NEW YORK STATE DEFENDERS ASSOCIATION

Public Defense Backup Center
REPORT

Volume XXVII Number 3 August–October 2012

A PUBLICATION OF THE DEFENDER INSTITUTE

# Defender News

## DWI, Drugs, and Sex Offender Registration Act Developments

While "tough on crime" rhetoric may have calmed somewhat in the face of unaffordable prison and law enforcement costs, the political instinct to increase penalties and criminalize more behavior has not disappeared. Certain topics—DWI, drugs, and sex offenses—seem to bring that instinct to the fore, while the prevalence of cases that has resulted from laws and regulations in these areas makes for a variety of challenges and rulings.

### Governor Orders Tougher DWI License Regs

As directed by Governor Cuomo, the New York State Department of Motor Vehicles (DMV) has issued emergency/proposed regulations said to be the toughest in the nation concerning individuals who persistently drive under the influence of alcohol or drugs. Among other things, the emergency regulations let DMV review the lifetime record of all drivers who seek reinstatement of their licenses after revocation. Reinstatement of the license will be denied if the lifetime record includes five or more alcohol- or drug-related driving convictions or three or more such convictions in the last 25 years plus at least one other serious driving offense. Reinstatement will be delayed and certain conditions imposed for drivers with three or four alcohol- or drug-related convictions but no serious driving offense in the last 25 years; the conditions depend upon whether the reason for the current revocation was an alcohol- or drug-related offense. Drivers with two or more such convictions in the last 25 years will no longer be able to reduce mandatory suspension or revocation periods by completing DMV's Drinking Driver Program. And drivers who have three or more alcohol- or drug-related driving convictions or incidents within the last 25 years are not eligible for a conditional license; previously, the look-back period was 10 years and did not include drug-related convictions or incidents.

A press release about the announcement, which notes that because of the new DMV regulations, "an estimated 20,000 drivers will have their licenses permanently revoked or delayed this year," is available at www.governor.ny.gov/press/09252012dwiregulations. Notices about the regulations were published in the Oct. 10, 2012 issue of the *State Register*. (www.dos.ny.gov/info/register/2012/oct10/toc.html.) The emergency regulations took effect on Sept. 25 and comments on the proposed amendments must be submitted on or before Nov. 26, 2012. We encourage defenders to submit comments and if you do comment on the proposed regulations, please send a copy to the Backup Center.

### DWI Blood Evidence Issues to be Heard in High Courts

Does the natural dissipation of alcohol in the bloodstream constitute exigent circumstances justifying the nonconsensual and warrantless taking of blood samples in DWI cases? The United States Supreme Court will hear this issue in the new term beginning in October. (www.scotusblog. com/case-files/cases/missouri-v-mcneely/.)

Meanwhile, in March, the Court of Appeals granted leave to appeal in *People v Pealer* (18 NY3d 961). As noted in the *REPORT* summary, the Fourth Department held in *Pealer* (89 AD3d 1504) that in a "trial for DWAI and DWI, the court did not err by allowing certificates into

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evidence, as 'business records,' that indicated that a breathalyzer was calibrated and functioning properly, without producing the government employees who prepared the records." *REPORT,* Vol. XXVII, No. 1 (Jan.-Mar. 2012).

### *Change Noted, but Denied, as to SORA Risk Factor for Child Porn*

According to an Aug. 18, 2012 article in the *New York Law Journal,* judges are now grappling with the factors to be considered when setting the Sex Offender Registration Act (SORA) risk level of a sex offender convicted of possessing or distributing child pornography. In *People v Marrero* (949 NYS2d 614 [Supreme Ct, New York Co 7/31/2012]), Judge Daniel P. Conviser stated the question before him to be: "Does the 'Position Statement' dated June 1, 2012 by the New York State Board of Examiners of Sex Offenders (the 'Board') regarding the scoring of child pornography cases under the New York Sex Offender Risk Assessment Instrument (the 'RAI') change the manner in which such cases must be scored under the instrument?" Judge Conviser said that prior to the Position Statement, "courts were clearly required to score defendants in typical child pornography cases with points because victims were strangers and because there were multiple victims," but the Position Statement changed that. He went on to say that "while the Position Statement may result in an improvement over the manner in which child pornography defendants were previously scored, the new system leaves courts with inadequate tools with which to make informed RAI departure decisions." Attorneys who would like a copy of the Position Statement may contact the Backup Center.

The *Law Journal* article noted that the Board claimed it "never assessed pornographers points for the number of victims or relationship to the victim," while in a number of cases judges clearly felt such a requirement existed. The wisdom of doing so has been challenged by, among others, Court of Appeals Judge Robert Smith in his opinion in *People v Johnson* (11 NY3d 416 [2008]).

### *Request DOCCS and OMH Records When Preparing for SORA Hearings*

When preparing for SORA risk level hearings for clients now being released from prison, attorneys should obtain copies of their clients' records from the Department of Corrections and Community Supervision sex offender counseling programs, as well as their clients' Office of Mental Health (OMH) file. The OMH file should include a completed STATIC-99 for the client, which is prepared in every case pursuant to the Sex Offender Management and Treatment Act. The STATIC-99 score is often lower than the SORA risk assessment instrument (RAI) score. Information about the Static-99 is available on the New York Static-99 website (www.static99.org), as well as from the Backup Center. Attorneys with questions about SORA hearings may contact the Backup Center.

### *Recent Reports on SOMTA*

In the past several months, both the Office of the Attorney General and the Office of Mental Health (OMH) have released reports on the Sex Offender Management and Treatment Act (SOMTA), Mental Hygiene Law article 10. The Attorney General's report (available at www.ag.ny.gov/sexual-offender/annual-reports) discusses the implementation of article 10 proceedings since SOMTA was enacted in 2007. Over the past five years, the Attorney General's Office has filed 476 civil management petitions and courts have civilly confined 211 respondents and placed 96 respondents on strict and intensive supervision and treatment. Additional statistics and information are contained in the OMH report, which is available at www.omh.ny.gov/omhweb/statistics/somta_report_2011.pdf.

### *"Bath Salts" Added to Prohibited Substances List*

A new Part 9 has been added to Article 10 of the New York Rules, Regulations, and Codes prohibiting the "possession, manufacture, distribution, sale or offer of sale" of synthetic phenethylamines and synthetic cannabinoids, commonly referred to as "bath salts." In March, the Department of Health had issued an Order for Summary Action that, among other things, prohibited the sale or distribution of synthetic cannabinoids, but then determined that further action was needed. The text of the new prohibition, along with the reason for its promulgation as

**Public Defense Backup Center REPORT**
A PUBLICATION OF THE DEFENDER INSTITUTE
**Volume XXVII Number 3 August–October 2012**

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an emergency rule, can be found in the Aug. 22, 2012 issue of the *State Register*, posted online at www.dos.ny.gov/info/register/2012/aug22/pdfs/rules.pdf. The emergency rule will expire on Nov. 4, 2012; however, the Department of Health has indicated that it intends to adopt the emergency rule as a permanent rule, and a notice of proposed rule making will appear in the *State Register* at a future date. Violations of the rule may be dealt with civilly under Public Health Law (PHL) 309(1)(f) or criminally prosecuted under PHL 229.

## *Retroactivity of* Padilla v Kentucky

In the past several months, both the First and Third Departments have applied the U.S. Supreme Court decision in *Padilla v Kentucky* (130 SCt 1473 [2010]) retroactively. *See People v Baret*, 2012 NY Slip Op 06550 (1st Dept 10/2/2012); *People v Oouch*, 97 AD3d 904 (3d Dept 2012). In *Baret*, the First Department remanded a CPL 440.10 motion to vacate a judgment to the Supreme Court, Bronx County after concluding that *Padilla* should be applied retroactively to a conviction that resulted from a plea of guilty taken on Dec. 23, 1996. In *Oouch*, the Third Department held that the trial court erred in denying the defendant's CPL 440.10 motion seeking to vacate his 2008 conviction without a hearing where there was "a clear question of credibility and defendant's claim is not conclusively resolved by unquestionable documentary evidence …." A summary of *Oouch* appears on p. 38. The US Supreme Court has granted certiorari in *Chaidez v United States* (No. 11-820) to resolve the question of *Padilla*'s retroactivity; oral argument is scheduled for Oct. 30, 2012. (www.scotusblog.com/case-files/cases/chaidez-v-united-states.) However, as NYSDA staff attorney Al O'Connor told the *New York Law Journal* for an article about *Oouch*, even if the Supreme Court decides that *Padilla* is not retroactive, New York courts are not barred from applying it retroactively under New York law. (www.newyorklawjournal.com/PubArticleNY.jsp?id=1202562999321&Hearing_Ordered_on_Attorneys_Advice_About_Deportation.)

## *Family Court and Miscellaneous Criminal Justice Legislative Updates*

Below is a summary of some recently enacted legislation related to Family Court representation and miscellaneous criminal justice issues. This issue's "Legislative Review," which starts on p. 12, discusses other significant criminal justice legislation.

### *Family Court Act*

- Chapter 184 (effective July 18, 2012): as noted in the last issue of the *REPORT*, the Legislature passed a bill that allows the Chief Administrative Judge to promulgate rules authorizing a voluntary e-filing program in family court, as well as a mandatory e-filing program in up to six counties for Family Court Act article 3 and 10 proceedings, upon consent of several agencies and members of the family court bars providing representation to adults and children. The related criminal court e-filing program is discussed in the "Legislative Review," beginning on p. 12.
- Chapter 468 (effective Jan. 1, 2013): amends Family Court Act (FCA) 439(a) and 454(5) to give Support Magistrates the authority to adjudicate child support license suspension proceedings.
- Chapter 470 (effective Oct. 3, 2012): designed to address problems that arose after the enactment of Chapter 97 of the Laws of 2011, the bill amends FCA 171, 173, 175, and 176 to make changes to provisions regarding probation in child support, juvenile delinquency, persons in need of supervision, and family offense proceedings. The bill gives courts the authority to transfer adult probation supervision to the jurisdiction in which the probationer resides, and eliminates the requirement, added in 2011, that the probationer request court permission to relocate to another county.

### *Criminal Justice*

- Chapter 447 (effective Feb. 23, 2013): This bill, commonly known as the Internet System for Tracking Over-Prescribing or I-STOP, includes an amendment to PL 220.00(8) that adds to the definition of narcotic preparation any controlled substance listed in the newly created Schedule II (b-1) in Public Health Law 3306; hydrocodone has been moved from Schedule III to the new Schedule II (b-1).
- Chapter 475 (effective Apr. 1, 2013): amends Correction Law 168-b and Mental Hygiene Law (MHL) 81.18 and 81.19 to: (a) give judges presiding over MHL article 81 guardianship proceedings information about guardians and potential guardians from several sources, including the sex offender registry, the registry of orders of protection, indicated reports from the statewide central register of child abuse and maltreatment, and related decisions in FCA article 10 court proceedings; (b) authorize courts, when making guardianship appointments or considering revocation of such an appointment, to review information from those sources regarding any person eighteen or older who resides in the guardian's or proposed guardian's household, if the alleged incapacitated person resides or will reside with the guardian or proposed guardian; and (c) require the court give the guardian or proposed guardian who is the subject of a criminal

history check a copy of his or her criminal history record and information about the right to seek correction of incorrect information in that record.

- Chapter 476 (effective Oct. 3, 2012): amends CPL 730.60(6)(a) to provide that upon discharge of a person committed to the custody of the Office of Mental Health or the Office for People with Developmental Disabilities pursuant to a final order of observation, the appropriate Commissioner must give written notice to the persons listed in paragraph (a) and amends that list to include "[a]ny person who may reasonably be expected to be the victim of any assault or any violent felony offense, as defined in the penal law, or any offense listed in [CPL 530.11] which would be carried out by the committed person; provided that the person who reasonably may be expected to be a victim does not need to be a member of the same family or household as the committed person." The bill also amends CPL 730.40(2) to provide that, upon discharge, the appropriate Commissioner must immediately certify to the court that he or she has complied with the notice provisions in CPL 730.60(6)(a).

## DOCCS Rules for Visiting Prisoners Effective Oct. 1, 2012

New regulations, "Entrance to a Correctional Facility, Visitation, and Disciplinary Rules (Part 200, Part 201, section 253.7, 254.7 and 1704.7 of 7 NYCRR)," issued by the Department of Corrections and Community Supervision (DOCCS) in March, are now in effect. They are available on the DOCCS website at www.doccs.ny.gov/RulesRegs/20120328_CCS-24-11-00005.html. Guidelines for prisoners and their families concerning prison visits under the new rules are also available. (www.doccs.ny.gov/PressRel/2012/Visiting_Program_Guidelines_20121001.pdf.)

## Annual Conference CLE: Ethics and Effective Representation in a Plea-Driven System

Much of the Continuing Legal Education (CLE) offered at NYSDA's 45th Annual Meeting and Conference focused on issues relating to legal representation of clients who are considering pleading guilty. The program reflected a growing body of United States Supreme Court law recognizing that in today's criminal justice system, which depends on guilty pleas, the representation offered to clients who plead guilty must meet certain constitutional requirements. The two cases from last term, *Missouri v Frye* (132 SCt 1399 [2012]) and *Lafler v Cooper* (132 SCt 1376 [2012]) were, of course, included in Kent Moston's "Supreme Court Update" at the conference.

### Counseling Clients

As public defense representation standards have long underscored, providing ethical professional representation requires more than avoiding constitutional ineffectiveness. But lawyers—and public defense funders—obviously must pay attention to the constitutionalization of duties, such as letting clients know of plea offers (*Lafler v Cooper*), accurately counseling clients about the charges against them (*Missouri v Frye*) and advising foreign national clients about immigration consequences of a guilty plea (*Padilla v Kentucky*, 130 SCt 1473 [2010]). The conference offered ethics credits for Steve Zeidman's session on "Counseling Clients Now that the Courts are Watching."

Trainers from organizations offering specialized services presented on specific aspects of representation regarding possible pleas. Mental Hygiene Legal Service (MHLS) lawyers described in detail what happens to clients who enter the mental health system as a result of pleas to being not responsible due to mental conditions in a session entitled "To Plea or Not to Plea: Pitfalls of the Insanity Defense."

Lawyers attending the conference also heard from Center for Community Alternatives advocates, who addressed "Preventing Collateral Damage: How to Use *Padilla* to Improve Plea Negotiations." From their use of the term "enmeshed consequences," shifting away from the limiting term "collateral consequences," to their detailed examples of the many penalties now confronting people accused of crime, the CCA team heralded expanding professional norms in criminal defense.

Lawyers looking for potential consequences of a conviction have a new tool. The ABA's National Inventory of Collateral Consequences of Conviction is online. The website can be searched and sorted by categories and keywords by state or by multiple jurisdictions. (www.abacollateralconsequences.org.) The ABA created a similar tool for juvenile collateral consequences: www.beforeyouplea.com. And there can be consequences even without a conviction. Examples include immigration consequences if foreign nationals admit to drug activity regardless of case outcome and employment consequences after a successful Adjournment in Contemplation of Dismissal in a petit larceny case (*see Smith v Bank of America* [11-cv-6368 (5/18/2012)]).

#### *"Defense" Expanded: Trends Toward Holistic Representation*

The full effects of the U.S. Supreme Court cases highlighted at the conference remain to be seen; commentators like Tony Mauro in the Sept. 4, 2012 issue of the *New York*

*Law Journal* continue to debate the extent to which the plea cases represent a "sea-change" in ineffectiveness claims in a guilty-plea world. But whether *Padilla* and its progeny created the new day or just recognized its dawning, quality defense in the twenty-first century extends far beyond analysis of statutory elements and narrow facts.

In a recent example of this growing trend, the American Bar Association (ABA) urged criminal defense lawyers to embrace a broad definition of what representing someone facing criminal charges entails. As reported in, among other places, the *Tonawanda News* on Sept. 7, the ABA passed a resolution urging defense lawyers to help clients address issues like addiction and unemployment that can drive involvement in the criminal justice system. The article notes the support of NYSDA's Executive Director for the resolution, which calls for increased resources to help public defenders serve the particular needs of their clients and furthers standards of practice that can not only help clients but ultimately save the system money. (http://tonawanda-news.com/local/x2076992409/A-new-kind-of-lawyer.) The New York State Bar Association co-sponsored the resolution. (http://newsandinsight.thomsonreuters.com/Legal/News/2012/08_-_August/ABA_urges_criminal_defense_lawyers_to_embrace_holistic_approach/.)

## *Legislative, Case Law, and Immigration Updates Offered*

Whether a lawyer offers "holistic" or "traditional" representation—qualities that may blend into each other in practice—basic tasks like keeping current on the law remain a vital part of the job. The Annual Conference provided updates on both U.S. Supreme Court and New York Court of Appeals cases. With no blockbuster legislative reforms and but a few major increases in crimes and penalties coming out of the State legislature, Al O'Connor's annual "Legislative Update" session at the conference was combined with an "Immigration Update" by Joanne Macri. Al's 2012 "Legislative Review" appears at p. 12.

### *Much to Keep Up With on DNA*

Included in the conference handouts relating to new legislation were materials dealing with pre-trial motions for DNA comparison and with post-conviction DNA evidence under new provisions of the Criminal Procedure Law. Meanwhile, in New York State and around the country, both scientific and political DNA developments make keeping up on its applications in legal representation challenging.

The recent legislative expansion of the State's DNA database could have gone even further; some jurisdictions seek DNA samples not just from individuals convicted of all or most crimes, including minor ones, but from suspects. The en banc Ninth Circuit is going to look at a California law requiring DNA samples from anyone arrested for a felony; a three-judge panel had upheld the law. *Haskell v Harris*, 669 F3d 1049, en banc review granted 686 F3d 1121 (9th Cir 2012). Information about the *Haskell* case is available at www.aclunc.org/cases/active_cases/haskell_v._harris.shtml. And Chief Justice John Roberts, pending a U.S. Supreme Court decision on whether to grant certiorari, has stayed enforcement of a Maryland Supreme Court decision overturning that state's legislation authorizing the taking of DNA samples from arrested suspects in certain types of cases. *Maryland v King*, No. 12A48, 2012 U.S. LEXIS 5018 (7/30/2012) [available at www.supremecourt.gov/opinions/11pdf/12A48c3d7.pdf].

On the science side, the recent discovery that "junk DNA" serves a variety of functions (*see* www.nytimes.com/2012/09/06/science/far-from-junk-dna-dark-matter-proves-crucial-to-health.html?pagewanted=1&_r=_1&hp) might have legal ramifications if early speculation that "DNA dark matter" has a role in psychiatric disorders turns out to be true. But long before lawyers have to confront that eventuality, they must deal with more mundane but vital questions about established uses of DNA.

## *Online Resources for Updates and Additional Information*

### *Keep Up with the Court of Appeals*

The Court of Appeals has announced that, beginning September 2012, transcripts of oral arguments will be made available. They will be posted along with the archived webcasts of oral arguments, which are available back to January 2010, at www.nycourts.gov/ctapps/OA-Archives.htm.

Information on cases pending in the Court of Appeals is also available on the Court's website, www.nycourts.gov/ctapps/docket.htm. For information on significant criminal cases, check the "Court of Appeals Update" posted every two months on the Center for Appellate Litigation website at www.appellate-litigation.org/court-of-appeals/.

### *Immigration Project Training Materials Now Online*

Several training materials developed by NYSDA's Criminal Defense Immigration Project are now posted online at www.nysda.org/Imm-TrainingResources.html. Topic headings include "Who Is At Risk For Removal And How?" and "Impact of Immigration Detainers on Criminal Proceedings." Links to other resources are also provided.

Note these headlines:

- "Weak DNA evidence could undermine justice, experts say" (http://articles.chicagotribune.com/2012-07-05/news/ct-met-dna-questions-20120705_1_forensic-dna-analysis-dna-profile-dna-scientists);
- "DNA evidence: Protecting the 'Gold Standard'?" (http://wrongfulconvictionsblog.org/2012/07/10/dna-evidence-protecting-the-gold-standard/); and
- "False Occupy Murder Match Raises Concerns about DNA Database and NYPD Practices" (www.nyclu.org/news/false-occupy-murder-match-raises-concerns-about-dna-database-and-nypd-practices) [More information about this incident is available at http://www.nytimes.com/2012/07/12/nyregion/suspected-dna-link-to-2004-killing-was-the-result-of-a-lab-error.html. The NYC Office of the Chief Medical Examiner provided an explanation of the incident in a letter to ASCLAD/LAB, which is available at http://criminaljustice.state.ny.us/pio/open-meetings/09-24-2012-dna/nyc-ocme-forensic-bio-lab.pdf].

Lawyers must also confront technical developments that deal less with the underlying science of DNA than with how testing is done. For example, the FBI has now acquired "Rapid DNA" equipment, a sort of "DNA analysis-in-a-box," for near-instant DNA analysis in the field. The Bureau will team up with the National Institute of Standards to test these new systems for law enforcement use. The full evaluation, including new processes to be followed to connect to federal databases, could take around a year; legislative changes may well be required in order to use the new technology to produce evidence. (www.forensicmag.com/news/legal-hurdles-threaten-slow-fbis-rapid-dna-revolution.) When state use of such equipment might occur can't be known, but lawyers need to be prepared to challenge the validity of both the underlying technology and any individual application of it. This is true of all forensic evidence. Once-revered fingerprint evidence remains challengeable on a variety of grounds, from the assumption that everyone's prints are unique to the uses of new technology. *See* www.psmag.com/uncategorized/why-fingerprints-arent-proof-47079/.

Outside the headlines, bureaucracies deal routinely with DNA issues that may directly or indirectly affect defense cases. While bureaucratic dictates may lack excitement, they can matter. Reference to material like the New York City Police Department's directive intended to prevent contamination of potential DNA samples obtained surreptitiously during interrogation can affect the effectiveness of police work—and of defense work:

> "'Detective,' Mr. [Marvyn] Kornberg said, launching into an imaginary cross-examination, 'Do you know if they cleaned the table? What was the last time the table was cleaned?'"

(www.nytimes.com/2012/08/29/nyregion/dna-evidence-in-police-interrogation-rooms-requires-bleach.html.)

Perhaps less often directly relevant but still potentially useful information can be found in meetings of the DNA Subcommittee of the Division of Criminal Justice Services (DCJS) Commission on Forensic Science. Draft minutes from a September meeting, for example, reflect discussion of a variety of issues. The New York City Office of Chief Medical Examiner's Forensic Biology Laboratory came up in two contexts—publicized false reports of contamination (see above) and validation of the Forensic Statistical Tool that the lab uses. Also discussed by the Subcommittee was the use of Y-STRs to obtain partial DNA matches, and laboratory disclosures of false results. (www.criminaljustice.ny.gov/pio/openmeetings.htm.)

Lawyers who do not recognize terms like "Y-STR" (Y-chromosome short tandem repeats) can turn, among other places, to a publication by the National Institute of Justice: *DNA for the Defense Bar* [June 2012] (available at www.nij.gov/pubs-sum/237975.htm). The fourth in a series, with the three others aimed at prosecutors, court officers, and law enforcement, the publication is a product of the federal "DNA Initiative." Approximately three-quarters of the funds allocated by Congress to this initiative for fiscal year 2011 "went directly to crime laboratories and police departments to reduce the current backlog of DNA evidence, increase laboratory capacity and solve cold cases." (www.nij.gov/nij/topics/forensics/lab-operations/evidence-backlogs/fy11-report-to-congress.htm.)

Incidentally, the use of Y-STR, which refers to DNA passed from father to son, is apparently growing. *See* www.freep.com/article/20120927/NEWS03/120927058/Judge-rule-DNA-linking-suspect-Royal-Oak-woman-s-murder. Like mitochondrial DNA, which is passed from mothers to children, Y-STR is not a unique identifier.

### *Schechter on Forensic Evidence Discovery*

Looking beyond DNA, information needed to challenge forensic evidence of many types was the theme of Marvin E. Schechter's presentation at the annual conference, "Forensic Document Discovery: Trolling for Records, Hunting for Fairness." Schechter is a member of the New York State Commission on Forensic Science (CFS), which is authorized to, among other things, develop minimum standards and an accreditation programs for all forensic laboratories in the state. As with the DNA Subcommittee, minutes of the CFS's meetings can be accessed online, allowing lawyers to see, for example, if problems with a particular lab have been recently raised. Materials handed out at CFS meetings and annual docu-

mentation of laboratory "events" like mistakes and corrective actions are also available online at www.criminaljustice.ny.gov/pio/openmeetings.htm. Posting of CFS (and DNA Subcommittee) materials is for a limited time, but requests can be made to DCJS for such materials on a CD.

Major laboratory problems discussed at CFS meetings may be news in the wider world as well—the Inspector General may weigh in, as happened this year with Monroe County's lab, and media attention may follow. But not every reported lab mistake shows up in the *New York Law Journal*, as the Monroe County story did back in June.

***No Better Time to Challenge Forensic Evidence***

The aura exuded by forensic experts may be fading. One-time believers in a variety of areas of alleged expertise have denounced use or misuse of forensic evidence once touted as cutting edge or solidly established. As one example, *see* http://blogs.clarionledger.com/jmitchell/2012/08/06/bite-mark-expert-michael-west-whose-testimony-helped-convict-dozens-now-says-bite-marks-should-be-thrown-out-in-courts/. Media attention has pressured law enforcement to investigate potential cases of wrongful conviction due to junk science. (www.washingtonpost.com/local/crime/justice-dept-fbi-to-review-use-of-forensic-evidence-in-thousands-of-cases/2012/07/10/gJQAT6DlbW_story.html.) And the Innocence Project continues to spearhead efforts to debunk junk science and bring real science to bear in the courtroom, posting information on its website (*e.g.*, www.innocenceproject.org/fix/Crime-Lab-Oversight.php), reaching out to scientists (*e.g.*, www.innocenceproject.org/Content/Forensic_Scientists_Join_Innocence_Project_in_Conversation_about_Wrongful_Convictions.php), and supporting new federal legislation introduced this summer, the "Forensic Science and Standards Act of 2012", aimed at strengthening the forensic sciences. (www.innocenceproject.org/Content/Forensic_Science_Improvement_Bill_Submitted_to_Congress.php.)

But every week, across New York State, public defense lawyers face huge hurdles in challenging weak forensic evidence that threatens to send their clients to prison. Court pressure to move dockets, excessive caseloads, and lack of resources make investigating the validity of forensic evidence daunting. Judges who "haven't gotten the memo" still want to allow discredited forms of forensic evidence in because such evidence was found to have passed the *Frye* test decades ago. County courts balk at paying the expert fees needed to obtain the advice, and perhaps testimony, needed to challenge flawed theories or procedures.

Don't give up. Check the list of potential experts on NYSDA's website. (www.nysda.org/ExpertDatabase.html.) Call the Backup Center and see what training materials, news items, and other information NYSDA has in its clearinghouse. Brainstorm with one of the staff attorneys about how to get what you need.

### *Award Recipients Celebrated at the 45th Annual Awards Banquet*

At this year's awards banquet, Tom Klein received NYSDA's Service of Justice Award for his commitment to justice. Klein, an attorney at The Legal Aid Society for over 25 years, was honored for his skills as a trainer, educating lawyers around the state, including at NYSDA's Annual Conference, and as a trial lawyer and supervisor. Hundreds of lawyers and their clients have benefited from Klein's training talents.

Michael Howard, an assistant public defender with the Columbia County Public Defender's Office, received this year's Wilfred O'Connor Award. This award was created by NYSDA's Board of Directors to recognize a public defense attorney in practice for fifteen or more years who exemplifies the client-centered sense of justice, persistence, and compassion that characterized Bill's life. Columbia County Public Defender Arlene Levinson and First Assistant Public Defender Robert W. Linville praised not only Howard's skill but also his empathy for clients, personal contact with and assistance to the client community, and advocacy for both his clients' rights and the integrity of the criminal justice process.

The Kevin M. Andersen Award, created by the Genesee County Public Defender's Office, was awarded to Susan Bryant, a NYSDA staff attorney, for the valuable assistance she provides to busy public defense lawyers. The Kevin M. Andersen Award is presented to an attorney who has been in practice less than fifteen years, practices in the area of indigent defense, and exemplifies the sense of justice, determination, and compassion that were Kevin's hallmarks.

## *2012 Defense Community Dinner Honors Assistant Federal Public Defender*

At this year's Defense Community Dinner, hosted by the Monroe County Public Defender's Office, Anne M. Burger, Assistant Federal Public Defender (WDNY), received the Jeffrey A. Jacobs Memorial Award. Burger was recognized for her work on a case that went to trial and ended in an acquittal based on her diligence in challenging procedural issues, innovative jury selection, conscientious investigation, and creative defense presentation. Jeffrey A. Jacobs was an assistant public defender with the Monroe County Public Defender's Office whose "dedication to his clients, perseverance despite the circumstances, and commitment to a fair justice system were

a source of inspiration for defense attorneys throughout our community." The dinner was held on the first day of a two day CLE program co-sponsored by the Monroe County Public Defender's Office and NYSDA, "Developing Trial Skills, Fostering Ethical Representation and Challenging Forensic Evidence."

## Recurring Discovery Reform Efforts: Will New York Ever Change?

Lawyers trying to find out details of the cases facing them and their clients, including information concerning forensic evidence that inculpates or exculpates the accused, too often hit the brick wall of New York's inequitable discovery laws. Efforts to find a way around the severe limitations on discovery continue, even though they may not succeed, or may not succeed for long. For example, in June the Third Department disapproved of one lawyer's success in obtaining an order compelling the prosecutor to perform a fingerprint comparison by a date certain; the case, *Matter of Farrell v LaBuda* (94 AD3d 1195), is summarized on p. 32. Broader discovery challenges have also met with little or no success. Discovery reforms large and small have been introduced in the State Legislature, only to fail. *See, e.g., REPORT*, Vol. XXVI, No. 3 (June-July 2011).

One aspect of discovery—the prosecution's duty to disclose exculpatory evidence under the so-called *Brady* rule (*Brady v Maryland*, 373 US 83 [1963])—has recently received a good deal of attention in New York. *See, e.g.,* www.newyorklawjournal.com/PubArticleNY.jsp?id=1202565186828. As noted in the weekly e-newsletter of It Could Happen to You on Aug. 15, 2012, controversy erupted following a column by Marvin Schechter, who is the current chair of the Criminal Justice Section of the New York State Bar Association, in the Summer 2012 issue of the Section's *New York Criminal Law Newsletter*. (www.scribd.com/doc/103044766/Wednesday-Watch-on-Injustice-Edition-64-08-15-2012.)

The column discussed a specific case (*People v Waters*, 35 Misc 3d 855 [Supreme Ct, Bronx Co 2012]), dealing with the failure of an Assistant District Attorney (ADA) to provide information to the defense about a change in what a primary eyewitness claimed to have seen. The prosecutor's office had argued that disclosure was not required because the change was more inculpatory, not exculpatory. Post-decision, the office "'did acknowledge that to avoid surprising the defense attorney, we should have disclosed this'" and that the ADA was "'now aware of the office position that notwithstanding whether it was or was not *Brady* material, it should have been disclosed.'" (www.newyorklawjournal.com/PubArticleNY.jsp?id=1202548467325&Judge_Faults_Bronx_ADA_for_Failure_to_Disclose_Witness_Changed_Story.) Schechter's comment in this context about withholding of *Brady* material being a learned—and taught—practice produced strong responses from some prosecutors, which in turn generated further comments. *See, e.g.,* www.nysacdl.org/2012/08/prosecutors-stance-on-brady-obligations-generates-ongoing-dialogue/. The Criminal Justice Section then adopted a resolution saying that "It is not the position of the Criminal Justice Section that the District Attorneys of New York State intentionally teach their Assistant District Attorneys to commit *Brady* violations." (www.newyorklawjournal.com/PubArticleNY.jsp?id=1202571674211&State_Bar_Adopts_Resolution_to_Clarify_Position_on_Brady.)

While these developments put discovery issues in legal headlines, it is important that the controversy not overshadow the need for reform. The defense community must continue to press in the courts, the Legislature, and all other appropriate forums for full, timely disclosure of all information needed to provide clients with proper representation.

## Prosecution Ethics Rules Amended to Address Wrongful Convictions

Effective July 1, 2012, Rule 3.8 of the New York Rules of Professional Conduct (Special Responsibilities of Prosecutors and Other Government Lawyers) now contains a provision addressing what a prosecutor must do when "the prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted ...." While the rule provides for disclosure to an appropriate court or prosecutor's office within a reasonable time, it does not require prompt disclosure to the defendant if the court authorizes delay for good cause shown. The rule also provides that "[w]hen a prosecutor knows of clear and convincing evidence establishing that a defendant was convicted, in a prosecution by the prosecutor's office, of an offense that the defendant did not commit, the prosecutor shall seek a remedy consistent with justice, applicable law, and the circumstances of the case." And "[a] prosecutor's independent judgment, made in good faith, that the new evidence is not of such a nature as to trigger the obligations …, though subsequently determined to have been erroneous, does not constitute a violation of this rule." The language of the rule was published in the July 18, 2012 issue of the *State Register*. (www.dos.ny.gov/info/register/2012/jul18/pdfs/courtnotices.pdf.)

The New York City Bar has been encouraging amendments to Rule 3.8 that track the language in the American Bar Association (ABA) Model Rules of Professional Conduct; the Model Rules contain stronger language than that enacted in New York and do not include a good faith exception. (www2.nycbar.org/pdf/report/uploads/ 20071856-LetterregardingRule3.8RulesofProfConduct.pdf.)

According to an ABA chart, New York is one of eight states that have adopted all or a portion of the wrongful conviction provision in the Model Rules. (www.americanbar.org/content/dam/aba/administrative/professional_responsibility/3_8_g_h.authcheckdam.pdf.) The District Attorneys Association of the State of New York has updated its publication, *"The Right Thing": Ethical Guidelines for Prosecutors*, to include the amendments to Rule 3.8. (www.daasny.org/Ethics%20Handbook%209.28.2012%20FINAL.pdf.) The amendments have been criticized by at least two members of the criminal defense bar; "they neither assure that an innocent person be released, nor that a prosecutor who sits on evidence of innocence be sanctioned." (http://blog.simplejustice.us/2012/08/15/meet-the-new-rule-same-as-the-old-rule.aspx; http://gamso-forthedefense.blogspot.com/ 2012/08/one-of-these-days-you-know-maybe-if.html.) Information about the causes of wrongful conviction, including prosecutorial misconduct, can be found all over the Internet, but some of the most comprehensive resources are the Innocence Project (www.innocenceproject.org/), the Wrongful Convictions Blog (wrongfulconvictionsblog.org), the Innocence Network (www.innocencenetwork.org), and the National Registry of Exonerations (www.law.umich.edu/special/exoneration/Pages/about.aspx).

## *Local Court Justice Resigns After Allegations Including Failure to Advise of Right to Counsel*

The Commission on Judicial Conduct has announced an end to formal proceedings against Oppenheim Town Court (Fulton County) Justice Robert L. Link following the Justice's stipulation resigning from the bench and promising not to seek or accept judicial office in the future. Allegations against Link included: failure to advise a defendant of the rights to counsel and to a hearing; improper elicitation of admissions from the defendant; consideration and/or reliance on ex parte communications; imposition of sentence after a determination of guilt made with no plea, trial, or opportunity to contest charges; failure to disclose personal involvement in a defendant's business in two cases or to disqualify himself; and failure to mechanically record court proceedings in two cases. (www.scjc.state.ny.us/Press.Releases/2012.Releases/Link.Release.2012-09-27.pdf.)

## *Stop and Frisk Issues in the Courts and in the News*

When may a law enforcement officer legally stop and frisk an individual? Is stop-and-frisk being overused and misused in New York City (or elsewhere)? How—and when, if ever—will these and other stop-and-frisk issues be resolved? The *REPORT* cannot answer all these questions but does note that they are being raised in a variety of venues.

Ongoing media attention to stop-and-frisk issues has been centered in New York City, where a variety of challenges to police policy have arisen, from a class-action lawsuit to organized meetings and street protests. Appellate courts are also addressing stop-and-frisk issues. Racial and ethnic discrimination underlies many of the current demands for freedom from unreasonable searches and seizures. Stop-and-frisk is one of the policies receiving attention from groups such as the Campaign to End the New Jim Crow. (www.endnewjimcrow.org/News-.html.) The eventual outcome of these developments could have long-term ramifications for Fourth Amendment protections in this state and even nationwide.

### *First Department Frisk Cases Noted*

In two of the cases included in this issue's Case Digest section (*Matter of Darryl C.* [98 AD3d 69] and *Matter of Jaquan M.* [97 AD3d 403], summaries on pp. 22 and 23, respectively), First Department panels "decided that nervous 14-year-olds encountered by the police in high-crime areas of Manhattan and the Bronx were not acting suspiciously enough to justify the officers' decisions to stop and frisk them…." (www.newyorklawjournal.com/PubArticleNY.jsp?id=1202564529367&Judges_Use_Complex_Protocol_to_Evaluate_Police_Searches&slreturn=20120627091511.) *Jaquan M.* is on appeal in the Court of Appeals. (www.nycourts.gov/reporter/motindex/7-06-12_7-26-12.htm.)

### *Has the Ever-Increasing Number of NYPD Stops Finally Peaked?*

Police officers reportedly stopped people on New York City's streets 203,500 times from January through March 2012, up from 183,326 stops during the same quarter a year earlier. This set the City on course to shatter last year's record for the highest annual tally of street stops. (www.nytimes.com/2012/05/13/nyregion/new-york-police-data-shows-increase-in-stop-and-frisks.html.)

However, three months later the NYPD was said to be "trumpeting a decrease of about one-third in the number of citizens detained under its increasingly unpopular stop-and-frisk program." (www.nytimes.com/2012/08/09/opinion/stop-and-frisk-in-new-york-city.html.) It is too early to tell whether this marks a trend and whether it stems from media coverage and public pressure or court action—or a combination of these pressures.

*(continued on page 15)*

# Book Review

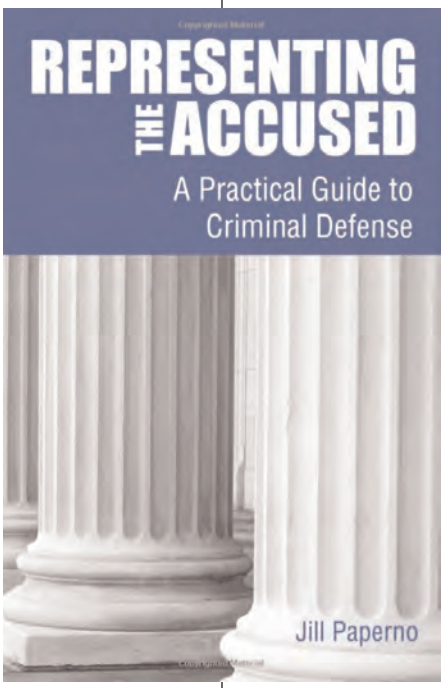
## *Representing the Accused: A Practical Guide to Criminal Defense*

**By Jill Paperno**
**Thomson Reuters/Aspatore (2012)**

**by Stephanie Batcheller***

### *Mentor in Your Pocket*

Jill Paperno's new book, *Representing the Accused: A Practical Guide to Criminal Defense*, is exactly that: a *practical guide*. Part teaching tool, part memoir, this handbook offers a step-by-step review of each phase of representation in a criminal case, conveyed in the voice of a successful and zealous practitioner who evolved in the trenches. Although the author has devoted her practice primarily to the state courts of New York, her ideas are universally applicable to any defense practice nationwide.




Ms. Paperno starts with a discussion of the practice of criminal defense as a career choice and invites the reader to carefully consider the challenges, both personal and professional, that go into becoming a defender, be it full-time or part-time, as an institutional provider or private practitioner. She then goes on to examine every phase of a criminal action, from the first client meeting through decisions about appeals, including tips on language, appearance, and preparation.

The degree to which defenders engage in a client-centered practice is highly idiosyncratic and the subject of wide ranging discourse related to whether a lawyer should engage in "social work" in the course of representing clients in criminal cases. While the book focuses on the legal aspects of case evaluation and presentation, Ms. Paperno's personal holistic approach is readily discernible in the way she encourages the reader to consider every aspect of a client's situation in order to develop positive attorney-client relationships and advocate for innovative resolutions.

The book offers practical advice on how to develop a working rapport with clients, how to develop a theory of defense, and how to manage the paper chase and organize information, from creating a traditional trial file to time and data management on a smart pad. It provides insight based on decades of experience on how to evaluate a case and prepare for various proceedings. It is a veritable how-to manual for dealing with preliminary hearings, motion practice, investigation techniques and goals, plea negotiations and dispositions, witness examination development, collateral consequences, sentencing, and more.

Ms. Paperno uses detailed examples and illustrations of how she prepares for proceedings like voir dire and cross-examination, with explanations of how her particular systems are beneficial. At the same time, she encourages the practitioner/reader to seek a broad understanding of substantive and procedural goals and to develop a personal style. Throughout the book, she candidly peppers her coaching with hints and caveats, describing some practices that have worked for her throughout the years and some that have backfired.

At first blush this volume may seem simplistic, but don't be fooled: to a great extent its simplicity is its strong point. Although it does contain some references to seminal Supreme Court jurisprudence on constitutional matters, for the most part it recognizes that too much formatting or legal citation would not only detract from its usefulness to practitioners across the wide jurisdictional spectrum, but would stifle the importance of individual creativity. The straightforwardness of its instructive writing style enhances its usefulness as a mentoring guide.

*Representing the Accused* will not replace the need for solid research and investigation in each and every case, but it does provide a framework in which to implement case development and preparation. It is a book to keep close at hand, side-by-side with a Graybook [*New York Criminal Statutes and Rules*] and the Rules of Evidence, worthy of review at each juncture as a reminder to approach each facet of a criminal case with a fresh eye. Defenders new and seasoned cannot be reminded too often that ruts in practice are easy to form and may lead to missed opportunities. If I were still regularly engaged in client representation and courtroom practice, my copy of this guide would be dog-eared and post-it laden, marking some of the many pointers and bolstering ideas Ms. Paperno offers. ⚖

**Stephanie Batcheller is a Backup Center Staff Attorney. She has been a defender for nearly thirty years, with extensive trial and appellate litigation experience in state and federal courts in Georgia, Maryland, and New York.*

# Conferences & Seminars

**Sponsor:** **New York State Defenders Association**
**Theme:** **Investigator Training**
**Date:** **November 8, 2012**
**Place:** **Albany, NY**
**Contact:** **NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org**

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Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Cross to Kill
Date: November 9, 2012
Place: Buffalo, NY
Contact: NYSACDL: tel (212) 532-4434; fax (888) 239-4665; website www.nysacdl.org

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**Sponsors:** **Office of the Federal Public Defender, New York State Defenders Association & NDNY Federal Court Bar Association**
**Theme:** **Federal Criminal Defense Training**
**Date:** **November 14, 2012**
**Place:** **Albany, NY**
**Contact:** **NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org**

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Sponsor: New York County Lawyers' Association
Theme: When Allegations of Child Sex Abuse Are Made Within Matrimonial and Family Law Cases…How to Defend and How to Prosecute
Date: November 27, 2012
Place: New York City
Contact: NYCLA: tel (212) 267-6646; fax (212) 267-1745; website www.nycla.org

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**Sponsor:** **New York State Defenders Association**
**Theme:** **Winning Criminal Defense Strategies**
**Date:** **November 30, 2012**
**Place:** **Poughkeepsie, NY**
**Contact:** **NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org**

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Sponsor: National Legal Aid & Defender Association
Theme: 2012 Annual Conference
Dates: December 5-8, 2012
Place: Chicago, IL
Contact: NLADA: tel (202) 452-0620; fax (202) 872-1031; email k.kane@nlada.org (Kris Kane); website www.nlada.org/Training

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Sponsor: The Legal Aid Society and Steven Epstein, Esq.
Theme: Man vs. Machine II: Science Made Simple
Date: December 7, 2012
Place: Brooklyn, NY
Contact: Steven Epstein: tel (518) 745-1500; email SBE@barketmarion.com

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Sponsor: National Association of Criminal Defense Lawyers
Theme: 33rd Annual Advanced Criminal Law Seminar—Emerging Trends, Novel Defenses
Dates: January 13-18, 2013
Place: Aspen, CO
Contact: NACDL: tel (202) 872-8600 x 636 (Gerald Lippert); fax (202) 872-8690; email glippert@nacdl.org; website www.nacdl.org/meetings

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Sponsor: National Association of Criminal Defense Lawyers
Theme: Reasonable Doubt and Actual Innocence: Winning Your Case with Cutting-Edge Science
Dates: February 20-23, 2013
Place: Washington, DC
Contact: NACDL: tel (202) 872-8600 x 636 (Gerald Lippert); fax (202) 872-8690; email glippert@nacdl.org; website www.nacdl.org/meetings

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**Sponsor:** **New York State Defenders Association**
**Theme:** **27th Annual Metropolitan Trainer**
**Date:** **March 16, 2013**
**Place:** **New York City**
**Contact:** **NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org**

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Sponsor: National Association of Criminal Defense Lawyers and California Attorneys for Criminal Justice
Theme: Making Sense of Science VI: Forensic Science & The Law
Dates: April 5-6, 2013
Place: Las Vegas, NV
Contact: NACDL: tel (202) 872-8600 x 632 (Viviana Sejas); fax (202) 872-8690; email vsejas@nacdl.org; website www.nacdl.org/meetings⚖

# 2012 Legislative Review

By Al O'Connor*

## DNA Testing

➢ **Chap. 19 (S.6733) (DNA testing for virtually all criminal convictions). Effective: Applies to convictions entered on or after August 1, 2012 (as amended by Chap. 55, Part A).**

Requires DNA testing of defendants convicted of all felonies and Penal Law misdemeanors, except first time convictions of criminal possession of marihuana under Penal Law § 221.10(1) (amounts of 25 grams or less burning or open to public view). The new testing requirements apply to convictions entered on or after August 1, 2012. The legislation specifies that DNA samples are to be taken by jails and prisons when the defendant is committed to custody, and by probation offices when a probationary term is imposed. Otherwise, samples are to be taken by court officers or sheriff's offices or, in the city of New York, by court officers.

The legislation also amends the discovery statute [CPL § 240.40(1)(d)] to authorize defense motions for comparison of DNA material "gathered in connection with the investigation or prosecution of the defendant" against the DNA databank when the request is "reasonable" and comparison is "material" to the defense. For the first time, post-conviction DNA testing under CPL § 440.30 will be available in cases where the defendant pleaded guilty, but only for pleas entered on or after August 1, 2012 and only for certain specified crimes (homicide, sex offenses, and violent felonies). The legislation also authorizes a highly qualified right to compelled production of property in possession of the prosecutor when the court orders an evidentiary hearing in a CPL § 440.10 proceeding.

## Penal Law

➢ **Chap. ___ (S.7638, Part D) (Family Offenses — Offense Level Upgrades). Effective: 60 days after governor's signature, except the new Penal Law § 240.75 and CPL § 200.63 are effective 90 days after governor's signature.**

This legislation elevates shoving, kicking and other physical contact to aggravated harassment in the second degree, a Class A misdemeanor, when the offense is committed against a member of the same family or household and the victim suffers physical injury. It also establishes the new Class E felony of aggravated family offense when the defendant has been convicted of any one of a long list of crimes against a family member within the preceding five years (exclusive of time in custody). Finally, the legislation amends the bail setting criteria defined in CPL § 510.30 to require the court in family offense matters to consider "(A) any violation by the principal of an order of protection issued by any court for the protection of a member or members of the same family or household . . . whether or not such order of protection is currently in effect; and (B) the principal's history of use or possession of a firearm."

**Penal Law § 240.30 — Aggravated harassment in the second degree.**

Subdivisions 4 and 5 of § 240.30 of the Penal Law are renumbered subdivisions 5 and 6 and a new subdivision 4 is added to read as follows:

"4. Strikes, shoves, kicks or otherwise subjects another person to physical contact thereby causing physical injury to such person or to a family or household member of such person as defined in section 530.11 of the criminal procedure law."

(Class A misdemeanor)

**Penal Law § 240.75 Aggravated family offense.**

1. A person is guilty of aggravated family offense when he or she commits a misdemeanor defined in subdivision two of this section as a specified offense and he or she has been convicted of one or more specified offenses within the immediately preceding five years. For the purposes of this subdivision, in calculating the five year period, any period of time during which the defendant was incarcerated for any reason between the time of the commission of any of such previous offenses and the time of commission of the present crime shall be excluded and such five year period shall be extended by a period or periods equal to the time served under such incarceration.

2. A "specified offense" is an offense defined in section 120.00 (assault in the third degree); section 120.05 (assault in the second degree); section 120.10 (assault in the first degree); section 120.13 (menacing in the first degree); section 120.14 (menacing in the second degree); section 120.15 (menacing in the third degree); section 120.20 (reckless endangerment in the second degree); section 120.25 (reckless endangerment in the first degree); section 120.45 (stalking in the fourth degree); section 120.50 (stalking in the third degree); section 120.55 (stalking in the second degree); section 120.60 (stalking in the first degree); section 121.11 (criminal obstruction of breathing or blood circulation); section 121.12 (strangulation in the second degree); section 121.13 (strangulation in the first degree); subdivision one of section 125.15 (manslaughter in the second degree); subdivision one, two or four of section 125.20 (manslaughter in the first degree); section 125.25 (murder in the second degree); section 130.20 (sexual mis-

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conduct); section 130.30 (rape in the second degree); section 130.35 (rape in the first degree); section 130.40 (criminal sexual act in the third degree); section 130.45 (criminal sexual act in the second degree); section 130.50 (criminal sexual act in the first degree); section 130.52 (forcible touching); section 130.53 (persistent sexual abuse); section 130.55 (sexual abuse in the third degree); section 130.60 (sexual abuse in the second degree); section 130.65 (sexual abuse in the first degree); section 130.66 (aggravated sexual abuse in the third degree); section 130.67 (aggravated sexual abuse in the second degree); section 130.70 (aggravated sexual abuse in the first degree); section 130.91 (sexually motivated felony); section 130.95 (predatory sexual assault); section 130.96 (predatory sexual assault against a child); section 135.05 (unlawful imprisonment in the second degree); section 135.10 (unlawful imprisonment in the first degree); section 135.60 (coercion in the second degree); section 135.65 (coercion in the first degree); section 140.20 (burglary in the third degree); section 140.25 (burglary in the second degree); section 140.30 (burglary in the first degree); section 145.00 (criminal mischief in the fourth degree); section 145.05 (criminal mischief in the third degree); section 145.10 (criminal mischief in the second degree); section 145.12 (criminal mischief in the first degree); section 145.14 (criminal tampering in the third degree); section 215.50 (criminal contempt in the second degree); section 215.51 (criminal contempt in the first degree); section 215.52 (aggravated criminal contempt); section 240.25 (harassment in the first degree); subdivision one, two or four of section 240.30 (aggravated harassment in the second degree); aggravated family offense as defined in this section or any attempt or conspiracy to commit any of the foregoing offenses where the defendant and the person against whom the offense was committed were members of the same family or household as defined in subdivision one of section 530.11 of the criminal procedure law.

3. The person against whom the current specified offense is committed may be different from the person against whom the previous specified offense was committed and such persons do not need to be members of the same family or household.

(Class E felony)

A new CPL § 200.63 has been enacted to provide for special informations for the charge of aggravated family offense, thereby offering the defendant an opportunity to admit to the prior offense and keep it out of evidence or, alternatively, deny it and have it be the subject of trial proof.

➢ **Chap. 456 (S.7742) (Obscene sexual performance by a child). Effective: September 7, 2012.**

Amends Penal Law § 263.11 (possessing an obscene sexual performance by a child) and Penal Law § 263.16 (possessing a sexual performance by a child) to include "knowingly access[ing]" such material on the internet with the intent to view it. The legislation is in response to *People v Kent* (19 NY3d 290 [2012]), where the Court of Appeals held that a defendant who merely accessed a website containing child pornography was not guilty of possession without further evidence that he downloaded or saved the contents of the site. The legislation also includes an exclusion for defense attorneys. A new subdivision 9 of Penal Law § 263.00 provides that the terms "possession," "control" and "promotion" "shall not include conduct by an attorney when the performance was provided to such attorney in relation to the representation of a person under investigation or charged under this chapter or as a respondent pursuant to the family court act, and is limited in use for the purpose of representation for the period of such representation."

➢ **Chap. 434 (S.7720) (Assault on an employee of a social service district). Effective: November 1, 2012.**

Adds employees of social service districts to the list of job titles covered by Penal Law § 120.05. (Class D felony)

**Penal Law § 120.05**

A person is guilty of assault in the second degree when:

3-a. With intent to prevent an employee of a local social services district directly involved in investigation of or response to alleged abuse or neglect of a child, a vulnerable elderly person or an incompetent or physically disabled person, from performing such investigation or response, the actor, not being such child, vulnerable elderly person or incompetent or physically disabled person, or with intent to prevent an employee of a local social services district directly involved in providing public assistance and care from performing his or her job, causes physical injury to such employee including by means of releasing or failing to control an animal under circumstances evincing the actor's intent that the animal obstruct the lawful activities of such employee;

11-a. With intent to cause physical injury to an employee of a local social services district directly involved in investigation of or response to alleged abuse or neglect of a child, vulnerable elderly person or an incompetent or physically disabled person, the actor, not being such child, vulnerable elderly person or incompetent or physically disabled person, or with intent to prevent an employee of a local social services district directly involved in providing public assistance and care from performing his or her job, causes physical injury to such employee.

➢ **Chap. 377 (A.6062-A) (Assault on New York City sanitation worker). Effective: September 16, 2012.**

Adds New York City sanitation workers to the list of job titles covered by Penal Law § 120.05 (assault on a person performing a lawful duty). (Class D felony)

➢ **Chap. ___ (S.7749 – Part G) (Endangering the welfare of an incompetent or physically disabled person). Effective: 30 days after governor's signature.**

This legislation enacts major reforms of laws dealing with abuse and neglect of persons with special needs in state operated and licensed facilities. Part G splits the crime of endangering the welfare of an incompetent or physically disabled person into first- and second-degree crimes. The current offense (knowingly endangering the welfare of an incompetent of physically disabled person [Penal Law § 260.25]) is upgraded to a Class E felony (from a Class A misdemeanor). The new second-degree crime (recklessly engages in conduct which is likely to be injurious to the physical, mental or moral welfare of an incompetent or physically disabled person [Penal Law § 260.24]) is now the Class A misdemeanor. The bill also amends Penal Law § 130.05 to make it a crime for employees or volunteers who provide direct services to residents of facilities operated or licensed by the Office of Mental Health, the Office for People with Developmental Disabilities, and the Office of Alcoholism and Substance Abuse Services to engage in sexual activity with residents of such facilities. Part G amends Penal Law § 240.50 relating to falsely reporting an incident of "abuse or neglect of a vulnerable person which did not in fact occur or exist." (Class A misdemeanor). Part F enacts new criminal background checks for employees or volunteers who work with persons with special needs in these facilities.

## Criminal Procedure Law

➢ **Chap. 347 (S.7190-A) (Interim Probation — Intercounty transfers). Effective: August 1, 2012.**

The 2009 Drug Law Reform Act (DLRA) offered drug treatment as an alternative to incarceration for most persons charged with drug and marihuana offenses. Unfortunately, the bill included an oversight that made drug treatment unavailable to some defendants when they were arrested outside their home counties. The 2009 DLRA failed to include a simple amendment authorizing judges to place these defendants on interim probation in their home counties. This bill cures the oversight by authorizing judges to place defendants on interim probation supervision in their home counties during the pendency of treatment. The court will otherwise retain jurisdiction of the case. [Amending CPL §§ 216.05(8), 410.80(1), (2).]

## Judiciary

➢ **Chap. 184 (A.10706) (Electronic Filing — Pilot project). Effective: July 18, 2012.**

This bill authorizes the chief administrative judge to establish pilot projects for electronic filing of documents in criminal cases in County Court and Supreme Court in six unspecified counties. Initially, the projects will be voluntary but may become mandatory with the consent of the district attorney and criminal defense bar ("all provider offices and/or organizations in the county that represented twenty-five percent or more of the persons represented by public defense providers pursuant to section 722 of the county law"). The legislation includes liberal opt-out options for attorneys who cannot comply with the electronic filing requirements.

➢ **Chap. ___ (S.1998-A) (Practicing law without a license). Effective: The first of November next succeeding the date on which is shall have become law.**

Elevates the crime of practicing law without a license to a Class E felony when a person "(1) either impersonates an attorney or offers legal services to the public under a title other than attorney; and (2) causes another person to suffer monetary loss or damages exceeding one thousand dollars or other material damage resulting from impairment of a legal right to which he or she is entitled according to law."

## Sex Offenders

➢ **Chap. 363 (A.8917) (Sex Offenders — Parole release interview transcripts). Effective: August 31, 2012.**

Amends Executive Law § 259-i(6)(a) to provide that the transcripts of parole release interviews of sex offenders shall be transcribed and delivered to the Office of Mental Health in connection with that office's review for possible civil commitment of the inmate pursuant to Mental Hygiene Law article 10.

➢ **Chap. 364 (A.9229) (Sex Offender Registration — Photo of Level 3 sex offenders). Effective: Aug. 31, 2012.**

Authorizes law enforcement agencies to take a new photograph of a Level 3 sex offender at a quarterly verification appearance if the offender's appearance has changed since the most recent regularly scheduled photograph was taken.

## Miscellaneous

➢ **Chap. 29 (A.3964-A) (Unlawful sale of embalming fluid). Effective: November 14, 2012.**

Amends Public Health Law § 3455 to criminalize unauthorized sales of embalming fluid by funeral directors.

(Embalming fluid is sometimes mixed with illegal drugs such as PCP.)

➢ **Chap. 287 (A.9380-B) (Electronic surveillance database). Effective: January 28, 2013.**

Establishes a voluntary database, within the Division of Homeland Security and Emergency Services, for registration of businesses and homeowners that conduct video surveillance of premises to provide law enforcement access to information about the location of privately owned surveillance cameras. The database is exempt from disclosure under the Freedom of Information Law, but the information may be accessible by judicial subpoena.

➢ **Chap. 144 (A.9552-A) (Animal fighting paraphernalia). Effective: October 16, 2012.**

Amends Agriculture and Markets Law § 351 to criminalize the possession, sale or manufacture of items commonly used to train or engage in animal fighting. (Class B misdemeanor; Class A misdemeanor if convicted of the same offense within the previous five years)

➢ **Chap. 233 (S.6848) (Crime Victims Board — eligibility for award). Effective: July 18, 2012.**

Amends Executive Law § 624 to provide that guardians, siblings, stepbrothers and stepsisters of a person who died as a direct result of a crime are eligible to receive an award from the Crime Victims Board.

## Parole and Corrections

➢ **Chap. 201 (S.6237) (Collection of community supervision fees). Effective: July 18, 2012.**

Prohibits parole officers from personally collecting supervision fees from a person on community supervision.

➢ **Chap. 343 (S.6864-A) (Albany County Correctional Facility). Effective: August 1, 2012.**

Amends Correction Law § 500-a to authorize use of the Albany County Correctional Facility for the detention of persons under arrest but prior to arraignment.

## Vehicle and Traffic

➢ **Chap. 55, Part C (S.6255-D) (VTL — No trial on first appearance). Effective: March 30, 2012.**

Amends VTL § 1806 to provide that upon receipt of a not guilty plea by mail, the court shall advise the motorist "by first class mail, of an appearance at which no testimony shall be taken. If the motorist requests a trial, the court shall set a trial date on a date subsequent to the date of the initial appearance . . . ."

➢ **Chap. 388 (A.9539-D) (Suffolk County Traffic and Parking Violations). Effective: April 1, 2013.**

Authorizes establishment of an agency for the adjudication of traffic and parking tickets in Suffolk County.

## Peace Officer Status

➢ A.948-B — Members of the security force of Kaledia Health in Buffalo (Effective: 180 days after governor's signature).
➢ S.6171-A — Uniform marine patrol officers appointed by the Seneca County Sheriff and employees of the Seneca County Sheriff's Office performing court security services (Effective: upon governor's signature).
➢ S.6319 — Uniformed court officers of the town court of the town of New Windsor (Effective: upon governor's signature).
➢ S.6320 — Court attendants in the town of Highlands (Effective: upon governor's signature).
➢ A.9666-A — Security services officers of the University of Rochester (Effective: upon governor's signature).
➢ S.6996 — Uniformed officers of the fire marshal's office of the town of Huntington (Effective: upon governor's signature).
➢ A.10116 — Members of the fire investigation unit in the city of Schenectady (Effective: upon governor's signature).
➢ A.10731 — Uniformed members of the bureau of fire prevention of the town of Islip. (Effective: upon governor's signature). ⚖

# *Defender News* *(continued from page 9)*

## *Injunction Sought Against NYPD Operation Clean Halls*

As the *REPORT* went to press, advocates prepared to seek a judicial order ending a New York Police Department (NYPD) "unconstitutional practice"—the practice "of stopping innocent people on suspicion of trespassing in public areas outside of thousands of private apartment buildings in the Bronx," as one source noted. An Oct. 15, 2012 hearing was scheduled in U.S. District Court in Manhattan on the matter, which is part of a federal class-action lawsuit challenging the NYPD's enforcement of Operation Clean Halls. The suit against this "citywide program within the Police Department's stop-and-frisk regime that allows police officers to patrol in and around certain private apartment buildings" is *Lingon v City of New York* (No. 12-CIV-2274 [SDNY]). Plaintiffs include The Bronx Defenders, the New York Civil Liberties Union, LatinoJustice PRLDEF, and Shearman & Sterling LLP. (www.nyclu.org/news/first-ever-court-hearing-nypd-stop-and-frisk-tactics-apartment-buildings.) ⚖

***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.***

## First Department

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

**Auxiliary Services (County Law § 722-c)**

**Narcotics (Drug Testing) (Evidence)**

**People v Wilkerson, 94 AD3d 423, 941 NYS2d 125 (1st Dept 4/3/2012)**

**Holding:** The court properly exercised its discretion in denying the defendant's motion, under County Law 722-c, for funds for an independent analysis of the narcotics evidence where the defendant provided only vague and speculative reasons for the need for independent testing and, while he challenged the officers' credibility, there was no trial issue regarding the identity or weight of the substances he allegedly possessed and sold. His appellate argument relies on issues that were not presented to the trial court. (Supreme Ct, New York Co)

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

**Identification (General) (Photographs)**

**People v Sanchez, 95 AD3d 241, 941 NYS2d 599 (1st Dept 4/10/2012)**

**Holding:** The defendant failed to show that he was denied effective assistance of counsel based on a conflict of interest that operated on or otherwise affected his defense because, despite the fact that during defense counsel's representation of the defendant, another attorney at the legal aid organization where defense counsel worked was representing another suspect in an unrelated robbery case, the defendant's theory of the case was that a third person, whose fingerprints were found at the scene and who was pictured in surveillance video images, actually committed the robbery. Right before opening statements, defense counsel notified the court that he had just learned of the potential conflict, but stated that they did not need to mention the other legal aid client since there was no physical evidence connecting him to the crime. Also, the court properly allowed testimony by two detectives that they recognized the defendant as one of the robbers seen in the video images and testimony by one that the defendant gained a lot of weight between the robbery and the trial. (Supreme Ct, Bronx Co)

**Dissent:** Defense counsel cannot avoid a potential conflict by agreeing not to mention the other legal aid client at trial. A reasonable attorney who was aware of some connection between the person whose fingerprint was found at the scene and the other suspect would have requested a recess to investigate this connection. The detectives' identification testimony should not have been admitted as it constituted improper bolstering and the prosecution made no argument that the testimony must be admitted because of weight gain.

[***Ed. Note:*** *This case is on appeal to the Court of Appeals.*]

**Robbery (Elements) (Evidence)**

**People v Tineo, 94 AD3d 507, 941 NYS2d 621 (1st Dept 4/12/2012)**

**Holding:** The defendant's conviction for attempted first-degree robbery is not supported by legally sufficient evidence where the accuser testified that she did not see any weapons during the incident; Penal Law 160.15(4) requires the display of a weapon and the display must actually be witnessed in some way by the accuser. (Supreme Ct, New York Co)

**Search and Seizure (Automobiles and Other Vehicles) (Weapons-frisks)**

**People v Newman, 96 AD3d 34, 942 NYS2d 93 (1st Dept 4/17/2012)**

**Holding:** The court correctly denied the defendants' motion to suppress the weapons and other evidence found in the vehicle where the evidence was found following a limited search of the car after the three defendants were removed and frisked and the search was based on a combination of the defendants' disconcerting movements when the car was pulled over for a Vehicle and Traffic Law violation and the deception of one of the defendants, *ie*, "suspiciously reaching under his seat, purportedly to search for paperwork, after trying to deceive the officers by feigning sleep . . . ." All four Appellate Division Departments have found that "the combination

## First Department *continued*

of (1) movements within a car suggesting that the defendant was reaching for something that might be a weapon and (2) *some other suggestive factor(s)* was sufficient to justify the limited intrusion of searching the area where a defendant's movements took place . . . ." [Emphasis in original.] *Arizona v Gant* (556 US 332 [2009]) does not apply because this was not a search incident to arrest. (Supreme Ct, New York Co)

**Evidence (Hearsay)**

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

**Witnesses (Confrontation of Witnesses)**

**People v Parson, 94 AD3d 577, 944 NYS2d 18 (1st Dept 4/17/2012)**

**Holding:** The court correctly denied the defendant's motion to suppress a weapon and cartridges where the police had reasonable suspicion to justify a stop and frisk based on an identified citizen witness's statement that the defendant had a firearm, and, after the officer did not find a weapon on the defendant, the witness said that it was in a nearby dumpster and the officer found a gun there, giving the police probable cause to arrest the defendant and conduct a search incident to arrest, which revealed the cartridges. The time between the frisk and the witness's statement about the dumpster constituted a brief investigatory detention that was reasonable under the circumstances. The witness, a foster care agency caseworker, testified at trial, but a child witness who was with the caseworker did not. The caseworker's testimony about the child pointing out of the car while appearing agitated, which led the caseworker to turn around and see the defendant pointing a weapon, was properly admitted because the child's demeanor and conduct were not nonverbal hearsay declarations, nor were they offered for their truth, and there was no Confrontation Clause violation. The court did not abuse its discretion by declining to compel the caseworker to reveal the child's identity after the caseworker refused to do so because of confidentiality concerns; the defendant's claim that the child might have provided exculpatory evidence is speculative, and any error was harmless. (Supreme Ct, New York Co)

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

**People v Gerard, 94 AD3d 592, 942 NYS2d 112 (1st Dept 4/19/2012)**

**Holding:** The court erred in denying the defendant's motion to suppress because, although the officer had founded suspicion that criminality was afoot when he approached the defendant and asked if he was carrying a weapon and whether he was all right, the officer did not have reasonable suspicion that the defendant was involved in a felony or misdemeanor when he conducted the stop and frisk where the defendant "turned his left shoulder towards the officer, stated unresponsively that he did not have any drugs on him, continued to talk on his cell phone, and attempted to block the officer's hand as the officer reached towards his pocket to feel the pocket bulge . . . ." The defendant's reaction to the illegal seizure was proper. The prosecution's argument that the officer's act of reaching towards the bulge was a permissible self-protective minimal intrusion within the scope of the common-law inquiry is unpreserved and cannot be reached on appeal as the trial court did not deny suppression on that ground. (Supreme Ct, New York Co)

**Narcotics**

**Plea Bargaining**

**People v Anonymous, 97 AD3d 1, 942 NYS2d 500 (1st Dept 4/24/2012)**

**Holding:** The court abused its discretion in declining to accept the prosecution's recommendation for sentencing under the plea agreement where: the defendant pleaded guilty to a class B drug felony in exchange for a promise that the prosecution would recommend that she be allowed to re-plead to seventh-degree criminal possession of a controlled substance if the defendant provided information concerning criminal activity in her neighborhood; the prosecution had the sole discretion to determine if the defendant provided satisfactory cooperation and complied with the agreement's terms and they told the court she had done so; and the prosecution detailed the defendant's extensive cooperation, which resulted in numerous arrests and recovery of drugs and counterfeit items, while noting that the defendant put herself and her children at considerable risk. The court's reasons for refusing to honor the plea agreement, *ie*, the prosecution's failure to keep the court apprised of the defendant's status and the defendant's drug use and post-plea arrests, were not sufficiently compelling; therefore, the defendant is entitled to specific performance of the plea agreement. "During the proceedings, the court exhibited hostility, even disdain, toward defendant and, more importantly, a total disregard for her safety and welfare relating to her role as a drug informant for the District Attorney's office." (Supreme Ct, New York Co)

**Constitutional Law (New York State Generally)**

**Defenses**

## First Department *continued*

**Witnesses (Confrontation of Witnesses) (Cross Examination)**

**People v Badia, 94 AD3d 622, 942 NYS2d 114 (1st Dept 4/24/2012)**

**Holding:** The court unduly restricted the defendant's cross-examination of a prosecution witness about the police investigation into a participant in the narcotics offense where the defendant's theory was that he unwittingly agreed to help with the drug enterprise at the other participant's request. The limitations on cross-examination impacted the defendant's constitutional rights to present a defense and to confront witnesses; the evidence he tried to elicit was critical to his defense and the error was not harmless. Also, the court incorrectly concluded that it was bound by the ruling on the cross-examination issue made by of the judge who presided over the defendant's first trial. (Supreme Ct, New York Co)

**Speedy Trial (Prosecutor's Readiness for Trial)**

**People v Bonilla, 94 AD3d 633, 942 NYS2d 509 (1st Dept 4/24/2012)**

**Holding:** The court erred in denying the defendant's second speedy trial motion because the prosecution was not ready for trial within 90 days. The prosecution's initial statement of readiness was illusory where they later requested two adjournments because they needed to further investigate the case, effectively admitting that the prior readiness statement was not accurate. There is no record support for an inference that the prosecution made an initial decision to proceed with a minimal prima facie case, but later decided to present additional evidence. Also, the prosecution's later off-calendar statement of readiness, which was filed with the court, was not effective until it was provided to defense counsel. (Supreme Ct, Bronx Co)

**Accusatory Instruments (Sufficiency)**

**Narcotics (Possession)**

**People v Dinardo, 94 AD3d 626, 942 NYS2d 352 (1st Dept 4/24/2012)**

**Holding:** The misdemeanor complaint charging seventh-degree criminal possession of a controlled substance was not jurisdictionally defective where it alleged that the defendant was in the hotel room where the police found drugs on a night table and in a dresser drawer because those allegations support the inference that the defendant was in constructive possession of the drugs, even though there was no allegation regarding the defendant's relationship to the room. (Supreme Ct, Bronx Co)

**Narcotics (Penalties)**

**Sentencing (Resentencing)**

**People v Martin, 94 AD3d 637, 942 NYS2d 115 (1st Dept 4/24/2012)**

**Holding:** The court erred in deciding that substantial justice dictated that the defendant's motion for resentencing under CPL 440.46 be denied where the defendant was denied his right to come before the court and have an opportunity to be heard on the substantial justice issue. The court issued the order several weeks before the defendant was scheduled to appear on the motion. (Supreme Ct, Bronx Co)

**Juveniles (Paternity)**

**Matter of Commissioner of Social Servs v Julio J., 94 AD3d 606, 943 NYS2d 42 (1st Dept 4/24/2012)**

**Holding:** The petitioner social services agency failed to present clear and convincing evidence that the respondent acted as the child's father to such an extent that equitable estoppel barred him from denying paternity and seeking paternity testing. The record does not show that the respondent played a significant role in raising, nurturing, or caring for the child or that they ever had an operative parent-child relationship. The respondent admitted to visiting the mother in the hospital after the child was born, but he refused to sign an acknowledgement of paternity at that time; at most, he did not object to the child calling him "Daddy" during their sporadic encounters, he gave her small amounts of money when she asked for it and occasionally gave her gifts or took her shopping, and at least once he took her to the park; and he had no interaction with the child during his two years of military service. The court did not interview the child and her answers during an out-of court interview with her court-appointed attorney showed "a warm but distant relationship and do not suffice to demonstrate by clear and convincing evidence that conducting a biological test would be contrary to her best interests." (Family Ct, New York Co)

**Dissent:** "[D]espite the majority's attempt to minimize the contact between respondent and the child, the Family Court properly determined that respondent held himself out as the child's father and that the child justifiably relied on this representation to her detriment . . . ."

**Driving While Intoxicated (Chemical Test [Blood or Urine]) (Driver's License Revocation or Suspension) (Evidence) (Field Sobriety Tests)**

## First Department *continued*

**Matter of Fermin-Perea v Swarts, 95 AD3d 439, 943 NYS2d 96 (1st Dept 5/3/2012)**

**Holding:** The DMV hearing officer erred in determining that there were reasonable grounds to believe the petitioner was intoxicated where, although the arresting officer's refusal report stated that he stopped the petitioner because he was speeding, following too closely, and changing lanes without signaling, and saw that the petitioner was unsteady on his feet, had bloodshot eyes, slurred speech, and a strong smell of alcohol on his breath, a video of the subsequent field sobriety test, administered 25 minutes later, showed that the petitioner successfully completed all three tests, clearly communicated with the officer, never slurred his speech, and never demonstrated an inability to comprehend the officer's instructions. "[R]efusal to submit to a chemical test only results in revocation of an operator's license if there are reasonable grounds to believe that the operator was driving while under the influence of drugs or alcohol and more specifically, insofar as relevant here, while *intoxicated or impaired*." [Emphasis in original.]

**Dissent:** The issue is whether the officer had reasonable cause to believe that the petitioner was driving while intoxicated when he was stopped, not 25 minutes later; the video evidence does not refute the evidence of the petitioner's erratic driving, bloodshot and watery eyes, and the smell of alcohol on his breath.

**Confessions (Interrogation) (*Miranda* Advice)**

**Harmless and Reversible Error (Harmless Error)**

**People v Baez, 95 AD3d 654, 944 NYS2d 539 (1st Dept 5/22/2012)**

**Holding:** The defendant's statement to police, admitting that the gravity knife found in the car was his, should have been suppressed because it was made while he was in custody and before he was given *Miranda* warnings where the defendant was one of five people who had been ordered by police to get out of the car and stand behind it, and an officer approached the group while holding the gravity knife and threatened that he could arrest all of them if the knife's owner did not identify himself. Because the police knew or should have known that the threat was reasonably likely to elicit an incriminating response, it constitutes the functional equivalent of interrogation under *Miranda*. However, given the overwhelming proof of the defendant's guilt, including that the knife was found in the seat pocket the defendant reached into after the traffic stop and his recorded admission, during a phone call he made while in jail, that he was arrested because he had the knife in the car, the admission of his statement to the police was harmless error. (Supreme Ct, New York Co)

**Concurrence:** That the police directed the defendant and the other occupants of the car to stand behind the car as part of the traffic stop does not mean they were in custody, and the police officer's statement that the entire group could be arrested if no one confessed to owning the knife "does not rise to the level of coercion that would be necessary to convince an innocent person that he was not free to leave . . . ." Further, given its harmless error holding, the majority should not have reached the suppression issue.

**Sentencing (Excessiveness) (Youthful Offenders)**

**People v Kwame S., 95 AD3d 664, 944 NYS2d 549 (1st Dept 5/22/2012)**

**Holding:** Because of the defendant's young age, the lighter sentences his co-defendants received, and his lack of any juvenile or prior criminal record, the five year sentenced imposed is excessive and should be reduced to an indeterminate term of 1-1/3 to 4 years. Further, under the circumstances, including that the defendant's subsequent arrests were directly related to drug use and the presentence report recommendation that he be adjudicated a youthful offender, it is in the interest of justice to relieve the defendant from the onus of a criminal record by vacating the conviction and adjudicating him a youthful offender. (Supreme Ct, New York Co)

**Juveniles (Delinquency)**

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

**Matter of Brandon D., 95 AD3d 776, 945 NYS2d 665 (1st Dept 5/31/2012)**

**Holding:** The court erred in denying the appellant's motion to suppress physical evidence and his statements where the appellant was not free to leave when, after leaving the store, he complied with an officer's order to stop, but there was no reasonable suspicion that the appellant committed a crime. "There was no basis to detain appellant for possession of a gravity knife since there was no evidence that he knew his friend had the knife." (Family Ct, New York Co)

**Counsel (Right to Counsel)**

**Trial (Summations)**

**People v Vega, 95 AD3d 773, 945 NYS2d 288 (1st Dept 5/31/2012)**

**Holding:** The defendant failed to preserve her claim that she was denied her right to the assistance of counsel

## First Department *continued*

when defense counsel's request to make a closing argument at the non-jury trial was denied. Alternatively, the constitutional claim is rejected on the merits because although a defendant sentenced to a conditional discharge has a right to the assistance of counsel, that right was not infringed where the record shows that counsel presented what, in effect, was a summation in moving to dismiss the charges at the close of the prosecution's case and at the close of the evidence, and counsel presented all of the arguments that were raised on appeal regarding the weight and sufficiency of the evidence. (Supreme Ct, Bronx Co)

**Defenses (Affirmative Defenses Generally)**

**Homicide (Murder [Defenses] [Degrees and Lesser Offenses])**

**People v Moronta, 96 AD3d 418, 945 NYS2d 303 (1st Dept 6/5/2012)**

**Holding:** The court properly denied the defendant's request to charge extreme emotional disturbance because the jury could not have found either: (1) that the defendant was acting out of extreme mental trauma or extremely unusual and overwhelming stress where his actions in seeking out the decedent in violation of an order of protection and carrying a knife showed the planned nature of the attack; or (2) that the defendant lost control where he was very calm after the attack and told the police, "She deserved it," and he exhibited a high degree of self-control in stabbing the decedent. (Supreme Ct, New York Co)

**Dismissal**

**Family Court (Family Offenses)**

**Matter of Janice M. v Terrance J., 96 AD3d 482, 945 NYS2d 693 (1st Dept 6/7/2012)**

**Holding:** The court erred in rejected the petitioner's testimony based on her admitted use of marijuana because, in ruling on a motion to dismiss for failure to prove a prima facie case, it is improper to consider credibility. Giving the petitioner the benefit of every reasonable doubt, her testimony that her son-in-law threatened to have someone beat her up, told her he would beat her, and threatened to hit her with a broom established a prima facie case of the family offense of second-degree harassment. (Family Ct, New York Co)

**Family Court (Evaluative Reports)**

**Juveniles (Custody)**

**Matter of Koegler v Woodard, 96 AD3d 454, 946 NYS2d 139 (1st Dept 6/7/2012)**

**Holding:** There is a sound and substantial basis for the court's denial of the mother's request to relocate to Texas. The court, in assessing the best interests of the child, correctly found that, based on the mother's failure to tell the father that she got a job in Texas and was out of town for extended periods, it was unlikely that she would be truthful and forthcoming with the father about the child's activities and well-being if she lived in Texas. The finding that the mother's relocation was not based on economic necessity is supported by evidence that the mother, who was unemployed for 18 months, said she did not want to live in New York and would not accept a job in New York, and an expert testified that the mother could have found a job in New York in six to eight months if she conducted a thorough job search. And while the psychologist appointed to conduct a forensic evaluation said he was leaning towards relocation, he did not recommend relocation and the psychologist acknowledged that the loss of the child's close relationship with her father could have a lasting impact on her future relationships and her future success. (Family Ct, New York Co)

**Dissent:** The court discounted the determination of its own forensic custody expert that relocation would be beneficial to the child, gave excessive weight to the impact of the move on the father's access schedule, and the evidence shows the move was warranted by economic necessity.

**Accomplices (Corroboration)**

**Double Jeopardy (Collateral Estoppel)**

**People v O'Toole, 96 AD3d 435, 946 NYS2d 127 (1st Dept 6/7/2012)**

**Holding:** The court erred in allowing the prosecution to introduce, at the defendant's retrial for second-degree robbery, evidence that the defendant's accomplice pointed what appeared to be a pistol at the accuser and that the defendant tried to extort payments of protection money from the accuser where the defendant was acquitted of first-degree robbery and second-degree attempted grand larceny at his first trial. Collateral estoppel barred presentation of that evidence. Contrary to the prosecution's argument, this case should not be treated like cases where the defendant may have been acquitted because the prosecution did not meet the statutory corroboration requirement; here, the statutory corroboration requirement was not applicable. (Supreme Ct, New York Co)

**Accusatory Instruments (Amendment) (Sufficiency)**

**Sex Offenses**

## First Department *continued*

**People v Rodriguez, 97 AD3d 246, 945 NYS2d 313 (1st Dept 6/7/2012)**

**Holding:** The court erred in amending the indictment after judgment had been rendered in the absence of both the defendant and his attorney and without giving him notice as required by CPL 200.70(1). The defendant pleaded guilty to both counts of the indictment, which charged second-degree burglary and sexually motivated felony, but, after sentencing, the court added the case to the calendar and, in the presence of the prosecutor, amended the indictment and commitment sheet by striking the second count, as it is not a separate crime, and amending the burglary count to reflect that it is burglary as a sexually motivated felony. While not raised on appeal, it is noted that CPL 200.70 is silent as to the permissibility of a post-judgment amendment.

However, the defendant is not entitled to have his conviction on the original indictment vacated because the indictment was not jurisdictionally defective, he failed to object to the count by making a timely motion to dismiss, and he waived the issue by pleading guilty. Although the indictment was inartfully drafted, it gave the defendant sufficient notice of the charge and incident upon which it was based and alleged all the elements of the crime either expressly or by reference to the applicable Penal Law section. (Supreme Ct, New York Co)

**Bail and Recognizance (Amount) (Appeal)**

**Habeas Corpus (State)**

**State of New York ex rel Greenwald v Schriro, 96 AD3d 523, 945 NYS2d 881 (1st Dept 6/12/2012)**

**Holding:** Considering the record and the factors in CPL 510.30(2)(a), the amount of bail set by the court was unreasonable and an abuse of discretion; a reduced amount of bail is sufficient to ensure the petitioner's attendance. The habeas corpus petition seeking a bail reduction is granted and bail is reduced from $2 million bond or $1 million cash to $250,000 bond or $125,000 cash on the condition that the petitioner surrenders her passport, agrees not to apply for a new or replacement passport, and arranges for electronic monitoring at her expense. Despite the notoriety of the case, the petitioner has no criminal record, she is charged with a class D nonviolent felony, she is a long-term resident of Orange County, is married, and has four children who are United States citizens. (Supreme Ct, New York Co)

**Family Court (Violation of Family Court Orders)**

**Juveniles (Hearings) (Parental Rights)**

**Matter of Gianna W., 96 AD3d 545, 946 NYS2d 172 (1st Dept 6/14/2012)**

**Holding:** The court had the authority to terminate the mother's parental rights based on her failure to comply with the suspended judgment by failing to obtain suitable housing. However, the court erred by limiting the evidence at the dispositional hearing to pre-violation petition facts; in determining the child's best interests, the court should have considered evidence of matters occurring after the petition was filed, particularly since the mother complied with the rest of the agency requirements, including visiting the child every weekend, remaining sober and maintaining steady employment since she was released from prison, and finding suitable housing by the time of the hearing. (Family Ct, Bronx Co)

**Discovery (*Brady* Material and Exculpatory Information) (Prior Statements of Witness)**

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

**People v McCutheon, 96 AD3d 580, 946 NYS2d 570 (1st Dept 6/19/2012)**

**Holding:** The defendant is entitled to a de novo suppression hearing where the prosecution failed to disclose grand jury testimony of the cab driver that materially contradicted the police account of the incident, which the court credited in denying suppression. "A defendant is entitled to disclosure of favorable 'evidence of a material nature which if disclosed could affect the ultimate decision on the suppression motion' . . . ." However, this Court will not accept the driver's account of the incident and grant suppression; the trial court should make credibility determinations. And because the defendant has not claimed that the prosecution's proof at the hearing was insufficient, a reopened hearing is authorized. (Supreme Ct, New York Co)

**Appeals and Writs (Preservation of Error for Review)**

**Evidence (Presumptions)**

**Narcotics (Possession)**

**People v Rosado, 96 AD3d 547, 947 NYS2d 434 (1st Dept 6/19/2012)**

**Holding:** "We do not believe that the drug factory presumption was intended to apply to seventh-degree possession, because implicit in the idea of a drug factory is that drugs are being prepared for sale. Therefore it should only apply to crimes requiring intent to sell, or crimes involving amounts of drugs greater than what is required for misdemeanor possession . . . ." Although the defendant failed to preserve the issue by objecting to the

## First Department *continued*

court's charge and response to a jury question, the issue is reached in the interest of justice. (Supreme Ct, New York Co)

**Dissent:** Because the issue was unpreserved and the majority conceded that the verdict was legally sufficient and not against the weight of the evidence, interest of justice review is not warranted or appropriate.

**Evidence (Exhibits) (Mobile Devices and Phones) (Sufficiency) (Weight)**

**People v Agudelo, 96 AD3d 611, 947 NYS2d 96 (1st Dept 6/21/2012)**

**Holding:** The accuser's testimony was sufficient to authenticate cell phone instant messages exchanged between her and the defendant where the detective testified that he saw the messages on the accuser's phone and later read a printout of the messages that the accuser cut and pasted into one document, and the accuser testified that the printout accurately represented the messages she received and that she knew they were from the defendant because his name appeared on her phone when she received them. Several other jurisdictions have found that authenticity can be established through testimony of a participant to the conversation that a transcript or copy-and-paste document is a fair and accurate representation of the conversation. The accuser's credibility and any motive she may have had to alter the evidence go to the weight of the evidence, not its admissibility. (Supreme Ct, New York Co)

**Sentencing (Appellate Review) (Concurrent/Consecutive) (Excessiveness) (Weapons)**

**Weapons (Evidence) (Pistols) (Possession)**

**People v Chuang, 96 AD3d 590, 947 NYS2d 37 (1st Dept 6/21/2012)**

**Holding:** The defendant's sentence for second-degree weapon possession and 26 counts of third-degree weapon possession is modified, as a matter of discretion in the interest of justice, from an aggregate term of 18½ to 22 years, which was reduced to a determinate sentence of 20 years under Penal Law 70.30(1)(E)(iii), to an aggregate term of 15 years, with all sentences running concurrently. The sentence was excessive to the extent that the indeterminate terms for two of the third-degree counts were to run consecutive to the 15 year determinate sentence for the second-degree count.

There is legally sufficient evidence to support the defendant's conviction of third-degree possession of a pistol during two incidents that occurred before the police recovered the pistol where "the totality of the circumstantial evidence warranted the conclusion that the pistol, which was determined to be operable when recovered after defendant's arrest, was also operable when defendant displayed it on the occasions in question." (Supreme Ct, New York Co)

**Dissent in Part:** The defendant's sentence should be reduced to an aggregate term of seven years. To justify the reduced 15-year sentence, the majority improperly relied upon evidence that the jury rejected, as evidenced by its not guilty verdict on the first-degree robbery and possession of an assault rifle with intent to use it against another person counts. "In my view, imposition of the maximum sentence for weapons possession where no one was harmed ignores the precedent of this court." The court erred by double counting the defendant's prior conviction by sentencing him as a second felony offender based on the prior conviction where the conviction was already used to elevate a fourth-degree possession charge to a third-degree offense.

**Constitutional Law (New York State Generally) (United States Generally)**

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

**Matter of Darryl C., 98 AD3d 69, 947 NYS2d 483 (1st Dept 6/26/2012)**

**Holding:** "The motion court erred in holding that a police officer exercising the common-law right to inquire without a reasonable suspicion of criminal activity may subject the individual he is questioning to a frisk under the guise that the officer claimed to perceive some threat to his personal safety. Such ruling broadly expands the power of the police to search an individual during street encounters and can too easily lead to the diminishment of one of the most cherished rights, the right of individuals to be secure in their persons against illegal searches and seizures (NY Const art I, § 12; US Const 4th Amend)." During a patrol of an area where there were multiple shootings arising from tensions between two youth gangs, four uniformed officers in an unmarked van saw the appellant, a 14-year-old boy, standing on the street and looking at a black object in his right hand and holding a cell phone in his left hand. The arresting officer testified that when the appellant saw the van, he put the object in his right coat pocket and continued walking. The officer's testimony showed that he did not have a reasonable suspicion that the appellant was involved in crime when he approached the appellant. When the officer asked what was in his right hand, the appellant acted a little bit nervous and said it was his wallet that he had in his back pocket. Based on the appellant's seemingly evasive answers, which could indicate that he had some sort of contraband, the officer had the authority to question the

## First Department *continued*

appellant under the common-law right to inquire, which the officer did not do. When the officer told the appellant he was interested in what was in the appellant's right pocket, the appellant started to put his hand in his back pocket, but complied with the officer's request that he not put his hands in his pockets. The officer did not have a reasonable suspicion that the defendant was armed before he tapped the defendant's right pocket, and after feeling an unknown hard object, tapped the pocket again and then reached into the pocket, finding a gun.

The officer's conclusory statement that he was in reasonable fear for his safety is contradicted by his other testimony, including that he had a friendly conversation with the appellant and did not consider the appellant a suspect in crime or gang activity.

"While aggressive police tactics may well result in more arrests, neither respect for the law nor cooperation with law enforcement authorities is fostered by subjecting individuals to the exercise of arbitrary police power." (Family Ct, Bronx Co)

**Dissent:** The officer was justified in conducting a limited safety frisk because he reasonably suspected that the appellant was armed with a weapon that could harm him. "The same evidence that leads us to conclude that Officer Colon had a reasonable fear for his safety also supports a finding of a reasonable suspicion that appellant committed a crime . . . ."

**Appeals and Writs (Record)**

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

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

**People v Major, 96 AD3d 677, 947 NYS2d 110 (1st Dept 6/28/2012)**

**Holding:** "The court was correct in summarily denying the CPL 440.10 motion since sufficient facts appear on the record on the direct appeal to permit our review (CPL 440.10 [2][b]). However, the record on the direct appeal supports defendant's contention that he was deprived of the effective assistance of counsel. The actions of the officers in stopping defendant and seizing the bag he had been carrying were of questionable propriety, and raised a colorable basis for suppression . . . . Under the circumstances, defense counsel's admitted failure to timely file a suppression motion, or to provide good cause or strategic reasons for such failure, constituted ineffective assistance . . . . Accordingly, we hold the appeal in abeyance and remand the matter for a suppression hearing . . . ." (Supreme Ct, New York Co)

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

**Matter of Jaquan M., 97 AD3d 403, 948 NYS2d 51 (1st Dept 7/3/2012)**

**Holding:** The court erred in denying the appellant's motion to suppress the gun found in the appellant's backpack because the police did not have reasonable suspicion that the appellant had a gun. Reasonable suspicion could not be based solely on the officers' seeing the appellant remove an object from his waistband where the officers conceded that the object did not bear any obvious hallmarks of a weapon, and "there were no other objective indicia of criminality because there were plausible, noncriminal reasons for appellant's behavior." The appellant's denials that there was anything in his backpack were insufficient to create probable cause to search the backpack. And the presentment agency failed to meet its burden of showing that the appellant consented to a search of the entire backpack. The appellant consented to a limited search for papers that may contain identifying information, and the officers did not have the authority to continue searching a compartment once they saw that it did not contain papers. (Family Ct, New York Co)

**Dissent:** The police had reasonable suspicion that the appellant was armed based on the progression of actions, which included the officers seeing the appellant carefully take a large white object large enough to be a gun out of his waistband and put it in his backpack; although the appellant's backpack appeared to be empty, it sagged from a heavy weight at the bottom; and the appellant made efforts to keep the object concealed, surreptitiously looked up and down the street, and was alone at night in a drug-prone area where armed robberies were on the increase. The officer's reasonable suspicion escalated to probable cause to believe the appellant had a gun in his backpack when the appellant lied by repeatedly saying there was nothing in his backpack, thereby justifying the search. And the appellant's consent to the search of his backpack for papers authorized the police to look in any pocket that may contain papers.

[***Ed. Note:*** *This case is on appeal to the Court of Appeals.*]

**Admissions (Interrogation) (*Miranda* Advice)**

**Arrest (Custody)**

**People v Perry, 97 AD3d 447, 948 NYS2d 594 (1st Dept 7/17/2012)**

**Holding:** The court erred in denying the defendant's motion to suppress the statement he gave at the police precinct because, even though he made the statement after he was *Mirandized*, the statement "was obtained as part of a single continuous chain of events, so that the later warnings were insufficient to dissipate the taint of

## First Department *continued*

the initial violation . . . ." The police entered the defendant's family's apartment pursuant to a search warrant, handcuffed the defendant and his three family members, led the defendant away from the others, and asked him, without advising him of his *Miranda* rights, where the weapon was; once the police found the gun, they brought the defendant to the precinct and after he was booked and processed for 20 or 30 minutes, the same officer who questioned him at the apartment advised him of his *Miranda* rights and then interrogated him, resulting in the defendant's statement that the gun was his. The defendant's initial statement was not voluntary as he was in custody when he made it and the officer's question was designed and intended to elicit an incriminating statement. (Supreme Ct, New York Co)

**Instructions to Jury (Circumstantial Evidence)**

**Larceny (Welfare Fraud)**

**People v Carter, 97 AD3d 492, 948 NYS2d 608 (1st Dept 7/24/2012)**

**Holding:** In this welfare fraud prosecution, the court incorrectly denied the defendant's request for a circumstantial evidence charge where the prosecution presented evidence that the defendant's name was identical to that of the person who received welfare benefits, but no one identified the defendant as the person who completed the welfare forms or as the person who was employed during the time the benefits were received. The prosecution did not introduce specific evidence that the defendant shared any of the pedigree characteristics with the person who improperly received the welfare benefits nor did they introduce documentary evidence showing that the defendant's birth date, social security number, or address matched those of the person who received the benefits. "Had the trial court given the circumstantial evidence charge, alerting the jury of the need to exclude to a moral certainty every other reasonable hypothesis of innocence, the verdict may have been different . . . ." And the error was not harmless as the circumstantial evidence did not overwhelmingly establish the defendant's guilt. (Supreme Ct, New York Co)

## Second Department

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

**Evidence (Weight)**

**Juveniles (Delinquency)**

**Prostitution and Related Offenses (Evidence)**

**Matter of Danielle B., 94 AD3d 757, 941 NYS2d 685 (2nd Dept 4/3/2012)**

**Holding:** The court's finding that the appellant committed acts that would constitute the crime of prostitution if committed by an adult, where the appellant allegedly agreed at the club where she worked as a dancer to perform oral sex on an undercover police officer after her shift, was against the weight of the evidence. There was no proof of an intent to follow through on the agreement, as she did not tell the officer when her shift ended, speak to him again while he remained in the club for two hours, or otherwise communicate an intent to meet him later. (Family Ct, Queens Co)

**Article 78 Proceedings**

**Competency to Stand Trial**

**Insanity (Civil Commitment) (Post-commitment Actions)**

**Matter of Lesley T. v D'Emic, 94 AD3d 768, 941 NYS2d 282 (2nd Dept 4/3/2012)**

**Holding:** A writ of prohibition does not lie against the Supreme Court as to orders: 1) denying the petitioner's 2010 motion, following his 2006 commitment to the Office of Mental Health (OMH) upon a finding that he was unfit to stand trial and retention thereafter, to exclude the prosecution from participating in proceedings regarding custody of the petitioner by OMH and OMH's efforts to convert the petitioner to civil commitment status or release him to the community; 2) requiring the petitioner to undergo a psychiatric examination by a prosecution expert; and 3) requiring OMH to provide the petitioner's medical records to the prosecutor. The petitioner's claim, in effect, is that the court acted in excess of its authority by means of an improper legal interpretation of CPL 730.50(2). Even though the "'contention that the trial court is acting ultra vires as a result of its legal interpretation of a statute'" is not reviewable by way of appeal, it does not justify invocation of the extraordinary remedy sought. (Supreme Ct, Kings Co)

**Evidence (Weight)**

**Homicide (Murder [Intent])**

**People v Bailey, 94 AD3d 904, 942 NYS2d 165 (2nd Dept 4/10/2012)**

**Holding:** The defendant's conviction of attempted second-degree murder was against the weight of the evi-

## Second Department *continued*

dence where there was no showing that the defendant shared the intent to kill demonstrated by a cohort who held a gun to the accuser's head and pulled the trigger three times after the defendant had fled the scene. The conviction and sentence on that count must be vacated. (Supreme Ct, Queens Co)

**Sentencing (Delay)**

**People v Morillo, 94 AD3d 909, 942 NYS2d 158 (2nd Dept 4/10/2012)**

**Holding:** Where the defendant pleaded guilty to robbery in May 2000, was arrested six months later in Pennsylvania, before sentencing, and pleaded guilty to federal offenses in 2001, and where the Bureau of Prisons sent "Detainer Action Letters" to the prosecutor here in 2002 and 2008 and the defendant wrote to the court clerk and others in 2008 asking that the outstanding bench warrant in this case be resolved and later in effect moved to be sentenced to concurrent time, and where he was brought to New York and sentenced in March 2009 while represented by counsel who did not move for dismissal based on the long delay, the court "should have granted the defendant's motion pursuant to CPL 440.10 to vacate the judgment of conviction, and thereafter dismissed the indictment pursuant to CPL 380.30 (1)," which requires that a sentence be imposed without unreasonable delay. (Supreme Ct, Queens Co)

**Family Court (Orders of Protection)**

**Matter of Taub v Taub, 94 AD3d 901, 942 NYS2d 145 (2nd Dept 4/10/2012)**

**Holding:** The court properly granted the husband's request to confirm a judicial hearing officer's recommendation that the wife be enjoined from seeking further temporary orders of protection ex parte under Family Court Act 828(3) where she had abused judicial process by repeatedly obtaining ex parte temporary orders of protection based on unsubstantiated allegations of abuse, and could still avail herself of police protection or obtain an order of protection on notice. (Family Ct, Kings Co)

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

**People v Warner, 94 AD3d 916, 941 NYS2d 865 (2nd Dept 4/10/2012)**

**Holding:** The court properly granted reargument and suppressed physical evidence because the prosecution failed to show that the search of the defendant's purse after she and a companion were stopped for going through a subway turnstile on one card swipe was necessary to prevent destruction of evidence or ensure the officers' safety. The defendant put the purse on the floor as requested when being arrested on an outstanding warrant discovered after her stop, she was handcuffed before the purse was searched, and the arresting officer never asserted that she acted out of concern for her safety or that of others. (Supreme Ct, Queens Co)

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

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

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

**People v Isaacs, 94 AD3d 1017, 942 NYS2d 220 (2nd Dept 4/17/2012)**

**Holding:** The post-conviction court erred by finding that because the defendant's ineffective assistance of counsel claim had not been raised on direct appeal it was procedurally barred, where the defendant had presented as a basis for relief under CPL 440.10 a "'mixed claim'" based in part on the record and in part on matters outside the record. The matter is remitted for a determination of the ineffective assistance claim on the merits. (Supreme Ct, Kings Co)

**Motions (Adjournment)**

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

**People v Jackson, 94 AD3d 961, 942 NYS2d 550 (2nd Dept 4/17/2012)**

**Holding:** The court erred in finding that the defendant waived his due process right to be present at the hearing to determine his risk level classification under the Sex Offender Registration Act (SORA) where the court relied on "an undated, written waiver, which was prepared by the [then-]New York State Department of Correctional Services . . . and purportedly signed by the defendant" that "did not provide the defendant with any notice that the hearing would be conducted in his absence, and there is no evidence in the record that the defendant was advised of the consequences of failing to appear . . . ." The court should not have denied the defense request for an adjournment to allow counsel, who only learned of the written waiver on the date of the hearing, to talk to the defendant. (Supreme Ct, Kings Co)

**Due Process**

**Probation and Conditional Discharge (Revocation)**

**Sentencing (Fees)**

## Second Department *continued*

**People v Souffrance, 94 AD3d 1024, 942 NYS2d 180 (2nd Dept 4/17/2012)**

**Holding:** Absent a finding that the defendant's failure to pay program fees was willful, revoking his probation and sentencing him to a term of imprisonment based upon that failure to pay violated his constitutional rights. The matter is remitted for further proceedings before a different judge to determine whether the failure to pay was willful, and to determine whether other grounds relied upon by the court in revoking the defendant's probation may legally serve as a valid basis for revocation and a sentence of incarceration, and for a new determination. (Supreme Ct, Queens Co)

**Domestic Violence**

**Juveniles (Neglect)**

**Matter of Chaim R., 94 AD3d 1127, 943 NYS2d 195 (2nd Dept 4/24/2012)**

**Holding:** The court erred by finding that the mother and father neglected their children where the facts showed that an argument between the parents escalated to a physical altercation in which each sustained minor injuries, but that when police arrived, the mother was calmly sitting in the living room, the father was holding the infant while the two-year-old was in the bedroom, and neither child was crying. There was no evidence regarding details of the altercation or impairment of the children's condition. (Family Ct, Kings Co)

**Accomplices (Accessories) (Principal)**

**Accusatory Instruments (Sufficiency)**

**Juveniles (Delinquency – Procedural Law)**

**Matter of Christopher M., 94 AD3d 1119, 943 NYS2d 171 (2nd Dept 4/24/2012)**

**Holding:** The allegations in the petition claiming the juvenile respondent had committed acts that would constitute the adult crimes of second-degree riot and unlawful assembly were legally insufficient where the officer claimed he saw two large groups of people, with the respondent in one, facing and threatening each other. While some reportedly were "'reaching for their waistbands'" and others were in possession of a belt, broomstick, and golf club, and one person threw a glass bottle when the police tried to disperse the groups, there was no allegation that the respondent engaged in "any act of tumultuous or violent conduct" or acts from which it could be inferred that "he shared a community of purpose with others to engage in" such conduct, as is required for second-degree riot as a principal or through accessorial liability. There was a similar lack of showing as to anything beyond the respondent's mere presence to show that he shared "a community of purpose with others to engage in or prepare to engage in" the conduct necessary for unlawful assembly. (Family Ct, Kings Co)

**Sentencing (Resentencing)**

**Weapons (Possession)**

**People v Johnson, 94 AD3d 1144, 942 NYS2d 621 (2nd Dept 4/24/2012)**

**Holding:** The defendant's conviction of third-degree weapons possession under Penal Law 265.02(1) is not a violent felony offense, and an indeterminate sentence should have been imposed; the matter must be remitted for resentencing on that count. (County Ct, Orange Co)

**Discovery (Right to Discovery)**

**Trial (Mistrial)**

**People v Lebovits, 94 AD3d 1146, 942 NYS2d 638 (2nd Dept 4/24/2102)**

**Holding:** The court improvidently exercised its discretion in denying a mistrial requested by the defendant due to the prosecution's failure to turn over, before the start of the trial, handwritten notes of an interview between the accuser and a detective regarding an alleged bribery attempt by the defense's only witness. "[T]he untimely disclosure of the interview notes precluded the defense from fully and adequately preparing for cross-examination and set a trap for the defendant which had already sprung at the time the notes were finally furnished . . . ." (Supreme Ct, Kings Co)

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

**Sentencing (Modification) (Resentencing)**

**People v Brims, 95 AD3d 899, 942 NYS2d 881 (2nd Dept 5/1/2012)**

**Holding:** The defendant's CPL 440.20 motion to vacate his illegal sentence, which he subsequently withdrew, did not divest the court of its inherent authority to correct a "*Sparber* error" made at sentencing. (County Ct, Rockland Co)

**Evidence (Business Records) (Privileges)**

**Trial (Confrontation of Witnesses)**

**Witnesses (Confrontation of Witnesses)**

## Second Department *continued*

**People v Jaikaran, 95 AD3d 903, 943 NYS2d 223 (2nd Dept 5/1/2012)**

**Holding:** The court erred by precluding the defense from placing into evidence portions of the records from the accuser's hospital stay following a suicide attempt that contained statements by the accuser that she was not sexually active and was not a sexual abuse victim. The accuser's statutory physician-patient privilege must yield to the defendant's constitutional right to confrontation. The statements in the hospital records were critical to the accuser's credibility on the alleged sexual abuse. Where the defendant was acquitted of rape and incest, but convicted of endangering the welfare of a child, and the evidence, resting largely on the accuser's testimony, was not overwhelming, the error was not harmless. (Supreme Ct, Queens Co)

**Dismissal**

**Double Jeopardy (Jury Trials)**

**Instructions to Jury (Verdict Sheet)**

**People v David, 95 AD3d 1031, 943 NYS2d 614 (2nd Dept 5/8/2012)**

**Holding:** The defendant's conviction of four counts of first-degree assault must be vacated where the court mistakenly submitted to the jury and included on the verdict sheet two first-degree counts that it had dismissed prior to trial, and the verdict sheet did not correspond to the court's instructions as to the first-degree counts related to one accuser. The first-degree assault conviction as to one accuser must be vacated because it cannot be determined whether the conviction was for the previously dismissed count or the remaining count. The first-degree assault conviction as to the other accuser on the dismissed count must be vacated. Since the jury was instructed not to consider counts of second-degree assault if they convicted of first-degree, retrial on the second-degree counts will not violate double jeopardy. (Supreme Ct, Kings Co)

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

**Guilty Pleas (Withdrawal)**

**People v Graves, 95 AD3d 1034, 943 NYS2d 593 (2nd Dept 5/8/2012)**

**Holding:** Where the defendant moved at sentencing to withdraw his guilty plea on the basis of inadequate representation by counsel, and his attorney expressed discomfort about representing the defendant at sentencing and said she could not state a legal ground for the motion to withdraw, the court should have assigned a different lawyer before deciding the withdrawal motion. The appeal must be held in abeyance while the matter is remitted for appointment of new counsel, a hearing on the motion to withdraw, and a new determination of that motion. (County Ct, Westchester Co)

**Counsel (*Anders* Brief)**

**Family Court**

**Matter of Griffin v Moore-James, 95 AD3d 1013, 945 NYS2d 95 (2nd Dept 5/8/2012)**

**Holding:** The *Anders* brief submitted by the mother's assigned counsel following a custody and visitation proceeding did not satisfy the requirement to act as an "'active advocate'" on behalf of the client, not merely as an advisor to the court regarding the appeal's merits. The brief fails to "'draw the Court's attention to the relevant evidence, with specific references to the record; identify and assess the efficacy of any significant objections, applications, or motions; and identify possible issues for appeal, with reference to the facts of the case and relevant legal authority' . . . ." Further, independent review indicates the existence of nonfrivolous issues including whether the father established a sufficient change in circumstances to warrant modification of prior orders. (Family Ct, Suffolk Co)

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

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

**People v Lou, 95 AD3d 1035, 943 NYS2d 621 (2nd Dept 5/8/2012)**

**Holding:** The court erred in determining that the defendant's CPL 440.10 ineffective assistance of counsel claim is procedurally barred where the claim depends in part on matter not appearing in the record, and the properly brought 440.10 motion should not have been denied without a hearing where the defendant submitted two affirmations from trial counsel that allege facts which, if true, may be sufficient to show the defense had been affected by an alleged death threat. (Supreme Ct, Queens Co)

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

**People v McDuffie, 95 AD3d 1036, 943 NYS2d 594 (2nd Dept 5/8/2012)**

**Holding:** The defendant's unpreserved challenge to the validity of the court's substitution of a juror is reviewed in the interest of justice, and a new trial is granted where the record does not show the defendant's election to substitute an alternative juror for the foreperson upon the foreperson's request complied with the state constitution, CPL 270.35, and relevant case law. The court

## Second Department *continued*

gave defense counsel a chance to confer with the defendant about the requested substitution, calling another case while that occurred, and upon recalling the defendant's case, signed a jury substitution waiver form that was apparently signed by the defendant, but there is no showing that the defendant signed in open court or that the judge questioned the defendant to ensure his actions were knowing and understanding. (Supreme Ct, Kings Co)

**Family Court (Family Offenses) (Orders of Protection)**

**Matter of Prezioso v Prezioso, 95 AD3d 1021, 943 NYS2d 773 (2nd Dept 5/8/2012)**

**Holding:** The notice of appeal from the fact-finding order is deemed an application for leave to appeal, which is granted, and the fact-finding order is reversed where the court found the wife failed to establish that the husband committed a family offense in connection with a Jan. 26, 2009 incident, but the issue was whether the wife had established, as alleged in the petition, that the husband violated an order of protection. The matter is remitted for a new hearing before a different judge. (Family Ct, Orange Co)

**Evidence (Hearsay)**

**People v Richardson, 95 AD3d 1039, 943 NYS2d 599 (2nd Dept 5/8/2012)**

**Holding:** The court erred in allowing the prosecution to introduce an out-of-court statement by another perpetrator to a defense witness that a third party, "G," had not participated in the offense of attempted robbery. The defense did not open the door to this evidence when it elicited defense testimony that "G" rather than the defendant had participated, as that testimony was neither incomplete nor misleading. A new trial is required. (Supreme Ct, Queens Co)

**Speedy Trial (Prosecutor's Readiness for Trial) (Statutory Limits)**

**People v Titus, 95 AD3d 1042, 945 NYS2d 323 (2nd Dept 5/8/2012)**

**Holding:** The statutory six-month speedy trial provisions of CPL 30.30 were exceeded where a criminal complaint charging a felony was filed on Aug. 8, 2007, and 190 days chargeable to the prosecution passed at the time of the defendant's motion to dismiss. The court erred in finding that only 162 days were chargeable to the prosecution. The prosecution was not ready for trial on Jan. 12, 2009 and so should have been charged with the one-day period from January 12 to January 13. As is found on review in the interest of justice although the contention was not preserved for appeal, the 27 days from the Jan. 10, 2008 filing of the indictment until Feb. 6, 2008, when the defendant was arraigned on the indictment, were also chargeable to the prosecution, where contrary to the prosecution's contention, the record does not reflect any written notice of readiness being served on the defendant and filed with the court on Jan. 10, 2008. (Supreme Ct, Kings Co)

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

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

**Sentencing (Concurrent/Consecutive)**

**People v Waiters, 95 AD3d 1043, 943 NYS2d 589 (2nd Dept 5/8/2012)**

**Holding:** Imposition of consecutive sentences as to the attempted murder of Lorenzo Warren and assault on Shatashia Lewis was improper because, while "[t]he evidence established that the defendant's murder of Tajmere Clark and assault on Mary Lee Clark were committed by separate and distinct acts, so the sentences imposed on those two counts were properly ordered to run consecutively to each other," the evidence failed to establish that the acts against Warren and Lewis were separate and distinct from each other and from the crimes committed against the Clarks.

The claim in the defendant's pro se supplemental brief that he was denied the effective assistance of counsel constitutes a mixed claim, as it is based in part on matter in the record and in part on matter outside the record, so that "a CPL 440.10 proceeding is the appropriate forum for reviewing the claim in its entirety . . . ." (Supreme Ct, Kings Co)

**Lesser and Included Offenses**

**Sex Offenses**

**People v Ortiz, 95 AD3d 1140, 944 NYS2d 628 (2nd Dept 5/15/2012)**

**Holding:** First-degree criminal sexual act and first-degree rape being lesser-included offenses of predatory sexual assault, the convictions on those two counts must be vacated and the counts dismissed. (Supreme Ct, Queens Co)

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

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

**People v Schnoor, 95 AD3d 1144, 943 NYS2d 894 (2nd Dept 5/15/2012)**

## Second Department *continued*

**Holding:** As the prosecution concedes, "the defendant's sentence of 90 days in jail and six years of probation on his conviction of the crime of endangering the welfare of a child is illegal . . . ." "[S]ince this appeal was taken only from the judgment of conviction, and not from the determination pursuant to the Sex Offender Registration Act . . . we are without authority to review the defendant's final contention that he should have been adjudicated a level one sex offender instead of a level two sex offender." (County Ct, Suffolk Co)

**Impeachment (Of Defendant [Including *Sandoval*])**

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

**People v Brothers, 95 AD3d 1227, 944 NYS2d 645 (2nd Dept 5/23/2012)**

**Holding:** The court erred by denying defense challenges for cause of two prospective jurors, one of whom knew many police officers through his volunteer work with the Police Athletic League, including some at the precinct in which this crime occurred, and who, after initially saying he thought he could keep an open mind, agreed he might give police testimony "'a leg up'" and "'a little built in credibility." The other prospective juror said he would be inclined to believe police testimony unless a reason was shown to make him think otherwise. Both had states of mind likely to keep them from rendering impartial verdicts, and neither gave unequivocal assurance that they could set aside any biases and render verdicts based on the evidence.

The court also erred in determining that if the defendant testified at his trial involving four counts of first-degree robbery, he could be asked if he had a 1998 conviction of attempted second-degree robbery; "[u]nder the circumstances presented here, including the fact that the conviction was more than 10 years old and the existence of other convictions which were also probative of the defendant's credibility but which were dissimilar to the crimes charged herein, the probative value of impeaching the defendant's credibility by questioning him about the 1998 robbery was so outweighed by the danger of undue prejudice that exclusion was warranted . . . ." (County Ct, Suffolk Co)

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

**People v Clermont, 95 AD3d 1349, 945 NYS2d 349 (2nd Dept 5/30/2012)**

**Holding:** Counsel's failure to make opening and closing arguments at the suppression hearing, even with the suppression court's factual error in finding that the defendant dropped his gun before rather than during the police chase, does not require reversal because the record shows that counsel, who successfully sought a suppression hearing and whose "cross-examination of the detective was reasonably competent and thorough," provided meaningful representation. (Supreme Ct, Queens Co)

**Dissent:** Counsel's affirmation in support of the suppression motion "consisted of arguments addressed to a different case involving a separate set of facts and distinct legal issues." Counsel's motion to withdraw, made before the hearing on the grounds that the resignation of an associate had left counsel overwhelmed with work and lacking time and resources to provide competent representation in all his cases, was renewed on the hearing date, but the hearing proceeded, and only after the suppression motion was denied did the court assign a new attorney. The court was never advised of the factual error in its subsequently-issued written order. The defendant was deprived of meaningful representation at the suppression hearing.

[***Ed. Note:*** *Leave to appeal was granted on Sept. 13, 2012 (2012 NY Slip Op 83941[U]).*]

**Assault (Evidence) (Serious Physical Injury)**

**Evidence (Sufficiency)**

**People v Nimmons, 95 AD3d 1360, 945 NYS2d 358 (2nd Dept 5/30/2012)**

**Holding:** The prosecution failed to prove beyond a reasonable doubt that the accuser suffered a "'serious physical injury,'" as required by Penal Law 10.00(10) and 120.05(4), where an emergency medical technician testified about potential consequences of gunshot wounds to the chest, but did not say whether the wound in the instant case created a substantial risk of death to the accuser. Further, the accuser's medical records were not explained or amplified by any health care provider. As the evidence was sufficient to show physical injury, the second-degree assault conviction is reduced to third-degree assault. (Supreme Ct, Queens Co)

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

**Identification (Photographs)**

**People v Hewitt, 95 AD3d 1358, 944 NYS2d 766 (2nd Dept 5/30/2012)**

**Holding:** Because the defendant has "demonstrated that there was no strategic or other legitimate explanation for defense counsel opening the door for the admission into evidence of a photo array identification of the defendant, which would not otherwise have been admissible, and which served to bolster the reliability of the in-court identification by the People's witness," reversal on the

## Second Department *continued*

basis of ineffective assistance of counsel is required. (Supreme Ct, Kings Co)

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

**Family Court**

**Motions (Adjournment)**

**Matter of Branch v Cole-Lacy, 96 AD3d 741, 945 NYS2d 743 (2nd Dept 6/6/2012)**

**Holding:** The mother's appeal of denials of her objections to two orders entered on her default dealing with child support and arrears are dismissed except for the denial of the mother's request for an adjournment preceding entry of the orders; an appeal that brings up for review the matters that were the object of contest, here, the denial of the requested adjournment, may be reviewed notwithstanding the prohibitions of CPLR 5511. Where the mother appeared at the court on the scheduled day, apparently became ill and requested an adjournment on that basis before leaving, allegedly to see a doctor, the Support Magistrate improvidently exercised her discretion when she in effect denied the adjournment by proceeding with the hearing. (Family Ct, Nassau Co)

**Juveniles (Neglect)**

**Sex Offenses (Corroboration)**

**Matter of Jada K.E., 96 AD3d 744, 949 NYS2d 58 (2nd Dept 6/6/2012)**

**Holding:** The court properly found that the out-of-court statement by the daughter of the respondent father about alleged sexual conduct was not sufficiently corroborated where the accuser's sister specifically denied the occurrence of sexual behavior and said the accuser was lying, and the drawing by the accuser that was submitted as corroboration dated from the same time as the lone accusation and was made at the request of the detective who was interviewing her.

The court also properly dismissed the portions of the petition alleging neglect by the mother where her act of allowing the father to drive her and the children home from day care once in an emergency situation, in violation of an order of protection, resulted in only minimal exposure of the children to the father. The mother's conduct was not such that it impaired or threatened the well being of the children. (Family Ct, Kings Co)

**Freedom of Information**

**Police**

**Matter of Oddone v Suffolk County Police Dept., 96 AD3d 758, 946 NYS2d 580 (2nd Dept 6/6/2012)**

**Holding:** The order and judgment granting the respondents' motion to dismiss the petition seeking review of a Freedom of Information Law (FOIL) officer's determination that all documents responsive to the petitioner's request for files and records relating to his criminal case had been provided is reversed. The officer's statement "that he had 'been informed' that a diligent search had been conducted by an unidentified source" did not conclusively demonstrate that the FOIL officer's determination was not arbitrary and capricious. Further, the allegations in the petition, which included reference to testimony at the petitioner's criminal trial that the investigation into his case had included interviews with more than 70 witnesses but that notes from only 18 had been turned over upon FOIL request and that the volume of documents turned over upon the FOIL request was much less than that of a six-inch binder used by the testifying investigator to refresh his recollection at trial, "would provide a factual basis to support the petitioner's contention that additional documents relating to the criminal investigation of the petitioner's case exist," and are sufficient to make out a claim that the FOIL officer's determination resulted from a violation of procedure or error of law, or was arbitrary and capricious. (Supreme Ct, Suffolk Co)

**Aliens (Deportation)**

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

**Narcotics (Drug Treatment)**

**People v Picca, 97 AD3d 170, 947 NYS2d 120 (2nd Dept 6/6/2012)**

**Holding:** The court erred by determining without a hearing that the defendant, a foreign national, could not rationally have rejected the prosecution's plea offer had he been properly advised that a guilty plea would make him subject to removal from this county, so that counsel's failure to so advise him did not result in prejudice. Counsel's duty to advise clients about immigration consequences of pleas does not depend on clients disclosing their status as foreign nationals, as they may not know that immigration status is relevant in criminal proceedings. Even though the defendant would have been subject to mandatory removal, contrary to the finding of the court and understanding of the parties, a ruling of no prejudice is not inescapable. Deciding whether to accept a plea offer is a calculus that takes into account all relevant circumstances; the order denying the motion to vacate the conviction is reversed, and the matter is remitted for a hearing.

The defendant's contention that he is entitled to withdraw his DTAP plea because he was never placed in an adequate treatment program is rejected where he com-

## Second Department *continued*

pleted a residential treatment program, relapsed, was thereafter placed in two others, but again relapsed during after-care. (Supreme Ct, Kings Co)

**Sex Offenses (Civil Commitment)**

**Matter of State of New York v Spencer D., 96 AD3d 768, 946 NYS2d 180 (2nd Dept 6/6/2012)**

**Holding:** The appellant's claim that "Mental Hygiene Law § 10.03 (i) is unconstitutional as applied to him because the phrase 'condition, disease or disorder' is undefined and the diagnosis made by the State's expert—paraphilia not otherwise specified (hereinafter NOS) (hebephilia)—is not listed as a specifically designated diagnosis in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (hereinafter DSM-IV)" fails. "Mental Hygiene Law § 10.03 (i) does not require a designated diagnosis under the DSM-IV for a finding of a mental abnormality. . . ." (Supreme Ct, Westchester Co)

**Juveniles (Delinquency)**

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

**People v Campbell, 98 AD3d 5, 946 NYS2d 587 (2nd Dept 6/13/2012)**

**Holding:** Consideration of the defendant's juvenile delinquency adjudication at 13 in establishing the defendant's risk level as an adult under the Sex Offender Registration Act was error as the Legislature has not authorized it. The prosecution's application for an upward departure to level three based on the defendant's prior adult incarcerations and parole/probation history did not establish that those facts were not adequately taken into account by the New York State Board of Examiners of Sex Offenders in recommending that the defendant be found a level two offender, or that those facts showed the defendant to be more likely to reoffend. (Supreme Ct, Queens Co)

**Double Jeopardy (Lesser Included and Related Offenses)**

**Evidence (Weight)**

**Robbery (Elements)**

**People v Farkas, 96 AD3d 873, 946 NYS2d 230 (2nd Dept 6/13/2012)**

**Holding:** The defendant's conviction of second-degree robbery was against the weight of the evidence as to larcenous intent where conflicting testimony was given as to an altercation that ensued when the defendant encountered the accuser, a consulting engineer acting for a third party, inspecting and photographing certain real estate owned by the defendant, resulting in the accuser being struck by the camera, which was then placed in the defendant's vehicle. As the jury was instructed not to consider lesser counts if it convicted the defendant of higher counts, retrial on third-degree assault would not be barred by double jeopardy protections, but the defendant may not be retried on counts in which larcenous intent plays a role. (Supreme Ct, Kings Co)

**Evidence (Newly Discovered)**

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

**People v Deacon, 96 AD3d 965, 946 NYS2d 613 (2nd Dept 6/20/2012)**

**Holding:** The court erred by denying the defendant's motion for a new trial based on newly discovered evidence, which included the proffered testimony of Trevor Brown and Colleen Campbell. Brown, who had acted as a federal informant, said a man named Watson, a member of a gang under investigation, admitted committing the robbery and murder with which the defendant was charged. The defense showed that Watson's statement met the four prerequisites for admission: Watson had been deported and so was unavailable, his admission that he participated in the attack was clearly against penal interest, the admission was rendered in circumstances making its truthfulness reasonably possible, and there were sufficient indicia that Brown's testimony about Watson was reliable. Campbell's recantation included credible reasons for her failure to say at trial that the defendant was not the assailant she saw fleeing—she had feared retaliation by the gang and she was encouraged by law enforcement to be "vague" under threat of losing her children. The recantation was consistent with other hearing witnesses and the record; her original description of the assailant matches that of Watson, not the defendant, and the record shows no motive for her to inappropriately come to the defendant's assistance.

The court properly refused to dismiss the charges on the basis of actual innocence, as the defendant did not establish that he was entitled to such relief, regardless of whether such a claim exists and is cognizable in CPL 440.10(1)(h) proceedings. (Supreme Ct, Kings Co)

**Sentencing (Second Felony Offender)**

**People v Feder, 96 AD3d 970, 946 NYS2d 872 (2nd Dept 6/20/2012)**

**Holding:** The defendant's unpreserved contention, conceded by the prosecution, that he was improperly adjudicated a second felony offender is reviewed in the interest of justice, and the matter is remitted for resen-

## Second Department *continued*

tencing because "the sentencing court adjudicated the defendant a second felony offender . . . absent any indication of compliance with the procedural requirements of CPL 400.21, or any showing that the defendant was given notice and an opportunity to be heard . . . ." (Supreme Ct, Nassau Co)

**Sentencing (Second Felony Offender)**

**People v Iliff, 96 AD3d 974, 946 NYS2d 626 (2nd Dept 6/20/2012)**

**Holding:** The defendant's unpreserved claim that he was illegally sentenced as a second felony offender because his Connecticut conviction for second-degree sexual assault does not qualify as a predicate New York felony under Penal Law 70.06(1)(b)(i) is reviewed in the interest of justice, and such review is not barred by his waiver of the right to appeal. The prosecution does not dispute "that there is no equivalent Penal Law provision which criminalizes sexual intercourse with a person under the age of eighteen based upon the offender's status as either a guardian or individual responsible for the general supervision of the victim's welfare," and the acts set out in the Connecticut accusatory instrument cannot be examined to see if they constitute a New York felony where the Connecticut offense is not one that can be committed in a variety of ways, some of which could constitute New York felonies. (Supreme Ct, Queens Co)

**Family Court**

**Juveniles (Support Proceedings)**

**Grossman v Composto-Longhi, 96 AD3d 1000, 948 NYS2d 95 (2nd Dept 6/27/2012)**

**Holding:** The Supreme Court erred by granting the branch of the plaintiff's motion to vacate Family Court orders that retroactively increased the plaintiff's child support, as a court of coordinate jurisdiction cannot rule on a matter that has been reviewed by another judge of equal authority, and the Supreme Court has "'no discretion to reduce or cancel arrears of child support which accrue before an application for downward modification of the child support obligation'. . . ." (Supreme Ct, Suffolk Co)

**Juveniles (Parental Rights)**

**Matter of Nazier B., 96 AD3d 1049, 947 NYS2d 157 (2nd Dept 6/27/2012)**

**Holding:** The petitioner did not sustain its burden of establishing by a preponderance of the evidence that it was in the children's best interest to change the permanency goal from reunification of the family to placement for adoption where the mother fully complied with all recommended services, fully cooperated with the petitioner, had unsupervised visits including overnight stays, was reported by service providers to have progressed substantially in addressing the issues that led to removal of the children, has help from family members, and is willing to accept the assistance "recommended and offered by the petitioner." (Family Ct, Westchester 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.**

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

**Matter of Farrell v LaBuda, 94 AD3d 1195, 943 NYS2d 237 (3rd Dept 4/5/2012)**

**Holding:** The court erred in issuing an order compelling the prosecutor to perform a fingerprint comparison by a date certain. No authority exists to compel pretrial discovery in a criminal case that is unavailable pursuant to statute and a prosecutor is not constitutionally or statutorily required to create discoverable evidence. Even though the prosecutor had stated his intention to have a fingerprint comparison done, because no specific date was agreed upon, this did not create an enforceable mutual accord or binding stipulation. While performance of the comparison, disclosing no match to the latent prints, rendered this proceeding moot, the issue is reviewed because it is significant and likely to recur.

**Rape (Evidence)**

**People v Simonetta, 94 AD3d 1242, 942 NYS2d 270 (3rd Dept 4/12/2012)**

**Holding:** The court did not abuse its discretion in precluding evidence of the accuser's sexual behavior with the defendant's friend where the record discloses uncertainty as to what the friend's testimony would have been. Defense counsel failed to make an offer of proof of the friend's testimony as required by CPL 60.42, which permits evidence of an accuser's sexual behavior in a criminal rape proceeding upon the trial court's finding that the evidence is relevant and admissible in the interests of justice.

Evidence of the accuser's willingness to engage in sexual conduct with the defendant's friend around the time the rape occurred is not relevant to determining con-

## Third Department *continued*

sent to sexual conduct with the defendant shortly afterward. The jury was entitled to accept only some of the accuser's testimony, as it did by acquitting the defendant of forcible rape despite the accuser's testimony that she did what the defendant told her because she feared he would kill her. The convictions of other sex offenses and third-degree unlawful dealing with a child were not against the weight of the evidence. (Supreme Ct, Schenectady Co)

**Forensics**

**Guilty Pleas (Vacatur)**

**People v Seeber, 94 AD3d 1335, 943 NYS2d 282 (3rd Dept 4/29/2012)**

**Holding:** The court did not abuse its discretion in vacating the defendant's guilty plea and conviction pursuant to CPL 440.10(1)(b), which permits the court to vacate a plea procured by misrepresentation or fraud by "a person acting on behalf of the prosecution . . . ." A State Police forensic scientist's failure to follow protocol in conducting fiber analysis, and misleading conclusions based on this deficient analysis, constituted a misrepresentation because they were presented to the defendant before she entered her plea. The prosecution's lack of knowledge of the scientist's misrepresentation is immaterial to determining whether the plea was procured by misrepresentation or fraud under the statute. (County Ct, Saratoga Co)

**Evidence (Sufficiency)**

**Prisoners (Crimes)**

**People v Cash, 95 AD3d 1374, 943 NYS2d 677 (3rd Dept 5/3/2012)**

**Holding:** Sufficient evidence existed to convict the incarcerated defendant in possession of a lighter of first-degree promoting prison contraband because the jury could conclude that the lighter was a dangerous instrument. Although the lighter had not been established to be operable by the arresting officer, the nature of the lighter, which was admitted into evidence without objection and available for inspection by the jury, along with the officer's testimony about the risks posed to security by lighters, was evidence from which the jury could infer its dangerous character. Additionally, the defendant's admission alone that lighters are dangerous may be sufficient to find him guilty of first-degree promoting prison contraband. (County Ct, Broome Co)

**Aliens (Deportation) (Immigration)**

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

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

**People v Glasgow, 95 AD3d 1367, 943 NYS2d 674 (3rd Dept 5/3/2012)**

**Holding:** The defendant failed to establish that he received ineffective assistance of counsel where defense counsel advised the defendant that deportation was a possible consequence of a drug-related conviction. "The fact that counsel, in advising defendant to accept the favorable plea deal, may have expressed his experience-based assessment of the *likelihood* that removal proceedings might or might not be initiated depending upon different factors was not misleading and did not undermine counsel's accurate preplea advisement to defendant that the drug sale plea offer is a removable offense for a noncitizen . . . ." [Emphasis in original.] (County Ct, Albany Co)

**Double Jeopardy (Jury Trials) (Mistrial)**

**Juries and Jury Trials (Selection)**

**Weapons (Possession)**

**People v Stewart, 95 AD3d 1363, 943 NYS2d 302 (3rd Dept 5/3/2012)**

**Holding:** A conviction for third-degree criminal possession of a weapon can be based on constructive possession and established by direct or circumstantial evidence that the defendant had dominion and control over the area where the weapon was found. The evidence, that the defendant was alone in a hotel room for several hours, was seen running in and out of the bathroom once the police arrived, and that the gun was found in a bathroom ceiling tile, was sufficient to find constructive possession of the handgun. There was sufficient evidence to find possession even though other individuals had access to the hotel room, and the hotel room had been paid for by another individual.

The defendant's failure to object to the granting of a mistrial for having jurors serve for longer than the five days permitted by Judiciary Law 525 constituted the defendant's implied consent to the mistrial, and the defendant's double jeopardy argument fails "because such protection is not triggered until a full jury has been impaneled and sworn . . . ." (County Ct, St. Lawrence Co)

**Appeals and Writs (Preservation of Error for Review)**

**Narcotics (Treatment Programs)**

**People v Eden, 95 AD3d 1446, 943 NYS2d 689 (3rd Dept 5/10/2012)**

## Third Department *continued*

**Holding:** By not objecting, the defendant failed to preserve her argument that the court erred in discharging her from the drug treatment court (DTC) program for violating the honesty condition in the DTC contract because her dishonesty was unrelated to possession or use of drugs or alcohol. The DTC contract requires that the defendant comply with the conditions in the DTC handbook, which provides that participants must be honest with the court, treatment providers, the rest of the DTC team, and others. At a hearing to determine whether the defendant should remain in the program, the defendant admitted that she repeatedly lied to the court by claiming she was diagnosed with cancer and was undergoing chemotherapy. The court's decision will not be disturbed. (County Ct, Broome Co)

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

**Juveniles (Custody) (Right to Counsel)**

**Matter of Holly J., 95 AD3d 1595, 946 NYS2d 263 (3rd Dept 5/31/2012)**

**Holding:** The respondent father's right to counsel in this permanency hearing was not violated where assigned counsel was available for the father at the first appearance, but was permitted to leave after the father's retained counsel stated that the father did not need assigned counsel, and the retained attorney represented the father at all subsequent proceedings. The father's right to effective assistance of counsel was not violated by counsel's joint representation of the father and the person the father wanted to receive custody because the father's interests were not adverse to that person, and the record shows he received meaningful representation. (Family Ct, Sullivan Co)

**Juveniles (Custody) (Hearings) (Jurisdiction)**

**Matter of Metz v Orta, 95 AD3d 1611, 945 NYS2d 469 (3rd Dept 5/31/2012)**

**Holding:** The court improperly dismissed, without a hearing, the child custody proceeding for lack of jurisdiction where the father's pleadings asserted the child lived in New York, but the mother stated at the initial appearance that the child lived in Florida. Every party to a child custody proceeding must provide, in the first pleading or in an affidavit, information as to where the child has lived in the last five years, and if there is disagreement about the child's residency, the court must "'examine the parties under oath as to the details of the information furnished and other matters pertinent to the court's jurisdiction . . . .'" (Family Ct, Schenectady Co)

**Juveniles (Paternity)**

**Matter of Starla D. v Jeremy E., 95 AD3d 1605, 945 NYS2d 779 (3rd Dept 5/31/2012)**

**Holding:** The court properly dismissed the respondent mother's equitable estoppel defense in this paternity proceeding because the respondent failed to establish that there was a close relationship between the child and another father figure and that disrupting that relationship would be detrimental to the child. Although the respondent showed that her friend and occasional roommate, with whom she had a brief romantic relationship, had a close relationship with the child since the child was three months old, the friend and members of his family referred to the child as his son and the child called him "dad," and the mother told others that he was the father, the respondent could not show this man played a significant role in raising or nurturing the child, provided the child with food, clothing, and shelter for most of his life, or performed other traditional responsibilities of a father. (Family Ct, Saratoga Co)

**Aliens (Deportation) (Immigration)**

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

**People v Carty, 96 AD3d 1093, 947 NYS2d 617 (3rd Dept 6/7/2012)**

**Holding:** The defendant received effective assistance of counsel because, although counsel has a duty to inform the defendant of the immigration consequences of a plea, this duty presupposes that counsel knows the defendant is a noncitizen, and although counsel met with the defendant several times, the defendant did not tell his attorney about his immigration status and there was no evidence that counsel should have been aware of this issue. While it may be the better practice, there is no federal constitutional requirement that counsel determine each client's immigration status. Further, the defendant did not show that his attorney's representation fell below the objective standard of reasonableness because "the prevailing 'practice and expectations of the legal community'" did not require that his attorney ask about his citizenship. And the defendant failed to establish that he was prejudiced where the attorney, with the defendant's active input, negotiated a highly favorable plea with a one-year jail sentence instead of possible consecutive prison sentences.

The defendant's state constitutional ineffective assistance of counsel claim fails where a review of the record shows that, at the time of the plea proceedings, counsel provided meaningful representation.

## Third Department *continued*

The court's failure to advise the defendant of deportation consequences did not violate the defendant's due process rights because such failure to advise does not affect the voluntariness of the plea, and because the court is not required to advise a defendant of collateral consequences of a plea, including deportation. And the "defendant has not persuasively demonstrated that a lack of knowledge of the deportation consequences of his guilty plea 'reasonably could have caused him, and in fact would have caused him, to reject an otherwise acceptable plea bargain' . . . ." (County Ct, Broome Co)

**Family Court (Violation of Family Court Orders)**

**Juveniles (Support Proceedings)**

**Matter of Commissioner of Social Services v Dockery, 96 AD3d 1119, 945 NYS2d 808 (3rd Dept 6/7/2012)**

**Holding:** The court erred in committing the defendant to county jail for failure to make child support payments because it did not first formally confirm the support magistrate's findings that the defendant was in willful violation of the child support order. "Formal confirmation by Family Court of such findings are an essential and integral part of this process and must occur before an individual in such a circumstance can be incarcerated for failing to pay child support . . . ." (Family Ct, Albany Co)

**Admissions (Evidence)**

**Search and Seizure (Parolees and Probationers)**

**People v Everett, 96 AD3d 1105, 945 NYS2d 494 (3rd Dept 6/7/2012)**

**Holding:** The court did not err in denying the motion to suppress cocaine found in the defendant's sneaker where, during a lawful home visit, the defendant's parole officer smelled marijuana and the defendant admitted he had smoked marijuana; the officer's supervisor directed the officer to remove the defendant from the home; and a detective picked up the sneakers from the defendant's closet because the defendant needed to put on shoes to leave house.

The court properly allowed the prosecution to introduce statements that had been suppressed where defense counsel opened the door to their admission by stating, during his opening remarks, that there was no proof connecting the defendant to the cocaine, which created a misleading impression. (County Ct, Albany Co)

**Victims (Compensation)**

**Matter of New York State Office of Victim Services v Raucci, 97 AD3d 235, 946 NYS2d 657 (3rd Dept 6/7/2012)**

**Holding:** Crime victims are able to recover from a defendant's public pension pursuant to the 2001 amendment to the Son of Sam Law, which expanded the recovery options from the profits of a crime to "'money and property that a convicted criminal receives from any source' . . . ." Although Retirement and Social Security Law 110 generally exempts public pensions from garnishment or attachment, "both the unambiguous statutory language of the Son of Sam Law and the legislative history of the 2001 amendments support petitioner's argument that respondent's pension funds are not exempt from the statute's reach." The Legislature expressly exempted certain categories of funds from the Son of Sam Law, but did not list public pension funds, thereby indicating that those funds were recoverable. And the older, more general exemption language of Retirement and Social Security Law 110 is superseded by the more recent and specific amendments to the Son of Sam Law. Further, "despite the absolute ban on assignment contained in statutes protecting public employee pensions, the 'courts have long recognized . . . limited exception[s] to the unyielding application' of such laws . . . ." (Supreme Ct, Albany Co)

[***Ed. Note:*** *Leave to appeal was granted on Sept. 18, 2012 (2012 NY Slip Op 84607).*]

**Evidence (Other Crimes) (Prejudicial) (Relevancy)**

**Impeachment**

**Rape (Elements) (Evidence)**

**People v Blond, 96 AD3d 1149, 946 NYS2d 663 (3rd Dept 6/14/2012)**

**Holding:** The court properly admitted evidence that the accuser saw the defendant commit acts of violence against his wife, the accuser's aunt, because the probative value of the evidence outweighed the prejudice to the defendant where it provided necessary background information about the accuser's fear of the defendant and her unwillingness to disclose the sexual abuse by the defendant until he was in police custody on a domestic violence charge. The court's failure to give, after the wife's testimony, a third limiting instruction to the jury as to the proper use of this evidence was harmless error because proper instructions were given twice during trial and in the final jury charge.

There is legally sufficient evidence of forcible compulsion based on implied threats where the accuser testified about the defendant's violent acts against his wife, the defendant's use of physical force to hold her down while having intercourse with her, the number of times the defendant sexually abused the accuser over a relative-

## Third Department *continued*

ly short time period, and the accuser's resulting fear of the defendant.

The court properly precluded the defendant from admitting, for impeachment purposes, the testimony of three social workers that statement validity analysis testing failed to corroborate the accuser's claims; unlike in family court, there is no statutory authorization for admission of such testimony in criminal proceedings. (Supreme Ct, Schenectady Co)

**Prisoners (Religion)**

**Matter of Green v Fischer, 96 AD3d 1247, 947 NYS2d 206 (3rd Dept 6/21/2012)**

**Holding:** The respondent's decision to deny the petitioner's request to wear a religious head covering in accordance with the beliefs of the Nation of Islam is not supported by a rational basis because the grievance was denied based upon the opinion of a Muslim chaplain, instead of consulting a Nation of Islam authority.

**Juveniles (Parental Rights) (Permanent Neglect)**

**Matter of Victor WW., 96 AD3d 1281, 947 NYS2d 213 (3rd Dept 6/21/2012)**

**Holding:** In this termination of parental rights case, the petitioner failed to establish by clear and convincing evidence that the respondent mother "'substantially and continuously or repeatedly [failed] to maintain contact with or plan for the future' of her children for the statutory period . . . ." The mother did not display a pattern of hostility and refusal to cooperate, even though she occasionally failed to cooperate with efforts to assist her. Although early on the mother said she was going to continue her relationship with a paramour who had harmed her children, she eventually ended the relationship and conceded that this man had hurt her children. She also maintained a close, appropriate, and mutually affectionate relationship with her children while they were in the petitioner's care. (Family Ct, Schenectady Co)

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

**Matter of Brooks v Commissioner of Special Housing Unit, 96 AD3d 1317, 947 NYS2d 221 (3rd Dept 6/28/2012)**

**Holding:** The determination that the prisoner had conspired to bring a controlled substance into a correctional facility was not supported by substantial evidence where the correction officer's testimony that the prisoner and his wife discussed marihuana and heroin over monitored telephone calls was not substantiated by the certified transcript, which did not contain those references. The transcript instead tracked the prisoner's defense that that he and his wife had been arguing about money.

**Auxiliary Services (Interpreters)**

**Parole (Release [Consideration for (includes guidelines)])**

**Matter of Zheng v Evans, 96 AD3d 1307, 947 NYS2d 669 (3rd Dept 6/28/2012)**

**Holding:** The petitioner prisoner's request for parole release was improperly denied because language barriers unfairly prevented him from fully participating in his parole hearing where the petitioner speaks in the Fujianese dialect, but was given a translator fluent in Mandarin, and the transcript did not show whether the prisoner was able to use Mandarin to communicate and does show that he was unable to converse and fully understand the questions posed to him in English. While a prisoner does not have a constitutional right to parole, "a parole release applicant is nevertheless entitled to a fair hearing where he or she 'fully understands [the] questions posed to him [or her] by the [B]oard and makes himself [or herself] understood in responding to any question' . . . ." Although this case was improperly transferred to this Court, it is retained in the interest of judicial economy.

**Juveniles (Custody) (Jurisdiction) (Visitation)**

**Matter of Belcher v Lawrence, 98 AD3d 197, 948 NYS2d 187 (3rd Dept 7/5/2012)**

**Holding:** The court improperly dismissed, for lack of jurisdiction, a proceeding to modify a New York order awarding the father custody of the couple's son and visitation with their daughter, who now lives with the mother in Virginia, and awarding the mother visitation with their son. Because the court made a child custody determination, the definition of which includes decisions about visitation, with respect to the daughter, it has continuing exclusive jurisdiction over custody matters involving the daughter because the father and daughter have a significant connection with this state, including that the father continues to live in New York, the daughter's brother has lived in New York for seven years, and the daughter visits her father and brother several times a year in New York. Further, although the father's modification petition is based on events that happened in Virginia, there is substantial evidence about those events and the ultimate issue of custody in New York.

The court also improperly found that New York was an inconvenient forum. "[M]uch of the evidence underlying the allegations of the petition—particularly the testimony of the children—is located in New York . . . ." Evidence of the best interests of the daughter that exists in

## Third Department *continued*

Virginia can be presented by depositions or testimony by phone or audiovisual or other electronic means. And, because the court previously heard testimony about the custody of the children, it can resolve this matter expeditiously and is more familiar with the case than the Virginia courts. (Family Ct, Saratoga Co)

**Double Jeopardy (Collateral Estoppel)**

**Juveniles (Neglect)**

**Matter of Jewelisbeth JJ., 97 AD3d 887, 948 NYS2d 701 (3rd Dept 7/5/2012)**

**Holding:** The petitioner may satisfy its burden of establishing neglect by relying on the respondent's criminal conviction where the identical issue has been resolved in the criminal case and there is a factual nexus between the conviction and the neglect allegations. The court abused its discretion in refusing to allow the petitioner to introduce the transcript of the father's plea allocution, which would have provided the factual nexus, after the close of proof, because the petitioner made the appropriate offer of proof in its post-trial submission, there is no undue delay in the trial, and the respondent is not prejudiced by its admission, even though it may prevent him from prevailing in the proceeding. (Family Ct, Rensselaer Co)

**Driving While Intoxicated**

**Homicide (Manslaughter [Vehicular])**

**People v Stickler, 97 AD3d 854, 948 NYS2d 696 (3rd Dept 7/5/2012)**

**Holding:** Penal Law 125.12, defining vehicular manslaughter, is not unconstitutional because the permissible rebuttable presumption does not improperly shift the burden of proof to the defense as it only arises if the prosecution establishes that the "defendant, in operating a vehicle while unlawfully intoxicated, caused the victim's death; only then may the jury draw an inference regarding the second element of causation—that it was the driver's intoxication that caused him or her to operate the vehicle in a dangerous manner." The court erred in treating the statutory presumption as mandatory, rather than permissive, and therefore failed to determine whether the defendant "operated the vehicle in a manner that caused the victim's death and did so as a result of unlawful intoxication—elements necessary to sustain a finding of guilt. . . ." (County Ct, Chemung Co)

**Appeals and Writs (Stay Pending Appeal)**

**Juveniles (Custody)**

**Matter of Whiting v Ward, 97 AD3d 861, 948 NYS2d 179 (3rd Dept 7/5/2012)**

**Holding:** The court improperly dismissed the father's petition for enforcement of and the mother's petition for modification of a child custody order on the grounds that the father's pending appeal from the same child custody order prevented the court from addressing the petitions. Filing a notice of appeal from a Family Court order does not give rise to an automatic stay. The order remains binding, enforceable, and modifiable during the prosecution of an appeal, even if the appeal subsequently nullifies the portion of the order sought to be enforced or modified. If a subsequent proceeding ultimately supersedes the order being appealed, the appeal will be dismissed as moot at that time. (Family Ct, Saratoga Co)

**Juveniles (Abuse) (Foster Care) (Neglect) (Visitation)**

**Matter of Fay GG., 97 AD3d 918, 948 NYS2d 730 (3rd Dept 7/12/2012)**

**Holding:** A child beyond the age of 18 who knowingly and voluntarily consents to remain in foster care remains the responsibility of the Department of Social Services, and therefore, the court has the jurisdiction to require the father to participate in services to ensure that his access to and visitation with the child is in the child's best interests. By not objecting to the child's continued custody with the petitioner, the father waived his claim that the child did not knowingly consent to remain in foster care, and the record shows that, despite the child's lower intellect and mental health challenges, he knowingly and voluntarily chose to stay in foster care. The court's findings of abuse and neglect on the part of the father have record support, and the father's decision not to testify permitted a strong inference to be drawn against him. (Family Ct, Broome Co)

**Juveniles (Neglect) (Parental Rights)**

**Sex Offenses**

**Matter of Hannah U., 97 AD3d 908, 948 NYS2d 704 (3rd Dept 7/12/2012)**

**Holding:** The court erred in finding that the respondent father neglected his children by refusing to obtain sex offender treatment and violating the terms of probation. There is insufficient evidence that the father exhibited a failure to maintain the minimum degree of care towards his children; although he is a registered sex offender, the father successfully completed sex offender treatment more than two years before the petition was

## Third Department *continued*

filed and there is no evidence he has committed offenses since that date. Further, status as a level two sex offender does not constitute per se neglect or create a presumption of neglect. Although the father did violate his probation by consuming alcohol, those incidents occurred two years before the instant petition and there is no evidence to refute the father's claim that he has not consumed alcohol since then. While he admits to providing his probation officer with falsified slips of attendance for Alcoholics Anonymous meetings, that conduct does not rise to the level of actual or imminent danger of impairment to the children sufficient to warrant a neglect finding. And the Department of Social Services, which approved of the father taking custody of his children and step-children, opposed this petition. (Supreme Ct, Clinton Co)

**Juveniles (Parental Rights)**

**Matter of Kobe D., 97 AD3d 947, 948 NYS2d 716 (3rd Dept 7/12/2012)**

**Holding:** The court erred in unilaterally modifying the permanency hearing goal from reunification to placement for adoption and termination of parental rights because the record did not indicate that the respondent mother failed to demonstrate a willingness to work toward the goal of reunification or comply with the petitioner's recommendations. The mother had completed parenting classes, attended family therapy with the children, and recognized her past poor parenting and identified ways to improve. Therefore, despite her limited financial means and the children's voiced concerns about returning to their mother's care, the record does not demonstrate a failing on the part of the mother that supports the modification. (Family Ct, Clinton Co)

**Defenses (Agency)**

**Narcotics (Cocaine) (Sale)**

**People v Monykuc, 97 AD3d 900, 947 NYS2d 830 (3rd Dept 7/12/2012)**

**Holding:** The court erred in failing to give an agency charge to the jury in a third-degree criminal sale of a controlled substance prosecution because there was evidence that could support an inference that the defendant was an agent of the buyer, including that the defendant only agreed to help the undercover detective purchase cocaine after being asked several times, which the jury could have been viewed as a favor in return for the car rides the detective provided; the defendant "did not advertise the quality of the drugs, bargain over price, or otherwise exhibit '[s]alesman-like behavior'"; while the defendant and the detective had no prior relationship, this factor alone is not dispositive on the issue of agency. There was also no evidence that the defendant was promised a reward, made a profit, or previously participated in drug transactions. (County Ct, Broome Co)

**Aliens (Deportation) (Immigration)**

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

**People v Oouch, 97 AD3d 904, 948 NYS2d 453 (3rd Dept 7/12/2012)**

**Holding:** The court should have held a hearing to resolve the defendant's CPL 440.10 motion to vacate his conviction for ineffective assistance of counsel because the defendant's claim that he was not informed of the deportation consequences of his plea was not resolved by unquestionable documentary evidence where the defendant provided documentary proof that his attorney was aware of his noncitizen status, supplied his own affidavit claiming counsel never informed him of deportation consequences, and an affidavit from his stepfather who reaffirmed that neither the defendant nor the stepfather was informed of deportation consequences, and the prosecution presented an affidavit from defense counsel stating that the defendant's claim was false, but did not offer any documentary proof showing that he did discuss immigration issues with the defendant before the plea.

The second prong of an ineffective counsel claim is satisfied by defendant's assertion that he would not have accepted the plea deal had he known the deportation consequences; this prong "does not require a prediction analysis of the likely outcome of the trial . . . ." (County Ct, Albany Co)

**Assault (Evidence) (Serious Physical Injury)**

**People v Trombley, 97 AD3d 903, 947 NYS2d 686 (3rd Dept 7/12/2012)**

**Holding:** The evidence is legally insufficient to establish that the accuser suffered a serious physical injury where the accuser had two facial scars, one below the lip and one below the chin, which was no more than one inch in size. While they are facial scars, "given their relatively small size, location and appearance, we cannot conclude that they are 'objectively "distressing or objectionable"' . . . ." Therefore, the defendant's conviction is reduced from second-degree to third-degree assault. (County Ct, Essex Co)

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

**People v Morrow, 97 AD3d 991, 948 NYS2d 463 (3rd Dept 7/19/2012)**

## Third Department *continued*

**Holding:** The court properly suppressed evidence resulting from a frisk of the defendant because the police did not have reasonable suspicion that the defendant was involved in criminal activity and armed where, although he matched the description of a person the police learned was selling drugs from an apartment, and the defendant had just exited the apartment, the generic description of a African-American male in his early to mid-thirties with short hair could have matched any number of people. Further, although the defendant appeared agitated when he noticed the police following him, had lied about exiting the apartment building when questioned, and had unzipped pants and was seen adjusting his pants leg, this "may have authorized the police to stop defendant and inquire, but did not give them reason to suspect that defendant had committed a crime or was armed with a weapon . . . ." (Supreme Ct, Albany Co)

## Fourth Department

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

**Appeals and Writs (Scope and Extent of Review) (Waiver of Right to Appeal)**

**People v Colucci, 94 AD3d 1419, 942 NYS2d 395 (4th Dept 4/20/2012)**

**Holding:** In this direct appeal, the defendant's argument regarding his waiver of the right to challenge the judgment of conviction by a CPL article 330 or 440 motion or by writ of coram nobis is premature; the issue is not presently justiciable. The defendant's argument is a request for an advisory opinion. (County Ct, Niagara Co)

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

**Sentencing (Fines)**

**People v Jenkins, 94 AD3d 1474, 942 NYS2d 397 (4th Dept 4/20/2012)**

**Holding:** The defendant's plea must be vacated because the court failed to advise the defendant that the law required either a fine or incarceration, or both. At the plea, the court told the defendant he could be sentenced to incarceration or probation, but did not mention a fine, which is a direct consequence of the plea; at sentencing, the court imposed a sentence of probation and a fine. (County Ct, Erie Co)

**Evidence (Weight)**

**Witnesses (Credibility)**

**People v Oberlander, 94 AD3d 1459, 943 NYS2d 316 (4th Dept 4/20/2012)**

**Holding:** The defendant's conviction for first-degree offering a false instrument for filing for allegedly failing to report on an application for food stamp benefits that the father of one of her children was living in the household, is against the weight of the evidence. After independently assessing the proof and substituting our own credibility determinations, "we find that the testimony of both the coworker's boyfriend and the coworker is not credible and that the testimony of defendant and her mother is credible." The jury failed to properly weigh the probative force of that conflicting testimony. And the jury failed to give the proper weight to one of the prosecution's exhibits, the rental agreement, given the conflicting testimony about when the father signed the document. (County Ct, Genesee Co)

**Counsel (Right to Counsel) (Waiver)**

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

**People v Bigby, 96 AD3d 1429, 945 NYS2d 900 (4th Dept 6/8/2012)**

**Holding:** The court erred in sentencing the defendant in the absence of defense counsel. The defendant's failure to appear at sentencing did not, on its own, constitute a waiver of the right to counsel at sentencing, which is a critical stage of the criminal proceeding. (County Ct, Cayuga Co)

**Confessions (Counsel) (Interrogation) (*Miranda* Advice) (Voluntariness)**

**People v Guilford, 96 AD3d 1375, 945 NYS2d 825 (4th Dept 6/8/2012)**

**Holding:** The court correctly denied the defendant's motion to suppress statements he made during an interview with detectives in Georgia where, even assuming he was in custody, the defendant voluntarily waived his *Miranda* rights before making any statements, and the defendant did not make an unequivocal request for counsel when he asked the detectives if he needed to speak to an attorney and the detectives made it seem like he could not get one then. The court properly suppressed the defendant's statements made during a later interrogation because, although the defendant was advised of his *Miranda* rights, the 49-hour interrogation "was unparal-

## Fourth Department *continued*

leled and should in no way be condoned." And, as to the statements the defendant made in the presence of assigned counsel after an eight-hour break in the interrogation, the court correctly held they were admissible because there was a "'definite, pronounced break'" in the interrogation, during which time the defendant consulted with an appointed attorney.

"Defense counsel was not ineffective . . . for making a 'strategic decision to encourage defendant to cooperate in order to receive favorable treatment' . . . ." The defendant told his attorney he wanted to "'cut a deal'" and he was offered a sentence cap if he cooperated. (County Ct, Onondaga Co)

**Concurrence:** The statements the defendant gave after the break in the interrogation were voluntary not only because they were sufficiently attenuated but also, independently of that, because they were made following consultation with, and in the presence of, counsel.

**Dissent:** The statements given after the break in interrogation should be suppressed where the defendant did not sleep during the entire 49½-hour interrogation and had only eaten one sandwich about 20 hours after he was taken into custody and 40 hours before he gave those statements; there was no evidence that he slept or was provided food during the break, which included his meeting with counsel and arraignment; and counsel said he appeared "'emotional and distraught.'" Factors in determining whether a break was sufficient to return the defendant to the status of one who is not under interrogation include the length of the break in comparison to the length of the interrogation and whether the defendant "may have believed himself 'so committed by a prior statement that he [felt] bound to make another' . . . ." "[T]he presence of counsel did nothing to improve defendant's cognitive functioning, which necessarily was affected by the prolonged lack of food and sleep." And "the presence of counsel alone cannot, following a 49 ½-hour continuous interrogation proceeded by a brief break nullify the coercive effect of the prior interrogation."

[***Ed. Note:*** *This case is on appeal to the Court of Appeals.*]

**Narcotics (Marijuana)**

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

**Witnesses (Credibility)**

**People v Howington, 96 AD3d 1440, 946 NYS2d 368 (4th Dept 6/8/2012)**

**Holding:** The court properly granted the defendant's motion to suppress, for lack of probable cause to arrest for possession after a traffic stop, the marijuana in a closed plastic bag seized by police from inside the defendant's pocket. "[T]he court's determination that the officer could not have smelled the unburned marihuana is supported by the evidence in the record and was based solely upon the court's assessment of the credibility of the witnesses at the suppression hearing . . . ." (Supreme Ct, Onondaga Co)

**Contempt (Elements)**

**Evidence (Business Records) (Sufficiency)**

**Larceny (Value)**

**Misconduct (Prosecution)**

**People v Huntsman, 96 AD3d 1387, 946 NYS2d 327 (4th Dept 6/8/2012)**

**Holding:** The defendant's convictions for fourth-degree grand larceny and first-degree criminal contempt must be reduced to petit larceny and second-degree criminal contempt because there is legally insufficient evidence as to the monetary value of the items allegedly stolen and damaged. The sole evidence of value was the complainant's testimony, which was conclusory and provided only rough estimates of value, and was contradicted by statements the complainant made to a police officer; and the only evidence of the value of the damaged property was a police investigator's testimony that provided a general approximation of the total cost of the damage.

The court erred in admitting the defendant's cell phone records in evidence because the prosecution failed to establish a foundation for their admission under CPLR 4518(a) and the records were not self-authenticating under CPLR 4518(c), nor were they " 'so patently trustworthy as to be self-authenticating' . . . ." However, this error was harmless.

Although the prosecutor, who has been repeatedly admonished for various acts of misconduct in prior cases, engaged in misconduct in this case, his misconduct did not jeopardize the fairness of the defendant's trial. However, the prosecutor is again reminded that "prosecutors have 'special responsibilities . . . to safeguard the integrity of criminal proceedings and fairness in the criminal process' . . . ." (County Ct, Ontario Co)

[***Ed. Note:*** *A summary of the related decision on the defendant's CPL 440.10 motion appears below.*]

**Confessions (Counsel) (Interrogation)**

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

**People v Huntsman, 96 AD3d 1390, 947 NYS2d 235 (4th Dept 6/8/2012)**

**Holding:** The court erred in denying the defendant's CPL 440.10 motion because a statement admitted at trial

## Fourth Department *continued*

was obtained in violation of his indelible right to counsel where: after a joint investigation and interview by an Ontario County Sheriff's Department investigator and a Seneca County Sheriff's Department deputy, the defendant was arraigned in Seneca County; at the arraignment, in the presence of the Seneca deputy, the defendant requested counsel on the Seneca charges and was remanded into custody; and the defendant was then brought to a local police department and questioned by the Ontario investigator about the Ontario County charges. Even assuming the defendant waived his *Miranda* rights, since he was in custody on the Seneca County case and had requested counsel, he could not be interrogated about any related or unrelated charges; the Ontario investigator "should be charged with the knowledge, actual or constructive, that defendant had requested counsel on the charges for which he had just been arraigned . . . ." The admission of the statement was not harmless error where the only other direct evidence was that the defendant's palm print was found at the alleged point of entry into the burglarized home, and there was evidence that the defendant lived in that home until shortly before the burglary. The defendant's original suppression motion did not raise this issue and the record did not include sufficient facts to permit adequate review of the issue; therefore, denial of the motion was not mandatory under CPL 440.10(2)(a), (b), or (c). (County Ct, Ontario Co)

**Narcotics (Penalties)**

**Sentencing (Hearing) (Resentencing)**

**People v Irvin, 96 AD3d 1453, 945 NYS2d 907 (4th Dept 6/8/2012)**

**Holding:** The court incorrectly concluded that the defendant was not eligible for resentencing pursuant to CPL 440.46 based on his status as a reincarcerated parole violator. The court also erred in denying, without a hearing, the defendant's resentencing application on the ground that substantial justice dictated the denial. The court should have given the defendant and his attorney an opportunity to appear and explain why resentencing was warranted. (County Ct, Ontario Co)

**Evidence (Rebuttal)**

**Impeachment (Of Defendant)**

**People v Salim, 96 AD3d 1484, 946 NYS2d 521 (4th Dept 6/8/2012)**

**Holding:** The court "abused its discretion in admitting rebuttal evidence concerning defendant's relationship with a woman other than his wife" where the relationship was not a material issue in the case and the rebuttal testimony was offered solely to attack the defendant's credibility on a collateral issue. The judgment must be reversed and a new trial ordered. (Supreme Ct, Erie Co)

**Accusatory Instruments (Duplicitous and/or Multiplicitous Counts)**

**Sentencing (Second Felony Offender)**

**People v Santiago, 96 AD3d 1495, 946 NYS2d 383 (4th Dept 6/8/2012)**

**Holding:** One of the two counts of first-degree sexual abuse for which the defendant was convicted must be vacated because the defendant could only be charged with one count of that offense where the evidence showed that there was a single, uninterrupted attack during which the defendant groped several parts of the accuser's body; the defendant failed to preserve his argument that the indictment was multiplicitous, but it is reviewed as a matter of discretion in the interest of justice.

The defendant failed to preserve his claim that he was improperly sentenced as a second felony offender based on his Pennsylvania conviction that encompassed several crimes, some of which he could not have been convicted of in New York based on his age at the time of the crimes, and the issue is not reviewed as a matter of discretion. (County Ct, Monroe Co)

**Due Process**

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

**People v Scott, 96 AD3d 1430, 945 NYS2d 886 (4th Dept 6/8/2012)**

**Holding:** The defendant was denied his due process rights in this Sex Offender Registration Act (SORA) proceeding where the prosecution failed to provide the defendant with the statutorily-required 10-day notice that they intended to seek a determination that differed from the one recommended by the Board of Examiners of Sex Offenders, and the court failed to give the defendant a meaningful opportunity to respond to the prosecution's proposed assessment of an additional 20 points. (County Ct, Monroe Co)

**Assault (Deadly Weapons) (Lesser Included Offenses)**

**Instructions to Jury**

**People v Solomon, 96 AD3d 1396, 946 NYS2d 348 (4th Dept 6/8/2012)**

**Holding:** The court incorrectly gave a jury charge of justification as to the conduct of the assault complainant because the charge was not responsive to the evidence as

## Fourth Department *continued*

there was no view of the evidence that the accuser was justified in using physical force against the defendant or that the accuser used physical force in the first instance. The prejudicial instruction deprived the defendant of a fair trial, and because the evidence of his guilt was not overwhelming, the error was not harmless.

The court properly denied the defendant's request that the court charge third-degree assault as a lesser included offense of first-degree assault as there was no reasonable view of the evidence that would support a finding that the defendant acted with criminal negligence and not intentionally. The fourth-degree criminal possession of a weapon charge was proper as it is not an inclusory concurrent county of first-degree assault. (County Ct, Ontario Co)

**Assault (Deadly Weapons) (Evidence)**

**Evidence (Weight)**

**Motions**

**People v Spratley, 96 AD3d 1420, 946 NYS2d 361 (4th Dept 6/8/2012)**

**Holding:** The appeal must be held and the matter remitted for a ruling on the defendant's renewed motion to dismiss the indictment, which was based on alleged prejudicial conduct during the grand jury proceeding. The court's failure to rule on the renewed motion does not constitute a denial thereof.

In this second-degree assault bench trial, the verdict was not against the weight of the evidence because a finding that the accuser's injury was not caused by a deadly weapon would have been unreasonable where the accuser's face was grazed by a bullet. And, while an acquittal based on the lack of a physical injury would not have been unreasonable—the accuser was treated at the hospital, received several stitches, and testified that he was in excruciating pain at the hospital and still has pain, but the accuser's hospital records showed that the accuser described his pain as "zero" out of 10 and he was not given pain medication—it cannot be said that the court did not give the evidence the weight it should be accorded. (County Ct, Oneida Co)

**Counsel (Right to Counsel)**

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

**Witnesses (Police)**

**People v Walker, 96 AD3d 1481, 946 NYS2d 373 (4th Dept 6/8/2012)**

**Holding:** The court committed a mode of proceedings error when, on the second day of jury selection, it questioned and discharged a sworn juror in the absence of the defendant and defense counsel; the court deprived the defendant of his right to counsel at trial. By consenting to the procedure, however, the defendant waived his right to appellate review of the claim.

The court did not err in allowing a police investigator to use the word "victim" to refer to the complainant because the investigator did not bolster the complainant's testimony or usurp the jury's role as fact-finder by either testifying to the contents of his interview with the complainant or giving an opinion as to the complainant's credibility or the defendant's guilt. Further, the court instructed the jury during the investigator's testimony and in its charge that the jurors were the ultimate fact-finders and determiners of credibility, instructions which the jury is presumed to have followed. And even if it was error, it was harmless. (Supreme Ct, Monroe Co)

**Appeals and Writs (Remittiturs) (Scope and Extent of Review)**

**Arrest (Identification) (Probable Cause)**

**People v Adams, 96 AD3d 1588, 946 NYS2d 771 (4th Dept 6/15/2012)**

**Holding:** The appeal is held and the case remitted for a determination of whether the pretrial identification testimony should be suppressed as the fruit of an illegal arrest. The court denied the defendant's suppression motion as to claims that the photo array procedure was unduly suggestive, but failed to address the legality of the defendant's arrest. This Court cannot review an issue that was not decided by the trial court. (Supreme Ct, Erie Co)

**Due Process (Fair Trial)**

**Harmless and Reversible Error**

**People v Barnes, 96 AD3d 1579, 946 NYS2d 813 (4th Dept 6/15/2012)**

**Holding:** The court erred in ordering the defendant to wear a stun belt and then shackles during trial without first making a finding on the record as to the need for those restraints. The court's post-trial explanation for the use of restraints, while reasonable, is insufficient because the court must consider the relevant factors and make a sufficient inquiry before deciding that restraints were necessary. Even assuming the error is harmless as to the shackles, harmless error analysis does not apply to the improper use of a stun belt. (County Ct, Ontario Co)

**Appeals and Writs (Preservation of Error for Review)**

## Fourth Department *continued*

**Misconduct (Prosecution)**

**Perjury**

**People v Fineout, 96 AD3d 1601, 946 NYS2d 393 (4th Dept 6/15/2012)**

**Holding:** "At the outset, we note our concern with defendant's contention that the People withheld disclosure of a cooperation agreement of one of their witnesses and subsequently countenanced the perjury of that witness with respect to the existence of the cooperation agreement. That contention, however, involves 'matters outside the record on appeal and thus may properly be raised by way of a motion pursuant to CPL article 440' (*People v Johnson*, 88 AD3d 1293, 1294 [2011] . . . )."

The defendant failed to preserve his claim that the court erred in admitting testimony of several police detectives regarding their investigation; he did not object to some of the testimony challenged on appeal, objected on grounds not advanced on appeal, and otherwise made general objections. Further, the testimony did not violate the exclusionary rule. The defendant also failed to preserve for review his claim that the court erred by not submitting to the jury the issue of whether a particular witness was an accomplice as a matter of law. (County Ct, Jefferson Co)

**Evidence (Presumptions)**

**Instructions to Jury**

**Narcotics (Possession)**

**People v Kims, 96 AD3d 1595, 947 NYS2d 729 (4th Dept 6/15/2012)**

**Holding:** The court erred in instructing the jury as to the Penal Law 220.25(2) "room presumption" because the facts do not satisfy the requirement that the defendant be in "close proximity" to the controlled substance at the time it was found where parole officers stopped the defendant after he had walked out of the front of his apartment and got into his car; several minutes later, the parole officers and police conducted a warrantless search of the apartment in which they found a person, as well as a significant amount of cocaine in the rear of the apartment; and the cocaine was seized after a search pursuant to a search warrant. The First Department decision in *People v Alvarez* (8 AD3d 58 [2004]) is distinguishable. The error is not harmless because there is no way to determine whether the jury convicted the defendant based on the improperly charged presumption or a finding of constructive possession. (County Ct, Jefferson Co)

**Dissent in Part:** The First Department's reasoning in *Alvarez* should be applied; in *Alvarez*, the court found the room presumption was properly charged where the defendant was found outside the apartment where the drugs were found and the police determined that he had jumped out of a window. In this case, the jury could conclude that the defendant was in close proximity to the cocaine where, five minutes before the police found the cocaine in plain view in the kitchen of the apartment the defendant rented, the defendant was seen leaving the apartment and was accompanied by a person who admitted he had just bought cocaine from the defendant, and the defendant was apprehended in his car in the driveway.

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

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

**People v Lee, 96 AD3d 1522, 947 NYS2d 241 (4th Dept 6/15/2012)**

**Holding:** In appeal No. 1, the court erred in denying the defendant's motion to suppress his statements because the defendant's Fourth Amendment rights were violated when he was detained for 24 minutes after he was first stopped by the police. The officer who stopped the defendant had a founded suspicion that criminal activity was afoot where the officer received a report of a person possibly stealing bicycles and saw the defendant about a block away come out of a yard riding a bike, and the defendant matched a witness's description of the person. However, an investigatory detention was not justified until the witness arrived at the location of the stop 24 minutes later and identified the defendant. "[B]ecause defendant was twice told to stop and remain at the scene with a uniformed officer while another officer conducted an investigation, we conclude that 'a reasonable person would have believed that he was not free to leave' . . . ." Even assuming the investigation did not begin until after the identification, the 24-minute detention was unlawful.

In appeal No. 2, the defendant's knowing, voluntary, and intelligent waiver of the right to appeal precludes review of his claim that the court abused its discretion in denying his request for an adjournment to retain a new attorney. And the defendant failed to preserve his argument that the court improperly imposed restitution at sentencing without giving him a chance to withdraw his plea. (County Ct, Monroe Co)

**Dissent:** The police did not subject the defendant to a level three forcible detention where the encounter took place on a public sidewalk; the defendant was not handcuffed or restrained; and the officers did not display any weapons, act in an abusive or threatening manner, or physically block or otherwise interfere with the defendant's freedom of movement. The first officer's statement

## Fourth Department *continued*

that the defendant will be on his way if everything checks out or if everything is okay, without any showing of force or other facts suggesting he was not free to leave, "did not elevate the level two encounter to a level three forcible detention . . . . "

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

**People v Riverso, 96 AD3d 1533, 947 NYS2d 250 (4th Dept 6/15/2012)**

**Holding:** In this Sex Offender Registration Act risk level proceeding, the court properly assessed 20 points against the defendant under risk factor 7 because the defendant's crimes arose in the context of an avocational relationship between the defendant, a soccer league coach, and three 16-year-old girls who played on the team he coached. Although the Risk Assessment Guidelines do not define "avocational relationship," the term avocational usually refers to "'a hobby or occupation pursued outside of a person's regular work' . . . ." While the defendant worked as a college soccer coach, his acts were not related to that job. And, even assuming the court should not have assessed those points, the defendant's presumptive risk level does not change.

The defendant's successful completion of a treatment program is not a mitigating factor not otherwise taken into account by the risk assessment instrument (RAI) because the RAI considers the defendant's acceptance of responsibility and assesses points for failing to participate in treatment. A downward departure is not warranted because of the facts underlying the defendant's conviction, and while the defendant's expert testified that the defendant's successful completion of treatment reduced his risk of reoffending up to 40%, the defendant still has a significant risk of reoffending. (Supreme Ct, Onondaga Co)

**Dissent:** A downward departure is warranted based on the expert testimony from two psychologists, the clinical psychologist who treated the defendant and administered multiple psychological tests in evaluating him and another psychologist who conducted a clinical interview and assessment of the defendant, that the defendant posed a low risk of reoffending. The record shows that the defendant had an exceptional response to treatment.

**Evidence (Hearsay)**

**Harmless and Reversible Error (Harmless Error)**

**People v Spencer, 96 AD3d 1552, 946 NYS2d 753 (4th Dept 6/15/2012)**

**Holding:** The court erred in admitting into evidence a recording of the 911 call made by one of the accusers following a robbery where the recording did not fall into the present sense impression exception to the hearsay rule because there was no evidence of when the call was made relative to the robbery and the statements on the recording also referred to other events, one that occurred at least a day before the robbery and another that occurred a week before the robbery. The recording was not admissible as an excited utterance because the "statements clearly indicate that he had time to reflect on what had occurred prior to describing the robbery and who had committed the robbery." However, the error was harmless because there was overwhelming proof of the defendant's guilt and there was no significant probability he would have been acquitted had the evidence not been introduced. (County Ct, Erie Co)

**Juveniles (Visitation)**

**Prisoners (Family Relationships)**

**Matter of Granger v Misercola, 96 AD3d 1694, 947 NYS2d 736 (4th Dept 6/29/2012)**

**Holding:** The court properly granted the father's petition for visitation with his child and awarded him one four-hour visit in January and in April 2012 and every other month beginning in July 2012. The record shows that the father, who was sentenced to an eight-year term of incarceration, made and continues to make efforts to establish a relationship with his three-year-old child where the father was present for the child's birth, visited with the child about 12 times in the six or seven months when he was not incarcerated following the birth, repeatedly asked the child's mother to bring the child to the correctional facility for visits, and tried to maintain a relationship by phone and by sending letters, cards, and gifts. Although the child will have to travel more than two hours each way to get to the prison, the child's age and the travelling distance do not necessarily preclude visitation. The father arranged for his mother and sisters to bring the child for visits, and because the child was not familiar with those relatives, the court ordered less frequent visits for the first six months to give the parties time to familiarize the child with them. The court correctly determined, given that the defendant's earliest release date is September 2016, that "such a long period of separation could be detrimental to the established relationship between the father and the child." (Family Ct, Jefferson Co)

**Forfeiture**

**Plea Bargaining**

## Fourth Department *continued*

**People v McCoy, 96 AD3d 1674, 947 NYS2d 740 (4th Dept 6/29/2012)**

**Holding:** The court erred in allowing the prosecution to condition their plea offer on the defendant's ability to pay $5,000 in forfeiture funds to the city police department where there was no apparent connection between the defendant's crimes and the forfeited funds; the funds were not the proceeds of the crime, nor were they derived from uncharged criminal activity. The defendant's waiver of his right to appeal as to the forfeiture was not voluntary, and thus invalid, because "the [prosecutor], with the court's imprimatur, essentially threatened to double his sentence if he failed to do so." "The conditioning of defendant's sentence upon his ability to procure funds for forfeiture creates an unacceptable appearance of impropriety, i.e., that funds were extorted from defendant or the person who posted his bail by threatening defendant with a more severe sentence. It may also appear that defendant was allowed to 'buy' a more lenient sentence by donating money to the local police department." The judgment is modified by vacating the forfeiture, without prejudice to the prosecution's commencement of a CPLR article 13-A forfeiture proceeding within the applicable statute of limitations. (County Ct, Ontario Co)

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

**People v Ryan, 96 AD3d 1692, 947 NYS2d 869 (4th Dept 6/29/2012)**

**Holding:** In this Sex Offender Registration Act (SORA) risk level proceeding, the court's upward departure from the defendant's presumptive classification as a level two risk to a level three risk was supported by clear and convincing evidence of aggravating factors, including the defendant's commission of various sex offenses that resulted in convictions in two counties where the defendant was not assessed any points for a prior sex crime, and the defendant's transient lifestyle, travelling between campgrounds, including locations where he committed sex offenses. The defendant was not assessed points for his endangering the welfare of a child convictions because that offense is not a sex offense for SORA purposes; "[n]evertheless, defendant's convictions of endangering the welfare of a child appear to have been based on his having exposed himself to his stepgrandchildren, and we agree with the court that such conduct was not adequately taken into account by the risk assessment instrument . . . ." (County Ct, Niagara Co)

**Evidence (Privileges)**

**Homicide (Murder [Degrees and Lesser Offenses] [Instructions])**

**People v Thomas, 96 AD3d 1670, 949 NYS2d 545 (4th Dept 6/29/2012)**

**Holding:** The court erred in denying the defendant's motion to suppress statements the defendant made to his wife because those statements were subject to the marital privilege; the defendant and his wife did not know the police were monitoring their conversation from an adjacent room. However, admission of those statements was harmless error.

The court properly denied the defendant's request to charge second-degree manslaughter (Penal Law 125.15[1]), as a lesser included offense of second-degree murder (Penal Law 125.25[1]) because although it may be a lesser included offense, there was no reasonable view of the evidence that would allow the jury to find that the defendant committed the lesser crime, but not the greater crime. (Supreme Ct, Erie Co)

**Family Court (Orders of Protection)**

**Juveniles (Removal) (Visitation)**

**Matter of Austin M., 97 AD3d 1168, 948 NYS2d 811 (4th Dept 7/6/2012)**

**Holding:** The court erred in denying the petition to the extent that it sought removal of the respondent's daughter, Anna, because the record established that the child was "at imminent risk of harm and that such risk could not be mitigated by reasonable efforts to avoid removal"; although there is no record evidence that Anna sustained any bruising as the respondent's son did, actual injury is not required for an imminent risk finding.

The court erred in allowing the respondent to have unsupervised visits with his son because the record, which contained evidence that the respondent repeatedly lost his temper and struck his son, establishes that he is unable to care for the child in a safe manner and a threat of future harm exists.

The record does not support the court's finding that the petitioner did not make reasonable efforts to keep the children in their father's care where the evidence showed that the petitioner provided numerous services, including several that addressed the father's discipline of the children, such as an intensive family coordinator who met with the father for seven hours a week and a caseworker who met with him several times a month.

The court should have granted the petitioner's request, at the conclusion of the emergency removal hearing, for an order of protection requiring the father not to use corporal punishment. (Family Ct, Oswego Co)

**Admissions (Interrogation) (*Miranda* Advice)**

## Fourth Department *continued*

**Counsel (Right to Counsel)**

**People v Doll, __ AD3d __, 948 NYS2d 471 (4th Dept 7/6/2012)**

**Holding:** The court properly denied the defendant's motion to suppress statements he made to the police, even though the police questioned him while he was in custody without *Miranda* warnings and after he requested an attorney, because continued questioning was authorized by the emergency doctrine. The police were justified in concluding that one or more persons had been seriously injured and were in need of help where, in response to a 911 call about a suspicious person, they found the defendant walking on the street with blood on his face, hands, and clothing; they later found more blood in and outside of the defendant's van and on the ground, as well as bloody gloves on top of a nearby car; and the defendant refused to answer their questions about whether a person was involved. As long as the police have an objective need to question the defendant in order to protect the public, it does not matter if the police also desired to obtain incriminating evidence.

The court correctly refused to suppress the statements the defendant made to his friend after the decedent's body was found because the friend was not acting as an agent for the police; therefore, the defendant's right to counsel was not implicated. (County Ct, Genesee Co)

**Dissent**: The emergency exception does not apply because the police did not know whether there was an injured person who needed police assistance; the defendant told the police that the blood was from butchering deer, which is a reasonable explanation. "To allow the police to disregard a person's invocation of the right to counsel based on the mere fact that the person has blood on his or her clothing is an unwarranted expansion of the emergency exception."

**Counsel (Competence/Effective Assistance/Adequacy) (Conflict of Interest) (Multiclient Representation)**

**Identification (Show-ups)**

**People v Lewis, 97 AD3d 1097, 947 NYS2d 745 (4th Dept 7/6/2012)**

**Holding:** The defendant failed to preserve his claims that the court erred in failing to suppress the showup identification on the grounds that the prosecution failed to show that the identification was conducted in temporal proximity to the crime and that the identification was unnecessary because the police already had probable cause to arrest him for a separate crime. Alternatively, those claims lack merit: the identification was proper where it was "conducted at the scene of the crime, within 95 minutes of the commission of the crime and in the course of a 'continuous, ongoing investigation' . . . ." And the showup identification was not improper merely because the police already had probable cause to detain the defendant.

The defendant was not denied effective assistance of counsel based on his attorney's representation of the defendant's two accomplices. Successive or joint representation of codefendants does not per se violate the constitutional right to the effective assistance of counsel, and the defendant failed to show that that the conduct of his defense was actually affected by the conflict of interest or that the conflict operated on defense counsel's representation. A *Gomberg* hearing was not necessary because defense counsel did not simultaneously represent codefendants. (County Ct, Monroe Co)

**Evidence (Circumstantial Evidence) (Sufficiency)**

**Robbery (Elements) (Evidence)**

**People v Reed, 97 AD3d 1142, 948 NYS2d 493 (4th Dept 7/6/2012)**

**Holding:** The defendant's robbery and felony murder convictions are supported by legally sufficient evidence where there was sufficient circumstantial evidence that the decedent was killed while the defendant or one of his accomplices stole a bag of money from him, including that the defendant was seen driving a vehicle away from the scene of the shooting, accompanied by the shooter; the vehicle was found near the defendant's sister's apartment and the sister testified that the defendant appeared disheveled when he arrived at her apartment soon after the shooting; and the decedent's girlfriend testified that shortly before the shooting, she gave the decedent a plastic grocery bag filled with cash to buy drugs, which she tied the bag using a "distinctive double knot," and she identified a bag found in the vehicle the defendant drove from the scene as the one that held the cash. (County Ct, Monroe Co)

**Dissent:** There was insufficient evidence that the shooter took any property from the decedent; none of the witnesses saw anyone walk away from the decedent's body carrying anything other than a gun. And given that the grocery bag was a common item in the city, there were no fingerprints or other evidence on the bag, the girlfriend did not mention the bag until the day after the shooting, and her testimony was unclear as to how the bag was tied, it is not reasonable to conclude that the bag found in the car was the same bag that the decedent had before his death.

**Accusatory Instruments (Duplicitous and/or Multiplicitous Counts)**

## Fourth Department *continued*

**Due Process (Fair Trial)**

**Misconduct (Prosecution)**

**People v Slishevsky, 97 AD3d 1148, 948 NYS2d 497 (4th Dept 7/6/2012)**

**Holding:** The cumulative effect of evidentiary errors by the court and prosecutorial misconduct deprived the defendant of a fair trial. The court erred in admitting testimony that Child Protective Services found credible evidence of abuse or maltreatment because that testimony intruded on the jury's function in determining the credibility of the accuser's allegations. The court also erred in admitting a police detective's testimony that the defendant did not ask for details of the claims against him, which infringed upon the defendant's right to remain silent. The prosecution improperly commented during summation that "the presumption of innocence is a 'notion' . . . ." Also, the prosecution improperly impeached the credibility of the accuser's mother on a collateral issue by stating during cross-examination of the mother that she was not testifying honestly; and the court erred by not giving a strong curative instruction to dispel the prejudice of the remark.

Counts two and three of the indictment, both charging second-degree course of sexual conduct against a child based on acts occurring from September 2001 to June 2003, are multiplicitous even though there were two months in which the accuser did not live with the defendant because "the statute . . . plainly contemplates the possibility of a single course of sexual conduct with interruptions significantly longer than two months . . . ." Count five is multiplicitous of count six for the same reason, and it is also subject to dismissal because it charges first-degree sexual conduct against a child, which is a lesser included offense of count six, which charges predatory sexual assault. Although the multiplicity claims were not preserved, they are reviewed as a matter of discretion in the interests of justice because the defendant received consecutive sentences on these counts. (County Ct, Onondaga Co)

**Evidence (Exclusionary Rule) (Relevancy)**

**Search and Seizure (Parolees and Probationers)**

**People v Taylor, 97 AD3d 1139, 947 NYS2d 871 (4th Dept 7/6/2012)**

**Holding:** The court erred in admitting into evidence an inoperable gun that was found during a search of the defendant's home where the gun was not used in the robbery and it was not admissible under any *Molineux* exception because it could not logically be connected to any material issue in the case. However, the error was harmless where there was overwhelming proof of the defendant's guilt, including a positive identification of the defendant by an eyewitness who was acquainted with the defendant and who had talked to the defendant outside the store minutes before the robbery, and surveillance video and testimony of several other witnesses corroborated the eyewitness's version of events; and the incriminating statements the defendant made after his arrest.

The court properly denied the defendant's motion to suppress evidence found during a search of his home by a parole officer because the search was rationally related to the parole officer's duties. At 11:00 pm, two police officers contacted a parole officer to get the defendant's most recent address, but did not explain why they needed the information. The parole officer said he was going to the residence to verify that the defendant was home because he had a 10:00 pm curfew, and asked the officers to accompany him because parole policy required that at least two officers be present for a home visit after 10:00 pm. After learning that the defendant was not at home, the parole officer had the authority to search the home to find a possible reason for the defendant's otherwise unexplained failure to comply with his curfew. (Supreme Ct, Erie Co)

**Trial (Public Trial)**

**People v Torres, 97 AD3d 1125, 948 NYS2d 488 (4th Dept 7/6/2012)**

**Holding:** The court erred in closing the courtroom to the defendant's wife at the start of jury selection on the ground that there was no room for her in the courtroom. "[I]t cannot be said that 'nothing of significance happened' while defendant's wife was excluded from the courtroom" where she was excluded for approximately one and a half to two hours, during which time the court read its preliminary instructions to the prospective jurors, the first panel of prospective jurors were questioned by the court and the parties, the court heard challenges to the panel members, and five prospective jurors were seated and sworn. And the defendant preserved the issue by making an objection before jury selection; although the objection was not placed on the record at that time, the parties and the court agreed during argument of the defendant's CPL 330.30 motion that the defendant had objected to the closure. (County Ct, Onondaga Co)

**Dissent:** The defendant's right to a public trial was not violated because the courtroom closure "'was so inconsequential that it [was] trivial' . . . ." The court told the defendant's wife she could come back in the courtroom once they started excusing prospective jurors, which occurred after the court read its preliminary instructions and the first panel answered the four questions posed by the court. Given the court's explicit instruction, the burden was not on the court to reopen the courtroom. ⚖

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