, sir.” The form pointed out only the risk of conviction, which represented defendants also face, and that legal proceedings are complicated; the justice failed to “insure that defendant was aware of the drawbacks of self-representation before allowing him to go down that path.” A new trial must be held.

In *Wingate*, the defendant’s assigned counsel was permitted to withdraw after the defendant said he might file a disciplinary complaint against the attorney. A second assigned lawyer requested to be relieved at the next appearance saying that the defendant did not want her representation. Asked if he wanted to proceed pro se at a pending suppression hearing, the defendant indicated he did, saying he had represented himself before with a lawyer’s assistance, and needed “co-counsel.” When advised he was not entitled to hybrid representation, the defendant requested to represent himself, acknowledging that he was facing felony charges carrying “jail time,” could lose the right to represent himself if he did not conduct himself properly, and wished to go forward notwithstanding any risks involved in self-representation. The suppression court’s colloquy suffered from the same deficiencies as the *Crampe* inquiry; it did not direct attention

to any dangers of self-representation beyond the risk of a felony conviction.

Wingate’s subsequent decision to proceed to trial without a lawyer after suppression was denied, however, followed an extensive colloquy that drew his attention to the many challenges inherent in proceeding without counsel. The defendant said he understood the challenges, and wanted, without a doubt, to proceed pro se. While it may logically be inferred that similar warnings from the suppression court would also have been disregarded, the trial court warnings could not retrospectively cure the suppression court’s error. A new suppression hearing must be held and, if the defendant prevails there, a new trial.

While the trial court’s colloquy in *Wingate* was exemplary, it did not create a template to be followed at every request to proceed pro se. The scope of the required inquiry turns on the context in which waiver of counsel is sought, and should turn on what purposes a lawyer can serve at the particular stage of proceedings and what help the lawyer could provide the defendant at that stage.

Witnesses (Defendant as Witness)

People v Robinson, 2011 NY Slip Op 07147 (10/13/2011)

Holding: The Appellate Division correctly found error where the court had sustained a prosecution objection to defense counsel’s asking the defendant why he had said, while in custody after police found a revolver under the driver’s seat of the vehicle owned by the defendant’s cousin but driven by the defendant, “possession is nine-tenths of the law.” The error was not harmless. The defendant had been driving his cousin’s car for only a short time, to take someone to the train station, when police stopped him for a traffic violation. Several other family members had access to the car before that time. The defendant’s potentially inculpatory statement was the only evidence tending to show he knew the gun was in the car. Because he was not allowed to explain the comment, “the jury was left to reconcile the automobile presumption with” the defendant’s statement. His explanation might have created enough doubt in the jury’s mind to rebut the presumption. There must be a new trial.

First Department

In the online version of the *REPORT*, the name of each case summarized is hyperlinked to the opinion provided on the website of the New York Official Reports, www.nycourts.gov/reporter/Decisions.htm.

Evidence (Hearsay)

First Department *continued***Matter of Odalis F., 85 AD3d 441, 925 NYS2d 22
(1st Dept 6/7/2011)**

Holding: The court erred by admitting, as an excited utterance, a recording of the 911 call made by the non-testifying complainant, the appellant's brother, who had not called 911 until he had called his mother, waited for her to get home, and, when she arrived home, asked her whether he should call the police. While there was no testimony regarding the amount of time that passed between when the respondent allegedly threatened the complainant with a knife and the 911 call, there were several intervening events that indicate the complainant had an opportunity for deliberation and reflection. And "there is no evidence of the existence of the allegedly startling event that led to the alleged excited utterance." (Family Ct, Bronx Co)

Larceny (Value)**People v Riley, 85 AD3d 431, 926 NYS2d 40
(1st Dept 6/7/2011)**

Holding: The prosecution failed to establish that the copper piping taken from four buildings had a value in excess of \$50,000 where the only evidence of the value included the labor costs associated with installing new piping and labor costs cannot be included as part of the replacement cost. No New York cases have addressed this issue, but appellate courts in several other states have held that replacement value of a stolen item does not include labor costs. (Supreme Ct, New York Co)

[*Ed. Note:* Leave to appeal was granted on August 30, 2011 (17 NY3d 821).]

Homicide (Manslaughter [Evidence])**Lesser and Included Offenses (General)****People v Lora, 85 AD3d 487, 925 NYS2d 38
(1st Dept 6/14/2011)**

Holding: The court erred in convicting the defendant of the lesser included offense of second-degree manslaughter because no reasonable view of the evidence would support a finding that the defendant committed that offense and not the charged offense of first-degree manslaughter where the defendant, an off-duty police officer, shot the decedent at close range and there was no evidence to undermine the inference that when he deliberately fired, the defendant intended to cause serious physical injury. The trial evidence, including the defendant's admission of intentional conduct, negated the element of recklessness. And because the element of recklessness was not established, the verdict was against the

weight of the evidence. The indictment must be dismissed. (Supreme Ct, Bronx Co)

Dissent: The defendant's statements after the shooting contradict his trial testimony that he intended to cause the decedent serious physical injury, and the record supports the trial court's finding of recklessness.

Sentencing (Concurrent/Consecutive)**People v Wright, 87 AD3d 229, 926 NYS2d 43
(1st Dept 6/21/2011)**

Holding: The court properly ordered consecutive sentences for first-degree murder (Penal Law 125.27[1][a] [viii]) and second-degree possession of a weapon (Penal Law 265.03[1][b]) "[b]ecause there is no overlap of statutory elements in the crimes . . ." "The test . . . is not whether the criminal intent is one and the same and inspiring the whole transaction but whether separate acts have been committed with the requisite criminal intent." The actus reus of the first-degree murder count was causing the death of two or more persons; there was no requirement that the defendant use a weapon. And the actus reus of the possession count was possession of a loaded operable firearm; the prosecution did not need to establish that the firearm was used in any way, lethally or otherwise. Recent Court of Appeals precedent confirms that the prosecution did not need to establish that the defendant's intent as to the possession count was separate from the intentional murder count. (Supreme Ct, New York Co)

Dissent in Part: *People v Hamilton* (4 NY3d 654) requires imposition of concurrent sentences; the prosecution failed to prove that the defendant's intent to use the gun unlawfully was distinct from his intent to commit murder.

[*Ed. Note:* Leave to appeal was granted on July 21, 2011 (2011 NY Slip Op 78815[U]).]

Forensics (DNA)**Witnesses (Confrontation of Witnesses) (Cross Examination)****People v Encarnacion, 87 AD3d 81, 926 NYS2d 446
(1st Dept 6/23/2011)**

Holding: The court properly allowed the prosecution to use the accuser's grand jury testimony in its case in chief where the prosecution established, by clear and convincing evidence, that the defendant forfeited his right to confront the accuser by calling her over 1,000 times, trying to convince her to change her testimony, and having his friends threaten her, thereby inducing her to refuse to testify. By not raising a specific confrontation clause objection, the defendant failed to preserve his objection to the court's decision to allow a prosecution witness to testify

First Department *continued*

about DNA testing linking him to the crime scene even though the witness did not personally test all the items about which she testified. Alternatively, the testimony about those items was properly admitted because it related to testing yielding non-accusatory raw data in the form of a DNA profile. (Supreme Ct, Bronx Co)

Concurrence: Because the evidence of the defendant’s guilt is overwhelming without considering the accuser’s grand jury testimony, any error in admitting that testimony, a difficult determination here, was harmless and the court should not resolve the issue. The court should also not resolve the DNA testimony issue where the defendant’s objection did not alert the trial court to a constitutional claim and any error in admitting the testimony was harmless.

Arrest (Probable Cause)

Identification (Lineups)

[People v Jones](#), 85 AD3d 612, 926 NYS2d 463
(1st Dept 6/23/2011)

Holding: The court properly denied the defendant’s motion to suppress the lineup identification evidence where, while the defendant’s initial arrest was not based on probable cause, the arresting officer obtained additional evidence from a detective prior to the lineup that provided probable cause for the defendant’s continued detention. The additional information that satisfied the requirements of probable cause included a detailed description of the robber from the accuser, a more specific description and distinctive nickname from an identified citizen informant who witnessed the robbery and was acquainted with the defendant, and a photo of a person who, according to police records, had the same nickname and closely matched the descriptions given by the accuser and eyewitness. Where the detective told the arresting officer about the photo and the officer compared the photo with the defendant, this communication constituted a direction to arrest the defendant. (Supreme Ct, New York Co)

Discovery (Brady Material and Exculpatory Information)

Impeachment

Witnesses (Confrontation of Witnesses) (Cross Examination)

[People v Ortiz](#), 85 AD3d 588, 927 NYS2d 9
(1st Dept 6/23/2011)

Holding: The court erred in precluding the defendant from impeaching a prosecution witness’s testimony con-

cerning statements the defendant made during a jailhouse interview with statements in the prosecution’s case summary report and voluntary disclosure form (VDF) where it was reasonable to infer that the witness prepared the documents. The witness, a former prosecutor, testified that either she or the assistant prosecutor had prepared them, the assistant was not at the interview, it was very possible the witness prepared the case summary, and her typewritten name appeared on the VDF; it is unreasonable to think that the lead prosecutor in a serious homicide case would not be familiar with the documents that recounted the defendant’s statements. The witness testified that the defendant admitted during the interview he knew that the shooter intended to kill the decedent, but the documents and the detective present at the interview indicated that the defendant said he did not know the shooter intended to kill the decedent and that he heard a third party tell the shooter to hurt the decedent. Preclusion of this impeachment evidence was not harmless error. (Supreme Ct, New York Co)

Concurrence: The prosecution violated its *Brady* obligation by failing to disclose before trial an earlier version of the case report that was the work product of the lead prosecutor and her assistant and was consistent with the defendant’s innocence claim and contradicted the prosecutor’s testimony.

Sex Offenses (Sex Offender Registration Act)

[People v Archbold](#), 85 AD3d 657, 926 NYS2d 85
(1st Dept 6/28/2011)

Holding: The defendant was not prejudiced by the absence of his attorney when the court announced its determination adjudicating the defendant a level III sex offender; the attorney had left the courtroom before the defendant was produced, but he had represented the defendant throughout the sex offender proceedings. The court’s announcement is not analogous to a sentencing, it was not a critical stage of the proceeding, and the attorney’s presence would not have had an impact. Assuming the court erred in announcing its decision without counsel present, remand for the purpose of having counsel present at the announcement would serve no useful purpose. (Supreme Ct, New York Co)

Search and Seizure (Electronic Searches) (Warrantless Searches)

[People v Hall](#), 86 AD3d 450, 926 NYS2d 514
(1st Dept 7/14/2011)

Holding: Suppression of the historical cell site location information (CSLI) for the calls made from the defendant’s cell phone during the three-day period surrounding the incident was not required under federal law

First Department *continued*

because the records were obtained by court order under 18 USC 2703(d), which does not require a probable cause showing or a warrant, and section 2703 does not preclude the prosecution from obtaining CSLI records even if the cell phone could be considered a tracking device under 18 USC 3117(b). Also, three days of CSLI records does not constitute protracted surveillance that may require a warrant under federal law. The defendant has no reasonable expectation of privacy under the Fourth Amendment while traveling in public. The defendant's state constitutional argument is unpreserved and, even if preserved, fails on the merits because *People v Weaver* (12 NY3d 433) does not address CSLI records and is distinguishable where the defendant's movements were only tracked for three days compared to 65 days of global positioning system device tracking. (Supreme Ct, New York Co)

Evidence (Instructions) (Prejudicial)

[People v Pagan](#), __ AD3d __, 926 NYS2d 524
(1st Dept 7/14/2011)

Holding: The court erred in admitting portions of telephone calls in which the defendant stated he was a gang member and that he would take care of a family member's problem because he was "trying to get some status" as the statements lacked any probative value in view of other trial testimony that clearly established the shooter's intent and motive. And the evidence's probative value, if any, outweighed its potential prejudice. The error was harmless, however, given the overwhelming proof of the defendant's guilt, including the accuser's uncontested account of the shooting and his identification of the defendant as the shooter; the accuser's prior contact with the defendant; neighbors' statements placing the defendant at the scene of the fight preceding the shooting, which conflicted with the alibi defense; the defendant's intimidation of the neighbors to make them unavailable to testify, which demonstrated consciousness of guilt; and the incriminating statements the defendant made to the police showing his knowledge of the events before and at the time of the shooting. The court's extensive instructions regarding the limited purpose of the evidence minimized the potential prejudice. (Supreme Ct, New York Co)

Narcotics (Penalties)**Sentencing (Resentencing)**

[People v Milton](#), 86 AD3d 478, 926 NYS2d 898
(1st Dept 7/21/2011)

Holding: The order denying the defendant's motion for resentencing under the Drug Law Reform Act of 2009

(2009 DLRA) is reversed as a matter of discretion in the interest of justice, the motion is granted, and the defendant is informed of a proposed sentence of five years and three years' post-release supervision. The defendant was convicted of two counts of third-degree criminal sale of a controlled substance, a class B felony, and sentenced to concurrent terms of four and a half to nine years after he failed to complete a drug treatment program; the trial court based the resentencing denial on the treatment program failure. Even though he failed to complete the treatment program and has not been a model prisoner, the defendant's family promised to give him substantial assistance upon his release, including employment, help finding housing, and emotional support; "[r]esentencing promotes the purpose of the 2009 DLRA to ameliorate harsh sentences, and the requisite period of postrelease supervision affords protection to the community" (Supreme Ct, Bronx Co)

Narcotics (Penalties)**Sentencing (Resentencing)**

[People v Jenkins](#), 86 AD3d 522, 927 NYS2d 598
(1st Dept 7/28/2011)

Holding: The order denying the defendant's motion for resentencing under the Drug Law Reform Act of 2009 must be vacated where the defendant was not afforded his right to be brought before the court and given an opportunity to be heard on the motion. (Supreme Ct, Bronx Co)

Search and Seizure (Stop and Frisk) (Weapons-frisks)

[People v Bowden](#), 87 AD3d 402, 928 NYS2d 12
(1st Dept 8/4/2011)

Holding: The court erred in suppressing the gun because the police had reasonable suspicion that the defendant had been or was then engaged in criminal activity, justifying a stop and frisk, where: the police went to an apartment they believed was the residence of a man arrested in connection with a shooting; after knocking on the door and identifying themselves to the woman inside, they heard scuffling noises and saw the defendant holding an object as she left the apartment through a window and climbed the fire escape to the roof; and they ordered the defendant to stop, with one officer detaining her while the other picked up the bag the defendant dropped and felt a hard object in it that the officer believed was a gun. The bag was in the defendant's grabbable area when she was stopped and was retrieved moments after she was detained. The officers did not need to be concerned for their safety when she was detained and the bag was patted down; it was enough that they had reason to suspect the bag contained a gun. (Supreme Ct, Bronx Co)

First Department *continued*

Dissent: At most, the defendant's flight from her apartment provided the police with founded suspicion that criminal activity was afoot, giving the officers a common-law right to inquire. When the defendant was detained, the officers did not have any evidence to connect her with the commission of any crime or subject the officers to a threat of physical injury.

Motions (Adjournment)

Narcotics (Penalties)

Sentencing (Resentencing)

People v Anonymous, 87 AD3d 443, 928 NYS2d 278 (1st Dept 8/11/2011)

Holding: The court erred in denying the defendant an adjournment before finally deciding his motion for resentencing under the Drug Law Reform Act of 2009 where one day before the second appearance on the motion, defense counsel learned from a deputy inspector general of the Department of Correctional Services that he had information relevant to the motion that he wished to share with the court, the information was not previously available because the defendant's file was misplaced, and counsel provided the court with the deputy's letter at the second appearance and requested an adjournment to obtain the information. Because the court concluded the defendant was eligible for resentencing, it must give him an opportunity to be heard. There was no claim that defense counsel failed to exercise due diligence in trying to get the information, and defense counsel requested the adjournment immediately upon learning about the information. Defense counsel's reluctance to reveal information related to the letter after the court refused, for no apparent reason, to grant counsel's request to close the courtroom was not unreasonable; it appears that counsel had legitimate concerns about her client's safety. (Supreme Ct, New York Co)

Dissent: The information defense counsel provided was insufficient to require the court to grant an adjournment.

Counsel (Conflict of Interest) (Right to Counsel)

Motions (Suppression)

People v Strothers, 87 AD3d 431, 928 NYS2d 28 (1st Dept 8/11/2011)

Holding: The court deprived the defendant of his right to counsel at the suppression hearing by allowing the first prosecution witness to begin testifying knowing that defense counsel was absent and the defendant would

be unrepresented. The pretrial suppression hearing was a critical stage and the defendant had an absolute right to counsel, deprivation of which was harmful per se; it does not matter if the outcome of the hearing would have been the same had counsel been present. It is irrelevant that counsel was absent for a small portion of the testimony. Counsel did not need to preserve the issue by objecting when he arrived for the hearing. And the record does not establish that the defendant agreed to be represented by his co-defendants' counsel and waived any conflict. The appeal is held in abeyance and the matter remitted for a de novo hearing. (Supreme Ct, New York Co)

Dissent: The defendant is not entitled to a de novo suppression hearing as the defendant did not preserve the issue of the alleged violation of his right to counsel, he was effectively given a de novo hearing when his attorney arrived, and the deprivation was harmless.

Search and Seizure (Stop and Frisk) (Weapons-frisks)

People v Fernandez, 87 AD3d 474, 928 NYS2d 293 (1st Dept 8/18/2011)

Holding: The court properly suppressed the gun found tucked in the defendant's waistband because the police did not have reasonable suspicion that the defendant was committing or was about to commit a crime to justify detaining him nor did they have reasonable suspicion that he was armed and dangerous to justify frisking him where the defendant was not breaking any laws when the three officers approached him while on routine patrol, they did not see what was in his sweatshirt pocket, and he did not make any suspicious or threatening gestures towards the officers. That the defendant's hand was near his waistband or was in his sweatshirt pocket, without any indication that he had a weapon, such as a visible outline of a gun, did not provide reasonable suspicion. Nor did his presence in an allegedly high crime area, without other objective indicia of criminality, provide reasonable suspicion. (Supreme Ct, New York Co)

Trial (Public Trial)

People v Gray, 87 AD3d 457, 928 NYS2d 636 (1st Dept 8/18/2011)

Holding: "The court deprived defendant of his right to a public trial when it ordered the courtroom closed to the public, including defendant's family and girlfriend, during the testimony of an undercover officer." The court rejected, without comment, the defendant's request to allow his family members and girlfriend to remain in the courtroom and the record does not show that the court considered if there were any reasonable accommodations that would have protected the public nature of the proceedings. (Supreme Ct, New York Co)

First Department *continued***Identification (Eyewitnesses) (Lineups) (Suggestive Procedures)**

**People v Kenley, 87 AD3d 518, 928 NYS2d 705
(1st Dept 8/25/2011)**

Holding: The defendant's motion to suppress the lineup identifications is granted because the lineup was unduly suggestive where the defendant, who weighed 400 pounds, was the only lineup participant who fit the witnesses' descriptions of the getaway car driver as "'a huge, big, fat, black guy,' 'a real big, real huge black guy,' and very heavy-set [and] large.'" While the fillers were large men, there was a very noticeable weight difference between them and the defendant. "We do not mean to suggest that the police are obligated to find grossly overweight fillers when dealing with the situation presented here, and we recognize the practical difficulties that would be involved in doing so. Instead, this situation would call for the use of some kind of covering to conceal the weight difference" An independent source hearing regarding the witnesses must be held prior to a new trial. (Supreme Ct, New York Co)

Second Department

In the online version of the *REPORT*, the name of each case summarized is hyperlinked to the opinion provided on the website of the New York Official Reports, www.nycourts.gov/reporter/Decisions.htm.

Juveniles (Custody)

**Matter of Moran v Cortez, 85 AD3d 795, 925 NYS2d 539
(2nd Dept 6/7/2011)**

Holding: The court failed to give sufficient weight to "the child's need for stability, and the impact of uprooting her from her current home and transferring her to a different school" where the father testified he would transfer her from the school to which she currently walked from her mother's home to one near his job, which would entail earlier awakening, 45 minutes of travel on public transportation, two hours of time spent at the father's job site, and a delay in returning home until 6:00 or 7:00 pm. While neither parent has a prima facie right to custody, and neither was more fit than the other, evidence showed the mother could provide more direct care due to her work schedule and could continue to foster the child's relationship with her father. (Family Ct, Queens Co)

Narcotics (Penalties)**Sentencing (Resentencing)**

**People v Concepcion, 85 AD3d 811, 924 NYS2d 849
(2nd Dept 6/7/2011)**

Holding: Where "the defendant's offense involved a small quantity of drugs," he did not have an extensive criminal or disciplinary record, and he showed a "willingness to participate in treatment and vocational and educational programming while incarcerated," the court erred in denying resentencing pursuant to CPL 440.46. A statutory presumption exists in favor of granting resentencing and substantial justice did not dictate denial here. (Supreme Ct, Queens Co)

Evidence (Weight)**Homicide (Manslaughter [Evidence]) (Murder [Degrees and Lesser Offenses] [Evidence])**

**People v Haney, 85 AD3d 816, 924 NYS2d 563
(2nd Dept 6/7/2011)**

Holding: The evidence supports a finding that the decedent's wounds were inflicted recklessly rather than in a calculated effort to kill her where the proof showed that there had been a struggle between the decedent and the defendant before the stabbing; the decedent had been using PCP, which may make a user violent; several knives were found on the floor; both the decedent and the defendant had bleeding cuts on the hands; and the decedent left the apartment with the defendant after being stabbed. The verdict convicting the defendant of second-degree murder was against the weight of the evidence. The judgment is reduced and the defendant must be sentenced for second-degree manslaughter. (Supreme Ct, Kings Co)

Juveniles (Abuse) (Removal)

**Matter of Alan C., 85 AD3d 912, 925 NYS2d 174
(2nd Dept 6/14/2011)**

Holding: The petitioner failed to make reasonable efforts to avoid removal of the child by seeking court-mandated services after the father refused to consent to certain services that were never fully explained to him. Granting removal based on bruises and other injuries to the child was not warranted where the explanation by the father and child that the injuries resulted from play-fighting with other children was corroborated by a school counselor and six weeks had elapsed with no new injuries before the petitioner commenced the instant proceeding. The record as a whole does not provide a sound and substantial basis for the court's conclusion that returning the child presented imminent risk to his life or health as provided in Family Court Act 1028(a). (Family Ct, Kings Co)

Second Department *continued*

Juveniles (Custody)

Matter of Stewart v Mosley, 85 AD3d 931, 925 NYS2d 594 (2nd Dept 6/14/2011)

Holding: The Juvenile Hearing Officer (JHO) lacked jurisdiction to award temporary custody to the mother upon motion by the attorney for the child where the court had directed the JHO to hear and report on the respective custody petitions of each parent and the father did not consent to the JHO's determination of custody. As the child has been with the mother for 10 months and will soon complete the school year, it is in the child's best interest to remain with the mother pending a new temporary custody ruling. (Family Ct, Kings Co)

Post-Judgment Relief (CPL § 440 Motion)

People v Baker, 85 AD3d 935, 925 NYS2d 616 (2nd Dept 6/14/2011)

Holding: The defendant is not procedurally barred from raising, in his CPL 440 motions following direct appeal, claims that "he was incorrectly sentenced as a persistent violent felony offender based upon the mistaken belief that a prior 1994 conviction" for attempted third-degree possession of a weapon was a violent felony conviction and that trial counsel was ineffective for not properly investigating his criminal record. The issue as to being a persistent violent felon is distinct from the claim raised in his appeal from his original sentence and requires a hearing, as does the ineffective assistance claim. The matter is remitted for hearings and new determinations. (County Ct, Dutchess Co)

Family Court (General)

Juveniles (Support Proceedings)

Matter of Semenova v Semenov, 85 AD3d 1036, 925 NYS2d 872 (2nd Dept 6/21/2011)

Holding: The father's motion to dismiss the mother's violation petition for lack of personal jurisdiction should have been granted where only the father's attorney of record in a real estate matter was served with the summons and petition and the mother had not obtained a court order for substituted service pursuant to Family Court Act 427. (Family Ct, Richmond Co)

Evidence (Uncharged Crimes)

Juries and Jury Trials (Deliberation)

People v Allen, 85 AD3d 1042, 925 NYS2d 621 (2nd Dept 6/21/2011)

Holding: The court erred by allowing into evidence a prior uncharged hand-to-hand drug sale that did not fall within the modus operandi or absence of mistake exceptions to the *Molineux* rule; the limiting instruction was not sufficient to cure the error. The defendant's unpreserved contention that he was denied a fair trial by the jury's receipt of items not admitted into evidence, including a marijuana bud and a bullet that the jurors found in the defendant's jacket pocket, also has merit. These errors were not harmless. (Supreme Ct, Nassau Co)

Narcotics (Penalties)

Sentencing (Resentencing)

People v Anderson, 85 AD3d 1043, 925 NYS2d 648 (2nd Dept 6/21/2011)

Holding: The court erred by stating that it intended to impose a ten-year prison term (two years greater than the prosecution recommended) with 5 years' post-release supervision, advising the defendant that he could withdraw his application before that sentence was imposed, and then imposing the sentence when the defendant accepted it after consulting with counsel. The court should have entered an initial DLRA order setting out its proposed sentence and advised the defendant of the right to appeal that order. The proposed sentence was excessive. The matter must be remanded for entry of an initial DLRA order specifying as a proposed sentence that recommended by the prosecution and advice to the defendant that unless he withdraws the motion for resentencing or appeals the order, the proposed sentence will be imposed. (County Ct, Rockland Co)

Sex Offenses (Sexual Abuse)

Witnesses (Confrontation of Witnesses) (Credibility) (Experts)

People v Diaz, 85 AD3d 1047, 926 NYS2d 128 (2nd Dept 6/21/2011)

Holding: The court erred in precluding the testimony of an ex-boyfriend of the accuser's mother to the effect that the accuser in this sexual abuse case had, when she was five, accused him of improperly touching her but then recanted to him and her mother. The testimony should have been admitted because evidence of a complainant's prior false allegations of sexual abuse may be used to impeach that complainant's credibility and also because the proffered testimony would have contradicted the mother's claim that she knew of no accusation against her ex-boyfriend, which could show bias, interest, or hostility on her part. Thus, preclusion of the testimony denied

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the defendant his confrontation right. It was not harmless error given that the evidence of guilt was not overwhelming and the jury acquitted on counts of first-degree course of sexual conduct, convicting only of second-degree.

The court also erred in allowing the prosecution's expert to bolster the accuser's testimony by describing "how a sex offender typically operates to win over the trust of a child victim, a description closely paralleling the complainant's account of the defendant's behavior." (Supreme Ct, Kings Co)

Sentencing (General)

[People v Thatcher](#), 85 AD3d 1065, 925 NYS2d 855
(2nd Dept 6/21/2011)

Holding: Under the circumstances of this case, the court "improperly considered the defendant's trial strategy to be an 'aggravating factor' during sentencing" (Supreme Ct, Westchester Co)

Juveniles (Support Proceedings)

[Matter of Ceballos v Castillo](#), 85 AD3d 1161,
926 NYS2d 142 (2nd Dept 6/28/2011)

Holding: The father showed that loss of employment constituted a substantial change in circumstances warranting a downward modification of child support where he testified he had been out of work since 2008 when he quit one job after his hours were significantly cut back and obtained another with longer hours but was let go, had made many efforts, described in detail, to obtain other work, and is ineligible for unemployment benefits. He met his burden of demonstrating inability to meet his child support obligations. The matter is remitted for a hearing on the amount of his reduced support payments, the order of commitment is reversed, and the mother's petition to adjudicate the father in willful violation of the support order is dismissed. (Family Ct, Westchester Co)

Evidence (Hearsay)**Witnesses (Confrontation of Witnesses)**

[People v Clay](#), 88 AD3d 14, 926 NYS2d 598
(2nd Dept 6/28/2011)

Holding: Statements made by the decedent in response to police questioning about who shot him after a police comment that it appeared the decedent was not "going to make it" were, while testimonial in nature, admissible under the dying declaration exception to the right to confront witnesses. Dicta in the U.S. Supreme

Court case of *Crawford v Washington* (541 US 36 [2004]) warrants a finding that such an exception to the Confrontation Clause of the federal constitution exists. Because the defendant made no argument that the state constitution provides greater protection than the Sixth Amendment, having cited the state constitutional provision only once and there in conjunction with the federal constitution, review is based on federal jurisprudence. The statements here meet the high threshold for dying declarations set by the Court of Appeals. (Supreme Ct, Kings Co)

**Appeals and Writs (Judgments and Orders Appealable)
(Preservation of Error for Review) (Retroactivity)****Family Court (Family Offenses)****Sentencing (Orders of Protection)**

[People v Foster](#), 87 AD3d 299, 927 NYS2d 92
(2nd Dept 6/28/2011)

Holding: The amendments to CPL 530.12(5), increasing from five years to eight the maximum duration of a final order of protection issued to protect the victim of a felony family offense, may be applied to cases where the offense was committed before the amendments became effective. The defendant's waiver of appeal was unenforceable where the court's discussion of the waiver was misleading in that it suggested the right to appeal exists only after a trial and because the record does not show the defendant understood the difference between the right to appeal and other trial rights automatically forfeited by a guilty plea. The unpreserved issue is reviewed in the interest of justice. (Supreme Ct, Kings Co)

Sex Offenses (Sex Offender Registration Act)

[People v Riley](#), 85 AD3d 1141, 926 NYS2d 303
(2nd Dept 6/28/2011)

Holding: To the extent the court intended to apply the "Mental Abnormality" override of a presumptive sex offender risk level, it erred, as no clinical assessment had been done "and the record does not suggest, much less establish" by clear and convincing evidence, that the defendant has such an abnormality. And no aggravating circumstances not adequately taken into account by the "Sex Offender Registration Act: Risk Assessment Guidelines and Commentary" appear in the record to warrant departure from the presumptive risk level. (County Ct, Suffolk Co)

Ethics (Prosecution)**Misconduct (Prosecution)**

Second Department *continued*

Matter of Muscatello, 87 AD3d 156, 926 NYS2d 653
(2nd Dept 7/5/2011)

Holding: The respondent is suspended from the practice of law for one year due to professional misconduct committed while employed as an assistant prosecutor. She told a grand jury that a chemical test analysis form admitted into evidence reflected a blood alcohol content of .08%, even though that line on the form was blank, and later directed a police officer to fill in the blank on the form, which the respondent had taken from her supervisor’s briefcase and then returned. The suspension is warranted “[n]otwithstanding the respondent’s candor, youth, remorse, and lack of a prior disciplinary history”

Instructions to Jury (Cautionary Instructions)

Juries and Jury Trials (Discharge)

Larceny (Defenses)

People v Engstom, 86 AD3d 580, 926 NYS2d 664
(2nd Dept 7/12/2011)

Holding: The cumulative effect of trial court errors, including dismissal of a sworn juror without sufficient investigation into that juror’s unavailability to continue serving, failure to instruct the jury on the “claim of right” defense in relation to the alleged theft of antique coins, and failure to dispel the prejudice to the defendant of the accuser’s unrelated, unresponsive, and derogatory comments during testimony, require reversal. A good faith claim of right is not an affirmative defense but a defense that the prosecution has the burden to disprove. It was not error per se to deny the defense motion for a mistrial based on the accuser’s emotional outburst, but the judge’s admonition to disregard the comments was inadequate. The errors were not harmless, as the evidence of guilt was not overwhelming. (Supreme Ct, Nassau Co)

Double Jeopardy (Jury Trials) (Lesser Included and Related Offenses)

People v McFadden, 87 AD3d 554, 927 NYS2d 792
(2nd Dept 8/2/2011)

Holding: The court erred in retrying the defendant on the higher offense of third-degree drug possession after a jury deadlocked on that charge but convicted him of seventh-degree drug possession, which is a lesser-included offense of the higher charge. Conviction on the lower charge is deemed an acquittal on the higher, so double jeopardy principles bar retrial. (Supreme Ct, Queens Co)

Narcotics (Penalties)

Sentencing (Resentencing)

People v Nunziata, 87 AD3d 555, 927 NYS2d 790
(2nd Dept 8/2/2011)

Holding: The court erred in finding that substantial justice dictated denial of the defendant’s motion for resentencing under the Drug Law Reform Act of 2004 where, in eight years of incarceration, the defendant had an exemplary prison record with no disciplinary history; earned his GED; and completed, with excellent progress reports, a vocational training program and bible study classes, and at the time of his motion was of advanced age and had a supportive family. (County Ct, Suffolk Co)

Habeas Corpus (State)

Parole (Revocation Hearings [Due Process])

Witnesses (Confrontation of Witnesses)

People ex rel Rosenfeld v Sposato, 87 AD3d 665,
928 NYS2d 350 (2nd Dept 8/16/2011)

Holding: The writ of habeas corpus is granted and the violation of parole warrant vacated because the petitioner’s due process rights were violated by admission, under the business records exception to the hearsay rule, of the report alleging that the petitioner violated curfew. Defense counsel specifically objected to the absence of the officer who had personal knowledge of the allegations, who was absent due to vacation, and the hearing officer failed to undergo the careful weighing required. Among factors not considered were the general preference for confrontation; the contents of the report; whether cross-examination of the missing witness would aid the fact-finding process; whether the evidence was cumulative; and what burden would be imposed on the prosecution by requiring the witness’s production. The petitioner presented fundamental constitutional and statutory claims that, under the circumstances of this case, constitute an exception to the rule that habeas corpus may not be used to review questions that could have been raised on direct appeal.

Juries and Jury Trials (Challenges) (Voir Dire)

People v MacFarlane, 87 AD3d 700, 928 NYS2d 755
(2nd Dept 8/23/2011)

Holding: Where a prospective juror, whose father and friends were or had been police officers and whose husband worked in law enforcement, twice expressed concerns during voir dire that she might give police testimony more credence than the testimony of others and never unequivocally stated that her bias would not influence

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her verdict, the trial court erred in denying the defense challenge for cause. The defense having then exercised a peremptory challenge to remove the prospective juror and exhausted all peremptories before completing jury selection, a new trial is required. (Supreme Ct, Suffolk Co)

Evidence (Weight)

Homicide (Murder [Evidence])

[People v Nisthalal](#), 87 AD3d 702, 928 NYS2d 588 (2nd Dept 8/23/2011)

Holding: The defendant's second-degree murder conviction was against the weight of the evidence where the accounts of the events given by prosecution witnesses were so contradictory as to be unworthy of belief. A bartender and disc jockey working at the defendant's club gave widely divergent accounts of events inside the club before the killing, which the prosecution alleged was committed on the defendant's order. Neither reported the alleged death conspiracy despite claims of being deeply disturbed when they heard it. The disc jockey required a translator to understand a threat allegedly made to him by the defendant in English, yet claimed to comprehend the plot he allegedly overheard in the club. He claimed to have quit his job three weeks after the killing due to threats, but persuasive defense evidence showed he worked there for several more years before being fired. Similar problems existed as to testimony by witnesses who were outside the club. One witness testified that he saw two men, who he described in some detail, beat the decedent, then one shot him while the other stood aside, but the witness had said during his 911 call that there had been one assailant and he could not describe him. The witness had also identified a different person as the shooter, but became so unsure that the police released that individual. Another witness said that the person he saw being assaulted was a woman. The testimony was so contradictory and inconsistent with other evidence that the conviction must be reversed and the indictment dismissed. (Supreme Ct, Queens Co)

Third Department

In the online version of the *REPORT*, the name of each case summarized is hyperlinked to the opinion provided on the website of the New York Official Reports, www.nycourts.gov/reporter/Decisions.htm.

Counsel (Competence/Effective Assistance/Adequacy)

Sex Offenses (Sexual Abuse)

[People v Arnold](#), 85 AD3d 1330, 924 NYS2d 679 (3rd Dept 6/9/2011)

Holding: The defendant was deprived of the effective assistance of counsel where his lawyer: (1) failed to object to remarks by the prosecutor during opening statements that improperly implied an expertise about the behavior of abused children and vouched for the accuser's veracity; (2) promised the jury he would present certain evidence, but did not explain how it related to why the accuser would falsely accuse the defendant and did not introduce some of that evidence; (3) failed to impeach the accuser with prior inconsistent statements, including those in her supporting deposition, which were significantly at odds with her trial testimony; (4) elicited testimony from defense witnesses that reflected badly on the defendant and bolstered the accuser's credibility; and (5) during summation, misstated the facts, focused on irrelevant issues, and made statements that clearly demonstrated his fundamental misunderstanding of the proof needed to convict his client "and resulted in devastating consequences to the entire defense." As the prosecution's case rested almost entirely on the accuser's credibility, there was no legitimate or strategic reason for counsel to fail to impeach the accuser. (County Ct, Schoharie Co)

Confessions (Counsel)

Counsel (Attachment) (Right to Counsel) (Scope of Counsel)

[People v Callicutt](#), 85 AD3d 1326, 924 NYS2d 675 (3rd Dept 6/9/2011)

Holding: The court properly suppressed the defendant's confession given during police questioning at the prison in which he was incarcerated because the defendant's right to counsel with respect to that crime (a homicide) indelibly attached before the questioning where, in connection with an unrelated prosecution, his attorney met with, advised, and accompanied him to a meeting with police concerning his requested participation in a polygraph examination regarding that crime. Those and other affirmative acts by his attorney and another assistant public defender signified to the prosecution and the police that the attorney was representing the defendant in the homicide case. It is the prosecution's burden to protect the right to counsel where there is doubt about the scope of representation; they cannot take advantage of arguable ambiguities in the attorney-client relationship. As the right to counsel indelibly attached, the police were obligated to find out if the representation continued before questioning the defendant. The officer who questioned the defendant knew the right to counsel issue had been discussed, but did not know the result of those discussions. "[T]he relevant factor is not the precise terms or scope of the representation, but rather the police awareness of

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an attorney’s appearance in the matter on the defendant’s behalf” And it is irrelevant that the defendant did not tell the police he was represented by counsel. (Supreme Ct, Albany Co)

Constitutional Law (United States Generally)

Sex Offenses (Sex Offender Registration Act)

Matter of Doe v O’Donnell, 86 AD3d 238, 924 NYS2d 684 (3rd Dept 6/9/2011)

Holding: The petitioner’s obligation under New York’s Sex Offender Registration Act (SORA) to annually register with the Division of Criminal Justice Services did not end when the petitioner moved out of state. SORA does not provide for removal from the registry upon relocation to another state; had the Legislature intended to require removal, it would have so provided. Registration for the duration of the required period, whether or not the registrant lives in New York, serves the state’s purposes of monitoring the whereabouts of offenders and helping law enforcement in prosecuting recidivist offenders. The registration requirement is not an extraterritorial application of SORA because the petitioner’s registration obligation is a product of his conviction of a sex offense in New York while a resident of the state. And the Full Faith and Credit Clause is not violated as New York and the petitioner’s current state of residence have separately determined the risk posed by the petitioner to their respective citizens and imposed registration requirements pursuant to each state’s law. (Supreme Ct, Albany Co)

Admissions (Interrogation) (Miranda Advice) (Silence)

Counsel (Attachment) (Right to Counsel)

People v Dashnaw, 85 AD3d 1389, 925 NYS2d 262 (3rd Dept 6/16/2011)

Holding: The court erred in refusing to suppress the defendant’s admissions made during his second and third interrogations as the defendant’s right to counsel indelibly attached during his first interrogation when he invoked his right to remain silent and requested counsel and his right to counsel could not be waived without counsel present. The indelible right to counsel did not expire because his initial invocation of his *Miranda* rights was two weeks before the third interrogation. The conviction was not against the weight of the evidence. However, the admission of the defendant’s statements made during the later interrogations was not harmless where the prosecution repeatedly elicited testimony as to the inconsistency between the defendant’s initial and later statements;

relied on those inconsistencies and the defendant’s admissions during their closing statement; and introduced, in their case in chief, testimony about the defendant’s invocation of his right to counsel and his right to remain silent. Although no objection was made to that testimony, the prosecution clearly elicited it to establish the defendant’s consciousness of guilt; without curative instructions, the potential for prejudice is present. (County Ct, Clinton Co)

Speedy Trial (Cause for Delay) (Prosecutor’s Readiness for Trial)

People v Seamans, 85 AD3d 1398, 925 NYS2d 266 (3rd Dept 6/16/2011)

Holding: The court properly granted the defendant’s motion to dismiss on speedy trial grounds where the prosecution did not declare their readiness for trial within 183 days of his arraignment on the felony complaint. The seven days the defendant was without counsel after arraignment on the felony complaint and the 49 day-adjourment defense counsel requested were chargeable to the defense. After excluding those days, the time chargeable to the prosecution was 184 days, one day over the statutory period. The exceptional circumstances provision of CPL 30.30(4)(g) did not apply where: the prosecution engaged in ultimately unsuccessful plea negotiations with the codefendant in an effort to obtain his grand jury testimony against the defendant, but did not seek a continuance to obtain that testimony; the prosecution was not prevented from presenting the case to the grand jury without that testimony; and there was no evidence that the prosecution lacked sufficient evidence to proceed with the indictment of the defendant. (County Ct, Cortland Co)

Sentencing (Enhancement) (Hearing)

People v Smalls, 85 AD3d 1450, 926 NYS2d 192 (3rd Dept 6/23/2011)

Holding: The court erred in imposing an enhanced sentence for the defendant’s post-plea arrest because it failed to conduct an adequate inquiry into the validity of the arrest after the defendant denied committing the offense for which he was arrested. Although the defendant failed to preserve the issue by objecting to the enhanced sentence or moving to withdraw the plea, the matter is reviewed in the interest of justice as the defendant’s argument has merit. (County Ct, Broome Co)

Narcotics (Penalties)

Sentencing (Resentencing)

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[People v Carter](#), 86 AD3d 653, 926 NYS2d 328
(3rd Dept 7/7/2011)

Holding: Under the Rockefeller Drug Law Reform Act of 2009, a defendant is ineligible for resentencing if the defendant has been convicted of a violent felony offense (an exclusion offense) within the preceding 10 years, excluding any time during which the defendant was incarcerated for any reason between the time of commission of the prior felony and the present felony. The court erred in concluding that the 10-year look-back period is measured from the date of the commission of the offense for which the defense seeks resentencing. “[W]e are in agreement with the reasoning of the other Departments of the Appellate Division and join in their conclusion that both the plain language and the ameliorative purpose of the statute dictate that the look-back period be measured from the date of the motion for resentencing” (County Ct, Columbia Co)

Freedom of Information**Police**

[Matter of New York Civil Liberties Union v City of Saratoga Springs](#), 87 AD3d 336, 926 NYS2d 732
(3rd Dept 7/7/2011)

Holding: The court abused its discretion in denying the petitioner’s motion for counsel fees and costs in this article 78 proceeding seeking disclosure of police department records relating to the use of stun guns or tasers under the Freedom of Information Law (FOIL) where: the petitioner substantially prevailed by obtaining all the documents it sought; the respondents had no reasonable basis for their initial denial of the FOIL request; the respondents failed to reply to the request within the statutory five-day time limit and provided no excuse for the failure; substantial efforts by the petitioner and repeated court intervention were necessary to obtain disclosure; and no extenuating circumstances were present. (Supreme Ct, Saratoga Co)

Freedom of Information**New York State Agencies (State Police, Division of)**

[Matter of New York State Defenders Association v New York State Police](#), 87 AD3d 193, 927 NYS2d 423
(3rd Dept 7/7/2011)

Holding: The court’s conclusion that the petitioner was not statutorily entitled to counsel fees in this article 78 proceeding seeking disclosure of records related to electronic recording of custodial interviews, interrogations,

confessions, and statements under the Freedom of Information Law (FOIL) was based on its erroneous conclusion that the respondents had a reasonable basis for withholding all of the requested records. The petitioner substantially prevailed in this proceeding by obtaining all of the requested documents; although the respondents attached the records to their answer and were not ordered to do so, adjudication on the merits is not required. The respondents’ blanket denial of the FOIL request was not reasonable, particularly in light of their virtually immediate release of the records upon commencement of the proceeding; a review of the records shows that, at most, the respondents could have believed that a small portion of the records were exempt under FOIL’s law enforcement exception; and the respondents failed to give a persuasive reason why they could not redact the records and disclose the non-exempt portions. (Supreme Ct, Albany Co)

Counsel (Competence/Effective Assistance/Adequacy)**Post-Judgment Relief (CPL § 440 Motion)****Sentencing (Second Felony Offender)**

[People v Wimberly](#), 86 AD3d 651, 926 NYS2d 718
(3rd Dept 7/7/2011)

Holding: The court erred in denying without a hearing the defendant’s post-conviction motions pursuant to CPL 440.10 and 440.20 because the defendant has raised an issue sufficient to require a hearing as to whether defense counsel denied him effective assistance by failing to detect and point out the mistaken assumption that the defendant was a second violent felony offender based on his prior federal conviction for possession of a firearm by a prohibited person under 18 USC 922(g)(8). The elements of the federal offense do not accord with any felony under New York law and the prosecution has not offered a state penal statute under which the defendant could be considered a predicate felon. If the federal conviction is not a predicate violent offense, the defendant’s sentence is illegal. (County Ct, Albany Co)

Juveniles (Parental Rights) (Permanent Neglect)

[Matter of Anthony WW.](#), 86 AD3d 654, 927 NYS2d 407
(3rd Dept 7/7/2011)

Holding: In this proceeding to terminate the respondent father’s parental rights because he allegedly suffers from a mental illness that prevents him from properly caring for his children, the testimony of two psychologists and their reports should not have been admitted because they relied on statements about the respondent attributed to non-testifying witnesses that were not admissible under any hearsay exception. A portion of the report of the court-appointed psychologist was stricken because it

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referred to evidence that was not admitted at trial, but the psychologist was not asked what impact that evidence had on his evaluation of the respondent and what effect, if any, it had on his opinion of the respondent's mental condition. Further, the court-appointed psychologist's evaluation should not have been admitted at all because it was not completed for the purpose of determining whether the respondent had the ability to provide an acceptable level of care for his children. The psychologist presented by the petitioner also relied on inadmissible evidence, he was not asked if his profession normally relied on this type of evidence for the performance of this type of evaluation, and he was not asked what impact the evidence had on his final opinion. Reversal is required because the court's decision terminating the respondent's parental rights was based in large part of the psychologists' testimony and reports. It is troubling that the petitioner sought termination of parental rights on the ground of mental illness while a suspended judgment, based on a finding of permanent neglect, was still in full force and effect and there was no allegation that the respondent did anything that would warrant vacating the suspension or commencing this proceeding. (Family Ct, St. Lawrence Co)

Subpoenas and Subpoenas Duces Tecum (Issuance)

Traffic Infractions

**People v Cruz, 86 AD3d 782, 927 NYS2d 212
(3rd Dept 7/14/2011)**

Holding: The court properly affirmed the town court's denial of the State Police's motions to quash prosecution subpoenas seeking the appearance of state troopers who issued simplified traffic informations at scheduled pretrial conferences/trials. The town court's failure to arraign each defendant in person did not deprive it of jurisdiction to schedule a pretrial conference/trial or preclude the prosecution from issuing subpoenas for appearance on those dates, since the troopers would be required to testify should plea negotiations fail and the case proceeds to trial. A defendant may waive his or her right to an in-person arraignment by pleading guilty by mail, appearing and entering a plea, or appearing and proceeding to trial. The 2009 amendment to Vehicle and Traffic Law 1806, substituting the word "appearance" for "trial," did not eliminate the exception to the general rule that the defendant be arraigned in person; the purpose of the amendment was to authorize the common practice of scheduling a pretrial conference for defendants who pleaded not guilty by mail. (County Ct, Ulster Co)

Probation and Conditional Discharge (Conditions and Terms) (Modification)

Sex Offenses

**People v McCaul, 86 AD3d 720, 926 NYS2d 752
(3rd Dept 7/14/2011)**

Holding: The court did not abuse its discretion when it denied the defendant's application for a modification of two probation conditions so that he could live with his daughter and his fiancée or to visit with his daughter because he did not demonstrate that he needed the modification, as he did not show that he attempted to work within the current restrictions, which prohibit him from living with a child under the age of 18 without the permission of his probation officer, from being alone with such a child unless an adult is present who is aware of the defendant's criminal history and has been approved as a safeguard by his probation officer, and from having contact with such a child. For example, the defendant did not seek permission from his probation officer to live with his daughter or to have someone, such as the child's mother, be approved as a supervisor. (County Ct, Columbia Co)

Sex Offenses (Sex Offender Registration Act)

**People v Wyant, 86 AD3d 754, 927 NYS2d 196
(3rd Dept 7/14/2011)**

Holding: The court erred in granting an upward departure from a risk level II to a risk level III because the court's basis for the departure, that the defendant's commission of sex offenses against two different categories of victims increased the number of potential victims who are at risk in the community, did not support a conclusion that the two offenses "are probative of defendant's risk of reoffense in a way that is not otherwise adequately taken into account by the [Sex Offender Registration Act risk assessment instrument] RAI." The defendant's current offense and his prior youthful offender adjudication for a sex offense were properly scored in the RAI. The matter must be remanded for the court to sufficiently review the other potential aggravating factors identified by the Board of Examiners of Sex Offenders. (County Ct, Cortland Co)

Search and Seizure (Automobiles and Other Vehicles [Roadblocks]) (Motions to Suppress [CPL Article 710])

**People v Haskins, 86 AD3d 794, 928 NYS2d 374
(3rd Dept 7/21/2011)**

Holding: The court properly denied the defendant's initial and renewed motion to suppress evidence obtained as a result of the sobriety checkpoint because the sworn factual allegations did not as a matter of law support the defendant's claim that the checkpoint was conducted in

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an unconstitutional manner. The initial motion contained conclusory allegations that the arresting officer conducted the checkpoint without uniform procedures, operated the roadblock with little or no safety precautions, lighting or fair warning of its existence, and impermissibly intruded on motorist privacy; it also referenced the lack of written police department guidelines for roadblocks and a Department of Motor Vehicles administrative determination that an arrest at the same location several hours later by a different officer was unlawful. The lack of written guidelines or the failure to stop all vehicles does not render a sobriety checkpoint invalid and the administrative determination did not give rise to any factual issues concerning the operation of the checkpoint when the defendant was arrested. The renewed motion was properly denied as it did not offer any new facts that could not have been raised in the initial motion. (County Ct, Schenectady Co)

Article 78 Proceedings**Prosecutors (General) (Special Prosecutors)**

Matter of Soares v Herrick, __ AD3d __, 928 NYS2d 386 (3rd Dept 8/4/2011)

Holding: The respondent judge exceeded his authority by disqualifying the petitioner district attorney and his staff from further prosecution of the respondent-defendants, based on an alleged conflict of interest due to their exposure to liability in a federal civil court action brought by the defendants, and appointing a special prosecutor. This court's prior decisions concluding that relief is not available through a writ of prohibition under these circumstances should no longer be followed; the district attorney must be able to challenge disqualification through a CPLR article 78 proceeding. Disqualification requires the objector to establish actual prejudice or so substantial a risk that it cannot be ignored, neither of which is present in this case. The malicious prosecution claims in the civil action were dismissed and none of the other allegations relate to the presentation of the case to the grand jury or the prosecution; prosecution on a new indictment will not impact the remaining claims of wrongful arrest and defamation. There has been no finding that the petitioner had an improper motive or was otherwise acting in bad faith, nor is there a basis in the record for such a finding. Allowing a criminal defendant to effect the removal of a district attorney and his or her staff by filing a civil lawsuit would establish a dangerous precedent that is not warranted in this case.

Dissent: Whether the conflict warranted disqualification is a question of law that cannot be reviewed in an article 78 proceeding seeking a writ of prohibition. And the

Court of Appeals has not said that the appearance of impropriety cannot be grounds for disqualification.

Developmentally Disabled**Due Process (Miscellaneous Procedures)****Sex Offenses (Civil Commitment)**

Matter of State of New York v Daniel OO., __ AD3d __, 928 NYS2d 787 (3rd Dept 8/11/2011)

Holding: New York's sex offender civil commitment law, Mental Hygiene Law (MHL) article 10, does not deprive the respondent, a developmentally disabled individual with numerous psychiatric conditions who has been committed to a secure facility since he was found to be mentally incapacitated to stand trial on charges of sexual abuse, of his due process rights. The petitioner concedes that it must prove beyond a reasonable doubt that the respondent committed the alleged sexual offense, as required by a permanent injunction issued by a federal district court in an ongoing case challenging several provisions of article 10. However, the injunction does not bar the petitioner from bringing an article 10 proceeding against incapacitated persons and this court's subject matter jurisdiction is not affected by rulings in the related federal case. The petitioner's strong interest in protecting the public from persons who are dangerously mentally ill and providing treatment to such persons overrides the respondent's significant liberty interest, and article 10 contains numerous procedural protections that minimize the risk of error in the ultimate determination. Protections include the right to counsel, the right to call witnesses, present evidence, and testify on his own behalf, and a unanimous verdict of 12 jurors that the respondent is a detained sex offender suffering from a mental abnormality. And the respondent may appeal from a final civil confinement order and can apply for release at any time, and must be evaluated annually to determine if he continues to meet the standard for confinement. (Supreme Ct, Franklin Co)

Narcotics (Penalties)**Sentencing (Resentencing)**

People v Devivo, 87 AD3d 794, 928 NYS2d 393 (3rd Dept 8/11/2011)

Holding: The court incorrectly concluded that the defendant was statutorily ineligible for resentencing under the Rockefeller Drug Law Reform of 2009 (CPL 440.46) based on his conviction for an exclusion offense, second-degree burglary, while he was on parole for the class B drug felony for which he sought resentencing. The language of CPL 440.46, which bars resentencing where

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the defendant was convicted of an exclusion offense within 10 years of the commission of the drug offense, does not apply where the exclusion offense was committed after the drug conviction. However, the court also stated that, had he been eligible, it would have denied the motion based on the defendant’s burglary conviction while he was on parole for the drug offense and his conduct while incarcerated. Substantial justice dictates that the application be denied on those grounds. (County Ct, Broome Co)

Juveniles (Custody) (Parental Rights)

Matter of Pettaway v Savage, 87 AD3d 796, 928 NYS2d 869 (3rd Dept 8/18/2011)

Holding: The court properly concluded that extraordinary circumstances existed to intervene in the father’s relationship with the child and that the child’s best interests would be served by an award of sole custody to a non-parent, the husband of the child’s deceased mother. Prior to the mother’s death, the child’s father emotionally abandoned the child by his neglect of her, including by frequently missing scheduled visits, leaving the child with other adults during visits, not attending school conferences or special education meetings, and not helping her with her homework even though he knew she needed special assistance. After the mother’s death, the father missed a meeting with the child’s teacher and guidance counselor, did not give her sufficient food or other essential items, failed to provide appropriate medical care when she was injured, and did not protect the child from her uncle’s questioning about her desire to live with her step-father. While the child was living with her father, she felt isolated from her other family contacts and had limited interaction with them, and the court had ample basis to doubt the father’s testimony that he would not relocate with this child to the state where his new wife lived. The father’s compliance with his child support obligations does not overcome the court’s extraordinary circumstances and best interests findings. (Family Ct, Tompkins Co)

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In the online version of the *REPORT*, the name of each case summarized is hyperlinked to the opinion provided on the website of the New York Official Reports, www.nycourts.gov/reporter/Decisions.htm.

Juveniles (Abuse) (Hearings)

Witnesses (Experts)

Matter of Bethany F., 85 AD3d 1588, 925 NYS2d 737 (4th Dept 6/10/2011)

Holding: The court properly admitted, without a *Frye* hearing, the validation testimony of the court-appointed mental health counselor where: the counselor used the Sgroi method to interview the child and make a determination about the veracity of her sexual abuse allegations against the respondent father; the counselor testified that all counselors in the field use that method; the Court of Appeals has cited to Dr. Sgroi’s handbook on intervention in child sexual abuse; and other courts have admitted validation testimony of experts who have used the method. The record does not show that the methods used by the counselor to validate the sexual abuse allegations were novel; therefore a *Frye* hearing was not required. (Family Ct, Erie Co)

Juveniles (Disposition) (Hearings) (Parental Rights) (Representation)

Matter of Shawn A., 85 AD3d 1598, 924 NYS2d 902 (4th Dept 6/10/2011)

Holding: The respondent mother’s appeal from the order terminating her parental rights is dismissed where she failed to appear at the dispositional hearing and her attorney, although present, chose not to participate in proceedings in the client’s absence; the respondent’s “unexplained failure to appear constituted a default” (Family Ct, Erie Co)

Juries and Jury Trials (Qualifications) (Selection) (Voir Dire)

Sex Offenses (Civil Commitment)

Matter of State of New York v Muench, 85 AD3d 1581, 925 NYS2d 291 (4th Dept 6/10/2011)

Holding: In this Mental Hygiene Law article 10 proceeding, the commissioner of jurors’ exclusion of 22 prospective jurors deprived the respondent of his right to a jury trial; the respondent had a fundamental right to have the judge preside over and supervise the voir dire proceedings while prospective jurors were being questioned about their qualifications. While an article 10 proceeding is civil in nature, the Criminal Procedure Law governs challenges of prospective jurors. A new trial is required. (Supreme Ct, Oneida Co)

Evidence (Sufficiency)

Sex Offenses (Civil Commitment)

Matter of State of New York v Stein, 85 AD3d 1646, 924 NYS2d 231 (4th Dept 6/10/2011)

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Holding: During the nonjury trial in this Mental Hygiene Law article 10 proceeding, the court did not assume the role of an advocate when it sua sponte reopened the proof at the end of the mental abnormality phase of the trial where the court stated on the record that additional evidence was needed to clarify hearsay issues and that the respondent's expert could provide a supplemental report and testimony taking into account the new testimony. There is legally sufficient evidence to support the mental abnormality finding and the determination that the respondent requires confinement: two psychologists testified that he "suffers from paraphilia not otherwise specified, which predisposes him to committing sexual offenses, and that he has had serious difficulty controlling that sexual conduct" and, based on his prior compliance problems with probation and parole, he was likely to recidivate if released from custody. (Supreme Ct, Chautauqua Co)

Arrest (Probable Cause) (Warrantless)**Search and Seizure (Arrest/Scene of the Crime Searches [Probable Cause])**

[People v Ayers](#), 85 AD3d 1583, 925 NYS2d 293 (4th Dept 6/10/2011)

Holding: The police lacked probable cause to arrest the defendant where: officers responded to a report of an attempted burglary of a house and car; two officers drove around the neighborhood looking for a suspect; about an hour after the report, an officer saw the defendant run across the street and up the driveway of a house near the location of the attempted burglary; and the officer told the defendant to stop and then immediately placed him under arrest and handcuffed him. The facts tied the defendant to the crime, but only justified, at most, a stop based on reasonable suspicion. The evidence obtained from the defendant as a result of his illegal arrest must be suppressed as fruit of the poisonous tree. (County Ct, Monroe Co)

Juries and Jury Trials (Constitution—Right to) Trial (Verdict)

[People v Boykins](#), 85 AD3d 1554, 924 NYS2d 711 (4th Dept 6/10/2011)

Holding: The defendant's conviction of attempted second-degree murder must be reversed because the indictment referred to a single attempt to cause the death of a particular individual, but the prosecution presented evidence at trial of two distinct shooting incidents that may constitute attempted second-degree murder. The jury

may have convicted the defendant of an unindicted offense and it is impossible to determine whether different jurors convicted him based on different acts. The defendant did not preserve the issue, but preservation is not required because the defendant has a fundamental and nonwaivable right to a unanimous verdict and to be tried and convicted of only those crimes and upon only those theories charged in the indictment. (Supreme Ct, Monroe Co)

Appeals and Writs (Waiver of Right to Appeal)**Search and Seizure (Arrest/Scene of the Crime Searches [Probable Cause]) (Motions to Suppress [CPL Article 710])**

[People v Cooper](#), 85 AD3d 1594, 926 NYS2d 777 (4th Dept 6/10/2011)

Holding: The defendant's appeal waiver was invalid because the record shows that the court told the defendant to execute a written appeal waiver, which he did, but there was no colloquy between the court and the defendant demonstrating that the defendant's waiver was voluntary, knowing, and intelligent. The invalid appeal waiver does not bar review of the defendant's argument that the court erred in denying his motion to suppress statements and physical evidence; however, the defendant forfeited his right to challenge the suppression ruling on appeal by pleading guilty before the court issued its order denying the motion. Review of the hearing evidence shows that there was probable cause for the arrest and search incident to the arrest where the police lawfully stopped the defendant's car for traffic violations; they observed a "dime baggie," "white residue," and a grocery bag filled with money in plain view; and the officer testified that, based on his experience, he recognized the baggie as a type commonly used to package drugs and the residue as crack cocaine residue. (County Ct, Monroe Co)

Juries and Jury Trials (Discharge) (Qualifications)**Misconduct (Prosecution)**

[People v McClary](#), 85 AD3d 1622, 925 NYS2d 307 (4th Dept 6/10/2011)

Holding: The court impermissibly removed a sworn juror over the defendant's objection as it was not obvious that the juror had a state of mind that would prevent the rendering of an impartial verdict where the juror said he could not remember any connection with a prosecution witness who stated that he met the juror two times, once at a party and another time at the witness's apartment when the juror was performing maintenance work there. Improper dismissal of a sworn juror is not subject to harmless error review. Reversal is also required because of

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several instances of prosecutorial misconduct, including eliciting testimony from police witnesses who vouched for the confidential informant’s credibility, eliciting testimony during the prosecution’s case in chief about the defendant’s post-arrest silence, referring to such silence during summation, and forcing the defendant on cross-examination to characterize the prosecution’s witnesses as liars. The defendant failed to preserve the misconduct claim, but it is reviewed in the interest of justice. (County Ct, Jefferson Co)

Search and Seizure (Prisoners) (Stop and Frisk) (Weapons-frisks)

Speedy Trial (Cause for Delay) (Due Process)

[People v Perez](#), 85 AD3d 1538, 924 NYS2d 704 (4th Dept 6/10/2011)

Holding: In this promoting prison contraband case, the court properly denied the defendant’s motion to suppress his statement made in response to the correction officer’s asking whether “he had anything on him” where the detention was the equivalent of a stop and frisk, which does not constitute custody for *Miranda* purposes. Under the circumstances, a prison inmate would not reasonably believe that there had been a restriction on his freedom over and above that of ordinary confinement in a prison. Assuming *Miranda* warnings were required, the public safety exception applies because the officer did not question the defendant solely for the purpose of eliciting testimonial evidence; the question was reasonably prompted by the officer’s concern for his safety. The defendant was not denied due process because of the 11½-month delay between the incident and his indictment where the prosecution stated the delay was caused by staffing problems in their office, the defendant does not claim that the prosecution acted in bad faith, the charge was serious, the delay did not result in the further curtailment of the defendant’s freedom, and the record does not show that the defense was impaired because of the delay. (County Ct, Wyoming Co)

Dissent: Suppression is required where the defendant was brought into a corridor, with several corrections officer present, told to face the wall and asked if he had anything on him, and the officer testified that the defendant was not free to leave and was subjected to greater restraint than that to which other inmates were subjected.

Sentencing (Pre-sentence Investigation and Report)

[People v Rudduck](#), 85 AD3d 1557, 925 NYS2d 278 (4th Dept 6/10/2011)

Holding: The court correctly denied the defendant’s motion to redact from the presentence report (PSR) a statement that the defendant was accused but never charged with alleged sexual abuse in 2005 where: the presentence investigation must include gathering information about previous conduct and complaints; since the defendant was never charged, the matter could not have been terminated in his favor under CPL 160.50; and the defendant failed to show that the information was inaccurate. PSRs should include all information that may have a bearing on the sentencing determination, even if it would not be admissible at trial. (County Ct, Ontario Co)

Criminal Mischief (Defenses) (Instructions)

Defenses (Justification)

Grand Jury (General) (Procedure)

[People v Calkins](#), 85 AD3d 1676, 925 NYS2d 773 (4th Dept 6/17/2011)

Holding: The indictment for third-degree criminal mischief must be dismissed because of several errors committed by the prosecutor during the grand jury presentation, including failure, after properly charging the grand jury regarding justification in defense of a person as to the second-degree assault charge, to instruct that the defense was also applicable to the criminal mischief charge; the grand jury did not indict for assault. The prosecutor also failed to charge the grand jury regarding justification in defense of premises and to tell the grand jury of the defendant’s request to have witnesses to the incident testify. (County Ct, Genesee Co)

Juries and Jury Trials (Deliberation)

[People v Mays](#), 85 AD3d 1700, 925 NYS2d 758 (4th Dept 6/17/2011)

Holding: The defendant failed to preserve for review his claim that the court erred in allowing the interaction between the prosecutor and the jurors during deliberations while a video recording was being replayed. Preservation is required because, unlike *People v O’Rama* (78 NY2d 270), this was a ministerial communication as to the scope of the requested readback and the prosecutor did not attempt to give any legal instructions to the jury, instruct it as to its duties and obligations, or give instructions about the mode or subject of the deliberations. (Supreme Ct, Monroe Co)

Dissent: The court “improperly delegated control of a critical portion of the proceedings to the prosecutor insofar as it allowed the prosecutor to fashion responses to juror questions and guide the jurors through the playback of video recordings.” The prosecutor talked to a juror during the playback, responded to juror requests to pause the

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video and replay certain portions, and asked the jurors questions, such as whether they wanted to see something again. “The subtleties of advocacy are founded upon establishing a positive relationship with jurors, which is precisely why direct contact between attorneys and jurors during deliberations is strictly prohibited.”

Due Process (Fair Trial)**Trial (Joinder/Severance of the Counts and/or Parties)**

People v Warren, 87 AD3d 36, 925 NYS2d 797 (4th Dept 6/17/2011)

Holding: The defendant was deprived of a fair trial where, in this combined bench trial for one codefendant and jury trials for the defendant and a second codefendant, the court allowed the bench trial codefendant to testify before the jury, after the prosecution, the defendant, and the jury trial codefendant rested. The court denied the defendant’s request for severance of the bench trial and his request to have the bench trial codefendant’s testimony taken outside the presence of the jury. The codefendant’s testimony implicated the defendant and exculpated himself and the jury trial codefendant. The jury convicted the defendant and acquitted the codefendant and the court acquitted the bench trial codefendant. Allowing such testimony was particularly egregious where it “was obviously damaging to defendant, was not properly a part of the jury trial and was easily severable from the evidence presented at the jury trial.” This procedure essentially gave the prosecution a windfall witness who was like a second prosecutor, and the prosecution repeatedly referred to the codefendant’s testimony during his summation, emphasizing that it corroborated the prosecution’s proof. (County Ct, Erie Co)

Counsel (Competence/Effective Assistance/Adequacy)**Evidence (Sufficiency)**

People v Hildreth, 86 AD3d 917, 926 NYS2d 252 (4th Dept 7/1/2011)

Holding: There is legally sufficient evidence to support the eavesdropping conviction where there was ample circumstantial evidence that the program the defendant installed on the accuser’s computer was configured to record certain types of communications and send a report regarding them to an email address and that the program attempted to do so. Although none of the witnesses testified that the information was recorded, the evidence presented could lead a rational person to conclude that the program recorded information gained from the accuser’s electronic communication. The defendant was not denied

effective assistance of counsel based on counsel’s failure to make an omnibus motion or to a request a bill of particulars, and counsel’s failure to make a motion for a trial order of dismissal did not constitute ineffective assistance as the motion had no chance of success. (Supreme Ct, Monroe Co)

Double Jeopardy (General)**Trial (Joinder/Severance of Counts and/or Parties)**

People v Tabor, 87 AD3d 829, 928 NYS2d 410 (4th Dept 8/19/2011)

Holding: The defendant allegedly assaulted a male and a female during a single incident in 2004. He was indicted and tried for the assault on the female; at the trial, both accusers testified and the defendant was convicted. The conviction was reversed and, in 2008, before the second trial, the prosecution indicted the defendant for assault on the male accuser. The indictments were joined for trial based on the prosecution’s claim that the indictments both alleged that the defendant committed the assaults during the same criminal transaction. Criminal Procedure Law 40.40 bars prosecution of the defendant in the second trial for the assault on the male accuser because the two assaults were joinable and at the time of the first trial, the prosecution had sufficient evidence to support a conviction of that assault. This unpreserved issue is reviewed as a matter of discretion in the interest of justice. (County Ct, Oneida Co) ⚖

Defender News *(continued from page 9)***Jones Installed as NACDL
Parliamentarian**

Rick Jones, the Executive Director and a founding member of the Neighborhood Defender Service of Harlem, was appointed to be Parliamentarian of the National Association of Criminal Defense Lawyers in August. Jones, who is a Lecturer-in-Law at Columbia Law School and a member of the faculty at the National Criminal Defense College in Macon, Georgia, is a member of NYSDA’s Board of Directors.

**Prudenti to Succeed Pfau as Chief
Administrative Judge**

A. Gail Prudenti, Presiding Justice of the Second Department, has accepted the position of Chief Administrative Judge. Judge Ann T. Pfau is stepping down on December 1, 2011, and will join a pilot program in Brooklyn Supreme Court aimed at settling medical malpractice suits out of court. (<http://newsandinsight.thomsonreuters.com>, 10/19/2011, 10/20/2011.) ⚖

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