NEW YORK STATE DEFENDERS ASSOCIATION

Public Defense Backup Center
REPORT

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Defender News

Year's End Sees Domestic Violence Developments

New Reporting Requirements for Misdemeanor Domestic Violence Convictions

As noted in Al O'Connor's Legislative Review in the last issue of the *REPORT*, Chapter 258 of the Laws of 2011 amended the Criminal Procedure Law by adding sections 370.15 and 380.97. The new law establishes a procedure to determine whether a defendant convicted of certain misdemeanor crimes is related to the complainant in a way that requires the conviction to be reported to the Division of Criminal Justice Services (DCJS) for inclusion in the National Instant Background Check System. The law is intended to enhance enforcement of federal laws prohibiting gun purchases and possession by persons convicted of crimes of domestic violence. At the end of November, the Office of Court Administration (OCA) issued a memo summarizing the new law. (www.law.com, 12/13/2011.)

The law applies to four misdemeanors (or attempts to commit them): third-degree assault (Penal Law 120.00); second-degree menacing (Penal Law 120.14); obstruction of breathing or blood circulation (Penal Law 121.11); and forcible touching (Penal Law 130.52). For reporting of a conviction to be required, a defendant must be related to the complainant as provided in 18 USC 921(a)(33)(A)(ii). The specified relationships are: a current or former spouse, parent or guardian; having a child in common; current or former cohabitation as spouse, parent or guardian; or a person similarly situated to a spouse, parent or guardian. The law applies to crimes committed on or after November 29, 2011.

Within 45 days of arraignment, the prosecution must serve the defendant and file with the court a notice that includes the alleged victim's name and the nature of the alleged relationship. Upon conviction of a designated misdemeanor, the court must advise the defendant of the right to a hearing as to the alleged relationship between the defendant and the complainant, the right to an adjournment to prepare for the hearing, and that the defendant's name will be sent to DCJS if the allegation in the notice is sustained. If the defendant admits or stipulates to the relationship, or it is established by the prosecution at the hearing, the court must issue a written determination. Attached to the OCA memo are a model CPL 370.15 notice and a model order.

A December 13th *New York Law Journal* article referred to the potential impact of the new requirements on the court system's workload; the law may also affect the workload of defense attorneys. Public defense programs may want to consider letting their funders know about the possible effects of the new law on staffing, investigation, and other resource needs.

Law Enforcement Database of Domestic Violence Incidents

Two weeks after the domestic violence reporting law took effect, DCJS issued a press release announcing the availability of a Domestic Incident Report Repository, which will be available to police, sheriffs, prosecutors, and parole and probation officers throughout the state. (www.criminaljustice.ny.gov/pio/press_releases/2011-12-14_pressrelease.html.) The database includes domestic incident reports filed by agencies in all non-New York City counties and will allow users to search by victim or offender name, incident address, or document number. As the press release notes, "[w]hen an individual is arrested in connection with a domestic violence incident, the Erie County Crime Analysis Center's staff creates a comprehensive packet for prosecutors that detail the individual's criminal history and criminal incident reports, and uses the Repository to access DIRs connected to that individual." A form domestic incident report and instructions are

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available on DCJS's website at www.criminaljustice.ny.gov/ojis/dir_training.htm.

Forensics Issues Heat Up

This issue of the *REPORT* recounts, as have past issues, examples of forensic "science" being questioned or outright debunked. From developments affecting arson cases to still more on the Nassau County Crime Lab, what follows should be news of interest to defense lawyers.

Potentially Troubling Decision Issued on Arson

In a short unanimous opinion written by Judge Jones, the Court of Appeals ruled last month that established case law on expert testimony applies in arson cases. The court rejected language from a 1914 case (*see People v Grutz,* 212 NY 72, 82) barring expert conclusions that a fire was intentionally set. The new decision cited approvingly the general rule that a trial court must weigh the potential evidentiary value of expert testimony against possible undue prejudice or "interference with the province of the jury." Noting that expert testimony by its nature is an authorized encroachment into the jury's province and should not be excluded on that basis alone, the Court repeated a precedential caution that such testimony not be barred merely because it invaded the jury's province to some degree. While acknowledging that in the case before it there was much other evidence indicating that the fires in question were set intentionally, making expert testimony unnecessary, the court found any error in admitting such testimony harmless. *See People v Rivers,* 2011 NY Slip Op 08455 (11/22/2011) [summary on p. 13].

Rivers is silent about increasing challenges to the scientific soundness of arson experts' testimony. Given the developments below, an appellate decision that could be read to support a broadening of cases in which it is proper to admit expert opinion that arson has occurred is very troubling.

Willingham Execution Based on Arson Evidence Continues to Reverberate

The likelihood that Texas wrongfully executed a man in 2004 for a 1991 fire that killed his children continues to fuel national debate and inquiry into the validity of arson investigation techniques. Just a few months ago, Paul C. Giannelli of Case Western Reserve University School of Law posted a paper, "The Execution of Cameron Todd Willingham: Junk Science, an Innocent Man, and the Politics of Death," at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1917454. The Innocence Project has highlighted Willingham's case, as well as that of Ernest Ray Willis, who was exonerated after evidence very similar to that used against Willingham was debunked. (www.innocenceproject.org/Content/Improving_forensics_to_end_injustice.php.) And just this month, news coverage of a California man's effort's to prove his actual innocence of arson by disproving the expert evidence in his case referenced Willingham. (www.latimes.com/news/local/la-me-fatal-fire-20111126,0,3192738.story.)

Science Requires Experiments, Not On the Job Training

For years, arson investigators learned their alleged science from other arson investigators. Training was done on the job, and few doubts about the field's validity were raised. As noted last month on NPR's All Things Considered: "In recent years, fire researchers and the changes to fire investigations have shattered dozens of arson myths as the science behind arson forensics continues to evolve." (www.npr.org/2011/11/19/142546979/arson-forensics-sets-old-fire-myths-ablaze.) The report cited an article published online a few weeks earlier that described, among other things, experiments at the Eastern Kentucky University fire lab, one of several sites at which fires are set, resulting conditions evaluated, and, not uncommonly, long-held beliefs about fire scene evidence are up-ended. (www.claimsjournal.com/news/national/2011/09/13/191137.htm.)

New Science Won't Cure All Old Problems, May Create New Ones

Today, the Innocence Project and many others are working to overturn old arson convictions based on out-

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moded, "junk" science. It can be an uphill battle when officials continue to insist on the accuracy of verdicts in cases where experts testified erroneously. *See, e.g.*, www.innocenceproject.org/Content/Experts_Question_More_Massachusetts_Arson_Convictions.php. (This tendency is not limited to arson cases; the *REPORT* noted over a decade ago, as to cases where DNA results cast doubt on the guilt of convicted persons, that "Prosecutors May Reject or Embrace Innocence Investigations." [*REPORT*, Vol. XV, No. 10 (Dec. 2000), p. 2.].)

In new cases, meanwhile, defense lawyers face new difficulties. Even if arson expertise, or any other type of formerly discredited forensic evidence, is found to be rehabilitated by the advent of rigorous testing of the methods used by experts, counsel must be ready and able to challenge expert testimony offered in individual cases. Questions that may be pertinent include: If arson investigation protocol requires that a fire be reenacted to test the hypothesis of how it started (*see* www.claimsjournal.com/news/national/2011/09/13/191137.htm), did the prosecution's expert perform such a reenactment? Was similar testing done to validate other types of expert testimony? Law enforcement may object that resources are not available for arson reenactments or other testing of proposed opinion testimony on causation. Efforts to address that problem were recently announced; a grant has been awarded for creation of a new Forensic Science Technology Center of Excellence for the National Institute of Justice. (www.newswise.com/articles/rti-international-to-lead-new-forensic-science-technology-center-of-excellence-for-national-institute-of-justice.)

Put more generally, the above questions are: what are the current standards of practice in the area of forensic evidence being offered and did the prosecution's expert follow current protocols? The more concrete question for counsel is, how can the expert's actions and resulting testimony most effectively be challenged?

Should counsel ask for a new *Frye* hearing to determine if the current practice is accepted in the relevant community? An article entitled "The *'Frye'* Standard and Evidentiary Entropy" was recently published in the *New York Law Journal.* Among the problems with *Frye* noted in the article was that it is limited to "novel" theories of expertise. Therefore, in cases such as *Matter of Bethany F.* (85 AD3d 1588 [4th Dept 6/10/2011]), summarized in the last issue of the *REPORT,* courts may find that no hearing is required on a now-outmoded method of interviewing alleged child abuse victims. (www.law.com, 11/3/2011.)

Rather than challenging a particular expert's testimony under *Frye,* then, should the defense focus on the individual expert's failure to adhere to current accepted practice in an already "accepted" field? Or is the field indeed, novel? New forensic methods and technologies seem to arise quickly; even if some fade away, others take their place in the list of potential evidence against clients. Here are just a few examples:

- Whether or not evidence based on neuroscience has a legitimate bearing on any individual's responsibility for a crime, or on the veracity of witnesses' testimony, it is being offered by one side or the other in court. *See, e.g.,* www.nytimes.com/2011/11/01/science/telling-the-story-of-the-brains-cacophony-of-competing-voices.html?_r=1#h.
- The FBI is rolling out the Next Generation Identification system, a system for searching a database of photos in an effort to "match" someone's photo to one that has a name attached to it. (http://news.discovery.com/tech/fbi-face-recognition-system-111010.html.)
- Carnegie Mellon University's Heinz College has developed an application designed to quickly track down the identity of a person in a photograph through use of facial recognition software to search the ever-growing amount of personal information on the Internet. (www.theatlantic.com/technology/archive/2011/09/cloud-powered-facial-recognition-is-terrifying/245867/.)
- At the Henry C. Lee College of Criminal Justice and Forensic Sciences, a national databank is being set up that is said to allow law enforcement to track marijuana DNA. (www.msnbc.msn.com/id/44644719/ns/technology_and_science-science/.)
- Across the Atlantic, a company has developed a prototype handheld apparatus that it claims will double as a fingerprint scanner and drug testing device. (http://news.cnet.com/8301-27083_3-57322416-247/doing-drugs-beware-this-fingerprinting-device/.)

Resources are Available

Regardless of whether or not a *Frye* hearing is sought when the prosecution will offer testimony from an expert, defense counsel will need the assistance of an expert to determine whether and how to challenge that expert's testimony. Resources on the NYSDA website may help in locating one. (www.nysda.org/ExpertDatabase.html.) The Backup Center also has materials to support public defense counsel's requests for funds for expert services. Reference resources are also available on the Web. Among them is John Louis Larsen & Daniel K. Harris, "Crime Scene Forensic Evidence Collection Guidelines For Defense Attorneys," *The Champion* (October 2011). (www.nacdl.org/champion.aspx?id=22916.)

IG Weighs in on Nassau Crime Lab

The State Inspector General (IG) has issued a report on the now-closed Nassau County crime lab that has already been subjected to intense criticism and scrutiny. The IG found that a failure of oversight at both state and local levels contributed to significant and pervasive problems at the Nassau County Police Department Forensic Evidence Bureau. A press release announcing the report noted that the IG "has recommended a broader review of every area at the lab to ensure the reliability of the laboratory's conclusions." (www.ig.state.ny.us/reports/reports.html.)

The New York State Commission on Forensic Science was among the entities criticized by the IG. On December 8, the Commission defeated, by a 9-3 vote, a motion to adopt the IG's recommendations. (www.newsday.com, 12/8/2011.) Nassau County Executive Edward Mangano has announced the creation of a forensic advisory board to oversee the restored Nassau County crime lab. (www.nassaucountyny.gov/agencies/CountyExecutive/NewsRelease/2011/12-15-2011.htm.) The board will be chaired by Michael Balboni, former New York Deputy Secretary for Public Safety, and its membership includes a former FBI senior executive, an anthropology professor, a former county deputy medical examiner, and the county's chief assistant district attorney. Two local bar associations and others have criticized Mangano for not appointing a representative from the criminal defense community to the board. (www.newsday.com, 12/15/2011; www.courtroomstrategy.com/2011/12/nassau-crime-lab-board-missing-defense-perspective/.)

NYSDA Training Includes Dealing with Scientific Evidence

In November, NYSDA presented a two-day regional training event in Brockport, NY, co-sponsored by the Monroe County Public Defender's Office. Entitled Defending Against Snitches & Using and Challenging Scientific Evidence, the training covered the following topics: shaken baby syndrome; eyewitness identification; and cell phone tracking.

NYSDA also offered a Continuing Legal Education program in Poughkeepsie on October 28. This half-day trainer gave lawyers unable to attend the annual conference in July an opportunity to learn about some of the subjects that were discussed there, as well as other timely issues.

NYSDA's Criminal Defense Immigration Project (CDIP) Director, Joanne Macri, presented a session in Poughkeepsie on Preparing for the "ICE" Age: Effective Assistance of Counsel Post-*Padilla* Immigration. Other CDIP presentations were made at the Westchester County Legal Aid Society, Queens Law Associates, and in Lake Placid.

In addition to designing and presenting trainings directly, NYSDA co-sponsored the Criminal Track Program presented by several Oneida County legal entities (Bar Association, Assigned Counsel Program, Public Defender-Criminal Division, and District Attorney) this fall, and a training in Albany by the Federal Defender and Federal Court Bar Association.

Chief Defender Convening Held in December

Chief Defender Convenings bring defense leaders from across the state together to learn about and discuss developments affecting their offices. On December 2, 2011, William Leahy, Director of the Indigent Legal Services (ILS) Office, addressed chiefs and discussed the distribution of state funding and other actions by the Office and the ILS Board.

Client Advisory Board Manual Completed, Local Training Begun

The NYSDA Client Advisory Board, an entity required by the Association's by-laws to advise the Executive Director, has completed work on "How to Develop a Public Defense Client Advisory Board: A Manual for Defender Leaders." The manual is a major step in a project to encourage and assist Chief Defenders to create and use local client advisory boards. A draft of the manual was used during an on-site training at the Genesee County Public Defender's Office. The final manual has been made available to all Chief Defenders; in 2012, the Client Advisory Board hopes to meet with a number of Chiefs to assist them in creating client advisory boards that will keep them in touch with news and perceptions in the client community that affect the work of public defense lawyers.

NYSDA representatives who attended the National Legal Aid and Defender Association's Centennial Conference in Washington DC, including Jay Coleman, Chair of NYSDA's Client Advisory Board, announced the manual's availability. Chief Defenders or others interested in the manual should contact the Backup Center.

Participating in Plea Bargaining Alone Does Not Amount to a Speedy Trial Waiver

In a brief decision, the Court of Appeals ruled that a defendant's participation in plea negotiations over a period of several months did not constitute a waiver of his speedy trial rights under CPL 30.30 where there was no

(continued on page 31)

Conferences & Seminars

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

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

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

Sponsor: National Association of Criminal Defense Lawyers & California Attorneys for Criminal Justice
Theme: Making Sense of Science V: Forensic Science & The Law
Dates: March 23–24, 2012
Place: Las Vegas, NV
Contact: NACDL: tel (202) 872-8600 x632 (Viviana Sejas); fax (202) 872-8690; email vsejas@nacdl.org; website www.nacdl.org/meetings

Sponsor: National Association of Criminal Defense Lawyers
Theme: 2012 Spring Meeting & Seminar: The Battle of the Experts: Beating Theirs, Winning With Yours
Dates: April 25–28, 2012
Place: Cleveland, OH
Contact: NACDL: tel (202) 872-8600 x632 (Viviana Sejas); fax (202) 872-8690; email vsejas@nacdl.org; website www.nacdl.org/meetings

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

Job Opportunities

Equal Justice Works seeks a visionary manager from the public defender community to join us in expanding employment opportunities in indigent defense across the country. Currently, there are 18 Public Defender Corps (PDC) fellows working in the northeast and southeast United States. The PDC is a partnership with the award-winning Southern Public Defender Training Center, a visionary organization dedicated to changing the culture of indigent defense from one which processes individuals quickly through the criminal defense system to one of client-centered representation and zealous advocacy. The manager will be a key leader in improving indigent defense by bringing talented new lawyers into the field. Resumes will be reviewed as they are received. For a full job description and application instructions, visit http://www.equaljusticeworks.org/about/employment#job1. Equal Justice Works is an equal opportunity employer and does not discriminate on the basis of race, color, religion, national origin, gender, age, marital status, personal appearance, sexual orientation, family responsibilities, physical or mental handicap, matriculation, or political affiliation.

King County, Washington seeks a Director for its Office of Public Defense (OPD). The successful candidate will have well-developed leadership skills to fill this highly visible position. The Director, appointed by the King County Executive and confirmed by the Metropolitan King County Council, will be responsible for working collaboratively with a variety of stakeholders, both locally and regionally, on ensuring all eligible clients receive the highest quality, public legal defense representation. Working under the general direction of both the King County Executive and the Director of the Department of Community and Human Services (DCHS), the OPD Director will be the lead advocate and policy voice regarding indigent defense for the County on relevant criminal justice committees, forums, and at all levels and branches of the King County government. The OPD Director participates as a member of the DCHS management team, providing input into strategic planning on equity and social justice issues and strategies to reduce the involvement of vulnerable populations in the criminal justice and other publicly provided systems. King County values its employees, challenges them to continuously improve the way we do business and the services we provide, and to carry out their duties in an ethical manner that earns the public trust. King County also offers excellent working conditions and premium benefits. For a complete job description and application instructions, visit http://www.kingcounty.gov/jobs.aspx. King County is an equal employment opportunity employer. We do not discriminate in hiring or employment on the basis of race, color, religion, sex, national origin, ancestry, age, marital or veteran status, disability, sexual orientation (including gender identity), or any protected status. ⚖

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

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

United States Supreme Court

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

Forensics

Habeas Corpus (Federal)

Homicide (Causation)

Cavazos v Smith, No. 10-1115, 565 US __ (10/31/2011)

Holding: In this federal habeas proceeding, the court of appeals improperly "substituted its judgment for that of a California jury on the question of whether the prosecution's or the defense's expert witnesses more persuasively explained the cause of a death." The court also erred in concluding that the state court decision rejecting a sufficiency of the evidence challenge was objectively unreasonable. The respondent was convicted of assault on a child resulting in death; the prosecution's theory was that the child died of shaken baby syndrome, not sudden infant death syndrome, the initial conclusion of the treating doctors. It is not the job of this Court or the court of appeals to decide whether the respondent is in fact guilty; the jury answered that question and its decision has record support.

Dissent: [Ginsburg, J] "This Court . . . has no law-clarifying role to play. Its summary adjudication seems to me all the more untoward for these reasons: What is now known about shaken baby syndrome (SBS) casts grave doubt on the charge leveled against Smith; and uncontroverted evidence shows that she poses no danger whatever to her family or anyone else in society." "[J]ustice is not served by the Court's exercise of discretion to take up this tragic, fact-bound case."

Confessions (Interrogation) (*Miranda* Advice)

Habeas Corpus (Federal)

Bobby v Dixon, No. 10-1540, 565 US __ (11/7/2011)

Holding: The court of appeals erred in granting the respondent's habeas corpus petition where "it is not clear that the Ohio Supreme Court erred at all, much less erred so transparently that no fairminded jurist could agree with that court's decision . . . ." The three purported errors identified by the court of appeals in this death penalty case relate to interrogations of the respondent and *Miranda* warnings. The respondent's assertion of his *Miranda* rights during a chance encounter with police did not bar the police from questioning him several days later; this Court has never held that an individual may invoke his *Miranda* rights anticipatorily when he is not in custody. And there is no Supreme Court holding suggesting, let alone clearly establishing, "that police may not urge a suspect to confess before another suspect does so . . . ." Finally, the admission of the respondent's second confession to murder was consistent with this Court's precedents where the respondent was given *Miranda* warnings prior to the confession, the police did not use the two-step interrogation technique condemned in *Missouri v Seibert* (542 US 600 [2004]), and there is no evidence of actual coercion. The state court properly suppressed the respondent's first confession to forgery because he was not given *Miranda* warnings, but this Court's precedent did not require suppression of the second confession, given four hours later, after he received *Miranda* warnings and during which time he was transported from the police station to the local jail and back and claimed to have spoken to his lawyer.

Habeas Corpus (Federal)

Witnesses (Confrontation of Witnesses)

Greene v Fisher, No. 10-637, 565 US __ (11/8/2011)

Holding: The phrase "clearly established Federal law" in the Antiterrorism and Effective Death Penalty Act (ADEPA) does not include "decisions of this Court that are announced after the last adjudication of the merits in state court but before the defendant's conviction becomes final." As this Court held in *Cullen v Pinholster* (563 US __ [2011]), ADEPA requires the federal courts to examine "'what a state court knew and did,' and to measure state-court decisions 'against this Court's precedents *as of "the time the state court renders its decision."*'" [Emphasis in original]. Because this Court's confrontation clause decision in

US Supreme Court *continued*

Gray v Maryland (523 US 185 [1998]) was issued nearly three months after the state court decided the petitioner's appeal on the merits, the holding in *Gray* may not be applied in this federal habeas proceeding. "The retroactivity rules that govern federal habeas review on the merits—which include *Teague* [*v Lane*, 489 US 288]—are quite separate from the relitigation bar imposed by AEDPA; neither abrogates or qualifies the other." The petitioner put himself in the unusual posture presented here by foregoing two obvious means of putting his *Gray* claim forward. He failed to seek certiorari after the Pennsylvania Supreme Court dismissed his appeal, which would almost certainly have resulted in a remand in light of the intervening *Gray* opinion, and failed to assert his *Gray* claim in state postconviction proceedings.

New York Court of Appeals

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

Insanity (Civil Commitment)

Matter of Rueda v Charmaine D., 17 NY3d 522, __ NYS2d__ (10/18/2011)

Holding: "[A]n emergency room psychiatrist was 'supervising the treatment of or treating' a patient within the meaning of Mental Hygiene Law § 9.27 (b) (11), and so had standing to seek an involuntary commitment of the patient pursuant to section 9.27," and was not required to use the emergency procedure of Mental Hygiene Law 9.39. Reading the words "treatment" and "treating" broadly, to encompass the relatively brief doctor-patient relationship in an emergency room, better serves the statute's purpose.

Trial (Confrontation of Witnesses)

Witnesses (Confrontation of Witnesses)

People v Porco, 17 NY3d 877, __ NYS2d __ (10/18/2011)

Holding: Any error in admitting testimony at trial that the defendant's severely injured mother nodded affirmatively when police asked if the defendant was her attacker was harmless beyond a reasonable doubt because overwhelming circumstantial evidence showed that the defendant was at his parents' Albany home when his father was killed and his mother injured.

Evidence (Sufficiency)

Forgery (Possession of a Forged Instrument)

People v Rodriguez, 17 NY3d 486, __ NYS2d __ (10/18/2011)

Holding: The evidence was sufficient to support the defendant's second-degree possession of a forged instrument conviction where an accuser had given police contact information and a photograph of a possible suspect, a detective called that person and was told the person was out of town and could not meet with him, the detective later saw the defendant on the street, recognized him from the photograph, and arrested him, and found forged items including a driver's license, non-driver identification card, and green card all bearing the defendant's photograph. The statutorily required intent to defraud, deceive, or injure can be inferred, as the defendant had a motive to assume a false identity because he knew the police were looking for him, his participation in creating the false IDs can be inferred where several of them, found in his possession but separate from his true ID, had his photograph on them and he was wearing a jacket upon arrest that appeared to be the one in the photographs, indicating that the IDs had been recently produced, "and that he retained the intent to defraud at the time of his arrest." There is no requirement in Penal Law 170.25 that a person use or attempt to use the forged instrument or that the contemplated use be imminent.

Rape (Evidence)

People v Rosario, 17 NY3d 501, __ NYS2d __ (10/18/2011)

Holding: The Appellate Division ruled properly in both these sex abuse cases concerning admission of testimony regarding the "prompt outcry" of young accusers. In *Rosario,* the lapse of up to five months between the last instance of alleged abuse and the teen-aged accuser's writing of a note to her boyfriend disclosing the abuse was too long to qualify as prompt outcry, and neither use of the phrase "So the story begins" nor any other part of defense counsel's opening statement can be said to have created a misleading impression justifying the prosecution's use of the note in their direct case. In *Parada,* the court properly admitted testimony that the accuser, who was six or seven during the period of alleged abuse, told a cousin who was a year older about it while it was still occurring; there is no reason to disallow a child accuser's prompt outcry to a peer, and the defendant did not raise that ground at trial. The error in admitting testimony of the accuser's disclosure of the alleged abuse to an aunt after it had ceased was harmless.

Dissent in *Rosario*, Concurrence in *Parada*: [Smith, J] While neither the disclosure to the boyfriend in *Rosario*

NY Court of Appeals *continued*

nor the one to the aunt in *Parada* meet the test for "prompt outcry," the limits of that rule have become obsolete and should be changed to allow the jury to know of any disclosure made by an accuser about the crime before it was reported to authorities.

Civil Practice

Domestic Violence

Evidence (Sufficiency)

Valdez v City of New York, 2011 NY Slip Op 07252 (10/18/2011)

Holding: There is not sufficient evidence to show a special relationship between the City and the plaintiff that would support her claim for damages for the failure to provide police protection adequate to prevent her estranged boyfriend from shooting her. She testified that she called police to report that her boyfriend, against whom she had an order of protection, had threatened to kill her; she was told by an officer she knew that police would arrest him immediately and that she should return home, which she did; and she was shot there by her boyfriend after she went into the apartment building hallway the next evening. It was unreasonable to rely on the promise of immediate arrest, which the plaintiff acknowledged by saying she had not called the officer back because she assumed he was out looking for her boyfriend. She also expected from prior experience that she would receive a call if an arrest had been made, yet she relaxed her vigilance when no such call had been received. Whether the City could have avoided liability under the governmental function immunity defense need not be addressed.

Dissent: [Lippman, CJ] Based on police assurances that she should return home rather than take refuge at her grandmother's, the plaintiff did so, and was not in a position to visually confirm that the promised arrest had been made, distinguishing this case from *Cuffy v City of New York* (69 NY2d 255). To say that an order of protection meant to foster reliance cannot in fact be relied on where a specific promise has been made to enforce it subverts the utility of such order.

Dissent: [Jones, J] It cannot be said that the plaintiff's reliance on the police promises was unjustifiable as a matter of law; "to conclude that this case involves unjustifiable reliance may be to remove claims based upon a 'special duty' from possibility."

Accusatory Instruments (Duplicitous and/or Multiplicitous Counts)

Due Process (Fair Trial)

Motions (Adjournment)

People v Becoats, 2011 NY Slip Op 07306 (10/20/2011)

Holding: Defendant Wright is entitled to a new trial because the court prevented the jury from hearing that one of two eyewitnesses to the attack told police she had overheard an earlier conversation about attacking the decedent and that Wright was not present but another key witness was. If the testimony was not admissible against codefendant Becoats, means such as careful limiting of the scope of questioning may have allowed Wright to benefit from the testimony without prejudice to Becoats.

The court did not abuse its discretion by refusing an eve-of-trial adjournment for the defense to obtain the testimony of a federal prisoner whose identity was disclosed to defendant Becoats' lawyer by the prosecution 20 days before trial, via regular mail sent two days after the witness had been interviewed, where the defense did not act with reasonable diligence but allowed almost two weeks to elapse during which an order requiring the witness's presence could have been sought. Prejudice from the absence of the witness is not clear on this record; defendant Becoats may seek to demonstrate it via a CPL article 440 motion.

The claim that the robbery of a gun and the robbery of sneakers from the decedent should have been charged separately rather than in a single count with the phrase "and/or" to avoid duplicitousness was not preserved and is not a mode of proceedings error. The Appellate Division's finding that the evidence was insufficient to show that the defendants intended to permanently deprive the decedent of his gun, which was used to beat him and was left at the scene, is assumed to be correct. The circumstantial evidence that the defendants took the decedent's sneakers after beating him was sufficient, and the argument that it was insufficient to show the defendants used force for the purpose of stealing the shoes is unpreserved. The jury is assumed to have convicted the defendants of robbery under the theory that had factual support.

Dissent in *Becoats*: [Lippman, CJ] The trial court abused its discretion in denying defendant Becoat's motion for an adjournment where the witness would have testified that he saw one of the prosecution witnesses, and not Becoats, participate in the crimes. "Inasmuch as there was no more compelling ground identified for the denial at issue and that denial undoubtedly abridged basic rights, leaving substantial doubt as to the reliability of the verdict, defendant Becoats should, like his co-defendant, be afforded a new trial."

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

NY Court of Appeals *continued*

People v Grant, 2011 NY Slip Op 07304 (10/20/2011)

Holding: The court properly reduced the charges of first-degree robbery under Penal Law 160.15(3) to third-degree robbery under Penal Law 160.05 because a written note to a bank teller saying the robber had a gun and would shoot unless his directions were followed was not, by itself, sufficient evidence that the robber actually possessed a dangerous instrument at the time. "To hold otherwise would blur the distinction created in the carefully calibrated statutory scheme between the lesser included offense of third-degree robbery . . . and the aggravated charge of first-degree robbery . . . ."

Dissent: [Graffeo, J] A grand jury can rationally draw the inference that *Pena*'s (*People v Pena* [50 NY2d 400]) actual possession requirement is met by a defendant's own admissions claiming to possess and threatening to use an identified type of weapon to harm a person who does not comply with the defendant's demands. The *Pena* requirement is a departure from the plain language of the statute; this is a further step away.

Appeals and Writs (Judgments and Orders Appealable)

Trial (Verdicts [Repugnant Verdicts])

Witnesses (Experts)

People v Muhammad, 17 NY3d 532, __ NYS2d __ (10/20/2011)

Holding: The jury verdicts convicting the defendants in these two cases of assault but acquitting them of possession of a weapon were not legally repugnant. Based on the jury instructions, viewed without regard to the actual evidence presented, it was theoretically possible for the juries to acquit the defendants of weapon possession but convict them of assault because the weapon counts required an element of physically possessing weapons or exercising dominion or control over them while the assault counts required injury of victims by means of weapons, which could be accomplished without possessing those weapons. "Jurors are allowed to compromise, make mistakes, be confused or even extend mercy when rendering their verdicts . . . ," which is why repugnancy must be analyzed from a theoretical perspective. Verdicts like those here are not uncommon, and this court unanimously recommends counsel request and judges give added instructions, such as explaining that the mens rea element can be met if a defendant intended to use the weapon unlawfully at any point in its possession. Where verdicts appear factually repugnant, a court may not be required to accept them, and may point out apparent inconsistencies to the jury, give further appropriate instructions, and ask for continuing deliberations, but failure to do so would not be an abuse of discretion as a matter of law.

Where the accuser testified he had known defendant Muhammad for over a decade before the shooting and recognized him at the time of the offense, and the defense sought to characterize the identification as a lie, it was not an abuse of discretion to disallow expert testimony on eyewitness identification.

In *Hill*, the trial court found that the defendant consented to a search of his home and did not have a reasonable expectation of privacy in the vestibule but did not find exigent circumstances, so that issue was not decided adversely to the defendant and was therefore improperly invoked by the Appellate Division. The matter is remitted for consideration of suppression issues properly raised but not determined by the appellate court.

Dissent: [Ciparick, J] The jury verdicts were clearly repugnant under *People v Tucker* (55 NY2d 1). The rule set out by the majority is unworkable and inconsistent with *Tucker*.

Identification (Expert Testimony) (Eyewitnesses)

People v Santiago, 2011 NY Slip Op 07303 (10/20/2011)

Holding: The court erred in excluding much of the proposed expert testimony on eyewitness recognition memory where, at the time of the court's ruling on the defense motion in limine, the case turned on a single eyewitness's identification of the defendant; the court should have ruled that testimony on several aspects of eyewitness identification were admissible, including the lack of correlation between a witness's confidence and his/her accuracy, confidence malleability, and cross-ethnic identification, and should have given more consideration to issues of exposure time, lineup fairness, the forgetting curve, and simultaneous versus sequential line-ups. Because mistaken eyewitness identification is a factor in many wrongful convictions, courts are encouraged to admit expert testimony that can educate a jury about circumstances in which an eyewitness is more likely to make a mistake. Furthermore, denial of the renewed defense request to call an expert was not justified by corroborating testimony where that testimony was questionable due to the fact that the attacker's face had been partially hidden, one witness's identification could have been tainted by seeing a photograph of the defendant in a newspaper, and other factors, and a second witness had seen the artist's sketch done from the accuser's potentially unreliable description, bringing into play the issue of unconscious transference.

Grand Jury (Procedure)

NY Court of Appeals *continued*

People v Credle, 17 NY3d 556, __ NYS2d __ (10/25/2011)

Holding: The motion court erred in ruling that, where the grand jury had indicted a codefendant but failed to reach agreement on indicting or dismissing charges against the defendant, the prosecution, without seeking judicial permission, had properly resubmitted the charges against the defendant to a second grand jury, which indicted him. As the purpose of CPL 190.75 and its predecessor was to reign in the practice of prosecutors re-presenting the same charges to different grand juries "until they hit upon an apparently receptive panel," case law such as *People v Wilkins* (68 NY2d 269) makes clear that in some circumstances a prosecutor's withdrawal of a case from the grand jury is tantamount to a dismissal so that judicial permission is required to re-present the case to another panel.

Dissent: [Pigott, J] The prosecution's withdrawal of the case from a deadlocked jury was perfectly logical and not the functional equivalent of a dismissal, so no judicial permission was needed before re-presenting the case. The courts below properly relied on *People v Aarons* (2 NY3d 547).

Grand Jury (Procedure)

People v Davis, 2011 NY Slip Op 07474 (10/25/2011)

Holding: The prosecution's withdrawal of the case from an initial grand jury due to witness unavailability did not constitute the functional equivalent of a dismissal under *People v Wilkins* (68 NY2d 269) as to defendant Davis, who had not yet been arrested and was not a named target, particularly given that the prosecution told the grand jury that evidence was being presented only as to defendant McIntosh. The court below erred in focusing on the legal sufficiency of the evidence that was presented to the first grand jury as to defendant McIntosh, rather than on the extent to which the grand jury had considered the evidence and the charge before the prosecution withdrew the case, where the prosecution had said the case would be continuing and had at least one witness left to testify at the end of the grand jury's term. The prosecution was not required to seek judicial permission before re-presenting the case to another grand jury.

Concurrence in *Davis*, Dissent in *McIntosh*: [Lippman, CJ] In the rare case where the first grand jury's consideration of a matter is terminated not by its own statutorily authorized action, but by the unilateral action of the prosecutor, "court supervision is necessary to assure that the action of the prosecutor has not impermissibly stripped the grand jury of its independent prerogative to judge whether a matter should be the subject of an indictment."

Aliens (Deportation)

Appeals and Writs

People v Ventura, 2011 NY Slip Op 07475 (10/25/2011)

Holding: The Appellate Division abused its discretion in dismissing the defendants' direct appeals on the basis that they had been involuntarily deported before decisions were rendered. Unlike cases in which appeals have been dismissed due to the voluntary absconding of the defendants from the jurisdiction, the defendants' absence from the country "lacked the scornful or contemptuous traits that compel courts to dismiss appeals filed by those who elude criminal proceedings." Deported defendants "have a greater need to avail themselves of the appellate process in light of the tremendous ramifications of deportation," and precedents dealing with discretionary appeals can be distinguished from these cases involving direct appeals. The perceived inability to obey the mandate of the court is not implicated as neither affirmance nor outright dismissal of the convictions would require the continued legal participation of the defendants; in other jurisdictions, defendants who continue appeals through counsel are not deemed unavailable.

Dissent in *Ventura*, Concurrence in *Gardner*: [Read, J] The reasons given by the majority for its holding do not furnish a basis for instituting a categorical rule that strips the Appellate Division of its statutory discretion to dismiss a criminal appeal "when the defendant happens to be an involuntarily deported noncitizen." Where the appellate court has no information that an appeal's outcome would affect the defendant's immigration status, it should be able to dismiss the appeal of someone involuntarily physically absent from the jurisdiction. And the majority's distinction between permissive appeals, as in the recent case of *People v Diaz* (7 NY3d 831), and direct appeals is without statutory support. No other state takes the approach adopted by the majority.

Juries and Jury Trials (Challenges)

People v Guay, 2011 NY Slip Op 08178 (11/15/2011)

Holding: The court did not abuse its discretion in dismissing a hearing-impaired prospective juror under the specific facts here, including the prospective juror's difficulty in hearing the precise questions asked during voir dire, body language perceived by the court as indicating the prospective juror was having trouble hearing despite his assurance that in the front row he was fine, the fact that the accuser here was a child and therefore more likely to be soft-spoken, and the lack of any accommodations being suggested to assuage these concerns. While it

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would have been better for the court to take steps sua sponte "to inquire about the prospective juror's auditory limitations and discuss possible accommodation," reversal is not required.

Appeals and Writs (Waiver of Right to Appeal)

People v Qoshja, 2011 NY Slip Op 08180 (11/15/2011)

Holding: The decision and order below leave unclear whether the affirmance was on the merits or predicated on the waiver of appeal and the case is remitted to the Appellate Division for clarification and, if appropriate, consideration of the merits. As noted in *People v Callahan* (80 NY2d 273, 285), when the Appellate Division considers a case that includes a bargained-for waiver of appeal, specifying whether the disposition is based on the waiver or the merits of the defendant's claim facilitates further review and minimizes unnecessary remittals.

Evidence (Sufficiency)

Identification (Suggestive Procedures)

People v Delamota, 2011 NY Slip Op 08225 (11/17/2011)

Holding: While the limited rule of *People v Ledwon* (153 NY 10) does not require reversal based on insufficiency of the evidence where the accuser consistently told the jury that the defendant robbed him but his testimony conflicted with testimony by a police detective of the accuser's pretrial statements, an unduly suggestive pretrial identification procedure does require a new trial preceded by an independent source hearing. At the initial *Wade* hearing, the court was troubled by the role of the accuser's son as interpreter at the photo array where the defendant was identified, but concluded that suppression was not required because the son did not know the defendant. The revelation at trial that the son had known the defendant for a long time strengthened the other factors militating in favor of suppression, including the detective's reliance on neighborhood gossip based on information provided by the son in adding the defendant's photograph to the second photo array, which led to the lineup; the detective either knew or should have known that the son was familiar with the defendant even though the son denied it; there was no apparent impediment to having a neutral interpreter rather than the son at the array; and the detective could not be reasonably sure of the accuracy of the son's translation.

Dissent: [Lippman, CJ] The remedy provided by the majority is inappropriate to the nature of the deficiency of proof where the evidence that the defendant was the robber is fundamentally flawed. Where all evidence of guilt comes from a single witness whose statements point to both guilt and innocence, the jury has no basis other than speculation to choose between the two.

Instructions to Jury

Robbery (Elements)

People v Medina, 2011 NY Slip Op 08224 (11/17/2011)

Holding: By expressing "concern that the jury might not understand the meaning of the phrase '[a]ppropriated for himself'" and requesting "a particular charge as to intent with regard to that phrase," defense counsel preserved for review the court's failure to instruct on "deprive" and "appropriate" as these terms relate to larcenous intent. Where the jury sent out notes during its extended deliberations indicating difficulty in understanding "intent" and in resolving whether the defendant, a paid DEA informant involved in a home invasion robbery, had the requisite intent, "the court's failure to define 'appropriate' and/or 'deprive' was not harmless."

Assault (Evidence)

People v Bueno, 2011 NY Slip Op 08443 (11/21/2011)

Holding: The prosecution made out a prima facie case of the defendant's intent to prevent "an emergency medical technician (EMT) 'from performing a lawful duty' when he caused an EMT to suffer physical injury (*see* Penal Law § 120.05 [3])" by presenting evidence that the defendant attacked someone he had reason to know was an on-duty EMT. Two EMTs had rendered aid to a woman with an injured hand, left that apartment, and returned to their ambulance when the defendant attacked the EMT preparing to enter the driver's side of the ambulance.

Dissent: [Lippman, CJ] "[I]t is not enough to determine whether the victim was engaged in a lawful duty at the time of the assault." The evidence showed only that the EMT "was subjected to an entirely unexplained, senseless assault," which did not meet the statutory requirement as to intent.

Robbery (Elements) (Evidence)

Weapons (Possession)

People v Hall, 2011 NY Slip Op 08445 (11/21/2011)

Holding: The prosecution failed to show that the stun gun used to temporarily incapacitate a store manager during a robbery was a dangerous weapon within the meaning of the Penal Law, so the defendants' convictions for first-degree robbery and fourth-degree possession of a weapon cannot stand. While the stun gun may well be a "dangerous instrument," the prosecution wholly failed to

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prove it where "[t]he stun gun was not recovered, and no expert or other witness was called to explain to the jury what a stun gun is, or what it can do." The accuser's description of "pain, a burning sensation and temporary incapacitation" did not suffice.

Identification (Eyewitness)

People v Thomas, 2011 NY Slip Op 08448 (11/21/2011)

Holding: Allowing the accuser to testify at the defendant's trial that he had identified a codefendant at a show-up on the night he was robbed was not error; *People v Monroe* (40 NY2d 1096) "does not stand for the proposition that the admission of evidence of a witness's identification of a codefendant not on trial is improper," and "[t]o the extent that some Appellate Division decisions suggest otherwise, they are in error." The accuser's identification of the codefendant was relevant to the accuser's ability to identify his attackers and whether conditions at the scene were conducive to identifying the perpetrators.

Dissent: [Ciparick, J] While evidence of a witness's identification of an accomplice not on trial may sometimes be permissible, it was more prejudicial than probative in this one-witness case where the offense occurred in a brief period of time, there was disagreement about how well the scene was lit, the accuser's description of one robber differed from the defendant's appearance, and testimony conflicted as to whether or not the codefendant, who was found in possession of the accuser's cell phone, was arrested in the company of the defendant.

Federal Law

Preemption

People v First American Corp., 2011 NY Slip Op 08450 (11/22/2011)

Holding: Federal law does not preclude the New York Attorney General from pursuing injunctive and monetary relief and civil penalties against the defendants for violations of the state's Executive Law, Consumer Protection Act, General Business Law, and the common law. The defendants' claim that federal law (the Home Owners' Loan Act and the Financial Institutions Reform, Recovery and Enforcement Act and concomitant regulations) preempts state action with regard to real estate appraisals is rejected.

Dissent: [Read, J] Federal courts considering the comparable question have found preemption and should not be second-guessed.

Due Process (Fair Trial) (Prisoners)

Evidence (Sufficiency)

People v Clyde, 2011 NY Slip Op 08453 (11/22/2011)

Holding: The court never placed findings on the record showing that the defendant, a state prisoner charged with attacking two civilian prison employees, required restraints, and while the defendant's history would have supported a decision to have him shackled, the record does not show if he was shackled as a matter of routine or on case-specific bases; however, the harmless error rule applies, and the evidence of guilt was overwhelming and there is no possibility he would have been acquitted but for the shackles.

The error in admitting over objection the testimony of physicians that injuries suffered by the accusers met the definition of "physical injury" was also harmless.

The prosecution's appeal contending that the court improperly dismissed the attempted rape charge on sufficiency grounds, the only issue reached as to that count, has merit. The Appellate Division's order affirming the dismissal is reversed and the matter is remitted for sentencing on the conviction; the defendant may then appeal any issues available to him.

Dissent: [Lippman, CJ] Where the evidence was not overwhelming as to the top count, it is "impossible to prove beyond a reasonable doubt that the defendant's appearance before the jury constantly clad in officially provided implements subversive of the presumption of innocence as well as naturally and eloquently indicative of the wearer's anti-social propensities, could not have contributed to the verdict." The question is "whether there is any reasonable possibility that the error *contributed* to the verdict." [Emphasis in original.]

Due Process (Fair Trial) (Prisoners)

People v Cruz, 2011 NY Slip Op 08454 (11/22/2011)

Holding: County court's failure to place any findings on the record particular to the defendant to justify shackling him during trial, and the placing of bunting on the defense table but not the prosecution table making it impossible to say the jury did not see the shackles or infer their presence, require reversal. The court's stated reasons for the shackles would apply to most repeat offenders, and its final statement indicated that it relied on security personnel, not its own independent determination, as to the necessity for the restraints.

Concurrence in the Result: [Lippman, CJ] There being no indication that the jury could see the leg irons on the defendant, federal constitutional case law does not apply; the question is what should be done on appeal where a defendant has been made to wear restraints without adequate justification but there is no record indication

NY Court of Appeals *continued*

the jury observed those restraints. In *People v Buchanan* (13 NY3d 1, 4) a conviction was summarily reversed. Use of restraints always risks their discovery and should not be routine. Restraints may also burden other rights, including the right to be present at all material trial stages and the right to testify, and definite consequences should attach to the failure to make requisite findings justifying the use of restraints.

Guilty Pleas (Vacatur)

Sentencing (Post-Release Supervision)

People v McAlpin, 2011 NY Slip Op 08456 (11/22/2011)

Holding: Where the court advised the defendant of consequences that might flow from violation of the plea agreement under which he pleaded guilty in exchange for being adjudicated a youthful offender and being placed on probation, but the court referenced only a prison term and not the possibility of post-release supervision (PRS), giving an inaccurate impression about sentencing options in the case of a violation, reversal and vacatur of the plea following the defendant's sentencing to a determinate prison term and PRS was appropriate. Where PRS was only mentioned moments before the sentence was imposed, the preservation requirement of *People v Murray* (15 NY3d 725) is inapplicable. The court's comment when the prison and PRS sentence was imposed, in which defense counsel concurred, that the defendant had been advised about the sentence, did not conclusively establish such advice was given.

Dissent: [Pigott, J] The majority does not address the important issues in this case, *ie*, whether a challenge under *People v Catu* (4 NY3d 242) can be raised on appeal when no objection was made at sentencing to the imposition of PRS and counsel agreed that the defendant had been advised of it at the time of the plea, and whether imposition of PRS violates *Catu* if the defendant was not told at the plea proceedings that PRS would be part of a sentence for violating the plea agreement.

Arson (Expert Evidence)

Evidence (Prejudicial) (Uncharged Crimes)

Witnesses (Experts)

People v Rivers, 2011 NY Slip Op 08455 (11/22/2011)

Holding: While certain prosecution questions clearly violated the court's *Molineux* rulings, the prejudice, if any, was minimal as the court considered each of the defendant's motions for mistrial on those grounds and concluded that none was required and, in some instances, called for there to be no more statements on improper topics, such as "stereotyping certain individuals just because they are members of the Nation of Islam and/or Muslims" and gave limiting instructions.

New York's established case law on the admissibility and limits of expert testimony applies in arson cases; the dicta in *People v Grutz* (212 NY 72, 82) that expert conclusions about whether a fire was intentionally set should not be admitted no longer applies; expert testimony would not usually be admissible where the cause of a fire is not in question; and any error in admitting expert testimony here that ruled out accidental and natural causes of the fires and concluded one fire was intentionally set was harmless where other trial evidence established that the fires were intentionally set, there was overwhelming evidence of guilt, and there was no significant probability that the verdict would have been different without the expert testimony.

First Department

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Assault (Evidence)

Evidence (Weight)

Weapons (Possession)

People v Thomas, 87 AD3d 867, 929 NYS2d 135 (1st Dept 9/1/2011)

Holding: The defendant's convictions of first- and second-degree assault, based on the theory that he caused serious physical injury or physical injury to the complainants in the course of and in furtherance of his commission of second-degree weapon possession, must be vacated as they were against the weight of the evidence. The trial evidence showed that the defendant fired several shots for no known reason, wounding three people on the street whom the defendant did not know, and walked away. There was no evidence that the defendant shot them to keep them from disarming him or that his actions otherwise furthered his commission of second-degree criminal possession of a weapon. (Supreme Ct, New York Co)

Freedom of Information

Police

Matter of Bellamy v New York City Police Department, 87 AD3d 874, 930 NYS2d 178 (1st Dept 9/8/2011)

First Department *continued*

Holding: The court erred in ordering the respondent to disclose unredacted police reports containing the names and statements of witnesses who spoke to the police during the investigation into a gang-related homicide, but did not testify at the petitioner's murder trial, because they are exempt from disclosure under the Freedom of Information Law as disclosure possibly would endanger the life or safety of those witnesses and the privacy exemption applies since the documents mention people who did not provide information relied upon during the investigation. "Because these individuals never became testifying witnesses, neither respondent, nor anyone else, would know about them otherwise. It is therefore possible that the lives of persons who spoke with police could be endangered from the release of identifying information. After learning the names, all one would need is an Internet connection to determine where they live and work." It is irrelevant that the petitioner sought the documents in connection to his effort to get a new trial. (Supreme Ct, New York Co)

Homicide (Negligent Homicide)

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

People v Rios, 87 AD3d 916, 930 NYS2d 180 (1st Dept 9/22/2011)

Holding: The court properly granted the motion to set aside the jury verdict convicting the defendants of criminally negligent homicide and second-degree reckless endangerment in connection with a fire in a building owned by one defendant and managed by another defendant because the prosecution proceeded under the theory that the manager knew of an illegal and unsafe partition created by a tenant and did not remove it, but they failed to present any evidence in support of that theory. The inferences the prosecution relied upon are impermissibly speculative and the building superintendent, called by the prosecution, testified that he knew about the partition, but did not tell the manager. "Even if the jury discredited that testimony, such disbelief would not supply affirmative proof of the contrary proposition." (Supreme Ct, Bronx Co)

Burglary (Elements) (Evidence)

People v Smith, 87 AD3d 920, 929 NYS2d 248 (1st Dept 9/22/2011)

Holding: The defendant's conviction for third-degree burglary must be vacated because there was insufficient evidence to satisfy the unlawful entry element where the defendant only went into the common areas of the apartment building; there was no evidence that the general public was excluded from those areas or that no trespassing signs were posted; the building did not have a doorman, buzzer, or intercom system; and the front door was always unlocked. The defendant's lack of a legitimate reason for being in the building does not establish unlawful entry. (Supreme Ct, New York Co)

Assault (Serious Physical Injury)

People v Rosado, 88 AD3d 454, 930 NYS2d 10 (1st Dept 10/4/2011)

Holding: The evidence is legally insufficient to establish that the accuser's broken nose or three chipped teeth constituted serious physical injury. After successful reconstructive surgery, neither the functioning of the accuser's nose nor his general health was impaired, and the post-surgery indentation in his nose met the definition of disfigurement, but did not amount to serious disfigurement. That the plastic material used to replace the chipped enamel on the three teeth needed to be replaced about every 10 years and it was possible for the teeth to darken or the nerves to heal improperly did not constitute serious disfigurement or impairment to the accuser's health or the functioning of his teeth. "[W]hile a likelihood of adverse effects on appearance, functionality, or overall health may qualify as a serious physical injury, the mere possibility of such consequences does not." (Supreme Ct, New York Co)

Counsel (Right to Counsel) (Standby and Substitute Counsel)

People v Bowman, 88 AD3d 583, 931 NYS2d 63 (1st Dept 10/25/2011)

Holding: The court did not deprive the defendant of his right to retain counsel of his choice by not conducting a minimal inquiry into the merits of the allegations in the defendant's pro se motion for the assignment of new counsel. Even though a brief and direct inquiry into why the defendant was dissatisfied with his attorney would likely have obviated this appeal, the court's failure doesn't warrant reversal. The defendant did not make specific factual allegations that indicated a serious conflict with his lawyer that would necessitate an inquiry, and, after stating that the motion was a delay tactic, the court gave the defendant an opportunity to speak and he provided no other reasons for his dissatisfaction with his lawyer. The judge who took the defendant's plea later the same morning did not abuse her discretion by refusing to reconsider the issue as there was no change in circumstances warranting such reconsideration. (Supreme Ct, New York Co)

First Department *continued*

Constitutional Law

Sex Offenses (Sex Offender Registration Act)

People v Rodriguez, 88 AD3d 600, 931 NYS2d 60 (1st Dept 10/25/2011)

Holding: The court erred in dismissing count two of the indictment that charged the defendant with failure to verify his sex offender registration information in violation of Correction Law 168-f(3), which requires level III offenders to verify their information in person every 90 days. The statute contemplates that the judicial determination of the defendant's risk level will be issued before the defendant is released, which did not occur in this case, but the date of the determination is not specified as the commencement date of the 90-day period. The prosecution alleged that the defendant's violation occurred well after the determination, the defendant had personally verified his information every 90 days on at least five occasions, and the defendant failed to report within 90 days of the date when he last reported. There is no need to examine the prior reporting periods or the commencement date of the reporting requirement. "The date on which the initial 90-day period commenced presented a purely academic question, since defendant failed to personally verify his address for a subsequent, clearly defined 90-day period." The statute was not unconstitutionally vague as it is sufficiently definite to provide fair notice of what conduct is forbidden and provided explicit standards for enforcement. (Supreme Ct, New York Co)

Narcotics (Penalties)

Sentencing (Resentencing)

People v Scarborough, 88 AD3d 585, 931 NYS2d 495 (1st Dept 10/25/2011)

Holding: The court erred in denying the defendant's motion for resentencing under CPL 440.46 where the defendant was eligible for consideration, even though he had been released from custody on his drug conviction but reincarcerated for a parole violation, and the defendant was not brought to court on the date the court issued its decision, the record does not show that he was given an opportunity to be heard at prior court appearances on the motion, and there appears to be a disputed issue regarding the defendant's prison disciplinary record. (Supreme Ct, Bronx Co)

Juveniles (Hearings) (Visitation)

Matter of Santiago v Halbal, 88 AD3d 616, 932 NYS2d 32 (1st Dept 10/27/2011)

Holding: The court improperly modified the prior order, which granted unsupervised visitation to the father, without conducting an evidentiary hearing. Although the judge has presided over this matter for many years and is familiar with the parents and children, there are factual disputes and allegations of parental alienation that necessitate a full hearing on whether changes to visitation are in the children's best interests. (Family Ct, Bronx Co)

Second Department

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

Juveniles (Right to Counsel)

Matter of Stephen Daniel A., 87 AD3d 735, 930 NYS2d 14 (2nd Dept 8/30/2011)

Holding: The court failed to ensure that the respondent mother in this Family Court Act article 10 proceeding had knowingly, intelligently, and voluntarily waived her constitutional and statutory right to counsel where the court failed to conduct a searching inquiry to determine that the mother understood the dangers and disadvantages of proceeding without counsel after she had been allowed to change counsel several times and was provided with appointed counsel. (Family Ct, Queens Co)

Juveniles (Visitation)

Matter of Cisse v Graham, 87 AD3d 1008, 929 NYS2d 628 (2nd Dept 9/13/2011)

Holding: The appeal from a temporary modification of visitation to which the mother objected is dismissed as academic where the events associated with the modification, attendance by the subject child at the rehearsal and ceremony for her first communion at the father's church, have occurred. (Family Ct, Queens Co)

Dissent: The central dispute here is the child's religious upbringing, and a determination on appeal will set a standard for the type of conduct that goes beyond mere exposure of the child to the religious traditions of either parent. As the father has substantial visitation, there is a likelihood the issue will be repeated. The modification went beyond the agreement that the child "be exposed to the Catholic traditions and Muslim traditions" and interfered with the mother's rights as custodial parent.

Second Department *continued*

Family Court

Juveniles (Hearings) (Jurisdiction)

Matter of Gale v Gale, 87 AD3d 1011, 929 NYS2d 495 (2nd Dept 9/13/2011)

Holding: The parties did not stipulate to reference, nor was there an order of reference, "designating the referee who heard and determined the petitions at issue here . . . ." The father did not implicitly consent to reference of the matter by participating in the proceeding without saying he wanted the matter tried before a judge. A stipulation executed by the parties in connection with a previous petition expired when that matter was completed. As the referee had no jurisdiction to consider the father's custody and visitation petitions and the mother's custody modification petition, the referee's order determining the petitions is reversed. (Family Ct, Suffolk Co)

Counsel (Competence/Effective Assistance/Adequacy)

People v Gavalo, 87 AD3d 1014, 929 NYS2d 321 (2nd Dept 9/13/2011)

Holding: Under the particular circumstances of the defendant's case, he did not receive meaningful representation where his attorney intentionally elicited unduly prejudicial and otherwise inadmissible testimony about an incident in which the defendant allegedly broke into a prosecution witness's home and shot at the witness. This improperly suggested that the defendant, on trial for charges that involved an alleged shooting, had a propensity for gun violence. A new trial is required. (Supreme Ct, Queens Co)

Assault (Evidence) (Lesser Included Offenses)

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

People v Heidgen, 87 AD3d 1016, 930 NYS2d 199 (2nd Dept 9/13/2011)

Holding: The evidence was legally sufficient to support a finding that the defendant had the mens rea required for depraved indifference murder and first-degree assault, despite his high level of blood alcohol, where he caused deaths and injuries by colliding with the decedents' limo after driving his pickup at high speed the wrong way on a highway for about two and a half miles while appearing to track rather than seek to avoid oncoming vehicles. Unlike the driver in *People v Valencia* (14 NY3d 927), the defendant did not appear oblivious to oncoming traffic, but rather chose to continue without regard for the grave danger to himself and others. The jury here had before it information that the defendant told police after the crash that he was "in a 'self-destructive mode' and depressed about the state of his life at the time," a statement he later acknowledged by claiming it was an attempt to make him seem worthy of leniency. This demonstrated willingness to lie. (Supreme Ct, Nassau Co)

Dissent in Part, Concurrence in Part: The murder convictions should be reduced to second-degree manslaughter, and the first-degree assault convictions to second-degree because the evidence as to the defendant's mens rea of wanton disregard for human life was legally insufficient and certainly against the weight of the evidence.

Civil Practice

Defense Systems (New York State Law [Statutes])

Hirschfeld v Horton, 88 AD3d 401, 929 NYS2d 599 (2nd Dept 9/13/2011)

Holding: Supreme Court should have granted summary judgment declaring that the Assigned Counsel Plan created under County Law article 18-B was not required to compensate Mental Hygiene Legal Service (MHLS), which had been awarded attorney fees after being assigned to represent allegedly incapacitated individuals in guardianship proceedings under Mental Hygiene Law article 81. (Supreme Ct, Queens Co)

Identification (Photographs)

Trial (Mistrial)

People v Oliver, 87 AD3d 1035, 929 NYS2d 182 (2nd Dept 9/13/2011)

Holding: Reversal is not required where the court failed to sua sponte declare a mistrial based on the accuser's photo array identification of another person with the same name as the defendant's, the pro se defendant rejected his legal advisor's advice to move for a mistrial or to strike the accuser's in-court identification of him, the jury knew of the photo array defect and misidentification, and other evidence tied the defendant to the charged offense. (Supreme Ct, Nassau Co)

Dissent: When it became clear that the accuser had identified a photograph of someone who did not look like the defendant, injustice was apparent and should have been corrected.

Sentencing (Orders of Protection)

People v Vasquez, 87 AD3d 1042, 929 NYS2d 180 (2nd Dept 9/13/2011)

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Holding: The order of protection issued at sentencing failed to take the defendant's jail time credits into account and exceeded the maximum limit of CPL 530.13(4). The order is vacated as to the expiration date, and a new determination of its duration must be made. (Supreme Ct, Queens Co)

Counsel (Competence/Effective Assistance/Adequacy)

Evidence (Prejudicial) (Uncharged Crimes)

People v Miller, 87 AD3d 1075, 929 NYS2d 328 (2nd Dept 9/20/2011)

Holding: No legitimate trial strategy existed for defense counsel's failure to object to the prejudicial nature of testimony implying that the defendant committed sex offenses against two of his girlfriend's nieces and prosecutorial questioning of his girlfriend about whether her daughter's dream that the defendant had raped her was "a 'horrible coincidence.'" Nor did counsel request a limiting instruction with regard to the testimony, or object to the prosecutor's inflammatory remarks about this testimony in summation. "[T]he inclusion of this testimony into the jury's calculus deprived the defendant of a fair trial by suggesting that he had a criminal propensity for committing crimes of sexual abuse against young children and distracting the jury from evaluating the evidence relating to the crimes charged." Because there must be a new trial, the defendant's other contentions need not be reached. (County Ct, Dutchess Co)

Impeachment (Of Defendant [Including *Sandoval*])

Self-Incrimination (Conduct and Silence) (Scope)

People v Tucker, 87 AD3d 1077, 929 NYS2d 631 (2nd Dept 9/20/2011)

Holding: The prosecution's use at trial of the defendant's post-arrest silence was reversible error, unpreserved but reviewed in the interest of justice. The defendant responded "'no'" when asked if he was willing to answer questions after his arrest following a shooting incident. He was then told by a police officer that he would be charged with two counts of attempted murder, and replied that he had been present but did not shoot anyone. After his trial testimony that a man named Mustafa was the shooter, the prosecutor repeatedly asked whether the defendant had told police after his arrest about Mustafa. The prosecution's contention that the defendant did not remain silent after invoking his right is rejected; adverse inferences may not be drawn "'from the fact that a defendant has maintained an effective silence, even if something less than total' . . . ." [Emphasis omitted.] The defendant's failure to make a more complete exculpatory statement after his conclusory denial of involvement may be attributable to his knowledge that he was not obliged to speak. His trial testimony was not inconsistent with his pretrial statement; he was impeached not with an inconsistent statement but with his silence. (Supreme Ct, Richmond Co)

Dissent: This case falls within the holding in *People v Savage* (50 NY2d 673 *cert den* 449 US 1016) that neither due process nor the right against self-incrimination bars impeachment with a failure to tell police, when speaking to them after *Miranda* warnings, about exculpatory circumstances not mentioned until trial.

Juveniles (Parental Rights) (Permanent Neglect)

Matter of Christopher John B., 87 AD3d 1133, 930 NYS2d 224 (2nd Dept 9/27/2011)

Holding: The court properly dismissed with prejudice a petition to terminate parental rights where the petitioner failed to prove by clear and convincing evidence that it made diligent efforts to strengthen and encourage the parental relationship. The petitioner's goal of having each parent acknowledge their responsibility for the alleged exposure of their children to some type of sexual activity by relatives was unreasonable given that the parents denied involvement in or knowledge of the specifics of the alleged abuse. Furthermore, the goal was never clearly communicated to the parents, no therapy specifically addressing that issue was every provided, and the petitioner failed to exercise due diligence to address the allegations or arrange appropriate child/parent contact, "and improperly kept the children in the care of foster parents who undermined efforts towards reunification." The parents visited whenever allowed to and substantially complied with all terms set by the petitioner, maintained contact with caseworkers, attended therapy when it was made available, and maintained adequate housing. (Family Ct, Nassau Co)

Juveniles (Support Proceedings)

Matter of DeVries v DeVries, 87 AD3d 1139, 929 NYS2d 879 (2nd Dept 9/27/2011)

Holding: The support magistrate did not err in granting, without a hearing and in the absence of an objection, the mother's in-court motion for voluntary withdrawal of a cost of living adjustment (COLA) proposed by the Support Collection Unit to increase the amount of child support to be paid by the father. The father's later objection, based on a claim that the mother lacked authority to withdraw the COLA without a motion made on notice and that the support amount would have been reduced after a hearing, was properly rejected by the Family Court

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because the argument as to the mother's authority was unpreserved and the court had the authority to grant the mother's motion in the absence of special circumstances, particular prejudice to the father, or other improper consequences. The father retained a right to seek a downward modification at any time. (Family Ct, Orange Co)

Defenses (Justification)

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

People v Locicero, 87 AD3d 1163, 930 NYS2d 58 (2nd Dept 9/27/2011)

Holding: The defendant's conviction of first-degree assault must be reversed where the testimony showed that he was involved in two altercations with the accuser and several of the accuser's friends; the accuser, with one companion, pursued the defendant and his cousin after the first fight, struck the defendant and pushed him against a car, beginning a new fight; the defendant stabbed the accuser before fleeing and asserted a justification defense at trial, saying he feared for his life based on threats by several of the accuser's companions and the brandishing of a knife by one; and the court, over objection, failed to instruct the jury to consider the actions of the accuser's companions in determining whether a reasonable person in the defendant's position would have had the same beliefs. There was not overwhelming evidence that the defendant's actions were not justified. (Supreme Ct, Kings Co)

Juveniles (Custody)

Matter of Parliman v Labriola, 87 AD3d 1144, 930 NYS2d 29 (2nd Dept 9/27/2011)

Holding: The court erred by granting the father's petition to modify the existing custody order where the petition was based mainly on the child having come to live with the father after the mother lost her job and home, but the mother testified that at the time of the hearing she had obtained employment and housing and the court based its award of sole physical and legal custody to the father solely on the acrimony existing between the parties. The record, which was made in a single day with only the testimony of the parents and no findings as to credibility, is not complete enough for a determination on appeal and two years have passed. The matter must be remitted for a new hearing and determination, for which the court must appoint an independent forensic expert to examine and evaluate the parents and the child, and hold an in camera hearing with the child to learn his wishes. (Family Ct, Orange Co)

Accomplices

Assault (Evidence)

Evidence (Sufficiency)

People v Smith, 87 AD3d 1169, 930 NYS2d 234 (2nd Dept 9/27/2011)

Holding: The defendant's convictions of second-degree assault and fourth-degree possession of a weapon must be reversed and the indictment dismissed for insufficient evidence where the prosecution relied on a theory of accomplice liability to hold the defendant criminally liable for the codefendant's use of a knife but failed to introduce evidence that the defendant knew the codefendant had a knife, much less shared any intent of the codefendant to use the knife to inflict physical injury on the accuser. (County Ct, Westchester Co)

Admissions (Interrogation) (*Miranda* Advice) (Spontaneous Declaration)

People v Tavares-Nunez, 87 AD3d 1171, 930 NYS2d 589 (2nd Dept 9/27/2011)

Holding: Contrary to the prosecution's contention, the defendant was in police custody at the time of his inculpatory statement where a detective, after being informed by a witness that the defendant had oral sexual conduct with an incapacitated nursing home resident, went to the defendant's home, told the defendant he needed to speak with him but it would be inappropriate to talk in the defendant's home, said he needed to talk to the defendant in the detective's office, responded to the defendant's inquiry about the subject matter by saying the detective was a member of the Special Victims Squad and wanted to discuss an incident at the defendant's workplace, drove the defendant to the station while saying they would not talk in the car, put the defendant in an interview room where he was left while the detective gathered paperwork, and upon returning to the room replied to the defendant's further inquiry about what was to be discussed by saying it was an incident at work that had caused the defendant to have to leave early. As it cannot be said that the defendant's apologetic, inculpatory statement was self-generated rather than the result of an interrogative environment, it cannot be found to be a spontaneous utterance. The court improvidently exercised its discretion in preventing defense counsel from cross-examining the detective about whether the defendant had been free to leave when the statement was made, as the subjective intention of a police officer is relevant insofar as that intention may have been conveyed to the

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defendant. However, these errors were harmless. (Supreme Ct, Queens Co)

Appeals and Writs (Jurisdiction)

Article 78 Proceedings

Applegate v Heath, 88 AD3d 699, 930 NYS2d 882 (2nd Dept 10/4/2011)

Holding: While there was evidence supporting the hearing officer's determination that the petitioner/plaintiff violated prison disciplinary rules, and the partial denial of the petitioner/plaintiff's inmate grievance regarding handling of his legal mail was not arbitrary and capricious, so that those determinations are confirmed in this CPLR article 78 proceeding, his request for a declaratory judgment that Directive 4421 (7 NYCRR 721.2[b][1]) is unconstitutional was not a matter that could be properly transferred to this court under CPLR 7804(g). The matter must be remanded for a determination of that issue. (Supreme Ct, Westchester Co)

Admissions (Interrogation) (Voluntariness)

Article 78 Proceedings

Ethics (Prosecution)

Motions (Suppression)

Matter of Brown v Blumenfeld, __ AD3d __, 930 NYS2d 610 (2nd Dept 10/4/2011)

Holding: Prohibition, sought in this CPLR article 78 proceeding brought by the District Attorney to stop the trial judge in an ongoing criminal matter from considering the report of an ethics expert and ruling on whether assistant district attorneys violated ethical rules in taking a suspect's videotaped statement, does not lie. The issue arose when the defendant in the criminal case sought to suppress evidence secured as a result of an interrogation pursuant to the District Attorney's Queens Central Booking Interview Program; the prosecutor contended that in deciding the motion to suppress, the court should be limited to determining the voluntariness of the defendant's statement and that violation of an ethical rule was not grounds to suppress. Whether or not any appeal would be available to the prosecutor to challenge any eventual adverse trial court ruling on the suppression motion can only be determined after such ruling, when the prosecution will know what evidence will be available to them. (Supreme Ct, Queens Co)

Forfeiture

Correnti v Suffolk County Dist. Attorney, 88 AD3d 633, 930 NYS2d 624 (2nd Dept 10/4/2011)

Holding: The court erred in making determinations about personal property, including files stored on CDs, seized during execution of a search warrant, without first examining the property in camera to determine whether or not some or all is in fact contraband that should be destroyed, as the prosecutor contends. The order denying the motion to enjoin destruction of the property and granting the motion for leave to destroy it is reversed and the matter remanded for inspection of the property and a new determination. (Supreme Ct, Suffolk Co)

Family Court (Family Offenses)

Juveniles (Custody)

Matter of Jablonsky-Urso v Urso, 88 AD3d 711, 930 NYS2d 243 (2nd Dept 10/4/2011)

Holding: The court properly dismissed the mother's petition for custody on the basis that New York is not the child's home state but "erred in refusing to exercise temporary emergency jurisdiction over the family offense petition" and summarily dismissing it upon finding the allegations in it insufficient. The matter must be reversed for a fact-finding hearing and determination of the petition with respect to those allegations. (Family Ct, Suffolk Co)

Juveniles (Custody) (Jurisdiction)

Matter of Knight v Morgan, 88 AD3d 713, 930 NYS2d 625 (2nd Dept 10/4/2011)

Holding: The court correctly found it lacked exclusive continuing jurisdiction where, after an order of custody on consent issued in August 2009 awarding joint legal custody, with primary residential custody to the father, the child moved to California with the father, where the child was diagnosed with emotional and mental health problems. However, the court had jurisdiction to hear the mother's December 2009 cross-petition to modify the prior order pursuant to Domestic Relations Law 76-a to give her sole custody, claiming the father had falsely accused her of abusing the child, where New York had been the child's home state within the six months immediately preceding and the mother continued to reside here. The matter must be remitted for further proceedings. (Family Ct, Queens Co)

Juveniles (Adoption) (Visitation)

Matter of Mia T., 88 AD3d 730, 930 NYS2d 282 (2nd Dept 10/4/2011)

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Holding: Where the father executed judicial surrenders agreeing to relinquish guardianship and custody of his two children to the county department of social services (DSS) on the condition that they would be adopted by their foster mother, and contact agreements were entered into by the father, the foster mother, DSS, and the attorney for the children governing visitation and communication between the father and the children, the court erred in finding upon the foster mother's petition that the contact agreements should be vacated and the surrenders should remain intact as modified. Under the statutory provisions governing adoption, a family court may refuse to enforce a contact agreement in the best interests of the child but may not terminate or vacate such an agreement. Furthermore, a foster parent designated as an adoptive parent by judicial surrender is not a party to the surrender, so the foster mother lacked standing to seek to vacate the contact agreements that were conditions of the surrender. (Family Ct, Suffolk Co)

Juveniles (Support Proceedings)

Matter of Morales v Marma, 88 AD3d 722, 930 NYS2d 629 (2nd Dept 10/4/2011)

Holding: The court erred in denying the motion to vacate the child support ordered on default where the father had arrived for the hearing on the petition at 9:00 am and due to traffic was minimally late for the 2:00 pm time at which he was told to return, and where he demonstrated a potentially meritorious defense in that he had become unemployed a month before the hearing and had been earning only a minimal salary when he moved to vacate the default. Public policy favors merit resolution of cases and the matter is remitted for a hearing and new determination. (Family Ct, Suffolk Co)

Family Court (Family Offenses)

Matter of Riedel v Vasquez, 88 AD3d 725, 930 NYS2d 238 (2nd Dept 10/4/2011)

Holding: Where the parties are connected only through the biological father of their respective children and have never resided together nor taken care of each other's children, no "intimate relationship" existed within the meaning of Family Court Act 812(1), and the court did not err in dismissing without a hearing the petition of one party for an order of protection against the other. (Family Ct, Queens Co)

Juveniles (Parental Rights) (Visitation)

Matter of Smith v Dawn F.B., 88 AD3d 729, 930 NYS2d 75 (2nd Dept 10/4/2011)

Holding: The provision of the order that conditioned the mother's application for resumption of visitation with her children on compliance with mental health treatment, including recommended medication, is deleted. A court may "direct a party to submit to counseling or treatment as a component of visitation," but may not order such treatment or counseling as a condition of future visitation or re-application for visitation. (Family Ct, Rockland Co)

Search and Seizure (Automobiles and Other Vehicles [Probable Cause Searches])

People v Anokye, 88 AD3d 736, 930 NYS2d 485 (2nd Dept 10/4/2011)

Holding: The court erred in finding, despite crediting the defense testimony that the taillights on the defendant's vehicle had been operating properly, that the arresting officer acted reasonably in stopping the vehicle based on inoperability of its taillights. "Under the circumstances presented, the officer could not reasonably have been mistaken as to what she saw, and there was no reasonable basis for her belief that the defendant had committed a traffic infraction . . . ." The motion to suppress physical evidence and the defendant's statements should have been granted. (Supreme Ct, Queens Co)

Grand Jury (Procedure)

Prosecutors (Special Prosecutors)

People v Del Col, 88 AD3d 737, 930 NYS2d 488 (2nd Dept 10/4/2011)

Holding: The court "properly determined that the District Attorney lacked the authority to appoint" as "Special Assistant District Attorney" a former prosecutor who had gone into private practice. Given the critical nature of the prosecutor's role in presentations before the grand jury, prejudice is likely to have resulted from the presence in the grand jury of an unauthorized prosecutor. (County Ct, Nassau Co)

Sex Offenses (Psychiatric Exam) (Sex Offender Registration Act)

People v Madrid, 88 AD3d 674, 930 NYS2d 240 (2nd Dept 10/4/2011)

Holding: The court erred by denying the prosecutor's motion for access to certain medical and psychiatric records of the defendant relevant to determination of his sex offender risk level; the court's privacy concerns "are adequately protected by compliance with the controlling state and federal privacy laws, which do not prohibit dis-

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closure where the applicable conditions of those laws are satisfied . . . ." There must be a hearing and new determination. (County Ct, Suffolk Co)

Aliens (Deportation)

Counsel (Competence/Effective Assistance/Adequacy)

People v Marino-Affaitati, 88 AD3d 742, 930 NYS2d 77 (2nd Dept 10/4/2011)

Holding: Where it was not clear from reading the text of the statute that the defendant's guilty plea to fourth-degree conspiracy subjected him to mandatory deportation, and he had argued in immigration proceedings that it did not, the advice of defense counsel that a plea might carry a risk of deportation was not ineffective assistance. Therefore, the retroactive application of *Padilla v Kentucky* (130 SCt 1473 [2010]) need not be addressed. The order granting the defendant's motion to withdraw his plea is reversed. (County Ct, Dutchess Co)

Speedy Trial (Cause for Delay) (Statutory Limits)

People v Smith, 88 AD3d 749, 930 NYS2d 489 (2nd Dept 10/4/2011)

Holding: The court erred in dismissing the indictment on the basis of a CPL 30.30 violation because the prosecution should not have been charged with a 12-day post-readiness delay to obtain records from the criminal court so the defendant could be properly arraigned. That delay should have been attributed to the criminal court. (Supreme Ct, Kings Co)

Freedom of Information

Matter of Legal Aid Society v New York State Dept. of Correctional Servs., 88 AD3d 793, 930 NYS2d 887 (2nd Dept 10/11/2011)

Holding: The court properly granted disclosure of certain medical records under Public Officers Law 84, the Freedom of Information Law (FOIL), subject to copying fees of 25 cents per page even though the appellant agreed to disclose the records under Public Health Law 18, which imposes a copying fee of 50 cents per page. That someone can obtain their records pursuant to the Public Health Law does not diminish their right to get them under FOIL. (Supreme Ct, Dutchess Co)

Guilty Pleas

Sentencing (Enhancement) (Resentencing)

People v Taylor, 88 AD3d 821, 930 NYS2d 674 (2nd Dept 10/11/2011)

Holding: Where the defendant pleaded guilty in 2004 to fifth-degree sale of drugs and entered a drug treatment program on the promise that if he completed it the case would be dismissed but if he did not, he would be sentenced to prison, and was, while in the program, charged with conspiracies to distribute drugs between 2001 and 2006, and denied that he committed any crimes after he entered the program, and the prosecution refused to disclose to him the evidence of a sale alleged to have occurred while he was in treatment, the court erred in sentencing the defendant to prison in the 2004 case. As the defendant has now served that sentence, as well as the sentence for conspiracy counts other than those involving alleged acts while he was in treatment, there is no reason to remit for an *Outley* hearing; the 2004 conviction is reversed and the Superior Court Information dismissed. The defendant failed to preserve for appeal his claim that the 2004 plea covered all misconduct before that plea and did not seek withdrawal of his 2006 plea based on reversal of the 2004 conviction. (Supreme Ct, Kings Co)

Counsel (Right to Counsel)

Juveniles (Parental Rights) (Right to Counsel)

Matter of Rosof v Mallory, 88 AD3d 802, 930 NYS2d 901 (2nd Dept 10/11/2011)

Holding: The court erred in denying, without conducting any inquiry, the father's request for new counsel when his attorney asked to be relieved at the beginning of a hearing on whether the father should have only supervised visitation and the father consented to counsel's discharge. The court placed its "interest in preventing delay above the interests of the parents and the child, and violated the father's right to be represented by counsel . . . ." The denial of the right to counsel requires reversal, regardless of the merits of the unrepresented person's position. (Family Ct, Suffolk Co)

Juveniles (Custody) (Hearings)

Matter of Prince Mc., 88 AD3d 885, 931 NYS2d 261 (2nd Dept 10/18/2011)

Holding: The court erred in finding that the mother's prior waiver of a hearing under Family Court Act 1028(a), before she made the instant motion for return of the subject children to her under 1028, warranted denial of the instant motion without a hearing. The statute expressly allows an application thereunder at any time while the proceedings are pending. (Family Ct, Kings Co)

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Search and Seizure (Arrest/Scene of the Crime Searches [Probable Cause (Furtive Conduct)]) ("Poisoned Fruit" Doctrine)

People v Beckett, 88 AD3d 898, 931 NYS2d 126 (2nd Dept 10/18/2011)

Holding: The court erred in denying suppression of physical evidence, identification testimony, and the defendant's statement that were all obtained after a police officer, responding to a radio call about a robbery by a black male in a black jacket, saw the defendant, wearing "a black jacket and a red and white, like a high school jacket" and walking quickly, begin to run upon seeing the undercover officer's unmarked car, and the officer pursued and apprehended him. The prosecution failed to establish the distance between the place the defendant was first seen and the robbery and that the defendant recognized the officer's status as a police officer. That the defendant matched an extremely vague description was not sufficient to indicate criminal activity, and his flight did not justify pursuit. (County Ct, Nassau Co)

Sentencing (Hearing) (Second Felony Offender)

People v Johnson, 88 AD3d 907, 931 NYS2d 263 (2nd Dept 10/18/2011)

Holding: The defendant's adjudication as a second felony offender is vacated as a matter of discretion in the interest of justice and the matter is remitted for a hearing to determine whether his California conviction for unlawful possession of a firearm under Cal Penal Code 12021(a) qualifies as a predicate felony under Penal Law 70.06 (1)(b)(i). As the prosecution concedes, the California statute renders several acts criminal, only some of which would constitute a felony if committed in New York. At the remittal hearing, the California accusatory instrument, among other things, may be considered in determining whether the particular acts underlying the defendant's California conviction would constitute a New York felony. (Supreme Ct, Queens Co)

Juries and Jury Trials (Deliberation)

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

People v Marsden, 88 AD3d 909, 931 NYS2d 519 (2nd Dept 10/18/2011)

Holding: This matter must be remitted for a hearing and report on the defendant's CPL 330.30(2) motion based on allegations of juror misconduct where the court improperly denied the motion without a hearing. A juror's affidavit indicated among other things that two jurors discussed information from a newspaper and online searches, and one juror conferred with a priest; such allegations of outside influence warrant a hearing as to the nature of the information brought before the jury and the likelihood that it engendered prejudice. The allegation that other jurors "pressured" the one juror to convict went to the tenor of deliberations and would not be a basis for setting aside the verdict. (County Ct, Nassau Co)

Narcotics (Penalties)

Sentencing (Resentencing)

People v Rivera, 88 AD3d 915, 931 NYS2d 514 (2nd Dept 10/18/2011)

Holding: "[T]he matter is remitted . . . for further proceedings and a new determination of the defendant's motion to be resentenced pursuant to CPL 440.46" because the defendant's release to parole while his motion for resentencing was pending did not render him ineligible for that relief. (Supreme Ct, Queens Co)

Sex Offenses (Sex Offender Registration Act)

People v Wyatt, __ AD3d __, 931 NYS2d 85 (2nd Dept 10/18/2011)

Holding: "[T]he proper standard to apply in evaluating a defendant's application for a downward departure from the presumptive risk level is proof by a preponderance of the evidence of facts establishing an appropriate mitigating factor of a kind, or to a degree, otherwise not adequately taken into account by the guidelines." Here, the Board of Examiners of Sex Offenders scored the defendant as having 115 points on the Risk Assessment Instrument (RAI), but recommended that he be found a risk level two rather than three because this was the defendant's only sex offense conviction and there was no forcible compulsion, although the accuser was 14 years of age. The prosecution opposed the downward departure, while the defendant disputed 10 points for failure to accept responsibility and provided documentation. The court did not rule on that dispute, noting that without those 10 points, the defendant was a presumptive risk level two, which the Board had not opposed. On appeal, the defendant claims the Board's recommendation of a downward departure should be from risk level two to risk level one. While departures from the Board's recommendations are the exception, the possibility of a departure is generally recognized; whether a particular factor meets the test of being of a kind or degree not adequately taken into account by the SORA guidelines is a legal question. The court did not have to grant a downward departure to risk level one where the Board's recommendation was premised on inclusion of the disputed 10 points. It was

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proper to assess points based on clear and convincing evidence of sexual contact even though the defendant was allowed to plead guilty to attempt. While the defendant established that the only lack of consent was based on legal inability due to age, he failed to adduce additional facts to establish that the scoring of 25 points for "sexual intercourse" resulted in an over-assessment of his risk to public safety. (Supreme Ct, Kings Co)

Admissions (Voluntariness)

Defenses (Justification)

Misconduct (Judicial)

People v Zayas, 88 AD3d 918, 931 NYS2d 109 (2nd Dept 10/18/2011)

Holding: The defendant's motion to suppress his statements to police because they were the result of physical force should have been granted where officers testified that they did not see a struggle when the defendant was arrested and photographs taken at the jail after the statement was made depicted marks and injuries, and the defendant received medical treatment following his interrogation. The statements were taken after police, responding to a domestic dispute report, heard no sounds from the house, but attempted to kick in a door and break a window after one officer recalled a subsequent radio report of a man with a knife and a child in the house, and the defendant then fired through the door, hitting an officer, before surrendering and subsequently making the statements at issue. The prosecution failed to establish the voluntariness of the statements beyond a reasonable doubt. The court also erred in denying a defense request for a justification charge on the assault counts where the defendant's wife said the police began kicking the door within less than a minute of arriving and she did not hear, from the street, any announcement by the police of their presence. The court also improperly denigrated defense counsel before the jury and improperly interrupted cross-examination of a witness and read to the jury from the court's personal notes about what the witness had said earlier. The defendant was denied a fair trial. (County Ct, Orange Co)

Family Court

Juveniles (Abuse) (Family Offenses)

Matter of Aquilla J., 88 AD3d 1002, 931 NYS2d 537 (2nd Dept 10/25/2011)

Holding: The purported motion to "amend" a fact-finding order was actually a motion for resettlement pursuant to CPLR 5019(a) rather than a motion for reargument, so the provisions of CPLR 2221(d)(e) did not apply. Where the findings of fact in the 2009 order supported a conclusion that the father committed acts defined in Family Court Act 1012(e)(iii), which refers to abuse of a sexual nature, the petitioner's motion to "amend" the order to provide the father had abused the subject child sought a change of form, not substance. The father was not prejudiced by the delay in seeking the change, so consideration of the motion was not barred by laches. (Family Ct, Kings Co)

Juveniles (Custody)

Matter of Fleishman v Hall, 88 AD3d 1000, 932 NYS2d 83 (2nd Dept 10/25/2011)

Holding: While the court appropriately required the mother to establish a change of circumstances for modification of custody in the best interests of the child, and there is a sound and substantial basis to support the determination that the mother failed to make such a showing regarding the period from the prior hearing through the date of the modification petition, "a sufficient amount of time has now elapsed to warrant consideration of" whether a finding of changed circumstances is now warranted. The court limited testimony to facts occurring between the date of the extraordinary circumstances determination that resulted in awarding of custody to a nonparent and the date of the mother's petition; the record is no longer sufficient for determining the ultimate issues. (Family Ct, Suffolk Co)

Confessions (Counsel)

Counsel (Attachment) (Right to Counsel)

Evidence (Hearsay)

People v Borukhova, __ AD3d __, 931 NYS2d 349 (2nd Dept 10/25/2011)

Holding: The defendant's right to counsel attached when an attorney retained by her sister called the precinct, said he was the defendant's attorney, asked to speak to her, and directed that she not be questioned until he could talk to her; the defendant could not then effectively waive her right to counsel without the attorney present, and her statements should have been suppressed. That the defendant said she had not called a lawyer and did not know the one who called was not a repudiation of the attorney who, unbeknown to her, had been retained by her family. Admission of the statements was harmless error because the proof of guilt without those statements was overwhelming. For the same reason, admission into evidence of certain hearsay testimony without a proper

Second Department *continued*

limiting instruction was error but does not require reversal. (Supreme Ct, Queens Co)

Sentencing (Fees) (Fines)

People v Cooper, 88 AD3d 1009, 931 NYS2d 346 (2nd Dept 10/25/2011)

Holding: The court did not err in imposing a $50 DNA databank fee when the defendant was sentenced on first-degree promoting prison contraband even though the defendant had already provided a DNA sample pursuant to a prior felony conviction that predated the legislation providing for a DNA databank fee. The decision in *People v Nelson* (77 AD3d 973) does not stand for the proposition that no DNA databank fee may be imposed under these circumstances. (County Ct, Dutchess Co)

Search and Seizure (Automobiles and other Vehicles [Impound Inventories]) ("Poisoned Fruit" Doctrine) (Warrantless Searches)

People v Perez, 88 AD3d 1016, 931 NYS2d 411 (2nd Dept 10/25/2011)

Holding: Physical evidence seized during warrantless searches of the defendant's car after it was impounded following his arrest for, among other things, driving with a suspended license should have been suppressed where a police officer initially entered the back seat of the car to leaf through notebooks whose incriminating character was not immediately apparent and where a second warrantless search was conducted after a drug dog signaled the presence of drugs. That a warrant was obtained before any evidence was removed did not cure the violation. The defendant's subsequent statements must be suppressed as fruits of the poisonous tree, but not statements made before the search. (County Ct, Suffolk Co)

Judges (Powers)

Sentencing (Pronouncement)

People v Ramdass, 88 AD3d 1019, 931 NYS2d 534 (2nd Dept 10/25/2011)

Holding: Upon remittal of this case for resentencing because the sentencing court erroneously believed it was bound by a promise made by the justice who presided over the plea, the court acknowledged its discretion to impose what it deemed an appropriate sentence, but said the plea justice "'knew the case best' and that there was no 'compelling' reason to depart from" that judge's promise. This language did not show that the court "fully appreciated the extent of it obligation and discretion." The sentencing court is in the best position to set an appropriate sentence because, unlike the court making a preliminary promise, it had among other things the presentence report and comments by the prosecutor, the accuser, defense counsel, and the defendant. The matter is again remitted for imposition of an appropriate sentence after consideration of all relevant circumstances. (Supreme Ct, Kings Co)

Counsel (Conflict of Interest)

People v Vega, 88 AD3d 1022, 931 NYS2d 883 (2nd Dept 10/25/2011)

Holding: The appeal must be held in abeyance for a new determination of the defendant's motion to withdraw his plea, for which he should be appointed new counsel, because his attorney took a position adverse to him and in effect became a witness against him when the motion was made at sentencing. (Supreme Ct, Queens Co)

Third Department

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

Sex Offenses (Sex Offender Registration Act)

People v Denny, 87 AD3d 1230, 929 NYS2d 886 (3rd Dept 9/29/2011)

Holding: The court incorrectly concluded that it did not have discretion to modify the defendant's risk level given that his prior conviction constituted an override factor under the Sex Offender Registration Act: Risk Assessment Guidelines and Commentary. Remittal is required so that the court can apply the correct "presumptive" override standard and adequately consider the defendant's claims of mitigating circumstances. (County Ct, St. Lawrence Co)

Sex Offenses (Sex Offender Registration Act)

People v Rhodehouse, 88 AD3d 1030, 930 NYS2d 105 (3rd Dept 10/6/2011)

Holding: The court properly considered the substance of the sworn statements given by the complainants (ages 16 and 11) to the police in designating the defendant a level II sex offender under the Sex Offender Registration Act. The court correctly applied traditional principles of accessorial liability when it assessed points under risk factor three for two victims; although the defendant did not have sexual contact with the second complainant, she did

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give the child alcohol and a drug, causing her to pass out prior to the defendant's boyfriend having sexual contact with her. It was not improper double counting to assess points under risk factor five for the ages of the complainants and under risk factor six for physically helpless victims where the children were both asleep at the beginning of the sexual offense. (County Ct, Schuyler Co)

Records (Access) (Sealing)

Matter of Albany County District Attorney's Office v William T., 88 AD3d 1133, 931 NYS2d 154 (3rd Dept 10/20/2011)

Holding: The court erred in granting the out of state prosecutor's ex parte application to unseal records from a prosecution of the appellant that ended with an adjournment in contemplation of dismissal and sealing under CPL 160.50 where the exception relied upon by the prosecutor, which permits a law enforcement agency to obtain sealed records if justice requires that the records be made available, did not apply because the prosecutor sought the records after commencing a criminal action against the respondent. The exception is akin to other investigatory tools that are used to uncover criminal activity prior to bringing a criminal action; disclosure is not authorized where the records were sought for admission at trial and to assist in sentencing and sex offender registration purposes. (County Ct, Albany Co)

Juveniles (Hearings) (Visitation)

Matter of Carl v McEver, 88 AD3d 1089, 931 NYS2d 168 (3rd Dept 10/20/2011)

Holding: The court erred in granting, without a hearing, the mother's motion for summary judgment on her cross-petition to terminate the father's visitation as there was insufficient evidence on which the court could conclude that visitation was not in the children's best interests. A hearing is generally required to resolve the best interests question because there is a presumption that visitation with a noncustodial parent is in a child's best interests. While the father was convicted of a sex offense and served a sentence of imprisonment, there is no basis for the court's finding that he was an untreated sex offender where there was no evidence that he was ordered to complete sex offender treatment and a probation report and psychological report do not conclusively show that treatment was required or that visitation would be detrimental to the children's best interests. While the mother was granted an order of protection after a 2007 incident between the parents, there was no proof to support the court's conclusion that he engaged in harassment of the mother. And the father raised issues of fact as to his absence from the children's lives, alleging that he tried to maintain a relationship with them, and delayed seeking visitation because of the order of protection and his temporary relocation for work. (Family Ct, Tompkins Co)

Counsel (Competence/Effective Assistance/Adequacy)

Juveniles (Hearings) (Neglect) (Parental Rights) (Right to Counsel)

Matter of Jaikob O., 88 AD3d 1075, 931 NYS2d 156 (3rd Dept 10/20/2011)

Holding: The respondent was denied effective assistance of counsel over the course of the neglect proceeding where, at the fact-finding hearing, counsel did not make an opening or closing argument or cross-examine the petitioner's witnesses on relevant matters including the children's exposure to the respondent's allegedly neglectful conduct; counsel's cross-examination was at times "tasteless and irrelevant, even prurient"; and counsel did not make any motions at the close of the petitioner's case. Counsel also failed to submit proposed findings of fact and conclusions of law, as directed by the court. Even though the court reserved decision as to neglect, respondent's counsel consented to immediately starting the dispositional hearing. In response to the respondent's request for a new attorney, counsel sent a letter with "a not-so-subtle threat that counsel would not send respondent anything, or convey any information to or cooperate with his next attorney, if he pursued a change of attorneys; counsel also flaunted that he had achieved financial success, upon which he elaborated, with his 'clients who have money' and essentially did not need this assignment." Among other failings, counsel did not object to the petitioner's oral motion to dispense with its duty to make diligent reunification efforts where such a motion must be in writing, on notice to the respondent, so that the respondent has a chance to gather evidence, raise issues of fact, and prepare for an evidentiary hearing. (Family Ct, Tioga Co)

Due Process

Juveniles (Custody) (Hearings) (Parental Rights)

Matter of Jeffrey JJ. v Stephanie KK., 88 AD3d 1083, 931 NYS2d 166 (3rd Dept 10/20/2011)

Holding: The court denied the respondent mother's due process rights in granting the father's petition to modify the prior custody order and awarding primary physical custody to the father without giving the mother an opportunity to present evidence, call witnesses, or testify on her own behalf. The father filed the petition after a neglect proceeding was brought against the mother and

Third Department *continued*

her husband, the child's step-father, and the father presented evidence at the fact-finding hearing that the mother was living with the child's step-father and there was an order of protection prohibiting the step-father from having contact with the child. The court concluded that it was impossible for the child to live with the mother who was residing with the step-father and that the child's best interests were almost determined by the order of protection. However, on cross-examination the step-father said he was willing to move out until the order of protection expired, and the court did not give the mother a chance to show the feasibility of this plan. (Family Ct, Rensselaer Co)

Juveniles (Jurisdiction) (Paternity)

Matter of Nathan O. v Jennifer P., 88 AD3d 1125, 931 NYS2d 198 (3rd Dept 10/20/2011)

Holding: Pursuant to Family Court Act article 5 and New York Constitution, article VI, § 13(b)(5), the family court has subject matter jurisdiction over paternity proceedings, even when the child is born to a married woman. The petitioner had standing to bring this proceeding, which was filed less than a month after the child was born, where he alleged that he had a sexual relationship with the mother when the child was probably conceived, the mother was not married at that time, and he was the child's father. By consenting during the hearing to the unsealing of the DNA test results and stipulating to a visitation order, subject to appeal on the issues of jurisdiction and standing, the child's mother and her husband waived their argument that the court had to conduct a full hearing on the child's best interests before issuing an order of filiation. (Family Ct, Saratoga Co)

Juveniles (Abuse) (Neglect) (Visitation)

Matter of Steven M., 88 AD3d 1099, 931 NYS2d 720 (3rd Dept 10/20/2011)

Holding: The court erred in delegating its duty to determine whether visitation would be in the child's best interests to the child's counselor. The court had no authority to order that the father participate in certain programs and services before visitation would be allowed; the court could only direct the father to seek counseling as a part of a custody or visitation order. While there was insufficient evidence of abuse, a preponderance of the credible evidence supports a finding that the father neglected his son based on a single incident of excessive corporal punishment where the father hit the child with a leather belt causing bruises and welts on the child's back and buttocks. However, the record does not contain compelling reasons and substantial evidence to support the drastic decision to deny all visitation, particularly given the respondent's willingness to submit to supervised visitation. (Supreme Ct, Columbia Co)

Juveniles (Hearings) (Visitation)

Matter of Susan LL. v Victor LL, 88 AD3d 1116, 931 NYS2d 189 (3rd Dept 10/20/2011)

Holding: The court properly determined that it would not be in the child's best interests to suspend the father's visitation, despite the breakdown in the relationship between the father and child resulting in the child's strong preference not to visit the father, where the relatively young child's preference is not dispositive and the court's order was "carefully crafted to assist the father in rebuilding his relationship with the child by incorporating most of the social worker's recommendations toward that end, with the exception of supervised visitation." Though it was clear that the court intended to benefit the child by revealing the substance of some of the child's statements during the *Lincoln* hearing, it was improper to do so after promising confidentiality. (Family Ct, Schoharie Co)

Counsel (Competence/Effective Assistance/Adequacy)

Guilty Pleas (Withdrawal)

Narcotics (Diversion) (Penalties)

People v Buswell, 88 AD3d 1164, 931 NYS2d 543 (3rd Dept 10/27/2011)

Holding: The court did not abuse its discretion in denying the defendant's motion to withdraw his plea to attempted fifth-degree sale of a controlled substance alleging that his attorney was ineffective by failing to advise him regarding the CPL article 216 judicial diversion program where the court has discretion to decide whether to allow an eligible defendant to participate in judicial diversion and the court stated that it would not have exercised its discretion in the defendant's favor even if a diversion application was made. (County Ct, Saratoga Co)

Family Court (Family Offenses)

Juveniles (Jurisdiction)

Matter of Janet GG. v Robert GG., 88 AD3d 1204, 931 NYS2d 746 (3rd Dept 10/27/2011)

Holding: The court correctly dismissed the petitioner's application for an order of protection because the respondent father's actions did not amount to a family offense where his actions, which may have constituted

Third Department *continued*

disorderly conduct, were directed at personnel at the children's school, not the petitioner mother or the children. There was no evidence to show that the mother or one of the children was in the immediate area where the confrontation between the school personnel and the father occurred, that the father was aware of their presence at that time, or that the father's actions were directed at the mother or child. Because the father did not commit a family offense, the court did not have jurisdiction to consider the petition. (Family Ct, Otsego Co)

Sentencing (Youthful Offenders)

People v Jeffrey VV., 88 AD3d 1159, 931 NYS2d 760 (3rd Dept 10/27/2011)

Holding: "[W]e choose to exercise our discretion . . . by vacating the conviction and adjudicating defendant a youthful offender" where the defendant, who was 18 at the time of sentencing, pleaded guilty to possessing sexually explicit material involving underage individuals, had no prior contact with law enforcement; he was found by a psychologist not to pose a threat to the community and unlikely to commit the same or similar offense in the future; the psychological evaluation revealed that the defendant was sexually interested in males of his own age and had a normal understanding of appropriate sexual behavior; he was in counseling and received vocational training; and he accepted full responsibility for his conduct. (County Ct, Columbia Co)

Aliens (Deportation)

Counsel (Competence/Effective Assistance/Adequacy)

Post-Judgment Relief (CPL § 440 Motion)

People v Reynoso, 88 AD3d 1162, 931 NYS2d 430 (3rd Dept 10/27/2011)

Holding: The court erred in denying, without a hearing, the defendant's CPL 440.10 motion to the extent that it alleged that counsel was deficient by giving him incorrect information about the deportation consequences of his plea to several counts of criminal sale and possession of a controlled substance where the defendant, a resident alien, alleged that although his deportation was virtually mandated by his conviction for selling a controlled substance, his attorney advised him that he could avoid deportation by pleading guilty and appealing his sentence, and that he would not have pleaded guilty had he known that that a plea would definitely lead to deportation. The court properly denied the part of the 440.10 motion alleging that counsel did not discuss agency and entrapment defenses with him where the record of the plea proceeding shows that the defendant was aware of those defenses. (County Ct, Columbia Co)

Juries and Jury Trials (Deliberation)

Trials (Verdicts)

People v Woodrow, __ AD3d __, 932 NYS2d 236 (3rd Dept 11/3/2011)

Holding: The court did not commit a mode of proceedings error by summarizing the jury's note and not advising the parties that the jurors had disclosed the verdict reached on one of four counts where the court said it was summarizing the note, the summary closely tracked the language in the note regarding their inability to reach an unanimous decision on three counts, and the court said that the jury reached unanimity on one of the counts; defense counsel had sufficient information regarding the state of the deliberations to request a partial verdict if he thought that was more appropriate than the court's proposal to give an *Allen* charge. "The better practice would surely have been to advise counsel that this information was being withheld . . . ." However, the court fulfilled its core responsibility; therefore, preservation was required. (County Ct, Broome Co)

Fourth Department

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Sentencing (Enhancement) (Hearing) (Post-Release Supervision)

People v Baker, 87 AD3d 1313, 930 NYS2d 167 (4th Dept 9/30/2011)

Holding: It was error for the court to consider, during the sentencing of the defendant following his conviction for arson, statements made by the prosecutor implicating the defendant in an additional uncharged arson that resulted in a fatality where there was no indication in the record that the court took steps to ascertain the reliability of the information provided by the prosecutor, which was disputed by the defendant and was not contained in the pre-sentence report. Additionally, the imposition of a period of post-release supervision greater than five years was illegal where the record failed to provide any indication that the arson was sexually motivated. (County Ct, Wayne Co)

Discovery (Matters Discoverable) (Right to Discovery)

Fourth Department *continued*

Forensics (DNA)

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

People v Davis, 87 AD3d 1332, 929 NYS2d 819 (4th Dept 9/30/2011)

Holding: The "exceptional remedy" of dismissal of the indictment joining two charges for rape, against two separate victims, was not warranted where the charges had been properly joined pursuant to CPL 200.20(2)(c) and the court had granted severance of the charges to avoid potential prejudice to the defendant. The defendant's contention that the prosecutor failed to instruct the grand jury to consider the two rapes as separate events was unpreserved where the defendant neither raised the issue in his omnibus motion nor challenged the prosecution's failure to give a limiting instruction after being informed of the failure by the court. The deficiency did not impair the grand jury proceedings so as to require dismissal of the indictment.

The court properly quashed the defendant's subpoena duces tecum seeking DNA records of a person who had been briefly investigated and excluded as a suspect because that person's DNA sample was not obtained nor analyzed in connection with the rape for which the defendant was prosecuted. *See* Executive Law 995-c(6). The defendant's request was a "fishing expedition" where DNA collected from the scene had been run through the database and did not match the alternative suspect's DNA; the accuser had identified the defendant as her assailant; the defendant had admitted to consensual sex with the accuser; the defendant's DNA had been matched with samples taken from the accuser; and, even if DNA taken from a straw had matched the alternative suspect, this fact would not have tended to exculpate the defendant.

The defendant failed to preserve his contention that his Confrontation Clause rights were violated when police witnesses were allowed to testify about statements allegedly made by the defendant's wife. In any event, the admission of the statements did not violate his confrontation rights as they were not offered for the truth of the matter asserted, but to explain why the defendant first professed ignorance of the incident, but later made some admissions, and the court gave the appropriate limiting instructions to the jury each time such testimony was offered. (Supreme Ct, Onondaga Co)

Burglary (Defenses) (Elements) (Evidence)

Counsel (Competence/Effective Assistance/Adequacy)

Post-Judgment Relief (CPL § 440 Motion)

People v Dombrowski, 87 AD3d 1267, 930 NYS2d 321 (4th Dept 9/30/2011)

Holding: In CPL 440.10 and 440.20 proceedings alleging ineffective assistance of counsel, a hearing was required in order to give trial counsel an opportunity to explain or provide a tactical reason for his decision not to call witnesses whose affidavits indicated that they would have offered testimony that would tend to exculpate the defendant. Contrary to the prosecution's position, to affirmatively defend against a burglary charge, the defendant need not establish actual residence at the property; it is enough that the defendant show that he mistakenly believed he was licensed or privileged to enter the building. Therefore, testimony that the defendant had been seen entering and leaving the apartment regularly, had keys to the apartment, and brought groceries to the apartment would have been beneficial in establishing a defense to the charge. The record disclosed no tactical reason why the attorney would fail to call witnesses who were willing to testify, two of whom were physically present at the courthouse at the time of the trial. (County Ct, Erie Co)

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

Post-Judgment Relief (CPL § 440 Motion)

People v Frazier, 87 AD3d 1350, 930 NYS2d 156 (4th Dept 9/30/2011)

Holding: It was error to dismiss the defendant's CPL 440.10 motion claiming ineffective assistance of counsel, without holding a hearing, where the defendant alleged that defense counsel failed to inform him of a plea offer and that he would have accepted the offer had he known of it, and the defendant offered an affidavit by the trial prosecutor stating the specific terms of the plea offer. An unsworn and unsigned memorandum allegedly written by the prosecutor stating that the defendant was aware of the terms of the offer does not constitute "unquestionable documentary proof" adequate to conclusively refute the submissions of the defendant. The defendant's factual allegations were supported by additional affidavit or evidence. (Supreme Ct, Erie Co)

Forensics (DNA)

Speedy Trial (Prosecutor's Readiness for Trial)

People v Fulmer, 87 AD3d 1385, 929 NYS2d 897 (4th Dept 9/30/2011)

Holding: The defendant's statutory speedy trial rights were not violated where the prosecution declared readiness for trial within six months, but failed to act for a period of at least three weeks to obtain a new DNA sample after inadvertently destroying an earlier sample taken

Fourth Department *continued*

from the defendant, because the prosecution remained ready to proceed to trial even without DNA test results. To charge postreadiness delay to the prosecution, the delay must directly implicate the ability to proceed to trial. (County Ct, Onondaga Co)

Trial (Presence of Defendant [Trial in Absentia])

People v Houghtaling, 87 AD3d 1302, 930 NYS2d 521 (4th Dept 9/30/2011)

Holding: The defendant's DWI conviction must be reversed and a new trial ordered where the court tried the defendant in absentia. Even assuming that the court actually informed the defendant of the trial date and warned him that the trial would proceed if he failed to appear, the court erred in failing "to inquire into defendant's absence and to recite 'on the record the facts and reasons it relied upon in determining that defendant's absence was deliberate' . . . ." (County Ct, Livingston Co)

Family Court (General)

Juveniles (Custody) (Foster Care)

Matter of Jose T., 87 AD3d 1335, 929 NYS2d 823 (4th Dept 9/30/2011)

Holding: The court's determination that continuing the permanency goal of placement for adoption was in the child's best interests lacks a sound and substantial basis in the record. The petitioner agency met its burden of establishing by a preponderance of the evidence that its recommendation to modify the permanency goal to placement in an alternative planned permanent living arrangement with the child's current foster parents would be in the child's best interest where: at the time of the permanency hearing, the child was 14 years old; despite the petitioner's diligent efforts to counsel the child regarding adoption and seek suitable adoptive resources, the child wished to remain in foster placement; the child's placement with foster parents allowed him to have continued contact with his older brother, friends, and other relatives; the foster parents provided a safe and happy home; and, although they have not signed the permanency pact yet, the foster parents unequivocally stated their willingness to be an ongoing resource for the child and considered the child a member of the family. (Family Ct, Erie Co)

Appeals and Writs (Briefs) (Counsel)

Counsel (*Anders* Brief)

Forfeiture (General)

People v McCoy, 87 AD3d 1419, 930 NYS2d 506 (4th Dept 9/30/2011)

Holding: Defense counsel's motion to be relieved from assignment, pursuant to *Anders v California* (386 US 738 [1967]), arguing that no non-frivolous issues exist for appeal, is granted; however, because a non-frivolous issue exists regarding the propriety of the forfeiture of the defendant's property following his conviction for third-degree criminal sale of a controlled substance, new counsel is assigned to brief this issue and any other issues counsel's review of the record may disclose. (County Ct, Ontario Co)

Appeals and Writs (Preservation of Error for Review)

Counsel (Competence/Effective Assistance/Adequacy)

Juveniles (Jurisdiction) (Parental Rights)

Matter of Sean W., 87 AD3d 1318, 930 NYS2d 700 (4th Dept 9/30/2011)

Holding: The respondent mother failed to preserve for appeal her claim that the court should have entered a suspended judgment, and such a claim is meritless as there was no evidence that the mother had a realistic, feasible plan to care for the child and the record showed that she was not likely to change her behavior. The respondent mother failed to establish that her counsel was ineffective for not requesting a suspended judgment or post-termination contact, and the dispositional hearing evidence showed that neither a suspended judgment nor post-termination contact was in the child's best interests. The court had subject matter jurisdiction even though the judge who presided over the termination proceeding did not preside over the prior permanency hearing. Social Services Law 384-b(3)(c-1) deals with venue, which can be and was waived by the respondent, and that provision merely expresses a preference in the assignment of judges, not a mandate. The respondent failed to preserve her claim that the court erred in allowing the foster parents to intervene without a written motion where the alleged deficiency could have could have been cured had it been raised before the family court. (Family Ct, Onondaga Co)

Accusatory Instruments (General)

Appeals and Writs (Preservation of Error for Review) (Waiver of Right to Appeal)

Sentencing (Appellate Review) (Restitution)

People v Spencer, 87 AD3d 1284, 930 NYS2d 326 (4th Dept 9/30/2011)

Holding: The defendant's waiver of his right to appeal did not foreclose his challenge to the amount of restitution because the amount was not specified in the

Fourth Department *continued*

plea agreement; however, the defendant waived the issue by not objecting to the amount at sentencing and he failed to preserve it by not requesting a hearing or otherwise challenging the amount. In the second appeal, the judgment must be reversed, the sentence vacated, and the superior court information (SCI) dismissed because the defendant could not waive indictment and agree to be prosecuted by an SCI as he had already been indicted; this is a jurisdictional issue that survives the appeal waiver and guilty plea. (County Ct, Jefferson Co)

Driving While Intoxicated (Prior Convictions)

Sentencing (Excessiveness) (Persistent Felony Offender)

People v Daggett, 88 AD3d 1296, 930 NYS2d 745 (4th Dept 10/7/2011)

Holding: Prior DWI convictions may serve as predicate offenses for both the determination of persistent felony offender status and for conviction of felony DWI and felony DWAI (drugs), and the trial court did not abuse its discretion by sentencing the defendant as a persistent felony offender. However, the court's imposition of the maximum sentence was unduly harsh and severe where the instant offenses resulted in neither physical injury nor property damage and the defendant's criminal history is the product of mental health issues and alcoholism. As a matter of discretion in the interest of justice, the defendant's sentence is reduced to 15 years to life. (County Ct, Onondaga Co)

Juveniles (Neglect)

Matter of Damian G., 88 AD3d 1268, 930 NYS2d 377 (4th Dept 10/7/2011)

Holding: The adjudication of neglect as to both parents is supported by a preponderance of evidence where the mother attempted to drive while intoxicated with the children in the car and the father purposely did not take his anti-seizure medicine so he could drink alcohol, knowing he was likely to become violent when he had a seizure, he had two seizures on the day in question and threatened the officers who responded to assist him, and the children were with the father for most of the evening and were coming home at the time of the second seizure. (Family Ct, Oneida Co)

Dissent: There was insufficient evidence that the children's physical, mental, or emotional condition was impaired, or was in imminent danger of becoming impaired where: there was only an unspecified possibility that the father might have a seizure, that he would become violent if he did so, and that he would harm the children if present; that the mother was intoxicated was not supported by a preponderance of the evidence where a police officer merely testified that she exuded a strong odor of alcohol and was belligerent, and the children were not in the area at the time she was belligerent; the court's finding that the mother failed to remove the children when the father had dramatic mood swings was contrary to the evidence as the mother and children were not present when the police responded to the emergency call; the court's finding that the mother failed to monitor the father's activities was not supported where there was no evidence that the mother knew the father did not take his medication; and the court's finding that the mother intended to drive with the children while intoxicated was not supported by the record where the evidence showed that the children were being cared for by a neighbor when the mother indicated she was going to drive.

Accusatory Instruments (General)

Double Jeopardy (Dismissal) (Pleadings and Pleas)

Sentencing (Persistent Felony Offender)

People v Sanders, 89 AD3d 106, 930 NYS2d 373 (4th Dept 10/7/2011)

Holding: The double jeopardy clauses of the federal and state constitutions bar re-prosecution of the defendant for assault where his original assault conviction has not been vacated, even though the conviction was based on a jurisdictionally defective superior court information (SCI) and could not be used as a predicate felony offense for purposes of determining persistent felony offender status. The defendant had waived indictment and pleaded guilty to an SCI charging second-degree assault under a different subdivision of the statute than was charged in the felony complaint. The defendant never moved to vacate the conviction and the court lacked authority to vacate the conviction; therefore, the prosecution may not prosecute the defendant again for the same offense. (County Ct, Monroe Co)

Identification (Eyewitnesses) (Misidentification) (Photographs) (*Wade* Hearing)

Juries and Jury Trials (Deliberation)

Trial (Verdicts)

People v Johnson, 88 AD3d 1293, 930 NYS2d 362 (4th Dept 10/7/2011)

Holding: The court properly denied the defendant's motion to suppress the store manager's identification of the defendant where, although the manager signed an affidavit stating that the defendant was a "possible robbery suspect," that language merely mirrored the lan-

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guage used by the police officer presenting the photo array and the officer testified at the suppression hearing that the manager unequivocally identified the defendant in the photo array.

In describing the sole count of the indictment on the verdict sheet, the court used the phrase "an armed felony," which amounts to an impermissible annotation; such an annotation may only be included where there are two or more counts and the annotation is used to distinguish between those counts. Unless defense counsel consented to the submission of the annotated verdict sheet to the jury, it cannot be deemed harmless error. The case is held, decision is reserved, and the matter is remitted to the trial court to determine, following a hearing if necessary, whether defense counsel consented to the annotated verdict sheet. (Supreme Ct, Erie Co) ⚖

Defender News *(continued from page 4)*

record evidence of a written or oral waiver. *See* People v Dickinson, 2011 NY Slip Op 09001 (12/15/2011). The Court repeated its "observation in [*People v*] *Waldron* [6 NY3d 463] that 'prosecutors would be well advised to obtain unambiguous written waivers in situations like these' . . . ." NYSDA filed an *amicus* brief in support of the defendant-appellant, which was written by Al O'Connor.

Recent Family Law Appellate Decisions

Family Court Cannot Order Treatment as a Condition of Future Visitation

In Matter of Smith v Dawn F.B. (88 AD3d 729 [2nd Dept 10/4/2011]), the Second Department held that the Family Court erred in conditioning the mother's application for resumption of visitation on compliance with mental health treatment. Such a condition may be part of a visitation order, but the court cannot order treatment as a condition of future visitation. The Third Department similarly held that the Family Court lacked the authority to order a parent to participate in programs and services before visitation would be allowed. *See* Matter of Steven M., 88 AD3d 1099 (3rd Dept 10/20/2011). In that case, the court also erred in delegating its duty to determine whether visitation was in the child's best interests to the child's counselor.

"Intimate Relationship" Under Family Court Act Article 8

The Second Department has ruled that individuals who are only connected through a third party, in this case the children of the petitioner and respondent had the same biological father, are not in an intimate relationship within the meaning of Family Court Act 812(1). The court noted that the parties never lived together or took care of each other's children and the respondent's contact with the petitioner and/or her children was minimal. The Family Court did not need to conduct a hearing because it had sufficient information to determine that the parties are not and have never been in an intimate relationship. *See* Matter of Riedel v Vasquez, 88 AD3d 725 (2nd Dept 10/4/2011).

Visitation Modification Hearing Still Needed Despite Judge's Familiarity With Case

The First Department recently held that, despite the Family Court judge's familiarity with the family after years of presiding over the matter, the judge improperly modified a prior visitation order without holding an evidentiary hearing on whether the modification was in the children's best interests where there were factual disputes and claims of parental alienation. *See* Matter of Santiago v Halbal, 88 AD3d 616 (1st Dept 10/27/2011).

Direct Appeals Cannot Be Dismissed Due to Involuntary Deportation

As briefly noted in the last issue of the *REPORT*, the Court of Appeals held that involuntary deportation is not an appropriate basis for dismissing a defendant's direct appeal that is pending before an intermediate appellate court. The Court noted that Criminal Procedure Law 450.10 gives defendants "an absolute right to see appellate review of their convictions" and, unlike a defendant who has voluntarily absconded, these defendants were involuntarily removed and, in fact, "have a greater need to avail themselves of the appellate process in light of the tremendous ramifications of deportation." A full summary of the decision, People v Ventura (2011 NY Slip Op 07475 [10/25/2011]), appears at p. 10.

While the focus has been on trial counsel's duty to advise non-citizen clients of the potential immigration consequences of convictions (*see Padilla v Kentucky*, 130 SCt 1473 [2010]), the Court's decision in *Ventura* provides a good reminder that appellate lawyers need to be aware of their clients' immigration status and the possibility of deportation during the pendency of the appeal. Appellate and trial attorneys may contact Joanne Macri, NYSDA's Criminal Defense Immigration Project Director, to discuss issues surrounding the representation of clients who are currently in or are facing the possibility of deportation proceedings during the pendency of the criminal proceedings. She can be reached by phone at (716) 913-3200 or (518) 465-3524 or by email at jmacri@nysda.org. ⚖

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