



Public Defense Backup Center REPORT

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Defender News

US Supreme Court Recognizes Counsel Rights Regarding Guilty Pleas

The nation’s high court recently considered constitutional standards for effective assistance of counsel in two cases regarding plea negotiations. Application of the test laid out in *Strickland v Washington* (466 US 668 [1984]) led to remand in both. One was a plea case involving a lawyer’s failure to communicate an initial plea offer. The other was a trial case involving counsel’s deficient advice during plea negotiations about the likelihood of success at trial.

Lawyers: Communicate Plea Offers to Clients

In the plea case, the Court stated unequivocally that defendants have a right to effective assistance of counsel during plea negotiations and can obtain relief when that right is violated as to an initial plea offer, even if the procedures in which a later guilty plea occurs are error free. Given the ubiquity and systemic benefits of guilty pleas in the criminal justice system, the Court said, requiring anything less than effective representation with regard to a plea offer “might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help . . .” [Internal quotes omitted.]

The Court acknowledged some logical and persuasive aspects to arguments that the State should not be penalized for failures of defense attorneys during plea negotiations, but rejected the position. The Court also acknowledged the difficulty of defining the duty and responsibilities of defense counsel in negotiations; it limited its holding to the confines of the facts before it. “[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.”

Where that did not occur, whether or not a defendant can obtain relief depends on what prejudice can be shown to have resulted. Defendants must show a reasonable probability that they would have accepted the plea offer and a reasonable probability that neither the prosecution nor the court would have prevented effectuation of the

offer. The case before the Supreme Court, in which the defendant had accepted a less generous offer after the initial offer expired without his knowing of it, was remanded to the state court for determination of issues bearing on the question of prejudice. Those include whether the untransmitted first plea offer, if accepted, would have been honored by the prosecution and accepted by the judge.

In dissent, Justice Antonin Scalia said that the attorney’s failure to transmit a plea offer did not deprive the defendant of a substantive or procedural right. That the defendant’s later guilty plea proceeding was untainted by attorney error should end the matter, according to Scalia. He stated that while plea negotiation “is a subject worthy of regulation,” it is not covered by the Sixth Amendment, which addresses only the fairness of conviction.

The case is *Missouri v Frye*, No. 10-444 (3/21/2012). (www.supremecourt.gov/opinions/11pdf/10-444.pdf.) The defendant’s name may lead to some confusion, as a “Frye test” currently means something entirely different to practicing attorneys. Perhaps this is good reason for New York to adopt the *Daubert* test for admission of expert testimony.

Fair Trial Doesn’t Vitate IAC Claim With Regard to Rejection of Plea

The Court faced a different set of circumstances with regard to counsel’s plea negotiation role in the trial case. *Lafler v Cooper*, No. 10-209 (3/21/2012). (www.supremecourt.gov/opinions/11pdf/10-209.pdf.) The *Lafler* defendant rejected plea offers and went to trial after his lawyer advised him that the facts of his case wouldn’t sustain a conviction on the charges. The defendant sought federal habeas relief after unsuccessful state appeals of his conviction. The Sixth

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Circuit found that counsel “had provided deficient performance by informing respondent of ‘an incorrect legal rule,’” and that the defendant “suffered prejudice because he ‘lost out on an opportunity to plead guilty and receive the lower sentence that was offered to him.’” As the deficiency of counsel’s pre-plea advice was uncontested, the issue before the Supreme Court was “how to apply *Strickland*’s prejudice test where ineffective assistance results in a rejection of the plea offer and the defendant is convicted at the ensuing trial.” The Court said that the plea offer must be presented to the defendant again, so the state trial court could exercise its discretion in deciding whether to 1) vacate the convictions and resentence the defendant pursuant to the plea agreement, 2) vacate only some of the convictions and resentence accordingly, or 3) leave the trial convictions and sentence undisturbed.

Justice Scalia derided the finding that the defendant was “entitled to some sort of habeas corpus relief (perhaps) because his attorney’s allegedly incompetent advice regarding a plea offer *caused* him to receive a full and fair trial.” [Emphasis in original.] He added that the establishment of a “constitutional right to effective plea-bargainers” was in any event a new rule of law that could not serve as the basis for habeas relief. Scalia also derided the remedy of requiring the State to “re-offer” the plea deal, a remedy “unheard-of in American jurisprudence—and, I would be willing to bet, in the jurisprudence of any other country.”

Justice Alito dissented separately to offer the hope that the lower court judges who implement the decision will “do so in a way that mitigates its potential to produce unjust results.”

Supremes Strip Rights from the Newly-Jailed

The Supreme Court has reversed a grant of summary judgment in a 42 USC § 1983 action concerning strip searches. The Court described the issue as “whether every detainee who will be admitted to the general population may be required to undergo a close visual inspection while undressed.” It found that that the record did not reflect the substantial evidence needed to overcome the deference that courts owe to the judgment of correctional officials regarding institutional policies. Therefore, it found the policies before it “struck a reasonable balance between inmate privacy and the needs of the institutions.” *Florence v Board of Chosen Freeholders of County of Burlington*, No. 10–945 (4/2/2012). (www.supremecourt.gov/opinions/11pdf/10-945.pdf.)

Commentary seeking to downplay the importance of the decision noted that the ruling “did not authorize jail officials to conduct a strip search unless the prisoner was to be placed among other prisoners at the facility.” However, a decision that in the commentator’s words

“was a clear defeat for challengers to strip searches as a general policy” provides nothing for civil libertarians and pretrial detainees to celebrate. (www.scotusblog.com/2012/04/opinion-analysis-routine-jail-strip-searches-ok/.)

Citing a Policemen’s Benevolent Association *amicus* briefs and a couple other secondary sources, the Court bewailed “grave threats posed by the increasing number of gang members who go through the intake process.” It also noted (again citing *amicus* briefs) the need to find dangerous “contraband concealed by new detainees.” And it noted that “[j]ails are often crowded, unsanitary, and dangerous places.” No wonder, the Court said, corrections officials seek to conduct thorough searches at intake. The suggestion that detainees should be exempt from intrusive search procedures absent “a particular reason to suspect them of hiding contraband” was rejected because “[p]eople detained for minor offenses can turn out to be the most devious and dangerous criminals,” like Timothy McVeigh, who was initially stopped for a traffic infraction after the Oklahoma City courthouse bombing. And there is a danger that “low security risk detainees would be enlisted to help obtain contraband or weapons by their fellow inmates,” the Court added, quoting *Block v Rutherford* (468 US 576, 587 [1984]).

Hopes that *Florence* will be a limited holding are fed by some of the separate opinions. Chief Justice Roberts, concurring, said it was important that the Court “not foreclose the possibility of an exception to the rule it announces.” Justice Alito, also concurring, emphasized that in cases where detainees were not being admitted to the general jail population, strip searches might not be reasonable. He did not address whether the *Florence* holding might give institutions that now “segregate temporary detainees who are minor offenders from the general

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population” motive to no longer do so. He did note that *Florence* does not address the legality of strip search policies applied before arrestees’ detention was reviewed by a judicial officer.

The dissenting opinion highlighted the lack of empirical evidence supporting the usefulness of strip searches for which no individualized grounds existed. Citing Alito’s concurrence, Justice Breyer also noted that “[i]n my view, it is highly questionable that officials would be justified, for instance, in admitting to the dangerous world of the general jail population and subjecting to a strip search someone with no criminal background arrested for jaywalking or another similarly minor crime....”

Can creative lawyers turn *Florence* to advantage in arguing for bail at first appearance for clients who have not yet been processed into jail, citing the hideous general population conditions acknowledged by the Court? Or will *Florence* only serve to justify even harsher jail policies in the future? And what does the Court’s apparently gratuitous comment at the beginning of the majority opinion, that the “term ‘jail’ is used here in a broad sense to include prisons and other detention facilities,” portend?

Old Conviction May Not Put Returning Green Card Holder into Removal Proceedings

Lawyers may have good news to give long-time lawful permanent residents (LPRs or green card holders) who ask about the possible effects of an old plea-based conviction on reentry into the U.S. after traveling abroad. The Supreme Court has just said that a foreign national who pleaded guilty to a moral turpitude offense before Apr. 1, 1997 implicitly relied on a rule existent until that date and is entitled to its protections. That rule, from *Rosenberg v Fleuti* (374 US 449 [1963]), said LPRs returning from brief/innocent/casual trips abroad did not make a new “entry” into the country upon return. Therefore, they could not be put into removal proceedings as LPRs seeking admission. LPRs convicted after trial (or by either plea or trial after the 1997 cut-off date) of crimes involving moral turpitude or drug offenses are subject to grounds of inadmissibility. The new case, involving a man who made several short trips to visit his parents in Europe, is *Vartelas v Holder*, No. 10–1211 (3/28/2012). (www.supremecourt.gov/opinions/11pdf/10-1211.pdf.)

Attorneys for whom the foregoing is as much “Greek” as the language spoken where Mr. Vartelas went to visit his family can seek assistance in understanding this development by contacting NYSDA’s Criminal Immigration Project Director Joanne Macri at (716) 913-3200 or at jmacri@nysda.org.

Statute Requires More than One Form of Bail

Interpreting a statute that surprisingly few court decisions have addressed, the Court of Appeals said on Mar. 22, 2012, “we hold that CPL 520.10 (2) (b) prohibits a court from fixing only one form of bail.” At issue was a court’s order setting bail at “\$20,000, ‘cash only.’” The order was issued after the petitioner, who while on parole had been arrested for two incidents involving the accuser and then again for violating an order of protection stemming from the first set of charges, was indicted. Prior bail had been set in lower amounts that could be met by cash or bond. After the court rejected the petitioner’s efforts to alter the cash-only order as being unlawful, the petitioner sought a writ of habeas corpus under CPLR article 70. The petitioner’s reading of the statute “comports with the overall statutory structure and the legislative purpose that prompted [its] enactment,” the court found. That purpose was to “reform the restrictive bail scheme that existed in the former Code of Criminal Procedure in order to improve the availability of pretrial release”

The court reached the merits of the appeal after declining to dismiss it as moot. “[T]he propriety of cash-only bail is an important issue that is likely to recur and which typically will evade our review,” the court noted. *People ex rel McManus v Horn*, 2012 NY Slip Op 2121 (3/22/2012). (www.nycourts.gov/reporter/3dseries/2012/2012_02121.htm.)

As noted in *McManus*, the statute provides nine categories of bail: “(1) cash; (2) an insurance company bail bond; (3) a secured surety bond; (4) a secured appearance bond; (5) a partially-secured surety bond; (6) a partially-secured appearance bond; (7) an unsecured surety bond; (8) an unsecured appearance bond; and (9) by posting bail with a credit card or similar device (*see* CPL 520.10 [1] [a]–[i]).” Presenters at a CLE training about the bail statute held during NYSDA’s annual conference last year urged lawyers to consider all the available types of bail when preparing to advocate for a client’s release.

On-Time State Budget Brings Financial and Legislative Changes

On the financial side, the enacted budget provides flat funding for the Aid to Defense program (\$8,099,000), the district attorney and indigent legal services attorney loan forgiveness program (\$2,430,000), and the operations of the Office of Indigent Legal Services (\$1,500,000). For the first time in several years, the legislature included some funding for the indigent parolee program; \$600,000 has been appropriated for payments to non-NYC counties, 30% of which may be used for representation in Wyoming County and not less than 6% of the remaining amount may be used for representation of parolees related to the

Willard program. The legislature has increased the appropriation from the Indigent Legal Services Fund (ILSF) for counties and New York City; \$81 million has been appropriated for the 2012-2013 state fiscal year. Prisoners' Legal Services of New York received a total appropriation of \$1,500,000 and NYSDA's total appropriation is \$2,089,000.

Legislative changes, in addition to the expansion of the DNA databank that is discussed below, include amendments to the Sex Offender Management and Treatment Act (SOMTA) [Mental Hygiene Law (MHL) article 10]; CPL article 730; and the recently enacted law creating an education reform program for eligible persons who are the subject of Family Court petitions or criminal charges relating to sexting or cyberbullying (L 2011, ch 535). The Legislature rejected proposals by the Governor to create a new criminal forfeiture scheme and authorize forfeiture in misdemeanor cases and to provide more flexible probation sentencing options for courts.

The changes to SOMTA include a provision that gives courts the authority to allow psychiatric examiners, upon good cause shown (including that the witness is currently employed by the state at a secure treatment facility or other work location, unless compelling circumstances require personal appearance), to testify via two-way closed circuit television at probable cause hearings and provides rules for the exchange of documents that may be used during the examiner's testimony. Also included is a new procedure for sending a respondent back to DOCCS custody if he has not reached his maximum expiration date on his underlying sentence and is determined, after an administrative hearing, to be significantly disruptive of the treatment program at the secure treatment facility. An amendment to MHL 10.09(b) specifies that the timing of the required annual examination for evaluation of the respondent's mental condition is based on the date on which the court last ordered or confirmed the need for continued confinement or the date on which the respondent waived the right to petition for discharge, whichever is later. (L 2012, ch 56, Part P [Health and Mental Hygiene article VII bill].)

Part Q of Health and Mental article VII bill amends CPL 730.10 (fitness to proceed) by adding a definition of "appropriate institution" (an OMH hospital or OPWDD developmental center, or a hospital licensed by the Department of Health that operates a psychiatric unit licensed by OMH and has an agreement between the OMH commissioner to accept such defendants). It also amends CPL 730.40(1) and 730.50(1) to allow for outpatient capacity restoration of felony defendants, upon consent of the District Attorney.

The education reform program for sexting and cyberbullying ("The Cybercrime Youth Rescue Act," L 2011, ch 535), as amended, applies to persons in need of supervision (PINS), juvenile delinquency (JD), and criminal cases where the individual is accused of committing a crime or

offense that involved cyberbullying or the sending or receipt of obscenity or nudity through electronic means, where the sender and recipient were both under 20 years old at the time of the communication, but were not more than 5 years apart in age. The court may order a defendant to participate in the program as a condition of an ACOD, conditional discharge, or probation. The effective date of chapter 535 has been moved from March 21, 2012 to May 20, 2012. The Office of Children and Family Services, in conjunction with the Office of Court Administration, the Office of Probation and Correctional Alternatives, and the Division of Criminal Justice Services, must provide annual notice regarding the program to a variety of entities, including county defender offices, and the notice must be provided to the defendant and defense counsel when the court orders participation in the program. (L 2012, ch 55, Part V [Public Protection and General Government article VII bill].)

DNA Databank Expansion Receives Widespread Attention

The Governor's proposed budget included a plan to expand the list of designated offenders in Executive Law 995(7) to include all persons convicted of a felony or any Penal Law misdemeanor and to specify who is responsible for collecting DNA samples. A revised version of that proposal was passed by the Legislature in mid-March. (L 2012, ch 19.) Chapter 19 expands the list of designated offenders to include all persons convicted of a felony or any Penal Law misdemeanor other than a first-time offender convicted under Penal Law 221.10(1), and specifies which officials are responsible for collecting samples. The law also includes amendments to CPL 240.40, 440.10, and 440.30, which set forth the limited circumstances in which a court may grant a defense motion for DNA testing and/or comparison of a DNA profile obtained from evidence gathered during the investigation or prosecution of the defendant against DNA databanks. Unfortunately, the amendments contain a number of limitations on the availability of such testing and comparisons. Even more problematic is that the law lacks other necessary innocence provisions regarding the recording of interrogations and eyewitness identification reform (see below for some recent news about eyewitness identification).

A new paragraph (d) was added to CPL 240.40(1) authorizing a defense motion for a comparison of a DNA profile relevant to the criminal case against DNA databanks by keyboard searches or another similar search method that does not involve uploading the DNA profile to the databank. The motion must be on notice to the parties and the entity that will perform the search. The court may order an entity with access to the combined DNA index system (CODIS) to perform a comparison if the defendant has shown that:

- (a) the DNA profile obtained from probative biological material gathered in the investigation or prosecution, which is in the prosecution's possession, custody, or control, complies with FBI or state requirements, whichever are applicable and as those requirements are applied to law enforcement agencies seeking comparison searches;
- (b) the data meets the state DNA index system or CODIS criteria as those criteria are applied to law enforcement agencies seeking a comparison;
- (c) the comparison is material to the presentation of his or her defense; and
- (d) the request is reasonable.

For the first time, post-conviction DNA testing will be allowed in cases where the defendant pleaded guilty, but

only for guilty pleas entered on or after Aug. 1, 2012. Also, the amendments to CPL 440.30 authorizing such testing will only apply to convictions for certain felony offenses: homicide offenses in Penal Law article 125; sex offenses in Penal Law article 130; violent felony offenses defined in Penal Law 70.02(1)(a); or any other felony offense where the defendant was charged in an indictment or information in the superior court with one or more homicide, sex offense, or violent felony offenses. There are several other limits on such motions, including time limitations and whether the defendant had the opportunity to request testing prior to entering a guilty plea. Chapter 19 also includes new provisions in CPL 440.30 regarding the production of certain property when the court orders an evidentiary hearing on a 440.10 motion filed by a defendant convicted after trial. The defendant must pay the cost of

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—*Padilla v. Kentucky*, 130 S. Ct. 1473 (2010)

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testing or keyboard searches performed pursuant to CPL 440.30(1-a); however, the court, taking into account the defendant's financial resources and obligations, must make a determination whether or not the payment of such cost would impose a hardship on the defendant, and if so, the state must bear the cost.

Two amendments to chapter 19 appear in the final state budget. The effective date is moved up to Aug. 1, 2012 (from Oct. 1, 2012); the new list of eligible offenses will apply to convictions on or after August 1 and, as noted above, the amendments authorizing post-conviction DNA testing in plea cases apply to guilty pleas entered on or after August 1. And an amendment to Executive Law 995-c(3) makes clear that when the defendant is not sentenced to a term of imprisonment or probation (outside NYC), the court must order that a court officer take the defendant's DNA sample or that the defendant report to the county sheriff's office to give the DNA sample.

Juvenile Justice Changes Coming to New York City

The Juvenile Justice Services Close to Home Initiative, enacted as part of the state budget, represents a significant reform of the juvenile justice system in New York City. (L 2012, ch 57, Part G [Education, Labor, and Family Assistance article VII bill].) Instead of housing children in juvenile detention facilities around the state, New York City will keep the children in or near New York City and the City's Administration for Children's Services will take over responsibility for their care. Only children who are committed to secure juvenile detention facilities will be in state custody. (www.nylj.com, 3/12/2012.)

Adolescent Diversion Courts Open for Business

In his State of the Judiciary Address, Chief Judge Jonathan Lippman advocated for the establishment of youth courts (in county court outside New York City and in supreme court in New York City) to adjudicate cases in which 16- and 17-year-olds are charged with non-violent criminal conduct. (www.nycourts.gov/admin/stateofjudiciary/SOJ-2012.pdf.) A proposed Youth Court Act is expected to be presented to the legislature this year. In the meantime, the court system has established nine adolescent diversion parts in Nassau County, Westchester County, Onondaga County, Erie County, and all five boroughs of New York City, which are governed by Part 149 of the Rules of the Chief Administrative Judge. (www.nycourts.gov/rules/chiefadmin/149.shtml.) These diversion parts will hear cases involving defendants who were 16 or 17 year olds at the time of the alleged offense where the court determines that transfer of the case would promote the administration of justice. As stated in Part 49 of

the Rules of the Chief Judge: "The purpose of this rule is to promote the administration of justice for 16- and 17-year-old defendants in criminal cases by providing a criminal justice response that includes age-appropriate services, interventions, and penalties." (www.nycourts.gov/rules/chiefjudge/49.shtml.)

DOCCS Adopts New Rules for Prison Visitation

The New York State Department of Corrections and Community Supervision (DOCCS) just adopted new rules governing prison visitation. The new rules, available on the DOCCS website at www.doccs.ny.gov/RulesRegs/20120328_CCS-24-11-00005.html, take effect on Oct. 1, 2012. Under the new rules, all adult visitors must present valid, unexpired photo identification at every visit. Other changes include harsher sanctions for visiting infractions, authorization of random ion scanning of visitors, and new rules for strip searches and the removal of religious headwear and other apparel. Visiting program guidelines are also available on the DOCCS website at www.doccs.ny.gov/Visiting_Program_Guidelines.html.

DOCCS declined to exclude attorney visits from these rules. However, DOCCS has stated that the current Directive 4404 (Inmate Legal Visits) will be reviewed and revised separately and that it will consider adopting separate rules for legal visits.

Two legislators (Assemblymen Aubry and Levine) and several organizations (the New York Civil Liberties Union, Prisoners Legal Services of New York, the Prisoners' Rights Project of the Legal Aid Society, and NYSDA) submitted comments to the proposed regulations.

State Loan Forgiveness Application Available; Application Deadline: May 1, 2012

The application for the New York State district attorney and indigent legal services attorney loan forgiveness program (Education Law 679-e) is available on the New York State Higher Education Services Corporation (HESC) website at [www.hesc.com/content.nsf/SFC/District Attorney and Indigent Legal Services Attorney Loan Forgiveness Program](http://www.hesc.com/content.nsf/SFC/District%20Attorney%20and%20Indigent%20Legal%20Services%20Attorney%20Loan%20Forgiveness%20Program). Applications must be submitted by May 1, 2012. Attorneys who received a state loan forgiveness award last year (for applications submitted by May 1, 2011) should have received a payment application and verification form directly from HESC. For more information about the state loan forgiveness program, contact HESC at 1-888-697-4372 or scholarships@hesc.org.

Because of a reduction in federal funding for the John R. Justice student loan repayment program, which is

administered by HESC and the Division of Criminal Justice Services, the state will not be accepting new applications for program awards this year. Information about other ways to manage student loan debt, including the Public Service Loan Forgiveness Program and income-based repayment, is available on the Equal Justice Works website at www.equaljusticeworks.org/ed-debt/post-grad/information-and-resources. Public defense attorneys with questions about these programs may also contact Susan Bryant at the Public Defense Backup Center at 518-465-3524 or sbryant@nysda.org.

Class Action Challenging NYPD Patrols of Private Apartment Buildings

The New York Civil Liberties Union (NYCLU), Bronx Defenders, and Latino Justice PRLDEF filed a federal class action suit alleging that the New York Police Department's Operation Clean Halls program violates constitutional, statutory, and common law rights of residents and visitors in thousands of private apartment buildings throughout New York City. The Operation Clean Halls program allows the NYPD, with consent of private landlords, to patrol in and around private apartment buildings. According to the complaint, each year, the program results in thousands of illegal stops, searches, summonses, and arrests of building residents and visitors. Information about the suit is available on the NYCLU's website, www.nyclu.org.

Eyewitness Identification: The Issues Just Keep Coming

That many instances of wrongful conviction involve mistaken identification fuels continuing efforts, in individual cases and in the context of systemic reform, to ensure that suggestive identification procedures are avoided and erroneous identifications are revealed as early as possible. As noted above, no procedural safeguards to strengthen the accuracy of eyewitness identifications or other non-DNA evidence on which convictions are obtained were included in the new legislation expanding the state's DNA databank, despite advocacy for such broader reform. But a number of identification issues, some with new angles, continue to warrant attention.

NYSDA has long kept the defense bar abreast of developments in the area of eyewitness identification. CLE presentations and *REPORT* items have addressed the issue. And attorneys with eyewitness identification cases can contact the Backup Center for assistance, from help locating expert witnesses (first, try checking the website at www.nysda.org/ExpertDatabase.html) to information on identification issues from cross-racial IDs or the effects of post-identification events on memory.

LeGrand Returns with a Twist

The First Department has affirmed the conviction of Nico LeGrand, whose earlier conviction was reversed by the Court of Appeals in 2007 because expert testimony about eyewitness identification was erroneously precluded at trial. *People v LeGrand*, 2012 NY Slip Op 01752 (1st Dept 3/8/2012). As the *REPORT* noted in 2007, the Court of Appeals ruled that "the general acceptance prong of the test for admission of scientific evidence was satisfied as to three of four factors" relating to eyewitness identifications (the correlation between witness confidence and the accuracy of identification; the effect of post-event information on accuracy; and confidence malleability), but that evidence as to the effect of "weapon focus" was properly excluded. *REPORT*, Vol. XXII, No. 2 (Mar.-May 2007). On retrial, LeGrand unsuccessfully sought a new *Frye* hearing on weapon focus to determine whether the concept had become more generally accepted.

In addition, the trial court "ruled that if the defense intended to have its expert testify that the witnesses' identification was tainted by postevent information (in the form of the photo array), evidence as to the preparation of the [composite] sketch would be allowed so the jury would have a true picture of what transpired, i.e. that shortly after the event the witnesses could recall and relate their observations of defendant." The First Department, in upholding the trial court's ruling, distinguished *People v Maldonado* (97 NY2d 522), which disallowed, as impermissible bolstering, use of a composite sketch to counteract evidence casting doubt on the reliability of a witness's identification.

It has long been New York law that a prosecution witness may not testify in the prosecution's case about an extrajudicial identification of a photograph or composite sketch of the defendant, although such evidence may be used for other purposes, such as establishing, at a suppression hearing, probable cause for arrest. See *People v Griffin*, 29 NY2d 91, 93. But there is now a move to change that, in the name of identification procedural reform.

Lippman Seeks to Allow Admission of Photo ID Evidence

During his State of the Judiciary address, Chief Judge Jonathan Lippman advocated for legislation that would make evidence of an eyewitness' pretrial identification of a defendant's photograph admissible at trial, with a "safeguard." The photo identification procedure would have to be administered in a double-blind, or at least "blinded," manner. That is, the administrator of the identification procedure should not know the identity of the suspect or, when that is not practical, at least not know where the suspect's photo is in the photo array. (www.nycourts.gov/admin/stateofjudiciary/SOJ-2012.pdf.)

It has been suggested that among problems with the Chief Judge's approach is the probability that admitting photo array identifications would lead to a decline in the use of live lineups, so that pretrial challenges would primarily be to photo identifications, at which there is no right to counsel. Counsel seeking suppression would need to seek complete documentation of the procedures used in presenting the array, and might also need to request the presence of the identifying witness to testify with regard to suggestiveness issues.

US Supreme Court: No Review of Non-state ID Procedures

The U.S. Supreme Court has just held that absent allegations of improper law enforcement activity leading to an identification, suppression of identification testimony cannot be sought based on arguments that the identification resulted from a suggestive situation. Reliability of an identification can be sufficiently tested, eight justices agreed, "through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt." *Perry v New Hampshire*, 132 S Ct 716 (1/11/2012). (A summary of the decision appears at p. 14.)

Justice Sonia Sotomayor dissented, saying the majority's decision "enshrines a murky distinction—between suggestive confrontations intentionally orchestrated by the police and, as here, those inadvertently caused by police actions—that will sow confusion." She added that the decision "ignores our precedents' acute sensitivity to the hazards of intentional and unintentional suggestion alike."

News coverage of *Perry* has noted the connection between erroneous identifications and wrongful conviction. An AP story noted that "[m]ore recent evidence has only bolstered arguments about the danger of relying on what people think they saw." (<http://thedailyrecord.com/2012/01/11/justices-refuse-to-limit-eyewitness-ids/>.)

The Latest on Lineup Reform

In 2002, a CLE session at NYSDA's annual conference focused on one aspect of eyewitness identification reform, "Fighting for Sequential Lineups." A decade later, Monroe County Judge John L. DeMarco has granted a prosecution request that he order a lineup in a particular case – but included several ground rules for that lineup, including that it be sequential and double-blind. *People v Flowers*, 2012 NY Slip Op 22016 (County Ct, Monroe Co 1/20/2012).

The value of sequential lineups is said to lie in the prevention of "relative judgments." That is, witnesses are more likely to assess the resemblance of each person pre-

sent to them against their memory of the perpetrator rather than select from the lineup the person who most closely resembles that memory. Because studies have shown that sequential lineups can decrease the likelihood of a correct identification if they are not conducted by a "blind" administrator, both the sequential and blind facets are vital when instituting this reform. See Innocence Project, *Eyewitness Identification Resource Guide: A Primer for Reform* (2012).

When the Connecticut legislature passed Public Act No. 11-252, "An Act Concerning Eyewitness Identification," last year, it directed police to establish procedures, for both live and photo lineups, that meet certain requirements. It did not include among those requirements that lineups be conducted sequentially. Rather, it established the Eyewitness Identification Task Force to study and report on sequential lineups, and on any topics related to sequential lineups or eyewitness identification deemed appropriate. (www.cga.ct.gov/2011/act/pa/2011pa-00252-r00hb-06344-PA.htm.) The Task Force has just issued its final report, with a detailed list of recommendations that include making the sequential method mandatory. (www.cga.ct.gov/jud/eyewitness/docs/Final%20Report.pdf.) In its letter transmitting the report to the Judiciary Committee of the Connecticut General Assembly, the Task Force recognized "the evolving nature of the relevant social sciences." It noted that its recommendations were made with the understanding "that the area of study will likely continue to evolve and develop . . ."

All reforms relating to eyewitness identification—and most other criminal justice matters—are subject to the development of new knowledge (and, perhaps, to evolving standards of decency). In fact, an article appearing just before this issue of the *REPORT* went to press could lead to further changes in how lineups and showups are conducted to maximize accuracy. According to a new study announced in March, requiring witnesses to complete identifications quickly may enhance the accuracy of the results. (www.economist.com/node/21548919?frsc=dg.) This would require a bit of tweaking to the Connecticut recommendations, which include advising a witness who is about to view a photo array, "Please take as much time as you would like to view the photos."

It Could Happen To You Summit: Eyewitness ID and More

The reform group It Could Happen to You (ICHTY) held its second annual summit on March 15 in Albany. Among the topics discussed was "Eyewitness Identification: The New Science"; NYSDA Staff Attorney Mardi Crawford participated on that panel. NYSDA Executive Director Jonathan E. Gradess gave the opening remarks. ICHTY works to prevent wrongful accusations and wrongful convictions. Discovery reform is a major ICHTY issue.

Jurors, Juries, and Jury Procedures Make News

Headlines about a particular jury's verdict are staples of local and national news, but the procedures that lead to the seating of a jury, the actions of individual jurors, and other general jury issues less frequently make news—at least until recently. The explosive growth of social media has led to stories across the nation of jurors Googling evidence, Tweeting about deliberations, and otherwise violating the nearly-sacred boundary between a jury and the outside world. A long-standing jury problem—the lack of racial and ethnic diversity in juries and jury pools—has just received a new round of attention here in New York. And, meanwhile, appellate courts, commentators, and psychologists continue to address jury issues that lawyers may need to be familiar with.

Block That Tweet!

In December, the Arkansas Supreme Court reversed a capital murder case conviction because a juror had Tweeted about the case as it was being heard. This story about jurors using social media sparked commentary—online, of course. *See, e.g.,* www.stateline.org/live/details/story?contentId=619920. This is not a brand new phenomenon; NYSDA's Director of Legal Information Services, Ken Strutin, published "Juror Behavior in the Information Age" over a year ago. (www.llrx.com/features/jurorbehavior.htm, 12/26/2010.)

Proposals in response to publicized misconduct include new court rules and instructions, with New York having acted early. The General Instructions of the Criminal Jury Instructions 2nd, "Jury Admonitions in Preliminary Instructions," were revised in 2009 to preclude juror use of electronic devices to research or communicate with others about the case. (www.nycourts.gov/cji/1-General/CJI2d.Jury_Admonitions.pdf.) A new proposal in neighboring Pennsylvania would amend court rules to provide for instructions to prospective and selected jurors about using personal communications devices. Because jurors are not the only ones who want to broadcast trial news as it happens, the proposed rules would also "clarify that the prohibition against broadcasting from the courtroom includes the use of cellphones and other similar electronic communications devices." (www.pacourts.us/NR/rdonlyres/25029F7C-956E-4EA5-9FB1-36CFADE128C6/0/rules626627etalcrim.pdf.)

Limits on Lawyers' Online Looks at Jurors (and Others)

Meanwhile, ethical questions—and some answers—continue to arise regarding what trial lawyers may and may not do to gain information about potential and sitting jurors—or others—via online social media. Last year, the

New York County Lawyers' Association Committee on Professional Ethics issued Formal Opinion 743 (5/18/2011). It says that lawyers may examine publicly-available information on prospective or sitting jurors' social networking sites as long as the lawyers do so in ways that do not result in jurors becoming aware they are being monitored and do not engage in any form of misrepresentation. The opinion also sets limits on what lawyers may do with information obtained; evidence of juror misconduct must be immediately communicated to the court, and cannot be used instead to further settlement negotiations on behalf of the lawyer's client. (www.nycla.org/siteFiles/Publications/Publications1450_0.pdf.) (A "hat tip" for this citation to Nicole Black at <http://nylawblog.typepad.com/suigeneris/2012/01/new-york-ethics-committee-on-lawyers-use-of-social-media-during-trials.html>.)

A year earlier, the New York State Bar Association's Committee on Professional Ethics said in Opinion # 843 (09/10/2010): "a lawyer may ethically view and access the Facebook and MySpace profiles of a party other than the lawyer's client in litigation as long as the party's profile is available to all members in the network and the lawyer neither 'friends' the other party nor directs someone else to do so." (www.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&template=/CM/ContentDisplay.cfm&ContentID=55951.)

At least as to Twitter accounts, one company is offering a possible way to examine those accounts without letting jurors know they are being monitored. A blogger has noted the creation of a service that—for \$945 per year—allows a subscriber to access up to 3200 past Tweets, as well as new Tweets in real time, of a specified user "without generating a formal 'follow' request with the resulting problematic communication." The blogger provided no assessment of the service's utility or propriety. (<http://juries.typepad.com/juries/2012/01/monitor-a-jurors-tweets-ethically.html>.)

Of course, the Internet is not the sole source of valuable information about potential jurors, and a New Jersey prosecutor wants access to potential jurors' birth dates for the purpose of doing background checks. Opposed by the New Jersey Public Defender Office and the American Civil Liberties Union of New Jersey, the prosecutor's motion is pending in the Essex County Superior Court in Newark. The ACLU-NJ letter brief is available at www.aclu-nj.org/download_file/view_inline/885/670/.

This issue surfaced in New York State over a decade ago when a case arising in Nassau County yielded a concurring opinion in the Second Department addressing an issue ignored by the majority. An apparent prosecution practice of running background checks on potential jurors had resulted in two jurors being confronted by the prosecutor about their histories. The concurring judges felt that the "practice warrants further regulation, either by

legislation or court rule.” The case was affirmed by the Court of Appeals on the grounds that the defendant’s issues had not been preserved. *People v Burris*, 275 AD2d 793, *affd* 96 NY2d 884. (www.nysda.org/docs/PDFs/TheReport/Dec2000Report.pdf.)

The issue of potential jurors’ criminal histories takes on added importance when analyzed in the context of the constitutional requirement that juries be “representative” of the community. As a disproportionate number of African Americans have been convicted of felonies and therefore have lost their civil rights, including the right to serve on a jury until such time as their civil rights are restored (sometimes a daunting process), jury pools may have a diminished number of eligible African American jurors. *See e.g.*, Amanda L. Kutz, Note: A Jury of One’s Peers: Virginia’s Restoration of Rights Process and its Disproportionate Effect on the African American Community, 46 *Wm & Mary LRev* 2109 [2005]. And the issue of representative juries remains current.

Representative Juries Still Not the Norm in NY

As Professor Valerie Hans recently noted on the Cornell Journal of Law and Public Policy Blog, two reports “offer new evidence of the ways in which juries in the state fall short of reflecting New York’s diverse population.” One report, “The First Annual Report Pursuant to Section 528 of the Judiciary Law,” covers the entire state. That report has its roots in a legislative focus on jury representativeness nearly three years ago. Hans and others, including NYSDA Staff Attorney Mardi Crawford, testified about jury representativeness at a public hearing held by the Assembly Standing Committee on Judiciary and Codes on Apr. 30, 2009. *REPORT*, Vol. XXIV, No. 2 (Mar.-May 2009). Two months later, legislation was enacted to help ensure that jury pools are a fair cross-section of their communities; among the statute’s requirements are the collection of demographic data concerning the people who report for jury service and an annual report by the Chief Administrative Judge about that data. The first such report, just released, was headlined not only on the Cornell blog (www.jlpp.org/2012/01/20/jury-representativeness-its-no-joke-in-the-state-of-new-york/) but also on The Daily Politics blog. (www.nydailynews.com/blogs/dailypolitics/2011/12/new-york-your-jury-may-not-look-like-you.)

The second study, a report to the Chief Administrative Judge by the Office of Court Research, focused on one county: “Jury Representativeness: A Demographic Study of Juror Qualification and Summoning in Monroe County.” It notes positive measures and areas of continuing concern. Most notably, communities whose populations reflect higher percentages of low income and black people have higher rates of undeliverable jury questionnaires and non-responses to

such questionnaires, which are the first step in qualifying individuals to be summoned as jurors.

The report notes that some research, including a study of a federal district court in Michigan, indicates that some “non-responses” may actually be undeliverable questionnaires. If that is the case, a new Michigan state law intended to enhance the racial and ethnic diversity of juries may miss the mark; it requires that questionnaires be sent “to each person on the first jury list regardless of whether the person previously failed to return a juror qualification questionnaire” (<http://juries.typepad.com/juries/2012/02/new-michigan-law-may-increase-minority-representation-on-juries.html>.)

Proving representativeness or its absence, and curing the lack of representativeness when it occurs, remain stubborn problems in the justice system. A new law review article posits that “a bright-line rule using either of the two most common measures of representation (absolute disparity and comparative disparity) would create ‘safe harbors’ in which the courts in a majority of jurisdictions across the country would become effectively immune from fair-cross-section challenges.” The abstract of the article, “Safe Harbors from Fair-Cross-Section Challenges? The Practical Limitations of Measuring Representation in the Jury Pool,” *Journal of Empirical Legal Studies* by Paula Hannaford-Agor and Nicole Waters, may be found at <http://juries.typepad.com/juries/2012/02/practical-limitations-of-measuring-representation-in-the-jury-pool-new-law-review-article.html>.

Juror Misconduct or Bias

In addition to being shielded from outside influence, jury deliberations are not generally subject to post-verdict second-guessing. But in extraordinary instances, what jurors say to one another may result in the reversal of a conviction. The Fourth Department has reversed a child abuse conviction after testimony at a post-verdict hearing revealed that two jurors offered expert opinions to the rest of the panel that the accuser’s conduct had been typical and normal for someone who had been abused. One juror was employed by the local Department of Social Services, and the other had a degree in human services; unlike expert testimony offered at a trial, the expertise these jurors proffered in the jury room was not subject to cross-examination, depriving the defendant of due process. (www.law.com, 12/29/2011.) The decision in *People v Jerge*, 90 AD3d 1486 (4th Dept 2011) is summarized at p. 37.

The Third Department has also recently reversed a conviction based on juror conduct and apparent bias, and on defense counsel’s failure to consent to the removal of the juror in question. *People v Wlasiuk*, 90 AD3d 1405 (3d Dept 2011) is summarized at p. 34. James Eckert, who has done training for NYSDA on a variety of topics, formulated the importance of *Wlasiuk* in a blog headline as follows: “Prospective Juror’s Knowledge of Defendant’s Reputa-

tion Potentially More Important Than Knowledge of the Crime Charged.” Noting that while the issue as it arose in *Wlasiuk* might be fairly uncommon, Eckert said the case points up that “when a potential juror indicates that he has heard of the crime through media coverage, it is worth the time to inquire whether that potential juror has also heard of related background information on the defendant.” (<http://newyorkcriminaldefense.blogspot.com/2012/01/prospective-jurors-knowledge-of.html>.)

Court News

Public Access to Family Court Outlined

A memo to administrative judges setting out guidelines for compliance with Uniform Rules for the Family Court § 205.4, Access to Family Court proceedings, was issued by Chief Administrative Judge A. Gail Prudenti in December 2011. Individuals seeking entrance to a courtroom may be respectfully asked if they are parties, witnesses or otherwise associated with a specific calendared case. Judges will be informed by their staff if members of the press or observers are present, and the judge may advise the parties and ask if there is any objection. Exclusion is permissible as a last resort, on a case-by-case basis, if an observer is likely to cause disruption, if a party objects for a compelling reason, or it is required for the protection of children. (www.law.com, 12/20/2012.)

As for court records, a document outlining access to all court records may be found on the Unified Court System website, <http://www.nycourts.gov/press/AccessToCourtRecords.pdf>.

E-filing Measures Don't Include All Cases—Yet

Criminal and family court cases were not included in mandatory or even voluntary e-filing measures included in a Jan. 12, 2012 order by Chief Administrative Judge A. Gail Prudenti (see www.nycourts.gov/attorneys/efiling.shtml). Currently, there is no legislation authorizing such an expansion. Still, it may be only a matter of time, if Chief Judge Jonathan Lippman has his way. In his State of the Judiciary Address on February 15, Lippman looked toward eventual mandatory e-filing in all cases. Information on the New York State Courts Electronic Filing program is available on the Unified Court System's website, <https://iapps.courts.state.ny.us/nyscef/HomePage>. (thomsonreuters.com, 2/28/2012; www.law.com, 2/15/2012.)

Adding a public defense perspective to e-filing planning, NYSDA's Managing Attorney, Charlie O'Brien, participates in the Chief Administrative Judge's Advisory Committee on e-Filing in Criminal Court. Among the tasks of this and other e-Filing Advisory Committees is to make recommendations for legislation authorizing the development of e-filing programs in these courts, as the

REPORT noted a year ago. *REPORT*, Vol. XXVI, No. 3 (June–July 2011).

Nominations for NYSDA's 45th Annual Meeting Awards Sought

Nominations are sought for two awards that will be presented at NYSDA's 45th Annual Meeting and Conference, which will be held in Saratoga Springs from July 22 to 24, 2012.

Kevin M. Andersen Memorial Award

Kevin M. Andersen was a lifelong public defender. Those who worked with him knew him to have the ability to be angered to his core by injustice, the will to fight ferociously for his client, and the compassion to grant the client the dignity each deserved as a human being despite whatever human frailties they might present. Following his death in 2004, the Genesee County Public Defender's Office created the Kevin M. Andersen Memorial Award to remember and honor his dedication to public defense work. This 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. Nominations with supporting materials should be forwarded to the Genesee County Public Defender's Office, One West Main Street, County Building, Batavia, NY 14020.

Wilfred R. O'Connor Award

Wilfred R. O'Connor was a founding member and long-time President of the New York State Defenders Association. He served as a legal aid lawyer in Brooklyn and Queens, as director of the Queens Legal Aid office, as a member of Legal Aid's Attica Defense Team, as director of the Prison Legal Assistants Program, and as president of NYSDA from 1978 to 1989. He went on to complete his career as a judge in New York City. His beliefs were clear: every defendant, regardless of race, color, creed or economic status, deserves a day in court and zealous client-centered representation. The NYSDA Board of Directors created the Wilfred R. O'Connor Award to remember Bill and honor his sustained commitment to the client-centered representation of the poor. This award will be presented to an attorney who has been in practice fifteen or more years, practices in the area of public defense, and exemplifies the client-centered sense of justice, persistence, and compassion that characterized Bill's life. Nominations with supporting materials should be forwarded to the New York State Defenders Association, 194 Washington Avenue, Suite 500, Albany, NY 12210-2314. ☪

CONFERENCES & SEMINARS

Sponsor: New York State Defenders Association, NDNY Federal Court Bar Association & Office of the Federal Public Defender
Theme: Federal Criminal Law Update
Date: May 10, 2012
Place: Syracuse, NY
Contact: NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org

Sponsor: New York State Bar Association
Theme: DWI on Trial—The Big Apple XII
Date: May 10, 2012
Place: New York, NY
Contact: NYSBA: tel (518) 487-5600; fax (518) 487-5517; website www.nysba.org

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Defense of a Drug Case
Date: May 18, 2012
Place: Brooklyn, NY
Contact: NYSACDL: tel (212) 532-4434; fax (888) 239-4665; website www.nysacdl.org

Sponsor: ABA Criminal Justice Section & Louis Stein Center for Law & Ethics
Theme: Third Annual Prescription for Criminal Justice Forensics
Date: June 1, 2012
Place: New York, NY
Contact: ABA: tel (202) 662-1519 (Carol Rose); fax (202) 662-1501; email carol.rose@americanbar.org; website www.americanbar.org/groups/criminal_justice.html

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

Sponsor: National Association of Criminal Defense Lawyers
Theme: 2012 Annual Meeting & Seminar
Dates: July 25–28, 2012
Place: San Francisco, CA
Contact: NACDL: tel (202) 872-8600 x632 (Viviana Sejas); fax (202) 872-8690; email vsejas@nacdl.org; website www.nacdl.org/meetings

Sponsor: National Child Abuse Defense & Resource Center
Theme: The Law, The Science, The Myths, The Reality
Dates: September 6–8, 2012
Place: Las Vegas, NV
Contact: NCADR: tel (419) 865-0513; email kimhart@kimhart.com; website www.falseallegation.org/conference

Sponsor: National Association of Criminal Defense Lawyers & National College for DUI Defense
Theme: 16th Annual DUI Seminar: DWI Means Defend With Ingenuity: Getting the Not Guilty Vote
Dates: October 18–20, 2012
Place: Las Vegas, NV
Contact: NACDL: tel (202) 872-8600 x636 (Gerald Lippert); fax (202) 872-8690; email glippert@nacdl.org; website www.nacdl.org/meetings

Job Opportunities

The Oneida County Public Defender-Criminal Division seeks an **Assistant Public Defender** (3rd Assistant). The Assistant Public Defender assists the Public Defender in the representation of indigent persons charged with crimes at all stages of the criminal proceeding; keeps abreast of all procedures and policies within the Public Defender's Office; and assists the Public Defender in maintaining law files which may be useful in criminal defense work. Applicants must be admitted to the New York State Bar. To apply, send a certificate of good standing from the Appellate Division of admission (must remain current throughout appointment); a complete resume including elementary education

and all employment, listing employers' addresses and telephone numbers; three (3) references with addresses and telephone numbers; a writing sample; a copy of a valid NYS driver's license; and a completed Oneida County application to: Oneida County Department of Personnel, John P. Talerico, Commissioner, 800 Park Avenue, Utica, NY 13501. Applications will be accepted until the position is filled. Blank applications may be picked up at the Oneida County Building or downloaded from www.ocgov.net (click on Oneida County Department of Personnel). You may also call (315) 798-5726 to request an application. Salary: \$44,777 plus excellent benefits package including health insurance

and membership in the New York State retirement system. Oneida County is an equal opportunity employer.

The Innocence Project seeks a **Staff Attorney** to join its Litigation Department and represent clients around the nation seeking access to post-conviction DNA testing and/or relief from their convictions based on exculpatory DNA test results. Requirements: minimum 4 years' litigation experience, preferably some criminal (trial or post-conviction practice), as well as admission to one or more state bars; ability to work independently in a fast-paced environment; excellent analytic and writing skills, and

(continued on p. 39)

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

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

United States Supreme Court

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

Habeas Corpus (Federal)

Witnesses (Confrontation of Witnesses)

[Hardy v Cross](#), 565 US __, 132 Sct 490 (12/12/2011)

Holding: The circuit court departed from the highly deferential standard imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) (28 USC 2254) on federal habeas corpus review of state-court rulings. The state supreme court "identified the correct Sixth Amendment standard and applied it in a reasonable manner" whether or not the court went too far by characterizing as "superhuman" the prosecution's efforts to secure the accuser's attendance at the retrial of sexual assault charges against the habeas petitioner. While more efforts to locate a witness can always be proposed in hindsight, there was no support in existing interviews to believe the accuser's current boyfriend or other friends had information on her location or to believe that anyone at the cosmetology school she had attended in the past had such information. And there is no Supreme Court precedent saying "that the prosecution must have issued a subpoena if it wishes to prove that a witness who goes into hiding is unavailable for Confrontation Clause purposes . . ."

Aliens (Deportation)

[Judulang v Holder](#), 565 US __, 132 Sct 476 (12/12/2011)

Holding: The policy of the Board of Immigration Appeals (BIA) for determining when a resident foreign national may seek relief from deportation under a now-repealed provision of federal immigration laws is arbitrary or capricious under the Administrative Procedure Act (5 USC 706(2)(A)). The repealed provision, section 212(c) of the Immigration and Nationality Act (INA), as amended, 66 Stat 187, 8 USC 1182(c) (1994 ed), still affects noncitizens who had criminal convictions before the repeal. The statutory bases for excluding noncitizens who seek to enter the U.S., whether for the first time or as a re-entry, and for deporting those already here have always varied. To determine whether INA § 212(c) relief from removal is available in a deportation proceeding, the BIA now employs a "comparable-grounds" approach that evaluates whether the ground for deportation charged in a given case has a close analogue in the list of exclusion grounds (i.e., grounds of inadmissibility). If the charges consist "of a set of crimes 'substantially equivalent' to the set of offenses making up an exclusion ground," INA § 212(c) relief is available. If the deportation charges cover "significantly different or more or fewer offenses than any exclusion ground," INA § 212(c) relief is unavailable, even if the particular offense falls within a ground of exclusion (i.e., ground of inadmissibility). The test is "unmoored from the purposes and concerns of the immigration laws." Hinging relief on this irrelevant comparison between statutory provisions is made more arbitrary by the fact that the outcome of the analysis "may rest on the happenstance of an immigration official's charging decision."

[Ed Note: This decision is included in the *REPORT* as a reminder that clients with prior criminal convictions may still face referral for removal proceedings upon coming into contact with local or state law enforcement even if any current criminal charges are resolved favorably. The decision also demonstrates that immigration law is a complicated area. Lawyers who lack immigration law expertise should consult with a lawyer knowledgeable in that field once it is determined that a client is not a U.S. citizen. For more information and assistance, please contact Joanne Macri, the Director of NYSDA's Criminal Defense Immigration Project, at (716) 913-3200 or at jmacri@nysda.org.]

Habeas Corpus (Federal)

Jurisdiction

[Gonzalez v Thaler](#), 565 US __, 132 Sct 641 (1/10/2012)

Holding: "This case interprets two provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)." While a certificate of appealability (COA), required under AEDPA for a habeas petitioner to appeal a federal district court's final order (28 USC 2253[c][1]), must be based on a "'substantial showing of the denial of a constitutional right,' §2253(c)(2)" and must "'indicate which specific issue'" satisfies that showing (§2253[c][3]),

US Supreme Court *continued*

the latter requirement is not jurisdictional. None of the arguments put forward by the state, with the U.S. as *amicus curiae*, in support of jurisdictional treatment of 2253(c)(3) is persuasive.

For state prisoners who do not seek review in their States' highest courts, their judgments become "final" for purposes of the AEDPA one-year limitation period on the date that the time for seeking such review expires. The habeas petitioner's contention, that direct review concludes on the date on which state law marks finality—in his case, the date on which the mandate issued—as the later of the two possible dates, is rejected.

Dissent: [Scalia, J] "I would reverse the judgment below for want of jurisdiction."

**Prisoners (Access to Courts and Counsel)
(Conditions of Confinement)**

Prisons (Civil Liabilities)

Minneci v Pollard, 565 US __, 132 Sct 617 (1/10/2012)

Holding: Because "in the circumstances present here state tort law authorizes adequate alternative damages actions—actions that provide both significant deterrence and compensation," no Eighth Amendment-based damages action lies under *Bivens v Six Unknown Fed. Narcotics Agents* (403 US 388, 389 [1971]) against employees of a privately operated federal prison.

Concurrence: [Scalia, J] "Even if the narrowest rationale of *Bivens* did apply here, however, I would decline to extend its holding . . . [and would] limit *Bivens* and its two follow-on cases . . . to the precise circumstances that they involved."

Dissent: [Ginsburg, J] Aggravated conduct forbidden by state tort law also offends the Federal Constitution when engaged in by official actors and should be "'compensable according to uniform rules of federal law' . . ." The suit here, which seeks damages directly from individual officers, would have precisely the individual deterrent effect that was central to the *Bivens* holding and was found absent in *Correctional Services Corp. v Malesko* (534 US 61 [2001]).

Discovery (Brady Material and Exculpatory Information)

Due Process (Fair Trial)

Smith v Cain, 565 US __, 132 Sct 627 (1/10/2012)

Holding: A witness's undisclosed statements directly contradicting his trial testimony, in which he identified the defendant as the first gunman to enter the door at the scene, which was the only evidence linking the defendant

to the charged offenses, were material to the case. Failure to disclose to the defense a police officer's notes containing statements by the witness that he could not identify anyone because he could not see faces violated *Brady v Maryland* (373 US 83 [1963]) and requires reversal of the conviction.

Dissent: [Thomas, J] The defendant "has not shown a 'reasonable probability' that the jury would have been persuaded by the undisclosed evidence." The judgment should be affirmed.

Identification (Eyewitnesses)

Perry v New Hampshire, 565 US __, 132 Sct 716 (1/11/2012)

Holding: "[T]he Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement." In the absence of improper state action, it is enough that reliability of identification may be tested "through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt." The defendant concedes that the suggestiveness here was not police arranged; the witness, who was being questioned by an officer in her kitchen, looked out her window unbidden and identified the defendant, who was standing with another officer in the parking lot. "[T]he potential unreliability of a type of evidence does not alone render its introduction at the defendant's trial fundamentally unfair."

Concurrence: [Thomas, J] "I would limit the Court's suggestive eyewitness identification cases to the precise circumstances that they involved."

Dissent: [Sotomayor, J] Due process concerns about eyewitness identification arise "not from the act of suggestion, but rather from the corrosive effects of suggestion on the reliability of the resulting identification." "The end result of suggestion, whether intentional or unintentional, is to fortify testimony bearing directly on guilt that juries find extremely convincing and are hesitant to discredit." "[T]he ordinary two-step inquiry should apply, whether the police created the suggestive circumstances intentionally or inadvertently."

Counsel (Competence/Effective Assistance/Adequacy)

Habeas Corpus (Federal)

Maples v Thomas, 565 US __, 132 Sct 912 (1/18/2012)

US Supreme Court *continued*

Holding: While negligence on the part of a postconviction attorney does not qualify as cause that would excuse in federal habeas proceedings a missed state notice of appeal deadline, a client cannot be held constructively responsible for the conduct of an attorney who abandoned the client without notice, resulting in the default, as the attorney is no longer operating as an agent in any meaningful sense. Here, two lawyers in a large out-of-state firm representing the petitioner pro bono left the firm without notifying the client or the court. No other lawyer in the firm obtained legal authority to act for the client before the deadline expired. Local counsel, who had made clear he would do nothing beyond assisting the out-of-state lawyers as to pro hac vice admission, took no action on the client's behalf. Because these attorneys were listed as counsel of record, the petitioner received no notice of the order triggering the deadline until the deadline passed. The issue of prejudice, unaddressed below, remains open and the case is remanded.

Concurrence: [Alito, J] "I agree that petitioner's attorneys effectively abandoned him and that this abandonment was a 'cause' that is sufficient to overcome petitioner's procedural default." However, Alabama's system for providing counsel for capital defendants, at trial and in state collateral proceedings, had little or nothing to do with the default, which was caused by "a veritable perfect storm of misfortune, a most unlikely combination of events that, without notice, effectively deprived petitioner of legal representation."

Dissent: [Scalia, J] Attorney error at a stage of proceedings at which a defendant has a constitutional right to effective assistance of counsel may constitute cause to excuse a procedural default. But where there is no right to counsel, "the client bears the risk of all attorney errors made in the course of the representation, regardless of the egregiousness of the mistake." There is no need to grapple with the alternative argument that the trial-court clerk should have taken action when the out-of-state lawyers' copies of the dismissals were returned, as local counsel did receive a copy.

Sex Offenses (Sex Offender Registration Act)

[Reynolds v United States](#), 565 US __, 132 SCt 975 (1/23/2012)

Holding: The federal Sex Offender Registration and Notification Act (Act) (120 Stat 590, 42 USC 16901 et seq [2006 ed and Supp III]) that requires certain convicted sex offenders to provide state governments with updated contact information does "not apply to pre-Act offenders until the Attorney General specifies that" it does. Whether the Attorney General's Feb. 28, 2007 Interim Rule consti-

tuted a valid specification matters in this case; the matter is remanded.

Dissent: [Scalia, J] The Act's requirements apply without the Attorney General's action. The provision in question is best understood as giving the Attorney General authority to create exceptions as to the Act's otherwise applicable requirements. It is not clear that Congress could "constitutionally leave it to the Attorney General to decide," without any statutory standard, whether or not a criminal statute is to apply to certain individuals.

Civil Rights Actions (USC § 1983 Actions)**Search and Seizure (Entries and Trespasses)**

[Ryburn v Huff](#), 565 US __, 132 SCt 987 (1/23/2012)

Holding: A civil suit against police officers for violating the plaintiffs' 4th Amendment rights by entering their home without a warrant was properly decided against the plaintiffs because the officers reasonably concluded they were facing an imminent threat of violence. The officers responded to the home after a school principal contacted them about rumors that the student who lived there, a victim of bullying, had threatened to "shoot up" his school and had been absent for two days; the plaintiffs did not answer the officers' knocks at their door or their telephone, and the mother, who did answer a call to her cell phone, hung up mid-call, and came outside with her son, refused to let the officers in to discuss the matter and ran back inside when the officers asked if there were guns in the home. The 9th Circuit majority, which reversed the trial decision, changed findings of the District Court that it purported to accept, referred to the legality of the mother's conduct without recognizing "there are many circumstances in which lawful conduct may portend imminent violence," analyzed each component of the evolving transaction separately, when "it is a matter of common sense that a combination of events each of which is mundane when viewed in isolation may paint an alarming picture," and "did not heed the District Court's wise admonition that judges should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation."

Search and Seizure (Automobiles and Other Vehicles [Investigative Searches])

[United States v Jones](#), 565 US __, 132 SCt 945 (1/23/2012)

Holding: Installation by government agents of a GPS device on a suspect's vehicle and use of that device to monitor the vehicle's movements is a "search." Agents installing such a device "physically occupied private property for the purpose of obtaining information" and while "'property rights are not the sole measure of Fourth

US Supreme Court *continued*

Amendment violations,' . . . 'physical intrusion of a constitutionally protected area in order to obtain information' certainly may constitute a 4th Amendment violation. The argument that the government had probable cause making the search reasonable was not raised below.

Concurrence: [Sotomayor, J] While reaffirmation of the principle that physical invasion of personal property to gather information constitutes a search suffices to decide this case, "physical intrusion is now unnecessary to many forms of surveillance." Justice Alito rightly points out that the technological advances that make non-trespassory surveillance techniques possible will also affect the test for determining constitutional challenges "by shaping the evolution of societal privacy expectations." "[I]t may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties," but not in this case.

Concurrence: [Alito, J] Whether the long-term monitoring of the respondent's vehicle violated his reasonable expectations of privacy, not whether "the law enforcement officers in this case engaged in conduct that might have provided grounds in 1791 for a suit for trespass to chattels," should determine the constitutional validity of the government's actions.

Admissions (*Miranda* Advice)

Confessions (*Miranda* Advice)

Howes v Fields, 565 US __, 132 S Ct 1181 (2/21/2012)

Holding: Isolating a prisoner from the general prison population for questioning about conduct outside the facility does not always amount to custody for purposes of *Miranda* warnings. People who are already incarcerated are not subject to "the same 'inherently compelling pressures'" experienced by a suspect who has been "yanked from familiar surroundings in the outside world and subjected to interrogation in a police station." Prisoners are "unlikely to be lured into speaking by a longing for prompt release," and know that the "officers who question [them] probably lack the authority to affect the duration of [their] sentence[s]." Further, "questioning a prisoner in private does not generally remove the prisoner from a supportive atmosphere," and there is nothing that gives questioning about criminal activity outside the prison "significantly greater potential for coercion than questioning under otherwise identical circumstances about criminal activity within the prison walls." The determination of custody when a prisoner is questioned "should focus on all of the features of the interrogation," including "the language that is used in summoning the prisoner to the interview and the manner in which the

interrogation is conducted." Here, circumstances that might indicate custody were offset by others that indicated otherwise, including that the prisoner was "told at the outset of the interrogation, and was reminded again thereafter, that he could leave and go back to his cell whenever he wanted," was "not physically restrained or threatened and was interviewed in a well-lit, average-sized conference room, where he was 'not uncomfortable,'" was offered food and water, and was in a room with the door sometimes left open. That the prisoner was not free to leave the room alone to make his own way to his cell, being required to wait for an escort, was no different a restraint than that he would have been subject to had he been there for something other than police questioning.

Concurrence in Part, Dissent in Part: [Ginsburg, J] While the majority correctly finds that the law was not "clearly established" in the habeas respondent's favor, the further question of whether he was in custody should, if on direct review, be answered affirmatively because he was "subjected to 'incommunicado interrogation . . . in a police-dominated atmosphere' . . . , placed against his will, in an inherently stressful situation . . . and his 'freedom of action [was] curtailed in [a] significant way . . .'"

Aliens (Deportation)

Tax Evasion

Kawashima v Holder, 565 US __, 132 S Ct 1166 (2/21/2012)

Holding: Foreign nationals convicted of "willfully making and subscribing a false tax return in violation of 26 U. S. C. §7206(1)" or "aiding and assisting in the preparation of a false tax return in violation of 26 U. S. C. §7206(2)" are deportable as having been convicted of an aggravated felony pursuant to 8 USC 1101(a)(43)(M). The contention that reading Clause (i) of subparagraph M together with Clause (ii) makes the provision inapplicable to their crimes is rejected. The application of the relevant provision is clear enough to make reliance on the rule of lenity unwarranted.

Dissent: [Ginsburg, J] "Clause (i) does not address tax offenses, and [I] would therefore hold that making a false statement on a tax return in violation of §7206 is not an 'aggravated felony.'"

Discovery (*Brady* Material and Exculpatory Information)

Wetzel v Lambert, 565 US __, 132 S Ct 1195 (2/21/2012)

Holding: The state courts' rejection of a *Brady* claim, regarding evidence put forward by this capital defendant 20 years after his conviction that the prosecution had failed to disclose material including that another individual had been named by the codefendant who later tes-

US Supreme Court *continued*

tified against the defendant, was not unreasonable but based on a conclusion that the material in question was ambiguous rather than exculpatory or impeaching. The burden of requiring the retrial of a case three decades after the crime with its resulting difficulties for the prosecution “should not be imposed unless *each* ground supporting the state court decision is examined and found to be unreasonable” [emphasis in original].

Dissent: [Breyer, J] While the prosecution had argued that the document in question was ambiguous, the state supreme court rejected the defendant’s contention because the codefendant had been impeached with other material, making impeachment with this information “redundant,” and also noted the weakness of the prosecution’s case, based largely on the one codefendant’s testimony. Granting certiorari in this fact-specific case was ill advised.

Civil Rights Actions (USC § 1983 Actions)**Search and Seizure (Search Warrants [Affidavits, Sufficiency of])**

Messerschmidt v Millender, 565 US __, 132 SCt 1235 (2/22/2012)

Holding: The petitioners, police officers who searched the respondents’ home pursuant to a warrant issued by a neutral magistrate, are entitled to qualified immunity in this lawsuit that alleged, among other things, that the warrant was overbroad as to firearms and evidence of gang affiliation. If the magistrate erred in issuing the warrant, the application for which had been shown by the officers to their superior and to a deputy district attorney, the error was not so obvious that any reasonable officer would recognize it. While a specifically-described shotgun was said to have been used in the underlying incident, the warrant asserted that the weapon was owned by a known gang member who had just fired it five times in public trying to kill someone the gang member said had “call[ed] the cops’ on him,” which taken together made it not unreasonable to conclude that there was a “fair probability” the sawed-off shotgun in question was not the only firearm the alleged gang member owned. And it would not have been unreasonable for an officer to believe based on the affidavits that proof of gang affiliation would be helpful in prosecuting the assault. This case is distinguishable from precedent in which a cursory reading—“perhaps just a simple glance—would have revealed a glaring deficiency’”

Concurrence: [Breyer, J] Taking all the “circumstances together, the officers could reasonably have believed that the scope of their search was supported by probable cause.”

Concurrence in Part, Dissent in Part: [Kagan, J] While the officers were entitled to qualified immunity as to the search for firearms, the majority “goes astray when it holds that a reasonable officer could have thought the warrant valid in approving a search for evidence of ‘street gang membership’”

Dissent: [Sotomayor, J] “All 13 federal judges who previously considered this case had little difficulty concluding that the police officers’ search for any gang-related material violated the Fourth Amendment.”

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

Martel v Clair, 565 US __, 132 SCt 1276 (3/5/2012)

Holding: In determining a defendant’s motion for replacement of appointed counsel in a capital case, including counsel in habeas corpus proceedings, district courts should use the same “interests of justice” standard that applies in non-capital cases, given that the federal statute for capital cases is silent as to the test and the “interests of justice” test of 18 USC § 3006A “comports with the myriad ways that [18 USC] §3599 seeks to promote effective representation for persons threatened with capital punishment.” The district court did not err in denying the respondent’s motion to change attorneys where the court had made proper inquiry into the respondent’s earlier complaint about his attorneys, which was resolved without court action, and the motion for new counsel, although it added a “new and significant charge of attorney error”—“that counsel had refused to investigate particular, newly located physical evidence” because counsel was focusing only on the death sentence and not any innocence claims—was made after the court told the parties that no further submissions would be accepted and the court was putting final touches on its habeas decision. To address the issue of new evidence, a substitute lawyer would have had to seek an amendment of the respondent’s petition, as well as an evidentiary hearing or a stay to allow exhaustion of remedies in state court. The Court of Appeals erred in overturning the denial of the respondent’s motion, which fell within the district court’s discretion.

New York Court of Appeals

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

Appeals and Writs (Judgments and Orders Appealable) (Waiver of Right to Appeal)**Guilty Pleas (General [Including Procedure and Sufficiency of Colloquy])**

NY Court of Appeals *continued*

[People v Bradshaw](#), 18 NY3d 257, 938 NYS2d 254 (12/13/2011)

Holding: The appeal waiver is invalid where “[t]here is no evidence from the oral colloquy that Supreme Court adequately assured itself that defendant understood the nature of the appeal waiver” even though the circumstances of the case should have alerted the court not only to provide a thorough explanation of the appeal waiver but also to make sure that defendant fully grasped this fundamental right that he was forgoing. The defendant had been ordered to submit to four CPL article 730 examinations in the nearly four years between his indictment and his guilty plea in this case and was found unfit to proceed with his case on two occasions; the record contains painstaking professional descriptions of his diminished mental capacity; even where he was found competent to proceed, a psychologist warned that defendant was “in need of a good deal of support by defense counsel, in order to explain the complexity of this case and how it relates to outcomes or plea offers in the other two cases;” and the defendant, a first-time felony offender, was ordered to submit to article 730 examinations in two other counties. When asked, following the court’s description of the appeal waiver, whether he comprehended the court’s remarks, the defendant simply inquired about the mandatory fees associated with his guilty plea.

Dissent: [Read, J] The differences between this case and *People v Ramos* (7 NY3d 737) are negligible to non-existent, but a unanimous court upheld Ramos’s appeal waiver, whereas a divided court invalidates the waiver here, with the majority completely discounting the defendant’s written waiver.

Larceny (Elements) (Evidence)

[People v Hightower](#), 18 NY3d 249, 938 NYS2d 500 (12/13/2011)

Holding: Using an unlimited subway card, which may be transferred by the holder but not for money, to allow another person to enter the subway in return for a fee does not constitute larceny. The Transit Authority, the alleged victim of the charged larceny, was not deprived of the unknown amount of money that changed hands because the Authority never owned those funds. While taking away a portion of an accuser’s business through extortion constitutes larceny, the Authority had “voluntarily transferred this valid MetroCard in a manner consistent with its ordinary course of business by selling the card and receiving the price it set.”

Appeals and Writs (Judgments and Orders Appealable) (Questions of Law and Fact)

[People v Omowale](#), 18 NY3d 825, 938 NYS2d 831 (12/13/2011)

Holding: The Appellate Division’s determination in an appeal by the defendant—that the police reasonably could have concluded there was a weapon in the defendant’s vehicle during a 2006 traffic stop and the situation presented an actual and specific danger to their safety—was a mixed question of law and fact for which there is support in the record, which is beyond further review here. The reversal by the Appellate Division, which directed suppression of evidence seized in connection to a 2007 traffic stop, was not “on the law alone or upon the law and such facts which, but for the determination of law, would not have led to reversal’”

Speedy Trial (Consent to Delay) (Waiver)

[People v Dickinson](#), 18 NY3d 835, 938 NYS2d 836 (12/15/2011)

Holding: The prosecution’s claim that the defendant waived his CPL 30.30 rights by participating in plea negotiations for several months is unavailing where it is undisputed that the prosecution was not ready for trial within six months of the commencement of the action and the record contains no evidence of a waiver, written or oral. “Mere silence is not a waiver. We repeat our observation . . . that ‘prosecutors would be well advised to obtain unambiguous written waivers in situations like these’”

Juries and Jury Trials (Challenges) (Competence) (Qualifications) (Selection)

[People v Furey](#), 18 NY3d 284, 938 NYS2d 277 (12/15/2011)

Holding: The court abused its discretion as a matter of law by denying the defendant’s for-cause challenge of a prospective juror, the wife of a police captain, who knew at least half the potential prosecution witnesses and had frequent social and professional relationships with two, which met the implied bias test of CPL 270.20(1)(c). Her “unequivocal assurances of impartiality . . . were ineffective in a case like this because there was a considerable risk that she could unwittingly give undue credence to the witnesses she knew and her service would give rise to the perception that defendant did not receive a fair trial.”

Assault (Serious Physical Injury)

[People v Stewart](#), 18 NY3d 831, 939 NYS2d 273 (12/15/2011)

NY Court of Appeals *continued*

Holding: Evidence did not support a finding that the accuser suffered “serious . . . disfigurement” or “protracted impairment of health,” the predicates offered for first-degree assault under Penal Law 120.10(1) and 10.00(10), where three of the four wounds required only gauze dressing and the remaining wound required no follow-up medical care other than removal of stitches and the wounds were not shown to be objectively “distressing or objectionable,” and there was no evidence that the accuser’s pain was so severe as to demonstrate extended health impairment.

Appeals and Writs (Judgments and Orders Appealable)
(Question of Law and Fact)
Search and Seizure (Detention)

People v Holland, 18 NY3d 840, 938 NYS2d 839 (12/20/2011)

Holding: The Appellate Division’s reversal of an order granting suppression, “while termed ‘on the law,’ was actually predicated upon a differing view concerning the issue of attenuation, which is a mixed question of law and fact. A reversal on a mixed question typically does not meet the requisites of CPL 450.90(2)(a)”

Dissent: [Lippman, CJ] If the Appellate Division had conducted an attenuation analysis and concluded from it that the defendant’s act of physically contacting an officer “was not in fact directly attributable and proportionately responsive to the preceding official illegality, I would agree that the appeal should be dismissed since it would then present an inquiry turning in essential part on factual findings” But the decision below was “not an attenuation analysis at all, but simply the announcement of an arbitrary rule that any physical contact with a police officer—no matter what its force or purpose—if not preceded by an attempt by the officer to contact the defendant, will be deemed distinct and unattributable to any precedent official illegality, no matter how provocative.” If the attenuation doctrine is not to swallow the rule against unjustified police intrusions, “care must be taken to assure that the doctrine is correctly employed.”

Impeachment (Of Defendant [Including *Sandoval*])
Trial (Presence of Defendant [Trial in Absentia])

People v Walker, 18 NY3d 839, 938 NYS2d 838 (12/20/2011)

Holding: The defendant “satisfied his burden of showing that a reconstruction hearing is necessary to determine whether he was present during the *Sandoval* hearing. Upon remittal, if it is determined that defendant

was not present during the *Sandoval* hearing, a new trial must be ordered; if it is determined that defendant was present, the judgment of conviction should be amended to reflect that result.”

Prisoners (Disciplinary Infractions and/or Proceedings)

Matter of Williams v Fischer, 18 NY3d 888, __ NYS2d __ (2/9/2012)

Holding: Given that “[i]nformation from a confidential informant may constitute substantial evidence to support a prison disciplinary determination so long as the hearing officer makes an independent assessment of the informant’s reliability,” the finding of the petitioner’s guilt is affirmed where “the hearing officer adequately questioned the correction officer who interviewed the confidential informant so as to gauge the basis for the informant’s knowledge of the assault and his reliability . . . , [and t]he inquiry established that the confidential account was detailed and specific; that there were valid reasons to conclude that the informant was reliable; and that there was no reason to think that the informant was motivated by a promise of reward from the prison officials or a personal vendetta against petitioner.”

Counsel (Right to Counsel)
Due Process (Fair Trial)**Evidence (Other Crimes)**

People v Gamble, 18 NY3d 386, __ NYS2d __ (2/9/2012)

Holding: The positioning of court officers during trial did not deprive the defendant of his right to communicate confidentially with his lawyer where nothing in the record suggests that the court’s finding that the defense request for the officers to return to their normal position would have moved them only two inches further from the defendant was incorrect. Nor did the officers’ position directly behind the defendant with their toes on the back of his chair prejudice the defendant in the eyes of the jury by conveying the impression that he was dangerous, as the placement, which was based on the defendant’s alleged assault on a corrections officer at Rikers Island, was minimally intrusive and he was not visibly restrained in the jury’s view. Permitting witnesses to testify that the defendant had previously threatened to kill them and one of the decedents “was relevant in establishing a motive for the murders and the identity of the perpetrator in this circumstantial evidence case,” provided necessary background, and placed the charged conduct in context, as the trial court ruled. The third-party culpability evidence that the defendant sought to offer concerning an earlier shooting assault on one of the decedents was speculative.

NY Court of Appeals *continued*

Evidence (Sufficiency)

Fraud

Larceny (Elements) (Evidence)

People v Khan, 2012 NY Slip Op 00855 (2/9/2012)

Holding: In this case offering the first opportunity to determine the nature of proof required under the recently enacted health care fraud statute (Penal Law article 177 *et seq*), the evidence was legally sufficient to support the defendant's grand larceny and health care fraud convictions, contrary to his contention that the prosecution did not prove the "knowingly and willfully providing materially false information" element as to one of the charged transactions at his pharmacy. An undercover officer, who had previously received from the defendant drugs other than those listed in prescriptions in another's name, came into the pharmacy with a prescription in the other person's name for 30 Sustiva tablets, asked for "the usual pills," and received from the defendant 40 pills stamped "GG461." The request for something other than Sustiva, the discrepancy in the number of pills prescribed and received, and the previous course of dealing supported a reasonable inference that the pills were not the drug prescribed and would not be received by the person named in the prescription, so that billing for the prescription involved providing materially false information to Medicaid.

Juveniles (Molestation)

Sex Offenses

Statute of Limitations (Tolling Of)

People v Quinto, 2012 NY Slip Op 00851 (2/9/2012)

Holding: A 14-year-old's claim to police who were investigating her pregnancy that she had been raped by a classmate did not activate the statute of limitations under CPL 30.10(3)(f), which provides that the statute of limitations for sex offenses against minors does not begin to run until a minor accuser has reached age eighteen or the offense is reported, whichever occurs first, where the accuser neither identified the defendant (her step-grandfather) as the perpetrator nor revealed any of the several offenses charged in the indictment.

The statute of limitations as to the non-sexual misdemeanors and petty offenses from the same time period was not tolled under the provisions of CPL 30.10(4)(a)(ii), which "excludes any periods of time following the commission of an offense if 'the whereabouts of the defendant were continuously unknown and continuously unascertainable by the exercise of reasonable diligence;'" tolling

due to police inability to "identify the perpetrator of a crime despite the exercise of reasonable diligence" or to find the perpetrator after a diligent investigation requires police knowledge that a crime was committed, and these offenses were not reported.

Counsel (Standby and Substitute Counsel)

Impeachment (Of Defendant [Including *Sandoval*])**People v Smith**, 2012 NY Slip Op 01097 (2/14/2012)

Holding: Declining to substitute counsel for a second time was a proper exercise of discretion where the court conducted an inquiry into the defendant's request to have assigned counsel replaced and the inquiry revealed that the "defendant did not approve of the representation counsel sought to provide him despite counsel detailing that he had considered defendant's motions, had prepared for trial and had tried numerous observation sale cases, which have similar factual allegations and issues" as here; the defendant offered no reason to substitute counsel for a second time; the court said the lawyer was competent and likely to provide effective representation; and the case was ready for trial.

The Court's concerns in *People v Sandoval* (34 NY2d 371), including that "cross-examination with respect to crimes or conduct similar to that of which defendant is presently charged may be highly prejudicial," particularly in drug cases, where prior narcotics convictions may present a special risk of impermissible prejudice because of the widely accepted belief that persons previously convicted of narcotics offenses are likely to be habitual offenders, remain relevant. However, the trial court properly weighed those concerns and limited the scope of the prosecution's potential cross-examination to the name of the crime, county, and date of conviction and advised that it would instruct the jury that the defendant's convictions were not evidence of his guilt. "We reiterate... that trial courts should take care in weighing 'whether the prejudicial effect of impeachment testimony far outweighs the probative worth of the evidence on the issue of credibility'"

Concurrence: [Pigott, J] The trial court abused its discretion in ruling that the prosecution could elicit the Penal Law names of the defendant's prior convictions, as it "presents exactly the unacceptable risk of prejudice that *Sandoval* warns against," but the error was harmless. During oral argument, defense counsel stated that it is common for New York City trial courts to permit impeachment of defendants by using the Penal Law names of their prior convictions; this is different from the practice in rest of the state where courts use the *Sandoval* compromise, which allows the prosecutor to ask the defendant one question regarding all prior convictions. "Unfortunately, the majority of this court now encourages

NY Court of Appeals *continued*

the entire State of New York to imitate the ‘rough justice’ of the City.”

Narcotics (Penalties)**Sentencing (Resentencing)****People v Sosa, 2012 NY Slip Op 01101 (2/14/2012)**

Holding: The ten-year look-back period for determining whether a defendant has committed an “exclusion offense” that makes the defendant ineligible for resentencing under L 2009, ch 56, the Drug Law Resentencing Act of 2009 (DLRA-3), codified in relevant part at CPL 440.46, extends from the date of the defendant’s application for resentencing, not from the date of the offense for which resentencing is sought. “The Legislature has evidently determined that a prior, temporally distant violent felony should not itself exclude an otherwise eligible defendant from DLRA-3 relief. This is plainly consistent with the legislation’s necessarily broad remedial objectives in addressing the sequellae of the prior sentencing regimen and should not be effectively nullified as a matter of statutory interpretation. To the extent that the Legislature’s definition of the eligible class in the individual case proves over-inclusive, the proper corrective is achieved by means of the statutorily required exercise of judicial discretion to determine whether relief to an eligible applicant is in the end consonant with the dictates of substantial justice”

Dissent: [Pigott, J] “[I]n my view, the phrase ‘within the preceding ten years’ refers to the ten years preceding the drug felony for which resentencing is sought”

Narcotics (Penalties)**Sentencing (Resentencing)****People v Steward, 2012 NY Slip Op 01099 (2/14/2012)**

Holding: Resentencing under the Drug Law Resentencing Act of 2009 (DLRA-3) is not available to anyone “‘who is serving a sentence on a conviction for *or has a predicate felony conviction for an exclusion offense*’” [Emphasis in decision.] The defendants here, who admittedly have prior violent felony convictions but who were adjudicated predicate felony offenders on later non-violent felony offenses and not the violent felonies, are ineligible for resentencing. It is not necessary that defendants were arraigned on a predicate statement, and adjudicated a predicate felony offender in proceedings regarding a prior violent felony offense, for that violent felony offense to render them ineligible for resentencing under the “exclusion offense” provision.

Evidence (Uncharged Crimes)**People v Agina, 2012 NY Slip Op 01143 (2/16/2012)**

Holding: Where the accuser who claimed that the defendant brutally attacked her was the defendant’s wife, there was no question of mistaken identity, but without the testimony of the defendant’s ex-wife about a very similar attack on her, the evidence was not conclusive that the defendant committed the charged acts, which “is the ‘identity’ that is relevant for purposes of the identity exception to *Molineux*” When ruling on the *Molineux* issue, the court knew from a prior hearing that the defendant said he was with another woman during part of the time the accuser claimed he was assaulting her; that later that evening he had held on to the accuser to keep her from pushing him but had not hit her, kicked her, tied her up, cut her with a knife or threatened to do so, or burned her; and that when asked if the accuser “was ‘into self-mutilation . . .’ he replied: ‘all I can tell you is that [the complainant] is a very angry person.’” Because the Appellate Division erred in holding that the defendant’s identity was “conclusively established” for *Molineux* purposes, the case must be returned for that court to “decide whether the identity exception is applicable to these facts, and resolve any other open issues.”

Dissent: [Ciparick, J] The ex-wife’s testimony was offered not for identity, which was not at issue, but to prove propensity; the defense was that the accuser was lying, and the prosecutor’s summation essentially acknowledged that the ex-wife’s testimony proved propensity, arguing that “if defendant suspects someone of cheating on him ‘[h]e ties them up. He tortures them.’” This is the danger *Molineux* warned against.

Defenses (Diminished Capacity)**Evidence (Uncharged Crimes)****Homicide (Murder [Defenses])****People v Cass, 2012 NY Slip Op 01144 (2/16/2012)**

Holding: At the defendant’s murder trial, the court properly admitted evidence about an uncharged murder to rebut the defendant’s extreme emotional disturbance (EED) defense. In post-arrest statements, the defendant admitted to the instant 2003 killing, saying that he had been a victim of child sexual abuse and had “‘just lost it’” and strangled his roommate when his roommate made sexual advances toward him during an argument begun when the defendant was asked to move out. Questioned about a 2002 homicide of which he was also suspected, the defendant admitted he had committed that killing as well, saying he had met the decedent at a bar, slept on the decedent’s couch, and killed him when the defendant woke up to find the decedent kissing and grabbing him.

NY Court of Appeals *continued*

The court ruled that the defendant’s statements about the 2002 killing and proof of that decedent’s death were admissible in the trial for the 2003 killing under the intent exception to the *Molineux* rule, which bars admission of evidence of other crimes not logically connected to a specific material issue in the case and tending only to show a propensity to commit the charged offense. The striking resemblance of the uncharged killing to the instant offense does make the former arguably evidence of propensity. But it also arguably shows that the defendant deliberately targeted gay men for violence, tending to rebut loss of control (the subjective element of the defendant’s EED defense) and also to bear directly on intent where the defendant had put his state of mind at issue by raising EED and the prosecution had put forward premeditated intent as its theory.

Counsel (Right to Counsel)

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

[People v Smith](#), 2012 NY Slip Op 01147 (2/16/2012)

Holding: Admission of evidence at trial that the defendant had “refused” a chemical test to determine the alcohol level in his blood was error where he was never told that requesting additional time to reach his lawyer to discuss the issue would be interpreted as a refusal. At the time his vehicle was stopped, the defendant received the chemical test warnings contemplated in Vehicle and Traffic Law 1194(2)(f) and he said he understood the warnings but wanted to talk to his attorney before deciding whether to agree to a chemical test. He was then taken to the state police barracks where he was given the warnings again, again said he wanted to call his lawyer and was allowed to use a phone but was unable to reach his lawyer. A half-hour later he received the warnings a third time and responded to an inquiry about whether he would take a chemical test by saying he was waiting for his lawyer to call him back, at which point the troopers recorded a refusal. “Hence, when defendant was asked on the third and final occasion whether he was willing to take a chemical test, he had no reason to know that his time for deliberation was over.” Reversal here will not require police to advise defendants “concerning the contours of their limited right to counsel” in such cases. There must simply be “a record basis to show that, through words or actions, defendant declined to take a chemical test despite having been clearly warned of the consequences of refusal.” The error here was not harmless.

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.

Search and Seizure (Motions to Suppress [CPL Article 710]) (Warrantless Searches [Abandoned Objects])

[People v Crawford](#), 89 AD3d 422, 931 NYS2d 313 (1st Dept 11/1/2011)

Holding: The defendant’s motion to suppress should have been granted because the police did not have reasonable suspicion that the defendant was involved in a crime where they saw him walking on the street and watched him adjust an object in his pants pocket several times; the defendant complied with the officers’ requests to talk to him and to remove his hands from his pockets, produced identification, and answered their question about where he was headed; one of the officers had an opportunity to view the bulge in the defendant’s pocket more closely, but could not identify the object; and when one of the officers got out of their unmarked car, the defendant fled and threw a gun onto the street before the officers forcibly seized him. Because the defendant threw away the gun in direct response to the police pursuit, and did not make a conscious and independent decision to abandon the gun, the gun should have been suppressed. (Supreme Ct, New York Co)

Article 78 Proceedings

New York State Agencies (Judicial Conduct, State Commission on)

[Matter of Martinez v State Commission on Judicial Conduct](#), 89 AD3d 437, 931 NYS2d 315 (1st Dept 11/1/2011)

Holding: The court properly dismissed the petitioner’s CPLR article 78 petition against the State Commission on Judicial Conduct as time-barred because it was filed more than four months after the Commission dismissed his complaint against the judge who presided over his criminal trial. Further, dismissal on the merits is warranted where the Commission has the authority to dismiss a complaint if it concludes that it lacks merit and such a decision is discretionary and is not amenable to mandamus. Dismissal of the article 78 petition against the assistant district attorney who prosecuted the petitioner was proper because the prosecutor did not exceed his legal authority by asking the Department of Correctional Services (DOCS) to take all legal and proper steps to keep the petitioner from harassing the witnesses who testified

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against him and the court could not compel the prosecutor to direct DOCS to disregard his request to impose a negative correspondence list and to cancel the list because the prosecutor could not and was not required by law to do so. (Supreme Ct, New York Co)

Larceny (Evidence) (Value)

People v Monclova, 89 AD3d 424, 931 NYS2d 322
(1st Dept 11/1/2011)

Holding: There was insufficient proof that the value of the stolen laptop computer at the time of the theft exceeded one thousand dollars where the prosecution merely presented evidence that the computer was purchased for a little over \$2,000 and that the computer was still functioning and in good condition three years later; “the jury could only speculate whether the computer still had a value of more than \$1000 [when it was stolen].” The defendant’s fourth-degree grand larceny conviction for the computer theft must be reduced to petit larceny. However, there was sufficient evidence that the value of the stolen television exceeded \$1,000 where the television was purchased nine months before the theft for \$1,500, the owner bought a replacement for \$1,300, and when the stolen television was returned to the owner, he preferred it to the newly-purchased replacement television. (Supreme Ct, New York Co)

Guilty Pleas (Withdrawal)**Sentencing (Resentencing)**

People v Monroe, 89 AD3d 429, 931 NYS2d 324
(1st Dept 11/1/2011)

Holding: The defendant is not entitled to withdraw his guilty plea to second-degree conspiracy even though that plea included a promise that he would be sentenced to a term of six to twelve years to run concurrently with an aggregate term of four and a half to nine years imposed for two drug convictions and the defendant was later resentenced on the drug convictions to an aggregate term of three years with two years’ post-release supervision, pursuant to CPL 440.46. Distinguishing *People v Rowland* (8 NY3d 342) and *People v Pichardo* (1 NY3d 126), the drug convictions and sentences here were not reversed on appeal or otherwise invalidated. “A concurrent sentence that subsequently proves to be invalid cannot be equated with a valid concurrent sentence that is subsequently reduced as a result of a defendant’s request for leniency. The former, but not the latter, may be viewed as an unfair inducement to plead guilty that affects the voluntariness of the plea.” (Supreme Ct, New York Co)

Sentencing (Excessiveness) (Modification)

People v Reyes, 89 AD3d 401, 931 NYS2d 601
(1st Dept 11/1/2011)

Holding: In the interest of justice, the defendant’s 11-year sentence for attempted second-degree murder is reduced to 8 years. “This incident represents defendant’s first and only contact with the criminal justice system. For more than 40 years, defendant successfully managed his mental illness. It is evident that the stress of the loss of his mother, his inadvertent medication lapse, and the psychosis that resulted, conspired to cause this tragic incident.” “While this Court appreciates the severity of the injury sustained by defendant’s innocent victim, under the circumstances herein, we believe that an 11-year determinate prison term—for a man suffering from such severe mental illness that his capacity to form the required element of intent for the subject crime is questionable at best—is unduly harsh.” (Supreme Ct, New York Co)

Dissent: It is not the role of this court to give a sentence reduction based solely on sympathy. The defendant received the sentence he agreed to, which was very fair given the underlying facts of the crime; “there were no extraordinary circumstances warranting a reduction of sentence”

Assault (Defenses) (Evidence) (Serious Physical Injury)**Counsel (Competency/Effective Assistance/Adequacy)**

People v Nesbitt, 89 AD3d 447, 931 NYS2d 612
(1st Dept 11/3/2011)

Holding: Defense counsel’s actions did not deprive the defendant of a fair trial where: it is unlikely that the jury would have found that the defendant committed second-degree assault as the evidence of the complainant’s disfigurement and impairment strongly supported the first-degree assault conviction; defense counsel successfully argued that the defendant was not guilty of attempted murder and portions of the argument could have given the jury a basis for finding the defendant not guilty of the assault charges; defense counsel’s strategy was to focus on what he correctly believed was the winnable part of the case and forgo an argument on the less defensible charges, which counsel could reasonably have believed would have eroded his credibility; and defense counsel’s statements during his summation did not concede guilt on the assault charges. Defense counsel had no basis to argue that the defendant did not intend to cause the complainant serious physical injury, and even though the evidence may not have supported the theory that the defendant placed the complainant at substantial risk of death, there was strong evidence that the complainant suffered serious and protracted disfigurement based on multiple visible and permanent scars and suf-

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ferred protracted impairment of the function of a bodily organ based on the loss of sensation in his right arm. The record is sufficient to determine this ineffective assistance claim without the need for a CPL 440.10 motion. (Supreme Ct, New York Co)

Dissent: The defendant received ineffective assistance of counsel; defense counsel essentially conceded the defendant’s guilt of first-degree assault. Although the evidence was legally sufficient to support the convictions, there was room for defense counsel to argue that the complainant’s wounds were not life-threatening, his scars healed well and thus did not amount to serious disfigurement, and the intermittent numbness in the complainant’s arm did not constitute a serious physical injury.

[*Ed. Note: Leave to appeal was granted on Jan. 17, 2012 (2012 NY Slip Op 61300[U]).*]

Constitutional Law

Sex Offenses (Civil Commitment)

Matter of State of New York v Nelson, 89 AD3d 441, 932 NYS2d 42 (1st Dept 11/3/2011)

Holding: The respondent’s motion to dismiss the petition for sex offender civil management was properly denied. The respondent was convicted of second-degree kidnapping and second-degree promoting prostitution prior to the enactment of the Sex Offender Management and Treatment Act (Mental Hygiene Law article 10). Because this is a civil proceeding, the ex post facto clause does not apply; due process does not require a standard of proof higher than the clear and convincing evidence standard set forth in MHL 10.07(c), (d); and that standard, as applied to pre-article 10 convictions, does not violate equal protection because it is narrowly tailored to serve the state’s compelling interest in detaining and treating dangerous past sex offenders. Although a federal district court has permanently enjoined the petitioner from enforcing MHL 10.07(c), (d) (*see Mental Hygiene Legal Serv v Cuomo*, 785 F Supp 2d 205 [SDNY 2011]), the Third Department’s view (*Matter of State of New York v Daniel OO.*, 88 AD3d 212) that the federal action does not render this article 10 proceeding moot is adopted. The federal injunction does not bar civil commitment of sex offenders; it requires that a reasonable doubt standard be applied in determining if a respondent’s conviction constitutes a sex offense. “While mindful of the guidance offered by the federal district court in *Mental Hygiene Legal Serv. v Cuomo*, we are compelled to disagree with the reasoning of the case” (Supreme Ct, New York Co)

Appeals and Writs (Preservation of Error for Review)

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

People v Sudol, 89 AD3d 499, 932 NYS2d 49 (1st Dept 11/10/2011)

Holding: The court erred in granting the defendant’s motion to set aside the verdict because the trial court can only grant such a motion “where the error alleged has been preserved by a proper objection at trial” The defendant’s motion for a trial order of dismissal failed to challenge the sufficiency of the evidence that the complainant sustained a serious physical injury; counsel’s argument to the jury regarding that element did not preserve the claim. Although the evidence was legally insufficient, the current procedural posture does not allow this court to affirm on this ground; the argument must be made in a postsentencing appeal. The defendant also failed to preserve the issue of whether the prosecution improperly cross-examined the defendant about a statement he made on the Internet in which he expressed an anti-police and anti-authority bias; however, none of the court’s reasons for faulting the cross-examination is a sufficient ground for ordering a new trial. “[N]othing in the [prosecution’s] summation was so egregious as to require a new trial. Moreover, any improprieties could have been rectified by curative instructions, but defendant never requested any” (Supreme Ct, New York Co)

Sex Offenses (Sex Offender Registration Act)

People v Epstein, 89 AD3d 570, 933 NYS2d 239 (1st Dept 11/17/2011)

Holding: The defendant was correctly determined to be a level three sex offender based on “highly reliable proof of criminal conduct for which defendant was neither indicted nor convicted.” The defendant pleaded guilty to the two prostitution-related offenses he was charged with in Florida. But in assessing the defendant’s risk level, the court was presented with strong evidence that the defendant committed sex offenses against others, including a detailed probable cause affidavit prepared by Florida law enforcement officials with statements of the accusers, which corroborated each other and were corroborated by other evidence; this evidence “outweighs any inferences to be drawn from the manner in which this case was prosecuted in Florida.” The record does not establish that the Florida authorities reasonably believed that the charges involving the others were unprovable, and the court was entitled to rely on the reliably proven facts and was not bound by the possible exercise of prosecutorial discretion. (Supreme Ct, New York Co)

First Department *continued***Search and Seizure (Arrest/Scene of the Crime Searches [Probable Cause (Informants)]) (Stop and Frisk)**

[People v Wallace](#), 89 AD3d 559, 933 NYS2d 13
(1st Dept 11/17/2011)

Holding: The defendant's motion to suppress must be denied as the police had reasonable suspicion to stop the defendant where: a man, who spoke quickly and seemed nervous, reported to an experienced subway operator that a black man in the first car of the train had a gun in a brown bag and was showing it to people; the same man approached the station agent and told him that a man on the train who was wearing a brown jacket had a brown bag with a gun in it; this information was transmitted to the police; the police stopped the train at another station and removed two black men with brown jackets from the first car; when one of the officers returned to the first car, he saw the defendant trying to get into a crowd and directed him to get off the train; and after the defendant refused to obey instructions, the officer unclipped a bag hanging from the defendant's chest and found a loaded firearm. Although the information provided to the station agent was insufficient, alone, to create reasonable suspicion, the reliability of the information was enhanced by the fact that it was provided in face-to-face encounters with the station agent and train conductor, who are as able as police officers to assess the reliability of someone reporting an emergency. Because the police encounter occurred in the confines of a subway car and the defendant, who fit the description given to police, was trying to push his way into a group of people, which is akin to an attempt to flee, the police had reasonable suspicion to stop him. (Supreme Ct, New York Co)

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

[People v Vargas](#), 89 AD3d 582, 933 NYS2d 23
(1st Dept 11/22/2011)

Holding: The court correctly suppressed the knife a police officer took out of the defendant's pocket immediately after approaching the defendant where the officer testified that the defendant had not done anything suspicious and made no threatening gestures; although the officer thought the defendant was carrying a gravity knife, he failed to "articulate any facts at all, much less specific facts from which he could have inferred that the knife was a gravity knife." The officer lacked "reasonable suspicion to stop and frisk the defendant, or, as he did here, reach into his pocket and remove the knife." (Supreme Ct, Bronx Co)

Counsel (Competency/Effective Assistance/Adequacy)**Forensics (DNA)****Witnesses (Confrontation of Witnesses)**

[People v Davis](#), 90 AD3d 432, 933 NYS2d 663
(1st Dept 12/6/2011)

Holding: Although defense counsel inadvertently elicited testimony that the defendant's DNA matched a bloodstain at the crime scene, this did not amount to ineffective assistance of counsel because there is no reasonable probability that this mistake affected the outcome of the trial or rendered the verdict unfair where there was overwhelming evidence of the defendant's guilt, including that his DNA matched a cigarette butt found at the scene, he made highly incriminating statements and behaved in an incriminating way when he returned to the scene and encountered the accuser, and there was no reasonable possibility that the defendant left the cigarette butt at the scene when he returned. The defendant failed to preserve for review his claim, raised only in a postverdict motion, that the prosecutor deprived him of a fair trial by creating a misleading impression that the defendant's DNA was found only on the cigarette. Furthermore, there is no basis for reversal since the prosecution turned the DNA report over to the defense as required by CPL 240.20(1)(c), the prosecutor himself mistakenly believed the defendant's DNA did not match the bloodstain, and the evidence did not affect the outcome of the trial. The defendant also failed to preserve his claim that the admission of certain DNA evidence violated the Confrontation Clause; his objection focused on the hearsay rule. The issue fails on the merits as the Court of Appeals has held that a similar DNA report was nontestimonial for Confrontation Clause purposes. (Supreme Ct, New York Co)

Evidence (Sufficiency)**Sex Offenses (Sexual Abuse)**

[Matter of Jabari L.](#), 90 AD3d 490, 935 NYS2d 9
(1st Dept 12/13/2011)

Holding: "The then 13-year-old complainant testified that the then-13-year-old appellant made rude sexual comments and gave her a quick slap on her buttocks in a classroom in which other students and their teacher were all present. Even if fully credited, this evidence was legally insufficient to establish beyond a reasonable doubt that appellate performed this highly offensive behavior 'for the purpose of gratifying sexual desire' (Penal Law § 130.00[3] . . .)." (Family Ct, Bronx Co)

First Department *continued*

Evidence (Business Records)

Juveniles (Neglect)

**Matter of Jaden C., 90 AD3d 485, 936 NYS2d 8
(1st Dept 12/13/2011)**

Holding: The court erred in finding that the respondent father neglected his child as there was no evidence to show that the father knew or should have known that going to the maternal grandmother's apartment would result in a dangerous situation. The court did not make a credibility finding regarding the caseworker's testimony that the father said that the maternal uncle was in the apartment when he arrived and that the uncle had threatened him in the past, which conflicted with the father's hearing testimony. And even if the uncle was there when the father arrived and had threatened him before, it does not establish that the father should not have gone to the apartment at all; there was no evidence that the father knew the uncle would be there when he agreed to escort the mother to the apartment, which he said he did because it was in a dangerous neighborhood. The caseworker's notes regarding information provided by a non-testifying emergency room doctor were not admissible under the business records exception; there was no evidence as to who gave the information to the doctor or whether that person had a business duty to report the information. The court erred in admitting the criminal histories of the father and the uncle, so they cannot be a basis for the neglect finding. The fight between the uncle and the father does not support a neglect finding as there was no evidence that the father brought the gun to the apartment or that he was the aggressor, and the court did not base its finding on this theory. (Family Ct, New York Co)

Attorney/Client Relationship

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

**People v Griffin, 92 AD3d 1, 934 NYS2d 393
(1st Dept 12/15/2011)**

Holding: "[T]he court improperly interfered with an established attorney-client relationship between defendant and The Legal Aid Society" (LAS). In the first five months after the defendant was arraigned, the prosecution was represented by several assistant district attorneys, which resulted in case delays, and the case was adjourned a number of times due to the unavailability of police witnesses, but when the defendant's attorney notified the court that he was leaving his job and asked the court to give the attorney's replacement time to prepare for trial, the court insisted that the new lawyer be ready

for trial in two weeks. Defense counsel's supervisor told the court that the new attorney would not be ready by then and said that if the court thought LAS should be relieved, it should do so. After criticizing LAS, the court relieved defense counsel and assigned a new attorney without asking the defendant about changing his attorney. In a case like this, "a defendant should not be treated as a mere spectator." "[C]ourts should be hesitant about micromanaging the institutional providers of legal services. Furthermore, we expect trial courts to treat institutional indigent defense providers with the same courtesy and respect as they treat the district attorney or non-institutional attorneys." The interference with the right to counsel is per se reversible and the issue was not waived by the defendant's guilty plea. (Supreme Ct, New York Co)

Dissent in Part: The court did not, as a matter of law, abuse its discretion in requiring LAS to assign another staff attorney to represent the defendant and be ready for trial in two weeks.

Narcotics (Penalties)

Sentencing (Resentencing)

**People v Cephas, 90 AD3d 557, 934 NYS2d 410
(1st Dept 12/20/2011)**

Holding: The order denying the defendant's CPL 440.46 motion for resentencing is reversed in the interest of justice. The court based its denial primarily on the defendant's long criminal history and that despite having completed programs during prior incarcerations, he relapsed into drugs and committed further crimes. However, the defendant completed work and substance abuse programs, received highly favorable evaluations from corrections officials, including a social worker, and was accepted into a two-year residential drug treatment program, which will provide treatment support he never had before. "Under the circumstances presented, the positive factors cited by defendant outweighed the extent of his criminal history." (Supreme Ct, New York Co)

Counsel (Competence/Effective Assistance/Adequacy)

Insanity (Evidence) (Psychiatrists and Psychologists)

Post-Judgment Relief (CPL § 440 Motion)

**People v Oliveras, 90 AD3d 563, 936 NYS2d 12
(1st Dept 12/27/2011)**

Holding: The defendant was deprived of effective assistance of counsel in this murder case, under both federal and state standards, where the only evidence linking him to the crime were his statements to the police, and defense counsel failed to obtain the defendant's psychiatric and educational records or to consult with an expert psychiatrist or psychologist. The psychiatrist retained in

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support of the defendant's CPL 440.10 motion reviewed those records and opined that the defendant's psychotic symptoms, learning disabilities, and probable mental retardation could have substantially impaired his ability to process and understand his *Miranda* rights and made him vulnerable to suggestion and coercion. Defense counsel mistakenly believed that if he obtained the defendant's records, he would have had to disclose them to the prosecution, even if they were not introduced at trial. Counsel's conclusion that he was "better off" not reviewing the defendant's records or consulting with an expert cannot be deemed a reasonable trial strategy. The court, in denying the defendant's motion to suppress his statements, cited the lack of medical records documenting the defendant's mental illness. In denying the defendant's motion to serve a late notice of a psychiatric defense, the court similarly relied upon the failure to consult with an expert or to obtain relevant medical records. (Supreme Ct, Bronx Co)

Dissent: The trial court properly concluded that the defense attorney's decision to rely on lay testimony to establish the defendant's mental deficiencies and not to get the defendant's medical records was a reasonable and legitimate strategy.

Second Department

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Juveniles (Support Proceedings)

Bushlow v Bushlow, 89 AD3d 663, 932 NYS2d 132 (2nd Dept 11/1/2011)

Holding: The parties' so-ordered stipulation of settlement, incorporated but not merged into the divorce judgment, did not comply with the Child Support Standards Act (CSSA), see Domestic Relations Law 240[1-b][h]. It lacked a recitation that the parties were advised of the CSSA and that the basic child support obligation provided for would presumptively result in the proper amount of support. The prorated shares of child care and future unreimbursed health care expenses deviated from CSSA guidelines. The provisions concerning basic child support, child care, and unreimbursed health care are not enforceable. Other provisions, however, are. The matter must be remitted for a determination in accordance with the CSSA. (Supreme Ct, Queens Co)

Counsel (*Anders* Brief)**Juveniles (Neglect) (Right to Counsel)**

Matter of Giovanni S., 89 AD3d 252, 931 NYS2d 676 (2nd Dept 11/1/2011)

Holding: The fundamental principles underlying *Anders v California* (386 US 738 [1967]) apply equally to criminal and family law cases. There are two steps in reviewing an *Anders* brief alleging that no nonfrivolous issues exist: 1) determining whether counsel has made "a diligent and thorough search of the record for any arguable claim that might support the client's appeal" and 2) if so, whether counsel's conclusion that no nonfrivolous issues exist is correct. If review indicates that an appellant has not received the benefit of a merits-based brief, the reviewing court should not analyze the merits of any particular issue. Here, appellate counsel analyzed only the direct testimony of the only witness, without identifying or evaluating cross-examination or objections by the lawyer representing the appellant below, without summarizing arguments made by the parties as to motions made below, and without analyzing possible issues or highlighting anything that might arguably support an appeal. An independent review of the record reveals potential nonfrivolous issues including whether the Administration for Children's Services met its burden as to allegations that the appellant was involved in drug sales in the presence of her child, whether the evidence was sufficient to establish neglect, and whether summary judgment was the proper way to resolve the matter. New counsel is assigned to perfect the appeal. (Family Ct, Kings Co)

Juveniles (Neglect) (Removal)

Matter of Serenity S., 89 AD3d 737, 931 NYS2d 693 (2nd Dept 11/1/2011)

Holding: "The Family Court erred in declining to take judicial notice of the prior orders of neglect against the mother with respect to the child's four older siblings . . ." Further, the court's credibility determination was not supported by the record where the court found sharply contrasting versions of an event both credible. Review of the record leads to the conclusion that the Administration for Children's Services (ACS) "met its burden of establishing, by a preponderance of the evidence, that the child's life or health would be at imminent risk" if not removed. The petitioner, ACS, had alleged in February 2011 that the mother derivatively neglected the subject child, born in January 2011, based on prior adjudications of neglect concerning the child's older siblings proximate in time to the child's birth. The petition to temporarily remove the child and place her in foster care following a Mar. 29, 2011 altercation between the mother and the child's father should have been granted. (Family Ct, Kings Co)

Second Department *continued*

Motions (Suppression)

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

Traffic Infractions

People v Allen, 89 AD3d 742, 932 NYS2d 142 (2nd Dept 11/1/2011)

Holding: A state trooper's testimony that the high beams on the defendant's on-coming vehicle caused the trooper to squint his eyes while driving did not establish probable cause to stop the defendant for violation of Vehicle and Traffic Law 375(3), subsection (2) of which requires interference with the vision of an approaching motorist. The Court of Appeals said in *People v Meola* (7 NY2d 391, 395) that the statute proscribes conduct that interferes with oncoming drivers' vision and hence their operation of their vehicle. Causing the oncoming driver to blink does not violate the statute. Evidence recovered as a result of the stop must be suppressed. (County Ct, Dutchess Co)

Dissent: Where the cars were less than 500 feet apart and the defendant's high beams caused the trooper to squint while driving, there was probable cause to stop for a 375(3) violation. *Meola* does not require an actual mishap or prudent response by the oncoming driver. Moreover, the defendant's guilty plea forfeited review of his claim as to the admissibility of evidence in the absence of a motion to withdraw the plea.

Counsel (Competence/Effective Assistance/Adequacy)

Sex Offenses (Sex Offender Registration Act)

People v Bowles, 89 AD3d 171, 932 NYS2d 112 (2nd Dept 11/1/2011)

Holding: A defendant has a right to the effective assistance of counsel at a hearing to determine the appropriate risk level to be assigned under the Sex Offender Registration Act (SORA). Such hearing is not a part of a criminal action, but statutory requirements that counsel be provided to those who cannot afford to hire an attorney for such proceedings would be meaningless if the counsel provided was not required to be effective. Due process therefore requires effective assistance. Applying New York's standard for effectiveness, which is more expansive than that under the 6th Amendment, the record reveals that the defendant's attorney provided meaningful representation. While it may have been prudent for the attorney, who contested certain points applied under the Risk Assessment Instrument (RAI), to also request a downward departure from the presumptive risk level estab-

lished by the RAI, the failure to do so, which the prosecution argued on appeal rendered the issue unpreserved for appeal, did not deprive the defendant of effective assistance. (Supreme Ct, Kings Co)

Driving While Intoxicated

Homicide (Murder [Defenses])

People v McPherson, 89 AD3d 752, 932 NYS2d 85 (2nd Dept 11/1/2011)

Holding: The evidence was legally sufficient to support a conviction of depraved indifference second-degree murder, contrary to the defendant's claim that his blood alcohol content (BAC) and intoxication rendered him unable to form the requisite intent. Testimony indicated that the defendant: did not appear intoxicated when he left a nightclub with others, including one person he helped leave; searched his own car trunk for something he said he had lost, apparently drugs; argued with his girlfriend; soon thereafter, following gunshots at or near his location, sped the wrong way on a parkway for about five miles, not braking or trying to avoid oncoming vehicles; violently collided with another vehicle, killing the driver; when aided by emergency personnel thereafter, smelled of alcohol and was agitated; and had a BAC of 0.19% an hour after the accident. While the Legislature's later creation of a new crime of aggravated vehicular assault was intended to apply to drunk drivers who kill without a mental state rising to depraved indifference to human life, earlier case law had not made conviction of a drunk driver for depraved indifference murder a legal impossibility. (County Ct, Nassau Co)

Dissent: The prosecution produced no evidence that showed beyond a reasonable doubt that the defendant deliberately drove the wrong way on the parkway, with utter disregard for the consequences.

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

People v Vargas, 89 AD3d 771, 931 NYS2d 683 (2nd Dept 11/1/2011)

Holding: Police officers who observed a vehicle matching the description received ten minutes earlier of a car involved in an armed robbery searched the car without probable cause to believe it contained contraband, a weapon, or evidence. That the front-seat passenger moved to allow the defendant to get out did not establish probable cause to believe there was a gun in the car. The prosecution theory that the police were entitled to make a limited protective search for a weapon presenting an actual, specific danger to their safety was unpreserved. The defendant's motion to suppress should have been granted. (Supreme Ct, Kings Co)

Second Department *continued***Family Court (Violation of Family Court Orders)****Juveniles (Custody)**

[Matter of Dana H. v James Y.](#), 89 AD3d 844, 932 NYS2d 517 (2nd Dept 11/9/2011)

Holding: Where the subject children had had behavioral and psychological issues when a 2008 custody order was issued, that they also had such problems at school in 2010 was not a change in circumstances warranting a hearing on a petition to modify the custody arrangement. A hearing should have been held on the petition alleging a willful violation of the custody order based on undisputed allegations that the father failed to consult with the mother about changes in psychiatric medication for the daughter, who was hospitalized for suicidal ideation, and that the son had not been attending therapy regularly and had been cutting himself. (Family Ct, Nassau Co)

Juveniles (Support Proceedings)

[Matter of Glen L.S. v Deborah A.S.](#), 89 AD3d 856, 932 NYS2d 177 (2nd Dept 11/9/2011)

Holding: The court should not have granted the father's petition to vacate child support provisions of a stipulation of settlement incorporated but not merged into the divorce judgment where "the father's own behavior was the parallel and coequal cause of the deterioration of the relationship" between the father and his son. "[T]he father failed to meet his burden of establishing that his son was constructively emancipated . . ." (Family Ct, Nassau Co)

Burglary (Degrees and Lesser Offenses)

[Matter of Richard M.](#), 89 AD3d 849, 932 NYS2d 165 (2nd Dept 11/9/2011)

Holding: Third-degree criminal trespass (*see* Penal Law 140.10[a]) is a lesser-included offense of second-degree burglary (*see* Penal Law 140.25[2]). The count of the petition charging third-degree criminal trespass should have been dismissed. (Family Ct, Queens Co)

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

[People v Berry](#), 89 AD3d 954, 933 NYS2d 94 (2nd Dept 11/15/2011)

Holding: Denial of the defendant's resentencing motion was an improvident exercise of discretion because the defendant's record of low-level drug sales and com-

mission of an offense not involving violence or weapons while on parole was insufficient to overcome the statutory presumption favoring resentencing under CPL 440.46. (Supreme Ct, Kings Co)

Abortion**Attempt**

[Matter of Mercedes K.](#), 89 AD3d 944, 933 NYS2d 691 (2nd Dept 11/15/2011)

Holding: A person can attempt to engage in conduct, and the crime of second-degree abortion (*see* Penal Law 125.40) imposes criminal liability for engaging in specified conduct; therefore, attempted second-degree abortion is a legally cognizable offense. The finding that the appellant committed acts that if committed by an adult would constitute that crime was not against the weight of the evidence. (Family Ct, Kings Co)

Juveniles (Abuse) (Molestation)

[Matter of Shernise C.](#), 91 AD3d 26, 934 NYS2d 171 (2nd Dept 11/15/2011)

Holding: Where DNA evidence established that the baby of the subject 14-year-old child was almost certainly fathered by the 14-year-old's stepfather, an order directing a forensic medical examination of the 14-year-old, including color photographs of any area of trauma, is reversed. A proper balance must be struck between the state's extraordinary interest in protecting children's welfare and the constitutional rights of children. (Family Ct, Kings Co)

Juveniles (Abuse)

[Matter of Jaiden T.G.](#), 89 AD3d 1021, 934 NYS2d 420 (2nd Dept 11/22/2011)

Holding: The presumption of parental abuse that was created by evidence that the subject four-month-old child had suffered a greenstick bone fracture that would not normally be sustained accidentally was rebutted by evidence credited by the Family Court that the child was solely in the care of the mother's paramour at the time of the injury. (Family Ct, Kings Co)

Civil Practice**Narcotics (Drug Testing)****Probation and Conditional Discharge**

[Landon v Kroll Lab. Specialists, Inc.](#), 91 AD3d 79, 934 NYS2d 183 (2nd Dept 11/22/2011)

Holding: A drug testing laboratory that entered into a contract with a county probation department to analyze

Second Department *continued*

biological samples provided by people on probation may be held liable to a person whose sample was negligently tested, despite the absence of a formal contractual relationship between the person whose sample was tested and the laboratory. Dismissal of the complaint for failure to state a cause of action was error. (Supreme Ct, Orange Co)

[Ed. Note: On Feb. 16, 2012, the Second Department granted the respondent's motion for leave to appeal and certified the following question to the Court of Appeals: "Was the opinion and order of this Court dated November 22, 2011, properly made?" (2012 NY Slip Op 64628(U).]

Forensics (DNA)

People v Perry, 89 AD3d 1114, 933 NYS2d 584 (2nd Dept 11/29/2011)

Holding: Despite changes in the law relevant to motions under CPL 440.30(1-a), a defendant is "still required to demonstrate that there exists a reasonable probability that the verdict would have been more favorable to him if a DNA test had been conducted on the evidence at issue, and if the results had been admitted at the subject trial," and the defendant here failed to make the required showing. (Supreme Ct, Richmond Co)

Sentencing (Concurrent/Consecutive) (Post-Release Supervision) (Resentencing)

People v Brinson, 90 AD3d 670, 933 NYS2d 728 (2nd Dept 12/6/2011)

Holding: Where the defendant had received a 10-year determinate sentence for second-degree robbery, to run consecutively to other prison terms, and the required period of postrelease supervision (PRS) had not been imposed for the second-degree robbery, the court did not err in resentencing the defendant to include a term of PRS after the defendant had served over 10 years in prison. Concurrent and consecutive sentences yield single sentences; the defendant was subject to all the sentences making up his aggregated sentence and did not have a reasonable expectation of finality in the portion of the sentence attributable to the second-degree robbery conviction. (Supreme Ct, Queens Co)

Family Court (Family Offenses) (Orders of Protection)

Matter of Parrella v Freely, 90 AD3d 664, 933 NYS2d 876 (2nd Dept 12/6/2011)

Holding: The court lacked jurisdiction under Family Court Act 812(1)(e) to issue an order of protection directing the appellant to stay away from a woman whose child had been fathered by the appellant's boyfriend where

there was no direct relationship between that woman and the appellant that could meet the statutory requirement of an "intimate relationship." The order was therefore void ab initio and the order in effect granting a petition to hold the appellant in violation of the order and directing her to stay away from the other woman and refrain from communicating with or about her for two years is reversed and the petition denied. (Family Ct, Nassau Co)

Evidence (Prejudicial) (Uncharged Crimes)

People v Clarke, 90 AD3d 777, 934 NYS2d 239 (2nd Dept 12/13/2011)

Holding: The court erred by allowing the accuser to testify, in detail, about uncharged allegations of sexual abuse by the defendant in this sex abuse case where there was no reasonable possibility the jury would infer the defendant lacked intent and the defendant "did not contest the element of intent or offer mistake as a defense" but denied committing the charged acts. The "limiting instructions were untimely and insufficient to cure the prejudice . . ." (County Ct, Orange Co)

Evidence (Hearsay)

Juveniles (Neglect)

Matter of Colton A., 90 AD3d 747, 935 NYS2d 38 (2nd Dept 12/13/2011)

Holding: The finding that the mother of the subject children neglected them by driving with them while under the influence of prescription medication against a doctor's recommendation was not supported by a preponderance of the evidence where the record showed that the doctor who prescribed her pain medications had not recommended she refrain from driving while under their influence. Uncorroborated hearsay evidence that the mother allowed one of the children to supervise the others while the mother slept was not admissible and in any event, the mother established she did not fail to appropriately supervise the children. (Family Ct, Suffolk Co)

Family Court (Orders of Protection)

Matter of McCarthy v McCarthy, 90 AD3d 758, 934 NYS2d 339 (2nd Dept 12/13/2011)

Holding: As the Mar. 26, 2009 order of protection expired on Mar. 26, 2010, the date on which the petition here was filed, the portion of the petition seeking to modify the 2009 order must be dismissed as academic. But the court was authorized to issue a new order of protection upon a finding that the respondent had willfully violated the 2009 and prior orders of protection, so summary

Second Department *continued*

denial of the branch of the petition in effect seeking a new order of protection was error. (Family Ct, Suffolk Co)

Juveniles (Custody)

Matter of Yearwood v Yearwood, 90 AD3d 771, 935 NYS2d 578 (2nd Dept 12/13/2011)

Holding: Where the divorced parents had amended their stipulation to have joint legal custody of the subject child, with residential custody to the mother; the mother was subsequently hospitalized for mental illness which has not made the mother unfit but has not been completely stabilized; the father has been the more consistently fit parent; and the nature of the parents' relationship makes joint custody unworkable, the Family Court's order is reversed and the father's petition for sole legal and residential custody is granted, and the matter remanded for further proceedings including allowing the mother liberal, unsupervised visitation. (Family Ct, Nassau Co)

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

People v Bush, 90 AD3d 945, 935 NYS2d 73 (2nd Dept 12/20/2011)

Holding: The branch of the defendant's motion under CPL 440.30(1-a) for DNA testing of previously untested scrapings from the decedent's fingernails should have been granted where initial testing of some scrapings had revealed male DNA and excluded the defendant but had not provided a DNA profile detailed enough for further testing; testing of the remaining tissue might reveal a more complete genetic profile that could be run through a DNA database or matched to the DNA found on a black plastic comb at the scene; and there might be a more favorable verdict if further testing showed the DNA on the scrapings or the comb shared a common source that was not the defendant. The branch of the motion seeking DNA testing of a white knit hat found at the scene but never an issue at trial was properly denied as the claim that exculpatory evidence would be revealed is purely speculative. (County Ct, Suffolk Co)

Counsel (Anders Brief)

Matter of Hohn v Guirand, 90 AD3d 928, 934 NYS2d 815 (2nd Dept 12/20/2011)

Holding: Appellate counsel having filed an *Anders* brief, and review of the record leading to the conclusion that a nonfrivolous issue exists as to whether the court's determination that the appellant committed the family

offense of second-degree harassment is supported by the weight of the evidence, new counsel is assigned to perfect the appeal. (Family Ct, Rockland Co)

Assault (Lesser Included Offenses)

People v McCalla, 90 AD3d 949, 934 NYS2d 724 (2nd Dept 12/20/2011)

Holding: The defendant's conviction of third-degree assault (Penal Law 120.00[1]) must be vacated and that count dismissed as an inclusory concurrent count of second-degree assault (Penal Law 120.05[1]), which the prosecution concedes. (Supreme Ct, Queens Co)

Sex Offenses (Sex Offender Registration Act)

People v Migliaccio, 90 AD3d 879, 935 NYS2d 603 (2nd Dept 12/20/2011)

Holding: The court erred in holding as a matter of law that the defendant's participation in treatment is adequately taken into account by the risk assessment instrument, as the Sex Offender Registration Act Risk Assessment Guidelines and Commentary specifically "recognize that '[a]n offender's response to treatment, if exceptional, can be the basis for a downward departure' . . ." The matter is remanded for determination of whether the defendant established by a preponderance of the evidence exceptional treatment response and if so whether the court should exercise its discretion to grant a downward departure. (County Ct, Suffolk Co)

Misconduct (Judicial)

People v Reynolds, 90 AD3d 956, 935 NYS2d 97 (2nd Dept 12/20/2011)

Holding: During the bench trial of this second-degree aggravated harassment case involving estranged parents of a child, the court exhibited bias by repeatedly interjecting queries during examination of defense witnesses, although there was rarely a need to clarify their testimony, clearly reflecting that the court found their innocuous explanations incredible. Where the accuser and her mother frequently contradicted themselves and each other on key issues while the defense witnesses' testimony was consistent, plausible, and supported by phone records, and the trial judge's intern had done Internet research regarding the timing of an event discussed by the defense witnesses that the judge said brought their credibility into question but added, upon a motion for mistrial, would not be considered, it cannot be said that the trial outcome was not affected by judicial bias. The unpreserved issue is reviewed in the interest of justice and a new trial is ordered before a different justice. (Supreme Ct, Kings Co)

Second Department *continued*

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

People v Borges, 90 AD3d 1067, 935 NYS2d 621 (2nd Dept 12/27/2011)

Holding: Where a prospective juror replied “[m]aybe not” to defense counsel’s questions as to whether the juror could be impartial after the juror initially indicated that she might not be able to serve impartially, and the court did not ascertain that the juror could render an impartial verdict based on the evidence and not be influenced by her prior state of mind, denial of a for-cause challenge was reversible error. (County Ct, Suffolk Co)

Juveniles (Custody)

Matter of Dorsa v Dorsa, 90 AD3d 1046, 935 NYS2d 343 (2nd Dept 12/27/2011)

Holding: The mother showed a sufficient change in circumstances to warrant changing the custody provisions set out in a stipulation of settlement, dated May 2001, incorporated but not merged into the parties’ divorce judgment where the children, now aged 13 and 15, expressed a strong preference to live with the mother, who possesses greater sensitivity to their particular emotional and psychological needs. (Family Ct, Westchester Co)

Counsel (Anders Brief)

People v Foster, 90 AD3d 1070, 934 NYS2d 865 (2nd Dept 12/27/2011)

Holding: As the *Anders* brief submitted by assigned counsel does not demonstrate that counsel acted as the defendant’s active advocate, but merely recites underlying facts and contains a bare conclusion that there are no nonfrivolous issues to be raised, and review of the record reveals potentially nonfrivolous issues regarding the admissibility of statements the defendant made to police, new counsel must be assigned. (Supreme Ct, Nassau Co)

Counsel (Competence/Effective Assistance/Adequacy) (Right to Counsel)

People v Fully, 90 AD3d 1071, 934 NYS2d 832 (2nd Dept 12/27/2011)

Holding: Where the defendant moved to withdraw his guilty plea before sentencing and his new appointed lawyer said three times that in the lawyer’s professional or knowledgeable opinion the defendant’s motion lacked merit, the defendant’s right to counsel was adversely affected, requiring a new hearing on his motion, for which

he shall be appointed new counsel. (Supreme Ct, Richmond Co)

Sex Offenses (Sex Offender Registration Act)

People v Gonzalez, 90 AD3d 1005, 934 NYS2d 851 (2nd Dept 12/27/2011)

Holding: As the prosecution concedes, where the record contains no evidence that the defendant received notice of the date of his risk level classification hearing under the Sex Offender Registration Act, the defendant’s due process right to be present absent a showing that he waived that right was denied, requiring a new hearing. (Supreme Ct, Kings Co)

Counsel (Anders Brief)

Juveniles (Right to Counsel)

Matter of Max E, 90 AD3d 1047, __ NYS2d __ (2nd Dept 12/27/2011)

Holding: The appellant is entitled to new counsel where, in the *Anders* brief, current counsel “failed to analyze any possible appellate issues or highlight anything in the record that might arguably support the appeal,” but rather stated in conclusory fashion that after analyzing the record, doing necessary research, speaking to trial counsel and the Attorneys for the Children, and discussing the analysis with the appellant after reviewing the transcript and completing research, counsel had concluded there were no nonfrivolous issues. Further, review of the record shows nonfrivolous issues including whether the neglect finding was supported by a preponderance of the evidence, whether denial of substitution of counsel was an improvident exercise of discretion, and whether the appellant received effective assistance of counsel. (Family Ct, Nassau Co)

Guilty Pleas (Vacatur)

Sentencing (Post-Release Supervision)

People v Singh, 90 AD3d 1079, 934 NYS2d 827 (2nd Dept 12/27/2011)

Holding: As the prosecution concedes, the plea minutes show the defendant was not advised of the mandatory period of postrelease supervision (PRS) to be imposed; but contrary to the contention that the case should be remanded for imposition of a sentence that does not include PRS, such relief is not statutorily permissible where the court explicitly imposed a term of PRS at sentencing. The conviction is reversed and the plea vacated. (Supreme Ct, Queens Co)

Third Department

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Admissions (*Miranda* Advice)

Confessions (Counsel) (*Miranda* Advice)

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

[People v Augustine](#), 89 AD3d 1238, 932 NYS2d 247 (3rd Dept 11/10/2011)

Holding: Suppression of the defendant's statements to police was properly denied because he failed to meet his burden of showing that he was represented by counsel on unrelated charges for which he was in custody at the time he waived counsel for purposes of talking to police about this case. Conflicting evidence exists as to whether he requested counsel on the unrelated charge and there was no proof that an attorney had entered the case. *Miranda* warnings were not required because the question was investigatory, relating to information to help locate the decedent who had been reported missing. Nor did the court err in denying substitution of counsel where the defendant's letter requesting new counsel, a week before trial, contained only general complaints about counsel and he agreed with the court's advice to remain silent to protect his interests. (County Ct, Greene Co)

Motions (Suppression)

Search and Seizure (Automobiles and Other Vehicles)

Traffic Infractions

[People v Allen](#), 90 AD3d 1082, 933 NYS2d 756 (3rd Dept 12/1/2011)

Holding: The suppression court erred by independently testing the tail light assembly of the defendant's vehicle, without notice to the parties, who were not present, to determine the credibility of the arresting officer's testimony that the initial stop was based on a violation of the statute requiring a red tail light. By inserting some type of bulb into the assembly, which had been admitted as an exhibit, and attaching a power source after the close of the hearing, "the court deprived the parties of the opportunity to address the differences in conditions between the experiment and the actual incident." The suppression court found that both white and red light shone through the tail light in question; "[w]e hold that the statute requires a tail light to display only red light."

White light could lead other motorists to believe the vehicle was backing up. The stop was not shown to be unlawful. (Supreme Ct, Albany Co)

Sex Offenses (Sex Offender Registration Act)

[People v Lashway](#), 90 AD3d 1178, 933 NYS2d 922 (3rd Dept 12/8/2011)

Holding: As the prosecution concedes, the defendant was entitled to a hearing on the merits of his request for modification of his risk level under the Sex Offender Registration Act (Correction Law 168-o), which the court summarily denied after requesting an updated recommendation from the Board of Examiners of Sex Offenders. (County Ct, Clinton Co)

Juveniles (Custody) (Support Proceedings)

[Matter of Luke v Luke](#), 90 AD3d 1179, 933 NYS2d 782 (3rd Dept 12/8/2011)

Holding: Despite the father's loss of contact with the subject child for several years, the court did not err in modifying a 2004 default order that gave the mother sole custody, instead awarding joint custody and terminating the father's support obligation, where the mother had: stopped bringing the child to visit the father after only one or two months following a stipulated order in 2003; moved numerous times without notifying the father, sometimes into unsuitable residences; and assigned custody, without notifying the father, to the mother's paramour's adult daughter who thwarted the father's efforts to re-establish a relationship with the child, while the father in those renewed efforts agreed to work with the local social services agency on preventative services and bring the child to mental health counseling. (Family Ct, Schuyler Co)

Contempt (Elements)

Juveniles (Custody) (Hearings)

[Matter of Miller v Miller](#), 90 AD3d 1185, 933 NYS2d 924 (3rd Dept 12/8/2011)

Holding: The court properly dismissed the father's petition, which alleged the mother was in contempt of a custody order's provisions requiring her to properly supervise and discipline the subject children, as the generalized allegations in the petition that the mother allowed the older child to be violent toward others and to smoke did not provide notice of particular events or violations permitting the mother to prepare a defense. Nor did the father assert how the mother's alleged failures met the requirements for a civil contempt finding, *ie*, that the "alleged failings defeated, impaired, impeded or preju-

Third Department *continued*

diced his rights” [Interior quote marks omitted].
(Family Ct, St. Lawrence Co)

Search and Seizure (Automobiles and Other Vehicles)

**People v Viele, 90 AD3d 1238, 935 NYS2d 171
(3rd Dept 12/15/2011)**

Holding: Denial of the defendant’s motion to suppress evidence resulting from the second of back-to-back stops of the defendant’s vehicle for the same on-going equipment failure was proper, as probable cause for the stop existed and additional subjective motivation to investigate other criminal activity “‘does not negate the objective reasonableness’ of the stop” (County Ct, St. Lawrence Co)

Civil Practice

Parole (Release)

**Graziano v Evans, 90 AD3d 1367, 935 NYS2d 382
(3rd Dept 12/22/2011)**

Holding: Dismissal of this class action on behalf of prisoners convicted of A-1 felonies who were denied parole based on the seriousness or nature of their crimes was proper because: individual erroneous parole release determinations are reviewable; lumping a number of claims together as purported evidence of a policy does not state a cognizable claim; and the doctrine of res judicata applies because the named plaintiff’s challenge to denial of release has already been litigated, even if on a different theory. (Supreme Ct, Albany Co)

Narcotics (Penalties)

Sentencing (Resentencing)

**People v Hoffler, 90 AD3d 1413, 935 NYS2d 228
(3rd Dept 12/29/2011)**

Holding: After attempting to appeal the court’s Mar. 29, 2010 bench decision, from which no appeal lies, the defendant appealed the court’s Sept. 2, 2011 written order denying his application for resentencing under the Drug Law Reform Act of 2009, which is reversed because in denying resentencing the court emphasized an overturned murder conviction which has not been retried. “[S]ubstantial justice does not dictate the denial of defendant’s application for resentencing based solely upon a charged crime for which he has not been legally convicted” (County Ct, Albany Co)

**Appeals and Writs (Judgments and Orders Appealable)
(Preservation of Error for Review)**

Homicide (Murder [Instructions]) (Negligent Homicide)

**People v Munck, __ AD3d __, 937 NYS2d 334
(3rd Dept 12/29/2011)**

Holding: Reviewed in the interest of justice, the unpreserved failure of the court to instruct the jury on the central issue of what if any legal duty the defendant owed to his brother, the decedent, warrants reversal of the defendant’s criminally negligent homicide conviction. The defendant did not seek medical attention for the 12-year-old decedent, who had suffered an earlier unknown internal injury, then sickened and died from a re-injury by the defendant while their grandmother, who had custody, was in the hospital. (County Ct, Broome Co)

Dissent: While the jury should have been given guidance as to the defendant’s legal duty, reversal using the interest of justice power is not reviewable by the Court of Appeals and relevant law concerning the in loco parentis standard is still developing.

Counsel (Competence/Effective Assistance/Adequacy)

Evidence (Hearsay)

**Juries and Jury Trials (Competence) (Discharge)
(Qualifications)**

**People v Wlasiuk, 90 AD3d 1405, 935 NYS2d 709
(3rd Dept 12/29/2011)**

Holding: The defendant was denied the effective assistance of counsel by his attorney’s failure to consent to the removal of a juror who had claimed to know little about the case when in fact he had worked with the decedent and had been interviewed by police and referred them to other coworkers for information on the defendant’s alleged prior acts of violence toward the decedent; additionally, while the juror disclosed that he knew one witness, the defendant’s paramour, only as a patient, that witness told defense counsel the juror had asked her many questions about the case. Counsel also erred in consenting to the jury’s consideration, without limiting instructions, of a police log that contained some material arguably helpful to the defense, but also described entries in the decedent’s diaries expressing her fear of the defendant, entries that were the basis of the reversal of the defendant’s first conviction. (County Ct, Chenango Co)

Counsel (Competence/Effective Assistance/Adequacy)

Guilty Pleas

Post-Judgment Relief (CPL § 440 Motion)

Third Department *continued*

People v Davey, 91 AD3d 1033, 936 NYS2d 389
(3rd Dept 1/12/2012)

Holding: The defendant's contentions that he was denied effective assistance of counsel when he pleaded guilty to second-degree possession of a forged instrument were sufficient to warrant a hearing. The defendant says that his plea lawyer advised him that he could not fight the charge and was guilty of it under law, and did not advise him that he had a defense based on his claim that he assumed the name on the social security card at issue and used it as his own for a period of years with no fraudulent intent. The prosecution has not controverted the claim that the defendant assumed the name nor have they claimed that he possessed it with intent to defraud, and did not submit evidence refuting the claim that defense counsel did not properly advise him as he claims in his affidavit, the sole evidence offered with the motion. (County Ct, Warren Co)

Sentencing (Persistent Violent Felony Offender) (Resentencing)

People v Boyer, 91 AD3d 1183, __ NYS2d __
(3rd Dept 1/26/2012)

Holding: The original sentencing date, not the date on which a defendant was resentenced on the basis of *People v Sparber* (10 NY3d 457), controls as to whether a prior conviction can be considered as a predicate, so the defendant's motion to vacate his sentence as a persistent violent felony offender and be resentenced as a second violent felony offender was properly denied. (County Ct, Albany Co)

Fourth Department

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Assault (Lesser Included Offenses)

Burglary (Degrees and Lesser Offenses)

People v Ali, 89 AD3d 1417, 932 NYS2d 616
(4th Dept 11/10/2011)

Holding: As the prosecution concedes, the defendant's conviction for second-degree burglary must be reversed because it is a lesser inclusory concurrent count of first-degree burglary. The defendant's conviction for second-degree assault is not a lesser inclusory concurrent count of first-degree burglary, because "[t]he instant

charge of assault requires evidence of the infliction of physical injury 'in furtherance of' the commission of the underlying felony of burglary, and such evidence is not required for the burglary conviction." This conclusion is consistent with *People v Abrew* (95 NY2d 806), and to the extent that *People v Rodrigues* (74 AD3d 1818 *lv den* 15 NY3d 809 *cert den* 131 SCt 1505) suggests a rule to the contrary, it should no longer be followed. (County Ct, Onondaga Co)

Evidence (Sufficiency)

Sex Offenses (Sexual Abuse)

People v Aponte, 89 AD3d 1429, 932 NYS2d 627
(4th Dept 11/10/2011)

Holding: Reviewed under the interest of justice authority, the unpreserved argument that the defendant's conviction was not supported by legally sufficient evidence merits reversal where the accuser's testimony that the defendant would "sometimes threaten that he was 'going to ground [her] or . . . hit [her] if [she did not] open the door'" was insufficient to establish the forcible compulsion element of first-degree sexual abuse, which requires that the defendant placed the accuser "'in fear of immediate death or physical injury' on the specific occasion in question" (County Ct, Niagara Co)

Sex Offenses

People v Bartlett, 89 AD3d 1453, 933 NYS2d 145
(4th Dept 11/10/2011)

Holding: The evidence was legally sufficient to support a conviction for forcible touching (CPL 130.52) where the accuser testified that the "defendant, her teacher, pressed up against her backside and rubbed her thigh approximately one inch from her vaginal area." Despite the trial court's original charge to the jury that "forcible touching 'means squeezing, grabbing or pinching,'" the language of the statute states that forcible touching "'includes squeezing, grabbing or pinching'" The judge later supplied the correct definition in response to a note from the jury during its deliberations. The prosecution was "not 'bound to satisfy the heavier burden in this case'" (County Ct, Ontario Co)

Due Process

Sex Offenses (Sex Offender Registration Act)

People v Hackett, 89 AD3d 1479, 933 NYS2d 470
(4th Dept 11/10/2011)

Holding: The order determining the defendant's risk level pursuant to the Sex Offender Registration Act (SORA) must be reversed where the court initially miscalculated

Fourth Department *continued*

the total risk factor score in determining that the defendant was a presumptive level III sex offender, and the court's later sua sponte assessment of additional points was in violation of the defendant's rights to due process where "neither risk factor was originally selected on the [risk assessment instrument]," the prosecution did not raise either at the SORA hearing, and the "defendant learned of the assessment of the additional points for the first time when the court issued its decision . . ." (County Ct, Cattaraugus Co)

Search and Seizure (Consent)

People v Holmes, 89 AD3d 1491, 932 NYS2d 270 (4th Dept 11/10/2011)

Holding: Upon remittitur from the defendant's successful appeal to the Court of Appeals, his guilty plea to second-degree criminal possession of a weapon is vacated and a gun found in his duffel bag after it was located during a search of his girlfriend's bedroom is suppressed, as the "mother of defendant's girlfriend did not have actual or apparent authority to consent to the search of the duffel bag" in her daughter's room and the prosecution "presented no evidence that the mother 'shared "common authority" over defendant's duffel bag, based upon mutual use or joint access and control' . . ." The defendant's statements to the police were "fruit of the poisonous tree" and must also be suppressed. (Supreme Ct, Monroe Co)

Forgery (Possession of a Forged Instrument)

Sentencing (Restitution)

People v Ippolito, 89 AD3d 1369, 932 NYS2d 603 (4th Dept 11/10/2011)

Holding: The evidence was not legally sufficient to support the jury's verdict of guilt on 40 of 43 counts of second-degree criminal possession of a forged instrument where a validly executed power of attorney making the defendant the accuser's attorney-in-fact authorized the defendant to sign the accuser's name to checks "which purport[] to be [the] authentic creation[s]' of the victim . . ." The defendant was entitled to a hearing on the amount of restitution owed on the remaining charges of criminal possession of a forged instrument and second-degree grand larceny upon his request "'irrespective of the level of evidence in the record' . . ." (County Ct, Monroe Co)

Dissent in Part: The power of attorney did not authorize the defendant to sign the accuser's name to the checks in question and to purport those instruments and the signatures on them to be authentic creations of the

accuser; this act constituted the false making of an instrument within the meaning of CPL 170.00(4).

Juries and Jury Trials (Deliberation)

People v Weaver, 89 AD3d 1477, 932 NYS2d 656 (4th Dept 11/10/2011)

Holding: The lack of any indication in the record that the defendant or his counsel were ever apprised of a jury's request to view a surveillance tape "'in an atmosphere where it can be discussed by [the] jury as a group [and] we can control what sections of video we watch'" supports reversal for failure to meet CPL 310.20's requirement that a defendant be afforded an "opportunity to be heard on the matter" and CPL 310.30's requirement that the jury be brought back into the courtroom upon its request for information, that the defendant be notified, and that the instruction or information be given in the presence of the defendant. Additionally, there was no indication that the trial court responded to the jury's request; "'[i]n the absence of record proof that the trial court complied with its core responsibilities under CPL 310.30, a mode of proceedings error occurred requiring reversal' . . ." (County Ct, Onondaga Co)

Appeals and Writs (Judgments and Orders Appealable)

Guilty Pleas (Withdrawal)

People v Chattley, 89 AD3d 1557, 932 NYS2d 750 (4th Dept 11/18/2011)

Holding: The defendant's argument that his pro se motion to withdraw his guilty plea should have been granted is beyond the Appellate Division's power to review where the record fails to indicate that the trial court ruled on the motion. Decision on the appeal is reserved and the matter remitted for the trial court to grant or deny the motion. (Supreme Ct, Erie Co)

Search and Seizure (Electronic Searches) (Search Warrants)

Sex Offenses

People v DeProspero, 91 AD3d 39, 932 NYS2d 789 (4th Dept 11/18/2011)

Holding: Suppression of evidence uncovered from a computer seized over seven months earlier was not required where there was no deadline for the completion of the forensic examination either written into the warrant or required by the Fourth Amendment, the forensic examination of the computer was conducted within a reasonable time, the defendant was not prejudiced by the delay, and "the police had an obligation to search defendant's property for contraband before returning it to him . . ."

Fourth Department *continued*

Underlying this novel issue are the following facts. In the course of a peer-to-peer electronic file-sharing sting, police traced suspected child pornography to the defendant's home, obtained a warrant, seized the defendant's computer, and arrested the defendant when an illicit image was found during a "limited preview" of it in May 2009. Absent a full forensic examination of the computer, the prosecutor believed that a single photo was all that the defendant possessed, and the defendant pleaded guilty to possession of a sexual performance by a child. After he was sentenced in November 2009, his attorney requested the return of the seized property. Police ran a full "sweep" of the computer in January 2010 to ensure no contraband was released, and found numerous other examples of child pornography, as well as video of the defendant, resulting in this predatory sexual assault prosecution. (County Ct, Oneida Co)

Driving While Intoxicated (Breathalyzer)**Witnesses (Confrontation of Witnesses)**

[People v Pealer](#), 89 AD3d 1504, 933 NYS2d 473
(4th Dept 11/18/2011)

Holding: In trial for DWAI and DWI, the court did not err by allowing certificates into evidence, as "business records," that indicated that a breathalyzer was calibrated and functioning properly, without producing the government employees who prepared the records. Such certificates are non-testimonial and do not violate the defendant's right of confrontation under *Crawford v Washington* (541 US 36 [2004]). The certificates are not accusatory as they do not independently establish an element of the crime or shed light on the defendant's guilt or innocence. The persons who "prepared the records were 'not defendant's "accuser[s]" in any but the most attenuated sense'" (County Ct, Yates Co)

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

[People v Dillon](#), 90 AD3d 1468, 935 NYS2d 390
(4th Dept 12/23/2011)

Holding: By failing to request a hearing on whether he could pay the restitution ordered, the defendant failed to preserve the issue of his ability to pay. Regardless, the record shows that the presentence report contained information on the defendant's education and income and, therefore, the sentencing court considered the defendant's ability to pay. Additionally, the defendant failed to preserve the issue of whether his plea to third-degree criminal mischief was knowing, intelligent, and voluntary by

failing to move to withdraw the plea or to vacate the judgment. (County Ct, Herkimer Co)

Dissent in Part: Penal Law 65.10 permits the court to impose restitution as a condition of a sentence of probation only when the defendant can afford to pay the amount. "[T]he "essential nature" of the right to be sentenced as provided by law, though not formally raised at the trial level, preserves a departure therefrom for [our] review'" It is not appropriate to search the record for evidence that the defendant had the ability to pay the restitution; further, the presentence report states that the defendant's last employment paid \$8.00 an hour in a twenty-five hour work week, indicating that there was no "rational relationship" between the defendant's ability to pay restitution and the order that he pay \$39,903.68 within five years.

Juries and Jury Trials (Deliberation)

[People v Jerge](#), 90 AD3d 1486, 935 NYS2d 396
(4th Dept 12/23/2011)

Holding: In a trial of the defendant for sex offenses and endangering the welfare of a child, it was error for the court to deny the defendant's motion to set aside the verdict for juror misconduct where two jurors (a substance abuse counselor and a DSS caseworker) conveyed to the rest of the jury that: they had special expertise in working with victims of sexual abuse, and that the complaining witness's inability to remember details of the abuse, delay in reporting the abuse, and failure to avoid the defendant were consistent with known patterns of behavior among child victims of sexual abuse. Such statements prejudiced the defendant's right to a fair trial by, in effect, depriving him of the ability to challenge unsworn expert testimony. (County Ct, Cattaraugus Co)

Dissent: Deference to the court's discretion in determining whether misconduct occurred is warranted; in the event there was misconduct, it did not rise to the level of prejudicing a substantial right of the defendant.

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

[People v Kalikow](#), 90 AD3d 1558, 934 NYS2d 906
(4th Dept 12/23/2011)

Holding: The record supports the court's determination that a police officer's search of the defendant was not incident to a lawful arrest where the officer merely issued an appearance ticket for "violating a municipal open container ordinance and had no intention of performing a custodial arrest" so the evidence resulting from the search was properly suppressed. (County Ct, Oswego Co)

Discovery (Prior Statements of Witness)

Fourth Department *continued*

Witnesses (Confrontation of Witnesses)

**People v Morrison, 90 AD3d 1554, 935 NYS2d 234
(4th Dept 12/23/2011)**

Holding: Admitting “a certified DNA report prepared by an analyst who did not testify at trial and the testimony of an analyst who testified at trial regarding that report” denied the defendant his right to confront the witnesses against him regarding testimonial evidence where the testifying analyst did not perform an independent review and analysis but simply read the report to ensure that the uncalled analyst, whom she supervised, had followed proper procedure. However, the error was harmless where the defendant admitted having sexual intercourse with the accuser. He was also not prejudiced by the prosecution’s *Rosario* violation in failing to timely produce to the defense a report of an investigator’s interview of the defendant. (County Ct, Oneida Co)

Appeals and Writs (Judgments and Orders Appealable)

Guilty Pleas (Withdrawal)

**People v Peck, 90 AD3d 1500, 936 NYS2d 797
(4th Dept 12/23/2011)**

Holding: The defendant’s waiver of appeal as part of his 2007 guilty plea that allowed him to enter drug treatment did not, even if valid, encompass his contentions that the court erred in summarily sentencing him in 2008 after he was terminated from a drug treatment program based on postplea arrests for other crimes that he denied. The court erred by not carrying out a sufficient inquiry to determine that there was a legitimate basis for the defendant’s termination from the program, including whether or not the arrests lacked foundation. The matter is remitted for that inquiry; the defendant having served his sentence, the only remedy available would be to allow him to withdraw his plea to a felony and plead guilty to a misdemeanor as provided in the original plea agreement. (County Ct, Onondaga Co)

Sentencing (Second Felony Offender)

**People v Ricks, 90 AD3d 1562, 935 NYS2d 421
(4th Dept 12/23/2011)**

Holding: Upon remand for resentencing that would allow the prosecution “to overcome the technical defects in their proof of defendant’s status as a second felony offender inasmuch as the original proof failed to comply with CPLR 4540 (c),” another second felony offender hearing was held, at which the prosecution submitted a fingerprint record that contains an authenticating signature,

which met the first requirement of the statute, but lacked documentation meeting the statute’s further requirement of authentication by another, separate authority; the current sentence is reversed and the matter again remitted. The argument that the statute does not require strict compliance is rejected. (Supreme Ct, Erie Co)

Counsel (Competence/Effective Assistance/Adequacy)

Impeachment (Of Defendant [Including *Sandoval*])

**People v Webb, 90 AD3d 1563, 935 NYS2d 423
(4th Dept 12/23/2011)**

Holding: The defendant was denied the effective assistance of counsel where his lawyer, after obtaining a *Sandoval* ruling precluding cross-examination of the defendant regarding one of four prior convictions, elicited testimony from the defendant about that conviction; did not object when the prosecutor asked questions about the facts underlying that conviction, including the particularly prejudicial fact that in the prior instance, as was alleged here, the defendant had fled from police; did not object when the prosecutor cross-examined a defense witness about the defendant’s nickname, “Threat”; and did not object when the prosecutor commented in summation that the defendant had the nickname because he possessed the weapon at issue. (County Ct, Monroe Co)

[Ed. Note: On Feb. 10, 2012, the Fourth Department granted a motion for reargument and amended its Dec. 23, 2011 order by deleting the last paragraph, which stated that the defendant’s remaining contentions were academic in light of the decision, and substituting a paragraph finding that the defendant failed to meet his burden of proving that counsel lacked a strategic or other legitimate explanation for the failure to pursue a suppression hearing on the ground that the police lacked probable cause to arrest him or reasonable suspicion to detain him. (937 NYS2d 911).]

Juveniles (Custody) (Jurisdiction)

**Matter of Bridget Y., __ AD3d __, 936 NYS2d 800
(4th Dept 12/30/2011)**

Holding: The court properly exercised temporary emergency jurisdiction under Domestic Relations Law 76-c where the subject children were present in this state at all relevant times. An emergency unquestionably existed on Nov. 7, 2008 when a temporary custody order was issued in a proceeding begun by the aunt and uncle in this state, with whom the children had been placed as a consequence of the parents having been charged in New Mexico with child abuse; the parents were seeking to revoke the temporary placement and move the children back to the home where the alleged abuse had occurred or

Fourth Department *continued*

to another guardian over whom they had control. While the orders appealed from, which found the children to be neglected and placed them in the custody of the Chautauqua County Department of Social Services (a petitioner), were issued after a New Mexico court issued two orders (assuming jurisdiction and approving home study and immediate transfer of the children), the orders here fell within Domestic Relations Law 76-c(3), allowing New York orders to remain in effect until a court of the home state has taken steps to assure the protection of the subject children, which had not occurred. (Family Ct, Chautauqua Co)

Dissent in Part: As the majority notes, the Uniform Child Custody Jurisdiction and Enforcement Act (see Domestic Relations Law 75-a[4]) controls, and there is no question that New Mexico, not New York, was the home state. The New Mexico court had not ordered the children back to the abusive home but to a family in Ohio, and issued an order of protection to keep the parents from contacting them and to take parenting classes. Applying the emergency doctrine here eviscerates the statute and places New York and New Mexico courts in a competitive posture.

Juveniles (Neglect)

Matter of Nicholas W., 90 AD3d 1614, 936 NYS2d 450 (4th Dept 12/30/2011)

Job Opportunities *(continued from p. 12)*

ability to construct cogent arguments; great interpersonal and verbal communication skills; understanding of DNA testing; knowledge of other forensic disciplines; client-centered approach to legal representation; honed organizational skills and the ability to prioritize cases; interest in working with diverse range of people; ability to assess work of students and paralegals, and constructively supervise their work; and enthusiasm for social justice and the work of the Innocence Project, including a demonstrated commitment to public interest law and criminal justice reform. Salary: DOE. Excellent benefits package. The Innocence Project is an equal opportunity employer committed to workplace diversity. For a full job description and application instructions, visit http://www.innocenceproject.org/Content/Staff_Attorney.php.

The Brennan Center for Justice at New York University School of Law seeks an experienced litigator to launch and defend litigation across the country aimed at ensuring a fair and impartial judiciary and preserving and advancing reforms of the judicial system. The attorney will manage a docket of cases and will work closely with partner organizations in a Fair Courts Litigation Task Force to develop a national litigation strategy to minimize the influence of money and partisan politics on our state judiciaries. Task Force member organizations will include the Justice at Stake Campaign, Campaign Legal Center, American Judicature Society, and others. The ideal candidate will have substantial litigation experience, a strong entrepreneurial spirit, and passion for fair and impartial courts. A J.D. and substantive legal experience (including clerkships, if any) in the private sector, government, academia, or policy advocacy are re-

Holding: Where the father pleaded guilty to third-degree assault in a criminal proceeding arising from an incident in which he struck his oldest son's face, but there was no allocution concerning the underlying conduct, and the Family Court subsequently granted summary judgment to the petitioner finding neglect with regard to the oldest son based on the criminal offense, the order must be reversed because the petitioner failed to meet its burden of establishing that the acts underlying the conviction constituted neglect as a matter of law and that the plea had resolved the issues in the neglect proceeding. While one corporal punishment incident may establish neglect, the petitioner did not establish "that the father intended to hurt his son or that his conduct was a pattern of excessive corporal punishment . . ." (Family Ct, Ontario Co)

Juveniles (Parental Rights) (Permanent Neglect)

Matter of Shirley A.S., 90 AD3d 1655, 936 NYS2d 825 (4th Dept 12/30/2011)

Holding: The respondent father's appeal from an order terminating his parental rights for permanent neglect fails where he did not preserve for review his contention that admission of his drug treatment records violated 42 USC 290dd-2, and in any event he presented no evidence that the treatment facility had the requisite federal ties; such records are subject to disclosure in neglect proceedings. His other evidentiary contentions are also rejected. (Family Ct, Erie Co) ⚖️

quired. Excellent writing skills (for a variety of audiences, including legal, legislative, journalistic, and public), as well as excellent analytic, strategic, and research skills; creativity, versatility, and flexibility; organizational skills; and the ability to deal with diverse clients and allies and to coordinate work effectively with other entities are required. Demonstrated commitment to the public interest is highly valued; specific litigation experience involving judicial independence, judicial selection, and judicial conduct rules is a plus. The Brennan Center, an equal opportunity, affirmative action employer, is strongly committed to diversity and welcomes applicants of all races, ethnicities, genders, and sexual orientations, and applicants who have been previously incarcerated. For more information, visit <http://www.brennan-center.org/pages/jobs>. ⚖️

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