



Public Defense Backup Center  
**REPORT**

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**Defender News**

**Revelations about Forensic Science  
Continue**

From sloppy or faked testing to fundamentally flawed hypotheses presented as scientific fact, revelations continue that forensic evidence offered to convict individuals of crimes is too often imperfect—and sometimes worthless. Here in New York State, the closing of Nassau County’s crime lab is one recent example of the continuing pattern. Elsewhere, shaken baby syndrome evidence has been further discredited. And these are only two examples of why defense lawyers must question, on a variety of levels, forensic evidence put forward to induce clients to plead guilty, convince judges to deny defense motions, or persuade juries to convict.

**Crime Lab in Nassau County Closed After Major Problems Revealed**

On Dec. 1, 2010, the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) placed the Nassau County Police Department Forensic Evidence Bureau in Mineola on probation. In early February 2011, county officials closed the drug unit of the crime lab after a spot check of nine cases involving ketamine or ecstasy revealed that six were inaccurately analyzed. ([www.lohud.com/article/20110211/NEWS05/1021103333?](http://www.lohud.com/article/20110211/NEWS05/1021103333?); [www.newsday.com, 2/11/2011](http://www.newsday.com, 2/11/2011).) Soon thereafter the entire lab was shut. Police officials reportedly had known examiners at the lab were producing inaccurate measurements in drug cases even before ASCLD/LAB’s December action, according to an Associated Press story published in the *New York Law Journal*. Samples from new arrests will now go to an independent lab, which will also conduct a spot review of nearly 9,000 drug cases handled by the county lab since 2007, the article said. ([www.law.com, 2/22/2011](http://www.law.com, 2/22/2011).) And just as the *REPORT* went to press, Governor Andrew Cuomo appointed the New York State Inspector General to investigate possible misconduct at the lab. ([www.newsday.com, 2/25/2011](http://www.newsday.com, 2/25/2011).)

These problems received news coverage not only in legal periodicals and blogs (*see, eg, [blog.simplejustice.us/2010/12/12/nassau-county-crime-lab-probation-is-a-two-way-street.aspx](http://blog.simplejustice.us/2010/12/12/nassau-county-crime-lab-probation-is-a-two-way-street.aspx)*), but also in the popular press. *Newsday* followed the issue in a series of articles, such as the one on Dec. 7, 2010 that noted the probation was based on at least 15 major problems, including “unsecured storage of evidence, an uncalibrated instrument used to determine alcohol content in blood and unmarked drug containers” and that the lab had been put on probation in 2007 for similar problems but was reaccredited the next year. Further, the lab’s problems were taken up by the New York State Commission on Forensic Science at its December 7 meeting.

The Backup Center has been monitoring the situation since learning that ASCLD/LAB had placed the lab on probation, and welcomes calls from Nassau County lawyers. The local defense bar, including public defense providers and the Nassau Criminal Courts Bar Association, has recognized that efforts must be made to secure prospective and retroactive relief for clients from the lab’s flawed forensics.

**SBS Shaken Further**

Long-time readers of the *REPORT* will not be surprised to learn that the legitimacy of Shaken Baby Syndrome (SBS) continues to erode. Prosecutors and their “experts” have repeatedly used SBS to convict and incarcerate parents and caregivers for the deaths of infants since this “syndrome” was first given a name. But as a recent *New York Times Magazine* article sets out, a growing number of experts are finding that causes other than shaking, such as infections or bleeding disorders, can bring on the triad of symptoms

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associated with SBS. ([www.nytimes.com/2011/02/06/magazine/06baby-t.html](http://www.nytimes.com/2011/02/06/magazine/06baby-t.html).)

In January, following a joint request by the prosecution and defense, the Canadian conviction of Dinesh Kumar was overturned. Kumar's prosecution 19 years earlier had been based on the testimony of pathologist Dr. Charles Smith, but a 2008 inquiry found 20 instances over a 10-year period where Smith had made mistakes leading to doubtful conclusions of criminality; 13 of those cases had resulted in convictions. (CBC News, 1/20/2011, [www.cbc.ca/news/canada/toronto/story/2011/01/20/dinesh-kumar365.html](http://www.cbc.ca/news/canada/toronto/story/2011/01/20/dinesh-kumar365.html).) Crown Counsel Gillian Roberts said after joining the motion to throw out Mr. Kumar's conviction that whether he is genuinely innocent will never be known. However, she said, medical evidence that was "viewed as diagnostic in 1992 is now viewed only as strongly suspicious," leaving Kumar's legal culpability in serious doubt. (*Globe and Mail*, 1/7/2010, [www.theglobeandmail.com/news/national/toronto/exo-neration-in-works-for-father-who-pleaded-guilty-in-face-of-charles-smith-testimony/article1861433/](http://www.theglobeandmail.com/news/national/toronto/exo-neration-in-works-for-father-who-pleaded-guilty-in-face-of-charles-smith-testimony/article1861433/).)

For such formerly accepted forensic "science" to crumble requires great defense perseverance and support. NYSDA provides information to help defense lawyers recognize what evidence may be challenged. With regard to SBS, over eight years ago the *REPORT* flagged a website, created by consultants and experts who had worked on behalf of those falsely accused of child abuse, containing information to educate and prepare defense attorneys to critically examine allegations of SBS. (*REPORT*, Vol XVII, No 6 (Nov-Dec 2002), [www.nysda.org/Report\\_02\\_11.pdf](http://www.nysda.org/Report_02_11.pdf), p. 8.) That website, Shaken Baby Syndrome Defense, remains online at [www.2ndchairservices.com/sbsdefense/](http://www.2ndchairservices.com/sbsdefense/). Two years later, an item entitled "Shaken Baby Findings Questioned" appeared in the March-May 2004 issue of the *REPORT*. ([www.nysda.org/04MarAprMayREPORT.pdf](http://www.nysda.org/04MarAprMayREPORT.pdf), p. 2.) At the 2005 Annual Conference, NYSDA offered a full session on "Shaken Baby Syndrome Defense Strategies," presented by Toni Blake, who maintains the website noted above. And in another effort to encourage lawyers to challenge SBS, the syndrome was included in a session entitled "There Is Another Medical Explanation—Gathering evidence and obtaining expert assistance to defend against a Res Ipsa case under 1046(a)(ii) of the Family Court Act" at NYSDA's Adult Representation in Family Court training event just last April. And NYSDA will continue to help defense lawyers learn about and raise this and other forensic science issues.

### **Keeping Up the Pressure**

While political and social realities make successful challenges to junk science difficult, challenges must be made, perhaps repeatedly, before they can be won. As the author of the blog "Simple Justice" has noted, victories that help the defense—like the U.S. Supreme Court's deci-

sion in *Melendez-Diaz v Massachusetts* (129 S Ct 2527 [2009]), requiring the prosecution to produce lab technicians to introduce testimonial reports—can be tenuous. The *Melendez-Diaz* mandate, which is essential in forensic evidence cases because cross-examination is the "only way to test the reliability and veracity of lab reports," is under attack by those who claim it is too expensive to guarantee the attendance of technicians at trial. ([blog.simplejustice.us/12/12/2010/](http://blog.simplejustice.us/12/12/2010/).)

Retrenched budgets threaten more than *Melendez-Diaz*. Erie County's 2011 budget, which eliminated jobs at the county's Toxicology Laboratory, could result in the loss of state and national accreditations, according to media coverage in January. One official noted that while the Medical Examiner's Office, which includes the lab, is not a high-profile department, it provides important community services; news reports said the jobs were to be restored. (*Buffalo News*, 1/13/2011, [www.buffalonews.com/city/communities/erie-county/article311113.ece](http://www.buffalonews.com/city/communities/erie-county/article311113.ece).)

But it is not just budget shortfalls and failures to understand the value of a particular service that lead to substandard forensics. Crime labs need to be independent of police and prosecution, judges need to scrutinize challenged expert testimony, prosecutors need to accept that because their job is to do justice they must abstain from proffering favorable but flawed evidence, and defense lawyers need to research and investigate every type of forensic evidence that arises in their cases—and confront failure by other actors to meet their responsibilities.

In supporting these practices, the Backup Center has publicized and conducted training on the momentous National Research Council report, "Strengthening Forensic Science in the United States: A Path Forward (2009). See, eg, "Recent Responses to the National Research

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The *REPORT* is published throughout the year by the Public Defense Backup Center of the New York State Defenders Association, Inc., 194 Washington Avenue, Suite 500, Albany, NY 12210-2314; Phone 518-465-3524; Fax 518-465-3249. Our web address is <http://www.nysda.org>. All rights reserved. This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is distributed with the understanding that its contents do not constitute the rendering of legal or other professional services. All submissions pertinent to public defense work in New York State and nationwide are welcome.

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Council's Forensic Science Report," *REPORT*, Vol XXIV, No 2 (Mar-May 2009), [www.nysda.org/09\\_MarchMayREPORT.pdf](http://www.nysda.org/09_MarchMayREPORT.pdf), p. 6; see also *REPORT*, Vol XXIV, No 3 (June-Aug 2009), [www.nysda.org/09\\_June-AugREPORT.pdf](http://www.nysda.org/09_June-AugREPORT.pdf), p. 2 and Vol XXV, No 2 (Mar-May 2010), [www.nysda.org/2010-BackupCenter-REPORT-Mar-May.pdf](http://www.nysda.org/2010-BackupCenter-REPORT-Mar-May.pdf), p. 3. We post on our website not only the *REPORT* but a great deal of other information about forensic science as well, including on the Forensic and Medical Evidence page, [www.nysda.org/html/forensic\\_medical\\_evidence.html](http://www.nysda.org/html/forensic_medical_evidence.html).

The *REPORT* has urged lawyers to question alleged scientific expertise of many types. See, eg, "From Fingerprints to Firearms, Forensics Aren't Foolproof," *REPORT*, Vol XX, No 4 (Aug-Oct 2005), [www.nysda.org/05\\_AugustOctoberREPORT.pdf](http://www.nysda.org/05_AugustOctoberREPORT.pdf), p. 1. We reported other New York forensic laboratory problems before Nassau County's. See, eg, "State Inspector General Finds Serious Misconduct in State and County Forensic Labs," *REPORT*, Vol XXV, No 1 (Jan-Feb 2010), [www.nysda.org/2010-BackupCenter-REPORT-Jan-Feb.pdf](http://www.nysda.org/2010-BackupCenter-REPORT-Jan-Feb.pdf), p. 1. Examples from other states have been noted as well. See, eg, "Oklahoma Chemist's Testimony is 'Junk Science,'" *REPORT*, Vol XVI, No 4 (June 2001), [www.nysda.org/REPORT\\_06\\_01.pdf](http://www.nysda.org/REPORT_06_01.pdf), p. 4. We will continue to help defense lawyers raise these challenges in court.

## **Changes to Rules and Forms**

### **Court of Appeals Issues E-filing Rules**

In addition to issuing the decisions summarized beginning on p. 9, the Court of Appeals has changed its rules to require that all briefs, appendices, and record material be submitted in both digital and printed formats. Amendments to 22 NYCRR Part 500 (Rules of the Court of Appeals) reduce from 25 to 20 the number of printed versions of records, appendices, and briefs that litigants in the Court must file, while now requiring digital filing. Requests to be relieved of the e-filing requirement must be made by letter "addressed to the clerk, with proof of service of one copy on each other party, and shall specifically state the reasons why submission of companion briefs and record material in digital format would present an undue hardship." Rule 500.2, Submission of Briefs and Record Material in Digital Format. The new requirements are posted on the Unified Court System website at [www.nycourts.gov/courts/appeals/news/Newrules112910.pdf](http://www.nycourts.gov/courts/appeals/news/Newrules112910.pdf).

### **Judge Pfau Issues New Forms for Domestic Violence & Family Court**

Chief Administrative Judge Ann Pfau recently issued orders setting out revised and new uniform forms for Family Court (AO/556/2010) and forms used in domestic violence cases in Supreme Court, Family Court, and courts with criminal jurisdiction (AO/557/2010). Changes

were made to more than two hundred official Family Court forms, while eight new forms were added and three old ones were permanently rescinded. Fifteen forms used in domestic violence cases were revised.

As explained in the Nov. 8, 2010 memo accompanying Administrative Order 556, the Family Court forms were revised to reflect numerous changes in the law, including:

- amending the petition for child support modification and supporting affidavit to incorporate the provisions of the Low Income Support Obligation and Performance Improvement Act (L 2010, ch 182);
- creating a new form petition and court order related to the restoration of parental rights under the limited circumstances set forth in L 2010, ch 343; and
- incorporating the provisions of L 2010, ch 113, which "requires the court in permanent neglect proceedings to consider 'particular constraints' caused by the parent's incarceration or residential drug treatment, including, but not limited to, limitations on family contact and 'unavailability of social or rehabilitative services' to aid in developing a meaningful relationship, to plan for the child's future and to maintain contact with the child."

According to the memo about the domestic violence forms, revisions were made to add the new crimes of strangulation and criminal obstruction of breathing or blood circulation (L 2010, ch 405) to the form orders and temporary orders of protection, the family offense petition, and other forms. The revisions also substitute the term "attorney for the child" for "law guardian."

The forms are available on the Uniform Court System's website at: [courts.state.ny.us/forms/familycourt/index.shtml](http://courts.state.ny.us/forms/familycourt/index.shtml) and [courts.state.ny.us/forms/familycourt/domesticviolence.shtml](http://courts.state.ny.us/forms/familycourt/domesticviolence.shtml).

## **Public Defense Developments in New York State**

Among legal and budgetary developments affecting public defense services in New York State in recent months, the selection of a Director of the Indigent Legal Services Office (ILS Office) stands out as historic. Other developments include class certification of the New York Civil Liberties Union lawsuit against the State and five counties, budget woes for public defense providers across the state, and the ongoing litigation regarding provision of public defense services in New York City.

### **Leahy To Head ILS Office**

William J. Leahy, former Chief Counsel to the Massachusetts Committee for Public Counsel Services, is the Director of the new ILS Office. New York's Chief Judge, Jonathan Lippman, announced Leahy's appointment during the State of the Judiciary address on Feb. 15, noting

that the selection followed a national search and lauding Leahy's "superb record as an administrator and nearly four decades of experience in this field."

Lippman said that in the coming year the ILS Office, and the ILS Board that Lippman chairs, will focus "on assisting and evaluating our State's multiplicity of counsel assignment systems, and supporting creative, cost-effective delivery systems that meet the fundamental constitutional right we are charged with enforcing. We will seek the participation, cooperation and input of all who are affected by and have an interest in strengthening New York's indigent defense system, particularly county and State officials." ([www.nycourts.gov/admin/stateofjudiciary/SOJ-2011.pdf](http://www.nycourts.gov/admin/stateofjudiciary/SOJ-2011.pdf).)

NYSDA has met with Leahy, and looks forward to working with the ILS Office and Board.

### **Third Department Certifies Class in Hurrell-Harring**

The Third Department has reversed a supreme court order denying class certification in the NYCLU's lawsuit against New York State and five counties for failure to provide adequate public defense. The appellate court found that the concrete legal issue presented, *ie*, whether fulfillment of the constitutional mandate to provide counsel to indigent defendants is at risk due to systemic conditions in the counties named as defendants, is common to all proposed class members, and "transcends any individual questions," warranting certification. *Hurrell-Harring v State of New York*, 2011 NY Slip Op 72, 914 NYS2d 367 (1/6/2011). A summary of the decision appears on p. 36. On Feb. 11, Corey Stoughton, lead counsel in *Hurrell-Harring*, discussed litigation as a method of reforming public defense systems and compel adequate funding at the American Bar Association's 2011 Mid-Year Meeting. ([www.abanow.org/2011/02/funding-reform-and-volunteers-needed-to-help-defendants-too-poor-to-pay/](http://www.abanow.org/2011/02/funding-reform-and-volunteers-needed-to-help-defendants-too-poor-to-pay/).)

### **Litigation Continues on NYC Use of Assigned Counsel**

The First Department issued a stay in February temporarily barring New York City from moving ahead with plans to shift representation in up to 44,000 conflict cases from assigned counsel to institutional public defense offices. The stay is effective pending appellate review of a trial court's dismissal of litigation brought by five bar associations challenging the City's call for contract proposals. Argument on that appeal is expected between mid-May and mid-June. ([www.law.com](http://www.law.com), 2/18/2011.)

### **New Chief Defenders Announced**

Whether due to retirements, changes in political control of county legislative bodies reflecting an unfortunate lack of independence of the public defense function, or other causes, NYSDA's Chief Defender list ([www.nysda.org/html/chief\\_defenders.html](http://www.nysda.org/html/chief_defenders.html)) has required several amendments in the last few months, with others pending. Recent changes include:

- Albany County Public Defender: James P. Milstein succeeded Peter Torncello
- Chautauqua County Public Defender: R. Thomas Rankin succeeded William Coughlin
- Cortland County Assigned Counsel Plan Administrator: Lynn Manning filled this new position
- Dutchess County Public Defender: Thomas Angell is acting Public Defender, succeeding David Goodman
- Jefferson County Assigned Counsel Administrator: Scott R. Nortz succeeded Thomas P. Goodwin
- Nassau County's Assigned Counsel Defender Plan Administrator: Robert M. Nigro succeeded Patrick L. McCloskey
- Wayne County Public Defender: James S. Kernan succeeded Ronald C. Valentine

NYSDA looks forward to working with all Chief Defenders on the many issues facing public defense services in New York. The Backup Center provides updates to Chief Defenders on budget issues, developments in procedural and substantive law, and more. Technical assistance including the Public Defense Case Management System and consultation on a variety of issues is also available. NYSDA's periodic Chief Defender Convenings allow Chiefs to share ideas on common problems and topics of interest.

### **What is Happening in YOUR County About Videotaping of Interrogations?**

The headline on Auburnpub.com last December blared that "New state rules allow secret videos of interrogations." While new protocols endorsed in December by a number of law enforcement organizations for videotaping custodial interrogations do not constitute mandatory "rules," the story illustrates why defense lawyers will want to find out what their local prosecutors and police are doing in the way of compliance. ([auburnpub.com/news/local/article\\_f2c73dc0-07e5-11e0-9230-001cc4c03286.html](http://auburnpub.com/news/local/article_f2c73dc0-07e5-11e0-9230-001cc4c03286.html).)

The article indicates that the new guidelines leave it up to each of New York's 550 police departments and 62 counties to decide whether to use a hidden camera or one clearly in view of the person being questioned. "Investigators are supposed to tell a suspect if he or she is being secretly

recorded on video, if the suspect asks," the article notes.

As to *all* the guidelines, not just the choice between secret and open recording, the "New York State Guidelines for Recording Custodial Interrogations of Suspects" encourage police and district attorneys to modify the protocols "to conform to their specific needs, while being mindful of the intent of the procedures." The Guidelines are available at [criminaljustice.state.ny.us/pio/press\\_releases/video-recording-interrogation-procedures.pdf](http://criminaljustice.state.ny.us/pio/press_releases/video-recording-interrogation-procedures.pdf).

A Division of Criminal Justice Services (DCJS) press release issued on Dec. 14 touted the endorsement by law enforcement agencies at all levels of New York state and local government of the practice of video recording in custodial interrogations in their entirety. DCJS noted that 40 counties were already developing programs for recording the entire questioning of suspects arrested for designated felonies. ([criminaljustice.state.ny.us/pio/press\\_releases/2010-12-14\\_pressrelease.html](http://criminaljustice.state.ny.us/pio/press_releases/2010-12-14_pressrelease.html).) And the New York City Police Department just announced that it has started a pilot program to videotape interrogations. The program started on Feb. 23 in two precincts, one in the Bronx and one in Brooklyn, and will focus on felony assault cases. Unless asked, police officers do not have to tell suspects they are being recorded, but the police must comply with a request by the suspect to turn off the camera. ([www.nydailynews.com](http://www.nydailynews.com), 2/27/2011.)

Meanwhile, the widespread, entrenched belief of many criminal justice practitioners and laypeople alike that an innocent person is unlikely to confess is being countered by a still-growing body of evidence from psychological studies and overturned convictions. In a newly-released Iowa State University study, the likelihood that undergraduates would confess to illegal activities was linked to whether doing so would relieve short-term distress (proximal consequence), despite the potential for some other long-term (distal) consequence, regardless of the relative seriousness of the two consequences. (*Science Daily*, 2/20/2011, [www.sciencedaily.com/releases/2011/02/110218111825.htm](http://www.sciencedaily.com/releases/2011/02/110218111825.htm).) Such insights bolster the need for recorded interrogations, and careful defense attention to the pressures brought to bear on those being questioned.

NYSDA has long backed recording of interrogations. The Board of Directors passed a resolution on July 22, 2003, supporting "the passage of a rule of law mandating uninterrupted electronic recording throughout the interrogation process of individuals by law enforcement personnel." ([www.nysda.org/About NYSDA/03 Board Resolution on Recorded Interrogations.pdf](http://www.nysda.org/About%20NYSDA/03%20Board%20Resolution%20on%20Recorded%20Interrogations.pdf).) But we recognize that new guidelines will not end practices that the defense may wish to challenge. (For example, the Auburnpub.com article notes that the protocols are "not expected to change common techniques that include lying to suspects about evidence against them.") Therefore, the Backup Center is interested in receiving any information on

local practice with regard to recording of interrogations. Contact either *REPORT* co-editor if you have news to share.

## **What About Questioning that Isn't Custodial?**

The *New York Law Journal* reported on Dec. 21, 2010 that Acting Justice Analisa Torres has found routine, random, unjustified questioning of residents and visitors in public housing to constitute a systematic violation of leading precedent. Torres, rejecting the prosecution's assertion that mere presence in public housing would justify a request for identification, suppressed cocaine found on the defendant in a public housing lobby. See *People v Jose Venture*, 2010 NY Slip Op 20514, 913 NYS2d 543 (Supreme Ct, New York Co 2010).

## **Keep Challenging the Constitutionality of Persistent Felony Offender Statutes**

As reported in the Mar-May 2010 issue of the *REPORT*, a panel of the Second Circuit ruled that New York's persistent felony statute was unconstitutional. ([www.nysda.org/2010-BackupCenter-REPORT-Mar-May.pdf](http://www.nysda.org/2010-BackupCenter-REPORT-Mar-May.pdf).) Unfortunately, that success was short-lived; in October, the Second Circuit issued an en banc decision reversing the panel's ruling, concluding that the state courts did not engage in an unreasonable application of clearly established Supreme Court law in affirming the petitioners' sentences. See *Portalatin v Graham*, 624 F3d 69 (2d Cir 2010).

In December, the Court of Appeals issued two decisions rejecting challenges to the persistent felony offender statute, *People v Battles* (2010 NY Slip Op 09160 [12/14/2010]) and *People v Wells* (15 NY3d 927 [12/14/2010]) (summarized on pp. 11-12.) But well-known defense lawyer Brian Shiffrin posits in a blog post that Chief Judge Lippman's strongly-worded dissent in *Battles* constitutes a "glimmer of hope" that New York's discretionary persistent felony offender sentencing statute may eventually be struck down by the U.S. Supreme Court. Based on that possibility, however slight, Shiffrin cautions that "prudent counsel will continue to raise constitutional challenge to

### **Keep up with What's Coming from the Court of Appeals!**

Courtesy of Robert Dean, at the Center for Appellate Litigation, the NYSDA website is linked to a list of significant criminal cases pending in the New York Court of Appeals, including the issues presented.

[www.nysda.org/html/courts\\_ny.html#Update](http://www.nysda.org/html/courts_ny.html#Update)

the statutes” to preserve clients’ challenges to unconstitutionally imposed life sentences. ([newyorkcriminaldefense.blogspot.com/2010/12/prudent-counsel-will-continue-to.html](http://newyorkcriminaldefense.blogspot.com/2010/12/prudent-counsel-will-continue-to.html)); see also “Is Persistent Felony Offender Statute Constitutional?,” *New York Law Journal*, 1/4/2011.)

### **Macri, Criminal Defense Immigration Project Recognized**

As many public defense programs and attorneys know, NYSDA’s Criminal Defense Immigration Project (CDIP) provides training and consultation about the intersection of immigration law and criminal law. Since last March, CDIP’s Director, Joanne Macri, has been busy presenting CLE sessions across the state to help lawyers meet their newly recognized constitutional duty to advise clients in criminal cases about the immigration conse-

quences of conviction and, when possible, seek to preserve any available forms of relief from removal. See *Padilla v Kentucky*, 130 S Ct 1473 (2010). Macri also staffs a telephone hotline (716-913-3200) from which attorneys can obtain expert assistance in determining potential immigration consequences. (Or, contact her by email at [jmacri@nysda.org](mailto:jmacri@nysda.org).)

### **Bar Foundation Awards Grant for CDIP**

For the second year in a row, the New York Bar Foundation has recognized the importance of CDIP, awarding a grant to support the Project’s work. In a difficult budget year, at a time when CDIP’s services are in greater-than-ever demand, this support is particularly beneficial; NYSDA is grateful to the Bar Foundation for this assistance.

*(continued on page 43)*

## CONFERENCES & SEMINARS

**Sponsor:** New York State Defenders Association  
**Theme:** Criminal Defense Tactics and Techniques XIII  
**Date:** April 2, 2011  
**Place:** Rochester, NY  
**Contact:** NYSDA: tel (518) 465-3524; fax (518) 465-3249; email [dgeary@nysda.org](mailto:dgeary@nysda.org); website [www.nysda.org](http://www.nysda.org)

**Sponsor:** New York State Bar Association  
**Theme:** Family Court Practice  
**Dates:** April 5 (Melville); April 6 (Syracuse); April 7 (Albany & Buffalo); April 14 (New York City & Westchester)  
**Place:** Melville, Syracuse, Albany, Buffalo, New York City & Westchester  
**Contact:** NYSBA: tel (800) 582-2452 or (518) 463-3724; website [www.nysba.org](http://www.nysba.org)

**Sponsor:** National Association of Criminal Defense Lawyers  
**Theme:** Righting Wrongful Convictions: Challenging Flawed Forensics  
**Date:** April 7, 2011  
**Place:** Cincinnati, OH  
**Contact:** NACDL (Vanessa Antoun): tel (202) 872-8600 x 263; email [vanessa@nacdl.org](mailto:vanessa@nacdl.org); website [www.nacdl.org](http://www.nacdl.org)/meetings

**Sponsor:** New York State Association of Criminal Defense Lawyers  
**Theme:** Cross to Kill  
**Date:** April 15, 2011  
**Place:** Brooklyn, NY  
**Contact:** NYSACDL: tel (212) 532-4434; fax (888) 239-4665; website [www.nysacdl.org](http://www.nysacdl.org)

**Sponsor:** New York State Bar Association  
**Theme:** DWI on Trial—The Big Apple XI  
**Dates:** May 5–6, 2011  
**Place:** New York, NY  
**Contact:** NYSBA: tel (800) 582-2452 or (518) 463-3724; website [www.nysba.org](http://www.nysba.org)

**Sponsor:** New York State Defenders Association  
**Theme:** 44th Annual Meeting & Conference  
**Dates:** July 24–26, 2011  
**Place:** Saratoga Springs, NY  
**Contact:** NYSDA: tel (518) 465-3524; fax (518) 465-3249; email [dgeary@nysda.org](mailto:dgeary@nysda.org); website [www.nysda.org](http://www.nysda.org)

**Sponsor:** New York State Defenders Association  
**Theme:** Winning Criminal Defense Strategies  
**Date:** October 28, 2011  
**Place:** Poughkeepsie, NY  
**Contact:** NYSDA: tel (518) 465-3524; fax (518) 465-3249; email [dgeary@nysda.org](mailto:dgeary@nysda.org); website [www.nysda.org](http://www.nysda.org)

*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.*

*Ed. Note: With this issue, the REPORT introduces a new case summary format. The change should increase the speed with which NYSDA can provide information about new decisions. The new format will also allow readers to more quickly identify those cases immediately relevant to their work. Because most REPORT readers can now access recent decisions electronically, citations to the precedents relied on in the summarized opinions are no longer included.*

## 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.supreme-court.gov/opinions/](http://www.supreme-court.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](http://www.law.cornell.edu).

### Federal Law (Crimes)

***Abbott v United States*, 562 US \_\_, 131 Sct 18 (11/15/2010)**

**Holding:** The "except" clause of 18 USC 924(c)(1)(A)(i), which states that a minimum term of five years shall be imposed as a consecutive sentence "[e]xcept to the extent that a greater minimum sentence is otherwise provided by [924(c) itself] or by any other provision of law" does not allow those convicted under 924(c) to avoid the imposition of additional prison time by virtue of receiving a higher mandatory minimum on a different count of conviction. Individuals convicted under this statute are subject to the highest mandatory minimum specified for their conduct in 924(c), unless another provision of law directed to conduct proscribed by 924(c) imposes an even greater mandatory minimum.

### Civil Rights Actions (USC § 1983 Actions)

***Los Angeles County, California v Humphries*, 562 US \_\_, 131 Sct 447 (11/30/2010)**

**Holding:** The requirement that litigants suing a municipal entity under 42 USC 1983 must show that the cause of their injury was a municipal policy or custom applies when prospective relief such as declaratory judgment or an injunction, rather than monetary damages, is sought. The contrary Ninth Circuit ruling in a case where parents exonerated of child abuse sued because they had no recourse for having their names removed from a Child Abuse Central Index is reversed.

### Counsel (Competence/Effective Assistance/Adequacy)

***Harrington v Richter*, 562 US \_\_, 131 Sct 770 (1/19/2011)**

**Holding:** The provisions of 28 USC 2254 as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) that bar relitigation of claims "adjudicated on the merits" in state court, subject to certain exceptions, applies where a state court's order was unaccompanied by an opinion explaining the reasons that relief was denied. The Ninth Circuit's opinion granting habeas corpus relief discloses an improper understanding of the unreasonableness standard of 2254 and of its operation in the context of a claim of ineffective assistance of counsel under *Strickland v Washington* (466 US 668 [1984]). While there are cases in which the only reasonable and available defense strategy requires counsel to consult with experts before or at trial or both, and/or introduce expert evidence, there are many ways to provide effective assistance of counsel in a given case. Here, though there were "any number of hypothetical experts" whose insight might have been useful as to a range of topics, an attorney "can avoid activities that appear 'distractive from more important duties.'" Testing of blood from a particular area could have exposed the defendant's version of events as a fabrication, or offering expert evidence could have had adverse effects at trial. This record provides "no basis to rule that the state court's determination was unreasonable."

### Counsel (Competence/Effective Assistance/Adequacy)

***Premo v Moore*, 562 US \_\_, 131 Sct 733 (1/19/2011)**

**Holding:** A state court did not engage in an unreasonable application of clearly established federal law by ruling that ineffective assistance of counsel was not shown where defense counsel failed to seek suppression of a defendant's confession to police, made after a confession to others, before advising the defendant regarding a guilty plea in a murder case potentially subject to the

US Supreme Court *continued*

death penalty. Strict adherence to the effective assistance standard set out in *Strickland v Washington* (466 US 668 [1984]) is particularly essential when the legal choices being reviewed were made by an attorney at the plea bargain stage. Plea bargains result from “complex negotiations suffused with uncertainty.” Claims of ineffective assistance that “lack the necessary foundation may bring instability to the very process the inquiry seeks to protect.” Prosecutors fearful of later second-guessing by courts outside the *Strickland* standard could lead to fewer plea offers beneficial to defendants. The Ninth Circuit arrived at its finding of ineffectiveness by transposing the Fifth Amendment case of *Arizona v Fulminante* (499 US 279 [1991]) into a novel context. Novelty, by definition, is not “clearly established” federal law. Further, *Fulminante* says nothing about prejudice for *Strickland* purposes and does not contemplate prejudice in the plea bargain context.

## Civil Rights Actions (USC § 1983 Actions)

***Ortiz v Jordan*, 562 US \_\_, 131 S Ct 884 (1/24/2011)**

**Holding:** A party may not appeal an order denying summary judgment after a full trial on the merits; once a trial has been held, the availability of official immunity is to be determined on the basis of the trial record. The assertion of prison officers that “a qualified immunity plea raising an issue of a ‘purely legal nature’ . . . is preserved for appeal by an unsuccessful motion for summary judgment” need not be addressed where they had not controverted the applicable law but rather the facts that could render them answerable for crossing a constitutional line.

## Habeas Corpus (Federal)

## Parole (Release [Consideration for])

***Swarthout v Cooke*, 562 US \_\_, 131 S Ct 859 (1/24/2011)**

**Holding:** California’s standard of appellate review in parole cases, whether “some evidence” supports the conclusion that the prisoners are unsuitable for parole because they are currently dangerous, is not a component of the liberty interest protected by the federal constitution allowing federal review of state decisions. The relevant inquiry is what process appealing prisoners received, not whether the state court decided their cases correctly.

## Habeas Corpus (Federal) (State)

***Walker v Martin*, No. 09-996, 562 US \_\_ (2/23/2011)**

**Holding:** California’s timeliness rule, which requires that state habeas petitioners file claims without substantial delay, is an independent state ground adequate to bar

federal habeas corpus relief because it is firmly established and regularly followed. California courts require that petitioners file claims “as promptly as the circumstances allow,” state when they first learned of the asserted claims, and explain why they did not seek post-conviction relief sooner. While California’s rule is discretionary, it is firmly established. The respondent did not file his habeas petition alleging ineffective assistance of counsel for almost five years and he provided no reason for the delay. California precedent shows that such a delay is considered substantial. The rule’s use of indeterminate language, which is substantially similar to discretionary federal rules applied by this Court, does not render it too vague to be deemed firmly established. The rule is also regularly followed; the state’s courts summarily deny hundreds of petitions citing the California Supreme Court’s decisions that established the rule. “Today’s decision . . . leaves unaltered this Court’s repeated recognition that federal courts must carefully examine state procedural requirements to ensure that they do not operate to discriminate against claims of federal rights.”

## Evidence (Hearsay)

## Witnesses (Confrontation of Witnesses)

***Michigan v Bryant*, No. 09-150, 562 US \_\_ (2/28/2011)**

**Holding:** The decedent’s statements to the police, identifying and describing the shooter and the location of the shooting, were not testimonial statements because an objective analysis shows that the “primary purpose of the interrogation” was “to enable police assistance to meet an ongoing emergency”; therefore, admission of those statements at the defendant’s murder trial did not violate the Confrontation Clause. The existence of an ongoing emergency that threatens the police and public is an important, but not a dispositive factor; the examination must not narrowly focus on whether the threat to the injured person is neutralized, but the emergency may not last the entire time the perpetrator is on the loose. Other factors include the duration and scope of the emergency, which may depend on the type of weapon used; the medical condition of the injured person, which provides information about the person’s ability to have any purpose at all in responding to police questions, the likelihood that any purpose formed would be testimonial, and the existence and magnitude of a continuing threat; and the informality of the encounter. Analysis of the statements and actions of both the declarant and the police also provides objective evidence of the primary purpose of the interrogation; this approach “ameliorates problems that could arise from looking solely to one participant,” including that police and declarants often have mixed motives.

Here, responding to a report that a man was shot, the police went to a gas station and found the decedent on the

**US Supreme Court** *continued*

ground with a gunshot wound to his abdomen. Several different officers asked him at different times over several minutes what happened, who shot him, and where the shooting occurred. The decedent, who died a few hours later, never indicated whether the shooting resulted from a private dispute or that the threat had ended; during their exchange, neither the police nor the decedent knew where the shooter was located; the decedent, who was obviously in considerable pain and had trouble breathing and talking, asked when emergency medical services would arrive; and the interrogation was informal.

**Concurrence:** [Thomas, J] The analysis should focus on the formality and solemnity of the questioning, *ie*, the “extent to which the interrogation resembles those historical practices that the Confrontation Clause addressed.”

**Dissent:** [Scalia, J] The intent of the police and the reliability of the declarant’s statements are irrelevant to whether the statements are testimonial. Here, the decedent’s statements were clearly testimonial and “had little value except to ensure the arrest and eventual prosecution of [the defendant].” The decedent knew: that the threat ended several blocks away and almost 30 minutes earlier when he fled from the defendant’s home; it was highly unlikely that the defendant would have followed him to the gas station and even more unlikely he would shoot at the decedent while the police were present; he was shot by a drug dealer, not someone who might randomly threaten others; and that the police were focusing on investigating the shooting, not his medical needs.

**Dissent:** [Ginsberg, J] Although not properly raised here, there remains an open issue of whether the dying declarations exception survives this Court’s recent Confrontation Clause decisions.

**New York 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](http://www.nycourts.gov/reporter/Decisions.htm).

**Discovery (Brady Material and Exculpatory Information)**

**People v Bayard**, 15 NY3d 896, 912 NYS2d 554 (11/17/2010)

**Holding:** No *Brady* violation warranting reversal of the conviction occurred based on omission of the name of the officer that compiled the information in the police omniform system complaint report turned over to the defendant before trial. Even if the omitted name had exculpatory or impeachment value, no reasonable possi-

bility existed on this record that disclosure of the officer’s identity would have changed the outcome of the proceedings. The defense was allowed to make significant use of the unsigned report during cross-examination and to challenge the complainant’s identification by introducing a non-testifying eyewitness’s description.

**Driving While Intoxicated (Breathalyzer)****Forensics**

**People v Boscic**, 15 NY3d 494, 912 NYS2d 556 (11/17/2010)

**Holding:** Prior caselaw created no per se rule requiring that breath-alcohol detection devices be calibrated at least every six months for the test results to be admissible. The prosecution must lay a foundation demonstrating that the particular device was in proper working order when the test was administered. Given the technological advances that have occurred and will continue to occur, along with the proliferation of breath-alcohol detection devices approved for use by the Department of Health, a court-imposed calibration timing rule would not help achieve the primary objective, *ie*, to provide a basis for determining whether the particular instrument produced reliable results in a specific instance.

**Juveniles (Delinquency – Procedural Law)**

**Matter of Jazmin A.**, 15 NY3d 439, 914 NYS2d 72 (11/17/2010)

**Holding:** The Legislature did not empower the Family Court to order detention of a juvenile probationer before the filing of a violation of probation (VOP) petition. The respondent’s acknowledgment of the court’s admonition about a swift detention if probation was violated did not amount to a waiver of a VOP petition, if such a waiver could ever be obtained from a minor in this situation. The respondent’s court appearance for checking on her compliance with probation could not be deemed an adjournment of the initial appearance on the underlying delinquency petition as a dispositional order has been entered. Because the substantial and novel issue presented was likely to recur and evade review, an exception exists to the mootness bar to considering it on appeal.

**Evidence (Sufficiency)****Instructions to Jury (Theories of Prosecution and/or Defense)**

**People v Levy**, 15 NY3d 510, 914 NYS2d 721 (11/18/2010)

**Holding:** The evidence supporting the defendant’s second-degree trademark counterfeiting conviction fell

**NY Court of Appeals** *continued*

within the meaning of the statute. The evidence could have led a rational juror to find beyond a reasonable doubt that the defendant intended to evade a lawful restriction on the sale of goods. Under state law, a trademark is a mark registered and in use which identifies and distinguishes goods from those manufactured by others; a counterfeit mark is an imitation mark used in selling or distributing goods substantially indistinguishable from genuine ones. The state Legislature’s decision not to parrot federal law and enact an identity-of-goods requirement may reflect an understanding that consumers rely on a trademark itself rather than its placement on a particular type of product such as hubcaps. It was not error for the judge to decline to instruct the jury further on mens rea; it would have been impossible to “intend to evade a lawful restriction” on the sale of goods without knowing that those goods were fake. Knowledge that a good is counterfeit is only required for simple possession.

**Homicide (Murder [Definition] [Evidence] [Intent])**

***People v Taylor*, 15 NY3d 518, 914 NYS2d 76 (11/18/2010)**

**Holding:** The defendant’s motion to dismiss the depraved indifference murder charge for legal insufficiency pursuant to *People v Suarez* (6 NY3d 202 [2005]) properly preserved the issue for appellate review. An argument under *Suarez* is not fundamentally different from one based on *People v Feingold* (7 NY3d 288 [2006]). The evidence here was legally insufficient to establish depraved indifference murder. The acts established—the defendant struck the decedent on the head, went to sleep, and upon awakening knotted a plastic bag over the decedent’s head and dumped her body on the roof of his building—did not fall within the limited nature of a depraved indifference murder required by precedent; the prosecution did not establish “torture or a brutal, prolonged” course of conduct.

**Evidence (Business Records) (Hearsay)**

***People v Ortega*, 15 NY3d 610, \_\_\_ NYS2d \_\_\_ (11/23/2010)**

**Holding:** In defendant Benston’s case, the accuser’s statements to the treating physician referring to an “old boyfriend” as the perpetrator, and the description in medical records of the case as involving “domestic violence,” references to a “safety plan” for the accuser, and the description of the weapon as a leather belt, were relevant to diagnosis and treatment and therefore fell within the business records exception to the rule against the use of hearsay. References to the color of the belt should not have

been admitted, but any error was harmless. In defendant Ortega’s case, the accuser’s statement to medical personnel that he was forced to smoke a white, powdery substance was relevant to his diagnosis and treatment, as the treatment of a patient who had been coerced into taking drugs may differ from a patient who had intentionally taken them.

**Concurrence:** [Smith, JJ] The business records exception made the records themselves, but not hearsay contained within those records, admissible. The statements were admissible under a newly adopted “medical diagnosis and treatment” exception to the hearsay rule. These cases did not present the harder problem that would arise when the out-of-court statement was made by a person who did not testify.

**Concurrence:** [Pigott, JJ] A medical record proffered for admission was, upon a proper objection, subject to redaction of information that was irrelevant or not germane to a medical diagnosis or treatment. The majority in *Benston* interpreted the business records exception too broadly. In defendant Ortega’s case, evidence that the accuser had been forced to ingest drugs should have been excluded in the absence of medical testimony that such information was relevant to diagnosis and treatment.

**Sex Offenses (Civil Commitment) (Sentencing)**

***Matter of State of New York v Rashid*, 2010 NY Slip Op 08612 (11/23/2010)**

**Holding:** To pursue civil management under article 10 of the Mental Hygiene Law, the key component of the Sex Offender Management and Treatment Act (SOMTA) (L 2007 ch 7), the Attorney General must file the required petition in a court of competent jurisdiction before the individual’s release from State custody or supervision. Here, the respondent had been released from incarceration for a definite sentence on a misdemeanor charge only four days before expiration of his parole at the end of the maximum term of his consecutive indeterminate felony sentences. Penal Law 70.30 is not relevant to the issue of which sentences made a person eligible for civil management under article 10. The Attorney General filed a petition a day after the parole expiration, and other petitions later. When individuals pass beyond the purview of the criminal justice system, the involuntary commitment provisions in article 9 of the Mental Hygiene Law might come into play in an appropriate case.

**Dissent:** [Graffeo, JJ] The respondent was a detained sex offender when interagency notice was given. Nothing in the civil management act expressly imposed a strict time limitation on the Attorney General’s ability to file a petition and commence the court proceeding. Being “at liberty” can arise from a discharge from parole. Article 10 does not contain any provision that directs how to make the “currently serving” determination when an offender

**NY Court of Appeals** *continued*

is subject to multiple terms of imprisonment. The default calculation rule of Penal Law 70.30(1)(b) should govern.

**Dissent:** [Smith, J] This case presented narrow issues of statutory construction, not the substantive question of how far Mental Hygiene Law article 10 went, or constitutionally might go, in permitting what amounts to preventive detention for dangerous sex offenders. The other opinions do not address, nor does this dissent imply, whether article 10 permits, or constitutionally could permit, the detention of the respondent or prisoners similarly situated.

**Discrimination (Race)****Juries and Jury Trials (Challenges) (Voir Dire)****People v Hecker, 15 NY3d 625, \_\_ NYS2d \_\_ (11/30/2010)**

**Holding:** These cases involve the three-step test of *Batson v Kentucky* for assessing whether peremptory challenges have been used to exclude potential jurors on a constitutionally improper basis. Defendant Guardino failed to make out the required first step, a prima facie claim. At the time of Guardino's *Batson* challenge, 22 of the 37 potential jurors were female, of whom six were African-American; the prosecution used 11 of their 12 peremptory challenges to remove females, four of whom were African-American. The 12-person jury ultimately selected included five females, one of whom was African-American. Mere numerical assertions alone did not give rise to a mandatory inference of discrimination. Guardino made no record of the racial or gender composition of the remaining venire and did not articulate other facts or circumstances that gave rise to an inference of discrimination.

In defendant Hecker's case, there was no basis for a finding by the court that race-neutral reasons by the defense for peremptory challenges were pretextual. The record did not support the conclusion that defense counsel purposely avoided questioning panelists of Asian descent to justify peremptorily striking them later. Defense counsel's strategy was not to avoid or ignore a particular class of prospective jurors based on race but to remove jurors there had not been time to question. The prosecution's prima facie case, which rested solely on the fact that defense counsel struck two jurors of Asian descent in one particular round, including one who would have been a problematic juror for any defendant and who was unsuccessfully challenged for cause, was weak. However, the court's error in seating the other on the jury was harmless.

Defendant Hollis improperly relied on a numerical argument to challenge the removal of the only two African-American panelists. No record was made of the

racial composition of the remaining venire, nor did defense counsel argue that the prosecution peremptorily struck African-American prospective jurors seated during the first round. He did not enumerate any other factors supporting an inference of discrimination.

In defendant Black's case, there was record support for the court's acceptance, based on the totality of all the relevant facts and circumstances, of the race neutral reasons given for excluding jurors. One had exhibited a "body-language problem" during questioning and two others were deemed dubious based on their residence, employment status, and educational backgrounds. The prosecution employed a general strategy to select primarily educated jurors with gainful employment or who have had at least a prior history of employment.

**Concurrence in Part, Dissent in Part:** [Smith, J] In *Guardino*, the suggestion that African-American women were a "cognizable group" for *Batson* purposes was not obviously correct. Challenging African-American women but not African-American men and white women, was not racism or sexism. Whether a group defined by race and sex was within *Batson*'s protections is an open question. In *Hecker*, application of an automatic-reversal rule based on a reverse *Batson* finding of exclusion of Asian jurors by the defense was not appropriate. The rule of automatic reversal is likely to discourage courts and prosecutors from policing a defendant's discriminatory use of peremptory challenges. Whether any error warranted reversal should be considered.

**Concurrence in Part, Dissent in Part:** [Grafano, J] There was record support for the *Hecker* court's step-three finding that the peremptory challenge was racially motivated.

**Sentencing (Concurrent/Consecutive) (Persistent Felony Offender)****People v Battles, 2010 NY Slip Op 09160 (12/14/2010)**

**Holding:** All but one of the sentences imposed on the defendant after he was convicted of depraved indifference murder and depraved indifference assault, for splashing gasoline throughout an apartment and on several individuals and igniting a fire that killed one person and injured several others, were properly made consecutive to one another. The sentence as to the individual who was never doused, but rather, was sprayed as a result of the dousing of the others, must run concurrently because the risk-creating conduct for that conviction was the same act as that of the others. The defendant's challenge to the constitutionality of his sentencing as a persistent felony offender and other claims were without merit.

**Dissent in Part:** [Lippman, CJ] "I do not believe that our persistent felony offender sentencing provisions can ultimately survive constitutional scrutiny and, practically, see nothing to be gained, and much to be lost, in clinging,

**NY Court of Appeals** *continued*

during what will undoubtedly be further protracted litigation, to a legally flawed sentencing scheme whose entirely proper objectives are capable of being met without constitutional offense.”

**Dissent in Part:** [Jones, JJ] The defendant’s sentences as to all four victims should be modified to run concurrently. The acts that preceded the defendant’s ignition of the fire—the pouring, splashing, or throwing gasoline—cannot be the basis of the sentencing determination under Penal Law 70.25(2) because these acts were insufficient to complete the crimes of which he was convicted. The defendant’s single act of causing the fire was the basis for his convictions, so consecutive punishment was prohibited.

**Sentencing (Persistent Violent Felony Offender)**

**People v Bell, 15 NY3d 935, 915 NYS2d 208 (12/14/2010)**

**Holding:** The defendant’s invitation to go beyond the United States Supreme Court’s ruling in *Apprendi v New Jersey*, reject the *Almendarez-Torres* holding on which many recent cases were decided, and hold that the New York State Constitution requires all facts that may enhance a defendant’s sentence, including the fact of a prior conviction, to be found by a jury, is rejected.

**Sentencing (Concurrent/Consecutive) (Persistent Violent Felony Offender)**

**People v Frazier, 2010 NY Slip Op 9159 (12/14/2010)**

**Holding:** The sentences for three convictions of second-degree burglary, which were completed when the defendant entered each apartment with the intent to commit a crime, may run consecutive to the sentences for two ensuing larcenies, which were crimes separate from the burglaries because they were perpetrated through the separate act of stealing. The defendant was properly found competent to stand trial. His argument that the persistent violent felony offender sentencing scheme is unconstitutional fails.

**Sentencing (Concurrent/Consecutive)**

**People v McKnight, 2010 NY Slip Op 09161 (12/14/2010)**

**Holding:** For firing multiple shots, two of which killed decedent Smith, the defendant properly received consecutive sentences for the attempted murder of the person he intended to shoot and the murder of Smith. Penal Law 70.25(2) did not mandate concurrent sentences.

The actus reus of the murder of Smith was the firing of the two shots that caused the death of a third person while intending to kill another, and the actus reus of the attempted murder was the firing of the eight other shots, which either hit no one or hit the intended target. The test is whether separate acts have been committed with the requisite criminal intent.

**Dissent in Part:** [Lippman, CJ] The actus reus of the attempted murder encompassed the entire actus reus of the murder. Concurrent sentences were required.

**Dissent in Part:** [Jones, JJ] The two offenses were committed through the same act and concurrent sentences must be imposed.

**Discrimination (Race)**

**Juries and Jury Trials (Challenges) (Voor Dire)**

**Sentencing (Persistent Violent Felony Offender)**

**People v Sweeper, 15 NY3d 925, 915 NYS2d 208 (12/14/2010)**

**Holding:** The defense failed to establish a step one prima facie case of racial discrimination to support the defendant’s *Batson* challenge. The defendant’s challenge to the constitutionality of his persistent violent felony offender adjudication is barred by precedent.

**Juries and Jury Trials (Discharge)**

**Sentencing (Persistent Felony Offender) (Persistent Violent Felony Offender)**

**People v Wells, 15 NY3d 927, \_\_ NYS2d \_\_ (12/14/2010)**

**Holding:** The defendant did not preserve for review his claim that the court lacked authority to discharge a sworn juror who revealed that because he worked the night shift, he had slept in the jury room, which raised concerns about the juror’s ability to stay awake during the trial. The defendant failed in the trial court to refer to Criminal Procedure Law 270.15, which he cited on appeal, essentially arguing below against an “incapacity” discharge and saying the juror could be ordered not to work nights during the trial. The defendant’s challenge to the constitutionality of his adjudication as a persistent violent felony offender and persistent felony offender is rejected.

**Dissent:** [Lippman, CJ] The defendant fully preserved the juror issue by objecting to the discharge of a “perfectly suitable and able” juror. The majority appears to adopt the argument that a court should be deemed to possess inherent authority to discharge a sworn juror for valid, cogent reasons other than illness or incapacity. It should not be concluded that the defendant’s sentencing as a persistent felony offender can survive constitutional scrutiny.

**NY Court of Appeals** *continued***Appeals and Writs (Scope and Extent of Review)****Weapons (General)****People v Smith, 15 NY3d 669, \_\_ NYS2d \_\_ (12/16/2010)**

**Holding:** The notice and registration requirements of New York City's Gun Offender Registration Act (GORA), to which the defendant was subject as a result of his guilty plea to second- and third-degree possession of a weapon, were not "traditional, technical or integral" parts of his sentence or subsumed within the judgment of conviction; rather, the registration of a gun offender is an administrative matter between the City, the police department, and the offender. A challenge to GORA as dealing with an issue preempted by state law is therefore not appealable under Criminal Procedure Law 450.10. Appropriate means such a CPLR article 78 proceeding or a declaratory judgment action exist for such a challenge.

**Appeals and Writs (Scope and Extent of Review)****Weapons (General)****People v Stepter, 15 NY3d 940, 915 NYS2d 213 (12/16/2010)**

**Holding:** Where the prosecution conceded that the defendant had no obligation to register as a gun offender under New York City's Gun Offender Registration Act (GORA) based on the crime for which he was convicted, the defendant's claim that he could not be required to register was moot. Further, a challenge to registration under GORA cannot be raised on direct appeal from a judgment of conviction and sentence.

**Counsel (General)****People v Porto, 2010 NY Slip Op 09378 (12/21/2010)**

**Holding:** As to defendant Porto, whose motion for substitution of counsel on the day of trial was by means of a form on which all three pre-printed grounds were circled but no information was included in the blank space provided for elaboration, and the court engaged in a colloquy with defense counsel but did not direct any questions towards the defendant, there is no record evidence that the court abused its discretion in denying the motion. The defendant failed to make any specific allegations that would require further inquiry.

In *Garcia*, where the defendant accepted a plea offer but repeatedly declined to discuss the facts of the case at the presentence report interview—a condition of the plea—and did not express dissatisfaction with counsel until the morning of the final hearing when the court said his

sentence would be enhanced, the court engaged in sufficient minimal inquiry by directing questions to both defendant and defense counsel, who evaded expounding on the motion but acknowledged that the defendant believed he had been coerced by counsel into taking the plea. It can be inferred from the record that the motion for new counsel was a possible delay tactic and it was not an abuse of discretion by the court to conclude that the defendant's vague claims were unavailing.

**Dissent:** [Pigott, J] A court's failure to ask a defendant about his motion for assignment of new counsel before denying it, essentially hearing only one side of the story, was reversible error. Defendant Porto's written *pro se* motion on its own suggested the serious possibility of an irreconcilable conflict with a lawyer who, according to Porto, would not visit him or keep him apprised of motion practice until the eve of trial; taken together with defense counsel's remarks, this suggested a serious possibility of good cause, a separate issue from the actual existence of good cause for assignment of new counsel.

**Guilty Pleas (General)****Sentencing (General)****People v Ashley, 2011 NY Slip Op 00034 (1/6/2011)**

**Holding:** "Defendant's challenge to his adjudication as a second violent felony offender and the sentence that was originally imposed is moot because County Court resentenced him as a first felony offender in a post-judgment CPL 440.20 proceeding that is not a subject of this appeal. Defendant failed to preserve his argument that the guilty plea became involuntary after he was subsequently resentenced for a prior, unrelated criminal offense."

**Attempt (Lesser and Included Offenses)****People v Aponte, 2011 NY Slip Op 00742 (2/10/2011)**

**Holding:** Attempted third-degree stalking (Penal Law 110.00, 120.50[3]) is a legally cognizable offense. The defendant was charged with third-degree stalking and harassment based on allegations that he followed the accuser from her home to her church, then for five blocks from her home, before confronting her and saying he was going to kill her. On the prosecution's motion, the court reduced the stalking charge to attempt, then tried the defendant without a jury and convicted him. The Appellate Term affirmed. The defendant's contention, that because the third-degree stalking statute encompasses actions in the nature of attempt a person cannot attempt to commit that crime, is rejected. One may attempt to engage in a course of conduct likely to cause enumerated consequences, in this instance, "'a course of conduct . . . likely to cause [another] to reasonably fear physical injury . . .'" or other results.

NY Court of Appeals *continued*

**Guilty Pleas (General)**

**Sex Offenses (Civil Commitment) (Sentencing)**

**People v Harnett, 2011 NY Slip Op 00744 (2/10/2011)**

**Holding:** Failing to warn persons charged with sex offenses that they may be subject to the Sex Offender Management and Treatment Act (SOMTA)—Mental Hygiene Law article 10—does not automatically invalidate their guilty pleas. Under SOMTA, a notice of the approach of a sex offender’s anticipated release must be given to the Attorney General and the Commissioner of Mental Health, after which a series of reviews, possibly including a jury trial, ensues that may lead to the offender’s civil confinement or strict and intensive supervision after the criminal sentence terminates. These are collateral rather than direct consequences of the conviction, because they are remedial rather than penal in nature and are far from automatic; the large majority of detained sex offenders will suffer no consequences beyond their criminal sentences. While potential commitment or intensive supervision following a sentence are important consequences, and explaining possible SOMTA effects prior to guilty pleas is recommended, not every failure to do so entitles the defendant to withdraw a guilty plea. The defendant here was told the length of his prison term, that a period of post-release supervision between three and 10 years would follow it, that he would be subject to an order of protection, and that he would have to register as a sex offender, but nothing was said about SOMTA. The defendant never sought to withdraw his plea, and failed to make a showing on appeal that would justify withdrawal of his plea as being involuntary based on the lack of SOMTA warnings. The Appellate Division properly affirmed.

**Dissent:** [Ciparick, J] SOMTA is so grave a deprivation of liberty that a guilty plea taken without knowing about it should not be considered knowing and voluntary.

**Appeals and Writs (Question of Law and Fact)**

**Search and Seizure (Entries and Trespasses)**

**People v Liggins, 2011 NY Slip Op 00743 (2/10/2011)**

**Holding:** “Appeal dismissed upon the ground that the reversal by the Appellate Division was not ‘on the law alone or upon the law and such facts which, but for the determination of law, would not have led to reversal’ (CPL 450.90[2][a]).”

**Dissent:** [Pigott, J] The reversal below involved the applicability of the emergency doctrine, which is usually a mixed question of law and fact. The appellate court’s

opinion shows that it was based on the legal conclusion that *People v Mitchell* (39 NY2d 173 [1976]) prohibited the application of the emergency doctrine to the facts here. The trial court sustained a warrantless search of an apartment. Based on a report of shots fired and the statement of a neighboring apartment dweller that she heard arguing in the target apartment just before the shots, police knocked, waited until a distraught woman talking on a cell phone answered the door, entered to search for a shooter or injured victim, and saw drugs. The Appellate Division reversed because 1) no evidence was presented as to the source of the report, the time between the report and the alleged shots, any identity of a perpetrator, or that a possible victim existed and 2) there was no reasonable basis on which to associate the apartment searched with the alleged emergency. The law does not mandate compliance with a standard that in hindsight would preclude all but the least intrusive course of conduct by police. The case is appealable and the Appellate Division decision should be reversed.

**Disorderly Conduct**

**People v Weaver, 2011 NY Slip Op 00745 (2/10/2011)**

**Holding:** Evidence of the defendant’s vocal and aggressive behavior, which began during an altercation between he and his new bride in a parking lot next to a hotel and extended into a public street near a minimart at a time both the hotel and market were open, and which escalated upon three police warnings to cease and leave the area, was sufficient to support convictions of disorderly conduct under Penal Law 240.20(1), (3). A valid line of reasoning and permissible inferences existed from which the jury could have found that the conduct had become “‘a potential or immediate public problem.’”

**First Department**

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**Search and Seizure (Electronic Searches)**

**People v Rodriguez, 77 AD3d 420, 908 NYS2d 652 (1st Dept 10/7/2010)**

**Holding:** The court properly denied without a hearing the defendant’s motion to suppress eavesdropping evidence because he failed to show he was prejudiced by the prosecution’s failure to comply with CPL 700.50(3), which requires that the named subject of eavesdropping warrant be notified of the warrant within 90 days of its

**First Department** *continued*

termination. Federal courts have held that failure to comply with the notice requirement in the equivalent federal statute (18 USC 2518(8)(d)) does not warrant suppression without a showing of prejudice. Unlike CPL 700.70, CPL 700.50(3) does not provide a consequence for failure to comply with the notice requirement. And suppression without a showing of prejudice “would run counter to the ‘commonsense balance between the rights of . . . defendant[s] and the needs of law enforcement’ . . . .” (Supreme Ct, New York Co)

**Jurisdiction (General)****Larceny (Elements) (Value)**

**People v Hinds, 77 AD3d 429, 908 NYS2d 397  
(1st Dept 10/12/2010)**

**Holding:** The defendants’ convictions for first-degree grand larceny must be dismissed because the prosecution failed to establish that the multiple thefts were committed pursuant to a single intent and a common fraudulent scheme. Therefore, the amounts stolen could not be aggregated to reach the over \$1 million value. The defendants stole money from bank accounts of five individuals after opening fraudulent checking accounts in their names and fraudulently opened a bank account in the name of an advertising firm and deposited checks stolen from the firm and withdrew that money. Also, the thefts took place in different boroughs over several months and were completed in different ways, including by ATM withdrawals, clothing purchases, and a wire transfer to a jewelry store. Although the defendants claimed that the court lacked jurisdiction regarding the bank accounts that were opened in Brooklyn, by failing to request a jury charge on that issue, they waived it and it is not reviewed in the interest of justice. (Supreme Ct, New York Co)

**Counsel (Right to Counsel)****Driving While Intoxicated (Breathalyzer)**

**People v Mora-Hernandez, 77 AD3d 531, 909 NYS2d 435  
(1st Dept 10/21/2010)**

**Holding:** The court properly suppressed the results of the defendant’s breathalyzer test and a videotape of that test because the officers violated the defendant’s right to counsel. In general, when a defendant who is arrested for driving while intoxicated asks for an attorney, he has the right to consult with the attorney before deciding whether to take a sobriety test. By ignoring the defendant’s requests for counsel before they administered the test, the police prevented him from contacting his attorney, even though there was no indication that granting the request

would have substantially interfered with the investigative procedure. There is no record proof that the defendant voluntarily abandoned his request for counsel by agreeing to take the test. (Supreme Ct, Bronx Co)

**Evidence (Photographs and Photography)****Identification (General)**

**People v Coleman, 78 AD3d 457, 910 NYS2d 69  
(1st Dept 11/9/2010)**

**Holding:** The court erred in allowing police officers and the defendant’s aunt to identify the defendant as the man seen with the complainant, the defendant’s brother, in a surveillance camera videotape. The tape shows the complainant and another man enter an apartment building shortly before the shooting. They argued in the vestibule; at that time, it appears that the other man had a gun. The tape also shows the man leaving the building shortly thereafter. The prosecution did not allege that the defendant altered his appearance and there was no indication that the jury, which had ample opportunity to look at the defendant, was less able than the witnesses to determine whether he was the other man in the tape. But the error was harmless. The court mitigated the effect of the opinion testimony by instructing the jury after the testimony and during the final charge that it could accept or reject the opinions and it had the ultimate responsibility to determine who was seen in the tape. And the tape and the extensive circumstantial evidence amply supported the conviction. (Supreme Ct, New York Co)

**Homicide (Murder [Definition] [Degrees and Lesser Offenses])****Witnesses (Confrontation of Witnesses)**

**People v Morales, \_\_ AD3d \_\_, 911 NYS2d 21  
(1st Dept 11/9/2010)**

**Holding:** The evidence is legally insufficient to show that the defendant acted with the intent to intimidate or coerce a civilian population in general, as opposed to the limited group of rival gang members, which is required by the terrorism statute, Penal Law 490.25. The defendant, a member of a Mexican-American gang, was convicted of three offenses as crimes of terrorism; he fired five shots during a fight between rival gangs, which killed one person and paralyzed another. The prosecution claimed that the “civilian population” the defendant and his gang targeted was Mexican-Americans living in a particular area of the Bronx where the gang sought to assert its dominance. However, the evidence shows that the purpose of the gang was to protect itself from and confront and attack rival gang members. And, even assuming this group constitutes a “civilian population” under the statute, there is

**First Department** *continued*

nothing to suggest that the defendant’s actions were meant to intimidate that group. The terrorism statute requires that the terroristic intent be connected to the offense underlying the charge, which is missing here. Members of other Mexican-American gangs in the area where the defendant’s gang was located do not qualify as a civilian population under Penal Law 490.25(1). “[I]t is clear from the legislative findings set out in Penal Law § 490.00 that the Legislature intended to address extraordinary criminal acts perpetrated for the purpose of intimidating a broad range of people, not a narrowly defined group of particular individuals whom the criminal actor happens to regard as adversaries.”

The defendant, through counsel, knowingly and intelligently waived his confrontation rights by failing to object to the detective’s testimony about the history of the defendant’s gang and its criminal activity, which incorporated a number of hearsay statements, and by seeking to use the testimony to support his strategy. (Supreme Ct, Bronx Co)

**Trial (General) (Mistrial)**

**Witnesses (Cross Examination) (Credibility)**

**People v Williams, 78 AD3d 459, 911 NYS2d 37 (1st Dept 11/9/2010)**

**Holding:** The court properly exercised its discretion in denying the defendant’s request to reopen the evidence to cross examine the complainant about her arrest, one day after jury deliberations started, for a crime involving a bad check, or for a mistrial. The complainant’s offense allegedly occurred before she testified at trial. If the court allowed cross-examination on that issue, the jury would likely have given it undue emphasis and the evidence as a whole could have been distorted. The complainant’s arrest went to her credibility only, which was not a central issue, and was collateral to the defendant’s guilt or innocence. The defendant’s guilt of criminal contempt for making harassing phone calls was established by recordings of those calls and the complainant’s identification of the defendant’s voice was unnecessary because the content and context of the recordings made them self-authenticating. (Supreme Ct, New York Co)

**Narcotics (Penalties)**

**Sentencing (Resentencing)**

**People v Wright, 78 AD3d 474, 911 NYS2d 42 (1st Dept 11/16/2010)**

**Holding:** The court properly denied the defendant’s motion for resentencing on his 2005 conviction for third-

degree criminal sale of a controlled substance; the incident occurred in 2004. In 1994, the defendant had two convictions for attempted second-degree robbery. The defendant was not eligible for resentencing because he had two prior violent felony offense convictions that were committed within the preceding 10 years of the instant offense, even though the convictions never resulted in predicate felony adjudications. Those convictions meet the definition of “exclusion offenses” as defined in CPL 440.46(5), and that subdivision’s “reference to ‘predicate felony conviction’ does not require that the defendant be so adjudicated.” In contrast, the list of exclusion offenses in CPL 440.46(5)(b) refers to violent felonies for which the applicant was previously adjudicated. (Supreme Ct, New York Co)

**Discovery (Brady Material and Exculpatory Information)**

**Lesser and Included Offenses (Instructions)**

**People v Cerda, 78 AD3d 539, 911 NYS2d 336 (1st Dept 11/18/2010)**

**Holding:** The court did not deprive the defendant of his constitutional right to disclosure of exculpatory or impeaching evidence by redacting from the complainant’s medical records a note that a report of sexual abuse by the complainant’s father made seven years earlier was unfounded. The defendant was convicted of predatory sexual assault against a child. The defendant’s claims that the notation could have led to admissible evidence that the complainant made a false sexual abuse claim and that the evidence could have cast doubt on the allegations against the defendant are entirely speculative. And the defendant did not show a reasonable possibility that the outcome of the trial would have been different if the investigation led to such admissible evidence.

The indictment originally included allegations of first-degree rape and first-degree criminal sexual act, but the court did not submit those counts to the jury. The defendant failed to preserve his claims that the prosecution had to choose between the sexual assault counts and the rape and sexual act counts, the additional counts suggested to the jury a higher level of culpability, and the rape and sexual act charges should have been submitted as lesser included offenses or noninclusory concurrent counts. The arguments are also without merit because the defendant has not shown he was prejudiced by the timing of the court’s dismissal of the lesser counts or that the court was required to submit the counts to the jury. (Supreme Ct, New York Co)

**Narcotics (Penalties)**

**Sentencing (Resentencing)**

**First Department** *continued***People v Ortiz, 78 AD3d 534, 910 NYS2d 647  
(1st Dept 11/18/2010)**

**Holding:** The defendant is not eligible to be resentenced to a one-year definite sentence instead of a determinate term and post-release supervision for her class B drug felony conviction. Under CPL 440.46, the defendant may only apply for resentencing to a determinate term. The defendant cannot seek resentencing to alternative dispositions under Penal Law 60.04 and 70.70 that are available for an initial sentence for a class B drug felony. (Supreme Ct, New York Co)

**Forgery (Possession of a Forged Instrument)****People v Solomon, 78 AD3d 521, 911 NYS2d 342  
(1st Dept 11/18/2010)**

**Holding:** The court properly defined a MetroCard as a debit card for purposes of instructing the jury on the statutory presumption of fraudulent intent to use the cards under Penal Law 170.27. A MetroCard meets the definition of a debit card as set forth in General Business Law 511(9) since it can be used without a code to purchase a subway ride. That Penal Law 165.15 treats debit cards and theft of transportation services in separate subsections is irrelevant to whether a MetroCard is a debit card under Penal Law 170.27 and General Business Law 511(9). Therefore, the defendant's conviction for criminal possession of a forged instrument is proper. (Supreme Ct, New York Co)

**Family Court (Family Offenses) (General)****Harassment (Evidence)****Matter of Tyrone T. v Katherine M., 78 AD3d 545,  
911 NYS2d 56 (1st Dept 11/18/2010)**

**Holding:** The court properly dismissed the petitioner's family offense petition since the court did not have jurisdiction over the matter. The petitioner and the respondent did not have an intimate relationship as defined by Family Court Act 812(1)(e); the petitioner was the respondent's friend and the boyfriend of the respondent's sister. Even if the court had jurisdiction, the petitioner failed to meet his burden of proving, by a preponderance of the evidence, that the respondent committed first-degree harassment because the petitioner did not have an objectively reasonable fear that the respondent would harm him. The respondent said that "things would get ugly" if the petitioner did not return her property; this could not be reasonably interpreted as a threat, particularly given the respondent's relationship with the petitioner. There was no proof that the respondent, a correc-

tions officer, threatened to shoot him. And, after filing the petition, the petitioner continued to socialize with the respondent at her home, which undermined his alleged fear. (Family Ct, Bronx Co)

**Sentencing (Enhancement)****Sex Offenses (Sentencing)****People v Frey, 78 AD3d 581, 911 NYS2d 610  
(1st Dept 11/30/2010)**

**Holding:** The court correctly sentenced the defendant as a second child sexual assault felony offender under Penal Law 70.07. The defendant does not dispute that his prior offense involved a child less than 15 years of age, making it a predicate offense. Because age was not an element of the current conviction of first-degree sexual abuse, the prosecution was required to establish that the complainant was less than 15 years of age. The defendant's plea allocution satisfied that age element. Even though the defendant did not explicitly admit that the complainant was 12 years old at the time of the offense, his statements and the statements of the prosecution and court clearly demonstrate such an admission. Because the age element was met by the plea allocution, the prosecution did not have to file a special information alleging that fact. And there was no violation of the principles in *Apprendi v New Jersey* (530 US 466 [2000]). (Supreme Ct, New York Co)

**Juveniles (Jurisdiction) (Neglect)****Matter of Erica B., 79 AD3d 415, 912 NYS2d 195  
(1st Dept 12/2/2010)**

**Holding:** The court had jurisdiction over the respondent father in this neglect proceeding, even though the respondent did not have custody of his children and was barred from contact with them by an order of protection. Under Family Court Act article 10, because the respondent is the children's father, the children did not need to be in his care or custody for the court to have jurisdiction over the matter. The respondent is not relieved of his responsibilities for his children merely because he does not have custody of them. And his parental duties continued even though he was barred from contacting them. The court properly found that the respondent knew that the children's mother was not properly caring for the children based on his testimony that he went to Puerto Rico to get one child after he learned that the child had not gone to school for a couple of months and the children's testimony that the respondent saw them when they visited their paternal grandparent. (Family Ct, Bronx Co)

**Rape (Degrees and Lesser Offenses) (Elements)**

**First Department** *continued*

**People v Evans, 79 AD3d 454, 913 NYS2d 41  
(1st Dept 12/7/2010)**

**Holding:** The defendant’s conviction for third-degree rape, under the theory that the complainant’s lack of consent is by reason of some factor other than incapacity to consent (Penal Law 130.25(3)), was based on legally sufficient evidence and was not against the weight of the evidence. Lack of consent under this theory requires proof that the complainant clearly expressed that she did not consent to engage in the act and a reasonable person in the defendant’s situation would have understood her words and acts to be an expression of lack of consent under all the circumstances. The complainant testified that she repeatedly told the defendant she wanted to leave his apartment and was crying, which a neutral person would have understood to be clear expressions of a lack of consent, particularly given the defendant’s actions, including when he forced the complainant into his apartment. The defendant’s unpreserved claim that, even though the third-degree rape charge was a separate count of the indictment, the court needed his consent to submit it to the jury, is meritless. The court did not submit the count as a lesser included offense of the first-degree rape count, for which consent would have been required under CPL 300.50(6). The third degree count was a noninclusory concurrent count, not only because the statute expressly states that this type of third-degree charge is not a lesser included offense, but because the first-degree charge does not require the complainant to do or say anything to express a lack of consent. (Supreme Ct, Bronx Co)

**Robbery (Defenses) (Elements)**

**People v Pagan, \_\_ AD3d \_\_, 914 NYS2d 87  
(1st Dept 12/14/2010)**

**Holding:** The court properly declined to give a mistake in fact charge and properly exercised its discretion in giving an anticipatory instruction that the claim of right defense did not apply. The defendant was a passenger in the complainant’s cab. When the cab arrived at the destination, there was a dispute between the defendant and the driver about how much the defendant paid and what change she was entitled to; the defendant used force to try to retake the cash. Because the defendant used force to recover cash allegedly owed to her, as opposed to a particular piece of property, the claim of right defense was not available. And the defendant’s alleged mistaken belief that the driver wrongfully withheld her money is essentially the same as a claim of right defense. The confusing scenario involving initial payment of a four-dollar fare with a twenty-dollar bill and a one-dollar bill, and subsequent disagreement about proper change, illustrates why

fungible cash cannot be the object of a genuine belief in ownership negating larcenous intent. (Supreme Ct, New York Co)

**Witnesses (Confrontation of Witnesses)**

**People v Abelo, 79 AD3d 668, 914 NYS2d 54  
(1st Dept 12/28/2010)**

**Holding:** The defendant’s conviction for second-degree aggravated unlicensed operation of a motor vehicle must be reversed and the matter remanded for a new trial because the court erred in admitting the notice of suspension mailed to the defendant in 1992. During a traffic stop, the officer learned that the defendant’s license was suspended based on 1992 and 1993 unpaid fines. The Department of Motor Vehicles (DMV) issued numerous suspensions to the defendant during those two years. At trial, a DMV employee who was first employed in 2002 testified as to the DMV’s mailing procedures, including that the DMV mailed a license suspension to the address on file in 1992. The employee acknowledged that she could not testify regarding the standard mailing procedures in 1992 or in 1993, and acknowledged that the procedures had changed. The court refused to admit the 1993 suspension notices, but did not strike the previously admitted 1992 notice. In order to admit the license suspension notice, the confrontation clause requires that the prosecution produce a witness who is familiar with the procedures used at the time of the suspension, though not necessarily someone who had been employed at that time. (Supreme Ct, Bronx Co)

**Dissent:** The defendant’s confrontation right was not violated because the defendant had the opportunity to cross-examine the DMV employee.

**Juveniles (Permanent Neglect)**

**Matter of Destiny S., 79 AD3d 666, 913 NYS2d 223  
(1st Dept 12/28/2010)**

**Holding:** There was clear and convincing evidence to support the court’s finding that the respondent permanently neglected her daughter by failing to plan for her future despite the petitioner agency’s diligent efforts to encourage and strengthen the parent child relationship. The undisputed evidence showed that the respondent did not adhere to the petitioner’s service plan and tested positive for illegal drugs during the statutory period. (Family Ct, New York Co)

**Dissent:** The primary basis for the petition was the respondent’s failure to remain drug free. The petitioner remained drug free for a substantial portion of the 16-month period that started when the child came into the petitioner’s care and ended with the filing of the petition. “[G]iven both the reality that those who are attempting to

**First Department** *continued*

conquer drug addictions face enormous difficulties and the long-standing and fundamental importance of New York's policy in favor of 'keeping biological families together' . . . , I would conclude that the statute requires a failure for a more protracted period than the one established here."

**Sentencing (Concurrent/Consecutive) (Resentencing)****People v Rodriguez, 79 AD3d 644, 913 NYS2d 202  
(1st Dept 12/28/2010)**

**Holding:** The court erred in sentencing the defendant to consecutive terms for attempted murder and assault because there is no basis for finding that the defendant committed these crimes through separate acts. The defendant was sentenced to an aggregate term of 40 years for attempted murder, assault, and three counts of robbery. The court originally directed that the sentences for robbery run concurrent to the assault and attempted murder sentences, but the sentence for one of the robbery counts, which required forcible stealing of property while displaying a firearm, could be consecutive to the assault and attempted murder counts. The matter is remanded to the trial court so that it may restructure the sentences so that the defendant receives, at most, the same aggregate sentence the court originally imposed. "To the extent the Second Department's decision in *People v Romain* (288 AD2d 424 [2001], *lv denied* 98 NY2d 640 [2002]) suggests that a different result is warranted, we decline to follow its reasoning." Because the prosecution seeks resentencing to realign which sentences are to run consecutively, and not to disturb any individual sentences imposed, there is no violation of CPL 430.10. (Supreme Ct, New York Co)

**Concurrence:** It can be difficult to determine when consecutive sentences are prohibited and no statutory provisions suggest that the Legislature intended that judges have only one chance to get it right.

**Second Department**

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**Homicide (Murder [Degrees and Lesser Offenses]  
[Instructions])****Lesser and Included Offenses (Instructions)****People v Brockett, 74 AD3d 1218, 904 NYS2d 172  
(2nd Dept 6/22/2010)**

**Holding:** The court erred by failing to charge second-degree manslaughter at the request of the defendant, who was charged with second-degree murder and second-degree possession of a weapon. The court had said it would charge on both first-degree manslaughter, over a defense objection, and second-degree manslaughter, but failed to charge on the latter. As the defendant was convicted of first-degree manslaughter, the issue was reviewed despite lack of preservation. The error's prejudicial effect extended to the second-degree weapons charge, where possession of the weapon was factually related to the shooting. A new trial was ordered on the weapons charge, and the manslaughter conviction was dismissed with leave to re-present any appropriate charges. The judge's participation as a reader during a requested read-back of testimony was also error. (Supreme Ct, Kings Co)

**Counsel (Right to Counsel) (Right to Self-Representation)****People v Grueiro, 74 AD3d 1232, 905 NYS2d 629  
(2nd Dept 6/22/2010)**

**Holding:** The court's failure to conduct a "searching inquiry" to determine whether the defendant appreciated the dangers and advantages of waiving the right to counsel was error. The court allowed the defendant to proceed without a lawyer at sentencing. The court adjudicated the defendant a second felony offender despite repeated comments by the defendant that he did not know what to do. Contrary to the prosecution's contention, the error "irreparably tainted" the sentencing proceeding. A new second felony offender determination and resentencing must be held, after the required searching inquiry. (Supreme Ct, Kings Co)

**Appeals and Writs (Preservation of Error for Review)  
(Scope and Extent of Review) (Waiver of Right to Appeal)****People v Nicelli, 74 AD3d 1235, 904 NYS2d 119  
(2nd Dept 6/22/2010)**

**Holding:** The defendant had exercised the statutory right to plead guilty to all counts with no prosecution or judicial plea agreement. The court improperly required the defendant to waive his right to appeal where "there was no promise, plea agreement, reduced charge, or any other bargain or consideration given to the defendant in exchange for his plea . . . ." The sentence imposed was therefore reviewed, but was found not to be excessive. (Supreme Ct, Kings Co)

**Second Department** *continued*

**Burglary (Evidence)**

**People v Person, 74 AD3d 1239, 903 NYS2d 525  
(2nd Dept 6/22/2010)**

**Holding:** The evidence was insufficient to sustain a second-degree burglary conviction. That a cigarette butt with the defendant’s DNA was found in a rear yard, screened by shrubbery, outside the burglarized house is subject to innocent inferences, despite the butt’s proximity to a hatchet that did not belong to the accuser and to shattered glass doors. Any implication that the defendant failed to provide a reasonable explanation for his DNA’s presence at the scene would impermissibly shift the burden of proof. (Supreme Ct, Queens Co)

**Sentencing (Credit for Time Served) (Hearing)  
(Resentencing)**

**People v Paccione, 74 AD3d 1363, 904 NYS2d 497  
(2nd Dept 6/29/2010)**

**Holding:** Proceedings held in 2008 constituted a resentencing at which the defendant had a right, which was not waived, to be present. The defendant was convicted on multiple counts of robbery and other charges. At sentencing in 2000, defense counsel had asked for credit for time the defendant spent in federal custody beginning in 1998. The court hesitantly agreed, but the sentence and order of commitment did not reflect the credit. Following correspondence, the court issued an amended sentence and order in May 2005, without notice to the prosecution, saying the sentence was to run from 1998. A further amendment running the instant sentences concurrently with the federal sentence was issued in July 2005. At the prosecution’s request, a hearing was held in 2008, where counsel was present but the defendant was not; an amended sentence and order were issued running the sentences here consecutively to the federal sentence. The 2008 hearing did not violate double jeopardy principles, and the defendant was not entitled to nunc pro tunc credit for the federal custody. (Supreme Ct, Kings Co)

**Search and Seizure (Arrest/Scene of the Crime Searches  
[Informants])**

**People v Voner, 74 AD3d 1371, 904 NYS2d 225  
(2nd Dept 6/29/2010)**

**Holding:** The court properly suppressed cigarettes found in a van driven by the defendant. There was no showing that the confidential informant’s tip about a black male picking up 30 cases of cigarettes on an Indian reservation in a white van was based on personal knowl-

edge or observation. The officer’s observation, a half mile from the reservation, of three or four thick black plastic bags was not sufficiently corroborative of criminal activity to support a belief that the tip was based on first-hand observation. (Supreme Ct, Queens Co)

**Double Jeopardy (Punishment)**

**Sentencing (Post-Release Supervision) (Resentencing)**

**People v Grant, 75 AD3d 558, 904 NYS2d 505  
(2nd Dept 7/13/2010)**

**Holding:** The prosecution’s argument—that a defendant who had been released from prison but was subject to reconfinement for violating the terms of his conditional release could be resentenced to his original prison term plus a period of post-release supervision—is rejected. Despite Court of Appeals language on the issue referring to completion of a sentence in addition to release from incarceration, ultimate significance was attached to a defendant’s release date for determining when the defendant developed a legitimate expectation of finality in the sentence for double jeopardy purposes. Adding post-release supervision to the sentence after the defendant was released from prison was held to be a violation of double jeopardy. (Supreme Ct, Kings Co)

**Ethics (General)**

**Family Court (General)**

**Matter of Awan v Awan, 75 AD3d 597, 906 NYS2d 70  
(2nd Dept 7/20/2010)**

**Holding:** “The father’s attorney violated the Rules of Professional Conduct (22 NYCRR 1200.0) rule 4.2 by allowing a physician, whom the attorney retained or caused the father to retain, to interview and examine the subject child regarding the pending dispute and to prepare a report without the knowledge or consent of the attorney for the child . . . .” The mother’s attorney was not notified either. The court did not err in striking the physician’s testimony. (Family Ct, Suffolk Co)

**Search and Seizure (Automobiles and Other Vehicles)**

**People v Lopez, 75 AD3d 610, 905 NYS2d 647  
(2nd Dept 7/20/2010)**

**Holding:** Police conduct in pulling an unmarked car in front of the defendant’s vehicle, blocking his ability to leave the parking lot, constituted a stop requiring reasonable suspicion of criminal activity or danger to the police. The defendant’s behavior—sitting in the parking lot of an open business with his interior car light on, looking down—could not be characterized as suspicious conduct, making the stop illegal. The physical evidence and statements

**Second Department** *continued*

of the defendant obtained as a result of the stop must be suppressed. (Supreme Ct, Nassau Co)

**Counsel (Competence/Effective Assistance/Adequacy)****People v Danraj, 75 AD3d 651, 905 NYS2d 280  
(2nd Dept 7/27/2010)**

**Holding:** The defendant was denied the effective assistance of counsel. No strategic or other legitimate explanation existed for defense counsel's elicitation of unfavorable hearsay during cross examination of a prosecution witness and failure to argue that the weapon and drugs found in the vehicle may have belonged to an unapprehended passenger rather than to the defendant, who was driving. The cumulative effect of the errors deprived the defendant of meaningful representation and a fair trial. (Supreme Ct, Queens Co)

**Juveniles (Support Proceedings)****Matter of H.M. v E.I., 76 AD3d 528, 906 NYS2d 85  
(2nd Dept 8/3/2010)**

**Holding:** The respondent stated a viable cause of action for invoking equitable estoppel in determining whether her former same-sex partner had to pay child support. Where such a partner consciously chooses, along with the mother, to bring a child into the world, and a child is conceived in reliance on the partner's implied promise to support the child, a cause of action for support has been sufficiently alleged. (Family Ct, Rockland Co)

**Article 78 Proceedings****Prosecutors (Decisionmaking) (General)****Traffic Infractions****Matter of People of State of New York v Christensen,  
77 AD3d 174, 906 NYS2d 301 (2nd Dept 8/3/2010)**

**Holding:** A town justice erred in accepting a guilty plea to a reduced traffic offense over the objection of the State Police acting under proper delegation of authority to prosecute. The justice appealed from a ruling in a CPLR article 78 proceeding in the nature of prohibition and mandamus. The justice lacked standing to challenge the district attorney's delegation of authority to prosecute the underlying case in question; the person who had standing—the individual receiving the traffic ticket—did not challenge the delegation. The town justice did have standing to contest the propriety of the article 78 challenging his disposition of the underlying case and future dispositions in other cases. The State Police properly commenced the

article 78 not as a party but in the name of "the People," the real party in interest. A district attorney's delegation of authority to prosecute a particular case includes authority to commence an article 78 arising from the prosecution of the case. The People were entitled to mandamus relief compelling the town justice to vacate the challenged plea. The People were also entitled to a writ prohibiting the town justice generally from accepting guilty pleas to reduced charges in traffic cases without the consent of the People. Policy and legal arguments relating to the inequity of disparate case dispositions among different prosecuting entities were rejected. (Supreme Ct, Dutchess Co)

**Homicide (Murder [Instructions])****Instructions to Jury (Theories of Prosecution and/or Defense)****People v Abdul, 76 AD3d 563, 906 NYS2d 594  
(2nd Dept 8/10/2010)**

**Holding:** A new trial is required because the trial court failed to properly respond to a critically important jury note. The prosecution's theory in this murder case was that the defendant either personally killed the decedent or acted in concert with another, either by direct action or by failing to perform a legal duty owed to the decedent, her child. The time of death was heavily litigated. The jury had asked if one could act in concert by doing nothing to cause death other than failing to do anything after the death, *ie*, failing to call medical or other authorities. The judge, over objection, merely read its original instructions of accessory liability, liability based on failure to perform a legal duty, and the substantive law of the charged offense. This did not meaningfully respond to the jury's question. The court should have said acts or omissions after death could not be the basis for a finding of guilt and that the prosecution had the burden of showing that the decedent was alive when the alleged behavior of the defendant occurred. (County Ct, Suffolk Co)

**Appeals and Writs (Waiver of Right to Appeal)****Arrest (Probable Cause)****People v Bradshaw, 76 AD3d 566, 906 NYS2d 93  
(2nd Dept 8/10/2010)**

**Holding:** The defendant's waiver of the right to appeal was unenforceable. The judge provided almost no explanation of the waiver of the right to appeal, which was presented as the last of several conditions of the plea bargain. When the court asked, "Do you understand that?", the defendant's response was a question about an unwaivable monetary fee. A written waiver form was submitted to the court, but nothing on the record showed that the right to appeal had been explained to the defen-

## Second Department *continued*

dant, that he understood the right, or that his waiver of that right was knowing and intelligent. At sentencing he said that his lawyer had coerced the plea, had misinformed him about the consequences of it, and had not given him “proper paperwork” but led him to believe he would be placed in a Mental Illness and Controlled-Substance Abuse program.

Without additional facts, the defendant’s presence near the security booth of a large apartment complex in the vicinity of the alleged rape did not provide probable cause for his arrest. (Supreme Ct, Kings Co)

**Dissent:** The identification of the defendant by a security guard as the person he saw near the time and place of the rape who matched the general description given by the accuser provided probable cause for arrest. The subsequent lineup was not suggestive. The defendant effectively waived the right to appeal.

[*Ed. Note: Leave to appeal was granted on October 14, 2010 (15 NY3d 896).*]

### Evidence (Hearsay)

### Juries and Jury Trials (Deliberations)

**People v Gibian, 76 AD3d 583, 907 NYS2d 226 (2nd Dept 8/10/2010)**

**Holding:** Disallowing the defendant’s testimony as to his mother’s confession to him of the instant killing was error. The testimony was offered to show the defendant’s state of mind leading him to immediately remove evidence and confess to police to protect his mother. A limiting instruction could have been given to allay concerns about use of the testimony to accuse the mother of the crime. The testimony would not have been cumulative, and, as evidence of the defendant’s guilt was not overwhelming, exclusion of it was not harmless error.

The trial court erred by failing to make sufficient inquiry before deciding that concerns about a court officer on the jury injecting her professional knowledge into deliberations did not establish misconduct. Further, the court’s imposition, with no prior notice, of a time limit on the defense summation but not on the prosecutor’s, was error. The cumulative errors require reversal. (Supreme Ct, Suffolk Co)

**Dissent:** The defendant was allowed to testify that his mother killed his stepfather. The excluded testimony was in reality offered to support that theory, which counsel explicitly argued in summation. Exclusion did not violate the constitutional right to present a defense. Nor did other claimed errors warrant reversal.

### Search and Seizure (Standing to Move to Suppress)

**People v Hardy, 77 AD3d 133, 907 NYS2d 244 (2nd Dept 8/10/2010)**

**Holding:** While expiration of a rental period extinguishes a hotel guest’s reasonable expectation of privacy in the guest’s room, the policies and practices of the hotel may extend the period of that reasonable expectation. Justifiable eviction, whether based on nonpayment or other grounds, extinguishes the reasonable expectation of privacy. Here, a hotel employee decided it was time to evict the defendant, who had been behind in paying more than once and about whom other guests had complained due to loud noise, when the odor of marijuana was detected coming from the defendant’s room. The employee contacted the police to assist in evicting the defendant. At that point, the defendant’s expectation of privacy was extinguished. He therefore lacked standing to challenge the subsequent search of his room and its contents that revealed drugs and other evidence of crime. (County Ct, Orange Co)

### Family Court (Family Offenses)

**Matter of Willis v Rhinehart, 76 AD3d 641, 906 NYS2d 335 (2nd Dept 8/17/2010)**

**Holding:** The court properly determined that the petitioner and the appellant were persons who had been in an intimate relationship under Family Court Act 812(1)(e) as amended effective July 21, 2008. Neither the language nor the legislative history of the amendment supports a contention that the relationship must have ended at a time relatively close to the time the family offense petition was filed. (Family Ct, Dutchess Co)

### Statute of Limitations (Tolling of)

**People v Quinto, 77 AD3d 76, 907 NYS2d 59 (2nd Dept 8/31/2010)**

**Holding:** The court properly dismissed as time-barred the non-sex-related charges against the defendant, as the statute of limitations exception for time in which the defendant’s whereabouts were unknown and unascertainable did not apply. However, the statute of limitations for sexual crimes was tolled. The accuser told police in December 2007 that the defendant, her step-grandfather, had engaged in sexual intercourse with her five years earlier, when she was 14. Near the time of the alleged offenses, she had told police a classmate raped her, but then recanted, saying that she and the classmate had consensual sex. The defendant was indicted in 2008, and his motion to dismiss the indictment as time-barred was granted. Because there was no nexus between the conduct alleged in the accuser’s 2002 report to police and that alleged in the accusatory instrument, the statute of limitations as to

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the sexual offenses charged did not begin to run in 2002. (Supreme Ct, Kings Co)

[*Ed. Note: Leave to appeal was granted on November 30, 2010 (15 NY3d 923).*]

**Search and Seizure (Entries and Trespasses)****People v Rodriguez, 77 AD3d 280, 907 NYS2d 294 (2nd Dept 8/31/2010)**

**Holding:** As the three-prong test for determining whether police who enter a home without a warrant faced an emergency situation was met, the court erred in suppressing physical evidence recovered from the defendant's residence. Police responding to a radio call about a stabbing found the defendant bleeding heavily in a stairwell of an apartment complex. The defendant said that he did not live in the building and had been stabbed by an unknown man in the hallway. The person placing the 911 call said the defendant did live in the building, and police followed a blood trail to an apartment where there was blood on the door and on the floor in front of it. The officer, believing he would not be able to break down the door, and thinking that it would take too long for emergency services to come, had the superintendent of the building unlock the door. Entering to see if anyone else had been injured, the officer found apparent drugs. The police reasonably believed there might be another stabbing victim. (Supreme Ct, Queens Co)

**Family Court (Family Offenses)****Matter of Dos Santos v Dos Santos, 76 AD3d 1013, 908 NYS2d 111 (2nd Dept 9/21/2010)**

**Holding:** The circumstances of this family offense proceeding did not establish a genuine default by the wife. She was present in the courtroom, with a new attorney, on the morning of scheduled proceedings in connection with a petition filed by the husband. When the matter was called, the wife's attorney of record told the court that he had met with the new attorney, whom the wife intended to request be substituted. After a brief hearing, the court signed an order directing the wife to stay away from the marital residence. The wife and new attorney learned of the order while in the court clerk's office seeking to file petitions on the wife's behalf. They told the court that they had checked in with a court officer, telling the officer and the attorney of record they had to notarize the petitions they were preparing to file. Even had this constituted a genuine default, it was not willful. The wife moved to vacate the final order of protection the same day, offered a reasonable excuse for the failure to appear,

and submitted an affidavit sufficient to demonstrate a potentially meritorious defense. (Family Ct, Queens Co)

**Confessions (Voluntariness)****Evidence (Other Crimes)****Misconduct (Prosecution)****People v Slide, 76 AD3d 1106, 908 NYS2d 414 (2nd Dept 9/28/2010)**

**Holding:** The defendant was deprived of a fair trial. The court allowed, over objection, questioning of the defendant about prior arrests without first providing an opportunity to show that undue prejudice would result; a motion for a *Sandoval* hearing was granted but no hearing ever held and no notice of intent to offer prior acts was given. The prosecution questioned the defendant not only about prior arrests but also about his mother's incarceration for an unrelated shooting. Further, the court's instructions to the jury about the voluntariness of the defendant's confession were incomplete, omitting any mention that a statement obtained by use or threatened use of physical force or other improper conduct could be considered involuntary. This left the jury without standards by which to judge the defendant's claim that his statement had been coerced. The prosecutor improperly made statements in summation about the testifying co-defendants' plea bargains that conveyed the possibility that evidence of the defendant's guilt existed outside the record. While the latter errors were not preserved, they are reached in the interest of justice. The cumulative effect of the errors required reversal. (Supreme Ct, Suffolk Co)

**Evidence (Sufficiency)****Reckless Endangerment (Evidence)****Matter of Stanley E., 76 AD3d 1069, 908 NYS2d 127 (2nd Dept 9/28/2010)**

**Holding:** The evidence was not legally sufficient to support a finding based on accessorial liability that the appellant committed acts that would constitute second-degree reckless endangerment if committed by an adult. Police who stopped the appellant and two others found one of the other youths to have a bag holding a plastic bottle partially filled with gasoline, glass bottles, a lighter, surgical mask, staple cutter, roll of paper towels, gloves, small bandages, a flashlight, and a fire extinguisher. Testimony was offered that carrying gasoline in the plastic bottle was dangerous because the gas might ignite if vapor escaped from it through a puncture or through the non-vapor proof cap when it was near heat. There was no evidence of puncturing or leaking of gasoline or vapor, and no evidence that the bottle was being exposed to heat. (Family Ct, Kings Co)

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**Defenses (Justification)**

**Homicide (Felony Murder)**

**People v Walker, 78 AD3d 63, 908 NYS2d 419  
(2nd Dept 9/28/2010)**

**Holding:** While the defense of justification may be available to an underlying felony in a felony murder case, it is never available as to felony murder itself. The felony murder statute’s purpose is to punish a defendant for killing someone in a situation in which the defendant created the mortal danger by committing an enumerated felony. In the rare felony murder case where a justification defense is not precluded by law, the defense must be asserted as to the underlying felony; a justification charge as to felony murder itself would undermine the statutory purpose. (Supreme Ct, Queens Co)

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

**Defenses (Self-defense)**

**People v Colville, 79 AD3d 189, 909 NYS2d 463  
(2nd Dept 10/5/2010)**

**Holding:** While there is a split in other jurisdictions, apparently due to a change in American Bar Association standards, as to whether the decision to have a jury instructed on lesser-included offenses is a fundamental one in the final control of the defendant or a strategic one resting with counsel, that question need not be resolved here. Whether fundamental or strategic, the defendant here did make the ultimate decision about lesser offenses, and counsel’s choice not to overrule that decision was reasonable. There was testimony that the defendant shared with others the kitchen in which this altercation began, so that a reasonable view of the evidence supported the defendant’s contention that he was first confronted with deadly physical force while in his dwelling. However, because there was no reasonable possibility that the verdict would have been different had the court given a no duty to retreat instruction, any error in the court’s failure to give such an instruction was harmless. (Supreme Ct, Kings Co)

**Juveniles (Jurisdiction) (Support Proceedings)**

**Matter of Deazle v Miles, 77 AD3d 660, 908 NYS2d 716  
(2nd Dept 10/5/2010)**

**Holding:** Where the mother, who initially sought child support while living in Ithaca, New York, presented evidence of a current lease of a Brooklyn apartment, a New York drivers license, and other indications of residence, she demonstrated that New York State remained

her residence, allowing New York to retain continuing, exclusive jurisdiction over the child support order despite the mother’s working and placing the child in school in Pennsylvania. The mother’s objection to the court’s dismissal of her petition for an upward modification is granted. (Family Ct, Kings Co)

**Juveniles (Support Proceedings)**

**Matter of Elegante v Elegante, 77 AD3d 663,  
908 NYS2d 267 (2nd Dept 10/5/2010)**

**Holding:** “The Family Court erred in concluding that the father’s loss of income for reasons beyond his control, increased expenses due to an uninsured hospital stay, and the change in the custody arrangement from the mother having primary residential custody of the parties’ two children to split residential custody, was not an unanticipated change of circumstances creating the need for modification of his child support obligation . . . .” (Family Ct, Nassau Co)

**Impeachment**

**Misconduct (Prosecution)**

**People v Maier, 77 AD3d 681, 908 NYS2d 711  
(2nd Dept 10/5/2010)**

**Holding:** The cumulative effect of several trial errors deprived the defendant of a fair trial. The drug charge was based on the discovery of narcotic prescription pills in the defendant’s car when he was stopped for failing to obey a traffic sign, and he did not contest the propriety of the police action or possession of the pills, only the illegality of that possession. Admission of evidence that a “crack pipe” and apparent marijuana were also found in the car was improper. Allowing the prosecutor to question a defense witness about whether the defendant was always truthful and then impeach her answer by asking her about criminal complaints she had filed against the defendant was error where the defendant did not testify and the person being questioned was a fact witness, not a character witness. And the prosecution’s elicitation in its direct case of police testimony that the defendant had failed to provide certain facts upon discovery of the narcotics and his arrest was an improper use of the defendant’s silence. (County Ct, Suffolk Co)

**Juveniles (Parental Rights) (Visitation)**

**Matter of Selena C., 77 AD3d 659, 909 NYS2d 84  
(2nd Dept 10/5/2010)**

**Holding:** After terminating the mother’s parental rights due to her mental illness, the family court erred by failing to hold a hearing and issue a determination as to

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whether direct visitation with the mother, as requested by the mother, would be in the subject child's best interests. Courts have inherent power to provide for visitation between an adopted child and a member of the child's birth family where it is in the child's best interest and not an undue interference with the adoptive relationship. (Family Ct, Kings Co)

**Juveniles (Support Proceedings)****Matter of Ataande v Ataande, 77 AD3d 742, 909 NYS2d 124 (2nd Dept 10/12/2010)**

**Holding:** While the court properly directed the father to pay a pro rata share of his son's college costs and expenses, the court erred in so doing without also directing that the father's child support obligation be reduced by amounts contributed for room and board when the son was at college, living away from the mother's home. (Family Ct, Westchester Co)

**Counsel (Right to Counsel)****Juveniles (Support Proceedings)****Matter of Bader v Hazzis, 77 AD3d 742, 909 NYS2d 121 (2nd Dept 10/12/2010)**

**Holding:** When the father, who had appeared with counsel when found to be in willful violation of his child support obligations but appeared without an attorney in later proceedings, was unrepresented at the final appearance before entry of a commitment order, the court erred in ignoring the father's statement that he could not afford a lawyer, and proceeding. At the hearing to be held after remittal, the father must be fully advised of his right to counsel, his right to appointed counsel fully explored, and counsel provided if appropriate before a new determination of the sanction to be imposed. (Family Ct, Nassau Co)

**Prisoners (Disciplinary Infractions and/or Proceedings)****Matter of Baez v Bezio, 77 AD3d 745, 908 NYS2d 608 (2nd Dept 10/12/2010)**

**Holding:** Where certain portions of the Tier III hearing on charges that the petitioner had violated prison disciplinary rules were not transcribed because the recording was inaudible, meaningful appellate review was impossible. The judgment affirming the determination must be reversed, the determination annulled, and the Department of Correctional Services must expunge all references to the matter from the petitioner's institutional record and hold a new hearing and determination. (Supreme Ct, Westchester Co)

**Forensics (Electronic Evidence)****Sex Offenses (General)****People v Kent, 79 AD3d 52, 910 NYS2d 78 (2nd Dept 10/12/2010)**

**Holding:** The mere existence of an image constituting child pornography, automatically stored in a computer's cache, is not alone legally sufficient to prove knowing procurement or knowing possession of such pornography. Whether the defendant knowingly or inadvertently accessed a web page containing child pornography, or knew the page would contain child pornography, are issues of fact. Viewing the totality of direct and circumstantial evidence in a light most favorable to the prosecution, the evidence here was sufficient to support a conviction on count one, promoting a sexual performance of a child, for images found in the computer's cache. A pattern of Internet browsing for child pornography web sites was established: eleven such sites were found in cache, four having been accessed within minutes of each other; eight child pornography videos were shown to have been accessed and viewed; over 30,000 images of scantily clad young girls had been meticulously categorized and saved in subfolders in allocated space; and scores of illegal images were found in unallocated space, showing they had been deleted after being saved and available in allocated space and indicating consciousness of guilt and knowledge of the difference between licit and illicit images. Additionally, the defendant's communications with another indicated the defendant knew he possessed illegal images. The evidence was also sufficient to support a conviction of possessing a sexual performance by a child for images found in the computer's cache. The evidence was also legally sufficient to support the convictions that were based on images found in unallocated space. Where the date of procurement was not a material element of the crime, allowing amendment of the indictment as to date of procurement was not error. (County Ct, Dutchess Co)

**Narcotics (Penalties)****Parole (General)****People ex rel Murphy v Ewald, 77 AD3d 778, 909 NYS2d 735 (2nd Dept 10/12/2010)**

**Holding:** The court erred in granting the defendant a writ of habeas corpus, where the defendant, convicted of a drug offense in 1989, had been on parole for over five years without revocation, but then had parole revoked and subsequently violated parole on numerous occasions, being returned to prison each time. The amended law that provides retroactive relief by mandating termination of sentences when defendants have been on unrevoked parole for three years (Executive Law 259-j[3-a]) does not

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apply to defendants whose parole was revoked prior to the amendment of the law. (Supreme Ct, Suffolk Co)

**Juries and Jury Trials (Deliberation) (General)**  
(Qualifications)

**Misconduct (Juror)**

**People v Porter, 77 AD3d 771, 909 NYS2d 486**  
(2nd Dept 10/12/2010)

**Holding:** The court erred by denying without full inquiry the defendant’s motion for a mistrial where a juror’s note after deliberations began revealed that the juror had a pending criminal matter in the same court, and investigation disclosed that the juror was receiving a favorable plea bargain from the prosecutor’s office. A new trial must be held on counts two and three; count one, under which the defendant was convicted of a lesser-included offense, is dismissed with leave to the prosecution to re-present to a different grand jury. (Supreme Ct, Nassau Co)

**Sex Offenses (Sex Offender Registration Act)**

**People v Strong, 77 AD3d 717, 909 NYS2d 734**  
(2nd Dept 10/12/2010)

**Holding:** Where it appears from the transcript that the court relied on a Risk Assessment Instrument (RAI) at the redetermination hearing at which the defendant was designated a level three sex offender, but the RAI was not introduced into evidence, and there is no indication as to what evidence the court relied on or what factors the court considered, the order must be reversed and the matter remitted. At a new hearing, the court shall clearly indicate its findings of fact and conclusions of law on the record. (Supreme Ct, Queens Co)

**Driving While Intoxicated (Chemical Test [Blood or Urine]) (Evidence)**

**People v Casco, 77 AD3d 848, 909 NYS2d 146**  
(2nd Dept 10/19/2010)

**Holding:** Any error in allowing the prosecution to present expert testimony that, based on “retrograde extrapolation,” the defendant’s blood alcohol content at the time of the accident was between .10 and .11 of one percent based on a blood sample taken at the police station was harmless. The defense contended that, by ruling that further questioning of the prosecution’s expert by defense counsel would open the door to admission of an inadmissible field test, the court curtailed cross-examination meant to support the defense contention that the

opinion was based on insufficient evidence because there was only one blood test. The field test was not admitted and the defense theory was before the jury; the evidence against the defendant was overwhelming and there was no significant probability that any error contributed to the conviction. Prosecutorial cross-examination of the defense expert with regard to sobriety standards for transportation did not warrant reversal. (Supreme Ct, Queens Co)

**Counsel (Right to Counsel)**

**Family Court (General)**

**Matter of Doino v Cartelli, 77 AD3d 830, 909 NYS2d 133**  
(2nd Dept 10/19/2010)

**Holding:** Where the appellant informed the court at first call of the calendar that he had retained an attorney, the court erred in proceeding with the fact-finding hearing at second call where the attorney had not yet appeared. The appellant was denied of the right to counsel, which he had not waived. An adjournment should have been granted. (Family Ct, Westchester Co)

**Evidence (Prejudicial)**

**Identification (Eyewitnesses)**

**People v Nesbitt, 77 AD3d 854, 910 NYS2d 471**  
(2nd Dept 10/19/2010)

**Holding:** The prosecution improperly bolstered the testimony of an eyewitness by eliciting police testimony that immediately after an accuser viewed a lineup, the defendant was arrested. The prosecution also improperly elicited, without a proper foundation, testimony about the identification of the defendant in a lineup by another accuser, who did not identify him at trial. Testimony by a detective about police conversations with an alleged accomplice and that accomplice’s viewing of a photograph improperly implied that the accomplice had said the defendant was the perpetrator. These unpreserved errors are reviewed in the exercise of the interest of justice jurisdiction and were not harmless. (Supreme Ct, Kings Co)

**Counsel (Anders Brief)**

**Juveniles (Custody)**

**Matter of Veronica C. v Administration for Children’s Services, 77 AD3d 828, 909 NYS2d 369**  
(2nd Dept 10/19/2010)

**Holding:** The request of appointed counsel for the maternal grandmother to be relieved is granted, and new counsel is appointed to perfect the appeal, where an independent review of the record indicates that a nonfrivolous issue exists as to whether the grandmother’s petition to

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modify a custody order was properly denied. (Family Ct, Kings Co)

**Juveniles (Parental Rights) (Permanent Neglect)****Matter of Austin C., 77 AD3d 938, 909 NYS2d 546  
(2nd Dept 10/26/2010)**

**Holding:** The petitioner failed to show by clear and convincing evidence that the mother failed to maintain contact with or plan for the future of her children. There was visitation, and the mother substantially complied with a court order by completing a class in parenting skills, executing forms for release of information, notifying the court of most changes of address or phone numbers, undergoing mental health evaluation and treatment, undergoing drug and alcohol evaluation, moving to a different apartment, participating with the children in counseling and communicating with their doctors, and getting her brother to become certified as a therapeutic foster parent for the children. That the mother did not meet with the caseworker at least monthly or continue counseling after she had been discharged was not enough to establish failure to take necessary steps within a reasonable time to plan for the children's future. (Family Ct, Orange Co)

**Family Court (Family Offenses)****Matter of Harris v Magee, 77 AD3d 944, 909 NYS2d 548  
(2nd Dept 10/26/2010)**

**Holding:** The court erred in dismissing the father's family offense petition against the maternal grandparents, as a parent may file a petition on behalf of the parent's child, and there is no requirement that the consent of the other parent be obtained. (Family Ct, Rockland Co)

**Parole (Release [Consideration for])****Matter of Huntley v Evans, 77 AD3d 945, 910 NYS2d 112  
(2nd Dept 10/26/2010)**

**Holding:** Denial of a motion to substitute Andrea Evans, Chairperson of the Division of Parole, as the respondent, is reversed, as is denial of an article 78 petition with regard to the denial of the petitioners' release on parole, to the extent the matter is remitted for a de novo parole hearing. In denying release on parole, the Parole Board cited only the seriousness of the petitioner's crime, failing to mention other statutory factors including the petitioner's record of achievements, training of service animals, and good disciplinary record, as well as the sentencing court's positive recommendation. (Supreme Ct, Orange Co)

**Juveniles (Custody)****Matter of Ruggiero v Noe, 77 AD3d 959, 910 NYS2d 479  
(2nd Dept 10/26/2010)**

**Holding:** The court erred by granting the father's petition to amend the joint custody arrangement established pursuant to a stipulation of settlement incorporated but not merged into a divorce judgment where the father failed to show the change was warranted by a change in circumstances. The parties have been adept at facilitating shared residential custody and the child expressed preference to live with both parents, an indication of the best interests of the child. The provision in the prior consent order that would give the mother automatic residential custody if she moved out of the school district cannot be given effect where joint custody is in the child's best interest, so denial of the mother's cross petition was proper. (Family Ct, Suffolk Co)

**Evidence (Sufficiency)****Larceny (Elements) (Evidence) (Fraud) (Lesser and Included Offenses) (Value)****People v Seymour, 77 AD3d 976, 910 NYS2d 487  
(2nd Dept 10/26/2010)**

**Holding:** There was insufficient proof as to the fourth-degree grand larceny count that the property allegedly taken had the requisite value of over \$1,000, where the specific type of television taken in the first incident was not shown, the value of the items taken in the second incident was less than \$1,000, and there was insufficient evidence that the two incidents constituted a common fraudulent scheme or plan. The defendant's nephew described two instances of going to Home Depot with the defendant, once taking a television without paying by distracting a store employee while removing it from the store, and once placing items that had not been paid for through a gap in a fence. As to the television, a store clerk testified only that she recognized the front of the box and knew the sale price to be \$1,999.97 but did not know the model number or name of the television allegedly taken. There was insufficient evidence that the defendant intended to commit fraud or to engage in a plan of continuous fraud. The evidence did establish the lesser charge of petit larceny. (County Ct, Dutchess Co)

**Family Court (Family Offenses)****Jurisdiction (Personal) (Subject Matter)****Matter of Richardson v Richardson, 80 AD3d 32,  
910 NYS2d 149 (2nd Dept 11/3/2010)**

**Holding:** Family Court Act 812 gives the family court jurisdiction over alleged family offenses alleged to have

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occurred outside the state or even the country. The respondents’ petitions asserted that the appellant, with whom they resided in Nassau County, committed a variety of family offenses while all were on the island of Anguilla. The appellant appeared before the court without challenging personal jurisdiction, and filed her own petitions, thereby waiving any claim as to personal jurisdiction. Venue was appropriate in the county where all parties lived. There is no geographic limitation in the statute as to where a family offense must have occurred to confer subject matter jurisdiction on family court. Amendments to the statute strengthened the remedies available in domestic violence matters by creating true concurrent family and criminal court jurisdiction, but did not make jurisdiction in the two courts identical; no provision exists applying the geographic limitations of criminal court to family court. No orders of protection were issued in Anguilla, so no comity requirement exists as to Anguilla law. The appellant’s petitions were properly dismissed; the court’s credibility determinations are entitled to great weight. (Family Ct, Nassau Co)

**Speedy Trial (Statutory Limits)**

**People v Rivas, 78 AD3d 739, 909 NYS2d 766  
(2nd Dept 11/3/2010)**

**Holding:** The court properly denied the parties’ request for an adjournment on consent after four prior adjournments and charged to the prosecution the 63-day period between the date that the defendant’s speedy trial waiver expired and the next adjourned date. The defendant’s motion to dismiss was therefore properly granted. (Supreme Ct, Queens Co)

**Accomplices (General)**

**Matter of Khalil H., 80 AD3d 83, 910 NYS2d 553  
(2nd Dept 11/9/2010)**

**Holding:** A high school gang is an “organization” within the meaning of Penal Law 120.16 and 120.17, New York’s hazing statutes. In the absence of a statutory definition of “organization,” the word retains its common meaning. Here, an initiation was required to join the gang, and members wore specific paraphernalia, held meetings, and received protection from other members. While the hazing statutes do not have language stating that victim consent is not a defense to prosecution, the statutes do not require that lack of consent be shown. Furthermore, consent is not a defense to prosecution for actions that are against public policy. The appellant’s acts of recruiting the accuser, controlling the duration and timing of the initiation attacks on the accuser, and videotaping those attacks,

showed a commonality of purpose with those who committed the actual attacks. The accuser was not an accomplice as a matter of law, so no corroboration of his testimony was required. Group initiation ceremonies that entail violence or endanger those who seek membership are properly criminalized. (Family Ct, Queens Co)

**Assault (Serious Physical Injury)**

**Matter of Jason P., 78 AD3d 838, 911 NYS2d 388  
(2nd Dept 11/9/2010)**

**Holding:** The presentment agency failed to present legally sufficient evidence to support the charge of acts that, if committed by an adult, would constitute second-degree gang assault. The fractured patella sustained by the accuser did not constitute a serious physical injury. The evidence was sufficient to establish the other allegations, for which the period of probation imposed is appropriate, so no remittal for a new order of disposition is required. (Family Ct, Kings Co)

**Confessions (Instructions) (Voluntariness)**

**Due Process (Fair Trial)**

**People v Clinkscales, 78 AD3d 1069, 912 NYS2d 260  
(2nd Dept 11/23/2010)**

**Holding:** The defendant was deprived of a fair trial by the court’s denial of his request to introduce evidence through a third party that a man named McClean said he had beaten and robbed the decedent. McClean’s assertion of the right against self-incrimination made him unavailable to testify. His admission was against his penal interest. His admission of his participation in the attack showed competent knowledge of the underlying facts. And there was a reasonable possibility that the statement may be true. McClean’s statement contradicted another’s trial testimony and the defendant’s statement to police; the jury should have heard McClean’s statement. The court also failed to give meaningful supplemental instructions when the jury asked a question about the voluntariness of the defendant’s confession. The court’s instructions did not adequately convey the factors the jury needed to consider in determining the voluntariness of the confession given by the 16-year-old defendant after being held, handcuffed to a chair and repeatedly questioned, by police overnight. (County Ct, Nassau Co)

**Defenses (Affirmative Defenses Generally)**

**Evidence (Weight)**

**People v Singh, 78 AD3d 1080, 911 NYS2d 464  
(2nd Dept 11/23/2010)**

**Second Department** *continued*

**Holding:** As to the first-degree robbery charge, the jury's finding that the defendant failed to establish the affirmative defense that the gun was not loaded was against the weight of the evidence. The codefendant testifying for the prosecution said that a third person gave him a gun, which the codefendant observed had no bullets, that the codefendant in turn gave to the defendant, who pointed it at the accuser in robbing him. The codefendant said that the gun was discarded in some bushes as they fled; the gun was never found. The codefendant's testimony as to the gun was uncontradicted. On remittal, the conviction on this charge must be reduced to lesser offense of second-degree robbery and the defendant must be resentenced. (Supreme Ct, Queens Co)

**Self-Incrimination (Conduct and Silence)****Witnesses (Confrontation of Witnesses)**

**People v Whitley, 78 AD3d 1084, 912 NYS2d 257  
(2nd Dept 11/23/2010)**

**Holding:** The court erred by admitting transcripts of the testimony of two gas station employees who had testified at the defendant's first trial but were said to have returned to their native Turkey before the second trial. The prosecution failed to show sufficient efforts to locate and make contact with one witness and due diligence to bring the other one to court. There was no showing that the prosecution fully and plainly explained to the located witness what would be done to accommodate his travel and personal concerns. It was also error to allow a detective to testify that the defendant, after becoming "defensive," stopped answering question and refused to explain anything. Given the cumulative prejudicial impact of the errors, they were not harmless. (County Ct, Suffolk Co)

**Counsel (Anders Brief)****Juveniles (Delinquency)**

**Matter of Kalexis R., 79 AD3d 754, 913 NYS2d 922  
(2nd Dept 12/7/2010)**

**Holding:** Replacement appellate counsel must be assigned where present counsel submitted an *Anders* brief seeking to be relieved of representation in this juvenile delinquency assault matter, but an independent review of the record indicates that nonfrivolous issues exist, including whether there was proof beyond a reasonable doubt that the appellant caused physical injury to a police officer with the intent of keeping the officer from performing a lawful duty and intentionally prevented or tried to prevent the officer from arresting him. (Family Ct, Queens Co)

**Sex Offenses (Civil Commitment)**

**Matter of State of New York v Anonymous, 79 AD3d 758, 913 NYS2d 677 (2nd Dept 12/7/2010)**

**Holding:** It is appropriate to apply a reasonable cause to believe standard at a probable cause hearing under Mental Hygiene Law 10.06(g). The court erred in finding that probable cause to believe civil management of the respondent, a sex offender, had not been shown. The State's expert concluded that the respondent had a mental abnormality affecting his capacity in a way that predisposed him to commit acts constituting sexual offenses and that the abnormality was associated with serious difficulty in controlling that behavior. (Supreme Ct, Suffolk Co)

**Dissent:** The requisite reasonable cause to believe standard was not met. The expert's testimony as to two of the three criteria for a diagnosis of antisocial personality disorder was too inconsistent and contradictory to reasonably support the diagnosis. Problems with the expert's testimony include reliance upon a Static-99 actuarial assessment instrument that had been completed as to the respondent before two revisions of the instrument were made, acknowledged misapplication of several of the test's criteria, and use of a second actuarial tool, the MnSOST-R, that had been abandoned in New York at the time it was used. The Supreme Court was in the best position to evaluate the testimony and evidence presented.

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

**People v Struss, 79 AD3d 773, 912 NYS2d 636  
(2nd Dept 12/7/2010)**

**Holding:** The court did not err in denying the defendant's request for an adjournment to consider moving for resentencing as to a class B drug felony when the court announced during a hearing under the Drug Law Reform Act (DLRA) of 2004, what determinate sentence the court would impose on the defendant's concurrent A-II drug felony. The court did err in then denying the defendant's motion for resentencing as to the A-II offense on the same ground. The matter is remitted for the court to enter the initial DLRA order with the proposed sentence on the A-II offense and to tell the defendant that unless he withdraws his motion or appeals that order, the original sentence will be vacated and the proposed sentence imposed. (County Ct, Dutchess Co)

**Juries and Jury Trials (Qualifications)**

**People v Gale, 79 AD3d 903, 912 NYS2d 305  
(2nd Dept 12/14/2010)**

**Second Department** *continued*

**Holding:** The court erred in its handling of a jury note that included a request it not be read in front of the defendant, received after several days of deliberation and rendering of a partial verdict finding the defendant guilty of a Vehicle and Traffic Law violation. Although agreeing that a juror said to be holding out as to the remaining charge due to a fear of retribution should be questioned, the court did not do so, denied a defense motion for mistrial, and instructed the jury that, among other things, its verdict had to be based on the evidence, not fear or other improper factors. After the jury convicted the defendant of third-degree possession of a weapon, the court questioned the juror in the presence of the other jurors but off the record, then summarized the conversation on the record and expressed confidence the juror had rendered an impartial verdict. This did not meet the requirements for determining whether a juror is grossly unqualified. A new trial must be held. (Supreme Ct, Kings Co)

**Habeas Corpus (State)**

**Juveniles (Custody)**

**Matter of Garcia v Ramos, 79 AD3d 872, 912 NYS2d 660 (2nd Dept 12/14/2010)**

**Holding:** The court erred in granting temporary custody to the father without a hearing where allegations by the teenage children and their adult sister, who had had custody of the children, raised significant issues as to the father's fitness to assume custody. The evidence is uncontested that the father is out of the country for extended periods, and the children refuse to stay with him. Due to insensitive and intemperate remarks by the judge, the hearing should be before a different judge. The writ of habeas corpus that directed the mother to return the children to the father should have directed her to produce them in court for a custody determination after due consideration. (Family Ct, Kings Co)

**Juveniles (Visitation)**

**Matter of Waverly v Gibson, 79 AD3d 897, 912 NYS2d 681 (2nd Dept 12/14/2010)**

**Holding:** The court improvidently exercised its discretion in finding that the maternal grandmother, with whom the children lived intermittently for the first one or two years of their lives, lacked standing to seek grandparent visitation rights after the children were removed from her home and placed with the paternal grandmother and the mother's parental rights were terminated. (Family Ct, Kings Co)

**Due Process (General)**

**Witnesses (Confrontation of Witnesses)**

**People v Gomez, 79 AD3d 1065, 913 NYS2d 758 (2nd Dept 12/21/2010)**

**Holding:** The court violated the defendant's right to present a defense by precluding two defense witnesses from testifying, where the witnesses would have contradicted the accuser's description of conversations she had with them regarding her desire to stay in Florida with the defendant and her mother and about her statements that the alleged offenses had not occurred. (Supreme Ct, Queens Co)

**Juveniles (Custody) (Jurisdiction)**

**Matter of Santiago v Riley, 79 AD3d 1045, 915 NYS2d 99 (2nd Dept 12/21/2010)**

**Holding:** Where the children were present in New York at the relevant times, and, upon learning that the father had filed a custody petition in Delaware, the court communicated with that court and learned that the father had failed to submit an affidavit of service showing the mother had been served, the court erred in dismissing the child custody proceeding resulting from the mother's filing of a family offense petition claiming acts of physical and verbal abuse by the father against her and the children. The court should have determined whether it should continue to exercise temporary emergency jurisdiction. (Family Ct, Nassau Co)

**Prisoners (Disciplinary Infractions and/or Proceedings)**

**Matter of Vaughn v Orlando, 79 AD3d 1048, 913 NYS2d 318 (2nd Dept 12/21/2010)**

**Holding:** Where the petitioner was confined to administrative segregation before his jail disciplinary hearing and so was unable to prepare his defense, he had a due process and regulatory right to assistance. Having been denied that right he is entitled to a new hearing and determination. The Supreme Court should have disposed of the argument that the determination was affected by an error of law before transferring this article 78 proceeding as to a substantial evidence question, but the full proceeding is decided here in the interest of judicial economy. (Supreme Ct, Westchester Co)

**Preemption**

**Weapons (Firearms)**

**Matter of Chwick v Mulvey, 2010 NY Slip Op 09911 (12/28/2010)**

**Second Department** *continued*

**Holding:** Nassau County Ordinance No. 9-2008, which bans “deceptively colored” handguns, is preempted by Penal Law 400.00, because the State implicitly preempted the field of firearm regulation by enacting detailed provisions that evince an intention to set out a uniform system of firearm licensing. (Supreme Ct, Nassau 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](http://www.nycourts.gov/reporter/Decisions.htm).

**Sex Offenses (General) (Sex Offender Registration Act)**

**People v Johnson, 77 AD3d 1039, 909 NYS2d 410  
(3rd Dept 10/14/2010)**

**Holding:** The court did not abuse its discretion in granting the defendant’s request for a downward departure to a risk level one under the Sex Offender Registration Act. Because acceptance of responsibility and successful completion of a sex offender treatment program are circumstances encompassed by the risk assessment instrument, they cannot be the basis for a downward departure. However, additional evidence, including proof that the defendant has a sound relapse prevention plan, continues to participate in the program to assist other offenders, and voluntarily continued drug and alcohol treatment was sufficient to warrant a downward departure. A risk assessment completed by the treatment staff showed that the defendant had a very low risk of reoffending. (County Ct, Sullivan Co)

**Guilty Pleas (Errors Waived By) (General [Including Procedure and Sufficiency of Colloquy])**

**People v Clark, 77 AD3d 1055, 909 NYS2d 573  
(3rd Dept 10/21/2010)**

**Holding:** The defendant’s plea was not intelligently, knowingly, or voluntarily entered and must be vacated. The defendant waived immunity and testified before the grand jury; during his testimony, he refused to answer a question and was thereafter charged with first-degree criminal contempt. The defendant’s guilty plea to the contempt charge was conditioned on his right to pursue appellate review of whether the question he refused to answer was a legal and proper interrogatory. The court incorrectly advised the defendant that his plea would not foreclose his right to appeal that issue. In fact, by pleading guilty, the defendant forfeited his challenge to the propri-

ety of the grand jury question. Reversal is required despite the defendant’s failure to properly preserve the issue. (County Ct, Saratoga Co)

**Lesser and Included Offenses (General)****Sentencing (Disparity) (Persistent Felony Offender)**

**People v Brown, 77 AD3d 1190, 910 NYS2d 209  
(3rd Dept 10/28/2010)**

**Holding:** The court properly refused to submit to the jury the charge of fourth-degree stalking as a lesser included offense of second-degree stalking because the lesser charge requires proof of material harm to a person’s mental or emotional health, which is not a necessary element of the greater offense. But the court erred by sentencing the defendant to a prison term of 15 years to life, as a persistent felony offender, after he was convicted upon retrial on the stalking charge following an appeal. The defendant was originally sentenced to an aggregate term not in excess of four years. No evidence presented during the second trial on the stalking charge warranted the dramatic increase in his sentence. Although he was adjudicated a persistent felony offender for the first time after the second trial, the court had the same information about his criminal record when it imposed the original sentence. And the prosecution, at the court’s request, filed a similar persistent felony offender statement during the first trial. The prosecution withdrew the statement over concerns that the statute was unconstitutional, but there was no allegation that it was prevented from pursuing persistent felony offender status. The sentencing disparity reinforces the perception that the defendant is being punished for successfully appealing his first conviction. (County Ct, Rensselaer Co)

**Guilty Pleas (General [Including Procedure and Sufficiency of Colloquy])****Sentencing (Enhancement)**

**People v Coffey, 77 AD3d 1202, 910 NYS2d 206  
(3rd Dept 10/28/2010)**

**Holding:** Because the defendant was given an opportunity to be heard and admitted that he violated the plea agreement, and he failed to request a hearing or move to withdraw his plea, a formal hearing was not required before the court imposed an enhanced sentence. The plea agreement required the defendant to cooperate with the presentence report preparation, including answering the probation department’s questions truthfully and in conformity with his statements during the plea allocution and accepting responsibility for his actions. The court explained that it would not be bound by the sentencing agreement and would impose the maximum sentence if

**Third Department** *continued*

the defendant failed to satisfy those conditions, which, at sentencing, the defendant acknowledged that he violated.

The defendant's appeal waiver was knowing, intelligent, and voluntary where the court explained the separate and distinct right to appeal that the defendant was waiving, the defendant expressed his understanding of the waiver, his counsel fully agreed with the waiver, and after conferring with counsel, the defendant signed a written appellate waiver in open court and again expressed his understanding of the waiver's consequences. (County Ct, Albany Co)

**Guilty Pleas (Withdrawal)**

**Insanity (General)**

**People v Copeman, 77 AD3d 1187, 909 NYS2d 815 (3rd Dept 10/28/2010)**

**Holding:** The court did not abuse its discretion in denying the defendant's motion to withdraw his plea of not responsible by reason of mental disease or defect, made after the Appellate Division affirmed the court's ruling that it lacked the authority to dismiss the underlying indictment upon entry of the plea and the commitment of the defendant to the custody of the Commissioner of Mental Health. A not responsible plea is the functional equivalent of a guilty plea, and the same standard for withdrawal applies. Denying withdrawal without a hearing is not an abuse of discretion if the court was aware of the defendant's mental health problems at the plea proceedings and conducted a thorough inquiry at that time to show that, despite the deficiencies, the defendant understood the nature of the charges and the plea's consequences. At the plea, defense counsel said that he spoke to the defendant a number of times prior to the plea, concluded that his mental state was significantly improved since psychiatric treatment began, and thought the defendant fully understood the consequences of the plea. The defendant listed his medications, agreed that he was feeling "fine" and was aware of his surroundings, and understood the rights he was giving up and the possibility he would be committed. The defendant's current claim that his medications were ineffective, rendering him unable to fully appreciate the consequences of the plea, is unsubstantiated and is not an adequate basis for this court to find an abuse of discretion. (County Ct, St. Lawrence Co)

**Sex Offenses (General) (Sex Offender Registration Act)**

**People v Curthoys, 77 AD3d 1215, 909 NYS2d 824 (3rd Dept 10/28/2010)**

**Holding:** The court did not abuse its discretion in accepting the Board of Examiners of Sex Offenders' recommendation of an upward modification of the defendant's sex offender classification from level one to two based on uncontested evidence that the defendant downloaded photos of nude children, took nude photos of his nine-year-old granddaughter, asked her to model thong underwear, and chatted with teenage girls online. These facts are not adequately covered by the risk assessment instrument, and uncontested facts in the Board's case summary may satisfy the prosecution's burden of proving aggravating factors by clear and convincing evidence. The defendant's advanced age and poor health do not minimize his risk of reoffending; he was in the same condition at the time of the offense and he does not need good mobility to download illicit photos. (County Ct, Schoharie Co)

**Sentencing (Pre-sentence Investigation and Report)**

**People v Jones, 77 AD3d 1178, 909 NYS2d 407 (3rd Dept 10/28/2010)**

**Holding:** The court did not err in denying the defendant's motion to redact from his presentence investigation report the statement that despite his denial of gang involvement, the defendant's behavior suggested otherwise. The statement could be included in the report because it was based on the probation officer's investigation and was relevant to sentencing. (County Ct, Albany Co)

**Juries and Jury Trials (Challenges) (Selection)**

**Trial (Confrontation of Witnesses)**

**People v Knowles, 79 AD3d 16, 911 NYS2d 483 (3rd Dept 10/28/2010)**

**Holding:** The court did not violate the defendant's statutory and constitutional right to confrontation by allowing the introduction of a prosecution witness' testimony from the defendant's first trial where the witness was unavailable, which constitutes incapacity under CPL 670.10(1). The witness participated in the offense and her plea agreement required her to testify. At the second trial, the witness briefly cooperated, but then recanted or contradicted her prior testimony, and, after counsel was appointed to represent her, she refused to testify and was held in contempt. And defense counsel cross-examined her extensively at the first trial.

The court properly denied the defendant's *Batson* objection to the prosecution's peremptory challenges of all three black potential jurors. One juror oversaw an educational program in which the decedent's mother was a student and the defendant did not object to this explanation. The prosecutor had a good faith belief that he prosecuted several relatives of another juror and the juror seemed to give evasive answers. The prosecutor challenged the third

**Third Department** *continued*

juror because she said that she read the Bible in her free time, arguing that the juror might favor forgiveness over conviction. While several white jurors who were not peremptorily challenged stated that they were active in their churches, none of them said that they read the Bible in their free time. The prosecution's distinction between Bible reading and church activities is not constitutionally impermissible. The defendant did not raise a religion-based *Batson* objection as to this juror and the US Supreme Court has not yet resolved this issue. (County Ct, Schenectady Co)

**Counsel (Competence/Effective Assistance/Adequacy)****Guilty Pleas (General [Including Procedure and Sufficiency of Colloquy])****People v Olmstead, 77 AD3d 1179, 910 NYS2d 232 (3rd Dept 10/28/2010)**

**Holding:** The court did not err in accepting the defendant's guilty plea to charges in two separate indictments despite the absence of one of the defendant's attorneys. The defendant was represented by different attorneys in each case, but the cases had effectively been prosecuted jointly. The defendant's attorney who was present at the plea allocution was fully aware of the plea agreement and was advised by the other attorney how to proceed at the allocution. The attorney's absence was discussed by all involved at a prior conference and, at that time, the attorney who was not at the allocution and the defendant agreed that the other attorney would represent the defendant on both charges when he pleaded guilty. And, at the plea allocution, the defendant told the court he was aware that his other attorney would not be present and that he had previously discussed the plea with him and was willing to proceed in his absence. By not moving to withdraw his plea or to vacate the judgment, the defendant failed to preserve his claim that ineffective assistance of counsel impacted the voluntariness of his plea. (County Ct, St. Lawrence Co)

**Arrest (Warrants)****Evidence (Weight)****People v Paige, 77 AD3d 1193, 911 NYS2d 176 (3rd Dept 10/28/2010)**

**Holding:** The court properly denied the defendant's motion to suppress drugs found after the police entered his girlfriend's home to execute a warrant for her arrest having properly announced their authority and reasonably believing that the girlfriend was in the home.

The conviction of obstruction of governmental administration was not against the weight of the evidence where the defendant answered the door and spoke to the police for several minutes, said he wasn't sure where his girlfriend was, confirmed that it was his girlfriend's home, looked over his shoulder into the apartment, and slammed and locked the door when the officer headed to his car to get the warrant. (County Ct, Franklin Co)

**Dissent:** The defendant's refusal to allow the police to enter the home cannot be used to establish a reasonable belief that he was being evasive to help his girlfriend avoid arrest.

**Evidence (Hearsay)****Sex Offenses (General)****People v Gregory, 78 AD3d 1246, 910 NYS2d 295 (3rd Dept 11/4/2010)**

**Holding:** The court did not err in allowing the investigating officer to testify that the investigation started after the ten-year-old complainant attended a good touch/bad touch presentation at school and a complaint was made to a child abuse hotline. The court properly instructed the jury that the officer's testimony about the complainant's statements should not be considered for the truth, but only to explain the officer's actions and the reason why the investigation started over a year after the alleged conduct. The court correctly sustained defense counsel's objections to the prosecutor's efforts to elicit from the officer testimony about the complainant's statements about when the conduct started and what conduct occurred. It was not an abuse of discretion for the court to allow the complainant's pediatrician to testify that she did not find physical proof of abuse, but that lack of such proof "was not inconsistent with abuse given the soft tissue area affected and the slight penetration alleged." (County Ct, Washington Co)

**Counsel (Conflict of Interest)****Witnesses (Experts)****People v Kennedy, 78 AD3d 1233, 910 NYS2d 590 (3rd Dept 11/4/2010)**

**Holding:** The court properly denied the defendant's request for a *Frye* hearing regarding the admissibility of evidence that a specially trained dog detected the odor of cocaine on the money taken from the defendant when he was arrested. The hearing was not necessary because "[t]he use of a properly trained dog to detect the presence of narcotics through its sense of smell 'is an investigative rather than a scientific procedure' . . . ." The prosecution showed that the dog and its trainer received training in drug detection and the dog was previously proven to be

## Third Department *continued*

reliable; this provided a proper foundation for the testimony. And the court properly admitted the dog handler's testimony about the dog's reactions. It was not opinion testimony, but merely testimony of the handler's observations of the dog when it was put in the room and how those observations related to the dog's prior drug detection training.

The defendant did not receive ineffective assistance of counsel because his attorney worked for the same public defense office as the attorney who represented a prosecution witness in a family court proceeding. After learning that the witness would testify for the prosecution, defense counsel told the court that he never met the witness and was not involved her representation. Although the dual representation should be avoided, there was no proof that the conflict inhibited the defendant's representation. (County Ct, Chemung Co)

### Homicide (Murder [Intent])

**People v Timmons, 78 AD3d 1241, 910 NYS2d 290  
(3rd Dept 11/4/2010)**

**Holding:** The court did not err in submitting both the intentional and depraved indifference murder counts in the alternative to the jury where the evidence showed the defendant shot at three boys who were fleeing down a street while a number of people were in the area, including a child who was hit by a bullet and died. These actions could support either an intentional murder conviction based on transferred intent or a depraved indifference conviction based on shooting a gun on a crowded street, which is comparable to firing into a crowd. There was legally sufficient evidence that the defendant knew that other people were on the street, but disregarded their safety or the risk of death by shooting the gun at the fleeing boys. (County Ct, Albany Co)

### Guilty Pleas (General [Including Procedure and Sufficiency of Colloquy]) (Vacatur)

#### Post-Judgment Relief (CPL § 440 Motion)

**People v Kearney, 78 AD3d 1329, 910 NYS2d 315  
(3rd Dept 11/10/2010)**

**Holding:** The court erred in denying the defendant's CPL 440.10 motion to vacate his conviction without a hearing where the issues raised were not previously determined in the direct appeal because the appellate court concluded that they were outside the record and should not be considered. The defendant claims that he would not have pleaded guilty but for his attorney's assurances that he was eligible for a certificate of relief

from civil disabilities. The collateral consequences rule does not apply because the defendant alleges that he based his decision to plead guilty on the information he was provided. During the plea proceedings, the court told the defendant he could get a certificate of relief that would allow him to continue to work as a nurse and the prosecutor and defense counsel made similar statements; the court repeated its promise at sentencing. A hearing is necessary to examine whether defense counsel told the defendant that he was eligible for a certificate and whether such assurances induced him to plead guilty. (County Ct, Sullivan Co)

### Search and Seizure (Warrantless Searches [Abandoned Objects])

**People v Pirillo, 78 AD3d 1424, 911 NYS2d 272  
(3rd Dept 11/24/2010)**

**Holding:** The court erred in denying the defendant's motion to suppress physical evidence because the defendant discarded the evidence after a police officer unlawfully pursued him. The officer, responding to a report of a suspicious man, saw the defendant, who matched the description, running out of a driveway. When she yelled for him to stop, he continued to run and she pursued him in her car. After she saw him throw something into a yard as he ran by, she pursued him on foot, handcuffed him, and then retrieved the property. Based on the information she had at the time, the officer could only ask the defendant for information about why he was in the area and follow him to observe him. (County Ct, Broome Co)

### Instructions to Jury (Circumstantial Evidence)

**People v Solomon, 78 AD3d 1426, 911 NYS2d 514  
(3rd Dept 11/24/2010)**

**Holding:** The court erred in refusing to give an expanded circumstantial evidence instruction for the counts that were solely based on circumstantial evidence that the defendant possessed an operable weapon, fired a shot through the floor of a second-floor apartment into a first-floor apartment, and did not live in the apartment where he and the gun were found. The first-floor apartment residents called the police and watched the building exits until police arrived eight minutes later and secured the building. The defendant came out of the second-floor apartment 30 minutes later. No one else was found in that apartment and the police found a disassembled gun missing a necessary piece and loose rounds of live ammunition in a bedroom closet near where the bullet was fired. The defendant's conviction on those counts must be reversed and a new trial is ordered. (County Ct, Schenectady Co)

**Third Department** *continued***Sentencing (Credit for Time Served) (General) (Non-incarcerative) (Split Sentences)****People v Cortese, 79 AD3d 1281, 913 NYS2d 383  
(3rd Dept 12/9/2010)**

**Holding:** The court properly sentenced the defendant under Penal Law 60.01(2)(d) to a split sentence of time served and three years' probation, concurrent. Although the defendant actually was in custody for 86 days before sentencing, the court's use of the phrase "time served" did not mean that he was receiving a split sentence of 86 days of imprisonment and three years' probation. The sentence is more accurately expressed as a sentence of 60 days of imprisonment, which is satisfied by the defendant's time served, and three years' probation. That the defendant served 86 days did not preclude the court from imposing a split sentence. Although the issue is moot, it should be noted that the jail sentence and probation term are reduced by the 60 days of time served, not 86 days that the court stated, because the probation term can only be reduced by time served up to the length of the incarceration sentence. (County Ct, St. Lawrence Co)

**Search and Seizure (Search Warrants)****People v Sherwood, 79 AD3d 1286, 915 NYS2d 171  
(3rd Dept 12/9/2010)**

**Holding:** The trial court erred in granting the defendant's motion to suppress the physical evidence based on a technical violation of law in the oral amendment of a no-knock warrant to authorize execution after 9:00 p.m. The amendment was illegal because the application was neither sworn nor recorded. However the original written application provided a basis for a nighttime search. The no-knock provision was authorized because the application alleged that drugs were being sold out of the location to be searched, and the issuing judge could infer that the drugs could easily be destroyed. Because that provision was authorized by the initial application, a nighttime search is also allowed even if it was not originally requested and even if the warrant does not expressly provide for it. (County Ct, Schenectady Co)

**Homicide (Causation)****People v Snow, 79 AD3d 1252, 912 NYS2d 334  
(3rd Dept 12/9/2010)**

**Holding:** The prosecution proved that the defendant caused the death of the child and the parents' decision to withdraw artificial life support did not constitute a superseding cause of death. The defendant's expert and one of

the decedent's doctors testified that the child would not have died but for the blunt trauma to his head. The parents' decision is not a defense because the child's death was not solely attributable to that decision and it did not break the chain of causation. (County Ct, Madison Co)

**Evidence (Hearsay)****Homicide (Murder [Degrees and Lesser Offenses] [Instructions])****People v Molina, 79 AD3d 1371, 914 NYS2d 331  
(3rd Dept 12/16/2010)**

**Holding:** The court erred in allowing the jury to consider the intentional and depraved indifference murder counts in the conjunctive where the defendant and others had a fight with another group at a club, then encountered the group on the street in an apartment complex, at which point the defendant pulled out a gun and shot at the group several times. One of the bullets went through a wall and struck the decedent; another bullet traveled through the wall of the decedent's bedroom and fell on the floor. No one else was hit. This is the rare case in which both charges can be submitted to the jury, but the charges must be considered in the alternative so that the jury must decide whether the defendant committed murder intentionally or with a depraved mind. The court properly excluded the defendant's evidence of third-party culpability because, while relevant, the defendant's evidence on that issue was inadmissible hearsay. The defendant's witness would have testified that another person told her that he had a gun that was used during the incident and that it had "a body on it." But that person was unavailable and there was no other evidence tending to support the hearsay statements. (County Ct, Chemung Co)

**Counsel (Competence/Effective Assistance/Adequacy)****Juveniles (Parental Rights) (Right to Counsel)****Matter of Eileen R., 79 AD3d 1482, 912 NYS2d 350  
(3rd Dept 12/23/2010)**

**Holding:** The court deprived the incarcerated respondent father of his federal and state due process rights to be present throughout the termination of parental rights proceeding by applying its blanket policy against telephonic testimony and not providing an alternative way for him to meaningfully participate. Courts have authorized telephonic testimony in similar cases to protect a physically absent parent's due process rights, and a blanket policy against such testimony is not condoned. The court also erred in announcing that it would not permit the respondent to present any evidence, and instead, would rely solely on the petitioner's testimony.

**Third Department** *continued*

The respondent's court appointed attorney failed to provide meaningful representation where counsel did not object to ban on telephonic testimony or request that the court allow the respondent to testify by deposition or other means and failed to take steps to alleviate the prejudice, such as asking for adjournments to allow him to review transcripts with his client, which prevented counsel from comprehensively cross-examining the petitioner's witnesses. The respondent was prejudiced by counsel's ineffectiveness. The respondent was prevented from presenting evidence; he was likely the only witness who could support his defense that he tried to contact his children, and thus, did not abandon them. Because of these errors, the order terminating the respondent's parental rights must be reversed. (Family Ct, Broome Co)

**Prisoners (Disciplinary Infractions and/or Proceedings)**

**Matter of Phillips v Fischer, 79 AD3d 1492, 913 NYS2d 416 (3rd Dept 12/23/2010)**

**Holding:** The decision finding the petitioner guilty of making threats is annulled because the record shows that the petitioner's comment, while totally inappropriate, could not have been considered an actual threat. The evidence presented at the tier III disciplinary hearing was that the inmate petitioner, dissatisfied with the delay caused by a correctional officer, said that "any f\*\*\*ing idiot could do this job, and [the officer] should be taken out back and shot." However, the misbehavior report and the officer's testimony provided substantial evidence to support the finding of guilt as to the harassment charge. Because the making threats charge is annulled and the penalty imposed included a recommended loss of good time, the matter must be remitted for a redetermination of the penalty.

**Sentencing (Enhancement)**

**People v Becker, \_\_ AD3d \_\_, 914 NYS2d 383 (3rd Dept 1/6/2011)**

**Holding:** Because the court did not explicitly require the defendant to provide answers that conformed to his plea allocution during the presentence report interview by the Probation Department, the defendant's failure to do so cannot serve as the basis for enhancing the sentences agreed to in the plea bargain. Furthermore, the probation officer's directive to the defendant to tell his "side of the story" was not the same as requesting the defendant to give a truthful and objective statement of facts. The originally-agreed upon sentences must be imposed or

the defendant given an opportunity to withdraw his pleas. (County Ct, Delaware Co)

**Sentencing (Enhancement)**

**People v Donnelly, \_\_ AD3d \_\_, 914 NYS2d 385 (3rd Dept 1/6/2011)**

**Holding:** While the court retained the discretion to impose a sentence different from that recommended by the prosecution, due to the court's statements during the plea colloquy that it would follow the recommendation absent something surprising or the defendant's involvement in further legal trouble, the court was required to offer the defendant a chance to withdraw the plea before it deviated from those statements and enhanced the sentence. That is especially true where the defendant was told of no express conditions that he had to meet. The issue survived the waiver of appeal, and while it was unpreserved, is addressed in the exercise of the interest of justice jurisdiction. (County Ct, Greene Co)

**Defense Systems (System Impacting Litigation)**

**Hurrell-Harring v State of New York, \_\_ AD3d \_\_, 914 NYS2d 367 (3rd Dept 1/6/2011)**

**Holding:** The plaintiffs' claim that the right to counsel is at risk of being unmet in the five named counties due to systemic conditions meets the prerequisites to certification of the matter as a class action. The numerosity requirement is clearly met where the proposed class potentially includes tens of thousands of individuals. The concrete legal issue presented and the right that the plaintiffs seek to vindicate are common to all members of the class and transcend any individual issues. The typicality prerequisite is also satisfied, as the individual claims and claims of class members arise from the same course of conduct and are based on the same theory. The plaintiffs have shown that the representative parties can fairly and adequately protect the interests of the whole class; the named plaintiffs' affidavits show they are familiar with the litigation and understand the issues, and several representative plaintiffs indicate they joined the suit to improve the public defense system, not to alter their own case outcomes. A class action is superior to duplicative, multiple individual suits giving rise to the possibility of inconsistent rulings and significant discovery challenges. Other claims of systemic deficiencies for which widespread, systemic reform was sought have been maintained as class actions, and any error in determining whether to certify a class should be resolved in favor of certification. The unique circumstances of this case make a class action the superior method of adjudicating the controversy presented. (Supreme Ct, Albany Co)

**Third Department** *continued***Juveniles (Custody) (Jurisdiction) (Visitation)****Matter of Hissam v Mancini, 2011 NY Slip Op 52  
(3rd Dept 1/6/2011)**

**Holding:** The family court's jurisdiction was proper because the mother has lived continuously in this state since the 2005 order granting the father in Pennsylvania primary physical custody with liberal parenting time to the mother, and events pertinent to the mother's current petition occurred when the child was here. The court was very familiar with the facts and issues based on prior hearings, and the father, whose ability to travel was superior to that of the mother, did not object to the court's jurisdiction, so New York was not an inconvenient forum as the mother claims. The court's decision that allowing the child to relocate to Thailand with the father was in the child's best interest was supported by the record. Such evidence included the father's wife's new, lucrative job there and the mother's behavior that had a harmful effect on the child, such as derogatory comments about the father, manipulation of the child to say negative things about the father, and the frequent use of profanity. Further, the father has provided a stable home, which the mother has failed to do, and provided many benefits "including exposure to a different culture and enhanced educational opportunities." Conditioning the mother's visitation on the posting of a \$10,000 bond or \$5,000 cash was unsupported by the record and created an undue burden on the mother, who qualified for assigned counsel. (Family Ct, St. Lawrence Co)

**Fourth 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](http://www.nycourts.gov/reporter/Decisions.htm).

**Domestic Violence (General)****Juveniles (Neglect)****Matter of Alfonso H., 77 AD3d 1410, 908 NYS2d 780  
(4th Dept 10/1/2010)**

**Holding:** The court properly concluded that the petitioner Department of Social Services failed to prove by a preponderance of the evidence that the child's "physical, mental or emotional condition" was impaired or was in imminent danger of being impaired due to the alleged domestic violence incidents between the parents. But the court improperly dismissed the Family Court article 10

petition insofar as it alleged that the respondent father's alcohol abuse impairs his ability to safely care for the child, and the matter must be remitted to reopen the fact-finding hearing on that part of the petition. The petitioner provided evidence that the police had to intervene several times when the father, while intoxicated, was violent to the respondent mother. (Family Ct, Onondaga Co)

**Evidence (Business Records)****People v Batjer, 77 AD3d 1279, 908 NYS2d 285  
(4th Dept 10/1/2010)**

**Holding:** The court improperly admitted into evidence certain company records that the prosecution failed to show fit within the business records exception to the hearsay rule. An employee of another company, RTI, testified that RTI relied on and incorporated the records into its own records, RTI was required to maintain the records, the records were made in the regular course of RTI's business, and RTI maintained the records in the regular course of business. However, none of the prosecution's witnesses was able to testify about whether the originating company made the records contemporaneously with the events recorded and whether they were made in the regular course of business. The error was harmless. (County Ct, Monroe Co)

**Instructions to Jury (Theories of Prosecution and/or Defense)****People v Bermudez, 77 AD3d 1284, 908 NYS2d 302  
(4th Dept 10/1/2010)**

**Holding:** The court properly instructed the jury that unanimity was not required as to whether the defendant was a principal or an accomplice in causing the decedent's death because the elements of second-degree manslaughter are the same under either theory. And the evidence was sufficient to establish that the defendant caused the decedent's death either by his own conduct or by acting in concert with another person. (County Ct, Monroe Co)

**Sex Offenders (Civil Commitment)****Matter of the State of New York v Flagg, 77 AD3d 1400,  
908 NYS2d 789 (4th Dept 10/1/2010)**

**Holding:** The court erred in denying the petitions seeking a determination that the respondent is a dangerous sex offender requiring confinement and releasing the respondent pursuant to its prior order imposing a regimen of strict and intensive supervision (SIST). The petitioner showed by clear and convincing evidence that the respondent is a dangerous sex offender requiring confinement. It established that the respondent violated several conditions of his SIST program; he consumed alcohol or

**Fourth Department** *continued*

drugs several times, refused to sign releases for access to personal information, did not follow his parole officer’s directions, had pornographic images on his computer, was discharged from sex offender treatment, and was arrested for promoting prison contraband and failing to register his internet information as required by the Sex Offender Registration Act. Although the respondent’s violations did not involve sexually inappropriate conduct, the evidence was sufficient to show that he could not be adequately controlled by modifying the SIST conditions. The petitions are granted to the extent they seek a determination that the respondent is a dangerous sex offender requiring confinement and an order for confinement pursuant to Mental Hygiene Law 10.11(d). (Supreme Ct, Onondaga Co)

**Search and Seizure (Motions to Suppress) (Search Warrants)**

**People v Gray, 77 AD3d 1308, 908 NYS2d 315 (4th Dept 10/1/2010)**

**Holding:** The court incorrectly concluded that the police did not have reasonable suspicion to pursue the defendant when he fled as police approached. The defendant was the only occupant of a home where the police were about to execute a valid search warrant and the police saw him run inside the front door and out the back door and then climb over a fence topped by barbed wire, fall to the ground, and continue to run before being arrested. Because the police pursuit was legal, the court erred in suppressing property seized from the residence and the defendant. And the court incorrectly suppressed the defendant’s statements made three hours after the arrest; even if the pursuit and arrest were illegal, the statements were sufficiently attenuated from the arrest. (County Ct, Monroe Co)

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

**People v Nixon, 77 AD3d 1443, 908 NYS2d 293 (4th Dept 10/1/2010)**

**Holding:** The court abused its discretion in denying the defendant’s motion to sever his trial from that of the codefendant where both were charged with criminal possession of a weapon found in a car they both were in, had irreconcilable defenses, and the defendant claimed that he would be prejudiced if the codefendant’s attorney was allowed to present evidence against him. At trial, each defendant implicated the other and the codefendant’s attorney took an aggressive adversarial stance against the defendant, thereby becoming a second prosecutor. Because the defenses were in conflict, if the jury believed

one defense, it necessarily had to disbelieve the other. The defendant must be given a new trial. The severance motion is moot, however, because the codefendant was acquitted. (Supreme Ct, Erie Co)

**Guilty Pleas (General [Including Procedure and Sufficiency of Colloquy])**

**Sentencing (General)**

**People v Wisniewski, 77 AD3d 1324, 908 NYS2d 781 (4th Dept 10/1/2010)**

**Holding:** Because the defendant did not violate the terms of his plea agreement, the court erred in imposing the prison alternative in that agreement. Under the agreement, the defendant’s sentence would be deferred for eight months to allow him the chance to pay restitution, and if he did so, he would be sentenced to probation. Five months later, the defendant was arrested on a bench warrant for failing to appear at a status conference and a presentence investigation interview; these two appearances were not conditions of his plea agreement. The court revoked bail without conducting a hearing to determine if the defendant intentionally violated a condition of the agreement. Therefore, the defendant was not given the promised eight months to pay the restitution. The court must either impose the promised sentence or give the defendant the opportunity to withdraw his plea. (Supreme Ct, Erie Co)

**Appeal and Writs (General) (Judgments and Orders Appealable)**

**Juveniles (Abuse) (Molestation)**

**Matter of Zanna E., 77 AD3d 1364, 908 NYS2d 313 (4th Dept 10/1/2010)**

**Holding:** The subject child’s appeal is dismissed because she testified that she was sexually abused by her stepfather, the respondent, and therefore, she was not aggrieved by the court’s dispositional order finding that such abuse occurred. The court’s determination is supported by a preponderance of the evidence, including DNA evidence, showing that the respondent’s sperm and seminal material were found on his stepdaughter’s shorts. (Family Ct, Steuben Co)

**Guilty Pleas (General [Including Procedure and Sufficiency of Colloquy]) (Vacatur)**

**Sentencing (Concurrent/Consecutive) (Presence of Defendant and/or Counsel)**

**People v Aloj, 78 AD3d 1546, 910 NYS2d 796 (4th Dept 11/12/2010)**

**Fourth Department** *continued*

**Holding:** The defendant's plea must be vacated as it was not knowing, intelligent, and voluntary because whether the defendant's sentences were to run concurrently or consecutively was not made clear during the plea colloquy. This conclusion is supported by the parties' discussion of the issue and the fact that the court resentenced the defendant twice. The court erred in resentencing the defendant in absentia. (County Ct, Cattaraugus Co)

**Juveniles (Neglect)**

**Matter of Anastasia C., 78 AD3d 1579, 910 NYS2d 631 (4th Dept 11/12/2010)**

**Holding:** There is insufficient evidence to support the court's findings that the respondent mother neglected her two older children by allowing them to attend school when "dirty and inappropriately dressed" and that she failed to give the oldest child prescription medications as directed by the child's doctor, but sufficient evidence to support the finding of neglect based on failure to protect the child from sexual abuse. Findings of neglect based on failure to provide adequate clothing and basic medical care must be based on a finding that the parent is financially able to do so or has been offered the means to do so, but no evidence was presented regarding the mother's financial status or her ability to provide adequate clothing. There was insufficient evidence regarding the oldest child's need for the medication and its appropriate dosage. The court properly admitted one child's out-of-court statements regarding sexual abuse by the father because they were sufficiently corroborated by an examining physician's testimony that "the child's symptoms were consistent with sexual abuse" and a psychologist's opinion, based on a video of the child's interview with a child protective services caseworker, that the child's statements were credible. (Family Ct, Cattaraugus Co)

**Trial (Verdicts [Motions to Set Aside (CPL § 330 Motions)])**

**People v Benton, 78 AD3d 1545, 910 NYS2d 795 (4th Dept 11/12/2010)**

**Holding:** The court erred in granting the defendants' CPL 330.30 motions to set aside the verdict based on the prosecution's failure to disclose a DNA report that the defendants requested and alleged was *Brady* material. The court may grant such a motion if it is based on an issue that would require reversal as a matter of law by an appellate court. Reversal for a *Brady* violation is not mandated, however, unless the issue is preserved for appeal. The issue was discussed in court, but the defendants did not

object to the prosecution's failure to disclose the report or otherwise notify the court of this basis for reversal. Therefore, reversal on appeal was not required as a matter of law and the court did not have the authority to grant the motions. (Supreme Ct, Erie Co)

**Habeas Corpus (State)****Parole (Revocation)**

**People ex rel Hayes v NYS Department of Correctional Services, 78 AD3d 1591, 910 NYS2d 728 (4th Dept 11/12/2010)**

**Holding:** Because the petitioner was still under parole supervision pursuant to Executive Law 259-i(2)(b), even though he was incarcerated at the time of the assault, and thus, could be found to have committed a parole violation, the court properly dismissed the habeas corpus petition. The petitioner remained in the custody of the Division of Parole until the expiration of his sentence or his return to custody of the Department of Correctional Services. (Supreme Ct, Wyoming Co)

**Homicide (Murder [Degrees and Lesser Offenses] [Intent])****Trial (Verdicts [Repugnant Verdicts])**

**People v Henderson, 78 AD3d 1506, 911 NYS2d 521 (4th Dept 11/12/2010)**

**Holding:** The jury's conclusion that the defendant intended to murder one person when he drove into a crowd did not prevent it from concluding that he acted with depraved indifference regarding three others, even if the evidence could also support a theory of transferred intent. Since there was more than one possible complainant at the scene, the defendant could be convicted of intentional and depraved indifference crimes because he could have had different states of mind with regard to each person. By not objecting before the jury was discharged, the defendant failed to preserve for review his claim that the verdict was repugnant, and because that claim has no merit, his ineffective assistance of counsel claim for failure to object is rejected. (County Ct, Onondaga Co)

**Sentencing (Post-Release Supervision)**

**People v Kennedy, 78 AD3d 1477, 910 NYS2d 602 (4th Dept 11/12/2010)**

**Holding:** The court erred by aggregating multiple periods of post-release supervision, as Penal Law 70.45(5)(c) requires that the periods merge and are satisfied by completion of the longest unexpired term. While the defen-

## Fourth Department *continued*

dant failed to raise the issue, an illegal sentence cannot be allowed to stand. (County Ct, Cayuga Co)

### Arson (Degrees and Lesser Offenses)

#### Juries and Jury Trials (Deliberation)

**People v Piccione, 78 AD3d 1518, 910 NYS2d 784  
(4th Dept 11/12/2010)**

**Holding:** There is no record evidence that the court complied with its core obligations under CPL 310.30 to respond to a jury note during deliberations; this constitutes a mode of proceedings error that requires reversal. Three jury notes were properly entered as court exhibits, but only two of the notes were discussed on the record. The record does not show that the prosecutor or defense counsel was even notified of the first note or how the court responded to the note, which asked for a copy of the law that applies to the case. Upon retrial, the court must charge the jury that third-degree arson is an inclusive concurrent count of second-degree arson. (Supreme Ct, Erie Co)

### Appeals (Judgments and Orders Appealable) (Waiver of Right to Appeal)

#### Guilty Pleas (General [Including Procedure and Sufficiency of Colloquy])

**People v Pivoski, 78 AD3d 1533, 910 NYS2d 618  
(4th Dept 11/12/2010)**

**Holding:** The court did not err in requiring, as a condition of his guilty plea, that the defendant withdraw his notice of appeal from an earlier Ontario County judgment. The court told the defendant that “its determination whether the sentences imposed on the conviction would run concurrently with the sentence previously imposed in Ontario County depended upon whether defendant waived his right to appeal from the Ontario County judgment. The court further explained to defendant that he would be asked at sentencing to sign a written waiver of his right to appeal from the judgment entered in Ontario County, and defendant signed that waiver. Thus, we conclude that the court did not impermissibly foreclose our review of those contentions raised in the appeal from the Ontario County judgment that survived defendant’s waiver of the right to appeal in that case . . . . Indeed, defendant did not withdraw his notice of appeal from that judgment and, in that prior appeal, we concluded that defendant’s waiver of the right to appeal was knowing and voluntary, despite the fact that it was executed as a condition of the plea entered in Monroe County . . . .” (Supreme Ct, Monroe Co)

### Arrest (Warrantless)

**People v Williams, 78 AD3d 1508, 910 NYS2d 396  
(4th Dept 11/12/2010)**

**Holding:** The court properly denied the defendant’s motion to suppress his statement as fruit of an illegal warrantless arrest inside his residence where he was arrested in the registration area of a drug rehabilitation facility with the possessions he took with him from his last known address. While there was not unlimited public access to the registration area, it was used by many people multiple times a day and was not residential in nature. Therefore, the defendant was not entitled to the privacy there that he would have had in his home. (County Ct, Erie Co)

### Driving While Intoxicated (Chemical Test [Blood or Urine])

#### Grand Jury (General)

**People v East, 78 AD3d 1680, 910 NYS2d 755  
(4th Dept 11/19/2010)**

**Holding:** The court erred in granting the defendant’s motion to dismiss the indictment based on the prosecution’s failure to comply with Vehicle and Traffic Law 1194(2)(f), which resulted in improper presentation of evidence to the grand jury that the defendant refused to submit to a chemical test, because the admissible grand jury evidence was legally sufficient to support the indictment. Dismissal pursuant to CPL 210.35(5) is not warranted because there was no prosecutorial misconduct, fraudulent conduct, or errors that potentially prejudiced the grand jury’s ultimate decision. The admissible evidence included that the defendant drove a car at a high rate of speed while weaving between lanes, he failed field sobriety tests, his eyes were bloodshot and his speech was slurred, and he admitted he may have had a little too much to drink. (County Ct, Monroe Co)

### Contempt (Counsel) (Elements)

#### Grand Jury (Witnesses)

**People v Nagel, 78 AD3d 1636, 911 NYS2d 561  
(4th Dept 11/19/2010)**

**Holding:** Because the defendant was deprived of his due process rights when the prosecution called him as a witness before a grand jury in the absence of his attorney, his criminal contempt conviction must be reversed. The defendant had pleaded guilty to a felony drug offense and acted as a confidential informant; he was represented by counsel in that case. While he was in prison for that offense, the prosecutor procured his attendance before a

**Fourth Department** *continued*

grand jury without notifying his attorney or the defendant that he was to appear. When the defendant was called to testify, he tried to invoke his privilege against self-incrimination; the prosecutor said he was refusing to be sworn. The defendant was entitled to consult with his attorney before the prosecution compelled him to make binding decisions about his legal rights, including whether to assert or waive his privilege against self-incrimination. The defendant cannot be prosecuted for contempt since the prosecution failed to tell him that he would be given immunity from prosecution, violating the requirement that a grand jury witness be apprised of the extent of the immunity conferred by statute. (County Ct, Cayuga Co)

**Probation and Conditional Discharge (Revocation)****Sentencing (Enhancement)****People v Richardson, 78 AD3d 1666, 910 NYS2d 747  
(4th Dept 11/19/2010)**

**Holding:** The court properly revoked the probation part of the defendant's split sentence and sentenced him to a determinate term of incarceration after he admitted to violating the terms of his probation. By not objecting to the enhanced sentence or moving to withdraw his admission or to vacate the judgment revoking the probation portion of his sentence, the defendant failed to preserve for review his claims that the court imposed an illegal period of interim probation by deferring sentencing on the probation violation petition and erred in imposing an enhanced sentence based on a violation of the interim probation. Even if preserved, the claims lack merit. The defendant's voluntary participation in a drug program pending sentencing on the probation violation was not an illegal term of interim probation. And the court did not err in enhancing his sentence after he failed to complete that program and was rearrested for a probation violation. (County Ct, Genesee Co)

**Evidence (Common Plan or Scheme) (Other Crimes)  
(Prejudicial)****People v Stubbs, 78 AD3d 1665, 910 NYS2d 829  
(4th Dept 11/19/2010)**

**Holding:** The court erred in admitting evidence regarding the defendant's prior robbery and attempted robbery on the issue of identity because the method of committing those crimes was not sufficiently unique; in both prior crimes, the defendant was a passenger in a car that went to a retail store where he threatened the cashier

with the use of a nonexistent gun. That the prior crimes and the current offense were committed on the same road, but in different localities, does not make the modus operandi unique. The prejudicial effect outweighed the probative value of the evidence and the error was not harmless, despite the strong circumstantial evidence connecting the defendant to the crime. A store employee who was face to face with the perpetrator was not asked to identify the defendant at trial and she told the police that she was 90% sure that the perpetrator was someone other than the defendant, and another witness who saw and spoke to the perpetrator could not identify the defendant at trial. (Supreme Ct, Monroe Co)

**Trial (Presence of Defendant)****People v Walker, 78 AD3d 1671, 912 NYS2d 366  
(4th Dept 11/19/2010)**

**Holding:** The defendant failed to meet his burden of providing substantial evidence showing that he was absent from the *Sandoval* hearing. That the court reporter did not document his presence at the hearing is insufficient to rebut the presumption of regularity of the proceeding. And, the record shows that the defendant was at least present for part of the proceedings, because the court addressed him following its *Sandoval* decision, and that he was present during proceedings on his motion to modify that ruling. Because the record is insufficient to establish the facts needed to meet the defendant's burden of proving his absence, a reconstruction hearing is unnecessary. The issue is reviewed de novo after a writ of coram nobis was granted based on appellate counsel's failure to raise this potential meritorious issue. (Supreme Ct, Monroe Co)

**Dissent:** Because the transcript indicates that the defendant was not present when the court decided to go forward with the hearing in the defendant's absence and it is ambiguous as to whether he came into the courtroom before the hearing started, the matter should be remitted for a reconstruction hearing.

**Double Jeopardy (Res Judicata)****Juveniles (Neglect)****Matter of Alfonzo I., 79 AD3d 1724, 914 NYS2d 488  
(4th Dept 12/30/2010)**

**Holding:** The court properly excluded evidence that the respondent parents neglected their child based on his exposure to domestic violence incidents between May 2008 and January 2009 as those allegations are barred by res judicata. The prior neglect petition against both parents alleged the same theory of neglect regarding domestic violence incidents during that time period

**Fourth Department** *continued*

and the petitioner had a full and fair opportunity to litigate it. Res judicata bars the current claim as to all incidents that occurred during that time period, not just those specifically alleged in the prior petition, because the petitioner could have discovered all the incidents prior to filing that petition by exercising due diligence. "To hold otherwise under the circumstances of this case would allow government agencies such as petitioner to bring successive proceedings alleging the same theory of neglect until the desired result was obtained, with the status of the child remaining undetermined throughout . . . ." The court erred in granting the motion to dismiss as to the allegations against the respondent father regarding a May 2009 fight between the parents where the father had a knife and pushed the mother onto the bed where the child was lying. The court could have concluded that this single incident put the child in imminent risk of being injured by the father's conduct. (Family Ct, Onondaga Co)

[*Ed. Note:* The Fourth Department's decision on the appeal regarding the prior petition is summarized above. See *Matter of Alfonzo T.*, 77 AD3d 1410, 908 NYS2d 780 (4th Dept 10/1/2010).]

**Counsel (Malpractice)**

**Dombrowski v Bulson, 79 AD3d 1587, \_\_ NYS2d \_\_ (4th Dept 12/30/2010)**

**Holding:** This legal malpractice action may proceed to the extent that it alleges that the plaintiff was wrongfully convicted due to his attorney's malpractice and seeks compensatory damages for the loss of liberty and emotional injuries or other losses directly attributed to his imprisonment, but the plaintiff may not seek damages for lost wages because he received Social Security Disability payments while he was incarcerated. Unlike in a legal malpractice action alleging negligence in a civil matter, nonpecuniary damages are recoverable in a malpractice action regarding a criminal matter; such an action is akin to false arrest and malicious prosecution actions, both of which allow recovery for loss of liberty. Imprisonment is a foreseeable result of negligence in a criminal case and damages for mental anguish arising from that foreseeable result should be available. The First Department's conclusion to the contrary in *Wilson v City of New York* (294 AD2d 290) is rejected. The federal magistrate's conclusion, when granting the plaintiff's habeas corpus petition, that the plaintiff was denied effective assistance of counsel due to his attorney's failure to adequately investigate the case and to conduct a sufficient cross-examination of the complainant regarding her prior inconsistent statements does

not establish the plaintiff's innocence as a matter of law and does not have collateral estoppel effect as to causation. (Supreme Ct, Allegany Co)

**Narcotics (Penalties)**

**Sentencing (Resentencing)**

**People v Highsmith, 79 AD3d 1741, \_\_ NYS2d \_\_ (4th Dept 12/30/2010)**

**Holding:** The 2004 Drug Law Reform Act (DLRA-I) did not give the court authority to reduce the defendant's conviction from an A-I drug felony (first-degree possession) to an A-II drug felony (second-degree possession), even though the defendant was convicted of possessing of an amount of cocaine that no longer meets the weight requirement for the A-I felony set forth in the statute as amended by DLRA-I. The court also does not have the authority under DLRA-I or the 2005 Drug Law Reform Act (DLRA-II) to determine whether the defendant's sentences are to be served concurrently or consecutively with respect to other sentences. Therefore, the court's denial of those two parts of the defendant's resentencing application was proper. The defendant now must decide whether to withdraw his resentencing application or agree to the new sentence proposed by the trial court, which is neither harsh nor excessive. (County Ct, Erie Co)

**Juveniles (Adoption) (Visitation)**

**Matter of Mya V.P., 79 AD3d 1794, 913 NYS2d 477 (4th Dept 12/30/2010)**

**Holding:** The court properly concluded that the petitioner, the child's birth mother, violated the terms of her post-adoption contact agreement with the respondents, the child's adoptive parents, but incorrectly dismissed the petition without determining whether enforcement of the agreement was in the child's best interests; the court must hold a hearing on that issue. The agreement provided that it would be voided if the petitioner missed two visits with the child during a 12-month period, which occurred in 2008 because the petitioner was incarcerated. The respondents' decision to stop visitation two months after the petitioner missed the first visit is irrelevant because the petitioner would have missed the second visit due to her continued incarceration, and thus, was not ready, willing, and able to meet her obligations under the agreement. Her incarceration does not excuse her failure to meet those obligations because she was incarcerated due to her own conduct. (Family Ct, Niagara Co)

**Fourth Department** *continued***Post-Judgment Relief (CPL § 440 Motion)****Speedy Trial (Burden of Proof) (Prosecutor's Readiness for Trial)**

**People v Sweet**, 79 AD3d 1772, \_\_ NYS2d \_\_  
(4th Dept 12/30/2010)

**Holding:** The court erred in denying the defendant's post-conviction motion to vacate his conviction without a hearing on whether defense counsel was ineffective by failing to make a speedy trial motion. Such a failure is enough to render the representation ineffective. The defendant made a prima facie showing of a CPL 30.30(1)(a) violation by providing evidence that the prosecution failed to announce ready within six months of the filing of the felony complaint. By failing to hold a hearing, the court incorrectly shifted the burden to the defendant to show the absence of excludable time. The matter must be remitted for a hearing. (Supreme Ct, Niagara Co)

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

**People v Williams**, 79 AD3d 1653, 914 NYS2d 521  
(4th Dept 12/30/2010)

**Holding:** The court should have suppressed the money found in the defendant's pocket because the search was incident to an unlawful arrest where the police properly stopped the defendant's car for speeding, asked for his license and registration, and had him get out of the car but lacked probable cause to arrest him on burglary charges and so had no authority to frisk him, handcuff him, and put him in a police car. At that time, they did not know whether a burglary had been committed. The error was not harmless because the money, which was in four packets that matched the amounts and denominations taken from four parts of the burglarized home, was the only evidence that directly connected him to the crime. Since the defendant's plea in a separate case was induced by a promise that his sentence would run concurrently with the sentence in the burglary case, that plea must be vacated. (Supreme Ct, Monroe Co)

**Dissent:** The police had the authority to forcibly detain the defendant based on their reasonable suspicion that he was involved in a burglary, based in part on data from a GPS tracking device they installed on his car pursuant to a warrant. Under the circumstances, handcuffing the defendant and placing him in a police car did not amount to an arrest. After they confirmed that a burglary had been committed, the police had probable cause to arrest and search the defendant. ⚖

**Defender News**

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**State Bar Criminal Justice Section Honors Macri**

The New York State Bar Association's Criminal Justice Section recognized Macri's work on Jan. 27, during the State Bar's Annual Meeting, presenting her with its award for Outstanding Contribution to Criminal Law Education. ([www.buffalonews.com/city/people-places/honor-roll/article307014.ece](http://www.buffalonews.com/city/people-places/honor-roll/article307014.ece).) From her home base in Buffalo to Long Island, where she has presented several CLE training sessions, Macri brings an extraordinary level of energy and knowledge to bear on a very complex field.

**ActivePresenter Pro Donation Enhances NYSDA's Public Defense Case Management System Support**

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At Atomi Systems' website, you can view an online demo or download a functional version of *ActivePresenter*. While the free version doesn't include all the features, like saving in Flash or *PowerPoint* format, it is still a useful tool. Converting to a paid version is easily done by simply entering a license key, without reinstallation. *ActivePresenter* truly embodies the Confucius quote on Atomi System's website "I hear and I forget. I see and I remember. I do and I understand." ⚖

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## NYSDA MEMBERSHIP APPLICATION

I wish to join the **New York State Defenders Association** and support its work to uphold the Constitutional guarantees of all citizens accused of crimes to legal representation and to advocate for an effective system of public defense representation for the poor.

Enclosed are my membership dues:  \$75 Attorney  \$40 Non-Attorney  \$15 Student  \$15 Prisoner

Name \_\_\_\_\_ Firm/Office \_\_\_\_\_

Office Address \_\_\_\_\_ City \_\_\_\_\_ State \_\_\_\_ Zip \_\_\_\_\_

Home Address \_\_\_\_\_ City \_\_\_\_\_ State \_\_\_\_ Zip \_\_\_\_\_

County \_\_\_\_\_ Phone (Office) (\_\_\_\_) \_\_\_\_\_ (Fax) (\_\_\_\_) \_\_\_\_\_ (Home) (\_\_\_\_) \_\_\_\_\_

E-mail (Office) \_\_\_\_\_ (Home) \_\_\_\_\_

**At which address do you want to receive membership mail?**  Office  Home

Please indicate if you are:  Assigned Counsel  Public Defender  Concerned Citizen  
 Legal Aid Attorney  Private Attorney  Student  Prisoner

*Attorneys and law students please complete:* Law School \_\_\_\_\_ Degree \_\_\_\_\_

Year of graduation \_\_\_\_\_ Year admitted to practice \_\_\_\_\_ State(s) \_\_\_\_\_

I have also enclosed a tax-deductible contribution:  \$500  \$250  \$100  \$50  Other \$ \_\_\_\_\_

Checks are payable to **New York State Defenders Association, Inc.** Please mail coupon, dues, and contributions to:  
New York State Defenders Association, 194 Washington Ave., Suite 500, Albany, NY 12210-2314.

*To pay by credit card:*  Visa  MasterCard  Discover  American Express

Card Billing Address: \_\_\_\_\_

Credit Card Number: \_\_\_\_\_ Exp. Date: \_\_\_\_ / \_\_\_\_

Cardholder's Signature: \_\_\_\_\_