NEW YORK STATE DEFENDERS ASSOCIATION

Public Defense Backup Center
REPORT

Volume XXVI Number 3 June–July 2011

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Defender News

High Court's Decisions Are Not Light Summer Fare

The United States Supreme Court and New York's Court of Appeals issued a number of decisions in recent weeks that cannot be called "beach books" but will be required summer reading for lawyers nonetheless. Several criminal law decisions were included. Summaries of the decisions set out below, and others, begin at page 14.

Supreme Court Recognizes Youth of Suspect as a Miranda *Factor, Requires Lab Experts Who Certify Forensic Reports to Testify, Denies Counsel in Civil Contempt Proceedings, and More*

Cases that will constitute largely pleasure reading for criminal defense counsel include the following:

- *J.D.B. v North Carolina*—When juveniles challenge the admissibility of their statements to police, their youth must be considered in determining the issue of custodial interrogation.
- *Bullcoming v New Mexico*—Calling a "surrogate" expert at trial who did not conduct or observe the tests recorded in a report in place of the expert who did the testing and certified the results violates the Confrontation Clause. That lab reports should not in any sense be presumed accurate is discussed in an item below.

Less pleasant reading from the U.S. Supreme Court includes such cases as:

- *Kentucky v King*—Where police action such as knocking on the door creates an exigent circumstance such as apparent imminent destruction of evidence, that circumstance justifies a warrantless entry if the initial action that caused it was reasonable.
- *Davis v United States*—The exclusionary rule does not apply to searches conducted by law enforcement in objectively reasonable reliance on binding appellate precedent that was overturned after the search but during the direct appeal of a resulting conviction.

The court also held, in *Turner v Rogers,* that the federal Constitution does not automatically require a state to provide counsel to a person unable to hire a lawyer when facing possible incarceration for civil contempt based on nonpayment of child support where payment is owed to an individual who has no attorney and alternative procedures are in place to ensure a fundamentally fair determination of whether the potential contemnor is able to comply with the support order. Because proper alternative procedures were lacking in the case before it, the Court vacated the decision below. As New York has statutory mechanisms in place to provide counsel in Family Court in such instances, and as determining in a given case whether counsel is constitutionally required would require extensive analysis likely to be more costly and time consuming than providing counsel, it can be hoped that *Turner* will have minimal effect here.

Contents

Court of Appeals Holds Prosecutors to Preservation Requirement, Clarifies Eligibility for Class B Drug Offense Resentencing, and More

In the area of prosecution appeals, the Court issued several decisions:

- *People v Hunter*—Prosecutors must allege, at the trial court level, that the defendant lacks standing to bring a suppression motion in order to preserve the issue for appeal. The Court noted that decisions to the contrary in the Second, Third, and Fourth Departments must not be followed.
- *People v Joseph R.*—Holds that there is no statute authorizing the prosecution to appeal a trial court's adjudication of the defendant as a youthful offender to the Appellate Division. Last year, the Second Department had reversed Joseph R.'s youthful offender adjudication; the Court of Appeals reversed and remitted to the Second Department with directions to dismiss the prosecution's appeal.
- *People v Alonso*—When the trial court dismisses an indictment as a sanction for the prosecution's failure to disclose *Brady* material, the prosecution has the right to appeal because the court's dismissal power comes from CPL 210.20, not CPL 240.70. (Other *Brady* issues are discussed below at p. 4.)

Cases arising from the failure of courts to impose statutorily-required post-release supervision (PRS) continue to get the Court's attention:

- *People v Lingle*—Double jeopardy and substantive due process rights are not violated if the defendant is resentenced to a term including PRS when the defendant is still serving his prison sentence or when the resentencing occurs after the defendant is conditionally released (after serving 6/7 of his prison term), but before the defendant completes that term. Also, a court may not reconsider the rest of the defendant's sentence when conducting a PRS resentencing.
- *Donald v State of New York*—The State is not liable for damages where the Department of Correctional Services administratively added PRS to the claimants' sentences.
- *People v Acevedo*—The two defendants had been sentenced to determinate terms without the required PRS. Later, each was convicted of a second offense and received an enhanced sentence based on his prior felony conviction. Both sought resentencing on their earlier convictions, under *People v Sparber* (10 NY3d 457), and after resentencing, challenged their predicate felony adjudication, arguing that the resentencing date controlled for predicate-felony purposes. In a 3-3-1 decision, the majority reinstated the trial courts' orders finding that the original sentencing date controlled for predicate-felony purposes. The primary opinion, written by Chief Judge Lippman, focused on the fact that the defendants clearly pursued resentencing to render their prior convictions useless for predicate sentencing purposes. But the concurring judges concluded that, for all *Sparber* resentencing cases, the original sentencing date, not the *Sparber* resentencing date, controls for predicate sentencing purposes. The decision leaves open the question of which sentencing date controls where the defendant did not seek an increased sentence on the predicate conviction in order to move the sentencing date and avoid an enhanced sentence on the second conviction.

As to resentencing under the 2009 Drug Law Reform Act (DLRA), the Court issued two decisions clarifying who is eligible for class B drug offense resentencing:

- *People v Paulin*—Individuals who are reincarcerated for a parole violation are not, for that reason, ineligible for resentencing under the 2009 DLRA.
- *People v Santiago*—An individual who applies for resentencing under the 2009 DLRA while in custody does not become ineligible if he or she is released before the court rules on the application.

This issue's Defense Practice Tip (beginning on p. 8) addresses another piece of the 2009 DLRA, conditional sealing of drug-related convictions under CPL 160.58.

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Police Must Pay Counsel Fees in FOIL Cases

The Third Department has ordered the State Police to pay counsel fees to the New York Civil Liberties Union (NYCLU) in a Freedom of Information Law (FOIL) suit brought based on a refusal to disclose policies relating to electronic recording of custodial questioning. The NYCLU filed a CPLR article 78 petition on behalf of NYSDA, which had made the FOIL request, after an administrative appeal of the refusal was rejected. The requested material was attached to the answer to the petition, the suit was dismissed as moot, and the request for counsel fees was denied.

As to the reasonableness of the initial blanket denial of the request, on the basis that the information fell within the law enforcement exception to disclosure (Public Officers Law 87[2][e][iv]), the court found that a finding of reasonableness was not supported by the record. In addition, the court said the record revealed that at most, only a small portion of the requested records could reasonably be believed to be exempt, and no persuasive reason had been given for not redacting the records and the portions that were not exempt from disclosure turned over . . . ." *Matter of NYSDA v New York State Police*, 2011 NY Slip Op 05839 (3rd Dept 7/7/2011).

The court also issued a decision regarding the NYCLU's request for records relating to local police use of stun guns. Where the police agency had engaged in delay tactics during the proceedings and made complete disclosure only after court intervention, counsel fees were found to be appropriate. *See Matter of New York Civ. Liberties Union v City of Saratoga Springs*, 2011 NY Slip Op 05847 (3rd Dept 7/7/2011.)

NYSDA Training in 2011: If You Haven't Been Yet, There Are More to Come

Publication of this issue of the *REPORT* will coincide with NYSDA's 44th Annual Meeting and Conference on July 24-26 (see p. 7), where 12.5 credit hours of Continuing Legal Education (CLE) will be provided, including 3.0 hours of Ethics credits. Before that, NYSDA had already presented or co-sponsored eight training events across the state this year.

In January, the Association co-sponsored with the Center for Community Alternatives a presentation in Wayne County on "Advocating for Judicial Diversion and Conditional Sealing: Making Drug Law Reform a Reality." Those who missed it can read the Practice Tips article beginning on page 8. Other training events presented so far include the Metropolitan New York trainer held at NYU in March, which marked its quarter-century anniversary; Criminal Defense Tactics and Techniques XIII at RIT in Rochester; and several more.

NYSDA Criminal Defense Immigration Project Director Joanne Macri presented After *Padilla v. Kentucky*: What Defense Attorneys Need to Know, at the Legal Aid Society in Westchester County. *Padilla* remains a hot topic. Appellate courts in at least two states have ruled it retroactive (*see* http://georgiadefenderblog.com/2011/06/01/padilla-retroactivity-state-appellate-cts) and the issue is percolating in New York. *See, e.g., People v Nunez*, 30 Misc 3d 55; 917 NYS2d 806 (App T, 2nd Dept, 12/14/2011).

For training events following the Annual Conference, check the NYSDA website and conference announcements in the *REPORT.*

Training a Major Factor in O'Brien Award

NYSDA's Managing Attorney Charles F. O'Brien received the 2011 Award for Outstanding Achievements in Promoting Standards of Excellence in Mandated Representation, presented by the New York State Bar Association Committee to Ensure Quality of Mandated Representation. "Charlie brings exceptional knowledge of criminal and procedural law, as well as developments outside the courtroom, from courtroom technology to forensic science challenges, to the design and implementation of NYSDA's well-regarded CLE training events," wrote former State Senator John Dunne of Whiteman, Osterman, and Hanna in his letter of nomination. The award highlighted the long-standing role NYSDA's training has played in helping public defense lawyers and others stay abreast of developments affecting their practice, to their benefit and that of their clients.

Charlie O'Brien (c) with State Bar President Vincent E. Doyle, III (l) and Committee Chair Norman Effman (r).

OAD, Frost Also Honored

The Office of the Appellate Defender (OAD) in New York City received an organizational Award for Outstanding Achievements in Promoting Standards of Excellence in Mandated Representation at the same ceremony at which O'Brien was recognized. As OAD Attorney-in-Charge Richard M. Greenberg noted in accepting the award, training is a major facet of the program's work. (www.appellatedefender.org.)

Rounding out the State Bar awards, which were bestowed during a day-long CLE event at the State Bar headquarters in Albany, was the presentation of the Denison Ray Award, named for a career legal activist who led legal services programs in New York and other states, to Jerome K. Frost. A long-time member of NYSDA, Frost is retiring as the Rensselaer County Public Defender, a job to which he has been continuously re-appointed since 1995.

Brady, *Wrongful Convictions, and Advocacy in and Outside the Courts*

To date, 2011 has produced a variety of developments regarding the *Brady* rule, which requires government disclosure of exculpatory evidence, and related issues. Some court decisions retained or increased limitations on *Brady* and on municipal liability for failure to disclose, while others sought to curb *Brady* violations by overturning resulting convictions amid continuing revelations about governmental disregard for the rule. And advocacy for prevention of wrongful convictions targeted *Brady,* discovery, and other government misconduct. Whether these developments produce progress, regress, or continuation of the status quo remains to be seen.

Court of Appeals Continues and Compounds Brady *Constraints*

The Court of Appeals just considered an assault conviction in which an officer who had protected the scene of a stabbing revealed before trial that he overheard comments from two bystanders that the person who was stabbed initially had the knife and "got what he deserved" after the defendant took it away. The officer did not get contact information, or even names, from the bystanders or investigate their comments. He did tell the prosecutor about the comments, which were disclosed to the defense. That was enough, the high court said, as police have no affirmative duty to investigate exculpatory evidence for the defense. *People v Hayes*, 17 NY3d 46 (2011) [summary on p. 22].

Trial counsel in *Hayes* tried to use what the Court of Appeals recognized as a "common and accepted tactic," which was to challenge the adequacy of the police investigation. Contending that the bystanders' statements were germane to the justification defense because they established that the accuser originally had the knife and was the initial aggressor, counsel sought to use the statements to show the police should have tested the knife for fingerprints and interviewed, or at least obtained contact information for, the two bystanders. The Court of Appeals upheld the trial court's conclusion that "the use of the anonymous hearsay in cross-examination would have created an unacceptable risk that the jury would consider the statements for their truth."

Chief Judge Lippman dissented. While "the apparent failure to develop leads seemingly favorable to" the defense did not violate due process, he wrote, failing "to bring what were evidently highly material inadequacies in the State's investigation to the factfinder's attention" did.

Post-Conviction Discovery of Brady *Violation Yields Release but not Liability*

Two months before *Hayes,* a divided U.S. Supreme Court held that a single *Brady* violation would not support a finding of civil liability under 42 USC 1983 against a prosecutor's office for failure to train its lawyers. (*Connick v Thompson,* 131 SCt 1350 [2011] [summarized in the last issue of the *REPORT*]). The court overturned a $14 million dollar award to a man who spent 18 years in prison, including 14 on death row, and came within a month of execution before a laboratory report was brought to light that led to a new trial at which he was acquitted. The four-justice dissent noted the evidence of pervasive misperception and disregard of *Brady* that established "persistent, deliberately indifferent conduct" in the prosecutor's office.

Commentators have criticized *Thompson.* "[I]t is quite disturbing for the Supreme Court to have endorsed a regime in which prosecutors can pursue capital cases without having received any training about their Brady obligations," wrote Christopher Dunn, associate legal director of the New York Civil Liberties Union and an adjunct professor at New York University School of Law's Civil Rights Clinic. (www.law.com, 4/7/2011.) Elkan Abramowitz and Barry A. Bohrer observed that "there is little to hold prosecutors accountable for their conduct" with regard to *Brady*. (www.law.com, 5/3/2011.) And retired Justice John Paul Stevens reportedly called on Congress to overrule *Connick.* (www.abajournal.com/news/article/justice_stevens_hits_immunity_ruling_calls_on_congress_to_change_the_result/, 5/4/2011.)

Brady *Cited as Conviction is Overturned in Veeder Scandal*

Soon after the U.S. Supreme Court issued its confrontation decision regarding laboratory experts (*Bullcoming,* discussed at p. 1), a Saratoga County decision was

issued that graphically illustrated the problem that confrontation should help allay—the too-common issue of shoddy or falsified forensic testing. County Judge Jerry J. Scarano vacated a plea-based murder conviction in which a laboratory report by later-disgraced state police laboratory forensic scientist Garry Veeder was the preeminent factor. The court wrote that Katherine Seeber's case raised "issues of misrepresentation and fraud, issues that involved *Brady v. Maryland*, 373 US 83, and a question as to whether or not the defendant was deprived of effective assistance of counsel due to the defendant being advised to plead guilty based upon a faulty item of evidence." (*People v Seeber,* Indictment M 083-2000 and 160-2000V [County Court, Saratoga County, 6/27/2011].) Attorneys may contact the Backup Center for a copy of the decision.

The *Seeber* case is apparently the first in which problems with Veeder's work, revealed in an Inspector General's report in late 2009 (*see* the *REPORT,* Vol. XXV, No. 1 [Jan-Feb 2010], p. 1), overturned a conviction. More recently-discovered problems in the Nassau crime lab, as noted in the last *REPORT*, have already led to the setting aside of a DWI conviction, and the situation is being examined in many other cases. And Nassau County defense lawyers recently learned of yet another avenue of evidence mishandling to explore—alleged marijuana evidence on its way to the Pennsylvania crime lab being used since the closing of the county crime lab disappeared from a FedEx truck. (*Newsday*, 6/26/2011.)

New York City lawyers also should be aware of last month's revelation that an NYPD lab technician "made more than 100 mistakes in 50 of her most recent drug-evidence tests, including what appear to be clear examples of records fraud . . . ." Retesting of the evidence is reportedly ongoing. (www.nypost.com, 6/27/2011.)

Advocacy Group Seeks Prosecutor Accountability and Other Reforms to End Wrongful Prosecutions and Convictions

Creating prosecutorial accountability for *Brady* violations and other misconduct that can contribute to wrongful prosecutions and convictions is a major tenet of the organization It Could Happen to YOU (ICHTY). At an Albany press conference on June 29, the group presented a summary of proceedings from its first annual summit, "Capturing Change Now," held at the Albany Law School in March. A Task Force on Prosecutorial Best Practices has been formed to create a guidebook that will include model New York legislation. (http://wnyt.com/article/stories/S2178370.shtml?cat=0.)

Discovery Reform a Long-Standing Need

For those seeking in-depth materials on the issue of discovery reform, one very good starting point is the law review article presenting the findings of six working groups from a November 2009 Symposium convened at the Benjamin N. Cardozo School of Law regarding "*New Perspectives on* Brady *and Other Disclosure Obligations: What Really Works?*" (www.cardozo.yu.edu/uploadedFiles/Cardozo/Profiles/burns_ethics-145/Day%202%20Working%20Group%20Reports.pdf).

An Assembly bill introduced by Assembly Member Joseph Lentol to provide several reforms (A.6907) was not included in the Legislature's last-minute law-making flurry before going home for the summer.

Videotaping Interrogations: Inhibit Police Lying, or at Least Catch Them in the Act

John Jay Distinguished Professor of Psychology Saul Kassin has long criticized the legally-allowed practice of police lying about evidence. "'In almost every single false confession case I've seen, the breaking point for the innocent person was the use of false evidence,'" he has said. (www.jjay.cuny.edu/docket/4263.php.) Police lying to suspects is a hallmark of government practices that underlie wrongful convictions like those of Marty Tankleff. The practice may be getting more public attention. (http://innocenceprojectpa.wordpress.com/2011/03/28/under-the-right-conditions-even-you-could-falsely-confess-to-a-crime-false-confessions-getting-more-attention-in-the-mainstream-press/.) Still, lawyers whose clients say they falsely confessed due to such tactics continue to face an uphill fight in presenting that defense. Videotaping of interrogations, intended to prevent false confessions, may also help in challenging those that do occur—if the practice is ever broadly implemented.

DCJS Issues Grants for Video Recording of Interrogations in 22 Counties

Following the publication of new law enforcement protocols for videotaping of custodial interrogations, noted here earlier this year (*REPORT,* Vol. XXVI, No. 1 [Jan-Mar 2011], p. 4), the Division of Criminal Justice Services announced last month that 22 upstate district attorney's offices had received grants totaling $477,836 for video recording of custodial interviews. Following use of these funds, 58 of the state's 62 counties should have video recording capabilities. Grants will be distributed to law enforcement offices in Allegany, Delaware, Essex, Lewis, Montgomery, Oswego, Orleans, Putnam, Schuyler, St. Lawrence, Steuben, Wayne, and Yates to institute such recording. Cayuga, Chenango, Dutchess, Jefferson, Oneida, Onondaga, Orange, Saratoga, and Westchester were given grants to enhance existing practices. (http://criminaljustice.state.ny.us/pio/press_releases/2011-5-13_pressrelease.html.)

Defense Investigation and Zealous Advocacy Remain Key

In the wake of *Hayes*, *Connick,* and other cases, and in the face of continuing resistance to discovery reform, defense counsel must continue investigations to uncover what they should be given and to zealously litigate for information they need—and for appellate relief for their clients when information is obtained too late.

The First Department recently reversed a defendant's conviction for bribing a witness due to the prosecution's "intolerable" failure "in three distinct respects to fulfill its disclosure obligations." Reversal in the interest of justice was required regardless of whether the failures to disclose affected the jury's verdict, the court found. *People v Sinha*, 84 AD3d 35 (1st Dept 4/7/2011) [Summary on p. 27]. Other convictions were allowed to stand, however, as the undisclosed evidence did not relate to those crimes involving a different accuser. While a somewhat Pyrrhic victory for the individual defendant, this decision should assist others in successfully challenging convictions involving blatant *Brady* violations.

NYSDA will continue to provide support to public defense lawyers battling *Brady* noncompliance and defiance. Watch for links to Practice Pointers on the website (www.nysda.org/html/practice_pointers.html) regarding *Brady* (*see, e.g.,* http://newyorkcriminaldefense.blogspot.com/2011/03/brady-v-maryland-outline-of-leading.html). Check out NYSDA training events, including the upcoming Annual Conference, where Kent Mosten's U.S. Supreme Court update might well include *Connick,* discussed above.

End of the Legislative Session Brings E-Filing Developments, Some Gains for Public Defense Providers

Is e-Filing Coming Soon to a Criminal or Family Court Near You?

Not yet, but at the end of session, the Legislature passed a bill directing the Chief Administrative Judge to form advisory committees to study issues surrounding electronic filing in criminal and family courts. The criminal court advisory committee will evaluate the impact that e-filing will have on litigants, including pro se defendants, practitioners, and the courts. The committee's membership must include public defenders, other institutional providers of criminal defense services, assigned counsel and other criminal defense attorneys, as well as court clerks, district attorneys, and other interested individuals and entities. The family court advisory committee will study similar issues as to the impact of an e-filing program for the commencement of juvenile delinquency proceedings and abuse and neglect proceedings and the filing and service of papers in such proceedings. Members of that committee must include public defenders, institutional providers of legal services for children and/or parents, and assigned counsel attorneys, as well as family court clerks and representatives of presentment and child protective agencies. By Jan. 1, 2012, the Chief Administrative Judge must file a report with the Legislature, the Governor, and the Chief Judge detailing the entities and individuals consulted, the input received, and the recommendations of the advisory committees, as well as recommendations for legislation authorizing the development of e-filing programs in these courts. To date, the bill (A.8368-A) has not been sent to Governor Cuomo for consideration. If the bill becomes law, readers of the *REPORT* are encouraged to let the Backup Center know if they have been asked to join one of the advisory committees or to otherwise provide comments on the impact of e-filing.

DMV Record Fees Eliminated for Legal Aid Organizations Providing Public Defense Services

The Legislature passed a bill (A.7932) adding legal aid bureaus and societies and other private entities providing services under County Law 722 to the list of entities that cannot be charged for searching records of the Department of Motor Vehicles (DMV) and for copies of DMV documents. The law already exempts public defender offices from paying those fees. As Senator Fuschillo noted: "Counties are responsible for funding legal services to defendants who cannot afford an attorney; we should not be charging them fees and making it more expensive to do so. This legislation would help counties save money on their public defense costs, while ensuring that legal aid societies can still access necessary information to provide their duties." (www.nysenate.gov/press-release/senate-passes-fuschillo-bill-lower-counties-public-defense-costs.)

State to Pay for Public Defense Costs in Cases Against Inmates in OMH Custody

Included in the omnibus property tax cap and mandate relief bill is a provision that requires the state to pay the costs associated with the prosecution and defense of state inmate-patients who are alleged to have committed crimes while in the custody of the Office of Mental Health. (Chapter 97, Laws of 2011.) The new Mental Hygiene Law 29.28 is based on Correction Law 606, which requires the state to pay the costs associated with the prosecution and defense of inmates alleged to have committed crimes while in the custody of the Department of Corrections and Community Supervision. Since all prisoners who are

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Conferences & Seminars

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; website www.nysda.org**

Sponsor: National Association of Criminal Defense Lawyers & National College for DUI Defense
Theme: DWI Means Defend with Ingenuity: Winning at Every Level
Dates: September 15–17, 2011
Place: Las Vegas, NV
Contact: NACDL (Gerald Lippert): tel (202) 872-8600 x 236; email gerald@nacdl.org; website www.nacdl.org/meetings

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Sponsor: National Association of Criminal Defense Lawyers
Theme: The Power of Persuasion: Effective Communication Skills
Dates: October 20–22, 2011
Place: Chicago, IL
Contact: NACDL (Tamara Kalacevic): tel (202) 872-8600 x 241; email tamara@nacdl.org; website www.nacdl.org/meetings

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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; website www.nysda.org**

Sponsor: American Bar Association Criminal Justice Section
Theme: 4th Annual Sentencing/Reentry Institute & Criminal Justice Legal Educators Colloquium
Dates: October 27–28, 2011
Place: Washington, DC
Contact: ABA (Carol Rose): tel (202) 662-1519; fax (202) 662-1501; email carol.rose@americanbar.org; website www.americanbar.org/groups/criminal_justice/events_cle.html

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Sponsor: National Legal Aid & Defender Association
Theme: NLADA Centennial Conference- Blueprint for Justice: Rethink, Retool, Rebuild
Dates: December 7–10, 2011
Place: Washington, DC
Contact: NLADA: tel (202) 452-0620; fax (202) 872-1031; website www.nlada.org/Training ⚖

Job Opportunities

Wyoming County-Attica Legal Aid Bureau, Inc. and Wyoming County Public Defender's Office seeks a full-time **Staff Attorney**. Responsibilities will include felony trial work, local criminal courts, appeals, and prison litigation, which includes article 78 and article 70 petitions. Full benefits. Send resume and cover letter by August 1, 2011 to: Norman P. Effman, Executive Director/Public Defender, 18 Linwood Avenue, Warsaw, NY 14569. No phone calls please. EOE.

The Immigrant Defense Project (IDP), a member of the Defending Immigrants Partnership, seeks an entrepreneurial, committed, and motivated attorney who will work with our litigation team to protect *Padilla v. Kentucky* by monitoring and supporting post-conviction relief litigation. The staff attorney will also work with other IDP staff in training criminal defense attorneys, consulting with public defender offices on immigration advisal protocols, and engaging in judicial education; and take on work in IDP's other program areas depending on needs, interest, and availability. The Defending Immigrants Partnership is a joint initiative staffed by IDP, the Immigration Legal Resource Center, and the National Immigration Project of the National Lawyers Guild – all national leaders in the immigration consequences of criminal court dispositions. IDP promotes fundamental fairness for immigrants accused or convicted of crimes and seeks to minimize the harsh and disproportionate immigration consequences of contact with the criminal justice system by 1) working to transform unjust deportation laws and policies and 2) educating and advising immigrants, their criminal defenders, and other advocates. Qualifications: J.D. and admission to the Bar of any state; at least two years of criminal appellate and/or defense experience highly preferred; some familiarity with immigration law (desired but not required); exceptional research, writing, and communication skills; strong ability to work well with other individuals and organizations; and commitment to social justice issues. To apply, please send a cover letter, resume, writing sample, and the names and phone numbers of three references to jobs@immigrantdefenseproject.org (Subject line: DIP Staff Attorney). We will consider applications on a rolling basis and encourage applicants to submit these materials as soon as possible. IDP strongly believes in the value of a diverse staff that identifies with the communities we serve. We encourage women, people of color, immigrants, and LGBT persons to apply. No phone calls please. For more information, visit www.immigrationadvocates.org/nonprofit/jobs/item.2832-Staff_Attorney_Immigrant_Defense_Project. ⚖

Advocating for Conditional Sealing—CPL § 160.58

By Andy Correia, Alan Rosenthal and Patricia Warth*

Introduction

Effective June 2009, Criminal Procedure Law (CPL) § 160.58 allows the sealing of drug-related convictions under certain circumstances. This is the first time that it is possible to seal convictions in New York. To date, however, only about 30 people have benefited from this new legislation. In light of the expanded use of criminal background searches and the significant barriers to successful reintegration that a person with a criminal conviction faces, it is surprising that more people have not taken advantage of the conditional sealing statute. This article provides tools and practice tips for defense counsel who seek to assist their clients in realizing the significant benefits of conditional sealing.

A. Is Sealing After Completing a Drug Treatment Alternative to Prison a New Concept?

No! For years, defendants have had arrests sealed after completing Drug Court programs or District Attorney sponsored Drug Treatment Alternative to Prison Programs (DTAP). This has been accomplished by dismissing the charges, resulting in a CPL § 160.50 sealing, or by reducing the charges to a violation, resulting in a CPL § 160.55 sealing.

CPL § 160.58 is different from traditional methods of sealing in that:

1) *Criminal convictions* are sealed;
2) The judge can order the sealing *over the DA's objection*;
3) *There is an adjudicatory process* with an opportunity for all the parties to be heard;
4) *Up to three prior Penal Law article 220 or 221 misdemeanor convictions may also be sealed*; and
5) The sealing is *conditional*, and conditionally sealed convictions are automatically unsealed upon a subsequent criminal arrest.

B. Why is Sealing Important?

1) The dissemination of criminal records is more widespread than ever, and a criminal conviction often creates barriers in all aspects of a person's life, including:

- Employment
- Housing
- Education
- Immigration status
- Family life

Sealing helps to limit or eliminate the negative impact of a criminal record by removing it from the public eye.

2) We know that recovery from addiction is a life long process and it is not enough to simply refrain from drug abuse. Instead, people in recovery need the tools, like stable employment and housing, to live a law-abiding and fulfilling life. Sealing criminal convictions helps put those tools within reach.

C. Are Enough New Yorkers Taking Advantage of Conditional Sealing?

No! Though hard to estimate, it is likely that there are many thousands of people around the State who completed Drug Court or District Attorney sponsored DTAP programs and who are eligible for conditional sealing, as well as the hundreds who complete a Judicial Diversion program each year. A Division of Criminal Justice Services (DCJS) update released in May 2011 almost two years after the June 6, 2009 effective date of CPL § 160.58, reported that there were only 33 CPL § 160.58 conditional sealing orders granted in the entire State during that time.

D. Who is Eligible for Conditional Sealing?

CPL § 160.58(1) sets forth the following three general eligibility requirements:

1) The defendant must be convicted of any Penal Law article 220 or 221 offense (including misdemeanors) or an offense listed in CPL § 410.91(5), often referred to as the "Willard offenses."

The non-drug Willard offenses are:
Penal Law (PL) § 140.20—Burglary 3rd
PL § 145.05—Criminal Mischief 3rd
PL § 145.10—Criminal Mischief 2nd
PL § 155.30 (sub 1,2,3,4,5,6,8,9,10)—Grand Larceny 4th
PL § 155.35—Grand Larceny 3rd
PL § 165.06—Unauthorized Use of Vehicle 2nd
PL § 165.45 (sub 1,2,3,5,6)—Criminal Possession of Stolen Property (CPSP) 4th
PL § 165.50—CPSP 3rd
PL § 170.10—Forgery 2nd

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PL § 170.25—Criminal Possession Forged Instrument 2nd
PL § 170.60 Unlawful Use of Slugs 1st
or
An attempt under PL § 110.00 for any above specified offenses.

2) The defendant must have also *completed one of the following programs*:

- A judicial diversion program under CPL article 216;
- A program "heretofore known as drug treatment alternative to prison," which is generally interpreted to mean a Drug Court or District Attorney sponsored DTAP program; or
- A "judicially sanctioned program of similar length, duration, and level of supervision."

What drug treatment programs does this include?

This is where advocacy becomes very important, and the following are just some of the possible programs that might fall within this last provision:

—a sentence of Willard (CPL § 410.91)
—Judicially ordered Shock (PL § 60.04[7])
—Judicially ordered CASAT (Comprehensive Alcohol and Substance Abuse Treatment Program) (PL § 60.04[6])
—sentence of probation with drug treatment ordered as a condition (An Onondaga County Court judge has granted such a conditional sealing application; a transcript of the court proceeding is available on CCA's website at the address listed below).

3) The defendant must have also *completed the sentence imposed* for the offense or offenses to be conditionally sealed.

E. An Eligibility Issue: Does CPL § 160.58 Apply Retroactively?

Though most district attorneys clearly understand that the conditional sealing statute applies retroactively, some have asserted otherwise, stating that the Legislature intended only to provide conditional sealing of convictions that occurred after CPL § 160.58's effective date of June 6, 2009. This is incorrect. If anyone encounters a court or district attorney arguing against the retroactive application of CPL § 160.58, please inform CCA (contact information below), and we can assist you in rebutting this argument. Here is an overview of why conditional sealing clearly applies retroactively:

1) The plain language of the statute contemplates retroactive application.

The language of the statute is consistent with retroactive application. CPL § 160.58(1) refers to programs "heretofore known as"—a reference to drug treatment programs in the past. In addition, the statue allows sealing for remote drug misdemeanors.

2) The legislative intent indicates sweeping, inclusive reforms.

Why would the Legislature restrict this benefit to future cases only, especially when the statute clearly authorizes retroactive misdemeanors being sealed?

3) OCA, DCJS, and commentators all agree the statute is retroactive.

Office of Court Administration: In a July 7, 2009 memo, Michael Colodner of the Unified Court System circulated a memo to all Supreme Court and County Court judges exercising criminal jurisdiction. That memo clearly contemplated CPL § 160.58 would apply to past graduates of judicially sanctioned drug treatment programs who had completed their sentences:

> Conditional sealing is available not only to cases arising under CPL Article 216, but also to cases diverted to "one of the programs heretofore known as drug treatment alternative to prison [D-tap] or another judicially sanctioned drug treatment program of similar duration, requirements and level of supervision" (CPL 160.58(1)). Because the D-tap program started in 1990, any defendant who successfully completed a D-tap or similar program and who is otherwise eligible for conditional sealing may request sealing pursuant to CPL 160.58.

Colodner memo, July 7, 2009, fn. 6.

DCJS: In periodic briefings regarding implementation of the 2009 DLRA, DCJS officials have made it clear that they anticipated a large number of conditional sealing applications soon after CPL § 160.58's enactment, and set aside significant resources to process the large number of anticipated sealing orders.

Hon. Barry Kamins stated in an article for the New York State Bar Association (NYSBA) that:

> The new law permits a court, on its own motion, or upon motion of a defendant, to conditionally seal the current case and up to three prior misdemeanor convictions for

offenses under Penal Law Articles 220 or 221. The sealing may be done in cases where the defendant has been *convicted* and *sentenced* after successfully completing a judicial diversion program, or a drug treatment program that was in existence prior to the judicial diversion program. Thus, this provision allows defendants who have completed drug treatment in existing drug treatment courts around the state to immediately file motions for conditional sealing.

"New 2009 Drug Crime Legislation- Drug Law Reform Act of 2009," NYSBA *New York Criminal Law Newsletter*, Fall 2009, Vol. 7, No. 4, p. 6

4) Finally, most conditional sealing orders tracked by DCJS have been retroactive.

F. Once You Have Determined that the Defendant is Eligible, What is the Process for Applying for Conditional Sealing?

1) The court that sentenced the defendant to a judicially sanctioned drug treatment program may "on its own motion" begin the process, but to our knowledge this has not yet happened.

2) Conditional sealing applications will most likely be "on the defendant's motion." This motion involves the following steps:

• Motion made to the sentencing court of the eligible offense, with notice to the District Attorney's office, identifying the offense to be sealed;

• If prior misdemeanors are to be sealed, the motion must identify these prior misdemeanors and notice of the application must also be given to the district attorney(s) and sentencing court(s) in the counties where those convictions occurred; and

• The notified district attorney(s) and court(s) must be given at least 30 days to respond.

3) The court must follow the steps outlined in CPL § 160.58(a)-(d):

• The court is to order a DCJS or FBI fingerprint-based criminal history record of the defendant, including sealed or suppressed information. Also, DCJS shall include an FBI record with out-of-state convictions, if any. The parties shall be allowed to examine these records. [*Practice tip*—Counsel should obtain the client's DCJS record prior to filing the conditional sealing motion to: ensure that the client is eligible; identify prior misdemeanors that may be subject to sealing; show that the sentences have been completed for relevant convictions; and finally, ensure that this statutory condition is met so the court has one less reason to deny the motion.]

• The court must ensure that the defendant has identified the misdemeanor conviction or convictions for which relief may be granted.

• The court must ensure that there is sufficient evidence that the sentences for all convictions to be sealed have been completed. The court may rely upon a sworn affidavit that the sentences have been completed. [*Practice tip*—The statute does not specify who must be the source of this affidavit. Presumably, an affidavit from the defendant should be sufficient, particularly if it is consistent with information on the DCJS record.]

• The court has ensured that the district attorneys and courts of each jurisdiction have been notified that an eligible prior misdemeanor is being considered for conditional sealing. The district attorneys and courts notified shall have not less than 30 days in which to comment and/or submit materials to aid the court in making such determination. [*Practice tip*—Consider including, along with your motion, proof that the relevant district attorneys and courts have been notified of the conditional sealing motion to ensure that there is one less reason to deny the motion.]

G. Is There an Opportunity for a Hearing?

1) CPL § 160.58 states that the judge *may* order a hearing at the request of the "defendant" or the "District Attorney for any jurisdiction in which the defendant committed a crime that is the subject of the sealing application."

• Use of the word "may" suggests that the judge is not required to grant the request for a hearing.

• If there is no request for a hearing, or if the judge denies the request, the motion will be decided on the papers submitted. [*Practice tip*—Because there is no guarantee of a hearing, counsel should ensure that the moving papers are as thorough and comprehensive as possible. Where possible, counsel should attach documents that support the facts alleged in the motion, as well as supporting affidavits, letters of recommendation, and possibly a personal statement in the defendant's own words.]

2) The court may conduct a hearing to "consider and review any relevant evidence offered by either party that would aid the court in its decision."

[*Practice tip*—Where there is an opportunity for a hearing, counsel should consider the possible benefits of live-witness testimony over (or in addition to) letters of support or affidavits.]

H. How does the Court Decide a Conditional Sealing Motion? How is the Court's Discretion to Grant or Deny the Motion Guided?

1) There is no burden of proof articulated in CPL § 160.58.

2) Instead, CPL § 160.58(3) provides that the court "shall consider any relevant factors, including, but not limited to" the following:

i) "the circumstances and seriousness of the offense or offenses that resulted in the conviction or convictions"
[*Practice tip*—Where appropriate, point out that the defendant's conviction history is non-violent, did not involve the use of weapons, physical injury, or property damage, and instead involves self-injurious drug offenses.]

ii) "the character of the defendant, including his or her completion of the judicially sanctioned treatment program as described in subdivision one of this section"
[*Practice tip*—Where appropriate, discuss the defendant's work, school, substance abuse and/or mental health treatment, family, friends, proof of sobriety, community involvement, faith community involvement—anything you can think of to show that the defendant has turned her life around and is committed to her sobriety and to being a productive community member. Here, letters of support may be very important.]

iii) "the defendant's criminal history"
[*Practice tip*—More often than not, the defendant's criminal history is not a product of malevolence or a "bad character," but is instead a by-product of drug addiction and, in some cases, a co-occurring mental health disorder. Consider using the criminal history to tell the defendant's story about his or her addiction, treatment, and subsequent recovery.]

iv) "the impact of sealing the defendant's records upon his or her rehabilitation and his or her successful and productive reentry and reintegration into society, and on public safety"
[*Practice tip*—This last factor offers you the most opportunity for effective advocacy. Make sure that you spend time with the defendant to find out if there have been times when the conviction(s) have stopped her from getting something specific—a job, a place to live, a chance at education, etc. Then tell that story to the court. You should also refer to Penal Law § 1.05(6), which specifically identifies successful reintegration as a sentencing goal in New York. Sobriety is just the first step of a person's successful reintegration. The next steps require the defendant to put her life back together by repairing relationships, supporting herself, earning a living wage, having a stable residence, and often getting an education. The life-long stigma of a conviction prevents people from completing their recovery, which negatively impacts public safety.]

I. If the Court Grants the Motion for Conditional Sealing, What is Sealed?

1) CPL § 160.58(2) states that the court "may order all official papers relating to the arrest, prosecution and conviction which resulted in the defendant's participation in the judicially sanctioned drug treatment program be conditionally sealed."

The Court may also order all "arrest, prosecution and conviction records for no more than three of the defendant's prior eligible misdemeanors" conditionally sealed.

CCA's website (listed below) includes OCA's form sealing order.

2) Once sealed, the records shall NOT be available to "any person or public or private agency" except for the following, as set forth in CPL § 160.58(6):

a) the defendant or the defendant's designated agent;

b) qualified agencies [under Executive Law § 835(9)] and federal and state law enforcement agencies, when acting within the scope of their law enforcement duties;
Executive Law § 835(9):
"Qualified agencies" means courts in the unified court system, the administrative board of the judicial conference, probation departments, sheriffs' offices, district attorneys' offices, the state department of corrections and community supervision, the department of correction of any municipality, the insurance frauds bureau of the state department of insurance, the office of professional medical conduct of the state department of health for the purposes of section two hundred thirty of the public health law, the child protective services unit of a local social services district when conducting an investigation pursuant to subdivision six of section four hundred twenty-four of the social services law, the office of Medicaid inspector general, the temporary state commission of investigation, the criminal investigations bureau of the banking department, police forces and departments having responsibility for enforcement of the general criminal laws of the

state and the Onondaga County Center for Forensic Sciences Laboratory when acting within the scope of its law enforcement duties.

c) any state or local officer or agency with responsibility for the issuance of licenses to possess guns, when the person has made application for such a license; or

d) any prospective employer of a police officer or peace officer as those terms are defined in subdivisions [33] and [34] of section 1.20 of this chapter, in relation to an application for employment as a police officer or peace officer; provided, however that every person who is an applicant . . . shall be furnished with a copy of all records obtained under this paragraph and afforded an opportunity to make an explanation thereto.

J. Can the Court Grant the Motion While the Defendant has a Pending Case?

No. CPL § 160.58(7) states: "The court shall not seal the defendant's record pursuant to this section while any charged offense is pending."

Based upon PL § 10.00(1), the use of the word "offense" could mean that sealing will not occur even if there is a violation level offense pending.

K. Under What Circumstances will this "Conditional" Sealing be Unsealed?

1) According to CPL § 160.58(8), if "subsequent to a sealing of records pursuant to this subdivision, the person who is the subject of such records is arrested for or formally charged with any misdemeanor or felony offense, such records shall be unsealed immediately . . . ." The word "immediately" has been understood as meaning that the sealed conviction is automatically unsealed upon a subsequent arrest for a criminal charge.

2) The conditionally sealed convictions will remain unsealed *unless* the new arrest charges are resolved by a disposition in favor of the accused as defined in CPL § 160.50, or by a conviction for a non-criminal offense as described in CPL § 160.55, in which case it will be conditionally sealed once again.

L. Is Review by the Appellate Division Possible?

CPL § 160.58 does not include any right to appeal. Thus, it is not clear if a court's conditional sealing decision is reviewable. There may be a possibility of asking for an appeal by permission pursuant to CPLR § 5701(c), or making an argument that because the court is acting in an administrative capacity, a CPLR article 78 petition might be an appropriate remedy.

M. What Can a Job Applicant with Conditionally Sealed Convictions Say to a Prospective Employer?

Unfortunately, there is really no good answer to this. In enacting CPL § 160.58, the Legislature also amended Executive (Human Rights) Law § 296(16) to include conditionally sealed convictions. This provision now reads as follows:

> 16. It shall be an unlawful discriminatory practice, unless specifically required or permitted by statute, for any person, agency, bureau, corporation or association, including the state and any political subdivision thereof, to make any inquiry about, whether in any form of application or otherwise, or to act upon adversely to the individual involved, any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in subdivision two of section 160.50 of the criminal procedure law, or by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law *or by a conviction which is sealed pursuant to section 160.58 of the criminal procedure law*, in connection with the licensing, employment or providing of credit or insurance to such individual; provided, further, that no person shall be required to divulge information pertaining to any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in subdivision two of section 160.50 of the criminal procedure law, or by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, *or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law. . . .*

[Emphasis added.]

Section 16 means that employers should only ask job applicants to disclose *criminal convictions that have not been sealed.* But what if the employer asks: "Have you ever been convicted of a crime?" The legally safest and most conservative answer is: "I have no arrests or convictions in this state or any other state that I am required by law to disclose." Although that obviously will raise red flags to employers, it is probably the most lawful and truthful statement about sealed convictions.

This problem demonstrates that the conditional sealing statute is not intended to be an expungement statute, and that actual expungement is still needed in New York. Conditional sealing is intended to give

citizens who qualify for sealing of certain records a chance for gainful employment. Hopefully employers will follow the limits of the Executive Law.

Conclusion

Some public defender offices across the state have successfully embraced CPL § 160.58 as a regular part of their practice. For example, the Saratoga County Public Defender's office has had several conditional sealing motions granted, leading the state in the number of conditional sealings thus far (8 of the 30 conditional sealings as of May 2011). Given the importance of helping our clients overcome the life-long consequences of a criminal conviction, it is hoped that other defender offices and defense counsel will start to utilize CPL § 160.58 as a regular part of the defense function. ⚖

Resources

Center for Community Alternatives: http://www.communityalternatives.org/publications/drugCases.html

Making Drug Law Reform A Reality—A CCA-powered blog on New York DLRA

http://makingreformreality.blogspot.com/

CCA attorneys who are supporting the "Making Drug Law Reform a Reality" Project:

Alan Rosenthal, (315) 422-5638, ext. 227, arosenthal@communityalternatives.org

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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.

US Supreme Court

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

Death Penalty (Penalty Phase)

Habeas Corpus (Federal)

Bobby v Mitts, 563 US __ , 131 SCt 1762 (5/2/2011)

Holding: The jury instructions in the penalty phase of this death penalty trial, which required the jury to unanimously reject a death sentence before considering sentencing alternatives, were not contrary to clearly established law. There is a fundamental difference between the nature of the guilt/innocence decision and the life/death choice at the penalty phase. After convicting the petitioner of two counts of aggravated murder and two counts of attempted murder, there is no concern that these instructions would have led the jurors to think that if they declined to recommend the death penalty, the petitioner would escape all penalties for the crimes.

Search and Seizure (Entries and Trespasses) (Warrantless Searches)

Kentucky v King, 563 US __, 131 SCt 1849 (5/16/2011)

Holding: Police officers, seeking a drug suspect who had entered one of two apartments on the same hallway, acted lawfully by knocking on the door of the apartment from which the scent of marijuana emanated and then entering without a warrant after hearing noises from inside that indicated destruction of evidence. The exigent circumstances exception to the constitutional requirement that a search warrant be obtained before entering a residence, which cannot be invoked if police created the exigency, does not apply if the police conduct preceding the entry was reasonable. Where the police did not engage or threaten to engage in conduct that would violate the Fourth Amendment, "warrantless entry to prevent the destruction of evidence is reasonable and thus allowed." [Footnote omitted.] The state court reliance on police "bad faith" in creating the exigency was fundamentally inconsistent with federal Supreme Court precedent rejecting a subjective approach to this issue. Nor is asking whether it was "reasonably foreseeable" that police action would create an exigency an acceptable constitutional test. Officers were not required to get a warrant before knocking on the door. And the ability of police to respond to an exigency cannot turn on subtleties such as that propounded by the defendant here, *ie,* whether the police action "would cause a reasonable person to believe that entry is imminent and inevitable." When police knock on the door, occupants may choose not to answer the door or allow police inside, but if they do not just stand on their constitutional rights but try to destroy evidence, they "have only themselves to blame for the warrantless exigent-circumstances search that may ensue." Whether any exigency existed here is better addressed below on remand.

Dissent: [Ginsburg, J] To conduct a warrantless search based on exigent circumstances, "[t]he urgency must exist . . . when the police come on the scene, not subsequent to their arrival, prompted by their own conduct."

Prisoners (Conditions of Confinement)

Prisons (Health Conditions)

Brown v Plata, 563 US __, 131 SCt 1910 (5/23/2011)

Holding: The Prison Litigation Reform Act of 1995 (PLRA) authorizes the remedial order issued by a three-judge district court requiring California to reduce prison overcrowding found to be the primary cause of "the severe and unlawful mistreatment of prisoners through grossly inadequate provision of medical and mental health care." Depriving prisoners "of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society."

"If government fails to fulfill this obligation, the courts have a responsibility to remedy the resulting Eighth Amendment violation."

Dissent: [Scalia, J] This decrowding order is an example of a "structural injunction," which is "radically different from the injunctions traditionally issued by courts of equity, and presumably part of 'the judicial Power' conferred on federal courts by Article III . . . ," and vastly expands the use of such an injunction. "[A] court may not

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order the release of prisoners who have suffered no violations of their constitutional rights, merely to make it less likely that that will happen to them in the future."

Dissent: [Alito, J] The order below violates the PLRA because it is "not narrowly tailored to address proven and ongoing constitutional violations" and does not adhere to the "critical command that any court contemplating a prisoner release order must give 'substantial weight to any adverse impact on public safety.'"

Appeals and Writs (Jurisdiction) (Judgments and Orders Appealable)

Juveniles (Abuse)

Camreta v Greene, No. 09-1454, 563 US __ (5/26/2011)

Holding: Because the child whose questioning by a deputy sheriff and child protective services worker is the subject matter of this suit "has grown up and moved across the country, and so will never again be subject to the Oregon in-school interviewing practices whose constitutionality is at issue," this case is moot. Therefore, the challenge by the officials, who were found to have qualified immunity, to the Ninth Circuit's ruling that they should have obtained a warrant before conducting the questioning cannot be decided and the ruling must be vacated. Neither Article III of the Constitution nor judicial policy would bar review at the request of the immunized parties.

Dissent: [Kennedy, J] "I would dismiss this case and note that our jurisdictional rule against hearing appeals by prevailing parties precludes petitioners' attempt to obtain review of judicial reasoning disconnected from a judgment."

Aliens (Immigration)

Preemption

Chamber of Commerce of the United States of America v Whiting, 563 US __, 131 SCt 1968 (5/26/2011)

Holding: An Arizona statute providing for suspension or revocation of licenses held by employers that knowingly or intentionally employ people who are not citizens and lack authorization to be in the United States, and for use of a federal electronic verification system to check employees' authorizations, is not pre-empted by federal law. The licensing provisions of the state law fall within the savings clause of the federal statute in question, 8 USC 1324a(h)(2), and the state statute conflicts with no other federal law. Federal law limits the ability of the Secretary of Homeland Security to require use of the verification system, but does not limit others.

Dissent: [Breyer, J] Arizona's law does not fall within the exemption for "licensing and similar laws" and is pre-empted. It "will impose additional burdens upon lawful employers and consequently lead those employers to erect ever stronger safeguards against the hiring of unauthorized aliens—without counterbalancing protection against unlawful discrimination."

Dissent: [Sotomayor, J] Because the Arizona statute creates a separate mechanism for state courts to determine whether a person has employed an undocumented noncitizen, it falls outside the saving clause and is pre-empted, as is the requirement for state employers to use the federal electronic verification system.

Evidence (Sufficiency)

Federal Law (Crimes)

Fowler v United States, 563 US __, 131 SCt 2045 (5/26/2011)

Holding: To prosecute someone under the federal witness tampering statute (18 USC 1512[a][1][C]) for killing another intending to prevent that person from communicating with law enforcement officers in general but not having federal law enforcement officers particularly in mind, the government must show that there had been "a *reasonable likelihood* that a relevant communication would have been made to a federal officer."

Concurrence: [Scalia, J] Remand for determination of whether the issue of sufficiency was preserved or whether the court committed plain error is appropriate, but there was insufficient evidence to support the conviction. The majority's "reasonable likelihood" test lacks statutory basis and will be confusing.

Dissent: [Alito, J] The majority "has effectively amended the statute by adding a new element."

Federal Law (Procedure)

Speedy Trial (Cause for Delay) (Statutory Limits)

United States v Tinklenberg, 563 US __, 131 SCt 2007 (5/26/2011)

Holding: Filing of a pretrial motion triggers the exception to the federal Speedy Trial Act for "*delay resulting from* any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion," 18 USC 3161(h)(1)(D) [emphasis added] regardless of whether such filing "actually causes, or is expected to cause, delay." Because the delay resulting from transporting the defendant to a facility for a competency evaluation was longer than the 10 days

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specified in 18 USC 3161(h)(1)(F), all days in excess of the 10 days, not just non-holiday weekdays, must be counted.

Concurrence in Part, Concurrence in the Judgment: [Scalia, J] The correct conclusion about this issue "is entirely clear from the text of the Speedy Trial Act, and [there is] no need to look beyond the text."

Arrest (Warrants)

Civil Rights Actions

Search and Seizure (Detention)

Ashcroft v Al-Kidd, 563 US __, 131 SCt 2074 (5/31/2011)

Holding: "[A]n objectively reasonable arrest and detention of a material witness pursuant to a validly obtained warrant cannot be challenged as unconstitutional on the basis of allegations that the arresting authority had an improper motive." At the time of the arrest challenged here, "not a single judicial opinion had held that pretext could render an objectively reasonable arrest pursuant to a material-witness warrant unconstitutional." Whether the US Attorney General would have absolute immunity in this action brought under *Bivens* v *Six Unknown Fed. Narcotics Agents* (403 US 388 [1971]) need not be reached, and a finding of qualified immunity would be warranted, even assuming that the Attorney General's alleged detention policy violated the Fourth Amendment.

Concurrence: [Kennedy, J] It may be that material witness warrants do not fall within the ambit of the Fourth Amendment's Warrant Clause but only the separate requirement that seizures of the person be reasonable. A national official "with responsibilities in many jurisdictions" who "may face ambiguous and sometimes inconsistent sources of decisional law" deserves "some deference for qualified immunity purposes . . . . "

Concurrence in the Judgment: [Ginsburg, J] "[T]here is strong cause to question the Court's opening assumption–a valid material-witness warrant–and equally strong reason to conclude that a merits determination was neither necessary nor proper [here]." [Footnote omitted.] The treatment of the person arrested presents serious questions about the legitimacy of the use of the Material Witness Statute.

Concurrence in the Judgment: [Sotomayor, J] "Whether the Fourth Amendment permits the pretextual use of a material witness warrant for preventive detention of an individual whom the Government has no intention of using at trial is, in my view, a closer question than the majority's opinion suggests."

Federal Law (Crimes)

Sentencing

McNeill v United States, No. 10-5258, 563 US __ (6/6/2011)

Holding: The "maximum term of imprisonment" for a prior state drug offense, for purposes of the Armed Career Criminal Act (ACCA) (18 USC 924[e][2][A][ii]), is the maximum sentence applicable to that offense when the defendant was convicted of it. "[S]ubsequent changes in state law [cannot] erase an earlier conviction for ACCA purposes."

Federal Law (Crimes)

Narcotics (Cocaine) (Penalties)

DePierre v United States, No. 09-1533, 564 US __ (6/9/2011)

Holding: As used in 21 USC 841(a), "the term 'cocaine base' . . . refers generally to cocaine in its chemically basic form [rather than] exclusively to what is colloquially known as 'crack cocaine.'" The drugs known as coca paste, crack cocaine, and freebase are cocaine in its base form, while what is known as powder cocaine is chemically a salt, not a base. Powder cocaine vaporizes at higher temperatures than the base forms and so, unlike them, is not commonly smoked. Smoking cocaine "allows the body to absorb the active ingredient quickly, thereby producing a shorter, more intense high. . . ." It is clear Congress intended to penalize more severely offenses involving chemically basic cocaine generally.

Concurrence in Part, Concurrence in the Judgment: [Scalia, J] The majority's discussion "conveys the mistaken impression that legislative history *could* modify the text of a criminal statute as clear as this." [Emphasis in original.]

Federal Law (Crimes)

Sentencing (Aggravated Penalties)

Sykes v United States, No. 09-11311, 564 US __ (6/9/2011)

Holding: The Indiana statute making it a criminal offense for the driver of a vehicle to knowingly or intentionally flee from a law enforcement officer constitutes a "violent felony" for determining a federal sentence under the Armed Career Criminal Act (ACCA), 18 USC 924(a)(2). Individuals convicted of violating the ACCA are subject to an increased sentence under this provision if they have three prior convictions for a violent felony or serious drug offense. Fleeing from law enforcement is deemed a violent felony under the residual clause, which applies the provision to a felony that "'otherwise involves conduct that

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presents a serious potential risk of physical injury to another.'"

Concurrence in the Judgment: [Thomas, J] Because "in the ordinary case, Indiana's crime of intentional vehicular flight . . . 'involves conduct that presents a serious potential risk of physical injury to another,'" it is a violent felony under the ACCA. "[T]he majority errs by implying that the 'purposeful, violent, and aggressive' test may still apply to offenses 'akin to strict liability, negligence, and recklessness crimes.'"

Dissent: [Scalia, J] The residual clause at issue "is a drafting failure" that should be declared void for vagueness. "[O]ur indulgence of imprecisions that violate the Constitution encourages" such imprecisions.

Dissent: [Kagan, J] Because the Indiana conviction here was for simple vehicular flight, and not for any flight offense involving aggressive or dangerous activity, it was not a "violent felony" under the federal statute.

Aliens

Discrimination (Gender)

Flores-Villar v United States, No. 09-5801, 564 US __ (6/13/2011)

Holding: "The judgment is affirmed by an equally divided Court." Justice Kagan did not take part.

*[**Ed. Note:** The case, brought by an individual born in Mexico to an American father and a Mexican mother, involved a challenge to a gender differential in immigration law. A father who is a U.S. citizen must have lived in the U.S. for at least five years after his fourteenth birthday for his child born outside the U.S. to be declared a citizen, while a mother must have lived in the U.S. only for a year. The tie vote sets no national precedent. (Los Angeles Times, 6/14/2011, http://articles.latimes.com/2011/jun/14/nation/la-na-court-speech-20110614; Constitutional Law Prof Blog, 6/13/2011; http://lawprofessors.typepad.com/conlaw/2011/06/equally-divided-court-affirms-flores-villar-gender-differentials-in-immigration-statutes-remain-cons.html.)]*

Federal Law

Narcotics (Penalties)

Tapia v United States, No. 10-5400, 564 US __ (6/16/2011)

Holding: The Sentencing Reform Act does not allow federal courts to impose or lengthen a prison term to promote a defendant's rehabilitation. At 18 USC 3582(a), the statute "instructs courts to 'recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation.'" The arguments of amicus curiae appointed to defend the judgment below because the government agrees with the defendant's interpretation of the statute are rejected.

Concurrence: [Sotomayor, J] It is not clear whether the sentencing court violated the statute's proscription against imposing or lengthening a prison term for rehabilitation purposes. The sentence imposed was the top of the Guidelines range, and the judge gave two reasons for choosing this sentence, both the defendant's need for drug treatment and deterrence.

Admissions (*Miranda* Advice)

Juveniles (Delinquency)

J. D. B. v North Carolina, No. 09-11121, 564 US __ (6/16/2011)

Holding: The age of a child subjected to police questioning is relevant to a custody analysis under *Miranda v Arizona* (384 US 436 [1966]). "[S]o long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test." [Footnote omitted.]

Dissent: [Alito, J] The ruling changes the *Miranda* determination from a single "reasonable-person test into an inquiry that must account for at least one individualized characteristic—age—that is thought to correlate with susceptibility to coercive pressures." The constitutional rights of minors can be protected, without such an extreme makeover of *Miranda*. Age can be considered when determining the voluntariness of a statement, an inquiry that is "flexible and accommodating by nature."

Constitutional Law (United States Generally)

Federal Law

Bond v United States, No. 09-1227, 564 US __ (6/16/2011)

Holding: A person indicted for violation of a federal statute has standing to assert that Congress exceeded its constitutional powers, thereby interfering with the powers reserved to the states, by enacting the statute. The argument of amicus curiae appointed to defend the decision below, that only the legal rights and interests of the states are at issue, is rejected. Federalism does more than set the boundaries between different governmental institutions to protect their integrity, it also "secures to citizens the liberties that derive from the diffusion of sovereign power." [Internal quotation marks omitted.] The government's concession that the petitioner has standing to challenge the validity of 18 USC 229 is overly narrow. The petitioner is not limited to asserting that passage of the

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statute was outside the "enumerated powers" of Congress; she is not barred from claiming that the statute "interferes with a specific aspect of state sovereignty." No opinion is expressed on the merits of the petitioner's claim.

Retroactivity

Search and Seizure (Arrest/Scene of the Crime Searches [Automobiles and Other Vehicles])

Davis v United States, No. 09-11328, 564 US __ (6/16/2011)

Holding: "[S]earches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." The sole purpose of the exclusionary rule is to deter future Fourth Amendment violations and the deterrence value must outweigh its heavy costs to the judicial system and society. Although the post-arrest vehicle search in this case violates *Arizona v Gant* (556 US __ [2009]), the search was conducted prior to that decision and in compliance with existing Court of Appeals precedent interpreting *New York v Belton* (453 US 454 [1981]). Because the appellant's conviction was not final on direct appeal, *Gant* applies retroactively, but the good-faith exception to the exclusionary rule applies. The officers did not deliberately, recklessly or with gross negligence violate the appellant's Fourth Amendment rights and the case presents no "'recurring or systemic negligence' on the part of law enforcement."

Concurrence in the Judgment: [Sotomayor, J] "[W]hether exclusion would result in appreciable deterrence in the circumstances of this case is a different question from whether exclusion would appreciably deter Fourth Amendment violations when the governing law is unsettled. The Court's answer to the former question in this case does not resolve the latter one."

Dissent: [Breyer, J] Because the search violated *Gant* and *Gant* applies retroactively, suppression is required. The good faith exception does not apply; to hold otherwise would "create[] 'a categorical bar to obtaining redress' in *every* case pending when a precedent is overturned." [Emphasis in original.] If the majority would only apply the exclusionary rule if the officer deliberately, recklessly, or with gross negligence violated the Fourth Amendment, "the 'good faith' exception will swallow the exclusionary rule."

Counsel (Right to Counsel)

Juveniles (Right to Counsel) (Support Proceedings)

Turner v Rogers, No. 10-10, 564 US __ (6/20/2011)

Holding: In civil contempt proceedings that could result in incarceration for failure to pay child support, the US Constitution does not automatically require that a state provide counsel to the indigent person facing possible incarceration. An attorney need not be provided where the parent entitled to receive child support is unrepresented and alternative procedures exist that "assure a fundamentally fair determination of the critical incarceration-related question, whether the supporting parent is able to comply with the support order." Such procedures include "adequate notice of the importance of ability to pay, fair opportunity to present, and to dispute, relevant information, and court findings." Not addressed here are matters in which payment is owed to the State, in which the opposing party is likely to have counsel, or matters that are unusually complex. In the instant case, the unrepresented person's incarceration violated the Due Process Clause because he did not have the benefit of these alternative procedures.

Dissent: [Thomas, J] As there is no constitutional right to counsel "for indigent defendants facing incarceration in civil contempt proceedings," and the question of alternative procedures was not raised by the parties, the decision below should be affirmed.

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

Trial (Confrontation of Witnesses)

Witnesses (Confrontation of Witnesses)

Bullcoming v New Mexico, No. 09–10876, 564 US __ (6/23/2011)

Holding: A forensic laboratory report that contains a testimonial certification made to prove a certain fact, such as the defendant's blood-alcohol concentration, cannot constitutionally be introduced in a criminal case through the testimony of a scientist who did not perform or observe the test reported in the certification or sign that certification. The accused has a right to confront "the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist." Here, the surrogate lab analyst who testified could not convey what the certifying analyst "knew or observed about the events his certification concerned, *i.e.*, the particular test and testing process he employed" and could not "expose any lapses or lies on the certifying analyst's part." [Footnotes omitted.] Significantly, the surrogate analyst did not know why the certifying analyst had been placed on unpaid leave, which could have been a topic of cross-examination. The lab report here cannot be meaningfully

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distinguished from the lab reports at issue in *Melendez-Diaz v Massachusetts* (557 US ___ [2009]).

Concurrence in Part: [Sotomayor, J] This case does not present circumstances where the prosecution asserts the forensic report was needed for an alternate purpose, such as providing the defendant with medical treatment, or where the surrogate analyst had at least some personal, if limited, connection to the test in question, or was asked for an independent opinion based on underlying test reports not themselves introduced into evidence.

Dissent: [Kennedy, J] It is a misstep to extend the *Melendez-Diaz* holding, whatever the merits of that decision, to the instant situation. "[T]he certifying analyst's role here was no greater than that of anyone else in the chain of custody." Requiring the prosecution to call the certifying analyst "is a hollow formality." The defense could call the technician who performed the test, or "other expert witnesses to explain that tests are not always reliable or that the technician might have made a mistake." Here the majority says that reliability does not animate the right to confrontation, but reliability is an essential part of other constitutional inquiries. And despite claims that the *Melendez-Diaz* requirements do not create an undue prosecutorial burden, contrary evidence is mounting.

Federal Law

Sentencing (Guidelines)

Freeman v United States, No. 09–10245, 564 US __ (6/23/2011)

Holding: A plurality agrees that the Court of Appeals holding below, that defendants who enter into plea agreements under Fed. R. Crim. Proc. 11(c)(1)(C) could not benefit from retroactive amendments to the Federal Sentencing Guidelines absent a miscarriage of justice or mutual mistake, must be reversed.

Concurrence in the Judgment: [Sotomayor, J] "Allowing district courts later to reduce a term of imprisonment simply because the court itself considered the Guidelines in deciding whether to accept the agreement would transform [18 USC] §3582(c)(2) into a mechanism by which courts could rewrite the terms of (C) agreements in ways not contemplated by the parties." But the categorical rule endorsed by the dissent should be rejected; the government can prevent unwanted future sentence reductions under 3582(c)(2) by including in individual plea agreements a waiver of the right to seek a sentence reduction.

Dissent: [Roberts, CJ] A sentence imposed under a (C) plea agreement is based on that agreement, not the Guidelines, whether or not the agreement "used" or "employed" a Guidelines range in arriving at the agreed-upon sentence. The lower courts face difficulty in making sense of today's decision going forward.

Appeals and Writs (Judgments and Orders Appealable) (Jurisdiction)

Sentencing (Ex Post Facto Punishment)

Sex Offenses

United States v Juvenile Male , No. 09–940, 564 US __ (6/27/2011)

Holding: The Ninth Circuit had no authority to rule on the respondent's ex post facto challenge to the application of the Sex Offender Registration and Notification Act (SORNA), 42 USC 16901 *et seq*., to juveniles adjudicated as delinquent before SORNA's enactment, because the respondent had turned 21 and the order applying SORNA to him expired. Demonstrating that a live controversy remained, giving the court continuing authority to rule, would require showing that "a decision invalidating those conditions would be sufficiently likely to redress collateral consequences adequate to meet Article III's injury-in-fact requirement." [Internal quotation marks omitted.] Where the Montana Supreme Court answered a certified question by saying that the "'respondent's state law duty to remain registered as a sex offender is not contingent upon the validity of the conditions of his federal supervision order, but is an independent requirement of Montana law,'" the issue raised is moot.

Justices Ginsburg, Breyer, and Sotomayor "would remand the case to the Ninth Circuit for that court's consideration of mootness in the first instance."

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

Double Jeopardy

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

People v Lingle, 2011 NY Slip Op 03308 (4/28/2011)

Holding: Five of the six defendants' double jeopardy and substantive due process rights were not violated when they were resentenced to a term including post-release supervision (PRS) because they were still serving their prison sentences at the time of resentencing. The sixth defendant, Sharlow, may also be resentenced to a term including PRS because he was conditionally released

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after serving only 6/7 of his originally-imposed prison term, and thus had not completed the lawful portion of his sentence. Defendants cannot acquire a legitimate expectation of finality by serving "significant" or "substantial" portions of their originally-imposed sentences. Even if the defendants have a fundamental right not to have their illegal sentences revised upward to correct the PRS error, they cannot show that the state's conduct in resentencing them to the statutorily-required term of PRS shocks the conscience. When resentencing to correct the PRS error, a judge cannot revisit the defendants' terms of incarceration, and the Appellate Division may not reduce the prison terms in the interest of justice.

Dissent in Part: [Ciparick, J] Because defendant Sharlow was released from prison prior to resentencing, double jeopardy prohibited the court from resentencing him to a term of PRS. On appeal from a PRS resentencing, the Appellate Division may review the entire sentence to determine whether it is unduly harsh or excessive.

Appeals and Writs (Judgments and Orders Appealable) (Prosecution, Appeals By)

Discovery (*Brady* Material and Other Exculpatory Information)

People v Alonso, 16 NY3d 581, __ NYS2d __ (5/3/2011)

Holding: The prosecution has a right to appeal after the trial court dismissed the indictments for failing to disclose exculpatory evidence in violation of *Brady v Maryland* (373 US 83 [1963]) because the court's dismissal power emanated from CPL 210.20(1)(h), not CPL 240.70. The language in CPL 240.70 authorizes the court to take "appropriate action" in addressing a discovery violation, but does not expressly give the court dismissal power. "The impossibility of a fair trial created, in Supreme Court's view, by the *Brady* violation presented a 'legal impediment to conviction' within the meaning of CPL 210.20(1)(h)."

Dissent: [Jones, J] The prosecution has no right to appeal under CPL 450.20 because the trial court dismissed the indictments pursuant to CPL 240.70, which is not specifically enumerated in CPL 450.20.

Appeals and Writs (Scope and Extent of Review)

Identification (Show-ups) (Suggestive Procedures)

People v Gilford, 16 NY3d 864, __ NYS2d __ (5/3/2011)

Holding: Because the hearing court's findings that the show up was reasonable under the circumstances and was not unduly suggestive, which are mixed questions of law and fact, were undisturbed by the Appellate Division and are supported by the record evidence, they are beyond this Court's review.

Alibi (Burden of Proof) (Instructions)

Appeals and Writs (Preservation of Error for Review)

People v Melendez, 16 NY3d 869, __ NYS2d __ (5/3/2011)

Holding: By not objecting to the court's proposed charge when it was first shown to the parties or after it was given to the jury, the defendant failed to preserve for review his argument that the trial court erred in not unequivocally conveying to the jury that the prosecution must disprove the defendant's alibi defense beyond a reasonable doubt. The charge reflected the amendment to the pattern Criminal Jury Instruction that provided that the prosecution could meet its burden by proving beyond a reasonable doubt that the defendant committed the crime. The defendant also failed to preserve his claims that the alibi charge and some of the prosecutor's comments during summation shifted the burden of proof to the defendant.

Driving While Intoxicated (Driver's License Revocation or Suspension)

Traffic Infractions

People v Rivera, 2011 NY Slip Op 03648 (5/3/2011)

Holding: "[A] driver whose license has been revoked, but who has received a conditional license and failed to comply with its conditions, may be prosecuted only for the traffic infraction of driving for a use not authorized by his license, not for the crime of driving while his license is revoked." While the defendant's conditional license was in effect, he was arrested for driving while intoxicated and was charged with, among other offenses, first-degree aggravated unlicensed operation of motor vehicle. The court correctly dismissed that charge. The legislature enacted Vehicle and Traffic Law (VTL) 1196(7)(f) to specifically deal with cases like this one.

Dissent: [Graffeo, J] The defendant's conduct violated both VTL 1196(7)(f) and VTL 511(3)(a)(i) because the receipt of a conditional license does not vitiate the original license revocation or suspension order. Therefore, the prosecution had the discretion to determine which offense to charge.

Juries and Jury Trials (Challenges) (Selection)

Rape (Evidence)

People v Scott, 16 NY3d 589, __ NYS2d __ (5/3/2011)

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Holding: The court properly precluded the defendant from presenting evidence of the accuser's sexual conduct with another male (Steven A.) the same evening as the alleged rape unless the prosecution introduced evidence that the accuser's bruises were caused by sexual contact with the defendant, which it did not. Whether the court abused its discretion in refusing to admit a statement by the accuser's friend that the accuser was crying because she had sex with Steven A. need not be resolved because the statement was only probative, if at all, of the forcible rape charge and the defendant was acquitted of that count.

The court did not err in dismissing a sworn juror who told the court, before any witnesses were sworn, that he thought there should be DNA evidence in this case, because, even though the court did not make a probing inquiry as to the juror's ability to render an impartial verdict, CPL 270.15(4) authorizes dismissal and trial courts should err on the side of disqualifying a "'prospective juror of dubious impartiality' . . . ." And the court properly denied the defendant's challenge for cause of a prospective juror who said "the prosecutor 'took a case for me for my son,' about 13 or 14 years earlier" because that relationship was distant in time and limited in nature.

Juveniles (Neglect)

Sex Offenses (Sex Offender Registration Act)

Matter of Afton C., 2011 NY Slip Op 03674 (5/5/2011)

Holding: The evidence was insufficient to prove that the respondent father, who was convicted of several sex offenses involving a minor and was adjudicated a level three sex offender, neglected his children. The petitioner only established the respondent's convictions, his sex offense risk level, that he had never sought sex offender treatment, and that he was living at home with his children. The petitioner failed to prove that the father's crimes endangered his children, and his likelihood of reoffending, as purportedly measured by the Sex Offender Registration Act risk assessment, is not directly relevant to whether his children are in imminent danger. The respondent's decision to not discuss the circumstances of his conviction and the court's conclusion that he lacked candor or insight into his behavior do not fill the evidentiary gap. "[W]e . . . reject any presumption that an untreated sex offender residing with his or her children is a neglectful parent." Even though the father's offenses involved minors, that fact alone does not establish neglect.

Concurrence: [Graffeo, J] If some of the evidentiary gaps, including the facts underlying the criminal convictions, the evidence the court relied on in adjudicated the respondent a level three sex offender, and evidence as to how the father's criminal history indicated that he posed a risk of harm to his children, were filled, there may have been sufficient evidence of neglect.

Search and Seizure (Weapons-frisks)

People v Brannon, 16 NY3d 596, __ NYS2d __ (5/5/2011)

Holding: To establish reasonable suspicion for an officer to stop and frisk an individual based on possession of a gravity knife, the following test must be met. The officer must have a reason, based on the officer's experience and training "and/or observable, identifiable characteristics" of the possessed item, to believe the item is a gravity knife and not some similar, legal object. Seeing what "looked like a pocketknife" in a person's pocket is insufficient. Seeing the "head" of a knife "sticking out of and clipped to" a person's pants pocket, and knowing, based on experience, "that gravity knives are commonly carried in a person's pocket, attached with a clip, with the 'head' protruding," is sufficient.

Concurrence in Part, Dissent in Part: [Jones, J] A gravity knife and a lawful knife can be indistinguishable in appearance. Illegality can only be ascertained by a knife's operation. Merely observing a portion of a knife, combined with the experience of the officer, does not establish sufficient reasonable suspicion. "The likely result of the majority's holding is that it will establish a catechism for the admission of gravity knife evidence . . . ."

Extradition

Probation and Conditional Discharge (Revocation)

People v Feliciano, 2011 NY Slip Op 03677 (5/5/2011)

Holding: The interstate detainer extradition arguments that the defendant claims trial counsel should have advanced at his violation of probation hearing are novel and call for an extension of or change in existing law, and "not so strong that 'no reasonable defense lawyer could have found [them] . . . to be not worth raising' . . . ." Therefore, appellate counsel had no reason to make an ineffective assistance of counsel argument. Precedent indicates that "states are not constitutionally obligated to execute detainers lodged out-of-state against parole or probation violators before their release from prison . . . ."

Trial (Mistrial)

Matter of Marte v Berkman, 16 NY3d 874, __ NYS2d __ (5/5/2011)

Holding: Whether the defendant impliedly consented to a mistrial, which is permissible although express consent is preferable, "involves a factual determination by the lower courts that may not be disturbed by this Court if

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there is any support for that finding in the record . . . ." Here, the court indicated at an *O'Rama* conference that it intended to respond to the jury's note by taking a partial verdict and declaring a mistrial on the counts for which no verdict had been reached. Counsel for the defendant remained silent when the co-defendant's attorney declined to be heard, and again when the court asked, after taking the partial verdict, if counsel wished to comment. Only after a mistrial was declared did counsel object. There is record support for the Appellate Division's factual finding that the defendants impliedly consented to a mistrial; its judgment is affirmed. It is not necessary to answer the certified question.

Dissent: [Ciparick, J] Counsel should not be found to have impliedly consented without further inquiry where it was not clear that the court was going to declare a mistrial.

Evidence (Sufficiency)

Motor Vehicles (Unauthorized Use)

People v Franov, 2011 NY Slip Op 03889 (5/10/2011)

Holding: While entry alone is not sufficient to establish second-degree unauthorized use of a vehicle under Penal Law 165.06, the statute is violated "when a person enters an automobile without permission and takes actions that interfere with or are detrimental to the owner's possession or use of the vehicle." [Footnote omitted.] Here, the jury could have reasonably found the defendant popped out the door lock, entered the car without permission, ripped apart the dashboard, and stole the light control module, satisfying the statute's elements.

Concurrence: [Smith, J] The majority's rule is not clear enough. The court should simply reaffirm that the statute criminalizes "'the unauthorized occupation of another person's vehicle, without his consent, irrespective of whether or not the vehicle is in motion' . . . ."

Dissent: [Jones, J] "[T]he statute in question is meant to prohibit a defendant's unauthorized 'use' of the vehicle *as a vehicle* . . . ." [Emphasis in original.]

Assault (Defenses)

Defenses (Justification) (Self-Defense)

Due Process (Fair Trial) (General)

People v Hayes, 2011 NY Slip Op 03887 (5/10/2011)

Holding: The *Brady* requirements concerning exculpatory evidence were not violated by the failure of police and the prosecution to investigate the sources of the two statements, overheard by an officer protecting the scene, that the person who was stabbed was the one who initially had the knife and the defendant had taken it away. Police have no affirmative duty to obtain exculpatory evidence for the defense.

Further, a defendant "does not have an unfettered right to challenge the adequacy of a police investigation by any means available" and "the trial court did not abuse its discretion in concluding that the use of the anonymous hearsay in cross-examination would have created an unacceptable risk that the jury would consider the statements for their truth." At the pivotal point of the encounter, the defendant used the knife against an unarmed person who, even if continuing to struggle with the defendant, could not use deadly physical force.

Dissent: [Lippman, CJ] "[T]he record does not disclose that there was any exercise of discretion involved in the trial court's decision to deny defendant use of the bystander statements" and, in any event, "the exercise of discretion now described by the majority is not consistent with a defendant's basic right to present a defense." The court's failure to allow the defendant to place in front of the jury "what were evidently highly material inadequacies in the State's investigation" violated due process.

Juries and Jury Trials (Voir Dire)

Trial (Public Trial)

People v Martin, 16 NY3d 607, __ NYS2d __ (5/10/2011)

Holding: The court erred by banning the defendant's father from the courtroom during voir dire, over objection, without considering alternatives that would have provided room for the potential jurors and prevented contact between them and the father. The stated concerns did not rise to the requisite level of likely prejudice to an overriding interest, and the court did not ponder other options "such as reserving a row of seating for the public or allowing defendant's father to be present elsewhere in the courtroom until a seat became available." Violations of open trial rights are not subject to harmless error analysis; the ability of the public to observe voir dire is important as a check on those with official roles in the questioning and to allow public evaluation of the fairness of the selection process.

Insanity

Matter of Miguel M., 2011 NY Slip Op 03886 (5/10/2011)

Holding: Admission, over objection, of hospital records at a hearing under Mental Hygiene Law 9.60, which authorizes assisted outpatient treatment (AOT), was error where the records had been obtained without permission of the patient. The law that permits disclosure of medical records at the request of directors of communi-

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ty services in the exercise of their duties (Mental Hygiene Law 33.13[c][12]), is preempted by the federal Health Insurance Portability and Accountability Act (HIPAA), (Pub L No 104-191, 110 US Stat 1936) and the Privacy Rule promulgated under HIPAA. The possibility that a person with mental illness might injure or kill another is not within the scope of the public health exception to the Privacy Rule. The treatment exception does not encompass disclosure "to facilitate 'treatment' administered by a volunteer 'provider' over the patient's objection." While the AOT order issued following the hearing had expired, the issue was reviewed as a novel and substantial one likely to recur and to evade review.

Impeachment

Witnesses (Credibility) (Cross Examination)

People v Fernandez, 2011 NY Slip Op 04540 (6/2/2011)

Holding: The trial court's exclusion of testimony that the accuser "had a bad reputation in the community for truth and veracity" was "an abuse of discretion as a matter of law." Where a proper foundation is laid, family and family friends can compose a community for purposes of establishing a witness's reputation for truth and veracity. Where those being questioned about the witness's reputation testified they had known her from birth, watched her grow up, and heard and participated in frequent discussions among family members about the witness, a proper foundation was established to ask reputation questions. "[U]nder our precedents, the presentation of reputation evidence by a criminal defendant is a matter of right, not discretion, once a proper foundation has been laid."

Dissent: [Graffeo, J] "[A] family is too insular and self-interested a grouping to provide a reliable community under our jurisprudence."

Appeals and Writs (Preservation of Error for Review)

Search and Seizure (Standing to Move to Suppress)

People v Hunter, 2011 NY Slip Op 04542 (6/2/2011)

Holding: The prosecution must raise to the suppression court the issue of a defendant's standing to challenge evidence on the basis of an alleged illegal search. Decisions in three of the four Appellate Divisions to the effect that the prosecution may raise standing for the first time on appeal because the defense has the initial burden of establishing standing are not to be followed. The preservation requirement ensures that claims are brought to the attention of the trial court and alerts the opposing party to the need to develop a record.

Juries and Jury Trials (Voir Dire)

People v Steward, 2011 NY Slip Op 04716 (6/7/2011)

Holding: The trial court erred by maintaining an unusually short time restriction of five minutes on counsel for questioning each jury panel during voir dire rounds in this case involving multiple felony charges, even after defense counsel objected at the end of the first round of voir dire. Voir dire is not amenable to rigid formulations; it is not possible to make an exhaustive list of possible factors to consider in setting fixed periods for voir dire should a court choose to do so, but there are a number that would be relevant in most cases. Some uniformity in comparable cases is to be expected, but the court's imposition of a similar limit in other cases is not relevant to resolving the appeal. The court's abuse of discretion in maintaining the five-minute limit over timely objection would not alone warrant reversal. But over a dozen potential jurors gave answers in the third round of voir dire alone that invited further inquiry, counsel's objection after the first round had included several topics he had hoped to discuss with potential jurors as well as noting that he was able to question only two of the 16 panel members, lack of clarity in the record as to which jurors were excused makes review difficult, and the defendant was charged with several class B violent felonies. While the responses of venire members may not have reflected inappropriate bias and efficiency is important, the defense allegations of prejudice here cannot be discounted, and reversal is required.

Dissent: [Smith, J] "[F]ive minutes of lawyer-conducted voir dire per side [is not] too little time, as a matter of law, for the first round of jury selection in a felony case [.]" And defense counsel preserved only a generic objection to the time limit.

Confessions (Counsel)

Counsel (Attachment) (Right to Counsel)

People v Pacquette, 2011 NY Slip Op 04717 (6/7/2011)

Holding: Even if an attorney representing the defendant at arraignment on unrelated charges in Manhattan told Brooklyn detectives that the defendant "is represented by counsel, do not question him . . . ," creating an ambiguity as to the lawyer's representation of the defendant on the Brooklyn homicide charges, no precedent holds that "an attorney may unilaterally create an attorney-client relationship in a criminal proceeding in this fashion . . . ." Nothing in the defendant's conduct before making a statement to the Brooklyn police suggested he meant to invoke his right to counsel, and the Manhattan lawyer had not conspicuously represented him as to any aspect of the Brooklyn case. The Appellate Division found that any

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error in obtaining a waiver of counsel and taking a statement from the defendant in the absence of counsel was harmless. The conviction is affirmed.

Dissent: [Lippman, CJ] "[T]he Court apparently undertakes to do what the Appellate Division did not upon a hearing record which, although well developed, raises certain factual issues not yet resolved by a court with jurisdiction to do so." Even if the artifice of prearranging the defendant's Manhattan release to the Brooklyn detectives who re-arrested him sufficed to avoid attachment of the indelible right to counsel, it also presented a "need and a corresponding prerogative on the part of the lawyer affirmatively to act to protect his client's interests." The record is not sufficient "for this Court to conclude that [counsel] did not do so, indeed, if it were necessary, that he did not do so 'conspicuously.'"

Defenses (Intoxication)

Instructions to Jury (Intoxication)

People v Sirico, 2011 NY Slip Op 04718 (6/7/2011)

Holding: The defendant was not entitled to a jury instruction on the intoxication defense. Uncontradicted evidence, including the defendant's own testimony about this incident in which he, an experienced archery hunter, shot an arrow towards his neighbor's yard, hitting the decedent, supports a finding that his overall behavior was purposeful. "[T]here is insufficient evidence to support an inference that defendant was so intoxicated as to be unable to form the requisite criminal intent."

Dissent: [Jones, J] That the defendant drank two large glasses of whiskey and took a Xanax pill shortly before threatening several people, shooting an arrow at a truck, and then shooting the decedent, met the "relatively low threshold" for an intoxication charge. The existence of some contrary evidence does not preclude the charge.

Counsel (Competence/Effective Assistance/Adequacy)

Trial (Summations)

People v Brown, 2011 NY Slip Op 04721 (6/7/2011)

Holding: Trial counsel's failure to object to prosecutorial comments in summation, some of which amounted to an improper "safe streets" argument and others, about the defendant's drug dealing, which was irrelevant and not inferable from the record, did not warrant reversal. Counsel may have chosen not to object because the comments also reflected badly on prosecution witnesses, which was consistent with the defense theory that the prosecution witnesses were not credible.

Juries and Jury Trials (Challenges) (Competence) (Voir Dire)

People v Johnson, 2011 NY Slip Op 04764 (6/9/2011)

Holding: The court erred during voir dire by failing to make further inquiry of and then rejecting a defense challenge to a potential juror who said she had a "strong bias" in connection with the insanity defense, about which she had written a college paper. The prospective juror said "'might be biased in the way that [she] interpret[ed] the evidence'" and was not sure she could give both sides a fair trial. A new trial is required.

Counsel (Attachment) (Right to Counsel)

Reckless Endangerment (Elements)

People v Lewie, 2011 NY Slip Op 04766 (6/9/2011)

Holding: Because the record supports a finding that the defendant acted recklessly but not that she acted with depraved indifference to human life, her conviction for second-degree manslaughter is affirmed and her conviction for first-degree reckless endangerment is vacated. The evidence showed that the defendant left her eight-month-old child with her co-defendant, cautioning him to shake a stuffed toy, not the child, when angry, at a time that she knew or believed it possible he had been hitting, shaking, and biting the child, was capable of inflicting injury on an adult, and was capable of killing a small animal. The record also supports a finding that she consciously disregarded the risk, which was "'of such nature and degree'" that disregarding it was "'a gross deviation from the standard of conduct that a reasonable person would observe in the situation.'" But the evidence, which included testimony that the defendant was worried or fearful about what might happen to her child, did not support a finding that she was depravedly indifferent, not caring how the risk turned out.

That a lawyer had been appointed for her for Family Court proceedings while she was being questioned by police after waiving her *Miranda* rights did not require that questioning cease. "[T]he argument, that the indelible right to counsel can attach by virtue of an attorney-client relationship in a Family Court or other civil proceeding" is rejected.

The court properly dealt with an "odd and inappropriate note" by a deliberating juror who was not shown to be grossly unqualified or to have engaged in misconduct of a substantial nature. And while the court misspoke when it included the words "what they should have seen" in its description of conscious disregard, the error posed no significant risk of confusion; the supplemental charge taken as a whole was proper.

NY Court of Appeals *continued*

Dissent in Part: [Jones, J] The manslaughter conviction was not supported by legally sufficient evidence.

Counsel (Right to Self-Representation)

Juveniles (Parental Rights) (Permanent Neglect)

Matter of Kathleen K., 2011 NY Slip Op 04768 (6/9/2011)

Holding: "Assuming, without deciding, that a parent in a termination of parental rights proceeding has a *Faretta*-type right of self-representation . . . the record does not facially demonstrate unequivocal and timely applications for self-representation that would have triggered a 'searching inquiry.'" When counsel sought to be relieved without stating that her client wished to proceed pro se, the client gave non-responsive answers to the court's inquiry and later said, "'that's why I want a different counsel.'" Counsel's second request to be relieved, after trial began, was untimely.

Concurrence: [Smith, J] A parent in a termination of parental rights case does not have a right to self-representation.

Sentencing (Enhancement) (Hearing)

People v Albergotti, 2011 NY Slip Op 04769 (6/9/2011)

Holding: The defendant's claim on direct appeal, that the court "failed to conduct an adequate 'inquiry'" as to whether he had violated the terms of the plea agreement so that an enhanced sentence was proper, was sufficiently preserved. While the objections were not specifically couched in terms of the requirements of *People v Outley (*80 NY2d 702, 713), "his arguments regarding the alleged sentencing error are readily discernible from the hearing transcript." The claim is rejected on the merits as the defendant and his lawyer had ample opportunity to contest the allegations that he had violated the bargain; the court was not required to conduct a hearing to determine the truth of the defendant's explanations nor to believe them.

Appeals and Writs (Scope and Extent of Review)

People v Concepcion, 2011 NY Slip Op 05110 (6/14/2011)

Holding: The Appellate Division erred in affirming the trial court's denial of a suppression motion on grounds that the trial court specifically rejected. As noted in *People v LaFontaine* (92 NY2d 470), which the defendant cited in seeking to reargue the matter in the Appellate Division, by enacting CPL 470.15(1) the Legislature barred affirming a decision on a ground not decided *adversely* to the appellant by the trial court. This Court has no broader review powers in this regard under CPL 470.35(1). Affirming a decision on alternative grounds does not violate *LaFontaine* so long as affirmance is not on a ground that was decided in the appellant's favor at the trial level. This Court has not, as the dissent claims, deliberately ignored *LaFontaine*, even if on occasion it has been overlooked due to the arguments presented by the parties. The Legislature has not taken up the invitation in *LaFontaine* to reexamine the statute.

There is no reasonable possibility that the drug evidence in question contributed to conviction on the weapons and assault charges under investigation at the time of the challenged search.

Dissent: [Smith, J] *LaFontaine* was a mistake, has not been followed, and should be overruled.

Conflict of Interest

Ethics (Prosecution)

Prosecutors (Special Prosecutors)

People v Abrams, 2011 NY Slip Op 05112 (6/14/2011)

Holding: A special prosecutor, appointed because the district attorney had previously represented the defendant, did not commit error by consulting with the district attorney as to whether the special prosecutor had the authority to grant the accuser immunity from prosecution for perjury. The district attorney did not give the special prosecutor any more authority than he already had by granting "permission" to immunize the accuser and the record does not suggest any confidential information was shared with the special prosecutor or that the district attorney impelled or influenced the special prosecutor's decision. The defendant, who objected to the grant of immunity on conflict of interest grounds, has not shown actual prejudice or a substantial risk of an abused client confidence.

Counsel (Right to Counsel)

People v Gibson, 2011 NY Slip Op 05115 (6/14/2011)

Holding: Police did not contravene the defendant's right to counsel by collecting his DNA from the cigarette he smoked while discussing non-case-related topics with a detective. The defendant had been taken into custody on a bench warrant in a matter upon which he was represented by counsel, which, the prosecution does not dispute, precluded police from questioning the defendant about any criminal matter in the absence of counsel. However, providing the defendant with a cigarette upon his request after the pack was displayed in front of him

NY Court of Appeals *continued*

was "not reasonably likely to elicit an incriminating response . . . ."

Appeals and Writs (Judgments and Orders Appealable)

Sentencing (Youthful Offenders)

People v Joseph R., 2011 NY Slip Op 05116 (6/14/2011)

Holding: No statute authorized the prosecution to appeal the County Court's adjudication of the defendant as a youthful offender to the Appellate Division. "On review of submissions pursuant to section 500.11 of the Rules," the matter is remitted for dismissal of the appeal.

Discovery (*Brady* Material and Exculpatory Information)

Homicide (Murder [Intent])

People v DiGuglielmo, 2011 NY Slip Op 05364 (6/23/2011)

Holding: Even if the defendant made a specific request for the allegedly exculpatory material at issue, there is no reasonable possibility that failure to disclose it contributed to the verdict. As for the conviction of depraved indifference murder, the standard set out in *People v Feingold* (7 NY3d 288) "simply does not apply retroactively to cases on collateral review . . . ." The claim that this result violates federal due process protections lacks merit.

Prisons (Civil Liabilities)

Sentencing (Post-Release Supervision)

Donald v State of New York, 2011 NY Slip Op 05367 (6/23/2011)

Holding: Each of the claimants was subjected to post-release supervision (PRS), and three of the four were imprisoned for PRS violations although no PRS period was prescribed by the sentencing judge; PRS was entered on each claimant's record by the Department of Correctional Services (DOCS). Their claims for damages lack merit. In one case, DOCS was "carrying out the mandate of the sentencing court, as recorded by the court clerk in a commitment sheet," and judicial immunity prevents State liability for the judge's error in not mentioning PRS orally. The other claimants have not stated the essential elements for the tort of wrongful imprisonment. One failed to assert that his confinement was the result of DOCS's error. The other two fail to allege that their confinements were not privileged as resulting from "'arrest under a valid process issued by a court having jurisdiction . . . .'" Issues also exist as to all three tort elements—"duty owed to the claimant, a breach of that duty, and injury resulting from the breach"—but need not be reached because DOCS's actions were discretionary in that they involved "'the exercise of reasoned judgment'" and so may not result in State liability.

Civil Rights Actions

Jails (Health Conditions) (Programs)

Prisoners (Rights Generally)

Brad H. v City of New York, 2011 NY Slip Op 05543 (6/28/2011)

Holding: The plaintiffs' motion to extend New York City's obligation under a negotiated settlement to provide mental health services to certain inmates in its jails was timely because it was filed before termination of the parties' settlement agreement. The settlement requiring the City to provide mentally ill inmates with individualized, clinically adequate and appropriate "discharge planning" to ensure that they were transitioned into community-based treatment and support services upon release or transfer from one of its jails was to terminate five years after monitoring of compliance began. The monitors did not begin work "in earnest" until June 25, 2003, so the five years of monitoring did not end until May 25 or 26, 2009, several days after the plaintiffs' motion was filed.

Dissent: [Pigott, J] The terms of the settlement agreement authorized monitoring before June 3, 2003, and monitoring did begin before that date. Therefore, the settlement agreement expired before the plaintiffs' motion was filed.

Narcotics (Penalties)

Sentencing (Resentencing)

People v Paulin, 2011 NY Slip Op 05544 (6/28/2011)

Holding: "[P]risoners who have been paroled, and then reincarcerated for violating their parole, are not for that reason barred from seeking relief under . . ." CPL 440.46, the 2009 Drug Law Reform Act (DLRA) resentencing statute. "The purpose of the 2009 DLRA, like that of its predecessors, the 2004 and 2005 DLRAs . . . , was to grant relief from what the Legislature perceived as the 'inordinately harsh punishment for low-level non-violent drug offenders' that the Rockefeller Drug Laws required . . . ." This punishment falls most heavily on people who are in prison, including those who are reincarcerated for a parole violation. In deciding a resentencing application, the court may consider whether an applicant's conduct

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shows that resentencing is not appropriate, and need not grant an application if "'substantial justice dictates that the application should be denied' . . . ." Reversal is required in *Paulin* and *Pratts* because both defendants are eligible for resentencing; *People v Phillips* is moot because the maximum term of Phillips's sentence has expired.

Narcotics (Penalties)

Sentencing (Resentencing)

People v Santiago, 2011 NY Slip Op 05545 (6/28/2011)

Holding: "[T]he 2009 DLRA says only that an offender must be in custody when he or she applies for resentencing; it does not require that custody continue until the application is decided. And to read that requirement into the statute would have significant disadvantages: it could produce gamesmanship, and unnecessarily arbitrary results, by leading the parties, and perhaps some judges, to try to accelerate or slow progress toward a decision in the expectation that parole release will cause the application to fail. We conclude that it is best to read the statute as written. We hold that it applies to an offender who was in prison at the time she made her application, even though she was paroled before the application was decided."

Sentencing (Resentencing) (Second Felony Offender)

People v Acevedo, 2011 NY Slip Op 05582 (6/30/2011)

Holding: Where the defendants, in seeking resentencing under *People v Sparber* (10 NY3d 457) due to the sentencing courts' failure to impose post-release supervision, had no expectation of relief from the originally imposed, fully discharged sentences, the resentencings did not destroy the underlying convictions' utility as predicates for enhanced sentencing for offenses committed after the original sentencing but before the resentencings. Where the only benefit the defendants could obtain from moving for resentencing was to push the sentences to a later date, the resentencings were "not effective to avoid the penal consequences of reoffending." "The present scenarios afford no occasion to decide what effect a bona fide *Sparber* resentence, or any resentence other than the ones before us, should have for predicate-felony purposes."

Concurrence: [Pigott, J] When a defendant is resentenced under *Sparber*, "the underlying conviction remains as does that part of the sentence imposing incarceration. . . ." As the resentencing is not a plenary proceeding, "the original sentence date on the prior conviction, and not the *Sparber* resentencing date, controls."

Dissent: [Jones, J] "Because their resentencing under *Sparber* took place after the subsequent felony conviction, defendants' proper sentences were not imposed until after the commission of the present felony; as such, defendants can no longer be classified as second felony offenders. . . ."

Speedy Trial (Cause for Delay) (Statutory Limits)

People v Mungro, 2011 NY Slip Op 05584 (6/30/2011)

Holding: Because the prosecutor had no statutory authority to request the defendant's presence in New York from federal custody out of state until his prosecution there was finished and he began serving the resulting sentence, the time that he was unavailable for trial here should not be charged to the prosecutor.

First Department

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Discovery (*Brady* Material and Exculpatory Information)

Misconduct (Prosecution)

People v Sinha, 84 AD3d 35, 922 NYS2d 275 (1st Dept 4/7/2011)

Holding: The defendant's conviction for bribing a witness is dismissed in the interest of justice for the prosecution's failure "to fulfill basic disclosure obligations that are essential to a fair trial" where the prosecutors did not disclose, until after the testimony of the witness allegedly bribed by the defendant, certain emails the prosecutors sent to the witness's mother about their efforts to convince Connecticut prosecutors to give him a break, arranging for him to receive phone privileges at the youth facility where he was incarcerated, and preventing his transfer to an adult facility. Nor did they disclose that the witness held the defendant responsible for a charge that he violated probation and that his past acts included transporting guns or drugs. The prosecution had disclosed the witness's prior conviction, his pending probation violation charge in Connecticut, their promise to tell the Connecticut prosecutors about his cooperation in the defendant's case, and several prior criminal acts for which he was not arrested. While the impeachment value of the belatedly disclosed evidence was minimal, it is unnecessary to decide whether the prosecution's inexcusable actions affected the verdict on this count because the conviction is reversed in the interest of justice; "to fail in three distinct respects to fulfill its disclosure obligations is intolerable." (Supreme Ct, New York Co)

First Department *continued*

Evidence (Sufficiency)

Homicide (Murder [Degrees and Lesser Offenses])

People v Matos, 83 AD3d 529, 921 NYS2d 66 (1st Dept 4/19/2011)

Holding: The defendant's conviction of second-degree depraved indifference murder of a child (Penal Law 125.25[4]) is supported by legally sufficient evidence and is not against the weight of the evidence where the defendant's liability was based on her failure to obtain medical attention for her injured child; the court instructed the jury that the risk-creating conduct may include the failure to perform a legally required act; and the evidence showed that the defendant: knew her son was severely injured and in pain; tried, unsuccessfully, to treat the child with home remedies; ignored the injuries for seven hours while she talked on the phone, drank and smoked, and went to sleep; and, before calling 911 around the time of the child's death, disposed of potentially incriminating evidence. The defendant also admitted that she did not seek help earlier because she was afraid of being blamed for the injuries, which is "strong evidence that her omission evinced depraved indifference rather than mere recklessness or negligence." (Supreme Ct, New York Co)

Evidence (Sufficiency)

Organized Crime

People v Western Express International, Inc., __ AD3d __, 923 NYS2d 34 (1st Dept 4/19/2011)

Holding: The court erred in dismissing the enterprise corruption charges because the grand jury evidence was sufficient to show that the defendants' "combined activities constituted the type of 'ascertainable structure' needed to satisfy the definition of enterprise corruption under Penal Law § 460.10(3)." The ascertainable structure requirement is not limited to a traditional hierarchical organized crime model; non-traditionally arranged, non-hierarchical structured criminal enterprises may also satisfy the requirement. The evidence showed that the defendants used Western Express' website and money exchange capabilities to traffic stolen credit card data and launder money and that Western Express, which also offered legitimate services, acted as an intermediary for buyers and sellers of the data and received a commission on the transactions. Western Express' website was a "full-service clearinghouse devoted to optimizing illegal transactions involving stolen credit card information." Recognizing this organized framework as an ascertainable structure does not expand the definition of criminal enterprise so as to eliminate the structure element. The prosecution should be allowed to try to show at trial that each defendant "took part in the ongoing criminal enterprise that Western Express had become . . . ." (Supreme Ct, New York Co)

Dissent: The "defendants' combined activities, undertaken for their individual benefit, without any chain of command, profit sharing, or continuity of criminal purpose beyond the scope of the criminal incidents alleged in the indictment" do not satisfy the ascertainable structure element of the crime.

Autopsies

Witnesses (Confrontation of Witnesses)

People v Hall, __ AD3d __, 923 NYS2d 428 (1st Dept 4/21/2011)

Holding: The defendant's confrontation right was not violated by the admission of an unredacted autopsy report completed by a non-testifying medical examiner through the testimony of another medical examiner who reviewed the report and related photographs and opined on the cause of death. This Court is bound by *People v Freycinet* (11 NY3d 38 [2008]), which held that admitting the factual portions of an autopsy report as a business record does not violate the Confrontation Clause. *Melendez-Diaz v Massachusetts* (129 S Ct 2527 [2009]) does not require a different result because the Supreme Court did not explicitly hold that autopsy results are testimonial; unlike the sworn drug analysis certificates in that case, the autopsy report was prepared by the medical examiner's office, which is not a law enforcement agency; autopsy reports are not prepared specifically for use at trial; and a live witness provided sufficient testimony to have the report admitted as a business record, testified about the decedent's injuries, gave her own expert opinion on the cause of death, and was subject to cross-examination. The defendant did not preserve his claim that the court should have redacted all but the factual portions of the report and any error in admitting the report was harmless. (Supreme Ct, New York Co)

Search and Seizure (Automobiles and Other Vehicles)

People v Garcia, __ AD3d __, 923 NY2d 433 (1st Dept 4/26/2011)

Holding: Suppression should have been granted because the nervousness of passengers in the defendant's car, which was stopped for a broken brake light, did not rise to the founded suspicion of criminality needed for the police to inquire about the presence of weapons in the car where the officers did not think there was anything suspi-

First Department *continued*

cious about the car and the defendant was polite and complied with the officer's request for his license and registration. The officers' testimony characterizing the passengers' unspecified movements as furtive amounted to conclusory assertions that the conduct was suspicious, which are insufficient to support a finding of founded suspicion of criminality. (Supreme Ct, Bronx Co)

Search and Seizure (Automobiles and Other Vehicles)

People v Omowale, 83 AD3d 614, __ NYS2d __ (1st Dept 4/28/2011)

Holding: The court erred by not suppressing evidence obtained when the defendant was arrested in 2007 after officers approached him for double-parking, where the defendant did not offer the driver's license of another person to the police as his own or impersonate anyone. While it is likely the defendant considered passing off the driver's license he was holding as his, holding it in his hand did not constitute a punishable attempt to commit criminal impersonation. (Supreme Ct, New York Co)

Dissent in Part: Suppression should also have been granted as to evidence obtained in a 2006 encounter in which the evidence warranting a stop of the vehicle did not also support a finding that police reasonably suspected the vehicle's occupants, who were nonthreatening and cooperative, were a threat to the officer's safety.

Search and Seizure (Arrest/Scene of the Crime Searches) (Warrantless Searches)

People v Evans, __ AD3d __, 922 NYS2d 403 (1st Dept 5/17/2011)

Holding: The court erred in denying the motion to suppress because there was no proof of exigent circumstances that would justify the warrantless search of the defendant's closed backpack where the defendant and two others were arrested for smoking marijuana in plain view and they were all in handcuffs and surrounded by four police officers and a 12-foot-high metal fence when the closed backpack was searched. There was no evidence that the officers feared for their safety during the arrest or that the defendant or his friends acted in an aggressive or hostile manner and the officers did not testify that they thought the backpack contained contraband. Finally, there was no evidence as to how the defendant could have gotten access to the bag's contents in order to destroy them after he was handcuffed. (Supreme Ct, New York Co)

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

Prostitution and Related Offenses (Evidence)

People v Vickers, 84 AD3d 627, 923 NYS2d 497 (1st Dept 5/24/2011)

Holding: The defendant's guilty plea to loitering for the purpose of engaging in prostitution must be vacated because the court failed to conduct an allocation adequate to ensure that the defendant was guilty of the crime charged and understood the constitutional rights she was giving up by entering the plea where: this was the twenty-year-old defendant's first arrest; the court only asked if she wanted to plead guilty, if she was being forced to do so, and if she was guilty; the plea minutes do not contain a description of the crime or the specific subsection of the statute she was pleading to; and the defendant was convicted of a class B misdemeanor with no indication that she was told that the offense could be a B misdemeanor or a violation, depending on whether it was her first offense. If it was, she may have pleaded to a crime for which she could not satisfy an express element. (Supreme Ct, Bronx Co)

Sentencing (Excessiveness)

People v Fernandez, 84 AD3d 661, 923 NYS2d 517 (1st Dept 5/26/2011)

Holding: The three-to-nine year prison term imposed for second-degree manslaughter on the 52-year-old defendant with no criminal record and US citizenship, following his guilty plea in the killing of a young man who had broken the defendant's nose in an unprovoked attack shortly before the fatal confrontation in which the decedent refused to apologize and lunged at the defendant, was excessive. The plea was entered after the original conviction, for which he had received a five-to-fifteen year sentence, was overturned for failure to instruct on the lesser offense of criminally negligent homicide; the prosecution had not opposed parole, and the defendant has already served five years. (Supreme Ct, New York Co)

Dissent: The defendant entered a negotiated plea that avoided a potentially longer sentence and received a sentence less than the one imposed after the initial trial. These are not extraordinary circumstances that warrant reducing the sentence as excessive.

Second Department

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Juveniles (Visitation)

Matter of Dennis D., 83 AD3d 700, 922 NYS2d 90 (2nd Dept 4/5/2011)

Holding: Where the court had required the father to get a mental health examination as a condition of supervision by the Department of Social Services, and provided no rationale for omitting the requirement later, the court should have required such an exam when extending the period of supervision and improvidently exercised its discretion by, in effect, granting the father supervised visitation when he had failed to comply with that requirement. (Family Ct, Suffolk Co)

Parole (Release [Consideration for])

Matter of Malone v Evans, 83 AD3d 719, 919 NYS2d 911 (2nd Dept 4/5/2011)

Holding: The record supports the petitioner's claim that the Parole Board failed to take into account statutory factors other than the seriousness of the original offense when determining whether to release the petitioner on parole. (Supreme Ct, Orange Co)

Sex Offenses (Sex Offender Registration Act)

People v Arrahman, 83 AD3d 680, 919 NYS2d 885 (2nd Dept 4/5/2011)

Holding: Where the defendant was incarcerated out of state at the time of the risk level assessment hearing held under the Sex Offender Registration Act, and his attorney told the court that he would not waive his appearance, his due process right to be present was violated and he is entitled to a new hearing. (Supreme Ct, Nassau Co)

Misconduct (Prosecution)

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

People v Caparella, 83 AD3d 730, 920 NYS2d 384 (2nd Dept 4/5/2011)

Holding: While the court did not err in denying the defendant's motion for severance as to three separate incidents involving three different accusers, the prosecutor's improper combining of the three during opening, summation, and examination of witnesses, despite multiple mistrial motions and admonitions by the trial court, created a substantial risk that the defendant was denied a fair trial. In addition to continual comments such as "'you saw three very different men take that witness stand . . . brought to together by . . . [the defendant],'" the prosecutor revealed a suppressed statement by the defendant that could have led jurors to believe the defendant had committed prior similar crimes. (Supreme Ct, Nassau Co)

Juries and Jury Trials (Deliberation)

People v Surpris, 83 AD3d 742, 920 NYS2d 374 (2nd Dept 4/5/2011)

Holding: Where only five of six jury notes were read into the record, and the record does not show that the court provided notice to the parties of the contents of or any action by the court as to the first note, the court failed to comply with CPL 310.30. (County Ct, Nassau Co)

Juveniles (Support Proceedings)

Matter of Getty v Getty, 83 AD3d 835, 920 NYS2d 673 (2nd Dept 4/12/2011)

Holding: Where the mother lost her job through no fault of her own in April 2008 and diligently sought reemployment while supporting herself and a child unrelated to this proceeding with unemployment benefits of only $362 weekly, which may be below the relevant poverty income guidelines, while the father and his current wife maintained annual income of over $150,000, the support magistrate erred in determining the mother was not entitled to a downward modification of her $200 per week child support obligation. (Family Ct, Nassau Co)

Juveniles (Abuse)

Matter of Senande v Carrion, 83 AD3d 851, 920 NYS2d 418 (2nd Dept 4/12/2011)

Holding: Under all the circumstances, including the lack of any finding of prior mistreatment or abuse, evidence that the child "developed a small, dime-sized red mark on her upper thigh as a result of her mother hitting her one or two times with a house slipper after the daughter admittedly was disobedient" did not support the finding by the Office of Children and Family Services of maltreatment by the parents. The article 78 petition to amend and seal an indicated report maintained by the state's Central Register of Child Abuse and Maltreatment is granted.

Second Department *continued*

Misconduct (Prosecution)

People v Anderson, 83 AD3d 854, 921 NYS2d 156 (2nd Dept 4/12/2011)

Holding: The defendant was deprived of a fair trial by the cumulative effect of prosecution misconduct at trial, reviewed in the interest of justice, which included going into facts about prior crimes that went well beyond a showing that the defendant placed his interest above society's by selling drugs; effectively vouching "for the conduct and credibility of [a city council member and a deputy executive assistant district attorney] based upon their positions"; denigrating the defense with comments about rehearsed lines, a script, and intimations of lying; and mischaracterizing the defendant's testimony as part of "an unnecessarily inflammatory argument that the defendant was as remorseless as a hunter who kills a deer . . . ." (Supreme Ct, Queens Co)

Counsel (Competence/Effective Assistance/Adequacy)

People v Cantave, 83 AD3d 857, 921 NYS2d 278 (2nd Dept 4/12/2011)

Holding; The defendant was denied effective assistance of counsel where his trial attorney failed to impeach the accuser with prior inconsistent statements made at the hospital indicating that due to her struggles, only digital, not penile, penetration had occurred, when penile penetration is an essential element of first-degree rape. No strategic or legitimate tactical explanations are perceived for the failure to highlight those inconsistencies, particularly in summation. (Supreme Ct, Queens Co)

Burglary (Degrees and Lesser Offenses) (Elements) (Evidence)

Lesser and Included Offenses

People v Kim, 83 AD3d 866, 921 NYS2d 291 (2nd Dept 4/12/2011)

Holding: Failing to submit the crime of attempted second-degree trespass as a lesser-included offense of second-degree burglary was an improvident exercise of discretion. The accuser testified about hearing banging on his back door, and seeing the defendant and co-defendant by the doorway when the door opened. The defendant testified that he went to the back of the complainant's house only after his co-defendant did so with the intent to relieve himself, he heard banging and saw the co-defendant pounding on the door, and both ran away when the accuser came to the door. In the absence of direct proof of intent to commit a crime, the jury was free to infer it or to find no intent. (Supreme Ct, Queens Co)

Narcotics (Penalties)

Sentencing (Resentencing)

People v Lashley, 83 AD3d 868, 920 NYS2d 421 (2nd Dept 4/12/2011)

Holding: The 10-year "look-back" period for establishing eligibility for resentencing under CPL 440.46(5)(a) is measured from the date of a defendant's resentencing motion, not the date of commission of the drug felonies for which the defendant was convicted. (Supreme Ct, Queens Co)

Impeachment

People v Mullings, 83 AD3d 871, 921 NYS2d 152 (2nd Dept 4/12/2010)

Holding: Where the complainant testified that he gave a description of the robber's white jacket in his initial statement to police, but the police report included no such content, the court erred in precluding the defense from calling the recording officer and from cross examining an officer who received a copy of the report. The error was not harmless as identification was important and the evidence of the defendant's guilt was not overwhelming. (Supreme Ct, Kings Co)

Assault (Evidence) (Serious Physical Injury)

Evidence (Weight)

People v Chardon, 83 AD3d 954, 922 NYS2d 127 (2nd Dept 4/19/2011)

Holding: The conviction of first-degree assault was against the weight of the evidence where the prosecution failed to demonstrate directly or by inference "that the defendant carried a dangerous instrument, stabbed the complainant, or was aware that any of his co-perpetrators intended to stab the complainant" and thus failed to prove that the defendant intended to cause the accuser serious physical injury. (Supreme Ct, Kings Co)

Constitutional Law (United States Generally)

Weapons (Firearms) (Possession)

People v Hughes, 83 AD3d 960, 921 NYS2d 300 (2nd Dept 4/19/2011)

Holding: The provisions of Penal Law 265.02(1) and 265.03(3), which criminalize possession of a firearm by someone who has been previously convicted of a crime,

Second Department *continued*

are not absolute bans on firearm possession and are not unconstitutionally overbroad under *District of Columbia v Heller*, 554 US 570, 626 (2008). (County Ct, Nassau Co)

Sentencing (Concurrent/Consecutive)

People v Jackson, 83 AD3d 962, 920 NYS2d 434 (2nd Dept 4/19/2011)

Holding: Where the defendant retrieved an object just before leaving a house with the accuser, then retrieved a bicycle and rode alongside the accuser before cutting the accuser with the object and riding away on the bicycle, the prosecution did not establish that the defendant possessed a dangerous instrument for a purpose unrelated to an intent to use it against the accuser. The court, therefore, erred in imposing consecutive sentences for the second-degree weapons possession and second-degree assault convictions. (County Ct, Orange Co)

Admissions (*Miranda* Advice)

Confessions (*Miranda* Advice)

People v Sedunova, 83 AD3d 965, 922 NYS2d 134 (2nd Dept 4/19/2011)

Holding: The court should have suppressed the defendant's videotaped statement where she was in custody when she had made inculpatory statements before being given *Miranda* warnings and remained continuously in the presence of the detectives thereafter while making an inculpatory written statement and the videotaped statement. The alternative argument that suppression of the un-Mirandized statements was erroneous may not be reviewed, and the error was not harmless as the statement was a primary part of the prosecution's case. (Supreme Ct, Kings Co)

Narcotics (Penalties)

Sentencing (Resentencing) (Second Felony Offender)

People v Stanley, 83 AD3d 968, 920 NYS2d 791 (2nd Dept 4/19/2011)

Holding: The defendant's predicate felony status was not challenged when it was determined at the original sentencing or on direct appeal, and he was not entitled to a de novo determination thereof upon resentencing pursuant to CPL 440.46. He was therefore properly resentenced as a second felony offender with a prior violent felony conviction based on an out-of-state conviction. (Supreme Ct, Queens Co)

Juveniles (Foster Care) (Jurisdiction) (Neglect)

Matter of Sheena B., 83 AD3d 1056, 922 NYS2d 176 (2nd Dept 4/26/2011)

Holding: Because the Family Court has jurisdiction over neglect petitions commenced before a child's 18th birthday even after that birthday occurs, and a placement based on a neglect finding may be continued with the child's permission until the child's 21st birthday, the court erred by granting, in effect, an application by the Administration for Children's Services for voluntary discontinuance. "In matters involving the welfare of a child, not only the parties to the action, but also the public, has an interest in the continuation of the proceeding . . . ." Dismissal would cause the child, who had given birth, to be discharged from foster care without services. (Family Ct, Kings Co)

Juveniles (Neglect)

Matter of Alanie H., 83 AD3d 1066, 922 NYS2d 166 (2nd Dept 4/26/2011)

Holding: The court improvidently exercised its discretion in finding, by a preponderance of the evidence, that the father neglected the child in the absence of a showing that the child's condition was impaired by the father watching the child through the night and taking him to the doctor in the morning after a doctor said "the parents 'should probably' bring" the child in when they called at 10 p.m. The child had been hospitalized and underwent a procedure to release fluid from his brain prior to this, and the parents had been told that the enlargement of his head would ameliorate within a week. They called after three days because the child had vomited and the enlargement persisted, but the child had no fever; a second procedure to drain fluid was not done until a day after the child was readmitted to the hospital. (Family Ct, Kings Co)

Juveniles (Abuse) (Hearings) (Parental Rights)

Matter of Leon K., 83 AD3d 1069, 923 NYS2d 121 (2nd Dept 4/26/2011)

Holding: After an appellate reversal of a decision that, in effect, granted summary judgment as to severe abuse of one child and derivative severe abuse as to others, the court granted without a fact-finding hearing the petitioner's motion, finding that no "'reasonable efforts' with regard to the mother" were required and that the mother had severely abused the one child and derivatively severely abused the others. The contention that reasonable efforts should be excused pursuant to Family Court Act 1039-b(b)(1) because the mother subjected one child to

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"'aggravated circumstances'" could not be determined without a hearing. The mother's conviction for second-degree assault under Penal Law 120.05(2) did not alone excuse reasonable efforts because "serious physical injury" is not an element of that offense. (Family Ct, Queens Co)

Juveniles (Abuse)

Matter of Elijah O., 83 AD3d 1076, 923 NYS2d 575 (2nd Dept 4/26/2011)

Holding: Where over three years passed between the commission by the mother of abuse toward one child and the birth of the subject child, it cannot be said as a matter of law that the condition that formed the basis of the abuse finding still exists, so it was error to grant summary judgment finding that the subject child was derivatively abused. (Family Ct, Queens Co)

Evidence (Sufficiency)

Menacing (Elements) (Evidence)

Robbery (Elements) (Evidence)

Matter of Tafari S., 83 AD3d 1084, 922 NYS2d 448 (2nd Dept 4/26/2011)

Holding: Where the accuser testified that she did not know what caused a "poke" in her side, and did not see anyone with a gun or see a gun until after it was dropped to the ground at an officer's approach, there was not legally sufficient proof that a "victim 'actually perceived' the display of what appeared to be a firearm" as required for attempted second-degree robbery and second-degree menacing under Penal Law 110.00, 160.10(2)(b), and 120.14(1). The evidence did establish that the appellant committed acts that would constitute attempted third-degree robbery and third-degree menacing. (Family Ct, Kings Co)

Search and Seizure (Entries and Trespasses [Trespasses]) (General) (Motions to Suppress [CPL Article 710])

People v Smalls, 83 AD3d 1103, 922 NYS2d 461 (2nd Dept 4/26/2011)

Holding: The defendant's motion to suppress a gun should have been granted as the police lacked reasonable suspicion to chase four men who started to run after they, and a woman, were followed for three blocks by police who saw them walking at a normal pace away from a building from which gunfire had been heard. That the men, including the defendant, went into a public housing building with a "no trespassing" sign is irrelevant where the unlawful police pursuit was already underway. The defendant's disposal of the gun was a spontaneous reaction to that pursuit. (Supreme Ct, Queens Co)

Assault (Evidence)

Evidence (Sufficiency)

Robbery (Degrees and Lesser Offenses) (Evidence)

People v Taylor, 83 AD3d 1105, 921 NYS2d 553 (2nd Dept 4/26/2011)

Holding: There was not sufficient proof of physical injury to sustain charges of second-degree robbery and second-degree assault where there was no loss of consciousness, bruises, bleeding, cessation of breathing, or other physical manifestations of pain or injury beyond a scratch and some reddening, no resulting diagnosis of injury or provision of medication at the hospital, and no testimonial details corroborating the accuser's subjective description of pain. The robbery conviction must be reduced to third-degree robbery and the assault conviction is reversed and dismissed. (County Ct, Orange Co)

Juveniles (Custody)

Matter of Goetz v Donnelly, __ AD3d __, 921 NYS2d 882 (2nd Dept 5/3/2011)

Holding: The court erred in summarily awarding sole custody of the child to the mother after a hearing on the father's petition for sole custody in the absence of any application by the mother for such relief. (Family Ct, Suffolk Co)

Juries and Jury Trials (Deliberation)

People v Lockley, __ AD3d __, 922 NYS2d 476 (2nd Dept 5/3/2011)

Holding: While the defense failed to object to the court's procedure of disclosing jury notes to the attorneys in front of the jury and immediately providing a response, the error of failing to allow counsel a chance to meaningfully participate in formulating a response went to the mode of proceedings, manifestly resulting in prejudice. The court's actions were effectively the same as saying counsel had no right to participate in suggesting substantive responses, preventing counsel's meaningful participation at a critical state of proceedings. The jury requested clarification about what to base its decision on and how to proceed in the face of a deadlock, not just ministerial acts like read-back of testimony. (Supreme Ct, Queens Co)

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Family Court

Juveniles (Support Proceedings)

Matter of Branch v Cole-Lacy, __ AD3d __, 921 NYS2d 897 (2nd Dept 5/10/2011)

Holding: The support magistrate improvidently exercised her discretion by denying the mother's application for an adjournment and, on the mother's default, granting the father's petition for leave to enter a money judgment for overpayment of child support arrears and to vacate a child support order. The mother had appeared in the morning, but submitted an adjournment request saying that she was ill, and left the courthouse for the stated purpose of seeing a doctor. The mother's objection to the denial of her adjournment request is granted. (Family Ct, Nassau Co)

Juveniles (Custody)

Matter of Corrigan v Orosco, 84 AD3d 955, 921 NYS2d 893 (2nd Dept 5/10/2011)

Holding: Where the petitioner sought custody saying she was the biological mother of the children, had custody since their birth, and was married to the adoptive mother, who had disappeared about nine days before the petition was filed and whose whereabouts were unknown, the court improvidently exercised its discretion in directing that a child protective investigation be conducted to determine if an abuse or neglect proceeding was warranted. While a court has broad discretion to order a child protective investigation, "there was absolutely no indication of abuse, neglect, or maltreatment of the subject children raised in the custody petition or in any proceedings, and the Family Court had before it no other information regarding suspected abuse . . . ." The appellant's claim of unlawful discrimination was only raised in her reply brief and is not properly before the court. (Family Ct, Suffolk Co)

Insanity

Juveniles (Parental Rights)

Matter of Shawn G., 84 AD3d 957, 924 NYS2d 398 (2nd Dept 5/10/2011)

Holding: The court erred in finding that the Department of Social Services (DSS) established by clear and convincing evidence that the mother was, by reason of mental illness, unable presently and for the foreseeable future to provide proper and adequate care for her children. The DSS expert testified that symptoms of the mother's mental illness were, at least temporarily, controlled by medication and that, while at the present time placing the children in the mother's care would put them in danger of becoming abused or neglected, she could not say with any degree of medical certainty whether the mother could, in the foreseeable future, "address the major issue which placed the children at risk." A suspended judgment is not authorized for termination of parental rights based on mental illness. (Family Ct, Suffolk Co)

Appeals (Counsel)

Counsel (Competence/Effective Assistance/Adequacy)

People v Contant, 84 AD3d 977, 923 NYS2d 842 (2nd Dept 5/10/2011)

Holding: "[F]ormer appellate counsel was ineffective in failing to raise the issue that the appellant's waiver of his right to appeal was not valid . . . , and in failing to evaluate whether there were any nonfrivolous issues which could be raised on appeal."

Sex Offenses (Sex Offender Registration Act)

People v Washington, 84 AD3d 910, 923 NYS2d 151 (2nd Dept 5/10/2011)

Holding: The court erred in finding that exemplary participation and achievement in a prison sex offender treatment program and other achievements were adequately taken into consideration in the risk assessment categories related to acceptance of responsibility and conduct while incarcerated. The Sex Offender Registration Act Guidelines and Commentary first promulgated in 1997 do not take into account the offender's response to treatment, despite the legislative command in the Act itself that treatment be considered, because a panel of experts had recommended skepticism toward treatment. Inasmuch as the court below "did not assess whether the defendant's response to treatment was exceptional and, if so, whether . . . a downward departure was appropriate," the matter is remitted for such a determination. (County Ct, Suffolk Co)

Juveniles (Hearings) (Parental Rights) (Removal)

Matter of Lucinda R., 2011 NY Slip Op 4256 (2nd Dept 5/17/2011)

Holding: The provisions of Family Court Act 1028, requiring that a hearing regarding the temporary removal of a child be held within three days of an application for such hearing, are not limited to situations where the removed child is placed into government-administered foster care. The court erred in denying a hearing to the mother when her young children were removed and

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paroled to the care of their nonrespondent father and his mother. Although the children were returned to the mother while this appeal was pending, the exception to the mootness doctrine applies because appellate review of the denial of her request for a hearing could not be completed before expiration of the three-day period statutory period, the issue is likely to recur, and the appeal raised "a substantial and novel issue of statewide importance involving the rights of parents." (Family Ct, Kings Co)

Juveniles (Support Proceedings)

Matter of Shvetsova v Paderno, 84 AD3d 1095, 923 NYS2d 202 (2nd Dept 5/17/2011)

Holding: While the record supports a finding that the father earned more than he reported from his current job, the court erred by in effect imputing to him the income he earned in 2001, which was significantly more than his current salary, where the father showed that he had been unable to secure employment commensurate with his prior salary and experience. Absent specific findings as to the amount of the father's income, it was improper to conclude that his failure to pay the ordered support was willful. (Family Ct, Kings Co)

Appeals and Writs (Judgments and Orders Appealable) (Prosecution, Appeals By)

Narcotics (Penalties)

Sentencing (Resentencing)

People v Foxworth, 84 AD3d 1114, 923 NYS2d 206 (2nd Dept 5/17/2011)

Holding: The prosecution is statutorily permitted to appeal from a resentence alleged to be invalid as a matter of law; nothing in the Drug Law Reform Act of 2009 (*see* CPL 440.46) or the Drug Law Reform Act of 2004 (L 2004, ch 738, § 23) limits this preexisting right. The court properly measured the "look-back" period from the date of the defendant's motion for resentencing; however, at the time she filed her motion, the defendant was ineligible for resentencing because her weapons possession conviction fell within the look-back period and thus constituted an exclusion offense. (Supreme Ct, Queens Co)

Sentencing (Concurrent/Consecutive)

People v Whitehead, 84 AD3d 1128, 923 NYS2d 212 (2nd Dept 5/17/2011)

Holding: The defendant's attempt to steal a vehicle constituted second-degree grand larceny and was also a material element of first-degree identity theft (*see* Penal Law 190.80[3]), so the sentences imposed for those offenses should run concurrently with each other. The sentence for second-degree scheme to defraud should run concurrently with the other counts that comprised the scheme. (County Ct, Suffolk Co)

Juveniles (Custody)

Matter of Ruiz v Travis, 84 AD3d 1242, 924 NYS2d 456 (2nd Dept 5/24/2011)

Holding: Dismissing, at the close of the mother's case, her petition to modify a custody order entered on consent of the parties was error where the evidence, especially that showing that she had maintained sobriety for a prolonged period, obtained full-time employment, been active in some of the child's medical treatment, and attended school and medical meetings about the child when advised of them, adequately demonstrated a change of circumstance that might warrant modification of custody in the best interest of the child. The matter must be remitted for a continued hearing. (Family Ct, Westchester Co)

Juveniles (Neglect)

Matter of Amoreih S., 84 AD3d 1246, 923 NYS2d 359 (2nd Dept 5/24/2011)

Holding: The neglect finding is not supported by a preponderance of the evidence where the mother and father were arguing while the father carried their son in a baby carrier, and the baby fell out of the carrier when the mother's friend tried during the argument to grab the baby. There was no evidence that the parents engaged in a physical altercation. While a single incident can sustain a neglect finding, that is not the case on the record here. The derivative neglect finding, which was based on the neglect finding, is similarly unsupported. (Family Ct, Suffolk Co)

Ethics (Defense) (General)

Misconduct (Defense) (General)

Matter of Saghir, 2011 NY Slip Op 04475 (2nd Dept 5/24/2011)

Holding: The respondent is disbarred based on discipline imposed by the federal district court after findings by the Committee on Grievances that, among other things, the respondent accepted $5,000 from a prisoner's family but did no work on his behalf, shared legal fees with a nonlawyer—another prisoner—for work of a legal nature and for recommending the respondent's services to others, charged and accepted excessive fees, aided a non-

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lawyer—one of the prisoners—in the practice of law by directing or assisting him in preparing motions for the respondent's clients, and withdrawing from the representation of a client without ensuring that the client would not be prejudiced.

Family Court

Juveniles (Custody) (Parental Rights)

Matter of Swinson v Brewington, 2011 NY Slip Op 04479 (2nd Dept 5/24/2011)

Holding: "The Judicial Hearing Officer erred in relying on the report of the attorney for the child and refusing to take testimony and receive documentary evidence offered by the father to refute the report. While attorneys for the children, as advocates, may make their positions known to the court orally or in writing, presenting reports containing facts which are not part of the record or making ex parte submission to the court are inappropriate practices . . . ." (Family Ct, Kings Co)

Evidence (Newly Discovered)

Post-Judgment Relief (CPL § 440 Motion)

People v Bellamy, 84 AD3d 1260, 923 NYS2d 681 (2nd Dept 5/24/2011)

Holding: The court properly found that the likely cumulative effect of newly discovered evidence presented at a hearing on a CPL 440.10 motion to vacate the conviction, including the testimony of an informant that another person had admitted, on an audio recording, committing the homicide with an accomplice, would be a more favorable verdict for the defendant. The informant's original implication of the second party had been unsolicited, and while the informant had later recanted, the parties he named were also implicated in a police report at the time of the homicide. The evidence at trial had not been overwhelming, and the newly discovered evidence could raise a reasonable doubt in jurors' minds. (Supreme Ct, Queens Co)

Juries and Jury Trials (Deliberation)

Misconduct (Juror)

People v Davis, 2011 NY Slip Op 04489 (2nd Dept 5/24/2011)

Holding: The denial of the defendant's motion to set aside the verdict for juror misconduct was not an improvident exercise of the court's discretion in this case, which "highlights the difficulty—perhaps futility—in drawing meaningful distinctions between jurors' professional expertise and life experience." The defendant was charged with many offenses including second-degree felony murder and first-degree robbery and burglary and was convicted on all 12 counts of the indictment. Seeking to set aside the verdict, the defendant presented a statement by one juror that another, a real estate lawyer, had said during deliberations that the defendant had to be convicted of all counts or acquitted on all counts and that because the defendant was present, he had to be found guilty. This was the lawyer juror's response to several jurors' conclusion that the defendant had not been guilty of murder, robbery, or burglary. Another juror said in a letter that most of the jury had been troubled by the inflexibility of the law, which required an all or nothing verdict. Yet another juror wrote of his belief that the defendant did not intend a violent crime to occur, which the juror realized was irrelevant to guilt of felony murder but hoped could be considered in sentencing. The lawyer juror did not inject extra-record experimentation, investigation, or calculation based on off-record facts and beyond average jurors' understanding. Jury deliberations not being transcribed, and given the known circumstances, it is unlikely that the lawyer juror's alleged misstatements of applicable law were actually misstatements. What the record reflects is not misconduct but a jury conscientiously trying to do its job. (County Ct, Westchester Co)

Narcotics (Penalties)

Sentencing (Resentencing)

People v Hallman, 84 AD3d 1266, 923 NYS2d 224 (2nd Dept 5/24/2011)

Holding: Where the defendant was eligible for resentencing under CPL 440.46, which should be granted unless substantial justice dictates denial, and had an exemplary prison record that included no disciplinary infractions and successful completion of a number of programs and vocational training, resentencing should have been granted. The court emphasized that the underlying crime and circumstances were violent, but the prosecution had neither pursued those counts nor presented evidence to support the position that the defendant had acted violently, and the defendant pleaded guilty only to third-degree possession of drugs. There was no showing that substantial justice required denial of resentencing. (Supreme Ct, Queens Co)

Constitutional Law

Defenses

Weapons (Defenses)

Second Department *continued*

People v Pitt, 84 AD3d 1275, 924 NYS2d 121 (2nd Dept 5/24/2011)

Holding: The court improperly precluded the defendant from testifying at his trial for second-degree possession of a weapon about escalating harassment, threats, and assault he endured after moving to the neighborhood in which he eventually shot and killed one of a group of men who attacked him. He was constitutionally entitled to present a defense to the charge, an essential element of which is intent to use the weapon unlawfully. The court also erred in redacting, over objection, portions of the defendant's statements and grand jury testimony except those related to the shooting incident itself and the length of time he had owned the gun. (Supreme Ct, Kings Co)

Juveniles (Custody)

Matter of Jennings v Yillah-Chow, 84 AD3d 1376, 924 NYS2d 519 (2nd Dept 5/31/2011)

Holding: The mother established that the children's best interests would be served by permitting their relocation to an apartment in Maryland with recreational amenities, proximity to schools equipped to deal with one child's special needs, and away from gun violence and drug-dealing in their current neighborhood, and the attorney for the children, whose opinion is entitled to some weight because it is not contradicted by the record, agrees. A liberal visitation schedule with extended visits during school vacations will allow a meaningful relationship to continue with the father. While a hearing court has an advantage in assessing the credibility of witnesses, the appellate court should not allow a relocation determination lacking a sound and substantial basis in the record to stand simply in deference to the court below. (Family Ct, Kings Co)

Juveniles (Support)

Matter of McAndrew v McAndrew, 84 AD3d 1381, 924 NYS2d 549 (2nd Dept 5/31/2011)

Holding: The court erred in denying the father's petition for a downward modification of the child support obligation in a stipulated settlement where he made a prima facie showing of a substantial unanticipated and unreasonable change in circumstances by presenting evidence that he was laid off through no fault of his own and had sought work. That he had tried to find a new or additional job more than a year before he was laid off and later admitted that, at the time of the settlement, he had been changed from a salaried position to a commission-only position with a lower maximum salary did not sufficiently establish that, at the time of the settlement, he knew he would be laid off or lose income. (Family Ct, Nassau Co)

Endangering the Welfare of a Child

Evidence (Weight)

People v Gonzalez, 2011 NY Slip Op 04700 (2nd Dept 5/31/2011)

Holding: Where the jury acquitted the defendant on counts of third-degree criminal sexual act and incest, clearly finding the accuser's testimony not to be credible, and there was no evidence other than the accuser's testimony supporting the charge of endangering the welfare of a child, the conviction on that charge was against the weight of the evidence. (County Ct, Orange Co)

Counsel (Competence/Effective Assistance/Adequacy)

Post-Judgment Relief (CPL § 440 Motion)

People v Jenkins, 84 AD3d 1403, 923 NYS2d 706 (2nd Dept 5/31/2011)

Holding: The court erred by denying without a hearing the defendant's motion to vacate his conviction based on the recantation of the sole eyewitness to the shooting where: the recantation was not incredible on its face in that portions of the eyewitness's trial testimony concerning his location and activities at the scene support his later claim that he could not recognize the shooter; undisputed evidence of police misconduct reveals that he had a motive to lie at trial; and nothing in the record indicates he had a motive to lie as to the recantation. Denial of the defendant's claim of ineffective assistance of counsel without a hearing was also error where affidavits of two potential alibi witnesses were submitted saying counsel never interviewed them and it cannot be determined without a hearing whether there were tactical or strategic reasons not to investigate or call them at trial. (Supreme Ct, Queens Co)

Third Department

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Motions (Omnibus)

People v Leonard, 83 AD3d 1113, 921 NYS2d 337 (3rd Dept 4/7/2011)

Holding: The court should not have substituted for the procedures set forth in the Criminal Procedure Law a

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policy of requiring parties to make good faith efforts to resolve issues by stipulation, thereby avoiding pretrial motions. However, the court's summary denial of the defendant's omnibus motion was harmless error where hearings were held on the defendant's motion to preclude evidence, the defense received the requested bill of particulars, and the prosecution responded to the defendant's request for *Brady* material. (Supreme Ct, Ulster Co)

Counsel (Right to Counsel)

Sentencing (Resentencing)

People v Coleman, 83 AD3d 1223, 920 NYS2d 482 (3rd Dept 4/14/2011)

Holding: Where the defendant requested assignment of counsel as to his motion for resentencing pursuant to CPL 440.46, alleging that he could not afford an attorney, and the court did not investigate that request, "the record is devoid of evidence that" the defendant sought to exercise his right of self-representation; the defendant reiterated his request for counsel after the prosecution argued he was not eligible for resentencing. The matter is remitted for the court to meet its obligation to inquire into the defendant's desire and eligibility for assigned counsel. (County Ct, Sullivan Co)

Search and Seizure (Standing to Move to Suppress) (Warrantless Searches [Abandoned Objects])

People v Harris, 83 AD3d 1220, 920 NYS2d 850 (3rd Dept 4/14/2011)

Holding: That the defendant deposited trash in the closed dumpster at the private apartment complex where he lived, for removal by a private hauling company, rather than putting it on the street for removal by a public sanitation department, did not distinguish this case from precedent that says there is no expectation of privacy in trash left in a public space for removal by a third party. "[T]rash disposed of in a communal place where others can access it with the understanding that it will be removed by a third party is deemed to be abandoned . . . ." The evidence found in the trash in 2008, which police searched based on a tip from an informant neighbor they had approached the year before because a bank reported suspicious activity by the defendant, provided a recent, sufficient basis to search the defendant's apartment. (County Ct, Chemung Co)

Insanity (Civil Commitment)

Sex Offenses (Civil Commitment)

Matter of State of New York v Myron P., __ AD3d __, 923 NYS2d 267 (3rd Dept 5/5/2011)

Holding: Article 1, Section 2 of the New York Constitution "does not guarantee the right to a jury trial for the dispositional phase of a proceeding under Mental Hygiene Law article 10 . . . ." The statutory right to a jury determination of both mental illness and the need to continue involuntary hospitalization under Mental Hygiene Law article 9 has only existed since 1972; prior law provided only for a jury determination as to "lunacy," not retention. The differences between articles 9 and 10 do not violate constitutional equal protection provisions, because respondents under the two provisions are not alike in all relevant aspects. The Legislature has determined "that differences exist between sex offenders with mental abnormalities and other individuals who are mentally ill, requiring separate treatment . . . ." (Supreme Ct, Albany Co)

Search and Seizure (Search Warrants)

People v Gavazzi, __ AD3d __, 921 NYS2d 742 (3rd Dept 5/5/2011)

Holding: The search warrant was invalid where it indicated that the issuing court was the Town of Broome local criminal court, which was shown at the suppression hearing to be wrong, was signed illegibly, and contained no other information as to the issuing court, thereby failing to substantially comply with the requirements of Penal Law 690.45(1). "[O]n its face the warrant appears to be issued by an unidentified judge in a nonexistent court and town in a different county." (County Ct, Chenango Co)

Robbery (Degrees and Lesser Offenses) (Elements) (Evidence)

Weapons (Firearms)

Witnesses

People v Grice, __ AD3d __, 921 NYS2d 727 (3rd Dept 5/5/2011)

Holding: The evidence was legally insufficient to sustain a first-degree robbery conviction because while the gun was shown to have been operable, there was no evidence that the recovered ammunition was determined to be live, nor was any adequate reason given for not test-firing the ammunition. The evidence does support a conviction of second-degree robbery. The court did not err in admitting into evidence a complaining witness's prior testimony where that accuser had been deported after a mistrial was declared in the defendant's first trial. Federal authorities had indicated before the first trial that the accuser's deportation would not be delayed to allow him to testify, and deportation was carried out before an order for a writ of habeas corpus ad testificandum, timely

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sought by the prosecution to compel the accuser's attendance in court, was executed. (County Ct, Clinton Co)

Fourth Department

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Defenses (Justification) (Notice of Defense)

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

People v Bradley, 83 AD3d 1444, 919 NYS2d 744 (4th Dept 4/1/2011)

Holding: The court erred in refusing to instruct the jury as to posttraumatic stress disorder (PTSD) in relation to the justification defense because the prosecution had sufficient notice to prepare a response to the defense where the defendant served a CPL 250.10 notice indicating her intent to introduce evidence of battered woman syndrome and both the defense and prosecution presented expert testimony on that syndrome and PTSD. However, the error was harmless as the defendant was allowed to present relevant evidence and to argue to the jury regarding both battered woman syndrome and PTSD, there was overwhelming evidence disproving the defense, and there was no reasonable probability of a different verdict had the court properly instructed the jury. (County Ct, Monroe Co)

Article 78 Proceedings

Sex Offenses (Sex Offender Registration Act)

People v Fleming, 83 AD3d 1462, 919 NYS2d 920 (4th Dept 4/1/2011)

Holding: The defendant's appeal from the court's order determining that he is a level one sex offender must be dismissed to the extent that it challenges the Board of Examiners of Sex Offenders' initial determination that the defendant was convicted of an offense (under the Uniform Court of Military Justice) that requires him to register as a sex offender in New York because that finding must be challenged through a CPLR article 78 proceeding against the Board. (County Ct, Cayuga Co)

Counsel (Competence/Effective Assistance/Adequacy) (Standby and Substitute Counsel)

Sentencing (Presence of Defendant and/or Counsel)

People v LaCroce, 83 AD3d 1388, 919 NYS2d 728 (4th Dept 4/1/2011)

Holding: The court did not abuse its discretion in refusing to adjourn the defendant's sentencing so that he could appear with the assistant public defender who represented him before and at the plea proceeding where another public defender represented him at sentencing, that attorney and the court answered the questions the defendant wanted to ask his original attorney, and the record does not indicate that the defendant was dissatisfied with the answers or still wanted to talk to his original attorney prior to sentencing. Additionally, the record did not indicate that the second attorney failed to represent the defendant in a competent and professional manner or that she was not familiar enough with the case and the defendant to provide meaningful representation. And the defendant was sentenced in accordance with the plea agreement. (County Ct, Jefferson Co)

Evidence (Sufficiency)

Homicide (Murder [Degrees and Lesser Offenses])

People v Little, 83 AD3d 1389, 919 NYS2d 702 (4th Dept 4/1/2011)

Holding: The defendant's depraved indifference second-degree murder conviction is not supported by legally sufficient evidence where it is undisputed that the defendant fired one shot at the decedent at close range on a city street around midnight. This scenario does not establish the mens rea of depraved indifference required for a Penal Law 125.25(2) conviction. Defense counsel's motion for a trial order of dismissal at the close of the prosecution's proof essentially anticipated the change in the law governing depraved indifference cases that started with *People v Hafeez* (100 NY2d 253) and culminated with *People v Suarez* (6 NY3d 202) and *People v Feingold* (7 NY3d 288). On direct appeal, the current law of depraved indifference murder will be applied, whether the issue was preserved or it is reviewed, as here where counsel failed to renew the motion after presenting evidence, in the interest of justice. (County Ct, Monroe Co)

Counsel (Conflict of Interest) (Competence/Effective Assistance/Adequacy)

People v McCullough, 83 AD3d 1438, 919 NYS2d 739 (4th Dept 4/1/2011)

Holding: The court erred in failing to conduct an inquiry regarding the defendant's claim that he had a conflict of interest with his attorney. At sentencing, the defendant requested new counsel saying that he had filed a grievance against his attorney, alleging, among other

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things, that counsel failed to investigate certain allegations and did not respond appropriately to the defendant's requests; defense counsel asked the court to assign a new lawyer to investigate the allegations. The court proceeded with sentencing without inquiring about the issues raised by the defendant, and without directing counsel to continue representing the defendant. While no rule requires the court to assign new counsel when the defendant files a grievance against his attorney, the court must ask whether defense counsel can continue to represent the defendant in light of the grievance, which the court here failed to do. The matter must be remitted for the assignment of new counsel and resentencing. (Supreme Ct, Monroe Co)

Instructions to Jury (Cautionary Instructions)

Misconduct (Prosecution)

People v Presha, 83 AD3d 1406, 919 NYS2d 713 (4th Dept 4/1/2011)

Holding: The court erred in failing to issue a limiting instruction both during the final jury charge and when the accuser testified that the defendant physically abused him once before the date of the alleged sex offense, to minimize the prejudicial effect of the evidence. This unpreserved issue is reviewed in the interest of justice, and was not harmless where the verdict depended on the jury's assessment of the credibility of the defendant and the accuser. Because a new trial is ordered, allegations of prosecutorial misconduct, many unpreserved, need not be reviewed. It is noted that the prosecutor: improperly questioned the defendant about collateral matters that tended to impugn his character without being probative of the crime charged; improperly tried to refresh the defendant's recollection when she was actually trying to place the contents of an inadmissible document into evidence; and made comments during summation that appealed to the jury's sympathy and improperly vouched for the accuser's credibility. (County Ct, Monroe Co)

Dissent: Because the defendant did not take advantage of several opportunities to request a limiting instruction or object to the absence of an instruction, the court's error is "a particularly inappropriate ground on which to grant a new trial as a matter of discretion in the interest of justice."

Defense Systems (Assigned Counsel Systems) (New York State Law)

Judges (Powers)

Matter of Smith v Tormey, 83 AD3d 1425, 920 NYS2d 534 (4th Dept 4/1/2011)

Holding: In determining that the County Court had no authority to appoint the petitioner as assigned counsel or to award legal fees, the respondent administrative judge exceeded his authority under 22 NYCRR 127.2(b), which only authorizes him to modify an excess compensation award if the amount awarded is found to be an abuse of discretion. The County Court appointed the petitioner, who was not on the Onondaga County Bar Association Assigned Counsel Program (ACP) panel list, as co-counsel in a high profile, complex murder case. The petitioner was eventually placed on the ACP misdemeanor panel, and, two weeks after a jury verdict, on the felony panel. The ACP denied the petitioner's request for payment because he was not on the list, and the program's executive committee affirmed. The County Court issued an order pursuant to County Law 722-b granting fees in excess of the statutory limits and ordered the ACP to pay for services rendered from the time the petitioner was first included on the panel list through the end of the case. Instead of asking the respondent to review the order, the County and the ACP should have filed a CPLR article 78 proceeding against the trial court seeking a writ of prohibition on the ground that the court acted in the absence or in excess of its jurisdiction pursuant to County Law 722. Having failed to do so, they are bound by the trial court's order.

*[**Ed. Note:** Leave to appeal was granted on June 23, 2011 (2011 NY Slip Op 76242).]*

Discovery (Matters Discoverable)

Subpoenas and Subpoenas Duces Tecum (General) (Issuance)

People v Wildrick, 83 AD3d 1455, 920 NYS2d 540 (4th Dept 4/1/2011)

Holding: The court erred in denying the defendant's application for a subpoena duces tecum seeking the accusers' school records where the accusers' mother testified about the accusers' behavior in school and her communications with their teachers and school counselors every day over the two-year period between when the alleged abuse occurred and when the accusers reported it; those records had the potential to impeach the mother's testimony, as well as to reveal relevant and material information. The error cannot be deemed harmless. (County Ct, Ontario Co)

Dissent in Part: The court correctly denied the subpoena application because the defendant did not provide any factual information showing that the school records contained information regarding the claimed changes in the accusers' behavior.

Fourth Department *continued*

Appeals and Writs (Briefs) (Counsel)

Counsel (*Anders* Brief)

People v Ivey, 83 AD3d 1605, 921 NYS2d 595 (4th Dept 4/29/2011)

Holding: The defendant's appellate counsel filed a brief pursuant to *People v Crawford* (71 AD2d 38) and asked to be relieved as counsel, claiming no nonfrivolous issues existed. A review of the record shows that, prior to sentencing, the defendant moved to withdraw his plea, claiming that the plea was coerced; a nonfrivolous issue exists as to whether the court erred in denying the motion without a hearing. Motion granted and new counsel to be assigned to brief this issue and any other issues that counsel may find. (County Ct, Monroe Co)

Appeals and Writs (Prosecution, Appeals By)

Sentencing (Youthful Offenders)

People v Jason L., 83 AD3d 1560, 921 NYS2d 603 (4th Dept 4/29/2011)

Holding: Because the prosecution's claim that the defendant's sentence is invalid as a matter of law is based solely on its argument that the court abused its discretion in granting the defendant youthful offender status, the appeal must be dismissed; CPL 450.30(2) does not authorize appeal from a youthful offender finding. (County Ct, Livingston Co)

Accomplices (Principal)

Evidence (Weight)

People v Lamar, 83 AD3d 1546, 921 NYS2d 757 (4th Dept 4/29/2011)

Holding: The verdict is against the weight of the evidence where the evidence supported two equally strong inferences that the defendant acted as the principal and that the codefendant acted as the principal and the court refused to instruct the jury on accessorial liability, giving only instructions that cast the defendant as the principal. Since there was no evidence making either inference stronger than the other, the jury improperly gave more weight to the inference that the defendant acted as the principal. (County Ct, Orleans Co)

Evidence (Circumstantial Evidence) (Sufficiency)

Grand Jury

People v Mercer, 83 AD3d 1526, 921 NYS2d 447 (4th Dept 4/29/2011)

Holding: The court erred in dismissing the indictment charging first-degree robbery where legally sufficient evidence was proffered to the grand jury regarding the identity of the robber, including that: a man stole items from a store and brandished a knife at employees while fleeing; using the robbery report and the description of the perpetrator, the police found the defendant near the store shortly after the robbery and found a knife nearby; and a store employee identified the knife as the one used in the robbery. While store employees never identified the defendant as the perpetrator, the circumstantial evidence viewed as a whole was sufficient to support an inference that the defendant was the perpetrator and that the employees and the police had testified about the same person. (County Ct, Erie Co)

Juveniles (Neglect) (Parental Rights)

Matter of Thor C., 83 AD3d 1585, 921 NYS2d 588 (4th Dept 4/29/2011)

Holding: The court violated the respondent mother's due process rights by refusing to allow her to testify during the fact-finding phase of the neglect proceeding based on its prior order finding that the mother neglected her son's siblings. The son was not a subject of the prior neglect proceeding; therefore, the court should have given the mother an opportunity to be heard in response to the new evidence presented by the petitioner. (Family Ct, Cattaraugus Co)

Misconduct (Prosecution)

Witnesses (Credibility) (Cross Examination)

People v Agostini, __ AD3d __, 922 NYS2d 724 (4th Dept 5/6/2011)

Holding: The prosecution's cross-examination of the defendant's wife regarding her prior work as an exotic dancer was improper because such employment does not constitute a prior bad act and the questions were not otherwise relevant to the case. However, this questioning did not deprive the defendant of a fair trial as the misconduct was not pervasive and was limited in nature. (County Ct, Onondaga Co)

Arraignment

Jurisdiction

People v Attea, 84 AD3d 1700, 921 NYS2d 777 (4th Dept 5/6/2011)

Fourth Department *continued*

Holding: The court had jurisdiction to accept the defendant's plea to a superior court information (SCI) charging him with third-degree criminal possession of stolen property where the court, properly exercising its jurisdiction to sit as a local court, arraigned him on a second felony complaint charging third-degree possession and held him for grand jury action before accepting the plea. The court had the authority to arraign the defendant on the complaint even though he was not actually arrested on that complaint. The second felony complaint was filed because the original complaint charged fourth-degree criminal possession and the court did not have jurisdiction to accept a guilty plea to an SCI charging a higher offense. (County Ct, Erie Co)

Dissent: Superior court judges do not have unlimited discretion to decide when to sit as a local criminal court. Because the defendant was not arrested on the second felony complaint, the court did not have the authority to arraign him on that complaint or accept his plea to the SCI.

Endangering the Welfare of a Child

Jurisdiction

Statute of Limitations (Computation of Period)

People v Bernardo, 84 AD3d 1717, 923 NYS2d 812 (4th Dept 5/6/2011)

Holding: Because an element of the offense occurred in New York, the court erred in dismissing the indictment for lack of geographical jurisdiction where the defendant was charged with endangering the welfare of a child, as a continuing offense, for allegedly abusing her son in New York and then in Massachusetts by subjecting him to unnecessary medical treatments. The grand jury evidence showed that unnecessary biopsies and x-rays were conducted on the child in New York and that at least one tube of black paint was implanted in the child in New York before he received treatment in Massachusetts for blood poisoning. The indictment is not time-barred because the two-year statute of limitations did not commence until the last act of abuse occurred. (Supreme Ct, Onondaga Co)

Juveniles (Parental Rights)

Matter of Colinia D., 84 AD3d 1755, 922 NYS2d 831 (4th Dept 5/6/2011)

Holding: The court properly dismissed the petitions seeking to terminate the father's parental rights because the petitioner failed to show that it made affirmative, repeated, and meaningful efforts to help the father overcome the particular problems he faced raising his now 18-year-old child who has severe Down syndrome. The hearing evidence did not show that the petitioner tailored its efforts to fit the needs of the father and child so that the father could provide for his child's future. (Family Ct, Erie Co)

Parole (Revocation)

Sentencing (Post-Release Supervision)

Matter of Jacoby v Evans, 84 AD3d 1731, 922 NYS2d 708 (4th Dept 5/6/2011)

Holding: The administrative law judge incorrectly found that, based on the petitioner's violation of his post-release supervision (PRS), the petitioner was a category I violator under 9 NYCRR 8005.20. That rule does not apply to those serving a PRS term; the administrative law judge should have applied Penal Law 70.45(1). However, the time assessment of 18 months is affirmed because it is shorter than the balance of the petitioner's PRS term, the maximum time assessment he could have received under Penal Law 70.45(1). The hearing evidence was sufficient to establish that the petitioner violated his PRS by possessing a Sai, a martial arts weapon that was found in his apartment, regardless of whether it had been put there by his former girlfriend, as the petitioner knew it was there and did not take any steps to return it to her or otherwise dispose of it.

Guilty Pleas (Vacatur)

Juries and Jury Trials (Deliberation)

People v Kalinowski, 84 AD3d 1739, 922 NYS2d 704 (4th Dept 5/6/2011)

Holding: A new trial on the second-degree murder charge is required because the court failed to comply with CPL 330.10 when it received the first jury note asking for clarification on the path of the bullet into the decedent's head. The note could fairly be interpreted as requesting a readback of the medical examiner's testimony and not just a request for the autopsy report or another exhibit, which the court could have responded to without reassembling the parties under the terms of the stipulation entered into by the parties and the court at the beginning of jury deliberations. The court did not read the note into the record, respond to it on the record, or give the attorneys notice of it and an opportunity to be heard as to the appropriate response. Because the court committed a mode of proceedings error, preservation is not required. The defendant's plea to second-degree conspiracy does not need to be vacated where the defendant was told prior to sentencing on the conspiracy charge that the conviction would stand even if she successfully appealed the murder conviction and defense counsel acknowledged that the

Fourth Department *continued*

defendant was aware of this before entering her guilty plea. (County Ct, Erie Co)

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

Homicide (Murder [Degrees and Lesser Offenses] [Intent])

People v Mox, 84 AD3d 1723, 922 NYS2d 686 (4th Dept 5/6/2011)

Holding: The defendant's plea to first-degree manslaughter must be vacated because the court failed to make a sufficient inquiry to ensure that the defendant understood the charge and that the plea was knowingly, voluntarily, and intelligently entered after the plea allocation suggested that the defendant was in a psychotic state at the time of the crime, due to his unmedicated schizoaffective disorder, thereby negating the element of intent. Preservation, by moving to withdraw the plea or to vacate the conviction, is not required under these circumstances. (County Ct, Monroe Co)

Dissent: The court's inquiry was sufficient where, after making the statements regarding his mental state, the defendant and his attorney unequivocally waived the defense of not guilty by reason of mental disease or defect, the plea was entered after the parties' experts reached different conclusions as to whether the defendant understood the nature and quality of his acts, and discussions between the parties and the court culminated in the plea offer to first-degree manslaughter committed under extreme emotional disturbance.

Accusatory Instruments (Sufficiency)

Contempt (Elements)

People v Roach, 84 AD3d 1734, 922 NYS2d 717 (4th Dept 5/6/2011)

Holding: The misdemeanor information charging the defendant with criminal contempt for violating a temporary order of protection was not jurisdictionally deficient because it alleged that the defendant knew of the order and because the attached supporting deposition from the accuser, stating that the "defendant 'd[id] not seem to care about the order of protection' as he drove by" her house, implied that the defendant had knowledge of the order. Although it may be preferable for the prosecution to allege in the information how the defendant was made aware of the order of protection, it was unnecessary in this case because the factual allegations gave the defendant sufficient notice to prepare a defense and were adequately detailed to prevent him from being tried twice for the same offense. (Supreme Ct, Monroe Co)

Dissent: The preprinted language of the information form includes a conclusory allegation that the defendant knew of the order, the officer failed to give any factual basis to support this conclusion, and "it is plausible to conclude on this record that what the [accuser] perceived as a lack of care with respect to the temporary order of protection was in fact a lack of knowledge thereof." ⚖

Defender News *(continued from page 6)*

transferred to OMH custody are housed in Oneida County at the Central New York Psychiatric Center, Oneida County has been providing prosecution and defense services in these cases without state reimbursement. This law corrects this reimbursement disparity.

NYSDA advocated for passage of the DMV fee and county reimbursement legislation, providing memoranda of support. The Association also monitored and/or commented on a number of other bills proposed during the legislative session.

New Edition of A Jailhouse Lawyer's Manual *Released*

The Columbia Human Rights Law Review has issued the 9th edition of *A Jailhouse Lawyer's Manual* (JLM), a valuable resource on the legal rights of prisoners, including appeals and post-conviction proceedings, right to adequate medical care, rights of incarcerated parents, religious freedom, and early release and parole. The new edition is available for free online at www3.law.columbia.edu/hrlr/ejlm.php. Prisoners and family members can purchase a hard copy of the JLM for $30 ($5 extra for the immigration and consular access supplement). Others may purchase it for $100 ($105 for first-class shipping); the supplement costs $20 ($22 for first class shipping). Order forms are available at www3.law.columbia.edu/hrlr/jlm/order-form.pdf.

New Rules for Prison Visitation Proposed

The Department of Corrections and Community Supervision (DOCCS) has proposed new rules governing all prisoner visits, including inmate legal visits. Attorneys who visit clients in DOCCS facilities should pay careful attention to these proposed rules, the text of which is available on the DOCCS website at www.docs.state.ny.us/Rules_Regs/index.html#visitrules. NYSDA is reviewing the proposal. Comments on the proposed rules may be sent to Maureen E. Boll, Deputy Commissioner and Counsel by email (Rules@docs.state.ny) or by mail to 1220 Washington Avenue, Building 2–State Campus, Albany NY 12206-2050, and will be accepted until July 30, 2011. ⚖

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